FEDERAL CASE UPDATE
UPDATE TO 2009-10 EIGHTH CIRCUIT AND SUPREME COURT CASES

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I. CIVIL LITIGATION AND PROCEDURE

A. Jurisdiction

Graham County Soil and Water Conversation District v. United States, __ U.S. __, 130 S. Ct. 1396 (2010). *Qui tam* actions under the False Claims Act are barred when the allegations of fraud have been disclosed in administrative reports from any source, county, state or federal -- it is not the case that only disclosures made in federal reports will bar such actions, therefore lawsuit based on county and state reports reporting irregularities in contract administration for flooding remediation paid for mostly by the federal government was barred.

Clos v. Corrections Corp. of America, 597 F.3d 925 (8th Cir. 2010). Parties could not create appellate jurisdiction by means of a stipulation linking a claim which survived summary judgment to the outcome of an appeal as to the other issues which were dismissed on summary judgment. District court's Rule 54(b) certification of an interlocutory appeal on the basis of no just reason for delay was conclusory and thus an abuse of discretion.

Dahlen v. Shelter House, 598 F.3d 1007 (8th Cir. 2010). Plaintiffs' Takings Clause claim arising out of plans to build a homeless shelter on property next to their mobile home park was not ripe for adjudication as they failed to bring an inverse condemnation action under Iowa law before bringing the present § 1983 action -- violations of state eminent domain statutes did not give rise to federal constitutional claims as the state law definition of "public purpose" was not incorporated in Fifth Amendment takings analysis.

Dodson v. University of Ark. for Medical Sciences, 2010 WL 1253781 (8th Cir. 4/2/2010). In a battle over the rights to embryos created before a divorce, which was twice litigated in state court before a § 1983 lawsuit was brought in federal court, *Rooker-Feldman* prevented the federal court from determining plaintiff's § 1983 action as to do so effectively would undermine the state court determinations already made on the issues raised. As for plaintiff's state law breach of contract claim, since the facts on which it was based occurred after the two state court lawsuits, it was still an actionable state law claim, over which the federal court declined to exercise supplemental jurisdiction.

**Knutson v. City of Fargo*, 2010 WL 1427043 (8th Cir. 4/12/2010). Although plaintiffs' federal constitutional claims against the city arising from a broken water main on their property were not barred by the *Rooker-Feldman* doctrine after their state law claims for inverse condemnation, intentional trespass and negligence did not survive summary judgment in state court, their federal Fifth Amendment takings claim was barred by issue preclusion as the issue of taking without just compensation was resolved by the inverse condemnation action. Federal Fourth and Fourteenth Amendment claims for denial of substantive and procedural due process and equal protection after the City refused to pay for plaintiffs' damages were barred by claim preclusion because the claims could have been raised in the prior state court action.

B. Procedure

United Student Aid Funds, Inc. v. Espinosa, __ U.S. __, 130 S. Ct. 1367 (2010). Bankruptcy court's confirmation order in Chapter 13 case discharging interest due on student loan without making the requisite undue hardship finding was not void for purposes of Rule 60(b)(4) motion -- student loan company had notice of the filing and contents of the debtor's proposed plan and failure to make service of summons and complaint in an adversary proceeding did not limit the bankruptcy court's jurisdiction over student loan debts. The failure to find undue hardship was a legal error which the lender failed to object to when it had notice.

Shady Grove Orthopedic Assoc. P.A. v. Allstate Ins. Co., __ U.S. __, 130 S. Ct. 1431 (2010). In a complicated split opinion, the Supreme Court holds that Fed. R. Civ. P. 23 governs in the face of a state law procedural rule which precluded a class action for the remedy sought in this case, here statutory interest due under state law.

In re Baycol Products Litigation, 596 F.3d 884 (8th Cir. 2010). Court did not abuse its discretion in striking a supplemental report by plaintiff's witness in a products liability case -- the report was submitted almost a year after the court's deadline with an inadequate reason for the delay -- that the doctor viewed the records more closely.

Quasius v. Schwan Food Company, 596 F.3d 947 (8th Cir. 2010). Trial court did not abuse its discretion by granting summary judgment against plaintiff based on admissions which were deemed "conclusively established" -- plaintiff failed to request additional time to respond to requests and did not timely respond and failed to seek leave to withdraw or amend the admissions in accordance with Rule 36(b) and the court's order allowing time to do so -- simply providing the responses to counsel for the other side without complying with the filing requirements did not comply with the rules of procedure.

In re Apple, Inc., 2010 WL1526453 (8th Cir. 4/19/2010). In this mandamus action, the circuit grants defendant's motion to transfer venue to Northern District of California from Western District of Arkansas: allowing plaintiff's choice of forum to stand based solely on plaintiff's desire to move case more quickly and not on any connection of the parties or the facts to the forum was an abuse of discretion by the district court.

Praetorian Ins. Co. v. Site Inspection, LLC, 2010 WL 1740692 (8th Cir. 5/3/2010). The case is a reminder of the binding effect of Rule 36 admissions -- in granting summary judgment in favor of defendant, the court relied on plaintiff's admissions that it had never cancelled policies based on inadequacies in defendant's site inspection report -- affidavit submitted by plaintiff to refute the admissions was ineffective to contradict the binding nature of the admissions and was self-serving, based on hindsight and improperly contradicted former testimony.

C. Causes of Action

**Hui v. Castaneda*, _ U.S. _, _ S. Ct. _, 2010 WL 1740524 (5/3/2010). Plaintiff could not bring a *Bivens* action containing constitutional claims against public health officers for medical malpractice resulting in his death as the public health officers had statutory immunity against such actions; plaintiff's sole remedy was under the Federal Tort Claims Act (which he also brought).

D. Evidence

**Brunsting v. Lutsen Mountains Corp.*, 2010 WL 1440350 (8thCir. 4/13/2010). Trial court abused its discretion in making its determination whether a statement by a ski resort employee, who observed plaintiff's accident as it occurred, was an excited utterance: trial court ignored the witness's deposition testimony which established she was stressed at what she had seen and made a statement which inculpated her employer under the effects of that stress and excitement. The statement should have been included in the evidentiary record -- case remanded.

