

**IN THE  
MISSOURI SUPREME COURT**

<b>DARIUS NICHOLSON,</b>	)	
	)	
<b>Respondent,</b>	)	
	)	
<b>vs.</b>	)	<b>No. 86143</b>
	)	
<b>STATE OF MISSOURI,</b>	)	
	)	
<b>Appellant.</b>	)	

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**Appeal from the Circuit Court of Cape Girardeau County  
Thirty-Second Judicial Circuit, Division II  
The Honorable John P. Heisserer, Judge at Post-Conviction Proceedings**

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**RESPONDENT'S SUBSTITUTE BRIEF**

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**JEREMIAH W. (JAY) NIXON  
Attorney General**

**SHAUN J MACKELPRANG  
ANDREA MAZZA FOLLETT  
Assistant Attorneys General  
Missouri Bar No. 48517**

**P. O. Box 899  
Jefferson City, MO 65102  
(573) 751-3321  
Attorneys for Respondent**

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## **JURISDICTIONAL STATEMENT**

This appeal is from the denial of a motion to vacate judgment and sentence under Supreme Court Rule 29.15 in the Circuit Court of Cape Girardeau County. The convictions sought to be vacated were for murder in the second degree, § 565.021, RSMo 1994; armed criminal action, § 571.015, RSMo 1994; and robbery in the first degree, § 569.020, RSMo 1994; for which the appellant was sentenced to concurrent terms of life imprisonment for murder, thirty years of imprisonment for armed criminal action, and thirty years of imprisonment for robbery. The Court of Appeals, Eastern District, affirmed the denial of appellant's Rule 29.15 on May 25, 2004. This Court granted transfer on August 24, 2004, and has jurisdiction. Article V, §10, Missouri Constitution (as amended 1982).

## STATEMENT OF FACTS

Appellant, Darius Nicholson, was charged with one count of murder in the first degree, one count of armed criminal action, and one count of robbery in the first degree, in the Circuit Court of Scott County, Missouri (L.F. 42-43). The case was moved on a change of venue to Cape Girardeau County (L.F. 3). On June 4, 2001, Appellant's jury trial began in the Circuit Court of Cape Girardeau County, the Honorable John W. Grimm presiding (L.F. 17-19). The evidence adduced at that trial was as follows:

On June 5, 1998, Michael Hatcher went riding around in Sikeston (Tr. 496-497). At around 5:00 p.m., Hatcher met Appellant at a basketball court (Tr. 497). Hatcher went home to baby-sit and left home at approximately 9:45 p.m. (Tr. 497). He went to the liquor store and purchased a beer, and he also purchased some marijuana (Tr. 498). Hatcher then went to his friend Herschell's house (Tr. 498). Michael Bell, Orlandis Farr, and Appellant were also at Herschell's house (Tr. 499). The men stayed at the house, drinking, smoking marijuana, and consuming cocaine (Tr. 499, 501). Sometime after midnight, Hatcher, Appellant, Bell, and Farr left the house to go to Hardee's to get something to eat (Tr. 501-502, 504). Hatcher drove his mother's red 1991 Grand Am (Tr. 502, 504).

Appellant brought up the idea of robbing Kellett's gas station (Tr. 504-505). All of the men were in agreement to rob the station (Tr. 505). They drove past the gas station to see if anyone was there, then parked the car on the next street in the alley (Tr. 505-508). Hatcher wore a red bandanna as a mask, while Bell and Farr wore ball caps and blue bandannas (Tr. 510-511). Appellant wore a ball cap and something to cover his face (Tr. 510-511).

The men walked towards the gas station; Farr walked in one direction, while Hatcher, Appellant, and Bell went in another direction (Tr. 509, 511-512). As Hatcher waited on the side of the gas station, Appellant and Bell went inside (Tr. 512). Hatcher then followed them inside (Tr. 513). Appellant had a gun pointed at the clerk (Tr. 514-515). The clerk, later identified as Charlie Garrett, was sitting inside on a chair and handed Hatcher some money (Tr. 514). Hatcher took the money and ran out the door (Tr. 516). As Hatcher ran out the door, he heard one gunshot and fell to the ground (Tr. 516). Hatcher looked back and saw Appellant and Bell running from inside the gas station (Tr. 516-517). Hatcher got up from the ground and ran in the same direction as the other men (Tr. 517). While running past the window, Hatcher saw that Garrett had been shot (Tr. 518). Garrett was yelling loudly and crawling on the ground (Tr. 518). Farr was still standing outside of the gas station (Tr. 517).

