

No. SC90918

In the
Supreme Court of Missouri

ANTHONY C. MOORE,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the City of St. Louis Circuit Court

Twenty-Second Judicial Circuit

The Honorable Bryan L. Hettenbach, Judge of Division 11

APPELLANT'S SUBSTITUTE BRIEF, STATEMENT, AND ARGUMENT

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JURISDICTIONAL STATEMENT

The State charged Appellant Anthony C. Moore in St. Louis City Circuit No. 22041-02595-01 with two counts of the class A felony of murder in the first degree in violation of § 565.020.¹ On April 9, 2007 through April 10, 2007, the State tried Mr. Moore on the charges, and on April 26, 2007, the Honorable Joan M. Burger, Judge of Division 13, found Mr. Moore guilty of both counts. On May 25, 2007, the trial court sentenced Mr. Moore to two concurrent terms of life imprisonment without the possibility of probation or parole.

Mr. Moore appealed his convictions to the Missouri Court of Appeals, Eastern District and in *State v. Moore*, 264 S.W.3d 657 (Mo. App. E.D. 2008), the Eastern District affirmed Mr. Moore's convictions. The Eastern District issued its mandate on October 16, 2008. Mr. Moore filed his *pro se* Rule 29.15 motion on May 21, 2009.

¹ All statutory references are to RSMo 2000 unless otherwise indicated.

Appellant Anthony C. Moore will cite to the record on appeal as follows: Legal File (ED89758), "(L.F)"; Trial Transcript (ED89758), "(Tr.)"; Supplemental Transcript (ED89758), "(Supp. Tr.)"; Sentencing Transcript (ED89758), "(S. Tr.)"; and, Post-conviction Legal File (ED93330), "(PCR L.F.)."

On June 10, 2009, the Honorable Bryan L. Hettenbach, Judge of Division 11, dismissed Mr. Moore's *pro se* Rule 29.15 motion based on its untimeliness. On June 18, 2009, Mr. Moore filed a Rule 75.01 motion for reconsideration of judgment and reinstatement of his Rule 29.15 cause. On July 8, 2009, the motion court denied Mr. Moore's Rule 75.01 motion. Mr. Moore timely filed his notice of appeal on July 20, 2009, appealing the motion court's dismissal of his Rule 29.15 motion.

On April 6, 2010, the Missouri Court of Appeals, Eastern District issued its opinion in *Moore v. State*, ___ S.W.3d ___, 2010 WL 1328144 (Mo. App. E.D. April 6, 2010), affirming the motion court's dismissal of Mr. Moore's Rule 29.15 motion. On June 29, 2010, this Court sustained Mr. Moore's application for transfer, and transferred this case to this Court. Consequently, this Court has jurisdiction over Mr. Brown's appeal. Mo. Const., Art. V, § 10 (as amended 1982); Rule 83.04.

STATEMENT OF FACTS

The State charged Appellant Anthony C. Moore in St. Louis City Circuit No. 22041-02595-01 with two counts of the class A felony of murder in the first degree (L.F. 12-13). On April 9, 2007 through April 10, 2007, the State tried Mr. Moore on the charges (L.F. 7, 75, 78), and on April 26, 2007, the Honorable Joan M. Burger, Judge of Division 13, found Mr. Moore guilty of both counts (Supp. Tr. 1-7; L.F. 79-87). On May 25, 2007, the trial court sentenced Mr. Moore to two concurrent terms of life imprisonment without the possibility of probation or parole (L.F. 88-92).

Mr. Moore appealed his convictions to the Missouri Court of Appeals, Eastern District (L.F. 93-95), and an appellate public defender from the Missouri State Public Defender System represented him on appeal (PCR L.F. 9-14). After the filing of appellate briefs, on August 26, 2008, the Eastern District affirmed Mr. Moore's conviction in *State v. Moore*, 264 S.W.3d 657 (Mo. App. E.D. 2008) (L.F. 93-95; PCR L.F. 26, 28, 41).

