Case Law Update
Cumulative Edition
2021-2023

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Editor's Note

Dear Readers:

This Case Law Update Cumulative Edition replaces the quarterly updates from 2021 through 2023.

I have made no effort to Shepardize or Instacite cases. Before citing a case, readers should do this to be sure it remains good law.

U.S. Supreme Court cases have an asterisk in front of them.

Sincerely,

Greg Mermelstein
Deputy Director / General Counsel

Abandonment (Rule 24.035 and 29.15)

Posch v. State, 619 S.W.3d 483 (Mo. App. E.D. 2021):
Holding: Even though motion court appointed Public Defender to Rule 24.035 case, where Public Defender subsequently filed motion to rescind appointment on grounds that Movant was not indigent under Sec. 600.086 and court granted motion, Movant was not "abandoned" when the Public Defender subsequently did not file an amended motion, because he wasn't eligible for Public Defender services.
Discussion: Rule 24.035 provides for appointment of counsel for "indigent" Movants but does not itself define indigence. However, Sec. 600.086 provides when a person is eligible for Public Defender services. 600.086.3 provides that the appointed defender shall determine if a person seeking Public Defender services is indigent. Upon motion by either party, the court shall then have authority to determine whether the services of the Public Defender may be used. Upon the court's finding that a defendant is not indigent, the Public Defender shall no longer represent the defendant. 600.086.6 provides that the defendant shall have the burden to convince the court of his eligibility for services. Here, the Public Defender properly determined that Movant was not indigent, and filed a motion to rescind appoint under 600.086.3. The court correctly held a hearing and found Movant non-indigent. Movant did not object or appeal. He now claims he was abandoned when the Public Defender failed to file an amended motion for him. However, since the Public Defender was allowed to withdraw on non-indigence grounds, the Public Defender had no duty to file an amended motion. As a non-indigent person, Movant was not entitled to appointed counsel. He had ample opportunity to hire private counsel.

Anderson v. State, 623 S.W.3d 613 (Mo. App. E.D. 2021):
Holding: Even though postconviction counsel filed a "Sanders" motion with their untimely amended motion and claimed that the late filing was due to counsel's actions (not Movant's), where the motion court – without holding a hearing -- entered a judgment finding that the "Sanders" motion was never presented to the court, and that there was no abandonment, case must be remanded for an abandonment hearing.
Discussion: Where an amended motion is filed late, a motion court must make an abandonment inquiry. This can be formal or informal, including written responses, telephone conference, a hearing, or other means. However, a sufficient record must be made to demonstrate on appeal that the motion court's determination on abandonment is not clearly erroneous. Here, there is not an adequate record to show this.

McClendon v. State, 617 S.W.3d 530 (Mo. App. E.D. 2021):
Holding: Even though (1) appointed 29.15 counsel moved to withdraw and strike his entry of appearance due to conflict of interest, which was granted, and (2) second appointed counsel subsequently entered appearance, the time for the amended motion ran from the date first counsel was appointed; case remanded for abandonment hearing where second counsel filed amended motion untimely.

Garcia v. State, 617 S.W.3d 526 (Mo. App. E.D.2021):
Holding: Even though (1) Rule 29.15 counsel filed a motion and affidavit claiming that the untimely filing of the amended motion was not the fault of Movant, but was due to counsel's actions, and (2) the motion court "left open" the record to submit an "affidavit or telephone deposition," where shortly thereafter the motion court summarily found by docket entry that counsel did not abandon Movant, the record is insufficient to determine whether the court clearly erred in determining this; the motion court did not indicate that it did not believe the evidence, or that Movant's personal negligence or failure to act caused the late filing; case remanded for abandonment hearing.
Discussion: An abandonment inquiry can be formal or informal, but must make a record to demonstrate on appeal that the court's findings on abandonment are not clearly erroneous. The record here is insufficient to determine this. The motion court did not find that the evidence was not credible, or that Movant was personally negligent for the late filing.

Earl v. State, 628 S.W.3d 695 (Mo. App. E.D.2021):
Holding: (1) Even though counsel filed request for extension of time to file amended motion within the initial 60 day period of Rule 24.035(g), the motion court lacked authority to grant the motion after this period expired; counsel's amended motion was untimely and case must be remanded for abandonment hearing; and (2) appellate court could not hold that motion court "implicitly credited" counsel's *Sanders* motion – which claimed the late amended motion was not Movant's fault -- since counsel's *Sanders* motion was not filed under oath.

Editor's Note: The time limit ruling appears to be contrary to *Federhofer v. State*, 462 S.W.3d 838, 841 (Mo. App. E.D. 2015), which allowed a motion court to rule on an extension request filed after the initial 60 day period, but before the extended time expired.

Edwards v. State, 624 S.W.3d 753 (Mo. App. E.D. 2021):
Holding: (1) Where Movant filed his pro se 29.15 motion prematurely during the pendency of his direct appeal, his amended motion under Rule 29.15 in effect at the time was due 60 days after the appellate court's mandate; and (2) even though postconviction counsel filed a request to extend the time for an amended motion to 90 days, where the motion court never ruled on the extension request, the amended motion was untimely and case must be remanded for abandonment hearing.

Halter v. State, 628 S.W.3d 238 (Mo. App. E.D. 2021):
Holding: Even though 29.15 counsel submitted an affidavit to the motion court stating that the untimely filing of the amended motion was the fault of counsel and not Movant (as well as an affidavit from Movant that the untimely filing was not Movant's fault), where the motion court's Findings did not address the timelines of the amended motion, case must be remanded for abandonment inquiry; "An extra sentence or two in the motion court's Findings of Fact and Conclusions of Law would have been sufficient" to address the timeliness issue if the motion court had ruled on the matter, but didn't.

Cleaves v. State, 626 S.W.3d 344 (Mo. App. E.D. 2021):
Holding: Even though 24.035 Movant's counsel filed a statement and affidavit that counsel was responsible for the late filling of the amended motion, where the motion court did not rule on the motion, case must be remanded for an abandonment hearing.

Harley v. State, 633 S.W.3d 912 (Mo. App. E.D. 2021):
Holding: Even though counsel's amended 24.035 motion would have been timely if the motion court had timely granted counsel's extension requests, where motion court purported to grant counsel's extension requests after the date for filing, the amended motion was untimely because a motion court cannot grant extensions after the time for filing has expired. Remanded for abandonment hearing.

Jones v. State, 2022 WL 1216300 (Mo. App. E.D. April 26, 2022):
Holding: (1) Extensions of time under Rule 29.15 must be requested and granted before the initial 60-day time period expires; thus, amended motion was untimely and case must be remanded for abandonment hearing, where counsel filed their request for extension of time one day after the amended motion was due (i.e., on the 61st day); (2) Eastern and Southern District cases – including *Federhofer v. State*, 462 S.W.3d 838 (Mo. App. E.D. 2015) and *Volner v. State*, 253 S.W.3d 590 (Mo. App. S.D. 2008) -- which hold that amended motions are timely as long as the extension request is ruled on within the authorized extended time period are no longer to be followed.

Hornsey v. State, 649 S.W.3d 386 (Mo. App. E.D. Aug. 16, 2022):
Holding: Where (1) 29.15 motion court never ruled on counsel's first request for 30-day extension of time to file amended motion, but (2) after the initial time for filing expired, purported to grant the first extension when ruling on counsel's request for second 30-day extension, case must be remanded for abandonment hearing, because a motion for extension of time must be made *and* granted within the time the amended motion is due.

Little v. State, 2022 WL 4136971 (Mo. App. E.D. Sept. 13, 2022):
Holding: Where 29.15 motion court did not rule on counsel's request for 30-day extension to file amended motion until after the time for filing amended motion had expired, the amended motion was untimely and abandonment hearing must be held; this is true even though court later granted counsel's second request for a second 30-day extension under then-version of Rule 29.15 and, belatedly, also granted the first extension request.

Whitt v. State, 2022 WL 16557017 (Mo. App. E.D. Nov. 1, 2022):
Holding: (1) The 120-day time for filing amended motions under Rule 29.15 (and 24.035) did not become effective until November 4, 2021; the "schedule" in Rule 29.15(m) (and 24.035(m)) stating that the Rule applies to all proceedings where sentence was pronounced on or after January 1, 2018, applies to amendments made to the Rule in 2017, *not* to the 120-day amendment made in 2021.

Brewer v. State, 2022 WL 17587743 (Mo. App. E.D. Dec. 13, 2022):
Holding: (1) Where (i) Movant filed timely Form 40 in PCR1 in February 2020; (ii) Movant filed an identical but untimely Form 40 in PCR2 in April 2020 (because there was a question whether the court had properly filed PCR1); (iii) the motion court appointed counsel in PCR2 and counsel was granted first extension of time to file amended motion in that case; (iv) in June 2020 counsel entered an appearance in PCR1 and moved to "consolidate" that case with PCR2, which the court granted; (v) counsel moved for second extension of time to extend the time for filing an amended in the "consolidated" case, but the court did not grant it before the time for filing expired, the court had no authority to grant extension after time expired, and amended motion is untimely; (2) even though Movant claims that because the two cases were "consolidated," the appellate court should use the entry of appearance date in PCR1 as the date to calculate when an amended motion was due (which would make the court's extension grant timely), the time for filing amended motion must be calculated from the "appointment" date in PCR2; and (3) even though PCR2's Form 40 was untimely-filed, the court did not err in considering it timely-filed because the untimely filing was apparently due to the court not properly filing PCR1. Remanded for abandonment hearing.

Herrington v. State, 2023 WL 139272 (Mo. App. E.D. Jan. 10, 2023):
Holding: Postconviction judge lacked authority to grant an extension of time to file amended 29.15 motion after the time for filing the amended motion had already expired, so amended motion was untimely, and case must be remanded for abandonment hearing.

Johnson v. State, 2023 WL 1787701 (Mo. App. E.D. Feb. 7, 2023):
Holding: 29.15 motion court lacks authority to grant extension of time to file amended motion after time for filing had already expired; remanded for abandonment hearing.

McGary v. State, 2023 WL 2656821 (Mo. App. E.D. March 28, 2023):
Holding: Where motion court (1) appointed Public Defender on October 9, but for unknown reasons "reappointed" Public Defender on December 2, Movant's amended motion was due within 60 days of the first appointment under then Rule 24.035(g), and since counsel did not request an extension of time until after that time expired, the amended motion filed by counsel was untimely, and case must be remanded for abandonment hearing.

Reehten v. State, 2023 WL 2655597 (Mo. App. E.D. March 28, 2023):
Holding: Even though 29.15 counsel requested extension of time to file amended motion before it was due, where motion court did not grant extension until after due date, court was without authority to grant extension after due date, so amended motion was untimely and case must be remanded for abandonment hearing.

Lauck v. State, 667 S.W.3d 684 (Mo. App. E.D. 2023):
Holding: Where the motion court did not grant counsel's request for extension of time to file amended motion until after the time to file an amended motion had expired, amended motion was untimely and case must be remanded for abandonment hearing.

Nickels v. State, 668 S.W.3d 287 (Mo. App. E.D. 2023):
Holding: Even though the motion court "backdated" its grant of extension of time to file an amended motion so that the date would be before the amended motion was due, the "backdating" had no legal effect; because the motion court failed to grant the extension request before the amended motion was due, the amended motion was untimely and case must be remanded for abandonment hearing.

Medlin v. State, 674 S.W.3d 494 (Mo. App. E.D. Aug. 22, 2023):
Holding: (1) Even though retained counsel filed a motion to extend time to file amended motion under former Rule 24.035(g), where motion court did not grant the extension until *after* the time for filing the amended motion had expired, the amended motion was untimely because motion court cannot grant an extension after the time has expired; and (2) because the "abandonment doctrine" does not apply to retained counsel, Movant cannot claim to have been abandoned in the late filing of the amended motion, so the amended motion cannot be considered. Remanded to consider only the *pro se* motion.

Kemper v. State, 2023 WL 6978191 (Mo. App. E.D. Oct. 24, 2023):
Holding: Where (1) Public Defender entered appearance for Movant in Rule 29.15 case without an appointment order; and (2) Public Defender requested an extension of time to file amended motion but motion court did not rule on it until after the time for filing had expired, the motion court was without authority to extend the time after expiration; the amended motion was untimely; and the "abandonment doctrine" does not apply because counsel was not "appointed." Thus, the motion court can only consider the timely *pro se* motion.
Discussion: Rule 29.15(e) requires a court to "cause counsel to be appointed" for an indigent Movant. The abandonment doctrine applies only to appointed counsel, not retained counsel. Even though Movant qualified for a Public Defender and was represented by a Public Defender, the abandonment doctrine applies only to "appointed" counsel and "no appointment occurred here."

Smiley v. State, 637 S.W.3d 705 (Mo. App. S.D. Jan. 5, 2022):
Holding: Where appointed counsel's amended 29.15 motion was filed late, case must be remanded for abandonment hearing.

Hatmon v. State, 2022 WL 794561 (Mo. App. S.D. March 16, 2022):
Holding: (1) Where the Court of Appeals had remanded case for an abandonment hearing because the amended motion was filed late, but (2) on remand, the motion court found that because it had originally decided the case on the merits despite the late filing, there was no abandonment, and (3) the motion court then re-entered its original Findings on the merits of the amended motion, this was clearly erroneous because without a finding of abandonment, the motion court lacked authority to rule on the amended motion. Case remanded for abandonment hearing.

Hatmon v. State, No. SD37074 (Mo. App. S.D. March 31, 2022):
Holding: Where (1) Court of Appeals had remanded postconviction case for an abandonment hearing, and then after that (2) State claimed on second appeal that the Movant's *pro se* motion was untimely, the law-of-the-case doctrine precluded Court of Appeals from re-considering timeliness issue, because in remanding the case for an abandonment hearing in the prior appeal, the appellate court had implicitly determined that the *pro se* motion was timely. This is because the Court of Appeals had a duty to examine timeliness in the first appeal, and if the *pro se* motion had been untimely, the Court of Appeals would have dismissed case.

Bryan v. State, 2022 WL 1261196 (Mo. App. S.D. April 28, 2022):
Holding: Where (1) court appointed Public Defender to Rule 29.15 case on December 26, 2014; (2) Public Defender never entered appearance but wrote to court that case was filed in wrong county and court transferred case to correct county; (3) Private Counsel entered case on February 24, 2015; and (4) the motion court subsequently determined that Public Defender had abandoned Movant, the finding of abandonment meant the case "shall proceed anew according to the provisions of the rule," so Private Counsel's amended motion filed on April 24, 2015, was timely under Rule 29.15(g), since it was filed within 60 days of Private Counsel's entry.

Courtois v. State, 2023 WL 2422254 (Mo. App. S.D. March 9, 2023):
Holding: Even though counsel filed request for 30-day extension of time to file amended 29.15 motion with the time the motion was due, where the motion court did not grant the extension until after the time for filing expired, the motion court lacked authority to grant the extension after the time expired, and thus, the amended motion was untimely and case must be remanded for abandonment hearing.

Owens v. State, 673 S.W.3d 839 (Mo. App. S.D. Aug. 10, 2023):
Holding: Even though in Rule 29.15 case the 60th day after appointment of counsel fell on a Sunday, the due date for the amended motion with 30-day extension was the 90th continuous day after appointment of counsel; counsel's calculation of the due date based on 30 days from the Monday following the Sunday was erroneous and made the amended motion untimely because filed on the 91st day.
Discussion: Counsel was appointed on June 14. Under Rule 44.01(a), the day of the act is not included, and if the last day is a Saturday, Sunday, or legal holiday the period runs until the next day. Therefore, June 15 was day one, and counsel had 90 days from June 15 to file an amended motion (or by Tuesday, September 12). But because day 60 was a Sunday, counsel believed that the 30-day extension period counted from the next Monday, so counsel filed the amended motion on Wednesday, September 13. However, after the grant of a 30-day extension, the 90-day period is counted continuously from the day after counsel's appointment. Only if the 90th day falls on a Saturday, Sunday or legal holiday is the time extended to the next day. Counsel filed the motion on the 91st day, and thus, was untimely. Case remanded for abandonment hearing.

Cooper v. State, 675 S.W.3d 718 (Mo. App. S.D. Sept. 19, 2023):
Holding: Where (1) retained counsel filed an initial 29.15 motion for Movant which was signed by counsel (thus, constituting an entry of appearance); (2) more than 60 days later, retained counsel filed a motion to withdraw and Public Defender was appointed in lieu of retained counsel; and (3) Public Defender was then granted an extension of time to file amended motion (which was accordingly filed), the amended motion was untimely because 29.15(g)(2) provides that an amended motion is due with 60 days of entry by retained counsel, retained counsel had not requested an extension before the amended motion was originally due (within 60 days), and motion court lacked authority to grant an extension after the deadline expired; furthermore, (4) "abandonment" doctrine does not apply to retained counsel, so Movant cannot claim abandonment. Case remanded to consider only the initial motion.

Jendro v. State, 2023 WL 8445894 (Mo. App. S.D. Dec. 6, 2023):
Holding: (1) Where first postconviction counsel had filed a timely amended 29.15 motion, the motion court was without authority to allow the filing of a second amended motion by second counsel on grounds that first counsel had "abandoned" Movant by not alleging additional claims, since Rule 29.15(g) allows only one amended motion; but (2) even though motion court erred in considering second amended motion, where the motion court decided identical claims as in the first (authorized) amended motion, appellate court will not remand case to issue new Findings on first motion, but under Rule 84.14 can enter the judgment on the first motion, as the motion court should have done, and can dismiss claims not in the first amended motion.

Briggs v. State, 621 S.W.3d 614 (Mo. App. W.D. 2021):
Holding: (1) Where retained private counsel filed amended 29.15 motion untimely, it cannot be considered, and there is no abandonment because the abandonment doctrine doesn't apply to non-appointed counsel; and (2) motion court ruled on claims in the untimely amended motion, but not claims in the timely *pro se* motion, there is no "final" judgment since the *pro se* claims have not been finally adjudicated, so appeal must be dismissed.

Ryland v. State, 619 S.W.3d 553 (Mo. App. W.D. 2021):
Holding: (1) Where Defendant/Movant's sentence was pronounced before January 1, 2018, his 29.15 motion was governed by the Rule that was in effect before January 1, 2018, which authorized only one extension of time for filing an amended motion; and (2) where 29.15 counsel filed the amended motion untimely, but – even though the motion court appointed the Public Defender -- the record in motion court is unclear whether Movant's counsel really was "privately retained" by Movant or was acting as an appointed counsel, case must be remanded to determine in what capacity counsel acted; if counsel was "privately retained" by Movant, only the *pro se* motion can be considered because the abandonment doctrine does not apply to privately retrained counsel, but if the counsel was acting as an appointed counsel, then court must hold abandonment hearing.

Wright v. State, 634 S.W.3d 698 (Mo. App. W.D. 2021):
Holding: (1) Where 29.15 Movant was sentenced in December 2017, Movant was governed by the 2017 version of Rule 29.15, which allowed only one extension of time for amended motions; (2) Motion court lacked authority to grant two extensions under the 2018 version of the Rule 29.15, so amended motion was untimely. Case remanded for abandonment hearing.

Mack v. State, 635 S.W.3d 607 (Mo. App. W.D. 2021):
Holding: (1) Even though 29.15 Movant timely filed their *pro se* motion in January 2019, the motion was governed by the pre-2018 version of Rule 29.15 because 29.15(g) states that if sentence was pronounced before January 1, 2018, the applicable Rule is the one in effect on the date the motion is filed "or December 31, 2017, whichever is *earlier*"; (2) even though postconviction counsel requested an extension of time to file an amended motion before the initial 60-day time limit expired, where the motion court did not grant the extension until after the time limit expired, the amended motion was untimely, so case must be remanded for abandonment hearing; and (3) where trial court summarily denied Rule 29.15 relief, judgment must be reversed because under Rule 29.15(j), motion court is required to enter Findings of Fact and Conclusions of Law sufficient to allow meaningful appellate review.

Ransom v. State, 635 S.W.3d 881 (Mo. App. W.D. 2021):
Holding: Even though 29.15 counsel requested an extension of time within the initial 60-day time period for filing an amended motion under 29.15(g), where the motion court did not grant the extension until after the 60-day time period, the amended motion as untimely. Remanded for abandonment hearing.
Discussion: A motion court lacks authority to grant an extension after the initial time limit for filing an amended motion expires. The Southern District has allowed this in *Scrivens v. State,* 630 S.W.3d 917 (Mo. App. S.D. 2021), but that is contrary to Missouri Supreme Court precedent.

Shelton v. State, 2022 WL 17925416 (Mo. App. W.D. Dec. 27, 2022):
Holding: Where under applicable version of Rule 24.035, counsel had 60 days from appointment and filing of a transcript to file amended motion and was authorized under Rule to request an extension of time, but counsel did not request an extension, the amended motion filed after 60 days was untimely and case must be remanded for abandonment hearing.

Brandolese v. State, 666 S.W.3d 309 (Mo. App. W.D. 2023):
Holding: Where there was nothing in the record showing the motion court ever ruled on counsel's motion to extend time to file 29.15 amended motion, the amended motion was untimely and case must be remanded for an abandonment hearing.

Nussbaum v. State, 665 S.W.3d 414 (Mo. App. W.D. 2023):
Holding: Where the motion court did not grant counsel's request for an extension of time to file 24.035 amended motion until after the deadline for filing had passed, the amended motion was untimely and case must be remanded for an abandonment hearing.

Appellate Procedure

State v. Johnson, 617 S.W.3d 439 (Mo. banc 2021):
Holding: Even though -- 25 years after Defendant was convicted and sentenced -- Prosecutor (as part of her Conviction Integrity Unit) filed a motion for new trial under Rule 29.11 claiming there was newly discovered evidence of actual innocence and *Brady* violations, the trial court's jurisdiction was exhausted at the time of sentencing and there is no authority to appeal at this late date; but Defendant may have a remedy in state habeas corpus.
Discussion: This case is not about whether Defendant is innocent or whether there exists a remedy for someone who is innocent. Ultimately, this case presents only the issue of whether there is any authority to appeal the dismissal of a new trial motion filed decades after a criminal conviction became final. No such authority exits. A criminal judgment is final once sentence is entered. At that point, the trial court lacks jurisdiction to do anything else. Defendant is appealing an order dismissing a motion the trial court had no authority to sustain. Appeal dismissed. However, nothing in this opinion should be read to conclude that Defendant may not seek relief by filing a petition for habeas corpus in the proper circuit court alleging gateway claims.

State v. Lehman, 617 S.W.3d 843 (Mo. banc March 8, 2021):
Holding: (1) Even though police said Defendant was "near" a park, and surveillance video showed Defendant in a parking lot with some trees and grass in the distance, this evidence was insufficient to prove that he was within 500 feet of a public park in violation of Sec. 566.150; (2) even though it may have been preferable for Defendant to present separate Points Relied On regarding whether the State proved he had knowledge he was within 500 feet of a park and whether the State proved the distance element, the failure to do so doesn't preclude review for sufficiency of evidence on the merits, since sufficiency is always reviewed on the merits (not as plain error), even if not briefed.
Discussion: Sec. 566.150.1(2) provides that people convicted of certain sex crimes cannot loiter within 500 feet of public park with playground equipment. Although the surveillance video of the parking lot where Defendant was found also showed a grassy area nearby, the video does not show any playground equipment, nor anything clearly identified as "the park." Although police said Defendant was "near" the park, "near" is vague. "Near" might be used to describe a location a few miles away, or something 50 yards away. There simply were no facts proving that Defendant was within 500 feet of a park. Conviction reversed.

State v. R.J.G., 632 S.W.3d 359 (Mo. banc Oct. 26, 2021):
Holding: (1) Where Defendant-Juvenile was 17 years old at time he allegedly committed felonies in October 2020 and was charged in January 2021, the law in effect at time of offense applied and he did not get benefit of "Raise the Age" legislation which became effective July 1, 2021, when legislature funded juvenile division services; (2) even though circuit court dismissed the circuit court proceedings "without prejudice" (to allow proceedings to be brought in juvenile court), this was an appealable "final judgment" because it had the practical effect of terminating the State's case in circuit court since re-filing there would have been futile.

State v. Gates, 635 S.W.3d 854 (Mo. banc Dec. 21, 2021):
Holding: (1) Where in felony-murder case the trial court prohibited Defendant from testifying to his exculpatory version of events about the underlying robbery on grounds self-defense cannot be asserted as a defense to felony-murder, trial court denied Defendant his Sixth and Fourteenth Amendment rights to present a "complete defense;" self-defense is an available justification when the criminal act being prosecuted is the defendant's use of force, and Sec. 563.031.1(3) does not prohibit a defendant from arguing he used physical force for a purpose other than committing the forcible felony he is charged with. (2) Although evidentiary rulings are typically reviewed for abuse of discretion, where the facts are not contested and the issue is one of law, review is de novo; question of whether Defendant's constitutional rights were violated is a question of law reviewed de novo.

Doe v. Frisz, 2022 WL 1228964 (Mo. banc April 26, 2022):
(1) Even though Petitioner was originally charged with various child sex offenses, where he pleaded guilty to endangering the welfare of a child based on hitting his children and exposing them to cold weather, Petitioner was not required to register as a sex offender, because his offense of conviction was not sexual in nature; but (2) writ of prohibition is not the proper remedy when Sheriff "required" Petitioner to register, because Sheriff's "requirement" had no legal effect; Petitioner's remedy to determine if he is required to register is declaratory judgment action.
Facts: Petitioner was originally charged with multiple child sex offenses. He pleaded guilty to endangering welfare of child based on hitting the children and exposing them to cold. He agreed to sex offender counseling as part of probation. After the plea, his Probation Officer and then the Sheriff "required" that he register. He sought a writ of prohibition in circuit court. The circuit court issued a preliminary writ, then quashed it.
Holding: (1) If the circuit court issues a preliminary order and then later denies a permanent writ, the proper remedy is appeal. Missouri uses a "non-categorical" approach to determine if the Petitioner's offense qualifies as registerable. Under this approach, the court looks beyond the statute of conviction to the underlying conduct of conviction. Thus, where a Petitioner pleads guilty to endangering based on some kind of sexual conduct, Petitioner must register. But here, although Petitioner was originally charged with sex offenses, he pleaded guilty only to hitting his children and exposing them to cold. Sec. 589.400.1(2) only requires a person register "when the endangerment is sexual in nature." Although SORA requires registration whenever SORNA required it, SORNA defines a "sex offender" only as a person "convicted of a sex offense." Merely alleging a person committed a sex offense doesn't make them a sex offender under SORNA. The fact that Petitioner agreed to sex counseling does not mean that the conditions of probation are related to the underlying conviction. E.g., a person can agree to drug treatment as part of probation but not be convicted of a drug offense. Even though the victim impact statements showed sexual conduct, those are unsworn statements giving the court sentencing information, but those are not guilty pleas. (2) However, writ of prohibition is not proper remedy. Prohibition only lies to prohibit judicial or quasi-judicial acts. Sheriff had no power under SORA to "require" Petitioner to register. Sec. 589.417.2 merely requires Sheriff to keep a registry. Whether an action is judicial or

quasi-judicial depends on its legal effect. Sheriff's determination that Petitioner was "required" to register has no legal effect, just as Petitioner's own counsel's determination that Petitioner does not have to register had no legal effect. At most, Sheriff could refer matter to Prosecutor, who could charge Petitioner with failure to register, and then a court would get involved in determining the matter. Petitioner's correct remedy – other than waiting to see if he gets charged for failure to register – is a declaratory judgment action under Sec. 527.010 RSMo.

Petersen v. State, 2022 WL 17129167 (Mo. banc Nov. 22, 2022):
Holding: (1) Where Defendant never raised a 4th Amendment claim regarding his motion to suppress in the trial court, but instead objected based on "lack of foundation," the 4th Amendment claim is not preserved for appeal; (2) a general objection to "lack of foundation" does not call the trial court's attention to what aspect of foundation is lacking, and is inadequate to preserve issue for appeal; (3) objecting to evidence only in a pretrial motion is not sufficient to preserve issue for appeal; a party is required to object to the evidence *during the trial itself* to allow the trial court to reconsider its ruling against the backdrop of the evidence actually presented at trial.

Hatmon v. State, 2023 WL 2586179 (Mo. banc March 21, 2023):
Holding: Even though (1) there had been prior appellate opinions in 24.035 Movant's case remanding the case for various further proceedings, and (2) the State in this subsequent appeal contended, for the first time, that Movant's *pro se* Form 40 had been untimely filed, the "law of the case doctrine" did not preclude litigation of the timeliness of the *pro se* motion in this subsequent appeal, since a court has discretion not to apply "law of the case" doctrine when a mistake has been made, and the deadline for filing a Form 40 is mandatory and cannot be waived; remanded to determine if *pro se* motion was timely filed.

In the Interest of L.N.G.S., Juvenile v. A.S., 2023 WL 2586188 (Mo. banc March 21, 2023):
Holding: Even though (1) Appellant-Relatives had been given temporary custody of Child by Children's Division, but (2) after apparent abuse of Child by Relatives, Children's Division filed petition for child neglect and court issued judgment placing Child in custody of Children's Division, Appellant-Relatives had no statutory authority to appeal the court's judgment because they do not fall within the class of persons who may appeal a judgment under Sec. 211.261; appeal dismissed.
Discussion: The right to appeal is solely statutory. Sec. 211.261 enumerates who may appeal actions taken under the Juvenile Code. Sec. 211.261.1 grants the right of appeal to: (1) the child; (2) the child's parent, guardian, legal custodian, spouse, relative or next friend, *so long as the party appeals on the child's behalf*; (3) a parent; and (4) the juvenile officer. Appellant-Relatives argue they fall under category 2. But they did not specify in their notice of appeal or briefing that they are appealing *on the child's behalf*. Their arguments seek to vindicate their own positions, not necessarily the Child's best interest. Because the statute doesn't give Relatives the right to appeal, appeal must be dismissed.

State v. Vandergrift, 669 S.W.3d 282 (Mo. banc 2023):

Holding: Where (1) Defendant was convicted at jury trial on February 3, 2021; (2) Defendant was present in court and orally sentenced to a term of years on April 7, 2021; (3) Defendant filed his Notice of Appeal (NOA) on April 14, 2021; (4) the Clerk attached various docket entries to the NOA showing the sentence when the Clerk sent the NOA to the Court of Appeals; (5) the Case.net generated legal file filed with the Court of Appeals did not contain these docket entries, but (6) it did contain a "Sentence and Judgment" entered December 2, 2021 by the judge (which tracked the oral pronouncement), the oral pronouncement of sentence started the time for filing the NOA so the April 14 NOA was timely, even though the formal "Sentence and Judgment" document was not entered until much later.

Discussion: Sec. 547.070 states a defendant's right of appeal is triggered when final judgment is "rendered." A final judgment is "rendered" when a court orally pronounces the judgment and imposes sentence in the presence of Defendant. Once a final judgment is "rendered," Rule 29.07(c) requires entry of a judgment memorializing this. Thus, a defendant's right to appeal is triggered by oral pronouncement of sentence, not the ministerial act of entering a written judgment. However, the written judgment must be included in the record on appeal, Rule 30.04(b), and appellate review cannot proceed without the written entry of judgement. Its absence, however, does not deprive a court of appellate jurisdiction, but could support dismissal of an appeal on procedural grounds under Rule 30.14. When rendition of judgment has occurred but entry has not, the appellate court must remand for entry of the judgment before appellate review can proceed. Here, there was a judgment entered on December 2, 2021, and it is in the record on appeal. And Defendant timely filed his NOA within 10 days of the date he was orally sentenced in his presence. Thus, appeal is timely and record on appeal is complete, so appellate review can proceed.

In the Interest of P.D.E. v. Juvenile Officer, 669 S.W.3d 129 (Mo. banc 2023):

Holding: Where (1) in January 2021, Juvenile Court conducted an adjudication hearing; (2) in March 2021, Juvenile Court conducted a disposition hearing and ordered Juvenile be made a ward of the court and pay restitution in an amount to be determined later; and (3) in October 2021, the court set restitution at $4,000, a Notice of Appeal (NOA) filed in October 2021 challenging the *adjudication* was untimely; an NOA challenging the adjudication and disposition needed to be filed within 40 days after the March disposition hearing.

Discussion: Sec. 211.261.1 states that an NOA shall be filed in a juvenile case within 30 days after a final judgment has been entered, but a plurality of this Court determined in *D.J.B v. M.B.*, 704 S.W.2d 217 (Mo. banc 1986) that a party has 40 days to file the NOA under Rules 81.04 and 81.05(a). "Final judgment" is left undefined in chapter 211. But once a disposition is made, even though post-dispositional hearings may continue to be held, all the issues before the court have been disposed of and nothing is left for determination. Here, the disposition occurred in March 2021 where Juvenile was made a ward of the court, and ordered to pay restitution in an amount to be determined. This entry of disposition under Rule 128.03d started the time to file an NOA challenging the adjudication hearing. The restitution amount could be determined later. The ultimate

determination of restitution is a modification of the order, and the modification is itself separately appealable under 211.261.1. Appeal of adjudication dismissed as untimely.

Editor's note: Although *D.J.B.* held a Juvenile has 40 days after final judgment to file an NOA, filing within 30 days is safer given Sec. 211.261.1 and the current Court's statement that *D.J.B.* was decided only by a "plurality."

State v. Forbes, 2023 WL 4201542 (Mo. banc June 27, 2023):

Holding: Where (1) on September 26, 2019, Defendant was found guilty at jury trial; (2) on October 18, 2019, Defendant filed New Trial Motion; (3) on January 13, 2020, the court orally sustained the New Trial Motion, but then set aside that ruling on January 23, 2020 and then found the motion was overruled by operation of law because more than 90 days had passed; (4) on February 10, 2020, the court sentenced Defendant to 10 years in prison; (5) on February 25, 2020, Defendant filed Notice of Appeal (NOA); (5) in March 2020, the Court of Appeals dismissed the appeal either because the NOA was untimely or because it was premature since proceedings were apparently still going on in the trial court; (6) in April 2020, the trial court held proceedings regarding restitution as a condition of parole; (7) on May 28, 2020, the trial court "withdrew" its sentence; (8) on September 14, 2020, the trial court ordered restitution in the amount of $26,000 and purported to re-sentence Defendant to 15 years in prison; and (9) on September 22, 2020, Defendant filed a new NOA, the appeal must be dismissed as untimely because "final judgment" occurred when the trial court orally pronounced sentence on February 10, 2020, and the NOA wasn't filed within 10 days of that; furthermore, everything the trial court did after February 10 (including imposing $26,000 in restitution and re-sentencing Defendant to 15 years) was a nullity. Appeal dismissed and case remanded for entry of sentence of 10 years.

Discussion: In a criminal case, "final judgment" is rendered when the trial court orally pronounces sentence in the presence of Defendant. After oral rendition of sentence, the trial court can take no further action inconsistent with that unless expressly provided by statute or rule. To allow otherwise would result in chaos of review, unlimited in time, scope and expense. Thus, any action taken by a trial court after sentence is imposed is a nullity. Sec. 559.105 governs restitution and allows a circuit court to order restitution as part of a sentence. However, nothing in the statute provides for such action after sentence is imposed and the criminal judgment is final. An NOA must be filed within 10 days of "final judgment," which here was February 10, 2020. The NOA filed here was untimely. Further, the trial court had no authority to take any action after "final judgment."

State v. Teter, 665 S.W.3d 306 (Mo. banc 2023):

Holding: (1) Where (i) Defendant was still represented by counsel at the time of his *Faretta* hearing, and (ii) counsel was present at the *Faretta* hearing where Defendant waived counsel and signed a written waiver, Defendant's claim on appeal that the *Faretta* hearing was inadequate to validly waive counsel could only be reviewed for plain error, since counsel did not object to the inadequacy at the hearing; a *de novo* standard of review applies only to those cases where there is no written waiver of counsel or waiver of the right to counsel on the record; (2) where the trial court took judicial notice of various hearings from other cases, the transcripts from those proceedings should have

been filed as part of the record on appeal in this case under Rule 81.12(c)(2), because they are necessary to decide the issues; matters omitted from the record are presumed not favorable to the appellant; (3) to preserve a claim of sentencing error, a party needs to object to the error at sentencing, but does not need to include this in a New Trial Motion, since the New Trial Motion must be filed before sentencing; and (4) even though the State and Defendant had agreed that the State would recommend concurrent sentences, where the State at sentencing "deferred to the court" on sentencing and did not advocate either a concurrent or consecutive sentence, there was no breach of the agreement because the sentencing court was always free to ignore the State's recommendation.
Discussion: If the State agrees to make a recommendation for sentencing under Rule 24.02(d)(1)(B), the sentencing court neither accepts nor rejects that agreement. Rather, in a nonbinding plea agreement for a particular sentence, the prosecutor's recommendation is what the court rejects, not the plea agreement itself, and Rule 24.02(d)(4) does not apply. Here, the court had the plea agreement in front of it (because Defendant told the court what it was), the court discussed the agreement with both parties, and acted within its discretion in imposing consecutive sentences.

State v. Harris, 675 S.W.3d 202 (Mo. banc Oct. 3, 2023):
Holding: (1) Even though the trial court found the State had breached a Deferred Prosecution Agreement and the trial court dismissed three of seven charges against defendant with prejudice as a result, the State's appeal must be dismissed because there is not a "final judgment" since four counts remain pending, but (2) State may seek review of this issue via a writ to appellate court.
Discussion: Although Sec. 547.200.2 authorizes the State to appeal, the Supreme Court has always interpreted this portion of the statute to require a "final judgment" before appeal. A judgment is final if it disposes of all disputed issues in the case and leaves nothing left for future adjudication. Because the trial court dismissed three counts with prejudice but did not dispose of four remaining counts, the judgment is not "final." In limited circumstances, an appellate court can treat an improper appeal as an application for an original writ. However, the Supreme Court declines to do that here, since the State faces no punitive consequences if it follows the proper writ procedures. The appropriate procedural mechanism for the State to seek merits review of the trial court's action is an appropriate writ filed in an appellate court. The State may seek such writ at this time. Appeal dismissed.

City of Harrisonville v. Mo. Dep't of Natural Resources, 2023 WL 879026 (Mo. banc Dec. 19, 2023):
Holding: (1) When the Missouri Supreme Court accepts transfer of a case, the Court of Appeals decision is vacated; (2) Rule 84.04(d) makes clear that the Supreme Court reviews only claims of "trial court" error, not claims of Court of Appeals error; (3) Sec. 512.020 authorizes appeal of only "trial court" error; (4) thus, a Point Relied On that the "Court of Appeals erred" is not cognizable at the Missouri Supreme Court and preserves and presents nothing for review.

State v. Slayton, 631 S.W.3d 614 (Mo. App. E.D. 2021):
Holding: Where testimony of five of six witnesses (except Victim's) was missing from the trial transcript due to a machine malfunction, appellate court is unable to conduct meaningful appellate review, and Defendant is granted new trial due to missing transcript; appellate court rejects State's contention that it can review for sufficiency of evidence based on Victim's testimony alone.

State v. Umfleet, 621 S.W.3d 15 (Mo. App. E.D. 2021):
(1) Sufficiency of evidence claim need not be included in a new trial motion to be preserved for appellate review, Rule 29.11(d); and (2) evidence was insufficient to convict Defendant of attempted first-degree burglary where the State failed to charge or prove a specific object offense, i.e., where the State neither charged nor proved what offense Defendant was intending to commit inside the residence.
Facts: Defendant was charged and convicted at trial with attempted first-degree burglary. Defendant was seen trying to open a window of his former girlfriend's house, while she was in the house.
Holding: Defendant contends the State did not prove Defendant intended to commit a crime in the residence as required by Sec. 569.160.1 for first-degree burglary. Neither the charging document nor the State's arguments at trial said what offense, if any, Defendant intended to commit by unlawfully entering the house. The State contends it was not required to specify the object offense. But there is no authority for the State's claim. Prior case law on sufficiency or jury instructions indicates that the State was required to identify the specific object offense, and prove Defendant's intent to commit it. Appellate court cannot become the State's advocate and supply the specific object offense for the State. The burden is on the State to charge a particular offense, and prove Defendant took a substantial step toward committing it. The distinction between first-degree burglary and first-degree trespass is the intent to commit an offense in the residence. Conviction entered for lesser-included offense of first-degree trespass.

State v. Howell, 628 S.W.3d 750 (Mo. App. E.D. 2021):
Holding: (1) Even though other states and federal courts use the parenthetical "(cleaned up)" after citations to indicate that internal quotations, ellipses, etc., have been altered, Eastern District disapproves use of "(cleaned up)" parenthetical; Eastern District says "(cleaned up)" harms "credibility and accuracy," and Court needs to know "precise language" being used in a case or statute; and (2) Where Defendant who had previously waived counsel sought to invoke right to counsel on day of trial, court did not err in proceeding with trial without counsel since no attorney under Rule 4-1.1 (competence) could ethically represent a client in a felony trial the same day without even passing awareness of the basic facts or possible defenses, and court was not required to grant continuance to obtain counsel.

In the Matter of Crocker, 629 S.W.3d 846 (Mo. App. E.D. July 20, 2021):
Holding: Where through no fault of Appellant a transcript of a Webex hearing could not be prepared due to computer malfunction, case remanded for new hearing because it's impossible to conduct meaningful appellate review; "While we acknowledge the

challenges in technology faced by trial courts and parties during the pandemic, it is necessary for parties to be afforded due process and a sufficient record of the underlying proceedings."

Conner v. State, 629 S.W.3d 108 (Mo. App. E.D. Aug. 24, 2021):
Holding: Where Movant had previously filed other 24.035 motions (on which he was denied relief), his newly-filed motion was successive under Rule 24.035(l), and both the circuit court and appellate court lacked authority to hear it or the appeal of it; appeal dismissed.

Bangert v. Rees, 634 S.W.3d 658 (Mo. App. E.D. 2021):
Holding: Trial court erred in excluding on hearsay grounds medical records that were certified as business records under Sec. 490.680, since medical records that are properly certified under the statute are admissible as an exception to hearsay rule; although such records are subject to specific objections such as irrelevancy, inadequate sources of information, being self-serving, going beyond the bounds of legitimate expert opinion, or other similar grounds, they are not inadmissible hearsay; but (2) since proponent of the records didn't make an offer of proof of the records, appellate court cannot determine if proponent was prejudiced by exclusion of the records.

In the Interest of J.R., 633 S.W.3d 899 (Mo. App. E.D. 2021):
Holding: (1) Even though (a) Witness who saw a shooting was not the person who made a neighborhood camera video of the shooting; (b) the video showed a different angle of view than where Witness was; and (c) an Officer testified the quality of the video was not very good, trial court erred in excluding the video (when offered by Defendant) on grounds that a proper foundation could not be established through Witness; all that is required for admission of a video is for the proponent to show that the video is an accurate representation of what it depicts, which can be done through any witness familiar with the subject matter of the video through their personal observation. (2) Even though defense counsel's oral offer of proof failed to say Witness would testify, this would not have affected the court's ruling excluding the video so the issue is preserved for appeal; including that statement in the offer of proof would have been futile.
Discussion: Testimony from the creator of the video is not required. Nor does Witness need to know the circumstances surrounding the creation of the video, or observed the exact view of the subject matter. Witness personally observed the shooting. She was competent to provide a foundation for the video even though Witness did not create it, or view shooting from same angle. Even if another witness described the video, that would not render the video itself inadmissible. Even if the video would not have fully exonerated Defendant, its exclusion was prejudicial because the video supported aspects of the defense.

Jones v. Impact Agape Ministries, 633 S.W.3d 909 (Mo. App. E.D. 2021):
Holding: Where Associate Circuit Court made no recording or had no court reporter for a trial de novo despite the requirements of Sec. 4789.072.1 and 512.180.2 that a record be made, Appellant could not provide a transcript on appeal, so case must be reversed and remanded for a proper record to be made.

Abbott v. State, 2022 WL 3722450 (Mo. App. E.D. Aug. 30, 2022):
Holding: Where (1) Movant filed a premature *pro se* 29.15 motion while his direct appeal was pending, and (2) Movant filed a timely second *pro se* 29.15 motion after his conviction was affirmed, the second *pro se* motion was legally a supplement to the original motion, and thus, the motion court was required to issue Findings on the claims therein (where, as here, appointed counsel filed a statement in lieu of amended motion); since the court did not address the supplemental claims, it did not adjudicate all issues, so the appeal must be dismissed as lacking a final judgment.

State v. Onyejiaka, 2022 WL 4474828 (Mo. App. E.D. Sept. 27, 2022):
Holding: (1) Convictions and sentences for both possession of controlled substance, Sec. 579.015.1, and unlawful use of weapon by possessing firearm while also being in possession of controlled substance, Sec. 571.030.1(11), did not violate Double Jeopardy. (2) Even though constitutional issues must generally be raised at earliest opportunity, appellate court can review unpreserved Double Jeopardy claim as plain error if it can be determined from the face of the record, because claim goes to very power of State to charge defendant.
Discussion: Double Jeopardy protects against multiple punishments for the same offense, but the test is whether multiple punishments were intended by the legislature. Sec. 556.041 provides that when the same conduct may establish the commission of more than one offense, the defendant cannot be convicted of more than one offense if one offense is included in the other. An included offense is one established by proof of the same or less than all the elements of the charged offense. Courts look only to the statutory elements to determine this, not the way the offenses are charged. Possession of a controlled substance requires proof Defendant possessed the illegal substance. Unlawful use of a weapon can be established by possessing a controlled substance, but can also be established by proof of other facts since 571.030 contains 11 different ways to commit the offense. Thus, unlawful use of weapon does not include possession of a controlled substance for Double Jeopardy purposes.

State v. Harris, 2022 WL 16752261 (Mo. App. E.D. Nov. 8, 2022):
Holding: (1) A direct appeal can be taken from a guilty plea alleging that there was an insufficient factual basis for the plea under Rule 24.02(e); (2) standard of review of such unobjected to claims is plain error; and (3) trial court did not plainly err in accepting guilty plea to involuntary manslaughter where Defendant traded drugs with a person who briefly overdosed when Defendant was present, and then later died of an overdose on the drugs when Defendant was not present, because this showed recklessness.
Discussion: (1) The State claims lack of factual basis is not cognizable on direct appeal, because a guilty plea waives appellate review of all error except subject-matter jurisdiction, sufficiency of the charging document, and *Bazell* claims. The State claims the issue can only be raised in postconviction under Rule 24.035. The State's arguments were rejected in *State v. Russell*, 598 S.W.3d 133 (Mo. banc 2020), which held that Rule 24.035 does not and cannot limit the issues which can be raised on direct appeal under Sec. 547.070, which grants defendants the right to appeal final judgments. While *Russell* dealt with excessive sentence, its rationale applies to factual basis. Thus, lack of factual

basis is cognizable on direct appeal. (2) The standard of review for such an unobjected to claim is plain error. (3) Whether a factual basis exists to support involuntary manslaughter is very case-specific. The issue is whether Defendant acted recklessly, i.e., whether there was a conscious disregard of risk of death and a gross deviation from what a reasonable person would do under the circumstances. While there are cases that would support both that Defendant here did and did not act recklessly, appellate court holds that any error here by the trial court in accepting the plea was not "evident, obvious and clear enough" to constitute plain error.

State v. Perkins, 2022 WL 17419393 (Mo. App. E.D. Dec. 6, 2022):
Holding: Even though an objection made after a Witness gives an answer to an objectionable question is usually not considered to be timely made, an exception to this timeliness requirement exists where the grounds for objection only become apparent when the Witness' answer is given; in these circumstances, an objection is timely where the attorney objects to the answer as soon as possible after it is given.

State v. Denson, 2023 WL 4065616 (Mo. App. E.D. June 20, 2023):
Holding: Even though Rule 27.050 states the Attorney General's Office "shall appear" on behalf of State in all cases "other than misdemeanor appeals," the Attorney General's Office "may choose" to handle misdemeanor appeals, citing *State v. Rall*, 557 S.W.3d 500 (Mo. App. W.D. 2018).

State v. Humphrey, 2023 WL 4874068 (Mo. App. E.D. Aug. 1, 2023):
Holding: Where, after jury verdict, (1) Defendant waived his right to direct appeal in exchange for a deal with the State to reduce his conviction and sentence to a lesser charge, and (2) the trial court made an on-the-record inquiry of Defendant to ensure that his waiver was voluntary, the record reflects that Defendant voluntarily waived his right to direct appeal, and appeal is dismissed.

In the Matter of Isreal, 673 S.W.3d 531 (Mo. App. E.D. Aug. 15, 2023):
Holding: Where the trial court took judicial notice of an emergency appointment of guardian and conservator proceeding where no record was made, appellate court cannot review Appellant's claim of error regarding that proceeding because appellate court cannot review the witness testimony; but unlike cases were appellate court dismisses appeal for failure of Appellant to supply a complete record for appellate review, where (as here) there is an incomplete record because no record was made of the trial court proceeding, appellate court reverses and remands so a proper record can be made.

State v. Shoemaker, 675 S.W.3d 672 (Mo. App. E.D. Sept. 5, 2023):
Holding: Even though Defendant received a suspended imposition of sentence (SIS) on two counts after jury trial, where trial court imposed sentences on three counts, there was a "final judgment" on those three counts, so appellate court had authority to hear appeal under Sec. 547.070.
Discussion: The State, relying on *State v. Waters*, 597 S.W.3d 185 (Mo. banc 2020), claims Defendant cannot appeal since there is no "final judgment," as two counts

received SIS. But *Waters* involved a situation where a defendant was found guilty of two counts but the jury hung on two others – leaving those counts unresolved. Here, there are not mistried counts remaining pending before the trial court. This Court has generally taken the approach that in situations, as here, defendants can appeal the counts on which sentence has been imposed.

J.M.L. v. Mo. State Hwy. Patrol, 674 S.W.3d 815 (Mo. App. E.D. Sept. 19, 2023):
Holding: (1) Even though Appellant claimed the case was submitted without a hearing in the trial court, where the legal file indicates a hearing was held and neither party could clarify this at oral argument on appeal, the record is incomplete and case must be remanded to make a proper record; and (2) documents submitted in an Appendix which were not before the trial court cannot be considered on appeal.

J.C.S. v. Mo. State Hwy. Patrol Crim. Records Repository, 675 S.W.3d 712 (Mo. App. E.D. Sept. 19, 2023):
Holding: Where Appellant did not provide a transcript on appeal and the parties did not provide the appellate court with information as to whether a transcript exists, appellate court finds record is incomplete because a record was not made, so reverses judgment and remands case to make a proper record.

State v. Morton, 615 S.W.3d 869 (Mo. App. S.D. 2021):
Holding: Where (1) Defendant was convicted at trial and did direct appeal, (2) on direct appeal, appellate court remanded for resentencing on one count; and (3) after resentencing, Defendant appealed again and raised new claims of trial court error at this original trial, the new claims were barred by the law of the case doctrine, because these claims of error could have been raised in the original direct appeal.

State v. Kleeschulte, 618 S.W.3d 246 (Mo. App. S.D. 2021):
Holding: (1) Even though Appellant filed a general pretrial motion to "federalize" or "constitutionalize" his trial objections, unless such pretrial motion explains why a specific ground requires a trial court to take a specific course of action, the motion adds nothing to the trial objection and preserves nothing for appeal; (2) where Defendant objected to evidence on "hearsay" grounds at trial, the pretrial motion to "federalize" or "constitutionalize" did not provide the level of specificity necessary to inform the trial court that this was also an objection based on the Confrontation Clause, so that issue is not preserved for appeal.

State v. Burros, 2022 WL 681346 (Mo. App. S.D. March 8, 2022):
Holding: (1) Defendant's failure to object to the lack of findings at trial that he was a prior and persistent offender failed to preserve the issue for appeal, and the issue was not jurisdictional because trial courts have subject matter jurisdiction over criminal cases under Art. V, Sec. 14, Mo.Const.; and (2) where the trial court pronounced Defendant to be a prior and persistent offender, but failed to check the box on the sentencing form about this, that is a clerical error which should be corrected *nunc pro tunc*.
Discussion: Defendant argues that a challenge to the court's authority to impose an enhanced sentence is "jurisdictional in nature" and is not waived by failure to raise the

issue in the trial court. Defendant cites *State v. Burdette*, 134 S.W.3d 45 (Mo. App. 2004) for this proposition. However, *Burdette* was decided before *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009), which eliminated the notion of "jurisdictional competence" and held that trial courts always have subject matter jurisdiction over criminal cases under Art. V, Sec. 14 Mo.Const. After *Webb*, a claim that a trial court has exceeded its statutory power or authority does not implicate the court's subject matter jurisdiction. To the extent *Burdette* ruled to the contrary, it should no longer be followed. The failure to object at trial renders this issue reviewable only for plain error under Rule 30.20. The failure to make findings is a procedural deficiency that does not necessarily create manifest injustice provided there is evidence to support a finding that Defendant is a prior and persistent offender, the trial court relied on such evidence, and the State was not unfairly given more than one opportunity to carry its burden of proof. Defendant has not sought plain error review, so such review is declined.

Hatmon v. State, No. SD37074 (Mo. App. S.D. March 31, 2022):
Holding: Where (1) Court of Appeals had remanded postconviction case for an abandonment hearing, and then after that (2) State claimed on second appeal that the Movant's *pro se* motion was untimely, the law-of-the-case doctrine precluded Court of Appeals from re-considering timeliness issue, because in remanding the case for an abandonment hearing in the prior appeal, the appellate court had implicitly determined that the *pro se* motion was timely. This is because the Court of Appeals had a duty to examine timeliness in the first appeal, and if the *pro se* motion had been untimely, the Court of Appeals would have dismissed case.

State v. Creutz, 2022 WL 17828847 (Mo. App. S.D. Dec. 21, 2022):
Holding: (1) Even though Defendant's motion to suppress evidence never cited Sec. 304.155 (which states that police can tow vehicles after taking someone into custody "where such person is unable to arrange for the property's timely removal"), where Defendant repeatedly argued to the trial court that the evidence obtained from an inventory search should be suppressed because Defendant was not given the opportunity to contact someone to remove his vehicle before it was searched after his arrest and asserted this in his new trial motion, appellate court will treat the Sec. 304.155 issue as preserved for appeal, although the better practice would have been to cite the statute in trial court; but (2) on the merits, the State established the search was motivated by legitimate governmental interest regarding inventory searches, not a desire to search for evidence, and having someone else remove the vehicle was not an option because no other driver was present to accept the vehicle and Defendant was incoherent and apparently unable to arrange for someone to get it.

State v. Estes, 2023 WL 1432021 (Mo. App. S.D. Feb. 1, 2023):
Holding: In order to preserve Speedy Trial violation claim for appeal, Defendant must have filed motion to dismiss on grounds of speedy trial violation in trial court (and preserve failure to dismiss on speedy trial grounds in new trial motion); merely alleging Speedy Trial violation without seeking dismissal isn't sufficient to preserve issue for appeal.

State v. Hansen, 2023 WL 1514941 (Mo. App. S.D. Feb. 3, 2023):
Holding: (1) Where Defendant-Appellant's Point Relied On alleged only that the trial court erred in not granting judgment of acquittal "at the close of the State's evidence," this claim was waived because Defendant presented evidence at trial, thus waiving any claim of error "at the close of the State's evidence;" and (2) even though a claim as to sufficiency of evidence can be raised on appeal even if not timely raised in the trial court, Rule 29.11(e), the purpose of a Point Relied On is to give notice to the opposing party of the precise matter being raised on appeal, and here, Appellant's Point Relied On fails to raise a sufficiency claim altogether, thus preserving nothing for review.

State v. Jobe, 2023 WL 2258550 (Mo. App. S.D. Feb. 28, 2023):
Holding: (1) Defendant can do direct appeal of his claim that his sentence was unlawfully excessive, and is not limited to raising the claim in a Rule 24.035 motion; and (2) where the trial court orally pronounced a 15-year sentence and entered a docket entry memorializing this, but the next day, the court said it "misspoke" and resentenced to a 20-year sentence instead, the judgment was final at the time the 15-year sentence was memorialized and the court had no authority to enter a 20-year sentence later.
Discussion: (1) The State claims Defendant can only raise his claim in a Rule 24.035 motion. But in *State v. Russell*, 598 S.W.3d 133 (Mo. banc 2020), the Supreme Court held a defendant can challenge excessiveness of a sentence in a direct appeal. (2) A judgment in a criminal case becomes final when sentence is imposed. A trial court loses jurisdiction after sentence is imposed, and any action after that is a nullity. Here, the sentence was orally pronounced and memorialized via docket entry the same day. The trial court had no authority to change the sentence the next day. The resentencing was void. Remanded with directions to vacate 20-year sentence.

State v. Gomez, 2023 WL 4285889 (Mo. App. S.D. June 30, 2023):
Holding: Even though Appellant-Defendant's brief fails to comply with the briefing requirements of Rule 84.04, appellate court will consider sufficiency of evidence because sufficiency claims are considered on appeal even if not briefed or not properly briefed (but evidence sufficient here).

Huckleberry v. State, 674 S.W.3d 801 (Mo. App. S.D. Sept. 1, 2023):
Holding: Where (1) 29.15 Movant's amended motion alleged one claim of ineffective appellate counsel and five claims of ineffective trial counsel; (2) the State filed a motion which argued the appellate counsel claim should be denied without hearing; and (3) the motion court thereafter issued a brief Order "agree[ing]" with the State and denying the entire motion (without further Findings), the motion court clearly erred because the State's argument only pertained to the appellate counsel claim; thus, the Order didn't rule on the five trial counsel claims, and so there is no "final judgment" to appeal from. Appeal dismissed.

Marvin v. State, 2023 WL 6531509 (Mo. App. S.D. Oct. 6, 2023):
Holding: (1) Even though plain error review is usually not available in a postconviction appeal under Rules 24.035 or 29.15, where the basis of the plain error claim could not have been known to Movant at the time the amended motion was filed, plain error review

may occur; but (2) even though the motion court judge made comments after the amended motion was filed which Movant claims show prejudgment and bias, the motion court did not err in failing to, *sua sponte*, disqualify itself because the court's comments were proper based on the evidence presented.

Discussion: Plain error review is usually not available in a postconviction case because Rules 24.035 and 29.15 expressly waive any claims "known" to Movant which aren't included in an amended motion. Thus, 24.035 and 29.15 usually conflict with the plain error Rule 84.13. However, a claim of alleged judicial bias occurring *after* filing an amended motion is not a claim that could be *known* to Movant and at the time an amended motion is filed. Thus, there is no conflict between Rule 29.15 and Rule 84.13 in allowing such claims to be reviewed for plain error.

State v. Jackson, 2023 WL 6839147 (Mo. App. S.D. Oct. 17, 2023):

Holding: Even though there was a direct appeal pending of Defendant's marijuana conviction at trial, where the trial court expunged this conviction while the appeal was pending, the trial court had jurisdiction to expunge despite an appeal pending since the expungement was a separate case from the criminal one, and the expungement rendered the appeal moot.

Discussion: The State argues the trial court lacked jurisdiction to vacate and expunge records during the pendency of the direct appeal of the marijuana conviction. As a general rule, an appeal cuts off a trial court's jurisdiction to exercise any judicial function in a case and vests jurisdiction in the appellate court only. But, here, the trial court did not act in the pending criminal case. The expungement action was done in an entirely separate case filed by Defendant under Art. XIV, Sec. 2, Mo.Const., which provides for expungements. Because there is no longer a sentence or conviction related to the marijuana conviction, the direct appeal is moot. Dismissed as moot.

Jendro v. State, 2023 WL 8445894 (Mo. App. S.D. Dec. 6, 2023):

Holding: (1) Where first postconviction counsel had filed a timely amended 29.15 motion, the motion court was without authority to allow the filing of a second amended motion by second counsel on grounds that first counsel had "abandoned" Movant by not alleging additional claims, since Rule 29.15(g) allows only one amended motion; but (2) even though motion court erred in considering second amended motion, where the motion court decided identical claims as in the first (authorized) amended motion, appellate court will not remand case to issue new Findings on first motion, but under Rule 84.14 can enter the judgment on the first motion, as the motion court should have done, and can dismiss claims not in the first amended motion.

State v. Parrow, 2023 WL 8664495 (Mo. App. S.D. Dec. 15, 2023):

Holding: (1) Joinder and severance are separate issues; (2) if joinder was not proper, prejudice is presumed and severance is mandatory; (3) if joinder was proper, then appellate court reviews for whether trial court abused discretion in denying a motion for severance; but (4) where a defendant did not file a motion to sever in trial court, appellate court reviews only for whether joinder was proper.

Briggs v. State, 621 S.W.3d 614 (Mo. App. W.D. 2021):
Holding: (1) Where retained private counsel filed amended 29.15 motion untimely, it cannot be considered, and there is no abandonment because the abandonment doctrine doesn't apply to non-appointed counsel; and (2) motion court ruled on claims in the untimely amended motion, but not claims in the timely *pro se* motion, there is no "final" judgment since the *pro se* claims have not been finally adjudicated, so appeal must be dismissed.

State v. Escalona, 619 S.W.3d 612 (Mo. App. W.D. 2021):
Holding: (1) Where disposition of an issue on appeal involves information contained in a Sentencing Assessment Report (SAR), either party may request that the SAR be made part of the record on appeal, even though SARs are not normally "filed" in the circuit court and aren't public documents until after a defendant pleads guilty, Sec. 577.026; (2) where Appellant-Defendant failed to include the SAR in the record on appeal, appellate court assumes the omitted portions of the record are unfavorable to Appellant and favorable to trial court's decision regarding sentencing; Appellant had a duty under Rule 81.12 to file a record on appeal with all documents necessary for appellate review.

State v. Hudson, 626 S.W.3d 800 (Mo. App. W.D. 2021):
Holding: A Defendant who pleads guilty can take a direct appeal from a denial of a *presentencing* motion to withdraw guilty plea under Rule 29.07(d).
Discussion: The State claims appellate court has no authority to consider whether trial court erred in denying a pre-sentencing motion to withdraw guilty plea (based on ineffective counsel), because a direct appeal from a guilty plea is limited to subject-matter jurisdiction, the sufficiency of the charging documents, and "possibly" excessive sentencing. However, the State fails to distinguish *post*-sentencing motions under Rule 29.07 from *presentencing* motions. A defendant who pleads guilty may appeal from a final judgment convicting and sentencing him to challenge the trial court's denial of a *presentence* motion to withdraw plea under 29.07(d). The State argues that Rule 24.035 is the "exclusive procedure" for raising a claim of ineffective assistance affecting the voluntariness of a guilty plea. But, again, the State confuses a *pre*-sentence motion from a *post*-sentence motion.

Hudson v. State, 626 S.W.3d 884 (Mo. App. W.D. 2021):
Where Movant filed a timely Rule 24.035 motion, but after that, he filed and was granted leave under Rule 30.03 to pursue a direct appeal of a motion to withdraw guilty plea, the 24.035 postconviction proceedings should have been stayed pending the direct appeal, so the motion court's judgment deciding the postconviction case before the appellate mandate in the direct appeal must be vacated; (2) Claims raised in the motion to withdraw guilty plea may face issue preclusion if re-raised in the 24.035 case.
Facts: Prior to sentencing, Defendant/Movant filed a motion to withdraw guilty plea under 29.07(d). The trial court denied it, and sentenced him. Movant then filed a 24.035 motion. Subsequently, Movant was granted leave to pursue a late direct appeal of the 29.07(d) motion. No one ever informed the motion court that the direct appeal was pending, so the motion court held an evidentiary hearing, and ultimately denied relief –

which Movant is appealing in the instant case. After the motion court denied the 24.035 motion, the direct appeal was decided, which affirmed the denial of the 29.07(d) motion. **Discussion:** 24.035(b) sets forth the procedure for premature 24.035 motions. As relevant here, the motion was premature before the date of the direct appeal appellate mandate affirming the conviction. Since the motion court decided the 24.035 case before that time, its ruling should be vacated and the case remanded so that the court can proceed after the criminal conviction was final. The motion court should have stayed the 24.035 proceedings when the direct appeal was filed, and waited to proceed until the direct appeal was concluded.

In the Interest of D.R.T. v. Juvenile Officer, 626 S.W.3d 311 (Mo. App. W.D. 2021):
Holding: Where Juvenile was certified in to adult court in 2019, that judgment became final 30 days after entry and a notice of appeal was required to be filed within 10 days thereafter; notice of appeal filed in 2020 after *D.E.G. v. Juvenile Officer of Jackson County*, 601 S.W.3d 212 (Mo. banc 2020)(holding statute authorized such appeals) was untimely, because D.E.G. did not change the law but "simply announced what had been true since at least 1994 when section 221.261" was enacted.

State v. Seaton, 628 S.W.3d 424 (Mo. App. W.D. 2021):
Holding: Even though an unpublished memorandum opinion is generally not binding or precedential in other cases, it is binding on the parties with respect to that case and subsequent postconviction case.

In the Matter of Care and Treatment of Turpin v. State, 628 S.W.3d 416 (Mo. App. W.D. 2021):
Holding: A Petitioner for SVP-release who wishes to challenge the sufficiency of the court's Findings on appeal must have first raised the issue in a motion to amend judgment under Rule 78.07(c).

Fuller v. Griffith, 630 S.W.3d 911 (Mo. App. W.D. 2021):
Holding: (1) Even though indigent-Appellant's small claims petition for trial de novo was dismissed without prejudice for failing to pay a filing fee, and a dismissal without prejudice is generally not appealable, Appellant can appeal the filing fee issue because any attempt by him to refile his petition for trial de novo in circuit court would be futile; (2) where Appellant filed his notice of appeal before the circuit court denominated its ruling a "judgment," the notice was premature but became effective immediately after the later judgment became final per Rule 81.05(a), so was timely; and (3) where Appellant had been granted in forma pauperis status when he filed his initial small claims petition, Sec. 506.369.2 provides that a court's determination of inability to pay "shall apply to the case until final judgment is entered by either the trial or appellate court," so Appellant was not required to pay a fee to file for trial de novo.

State v. Jackson, 636 S.W.3d 908 (Mo. App. W.D. 2021):
Holding: (1) Even though the State claimed on appeal that the trial court plainly erred in imposing concurrent sentences for rape, tampering with a victim, and violating an order of protection (which State claimed were required to be consecutive under Secs.

558.026.1(1) and (5)), the general rule is that, in the absence of a cross-appeal by the State, the State will not be heard to complain about portions of the judgment not favorable to it; but (2) regardless, the State's argument is without merit because the conduct giving rise to the charges for victim tampering and violation of a protection order occurred well after the rape of Victim, so not "during or at the same time as" the rape conviction, Sec. 558.026.1(1).

State v. Henderson, 2021 WL 6048862 (Mo. App. W.D. Dec. 21, 2021):
Holding: Even though (1) Defendant's original conviction was reversed on direct appeal, and (2) the State claimed that an evidentiary ruling made in the first trial was "the law of the case" and could not be raised in the second direct appeal (after retrial), Court of Appeals questions whether "law of the case" bars appeal of the issue since the appellate court would not have decided that issue in the first appeal even if it had been raised, since case was reversed on other grounds; this is distinct from cases where an appellate court decides an issue on direct appeal, and the parties try to re-litigate that issue later. (But Court of Appeals doesn't decide "law of case" issue because Defendant's point lacks merit.)

State v. Borst, 2022 WL 287305 (Mo. App. W.D. Feb. 1, 2022):
Holding: (1) Where Defendant was charged with second-degree murder for "knowingly causing the death of Victim by shooting him," but instruction allowed jury to convict for "it was Defendant's purpose to cause serious physical injury to Victim," this was a fatal variance from the original charge; and (2) even though Defendant did not use the words "fatal variance" in his objection to the instruction, where Defendant objected and asked for language consistent with the original charge, the issue was preserved for appeal; where an objection plainly informs trial court of a party's position, party need not cite a specific rule or statute in objection or new trial motion to preserve issue.
Discussion: Due process requires notice of the charge, which means a defendant cannot be charged with one offense, or form of offense, but convicted of another. "Conventional" second degree murder, Sec. 565.021.1, can be committed by either "knowingly causing" the death of another," or "with the purpose of causing serious physical injury, the defendant causes the death of another." If one form or method is charged, a different form or method cannot be submitted to jury. Here, the manner in which the offense was charged differed from the manner submitted to the jury. Defendant was prejudiced because his defense was that he shot Victim in self-defense in the legs but did not "knowingly cause" his death. However, the manner in which the offense was submitted – allowing conviction if Defendant's purpose was to cause serious physical injury -- negated Defendant's *mens rea* defense. Reversed for new trial.

In the Interest of J.N.W. v. Juvenile Officer, 2022 WL 453049 (Mo. App. W.D. Feb. 15, 2022):
Holding: (1) Even though the juvenile's court's order dismissing Defendant-Juvenile from juvenile court's jurisdiction and certifying him to the trial court was not denominated a "judgment," the order was immediately appealable, because Rule 74.01(a)'s judgment denomination requirement is not applicable to Sec. 211.071 certification proceedings; (2) the time for filing such an appeal is 30 days after the

dismissal (as with other civil judgments), because the juvenile court retains control over its judgment for 30 days after entry, Rules 75.01 and 81.04(a); judgment becomes final after 30 days, and then there is 10 days to file the notice of appeal; (3) even though Juvenile filed his appeal before the 30 days expired, his premature notice became effective immediately after the judgment was final, Rule 81.05(b); (4) the standard of review for a certification appeal is whether the trial court abused its discretion in certifying, Sec. 211.071.1; (5) Juvenile can raise on direct appeal his claim of ineffective assistance of counsel at his certification hearing where the record is sufficient to raise it on direct appeal; (6) it remains an open question whether the *Strickland* standard applies to ineffective assistance claims, or the "meaningful hearing" standard applied in termination of parental rights cases; (7) since certification hearings are not adjudicatory, there is no authority for the general proposition that the rules of evidence apply to certification proceedings.

State v. Masters, 2022 WL 4073850 (Mo. App. W.D. Sept. 6, 2022):
Holding: (1) Even though Defendant told trial court he wanted to represent himself, and court told Defendant it was not in his best interest to represent himself and that if he was convicted he would be "hard-pressed" to claim he should have had an attorney, this *Faretta* hearing was inadequate since court did not advise Defendant of the nature of charges, the potential sentences if convicted, or potential defenses to the charges, and did not give Defendant the opportunity to sign a written wavier of counsel form as required by Sec. 600.051; (2) Even though Defendant did not raise these issues in a new trial motion, claim that a waiver-of-counsel hearing was constitutionally inadequate is reviewed *de novo*, since a *pro se* Defendants cannot be expected to object that his waiver of counsel was not voluntary due to an inadequate *Farretta* record.

State v. Putfark, 2022 WL 4073854 (Mo. App. W.D. Sept. 6, 2022):
Holding: (1) Double Jeopardy was violated where Defendant was convicted at trial of first-degree statutory sodomy, Sec. 566.062, and first-degree child molestation, Sec. 566.067, based on the same conduct, because the child molestation is a lesser-included offense of the sodomy; (2) even though the Double Jeopardy claim was not preserved for appeal, it can be reviewed as plain error where it can be determined from the face of the record; and (3) even though Defendant was charged with first-degree child molestation, where trial court mistakenly gave the jury instruction for second-degree child molestation, Defendant must be resentenced for second-degree child molestation; resentencing is required even though the sentence is within the range of punishment for second-degree child molestation (a Class B felony), since the record showed the court mistakenly believed the offense was a Class A felony with a higher punishment range.
Discussion: (1) Double Jeopardy protects against multiple punishments for the same offense. Sec. 556.041 provides that where the same conduct establishes commission of more than one offense, a defendant may be convicted of both unless one is included in the other. First-degree child molestation is a lesser-included offense of first-degree statutory sodomy. Here, the jury considered the identical evidence to convict of both offenses. There was no other evidence that Defendant did any other touching of Victim. Thus, the second-degree child molestation count was established with fewer facts necessary to establish the statutory sodomy. This Double Jeopardy violation is

determinable from the face of the record and constitutes plain error. (3) Defendant was charged with Class A felony first-degree child molestation, but the court mistakenly submitted the jury instruction for Class B felony second-degree child molestation. Thus, Defendant was only convicted of the Class B felony. Although Defendant's actual sentence was within the authorized range of a Class B felony, the parties and the Sentencing Assessment Report all assumed the offense was a Class A felony, and argued that range of punishment. The trial court gave 10 years, the minimum for an A felony. Resentencing is required because trial court mistakenly believed offense was an A felony and that the minimum sentence was 10, when it was really five.

In the Interest of D.E.D. Juvenile Officer v. D.E.D., 2022 WL 4834974 (Mo. App. W.D. Oct. 4, 2022):
Holding: (1) Trial court plainly erred in certifying Juvenile-Defendant to circuit court without explaining its decision, because Sec. 211.071.1 requires "findings showing the reasons underlying the court's decision"; Rule 129.04d requires the Order state "the reasons for [the court's] decision", and 5th and 14th Amendment and Mo. Const. Art. I, Sec. 10 constitutional rights to a fair proceeding and due process require a decision set forth its basis sufficient to permit meaningful appellate review; (2) even though the Order certifying Juvenile was not denominated a "judgment," Rule 74.01(a)'s denomination requirement is not applicable to appeal of certification Orders, which are appealable.

State v. Gannon, 2022 WL 14938744 (Mo. App. W.D. Oct. 25, 2022):
Holding: Even though the Southern District and a concurring opinion by Judge Wilson hold that an appellate court should not engage in plain error review of jury instructions where defense counsel did not object to the instructions under circumstances that may have indicated a trial strategy reason for doing so, this no-plain-error review approach has not been adopted by a majority of the Missouri Supreme Court, so Western District will engage in plain error review; the one exception would be where the record shows a Defendant "invited" the instructional error by proffering the instruction "jointly" with the State.

State v. Crosby, 2022 WL 14938743 (Mo. App. W.D. Oct. 25, 2022):
Holding: (1) Trial court plainly erred in counting a conviction which occurred *after* the date of the charged offense to establish persistent offender status (and, hence, an extended range of punishment), because Sec. 558.016.6 requires that the previous finding of guilt "be prior to the date of commission of the present offense," and (2) even though defense counsel stated "no objection" to admission of exhibits of Defendant's prior judgments of conviction, this statement in context meant "no objection" to admission of the exhibits, which is distinct from the trial court's finding Defendant to be a persistent offender. (Appellate court expresses no opinion as to whether plain error review would be available if counsel's statement of "no objection" could be read more broadly to state no objection to trial court finding Defendant to be persistent offender.) Remanded for resentencing within non-extended range of punishment.

<u>In the Interest of P.D.E. v. Juvenile Officer</u>, 2022 WL 17100535 (Mo. App. W.D. Nov. 22, 2022):
Holding: Where (1) Juvenile Court held a disposition hearing in March, ordered that Defendant-Juvenile be made a ward of the court, and that Juvenile pay restitution "in an amount to be determined," but (2) Court did not determine the amount owed until October 2021, a Notice of Appeal filed in October 2021 of the disposition order is untimely because it had to be filed no later than 40 days after the March disposition order, which was the "final" judgment appealed from; Sec. 211.261.1 made that judgment "final" 30 days after entry, and Rule 81.04 requires Notice of Appeal be filed within 10 days of final judgment. But case transferred to Supreme Court due to general interest and importance of time for filing Notice of Appeal.

<u>State v. Vandergrift</u>, 2022 WL 17587482 (Mo. App. W.D. Dec. 13, 2022):
Holding: Time for filing Notice of Appeal in criminal case is within 10 days after oral pronouncement of sentence, even where trial court does not enter a written judgment and sentence until later (here, eight months later). But case transferred to Supreme Court due to general interest and importance of time for filing Notice of Appeal.

<u>In re the Matter of K.L.M. v. Juvenile Officer</u>, 2023 WL 1128221 (Mo. App. W.D. Jan. 31, 2023):
Holding: Where (1) the only issue raised on appeal was whether Juvenile Court erred in failing to grant continuance of dispositional hearing (where Juvenile was committed to juvenile facility), but (2) Case.net showed Juvenile had subsequently been released on probation but then held on a new allegation, the appeal is moot because there is no relief the appellate court could grant in regard to the continuance motion, since Juvenile was no longer being held for anything that happened at the dispositional hearing.

<u>In the Interest of A.B.W., Juvenile Officer v. A.B.W.</u>, 2023 WL 2278602 (Mo. App. W.D. Feb. 28, 2023):
Holding: Where (1) the only issue raised on appeal was the Juvenile Court's disposition (sentence) of Juvenile-Defendant, and (2) Juvenile had been released from custody since the appeal was filed, there is no relief the appellate court can grant, so case is dismissed as moot.
Discussion: Here, Juvenile has already received the outcome Juvenile requested at trial and is requesting on appeal, i.e., a non-custodial outcome. A case is moot if an appellate judgment would have no practical effect. One exception to mootness is when a Juvenile is challenging their *adjudication* (conviction) on appeal, because an adjudication may have collateral consequences. But, here, Juvenile isn't challenging their adjudication, only their disposition. Thus, collateral consequence concerns aren't present. Case dismissed as moot.

<u>State v. Vandervort</u>, 2023 WL 2656828 (Mo. App. W.D. March 28, 2023):
Holding: Where (1) trial court made oral Order granting a motion to suppress; (2) State filed interlocutory appeal within 5 days per Sec. 547.200.1; (3) trial court then entered written Findings granting the motion to suppress, and (4) State filed a second notice of appeal within 5 days of that ruling, the appellate court was not without jurisdiction to

hear issues arising from the second notice of appeal; the first notice was filed in an abundance of caution to meet the 5-day deadline to appeal, and it was unclear at that time whether the trial court would be entering written Findings.

State v. Whirley, 2023 WL 2656825 (Mo. App. W.D. March 28, 2023):
Holding: Where after guilty plea (1) trial court sentenced Defendant to seven years in prison for unlawful use of a weapon, Sec. 571.030.1(9), which carried a mandatory minimum 15-year sentence, (2) the State filed a notice of appeal of that sentence, and (3) the trial court then purported to set aside its prior judgment and sentenced Defendant to 15 years, the trial court lost jurisdiction to change its original judgment once sentence was imposed, but the State can appeal this sentencing error, and the trial court plainly erred in imposing a sentence below the statutory minimum; appellate court vacates the sentence and remands for resentencing, but notes Defendant can move to withdraw his guilty plea under Rule 29.07(d) because "[p]rior to sentencing, the withdrawal of a guilty plea is freely allowed."
Discussion: Sec. 547.200.2 authorizes the State to appeal "in all other criminal cases" except those were double jeopardy would result. This "catch-all" provision authorizes the appeal here. The State's appeal does not violate double jeopardy. A trial court loses jurisdiction to modify its judgment in a criminal case once sentence is imposed. Thus, the trial court had no authority to modify its prior sentence. However, a sentence below a mandatory minimum constitutes plain error. The power to define crimes and punishment is exclusively vested in the Legislature. To leave the original error in the judgment uncorrected would give the courts the power to define the range of punishment, contrary to the Legislature's mandate. Sentence vacated and remanded for resentencing.

U.S. v. Reyes-Barreto, 2022 WL 247827 (1st Cir. 2022):
Holding: Defendant's appeal challenging reasonableness of his 12-month prison sentence was not rendered moot by his release during appeal, where Defendant continued serving supervised release portion of sentence.

People v. Johnson, 2021 WL 5873058 (Colo. 2021):
Holding: Where Defendant died during direct appeal, common law doctrine of abatement ab initio required vacation of restitution order.

State v. Gomes, 2021 WL 262029 (Conn. 2021):
Holding: Even though Defendant was deported, this did not make his appeal moot since a favorable decision would remove stain of criminal conviction.

Champ v. State, 2021 WL 536261 (Ga. 2021):
Holding: Where Defendant raises a right to be present claim for first time on appeal, case should be remanded to trial court to make record and factual findings on what happened at trial, unless claim can easily be rejected based on existing record.

Randolph v. Com., 173 N.E.3d (Mass. 2021):
Holding: A third-party who is ordered to provide a DNA sample in a postconviction case has a right to appeal that decision, even though they have not intervened in the postconviction case.

State v. Tesfasilasye, 2022 WL 5237738 (Wash. 2022):
Holding: (1) Appellate court will apply de novo review as standard for reviewing whether race played role in peremptory strike of juror in violation of court rule; and (2) an objective observer would believe race played a role in prosecutor's strike of Latino immigrant juror, where prosecutor misstated what juror had said about eyewitness testimony and didn't strike another juror who made similar remarks.

People v. Jennings, 2021 WL 3671109 (Colo. App. 2021):
Holding: Defendant's guilty plea did not preclude appellate review of Defendant's claim that plea judge exhibited bias against her so as to warrant disqualification.

Com. v. Jones, 2021 WL 5964729 (Pa. Super. 2021):
Holding: Even though a video was never formally admitted at trial by being moved into evidence, where the trial court had determined the video was admissible before allowing it to be played at trial, the video was part of the record that could be considered on appeal.

State v. Cruz-Yon, 2021 WL 5295070 (Wash. Ct. App. 2021):
Holding: Non-English speaking Defendant on direct appeal must have a translated version of their transcript and attorney's brief in order to inform Court of Appeals of issues they wish to raise.

Attorney's Fees

City of Skidmore v. Stanton, 668 S.W.3d 277 (Mo. App. W.D. 2023):
Holding: (1) Where Defendant was charged and convicted at a jury trial for violating a municipal ordinance against maintaining nuisance properties and was fined $500, the trial court was without authority to order Defendant to pay $8,000 of City's attorney's fees; although Sec. 79.383 allows a city to recover attorney's fees in certain nuisance actions where authorized by ordinance, the ordinance at issue here did not authorize attorney's fees for prosecution under the ordinance (only for abatement); (2) trial court was also without authority to order injunctive relief because the charging document did not mention injunctive relief, City didn't raise that issue until sentencing, City didn't plead a continuing violation, and the case was tried to a jury, whereas an injunction is an equitable remedy tried to a court.

Bail – Pretrial Release Issues

Nichols v. McCarthy, 638 S.W.3d 902 (Mo. App. E.D. 2021):
Holding: (1) Rules 22.04 and 33.01 require only that a court rely on "available information" – meaning information present or ready for immediate use -- when setting bond in an *initial* arrest warrant; only if the available information at the time includes information regarding defendant's ability to pay is the court required to consider that; and (2) the Rules do not impose upon police, prosecutors or the court an obligation to investigate a defendant's financial resources and ability to pay before an *initial* arrest warrant is issued under Rule 22.04.

State v. Woolery, 2023 WL 4188250 (Mo. App. W.D. June 27, 2023):
Holding: (1) Where Defendant had been indicted and appeared at first appearance/arraignment without counsel, the trial court did not err in not appointing counsel at that time because Rule 31.02(a) only requires the court to tell Defendant that it will appoint counsel if Defendant cannot afford one (which the court did), and the Rule does not require suspension of initial appearance until counsel has been appointed; (2) under the Sixth Amendment, the mere label of a proceeding as "arraignment" does not create a "critical stage" requiring counsel; whether counsel has to be present depends on whether Defendant will "irretrievably lose" defenses or other rights if counsel isn't present; (3) even though Defendant's bail hearing was not held within seven days as required by Rule 33.05, where the court ultimately denied a bond reduction, Defendant cannot show prejudice; in any event, this issue should have properly been the subject of a remedial writ under Rule 33.09.

State v. Mascareno-Haidle, 2022 WL 2351632 (N.M. 2022):
Holding: Even though Defendant's larceny was extreme, the offense by itself was not sufficient to meet State's burden of proving that no reasonable conditions would protect the safety of the community so as to deny pretrial release; to hold otherwise would eliminate the State's constitutional burden.

State v. Barnett, 2023 WL 6153709 (Utah 2023):
Holding: Even though State Constitution stated legislature "may" deny bail for certain crimes, this did not authorize legislature to mandate bail be automatically denied even for such offenses because other provisions of the State Constitution gave a right to bail for all offenses.

Ex parte Green, 2023 WL 6168336 (Ala. Crim. App. 2023):
Holding: Trial court lacked authority to revoke bond where State had not moved to do so; trial court's *sua sponte* revocation was an improper reopening of the pretrial detention hearing.

Brady Issues

State v. Deroy, 623 S.W.3d 778 (Mo. App. E.D. 2021):
Holding: (1) Conviction for both stealing, Sec. 570.030, based on 'possessing" a car, and first-degree tampering, Sec. 569.080, based on "operating" the car does not violate Double Jeopardy since the elements of the offenses are different; (2) even though police damaged Defendant's phone when they tried to extract data from it so that Defendant later wasn't able to extract his own possibly exculpatory data, this alone did not demonstrate "bad faith" by police to support a due process violation for destruction of potentially exculpatory evidence.

Com. v. Pope, 2022 WL 2036833 (Mass. 2022):
Holding: Prosecutor committed Brady violation in failing to disclose memo and preliminary field report by district attorney-member of homicide response team which revealed inconsistencies in testimony of key witness and their version of event.

Child Support

State v. Rust, 2023 WL 8368230 (Mo. App. S.D. Dec. 4, 2023):
Holding: (1) After the 2011 amendment of Sec. 568.040, not paying "without good cause" is no longer an element of criminal nonsupport; it is now an affirmative defense on which Defendant bears burden of production and persuasion; and (2) on appeal, appellate court must ignore even uncontradicted evidence of the affirmative defense under appellate standard of reviewing evidence in light most favorable to verdict.

Civil Procedure

Allsberry v. Flynn, 628 S.W.3d 392 (Mo. banc 2021):
Holding: Where Circuit Clerk brought declaratory judgment action against Presiding Judge to enjoin Presiding Judge from suspending her from office, circuit judge in declaratory judgment action erred in holding it had no power to order injunctive relief against another circuit judge; the circuit court's authority in this case is no different than in any other case in which a plaintiff seeks a declaration of rights and injunctive relief against a defendant.

City of St. Louis v. State, 2022 WL 1228934 (Mo. banc April 26, 2022):
Holding: Plaintiff-Cities can proceed with declaratory judgment action as to constitutionality of Second Amendment Preservation Act (SAPA), Secs. 1.410 – 1.485, because they otherwise lack an adequate remedy, even though Plaintiff-Cities are also defendants in multiple individual lawsuits under SAPA.
Discussion: Defendants claim Plaintiff-Cities can raise their constitutional claims in the multiple SAPA lawsuits pending against them. This Court has repeatedly rejected the notion a person must violate the law to create a ripe controversy. Pre-enforcement actions to assert constitutional claims present a ripe controversy for adjudication. Parties

need not subject themselves to multiple suits or await imposition of penalties under an unconstitutional enactment in order to assert a constitutional claim for an injunction under Declaratory Judgment Act. Remanded for ruling on merits.

Hill v. Wallach, 2023 WL 2586185 (Mo. banc March 21, 2023):
Holding: Even though Plaintiffs contended certain settlement documents and emails from a prior case were protected from discovery in a new case by the work-product doctrine under Rule 56.01(b)(5), the work-product protection was waived because Plaintiffs had voluntarily disclosed the protected material to an adversary (insurance company for at-fault driver) in the prior case.
Discussion: The fact that Plaintiffs disclosed the documents to a former adversary rather the current adversary in the new case is irrelevant. Once Plaintiffs disclosed the documents and emails in the prior case, they waived work-product protection in any subsequent case in which the documents and emails would otherwise be discoverable.

In the Interest of L.N.G.S., Juvenile v. A.S., 2023 WL 2586188 (Mo. banc March 21, 2023):
Holding: Even though (1) Appellant-Relatives had been given temporary custody of Child by Children's Division, but (2) after apparent abuse of Child by Relatives, Children's Division filed petition for child neglect and court issued judgment placing Child in custody of Children's Division, Appellant-Relatives had no statutory authority to appeal the court's judgment because they do not fall within the class of persons who may appeal a judgment under Sec. 211.261; appeal dismissed.
Discussion: The right to appeal is solely statutory. Sec. 211.261 enumerates who may appeal actions taken under the Juvenile Code. Sec. 211.261.1 grants the right of appeal to: (1) the child; (2) the child's parent, guardian, legal custodian, spouse, relative or next friend, *so long as the party appeals on the child's behalf*; (3) a parent; and (4) the juvenile officer. Appellant-Relatives argue they fall under category 2. But they did not specify in their notice of appeal or briefing that they are appealing *on the child's behalf*. Their arguments seek to vindicate their own positions, not necessarily the Child's best interest. Because the statute doesn't give Relatives the right to appeal, appeal must be dismissed.

State ex rel. Nutall v. Missouri Dep't of Corr., 671 S.W.3d 872 (Mo. App. E.D. July 18, 2023):
Holding: Even though trial court granted Petitioner's writ of mandamus that first-degree domestic assault was not a "dangerous felony" under Sec. 556.061 in 2002 for purposes of parole eligibility, trial court's writ is vacated and dismissed because there was not proper service of process on the DOC, which is a prerequisite to jurisdiction; (2) actual notice of a lawsuit is not sufficient to confer jurisdiction, because service must conform to the manner established by law; (3) under Rule 94.05, proper service in a mandamus proceeding requires the Clerk to deliver a copy of the preliminary writ and petition for service by the Sheriff, or other person appointed, to serve it on DOC.

State ex rel. Hutchison v. Manasala, 674 S.W.3d 811 (Mo. App. E.D. Sept. 12, 2023):
Holding: Even though Associate Circuit Judge had previously set several trial dates and then continued them, where Defendant in civil case moved for change of Judge five days before trial, Associate Judge was required to grant it because Sec. 517.061 provides for automatic change of judge in Associate Circuit Court if such motions are filed at least five days before trial.
Discussion: Although Rule 51.05 governs changes of judge generally, Sec. 517.061 governs the timing for change of judge in Associate Circuit Court. As relevant here, a party is entitled to an automatic change of judge if filed 5 days before trial. Here, it was irrelevant that the case had been previously set for trial numerous times and then continued. An application for change of judge is timely so long as filed 5 days before the "final" trial setting.

State ex rel. Phillip-Smith v. Stelzer, 675 S.W.3d 230 (Mo. App. E.D. Sept. 12, 2023):
Holding: Where, in an auto accident suit, Sheriff served Defendant by leaving pleading with an unidentified person in the HR Department of the company where Defendant worked, this was deficient service under Rule 54.13(b)(1) because there was no showing that this HR person had actual or apparent authority to accept service for Defendant, so circuit court acquired no jurisdiction over Defendant to act in case; even though the HR person told Sheriff that they could accept service, Defendant denied giving the HR person authority to accept service for him, and the company denied that the HR person was authorized to accept service for employees.

State ex rel. Hogg v. Horn, 2023 WL 6066256 (Mo. App. E.D. Sept. 19, 2023):
Holding: Even though (1) Plaintiff-Victim was suing Defendant for civil damages for sexual abuse after Defendant pleaded guilty to a sex offense against Plaintiff, and (2) Defendant claimed he acted at the direction of Plaintiff's Mother, trial court erred in granting Defendant's motion to join Mother as a third-party defendant under Rule 52.04, because Mother was not necessary to provide complete relief, and a defendant cannot complain that a plaintiff has not joined all tortfeasors in a lawsuit; (2) even though Defendant claims Mother should be joined to determine her responsibility in the lawsuit, Rule 52.04 is not the appropriate mechanism for joinder on this basis, since it would conflict with the rule that a plaintiff need not sue all tortfeasors.

In the Interest of C.I.G. v. M.D.G., 616 S.W.3d 758 (Mo. App. S.D. 2021):
Holding: Even though incarcerated Defendant-Father was not allowed to appear personally in court in this civil case due to COVID precautions, trial court did not err in denying a continuance and Defendant was not denied "meaningful access to the courts" because (1) there is no constitutional right to appear in person in a civil case; and (2) trial court took measures to allow Defendant to appear by Polycom; engage in private communication with his counsel during the trial; and take notes and participate in the trial.

Stanton v. City of Skidmore, 620 S.W.3d 245 (Mo. App. W.D. 2021):
Holding: (1) Unlike statutes, a trial court cannot take judicial notice of a City Ordinance; City Ordinances must be admitted into evidence or stipulated to by parties; (2) thus, even though Defendant-City attached its Ordinance to its answer in civil case, where Plaintiff never stipulated to the Ordinance and denied City's allegations, trial court erred in granting summary judgment to City on the Ordinance.

Fuller v. Griffith, 630 S.W.3d 911 (Mo. App. W.D. 2021):
Holding: (1) Even though indigent-Appellant's small claims petition for trial de novo was dismissed without prejudice for failing to pay a filing fee, and a dismissal without prejudice is generally not appealable, Appellant can appeal the filing fee issue because any attempt by him to refile his petition for trial de novo in circuit court would be futile; (2) where Appellant filed his notice of appeal before the circuit court denominated its ruling a "judgment," the notice was premature but became effective immediately after the later judgment became final per Rule 81.05(a), so was timely; and (3) where Appellant had been granted in forma pauperis status when he filed his initial small claims petition, Sec. 506.369.2 provides that a court's determination of inability to pay "shall apply to the case until final judgment is entered by either the trial or appellate court," so Appellant was not required to pay a fee to file for trial de novo.

