

No. 83406

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IN THE  
SUPREME COURT OF MISSOURI

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**GEORGE BROWN, JR.,**

**Appellant,**

**vs.**

**STATE OF MISSOURI,**

**Respondent.**

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**APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF  
SCOTT COUNTY, MISSOURI  
HONORABLE T. LYNN BROWN, JUDGE**

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**RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT**

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### **JURISDICTIONAL STATEMENT**

This appeal is from the denial of the appellant's motion to withdraw his guilty plea filed pursuant to Supreme Court Rule 29.07 in the Circuit Court of Scott County. Appellant pled guilty to and was convicted of forgery, § 570.090, RSMo 1994, and was ultimately sentenced to three years of imprisonment in the Missouri Department of Corrections. The denial of appellant's Rule 29.07 motion was reversed by the Court of Appeals, Southern District, **Brown v. State**, No 23861 (January 29, 2001). This Court has jurisdiction as it sustained the State's application for transfer pursuant to Supreme Court Rule 83.04. Article V, §10, Missouri Constitution (as amended 1982).

### **STATEMENT OF FACTS**

On April 29, 1999, appellant, George Brown, appeared before the Honorable David

A. Dolan and entered a plea of guilty to forgery (Supp.L.F. 1)<sup>1</sup>. The plea court accepted appellant's plea finding that appellant voluntarily and intelligently plead guilty with the understanding of the nature of the charge against him, the range of punishment for such charge and the consequences of his plea of guilty (Supp.L.F. 1).

That same day the court sentenced appellant to three years of imprisonment in the Missouri Department of Corrections (Supp.L.F. 1). The court also requested that appellant be considered for probation during the first 120 days and that he be placed in an institutional treatment center pending review by the Department of Corrections pursuant to § 559.115, RSMo 1994 (L.F. 12, Supp.L.F. 1).

On April 30, 1999, appellant was delivered to the custody of the Missouri Department of Corrections (L.F. 14, 17). On July 26, 1999, appellant was denied probation (Supp.L.F. 2). On June 29, 2000, appellant filed a **pro se** Rule 24.035 motion for postconviction relief (L.F. 17-21). The motion court dismissed appellant's motion for post-conviction relief as untimely (L.F. 13). On August 21, 2000, appellant filed a "Motion to Correct Manifest Injustice Pursuant to Rule 29.07" alleging that he was not placed in the Institutional Treatment Center as ordered by the court (L.F. 10-11). The motion court

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<sup>1</sup> The record on appeal consists of the legal file ("L.F."), a first supplemental legal file ("Supp.L.F."), and a second supplemental legal file ("Sec.Supp. L.F.").

summarily denied appellant's 29.07 motion (L.F. 8).

The denial of appellant's Rule 29.07 motion was reversed by the Court of Appeals, Southern District, **Brown v. State**, No 23861 (January 29, 2001). This Court then sustained the State's application for transfer pursuant to Supreme Court Rule 83.04.

**POINT RELIED ON**

**THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S RULE 29.07(d) MOTION TO WITHDRAW HIS GUILTY PLEA BECAUSE APPELLANT'S CLAIM THAT HIS PLEA WAS RENDERED INVOLUNTARY DUE TO HIS BELIEF THAT HE WOULD RECEIVE PROBATION AFTER 120 DAYS IN AN INSTITUTIONAL TREATMENT CENTER WAS COGNIZABLE UNDER RULE 24.035 AND THEREFORE REQUIRED HIM TO RAISE HIS CLAIM WITHIN NINETY DAYS OF DELIVERY TO THE DEPARTMENT OF CORRECTIONS, WHICH HE FAILED TO DO.**

**AT ANY RATE, SHOULD HIS CLAIM BE CONSIDERED ON THE MERITS IT WOULD STILL FAIL AS THE RECORD SHOWS THAT APPELLANT KNEW THAT IF HE WERE TO RECEIVE PROBATION IT WOULD BE IN THE SOLE DISCRETION OF THE TRIAL COURT.**

Logan v. State, 22 S.W.3d 783 (Mo.App. W.D. 2000);

Reynolds v. State, 939 S.W.2d 451 (Mo.App. W.D. 1996);

State v. Ryan, 813 S.W.2d 898 (Mo.App. S.D. 1991);

Leatherwood v. State, 898 S.W.2d 109 (Mo.App. S.D. 1995);

Supreme Court Rule 24.035;

Supreme Court Rule 29.07.

