Case Law Update

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Editor's Note

June 30, 2024

Dear Readers:

This edition of *Case Law Update* contains all Missouri appellate opinions from April 1 through June 30, 2024, which resulted in reversals, or, in my opinion, were otherwise noteworthy, as well as all criminal-law related U.S. Supreme Court opinions during that time. U.S. Supreme Court opinions have an asterisk in front of them.

I do not know subsequent history on all cases. Before citing a case, be sure to Instacite it to be sure it remains good law.

Sincerely,

Greg Mermelstein
Deputy Director / General Counsel

Abandonment (Rule 24.035 and 29.15)

Garretson v. State, 2024 WL 3034860 (Mo. App. W.D. June 18, 2024):
Holding: (1) where the 29.15 motion court merely notified the Public Defender that Movant had filed a 29.15 motion, the notification was not an "appointment" starting the time limits for filing an amended motion; but (2) where the Public Defender entered an appearance, the entry did start the time limits, even though the Public Defender later withdrew; (3) even though retained counsel timely requested an extension of time to file amended motion, where the motion court didn't grant it within the time the amended motion was originally due, the court was without authority to grant it later and the amended motion was untimely; (4) because the abandonment doctrine does not apply to retained counsel, the motion court could only consider the timely *pro se* motion; so (5) since the court didn't decide the *pro se* claims, there is no "final judgment" and appeal is dismissed.

Appellate Procedure

State v. Bodenhamer, 2024 WL 2831386 (Mo. banc June 4, 2024):
Holding: (1) Where after jury trial Defendant received sentences (incarceration or fines) on three counts of conviction, but received a suspended imposition of sentence (SIS) on a fourth count, there is not a final, appealable judgment under Sec. 547.070, so appeal must be dismissed; (2) Defendant can appeal the other counts when he completes probation on the SIS count, or when his probation is revoked and sentence imposed; and (3) Defendants wishing to avoid delay in appeal can request to receive a sentence on all counts rather than an SIS on one or more counts.
Discussion: An SIS is not a final judgment for appeal because it is not a sentence. Some districts of the Court of Appeals have allowed appeals in situations such as the one here, but that's wrong because there is no appellate jurisdiction in the absence of a final judgment. A judgment that doesn't resolve all of the charges is not a final judgment. No exception appears for SIS in statute or rule. Because the SIS count remains pending in the circuit court, the judgment as a whole cannot be appealed. However, Defendant's right to appeal is not eliminated, but delayed. Defendant can appeal when he completes probation on the SIS count, or when his probation is revoked and sentence imposed.

State v. Kates, 2024 WL 1863624 (Mo. App. E.D. April 30, 2024):
Holding: Even though *State v. Russell*, 598 S.W.3d 133 (Mo. banc 2020), allowed a direct appeal from a guilty plea regarding an excessive sentence, where Defendant pleaded guilty in an unconditional plea to drug and gun charges, he waived appellate review of any constitutional claims he may have had to his convictions; we do not read *Russell* so broadly as to change the longstanding rule that a guilty plea waives most non-jurisdictional defects.

State v. Tate, 2024 WL 2712483 (Mo. App. E.D. May 28, 2024):
Holding: (1) Even though Defendant shot Victims in the leg and hand and they were taken to the hospital, where the only evidence presented of Victims' injuries was that they were shot in the leg and hand, were walking around after being shot, and a 1-page medical record showing they were shot, the evidence was insufficient to prove they suffered "serious physical injury", Sec. 565.050, to sustain first-degree assault as a Class A felony; the mere fact a victim was shot is insufficient to prove serious physical injury; and (2) even though the State admitted 150 pages of medical records (which would have shown serious physical injury), where the State "published" only one page of the records to the jury (which showed merely that Victims had a gunshot), appellate court cannot consider the other pages of medical records because only the "published" exhibits were before the jury.
Discussion: To uphold the Class A felony, the State seeks to rely on medical records which, although admitted into evidence, were not "published" to the jury. Admitting a piece of evidence is not the same as "publishing" such evidence. A jury is not permitted to take all admitted evidence into the jury room. Instead, a jury may request to review evidence, and the court may decide whether to send it to the jury in its discretion. But, here, the jury didn't even request the full medical records. Since the State didn't "publish" the full records, those details weren't before the jury, and can't be considered on appeal. Evidence is insufficient to show "serious physical injury." But the evidence is sufficient to support first-degree assault as a Class B felony (without serious physical injury). Conviction entered for Class B felony and remanded for resentencing.

Sanders v. State, 2024 WL 3041362 (Mo. App. E.D. June 25, 2024):
Holding: Where Rule 24.035 Appellate failed to file the transcripts of his plea and sentencing with the Court of Appeals, Appellant failed to comply with Rule 81.12 requiring a complete record for appellate review, so appeal is dismissed.

State v. Wolf, 2024 WL 2873524 (Mo. App. S.D. June 7, 2024):
Holding: A single Point Relied on challenging two separate counts of conviction is multifarious in violation of Rule 84.04(d).

State v. Rodgers, 2024 WL 2873710 (Mo. App. S.D. June 7, 2024):
Holding: Even though Defendant stated "no objection" to the State's jury instructions, this did not waive plain error review for claims of instructional error.

State v. Brashier, 2024 WL 1724101 (Mo. App. W.D. April 23, 2024):
Holding: Even though the Trial Judge at motion-to-suppress hearing made statements about the Judge's beliefs regarding the facts which were inconsistent with the Judge's later docket entry which merely stated, "Motion to Suppress [is] granted", the appellate court on appeal presumes the trial court found all facts in accordance with its ruling, so must disregard the Judge's oral statements about the facts to the contrary.
Discussion: The State claims on appeal that Trial Judge misapplied the law by ruling contrary to the Judge's belief as to the facts, as orally stated by the Judge at the hearing. However, the written judgment on the motion to suppress merely states that the motion is "granted," and neither party requested written Findings. Appellate courts presume a trial

court found all facts in accordance with its ruling. Appellate review is ordinarily limited to the trial court's written judgment or order, and does not extend to oral comments made by the trial court which are not included in the written order. There are exceptions, such as when a written order is ambiguous, or for imposing sentence, but the exceptions aren't applicable here. Judgment granting motion to suppress affirmed.

State v. Whirley, 2024 WL 3034854 (Mo. App. W.D. June 18, 2024):
Holding: Even though Defendant-Juvenile claimed his counsel was ineffective at his certification hearing, where Defendant didn't file a transcript of the certification hearing on appeal, Court of Appeals denies claim because of lack of complete record; it was appellant's responsibility to file a complete record necessary for appellate review.

Garretson v. State, 2024 WL 3034860 (Mo. App. W.D. June 18, 2024):
Holding: (1) where the 29.15 motion court merely notified the Public Defender that Movant had filed a 29.15 motion, the notification was not an "appointment" starting the time limits for filing an amended motion; but (2) where the Public Defender entered an appearance, the entry did start the time limits, even though the Public Defender later withdrew; (3) even though retained counsel timely requested an extension of time to file amended motion, where the motion court didn't grant it within the time the amended motion was originally due, the court was without authority to grant it later and the amended motion was untimely; (4) because the abandonment doctrine does not apply to retained counsel, the motion court could only consider the timely *pro se* motion; so (5) since the court didn't decide the *pro se* claims, there is no "final judgment" and appeal is dismissed.

Armed Criminal Action

Belk v. Mo. Dep't of Corr., 2024 WL 18720898 (Mo. App. W.D. April 30, 2024):
Holding: Appellate court notes that because of a 2020 amendment to Sec. 556.061(19) which added "armed criminal action" into the definition of "dangerous felony," there may now be a conflict between that statute and Secs. 558.019.1 which states that its minimum prison terms shall not apply to 571.015 (ACA); such a conflict also existed before 1994, and the appellate courts had held that Sec. 558.019 doesn't apply to armed criminal action, but appellate court doesn't decide what future cases may hold regarding whether 571.015 or 558.019 governs the minimum prison terms for ACA.

Bail – Pretrial Release Issues

State v. Mills, 687 S.W.3d 668 (Mo. banc April 30, 2024):
Holding: A proceeding during which the trial court considers or determines conditions for pretrial release – whether during an initial appearance, arraignment, or separate bail review hearing under Rule 33.05 – is not a "critical stage" at which trial court must provide counsel for indigent persons.

Discussion: The 6th Amendment requires a court to provide counsel at all "critical stages" of a criminal case. Critical stages are proceedings, whether formal or informal, that amount to "trial-like confrontations" and those that would "impair defense on the merits" if counsel isn't provided. Consideration of pretrial release (bail) is not such a stage. Pretrial release proceedings don't involve presentation, confrontation or cross-exam of witnesses. Rule 33.07(a) makes the proceedings "informal and rules of evidence need not apply." Further, any pretrial release proceeding does not permanently fix a defendant's bail, and there can be multiple proceedings reviewing conditions of release after a defendant secures counsel.