Appellant, Farr, Bell, and Hatcher ran back to the car, and Hatcher drove away from the scene (Tr. 518-19). As Hatcher drove, Bell grabbed his bandanna and threw it out the window (Tr. 519-520). Hatcher dropped off Appellant at his grandmother's house; Bell, Hatcher, and Farr returned to Herschell's house (Tr. 520-521). After giving Hatcher some of the money from the robbery, Bell and Farr left Herschell's house (Tr. 522).

At approximately 2:51 a.m., the 911 dispatcher in Sikeston received an "open line call" (Tr. 230-231). However, when the call came through, no one was on the other end of the line (Tr. 231). The dispatcher discovered that the telephone call came from Kellett's gas station and dispatched officers to the scene, informing them that no one at the station had made contact and that the line was still open (Tr. 231-233). When officers arrived at the station, they

relayed to the dispatcher that a clerk was down and that a cash drawer was missing (Tr. 234-35). The dispatcher notified the ambulance service and the detective on call (Tr. 235).

When paramedics and police officers arrived at Kellett's, they found Charlie Garrett lying face down on the floor (Tr. 245, 256, 258). The paramedics turned Garrett over, and blood was visible on his chest (Tr. 256). A puncture wound was visible on his left arm (Tr. 263-264). The telephone dangled above Garrett, and the cash drawer was open (Tr. 256). Kellett's bookkeeper, Sharon Evans, determined that \$370.33 had been stolen from the gas station (Tr. 273).

Officer Mark Vavak of the Sikeston Department of Public Safety (SDPS) was at the scene and patrolled the area for evidence (Tr. 306). As Officer Vavak canvassed the surrounding neighborhoods, he located a white T-shirt and a red bandanna on Warner Street near the gas station (Tr. 307-308, 329-330). The items were on opposite sides of the street (Tr. 310-311).

Lieutenant James Hailey of the SDPS was also at the scene (Tr. 279). He searched the surrounding area and located a set of tire tracks (Tr. 281). Lieutenant Hailey also found a ball cap, a bandanna, and a handgun on the north side of the alleyway behind an air conditioner, and a blue bandanna and ball cap on the south side of the street (Tr. 282-293, 335-336). From the tire tracks, Lieutenant Hailey determined that the vehicle left at a high rate of speed (Tr. 281-282, 284).

Detective Dan Hinton of the SDPS reported to the hospital to take evidence from Garrett (Tr. 291-292). Hinton processed the body and took fingernail scrapings, hair samples,

and fingerprint impressions (Tr. 292). Detective Hinton was also present during the autopsy conducted later that day (Tr. 292-293). Dr. Zaricor, a pathologist from the Mineral Area Regional Medical Center in Farmington, performed the autopsy of Charlie Garrett and found an entrance bullet wound in Garrett's left wrist (Tr. 293, 313-15, 317). The bullet exited the wrist and entered Garrett's torso area near his armpit, and Dr. Zaricor recovered the bullet from the right ventricle of Garrett's heart (Tr. 318-20). Dr. Zaricor determined that the cause of death was a single gunshot wound to the chest (Tr. 321).

The day after the robbery, Hatcher ran into Appellant and then Bell at a store (Tr. 524-525). Bell gave Hatcher some money and told him to give it to Appellant (Tr. 525). Bell told Hatcher that the clerk had died and told Hatcher not to tell Appellant because "he might freak out" (Tr. 525). When Appellant came out of the store, Hatcher gave him his money from the robbery (Tr. 525). Hatcher and Appellant then went to a friend's party in New Madrid (Tr. 524-525). While there, Hatcher and Appellant saw a television news report about the Kellett's robbery (Tr. 525). After hearing that Charlie Garrett had been killed, Appellant told Hatcher that "he didn't mean to shoot him" (Tr. 526). Appellant was so upset that he became physically ill (Tr. 526). However, a day or two later, Appellant told Hatcher that he intentionally shot Garrett because Garrett had called the police on him for stealing gas (Tr. 527).

On July 16, 1998, several weeks after the robbery, the Cape Girardeau Police Department contacted Detective Crocker, the lead investigator on the Kellett's case, about a crime that had occurred in Cape Girardeau (Tr. 345, 465). Detective Crocker went to Cape Girardeau to talk with the suspects and interviewed Jermaine (Roderick) Harrington, but

Harrington provided no information about the Kellett's incident (Tr. 346, 466). Detective Crocker returned to Sikeston that day and received another phone call from the Cape Girardeau Police Department that same evening (Tr. 347). The suspects, Harrington and Reginald Hatchett, had requested to speak with Detective Crocker about the Kellett's homicide (Tr. 347).