## ARGUMENT

**THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S RULE 29.07(d) MOTION TO WITHDRAW HIS GUILTY PLEA BECAUSE APPELLANT'S CLAIM THAT HIS PLEA WAS RENDERED INVOLUNTARY DUE TO HIS BELIEF THAT HE WOULD RECEIVE PROBATION AFTER 120 DAYS IN AN INSTITUTIONAL TREATMENT CENTER WAS COGNIZABLE UNDER RULE 24.035 AND THEREFORE REQUIRED HIM TO RAISE HIS CLAIM WITHIN NINETY DAYS OF DELIVERY TO THE DEPARTMENT OF CORRECTIONS, WHICH HE FAILED TO DO.**

**AT ANY RATE, SHOULD HIS CLAIM BE CONSIDERED ON THE MERITS IT WOULD STILL FAIL BECAUSE THE RECORD SHOWS THAT APPELLANT KNEW THAT IF HE WERE TO RECEIVE PROBATION IT WOULD BE IN THE SOLE DISCRETION OF THE TRIAL COURT.**

In his sole point on appeal, appellant claims that the motion court erred in denying his Rule 29.07(d) motion to withdraw his guilty plea based on an alleged manifest injustice (App.Br. 4). According to appellant his plea was rendered involuntary because he believed he would receive probation after 120 days in an institutional treatment center pursuant to §559.115, RSMo 1994 (App.Br. 4).

### **A. Facts**

On April 29, 1999, appellant, George Brown, appeared before the Honorable David A. Dolan and entered a plea of guilty to forgery (Supp.L.F. 1). That same day the court sentenced appellant to three years of imprisonment in the Missouri Department of Corrections (Supp.L.F. 1). The court also requested that appellant be considered for probation during the first 120 days and that he be placed in an institutional treatment center pending review by the Department of Corrections pursuant to § 559.115, RSMo 1994 (L.F. 12, Supp.L.F. 1).

On April 30, 1999, appellant was delivered to the custody of the Missouri Department

of Corrections (L.F. 14, 17). On July 26, 1999, appellant was denied probation (Supp.L.F. 2). On June 30, 2000, appellant filed a **pro se** Rule 24.035 motion for postconviction relief but it was dismissed as untimely (L.F. 13, 17-21). On August 21, 2000, appellant also filed a "Motion to Correct Manifest Injustice Pursuant to Rule 29.07" and it was summarily denied by the motion court (L.F. 10-11).

#### **B. Appellant Cannot File An Untimely Successive Rule 29.07(d) Motion**

Rule 29.07(d) allows a defendant to withdraw his or her guilty plea, but only before the sentence is imposed or when imposition of sentence is suspended. See **Logan v. State**, 22 S.W.3d 783, 785 (Mo.App. W.D. 2000). The rule permits such a motion after sentencing only "to correct manifest injustice." Whether a defendant will be allowed to withdraw a guilty plea is within the sound discretion of the trial court. **Sharp v. State**, 908 S.W.2d 752, 754 (Mo.App. E.D. 1995), *cert. denied*, 116 S.Ct. 2529 (1995). "While Rule 29.07(d) itself imposes no time restrictions on the granting of relief under that rule. . . Rule 29.07(d) must be read in pari materia with Rule 24.035, however, which declares itself to be the 'exclusive procedure' for challenging the validity of a guilty plea in a felony case in the sentencing court." **Reynolds v. State**, 939 S.W.2d 451, 454 (Mo. App. W.D. 1996).

Rule 24.035 provides, in pertinent part, that:

(a) A person convicted of a felony on a plea of guilty and delivered to the custody of the department of corrections who claims that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States...may seek relief in the sentencing court pursuant to the provisions of this Rule 24.035. This Rule 24.035 provides the exclusive remedy by which such persons may seek relief in the sentencing court for the claims enumerated.

Supreme Court Rule 24.035(a). This rule further provides that all such claims must be filed within ninety days of the date the person is delivered to the custody of the department of corrections. Supreme Court Rule

24.035(b).

Here, appellant's sole claim in his motion to withdraw his guilty plea was that he was induced to enter his plea of guilty by an unhonored plea bargain (L.F. 10). Appellant alleged in his Rule 29.07 motion as follows:

Movant did not receive the Institutional Treatment Center ordered by the Honorable David A. Dolan on April 29, 1999. The Institutional Treatment Center pursuant to Chapter 559.115 **was the inducement to receive Movant's guilty plea.** Movant believed he would receive probation after completing the Institutional Treatment Center pursuant to Chapter 559.115.

Movant is well aware that the time limit on Rule 24.035 is ninety days. However, **Movant is claiming his plea to be involuntary because he did not receive what was promised in the plea agreement and ordered by the Court,** nor did he receive probation as he believed he would.

(L.F. 10) (emphasis added).