II. CRIMINAL LAW

A. Criminal Acts

United States v. Stevens, _ U.S. _, _ S. Ct. _, 2010 WL 1540082 (4/20/2010). As written, federal statute criminalizing the commercial depictions of animal cruelty is overbroad and violates the First Amendment, but Supreme Court does not decide whether a statute limited to "crush" videos or other "extreme" types of animal cruelty, which the government argued this version of the statute was intended to reach, would be constitutional.

**United States v. Birbragher*, 2010 WL 1643600 (8th Cir. 4/26/2010) and *United States v. Kanner*, 2010 WL 1643597 (8th Cir. 4/26/2010). Co-defendants in controlled substances conspiracy/money laundering case challenged application of the Controlled Substances Act to their conduct -- ownership and operation of an internet prescription service, by which prescription medications were provided to individuals through on-line sales with minimal if any review by physicians -- application of CSA upheld as providing adequate notice of prohibited conduct including issuance of prescriptions outside "usual course of professional practice."

B. Procedure

Bloate v. United States, _ U.S. _, 130 S. Ct. 1345 (2010). Time granted to prepare pretrial motions may only be excluded from 70-day speedy trial limits when the court grants a continuance based on findings under 18 U.S.C. § 3161(h)(7) -- the ends of justice served outweigh the best interests of the public and defendant in a speedy trial.

**Renico v. Lett*, _ U.S. _, _ S. Ct. _, 2010 WL 1740525 (5/3/2010). While the Supreme Court agreed the trial judge could have bored more thoroughly into the issue of jury deadlock before declaring a mistrial in a murder case, it was not beyond the court's discretion to declare a mistrial under the circumstances and Double Jeopardy did not bar a retrial.

United States v. McCarther, 596 F.3d 438 (8th Cir. 2010). Because 924(c) firearms count required proof it was connected to the charged drug conspiracy, it was not improper to join the counts at the outset of the case even though the government was later unable to show the conduct was related for sentencing purposes. Joinder of the counts was not prejudicial as the conspiracy would have been necessary to prove the firearm charge and vice versa. Finally, defendant's desire to testify in response to the firearms count but not the other counts, without any other detail, did not support his motion to sever the count.

United States v. Bolden, 596 F.3d 976 (8th Cir. 2010). After defendant's girlfriend was observed talking to jurors during a trial break, the trial court's action in removing one of the jurors because that juror learned the identity of the girlfriend and they discussed personal information was not an abuse of discretion.

United States v. Rector, 598 F.3d 468 (8th Cir. 2010). For purposes of Speedy Trial Act calculation, time between date parties provided written plea agreement and change of plea hearing scheduled 20 days later was correctly excluded as delay attributable to consideration of a plea agreement; time between failed change of plea hearing and date of trial was properly excluded as defendant changed attorneys, leading the court to make an ends of justice finding that the continuance allowed retention of new counsel and time for new counsel to prepare for trial.

United States v. Wisecarver, 598 F.3d 982 (8th Cir. 2010). In a case charging defendant with depredation of government property after he shot a BIA truck on land in which defendant had a property interest, court's supplemental instruction telling the jury that shooting the truck was depredation unless the jury found defendant did not use justifiable force (a double negative which mistated the law) was in error; there was a reasonable probability the error affected the outcome of the jury verdict. Case remanded for new trial.

United States v. Amerson, 599 F.3d 854 (8th Cir. 2010). State court did not have duty to advise defendant of the possibility of a future firearm conviction arising from his plea to a domestic assault charge, therefore his state court conviction which was the basis for a federal charge of possessing a firearm after a domestic violence conviction was not subject to collateral attack by means of a motion to dismiss indictment.

United States v. Boesen, 599 F.3d 874 (8th Cir. 2010). The seven-day from judgment time limit for a Rule 33 motion for new trial was not terminated by a judgment of acquittal and counsel's failure to bring a Rule 33 motion at the same time as defendant's Rule 29 motion for judgment of acquittal was not excusable neglect; therefore, defendant's Rule 33 motion filed three days after the circuit's order reinstating the jury's guilty verdict, and not quite a year after the original verdict, was untimely.

**United States v. Jones*, 2010 WL 1407765 (8th Cir. 4/9/2010). Government's explanations for peremptory challenges of African-American jurors -- one because she had family working in corrections and believed such persons were always under investigation with respect to controlled substances and two because they expressed a belief that African-Americans were treated unfairly by the justice system -- were found to be race-neutral and defendant did not show purposeful discrimination in his *Batson* challenge to the strikes.

**United States v. Akens*, 2010 WL 1440364 (8th Cir. 4/13/2010). Trial court did not abuse its discretion when it denied defendant's motion to withdraw his plea: as to the felon in possession count, expungement of defendant's prior Missouri drug conviction did not restore all of his civil rights, therefore the state conviction could stand as a predicate for the charge; with respect to the drug possession charge, defendant was not entitled to a *Franks* hearing as he did not identify any false statements made by officers in support of the warrant affidavit he was challenging.

**United States v. Lockett*, 2010 WL 1461440 (8th Cir. 4/14/2010). Although prosecution's question to a witness about concern for his own safety by testifying was improper, trial court took prompt corrective action by striking the question and instructing the jury the question was improper and should be disregarded as well as any inference therefrom; therefore, denial of motion for mistrial was not an abuse of the court's discretion.

United States v. Millard-Grasshorn, 2010 WL 1657329 (8th Cir. 4/27/2010). Even though magistrate judge's order of commitment for psychiatric evaluation inadvertently committed defendant for the four-month restoration-of-competency period of § 4241(d) instead of the one-month pre-hearing mental competency exam period of § 4241(b), district judge's subsequent commitment for four months to evaluate restoration of competency was mandatory under circuit law.

United States v. Byers, 2010 WL 1687774 (8th Cir. 4/28/2010). In a felon possession case, prosecutor's comments about hollow-tipped ammunition and an extended magazine found on a Glock defendant was observed dropping were not improper as the information provided to the jury the "context" of the crime. It was not plain error to instruct the jury the length of time a firearm was possessed was not relevant as the evidence did not show defendant obtained the firearms at issue innocently.

