No. SC88584

IN THE
SUPREME COURT OF MISSOURI

STEVEN CRENSHAW,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of the City of St. Louis
Twenty-second Judicial Circuit
The Honorable Julian L. Bush, Judge

RESPONDENT'S BRIEF

JEREMIAH W. (JAY) NIXON
Attorney General

JOSHUA N. CORMAN
Assistant Attorney General
Missouri Bar No. 58608

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
josh.corman@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules, Statutes, and Other Authorities

JURISDICTIONAL STATEMENT

This appeal is from a St. Louis City Circuit Court judgment granting Appellant's motion to reopen his Rule 29.15 post-conviction proceedings in order to provide Appellant with additional time to file a notice of appeal. The Eastern District Court of Appeals dismissed Appellant's appeal. *Crenshaw v. State*, 2007 WL 1052480 (Mo. App. E.D. April 10, 2007). On September 25, 2007, this Court granted transfer pursuant to Missouri Supreme Court Rule 83.04. Therefore, jurisdiction lies in this Court under Article V, § 10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Steven Crenshaw, was charged by indictment as a prior and persistent offender with assault in the first degree, §565.050, and armed criminal action, §571.015. (L.F. 7-8).[1] On August 16, 2000, Appellant was tried before a jury in the Circuit Court of the City of St. Louis, the Honorable Julian L. Bush presiding. (Tr. 1-2). Viewed in the light most favorable to the verdict, the evidence adduced at trial was as follows:

On or around September 23, 1999, Darwin Beck visited Royal Palace, a nightclub in the City of St. Louis. (Tr. 192-96). While Beck was walking to the restroom in the club, a man named Charlie put his finger in Beck's chest and told Beck that he could not go that way. (Tr. 194-96). Beck was upset so he left the club. (Tr. 196). A few of Charlie's associates approached Beck outside the club, apologized for Charlie's drunkenness, and encouraged Beck to come back inside the club. (Tr. 196). When Beck went back inside, Charlie and his friends had left. (Tr. 196). Although Beck was not involved in any other altercations that night, Beck knew of Charlie from a previous altercation he had with Charlie a few weeks earlier. (Tr. 196-97, 214-15).

---

[1] The abbreviations "L.F." and "Tr." refer to the legal file and trial transcript from the direct appeal. "PCR L.F." and "PCR Tr." refer to the post-conviction legal file and post-conviction evidentiary hearing. "A.Tr" refers to the abandonment hearing transcript. "App. Dir. Br." refers to the Appellant's direct appeal brief. "App. Br." refers to Appellant's brief in this appeal.

A week later, on September 30, Beck returned to Royal Palace around 11:30 p.m. (Tr. 193, 197, 214). Charlie was also at the club that night and at one point, Charlie motioned for Beck to come over to him, but Beck declined. (Tr. 198). Beck stayed at the club until it closed around 1:30. (Tr. 197-98, 214). Beck drank two shots of Hennessey while at the club. (Tr. 193, 214). Two female acquaintances, Tasha and Shalon, asked Beck to drive them home and Beck agreed to do so. (Tr. 199).

As Beck made a right turn out of the parking lot, the woman sitting in the backseat told Beck that there was a man walking towards the car with a gun. (Tr. 200-02, 218). As Beck turned, his windows shattered and the woman in the front seat started screaming. (Tr. 202, 208). Appellant had walked up to the driver's door and shot Beck from approximately 4-5 feet away. (Tr. 202-03, 220). Beck had known Appellant for a long time; they both attended the same high school. (Tr. 203, 222). Beck knew Appellant as "Herk." (Tr. 203). Appellant was friends with Charlie. (Tr. 197). Although Beck had gotten into a fight with Appellant's best friend years prior and Appellant had been in an altercation with Beck's sister in the past, Beck and Appellant had not had any problems in years. (Tr. 223-24).

