Case Law Update

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Editor's Note

December 31, 2024

Dear Readers:

This edition of *Case Law Update* contains all Missouri appellate opinions from October 1 through December 31, 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)

Scott v. State, 2024 WL 4887460 (Mo. App. W.D. Nov. 26, 2024):
Holding: Where Movant timely filed his *pro se* 29.15 motion on April l1, 2022 (which was within 90 days of his mandate on direct appeal), the version of 29.15 in effect from November 4, 2021 through June 30, 2023, applied to his case and allowed counsel 120 days to file an amended motion (disagreeing with *Smith v. State*, 697 S.W.3d 617 (Mo. App. E.D. 2024)); this is because 29.15(m) in effect from November 4, 2021 through June 30, 2023, did *not* contain a schedule indicating that proceedings for a movant sentenced after January 1, 2018, were to be governed by the rules in effect at the time of movant's sentencing.
Discussion: The dispositive circumstance for purposes of this case is that 29.15(m) in effect at the time Movant filed his *pro se* motion in April 2022 did *not* indicate that any other version of Rule 29.15(g) (granting 120 days to file an amended motion) applied other than the version then in effect. 29.15(m) in effect from November 4, 2021 through June 30, 2023, did *not* contain a schedule indicating that such proceedings were to be governed by the rule in effect at the time of sentencing. The version of 29.15(m) that *became effective July 1, 2023*, does state that the Rule in effect at time of sentencing controls. The *Smith* case improperly applied the *post*-July 1, 2023, Rule 29.15(m) to a case occurring between November 4, 2021 to June 30, 2023, so Western District chooses not to follow *Smith*.

Tolentino-Geronimo v. State, 2024 WL 5204190 (Mo. App. W.D. Dec. 24, 2024):
Holding: Where Attorney electronically filed Movant's *pro se* 29.15 motion which was signed by Movant, this did not constitute an "entry of appearance" by Attorney and, thus, did not start the time for filing an amended motion.
Discussion: Rule 55.03(b) provides that an attorney enters and appearance by (1) "participating in any proceeding as counsel" for a party, (2) signing attorney's name on any pleading, motion or other filing, or (3) filing an entry of appearance. Here, Attorney did not engage in any of these activities when she filed the *pro se* 29.15 motion. She did not participate as counsel, did not sign her name on the *pro se* motion, and did not file a written entry of appearance. Thus, this did not constitute an entry and did not start the time for filing an amended motion. Compare *Cooper v. State*, 675 S.W.3d 718 (Mo. App. S.D. 2023), holding counsel did enter an appearance *by signing his name* to Movant's initial *pro se* 29.15 motion.

Appellate Procedure

Beach through Walton v. Zellers, 2024 WL 5200966 (Mo. banc Dec. 23, 2024):
Holding: Trial court erred in issuing a permanent Writ of Mandamus without first issuing a preliminary order in mandamus as required by Rule 94; permanent writ vacated.
Discussion: This Court has consistently emphasized there is peril involving departing from the procedure in Rule 94, which is: First, Relator files a petition for Writ of Mandamus in the circuit court. Second, the court considers the petition and determines if a preliminary writ (order) should issue. If the court doesn't grant a preliminary writ,

Relator must then file its writ petition in the next highest court. If the court is of the opinion a mandamus should be granted, it must grant a preliminary order (writ) in mandamus. The preliminary order directs Respondent to file an answer (which should admit/deny Relator's numbered paragraphs and assert defenses) within a specified time. If the court issues a preliminary order in mandamus, any final decision is reviewable by appeal. Here, the circuit court didn't follow these procedures. After Relator filed for a writ, the circuit court proceeded to hold a hearing and ultimately issued a permanent writ. But Respondent claims it would have asserted additional defense and presented other evidence if it had known the hearing was on the merits of the writ. This case demonstrates why this Court has warned parties that they must follow the procedures of Rule 94. If the circuit court had declined to issue a preliminary order, Relator could have filed his writ petition in the next highest court. If the circuit court had granted the preliminary order, Respondent would have fully responded. Then, a hearing could have been held. The failure to enter a preliminary order in mandamus materially affected the merits, and requires the judgment be vacated.

Schierbaum v. State, 2024 WL 5126863 (Mo. App. E.D. Dec. 17, 2024):
Holding: (1) Appellant's Point Relied On preserved nothing for review because it wasn't in proper form under Rule 84.04(d), which requires use of the "because", followed by the legal reasons for a claim of reversible error [followed by "in that" (explain why the legal reasons, in the context of the case, support claim of reversible error)]; and (2) Appellant's Point was multifarious and preserved nothing for review because it combined separate rulings in two different jury trials.

Sneed v. State, 2024 WL 4902794 (Mo. App. S.D. Nov. 27, 2024):
Holding: Where (1) Movant filed a premature *pro se* Rule 29.15 motion before sentencing; (2) the Public Defender notified the court that it wouldn't take any action on Movant's motion until it became ripe; (3) Movant then filed a document stating he "would like to withdraw my *pro se* motion"; (4) Movant was sentenced and did a direct appeal; (5) after direct appeal mandate, the Public Defender entered the 29.15 case and filed an amended motion, which was denied on the merits; and then (6) Movant appealed, the appeal must be dismissed because Movant's voluntary withdrawal of his premature *pro se* motion operated as a voluntary dismissal of his case, and he never filed another timely *pro se* 29.15 motion.
Discussion: Movant argues he didn't dismiss his case because he never cited the voluntary dismissal rule, 67.02 and didn't use the word "dismiss." But to voluntarily dismiss a case, a party need not invoke "magic language." Instead, courts look to the substance of a motion. When Movant "withdrew" his *pro se* motion, this functioned as a voluntary dismissal. It voluntarily removed from the motion court's consideration all claims before it. Movant could have timely refiled his *pro se* motion within 90 days after the direct appeal mandate, but he didn't. Appeal dismissed.

Hood v. Dir. of Revenue, 2024 WL 5134597 (Mo. App. S.D. Dec. 17, 2024):
Holding: In order to raise an against-the-weight-of-the-evidence claim on appeal, Appellant must complete four sequential steps: (1) identify a challenged factual proposition, the existence of which is necessary to sustain the judgment; (2) identify all favorable evidence supporting the existence of that proposition; (3) identify the evidence contrary to the belief of that proposition, resolving all conflicts in testimony in accordance with the trial court's credibility determinations, whether explicit or implicit; and (4) demonstrate why the favorable evidence, along with the reasonable inferences drawn from that evidence, is so lacking in probative value, when considered in the context of the totality of the evidence, that it fails to induce belief in that proposition. Since Appellant-Driver's brief fails to follow this mandatory analytical framework, his challenge fails.

State v. Keathley, 2024 WL 5153185 (Mo. App. S.D. Dec. 18, 2024):
Holding: (1) Even though Defendant, who was convicted of making a terroristic threat, Sec. 574.115, claimed on appeal that his allegedly threatening statements were protected by the First Amendment, Defendant failed to preserve this issue for appeal, because he failed to bring the claim as a challenge to the sufficiency of the information *before trial* in a motion to dismiss based on his constitutional argument; (2) Rule 24.04(b)(2) requires such defenses and objections be raised *before trial*; and (3) because constitutional challenges must be raised at the "earliest opportunity," the failure to raise this *before trial* waived the constitutional issue on appeal. Raising the matter as trial court error for overruling the motion for judgment of acquittal is insufficient.

Davis v. State. 2024 WL 4675135 (Mo. App. W.D. Nov. 5, 2024):
Holding: Assuming there is a meritorious reason to amend an old 24.035/29.15 judgment after a postconviction appeal, a Movant must first file a motion to recall the mandate in the Court of Appeals, and only if appellate court recalls its mandate and remands case, can the motion court then conduct further proceedings.

Mack v. State, 2024 WL 4674134 (Mo. App. W.D. Nov. 5, 2024):
Holding: Even though Public Defender entered an appearance for 29.15 Movant rather than be appointed and then filed the amended motion late, where (1) motion court found counsel had abandoned Movant, and (2) the State did not argue in the motion court that no abandonment occurs where Public Defender enters an appearance and did not file a cross-appeal, appellate court will not consider State's argument of no-abandonment on appeal; appellate courts do not consider arguments not presented to the circuit court and made for first time on appeal.