On September 11, 2008, appellate counsel filed in the Eastern District a motion for rehearing, and/or application for transfer to this Court, which on October 8, 2008, the Eastern District ordered stricken as untimely filed (PCR L.F. 28). On October 16, 2008, appellate counsel filed in the Eastern District a motion for reconsideration of the order striking the motion for rehearing

and/or application for transfer to this Court, but on that same day, the Eastern District issued its mandate (PCR L.F. 11-12, 26, 28, 41). The Eastern District denied appellate counsel's motion for reconsideration on December 22, 2008 (Supp. L.F. 28).

By letter, dated March 12, 2009, appellate counsel wrote Mr. Moore informing him as follows:

The Court of Appeals denied the Motion to Reconsider on December 22, 2008. I received notice of the ruling by fax, but did not understand after reading it that the Court had denied the Motion to Reconsider. I thought the fax transmission just let me know that the Motion for Rehearing had been denied, which I already knew. Here is a copy of the fax transmission. I did not understand that the Court had denied the Motion to Reconsider until February 17, 2009 when I called the Court of Appeals about it.

Unfortunately my not realizing that the Motion to Reconsider had been denied has some bad consequences for you, which I will try to correct. The mandate in your direct appeal was issued on October 16, 2008, the same day I filed the Motion to Reconsider. Here is a copy. By filing the mandate, the Court of

Appeals officially closed this appeal. Because the Motion to Reconsider was denied, you needed to have filed for post-conviction relief under the Missouri Supreme Court Rule 29.15 by ninety (90) days after the Court of Appeals issued the mandate, or by January 14, 2009. Of course, that date is long past.

I have written an affidavit setting out the same facts as in this letter and put it in the direct appeal file. Here is a copy. Your post-conviction attorney can file the affidavit with a motion asking the post-conviction court not to dismiss your post-conviction cause because your *pro se* motion was filed late through no fault of yours.

I am sorry that I caused you to miss the deadline to timely file for post-conviction relief. I hope the affidavit will still allow you to litigate post-conviction claims.

(PCR L.F. 13).

The affidavit, enclosed with the letter, was signed March 13, 2009 and stated in pertinent part:

12. . . . Movant Moore needed to have filed for post-conviction relief under Missouri Supreme Court Rule 29.15 by ninety (90) days after the Court of Appeals issued the mandate, or by January 14, 2009;

13. I did not advise Movant Moore that the mandate had been issued in his direct appeal and that his deadline to file for post-conviction relief had passed until I wrote him a letter dated March 12, 2009 and mailed March 13, 2009.

(PCR L.F. 10).

Mr. Moore filed his *pro se* Rule 29.15 motion on May 21, 2009 (PCR L.F. 3-25). To his *pro se* motion, he attached appellate counsel's affidavit, appellate counsel's motion to reconsider, appellate counsel's letter, dated March 12, 2009, his claims, and this statement (PCR L.F. 9-21):

I, Anthony Curtis Moore, hereby state that the foregoing facts are true and accurate to the best of my knowledge. At all times, I informed my appellate attorney, . . . , that I wanted to pursue [sic] my appeal options, to incorporate several issue's [sic] in my direct appeal, concerning my trial attorney . . . , and that I wanted to be informed of when the time was right to file my Post-Conviction

form's [sic] if necessary. By September 10, 2008, she failed to file a timely motion for rehearing and the Court denied it because it was filed a day late. [She] also failed to inform me that a mandate had been issued and that I needed to file my post-conviction forms.

(PCR L.F. 22).

On June 10, 2009, the Honorable Bryan L. Hettenbach, Judge of Division 11, dismissed Mr. Moore's Rule 29.15 motion based on its untimeliness (PCR L.F. 26). The motion court found that the files clearly showed that Mr. Moore had filed his Rule 29.15 motion outside the time limitations permitted under Rule 29.15(b). (PCR L.F. 26). The motion court concluded, "This Court has no jurisdiction to entertain a motion filed out of time" (PCR L.F. 26).