Beck did not realize that he had been shot until Tasha told him that he was bleeding and to pull the car over. (Tr. 204). Because there was a car behind him and Beck was unsure who was in that car, he did not want to pull over. (Tr. 204). Then, Beck started to feel weak so he pulled the car over and let one of the women drive him to the hospital. (Tr. 205). The last thing he remembered was being put on a stretcher and having his clothes torn off. (Tr. 205).

Beck was shot twice in the hip and buttock area causing injuries to his large intestine, small intestine, and stomach. (Tr. 207, 245-47). Portions of Beck's colon, small intestine, and large intestine had to be removed, and he received a temporary colostomy. (Tr. 247-48). Beck spent a total of two weeks in the hospital and relied on a colostomy bag for three or four months after the incident. (Tr. 207, 249). As a result of his injuries, Appellant had trouble lifting, bending, and it was difficult for him to walk very far. (Tr. 207, 212-13).

While in the hospital, Detective Keenan Richardson of the St. Louis Metropolitan Police Department spoke with Beck who told Richardson that the man that had shot him went by the nickname, "Herk," and that he hung out in the vicinity of Ashland, around Beaumont High School. (Tr. 206, 256, 276-77, 279-80). Detective Richardson ran a computer check for the nickname or alias, "Herk" and found a "Herk" who lived in the Ashland/Beaumont High School area. (Tr. 257, 280-81). Detective Richardson prepared a photographic line-up and returned to the hospital to show the line-up to Beck; Beck identified Appellant as the shooter. (Tr. 206, 257-60, 274, 277). Detective Richardson and his partner then responded to 4119 Ashland and arrested Appellant. (Tr. 260-61).

The next day, Appellant was placed in a live line-up at the police station. (Tr. 261-62, 274). Because Beck was still in the hospital and unable to come to the police station to view the line-up, Detective Richardson photographed the line-up and then took the picture to the hospital to show Beck. (Tr. 263-65). Beck again identified Appellant as his assailant. (Tr. 265-66, 274).

Appellant testified at trial. (Tr. 291-316). Appellant claimed that he was with a friend, Tracy Shanklin, whom he had known for approximately fifteen years, on the evening

of September 30, 1999. (Tr. 293-95, 304). According to Appellant, he met Shanklin at his grandmother's house around 9:45 p.m. that evening, the two drove around, went to Shanklin's mother's house, and then returned to Shanklin's apartment at approximately 11:45 p.m. (Tr. 294-95). Appellant claimed that the two were sexually intimate that night and he did not leave Shanklin's apartment until 3:00 p.m. the next afternoon. (Tr. 295-96, 305).

Appellant admitted that he went to Beaumont High School and he knew Beck's sister, but Appellant claimed that he did not know Beck. (Tr. 297). Appellant had previously been convicted of burglary in the second degree, robbery in the second degree, trespass in the first degree, unlawful use of a weapon, and various misdemeanors. (Tr. 298-99, 308, 314, 340-43).

Appellant also claimed that after he was arrested, he told Detective Richardson that he was with Tracy Shanklin that night. (Tr. 303, 307-08, 315-16). Appellant testified that he had Shanklin's phone number, but he did not give it to the detective. (Tr. 304, 307-08). Appellant also testified that he continued to see Shanklin during the month of October and the two had spoken on the telephone since he had been incarcerated. (Tr. 306-07).

At the close of Appellant's evidence, the State recalled Detective Richardson. (Tr. 331-32). Detective Richardson testified in rebuttal that after he advised Appellant of his rights pursuant to *Miranda*, Appellant told him that he had spent the evening in question with a woman named Tonya. (Tr. 332-34, 335). Appellant could not provide the detective with Tonya's last name, telephone number, address, or street name, but only that Tonya's apartment had a red door. (Tr. 333-34, 337). Detective Richardson asked if there was

someone who could give him that information but Appellant did not provide any further information. (Tr. 337-38). Detective Richardson investigated the general area Appellant described but was unable to locate a Tonya. (Tr. 334, 335).