Detective Crocker spoke with both the men separately that evening (Tr. 347). He first met with Hatchett and obtained a written statement regarding the Kellett's homicide (Tr. 348, 466). Detective Crocker then spoke with Harrington, and he also provided a written statement (Tr. 350-351, 467). Hatchett and Harrington said that they had a conversation with Appellant and Hatcher two or three days after the Kellett's robbery (Tr. 374-375, 467-469, S. Ex. 26). During that conversation, Appellant admitted that he shot Garrett (Tr. 386, 467-469, S. Ex. 26). Based upon that information, Detective Crocker called Detective Hinton and asked him to look for Hatcher (Tr. 473). Detective Jim Smith conducted a computer search in an attempt to locate Appellant's address and discovered an address in Columbia (Tr. 473).

When Detective Crocker returned to Sikeston, Hatcher was at the police station (Tr. 474-475). Detective Crocker spoke with Hatcher about evidence he had regarding the Kellett's robbery, and Hatcher denied any involvement (Tr. 530-534). Hatcher was arrested that night (Tr. 533). Detective Crocker interviewed Hatcher again the next day (Tr. 534). Hatcher asked Detective Crocker to find out from the prosecuting attorney how much time he would face if he admitted his involvement (Tr. 536). After being told that there was a possibility he could receive a ten-year sentence for cooperating, Hatcher confessed to being present during the

robbery (Tr. 536-37). Hatcher told the officers that he, Appellant, and “some guy from Malden” were involved in the robbery (Tr. 537). Hatcher considered Bell a friend and did not want to give information that he was involved (Tr. 538).

Police issued a warrant for Appellant for first-degree murder (Tr. 650). The Kansas City, Missouri, Police Department received a tip that Appellant was at a residence on Wyoming Street in Kansas City (Tr. 649-651). Detective Chris Jefferson accompanied other officers to that residence, and the officers took Appellant into custody without incident (Tr. 651-652).

In September 1998, Hatcher’s attorney, Wayne Schuster, contacted Detective Crocker and said that Hatcher had some additional facts that he wanted to provide (Tr. 540). Hatcher told Detective Crocker that “a guy named Landis” and Michael Bell were involved (Tr. 541). Hatcher identified Orlandis Farr from a Malden High School yearbook (Tr. 541-542, 639). Hatcher, Roderick Harrington, and Reginald Hatchett consented to hair and swab samples; hair and blood samples from Appellant, Bell, and Farr were taken pursuant to a court order (Tr. 659-665).

Detective Michael Williams took latent impressions of the tires on the red Grand Am that Hatcher drove (Tr. 658). Andy Wagoner of the Southeast Missouri Regional Crime Laboratory performed the firearms examination, analyzed the tire track impressions, and conducted some trace analysis (Tr. 675-677). Wagoner concluded that the revolver submitted in the case had fired the bullet recovered from Garrett’s body (Tr. 679-687). The tire tracks were from Firestone Firehawk SS-type tires, the same type of tires found on the suspect

vehicle (Tr. 687-694). Wagoner also analyzed a hair fragment retrieved from a ball cap recovered near the scene and determined that the hair came from someone of the “Negro” race (Tr. 694-696).

DNA testing was conducted on the shirt and bandannas retrieved from the crime scene area (Tr. 716-718). The samples taken from these items were compared to blood samples or buckle swabs from Appellant, Farr, Bell, Hatcher, Harrington, and Hatchett (Tr. 716, 719). Although DNA mixtures were detected on the two blue bandannas, the six individuals were eliminated as potential donors to that mixture (Tr. 721). DNA testing on the red bandanna resulted in the elimination of all six individuals as major contributors of the mixture (Tr. 722-725). However, only Bell, Hatcher, Harrington, and Hatchett could definitely be eliminated as minor contributors (Tr. 725). Appellant and Farr could not be excluded as minor contributors, nor could they be confirmed as minor contributors (Tr. 725-727). Some DNA found on the T-shirt was consistent with the DNA of Appellant, and other DNA was consistent with an unknown person or persons (Tr. 728-730). The odds of the DNA contributor being someone other than Appellant were one in thirty million (Tr. 704, 731-735).

