Case Law Update

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Editor's Note

September 30, 2024

Dear Readers:

This edition of *Case Law Update* contains all Missouri appellate opinions from July 1 through September 30, 2024, which resulted in reversals, or, in my opinion, were otherwise noteworthy.

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)

Kinsella v. State, 2024 WL 3763614 (Mo. App. E.D. Aug. 13, 2024):
Holding: (1) Even though the 29.15 motion court "identified" Movant's counsel as a Public Defender because Movant was indigent, where Public Defender had entered an appearance for Movant instead of being appointed, motion court erred in deeming amended motion timely under the abandonment doctrine since it applies only to "appointed" counsel and counsel's late-filed amended motion could not be considered; and (2) since the motion court did not rule on the *pro se* motion claims, there is no final judgment and appeal must be dismissed.

Smith v. State, 2024 WL 4127133 (Mo. App. E.D. Sept. 10, 2024):
Holding: (1) The version of Rule 29.15 (and 24.035) extending the time for filing an amended motion from 60 to 120 days (if extensions are timely granted by the motion court) became effective November 4, 2021, but (2) even though the Court of Appeals issued its mandate in Movant's direct appeal after November 4, 2021, where Movant had been sentenced in October 2020, the Rule in effect *at the time of sentencing* controls, so Movant's amended motion was untimely. Remanded for abandonment inquiry.

Beerbower v. State, 2024 WL 4262818 (Mo. App. S.D. Sept. 23, 2024):
Holding: Even though Public Defender counsel filed a affidavit saying the late-filed 29.15 amended motion was counsel's fault, where Public Defender had entered an appearance for Movant rather than be appointed, the motion court erred in deeming amended motion timely under abandonment doctrine because it applies only to "appointed" counsel; (2) a directive to the clerk to notify the Public Defender's Office of the filing of a 29.15 *pro se* motion is not an "appointment"; and (3) since the motion court did not rule on a claim in the *pro se* motion, the judgment is not final and appeal is dismissed.

Appellate Procedure

State ex rel. Bailey v. Sengheiser, 692 S.W.3d 20 (Mo. banc July 30, 2024):
Holding: Even though the circuit judge granted the county Prosecutor's motion to vacate conviction under Sec. 547.031, that judgment is not automatically stayed pending the Attorney General's appeal, but the circuit judge lacked authority to order the immediate release of the exonerated defendant because the vacation of the conviction meant that the original charges against the defendant were reinstated, and defendant will be retried unless the State chooses not to retry him.
Discussion: The first issue is whether the filing of an appeal by the Attorney General automatically stays the defendant's release. It does not. Proceedings under 547.031 are civil in nature. A civil judgment is operative from the date of its rendition, absent some Rule to the contrary. Rule 30.17 authorizes an automatic stay pending appeal where postconviction relief is granted under Rules 24.035 and 29.15, but no such Rule exists for 547.031. Thus, the judgment was effective immediately and wasn't automatically stayed.

However, that didn't mean defendant should be automatically released. 547.031 allows a court to vacate a conviction, but doesn't provide that the court can order immediate release. As with any vacated conviction, the original charges are reinstated. Typically, the circuit court will set a deadline by which the State must retry a defendant. The State can then retry the defendant, or dismiss the charges (at which time defendant will be released).

Pros. Atty. 21st Judicial Cir. ex rel. Williams v. State, 696 S.W.3d 85 (Mo. banc Sept. 23, 2024):

Holding: (1) Even though Williams was sentenced to death, Prosecutor's appeal of a denial of Prosecutor's Sec. 547.031 motion to vacate conviction does not invoke the Supreme Court's exclusive appellate jurisdiction under Art. V, Sec. 3, Mo.Const., but because Supreme Court can transfer a case before an opinion of the Court of Appeals due to a general interest or importance, Supreme Court has accepted jurisdiction on that basis; (2) appeal of a denial of a 574.031 motion does not automatically stay an execution date, and Williams must still satisfy the criteria for a stay of execution; (3) Prosecutor waived appellate review of his claim that there was *Batson* error at trial because Prosecutor failed to file a Rule 78.07(c) motion regarding the 547.031 court's failure to rule on this claim in its Findings; (4) even though Prosecutor claims 574.031 court erred in not applying spoilation doctrine to the DNA evidence because it was contaminated by the original trial prosecutor who touched the murder weapon in 2001 without wearing gloves, Prosecutor failed to show intentional mishandling of the evidence aimed at suppressing the truth; the fact that the protocols for handling evidence in 2024 differ from those in 2001 when trial occurred shows only that understanding of DNA transmission has changed, not intentional spoilation; and (5) even though Prosecutor attempts to "concede" error, Supreme Court has "repeatedly rejected" the State's attempt to concede questions of law; parties cannot stipulate to legal issues, and Supreme Court is not bound by Prosecutor's concessions; Sec. 547.031.4 reinforces notion that Supreme Court isn't bound by Prosecutor's concessions because statute allows Attorney General to intervene and oppose Prosecutor's motion.

State v. Creviston, 694 S.W.3d 630 (Mo. App. S.D. Aug. 6, 2024):

Holding: "Incorporation by reference" from one part of an appellate brief to another part is prohibited.

Johnson v. State, 696 S.W.3d 84 (Mo. App. S.D. Aug. 14, 2024):

Even though the plea court accepted Defendant-Movant's guilty plea to fourth-degree child molestation and sentenced him to four years under a statute which did not yet exist at the time of the charged conduct, that judgment was merely erroneous, not void, so the court had no authority to later set it aside more than 30 days later, and ultimately convict and sentence Defendant to 15 years under a different statute.

Facts: In July 2017, Defendant was charged with first-degree child molestation, Sec. 566.067, for offenses that occurred in 2010-2012. In August 2018, pursuant to a plea agreement, Defendant pleaded guilty to fourth-degree child molestation, Sec. 566.071 (a statute that was not in effect in 2010-12), and was sentenced to 4 years. The court orally

pronounced sentence, but a formal written judgment was never entered. In October 2018, the court ordered Defendant brought back to court for a "pending" matter. At that time, Defendant had *not* appealed or moved to set aside his guilty plea, and the court had *not* set the conviction aside pursuant to Rule 29.13. Nevertheless, the State filed an amended information charging Defendant with second-degree statutory sodomy under Sec. 566.064, and announced that Defendant had rejected a plea offer. Defendant announced he was "going to trial." Subsequently, Defendant filed numerous motions claiming the trial court had exhausted its authority when it first sentenced him to four years, and that the original judgment was merely erroneous, not void. In 2021, the trial court denied Defendant's motions, and ruled that the original guilty plea was defective, void and a nullity. The State subsequently filed additional sex charges. Movant ultimately pleaded guilty, but at sentencing, re-asserted that the original sentence was merely erroneous, not void, and the trial court had no authority to re-open the case. The trial court overruled the motion, and sentenced Defendant to 15 years with lifetime supervision. Defendant-Movant filed a 24.035 motion to challenge the new conviction and 15 years sentence, which was denied.

Holding: The court's oral pronouncement of sentence in 2018 was a final judgment. Even though the court sentenced Defendant under a statue which had not yet been adopted when the charged acts occurred, the trial court's error did not nullify or void the judgment, since the court had personal jurisdiction over the Defendant and subject matter jurisdiction over the case. The 2018 judgment was merely erroneous. The remedy for a merely erroneous judgment is direct appeal. The notion that in order to constitute a final judgment, the sentence not be contrary to law, is the concept of "jurisdictional competence" – which has been rejected by the Mo. Supreme Court. Rule 29.13 allows a court to set aside a conviction if the indictment or information doesn't charge an offense, or if the court lacks jurisdiction, but that must occur "within 30 days after entry of judgment." The Rule does not give the court authority to extend the 30-day deadline. Here, the court didn't set aside the plea within 30 days. The State next argues that Defendant's second guilty plea waived any defects. A guilty plea generally waives all non-jurisdictional defects. However, an exception exists where the court had *no power* to enter the conviction or sentence. A trial court has no power to enter a subsequent conviction or sentence when it has exhausted its jurisdiction in the case. This term "jurisdiction" is not to be confused with personal or subject matter jurisdiction. It means when a court loses the "power" to take further action in a case. A trial court loses the power to take action once it imposes sentence. Accordingly, any action taken after sentence is a nullity and void unless authorized by law. Here, the trial court exhausted its power when it imposed the 4 year sentence. It had no power to take further action. The 2021 judgment and sentence is vacated, and case remanded with directions to enter a written sentence and judgment of 4 years in accord with the 2018 plea.

In the Interest of P.S.A. v. C.R.A., 2024 WL 4100407 (Mo. App. S.D. Sept. 6, 2024):

Holding: Even though Appellant contended trial court erred in adopting the opposing party's proposed Findings verbatim as its judgment so that the trial court didn't exercise "independent judgment," this type of claim is that the form of the judgment is defective and must be raised in a post-trial motion under Rule 78.07(c) to be preserved for appeal.

State v. McKeown, 2024 WL 4197789 (Mo. App. S.D. Sept. 16, 2024):
Even though (1) the 2018 version of the Armed Criminal Action statute, Sec. 571.015.1, applied to Defendant's case because that was when her offense occurred, and (2) that statute did not require consecutive sentences, where defense counsel argued for a minimum sentence of three years and agreed with the trial judge that it should be consecutive to Defendant's other sentence, Defendant's affirmative agreement to the sentence waived plain error review of whether the sentence was required to be consecutive.
Facts: The State argued for a 10-year sentence. Defense counsel argued for a minimum three-year sentence. The court then asked defense counsel if he "agree[d]" that the sentence had to run consecutively. He said, "I understand," indicating agreement. The court then imposed the requested three-year sentence.
Holding: Defendant contends the trial court plainly erred in believing that consecutive sentences were required under the 2018 version of the statute. Although Defendant is correct that the 2018 version didn't require consecutive sentences, where a defendant accepts and agrees to what the trial court proposes, any claim of error is waived, including plain error. Here, Defendant cannot strategically ask the trial court for a 3-year sentence and then turn around and ask the appellate court to hold that the trial court plainly erred in doing what Defendant asked.

State v. Moore, 2024 WL 4314966 (Mo. App. S.D. Sept. 27, 2024):
Holding: Where the trial court dismissed charges against Defendant by finding that his conduct wasn't covered by the relevant statute, the State was required to file a Notice of Appeal within five days of the trial court's order, Sec. 547.200.4, and failure to do so renders the Notice untimely. Appeal dismissed.
Discussion: 547.200.1(3) provides that an appeal may be taken by the State from any order which has the effect of suppressing evidence. However, 547.200.4 directs that Notices of Appeal must be filed within five days of the trial court's order. Here, the State filed its Notice even days after. The timely filing of a Notice of Appeal is jurisdictional, and failure to file on time requires appellate court to dismiss appeal.