State v. Coward, 2024 WL 4886988 (Mo. App. W.D. Nov. 26, 2024):
Holding: (1) Even though State claimed trial court's granting of "legislative continuance"-stay under Sec. 510.120 to state legislator-defense counsel in criminal case during legislative term violated Victim's rights, appellate court lacked jurisdiction to hear State's appeal because Sec. 547.200 only allows a State appeal quashing an arrest warrant, regarding competency, or suppressing evidence; and (2) even though Sec. 510.120.4 grants court of appeals "original jurisdiction" over termination or modification

of the stay authorized by 510.120, this is contrary to Art. V, section 3, Mo.Const. which grants only general "appellate" jurisdiction to court of appeals, so cannot provide a basis for jurisdiction here.

Attorney's Fees

S.J.H. v. J.P.H., 2024 WL 4351478 (Mo. App. E.D. Oct. 1, 2024):
Holding: (1) Trial court abused discretion in awarding attorney's fees to prevailing party (Wife) in Order of Protection case where there was no evidence before the court as to the parties' financial resources; although Sec. 455.075 allows a trial court to award attorneys' fees in Order of Protection case, the court must have before it each party's debts, income, etc., before it can determine if either party has an ability to pay; and (2) even though Wife claimed she couldn't present evidence of Husband's ability to pay because he had concealed his financial information from her, Sec. 455.075 doesn't contain any such exception to requirement to present evidence of parties' financial resources.

Bail – Pretrial Release Issues

State v. Lewis, 2024 WL 4887160 (Mo. App. E.D. Nov. 26, 2024):
Even though Defendant on direct appeal claimed trial court erred in not sustaining his motion to dismiss charges after he wasn't brought to trial within 120 days as required by Rule 33.01(d), the proper remedy for violation of that Rule is not dismissal, but, under Rule 33.09, to "seek remedial writ relief in a higher court pursuant to Rule 84.24."
Facts: Defendant was held pretrial without bond. After three years in jail, he filed a motion seeking dismissal of his charges. After 120 additional days had expired, he requested two continuances. After conviction at trial, he appealed.
Holding: Rule 33.01(d) provides that if a defendant is detained pretrial, he shall upon written request, be entitled to a trial within 120 days, but that any request to continue the trial beyond the 120 days shall be a waiver. The State contends that "any" request to continue a case beyond 120 days waives the issue, and that Defendant's continuance requests waived it. Defendant contends he couldn't waive his right to trial within 120 days by asking for continuances after the 120 days had already expired. We need not decide whether Defendant waived his rights under 33.01(d) because the proper remedy for the alleged violation is not dismissal of the pending charges. Rule 33.09 outlines how to seek relief for a defendant who contends he was unlawfully detained in violation of the Rules. It states a defendant "may seek remedial writ relief in a higher court pursuant to Rule 84.24." Defendant didn't file for a remedial writ. Instead, he opted to seek relief in the form of a remedy which has no basis in law by filing a motion to dismiss. This was properly denied. However, the trial court did give him relief under 33.01(d) by setting trial with 40 days. If Defendant believed he was still being unlawfully detained, he could have filed an appellate writ, but didn't.

Brady Issues

State v. Brown, 2024 WL 5165209 (Mo. App. S.D. Dec. 19, 2024):
Holding: Even though Defendant claimed that Victim's juvenile records would be relevant to his defense, the trial court lacked authority to order disclosure of such records, because under Sec. 211.321, only the Juvenile Court has authority to allow disclosure of such records to "persons having a legitimate interest therein."

State ex rel. Bailey v. Horsman, 2024 WL 4536351 (Mo. App. W.D. Oct. 22, 2024):
Holding: (1) In highly fact-specific case, Western District holds habeas court did not err in granting habeas petition regarding Petitioner's 1985 murder conviction where habeas evidence revealed State had failed to disclose documents showing Victim's earrings were found in Alternative Suspect's apartment, three FBI reports which showed Petitioner's palm or fingerprints were not on various evidence and were otherwise potentially exculpatory, and documents showing Alternative Suspect (who was a police officer) was implicated in other crimes, including burglaries, stalking and fraud; and (2) even though Petitioner did not learn of the undisclosed FBI reports until discovery in the habeas case and, thus, had not pleaded their non-disclosure in her Petition, this did not bar habeas relief because Rule 91.06 provides that a court shall grant such relief even in the absence of a petition.
Discussion: Review of a grant of habeas relief (via writ of certiorari) does not contemplate review of findings of fact, but is limited to questions of law presented by the record before the habeas court. Review is limited to whether the habeas court exceeded its authority or abused its discretion. A habeas court exceeds its authority if the evidence as a whole does not support the grant of relief, and abuses its discretion if its ruling is clearly against the logic of the circumstances, is arbitrary or unreasonable. Where, as here, a habeas court granted relief on several claims -- here, freestanding actual innocence; a gateway claim of actual innocence and cause-and-prejudice permitting review of otherwise barred claims; *Brady* violations; and ineffective assistance of counsel for failure to show Petitioner's mental illness and vulnerability to false confession – the appellate court need only decide if at least *one* of the claims has merit. The State claims the habeas court erred in granting relief regarding non-disclosure of the FBI reports because this issue wasn't pleaded in Petitioner's habeas petition. The State claims it was "ambushed" by this evidence. "The Attorney General's assertation that *the state* was ambushed by exculpatory evidence [Petitioner] did not know about until discovery was conducted after her habeas petition was filed borders on the absurd." Prosecutors are bound by their ethics to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of a conviction. Moreover, Rule 91.06 provides that a court must issue habeas relief when supported by evidence "although no petition be presented for such writ." Thus, the FBI *Brady* claim didn't have to be pleaded in the Petition. The habeas court found that issue was tried by "implied consent," but that's irrelevant because the issue didn't have to be pleaded at all in order to obtain relief on it. The State claims the evidence regarding Alternative Suspect's other convictions was merely impeaching and didn't have to be disclosed because the State didn't intend to call and didn't call Alternative Suspect at Petitioner's trial. But the evidence wasn't

merely impeaching. The evidence was independently exculpatory irrespective of impeachment because it supported the argument that Alternative Suspect, not Petitioner, murdered the Victim. The habeas record "reveals a troubling realization." All of the suppressed evidence became known to Police Department *shortly after* police had extracted a confession from Petitioner after multiple interrogations. Alternative Suspect – who was a Police Officer with the Police Department – had in his possession Victim's purse, credit card and earrings, and there's no explanation for how he could have had these things if he wasn't involved in the murder. The habeas record "strongly suggests" the Police Dept. "buried" its investigation into whether Alternative Suspect committed the murder, and intentionally failed to follow up on information about Alternative Suspect. Further, Alternative Suspect was allowed to plead guilty in a fraud case in exchange for the State promising not to bring any other charges against him, which meant the State could not charge him with the murder. This plea agreement is part of a "large volume" of evidence that was not disclosed to Petitioner. Evidence that Alternative Suspect was relieved of criminal liability for the murder, despite never having been cleared of the crime, would have been of the utmost value to Petitioner during her trial as she sought to explain why the State would be motivated to cling to Petitioner's contradictory, inaccurate and unsubstantiated confession, while ignoring Alternative Suspect's direct ties to the murder. Evidence that Alternative Suspect had been involved in home burglaries, fraudulent use of stolen checks, trespass and Peeping Tom incidents in the months immediately before and after the murder would have been of value to Petitioner due to the similarities between those incidents and Victim's murder – a woman murdered in her apartment. There is no doubt the suppressed evidence was material, and in its absence, Petitioner did not receive a fair trial worthy of confidence. We reach this conclusion notwithstanding Petitioner's confession. We can independently confirm from the record that the habeas court didn't exceed or abuse its authority by concluding that Petitioner's confession wasn't reliable. That conclusion is supported by the inaccuracy of the confession itself (compared to known evidence), but also by testimony of a forensic psychiatrist who testified to Petitioner's vulnerability to false confession. Grant of habeas relief affirmed unless State files written notice to re-try Petitioner within 10 days of the court's mandate and such trial occurs within 180 days of such notice.