C. Fourth Amendment

United States v. Newell, 596 F.3d 876 (8th Cir. 2010). Officers' conduct in opening the door of defendant's car, after receiving a tip from an informant that defendant was in possession of cocaine, because the windows were tinted heavily and they could not see any of the vehicle occupants, then ordering defendant to put his hands on the steering wheel and grabbing his right arm after they thought he was reaching for something in the car was reasonable and within the confines of a *Terry* stop -- their acts were justified by the need for protection.

United States v. Wiest, 596 F.3d 906 (8th Cir. 2010). With respect to clothing which defendant left in the home of his girlfriend's stepmother, wh ere defendant had stayed the night prior to his arrest, his privacy expectations were limited by the fact the stepmother lived in the home and the laundry room from which she took his clothing was a shared facility -- her act in turning the clothes over to police in response to their query whether defendant had any property in the house was a "voluntary and unsolicited act."

United States v. Granados, 596 F.3d 970 (8th Cir. 2010). The smell of marijuana outside defendant's hotel room, coupled with officers' knowledge that defendant had arrived with a co-defendant who had just been arrested outside for taking payment for a past delivery of marijuana, that co-defendant

did not have any weapons on him but drug dealers frequently did, and that defendant might have been watching the transaction in the parking lot from the hotel room window, gave the officers probable cause for a warrantless entry into defendant's hotel room to protect the public and themselves.

United States v. Cisneros -Gutierrez, 598 F.3d 997 (8th Cir. 2010). In the absence of "credible evidence" that officers physically intimidated or threatened or made promises in exchange for consent to search, defendant's consent given during a knock-and-talk with law enforcement was not coerced. Warrantless entry and search of another residence based on information from persons at the first residence and officers' observation of evasive behavior inside the house provided probable cause to believe drug trafficking activity would be found in the residence.

United States v. Burtton, 599 F.3d 823 (8th Cir. 2010). Defendant's violation of state open container law, as an infraction committed in the presence of officers, gave them probable cause under the Fourth Amendment to arrest him, thus permitting a search incident to arrest during which marijuana baggies were found on defendant's person.

United States v. Winters, 2010 WL 1286743 (8th Cir. 4/6/2010). Search of defendant's person and car was supported by probable cause even if there were minor questions about the reliability of a drug dog who subsequently was found to have a blood clot on its head; although the dog's handler admitted the dog was lethargic and not acting normally, the dog did alert on defendant's person and car and had been reliable in the past. Denial of defendant's untimely request for "drug dog expert" was not an abuse of the court's discretion and defendant's renewed motion to suppress in which he requested that expert did not make a specific showing that additional evidence would result in a different ruling on the suppression issue.

**United States v. Mohamed*, 2010 WL 1440420 (8th Cir. 4/13/2010). Continuation of traffic stop after the purpose of the stop was completed to permit canine sniff in the face of defendant's increasing nervousness and loose door panels in the car was not an unreasonable extension or prolongation of the stop in violation of the Fourth Amendment -- the dog was already present and the "sniff" only took another five minutes.

United States v. Lopez-Mendoza, 2010 WL 1489704 (8th Cir. 4/15/2010). Defendant's chance encounter with a deputy during a gasoline stop while driving from California to New York did not evolve into an "illegal investigatory detention" when the deputy asked for defendant's driver's license and insurance card -- the deputy did not require compliance with his request and the act of giving him the documents was consensual. Similarly deputy's request to search the vehicle came during a consensual encounter and was backed by reasonable suspicion in any event as defendant and his passenger gave conflicting stories, suddenly told the deputy they did not speak English after conversing for some time and there were many air fresheners in the car.

United States v. Johnson, 2010 WL 1489909 (8th Cir. 4/15/2010). An investigatory stop of van defendant was driving was justified by an anonymous call concerning vehicles parked in an alley with engines running, officer's observation of the late hour, a van blocking the alley, a woman in the van putting on clothing as she moved from the middle seat, and defendant moving from the middle seat to the driver's seat and trying to drive away; therefore stop and search of vehicle were legal.

United States v. Grooms, 2010 WL 1687777 (8th Cir. 4/28/2010). After a bouncer at a night club reported that defendant had threatened to get a gun out of his truck to use on the bouncer, there was probable cause to search his vehicle even though defendant was outside the truck and secured in handcuffs -- Missouri law prohibits making threats and the search was undertaken to find evidence relevant to that crime, which is permitted under *Gant*.

United States v. Coleman, 2010 WL 1687770 (8th Cir. 4/28/2010). Officer's stop of vehicle in which defendant was a passenger was lawful as officer observed traffic violation of double parking. Further, the officers had "reasonable suspicion of illegal activity" sufficient to make the stop as the officers saw the car stopped illegally in a known drug-trafficking area; an individual known to be involved in drug activity entered the vehicle; someone left the car, removed something from the trunk and got back in the car -- all of which could lead an officer to suspect drug activity was involved.

D. Fifth Amendment

United States v. Ochoa-Gonzalez, 598 F.3d 1033 (8th Cir. 2010). When it appeared from the plea colloquy that neither defendant nor her counsel understood that an essential element of the charge of aggravated identity theft against defendant was defendant's knowledge that an ADIT number belonged to another individual, her plea to the charge was not intelligent and therefore constitutionally invalid and the court committed plain error in accepting the plea, requiring reversal of conviction and remand; however, defendant's "spontaneous statements" to ICE agent were voluntary and not in response to interrogation -- "what is your full and complete name" is a routine booking question not considered interrogation under *Miranda*.

United States v. Hernandez-Mendoza, 2010 WL 1286749 (8th Cir. 4/6/2010). Trooper who activated a recording device before leaving drug trafficking suspects alone in the back of his patrol car did not expressly question the suspects, therefore, recording of the suspects' voluntary statements to each other while the trooper was absent (and before they received their warnings) did not violate *Miranda* and statements were properly admissible into evidence.