In the Interest of D.L.C. v. Juvenile Officer, 2024 WL 3942219 (Mo. App. W.D. Aug. 27, 2024):
Holding: Where Appellant's Point Relied On contended that counsel was ineffective without stating how counsel was ineffective or explaining the legal reasoning, the Point failed to comply with Rule 84.04, which requires Points state the legal reason for the claim of error, and explain why, in the context of the case, those legal reasons support the claim of error.

Civil Procedure

In the Interest of P.S.A. v. C.R.A., 2024 WL 4100407 (Mo. App. S.D. Sept. 6, 2024):
Holding: Even though Appellant contended trial court erred in adopting the opposing party's proposed Findings verbatim as its judgment so that the trial court didn't exercise "independent judgment," this type of claim is that the form of the judgment is defective and must be raised in a post-trial motion under Rule 78.07(c) to be preserved for appeal.

Civil Rights

Cady v. City of Malden, 694 S.W.3d 616 (Mo. App. S.D. July 17, 2024):
Holding: Where inmate's family sued Jail Officers for negligently failing to watch inmate who committed suicide in the jail, Jail Officers were entitled to official immunity because watching an inmate involves discretionary decision making and is not "ministerial"; tasks that can be completed partially or through different methods are not "ministerial"; Officers have official immunity for discretionary acts.

Costs

Ramirez v. Mo. Pros. Atty's and Circ. Atty's Retirement Sys., 694 S.W.3d 432 (Mo. banc July 9, 2024):
Holding: Even though Petitioner claimed that the court costs he had been charged as a result of his guilty plea (which included charges for seven state statutory funds, including the DNA analysis fund, brain injury fund, independent living center fund, motorcycle safety fund, Office of Prosecution Services fund, spinal cord injury fund, and crime victim's compensation fund) violated Art. I, Sec. 14 Mo. Const., which provides that the courts shall be open to everyone and justice shall be administered without sale, his suit was properly dismissed on sovereign immunity grounds.

Counsel – Right To – Conflict of Interest

State v. Thompson, 2024 WL 4018668 (Mo. App. E.D. Sept. 3, 2024):
Holding: Even though trial court did not provide counsel for Defendant at his preliminary hearing, where Defendant was later convicted at trial of only a misdemeanor, appellate court need not decide if a preliminary hearing is a "critical stage" which requires counsel under Sixth Amendment, and Defendant cannot demonstrate prejudice sufficient to warrant reversal of conviction.
Discussion: Whether a preliminary hearing is a critical stage of criminal proceedings in Missouri is an "open question." We do not decide that question here. But even assuming it is a critical stage, Defendant here cannot show prejudice. Since he was ultimately

acquitted at trial of the felony charge, his claim he was denied his right to counsel at the preliminary hearing is theoretical at best. To demonstrate prejudice, Defendant must show that something that happened at the preliminary hearing affected the fairness of his trial. Defendant claims that if he had counsel at this preliminary hearing, the charge might have been dismissed. But this claim of prejudice is highly speculative and not a basis for reversing his misdemeanor conviction.

State v. Shields, 696 S.W.3d 469 (Mo. App. S.D. Aug. 14, 2024):
Holding: (1) Where Defendant absconded for one year after the guilt phase of his trial, his direct appeal claims of error at trial are barred by the escape rule, but his claims of error at the later sentencing hearing are not barred because those arose after he was arrested (post-capture), and (2) even though Defendant "fired" his sentencing counsel at sentencing because Defendant believed he had a conflict of interest since Defendant had filed a lawsuit against him, where Defendant expressly said he wasn't waiving his right to counsel, requested appointment of alternate counsel, and said sentencing should not occur without counsel, Defendant did not make a valid waiver of counsel. Remanded for new sentencing hearing.
Discussion: In order to pass constitutional muster, a waiver of counsel must be unequivocal. Here, Defendant affirmatively told the sentencing court he was not waiving his right to counsel, and requested alternative counsel. The State argues Defendant implicitly waived counsel by creating the alleged conflict to cause delay. But in the implicit waiver cases, the trial courts either gave the defendants the option to have court-appointed counsel, or the option to proceed *pro se* after a *Faretta* hearing. That didn't happen here.

State v. Smith, 2024 WL 4249547 (Mo. App. S.D. Sept. 20, 2024):
Holding: Even though (1) Defendant's retained counsel withdrew because Defendant was unable to continue to pay her, and (2) the trial court had found Defendant ineligible for a public defender because he posted too high a bond, trial court plainly erred in finding that Defendant knowingly and voluntarily waived counsel because Defendant was never informed by the trial court of the maximum punishment for the offense, either in the written waiver he signed or at the *Faretta* hearing.
Discussion: Sec. 600.051 requires a written waiver of counsel include very specific content, including the maximum punishment. Because 600.051 protects a fundamental constitutional right, violation of the statute is evident, obvious and clear error. A violation of the right to counsel constitutes manifest injustice because the right is structural error and infects the entire trial. Because the State bears of the burden to prove an unrepresented defendant waived counsel, the State must prove compliance with 600.051 and that a defendant was afforded a *Faretta* hearing. Conviction vacated and remanded for new trial.

State v. Moore, 694 S.W.3d 79 (Mo. App. W.D. July 30, 2024):
Holding: Where (1) former Public Defender appeared for Defendant at two court appearances while a Public Defender, and (2) subsequently Public Defender joined the Prosecutor's Office and participated in prosecution of Defendant in the case, trial court abused its discretion in not disqualifying former Public Defender and entire Prosecutor's Office from case.
Discussion: The defendant's motion to disqualify the Prosecutor's Office set forth sufficient legal grounds and factual allegations to apprise the court of a potential conflict of interest and appearance of impropriety that necessitated further inquiry by the court. Rule 4-1.9 states that a lawyer who has previously represented someone in a matter shall not thereafter represent another person in a related matter in which the former client's interests are adverse. The Rule's Comment indicates that the burden rests upon the firm (Office) sought be disqualified to show that the attorney wasn't privy to confidential information warranting disqualification. Sec. 56.110 provides that if a prosecutor has been previously employed in any case where their duties would conflict with prosecution duties, the court may appoint another prosecutor. In general, where two matters in question have such a close temporal proximity and similarity in subject matter, the appearance of impropriety is inherent, and requires disqualification. To avoid disqualification, the Prosecutor's Office could have implemented screening measures to screen former Public Defender from defendant's case. The Prosecutor's Office would need to show adequate screening to rebut the presumption of prejudice arising from an appearance of impropriety. If screening had been put in place, the entire Prosecutor's Office would not have been disqualified. Reversed and remanded for new trial with directions to appoint a special prosecutor pursuant to Sec. 56.110.

Death Penalty

State v. Williams, 2024 WL 3402597 (Mo. banc July 12, 2024):
Holding: Even though the local Prosecutor filed a motion to vacate Defendant's first-degree murder conviction under Sec. 547.031 (which authorizes a Prosecutor to file a motion to vacate when a person may be innocent or erroneously convicted), such motion is not a "state postconviction motion" preventing the Supreme Court from setting an execution date pursuant to Rule 30.03(c); the proper remedy to stop an execution is to file a Motion to Stay, which must meet equitable requirements.
Discussion: Rule 30.03(c) states that Supreme Court cannot set an execution date before final review of "*the defendant's* direct appeal, state postconviction motion, and federal habeas corpus." The plain language of the Rule applies only to "the defendant's" postconviction motion (under Rules 24.035 or 29.15), not a postconviction motion by the State. Thus, Court is authorized to set execution date even though a Sec. 547.031 proceeding is pending. A Motion to Stay may then be filed to try to stop the execution.

Pros. Atty. 21st Judicial Cir. ex rel. Williams v. State, 696 S.W.3d 85 (Mo. banc Sept. 23, 2024):

Holding: (1) Even though Williams was sentenced to death, Prosecutor's appeal of a denial of Prosecutor's Sec. 547.031 motion to vacate conviction does not invoke the Supreme Court's exclusive appellate jurisdiction under Art. V, Sec. 3, Mo.Const., but because Supreme Court can transfer a case before an opinion of the Court of Appeals due to a general interest or importance, Supreme Court has accepted jurisdiction on that basis; (2) appeal of a denial of a 574.031 motion does not automatically stay an execution date, and Williams must still satisfy the criteria for a stay of execution; (3) Prosecutor waived appellate review of his claim that there was *Batson* error at trial because Prosecutor failed to file a Rule 78.07(c) motion regarding the 547.031 court's failure to rule on this claim in its Findings; (4) even though Prosecutor claims 574.031 court erred in not applying spoilation doctrine to the DNA evidence because it was contaminated by the original trial prosecutor who touched the murder weapon in 2001 without wearing gloves, Prosecutor failed to show intentional mishandling of the evidence aimed at suppressing the truth; the fact that the protocols for handling evidence in 2024 differ from those in 2001 when trial occurred shows only that understanding of DNA transmission has changed, not intentional spoilation; and (5) even though Prosecutor attempts to "concede" error, Supreme Court has "repeatedly rejected" the State's attempt to concede questions of law; parties cannot stipulate to legal issues, and Supreme Court is not bound by Prosecutor's concessions; Sec. 547.031.4 reinforces notion that Supreme Court isn't bound by Prosecutor's concessions because statute allows Attorney General to intervene and oppose Prosecutor's motion.

Double Jeopardy

State v. Heathcock, 2024 WL 3418069 (Mo. App. E.D. July 16, 2024), transferred to Supreme Court (Oct. 1, 2024):

(1) Where Defendant was convicted of first-degree tampering, Sec. 569.080, in Montgomery County, the subsequent prosecution of Defendant in Warren County for tampering with the same car, on the same date, with the same victim violated Double Jeopardy because it subjected him to multiple punishments for the same offense, even though Defendant had briefly parked the car in Warren County, and then drove away again; (2) even if appellate court assumes that a defendant could form a separate mens rea in Warren County and thus a separate offense, the State's evidence didn't show that because it consisted solely of Defendant's statement that he had briefly parked in Warren County before driving again, which didn't prove the corpus delicti of a separate offense.