Civil Procedure

Torch Electronics LLC v. Mo. Dep't of Pub. Safety, 2024 WL 2712941 (Mo. App. W.D. May 28, 2024):
Holding: Gaming-device operator could not seek declaratory judgment that its devices are not "gambling devices" under Missouri law, because declaratory judgment and injunctive relief is not available regarding a criminal statute absent a challenge to the statute's constitutionality or validity.
Discussion: Plaintiffs have not challenged the constitutionality or validity of the criminal statute defining "gambling devices." Plaintiffs rely on declaratory judgment cases regarding whether a person has to register as a sex offender to support their claim that declaratory relief is available. But sex offender registration laws are civil in nature, not criminal. Plaintiffs provide no other support for their contention that a party can obtain declaratory judgment about a criminal law without challenging the law's constitutionality or validity. Plaintiffs cannot seek a declaratory judgment that would interfere with the enforcement of criminal laws in Missouri. Trial court order dismissing case affirmed.

Civil Rights

*** Chiaverini v. City of Napoleon, ___ U.S. ___, 144 S.Ct. 1745 (U.S. June 20, 2024):**
Holding: The presence of probable cause to arrest a person (Plaintiff) for one charge does not categorically defeat a Sec. 1983 Fourth-Amendment malicious-prosecution claim relating to Plaintiff's simultaneous arrest and detention for another, baseless charge.

*** Gonzalez v. Trevino, ___ U.S. ___, 144 S.Ct. 1663 (U.S. June 20, 2024):**
Holding: Fifth Circuit applied too "cramped" an interpretation of *Nieves* ruling that a Plaintiff bringing a Sec. 1983 retaliatory-arrest claim must plead and prove "the absence of probable cause for the arrest" *unless* plaintiff produces "objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort" of conduct had not been; here, Plaintiff-City Council Member was charged with tampering for accidently taking a city petition at the close of a council meeting, and to show her arrest was a retaliatory sham, she produced evidence that the only tampering offenses

charged in the past decades were for fake social security numbers, driver's licenses or green cards; the Fifth Circuit erred in holding that because Plaintiff couldn't produce evidence that another person who took a city petition had not been charged, she could not proceed with a claim. Her evidence was sufficient to state a claim under *Nieves*.

Clemency

State ex rel. Parson v. Walker, 2024 WL 2831393 (Mo. banc June 4, 2024):
Holding: Even though Board of Inquiry appointed by former Governor in 2017 pursuant to Sec. 552.070 had not yet issued a report in death penalty clemency case, current Governor had exclusive constitutional authority under clemency power to dissolve the Board and allow execution to proceed.
Discussion: A Governor's clemency power involves three actions: reprieves, commutations, and pardons. Reprieves temporarily stay an execution of sentence. Commutations reduce a sentence. Pardons relieve an offender from the consequences of a specific crime. Pardons and commutations are permanent when granted, and cannot be rescinded or revoked. But reprieves are temporary, and a recipient cannot complain when they are rescinded or revoked. Here, the appointment of a Board of Inquiry was a reprieve, which the Governor was free to rescind at his absolute discretion.

Cass Cnty. Clerk Fletcher v. Young, 689 S.W.3d 161 (Mo. banc June 10, 2024):
Holding: Even though Petitioner received a pardon from the Governor for a prior felony conviction, he was still ineligible to run for state public office because Sec. 1115.306.1 disqualifies anyone "who has been found guilty or pled guilty to a felony" from state elective office, and a pardon obliterates a conviction but not the fact of guilt.
Discussion: A pardon does not erase the fact that a person has previously pleaded guilty to a criminal offense. Sec. 115.306.1 uses the phrase "found guilty of or pled guilty to" a felony, rather than the term "conviction," thus illustrating the Legislature's intent to broaden the disqualifications for elective public office beyond a "conviction."

Closing Argument & Prosecutor's Remarks

State v. Tate, 2024 WL 2712483 (Mo. App. E.D. May 28, 2024):
Holding: State's closing argument in first-degree murder case that "You can consider murder in the second degree *only if you find that he's not guilty of murder in the first degree*" misstated the law as an improper "acquittal first" argument, but wasn't plain error.
Discussion: Missouri's instructions on lesser-included offenses do not require the defendant first be acquitted of the greater offense before the jury can consider the lesser. A jury may consider lessers if it does find the defendant guilty of the greater. Telling a jury that it must first find a defendant not guilty of the greater offense before lessers can be considered is an improper acquittal first argument.

Confrontation and Hearsay

*** Smith v. Arizona, 2024 WL 3074423, ___ U.S. ___ (U.S. June 21, 2024):**
Holding: Even though the testifying forensic lab Expert reached "independent" conclusions, where Expert based his opinions on a prior forensic lab expert's factual findings, the Prior Expert's statements were for "the truth of the matter asserted" and, thus, implicate the Sixth Amendment Confrontation Clause; case remanded for lower court to decide if the out-of-court statements of the Prior Expert are "testimonial." Lower courts had held Prior Expert's statements didn't implicate Confrontation Clause because weren't offered "the truth of the matter asserted."

Costs

State v. Mitts, 2014 WL 1460083 (Mo. App. S.D. April 4, 2024):
Holding: Even though Sections 550.280, 550.010, and 494.455.2 authorize imposition of jury fees of six dollars per day and seven cents per mile on a defendant convicted of a misdemeanor, trial court plainly erred in imposing $944 as "jury costs" on Defendant for a one-day jury trial without any explanation as to how the court determined those costs.
Discussion: Costs are creatures of statute, and courts do not have inherent power to tax them. Here, the appellate court cannot determine how the trial court arrived at its $944 "jury costs" for a one-day trial. Awarding costs not authorized by statute is evident, obvious and clear error. Remanded with instructions to only impose statutorily-authorized costs, unless Defendant demonstrates she is unable to pay such costs.

Counsel – Right To – Conflict of Interest

State v. Woolery, 687 S.W.3d 652 (Mo. banc April 30, 2024):
Holding: (1) Initial appearance (or initial appearance-arraignment when combined after an indictment) is not a "critical stage" at which a court must provide counsel for indigent persons, and (2) Rule 31.02(a) does not confer a duty on courts to do so.
Discussion: (1) The 6th Amendment requires a court to provide counsel at all "critical stages" of a criminal case. Critical stages are proceedings, whether formal or informal, that amount to "trial-like confrontations" and those that would "impair defense on the merits" if counsel isn't provided. An initial appearance or initial appearance-arraignment in Missouri doesn't involve "trial-like confrontation" or require assertion of any defense. Absent some prejudice to the accused, the absence of counsel at arraignment doesn't violate due process. Thus, initial appearance and initial appearance-arraignment are not a critical stage. However, to avoid any concern that prejudice could arise from lack of counsel at arraignment, best practice would be to refrain from doing arraignment at the Rule 22.08 initial appearance, when a criminal felony is initiated by indictment. Then, arraignment could be delayed until after counsel is secured. (2) Rule 31.02(a) expressly states a defendant may be without counsel at his "first appearance." In such cases, the rule simply requires the court advise defendant of his right to have appointed counsel if he cannot afford to hire counsel. The rule doesn't require counsel *at* the initial appearance.

State v. Mills, 687 S.W.3d 668 (Mo. banc April 30, 2024):
Holding: A proceeding during which the trial court considers or determines conditions for pretrial release – whether during an initial appearance, arraignment, or separate bail review hearing under Rule 33.05 – is not a "critical stage" at which trial court must provide counsel for indigent persons.
Discussion: The 6th Amendment requires a court to provide counsel at all "critical stages" of a criminal case. Critical stages are proceedings, whether formal or informal, that amount to "trial-like confrontations" and those that would "impair defense on the merits" if counsel isn't provided. Consideration of pretrial release (bail) is not such a stage. Pretrial release proceedings don't involve presentation, confrontation or cross-exam of witnesses. Rule 33.07(a) makes the proceedings "informal and rules of evidence need not apply." Further, any pretrial release proceeding does not permanently fix a defendant's bail, and there can be multiple proceedings reviewing conditions of release after a defendant secures counsel.

State v. Barnett, 2024 WL 2279608 (Mo. App. E.D. May 21, 2024):
Holding: Trial court plainly erred in believing it had no authority to appoint standby counsel for Defendant, who was representing himself; Missouri courts have authority to appoint standby counsel in this situation (though wasn't prejudicial here).