On June 18, 2009, Mr. Moore filed a Rule 75.01 motion for reconsideration of judgment and reinstatement of his Rule 29.15 cause on the ground that appellate counsel's failure to timely advise him of the issuance of the appellate court's mandate caused his untimely *pro se* filing (PCR L.F. 27-40). Mr. Moore's motion cited a number of recent appellate decisions in which courts have recognized limited exceptions to the mandatory time limitations under Rule 29.15(b) (PCR L.F. 27-40).

On July 8, 2009, the motion court denied Mr. Moore's Rule 75.01 motion (PCR L.F. 41-43). The motion court found that none of the recent appellate decisions assisted Mr. Moore because "in every one of those cases the movant timely prepared and sent his motion" (PCR L.F. 43). The motion court noted that Mr. Moore had not filed his *pro se* Rule 29.15 motion until four months after the ninety-day time limit under Rule 29.15 had expired, and over sixty days after appellate counsel advised him of the issuance of the appellate court's mandate (PCR L.F. 43). The motion court "[o]rdered and [d]ecreed" that the motion to reconsider was denied (PCR L.F. 43).

Mr. Moore timely filed his notice of appeal on July 20, 2009, appealing the motion court's dismissal of his Rule 29.15 motion (PCR L.F. 44-47). On April 6, 2010, the Missouri Court of Appeals, Eastern District issued its opinion in *Moore v. State*, __ S.W.3d __, 2010 WL 1328144 (Mo. App. E.D. April 6, 2010), affirming the motion court's dismissal of Mr. Moore's Rule 29.15 motion. On June 29, 2010, this Court sustained Mr. Moore's application for transfer, and transferred this case to this Court. Mr. Moore will cite other facts as necessary in the argument portion of his brief.

POINT

The motion court clearly erred in concluding that it had no jurisdiction to entertain Mr. Moore's Rule 29.15 motion, and in dismissing Mr. Moore's Rule 29.15 motion based on the untimely filing of Mr. Moore's *pro se* Rule 29.15 motion, because the motion court had jurisdiction over Mr. Moore's post-conviction case, and appellate counsel's failure to inform Mr. Moore of the appellate court's issuance of its mandate excused Mr. Moore's untimely filing. The motion court's error deprived Mr. Moore of his rights to due process of law and to access to the courts in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10 and 14 of the Missouri Constitution. This Court must reverse and remand for reinstatement of Mr. Moore's Rule 29.15 cause.

Webb ex rel. J.C.W. v. Wyciskalla, 275 S.W.3d 249 (Mo. banc 2009);

Andrews v. State, 282 S.W.3d 372 (Mo. App. W.D. 2009);

McFadden v. State, 256 S.W.3d 103 (Mo. banc 2008);

Schmidt v. State, 292 S.W.3d 574 (Mo. App. S.D. 2009);

U.S. Const. Amend. I, V, and XIV;

Mo. Const. Art. I, §§ 10 & 14; and,

Rule 29.15.

ARGUMENT

The motion court clearly erred in concluding that it had no jurisdiction to entertain Mr. Moore’s Rule 29.15 motion, and in dismissing Mr. Moore’s Rule 29.15 motion based on the untimely filing of Mr. Moore’s *pro se* Rule 29.15 motion, because the motion court had jurisdiction over Mr. Moore’s post-conviction case, and appellate counsel’s failure to inform Mr. Moore of the appellate court’s issuance of its mandate excused Mr. Moore’s untimely filing. The motion court’s error deprived Mr. Moore of his rights to due process of law and to access to the courts in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10 and 14 of the Missouri Constitution. This Court must reverse and remand for reinstatement of Mr. Moore’s Rule 29.15 cause.