United States v. Buchanan, 2010 WL 1753346 (8th Cir. 5/4/2010). Evidence of matching markings on a key found on defendant's person at the time of arrest and on a safe in a suspected "stash house" to which he was linked were not hearsay as they were not assertions by a declarant but instead were descriptive observations by investigating officers. As for defendant's "best evidence" objection to the writing "2010" found in the safe and on the key, it was within the trial court's discretion to treat the safe on which the writing was found as a chattel -- the writing was simple, it was unlikely a witness would have inaccurate memory of that writing, the court also admitted the instructional manual for the safe, which contained the same "writing," and the safe was only "collateral evidence" of the crime and not part of the charged drug crime itself.

United States v. Hall, 2010 WL 1753349 (8th Cir. 5/4/2010). Admission of evidence of a prior fake trust scheme conducted by defendant in another state was within the trial court's discretion -- the two trusts were created at the same time, place and with the same business address, defendant operated the two trusts the same way although several years apart, controlled the trusts through other persons, and spent the funds paid by investors into the trusts on personal expenses without making the

promised investments. Any error in admitting the evidence was harmless in the face of overwhelming evidence against defendant including admission of his criminal conduct after he was indicted, undisputed evidence of defendant's use of the funds and lack of evidence any of the funds were invested.

E. Due Process/Evidence

United States v. Donnell, 596 F.3d 913 (8th Cir. 2010). Wiretap recordings of defendant's phone conversations with the leader of a drug conspiracy were properly admitted as they supported a relationship between drugs and the use of firearms and the government's theory that defendant was an enforcer for the leader's drug conspiracy and also showed defendant's awareness their conduct was of interest to law enforcement. A note from defendant to a co-defendant was also admissible as showing defendant's involvement in the conspiracy as he described his role and the roles of other co-conspirators.

United States v. Wilder, 597 F.3d 936 (8th Cir. 2010). Co-defendant's post-arrest statement offered by defendant to rebut testimony of a prosecution witness concerning defendant's interaction with a co-defendant in a drug conspiracy case was properly excluded as not being against the penal interest of the absent witness and was not later offered by defendant when the court later determined the declarant was unavailable due to invocation of his Fifth Amendment privilege. Recording of conversation between defendant and another co-defendant in the squad car after arrest was properly excluded as defendant's state of mind about why he was stopped was not relevant to the drug charges involved.

United States v. Nadeau, 598 F.3d 966 (8th Cir. 2010). In case charging defendant with assault with a dangerous weapon, admission of metal pipe found in defendant's car after he reportedly struck another individual with it was not an abuse of discretion even if "there was no hair, blood or fingerprints" on it -- there was much testimony that defendant used a pipe-like object in the assault, the car in which it was found was the one defendant was riding in, and others testified the pipe was in the car that night -- it was up to jury to determine whether to give the pipe any evidentiary weight.

United States v. Ward, 598 F.3d 1054 (8th Cir. 2010). Defendant's exclusion from trial based on his disruptive behavior in the courtroom was an abuse of the trial court's discretion -- because defendant was removed before voir dire, there was no record whether his behavior persisted or whether he could have controlled it, defendant did not threaten anyone and was not charged with a crime of violence. Exclusion because defendant did not obey the court's order to stop talking to his attorney under the circumstances also violated his right to counsel: "A defendant's constitutional right to be present at his trial includes the right to be an irritating fool in front of a jury of his peers."

United States v. Fazio, 599 F.3d 835 (8th Cir. 2010). Trial court did not err in concluding an involuntary medication plan outlined by the government's expert, rejecting the testimony of defendant's expert to the contrary, would make defendant competent to stand trial in a case charging defendant with possession and transportation of child pornography and being a felon in possession of a firearm.

United States v. Fenner, 2010 WL 1190535 (8th Cir. 3/30/2010). An agent's innocent misstatement

to the grand jury that seized drugs had all been tested (beyond field testing) when tests received after grand jury indicted showed some of the drugs seized was powder and not crack cocaine was rendered harmless error by the petit jury's subsequent conviction and finding that defendant was involved in providing in excess of 50 grams of crack cocaine, particularly where during trial the government was careful to have witnesses specify the type of cocaine involved.

F. Double Jeopardy
G. Sixth Amendment

Padilla v. Kentucky, __ U.S. __, 130 S. Ct. 1473 (2010). The Supreme Court holds that counsel is ineffective if he/she fails to inform a client whether a guilty plea carries with it the risk of deportation. In this case, no record was developed on the prejudice prong of the *Strickland*, therefore case remanded for appropriate findings and conclusions.

Rodela-Aguilar v. United States, 596 F.3d 457 (8th Cir. 2010). Trial counsel was not ineffective in failing to have handwriting on a mailing label analyzed -- on cross examination of the government's witnesses she established that anyone could have written defendant's name on the label and what defendant's handwriting looked like and in closing pointed out the differences to the jury -- and counsel's tactics were more consistent with overall defense strategy. Counsel's failure to call defendant's employer concerning defendant's work schedule on the date drugs were found in a residence he shared with a co-defendant was also not ineffective assistance -- she testified about the cost-benefit analysis she undertook weighing the benefits of calling the employer against the evidence that could come in that defendant worked at places where drug dealing frequently occurred and where he often received drugs rolled up in dollar bills as tips.

United States v. Washington, 596 F.3d 926 (8th Cir. 2010). Trial court did not err in allowing defendant to represent himself at trial -- the record did not show that trial counsel was unprepared or inadequate as he turned over planned cross-examination of government witnesses to defendant when the court allowed him to withdraw, and the court could require defendant to choose to proceed pro se, with or without standby counsel, or with counsel. Defendant's repeated assertion of his right to self-representation after the jury had been selected was unequivocal even in the face of defendant's statement he would welcome the assistance of the attorney whose work he criticized.

H. Sentencing

United States v. Owens, 596 F.3d 430 (8th Cir. 2010). Sentencing court's finding that defendant was not a career offender, made to preserve appeal which was otherwise waived by plea agreement, was not procedural error as the court used a guidelines range otherwise consistent with defendant being a career offender and then departed downward from that range based on overstated criminal history and varied downward based on cocaine base-powder sentencing disparities.