Civil Procedure

Beach through Walton v. Zellers, 2024 WL 5200966 (Mo. banc Dec. 23, 2024):
Holding: Trial court erred in issuing a permanent Writ of Mandamus without first issuing a preliminary order in mandamus as required by Rule 94; permanent writ vacated.
Discussion: This Court has consistently emphasized there is peril involving departing from the procedure in Rule 94, which is: First, Relator files a petition for Writ of Mandamus in the circuit court. Second, the court considers the petition and determines if a preliminary writ (order) should issue. If the court doesn't grant a preliminary writ, Relator must then file its writ petition in the next highest court. If the court is of the opinion a mandamus should be granted, it must grant a preliminary order (writ) in mandamus. The preliminary order directs Respondent to file an answer (which should

admit/deny Relator's numbered paragraphs and assert defenses) within a specified time. If the court issues a preliminary order in mandamus, any final decision is reviewable by appeal. Here, the circuit court didn't follow these procedures. After Relator filed for a writ, the circuit court proceeded to hold a hearing and ultimately issued a permanent writ. But Respondent claims it would have asserted additional defense and presented other evidence if it had known the hearing was on the merits of the writ. This case demonstrates why this Court has warned parties that they must follow the procedures of Rule 94. If the circuit court had declined to issue a preliminary order, Relator could have filed his writ petition in the next highest court. If the circuit court had granted the preliminary order, Respondent would have fully responded. Then, a hearing could have been held. The failure to enter a preliminary order in mandamus materially affected the merits, and requires the judgment be vacated.

Sneed v. State, 2024 WL 4902794 (Mo. App. S.D. Nov. 27, 2024):
Holding: Where (1) Movant filed a premature *pro se* Rule 29.15 motion before sentencing; (2) the Public Defender notified the court that it wouldn't take any action on Movant's motion until it became ripe; (3) Movant then filed a document stating he "would like to withdraw my *pro se* motion"; (4) Movant was sentenced and did a direct appeal; (5) after direct appeal mandate, the Public Defender entered the 29.15 case and filed an amended motion, which was denied on the merits; and then (6) Movant appealed, the appeal must be dismissed because Movant's voluntary withdrawal of his premature *pro se* motion operated as a voluntary dismissal of his case, and he never filed another timely *pro se* 29.15 motion.
Discussion: Movant argues he didn't dismiss his case because he never cited the voluntary dismissal rule, 67.02 and didn't use the word "dismiss." But to voluntarily dismiss a case, a party need not invoke "magic language." Instead, courts look to the substance of a motion. When Movant "withdrew" his *pro se* motion, this functioned as a voluntary dismissal. It voluntarily removed from the motion court's consideration all claims before it. Movant could have timely refiled his *pro se* motion within 90 days after the direct appeal mandate, but he didn't. Appeal dismissed.

Continuance

State v. Coward, 2024 WL 4886988 (Mo. App. W.D. Nov. 26, 2024):
Holding: (1) Even though State claimed trial court's granting of "legislative continuance"-stay under Sec. 510.120 to state legislator-defense counsel in criminal case during legislative term violated Victim's rights, appellate court lacked jurisdiction to hear State's appeal because Sec. 547.200 only allows a State appeal quashing an arrest warrant, regarding competency, or suppressing evidence; and (2) even though Sec. 510.120.4 grants court of appeals "original jurisdiction" over termination or modification of the stay authorized by 510.120, this is contrary to Art. V, section 3, Mo.Const. which grants only general "appellate" jurisdiction to court of appeals, so cannot provide a basis for jurisdiction here.

Costs

State v. Stock, 2024 WL 4536295 (Mo. App. W.D. Oct. 22, 2024):
Class E felonies are not subject to the $46 charge for the Crime Victims' Compensation Fund because the plain language of Sec. 595.045.8, which lists the class of felonies subject to the fee, does not include "Class E" felonies.
Facts: Defendant was convicted of tampering with physical evidence and abandonment of a corpse, both Class E felonies. He was charged $46 for the Crime Victims Compensation Fund.
Holding: The trial court plainly erred in imposing the $46 judgment. Sec. 595.045.8 provides that a court shall enter a judgment of $68 for persons convicted of a "class A or B felony" and $46 for persons convicted of a "class C or D felony." At the time 595.045 was last amended in 2009, Class E felonies did not exist. In 2014, the new Criminal Code created the Class E felony. Tampering with physical evidence and abandonment of a corpse were reclassified in 2014 from D felonies to E felonies. The State argues that the legislature's failure to amend 595.045 to account for Class E felonies was an oversight, but an appellate court cannot supply what the legislature omitted. The plain language of 595.045 applies only to A, B, C and D felonies. Not E's. It is presumed the legislature acts with knowledge of existing law, and appellate court presumes legislature intended this result. $46 judgment vacated.

Discovery

State v. Brown, 2024 WL 5165209 (Mo. App. S.D. Dec. 19, 2024):
Holding: Even though Defendant claimed that Victim's juvenile records would be relevant to his defense, the trial court lacked authority to order disclosure of such records, because under Sec. 211.321, only the Juvenile Court has authority to allow disclosure of such records to "persons having a legitimate interest therein."

Double Jeopardy

State v. Gholson, 2024 WL 4820809 (Mo. App. E.D. Nov. 19, 2024):
In case of first impression, appellate court holds that even though trial court, sua sponte, declared a mistrial in the presence of the jury when the jury indicated it was deadlocked, defense counsel had "opportunity to object" and is deemed to have consented to the mistrial in the absence of objection; defense counsel should have requested sidebar, objected, and court could have told jury it had reconsidered its ruling and they should continue deliberating.
Facts: Defendant was tried twice. The first trial ended during deliberations when, after deliberating for several hours, the court asked jurors if they were deadlocked. They said they were, and that more time wouldn't resolve it. The court then said in the jury's presence that it was declaring a mistrial, but then asked counsel if there was any legal reason not to discharge the jury. Defense counsel said, "no." Before the second trial,

Defendant filed a motion to dismiss on grounds of Double Jeopardy. He claimed he had not consented to the *sua sponte* mistrial and there was no manifest necessity for it. The trial court denied the motion. After conviction, Defendant appealed.
Discussion: Generally, Double Jeopardy bars retrial if a judge grants a mistrial without Defendant's request or consent. However, consent can be express or implied from the totality of circumstances. Defendant argues he had no opportunity to object because the trial court declared a mistrial in front of the jury without giving Defendant an opportunity to object outside their presence. This is an issue of first impression in Missouri, but our Supreme Court has focused on the "opportunity to object," and if the only such opportunity is in front of the jury, it is counsel's responsibility to request a sidebar conference outside their presence, and if the court sustains counsel's objection, the court can notify the jury that it has reconsidered and they should continue deliberating. Denial of motion to dismiss affirmed.

State v. Royal, 2024 WL 4536298 (Mo. App. W.D. Oct. 22, 2024):
Holding: Convictions for both involuntary manslaughter and child abuse resulting in death was not plain error under Sec. 556.041(3), which prohibits multiple convictions when "the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of conduct," because the two offenses each contain an element that the other does not under *Blockburger* test; Western District declines to follow a prior case, *State v. Dailey*, 708 S.W.2d 220 (Mo. App. S.D. 1986), which held Sec. 556.041(3) was violated if the same "facts" were used to support two convictions, because *Dailey* has been rejected by all subsequent courts in favor of the *Blockburger* test.