Standard of Review

Appellate review is limited to determining whether the findings and conclusions of the trial court are clearly erroneous. *White v. State*, 282 S.W.2d 409, 410 (Mo. App. W.D. 2009). Rule 29.15(k). The findings and conclusions are clearly erroneous only if after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made. *Clark v. State*, 261 S.W.3d 565, 568 (Mo. App. E.D. 2008).

Argument

The motion court clearly erred in concluding that it had no jurisdiction to entertain Mr. Moore's Rule 29.15 motion, and in dismissing Mr. Moore's Rule 29.15 motion based on the untimely filing of Mr. Moore's *pro se* Rule 29.15 motion. Rule 29.15 is the exclusive procedure for seeking state post-conviction relief from constitutional violations. *Reuscher v. State*, 887 S.W.2d 588, 590 (Mo. banc 1994); Rule 29.15(a). Its purpose is to adjudicate claims regarding the trial court's jurisdiction and the legality of the defendant's conviction or sentence. *Thomas v. State*, 808 S.W.2d 364, 366 (Mo. banc 1991). It also serves the legitimate end of avoiding delay in the processing of prisoner's claims and preventing the litigation of stale claims. *Id.* (citing *Day v. State*, 770 S.W.2d 692, 695 (Mo. banc 1989)). To further this end, Rule 29.15 is subject to requirements for timely filing and limitations on amendments. *Id.*; *State v. Brooks*, 960 S.W.2d 479, 499 (Mo. banc 1997).

Rule 29.15(b) provides in pertinent part:

If an appeal of the judgment or sentence sought to be vacated, set aside or corrected was taken, the motion shall be filed within 90 days after the date the mandate of the appellate court is issued affirming such judgment or sentence.

Failure to file a motion within the time provided by this Rule 29.15 shall constitute a complete waiver of any right to proceed under this Rule 29.15 and a complete waiver of any claim that could be raised in a motion filed pursuant to this Rule 29.15.

- **The motion court clearly erred in concluding that it had no jurisdiction to entertain Mr. Moore's Rule 29.15 motion.**

This Court previously held that the time limits imposed by Rule 29.15 are constitutional, valid, and mandatory. *Day*, 770 S.W.2d at 695; *State v. Story*, 901 S.W.2d 886, 900 (Mo. banc 1995). In the past, courts have also held that failure to file a motion within the time limits of Rule 29.15 is a fatal defect that deprives the motion court of jurisdiction. *Howard v. State*, 289 S.W.3d 651, 652 (Mo. App. E.D. 2009) (quoting *Matchett v. State*, 119 S.W.3d 558, 559 (Mo. App. S.D. 2003)). Courts have mandated that the motion court dismiss the untimely filed motion for lack of jurisdiction, regardless of the reasons for the untimely filing. *Spells v. State*, 213 S.W.3d 700, 701 (Mo. App. W.D. 2007); *Matchett*, 119 S.W.3d at 559. And, courts have permitted no extension of the time limitations under the rule for either good cause or excusable neglect. *Smith v. State*, 798 S.W.2d 152, 153 (Mo. banc 1990).

For example, the movant in *Patterson v. State*, 164 S.W.3d 546, 548 (Mo. App. E.D. 2005) filed his *pro se* Rule 29.15 motion with the circuit clerk ninety-two days after the Eastern District issued its mandate, instead of within ninety days of the appellate court's mandate as permitted by rule. The motion court dismissed movant's *pro se* Rule 29.15 motion based on its untimeliness.

Patterson, 164 S.W.3d at 547.