Facts: Defendant stole his girlfriend's car in Montgomery County and drove it to Warren County. Upon arrest in Warren County, Defendant told police he had parked the car at a Wal-Mart in Warren County for a brief time, and then drove away again. Defendant pleaded guilty to tampering in Montgomery County and was sentenced to three years. Meanwhile, Warren County charged Defendant with tampering with the same car and victim on the same date. Defendant moved pretrial to dismiss the Warren County charge on grounds of Double Jeopardy, which was overruled.

Holding: (1) The State contends that because Defendant briefly parked in Warren County before driving away again, there are two separate offenses. Sec. 556.041 provides that a person cannot be convicted of more than one offense if one offense is included in the other, or the offense is defined as a continuing course of conduct and the person's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses. Critical to whether the two prosecutions are for the same offense is whether they consist of the same elements. Although the State argues that it was prosecuting Defendant only for events that took place in Warren County, venue is not an element of first-degree tampering. Nowhere in 569.080 is the location of the offense listed as an element. The Montgomery charge and Warren charges had identical elements. The same elements test indicates that Defendant's right to be free from Double Jeopardy was violated. Defendant argues his conduct was also a continuing course of conduct. The appellate court doesn't reach that issue, however, because it finds that, under 589.080.1(2), the allowable unit of prosecution is tampering with "an automobile," which means one, single automobile. The unit-of-prosecution issue is one of first impression. Use of "an automobile" in the statute indicates legislative intent that it is "a" (one) automobile. Nothing in the statute can be interpreted to divide such conduct into different acts or to create separate *mens rea* based solely on the time or place of operation, such as the number of counties in which a person operates the car, or the number of hours that lapse. Thus, the legislature did not intend cumulative punishments for tampering with a car, and Defendant's two sentences for this same offense violated Double Jeopardy. (2) Even if appellate court assumes that a separate offense could occur in Warren County, the State didn't prove a separate offense here because of the *corpus delicti* rule. The only evidence that Defendant parked the car, and then drove away again, was Defendant's statement to police. A defendant's confession not made in open court, uncorroborated by circumstances and without proof from another source that a crime was committed will not support a conviction. The State failed to prove the *corpus delicti* of the charged crime in Warren County.

DWI

State v. Schwarz, 2024 WL 4280640 (Mo. App. W.D. Sept. 24, 2024):
Holding: Even though the 12-step Drug Recognition Expert protocol was not performed on Defendant after DWI stop and even though the DRE (Expert) based his opinions only on the arresting Officers' reports and observations of Defendant, where Expert only gave "generalized" testimony about the effects of gasoline intoxication on Defendant (which State claimed he was inhaling), a different "reliability" analysis than contained in 490.065.2 is required, and as long as Expert's testimony rests upon good grounds based on what is known, the testimony should be tested by cross-examination rather than excluded by the trial court.
Discussion: Defendant claims Expert's testimony should be excluded under 490.065.2 because it wasn't based on sufficient facts or data, wasn't the product of reliable principles and methods, and the Expert hadn't reliably applied the principles to the facts of the case. Defendant claims Expert's testimony didn't meet these standards because the

12-step DRE protocol wasn't performed, and Expert based his opinions only upon the observations and reports of arresting Officers. However, generalized testimony about the intoxicating inhalants' effects was admissible. Where an expert offers non-scientific generalized testimony based on specialized knowledge rather than on strictly "scientific" knowledge, a different reliability analysis is appropriate. If the expert purports to apply principles and methods to the facts of the case, it is important that this application be reliable. But in some cases, the expert can educate the factfinder about general principles without ever attempting to apply these principles to the specific facts of the case. As long as the expert's testimony rests upon good grounds based upon what is known, it should be tested through cross-examination and not excluded. Here, Expert gave general testimony about the effects of gasoline as an inhalant, such as confusion, disorientation, lack of muscle control. These effects were observed by Officers at the scene.

Editor's Note: An extensive dissenting opinion citing cases from other states argues the Expert's testimony should have been excluded because the 12-step DRE protocol wasn't completed by either the Expert or the arresting officers; there are no cases elsewhere allowing such testimony without the 12-step DRE. The dissent would also hold that the trial court erred in excluding Defendant's statements to police that he had mental health problems (bipolar and schizophrenia, which would have offered an alternative explanation for Defendant's behavior other than intoxication by inhalants) because the DRE protocol itself says medical impairments have to be ruled out, and Defendant's statement wasn't "hearsay" because it could be admitted to show Officers' subsequent conduct. Whether Defendant, in fact, had mental illness was "beside the point." The fact that Defendant told Officers this "should have had some bearing on their subsequent actions and should have at least been considered when they determined [he] was impaired due to inhaling gasoline."

Escape Rule

State v. Shields, 696 S.W.3d 469 (Mo. App. S.D. Aug. 14, 2024):
Holding: Where Defendant absconded for one year after the guilt phase of his trial, his direct appeal claims of error at trial are barred by the escape rule, but his claims of error at the later sentencing hearing are not barred because those arose after he was arrested (post-capture).

Evidence

Midwest Neurosurgeorns L.L.C. v. Cain, 693 S.W.3d 146 (Mo. App. E.D. July 2, 2024):
Holding: For business records to be admitted pursuant to Sec. 490.692, they must be attached to the records custodian affidavit; where no records are attached, a proper foundation for admission is not made.

Frost v. PCRMC Medical Group, 694 S.W.3d 103 (Mo. App. W.D. July 10, 2024):
Holding: Trial court did not abuse its discretion in admitting CDC and Ohio State Health Guidelines, on which an Expert Witness relied, because Sec. 490.065.2(2) provides that "if the facts or data [on which Expert relied] would otherwise be inadmissible, the proponent of the opinion *may disclose them to the jury* only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect," and here, defendant did not argue that the prejudicial effect of the Guidelines outweighed their probative value.

Experts

Moore v. Monsanto Co., 2024 WL 4018871 (Mo. App. E.D. Sept. 3, 2024):
Holding: Even though Doctor was an expert in cancer treatment, trial court did not abuse discretion in excluding him from testifying as to causation (whether exposure to Roundup caused cancer), because Sec. 490.065.2 permits an expert to testify only within his area of expertise, and Expert's opinions were largely based only on articles which plaintiff's counsel had given Expert to review.
Discussion: 490.065.2 allows an expert to testify to opinions if they are qualified to do so, and the opinion offered is within the expert's area of expertise. Medical professionals are not permitted to opine on all things medical just because they are medical professionals. Like other experts, they must be qualified by knowledge, skill, experience, training or education. Here, Expert-Doctor acknowledged he only began to examine causation at the request of plaintiff's counsel. Expert was not an expert in epidemiology, biostatistics, genetics, genotoxicity or animal bioassays, yet he was asked by plaintiff's counsel to review studies from all these fields. Many of the studies were provided to him by plaintiff's counsel. Expert did little more than summarize the studies that were helpful to plaintiff's position. In short, although Expert may be an expert in treatment of cancer, his deposition testimony leaves this Court with significant doubts about his status as an expert in causation.

Frost v. PCRMC Medical Group, 694 S.W.3d 103 (Mo. App. W.D. July 10, 2024):
Holding: Trial court did not abuse its discretion in admitting CDC and Ohio State Health Guidelines, on which an Expert Witness relied, because Sec. 490.065.2(2) provides that "if the facts or data [on which Expert relied] would otherwise be inadmissible, the proponent of the opinion *may disclose them to the jury* only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect," and here, defendant did not argue that the prejudicial effect of the Guidelines outweighed their probative value.

State v. Schwarz, 2024 WL 4280640 (Mo. App. W.D. Sept. 24, 2024):
Holding: Even though the 12-step Drug Recognition Expert protocol was not performed on Defendant after DWI stop and even though the DRE (Expert) based his opinions only on the arresting Officers' reports and observations of Defendant, where Expert only gave "generalized" testimony about the effects of gasoline intoxication on Defendant (which State claimed he was inhaling), a different "reliability" analysis than contained in

490.065.2 is required, and as long as Expert's testimony rests upon good grounds based on what is known, the testimony should be tested by cross-examination rather than excluded by the trial court.

Discussion: Defendant claims Expert's testimony should be excluded under 490.065.2 because it wasn't based on sufficient facts or data, wasn't the product of reliable principles and methods, and the Expert hadn't reliably applied the principles to the facts of the case. Defendant claims Expert's testimony didn't meet these standards because the 12-step DRE protocol wasn't performed, and Expert based his opinions only upon the observations and reports of arresting Officers. However, generalized testimony about the intoxicating inhalants' effects was admissible. Where an expert offers non-scientific generalized testimony based on specialized knowledge rather than on strictly "scientific" knowledge, a different reliability analysis is appropriate. If the expert purports to apply principles and methods to the facts of the case, it is important that this application be reliable. But in some cases, the expert can educate the factfinder about general principles without ever attempting to apply these principles to the specific facts of the case. As long as the expert's testimony rests upon good grounds based upon what is known, it should be tested through cross-examination and not excluded. Here, Expert gave general testimony about the effects of gasoline as an inhalant, such as confusion, disorientation, lack of muscle control. These effects were observed by Officers at the scene.

Editor's Note: An extensive dissenting opinion citing cases from other states argues the Expert's testimony should have been excluded because the 12-step DRE protocol wasn't completed by either the Expert or the arresting officers; there are no cases elsewhere allowing such testimony without the 12-step DRE. The dissent would also hold that the trial court erred in excluding Defendant's statements to police that he had mental health problems (bipolar and schizophrenia, which would have offered an alternative explanation for Defendant's behavior other than intoxication by inhalants) because the DRE protocol itself says medical impairments have to be ruled out, and Defendant's statement wasn't "hearsay" because it could be admitted to show Officers' subsequent conduct. Whether Defendant, in fact, had mental illness was "beside the point." The fact that Defendant told Officers this "should have had some bearing on their subsequent actions and should have at least been considered when they determined [he] was impaired due to inhaling gasoline."

Expungement

D.K.R. v. Mo. State Hwy. Patrol Crim. Justice Info. Serv., 694 S.W.3d 621 (Mo. App. S.D. July 25, 2024):

Even though the assault statute under which Petitioner was convicted was later repealed, Petitioner was not eligible for expungement of the assault conviction because the plain language of Sec. 610.140.2(5) precludes expungement of "any felony offense of assault."

Facts: In 2006, Petitioner pleaded guilty to the Class D felony of assault on school property, an offense that was repealed in 2017. In 2022, she sought to expunge the conviction.

Holding: Sec. 610.140.2(5) precludes "any felony offense of assault" from eligibility for expungement. The clear language means any and all felony offenses of assault. Even though the assault-on-school-property statute was later repealed, under Sec. 1.160, repeal of a statute does not affect adjudications in which final judgement was entered before the statute was repealed.