State ex rel. Putnam v. State Bd. of Registration for Healing Arts, 641 S.W.3d 250 (Mo. App. W.D. 2021):
Holding: Civil interrogatory which asked opposing party to state "the substance" of persons with knowledge of facts relating to the claims was improper because the substance of witness statements obtained by counsel is protected as attorney work product; interrogatory can ask for identity of persons with knowledge of relevant facts, and the general subject matter of the persons' knowledge, but cannot seek "the substance" of statements obtained by counsel.

Osborn v. State, 2023 WL 1131223 (Mo. App. W.D. Jan. 31, 2023):
Holding: Even though Rule 29.15(c) requires Circuit Clerk to retain the envelope in which Movant mails his *pro se* 29.15 motion to court, where Clerk instead sent the envelope back to Movant, this did not deprive Movant of evidence needed to prove his motion was timely filed, since Movant had the envelope available to him (though failed to present it at hearing); and (2) appellate court doesn't decide issue of whether Clerk erred in not accepting Movant's motion in first place (because it wasn't fully filled out), but appellate court cites cases that hold Clerks must accept filings in the absence of clear prohibition in law, court rule or specific court order, and have no discretion to reject filings.

*** Brownback v. King, ___ U.S. ___, 141 S.Ct. 740 (U.S. Feb. 25, 2021):**
Holding: District court order dismissing Plaintiff's Federal Tort Claim Act claim was a judgment on the merits that precludes his *Bivens* claim; an on-the-merits judgment can still trigger FTCA's judgment bar even if that determination necessarily deprives the court of subject-matter jurisdiction.

* **Kemp v. U.S., 2022 WL 2111354, ___ U.S. ___ (U.S. June 13, 2022):**
Holding: The term "mistake" in Federal Rule Civil Procedure 60(b)(1) include a judge's error of law.

*** Reed v. Goertz, ___ U.S. ___, 143 S.Ct. 955 (2023):**
Holding: The two-year statute of limitations for a Sec. 1983 claiming challenging the constitutionality of a state's postconviction DNA testing procedures does not begin to run until the state appellate process is completed, including a state motion for rehearing.

*** Dupree v. Younger, ___ U.S. ___, 143 S.Ct. 1382 (2023):**
Holding: A post-trial motion under Rule 50 is not required to preserve for appellate review a "purely legal" claim decided by summary judgment before trial; thus, even though Defendant-Officer in Sec. 1983 suit did not file a post-trial motion under Rule 50(b), which allows a losing party to file a renewed motion for judgment as a matter of law, Defendant could still appeal the pretrial denial of his motion for summary judgment on grounds Plaintiff had not exhausted administrative remedies, because this was a "purely legal" issue; factual development of the claim at trial would not change the analysis of a "purely legal" question, so a post-trial motion requirement would be an empty exercise.

* **U.S. v. Texas, ___ U.S. ___, 143 S.Ct. 1964 (2023):**
Holding: Texas lacks Article III standing to challenge Biden Administration's immigration enforcement guidelines, which Texas claims don't require arrest of noncitizens who should be arrested under immigration law; although Texas wants the "Federal Judiciary to order the Executive Branch to alter its arrest policy so as to make more arrests…this Court has long held that a citizen lacks standing to contest the policies of their prosecuting authority when he himself is neither prosecuted nor threatened with prosecution"; Texas lacks standing under this same Article III principle.

Civil Rights

State ex rel. Helms v. Rathert, 624 S.W.3d 159 (Mo. banc 2021):
Holding: Even though Sec. 544.157.4 requires police agencies to institute policies for police pursuit of vehicles and Defendant-Police Officials did not do so, adoption of such policies requires a high degree of discretion in what the policies are and is not "ministerial;" thus, doctrine of official immunity prevents Defendant-Police Officials from being personally liable for failure to adopt such policies.

Stalnacker v. Dolan, 631 S.W.3d 658 (Mo. App. S.D. 2021):
Holding: Even though assuming Defendant-Judge erroneously revoked Plaintiff's probation after it had expired (causing her to serve 26 months in prison), Judge was entitled to judicial immunity in civil action against Judge for monetary damages, since judicial immunity applies to actions taken "in excess of authority" as opposed to those

"wholly without jurisdiction;" Judge had subject matter jurisdiction to decide the probation case, and thus, is shielded from liability by judicial immunity.

*** Brownback v. King, ___ U.S. ___, 141 S.Ct. 740 (U.S. Feb. 25, 2021):**
Holding: District court order dismissing Plaintiff's Federal Tort Claim Act claim was a judgment on the merits that precludes his *Bivens* claim; an on-the-merits judgment can still trigger FTCA's judgment bar even if that determination necessarily deprives the court of subject-matter jurisdiction.

*** Torres v. Madrid, ___ U.S. ___, 141 S.Ct. 989 (U.S. March 25, 2021):**
Holding: The application of physical force to the body of a person with intent to restrain is a seizure under 4th Amendment even if the person does not submit and is not subdued; thus, Plaintiff was "seized" when police shot her even though she eluded capture.

*** Lombardo v. City of St. Louis, Mo., ___ U.S. ___, 141 S.Ct. 2239 (U.S. June 28, 2021):**
Holding: In Sec. 1983 case for use of excessive force where Plaintiff died after police held him down in prone position for 15 minutes, 8th Circuit erred in holding that use of the prone restraint was *per se* constitutional so long as the individual being held down appears to be resisting the Officers; proper test is whether Officers' conduct was "objectively reasonable" in light of all facts and circumstances, such as intensity, duration, and police department policies and procedures.

* **City of Tahlequah, Okahoma v. Bond, ___ U.S. ___, 142 S.Ct. 9 (U.S. Oct. 18, 2021):**
Holding: Even though Officer's own reckless or deliberate conduct in approaching an intoxicated man in a garage may have created the situation where Officer ended up shooting the man, Officer was entitled to qualified immunity in 1983 action for use of excessive force under 4th Amendment, since no decision of the U.S. Supreme Court has found such conduct unlawful under similar circumstances; qualified immunity shields officers from liability so long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person should have known."

* **Rivas-Villegas v. Cortesluna, ___ U.S. ___, 142 S.Ct. 4 (U.S. Oct. 18, 2021):**
Holding: Even though Officer raised Plaintiff's arms behind his back during an arrest where police shortly before then had taken a knife away from him, Officer was entitled to qualified immunity in 1983 action for excessive use of force under 4th Amendment because Plaintiff has not identified "any Supreme Court case that addresses facts like the one at issue here"; qualified immunity attaches when officers' conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."

*** Thompson v. Clark, ___ U.S. ___, 142 S.Ct. 1332 (U.S. April 4, 2022):**
Holding: A plaintiff alleging a claim for malicious prosecution need only show his prior prosecution ended without a conviction, in order to satisfy the favorable termination element for such claims.

*** Egbert v. Boule, 2022 WL 2056291, ___ U.S. ___ (U.S. June 8, 2022):**
Holding: *Bivens* actions do not extend to claims of excessive force at border, or First Amendment retaliation claims.

*** Vega v. Tekoh, 2022 WL 2251304, ___ U.S. ___ (U.S. June 23, 2022):**
Holding: Even though Officer may have violated Plaintiff's *Miranda* rights prior to his criminal trial, a violation of *Miranda* does not provide a basis for seeking civil damages under Sec. 1983, because violation of *Miranda* is not itself a violation of the Fifth Amendment; *Miranda* is only a prophylactic rule designed to protect Fifth Amendment rights, and as such, cannot itself support a 1983 action.

Clemency

McCloskey v. State, 2023 WL 8882868 (Mo. App. E.D. Dec. 26, 2023):
Holding: (1) Even though Defendant, who had pleaded guilty to a misdemeanor which plea deal required that he forfeit certain guns, had subsequently been pardoned by the Governor, Defendant was not entitled in replevin action under Rule 99 to retrieve possession of the guns, because a pardon extinguishes the fact of "conviction," but not the fact of "guilt"; and (2) even though Defendant claims the misdemeanor proceedings against him, which seized his guns, violated his 2nd Amendment rights, Defendant's guilty plea waived all nonjurisdictional defects, including this claim; Defendant was required to raise constitutional claims in his criminal case, and cannot raise them in a civil collateral attack.
Discussion: Prior cases have held that even though a person has received a pardon from the Governor, they still are ineligible for a concealed-carry gun permit under Sec. 571.101 and still are ineligible run for public office under Sec. 145.306.1. This is because a pardon extinguishes the fact of "conviction," but not the fact of "guilt." The same is true here.

Closing Argument & Prosecutor's Remarks

State v. Craft, 669 S.W.3d 719 (Mo. App. E.D. 2023):
Holding: Even though Prosecutor's remarks during voir dire that "under the law, the defendant has a right not to testify" were an improper direct reference to Defendant's 5th Amendment right not to testify, reversal is not required because Prosecutor's comments were in the context of correcting a juror's misunderstanding of the law, correctly "restated" the law, and the court made efforts to cure the situation; but if the trial court had not made efforts to cure, reversal may have been required.

Confrontation & Hearsay

State v. Smith, 636 S.W.3d 576 (Mo. banc Jan. 11, 2022):
Where trial court allowed DNA Examiner to testify at trial via two-way video link without making any finding that Examiner was unavailable, this violated Defendant's Sixth Amendment right to face-to-face confrontation.
Facts: Defendant was charged with sexual assault. Over Defendant's confrontation objection, the trial court allowed DNA Examiner, who was on paternity leave under the FMLA, to testify via two-way video link to the results of his DNA work in case, which was the primary evidenced linking Defendant to the crime.
Holding: The issue of testimony via two-way video link is one of first impression for this Court, but courts nationally have adopted three approaches: (1) *Craig*, (2) the 2nd Circuit test from *Giagante*, or (3) *Crawford*. *Maryland v. Craig*, 497 U.S. 836 (1990), held a defendant's confrontation rights are violated by two-way video unless such a procedure is necessary to further an important public policy and reliability of the testimony is otherwise assured. *Craig* involved a child victim. *U.S. v. Giagante*, 166 F.3d 75 (2d Cir. 1999), adopted a more lenient approach, and allowed two-way video upon finding of exceptional circumstances. *Crawford v. Washington*, 541 U.S. 36 (2004), rejected the "reliability test," and held the Sixth Amendment requires actual confrontation as the procedural means to achieve reliability. However, *Crawford* did not overrule *Craig*. Thus, "Missouri courts should certainly continue to apply *Craig* to the facts it decided: a child victim may testify against the accused by means of video (or similar *Craig* process) when the circuit court determines, consistent with statutory authorization and through case-specific showing of necessity, that a child victim needs special protection." This Court need not decide the general issue of whether two-way video under any circumstances could ever satisfy the Sixth Amendment. Here, DNA Examiner was not a child and, in any event, the trial court made no express finding that DNA Examiner was unavailable. "More importantly, this Court is not confident the issue [in *Craig*] would be decided the same way today." The admission of DNA Examiner's testimony was not harmless, because it was the only physical evidence linking Defendant to the crime. Reversed for new trial.

In the Interest of C.A.R.A. v. Jackson County Juvenile Office, 637 S.W.3d 50 (Mo. banc Jan. 11, 2022):
Where trial court allowed Victim, Victim's Mother, and Victim's Babysitter to testify via two-way video as a COVID-19 safety measure, this violated Defendant's Sixth Amendment right to face-to-face confrontation.
Facts: Defendant-Juvenile was charged with a sex offense. The trial court, over Defendant's objection, allowed Victim, Victim's Mother, and Victim's Babysitter to testify via two-way video, as a COVID precaution. The trial court believed this was authorized by the Supreme Court's COVID operational directives.
Holding: Contrary to the trial court's belief, this Court was careful to ensure its operational directives for COVID would not permit violation of a defendant's constitutional or statutory rights. Once the trial court determines that a trial (adjudication hearing) must be held, nothing in the operational directives expressly permits witnesses

to appear remotely. Courts which have addressed this issue nationally have adopted three approaches: (1) *Craig*, (2) the 2nd Circuit test from *Giagante*, or (3) *Crawford*. *Maryland v. Craig*, 497 U.S. 836 (1990), held a defendant's confrontation rights are violated by two-way video unless such a procedure is necessary to further an important public policy and reliability of the testimony is otherwise assured. *Craig* involved a child victim. In the context of COVID, some courts have applied *Craig* to recognize that protecting public health is an important public policy. But witness-specific findings -- such as that a witness has a health condition particularly susceptible to COVID -- are required to meet the necessity prong. *U.S. v. Giagante*, 166 F.3d 75 (2d Cir. 1999), adopted a more lenient approach than *Craig*, and allowed two-way video upon finding of exceptional circumstances. Courts using this approach, in the COVID context, have required witness specific findings of a particular risk associated with COVID to meet the exceptional circumstances test. *Crawford v. Washington*, 541 U.S. 36 (2004), rejected the "reliability test," and held the Sixth Amendment requires actual confrontation as the procedural means to achieve reliability. However, *Crawford* did not overrule *Craig*. Thus, "Missouri courts should certainly continue to apply *Craig* to the facts it decided: a child victim may testify against the accused by means of video (or similar *Craig* process) when the circuit court determines, consistent with statutory authorization and through case-specific showing of necessity, that a child victim needs special protection." This Court need not decide the general issue of whether two-way video under any circumstances could ever satisfy the Sixth Amendment. Here, the court made no witness-specific findings regarding unavailability for any of the witness – Victim, Victim's Mother, or Babysitter. "More importantly, this Court is not confident the issue [in *Craig*] would be decided the same way today." Throughout the pandemic, this Court's orders have sought to protect the constitutional rights of criminal defendants. Applying the above to the witnesses here, the Victim's testimony might have met the *Craig* test for video testimony because Victim was a child, and Sec. 491.699 gives statutory authorization to two-way video. But here, the trial court made no witness-specific findings about Victim, so conviction must be reversed and remanded. The other witnesses' testimony is to be guided by the above analysis on remand. Reversed for new trial.

<u>In the Interest of J.A.T. v. Jackson Cnty. Juvenile Office</u>, 637 S.W.3d 1 (Mo. banc Jan. 11, 2022):

Where -- as a COVID precaution -- trial court required Defendant-Juvenile to participate in his trial from the jail via two-way video link while all other witnesses and parties were in the courtroom, this violated Defendant's Sixth and Fourteenth Amendment rights to due process and confrontation to be personally present at trial to confront witnesses.

Facts: Trial court, over Defendant's object, required Defendant to view his trial from jail via a two-way video link. The trial court believed the Supreme Court's COVID directives authorized this.

Discussion: Contrary to the trial court's belief, this Court's COVID directives did not authorize the trial court to violate Defendant's constitutional or statutory rights. One of the most basic rights guaranteed by the Confrontation Clause is the right to be present in the courtroom at every stage of trial. Due process also guarantees the right to be present. Rule 128.01 also provides that juveniles shall have the right to be present. Generalized

concerns about COVID do not override Defendant's due process right to be physically present at trial where his guilt or innocence will be determined. Reversed and remanded for new trial.

State v. Hollowell, 2022 WL 1228957 (Mo. banc April 26, 2022):
Holding: (1) Trial court erred, in felon-in-possession case, in allowing Officer to testify that Defendant's wife, who did not testify, told Officer that she had bought firearms for Defendant, because this hearsay went beyond explaining Officer's conduct and was the only direct evidence linking Defendant to the crime; (2) even though Defendant cross-examined Officer about the hearsay statement, this did not waive Defendant's objection from direct, since when a party objects to introduction of evidence and is overruled, the party does not waive the objection by eliciting the same evidence on cross; and (3) where Defendant was charged with 14 counts of possession of a firearm, this did not violate Double Jeopardy because Sec. 571.070.1 uses the phrase "unlawful possession of a firearm," indicating the legislature intended each firearm to be a separate offense.
Discussion: (1) Officer can testify to hearsay for the limited purpose of explaining Officer's conduct. However, the jury may not be aware of this limitation, so such hearsay is subject to careful scrutiny and limitation. Such hearsay must not be allowed to elicit details directly connecting Defendant to the crime. Here, the State's direct of Officer allowed Officer to testify beyond what was necessary to explain his conduct. This prejudiced Defendant because the non-testifying wife's statement was the only evidence directly connecting Defendant to crime. (2) Double Jeopardy prohibits multiple punishments for the same offense. The question is whether the legislature intended multiple punishments. Here, Sec. 571.070.1 prohibits unlawful possession of "a firearm." Thus, the unit of prosecution is the singular "a", meaning each firearm.

State v. Buechting, 633 S.W.3d 367 (Mo. App. E.D. 2021):
Holding: Even though Defendant was charged with killing Victim (with whom he lived) by hitting her and she later died, trial court erred in ruling that Victim's statements to others about her relationship with Defendant were admissible under under "forfeiture by wrongdoing" exception to hearsay and 6th Amendment Confrontation Clause, because there was no evidence that Defendant killed Victim with the intent to prevent her from reporting him to police for domestic violence or testifying against him in some proceeding; but error was harmless since other evidence of guilt was overwhelming.

In the Interest of D.H., 2022 WL 1309976 (Mo. App. E.D. May 3, 2022):
Holding: Even though Juvenile Officer claimed trial court had made an individualized finding that remote appearance by Defendant-Juvenile at adjudication hearing was necessary to protect Juvenile from COVID, this violated Juvenile's Sixth Amendment right to confront witnesses, where the record did not contain any such individualized finding and there was no statutory authority supporting remote-only appearance.

In the Interest of I.J., 2022 WL 1547969 (Mo. App. E.D. May 17, 2022):
Holding: Even though trial court had Defendant-Juvenile participate at his adjudication hearing via Webex as a COVID precaution, this violated Juvenile's constitutional rights to face-to-face confrontation.

In the Interest of C.A.M. Jr., 644 S.W.3d 600 (Mo. App. E.D. May 3, 2022):
Holding: Even though court required Juvenile attend their certification hearing remotely by video as a COVID safety measure, this violated Juvenile's due process right to be physically present at a critical stage of their case, and nothing in the record indicates that Juvenile voluntarily, knowingly and intelligently waived that right; this was plain error even in absence of objection by defense counsel.

In the Interest of A.L.D., 649 S.W.3d 370 (Mo. App. E.D. Aug. 9, 2022):
Holding: Juvenile Court plainly erred in conducting Juvenile-Defendant's certification hearing via 2-way video without Juvenile's personal presence in courtroom due to general concerns about COVID, since this violated Juvenile's 6th Amendment right to face-to-face confrontation and 5th and 14th Amendment due process rights to be physically present at a critical stage. Judgment certifying Juvenile for prosecution as adult reversed and remanded for in-person certification hearing.

In the Interest of D.M.M., 2022 WL 17587307 (Mo. App. E.D. Dec. 13, 2022):
Holding: (1) Juvenile court did not err in failing at certification hearing to exclude under Sec. 490.065 Deputy Juvenile Officer's "expert opinion testimony," because Sec. 490.065.1 only applies in actions "adjudicated" in juvenile court under Chapter 211, and certification proceedings are not adjudications; and (2) court did not err in excluding certain "hearsay" testimony from DJO's report because hearsay rules do not strictly apply to non-adjudicatory certification proceedings, which allow "reliable" hearsay to be admitted.

Denney v. Syberg's Westport Inc., 665 S.W.3d 348 (Mo. App. E.D. 2023):
Holding: Even though Sec. 490.680 allows business (medical) records to be admitted as an exception to hearsay, the trial court may still exclude the records based on objection on other grounds, such as lack of foundation; here, court properly excluded the medical records on grounds of lack of foundation because Plaintiff was essentially seeking to use the records as a substitute for required expert testimony under Section 490.065 to prove causation for his civil claim, and there was no evidence that the doctor's notations were based on a reasonable degree of medical certainty.

State v. Hamm, 2023 WL 5021838 (Mo. App. E.D. Aug. 8, 2023):
Holding: (1) Even though phone company had changed ownership and no longer had access to certain records, where the Records Custodian of the new company was able to testify that the records provided to police from the prior company were computer generated and that such records were routinely produced for police, this was sufficient authentication to be admissible; (2) computer-generated records containing Defendant's phone number and geolocation data are not "hearsay" because they do not contain statements of any human declarant, and their admissibility is determined based on their reliability and accuracy of the process used to obtain the data, not the business records exception to hearsay; and (3) because computer generated data is not the result of human entries, the Confrontation Clause doesn't apply, since no human declarant made the statements.

Discussion: Computer-generated phone records showing geolocation data are not "hearsay" because they don't contain statements of any human declarant. They are not subject to analysis under the hearsay rule or business records exception. Their admissibility depends on the reliability and accuracy of the process used to create and obtain the data. Thus, courts have previously held that screenshots of call logs from a defendant's cell phone aren't "hearsay" because the logs weren't made by human entries, but by operation of the phone itself. Here, the records were not the result of human entries, but were computer-generated. For similar reasons, the Confrontation Clause doesn't apply. The records here were not made by a human declarant but were computer generated, and thus, there is no declarant (witness) to confront and cross-examine.

State v. Kleeschulte, 618 S.W.3d 246 (Mo. App. S.D. 2021):
Holding: (1) Even though Appellant filed a general pretrial motion to "federalize" or "constitutionalize" his trial objections, unless such pretrial motion explains why a specific ground requires a trial court to take a specific course of action, the motion adds nothing to the trial objection and preserves nothing for appeal; (2) where Defendant objected to evidence on "hearsay" grounds at trial, the pretrial motion to "federalize" or "constitutionalize" did not provide the level of specificity necessary to inform the trial court that this was also an objection based on the Confrontation Clause, so that issue is not preserved for appeal.

In the Interest of L.I.B. v. Juvenile Officer, 2022 WL 677876 (Mo. App. W.D. March 8, 2022):
Holding: Where trial court required Defendant-Juvenile to attend adjudication hearing (trial) remotely from jail while all other Witnesses were present in the courtroom, this violated Defendant's constitutional rights to Confrontation and Due Process because Defendants have right to confront witnesses face-to-face and to be personally present at all stages of trial.

In the Interest of A.S.B. v. Juvenile Officer, 2022 WL 2309954 (Mo. App. W.D. June 28, 2022):
Holding: Where trial court conducted Defendant-Juvenile's adjudication hearing by Webex as a general COVID precaution, this violated Juvenile's rights to confront witnesses under Sixth Amendment and Art. I, Sec. 18(a), Mo.Const., in the absence of any case-specific findings as to whether the unavailability of witnesses was necessary.

X.D.M. v. Juvenile Officer, 647 S.W.3d 311 (Mo. App. W.D. July 5, 2022):
Holding: Juvenile Court erred, over Juvenile-Defendant's objection, in conducting adjudication hearing by 2-way video based on generalized concerns over COVID, since this violated Juvenile's 6th Amendment right to face-to-face confrontation, without the court having made any specific findings establishing a need to conduct the proceedings virtually.

In the Interest of K.D.D. v. Juvenile Officer, 2022 WL 16557409 (Mo. App. W.D. Nov. 1, 2022):
Holding: Juvenile court erred in requiring Defendant-Juvenile attend his certification hearing via two-way video, since this violated 14th Amendment due process right to be personally present at a critical stage, 6th Amendment right to confrontation, and Sec. 211.071.7(3) which requires certification hearings be held "in the presence of the child."

*** Hemphill v. New York, ___ U.S. ___, 142 S.Ct. 681 (U.S. Jan. 30, 2022):**
Holding: Even though Defendant in murder trial had contended that another Person had committed the murder, Defendant's Sixth Amendment right to confrontation was violated when State was permitted to introduce other Person's guilty plea transcript in another case to refute Defendant's claim; Supreme Court rejects Gov't argument that Confrontation Clause allows such evidence to be admitted without cross-examination where Defendant "opens door" to such evidence, and such evidence is necessary to correct a "misleading" impression; Sixth Amendment requires actual confrontation, not a trial court assessing the alleged reliability of the evidence.

* **Samia v. U.S., ___ U.S. ___, 143 S.Ct. 2004 (2023):**
Holding: The Sixth Amendment's Confrontation Clause is not violated, in joint trial of co-defendants, by admission of a non-testifying co-defendant's confession where (1) the confession has been modified to avoid *directly* identifying the non-confessing co-defendant and (2) the court gives a limiting instruction that jurors may consider the confession only with respect to the confessing co-defendant; thus, admission of non-testifying co-defendant's confession which was modified to state that "the other person" pulled the trigger did not violate Confrontation Clause where trial court also gave limiting instruction; however, "directly accusatory" confessions that have been obviously redacted (such as be "deleted" name) remain inadmissible under *Gray v. Maryland*, 523 U.S. 185 (1998).

U.S. v. Oliver, 987 F.3d 794 (8th Cir. 2021):
Holding: Even though Officers who gave input into a map showing drugs were sold less than 1,000 from school testified at trial subject to cross-examination, the computer-generated map showing the distance from school was not admissible and did not fall under any recognized hearsay exception; the map was offered to prove the truth of the matter asserted therein, i.e., the sales took place within 1,000 feet.

Com. v. Costa, 189 N.E.3d 284 (Mass. 2022):
Holding: State's introduction of complaining witness' hearsay statements at probation revocation hearing without permitting Probationer to call the complaining witness violated Probationer's due process rights to present a defense to revocation, even though there was evidence that the complaining witness would have been distressed if required to testify.

People v. Deverow, 2022 WL 16131508 (N.Y. 2022):
Holding: Exclusion of testimony that contradicted eye-witness' account and exclusion of 911 calls placed around time of crime which would have been admissible under

present sense impression exception to hearsay rule violated Defendant's due process right to present a complete defense and 6th Amendment confrontation rights.

State v. Trifiletti, 2022 WL 4126380 (Minn. App. 2022):
Holding: Even though State's Witness was exposed to COVID, she was not "unavailable" at trial so as to allow her prior testimony to be read into record, where she had no symptoms, was willing to testify, was in contact with prosecutor, and was in jurisdiction to testify.

Continuance

In the Interest of C.I.G. v. M.D.G., 616 S.W.3d 758 (Mo. App. S.D. 2021):
Holding: Even though incarcerated Defendant-Father was not allowed to appear personally in court in this civil case due to COVID precautions, trial court did not err in denying a continuance and Defendant was not denied "meaningful access to the courts" because (1) there is no constitutional right to appear in person in a civil case; and (2) trial court took measures to allow Defendant to appear by Polycom; engage in private communication with his counsel during the trial; and take notes and participate in the trial.

Costs

Fowler v. Missouri Sheriff's Retirement System, 623 S.W.3d 578 (Mo. banc 2021):
Holding: The $3.00 surcharge imposed by Sec. 57.955 as court costs for the Sheriff's Retirement Fund is unconstitutional under Article I, Sec. 14 Mo. Const., because it has no reasonable relationship to the administration of justice.
Discussion: For a court cost to withstand an Art. I, Sec. 14 challenge, the cost must be "reasonably related to the expense of the administration of justice." A cost collected to enhance the compensation of officials of the executive department of county government – here, retired sheriffs -- does not meet this test.

Graves v. Mo. Dept. of Corr., Div. of Probation and Parole, 630 S.W.3d 769 (Mo. banc 2021):
Holding: Even though Petitioner-Probationer (who was behind in paying monthly interventions fees) received a letter from P&P that failure to pay his monthly fee "may" place him in violation status, Petitioner's declaratory judgment claim that 42 U.S.C. Sec. 407(a) prohibited P&P from requiring him to pay this fee out of his sole income of Supplemental Security Income (SSI) was not ripe for adjudication and should be dismissed without prejudice, since P&P had not yet compelled Petitioner to pay the fee, or placed him in violation status for failure to pay.
Discussion: P&P's letter to Petitioner only said that failure to pay "may" place him in violations statute. Petitioner's claim would not become ripe until P&P made a concrete, binding, immediate decision to place him in violation status or take other definitive action to collect the fee. Without this, the likelihood of P&P collecting the fee or sanctioning

Petitioner for failure to pay is speculative. P&P may not seek to collect the fee. 14 CSR 80-5.020(1)(I)(3) limits sanctions to "willful nonpayment." 14 CSR 80-5.020(1)(H) allows P&P to waive the fee based on limited income.

Fuller v. Griffith, 630 S.W.3d 911 (Mo. App. W.D. 2021):
Holding: (1) Even though indigent-Appellant's small claims petition for trial de novo was dismissed without prejudice for failing to pay a filing fee, and a dismissal without prejudice is generally not appealable, Appellant can appeal the filing fee issue because any attempt by him to refile his petition for trial de novo in circuit court would be futile; (2) where Appellant filed his notice of appeal before the circuit court denominated its ruling a "judgment," the notice was premature but became effective immediately after the later judgment became final per Rule 81.05(a), so was timely; and (3) where Appellant had been granted in forma pauperis status when he filed his initial small claims petition, Sec. 506.369.2 provides that a court's determination of inability to pay "shall apply to the case until final judgment is entered by either the trial or appellate court," so Appellant was not required to pay a fee to file for trial de novo.

State ex rel. Adams v. Crane, 2022 WL 4240985 (Mo. App. W.D. Sept. 13, 2022):
Holding: Even though Prosecutor emailed defense counsel right before sentencing that Prosecutor's Office was still "processing and verifying" restitution amount, where trial court sentenced Defendant without either the court or Prosecutor making any mention of restitution at sentencing, trial court lacked jurisdiction three weeks later to grant a motion to impose restitution; the judgment was final when trial court imposed sentence, and court lacked jurisdiction to enter restitution order later.

U.S. v. Kidd, 2022 WL 90206 (8th Cir. 2022):
Holding: Prison wages were not within scope of "any source" in statute that requires that a prisoner's prison resources be used to pay restitution; statute's focus was on money from outside sources (such as inheritance), and not from prison work; taking prison wages would threaten prison security by discouraging inmates from working and harming inmate morale.

U.S. v. Woodring, 2022 WL 1612822 (8th Cir. 2022):
Holding: Remand to district court was required to determine exact source of funds in federal prisoner's trust account and whether applying those funds to restitution owed was proper, where District Court had granted Gov't's motion to pay restitution from the prisoner's funds without explanation and there were no findings as to source of funds.

Jones v. Clark County, 2021 WL 5050367 (Ky. 2021):
Holding: Only the sentencing court, not the county jail, has authority to order payment of costs associated with incarceration of a prisoner.

Counsel – Right To – Conflict of Interest

State v. Johnson, 2022 WL 17347195 (Mo. banc Nov. 28, 2022):
Holding: (1) It is "open question" whether appeals of prosecutor-filed motions to vacate convictions and sentences under Sec. 547.031 in death penalty cases should be filed first in Court of Appeals or whether Supreme Court has exclusive jurisdiction under Mo. Const., Art. V, Sec. 3 because the punishment is death, and Supreme Court does not decide that in this case; (2) even though St. Louis County Prosecutor's Office claimed it had a conflict of interest in pursuing the Sec. 547.031 motion because Johnson's former defense counsel now worked in the St. Louis County Prosecutor's Office, Supreme Court questions whether that requires disqualification of the entire Prosecutor's Office, but assuming that it did, the St. Louis County Prosecutor's Office "had no business selecting (or even recommending)" the Special Prosecutor for the circuit court to appoint under Sec. 56.110; nothing in Sec. 56.110 gives the Prosecutor's Office such a role, and doing so would spread whatever taint afflicted the original Prosecutor's Office; and (3) Special Prosecutor's motion to vacate conviction and death sentence under Sec. 547.031, which largely relies on a statistical study of the prosecutor's charging decisions as evidence of racial bias, falls far short of "clear and convincing evidence" demonstrating a "constitutional error" that "undermines confidence in the judgment" under Sec. 547.031.3; thus, trial court didn't err in not holding a hearing under Sec. 547.031 because the Special Prosecutor's motion fails to state adequate grounds for granting relief. Motions to stay execution denied.

State v. Howell, 628 S.W.3d 750 (Mo. App. E.D. 2021):
Holding: (1) Even though other states and federal courts use the parenthetical "(cleaned up)" after citations to indicate that internal quotations, ellipses, etc., have been altered, Eastern District disapproves use of "(cleaned up)" parenthetical; Eastern District says "(cleaned up)" harms "credibility and accuracy," and Court needs to know "precise language" being used in a case or statute; and (2) Where Defendant who had previously waived counsel sought to invoke right to counsel on day of trial, court did not err in proceeding with trial without counsel since no attorney under Rule 4-1.1 (competence) could ethically represent a client in a felony trial the same day without even passing awareness of the basic facts or possible defenses, and court was not required to grant continuance to obtain counsel.

In the Interest of T.A.G., 2023 WL 8042664 (Mo. App. E.D. Nov. 21, 2023):
Holding: Where in termination of parental rights case (1) trial court appointed the same counsel to represent both Mother and Father; (2) Mother and Father had divergent facts and interests in the case; and (3) neither Mother nor Father waived any conflict in writing, counsel had an active conflict of interest that denied Father effective assistance of counsel and a meaningful hearing.
Discussion: An attorney does not provide effective assistance when his representation involves an actual conflict of interest. Rule 4-1.7(a) states a lawyer shall not represent a client if the representation of one client will be directly adverse to another client, or if there is a significant risk that representation of one or more clients will limit the lawyer's duties to another client. Here, joint representation of Mother limited counsel's duties

toward Father and vice versa. The interests of Mother and Father differed significantly from each other. Counsel's duties toward one parent limited counsel's advocacy for the other parent. Neither Mother nor Father gave informed consent in writing to waive this conflict, as required by Rule 4-1.7(b)(4). Judgment terminating Father's parental rights reversed.

Zuko v. State, 2023 WL 8042626 (Mo. App. E.D. Nov. 21, 2023):
Holding: Even though 24.035 Movant hired the same attorney to represent him at his guilty plea, direct appeal and postconviction case, there was no disqualifying conflict of interest in retained counsel representing Movant in postconviction, because there is no Sixth Amendment right to effective counsel in postconviction; thus, even if counsel had a conflict of interest (because he could not raise ineffectiveness claims against himself), Movant cannot challenge counsel's effectiveness as postconviction counsel.

Napper v. State, 2023 WL 8194727 (Mo. App. E.D. Nov. 28, 2023):
Holding: (1) A claim that plea counsel had a conflict of interest is "cognizable" in a Rule 24.035 action as ineffective assistance of counsel and is not waived by a guilty plea; but (2) even though defense counsel worked as a prosecutor in the Prosecutor's Office at time the criminal case was filed against Defendant/Movant, there was no conflict of interest when defense counsel later left the Prosecutor's Office and became defense counsel for Defendant/Movant, and counsel never had any knowledge or contact with Defendant/Movant's case while a prosecutor.
Discussion: Although older cases, such as *Smith v. State*, 972 S.W.2d 551 (Mo. App. S.D. 1998) and *Berry v. State*, 214 S.W.3d 413 (Mo. App. S.D. 2007), indicate that a conflict of interest claim is waived by a guilty plea, those cases should no longer be followed because the Supreme Court has recognized such a claim in the more recent case of *DePriest v. State*, 510 S.W.3d 331 (Mo. banc 2017). Such claims can be raised as claims of ineffective assistance of counsel. Rule 4-1.11 governs the conduct of government lawyers in the situation here, where former prosecutor became a defense counsel. A conflict of interest would only arise if the former prosecutor (now defense counsel) "participated personally and substantially as a public officer" in Defendant/Movant's case, while a prosecutor. That did not happen here. The constitutional right to a fair trial provides more protections to a defendant than Rule 4-1.11. That right would find a conflict if there was an "appearance of impropriety." But that requires analysis of all the facts and circumstances. Here, there are no facts showing former prosecutor (now defense counsel) had any participation in or knowledge of Defendant/Movant's case while a prosecutor. Thus, no appearance of impropriety.

State v. Cox, 2023 WL 1232016 (Mo. App. S.D. Jan. 31, 2023):
Holding: (1) Even though trial court had *pro se* Defendant sign a waiver-of-counsel form, plain error occurred because form did not state the offenses for which Defendant was on trial or the maximum punishment for those offenses as required by Sec. 600.051.1; and (2) trial court plainly erred in not conducting an on-the-record hearing establishing that Defendant's waiver of counsel was voluntary, knowing and intelligent.
Discussion: Violation of a defendant's right to counsel constitutes plain error. The State has the burden of proving a waiver of counsel was valid. To ensure a waiver is valid, a

trial court must (1) hold an on-the-record evidentiary hearing that established the defendant understands the rights being waived, and the dangers associated with waiving those rights, and (2) give the defendant the opportunity to sign a waiver of counsel from containing the requirements of Sec. 600.051.1. Reversed for new trial.

State v. Schurle, 2021 WL 4057191 (Mo. App. W.D. Sept. 7, 2021):
Holding: (1) Even though when Defendant was arrested during a traffic stop he had only methamphetamine residue (no measurable amount of meth), where Defendant had $480 in cash and a digital scale with meth residue, evidence was sufficient to convict of delivery of meth, Sec. 579.020; but (2) where Defendant's retained attorneys had withdrawn due to his failure to pay them; the Public Defender had declined to represent Defendant; and the trial court refused to overrule the Public Defender's denial because the court believed Defendant should get a job to hire counsel, trial court plainly erred in having him proceed to trial *pro se* without giving him warnings about the dangers of self-representation required by *Faretta*.
Discussion: (1) No Missouri appellate court has previously considered whether a defendant can be convicted of delivery when not arrested while in actual possession of a distributable quantity of drugs, or is not actually observed distributing the drugs. However, a majority of courts in other jurisdictions have held a defendant can be convicted if the evidence supports the inference that defendant was recently in possession of a distributable quantity. Here, Defendant's possession of the cash and the scales, as well as deceitful statements made by him to police, supports that he was recently in possession of a distributable quantity. (2) *Faretta* requires that before a court can conclude that a defendant has voluntarily waived counsel, the court must conduct "a thorough evidentiary hearing" which warns Defendant of the dangers of self-representation. That did not occur here. On remand, the trial court will need to re-examine indigence. Defendant claimed his father had paid for his prior attorneys, and would not pay more. A determination of indigence must be based on the means at Defendant's disposal or available to him to obtain counsel. Sec. 600.086.1. If the defendant's financial circumstances change, a further determination of indigence may be made "at any stage of the proceedings." Sec. 600.086.3.

State v. Masters, 2022 WL 4073850 (Mo. App. W.D. Sept. 6, 2022):
Holding: (1) Even though Defendant told trial court he wanted to represent himself, and court told Defendant it was not in his best interest to represent himself and that if he was convicted he would be "hard-pressed" to claim he should have had an attorney, this *Faretta* hearing was inadequate since court did not advise Defendant of the nature of charges, the potential sentences if convicted, or potential defenses to the charges, and did not give Defendant the opportunity to sign a written wavier of counsel form as required by Sec. 600.051; (2) Even though Defendant did not raise these issues in a new trial motion, claim that a waiver-of-counsel hearing was constitutionally inadequate is reviewed *de novo*, since a *pro se* Defendants cannot be expected to object that his waiver of counsel was not voluntary due to an inadequate *Farretta* record.

State v. Woolery, 2023 WL 4188250 (Mo. App. W.D. June 27, 2023):
Holding: (1) Where Defendant had been indicted and appeared at first appearance/arraignment without counsel, the trial court did not err in not appointing counsel at that time because Rule 31.02(a) only requires the court to tell Defendant that it will appoint counsel if Defendant cannot afford one (which the court did), and the Rule does not require suspension of initial appearance until counsel has been appointed; (2) under the Sixth Amendment, the mere label of a proceeding as "arraignment" does not create a "critical stage" requiring counsel; whether counsel has to be present depends on whether Defendant will "irretrievably lose" defenses or other rights if counsel isn't present; (3) even though Defendant's bail hearing was not held within seven days as required by Rule 33.05, where the court ultimately denied a bond reduction, Defendant cannot show prejudice; in any event, this issue should have properly been the subject of a remedial writ under Rule 33.09.

State v. Robison, 496 P.3d 892 (Kan. 2021):
Holding: Kansas restitution procedure which required restitution order be filed and enforced as a civil judgment violated state constitution's right to a jury trial in civil cases, since it allowed the judge in the criminal case to determine the damages and then convert that to a civil judgment, thus bypassing the traditional function of a jury to determine civil damages.

People v. Urzua, 2021 WL 4452300 (Ill. App. Ct. 2021):
Holding: Withdrawal of postconviction Movant's court-appointed counsel, after certifying he complied with rule setting forth obligations of postconviction counsel, did not extinguish Movant's right under Postconviction Hearing Act for reasonable assistance from subsequently retained private counsel, where Movant had claimed appointed counsel did not properly represent him

Death Penalty

State v. Johnson, 2022 WL 17347195 (Mo. banc Nov. 28, 2022):
Holding: (1) It is "open question" whether appeals of prosecutor-filed motions to vacate convictions and sentences under Sec. 547.031 in death penalty cases should be filed first in Court of Appeals or whether Supreme Court has exclusive jurisdiction under Mo. Const., Art. V, Sec. 3 because the punishment is death, and Supreme Court does not decide that in this case; (2) even though St. Louis County Prosecutor's Office claimed it had a conflict of interest in pursuing the Sec. 547.031 motion because Johnson's former defense counsel now worked in the St. Louis County Prosecutor's Office, Supreme Court questions whether that requires disqualification of the entire Prosecutor's Office, but assuming that it did, the St. Louis County Prosecutor's Office "had no business selecting (or even recommending)" the Special Prosecutor for the circuit court to appoint under Sec. 56.110; nothing in Sec. 56.110 gives the Prosecutor's Office such a role, and doing so would spread whatever taint afflicted the original Prosecutor's Office; and (3) Special

Prosecutor's motion to vacate conviction and death sentence under Sec. 547.031, which largely relies on a statistical study of the prosecutor's charging decisions as evidence of racial bias, falls far short of "clear and convincing evidence" demonstrating a "constitutional error" that "undermines confidence in the judgment" under Sec. 547.031.3; thus, trial court didn't err in not holding a hearing under Sec. 547.031 because the Special Prosecutor's motion fails to state adequate grounds for granting relief. Motions to stay execution denied.

State ex rel. Johnson v. Vandergriff, 668 S.W.3d 574 (Mo. banc 2023):
Holding: In competency to be executed case, even though Petitioner (Defendant) may be aware he has been sentenced to death for the murder of a child, his awareness of the reason for his penalty is not the same a "rational understanding" of the reason for his penalty; awareness of the rationale for execution does not end the inquiry as to whether Petitioner has a "rational understanding" of the reason for his penalty.

* **U.S. v. Tsarnaev, ___ U.S. ___, 142 S.Ct. 1024 (U.S. March 4, 2022):**
Holding: (1) in Boston Marathon bombing case, trial court did not abuse its discretion in declining to ask about the content and extent of each venireperson's knowledge of the case from the media, when the court had asked about what media sources venirepersons followed, whether they had formed an opinion about the case, and had other individualized voir dire to probe for bias; and (2) trial court did not abuse its discretion in excluding Defendant's mitigating evidence that his brother – who committed the bombing with him – had possibly committed a prior murder; although Defendant claimed this evidence would show he was under the domination of his brother, the trial court did not abuse its discretion in finding that the evidence lacked probative value and would be confusing to jurors, especially given that the witnesses who could have confirmed the brother's commission of the prior murder were themselves deceased; the "other murder" evidence risked producing a confusing mini-trial where the only witnesses who knew the truth were dead.

*** Ramirez v. Collier, 2022 WL 867311, ___ U.S. ___ (U.S. March 24, 2022):**
Holding: Death-sentenced Defendant is likely entitled to preliminary injunction against Texas prison policy which prohibits outside ministers from laying hands on condemned person at time of execution; such a policy likely violates the Religious Land Use and Institutionalized Persons Act (RLUIPA).

*** Nance v. Ward, 2022 WL 2251307, ___ U.S. ___ (U.S. June 23, 2022):**
Holding: Sec. 1983 (rather than federal habeas) is the proper vehicle to bring a method-of-execution claim even where Petitioner-Prisoner proposes an alternative method of execution not authorized by a State's law.

*** Cruz v. Arizona, 598 U.S. ___, 143 S.Ct. 650 (2023):**
Holding: Arizona postconviction procedural rule was not "adequate" state grounds to bar federal review of claim by capital defendant that he wasn't allowed to inform jury a life sentence would be without parole.

State v. Rogers, 2021 WL 5275812 (Or. 2021):
Holding: Where after Defendant's death sentence the Legislature amended the law to eliminate the categories of "aggravated murder" of which Defendant was convicted, Defendant's death sentence was disproportionate because the Legislature had since determined that his conduct didn't fall within the narrow category of cases appropriate for death.

Detainer Law & Speedy Trial

State v. Shegog, 633 S.W.3d 362 (Mo. banc 2021):
Holding: Where (1) Defendant's trial ended in a hung jury; (2) trial court scheduled Defendant's new trial within the next term of court, but (3) trial court, on State's motion, later continued trial beyond that term, there was no violation of Mo.Const. Art. I, Sec. 19, because the trial was scheduled within the next term of court; court Rules authorize continuances; and Rule 20.01(c) provides that a court's authority to act is not affected by expiration of a term of court.
Discussion: Art. I, Sec. 19 provides that if a jury hangs, the court can retry Defendant "at the same or next term of court." Defendant contends the trial court lost authority to try him, because his retrial didn't occur within the "same or next term of court." However, Art. I, Sec. 19 does not abolish other statutory and common-law procedures regarding trial of criminal cases. Art. V, Sec. 5 allows the Supreme Court to establish Rules. The Supreme Court has established Rules allowing continuances, and has enacted Rule 20.01(c) which provides that a court's authority to act is not affected by expiration of a term of court.

State ex rel. Wishom v. Bryant, 673 S.W.3d 88 (Mo. banc Aug. 29, 2023):
Where Defendant had properly invoked the Interstate Agreement on Detainers (IAD), Sec. 217.490, which mandated trial within 180 days, and on the day of trial near that deadline the trial court continued the trial because there were other trials taking place that day which caused the court to be unable to secure a jury panel, this was not good cause for delay, and case must be dismissed with prejudice.
Facts: Defendant, who was serving a federal sentence in federal prison, made a request pursuant to the IAD to dispose of a detainer which had been filed against him for rape charges in St. Louis. The circuit court and Prosecutor received this request on April 14, 2022. When properly invoked, this starts a 180-day time limit in which a trial must occur. The State acknowledged receipt of the notice, and checked a box on a form requesting temporary custody of Defendant "via IAD." St. Louis received custody of Defendant in early June 2022. Meanwhile, private counsel, who had been representing Defendant, moved to withdraw, and there were several days before a Public Defender entered later in June. In June, the Public Defender notified the court that trial had to commence by October 11 to be within the 180 days. The court scheduled trial for October 11. On October 11, the Prosecutor and Defendant appeared for trial and announced ready. However, the trial court noted that other trials were taking place that day, and the trial court could not secure a jury panel. Thus, the trial court continued the case. On October 14, Defendant filed a motion to dismiss the charges under the IAD. On

October 18, the trial court overruled the motion, and the parties scheduled trial for October 31. The trial court overruled the motion on various grounds, including that Defendant had not requested a "priority trial date" for October 11. Defendant sought a writ of prohibition.

Discussion: Defendant properly invoked the IAD. Thus, trial had to occur within 180 days unless there was a waiver by Defendant. The State claims, for the first time on appeal, that Defendant waived the IAD because he didn't accompany his request with a certificate of inmate status. The State, however, may waive compliance with provisions of the IAD, and did so here because the State requested custody of Defendant "via IAD" and never objected to or claimed in the trial court that Defendant didn't properly invoke the IAD. A court's crowded docket is not "good cause" under the IAD to continue a trial beyond 180 days. The trial court should have given priority to Defendant's case, instead of others, to ensure he was tried within that time. The court – not Defendant – had the responsibility to take affirmative steps to ensure the case was tried. The State contends the time was extended because there were several days when private counsel was trying to withdraw, which must be attributed to Defendant. But private counsel's motion to withdraw was not granted until the Public Defender entered, so Defendant wasn't legally unrepresented at any time, but even if he was, this didn't cause any delay. The State argues that Defendant "agreed" to resetting his trial date for October 31. But Defendant cannot be faulted for this because he agreed to rescheduling *only after* the trial court failed to try his case on October 11 and overruled his motion to dismiss. Writ granted, dismissing case with prejudice.

State v. Oliver, 2022 WL 4834854 (Mo. App. E.D. Oct. 4, 2022):

Holding: Delays in bringing Defendants to trial due to COVID pandemic should generally not be weighted against either the State or Defendant in applying speedy trial factors under *Barker v. Wingo*. 407 U.S. 514 (1972).

Discussion: Missouri Supreme Court COVID directives did not mandate that Defendants give up constitutional rights but, instead, intended for trial courts to weigh the constitutional rights of defendants and public health on a case-by-case basis. When a criminal defendant, as here, did not waive his rights to a jury trial and to confront witnesses, the trial court may reasonably conclude the trial would have to wait until an in-person jury trial setting was safe, especially where the Defendant did not assert his right to a speedy trial early and did not assert it during the COVID shutdown.

State v. Estes, 2023 WL 1432021 (Mo. App. S.D. Feb. 1, 2023):

Holding: In order to preserve Speedy Trial violation claim for appeal, Defendant must have filed motion to dismiss on grounds of speedy trial violation in trial court (and preserve failure to dismiss on speedy trial grounds in new trial motion); merely alleging Speedy Trial violation without seeking dismissal isn't sufficient to preserve issue for appeal.

State v. Burhop, 624 S.W.3d 186 (Mo. App. W.D. 2021):
Even though the Prosecutor did not receive directly from Defendant a notice of disposition of detainer, where the Circuit Clerk received the document and Prosecutor received notice of it through Case.net, Rule 103.08 made the Case.net filing service on the Prosecutor, so trial court did not err in dismissing case under Interstate Agreement on Detainers for failure to try Defendant within 180 days; and (2) even though State disputed whether a detainer against Defendant was actually filed, where trial court made factual finding that there was such a detainer, appellate court defers to that.
Facts: On Sept. 20, 2019, The Circuit Clerk received a packet of materials from a Kansas prison officials labeled "Uniform Mandatory Disposition of Detainers Act" which indicated a detainer was filed against Defendant for a Ray County charge; that Defendant was requesting disposition of such detainer; and that Kansas would deliver Defendant to Ray County for disposition. After no action was taken in the criminal case for more than 180 days, Defendant moved to dismiss with prejudice on March 18, 2020, which the trial court granted. State appealed.
Holding: As relevant here, to invoke the IAD, Defendant must show the receiving state (Missouri) has lodged a detainer against him, and Defendant notified the Prosecutor of his request for final disposition. State claims Defendant did not prove either requirement. Here, the trial court found from the Kansas documents that there was a detainer filed against defendant. Although the State disputes that, the trial court chose to find this document credible, and appellate court must defer to that factual finding. Regarding the notice requirement: Although the documents were not sent directly to Prosecutor, they were sent to the Circuit Clerk, who filed them on Case.net. Prosecutor received notice of that filing through Case.net. Rule 103.08 states "service shall be made to registered [Case.net] users through the electronic filing system." This constitutes a good-faith effort by Defendant to serve the Prosecutor, and invoke the IAD. Dismissal affirmed.

State v. Stevenson, 624 S.W.3d 420 (Mo. App. W.D. 2021):
(1) Even though a disposition of detainer packet did not specifically state that Ray County had filed a detainer against Defendant, where Warden offered to deliver Defendant to Ray County for untried charges, trial court did not err in finding there was a detainer and dismissing charges under Interstate Agreement on Detainers for failure to try Defendant within 180 days; and (2) even though the Prosecutor did not receive directly from Defendant a notice of disposition of detainer and the document that was received by the Circuit Clerk was addressed to a different county's prosecutor "and all others," where the Circuit Clerk filed the document on Case.net and Ray County Prosecutor received notice of it through Case.net, Rule 103.08 made the Case.net filing service on the Ray County Prosecutor, so trial court did not err in dismissing charges.
Facts: On June 17, 2019, Ray County Circuit Clerk received packed of documents from Federal Prison officials in Illinois. The documents were addressed to the Clay County Prosecuting Attorney and "all other prosecuting officers and courts … listed below." The documents offered to deliver Defendant to Clay County for disposition of detainers in Clay County, and also authorized Clay County to deliver Defendant to Ray County for disposition of charges there. After no action was taken by Ray County in his criminal case for more than 180 days, Defendant moved to dismiss with prejudice on February 28, 2020, which the trial court granted. State appealed.

Holding: As relevant here, to invoke the IAD, Defendant must show the receiving state (Missouri) has lodged a detainer against him, and Defendant notified the Prosecutor of his request for final disposition. State claims Defendant did not prove either requirement. Although the documents received from Federal Prison officials did not specifically state that a detainer had been filed by Ray County, the documents authorized Clay County to deliver Defendant to Ray County. Thus, the trial court could reasonably infer that Ray County had, in fact, lodged a detainer. Regarding the notice requirement: Although Federal Prison officials sent the documents only to the Ray County Clerk, the Clerk filed them on Case.net in the criminal case. Prosecutor received notice of that filing through Case.net. Rule 103.08 states "service shall be made to registered [Case.net] users through the electronic filing system." This constitutes a good-faith effort by Defendant to serve the Prosecutor, and invoke the IAD. Dismissal affirmed.

U.S. v. Black, 2022 WL 288173 (10th Cir. 2022):
Holding: (1) Where Defendant was indicted in both Dist. of Kansas and Western Dist. of Missouri for robberies in both states, the indictment for Kansas charges was "pending" in the Western Dist. of Missouri, as transferee court, when Defendant made first appearance by being arraigned in Missouri; thus, speedy trial clock began to run for Speedy Trial Act purposes (requiring trial within 70 days); and (2) even though case was later returned to Kansas after Defendant pled not guilty in Missouri, case should have been dismissed in Kansas where more than 70 non-excludable days had elapsed between Missouri appearance and disposition in Kansas.

U.S. v. Olsen, 2022 WL 4493853 (C.D. Cal. 2022):
Holding: General order suspending jury trials during COVID violated the "ends of justice" exception to Speedy Trial Act that delays specifically be limited in time.

U.S. v. Nunez, 2022 WL 2114632 (S.D. Iowa 2022):
Holding: Even though Defendant received a copy of his federal indictment and notice of detainer while in state prison, he could not have reasonably been expected to assert speedy trial right (thus rendering this a neutral factor), where he was illiterate or near-illiterate, had a low IQ, was enrolled in special education, and had no experience with federal criminal system.

State v. Mann, 2021 WL 3047261 (Haw. App. 2021):
Holding: The filing of a citation for various traffic offenses in lieu of arrest started the "speedy trial clock" in prosecution for Defendant later charged by complaint, even though the citation was dismissed and the later complaint added a DWI offense.

State v. Johnson, 2021 WL 4473112 (La. 2021):
Holding: Four-year delay between Defendant's original charge and trial violated Speedy Trial right, where State had nolle prossed charge when faced with unfavorable rulings on its continuance motions, and then waited three years to re-file charge.

State v. Reeves, 2022 WL 320386 (Me. 2022):
Holding: Trial court's grant of continuance for good cause was not done in "open court," and thus did not extend the deadline of the Interstate Compact on Detainers for bringing Defendant to trial, where continuance was granted after an unrecorded telephone call-hearing between State and Defendant's attorney.

State v. Bolinske, 2022 WL 188466 (N.D. 2022):
Holding: Defendant's 4th Amendment right to prompt probable cause determination was violated where Defendant was arrested without a warrant on Friday afternoon but not brought before a judge until Monday.

People v. Votaw, 2021 WL 202854 (N.Y. App. Div. 2021):
Holding: Phrase in speedy trial statute stating that motions to dismiss "shall be reviewable on appeal" means that a guilty plea no longer forfeits the ability to raise denial of speedy trial issue on appeal, but issue can be waived.

People v. Kinch, 2022 WL 14407037 (N.Y. City Crim. Ct. 2022):
Holding: Where the State announced "ready" for trial by filing a document in a Case.net-type electronic system at 11:35 p.m. on the 92nd day of a time period, the readiness announcement would be counted as having been filed on the 93rd day for speedy trial purposes, because, for speedy trial purposes, the State must announce ready for trial at a time during business hours when a trial could actually commence.

Discovery

State ex rel. Lutman v. Baker, 635 S.W.3d 548 (Mo. banc 2021):
Holding: (1) Even though (a) Defendant in civil car accident case had told police he blacked out or had a heart attack during the incident, and (b) Defendant wrote Plaintiff's family an apology letter saying he was an alcoholic and had "lost control of his life," this did not expressly or impliedly waive his doctor-patient privilege, Sec. 491.060(5) and Defendant did not place his medical condition at issue in the lawsuit, so Plaintiff's subpoena to obtain Defendant's medical records should have been quashed; an implied waiver requires a "clear, unequivocal purpose" to waive privilege, and Lutman's statements were not an indication of a desire to share confidential medical records; and (2) Even though the medical records here had already been (somewhat inadvertently) disclosed to Plaintiff, the case is not moot in prohibition proceeding because the harm to Defendant is ongoing, and appellate court is still able to effect at least a partial remedy, such as requiring the records be returned or destroyed.

State ex rel. Barks v. Pelikan, 2002 WL 605737 (Mo. banc March 1, 2022):
Holding: Even though (1) Plaintiff's petition alleged Defendant was intoxicated when she crashed a golf cart in which Plaintiff was a passenger, and (2) Defendant pleaded affirmative defenses of comparative fault and assumption of risk (because Plaintiff knew

Defendant was intoxicated), this did not waive Defendant's doctor-patient privilege, Sec. 491.050(5), in the confidentiality of her medical records regarding the incident.
Discussion: A patient can waive privilege by express or implied waiver if they *voluntarily* place their medical condition at issue. The most common waiver occurs when plaintiffs file a petition alleging they suffered physical or mental injuries. Defendant has not sought any damages for injury, and her claims of comparative fault and assumption of risk are purely defensive. Affirmative defenses must be affirmatively pleaded or they are waived. Thus, Defendant's assertion of these defenses is "involuntary" because she would have waived them if she didn't affirmatively plead them. It would be illogical and unacceptable to require Defendant to choose between waiving her doctor-patient privilege or forfeiting her affirmative defenses. Although Defendant's medical records may establish whether Defendant was intoxicated, the very nature of an evidentiary privilege is to remove evidence that is otherwise relevant and discoverable from the scope of discovery. Privileges always are invoked at the expense of "truth-seeking" and the equities of supporting the privilege are "not great" in all cases, but the privilege is set by statute. Writ of prohibition granted to bar discovery of Defendant's medical records.

Hill v. Wallach, 2023 WL 2586185 (Mo. banc March 21, 2023):
Holding: Even though Plaintiffs contended certain settlement documents and emails from a prior case were protected from discovery in a new case by the work-product doctrine under Rule 56.01(b)(5), the work-product protection was waived because Plaintiffs had voluntarily disclosed the protected material to an adversary (insurance company for at-fault driver) in the prior case.
Discussion: The fact that Plaintiffs disclosed the documents to a former adversary rather the current adversary in the new case is irrelevant. Once Plaintiffs disclosed the documents and emails in the prior case, they waived work-product protection in any subsequent case in which the documents and emails would otherwise be discoverable.

State v. Deroy, 623 S.W.3d 778 (Mo. App. E.D. 2021):
Holding: (1) Conviction for both stealing, Sec. 570.030, based on 'possessing" a car, and first-degree tampering, Sec. 569.080, based on "operating" the car does not violate Double Jeopardy since the elements of the offenses are different; (2) even though police damaged Defendant's phone when they tried to extract data from it so that Defendant later wasn't able to extract his own possibly exculpatory data, this alone did not demonstrate "bad faith" by police to support a due process violation for destruction of potentially exculpatory evidence.

State ex rel. Kilroy Was Here LLC v. Moriarty, 633 S.W.3d 406 (Mo. App. E.D. 2021):
Holding: (1) Where Attorney exceeded the scope of his representation of Client-Insurance Company on a bad-faith-refusal-to-settle claim by becoming involved in the underlying litigation which could align with or be adverse to Client, discovery could be had of Attorney's materials that were outside the scope of his representation of Insurance Company; (2) to the extent that Attorney appeared to act as de facto Attorney for Insured in the underlying litigation, Insured could obtain discovery of Attorney's materials

because they were de facto client files of Insured, and exceeded scope of Attorney's representation of Insurance Company.

Discussion: Mandamus is appropriate to compel discovery when matters aren't work product or privileged, because trial court has no discretion to deny discovery of relevant matters or reasonably calculated to lead to discovery of admissible evidence. To be privileged, a communication must be made to secure legal advice. Communications between lawyer and client about non-legal matters are not privileged (e.g., where lawyer acts as a collections agent); nor are communications when a third person representing an adverse party was present. Privilege can also be waived when invoked in some "fundamentally unfair way." Rule 56.01(b)(1) gives absolute immunity to privileged material, and qualified immunity for work product. In contrast to privileged material, work product must be prepared in anticipation of litigation. "Tangible" work product (written statements, briefs, memos) may be discoverable upon showing of substantial need and inability to obtain substantial equivalent without undue hardship. "Intangible" work product (mental impressions, opinions, legal theories) is not discoverable. Insured may obtain discovery of all materials to the extent that Attorney (1) acted as de facto counsel for Insured, (2) made communications in the presence of a third party, or (3) where another exception to attorney-client privilege applies. Mandamus granted.

State v. Quinn, 2023 WL 3698256 (Mo. App. E.D. May 30, 2023):

Even though State had not obtained a statement of Defendant given to a Federal Officer for more than three years after Defendant had sought discovery of it under Rule 25, where the State had tried to get the statement but failed, the trial court erred in dismissing charges with prejudice, because the State and Court lacked jurisdiction to subpoena the statement from federal authorities under federal "Touhy" regulations; Defendant's remedy was to seek the report in U.S. District Court, which had authority to order production.

Facts: In 2019, Defendant was charged with murder. Defendant sought discovery under Rule 25, including discovery of a statement she made to a Federal Officer. The State made informal attempts to obtain the statement. In 2021, Defendant moved for sanctions for not producing the statement. The trial court granted sanctions first by ruling that no statement of Defendant would be admitted at trial, and then ordering State to subpoena the statement. When the statement still was not produced by 2022, Defendant moved to dismiss for continuing discovery violation. The trial court dismissed charges with prejudice. State appealed.

Holding: Rule 25.03(h) requires the State use diligence and good faith to obtain discovery from other government personnel, but the mere failure to disclose doesn't establish a violation. The Rule recognizes the State may fail in obtaining the discovery, and thus, authorizes the court, upon request by either party, to issue a subpoena for the material. Here, however, the court was without authority to subpoena a Federal Officer under the federal "Touhy" regulations. Thus, to the extent the trial court found the State violated Rule 25.03(h) by failing to disclose the statement that was in the sole possession of federal authorities, neither the State nor trial court had authority to produce the report. The State cannot be penalized for failing to disclose evidence it was not authorized to obtain under "Touhy" regulations. However, the regulations allow either party to go to

U.S. District Court to get a federal court to order production. Defendant was free to do this. Dismissal reversed.

Editor's note: Eastern District reached similar result in co-defendant's case, **State v. Nixon**, 2023 WL 3698246 (Mo. App. E.D. May 30, 2023). Co-defendant sought to obtain the statement as potential *Brady* material. Eastern District reversed dismissal of Nixon's charges with prejudice, on same rationale as in **Quinn**.

State ex rel. Putnam v. State Bd. of Registration for Healing Arts, 641 S.W.3d 250 (Mo. App. W.D. 2021):
Holding: Civil interrogatory which asked opposing party to state "the substance" of persons with knowledge of facts relating to the claims was improper because the substance of witness statements obtained by counsel is protected as attorney work product; interrogatory can ask for identity of persons with knowledge of relevant facts, and the general subject matter of the persons' knowledge, but cannot seek "the substance" of statements obtained by counsel.

State v. A.S., 2022 WL 2032264 (Mo. App. W.D. June 7, 2022):
Holding: Where court dismissed State's case with prejudice on grounds that State had failed to disclose a witness list to defense counsel before the preliminary hearing, this was erroneous because Rule 25.03 requires disclosure of a witness list only after the filing of an indictment or information (which had not yet occurred).
Discussion: Rule 25.03 has different disclosure requirements for different stages of the case. 25.03(a) governs disclosure after filing of a "complaint" and, thus, disclosure before preliminary hearing. 25.03(a) requires disclosure of various reports, but not a witness list. 25.03(b)(2) applies after "indictment" or "information" and requires disclosure of the names and last known addresses of persons the State intends to call. Here, court erroneously found the State violated 25.03(b)(2), but State didn't, because this was pre-indictment or information. Dismissal reversed.

State v. Jackson-Kuofie, 2022 WL 2032266 (Mo. App. W.D. June 7, 2022):
Holding: Where court dismissed State's case with prejudice on grounds that State had failed to disclose a witness list to defense counsel before the preliminary hearing, this was erroneous because Rule 25.03 requires disclosure of a witness list only after the filing of an indictment or information (which had not yet occurred).
Discussion: Rule 25.03 has different disclosure requirements for different stages of the case. 25.03(a) governs disclosure after filing of a "complaint" and, thus, disclosure before preliminary hearing. 25.03(a) requires disclosure of various reports, but not a witness list. 25.03(b)(2) applies after "indictment" or "information" and requires disclosure of the names and last known addresses of persons the State intends to call. Here, court erroneously found the State violated 25.03(b)(2), but State didn't, because this was pre-indictment or information. Dismissal reversed.

State v. Kerksiek, 2023 WL 2375395 (Mo. App. W.D. March 7, 2023):
Holding: Even though the State had listed Witness on the felony information, where Defendant did not endorse Witness as a defense witness but sought to call Witness during trial, trial court did not abuse its discretion in not allowing Witness to be called, because

Defendant was required to have disclosed before trial witnesses he intended to call under Rule 25.05.

Discussion: Rule 25.05(a)(2) requires that, upon written request of the State, Defendant shall disclose the names and last known addresses of persons, other than Defendant, whom Defendant intends to call at trial. Rule 25.02(b) requires requests for discovery be answered within 14 days after service. This obligation is continuing. Defendant argues that because Witness was listed on the felony information, *either* party was thereafter allowed to call Witness without further endorsement. Accepting this argument would nullify Rule 25.05's disclosure requirements. Endorsing a witness on a felony information does not apprise the State of a *Defendant's* intent to call that same person as a witness.

State v. Griest, 2023 WL 3183839 (Mo. App. W.D. May 2, 2023):

Holding: (1) The State violated Rule 25.03 where it did not disclose photos of Victim's injuries until night of trial, even though State claimed it didn't know of the photos until it contacted the SANE nurse who conducted the exam of Victim and the State only contacted Nurse right before trial; the duty to disclose includes not only information that is actually known to prosecutor, *but also information that may be learned through reasonable investigation*; State's delay in contacting Nurse wasn't reasonable; (2) even though State had disclosed Nurse as a witness months before trial, this does not excuse the delay in disclosing the photos. (But violation wasn't prejudicial in this case).

State v. Ivy, 673 S.W.3d 884 (Mo. App. W.D. Aug. 15, 2023):

Holding: Where, four days before trial, Defendant disclosed certain medical records on which Defendant's Expert intended to rely, trial court did not abuse discretion in precluding Defendant's Expert from testifying to the information in the medical records, since Rule 25.05(a)(1) required the defense to disclose results of medical examinations, and Rule 25.08 states that if a discovery request is made under 25.05, the duty to disclose is continuing and must be disclosed "as soon as practicable;" here, Defendant apparently had the medical records for three years before trial, so failure to disclose until four days before trial was not "as soon as practicable" under the Rule.

Z.R., A Minor, By and Through Next Friend T.R. v. Kansas City Pediatrics LLC, 2023 WL 7136352 (Mo. App. W.D. Oct. 31, 2023):

Holding: Where (1) defense Expert's opinion at trial "directly contradicted" their opinion given in their pretrial deposition, and (2) the defense had not disclosed the change in opinion, Plaintiff was entitled to new trial, because the discovery rules require that when an Expert Witness has been deposed and later changes their opinion before trial or bases that opinion on new facts different from those disclosed in the deposition, it is the duty of the party intending to use the Expert to disclose that information to the opposing side and update the responses made in the deposition.

State ex rel. L.O. v. Hansbrough, 2023 WL 8721939 (Mo. App. W.D. Dec. 19, 2023):

Holding: Even though Plaintiff-Student's discrimination claim against School District directly involved only certain racist emails, Plaintiff was entitled to discovery of other racist incidents involving nooses hung in the School -- which occurred both before and

after the email incident – because discovery regarding the other incidents may very well support Plaintiff's burden to prove School "knew or should have known" of the racially discriminatory environment, and provide relevant background evidence for an actionable claim.

Discussion: The trial court denied discovery of other racist incidents as irrelevant. Mandamus is a proper remedy when a court abuses its discretion in denying discovery on matters which are relevant and reasonably calculated to lead to the discovery of admissible evidence. Here, we are not even at the stage of evaluating the *admissibility* of any evidence. Instead, we are merely at the stage of *discovery* of such evidence. Plaintiff's theory of the case is that School facilitated racial harassment either by not properly responding to known past incidents of racial harassment or by failing to investigate past incidents altogether. Plaintiff's discovery requests about other incidents before and after the incident at issue are reasonably calculated to lead to the discovery of admissible evidence. Writ ordering discovery granted.

*** U.S. v. Zubaydah, ___ U.S. ___, 142 S.Ct. 959 (U.S. March 3, 2022):**

Holding: Even though the location of a CIA detention facility had previously been publicly reported by various sources, where the U.S. Gov't had never confirmed or denied those reports and Gov't contended that doing so would harm national security, the Gov't could assert "state secrets privilege" to quash subpoenas seeking this information from CIA contractors.

*** Federal Bureau of Investigation v. Fazaga, ___ U.S. ___, 142 S.Ct. 1051 (U.S. March 4, 2022):**

Holding: Sec. 1806(f) of the Foreign Intelligence Surveillance Act (FISA) did not eliminate or "displace" the Government's long-established "state secrets privilege," which the Government can invoke to prevent the disclosure of state and military secrets; thus, trial court properly dismissed most of Plaintiff's unlawful surveillance claims because evaluation of those claims would require disclosure of intelligence information that would threaten national security interests.

Randolph v. Com., 173 N.E.3d (Mass. 2021):

Holding: A third-party who is ordered to provide a DNA sample in a postconviction case has a right to appeal that decision, even though they have not intervened in the postconviction case.

DNA Statute & DNA Issues

Randolph v. Com., 173 N.E.3d (Mass. 2021):
Holding: A third-party who is ordered to provide a DNA sample in a postconviction case has a right to appeal that decision, even though they have not intervened in the postconviction case.

State v. Thompson, 2022 WL 1787550 (N.J. 2022):
Holding: The 5-year statute of limitations for sex crimes and burglary prosecutions began to run when the FBI updated its guidelines for National DNA Index System to allow previously-excluded data to be to be entered for DNA profiles; State possessed both physical evidence from the crime and Defendant's DNA sample at that time, and should have been able to identify Defendant at that time.

Double Jeopardy

State v. Andrews, 2022 WL 789331 (Mo. banc March 15, 2022):
Prosecution, in a single proceeding, of unlawful use of a weapon while in possession of a controlled substance, Sec. 571.030(11), and possession of a controlled substance, Sec. 579.015, does not violate Double Jeopardy.
Facts: Defendant was charged in a single indictment with unlawful use of a weapon while in possession of a controlled substance, Sec. 571.030(11), and possession of a controlled substance, Sec. 579.015. The trial court believed that convicting of both counts would violate Double Jeopardy. Despite the State's disagreement, the trial court accepted a guilty plea from Defendant for UUW possession, and sentenced him. Defendant then filed a motion to dismiss the drug possession count on grounds that because he had been convicted of the greater offense (UUW), any prosecution or sentence for the lesser offense would violate Double Jeopardy. The trial court dismissed the drug count. The State appealed.
Holding: Double Jeopardy protects against successive prosecutions for the same offense, and multiple punishments for the same offense. But the U.S. Supreme Court had held what whether a defendant can *sentenced* separately for two different statutory offenses is entirely distinct from whether a defendant can be *prosecuted* for both offenses in a single proceeding. In *Ohio v. Johnson*, 467 U.S. 493 (1984), defendant was charged in a single indictment with murder and involuntary manslaughter. Over the State's objection, Defendant pleaded guilty to manslaughter, then successfully moved to dismiss the murder charge. The Supreme Court held that although Double Jeopardy protects defendants against cumulative punishments for the same offense, it does not prohibit prosecuting defendants for such multiple offenses in a single prosecution. The Court held determination of guilt on one count of a multi-count indictment does not bar continued prosecution of the remaining counts that are greater or lesser-included offenses of the charge. Under *Johnson*, Defendant's guilty plea to UUW possession did not bar his continued prosecution for drug possession. Because the trial court's judgment is reversed on these grounds, the issue of whether the legislature intended for possession and UUW-

possession to be subject to cumulative punishments is not reached. Judgment of dismissal reversed.

State v. Hollowell, 2022 WL 1228957 (Mo. banc April 26, 2022):
Holding: (1) Trial court erred, in felon-in-possession case, in allowing Officer to testify that Defendant's wife, who did not testify, told Officer that she had bought firearms for Defendant, because this hearsay went beyond explaining Officer's conduct and was the only direct evidence linking Defendant to the crime; (2) even though Defendant cross-examined Officer about the hearsay statement, this did not waive Defendant's objection from direct, since when a party objects to introduction of evidence and is overruled, the party does not waive the objection by eliciting the same evidence on cross; and (3) where Defendant was charged with 14 counts of possession of a firearm, this did not violate Double Jeopardy because Sec. 571.070.1 uses the phrase "unlawful possession of a firearm," indicating the legislature intended each firearm to be a separate offense.
Discussion: (1) Officer can testify to hearsay for the limited purpose of explaining Officer's conduct. However, the jury may not be aware of this limitation, so such hearsay is subject to careful scrutiny and limitation. Such hearsay must not be allowed to elicit details directly connecting Defendant to the crime. Here, the State's direct of Officer allowed Officer to testify beyond what was necessary to explain his conduct. This prejudiced Defendant because the non-testifying wife's statement was the only evidence directly connecting Defendant to crime. (2) Double Jeopardy prohibits multiple punishments for the same offense. The question is whether the legislature intended multiple punishments. Here, Sec. 571.070.1 prohibits unlawful possession of "a firearm." Thus, the unit of prosecution is the singular "a", meaning each firearm.

State v. Collins, 2022 WL 1559253 (Mo. banc May 17, 2022):
Holding: (1) Second-degree harassment statute, Sec. 565.091, is not unconstitutionally overbroad under First Amendment, because it requires a person's communications be "without good cause" and made "with the purpose" of causing emotional distress; the statute does not require use of "fighting words" or require Victim to actually suffer emotional distress; (2) where Defendant sent Facebook messages and voicemails to Probation Officer referencing Officer's family members, and saying he would follow her like she follows him, evidence was sufficient to convict of second-degree harassment; and (3) conviction for both tampering with judicial officer, Sec. 575.095, and second degree harassment does not violate Double Jeopardy, because tampering with judicial officer contains statutory elements that harassment does not (e.g., tampering covers conveying a benefit to a judicial officer); court examines all elements of statutes to see if they're the same, not the Defendant's actual conduct.

State v. Onyejiaka, 2023 WL 3976283 (Mo. banc June 13, 2023):
Holding: Sentencing for both possession of a controlled substance, Sec. 579.015.1 and unlawful use of a weapon while in possession of a controlled substance, Sec. 517.030.1(11), does not violate Double Jeopardy because the legislature intended multiple punishments for these offenses.
Discussion: A defendant can be convicted in one proceeding of more than one offense based upon the same conduct if the legislature intends to punish the conduct under more

than one statute. The legislature can express its intent within the offense specific statutes, or through Sec. 556.041 (e.g. prohibiting multiple punishments for lesser-include offenses). But here, the plain language of the statutes and statutory construction lead to conclusion that the legislature intended each offense here to be punishable. Sec. 571.030.1(11) states a person can be found guilty of the weapons offense by possessing a firearm "while also" knowingly possessing a controlled substance. Defendant violated two distinct prohibitions and can be punished for both.

State v. Deroy, 623 S.W.3d 778 (Mo. App. E.D. 2021):
Holding: (1) Conviction for both stealing, Sec. 570.030, based on 'possessing" a car, and first-degree tampering, Sec. 569.080, based on "operating" the car does not violate Double Jeopardy since the elements of the offenses are different; (2) even though police damaged Defendant's phone when they tried to extract data from it so that Defendant later wasn't able to extract his own possibly exculpatory data, this alone did not demonstrate "bad faith" by police to support a due process violation for destruction of potentially exculpatory evidence.

State v. Onyejiaka, 2022 WL 4474828 (Mo. App. E.D. Sept. 27, 2022):
Holding: (1) Convictions and sentences for both possession of controlled substance, Sec. 579.015.1, and unlawful use of weapon by possessing firearm while also being in possession of controlled substance, Sec. 571.030.1(11), did not violate Double Jeopardy. (2) Even though constitutional issues must generally be raised at earliest opportunity, appellate court can review unpreserved Double Jeopardy claim as plain error if it can be determined from the face of the record, because claim goes to very power of State to charge defendant.
Discussion: Double Jeopardy protects against multiple punishments for the same offense, but the test is whether multiple punishments were intended by the legislature. Sec. 556.041 provides that when the same conduct may establish the commission of more than one offense, the defendant cannot be convicted of more than one offense if one offense is included in the other. An included offense is one established by proof of the same or less than all the elements of the charged offense. Courts look only to the statutory elements to determine this, not the way the offenses are charged. Possession of a controlled substance requires proof Defendant possessed the illegal substance. Unlawful use of a weapon can be established by possessing a controlled substance, but can also be established by proof of other facts since 571.030 contains 11 different ways to commit the offense. Thus, unlawful use of weapon does not include possession of a controlled substance for Double Jeopardy purposes.

In the Interest of J.K.M., 665 S.W.3d 373 (Mo. App. E.D. 2023):
Holding: Even though the Juvenile Court found that Juvenile-Defendant had committed both the offense of violating a court order by removing a GPS device, and the offense of tampering with electronic monitoring equipment, Sec. 575.205 (which would be a Class D felony if committed by an adult), this did not violate Double Jeopardy because the violating-court-order offense was a "status offense," which is an infraction and in the nature of a civil proceeding which allows a court to take control of Juvenile for behavior

injurious to Juvenile's welfare; there is less constitutional protection regarding a "status offense" than a "delinquency offense."

State v. Johnson, 2023 WL 4994092 (Mo. App. S.D. Aug. 4, 2023):
Holding: (1) Where Defendant left the scene of an accident where two people were injured, his conviction for two counts of leaving the scene of an accident, Sec. 577.060.1, did not violate Double Jeopardy, because the statute's use of the word "an" accident (as opposed to "any" accident) indicates a crime occurs each time an injury occurs to a person; and (2) even though Sec. 556.041 states a person cannot be convicted of more than one offense if the offense is defined as a continuing course of conduct, this statute did not apply, because leaving the scene is not defined as a continuing course of conduct, and it has a specified unit of prosecution of "an" accident.

State v. Putfark, 2022 WL 4073854 (Mo. App. W.D. Sept. 6, 2022):
Holding: (1) Double Jeopardy was violated where Defendant was convicted at trial of first-degree statutory sodomy, Sec. 566.062, and first-degree child molestation, Sec. 566.067, based on the same conduct, because the child molestation is a lesser-included offense of the sodomy; (2) even though the Double Jeopardy claim was not preserved for appeal, it can be reviewed as plain error where it can be determined from the face of the record; and (3) even though Defendant was charged with first-degree child molestation, where trial court mistakenly gave the jury instruction for second-degree child molestation, Defendant must be resentenced for second-degree child molestation; resentencing is required even though the sentence is within the range of punishment for second-degree child molestation (a Class B felony), since the record showed the court mistakenly believed the offense was a Class A felony with a higher punishment range.
Discussion: (1) Double Jeopardy protects against multiple punishments for the same offense. Sec. 556.041 provides that where the same conduct establishes commission of more than one offense, a defendant may be convicted of both unless one is included in the other. First-degree child molestation is a lesser-included offense of first-degree statutory sodomy. Here, the jury considered the identical evidence to convict of both offenses. There was no other evidence that Defendant did any other touching of Victim. Thus, the second-degree child molestation count was established with fewer facts necessary to establish the statutory sodomy. This Double Jeopardy violation is determinable from the face of the record and constitutes plain error. (3) Defendant was charged with Class A felony first-degree child molestation, but the court mistakenly submitted the jury instruction for Class B felony second-degree child molestation. Thus, Defendant was only convicted of the Class B felony. Although Defendant's actual sentence was within the authorized range of a Class B felony, the parties and the Sentencing Assessment Report all assumed the offense was a Class A felony, and argued that range of punishment. The trial court gave 10 years, the minimum for an A felony. Resentencing is required because trial court mistakenly believed offense was an A felony and that the minimum sentence was 10, when it was really five.

* **Denezpi v. U.S., 2022 WL 2111348, ___ U.S. ___ (U.S. June 13, 2022):**
Holding: Double Jeopardy's dual-sovereignty doctrine doesn't prohibit same sovereign from prosecuting same conduct under both Native American and federal law.

*** Smith v. U.S., ___ U.S. ___, 143 S.Ct. 1594 (2023):**
Holding: Double Jeopardy is not violated where a Defendant seeks retrial for violation of the Venue Clause, Art. III, or the Vicinage Clause, Amend. 6 (which guarantees a jury trial in the district where the crime was committed); thus, where (i) Defendant had used a computer in Alabama to steal goods from a Florida company, (ii) he was tried in Florida but objected to venue there, appellate remedy is to reverse and remand for a new trial in Alabama, and this is not barred by Double Jeopardy.

U.S. v. Kuhnel, 2022 WL 301606 (8th Cir. 2022):
Holding: Defendant's two convictions under both 18 USC 2252(a)(4)(B) and 18 USC 2252A(a)(5)(B) for possession a single material containing child pornography on a single laptop violated Double Jeopardy; the statutes forbid possession of "matter" or "material" containing child pornography, not the individual images themselves; thus, possession of multiple child pornography images on the same laptop constituted a single criminal act.

Williams v. U.S., 2022 WL 40176 (D.C. 2022):
Holding: Defendant could not be convicted of two first-degree burglaries first for entering an apartment, and then entering a locked bedroom within the apartment, where only one resident was in the apartment.

Patrick v. State, 2021 WL 4347744 (Del. 2021):
Holding: Defendant's two convictions for unlawful possession of weapon violated Double Jeopardy pursuant to multiplicity doctrine where Defendant was convicted under two different statutory sections for possession of one weapon; the relevant unit of prosecution was the unlawful act of possession of one weapon, not each way a person qualified as someone who cannot possess the weapon.

Terrell v. State, 2022 WL 287005 (Ga. 2022):
Holding: Where Defendant was convicted of both felony-murder and the underlying felony of aggravated assault, the underlying felony merges into the felony-murder conviction, and must be vacated.

State v. Euler, 2021 WL 5876042 (Kan. 2021):
Holding: When two criminal statutes cover Defendant's conduct, the "identical offense doctrine" should be used to determine which crime Defendant can be convicted of, not the rule that Defendant can only be convicted under the more specific statute; "identical offense doctrine" holds that where two offenses have the same or similar elements, a defendant can only be sentenced to the less severe penalty.

State v. Larson, 2022 WL 6852322 (Minn. 2022):
Holding: Even though Defendant refused parole officer's directive to register as sex offender two times, two separate convictions for refusals involving the same officer violated double jeopardy.

McGlasten v. State, 2021 WL 5118111 (Miss. 2021):
Holding: Simultaneous possession of multiple firearms generally is only one offense under statute prohibiting felon-in-possession of a firearm, unless the weapons were stored in different places or acquired at different times.

Sena v. State, 2022 WL 1698545 (Nev. 2022):
Holding: Rule of lenity which prohibited sexual relations between relatives made the unit of prosecution a per-relationship basis, rather than a per-act basis.

People v. Snider, 2021 WL 627570 (Colo. App. 2021):
Holding: Resisting arrest was lesser-included of second-degree assault on officer, since comparing the elements shows resisting is a subset of the elements of assault; failure to merge offense violated double jeopardy.

State v. Crossley, 2020 WL 7310985 (Ohio App. 2020):
Holding: Convictions for carrying concealed weapon and improperly handling firearm in vehicle should have merged at sentencing.

Com. v. Given, 2020 WL 7639609 (Pa. Super. Ct. 2020):
Holding: Where Defendant committed a single act of driving with a metabolite in his blood, he should not have been subjected to multiple convictions or sentences for DWI.

DWI

State v. Shepherd, 2022 WL 12289858 (Mo. banc April 26, 2022):
Even though State presented Defendant's driving record from Colorado showing he had five prior DWI offenses, evidence was insufficient to prove "habitual offender" DWI status, because State introduced no facts underlying the Colorado convictions to show the conduct involved would qualify as an intoxication related traffic offense (IRTO) in Missouri at the time of the current offense.
Facts: Defendant was charged with DWI as a "habitual offender," Sec. 577.010.2(6)(a), for having 5 or more prior IRTOs. As relevant here, when Defendant committed the Mo. DWI, IRTOs were defined as "driving while intoxicated" and "driving with excessive blood alcohol content." As proof of this, State introduced Defendant's Colorado driving record, which showed five prior offenses.
Holding: A prior conviction qualifies as an IRTO only if the conduct involved "driving while intoxicated," or another portion of the IRTO definition in section 577.001(15), as defined at the time of the current offense for which State seeks enhancement. As used in Chapter 577 at time of Defendant's offense, the word "driving" meant "physically driving or operating a vehicle," Sec. 577.001(9). This does not include merely being in

"actual physical control" of a vehicle. This is critical to the State's failure of proof here, because Colorado statutes did not make a distinction between driving a vehicle, and merely being in actual physical control of the vehicle. Under Colorado law, merely being in actual physical control would constitute DWI. Thus, all of Defendant's prior convictions could have been for merely being in actual physical control. State had burden to prove beyond a reasonable doubt that Defendant's prior convictions met the *definition* of an IRTO under Missouri law at time of present offense. (But State need not prove that the conduct underlying the prior out-of-state convictions also constitutes a *crime* under Mo. law in effect at time of present offense. To the extent cases such as *State v. Coday*, 496 S.W.3d 572 (Mo. App. W.D. 2016), and *State v. Gibson*, 122 S.W.3d 121 (Mo. App. W.D. 2003) impose such a requirement, they are overruled). Here, State presented no evidence about Defendant's underlying conduct in Colorado. Nevertheless, it may be possible to make reasonable inferences about some of Defendant's prior convictions that they involved actual driving, since they resulted in accidents; but that is an issue for remand. Judgment vacated and remanded for resentencing.

Wilmoth v. Dir. of Revenue, 669 S.W.3d 102 (Mo. banc 2023):
Holding: Even though Sec. 577.021.3 states that a preliminary breath test "shall be admissible as probable cause to arrest … but shall not be admissible as evidence of blood alcohol content," trial court did not err in license suspension proceeding in allowing Officer to testify that preliminary breath test showed BAC of .11 because courts assessing whether an officer has probable cause to arrest must consider all facts known to Officer at time of arrest; the information known to Officer was not that Driver's BAC was actually .11, but merely that the preliminary test returned a result of .11, subject to all the potential unreliability of that test.
Discussion: It is a matter of first impression for this Court as to whether the numerical result of a preliminary beath test is admissible for purpose of establishing probable cause, which must be proven for Director to suspend a license. When an officer administers a preliminary breath test, the test produces a numerical result, which the officer knows. Probable cause is an objective test, which requires a court to determine all the facts and circumstances known by the officer at the time of arrest. Because of this, the numerical result is admissible evidence of whether the officer had probable cause. The fact that the test cannot be admitted to prove a defendant's BAC did not require exclusion of the numerical result. Evidence may admitted for one purpose but not others. The test results were offered to prove Officer had probable cause to arrest (along with other evidence of intoxication), not to prove Driver's BAC.

Schwander v. Dir. of Revenue, 616 S.W.3d 534 (Mo. App. E.D. 2021):
Holding: Even though 19 CSR 25-30.051(6) provides that supplies for a breathalizyer must come from "Intoximeters, Inc., St. Louis, MO *63114*," trial court erred in excluding breath test results from "Intoximeters, Inc., St. Louis, MO *63146*," because it is not necessary for Director to prove that a supplier has a particular zip code; to hold otherwise would lead to unreasonable result that the CSR would have to be revised every time a supplier moved to a different zip code.

Hummel v. Dir. of Rev., 625 S.W.3d 484 (Mo. App. E.D. 2021):
Holding: Even though Officer was in the patrol car from which Driver had to telephone his attorney about whether to take a breath test, a phone call made in a patrol car is not required to be private, at least where Driver did not make a request for privacy, unlike at a police station where there is a "private room" requirement under Sec. 600.048.3; if Driver had requested privacy, appellate court "could possibly reach a different conclusion." License revocation affirmed.

Wood v. Dir. of Revenue, 668 S.W.3d 292 (Mo. App. E.D. 2023):
Holding: (1) A federal park ranger has authority under Missouri's Implied Consent Law, because the "arresting officer" specified in Sec. 577.020 includes federal officers authorized to carry firearms and makes arrests for violating U.S. law; (2) even though Driver was arrested in national park for violating federal DWI law, Sec. 302.574 does not require that a Driver be cited for violating a Missouri state law or municipal or county ordinance for the Director to be able to revoke a license for refusal to take breath test; (3) arresting officers are not required to be agents or delegates of the Director under the Implied Consent Law.

Greco v. Dir. of Revenue, 2023 WL 6978394 (Mo. App. E.D. Oct. 24, 2023):
Holding: Where Driver had already had one court-ordered reinstatement of Driver's license after a 10-year suspension, where Driver was subsequently convicted of another DWI, Director did not err in revoking license permanently, because Sec. 302.060.1(9) allows a person to obtain a license through court action only one time; a Driver may not seek any sort of reinstated driving privileges under either 302.060.1(9) or 302.309.3(6)(b)[limited driving privileges] after a 10-year suspension and subsequent DWI.

Kaercher v. Dir. of Revenue, 2023 WL 8882363 (Mo. App. E.D. Dec. 26, 2023):
Holding: Even though the certification letter attached to various Dep't of Revenue driver's documents did not bear the original signature of the Director or custodian of records but was a copy of a signature, the document was properly admitted because Sec. 302.312 requires only that the documents be "properly certified" and 302.010(23) defines "signature" as "any method determined by the director of revenue for the signing, subscribing or verifying" the record; Sec. 302.010(23) does not require the signature be "original."

State v. Benson, 2022 WL 2072931 (Mo. App. S.D. June 9, 2022):
Holding: Where Defendant was charged in 2017 with DWI as a class E felony due to prior intoxicated-related traffic offenses (IRTOs), Sec. 577.001(15), the State was not required to prove Defendant was represented by counsel or waived counsel in the prior IRTO proceedings, because whether a prior conviction qualifies as an IRTO is defined as of the time of the current offense (2017), and the statutory language requiring prior IRTOs to have been with counsel or waiver of counsel was repealed in 2009.

Acevedo v. Dir. of Revenue, 2023 WL 2534544 (Mo. App. S.D. March 16, 2023):
Holding: Trial court erred in license suspension hearing in excluding pre-arrest portable breathalyzer test (PBT) results on grounds of "lack of foundation" in not showing how the PBT machine was maintained, since Sec. 577.021 permits an Officer to administer a chemical test prior to arrest, and states that a test performed pursuant to Sec. 577.021 "shall be admissible as evidence of probable cause to arrest," and further states that the calibration requirement "shall not apply to a test administered prior to arrest."

Gamblin v. Dir. of Revenue, 2023 WL 4230471 (Mo. App. S.D. June 28, 2023):
Holding: Even though the Implied Consent Law, Sec. 577.041, requires Officer to give Driver 20 minutes to contact an attorney after having been read Implied Consent rights, where (1) Officer arrested Driver on a road; (2) Driver asked to call his attorney, and spoke with attorney; (3) Officer then read Implied Consent rights; and (4) one minute later, Driver refused to take a breath test, trial court did not err in revoking driving privileges because Defendant had, in fact, spoken with his attorney and Sec. 577.041 is satisfied if Driver is given 20 minutes *or* Driver "abandons" their efforts to contact attorney; Drivers are deemed to have abandoned their efforts if they refuse a test after having spoken with an attorney.