Appellant’s jury found him guilty of murder in the second degree, armed criminal action, and robbery in the first degree; and Appellant was sentenced to terms of life imprisonment, thirty years of imprisonment, and thirty years of imprisonment, respectively (Tr. 857, 871).

On September 3, 2002, the Court of Appeals, Eastern District, affirmed Appellant’s conviction and sentence. State v. Nicholson, 84 S.W.3d 491 (Mo.App. E.D. 2002). The Court

of Appeals issued its mandate on October 9, 2002 (*see* Respondent's Appendix). As a result, appellant's *pro se* motion for post-conviction relief was due on or before January 7, 2003, ninety days after October 9, 2002.

On January 6, 2003, Appellant filed his *pro se* motion for postconviction relief in the Circuit Court of the City of St. Louis (PCR L.F. 3-15, 23).<sup>1</sup> On January 9, 2003, the *pro se* motion was filed in the Circuit Court of Cape Girardeau County (PCR L.F. 1, 3-15, 23). On May 16, 2003, Appellant's counsel filed a motion to allow Appellant to proceed with the postconviction motion despite the untimely filing of the *pro se* motion (PCR L.F. 1; PCR Supp. L.F. 4-8). In that motion, Appellant acknowledged that his *pro se* motion should have been filed by January 7, 2003 (PCR Supp. L.F. 5). The State filed its opposition to the motion on May 19, 2003 (PCR L.F. 1; PCR Supp. L.F. 1-2).

On June 3, 2003, the motion court entered the following order and judgment, dismissing appellant's *pro se* motion:

Now on this 3<sup>rd</sup> day of June, 2003, the Court having reviewed the file and memorandum of counsel does find that the PCR motion filed by [Appellant] on Jan. 9, 2003, with the clerk of the trial court was untimely filed and the failure to file said motion within 90 days of the Court of Appeals Mandate pursuant to Supreme Court Rule 24.035(b) [sic] deprives this court of jurisdiction to consider same. It is therefore ordered that [Appellant's] motion be and is hereby dismissed with prejudice.

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<sup>1</sup>The motion bears the stamp of Mariano V. Favazza (PCR L.F. 3).

(PCR Supp.L.F. 19; *see also* PCR L.F. 2) (emphasis in original). This appeal followed.

## ARGUMENT

The motion court did not clearly err when it dismissed appellant's *pro se* Rule 29.15 motion as untimely, because appellant failed to invoke the jurisdiction of the court within the mandatory, reasonable time limits of Rule 29.15, in that appellant failed to file his motion in the sentencing court within ninety days; and because there is no compelling reason to extend the time limits of Rule 29.15 for movants who incorrectly file their *pro se* motions in the wrong court.

Appellant contends that the motion court clearly erred in dismissing his Rule 29.15 motion as untimely filed (App.Sub.Br. 11). He acknowledges that his motion was received by the Circuit Court of Cape Girardeau County *after* the time for filing had expired; however, he claims that, because he filed his *pro se* motion in the Circuit Court of the City of St. Louis within the time limits of Rule 29.15, the Circuit Court of Cape Girardeau County should have considered his motion as timely filed (App.Sub.Br. 11). He asserts that to conclude otherwise would conflict with § 476.410, RSMo 2000, and Supreme Court Rule 51.10 (App.Sub.Br. 11). Moreover, he argues that allowing this exception to the rule would not undermine the rational behind the mandatory time limits of Rule 29.15 (App.Sub.Br. 11-12).

### **A. The Standard of Review**

In reviewing the denial of a Rule 29.15 motion, an appellate court is limited to a determination of whether the motion court's findings of fact and conclusions of law were clearly erroneous. Supreme Court Rule 29.15(k); Tripp v. State, 958 S.W.2d 108, 109 (Mo.App. S.D. 1998). The motion court's findings will be found clearly erroneous only if,

upon a review of the entire record, this Court is left with a definite and firm impression that a mistake has been made. State v. Kenley, 952 S.W.2d 250, 266 (Mo. banc 1997), *cert. denied*, 118 S.Ct. 892 (1998).

### **B. The Motion Court Properly Dismissed Appellant's Untimely Motion**

Supreme Court Rule 29.15 required that appellant seek post-conviction relief "in the sentencing court." The rule states:

A person convicted of a felony after trial claiming that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, including claims of ineffective assistance of trial and appellate counsel, that the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief *in the sentencing court* pursuant to the provisions of this Rule 29.15. *This Rule 29.15 provides the exclusive procedure by which such person may seek relief in the sentencing court for the claims enumerated.*

Supreme Court Rule 29.15(a) (emphasis added).