On appeal, the Eastern District held (1) that the motion court lacked jurisdiction to review the untimely filed Rule 29.15 motion, (2) that movant's untimely filing was inexcusable, and (3) that the Eastern District lacked jurisdiction to hear movant's appeal of the dismissal of his untimely filed motion. *Id.* at 548. The Eastern District dismissed movant's appeal for lack of jurisdiction. *Id.*

Similarly, in *Thomas*, the Eastern District affirmed the motion court's dismissal of movant's Rule 29.15 motion because movant's *pro se* Rule 29.15 motion was filed in the circuit clerk's office one day late. 31 S.W.3d at 25. The Eastern District held that movant's untimely filing of his *pro se* Rule 29.15 motion was a defect that movant could not cure, and that the Eastern District had no jurisdiction to consider his remaining points on appeal. *Id.*

Mr. Moore acknowledges *Thomas*, *Patterson*, and other adverse case law from this Court and the appellate court districts holding that movant's failure

to timely file his *pro se* Rule 29.15 motion deprives the motion court of jurisdiction and mandates dismissal of his Rule 29.15 motion. Nonetheless, Mr. Moore urges this Court to reconsider this prior case law in light of this Court's opinion in *Webb ex rel. J.C.W. v. Wyciskalla*, 275 S.W.3d 249, 251-253 (Mo. banc 2009).

In *Webb*, this Court noted that Missouri recognizes only two types of jurisdiction, personal and subject matter, and stated that both derive from constitutional principles. 275 S.W.3d at 251-253. “[P]ersonal jurisdiction refers quite simply to the power of a court to require a person to respond to a legal proceeding that may affect the person’s rights or interests.” *Id.* at 253. It derives from the due process clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 252-253. On the other hand, subject matter jurisdiction, or “the court’s authority to render a judgment in a particular category of case,” derives from article V, section 14 of the Missouri Constitution, which states that “[t]he circuit court shall have original jurisdiction over all cases and matters, civil and criminal.” *Id.* at 253.

In *Webb*, this Court recognized that aside from subject matter and personal jurisdiction, prior case law purported to create yet another type of jurisdiction called “jurisdictional competence.” *Id.* at 254. An issue of “jurisdictional competence” arises when there is no question about the court’s

subject matter jurisdiction over the issue, but there is a question of whether the parties or issues were properly before the court for its resolution at the time. *Id.* at 254. This Court held that “jurisdictional competence” does not deal with jurisdiction in the true sense, and that it is not derived from constitutional principles. *Id.* This Court specifically stated, “Because the authority of a court to render judgment in a particular case is, in actuality, the definition of subject matter jurisdiction, there is no constitutional basis for this third jurisdictional concept that would bar litigants from relief.” *Id.*

As a consequence, this Court further directed that Missouri courts should not construe statutory or rule restrictions on claims for relief as restrictions on the court’s subject matter jurisdiction, or as matters of “jurisdictional competence.” *Id.* This Court indicated that elevating statutory or rule restrictions to matters of “‘jurisdictional competence’ erodes the constitutional boundary established by article V of the Missouri Constitution, as well as robs the concept of subject matter jurisdiction of the clarity that the constitution provides.” *Id.*

Given this Court’s directive and holding in *Webb*, this Court should find any and all prior case law, holding that movant’s failure to timely file his *pro se* Rule 29.15 motion deprives the motion court of jurisdiction, is no longer applicable. *See, e.g., Schmidt v. State*, 292 S.W.3d 574, 576-577 (Mo. App. S.D.

2009) (holding failure to comply with the Uniform Mandatory Disposition of Detainers Law no longer deprives the circuit court of subject matter jurisdiction). Because the circuit court has subject matter jurisdiction over all civil cases, including Rule 29.15 cases, the question of whether a motion court has authority to hear an untimely filed Rule 29.15 motion is a matter of “jurisdictional competence,” and not an issue of jurisdiction. Mo. Const., Art. V, § 14.