DWI

Hood v. Dir. of Revenue, 2024 WL 5134597 (Mo. App. S.D. Dec. 17, 2024):
Holding: In order to raise an against-the-weight-of-the-evidence claim on appeal, Appellant must complete four sequential steps: (1) identify a challenged factual proposition, the existence of which is necessary to sustain the judgment; (2) identify all favorable evidence supporting the existence of that proposition; (3) identify the evidence contrary to the belief of that proposition, resolving all conflicts in testimony in accordance with the trial court's credibility determinations, whether explicit or implicit; and (4) demonstrate why the favorable evidence, along with the reasonable inferences drawn from that evidence, is so lacking in probative value, when considered in the context of the totality of the evidence, that it fails to induce belief in that proposition. Since Appellant-Driver's brief fails to follow this mandatory analytical framework, his challenge fails.

Evidence

State v. Mosely, 2024 WL 4886247 (Mo. App. E.D. Nov. 26, 2024):
Holding: Even though general testimony by Expert on coercive interrogations and false confessions is allowed, trial court didn't abuse discretion in prohibiting Defendant from asking Expert, "what type of false confession did you see in this case?" and "was the interrogation coercive?", because these questions sought to elicit answers about the reliability, accuracy or credibility of specific witness' testimony, which is prohibited, and invaded province of jury.
Discussion: Sec. 490.065.2 allows expert testimony when it will help the jury understand the evidence or decide contested issues, but such testimony may still be limited when it invades the exclusive province of the jury. Experts are allowed to testify *generally* as to factors that may assist the jury in determining the reliability of a witness, but cannot testify as to the particular reliability or credibility of a specific witness. Here, Defendant's questions sought to elicit Expert's opinions about the particular accuracy of Defendant's confession or Defendant's general credibility, in that it would have allowed Expert to speculate about whether Defendant's statements made during his interrogation were truthful or were coerced falsehoods. This is prohibited testimony about the reliability, accuracy and credibility of a specific witness. Expert can testify to the general factors of coercive interrogations, but it was for the jury to determine if the confession was truthful or coerced.

State v. King, 2024 WL 4887249 (Mo. App. E.D. Nov. 26, 2024):
(1) Admission of screen shots of a Store's surveillance video violated Best Evidence Rule where State made no attempt to obtain the original video from Store and Store Manager, who testified about incriminating events on the screen-shots, had no first-hand knowledge of the events; and (2) admission of Store's transaction report of sales was abuse of discretion because it was not properly authenticated in that Store Manager was not the records custodian, and could not testify as to its mode of preparation or maintenance, and there was no business records affidavit per Sec. 490.692.
Facts: Defendant was charged with stealing by switching bar codes on merchandise at Store. State's evidence consisted of Store Manager's testimony of screen shots from Store's video system showing Defendant in Store, and Manager's testimony about sales at the Store from a "transaction report."
Discussion: (1) The Best Evidence Rule applies when evidence is offered to prove the content of a writing or recording. If the contents of the writing and recording aren't "directly" at issue, the Rule doesn't apply and secondary evidence may be used. The Rule applies here because the contents of the video were directly in dispute as to whether Defendant switched bar codes. The Rule provides that when the primary (original) evidence is unavailable, secondary evidence can be used if the unavailability is not the proponent's fault and the secondary evidence is trustworthy. Here, the State didn't even show the video was unavailable; the State made no effort to obtain it from Store and simply said it didn't have it at trial. The State was required to use diligence in obtaining the video. Manager's accounts of the screen shots isn't trustworthy because Manager had no first-hand, personal knowledge of events depicted. (2) Sec. 490.680 requires that to admit records, a "qualified witness" must testify as to the records' identity, mode of

preparation, regular course of business and timing requirements. Sec. 490.692 allows authentication of records via an affidavit from a records custodian. Here, Manager wasn't a "qualified witness" to authenticate the records because Manager couldn't testify as to how the records were prepared, and State didn't offer an affidavit in lieu of Manager's testimony. Reversed for new trial.

State v. Keleise, 2024 WL 4750641 (Mo. App. S.D. Nov. 12, 2024):
Holding: Even though exhibits that are testimonial in nature generally cannot be given to the jury during deliberations, Missouri courts have "consistently" held that forensic interviews do not fall under this prohibition; thus, trial court didn't plainly err in allowing jury to view video (exhibit) during deliberations of Child Advocacy Center interview of Child Witness.

Evidentiary Hearing (Rules 24.035 and 29.15)

Baker v. State, 2024 WL 48200507 (Mo. App. E.D. Nov. 19, 2024):
Holding: Even though 24.035 Movant said in his plea petition or at his guilty plea that no "promises" had been made to him and that he acknowledged that he was "not relying upon anyone's promise or representation that if I am committed to DOC, I will serve any less time … than the time specified in the actual sentence," Movant was entitled to evidentiary hearing on claim that counsel affirmatively misadvised him that he would be "*eligible"* for parole after 50% of his sentence; this was not refuted by the record since there was no discussion in the plea petition or plea as to parole eligibility.
Discussion: Although counsel is not ineffective for failing to advise of collateral consequences such as parole eligibility, it is objectively unreasonable to affirmatively give incorrect information about such issues. Here, Movant wasn't eligible for parole until having served 80% of his sentence. When a Movant pleads guilty in reliance on an affirmative misrepresentation, giving up his right to trial, counsel's deficient performance results in prejudice. The State argues the allegation of prejudice is "vague" here, but it is "well-settled" that an allegation that "if plea counsel had not given incorrect advice regarding parole eligibility, the movant would not have pleaded guilty and would have insisted on going to trial" satisfies the necessary factual predicate for prejudice. Even though Movant said no "promises" had been made, an attorney's advice is "not the same as a promise." A defendant can correctly say he wasn't promised anything, but this doesn't mean he wasn't given incorrect advice. Even though Movant acknowledged that he would have to serve all of his sentence, this doesn't refute an allegation that he was misadvised as to when he'd be "eligible" for parole. Movant's allegation is not that he did not believe counsel representation meant he'd be "*entitled*" to parole, but only "*eligible*" after 50%. Movant's statement in the plea petition that no one represented he would "*serve*" less than the actual sentence doesn't refute this. Reversed and remanded for evidentiary hearing.

Experts

State v. Mosely, 2024 WL 4886247 (Mo. App. E.D. Nov. 26, 2024):
Holding: Even though general testimony by Expert on coercive interrogations and false confessions is allowed, trial court didn't abuse discretion in prohibiting Defendant from asking Expert, "what type of false confession did you see in this case?" and "was the interrogation coercive?", because these questions sought to elicit answers about the reliability, accuracy or credibility of specific witness' testimony, which is prohibited, and invaded province of jury.
Discussion: Sec. 490.065.2 allows expert testimony when it will help the jury understand the evidence or decide contested issues, but such testimony may still be limited when it invades the exclusive province of the jury. Experts are allowed to testify *generally* as to factors that may assist the jury in determining the reliability of a witness, but cannot testify as to the particular reliability or credibility of a specific witness. Here, Defendant's questions sought to elicit Expert's opinions about the particular accuracy of Defendant's confession or Defendant's general credibility, in that it would have allowed Expert to speculate about whether Defendant's statements made during his interrogation were truthful or were coerced falsehoods. This is prohibited testimony about the reliability, accuracy and credibility of a specific witness. Expert can testify to the general factors of coercive interrogations, but it was for the jury to determine if the confession was truthful or coerced.

Expungement

C.S. v. Mo. State Hwy. Patrol Crim. Justice Info. Serv., 2024 WL 5204189 (Mo. App. W.D. Dec. 24, 2024):
Holding: Petitioner's 2020 conviction for the class E felony of unlawful use of a weapon, Secs. 571.030.1(11) and 571.030.8(1), for possessing a firearm along with 84 grams of marijuana was eligible for expungement under Art. XIV, Sec. 2, Mo. Const. (the marijuana amendment), because this was a "marijuana offense"; for purposes of constitutionally mandated expungement, "marijuana offense" includes any charged crime that, but for the use, possession, cultivation, and distribution of marijuana would not be a crime.
Discussion: Sec. 2.10(7)(a)(c) of the marijuana amendment provides, in relevant part, that any person incarcerated in prison who is serving a sentence for a marijuana offense which was a class E felony involving less than three pounds of marijuana may petition for release and expungement. The circuit court found the offense was a "weapons offense" – not a marijuana offense – and denied release and expungement. But 571.030.1(11) makes the non-criminal act of possessing a firearm a crime based "solely and only" on the fact that the defendant also possessed a controlled substance. But for Petitioner's possession of marijuana, he could not have been convicted of unlawful use of a weapon under 571.030.1(11). The amendment does not define "marijuana offense." But the plain meaning of "offense" makes possession of marijuana while the person is in the otherwise lawful possession of a firearm a criminal act punishable by law, and thus, a "marijuana offense." We reject the State's argument that "marijuana offense" refers only

to offenses in Chapter 579 (the Controlled Substances chapter). The amendment states it is to be interpreted "to the fullest extent possible" to carry out its purpose of preventing arrest and penalty for personal possession of limited amounts of marijuana. We hold that for purposes of constitutionally mandated expungement, "marijuana offense" includes any charged crime that, but for the use, possession, cultivation, and distribution of marijuana would not be a crime.