State v. Proctor, 2023 WL 8270521 (Mo. App. S.D. Nov. 30, 2023):
Trial court erred in DWI case in suppressing BAC results on grounds that Officer did not read Defendant her Miranda rights before reading the Implied Consent law statement, because asking for a breath test under the Implied Consent law does not constitute guilt-seeking interrogation.
Facts: Officer arrested Defendant for DWI and took her to police station. At station, Officer read Defendant Missouri's Implied Consent Statements and asked her to take a breath test. After she answered she would take the test, Officer then read her the *Miranda* rights. Officer then administered the test. The trial court suppressed the BAC results on grounds that Officer had not read *Miranda* rights before the Implied Consent statement.
Discussion: The Western District recently held in *State v. Vandervort*, 663 S.W.3d 520 (Mo. App. W.D. 2023), that *Miranda* rights are not required at the time the Implied Consent statement is read. We agree. The Implied Consent law deems all persons operating a vehicle to have consented to BAC or chemical testing, but drivers may still refuse to test. A refusal is not testimonial or communicative, nor an act coerced by law enforcement. Thus, the privilege against self-incrimination doesn't apply and *Miranda* warnings need not be given.

Baker v. Dir. of Revenue, 620 S.W.3d 102 (Mo. App. W.D. 2021):
Holding: Where within the past 10 years Driver had been convicted of a disorderly conduct offense in Michigan which involved proof of "intoxication," Driver was not eligible for license reinstatement after 10-year suspension, because Sec. 302.060.1(9) prohibits reinstatement if a person has been found guilty of "any offense related to alcohol" during prior 10 years; this is true even if the alcohol offense is for a non-driving related offense.

Mottet v. Dir. of Rev., 635 S.W.3d 862 (Mo. App. W.D. 2021):
Holding: Where local prosecutor – after receiving notice of case -- failed to appear on behalf of Director and, thus, failed to adduce any evidence at Driver's license suspension case, trial court did not err in entering judgment against Director for failure to adduce evidence, and in denying later motion to set aside the judgment as "void" under Rule 74.06(b). The Director is represented by the local prosecutor in such proceedings, Sec. 302.574.4, and is treated as any other party in a civil lawsuit. Since the local prosecutor had notice, the judgment is not "inconsistent with due process," Rule 74.06(b), and, thus, is not "void."

Gabbert v. State and Dir. of Rev., 636 S.W.3d 194 (Mo. App. W.D. 2021):
Holding: Even though the local prosecutor had actual notice of Driver's petition to reinstate his license, where Director was never properly served, the judgment entered against Director is void for lack of jurisdiction; no amount of actual notice supplants proper service of process, and Director did not waive service.

Kisner v. Director of Revenue, 2022 WL 1217427 (Mo. App. W.D. April 26, 2022):
Holding: Where (1) Driver arrested for DWI asked to speak to an attorney at 10:30 p.m.; (2) Officer allowed her 20 minutes to contact one from 10:30 to 10:53; (3) then, at 10:55, Officer read implied consent law and Driver refused to take a test at 11:05, Driver's refusal was not knowing and consensual because she was not given 20 minutes *after* being read implied consent law to contact an attorney.
Discussion: Sec. 577.041.3 requires that when a Driver has requested an attorney, the 20-minute period to contact one begins immediately after being read the implied consent law, regardless of whether Driver asked for an attorney before or after being read the law. Here, Driver's consent was not informed because she wasn't given 20 minutes to contact an attorney *after* being read the implied consent law. Revocation of license reversed.

State v. Nowicki, 2023 WL 1786654 (Mo. App. W.D. Feb. 7, 2023):
Holding: (1) A trial court's findings that Defendant had the requisite Intoxication Related Traffic Offenses (IRTOs) to qualify for enhanced punishment for DWI is reviewed as a sufficiency-of-evidence challenge on appeal, so need not be raised in a Motion for New Trial to preserve for appeal, Rule 29.11(d); (2) a prior conviction qualifies as an IRTO only if the conduct involved constituted "driving while intoxicated" *as defined at the time of the current offense for which the State seeks enhancement*, not the time of the conduct of the underlying conviction; (3) "driving" in the IRTO statute means "physically driving or operating a vehicle", 577.001(9), not merely being in "actual physical control" of the vehicle; (4) even though State introduced copies of Defendant's DWI convictions from 1986, 1990, and 1994, these documents did not show that Defendant was "physically driving or operating" the vehicle, so evidence was insufficient to count these as qualifying IRTOs; and (5) Defendant's 2005 conviction doesn't qualify for "prior offender" status because it was more than five years before the occurrence of Defendant's present offense, Sec. 577.010.2(1) and (2).
Discussion: Regarding the 1986, 1990 and 1994 convictions, Defendant could have been convicted for merely being in "physical control" of a vehicle. That doesn't qualify as "driving or operating a vehicle" at time of present offense. The State needed to offer

more proof on those convictions to show Defendant was "driving." Even though the State may offer MULES records as proof of prior convictions under Sec. 577.023.4, the mere admission of those records does not satisfy the State's burden to submit *facts* into evidence showing Defendant was "physically driving or operating a vehicle." Other factual information must appear in the evidence to support a reasonable inference that the offense is a qualifying IRTO. *State v. Ellmaker*, 611 S.W.3d 320 (Mo. App. W.D. 2020) held MULES records establish *prima facie* proof of qualifying IRTOs. But *Ellmaker* is contrary to *State v. Shepherd*, 643 S.W.3d 346 (Mo. banc 2022) and should no longer be followed. Finally, even though the prior offenses are called "driving while intoxicated" or "DWI," the bare designation of the charged offense is not evidence of the existence or non-existence of a fact supporting a reasonable inference about the conduct of the driver at the time of the offense. Reversed and remanded for sentencing as Class B misdemeanor DWI.

Dunbar v. Dir. of Rev., 2023 WL 5210922 (Mo. App. W.D. Aug. 15, 2023):
Holding: Even though Officer did not comply with the Implied Consent Law, Sec. 577.041.3, in that Officer didn't allow Driver 20 minutes to contact an attorney after reading the Implied Consent notification, where Officer instead obtained a search warrant to draw Driver's blood, Driver's license was not revoked for refusing a chemical test but rather was suspended under Sec. 302.505.1 because Director proved Driver was arrested upon probable cause for violating an alcohol-related offense and Driver's BAC exceeded the legal limit; the toxicology report was admissible in the license revocation proceeding because the blood sample was obtained pursuant to a valid search warrant under Secs. 542.266 and 541.271, and not under the Implied Consent Law; failure to comply with the Implied Consent Law was immaterial in such circumstances, because that law applies only to *warrantless testing*.

Comer v. Dir. of Rev., 673 S.W.3d 504 (Mo. App. W.D. July 25, 2023):
Holding: Even though *Hilkemeyer v. Dir. of Rev*., 353 S.W.3d 62 (Mo. App. S.D. 2011), held that an Officer cannot "multi-task" during the 15 minute observation period of observing a Driver before a breath test, the definition of "observation period" in Code of State Regulations was changed in 2012 to only "reasonably ensure observation" and not require "direct observation", so fact that Officer walked around car and did paperwork during 15 minute period did not invalidate the breath test.

Ford v. Dir. of Revenue, 2023 WL 7136159 (Mo. App. W.D. Oct. 31, 2023):
Holding: Where the trial court did not make an audio recording (or other record) of the trial *de novo* in Driver's license suspension case, and this was not the fault of Appellant-Driver, case must be reversed and remanded for new trial *de novo* so that proper record can be made for appellate review.

Awad v. State, 2022 WL 162796 (Ga. 2022):
Holding: Georgia constitution's right against compelled self-incrimination prohibited state from admitting evidence that Defendant refused to take a urine test, following his arrest for DWI.

State v. Skapinok, 2022 WL 1909093 (Haw. 2022):
Holding: Officer's question to Defendant during DWI stop whether he was taking any medication was "interrogation" for *Miranda* purposes.

State v. Patton, 2022 WL 414260 (Kan. 2022):
Holding: Application of amended DWI statute, which counted out-of-state convictions for enhancement purposes, to Defendant who committed DWI before the amendments violated Ex Post Facto Clause.

State v. Forrett, 974 N.W.2d 422 (Wisc. 2022):
Holding: Recidivist DWI statute was unconstitutional to extent it counted prior stand-alone revocations for refusing to submit to warrantless blood draws to enhance penalty.

Com. v. Given, 2020 WL 7639609 (Pa. Super. Ct. 2020):
Holding: Where Defendant committed a single act of driving with a metabolite in his blood, he should not have been subjected to multiple convictions or sentences for DWI.

Escape Rule

In the Interest of B.J., 2023 WL 8042229 (Mo. App. E.D. Nov. 21, 2023):
Holding: Even though Juvenile-Defendant absconded from his mother's home, could not be found for a period of time, and warrants had to be issued for his arrest – which delayed final resolution of his pending juvenile case – the "escape rule" has never been applied to dismiss appeals in juvenile delinquency cases, so appellate court declines to apply it here.

State v. King, 2023 WL 2595683 (Mo. App. S.D. March 22, 2023):
Holding: Even though after conviction Defendant fled to Mexico and had to be arrested there, appellate court rejects State's request to apply the "escape rule" to bar review of Defendant's post-capture claim of sentencing error, because "escape rule" doesn't apply to post-capture errors; if "escape rule" were applied in such a situation, once a defendant has been recaptured, all involved in the trial and sentencing would know that any errors or even intentional violations of constitutional rights would not be reviewed by any other court.

State v. Smith, 668 S.W.3d 605 (Mo. App. S.D. 2023):
Holding: Even though Defendant did not appear for his scheduled sentencing hearing because he was incarcerated in another state, the "escape rule" (barring appeal) should

not be applied because Defendant had not "escaped justice" but was in custody elsewhere.

State v. Haneline, 2023 WL 2375392 (Mo. App. W.D. March 7, 2023):
Holding: Even though (1) immediately after Defendant was convicted at trial, court told Defendant to "contact the Clerk tomorrow after 9:00 a.m." to start the process of preparing a Sentencing Assessment Report (SAR), but (2) Defendant failed to do so and court issued an arrest warrant, where Defendant later voluntarily appeared for sentencing (because the arrest warrant wasn't served yet), appellate court will not apply the "escape rule" to dismiss Defendant's appeal.
Discussion: The "escape rule" is designed to protect the orderly use of judicial resources. The rule denies the right of appeal to persons who attempt to escape justice. Whether to apply the rule is in the appellate court's sound discretion after weighing whether the escape adversely affected the justice system. Here, Defendant's failure to go to the Clerk's Office meant that a SAR was never prepared, and this apparently caused a one-week delay in sentencing Defendant. However, Defendant did voluntarily appear for his actual sentencing on the scheduled date. The delay here was minor, and the trial court considered it in sentencing Defendant. Under these circumstances, appellate court will not apply escape rule, and will decide case on the merits.

Sills v. State, 2022 WL 5239563 (Or. 2022):
Holding: Delay caused by Defendant's flight before sentencing lacked the kind of connection to postconviction proceedings so as apply escape rule to PCR proceeding involving claims of ineffective counsel.

Ethics

Greer v. State, 637 S.W.3d 742 (Mo. App. E.D. 2021):
Holding: Plea counsel was not ineffective or unethical in discussing plea offer with Defendant's parents in order to enlist their help in trying to convince Defendant to accept plea.
Discussion: Postconviction Movant claims his counsel was ineffective and violated ethics Rules for discussing plea offer with his parents in effort to get him to take plea offer. However, the information about plea offers which counsel shared with parents was not confidential attorney-client information. The State's plea offer was not confidential information since it was obviously known by the prosecutor and likely others in the prosecutor's office.

Editor's note: I would be cautious about relying on this opinion as an "ethics opinion" since the issue arose in the context of an ineffective assistance claim. Comment 2 to Rule 4-1.6 states "[a] fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation….This contributes to the trust that is the hallmark of the client-lawyer relationship."

Evidence

John Doe 122 v. Marianist Province of the U.S., 620 S.W.3d 73 (Mo. banc 2021):
Holding: Priest was qualified through knowledge, experience and education to testify as an Expert as to the meaning of various words used in personnel documents and whether these were "code" words indicating sexual abuse.
Discussion: The issue in case is whether Defendant-Church/School knew about sexual abuse. Defendant's personnel records do not expressly refer to sexual abuse but use phrases like "unusual situation" and "serious" "problem." The proposed Expert, a priest, had extensive knowledge and experience with sexual abuse issues in the Church. His testimony is admissible as Expert testimony under Sec. 490.065.2(1) because he is qualified through knowledge, experience and education with how the Church used "code" to discuss sexual abuse in records. His testimony does not invade the province of the jury because he does not claim to have first-hand knowledge of the alleged sexual abuse in Plaintiff's case, but will only explain to the jury what the Church's records mean when they refer to the "problem." Such expert testimony has been admitted in analogous situations, such as where experts have been permitted to testify to "practices, symbols, and terminology" used by street gangs. The testimony provides jurors with information for them to use in deciding how to judge the language used in records. However, the jury is always free to not believe the expert.

State ex rel. Garrabrant v. Holden, 633 S.W.3d 356 (Mo. banc 2021):
Holding: Where (1) Defendant met with her attorney's investigators and tape recorded her meeting with them, and then (2) Defendant gave the tape recording to a third party, who gave it to police, Defendant waived attorney-client privilege by giving the tape to the third party.
Discussion: Even though Defendant met with her attorney's investigators, they were agents of the attorney so this did not waive the attorney-client privilege. And, even though Defendant recorded her meeting with them, that did not defeat the privilege either because the digital recording device was not itself a third party. However, when Defendant gave the tape recording to a third party (who then gave it to police), Defendant waived the privilege. Inadvertent disclosure does not necessarily waive privilege, but here, there was no indication that Defendant inadvertently gave the recording to the third party. Writ mandamus granted, allowing recording to be used at trial.

State v. Gates, 635 S.W.3d 854 (Mo. banc 2021):
(1) Where in felony-murder case the trial court prohibited Defendant from testifying to his exculpatory version of events about the underlying robbery on grounds self-defense cannot be asserted as a defense to felony-murder, trial court denied Defendant his Sixth and Fourteenth Amendment rights to present a "complete defense;" self-defense is an available justification when the criminal act being prosecuted is the defendant's use of force, and Sec. 563.031.1(3) does not prohibit a defendant from arguing he used physical force for a purpose other than committing the forcible felony he is charged with. (2) Although evidentiary rulings are typically reviewed for abuse of discretion, where the facts are not contested and the issue is one of law, review is de novo; question of whether Defendant's constitutional rights were violated is a question of law reviewed de novo.

Facts: Defendant was charged with felony-murder for shooting a person during an alleged robbery. The State's Witness testified Defendant shot Victim during a robbery. Defendant, however, wanted to present as a defense that *Victim* tried to rob Defendant, and Defendant shot Victim in self-defense. The trial court granted the State's motion in limine to preclude Defendant from injecting any issue of self-defense into the trial because of Sec. 563.031.1(3) and *State v. Oates*, 540 S.W.3d 858 (Mo. banc 2018). Defendant was not permitted to mention self-defense or testify as to his exculpatory version of events. Defendant conceded he would not be seeking a self-defense instruction.

Holding: The court's evidentiary rulings prohibiting any mention of self-defense and preventing Defendant from testifying about his exculpatory version of events denied Defendant his Sixth and Fourteenth Amendment rights to present a "complete defense." An accused's right to present his own version of events in his own words is fundamental to the fairness of the proceedings. Because the felony-murder charge was based on the underlying felony of first-degree robbery, whether Defendant had, in fact, committed first-degree robbery was the ultimate issue in the case. The jury instruction required the jury to find Defendant used physical force "for the purpose of preventing resistance to the taking of property." The purpose behind Defendant's actions in shooting Victim – whether to take property, or in self-defense – was critical in determining if Defendant was guilty of felony-murder. *Oates* held self-defense is not a legal defense to felony murder because felony-murder is not based on the defendant's use of force but on the underlying felony. But *Oates* clarified that self-defense *is* available when the criminal act being prosecuted is the defendant's use of force. The underlying felony in *Oates* was a non-forcible felony, but here, the robbery is a forcible felony. Sec. 563.031.1(3) provides a person may not use self-defense for the use of force if he was committing a forcible felony. But 563.031.1(3) does not prohibit the admissibility of evidence, and instead, addresses the availability of a legal defense. The statute does not prevent a defendant from arguing he used physical force for a purpose other than committing the forcible felony he is charged with. Such a rule would violate a defendant's right to a jury determination of every element of the charged crime.

State ex rel. Lutman v. Baker, 635 S.W.3d 548 (Mo. banc 2021):

Holding: (1) Even though (a) Defendant in civil car accident case had told police he blacked out or had a heart attack during the incident, and (b) Defendant wrote Plaintiff's family an apology letter saying he was an alcoholic and had "lost control of his life," this did not expressly or impliedly waive his doctor-patient privilege, Sec. 491.060(5) and Defendant did not place his medical condition at issue in the lawsuit, so Plaintiff's subpoena to obtain Defendant's medical records should have been quashed; an implied waiver requires a "clear, unequivocal purpose" to waive privilege, and Lutman's statements were not an indication of a desire to share confidential medical records; and (2) Even though the medical records here had already been (somewhat inadvertently) disclosed to Plaintiff, the case is not moot in prohibition proceeding because the harm to Defendant is ongoing, and appellate court is still able to effect at least a partial remedy, such as requiring the records be returned or destroyed.

State v. Hollowell, 2022 WL 1228957 (Mo. banc April 26, 2022):
Holding: (1) Trial court erred, in felon-in-possession case, in allowing Officer to testify that Defendant's wife, who did not testify, told Officer that she had bought firearms for Defendant, because this hearsay went beyond explaining Officer's conduct and was the only direct evidence linking Defendant to the crime; (2) even though Defendant cross-examined Officer about the hearsay statement, this did not waive Defendant's objection from direct, since when a party objects to introduction of evidence and is overruled, the party does not waive the objection by eliciting the same evidence on cross; and (3) where Defendant was charged with 14 counts of possession of a firearm, this did not violate Double Jeopardy because Sec. 571.070.1 uses the phrase "unlawful possession of a firearm," indicating the legislature intended each firearm to be a separate offense.
Discussion: (1) Officer can testify to hearsay for the limited purpose of explaining Officer's conduct. However, the jury may not be aware of this limitation, so such hearsay is subject to careful scrutiny and limitation. Such hearsay must not be allowed to elicit details directly connecting Defendant to the crime. Here, the State's direct of Officer allowed Officer to testify beyond what was necessary to explain his conduct. This prejudiced Defendant because the non-testifying wife's statement was the only evidence directly connecting Defendant to crime. (2) Double Jeopardy prohibits multiple punishments for the same offense. The question is whether the legislature intended multiple punishments. Here, Sec. 571.070.1 prohibits unlawful possession of "a firearm." Thus, the unit of prosecution is the singular "a", meaning each firearm.

State v. Minor, 2022 WL 2134505 (Mo. banc June 14, 2022):
Concurring opinion joined by 5 Judges (majority): (1) Even though Art. I, Sec. 18(c) Mo.Const., allows propensity evidence to be admitted in child sex cases, *unadjudicated* prior bad acts will generally be more prejudicial than probative and generally should not be admitted; and (2) a "continuing objection" to admission of propensity evidence will generally not preserve the issue for appellate review, since the cumulative prejudicial effect of the evidence increases as more and more evidence is presented, so defense counsel must object as the evidence is presented so the court can continuously weigh probative value vs. prejudice; objection must be made to each new witness and exhibit.
Facts: Defendant was convicted at trial of a child sex offense. During trial, the State called two other children, who testified at length about prior *unadjudicated* sexual acts against them in order to show "propensity." The State also called a third witness about the prior bad acts, and introduced exhibits about the prior bad acts. The Supreme Court held the issue wasn't properly preserved for appeal, so did not reverse. However, a majority of the Court – five Judges – joined in a concurring opinion to instruct on what should happen in future cases.
Discussion: (1) Prior Supreme Court cases dealing with propensity evidence have dealt with prior *convictions*, and the propensity evidence tended to be limited to records, and was brief. Here, the Court is dealing with *unadjudicated* prior bad acts, and the State's evidence was an extensive, emotional mini-trial on whether Defendant committed those prior bad acts. "*The unfair prejudice generated by the presentation of this evidence should forewarn trial courts from admitting mere allegations of unadjudicated prior bad acts in future cases*." A court must not admit propensity evidence if the probative value is substantially outweighed by danger of unfair prejudice. Instead of an emotionless

presentation of an exhibit showing a prior conviction, unadjudicated acts require presentation of emotional testimony from other witnesses and require a "trial within the trial" over whether Defendant committed the prior bad acts. This opens a Pandora's box of allegations, and the allegations mount like snow in a blizzard. The confusion and unfair prejudice from unadjudicated allegations weighs heavily against the probative value. To avoid this, trial courts "*rarely should admit allegations of unadjudicated prior criminal offenses*." Evidence of unadjudicated allegations, both the alleged victim's testimony and any extrinsic evidence, will rarely survive the probative-versus-prejudicial balancing test in Art. I, Sec. 18(c). (2) To preserve this issue, defense counsel must be cautious about using "continuing objections." Merely objecting before trial preserves nothing since the trial court's ruling is interlocutory and can be changed. Moreover, the prejudicial vs. probative balance changes throughout the trial, since as more evidence is presented, the more prejudicial it becomes. It is the responsibility of the party seeking to exclude this evidence to advise and notify the court of the *quantum* of propensity evidence that has shifted the scales. This does not mean Defendant must object to every question or piece of evidence when a continuing objection is granted, but separate, particularized objections must be lodged when significant new evidence or witnesses are introduced.

State v. Brown, 619 S.W.3d 586 (Mo. App. E.D. 2021):
Holding: Prosecutor improperly asked trial Witness if Victim was "making up" his story, because witnesses may not be asked to give their opinion on the truth or veracity of another witness, or asked if another witness is lying (but not plain error); Prosecutor asked Witness, "So if Victim is telling us that, he's just making that up?" and "So…he's making that up, too?"

State v. Burroughs, 627 S.W.3d 69 (Mo. App. E.D. 2021):
Holding: Where (1) alleged rape Victim did not testify at trial, and (2) Officer was allowed to testify that Victim told Officer "he [Defendant] raped me" to explain Officer's subsequent conduct in directing Victim to hospital, trial court erred in refusing Defendant's request to instruct jury that Victim's statements could not be considered for their truth (but error was harmless in this case due to strong evidence of guilt).
Discussion: The trial court overruled Defendant's request to instruct jury that they could not consider the truth of Victim's statement to Officer that "he raped me," and that the statement was only admitted to show Officer's subsequent conduct. The court said it was up to the prosecutor to tell that to jury (which the prosecutor didn't). The court abdicated its responsibility to limit the jury's consideration of the evidence to its sole admissible purpose – to explain Officer's subsequent actions. Instead of fulfilling this duty, the court left it "up to the prosecutor" whether to inform jurors about this. Even if the prosecutor had complied, error would still exist because it is the role of the judge to instruct the jury on the law.

State v. Mills, 623 S.W.3d 717 (Mo. App. E.D. 2021):
Holding: (1) Trial court did not err in granting State's motion in limine to preclude Defendant from cross-examining State's toolmark and firearms expert with the National Academy of Sciences report (2009) and Presidential Council of Advisors on Science

Technology report (2015) about "false positives" in toolmark examination, where State's expert didn't concede these reports were "authoritative," Defendant did not present expert testimony of their "authoritativeness," and court was not required to take judicial notice of this; (2) trial court did not err in denying a formal *Daubert* hearing on toolmark examination, where court considered issues regarding reliability and admissibility of the evidence informally through the motion in limine hearing.
Discussion: (1) A "learned treatise" can be used to cross-examine an expert, but the proponent of the treatise must lay a proper foundation to use it, i.e., must show that the treatise is "authoritative." Otherwise, the writings are inadmissible hearsay offered to prove the truth of the matter asserted. To show a treatise is "authoritative," a proponent can show (a) a concession from the expert that it is authoritative; (b) judicial notice of authoritativeness; or (c) other experts can say it is "authoritative." Here, the State's expert didn't concede these treatises were "authoritative." Defendant did not present any expert of his own to say that they were. And the trial court wouldn't and wasn't required to take judicial notice of this. (2) A formal *Daubert* hearing is not required under Sec. 490.065. The statute imposes a duty on the court to determine whether the facts and data relied on are reasonably reliable. But the only legal requirement is that the parties "have an adequate opportunity to be heard" before the court makes that decision. An inquiry about admissible evidence is to be "flexible." Here, the court heard arguments during the motion in limine hearing on the reliability of toolmark identification. This informal procedure satisfied the statute.

City of Center v. Andrews, 622 S.W.3d 211 (Mo. App. E.D. 2021):
Holding: Even though Police Chief-Witness and prosecutor testified or argued that Defendant violated municipal ordinance for speeding, trial court plainly erred in entering conviction for speeding because the municipal ordinance was not introduced into evidence; municipal ordinances are not subject to judicial notice, so the State failed to prove Defendant's guilt by not introducing the ordinance at trial.

State v. Thomas, 628 S.W.3d 686 (Mo. App. E.D. 2021):
Holding: Trial court erred in murder trial in admitting uncharged, bad act evidence that Defendant had an unrelated altercation with a different person about two miles from the murder scene the night of murder, because the probative value of this was outweighed by its risk of prejudice, confusion of issues, and misleading the jury (but harmless in this case because evidence of guilt strong).
Discussion: Evidence of uncharged bad acts is generally inadmissible unless the evidence is both logically and legally relevant. Logical relevance is a very low test and means the evidence tends to make the existence of a material fact more or less probable. Legal relevance weighs the probative value against the prejudicial effect. Prior bad acts can be admitted to show motive, identity of person charged, intent, absence of mistake or accident, common scheme or plan, or a complete picture of charged crime. None of these exceptions applied here. The evidence had logical relevance because it placed Defendant within two miles of the murder, but the risk of prejudice and confusion outweighed that. Additionally, the State could have presented the evidence that Defendant was within two miles of the murder without having the Witness testify about the unrelated altercation that occurred there. The unrelated altercation did not complete any picture of the crime.

State v. Schmidt, 630 S.W.3d 802 (Mo. App. E.D. 2021):
Holding: Trial court plainly erred in allowing State's Witnesses to testify that they "believed" Defendant had committed the charged murder which he had confessed to them, because Witnesses cannot comment directly on whether they think a defendant is innocent or guilty, and cannot give an opinion on an ultimate issue the jury is to determine.

State v. Buechting, 633 S.W.3d 367 (Mo. App. E.D. 2021):
Holding: Even though Defendant was charged with killing Victim (with whom he lived) by hitting her and she later died, trial court erred in ruling that Victim's statements to others about her relationship with Defendant were admissible under under "forfeiture by wrongdoing" exception to hearsay and 6th Amendment Confrontation Clause, because there was no evidence that Defendant killed Victim with the intent to prevent her from reporting him to police for domestic violence or testifying against him in some proceeding; but error was harmless since other evidence of guilt was overwhelming.

Bangert v. Rees, 634 S.W.3d 658 (Mo. App. E.D. 2021):
Holding: Trial court erred in excluding on hearsay grounds medical records that were certified as business records under Sec. 490.680, since medical records that are properly certified under the statute are admissible as an exception to hearsay rule; although such records are subject to specific objections such as irrelevancy, inadequate sources of information, being self-serving, going beyond the bounds of legitimate expert opinion, or other similar grounds, they are not inadmissible hearsay; but (2) since proponent of the records didn't make an offer of proof of the records, appellate court cannot determine if proponent was prejudiced by exclusion of the records.

In the Interest of J.R., 633 S.W.3d 899 (Mo. App. E.D. 2021):
Holding: (1) Even though (a) Witness who saw a shooting was not the person who made a neighborhood camera video of the shooting; (b) the video showed a different angle of view than where Witness was; and (c) an Officer testified the quality of the video was not very good, trial court erred in excluding the video (when offered by Defendant) on grounds that a proper foundation could not be established through Witness; all that is required for admission of a video is for the proponent to show that the video is an accurate representation of what it depicts, which can be done through any witness familiar with the subject matter of the video through their personal observation. (2) Even though defense counsel's oral offer of proof failed to say Witness would testify, this would not have affected the court's ruling excluding the video so the issue is preserved for appeal; including that statement in the offer of proof would have been futile.
Discussion: Testimony from the creator of the video is not required. Nor does Witness need to know the circumstances surrounding the creation of the video, or observed the exact view of the subject matter. Witness personally observed the shooting. She was competent to provide a foundation for the video even though Witness did not create it, or view shooting from same angle. Even if another witness described the video, that would not render the video itself inadmissible. Even if the video would not have fully

exonerated Defendant, its exclusion was prejudicial because the video supported aspects of the defense.

In the Interest of T.D.S. Jr., 2021 WL 4955508 (Mo. App. E.D. Oct. 26, 2021):
Holding: In issue of first impression, Eastern District holds that hearsay – here, the written report of Deputy Juvenile Officer which contained hearsay – was admissible at child certification hearing.
Discussion: Sec. 211.071.6 requires a written report be "prepared" which develops "all available information" relevant to the factors to be considered for certification. The report should be comprehensive, and the juvenile court should consider it in its entirety. This satisfies due process. The process is constitutional if a hearing is provided, the child is given the right to counsel and access to his/her records, and it results in a decision that sets forth the basis for the court's ruling in a way to permit meaningful appellate review. Missouri Supreme Court Rule 116.02 states that the rules of evidence only apply at hearings "involving adjudication." A certification hearing is not adjudicatory. Here, the report was prepared in accord with the statutory command, and Deputy Juvenile Officer who prepared it was available for cross-examination.

Otwell v. Treasurer of Mo. as Custodian of Second Injury Fund, 634 S.W.3d 850 (Mo. App. E.D. 2021):
Holding: Even though Expert testified in a pretrial deposition that he "relied" on another doctor's report (which was by a non-testifying doctor), trial court erred in excluding Expert's entire testimony because Sec. 490.065.2 allows an Expert to rely on facts or data "reasonably relied upon by experts in the field in forming opinions," and the non-testifying doctor's report was just one of several medical records that Expert had reviewed in forming his opinion.
Discussion: An expert cannot be an expert in all fields, and it is reasonable to expect that experts will rely on opinions of experts in other fields. If the testifying expert merely acts as a "conduit" for another non-testifying expert's opinion, the "expert opinion" is hearsay and inadmissible. But expert opinion partially based on other expert opinion is not necessarily inadmissible. Rather, an expert is allowed to rely on hearsay to support expert's opinion where expert testifies that the evidence is of a sort reasonably relied on by experts in the field and the court finds the evidence is reasonably reliable. The non-testifying doctor's report was background for Expert's opinion and wasn't offered as independent substantive evidence.

State v. Townsend, 2022 WL 1146356 (Mo. App. E.D. April 19, 2022):
(1) Trial court plainly erred in excluding Defendant's testimony that, an hour before the shooting, Victim's Mother had told Defendant that her Victim-Son was going to "blow your fuckin' head off," and made racially derogatory comments toward Defendant, because the testimony explained Defendant's state of mind at the time of the shooting, and its exclusion prevented him from presenting a complete defense of self-defense; and (2) trial court plainly erred in allowing Lay Witness to testify about Missouri's legal requirement to carry out an eviction because this created the false impression that Defendant (Landlord) was unlawfully on the property where shooting occurred and, thus, had a duty to retreat before shooting.

Facts: Defendant was charged with first-degree assault for shooting Victim-Son. Defendant had purchased a property on which Victim-Son and his Mother resided as tenants. Defendant and Victim-Son had agreed that, in exchange for waiver of 90 days rent, Son and Mother would vacate the property. On the day of the charged crime near the end of the 90 days, Mother and Defendant got into a dispute. Mother told Defendant that her Son was going to "blow your head fuckin' off" and made racially derogatory comments toward Defendant, who was Black. About an hour later, Son asked Defendant to come back to the property to unlock a shed. Son had a gun. An argument ensued between Mother and Defendant over trash at the property. Mother again called Defendant derogatory names, and told him to shut up and leave. Son testified Defendant pulled out a gun, a struggle ensued between him and Defendant, and Defendant shot Son while Son was running away. Defendant testified he shot Defendant after Defendant pointed the gun at him and cocked it. The trial court prohibited Defendant from testifying about Mother's remarks an hour before the shooting on hearsay grounds and because he had not told this to police, and prohibited Defendant from testifying about the racially derogatory remarks because they were inflammatory. The trial court also allowed a Lay Witness to testify about eviction procedures in Missouri, which allow a Landlord to enter property for an eviction only if accompanied by a Sheriff.
Holding: (1) Out-of-court statements not offered to prove the truth of the matter are not hearsay. In self-defense cases, the Defendant's state of mind is critical. Under the state-of-mind exception to hearsay, statements that go to Defendant's state of mind may be admissible. Since state of mind is critical, it's important that Defendant be able to tell the reasons for his state of mind. Defendant's proposed testimony was not hearsay – because it wasn't offered for its truth – but it was relevant to his state of mind. By excluding it, the jury didn't hear all relevant, probative evidence on the issue of self-defense. The State argues the statements were not made by Victim, but this misses the mark because it focusses on Victim's state of mind, *not* Defendant's. Testimony relevant to Defendant's state of mind is not limited to statements only by the Victim. The self-defense instruction speaks of whether Defendant had "reasonable grounds" to "reasonably believe" physical force was necessary to defend himself. Those grounds do not have to come only from Victim. The State argues that no other witness corroborated Mother's statements, but Missouri law does not require another witness corroborate a Defendant's testimony, before it is admissible. As to the trial court's exclusion of Defendant's testimony because he didn't tell this version to police, that is a matter for cross-examination, not admissibility. While the racial epithets were vile, the inflammatory nature of otherwise admissible evidence doesn't justify its exclusion, particularly because it helped explain Defendant's statement of mind. Defendant was denied his 6th Amendment right to present complete defense. (2) A Lay Witness was allowed to testify that a Landlord is not permitted to enter leased premises to do an eviction unless accompanied by a Sheriff. This injected a false issue into the case as to whether Defendant was lawfully on the property. This case did *not* involve an eviction. Son and Mother were vacating the property voluntarily in exchange for waiver of rent. This false issue resulted in manifest injustice because the self-defense instruction told jurors that a person is not required to retreat only if he is "lawfully remaining" on the property. In a self-defense case, whether Defendant was lawfully on the property is critical. The Lay Witness' testimony injected a false issue into the case.

In the Interest of D.M.M., 2022 WL 17587307 (Mo. App. E.D. Dec. 13, 2022):
Holding: (1) Juvenile court did not err in failing at certification hearing to exclude under Sec. 490.065 Deputy Juvenile Officer's "expert opinion testimony," because Sec. 490.065.1 only applies in actions "adjudicated" in juvenile court under Chapter 211, and certification proceedings are not adjudications; and (2) court did not err in excluding certain "hearsay" testimony from DJO's report because hearsay rules do not strictly apply to non-adjudicatory certification proceedings, which allow "reliable" hearsay to be admitted.

State v. Shepard, 2023 WL 2247141 (Mo. App. E.D. Feb. 28, 2023):
Holding: (1) "Continuing objections" seeking the exclusion of propensity evidence in child sex cases are not favored because the underlying objection involves balancing the probative value of *accumulating* evidence against prejudicial effect; a Defendant must monitor the "quantum" of accumulating evidence and object when the scales tip toward unfair prejudice; (2) where Defendant's only objection at trial was a "continuing objection" to one Witness' propensity testimony, this did not preserve any error as to later propensity Witnesses or as to the quantum of evidence.

Denney v. Syberg's Westport Inc., 665 S.W.3d 348 (Mo. App. E.D. 2023):
Holding: Even though Sec. 490.680 allows business (medical) records to be admitted as an exception to hearsay, the trial court may still exclude the records based on objection on other grounds, such as lack of foundation; here, court properly excluded the medical records on grounds of lack of foundation because Plaintiff was essentially seeking to use the records as a substitute for required expert testimony under Section 490.065 to prove causation for his civil claim, and there was no evidence that the doctor's notations were based on a reasonable degree of medical certainty.

State v. Fields, 2023 WL 4711674 (Mo. App. E.D. July 25, 2023):
Holding: In case of first impression, court holds that lab reports which briefly summarize conclusions of Expert who testified at trial can be sent to the jury during deliberations, because the reports are not like transcripts or videos of live testimony, which cannot be sent to avoid giving them undue weight.
Discussion: The general rule is that exhibits which are "testimonial" in nature cannot be given to the jury during deliberations to avoid giving them undue weight. This meaning of "testimonial" is different than for Confrontation Clause purposes. Here, "testimonial" means transcripts of live testimony or a video of live testimony. No existing Missouri case has examined whether lab-report exhibits are "testimonial" for purposes of letting the jury review them during deliberations. Missouri cases have made clear that transcripts and videos of live testimony cannot be given to the jury. The lab reports here were not word-for-word reiterations of what the Expert testified to. The reports merely summarized conclusions about the Expert's findings. "Our holding here should not be understood to encompass all 'expert reports,' as there are certainly conceivable situations where an expert's report would be properly admitted into evidence and could also be determined to be testimonial. We simply do not find that to be the case here."

State v. Hamm, 2023 WL 5021838 (Mo. App. E.D. Aug. 8, 2023):
Holding: (1) Even though phone company had changed ownership and no longer had access to certain records, where the Records Custodian of the new company was able to testify that the records provided to police from the prior company were computer generated and that such records were routinely produced for police, this was sufficient authentication to be admissible; (2) computer-generated records containing Defendant's phone number and geolocation data are not "hearsay" because they do not contain statements of any human declarant, and their admissibility is determined based on their reliability and accuracy of the process used to obtain the data, not the business records exception to hearsay; and (3) because computer generated data is not the result of human entries, the Confrontation Clause doesn't apply, since no human declarant made the statements.
Discussion: Computer-generated phone records showing geolocation data are not "hearsay" because they don't contain statements of any human declarant. They are not subject to analysis under the hearsay rule or business records exception. Their admissibility depends on the reliability and accuracy of the process used to create and obtain the data. Thus, courts have previously held that screenshots of call logs from a defendant's cell phone aren't "hearsay" because the logs weren't made by human entries, but by operation of the phone itself. Here, the records were not the result of human entries, but were computer-generated. For similar reasons, the Confrontation Clause doesn't apply. The records here were not made by a human declarant but were computer generated, and thus, there is no declarant (witness) to confront and cross-examine.

Crowder v. Ingram Barge Co. LLC, 2023 WL 7136150 (Mo. App. E.D. Oct. 31, 2023):
Holding: Even though there is a degree of speculation required to determine the value of wages a plaintiff may lose as a result of an injury, Forensic Economist's expert testimony on this matter is admissible under Sec. 490.065 and any weakness in the expert's conclusions goes to the weight of the evidence, not its admissibility.

State v. Bolton, 2023 WL 8882361 (Mo. App. E.D. Dec. 26, 2023):
Holding: A sufficient foundation for admission of Dep't of Corrections medical records was not established by the testimony of Defendant, even though the records were about Defendant's medical condition; the business records statute, Sec. 490.680, requires the records be verified by a records "custodian" or "other qualified witness," which would include a clerk, nurse, doctor or other DOC employee with sufficient knowledge of the DOC's record-keeping; Defendant was not an "other qualified witness."

State ex rel. Patterson v. Curless, 630 S.W.3d 867 (Mo. App. S.D. 2021):
Holding: Where Defendant filed an unverified motion to disqualify Prosecutor's Office based on alleged conflict of interest, and presented only argument on this at the hearing on the matter, there was no evidence presented for court to have sustained motion to disqualify; a bare assertion by defense counsel is not self-proving of the alleged facts; writ of prohibition to set aside disqualification granted.

State v. Troyer, 2023 WL 1812787 (Mo. App. S.D. Feb. 8, 2023):
Where (1) Defendant had told a probation officer that he had inappropriately touched a Child and (2) the State's evidence at trial was Defendant's statement and vague testimony by Child's Father that Defendant had been momentarily alone with Child but Father didn't know if anything happened, trial court abused its discretion in admitting Defendant's statement because State failed to prove the corpus delecti of the charged offense of first-degree child-molestation.
Facts: Defendant was a member of a cloistered Mennonite community. While on probation for a prior sex offense, Defendant told his probation officer he had inappropriately touched Child's genitals. Defendant also told this to a police Detective. The State's evidence at trial consisted of Defendant's statements, and testimony by Child's Father that Defendant was briefly alone with Child in Father's workshop, but Father didn't know if anything happened. Defendant moved to exclude his statements on grounds State failed to prove corpus delecti.
Holding: The corpus delecti rule is a rule of evidence that extrajudicial statements of a defendant are not admissible in the absence of independent proof of the commission of an offense, i.e., the corpus delecti. Only slight corroborating facts are necessary. But, here, there were none. Father's testimony showed nothing that could serve as proof of the offense. There was nothing connecting the minutes or moments Defendant was alone with Child at the workshop to anything described in Defendant's confession. Father's testimony about his (Father's) momentary absence from the workshop where Defendant and Child were didn't provide any proof that anything specific occurred. Here, there was no evidence that any criminal act occurred other than Defendant's statements; thus, State failed to prove corpus delecti and trial court abused its discretion in admitting Defendant's statements. The error is prejudicial because without Defendant's statements, the evidence is insufficient to convict. "[W]e have no way of knowing whether the State will be able to gather any proof of first-degree child molestation, independent of Defendant's confession, that is sufficient to prove the corpus delecti." Judgment vacated and remanded for further proceedings.

State v. Gibbs, 2023 WL 2724768 (Mo. App. S.D. March 31, 2023):
Holding: (1) Even though Defendant, in failure to register as sex offender case stemming from a 2003 conviction, claimed evidence was insufficient because he was never required to register because of the "Romeo and Juliet" exception of the federal SORNA (because the victim was at least 13 and Defendant had been no more than 4 years older when they had consensual sex), appellate court does not decide merits of claim because defense counsel in opening statement at trial said Defendant was "required to register"; this was a judicial admission by counsel that is conclusive on Defendant for purposes of the case; and (2) even though Defendant objected to certain hearsay testimony by Witness and was overruled, where there was no continuing objection and Witness then gave other answers based on the hearsay, Defendant was required to either object to the additional testimony, or to move to strike the additional testimony in order to preserve his earlier objection to the testimony for appeal.

Stanton v. City of Skidmore, 620 S.W.3d 245 (Mo. App. W.D. 2021):
Holding: (1) Unlike statutes, a trial court cannot take judicial notice of a City Ordinance; City Ordinances must be admitted into evidence or stipulated to by parties; (2) thus, even though Defendant-City attached its Ordinance to its answer in civil case, where Plaintiff never stipulated to the Ordinance and denied City's allegations, trial court erred in granting summary judgment to City on the Ordinance.

Gebhardt v. American Honda Motor Co., Inc., 627 S.W.3d 37 (Mo. App. W.D. 2021):
Holding: Even though Expert in all-terrain vehicle accident case had a Ph.D. in mechanical engineering and a certificate in accident reconstruction, trial court did not abuse discretion in excluding him as expert where he did not thoroughly explain his methodology or point to prior studies, tests, publications, or other support for his findings; Sec. 490.065.1 requires that testimony of experts be the produce of reliable principles and methods.

State ex rel. Jones v. Prokes, 637 S.W.3d 110 (Mo. App. W.D. 2021):
Where Defendant who was on probation submitted false AA and NA attendance sheets to his probation officer, these sheets were admissible in a trial against him for forgery and tampering with a judicial officer; they were not privileged from disclosure under Secs. 549.500 or 559.125, which make certain probation information privileged and non-admissible, because the documents themselves constituted the criminal act.
Facts: Defendant, who was on probation for DWI and who was required to attend substance abuse treatment as a condition of probation, submitted false AA and NA attendance sheets to his probation officer. The State charged him with forgery, Sec. 570.090, and tampering with a judicial officer, Sec. 575.095. Defendant contended the sheets weren't admissible under Secs. 549.500 and 559.125. The trial court excluded them from trial. The State sought writ of mandamus.
Holding: Sec. 549.500 provides that all documents obtained by employees of probation and prole shall be privileged and shall not be disclosed, except that the board may in its discretion allow "persons having a proper interest" in them to inspect them. Sec. 559.125.2 provides that information obtained by a probation officer shall be privileged and not receivable in court, and that the information shall not be disclosed except to the judge, but that the board may in its discretion allow a "person having a proper interest" to inspect them. A person commits the crime of tampering with a judicial office if they use "deception" to influence their official duties. "Judicial officer" includes "probation officer." Sec. 575.095.2. Forgery occurs if a person transfers a false document to another with the purpose to defraud. To hold that Secs. 549.500 and 559.125 create an absolute privilege surrounding all communications between a probation officer and a defendant would immunize from prosecution many acts which the legislature intended to prohibit in the forgery and tampering statutes. It would be absurd and unreasonable to interpret the privilege statutes to give a defendant license to attempt to deceive, harass, threaten or bribe his probation officer with impunity. This is the unusual case where Defendant's interactions with his probation officer constitute *the crime itself.* Missouri courts have recognized in other contexts that statutory privileges cannot be invoked to shield criminal activity from prosecution. Writ of mandamus granted.

State v. Antle, 2021 WL 1880945 (Mo. App. W.D. May 11, 2021):
(1) In child sex case, trial court applied wrong legal standard under Sec. 491.075 in determining whether statements Child-Victim made to others were admissible; court applied test of whether Witnesses were accurately recounting what child said, rather than correct test of whether under totality of circumstances, the evidence is reliable; remedy is remand for court to apply correct test in first instance, and grant new trial or not; but (2) trial court did not abuse discretion in excluding defense Expert to testify that improper child interview questions "contaminated" the results and that the interviewer's questions had a poor "coding score;" this went beyond explaining proper interview techniques (which is admissible) to invading the province of the jury by offering opinions on the State interviewer's credibility.
Facts: In child sex case, Child-Victim made statements to several adult Witnesses. The court held a 491.075 hearing, and determined the statements were admissible because the Witnesses would accurately recount what the child told them, so the statements were "reliable." The court excluded at trial a defense Expert who would have testified about the child forensic interview conducted by the State examiner. Expert would have testified about a "scoring system" Expert had devised to identify improper leading questions, and interviewer received a low, poor score. Expert would have also testified that the interview was "highly problematic" and "highly contaminated" by the improper questions.
Holding: (1) Sec. 491.075 provides that extrajudicial statements of a child under age 14 are admissible if the court finds the statements "provide sufficient indicia of reliability." The trial court wrongly interpreted this to mean only whether the Witnesses are accurately recounting what the child said to them. The correct legal standard to determine if the statements are "reliable" is a totality of circumstances test that considers, among other factors, spontaneity and consistent repetition; mental state of declarant; lack of motive to fabricate; knowledge of subject matter unexpected of a child of similar age. The court can also consider factors such as the interview techniques employed by the interviewer to whom the statements were made. Since the trial court applied the wrong legal standard, remedy is for appellate court to remand case to trial court to apply correct standard. Trial court will need to decide under correct legal standard if statements provided sufficient indicia of reliability, and then depending on that answer, if a new trial is warranted. (2) Experts at trial can properly give generalized testimony about proper child interview techniques. But they cannot give "particularized" testimony which comments on child's or other witness' credibility. Here, Expert's proposed testimony was "particularized" testimony which would have invaded province of jury by commenting on other witnesses' credibility. Also, Expert's scoring system whereby she gave the interviewer a low grade wasn't supported by specific research or data, as required by Sec. 490.065 regarding expert testimony.

State v. Davison, 636 S.W.3d 588 (Mo. App. W.D. 2021):
Holding: Trial court did not err in precluding Defendant from cross-examining Child-Witness about sexual abuse claims she had made against multiple other people because Defendant failed to demonstrate that those claims were, in fact, false.

Discussion: Evidence of Witness' prior sexual abuse allegations against other people was inadmissible because Defendant did not show that the allegations were false or that Witness knew them to be false. Defendant argues the allegations go to Witness' credibility because they are "too outlandish to be true." Even though the allegations are "unusual," that alone does not render them false as a matter of law. A prior report of sexual abuse that is not shown to be false does not bear on the issue of a Witness' credibility. If the proponent of the evidence fails to show the falsity of the prior allegation, he is not entitled to cross-examine the Witness about it or introduce extrinsic evidence of that report for the purpose of impeaching the Witness.

Brown v. Chipotle Services LLC, 2022 WL 677881 (Mo. App. W.D. March 8, 2022):
Holding: 28 U.S.C. Sec. 1746, which gives unnotarized declarations made under penalty of perjury the same effect as affidavits does not apply in Missouri state court proceedings; in state court proceedings, a valid "affidavit" is required to include an oath sworn to before someone (notary or other authorized person) authorized to administer the oath.

In the Interest of J.N.W. v. Juvenile Officer, 2022 WL 453049 (Mo. App. W.D. Feb. 15, 2022):
Holding: (1) Even though the juvenile's court's order dismissing Defendant-Juvenile from juvenile court's jurisdiction and certifying him to the trial court was not denominated a "judgment," the order was immediately appealable, because Rule 74.01(a)'s judgment denomination requirement is not applicable to Sec. 211.071 certification proceedings; (2) the time for filing such an appeal is 30 days after the dismissal (as with other civil judgments), because the juvenile court retains control over its judgment for 30 days after entry, Rules 75.01 and 81.04(a); judgment becomes final after 30 days, and then there is 10 days to file the notice of appeal; (3) even though Juvenile filed his appeal before the 30 days expired, his premature notice became effective immediately after the judgment was final, Rule 81.05(b); (4) the standard of review for a certification appeal is whether the trial court abused its discretion in certifying, Sec. 211.071.1; (5) Juvenile can raise on direct appeal his claim of ineffective assistance of counsel at his certification hearing where the record is sufficient to raise it on direct appeal; (6) it remains an open question whether the *Strickland* standard applies to ineffective assistance claims, or the "meaningful hearing" standard applied in termination of parental rights cases; (7) since certification hearings are not adjudicatory, there is no authority for the general proposition that the rules of evidence apply to certification proceedings.

In the Interest of S.R.W. v. Juvenile Officer, 2022 WL 2124964 (Mo. App. W.D. June 14, 2022):
Holding: Where Juvenile Officer never introduced into evidence the municipal ordinance Defendant-Juvenile was charged with violating, the evidence was insufficient to convict, because courts cannot take judicial notice of municipal ordinances. Judgment reversed and Juvenile discharged.
Discussion: Courts cannot take judicial notice of municipal ordinances. The ordinances must be introduced at trial in accord with Sec. 490.240, which provides various methods

by which a copy of the ordinance can be introduced. Juvenile Officer failed to do that here. Thus, the ordinance violation remains unproven, and double jeopardy precludes a retrial.

State v. Fox, 2022 WL 17100482 (Mo. App. W.D. Nov. 22, 2022):
(1) Defendant's possession of 0.5 grams of a wax substance containing THC was a Class D felony under Sec. 579.105.2 because Secs. 195.015 and 195.017 treat marijuana and THC separately, despite Defendant's argument that the offense should be a misdemeanor because the THC was less than 35 grams; and (2) State was not required to prove that Defendant's substance was not derived from industrial hemp, since Sec. 571.015.5 places the burden to prove an exception to legal liability on Defendant.
Facts: Defendant was charged with a Class D felony for possessing a wax-like substance that weighed 0.5 grams and contained THC.
Holding: (1) Defendant argues the weight exception to possession of marijuana (35 grams or less) applies to possession of THC. The possession of a controlled substance is a D felony under Sec. 579.015.2 unless it is 35 grams or less of marijuana. However, Sec. 195.017.2(5) distinguishes between marijuana and THC. To find THC subject to the 35-grams-of-marijuana exception would require the court to ignore the specific language treating the substances differently or to treat that language as surplusage. If THC were meant to be treated the same as marijuana, there would be no need to list it as a separate substance in Sec. 195.017. And if THC were subject to the same weight exception, THC would have been listed in the exception in Sec. 579.105.2. (2) Defendant argues the State had to prove the substance was not derived from industrial hemp. A wax derived from industrial hemp is not illegal under Sec. 195.107.2(5)(nn). However, Sec. 579.015.5 places the burden on a defendant to prove that an exception applies. The State's only burden was to prove that Defendant knowingly possessed a controlled substance. The State had no burden to prove the substance was not industrial hemp.

State v. Sander, 2023 WL 8882876 (Mo. App. W.D. Dec. 26, 2023):
Holding: The State was not required to show that the internet searches and web sites visited on Defendant's phone were actually made by Defendant to admit such evidence; it was a sufficient foundation only to show that this data was extracted from Defendant's phone.
Discussion: Defendant claims the State didn't present a sufficient foundation to admit the results of internet searches and websites on her cellphone, because the State failed to show that she personally had conducted the searches. Defendant relies on cases involving admissibility of written communications, texts, or social media postings, which have held that there must be some evidence supporting an inference that the defendant personally made the writings. But unlike texts and other written communications, internet searches and browsing history contain fewer distinguishing characteristics. In other cases involving phones (such as call history or location history), it has never been held that the State must establish that the defendant personally made the calls or personally was in a location. Obviously, a defendant could argue that she wasn't the person who made the calls or wasn't in that location, but this goes to weight, not admissibility or authenticity. Internet searches and websites visited on a defendant's

phone are more like call history or location history. It was a sufficient foundation to show only that this data came from Defendant's phone.

* **U.S. v. Tsarnaev, ___ U.S. ___, 142 S.Ct. 1024 (U.S. March 4, 2022):**
Holding: (1) in Boston Marathon bombing case, trial court did not abuse its discretion in declining to ask about the content and extent of each venireperson's knowledge of the case from the media, when the court had asked about what media sources venirepersons followed, whether they had formed an opinion about the case, and had other individualized voir dire to probe for bias; and (2) trial court did not abuse its discretion in excluding Defendant's mitigating evidence that his brother – who committed the bombing with him – had possibly committed a prior murder; although Defendant claimed this evidence would show he was under the domination of his brother, the trial court did not abuse its discretion in finding that the evidence lacked probative value and would be confusing to jurors, especially given that the witnesses who could have confirmed the brother's commission of the prior murder were themselves deceased; the "other murder" evidence risked producing a confusing mini-trial where the only witnesses who knew the truth were dead.

* **Samia v. U.S., ___ U.S. ___, 143 S.Ct. 2004 (2023):**
Holding: The Sixth Amendment's Confrontation Clause is not violated, in joint trial of co-defendants, by admission of a non-testifying co-defendant's confession where (1) the confession has been modified to avoid *directly* identifying the non-confessing co-defendant and (2) the court gives a limiting instruction that jurors may consider the confession only with respect to the confessing co-defendant; thus, admission of non-testifying co-defendant's confession which was modified to state that "the other person" pulled the trigger did not violate Confrontation Clause where trial court also gave limiting instruction; however, "directly accusatory" confessions that have been obviously redacted (such as be "deleted" name) remain inadmissible under *Gray v. Maryland*, 523 U.S. 185 (1998).

U.S. v. Oliver, 987 F.3d 794 (8th Cir. 2021):
Holding: Even though Officers who gave input into a map showing drugs were sold less than 1,000 from school testified at trial subject to cross-examination, the computer-generated map showing the distance from school was not admissible and did not fall under any recognized hearsay exception; the map was offered to prove the truth of the matter asserted therein, i.e., the sales took place within 1,000 feet.

Gable v. Williams, 2022 WL 4543715 (9th Cir. 2022):
Holding: Even assuming state court properly applied its evidence rules, state court denied Petitioner due process right to present a complete defense where it excluded evidence that another person confessed to the charged murder, where the confession was made shortly after the murder and the confessor had no ulterior motive.

Mercer v. Stewart, 2022 WL 1212786 (E.D. Mich. 2022):
Holding: Habeas relief granted on claim that Petitioner was deprived of due process right to present a defense in murder case when trial court refused to give justification jury instruction that Petitioner killed victim to prevent him from raping her.

Vasquez v. State, 652 S.W.3d 586 (Ark. 2022):
Holding: Sexual assault nurse's (SANE) testimony about the frequency of normal findings on sexual-assault exams and delay in disclosure exceeded permissible scope of lay opinion testimony.

State v. Manuel T, 2020 WL 8255326 (Conn. 2020):
Holding: Screenshots of text messages were authenticated and admissible where Witness who received text messages testified about them; any doubts about Witness' credibility or reliability of source of messages went to weight, not admissibility.

In the Interest of G.H., 2022 WL 6325944 (Haw. 2022):
Holding: Where Defendant in sex case seeks to admit Victim's false allegations of sexual assault against others, admissibility is not subject to evidentiary rule governing Victim's past sexual conduct or a requirement that trial court make a determination as to the truth or falsity of the allegations, but Defendant must make clear the evidence is offered for its falsity.

State v. Elzey, 2021 WL 302869 (Md. 2021):
Holding: Finding that Victim-Husband had repeatedly abused Defendant-Wife was not required for Defendant-Wife to be able to use Battered Spouse Syndrome expert testimony as defense, where Defendant-Wife sought to show she had been repeatedly abused by other men which caused the Syndrome.

State v. Matthews, 2022 WL 2236139 (Md. 2022):
Holding: Photogrammerty expert's testimony was admissible; could testify to estimated height of person in video.

Abruquah v. State, 2023 WL 4073308 (Md. June 20, 2023):
Holding: Firearms examiner cannot offer an "unqualified opinion" that crime scene bullets were fired from a particular gun. At most, an examiner can testify that patterns and markings on bullets are "consistent" or "inconsistent" with bullets fired from a particular firearm.

Com. v. Rintala, 2021 WL 4398660 (Mass. 2021):
Holding: Expert's testimony in murder trial as to drying time of paint and whether paint was poured rather than spilled at the scene was not sufficiently reliable have been admissible.

State v. Hall, 2021 WL 5349468 (Minn. 2021):
Holding: Where Victim-Stepdaughter gave only general testimony about sexual abuse by Defendant, this was insufficient to corroborate Defendant's detailed confession to particular sexual acts as required by corpus delecti rule.

State v. Wilson, 2022 WL 152903 (Mont. 2022):
Holding: Witness was not competent to testify in burglary case where Witness had been diagnosed with mental health condition, and Witness' health care provider reported that Witness' condition undermined his memory and ability to distinguish between truth and falsity.

State v. Lake, 2022 WL 368551 (Mont. 2022):
Holding: Trial court erred in murder case in admitting "shocking" explicit statements Defendant had made supporting child sex abuse, even though the State claimed the statements were relevant to the reasons for the altercation that led to the murder, because the statements were overwhelmingly prejudicial to Defendant's character regarding matters not directly at issue and had little probative value; this was true even though court gave limiting instruction that Defendant had not actually committed sexual abuse and wasn't being tried for his comments; State could have accomplished same goal by presenting more generic testimony that Victim was offended by general child sex abuse comments.

State v. Clark, 2022 WL 414623 (N.C. 2022):
Holding: Expert improperly vouched for Victim in sex case by testifying Victim was "sexually abused"; testimony amounted to improper comment on Victim's credibility.

People v. Deverow, 2022 WL 16131508 (N.Y. 2022):
Holding: Exclusion of testimony that contradicted eye-witness' account and exclusion of 911 calls placed around time of crime which would have been admissible under present sense impression exception to hearsay rule violated Defendant's due process right to present a complete defense and 6th Amendment confrontation rights.

State v. Rix, 2023 WL 5541831 (Ariz. Ct. App. 2023):
Holding: Even though Defendant was charged with soliciting sexual images from a 13-year-old girl, the prejudice from admitting various other child pornography in Defendant's possession (depicting group sex, bestiality and other kinds of sex different than what Defendant solicited) at the time of his arrest outweighed its probative value.

People v. Schnorenberg, 2023 WL 6152406 (Colo. App. 2023):
Holding: In prosecution for securities fraud, where Defendant relied on advice of counsel in misstating or omitting certain materials was relevant to determination of whether Defendant had requisite mental state.

Corbett v. State, 2021 WL 5227410 (Ind. Ct. App. 2021):
Holding: Non-judicial administrative punishment that Defendant received in Navy was not a "conviction," so could not be used to impeach him.

Hayko v. State, 2022 WL 4490978 (Ind. App. 2022):
Holding: Before ruling Defendant's proffered testimony as to Victim's untruthfulness in sex case was inadmissible, trial court was required to consider not only whether such testimony was admissible as reputational evidence regarding truthfulness but also whether testimony was admissible as opinion evidence.

State v. Trifiletti, 2022 WL 4126380 (Minn. App. 2022):
Holding: Even though State's Witness was exposed to COVID, she was not "unavailable" at trial so as to allow her prior testimony to be read into record, where she had no symptoms, was willing to testify, was in contact with prosecutor, and was in jurisdiction to testify.

State v. Nieves, 2023 WL 5947996 (N.J. Super. Ct. App. 2023):
Holding: Shaken baby syndrome (SBS) and abusive head trauma (AHT) are not generally accepted in the scientific community and are not admissible, even though they are accepted in the pediatric community; these have never been proven by biomechanical testing or principles.

Evidentiary Hearing (Rules 24.035 and 29.15)

McLemore v. State, 635 S.W.3d 554 (Mo. banc 2021):
Holding: (1) Even though 29.15 Movant alleged trial counsel had failed to object to the State's closing; elicited damaging evidence from one witness; and made ineffective opening statement and closing argument, Movant was not entitled to an evidentiary hearing because trial counsel's subjective state of mind on these matters is irrelevant to whether counsel's actions were objectively reasonable; as long as counsel's actions could be considered sound trial strategy – which they are presumed to be – counsel's performance is competent; (2) in other cases, whether trial counsel's actions could be considered sound trial strategy may depend on facts outside the record – such as the extent and fruits of counsel's pretrial investigation – so an evidentiary hearing is necessary to establish such outside-the-record facts; and (3) even though counsel's failure to object to State's closing and counsel's own opening may have been objectively unreasonable here, Movant has not demonstrated prejudice, especially since the jury acquitted Movant of two counts.

Yates v. State, 623 S.W.3d 184 (Mo. App. E.D. 2021):
(1) Motion court clearly erred in denying 29.15 motion without evidentiary hearing on claim that trial counsel had been ineffective in failing to investigate and call additional jurors to testify about alleged jury misconduct, where trial counsel had affidavits from some jurors showing misconduct but failed to investigate additional jurors to obtain a new trial; and (2) Motion court abused discretion in denying Movant's motion to contact

jurors to plead and prove his 29.15 claim, because there was credible information in the record that juror misconduct had occurred.

Facts: Movant was convicted at trial of various offenses. After filing a new trial motion, trial counsel was contacted by a juror who alleged another juror engaged in misconduct by obtaining extrinsic information about the case from a bailiff or police officer about the meaning of certain jury instructions. Trial counsel presented two juror affidavits about this, and filed a motion to question jurors, which the trial court denied. The trial court then denied an amended motion for new trial. During the direct appeal, the Eastern District remanded to the trial court for an evidentiary hearing on the amended motion for new trial on grounds of newly discovered evidence. Trial counsel stated he wished to investigate other jurors, but he did not actually seek permission from the trial court to contact other jurors. The trial court denied a continuance for that hearing, and denied a new trial, relying on the previously-submitted affidavits. The Eastern District affirmed. Movant filed a 29.15 motion, alleging trial counsel was ineffective in the investigation of juror misconduct. The motion court denied Movant's motion to contact jurors, and denied the claim without an evidentiary hearing.

Holding: While there is no right to contact jurors, courts have discretionary power to allow this where there is credible indication that juror misconduct occurred. Jurors can testify about misconduct that involves gathering extrinsic information. Once it is established that misconduct involving extrinsic information occurred, the burden shifts to the non-moving part to overcome a presumption of prejudice. While a Movant cannot relitigate an issue decided on direct appeal, that's not what happened here. The issue on direct appeal was whether the trial court abused its discretion in not granting a new trial based on the limited evidence of two affidavits before it. The 29.15 issue is whether trial counsel was ineffective in failing to investigate and present additional evidence to change that outcome. The motion court clearly erred in denying Movant's claim on grounds that he didn't adequately plead it because this was caused by the court's failure to allow Movant to contact jurors. Movant pleaded juror misconduct, and pleaded that one or more jurors would testify to receiving extrinsic information that may have impacted the verdict. The two affidavits gave credible reason to suspect juror misconduct. Gathering information from other jurors was necessary to determine if any additional juror information would affect the outcome. Reversed and remanded to allow contact of jurors and an evidentiary hearing.

Rossa v. State, 624 S.W.3d 756 (Mo. App. E.D. 2021):

Holding: Rule 24.035 Movant was entitled to evidentiary hearing on claim that plea counsel was ineffective for erroneously advising him that he would receive jail credit for time spent in another State; claim was not refuted by record because Judge actually ordered credit for time in other State (but Movant didn't actually get it), and even though Movant said at guilty plea that no "promises" were made to him, counsel's "advice" is not the same as a "promise;" a Movant can say no "promises" were made to him, but that doesn't mean he wasn't given incorrect advice.

Philips v. State, 635 S.W.3d 870 (Mo. App. E.D. 2021):
Holding: Even though (1) 24.035 Movant had told sentencing court in open plea that no "promises" had been made to him, and (2) Movant answered "no" to the plea court's question, "Has your attorney or anyone told you how long you will be confined or have to serve in the penitentiary," this did not refute Movant's 24.035 claim that his attorney told him he would be eligible for parole after "three or four years," when, in fact, he was required to serve 80% of his sentence; thus, Movant is entitled to an evidentiary hearing on his claim.
Discussion: Claims that counsel misinformed a defendant about parole ineligibility are not conclusively refuted by the record where no mention of parole eligibility is made; a negative response to a routine inquiry is not sufficient to refute the record.

McCallister v. State, 2022 WL 774103 (Mo. App. E.D. March 15, 2022):
Holding: Where (1) Defendant/Movant was charged at trial with statutory sodomy for hand-to-genital contact with Victim, but (2) Victim testified at trial only that Defendant used his hand to touch her chest and buttocks, Rule 29.15 motion court clearly erred in not granting evidentiary hearing on claim that appellate counsel was ineffective in not raising sufficiency of evidence claim on direct appeal.
Discussion: A movant may show deficient performance by showing that appellate counsel failed to raise a claim of error so obvious that a competent and effective attorney would have raised it. An evidentiary hearing is warranted where appellate counsel failed to raise a meritorious sufficiency claim. The State claims that because Victim testified it was "mostly his penis that was touching" her, that at some point, Defendant's hand must have touched her genitals. But this argument requires speculative, forced inferences an appellate court cannot supply. The State did not present sufficient evidence of statutory sodomy. This calls into question the reasonableness of appellate counsel's strategy and effectiveness on direct appeal. Thus, Movant has demonstrated the need for an evidentiary hearing as to the failure to raise the issue. Because the sufficiency claim would have had merit, Movant has shown prejudice in that there is a reasonable probability the result of the appeal would have been different. Remanded for evidentiary hearing.

Armantrout v. State, 2022 WL 4137451 (Mo. App. E.D. Sept. 13, 2022):
Holding: (1) Where Mother and Son had been co-defendants, Movant-Mother was entitled to evidentiary hearing on 24.035 claim that her plea to first degree murder was involuntary and counsel ineffective because she believed the plea agreement required her to plead in order for her Son to receive a more lenient sentence than her, but her counsel had failed to inform her that this was no longer part of the plea agreement (though it had been at one time); (2) in situations where family member co-defendants are pleading guilty, court must specifically inquire into whether the plea agreement involves other family members; (3) Movant's general statements that no "promises" or "agreement" were made to "her" were too general to refute Movant's 24.035 claim, because the agreement about her Son was not about "her" but her Son; (4) defense counsel's statements before plea that he had "conveyed" all plea offers did not refute Movant's claim that counsel had not conveyed a "change" in the plea offer and, in any event, court cannot rely on unsworn statement of defense counsel to deny evidentiary hearing; and (5)

Movant pleaded prejudice because the only possible sentence for her plea was life without parole, and Movant alleged she would not have pleaded guilty but for her belief she was required to do in order for her Son to receive a more lenient sentence.
Discussion: Although the plea colloquy and written plea petition were very thorough, given the unique circumstances here of co-defendant Mother and Son, the plea court should have specifically inquired whether any promises, agreements or discussions were had about Mother's co-defendant-Son that she was relying on to plead guilty. If the court had asked that question, then Movant's claim would be refuted by the record.

Wyatt v. State, 2023 WL 1786644 (Mo. App. E.D. Feb. 7, 2023):
Holding: Where Movant had robbed a bank by telling the teller to give him "all the money or [I'll] shoot", Movant was entitled to evidentiary hearing in Rule 24.035 case that plea counsel was ineffective in advising him to plead to first degree robbery without discussing defense of lesser-included offenses that don't involve use of force.
Discussion: Movant alleged counsel failed to discuss lesser-included offenses of second degree robbery (which does not require showing a defendant threatened immediate use of a dangerous instrument) or stealing (which doesn't require any use of force). A plea may be rendered unknowing and involuntary when counsel fails to advise of possible defenses. When Movant's claim is that counsel failed to advise of the applicability of lesser-included offenses, the question is whether Movant's claim is refuted by the record. Here, the transcript of the plea hearing does not indicate that counsel had discussed possible defenses with Movant. Although it's possible counsel did, this cannot be known without an evidentiary hearing. Movant alleged he was prejudiced because he wouldn't have pleaded guilty and would have proceeded to trial, if he had known of possible lesser-included offenses. Without a hearing, "we must take Movant at his word."

Forman v. State, 2023 WL 2247136 (Mo. App. E.D. Feb. 28, 2023):
Holding: Rule 24.035 Movant was entitled to evidentiary hearing on claim that plea counsel affirmatively misadvised him that his plea would only require him to serve 24 months, when in fact, his offense required him to serve 85% of his sentence; claim was not refuted by the record where there was no mention of parole eligibility during plea hearing.
Discussion: Mistaken beliefs about sentencing affect a defendant's ability to knowingly enter a guilty plea if the mistake is reasonable and based upon a positive representation upon which defendant is entitled to rely. Here, Movant alleged his counsel told him he would serve only 24 months (not the longer mandatory 85%). Movant's belief was not unreasonable since there was no mention at the plea hearing about parole eligibility. Movant's general answers at the plea hearing that no "promises" had been made to him was too general to refute Movant's claim. Movant properly alleged prejudice in that he claims he wouldn't have pleaded guilty but would have proceeded to trial if counsel had not affirmatively misadvised him. Remanded for evidentiary hearing.

Summers v. State, 668 S.W.3d 311 (Mo. App. E.D. 2023):
Holding: (1) Movant was entitled to evidentiary on claim that his *pro se* 29.15 motion was timely where the post-mark on the Clerk's scanned copy of the mailing envelope was illegible, but Movant's amended motion pleaded that he would testify as to the timely date of mailing and would present other evidence showing timeliness of the *pro se* motion; but (2) fact that Clerk's Office failed to retain original envelope does not automatically result in deeming the *pro se* motion timely. Motion court erred in dismissing motion as untimely without an evidentiary hearing.

Waldorf v. State, 673 S.W.3d 511 (Mo. App. E.D. Aug. 1, 2023):
Holding: Even though postconviction Movant pleaded that counsel was ineffective in failing to obtain a surveillance video which was destroyed 90 days after the crime, where counsel did not enter the underlying case until 112 days after the crime, Movant was not entitled to an evidentiary hearing because he cannot show prejudice, since, by Movant's own admission, the video was destroyed before counsel even entered.

Schauer v. State, 2023 WL 3734903 (Mo. App. S.D. May 31, 2023):
Holding: (1) Motion court clearly erred in denying Movant's 24.035 motion without an evidentiary hearing on grounds that "allegations in a motion are not self-proving," because – although a correct statement of law -- Movant was denied an opportunity to prove her claims due to denial of a hearing; (2) motion court clearly erred in denying claims without a hearing on grounds that the allegations were not "credible," because motion court cannot make credibility findings in absence of a hearing; and (3) even though Movant expressed satisfaction with plea counsel at her sentencing, where her amended motion alleged she was coerced into giving those answers by threats of counsel to withdraw or by receiving the death penalty, the allegation of coercion meant Movant's claims were not refuted by the record, and warranted a hearing. Remanded for evidentiary hearing.

Kelley v. State, 618 S.W.3d 722 (Mo. App. W.D. 2021):
(1) 29.15 court clearly erred in denying claim without evidentiary hearing that counsel was ineffective for failing to cross-examine alleged assault Victim with prior inconsistent statement which supported Movant-Defendant's exculpatory version of events, since the prior inconsistent statement would have been substantive evidence that went directly to the central disputed issue at trial; (2) 29.15 court clearly erred in denying claim without an evidentiary hearing that counsel failed to elicit from Witness evidence which would have corroborated Movant's trial testimony and rebutted State's evidence on significant issue; (3) 29.15 court clearly erred in denying claim without an evidentiary hearing that counsel was ineffective in failing to cross-examine Officer concerning his analysis a tire marks found at the crime scene and Officer's lack of expertise to make such an analysis; and (4) 29.15 court must consider "cumulative prejudice" to Movant from counsel's failures regarding all three witnesses.
Facts: Movant-Defendant was convicted of first degree assault. As relevant here, Victim testified to a version of events that Movant assaulted him by trying to run him over with a truck. Movant-Defendant testified at trial to an exculpatory version of the

events. After his conviction was affirmed on direct appeal, Movant sought 29.15 relief. The motion court denied his claims without an evidentiary hearing.
Holding: The rules encourage evidentiary hearing in order to ensure claims are decided accurately. (1) Movant claims counsel was ineffective in failing to cross-examine Victim about inconsistent statements he made to police. Although failure to impeach does not generally constitute ineffective assistance, failure to cross-examine witnesses with prior inconsistent statements about a key, central issue in the case will. Here, Victim gave statements to police that were directly contrary to Victim's trial testimony, and which would have corroborated Movant's exculpatory version of events. This was not mere "impeachment," because, under Sec. 491.074, a prior inconsistent statement is received as substantive evidence and can be argued for its truth. Victim's prior inconsistent statements would have corroborated Movant's exculpatory version of events. Movant was entitled to evidentiary hearing. (2) Movant claims counsel was ineffective in failing to elicit additional testimony from another Witness which would have corroborated Movant's version. The motion denied this claim as "speculation" as to what Witness would have testified to at trial. But Movant's motion specifically alleged what Witness would have testified to. This was enough. Without a hearing, Movant was unable to *prove* what the trial testimony would have been. Movant's motion wasn't required to *prove* his claims; it was only required to *allege* his claims. Witness' testimony would have provided important corroboration to Movant's testimony. (3) Officer testified about various tire marks at the crime scene in a fashion to support the State's theory of the case. Movant claimed counsel was ineffective in failing to cross-examine Officer about his lack of expertise in this area. This, too, warranted a hearing. (4) While failure to examine the last two witnesses may not present the same prospect of prejudice as failure to present the prior inconsistent statements of Victim, the motion court must assess the cumulative prejudicial impact of all three deficiencies in performance. Remanded for evidentiary hearing.

King v. State, 2022 WL 97164 (Mo. App. W.D. Jan. 11, 2022):
Holding: (1) Motion court did not err in failing to grant evidentiary hearing on claim trial counsel was ineffective in failing to seek lesser-included instruction where amended 29.15 motion merely pleaded that counsel failed to exercise customary skill and diligence of reasonably competent attorney in not seeking a lesser; such pleading is a "legal conclusion," not a factual allegation; but (2) if the amended motion had pleaded that counsel's failure to seek lesser-included was due to inadvertence or wasn't reasonable trial strategy, those are "factual allegations" that may have required a hearing.

Mothershead v. Wofford, 2022 WL 2275423 (W.D. Wash. 2022):
Holding: Even though State postconviction counsel negligently failed to supplement the state record, where petitioner herself supplemented the record with declarations from trial counsel and an expert, she was diligent and not at fault for failure to develop the state court record, so was entitled to evidentiary hearing.

Mbula v. State, 2022 WL 2513543 (N.D. 2022):
Holding: Summary denial of Movant's ineffective counsel motion for failure to call co-defendant was erroneous, where Movant presented affidavit from co-defendant saying he

would have waived right against self-incrimination and testified to facts exculpating Movant, and there was no testimony from trial counsel that failure to call co-defendant was strategic.

Experts

John Doe 122 v. Marianist Province of the U.S., 620 S.W.3d 73 (Mo. banc 2021):
Holding: Priest was qualified through knowledge, experience and education to testify as an Expert as to the meaning of various words used in personnel documents and whether these were "code" words indicating sexual abuse.
Discussion: The issue in case is whether Defendant-Church/School knew about sexual abuse. Defendant's personnel records do not expressly refer to sexual abuse but use phrases like "unusual situation" and "serious" "problem." The proposed Expert, a priest, had extensive knowledge and experience with sexual abuse issues in the Church. His testimony is admissible as Expert testimony under Sec. 490.065.2(1) because he is qualified through knowledge, experience and education with how the Church used "code" to discuss sexual abuse in records. His testimony does not invade the province of the jury because he does not claim to have first-hand knowledge of the alleged sexual abuse in Plaintiff's case, but will only explain to the jury what the Church's records mean when they refer to the "problem." Such expert testimony has been admitted in analogous situations, such as where experts have been permitted to testify to "practices, symbols, and terminology" used by street gangs. The testimony provides jurors with information for them to use in deciding how to judge the language used in records. However, the jury is always free to not believe the expert.

State v. Mills, 623 S.W.3d 717 (Mo. App. E.D. 2021):
Holding: (1) Trial court did not err in granting State's motion in limine to preclude Defendant from cross-examining State's toolmark and firearms expert with the National Academy of Sciences report (2009) and Presidential Council of Advisors on Science Technology report (2015) about "false positives" in toolmark examination, where State's expert didn't concede these reports were "authoritative," Defendant did not present expert testimony of their "authoritativeness," and court was not required to take judicial notice of this; (2) trial court did not err in denying a formal *Daubert* hearing on toolmark examination, where court considered issues regarding reliability and admissibility of the evidence informally through the motion in limine hearing.
Discussion: (1) A "learned treatise" can be used to cross-examine an expert, but the proponent of the treatise must lay a proper foundation to use it, i.e., must show that the treatise is "authoritative." Otherwise, the writings are inadmissible hearsay offered to prove the truth of the matter asserted. To show a treatise is "authoritative," a proponent can show (a) a concession from the expert that it is authoritative; (b) judicial notice of authoritativeness; or (c) other experts can say it is "authoritative." Here, the State's expert didn't concede these treatises were "authoritative." Defendant did not present any expert of his own to say that they were. And the trial court wouldn't and wasn't required to take judicial notice of this. (2) A formal *Daubert* hearing is not required under Sec. 490.065. The statute imposes a duty on the court to determine whether the facts and data

relied on are reasonably reliable. But the only legal requirement is that the parties "have an adequate opportunity to be heard" before the court makes that decision. An inquiry about admissible evidence is to be "flexible." Here, the court heard arguments during the motion in limine hearing on the reliability of toolmark identification. This informal procedure satisfied the statute.

Otwell v. Treasurer of Mo. as Custodian of Second Injury Fund, 634 S.W.3d 850 (Mo. App. E.D. 2021):
Holding: Even though Expert testified in a pretrial deposition that he "relied" on another doctor's report (which was by a non-testifying doctor), trial court erred in excluding Expert's entire testimony because Sec. 490.065.2 allows an Expert to rely on facts or data "reasonably relied upon by experts in the field in forming opinions," and the non-testifying doctor's report was just one of several medical records that Expert had reviewed in forming his opinion.
Discussion: An expert cannot be an expert in all fields, and it is reasonable to expect that experts will rely on opinions of experts in other fields. If the testifying expert merely acts as a "conduit" for another non-testifying expert's opinion, the "expert opinion" is hearsay and inadmissible. But expert opinion partially based on other expert opinion is not necessarily inadmissible. Rather, an expert is allowed to rely on hearsay to support expert's opinion where expert testifies that the evidence is of a sort reasonably relied on by experts in the field and the court finds the evidence is reasonably reliable. The non-testifying doctor's report was background for Expert's opinion and wasn't offered as independent substantive evidence.

In the Interest of D.M.M., 2022 WL 17587307 (Mo. App. E.D. Dec. 13, 2022):
Holding: (1) Juvenile court did not err in failing at certification hearing to exclude under Sec. 490.065 Deputy Juvenile Officer's "expert opinion testimony," because Sec. 490.065.1 only applies in actions "adjudicated" in juvenile court under Chapter 211, and certification proceedings are not adjudications; and (2) court did not err in excluding certain "hearsay" testimony from DJO's report because hearsay rules do not strictly apply to non-adjudicatory certification proceedings, which allow "reliable" hearsay to be admitted.

Huett v. Branson, 2023 WL 4566209 (Mo. App. E.D. July 18, 2023):
Holding: (1) Biomechanical Engineering Expert (who studies how the body works, how it breaks, and who designs computer models showing this) was qualified under Sec. 490.065 to give general testimony about the force applied to a Baby during an abnormal delivery and such general testimony was "reliable" because based on sufficient facts, data, and reliable principles, but (2) this Expert was not qualified to give an opinion on the specific cause of Baby's injuries because Expert did not have the "knowledge, skill, experience, training or education" to testify about certain obstetric practices or standards of care, and her computer modeling could not reliably be applied to the specific facts of the case.

Crowder v. Ingram Barge Co. LLC, 2023 WL 7136150 (Mo. App. E.D. Oct. 31, 2023):

Holding: Even though there is a degree of speculation required to determine the value of wages a plaintiff may lose as a result of an injury, Forensic Economist's expert testimony on this matter is admissible under Sec. 490.065 and any weakness in the expert's conclusions goes to the weight of the evidence, not its admissibility.

Gebhardt v. American Honda Motor Co., Inc., 627 S.W.3d 37 (Mo. App. W.D. 2021):

Holding: Even though Expert in all-terrain vehicle accident case had a Ph.D. in mechanical engineering and a certificate in accident reconstruction, trial court did not abuse discretion in excluding him as expert where he did not thoroughly explain his methodology or point to prior studies, tests, publications, or other support for his findings; Sec. 490.065.1 requires that testimony of experts be the produce of reliable principles and methods.

State v. Antle, 2021 WL 1880945 (Mo. App. W.D. May 11, 2021):

(1) In child sex case, trial court applied wrong legal standard under Sec. 491.075 in determining whether statements Child-Victim made to others were admissible; court applied test of whether Witnesses were accurately recounting what child said, rather than correct test of whether under totality of circumstances, the evidence is reliable; remedy is remand for court to apply correct test in first instance, and grant new trial or not; but (2) trial court did not abuse discretion in excluding defense Expert to testify that improper child interview questions "contaminated" the results and that the interviewer's questions had a poor "coding score;" this went beyond explaining proper interview techniques (which is admissible) to invading the province of the jury by offering opinions on the State interviewer's credibility.

Facts: In child sex case, Child-Victim made statements to several adult Witnesses. The court held a 491.075 hearing, and determined the statements were admissible because the Witnesses would accurately recount what the child told them, so the statements were "reliable." The court excluded at trial a defense Expert who would have testified about the child forensic interview conducted by the State examiner. Expert would have testified about a "scoring system" Expert had devised to identify improper leading questions, and interviewer received a low, poor score. Expert would have also testified that the interview was "highly problematic" and "highly contaminated" by the improper questions.

Holding: (1) Sec. 491.075 provides that extrajudicial statements of a child under age 14 are admissible if the court finds the statements "provide sufficient indicia of reliability." The trial court wrongly interpreted this to mean only whether the Witnesses are accurately recounting what the child said to them. The correct legal standard to determine if the statements are "reliable" is a totality of circumstances test that considers, among other factors, spontaneity and consistent repetition; mental state of declarant; lack of motive to fabricate; knowledge of subject matter unexpected of a child of similar age. The court can also consider factors such as the interview techniques employed by the interviewer to whom the statements were made. Since the trial court applied the wrong legal standard, remedy is for appellate court to remand case to trial court to apply correct

standard. Trial court will need to decide under correct legal standard if statements provided sufficient indicia of reliability, and then depending on that answer, if a new trial is warranted. (2) Experts at trial can properly give generalized testimony about proper child interview techniques. But they cannot give "particularized" testimony which comments on child's or other witness' credibility. Here, Expert's proposed testimony was "particularized" testimony which would have invaded province of jury by commenting on other witnesses' credibility. Also, Expert's scoring system whereby she gave the interviewer a low grade wasn't supported by specific research or data, as required by Sec. 490.065 regarding expert testimony.

In the Interest of E.T.S., Juvenile Officer v. E.T.S., 2023 WL 139280 (Mo. App. W.D. Jan. 10, 2023):
Holding: Juvenile Court did not err in allowing Deputy Juvenile Officer to give expert testimony at certification hearing, because the expert witness statute, Sec. 490.065, applies only to actions "adjudicated" in juvenile court under Chapter 211, and a certification hearing is not an "adjudication" involving guilt or innocence.

Z.R., A Minor, By and Through Next Friend T.R. v. Kansas City Pediatrics LLC, 2023 WL 7136352 (Mo. App. W.D. Oct. 31, 2023):
Holding: Where (1) defense Expert's opinion at trial "directly contradicted" their opinion given in their pretrial deposition, and (2) the defense had not disclosed the change in opinion, Plaintiff was entitled to new trial, because the discovery rules require that when an Expert Witness has been deposed and later changes their opinion before trial or bases that opinion on new facts different from those disclosed in the deposition, it is the duty of the party intending to use the Expert to disclose that information to the opposing side and update the responses made in the deposition.

Vasquez v. State, 652 S.W.3d 586 (Ark. 2022):
Holding: Sexual assault nurse's (SANE) testimony about the frequency of normal findings on sexual-assault exams and delay in disclosure exceeded permissible scope of lay opinion testimony.

State v. Raynor, 2021 WL 8255199 (Conn. 2020):
Holding: Before deciding whether to grant *Daubert*-type hearing, court was required to consider Defendant's evidence challenging methodology and reliability of State expert's firearm and toolmark analysis.

State v. Elzey, 2021 WL 302869 (Md. 2021):
Holding: Finding that Victim-Husband had repeatedly abused Defendant-Wife was not required for Defendant-Wife to be able to use Battered Spouse Syndrome expert testimony as defense, where Defendant-Wife sought to show she had been repeatedly abused by other men which caused the Syndrome.

State v. Matthews, 2022 WL 2236139 (Md. 2022):
Holding: Photogrammerty expert's testimony was admissible; could testify to estimated height of person in video.

Abruquah v. State, 2023 WL 4073308 (Md. June 20, 2023):
Holding: Firearms examiner cannot offer an "unqualified opinion" that crime scene bullets were fired from a particular gun. At most, an examiner can testify that patterns and markings on bullets are "consistent" or "inconsistent" with bullets fired from a particular firearm.

Com. v. Rintala, 2021 WL 4398660 (Mass. 2021):
Holding: Expert's testimony in murder trial as to drying time of paint and whether paint was poured rather than spilled at the scene was not sufficiently reliable have been admissible.

State v. Clark, 2022 WL 414623 (N.C. 2022):
Holding: Expert improperly vouched for Victim in sex case by testifying Victim was "sexually abused"; testimony amounted to improper comment on Victim's credibility.

State v. Nieves, 2023 WL 5947996 (N.J. Super. Ct. App. 2023):
Holding: Shaken baby syndrome (SBS) and abusive head trauma (AHT) are not generally accepted in the scientific community and are not admissible, even though they are accepted in the pediatric community; these have never been proven by biomechanical testing or principles.

Expungement

Milton v. St. Louis County, Mo., 2022 WL 774105 (Mo. App. E.D. March 15, 2022):
Holding: Even though the crime for which Petitioner had been arrested (but never convicted) was a sex offense without a statute of limitations, Petitioner was entitled to an evidentiary hearing in her case to expunge her arrest record under Sec. 610.123, because Petitioner may be able to show that she would never be re-charged with the offense, and thus, be eligible for expungement.
Discussion: Sec. 610.122 allows a Petitioner to expunge their arrest record if they can show that "no charges will be pursued as a result of the arrest." Sec. 610.123.3 requires that upon filing an expungement petition, the court "shall set a hearing." Missouri Supreme Court Rule 155.04(b) also mandates a "hearing" in such cases. Here, however, the trial court denied Petitioner's expungement motion, without a hearing, on grounds that since Petitioner's offense had no statute of limitations, the crime could be re-charged at any time in the future, so Petitioner could never show that she would never be re-charged. (Her charge had previously been dismissed without prejudice when the State's witness failed to appear.) Such an assumption is too speculative. The absence of a statute of limitations does not automatically mean that Petitioner will be re-charged. This is especially true where the State's witness failed to appear. Petitioner, e.g., may be able to show her actual innocence. She may be able to present other evidence that the State will never re-charge her, such as false information or no probable cause. Other proof may exist. Petitioner is entitled to evidentiary hearing in her expungement action.

N.M.C. v. Missouri State Highway Patrol Criminal Records Repository, 2023 WL 2124765 (Mo. App. E.D. Feb. 23, 2023):

Even though Petitioner's arrests for separate felonies in 2006 and 2013 ultimately did not result in convictions, trial court in expunging both felony arrest records because Sec. 610.140.12 imposes a lifetime limit of expungement of one felony record; remanded to allow Petitioner to choose which record he wants expunged.

Facts: Petitioner was charged in 2006 with possession of a controlled substance, and a second felony with the same arrest date and same case number. There is no dispute that these arose out of the same course of conduct and comprise a single offense for purposes of Sec. 610.140. Petitioner pleaded guilty to these offenses in plea deal that would allow the charges to be dismissed if he successfully completed a treatment program. Petitioner completed the program, and the 2006 charges were ultimately dismissed. In 2013, Petitioner was charged in a different case with felony possession of a controlled substance. He ultimately pleaded guilty to a misdemeanor. The trial court expunged both the 2006 and 2013 felony arrest records.

Holding: Sec. 610.140.12(2) limits expungement to no more than one felony offense during a person's lifetime. Sec. 610.140.1 creates an exception that multiple offenses charged in the same indictment or information, or that are part of the same course of criminal conduct, count as a single offense. Thus, the 2006 offenses count as a single offense. But the 2006 and 2013 offenses were not charged in the same information or indictment, were not part of the same course of conduct, and were six years apart. Petitioner argues that because his felony arrests did not result in "convictions," they are not subject to the one-felony offense limit in 610.140.12. Petitioner maintains that "offense" in the statute means "conviction." The dictionary definition of "offense" means "a violation of the law; a crime." Nothing in the dictionary definitions suggest an "offense" only exists after a "conviction," and the two terms are not synonymous or interchangeable. Remanded to allow Petitioner to choose which felony record he wishes to have expunged.

State v. Jackson, 2023 WL 6839147 (Mo. App. S.D. Oct. 17, 2023):

Holding: Even though there was a direct appeal pending of Defendant's marijuana conviction at trial, where the trial court expunged this conviction while the appeal was pending, the trial court had jurisdiction to expunge despite an appeal pending since the expungement was a separate case from the criminal one, and the expungement rendered the appeal moot.

Discussion: The State argues the trial court lacked jurisdiction to vacate and expunge records during the pendency of the direct appeal of the marijuana conviction. As a general rule, an appeal cuts off a trial court's jurisdiction to exercise any judicial function in a case and vests jurisdiction in the appellate court only. But, here, the trial court did not act in the pending criminal case. The expungement action was done in an entirely separate case filed by Defendant under Art. XIV, Sec. 2, Mo.Const., which provides for expungements. Because there is no longer a sentence or conviction related to the marijuana conviction, the direct appeal is moot. Dismissed as moot.

Recipient of Final Expunction Order in McNairy County Circuit Court Case No. 3279 v. Rausch, 2022 WL 1697281 (Tenn. 2022):
Holding: State Bureau of Investigation could not refuse to comply with court's expungement order even if the offense was statutorily ineligible for expungement.

Ex Post Facto

Williams v. Falkenrath, 2023 WL 6220318 (Mo. App. W.D. Sept. 26, 2023):
Holding: (1) Even though Petitioner had previously filed and lost numerous habeas petitions, he wasn't procedurally barred from proceeding in a new habeas petition, since Missouri does not categorically prohibit successive habeas petitions; (2) even though Petitioner failed to previously raise his current claim that he was erroneously sentenced in 1988 as a "Class X" offender (requiring him to serve 80% of his sentence), this claim was not barred because a sentence beyond that permitted by law may be corrected in a habeas petition; and (3) where Petitioner's offense occurred in May 1988 but the trial court applied sentencing enhancements which didn't become effective until August 1988, the application of post-offense enhancements was *ex post facto*.
Discussion: The State argues Petitioner's claims are procedurally defaulted. But default can be overcome by showing a jurisdictional defect, cause and prejudice, or extraordinary circumstances where manifest injustice would occur without relief. Although a claim that a sentence exceeds that authorized by law is technically no longer a "jurisdictional" defect, it is still cognizable in a habeas proceeding. Missouri does not categorically prohibit successive habeas petitions. A claim that a petitioner is serving a legally erroneous sentence is entitled to consideration on the merits, despite procedural obstacles which would bar other claims. At the time Petitioner committed his offense, the "Class X" offender statute only applied to A and B felonies. Petitioner's sex crimes were "unclassified" felonies at that time. The Class X offender statute was later amended to change this, but that amendment should not have been applied to Petitioner because it was *ex post facto* to do so.