Death Penalty

State ex rel. Parson v. Walker, 2024 WL 2831393 (Mo. banc June 4, 2024):
Holding: Even though Board of Inquiry appointed by former Governor in 2017 pursuant to Sec. 552.070 had not yet issued a report in death penalty clemency case, current Governor had exclusive constitutional authority under clemency power to dissolve the Board and allow execution to proceed.
Discussion: A Governor's clemency power involves three actions: reprieves, commutations, and pardons. Reprieves temporarily stay an execution of sentence. Commutations reduce a sentence. Pardons relieve an offender from the consequences of a specific crime. Pardons and commutations are permanent when granted, and cannot be rescinded or revoked. But reprieves are temporary, and a recipient cannot complain when they are rescinded or revoked. Here, the appointment of a Board of Inquiry was a reprieve, which the Governor was free to rescind at his absolute discretion.

*** Thornell v. Jones, ___ U.S. ___, 144 S.Ct. 1302 (U.S. May 30, 2024):**
Holding: Ninth Circuit improperly ignored the weight of aggravating evidence in finding that a death-sentenced defendant was prejudiced under *Strickland*'s standard for ineffective assistance of counsel.

Discovery

State ex rel. Bailey v. Cox, 2024 WL 1738319 (Mo. App. S.D. April 23, 2024):
Holding: Defendants were not entitled to discovery of communications between the Attorney General's Office (which was prosecuting Defendants) and the local prosecutor, or the Attorney General's Office and the Governor (who had assigned the Attorney General to assist in the case pursuant to Sec. 27.030), regarding the appropriateness of the charges, the weight of the evidence, or strategy directives of the Attorney General, because documents which relate to the commencement, filing or prosecution of the charges are opinions, theories or conclusions of counsel protected by Rule 25.10(a).
Discussion: The Missouri Supreme Court has held that a prosecutor's rationale for seeking a particular punishment in a specific case is necessarily mental impressions and conclusions and, thus, intangible work product. Intangible work product is privileged, and the State would suffer irreparable harm if required to disclose. The same rationale applies here. Writ of prohibition issues to prohibit trial court from ordering this disclosure.

DWI

State v. Wilson, 2024 WL 3152561 (Mo. App. E.D. June 25, 2024):
Holding: Even though Defendant pleaded guilty in 1991 to two charges of "DWI-alcohol," the certified docket sheets alone from these convictions were not sufficient to prove they qualified as an Intoxicated Related Traffic Offense (IRTO) because, in 1991, DWI was for *either* "physically driving or operating" *or* "being in actual physical control" of a vehicle, and Sec. 577.023.1(2) requires "physically driving or operating" to be an IRTO; the statute wasn't changed until 1996 to eliminate "being in actual physical control."
Discussion: The docket sheets of the 1991 convictions contained no description of the conduct underlying the "DWI-alcohol" convictions. Without that information, the docket sheets didn't prove an IRTO.

State v. Wilson, 2024 WL 3152561 (Mo. App. E.D. June 25, 2024):
Holding: Trial court erred in a DWI trial in admitting results of portable breath test (PBT) because, where probable cause to arrest is not at issue, the PBT isn't admissible to prove intoxication (but not plain error).
Discussion: Sec. 577.021.3 provides that PBT shall be admissible as probable cause to arrest but not as evidence of a driver's BAC. Thus, courts have typically held that, while evidence that a PBT was positive is admissible as evidence of probable cause, the specific numeric value of the test isn't admissible, and can't be used to prove intoxication. Here, whether Officer had probable cause to arrest on suspicion of DWI wasn't at issue, so the trial court should not have admitted the positive PBT. However, not plain error since there was other evidence of guilt.

Evidence

State v. Jackson-Bey, 2024 WL 1904587 (Mo. banc April 30, 2024):
Holding: Even though the first-degree murder statute, Sec. 565.020.2, provides that "if a person is 18 years of age or older at the time of the offense," the punishment shall be either death or life without parole (and provides lower punishment for those younger than 18), age is not an element of the offense which the State must prove; instead, age is an affirmative defense which a defendant has both the burden to produce evidence and to convince the fact-finder by preponderance of the evidence that defendant was under 18.
Discussion: Defendant claims that any fact that, by law, increases the penalty for a crime is an element that must be submitted to the jury and found beyond a reasonable doubt. But proof of the nonexistence of all affirmative defenses has never been constitutionally required. States may place the burden on a defendant to prove certain affirmative defenses. For example, in death penalty cases, the defendant has the burden to prove intellectual disability, which is an exemption from the death penalty. Here, age creates an exemption from the death penalty or LWOP. But if Defendant wished to claim age – which he did not try to do – he bore the burden both to produce evidence and convince the fact-finder by preponderance of evidence that he was under 18.

Brock v. Shaikh, 2024 WL 2278777 (Mo. App. E.D. May 21, 2024):
Holding: Even though Missouri permits counsel to make an offer of proof in narrative form by summarizing prospective witness' testimony, the "preferred" and "proper" method of making an offer of proof is to put the witness on the stand and question them outside the presence of the jury; a narrative offer runs a greater risk of being found legally insufficient.

Marchbank v. Chakrabarty, 2024 WL 1863623 (Mo. App. E.D. April 30, 2024):
Holding: In malpractice case, trial court abused discretion in excluding prior medical license disciplinary record of Defendant-Doctor, whom the defense identified in interrogatories under Rule 56.01(b)(7) as an expert who may testify on the standard of care, liability, damages and causation; thus, Plaintiff was entitled to question Defendant-Doctor about his qualifications and skills as an "expert witness" (which includes impeachment about licensing censure), since Defendant-Doctor was identified as an "expert witness," and not merely a "fact witness," for whom such impeachment may not have been permitted.

State v. Whirley, 2024 WL 3034854 (Mo. App. W.D. June 18, 2024):
Holding: Trial court abused its discretion in excluding evidence that another person (Defendant's Brother) may have committed the charged murder.
Discussion: Evidence of an alternative perpetrator is admissible only if there is also proof the other person committed *some act* directly connecting him with the crime. The defendant must establish a "clear link" between the alternative perpetrator and a "key piece of evidence" in the crime. Here, Defendant's evidence (some of which consisted of photos of Brother) would have shown that Brother had the gun that was arguably the same gun used in the shooting; that Brother had a bag that was arguably the same bag in which the gun was found; that Brother had clothes consistent with the shooter; that the

same type of ammunition was used in another crime Brother had pleaded guilty to shortly before the murder; that Brother was near the scene of the murder when it occurred; that Brother was in the house where the murder-gun was found. This evidence shows a clear link between Brother and key evidence from the shooting. The exclusion of this evidence was prejudicial. Reversed for new trial.

*** Diaz v. U.S., ___ U.S. ___, 144 S.Ct. 1727 (U.S. June 20, 2024):**
Holding: Expert testimony by a Special Agent that "most couriers know" they are transporting drugs did not violate Fed. Rule 704(b), which states that "an expert witness must not state an opinion about whether the defendant did or did not have a mental state that constitutes an element of crime charged or a defense", because Expert's testimony was about "most" couriers, not Defendant specifically; Defendant charged with drug trafficking claimed she didn't know there were 54 pounds of methamphetamine hidden in her car; the Government presented the Expert to show she knowingly possessed them.

*** Smith v. Arizona, 2024 WL 3074423, ___ U.S. ___ (U.S. June 21, 2024):**
Holding: Even though the testifying forensic lab Expert reached "independent" conclusions, where Expert based his opinions on a prior forensic lab expert's factual findings, the Prior Expert's statements were for "the truth of the matter asserted" and, thus, implicate the Sixth Amendment Confrontation Clause; case remanded for lower court to decide if the out-of-court statements of the Prior Expert are "testimonial." Lower courts had held Prior Expert's statements didn't implicate Confrontation Clause because weren't offered "the truth of the matter asserted."

Experts

Marchbank v. Chakrabarty, 2024 WL 1863623 (Mo. App. E.D. April 30, 2024):
Holding: In malpractice case, trial court abused discretion in excluding prior medical license disciplinary record of Defendant-Doctor, whom the defense identified in interrogatories under Rule 56.01(b)(7) as an expert who may testify on the standard of care, liability, damages and causation; thus, Plaintiff was entitled to question Defendant-Doctor about his qualifications and skills as an "expert witness" (which includes impeachment about licensing censure), since Defendant-Doctor was identified as an "expert witness," and not merely a "fact witness," for whom such impeachment may not have been permitted.

*** Diaz v. U.S., ___ U.S. ___, 144 S.Ct. 1727 (U.S. June 20, 2024):**
Holding: Expert testimony by a Special Agent that "most couriers know" they are transporting drugs did not violate Fed. Rule 704(b), which states that "an expert witness must not state an opinion about whether the defendant did or did not have a mental state that constitutes an element of crime charged or a defense", because Expert's testimony was about "most" couriers, not Defendant specifically; Defendant charged with drug trafficking claimed she didn't know there were 54 pounds of methamphetamine hidden in her car; the Government presented the Expert to show she knowingly possessed them.