Ex Post Facto

Roy v. Mo. Dep't of Corr., 2024 WL 4594969 (Mo. App. W.D. Oct. 29, 2024):
Holding: Even though (1) the 1994 version of Sec. 558.019.5 allowed the Parole Board to convert consecutive sentences to concurrent ones, and (2) Petitioner was convicted in 1997 and given consecutive sentences, the repeal of this provision in 2005 did not violate the prohibition on *ex post facto* laws, as applied to Petitioner.
Discussion: Petitioner argues that repeal of the provision violates the *ex post facto* rule because repeal operates to make his punishment for his 1997 convictions more onerous since the Board can no longer convert his consecutive sentences to concurrent ones. To decide whether an amendment violates *ex post facto*, the court must determine whether it produces a sufficient risk of increasing the measure of punishment attached to covered crimes. An amendment that creates only the most speculative and attenuated possibility of producing the prohibited effect isn't sufficient. Here, any risk of greater punishment from the repeal is speculative and attenuated. The 1994 statute did not require the Board to convert the sentences, or "even consider" doing so. Petitioner's claim that the 2005 repeal eliminated his substantive right to obtain earlier release is "purely conjectural" and insufficient to establish an *ex post facto* violation.

Indictment and Information

State v. Devore, 2024 WL 5130825 (Mo. App. E.D. Dec. 17, 2024):
Holding: Even though Defendant charged with possession of a controlled substance, Sec. 579.015, was originally charged with possessing heroin, trial court did not err in allowing State to file amended information changing drug to fentanyl, because this did not charge a new or different offense, since the elements of the charge of possession remained the same both before and after the amendment.
Discussion: Rule 23.08 allows an information to be amended any time before verdict if no additional or different offense is charged, and Defendant's "substantial rights" aren't prejudiced. A person commits the offense of possession of a controlled substance if they knowingly possess a controlled substance. Both heroin and fentanyl are controlled substances. Thus, the elements of the offense didn't change due to the amended information.

State v. Keathley, 2024 WL 5153185 (Mo. App. S.D. Dec. 18, 2024):
Holding: (1) Even though Defendant, who was convicted of making a terroristic threat, Sec. 574.115, claimed on appeal that his allegedly threatening statements were protected by the First Amendment, Defendant failed to preserve this issue for appeal, because he failed to bring the claim as a challenge to the sufficiency of the information *before trial* in a motion to dismiss based on his constitutional argument; (2) Rule 24.04(b)(2) requires such defenses and objections be raised *before trial*; and (3) because constitutional challenges must be raised at the "earliest opportunity," the failure to raise this *before trial* waived the constitutional issue on appeal. Raising the matter as trial court error for overruling the motion for judgment of acquittal is insufficient.

Jury Instructions

State v. Stock, 2024 WL 4536295 (Mo. App. W.D. Oct. 22, 2024):
Holding: (1) Where the jury instruction for felony tampering with physical evidence only required the jury to find that Defendant altered evidence "to impair the investigation into death of Victim", this was erroneous because felony tampering requires as an element that the tampering have resulted in the impairment or obstruction of the prosecution for a felony, Sec. 575.100.2 (but wasn't plain error because this element wasn't disputed at trial); (2) where the jury instruction for tampering with physical evidence allowed the jury to convict if Defendant acted "knowingly" rather than "purposely," this was erroneous because tampering, Sec. 575.100.1(1), requires a defendant act "with the purpose to impair" the evidence's availability, and "purposely" is a higher mental state than "knowingly" (but wasn't plain error because Defendant's trial testimony indicated it was his purpose to destroy the evidence).
Discussion: (1) An instruction must contain all essential elements of an offense as set out in a statute. For tampering to constitute a class E felony instead of a class A misdemeanor, Sec. 575.100.2 requires that the tampering obstruct or impair a felony prosecution. This was an essential element of the crime, and failure to include it in the verdict director was erroneous. But this isn't plain error because Defendant didn't dispute this element at trial. (2) Sec. 575.100.1(1) requires as a mental state the "purpose" to impair, which is a higher mental state than "knowingly." The verdict director was erroneous because it lowered the culpable mental state. However, Defendant testified extensively at trial that he was trying to get rid of evidence, and this this testimony showed he acted purposely in destroying evidence. Thus, no plain error.

State v. Stock, 2024 WL 4536295 (Mo. App. W.D. Oct. 22, 2024):
Holding: Even though (1) Defendant shot Victim and then cut up Victim's body parts and disposed of some of them (head, arms, legs) in a woods, but (2) the Victim's torso was too heavy for Defendant to move so he left it in his home, the jury instruction for abandonment of a corpse was plainly erroneous because it allowed conviction if Defendant "disposed of *parts* of the corpse," but the applicable MAI and statute required abandonment of a "corpse."
Discussion: Sec. 194.425.1 provides that a person commits the crime of abandonment of a corpse when they abandon, dispose or leave a "corpse" without reporting it to law

enforcement. Here, the State modified the applicable MAI-CR 4th 432.10 to change that Defendant disposed of a "corpse" to disposed of only "parts of the corpse." Rule 28.02(c) provides that when an MAI-CR instruction is available, the court is required to use it. Failure to do so is error, the prejudicial effect of which to be judicially determined. Given that both the statute and applicable MAI required the jury to find that Defendant disposed of a "corpse," the modification to allow conviction for disposing of only "parts of the corpse" was clear, obvious, evident error. Although appellate court believes that Defendant's disposal of Victim's body parts was sufficient to convict of abandonment of a corpse, "this court cannot say that a reasonable jury would have unanimously determined this element when it was not properly submitted in the instruction." This resulted in manifest injustice and requires new trial.

Jury Issues – Batson – Striking of Jurors – Juror Misconduct

State v. Gholson, 2024 WL 4820809 (Mo. App. E.D. Nov. 19, 2024):
In case of first impression, appellate court holds that even though trial court, sua sponte, declared a mistrial in the presence of the jury when the jury indicated it was deadlocked, defense counsel had "opportunity to object" and is deemed to have consented to the mistrial in the absence of objection; defense counsel should have requested sidebar, objected, and court could have told jury it had reconsidered its ruling and they should continue deliberating.
Facts: Defendant was tried twice. The first trial ended during deliberations when, after deliberating for several hours, the court asked jurors if they were deadlocked. They said they were, and that more time wouldn't resolve it. The court then said in the jury's presence that it was declaring a mistrial, but then asked counsel if there was any legal reason not to discharge the jury. Defense counsel said, "no." Before the second trial, Defendant filed a motion to dismiss on grounds of Double Jeopardy. He claimed he had not consented to the *sua sponte* mistrial and there was no manifest necessity for it. The trial court denied the motion. After conviction, Defendant appealed.
Discussion: Generally, Double Jeopardy bars retrial if a judge grants a mistrial without Defendant's request or consent. However, consent can be express or implied from the totality of circumstances. Defendant argues he had no opportunity to object because the trial court declared a mistrial in front of the jury without giving Defendant an opportunity to object outside their presence. This is an issue of first impression in Missouri, but our Supreme Court has focused on the "opportunity to object," and if the only such opportunity is in front of the jury, it is counsel's responsibility to request a sidebar conference outside their presence, and if the court sustains counsel's objection, the court can notify the jury that it has reconsidered and they should continue deliberating. Denial of motion to dismiss affirmed.