D.B. v. Mo. Hwy. Patrol Crim. Justice Info. Serv., 2024 WL 334622 (Mo. App. W.D. July 9, 2024):

Holding: Even though Petitioner claimed his two felony convictions for distributing or manufacturing drugs, which resulted from incidents and arrests on April 26, 2004 and July 2, 2004, were related because he was addicted to drugs and needed money during this time period, the two convictions were not part of the "same course of conduct," so Defendant could only expunge one of them under Sec. 610.140.12 (2016), which limited expungements to only one felony conviction in a lifetime.

Discussion: 610.140.12(2) (2016) limited expungements to one felony conviction in a lifetime unless the offenses were charged in the same indictment or information, or were part of the "same course of criminal conduct." The phrase "same course of conduct" is not defined in the statute. However, the plain meaning is that the course taken by Petitioner must be the same course, not two or more courses between which events of non-criminal conduct occurred. This requires focusing on Petitioner's actions leading up to the charges, and whether there was evidence of intervening non-criminal conduct between the events. Here, Petitioner spent 25 days in jail between the two arrests, and also there was more than two months between events. This showed a discontinuance of the course of conduct, so the two offenses can't be the "same course." Petitioner is entitled to expunge only one of the convictions, and is permitted to choose which one.

Editor's Note: 610.140.13 (2025), effective January 1, 2025, permits *two* felony convictions to be expunged in a lifetime.

R.M.S. v. Lafayette Cnty. Pros. Atty., 696 S.W.3d 401 (Mo. App. W.D. Aug. 20, 2024):

Holding: Petitioner, who had pleaded guilty in 2017 to possession of a 2-ounce cream containing THC and a 1-ounce bottle of "Re-leaf" brand "THC laced liquid", was eligible for expungement under Mo.Const. Art. XIV, Sec. 2 ("Amendment 3"), because the Amendment defines marijuana as any "resin extracted from the marijuana plant and marijuana infused products", and there was no evidence at Petitioner's guilty plea that the substances he possessed were "synthetic."

Discussion: At the time Petitioner pleaded guilty, possession of THC was considered a separate offense from possession of marijuana. But Amendment 3 enacted a different definition of marijuana. The Amendment legalized marijuana-infused products that "are infused, dipped, coated, sprayed or mixed with marijuana *or an extract thereof*, including, but not limited to, products that are able to be vaporized or smoked, edible products, ingestible products, topical products, suppositories, and infused prerolls." The State argues that only naturally occurring THC is legal and that "synthetic" THC is not, and that Petitioner can't prove he didn't have "synthetic" THC. But Petitioner was not charged with possession "synthetic" THC. The probable cause statement and Petitioner's admissions at his guilty plea show only that the substance was THC, with no mention of

"synthetic" THC. This establishes that he did not plead guilty to possession of "synthetic" THC. Judgment denying expungement reversed.

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

Trapp v. State, 2024 WL 3942141 (Mo. App. E.D. Aug. 27, 2024):
Holding: (1) Even though motion court dismissed 24.035 motion for failure to prosecute, it erred in not issuing Findings of Fact and Conclusions of Law on amended motion claims because Rule 24.035(j) requires Findings even in the absence of a hearing; and (2) where Movant alleged his *pro se* motion was untimely due to active third-party interference of jail and DOC officials who moved Movant to a different jail days before his *pro se* motion was due and Movant wasn't able to file from the new jail, motion court erred in not issuing Findings on this claim.
Discussion: Regarding timeliness of the *pro se* motion, Movant has alleged a third-party inference claim which could potentially be cause to deem his *pro se* motion timely. Although Movant's claim may be exceedingly difficult to prove, the motion court must determine the validity of this claim in the first instance by determining whether it warrants a hearing, and issuing Findings regarding the claim. The Findings may dismiss the motion as untimely, or may deem the motion timely, and then proceed to determine if the amended motion claims warrant a hearing, and issue Findings on their merits either with or without a hearing.

In the Interest of P.S.A. v. C.R.A., 2024 WL 4100407 (Mo. App. S.D. Sept. 6, 2024):
Holding: Even though Appellant contended trial court erred in adopting the opposing party's proposed Findings verbatim as its judgment so that the trial court didn't exercise "independent judgment," this type of claim is that the form of the judgment is defective and must be raised in a post-trial motion under Rule 78.07(c) to be preserved for appeal.

Guilty Plea

State v. Homan, 2024 WL 4271505 (Mo. App. E.D. Sept. 24, 2024):
Holding: In case of first impression, even though Defendant, who entered an "*Alford* plea", claimed the plea court should not have been able to consider "lack of remorse" under the such circumstances in imposing sentence, cases from other jurisdictions hold that a court can consider lack of remorse even in an "*Alford* plea," so trial court didn't err in considering it.

Editor's Note: Case is notable because it's a direct appeal from a guilty plea raising several alleged errors regarding sentencing, including denying a continuance for the sentencing hearing, sentencing Defendant on basis of unproven allegations, and proportionality of the sentence. Although the appellate court doesn't discuss the procedural posture of the case, the case, by implication, may expand the range of issues that can be raised on direct appeal from a guilty plea.

Indictment and Information

Johnson v. State, 696 S.W.3d 84 (Mo. App. S.D. Aug. 14, 2024):
Even though the plea court accepted Defendant-Movant's guilty plea to fourth-degree child molestation and sentenced him to four years under a statute which did not yet exist at the time of the charged conduct, that judgment was merely erroneous, not void, so the court had no authority to later set it aside more than 30 days later, and ultimately convict and sentence Defendant to 15 years under a different statute.
Facts: In July 2017, Defendant was charged with first-degree child molestation, Sec. 566.067, for offenses that occurred in 2010-2012. In August 2018, pursuant to a plea agreement, Defendant pleaded guilty to fourth-degree child molestation, Sec. 566.071 (a statute that was not in effect in 2010-12), and was sentenced to 4 years. The court orally pronounced sentence, but a formal written judgment was never entered. In October 2018, the court ordered Defendant brought back to court for a "pending" matter. At that time, Defendant had *not* appealed or moved to set aside his guilty plea, and the court had *not* set the conviction aside pursuant to Rule 29.13. Nevertheless, the State filed an amended information charging Defendant with second-degree statutory sodomy under Sec. 566.064, and announced that Defendant had rejected a plea offer. Defendant announced he was "going to trial." Subsequently, Defendant filed numerous motions claiming the trial court had exhausted its authority when it first sentenced him to four years, and that the original judgment was merely erroneous, not void. In 2021, the trial court denied Defendant's motions, and ruled that the original guilty plea was defective, void and a nullity. The State subsequently filed additional sex charges. Movant ultimately pleaded guilty, but at sentencing, re-asserted that the original sentence was merely erroneous, not void, and the trial court had no authority to re-open the case. The trial court overruled the motion, and sentenced Defendant to 15 years with lifetime supervision. Defendant-Movant filed a 24.035 motion to challenge the new conviction and 15 years sentence, which was denied.
Holding: The court's oral pronouncement of sentence in 2018 was a final judgment. Even though the court sentenced Defendant under a statue which had not yet been adopted when the charged acts occurred, the trial court's error did not nullify or void the judgment, since the court had personal jurisdiction over the Defendant and subject matter jurisdiction over the case. The 2018 judgment was merely erroneous. The remedy for a merely erroneous judgment is direct appeal. The notion that in order to constitute a final judgment, the sentence not be contrary to law, is the concept of "jurisdictional competence" – which has been rejected by the Mo. Supreme Court. Rule 29.13 allows a court to set aside a conviction if the indictment or information doesn't charge an offense, or if the court lacks jurisdiction, but that must occur "within 30 days after entry of judgment." The Rule does not give the court authority to extend the 30-day deadline. Here, the court didn't set aside the plea within 30 days. The State next argues that Defendant's second guilty plea waived any defects. A guilty plea generally waives all non-jurisdictional defects. However, an exception exists where the court had *no power* to enter the conviction or sentence. A trial court has no power to enter a subsequent conviction or sentence when it has exhausted its jurisdiction in the case. This term "jurisdiction" is not to be confused with personal or subject matter jurisdiction. It means when a court loses the "power" to take further action in a case. A trial court loses the

power to take action once it imposes sentence. Accordingly, any action taken after sentence is a nullity and void unless authorized by law. Here, the trial court exhausted its power when it imposed the 4 year sentence. It had no power to take further action. The 2021 judgment and sentence is vacated, and case remanded with directions to enter a written sentence and judgment of 4 years in accord with the 2018 plea.

State v. Smith, 2024 WL 2964008 (Mo. App. S.D. Aug. 28, 2024):
Holding: Even though Defendant called 911 to report he couldn't breathe, where (1) by the time emergency personnel and police arrived, Defendant had recovered; (2) Defendant asked police if they could give him a ride; (3) police asked if they could search Defendant before doing so; and (4) Defendant consented to search and police found drugs on him, Defendant was not immune from prosecution under "Good Samaritan" law, Sec. 195.202, because the drugs were not found "as a result" of his seeking medical attention since there was a break in the causal chain between his request for medical assistance and his consent to search.
Discussion: This is a case of first impression. The Good Samaritan statute provides immunity from prosecution if the drug evidence "was gained as a result of seeking or obtaining medical assistance." Defendant argues the statute encompasses a broad "but for" causation test that covers any event that would not have occurred "but for" Defendant calling for help. However, the statute is not that broad. For immunity to apply, the statute requires a defendant to show that seeking or obtaining medical assistance *caused* the evidence to be discovered. Other jurisdictions have held similar statutes don't apply when there's been a break in the causal chain between the call for medical help and the discovery of evidence. Here, the evidence was found not because Defendant called for medical assistance, but because Defendant consented to a search after asking police for a ride.

Ineffective Assistance of Counsel

Miller-Kirkland v. State, 2024 WL 4206201 (Mo. App. W.D. Sept. 17, 2024):
Holding: (1) Trial counsel's performance was ineffective in failing to object to submission of MAI-410.50 which stated that "an intoxicated or drugged condition" will not relieve a defendant of responsibility for their conduct, because there was no evidence Defendant was in a "drugged condition" so that portion should not have been submitted, but (2) even though in deciding prejudice the motion court erred in applying the plain error (manifest injustice / outcome determinative) standard instead of the "somewhat lower" *Strickland* standard of reasonable probability of a different outcome, where, during trial, jurors were told to disregard a witness' answer referring to drugs, appellate court presumes jurors followed that instruction to disregard and holds that Defendant-Movant has not shown prejudice.