S.A.B. v. J.L.R., 675 S.W.3d 245 (Mo. App. E.D. Sept. 19, 2023):
Holding: (1) Even though the new five-year length of Protection Orders did not take effect until August 28, 2021, where the trial court applied this to conduct occurring both before and after that date, this did not violate Art. I, Sec. 13 Mo.Const.'s ban on retrospective laws, because the change in the length of Protection Orders was merely "procedural," not "substantive," and did not impair any vested rights of Defendant or impose any new duties on him; (2) even though threatening texts were received in Missouri at 11:30 P.M. Central Time on August 27, where Defendant sent them from New York in the Eastern Time Zone at 12:30 A.M. on August 28, the August 28 statute applies to Defendant because a statute comes into effect in a foreign jurisdiction when the foreign jurisdiction (New York) reaches the stated date, even if the host jurisdiction (Missouri) has not yet reached that date because of a time difference.

U.S. v. Maurya, 2022 WL 294046 (11th Cir. 2022):
Holding: District court violated Ex Post Facto Clause in imposing a sentencing enhancement for wire fraud based on USSG substantial financial hardship enhancement that was added after Defendant had committed her offense.

Frank A. v. Ames, 2021 WL 5410526 (W. Va. 2021):
Holding: Trial court's imposition of period of extended supervised release was ex post facto, where State failed to show that any of Defendant's charged offenses occurred after the effective date of the extended supervised release statute.

State v. Patton, 2022 WL 414260 (Kan. 2022):
Holding: Application of amended DWI statute, which counted out-of-state convictions for enhancement purposes, to Defendant who committed DWI before the amendments violated Ex Post Facto Clause.

Factual Basis

State v. Harris, 2022 WL 16752261 (Mo. App. E.D. Nov. 8, 2022):
Holding: (1) A direct appeal can be taken from a guilty plea alleging that there was an insufficient factual basis for the plea under Rule 24.02(e); (2) standard of review of such unobjected to claims is plain error; and (3) trial court did not plainly err in accepting guilty plea to involuntary manslaughter where Defendant traded drugs with a person who briefly overdosed when Defendant was present, and then later died of an overdose on the drugs when Defendant was not present, because this showed recklessness.
Discussion: (1) The State claims lack of factual basis is not cognizable on direct appeal, because a guilty plea waives appellate review of all error except subject-matter jurisdiction, sufficiency of the charging document, and *Bazell* claims. The State claims the issue can only be raised in postconviction under Rule 24.035. The State's arguments were rejected in *State v. Russell*, 598 S.W.3d 133 (Mo. banc 2020), which held that Rule 24.035 does not and cannot limit the issues which can be raised on direct appeal under Sec. 547.070, which grants defendants the right to appeal final judgments. While *Russell* dealt with excessive sentence, its rationale applies to factual basis. Thus, lack of factual basis is cognizable on direct appeal. (2) The standard of review for such an unobjected to claim is plain error. (3) Whether a factual basis exists to support involuntary manslaughter is very case-specific. The issue is whether Defendant acted recklessly, i.e., whether there was a conscious disregard of risk of death and a gross deviation from what a reasonable person would do under the circumstances. While there are cases that would support both that Defendant here did and did not act recklessly, appellate court holds that any error here by the trial court in accepting the plea was not "evident, obvious and clear enough" to constitute plain error.

Easley v. State, 623 S.W.3d 211 (Mo. App. S.D. 2021):
Holding: Claim that Movant's guilty plea lacked a factual basis is not cognizable in Rule 24.035 action.

Discussion: Movant alleges noncompliance with Rule 24.02(e) is a due process violation. This is false because a sufficient factual basis for a guilty plea is not constitutionally required. 24.02(e) merely assists the plea court in deciding if a guilty plea is voluntarily, intelligently and knowingly made. Movant claims the lack of factual basis rendered Movant's plea involuntary, unknowing and unintelligent. This is false because the term "factual basis" is not interchangeable or synonymous with a "knowing and voluntary plea." Whether a plea is knowing and voluntary is determined form the record as a whole.

In the Interest of P.L.S. v. Juvenile Officer, 2022 WL 4074414 (Mo. App. W.D. Sept. 6, 2022):
Holding: Juvenile Court plainly erred in accepting Juvenile-Defendant's plea to Class A misdemeanor of violation of a court order, Sec. 211.431, because Juvenile's plea lacked a factual basis, since Juvenile could not have violated the statute because 211.431 explicitly applies only to persons "eighteen years of age or over" who fail to obey a court order.
Discussion: Juvenile could not have violated 211.431 because the statute, by its express terms, only applies to persons "eighteen years of age or over." Thus, the statute cannot serve as the basis for a finding of delinquency by a juvenile. Unlike other states, the Missouri statute giving the juvenile court exclusive authority over delinquency cases does not refer to acts which *would* constitute a violation of the law *if committed by a hypothetical adult*. Instead, 211.031.1(3) gives the juvenile court exclusive authority only when a juvenile "is alleged to have violated a state law or municipal ordinance." Thus, Juvenile here could only be found delinquent is he himself *actually violated* 211.431. It is not enough that his actions *would have* constituted a violation if committed by an adult. Plea vacated.

People v. Eynon, 2021 WL 4190633 (Cal. App. 2021):
Holding: Petitioner was entitled to postconviction relief after he pleaded guilty to premeditated and felony murder based on impermissible legal theory that he was responsible for murder actually committed by co-defendant.

Findings of Fact, Conclusions of Law (Rules 24.035 and 29.15)

Ball v. Ball, 638 S.W.3d 543 (Mo. App. E.D. 2021):
Holding: Eastern District states it does not condone verbatim adoption of proposed findings by a trial court and strongly encourages all trial courts to avoid such a practice (but no error here where trial court modified proposed findings).

Ross v. State, 2023 WL 192240 (Mo. App. E.D. Jan. 17, 2023):
Holding: (1) Findings as to timeliness of *pro se* Rule 24.035 motion were required – even under pre-November 4, 2021, version of 24.035 -- because appellate court otherwise would have to engage in de novo review of the timeliness issue (the post-November 4, 2021 version of 24.035(j) expressly requires Findings on timeliness); (2) Even though motion court did not grant an evidentiary hearing, Findings are still required, because to find remand to be unnecessary on grounds that the motion did not warrant a hearing

would mean circuit courts could simply deny postconviction motions without any Findings, and wait for appellate court to determine whether a hearing was warranted and that Findings were required; and (3) Movant's allegations that he was prevented from timely-filing his *pro se* motion due to prison lockdown during COVID do not entirely fit within third-party interference exception to timeliness but are not "squarely foreclosed" by it either, and require Findings. Remanded for Findings.

Huckleberry v. State, 674 S.W.3d 801 (Mo. App. S.D. Sept. 1, 2023):
Holding: Where (1) 29.15 Movant's amended motion alleged one claim of ineffective appellate counsel and five claims of ineffective trial counsel; (2) the State filed a motion which argued the appellate counsel claim should be denied without hearing; and (3) the motion court thereafter issued a brief Order "agree[ing]" with the State and denying the entire motion (without further Findings), the motion court clearly erred because the State's argument only pertained to the appellate counsel claim; thus, the Order didn't rule on the five trial counsel claims, and so there is no "final judgment" to appeal from. Appeal dismissed.

Morse v. State, 620 S.W.3d 117 (Mo. App. W.D. 2021):
Holding: Where (1) 29.15 motion court denied Movant's amended motion by stating it was "denied" in a docket entry, and (2) motion court denied (by expiration of time) subsequently-filed Rule 78.06 motion to amend judgment to make Findings, motion court clearly erred in not entering Findings under Rule 29.15(j), which requires Findings sufficient to allow for meaningful appellate review; remanded for entry of Findings.

Mack v. State, 635 S.W.3d 607 (Mo. App. W.D. 2021):
Holding: (1) Even though 29.15 Movant timely filed their *pro se* motion in January 2019, the motion was governed by the pre-2018 version of Rule 29.15 because 29.15(g) states that if sentence was pronounced before January 1, 2018, the applicable Rule is the one in effect on the date the motion is filed "or December 31, 2017, whichever is *earlier*"; (2) even though postconviction counsel requested an extension of time to file an amended motion before the initial 60-day time limit expired, where the motion court did not grant the extension until after the time limit expired, the amended motion was untimely, so case must be remanded for abandonment hearing; and (3) where trial court summarily denied Rule 29.15 relief, judgment must be reversed because under Rule 29.15(j), motion court is required to enter Findings of Fact and Conclusions of Law sufficient to allow meaningful appellate review.

Davis v. State, 2023 WL 4065814 (Mo. App. W.D. June 20, 2023):
Holding: Where (1) 24.035 Movant's amended motion alleged multiple claims for relief, (2) the motion court issued Findings which listed some of Movant's claims but did not appear to address two other claims, (3) Movant filed a motion to amend judgment under Rule 78.07 to have Findings issued on the two claims, but (4) motion court did not amend judgment, the motion court's general Findings that Movant's plea was "voluntary" were insufficient to address the two claims and did not allow meaningful appellate review; remanded to address the two claims.

Discussion: Rule 24.035(j) mandates the motion court issue Findings sufficient to allow meaningful appellate review. Here, the court specifically listed and ruled on most of Movant's claims, but didn't specifically discuss two of them. The State claims the motion court's general discussion that counsel was not ineffective for not making objections or filing motions, and that the plea was "voluntary" were sufficient Findings for the seemingly omitted claims. However, the omitted claims didn't deal with failing to make objections or file motions. Moreover, Findings cannot simply state bald conclusions without identifying any facts or part of the record that support the Findings. Statements of ultimate conclusions aren't sufficient to satisfy duty to issue Findings.

Kirby v. State, 673 S.W.3d 148 (Mo. App. W.D. July 25, 2023):
Holding: Even though motion court, without issuing Findings, dismissed Rule 24.035 case pursuant to local rule for failure to prosecute, appellate court affirms dismissal, because Movant did not file a motion to amend judgment under Rule 78.07(c) to claim error in not issuing Findings.
Discussion: Rule 24.035(j) requires motion courts to issue Findings. However, Rule 24.035 is subject to local rules of court. Here, there was a local rule authorizing dismissal of stale cases, which the motion court followed. Rule 78.07(c) provides, in relevant part, that allegations of error regarding failure to make Findings must be raised in a motion to amend judgment to be preserved for appellate review. Rule 24.035(j) expressly states that "Rule 78.07(c) shall apply to these proceedings." Thus, appellate court affirms motion court's dismissal because issue of not doing Findings isn't preserved.

Guilty Plea

Hefley v. State, 626 S.W.3d 244 (Mo. banc 2021):
(1) Defendant-24.035 Movant was denied effective counsel where he pleaded guilty in an open guilty plea after his counsel told him he "could" be placed in a long-term treatment program, but Defendant-Movant was, in fact, legally ineligible for such a program; and (2) Sec. 217.362.2 requires that judges considering sentencing a defendant to long-term treatment notify DOC in advance of sentencing; screening for eligibility after sentencing is not appropriate.
Facts: Defendant was charged with DWI as a "habitual offender." He pleaded guilty in an open guilty plea after his counsel told him he "could" be eligible for long-term treatment. The plea court sentenced him to 9 years but with the long-term treatment program that gave Defendant opportunity for early release. After sentencing, however, DOC notified Defendant that he was statutorily ineligible for long-term treatment because long-term treatment is not available to a person convicted of a "dangerous felony," Sec. 217.362.1, and DWI as a "habitual offender" is a "dangerous felony," Sec. 556.061(19). Defendant filed a 24.035 motion.
Holding: (1) Counsel's affirmative misrepresentations to Movant about the possibility of long-term treatment were objectively unreasonable. The record reflects a reasonable basis for Movant's mistaken belief that long-term treatment was available to him, which even the plea court subscribed to in sentencing Movant to long-term treatment. Because

of counsel's erroneous advice, Movant lacked a sufficient understanding of his potential sentence. The State argues the motion court must have found Movant's testimony that he would not have pleaded guilty, if he had received correct advice, to be incredible. But the motion court's Findings do not discuss credibility, and no deference is owed to an alleged "implicit" finding of non-credibility. (2) Sec. 217.362.2 requires a sentencing judge who is considering long-term treatment to notify DOC about that before sentencing. This is so the DOC can determine if a defendant is eligible for the program and if space is available. If not, the judge is to consider other options. It is error for the judge to sentence a defendant to long-term treatment without contacting DOC before doing so.

State v. Teter, 665 S.W.3d 306 (Mo. banc 2023):
Holding: (1) Where (i) Defendant was still represented by counsel at the time of his *Faretta* hearing, and (ii) counsel was present at the *Faretta* hearing where Defendant waived counsel and signed a written waiver, Defendant's claim on appeal that the *Faretta* hearing was inadequate to validly waive counsel could only be reviewed for plain error, since counsel did not object to the inadequacy at the hearing; a *de novo* standard of review applies only to those cases where there is no written waiver of counsel or waiver of the right to counsel on the record; (2) where the trial court took judicial notice of various hearings from other cases, the transcripts from those proceedings should have been filed as part of the record on appeal in this case under Rule 81.12(c)(2), because they are necessary to decide the issues; matters omitted from the record are presumed not favorable to the appellant; (3) to preserve a claim of sentencing error, a party needs to object to the error at sentencing, but does not need to include this in a New Trial Motion, since the New Trial Motion must be filed before sentencing; and (4) even though the State and Defendant had agreed that the State would recommend concurrent sentences, where the State at sentencing "deferred to the court" on sentencing and did not advocate either a concurrent or consecutive sentence, there was no breach of the agreement because the sentencing court was always free to ignore the State's recommendation.
Discussion: If the State agrees to make a recommendation for sentencing under Rule 24.02(d)(1)(B), the sentencing court neither accepts nor rejects that agreement. Rather, in a nonbinding plea agreement for a particular sentence, the prosecutor's recommendation is what the court rejects, not the plea agreement itself, and Rule 24.02(d)(4) does not apply. Here, the court had the plea agreement in front of it (because Defendant told the court what it was), the court discussed the agreement with both parties, and acted within its discretion in imposing consecutive sentences.

Armantrout v. State, 2022 WL 4137451 (Mo. App. E.D. Sept. 13, 2022):
Holding: (1) Where Mother and Son had been co-defendants, Movant-Mother was entitled to evidentiary hearing on 24.035 claim that her plea to first degree murder was involuntary and counsel ineffective because she believed the plea agreement required her to plead in order for her Son to receive a more lenient sentence than her, but her counsel had failed to inform her that this was no longer part of the plea agreement (though it had been at one time); (2) in situations where family member co-defendants are pleading guilty, court must specifically inquire into whether the plea agreement involves other family members; (3) Movant's general statements that no "promises" or "agreement"

were made to "her" were too general to refute Movant's 24.035 claim, because the agreement about her Son was not about "her" but her Son; (4) defense counsel's statements before plea that he had "conveyed" all plea offers did not refute Movant's claim that counsel had not conveyed a "change" in the plea offer and, in any event, court cannot rely on unsworn statement of defense counsel to deny evidentiary hearing; and (5) Movant pleaded prejudice because the only possible sentence for her plea was life without parole, and Movant alleged she would not have pleaded guilty but for her belief she was required to do in order for her Son to receive a more lenient sentence.
Discussion: Although the plea colloquy and written plea petition were very thorough, given the unique circumstances here of co-defendant Mother and Son, the plea court should have specifically inquired whether any promises, agreements or discussions were had about Mother's co-defendant-Son that she was relying on to plead guilty. If the court had asked that question, then Movant's claim would be refuted by the record.

Shepard v. State, 2022 WL 14162288 (Mo. App. E.D. Oct. 25, 2022):
Holding: A guilty plea will waive a claim that a Defendant was immune from prosecution for drug possession under the Good Samaritan Law, Sec. 195.205; if the Defendant opts to plead guilty rather than pursue the defense, the defense is waived.

State v. Harris, 2022 WL 16752261 (Mo. App. E.D. Nov. 8, 2022):
Holding: (1) A direct appeal can be taken from a guilty plea alleging that there was an insufficient factual basis for the plea under Rule 24.02(e); (2) standard of review of such unobjected to claims is plain error; and (3) trial court did not plainly err in accepting guilty plea to involuntary manslaughter where Defendant traded drugs with a person who briefly overdosed when Defendant was present, and then later died of an overdose on the drugs when Defendant was not present, because this showed recklessness.
Discussion: (1) The State claims lack of factual basis is not cognizable on direct appeal, because a guilty plea waives appellate review of all error except subject-matter jurisdiction, sufficiency of the charging document, and *Bazell* claims. The State claims the issue can only be raised in postconviction under Rule 24.035. The State's arguments were rejected in *State v. Russell*, 598 S.W.3d 133 (Mo. banc 2020), which held that Rule 24.035 does not and cannot limit the issues which can be raised on direct appeal under Sec. 547.070, which grants defendants the right to appeal final judgments. While *Russell* dealt with excessive sentence, its rationale applies to factual basis. Thus, lack of factual basis is cognizable on direct appeal. (2) The standard of review for such an unobjected to claim is plain error. (3) Whether a factual basis exists to support involuntary manslaughter is very case-specific. The issue is whether Defendant acted recklessly, i.e., whether there was a conscious disregard of risk of death and a gross deviation from what a reasonable person would do under the circumstances. While there are cases that would support both that Defendant here did and did not act recklessly, appellate court holds that any error here by the trial court in accepting the plea was not "evident, obvious and clear enough" to constitute plain error.

McCloskey v. State, 2023 WL 8882868 (Mo. App. E.D. Dec. 26, 2023):
Holding: (1) Even though Defendant, who had pleaded guilty to a misdemeanor which plea deal required that he forfeit certain guns, had subsequently been pardoned by the

Governor, Defendant was not entitled in replevin action under Rule 99 to retrieve possession of the guns, because a pardon extinguishes the fact of "conviction," but not the fact of "guilt"; and (2) even though Defendant claims the misdemeanor proceedings against him, which seized his guns, violated his 2nd Amendment rights, Defendant's guilty plea waived all nonjurisdictional defects, including this claim; Defendant was required to raise constitutional claims in his criminal case, and cannot raise them in a civil collateral attack.

Discussion: Prior cases have held that even though a person has received a pardon from the Governor, they still are ineligible for a concealed-carry gun permit under Sec. 571.101 and still are ineligible run for public office under Sec. 145.306.1. This is because a pardon extinguishes the fact of "conviction," but not the fact of "guilt." The same is true here.

State v. Harris, No. WD84640, ___ WL ___ (Mo. App. W.D. Dec. 13, 2022):

Holding: (1) Where (i) Defendant was charged with second-degree murder and first-degree robbery; (ii) he entered into a written deferred prosecution agreement (DPA), which would be effective for five years, and required him to testify truthfully against co-defendants and plead guilty to stealing; but (iii) after he pled guilty and was paroled on his stealing sentence, the State claimed he breached his agreement and re-filed the murder and robbery charges along with multiple new charges arising out of the same incident; (iv) Defendant filed a motion to dismiss the charges, and (v) the trial court ultimately found Defendant had not violated the plea agreement and, thus, dismissed the murder and robbery charges with prejudice but (in effect) allowed the new, different charges to proceed, the trial court was correct in dismissing the murder and robbery charges but should not have done so "with prejudice" because the DPA remained in effect until 2024; and (2) the DPA is ambiguous as to whether other charges could be filed, that ambiguity must be construed against the State, and since there is a general policy in the law that all offenses arising out of the same incident be prosecuted in one transaction, the *only* charges which could possibly be revived under the agreement were murder and first-degree robbery, and other, new charges were not permissible.

Discussion: How to interpret an ambiguous written plea agreement has not been addressed in Missouri, but federal cases indicate ambiguity should be construed against the State, even if Defendant's counsel played a role in drafting the agreement. This is because, unlike a private contract, the validity of a bargained for guilty plea depends upon the voluntariness and intelligence with which Defendant entered into it. Principles of claim preclusion and double jeopardy create a general policy in the law that all offenses arising from the same transaction be charged in one proceeding; otherwise, there would be multiple, piecemeal prosecutions arising against a defendant out of a single event. Here, if the State were always free to charge additional offenses, then even if Defendant testified truthfully, the State could use that testimony to then charge him with other additional offenses except murder and robbery. Under the principle of *expressio unius*, the inclusion of the murder and robbery charges in the agreement is a limitation that excludes all other limitations of that type. This means that re-filing the murder and robbery charges were the *only* consequences if Defendant breached the DPA.

Hecker v. State, 2023 WL 2576526 (Mo. App. W.D. March 21, 2023):
Holding: Where plea counsel knew (1) Defendant-24.035 Movant had been suicidal and hospitalized under psychiatric care after his arrest, (2) Defendant had been diagnosed with schizophrenia, (3) Defendant had been found incompetent in a Kansas case but restored, (4) Defendant's parents had been seeking a guardianship for him due to his mental condition, and (5) counsel himself prevented Defendant from participating in the Sentencing Assessment Report or speaking during sentencing because of "mental health issues," motion court clearly erred in finding counsel was not ineffective at plea and sentencing in failing to seek competence evaluation; Defendant-Movant was prejudiced because he demonstrated a reasonable probability he was incompetent, sufficient to undermine confidence in the outcome. Plea vacated.

*** Greer v. U.S., ___ U.S. ___, 141 S.Ct. 2090 (U.S. June 14, 2021):**
Holding: Even though *Rehaif v. U.S.*, 139 S.Ct. 2191 (2019) held that in felon-in-possession cases, the Gov't must prove the defendant "knew" he was a felon, for cases decided before *Rehaif*, it is not plain error for a plea court to have failed to inform a defendant that the Gov't would have to prove at trial he "knew" he was a felon, or for a trial court to have failed to instruct jury that it must find that defendant "knew" he was a felon *unless* the defendant presents evidence that he did not, in fact, know he was a felon; in the latter cases, a court must then determine if there is a "reasonable probability" the result of the proceeding would have been different, i.e., that defendant would not have pleaded guilty, or the outcome of trial would have been different.

People v. Eynon, 2021 WL 4190633 (Cal. App. 2021):
Holding: Petitioner was entitled to postconviction relief after he pleaded guilty to premeditated and felony murder based on impermissible legal theory that he was responsible for murder actually committed by co-defendant.

J.V. v. Blair in and for County of Maricopa, 2023 WL 5615744 (Ariz. Ct. App. 2023):
Holding: Where Defendant was legally eligible for a deferred prosecution program, it violated separation of powers for trial court to reject prosecutor's offer of deferred prosecution; trial court's remedial authority over plea agreements did not extend to deferred prosecution.

Immigration

*** Pereida v. Wilkinson, ___ U.S. ___, 141 S.Ct. 754 (U.S. March 4, 2021):**
Holding: Under the Immigration and Nationality Act, a nonpermanent resident seeking to cancel a lawful removal order fails to carry their burden to show they have not been convicted of a disqualifying offense when the statute of conviction lists multiple offenses, some of which are disqualifying, and the record is ambiguous as to which crime formed the basis of conviction.

*** Niz-Chavez v. Garland, ___ U.S. ___, 141 S.Ct. 1474 (U.S. April 29, 2021):**
Holding: Under the Illegal Immigration Reform and Immigrant Responsibility Act, a "notice to appear" must contain all the statutory information required by Sec. 1229(a) in a single document in order for the "stop time" rule for continuous presence in the U.S. to apply; Gov't cannot supply the required information piecemeal through multiple documents sent at different times.

*** U.S. v. Palomar-Santiago, ___ U.S. ___, 141 S.Ct. 1615 (U.S. May 24, 2021):**
Holding: Before a defendant facing unlawful reentry charges can challenge their original removal order, they must show (1) they have exhausted any administrative remedies; (2) they were deprived of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair; all three requirements must be met under 8 USC Sec. 1326(d), even if the prior unlawful removal order was invalid.

*** Garland v. Dai, ___ U.S. ___, 141 S.Ct. 1669 (U.S. June 1, 2021):**
Holding: (1) 9th Circuit's unique rule in immigration cases that, in the absence of an explicit adverse credibility determination by Immigration Judge or Board of Immigration Appeals, a reviewing appellate court must treat Petitioner-Non-Citizen's testimony as credible and true is contrary to the Immigration and Nationality Act; (2) Act requires the Board of Immigration Appeals to apply a presumption of credibility if the Immigration Judge did not make an explicit credibility determination, but an appellate court must accept the agency's findings of fact as conclusive "unless any reasonable adjudicator would be compelled to conclude to the contrary."

*** Sanchez v. Mayorkas, ___ U.S. ___, 141 S.Ct. 1809 (U.S. June 7, 2021):**
Holding: Under 8 U.S.C. Sec. 1255, even though a Petitioner-Non-Citizen has been granted Temporary Protected Status (TPS) allowing him to stay and work in the U.S. for as long as certain conditions in his home country persist, the conferral of TPS does not enable him to obtain Lawful Permanent Resident (LPR) status if he had originally entered the U.S. unlawfully.

*** Johnson v. Guzman Chavez, ___ U.S. ___, 141 S.Ct. 2271 (U.S. June 29, 2021):**
Holding: Non-citizens who (1) were removed from the U.S. but later re-entered without authorization, and (2) are subject to reinstated removal orders but who are seeking withholding of removal due to fear of persecution in their home countries, are not entitled to a bond hearing while they pursue withholding of removal, because 18 U.S.C. Sec. 1231 applies to them.

*** Patel v. Garland, 2022 WL 1528346, ___ U.S. ___ (U.S. May 16, 2022):**
Holding: Federal courts cannot review factual findings that underlie a denial of discretionary relief from removal of noncitizens.

*** Johnson v. Arteaga-Martinez, 2022 WL 2111342, ___ U.S. ___ (U.S. June 13, 2022):**
Holding: Section 1231(a)(6) of Immigration and Nationality Act does not require the Government to offer detained noncitizens bond hearings after six months, at which the Government bears burden of proving that a noncitizen poses a flight risk or danger to the community.

*** Garland v. Aleman Gonzalez, 2022 WL 2111346, ___ U.S. ___ (U.S. June 13, 2022):**
Holding: Section 1252(f)(1) of Immigration and Nationality Act does not permit federal courts to hear class action suits for injunctive relief brought by noncitizens seeking bond hearings while removal proceedings are pending.

*** Biden v. Texas, 2022 WL 2347211, ___ U.S. ___ (U.S. June 30, 2022):**
Holding: The Department of Homeland Security's rescission of the Migrant Protection Protocols (which require non-Mexican nationals arriving by land from Mexico to be returned to Mexico to await results of their removal proceedings) did not violate Sec. 1225 of the Immigration and Nationality Act and constituted a final agency action.

People v. Soto, 2022 WL 1969912 (Cal. App. 2022):
Holding: Defendant was prejudiced by "generic" advice about immigration consequences of plea, which didn't state that conviction would result in mandatory removal, where Defendant had been in country with his family since he was a teenager and said he wouldn't have pleaded guilty if he had known of mandatory removal.

*** Santos-Zacaria v. Garland, ___ U.S. ___, 143 S.Ct. 1103 (2023):**
Holding: 8 U.S.C. Sec. 1252(d)(1)'s exhaustion requirement is not jurisdictional, and requires exhaustion only for legal claims where review is "as of right"; because whether to consider a Motion to Reconsider the Board of Immigration Appeals' decision would have been discretionary with the Board, Petitioner-Noncitizen was not required to have filed a Motion to Reconsider with the Board before seeking judicial review.

*** U.S. v. Hansen, ___ U.S. ___, 143 S.Ct. 1932 (2023):**
Holding: 8 U.S.C. Sec. 1324(a)(1)(A)(iv), which makes it illegal to "encourage or induce" a noncitizen to come to, enter, or reside in U.S., forbids only the purposeful solicitation and facilitation of specific acts known to violate federal law, and thus is not unconstitutionally overbroad under First Amendment; "encourages or induces" is used in its specialized, criminal law sense as the intentional encouragement of an unlawful act, and facilitation – i.e., aiding and abetting – is the provision of assistance to a wrongdoer with the intent to further an offense's commission.

*** <u>Pugin v. Garland</u>, ___ U.S. ___, 143 S.Ct. 1833 (2023):**
Holding: Even though Noncitizen may have been convicted of obstruction of justice where an official investigation or proceeding was "not pending," this nevertheless is an offense "related to obstruction of justice" under 8 U.S.C. Sec. 1101(a)(43)(S), and thus constitutes an "aggravated felony" under 8 U.S. C. Sec. 1227(a)(2)(A)(iii), which makes the Noncitizen removable from U.S.; Sec. 1101 does not require an investigation or proceeding be "pending."

* **<u>U.S. v. Texas</u>, ___ U.S. ___, 143 S.Ct. 1964 (2023):**
Holding: Texas lacks Article III standing to challenge Biden Administration's immigration enforcement guidelines, which Texas claims don't require arrest of noncitizens who should be arrested under immigration law; although Texas wants the "Federal Judiciary to order the Executive Branch to alter its arrest policy so as to make more arrests…this Court has long held that a citizen lacks standing to contest the policies of their prosecuting authority when he himself is neither prosecuted nor threatened with prosecution"; Texas lacks standing under this same Article III principle.

Indictment & Information

<u>State v. Vaughn</u>, 2021 WL 6121847 (Mo. App. E.D. Dec. 28, 2021):
The "Good Samaritan Law," Sec. 195.205, applies to Defendants whose actions occur before the law's effective date in August 2017; thus, trial court did not err in dismissing possession charges against Defendant, who was the subject of a medical emergency call and was found unconscious with a syringe in April 2017.
Facts: Sec. 195.205.2, effective August 2017, provides, in relevant part, that a person who seeks medical assistance for himself for a drug overdose, or for whom someone else has sought medical assistance, "shall not be arrested, charged, prosecuted, [or] convicted" of certain drug offenses. In April 2017, police were called about a medical emergency involving Defendant. Defendant was found unconscious with a drug syringe. He was later charged with drug possession over this incident. The trial court dismissed the charge. The State appealed.
Holding: The State claims Sec. 1.160 bars retroactive application of the statute to Defendant. But 1.160 does not apply to "new provisions" of statutes. 195.205.2 was not an amendment of drug laws. It did not make any previously prohibited activity – i.e., drug possession – legal; possession remains illegal just as it was prohibited before. Thus, 195.205.2 did not "amend" the possession statutes. 195.205.2 is a new statutory provision that "did not repeal or amend any previously existing statute." If it had, the law in effect in April 2017 would apply due to 1.160, but because 195.205.2 is a "highly unusual" new statute, it falls outside the scope of 1.160. Thus, the trial court did not err in dismissing charges.

State v. Gill, 2022 WL 838310 (Mo. App. E.D. March 22, 2022):
(1) The burden to produce evidence and burden of persuasion to show the applicability of "Good Samaritan" law, Sec. 195.205, is on the Defendant; (2) determination of whether a Defendant acted in "good faith" in calling for help includes not only the Defendant's subjective intent in making the call for help, but also requires analysis of the circumstances surrounding the seeking of aid, including any delay in calling for help.
Facts: Defendant called 911 to report the death of a friend in a hotel room from drugs. When authorities arrived, they found drugs in in a bag belonging to Defendant. Defendant was charged with possession, Sec. 579.015. He sought dismissal of the charges under the "Good Samaritan" law, Sec. 195.205. The State claimed Defendant had not called 911 in good faith, and had delayed in seeking help. The trial court dismissed the charge on grounds that the State did not prove the inapplicability of Sec. 195.205, and that the court should consider only Defendant's subjective intent at the time of the call, and not surrounding circumstances, to determine if there was "good faith."
Discussion: (1) Sec. 195.205 states that a person who "in good faith" seeks medical help for a person overdosing on drugs or alcohol shall not be charged or convicted as a result of seeking medical help. Other provisions of Chapters 195 and 579 regarding drug offenses place the burden of persuasion and production on a defendant to prove that they are exempt from those statutes' provisions. Sec. 579.180.1 states "[t]he burden of producing evidence of any exemption or exception is upon the person claiming it." Sec. 195.205 is in Chapter 195. Thus, the trial court erroneously placed the burden of persuasion and production on the State. (2) The trial court's narrow interpretation of "good faith" is not supported by the language of the statute. Determining whether a defendant acted in "good faith" is not limited to the precise moment when defendant called 911, but includes all aspects of the circumstances and of the defendant's conduct leading up to the call. Here, the State claims Defendant did not act in good faith since he waited hours before calling 911, and took other actions inconsistent with seeking medical help. The trial court should have considered these circumstances. Dismissal reversed and remanded.

State v. Potter, 2022 WL 17419400 (Mo. App. E.D. Dec. 6, 2022):
Holding: (1) Defendant could move to withdraw his 2009 misdemeanor DWI conviction under Rule 29.07(d) on grounds of manifest injustice (and appeal the denial thereof); but (2) on the merits, deficiencies in the charging document or lack of a charging document (he was charged with DWI by uniform citation) did not constitute manifest injustice since after a conviction, a charging document must be so deficient that Defendant was not on notice as to the crime he was charged with or so lacking in clarity that Defendant was unable to prepare a proper defense.

State v. Colville, 2023 WL 4278220 (Mo. App. E.D. June 30, 2023):
Holding: Even though the indictment for second-degree involuntary manslaughter, Sec. 565.027.1, (arising out of an auto accident where Defendant turned into another vehicle) properly tracked the MACH-CR 14.12, where (1) Defendant filed a motion to dismiss and (2) the trial court considered, without objection by the State, video of the accident and other factual matters, trial court did not plainly err in dismissing the indictment with prejudice since, under the circumstances here, court had authority under Rule 24.04(b) to

determine as a matter of law whether Defendant's conduct constituted criminal negligence.
Discussion: The State claims trial court erred in considering the video and other factual matters. However, this error was "invited" since the State didn't object to this in the trial court. An indictment is properly dismissed if all the facts stated are true, and yet the accused can be innocent of the crime or if the acts alleged do not constitute a violation of law. Defenses based on defects in indictments are generally required to be raised by motion before trial. Since the State didn't object to the video or other factual matters, there was no plain error in the court considering them as part of its review under Rule 24.04(b). The trial court found as a matter of law that Defendant's actions did not constitute criminal negligence, i.e., that the facts here did not charge a crime.

State v. Callaway, 668 S.W.3d 251 (Mo. App. E.D. 2023):
Holding: (1) Even though (i) Defendant and Co-Defendant were both charged as principals for various offenses stemming from a high speed chase in which their car had collided with police, and (ii) Co-Defendant pleaded guilty before Defendant, trial court erred in then dismissing charges against Defendant on grounds there could be only one operator of the vehicle, since Secs. 562.036 and 562.041 allow a defendant to be liable as an accomplice, and the indictment or information may charge either as a principal or aider with the same legal effect; (2) although the State cannot take factually inconsistent positions, nothing in the record showed the State was doing that here; (3) a defendant can be a passenger in a car and be found guilty of an offense as an aider.

State v. Borst, 2022 WL 287305 (Mo. App. W.D. Feb. 1, 2022):
Holding: (1) Where Defendant was charged with second-degree murder for "knowingly causing the death of Victim by shooting him," but instruction allowed jury to convict for "it was Defendant's purpose to cause serious physical injury to Victim," this was a fatal variance from the original charge; and (2) even though Defendant did not use the words "fatal variance" in his objection to the instruction, where Defendant objected and asked for language consistent with the original charge, the issue was preserved for appeal; where an objection plainly informs trial court of a party's position, party need not cite a specific rule or statute in objection or new trial motion to preserve issue.
Discussion: Due process requires notice of the charge, which means a defendant cannot be charged with one offense, or form of offense, but convicted of another. "Conventional" second degree murder, Sec. 565.021.1, can be committed by either "knowingly causing" the death of another," or "with the purpose of causing serious physical injury, the defendant causes the death of another." If one form or method is charged, a different form or method cannot be submitted to jury. Here, the manner in which the offense was charged differed from the manner submitted to the jury. Defendant was prejudiced because his defense was that he shot Victim in self-defense in the legs but did not "knowingly cause" his death. However, the manner in which the offense was submitted – allowing conviction if Defendant's purpose was to cause serious physical injury -- negated Defendant's *mens rea* defense. Reversed for new trial.

City of Skidmore v. Stanton, 668 S.W.3d 277 (Mo. App. W.D. 2023):
Holding: (1) Where Defendant was charged and convicted at a jury trial for violating a municipal ordinance against maintaining nuisance properties and was fined $500, the trial court was without authority to order Defendant to pay $8,000 of City's attorney's fees; although Sec. 79.383 allows a city to recover attorney's fees in certain nuisance actions where authorized by ordinance, the ordinance at issue here did not authorize attorney's fees for prosecution under the ordinance (only for abatement); (2) trial court was also without authority to order injunctive relief because the charging document did not mention injunctive relief, City didn't raise that issue until sentencing, City didn't plead a continuing violation, and the case was tried to a jury, whereas an injunction is an equitable remedy tried to a court.

Ineffective Assistance of Counsel

Hefley v. State, 626 S.W.3d 244 (Mo. banc 2021):
(1) Defendant-24.035 Movant was denied effective counsel where he pleaded guilty in an open guilty plea after his counsel told him he "could" be placed in a long-term treatment program, but Defendant-Movant was, in fact, legally ineligible for such a program; and (2) Sec. 217.362.2 requires that judges considering sentencing a defendant to long-term treatment notify DOC in advance of sentencing; screening for eligibility after sentencing is not appropriate.
Facts: Defendant was charged with DWI as a "habitual offender." He pleaded guilty in an open guilty plea after his counsel told him he "could" be eligible for long-term treatment. The plea court sentenced him to 9 years but with the long-term treatment program that gave Defendant opportunity for early release. After sentencing, however, DOC notified Defendant that he was statutorily ineligible for long-term treatment because long-term treatment is not available to a person convicted of a "dangerous felony," Sec. 217.362.1, and DWI as a "habitual offender" is a "dangerous felony," Sec. 556.061(19). Defendant filed a 24.035 motion.
Holding: (1) Counsel's affirmative misrepresentations to Movant about the possibility of long-term treatment were objectively unreasonable. The record reflects a reasonable basis for Movant's mistaken belief that long-term treatment was available to him, which even the plea court subscribed to in sentencing Movant to long-term treatment. Because of counsel's erroneous advice, Movant lacked a sufficient understanding of his potential sentence. The State argues the motion court must have found Movant's testimony that he would not have pleaded guilty, if he had received correct advice, to be incredible. But the motion court's Findings do not discuss credibility, and no deference is owed to an alleged "implicit" finding of non-credibility. (2) Sec. 217.362.2 requires a sentencing judge who is considering long-term treatment to notify DOC about that before sentencing. This is so the DOC can determine if a defendant is eligible for the program and if space is available. If not, the judge is to consider other options. It is error for the judge to sentence a defendant to long-term treatment without contacting DOC before doing so.

McLemore v. State, 635 S.W.3d 554 (Mo. banc 2021):
Holding: (1) Even though 29.15 Movant alleged trial counsel had failed to object to the State's closing; elicited damaging evidence from one witness; and made ineffective opening statement and closing argument, Movant was not entitled to an evidentiary hearing because trial counsel's subjective state of mind on these matters is irrelevant to whether counsel's actions were objectively reasonable; as long as counsel's actions could be considered sound trial strategy – which they are presumed to be – counsel's performance is competent; (2) in other cases, whether trial counsel's actions could be considered sound trial strategy may depend on facts outside the record – such as the extent and fruits of counsel's pretrial investigation – so an evidentiary hearing is necessary to establish such outside-the-record facts; and (3) even though counsel's failure to object to State's closing and counsel's own opening may have been objectively unreasonable here, Movant has not demonstrated prejudice, especially since the jury acquitted Movant of two counts.

Greer v. State, 637 S.W.3d 472 (Mo. App. E.D. 2021):
Holding: Plea counsel was not ineffective or unethical in discussing plea offer with Defendant's parents in order to enlist their help in trying to convince Defendant to accept plea.
Discussion: Postconviction Movant claims his counsel was ineffective and violated ethics Rules for discussing plea offer with his parents in effort to get him to take plea offer. However, the information about plea offers which counsel shared with parents was not confidential attorney-client information. The State's plea offer was not confidential information since it was obviously known by the prosecutor and likely others in the prosecutor's office.
Editor's note: I would be cautious about relying on this opinion as an "ethics opinion" since the issue arose in the context of an ineffective assistance claim. Comment 2 to Rule 4-1.6 states "[a] fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation….This contributes to the trust that is the hallmark of the client-lawyer relationship."

Reiker v. State, 2021 WL 5894800(Mo. App. E.D. Dec. 14, 2021):
Holding: (1) Claim of ineffective assistance of counsel for representation at a probation revocation hearing is not cognizable in 24.035 postconviction motion; remedy is habeas corpus; but (2) a distinction is drawn between a defendant who received an SES versus SIS; a probation revocation involving an SIS is a *sentencing* proceeding, and an ineffective counsel claim *can* be raised regarding sentencing proceedings; in contrast, a probation revocation for an SES involves a sentence which had already been imposed in a prior sentencing proceeding but never executed; Rule 24.035 does not apply to that revocation proceeding.

Burgess v. State, 2022 WL 1144719 (Mo. App. E.D. April 19, 2022):
Holding: (1) Even though Victim in third-degree domestic assault trial testified she was "just friends" with Defendant-29.15 Movant, where she and Defendant-Movant had had sexual relations one time but remained in contact thereafter, this satisfied the definition of

"household member" under Sec. 455.010(7)(2016), which defined it as "any person who is or has been in a *continuing social relationship* of a[n] … *intimate* nature with the victim"; thus, appellate counsel was not ineffective in failing to raise on direct appeal a claim that the evidence was insufficient; and (2) even though Prosecutor misstated the law in arguing in closing that a one-time sexual encounter between two people with *no ongoing social relationship* would bring such relationship "under the domestic umbrella," trial counsel was not ineffective in failing to object since any error was corrected by the proper jury instructions in the case.

Armantrout v. State, 2022 WL 4137451 (Mo. App. E.D. Sept. 13, 2022):
Holding: (1) Where Mother and Son had been co-defendants, Movant-Mother was entitled to evidentiary hearing on 24.035 claim that her plea to first degree murder was involuntary and counsel ineffective because she believed the plea agreement required her to plead in order for her Son to receive a more lenient sentence than her, but her counsel had failed to inform her that this was no longer part of the plea agreement (though it had been at one time); (2) in situations where family member co-defendants are pleading guilty, court must specifically inquire into whether the plea agreement involves other family members; (3) Movant's general statements that no "promises" or "agreement" were made to "her" were too general to refute Movant's 24.035 claim, because the agreement about her Son was not about "her" but her Son; (4) defense counsel's statements before plea that he had "conveyed" all plea offers did not refute Movant's claim that counsel had not conveyed a "change" in the plea offer and, in any event, court can rely on unsworn statement of defense counsel to deny evidentiary hearing; and (5) Movant pleaded prejudice because the only possible sentence for her plea was life without parole, and Movant alleged she would not have pleaded guilty but for her belief she was required to do in order for her Son to receive a more lenient sentence.
Discussion: Although the plea colloquy and written plea petition were very thorough, given the unique circumstances here of co-defendant Mother and Son, the plea court should have specifically inquired whether any promises, agreements or discussions were had about Mother's co-defendant-Son that she was relying on to plead guilty. If the court had asked that question, then Movant's claim would be refuted by the record.

In the Interest of K.M.F., 668 S.W.3d 302 (Mo. App. E.D. 2023):
Holding: It is an unresolved question in Missouri whether the *Strickland* standard or the "meaningful hearing" standard applies to ineffective assistance of counsel claims in juvenile proceedings, but even assuming more stringent *Strickland* standard applies, Defendant has not shown prejudice.

In the Interest of T.A.G., 2023 WL 8042664 (Mo. App. E.D. Nov. 21, 2023):
Holding: Where in termination of parental rights case (1) trial court appointed the same counsel to represent both Mother and Father; (2) Mother and Father had divergent facts and interests in the case; and (3) neither Mother nor Father waived any conflict in writing, counsel had an active conflict of interest that denied Father effective assistance of counsel and a meaningful hearing.
Discussion: An attorney does not provide effective assistance when his representation involves an actual conflict of interest. Rule 4-1.7(a) states a lawyer shall not represent a

client if the representation of one client will be directly adverse to another client, or if there is a significant risk that representation of one or more clients will limit the lawyer's duties to another client. Here, joint representation of Mother limited counsel's duties toward Father and vice versa. The interests of Mother and Father differed significantly from each other. Counsel's duties toward one parent limited counsel's advocacy for the other parent. Neither Mother nor Father gave informed consent in writing to waive this conflict, as required by Rule 4-1.7(b)(4). Judgment terminating Father's parental rights reversed.

In the Interest of P.J.T., Scott County Juvenile Officer v. P.J.T., 2021 WL 5355228 (Mo. App. S.D. Nov. 17, 2021):
Holding: Missouri law has not yet decided whether the standard to be applied to ineffective assistance of counsel claims involving juvenile proceedings is the "meaningful hearing" standard used in parental rights cases, or the *Strickland* standard used in criminal cases; however, defendant here has not satisfied either standard.

Vickers v. State, 632 S.W.3d 781 (Mo. App. W.D. 2021):
Holding: Trial counsel was ineffective in having investigator conduct only a cursory interview of alibi Witness; failing to file a notice to rely on alibi defense; and then "changing mind" when counsel personally interviewed Witness when she showed up for trial, but court wouldn't allow Witness to testify due to failure to file proper notice and late disclosure.
Discussion: At the 29.15 hearing, alibi Witness testified she tried to contact Defense Counsel before trial but was unable to talk directly with Counsel. Witness talked to counsel's Investigator over the phone twice, and was under impression she would be called at trial. Witness came to the trial ready to testify. Counsel never personally interviewed her until she came to the trial. Counsel's Investigator told Counsel that Witness would not be a "good" Witness because Witness didn't initially remember certain dates. However, Investigator's contact with Witness was a short, "cursory" interview over the phone that merely asked Witness where she was on a certain date -- five years after the crime --without providing any context for surrounding events that might help Witness remember details. Investigating an alibi Witness requires personally meeting with the Witness, sitting down with them, and making an effort to help the Witness recall corroborating details. It might be a concert ticket, a weather event, a family gathering, etc. This is the minimal effort that must go into investigating an alibi defense. Counsel never spoke with Witness until Witness showed up at trial, and Counsel, at that time, decided Counsel wanted to call Witness, but it was too late. 29.15 judgment finding Counsel ineffective and ordering new trial is affirmed.

In the Matter of the Care and Treatment of Davis v. State, 635 S.W.3d 176 (Mo. App. W.D. 2021):
Holding: Defendants have right to effective assistance of counsel in sexually violent predator proceedings; however, because the Missouri Supreme Court has not declared whether such claims are reviewed under the "meaningful hearing standard" used in parental termination cases, or the more-exacting *Strickland* standard used in criminal

postconviction proceedings, appellate court will apply both standards to see if outcome would be the same.

In the Matter of the Care and Treatment of Haggerman v. State, 637 S.W.3d 697 (Mo. App. W.D. 2021):
Holding: Where a Defendant/Appellant was found to be a sexually violent predator and raises ineffective assistance of counsel on direct appeal, the appellate court will follow this procedure: (1) If the claim can be determined based on the record, court will decide the issue on appeal; (2) but if the record is insufficient to determine the merits of the claim, court will consider whether to remand for an evidentiary hearing; (3) if the claim raises sufficient allegations, remand is appropriate; if not, court may reject the claim outright; and (4) in all scenarios court will apply both the "meaningful hearing" standard and *Strickland* standard, because Missouri has not yet determine which standard to apply. Here, while Defendant's claim that his attorney was ineffective in advising him to waive a jury might typically require a remand to develop a record of counsel's advice, no remand is required because Defendant didn't adequately plead his claim or show *Strickland* prejudice.

In the Interest of J.N.W. v. Juvenile Officer, 2022 WL 453049 (Mo. App. W.D. Feb. 15, 2022):
Holding: (1) Even though the juvenile's court's order dismissing Defendant-Juvenile from juvenile court's jurisdiction and certifying him to the trial court was not denominated a "judgment," the order was immediately appealable, because Rule 74.01(a)'s judgment denomination requirement is not applicable to Sec. 211.071 certification proceedings; (2) the time for filing such an appeal is 30 days after the dismissal (as with other civil judgments), because the juvenile court retains control over its judgment for 30 days after entry, Rules 75.01 and 81.04(a); judgment becomes final after 30 days, and then there is 10 days to file the notice of appeal; (3) even though Juvenile filed his appeal before the 30 days expired, his premature notice became effective immediately after the judgment was final, Rule 81.05(b); (4) the standard of review for a certification appeal is whether the trial court abused its discretion in certifying, Sec. 211.071.1; (5) Juvenile can raise on direct appeal his claim of ineffective assistance of counsel at his certification hearing where the record is sufficient to raise it on direct appeal; (6) it remains an open question whether the *Strickland* standard applies to ineffective assistance claims, or the "meaningful hearing" standard applied in termination of parental rights cases; (7) since certification hearings are not adjudicatory, there is no authority for the general proposition that the rules of evidence apply to certification proceedings.

Hecker v. State, 2023 WL 2576526 (Mo. App. W.D. March 21, 2023):
Holding: Where plea counsel knew (1) Defendant-24.035 Movant had been suicidal and hospitalized under psychiatric care after his arrest, (2) Defendant had been diagnosed with schizophrenia, (3) Defendant had been found incompetent in a Kansas case but restored, (4) Defendant's parents had been seeking a guardianship for him due to his mental condition, and (5) counsel himself prevented Defendant from participating in the Sentencing Assessment Report or speaking during sentencing because of "mental health

issues," motion court clearly erred in finding counsel was not ineffective at plea and sentencing in failing to seek competence evaluation; Defendant-Movant was prejudiced because he demonstrated a reasonable probability he was incompetent, sufficient to undermine confidence in the outcome. Plea vacated.

Nguyen v. State, 670 S.W.3d 256 (Mo. App. W.D. 2023):
Holding: When the sentencing judge and 24.035/29.15 motion court judge are the same, the standard for judging prejudice for counsel's ineffectiveness at sentencing is an "objective" test under *Strickland* of whether there is a reasonable probability Defendant would have received a lower sentence if counsel had not been ineffective; the standard is not a "subjective" one based on what the particular sentencing judge would have done.

Beckett v. State, 2023 WL 4566595 (Mo. App. W.D. July 18, 2023):
Holding: Where the defense in first degree murder case was that Defendant unintentionally fired a gun when he grabbed it off a bed, counsel was ineffective in failing to investigate and call a Firearms Examiner who would have supported Defendant's version of unintentional discharge of the gun, and would have rebutted the State's experts and argument that since "two shots" were fired, the shooting could not have been unintentional.
Discussion: The Firearms Examiner called in postconviction testified that Defendant could have fired the gun unintentionally when he grabbed it; that the crime scene was consistent with the gun firing in a sideways position; and that published literature regarding unintentional discharges shows that they can involve more than one shot. This would have corroborated Defendant's testimony at trial, and cannot be dismissed as "cumulative" because a Defendant's testimony on a decisive issue is always received with doubt because of his interest in the case. A reasonable trial counsel would have investigated such an expert. The motion court denied relief because Firearms Examiner never examined the actual gun. But this wasn't necessary because the defense conceded the gun functioned properly; the issue was whether it could be unintentionally fired even when it operated properly. Even though the amended motion pleaded that the shotting was "accidental" – which has a different technical meaning to experts than "unintentional" – this is not fatal to the postconviction claim because everyone referred to the shooting as "accidental" at trial, and "accidental shooting" to lay people has a broad, generic sense encompassing both accidental and unintentional shootings.

In the Interest of C.R.B. v. Juvenile Officer, 673 S.W.3d 135 (Mo. App. W.D. July 18, 2023):
Holding: (1) A claim of ineffective assistance of counsel in a juvenile case can be raised on direct appeal, even though it was not raised in the trial court; (2) such claims are "preserved" and are not reviewed under the "plain error" standard; but (3) if the claim cannot be sufficiently determined from the record, the case may need to be remanded to develop the factual basis for review of the claim.

Flaherty v. State, 2023 WL 5210899 (Mo. App. W.D. Aug. 15, 2023):
(1) Even though defense counsel in first-degree domestic assault case requested and received a second-degree domestic assault instruction, counsel was ineffective in failing to request a fourth-degree instruction, because the defense was not an "all or nothing" defense but was based on a theory that Defendant accidently shot Victim, and fourth degree would have tested whether Defendant acted negligently, as opposed to recklessly; (2) even though the jury convicted Defendant of second-degree domestic assault, 29.15 court erred in finding Defendant was not prejudiced by failure to request fourth-degree instruction on theory that jury would have acquitted Defendant if it didn't believe Defendant acted recklessly; Missouri juries do not have to find a Defendant "not guilty" of the greater offense before considering a lesser, and conviction of a greater doesn't foreclose all possibility the jury would have convicted of the lesser if so instructed.
Facts: Defendant was charged with first-degree domestic assault for shooting his wife. The defense theory was Defendant "accidently" shot his wife with an antique firearm during a struggle; the defense presented Expert testimony about the antique firearm to support this theory. Defense counsel requested only a second-degree domestic assault instruction as a lesser. During closing, counsel did not ask the jury to acquit Defendant, but argued the offense was an accident. After conviction for second-degree domestic assault, Defendant/Movant claimed counsel was ineffective for not requesting a fourth-degree domestic assault instruction. The motion court found counsel should have requested the instruction, but found Defendant wasn't prejudiced because the jury didn't acquit him of second-degree assault, which it would have needed to do if it didn't believe Defendant acted "recklessly."
Discussion: First-degree domestic assault requires a mental state of consciously causing serious physical injury. Second degree requires "recklessly" causing serious physical injury. Fourth degree requires acting with "criminal negligence." The distinction between second and fourth is whether Defendant *consciously disregarded* the substantial risk of injury, or instead was *unreasonable ignorant* of that risk. The parties agree that if Defendant had requested a fourth-degree instruction, he would have been entitled to it. The State argues Defendant was pursuing an "all or nothing" strategy, which counsel cannot be found ineffective for doing. But, here, counsel wasn't following such a strategy because counsel asked for a second-degree lesser, and didn't argue to acquit Defendant but instead argued the offense was an accident. The motion court found there was no prejudice here, because since the jury didn't acquit Defendant of second degree, it had to have believed Defendant acted "recklessly" and, thus, would not have found the lesser. Although some old case law supports the trial court's theory of lack of prejudice, a subsequent Missouri Supreme Court case has rejected it. Missouri is not an "acquittal first" State. A jury doesn't have to find a Defendant "not guilty" of a greater offense to consider a lesser offense. It's possible that if properly instructed, the jury could have found fourth degree domestic assault here, instead of second degree.

*** Dunn v. Reeves, ___ U.S. ___, 141 S.Ct. 2405 (U.S. July 2, 2021):**
Holding: In federal habeas case, 11th Circuit erred in concluding that state court had applied a *per se* rule that a Petitioner cannot prevail on an ineffective assistance of counsel claim where he failed to call counsel at his state postconviction hearing; state court did not unreasonably apply federal law because the absence of evidence from

counsel did not overcome the strong presumption that counsel's actions were reasonable and strategic.

People v. Leffew, 2022 WL 246549 (Mich. 2022):
Holding: Counsel was ineffective in failing to request defense-of-others instruction in case where Defendant had broken into a house to try to protect another person (who was in the house) from harm from another occupant; counsel mistakenly believed a defense-of-others defense was not available because the charged offense was not an assaultive offense and because defendant had no legal right to be in the house.

Montana v. Wright, 2021 WL 4272322 (Mont. 2021):
Holding: Sentencing counsel was ineffective in failing to call court's attention to statute which would have allowed alternative sentence; counsel instead focused court's attention on a deferred sentence statute for which Defendant was not eligible.

Com. v. Bradley, 2021 WL 487232 (Pa. 2021):
Holding: Postconviction relief petitioner may raise claims of ineffective postconviction counsel, after obtaining new counsel or acting pro se, at the first opportunity to do so, even if on appeal; considering ineffectiveness claims on postconviction appeal does not constitute a successive petition or violate the one-year time bar for filing.

People v. Soto, 2022 WL 1969912 (Cal. App. 2022):
Holding: Defendant was prejudiced by "generic" advice about immigration consequences of plea, which didn't state that conviction would result in mandatory removal, where Defendant had been in country with his family since he was a teenager and said he wouldn't have pleaded guilty if he had known of mandatory removal.

Interrogation – Miranda – Self-Incrimination – Suppress Statements

State v. Reuter, 637 S.W.3d 478 (Mo. App. E.D. 2021):
Holding: (1) Where Defendant barricaded himself inside his house when police sought to serve a search warrant, he was not "in custody" for *Miranda* purposes and statements he made to police-negotiator and other officers should not be suppressed, since *Miranda* warnings weren't required; and (2) Where after Defendant was placed in police car, police engaged in casual conversation with Defendant about dentistry, football, and thanked him for coming out of house, Defendant's statements to police should not be suppressed because Defendant's statements were not the product of "interrogation" under *Miranda*, in that Officers' casual conversation with Defendant was not likely to elicit an incriminating response, and Defendant's statements were not the result of express questioning by Officers.
Discussion: It is issue of first impression in Missouri whether a suspect involved in a barricaded standoff with police is "in custody" for *Miranda* purposes. However, all other jurisdictions which have addressed this issue have found this situation is not custodial. The goal of crisis negotiators is to peacefully resolve a standoff, not to collect

incriminating statements. Indeed, if the suspect were to perceive the crisis negotiator as seeking to incriminate him, negotiations could break down and danger increase.

State v. Ybarra, 637 S.W.3d 644 (Mo. App. E.D. 2021):
Holding: (1) Where Officer, during a traffic stop, had the passengers get out of the car, and Officer questioned Defendant-Passenger about whether he had drugs (and Defendant answered yes, and produced drugs), trial court erred in suppressing Defendant's statement and drugs because Defendant was not "in custody" at that time (because he was free to leave), and, thus, wasn't entitled to *Miranda* warnings, but (2) where Officer allowed other officers to then drive Defendant-Passenger to a hotel, but told them not to let Defendant leave, and then Officer showed up at hotel and questioned Defendant about whether he owned a backpack (with drugs) that was found in the car, trial court did not err in suppressing Defendant's statements at the hotel, because Defendant was then "in custody" (not free to leave) and was subject to "interrogation" when Officer questioned him there without giving *Miranda* warnings.

Foltz v. City of St. Louis, 2023 WL 5688659 (Mo. App. E.D. Sept. 5, 2023):
Holding: Where St. Louis terminated Police Officer's employment because he refused to give a statement to a criminal investigator who was investigating his involvement in a possible crime, this violated Officer's Fifth Amendment right against self-incrimination and violated *Garrity v. New Jersey*, 385 U.S. 493 (1967), which held that Fourteenth Amendment due process prohibits the government from making an Officer choose between losing their job or making a statement that can be used against them in a criminal prosecution; the threat of job loss is sufficiently coercive to render such statements involuntary.

State v. Hough, 675 S.W.3d 214 (Mo. App. S.D. Sept. 6, 2023):
Holding: Where (1) Defendant, who was charged with child sex offenses, was given *Miranda* warnings by police; but (2) during subsequent interrogation, answered some questions but refused to answer questions about the offense, saying "I don't want to answer that question," "no comment", and "I will not confirm or deny that," the Prosecutor's closing argument that Defendant never denied the offense and an innocent person "would say no" they didn't do the crime, violated Defendant's privilege against self-incrimination and right to silence, but wasn't manifest injustice under plain error standard here.
Discussion: The State argues Defendant waived his right to remain silent by answering some questions, because Defendant was "selectively" silent. But to waive the right to not have the State comment on his post-*Miranda* right to silence, a defendant must make a statement obviously related to something, and then the waiver is *only as to the subject matter of that statement*. Here, Defendant affirmatively refused to address the specifics of the charges against him. Thus, any waiver of his right to remain silent didn't extent to his failure to provide exculpatory statements to police.

State v. Proctor, 2023 WL 8270521 (Mo. App. S.D. Nov. 30, 2023):
Trial court erred in DWI case in suppressing BAC results on grounds that Officer did not read Defendant her Miranda rights before reading the Implied Consent law statement, because asking for a breath test under the Implied Consent law does not constitute guilt-seeking interrogation.
Facts: Officer arrested Defendant for DWI and took her to police station. At station, Officer read Defendant Missouri's Implied Consent Statements and asked her to take a breath test. After she answered she would take the test, Officer then read her the *Miranda* rights. Officer then administered the test. The trial court suppressed the BAC results on grounds that Officer had not read *Miranda* rights before the Implied Consent statement.
Discussion: The Western District recently held in *State v. Vandervort*, 663 S.W.3d 520 (Mo. App. W.D. 2023), that *Miranda* rights are not required at the time the Implied Consent statement is read. We agree. The Implied Consent law deems all persons operating a vehicle to have consented to BAC or chemical testing, but drivers may still refuse to test. A refusal is not testimonial or communicative, nor an act coerced by law enforcement. Thus, the privilege against self-incrimination doesn't apply and *Miranda* warnings need not be given.

State v. Vandervort, 2023 WL 2656828 (Mo. App. W.D. March 28, 2023):
Holding: Where (1) Officer was called to investigate single-car accident where Defendant had struck a light pole, (2) Defendant refused to perform field sobriety tests, (3) Officer arrested Defendant, handcuffed her, and put her in patrol car, (4) Officer heard Defendant vomiting and questioned her about that, to which she made remarks, (5) at police station, Officer informed Defendant of her implied consent rights and she refused a BAC test, and (6) after that, Officer read *Miranda* rights for first time, the trial court in DWI case did not err in suppressing Defendant's statements about the vomiting because these were un-*Mirandized* statements during custody and Officer's questions were not routine booking questions but were reasonably likely to elicit an incriminating response, but trial court erred in suppressing Defendant's refusal to take BAC test, because the implied consent law does not compel a Driver to refuse such testing but provides a choice, and per the law, Officer informed Defendant that her refusal may be used against her.
Discussion: (1) The questions about the vomiting were not routine questions incident to an arrest. They were likely to elicit an incriminating response about intoxication. Hence, Defendant should have been given *Miranda* warnings prior to questioning. (2) *South Dakota v. Neville*, 459 U.S. 553 (1983), held that a refusal to take a BAC test is not coerced by the police because a driver has a choice to submit or refuse, and thus, the refusal is not protected by privilege against self-incrimination. The Supreme Court held the right to silence is a constitutional protection, while the right to refuse a BAC test is a right bestowed only by state statute. Under the implied consent law, Sec. 577.041, a driver is warned that refusal to take a BAC test may be used against them. Thus, a refusal is not subject to suppression for failure to give *Miranda* warning.

* **Samia v. U.S., ___ U.S. ___, 143 S.Ct. 2004 (2023):**
Holding: The Sixth Amendment's Confrontation Clause is not violated, in joint trial of co-defendants, by admission of a non-testifying co-defendant's confession where (1) the confession has been modified to avoid *directly* identifying the non-confessing co-defendant and (2) the court gives a limiting instruction that jurors may consider the confession only with respect to the confessing co-defendant; thus, admission of non-testifying co-defendant's confession which was modified to state that "the other person" pulled the trigger did not violate Confrontation Clause where trial court also gave limiting instruction; however, "directly accusatory" confessions that have been obviously redacted (such as be "deleted" name) remain inadmissible under *Gray v. Maryland*, 523 U.S. 185 (1998).

State v. Skapinok, 2022 WL 1909093 (Haw. 2022):
Holding: Officer's question to Defendant during DWI stop whether he was taking any medication was "interrogation" for *Miranda* purposes.

State v. Rivas, 2022 WL 2231382 (N.J. 2022):
Holding: Even though Defendant was given *Miranda* warnings before second interrogation, where he had equivocally invoked right to counsel at beginning of first interrogation but detectives didn't clarify, was interrogated for six hours, and then requested to see detectives again at end of first interrogation, he remained under sway of unlawful first interrogation.

State v. Pittman, 2021 WL 282307 (Or. 2021):
Holding: Court order requiring Defendant to disclose passcode to her smartphone violated Oregon Constitution's self-incrimination provision.

People v. Sumagang, 2021 WL 4453232 (Cal. App. 2021):
Holding: Police deliberately undermined *Miranda* warnings by using two-step interrogation where they questioned Defendant for 25 minutes about a murder without giving *Miranda* warnings, then interrogated him again after giving warnings.

State v. Vivian, 2022 WL 4846192 (Idaho App. 2022):
Holding: Even though inevitable discovery exception to exclusionary rule applied to search of Defendant's vehicle (where drugs were found) because vehicle remained at scene due to Defendant having suspended license so would have inevitably been impounded and searched, the exception did not apply to Defendant's statements given to police after the drugs were found even though police gave *Miranda* warnings.

State v. Simms, 2021 WL 387671 (N.J. Super. Ct. App. 2021):
Holding: A defendant who is arrested by police before any charges being filed cannot waive *Miranda* rights unless informed of the specific charge, where the arrest was based on information developed through an earlier investigation.

Joinder/Severance

State v. Boyd, 2023 WL 1998022 (Mo. banc Feb. 14, 2023):
Holding: (1) Even though there was a 10-year time difference between charged sex offenses committed against different child victims, trial court did not abuse discretion in not severing the offenses under Rule 24.07 because Defendant was unable to make a particularized showing of substantial prejudice if the offenses were not tried separately since the evidence was uncomplicated and distinct, and in addition, the jury heard propensity evidence that Defendant had committed other child sexual offenses 20 years ago; the prejudice of jointly trying offenses related to separate victims is reduced when the jury has heard evidence that the Defendant has abused victims other than the victims in the joined offenses; and (2) Evidence was sufficient to convict of enticement of a child, Sec. 566.151.1 where Defendant had child dress in tight, clingy dress; pose for sexy pictures; put her legs across him; touched her inner thigh; and kissed her and said she'd be his girlfriend if she was older, because a jury could find Defendant did this to persuade, coax, entice or lure victim for purpose of engaging in sexual conduct (defined in Sec. 566.010(6)) with her; Sec. 566.151.1 does not require the sexual conduct to actually occur.

State v. Parrow, 2023 WL 8664495 (Mo. App. S.D. Dec. 15, 2023):
Holding: (1) Joinder and severance are separate issues; (2) if joinder was not proper, prejudice is presumed and severance is mandatory; (3) if joinder was proper, then appellate court reviews for whether trial court abused discretion in denying a motion for severance; but (4) where a defendant did not file a motion to sever in trial court, appellate court reviews only for whether joinder was proper.

Judges – Recusal – Improper Conduct – Effect on Counsel – Powers

Allsberry v. Flynn, 628 S.W.3d 392 (Mo. banc Sept. 14, 2021):
Holding: Where Circuit Clerk brought declaratory judgment action against Presiding Judge to enjoin Presiding Judge from suspending her from office, circuit judge in declaratory judgment action erred in holding it had no power to order injunctive relief against another circuit judge; the circuit court's authority in this case is no different than in any other case in which a plaintiff seeks a declaration of rights and injunctive relief against a defendant.

State ex rel. Grooms v. Privette, 667 S.W.3d 92 (Mo. banc 2023):
Holding: Even though Circuit Clerk and trial court had statutory duty to compile and submit certain jail incarceration costs to the State so that their county could be reimbursed for those costs, trial court lacked authority to hold Circuit Clerk in contempt for failing to do this, because a court's contempt power only extends to "the judicial function – the trying and determining of cases in controversy," or to protect the court's "existence," or "the proper functioning of the court as a judicial tribunal;" the statutory

duties here were simply to reimburse counties, and had no impact on the court's ability to operate in its judicial role. Writ of prohibition granted in favor of Circuit Clerk.

Worth v. Roden, 2022 WL 1790201 (Mo. App. E.D. June 2, 2022):
Even though Plaintiff filed her motion to disqualify Judge (without cause) less than 30 days before trial and the parties had already appeared before the Judge, the motion was timely because Rule 51.05 renders a disqualification motion untimely if, and only if, the Judge was designated less than 30 days before trial, but here, the Judge was designated 42 days before trial (and the motion was filed within 60 days of service).
Facts: Plaintiff filed her petition (challenging a candidate on a ballot) on March 30. On April 4, Judge was assigned. On May 2, Judge conducted a hearing and set a trial date of May 16. Also on May 2, Plaintiff filed a motion to disqualify Judge under Rule 51.05. Trial occurred on May 18.
Holding: Rule 51.05 gives a party an absolute right to disqualify a Judge. To be timely, the motion must be filed within 60 days from service of process or 30 days from designation of trial Judge, whichever is longer. Here, the longer period is 60 days from service, which was April 1, making the 60th day be May 31. Defendant argues this sentence from Rule 51.05(b) applies: "If the designation of the trial judge occurs less than 30 days before trial, the application must be filed prior to any appearance before the trial judge." Defendant reads this sentence out of context. Under 51.05, an appearance before a trial judge renders a 51.05 motion untimely if, but only if, the trial judge was designated less than 30 days before trial. Here, the trial judge was designated 42 days before trial, rendering this sentence of 51.05(b) inapplicable. Judgment vacated and remanded for trial before different judge.

State ex rel. Hutchison v. Manasala, 674 S.W.3d 811 (Mo. App. E.D. Sept. 12, 2023):
Holding: Even though Associate Circuit Judge had previously set several trial dates and then continued them, where Defendant in civil case moved for change of Judge five days before trial, Associate Judge was required to grant it because Sec. 517.061 provides for automatic change of judge in Associate Circuit Court if such motions are filed at least five days before trial.
Discussion: Although Rule 51.05 governs changes of judge generally, Sec. 517.061 governs the timing for change of judge in Associate Circuit Court. As relevant here, a party is entitled to an automatic change of judge if filed 5 days before trial. Here, it was irrelevant that the case had been previously set for trial numerous times and then continued. An application for change of judge is timely so long as filed 5 days before the "final" trial setting.

State ex rel. Gonzalez v. Johnson, 622 S.W.3d 215 (Mo. App. S.D. 2021):
Holding: Even though Petitioner was not entitled to a change of judge as a matter of right under Rule 51.05 on motion to modify custody and related motion for contempt, where trial Judge nevertheless granted a change of Judge, Judge could not later rescind the change; since there was no legal reason for Judge to disqualify herself under 51.05, there is a presumption that Judge's disqualification was a voluntary one under 51.07, which requires no reason be given.

Discussion: Petitioner's motion seeking a change of judge was actually a second and unauthorized motion under Rule 51.05. Nevertheless, Judge granted the change of judge motion. *State ex rel. Thexton v. Killebrew*, 25 S.W.3d 167 (Mo. App. S.D. 2000), creates a presumption that the disqualification was under Rule 51.07 because Judge had no other basis to support her recusal. Judge has not rebutted that presumption. As there was no legal reason for Judge to disqualify herself under Rule 51.05, we presume Judge's disqualification was a voluntary one under Rule 51.07, which requires no explanation. Writ of prohibition granted to prohibit judge from rescinding change of judge.

Tibbels v. People, 2022 WL 91582 (Colo. 2022):
Holding: Where trial judge during voir dire equated reasonable doubt to doubt a prospective homebuyer would have upon seeing floor-to-ceiling cracks in a home's foundation, this violated due process because it lowered State's burden of proof and was structural error requiring new trial.

J.V. v. Blair in and for County of Maricopa, 2023 WL 5615744 (Ariz. Ct. App. 2023):
Holding: Where Defendant was legally eligible for a deferred prosecution program, it violated separation of powers for trial court to reject prosecutor's offer of deferred prosecution; trial court's remedial authority over plea agreements did not extend to deferred prosecution.

People v. Jennings, 2021 WL 3671109 (Colo. App. 2021):
Holding: Defendant's guilty plea did not preclude appellate review of Defendant's claim that plea judge exhibited bias against her so as to warrant disqualification.

Jury Instructions

State v. Gates, 635 S.W.3d 854 (Mo. banc 2021):
(1) Where in felony-murder case the trial court prohibited Defendant from testifying to his exculpatory version of events about the underlying robbery on grounds self-defense cannot be asserted as a defense to felony-murder, trial court denied Defendant his Sixth and Fourteenth Amendment rights to present a "complete defense;" self-defense is an available justification when the criminal act being prosecuted is the defendant's use of force, and Sec. 563.031.1(3) does not prohibit a defendant from arguing he used physical force for a purpose other than committing the forcible felony he is charged with. (2) Although evidentiary rulings are typically reviewed for abuse of discretion, where the facts are not contested and the issue is one of law, review is de novo; question of whether Defendant's constitutional rights were violated is a question of law reviewed de novo.
Facts: Defendant was charged with felony-murder for shooting a person during an alleged robbery. The State's Witness testified Defendant shot Victim during a robbery. Defendant, however, wanted to present as a defense that *Victim* tried to rob Defendant, and Defendant shot Victim in self-defense. The trial court granted the State's motion in limine to preclude Defendant from injecting any issue of self-defense into the trial

because of Sec. 563.031.1(3) and *State v. Oates*, 540 S.W.3d 858 (Mo. banc 2018). Defendant was not permitted to mention self-defense or testify as to his exculpatory version of events. Defendant conceded he would not be seeking a self-defense instruction.

Holding: The court's evidentiary rulings prohibiting any mention of self-defense and preventing Defendant from testifying about his exculpatory version of events denied Defendant his Sixth and Fourteenth Amendment rights to present a "complete defense." An accused's right to present his own version of events in his own words is fundamental to the fairness of the proceedings. Because the felony-murder charge was based on the underlying felony of first-degree robbery, whether Defendant had, in fact, committed first-degree robbery was the ultimate issue in the case. The jury instruction required the jury to find Defendant used physical force "for the purpose of preventing resistance to the taking of property." The purpose behind Defendant's actions in shooting Victim – whether to take property, or in self-defense – was critical in determining if Defendant was guilty of felony-murder. *Oates* held self-defense is not a legal defense to felony murder because felony-murder is not based on the defendant's use of force but on the underlying felony. But *Oates* clarified that self-defense *is* available when the criminal act being prosecuted is the defendant's use of force. The underlying felony in *Oates* was a non-forcible felony, but here, the robbery is a forcible felony. Sec. 563.031.1(3) provides a person may not use self-defense for the use of force if he was committing a forcible felony. But 563.031.1(3) does not prohibit the admissibility of evidence, and instead, addresses the availability of a legal defense. The statute does not prevent a defendant from arguing he used physical force for a purpose other than committing the forcible felony he is charged with. Such a rule would violate a defendant's right to a jury determination of every element of the charged crime.

State v. Whitaker, 636 S.W.3d 569 (Mo. banc Jan. 11, 2022):

Where substantial evidence supported that Defendant shot Victim in order to prevent an arson, trial court erred in refusing Defendant's self-defense instruction that he used force to prevent arson.

Facts: Defendant and Victim lived in next-door trailer homes, and had a longstanding dispute over ownership of the trailers. On the day of the incident, Victim was outside the trailers with a gasoline jug, threatening Defendant with arson. Defendant came outside with a gun. Victim ran toward Defendant and tried to take the gun, but Defendant shot him, resulting in a non-fatal wound. Victim then ran back inside Victim's trailer. Defendant testified he was concerned Victim would set the trailer on fire, so followed Victim into the trailer. Victim set the gas jug down and went into the bathroom. Defendant said he would take the jug. Victim then burst through the bathroom door and onto Defendant. Defendant then shot Victim, killing him. Defendant was charged with first degree murder. The trial court refused Defendant's request for a self-defense instruction on arson. The jury convicted of voluntary manslaughter.

Holding: Sec. 563.031 (2013) was the statute in effect at the time of the incident. It allowed a person to use deadly force if he reasonably believed deadly force was necessary to protect himself against a forcible felony – here, that Victim was about to commit arson. The trial court was required to give the instruction if, viewed in the light most favorable to the instruction, there was substantial evidence that Defendant: (1) was

not the initial aggressor; (2) reasonably believed physical force was necessary to defend himself from what he reasonably believed to be imminent use of unlawful force by Victim; (3) reasonably believed deadly force was necessary to protect himself from any forcible felony (arson); and (4) did not have a duty to retreat. The trial court believed the threat of arson was not imminent because Victim didn't have the gas jug at the time of the fatal shooting. But "[i]t is all well and good to analyze the evidence on a moment by moment basis and claim the ability to parse these two individuals' purposes and beliefs across each indivisible instant of time. Reality, however, is much different." This altercation, which began outside, was dangerous, dynamic and short. At the moment Defendant shot Victim, the jury could reasonably infer Defendant believed deadly force was necessary to prevent imminent arson. Reversed and remanded for new trial.

State v. Straughter, 2022 WL 1228939 (Mo. banc April 26, 2022):

(1) Defendant was entitled to "castle doctrine" self-defense instruction where Victim put her arm through Defendant's car window and hit Defendant; "castle doctrine" instruction was required if there was substantial evidence Defendant reasonably believed physical force was necessary to defend herself from what she reasonably believed to be imminent use of unlawful force by Victim, and Victim unlawfully entered vehicle; and (2) even though Defendant's new trial motion misidentified the number of the rejected "castle doctrine" instruction, where her substantive argument focused on the "castle doctrine," the issue is preserved for appeal because Rule 78.09 allows specific objections to be made at trial and then a general statement in the new trial motion.

Facts: Defendant and another person went to Victim's house. Defendant stayed in car. Victim came out of house with a gun, threatening to shoot everyone. Victim approached car, thrust her arm inside, and punched Defendant in face. As Victim punched Defendant, still another person ran toward the car with a gun. Defendant grabbed a gun that was in the car, and without aiming, fired twice, hitting Victim. Trial court refused Defendant's request for "castle doctrine" self-defense instruction. Defendant was convicted of assault.

Holding: The "castle doctrine," Sec. 563.031.2, provides that a person need not face death, serious physical injury, or any forcible felony to respond with deadly force, if the person (1) is defending herself or a third person from what she reasonably believes to be the use or imminent use of unlawful force, and (2) such force is used against a person who unlawfully enters, or attempts to unlawfully enter, a residence or vehicle occupied by such person. Viewed in the light most favorable to the giving of the instruction, that test is met here. The State claims that Victim's arm was no longer in the car when Defendant shot, so instruction should not be given. But the events happened quickly. It is all well and good to analyze evidence on a moment by moment basis and claim the ability to parse Defendant's and Victim's purposes and beliefs across each moment in time. Reality, however, is much different. Victim's punch through the car window entitled Defendant to the statutory privilege of the "castle doctrine." Even though the court gave a general self-defense instruction, Defendant was prejudiced. Under general self-defense, Defendant was justified in using deadly force only if she reasonably believed she was protecting herself from death or serious injury, Sec. 563.031.2(1). But under the "castle doctrine," Defendant did not need to face death or serious injury, Sec.

563.031.2(2). Thus, the jury could have found Defendant could use force under "castle doctrine," but not general self-defense. Reversed for new trial.

State v. Hurst, 2023 WL 2591005 (Mo. banc March 21, 2023):
Holding: Where (1) Officers enforcing an eviction were seeking to evict Defendant from a trailer, (2) Officers told Defendant he had to leave or he would be arrested, (3) Defendant refused to leave and was handcuffed and placed in patrol car, (4) while in patrol car by himself, Defendant, while handcuffed, managed to drive away and led police on a lengthy car chase with erratic driving and speeds of up to 100 miles an hour, and (5) at trial, Defendant testified he drove away because the police had beat him and he believed they were going to kill him if he didn't get away, trial court did not err, in later first-degree tampering and resisting arrest case, in refusing Defendant's instruction for defense of necessity, Sec. 563.026.
Discussion: The criteria for giving the defense-of-necessity instruction is an issue of first impression for Supreme Court. Sec. 536.026.1 provides that otherwise criminal conduct is "justified" (necessary) when (1) it is necessary as an emergency measure, (2) to avoid imminent private or public injury, (3) that is about to occur through no fault of Defendant, and (4) the action taken is objectively reasonable in light of the injury to be avoided. Sec. 563.026.2 further provides that "the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a justification." Thus, the statute requires the judge act as a gatekeeper for this defense. The judge must make a preliminary determination whether Defendant's actions, as a matter of law, viewed in the light most favorable to the giving of the instruction, were objectively reasonable, i.e,. whether the harm Defendant sought to avoid outweighed the harm caused by Defendant. If the judge determines Defendant's actions were objectively reasonable, then the jury must ultimately decide, as a factual matter, whether Defendant's harm was outweighed by the injury avoided. Here, Defendant's actions were not objectively reasonable. He cannot meet the four-prong test. His actions weren't necessary, because he had other alternatives than to drive off on a high speed chase where he risked harming other people on the roads. His actions were brought about by his own conduct, because he was warned by Officers to voluntarily leave the premises multiple times, and was only arrested after he refused.
Concurring opinion: Judge Powell writes separately to distinguish between "self-defense" and "necessity." Self-defense requires a defendant to have "believed" his acts were necessary, and to have had "reasonable grounds" for the belief, Sec. 563.031. Necessity under Sec. 563.026 requires no such analysis. 563.026 justifies criminal conduct when "it is necessary" – not when the defendant "believes" it is necessary. The test under 563.026 is solely the objective facts and circumstances that suggest necessity – not a defendant's subjective beliefs about his actions. Unlike self-defense, the trial court also plays a gatekeeping function for defense of necessity, where the court determines whether the harm or injury to be avoided outweighs the harm caused in committing the criminal offense. Also, necessity is an affirmative defense. Self-defense is a special negative defense.

State v. Hamby, 669 S.W.3d 76 (Mo. banc 2023):
Holding: (1) To preserve for appeal a "*Celis-Garcia*" [344 S.W.3d 150 (Mo. banc 2011)] objection that the verdict directors lack specificity so as to not require juror unanimity, Defendant must identify the specific details in the evidence he believes distinguish one act of abuse from another that should be included in the verdict directors to resolve his juror unanimity concern; (2) when there are more than two separate and distinct acts specifically described in the evidence, merely submitting that the conduct must be "separate and distinct" from that included in another instruction fails to adequately identify any distinct act to which the jurors have to substantially agree; and (3) to resolve juror unanimity concerns, the State can either (i) elect the specific criminal act upon which they rely to establish the charged offense and include that specific act in the verdict director or (ii) have the trial court provide a special unanimity instruction informing the jury that, to convict on the relevant count, all jurors must agree that the Defendant committed the same act.

State v. Clement, 2023 WL 2375211 (Mo. App. E.D. March 7, 2023):
Holding: Where (1) Defendant was a guest at an apartment building, (2) at around midnight, intoxicated Victim came to door of apartment and got into confrontation with Defendant, (3) Victim put his hand in doorway when Defendant tried to close door, and (4) Defendant shot and killed Victim, trial court erred in failing to give requested Castle Doctrine instruction.
Discussion: The Castle Doctrine provides a "heightened level" of self-defense. Unlike general self-defense or defense of others, a defendant need not face death, serious physical injury or a forcible felony to respond with deadly force under Castle Doctrine, Sec. 563.031. Instead, deadly force can be used to defend from what defendant reasonably believes to be the use or imminent use of unlawful force, and such force is used against a person who unlawfully enters, remains after unlawfully entering, or attempts to unlawfully enter a dwelling, residence or vehicle lawfully occupied by the defendant. Substantial evidence to require the instruction can come from Defendant's own testimony alone, even though it may be considered "self-serving." Here, Defendant's testimony that he was threatened and Victim put his hand in doorway, which prevented Defendant from closing the door, provided substantial evidence requiring the instruction. Even though the court gave general self-defense and defense of third persons instructions, Defendant was prejudiced since the Castle instruction only requires that Defendant defended against "the use or imminent use of unlawful force," not the threat of "death or serious physical injury," as required by the general self-defense instructions.

State v. Hurst, 2022 WL 3754802 (Mo. App. S.D. Aug. 30, 2022):
Trial court erred in refusing to give justification-by-emergency instruction, MAI-CR 4th 408.20, where the evidence, viewed in light most favorable to giving instruction, showed that police were severely beating Defendant and threatening to kill him, so that Defendant was justified in taking their patrol car to flee and drive into town to seek help.
Facts: Police stopped to investigate Defendant, who was moving out of a residence, for trespassing. According Defendant's testimony, police, without provocation, knocked Defendant to the ground, continuously severely beat him, and threatened to kill him and his Wife. Even though police handcuffed Defendant, he was able to get into their patrol

car, and fled toward town to seek help. While driving the patrol car, Defendant was calling for help on the police radio. Defendant was ultimately charged with tampering and resisting arrest. He sought a justification instruction, MAI-CR 4th 408.20, which the trial court refused.

Discussion: Sec. 563.026 provides that, other than for murder and Class A felonies, conduct that is otherwise criminal may be justifiable "when it is necessary as an emergency measure to avoid imminent public or private injury … developed through no fault of the actor." A defendant is entitled an emergency justification instruction when faced with an imminent danger; defendant's actions will abate the danger; there is no legal alternative which will be effective in abating the danger; and the legislature has not specifically precluded the defense. Viewed in the light most favorable to the instruction, all these elements were satisfied. The trial court denied the instruction on grounds that Defendant could have handled the situation differently; his version was based solely on his own "subjective" testimony; and his long, drawn out escape route wasn't justified. But the instruction must be given when supported by evidence, even Defendant's own testimony alone.

State v. Stevenson, 2022 WL 15791639 (Mo. App. S.D. Oct. 28, 2022):

Holding: Where Defendant was charged with the Class E felony of resisting arrest, Sec. 575.150.5, but the jury instructions did not include the paragraph required to elevate the offense to a Class E felony (i.e., arrest for a felony, or fleeing in such a manner as to create a substantial risk of serious physical injury or death), the offense was Class A misdemeanor, and trial court plainly erred in sentencing Defendant to felony term of imprisonment.

Discussion: Resisting arrest is generally a Class A misdemeanor unless the defendant is being arrested for a felony, or flees in such a manner to create a substantial risk of serious physical injury or death. MAI-CR4th 429.61 has optional paragraphs to submit the offense as a felony. But here, those paragraphs were omitted. Even though defense counsel did not object to the instruction, counsel did not have to object, since a competent defense counsel would not object to the State (unwittingly) submitting the offense as a misdemeanor. Here, despite being charged as a felony, the offense was only submitted as a misdemeanor. The State was required to prove all elements making the offense a felony. It is plain error to impose a sentence greater than authorized by law. The State argues the remedy should be a retrial with the correct instruction, but the State is bound by its chosen instruction, and cannot complain of its own error. Remanded for misdemeanor re-sentencing.

State v. Brown, 669 S.W.3d 733 (Mo. App. S.D. 2023):

Holding: Where (1) the verdict director for first-degree burglary, MAI-CR 4th 423.52, directs a definition be inserted for the crime Defendant intended to commit in entering the building, and (2) the court defined "unlawful use of a weapon" as "knowingly exhibits … any weapon readily capable of lethal use in an angry or threatening manner," there was no error because the court was not required to name a specific weapon or specify exactly how Defendant intended to use the weapon in the definition.

State v. Jackson, 2023 WL 6839147 (Mo. App. S.D. Oct. 17, 2023):
Holding: Even though the Notes on Use to MAI-CR3d 325.11.2 for first-degree trafficking of a controlled substance, Sec. 195.222, do not list "possessed" as a term that must be defined in the trafficking instruction which uses the term "possessed", the term must nevertheless be defined because Note 2 to MAI-CR3d 325.02 for "Controlled Substances: Possession" states that "possession" must be defined (but not plain error in this case).

State v. Borst, 2022 WL 287305 (Mo. App. W.D. Feb. 1, 2022):
Holding: (1) Where Defendant was charged with second-degree murder for "knowingly causing the death of Victim by shooting him," but instruction allowed jury to convict for "it was Defendant's purpose to cause serious physical injury to Victim," this was a fatal variance from the original charge; and (2) even though Defendant did not use the words "fatal variance" in his objection to the instruction, where Defendant objected and asked for language consistent with the original charge, the issue was preserved for appeal; where an objection plainly informs trial court of a party's position, party need not cite a specific rule or statute in objection or new trial motion to preserve issue.
Discussion: Due process requires notice of the charge, which means a defendant cannot be charged with one offense, or form of offense, but convicted of another. "Conventional" second degree murder, Sec. 565.021.1, can be committed by either "knowingly causing" the death of another," or "with the purpose of causing serious physical injury, the defendant causes the death of another." If one form or method is charged, a different form or method cannot be submitted to jury. Here, the manner in which the offense was charged differed from the manner submitted to the jury. Defendant was prejudiced because his defense was that he shot Victim in self-defense in the legs but did not "knowingly cause" his death. However, the manner in which the offense was submitted – allowing conviction if Defendant's purpose was to cause serious physical injury -- negated Defendant's *mens rea* defense. Reversed for new trial.

State v. Hudson, 2022 WL 1144721 (Mo. App. W.D. April 19, 2022):
Holding: As a matter of first impression, Defendant was not entitled to "involuntary intoxication" instruction, MAI-CR 410.52, on theory that he committed crime after smoking marijuana which – unbeknownst to him – was laced with PCP, since marijuana is an illegal substance that does not come with warranties of purity; a reasonable person has no right to assume illegal marijuana will not be laced with other substances; court expressly does *not* opine on what impact use of legal medical marijuana might have on a similar scenario.

State v. Forbes, 2022 WL 1309991 (Mo. App. W.D. May 3, 2022):
(1) Where Defendant-Daughter was appointed guardian and conservator of Father's assets by a Probate Court, the evidence was insufficient to convict of financial exploitation of elderly, Sec. 570.145, by "obtain[ing] control" of Father's assets, because she took control under lawful order of the Probate Court, and even though she used those assets for personal use, that wasn't what she was charged with; (2) Jury instruction allowing conviction for "obtain[ing]control" of assets was erroneous because it allowed jury to convict for lawful act authorized by Probate Court.

Facts: Defendant was Daughter of Victim (Father). Father had dementia, and was placed in nursing facility. On June 29, 2016, Defendant-Daughter was appointed by a Probate Court to become Father's guardian and conservator. In September 2016, Defendant-Daughter wrote a check on Father's account to nursing facility to pay for Father's care. Also starting in September 2016, Defendant-Daughter began writing checks to herself for her personal use, and sold Father's car for her personal benefit. In August 2017, Daughter voluntarily relinquished her guardianship and conservatorship to Saline County Administrator. Defendant-Daughter was charged with financial exploitation of elderly, Sec. 570.145. The jury instruction instructed to find Defendant guilty if between June 29, 2016, and September 10, 2017, Defendant "knowingly obtained control of a bank account and the proceeds" from the sale of Father's car. After guilty verdict, Defendant appealed.
Holding: (1) The jury instruction criminalized a legal act in that Defendant, as the court-appointed conservator for Father, was authorized by the Probate Court to take control of the bank account and Father's assets. Sec. 570.145 requires a person use "undue influence" to take control of an elderly person's property. There was simply no evidence that occurred here. The Probate Court appointed Defendant as guardian and conservator in June 2016. Defendant was *not* charged with inappropriately spending Father's assets. The verdict director instructed the jury to convict if Defendant "obtained control" of the assets. This erroneous instruction prejudiced Defendant because it allowed jury to convict her based on the legal action of taking control of the bank account by order of the Probate Court. (2) The amended information charged Defendant with obtaining control over the back account and assets. The State did not produce sufficient evidence that Defendant "obtained control" of Father's bank account or assets by "undue influence" because it is not disputed that the Probate Court ordered her to take control of these assets. Therefore, the information does not state an offense, and the evidence was insufficient. Double Jeopardy would bar retrial. Defendant discharged.

State v. Gannon, 2022 WL 14938744 (Mo. App. W.D. Oct. 25, 2022):
Holding: Even though the Southern District and a concurring opinion by Judge Wilson hold that an appellate court should not engage in plain error review of jury instructions where defense counsel did not object to the instructions under circumstances that may have indicated a trial strategy reason for doing so, this no-plain-error review approach has not been adopted by a majority of the Missouri Supreme Court, so Western District will engage in plain error review; the one exception would be where the record shows a Defendant "invited" the instructional error by proffering the instruction "jointly" with the State.

State v. Torres, 2023 WL 139284 (Mo. App. W.D. Jan. 10, 2023):
Holding: Even though (1) Victim in first-degree statutory sodomy case testified Defendant touched her genitals in the living room and the bedroom, and (2) the jury instruction allowed jurors to convict if Defendant "knowingly touched [Victim's] genitals with his hand," Defendant's right to a unanimous jury verdict, Mo. Const. Art. I, Sec. 22(a), was not violated (i.e., no *Celis-Garcia* violation), because the act of touching here was a "single, specific incident," not two distinct acts.