The rule also required that appellant file his motion in the sentencing court within 90 days. *See* Supreme Court Rule 29.15(b) ("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 of the mandate of the appellate court is issued affirming such judgment or sentence." See also Matchett v. State, 119 S.W.3d 558, 559 (Mo.App. S.D. 2003).

As is evident from the record in this case, the motion court's dismissal of appellant's Rule 29.15 motion was based upon appellant's failing to timely file his motion in the Circuit Court of Cape Girardeau County, the court where he was sentenced (PCR Supp.L.F. 19). This was not clearly erroneous, because it comported with the plain language of Rule 29.15, which requires a movant to timely file his motion in the sentencing court.

As is well established, the demonstration of timely filing in the sentencing court is a "condition precedent" to raising a claim or post-conviction relief. Unnerstall v. State, 53 S.W.3d 589, 591 (Mo.App. E.D. 2001) (Rule 24.035 case). "[T]he failure to file the motion within the prescribed time allotment constitutes a complete waiver to proceed under the rule." Matchett v. State, 119 S.W.3d at 559. An untimely motion deprives the circuit court of jurisdiction, and the circuit court must dismiss it. Id.

Also, consistent with the plain language of Rule 29.15, it is evident that the post-conviction motion must be timely filed "in the sentencing court." As set forth in the rule, Rule 29.15 is the "exclusive procedure" for litigating post-conviction claims. Rule 29.15(a). It stands to reason, therefore, that a post-conviction litigant must follow the procedures set forth in the rule. And, with regard to the filing of the motion, the rule states that the "[m]ovant shall file the motion and two copies thereof *with the clerk of the trial court.*" Rule 29.15(c) (emphasis added). Consistent with those provisions, Criminal Procedure Form No. 40 explicitly states: "This [29.15] motion must be filed in the Circuit Court which imposed

sentence.”<sup>2</sup> This requirement, which must be read in tandem with the time limits, was clearly known to appellant, because his Form 40 was drafted in accordance with Criminal Procedure Form No. 40 (see PCR L.F. 3).<sup>3</sup>

In short, when the motion court received appellant’s motion only *after* the time for filing had expired, dismissal was the only option available to the court. The motion court did not clearly err.

### **C. Dismissal Did Not Violate Due Process**

While acknowledging the requirements of Rule 29.15, appellant argues that the motion court’s strict application of these requirements, under the facts and circumstances of his case, deprived him of due process (App.Sub.Br. 15, 17). He claims that the motion court’s strict application of the rule resulted in an arbitrarily deprivation of his right to seek post-conviction relief by denying him “adequate, effective, and meaningful” “access to the courts” (App.Sub.Br. 15-17). But that simply is not the case.

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<sup>2</sup> There is never any question about which court imposed sentence; thus, whatever vagaries might surround venue in other civil cases is simply not an issue in post-conviction cases. In other words, contrary to appellant’s claim (App.Sub.Br. 26), requiring an inmate to send his post-conviction motion to the sentencing court does not in any meaningful way impose a “higher standard” than the standard imposed upon attorneys in other civil cases.

<sup>3</sup> And, notably, appellant correctly identified “Cape Girardeau County” as the “Name and location of court which imposed sentence” (PCR L.F. 3).

Consistent enforcement of the ninety-day time limit is not arbitrary. To the contrary, it is only by consistent application of the ninety-day time limit that the rule *avoids* arbitrary application. If exceptions are made for one movant but not another, the rule becomes arbitrary and loses its ability to treat post-conviction litigants in a fair and impartial manner. It has been repeatedly held that the time limits of Rules 24.035 and 29.15 are valid and mandatory. State v. Blankenship, 830 S.W.2d 1, 16 (Mo. banc 1992); State v. Twenter, 818 S.W.2d 628, 644 (Mo. banc 1991); State v. Six, 805 S.W.2d 159, 169-170 (Mo. banc 1991), *cert. denied*, 502 U.S. 871 (1991); Day v. State, 770 S.W.2d 692 (Mo. banc 1989), *cert. denied sub nom.*, Walker v. Missouri, 493 U.S. 866 (1989); Searcy v. State, 103 S.W.3d 201, 204 (Mo.App. W.D. 2003); Duvall v. Purkett, 15 F.3d 745, 748 (8th Cir. 1994), *cert. denied*, 512 U.S. 1241 (1994).