At the close of the evidence, instructions, arguments by counsel and deliberation, the jury found Appellant guilty of assault in the first degree and armed criminal action. (Tr. 367, L.F. 66-67). On December 1, 2000, the court sentenced Appellant to a term of nineteen years imprisonment for assault in the first degree, and a consecutive term of eleven years for armed criminal action. (Tr. 404; L.F. 81-83). Appellant's convictions and sentences were affirmed on direct appeal. *State v. Crenshaw*, 66 S.W.3d 109 (Mo. App. E.D. 2002).

Appellant timely filed his *pro se* motion for post-conviction relief on May 29, 2002. (PCR L.F. 4-14). Appellant's amended motion for post-conviction relief was filed on August 20, 2002. (PCR L.F. 19-39). On January 9, 2003, the motion court entered findings of fact, conclusions of law and order denying Appellant's motion after an evidentiary hearing. (PCR L.F. 60-63; PCR Tr. 1-49). No appeal was filed.

On March 25, 2005, Appellant filed a motion to reopen his post-conviction proceedings "for the sole purpose of re-filing the Findings of Fact, Conclusions of Law, and Order … to allow [Appellant] to file a timely notice of appeal." (PCR L.F. 64-71).[2] Appellant asserted that post-conviction counsel had abandoned him by failing to timely file a

---

[2] Appellant also filed a motion to set aside the motion court's judgment on the basis that it was void for lack of notice under Rule 74.06. (PCR L.F. 72-77). That motion was denied. (PCR L.F. 81).

notice of appeal or petition the Court of Appeals for leave to file notice of appeal out of time under Rule 30.03. (PCR L.F. 64-71).

On August 7, 2006, a hearing was held on the issue of abandonment in connection with Appellant's motion to re-open his post-conviction proceedings. (A.Tr. 2-4). Appellant did not testify at the hearing. (A.Tr. 2-4). Post-conviction counsel, Gwenda Robinson, made the following statement:

> In this particular case, I did not file the notice of appeal. I did not receive a copy of the Court's findings of fact and conclusions of the law within time to file a timely notice of appeal or a late notice of appeal with permission of the Missouri Court of Appeals Eastern District. However, it is, to my knowledge, Mr. Crenshaw wanted an appeal.
>
> I handled Mr. Crenshaw's case the same way as I handle most post-conviction cases with intent to file a notice of appeal under the presumption the client desires an appeal unless I am told otherwise. To the best of my belief, Mr. Crenshaw did not[3] want to appeal for denial of his post-conviction case in this instance. I was unable to file that notice of appeal for him and did not file that notice of appeal for him.

(A.Tr. 2).

---

[3] Respondent notes that in Appellant's brief, when quoting this portion of the hearing, Appellant unilaterally attempted to correct either her own misstatement or an error in the transcription of the hearing by including a [sic] after the "did not." (App. Br. 17).

On the same day, the motion court found that Appellant had been abandoned by post-conviction counsel and granted Appellant until August 18, 2006, to file a notice of appeal. (PCR L.F. 82). The motion court did *not* issue new Findings of Fact, Conclusions of Law, and Order. (PCR L.F. 3). Appellant filed his notice of appeal on August 7, 2006. (PCR L.F. 85-87).

The Eastern District Court of Appeals dismissed Appellant's appeal. *Crenshaw v. State*, 2007 WL 1052480 (Mo. App. E.D. April 10, 2007). The court held that the motion court had no authority to reopen Appellant's post-conviction proceedings, reissue the findings of fact and conclusions of law, and provide Appellant with additional time to "timely" file a notice of appeal. *Id*. at *2.[4] On September 25, 2007, this Court granted transfer.

[4] The court also noted that although Appellant had not appealed the denial of his motion to set aside the judgment as void for lack of notice, such an appeal would have had no merit because this Court had recently held that a motion under Rule 74.06 is not permitted in post-conviction proceedings. *Id*. at fn1, citing *State ex rel. Nixon v. Daugherty*, 186 S.W.3d 253 254 (Mo. banc 2006).

ARGUMENT

I.