State v. Coyle, 2023 WL 4188248 (Mo. App. W.D. June 27, 2023):
Holding: (1) Even though Defendant stated "no objection" to jury instructions in child sex case but raises "*Celis-Garcia*" unanimity issue on appeal, Western District will reluctantly engage in plain error review, because Supreme Court has stated that a defendant does not waive plain error review by failing to object to a faulty jury instruction, by failing to correct a faulty jury instruction, or by affirmatively telling trial court that defendant has no objection; however, Western District believes "it may be time to re-evaluate whether a defendant in a multiple acts sexual offense case can retain the right to plain error review … after affirmatively assuring the trial court [he] has no objection"; and (2) in writing jury instructions to distinguish between multiple, distinct acts, Western District advises not using a date range to distinguish the acts because, although time is not an essential element of a sex offense, using a date range may create the appearance of a sufficiency-of-evidence issue if there was no evidence the act occurred within that exact date range, as happened here; but evidence is sufficient since time isn't an element of the offense.

Editor's note: *See State v. Hamby*, 669 S.W.3d 76 (Mo. banc 2023) for what defense counsel must do to properly preserve a "*Celis-Garcia*" objection.

*** Greer v. U.S., ___ U.S. ___, 141 S.Ct. 2090 (U.S. June 14, 2021):**
Holding: Even though *Rehaif v. U.S.*, 139 S.Ct. 2191 (2019) held that in felon-in-possession cases, the Gov't must prove the defendant "knew" he was a felon, for cases decided before *Rehaif*, it is not plain error for a plea court to have failed to inform a defendant that the Gov't would have to prove at trial he "knew" he was a felon, or for a trial court to have failed to instruct jury that it must find that defendant "knew" he was a felon *unless* the defendant presents evidence that he did not, in fact, know he was a felon; in the latter cases, a court must then determine if there is a "reasonable probability" the result of the proceeding would have been different, i.e., that defendant would not have pleaded guilty, or the outcome of trial would have been different.

* **Percoco v. U.S., 598 U.S. 319 (2023):**
Holding: The legal standard for whether a private citizen can be convicted of "honest services fraud," 18 U.S.C. Secs. 1343 and 1346, for depriving the government of its "intangible right to honest services" is not whether the private citizen had a "special relationship" with the government entity and had "dominated and controlled" government business; although a private citizen can be convicted of "honest services fraud" in some circumstances, jury instructions implying that the public has a right to a private person's honest services whenever that private person's clout exceeds some ill-defined threshold were too vague, and did not define the right to honest services with sufficient definiteness to prevent arbitrary enforcement.

*** Ciminelli v. U.S., 598 U.S. 306 (2023):**
Holding: A defendant cannot be convicted of federal wire fraud, 18 U.S.C. Sec. 1343, under a "right to control" theory (under which the Government establishes fraud by showing that the defendant schemed to deprive a victim of potentially valuable economic information necessary to make discretionary economic decisions) because the right to valuable economic information is not a traditional property interest; the text of the wire-

fraud statute criminalizes taking "money or property" by means of false pretenses; it does not criminalize taking "intangible property" of "potentially valuable economic information necessary to make discretionary economic decisions."

U.S. v. Cabrera, 2021 WL 4073056 (2d Cir. 2021):
Holding: Jury instruction on entrapment erroneously overstated Defendant's slight burden of producing some evidence that government initiated the crime, by requiring jury definitively accept Defendant's account a precondition to considering predisposition.

U.S. v. Lindberg, 2022 WL 2335366 (4th Cir. 2022):
Holding: Jury instruction which instructed jury that Government Official's conduct in replacing another official was an "official act" under federal bribery statute improperly relieved Gov't of burden to prove offense of conspiracy to commit honest services wire fraud with intent to influence an "official act"; it was up to jury, under facts of case, to determine whether public official agreed to perform "official act" in exchange for campaign contributions.

Mercer v. Stewart, 2022 WL 1212786 (E.D. Mich. 2022):
Holding: Habeas relief granted on claim that Petitioner was deprived of due process right to present a defense in murder case when trial court refused to give justification jury instruction that Petitioner killed victim to prevent him from raping her.

Jones-Nelson v. State, 2022 WL 2285927 (Alaska 2022):
Holding: Jury instruction which stated "in circumstances when a person is permitted to use deadly force in self-defense, that person may still not be authorized to employ all-out deadly force" because it isn't necessary, and that "use of deadly force is unreasonable if non-deadly force is" sufficient, incorrectly directed jury to retroactively assess the reasonableness of Defendant's use of force for self-defense, contrary to law's requirement that use of force be evaluated based on circumstances as they appeared to Defendant when the force was used, and not in hindsight.

State v. Jones, 2020 WL 8257703 (Conn. 2020):
Holding: Special credibility instruction was required when incarcerated Witness, in exchange for favorable treatment by the State, offered his testimony that Defendant had confessed to him when they socialized outside of prison; Defendant was "jail house" informant even though the confession happened outside of prison.

Tibbels v. People, 2022 WL 91582 (Colo. 2022):
Holding: Where trial judge during voir dire equated reasonable doubt to doubt a prospective homebuyer would have upon seeing floor-to-ceiling cracks in a home's foundation, this violated due process because it lowered State's burden of proof and was structural error requiring new trial.

Garcia v. People, 2022 WL 351080 (Colo. 2022):
Holding: Trial court erred in instructing jury that phrase "seizes and carries" in kidnapping statute means "any movement, however short in duration," because this improperly omitted half the statutory definition of asportation.

Holmgren v. State, 2022 WL 4588455 (Ind. App. 2022):
Holding: Trial court violated Defendant's 6th Amendment right to jury trial where it enhanced Defendant's sentence under statute based on child victim being under age 12, where the jury was only instructed to find that the victim was under age 14; a jury-finding was required that Defendant was under age 12.

Skinner v. State, 2023 WL 5922082 (Miss. Ct. App. 2023):
Holding: Defendant was entitled to imperfect self-defense instruction where Defendant believed Victim "was the devil" and was in a satanic cult; Defendant was paranoid and erratic leading up to the shooting; and Defendant shot Victim after they had fought over a gun, Victim came toward Defendant, and Defendant was scared for his life.

Jury Issues – Batson – Striking of Jurors – Juror Misconduct

Yates v. State, 623 S.W.3d 184 (Mo. App. E.D. 2021):
(1) Motion court clearly erred in denying 29.15 motion without evidentiary hearing on claim that trial counsel had been ineffective in failing to investigate and call additional jurors to testify about alleged jury misconduct, where trial counsel had affidavits from some jurors showing misconduct but failed to investigate additional jurors to obtain a new trial; and (2) Motion court abused discretion in denying Movant's motion to contact jurors to plead and prove his 29.15 claim, because there was credible information in the record that juror misconduct had occurred.
Facts: Movant was convicted at trial of various offenses. After filing a new trial motion, trial counsel was contacted by a juror who alleged another juror engaged in misconduct by obtaining extrinsic information about the case from a bailiff or police officer about the meaning of certain jury instructions. Trial counsel presented two juror affidavits about this, and filed a motion to question jurors, which the trial court denied. The trial court then denied an amended motion for new trial. During the direct appeal, the Eastern District remanded to the trial court for an evidentiary hearing on the amended motion for new trial on grounds of newly discovered evidence. Trial counsel stated he wished to investigate other jurors, but he did not actually seek permission from the trial court to contact other jurors. The trial court denied a continuance for that hearing, and denied a new trial, relying on the previously-submitted affidavits. The Eastern District affirmed. Movant filed a 29.15 motion, alleging trial counsel was ineffective in the investigation of juror misconduct. The motion court denied Movant's motion to contact jurors, and denied the claim without an evidentiary hearing.
Holding: While there is no right to contact jurors, courts have discretionary power to allow this where there is credible indication that juror misconduct occurred. Jurors can testify about misconduct that involves gathering extrinsic information. Once it is

established that misconduct involving extrinsic information occurred, the burden shifts to the non-moving part to overcome a presumption of prejudice. While a Movant cannot relitigate an issue decided on direct appeal, that's not what happened here. The issue on direct appeal was whether the trial court abused its discretion in not granting a new trial based on the limited evidence of two affidavits before it. The 29.15 issue is whether trial counsel was ineffective in failing to investigate and present additional evidence to change that outcome. The motion court clearly erred in denying Movant's claim on grounds that he didn't adequately plead it because this was caused by the court's failure to allow Movant to contact jurors. Movant pleaded juror misconduct, and pleaded that one or more jurors would testify to receiving extrinsic information that may have impacted the verdict. The two affidavits gave credible reason to suspect juror misconduct. Gathering information from other jurors was necessary to determine if any additional juror information would affect the outcome. Reversed and remanded to allow contact of jurors and an evidentiary hearing.

State v. Fields, 2023 WL 4711674 (Mo. App. E.D. July 25, 2023):
Holding: In case of first impression, court holds that lab reports which briefly summarize conclusions of Expert who testified at trial can be sent to the jury during deliberations, because the reports are not like transcripts or videos of live testimony, which cannot be sent to avoid giving them undue weight.
Discussion: The general rule is that exhibits which are "testimonial" in nature cannot be given to the jury during deliberations to avoid giving them undue weight. This meaning of "testimonial" is different than for Confrontation Clause purposes. Here, "testimonial" means transcripts of live testimony or a video of live testimony. No existing Missouri case has examined whether lab-report exhibits are "testimonial" for purposes of letting the jury review them during deliberations. Missouri cases have made clear that transcripts and videos of live testimony cannot be given to the jury. The lab reports here were not word-for-word reiterations of what the Expert testified to. The reports merely summarized conclusions about the Expert's findings. "Our holding here should not be understood to encompass all 'expert reports,' as there are certainly conceivable situations where an expert's report would be properly admitted into evidence and could also be determined to be testimonial. We simply do not find that to be the case here."

Potter v. State, 2023 WL 5740431 (Mo. App. E.D. Sept. 19, 2023):
Holding: In case where Defendant was charged with purposely ramming his vehicle into others to cause serious injury, Prosecutor's voir dire "hypothetical," which asked jurors if anyone did not agree that a person who throws a bowling ball off a highway overpass intends to cause life-threatening injury, was an improper request for a jury commitment (but wasn't ineffective counsel for failure to object because evidence was overwhelming, so no prejudice).
Discussion: When a voir dire question is phrased in such a manner that it requires the one answering it to speculate on his own reaction to such an extent that he tends to feel obligated to react in that manner, prejudice can result. Phrasing voir dire questions in a manner which preconditions jurors to react in a particular way to anticipated evidence is improper.

Jendro v. State, 2023 WL 8445894 (Mo. App. S.D. Dec. 6, 2023):
Holding: (1) Even though the jury instructions told jury they could only give up to 30 years, but jury gave 40 years (which court imposed), this claim could only be raised on direct appeal and was not "cognizable" as a due process violation in a 29.15 case, because the authorized term of imprisonment for statutory rape, Sec. 566.062 RSMo. 2006, was a term of years up to life imprisonment, and 40 years was within this range.

State v. Howell, 626 S.W.3d 758 (Mo. App. W.D. 2021):
Holding: Even though trial court conducted portions of voir dire regarding statutory disqualifications and hardship excuses without the presence of counsel, court did not err in doing this since no statute or court rule was violated in doing so, and Defendant failed to properly challenge the procedure under Sec. 494.465.3, which requires a party to seek relief before the petit jury is sworn.
Discussion: Defendant seeks new trial on grounds the trial court improperly excluded counsel from portions of voir dire. Defendant cites no legal authority that guarantees him a right to have counsel observe the process of statutory disqualifications and hardship excusals that generally take place before voir dire. These matters are regularly conducted through written correspondence with the trial court, without the participation of counsel – although, here, the trial court apparently orally questioned some jurors about this without the presence of counsel. No statute or court rule was violated by the court's procedure. In any event, Sec. 494.465.3 requires that if a party wants to raise a claim that jury was not selected in conformity with statutory procedures, it must seek a stay or appropriate relief before the petit jury is sworn, or within 14 days after the party could have discovered the grounds supporting the motion. Defendant didn't do either.

* **Edwards v. Vannoy, ___ U.S. ___, 141 S.Ct. 1547 (U.S. May 17, 2021):**
Holding: (1) New criminal procedural rules will never apply retroactively on federal collateral review; (2) Court overturns *Teague*'s holding that such rules would be retroactive if deemed "watershed;" and (3) *Ramos*' holding that Sixth Amendment requires juries to be unanimous in determining guilt is not retroactive on federal collateral review.

* **U.S. v. Tsarnaev, ___ U.S. ___, 142 S.Ct. 1024 (U.S. March 4, 2022):**
Holding: (1) in Boston Marathon bombing case, trial court did not abuse its discretion in declining to ask about the content and extent of each venireperson's knowledge of the case from the media, when the court had asked about what media sources venirepersons followed, whether they had formed an opinion about the case, and had other individualized voir dire to probe for bias; and (2) trial court did not abuse its discretion in excluding Defendant's mitigating evidence that his brother – who committed the bombing with him – had possibly committed a prior murder; although Defendant claimed this evidence would show he was under the domination of his brother, the trial court did not abuse its discretion in finding that the evidence lacked probative value and would be confusing to jurors, especially given that the witnesses who could have confirmed the brother's commission of the prior murder were themselves deceased; the "other murder" evidence risked producing a confusing mini-trial where the only witnesses who knew the truth were dead.

U.S. v. Woodberry, 2021 WL 506091 (9th Cir. 2021):
Holding: Statute which enhances minimum sentence for use of a short-barreled rifle or shotgun requires that this essential element be proven to a jury beyond a reasonable doubt.

People v. Superior Ct. of San Diego Cnty., 2021 WL 5707638 (Cal. 2021):
Holding: Prosecutor impliedly waived work-product privilege by claiming he had used a numeric scoring system to evaluate what venirepersons to strike; without seeing the scoring system, the defense and court had no way to know if Prosecutor's strikes were race-neutral under *Batson*.

People v. Ojeda, 2021 WL 6883281 (Colo. 2021):
Holding: State's peremptory strike of Hispanic Juror on grounds that Juror had experienced racial profiling and, thus, might persuade the jury why Hispanic-Defendant was wrongly charged, was explicitly race-based (not race-neutral) and violated *Batson*.

State v. Soto, 2022 WL 2303809 (Utah 2022):
Holding: Comments made to jurors in courthouse elevator by police and courthouse personnel to "hang" Defendant, while Bailiff stoop quietly by, violated right to fair and impartial jury and created presumption Defendant was prejudiced.

State v. Tesfasilasye, 2022 WL 5237738 (Wash. 2022):
Holding: (1) Appellate court will apply de novo review as standard for reviewing whether race played role in peremptory strike of juror in violation of court rule; and (2) an objective observer would believe race played a role in prosecutor's strike of Latino immigrant juror, where prosecutor misstated what juror had said about eyewitness testimony and didn't strike another juror who made similar remarks.

Com. v. Ralph R., 2021 WL 3716688 (Mass. App. 2021):
Holding: Trial judge was required to conduct further inquiry when jury foreperson reported that jurors were making "a lot of discriminating comments" during deliberations of Hispanic Defendant.

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Holmgren v. State, 2022 WL 4588455 (Ind. App. 2022):
Holding: Trial court violated Defendant's 6th Amendment right to jury trial where it enhanced Defendant's sentence under statute based on child victim being under age 12, where the jury was only instructed to find that the victim was under age 14; a jury-finding was required that Defendant was under age 12.

Juvenile

State ex rel. T.J. v. Cundiff, 632 S.W.3d 353 (Mo. banc 2021):
Holding: Where Defendant-Juvenile was 17 years old at time he was charged with committing felonies in January 2021, he was subject to the law in effect at the time of the offense which mandated that he be tried in adult court; the 2018 "Raise the Age" to 18 legislation did not become effective until July 1, 2021, when the legislature appropriate funds to expand juvenile division services.

State v. R.J.G., 632 S.W.3d 359 (Mo. banc 2021):
Holding: (1) Where Defendant-Juvenile was 17 years old at time he allegedly committed felonies in October 2020 and was charged in January 2021, the law in effect at time of offense applied and he did not get benefit of "Raise the Age" legislation which became effective July 1, 2021, when legislature funded juvenile division services; (2) even though circuit court dismissed the circuit court proceedings "without prejudice" (to allow proceedings to be brought in juvenile court), this was an appealable "final judgment" because it had the practical effect of terminating the State's case in circuit court since re-filing there would have been futile.

In the Interest of J.T.J., 635 S.W.3d 566 (Mo. banc 2021):
Holding: Even though the allegations resulting in Juvenile's certification to adult court were contained in a filing denominated a "motion to modify" as opposed to a "petition," and (2) Sec. 211.071 and Rule 129, the procedures governing filing for certification, reference a "petition," Juvenile was not prejudiced by the label of the filing in this case, so this was not plain error; Juvenile was already under jurisdiction of family court due to a prior adjudication when the "motion to modify" with new allegations was filed.
Discussion: After the family court takes jurisdiction over a juvenile, neither a rule nor statute provide a straightforward method of adding additional offenses the juvenile may have committed that could or would necessitate a certification hearing. Juvenile here did not object to the certification hearing premised on a motion to modify, so review is for plain error. Plain error requires Juvenile to go beyond mere prejudice and show manifest prejudice affecting substantial rights. The "motion to modify" contained all the essential information of a petition, and the label of the filing did not deprive Juvenile of the protections afforded by the certification procedure in Sec. 211.071 or Rule 129. Nothing about the certification procedure was affected by the title of the filing.

In the Interest of C.A.R.A. v. Jackson County Juvenile Office, 637 S.W.3d 50 (Mo. banc Jan. 11, 2022):
Where trial court allowed Victim, Victim's Mother, and Victim's Babysitter to testify via two-way video as a COVID-19 safety measure, this violated Defendant's Sixth Amendment right to face-to-face confrontation.
Facts: Defendant-Juvenile was charged with a sex offense. The trial court, over Defendant's objection, allowed Victim, Victim's Mother, and Victim's Babysitter to testify via two-way video, as a COVID precaution. The trial court believed this was authorized by the Supreme Court's COVID operational directives.

Holding: Contrary to the trial court's belief, this Court was careful to ensure its operational directives for COVID would not permit violation of a defendant's constitutional or statutory rights. Once the trial court determines that a trial (adjudication hearing) must be held, nothing in the operational directives expressly permits witnesses to appear remotely. Courts which have addressed this issue nationally have adopted three approaches: (1) *Craig*, (2) the 2nd Circuit test from *Giagante*, or (3) *Crawford.* *Maryland v. Craig*, 497 U.S. 836 (1990), held a defendant's confrontation rights are violated by two-way video unless such a procedure is necessary to further an important public policy and reliability of the testimony is otherwise assured. *Craig* involved a child victim. In the context of COVID, some courts have applied *Craig* to recognize that protecting public health is an important public policy. But witness-specific findings -- such as that a witness has a health condition particularly susceptible to COVID -- are required to meet the necessity prong. *U.S. v. Giagante*, 166 F.3d 75 (2d Cir. 1999), adopted a more lenient approach than *Craig*, and allowed two-way video upon finding of exceptional circumstances. Courts using this approach, in the COVID context, have required witness specific findings of a particular risk associated with COVID to meet the exceptional circumstances test. *Crawford v. Washington*, 541 U.S. 36 (2004), rejected the "reliability test," and held the Sixth Amendment requires actual confrontation as the procedural means to achieve reliability. However, *Crawford* did not overrule *Craig*. Thus, "Missouri courts should certainly continue to apply *Craig* to the facts it decided: a child victim may testify against the accused by means of video (or similar *Craig* process) when the circuit court determines, consistent with statutory authorization and through case-specific showing of necessity, that a child victim needs special protection." This Court need not decide the general issue of whether two-way video under any circumstances could ever satisfy the Sixth Amendment. Here, the court made no witness-specific findings regarding unavailability for any of the witness – Victim, Victim's Mother, or Babysitter. "More importantly, this Court is not confident the issue [in *Craig*] would be decided the same way today." Throughout the pandemic, this Court's orders have sought to protect the constitutional rights of criminal defendants. Applying the above to the witnesses here, the Victim's testimony might have met the *Craig* test for video testimony because Victim was a child, and Sec. 491.699 gives statutory authorization to two-way video. But here, the trial court made no witness-specific findings about Victim, so conviction must be reversed and remanded. The other witnesses' testimony is to be guided by the above analysis on remand. Reversed for new trial.

<u>In the Interest of J.A.T. v. Jackson Cnty. Juvenile Office</u>, 637 S.W.3d 1 (Mo. banc Jan. 11, 2022):

Where -- as a COVID precaution -- trial court required Defendant-Juvenile to participate in his trial from the jail via two-way video link while all other witnesses and parties were in the courtroom, this violated Defendant's Sixth and Fourteenth Amendment rights to due process and confrontation to be personally present at trial to confront witnesses.

Facts: Trial court, over Defendant's object, required Defendant to view his trial from jail via a two-way video link. The trial court believed the Supreme Court's COVID directives authorized this.

Discussion: Contrary to the trial court's belief, this Court's COVID directives did not authorize the trial court to violate Defendant's constitutional or statutory rights. One of the most basic rights guaranteed by the Confrontation Clause is the right to be present in the courtroom at every stage of trial. Due process also guarantees the right to be present. Rule 128.01 also provides that juveniles shall have the right to be present. Generalized concerns about COVID do not override Defendant's due process right to be physically present at trial where his guilt or innocence will be determined. Reversed and remanded for new trial.

In the Interest of L.N.G.S., Juvenile v. A.S., **2023 WL 2586188 (Mo. banc March 21, 2023):**

Holding: Even though (1) Appellant-Relatives had been given temporary custody of Child by Children's Division, but (2) after apparent abuse of Child by Relatives, Children's Division filed petition for child neglect and court issued judgment placing Child in custody of Children's Division, Appellant-Relatives had no statutory authority to appeal the court's judgment because they do not fall within the class of persons who may appeal a judgment under Sec. 211.261; appeal dismissed.

Discussion: The right to appeal is solely statutory. Sec. 211.261 enumerates who may appeal actions taken under the Juvenile Code. Sec. 211.261.1 grants the right of appeal to: (1) the child; (2) the child's parent, guardian, legal custodian, spouse, relative or next friend, *so long as the party appeals on the child's behalf*; (3) a parent; and (4) the juvenile officer. Appellant-Relatives argue they fall under category 2. But they did not specify in their notice of appeal or briefing that they are appealing *on the child's behalf*. Their arguments seek to vindicate their own positions, not necessarily the Child's best interest. Because the statute doesn't give Relatives the right to appeal, appeal must be dismissed.

In the Interest of P.D.E. v. Juvenile Officer, 669 S.W.3d 129 (Mo. banc 2023):

Holding: Where (1) in January 2021, Juvenile Court conducted an adjudication hearing; (2) in March 2021, Juvenile Court conducted a disposition hearing and ordered Juvenile be made a ward of the court and pay restitution in an amount to be determined later; and (3) in October 2021, the court set restitution at $4,000, a Notice of Appeal (NOA) filed in October 2021 challenging the *adjudication* was untimely; an NOA challenging the adjudication and disposition needed to be filed within 40 days after the March disposition hearing.

Discussion: Sec. 211.261.1 states that an NOA shall be filed in a juvenile case within 30 days after a final judgment has been entered, but a plurality of this Court determined in *D.J.B v. M.B.*, 704 S.W.2d 217 (Mo. banc 1986) that a party has 40 days to file the NOA under Rules 81.04 and 81.05(a). "Final judgment" is left undefined in chapter 211. But once a disposition is made, even though post-dispositional hearings may continue to be held, all the issues before the court have been disposed of and nothing is left for determination. Here, the disposition occurred in March 2021 where Juvenile was made a ward of the court, and ordered to pay restitution in an amount to be determined. This entry of disposition under Rule 128.03d started the time to file an NOA challenging the adjudication hearing. The restitution amount could be determined later. The ultimate

determination of restitution is a modification of the order, and the modification is itself separately appealable under 211.261.1. Appeal of adjudication dismissed as untimely.

Editor's note: Although *D.J.B.* held a Juvenile has 40 days after final judgment to file an NOA, filing within 30 days is safer given Sec. 211.261.1 and the current Court's statement that *D.J.B.* was decided only by a "plurality."

In the Interest of D.E.W., 617 S.W.3d 514 (Mo. App. E.D. 2021):
Holding: Where Juvenile was charged with "minor in possession of alcohol," but trial court's Adjudication Order found him "guilty of stealing," this was a clerical error which could be corrected nunc pro tunc.
Discussion: To determine whether a nunc pro tunc is proper, it must be determined whether correcting the Adjudication Order changes the original judgment or merely changes the record. The record here shows that this was a clerical error. Juvenile was charged with multiple stealing offenses (including of alcohol). The court separately found the stealing of the vodka as a stealing offense. This shows that the designation of the "minor in possession" as a stealing offense was a clerical error, as the court could not have found him guilty of the same offense twice.

In the Interest of T.D.S. Jr., 2021 WL 4955508 (Mo. App. E.D. Oct. 26, 2021):
Holding: In issue of first impression, Eastern District holds that hearsay – here, the written report of Deputy Juvenile Officer which contained hearsay – was admissible at child certification hearing.
Discussion: Sec. 211.071.6 requires a written report be "prepared" which develops "all available information" relevant to the factors to be considered for certification. The report should be comprehensive, and the juvenile court should consider it in its entirety. This satisfies due process. The process is constitutional if a hearing is provided, the child is given the right to counsel and access to his/her records, and it results in a decision that sets forth the basis for the court's ruling in a way to permit meaningful appellate review. Missouri Supreme Court Rule 116.02 states that the rules of evidence only apply at hearings "involving adjudication." A certification hearing is not adjudicatory. Here, the report was prepared in accord with the statutory command, and Deputy Juvenile Officer who prepared it was available for cross-examination.

In the Interest of D.H., 2022 WL 1309976 (Mo. App. E.D. May 3, 2022):
Holding: Even though Juvenile Officer claimed trial court had made an individualized finding that remote appearance by Defendant-Juvenile at adjudication hearing was necessary to protect Juvenile from COVID, this violated Juvenile's Sixth Amendment right to confront witnesses, where the record did not contain any such individualized finding and there was no statutory authority supporting remote-only appearance.

In the Interest of I.J., 2022 WL 1547969 (Mo. App. E.D. May 17, 2022):
Holding: Even though trial court had Defendant-Juvenile participate at his adjudication hearing via Webex as a COVID precaution, this violated Juvenile's constitutional rights to face-to-face confrontation.

State v. Burton, 2022 WL 3363812 (Mo. App. E.D. Aug. 16, 2022):
Holding: Even though Sec. 211.061 provides that when a Juvenile is taken into custody, they "shall be taken immediately and directly before the juvenile court, *or delivered to the juvenile officer or person acting for him*," where Juvenile Officer was contacted after Defendant-Juvenile's arrest and Officer told police to take Juvenile to Sheriff's Office (where he was questioned in presence of Juvenile Officer), this did not violate 211.061 because only reasonable compliance with the statute is required (not literal compliance), and Juvenile was reasonably delivered to Juvenile Officer; thus, no error in not suppressing Juvenile's statements.

In the Interest of A.L.D., 649 S.W.3d 370 (Mo. App. E.D. Aug. 9, 2022):
Holding: Juvenile Court plainly erred in conducting Juvenile-Defendant's certification hearing via 2-way video without Juvenile's personal presence in courtroom due to general concerns about COVID, since this violated Juvenile's 6th Amendment right to face-to-face confrontation and 5th and 14th Amendment due process rights to be physically present at a critical stage. Judgment certifying Juvenile for prosecution as adult reversed and remanded for in-person certification hearing.

In the Interest of D.M.M., 2022 WL 17587307 (Mo. App. E.D. Dec. 13, 2022):
Holding: (1) Juvenile court did not err in failing at certification hearing to exclude under Sec. 490.065 Deputy Juvenile Officer's "expert opinion testimony," because Sec. 490.065.1 only applies in actions "adjudicated" in juvenile court under Chapter 211, and certification proceedings are not adjudications; and (2) court did not err in excluding certain "hearsay" testimony from DJO's report because hearsay rules do not strictly apply to non-adjudicatory certification proceedings, which allow "reliable" hearsay to be admitted.

In the Interest of K.M.F., 668 S.W.3d 302 (Mo. App. E.D. 2023):
Holding: It is an unresolved question in Missouri whether the *Strickland* standard or the "meaningful hearing" standard applies to ineffective assistance of counsel claims in juvenile proceedings, but even assuming more stringent *Strickland* standard applies, Defendant has not shown prejudice.

In the Interest of J.K.M., 665 S.W.3d 373 (Mo. App. E.D. 2023):
Holding: Even though the Juvenile Court found that Juvenile-Defendant had committed both the offense of violating a court order by removing a GPS device, and the offense of tampering with electronic monitoring equipment, Sec. 575.205 (which would be a Class D felony if committed by an adult), this did not violate Double Jeopardy because the violating-court-order offense was a "status offense," which is an infraction and in the nature of a civil proceeding which allows a court to take control of Juvenile for behavior injurious to Juvenile's welfare; there is less constitutional protection regarding a "status offense" than a "delinquency offense."

In the Interest of C.B.K. v. Juvenile Officer, 2023 WL 7498033 (Mo. App. E.D. Nov. 14, 2023):
Holding: (1) Even though 12-year-old Juvenile-Defendant "punched" Victim's vagina while she was in the shower and said "I hate you," the evidence was insufficient to prove third-degree child molestation, Sec. 566.069.1, because this did show that Defendant did the touching for the purpose of arousing or gratifying his sexual desire, as required by Sec. 566.010(6); and (2) this is true even though Juvenile-Defendant also had other sexually related images or texts on his phone, because those images and texts were not shown to be reasonably close in time to the offense.

In the Interest of B.J., 2023 WL 8042229 (Mo. App. E.D. Nov. 21, 2023):
Holding: Even though Juvenile-Defendant absconded from his mother's home, could not be found for a period of time, and warrants had to be issued for his arrest – which delayed final resolution of his pending juvenile case – the "escape rule" has never been applied to dismiss appeals in juvenile delinquency cases, so appellate court declines to apply it here.

In the Interest of P.J.T., Scott County Juvenile Officer v. P.J.T., 2021 WL 5355228 (Mo. App. S.D. Nov. 17, 2021):
Holding: Missouri law has not yet decided whether the standard to be applied to ineffective assistance of counsel claims involving juvenile proceedings is the "meaningful hearing" standard used in parental rights cases, or the *Strickland* standard used in criminal cases; however, defendant here has not satisfied either standard.

In the Interest of D.B., 616 S.W.3d 748 (Mo. App. W.D. 2021):
Holding: The juvenile certification statute, Sec. 211.071, is not unconstitutionally vague; certification proceedings conform to due process if they require a hearing, right to counsel, and issuance of an order by the juvenile court setting forth the basis for its decision in a sufficient manner to permit meaningful appellate review.

In the Interest of D.R.T. v. Juvenile Officer, 626 S.W.3d 311 (Mo. App. W.D. 2021):
Holding: Where Juvenile was certified in to adult court in 2019, that judgment became final 30 days after entry and a notice of appeal was required to be filed within 10 days thereafter; notice of appeal filed in 2020 after *D.E.G. v. Juvenile Officer of Jackson County*, 601 S.W.3d 212 (Mo. banc 2020)(holding statute authorized such appeals) was untimely, because D.E.G. did not change the law but "simply announced what had been true since at least 1994 when section 221.261" was enacted.

In the Interest of R.M. v. Juvenile Officer, 625 S.W.3d 779 (Mo. App. W.D. 2021):
Holding: Even though Juvenile called a Detention Worker -- who was trying to remove Juvenile from an area – foul names and said "I wanna f--- you in your big booty, bitch," the evidence was insufficient to convict of second-degree harassment, Sec. 565.091.1, because this did not prove the element of "purpose to cause emotional distress" to Detention Worker.
Discussion: A person commits second degree harassment, Sec. 565.091.1 if they "without good cause, engage[] in any act with the purpose to cause emotional distress to

another person." 565.002(7) defines "emotional distress" as "something markedly greater than the level of uneasiness, nervousness, unhappiness, or the like which are commonly experienced in day-to-day living." The emotional distress must be considerable or substantial to a reasonable person. Here, although Detention Worker testified she was distressed, the events here involve a 15-year-old Juvenile who was "acting out" in a way that showed disrespect for the Detention Worker but did not demonstrate purpose to cause emotional distress to her. This is not to say the words used here could never rise to the level of harassment under Sec. 565.091.1, but the circumstances here do not show the "purpose" element of the offense.

In the Interest of L.I.B. v. Juvenile Officer, 2022 WL 677876 (Mo. App. W.D. March 8, 2022):
Holding: Where trial court required Defendant-Juvenile to attend adjudication hearing (trial) remotely from jail while all other Witnesses were present in the courtroom, this violated Defendant's constitutional rights to Confrontation and Due Process because Defendants have right to confront witnesses face-to-face and to be personally present at all stages of trial.

In the Interest of J.N.W. v. Juvenile Officer, 2022 WL 453049 (Mo. App. W.D. Feb. 15, 2022):
Holding: (1) Even though the juvenile's court's order dismissing Defendant-Juvenile from juvenile court's jurisdiction and certifying him to the trial court was not denominated a "judgment," the order was immediately appealable, because Rule 74.01(a)'s judgment denomination requirement is not applicable to Sec. 211.071 certification proceedings; (2) the time for filing such an appeal is 30 days after the dismissal (as with other civil judgments), because the juvenile court retains control over its judgment for 30 days after entry, Rules 75.01 and 81.04(a); judgment becomes final after 30 days, and then there is 10 days to file the notice of appeal; (3) even though Juvenile filed his appeal before the 30 days expired, his premature notice became effective immediately after the judgment was final, Rule 81.05(b); (4) the standard of review for a certification appeal is whether the trial court abused its discretion in certifying, Sec. 211.071.1; (5) Juvenile can raise on direct appeal his claim of ineffective assistance of counsel at his certification hearing where the record is sufficient to raise it on direct appeal; (6) it remains an open question whether the *Strickland* standard applies to ineffective assistance claims, or the "meaningful hearing" standard applied in termination of parental rights cases; (7) since certification hearings are not adjudicatory, there is no authority for the general proposition that the rules of evidence apply to certification proceedings.

In the Interest of J.R.K. Juvenile Officer v. J.R.K., 2022 WL 774551 (Mo. App. W.D. March 15, 2022):
Holding: Sec. 544.665, which makes it a crime for defendants to fail to appear for a criminal proceeding, does not apply to juvenile proceedings.
Discussion: Practice and procedure for juvenile courts is government by Rules 110-129. Rule 110.02 provides that these rules "supersede all statutes and existing court rules inconsistent therewith." Rule 127.03 provides conditions for release of a juvenile and

provides the consequences that a court can impose for juvenile's failure to appear. Since Rule 127.03 already provides consequences for failure to appear, Sec. 544.665 (i.e., potential criminal charge) is inconsistent and inapplicable to juvenile proceedings. In dicta, appellate court also questions whether juveniles today can be charged under Sec. 575.200 for escape from custody for "crimes," since per Rule 127.01(b), juveniles are no longer arrested for "crimes." Adjudication finding that Juvenile violated Sec. 544.665 reversed.

State v. Todd, 2022 WL 1739238 (Mo. App. W.D. May 31, 2022):
Holding: Even though Juvenile was 17 years old at the time of his offense in 2019, trial court erred in dismissing his case in court of general jurisdiction and referring case to Juvenile Court, because the 2021 "raise the age" legislation for juveniles is not retroactive under *State v. R.J.G.*, 632 S.W.3d 359 (Mo. banc 2021).

In the Interest of S.R.W. v. Juvenile Officer, 2022 WL 2124964 (Mo. App. W.D. June 14, 2022):
Holding: Where Juvenile Officer never introduced into evidence the municipal ordinance Defendant-Juvenile was charged with violating, the evidence was insufficient to convict, because courts cannot take judicial notice of municipal ordinances. Judgment reversed and Juvenile discharged.
Discussion: Courts cannot take judicial notice of municipal ordinances. The ordinances must be introduced at trial in accord with Sec. 490.240, which provides various methods by which a copy of the ordinance can be introduced. Juvenile Officer failed to do that here. Thus, the ordinance violation remains unproven, and double jeopardy precludes a retrial.

In the Interest of A.S.B. v. Juvenile Officer, 2022 WL 2309954 (Mo. App. W.D. June 28, 2022):
Holding: Where trial court conducted Defendant-Juvenile's adjudication hearing by Webex as a general COVID precaution, this violated Juvenile's rights to confront witnesses under Sixth Amendment and Art. I, Sec. 18(a), Mo.Const., in the absence of any case-specific findings as to whether the unavailability of witnesses was necessary.

X.D.M. v. Juvenile Officer, 647 S.W.3d 311 (Mo. App. W.D. July 5, 2022):
Holding: Juvenile Court erred, over Juvenile-Defendant's objection, in conducting adjudication hearing by 2-way video based on generalized concerns over COVID, since this violated Juvenile's 6th Amendment right to face-to-face confrontation, without the court having made any specific findings establishing a need to conduct the proceedings virtually.

In the Interest of P.L.S. v. Juvenile Officer, 2022 WL 4074414 (Mo. App. W.D. Sept. 6, 2022):
Holding: Juvenile Court plainly erred in accepting Juvenile-Defendant's plea to Class A misdemeanor of violation of a court order, Sec. 211.431, because Juvenile's plea lacked a factual basis, since Juvenile could not have violated the statute because 211.431 explicitly applies only to persons "eighteen years of age or over" who fail to obey a court order.

Discussion: Juvenile could not have violated 211.431 because the statute, by its express terms, only applies to persons "eighteen years of age or over." Thus, the statute cannot serve as the basis for a finding of delinquency by a juvenile. Unlike other states, the Missouri statute giving the juvenile court exclusive authority over delinquency cases does not refer to acts which *would* constitute a violation of the law *if committed by a hypothetical adult*. Instead, 211.031.1(3) gives the juvenile court exclusive authority only when a juvenile "is alleged to have violated a state law or municipal ordinance." Thus, Juvenile here could only be found delinquent is he himself *actually violated* 211.431. It is not enough that his actions *would have* constituted a violation if committed by an adult. Plea vacated.

In the Interest of D.E.D. Juvenile Officer v. D.E.D., 2022 WL 4834974 (Mo. App. W.D. Oct. 4, 2022):
Holding: (1) Trial court plainly erred in certifying Juvenile-Defendant to circuit court without explaining its decision, because Sec. 211.071.1 requires "findings showing the reasons underlying the court's decision"; Rule 129.04d requires the Order state "the reasons for [the court's] decision", and 5th and 14th Amendment and Mo. Const. Art. I, Sec. 10 constitutional rights to a fair proceeding and due process require a decision set forth its basis sufficient to permit meaningful appellate review; (2) even though the Order certifying Juvenile was not denominated a "judgment," Rule 74.01(a)'s denomination requirement is not applicable to appeal of certification Orders, which are appealable.

In the Interest of K.D.D. v. Juvenile Officer, 2022 WL 16557409 (Mo. App. W.D. Nov. 1, 2022):
Holding: Juvenile court erred in requiring Defendant-Juvenile attend his certification hearing via two-way video, since this violated 14th Amendment due process right to be personally present at a critical stage, 6th Amendment right to confrontation, and Sec. 211.071.7(3) which requires certification hearings be held "in the presence of the child."

In the Interest of P.D.E. v. Juvenile Officer, 2022 WL 17100535 (Mo. App. W.D. Nov. 22, 2022):
Holding: Where (1) Juvenile Court held a disposition hearing in March, ordered that Defendant-Juvenile be made a ward of the court, and that Juvenile pay restitution "in an amount to be determined," but (2) Court did not determine the amount owed until October 2021, a Notice of Appeal filed in October 2021 of the disposition order is untimely because it had to be filed no later than 40 days after the March disposition order, which was the "final" judgment appealed from; Sec. 211.261.1 made that judgment "final" 30 days after entry, and Rule 81.04 requires Notice of Appeal be filed within 10 days of final judgment. But case transferred to Supreme Court due to general interest and importance of time for filing Notice of Appeal.

In the Interest of B.S. v. Juvenile Officer, 2022 WL 17814035 (Mo. App. W.D. Dec. 20, 2022):
Holding: Sec. 211.071.1 (as in effect at the time of the charged offense) allows certification of any person who was between ages 12 and 17 *at the time of their underlying offense*; court rejects argument that Defendant (who was 19 at time petition

charging him with sex offense was filed) could not be certified because he was not between 12 and 17 *at the time the petition was filed*.

In the Interest of E.T.S., Juvenile Officer v. E.T.S., 2023 WL 139280 (Mo. App. W.D. Jan. 10, 2023):
Holding: Juvenile Court did not err in allowing Deputy Juvenile Officer to give expert testimony at certification hearing, because the expert witness statute, Sec. 490.065, applies only to actions "adjudicated" in juvenile court under Chapter 211, and a certification hearing is not an "adjudication" involving guilt or innocence.

In re the Matter of K.L.M. v. Juvenile Officer, 2023 WL 1128221 (Mo. App. W.D. Jan. 31, 2023):
Holding: Where (1) the only issue raised on appeal was whether Juvenile Court erred in failing to grant continuance of dispositional hearing (where Juvenile was committed to juvenile facility), but (2) Case.net showed Juvenile had subsequently been released on probation but then held on a new allegation, the appeal is moot because there is no relief the appellate court could grant in regard to the continuance motion, since Juvenile was no longer being held for anything that happened at the dispositional hearing.

Henry v. State, 2023 WL 1975095 (Mo. App. W.D. Feb. 14, 2023):
Holding: Where (1) Juvenile-Movant committed first-degree murder in 2015 when he was 14-years-old and was so charged; (2) legislature enacted new scheme for first degree murder for Juveniles in 2016 in Secs. 565.020.2 and 565.033; and (3) Juvenile pleaded guilty in 2019 under 2016 statute and was sentenced accordingly, Juvenile's sentence was not unlawful so as to require Rule 24.035 relief, because the 2016 juvenile murder sentence scheme is retroactive to juvenile criminal offenses committed prior to its effective date.
Discussion: At the time Juvenile committed his offense, Missouri's mandatory life-without-parole provision for Juveniles convicted of first degree murder had effectively been declared unconstitutional by *Miller v. Alabama*, 567 U.S. 460 (2012). To remedy this, the legislature enacted Secs. 565.020.2 and 565.033, which require a judge to consider 10 factors in determining the punishment for a Juvenile convicted of first degree murder. The legislature intended this scheme to apply to offenses committed before its enactment. Thus, when Movant pleaded guilty pursuant to this scheme in 2019, his sentence was lawful. He is not entitled to withdraw his plea under Rule 24.035.

In the Interest of A.B.W., Juvenile Officer v. A.B.W., 2023 WL 2278602 (Mo. App. W.D. Feb. 28, 2023):
Holding: Where (1) the only issue raised on appeal was the Juvenile Court's disposition (sentence) of Juvenile-Defendant, and (2) Juvenile had been released from custody since the appeal was filed, there is no relief the appellate court can grant, so case is dismissed as moot.
Discussion: Here, Juvenile has already received the outcome Juvenile requested at trial and is requesting on appeal, i.e., a non-custodial outcome. A case is moot if an appellate judgment would have no practical effect. One exception to mootness is when a Juvenile is challenging their *adjudication* (conviction) on appeal, because an adjudication may

have collateral consequences. But, here, Juvenile isn't challenging their adjudication, only their disposition. Thus, collateral consequence concerns aren't present. Case dismissed as moot.

In re the Matter of J.R.K. v. Juvenile Officer, 2023 WL 2659091 (Mo. App. W.D. March 28, 2023):

Holding: Where (1) Juvenile Court adjudicated Juvenile-Defendant for tampering, placed him probation (without suspending any commitment order) and ordered he pay restitution, and (2) after Juvenile committed a new offense, Juvenile Court revoked his probation and ordered him committed to Juvenile Academy, appellate court rejects Juvenile's argument that because his original disposition did not include a suspended execution of a commitment order, he was never actually placed on probation under Sec. 211.181.2 and 3, so he could not later be revoked and committed.

Discussion: Juvenile argues the only disposition option under Sec. 211.181.2 and .3 that allows for probation requires a court to suspend execution of a commitment order. Juvenile argues that because the court merely put him on "probation" in the custody of his parents, there was never an authorized probation order, so Juvenile could not later be found to have violated probation and be revoked (committed). However, Sec. 211.181.2 and .3 allow a court to place a Juvenile "under supervision in his or her home" under "such conditions as the court may require." This is the exact disposition the court originally ordered. While the court could have suspended an execution of a commitment order in placing Juvenile on probation, that wasn't the only authorized disposition.

In the Interest of C.R.B. v. Juvenile Officer, 673 S.W.3d 135 (Mo. App. W.D. July 18, 2023):

Holding: (1) A claim of ineffective assistance of counsel in a juvenile case can be raised on direct appeal, even though it was not raised in the trial court; (2) such claims are "preserved" and are not reviewed under the "plain error" standard; but (3) if the claim cannot be sufficiently determined from the record, the case may need to be remanded to develop the factual basis for review of the claim.

In re: the Matter of D.H.C. v. Juvenile Officer, 674 S.W.3d 804 (Mo. App. W.D. Sept. 5, 2023):

Holding: Where (1) in 2020 court assumed jurisdiction over Defendant-Juvenile based on its determination he had committed a federal firearms offense, 18 U.S.C. Sec. 922, and placed Juvenile on probation; and (2) in 2022 the court granted Juvenile Officer's motion to modify the prior dispositional order based on Juvenile committing new state law offenses and placed Juvenile in DYS, the 2022 dispositional order regarding sentence (which is based, in part, on the 2020 dispositional order) must be reversed, because the court lacked subject-matter jurisdiction in 2020 to adjudicate a federal offense.

Discussion: As an initial matter, Juvenile could have appealed the 2020 dispositional order but did not. Collateral attacks on earlier judgments are generally prohibited, in the interest of finality. But an earlier judgment can be attacked if it is void because a court lacked subject matter jurisdiction. Here, the 2020 court lacked subject matter jurisdiction to try a federal crime. Per 18 U.S.C. Sec. 3231, federal courts have exclusive original jurisdiction over federal crimes. Sec. 3231 preempts state jurisdiction to determine if a

person has violated federal law. Further, Missouri's juvenile statutes apply only to a child "who is alleged to have violated a state law or municipal ordinance", Sec. 211.021.1(3). Motions to modify can be used to adjudicate new charges against a juvenile. Thus, the Juvenile Officer, in 2022, could file new state charges against Juvenile via a motion to modify. Although the 2022 charges should have been adjudicated in an independent proceeding, Juvenile here wasn't prejudiced by not doing so, since substantially similar procedures were used. But the dispositional order is different. The court's commitment to DYS was based not only on adjudication of the new state offenses but also the court's 2020 decision that Juvenile committed a federal offense. Consideration of the federal offense may have tipped the scales toward commitment to DYS. Dispositional order reversed and remanded for resentencing.

In the Interest of A.L.H. v. Juvenile Officer, 2023 WL 639440 (Mo. App. W.D. Oct. 3, 2023):
Holding: The trial court plainly erred in only asking Defendant-Juvenile if he "understood" he was admitting to various delinquency offenses that would constitute stealing, because due process and Rule 128.02(d)(3) require a record, finding, and factual basis that Juvenile knowingly and voluntarily admitted to the charged conduct.
Discussion: Juveniles are entitled to the same minimum due process rights as are criminal defendants during guilty pleas. Rule 128.02 requires the court make a finding whether the Juvenile's admissions are freely, voluntarily and knowingly made, and whether a factual basis exists for them. Here, the court made no inquiry about any of this. The court only confirmed that Juvenile was admitting the allegations. Without a finding of voluntary admission, evidence, or factual basis, Juvenile was deprived of his right against self-incrimination and due process. Judgment reversed.

In the Interest of A.J.L.G., 2023 WL 8042631 (Mo. Ap. W.D. Nov. 21, 2023):
Juvenile court plainly erred in finding Juvenile-Defendant to be delinquent without making any record or findings that Juvenile knowingly and voluntarily admitted the alleged conduct, or that a factual basis existed for the charge.
Facts: Juvenile was charged with unlawful use of a weapon. At Juvenile's brief disposition hearing, defense counsel told the court that Juvenile was admitting the allegations in the petition. The court only asked Juvenile if he was admitting the allegations, and Juvenile said "Yes." The judge committed Juvenile to DYS.
Holding: Due process requires similar protections and fair treatment be applied to juvenile adjudications as to adult guilty pleas. Rule 124.06 requires a juvenile court to determine if the allegations in a petition are true. Rule 128.02(d)(3) requires the court make a finding whether juvenile's admissions are knowingly and voluntarily made, and whether a factual basis exists. Here, the court didn't inquire whether Juvenile's admissions were knowing and voluntary, and whether there was a factual basis. The failure to comply with Rule 128 resulted in manifest injustice. Judgment reversed and remanded.

*** Jones v. Mississippi, ___ U.S. ___, 141 S.Ct. 1307 (U.S. April 22, 2021):**
Holding: Sentencing court does not have to find that a juvenile is permanently incorrigible to sentence them to life in prison without parole.

State v. Conner, 2022 WL 2185005 (N.C. 2022):
Holding: Where redeemable Juvenile is convicted of murder and other counts, trial court is not required to run sentences concurrently, but Juvenile must be given opportunity to seek early release after 40 years to avoid de facto life without parole sentence in violation of 8th Amendment.

State v. Haag, 2021 WL 4314112 (Wash. 2021):
Holding: Trial court, in resentencing Juvenile under *Miller v. Alabama*, improperly emphasized retribution over mitigation, when it discussed the gravity of the wrong committed and compared the Defendant with the Victim, rather than focusing on Defendant's youth.

Bracewell v. State, 2019 WL 1104801 (Ala. Crim. App. 2019):
Holding: In proceeding to determine whether Juvenile should be re-sentenced to life without parole, trial court violated 8th Amendment when it considered Juvenile's age of 17 as an aggravating fact instead of mitigating one, and failed to adequately consider other hallmarks of youth.

People v. Kruger, 2021 WL 3524153 (Ill. App. 2021):
Holding: Defendant, who was 21 years old at time he committed murder, was not entitled to bring challenge that his life sentence violated 8th Amendment under *Miller v. Alabama*, because such claims in Illinois are limited to people under the age of 21; Illinois recognizes *Miller* claims for people ages 18 to 20, even though *Miller* itself drew line at below 18.

Mental Disease or Defect – Competency – Chapter 552

State of Mo., Dep't of Mental Health v. Rosseau, 617 S.W.3d 862 (Mo. App. W.D. 2021):
Holding: (1) Even though State experts testified Petitioner should not be conditionally released, where State experts had only seen Petitioner for a 25-minute evaluation and reviewed records, and Petitioner's multiple experts had been involved in treating or evaluating Petitioner for many years and had conducted more thorough evaluations, trial court did not err in finding that Petitioner was not likely to be dangerous if released; and (2) even though trial court's Findings relied on experts' opinions, trial court did not improperly defer to experts in granting release where trial court's Findings applied the statutory factors, Sec. 552.040.12, for granting release.
Discussion: (1) DMH contends Petitioner failed to present clear and convincing evidence he was not likely to be dangerous if released, Sec. 552.020.12. However, the trial court's Findings weighed the relatively non-extensive evaluations of the State's experts, with the

detailed, thorough evaluations of Petitioner's experts. The court credited Petitioner's experts and gave them greater weight, which the appellate court must defer to. DMH claims the trial court only considered that Petitioner was not "violent" or "aggressive" but "dangerousness" is more broad. While "dangerousness" is more broad, the court also considered other factors about "dangerousness," including that Petitioner was remorseful for his crime for which he was found NGRI; that he had no reported unlawful conduct for a decade; that he participated in treatment; and that he is not a risk to himself or others. This fills the gaps between "violence" and "danger." DMH also contends that because Petitioner escaped at one time and fled to Israel, that this should preclude release. But this was over a decade ago, and Petitioner's mental condition and behavior has changed since then. (2) DMH contends the trial court improperly deferred to experts. The determination of whether the evidence satisfies the conditions for release is made by the courts, not treating physicians. The trial court's Findings discussed the Petitioner's experts' opinions, and that they all testified Petitioner met the requirements for release. However, the Findings also discussed and applied the factors for granting conditional release set forth in Sec. 552.040.12. This shows the court did not defer solely to the experts. Judgment granting conditional release affirmed.

In the Matter of L.T., 673 S.W.3d 853 (Mo. App. W.D. Aug. 15, 2023):
Holding: Even though Mental Hospital's petition to extend the involuntary civil detention and treatment of Defendant for 90 days was not verified by the psychiatrist who treated Defendant, as required by Sec. 632.330.2(9), this verification requirement did not deprive the trial court of authority to hear the case, because the use of "shall" be verified in the statute is directory and not mandatory since no penalty is attached to failure to verify, and in any event, any failure to verify was remedied when Defendant's treating psychiatrist actually testified at the hearing as to why he was unavailable to verify the petition, and his in-court testimony was essentially an amendment to the petition verifying it.

U.S. v. Reeves, 2023 WL 5736944 (W.D. N.C. 2023):
Holding: Pre-hospitalization detention of incompetent Defendant for nine months violated 5th Amendment due process, where Defendant's incarceration was nearly twice as long as his likely sentence would end up being, if convicted.

Order of Protection

L.M.M. v. J.L.G., 619 S.W.3d 593 (Mo. App. E.D. 2021):
Even though Petitioner-Victim feared that Defendant would contact her employer and try to get her fired and also attack her on social media, this was not sufficient evidence to support a full Order of Protection, since this didn't meet the definition of stalking, which requires danger of physical harm; nor could Victim obtain an Order as "harassment" since "harassment" only qualifies for an Order if Victim and Defendant are in a domestic relationship; here Defendant was only the Sister of Victim's boyfriend.

Facts: Victim sought Order of Protection against Defendant, the Sister of her boyfriend. Defendant texted Victim as often as 75 times a day, called Victim's employer and made false claims about Victim, and made fun of Victim's appearance on social media. The trial court granted Order of Protection on grounds of stalking, and found Victim had fear of physical harm if Defendant came to her place of employment.
Holding: The evidence was insufficient to prove Defendant repeatedly engaged in an unwanted course of conduct that caused Victim fear of physical harm. An Order required proof of stalking, which occurs when a person engages in an unwanted course of conduct that causes "alarm" to another person, Sec. 455.010(14). "Alarm" means "fear of danger of physical harm." Alarm has both a subjective and objective component, but here neither was proved. Victim did not assert Defendant ever made actual physical threats against Victim. Although Victim said Defendant came to her work, Victim didn't say this caused her to fear physical harm. Their history of angry text exchanges without threats of physical violence is insufficient to prove Victim had reasonable fear of physical harm. Victim's fear that Defendant's actions might cause Victim to lose her job doesn't qualify as physical harm. Moreover, criticizing someone on social media is not a threat of physical harm. Nor could Victim obtain an Order on grounds of harassment. Harassment is included only in the portion of the statute involving domestic violence, and Victim doesn't qualify as a "domestic violence" Victim because Defendant is not a "family or household member" of Victim, but only the Sister of Victim's boyfriend. To the extent *P.D.J. v. S.S.*, 535 S.W.3d 821 (Mo. App. E.D. 217) conflicts with today's holding, it is "better practice" to follow Eastern District's "most recent published caselaw."

E.H. v. A.L., 621 S.W.3d 684 (Mo. App. E.D. 2021):
Holding: Where (a) the parties were proceeding pro se in an Order of Protection case, and (b) the trial court asked questions of the Complainant which seemed to help her make her case but didn't ask anything of Defendant (who asked only one question on cross-exam of Complainant), and then said, "Anything else on behalf of Defendant?," the trial court violated Defendant's procedural due process rights because he was not given an opportunity to be heard in a meaningful manner; and (2) on remand, trial court will need to consider whether it still has authority to conduct a new hearing since an Order of Protection may now be moot under the circumstances, and since Sec. 455.040.1 specifies a time limit for considering Orders, the court must consider whether it would be consistent with the intent of the statute to proceed further on the original petition at this late date.
Discussion: Although Defendant could have been more forceful about demanding an opportunity to be heard, the record shows the trial court didn't give him the opportunity to present evidence, and there was no waiver by Defendant of this. The court failed to examine the witnesses in an equitable manner because the court did not question Defendant about the allegations in any respect. In short, Defendant was not given an opportunity to refute Complainant's contentions or tell his "side" of the story.

S.A.B. v. J.L.R., 675 S.W.3d 245 (Mo. App. E.D. Sept. 19, 2023):
Holding: (1) Even though the new five-year length of Protection Orders did not take effect until August 28, 2021, where the trial court applied this to conduct occurring both before and after that date, this did not violate Art. I, Sec. 13 Mo.Const.'s ban on retrospective laws, because the change in the length of Protection Orders was merely "procedural," not "substantive," and did not impair any vested rights of Defendant or impose any new duties on him; (2) even though threatening texts were received in Missouri at 11:30 P.M. Central Time on August 27, where Defendant sent them from New York in the Eastern Time Zone at 12:30 A.M. on August 28, the August 28 statute applies to Defendant because a statute comes into effect in a foreign jurisdiction when the foreign jurisdiction (New York) reaches the stated date, even if the host jurisdiction (Missouri) has not yet reached that date because of a time difference.

G.E.G. v. Gauert, 620 S.W.3d 676 (Mo. App. W.D. 2021):
Holding: Even though Defendant (1) shot Neighbor's dog when dog came on Defendant's property and threatened Defendant and (2) took a photo of Neighbor when she was driving her car, evidence was not sufficient to support Order of Protection for Neighbor because these events would not cause a reasonable person to fear a danger of physical harm from Defendant.
Discussion: Since Neighbor and Defendant are not related and not members of the same household, the only basis for an Order of Protection is "stalking." Sec. 455.010 requires that to prove stalking, the Petitioner-Neighbor must show (1) that Defendant engaged in a pattern of conduct of at least two or more acts; (2) which served no legitimate purpose; (3) causing petitioner to fear danger of physical harm; and (4) that petitioner's fear was reasonable. Neither of the two acts here would cause a reasonable person to fear physical harm from Defendant. Regarding the dog shooting, although the event was "extremely upsetting," there was no evidence it was directed at Neighbor; indeed, Defendant and neighbor did not even know each other before the incident. Regarding the photo incident, Defendant did not make any threats to Neighbor. Even though Neighbor thought the incident was "not normal" and caused her to fear for her life, a reasonable person would not fear physical harm from it.

L.E.C. v. K.R.C., 2023 WL 4065504 (Mo. App. E.D. June 20, 2023):
Holding: Where (1) in 2017 Petitioner-Wife filed and received *ex parte* order of protection at time she filed for divorce; (2) trial court did not hold a hearing in the case until 2021 when the divorce proceeding was concluded; (3) the evidence at the hearing concerned events which happened in 2017; and (4) no events happened after 2017, the four-plus year delay in hearing the case rendered the facts stale, because a trier of fact could not reasonably decide a full order of protection was warranted in 2021 based on old evidence, even though Wife claimed she was "still afraid" of Defendant-Husband; Sec. 455.020 generally requires a hearing within 15 days absent good cause, and due process requires the hearing withing a "meaningful time." Grant of full order of protection vacated, but court notes Wife may petition for new order if she believes "one is still needed" based on more recent events.

Woodward v. Conde, 2022 WL 1420855 (Mo. App. S.D. May 5, 2022):
Holding: Sec. 455.516.1 allows a court to renew a full order of child protection without any finding that expiration of the original order would place the child in imminent present danger of abuse.

L.M.D. v. Gauert, 622 S.W.3d 712 (Mo. App. W.D. 2021):
Holding: Even though Defendant (1) called Neighbor vulgar names when Neighbor was picking up her mail in 2011, (2) cursed at Neighbor regarding building a fence in 2011, (3) refused to shake Neighbor's hand when Neighbor approached Defendant at a store in 2012-13 and yelled at Neighbor to stay away from him, (4) drove a truck toward Neighbor and chased Neighbor off his property when Neighbor rode an ATV on Defendant's property, and (5) shot a dog that came onto his property and threatened him, evidence was not sufficient to support Order of Protection for Neighbor, because some of the events served a legitimate purpose (such as chasing Neighbor off Defendant's property); other events failed to show fear of physical danger either subjectively or objectively; and other events were initiated by Neighbor (such as the store incident), so cannot form the basis for an Order of Protection.
Discussion: Since Neighbor and Defendant are not related and not members of the same household, the only basis for an Order of Protection is "stalking." Sec. 455.010 requires that to prove stalking, the Petitioner-Neighbor must show (1) that Defendant engaged in a pattern of conduct of at least two or more acts; (2) which served no legitimate purpose; (3) causing petitioner to fear danger of physical harm; and (4) that petitioner's fear was reasonable. None of the incidents here meet this test. Even though Defendant chased Neighbor off his property, that served a legitimate purpose. A legitimate purpose is one that is allowed by law. Neighbor was unlawfully on Defendant's property riding an ATV. Defendant was within his right to use reasonable force to chase Neighbor away; Defendant stopped chasing Neighbor at the property line. Regarding other incidents (such as the dog shooting), Neighbor did not testify she was subjectively afraid during them. Even though Neighbor felt afraid during one of the verbal incidents, Neighbor did not take any precautionary measures (such as leaving the incident) and remained in the situation for several minutes; the bare assertion that she felt threatened is insufficient. Regarding the store incident, Neighbor initiated that by approaching Defendant, so that conduct cannot qualify as "unwanted" contact or communication. Finally, even though Defendant called Neighbor vulgar names, the fact that his occurred 10 years ago (without Neighbor doing anything about it) indicates, without more, that this did not cause Neighbor to fear physical harm.

R.J.D. v. Gauert, 622 S.W.3d 703 (Mo. App. W.D. 2021):
Holding: Even though Defendant (1) called Neighbor's Wife vulgar names in 2011, (2) argued with Neighbor over an easement in 2011, (3) drove a truck toward Neighbor and chased Neighbor off Defendant's property when Neighbor rode an ATV onto Defendant's property, (4) called Neighbor a "coward" and said he needed to learn how to defend himself and his wife, and (5) shot a dog that came onto Defendant's property and threatened him, evidence was not sufficient to support Order of Protection for Neighbor, because some of the acts served a legitimate purpose (such as chasing Neighbor off

Defendant's property); Neighbor initiated one of the contacts with Defendant, so that conduct cannot qualify as "unwanted" contact or communication; and Neighbor did not subjectively fear physical harm during other incidents.
Discussion: Since Neighbor and Defendant are not related and not members of the same household, the only basis for an Order of Protection is "stalking." Sec. 455.010 requires that to prove stalking, the Petitioner-Neighbor must show (1) that Defendant engaged in a pattern of conduct of at least two or more acts; (2) which served no legitimate purpose; (3) causing petitioner to fear danger of physical harm; and (4) that petitioner's fear was reasonable. None of the incidents here meet this test. Even though Defendant chased Neighbor off his property, that served a legitimate purpose. A legitimate purpose is one that is allowed by law. Neighbor was unlawfully on Defendant's property riding an ATV. Defendant was within his right to use reasonable force to eject Neighbor from his property. Neighbor initiated one of the incidents by approaching Defendant. This cannot qualify as "unwanted" communication or contact. Finally, Neighbor did not testify that he subjectively feared danger of physical harm in other incidents. Neighbor felt safe as long as he remained on his own property and only felt he would be harmed if he crossed onto Defendant's property.

R.K. v. Kelly, 630 S.W.3d 904 (Mo. App. W.D. 2021):
Holding: Even though Defendant, against whom Order of Protection was entered, had let his dogs defecate on public easements owned by Petitioner and her Husband, and even though Defendant had gotten into verbal altercations with Petitioner and her Husband, called them obscenities, and one altercation had involved Husband hitting Defendant, evidence was insufficient to support Order of Protection, because although Petitioner testified she found Defendant's conduct irritating and unpleasant, she did not testify she subjectively feared physical harm (which is necessary under Sec. 455.010(14)(a); and even though there was one physical altercation between Defendant and Husband, this single event was insufficient to prove stalking because of the absence of a repeated acts over time (which is necessary under Sec. 455.010(14)(b)). Order of Protection reversed.

D.R.F. III v. D.L.S., 2022 WL 453133 (Mo. App. E.D. Feb. 15, 2022):
Holding: Where Protective Order had expired (and was not renewed) before appellate case was decided, appellate court dismisses case as moot; none of the exceptions to mootness apply; lapsed protective orders are not of adequate public interest to require appellate review.

Presence at Trial

In the Interest of J.A.T. v. Jackson Cnty. Juvenile Office, 637 S.W.3d 1 (Mo. banc Jan. 11, 2022):

Where -- as a COVID precaution -- trial court required Defendant-Juvenile to participate in his trial from the jail via two-way video link while all other witnesses and parties were in the courtroom, this violated Defendant's Sixth and Fourteenth Amendment rights to due process and confrontation to be personally present at trial to confront witnesses.

Facts: Trial court, over Defendant's object, required Defendant to view his trial from jail via a two-way video link. The trial court believed the Supreme Court's COVID directives authorized this.

Discussion: Contrary to the trial court's belief, this Court's COVID directives did not authorize the trial court to violate Defendant's constitutional or statutory rights. One of the most basic rights guaranteed by the Confrontation Clause is the right to be present in the courtroom at every stage of trial. Due process also guarantees the right to be present. Rule 128.01 also provides that juveniles shall have the right to be present. Generalized concerns about COVID do not override Defendant's due process right to be physically present at trial where his guilt or innocence will be determined. Reversed and remanded for new trial.

In the Interest of C.I.G. v. M.D.G., 616 S.W.3d 758 (Mo. App. S.D. 2021):

Holding: Even though incarcerated Defendant-Father was not allowed to appear personally in court in this civil case due to COVID precautions, trial court did not err in denying a continuance and Defendant was not denied "meaningful access to the courts" because (1) there is no constitutional right to appear in person in a civil case; and (2) trial court took measures to allow Defendant to appear by Polycom; engage in private communication with his counsel during the trial; and take notes and participate in the trial.

State v. Howell, 626 S.W.3d 758 (Mo. App. W.D. 2021):

Holding: Even though trial court conducted portions of voir dire regarding statutory disqualifications and hardship excuses without the presence of counsel, court did not err in doing this since no statute or court rule was violated in doing so, and Defendant failed to properly challenge the procedure under Sec. 494.465.3, which requires a party to seek relief before the petit jury is sworn.

Discussion: Defendant seeks new trial on grounds the trial court improperly excluded counsel from portions of voir dire. Defendant cites no legal authority that guarantees him a right to have counsel observe the process of statutory disqualifications and hardship excusals that generally take place before voir dire. These matters are regularly conducted through written correspondence with the trial court, without the participation of counsel – although, here, the trial court apparently orally questioned some jurors about this without the presence of counsel. No statute or court rule was violated by the court's procedure. In any event, Sec. 494.465.3 requires that if a party wants to raise a claim that jury was not selected in conformity with statutory procedures, it must seek a stay or appropriate relief before the petit jury is sworn, or within 14 days after the party could have discovered the grounds supporting the motion. Defendant didn't do either.

In the Interest of L.I.B. v. Juvenile Officer, 2022 WL 677876 (Mo. App. W.D. March 8, 2022):
Holding: Where trial court required Defendant-Juvenile to attend adjudication hearing (trial) remotely from jail while all other Witnesses were present in the courtroom, this violated Defendant's constitutional rights to Confrontation and Due Process because Defendants have right to confront witnesses face-to-face and to be personally present at all stages of trial.

In the Interest of K.D.D. v. Juvenile Officer, 2022 WL 16557409 (Mo. App. W.D. Nov. 1, 2022):
Holding: Juvenile court erred in requiring Defendant-Juvenile attend his certification hearing via two-way video, since this violated 14th Amendment due process right to be personally present at a critical stage, 6th Amendment right to confrontation, and Sec. 211.071.7(3) which requires certification hearings be held "in the presence of the child."

Micheaux v. State, 2023 WL 5536170 (Mo. App. W.D. Aug. 29, 2023):
Holding: (1) Even though Defendants have a constitutional Confrontation and Due Process right to be personally present at their guilty pleas, and Sec. 546.030 and Rule 31.03(a) require this, where the totality of the record indicated Defendant pleaded guilty via WebEx in order to accept a favorable plea offer, Defendant waived his right to personal presence and wasn't entitled to set aside his plea under Rule 24.035; and (2) even though the plea court did not make an express record that Defendant was voluntarily waiving his personal presence, appellate court need not decide if this is a jurisdictional defect that could result in 24.035 relief, because the totality of the record indicated Defendant waived his presence; however, the "better practice" would be for plea courts to make a record at the plea that reflects a voluntary waiver of personal presence.

Champ v. State, 2021 WL 536261 (Ga. 2021):
Holding: Where Defendant raises a right to be present claim for first time on appeal, case should be remanded to trial court to make record and factual findings on what happened at trial, unless claim can easily be rejected based on existing record.

State v. Byers, 2022 WL 2128507 (W.Va. 2022):
Holding: Defendant's right to be present at sentencing was violated when court required Defendant to appear by videoconferencing.

Privileges

State ex rel. Garrabrant v. Holden, 633 S.W.3d 356 (Mo. banc Nov. 9, 2021):
Holding: Where (1) Defendant met with her attorney's investigators and tape recorded her meeting with them, and then (2) Defendant gave the tape recording to a third party, who gave it to police, Defendant waived attorney-client privilege by giving the tape to the third party.

Discussion: Even though Defendant met with her attorney's investigators, they were agents of the attorney so this did not waive the attorney-client privilege. And, even though Defendant recorded her meeting with them, that did not defeat the privilege either because the digital recording device was not itself a third party. However, when Defendant gave the tape recording to a third party (who then gave it to police), Defendant waived the privilege. Inadvertent disclosure does not necessarily waive privilege, but here, there was no indication that Defendant inadvertently gave the recording to the third party. Writ mandamus granted, allowing recording to be used at trial.

State ex rel. Lutman v. Baker, 635 S.W.3d 548 (Mo. banc 2021):
Holding: (1) Even though (a) Defendant in civil car accident case had told police he blacked out or had a heart attack during the incident, and (b) Defendant wrote Plaintiff's family an apology letter saying he was an alcoholic and had "lost control of his life," this did not expressly or impliedly waive his doctor-patient privilege, Sec. 491.060(5) and Defendant did not place his medical condition at issue in the lawsuit, so Plaintiff's subpoena to obtain Defendant's medical records should have been quashed; an implied waiver requires a "clear, unequivocal purpose" to waive privilege, and Lutman's statements were not an indication of a desire to share confidential medical records; and (2) Even though the medical records here had already been (somewhat inadvertently) disclosed to Plaintiff, the case is not moot in prohibition proceeding because the harm to Defendant is ongoing, and appellate court is still able to effect at least a partial remedy, such as requiring the records be returned or destroyed.

State ex rel. Barks v. Pelikan, 2002 WL 605737 (Mo. banc March 1, 2022):
Holding: Even though (1) Plaintiff's petition alleged Defendant was intoxicated when she crashed a golf cart in which Plaintiff was a passenger, and (2) Defendant pleaded affirmative defenses of comparative fault and assumption of risk (because Plaintiff knew Defendant was intoxicated), this did not waive Defendant's doctor-patient privilege, Sec. 491.050(5), in the confidentiality of her medical records regarding the incident.
Discussion: A patient can waive privilege by express or implied waiver if they *voluntarily* place their medical condition at issue. The most common waiver occurs when plaintiffs file a petition alleging they suffered physical or mental injuries. Defendant has not sought any damages for injury, and her claims of comparative fault and assumption of risk are purely defensive. Affirmative defenses must be affirmatively pleaded or they are waived. Thus, Defendant's assertion of these defenses is "involuntary" because she would have waived them if she didn't affirmatively plead them. It would be illogical and unacceptable to require Defendant to choose between waiving her doctor-patient privilege or forfeiting her affirmative defenses. Although Defendant's medical records may establish whether Defendant was intoxicated, the very nature of an evidentiary privilege is to remove evidence that is otherwise relevant and discoverable from the scope of discovery. Privileges always are invoked at the expense of "truth-seeking" and the equities of supporting the privilege are "not great" in all cases, but the privilege is set by statute. Writ of prohibition granted to bar discovery of Defendant's medical records.

State v. Craft, 669 S.W.3d 719 (Mo. App. E.D. 2023):
Holding: Even though Prosecutor's remarks during voir dire that "under the law, the defendant has a right not to testify" were an improper direct reference to Defendant's 5th Amendment right not to testify, reversal is not required because Prosecutor's comments were in the context of correcting a juror's misunderstanding of the law, correctly "restated" the law, and the court made efforts to cure the situation; but if the trial court had not made efforts to cure, reversal may have been required.

State ex rel. Jones v. Prokes, 637 S.W.3d 110 (Mo. App. W.D. 2021):
Where Defendant who was on probation submitted false AA and NA attendance sheets to his probation officer, these sheets were admissible in a trial against him for forgery and tampering with a judicial officer; they were not privileged from disclosure under Secs. 549.500 or 559.125, which make certain probation information privileged and non-admissible, because the documents themselves constituted the criminal act.
Facts: Defendant, who was on probation for DWI and who was required to attend substance abuse treatment as a condition of probation, submitted false AA and NA attendance sheets to his probation officer. The State charged him with forgery, Sec. 570.090, and tampering with a judicial officer, Sec. 575.095. Defendant contended the sheets weren't admissible under Secs. 549.500 and 559.125. The trial court excluded them from trial. The State sought writ of mandamus.
Holding: Sec. 549.500 provides that all documents obtained by employees of probation and prole shall be privileged and shall not be disclosed, except that the board may in its discretion allow "persons having a proper interest" in them to inspect them. Sec. 559.125.2 provides that information obtained by a probation officer shall be privileged and not receivable in court, and that the information shall not be disclosed except to the judge, but that the board may in its discretion allow a "person having a proper interest" to inspect them. A person commits the crime of tampering with a judicial office if they use "deception" to influence their official duties. "Judicial officer" includes "probation officer." Sec. 575.095.2. Forgery occurs if a person transfers a false document to another with the purpose to defraud. To hold that Secs. 549.500 and 559.125 create an absolute privilege surrounding all communications between a probation officer and a defendant would immunize from prosecution many acts which the legislature intended to prohibit in the forgery and tampering statutes. It would be absurd and unreasonable to interpret the privilege statutes to give a defendant license to attempt to deceive, harass, threaten or bribe his probation officer with impunity. This is the unusual case where Defendant's interactions with his probation officer constitute *the crime itself.* Missouri courts have recognized in other contexts that statutory privileges cannot be invoked to shield criminal activity from prosecution. Writ of mandamus granted.

*** U.S. v. Zubaydah, ___ U.S. ___, 142 S.Ct. 959 (U.S. March 3, 2022):**
Holding: Even though the location of a CIA detention facility had previously been publicly reported by various sources, where the U.S. Gov't had never confirmed or denied those reports and Gov't contended that doing so would harm national security, the Gov't could assert "state secrets privilege" to quash subpoenas seeking this information from CIA contractors.

*** Federal Bureau of Investigation v. Fazaga, ___ U.S. ___, 142 S.Ct. 1051 (U.S. March 4, 2022):**
Holding: Sec. 1806(f) of the Foreign Intelligence Surveillance Act (FISA) did not eliminate or "displace" the Government's long-established "state secrets privilege," which the Government can invoke to prevent the disclosure of state and military secrets; thus, trial court properly dismissed most of Plaintiff's unlawful surveillance claims because evaluation of those claims would require disclosure of intelligence information that would threaten national security interests.

People v. Superior Ct. of San Diego Cnty., 2021 WL 5707638 (Cal. 2021):
Holding: Prosecutor impliedly waived work-product privilege by claiming he had used a numeric scoring system to evaluate what venirepersons to strike; without seeing the scoring system, the defense and court had no way to know if Prosecutor's strikes were race-neutral under *Batson*.

State v. Bailey, 2022 WL 2203960 (N.J. 2022):
Holding: Crime fraud exception to marital communications privilege did not apply to text messages between Defendant-Wife and her Husband. (Note: N.J. later changed its statute to apply crime fraud exception.)

Probable Cause to Arrest

State v. Barton, 669 S.W.3d 661 (Mo. banc June 27, 2023):
(1) Even though Officer arrested Defendant outside of Officer's jurisdiction in violation of Sec. 544.216, the exclusionary rule is not applied to violation of state statutes, so suppression of evidence cannot be granted on basis of statutory violation; (2) exclusionary rule only applies to Fourth Amendment violations; and (3) there is no Fourth Amendment violation if Officer has probable cause to arrest for a felony, even if the felony was not committed in Officer's presence.
Facts: Officer, who was investigating a robbery, arrested Defendant for the robbery in a town outside of Officer's jurisdiction. Defendant moved to suppress evidence and statements resulting from the arrest, since arrest outside Officer's jurisdiction violated Sec. 544.216. The trial court granted motion to suppress on this basis. State appealed.
Holding: Sec. 544.216 authorizes law enforcement officers to arrest people for violation of laws "over which such officer has jurisdiction." As a general rule, municipal officers have no power to arrest people beyond the boundaries of their municipality. Here, the State agrees Officer violated state law in arresting Defendant. However, this Court has never applied the exclusionary rule to remedy a state law violation. The exclusionary rule only applies to Fourth Amendment violations. *Virginia v. Moore*, 533 U.S. 164 (2008), held that in a *misdemeanor arrest*, an Officer must have *both* probable cause *and* that the crime be committed in the Officer's presence to satisfy the Fourth Amendment. But Moore doesn't apply to the instant case, because it involves an arrest for a felony. Under common-law, an Officer was allowed to arrest someone for a felony not committed in his presence if there was reasonable grounds for making an arrest. This Court holds that, when the warrantless arrest is for a felony, the Fourth Amendment is

satisfied if Officer has probable cause for the arrest, even when the felony was not committed in Officer's presence. (But Court notes that warrantless arrests upon probable cause in arrestee's home are impermissible absent consent to enter or exigent circumstances.) The motion court did not rule on whether there was probable cause for arrest. Reversed and remanded for further proceedings.

Wood v. Eubanks, 2022 WL 269350 (6th Cir. 2022):
Holding: Even though Petitioner yelled profanities at police and called them thugs and rats with guns, Petitioner's words were protected by First Amendment and did not provide probable cause to arrest him for disorderly conduct.

Prosecutorial Misconduct and Police Misconduct

State v. Deroy, 623 S.W.3d 778 (Mo. App. E.D. 2021):
Holding: (1) Conviction for both stealing, Sec. 570.030, based on 'possessing" a car, and first-degree tampering, Sec. 569.080, based on "operating" the car does not violate Double Jeopardy since the elements of the offenses are different; (2) even though police damaged Defendant's phone when they tried to extract data from it so that Defendant later wasn't able to extract his own possibly exculpatory data, this alone did not demonstrate "bad faith" by police to support a due process violation for destruction of potentially exculpatory evidence.

State v. Craft, 669 S.W.3d 719 (Mo. App. E.D. 2023):
Holding: Even though Prosecutor's remarks during voir dire that "under the law, the defendant has a right not to testify" were an improper direct reference to Defendant's 5th Amendment right not to testify, reversal is not required because Prosecutor's comments were in the context of correcting a juror's misunderstanding of the law, correctly "restated" the law, and the court made efforts to cure the situation; but if the trial court had not made efforts to cure, reversal may have been required.

Public Defender

Posch v. State, 619 S.W.3d 483 (Mo. App. E.D. 2021):
Holding: Even though motion court appointed Public Defender to Rule 24.035 case, where Public Defender subsequently filed motion to rescind appointment on grounds that Movant was not indigent under Sec. 600.086 and court granted motion, Movant was not "abandoned" when the Public Defender subsequently did not file an amended motion, because he wasn't eligible for Public Defender services.
Discussion: Rule 24.035 provides for appointment of counsel for "indigent" Movants but does not itself define indigence. However, Sec. 600.086 provides when a person is eligible for Public Defender services. 600.086.3 provides that the appointed defender shall determine if a person seeking Public Defender services is indigent. Upon motion by either party, the court shall then have authority to determine whether the services of the

Public Defender may be used. Upon the court's finding that a defendant is not indigent, the Public Defender shall no longer represent the defendant. 600.086.6 provides that the defendant shall have the burden to convince the court of his eligibility for services. Here, the Public Defender properly determined that Movant was not indigent, and filed a motion to rescind appoint under 600.086.3. The court correctly held a hearing and found Movant non-indigent. Movant did not object or appeal. He now claims he was abandoned when the Public Defender failed to file an amended motion for him. However, since the Public Defender was allowed to withdraw on non-indigence grounds, the Public Defender had no duty to file an amended motion. As a non-indigent person, Movant was not entitled to appointed counsel. He had ample opportunity to hire private counsel.

Rule 24.035/29.15 & Habeas Postconviction Procedural Issues

State v. Johnson, 617 S.W.3d 439 (Mo. banc 2021):
Holding: Even though -- 25 years after Defendant was convicted and sentenced -- Prosecutor (as part of her Conviction Integrity Unit) filed a motion for new trial under Rule 29.11 claiming there was newly discovered evidence of actual innocence and *Brady* violations, the trial court's jurisdiction was exhausted at the time of sentencing and there is no authority to appeal at this late date; but Defendant may have a remedy in state habeas corpus.
Discussion: This case is not about whether Defendant is innocent or whether there exists a remedy for someone who is innocent. Ultimately, this case presents only the issue of whether there is any authority to appeal the dismissal of a new trial motion filed decades after a criminal conviction became final. No such authority exits. A criminal judgment is final once sentence is entered. At that point, the trial court lacks jurisdiction to do anything else. Defendant is appealing an order dismissing a motion the trial court had no authority to sustain. Appeal dismissed. However, nothing in this opinion should be read to conclude that Defendant may not seek relief by filing a petition for habeas corpus in the proper circuit court alleging gateway claims.

Staten v. State, 624 S.W.3d 748 (Mo. banc 2021):
Holding: Even though circuit court filed and granted Movant's Rule 24.035 motion as a filing in the underlying criminal case (rather than assign it a separate civil case number), this did not mean that the court "lacked jurisdiction" to grant the motion; "This Court is loath to find the motion court lacked jurisdiction just because the case number affixed to the judgment contained the same letters and numbers as the underlying criminal action when the Rule 24.035 motion was otherwise legally considered and disposed of as an independent, civil, postconviction motion in every possible way. Such a finding would prioritize form over substance."

State v. Johnson, 2022 WL 17347195 (Mo. banc Nov. 28, 2022):
Holding: (1) It is "open question" whether appeals of prosecutor-filed motions to vacate convictions and sentences under Sec. 547.031 in death penalty cases should be filed first in Court of Appeals or whether Supreme Court has exclusive jurisdiction under Mo.

Const., Art. V, Sec. 3 because the punishment is death, and Supreme Court does not decide that in this case; (2) even though St. Louis County Prosecutor's Office claimed it had a conflict of interest in pursuing the Sec. 547.031 motion because Johnson's former defense counsel now worked in the St. Louis County Prosecutor's Office, Supreme Court questions whether that requires disqualification of the entire Prosecutor's Office, but assuming that it did, the St. Louis County Prosecutor's Office "had no business selecting (or even recommending)" the Special Prosecutor for the circuit court to appoint under Sec. 56.110; nothing in Sec. 56.110 gives the Prosecutor's Office such a role, and doing so would spread whatever taint afflicted the original Prosecutor's Office; and (3) Special Prosecutor's motion to vacate conviction and death sentence under Sec. 547.031, which largely relies on a statistical study of the prosecutor's charging decisions as evidence of racial bias, falls far short of "clear and convincing evidence" demonstrating a "constitutional error" that "undermines confidence in the judgment" under Sec. 547.031.3; thus, trial court didn't err in not holding a hearing under Sec. 547.031 because the Special Prosecutor's motion fails to state adequate grounds for granting relief. Motions to stay execution denied.

State ex rel. Bailey v. Fulton, 2023 WL 1997995 (Mo. banc Feb. 14, 2023):
Holding: Even though prosecution of defendant originated in Washington County in 1999, where a change of venue was granted to St. Francois County and the case was tried in St. Francois County in 2002 by the Washington County prosecutor, the Washington County prosecutor was not authorized to file a motion to set aside the conviction under Sec. 547.031 for wrongful conviction, because the statute only authorizes the prosecutor "in the jurisdiction in which a person was convicted" to file such a motion. The jurisdiction of conviction was St. Francois County, so only the St. Francois County prosecutor is authorized to file under Sec. 547.031. Writ of prohibition ordering circuit court to dismiss action by Washington County prosecutor granted.

Hatmon v. State, 2023 WL 2586179 (Mo. banc March 21, 2023):
Holding: Even though (1) there had been prior appellate opinions in 24.035 Movant's case remanding the case for various further proceedings, and (2) the State in this subsequent appeal contended, for the first time, that Movant's *pro se* Form 40 had been untimely filed, the "law of the case doctrine" did not preclude litigation of the timeliness of the *pro se* motion in this subsequent appeal, since a court has discretion not to apply "law of the case" doctrine when a mistake has been made, and the deadline for filing a Form 40 is mandatory and cannot be waived; remanded to determine if *pro se* motion was timely filed.

Pool v. State, 621 S.W.3d 640 (Mo. App. E.D. 2021):
Holding: Even though 29.15 Movant's appellate counsel failed to tell him that his direct appeal had been decided or the mandate issued, this did not fall within the "third-party interference" exception to excuse the untimeliness of the *pro se* motion; Movant's 29.15 appeal dismissed because *pro se* motion was untimely filed.
Discussion: The "third party interference" exception only applies when (1) a Movant prepares a *pro se* motion and does all he reasonably can to do ensure it is timely filed, and (2) tardiness results solely from the active interference of a third party beyond

Movant's control. "Active interference" requires more than error committed by an attorney purporting to advice or represent Movant. Courts are not responsible for an attorney's breach of duties. Movant did not plead or prove he did all he could do to prepare and timely file a *pro se* motion.

Chandler v. State, 621 S.W.3d 52 (Mo. App. E.D. 2021):
Holding: Even though 24.035 Movant claimed trial court had lacked authority to both sentence him to prison and order payment of restitution under Sec. 577.011 (2016), where Movant had agreed to this in a plea bargain, any such sentencing error was "self-invited" and Movant's claim was waived by his knowing and voluntary plea.

Yates v. State, 623 S.W.3d 184 (Mo. App. E.D2021):
(1) Motion court clearly erred in denying 29.15 motion without evidentiary hearing on claim that trial counsel had been ineffective in failing to investigate and call additional jurors to testify about alleged jury misconduct, where trial counsel had affidavits from some jurors showing misconduct but failed to investigate additional jurors to obtain a new trial; and (2) Motion court abused discretion in denying Movant's motion to contact jurors to plead and prove his 29.15 claim, because there was credible information in the record that juror misconduct had occurred.
Facts: Movant was convicted at trial of various offenses. After filing a new trial motion, trial counsel was contacted by a juror who alleged another juror engaged in misconduct by obtaining extrinsic information about the case from a bailiff or police officer about the meaning of certain jury instructions. Trial counsel presented two juror affidavits about this, and filed a motion to question jurors, which the trial court denied. The trial court then denied an amended motion for new trial. During the direct appeal, the Eastern District remanded to the trial court for an evidentiary hearing on the amended motion for new trial on grounds of newly discovered evidence. Trial counsel stated he wished to investigate other jurors, but he did not actually seek permission from the trial court to contact other jurors. The trial court denied a continuance for that hearing, and denied a new trial, relying on the previously-submitted affidavits. The Eastern District affirmed. Movant filed a 29.15 motion, alleging trial counsel was ineffective in the investigation of juror misconduct. The motion court denied Movant's motion to contact jurors, and denied the claim without an evidentiary hearing.
Holding: While there is no right to contact jurors, courts have discretionary power to allow this where there is credible indication that juror misconduct occurred. Jurors can testify about misconduct that involves gathering extrinsic information. Once it is established that misconduct involving extrinsic information occurred, the burden shifts to the non-moving part to overcome a presumption of prejudice. While a Movant cannot relitigate an issue decided on direct appeal, that's not what happened here. The issue on direct appeal was whether the trial court abused its discretion in not granting a new trial based on the limited evidence of two affidavits before it. The 29.15 issue is whether trial counsel was ineffective in failing to investigate and present additional evidence to change that outcome. The motion court clearly erred in denying Movant's claim on grounds that he didn't adequately plead it because this was caused by the court's failure to allow Movant to contact jurors. Movant pleaded juror misconduct, and pleaded that one or more jurors would testify to receiving extrinsic information that may have impacted the

verdict. The two affidavits gave credible reason to suspect juror misconduct. Gathering information from other jurors was necessary to determine if any additional juror information would affect the outcome. Reversed and remanded to allow contact of jurors and an evidentiary hearing.

Earl v. State, 628 S.W.3d 695 (Mo. App. E.D. 2021):
Holding: (1) Even though counsel filed request for extension of time to file amended motion within the initial 60 day period of Rule 24.035(g), the motion court lacked authority to grant the motion after this period expired; counsel's amended motion was untimely and case must be remanded for abandonment hearing; and (2) appellate court could not hold that motion court "implicitly credited" counsel's *Sanders* motion – which claimed the late amended motion was not Movant's fault -- since counsel's *Sanders* motion was not filed under oath.

Editor's Note: The time limit ruling appears to be contrary to *Federhofer v. State*, 462 S.W.3d 838, 841 (Mo. App. E.D. 2015), which allowed a motion court to rule on an extension request filed after the initial 60 day period, but before the extended time expired.

Edwards v. State, 624 S.W.3d 753 (Mo. App. E.D. 2021):
Holding: (1) Where Movant filed his pro se 29.15 motion prematurely during the pendency of his direct appeal, his amended motion under Rule 29.15 in effect at the time was due 60 days after the appellate court's mandate; and (2) even though postconviction counsel filed a request to extend the time for an amended motion to 90 days, where the motion court never ruled on the extension request, the amended motion was untimely and case must be remanded for abandonment hearing.

Conner v. State, 629 S.W.3d 108 (Mo. App. E.D. 2021):
Holding: Where Movant had previously filed other 24.035 motions (on which he was denied relief), his newly-filed motion was successive under Rule 24.035(l), and both the circuit court and appellate court lacked authority to hear it or the appeal of it; appeal dismissed.

Goldberg v. State, 635 S.W.3d 599 (Mo. App. E.D. 2021):
Holding: Even though 24.035 motion court ruled before an evidentiary hearing that Movant's Form 40 was timely-filed due to the active interference exception, where Movant never presented any evidence to prove up the facts supporting active interference, the Form 40 was untimely and case must be dismissed.
Discussion: Although Movant pleaded facts showing active interference, Movant had the burden to prove those facts by evidence at hearing. Movant submitted no testimony or affidavits to prove his facts, though affidavits are not evidence of facts unless stipulated to by the parties. It may be that Movant believed he didn't need to prove his facts because of the motion court's pre-evidentiary hearing ruling that deemed his Form 40 timely. But that ruling did not relieve Movant of the burden to prove his factual allegations regarding the timeliness of the Form 40. The motion court should not have decided merits of case in absence of proof that Form 40 was timely. Appeal dismissed.

Huskey v. State, 635 S.W.3d 886 (Mo. App. E.D. 2021):
Holding: Even though no one contested Movant's DOC delivery date in the motion court, where the record showed that (1) Movant received an SES in 2016, and (2) was revoked in January 2018, but didn't file his 24.035 motion until July 2018, the timeliness of the *pro se* motion depends on whether Movant filed it within 180 days of his DOC delivery date under the pre-2018 version of Rule 24.035, and Movant did not present any evidence to support his pleading that he was delivered in May 2018. Reversed and remanded to determine timeliness.

Reiker v. State, 636 S.W.3d 626 (Mo. App. E.D. 2021):
Holding: (1) Claim of ineffective assistance of counsel for representation at a probation revocation hearing is not cognizable in 24.035 postconviction motion; remedy is habeas corpus; but (2) a distinction is drawn between a defendant who received an SES versus SIS; a probation revocation involving an SIS is a *sentencing* proceeding, and an ineffective counsel claim *can* be raised regarding sentencing proceedings; in contrast, a probation revocation for an SES involves a sentence which had already been imposed in a prior sentencing proceeding but never executed; Rule 24.035 does not apply to that revocation proceeding.

Tinsley v. State, 2022 WL 1086033 (Mo. App. E.D. April 12, 2022):
Holding: Even though the docket entry of a guilty plea/Rule 24.035 case said "Transcript Filed," where the court reporter had actually only filed a statement saying the plea and sentencing transcripts were completed and were now in her possession, the time for filing an amended motion never began to run because Rule 24.035(g) starts the time when "a complete transcript … has been *filed* in the trial court" and counsel has been appointed; thus, counsel's amended motion was not untimely because the time never began to run since no transcript was actually "filed" on that date.