A motion contending that the sentence was imposed on a guilty plea induced by an unhonored plea bargain is more properly addressed under a Rule 24.035 motion, not a Rule 29.07(d) motion. *See, e.g., State v. Myers*, 588 S.W.2d 236 (Mo.App. 1979); *State v. Dunn*, 970 S.W.2d 891 (Mo.App., E.D. 1998). The essence of appellant's claim is that he did not enter his guilty plea voluntarily and that this was a violation of his constitutional due process rights. *See Reynolds v. State*, 939 S.W.2d at 455; *State v. Pendleton*, 910 S.W.2d 268, 271 (Mo.App. W.D. 1995). Such claim is one for which Rule 24.035 provides the exclusive remedy.

If the allegations of the Rule 29.07(d) motion and the relief sought are such that could be sought under a Rule 24.035 pleading, the motion is subject to the terms and conditions of Rule 24.035, including the

time limitations. **Logan v. State**, 22 S.W.2d at 785; **State v. Pendleton**, 910 S.W.2d at 271. To require otherwise "would emasculate Rule 24.035 and constitute Rule 29.079(d) an escape hatch through which any claim procedurally barred by Rule 24.035 could scurry into trial courts." **Logan v. State**, *supra* (quoting **State v. Ryan**, 813 S.W.2d 898, 902 (Mo.App., S.D. 1991)).<sup>2</sup> In **Ryan**, the Southern District noted that allowing a movant to assert a claim under Rule 29.07(d) even though such claim would be time-barred by Rule 24.035 "would render the Supreme Court's repeal of Rule 27.76 and adoption of Rule 24.035 a useless act and reopen the trial courts to stale claims, contrary to the declared objective of Rule 24.035 as expressed in **Day v. State**" *Id.* at 902 (citing **Day v. State**, 770 S.W.2d 692, 695 (Mo. banc 1989), *cert. denied, sub. nom., State v. Walker*, 493 U.S. 866 (1989)).

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<sup>2</sup> For a detailed account of the history of Rule 29.07 and how it corresponded with the promulgation of Rule 24.035 see **State v. Ryan**, 813 S.W.2d 898, 901-902 (Mo.App., S.D. 1991).

In the present case, although appellant did file a Rule 24.035 motion for postconviction relief, with the claim that his plea was involuntary because the “state did not give Movant what was agreed in the plea agreement and [the] ITC [the] judge ordered” (L.F. 18), it was dismissed by the court as untimely because appellant was delivered to the Department of Corrections on April 30, 1999, and the **pro se** Rule 24.035 motion was filed on June 30, 2000, more than 90 days later and past the time limitations. Appellant did not file his Rule 29.07(d) motion until August 21, 2000, well past the ninety day filing limitations for a Rule 24.035 motion.<sup>3</sup> Appellant cannot use an untimely Rule 29.07 motion to end run his way past a Rule 24.035 claim that had already been dismissed for being untimely. As such, appellant was not entitled to seek relief on his claim in a motion to withdraw his plea filed pursuant to Rule 29.07. **State v. Evans**, 989 S.W.2d 662, 663 (Mo. App. S.D. 1999); **Reynolds**, 939 S.W.2d at 455; **Pendleton**, 910 S.W.2d at 271; **State v. Ryan**, 813 S.W.2d at 901-02.

#### **C. Rule 24.035 Does Not Allow For An Extension Of Time To File Claims**

Appellant claims that he could not have filed his Rule 24.035 claim on time because "it was impossible for him to realize that he would not get the treatment as ordered, or that he would be denied probation until 120 days after he began his sentence or thirty days after the time limits of Rule 24.035 had run" (App.Br. 4). Apparently agreeing with appellant, the Court of Appeals below found that appellant's claim was not

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<sup>3</sup> Appellant's **pro se** Rule 24.035 motion was filed 426 days after his delivery to the department of corrections, while his Rule 29.07(d) motion was filed 478 days after his delivery to the department of corrections.

time barred by the ninety-day time limitation of Rule 24.035 because his claim was not “necessarily cognizable” within the ninety-day time limit in Rule 24.035. **Brown v. State**, No. 23861 slip op. at 2. The Court of Appeals found the record was not clear whether appellant became cognizant of his claim before or after the time limitation. **Brown v. State**, No. 23861 slip op. at 2. However, the Court of Appeals below confuses the notion of whether appellant’s claim is one which is cognizable under the claims enumerated in Rule 24.035(a) with the notion of when appellant had knowledge of his claim. At any rate, this same argument has been raised and it was rejected by the Court of Appeals in **Leatherwood v. State**, 898 S.W.2d 109, 111 (Mo.App., S.D. 1995) and **Matthews v. State**, 863 S.W.2d 388, 389 (Mo.App., S.D. 1993).