At least one court has subscribed to this opinion. In *Andrews v. State*, 282 S.W.3d 372, 374 (Mo. App. W.D. 2009), the Rule 24.035 movant appealed the motion court’s denial of his post-conviction claim after an evidentiary hearing. On appeal, the State argued that the motion court lacked subject matter jurisdiction to entertain movant’s claim because movant failed to file his *pro se* Rule 24.035 motion within the time limitations permitted by rule. *Id.* at 375, n. 3. Relying on *Webb*, the Western District stated the State’s argument was “a question of jurisdictional competence,” and “not an issue of jurisdiction.” *Id.*

This Court should similarly hold that Mr. Moore’s failure to timely file his *pro se* Rule 29.15 motion gave rise to a question of “jurisdictional competence” and not an issue of jurisdiction. Under *Webb*, the motion court had jurisdiction to entertain the merits of Mr. Moore’s untimely filed *pro se*

Rule 29.15 motion. The motion court clearly erred in concluding otherwise and dismissing Mr. Moore's Rule 29.15 motion for its untimeliness. *See, e.g., Dye v. Department of Mental Health*, 308 S.W.3d 321, 324 (Mo. App. W.D. 2010) (finding court erred in dismissing petition for judicial review for lack of subject-matter jurisdiction).

- **The motion court clearly erred in concluding that appellate counsel's failure to inform Mr. Moore of the appellate court's issuance of its mandate did not excuse Mr. Moore's untimely filing.**

Recently, courts have held that exceptional circumstances beyond the Rule 29.15 movant's control, as well as minor, honest mistakes, can excuse the untimely filing of the movant's *pro se* Rule 29.15 motion. For example, courts have excused untimely filings where minor, clerical mistakes in addressing or mailing the motions resulted in the motion's filing outside the ninety-day time limit set by Rule 29.15(b). In *Nicholson v. State*, 151 S.W.3d 369, 370 (Mo. banc 2004), the movant filed his *pro se* 29.15 motion in the Circuit Court of the City of St. Louis within ninety days of his mandate on direct appeal. Yet, under Rule 29.15(a), he should have filed his motion in Cape Girardeau County Circuit Court. *Id.* By the time the clerk forwarded the motion from St. Louis to Cape Girardeau for filing, it was two days late. *Id.*

Relying on Rule 51.10 and §476.410, which state that if a case is filed in the wrong venue, it shall be transferred to the proper venue as if it had originated in that court, this Court held that the motion was timely. *Id.* at 370-71. The Court considered fairness and practicality concerns in determining the appropriate result. *Id.* at 371 n. 1. The Court stated, “It would be patently unfair to prohibit incarcerated, *pro se* litigants from availing themselves of section 476.410 and Rule 51.10 while permitting other civil litigants to have their cases transferred to an appropriate venue. Given the facts of this case, there is no legal or just basis for holding Mr. Nicholson to a higher standard of legal competence than that of experienced attorneys representing clients in other civil matters.” *Id.*

Also, “[c]onsistent with the spirit of Rule 29.15 and *Nicholson*,” the Western District similarly reversed the dismissal of movant’s Rule 29.15 motion in *Spells*. 213 S.W.3d at 702. In *Spells*, movant mailed his *pro se* Rule 29.15 motion to the circuit court. 213 S.W.3d at 701. But by the time of the filing of the Rule 29.15 motion, the circuit court’s address had changed. *Id.* The post office received the motion five days before Rule 29.15’s filing deadline expired, but returned the motion to the movant, stating that the forwarding order had expired. *Id.* at 701-02. Movant then mailed his motion

to the new address, and the circuit court received his motion 97 days after the appellate court issued its mandate on direct appeal. *Id.*

On appeal, the Western District held that mechanistic application of the time limits under Rule 29.15 to the facts of movant's case would be unfair. *Id.* at 702. The Western District further noted that there was no indication that movant intended to cause delay, and that movant "made an honest, minor clerical mistake." *Id.* at 702.