United States v. Jones, 596 F.3d 881 (8th Cir. 2010). Two-level increase in defendant's offense level was justified based on his "extensive" criminal history -- 19 criminal history points in ten years based on conduct which was aggressive and violent. Nor did sentencing court err in considering first the applicable Guidelines range and then the government's motion for upward departure.

United States v. Woods, 596 F.3d 445 (8th Cir. 2010). In felon in possession case, sentencing court could rely on hearsay statements reported by agent as there was sufficient evidence that the third-party statements were accurate and corroborated by what agents observed. Court's assessment of testifying agent's credibility was not clear error nor was its finding that defendant was ineligible for an acceptance of responsibility reduction as defendant denied other relevant offense conduct about his intent to use the gun on law enforcement officers.

United States v. Azure, 596 F.3d 449 (8th Cir. 2010). Trial court's assignment of "hypothetical" criminal history points for six past incidents of uncharged conduct, a total of thirteen points, was permissible as defendant had an "extended history of violence" which ultimately led to the murder of a defenseless person.

United States v. Shuler, 598 F.3d 444 (8th Cir. 2010). 470-month sentence after four-level enhancement for defendant's production of child pornography containing sadistic or violent images was within the advisory ranges for two levels of offense and court noted in imposing the sentence it would have reached the same ultimate sentence even without the enhancement; rejection of defendant's motion for downward departure based on lack of previous conviction of a sex crime was not an abuse of discretion.

United States v. Dodd, 598 F.3d 449 (8th Cir. 2010). Distribution enhancement of defendant's sentence for receipt and possession of child pornography was properly applied based on defendant's plea agreement admission of knowing and intentional downloading of child pornography and storage on his computer followed by storage of the files in peer-to-peer file-sharing network folder -- ignorance was "entirely counterintuitive" in this situation in the absence of "concrete *evidence*" thereof.

United States v. Myers, 598 F.3d 474 (8th Cir. 2010). After defendant pled guilty to charge of failing to register as a sex offender, no double counting occurred when the court increased defendant's base offense level based on the predicate felony of sexual assault of a nine-year-old because the harm of the sexual assault conviction was not factored into defendant's criminal history score but only into the offense level score; even if double-counting occurred it was permissible as intended by the Guidelines under which the base offense level and criminal history calculations meet "different sentencing goals."

United States v. Steward, 598 F.3d 960 (8th Cir. 2010). Sentencing court did not ignore the circuit's mandate to resentence defendant in light of *Kimbrough* and *Gall* when it also considered *Begay* in determining a prior offense did not qualify as a crime of violence -- *Begay* was decided between the mandate and date of resentencing and Iowa conviction for operating a vehicle without the owner's consent does not qualify as a crime of violence in any event.

United States v. Williams, 598 F.3d 963 (8th Cir. 2010). It did not matter whether defendant was sentenced as a career offender or because he fit the status as he was resentenced under a binding Rule 11(c)(1)(C) plea agreement.

United States v. Ault, 598 F.3d 1039 (8th Cir. 2010). Defendant's prior drug paraphernalia conviction, although occurring during the period of time of the methamphetamine conspiracy with

which defendant was charged, was properly regarded as separate and distinct from the conspiracy charge such that it could be relied on in assessing criminal history points to defendant in sentencing on the conspiracy conviction. While 124-month sentence was based on a two-level reduction for acceptance of responsibility instead of three-level, the sentence was below the bottom of the advisory range and would be below a properly calculated advisory range, therefore any procedural error was not prejudicial.

United States v. Brown, 598 F.3d 1013 (8th Cir. 2010). A conviction for delivery of a "simulated" drug under Iowa law does not qualify as a "felony drug offense" under the mandatory life imprisonment/recidivism provision of the Controlled Substances Act, therefore, defendant's case remanded for resentencing**.**

United States v. King, 598 F.3d 1043 (8th Cir. 2010). Applying *Begay*, where the sentencing court failed to choose a category under which defendant's prior juvenile delinquency conviction fell for purpose of considering whether it qualified as a conviction for violent felony and application of the mandatory minimum sentence of the ACCA, sentence vacated and remanded for further development of the record to categorize the prior adjudication.

United States v. Williams, 599 F.3d 831 (8th Cir.), *cert. denied*, __ S. Ct. __, 2010 WL 1047613 (4/19/2010). After defendant was convicted on three counts of bank robbery and three counts of using a firearm in connection with that conduct, an overall sentence of 776 months (84 month sentence on the first firearm count, 300 months on each of the other firearm counts consecutive to 92 months on each of the bank robbery counts, the latter to run concurrently) -- the court could not consider the severity of the statutory minimum sentences for the firearm counts in sentencing defendant on the bank robbery counts.

United States v. Small, 599 F.3d 814 (8th Cir. 2010). Defendant's 240-month sentence for armed bank robbery was not based on an improper increase in his criminal history category -- defendant was a career offender -- the offense level for the underlying conduct was greater than the career offender level and pursuant to the guidelines required the court to choose the higher offense level; an enhancement for obstruction of justice was justified by defendant's flight from police officers at 100 mph during morning rush-hour traffic, ending with defendant drawing a weapon which caused police to fire upon him, all of which caused a substantial risk of bodily injury to others.

United States v. Rutherford, 599 F.3d 817 (8th Cir. 2010). In a case involving two counts of use of interstate communications to transmit a threat, consecutive sentences, the sum of which was higher than the statutory maximum, was not an abuse of the sentencing court's discretion as no single count carried a statutory maximum sentence permitting "total punishment" -- § 5G1.2 is not the only guideline by which the court may impose consecutive sentences.

United States v. Nguyen, 2010 WL 1253783 (8th Cir. 4/2/2010). Sentencing court committed only procedural and not constitutional error when it stated it could not justify a substantial assistance downward departure of 50% or more under the Guidelines, therefore, sentence fell within the scope of defendant's appeal waiver.