In **Leatherwood**, the defendant argued that "he could not have filed his motion within ninety days after delivery to the Department of Corrections because the probation he was to receive per the plea agreement was to begin only after he had been imprisoned 120 days." 898 S.W.2d at 111. The Court of Appeals noting the “dilemma” in which the defendant found himself nonetheless held that the motion court did not err in dismissing his motion as untimely because "Rule 24.035 contains no authority for extension of the deadline for filing a motion for postconviction relief . . . the rules for postconviction relief make no allowance for excuse." *Id.* Such is the case here.

In **Matthews v. State**, 863 S.W.2d 388, 389 (Mo.App., S.D. 1993), the defendant attacked the dismissal of his Rule 24.035 motion, “alleging that the time limits in Rule 24.035 operate to deny due process rights, especially when the trial court had retained jurisdiction under §559.115.” He further alleged that he was “‘placed in a quandry’ of either not timely filing a Rule 24.035 motion, hoping for probation after 120 days, or filing such motion and risk alienating the judge.” *Id.* at 390. The Court of Appeals held that it was “constitutionally controlled by decisions of the Missouri Supreme Court . . . Both **Day** and **Thomas** require that

[it] hold steadfast to the time limitation contained in Rule 24.035(b).” *Id.* (citing **Day v. State**, 770 S.W.2d at 695 and **Thomas v. State**, 808 S.W.2d 364, 365 (Mo. banc 1991)).

Although the Western District has noted in dicta the dilemma movants face when they cannot raise an issue in either a Rule 29.07 or 24.035 motion if they are not aware of the claim, **Reynolds**, 939 S.W.2d at 454; **Pendleton**, 910 S.W.2d at 271 n.3, the Western District also recently noted that “this court has never expressly held that the ninety-day time limit in Rule 24.035 may be tolled during the period a movant is unable to discover grounds for relief.” **Logan v. State**, 22 S.W.2d at 785 n.2. In those cases the Western District declined to expressly set out such a new rule as it went on to find that the movant was aware of their respective claims within the ninety-day time limit. At any rate, as it stands today, there are **no** cases that have held that the ninety-day time limit in Rule 24.035 may be tolled on this basis. If the holding in the Court of Appeals opinion below were to remain in place, then a defendant may file at any time a successive post-conviction motion under Rule 29.07(d) by simply alleging that he or she was not aware of the claim in time to prepare the motion under the time limits of Rule 24.035.

#### **D. The Record Shows Appellant Was Aware Of His Claim**

Furthermore, there is evidence that appellant was aware of his claim within the ninety-day time limit. Appellant was delivered to the Department of Corrections on April 30, 1999, and he was denied probation on July 26, 1999 (L.F. 14, Supp.L.F. 2). Thus, the knowledge of his claim is imputed to him within the ninety-day time limit. *See e.g.* **Logan**, 22 S.W.3d at 785. In **Logan**, the movant claimed “that counsel failed to tell him about the alleged falsity of the police officer’s report until after the ninety-day deadline” but the court nonetheless found that “the information in the arrest records was available to [movant] during the entirety of the ninety-day period.” *Id.* Just as the information of the arrest records was imputed to the defendant in **Logan** within the entire time period without direct evidence that he

was told about the “false” police report, so should the information that appellant’s probation was denied be imputed to appellant without direct evidence that he was told about the denial.

The Court of Appeals below noted however that “[w]hen Movant learned of this is unknown, but it would be unreasonable to assume that with the three days remaining to file a motion under Rule 24.035 Movant could do so from the penitentiary.” **Brown**, slip op. at 2. Whether or not appellant had three days remaining to file or one day is irrelevant however, because there is no authority within Rule 24.035 to grant him an extension in order to file his motion within the ninety-day time limit.

At any rate, appellant’s claim should still be considered untimely. Assuming **arguendo**, that appellant did not become aware that his probation was denied until after 120 days passed, presumably around August 30, 1999, appellant did not file his **pro se** Rule 24.035 until June 30, 2000, and he did not file his Rule 29.07 until August 21, 2000 (L.F. 10-11, 13). This is more than ninety days after the 120<sup>th</sup> day, when he would “discover” that he did not indeed receive probation. If the time limits were to be tolled until such time when appellant could discover his claim, his Rule 24.035 and thus, his Rule 29.07 motion would still be late.