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

Johnson v. State, 696 S.W.3d 84 (Mo. App. S.D. Aug. 14, 2024):
Even though the plea court accepted Defendant-Movant's guilty plea to fourth-degree child molestation and sentenced him to four years under a statute which did not yet exist at the time of the charged conduct, that judgment was merely erroneous, not void, so the court had no authority to later set it aside more than 30 days later, and ultimately convict and sentence Defendant to 15 years under a different statute.
Facts: In July 2017, Defendant was charged with first-degree child molestation, Sec. 566.067, for offenses that occurred in 2010-2012. In August 2018, pursuant to a plea agreement, Defendant pleaded guilty to fourth-degree child molestation, Sec. 566.071 (a statute that was not in effect in 2010-12), and was sentenced to 4 years. The court orally pronounced sentence, but a formal written judgment was never entered. In October 2018, the court ordered Defendant brought back to court for a "pending" matter. At that time, Defendant had *not* appealed or moved to set aside his guilty plea, and the court had *not* set the conviction aside pursuant to Rule 29.13. Nevertheless, the State filed an amended information charging Defendant with second-degree statutory sodomy under Sec. 566.064, and announced that Defendant had rejected a plea offer. Defendant announced he was "going to trial." Subsequently, Defendant filed numerous motions claiming the trial court had exhausted its authority when it first sentenced him to four years, and that the original judgment was merely erroneous, not void. In 2021, the trial court denied Defendant's motions, and ruled that the original guilty plea was defective, void and a nullity. The State subsequently filed additional sex charges. Movant ultimately pleaded guilty, but at sentencing, re-asserted that the original sentence was merely erroneous, not void, and the trial court had no authority to re-open the case. The trial court overruled the motion, and sentenced Defendant to 15 years with lifetime supervision. Defendant-Movant filed a 24.035 motion to challenge the new conviction and 15 years sentence, which was denied.
Holding: The court's oral pronouncement of sentence in 2018 was a final judgment. Even though the court sentenced Defendant under a statue which had not yet been adopted when the charged acts occurred, the trial court's error did not nullify or void the judgment, since the court had personal jurisdiction over the Defendant and subject matter jurisdiction over the case. The 2018 judgment was merely erroneous. The remedy for a merely erroneous judgment is direct appeal. The notion that in order to constitute a final judgment, the sentence not be contrary to law, is the concept of "jurisdictional competence" – which has been rejected by the Mo. Supreme Court. Rule 29.13 allows a court to set aside a conviction if the indictment or information doesn't charge an offense, or if the court lacks jurisdiction, but that must occur "within 30 days after entry of judgment." The Rule does not give the court authority to extend the 30-day deadline. Here, the court didn't set aside the plea within 30 days. The State next argues that Defendant's second guilty plea waived any defects. A guilty plea generally waives all non-jurisdictional defects. However, an exception exists where the court had *no power* to enter the conviction or sentence. A trial court has no power to enter a subsequent conviction or sentence when it has exhausted its jurisdiction in the case. This term "jurisdiction" is not to be confused with personal or subject matter jurisdiction. It means when a court loses the "power" to take further action in a case. A trial court loses the

power to take action once it imposes sentence. Accordingly, any action taken after sentence is a nullity and void unless authorized by law. Here, the trial court exhausted its power when it imposed the 4 year sentence. It had no power to take further action. The 2021 judgment and sentence is vacated, and case remanded with directions to enter a written sentence and judgment of 4 years in accord with the 2018 plea.

Jury Instructions

State v. Garoutte, 694 S.W.3d 624 (Mo. App. W.D. July 30, 2024):
Holding: Where Defendant was charged with being a felon-in-possession of a firearm, Sec. 571.070.1(1), the State was not required to prove the gun wasn't an "antique firearm," so whether the gun wasn't an "antique firearm" wasn't required to be included in the jury instruction.
Discussion: Sec. 571.070.3 provides a statutory exception to felon-in-possession for possessing an "antique firearm." Defendant claims this is an element of the offense, and the State is required to prove the firearm isn't antique. The general rule is that where an exception appears in the section of the statute defining the offense, the State has the burden to prove that the relevant facts do not fall within the exception. But where the exception is found in a separate clause or part of the statute disconnected from the definition of the offense, the State isn't required to negate it. Here, the offense is defined in Sec. 570.070.1(1), but the exception is in subsection 3. Since subsection 3 is a separate and distinct clause from the definition of the offense, the State is not required to prove that the firearm wasn't antique. Court does not determine if antique firearm is an affirmative defense, or special negative defense, because in either situation, the Defendant must first inject the issue that the firearm is antique, and then the Defendant must prove that (for affirmative defenses) or the State disprove it (for special negative defenses). But here, Defendant never injected the issue by claiming the firearm was antique.

Jury Issues – Batson – Striking of Jurors – Juror Misconduct

State v. Bozeman, 2024 WL 3942209 (Mo. App. W.D. Aug. 27, 2024):
Holding: Even though the trial court seated a Juror who had a prior felony conviction and should have been disqualified under Sec. 494.425(4), this was not plain error resulting in manifest injustice.
Discussion: It was erroneous for Juror to be allowed on jury because 494.425 disqualifies persons with felony convictions who have not had their civil rights restored. However, because Defendant didn't object, he must still satisfy the standard for plain error. A violation of the jury qualification statute does not by itself show that defendant received an unfair trial resulting in manifest injustice. Defendant bears the burden of proving manifest injustice, and hasn't show that here.

Order of Protection

A.L.O. v. G.L.N., 2024 WL 4127130 (Mo. App. E.D. Sept. 10, 2024):
Holding: (1) Even though Respondent checked a box on an application for Order of Protection that she and Appellant "are/were in a continuing social relationship of a romantic/intimate nature," where Respondent didn't testify to this at the Order of Protection hearing and presented no other evidence on it, the evidence was insufficient to support an Order of Protection for domestic violence because Sec. 455.010(5) requires that this be abuse or stalking committed by a "family or household member" and the court does not look to the petition as substantive evidence; (2) even though Respondent testified that Appellant sent her "threatening text messages," told her he knew people who would make her "not safe," and testified Appellant called her 15-20 times per day, where Respondent didn't produce the texts at the hearing and didn't testify that she feared physical harm from Appellant, as required by the statute, evidence was insufficient to support Order of Protection; and (3) even though Appellant threatened to post nude photos of Respondent on internet, this didn't satisfy the objective component of the statute of fear of "physical harm"; the statute is intended to prevent potential violence, not hurt feelings or harm to reputation. Judgment granting full Order of Protection reversed.

Rule 24.035/29.15 & Habeas Postconviction Procedural Issues

State ex rel. Bailey v. Sengheiser, 692 S.W.3d 20 (Mo. banc July 30, 2024):
Holding: Even though the circuit judge granted the county Prosecutor's motion to vacate conviction under Sec. 547.031, that judgment is not automatically stayed pending the Attorney General's appeal, but the circuit judge lacked authority to order the immediate release of the exonerated defendant because the vacation of the conviction meant that the original charges against the defendant were reinstated, and defendant will be retried unless the State chooses not to retry him.
Discussion: The first issue is whether the filing of an appeal by the Attorney General automatically stays the defendant's release. It does not. Proceedings under 547.031 are civil in nature. A civil judgment is operative from the date of its rendition, absent some Rule to the contrary. Rule 30.17 authorizes an automatic stay pending appeal where postconviction relief is granted under Rules 24.035 and 29.15, but no such Rule exists for 547.031. Thus, the judgment was effective immediately and wasn't automatically stayed. However, that didn't mean defendant should be automatically released. 547.031 allows a court to vacate a conviction, but doesn't provide that the court can order immediate release. As with any vacated conviction, the original charges are reinstated. Typically, the circuit court will set a deadline by which the State must retry a defendant. The State can then retry the defendant, or dismiss the charges (at which time defendant will be released).

Pros. Atty. 21st Judicial Cir. ex rel. Williams v. State, 696 S.W.3d 85 (Mo. banc Sept. 23, 2024):

Holding: (1) Even though Williams was sentenced to death, Prosecutor's appeal of a denial of Prosecutor's Sec. 547.031 motion to vacate conviction does not invoke the Supreme Court's exclusive appellate jurisdiction under Art. V, Sec. 3, Mo.Const., but because Supreme Court can transfer a case before an opinion of the Court of Appeals due to a general interest or importance, Supreme Court has accepted jurisdiction on that basis; (2) appeal of a denial of a 574.031 motion does not automatically stay an execution date, and Williams must still satisfy the criteria for a stay of execution; (3) Prosecutor waived appellate review of his claim that there was *Batson* error at trial because Prosecutor failed to file a Rule 78.07(c) motion regarding the 547.031 court's failure to rule on this claim in its Findings; (4) even though Prosecutor claims 574.031 court erred in not applying spoilation doctrine to the DNA evidence because it was contaminated by the original trial prosecutor who touched the murder weapon in 2001 without wearing gloves, Prosecutor failed to show intentional mishandling of the evidence aimed at suppressing the truth; the fact that the protocols for handling evidence in 2024 differ from those in 2001 when trial occurred shows only that understanding of DNA transmission has changed, not intentional spoilation; and (5) even though Prosecutor attempts to "concede" error, Supreme Court has "repeatedly rejected" the State's attempt to concede questions of law; parties cannot stipulate to legal issues, and Supreme Court is not bound by Prosecutor's concessions; Sec. 547.031.4 reinforces notion that Supreme Court isn't bound by Prosecutor's concessions because statute allows Attorney General to intervene and oppose Prosecutor's motion.

Trapp v. State, 2024 WL 3942141 (Mo. App. E.D. Aug. 27, 2024):

Holding: (1) Even though motion court dismissed 24.035 motion for failure to prosecute, it erred in not issuing Findings of Fact and Conclusions of Law on amended motion claims because Rule 24.035(j) requires Findings even in the absence of a hearing; and (2) where Movant alleged his *pro se* motion was untimely due to active third-party interference of jail and DOC officials who moved Movant to a different jail days before his *pro se* motion was due and Movant wasn't able to file from the new jail, motion court erred in not issuing Findings on this claim.

Discussion: Regarding timeliness of the *pro se* motion, Movant has alleged a third-party inference claim which could potentially be cause to deem his *pro se* motion timely. Although Movant's claim may be exceedingly difficult to prove, the motion court must determine the validity of this claim in the first instance by determining whether it warrants a hearing, and issuing Findings regarding the claim. The Findings may dismiss the motion as untimely, or may deem the motion timely, and then proceed to determine if the amended motion claims warrant a hearing, and issue Findings on their merits either with or without a hearing.