This appeal should be dismissed for lack of appellate jurisdiction because Appellant failed to timely file his notice of appeal in that he filed his notice of appeal 1266 days (nearly three and a half years) after the motion court issued its judgment denying Appellant relief on his Rule 29.15 motion. The motion court had no authority to circumvent the time limits proscribed in Rules 81.04(a) and 30.03, governing the time for filing a notice of appeal, because Appellant was not abandoned by post-conviction counsel.

Appellant claims that this Court has jurisdiction to hear this appeal because the motion court did not err in granting his motion to reopen his post-conviction proceedings and provide him additional time to file a notice of appeal. (App. Br. 22-28). Appellant argues that post-conviction counsel abandoned him by failing to timely file a notice of appeal of the motion court's denial of his Rule 29.15 motion, and therefore, the motion court's remedy of reopening his proceedings to allow him to file a notice of appeal was authorized. (App. Br. 22-28). Appellant's claim is without merit.

A. Standard of review[5]

---

[5] Appellant asserts, without authority, that appellate review of a ruling on a motion to reopen post-conviction proceedings is treated the same as appellate review of a denial of a motion for post-conviction relief, i.e. whether the findings and conclusions of the motion court are clearly erroneous. (App. Br. 23).

Whether or not a motion court has jurisdiction to reopen a 29.15 proceeding is a question of law to be reviewed *de novo*. *Middleton v. State*, 200 S.W.3d 140, 143 (Mo. App. W.D. 2006). Appellate jurisdiction derives from that of the circuit court. *Simmons v. State*, 190 S.W.3d 558, 560 (Mo. App. E.D. 2006). If the circuit court does not have jurisdiction, this Court is without jurisdiction. *Id*.

B. Analysis

1. This appeal should be dismissed for lack of appellate jurisdiction

Rule 29.15 motions for post-conviction relief are governed by the rules of civil procedure insofar as applicable. Supreme Court Rule 29.15(a); *State v. Harris*, 870 S.W.2d 798, 815 (Mo. banc 1994). Rule 81.04(a) provides that a notice of appeal "shall be filed not later than ten days after the judgment or order appealed from becomes final." Rule 81.05(a)(1) provides that "[a] judgment becomes final at the expiration of thirty days after its entry if no timely authorized after-trial motion is filed." Additionally, Rule 30.03 provides that where a defendant has the right of appeal but notice of appeal is not timely filed, "including appeals from an order in a post-conviction proceeding involving a prior felony conviction," the appellate court may grant a special order, for good cause shown, and allow the defendant or the State to file the notice of appeal. Rule 30.03, however, only grants the appellate court this jurisdiction "within twelve months after the judgment becomes final."

Here, the findings of fact, conclusions of law, and order were issued on January 9, 2003. (PCR L.F. 60-63). Accordingly, the judgment became final thirty days later, on February 8, 2003. Appellant's notice of appeal was due no later than February 18, 2003. Rule 81.05(a)(1); Rule 81.04(a). Appellant's notice of appeal, however, was not filed until

August 7, 2006, 1266 days after the notice of appeal was due – almost three and a half years late. (PCR L.F. 85-87). Even if Appellant would have filed a motion for leave in the appellate court under Rule 30.03, the appellate court's jurisdiction to grant such a special order expired on February 8, 2004. After the time for requesting permission to file a late notice of appeal under Rule 30.03 has expired, the appellate court has no jurisdiction to consider the case. *State v. Nelson*, 9 S.W.3d 687, 688-89 (Mo. App. E.D. 1999). "If a notice of appeal is untimely, the appellate court is without jurisdiction to review the motion court's judgment." *State v. Mackin*, 927 S.W.2d 553, 557 (Mo. App. S.D. 1996) (dismissing Rule 29.15 appeal because the notice of appeal was filed more than two years late and motion court had no jurisdiction to vacate entry of judgment); *see also Swiney v. State*, 27 S.W.3d 498, 500 (Mo. App. E.D. 2000) (dismissing appeal from denial of Rule 24.035 motion). Consequently, Appellant's notice of appeal filed on August 7, 2006 was a nullity and, as a result, this appeal must be dismissed.