#### **E. The Court Of Appeals Improperly Effectuated Habeas Corpus Relief**

The Court of Appeals opinion below was also improper by citing to **Brown v. Gammon**, 947 S.W.2d 437, 440 (Mo.App., W.D. 1997), for the proposition that just as habeas corpus relief can be granted to correct manifest injustice under Rule 91 despite the time bar of Rule 24.035 “where the movant was not and could have been cognizant of his claim until after the time limitation” so should relief be granted under Rule 29.07(d) to correct manifest injustice where the movant is likewise not cognizant of his claim. **Brown v. State**, slip op. at 2. By doing so, the Court of Appeals ignored the recent case from this Court, **Clay v. Dormire**, 37 S.W.3d 214 (Mo. banc 2000). In **Clay**, this Court held that not only must an individual show that he was not aware of his claims in time to raise them in a timely post-conviction motion, he must also show a manifest injustice. *Id.* This Court defined manifest injustice as “newly discovered” evidence of actual innocence. *Id.*

Therefore, the Court of Appeals' reliance on **Brown v. Gammon**, claiming that appellant need only show he did not know of the claim is misplaced and is contrary to this Court's holding.

Not only was the Court of Appeals opinion below incorrect in its interpretation of the manifest injustice standard under habeas corpus relief, but it also was improper by attempting to effectuate habeas corpus relief in what is essentially a post-conviction appeal. It did so by citing **Brown v. Gammon**, to illustrate why appellant should be granted relief under his present claim as he would most likely be granted relief under Rule 91. **Brown**, slip op. at 3. In **Reuscher v. State**, 887 S.W.2d 588, 591 (Mo. banc 1994), this Court held that because the appellant in that case did not file petition for habeas corpus pursuant to Rule 91.02(b) and the parties have not plead nor argue in their brief that the action was a habeas corpus proceeding that "this Court declines to treat this proceeding as anything other than which it is; an appeal from a denial of relief pursuant to Rule 29.15" and not a habeas corpus action. *Id.*<sup>4</sup>

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<sup>4</sup> It should also be noted that the trial court did not have the jurisdiction to hear appellant's claim in the form of habeas corpus relief because it was not plead as a habeas corpus claim and it was not in the proper forum. It was not the proper forum because unlike Rule 29.07 motions which may be filed in the sentencing court, a habeas corpus action must be filed in the court of custody. *See e.g. State ex. rel. Lock v. Seay*, 957 S.W.2d 768, 769 (Mo. banc 1997); **Harden v. State**, 765 S.W.2d 692, 693-694

### F. Appellant's Claim Fails On The Merits

Because appellant's Rule 29.07(d) claim was untimely, the motion court did not err in summarily denying his Rule 29.07(d) motion. However, respondent gratuitously submits that appellant's claim also fails on the merits at his claim is refuted by the record. Appellant signed a "Petition to Enter Plea of Guilty" (Sec.Supp.L.F. 2-8). In this petition appellant acknowledges that "no officer or agent of any branch of government (federal, state or local) has promised or suggested that [he] will receive a particular sentence, or probation, or any other form of leniency if [he] pleads guilty" (Sec.Supp. L.F. 5). He acknowledges that the prosecutor only promised that if appellant were to plead guilty, she would "recommend 3 years DOC on count I, dismiss counts II and III, concurrent to my present DOC sentence" (Sec.Supp. L.F. 6). Finally, appellant acknowledges that no one "has told or promised me I would receive probation or parole and I understand that I do not have a right to receive probation or parole and whether or not I receive probation or parole is solely in the Court's discretion" (Sec.Supp. L.F. 8). Thus, appellant acknowledges that no one had promised him he would receive probation after 120 days in an Institutional Treatment Center and he acknowledges knowing that if he were to receive probation it would be in the sole discretion of the plea court.

In sum, if a defendant "raises claims in a Rule 29.07(d) motion which are within those enumerated in Rule 24.035, *the motion "remains a Rule 24.035 motion and is subject to all the terms and conditions of Rule 24.035, including the time limitations, regardless of how the motion is entitled."* Logan v. State, 22 S.W.2d at 785 (emphasis added). Because appellant's Rule 29.07 claim was untimely, the motion court did not err in summarily denying his Rule 29.07 motion.

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(Mo.App., E.D. 1989).

**CONCLUSION**

In view of the foregoing, respondent submits that the denial of appellant's Rule 29.07 motion should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE AND COMPLIANCE**

I hereby certify:

1. That the attached brief complies with the limitations contained in Special Rule 1(b) of this Court and contains —number- of-- words, excluding the cover, signature block, and this certification as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and floppy disk containing a copy of this brief, were mailed, postage prepaid this \_\_\_\_\_ day of April, 2001, to:

George Brown, Jr.  
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