Smith v. State, 2024 WL 4280112 (Mo. App. W.D. Sept. 24, 2024):

Holding: Where (1) sentencing court correctly told Movant that his *pro se* 29.15 motion (Form 40) should be filed within 90 days after his mandate on direct appeal; (2) Movant began preparing his Form 40 while his direct appeal was pending and was waiting to file until he received a mandate; but (3) Movant never received notice from either the

appellate Clerk or any other source that his mandate had issued; and (4) Movant presented an affidavit from the DOC mailroom that he had not received any legal mail within 90 days after his mandate, the motion court did not clearly err in finding that Movant's late filing of his Form 40 should be excused due to the active interference of a third party (i.e., the Post Office) beyond Movant's control.
Discussion: The appellate Clerk mailed a mandate to Movant in a timely fashion. However, the DOC mailroom affidavit showed that Movant didn't receive any legal mail from any source during the 90 days after his mandate. Where a Movant does all he reasonably can to file his motion on time but the active interference of a third party beyond Movant's control causes the motion to be late, the untimely filing will be excused. Here, the motion court credited Movant's evidence on this matter, excused the untimeliness, and deemed the Form 40 timely. This was not clearly erroneous.

Sentencing Issues

State v. Yocco, 2024 WL 3573083 (Mo. App. E.D. July 30, 2024):
Holding: (1) Predatory sexual offender statute, Sec. 566.125.5, which mandates life in prison without parole, does not encompass the offenses of second-degree rape or second-degree sodomy, but (2) the statute does not require that defendant's act or acts against more than one victim occur at the same time.
Discussion: (1) Sec. 566.125.1 provides, in relevant part, that a defendant shall be sentenced to an extended term as a "persistent sexual offender" if they have been found guilty of first-degree statutory rape or sodomy, first degree rape or sodomy, forcible rape, forcible sodomy, "(5) rape" or "(6) sodomy." 566.125.4 provides that a defendant shall be sentenced to an extended term as a "predatory sexual offender" if they have been found guilty of committing "any of the offenses listed in subsection 1". 566.125.5(3) provides a "predatory sexual offender" is a defendant who "has committed an act or acts against more than one victim which would constitute an offense or offenses listed in subsection 4 of this section, whether or not the defendant was charged with an additional or offenses as a result of such act or acts." Appellate court looks to the history of the statute to determine legislative intent. First-degree rape or sodomy, as well as forcible rape or sodomy, all include forcible compulsion. Before 1980, the offenses of "rape" and "sodomy" both required forcible compulsion. However, second-degree rape, 566.031, and second-degree sodomy, 566.061, do not include forcible compulsion as an element. Before 2017, the predecessor statute to 566.125 (Sec. 558.018.1 (2014)), did not encompass second-degree rape or sodomy. The history of 566.125 and its immediate predecessor lead to the result that second-degree rape and second-degree sodomy are not covered by "predatory sexual offender." Because trial court sentenced Defendant to life without parole for these offenses, this was greater than the maximum authorized sentence, and constitutes plain error. (2) Defendant was also convicted of other sexual offenses and sentenced as a "predatory sexual offender" for them. He argues that the phrase "an act or acts against more the one victim" in 566.125.5(3) means the act or acts be committed *at the same time*. However, this is refuted by the plain and ordinary meaning of the statutory language and would lead to absurd results. The statute doesn't mention the timing of defendant's acts or defendant's previous conduct. The plain

reading of the statute is a defendant can be classified as a "predatory sexual offender" if they commit a listed offense or offenses against more than one victim, regardless of whether such conduct occurs at the same time or at different times.

State v. Johnston, 2024 WL 3942142 (Mo. App. E.D. Aug. 27, 2024):
Even though the trial court failed to make a finding that Defendant was a prior and persistent offender before the case was submitted to the jury and Defendant requested jury sentencing while the jury was deliberating on guilt (which was denied), the trial court's failure to make this finding was erroneous, but since the right to jury sentencing is only statutory (not constitutional) Defendant must show prejudice from the error and mere speculation that Defendant might have received a lower sentence from a jury is only speculative, especially where jury ultimately convicted him only of misdemeanors not the charged felonies.
Facts: Defendant was charged as a prior and persistent offender with various felonies. Immediately after the case was submitted to the jury, defense counsel said he would be seeking jury sentencing since the State hadn't proved and the court hadn't found that Defendant was a prior and persistent offender before submission. The Judge noted that Defendant had testified he had two prior felony convictions, so was now making the finding of prior and persistent status, and denied jury sentencing. The jury ultimately convicted Defendant of lesser-included misdemeanors. The court sentenced him to one year SES.
Holding: Sec. 558.021.2 requires a court to make findings as to prior and persistent status *before* the case is submitted to the jury. The court's failure to do this was erroneous, but Defendant still must show prejudice to succeed on appeal. Defendant claims the jury would have given a lower sentence than one year. But Defendant doesn't support this assertion with any studies or statistics. Counsel asserts this based on his own experience, but counsel's "selective sampling is not a substitute for reviewable evidentiary findings." Remand for jury sentencing would not ensure that Defendant would receive a sentence less than one year. What a jury might have done is purely speculative.

State ex rel. Wrinkle v. Cole, 2024 WL 4163838 (Mo. App. S.D. Sept. 12, 2024):
Even though the trial court made a docket entry on December 5, 2023, suspending Defendant's probation and scheduling a violation hearing for January 9, 2024, where the court never sent notice of this to anyone and on January 9, rescheduled the hearing until February 14 (after Defendant's probation expired), the court did not make every reasonable effort to notify Defendant and to conduct the revocation hearing before expiration as required by Sec. 559.036.8; writ of prohibition issues prohibiting revocation.
Facts: Following the above events in December and January, Defendant, on February 12, 2024, filed a motion to discharge Defendant from probation because her probationary term had expired on February 5, 2024. The trial court denied the motion. Defendant sought a writ of prohibition.
Holding: The general rule is that once a probationary term expires, a trial court has no authority over a defendant and cannot revoke probation. However, a court may extend the term of probation for any matters arising before expiration if the requirements of Sec.

559.0365.8 are satisfied. To revoke after expiration, the court must have (1) affirmatively manifested an intent to conduct a revocation hearing, and (2) made every reasonable effort to notify defendant and conduct the hearing prior to the expiration period. Here, the court affirmatively manifested an intent to conduct a revocation hearing before expiration by suspending probation on December 5 and setting a violation hearing for January 9. But the court did not make every reasonable effort to notify defendant and hold the hearing before expiration. There is no documentation in the record that the clerk or anyone else notified Defendant of the December Order suspending probation and setting a revocation hearing for January 9. When Defendant failed to appear on January 9, the court continued the hearing to a date *after* expiration. The clerk did notify Defendant of the February 14 date, but that date was too late because it was after expiration. Writ of prohibition issues.

State v. McKeown, 2024 WL 4197789 (Mo. App. S.D. Sept. 16, 2024):
Even though (1) the 2018 version of the Armed Criminal Action statute, Sec. 571.015.1, applied to Defendant's case because that was when her offense occurred, and (2) that statute did not require consecutive sentences, where defense counsel argued for a minimum sentence of three years and agreed with the trial judge that it should be consecutive to Defendant's other sentence, Defendant's affirmative agreement to the sentence waived plain error review of whether the sentence was required to be consecutive.
Facts: The State argued for a 10-year sentence. Defense counsel argued for a minimum three-year sentence. The court then asked defense counsel if he "agree[d]" that the sentence had to run consecutively. He said, "I understand," indicating agreement. The court then imposed the requested three-year sentence.
Holding: Defendant contends the trial court plainly erred in believing that consecutive sentences were required under the 2018 version of the statute. Although Defendant is correct that the 2018 version didn't require consecutive sentences, where a defendant accepts and agrees to what the trial court proposes, any claim of error is waived, including plain error. Here, Defendant cannot strategically ask the trial court for a 3-year sentence and then turn around and ask the appellate court to hold that the trial court plainly erred in doing what Defendant asked.

State ex rel. Mo. Dep't of Corr. v. Green, 2024 WL 4280113 (Mo. App. W.D. Sept. 24, 2024):
Holding: (1) Where Petitioner could not establish that DOC violated an injunction entered in 2017 which determined which defendants who had been convicted of sex offenses were subject to lifetime supervision, including GPS monitoring, under Secs. 217.735.1 and 559.106.1, trial court erred in issuing show cause order to DOC to show why it should not be held in contempt for violating the injunction; and (2) even though Petitioner claims that the 2017 injunction incorrectly determined who was subject to lifetime supervision and that subjecting him to lifetime supervision was *ex post facto*, Petitioner's remedy is to file an independent declaratory judgment action to determine this; he cannot challenge the validity of a prior injunction through a contempt action.
Discussion: In 2005, the legislature enacted Secs. 217.735.1 and 559.106.1 which imposed lifetime supervision on persons convicted of certain sex offenses. In 2006, the

legislature amended the statutes to appear to create two categories of offenses, so that some would require lifetime supervision regardless of the victim's age and the offender's prior sex offender status (Category I offenses), while others would require lifetime supervision only if the victim was less than 14 and the offender was a prior sex offender (Category 2 offenses). The statutes were amended again in 2017. The 2017 amendments subjected all Category 1 and 2 offenders to lifetime supervision for acts committed after August 28, 2006, without regard to age of the victim, and without the requirement that the offender be a prior sex offender. 217.735.1(2) also added additional offenses subject to lifetime supervision but only for acts committed after Jan. 1, 2017, and only where the victim was less than 14 and the offender is a prior sex offender. In 2017, as a result of a lawsuit, DOC agreed to a permanent injunction regarding these statutes. DOC agreed that (1) for those offenders found guilty of a Category 2 offense for acts committed after August 28, 2006, but before Jan. 1, 2017, DOC would be enjoined from enforcing 217.735 and 559.106 as amended in 2017 and would instead apply the statutes as amended in 2006; (2) for offenders who were found guilty of a Category 2 offense based on acts after Jan. 1, 2017, DOC would apply the 2017 amendments; and (3) for those offenders found guilty of Category 1 offenses, DOC would not be enjoined from enforcing the statutes as amended in 2017, which meant the statutes apply to Category 1 offenses for acts committed after Aug. 28, 2006. In 2016, Petitioner here pleaded guilty to two Category 2 offenses and four Category 1 offenses. All six offenses involved a victim under 14. Petitioner was not a prior sex offender. Upon Petitioner's release from prison in 2021, DOC required Petitioner to be subject to lifetime supervision because of his Category 1 offenses. He claims this violates the 2017 injunction and is *ex post facto*. No decisional law has interpreted the 2006 amendments to conclude the phrase "against a victim who was less than 14 years old and the offender is a prior sex offender" applies to both Category 1 and 2 offenses, and we do not need to decide that question here. For purposes of Petitioner's case, all that is relevant is that the DOC agreed in the 2017 injunction that this phrase in the 2006 amendments applies only to Category 2 offenses. The injunction reflected the view that the 2017 amendments did not change the law with respect to Category 1 offenses because the 2006 amendments already required lifetime supervision for those. We recognize Petitioner doesn't agree with the legal reasoning in the injunction case. Nothing prohibits Petitioner from bringing an independent declaratory judgment action to ask a court to determine whether application of the 2017 amendments constitutes *ex post facto* and retrospective application of the law. But Petitioner cannot circumvent that step by claiming DOC is in contempt for violating the injunction. The use of civil contempt to challenge the validity, and seek an annulment, of the underlying injunction is inappropriate.