Juvenile

State v. Brown, 2024 WL 5165209 (Mo. App. S.D. Dec. 19, 2024):
Holding: Even though Defendant claimed that Victim's juvenile records would be relevant to his defense, the trial court lacked authority to order disclosure of such records, because under Sec. 211.321, only the Juvenile Court has authority to allow disclosure of such records to "persons having a legitimate interest therein."

Order of Protection

S.J.H. v. J.P.H., 2024 WL 4351478 (Mo. App. E.D. Oct. 1, 2024):
Holding: (1) Trial court abused discretion in awarding attorney's fees to prevailing party (Wife) in Order of Protection case where there was no evidence before the court as to the parties' financial resources; although Sec. 455.075 allows a trial court to award attorneys' fees in Order of Protection case, the court must have before it each party's debts, income, etc., before it can determine if either party has an ability to pay; and (2) even though Wife claimed she couldn't present evidence of Husband's ability to pay because he had concealed his financial information from her, Sec. 455.075 doesn't contain any such exception to requirement to present evidence of parties' financial resources.

K.E.S. v. S.R.S., 2024 WL 4595195 (Mo. App. E.D. Oct. 29, 2024):
Holding: (1) In case of first impression, appellate court holds that Sec. 455.040.1(4)'s requirements for granting a 10-year extension of an Order of Protection on the basis that Respondent poses a "serious danger to the physical or mental health of petitioner" are a list of "factors" to consider, not "elements," and the statutory list of factors is not exclusive; and (2) regarding the factor of whether Respondent has a "criminal record," Case.net "screenshots" aren't sufficient to prove this because Case.net is not an official record, and Petitioner-Victim's testimony that Respondent has a criminal record doesn't provide official documentation either; however, Judge can take judicial notice of Respondent's criminal record, and "certified" copies of the record aren't required.

C.B. v. G.B., 2024 WL 4674127 (Mo. App. E.D. Nov. 5, 2024):
Holding: (1) Even though Respondent-Husband in Order of Protection case received notice of the date the original full Order hearing would be held, where he didn't appear (apparently because he was incarcerated) and Petitioner-Wife subsequently requested and received two continuances of the original hearing for which Husband did *not* receive notice, trial court erred in later denying Husband's Rule 74.06(b) motion to set aside the judgment because it was void on due process grounds since Husband had not received notice and opportunity to be heard; trial court was required under Rule 74.03 and 43.01 to notify Husband of the continuances and new hearing dates, and this is true even though Husband didn't inquire about the status of his case; (2) even though the record indicated the trial court faxed notices of the continuances to "Ferguson," without more details identifying the place or intended recipient of these notices, they weren't reasonably calculated to provide notice to Husband.

J.A.W. v. V.W., 2024 WL 4887161 (Mo. App. E.D. Nov. 26, 2024):
Holding: Trial court's ruling denying full Order of Protection to Mother on behalf of her 6-year-old Child from Grandfather was against the weight of the evidence, where photographs showed Grandfather had bitten Child on various parts of Child's body on multiple occasions (including on the groin and above buttocks) and left bite marks on Child, even though Grandfather testified the events were the result of playful games and not intentional; a GAL testified Child and Grandfather had a loving relationship and more harm could come to the Child from separating them; and a Dept. of Social Services Investigator reported that the incidents didn't meet the Dept's criteria for physical abuse because Child's Father was present during the incidents.
Discussion: The trial court's judgment cannot stand because the extensive and persuasive evidence in the record demonstrates that Grandfather's purposeful sucking and biting behavior constituted a battery such that the court's judgment was against the weight of the evidence. Sec. 455.010(5) states that "domestic violence" is "abuse" which includes battery, defined in Sec. 455.010(1)(c), as "purposely or knowingly causing physical harm to another." The photos and witness testimony paint a picture different from Grandfather's testimony. The photos, in particular, have far more persuasive value than Grandfather's self-serving denials or explanations. The probative value of Grandfather's self-serving claim that he did not "intentionally" cause these injuries is minimal and overwhelmed by contrary evidence. This is a rare case where we believe the trial court could not have reasonably found what it found and we therefore firmly believe the judgment was wrong. Denial of full Order of Protection reversed.

Rule 24.035/29.15 & Habeas Postconviction Procedural Issues

In re: Branson v. Buckner, 2024 WL 4600255 (Mo. App. S.D. Oct. 29, 2024):
Holding: (1) Where the applicable 2006 version of Sec. 566.067 made first-degree child molestation a class A felony (instead of a class B) only if certain conditions were satisfied, and the State failed to allege or prove any of those conditions at Petitioner's guilty plea, his sentence of life imprisonment exceeded the sentence authorized by law, and warranted habeas relief; (2) even though Petitioner failed to raise this claim in this prior Rule 24.035 case, the claim is not procedurally barred because habeas relief is available where a person receives a greater sentence than permitted by law; but (3) since Petitioner's guilty plea was part of a negotiated deal whereby the State dismissed other charges, the remedy is to vacate the entire plea and remand to allow the dismissed charges to be resumed, rather than merely resentencing as a class B felony.
Discussion: (1) The relevant statute provided that first-degree child molestation was a class A felony only if the defendant had a prior conviction under Chapter 566; inflicted serious physical injury; displayed a deadly weapon; or committed the crime as part of a ritual or ceremony. Here, the State alleged none of these conditions, and no evidence was presented on them at Petitioner's guilty plea. Thus, Petitioner's offense was only a class B felony. (2) Petitioner failed to raise this claim in a direct appeal or in his prior 24.035 amended motion. (He tried to raise it on 24.035 appeal, but appellate court didn't consider it because it wasn't pleaded in the amended motion). Although failure to raise a claim on direct appeal or in a postconviction motion generally bars habeas review, a

narrow exception exists where Petitioner received a greater sentence than that permitted by law. That exception applies here. (3) As to remedy, Petitioner argues the court should resentence for a class B felony. But, here, the State dismissed other charges against Petitioner which would have carried lengthy sentences in exchange for the negotiated guilty plea. Those who collaterally attack their guilty pleas lose the benefit of the bargains obtained as a result. A different calculus informs whether it is wise to challenge a guilty plea in a habeas proceeding because the challenge may result in a less favorable outcome. Habeas relief embodies the saying, "Be careful what you wish for." Conviction vacated and remanded for further proceedings.

Sneed v. State, 2024 WL 4902794 (Mo. App. S.D. Nov. 27, 2024):
Holding: Where (1) Movant filed a premature *pro se* Rule 29.15 motion before sentencing; (2) the Public Defender notified the court that it wouldn't take any action on Movant's motion until it became ripe; (3) Movant then filed a document stating he "would like to withdraw my *pro se* motion"; (4) Movant was sentenced and did a direct appeal; (5) after direct appeal mandate, the Public Defender entered the 29.15 case and filed an amended motion, which was denied on the merits; and then (6) Movant appealed, the appeal must be dismissed because Movant's voluntary withdrawal of his premature *pro se* motion operated as a voluntary dismissal of his case, and he never filed another timely *pro se* 29.15 motion.
Discussion: Movant argues he didn't dismiss his case because he never cited the voluntary dismissal rule, 67.02 and didn't use the word "dismiss." But to voluntarily dismiss a case, a party need not invoke "magic language." Instead, courts look to the substance of a motion. When Movant "withdrew" his *pro se* motion, this functioned as a voluntary dismissal. It voluntarily removed from the motion court's consideration all claims before it. Movant could have timely refiled his *pro se* motion within 90 days after the direct appeal mandate, but he didn't. Appeal dismissed.

Davis v. State. 2024 WL 4675135 (Mo. App. W.D. Nov. 5, 2024):
Holding: Assuming there is a meritorious reason to amend an old 24.035/29.15 judgment after a postconviction appeal, a Movant must first file a motion to recall the mandate in the Court of Appeals, and only if appellate court recalls its mandate and remands case, can the motion court then conduct further proceedings.