Hodge v. United States, 2010 WL 1657281 (8th Cir. 4/27/2010). Following three remands for

resentencing, in a § 2255 motion defendant argued *Gall* applied retroactively to the third sentence imposed, some six months prior to *Gall*. The circuit rejects his argument, holding "*Gall* does not apply retroactively to cases which became final prior to its filing."

United States v. Cosey, 2010 WL 1687898 (8th Cir. 4/28/2010). Sentence of 400 months' imprisonment after defendant pled guilty to charge of conspiracy to distribute/possession with intent to distribute crack cocaine in excess of 50 grams was not unreasonable: court is not required to consider crack-powder disparities; computation of defendant's Guidelines range was based on his long history of many violent crimes and drug dealing and defendant's personal characteristics; the court's drug quantity determination was based on testimony presented at sentencing hearings and leadership and weapons enhancements were supported in the record.

United States v. Statman, 2010 WL 1753347 (8th Cir. 5/4/2010). In criminal fraud case use of foreclosure sale price (higher) instead of fair market value (lower) of property defendants fraudulently obtained in order to calculate loss amount under the MVRA was an appropriate means of determining restitution as the "intended beneficiaries" of the restitution law were "'the victims, not the victimizers.'"

I. Habeas

Berghuis v. Smith, __ U.S. __, 130 S. Ct. 1382 (2010). State supreme court did not unreasonably apply federal law in reviewing petitioner's Sixth Amendment claim that his impartial-jury-from-a-fair-cross-section rights were denied by county's practice in assigning prospective jurors to local district courts first and then to countywide circuit court -- it was petitioner's burden to show the complained-of underrepresentation was caused by systemic exclusion and the state supreme court correctly recognized that.

Christenson v. Ault, 598 F.3d 990 (8th Cir. 2010). Trial counsel was not ineffective in failing to discover the existence of photographs which allegedly were exculpatory -- he was entitled to believe the prosecution had turned over all evidence as required and there was no evidence to lead him to believe otherwise. Additionally, the photographs at issue were constitutionally immaterial in view of the "overwhelming evidence" of petitioner's guilt.

McMullan v. Roper, 599 F.3d 849 (8th Cir. 2010). A motion for relief from final judgment or order of Missouri courts does not qualify as a "properly filed" application for state post-conviction relief as such motions could not be used to attack Missouri criminal convictions; therefore the one-year AEDPA statute of limitations was not tolled while review of that action was pending, thus petitioner's federal habeas petition was time-barred under 28 U.S.C. § 2244(d)(1)(A).

Sinisterra v. United States, 2010 WL1236310 (8th Cir. 4/1/2010). In death penalty habeas case, petitioner's ineffective assistance claims remanded for evidentiary hearing to determine effectiveness of counsel in investigating and presenting mitigation evidence such as defendant's mental health and capacity and his "troubled history", both which were not fully developed in the record.

**Noe v. United States*, 2010 WL 1373196 (8th Cir. 4/8/2010). Allegation that counsel was ineffective because of joint representation was properly rejected by the trial court: attorneys for co-

defendants, while previously in practice together, were not associated at the time of trial; joint defense agreement was entered into only to allow attorneys to discuss case between themselves; fee arrangement by which co-defendant's fees to his attorney were made through defendant's counsel's law firm was not shown to have an adverse effect on defendant's case.

III. EMPLOYMENT LAW

A. General Issues

B. Age

C. Disability

D. Race/Gender/Retaliation

Lake v. Yellow Transportation, Inc., 596 F.3d 871 (8th Cir. 2010). African-American male whose probationary status with employer was terminated was entitled to jury trial as the facts whether employer applied its probationary policies unequally based on employee's records of unavailability were disputed.

Elam v. Regions Financial Corp., 2010 WL 1526450 (8th Cir. 4/19/2010). Supervisors' references to plaintiff as the "pregnant" teller were not direct evidence of discriminatory animus based on her pregnancy but only a communication of her condition as the supervisors tried to determine how to accommodate her morning sickness in the context of her job duties, which the summary judgment record showed were poorly performed, leading to plaintiff's termination from employment.

E. Hostile Work Environment

Helton v. Southland Racing Corp., 2010 WL 1266861 (8th Cir. 4/5/2010). Plaintiff, a white female working as assistant cage manager at a race track, alleged she was subjected to a hostile work environment because she was white; however, the evidence did not show severe or pervasive harassment -- plaintiff's supervisor sent demeaning emails only about once a week, sent fewer emails after another individual became plaintiff's direct supervisor, plaintiff did not remember much of the contents of the alleged harassing emails, was never physically threatened, written up or disciplined and although plaintiff was not hired as a cage manager, another white female with more experience was hired which would not support a hostile work environment claim based on plaintiff's race.

F. FMLA

G. Miscellaneous Employment Cases

Holschen v. Int'l. Union of Painters & Allied Trades, 598 F.3d 454 (8th Cir. 2010). Union member's state law claim for interference with a valid business expectancy after he was fined and expelled from the union was preempted under the LMRA because the CBA which governed the relationship between the union and its members had to be examined to resolve the state law claim.

EEOC v. Kelly Services, Inc., 598 F.3d 1022 (8th Cir. 2010). Employment agency's failure to refer Muslim female applicant for a job at a commercial printing company which had a safety-based dress policy prohibiting loose clothing and headwear for any temporary workers did not constitute an adverse employment action based on plaintiff's religion -- the EEOC failed to show the employer had an available position to which the female could be referred when she applied for work at the

employment service and also failed to show the safety-based reason for not referring her was a pretext for discrimination.

Binkley v. Entergy Operations, Inc., 2010 WL 1643566 (8th Cir. 4/26/2010). Plaintiff's promissory estoppel claim that a statement by an HR representative that plaintiff could get his job back if he proceeded with the employer's Issue Resolution Policy procedure coupled with statements in the policy he argued were a promise the panel decision on re-employment would be followed failed as plaintiff did not suffer detriment from making the choice to follow the procedure -- the same person, who upheld plaintiff's termination contrary to the panel recommendation, would make the ultimate decision with the alternative method of resolution.