State v. Winter, 2024 WL 4234277 (Mo. App. S.D. Sept. 19, 2024):
Holding: Where the court's oral pronouncement of sentence was for life without parole, but the written sentence and judgment stated it was for "999 days," this was a clerical error that can be corrected *nunc pro tunc*.

Sex Offender Issues – Registration

Doe v. Olson, 696 S.W.3d 320 (Mo. banc Aug. 13, 2024):
Holding: (1) Even though Petitioner received a Suspended Imposition of Sentence (SIS) for a sex offense in 1997, successfully completed probation and his records are now sealed under Sec. 610.105, the requirements that he register as a sex offender under Mo-SORA do not require him to reveal information from a sealed record in violation of his right to privacy and substantive due process, because there is no fundamental right to privacy in that information and the registry is rationally related to the legitimate state interest of protecting children; and (2) the registration requirements are not *ex post facto* because registration is civil in nature.

State ex rel. Mo. Dep't of Corr. v. Green, 2024 WL 4280113 (Mo. App. W.D. Sept. 24, 2024):
Holding: (1) Where Petitioner could not establish that DOC violated an injunction entered in 2017 which determined which defendants who had been convicted of sex offenses were subject to lifetime supervision, including GPS monitoring, under Secs. 217.735.1 and 559.106.1, trial court erred in issuing show cause order to DOC to show why it should not be held in contempt for violating the injunction; and (2) even though Petitioner claims that the 2017 injunction incorrectly determined who was subject to lifetime supervision and that subjecting him to lifetime supervision was *ex post facto*, Petitioner's remedy is to file an independent declaratory judgment action to determine this; he cannot challenge the validity of a prior injunction through a contempt action.
Discussion: In 2005, the legislature enacted Secs. 217.735.1 and 559.106.1 which imposed lifetime supervision on persons convicted of certain sex offenses. In 2006, the legislature amended the statutes to appear to create two categories of offenses, so that some would require lifetime supervision regardless of the victim's age and the offender's prior sex offender status (Category I offenses), while others would require lifetime supervision only if the victim was less than 14 and the offender was a prior sex offender (Category 2 offenses). The statutes were amended again in 2017. The 2017 amendments subjected all Category 1 and 2 offenders to lifetime supervision for acts committed after August 28, 2006, without regard to age of the victim, and without the requirement that the offender be a prior sex offender. 217.735.1(2) also added additional offenses subject to lifetime supervision but only for acts committed after Jan. 1, 2017, and only where the victim was less than 14 and the offender is a prior sex offender. In 2017, as a result of a lawsuit, DOC agreed to a permanent injunction regarding these statutes. DOC agreed that (1) for those offenders found guilty of a Category 2 offense for acts committed after August 28, 2006, but before Jan. 1, 2017, DOC would be enjoined from enforcing 217.735 and 559.106 as amended in 2017 and would instead apply the statutes as amended in 2006; (2) for offenders who were found guilty of a Category 2 offense based on acts after Jan. 1, 2017, DOC would apply the 2017 amendments; and (3) for those offenders found guilty of Category 1 offenses, DOC would not be enjoined from enforcing the statutes as amended in 2017, which meant the statutes apply to Category 1 offenses for acts committed after Aug. 28, 2006. In 2016, Petitioner here pleaded guilty to two Category 2 offenses and four Category 1 offenses. All six offenses involved a victim under 14. Petitioner was not a prior sex offender. Upon Petitioner's release from

prison in 2021, DOC required Petitioner to be subject to lifetime supervision because of his Category 1 offenses. He claims this violates the 2017 injunction and is *ex post facto*. No decisional law has interpreted the 2006 amendments to conclude the phrase "against a victim who was less than 14 years old and the offender is a prior sex offender" applies to both Category 1 and 2 offenses, and we do not need to decide that question here. For purposes of Petitioner's case, all that is relevant is that the DOC agreed in the 2017 injunction that this phrase in the 2006 amendments applies only to Category 2 offenses. The injunction reflected the view that the 2017 amendments did not change the law with respect to Category 1 offenses because the 2006 amendments already required lifetime supervision for those. We recognize Petitioner doesn't agree with the legal reasoning in the injunction case. Nothing prohibits Petitioner from bringing an independent declaratory judgment action to ask a court to determine whether application of the 2017 amendments constitutes *ex post facto* and retrospective application of the law. But Petitioner cannot circumvent that step by claiming DOC is in contempt for violating the injunction. The use of civil contempt to challenge the validity, and seek an annulment, of the underlying injunction is inappropriate.

Statutes – Constitutionality -- Interpretation – Vagueness

State v. Smith, 2024 WL 2964008 (Mo. App. S.D. Aug. 28, 2024):
Holding: Even though Defendant called 911 to report he couldn't breathe, where (1) by the time emergency personnel and police arrived, Defendant had recovered; (2) Defendant asked police if they could give him a ride; (3) police asked if they could search Defendant before doing so; and (4) Defendant consented to search and police found drugs on him, Defendant was not immune from prosecution under "Good Samaritan" law, Sec. 195.202, because the drugs were not found "as a result" of his seeking medical attention since there was a break in the causal chain between his request for medical assistance and his consent to search.
Discussion: This is a case of first impression. The Good Samaritan statute provides immunity from prosecution if the drug evidence "was gained as a result of seeking or obtaining medical assistance." Defendant argues the statute encompasses a broad "but for" causation test that covers any event that would not have occurred "but for" Defendant calling for help. However, the statute is not that broad. For immunity to apply, the statute requires a defendant to show that seeking or obtaining medical assistance *caused* the evidence to be discovered. Other jurisdictions have held similar statutes don't apply when there's been a break in the causal chain between the call for medical help and the discovery of evidence. Here, the evidence was found not because Defendant called for medical assistance, but because Defendant consented to a search after asking police for a ride.

Sufficiency Of Evidence

State v. Heathcock, 2024 WL 3418069 (Mo. App. E.D. July 16, 2024), transferred to Supreme Court (Oct. 1, 2024):

(1) Where Defendant was convicted of first-degree tampering, Sec. 569.080, in Montgomery County, the subsequent prosecution of Defendant in Warren County for tampering with the same car, on the same date, with the same victim violated Double Jeopardy because it subjected him to multiple punishments for the same offense, even though Defendant had briefly parked the car in Warren County, and then drove away again; (2) even if appellate court assumes that a defendant could form a separate mens rea in Warren County and thus a separate offense, the State's evidence didn't show that because it consisted solely of Defendant's statement that he had briefly parked in Warren County before driving again, which didn't prove the corpus delicti of a separate offense.

Facts: Defendant stole his girlfriend's car in Montgomery County and drove it to Warren County. Upon arrest in Warren County, Defendant told police he had parked the car at a Wal-Mart in Warren County for a brief time, and then drove away again. Defendant pleaded guilty to tampering in Montgomery County and was sentenced to three years. Meanwhile, Warren County charged Defendant with tampering with the same car and victim on the same date. Defendant moved pretrial to dismiss the Warren County charge on grounds of Double Jeopardy, which was overruled.

Holding: (1) The State contends that because Defendant briefly parked in Warren County before driving away again, there are two separate offenses. Sec. 556.041 provides that a person cannot be convicted of more than one offense if one offense is included in the other, or the offense is defined as a continuing course of conduct and the person's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses. Critical to whether the two prosecutions are for the same offense is whether they consist of the same elements. Although the State argues that it was prosecuting Defendant only for events that took place in Warren County, venue is not an element of first-degree tampering. Nowhere in 569.080 is the location of the offense listed as an element. The Montgomery charge and Warren charges had identical elements. The same elements test indicates that Defendant's right to be free from Double Jeopardy was violated. Defendant argues his conduct was also a continuing course of conduct. The appellate court doesn't reach that issue, however, because it finds that, under 589.080.1(2), the allowable unit of prosecution is tampering with "an automobile," which means one, single automobile. The unit-of-prosecution issue is one of first impression. Use of "an automobile" in the statute indicates legislative intent that it is "a" (one) automobile. Nothing in the statute can be interpreted to divide such conduct into different acts or to create separate *mens rea* based solely on the time or place of operation, such as the number of counties in which a person operates the car, or the number of hours that lapse. Thus, the legislature did not intend cumulative punishments for tampering with a car, and Defendant's two sentences for this same offense violated Double Jeopardy. (2) Even if appellate court assumes that a separate offense could occur in Warren County, the State didn't prove a separate offense here because of the *corpus delicti* rule. The only evidence that Defendant parked the car, and then drove away again, was Defendant's statement to police. A defendant's confession not made in open court, uncorroborated by circumstances and without proof

from another source that a crime was committed will not support a conviction. The State failed to prove the *corpus delicti* of the charged crime in Warren County.

State v. Myers, 2024 WL 3942137 (Mo. App. E.D. Aug. 27, 2024):
Holding: Where (1) Officer saw Husband, who had active warrants for his arrest, go into a home, and (2) Defendant-Wife answered door and repeatedly denied that Husband was in the home (even though Officer could hear Wife talking to Husband) and told Officer to get a search warrant, evidence was sufficient to convict Defendant-Wife of hindering prosecution, Sec. 575.020.1(1), because she concealed Husband.
Discussion: Sec. 570.030.1(1) provides that a defendant commits the offense of hindering prosecution if, for the purpose of preventing apprehension of another, the defendant "conceals" such person. The offense does *not* make deceiving law enforcement by itself a crime. No statutory definition of "conceal" exists, so court looks to its plain meaning and dictionary definition, which includes preventing disclosure, avoiding revelation, and placing out of sight. Wife's conduct meets this definition.