Enforcement of the ninety-day time limit also does not deny a post-conviction litigant “meaningful” access to the courts. To the contrary, each post-conviction litigant has the same, adequate, effective, and meaningful opportunity to file a post-conviction motion. He or she must simply avail him- or herself of the opportunity within the reasonable amount of time allotted by the rule by filing a motion in the sentencing court. This is not an onerous requirement; and, once a post-conviction litigant has complied with the requirements of the rule, “meaningful” access to the courts is assured by the post-conviction litigant’s access to the tools necessary to press his claims for relief, e.g., access to a law library and the assistance of counsel in crafting and litigating claims. Additionally, while the time limits of the rule are there to foster finality, the time limits are also designed to avoid the litigation of stale claims,

see Day v. State, 770 S.W.2d at 693 – a rationale that, at least in part, benefits a movant who might otherwise be prejudiced if his witnesses cannot recall important events or information due to the passage of time. In other words, while the requirements of the rule put limits upon the post-conviction procedure, the requirements are designed to foster reasonable and legitimate interests that are important to all parties.

In short, to the extent that appellant was “denied” meaningful access to the courts, it was not due to the motion court’s dismissal of his motion; rather, it was due to appellant’s procrastination and failure to send the motion to the correct court. The motion court did not clearly err.

**D. Filing a Post-conviction Motion in a Circuit Court Does Not Satisfy the Rule’s Requirement that the Motion be Filed in the Sentencing Court**

Appellant argues, however, that filing his post-conviction motion in any circuit court should have been sufficient to comply with the rule (App.Sub.Br. 18). He points out that § 476.410 requires “[t]he division of a circuit court in which a case is filed laying venue in the wrong division or wrong circuit shall transfer the case to any division or circuit in which it could have been brought” (App.Sub.Br. 19). He also points out that Rule 51.10, which deals with cases transferred after a change of venue, provides as follows: “The clerk of the court to which the civil action is transferred shall file and docket the action. . . . The action shall be treated and determined as if it had originated in the receiving court” (App.Sub.Br. 19). Thus, appellant concludes that the circuit clerk of the City of St. Louis properly handled this matter; and that, accordingly, the date of his filing his post-conviction motion in the City of St. Louis,

should be the controlling date in determining whether he complied with the time limits of Rule 29.15.

However, there is no reason to dilute the clear and easily-applied rule that governs the timeliness of post-conviction motions. It is apparent that the provisions of § 476.410 and Rule 51.10 do not apply under the circumstances of this case. Section 476.410, RSMo is a statute that pertains to mistaken venue. Alford Adver., Inc. v. Mo. Highway and Transp. Comm'n, 944 S.W.2d 245, 246 (Mo.App. W.D. 1997). ““Venue has to do with the place of the proceedings, not with the power of the court to act.”” Id. Prior to the enactment of that statute, improper venue required the court to dismiss the action. Keltner v. Keltner, 950 S.W.2d 690, 691 (Mo.App. S.D. 1997). Subsequent to the enactment, circuit courts have limited jurisdiction to transfer a case filed in an improper venue “to any circuit court otherwise designated by the legislature to hear the particular matter.” State ex rel. Director of Revenue v. Gaertner, 32 S.W.3d 564, 567 (Mo. banc 2000). Since the enactment of § 476.410, RSMo, improper venue is not a jurisdictional defect; “the remedy for filing an improper venue is transfer, not dismissal.” Parks v. Rapp, 907 S.W.2d 286, 292 (Mo.App. W.D. 1995).

In the case at bar, however, it appears as though the circuit clerk of the City of St. Louis simply forwarded Appellant’s *pro se* motion to the Circuit Court of Cape Girardeau County. Thus, although § 476.410 gave the Circuit Court of the City of St. Louis the power to transfer a case to its appropriate venue, it does not appear that there was ever an order for a change of

venue in this case.<sup>4</sup> Thus, the timing language of Rule 51.10, which evidently deals with the appropriate procedure after a change of venue is ordered, see e.g. Rule 51.09, does not apply under these circumstances.

Rule 51.10, entitled “Clerk to File and Docket Civil Action When Transferred,” reads as follows:

The clerk of the court to which the civil action is transferred shall file and docket the action. The clerk also shall mail a notice to all counsel of record acknowledging the receipt of the action, any new cause number, and the division to which it has been assigned. The action shall be treated and determined as if it had originated in the receiving court.