Palmer v. State, 2022 WL 1144704 (Mo. App. E.D. April 19, 2022):
Holding: (1) Where Defendant/Movant had pleaded guilty in 2016 and received an SES, and later was placed in the CODS program in 2017, the CODS program counted as "delivery" to the DOC under the 2016 version of Rule 24.035 so his *pro se* motion was due within 180 days of that delivery; his motion filed in 2020 was untimely; and (2) even though the trial court did not inform Defendant/Movant of his 24.035 rights when it placed him in the CODS program, this does not constitute an exception to timeliness; an exception exists only when a trial court affirmatively misadvises about the time limits.

Jones v. State, 2022 WL 1216300 (Mo. App. E.D. April 26, 2022):
Holding: (1) Extensions of time under Rule 29.15 must be requested and granted before the initial 60-day time period expires; thus, amended motion was untimely and case must be remanded for abandonment hearing, where counsel filed their request for extension of time one day after the amended motion was due (i.e., on the 61st day); (2) Eastern and Southern District cases – including *Federhofer v. State*, 462 S.W.3d 838 (Mo. App. E.D. 2015) and *Volner v. State*, 253 S.W.3d 590 (Mo. App. S.D. 2008) -- which hold that amended motions are timely as long as the extension request is ruled on within the authorized extended time period are no longer to be followed.

Abbott v. State, 2022 WL 3722450 (Mo. App. E.D. Aug. 30, 2022):
Holding: Where (1) Movant filed a premature *pro se* 29.15 motion while his direct appeal was pending, and (2) Movant filed a timely second *pro se* 29.15 motion after his conviction was affirmed, the second *pro se* motion was legally a supplement to the original motion, and thus, the motion court was required to issue Findings on the claims therein (where, as here, appointed counsel filed a statement in lieu of amended motion); since the court did not address the supplemental claims, it did not adjudicate all issues, so the appeal must be dismissed as lacking a final judgment.

Hamilton v. State, 2022 WL 4474307 (Mo. App. E.D. September 27, 2022):
Holding: Where Movant did not file his *pro se* Rule 24.035 motion within 180 days of his sentence as required by Rule 24.035(b) and had no recognized excuse for not doing so, his motion was untimely and case must be dismissed.

Whitt v. State, 2022 WL 16557017 (Mo. App. E.D. Nov. 1, 2022):
Holding: (1) The 120-day time for filing amended motions under Rule 29.15 (and 24.035) did not become effective until November 4, 2021; the "schedule" in Rule 29.15(m) (and 24.035(m)) stating that the Rule applies to all proceedings where sentence was pronounced on or after January 1, 2018, applies to amendments made to the Rule in 2017, *not* to the 120-day amendment made in 2021.

State v. Potter, 2022 WL 17419400 (Mo. App. E.D. Dec. 6, 2022):
Holding: (1) Defendant could move to withdraw his 2009 misdemeanor DWI conviction under Rule 29.07(d) on grounds of manifest injustice (and appeal the denial thereof); but (2) on the merits, deficiencies in the charging document or lack of a charging document (he was charged with DWI by uniform citation) did not constitute manifest injustice since after a conviction, a charging document must be so deficient that Defendant was not on notice as to the crime he was charged with or so lacking in clarity that Defendant was unable to prepare a proper defense.

Ross v. State, 2023 WL 192240 (Mo. App. E.D. Jan. 17, 2023):
Holding: (1) Findings as to timeliness of *pro se* Rule 24.035 motion were required – even under pre-November 4, 2021, version of 24.035 -- because appellate court otherwise would have to engage in de novo review of the timeliness issue (the post-November 4, 2021 version of 24.035(j) expressly requires Findings on timeliness); (2) Even though motion court did not grant an evidentiary hearing, Findings are still required, because to find remand to be unnecessary on grounds that the motion did not warrant a hearing would mean circuit courts could simply deny postconviction motions without any Findings, and wait for appellate court to determine whether a hearing was warranted and that Findings were required; and (3) Movant's allegations that he was prevented from timely-filing his *pro se* motion due to prison lockdown during COVID do not entirely fit within third-party interference exception to timeliness but are not "squarely foreclosed" by it either, and require Findings. Remanded for Findings.

Watkins v. State, 2023 WL 2124768 (Mo. App. E.D. Feb. 21, 2023):
Holding: Where 24.035 Movant's claim was that the trial court was without authority to revoke his probation because it had expired due to earning of Earned Compliance Credits, this claim was not barred by Sec. 217.703.8 (which states the award of ECC shall not be subject to any motion for postconviction relief) since Movant's claim was not about the "award" of ECC but about the revocation court's application of those credits and the timeliness of revocation of probation – which are cognizable postconviction claims.

Summers v. State, 668 S.W.3d 311 (Mo. App. E.D. 2023):
Holding: (1) Movant was entitled to evidentiary on claim that his *pro se* 29.15 motion was timely where the post-mark on the Clerk's scanned copy of the mailing envelope was illegible, but Movant's amended motion pleaded that he would testify as to the timely date of mailing and would present other evidence showing timeliness of the *pro se* motion; but (2) fact that Clerk's Office failed to retain original envelope does not automatically result in deeming the *pro se* motion timely. Motion court erred in dismissing motion as untimely without an evidentiary hearing.

Waldorf v. State, 673 S.W.3d 511 (Mo. App. E.D. Aug. 1, 2023):
Holding: Even though postconviction Movant pleaded that counsel was ineffective in failing to obtain a surveillance video which was destroyed 90 days after the crime, where counsel did not enter the underlying case until 112 days after the crime, Movant was not entitled to an evidentiary hearing because he cannot show prejudice, since, by Movant's own admission, the video was destroyed before counsel even entered.

Phillips v. State, 2023 WL 6066259 (Mo. App. E.D. Sept. 19, 2023):
Holding: Narrative conclusions of ineffective assistance are insufficient to plead a claim under Rule 29.15; appellate court suggests that Movants draft amended motion using style of civil petitions in Rule 55.
Discussion: Rule 29.15 motions are governed by the Rules of Civil Procedure "insofar as applicable." Rule 55's pleading requirements do not conflict with Rule 29.15, enhance the purposes of the Rule, and should be followed. Following Rule 55 should largely cure pleading deficiencies by requiring counsel to focus on alleging the specific facts necessary to support a claim. Rule 55 pleading would also permit courts to fully assess well-pleaded claims of ineffective assistance.

Zuko v. State, 2023 WL 8042626 (Mo. App. E.D. Nov. 21, 2023):
Holding: Even though 24.035 Movant hired the same attorney to represent him at his guilty plea, direct appeal and postconviction case, there was no disqualifying conflict of interest in retained counsel representing Movant in postconviction, because there is no Sixth Amendment right to effective counsel in postconviction; thus, even if counsel had a conflict of interest (because he could not raise ineffectiveness claims against himself), Movant cannot challenge counsel's effectiveness as postconviction counsel.

Napper v. State, 2023 WL 8194727 (Mo. App. E.D. Nov. 28, 2023):
Holding: (1) A claim that plea counsel had a conflict of interest is "cognizable" in a Rule 24.035 action as ineffective assistance of counsel and is not waived by a guilty plea;

but (2) even though defense counsel worked as a prosecutor in the Prosecutor's Office at time the criminal case was filed against Defendant/Movant, there was no conflict of interest when defense counsel later left the Prosecutor's Office and became defense counsel for Defendant/Movant, and counsel never had any knowledge or contact with Defendant/Movant's case while a prosecutor.

Discussion: Although older cases, such as *Smith v. State*, 972 S.W.2d 551 (Mo. App. S.D. 1998) and *Berry v. State*, 214 S.W.3d 413 (Mo. App. S.D. 2007), indicate that a conflict of interest claim is waived by a guilty plea, those cases should no longer be followed because the Supreme Court has recognized such a claim in the more recent case of *DePriest v. State*, 510 S.W.3d 331 (Mo. banc 2017). Such claims can be raised as claims of ineffective assistance of counsel. Rule 4-1.11 governs the conduct of government lawyers in the situation here, where former prosecutor became a defense counsel. A conflict of interest would only arise if the former prosecutor (now defense counsel) "participated personally and substantially as a public officer" in Defendant/Movant's case, while a prosecutor. That did not happen here. The constitutional right to a fair trial provides more protections to a defendant than Rule 4-1.11. That right would find a conflict if there was an "appearance of impropriety." But that requires analysis of all the facts and circumstances. Here, there are no facts showing former prosecutor (now defense counsel) had any participation in or knowledge of Defendant/Movant's case while a prosecutor. Thus, no appearance of impropriety.

Walls v. State, 616 S.W.3d 531 (Mo. App. S.D. 2021):

Holding: Even though (1) Movant had mailed a Form 40 to clerk before deadline but it was returned to him due to incorrect P.O. Box address; (2) Movant re-sent the Form 40 but that envelope did not have a postmark on it and was received by clerk four days late; and (3) motion court excused the untimely filing under an older case. *Spells v. State*, 213 S.W.3d 700 (Mo. App. W.D. 2007), which held a wrong address can excuse an untimely filing, a later case, *Dorris v. State*, 360 S.W.3d 260 (Mo. banc 2012), requires the motion be deposited in the mail with a correct address; case remanded for additional findings on whether Movant placed a correctly addressed envelope in mail before filing deadline.

McCartney v. State, 622 S.W.3d 729 (Mo. App. S.D. 2021):

Holding: A claim that a pro se 24.035/29.15 motion should be deemed timely-filed must be raised in an amended motion, not in a separate "motion to excuse late filing" that is filed before an amended motion is due.

Discussion: Before an amended motion was due, Movant's appointed counsel filed a "motion to excuse late filing" of his pro se 24.035 motion (which was untimely filed, allegedly though no fault of Movant). However, *Vogl v. State*, 437 S.W.3d 218 (Mo. banc 2014), holds there are only 3 ways to plead and prove the timeliness of a pro se motion: (1) filing it timely so that the file stamp shows it was filed on time; (2) *alleging in the pro se motion* a recognized exception to timeliness; or (3) *alleging in the amended motion* a recognized exception. Here, Movant's "motion to excuse late filing" was not among these three ways, so it wasn't authorized. Thus, the motion court did not err in summarily denying the motion. However, since the time for filing an amended motion had not yet expired, the motion court did err in entering Findings and concluding the

case. Case remanded to allow Movant to file an amended motion (in which Movant can allege a recognized exception).

Easley v. State, 623 S.W.3d 211 (Mo. App. S.D. 2021):
Holding: Claim that Movant's guilty plea lacked a factual basis is not cognizable in Rule 24.035 action.
Discussion: Movant alleges noncompliance with Rule 24.02(e) is a due process violation. This is false because a sufficient factual basis for a guilty plea is not constitutionally required. 24.02(e) merely assists the plea court in deciding if a guilty plea is voluntarily, intelligently and knowingly made. Movant claims the lack of factual basis rendered Movant's plea involuntary, unknowing and unintelligent. This is false because the term "factual basis" is not interchangeable or synonymous with a "knowing and voluntary plea." Whether a plea is knowing and voluntary is determined form the record as a whole.

Scrivens v. State, 630 S.W.3d 917 (Mo. App. S.D. 2021):
Holding: Southern District notes there is a split of authority in Court of Appeals regarding whether a 24.035/29.15 motion court can grant an authorized extension of time after the initial time period for filing the amended motion expires; the Western District holds that a court must rule on an extension motion within the time the amended motion is initially due, but the Eastern and Southern Districts allow a motion court to grant an extension after the initial time has expired, so long as the amended motion is filed within the extended time.

Jackson v. State, 2022 WL 575641 (Mo. App. S.D. Feb. 25, 2022):
Holding: Even though (1) Movant had filed a premature *pro se* Rule 29.15 motion while his direct appeal was pending, but his counsel "suggested" to the motion court that it be dismissed as premature (which the court did), and (2) Movant filed an untimely *pro se* Rule 29.15 motion after his direct appeal, the motion court had no authority to set aside the prior case's order of dismissal and allow that case to proceed, because once a case is voluntarily dismissed, it cannot be reinstated; thus, Movant failed to meet his burden to prove that his *pro se* motion was timely filed, and case must be dismissed.
Discussion: The motion court appointed counsel in the premature 29.15 case, and counsel wrote a letter to the court "suggesting" the court either stay the proceedings until the direct appeal was concluded, or dismiss the case without prejudice. The court dismissed without prejudice. Movant is bound by his attorney's actions. A voluntarily dismissed case leaves nothing before the court; it is as though the suit had never been filed. Thus, the court could not later "reinstate" that case. Movant's second *pro se* motion was untimely, and no recognized exception to timeliness applies in the situation here. Case dismissed.

Stewart v. State, 2022 WL 681303 (Mo. App. S.D. March 8, 2022):
Holding: Where (1) the mandate in Movant's direct appeal issued in June 2017, making Movant's *pro se* 29.15 motion due September 6, 2017, but (2) Movant's motion was file-stamped by the court "September 7" but post-marked "September 6," the motion was

timely because Rule 29.15(b) was amended effective July 1, 2017, to make the postmarked date be the date of filing.

Bryan v. State, 2022 WL 1261196 (Mo. App. S.D. April 28, 2022):
Holding: Where (1) court appointed Public Defender to Rule 29.15 case on December 26, 2014; (2) Public Defender never entered appearance but wrote to court that case was filed in wrong county and court transferred case to correct county; (3) Private Counsel entered case on February 24, 2015; and (4) the motion court subsequently determined that Public Defender had abandoned Movant, the finding of abandonment meant the case "shall proceed anew according to the provisions of the rule," so Private Counsel's amended motion filed on April 24, 2015, was timely under Rule 29.15(g), since it was filed within 60 days of Private Counsel's entry.

Pulliam v. State, 2022 WL 1284042 (Mo. App. S.D. April 29, 2022):
Holding: Even though (1) Rule 29.15 Movant mistakenly believed that he needed to file a statement of his inmate account along with his *pro se* motion to prove that he was a poor person, and (2) DOC did not provide him with such a statement until after the deadline expired to file his motion, this did not fall within the active or third-party interference exception to timeliness, because Movant had not completed a *pro se* motion or delivered it to a third-party for filing by the deadline; motion properly dismissed as untimely.

Owens v. State, 673 S.W.3d 839 (Mo. App. S.D. Aug. 10, 2023):
Holding: Even though in Rule 29.15 case the 60th day after appointment of counsel fell on a Sunday, the due date for the amended motion with 30-day extension was the 90th continuous day after appointment of counsel; counsel's calculation of the due date based on 30 days from the Monday following the Sunday was erroneous and made the amended motion untimely because filed on the 91st day.
Discussion: Counsel was appointed on June 14. Under Rule 44.01(a), the day of the act is not included, and if the last day is a Saturday, Sunday, or legal holiday the period runs until the next day. Therefore, June 15 was day one, and counsel had 90 days from June 15 to file an amended motion (or by Tuesday, September 12). But because day 60 was a Sunday, counsel believed that the 30-day extension period counted from the next Monday, so counsel filed the amended motion on Wednesday, September 13. However, after the grant of a 30-day extension, the 90-day period is counted continuously from the day after counsel's appointment. Only if the 90th day falls on a Saturday, Sunday or legal holiday is the time extended to the next day. Counsel filed the motion on the 91st day, and thus, was untimely. Case remanded for abandonment hearing.

Huckleberry v. State, 674 S.W.3d 801 (Mo. App. S.D. Sept. 1, 2023):
Holding: Where (1) 29.15 Movant's amended motion alleged one claim of ineffective appellate counsel and five claims of ineffective trial counsel; (2) the State filed a motion which argued the appellate counsel claim should be denied without hearing; and (3) the motion court thereafter issued a brief Order "agree[ing]" with the State and denying the entire motion (without further Findings), the motion court clearly erred because the State's argument only pertained to the appellate counsel claim; thus, the Order didn't rule

on the five trial counsel claims, and so there is no "final judgment" to appeal from. Appeal dismissed.

Marvin v. State, 2023 WL 6531509 (Mo. App. S.D. Oct. 6, 2023):
Holding: (1) Even though plain error review is usually not available in a postconviction appeal under Rules 24.035 or 29.15, where the basis of the plain error claim could not have been known to Movant at the time the amended motion was filed, plain error review may occur; but (2) even though the motion court judge made comments after the amended motion was filed which Movant claims show prejudgment and bias, the motion court did not err in failing to, *sua sponte*, disqualify itself because the court's comments were proper based on the evidence presented.
Discussion: Plain error review is usually not available in a postconviction case because Rules 24.035 and 29.15 expressly waive any claims "known" to Movant which aren't included in an amended motion. Thus, 24.035 and 29.15 usually conflict with the plain error Rule 84.13. However, a claim of alleged judicial bias occurring *after* filing an amended motion is not a claim that could be *known* to Movant and at the time an amended motion is filed. Thus, there is no conflict between Rule 29.15 and Rule 84.13 in allowing such claims to be reviewed for plain error.

Caraway v. State, 2023 WL 7526905 (Mo. App. S.D. Nov. 14, 2023):
Holding: A claim that the trial court conducted an inadequate *Faretta* hearing before allowing Defendant-Movant to proceed *pro se* is not cognizable in a Rule 29.15 case, at least were Defendant-Movant knew he had a right to do a direct appeal but did not; this type of claim can only be raised on direct appeal.

Jendro v. State, 2023 WL 8445894 (Mo. App. S.D. Dec. 6, 2023):
Holding: (1) Even though the jury instructions told jury they could only give up to 30 years, but jury gave 40 years (which court imposed), this claim could only be raised on direct appeal and was not "cognizable" as a due process violation in a 29.15 case, because the authorized term of imprisonment for statutory rape, Sec. 566.062 RSMo. 2006, was a term of years up to life imprisonment, and 40 years was within this range.

Jendro v. State, 2023 WL 8445894 (Mo. App. S.D. Dec. 6, 2023):
Holding: (1) Where first postconviction counsel had filed a timely amended 29.15 motion, the motion court was without authority to allow the filing of a second amended motion by second counsel on grounds that first counsel had "abandoned" Movant by not alleging additional claims, since Rule 29.15(g) allows only one amended motion; but (2) even though motion court erred in considering second amended motion, where the motion court decided identical claims as in the first (authorized) amended motion, appellate court will not remand case to issue new Findings on first motion, but under Rule 84.14 can enter the judgment on the first motion, as the motion court should have done, and can dismiss claims not in the first amended motion.

Briggs v. State, 621 S.W.3d 614 (Mo. App. W.D. 2021):
Holding: (1) Where retained private counsel filed amended 29.15 motion untimely, it cannot be considered, and there is no abandonment because the abandonment doctrine doesn't apply to non-appointed counsel; and (2) motion court ruled on claims in the untimely amended motion, but not claims in the timely *pro se* motion, there is no "final" judgment since the *pro se* claims have not been finally adjudicated, so appeal must be dismissed.

Cooper v. State, 621 S.W.3d 624 (Mo. App. W.D. 2021):
Holding: The time limit for filing an amended motion under Rule 24.035 began when the transcript of the "guilty plea and sentencing hearing was filed," even though this did not include a transcript on a motion to withdraw plea, which wasn't filed until later; Rule 24.035(g) provides that the time limit begins to run upon the filling of "a complete transcript of both the guilty plea and sentencing hearing."

Kelley v. State, 618 S.W.3d 722 (Mo. App. W.D. 2021):
(1) 29.15 court clearly erred in denying claim without evidentiary hearing that counsel was ineffective for failing to cross-examine alleged assault Victim with prior inconsistent statement which supported Movant-Defendant's exculpatory version of events, since the prior inconsistent statement would have been substantive evidence that went directly to the central disputed issue at trial; (2) 29.15 court clearly erred in denying claim without an evidentiary hearing that counsel failed to elicit from Witness evidence which would have corroborated Movant's trial testimony and rebutted State's evidence on significant issue; (3) 29.15 court clearly erred in denying claim without an evidentiary hearing that counsel was ineffective in failing to cross-examine Officer concerning his analysis a tire marks found at the crime scene and Officer's lack of expertise to make such an analysis; and (4) 29.15 court must consider "cumulative prejudice" to Movant from counsel's failures regarding all three witnesses.
Facts: Movant-Defendant was convicted of first degree assault. As relevant here, Victim testified to a version of events that Movant assaulted him by trying to run him over with a truck. Movant-Defendant testified at trial to an exculpatory version of the events. After his conviction was affirmed on direct appeal, Movant sought 29.15 relief. The motion court denied his claims without an evidentiary hearing.
Holding: The rules encourage evidentiary hearing in order to ensure claims are decided accurately. (1) Movant claims counsel was ineffective in failing to cross-examine Victim about inconsistent statements he made to police. Although failure to impeach does not generally constitute ineffective assistance, failure to cross-examine witnesses with prior inconsistent statements about a key, central issue in the case will. Here, Victim gave statements to police that were directly contrary to Victim's trial testimony, and which would have corroborated Movant's exculpatory version of events. This was not mere "impeachment," because, under Sec. 491.074, a prior inconsistent statement is received as substantive evidence and can be argued for its truth. Victim's prior inconsistent statements would have corroborated Movant's exculpatory version of events. Movant was entitled to evidentiary hearing. (2) Movant claims counsel was ineffective in failing to elicit additional testimony from another Witness which would have corroborated Movant's version. The motion denied this claim as "speculation" as to what

Witness would have testified to at trial. But Movant's motion specifically alleged what Witness would have testified to. This was enough. Without a hearing, Movant was unable to *prove* what the trial testimony would have been. Movant's motion wasn't required to *prove* his claims; it was only required to *allege* his claims. Witness' testimony would have provided important corroboration to Movant's testimony. (3) Officer testified about various tire marks at the crime scene in a fashion to support the State's theory of the case. Movant claimed counsel was ineffective in failing to cross-examine Officer about his lack of expertise in this area. This, too, warranted a hearing. (4) While failure to examine the last two witnesses may not present the same prospect of prejudice as failure to present the prior inconsistent statements of Victim, the motion court must assess the cumulative prejudicial impact of all three deficiencies in performance. Remanded for evidentiary hearing.

Ryland v. State, 619 S.W.3d 553 (Mo. App. W.D. 2021):
Holding: (1) Where Defendant/Movant's sentence was pronounced before January 1, 2018, his 29.15 motion was governed by the Rule that was in effect before January 1, 2018, which authorized only one extension of time for filing an amended motion; and (2) where 29.15 counsel filed the amended motion untimely, but – even though the motion court appointed the Public Defender -- the record in motion court is unclear whether Movant's counsel really was "privately retained" by Movant or was acting as an appointed counsel, case must be remanded to determine in what capacity counsel acted; if counsel was "privately retained" by Movant, only the *pro se* motion can be considered because the abandonment doctrine does not apply to privately retrained counsel, but if the counsel was acting as an appointed counsel, then court must hold abandonment hearing.

State v. Hudson, 626 S.W.3d 800 (Mo. App. W.D. 2021):
Holding: A Defendant who pleads guilty can take a direct appeal from a denial of a *presentencing* motion to withdraw guilty plea under Rule 29.07(d).
Discussion: The State claims appellate court has no authority to consider whether trial court erred in denying a pre-sentencing motion to withdraw guilty plea (based on ineffective counsel), because a direct appeal from a guilty plea is limited to subject-matter jurisdiction, the sufficiency of the charging documents, and "possibly" excessive sentencing. However, the State fails to distinguish *post*-sentencing motions under Rule 29.07 from *presentencing* motions. A defendant who pleads guilty may appeal from a final judgment convicting and sentencing him to challenge the trial court's denial of a *presentence* motion to withdraw plea under 29.07(d). The State argues that Rule 24.035 is the "exclusive procedure" for raising a claim of ineffective assistance affecting the voluntariness of a guilty plea. But, again, the State confuses a *pre*-sentence motion from a *post*-sentence motion.

Fields v. State, 625 S.W.3d 479 (Mo. App. W.D. 2021):
Holding: Even though (1) 29.15 Movant previously received a remand because she had pleaded a recognized exception to the time limits for filing a *pro se* 29.15 motion, and (2) on remand, Movant's counsel submitted an affidavit by counsel allegedly verifying the facts related to the untimely filing (but counsel had no personal knowledge of the facts and there was no stipulation to admit the affidavit), where Movant failed to offer any

evidence at the evidentiary hearing to prove up the facts concerning the untimely filing, Movant failed to meet her burden to prove a recognized exception applied; motion dismissed as untimely.
Discussion: Movant argues she wasn't required to present evidence at the evidentiary hearing in support of her allegations of active interference (a recognized exception) because the facts were verified and sworn to by her motion counsel. This argument fails because, absent a stipulation between the parties, an affidavit is not treated as evidence. Moreover, counsel had no personal knowledge of the alleged facts counsel "verified." Thus, the contention that counsel's "verified motion" or affidavit itself constituted evidence is unsupported by the record or any controlling precedent.

Hudson v. State, 626 S.W.3d 884 (Mo. App. W.D. 2021):
Where Movant filed a timely Rule 24.035 motion, but after that, he filed and was granted leave under Rule 30.03 to pursue a direct appeal of a motion to withdraw guilty plea, the 24.035 postconviction proceedings should have been stayed pending the direct appeal, so the motion court's judgment deciding the postconviction case before the appellate mandate in the direct appeal must be vacated; (2) Claims raised in the motion to withdraw guilty plea may face issue preclusion if re-raised in the 24.035 case.
Facts: Prior to sentencing, Defendant/Movant filed a motion to withdraw guilty plea under 29.07(d). The trial court denied it, and sentenced him. Movant then filed a 24.035 motion. Subsequently, Movant was granted leave to pursue a late direct appeal of the 29.07(d) motion. No one ever informed the motion court that the direct appeal was pending, so the motion court held an evidentiary hearing, and ultimately denied relief – which Movant is appealing in the instant case. After the motion court denied the 24.035 motion, the direct appeal was decided, which affirmed the denial of the 29.07(d) motion.
Discussion: 24.035(b) sets forth the procedure for premature 24.035 motions. As relevant here, the motion was premature before the date of the direct appeal appellate mandate affirming the conviction. Since the motion court decided the 24.035 case before that time, its ruling should be vacated and the case remanded so that the court can proceed after the criminal conviction was final. The motion court should have stayed the 24.035 proceedings when the direct appeal was filed, and waited to proceed until the direct appeal was concluded.

Wynes v. State, 628 S.W.3d 786 (Mo. App. W.D. 2021):
Holding: Under Rule 24.035(b), the date that a sentence is "entered" is the date that the formal written sentence and judgment was filed; thus, even though trial court actually imposed sentence at an earlier date and made a docket entry reflecting this, the time for filing the *pro se* motion did not begin to run until a formal written sentence and judgment document was filed.

State ex rel. Schmitt v. Harrell, 633 S.W.3d 463 (Mo. App. W.D. 2021):
Holding: Trial court erred in holding Attorney General had no right to file pretrial motions in Sec. 547.031 proceeding -- which allows a local prosecutor to file a motion to vacate a conviction based on actual innocence – because Sec. 547.031.2 expressly permits the Attorney General to participate in such hearing, and it would make little sense

to permit the AG to participate, yet deny the AG the right to file motions which relate to the manner in which the hearing will be conducted.

Mack v. State, 635 S.W.3d 607 (Mo. App. W.D. 2021):
Holding: (1) Even though 29.15 Movant timely filed their *pro se* motion in January 2019, the motion was governed by the pre-2018 version of Rule 29.15 because 29.15(g) states that if sentence was pronounced before January 1, 2018, the applicable Rule is the one in effect on the date the motion is filed "or December 31, 2017, whichever is *earlier*"; (2) even though postconviction counsel requested an extension of time to file an amended motion before the initial 60-day time limit expired, where the motion court did not grant the extension until after the time limit expired, the amended motion was untimely, so case must be remanded for abandonment hearing; and (3) where trial court summarily denied Rule 29.15 relief, judgment must be reversed because under Rule 29.15(j), motion court is required to enter Findings of Fact and Conclusions of Law sufficient to allow meaningful appellate review.

King v. State, 2022 WL 97164 (Mo. App. W.D. Jan. 11, 2022):
Holding: (1) Motion court did not err in failing to grant evidentiary hearing on claim trial counsel was ineffective in failing to seek lesser-included instruction where amended 29.15 motion merely pleaded that counsel failed to exercise customary skill and diligence of reasonably competent attorney in not seeking a lesser; such pleading is a "legal conclusion," not a factual allegation; but (2) if the amended motion had pleaded that counsel's failure to seek lesser-included was due to inadvertence or wasn't reasonable trial strategy, those are "factual allegations" that may have required a hearing.

Robinson v. State, 2022 WL 516880 (Mo. App. W.D. Feb. 22, 2022):
Holding: (1) Even assuming that the Western District should have transferred Movant's *pro se* Rule 29.15 motion filed with the Western District to the circuit court where it should have been filed, the motion was not timely-filed at the Western District, so Movant's motion is not timely; and (2) in order to get the benefit of the "mailbox rule," Rule 29.15(b) required that Movant's *pro se* motion be "addressed correctly" and placed in the mail on or before the due date; although Movant mailed his motion on time, it was not "addressed correctly" because he sent it to the wrong court – the Western District. Case dismissed because *pro se* motion was untimely.

Likins-Osbey v. State, 2022 WL 4240944 (Mo. App. W.D. Sept. 13, 2022):
Holding: Even though sentencing court did not ask Defendant/Movant whether "he has any legal cause to show why judgment and sentence should not be pronounced" as required by Rule 29.07(b), this failure of allocution did not provide grounds for 24.035 relief, since this was only a "technical" violation of Rule 29.07 (where Movant did address the court via questions asked by defense counsel at sentencing), and in any event, Movant has not shown any prejudice (since he hasn't shown anything additional he would have given the trial court to consider).

Eckes v. State, 2022 WL 17100534 (Mo. App. W.D. Nov. 22, 2022):
Holding: (1) Even though motion court appointed counsel under Rule 24.035, where no counsel ever entered and no guilty plea transcript was ever filed, the time for filing an amended motion never began to run, so motion court erred in dismissing case as "inactive" after pending for five years; and (2) even though Movant's *pro se* motion facially appears to have been filed six days late, appointed counsel must be given an opportunity to plead an exception to the time limits in an amended motion, so case cannot be dismissed as untimely before an amended motion is filed.

Osborn v. State, 2023 WL 1131223 (Mo. App. W.D. Jan. 31, 2023):
Holding: Even though Rule 29.15(c) requires Circuit Clerk to retain the envelope in which Movant mails his *pro se* 29.15 motion to court, where Clerk instead sent the envelope back to Movant, this did not deprive Movant of evidence needed to prove his motion was timely filed, since Movant had the envelope available to him (though failed to present it at hearing); and (2) appellate court doesn't decide issue of whether Clerk erred in not accepting Movant's motion in first place (because it wasn't fully filled out), but appellate court cites cases that hold Clerks must accept filings in the absence of clear prohibition in law, court rule or specific court order, and have no discretion to reject filings.

Canfield v. State, 666 S.W.3d 312 (Mo. App. W.D. 2023):
Holding: Even though Movant's *pro se* Rule 24.05 motion was required to be filed within 180 days of sentencing, Rule 24.035(b), where the sentencing court erroneously told him that it had to be filed within 180 days of his delivery to DOC (which is no longer the rule) and Movant followed this advice, his out-of-time filing is excused due to reliance on erroneous advice by the sentencing court.

Williams v. Falkenrath, 2023 WL 6220318 (Mo. App. W.D. Sept. 26, 2023):
Holding: (1) Even though Petitioner had previously filed and lost numerous habeas petitions, he wasn't procedurally barred from proceeding in a new habeas petition, since Missouri does not categorically prohibit successive habeas petitions; (2) even though Petitioner failed to previously raise his current claim that he was erroneously sentenced in 1988 as a "Class X" offender (requiring him to serve 80% of his sentence), this claim was not barred because a sentence beyond that permitted by law may be corrected in a habeas petition; and (3) where Petitioner's offense occurred in May 1988 but the trial court applied sentencing enhancements which didn't become effective until August 1988, the application of post-offense enhancements was *ex post facto*.
Discussion: The State argues Petitioner's claims are procedurally defaulted. But default can be overcome by showing a jurisdictional defect, cause and prejudice, or extraordinary circumstances where manifest injustice would occur without relief. Although a claim that a sentence exceeds that authorized by law is technically no longer a "jurisdictional" defect, it is still cognizable in a habeas proceeding. Missouri does not categorically prohibit successive habeas petitions. A claim that a petitioner is serving a legally erroneous sentence is entitled to consideration on the merits, despite procedural obstacles which would bar other claims. At the time Petitioner committed his offense, the "Class

X" offender statute only applied to A and B felonies. Petitioner's sex crimes were "unclassified" felonies at that time. The Class X offender statute was later amended to change this, but that amendment should not have been applied to Petitioner because it was *ex post facto* to do so.

James v. State, 2023 WL 7504879 (Mo. App. W.D. Nov. 14, 2023):
Holding: (1) Even though 24.035 Movant pleaded guilty in 2014, his *pro se* 24.035 motion filed in 2020 was timely, because, under 24.035(m), the pre-December 31, 2017 version of 24.035 applied to him, making his *pro se* motion due within 180 days of delivery to the Dept. of Corrections and Movant wasn't delivered there until 2020; (2) even though Movant failed to present direct evidence to prove his delivery date was in 2020, where his amended motion pleaded delivery was in 2020 and the State's counsel said the *pro se* motion was "timely" in the motion court, this was a judicial admission that delivery occurred in 2020; (3) where a sentencing transcript was filed in Movant's case but the plea transcript apparently never was filed, the time for filing the amended motion never began to run because there was no "complete transcript" filed of the plea and sentencing, so counsel's amended motion was also timely.

*** Mays v. Hines, __ U.S. ___, 141 S.Ct. 1145 (U.S. March 29, 2021):**
Holding: A federal habeas court cannot disregard a state court's finding denying postconviction relief on grounds that evidence of guilt was overwhelming.

*** Alaska v. Wright, ___ U.S. ___, 141 S.Ct. 1467 (U.S. April 26, 2021):**
Holding: Even though a prior State offense may be a predicate crime for a new federal offense, where the person is no longer in State custody for the prior offense, they cannot bring a federal habeas corpus proceeding pursuant to Section 2254(a).

* **Edwards v. Vannoy, ___ U.S. ___, 141 S.Ct. 1547 (U.S. May 17, 2021):**
Holding: (1) New criminal procedural rules will never apply retroactively on federal collateral review; (2) Court overturns *Teague*'s holding that such rules would be retroactive if deemed "watershed;" and (3) *Ramos*' holding that Sixth Amendment requires juries to be unanimous in determining guilt is not retroactive on federal collateral review.

*** Dunn v. Reeves, ___ U.S. ___, 141 S.Ct. 2405 (U.S. July 2, 2021):**
Holding: In federal habeas case, 11th Circuit erred in concluding that state court had applied a *per se* rule that a Petitioner cannot prevail on an ineffective assistance of counsel claim where he failed to call counsel at his state postconviction hearing; state court did not unreasonably apply federal law because the absence of evidence from counsel did not overcome the strong presumption that counsel's actions were reasonable and strategic.

*** Brown v. Davenport, 2022 WL 1177498, ___ U.S. ___ (U.S. April 21, 2022):**
Holding: Federal habeas petitioners must satisfy the prejudice tests in both *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and the Antiterrorism and Effective Death Penalty Act in order to obtain relief.

* **Shinn v. Ramirez, 2022 WL 1611786, ___ U.S. ___ (U.S. May 23, 2022):**
Holding: AEDPA bars federal courts from hearing new evidence on claim under *Martinez v. Ryan*, 566 U.S. 1 (2012), that state postconviction counsel negligently failed to develop state court record.

*** Kemp v. U.S., 2022 WL 2111354, ___ U.S. ___ (U.S. June 13, 2022):**
Holding: The term "mistake" in Federal Rule Civil Procedure 60(b)(1) include a judge's error of law.

*** Shoop v. Twyford, 2022 WL 220334, ___ U.S. ___ (U.S. June 21, 2022):**
Holding: Issuance of a transportation writ to take a habeas Petitioner to a medical facility for testing for his case is not "necessary or appropriate" under the All Writs Act unless Petitioner first shows that the evidence he hopes to find from the testing would be admissible in the habeas case.

*** Cruz v. Arizona, 598 U.S. ___, 143 S.Ct. 650 (2023):**
Holding: Arizona postconviction procedural rule was not "adequate" state grounds to bar federal review of claim by capital defendant that he wasn't allowed to inform jury a life sentence would be without parole.

*** Jones v. Hendrix, __ U.S. ___, 143 S.Ct. 1857 (2023):**
Holding: 28 U.S.C. Sec. 2255(e)'s "savings clause" does not allow a prisoner asserting an intervening change in interpretation of a criminal statute to circumvent AEDPA's restrictions on a second or successive Sec. 2255 motion by filing a Sec. 2241 habeas petition; thus, even though Supreme Court in *Rehaif v. U.S.*, 139 S.Ct. 2191 (2019), abrogated certain law regarding unlawful possession of a firearm under 18 U.S.C. Sec. 922(g), Petitioner who pursued (and lost) postconviction relief before *Rehaif* cannot now seek relief by writ of habeas corpus under Sec. 2241.

*** Reed v. Goertz, ___ U.S. ___, 143 S.Ct. 955 (2023):**
Holding: The two-year statute of limitations for a Sec. 1983 claiming challenging the constitutionality of a state's postconviction DNA testing procedures does not begin to run until the state appellate process is completed, including a state motion for rehearing.

Wilkerson v. Mass., 2022 WL 1608468 (D. Mass. 2022):
Holding: Habeas Petitioner was entitled to stay and abey to exhaust state claims, where his claims were not plainly meritless, he did not engage in abusive litigation tactics, and he made adequate showing of good cause for failure to exhaust state claims.

Mothershead v. Wofford, 2022 WL 2275423 (W.D. Wash. 2022):
Holding: Even though State postconviction counsel negligently failed to supplement the state record, where petitioner herself supplemented the record with declarations from trial counsel and an expert, she was diligent and not at fault for failure to develop the state court record, so was entitled to evidentiary hearing.

People v. Blalock, 2022 WL 4372206 (Ill. 2022):
Holding: Newly-discovered evidence after postconviction case of a pattern of police brutality satisfies "cause and prejudice" exception to bar against successive postconviction proceedings.

Com. v. Bradley, 2021 WL 487232 (Pa. 2021):
Holding: Postconviction relief petitioner may raise claims of ineffective postconviction counsel, after obtaining new counsel or acting pro se, at the first opportunity to do so, even if on appeal; considering ineffectiveness claims on postconviction appeal does not constitute a successive petition or violate the one-year time bar for filing.

Matter of Fowler, 2021 WL 386582 (Wash. 2021):
Holding: Equitable tolling of statute of limitations for habeas petition was warranted where Defendant hired attorney to prepare petition, attorney falsely told Defendant he was doing so, but then did nothing and disappeared without notifying Defendant, and Defendant's brother hired new attorney before deadline.

People v. Urzua, 2021 WL 4452300 (Ill. App. Ct. 2021):
Holding: Withdrawal of postconviction Movant's court-appointed counsel, after certifying he complied with rule setting forth obligations of postconviction counsel, did not extinguish Movant's right under Postconviction Hearing Act for reasonable assistance from subsequently retained private counsel, where Movant had claimed appointed counsel did not properly represent him.

Sanctions

State ex rel. Grooms v. Privette, 667 S.W.3d 92 (Mo. banc 2023):
Holding: Even though Circuit Clerk and trial court had statutory duty to compile and submit certain jail incarceration costs to the State so that their county could be reimbursed for those costs, trial court lacked authority to hold Circuit Clerk in contempt for failing to do this, because a court's contempt power only extends to "the judicial function – the trying and determining of cases in controversy," or to protect the court's "existence," or "the proper functioning of the court as a judicial tribunal;" the statutory duties here were simply to reimburse counties, and had no impact on the court's ability to operate in its judicial role. Writ of prohibition granted in favor of Circuit Clerk.

State ex rel. Area 25 Trial Office v. Clayton, 628 S.W.3d 263 (Mo. App. S.D. 2021):
Holding: Even though trial court found Attorney's international travel during COVID to be "irresponsible" or negligent, and this caused a trial to be continued, trial court abused discretion in imposing monetary sanctions because it made no finding of "bad faith," which is necessary to support sanctions, and the record did not support a finding of "bad faith"; "bad faith" requires a dishonest purpose, moral obliquity, conscious wrongdoing, breach of known duty through some ulterior motive or ill will partaking in the nature of fraud, or actual intent to deceive or mislead another.

Search & Seizure – Suppression of Physical Evidence

State v. Bales, 630 S.W.3d 754 (Mo. banc 2021):
Holding: (1) Where a search warrant commanded Officers to search a cell phone at a particular address (Defendant's home address), but Officers seized it from Defendant when he came to the sheriff's office with his attorney for an interview, the seizure at the sheriff's office was outside the scope of the warrant, so the evidence was not validly seized; and (2) the good faith exception to the exclusionary rule does not apply because it was not objectively reasonable for Officer to seize the cell phone at the sheriff's office contrary to the clear direction of the search warrant to seize it at a particular address.
Discussion: The Fourth Amendment requires that a search warrant must particularly describe "the place to be searched" and "the person or things to be seized." Sec. 542.276.6 requires the same. Here, the warrant described the phone as being kept at a particular home address. Police are required to adhere to the terms listed in the warrant and may not exceed its authorized scope by searching a location other than the one identified in the warrant. Here, Officer exceeded the scope by seizing the phone at the sheriff's office, not at the home address. (2) The good faith exception to the exclusionary rule only applies if it was objectively reasonable for Officer to rely on the warrant. It was not objectively reasonable for Officer to rely on warrant to seize the phone at the sheriff's office because the warrant did not authorize a search outside the described address. Suppression of cell phone evidence affirmed.

Petersen v. State, 2022 WL 17129167 (Mo. banc Nov. 22, 2022):
Holding: (1) Where Defendant never raised a 4th Amendment claim regarding his motion to suppress in the trial court, but instead objected based on "lack of foundation," the 4th Amendment claim is not preserved for appeal; (2) a general objection to "lack of foundation" does not call the trial court's attention to what aspect of foundation is lacking, and is inadequate to preserve issue for appeal; (3) objecting to evidence only in a pretrial motion is not sufficient to preserve issue for appeal; a party is required to object to the evidence *during the trial itself* to allow the trial court to reconsider its ruling against the backdrop of the evidence actually presented at trial.

State v. Barton, 669 S.W.3d 661 (Mo. banc June 27, 2023):
(1) Even though Officer arrested Defendant outside of Officer's jurisdiction in violation of Sec. 544.216, the exclusionary rule is not applied to violation of state statutes, so suppression of evidence cannot be granted on basis of statutory violation; (2) exclusionary rule only applies to Fourth Amendment violations; and (3) there is no Fourth Amendment violation if Officer has probable cause to arrest for a felony, even if the felony was not committed in Officer's presence.
Facts: Officer, who was investigating a robbery, arrested Defendant for the robbery in a town outside of Officer's jurisdiction. Defendant moved to suppress evidence and statements resulting from the arrest, since arrest outside Officer's jurisdiction violated Sec. 544.216. The trial court granted motion to suppress on this basis. State appealed.
Holding: Sec. 544.216 authorizes law enforcement officers to arrest people for violation of laws "over which such officer has jurisdiction." As a general rule, municipal officers have no power to arrest people beyond the boundaries of their municipality. Here, the

State agrees Officer violated state law in arresting Defendant. However, this Court has never applied the exclusionary rule to remedy a state law violation. The exclusionary rule only applies to Fourth Amendment violations. *Virginia v. Moore*, 533 U.S. 164 (2008), held that in a *misdemeanor arrest*, an Officer must have *both* probable cause *and* that the crime be committed in the Officer's presence to satisfy the Fourth Amendment. But Moore doesn't apply to the instant case, because it involves an arrest for a felony. Under common-law, an Officer was allowed to arrest someone for a felony not committed in his presence if there was reasonable grounds for making an arrest. This Court holds that, when the warrantless arrest is for a felony, the Fourth Amendment is satisfied if Officer has probable cause for the arrest, even when the felony was not committed in Officer's presence. (But Court notes that warrantless arrests upon probable cause in arrestee's home are impermissible absent consent to enter or exigent circumstances.) The motion court did not rule on whether there was probable cause for arrest. Reversed and remanded for further proceedings.

State v. Utech, 631 S.W.3d 600 (Mo. App. E.D. 2021):
(1) Even though Defendant claimed trial court's grant of motion to suppress must be affirmed because trial court had made credibility determinations regarding Officer's testimony, trial court could not have made credibility determinations where Defendant had essentially agreed with the facts and presented the issue to the trial court as one of law only; (2) Defendant's cross-examination of Officer did not seek to challenge his credibility or otherwise undermine his factual representations; (3) Officer's testimony that a "computer check" showed Defendant had expired license plate created reasonable suspicion for traffic stop, even though it turned out that Defendant's plates were not, in fact, expired.
Facts: Defendant, charged with DWI, filed motion to suppress, alleging Officer lacked reasonable suspicion for traffic stop. Officer testified he stopped Defendant because, among other reasons, a "computer check" showed he had an expired license plate. But Officer also testified that he noticed a "2020 sticker" on the plate before he stopped Defendant, and that after he stopped Defendant, he discovered his license wasn't really expired. Officer "explained" the stop on grounds that "in his experience" many people "switch or manufacture their own stickers," or "maybe the computer just wasn't updated." After the suppression hearing, defense counsel filed a memorandum in which he did not challenge Officer's credibility but instead framed the issue purely as a legal one, i.e., whether the State met its burden of proving Officer had reasonable suspicion to stop car. The trial court granted the motion to suppress. The State appealed.
Holding: The standard of review requires appellate court to view the evidence in the light most favorable to trial court's ruling, and defer to trial court on credibility determinations and factual findings. Defendant argues trial court found Officer not credible, so appellate court must affirm. But Defendant's cross-examination of Officer did not challenge Officer's credibility or Officer's factual assertions. Defendant framed the issue only as a question of law based on Officer's statement of facts. Even a minor traffic violation will support probable cause to stop a vehicle, so here trial court erred in granting suppression motion, since an Officer who observes expired license plates has probable cause to stop a car. Although license plate was not, in fact, expired, Officer's reliance on the "computer check" created reasonable suspicion.

State v. Ybarra, 637 S.W.3d 644 (Mo. App. E.D. 2021):
Holding: (1) Where Officer, during a traffic stop, had the passengers get out of the car, and Officer questioned Defendant-Passenger about whether he had drugs (and Defendant answered yes, and produced drugs), trial court erred in suppressing Defendant's statement and drugs because Defendant was not "in custody" at that time (because he was free to leave), and, thus, wasn't entitled to *Miranda* warnings, but (2) where Officer allowed other officers to then drive Defendant-Passenger to a hotel, but told them not to let Defendant leave, and then Officer showed up at hotel and questioned Defendant about whether he owned a backpack (with drugs) that was found in the car, trial court did not err in suppressing Defendant's statements at the hotel, because Defendant was then "in custody" (not free to leave) and was subject to "interrogation" when Officer questioned him there without giving *Miranda* warnings.

State v. Ingram, 2023 WL 2483431 (Mo. App. E.D. March 14, 2023):
In case of first impression, (1) evidence is sufficient to convict of possession of child pornography for possession of cache files containing such images where there is other corroborating evidence (e.g., Defendant's incriminating statements) to support that Defendant knowingly possessed them; this is true even if there is no evidence Defendant knew of the cache files, and even if Defendant deleted the original images that corresponded to the cache files; and (2) even though Yahoo and the National Center for Missing and Exploited Children (NCMEC) reported Defendant's possession to police in Missouri, who then obtained a search warrant to search Defendant's computer (where the cache files were found), there was no 4th Amendment violation because Yahoo and NCMEC were acting as private parties, not government agents, when they notified police; even assuming NCMEC was a government authority, it did not exceed the scope of Yahoo's private search when NCMEC reviewed the photos Yahoo provided, so there was no 4th Amendment violation.
Facts: Internet provider Yahoo notified NCMEC that Defendant had images containing child pornography in his Flikr account. NCMEC then reviewed those same images, and took the additional action of geolocating Defendant's IP address in Missouri. NCMEC then notified local police in Missouri, who obtained a search warrant for Defendant's computer. Police used special software to find several images of child pornography in Defendant's cache files. Police testified that in order for these images to have been in the cache files, someone would have had to have previously deleted the files from the computer (but they remained in the computer's cache). Defendant made incriminating remarks to police that he "probably" had child pornography. The trial court denied Defendant's motion to suppress.
Holding: (1) It is a matter of first impression in Missouri whether images in cache files are sufficient to sustain a conviction for possession of child pornography. We hold there is sufficient evidence to support such a conviction when there is evidence of child pornography images found in cache files, and there is other corroborating evidence to support a finding that Defendant knowingly possessed child pornography. This is true even if there is no evidence Defendant knew of the cache files, even if there was not special software on Defendant's computer allowing him to view the cache files, and even if Defendant deleted the original images which correspond to the cache files. Additional corroborating evidence may include incriminating statements; that Defendant possessed

special software to "clean" his computer or delete files from his computer; or that Defendant had a history of viewing child pornography. (2) It is also an issue of first impression in Missouri whether actions by Internet Service Providers (ISP's) and NCMEC to report child pornography to police constitute a warrantless search in violation of 4th Amendment. Regarding Yahoo, it is a private entity that reviewed Defendant's Flikr account in a private capacity; Yahoo was not a government agent, so the 4th Amendment didn't apply. Even though a federal statute requires ISP's to report child pornography to NCMEC, the statute does *not* require Internet Service Providers to "seek out and discover" child pornography. The Providers do that on their own as private parties. Even assuming NCMEC is a government agent, there is no 4th Amendment violation if the government authorities search no more than what the private party provided. Here, NCMEC only reviewed the photos provided by Yahoo, so did not exceed the scope of Yahoo's private search. Furthermore, to the extent NCMEC located Defendant's IP address in Missouri, that didn't violate 4th Amendment because there is no reasonable expectation of privacy in an IP address.

State v. Branson, 2022 WL 152897 (Mo. App. S.D. Jan. 18, 2022):
Holding: (1) Even though State claimed the warrantless search of Defendant's backpack (where drugs were found) was "incident to arrest" because Defendant was being arrested on a warrant, where Officer had already handcuffed Defendant so that Defendant could not gain access to the backpack, the backpack could not be searched without a warrant because it was not within Defendant's immediate control; and (2) Even though State claimed the backpack would have been searched as an "inventory search" at police station so "inevitable discovery" exception applied, the trial court was not required to believe Officer's testimony that backpack would have been searched and State didn't introduce any written policy or other documents demonstrating inventory search procedures.
Discussion: The trial court sustained motion to suppress by docket entry. The trial court may believe or disbelieve all or any part of the State's evidence. Here, Officer testified that the backpack was close to Defendant but also that Defendant was in handcuffs. Trial court wasn't required to believe that Defendant could still access the backpack. Officer also testified that backpack would have inevitably been searched as part of an inventory search. But State introduced no written policies about his, and trial court wasn't required to believe it. Trial court may disbelieve even uncontradicted State's evidence.

State v. Barton, 2022 WL 14374812 (Mo. App. S.D. Oct. 25, 2022):
Holding: Even though Officer arrested Defendant outside his jurisdiction in violation of Missouri state law, the 4th Amendment does not require suppression of the evidence because all the constitution requires is that an Officer's warrantless arrest be based upon probable cause.
Discussion: The question in this case is whether an Officer violates the 4th Amendment when he makes an arrest that is prohibited by state law. The answer is no. Here, Officer, after receiving report of a robbery, arrested Defendant outside his jurisdiction. Defendant sought to suppress the warrantless arrest and all evidence obtained thereafter on grounds that the "detention was unlawful" since Officer had no arrest power outside of his jurisdiction. The U.S. Supreme Court has held that the 4th Amendment doesn't apply to

additional protections that state legislatures may enact. The 4th Amendment only concerns whether there was probable cause to arrest. Thus, an Officer who makes an arrest on probable cause does not violate the 4th Amendment even though the arrest is prohibited by state law. Here, the trial court erroneously suppressed the evidence on grounds that Officer's arrest outside his jurisdiction violated 4th Amendment. Instead, the court should have determined only whether there was probable cause to arrest. Reversed and remanded for probable cause determination.

State v. Creutz, 2022 WL 17828847 (Mo. App. S.D. Dec. 21, 2022):
Holding: (1) Even though Defendant's motion to suppress evidence never cited Sec. 304.155 (which states that police can tow vehicles after taking someone into custody "where such person is unable to arrange for the property's timely removal"), where Defendant repeatedly argued to the trial court that the evidence obtained from an inventory search should be suppressed because Defendant was not given the opportunity to contact someone to remove his vehicle before it was searched after his arrest and asserted this in his new trial motion, appellate court will treat the Sec. 304.155 issue as preserved for appeal, although the better practice would have been to cite the statute in trial court; but (2) on the merits, the State established the search was motivated by legitimate governmental interest regarding inventory searches, not a desire to search for evidence, and having someone else remove the vehicle was not an option because no other driver was present to accept the vehicle and Defendant was incoherent and apparently unable to arrange for someone to get it.

State v. Crum, 617 S.W.3d 504 (Mo. App. W.D. 2021):
(1) Where trial court denied Defendant's motion to suppress on grounds that Defendant "presented no evidence of his own" and did "not persuade the court" that consent to search was not given, this erroneously placed the burden of producing evidence and persuasion on Defendant; (2) with respect to a motion to suppress, the State bears both the burden of producing evidence and persuading the trial court by preponderance of the evidence to overrule the motion, Sec. 542.296.6.
Facts: Defendant filed a motion to suppress drugs found in an apartment. As relevant here, there was conflicting police testimony as to whether a person had consented to search of the apartment. The trial court denied the motion on grounds that Defendant "does not persuade the court" that consent was not given, and that Defendant "presented no evidence of his own" at the suppression hearing.
Discussion: The trial court clearly erred in placing the burden of producing evidence and persuasion on Defendant. Regarding a motion to suppress, the State bears both the burden of producing evidence and persuading the trial court by a preponderance of evidence to overrule the suppression motion, Sec. 542.296.6. The language of the court's ruling directly calls for Defendant to have presented evidence and persuade the court. In addition, the court had a duty to make factual and credibility determinations whether consent was given. The trial court failed to do this. Denial of motion to suppress reversed, and remanded to trial court to reconsider the evidence under proper standards.

State v. Kirui, 618 S.W.3d 696 (Mo. App. W.D. March 2, 2021):
Holding: Where (1) Defendant was arrested for rape while crime was in progress and was taken to jail, and (2) it would have taken four hours to obtain a warrant to take a DNA sample from his genitals, trial court did not err in denying motion to suppress on grounds that exigent circumstances justified the search without a warrant; but appellate court notes that "nothing is more intrusive than a search of a person's genitalia" and that if this same Defendant had been arrested at his house shortly after the sexual assault, there may not have been "the same exigent circumstances."

State v. Anderson, 629 S.W.3d 39 (Mo. App. W.D. 2021):
Trial court plainly erred in denying motion to suppress that was based on information unlawfully obtained during several warrantless searches; when the illegally obtained evidence was excluded from the warrant affidavit, the remaining evidence did not support probable cause, and since the State's only evidence at trial turned on evidence which should have been suppressed, manifest injustice occurred.
Facts: Defendant had two trials for animal abuse. Prior to the first trial, Officer's search warrant affidavit concerning alleged animal abuse claimed Officer had not entered Defendant's barn. A motion to suppress was denied, and Defendant was convicted. Later, during a separate civil suit, the State disclosed documents showing that Officer had entered Defendant's barn. Based on this disclosure, the trial court granted a new trial. Defendant again moved to suppress evidence. The trial court suppressed evidence obtained from three warrantless searches, but denied it for the warrant-supported search. After conviction, Defendant appealed.
Holding: Because Defendant did not object to introduction of the evidence at trial, the issue is reviewed for plain error. The trial court failed to consider how the three warrantless searches affected the warrant application. The court should have redacted from its analysis of probable cause in the warrant affidavit any information obtained illegally in the warrantless searches. However, the fact that illegally obtained evidence is included in the affidavit does not invalidate the warrant. The question is whether, setting aside all tainted allegations, the independent and lawful information stated in the affidavit shows probable cause. By suppressing evidence from the warrantless searches, the trial court necessarily determined that evidence was illegally obtained. Thus, that evidence should have been redacted from the warrant application. There was no such redaction in this case. When that evidence is redacted, the majority of the remaining information does not provide probable cause for the search. Even though Officer claimed that he had received "complaints" about how Defendant treated his animals, the affidavit didn't reveal the identify of informants, number of complaints, substance of complaints, dates, or reliability of the complaints. When the evidence related to the warrant is suppressed, the State is left with no evidence of guilt to present at trial. Thus, manifest injustice occurred.

State v. Haneline, 2023 WL 2375392 (Mo. App. W.D. March 7, 2023):
Holding: Where (1) Officer saw Defendant on his hands and knees digging a hole in a public park at midnight, (2) Defendant wouldn't give Officer a straight answer as to why Defendant was digging, (3) Officer saw a black lunchbox near Defendant that was partially opened, and (4) Officer opened lunchbox and found drug paraphernalia, contents

of lunch box should have been suppressed because Defendant had reasonable expectation of privacy in lunchbox, even though Defendant denied ownership of lunchbox to Officer.
Discussion: At the suppression hearing, Defendant testified the lunchbox was his. A warrantless search is presumptively invalid under 4th Amendment. Defendant had a reasonable expectation of privacy in the lunchbox because he kept it at least partially closed. The 4th Amendment provides protection to owners of containers who conceal their contents from plain view. The State claims Defendant abandoned the property by denying ownership, so the search was valid. But abandonment will be found only when incriminating evidence has been abandoned voluntarily, and abandonment is not voluntary if it results from an illegal seizure. Where Defendant shows a nexus between the unlawful police conduct and the abandonment of property, the abandonment is involuntary. Abandonment is involuntary if it results from illegal police conduct, such as an unreasonable, warrantless search, as here.

State v. Thomas, 2023 WL 8588320 (Mo. App. W.D. Dec. 12, 2023):
Holding: Even though after Officer stopped Defendant for having a headlight out, (1) Defendant initially refused to get out of his car; (2) couldn't find his license and turned his back to Officer while looking in the console; (3) initially gave consent to search part of the car but then revoked it; (4) appeared nervous; and (5) had an active municipal warrant for an unpaid fine (but warrant also stated not to take into custody due to COVID), where (5) Officer was able to confirm over radio that Defendant had a valid license, but (6) called other Officers to scene who then discussed calling a K-9 unit and delaying writing a ticket for the K-9 dog to arrive, Officer unreasonably delayed the stop beyond the time necessary to investigate and complete the traffic stop in violation of 4th Amendment, and drugs found in car are suppressed.
Discussion: A dog sniff which prolongs an initial traffic stop beyond the time reasonably required to investigate and complete the stop violates the 4th Amendment. However, an officer may continue to detain a driver beyond the time needed to compete the stop if the officer develops reasonable suspicion of illegal activity. Here, after Officer stopped Defendant for having a headlight out, it was reasonable for Officer to investigate whether Defendant had a valid driver's license. This led to discovery of the municipal warrant for an unpaid fine, although the warrant also stated not to take Defendant into custody due to COVID. This process took about 12 minutes, which was reasonable. However, when Officer began writing a traffic ticket, other Officers (who had been called to the scene) "specifically suggested to Officer that he delay writing the traffic ticket until the warrant issue was resolved, because that would allow more time for the K-9 unit to arrive." Dog arrived 22 minutes after the initial stop and found drugs. The decision not to begin writing the traffic citation until the K-9 unit arrived was an unreasonable extension of the traffic stop without reasonable suspicion. Defendant's nervousness, by itself, doesn't create reasonable suspicion. Even though Defendant withdrew consent to search, the withdrawal of consent may not be used to create reasonable suspicion of criminal wrongdoing anymore than an initial refusal to search. Yet Officer called for K-9 unit right after Defendant's refusal. Officer didn't see any weapons, smell any drugs, and Defendant did not appear impaired Even though Defendant initially refused to get out of his car, and Officer testified Defendant was "argumentative," the video of the stop showed Defendant was cooperative overall. Even though Defendant turned his back

toward Officer while looking in the console, Officer did not testify that Officer believed this conduct was an attempt to conceal or destroy evidence of crime. While criminal history can be a basis for reasonable suspicion, the fact that Defendant had a municipal warrant for unpaid fines doesn't amount to reasonable suspicion. Evidence suppressed.

State v. O'Connor, 2023 WL 8721993 (Mo. App. W.D. Dec. 19, 2023):
Holding: Even though Officer responding to a "well-being check" (1) found Defendant and a driver asleep in a car on a bank parking lot; (2) Defendant, a woman, was unclothed from the waist down and the male driver was completely unclothed; (3) it took several minutes to wake both of them up; (4) Defendant identified herself and said she might have a warrant out for her arrest; (5) Defendant said she had used drugs several hours ago; (6) Officer verified there was an arrest warrant for Defendant; (7) when Officer arrested Defendant pursuant to the warrant, he asked her whether she wanted to take her purse, but she said, "no, leave it there" in the car; (8) the male driver later gave consent to search the car; (9) drugs were found in Defendant's purse; and (10) Officer testified he didn't know what happened to the car after this incident, the drugs in the purse should have been suppressed because Defendant did not abandon her purse, the male passenger had no apparent authority to consent to search of Defendant's purse, and the inevitable discovery exception doesn't apply because there was no evidence presented that the car would have been searched pursuant to an inventory search.
Discussion: The State has the burden to justify a warrantless search and seizure under the 4th Amendment. The State first claims Defendant abandoned the purse. Whether property has been abandoned is determined on the basis of objective facts available to the investigating Officer, not on the basis of the owner's subjective intent. Two important factors are whether a defendant denies ownership of the property and whether defendant physically relinquishes the property. Here, Defendant never denied ownership of the purse, and acted at all times to show that this was her purse. Defendant's leaving the purse in the car was not a physical relinquishment, because telling the Officer to leave it in the car does not show Defendant's intent never to reclaim the purse. Defendant's choice to leave the purse in the car shows an intent to leave the purse in a protected location since she was about to be taken to jail. The State next claims the male driver had authority to consent to search of the purse. Whether a third-party's consent extends to an absent person's property is made using an objective standard. Though by sharing a vehicle, a passenger relinquishes some expectation of privacy in the vehicle itself, a passenger does not have a similarly limited privacy expectation in items in the car which are independently the subject of privacy expectations. The shared control of "host" property does not serve to forfeit the expectation of privacy in containers within that property. Here, there was no evidence that male driver was authorized to consent to search Defendant's purse. A girlfriend does not give her boyfriend authority to consent to search her purse from the mere fact of their relationship and the fact that the purse is in the boyfriend's car. The State next argues the inevitable discovery exception applies, since the purse would have been eventually searched through an inventory search of the car. However, to show this, the State was required to prove that the local police department had certain standard inventory procedures, and that those procedures would have led to search of the purse. But here, the State presented no evidence that the car was even seized by police, let alone any evidence of standard inventory procedures. The

testifying Officer didn't know what happened to the car. Finally, the search might be justified if there was probable cause to search the purse and exigent circumstances necessitate the search. But here, the Officer and State sought to justify the search based on consent to search. Officer did not testify he searched the purse based on probable cause. Evidence suppressed.

*** Torres v. Madrid, ___ U.S. ___, 141 S.Ct. 989 (U.S. March 25, 2021):**
Holding: The application of physical force to the body of a person with intent to restrain is a seizure under 4th Amendment even if the person does not submit and is not subdued; thus, Plaintiff was "seized" when police shot her even though she eluded capture.

* **Caniglia v. Strom, ___ U.S. ___, 141 S.Ct. 1596 (U.S. May 17, 2021):**
Holding: The "community caretaking" exception to Fourth Amendment does not apply to searches of residences.

*** U.S. v. Cooley, ___ U.S. ___, 141 S.Ct. 1638 (U.S. June 1, 2021):**
Holding: A tribal police officer has authority to detain temporarily and to search non-Native American persons traveling on public right-of -ways running through a reservation for potential violations of state or federal laws.

*** Lange v. California, ___ U.S. ___, 141 S.Ct. 2011 (U.S. June 23, 2021):**
Holding: Under the Fourth Amendment, pursuit of a fleeing misdemeanor suspect does not always (categorically) qualify as an exigent circumstance to permit warrantless entry into a home; such misdemeanor cases require a case-by-case evaluation as to whether the totality of circumstances show emergency circumstances – such as imminent harm to others, threat to the officer, destruction of evidence, or escape from the home; only if exigent circumstances are present in the particular misdemeanor case can police enter the home without a warrant.

U.S. v. Wilson, 2021 WL 4270847 (9th Cir. 2021):
Holding: Gov't's warrantless search of Defendant's email attachments violated 4th Amendment because it exceeded the scope of the prior private search by Defendant's email provider, whose automated program had notified Gov't that Defendant's attachments contained child pornography even though no employee had actually viewed the images; Gov't's search of the attachments allowed Gov't to learn exactly what the images showed and allowed it to obtain warrant based on that information.

U.S. v. Buescher, 2023 WL 5950124 (N.D. Iowa 2023):
Holding: Where drug dog put his head into the open window of Defendant's vehicle, this was a trespass with the intent to obtain information, and violated Defendant's 4th Amendment right to be free from unreasonable searches.

U.S. v. Milton, 2022 WL 3334706 (S.D. N.Y. 2022):
Holding: Even though Defendant-passenger was stopped for only seven minutes before being searched, police unreasonably prolonged traffic stop prior to search in violation of 4th Amendment where they had completed their warrant checks on driver and passenger

within four minutes (at which point they should have issued a ticket), but then began asking questions unrelated to the traffic violation.

State v. Rolon, 2020 WL 8255318 (Conn. 2020):
Holding: Exception to warrant requirement which allows Officers to detain occupants of place to be searched did not apply where Officers were searching a multi-unit apartment building, Defendant was in the parking lot, and there was no basis to believe Defendant had the ability to enter the individual's apartment which was being searched.

Juliano v. State, 2021 WL 4127187 (Del. 2021):
Holding: Marijuana odor on passenger side of car did not provide probable cause to arrest passenger during traffic stop for offense of "use of marijuana in a moving vehicle," since possession of marijuana is not a crime and occupants of car did not appear to be under influence of marijuana.

Taylor v. State, 2021 WL 4095672 (Del. 2021):
Holding: Search warrant essentially authorizing search of everything on murder Defendant's smartphone by using "including but not limited to" language, was unconstitutionally overbroad, did not limit the search to the relevant time frame, and did not describe the places to be searched with particularity.

Mayo v. U.S., 2022 WL 54516 (D.C. 2022):
Holding: Even though Defendant was in an area at night where there had been prior gun seizures and fled when Officers approached him and asked if he had a gun, Officers did not have reasonable, articulable suspicion for *Terry* stop, because they weren't responding to any tip, didn't see any suspicious behavior beforehand, and Defendant's gestures had innocent explanations.

Awad v. State, 2022 WL 162796 (Ga. 2022):
Holding: Georgia constitution's right against compelled self-incrimination prohibited state from admitting evidence that Defendant refused to take a urine test, following his arrest for DWI.

State v. Wilson, 2022 WL 127957 (Iowa 2022):
Holding: Where (1) police had violated 4th Amendment by making a warrantless entry into Defendant's apartment to arrest her for a misdemeanor; (2) police saw Defendant throw down a vial of cocaine right before arresting her; and (3) Defendant resisted arrest, the warrantless entry required suppression of the cocaine, and the "new crime exception" to the exclusionary rule did not permit police to later get a warrant for the cocaine based on Defendant's new crime of resisting arrest, since she had thrown down the cocaine before the new crime of resisting.

State v. Carter, 2021 WL 302802 (Md. 2021):
Holding: Even though light rail train had signs indicating that ticket was required, Defendant-Passenger did not implicitly consent to her seizure when Officer entered stationary train to conduct "fare sweep" to determine if passengers had tickets; there were

no signs warning passengers of fare sweeps, and seizure of stationary train for as long as it took to conduct "fare sweep" was beyond understanding of reasonable passengers that some fare inspection might occur.

Com. v. Yusuf, 173 N.E.3d 378 (Mass. 2021):
Holding: Even though police had been called to residence for a domestic disturbance and a resident allowed the police inside, the "plain view" doctrine did not extend to a later warrantless investigatory review of the video footage from the Officer's body camera which was worn inside the home; review of video resulted in additional invasion of privacy unconnected to the original authorized entry to the home, and occupants would not expect that police video of their home would be preserved indefinitely and accessed without restriction for reasons unrelated to the original purpose.

Com. v. Garner, 2022 WL 2285782 (Mass. 2022):
Holding: Police lacked reasonable suspicion to pat and frisk Defendant during traffic stop; even though Defendant had two prior convictions for firearms, they were six years old and Defendant was cooperative with police during stop.

State v. Zeimer, 2022 WL 1639236 (Mont. 2022):
Holding: Officers unlawfully prolonged stop in a parking lot before conducting DWI tests at the 20-minute point, where they first did non-DWI-related questioning, then did a pat-down search, then did more questioning about why Defendant was parked in the parking lot, and Defendant was coherent and cooperative throughout.

State v. Radel, 2022 WL 175236 (N.J. 2022):
Holding: Where Defendant is arrested outside of their home, the 4th Amendment allows officer to then conduct protective sweep inside the home only when officer has reasonable, articulable suspicion that the home harbors people posing a danger to those at the arrest scene.

State v. Nyema, 2022 WL 211436 (N.J. 2022):
Holding: Even though a police dispatch alert said that two Black males had just robbed a store, officers lacked reasonable suspicion to stop a vehicle with three Black males in it; even if officers could infer that the third male was a getaway driver, the dispatch alert -- without further description -- was so general it placed every Black male in the area under suspicion; similar inferences, if permitted, would allow officers to stop any single Black male on theory that the robbers could have split up.

State v. Goldsmith, 2022 WL 2431867 (N.J. 2022):
Holding: Even though two police officers never told Defendant to "stop," where they saw Defendant near a vacant house allegedly used for sale of drugs, blocked his path, and asked him questions about why he was there and where he was coming from, this was an investigatory stop requiring reasonable suspicion.

State v. Smith, 2022 WL 2309863 (N.J. 2022):
Holding: Police lacked reasonable suspicion for traffic stop for tinted windows violation where they only saw dark tint on rear window, and could see Defendant inside making a "shoving" motion.

State v. Bolinske, 2022 WL 188466 (N.D. 2022):
Holding: Defendant's 4th Amendment right to prompt probable cause determination was violated where Defendant was arrested without a warrant on Friday afternoon but not brought before a judge until Monday.

State v. Pittman, 2021 WL 282307 (Or. 2021):
Holding: Court order requiring Defendant to disclose passcode to her smartphone violated Oregon Constitution's self-incrimination provision.

Hawken v. State, 2022 WL 2166878 (Wyo. 2022):
Holding: Defendant's Husband did not impliedly consent to Officer's warrantless entry into home, where Officer came to door to speak to Wife, Husband told Officer he would get Wife, told Officer to "wait right here," but Officer followed Husband into home.

Medina-Hernandez v. State, 2022 WL 1767159 (Ga. App. 2022):
Holding: Even though a man and woman seen outside residence may have engaged in criminal activity, affidavit supporting search warrant for residence did not establish probable cause, where affidavit provided no information about how long man and woman were outside, who owned residence, whether man and woman lived at residence, and nothing in affidavit showed that anyone carried anything (drugs) into residence.

People v. Abcumby-Blair, 2020 WL 7635462 (Mich. Ct. App. 2020):
Holding: Officer's act of answering Defendant's cell phone without his permission and without warrant was a search under Fourth Amendment that violated arrestee's reasonable expectation of privacy.

State v. Vivian, 2022 WL 4846192 (Idaho App. 2022):
Holding: Even though inevitable discovery exception to exclusionary rule applied to search of Defendant's vehicle (where drugs were found) because vehicle remained at scene due to Defendant having suspended license so would have inevitably been impounded and searched, the exception did not apply to Defendant's statements given to police after the drugs were found even though police gave *Miranda* warnings.

Self-Defense

State v. Townsend, 2022 WL 1146356 (Mo. App. E.D. April 19, 2022):
(1) Trial court plainly erred in excluding Defendant's testimony that, an hour before the shooting, Victim's Mother had told Defendant that her Victim-Son was going to "blow your fuckin' head off," and made racially derogatory comments toward Defendant, because the testimony explained Defendant's state of mind at the time of the shooting, and its exclusion prevented him from presenting a complete defense of self-defense; and (2) trial court plainly erred in allowing Lay Witness to testify about Missouri's legal requirement to carry out an eviction because this created the false impression that Defendant (Landlord) was unlawfully on the property where shooting occurred and, thus, had a duty to retreat before shooting.
Facts: Defendant was charged with first-degree assault for shooting Victim-Son. Defendant had purchased a property on which Victim-Son and his Mother resided as tenants. Defendant and Victim-Son had agreed that, in exchange for waiver of 90 days rent, Son and Mother would vacate the property. On the day of the charged crime near the end of the 90 days, Mother and Defendant got into a dispute. Mother told Defendant that her Son was going to "blow your head fuckin' off" and made racially derogatory comments toward Defendant, who was Black. About an hour later, Son asked Defendant to come back to the property to unlock a shed. Son had a gun. An argument ensued between Mother and Defendant over trash at the property. Mother again called Defendant derogatory names, and told him to shut up and leave. Son testified Defendant pulled out a gun, a struggle ensued between him and Defendant, and Defendant shot Son while Son was running away. Defendant testified he shot Defendant after Defendant pointed the gun at him and cocked it. The trial court prohibited Defendant from testifying about Mother's remarks an hour before the shooting on hearsay grounds and because he had not told this to police, and prohibited Defendant from testifying about the racially derogatory remarks because they were inflammatory. The trial court also allowed a Lay Witness to testify about eviction procedures in Missouri, which allow a Landlord to enter property for an eviction only if accompanied by a Sheriff.
Holding: (1) Out-of-court statements not offered to prove the truth of the matter are not hearsay. In self-defense cases, the Defendant's state of mind is critical. Under the state-of-mind exception to hearsay, statements that go to Defendant's state of mind may be admissible. Since state of mind is critical, it's important that Defendant be able to tell the reasons for his state of mind. Defendant's proposed testimony was not hearsay – because it wasn't offered for its truth – but it was relevant to his state of mind. By excluding it, the jury didn't hear all relevant, probative evidence on the issue of self-defense. The State argues the statements were not made by Victim, but this misses the mark because it focusses on Victim's state of mind, *not* Defendant's. Testimony relevant to Defendant's state of mind is not limited to statements only by the Victim. The self-defense instruction speaks of whether Defendant had "reasonable grounds" to "reasonably believe" physical force was necessary to defend himself. Those grounds do not have to come only from Victim. The State argues that no other witness corroborated Mother's statements, but Missouri law does not require another witness corroborate a Defendant's testimony, before it is admissible. As to the trial court's exclusion of Defendant's testimony because he didn't tell this version to police, that is a matter for cross-examination, not

admissibility. While the racial epithets were vile, the inflammatory nature of otherwise admissible evidence doesn't justify its exclusion, particularly because it helped explain Defendant's statement of mind. Defendant was denied his 6th Amendment right to present complete defense. (2) A Lay Witness was allowed to testify that a Landlord is not permitted to enter leased premises to do an eviction unless accompanied by a Sheriff. This injected a false issue into the case as to whether Defendant was lawfully on the property. This case did *not* involve an eviction. Son and Mother were vacating the property voluntarily in exchange for waiver of rent. This false issue resulted in manifest injustice because the self-defense instruction told jurors that a person is not required to retreat only if he is "lawfully remaining" on the property. In a self-defense case, whether Defendant was lawfully on the property is critical. The Lay Witness' testimony injected a false issue into the case.

Mercer v. Stewart, 2022 WL 1212786 (E.D. Mich. 2022):
Holding: Habeas relief granted on claim that Petitioner was deprived of due process right to present a defense in murder case when trial court refused to give justification jury instruction that Petitioner killed victim to prevent him from raping her.

Jones-Nelson v. State, 2022 WL 2285927 (Alaska 2022):
Holding: Jury instruction which stated "in circumstances when a person is permitted to use deadly force in self-defense, that person may still not be authorized to employ all-out deadly force" because it isn't necessary, and that "use of deadly force is unreasonable if non-deadly force is" sufficient, incorrectly directed jury to retroactively assess the reasonableness of Defendant's use of force for self-defense, contrary to law's requirement that use of force be evaluated based on circumstances as they appeared to Defendant when the force was used, and not in hindsight.

People v. Yanez, 2022 WL 1513651 (Ill. App. 2022):
Holding: Defendant's use of deadly force to stop intoxicated Defendant from attempting to enter his home in violent or tumultuous manner justified as defense of dwelling.

Skinner v. State, 2023 WL 5922082 (Miss. Ct. App. 2023):
Holding: Defendant was entitled to imperfect self-defense instruction where Defendant believed Victim "was the devil" and was in a satanic cult; Defendant was paranoid and erratic leading up to the shooting; and Defendant shot Victim after they had fought over a gun, Victim came toward Defendant, and Defendant was scared for his life.

Sentencing Issues

Hefley v. State, 626 S.W.3d 244 (Mo. banc 2021):
(1) Defendant-24.035 Movant was denied effective counsel where he pleaded guilty in an open guilty plea after his counsel told him he "could" be placed in a long-term treatment program, but Defendant-Movant was, in fact, legally ineligible for such a program; and (2) Sec. 217.362.2 requires that judges considering sentencing a defendant to long-term treatment notify DOC in advance of sentencing; screening for eligibility after sentencing is not appropriate.
Facts: Defendant was charged with DWI as a "habitual offender." He pleaded guilty in an open guilty plea after his counsel told him he "could" be eligible for long-term treatment. The plea court sentenced him to 9 years but with the long-term treatment program that gave Defendant opportunity for early release. After sentencing, however, DOC notified Defendant that he was statutorily ineligible for long-term treatment because long-term treatment is not available to a person convicted of a "dangerous felony," Sec. 217.362.1, and DWI as a "habitual offender" is a "dangerous felony," Sec. 556.061(19). Defendant filed a 24.035 motion.
Holding: (1) Counsel's affirmative misrepresentations to Movant about the possibility of long-term treatment were objectively unreasonable. The record reflects a reasonable basis for Movant's mistaken belief that long-term treatment was available to him, which even the plea court subscribed to in sentencing Movant to long-term treatment. Because of counsel's erroneous advice, Movant lacked a sufficient understanding of his potential sentence. The State argues the motion court must have found Movant's testimony that he would not have pleaded guilty, if he had received correct advice, to be incredible. But the motion court's Findings do not discuss credibility, and no deference is owed to an alleged "implicit" finding of non-credibility. (2) Sec. 217.362.2 requires a sentencing judge who is considering long-term treatment to notify DOC about that before sentencing. This is so the DOC can determine if a defendant is eligible for the program and if space is available. If not, the judge is to consider other options. It is error for the judge to sentence a defendant to long-term treatment without contacting DOC before doing so.

State v. Yount, 2022 WL 1019014 (Mo. banc April 5, 2022):
Proof of "dangerous offender" status, Sec. 558.016.4, requires both (1) that Defendant is being sentenced for a felony in which he murdered, endangered or threatened the life of another, or knowingly inflicted, attempted, or threated to inflict serious physical injury on another, and (2) that Defendant previously has been found guilty of a class A or B felony or dangerous felony.
Facts: Defendant was charged in the instant case with various class D felony second-degree burglaries. The State further charged Defendant as a "dangerous offender," Sec. 558.016.4, because he had a prior conviction for kidnapping in 1994. The court found Defendant was a "dangerous offender," and sentenced him to enhanced punishment.
Holding: A sentence which exceeds the maximum authorized by law is plain error. Sec. 558.016.4 has two clauses separated by an "and." Sec. 558.016.4 states that a "dangerous offender" is one who (1) is being sentenced for a felony during which he knowingly murdered, endangered or threatened another, or knowingly inflicted,

attempted or threatened serious physical injury on another, *"and"* (2) has been found guilty of a class A or B felony or dangerous felony. Here, the State showed that Defendant satisfied subsection (2), because he was previously found guilty of kidnapping, which was a dangerous felony. But the State did not show that Defendant satisfied subsection (1), because Defendant's second-degree burglaries do not fit within the conduct of that subsection. The word "and" in the statute means that *both* subsections of the statute be satisfied. There is no indication the legislature intended "and" to be construed any way but its commonsense meaning. If only one part of Sec. 558.016.4 needed to be proved, then any murder or assault would always qualify under the first subsection. This would create the untenable result that certain felonies would always be subject to enhancement, ignoring the legislature's chosen class designations for those felonies. Even though MACH-CR 2d 2.30 says either subsection will qualify, where a conflict exists between MACH-CR and the substantive law, the substantive law controls. Lastly, the State contends remand is appropriate to prove up a different sentence enhancement (persistent offender). However, the State only gets one opportunity to plead and prove an enhancement status. Defendant's sentence as "dangerous offender" reversed.

State v. Shepherd, 2022 WL 12289858 (Mo. banc April 26, 2022):

Even though State presented Defendant's driving record from Colorado showing he had five prior DWI offenses, evidence was insufficient to prove "habitual offender" DWI status, because State introduced no facts underlying the Colorado convictions to show the conduct involved would qualify as an intoxication related traffic offense (IRTO) in Missouri at the time of the current offense.

Facts: Defendant was charged with DWI as a "habitual offender," Sec. 577.010.2(6)(a), for having 5 or more prior IRTOs. As relevant here, when Defendant committed the Mo. DWI, IRTOs were defined as "driving while intoxicated" and "driving with excessive blood alcohol content." As proof of this, State introduced Defendant's Colorado driving record, which showed five prior offenses.

Holding: A prior conviction qualifies as an IRTO only if the conduct involved "driving while intoxicated," or another portion of the IRTO definition in section 577.001(15), as defined at the time of the current offense for which State seeks enhancement. As used in Chapter 577 at time of Defendant's offense, the word "driving" meant "physically driving or operating a vehicle," Sec. 577.001(9). This does not include merely being in "actual physical control" of a vehicle. This is critical to the State's failure of proof here, because Colorado statutes did not make a distinction between driving a vehicle, and merely being in actual physical control of the vehicle. Under Colorado law, merely being in actual physical control would constitute DWI. Thus, all of Defendant's prior convictions could have been for merely being in actual physical control. State had burden to prove beyond a reasonable doubt that Defendant's prior convictions met the *definition* of an IRTO under Missouri law at time of present offense. (But State need not prove that the conduct underlying the prior out-of-state convictions also constitutes a *crime* under Mo. law in effect at time of present offense. To the extent cases such as *State v. Coday*, 496 S.W.3d 572 (Mo. App. W.D. 2016), and *State v. Gibson*, 122 S.W.3d 121 (Mo. App. W.D. 2003) impose such a requirement, they are overruled). Here, State presented no evidence about Defendant's underlying conduct in Colorado. Nevertheless,

it may be possible to make reasonable inferences about some of Defendant's prior convictions that they involved actual driving, since they resulted in accidents; but that is an issue for remand. Judgment vacated and remanded for resentencing.

State v. Hollowell, 2022 WL 1228957 (Mo. banc April 26, 2022):
Holding: (1) Trial court erred, in felon-in-possession case, in allowing Officer to testify that Defendant's wife, who did not testify, told Officer that she had bought firearms for Defendant, because this hearsay went beyond explaining Officer's conduct and was the only direct evidence linking Defendant to the crime; (2) even though Defendant cross-examined Officer about the hearsay statement, this did not waive Defendant's objection from direct, since when a party objects to introduction of evidence and is overruled, the party does not waive the objection by eliciting the same evidence on cross; and (3) where Defendant was charged with 14 counts of possession of a firearm, this did not violate Double Jeopardy because Sec. 571.070.1 uses the phrase "unlawful possession of a firearm," indicating the legislature intended each firearm to be a separate offense.
Discussion: (1) Officer can testify to hearsay for the limited purpose of explaining Officer's conduct. However, the jury may not be aware of this limitation, so such hearsay is subject to careful scrutiny and limitation. Such hearsay must not be allowed to elicit details directly connecting Defendant to the crime. Here, the State's direct of Officer allowed Officer to testify beyond what was necessary to explain his conduct. This prejudiced Defendant because the non-testifying wife's statement was the only evidence directly connecting Defendant to crime. (2) Double Jeopardy prohibits multiple punishments for the same offense. The question is whether the legislature intended multiple punishments. Here, Sec. 571.070.1 prohibits unlawful possession of "a firearm." Thus, the unit of prosecution is the singular "a", meaning each firearm.

State v. Forbes, 2023 WL 4201542 (Mo. banc June 27, 2023):
Holding: Where (1) on September 26, 2019, Defendant was found guilty at jury trial; (2) on October 18, 2019, Defendant filed New Trial Motion; (3) on January 13, 2020, the court orally sustained the New Trial Motion, but then set aside that ruling on January 23, 2020 and then found the motion was overruled by operation of law because more than 90 days had passed; (4) on February 10, 2020, the court sentenced Defendant to 10 years in prison; (5) on February 25, 2020, Defendant filed Notice of Appeal (NOA); (5) in March 2020, the Court of Appeals dismissed the appeal either because the NOA was untimely or because it was premature since proceedings were apparently still going on in the trial court; (6) in April 2020, the trial court held proceedings regarding restitution as a condition of parole; (7) on May 28, 2020, the trial court "withdrew" its sentence; (8) on September 14, 2020, the trial court ordered restitution in the amount of $26,000 and purported to re-sentence Defendant to 15 years in prison; and (9) on September 22, 2020, Defendant filed a new NOA, the appeal must be dismissed as untimely because "final judgment" occurred when the trial court orally pronounced sentence on February 10, 2020, and the NOA wasn't filed within 10 days of that; furthermore, everything the trial court did after February 10 (including imposing $26,000 in restitution and re-sentencing Defendant to 15 years) was a nullity. Appeal dismissed and case remanded for entry of sentence of 10 years.

Discussion: In a criminal case, "final judgment" is rendered when the trial court orally pronounces sentence in the presence of Defendant. After oral rendition of sentence, the trial court can take no further action inconsistent with that unless expressly provided by statute or rule. To allow otherwise would result in chaos of review, unlimited in time, scope and expense. Thus, any action taken by a trial court after sentence is imposed is a nullity. Sec. 559.105 governs restitution and allows a circuit court to order restitution as part of a sentence. However, nothing in the statute provides for such action after sentence is imposed and the criminal judgment is final. An NOA must be filed within 10 days of "final judgment," which here was February 10, 2020. The NOA filed here was untimely. Further, the trial court had no authority to take any action after "final judgment."

Jagels v. State, 631 S.W.3d 618 (Mo. App. E.D. 2021):
Holding: Where Defendant pleaded guilty to a Class D felony, but the written sentence and judgment stated this was a Class C felony, this was a clerical error that can be corrected *nunc pro tunc* per Rule 29.12(c).

In the Interest of D.E.W., 617 S.W.3d 514 (Mo. App. E.D. 2021):
Holding: Where Juvenile was charged with "minor in possession of alcohol," but trial court's Adjudication Order found him "guilty of stealing," this was a clerical error which could be corrected nunc pro tunc.
Discussion: To determine whether a nunc pro tunc is proper, it must be determined whether correcting the Adjudication Order changes the original judgment or merely changes the record. The record here shows that this was a clerical error. Juvenile was charged with multiple stealing offenses (including of alcohol). The court separately found the stealing of the vodka as a stealing offense. This shows that the designation of the "minor in possession" as a stealing offense was a clerical error, as the court could not have found him guilty of the same offense twice.

Chandler v. State, 621 S.W.3d 52 (Mo. App. E.D. 2021):
Holding: Even though 24.035 Movant claimed trial court had lacked authority to both sentence him to prison and order payment of restitution under Sec. 577.011 (2016), where Movant had agreed to this in a plea bargain, any such sentencing error was "self-invited" and Movant's claim was waived by his knowing and voluntary plea.

State ex rel. Bailey v. Hilton, 2023 WL 5022182 (Mo. App. E.D. Aug. 8, 2023):
Holding: Where (1) Petitioner's probation was set to expire on Jan. 31, 2016, but (2) on January 19, 2016, the probation court suspended probation and scheduled a revocation hearing for March 1, 2016, and (3) Petitioner subsequently failed to appear for several scheduled revocation hearings and was eventually arrested and revoked in October 2016, the habeas court exceeded its authority in holding that probation was illegally revoked, since the probation (trial) court manifested an intent to revoke by scheduling a revocation hearing before the probation expired, and Petitioner has not met his burden of showing that the hearing could have been conducted before then and did not object to the March date.

Discussion: Sec. 558.036.8 allows a court to extend a probation period if (1) there has been some affirmative manifestation of an intent to conduct a revocation hearing before expiration, and (2) every reasonable effort was made to conduct the hearing before expiration. The *scheduling* of a revocation hearing before expiration is sufficient to show an affirmative manifestation of intent to revoke. *Petitioner* has the burden to demonstrate the probation court did not make every reasonable effort to hold the revocation hearing before expiration. But Petitioner does not present any evidence that the court could have held the hearing before expiration, and Petitioner did not object to the scheduling of his revocation hearing after its expiration. Grant of habeas relief reversed.

State v. Ferguson, 2023 WL 6219677 (Mo. App. E.D. Sept. 26, 2023):
Holding: Where Defendant's statutory sodomy crimes occurred in 2008 through January 2013, the pre-August 2013 version of Sec. 558.026 applied which gave the trial court discretion to run the sentences currently; since the record reflects the trial court and parties all mistakenly believed the sentences were *required* to run consecutively, plain error occurred and Defendant is entitled to resentencing, where the court may consider whether to impose concurrent sentences.

State v. Hankins, 2023 WL 8042613 (Mo. App. E.D. Nov. 21, 2023):
Holding: Where the written sentence and judgment incorrectly stated which Counts Defendant was convicted of and which Counts he was acquitted of, this was a clerical error that can be corrected *nunc pro tunc* under Rule 29.12(c).

McCloskey v. State, 2023 WL 8882868 (Mo. App. E.D. Dec. 26, 2023):
Holding: (1) Even though Defendant, who had pleaded guilty to a misdemeanor which plea deal required that he forfeit certain guns, had subsequently been pardoned by the Governor, Defendant was not entitled in replevin action under Rule 99 to retrieve possession of the guns, because a pardon extinguishes the fact of "conviction," but not the fact of "guilt"; and (2) even though Defendant claims the misdemeanor proceedings against him, which seized his guns, violated his 2nd Amendment rights, Defendant's guilty plea waived all nonjurisdictional defects, including this claim; Defendant was required to raise constitutional claims in his criminal case, and cannot raise them in a civil collateral attack.
Discussion: Prior cases have held that even though a person has received a pardon from the Governor, they still are ineligible for a concealed-carry gun permit under Sec. 571.101 and still are ineligible run for public office under Sec. 145.306.1. This is because a pardon extinguishes the fact of "conviction," but not the fact of "guilt." The same is true here.

State ex rel. Hunt v. Seay, 622 S.W.3d 184 (Mo. App. S.D. 2021):
Trial court abused discretion in denying release on probation under Sec. 559.115 where Defendant had successfully completed DOC program; trial court's reliance on severity of crime and Defendant's failure to successfully complete probation in past did not support denial of release, since this was pre-sentencing evidence, which does not, by itself, make a defendant unfit for probation.

Facts: Defendant pleaded guilty, received an SIS, and was placed on probation. After violating probation, trial court ultimately sentenced him to a 120-day shock incarceration program under Sec. 559.115.3. DOC notified trial court that Defendant successfully completed the program and would be released. Trial court held a hearing, and found it would be an abuse of discretion to release Defendant because of the severity of the crime, and because Defendant had not successfully completed probation in this case. Defendant sought writ of mandamus:
Holding: The procedural means for challenging denial of probation is writ of mandamus. Sec. 559.115.3 states that a trial court is "required" to release an offender on probation if he successfully completes the program, absent a finding that probation is not appropriate. Respondent Judge has failed to point to evidence in the record that would justify a finding that release is not appropriate. Pre-sentencing evidence does not, by itself, make Defendant unfit for probation. A court may look at a defendant's conduct before sentencing; however, it may not base its decision exclusively on that evidence. Defendant ordered released.

Burns v. State, 627 S.W.3d 613 (Mo. App. S.D. 2021):
Holding: (1) Even though Defendant/Movant had two previous convictions for assault, this did not support finding him to be a prior assault offender (with enhanced range of punishment) under Sec. 565.079 because the previous assault offenses occurred more than 5 years before the charged assault offense, but (2) Defendant/Movant was not prejudiced because he was also charged as and found to be a persistent offender under Sec. 558.016, which carried the same enhanced range of punishment.

State v. Fewins, 638 S.W.3d 36 (Mo. App. S.D. 2021):
Holding: Where court's oral pronouncement of sentence was for "life" sentences, but the written judgment stated "99 year sentences," this was a clerical error that can be corrected *nunc pro tunc*; the difference is significant because it affects parole eligibility.