*** Smith v. Arizona, 2024 WL 3074423, ___ U.S. ___ (U.S. June 21, 2024):**
Holding: Even though the testifying forensic lab Expert reached "independent" conclusions, where Expert based his opinions on a prior forensic lab expert's factual findings, the Prior Expert's statements were for "the truth of the matter asserted" and, thus, implicate the Sixth Amendment Confrontation Clause; case remanded for lower court to decide if the out-of-court statements of the Prior Expert are "testimonial." Lower courts had held Prior Expert's statements didn't implicate Confrontation Clause because weren't offered "the truth of the matter asserted."

Expungement

Smith v. MSHP Criminal Records Repository, 2024 WL 2001848 (Mo. App. E.D. May 7, 2024):
Holding: (1) Even though Defendant pleaded guilty at a single proceeding to burglary and stealing from a school, and burglary and receiving stolen property from the same school which occurred a few days later, trial court did not err in expungement action in finding these were not part of the "same course of criminal conduct" and thus, not all eligible for expungement because court wasn't required to believe Petitioner's testimony that the offenses were all the same; but (2) appellate court cautions that although double jeopardy analysis applies, in part, in determining if offenses are the same, such analysis should not be applied "too strictly" in expungement analysis because the purposes of double jeopardy and expungement are different.
Discussion: Sec. 610.140.12 allows expungement of multiple convictions if they were committed "as part of the same course of criminal conduct." However, the statute doesn't define this. *N.M.C. v. MSHP Criminal Records Repository*, 661 S.W.3d 18 (Mo. App. E.D. 2023), held double jeopardy analysis should be used to decide this, at least in part. However, appellate court "caution[s] against a strict adherence to double jeopardy concepts in the expungement analysis" because double jeopardy serves a different purpose. Double jeopardy provides a limitation on prosecutorial authority, but expungement serves a remedial purpose. Double jeopardy seeks to determine whether a defendant committed separately punishable offenses. But in expungement, questions regarding whether the offenses are based on different acts or separate mental states are important in whether multiple actions should be considered one offense. The expungement statute asks whether multiple offenses were committed as a result of the same course of conduct, thereby warranting expungement. This should be guided by the plain language of Sec. 610.140.

Findings of Fact & Conclusions of Law (Rules 24.035 & 29.15)

Escalona v. State, 2024 WL 3152569 (Mo. App. W.D. June 25, 2024):
Holding: Even though Movant failed to personally appear at this 29.15 evidentiary hearing, where his attorney announced that his presence wasn't necessary to present his claims, the motion court erred in summarily dismissing his case without Findings, because 29.15(j) requires the court enter Findings, and 29.15(i) provides a Movant need not be present at their hearing; reversed and remanded for entry of Findings.

Forfeiture

*** McIntosh v. U.S., 601 U.S. 330 (U.S. April 17, 2024):**
Holding: Even though Rule 32.2 requires a district court to enter a preliminary order of forfeiture before sentencing, failure to do so does not bar the court from ordering forfeiture absent a showing of prejudice.

*** Culley v. Marshall, 601 U.S. 377 (U.S. May 9, 2024):**
Holding: Due process does not require a separate preliminary hearing to determine whether the Government may retain property before a pending forfeiture hearing.

Immigration

*** Campos-Chaves v. Garland, ___ U.S. ___, 144 S.Ct. 1637 (U.S. June 14, 2024):**
Holding: In order for a noncitizen to have their in-absentia removal order rescinded, they must prove that they did not receive notice to appear at their removal hearing under 8 U.S.C. 1229(a)(1) and (2), which require different notices; if the noncitizen received notice to appear under *either* provision, they cannot seek recission of their removal order.

*** Dep't of State v. Munoz, 2024 WL 3074425, ___ U.S. ___ (U.S. June 21, 2024):**
Holding: A U.S. Citizen does not have a due process liberty interest in having their Non-Citizen spouse be admitted into the United States; Gov't can deny entry of Non-Citizen spouse to U.S. under immigration provision which denies entry to persons suspected of criminal activity.

Indictment and Information

State v. Colville, 687 S.W.3d 637 (Mo. banc April 30, 2024):
Holding: Where (1) Defendant was charged with involuntary manslaughter, Sec. 565.027, by acting with criminal negligence in failing to yield and use a turn signal, resulting in death of Victim and (2) trial court, on Motion to Dismiss, reviewed surveillance video of the accident, found there was no criminal negligence, and dismissed case with prejudice, trial court erred in doing this because the only issue trial court can review before trial is whether the charging document alleges the essential elements of the

offense and apprises Defendant of the facts constituting the offense; trial court cannot look outside the four corners of the charging document.
Discussion: So long as the indictment puts Defendant on notice of the criminal nature and factual foundation of the crime charged, it should be adjudged sufficient. Whether Defendant's actions constituted criminal negligence is not capable of determination without a trial. In *State v. Metzinger*, 456 S.W.3d 84 (Mo. App. E.D. 2015), a trial court dismissed before trial a charge of making a terroristic threat, on grounds the defendant's speech was constitutionally protected and not a true threat. The Court of Appeals held the case could be dismissed before trial because it raised a constitutional question of law to be decided before trial. *Metzinger* doesn't apply to the current case, and "to the extent it suggests a circuit court always may consider evidence outside the charging document on a motion to dismiss, it should no longer be followed."

State v. Branning, 2024 WL 2719014 (Mo. App. S.D. May 28, 2024):
Holding: (1) Even though Defendant got out of his vehicle and placed several long guns on the ground, this was insufficient as a matter of law to constitute making a terrorist threat, Sec. 574.115 or first-degree harassment, Sec. 565.090, so the trial court properly dismissed the Information under Rule 23.01 because they did not charge an offense; and (2) where Defendant's felony-level resisting arrest charge, Sec. 575.150, was dependent on the other invalid charges being felonies, trial court did not err in dismissing felony resisting with leave to amend to misdemeanor resisting.
Discussion: An Information is properly dismissed if all the facts stated are true, and yet the Information does not charge a violation of law. Making a terroristic threat requires the purpose of frightening 10 or more people and communicating an express or implied threat to cause an incident or condition involving danger to life. Although Defendant's actions were unusual and "could" constitute a threat, they also "could" constitute legitimate actions that would not be a threat, such as merely inspecting his guns. First-degree harassment requires an act with the purpose to cause emotion distress to another person, and such act does cause emotional distress. The Information was insufficient to support a reasonable inference that Defendant had the purpose to cause emotional distress to anyone. The Information does not even allege Defendant was aware of alleged Victim's presence.

Mims v. State, 2024 WL 1392212 (Mo. App. W.D. April 2, 2024):
Holding: Even though 24.035 Movant was originally charged with first-degree statutory sodomy, Sec. 566.062, for having deviate sexual intercourse with "a child less than 12," where he pleaded guilty via an *Alford* plea to first-degree statutory sodomy based on an amended information which charged deviate sexual intercourse "with a child less than 14" and a sentence of eight years, Movant was not subject to an enhanced minimum 10-year sentence for sex with a child "less than 12," or required to serve 85% of his sentence.
Discussion: The amended information did not charge Movant with subjecting a child "less than 12" to deviate sexual intercourse. There is nothing that requires the State to charge a defendant with the most serous offense the facts would support. The only allegation in the amended information was that the child was "less than 14." Even though the Prosecutor stated as part of the factual basis that the child was seven years old,

this did not convert the offense into the non-charged enhanced offense of a sodomy on a child "less than 12." The plea court, in finding a factual basis, only had to find the child was less than 14. Movant was only pleading guilty to sodomy of a child "less than 14" and was not admitting any of the factual allegations beyond what was charged in the amended information. Movant's eight-year sentence was within the authorized range, and he was not subject to the 10-year minimum in Sec. 566.062.2(1) for a child less than 12. Further, Movant was not subject to the 85% rule in Sec. 558.019.3 regarding "dangerous felonies." Sec. 556.061(19) defines "dangerous felony" as first-degree statutory sodomy with a "child less than 12." But the amended information charged a "child less than 14" so Movant isn't subject to the 85% rule.

Ineffective Assistance of Counsel

Flaherty v. State, 2024 WL 3047689 (Mo. banc June 18, 2024):
(1) An appellate court can overrule a 29.15 motion court's judgment only for (a) a mistake of law (for which appellate review is de novo), (b) a factual finding for which there was insufficient evidence (reviewed under the "clearly erroneous" standard), or (c) a factual finding for which there was sufficient evidence but which appellate court finds was "clearly erroneous," i.e., appellate court on the whole evidence is left with a definite and firm conviction a mistake was made; (2) motion court had strong evidence to conclude that trial counsel was ineffective in failing to request fourth-degree assault instruction, but under deferential standard of review, motion court was not clearly erroneous in finding counsel's error didn't result in prejudice.
Facts: Movant was charged with first-degree domestic assault and ACA. Trial counsel requested second-degree domestic assault instruction, but not fourth-degree domestic assault instruction. Jury convicted of second-degree domestic assault. Trial counsel's theory had been Movant accidently shot Victim.
Holding: The performance prong of *Strickland* calls for inquiry into the *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. The motion court found counsel's performance was objectively unreasonable because the evidence would have supported a fourth-degree instruction, which would have been a misdemeanor and would have prevented conviction for ACA. There was sufficient evidence for the motion court to find this. But the motion court also found no prejudice. Under the standard of review, the motion court (who was also the trial judge) saw the impact of the evidence on the jury, and was in a better position to judge if the jury would have been persuaded that Movant's actions were merely criminally negligent and that there wasn't serious physical injury (thus supporting fourth-degree assault).