State ex rel. Bailey v. Horsman, 2024 WL 4536351 (Mo. App. W.D. Oct. 22, 2024):
Holding: (1) In highly fact-specific case, Western District holds habeas court did not err in granting habeas petition regarding Petitioner's 1985 murder conviction where habeas evidence revealed State had failed to disclose documents showing Victim's earrings were found in Alternative Suspect's apartment, three FBI reports which showed Petitioner's palm or fingerprints were not on various evidence and were otherwise potentially exculpatory, and documents showing Alternative Suspect (who was a police officer) was implicated in other crimes, including burglaries, stalking and fraud; and (2) even though Petitioner did not learn of the undisclosed FBI reports until discovery in the habeas case and, thus, had not pleaded their non-disclosure in her Petition, this did not bar habeas relief because Rule 91.06 provides that a court shall grant such relief even in the absence of a petition.

Discussion: Review of a grant of habeas relief (via writ of certiorari) does not contemplate review of findings of fact, but is limited to questions of law presented by the record before the habeas court. Review is limited to whether the habeas court exceeded its authority or abused its discretion. A habeas court exceeds its authority if the evidence as a whole does not support the grant of relief, and abuses its discretion if its ruling is clearly against the logic of the circumstances, is arbitrary or unreasonable. Where, as here, a habeas court granted relief on several claims -- here, freestanding actual innocence; a gateway claim of actual innocence and cause-and-prejudice permitting review of otherwise barred claims; *Brady* violations; and ineffective assistance of counsel for failure to show Petitioner's mental illness and vulnerability to false confession – the appellate court need only decide if at least *one* of the claims has merit. The State claims the habeas court erred in granting relief regarding non-disclosure of the FBI reports because this issue wasn't pleaded in Petitioner's habeas petition. The State claims it was "ambushed" by this evidence. "The Attorney General's assertation that *the state* was ambushed by exculpatory evidence [Petitioner] did not know about until discovery was conducted after her habeas petition was filed borders on the absurd." Prosecutors are bound by their ethics to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of a conviction. Moreover, Rule 91.06 provides that a court must issue habeas relief when supported by evidence "although no petition be presented for such writ." Thus, the FBI *Brady* claim didn't have to be pleaded in the Petition. The habeas court found that issue was tried by "implied consent," but that's irrelevant because the issue didn't have to be pleaded at all in order to obtain relief on it. The State claims the evidence regarding Alternative Suspect's other convictions was merely impeaching and didn't have to be disclosed because the State didn't intend to call and didn't call Alternative Suspect at Petitioner's trial. But the evidence wasn't merely impeaching. The evidence was independently exculpatory irrespective of impeachment because it supported the argument that Alternative Suspect, not Petitioner, murdered the Victim. The habeas record "reveals a troubling realization." All of the suppressed evidence became known to Police Department *shortly after* police had extracted a confession from Petitioner after multiple interrogations. Alternative Suspect – who was a Police Officer with the Police Department – had in his possession Victim's purse, credit card and earrings, and there's no explanation for how he could have had these things if he wasn't involved in the murder. The habeas record "strongly suggests" the Police Dept. "buried" its investigation into whether Alternative Suspect committed the murder, and intentionally failed to follow up on information about Alternative Suspect. Further, Alternative Suspect was allowed to plead guilty in a fraud case in exchange for the State promising not to bring any other charges against him, which meant the State could not charge him with the murder. This plea agreement is part of a "large volume" of evidence that was not disclosed to Petitioner. Evidence that Alternative Suspect was relieved of criminal liability for the murder, despite never having been cleared of the crime, would have been of the utmost value to Petitioner during her trial as she sought to explain why the State would be motivated to cling to Petitioner's contradictory, inaccurate and unsubstantiated confession, while ignoring Alternative Suspect's direct ties to the murder. Evidence that Alternative Suspect had been involved in home burglaries, fraudulent use of stolen checks, trespass and Peeping Tom incidents in the months immediately before and after the murder would have been of value to

Petitioner due to the similarities between those incidents and Victim's murder – a woman murdered in her apartment. There is no doubt the suppressed evidence was material, and in its absence, Petitioner did not receive a fair trial worthy of confidence. We reach this conclusion notwithstanding Petitioner's confession. We can independently confirm from the record that the habeas court didn't exceed or abuse its authority by concluding that Petitioner's confession wasn't reliable. That conclusion is supported by the inaccuracy of the confession itself (compared to known evidence), but also by testimony of a forensic psychiatrist who testified to Petitioner's vulnerability to false confession. Grant of habeas relief affirmed unless State files written notice to re-try Petitioner within 10 days of the court's mandate and such trial occurs within 180 days of such notice.

State ex rel. Bailey v. Davis, 2024 WL 4819933 (Mo. App. W.D. Nov. 19, 2024):
Holding: (1) Where a habeas court issues a "preliminary" writ of habeas corpus, the State's remedy to appeal that is via writ of prohibition; for final judgment's in habeas, the State's remedy is by writ of certiorari; (2) where Petitioner filed a declaratory judgment action seeking certain jail time credit, which was denied, and Petitioner had an appeal of that denial pending, Petitioner could not then seek habeas relief on identical grounds because the declaratory judgment has *res judicata* effect and Petitioner cannot re-litigate the identical issue. Writ of prohibition granted, but appellate court notes "special" nature of habeas and states this "Opinion should not be read to impose a blanket prohibition on every attempt to seek habeas relief that attacks a contrary order or judgment entered by a co-equal court", such as where the prior court lacked jurisdiction or lawful authority.

Scott v. State, 2024 WL 4887460 (Mo. App. W.D. Nov. 26, 2024):
Holding: Where Movant timely filed his *pro se* 29.15 motion on April l1, 2022 (which was within 90 days of his mandate on direct appeal), the version of 29.15 in effect from November 4, 2021 through June 30, 2023, applied to his case and allowed counsel 120 days to file an amended motion (disagreeing with *Smith v. State*, 697 S.W.3d 617 (Mo. App. E.D. 2024)); this is because 29.15(m) in effect from November 4, 2021 through June 30, 2023, did *not* contain a schedule indicating that proceedings for a movant sentenced after January 1, 2018, were to be governed by the rules in effect at the time of movant's sentencing.
Discussion: The dispositive circumstance for purposes of this case is that 29.15(m) in effect at the time Movant filed his *pro se* motion in April 2022 did *not* indicate that any other version of Rule 29.15(g) (granting 120 days to file an amended motion) applied other than the version then in effect. 29.15(m) in effect from November 4, 2021 through June 30, 2023, did *not* contain a schedule indicating that such proceedings were to be governed by the rule in effect at the time of sentencing. The version of 29.15(m) that *became effective July 1, 2023*, does state that the Rule in effect at time of sentencing controls. The *Smith* case improperly applied the *post*-July 1, 2023, Rule 29.15(m) to a case occurring between November 4, 2021 to June 30, 2023, so Western District chooses not to follow *Smith*.

Tolentino-Geronimo v. State, 2024 WL 5204190 (Mo. App. W.D. Dec. 24, 2024):
Holding: Where Attorney electronically filed Movant's *pro se* 29.15 motion which was signed by Movant, this did not constitute an "entry of appearance" by Attorney and, thus, did not start the time for filing an amended motion.
Discussion: Rule 55.03(b) provides that an attorney enters and appearance by (1) "participating in any proceeding as counsel" for a party, (2) signing attorney's name on any pleading, motion or other filing, or (3) filing an entry of appearance. Here, Attorney did not engage in any of these activities when she filed the *pro se* 29.15 motion. She did not participate as counsel, did not sign her name on the *pro se* motion, and did not file a written entry of appearance. Thus, this did not constitute an entry and did not start the time for filing an amended motion. Compare *Cooper v. State*, 675 S.W.3d 718 (Mo. App. S.D. 2023), holding counsel did enter an appearance *by signing his name* to Movant's initial *pro se* 29.15 motion.