Supreme Court Rule 51 is entitled “Venue, Including Change Of Venue And Change Of Judge,” and its subsections apply to those cases in which a party seeks a change of venue and/or judge and is granted such a change.

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<sup>4</sup> Notably, § 476.410, RSMo 2000, contains no clause about the transferred case being treated as originally or timely filed. *Compare* § 476.410, RSMo 200 with § 478.720.6, RSMo 2000 (statute specifically applying to the Circuit Court of Marion County that contains “originally filed” language) and § 508.180, RSMo 2000 (under chapter entitled “Venue And Change Of Venue;” “The clerk of the court to which such cause is certified shall file the same, and the cause shall be docketed, proceeded in and determined as if it had originated therein”).

However, as stated above, in Appellant's case, there was never any change of venue between the Circuit Courts of Cape Girardeau County and the City of St. Louis. To the contrary, venue in Appellant's underlying criminal case was moved from Scott County to Cape Girardeau County (L.F. 3). Thus, appellant's reading of Rule 51.10 is overly broad and cannot be applied under the circumstances of his case. Moreover, applying the general provisions of § 476.410 and Rule 51.10 would be inconsistent with well-established case law and the purposes of Rule 29.15.

Case law supports the conclusion that the requirement that the motion be timely filed in the sentencing court is *jurisdictional*. For example, in Plant v. Haynes, 568 S.W.2d 585, 585-86 (Mo.App. K.C.Dist. 1978), the plaintiff was sentenced on criminal charges in St. Louis and St. Charles Counties. He then filed two petitions for declaratory judgment attacking those sentences in the Circuit Court of Cole County. Id. at 585. Upon review, the Court of Appeals held that the exclusive remedy for the plaintiff's attack was to file a motion pursuant to Rule 27.26 (the forerunner of the current Rule 29.15) and that the rule specifically stated that the motion "shall" have been filed in the court where the sentence was imposed. Id. at 587. Interpreting federal law, the court noted that "a court, which did not impose the sentence, is without jurisdiction in the matter," and the court held that the requirement of Rule 27.26 to file the motion in the sentencing court was jurisdictional. Id. The court dismissed the plaintiff's appeal for want of jurisdiction. Id. at 588.

In the case at bar, Appellant was sentenced in Cape Girardeau County. Accordingly, to invoke the jurisdiction of the proper court, appellant's motion had to be received by the proper court in a timely fashion. That did not happen here.

Additionally, the specific language of Rule 29.15 is plain and easy to understand, and it has been reasonably construed to mandate *receipt* of the motion by the sentencing court within the time limits of the rule. "A Rule 29.15 motion is filed 'when it is received by the proper officer and lodged in his office.'" Jameson v. State, 125 S.W.3d 885, 888 (Mo.App. E.D. 2004) (quoting Phelps v. State, 21 S.W.3d 832, 833 (Mo.App. E.D. 1999)). "The date the Clerk's office actually receives the document, as evidenced by the file stamp, is crucial in determining timeliness." Id. at 888-889. See also Matchett v. State, 119 S.W.3d at 559 (the "post-conviction motion is considered filed when deposited with the circuit court clerk, not when it is mailed," and the "rule makes no allowances for extension of time for good cause shown or excusable neglect"); Unnerstall v. State, 53 S.W.3d at 591; Thomas v. State, 31 S.W.3d 23, 25 (Mo.App. E.D. 2000).

Thus, here, while appellant's motion was initially file stamped within the time limits of Rule 29.15, it was not stamped by the proper official of the proper court. Consequently, the later filing – as shown by the date stamp of the proper court – was untimely. No new exception should be made for appellant's failing to follow the procedures outlined in the rule. See generally State v. Gibson, 812 S.W.2d 521 (Mo.App. E.D. 1991) (the movant's motion was untimely filed despite his claim that he had originally, within the proper time limits, "accidentally filed his *pro se* motion in the wrong court").

Finally, the general provisions of § 476.410 and Rule 51.10, to the extent that they are relevant, should not be applied in place of the specific requirements of Rule 29.15. In other words, because Rule 29.15 has specific requirements that a motion be filed in the sentencing court within ninety days, no general provision that has the effect of circumventing those requirements should be applied. Indeed, as appellant acknowledges in his brief, the rules of civil procedure apply in post-conviction proceedings only insofar as they are applicable (App.Sub.Br. 20). See Rule 29.15(a). Moreover, whether the rules of civil procedure are applicable in post-conviction proceedings depends on whether they enhance, conflict with, or are of neutral consequence (App.Sub.Br. 20) (citing State v. Reber, 976 S.W.2d 45, 451 (Mo. banc 1998)).