State ex rel. Fletcher v. Cole, 636 S.W.3d 925 (Mo. App. S.D. 2021):
Holding: Even though Defendant received an SIS and five-year term of probation in May 2013, where (1) Defendant was then sentenced to an SES and five-years probation in August 2014, and (2) agreed to a one-year extension in July 2019, his probation had not expired by the time of its revocation in December 2019 because the time on SIS probation does not count once a sentence is converted to an SES, since there was no conviction prior to the SES and the time after the SES is not an extension of the original SIS probation.
Discussion: Defendant had no criminal conviction during the time he was on SIS probation from May 2013 through August 2014, when his SIS was converted to an SES. When the trial court converted his SIS into an SES and placed him on a new five-year term of probation, that new SES probation was not an extension of the original SIS probation. Sec. 559.016.3 provides that any probation term not exceed five years plus one additional year. Thus, Defendant's probation term ran from August 2014 through August 2020 (six years), and had not expired at the time he was revoked in December 2019.

State v. Burros, 2022 WL 681346 (Mo. App. S.D. March 8, 2022):
Holding: (1) Defendant's failure to object to the lack of findings at trial that he was a prior and persistent offender failed to preserve the issue for appeal, and the issue was not jurisdictional because trial courts have subject matter jurisdiction over criminal cases under Art. V, Sec. 14, Mo.Const.; and (2) where the trial court pronounced Defendant to be a prior and persistent offender, but failed to check the box on the sentencing form about this, that is a clerical error which should be corrected *nunc pro tunc*.
Discussion: Defendant argues that a challenge to the court's authority to impose an enhanced sentence is "jurisdictional in nature" and is not waived by failure to raise the issue in the trial court. Defendant cites *State v. Burdette*, 134 S.W.3d 45 (Mo. App. 2004) for this proposition. However, *Burdette* was decided before *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009), which eliminated the notion of "jurisdictional competence" and held that trial courts always have subject matter jurisdiction over criminal cases under Art. V, Sec. 14 Mo.Const. After *Webb*, a claim that a trial court has exceeded its statutory power or authority does not implicate the court's subject matter jurisdiction. To the extent *Burdette* ruled to the contrary, it should no longer be followed. The failure to object at trial renders this issue reviewable only for plain error under Rule 30.20. The failure to make findings is a procedural deficiency that does not necessarily create manifest injustice provided there is evidence to support a finding that Defendant is a prior and persistent offender, the trial court relied on such evidence, and the State was not unfairly given more than one opportunity to carry its burden of proof. Defendant has not sought plain error review, so such review is declined.

State v. Christianson, 2022 WL 1013274 (Mo. App. S.D. April 5, 2022):
Holding: Where the written sentence and judgment differed from the controlling oral pronouncement of sentence in that it misstated the disposition of certain counts and whether there was a trial or plea, these were clerical errors that should be corrected *nunc pro tunc*.

State v. Boyd, 2022 WL 1284048 (Mo. App. S.D. April 29, 2022):
Holding: Where the written sentence and judgment misstated the charges Defendant was convicted of, this was a clerical error that can be corrected *nunc pro tunc* under Rule 29.12(c) to reflect the oral pronouncement of conviction and sentence.

State v. Haden, 2022 WL 648 S.W.3d 148 (Mo. App. S.D. Aug. 3, 2022):
Holding: Even though Defendant's 2015 Arkansas driving-while-license-suspended conviction was a first offense under Arkansas law, where Defendant had a prior conviction for this in North Dakota in 2012, the Arkansas conviction qualified as a "second violation" under Missouri law, Sec. 302.321, and thus was a "Class A" misdemeanor under Missouri law; thus, it could be counted as a qualifying offense for whether Defendant qualified as a "prior misdemeanor offender" under Sec. 558.016.5 (a person with two or more Class A or B misdemeanors "under the laws of this state").

State v. Halbrook, 2023 WL 2236778 (Mo. App. S.D. Feb. 27, 2023):
Holding: Where during sentencing on two counts the trial court was silent as to whether the sentences were concurrent or consecutive, but the trial court's later written judgment stated the sentences were consecutive, this was plain error resulting in manifest injustice because the oral pronouncement controls, and Secs. 558.026.1 and Rule 29.09 provide that if the court doesn't state when pronouncing sentence whether the sentences are concurrent or consecutive, they shall be concurrent.

State v. Young, 2023 WL 2385144 (Mo. App. S.D. March 7, 2023):
Holding: Where trial court orally sentenced Defendant to "life imprisonment" but written judgment stated "999 years" and "life without parole," the oral pronouncement of sentence controls, and case is remanded for entry of *nunc pro tunc* order that corrects judgment.

State v. Jobe, 2023 WL 2258550 (Mo. App. S.D. Feb. 28, 2023):
Holding: (1) Defendant can do direct appeal of his claim that his sentence was unlawfully excessive, and is not limited to raising the claim in a Rule 24.035 motion; and (2) where the trial court orally pronounced a 15-year sentence and entered a docket entry memorializing this, but the next day, the court said it "misspoke" and resentenced to a 20-year sentence instead, the judgment was final at the time the 15-year sentence was memorialized and the court had no authority to enter a 20-year sentence later.
Discussion: (1) The State claims Defendant can only raise his claim in a Rule 24.035 motion. But in *State v. Russell*, 598 S.W.3d 133 (Mo. banc 2020), the Supreme Court held a defendant can challenge excessiveness of a sentence in a direct appeal. (2) A judgment in a criminal case becomes final when sentence is imposed. A trial court loses jurisdiction after sentence is imposed, and any action after that is a nullity. Here, the sentence was orally pronounced and memorialized via docket entry the same day. The trial court had no authority to change the sentence the next day. The resentencing was void. Remanded with directions to vacate 20-year sentence.

Owens v. State, 673 S.W.3d 839 (Mo. App. S.D. Aug. 10, 2023):
Holding: Even though in Rule 29.15 case the written sentence and judgment contained a clerical error, appellate court lacked authority to correct this since it wasn't properly raised as an issue in 29.15 case, but Movant can file a *nunc pro tunc* motion in trial court under Rule 29.12(c) to correct the error.

State v. Pierce, 2023 WL 5606425 (Mo. App. S.D. Aug. 30, 2023):
Holding: Where Defendant was orally sentenced to "life" but the written judgment stated "99 years," the oral prouncement controls, and the clerical error in the written judgment can be corrected *nunc pro tunc*.

State v. Hausmann, 2023 WL 6988275 (Mo. App. S.D. Oct. 24, 2023):
Holding: (1) Where the oral pronouncement of sentence was for "life in prison," but the written sentence and judgment stated "99 years," the oral pronouncement controls and this may be corrected *nunc pro tunc*; (2) Defendant was prejudiced by this error because

under Sec. 558.019.4 a "life" sentence is calculated as 30 years for minimum prison term, but a 99-year sentence would be calculated as 75 years.

Jendro v. State, 2023 WL 8445894 (Mo. App. S.D. Dec. 6, 2023):
Holding: (1) Even though the jury instructions told jury they could only give up to 30 years, but jury gave 40 years (which court imposed), this claim could only be raised on direct appeal and was not "cognizable" as a due process violation in a 29.15 case, because the authorized term of imprisonment for statutory rape, Sec. 566.062 RSMo. 2006, was a term of years up to life imprisonment, and 40 years was within this range.

State v. Pike, 614 S.W.3d 651 (Mo. App. W.D. 2021):
Holding: Where the written sentence and judgment misstated the offense for which Defendant was convicted, this was a clerical error that can be corrected nunc pro tunc under Rule 29.12.

State v. Gonsalez, 619 S.W.3d 559 (Mo. App. W.D. 2021):
Holding: Where the written judgment and sentence incorrectly recorded the felony classification for Defendant's offense, this is a clerical error that can be corrected *nunc pro tunc*.

State v. Escalona, 619 S.W.3d 612 (Mo. App. W.D. 2021):
Holding: (1) Where disposition of an issue on appeal involves information contained in a Sentencing Assessment Report (SAR), either party may request that the SAR be made part of the record on appeal, even though SARs are not normally "filed" in the circuit court and aren't public documents until after a defendant pleads guilty, Sec. 577.026; (2) where Appellant-Defendant failed to include the SAR in the record on appeal, appellate court assumes the omitted portions of the record are unfavorable to Appellant and favorable to trial court's decision regarding sentencing; Appellant had a duty under Rule 81.12 to file a record on appeal with all documents necessary for appellate review.

State v. McDonald, 626 S.W.3d 708 (Mo. App. W.D. 2021):
Holding: Where the State charged Defendant with several counts of child sex offenses which occurred over several years, Defendant could be sentenced as a predatory sexual offender under Sec. 558.018.5(2) based on Count I having occurred before the other charged Counts in the case; Sec. 558.018.5(2) does not require that the sexual conduct which was "previously committed" be before the instant charged case.
Discussion: Sec. 558.018.5 authorizes a defendant to be sentenced as a "predatory sexual offender" if the defendant "has committed an act which would constitute an offense listed in subsection 4 of this section, whether or not the act resulted in a conviction." Here, the trial court followed the statutory scheme in making a finding of predatory sexual offender status before submission to the jury, but pursuant to *Alleyne v. U.S.*, 570 U.S. 99 (2013), also required the jury to make the finding that Count I occurred before the other Counts. Thus, the issue here is what is meant by "previously committed?" I.e., to what must the act be previous to? Before the enactment of 558.018.5, Missouri had a statute that enhanced sentence if a defendant had "previously pleaded guilty to or been found guilty" of a qualifying prior offense. 558.018.5 changed

that to make acts that did *not* result in convictions qualify. This shows legislative intent to allow a defendant's sentence to be enhanced if the defendant "previously committed" a qualifying offense before the act for which enhanced sentence is being imposed, whether or not defendant was convicted. Here, the jury found Defendant committed the first sexual act (qualifying act) charged in Count I before committing the later sexual acts in charged in subsequent Counts. Thus, Defendant qualifies as a predatory sexual offender.

State ex rel. Barnes v. Philley, 624 S.W.3d 372 (Mo. App. W.D. 2021):
Even though (1) Defendant was arrested for a new offense, and (2) as a result, the trial court "suspended" Defendant's probation seven days before it was to expire and set an appearance for after the expiration, trial court did not affirmatively manifest an intent to conduct a revocation hearing before expiration, Sec. 559.036.8, so could not revoke later.
Facts: On August 7, 2018, Defendant was placed on two years probation for a misdemeanor. In March 2020, Defendant was charged with a new offense. On July 30, 2020, the court "suspended" Defendant's probation and set an appearance for August 18. On August 18, the court made a docket entry saying Defendant had been charged with a new offense and the prosecutor planned to file a motion to revoke probation. Defendant retained counsel, who requested two continuances, which were granted. In December 2020, Defendant filed a motion to discharge from probation, which was denied. The court revoked probation. Defendant sought writ of prohibition.
Holding: Sec. 559.036.8 allows probation to be revoked after it has expired only if (1) the court manifested its intent to conduct a revocation hearing during the probation term, and (2) the court made every reasonable effort to notify the Defendant and hold the hearing before the term ended. The fact that a court "suspends" probation does not alter the analysis. Here, the court failed to affirmatively manifest its intent to hold a revocation hearing before expiration. Suspending probation and scheduling a review hearing is insufficient to manifest an intent to hold a *probation revocation* hearing. The court must do something such as scheduling a revocation hearing, or issuing a warrant for arrest for such hearing. Moreover, here, the State has never even filed a motion to revoke probation. Writ granted.

Sims v. State, 637 S.W.3d 425 (Mo. App. W.D. 2021):
Holding: Even though U.S. District Judge ordered that Defendant's federal sentence run concurrently with this State sentence, where (1) Defendant was not sentenced to his State sentence until after the federal sentence (though he pleaded guilty before the federal sentence), and (2) Missouri DOC refused to accept custody of Defendant while he was serving his federal sentence in federal prison, the District Judge's concurrent pronouncement was not binding or controlling on State sentence; thus, where State judge ordered State sentence be consecutive to federal sentence, it is consecutive, and Defendant began serving his State sentence when he finished his federal one and was delivered to Missouri DOC to start serving the State one.

Johnson v. Mo. Dep't of Corr., 639 S.W.3d 1 (Mo. App. W.D. 2021):
Holding: Even though Sec. 558.019.6 was amended in 2019 to allow persons who were convicted of certain offenses "prior to August 28, 2019" to "no longer be subject to the minimum prison term provisions," this did not apply to Petitioner/Defendant who was a "Class X" offender under the pre-1994 version of the statute, since parole ineligibility for "Class X" offenders was determined by the sentencing court (which counted prior convictions) as part of the court's judgment and sentence; after 1994, trial courts sentence a person to a term of years, and parole eligibility is an administrative determination of DOC based on the number of prior commitments; if it were true that Petitioner/Defendant's sentence and final judgment contained no restriction on parole eligibility (as with post-1994 sentences), he would get the benefit of the 2019 amendment.

State v. Jackson, 636 S.W.3d 908 (Mo. App. W.D. 2021):
Holding: (1) Even though the State claimed on appeal that the trial court plainly erred in imposing concurrent sentences for rape, tampering with a victim, and violating an order of protection (which State claimed were required to be consecutive under Secs. 558.026.1(1) and (5)), the general rule is that, in the absence of a cross-appeal by the State, the State will not be heard to complain about portions of the judgment not favorable to it; but (2) regardless, the State's argument is without merit because the conduct giving rise to the charges for victim tampering and violation of a protection order occurred well after the rape of Victim, so not "during or at the same time as" the rape conviction, Sec. 558.026.1(1).

State v. Davie, 638 S.W.3d 514 (Mo. App. W.D. 2021):
Holding: Where trial court orally pronounced sentences as "consecutive" but written sentence stated they were "concurrent," the oral pronouncement controls, and case is remanded to correct this clerical error in the written judgment nunc pro tunc under Rule 29.12(c).

State ex rel. Schmitt v. Crane, 641 S.W.3d 357 (Mo. App. W.D. 2021):
Holding: (1) Even though Defendant (who had a 40-year Missouri prison sentence) escaped from Missouri custody in 1978 and fled to California where he received a life prison sentence for murder there, which California declared "concurrent" with the Missouri sentence, where (a) Defendant had sought since 1980 to be returned to Missouri DOC-custody via various administrative and court challenges but MDOC had always refused to "accept" Defendant back, and (b) MDOC only "accepted" Defendant back after he completed his California sentence in 2020, Defendant was entitled to a writ of habeas corpus ordering his release from MDOC because, under Missouri statutes at the time of his offense, his Missouri sentenced continued to run despite his escape and it had expired by 2020; and MDOC's refusal to "accept" Defendant until his California sentence expired essentially allowed MDOC – not a court – to determine whether Defendant's sentence would be concurrent or consecutive; (2) even though Defendant was paroled during this habeas proceeding, that does not render the case moot since "any restraint" on freedom (including parole) is sufficient to support a habeas action.

Discussion: DOC is charged with *executing* sentences imposed by courts, not with *imposing* sentence in the first instance. In this case, allowing DOC to decide not to accept Defendant's return would essentially give DOC unilateral authority to dictate whether his Missouri sentence will be concurrent or consecutive to his California one. Missouri did not adopt a statute which "suspended" the running of sentences upon escape until *after* Defendant's escape. But even if Missouri had such a rule then, that rule would not continue to suspend Defendant's sentences after MDOC repeatedly and arbitrarily refused to accept his transfer back to Missouri, in derogation of its statutory duty to promptly secure Defendant's return.

State v. Millens, 2022 WL 1548153 (Mo. App. W.D. May 17, 2022):
Holding: Where written sentence and judgment said Defendant was sentenced to "999 years," but the oral pronouncement of sentence was for "life in prison," the oral pronouncement controls and case is remanded for entry of *nuc pro tunc* order under Rule 29.12(c).

State ex rel. Washington v. Crane, 2022 WL 2092549 (Mo. App. W.D. June 10, 2022):
Holding: Where Judge denied Defendant release on probation after successful completion of 120-day shock incarceration under Sec. 559.115.3 because of Defendant's offenses of kidnapping, domestic violence, trafficking, and drug possession, this was erroneous and an abuse of discretion as a matter of law, since presentencing evidence cannot, by itself, make a person unfit for probation.
Discussion: After successful completion of a 120-day program under 559.115.3, a Judge's determination that probation is not appropriate must be supported by evidence. While a court may look to evidence concerning Defendant's conduct before sentencing when deciding if probation is appropriate, the court may not base its decision exclusively on that evidence. The Judge was aware of the nature of the charges against Defendant when it accepted Defendant's plea and placed him in the 120-day program. Writ mandamus granted, ordering Defendant be released on probation.

Cobbins v. Mo. Dept. of Corrections, 2022 WL 2310220 (Mo. App. W.D. June 28, 2022):
Where Petitioner-Defendant was convicted of second-degree robbery, Sec. 569.030 (1979), and delivered to DOC in 2019, the 80% minimum term requirement of Sec. 558.019 (2019) does not apply to him, because the focus of that statute is not on the "name" or "statute number" of the offense, but on whether the elements comprising that offense are "contained in" Sec. 558.019; the elements of the offense of second-degree robbery (1979) are not the same as the elements of the offenses listed in current 558.019.
Facts: In 2011, Petitioner-Defendant was convicted of second-degree robbery, Sec. 569.030 (1979), and put on probation. Probation was revoked in 2020. DOC determined he was required to serve 80% of his sentence under Sec. 558.019 (2019), because he had three prior remands to DOC. He brought a declaratory judgment action challenging this.
Holding: Between 2011 and 2020, the legislature adopted the new criminal code, and also amended 558.019. The legislature substantively *changed* the offense of second-degree robbery by adding a new element not previously contained in Sec. 569.030. This

is a distinction with a difference. Second-degree robbery is now in Sec. 570.025, and requires proof that defendant had forcibly stolen property *and* caused physical injury to another. This means that conduct formerly constituting second-degree robbery under 569.030 no longer qualifies as second-degree robbery after enactment of 570.025. 558.019 states that its minimum term provisions "shall only be applicable to the offenses contained in" that section. It lists 570.025 and "570.030 when punished as a class A, B, or C felony." Petitioner's offense is not "contained in" new 558.019. In fact, "forcibly stealing" is no longer *any* offense under the new criminal code. If "forcibly stealing" were still an offense, Petitioner would have to serve 80% of his sentence. But the closest offense to "forcibly stealing" is now 570.030.5(2) of the general stealing statute, which makes it a *Class D* felony to physically take property from another. That offense is not listed in 558.019, because 570.030 offenses to have minimum terms under 558.019 must be Class A, B, or C felonies. Petitioner is not required to serve 80%.

State ex rel. Adams v. Crane, 2022 WL 4240985 (Mo. App. W.D. Sept. 13, 2022):
Holding: Even though Prosecutor emailed defense counsel right before sentencing that Prosecutor's Office was still "processing and verifying" restitution amount, where trial court sentenced Defendant without either the court or Prosecutor making any mention of restitution at sentencing, trial court lacked jurisdiction three weeks later to grant a motion to impose restitution; the judgment was final when trial court imposed sentence, and court lacked jurisdiction to enter restitution order later.

State v. Putfark, 2022 WL 4073854 (Mo. App. W.D. Sept. 6, 2022):
Holding: (1) Double Jeopardy was violated where Defendant was convicted at trial of first-degree statutory sodomy, Sec. 566.062, and first-degree child molestation, Sec. 566.067, based on the same conduct, because the child molestation is a lesser-included offense of the sodomy; (2) even though the Double Jeopardy claim was not preserved for appeal, it can be reviewed as plain error where it can be determined from the face of the record; and (3) even though Defendant was charged with first-degree child molestation, where trial court mistakenly gave the jury instruction for second-degree child molestation, Defendant must be resentenced for second-degree child molestation; resentencing is required even though the sentence is within the range of punishment for second-degree child molestation (a Class B felony), since the record showed the court mistakenly believed the offense was a Class A felony with a higher punishment range.
Discussion: (1) Double Jeopardy protects against multiple punishments for the same offense. Sec. 556.041 provides that where the same conduct establishes commission of more than one offense, a defendant may be convicted of both unless one is included in the other. First-degree child molestation is a lesser-included offense of first-degree statutory sodomy. Here, the jury considered the identical evidence to convict of both offenses. There was no other evidence that Defendant did any other touching of Victim. Thus, the second-degree child molestation count was established with fewer facts necessary to establish the statutory sodomy. This Double Jeopardy violation is determinable from the face of the record and constitutes plain error. (3) Defendant was charged with Class A felony first-degree child molestation, but the court mistakenly submitted the jury instruction for Class B felony second-degree child molestation. Thus, Defendant was only convicted of the Class B felony. Although Defendant's actual

sentence was within the authorized range of a Class B felony, the parties and the Sentencing Assessment Report all assumed the offense was a Class A felony, and argued that range of punishment. The trial court gave 10 years, the minimum for an A felony. Resentencing is required because trial court mistakenly believed offense was an A felony and that the minimum sentence was 10, when it was really five.

State v. Crosby, 2022 WL 14938743 (Mo. App. W.D. Oct. 25, 2022):
Holding: (1) Trial court plainly erred in counting a conviction which occurred *after* the date of the charged offense to establish persistent offender status (and, hence, an extended range of punishment), because Sec. 558.016.6 requires that the previous finding of guilt "be prior to the date of commission of the present offense," and (2) even though defense counsel stated "no objection" to admission of exhibits of Defendant's prior judgments of conviction, this statement in context meant "no objection" to admission of the exhibits, which is distinct from the trial court's finding Defendant to be a persistent offender. (Appellate court expresses no opinion as to whether plain error review would be available if counsel's statement of "no objection" could be read more broadly to state no objection to trial court finding Defendant to be persistent offender.) Remanded for resentencing within non-extended range of punishment.

State v. Russell, 2022 WL 17587324 (Mo. App. W.D. Dec. 13, 2022):
Holding: Where Defendant's first degree sodomy charge was not submitted to the jury as an "aggravated" offense because MAI-CR 4th 420.12 submits the offense only as a non-aggravated offense, but the "Charge Code" on the written sentence and judgment stated the offense was for 1st degree aggravated sodomy ("1st Deg.-Agg. S."), this was a clerical error that can be corrected by the appellate court *nunc pro tunc* under Rules 29.12(c) and 30.23.

Henry v. State, 2023 WL 1975095 (Mo. App. W.D. Feb. 14, 2023):
Holding: Where (1) Juvenile-Movant committed first-degree murder in 2015 when he was 14-years-old and was so charged; (2) legislature enacted new scheme for first degree murder for Juveniles in 2016 in Secs. 565.020.2 and 565.033; and (3) Juvenile pleaded guilty in 2019 under 2016 statute and was sentenced accordingly, Juvenile's sentence was not unlawful so as to require Rule 24.035 relief, because the 2016 juvenile murder sentence scheme is retroactive to juvenile criminal offenses committed prior to its effective date.
Discussion: At the time Juvenile committed his offense, Missouri's mandatory life-without-parole provision for Juveniles convicted of first degree murder had effectively been declared unconstitutional by *Miller v. Alabama*, 567 U.S. 460 (2012). To remedy this, the legislature enacted Secs. 565.020.2 and 565.033, which require a judge to consider 10 factors in determining the punishment for a Juvenile convicted of first degree murder. The legislature intended this scheme to apply to offenses committed before its enactment. Thus, when Movant pleaded guilty pursuant to this scheme in 2019, his sentence was lawful. He is not entitled to withdraw his plea under Rule 24.035.

State v. Whirley, 2023 WL 2656825 (Mo. App. W.D. March 28, 2023):
Holding: Where after guilty plea (1) trial court sentenced Defendant to seven years in prison for unlawful use of a weapon, Sec. 571.030.1(9), which carried a mandatory minimum 15-year sentence, (2) the State filed a notice of appeal of that sentence, and (3) the trial court then purported to set aside its prior judgment and sentenced Defendant to 15 years, the trial court lost jurisdiction to change its original judgment once sentence was imposed, but the State can appeal this sentencing error, and the trial court plainly erred in imposing a sentence below the statutory minimum; appellate court vacates the sentence and remands for resentencing, but notes Defendant can move to withdraw his guilty plea under Rule 29.07(d) because "[p]rior to sentencing, the withdrawal of a guilty plea is freely allowed."
Discussion: Sec. 547.200.2 authorizes the State to appeal "in all other criminal cases" except those were double jeopardy would result. This "catch-all" provision authorizes the appeal here. The State's appeal does not violate double jeopardy. A trial court loses jurisdiction to modify its judgment in a criminal case once sentence is imposed. Thus, the trial court had no authority to modify its prior sentence. However, a sentence below a mandatory minimum constitutes plain error. The power to define crimes and punishment is exclusively vested in the Legislature. To leave the original error in the judgment uncorrected would give the courts the power to define the range of punishment, contrary to the Legislature's mandate. Sentence vacated and remanded for resentencing.

Shores v. State, 2023 WL 4188206 (Mo. App. W.D. June 27, 2023):
Holding: To qualify as a predatory sexual offender under Sec. 558.018.5(1), the defendant need only have pleaded guilty to a predicate offense before the current case in which he is found to be a predatory sexual offender, but the conduct underlying that prior offense need not have occurred before the current case.
Discussion: Sec. 558.018.4 states the court shall sentence a person who has pleaded guilty to certain sex offenses to an extended term if it finds the defendant is a predatory sexual offender. Sec. 558.018.5(1) defines predatory sexual offender as a person who "has previously pleaded guilty to" certain sexual offenses. Here, Defendant had pleaded guilty in another sex case before he was sentenced in the current case, but Defendant claims that State also has to show that the underlying conduct in the other sex case happened before the conduct in the current case. But "previously pleaded guilty" means simply that the plea occurred before the court's finding him to be a "predatory sexual offender" in the current case. The plain language of Sec. 558.018.5(1) reflects a legislative intent that the plea serving as the predicate for enhancement occur before the status determination in the current case (but not necessarily before the conduct underlying the current case).

City of Skidmore v. Stanton, 668 S.W.3d 277 (Mo. App. W.D. 2023):
Holding: (1) Where Defendant was charged and convicted at a jury trial for violating a municipal ordinance against maintaining nuisance properties and was fined $500, the trial court was without authority to order Defendant to pay $8,000 of City's attorney's fees; although Sec. 79.383 allows a city to recover attorney's fees in certain nuisance actions where authorized by ordinance, the ordinance at issue here did not authorize attorney's fees for prosecution under the ordinance (only for abatement); (2) trial court was also

without authority to order injunctive relief because the charging document did not mention injunctive relief, City didn't raise that issue until sentencing, City didn't plead a continuing violation, and the case was tried to a jury, whereas an injunction is an equitable remedy tried to a court.

State v. King, 674 S.W.3d 218 (Mo. App. W.D. Aug. 1, 2023):
Holding: (1) Where Defendant was charged as a persistent offender, but the State did not present any evidence of prior convictions *before* the case was submitted to the jury as required by Sec. 558.021.1.2, this was plain error, but (2) where, at sentencing, the *defense* asked the Court to take judicial notice of cases showing Defendant's prior convictions (as part of an argument for leniency) and Defendant's two enhanced sentences were ordered to run concurrently with a longer, unenhanced sentence, there was no manifest injustice because the total length of sentence was not affected by the enhancement error.

Williams v. Falkenrath, 2023 WL 6220318 (Mo. App. W.D. Sept. 26, 2023):
Holding: (1) Even though Petitioner had previously filed and lost numerous habeas petitions, he wasn't procedurally barred from proceeding in a new habeas petition, since Missouri does not categorically prohibit successive habeas petitions; (2) even though Petitioner failed to previously raise his current claim that he was erroneously sentenced in 1988 as a "Class X" offender (requiring him to serve 80% of his sentence), this claim was not barred because a sentence beyond that permitted by law may be corrected in a habeas petition; and (3) where Petitioner's offense occurred in May 1988 but the trial court applied sentencing enhancements which didn't become effective until August 1988, the application of post-offense enhancements was *ex post facto*.
Discussion: The State argues Petitioner's claims are procedurally defaulted. But default can be overcome by showing a jurisdictional defect, cause and prejudice, or extraordinary circumstances where manifest injustice would occur without relief. Although a claim that a sentence exceeds that authorized by law is technically no longer a "jurisdictional" defect, it is still cognizable in a habeas proceeding. Missouri does not categorically prohibit successive habeas petitions. A claim that a petitioner is serving a legally erroneous sentence is entitled to consideration on the merits, despite procedural obstacles which would bar other claims. At the time Petitioner committed his offense, the "Class X" offender statute only applied to A and B felonies. Petitioner's sex crimes were "unclassified" felonies at that time. The Class X offender statute was later amended to change this, but that amendment should not have been applied to Petitioner because it was *ex post facto* to do so.

*** Jones v. Mississippi, ___ U.S. ___, 141 S.Ct. 1307 (U.S. April 22, 2021):**
Holding: Sentencing court does not have to find that a juvenile is permanently incorrigible to sentence them to life in prison without parole.

*** Borden v. U.S., ___ U.S. ___, 141 S.Ct. 1817 (U.S. June 10, 2021):**
Holding: (1) Under the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e), in order for a prior offense to qualify as a "violent felony" for purposes of mandating a 15-year minimum sentence for felon-in-possession of a firearm, the prior offense cannot have

required a *mens rea* only of recklessness; the prior offense must have contained a higher mental state of purpose or knowledge; thus, using a categorical approach, where Defendant's prior offense could be committed by "recklessly committing an assault," the prior offense could not be used to enhance under ACCA; (2) Court distinguishes this case from *Voisine v. U.S.*, 136 S.Ct. 2272 (2016), which involved a *different* statutory definition, 18 U.S.C. Sec. 922(g)(9), and held that a person convicted of a "misdemeanor crime of domestic violence" with a mental state of recklessness was prohibited from possessing a firearm.

*** Terry v. U.S., ___ U.S. ___, 141 S.Ct. 1858 (U.S. June 14, 2021):**
Holding: A defendant convicted of a crack offense is eligible for a sentence reduction under the federal First Steps Act only if he was convicted of a crack offense that triggered the mandatory minimum sentences based on drug quantity; thus, Defendant was not eligible for a sentence reduction where he had been convicted of possession with intent to distribute crack, without regard to a quantity.

*** Wooden v. U.S., ___ U.S. ___, 142 S.Ct. 1063 (U.S. March 7, 2022):**
Holding: Even though Defendant had 10 prior burglary convictions for burglarizing 10 storage units at a single storage facility during the same incident, Defendant was not subject to enhancement under the Armed Career Criminal Act, 18 U.S.C. Sec. 942(e)(1), which enhances punishment where Defendant has three or more prior convictions for violent felonies (like burglary) "committed on occasions different from one another," because Defendant's prior conduct was only a single criminal episode; the text and history of ACCA do not allow Gov't to divide the single criminal episode into 10 separate points in time for each storage unit in order to enhance punishment.

* **U.S. v. Taylor, ___ U.S. ____, 142 S.Ct. 2015 (U.S. June 21, 2022):**
Holding: Attempted Hobbs Act robbery is not a "crime of violence" under Armed Career Criminal Act, Sec. 924(c), so cannot be used to enhance sentence.

*** Concepcion v. U.S., 2022 WL 2295029, ___ U.S. ___ (U.S. June 27, 2022):**
Holding: The First Steps Act (which allows resentencing for certain crack-related offenses) allows district courts to consider intervening changes of law and fact in exercising their discretion to reduce sentences.

*** Dubin v. U.S., ___ U.S. ___ , 143 S.Ct. 1557 (2023):**
Holding: "Aggravated identity theft" (which requires a predicate offense and provides an enhanced sentence) under 18 U.S.C. Sec. 1028A(a)(1) requires that the misuse of another person's identity be "at the crux" of the criminality and have a "genuine nexus" to the predicate offense so that the means of identification is used in a fraudulent or deceitful matter; thus, even though Defendant (who managed a psychology practice) overbilled Medicaid for services using actual patients' identifying information (which constituted healthcare fraud in violation of a separate statute), his actions did not constitute "aggravated identity theft" because the misuse of the patients' information was merely an ancillary feature of his overbilling.

* **Lora v. U.S., 599 U.S. 453 (2023):**
Holding: Even though 18 U.S.C. Sec. 924(c)(1)(D)(ii) prohibits concurrent sentences for using or carrying a firearm in relation to a crime of violence or drug trafficking, that bar to concurrent sentences does not apply to conviction under 18 U.S.C. Sec. 924(j), which prohibits causing the death of a person through use of a firearm; a sentence under 924(j) can run either concurrently with or consecutively to another sentence based on the sentencing court's discretion.

U.S. v. Texeira-Nieves, 2022 WL 109269 (1st Cir. 2022):
Holding: Administrative exhaustion requirement for prisoner-initiated compassionate release sentence reduction motions is not jurisdictional, but is a non-jurisdictional claim-processing rule.

U.S. v. Reyes-Barreto, 2022 WL 247827 (1st Cir. 2022):
Holding: Defendant's appeal challenging reasonableness of his 12-month prison sentence was not rendered moot by his release during appeal, where Defendant continued serving supervised release portion of sentence.

U.S. v. Ruvalcaba, 2022 WL 468925 (1st Cir. 2022):
Holding: District court can consider First Step Act's non-retroactive amendments to mandatory minimum penalties on an individualized basis to decide if a compelling reason exists for compassionate release in particular case.

U.S. v. Rosario, 2021 WL 683607 (2d Cir. 2021):
Holding: Court's finding that there was no doubt Defendant committed charged offense of destroying evidence did not satisfy its obligation to make separate findings at sentencing on all elements of perjury, including that Defendant's testimony was intentionally false, before increasing sentence for obstruction of justice based on his trial testimony.

U.S. v. Vastardis, 2021 WL 5891647 (3d Cir. 2021):
Holding: Trial court abused discretion in imposing probation condition which banished non-citizen-Defendant (who was an engineer on ships) from U.S. or U.S. waters; condition circumvented authority of Attorney General, was unrelated to rehabilitation or public protection, and drastically interfered with Defendant's ability to earn a living.

U.S. v. Campbell, 2022 WL 71824 (4th Cir. 2022):
Holding: Sentencing Commission's commentary regarding defining "controlled substance offenses" in career offender provision of USSG, which extends the definition to inchoate attempts to commit substantive crimes enumerated in the definition, is a plainly inconsistent reading of the Guidelines, which define "controlled substance offense" as enumerated substantive crimes; the Guidelines control.

U.S. v. Benton, 2022 WL 200973 (4th Cir. 2022):
Holding: Because presentence report designated only 4 of Defendant's prior convictions as ACCA predicates, Gov't could not use other convictions of Defendant to increase sentence after 2 of the 4 predicates were found not to qualify under ACCA.

U.S. v. Kelly, 2022 WL 2663484 (5th Cir. 2022):
Holding: Texas conviction for assault on public servant is not "crime of violence' under force clause in federal sentencing guidelines, because statute includes mental state of recklessness.

U.S. v. [Redacted], 986 F.3d 642 (6th Cir. 2021):
Holding: Even though Gov't sought and was granted a sentencing reduction for cooperative Defendant, Defendant was denied opportunity to seek even greater reduction by court's granting Gov't motion on day it was filed and not giving Defendant an opportunity to respond.

U.S. v. Nebinger, 987 F.3d 734 (7th Cir. 2021):
Holding: Illinois conviction for residential burglary was not "violent felony offense" under ACCA.

U.S. v. Blake, 2022 WL 31791 (7th Cir. 2022):
Holding: District court's denial of Defendant's sentence reduction motion, without first resolving a dispute about the amount of drugs attributable to him, did not accord Defendant with process that First Steps Act required.

U.S. v. Bravo, 2022 WL 420543 (7th Cir. 2022):
Holding: Defendant's two Illinois misdemeanors for street gang contact were similar to USSG's enumerated offense of disorderly conduct or disturbing the peace, so as to warrant exclusion from criminal history score.

U.S. v. Newbern, 2022 WL 6900928 (7th Cir. 2022):
Holding: District court gave inadequate explanation for denying sentence reduction under First Step Act.

U.S. v. Kidd, 2022 WL 90206 (8th Cir. 2022):
Holding: Prison wages were not within scope of "any source" in statute that requires that a prisoner's prison resources be used to pay restitution; statute's focus was on money from outside sources (such as inheritance), and not from prison work; taking prison wages would threaten prison security by discouraging inmates from working and harming inmate morale.

U.S. v. Woodring, 2022 WL 1612822 (8th Cir. 2022):
Holding: Remand to district court was required to determine exact source of funds in federal prisoner's trust account and whether applying those funds to restitution owed was proper, where District Court had granted Gov't's motion to pay restitution from the prisoner's funds without explanation and there were no findings as to source of funds.

U.S. v. Woodberry, 2021 WL 506091 (9th Cir. 2021):
Holding: Statute which enhances minimum sentence for use of a short-barreled rifle or shotgun requires that this essential element be proven to a jury beyond a reasonable doubt.

U.S. v. Lonich, 2022 WL 80881 and 2022 WL 95934 (9th Cir. 2022):
Holding: Gov't didn't establish loss-related enhancement under USSG for Bank Officer-Defendants and Real Estate Lawyer-Defendant that their fraudulent conduct caused bank's failure, where bank failed for a variety of reasons, including poor management, bad loans do others, and deteriorating market conditions.

U.S. v. Merrell, 2022 WL 2092588 and 2022 WL 2110947 (9th Cir. 2022):
Holding: Clause in First Step Act about applicability to pending cases, of Act's amendment allowing sentencing enhancements, for second or more crimes of violence involving firearms, only after a conviction becomes final, under which amendment clause applies to any offense that was committed before date of enactment if "a sentence" for offense has not been imposed as of such date, does not bar application of amendment when sentences imposed before Act's passage are vacated and defendants are resentenced after Act's passage; vacating prior sentence wipes slate clean, so there is not longer "a sentence" imposed before enactment.

U.S. v. Maurya, 2022 WL 294046 (11th Cir. 2022):
Holding: District court violated Ex Post Facto Clause in imposing a sentencing enhancement for wire fraud based on USSG substantial financial hardship enhancement that was added after Defendant had committed her offense.

U.S. v. Jackson, 2022 WL 2080280 (11th Cir. 2022):
Holding: Florida conviction for sale of cocaine didn't qualify as predicate "serious drug offense" to support enhancement under ACCA, where Florida statute criminalized ioflupane, which wasn't a "controlled substance" under ACCA.

Rogers v. Ark. Dep't of Corr., 2022 WL 324430 (Ark. 2022):
Holding: Inmate was entitled to parole-eligibility determination based on parole statute in effect at the time of his offense.

State v. Robison, 496 P.3d 892 (Kan. 2021):
Holding: Kansas restitution procedure which required restitution order be filed and enforced as a civil judgment violated state constitution's right to a jury trial in civil cases, since it allowed the judge in the criminal case to determine the damages and then convert that to a civil judgment, thus bypassing the traditional function of a jury to determine civil damages.

State v. Euler, 2021 WL 5876042 (Kan. 2021):
Holding: When two criminal statutes cover Defendant's conduct, the "identical offense doctrine" should be used to determine which crime Defendant can be convicted of, not the rule that Defendant can only be convicted under the more specific statute; "identical offense doctrine" holds that where two offenses have the same or similar elements, a defendant can only be sentenced to the less severe penalty.

State v. Patton, 2022 WL 414260 (Kan. 2022):
Holding: Application of amended DWI statute, which counted out-of-state convictions for enhancement purposes, to Defendant who committed DWI before the amendments violated Ex Post Facto Clause.

Com. v. Costa, 189 N.E.3d 284 (Mass. 2022):
Holding: State's introduction of complaining witness' hearsay statements at probation revocation hearing without permitting Probationer to call the complaining witness violated Probationer's due process rights to present a defense to revocation, even though there was evidence that the complaining witness would have been distressed if required to testify.

Aldape v. State, 2023 WL 6353315 (Nev. 2023):
Holding: Statute imposing mandatory total internet ban as a condition of probation for sex offense conviction, without regard to the nature of the crime, or defendant's internet history or threat to online users, facially violated First Amendment free speech guarantee.

State v. Melvin, 2021 WL 4314078 (N.J. 2021):
Holding: Under principles of due process and fundamental fairness, the findings of a jury with respect to acquitted conduct cannot be nullified by then applying a lower standard of fact-finding at sentencing to enhance punishment based on that conduct.

State v. Conner, 2022 WL 2185005 (N.C. 2022):
Holding: Where redeemable Juvenile is convicted of murder and other counts, trial court is not required to run sentences concurrently, but Juvenile must be given opportunity to seek early release after 40 years to avoid de facto life without parole sentence in violation of 8th Amendment.

State v. Rogers, 2021 WL 5275812 (Or. 2021):
Holding: Where after Defendant's death sentence the Legislature amended the law to eliminate the categories of "aggravated murder" of which Defendant was convicted, Defendant's death sentence was disproportionate because the Legislature had since determined that his conduct didn't fall within the narrow category of cases appropriate for death.

State v. Hovey, 2021 WL 3822971 (Vt. 2021):
Holding: Trial court plainly erred in imposing probation condition on Defendant to reside and work only where his probation officer approved, where trial court did not

make any finding indicating why such a broad condition, which essentially allowed probation officer to dictate where Defendant would live and work, was necessary.

State v. Haag, 2021 WL 4314112 (Wash. 2021):
Holding: Trial court, in resentencing Juvenile under *Miller v. Alabama*, improperly emphasized retribution over mitigation, when it discussed the gravity of the wrong committed and compared the Defendant with the Victim, rather than focusing on Defendant's youth.

Frank A. v. Ames, 2021 WL 5410526 (W. Va. 2021):
Holding: Trial court's imposition of period of extended supervised release was ex post facto, where State failed to show that any of Defendant's charged offenses occurred after the effective date of the extended supervised release statute.

State v. Byers, 2022 WL 2128507 (W.Va. 2022):
Holding: Defendant's right to be present at sentencing was violated when court required Defendant to appear by videoconferencing.

Peterson v. Municipality of Anchorage, 2021 WL 4806663 (Alaska Ct. App. 2021):
Holding: Where Defendant was convicted only of driving with revoked license, trial court could not impose restitution for damages caused by an accident since this would penalize Defendant for conduct she was not convicted of, wnor afford the right to a jury trial under Sixth Amendment.

State v. Forrett, 974 N.W.2d 422 (Wisc. 2022):
Holding: Recidivist DWI statute was unconstitutional to extent it counted prior stand-alone revocations for refusing to submit to warrantless blood draws to enhance penalty.

Bracewell v. State, 2019 WL 1104801 (Ala. Crim. App. 2019):
Holding: In proceeding to determine whether Juvenile should be re-sentenced to life without parole, trial court violated 8th Amendment when it considered Juvenile's age of 17 as an aggravating fact instead of mitigating one, and failed to adequately consider other hallmarks of youth.

Negron v. Superior Ct. of Kern Cnty., 2021 WL 4963241 (Cal. App. 2021);
Holding: Even though a defendant may be diagnosed with a mental disorder listed as an excluded disorder for pretrial mental health court diversion, that is not a categorical bar to diversion if defendant also has a qualifying disorder.

People v. Dryden, 2021 WL 609256 (Cal. App. 2021):
Holding: Consecutive sentence of 25 years to life for assault with deadly weapon, which was de facto life without parole, was excessive where Defendant was an intoxicated, mentally ill homeless person; offense was spontaneous late-night fight at a fast-food restaurant involving a group of people; it was unclear how the fight started or who was to blame; Defendant was also injured; and Defendant had no prior similar convictions.

People v. Tirado, 2022 WL 176141 (Cal. App. 2022):
Holding: Once trial court found Defendant satisfactorily completed diversion program and rendered final judgment dismissing charges involving injury to a child, trial court lost jurisdiction over the matter, and could not entertain a motion by State to reopen and restore the case on grounds that Defendant had violated a program condition by having contact with minors; probation officer had alerted State to the possible violation before dismissal, but the State didn't ask for a continuance to investigate it.

People v. Qualkinbush, 2022 WL 2127230 (Cal. App. 2022):
Holding: Trial court was required to consider mental health diversion statute's criteria for pretrial diversion instead of relying only on general sentencing objectives in considering suitability for diversion.

State v. Omar, 2021 WL 5872021 (Conn. App. 2021):
Holding: Even though parole statute was amended to eliminate parole for certain offenses, amendments did not apply retroactively to offenses committed before enactment, where the effective date was the only textual reference to the date of their applicability; amendments did not mention retroactivity.

People v. Kruger, 2021 WL 3524153 (Ill. App. 2021):
Holding: Defendant, who was 21 years old at time he committed murder, was not entitled to bring challenge that his life sentence violated 8th Amendment under *Miller v. Alabama*, because such claims in Illinois are limited to people under the age of 21; Illinois recognizes *Miller* claims for people ages 18 to 20, even though *Miller* itself drew line at below 18.

Bradley v. Com., 2021 WL 5141902 (Ky. Ct. App. 2021):
Holding: Where Defendant was convicted of driving without insurance, her due process rights were violated by order of restitution for damages caused by accident since Defendant had no opportunity to contest whether she was at fault for accident.

State v. Williams, 2021 WL 598546 (N.M. App. 2021):
Holding: Defendant's right to allocution was violated at probation revocation where trial court only addressed Defendant as to whether he committed the probation violation and did not address him during the sentencing portion of the proceeding.

State v. Ehlert, 2021 WL 4736604 (Wash. App. 2021):
Holding: Because two Drug Sentencing Alternative sentences served concurrently provide only one opportunity for treatment, such a concurrent sentence does not render a Defendant ineligible for a subsequent Drug Sentencing Alternative sentence.

Sex Offense Issues – Registration

State v. McCord, 621 S.W.3d 496 (Mo. banc 2021):
The 1000 foot distance from schools mandated by Sec. 566.147 (2017) for persons convicted of sex offenses is measured from the school's property line, not the school building itself.
Facts: Defendant, who had been convicted of a sex offense, was convicted of residing within 1000 feet of a school, Sec. 566.147. The trial court measured the distance from Defendant's residence to the school's property line, rather than the school building itself. That distance was 839 feet.
Discussion: The 2017 statute stated the distance is measured from "any public school as defined in Sec. 160.011," which states a "public school" is a place of "giving instruction." Instruction can be given both inside and outside of a building; e.g., physical education classes may be instructed outside. The statute is intended to protect children from interaction with or exposure to people convicted of sex crimes by creating a buffer between them. The trial did not err in measuring distance from the residence to the school's property line. "This Court need not further examine the meaning and interpretation of the term 'residence' as used in the statute. Because 'school' as used in Sec. 566.147 included the [school] structure and adjoining grounds, sufficient evidence supported [Defendant's] conviction regardless of whether the statute required measuring the 1,000 feet from the school to the offender's residential structure or property line."
Editor's note: The 2018 version of Sec. 566.147 states the distance "shall be measured from the edge of the offender's property nearest the public school … to the nearest edge of the public school."

Doe v. Frisz, 2022 WL 1228964 (Mo. banc April 26, 2022):
(1) Even though Petitioner was originally charged with various child sex offenses, where he pleaded guilty to endangering the welfare of a child based on hitting his children and exposing them to cold weather, Petitioner was not required to register as a sex offender, because his offense of conviction was not sexual in nature; but (2) writ of prohibition is not the proper remedy when Sheriff "required" Petitioner to register, because Sheriff's "requirement" had no legal effect; Petitioner's remedy to determine if he is required to register is declaratory judgment action.
Facts: Petitioner was originally charged with multiple child sex offenses. He pleaded guilty to endangering welfare of child based on hitting the children and exposing them to cold. He agreed to sex offender counseling as part of probation. After the plea, his Probation Officer and then the Sheriff "required" that he register. He sought a writ of prohibition in circuit court. The circuit court issued a preliminary writ, then quashed it.
Holding: (1) If the circuit court issues a preliminary order and then later denies a permanent writ, the proper remedy is appeal. Missouri uses a "non-categorical" approach to determine if the Petitioner's offense qualifies as registerable. Under this approach, the court looks beyond the statute of conviction to the underlying conduct of conviction. Thus, where a Petitioner pleads guilty to endangering based on some kind of sexual conduct, Petitioner must register. But here, although Petitioner was originally charged with sex offenses, he pleaded guilty only to hitting his children and exposing them to cold. Sec. 589.400.1(2) only requires a person register "when the endangerment is sexual

in nature." Although SORA requires registration whenever SORNA required it, SORNA defines a "sex offender" only as a person "convicted of a sex offense." Merely alleging a person committed a sex offense doesn't make them a sex offender under SORNA. The fact that Petitioner agreed to sex counseling does not mean that the conditions of probation are related to the underlying conviction. E.g., a person can agree to drug treatment as part of probation but not be convicted of a drug offense. Even though the victim impact statements showed sexual conduct, those are unsworn statements giving the court sentencing information, but those are not guilty pleas. (2) However, writ of prohibition is not proper remedy. Prohibition only lies to prohibit judicial or quasi-judicial acts. Sheriff had no power under SORA to "require" Petitioner to register. Sec. 589.417.2 merely requires Sheriff to keep a registry. Whether an action is judicial or quasi-judicial depends on its legal effect. Sheriff's determination that Petitioner was "required" to register has no legal effect, just as Petitioner's own counsel's determination that Petitioner does not have to register had no legal effect. At most, Sheriff could refer matter to Prosecutor, who could charge Petitioner with failure to register, and then a court would get involved in determining the matter. Petitioner's correct remedy – other than waiting to see if he gets charged for failure to register – is a declaratory judgment action under Sec. 527.010 RSMo.

Smith v. St. Louis County Police, 2023 WL 1392052 (Mo. banc Jan. 31, 2023):
Even though the 2018 amendments to MO-SORA, Secs. 589.400.4(1)-(3), enacted a Tier system creating different time periods for which persons have to register as sex offenders, such persons are not eligible to be removed from the registry if they ever had to register under federal SORNA, because Sec. 589.400.1(7) imposes lifetime registration if a person "has been or is required" to register under the federal SORNA, and the Legislature did not change 589.400.1(7).
Facts: Petitioner Smith pleaded guilty to a registrable offense in 2005, and received an SIS. He successfully completed probation, and registered pursuant to MO-SORA, Secs. 589.400 et seq. Under the 2018 amendments to SORA, he claimed was a Tier I offender who was entitled to removal from the registry because the requisite time period had expired. He petitioned to be removed. The circuit court denied removal because of Sec. 589.400.1(7).
Holding: Sec. 589.400.1(7) requires registration for any person who "has been or is required to register" under federal law. Although the Legislature created a Tier system in 2018, the language in 589.400.1(7) remained unchanged. Before the 2018 amendments, Missouri courts had interpreted 589.400.1(7) to require registration in Missouri for life if persons were *ever* required to register under federal SORNA, even if they were not currently required to register under federal SORNA. The registration requirement under 589.400.1(7) continues even after a person's federal obligation to register under SORNA expires because Missouri's registration requirement is based on whether the person "has been" required to register under SORNA. The Legislature was aware of the courts' opinions interpreting SORA in this manner, but chose to leave 589.400.1(7)'s language unchanged. There may be some persons who were not required to register under SORNA, and those persons may seek removal from the Missouri registry. Petitioner, however, concedes that he was required to register under federal SORNA from 2008 to

2020. Because he had been required to register under SORNA, 589.400.1(7) requires him to register in Missouri and he is *not* eligible for removal from the registry.

MacColl v. Missouri State Highway Patrol, 665 S.W.3d 290 (Mo. banc 2023):
Holding: Where (1) In 1995, Petitioner pleaded guilty to sexual misconduct, a misdemeanor, Sec. 566.090 (1994); (2) she received probation and completed a sexual offender treatment program as a condition of probation; (3) in 1995 MO-SORA did not require registration for misdemeanors; (4) in 2000, MO-SORA was amended to require registration for misdemeanors, but that was later declared unconstitutionally retrospective to persons who pleaded guilty before 2000; (5) in 2008 federal SORNA became effective, but Missouri courts have held it did not apply to persons who pleaded guilty before August 2008; (6) in 2013, Sec. 566.090 was transferred to Sec. 566.101 and became second-degree sexual abuse with a different penalty; (7) in 2018, MO-SORA was amended to create a Tier System similar to the federal Tier System, (8) Like SORNA, MO-SORA's Tier System allows a reduction in registration time for Tier I people who meet certain criteria; and (9) SORNA also allows a reduction in registration time for people who meet certain criteria, and (10) in 2020, Petitioner filed a declaratory judgment action claiming she was a Tier I person under MO-SORA and does not have a prior or current obligation to register under SORNA so should be removed from registry, there is a genuine issue of material fact whether Petitioner was ever required to register under SORNA and whether she met the criteria for reduction. Although *Smith v. St. Louis Cnty. Police*, 659 S.W.3d 895 (Mo. banc 2023) recently held that 589.400.1(7) requires everyone who is or has been required to register under SORNA to keep doing so for life (despite the 2018 amendments), Petitioner's case is different because she contends any duty to register based on her 1995 misdemeanor offense expired before SORNA took effect. Summary judgment for State is reversed and case remanded for further proceedings.
Discussion: State argues that because Sec. 566.090 (1994) was transferred to Sec. 566.101, then 566.090 doesn't appear in any MO-SORA Tier so Petitioner should be classified as Tier III (not eligible for removal) by default because 558.414.7(5) states that anyone not falling into a specific Tier is Tier III. But Petitioner is correct that 566.090 is not classified under MO-SORA by design because it ceased to exist in 2013; moreover, it defies logic that the legislature would categorize offenses that ceased to exist more than five years before the 2018 amendments implemented the Tier System, and it also leads to absurd results because Tier III is for the most serious sex offenses. Although *Smith v. St. Louis Cnty. Police*, 659 S.W.3d 895 (Mo. banc 2023) recently held that 589.400.1(7) requires everyone who is or has been required to register under SORNA to keep doing so for life (despite the 2018 amendments), Petitioner's case is different because she contends any duty to register based on her 1995 misdemeanor offense expired before SORNA took effect. SORNA does not authorize "automatic" reduction in a person's registration time, but does allow a Petitioner to file a court action seeking the reduction by proving she meets the four requirements for reduction under SORNA. The State contends Petitioner was required to seek a declaration of reduction closer in time to when she believed her registration duty actually expired, but Court holds she can seek such a declaration now. However, there is a genuine issue of material fact whether Petition completed a "treatment program certified by a jurisdiction or by the Attorney General"

(which is one of the criteria she must have met for reduction of time under SORNA). Summary judgment for State is reversed and case remanded for further proceedings and factual findings.

Smith v. St. Louis County Police, 2022 WL 2032238 (Mo. App. E.D. June 7, 2022):
Trial court erred in denying "Tier I" Petitioner's petition for removal from sex offender registry on grounds that Petitioner "has been" required to register under federal SORNA, because such an interpretation effectively renders meaningless the Tier I, II and III system adopted by the legislature in 2018 to enable some persons to petition off the registry after certain periods of time; Eastern District disagrees with cases to the contrary because they rely on pre-2018 law.
Facts: In 2005, Petitioner pleaded guilty to misdemeanor offense of first-degree sexual misconduct (since renamed second-degree sexual abuse). He registered as a sex offender, and has continuously met all the requirements for registration. In 2021, he petitioned for removal from the registry on grounds that his offense is a "Tier I" offense, eligible for removal after 10 or 15 years. The trial court denied removal since Petitioner "has been" required to register under SORNA, and *Selig v. Russell*, 604 S.W.3d 817 (Mo. App. W.D. 2020).
Holding: Sec. 589.400.1(7) provides that SORA applies to any person who "has been" required to register under federal law (SORNA). SORNA itself provides a tier system for registration, and Missouri adopted a tier system in 2018. Before 2018, all persons registering in Missouri had to do so for life. No one disputes that Petitioner is a Tier I offender under the 2018 amendments. We disagree with *Selig* to the extent it holds lifetime registration is required for Tier I and II offenders under SORA simply because of Sec. 589.400.1(7). Close examination of *Selig* shows that this was dicta, and the prior cases which rely on the "has been" required to register language pre-date the 2018 amendments. 589.400.1(7) specifies persons who are "generally subject" to SORA and nothing more; it does not specify the length of time (duration) a person must remain on the registry. The registry statute must be read in totality and harmonized. Thus, Tier I and II offenders may take advantage of the new removal provisions of 589.401, provided they have fully complied with SORNA's duration requirements as set forth in 34 USC 20915. We see nothing in the 2018 amendments that indicate the General Assembly intended to impose a lifetime registration requirement on all Tiers. If the General Assembly intended lifetime registration for everyone, it would not have created the Tier System. Interpreting SORA to still require lifetime registration due to 589.400.1(7) effectively renders the 2018 amendments meaningless. Statutes are not interpreted to assume the legislature committed a useless act. We conclude that all pre-2018 cases are no longer controlling to the extent they require lifetime registration for Tier I and II offenders. Rather, courts should evaluate whether an offender is a Tier I or II under both SORA and SORNA, and grant or deny the petition accordingly.

Ford v. Belmar, 2022 WL 2028209 (Mo. App. E.D. June 7, 2022):
Where Petitioner-Defendant had been convicted of second-degree child molestation in 2004 and had been in compliance with his duty to register as a sex offender ever since, he was eligible to petition off the registry as a "Tier I" offender; Sec. 589.400.1(7), which

requires registration for persons have been required to register under federal SORNA, does not mandate the duration (length) of registration.
Facts: Petitioner-Defendant was convicted of second-degree child molestation in 2004, and complied with registration requirements ever since. He petitioned to be removed from the registry since his offense is a "Tier I" offense under the 2018 amendments creating a Tier system for various offenses, and time periods of registration for those offenses. The trial court denied removal on the basis of Sec. 589.400.1(7), since Defendant "has been" required to register under SORNA.
Holding: 589.400.1(7) does not say anything about the *duration* of the registration requirement, only that the provisions of MO-SORA apply to anyone who "has been or is" required to register under federal SORNA. 589.400.1(7) does no more than impose on people an *obligation to register* based on their registration status under SORNA. 589.400.1(7) simply does not answer the question of how long a person must stay on the registry. Under the 2018 amendments in 589.400.4, Tier I and II offenders are no longer required to register for life, but for 15 and 25 years respectively. The implementation of the Tier system was an indication by the legislature that not all sex offenses are equally severe or require lifetime registration. To adopt the trial court's position would be to render the 2018 amendments meaningless. Removal granted.

Ewing v. Col. Hayden, 2023 WL 6984404 (Mo. App. E.D. Oct. 24, 2023):
Holding: Even though Petitioner for removal from sex offender registry was convicted of "rape" in 1976 and sentenced to two years, where the record was "devoid of any facts concerning the 1976 conviction", trial court did not err in finding that Petitioner failed to prove he was not a Tier III offender subject to lifetime registration under Sec. 558.400.1(7); appellate court notes that if Petitioner was a Tier II offender, his federal registration requirement would have ended in 2001, which is before SORNA was given retroactive effect, and thus, he would be able to be removed from the registry, but Petitioner did not present any facts to determine the nature of 1976 conviction, and in fact, abandoned a claim on appeal that he was not Tier III.

State v. Shepherd, 630 S.W.3d 896 (Mo. App. S.D. 2021):
Holding: Where Defendant was convicted of second degree kidnapping, Sec. 565.120, without any finding by the jury that the offense was committed for sexual motivation (and the jury acquitted Defendant attempted first degree rape), trial court erred ordering Defendant to register as a sex offender as part of the oral pronouncement of sentence.
Discussion: Sec. 589.414.5(1)(d) requires registration for second degree kidnapping "with sexual motivation." However, this cannot be applied to Defendant because *the jury* never found he committed the offense for sexual motivation. Defendant was charged with second degree kidnapping, Sec. 565.120.1, which interfering with Victim's liberty and exposing her to substantial risk of serious physical injury. Sexual motivation is not an element of this offense. The jury instructions made no reference to sexual motivation. The closing argument made no reference to sexual motivation for kidnapping. The jury acquitted Defendant of an attempted rape charge. Trial court erred in orally sentencing Defendant to register, but since this wasn't embodied in the written sentence and judgment, the written sentence isn't erroneous so it is affirmed.

State v. Tilton, 2022 WL 17973539 (Mo. App. S.D. 2022):
Holding: Even though Defendant claims evidence is insufficient to convict of failure to register as sex offender because he was no longer required to register as a "Tier I" offender, Southern District would hold that he still had a lifetime registration requirement under the "catch-all" provision in Sec. 589.400.1(7) that requires lifetime registration for anyone who "has been" required register under federal law. However, Southern District transfers case to Supreme Court where two similar cases are presently pending.

Iseman v. Mo. Dep't of Corr., 2023 WL 2129661 (Mo. App. W.D. Feb. 21, 2023):
(1) Petitioner may bring declaratory judgment action to contest DOC's determination that he must register as a sex offender; but (2) trial court must determine in first instance whether Petitioner's guilty plea to harassment (in lieu of a plea to child molestation and sodomy) requires registration under the federal catch-all of "any conduct that by its nature is a sex offense against a minor", and the court may look beyond the guilty plea to the underlying facts of the offense.
Facts: Petitioner/Defendant was originally charged with child molestation and sodomy for sexually touching a child. However, he ultimately pleaded guilty to harassment, Sec. 565.090, for causing emotion distress to child by touching child in non-sexual way and entering her room without wearing pants. He was sentenced to 4 years in prison. DOC informed him he must register as a sex offender. He brought a declaratory judgment action to contest this on grounds that he did not plead to a sexual offense. The trial court dismissed the declaratory judgment on grounds that it was not ripe, and that there was an adequate remedy at law under Sec. 589.400.9.
Holding: (1) Petitioner's claims are not un-ripe because he is bringing a pre-enforcement challenge to clarify his future registration obligations. The purpose of declaratory judgment is to allow parties relief from uncertainty regarding their legal rights and status. Where the facts are sufficiently developed, the Declaratory Judgment Act allows parties to preemptively seek a judicial declaration of their rights, without first engaging in conduct that would subject them to risk of prosecution. Similar to here, in *Doe v. Frisz*, 643 S.W.3d 358, 366 n. 4 (Mo. banc 2022), the Supreme Court held that a petitioner who was told by executive officials that he had to register could pursue a declaratory judgment action to contest that. Petitioner does not have an adequate remedy at law, because although Sec. 589.400.9 provides exemptions for persons currently on the registry or who would otherwise be subject to register, Petitioner's claim is that he should not be required to register *at all*, because his offenses don't require registration. (2) Because the trial court dismissed the case as unripe, it didn't rule on the merits. Petitioner would be required to register under Missouri law if he is required to register under federal law. The federal registration law has a catch-all provision that requires registration for offenses against a minor that include "any conduct that by its nature is a sex offense against a minor." 34 U.S.C. Sec. 20911(7)(I). To determine this, Missouri uses a "non-categorical" approach which allows courts to look beyond the guilty plea to the underlying facts of the offense to determine whether the offense qualifies as a sex offense. This allows the court to look at the circumstances of the crime, including the underlying conduct on which the conviction was based. Remanded to determine this in first instance.

Drewell v. Missouri State Highway Patrol, 672 S.W.3d 284 (Mo. App. W.D. July 25, 2023):
Holding: Even though Petitioner, who was convicted in 2001 of a sex offense, was a Tier I offender under SORNA and MO-SORA (both of which required registration for 15 years), Petitioner must still register for life under Sec. 589.400.1(7), which requires lifetime registration for anyone who "has been" required to register under federal law.

McCleery v. Nodaway Cnty. Sheriff's Dep't, 2023 WL 8588326 (Mo. App. W.D. Dec. 12, 2023):
Holding: Where, in petition for removal from sex offender registry case, (1) the Highway Patrol (MSHP) was served with the petition but notified the trial court that it was entrusting representation in the case to the local prosecutor; (2) the local prosecutor ultimately did not object to Petitioner's removal; (3) MSHP did not file any post-trial motion under Rule 78.07(c) to allege error; and (4) MSHP appealed the trial court's judgment removing Petitioner from the registry, MSHP did not preserve anything for appellate review and plain error review under Rule 84.13(c) is not warranted.
Discussion: MSHP was properly served with a copy of Plaintiff's petition and could have filed a responsive pleading. Instead, MSHP notified the trial court that it was entrusting representation to the local prosecutor. The local prosecutor did not object to Petitioner's removal, and the trial court entered judgment accordingly. MSHP now contends on appeal that Petitioner was subject to lifetime registration under Sec. 589.400.1(7). However, MSHP failed to preserve this issue for appeal because MSHP didn't answer, object or participate in the trial court proceedings. MSHP could have preserved the issue by filing a Rule 78.07(c) motion alleging error relating to the form or language of the judgment, but MSHP did not. Although MSHP argues that its interests were not protected by the local prosecutor, MSHP chose to have the local prosecutor represent them. MSHP claims the trial court's judgment constitutes plain error under Rule 84.13(c). But there is no manifest injustice here, and the plain error doctrine is not available to revive issues already abandoned by selection of trial strategy or oversight.

U.S. v. Icker, 2021 WL 4163789 (3d Cir. 2021):
Holding: Defendant, a former police officer, could not be required to register as sex offender under SORNA, where he was not convicted of an enumerated sex offense, even though his conduct involved sexual contact with women.

Doe v. Wasden, 2021 WL 4129144 (D. Idaho 2021):
Holding: Idaho law that required adults who had been convicted of private consensual sexual acts under Crimes Against Nature Law to register as sex offenders violated substantive due process and served no legitimate state interest, since such acts now are protected liberty interests.

Jones v. Stanford, 2020 WL 8414989 (E.D. N.Y. 2020):
Holding: Blanket ban on persons convicted of sex offenses and on probation from accessing social media was not narrowly tailored and violated First Amendment; there were less restrictive alternatives, such as computer monitoring software available.

People v. Galley, 2021 WL 49953 (Ill. App. 2021):
Holding: Statute requiring people convicted of sex offenses to refrain from social media was overbroad.

Sexual Predator

In the Matter of Care and Treatment of Turpin v. State, 628 S.W.3d 416 (Mo. App. W.D. 2021):
Holding: A Petitioner for SVP-release who wishes to challenge the sufficiency of the court's Findings on appeal must have first raised the issue in a motion to amend judgment under Rule 78.07(c).

In the Matter of the Care and Treatment of Davis v. State, 635 S.W.3d 176 (Mo. App. W.D. 2021):
Holding: Defendants have right to effective assistance of counsel in sexually violent predator proceedings; however, because the Missouri Supreme Court has not declared whether such claims are reviewed under the "meaningful hearing standard" used in parental termination cases, or the more-exacting *Strickland* standard used in criminal postconviction proceedings, appellate court will apply both standards to see if outcome would be the same.

In the Matter of the Care and Treatment of Haggerman v. State, 637 S.W.3d 697 (Mo. App. W.D. 2021):
Holding: Where a Defendant/Appellant was found to be a sexually violent predator and raises ineffective assistance of counsel on direct appeal, the appellate court will follow this procedure: (1) If the claim can be determined based on the record, court will decide the issue on appeal; (2) but if the record is insufficient to determine the merits of the claim, court will consider whether to remand for an evidentiary hearing; (3) if the claim raises sufficient allegations, remand is appropriate; if not, court may reject the claim outright; and (4) in all scenarios court will apply both the "meaningful hearing" standard and *Strickland* standard, because Missouri has not yet determine which standard to apply. Here, while Defendant's claim that his attorney was ineffective in advising him to waive a jury might typically require a remand to develop a record of counsel's advice, no remand is required because Defendant didn't adequately plead his claim or show *Strickland* prejudice.

Howe v. Godinez, 2021 WL 4050852 (S.D. Ill. 2021):
Holding: Illinois's sexually dangerous civil commitment program violates due process because it does not afford detainees a realistic opportunity to be cured or improve their mental condition, but instead, transforms civil commitment into a punitive and possibly lifetime detention; program offered therapy less than required by professional standards, did not have enough therapists, and suspension of semi-annual evaluations prevented detainees from advancing in the program.

People v. Kastman, 2022 WL 4372989 (Ill. 2022):
Holding: Where statute for SVP persons provided that they would be on conditional release until discharged, trial court had authority to order Department Director of the program to provide financial assistance to such persons on conditional release since they remained "committed" to Director's "custody," weren't yet discharged, and assistance served the statute's rehabilitative purpose.

Statute of Limitations

State v. Clayborn-Muldrow, 2022 WL 517297 (Mo. App. E.D. Feb. 22, 2022):
Holding: Where (1) on March 15, 2020, Defendant-Police Officer attempted to dissuade Victim from reporting a crime; but (2) Victim went to police station and reported the crime on March 16, 2020; and (3) while Victim was at the station being interviewed, Defendant-Officer asked who was conducting the interview but did not have contact with Victim or Investigating Officers on that date, the crime was completed on March 15, 2020; was not a continuing "course of conduct" through March 16, 2020; and thus, the State's initiation of the criminal charge by Information on March 16, 2021, was barred by the one-year statute of limitations. Trial court's grant of motion to dismiss affirmed.
Discussion: The charged offense is a Class A misdemeanor with a one-year statute of limitations, Sec. 566.036.2(2). The State claims the offense was a "continuing offense" through March 16, 2020, when Defendant made inquiries about Victim at the police station. But the tampering with a victim statute, Sec. 575.270.2(a), does not criminalize a "course of conduct." And unlike some offenses, such as possession, which by necessity are continuing offenses, victim tampering can be accomplished by a single act. Here, the only criminal action which Defendant committed occurred on March 15, 2020, in attempting to dissuade Victim from reporting the crime. Thus, filing the charge on March 16, 2021, was barred by the one-year statute of limitations.

*** Reed v. Goertz, ___ U.S. ___, 143 S.Ct. 955 (2023):**
Holding: The two-year statute of limitations for a Sec. 1983 claiming challenging the constitutionality of a state's postconviction DNA testing procedures does not begin to run until the state appellate process is completed, including a state motion for rehearing.

State v. Thompson, 2022 WL 1787550 (N.J. 2022):
Holding: The 5-year statute of limitations for sex crimes and burglary prosecutions began to run when the FBI updated its guidelines for National DNA Index System to allow previously-excluded data to be to be entered for DNA profiles; State possessed both physical evidence from the crime and Defendant's DNA sample at that time, and should have been able to identify Defendant at that time.

Statutes – Constitutionality -- Interpretation – Vagueness

State v. McCord, 621 S.W.3d 496 (Mo. banc 2021):
The 1000 foot distance from schools mandated by Sec. 566.147 (2017) for persons convicted of sex offenses is measured from the school's property line, not the school building itself.
Facts: Defendant, who had been convicted of a sex offense, was convicted of residing within 1000 feet of a school, Sec. 566.147. The trial court measured the distance from Defendant's residence to the school's property line, rather than the school building itself. That distance was 839 feet.
Discussion: The 2017 statute stated the distance is measured from "any public school as defined in Sec. 160.011," which states a "public school" is a place of "giving instruction." Instruction can be given both inside and outside of a building; e.g., physical education classes may be instructed outside. The statute is intended to protect children from interaction with or exposure to people convicted of sex crimes by creating a buffer between them. The trial did not err in measuring distance from the residence to the school's property line. "This Court need not further examine the meaning and interpretation of the term 'residence' as used in the statute. Because 'school' as used in Sec. 566.147 included the [school] structure and adjoining grounds, sufficient evidence supported [Defendant's] conviction regardless of whether the statute required measuring the 1,000 feet from the school to the offender's residential structure or property line."
Editor's note: The 2018 version of Sec. 566.147 states the distance "shall be measured from the edge of the offender's property nearest the public school … to the nearest edge of the public school."

Fowler v. Missouri Sheriff's Retirement System, 623 S.W.3d 578 (Mo. banc 2021):
Holding: The $3.00 surcharge imposed by Sec. 57.955 as court costs for the Sheriff's Retirement Fund is unconstitutional under Article I, Sec. 14 Mo. Const., because it has no reasonable relationship to the administration of justice.
Discussion: For a court cost to withstand an Art. I, Sec. 14 challenge, the cost must be "reasonably related to the expense of the administration of justice." A cost collected to enhance the compensation of officials of the executive department of county government – here, retired sheriffs -- does not meet this test.

Fox v. State, 2022 WL 789330 (Mo. banc March 15, 2022):
Holding: Sec. 595.201, which requires defense attorneys to give certain notification of rights to victims in sex cases prior to interviewing them, is unconstitutional as applied to defense attorneys, because the statute violates the attorneys' freedom of speech; the State failed to meet its burden to establish that the requirements placed on defense attorneys are necessary to achieve the statute's objectives, that the requirements are narrowly tailored, or that no less restrictive alternatives exist.

State v. Collins, 2022 WL 1559253 (Mo. banc May 17, 2022):
Holding: (1) Second-degree harassment statute, Sec. 565.091, is not unconstitutionally overbroad under First Amendment, because it requires a person's communications be "without good cause" and made "with the purpose" of causing emotional distress; the

statute does not require use of "fighting words" or require Victim to actually suffer emotional distress; (2) where Defendant sent Facebook messages and voicemails to Probation Officer referencing Officer's family members, and saying he would follow her like she follows him, evidence was sufficient to convict of second-degree harassment; and (3) conviction for both tampering with judicial officer, Sec. 575.095, and second degree harassment does not violate Double Jeopardy, because tampering with judicial officer contains statutory elements that harassment does not (e.g., tampering covers conveying a benefit to a judicial officer); court examines all elements of statutes to see if they're the same, not the Defendant's actual conduct.

Wilson v. City of St. Louis, 2023 WL 2394417 (Mo. banc March 7, 2023):
Holding: Certain provisions of Secs. 82.485 and 82.487 RSMo, which create a parking commission to regulate public parking in the City of St. Louis, are unconstitutional under Art. VI, Sec. 22, Mo.Const., because the statutes create powers and duties for municipal offices (officers) of a charter city.

State v. Williams, 673 S.W.3d 467 (Mo. banc Aug. 15, 2023):
Holding: Sec. 167.031, which makes it a misdemeanor for a parent to fail to cause their child to attend school "on a regular basis", is not unconstitutionally vague, because the common understanding of "regular" means anything less than having their child go to school on days the school is in session.

Byrd v. State, 2023 WL 8790264 (Mo. banc Dec. 19, 2023):
Holding: HB 1606, which contains Sec. 67.2300 making unauthorized sleeping and camping on state-owned lands a Class C misdemeanor, violates the single subject, clear title, and original purpose requirements of Art. III, Secs. 21 and 23 of the Missouri Constitution, and is invalid in its entirety.
Discussion: Plaintiffs brought declaratory judgment action claiming HB 1606 violated the single subject, clear title, and original purpose requirements of the Missouri Constitution. HB 1606 was titled "relating to political subdivisions." Among its many provisions, the bill enacted Sec. 67.2300, which imposed restrictions on the expenditure of state funds for homelessness, and made unauthorized sleeping and camping on state-owned lands a Class C misdemeanor. The provisions of HB 1606 do not fairly relate to the subject of "political subdivisions."' HB 1606 violates the single subject requirement because the addition of Sec. 67.2300 introduced at least one impermissible additional subject, i.e., homelessness. Art. III, Sec. 23, provides that no bill shall contain more than one subject which shall be clearly expressed in the title. HB 1606 has provisions which go far beyond "political subdivisions" to include not-for-profit agencies that receive state funds and even private campground owners, who aren't "political subdivisions" at all. The connection between the various provisions of Sec. 67.2300 and the subject "political subdivisions" is remote at best and, in some instances, completely missing. Severance of the unconstitutional provisions is not possible here because there is no basis for concluding beyond a reasonable doubt that the Legislature would have passed HB 1606 without Sec. 67.2300 in it. Thus, HB 1606 is invalid in its entirety.

State v. Vaughn, 2021 WL 6121847 (Mo. App. E.D. Dec. 28, 2021):
The "Good Samaritan Law," Sec. 195.205, applies to Defendants whose actions occur before the law's effective date in August 2017; thus, trial court did not err in dismissing possession charges against Defendant, who was the subject of a medical emergency call and was found unconscious with a syringe in April 2017.
Facts: Sec. 195.205.2, effective August 2017, provides, in relevant part, that a person who seeks medical assistance for himself for a drug overdose, or for whom someone else has sought medical assistance, "shall not be arrested, charged, prosecuted, [or] convicted" of certain drug offenses. In April 2017, police were called about a medical emergency involving Defendant. Defendant was found unconscious with a drug syringe. He was later charged with drug possession over this incident. The trial court dismissed the charge. The State appealed.
Holding: The State claims Sec. 1.160 bars retroactive application of the statute to Defendant. But 1.160 does not apply to "new provisions" of statutes. 195.205.2 was not an amendment of drug laws. It did not make any previously prohibited activity – i.e., drug possession – legal; possession remains illegal just as it was prohibited before. Thus, 195.205.2 did not "amend" the possession statutes. 195.205.2 is a new statutory provision that "did not repeal or amend any previously existing statute." If it had, the law in effect in April 2017 would apply due to 1.160, but because 195.205.2 is a "highly unusual" new statute, it falls outside the scope of 1.160. Thus, the trial court did not err in dismissing charges.

State v. Gill, 2022 WL 838310 (Mo. App. E.D. March 22, 2022):
(1) The burden to produce evidence and burden of persuasion to show the applicability of "Good Samaritan" law, Sec. 195.205, is on the Defendant; (2) determination of whether a Defendant acted in "good faith" in calling for help includes not only the Defendant's subjective intent in making the call for help, but also requires analysis of the circumstances surrounding the seeking of aid, including any delay in calling for help.
Facts: Defendant called 911 to report the death of a friend in a hotel room from drugs. When authorities arrived, they found drugs in in a bag belonging to Defendant. Defendant was charged with possession, Sec. 579.015. He sought dismissal of the charges under the "Good Samaritan" law, Sec. 195.205. The State claimed Defendant had not called 911 in good faith, and had delayed in seeking help. The trial court dismissed the charge on grounds that the State did not prove the inapplicability of Sec. 195.205, and that the court should consider only Defendant's subjective intent at the time of the call, and not surrounding circumstances, to determine if there was "good faith."
Discussion: (1) Sec. 195.205 states that a person who "in good faith" seeks medical help for a person overdosing on drugs or alcohol shall not be charged or convicted as a result of seeking medical help. Other provisions of Chapters 195 and 579 regarding drug offenses place the burden of persuasion and production on a defendant to prove that they are exempt from those statutes' provisions. Sec. 579.180.1 states "[t]he burden of producing evidence of any exemption or exception is upon the person claiming it." Sec. 195.205 is in Chapter 195. Thus, the trial court erroneously placed the burden of persuasion and production on the State. (2) The trial court's narrow interpretation of "good faith" is not supported by the language of the statute. Determining whether a

defendant acted in "good faith" is not limited to the precise moment when defendant called 911, but includes all aspects of the circumstances and of the defendant's conduct leading up to the call. Here, the State claims Defendant did not act in good faith since he waited hours before calling 911, and took other actions inconsistent with seeking medical help. The trial court should have considered these circumstances. Dismissal reversed and remanded.

S.A.B. v. J.L.R., 675 S.W.3d 245 (Mo. App. E.D. Sept. 19, 2023):
Holding: (1) Even though the new five-year length of Protection Orders did not take effect until August 28, 2021, where the trial court applied this to conduct occurring both before and after that date, this did not violate Art. I, Sec. 13 Mo.Const.'s ban on retrospective laws, because the change in the length of Protection Orders was merely "procedural," not "substantive," and did not impair any vested rights of Defendant or impose any new duties on him; (2) even though threatening texts were received in Missouri at 11:30 P.M. Central Time on August 27, where Defendant sent them from New York in the Eastern Time Zone at 12:30 A.M. on August 28, the August 28 statute applies to Defendant because a statute comes into effect in a foreign jurisdiction when the foreign jurisdiction (New York) reaches the stated date, even if the host jurisdiction (Missouri) has not yet reached that date because of a time difference.

State v. Rust, 2023 WL 8368230 (Mo. App. S.D. Dec. 4, 2023):
Holding: (1) After the 2011 amendment of Sec. 568.040, not paying "without good cause" is no longer an element of criminal nonsupport; it is now an affirmative defense on which Defendant bears burden of production and persuasion; and (2) on appeal, appellate court must ignore even uncontradicted evidence of the affirmative defense under appellate standard of reviewing evidence in light most favorable to verdict.

Beach by and through Walton v. Zellers, 2023 WL 8588240 (Mo. App. W.D. Dec. 12, 2023):
Holding: Even though Defendant-State Employee pleaded guilty to an assault, which was now the subject of a civil suit against Defendant-State Employee, the guilty plea did not constitute "lack of cooperation" with the Attorney General's Office such as to deny coverage under the State Legal Expense Fund (SLEF) in the civil case.
Discussion: Sec. 105.716.2 requires state employees cooperate "in all respects, including the making of settlements, the securing and giving of evidence, and the attending and obtaining witnesses to attend hearings and trials" in order to receive SLEF coverage. Nowhere does the statute require securing approval of the AG before the employee takes action in a criminal case. It would place Defendant-State Employee in an untenable position if she had to reject a favorable plea offer to obtain coverage under SLEF in a civil case.

*** Van Buren v. U.S., ___ U.S. ___, 141 S.Ct. 1648 (U.S. June 3, 2021):**
Holding: The Computer Fraud and Abuse Act, 18 U.S.C. Sec. 1030, which prohibits "access[ing] a computer without authorization or exceed[ing] authorized access," does not criminalize accessing a database to which a defendant has authorized access, even though the defendant uses the information for a non-authorized, improper purpose; the

Act only criminalizes accessing databases to which the defendant has not been granted lawful access; thus, even though Defendant-Police Officer accessed a law enforcement database, to which he had regular access in his job, to gain information about person for an improper non-law enforcement purpose in violation of Police Department policy, his conduct did not violate the Act.

*** Greer v. U.S., ___ U.S. ___, 141 S.Ct. 2090 (U.S. June 14, 2021):**
Holding: Even though *Rehaif v. U.S.*, 139 S.Ct. 2191 (2019) held that in felon-in-possession cases, the Gov't must prove the defendant "knew" he was a felon, for cases decided before *Rehaif*, it is not plain error for a plea court to have failed to inform a defendant that the Gov't would have to prove at trial he "knew" he was a felon, or for a trial court to have failed to instruct jury that it must find that defendant "knew" he was a felon *unless* the defendant presents evidence that he did not, in fact, know he was a felon; in the latter cases, a court must then determine if there is a "reasonable probability" the result of the proceeding would have been different, i.e., that defendant would not have pleaded guilty, or the outcome of trial would have been different.

*** New York State Rifle and Pistol Assoc. v. Bruen, 2022 WL 2251305, ___ U.S. ___ (U.S. June 23, 2022):**
Holding: Statute which requires citizens to show a "proper cause" (special need) to obtain a license to carry a gun outside the home violates Second Amendment by preventing law-abiding citizens with ordinary self-defense needs from carrying guns.

*** Ruan v. U.S., 2022 WL 2295024, ___ U.S. ___ (U.S. June 27, 2022):**
Holding: The Federal Controlled Substance Act's "knowingly or intentionally" *mens rea* applies to Sec. 841, which makes it unlawful for anyone to dispense controlled substances "except as authorized"; thus, after Defendant-Doctor produced evidence that he was authorized to prescribe controlled substances (opioids), the Government must prove beyond a reasonable doubt that he knew he was acting in an unauthorized manner, or intended to do so.

*** Oklahoma v. Castro-Huerta, 2022 WL 2334307, ___ U.S. ___ (U.S. June 29, 2022):**
Holding: The federal government and States have concurrent jurisdiction to prosecute crimes committed by non-Native Americans against Native Americans in Indian County.

* **Counterman v. Colorado, ___ U.S. ___, 143 S.Ct. 2106 (2023):**
Holding: Where Defendant is being prosecuted for making a true threat (here, via internet postings), the State must prove a *mens rea* of at least recklessness so as not to violate First Amendment, i.e., prove that Defendant consciously disregarded a substantial risk that his communications would be viewed as threatening; Colorado law which used a purely "objective" standard of whether a reasonable person would consider the statements threatening violates First Amendment.

*** U.S. v. Hansen, ___ U.S. ___, 143 S.Ct. 1932 (2023):**
Holding: 8 U.S.C. Sec. 1324(a)(1)(A)(iv), which makes it illegal to "encourage or induce" a noncitizen to come to, enter, or reside in U.S., forbids only the purposeful solicitation and facilitation of specific acts known to violate federal law, and thus is not unconstitutionally overbroad under First Amendment; "encourages or induces" is used in its specialized, criminal law sense as the intentional encouragement of an unlawful act, and facilitation – i.e., aiding and abetting – is the provision of assistance to a wrongdoer with the intent to further an offense's commission.

*** Turkiye Halk Bankasi A.S. v. U.S., ___ U.S. ___, 143 S.Ct. 940 (2023):**
Holding: The Foreign Sovereign Immunity Act grants immunity to foreign states for civil claims only; thus, Defendant, a bank owned by the Republic of Turkey, could be criminally indicted and prosecuted for violation of U.S. law in U.S. courts.

* **Percoco v. U.S., 598 U.S. 319 (2023):**
Holding: The legal standard for whether a private citizen can be convicted of "honest services fraud," 18 U.S.C. Secs. 1343 and 1346, for depriving the government of its "intangible right to honest services" is not whether the private citizen had a "special relationship" with the government entity and had "dominated and controlled" government business; although a private citizen can be convicted of "honest services fraud" in some circumstances, jury instructions implying that the public has a right to a private person's honest services whenever that private person's clout exceeds some ill-defined threshold were too vague, and did not define the right to honest services with sufficient definiteness to prevent arbitrary enforcement.

*** Ciminelli v. U.S., 598 U.S. 306 (2023):**
Holding: A defendant cannot be convicted of federal wire fraud, 18 U.S.C. Sec. 1343, under a "right to control" theory (under which the Government establishes fraud by showing that the defendant schemed to deprive a victim of potentially valuable economic information necessary to make discretionary economic decisions) because the right to valuable economic information is not a traditional property interest; the text of the wire-fraud statute criminalizes taking "money or property" by means of false pretenses; it does not criminalize taking "intangible property" of "potentially valuable economic information necessary to make discretionary economic decisions."

Range v. Attorney General of the United States, 2023 WL 3833404 (3d Cir. June 6, 2023):
Holding: Even though Plaintiff was convicted of making a false statement to obtain food stamps, which offense carried up to five years in prison, the federal felon-in-possession law, 18 U.S.C. Sec. 922(g)(1), does not prohibit him from possessing a firearm because there is no long-standing historical traditional of depriving people convicted of such offenses of their Second Amendment rights.

U.S. v. Perez-Greaux, 2023 WL 6303194 (1st Cir. 2023):
Holding: Even though statute was silent as to mens rea, conviction for possession of machine gun requires that Defendant knew the firearm was a machine gun, particularly

given the draconian sentence of 30 years; to hold otherwise would make possessing machine gun a strict liability crime.

Johnson v. City of Grants Pass, 2022 WL 4492090 (9th Cir. 2022):
Holding: "Anti-camping" ordinance precluding use of bedding supplies (such as blankets and sleeping bags) in public violated 8th Amendment Cruel and Unusual Punishment Clause as applied to people who were involuntarily experiencing homelessness and needed the bedding supplies to avoid winter cold.

U.S. v. Quailes, 2023 WL 5401733 (M.D. Pa. 2023):
Holding: Statute prohibiting felon-in-possession of firearm was not consistent with Nation's historical tradition of firearm regulation, and was unconstitutional under 2nd Amendment as applied to Defendant.

Jones v. Stanford, 2020 WL 8414989 (E.D. N.Y. 2020):
Holding: Blanket ban on persons convicted of sex offenses and on probation from accessing social media was not narrowly tailored and violated First Amendment; there were less restrictive alternatives, such as computer monitoring software available.

State v. Kaeo, 2021 WL 6200773 (Haw. 2021):
Holding: Even though Defendant (and other protesters) blocked convoy workers from getting to a construction site Defendant was protesting against, the convoy workers were not member of the "public" within the meaning of the disorderly conduct statute that criminalizes certain conduct intended to cause inconvenience or alarm to the general public; the convoy workers were not part of the people as a whole, but were a subset of workers on the project being protested.

State v. Euler, 2021 WL 5876042 (Kan. 2021):
Holding: When two criminal statutes cover Defendant's conduct, the "identical offense doctrine" should be used to determine which crime Defendant can be convicted of, not the rule that Defendant can only be convicted under the more specific statute; "identical offense doctrine" holds that where two offenses have the same or similar elements, a defendant can only be sentenced to the less severe penalty.

McGlasten v. State, 2021 WL 5118111 (Miss. 2021):
Holding: Simultaneous possession of multiple firearms generally is only one offense under statute prohibiting felon-in-possession of a firearm, unless the weapons were stored in different places or acquired at different times.

Sena v. State, 2022 WL 1698545 (Nev. 2022):
Holding: Rule of lenity which prohibited sexual relations between relatives made the unit of prosecution a per-relationship basis, rather than a per-act basis.

State v. Nupdal, 2021 WL 5346690 (N.D. 2021):
Holding: Where Defendant used a scale only to weigh and package meth, this did not fall within the drug paraphernalia statute which requires use of the scale to produce or prepare meth.

People v. Wimer, 2022 WL 177714 (Cal. App. 2022):
Holding: Statute making it a felony to distribute or exhibit child pornography for "commercial consideration" does not include trading or inducing other to trade child pornography, which are separate offenses with lesser punishments.

State v. Omar, 2021 WL 5872021 (Conn. App. 2021):
Holding: Even though parole statute was amended to eliminate parole for certain offenses, amendments did not apply retroactively to offenses committed before enactment, where the effective date was the only textual reference to the date of their applicability; amendments did not mention retroactivity.

People v. Galley, 2021 WL 49953 (Ill. App. 2021):
Holding: Statute requiring people convicted of sex offenses to refrain from social media was overbroad.

State v. Fair, 2021 WL 5829775 (N.J. Super. Ct. App. 2021):
Holding: Reckless-disregard portion of terroristic threats statute is overbroad under 1st Amendment because it permits convictions for speech that does not constitute a "true threat"; to sustain a threat conviction without violating 1st Amendment, State must prove more than the mere utterance of threatening words – some of level of intent is required.

Griswold v. State, 2021 WL 6049853 (Tex. App. 2021):
Holding: Stalking statute was overbroad and violated First Amendment where it prohibited a substantial amount of protected speech and the terms "harass, annoy, alarm, abuse, torment, embarrass, or offend" in the electronic communications section of the statute were subject to various, uncertain meanings.

Sufficiency Of Evidence

State v. Lehman, 617 S.W.3d 843 (Mo. banc March 8, 2021):
Holding: (1) Even though police said Defendant was "near" a park, and surveillance video showed Defendant in a parking lot with some trees and grass in the distance, this evidence was insufficient to prove that he was within 500 feet of a public park in violation of Sec. 566.150; (2) even though it may have been preferable for Defendant to present separate Points Relied On regarding whether the State proved he had knowledge he was within 500 feet of a park and whether the State proved the distance element, the failure to do so doesn't preclude review for sufficiency of evidence on the merits, since sufficiency is always reviewed on the merits (not as plain error), even if not briefed.
Discussion: Sec. 566.150.1(2) provides that people convicted of certain sex crimes cannot loiter within 500 feet of public park with playground equipment. Although the surveillance video of the parking lot where Defendant was found also showed a grassy area nearby, the video does not show any playground equipment, nor anything clearly identified as "the park." Although police said Defendant was "near" the park, "near" is vague. "Near" might be used to describe a location a few miles away, or something 50 yards away. There simply were no facts proving that Defendant was within 500 feet of a park. Conviction reversed.

State v. McCord, 621 S.W.3d 496 (Mo. banc 2021):
The 1000 foot distance from schools mandated by Sec. 566.147 (2017) for persons convicted of sex offenses is measured from the school's property line, not the school building itself.
Facts: Defendant, who had been convicted of a sex offense, was convicted of residing within 1000 feet of a school, Sec. 566.147. The trial court measured the distance from Defendant's residence to the school's property line, rather than the school building itself. That distance was 839 feet.
Discussion: The 2017 statute stated the distance is measured from "any public school as defined in Sec. 160.011," which states a "public school" is a place of "giving instruction." Instruction can be given both inside and outside of a building; e.g., physical education classes may be instructed outside. The statute is intended to protect children from interaction with or exposure to people convicted of sex crimes by creating a buffer between them. The trial did not err in measuring distance from the residence to the school's property line. "This Court need not further examine the meaning and interpretation of the term 'residence' as used in the statute. Because 'school' as used in Sec. 566.147 included the [school] structure and adjoining grounds, sufficient evidence supported [Defendant's] conviction regardless of whether the statute required measuring the 1,000 feet from the school to the offender's residential structure or property line."
Editor's note: The 2018 version of Sec. 566.147 states the distance "shall be measured from the edge of the offender's property nearest the public school … to the nearest edge of the public school."