IV. CONSTITUTIONAL LAW

A. First Amendment

Salazar v. Buono, _ U.S. _, _ S. Ct. _, 2010 WL 1687118 (4/28/2010). In 5-4 split with multiple concurrences on different grounds to the majority opinion, the Supreme Court holds that enjoining the government from implementing a land-transfer statute enacted to enable the government to comply with an injunction which would have required destruction of 70-year old cross acknowledging American soldiers who died in World War I was incorrect as the change in law (the new statute) and circumstances made the "reasonable observer" standard inappropriate.

**Zutz v. Nelson*, 2010 WL 1489350 (8th Cir. 4/15/2010). Claim of First Amendment retaliation by newly appointed watershed board members after they investigated possible financial wrongdoings by the rest of the board failed to state a claim upon which relief could be granted as the only retaliatory harm alleged was reputational harm, mental distress, humiliation and embarrassment arising from false accusations the new board members proceeded without authority in undertaking their investigation -- such a harm is insufficient to chill an ordinary person from engaging in protected conduct.

B. Fourth Amendment

Felder v. King, 599 F.3d 846 (8th Cir. 2010). Officers alleged to have used excessive force causing death of plaintiff's decedent in the course of investigating a domestic incident were not entitled to qualified immunity on the subsequent § 1983 claim as the evidence concerning the circumstances in which the decedent was shot by an officer were disputed.

C. Due Process/Equal Protection
D. Eighth Amendment
E. Miscellaneous Constitutional Claims

Perdue v. Kenny A., _ U.S. _, _ S. Ct. _, 2010 WL 1558980 (4/21/2010). The Supreme Court holds that "only in extraordinary circumstances" should a lodestar attorney's fee award in a civil rights case be increased because of superior performance by counsel. In this case, the district court did not properly justify a 75% fee enhancement under the relevant factors.

Quigley v. Winter, 598 F.3d 938 (8th Cir. 2010). Claim for hostile housing environment sexual harassment was actionable under the Fair Housing Act -- although $250,000 punitive damages award was excessive trial court's reduction was to an insufficient amount to address the reprehensibility of the landlord's conduct -- circuit sets award at four times amount of actual damages award.

**Morris v. Zefferi*, 2010 WL 1440337 (8th Cir. 4/13/2010). Transportation of pretrial detainee in 3x3x3' dog cage littered with dog hair, excrement and urine violated plaintiff's constitutional rights and was not reasonably related to a governmental interest in preventing plaintiff's escape during transport when alternative restraint methods had been used before, there was no compelling urgency to use the dog cage, and the choice of transportation was excessive in relation to the escape-preventing goal -- officer was not entitled to qualified immunity as the unconstitutionality of his conduct "should have been obvious . . . based on both common sense and prior general case law."

V. ERISA

**Conkright v. Frommert*, _ U.S. _, _ S. Ct. _, 2010 WL 1558979 (4/21/2010). "[A] single honest mistake" by a plan administrator in interpreting language in a plan document does not require a change in the standard review of the administrator's subsequently challenged interpretation of other terms of the plan from deferential to *de novo*.

Jones v. Unum Provident Corp., 596 F.3d 433 (8th Cir. 2010). Trial court correctly applied the abuse-of-discretion standard in affirming plan administrator's determination that plaintiff's long-term disability coverage lapsed when she was released by her treating physicians to return to work, but then returned only part-time and then quit working shortly after that, claiming continued disability but then returned to work a few months later.

Darvell v. Life Ins. Co. of North America, 597 F.3d 929 (8th Cir. 2010). It was not an abuse of the plan administrator's discretion to disregard some medical evidence in the record where there was conflicting evidence concerning whether plaintiff was disabled. Plan administrator also did not abuse its discretion in using the DOT description of plaintiff's job duties instead of what he actually did on the job as the plan did not define "regular occupation."

Jobe v. Medical Life Ins. Co., 598 F.3d 478 (8th Cir. 2010). Long-term disability policy did not give plan administrator discretion to determine eligibility for benefits, although summary plan description tried to do so. Given language in the policy that differences between the two were to be governed by the policy and the disclosure purpose of the ERISA statutes led the circuit to vary from the general rule that a summary plan description would prevail over the formal policy, requiring remand to the district court for *de novo* review of the plan administrator's decision.

Chorosevic v. Metlife Choices, 2010 WL 1253778 (8th Cir. 4/2/2010). Plaintiff's letter concerning "banked money issues" as related to one claim for medical services which did not reference other specific claims made in plaintiff's lawsuit did not satisfy the ERISA exhaustion requirement with

respect to those claims.

**Schultz v. Windstream Communications, Inc.*, 2010 WL 1266858 (8th Cir. 4/5/2010). Amendment to plan which provided retirement benefits for those employees who started earlier in life than others and attained sufficient years of service before the retirement age did not discriminate based on age, instead the difference in retirement benefit was based on pension status which is not necessarily an age-related factor.

VI. PRISONERS' RIGHTS

A. General Issues

King v. IDOC, 598 F.3d 1051 (8th Cir. 2010). Plaintiff's failure to appeal his prison grievances concerning clean-up of biohazard wastes beyond the first step of a four-step process required a finding he had failed to exhaust his prison remedies under 42 U.S.C. § 1997e(a), thus his lawsuit was properly dismissed.

B. First Amendment

Keup v. Hopkins, 596 F.3d 899 (8th Cir. 2010). Even though during the course of litigation defendants amended prison regulations regarding the types of drawings which it banned inmates from creating, which regulations were the subject of plaintiff's § 1983 First Amendment claim, his claim for damages arising from prison officials' refusal to mail out drawings created under the prior regulations was not mooted. Plaintiff's nominal damages award of $1 capped the amount of prevailing party attorney fees to $1.50.

C. Eighth Amendment

Whitson v. Stone County Jail, 2010 WL 1610071 (8th Cir. 4/22/2010). It was reasonably foreseeable that an assault (here the alleged rape of a female prisoner by a male prisoner) could occur when two inmates of opposite genders were placed together in the back of a dark and noisy transport van, thus plaintiff's Eighth Amendment failure to protect claim should not have been dismissed on summary judgment as there was an issue of fact concerning the transporting officers' knowledge, not the victim's knowledge.