2. The motion court had no authority to reopen Appellant's Rule 29.15 proceedings and grant him additional time to file a notice of appeal

On March 25, 2005, Appellant filed a motion to "reopen"[6] his post-conviction proceedings, alleging that he was abandoned by post-conviction counsel. (PCR L.F. 64-71).

---

[6] In this case, the motion court was not even reopening the proceeding as the term is understood. The merits of Appellant's Rule 29.15 motion had already been addressed and denied by the motion court. (PCR L.F. 60-63). Therefore, the motion court was not reopening the Rule 29.15 proceedings to reexamine the merits of Appellant's claims but was

Appellant requested that the motion court re-file its findings and conclusions to permit the timely filing of a notice of appeal. (PCR L.F. 64-71). Even though the motion court granted Appellant's motion, it lacked the jurisdiction to do so at that point and had no authority to "reopen" the case and grant Appellant additional time in which to file his notice of appeal.

Although not invoked by Appellant in his motion, the only rule allowing a court to reopen its judgment is Rule 75.01. And while Rule 75.01 provides authority to reopen judgments, that authority is limited to "the thirty-day period after judgment." Supreme Court Rule 75.01. The time limits of this rule apply to motions to reopen post-conviction proceedings pursuant to Rule 29.15. *Smith v. State*, 215 S.W.3d 749, 750 (Mo. App. W.D. 2007); *Cook v. State*, 156 S.W.3d 418, 420 (Mo. App. E.D. 2005). "Any attempt by a trial court to amend a judgment more than 30 days after it was entered is in excess of its jurisdiction and is void." *Swiney v. State*, 27 S.W.3d 498, 499 (Mo. App. E.D. 2000); *see also Mackin*, 927 S.W.2d at 557.

Swiney provides an example of jurisdictional defects somewhat similar to those in this case. In *Swiney*, the movant filed his *pro se* motion for post-conviction relief out of time; therefore, the motion court declined to allow the movant to proceed and entered judgment denying the motion as untimely. *Swiney*, 27 S.W.3d at 499. The movant did not file a notice of appeal from that judgment. *Id.* Several months later, after noting its prior judgment, the motion court nonetheless addressed the merits of the motion and issued findings of fact and

---

simply extending the deadline for Appellant to file his notice of appeal from the denial of his Rule 29.15 proceeding. The motion court had no authority to do so.

conclusions of law denying the motion. *Id*. The movant then filed a notice of appeal from that judgment. *Id*. The Eastern District Court of Appeals held that the order from which the movant appealed was void and dismissed the appeal for lack of jurisdiction. *Id*. at 499-500. As the court explained, the motion court was without jurisdiction to change, alter or modify its earlier judgment because it became final thirty-days after it was issued. *Id*. at 499, citing Rule 75.01. "Any attempt by a trial court to amend a judgment more than 30 days after it was entered is in excess of its jurisdiction and is void." *Id*.

Similarly, in *State v. Mackin*, the motion court denied the movant's Rule 29.15 motion, and the matter lay dormant for more than two years before post-conviction counsel eventually sent a letter to the motion court stating that he had not received any findings in the matter and the movant was concerned about the status of his case. *Mackin*, 927 S.W.2d at 557. The motion court informed counsel that it had issued its findings two years prior. *Id*. Nonetheless, the motion court vacated its earlier judgment and entered a new judgment. *Id*. The appellant then filed a notice of appeal from that judgment. *Id*. The Southern District Court of Appeals explained that under Rule 75.01, the motion court only retained control over its original judgment for thirty days, and because the notice of appeal was filed more than two years after the expiration of that thirty-day period, the appeal had to be dismissed for lack of jurisdiction. *Id*.