*** Thornell v. Jones, ___ U.S. ___, 144 S.Ct. 1302 (U.S. May 30, 2024):**
Holding: Ninth Circuit improperly ignored the weight of aggravating evidence in finding that a death-sentenced defendant was prejudiced under *Strickland*'s standard for ineffective assistance of counsel.

Interrogation – Miranda – Self-Incrimination – Suppress Statements

State v. Brashier, 2024 WL 1724101 (Mo. App. W.D. April 23, 2024):
Holding: Even though the Trial Judge at motion-to-suppress hearing made statements about the Judge's beliefs regarding the facts which were inconsistent with the Judge's later docket entry which merely stated, "Motion to Suppress [is] granted", the appellate court on appeal presumes the trial court found all facts in accordance with its ruling, so must disregard the Judge's oral statements about the facts to the contrary.
Discussion: The State claims on appeal that Trial Judge misapplied the law by ruling contrary to the Judge's belief as to the facts, as orally stated by the Judge at the hearing. However, the written judgment on the motion to suppress merely states that the motion is "granted," and neither party requested written Findings. Appellate courts presume a trial court found all facts in accordance with its ruling. Appellate review is ordinarily limited to the trial court's written judgment or order, and does not extend to oral comments made by the trial court which are not included in the written order. There are exceptions, such as when a written order is ambiguous, or for imposing sentence, but the exceptions aren't applicable here. Judgment granting motion to suppress affirmed.

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

State ex rel. Bailey v. Pierce, 2024 WL 3047715 (Mo. banc June 18, 2024):
Holding: Where Defendant and Prosecutor had previously stipulated to and received a change of venue and judge, new judge lacked authority to grant Defendant's second motion for change of judge.
Discussion: Rule 32.02 permits parties to stipulate to change of venue, but provides that, after that, no further change of venue or judge is permitted except for cause. Defendant wasn't alleging change for cause here, so judge lacked authority to grant change of judge.

Jury Instructions

State v. Fowler, 2024 WL 2001871 (Mo. App. E.D. May 7, 2024):
Holding: (1) Trial court did not err in failing to give lesser-included offense instruction which materially differed from the charged greater offense instruction; greater instruction submitted offense of first-degree assault as attempting to cause serious physical injury by "shooting at" Victim, but proposed lesser for fourth-degree assault submitted offense as recklessly engaging in conduct that created a substantial risk of death or serious physical injury by "throwing his gun on the ground"; and (2) even though Defendant claimed he was being arrested only for a misdemeanor and, thus, evidence is insufficient to support felony resisting arrest, where defense counsel told jury Defendant was guilty of "resisting arrest" and the offense was charged as a felony, this was a judicial admission of fact that is binding on Defendant and waived sufficiency review.
Discussion: (1) When a party's proffered instruction involving a nested or non-nested lesser included offense alleges the defendant engaged in criminal conduct which

impermissibly deviates from that alleged in the greater charged offense, a trial court is not required to give the proffered instruction and does not err in refusing to submit it. A defendant cannot alter the manner in which a criminal offense is charged by changing the criminal conduct when requesting a lesser because this risks confusing the jury. Here, the greater offense alleged Defendant was "shooting at" Victim, but the proposed lesser instruction said Defendant threw the gun on the ground. Thus, the proffered lesser impermissibly deviated from the greater offense. (2) When a Defendant's attorney admits in open court that Defendant is guilty of an offense, the Defendant waives the right to challenge sufficiency of evidence on that count. Here, defense counsel told jury Defendant is guilty of "resisting arrest," and since felony resisting was charged, this was an admission Defendant was guilty of felony resisting.

Jury Issues – Batson – Striking of Jurors – Juror Misconduct

*** Erlinger v. U.S., 2024 WL 3074427, ___ U.S. ___ (U.S. June 21, 2024):**
Holding: Where 18 U.S.C. Sec. 924(e)(1) provides for an enhanced sentence if a person has three prior offenses committed at different times, the Fifth and Sixth Amendments right to a jury trial (as interpreted by *Apprendi* and its progeny) require that a jury determine beyond a reasonable doubt whether Defendant's three burglaries committed over several days were a "single criminal episode" or separate offenses.

*** S.E.C. v. Jarkesy, 2024 WL 3187811, ___ U.S. ___ (U.S. June 27, 2024):**
Holding: When the SEC seeks civil penalties against a defendant for securities fraud, the Seventh Amendment entitles the defendant to a jury trial; civil penalties cannot be imposed merely administratively.

Juvenile

State v. Whirley, 2024 WL 3034854 (Mo. App. W.D. June 18, 2024):
Holding: Even though Defendant-Juvenile claimed his counsel was ineffective at his certification hearing, where Defendant didn't file a transcript of the certification hearing on appeal, Court of Appeals denies claim because of lack of complete record; it was appellant's responsibility to file a complete record necessary for appellate review.

Privileges

State v. Studdard, 2024 WL 1694838 (Mo. App. S.D. April 19, 2024):
(1) Even though Pastor's Wife and Victim's Mother were present in family counseling sessions with Pastor and Victim, trial court did not err in excluding Pastor's testimony about what Victim said at sessions because of the clergy-communicant privilege in Sec. 491.060(4), and Wife and Mother were "necessary" participants in the sessions; and (2) appellate court cannot determine whether trial court erred in excluding Mother's testimony since there was no offer of proof as to what Mother's testimony would have been.

Facts: Defendant, in child sex case, sought call a Pastor and the Victim's Mother – all of whom had participated in family counseling sessions with the Pastor – to testify to what Victim had said in the sessions. The trial court prohibited the testimony.
Holding: (1) Regarding the exclusion of Pastor's testimony, it is an issue of first impression whether a third-party's presence at a pastoral session waives the pastor-communicant privilege. Privileges for attorneys and doctors generally are not waived if a "necessary" third-person is included in the communications. The same should apply to pastors. Here, Pastor's Wife customarily participated in Pastor's family counseling sessions as a spiritual counselor to women. Thus, she was a "necessary" participant. Similarly, Mother was a "necessary" participant since it was a family counseling session. Thus, the pastor-communicant privilege was not waived. (2) Regarding the trial court's exclusion of Mother's testimony, there was no offer of proof as to what Mother would have testified to. Hence, the claim can't be reviewed on appeal.

State ex rel. Bailey v. Cox, 2024 WL 1738319 (Mo. App. S.D. April 23, 2024):
Holding: Defendants were not entitled to discovery of communications between the Attorney General's Office (which was prosecuting Defendants) and the local prosecutor, or the Attorney General's Office and the Governor (who had assigned the Attorney General to assist in the case pursuant to Sec. 27.030), regarding the appropriateness of the charges, the weight of the evidence, or strategy directives of the Attorney General, because documents which relate to the commencement, filing or prosecution of the charges are opinions, theories or conclusions of counsel protected by Rule 25.10(a).
Discussion: The Missouri Supreme Court has held that a prosecutor's rationale for seeking a particular punishment in a specific case is necessarily mental impressions and conclusions and, thus, intangible work product. Intangible work product is privileged, and the State would suffer irreparable harm if required to disclose. The same rationale applies here. Writ of prohibition issues to prohibit trial court from ordering this disclosure.

*** Trump v. U.S., 2024 WL 3237603, ___ U.S. ___ (U.S. July 1, 2024):**
Holding: President is immune under separation of powers doctrine from criminal prosecution for acts within his constitutional authority; thus, President is entitled to at least presumptive immunity from prosecution for all official acts, but there is no immunity for unofficial acts.