Search & Seizure – Suppression of Physical Evidence

State v. McClain, 2024 WL 4351933 (Mo. App. E.D. Oct. 1, 2024):
In case of first impression, appellate court holds that even though police did not obtain a warrant to have Telephone Company provide real-time cell phone information which gave police Defendant's location (resulting in his arrest), the warrantless search was justified by exigent circumstances since Defendant was wanted as a suspect in three murders within a 24-hour period and lives would be at risk if he weren't apprehended.
Facts: Immediately after three murders in which Defendant was a suspect, police requested, and Telephone Company provided, cell phone information which gave Defendant's real-time location. Defendant was arrested and various items seized. Defendant moved to suppress the items because police had not obtained a warrant for the cell phone information. Trial court denied the motion.
Holding: Missouri courts have not yet offered specific guidance on privacy interests in real-time cell site simulators (which provide real-time location of people). Assuming *arguendo* that Defendant had a legitimate expectation of privacy in the particular cell phone information here, we must consider whether the State proved the warrantless search was justified under an exception to the warrant requirement. Here, the State met its burden to show exigent circumstances justified the warrantless search. Exigent circumstances exist if the time needed to obtain a warrant would endanger life, allow a suspect to escape, or allow destruction of evidence. Here, trial court found that "lives were at risk" if police had waited to obtain a warrant. There is no more exigent circumstances than trying to locate and apprehend a suspect in multiple murders.

Sentencing Issues

In re: Branson v. Buckner, 2024 WL 4600255 (Mo. App. S.D. Oct. 29, 2024):
Holding: (1) Where the applicable 2006 version of Sec. 566.067 made first-degree child molestation a class A felony (instead of a class B) only if certain conditions were satisfied, and the State failed to allege or prove any of those conditions at Petitioner's guilty plea, his sentence of life imprisonment exceeded the sentence authorized by law, and warranted habeas relief; (2) even though Petitioner failed to raise this claim in this prior Rule 24.035 case, the claim is not procedurally barred because habeas relief is available where a person receives a greater sentence than permitted by law; but (3) since Petitioner's guilty plea was part of a negotiated deal whereby the State dismissed other charges, the remedy is to vacate the entire plea and remand to allow the dismissed charges to be resumed, rather than merely resentencing as a class B felony.
Discussion: (1) The relevant statute provided that first-degree child molestation was a class A felony only if the defendant had a prior conviction under Chapter 566; inflicted serious physical injury; displayed a deadly weapon; or committed the crime as part of a ritual or ceremony. Here, the State alleged none of these conditions, and no evidence was presented on them at Petitioner's guilty plea. Thus, Petitioner's offense was only a class B felony. (2) Petitioner failed to raise this claim in a direct appeal or in his prior 24.035 amended motion. (He tried to raise it on 24.035 appeal, but appellate court didn't consider it because it wasn't pleaded in the amended motion). Although failure to raise a claim on direct appeal or in a postconviction motion generally bars habeas review, a narrow exception exists where Petitioner received a greater sentence than that permitted by law. That exception applies here. (3) As to remedy, Petitioner argues the court should resentence for a class B felony. But, here, the State dismissed other charges against Petitioner which would have carried lengthy sentences in exchange for the negotiated guilty plea. Those who collaterally attack their guilty pleas lose the benefit of the bargains obtained as a result. A different calculus informs whether it is wise to challenge a guilty plea in a habeas proceeding because the challenge may result in a less favorable outcome. Habeas relief embodies the saying, "Be careful what you wish for." Conviction vacated and remanded for further proceedings.

Roy v. Mo. Dep't of Corr., 2024 WL 4594969 (Mo. App. W.D. Oct. 29, 2024):
Holding: Even though (1) the 1994 version of Sec. 558.019.5 allowed the Parole Board to convert consecutive sentences to concurrent ones, and (2) Petitioner was convicted in 1997 and given consecutive sentences, the repeal of this provision in 2005 did not violate the prohibition on *ex post facto* laws, as applied to Petitioner.
Discussion: Petitioner argues that repeal of the provision violates the *ex post facto* rule because repeal operates to make his punishment for his 1997 convictions more onerous since the Board can no longer convert his consecutive sentences to concurrent ones. To decide whether an amendment violates *ex post facto*, the court must determine whether it produces a sufficient risk of increasing the measure of punishment attached to covered crimes. An amendment that creates only the most speculative and attenuated possibility of producing the prohibited effect isn't sufficient. Here, any risk of greater punishment from the repeal is speculative and attenuated. The 1994 statute did not require the Board to convert the sentences, or "even consider" doing so. Petitioner's claim that the 2005

repeal eliminated his substantive right to obtain earlier release is "purely conjectural" and insufficient to establish an *ex post facto* violation.

State v. Pardee, 2024 WL 4595308 (Mo. App. W.D. Oct. 29, 2024):
Holding: Where the court's oral pronouncement of sentence was for "life" imprisonment, but the written sentence and judgment stated it was for "999 years," this was a clerical error than can be corrected *nunc pro tunc*; moreover, the error was material because sentences of life and 999 years have different effects in determining parole eligibility.

Tolentino-Geronimo v. State, 2024 WL 5204190 (Mo. App. W.D. Dec. 24, 2024):
Holding: Where 29.15 Movant included as a claim in his amended motion that the motion court should correct his written judgment *nunc pro tunc* because the written sentence differed from the oral pronouncement in that the written judgment didn't reference Movant's parole eligibility, motion court clearly erred in denying this claim because such errors can be corrected *nunc pro tunc*; court pronounced sentence as "life without parole under the statute as defined" but the written sentence said only "life without parole" and the statute at issue, Sec. 566.030.2(2), authorized parole after defendant served 30 years or reached age 75.

Trial Procedure

State v. Gholson, 2024 WL 4820809 (Mo. App. E.D. Nov. 19, 2024):
In case of first impression, appellate court holds that even though trial court, sua sponte, declared a mistrial in the presence of the jury when the jury indicated it was deadlocked, defense counsel had "opportunity to object" and is deemed to have consented to the mistrial in the absence of objection; defense counsel should have requested sidebar, objected, and court could have told jury it had reconsidered its ruling and they should continue deliberating.
Facts: Defendant was tried twice. The first trial ended during deliberations when, after deliberating for several hours, the court asked jurors if they were deadlocked. They said they were, and that more time wouldn't resolve it. The court then said in the jury's presence that it was declaring a mistrial, but then asked counsel if there was any legal reason not to discharge the jury. Defense counsel said, "no." Before the second trial, Defendant filed a motion to dismiss on grounds of Double Jeopardy. He claimed he had not consented to the *sua sponte* mistrial and there was no manifest necessity for it. The trial court denied the motion. After conviction, Defendant appealed.
Discussion: Generally, Double Jeopardy bars retrial if a judge grants a mistrial without Defendant's request or consent. However, consent can be express or implied from the totality of circumstances. Defendant argues he had no opportunity to object because the trial court declared a mistrial in front of the jury without giving Defendant an opportunity to object outside their presence. This is an issue of first impression in Missouri, but our Supreme Court has focused on the "opportunity to object," and if the only such opportunity is in front of the jury, it is counsel's responsibility to request a sidebar conference outside their presence, and if the court sustains counsel's objection, the court

can notify the jury that it has reconsidered and they should continue deliberating. Denial of motion to dismiss affirmed.

State v. Keathley, 2024 WL 5153185 (Mo. App. S.D. Dec. 18, 2024):
Holding: (1) Even though Defendant, who was convicted of making a terroristic threat, Sec. 574.115, claimed on appeal that his allegedly threatening statements were protected by the First Amendment, Defendant failed to preserve this issue for appeal, because he failed to bring the claim as a challenge to the sufficiency of the information *before trial* in a motion to dismiss based on his constitutional argument; (2) Rule 24.04(b)(2) requires such defenses and objections be raised *before trial*; and (3) because constitutional challenges must be raised at the "earliest opportunity," the failure to raise this *before trial* waived the constitutional issue on appeal. Raising the matter as trial court error for overruling the motion for judgment of acquittal is insufficient.