State v. Shepherd, 2022 WL 12289858 (Mo. banc April 26, 2022):
Even though State presented Defendant's driving record from Colorado showing he had five prior DWI offenses, evidence was insufficient to prove "habitual offender" DWI status, because State introduced no facts underlying the Colorado convictions to show the conduct involved would qualify as an intoxication related traffic offense (IRTO) in Missouri at the time of the current offense.
Facts: Defendant was charged with DWI as a "habitual offender," Sec. 577.010.2(6)(a), for having 5 or more prior IRTOs. As relevant here, when Defendant committed the Mo. DWI, IRTOs were defined as "driving while intoxicated" and "driving with excessive blood alcohol content." As proof of this, State introduced Defendant's Colorado driving record, which showed five prior offenses.
Holding: A prior conviction qualifies as an IRTO only if the conduct involved "driving while intoxicated," or another portion of the IRTO definition in section 577.001(15), as defined at the time of the current offense for which State seeks enhancement. As used in Chapter 577 at time of Defendant's offense, the word "driving" meant "physically driving or operating a vehicle," Sec. 577.001(9). This does not include merely being in "actual physical control" of a vehicle. This is critical to the State's failure of proof here, because Colorado statutes did not make a distinction between driving a vehicle, and merely being in actual physical control of the vehicle. Under Colorado law, merely being in actual physical control would constitute DWI. Thus, all of Defendant's prior convictions could have been for merely being in actual physical control. State had burden to prove beyond a reasonable doubt that Defendant's prior convictions met the *definition* of an IRTO under Missouri law at time of present offense. (But State need not prove that the conduct underlying the prior out-of-state convictions also constitutes a *crime* under Mo. law in effect at time of present offense. To the extent cases such as *State v. Coday*, 496 S.W.3d 572 (Mo. App. W.D. 2016), and *State v. Gibson*, 122 S.W.3d 121 (Mo. App. W.D. 2003) impose such a requirement, they are overruled). Here, State presented no evidence about Defendant's underlying conduct in Colorado. Nevertheless, it may be possible to make reasonable inferences about some of Defendant's prior convictions that they involved actual driving, since they resulted in accidents; but that is an issue for remand. Judgment vacated and remanded for resentencing.

State v. Collins, 2022 WL 1559253 (Mo. banc May 17, 2022):
Holding: (1) Second-degree harassment statute, Sec. 565.091, is not unconstitutionally overbroad under First Amendment, because it requires a person's communications be "without good cause" and made "with the purpose" of causing emotional distress; the statute does not require use of "fighting words" or require Victim to actually suffer emotional distress; (2) where Defendant sent Facebook messages and voicemails to Probation Officer referencing Officer's family members, and saying he would follow her like she follows him, evidence was sufficient to convict of second-degree harassment; and (3) conviction for both tampering with judicial officer, Sec. 575.095, and second degree harassment does not violate Double Jeopardy, because tampering with judicial officer contains statutory elements that harassment does not (e.g., tampering covers conveying a benefit to a judicial officer); court examines all elements of statutes to see if they're the same, not the Defendant's actual conduct.

State v. Boyd, 2023 WL 1998022 (Mo. banc Feb. 14, 2023):
Holding: (1) Even though there was a 10-year time difference between charged sex offenses committed against different child victims, trial court did not abuse discretion in not severing the offenses under Rule 24.07 because Defendant was unable to make a particularized showing of substantial prejudice if the offenses were not tried separately since the evidence was uncomplicated and distinct, and in addition, the jury heard propensity evidence that Defendant had committed other child sexual offenses 20 years ago; the prejudice of jointly trying offenses related to separate victims is reduced when the jury has heard evidence that the Defendant has abused victims other than the victims in the joined offenses; and (2) Evidence was sufficient to convict of enticement of a child, Sec. 566.151.1 where Defendant had child dress in tight, clingy dress; pose for sexy pictures; put her legs across him; touched her inner thigh; and kissed her and said she'd be his girlfriend if she was older, because a jury could find Defendant did this to persuade, coax, entice or lure victim for purpose of engaging in sexual conduct (defined in Sec. 566.010(6)) with her; Sec. 566.151.1 does not require the sexual conduct to actually occur.

The Fred Kemp Co. LLC v. Braselman, 619 S.W.3d 477 (Mo. App. E.D. 2021):
Holding: Sec. 71.780 does not allow a City to hold a person responsible for a nuisance unless they are the owner or occupant of the nuisance property; merely being a "person in control" of such property is not sufficient.

State v. Umfleet, 621 S.W.3d 15 (Mo. App. E.D. 2021):
(1) Sufficiency of evidence claim need not be included in a new trial motion to be preserved for appellate review, Rule 29.11(d); and (2) evidence was insufficient to convict Defendant of attempted first-degree burglary where the State failed to charge or prove a specific object offense, i.e., where the State neither charged nor proved what offense Defendant was intending to commit inside the residence.
Facts: Defendant was charged and convicted at trial with attempted first-degree burglary. Defendant was seen trying to open a window of his former girlfriend's house, while she was in the house.
Holding: Defendant contends the State did not prove Defendant intended to commit a crime in the residence as required by Sec. 569.160.1 for first-degree burglary. Neither the charging document nor the State's arguments at trial said what offense, if any, Defendant intended to commit by unlawfully entering the house. The State contends it was not required to specify the object offense. But there is no authority for the State's claim. Prior case law on sufficiency or jury instructions indicates that the State was required to identify the specific object offense, and prove Defendant's intent to commit it. Appellate court cannot become the State's advocate and supply the specific object offense for the State. The burden is on the State to charge a particular offense, and prove Defendant took a substantial step toward committing it. The distinction between first-degree burglary and first-degree trespass is the intent to commit an offense in the residence. Conviction entered for lesser-included offense of first-degree trespass.

City of Center v. Andrews, 622 S.W.3d 211 (Mo. App. E.D. 2021):
Holding: Even though Police Chief-Witness and prosecutor testified or argued that Defendant violated municipal ordinance for speeding, trial court plainly erred in entering conviction for speeding because the municipal ordinance was not introduced into evidence; municipal ordinances are not subject to judicial notice, so the State failed to prove Defendant's guilt by not introducing the ordinance at trial.

State v. Vaughn, 2021 WL 6121847 (Mo. App. E.D. Dec. 28, 2021):
The "Good Samaritan Law," Sec. 195.205, applies to Defendants whose actions occur before the law's effective date in August 2017; thus, trial court did not err in dismissing possession charges against Defendant, who was the subject of a medical emergency call and was found unconscious with a syringe in April 2017.
Facts: Sec. 195.205.2, effective August 2017, provides, in relevant part, that a person who seeks medical assistance for himself for a drug overdose, or for whom someone else has sought medical assistance, "shall not be arrested, charged, prosecuted, [or] convicted" of certain drug offenses. In April 2017, police were called about a medical emergency involving Defendant. Defendant was found unconscious with a drug syringe. He was later charged with drug possession over this incident. The trial court dismissed the charge. The State appealed.
Holding: The State claims Sec. 1.160 bars retroactive application of the statute to Defendant. But 1.160 does not apply to "new provisions" of statutes. 195.205.2 was not an amendment of drug laws. It did not make any previously prohibited activity – i.e., drug possession – legal; possession remains illegal just as it was prohibited before. Thus, 195.205.2 did not "amend" the possession statutes. 195.205.2 is a new statutory provision that "did not repeal or amend any previously existing statute." If it had, the law in effect in April 2017 would apply due to 1.160, but because 195.205.2 is a "highly unusual" new statute, it falls outside the scope of 1.160. Thus, the trial court did not err in dismissing charges.

State v. Gill, 2022 WL 838310 (Mo. App. E.D. March 22, 2022):
(1) The burden to produce evidence and burden of persuasion to show the applicability of "Good Samaritan" law, Sec. 195.205, is on the Defendant; (2) determination of whether a Defendant acted in "good faith" in calling for help includes not only the Defendant's subjective intent in making the call for help, but also requires analysis of the circumstances surrounding the seeking of aid, including any delay in calling for help.
Facts: Defendant called 911 to report the death of a friend in a hotel room from drugs. When authorities arrived, they found drugs in in a bag belonging to Defendant. Defendant was charged with possession, Sec. 579.015. He sought dismissal of the charges under the "Good Samaritan" law, Sec. 195.205. The State claimed Defendant had not called 911 in good faith, and had delayed in seeking help. The trial court dismissed the charge on grounds that the State did not prove the inapplicability of Sec. 195.205, and that the court should consider only Defendant's subjective intent at the time of the call, and not surrounding circumstances, to determine if there was "good faith."
Discussion: (1) Sec. 195.205 states that a person who "in good faith" seeks medical help for a person overdosing on drugs or alcohol shall not be charged or convicted as a result of seeking medical help. Other provisions of Chapters 195 and 579 regarding drug

offenses place the burden of persuasion and production on a defendant to prove that they are exempt from those statutes' provisions. Sec. 579.180.1 states "[t]he burden of producing evidence of any exemption or exception is upon the person claiming it." Sec. 195.205 is in Chapter 195. Thus, the trial court erroneously placed the burden of persuasion and production on the State. (2) The trial court's narrow interpretation of "good faith" is not supported by the language of the statute. Determining whether a defendant acted in "good faith" is not limited to the precise moment when defendant called 911, but includes all aspects of the circumstances and of the defendant's conduct leading up to the call. Here, the State claims Defendant did not act in good faith since he waited hours before calling 911, and took other actions inconsistent with seeking medical help. The trial court should have considered these circumstances. Dismissal reversed and remanded.

Burgess v. State, 2022 WL 1144719 (Mo. App. E.D. April 19, 2022):
Holding: (1) Even though Victim in third-degree domestic assault trial testified she was "just friends" with Defendant-29.15 Movant, where she and Defendant-Movant had had sexual relations one time but remained in contact thereafter, this satisfied the definition of "household member" under Sec. 455.010(7)(2016), which defined it as "any person who is or has been in a *continuing social relationship* of a[n] … *intimate* nature with the victim"; thus, appellate counsel was not ineffective in failing to raise on direct appeal a claim that the evidence was insufficient; and (2) even though Prosecutor misstated the law in arguing in closing that a one-time sexual encounter between two people with *no ongoing social relationship* would bring such relationship "under the domestic umbrella," trial counsel was not ineffective in failing to object since any error was corrected by the proper jury instructions in the case.

State v. Hartwein, 2022 WL 1739954 (Mo. App. E.D. May 31, 2022):
Holding: Even though Defendant-Mother (who did not have legal custody of her Child) told people she was going to take Child and went to a bus stop to try to persuade Child to come with her, evidence was insufficient to convict of interference with custody, Sec. 565.150, because Child did not, in fact, go with her.
Discussion: A person commits offense of interference with custody if, knowing she has no legal right to do so, "takes or entices from legal custody any person entrusted by order of a court to the custody of another person." The State concedes Defendant did not "take" Child. The State contends Defendant enticed Child. However, Chapter 565 doesn't define "entice." The plain meaning of "entice from legal custody" suggests a physical separation from the person afforded legal custody. Thus, for either taking or enticing, the State had to prove Defendant took or enticed Child from Father's lawful custody, which requires a physical transfer of custody to complete the offense. Merely trying to persuade Child to leave Father's lawful custody doesn't complete the offense. However, where evidence is insufficient to convict of the greater offense, but is sufficient to convict of a lesser-included offense, appellate court can enter conviction for the lesser. Conviction entered for attempted interference with custody.

State v. Harris, 2022 WL 16752261 (Mo. App. E.D. Nov. 8, 2022):
Holding: (1) A direct appeal can be taken from a guilty plea alleging that there was an insufficient factual basis for the plea under Rule 24.02(e); (2) standard of review of such unobjected to claims is plain error; and (3) trial court did not plainly err in accepting guilty plea to involuntary manslaughter where Defendant traded drugs with a person who briefly overdosed when Defendant was present, and then later died of an overdose on the drugs when Defendant was not present, because this showed recklessness.
Discussion: (1) The State claims lack of factual basis is not cognizable on direct appeal, because a guilty plea waives appellate review of all error except subject-matter jurisdiction, sufficiency of the charging document, and *Bazell* claims. The State claims the issue can only be raised in postconviction under Rule 24.035. The State's arguments were rejected in *State v. Russell*, 598 S.W.3d 133 (Mo. banc 2020), which held that Rule 24.035 does not and cannot limit the issues which can be raised on direct appeal under Sec. 547.070, which grants defendants the right to appeal final judgments. While *Russell* dealt with excessive sentence, its rationale applies to factual basis. Thus, lack of factual basis is cognizable on direct appeal. (2) The standard of review for such an unobjected to claim is plain error. (3) Whether a factual basis exists to support involuntary manslaughter is very case-specific. The issue is whether Defendant acted recklessly, i.e., whether there was a conscious disregard of risk of death and a gross deviation from what a reasonable person would do under the circumstances. While there are cases that would support both that Defendant here did and did not act recklessly, appellate court holds that any error here by the trial court in accepting the plea was not "evident, obvious and clear enough" to constitute plain error.

State v. Ingram, 2023 WL 2483431 (Mo. App. E.D. March 14, 2023):
In case of first impression, (1) evidence is sufficient to convict of possession of child pornography for possession of cache files containing such images where there is other corroborating evidence (e.g., Defendant's incriminating statements) to support that Defendant knowingly possessed them; this is true even if there is no evidence Defendant knew of the cache files, and even if Defendant deleted the original images that corresponded to the cache files; and (2) even though Yahoo and the National Center for Missing and Exploited Children (NCMEC) reported Defendant's possession to police in Missouri, who then obtained a search warrant to search Defendant's computer (where the cache files were found), there was no 4th Amendment violation because Yahoo and NCMEC were acting as private parties, not government agents, when they notified police; even assuming NCMEC was a government authority, it did not exceed the scope of Yahoo's private search when NCMEC reviewed the photos Yahoo provided, so there was no 4th Amendment violation.
Facts: Internet provider Yahoo notified NCMEC that Defendant had images containing child pornography in his Flikr account. NCMEC then reviewed those same images, and took the additional action of geolocating Defendant's IP address in Missouri. NCMEC then notified local police in Missouri, who obtained a search warrant for Defendant's computer. Police used special software to find several images of child pornography in Defendant's cache files. Police testified that in order for these images to have been in the cache files, someone would have had to have previously deleted the files from the

computer (but they remained in the computer's cache). Defendant made incriminating remarks to police that he "probably" had child pornography. The trial court denied Defendant's motion to suppress.
Holding: (1) It is a matter of first impression in Missouri whether images in cache files are sufficient to sustain a conviction for possession of child pornography. We hold there is sufficient evidence to support such a conviction when there is evidence of child pornography images found in cache files, and there is other corroborating evidence to support a finding that Defendant knowingly possessed child pornography. This is true even if there is no evidence Defendant knew of the cache files, even if there was not special software on Defendant's computer allowing him to view the cache files, and even if Defendant deleted the original images which correspond to the cache files. Additional corroborating evidence may include incriminating statements; that Defendant possessed special software to "clean" his computer or delete files from his computer; or that Defendant had a history of viewing child pornography. (2) It is also an issue of first impression in Missouri whether actions by Internet Service Providers (ISP's) and NCMEC to report child pornography to police constitute a warrantless search in violation of 4th Amendment. Regarding Yahoo, it is a private entity that reviewed Defendant's Flikr account in a private capacity; Yahoo was not a government agent, so the 4th Amendment didn't apply. Even though a federal statute requires ISP's to report child pornography to NCMEC, the statute does *not* require Internet Service Providers to "seek out and discover" child pornography. The Providers do that on their own as private parties. Even assuming NCMEC is a government agent, there is no 4th Amendment violation if the government authorities search no more than what the private party provided. Here, NCMEC only reviewed the photos provided by Yahoo, so did not exceed the scope of Yahoo's private search. Furthermore, to the extent NCMEC located Defendant's IP address in Missouri, that didn't violate 4th Amendment because there is no reasonable expectation of privacy in an IP address.

State v. Jackson-Bey, 2023 WL 4188362 (Mo. App. E.D. June 27, 2023):
Holding: Even though (1) in first-degree murder case, trial court submitted MAI-CR 4th 414.02, which required jury to find Defendant was "18 years of age or older at time of offense," and (2) there was no evidence presented of Defendant's age, Defendant's sufficiency-of-evidence claim fails because the State was only required to prove the elements of first-degree murder, Sec. 565.020.1 (knowingly causing the death of a person after deliberation) and age was not an element; to the extent the MAI conflicts with substantive law, MAI wasn't binding; although age may play a role during sentencing, age was not a requirement for the jury to find beyond a reasonable doubt.

State v. Jansen, 2023 WL 6978319 (Mo. App. E.D. Oct. 24, 2023):
Holding: In case of first impression, appellate court holds that (1) even though Sec. 568.060.1(1) for felony child abuse requires the perpetrator of the abuse (Defendant) be "eighteen years of age or older," and (2) even though the State failed to present direct proof of Defendant's age, the evidence is sufficient to convict where jury can infer age from observing the appearance of the non-testifying Defendant in court, *plus* there is additional circumstantial evidence of Defendant's age presented.

Holding: Here, the evidence was sufficient to convict because the jury was able to observe Defendant in court, "plus" there was "additional circumstantial evidence from which the jury may reasonably infer age." That testimony included that a Witness testified she had been in a romantic relationship with Defendant for seven years, that she and Defendant had three children together, and that both she and Defendant are State-appointed child care providers. It is unlikely the State would appoint a person under 18 to be a State-appointed child care provider. Other circumstantial evidence included other Witnesses repeatedly referring to Defendant as "a man" or as "other adults" in the household.

In the Interest of C.B.K. v. Juvenile Officer, 2023 WL 7498033 (Mo. App. E.D. Nov. 14, 2023):
Holding: (1) Even though 12-year-old Juvenile-Defendant "punched" Victim's vagina while she was in the shower and said "I hate you," the evidence was insufficient to prove third-degree child molestation, Sec. 566.069.1, because this did show that Defendant did the touching for the purpose of arousing or gratifying his sexual desire, as required by Sec. 566.010(6); and (2) this is true even though Juvenile-Defendant also had other sexually related images or texts on his phone, because those images and texts were not shown to be reasonably close in time to the offense.

State v. Ray, 615 S.W.3d 439 (Mo. App. S.D. Jan. 19, 2021):
Holding: Even though Defendant failed to appear in court and sought to escape capture by knocking on a neighborhood resident's door and begging to be let in, where jury subsequently convicted Defendant of attempted first degree burglary on theory that he was attempting to commit the offense of "failure to appear" by gaining entry to the house, trial court did not err in granting JNOV and convicting of the submitted lesser of attempted first-degree trespassing; this is because the "failure to appear" was complete when Defendant failed to appear in court, and thus, Defendant could not have been committing that offense "therein" the house.
Discussion: Defendant was charged with attempted first degree burglary, Sec. 569.160, for trying to gain entry into a house to evade capture for failure to appear. First degree burglary, Sec. 569.160, requires that a person seek to enter an inhabitable structure "for the purpose of committing an offense *therein*." Failure to appear, Sec. 544.665.1, occurs when a person "knowingly fails to appear before any court or judicial officer." All the elements of the offense of failure to appear are completed when a criminal defendant knowingly fails to appear in court. Thus, Defendant could not have been committing or completing that crime when he tried to gain admittance to the house.

State v. Pliemling, 2022 WL 1402457 (Mo. App. S.D. May 4, 2022):
Holding: (1) Where (a) in 2016, Defendant applied for public assistance and falsely stated on her application that she didn't have a prior felony conviction for drugs; (b) in 2018, Defendant was charged with unlawful receipt of public benefits under Sec. 578.377 (2013) for unlawfully receiving assistance "before" December 31, 2016; (c) Sec. 578.377 was repealed and replaced by Sec. 570.400 effective January 1, 2017; (d) the new statute increased the dollar amount threshold of public assistance to qualify as a felony vs. a misdemeanor; (e) the evidence at trial was that Defendant didn't actually receive any

public assistance until 2017; and (e) the jury instructions directed jurors to find Defendant guilty for conduct spanning 2016 through 2018, the trial court plainly erred in convicting of a felony because the State was relieved of having to prove the correct threshold amount for a felony; and (2) under these unusual circumstances, the remedy is not discharge or resentencing as a misdemeanor, but to remand with instructions to dismiss the case unless the State files a motion for leave to further amend the information to charge receiving benefits in 2017 under Sec. 570.400, which is when the unlawful receipt occurred; filling out the false application wasn't the criminal act.
Discussion: Even though the old statute was repealed, Defendant still could have been convicted of acts under it because Sec. 1.160 preserves liability for repealed statutes. The problem here is that the State charged Defendant with alleged conduct spanning 2016 through 2018 – a time during which the old statute was repealed and replaced by an entirely new one with a different threshold amount for a felony. The evidence showed Defendant didn't actually receive any benefits until 2017, which was a period covered by the higher amount. Thus, the State was required to prove the new, higher amount to convict of a felony. Although the evidence was that Defendant received more than the new, higher amount, that "finding" can only be made by a jury, not a court. Thus, Defendant suffered manifest injustice by convicting of a felony. Here, the State did present evidence showing Defendant was guilty of at least a misdemeanor. Thus, discharge is not appropriate. Usually, the appellate court might order resentencing as a misdemeanor, but that's not appropriate here either, because Defendant was convicted under a repealed statute for conduct she didn't do when the statute was in effect; she didn't receive the benefits until 2017. So the court remands to allow filing of an amended information.

State v. Parham, 2022 WL 1616532 (Mo. App. S.D. May 23, 2022):
Where Officers who pursued Defendant-bicyclist did not activate their lights, sirens, or make a verbal command to stop, evidence was insufficient to convict of resisting arrest, Sec. 575.150, since there was no evidence Officers were arresting or attempting to arrest Defendant, or that Defendant should have known Officers were attempting to arrest him.
Facts: Officers saw two bicyclists riding late at night with no lights. They approached them in their patrol car. One of the people stopped, but Defendant rode away. Defendant was convicted of resisting arrest.
Holding: The verdict director required the jury to find that Officer was arresting Defendant for failure to have headlamp on bike; that Defendant reasonably should have known Officer was making an arrest; and that Defendant fled to prevent arrest. There was no evidence from which a reasonable juror could conclude Officers were arresting or attempting to arrest Defendant, or that Defendant should have known this, when Officers drove near him without lights, sirens, or a verbal command to stop.

State v. Meador, 2022 WL 17591868 (Mo. App. S.D. Dec. 13, 2022):
Holding: Where (1) Officers saw Defendant exit a vehicle that may have been stolen, (2) Officers knew Defendant and thought there was an outstanding arrest warrant for him, (3) Officers told him to "hang out over here for me" while Officers checked on whether there was a warrant, (4) Defendant ran, and (5) Officers twice yelled "stop" while chasing him, trial court erred in granting judgment of acquittal notwithstanding the verdict

(JNOV) after jury finding of guilty, because this evidence made a submissible case for felony resisting arrest, Sec. 575.150.1.
Discussion: Sec. 575.150.1 provides that a person commits felony resisting if (1) he knew or reasonably should have known Officers were making an arrest, (2) he resisted by using or threatening violence, physical force, or fleeing, and (3) he did so for purpose of preventing Officers from completing the arrest. Here, the issue is whether Defendant knew or reasonably should have known Officers were arresting him. Defendant was told to wait while Officers checked on whether there was a warrant for him, and was twice told to "stop" while Officers chased him. It is not necessary for Officers to say "you are under arrest" when circumstances indicate Officers were attempting an arrest. Remanded for entry of conviction and sentencing.

State v. Tilton, 2022 WL 17973539 (Mo. App. S.D. 2022):
Holding: Even though Defendant claims evidence is insufficient to convict of failure to register as sex offender because he was no longer required to register as a "Tier I" offender, Southern District would hold that he still had a lifetime registration requirement under the "catch-all" provision in Sec. 589.400.1(7) that requires lifetime registration for anyone who "has been" required register under federal law. However, Southern District transfers case to Supreme Court where two similar cases are presently pending.

State v. Burpo, 670 S.W.3d 439 (Mo. App. S.D. May 12, 2023):
Holding: Where (1) in June 2020, police searched a trailer at 372 County Road and found marijuana growing in yard; (2) in June 2020, Defendant's and another person's names were on mailbox of trailer but there was nothing in the trailer connecting it to Defendant, although there were items in the trailer with the other person's name on them; (3) in September 2020, Defendant was booked on an unrelated offense and gave 372 County Road as his address; and (4) in March 2021, police searched the trailer again and found Defendant present there, the evidence was insufficient to convict Defendant of manufacture of marijuana there in *June 2020* , since there was no showing Defendant had constructive possession of the premises at that time, i.e., no showing Defendant had access to or control of the premises at that time. Defendant discharged.

State v. Hamilton, 673 S.W.3d 923 (Mo. App. S.D. Aug. 30, 2023):
Holding: (1) Even though Victim-Wife could assert spousal privilege under Sec. 546.260 to refuse to testify against Defendant-Husband, this did not negate Defendant's guilt for tampering with a witness, Sec. 575.270, for offering Victim-Wife $500 to try to get the charges dismissed; and (2) even though the charges didn't get dismissed, the evidence was still sufficient to convict of tampering since 575.270.1(2) only requires a defendant *attempt* to prevent or dissuade a victim from assisting the prosecution's case.

State v. Rust, 2023 WL 8368230 (Mo. App. S.D. Dec. 4, 2023):
Holding: (1) After the 2011 amendment of Sec. 568.040, not paying "without good cause" is no longer an element of criminal nonsupport; it is now an affirmative defense on which Defendant bears burden of production and persuasion; and (2) on appeal, appellate court must ignore even uncontradicted evidence of the affirmative defense under appellate standard of reviewing evidence in light most favorable to verdict.

State v. Pitiya, 623 S.W.3d 217 (Mo. App. W.D. 2021):
Holding: Where Defendant was charged with resisting arrest because he "used physical force" by attempting to hit Officer's patrol car with his car, the evidence was insufficient to convict of felony resisting because when the alleged resistance involves use of physical force, the charge may be elevated to a felony only if the underlying arrest is for a felony; a warrant for failure to appear on a felony; or a warrant for a probation violation on a felony, Sec. 575.150.5, and the State failed to prove the nature of the underlying charge.
Discussion: Sec. 575.150.1 proscribes resisting a stop by either (1) using or threatening violence or physical force, or (2) fleeing. Resisting arrest by *any* means is a Class A misdemeanor unless the underlying arrest is for a felony, a warrant issued for failure to appear on a felony, or a warrant issue for a probation violation on a felony. Resisting also becomes a felony where the resistance is accomplished by *flight* and "the person fleeing creates a substantial risk of serious physical injury or death." Here, Defendant was not charged with resisting by fleeing, yet the charging document alleged he "created a substantial risk of serious physical injury or death." Creating a substantial risk of serious physical injury or death elevates the charge to a felony only where the method of resistance is *flight*. To maintain a felony conviction, the State needed to prove arrest for a felony, a warrant for failure to appear on a felony, or a warrant for a probation violation for a felony. The State failed to either allege or prove the nature of the underlying offense. Since Defendant was also convicted of ACA based on felony resisting, the ACA conviction is also vacated because ACA requires an underlying felony, Sec. 571.015.1. Conviction for felony resisting and ACA vacated, and remanded for resentencing as misdemeanor.

In the Interest of R.M. v. Juvenile Officer, 625 S.W.3d 779 (Mo. App. W.D. 2021):
Holding: Even though Juvenile called a Detention Worker -- who was trying to remove Juvenile from an area – foul names and said "I wanna f--- you in your big booty, bitch," the evidence was insufficient to convict of second-degree harassment, Sec. 565.091.1, because this did not prove the element of "purpose to cause emotional distress" to Detention Worker.
Discussion: A person commits second degree harassment, Sec. 565.091.1 if they "without good cause, engage[] in any act with the purpose to cause emotional distress to another person." 565.002(7) defines "emotional distress" as "something markedly greater than the level of uneasiness, nervousness, unhappiness, or the like which are commonly experienced in day-to-day living." The emotional distress must be considerable or substantial to a reasonable person. Here, although Detention Worker testified she was distressed, the events here involve a 15-year-old Juvenile who was "acting out" in a way that showed disrespect for the Detention Worker but did not demonstrate purpose to cause emotional distress to her. This is not to say the words used here could never rise to the level of harassment under Sec. 565.091.1, but the circumstances here do not show the "purpose" element of the offense.

State v. Schurle, 2021 WL 4057191 (Mo. App. W.D. Sept. 7, 2021):
Holding: (1) Even though when Defendant was arrested during a traffic stop he had only methamphetamine residue (no measurable amount of meth), where Defendant had

$480 in cash and a digital scale with meth residue, evidence was sufficient to convict of delivery of meth, Sec. 579.020; but (2) where Defendant's retained attorneys had withdrawn due to his failure to pay them; the Public Defender had declined to represent Defendant; and the trial court refused to overrule the Public Defender's denial because the court believed Defendant should get a job to hire counsel, trial court plainly erred in having him proceed to trial *pro se* without giving him warnings about the dangers of self-representation required by *Faretta*.

Discussion: (1) No Missouri appellate court has previously considered whether a defendant can be convicted of delivery when not arrested while in actual possession of a distributable quantity of drugs, or is not actually observed distributing the drugs. However, a majority of courts in other jurisdictions have held a defendant can be convicted if the evidence supports the inference that defendant was recently in possession of a distributable quantity. Here, Defendant's possession of the cash and the scales, as well as deceitful statements made by him to police, supports that he was recently in possession of a distributable quantity. (2) *Faretta* requires that before a court can conclude that a defendant has voluntarily waived counsel, the court must conduct "a thorough evidentiary hearing" which warns Defendant of the dangers of self-representation. That did not occur here. On remand, the trial court will need to re-examine indigence. Defendant claimed his father had paid for his prior attorneys, and would not pay more. A determination of indigence must be based on the means at Defendant's disposal or available to him to obtain counsel. Sec. 600.086.1. If the defendant's financial circumstances change, a further determination of indigence may be made "at any stage of the proceedings." Sec. 600.086.3.

State v. Morris, 2022 WL 516892 (Mo. App. W.D. Feb. 22, 2022):

Holding: Where (1) State charged Defendant with first degree trespassing for going on to property after being given "actual communication" not to, but (2) none of the State's witnesses testified that Defendant had been given "actual communication," evidence was insufficient to convict of first degree trespassing.

Discussion: Sec. 569.140 provides that first degree trespass can be committed by entering real property after being given "actual communication" not to, or through "posting" a sign. Where the act constituting the crime is specified in the charge, the State is held to proof of that act at trial, and cannot change its theory on appeal to allege a different statutory method of committing the crime. Given the fact that there was an on-going dispute between Defendant and Property Owner, it is likely that Defendant was given "actual communication" not to go on Owner's property. However, that assumption is not sufficient evidence to support a conviction for first degree trespass. But because jury found all elements necessary for the lesser-included offense of second degree trespass – which is an absolute liability offense for unlawfully entering real property of another -- appellate court enters conviction for that offense.

In the Interest of J.R.K. Juvenile Officer v. J.R.K., 2022 WL 774551 (Mo. App. W.D. March 15, 2022):

Holding: Sec. 544.665, which makes it a crime for defendants to fail to appear for a criminal proceeding, does not apply to juvenile proceedings.

Discussion: Practice and procedure for juvenile courts is government by Rules 110-129. Rule 110.02 provides that these rules "supersede all statutes and existing court rules inconsistent therewith." Rule 127.03 provides conditions for release of a juvenile and provides the consequences that a court can impose for juvenile's failure to appear. Since Rule 127.03 already provides consequences for failure to appear, Sec. 544.665 (i.e., potential criminal charge) is inconsistent and inapplicable to juvenile proceedings. In dicta, appellate court also questions whether juveniles today can be charged under Sec. 575.200 for escape from custody for "crimes," since per Rule 127.01(b), juveniles are no longer arrested for "crimes." Adjudication finding that Juvenile violated Sec. 544.665 reversed.

State v. Forbes, 2022 WL 1309991 (Mo. App. W.D. May 3, 2022):
(1) Where Defendant-Daughter was appointed guardian and conservator of Father's assets by a Probate Court, the evidence was insufficient to convict of financial exploitation of elderly, Sec. 570.145, by "obtain[ing] control" of Father's assets, because she took control under lawful order of the Probate Court, and even though she used those assets for personal use, that wasn't what she was charged with; (2) Jury instruction allowing conviction for "obtain[ing]control" of assets was erroneous because it allowed jury to convict for lawful act authorized by Probate Court.
Facts: Defendant was Daughter of Victim (Father). Father had dementia, and was placed in nursing facility. On June 29, 2016, Defendant-Daughter was appointed by a Probate Court to become Father's guardian and conservator. In September 2016, Defendant-Daughter wrote a check on Father's account to nursing facility to pay for Father's care. Also starting in September 2016, Defendant-Daughter began writing checks to herself for her personal use, and sold Father's car for her personal benefit. In August 2017, Daughter voluntarily relinquished her guardianship and conservatorship to Saline County Administrator. Defendant-Daughter was charged with financial exploitation of elderly, Sec. 570.145. The jury instruction instructed to find Defendant guilty if between June 29, 2016, and September 10, 2017, Defendant "knowingly obtained control of a bank account and the proceeds" from the sale of Father's car. After guilty verdict, Defendant appealed.
Holding: (1) The jury instruction criminalized a legal act in that Defendant, as the court-appointed conservator for Father, was authorized by the Probate Court to take control of the bank account and Father's assets. Sec. 570.145 requires a person use "undue influence" to take control of an elderly person's property. There was simply no evidence that occurred here. The Probate Court appointed Defendant as guardian and conservator in June 2016. Defendant was *not* charged with inappropriately spending Father's assets. The verdict director instructed the jury to convict if Defendant "obtained control" of the assets. This erroneous instruction prejudiced Defendant because it allowed jury to convict her based on the legal action of taking control of the bank account by order of the Probate Court. (2) The amended information charged Defendant with obtaining control over the back account and assets. The State did not produce sufficient evidence that Defendant "obtained control" of Father's bank account or assets by "undue influence" because it is not disputed that the Probate Court ordered her to take control of these assets. Therefore, the information does not state an offense, and the evidence was insufficient. Double Jeopardy would bar retrial. Defendant discharged.

In the Interest of S.R.W. v. Juvenile Officer, 2022 WL 2124964 (Mo. App. W.D. June 14, 2022):

Holding: Where Juvenile Officer never introduced into evidence the municipal ordinance Defendant-Juvenile was charged with violating, the evidence was insufficient to convict, because courts cannot take judicial notice of municipal ordinances. Judgment reversed and Juvenile discharged.

Discussion: Courts cannot take judicial notice of municipal ordinances. The ordinances must be introduced at trial in accord with Sec. 490.240, which provides various methods by which a copy of the ordinance can be introduced. Juvenile Officer failed to do that here. Thus, the ordinance violation remains unproven, and double jeopardy precludes a retrial.

In the Interest of P.L.S. v. Juvenile Officer, 2022 WL 4074414 (Mo. App. W.D. Sept. 6, 2022):

Holding: Juvenile Court plainly erred in accepting Juvenile-Defendant's plea to Class A misdemeanor of violation of a court order, Sec. 211.431, because Juvenile's plea lacked a factual basis, since Juvenile could not have violated the statute because 211.431 explicitly applies only to persons "eighteen years of age or over" who fail to obey a court order.

Discussion: Juvenile could not have violated 211.431 because the statute, by its express terms, only applies to persons "eighteen years of age or over." Thus, the statute cannot serve as the basis for a finding of delinquency by a juvenile. Unlike other states, the Missouri statute giving the juvenile court exclusive authority over delinquency cases does not refer to acts which *would* constitute a violation of the law *if committed by a hypothetical adult*. Instead, 211.031.1(3) gives the juvenile court exclusive authority only when a juvenile "is alleged to have violated a state law or municipal ordinance." Thus, Juvenile here could only be found delinquent is he himself *actually violated* 211.431. It is not enough that his actions *would have* constituted a violation if committed by an adult. Plea vacated.

State v. Fox, 2022 WL 17100482 (Mo. App. W.D. Nov. 22, 2022):

(1) Defendant's possession of 0.5 grams of a wax substance containing THC was a Class D felony under Sec. 579.105.2 because Secs. 195.015 and 195.017 treat marijuana and THC separately, despite Defendant's argument that the offense should be a misdemeanor because the THC was less than 35 grams; and (2) State was not required to prove that Defendant's substance was not derived from industrial hemp, since Sec. 571.015.5 places the burden to prove an exception to legal liability on Defendant.

Facts: Defendant was charged with a Class D felony for possessing a wax-like substance that weighed 0.5 grams and contained THC.

Holding: (1) Defendant argues the weight exception to possession of marijuana (35 grams or less) applies to possession of THC. The possession of a controlled substance is a D felony under Sec. 579.015.2 unless it is 35 grams or less of marijuana. However, Sec. 195.017.2(5) distinguishes between marijuana and THC. To find THC subject to the 35-grams-of-marijuana exception would require the court to ignore the specific language treating the substances differently or to treat that language as surplusage. If THC were meant to be treated the same as marijuana, there would be no need to list it as a separate

substance in Sec. 195.017. And if THC were subject to the same weight exception, THC would have been listed in the exception in Sec. 579.105.2. (2) Defendant argues the State had to prove the substance was not derived from industrial hemp. A wax derived from industrial hemp is not illegal under Sec. 195.107.2(5)(nn). However, Sec. 579.015.5 places the burden on a defendant to prove that an exception applies. The State's only burden was to prove that Defendant knowingly possessed a controlled substance. The State had no burden to prove the substance was not industrial hemp.

State v. Turner, 2023 WL 8882874 (Mo. App. W.D. Dec. 26, 2023):
Holding: (1) Evidence was insufficient to support conviction for Class B felony of use of child in sexual performance, Sec. 568.080 RSMo 2000 [now Sec. 573.200] because Sec. 556.061(27) [now Sec. 556.061(43)] requires that "serious emotional injury shall be established by expert testimony" and there was no expert presented to support Victim's alleged emotional injury, but (2) since Defendant was convicted of a greater offense, and jury found all elements of the lesser offense, appellate court can enter conviction for Class C felony of use of a child in sexual performance, and remand for sentencing accordingly.

*** Van Buren v. U.S., ___ U.S. ___, 141 S.Ct. 1648 (U.S. June 3, 2021):**
Holding: The Computer Fraud and Abuse Act, 18 U.S.C. Sec. 1030, which prohibits "access[ing] a computer without authorization or exceed[ing] authorized access," does not criminalize accessing a database to which a defendant has authorized access, even though the defendant uses the information for a non-authorized, improper purpose; the Act only criminalizes accessing databases to which the defendant has not been granted lawful access; thus, even though Defendant-Police Officer accessed a law enforcement database, to which he had regular access in his job, to gain information about person for an improper non-law enforcement purpose in violation of Police Department policy, his conduct did not violate the Act.

*** Greer v. U.S., ___ U.S. ___, 141 S.Ct. 2090 (U.S. June 14, 2021):**
Holding: Even though *Rehaif v. U.S.*, 139 S.Ct. 2191 (2019) held that in felon-in-possession cases, the Gov't must prove the defendant "knew" he was a felon, for cases decided before *Rehaif*, it is not plain error for a plea court to have failed to inform a defendant that the Gov't would have to prove at trial he "knew" he was a felon, or for a trial court to have failed to instruct jury that it must find that defendant "knew" he was a felon *unless* the defendant presents evidence that he did not, in fact, know he was a felon; in the latter cases, a court must then determine if there is a "reasonable probability" the result of the proceeding would have been different, i.e., that defendant would not have pleaded guilty, or the outcome of trial would have been different.

*** Ruan v. U.S., 2022 WL 2295024, ___ U.S. ___ (U.S. June 27, 2022):**
Holding: The Federal Controlled Substance Act's "knowingly or intentionally" *mens rea* applies to Sec. 841, which makes it unlawful for anyone to dispense controlled substances "except as authorized"; thus, after Defendant-Doctor produced evidence that he was authorized to prescribe controlled substances (opioids), the Government must

prove beyond a reasonable doubt that he knew he was acting in an unauthorized manner, or intended to do so.

* **Counterman v. Colorado, ___ U.S. ___, 143 S.Ct. 2106 (2023):**
Holding: Where Defendant is being prosecuted for making a true threat (here, via internet postings), the State must prove a *mens rea* of at least recklessness so as not to violate First Amendment, i.e., prove that Defendant consciously disregarded a substantial risk that his communications would be viewed as threatening; Colorado law which used a purely "objective" standard of whether a reasonable person would consider the statements threatening violates First Amendment.

* **Percoco v. U.S., 598 U.S. 319 (2023):**
Holding: The legal standard for whether a private citizen can be convicted of "honest services fraud," 18 U.S.C. Secs. 1343 and 1346, for depriving the government of its "intangible right to honest services" is not whether the private citizen had a "special relationship" with the government entity and had "dominated and controlled" government business; although a private citizen can be convicted of "honest services fraud" in some circumstances, jury instructions implying that the public has a right to a private person's honest services whenever that private person's clout exceeds some ill-defined threshold were too vague, and did not define the right to honest services with sufficient definiteness to prevent arbitrary enforcement.

*** Ciminelli v. U.S., 598 U.S. 306 (2023):**
Holding: A defendant cannot be convicted of federal wire fraud, 18 U.S.C. Sec. 1343, under a "right to control" theory (under which the Government establishes fraud by showing that the defendant schemed to deprive a victim of potentially valuable economic information necessary to make discretionary economic decisions) because the right to valuable economic information is not a traditional property interest; the text of the wire-fraud statute criminalizes taking "money or property" by means of false pretenses; it does not criminalize taking "intangible property" of "potentially valuable economic information necessary to make discretionary economic decisions."

*** Dubin v. U.S., ___ U.S. ___ , 143 S.Ct. 1557 (2023):**
Holding: "Aggravated identity theft" (which requires a predicate offense and provides an enhanced sentence) under 18 U.S.C. Sec. 1028A(a)(1) requires that the misuse of another person's identity be "at the crux" of the criminality and have a "genuine nexus" to the predicate offense so that the means of identification is used in a fraudulent or deceitful matter; thus, even though Defendant (who managed a psychology practice) overbilled Medicaid for services using actual patients' identifying information (which constituted healthcare fraud in violation of a separate statute), his actions did not constitute "aggravated identity theft" because the misuse of the patients' information was merely an ancillary feature of his overbilling.

U.S. v. Hillie, 2021 WL 4228187 (D.C. Cir. 2021):
Holding: Where videos which Defendant possessed showed only fleeting views of children's pubic areas and showed children engaged in ordinary grooming activities,

changing clothes and dancing, evidence was insufficient to support sexual exploitation of a minor conviction, since the videos did not depict children engaging in any sexually explicit conduct or overt sexual activity.

U.S. v. Hillie, 2022 WL 2333936 (D.C. Cir. 2022):
Holding: Even though Defendant possessed videos showing fleeting views of children's pubic areas, evidence was insufficient to support child pornography convictions where the children weren't engaged in sexually explicit conduct or activity, but were only involved in ordinary grooming, changing clothes, and dancing.

U.S. v. Perez-Greaux, 2023 WL 6303194 (1st Cir. 2023):
Holding: Even though statute was silent as to mens rea, conviction for possession of machine gun requires that Defendant knew the firearm was a machine gun, particularly given the draconian sentence of 30 years; to hold otherwise would make possessing machine gun a strict liability crime.

Wood v. Eubanks, 2022 WL 269350 (6th Cir. 2022):
Holding: Even though Petitioner yelled profanities at police and called them thugs and rats with guns, Petitioner's words were protected by First Amendment and did not provide probable cause to arrest him for disorderly conduct.

Hesser v. U.S., 2022 WL 2712168 (11th Cir. 2022):
Holding: Even if Defendant hid gold in his house so that IRS could not find it, this did not prove attempted tax evasion in absence of evidence the gold belonged to him, rather than a family trust.

State v. Kaeo, 2021 WL 6200773 (Haw. 2021):
Holding: Even though Defendant (and other protesters) blocked convoy workers from getting to a construction site Defendant was protesting against, the convoy workers were not member of the "public" within the meaning of the disorderly conduct statute that criminalizes certain conduct intended to cause inconvenience or alarm to the general public; the convoy workers were not part of the people as a whole, but were a subset of workers on the project being protested.

State v. Hall, 2022 WL 188433 (Iowa 2022):
Holding: Defendant's offer of a future relationship with Witness as an inducement not to attend a deposition, did not constitute subornation of perjury, where Defendant did not request or offer any inducement that Witness testify falsely or conceal material information while under oath.

Com. v. Shirley, 2022 WL 4397980 (Ky. 2022):
Holding: Even though Defendant changed barcodes on merchandise before checking out at self-serve checkout, evidence was insufficient to convict of unlawful access to a computer, because shoppers were intended to have access to the self-checkout machines.

State v. Noor, 2021 WL 4185651 (Minn. 2021):
Holding: Mental state required for depraved-mind murder is generalized indifference to human life, which cannot exist where Defendant's actions are directed with particularity at the person who is killed.

People v. Gaworecki, 2021 WL 4596362 (N.Y. 2021):
Holding: Even though (1) Defendant sold heroin to Victim who died; and (2) Defendant knew the heroin was "potent," evidence was insufficient to establish that Defendant acted "recklessly" to sustain charge of second-degree manslaughter, since "potency" did not equate to substantial and unjustifiable risk of death; several others who used the same heroin did not die; and the State presented no evidence that Defendant knew that any other people had overdosed from the heroin Defendant sold.

State v. Nupdal, 2021 WL 5346690 (N.D. 2021):
Holding: Where Defendant used a scale only to weigh and package meth, this did not fall within the drug paraphernalia statute which requires use of the scale to produce or prepare meth.

State v. Shedrick, 2022 WL 5239561 (Or. 2022):
Holding: Statute requiring culpable mental state for material elements of an offense applied to the property-value element of first-degree theft.

State v. Jilling, 2022 WL 2164263 (R.I. 2022):
Holding: Even though Defendant-Repair Store Employee copied photos from women's computers that he was repairing, this didn't constitute accessing a computer for fraudulent purposes because he didn't make any misrepresentation, and the customers voluntarily brought him their computers.

City of Martinsburg v. Dunbar, 2022 WL 278957 (W.Va. 2022):
Holding: Defendant did not violate obstruction statute by providing a false name to detective where Defendant did not know detective was a law enforcement officer at time Defendant gave the false name, and even though Defendant did not correct the misinformation after learning detective's true law enforcement status, statute imposed no obligation on Defendant to correct the prior false information.

Ex parte Land, 2021 WL 3463017 (Ala. Crim. App. 2021):
Holding: Impersonation of an FBI officer does not violate statute prohibiting impersonation of a "peace officer" since "peace officer" is defined as officer of the state, municipality or county.

People v. Wimer, 2022 WL 177714 (Cal. App. 2022):
Holding: Statute making it a felony to distribute or exhibit child pornography for "commercial consideration" does not include trading or inducing other to trade child pornography, which are separate offenses with lesser punishments.

People v. Johnson, 2022 WL 2187083 (Cal. App. 2022):
Holding: Defendant's statement that he'd "blow his brains out" if Wife called police during domestic violence incident was threat to himself, and thus didn't support conviction under statute making it a felony to dissuade a witness or victim from reporting a crime.

Armes v. State, 194 N.E.3d 1220 (Ind. App. 2022):
Holding: Rule declaring MDMB-4en-PINACA (MDMB) a Schedule I controlled substance did not provide adequate information for a reasonable person to know if he was dealing with a substance that contained MDMB because Rule did not provide the chemical composition of the substance.

People v. Otto, 2023 WL 5987017 (Mich. Ct. App. 2023):
Holding: Even though Defendant failed to maintain his vehicle and the brakes failed while he was driving (causing Victim's death), this did not constitute reckless driving because reckless-driving offense requires the "manner" of operating a vehicle be reckless, not the "decision" to operate the vehicle.

State v. Gutzke, 2023 WL 5519380 (Minn. Ct. App. 2023):
Holding: Defendant's conduct of merely looking at a ringing cellphone while driving to identify the caller didn't support conviction for using a cell phone while driving; statute required initiating a call, talking or listening, or not keeping both hands on the wheel.

City of Seattle v. Buford-Johnson, 2021 WL 6112342 (Wash. Ct. App. 2021):
Holding: Even though Defendant drove past a police Officer and yelled "fuck the police" while pointing his finger as if he had a gun, this did not constitute criminal harassment because it was not a true threat and was protected First Amendment political speech, where there was no indication Defendant knew or was targeting the Officer.

Sunshine Law

Gross v. Parson, 624 S.W.3d 877 (Mo. banc 2021):
Holding: (1) Sec. 610.026.1 does not allow Agencies to charge for "attorney review time" in reviewing Sunshine Law requests; (2) Sec. 610.023.3 requires Agencies to give a detailed explanation for delay in providing documents and a date certain records will be available; Agency cannot state records will be available X days after receiving payment; while Agency can require advance payment under 610.026.2, Agency cannot estimate time records will be available from date of payment, but must give exact date regardless of payment; (3) where Agency seeks to close records, the burden of persuasion is on Agency to show Sunshine Law does not require disclosure.

Weeks v. St. Louis County, 2023 WL 7497857 (Mo. App. E.D. Nov. 14, 2023):
Holding: (1) Even though Sunshine Law does not require a gov't agencies to create a record for a requester, Sec. 610.010(6) requires agencies to retain documents or studies prepared by an outside professional service, so City was required to "re-create" such records which it destroyed; (2) even though City had a practice of destroying traffic stop data after providing it to REJIS (an outside professional service), City must "re-create" this data from its computer system for requester; but (3) where City did not typically generate any reports showing Officers' Department Service Numbers (DSN), City was not required to create such a report from its computer system for requester.

Calzone v. Maries Cnty. Comm., 648 S.W.3d 140 (Mo. App. S.D. July 25, 2022):
Holding: (1) Even though County Commission closed its courthouse due COVID, Commission violated Sunshine Law, Sec. 610.020.1, when it failed to publicly post notice of its meetings, the mode by which they would be conducted (telephone), and how the public could access the meetings by telephone; (2) case remanded to trial court to determine, per Sec. 610.027.5, whether court should hold the actions of the Commission done in violation of the Sunshine Law void, in order to enforce the public interest in the Sunshine Law.

Starr v. Jackson County Prosecuting Attorney, 635 S.W.3d 185 (Mo. App. W.D. 2021):
Holding: Even though Sunshine Law Petitioner sent their records request to a staff member of the Jackson County Prosecuting Attorney (who had previously provided records), that person was not the official "records custodian" of the Prosecuting Attorney's Office, so this did not comply with Sec. 610.023.3 (so no error in not providing records); service on official "records custodian" is required in order to facilitate timely consistent compliance with Sunshine Law and guarantee that the government body is on notice of the records request.

Glasgow School Dist. v. Howard County Coroner, 633 S.W.3d 822 (Mo. App. W.D. 2021):
Holding: (1) Even though a Coroner's Officer may at times function as a "law enforcement agency," thus making its reports a closed investigative report under the Sunshine Law, Sec. 610.100.2, where the Coroner's Office held a public inquest to determine the cause of death, the transcript of the public inquest was an open record under the Sunshine Law; a transcript of a public event does not jeopardize any potential investigation and prosecution; (2) Coroner's Office purposely violated Sunshine Law in not providing the transcript; but (2) Coroner's Office was not required under Sunshine Law to provide copies of Exhibits used at the inquest, which Exhibits were in the possession of the separate Sheriff's Office; Coroner's Office did not have custody of the Exhibits.

Show-Me Inst. v. Off. of Admin., 2022 WL 904703 (Mo. App. W.D. March 29, 2022):
Holding: Even though Gov't Agency had released certain personnel records to a labor union pursuant to a labor contract, that did not waive Agency's position as to other Requesters that the records were closed under Sec. 610.021(13); closure of a public

record is not forever waived merely because Agency has chosen to disclose the record in some other context or circumstance.

Sansone v. Governor of Missouri, 2022 WL 2032254 (Mo. App. W.D. June 7, 2022):
Holding: (1) Governor's Office did not violate Sunshine Law in using a "disappearing app" which automatically deleted text messages when sent and read, because Sunshine Law only requires agencies to access to records which it has in its possession or control, and since the texts were auto-deleted, there was nothing to disclose; (2) how long or whether records must be retained is governed by Chapter 109, not the Sunshine Law, which only deals with public access to records which exist; (3) even though Governor used his personal phone for the auto-deleted texts, Governor's personal cell phone number fell within the individually identifiable personnel record exemption of the Sunshine Law, Sec. 610.021(13), in order to enable public officials to have a "modicum of privacy."

Pride v. Boone County Sheriff's Department, 667 S.W.3d 210 (Mo. App. W.D. 2023):
Holding: The Boone County Sheriff's Office and Prosecutor's Office are proper Defendants in a Sunshine Law violation suit; appellate court rejects their claim that only Boone County would be the proper Defendant because the Sheriff and Prosecutor Offices are only "subdivisions" of Boone County; however, subdivisions of a city or county are are "governmental bodies" under Sunshine Law.

Malin v. Cole Cnty. Prosecuting Atty., 2023 WL 6066456 (Mo. App. W.D. Sept. 19, 2023):
Holding: (1) Prosecutor waived claim that it could charge Plaintiff for records under Sunshine Law, Sec. 610.026, where Prosecutor failed to assert that defense to his failure to produce records in original Sunshine suit brought by Plaintiff; (2) where trial court had entered "final" judgment against Prosecutor to produce records and that judgment was affirmed on appeal, trial court was without authority to modify the judgment to require payment for records in later "motion to enforce judgment" action brought by Plaintiff; (3) where original judgment required prosecutor to produce "all" records related to Drug Task Force, but Prosecutor "admitted" in enforcement action that "thousands" of paper and electronic records were yet to be searched, trial court had no basis to find that the Prosecutor's search had been sufficient under the original judgment; (4) even though Plaintiff had previously appealed a civil contempt action (and lost), the issues in this concern a "motion to enforce judgment" (which is different than civil contempt) so neither collateral estoppel nor law-of-the-case doctrine preclude the "motion to enforce judgment."

Transcript – Right To

State v. Slayton, 631 S.W.3d 614 (Mo. App. E.D. 2021):
Holding: Where testimony of five of six witnesses (except Victim's) was missing from the trial transcript due to a machine malfunction, appellate court is unable to conduct meaningful appellate review, and Defendant is granted new trial due to missing transcript; appellate court rejects State's contention that it can review for sufficiency of evidence based on Victim's testimony alone.

In the Matter of Crocker, 629 S.W.3d 846 (Mo. App. E.D. July 20, 2021):
Holding: Where through no fault of Appellant a transcript of a Webex hearing could not be prepared due to computer malfunction, case remanded for new hearing because it's impossible to conduct meaningful appellate review; "While we acknowledge the challenges in technology faced by trial courts and parties during the pandemic, it is necessary for parties to be afforded due process and a sufficient record of the underlying proceedings."

In the Matter of Isreal, 673 S.W.3d 531 (Mo. App. E.D. Aug. 15, 2023):
Holding: Where the trial court took judicial notice of an emergency appointment of guardian and conservator proceeding where no record was made, appellate court cannot review Appellant's claim of error regarding that proceeding because appellate court cannot review the witness testimony; but unlike cases were appellate court dismisses appeal for failure of Appellant to supply a complete record for appellate review, where (as here) there is an incomplete record because no record was made of the trial court proceeding, appellate court reverses and remands so a proper record can be made.

J.M.L. v. Mo. State Hwy. Patrol, 674 S.W.3d 815 (Mo. App. E.D. Sept. 19, 2023):
Holding: (1) Even though Appellant claimed the case was submitted without a hearing in the trial court, where the legal file indicates a hearing was held and neither party could clarify this at oral argument on appeal, the record is incomplete and case must be remanded to make a proper record; and (2) documents submitted in an Appendix which were not before the trial court cannot be considered on appeal.

J.C.S. v. Mo. State Hwy. Patrol Crim. Records Repository, 675 S.W.3d 712 (Mo. App. E.D. Sept. 19, 2023):
Holding: Where Appellant did not provide a transcript on appeal and the parties did not provide the appellate court with information as to whether a transcript exists, appellate court finds record is incomplete because a record was not made, so reverses judgment and remands case to make a proper record.

Collins v. Bannister, 2022 WL 1438952 (Mo. App. S.D. May 6, 2022):
Holding: Where the sound recording equipment in order of protection case malfunctioned such that a transcript cannot be prepared for appeal, case reversed for new trial; an Appellant is entitled to a transcript for appellate review, and where one cannot be prepared through no fault of the parties, remedy is new trial.

In the Interest of L.A.M.M. v. C.M.M., 2022 WL 2045301 (Mo. App. S.D. June 7, 2022):
Holding: Where the sound recording equipment malfunctioned for 90 minutes during a trial so that a full and complete transcript could not be produced through no fault of Appellant, case must be reversed and remanded for new trial.

Ford v. Dir. of Revenue, 2023 WL 7136159 (Mo. App. W.D. Oct. 31, 2023):
Holding: Where the trial court did not make an audio recording (or other record) of the trial *de novo* in Driver's license suspension case, and this was not the fault of Appellant-Driver, case must be reversed and remanded for new trial *de novo* so that proper record can be made for appellate review.

Trial Procedure

State v. Shegog, 633 S.W.3d 362 (Mo. banc Nov. 9, 2021):
Holding: Where (1) Defendant's trial ended in a hung jury; (2) trial court scheduled Defendant's new trial within the next term of court, but (3) trial court, on State's motion, later continued trial beyond that term, there was no violation of Mo.Const. Art. I, Sec. 19, because the trial was scheduled within the next term of court; court Rules authorize continuances; and Rule 20.01(c) provides that a court's authority to act is not affected by expiration of a term of court.
Discussion: Art. I, Sec. 19 provides that if a jury hangs, the court can retry Defendant "at the same or next term of court." Defendant contends the trial court lost authority to try him, because his retrial didn't occur within the "same or next term of court." However, Art. I, Sec. 19 does not abolish other statutory and common-law procedures regarding trial of criminal cases. Art. V, Sec. 5 allows the Supreme Court to establish Rules. The Supreme Court has established Rules allowing continuances, and has enacted Rule 20.01(c) which provides that a court's authority to act is not affected by expiration of a term of court.

State v. Minor, 2022 WL 2134505 (Mo. banc June 14, 2022):
Concurring opinion joined by 5 Judges (majority): (1) Even though Art. I, Sec. 18(c) Mo.Const., allows propensity evidence to be admitted in child sex cases, *unadjudicated* prior bad acts will generally be more prejudicial than probative and generally should not be admitted; and (2) a "continuing objection" to admission of propensity evidence will generally not preserve the issue for appellate review, since the cumulative prejudicial effect of the evidence increases as more and more evidence is presented, so defense counsel must object as the evidence is presented so the court can continuously weigh probative value vs. prejudice; objection must be made to each new witness and exhibit.
Facts: Defendant was convicted at trial of a child sex offense. During trial, the State called two other children, who testified at length about prior *unadjudicated* sexual acts against them in order to show "propensity." The State also called a third witness about the prior bad acts, and introduced exhibits about the prior bad acts. The Supreme Court held the issue wasn't properly preserved for appeal, so did not reverse. However, a

majority of the Court – five Judges – joined in a concurring opinion to instruct on what should happen in future cases.

Discussion: (1) Prior Supreme Court cases dealing with propensity evidence have dealt with prior *convictions*, and the propensity evidence tended to be limited to records, and was brief. Here, the Court is dealing with *unadjudicated* prior bad acts, and the State's evidence was an extensive, emotional mini-trial on whether Defendant committed those prior bad acts. "*The unfair prejudice generated by the presentation of this evidence should forewarn trial courts from admitting mere allegations of unadjudicated prior bad acts in future cases*." A court must not admit propensity evidence if the probative value is substantially outweighed by danger of unfair prejudice. Instead of an emotionless presentation of an exhibit showing a prior conviction, unadjudicated acts require presentation of emotional testimony from other witnesses and require a "trial within the trial" over whether Defendant committed the prior bad acts. This opens a Pandora's box of allegations, and the allegations mount like snow in a blizzard. The confusion and unfair prejudice from unadjudicated allegations weighs heavily against the probative value. To avoid this, trial courts "*rarely should admit allegations of unadjudicated prior criminal offenses*." Evidence of unadjudicated allegations, both the alleged victim's testimony and any extrinsic evidence, will rarely survive the probative-versus-prejudicial balancing test in Art. I, Sec. 18(c). (2) To preserve this issue, defense counsel must be cautious about using "continuing objections." Merely objecting before trial preserves nothing since the trial court's ruling is interlocutory and can be changed. Moreover, the prejudicial vs. probative balance changes throughout the trial, since as more evidence is presented, the more prejudicial it becomes. It is the responsibility of the party seeking to exclude this evidence to advise and notify the court of the *quantum* of propensity evidence that has shifted the scales. This does not mean Defendant must object to every question or piece of evidence when a continuing objection is granted, but separate, particularized objections must be lodged when significant new evidence or witnesses are introduced.

Petersen v. State, 2022 WL 17129167 (Mo. banc Nov. 22, 2022):

Holding: (1) Where Defendant never raised a 4th Amendment claim regarding his motion to suppress in the trial court, but instead objected based on "lack of foundation," the 4th Amendment claim is not preserved for appeal; (2) a general objection to "lack of foundation" does not call the trial court's attention to what aspect of foundation is lacking, and is inadequate to preserve issue for appeal; (3) objecting to evidence only in a pretrial motion is not sufficient to preserve issue for appeal; a party is required to object to the evidence *during the trial itself* to allow the trial court to reconsider its ruling against the backdrop of the evidence actually presented at trial.

State v. Vandergrift, 669 S.W.3d 282 (Mo. banc 2023):

Holding: Where (1) Defendant was convicted at jury trial on February 3, 2021; (2) Defendant was present in court and orally sentenced to a term of years on April 7, 2021; (3) Defendant filed his Notice of Appeal (NOA) on April 14, 2021; (4) the Clerk attached various docket entries to the NOA showing the sentence when the Clerk sent the NOA to the Court of Appeals; (5) the Case.net generated legal file filed with the Court of Appeals did not contain these docket entries, but (6) it did contain a "Sentence and Judgment"

entered December 2, 2021 by the judge (which tracked the oral pronouncement), the oral pronouncement of sentence started the time for filing the NOA so the April 14 NOA was timely, even though the formal "Sentence and Judgment" document was not entered until much later.

Discussion: Sec. 547.070 states a defendant's right of appeal is triggered when final judgment is "rendered." A final judgment is "rendered" when a court orally pronounces the judgment and imposes sentence in the presence of Defendant. Once a final judgment is "rendered," Rule 29.07(c) requires entry of a judgment memorializing this. Thus, a defendant's right to appeal is triggered by oral pronouncement of sentence, not the ministerial act of entering a written judgment. However, the written judgment must be included in the record on appeal, Rule 30.04(b), and appellate review cannot proceed without the written entry of judgement. Its absence, however, does not deprive a court of appellate jurisdiction, but could support dismissal of an appeal on procedural grounds under Rule 30.14. When rendition of judgment has occurred but entry has not, the appellate court must remand for entry of the judgment before appellate review can proceed. Here, there was a judgment entered on December 2, 2021, and it is in the record on appeal. And Defendant timely filed his NOA within 10 days of the date he was orally sentenced in his presence. Thus, appeal is timely and record on appeal is complete, so appellate review can proceed.

In the Interest of P.D.E. v. Juvenile Officer, 669 S.W.3d 129 (Mo. banc 2023):

Holding: Where (1) in January 2021, Juvenile Court conducted an adjudication hearing; (2) in March 2021, Juvenile Court conducted a disposition hearing and ordered Juvenile be made a ward of the court and pay restitution in an amount to be determined later; and (3) in October 2021, the court set restitution at $4,000, a Notice of Appeal (NOA) filed in October 2021 challenging the *adjudication* was untimely; an NOA challenging the adjudication and disposition needed to be filed within 40 days after the March disposition hearing.

Discussion: Sec. 211.261.1 states that an NOA shall be filed in a juvenile case within 30 days after a final judgment has been entered, but a plurality of this Court determined in *D.J.B v. M.B.*, 704 S.W.2d 217 (Mo. banc 1986) that a party has 40 days to file the NOA under Rules 81.04 and 81.05(a). "Final judgment" is left undefined in chapter 211. But once a disposition is made, even though post-dispositional hearings may continue to be held, all the issues before the court have been disposed of and nothing is left for determination. Here, the disposition occurred in March 2021 where Juvenile was made a ward of the court, and ordered to pay restitution in an amount to be determined. This entry of disposition under Rule 128.03d started the time to file an NOA challenging the adjudication hearing. The restitution amount could be determined later. The ultimate determination of restitution is a modification of the order, and the modification is itself separately appealable under 211.261.1. Appeal of adjudication dismissed as untimely.

Editor's note: Although *D.J.B.* held a Juvenile has 40 days after final judgment to file an NOA, filing within 30 days is safer given Sec. 211.261.1 and the current Court's statement that *D.J.B.* was decided only by a "plurality."

State v. Forbes, 2023 WL 4201542 (Mo. banc June 27, 2023):

Holding: Where (1) on September 26, 2019, Defendant was found guilty at jury trial; (2) on October 18, 2019, Defendant filed New Trial Motion; (3) on January 13, 2020, the court orally sustained the New Trial Motion, but then set aside that ruling on January 23, 2020 and then found the motion was overruled by operation of law because more than 90 days had passed; (4) on February 10, 2020, the court sentenced Defendant to 10 years in prison; (5) on February 25, 2020, Defendant filed Notice of Appeal (NOA); (5) in March 2020, the Court of Appeals dismissed the appeal either because the NOA was untimely or because it was premature since proceedings were apparently still going on in the trial court; (6) in April 2020, the trial court held proceedings regarding restitution as a condition of parole; (7) on May 28, 2020, the trial court "withdrew" its sentence; (8) on September 14, 2020, the trial court ordered restitution in the amount of $26,000 and purported to re-sentence Defendant to 15 years in prison; and (9) on September 22, 2020, Defendant filed a new NOA, the appeal must be dismissed as untimely because "final judgment" occurred when the trial court orally pronounced sentence on February 10, 2020, and the NOA wasn't filed within 10 days of that; furthermore, everything the trial court did after February 10 (including imposing $26,000 in restitution and re-sentencing Defendant to 15 years) was a nullity. Appeal dismissed and case remanded for entry of sentence of 10 years.

Discussion: In a criminal case, "final judgment" is rendered when the trial court orally pronounces sentence in the presence of Defendant. After oral rendition of sentence, the trial court can take no further action inconsistent with that unless expressly provided by statute or rule. To allow otherwise would result in chaos of review, unlimited in time, scope and expense. Thus, any action taken by a trial court after sentence is imposed is a nullity. Sec. 559.105 governs restitution and allows a circuit court to order restitution as part of a sentence. However, nothing in the statute provides for such action after sentence is imposed and the criminal judgment is final. An NOA must be filed within 10 days of "final judgment," which here was February 10, 2020. The NOA filed here was untimely. Further, the trial court had no authority to take any action after "final judgment."

State v. Teter, 665 S.W.3d 306 (Mo. banc 2023):

Holding: (1) Where (i) Defendant was still represented by counsel at the time of his *Faretta* hearing, and (ii) counsel was present at the *Faretta* hearing where Defendant waived counsel and signed a written waiver, Defendant's claim on appeal that the *Faretta* hearing was inadequate to validly waive counsel could only be reviewed for plain error, since counsel did not object to the inadequacy at the hearing; a *de novo* standard of review applies only to those cases where there is no written waiver of counsel or waiver of the right to counsel on the record; (2) where the trial court took judicial notice of various hearings from other cases, the transcripts from those proceedings should have been filed as part of the record on appeal in this case under Rule 81.12(c)(2), because they are necessary to decide the issues; matters omitted from the record are presumed not favorable to the appellant; (3) to preserve a claim of sentencing error, a party needs to object to the error at sentencing, but does not need to include this in a New Trial Motion, since the New Trial Motion must be filed before sentencing; and (4) even though the State and Defendant had agreed that the State would recommend concurrent sentences,

where the State at sentencing "deferred to the court" on sentencing and did not advocate either a concurrent or consecutive sentence, there was no breach of the agreement because the sentencing court was always free to ignore the State's recommendation.
Discussion: If the State agrees to make a recommendation for sentencing under Rule 24.02(d)(1)(B), the sentencing court neither accepts nor rejects that agreement. Rather, in a nonbinding plea agreement for a particular sentence, the prosecutor's recommendation is what the court rejects, not the plea agreement itself, and Rule 24.02(d)(4) does not apply. Here, the court had the plea agreement in front of it (because Defendant told the court what it was), the court discussed the agreement with both parties, and acted within its discretion in imposing consecutive sentences.

Bangert v. Rees, 634 S.W.3d 658 (Mo. App. E.D. 2021):
Holding: Trial court erred in excluding on hearsay grounds medical records that were certified as business records under Sec. 490.680, since medical records that are properly certified under the statute are admissible as an exception to hearsay rule; although such records are subject to specific objections such as irrelevancy, inadequate sources of information, being self-serving, going beyond the bounds of legitimate expert opinion, or other similar grounds, they are not inadmissible hearsay; but (2) since proponent of the records didn't make an offer of proof of the records, appellate court cannot determine if proponent was prejudiced by exclusion of the records.

In the Interest of A.L.D., 649 S.W.3d 370 (Mo. App. E.D. Aug. 9, 2022):
Holding: Juvenile Court plainly erred in conducting Juvenile-Defendant's certification hearing via 2-way video without Juvenile's personal presence in courtroom due to general concerns about COVID, since this violated Juvenile's 6th Amendment right to face-to-face confrontation and 5th and 14th Amendment due process rights to be physically present at a critical stage. Judgment certifying Juvenile for prosecution as adult reversed and remanded for in-person certification hearing.

State v. Perkins, 2022 WL 17419393 (Mo. App. E.D. Dec. 6, 2022):
Holding: Even though an objection made after a Witness gives an answer to an objectionable question is usually not considered to be timely made, an exception to this timeliness requirement exists where the grounds for objection only become apparent when the Witness' answer is given; in these circumstances, an objection is timely where the attorney objects to the answer as soon as possible after it is given.

State v. Shepard, 2023 WL 2247141 (Mo. App. E.D. Feb. 28, 2023):
Holding: (1) "Continuing objections" seeking the exclusion of propensity evidence in child sex cases are not favored because the underlying objection involves balancing the probative value of *accumulating* evidence against prejudicial effect; a Defendant must monitor the "quantum" of accumulating evidence and object when the scales tip toward unfair prejudice; (2) where Defendant's only objection at trial was a "continuing objection" to one Witness' propensity testimony, this did not preserve any error as to later propensity Witnesses or as to the quantum of evidence.

State v. Fields, 2023 WL 4711674 (Mo. App. E.D. July 25, 2023):
Holding: In case of first impression, court holds that lab reports which briefly summarize conclusions of Expert who testified at trial can be sent to the jury during deliberations, because the reports are not like transcripts or videos of live testimony, which cannot be sent to avoid giving them undue weight.
Discussion: The general rule is that exhibits which are "testimonial" in nature cannot be given to the jury during deliberations to avoid giving them undue weight. This meaning of "testimonial" is different than for Confrontation Clause purposes. Here, "testimonial" means transcripts of live testimony or a video of live testimony. No existing Missouri case has examined whether lab-report exhibits are "testimonial" for purposes of letting the jury review them during deliberations. Missouri cases have made clear that transcripts and videos of live testimony cannot be given to the jury. The lab reports here were not word-for-word reiterations of what the Expert testified to. The reports merely summarized conclusions about the Expert's findings. "Our holding here should not be understood to encompass all 'expert reports,' as there are certainly conceivable situations where an expert's report would be properly admitted into evidence and could also be determined to be testimonial. We simply do not find that to be the case here."

State v. Kleeschulte, 618 S.W.3d 246 (Mo. App. S.D. 2021):
Holding: (1) Even though Appellant filed a general pretrial motion to "federalize" or "constitutionalize" his trial objections, unless such pretrial motion explains why a specific ground requires a trial court to take a specific course of action, the motion adds nothing to the trial objection and preserves nothing for appeal; (2) where Defendant objected to evidence on "hearsay" grounds at trial, the pretrial motion to "federalize" or "constitutionalize" did not provide the level of specificity necessary to inform the trial court that this was also an objection based on the Confrontation Clause, so that issue is not preserved for appeal.

State ex rel. Patterson v. Curless, 630 S.W.3d 867 (Mo. App. S.D. 2021):
Holding: Where Defendant filed an unverified motion to disqualify Prosecutor's Office based on alleged conflict of interest, and presented only argument on this at the hearing on the matter, there was no evidence presented for court to have sustained motion to disqualify; a bare assertion by defense counsel is not self-proving of the alleged facts; writ of prohibition to set aside disqualification granted.

State v. Flores-Martinez, 2022 WL 4128819 (Mo. App. S.D. Sept. 12, 2022):
Holding: Where the trial court proceeded to bench trial without anything in the record demonstrating that Defendant personally waived his right to a jury trial as required by Rule 27.01, appellate court, *sua sponte*, reverses and remands for new trial, where evidence of guilt was sufficient to establish guilty; if evidence had been insufficient, then Double Jeopardy and due process would require discharge of Defendant, since State would not get a second bite at the apple if State had failed to present sufficient evidence in first trial.

State v. Estes, 2023 WL 1432021 (Mo. App. S.D. Feb. 1, 2023):
Holding: In order to preserve Speedy Trial violation claim for appeal, Defendant must have filed motion to dismiss on grounds of speedy trial violation in trial court (and preserve failure to dismiss on speedy trial grounds in new trial motion); merely alleging Speedy Trial violation without seeking dismissal isn't sufficient to preserve issue for appeal.

State v. Gibbs, 2023 WL 2724768 (Mo. App. S.D. March 31, 2023):
Holding: (1) Even though Defendant, in failure to register as sex offender case stemming from a 2003 conviction, claimed evidence was insufficient because he was never required to register because of the "Romeo and Juliet" exception of the federal SORNA (because the victim was at least 13 and Defendant had been no more than 4 years older when they had consensual sex), appellate court does not decide merits of claim because defense counsel in opening statement at trial said Defendant was "required to register"; this was a judicial admission by counsel that is conclusive on Defendant for purposes of the case; and (2) even though Defendant objected to certain hearsay testimony by Witness and was overruled, where there was no continuing objection and Witness then gave other answers based on the hearsay, Defendant was required to either object to the additional testimony, or to move to strike the additional testimony in order to preserve his earlier objection to the testimony for appeal.

State v. Parrow, 2023 WL 8664495 (Mo. App. S.D. Dec. 15, 2023):
Holding: (1) Joinder and severance are separate issues; (2) if joinder was not proper, prejudice is presumed and severance is mandatory; (3) if joinder was proper, then appellate court reviews for whether trial court abused discretion in denying a motion for severance; but (4) where a defendant did not file a motion to sever in trial court, appellate court reviews only for whether joinder was proper.

State v. Crum, 617 S.W.3d 504 (Mo. App. W.D. 2021):
(1) Where trial court denied Defendant's motion to suppress on grounds that Defendant "presented no evidence of his own" and did "not persuade the court" that consent to search was not given, this erroneously placed the burden of producing evidence and persuasion on Defendant; (2) with respect to a motion to suppress, the State bears both the burden of producing evidence and persuading the trial court by preponderance of the evidence to overrule the motion, Sec. 542.296.6.
Facts: Defendant filed a motion to suppress drugs found in an apartment. As relevant here, there was conflicting police testimony as to whether a person had consented to search of the apartment. The trial court denied the motion on grounds that Defendant "does not persuade the court" that consent was not given, and that Defendant "presented no evidence of his own" at the suppression hearing.
Discussion: The trial court clearly erred in placing the burden of producing evidence and persuasion on Defendant. Regarding a motion to suppress, the State bears both the burden of producing evidence and persuading the trial court by a preponderance of evidence to overrule the suppression motion, Sec. 542.296.6. The language of the court's ruling directly calls for Defendant to have presented evidence and persuade the court. In addition, the court had a duty to make factual and credibility determinations whether

consent was given. The trial court failed to do this. Denial of motion to suppress reversed, and remanded to trial court to reconsider the evidence under proper standards.

State v. Howell, 626 S.W.3d 758 (Mo. App. W.D. 2021):
Holding: Even though trial court conducted portions of voir dire regarding statutory disqualifications and hardship excuses without the presence of counsel, court did not err in doing this since no statute or court rule was violated in doing so, and Defendant failed to properly challenge the procedure under Sec. 494.465.3, which requires a party to seek relief before the petit jury is sworn.
Discussion: Defendant seeks new trial on grounds the trial court improperly excluded counsel from portions of voir dire. Defendant cites no legal authority that guarantees him a right to have counsel observe the process of statutory disqualifications and hardship excusals that generally take place before voir dire. These matters are regularly conducted through written correspondence with the trial court, without the participation of counsel – although, here, the trial court apparently orally questioned some jurors about this without the presence of counsel. No statute or court rule was violated by the court's procedure. In any event, Sec. 494.465.3 requires that if a party wants to raise a claim that jury was not selected in conformity with statutory procedures, it must seek a stay or appropriate relief before the petit jury is sworn, or within 14 days after the party could have discovered the grounds supporting the motion. Defendant didn't do either.

X.D.M. v. Juvenile Officer, 647 S.W.3d 311 (Mo. App. W.D. July 5, 2022):
Holding: Juvenile Court erred, over Juvenile-Defendant's objection, in conducting adjudication hearing by 2-way video based on generalized concerns over COVID, since this violated Juvenile's 6th Amendment right to face-to-face confrontation, without the court having made any specific findings establishing a need to conduct the proceedings virtually.

City of Skidmore v. Stanton, 668 S.W.3d 277 (Mo. App. W.D. 2023):
Holding: (1) Where Defendant was charged and convicted at a jury trial for violating a municipal ordinance against maintaining nuisance properties and was fined $500, the trial court was without authority to order Defendant to pay $8,000 of City's attorney's fees; although Sec. 79.383 allows a city to recover attorney's fees in certain nuisance actions where authorized by ordinance, the ordinance at issue here did not authorize attorney's fees for prosecution under the ordinance (only for abatement); (2) trial court was also without authority to order injunctive relief because the charging document did not mention injunctive relief, City didn't raise that issue until sentencing, City didn't plead a continuing violation, and the case was tried to a jury, whereas an injunction is an equitable remedy tried to a court.

*** Oklahoma v. Castro-Huerta, 2022 WL 2334307, ___ U.S. ___ (U.S. June 29, 2022):**
Holding: The federal government and States have concurrent jurisdiction to prosecute crimes committed by non-Native Americans against Native Americans in Indian County.

State v. Byers, 2022 WL 2128507 (W.Va. 2022):
Holding: Defendant's right to be present at sentencing was violated when court required Defendant to appear by videoconferencing.

Rubio v. State, 2022 WL 221494 (Tex. Crim. App. 2022):
Holding: Defendant can file second, amended new trial motion even after trial court denies first one, as long as trial court grants leave to do so and amended motion is filed within the original 30-day time limit for filing a new trial motion.

Venue

State v. Stewart, 2022 WL 517304 (Mo. App. E.D. Feb. 22, 2022):
Holding: Where Defendant did not object to venue as to whether the crime was committed in the county where charged until his motion for judgment of acquittal at the close of the State's evidence, the issue was not preserved for appeal; objections to venue must be raised before trial.
Discussion: If the defendant objects before trial, the State must prove by a preponderance of the evidence to the court pre-trial that the crime occurred in the county where the case is filed. If the State fails to so prove, the court will transfer the case to the correct venue pursuant to Sec. 476.410. But where, as here, Defendant didn't raise the issue until his motion for judgment of acquittal after the close of the State's evidence at trial, the issue of venue was waived.

State v. McMillon, 2022 WL 1217191 (Mo. App. W.D. April 26, 2022):
Holding: Even though Sec. 478.461 provides that the Presiding Judge can transfer a case from Western Jackson County to Eastern Jackson County by agreement of the parties or if court divisions in one place are overloaded – and neither circumstance applied here – Secs. 478.465 and 478.467 allow the 16th Circuit (Jackson County) to transfer division cases from Western to Eastern for good cause, so Presiding Judge did not err in transferring Defendant's case from Western to Eastern Jackson County, when this transfer did not involve a different division; result in change of judge; or subject Defendant to a different jury pool. All that occurred was having the trial in a different location with the same judge and jury.

*** Smith v. U.S., ___ U.S. ___, 143 S.Ct. 1594 (2023):**
Holding: Double Jeopardy is not violated where a Defendant seeks retrial for violation of the Venue Clause, Art. III, or the Vicinage Clause, Amend. 6 (which guarantees a jury trial in the district where the crime was committed); thus, where (i) Defendant had used a computer in Alabama to steal goods from a Florida company, (ii) he was tried in Florida but objected to venue there, appellate remedy is to reverse and remand for a new trial in Alabama, and this is not barred by Double Jeopardy.

Waiver of Appeal & PCR

State v. Humphrey, 2023 WL 4874068 (Mo. App. E.D. Aug. 1, 2023):
Holding: Where, after jury verdict, (1) Defendant waived his right to direct appeal in exchange for a deal with the State to reduce his conviction and sentence to a lesser charge, and (2) the trial court made an on-the-record inquiry of Defendant to ensure that his waiver was voluntary, the record reflects that Defendant voluntarily waived his right to direct appeal, and appeal is dismissed.

Waiver of Counsel

State v. Howell, 628 S.W.3d 750 (Mo. App. E.D. 2021):
Holding: (1) Even though other states and federal courts use the parenthetical "(cleaned up)" after citations to indicate that internal quotations, ellipses, etc., have been altered, Eastern District disapproves use of "(cleaned up)" parenthetical; Eastern District says "(cleaned up)" harms "credibility and accuracy," and Court needs to know "precise language" being used in a case or statute; and (2) Where Defendant who had previously waived counsel sought to invoke right to counsel on day of trial, court did not err in proceeding with trial without counsel since no attorney under Rule 4-1.1 (competence) could ethically represent a client in a felony trial the same day without even passing awareness of the basic facts or possible defenses, and court was not required to grant continuance to obtain counsel.

State v. Sullivan, 2022 WL 453011 (Mo. App. E.D. Feb. 15, 2022):
Holding: Even though (1) Defendant told the court he didn't qualify for a Public Defender (but still wanted counsel); (2) the court had Defendant sign a waiver of counsel form; and (3) the court made a docket entry stating that Defendant had been warned of the "perils of self-representation," trial court plainly erred in allowing Defendant to represent himself in the absence of an *on the record* inquiry showing that his waiver was knowing and intelligent.
Discussion: Missouri has two requirements before a court can conclude that a defendant has effectively waived counsel: (1) defendant must be given the opportunity to sign a written waiver mandated by Sec. 600.051; (2) there must be an on-the-record evidentiary hearing that establishes that defendant's waiver is knowing and intelligent. Appellate court will not presume a valid waiver from a silent record. The State has the burden to prove the waiver of counsel was valid. The State cannot do that here without a record. Conviction reversed and remanded for new trial.

State v. Hilbert, 2022 WL 2308663 (Mo. App. E.D. June 28, 2022):
Holding: Even though (1) Defendant's attorney, in the presence of Defendant, stated that Defendant was waiving a jury, and (2) Defendant "declined" to answer questions about this waiver when judge inquired, after verdict, about effectiveness of counsel, trial court plainly erred in holding bench trial, since record did not show with unmistakable clarity that Defendant, personally, knowingly and voluntarily waived right to jury trial.

Discussion: The decision to waive a jury is a right that cannot be waived by a surrogate. The record must show that Defendant, personally, waived that right. To avoid the problem here, trial courts should question defendants on the record and then obtain a written signed jury waiver. New trial granted.

State v. Cox, 2023 WL 1232016 (Mo. App. S.D. Jan. 31, 2023):
Holding: (1) Even though trial court had *pro se* Defendant sign a waiver-of-counsel form, plain error occurred because form did not state the offenses for which Defendant was on trial or the maximum punishment for those offenses as required by Sec. 600.051.1; and (2) trial court plainly erred in not conducting an on-the-record hearing establishing that Defendant's waiver of counsel was voluntary, knowing and intelligent.
Discussion: Violation of a defendant's right to counsel constitutes plain error. The State has the burden of proving a waiver of counsel was valid. To ensure a waiver is valid, a trial court must (1) hold an on-the-record evidentiary hearing that established the defendant understands the rights being waived, and the dangers associated with waiving those rights, and (2) give the defendant the opportunity to sign a waiver of counsel from containing the requirements of Sec. 600.051.1. Reversed for new trial.

Caraway v. State, 2023 WL 7526905 (Mo. App. S.D. Nov. 14, 2023):
Holding: A claim that the trial court conducted an inadequate *Faretta* hearing before allowing Defendant-Movant to proceed *pro se* is not cognizable in a Rule 29.15 case, at least were Defendant-Movant knew he had a right to do a direct appeal but did not; this type of claim can only be raised on direct appeal.

State v. Schurle, 2021 WL 4057191 (Mo. App. W.D. Sept. 7, 2021):
Holding: (1) Even though when Defendant was arrested during a traffic stop he had only methamphetamine residue (no measurable amount of meth), where Defendant had $480 in cash and a digital scale with meth residue, evidence was sufficient to convict of delivery of meth, Sec. 579.020; but (2) where Defendant's retained attorneys had withdrawn due to his failure to pay them; the Public Defender had declined to represent Defendant; and the trial court refused to overrule the Public Defender's denial because the court believed Defendant should get a job to hire counsel, trial court plainly erred in having him proceed to trial *pro se* without giving him warnings about the dangers of self-representation required by *Faretta*.
Discussion: (1) No Missouri appellate court has previously considered whether a defendant can be convicted of delivery when not arrested while in actual possession of a distributable quantity of drugs, or is not actually observed distributing the drugs. However, a majority of courts in other jurisdictions have held a defendant can be convicted if the evidence supports the inference that defendant was recently in possession of a distributable quantity. Here, Defendant's possession of the cash and the scales, as well as deceitful statements made by him to police, supports that he was recently in possession of a distributable quantity. (2) *Faretta* requires that before a court can conclude that a defendant has voluntarily waived counsel, the court must conduct "a thorough evidentiary hearing" which warns Defendant of the dangers of self-representation. That did not occur here. On remand, the trial court will need to re-examine indigence. Defendant claimed his father had paid for his prior attorneys, and

would not pay more. A determination of indigence must be based on the means at Defendant's disposal or available to him to obtain counsel. Sec. 600.086.1. If the defendant's financial circumstances change, a further determination of indigence may be made "at any stage of the proceedings." Sec. 600.086.3.

State v. Lee, 637 S.W.3d 446 (Mo. App. W.D. 2021):
Holding: Even though (1) Defendant -- who unequivocally wanted to proceed *pro se* at trial – did not have "technical knowledge" about the trial process or law and (2) trial court was concerned about Defendant personally examining Victim in child sex trial, this did not justify denying him his right to proceed *pro se* under *Faretta*.
Discussion: A judge at a *Faretta* hearing should ensure that a Defendant is minimally familiar with the trial process, including possible defenses, the different phases of trial, objection procedure, and elements of the crime charged. But this does not mean that a Defendant must have "technical legal knowledge" that would equal that of a licensed attorney. Thus, even though Defendant may not have understood voir dire procedures, lesser-included offenses, the effect of being prior and persistent offender, or the admissibility of propensity evidence, where he had general understanding of the charges, possible defenses, and range of punishment, this was sufficient. Even though the trial judge was apprehensive about allowing Defendant to personally cross-examine Victim, the trial judge could have handled this by following the rule that a Defendant forfeits the right to self-representation if he engages in misconduct toward the Victim-Witness, or the trial court could have appointed stand-by counsel to assist. *Faretta* error is structural. New trial ordered.

State v. Floyd, 635 S.W.3d 593 (Mo. App. W.D. 2021):
Holding: (1) Even though Defendant had fired six attorneys and gave the trial court a handwritten waiver of counsel form purporting to comply with Sec. 600.051 (regarding written waiver of counsel), where trial court did not conduct a *Faretta* hearing, trial court erred in allowing Defendant to proceed to trial *pro se*; and (2) even though Defendant did not object to the absence of a *Faretta* hearing at trial, this issue is preserved for appeal because Defendant cannot be expected to object that their waiver-of-counsel wasn't voluntary because of an inadequate on-the-record inquiry to determine whether the waiver was voluntary.
Discussion: Before a defendant can be allowed to proceed *pro se*, there must a *Faretta* hearing that establishes Defendant's waiver is knowing and voluntary. The *Faretta* hearing must show Defendant understood the nature of the charges, possible sentences, possible defenses, the nature of trial proceedings, and the dangers of proceeding *pro se*. Reversed and remanded for new trial.

State v. Masters, 2022 WL 4073850 (Mo. App. W.D. Sept. 6, 2022):
Holding: (1) Even though Defendant told trial court he wanted to represent himself, and court told Defendant it was not in his best interest to represent himself and that if he was convicted he would be "hard-pressed" to claim he should have had an attorney, this *Faretta* hearing was inadequate since court did not advise Defendant of the nature of charges, the potential sentences if convicted, or potential defenses to the charges, and did not give Defendant the opportunity to sign a written wavier of counsel form as required

by Sec. 600.051; (2) Even though Defendant did not raise these issues in a new trial motion, claim that a waiver-of-counsel hearing was constitutionally inadequate is reviewed *de novo*, since a *pro se* Defendants cannot be expected to object that his waiver of counsel was not voluntary due to an inadequate *Farretta* record.

State v. Peck, 2023 WL 4188243 (Mo. App. W.D. June 27, 2023):
Holding: Where (1) no attorney ever appeared for Defendant during entire time her case was pending; (2) on day of trial, court made record remining her of maximum range of punishment and reminding her that court had previously asked her if she was hiring counsel and she had said "no"; and (3) at jury trial, Defendant took no action of any kind other than to testify and apologize to Victim, the trial court erred in failing to conduct an adequate *Faretta* hearing because it did not inform Defendant of the nature of the charges, the potential sentences (including the minimum), or potential defenses; and the trial court also erred failing to have Defendant execute a waiver of counsel form under Sec. 600.051. Reversed and remanded for new trial.

Villafranco v. State, 2021 WL 4187839 (Tex. Crim. App. 2021):
Holding: Adversarial hearing under rape shield law is a critical stage, and thus, defendant's right to counsel at the hearing must be affirmatively waived and cannot be forfeited by inaction alone.

Waiver of Jury Trial

State v. Hilbert, 2023 WL 2586186 (Mo. banc March 21, 2023):
Holding: Even though the bench trial court did not specifically question Defendant personally about whether he was waiving his right to a jury and there was no written waiver signed by Defendant, where (1) there had been a prior mistrial in the case in which there was a jury, (2) Defendant then later appeared in court with counsel who said they were waiving a jury for re-trial, (3) Defendant's Mother testified at sentencing that "stress" was a major reason they decided to do a bench trial, and (4) after sentencing, the court expressly asked Defendant about whether his counsel had explained a bench trial versus a jury trial, and Defendant did not complain about anything, the record as a whole shows that the waiver was voluntary, and trial court did not plainly err in proceeding to bench trial without questioning Defendant or obtaining a written waiver.
Discussion: The best practice to ensure a waiver of jury trial is voluntary, knowing and intelligent is for the judge to question Defendant personally before trial and obtain a signed waiver. However, there are instances, as here, where the collective circumstances found in the record can indicate a waiver was voluntary. Some appellate cases, such as *State v. Williams*, 417 S.W.3d 360 (Mo. App. E.D. 2013), have held that a bare assertion by defense counsel of a waiver of jury is constitutionally invalid without "something more." But to the extent these cases suggest a "something more" test, they should no longer be followed.

State v. Flores-Martinez, 2022 WL 4128819 (Mo. App. S.D. Sept. 12, 2022):
Holding: Where the trial court proceeded to bench trial without anything in the record demonstrating that Defendant personally waived his right to a jury trial as required by Rule 27.01, appellate court, *sua sponte*, reverses and remands for new trial, where evidence of guilt was sufficient to establish guilty; if evidence had been insufficient, then Double Jeopardy and due process would require discharge of Defendant, since State would not get a second bite at the apple if State had failed to present sufficient evidence in first trial.

Sanchez v. State, 2021 WL 4301843 (Tex. Crim. App. 2021):
Holding: Trial court abused discretion in failing to allow Defendant to withdraw his jury trial waiver, where Defendant's waiver was premised on anticipation of a negotiated plea agreement that was never consummated, and grant of the request for a jury trial would not have delayed the proceedings, or caused inconvenience or disruption; any prejudice to the State was not the result of the request to withdraw the jury waiver itself, but by Defendant's broader decision not to accept the plea bargain.

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