State v. Houston, 2024 WL 3451931 (Mo. App. S.D. July 18, 2024):
Holding: Even though Defendant, who stole a car and then ran into an elderly person in another car, did not know the person he ran into was a "special victim," the evidence was sufficient to prove second-degree assault against a "special victim, Sec. 565.052, since the statute doesn't require the State to prove a defendant knew of the victim's special status.
Discussion: Sec. 565.052.1(3) provides that a person commits second degree assault if they recklessly cause serious physical injury to another. 565.052.3 provides an assault against a "special victim" is a Class B felony. 565.002 provides that persons over 60 are "special victims." 562.021.2 provides that if an offense prescribes a culpable mental state for a particular element or elements, that mental state is required *only* as to those elements. Here, 565.052.1(3) provides a mental state of recklessly causing physical injury, but does not provide a mental state for the special victim element. Therefore, no proof of a particular mental state for "special victim" is required.

State v. Whitney, 2024 WL 3897455 (Mo. App. S.D. Aug. 22, 2024):
Holding: (1) Even though Defendant fired an AK-47 multiple times at a house with 11 people inside, where Defendant only knew that two people were inside, the evidence was insufficient to convict of first-degree assault, Sec. 565.050, on the people he didn't know were inside (nine counts) because the statute requires defendant act purposely as to a specific victim, but (2) appellate court enters convictions for the lesser-included offense of fourth-degree assault, which requires only that Defendant recklessly engage in conduct which creates a substantial risk of death or serious physical injury.
Discussion: First-degree assault requires a defendant attempt to kill or knowingly cause or attempt to cause serious physical injury to another person. The statute requires a defendant act purposely toward a specific victim. A person does not act purposely if they are unaware of the likely presence of another person, although they may be guilty of reckless or negligent conduct. There was no evidence Defendant knew nine other people were in the house. However, Defendant is not entitled to discharge. A lesser-include offense is established by proof of the same or less than all the facts required to

established the greater. Appellate court enters convictions for the lesser fourth-degree assault, and remands for resentencing on lesser.

State v. Lewis, 2024 WL 3948473 (Mo. App. S.D. Aug. 27, 2024):
Even though (1) Defendant-Father did not obtain approval from a Juvenile Court before he left his child with child's grandparents while Defendant served a jail sentence for contempt over child's custody, and (2) even though Defendant's ex-Wife was supposed to have legal custody of child, the evidence was insufficient to convict Defendant of transfer of custody of a minor child without court approval, Sec. 453.110, because the statute only prohibits the permanent placement of a child with another party without court approval; the statute allows a parent to temporarily place a child with another party and then to resume custody at a later date.
Facts: Defendant and his ex-Wife were in a custody dispute over child. Defendant had been ordered to return child to ex-Wife, but had refused. The Family Court ordered that Defendant be jailed for contempt. Defendant left child with child's grandparents while Defendant served his jail sentence. Meanwhile, the State charged Defendant with unlawful transfer of custody of a child without court approval, Sec. 453.110, and he was convicted at trial.
Holding: This is a case of first impression regarding interpretation of 453.110. The statute prohibits transfer of custody of a child to another party without court approval. However, 453.110.5 provides that the statute "shall not be construed to prohibit any parent … from placing a child with another individual for care if the right to supervise the care of the child and *to resume custody thereof is retained*." The plain meaning of the statute is that transfer of temporary custody is permitted. Only the *permanent* transfer of custody requires court approval. Here, the State failed to prove that Defendant transferred *permanent* custody to the grandparents. To the contrary, the evidence showed that Defendant was transferring custody only while Defendant was in jail, and that Defendant intended to resume custody upon release. Although Defendant may have intended to deprive ex-Wife of her legal custody, and while such conduct may violate a different statute, such evidence was insufficient to convict under 453.110.

State v. Winter, 2024 WL 4234277 (Mo. App. S.D. Sept. 19, 2024):
Holding: Even though the State's circumstantial evidence showed that Defendant had (1) invited Victim to a residence in a plot to kill him, (2) murdered the Victim at the residence, and then (3) transported Victim's body to a forest in a U-Haul, the evidence was insufficient to convict of kidnapping, Sec. 565.110.1, because there was no evidence Defendant confined Victim for a "substantial period" without his consent or that the confinement was more than incidental to the murder.
Discussion: Kidnapping requires that a defendant confine a victim for a "substantial period." Although this isn't defined in the statute, it has been interpreted to require an increased risk of harm, with the length of confinement only being one factor. Additionally, the offense of kidnapping can only be sustained where the confinement of the victim is more than merely incidental to another offense. The confinement must add to the danger already present from the other crime. The "merely incidental" test negates the concern that a kidnapping charge can be "pyramided" upon the underlying offense. Here, there was not sufficient evidence to show that the kidnapping was more than

merely incidental to the murder, or that the Victim was held for a "substantial period." No evidence exists as to how long Victim was held or whether he was held against his consent. There's no evidence to show that the movement of the Victim to the forest was anything more than incidental to the murder. Murder's purpose is to end a human life. There is no evidence the movement or confinement of Victim posed any greater threat than the murder Victim already faced. Kidnapping conviction vacated.

Sunshine Law

Weeks v. St. Louis Cnty., 696 S.W.3d 333 (Mo. banc Sept. 3, 2024):
Holding: (1) "Raw data" stored in government computers are a "record" "electronically stored" under the Sunshine Law, and may be required to be produced after considering the applicable exemptions or exceptions; (2) the Sunshine Law does not require the government agency to create a new record, such as a "new, customized record from information contained in existing records"; (3) where Sunshine request asked for "data files from Vehicle Stop Forms" and Department Serial Number (DSN) for each officer in a stop, there was insufficient information to grant a summary judgment because nothing in the record shows that both DSN and vehicle stop information currently exist together in any record, and the agency is not required to create a new record; this is true even though a new record could be created by the agency at arguably minimal cost; (4) DSN information is not necessarily exempt from disclosure under the personnel exemptions in Secs. 610.021(3) and (13), because the DSN doesn't necessarily relate to the hiring, firing or discipline of employees or be in a personnel file, so summary judgment isn't proper on this record. Reversed and remanded for further proceedings.

Hill-Bey v. Vandergriff, 697 S.W.3d 105 (Mo. App. E.D. Aug. 20, 2024):
Holding: A prisoner is required to exhaust their administrative remedies under the Prison Litigation Reform Act, Sec. 506.384.1, before they can bring a Sunshine Law lawsuit in court for failure of the DOC to provide documents under the Sunshine Law; trial court did not err in dismissing prisoner's Sunshine Law suit where he failed to plead or alleged facts that he has exhausted the DOC's administrative grievance process over failure to provide requested documents.

Trial Procedure

State v. Johnston, 2024 WL 3942142 (Mo. App. E.D. Aug. 27, 2024):
Even though the trial court failed to make a finding that Defendant was a prior and persistent offender before the case was submitted to the jury and Defendant requested jury sentencing while the jury was deliberating on guilt (which was denied), the trial court's failure to make this finding was erroneous, but since the right to jury sentencing is only statutory (not constitutional) Defendant must show prejudice from the error and mere speculation that Defendant might have received a lower sentence from a jury is only

speculative, especially where jury ultimately convicted him only of misdemeanors not the charged felonies.
Facts: Defendant was charged as a prior and persistent offender with various felonies. Immediately after the case was submitted to the jury, defense counsel said he would be seeking jury sentencing since the State hadn't proved and the court hadn't found that Defendant was a prior and persistent offender before submission. The Judge noted that Defendant had testified he had two prior felony convictions, so was now making the finding of prior and persistent status, and denied jury sentencing. The jury ultimately convicted Defendant of lesser-included misdemeanors. The court sentenced him to one year SES.
Holding: Sec. 558.021.2 requires a court to make findings as to prior and persistent status *before* the case is submitted to the jury. The court's failure to do this was erroneous, but Defendant still must show prejudice to succeed on appeal. Defendant claims the jury would have given a lower sentence than one year. But Defendant doesn't support this assertion with any studies or statistics. Counsel asserts this based on his own experience, but counsel's "selective sampling is not a substitute for reviewable evidentiary findings." Remand for jury sentencing would not ensure that Defendant would receive a sentence less than one year. What a jury might have done is purely speculative.

Waiver of Counsel

State v. Shields, 696 S.W.3d 469 (Mo. App. S.D. Aug. 14, 2024):
Holding: (1) Where Defendant absconded for one year after the guilt phase of his trial, his direct appeal claims of error at trial are barred by the escape rule, but his claims of error at the later sentencing hearing are not barred because those arose after he was arrested (post-capture), and (2) even though Defendant "fired" his sentencing counsel at sentencing because Defendant believed he had a conflict of interest since Defendant had filed a lawsuit against him, where Defendant expressly said he wasn't waiving his right to counsel, requested appointment of alternate counsel, and said sentencing should not occur without counsel, Defendant did not make a valid waiver of counsel. Remanded for new sentencing hearing.
Discussion: In order to pass constitutional muster, a waiver of counsel must be unequivocal. Here, Defendant affirmatively told the sentencing court he was not waiving his right to counsel, and requested alternative counsel. The State argues Defendant implicitly waived counsel by creating the alleged conflict to cause delay. But in the implicit waiver cases, the trial courts either gave the defendants the option to have court-appointed counsel, or the option to proceed *pro se* after a *Faretta* hearing. That didn't happen here.

State v. Smith, 2024 WL 4249547 (Mo. App. S.D. Sept. 20, 2024):
Holding: Even though (1) Defendant's retained counsel withdrew because Defendant was unable to continue to pay her, and (2) the trial court had found Defendant ineligible for a public defender because he posted too high a bond, trial court plainly erred in finding that Defendant knowingly and voluntarily waived counsel because Defendant was

never informed by the trial court of the maximum punishment for the offense, either in the written waiver he signed or at the *Faretta* hearing.

Discussion: Sec. 600.051 requires a written waiver of counsel include very specific content, including the maximum punishment. Because 600.051 protects a fundamental constitutional right, violation of the statute is evident, obvious and clear error. A violation of the right to counsel constitutes manifest injustice because the right is structural error and infects the entire trial. Because the State bears of the burden to prove an unrepresented defendant waived counsel, the State must prove compliance with 600.051 and that a defendant was afforded a *Faretta* hearing. Conviction vacated and remanded for new trial.