Rule 24.035/29.15 & Habeas Postconviction Procedural Issues

Flaherty v. State, 2024 WL 3047689 (Mo. banc June 18, 2024):
(1) An appellate court can overrule a 29.15 motion court's judgment only for (a) a mistake of law (for which appellate review is de novo), (b) a factual finding for which there was insufficient evidence (reviewed under the "clearly erroneous" standard), or (c) a factual finding for which there was sufficient evidence but which appellate court finds was "clearly erroneous," i.e., appellate court on the whole evidence is left with a definite and firm conviction a mistake was made; (2) motion court had strong evidence to conclude that trial counsel was ineffective in failing to request fourth-degree assault

instruction, but under deferential standard of review, motion court was not clearly erroneous in finding counsel's error didn't result in prejudice.
Facts: Movant was charged with first-degree domestic assault and ACA. Trial counsel requested second-degree domestic assault instruction, but not fourth-degree domestic assault instruction. Jury convicted of second-degree domestic assault. Trial counsel's theory had been Movant accidently shot Victim.
Holding: The performance prong of *Strickland* calls for inquiry into the *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. The motion court found counsel's performance was objectively unreasonable because the evidence would have supported a fourth-degree instruction, which would have been a misdemeanor and would have prevented conviction for ACA. There was sufficient evidence for the motion court to find this. But the motion court also found no prejudice. Under the standard of review, the motion court (who was also the trial judge) saw the impact of the evidence on the jury, and was in a better position to judge if the jury would have been persuaded that Movant's actions were merely criminally negligent and that there wasn't serious physical injury (thus supporting fourth-degree assault).

Counts v. State, 2024 WL 2789610 (Mo. App. S.D. May 9, 2024):
Holding: A Movant claiming that third-party interference by correctional officials prevented timely filing of his *pro se* 29.15 motion during COVID pandemic must show that his tardiness was due "solely" to COVID restrictions at his prison, and not other causes.

Garretson v. State, 2024 WL 3034860 (Mo. App. W.D. June 18, 2024):
Holding: (1) where the 29.15 motion court merely notified the Public Defender that Movant had filed a 29.15 motion, the notification was not an "appointment" starting the time limits for filing an amended motion; but (2) where the Public Defender entered an appearance, the entry did start the time limits, even though the Public Defender later withdrew; (3) even though retained counsel timely requested an extension of time to file amended motion, where the motion court didn't grant it within the time the amended motion was originally due, the court was without authority to grant it later and the amended motion was untimely; (4) because the abandonment doctrine does not apply to retained counsel, the motion court could only consider the timely *pro se* motion; so (5) since the court didn't decide the *pro se* claims, there is no "final judgment" and appeal is dismissed.

Escalona v. State, 2024 WL 3152569 (Mo. App. W.D. June 25, 2024):
Holding: Even though Movant failed to personally appear at this 29.15 evidentiary hearing, where his attorney announced that his presence wasn't necessary to present his claims, the motion court erred in summarily dismissing his case without Findings, because 29.15(j) requires the court enter Findings, and 29.15(i) provides a Movant need not be present at their hearing; reversed and remanded for entry of Findings.

Search and Seizure – Suppression of Physical Evidence

State v. Brashier, 2024 WL 1724101 (Mo. App. W.D. April 23, 2024):
Holding: Even though the Trial Judge at motion-to-suppress hearing made statements about the Judge's beliefs regarding the facts which were inconsistent with the Judge's later docket entry which merely stated, "Motion to Suppress [is] granted", the appellate court on appeal presumes the trial court found all facts in accordance with its ruling, so must disregard the Judge's oral statements about the facts to the contrary.
Discussion: The State claims on appeal that Trial Judge misapplied the law by ruling contrary to the Judge's belief as to the facts, as orally stated by the Judge at the hearing. However, the written judgment on the motion to suppress merely states that the motion is "granted," and neither party requested written Findings. Appellate courts presume a trial court found all facts in accordance with its ruling. Appellate review is ordinarily limited to the trial court's written judgment or order, and does not extend to oral comments made by the trial court which are not included in the written order. There are exceptions, such as when a written order is ambiguous, or for imposing sentence, but the exceptions aren't applicable here. Judgment granting motion to suppress affirmed.

Sentencing Issues

State v. Jackson-Bey, 2024 WL 1904587 (Mo. banc April 30, 2024):
Holding: Even though the first-degree murder statute, Sec. 565.020.2, provides that "if a person is 18 years of age or older at the time of the offense," the punishment shall be either death or life without parole (and provides lower punishment for those younger than 18), age is not an element of the offense which the State must prove; instead, age is an affirmative defense which a defendant has both the burden to produce evidence and to convince the fact-finder by preponderance of the evidence that defendant was under 18.
Discussion: Defendant claims that any fact that, by law, increases the penalty for a crime is an element that must be submitted to the jury and found beyond a reasonable doubt. But proof of the nonexistence of all affirmative defenses has never been constitutionally required. States may place the burden on a defendant to prove certain affirmative defenses. For example, in death penalty cases, the defendant has the burden to prove intellectual disability, which is an exemption from the death penalty. Here, age creates an exemption from the death penalty or LWOP. But if Defendant wished to claim age – which he did not try to do – he bore the burden both to produce evidence and convince the fact-finder by preponderance of evidence that he was under 18.

State v. Yocco, 2024 WL 1625265 (Mo. App. E.D. April 16, 2024):
Holding: Trial court plainly erred in sentencing Defendant to life sentences as a predatory sexual offender for second-degree rape, second-degree statutory sodomy, and attempted second-degree statutory sodomy because these offenses are not subject to that enhancement under Section 566.125.
Discussion: As relevant here, the enhancements apply only to offenses listed in Section 566.125.1: completed or attempted first-degree statutory rape or first-degree statutory sodomy; first-degree rape or first-degree sodomy; forcible rape; forcible sodomy; rape;

sodomy. Review of the legislative history of the statute shows that rape and sodomy generally required use of forcible compulsion. The language of the predecessor statute, 558.018.1 RSMo. Cum. Supp. 2014, did not encompass second-degree rape or second-degree sodomy, which do not require forcible compulsion. That statute was transferred to 566.125.1. The history of the statute and its predecessor indicate that the enhancement doesn't apply to second-degree rape, second-degree sodomy and attempted second-degree sodomy. Remanded with directions to impose sentences for class D felonies or E felony (for the attempt). Under Section 558.026.1, trial court has discretion to run the sentences consecutively or concurrently for offenses not committed at the same time.

State v. Barnett, 2024 WL 2279608 (Mo. App. E.D. May 21, 2024):
Holding: Where the sentencing judge stated three times that she believed that Defendant's armed criminal action sentence had to be consecutive, this was plainly erroneous under the 2018 version of Sec. 571.015 and requires resentencing.
Discussion: The 2018 version of Sec. 571.015 did not require consecutive sentences for ACA. When the record shows the sentencing judge *based* their sentence on a mistake of law, then plain error results. Case remanded for limited purpose of resentencing to allow judge to exercise discretion to run ACA sentence concurrently or consecutively.

State v. Rost, 2024 WL 2789279 (Mo. App. S.D. May 9, 2024):
Holding: Where the written sentence and judgment misstated the offense for which Defendant was found guilty, this was a clerical error that can be corrected *nunc pro tunc*.

State v. Nieto, 2024 WL 2010944 (Mo. App. S.D. May 7, 2024):
Holding: Where the jury found Defendant "not guilty" on certain counts, but the written sentence and judgment stated the counts were "dismissed by nolle pros." and also erroneously stated Defendant had pleaded guilty to one count, these were clerical errors that can be corrected *nunc pro tunc*.

Belk v. Mo. Dep't of Corr., 2024 WL 18720898 (Mo. App. W.D. April 30, 2024):
Holding: Appellate court notes that because of a 2020 amendment to Sec. 556.061(19) which added "armed criminal action" into the definition of "dangerous felony," there may now be a conflict between that statute and Secs. 558.019.1 which states that its minimum prison terms shall not apply to 571.015 (ACA); such a conflict also existed before 1994, and the appellate courts had held that Sec. 558.019 doesn't apply to armed criminal action, but appellate court doesn't decide what future cases may hold regarding whether 571.015 or 558.019 governs the minimum prison terms for ACA.

Mims v. State, 2024 WL 1392212 (Mo. App. W.D. April 2, 2024):
Holding: Even though 24.035 Movant was originally charged with first-degree statutory sodomy, Sec. 566.062, for having deviate sexual intercourse with "a child less than 12," where he pleaded guilty via an *Alford* plea to first-degree statutory sodomy based on an amended information which charged deviate sexual intercourse "with a child less than 14" and a sentence of eight years, Movant was not subject to an enhanced minimum 10-year sentence for sex with a child "less than 12," or required to serve 85% of his sentence.

Discussion: The amended information did not charge Movant with subjecting a child "less than 12" to deviate sexual intercourse. There is nothing that requires the State to charge a defendant with the most serous offense the facts would support. The only allegation in the amended information was that the child was "less than 14." Even though the Prosecutor stated as part of the factual basis that the child was seven years old, this did not convert the offense into the non-charged enhanced offense of a sodomy on a child "less than 12." The plea court, in finding a factual basis, only had to find the child was less than 14. Movant was only pleading guilty to sodomy of a child "less than 14" and was not admitting any of the factual allegations beyond what was charged in the amended information. Movant's eight-year sentence was within the authorized range, and he was not subject to the 10-year minimum in Sec. 566.062.2(1) for a child less than 12. Further, Movant was not subject to the 85% rule in Sec. 558.019.3 regarding "dangerous felonies." Sec. 556.061(19) defines "dangerous felony" as first-degree statutory sodomy with a "child less than 12." But the amended information charged a "child less than 14" so Movant isn't subject to the 85% rule.