After *Nicholson* and *Spells*, courts became not only more willing to excuse the movant's minor, clerical mistakes, but also more likely not to hold the movant accountable when the mistakes of others caused the motion's untimely filing. In *McFadden v. State*, 256 S.W.3d 103, 105 (Mo. banc 2008), the movant, who was incarcerated, sent his *pro se* Rule 29.15 motion to his post-conviction attorney for filing 16 days before Rule 29.15's filing deadline. His attorney had told him to do this, and had told him that she (the attorney) would file his motion before the due date. *Id.* The attorney received the motion 13 days before the deadline. *Id.* Nevertheless, the attorney filed the motion one day late. *Id.*

Citing *Nicholson* and *Spells*, this Court recognized that "in very rare circumstances . . . our courts have found an improper filing, caused by circumstances beyond the control of the movant, justified a late receipt of the

motion by the proper court.” *Id.* at 108. The Court held that because movant had timely prepared his motion and provided it to counsel “well before” it was due, counsel’s failure to file it on time constituted active interference with the timely filing and an abandonment by counsel. *Id.* at 109.

In so holding, the Court noted the plight of prisoners seeking post-conviction review, and stated that “[s]uch prisoners cannot take the steps other litigants can take . . . to ensure the court clerk receives and stamps their [legal papers] before the . . . deadline.” *Id.* (quoting *Houston v. Lack*, 487 U.S. 266, 270-71 (1988)). Consequently, the Court allowed the post-conviction proceedings to be reopened, so that movant could proceed with his post-conviction claims. *Id.*

Following this Court’s decision in *McFadden*, the Eastern District later reversed the motion court’s dismissal of a movant’s Rule 29.15 motion. In *Howard*, the movant delivered his *pro se* Rule 29.15 motion to the guards at his correctional center a full 20 days before the filing deadline and requested that it be sent via certified mail. *Howard*, 289 S.W.3d at 653. Yet, due to circumstances beyond movant’s control, his *pro se* Rule 29.15 motion was not mailed via certified mail. *Id.* And, although the correctional center mailed the motion, it was lost in the postal system for five weeks before the post office returned it and corrections officials resent it to its intended destination. *Id.* at

654. The circuit clerk's office eventually received and filed movant's motion almost 30 days after the ninety-day deadline under Rule 29.15. *Id.* at 652.

On appeal, the Eastern District held that the correctional center's failure to send movant's envelope certified mail, despite his request that they do so, and their failure to alert him that the post office had returned the motion to the correctional center, constituted "circumstances beyond Movant's control" and placed movant "in the same category as McFadden, who having timely filled all of his obligations, was dependent upon his attorney to file his motion before the deadline." *Id.* at 654. The Eastern District permitted movant's Rule 29.15 post-conviction action to proceed because his motion was untimely filed due to no fault of his own. *Id.*

This Court should similarly find that Mr. Moore's untimely filing was due to no fault of his own and was due to circumstances beyond his control - his appellate attorney's failure to timely inform him of the issuance of the appellate court's mandate. *See, e.g., Ex parte Crow*, 180 S.W.3d 135, 138 (Tex. Crim. App. 2005) (granting applicant leave to file an out-of-time petition for discretionary review where appellate counsel informed applicant of issuance of appellate opinion after the time for filing a timely petition had expired).

Mr. Moore had expected his appellate counsel to timely inform him of the issuance of the appellate court's mandate. He had also expected to have

close to ninety days to prepare and mail his *pro se* Rule 29.15 motion because ninety days is what the rule permits. Rule 29.15(b).

Instead, appellate counsel first informed Mr. Moore of the issuance of the appellate court's mandate after the time limitations under Rule 29.15 had already expired, and provided Mr. Moore no time within which to comply with Rule 29.15's requirements. Though ninety days from the date of the appellate court's issuance of its mandate was January 14, 2009, Mr. Moore did not learn of the appellate court's issuance of its mandate until almost two months later when he received appellate counsel's letter, dated March 12, 2009, informing him of the mandate's issuance (PCR L.F. 10-13, 26, 28, 41).