D. RLUIPA

VII. MISCELLANEOUS

Milavetz, Gallop & Milavetz, P.A. v. United States, _ U.S. _, 130 S. Ct. 1324 (2010). The Supreme Court affirmed the Eighth Circuit's conclusion that attorneys providing bankruptcy assistance can be considered debt relief agencies under the BAPCPA subject to the disclosure requirements of § 528 of the act which require "an accurate statement of the advertiser's legal status and the character of assistance provided."

Jones v. Harris Associates L.P., _ U.S. _, 130 S. Ct. 1418 (2010). In case involving allegations of breach of fiduciary duty by investment advisers to mutual funds concerning their fees, the Supreme Court upholds the continuing validity of the standard in *Gartenberg v. Merrill Lynch Asset Mgmt., Inc.*, 694 F.2d 923, 928 (2d Cir.), which although not analytically sharp and clear, has proved to be a workable standard for over thirty years.

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, , __ U.S. __, __ S. Ct. __, 2010 WL 1558977 (4/21/2010). The Supreme Court held that the statutory "bona fide error" defense under the Fair Debt Collection Practices Act does not apply to collection conduct by a law firm made under mistaken interpretation of the law.

Merck & Co, Inc. v. Reynolds , _ U.S. _, _ S. Ct. _, 2010 WL 1655827 (4/27/2010) . Limitations period for securities fraud complaint begins to run under the traditional "discovery" standard: upon discovery of or when "a reasonably diligent plaintiff" would have discovered facts which constitute a securities fraud violation. In this case, "discovery" did not occur as a result of a warning letter from the FDA concerning poor results for Vioxx and general statements about the manufacturer's state of mind made in products liability complaints.

Stolt-Nielsen S.A. v. AnimalFeeds Intern. Corp., __ U.S. __, __ S. Ct. __, 2010 WL 1655826 (4/27/2010). The Supreme Court holds that the imposition of class arbitration on non-consenting parties is inconsistent with the Federal Arbitration Act.

Healtheast Bethesda Hospital v. United Commercial Travelers of America, 596 F.3d 986 (8th Cir. 2010). Medicare supplement insurance carrier was not entitled to rescind a settlement agreement it entered into with health care provider after its insured had a lengthy stay and died, leaving a substantial hospital bill -- insurer did not exercise ordinary care in reviewing the insured's health history and treatment before agreeing to settle the case, reviewing only coinsurance information and lifetime reserve days.

George's Inc. v. Allianz Global Risks U.S. Ins. Co., 596 F.3d 989 (8th Cir. 2010). Business insurance policy unambiguously excluded claims for business expenses (increase in cost-per-pound fixed labor and overhead costs) and loss of personal property (chickens) submitted by insured, a poultry processing company which lost electrical service after ice storms, disrupting production and killing a number of chickens.

Pinnacle Pizza Company, Inc. v. Little Caesar Enterprises, Inc., 598 F.3d 970 (8th Cir. 2010). Applying the statute of limitations of the forum state, South Dakota, but the contract law of Michigan as dictated by the franchise agreement between the parties, circuit holds provision restricting the franchisor from certain conduct differed from an installment or commission contract, thus LCE's breach of the agreement not to use "original advertising materials" created by the franchisee occurring only once prior to the applicable limitations period and use during limitations period did not constitute a continuing wrong, therefore the franchisee's breach of contract claim was barred by the statute of limitations.

Cole v. Homier Distributing Co., 599 F.3d 856 (8th Cir. 2010). Although trial court did not abuse its discretion in excluding the report of plaintiff's damages expert in granting defendant's *Daubert*

motion and summary judgment motion on contract claims because plaintiff could not prove its damages; however, in the face of documentary evidence that defendant violated the ninety-day notice provision of a franchise agreement, summary judgment should not have been granted on the statutory claim regarding termination of the franchise agreement.

Barzilay v. Barzilay, 2010 WL 1253732 (8th Cir. 4/2/2010). In determining the habitual residence of children subject to a custody dispute between parents under the Hague Convention, the court was not bound by a consent judgment in an Israeli family court nor was it bound by a repatriation agreement in the marriage dissolution agreement between the parents. The Israeli court did not adjudicate a Hague Convention claim and therefore did not have preclusive effect and the repatriation agreement was "at odds with the basic purposes of the Hague Convention" which attempts to prevent "artificial jurisdictional links."

**Syverson v. USDA*, 2010 WL 1407761 (8th Cir. 4/9/2010). Decision of judicial officer for Grain Inspection, Packers and Stockyard Administration suspending registration of market agency and dealer for five years was supported by substantial evidence that plaintiff was acting as a market agency with respect to contested transactions and violated the higher fiduciary standards inherent in that status by failing to disclose repurchase of cattle from his own consignment purchase.

**Bremer Bank v. John Hancock Life Ins. Co.*, 2010 WL 1440419 (8th Cir. 4/13/2010). Acceleration notice sent out by owner trustee/indenture trustee declaring sums due on airplane leased to airline qualified as a declaration of default which permitted the indenture trustee to exercise remedies under the indenture agreement, including sale of the airplane in derogation of the rights of the owner participant under the agreement, who did not attend the sale, bid for the indenture estate or purchase secured debt.

Blankenship v. USA Truck, Inc., 2010 WL 1489551 (8th Cir. 4/15/2010). After reviewing case law from Arkansas, circuit holds that non-reliance clause in settlement agreement did not bar plaintiff's claim that the settlement was fraudulently induced by defendant, who provided false information to plaintiff which plaintiff subsequently learned was substantially understated.

Roberson v. AFC Enterprises, Inc., 2010 WL 1643575 (8th Cir. 4/26/2010). A case standing for the proposition that while fried chicken may not be good for you, it is important to establish facts from which a jury could conclude that the chicken purveyor knows or should know of oil spills from *cars coming to its parking lot on a regular basis* as a hazard to its customers -- apparently oil from chicken frying was not a factor in this personal injury slip and fall case.