*** Brown v. U.S., ___ U.S. ___, 144 S.Ct. 1195 (U.S. May 23, 2024):**
Holding: A state crime counts as a "serious drug offense" under the Armed Career Criminal Act it if involved a drug that was on the federal schedules when a defendant possessed or trafficked the drug, even if the drug was later removed from the federal schedules.

*** Erlinger v. U.S., 2024 WL 3074427, ___ U.S. ___ (U.S. June 21, 2024):**
Holding: Where 18 U.S.C. Sec. 924(e)(1) provides for an enhanced sentence if a person has three prior offenses committed at different times, the Fifth and Sixth Amendments right to a jury trial (as interpreted by *Apprendi* and its progeny) require that a jury determine beyond a reasonable doubt whether Defendant's three burglaries committed over several days were a "single criminal episode" or separate offenses.

Sex Offender Issues – Registration

Missouri State Highway Patrol v. Cooley, 687 S.W.3d 212 (Mo. App. W.D. April 2, 2024):
Where, in removal from sex offender registry suit regarding an alleged conviction from Wyoming, Petitioner failed to name the MSHP, Sheriff or Prosecutor as respondents in his removal suit, trial court erred in ordering removal because Petitioner's failure to name and serve required respondents under Sec. 589.401 deprived respondents of notice and their right to present evidence in opposition.
Facts: In 1997, Petitioner pleaded guilty to a sex offense in Wyoming and was placed on probation. In 1998, he moved to Missouri and registered as a sex offender. In 2000, Petitioner completed probation and, pursuant to Wyoming law, the court discharged him "without any adjudication of guilt" and his offense was "not a conviction for any purpose." In 2021, Petitioner moved for removal from Missouri's sex offender registry and properly served all respondents, but trial court denied relief in that case on grounds that the Wyoming matter was similar to Missouri's SIS, which constitutes an admission

of guilt under Sec. 589.404(1). In 2022, Petitioner initiated a second suit, but did not name the MSHP, Sheriff or Prosecutor as respondents. The trial court ordered removal in the second suit. MSHP filed a motion to reconsider or vacate, which was denied.
Holding: Petitioner's second suit failed to comply with Sec. 589.401 because he failed to name MSHP, Sheriff or Prosecutor as respondents. This deprived them of notice and opportunity to present evidence opposing removal. And it has left appellate court without a sufficient record to decide case on the merits. Judgment vacated and remanded for further proceedings.

Statutes – Constitutionality -- Interpretation – Vagueness

State v. Jackson-Bey, 2024 WL 1904587 (Mo. banc April 30, 2024):
Holding: Even though the first-degree murder statute, Sec. 565.020.2, provides that "if a person is 18 years of age or older at the time of the offense," the punishment shall be either death or life without parole (and provides lower punishment for those younger than 18), age is not an element of the offense which the State must prove; instead, age is an affirmative defense which a defendant has both the burden to produce evidence and to convince the fact-finder by preponderance of the evidence that defendant was under 18.
Discussion: Defendant claims that any fact that, by law, increases the penalty for a crime is an element that must be submitted to the jury and found beyond a reasonable doubt. But proof of the nonexistence of all affirmative defenses has never been constitutionally required. States may place the burden on a defendant to prove certain affirmative defenses. For example, in death penalty cases, the defendant has the burden to prove intellectual disability, which is an exemption from the death penalty. Here, age creates an exemption from the death penalty or LWOP. But if Defendant wished to claim age – which he did not try to do – he bore the burden both to produce evidence and convince the fact-finder by preponderance of evidence that he was under 18.

Torch Electronics LLC v. Mo. Dep't of Pub. Safety, 2024 WL 2712941 (Mo. App. W.D. May 28, 2024):
Holding: Gaming-device operator could not seek declaratory judgment that its devices are not "gambling devices" under Missouri law, because declaratory judgment and injunctive relief is not available regarding a criminal statute absent a challenge to the statute's constitutionality or validity.
Discussion: Plaintiffs have not challenged the constitutionality or validity of the criminal statute defining "gambling devices." Plaintiffs rely on declaratory judgment cases regarding whether a person has to register as a sex offender to support their claim that declaratory relief is available. But sex offender registration laws are civil in nature, not criminal. Plaintiffs provide no other support for their contention that a party can obtain declaratory judgment about a criminal law without challenging the law's constitutionality or validity. Plaintiffs cannot seek a declaratory judgment that would interfere with the enforcement of criminal laws in Missouri. Trial court order dismissing case affirmed.

*** Garland v. Cargill, __ U.S. ___, 144 S.Ct. 1613 (U.S. June 14, 2024):**
Holding: Bureau of Alcohol, Tobacco and Firearms exceeded its authority in banning "bump stock" guns, because they do not meet the definition of "machine gun" in 26 U.S.C. 5845(b).

*** U.S. v. Rahimi, 2024 WL 3074728, ___ U.S. ___ (U.S. June 21, 2024):**
Holding: 18 U.S.C. Sec. 922(g)(8), which prohibits persons subject to a domestic violence restraining order from possessing a firearm, does not violate Second Amendment.

*** Snyder v. U.S., 2024 WL 3165518, ___ U.S. ___ (U.S. June 26, 2024):**
Holding: 18 U.S.C. Sec. 666 prohibits public officials from accepting "bribes" (which are payments made or agreed to *before* an official act to influence that act) but does not prohibit them from accepting "gratuities" (payments made *after* an official act as a reward or token of appreciation).

*** Fischer v. U.S., 2024 WL 3208034, ___ U.S. ___ (U.S. June 28, 2024):**
Holding: 18 U.S.C. Sec.1512(c)(2), which criminalizes "otherwise" obstructing, influencing or impeding official proceedings, must be read in conjunction with and is limited by the preceding clause in 1512(c)(1), which criminalizes altering, destroying mutilating or concealing a record, document, or other object to impair the object's availability in an official proceeding; thus, the Gov't must prove that a defendant's actions impaired the availability of records, documents, objects or things used in an official proceeding; the actions of "January 6" Defendant in entering Capitol did not fall within statute.

*** City of Grants Pass v. Johnson, 2024 WL 3208072, ___ U.S. ___ (U.S. June 28, 2024):**
Holding: The enforcement of generally applicable laws prohibiting camping on public property does not violate Eighth Amendment cruel and unusual punishment clause, even when enforced against unhoused people.

Sufficiency Of Evidence

State v. Jackson-Bey, 2024 WL 1904587 (Mo. banc April 30, 2024):
Holding: Even though the first-degree murder statute, Sec. 565.020.2, provides that "if a person is 18 years of age or older at the time of the offense," the punishment shall be either death or life without parole (and provides lower punishment for those younger than 18), age is not an element of the offense which the State must prove; instead, age is an affirmative defense which a defendant has both the burden to produce evidence and to convince the fact-finder by preponderance of the evidence that defendant was under 18.
Discussion: Defendant claims that any fact that, by law, increases the penalty for a crime is an element that must be submitted to the jury and found beyond a reasonable doubt. But proof of the nonexistence of all affirmative defenses has never been constitutionally required. States may place the burden on a defendant to prove certain

affirmative defenses. For example, in death penalty cases, the defendant has the burden to prove intellectual disability, which is an exemption from the death penalty. Here, age creates an exemption from the death penalty or LWOP. But if Defendant wished to claim age – which he did not try to do – he bore the burden both to produce evidence and convince the fact-finder by preponderance of evidence that he was under 18.

State v. Fowler, 2024 WL 2001871 (Mo. App. E.D. May 7, 2024):
Holding: (1) Trial court did not err in failing to give lesser-included offense instruction which materially differed from the charged greater offense instruction; greater instruction submitted offense of first-degree assault as attempting to cause serious physical injury by "shooting at" Victim, but proposed lesser for fourth-degree assault submitted offense as recklessly engaging in conduct that created a substantial risk of death or serious physical injury by "throwing his gun on the ground"; and (2) even though Defendant claimed he was being arrested only for a misdemeanor and, thus, evidence is insufficient to support felony resisting arrest, where defense counsel told jury Defendant was guilty of "resisting arrest" and the offense was charged as a felony, this was a judicial admission of fact that is binding on Defendant and waived sufficiency review.
Discussion: (1) When a party's proffered instruction involving a nested or non-nested lesser included offense alleges the defendant engaged in criminal conduct which impermissibly deviates from that alleged in the greater charged offense, a trial court is not required to give the proffered instruction and does not err in refusing to submit it. A defendant cannot alter the manner in which a criminal offense is charged by changing the criminal conduct when requesting a lesser because this risks confusing the jury. Here, the greater offense alleged Defendant was "shooting at" Victim, but the proposed lesser instruction said Defendant threw the gun on the ground. Thus, the proffered lesser impermissibly deviated from the greater offense. (2) When a Defendant's attorney admits in open court that Defendant is guilty of an offense, the Defendant waives the right to challenge sufficiency of evidence on that count. Here, defense counsel told jury Defendant is guilty of "resisting arrest," and since felony resisting was charged, this was an admission Defendant was guilty of felony resisting.