Mr. Moore later filed his *pro se* Rule 29.15 motion on May 21, 2009, within ninety days of the date of appellate counsel's letter to him about the mandate (PCR L.F. 9-10; PCR L.F. 3-25). May 21, 2009 was seventy days from the date of appellate counsel's March 12, 2009 letter, and four months and seven days from the date on which the time limitations under Rule 29.15 expired.

Though Mr. Moore arguably could have filed his *pro se* Rule 29.15 motion at any time after March 12, 2009 and before May 21, 2009, Rule 29.15 makes clear that Mr. Moore would not have benefitted from doing so. An

untimely *pro se* filing is untimely no matter how many days after the deadline the *pro se* motion is filed. Rule 29.15(b).

Mr. Moore was entitled to pursue a collateral attack of his conviction under Rule 29.15, asked appellate counsel to inform him when the time was right to do so, and would have timely initiated his case by filing a timely *pro se* Rule 29.15 motion but for appellate counsel's failure (PCR L.F. 10, 13, 22). Rule 29.15(a).

Under the circumstances, *Howard, McFadden, Spells, and Nicholson* dictate that this Court permit Mr. Moore to proceed with his Rule 29.15 post-conviction action, and the motion court clearly erred in concluding otherwise. The motion court's error in dismissing Mr. Moore's Rule 29.15 motion deprived Mr. Moore of his fundamental rights.

Under the First and Fourteenth Amendments to the United States Constitution, state prisoners have a right to access to the courts. *Lewis v. Casey*, 518 U.S. 343, 346 (1996). "[A]ccess to the courts means the opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in order to commence or prosecute court proceedings affecting one's liberty." *Id.* (quoting *Hatfield v. Bailleaux*, 290 F.2d 632, 637 (9th Cir. 1961)).

Furthermore, the “Open Courts” provision in article I, section 14 of the Missouri Constitution prohibits any law that unreasonably or arbitrarily bars individuals or classes of individuals from accessing the courts in order to enforce recognized causes of action; in other words, it permits the pursuit in Missouri courts of causes of action recognized in substantive law. *Mo. Highway & Transp. Comm’n v. Merritt*, 204 S.W.3d 278, 285 (Mo. App. E.D. 2006). It applies to judicial and legislative acts that impose procedural bars to access to Missouri courts. *Wheeler v. Briggs*, 941 S.W.2d 512, 514 (Mo. banc 1997). “An open courts violation is established upon a showing that: (1) a party has a recognized cause of action; (2) that the cause of action is being restricted; and (3) the restriction is arbitrary or unreasonable.” *Snodgras v. Martin & Bayley, Inc.*, 204 S.W.3d 638, 640 (Mo. banc 2006).

Mr. Moore had a recognized cause of action under Rule 29.15, and the motion court’s action of dismissing his Rule 29.15 motion arbitrarily and unreasonably restricted him from litigating claims challenging the loss of his liberty. The motion court’s error deprived Mr. Moore of his rights to due process of law and to access to the courts in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10 and 14 of the Missouri Constitution. This Court must reverse and remand for reinstatement of Mr. Moore’s Rule 29.15 cause.

CONCLUSION

WHEREFORE, based on his arguments in his brief, Appellant Anthony Moore requests this Court to reverse and remand for reinstatement of Mr. Moore's Rule 29.15 cause.

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g) and Special Rule 361, I hereby certify that on Monday, July 19, 2010, a true and correct copy of the foregoing brief and a floppy disk containing the foregoing brief were mailed postage prepaid to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102. In addition, I hereby certify that this brief includes the information required by Rules 55.03 and 84.06, and that it complies with the word limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, uses Californian FB 14 point font, and contains _____ words. Finally, I hereby certify that the enclosed diskette has been scanned for viruses with McAfee VirusScan Enterprise 7.1.0 software and found virus-free.

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APPENDIX

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