Here, applying the general provisions of § 476.410 and Rule 51.10 would circumvent one of the purposes of Rule 29.15. As outlined above, Rule 29.15 imposes mandatory but reasonable time limits. However, if a movant could file his motion in any circuit court, the resulting litigation could be delayed or bogged down by litigation in that circuit court (as opposed to the proper circuit court). Alternatively, even if the case is promptly transferred, it will still result, in many instances, in the filing of post-conviction motions beyond the time limits of Rule 29.15.

Indeed, even though appellant's motion was quickly forwarded by the circuit clerk, there was still enough of a delay to push the filing of appellant's motion beyond the time limits of the rule. Appellant asserts that "[i]t is difficult to ascertain how application of the civil rules permitting transfer of civil action filed in the improper venue to the proper circuit court would

‘conflict’ with the purpose of Rule 29.15 ‘[t]o avoid . . . delays and to prevent litigation of stale claims” (App.Sub.Br. 22).

However, this argument would apply with equal force to any rule that barred relief on a motion filed one day too late. The question is not simply whether a slight delay will necessarily frustrate the purposes of Rule 29.15; the question is whether appellant complied with the rule and properly invoked the jurisdiction of the court.

Additionally, non-compliance with the time limit cannot be winked at because the time limit is jurisdiction. One day beyond the time limits is simply one day too many. Indeed, if appellant were to be granted a reprieve from the requirements of the rule, such a rule would simply favor those litigants who file their motions in contravention of the procedures set forth in the rule (while maintaining the bar for those litigants who file their motions in the proper court but one day late). This would have the unfair consequence, for example, of arbitrarily punishing the one-day-late litigants who did not think to attempt to file their motions in a closer circuit court that might have received the mail more quickly than the sentencing court. In short, an exception to the time limits cannot be crafted simply because the contemplated delay is not very long. If that were sufficient cause, then anyone who filed within a reasonable time of the time limit could properly seek relief, as well. But that route simply devolves into endless litigation over what is reasonable.

### **E. Conclusion**

In sum, Appellant’s filing of a post-conviction motion in *a* circuit court cannot be used to circumvent the express requirement that the motion be filed in *the* sentencing court.

Appellant did not file his *pro se* motion in the Circuit Court of Cape Girardeau County within ninety days of this Court's mandate, and it was not received by the appropriate court within the time allotted. Accordingly, the motion court did not clearly err in dismissing the motion as untimely. Moreover, in light of the facts and circumstances of appellant's case, and the purposes and provisions of Rule 29.15, the application of the provisions of § 476.410 and Rule 51.10 is not appropriate. This point should be denied.

**CONCLUSION**

In view of the foregoing, Respondent submits that the denial of Appellant's untimely *pro se* Rule 29.15 motion be affirmed.

Respectfully submitted,

**JEREMIAH W. (JAY) NIXON**  
Attorney General

**SHAUN J MACKELPRANG**  
**ANDREA MAZZA FOLLETT**  
Assistant Attorneys General  
Missouri Bar No. 48517

P. O. Box 899  
Jefferson City, MO 65102-0899  
(573) 751-3321  
Attorneys for Respondent

**CERTIFICATE OF COMPLIANCE AND SERVICE**

I hereby certify:

(1) That the attached brief complies with the limitations contained in this Supreme Court Rule 84.06(b), and that the brief, excluding the cover, the certificate of service, this certificate, the signature block, and appendix, contains 6,225 words (as determined by WordPerfect 9 software);

(2) That the floppy disk filed with this brief, and containing a copy of this brief, has been scanned for viruses and is virus-free; and

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S. KRISTINA STARKE  
1000 St. Louis Union Station, Suite 300  
St. Louis, MO 63103  
(314) 340-7662

LEW KOLLIAS  
3402 Buttonwood  
Columbia, MO 65201  
(573) 882-9855

**JEREMIAH W. (JAY) NIXON**  
Attorney General

**SHAUN J MACKELPRANG**  
**ANDREA MAZZA FOLLETT**  
Assistant Attorneys General  
Missouri Bar No. 48517

P. O. Box 899  
Jefferson City, MO 65102-0899  
(573) 751-3321  
Attorneys for Respondent