State v. Tate, 2024 WL 2712483 (Mo. App. E.D. May 28, 2024):
Holding: (1) Even though Defendant shot Victims in the leg and hand and they were taken to the hospital, where the only evidence presented of Victims' injuries was that they were shot in the leg and hand, were walking around after being shot, and a 1-page medical record showing they were shot, the evidence was insufficient to prove they suffered "serious physical injury", Sec. 565.050, to sustain first-degree assault as a Class A felony; the mere fact a victim was shot is insufficient to prove serious physical injury; and (2) even though the State admitted 150 pages of medical records (which would have shown serious physical injury), where the State "published" only one page of the records to the jury (which showed merely that Victims had a gunshot), appellate court cannot consider the other pages of medical records because only the "published" exhibits were before the jury.
Discussion: To uphold the Class A felony, the State seeks to rely on medical records which, although admitted into evidence, were not "published" to the jury. Admitting a piece of evidence is not the same as "publishing" such evidence. A jury is not permitted

to take all admitted evidence into the jury room. Instead, a jury may request to review evidence, and the court may decide whether to send it to the jury in its discretion. But, here, the jury didn't even request the full medical records. Since the State didn't "publish" the full records, those details weren't before the jury, and can't be considered on appeal. Evidence is insufficient to show "serious physical injury." But the evidence is sufficient to support first-degree assault as a Class B felony (without serious physical injury). Conviction entered for Class B felony and remanded for resentencing.

State v. Milazzo, 2024 WL 2712497 (Mo. App. W.D. May 28, 2024):
Even though Defendant-Driver refused to unlock his car's door so that Officers could arrest Defendant's Passenger, the evidence was insufficient to convict of interfering with an arrest, Sec. 575.150, because Defendant did not take any affirmative step to physically interfere with the arrest, had no duty to unlock the car door (which locked automatically), and Officers had a key to the car in any event.
Facts: Officers, who stopped Defendant's car at a checkpoint, sought to arrest Defendant's Passenger for not wearing a seat belt. Officers reached through the driver side window and took the keys to the car. Officers then asked Defendant-Driver to unlock the car doors but Defendant refused. Officers then broke through the passenger side window with a "window punch" and arrested Passenger. Defendant was convicted of interfering with an arrest.
Discussion: As relevant here, Defendant was charged with interfering with an arrest by "physical interference." There is little caselaw on what interfering with an arrest by physical interference means. Relying on the dictionary definitions, a person convicted of this offense must take an affirmative act such as physically restraining the officer, actively concealing the person being arrested, or placing a person between an officer's path or progression to impeded effecting an arrest. The State cites no authority that Defendant was required to take the affirmative step of unlocking the car door. The evidence was that Defendant's door locked automatically when the car was driven, and didn't unlock automatically when the car stopped. In any event, Officers here had the keys to the car and could have easily unlocked it. While Defendant's refusal to unlock the doors may have offended the Officers, it was insufficient to establish interfering with an arrest by physical interference.

*** Snyder v. U.S., 2024 WL 3165518, ___ U.S. ___ (U.S. June 26, 2024):**
Holding: 18 U.S.C. Sec. 666 prohibits public officials from accepting "bribes" (which are payments made or agreed to *before* an official act to influence that act) but does not prohibit them from accepting "gratuities" (payments made *after* an official act as a reward or token of appreciation).

*** Fischer v. U.S., 2024 WL 3208034, ___ U.S. ___ (U.S. June 28, 2024):**
Holding: 18 U.S.C. Sec.1512(c)(2), which criminalizes "otherwise" obstructing, influencing or impeding official proceedings, must be read in conjunction with and is limited by the preceding clause in 1512(c)(1), which criminalizes altering, destroying mutilating or concealing a record, document, or other object to impair the object's availability in an official proceeding; thus, the Gov't must prove that a defendant's actions impaired the availability of records, documents, objects or things used in an

official proceeding; the actions of "January 6" Defendant in entering Capitol did not fall within statute.

Sunshine Law

Hynes v. Mo. Dep't of Corr., 2024 WL 1724100 (Mo. App. W.D. April 23, 2024):
Holding: Even though the Sunshine Law authorizes governmental bodies to redact certain information from open records, Sunshine Law does not authorize governmental bodies to seek a protective order from a court regarding how a requester may use "open" records which are obtained via the Sunshine Law; protective orders are only applicable to discovery litigation.

Trial Procedure

State v. Colville, 687 S.W.3d 637 (Mo. banc April 30, 2024):
Holding: Where (1) Defendant was charged with involuntary manslaughter, Sec. 565.027, by acting with criminal negligence in failing to yield and use a turn signal, resulting in death of Victim and (2) trial court, on Motion to Dismiss, reviewed surveillance video of the accident, found there was no criminal negligence, and dismissed case with prejudice, trial court erred in doing this because the only issue trial court can review before trial is whether the charging document alleges the essential elements of the offense and apprises Defendant of the facts constituting the offense; trial court cannot look outside the four corners of the charging document.
Discussion: So long as the indictment puts Defendant on notice of the criminal nature and factual foundation of the crime charged, it should be adjudged sufficient. Whether Defendant's actions constituted criminal negligence is not capable of determination without a trial. In *State v. Metzinger*, 456 S.W.3d 84 (Mo. App. E.D. 2015), a trial court dismissed before trial a charge of making a terroristic threat, on grounds the defendant's speech was constitutionally protected and not a true threat. The Court of Appeals held the case could be dismissed before trial because it raised a constitutional question of law to be decided before trial. *Metzinger* doesn't apply to the current case, and "to the extent it suggests a circuit court always may consider evidence outside the charging document on a motion to dismiss, it should no longer be followed."

State v. Woolery, 687 S.W.3d 652 (Mo. banc April 30, 2024):
Holding: (1) Initial appearance (or initial appearance-arraignment when combined after an indictment) is not a "critical stage" at which a court must provide counsel for indigent persons, and (2) Rule 31.02(a) does not confer a duty on courts to do so.
Discussion: (1) The 6th Amendment requires a court to provide counsel at all "critical stages" of a criminal case. Critical stages are proceedings, whether formal or informal, that amount to "trial-like confrontations" and those that would "impair defense on the merits" if counsel isn't provided. An initial appearance or initial appearance-arraignment in Missouri doesn't involve "trial-like confrontation" or require assertion of any defense. Absent some prejudice to the accused, the absence of counsel at arraignment doesn't violate due process. Thus, initial appearance and initial appearance-arraignment are not a

critical stage. However, to avoid any concern that prejudice could arise from lack of counsel at arraignment, best practice would be to refrain from doing arraignment at the Rule 22.08 initial appearance, when a criminal felony is initiated by indictment. Then, arraignment could be delayed until after counsel is secured. (2) Rule 31.02(a) expressly states a defendant may be without counsel at his "first appearance." In such cases, the rule simply requires the court advise defendant of his right to have appointed counsel if he cannot afford to hire counsel. The rule doesn't require counsel *at* the initial appearance.

State v. Mills, 687 S.W.3d 668 (Mo. banc April 30, 2024):
Holding: A proceeding during which the trial court considers or determines conditions for pretrial release – whether during an initial appearance, arraignment, or separate bail review hearing under Rule 33.05 – is not a "critical stage" at which trial court must provide counsel for indigent persons.
Discussion: The 6th Amendment requires a court to provide counsel at all "critical stages" of a criminal case. Critical stages are proceedings, whether formal or informal, that amount to "trial-like confrontations" and those that would "impair defense on the merits" if counsel isn't provided. Consideration of pretrial release (bail) is not such a stage. Pretrial release proceedings don't involve presentation, confrontation or cross-exam of witnesses. Rule 33.07(a) makes the proceedings "informal and rules of evidence need not apply." Further, any pretrial release proceeding does not permanently fix a defendant's bail, and there can be multiple proceedings reviewing conditions of release after a defendant secures counsel.

Brock v. Shaikh, 2024 WL 2278777 (Mo. App. E.D. May 21, 2024):
Holding: Even though Missouri permits counsel to make an offer of proof in narrative form by summarizing prospective witness' testimony, the "preferred" and "proper" method of making an offer of proof is to put the witness on the stand and question them outside the presence of the jury; a narrative offer runs a greater risk of being found legally insufficient.