In the case at bar, as in *Swiney* and *Mackin*, after the expiration of Rule 75.01's thirty-day limit, the motion court lost jurisdiction and could not supplant its earlier judgment by either issuing new findings and conclusions as Appellant requested, or by simply granting Appellant additional time to file his notice of appeal, which is what the motion court actually

did. (PCR L.F. 3, 82). "Any attempt by a trial court to amend a judgment more than 30 days after it was entered is in excess of its jurisdiction and is void." *Swiney*, 27 S.W.3d at 499. "[T]he time within which a losing party must seek review cannot be enlarged just because the lower court in its discretion thinks it should be enlarged." *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co*., 344 U.S. 206, 211 (1952).

The motion court's action was an attempt to circumvent the requirements of Rules 81.04, 30.03, and 75.01. Moreover, by simply extending the deadline for Appellant to file his notice of appeal, the motion court completely usurped the authority of the appellate court. The motion court's order granting Appellant additional time to file his notice of appeal was void. Consequently, Appellant's notice of appeal filed on August 7, 2006 was ineffective to invoke this Court's jurisdiction, and as a result, this appeal must be dismissed.

3. No abandonment of post-conviction counsel

Although Rule 75.01 limits a motion court's authority to reopen a judgment to the thirty-day period following entry of the judgment, current case law recognizes a single exception to that time limit, "which allows the post-conviction court to reopen the proceeding to address a claim of abandonment by post-conviction counsel." *Johnson v. State*, 189 S.W.3d 698, 701 (Mo. App. W.D. 2006).

Appellant argues that this Court has jurisdiction to hear this appeal because the motion court correctly found that post-conviction counsel, Gwenda Robinson, abandoned him by failing to timely file a notice of appeal. (App. Br. 22-28). Appellant's claim of abandonment, however, does not fall within the narrow class of recognized acts that would initiate an abandonment analysis. The failure to file a notice of appeal from the denial of a properly filed amended Rule 29.15 post-conviction motion does not constitute abandonment.

This Court has repeatedly recognized only two forms of abandonment, when: (1) post-conviction counsel takes no action on a movant's behalf with respect to filing an amended motion and as such the record shows that the movant is deprived of a meaningful review of his claims, *Luleff v. State*, 807 S.W.2d 495 (Mo. banc 1991) (where there was no activity whatsoever by appointed counsel at any time during the proceedings); or (2) when post-conviction counsel is aware of the need to file an amended post-conviction relief motion and fails to do so in a timely manner. *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991); *see also Moore v. State*, 934 S.W.2d 289, 291 (Mo. banc 1996); *Barnett v. State*, 103 S.W.3d 765, 773-74 (Mo. banc 2003); *Smith v. State*, 215 S.W.3d 749, 751 (Mo. App. W.D. 2007)

("Abandonment sufficient to give the court jurisdiction is limited to two circumstances …"). Neither of these instances occurred in the case at bar.

Abandonment of post-conviction counsel, as it is recognized today, originated from this Court's decisions in *Luleff* and *Sanders*. In *Sanders*, this Court explained:

> Until today[7] this Court has not deviated from its firm position that failure to timely file a motion constitutes a complete bar to consideration of a movant's claim, even when the claims are entirely attributable to inaction of counsel. Our courts have traditionally held that postconviction proceedings may not under any circumstances be used to challenge the effectiveness of postconviction counsel.

Sanders, 807 S.W.2d at 494. This Court then "altered course" and articulated the *two* instances referenced above in which abandonment of post-conviction counsel would be recognized. *Id*.

The reason abandonment of post-conviction counsel is expressly limited to these two instances is because under Rules 24.035 and 29.15, post-conviction counsel has an affirmative duty to either file an amended motion or at least file a statement setting out facts demonstrating what actions were taken to ensure that all facts supporting the claims were asserted in the *pro se* motion and that all known claims were included in the *pro se* motion. *See* Rule 24.035(e); Rule 29.15(e). And in both *Sanders* and *Luleff*, post-conviction counsel

---

[7] Both *Sanders* and *Luleff* were decided on the same day, April 9, 1991.

failed to file an amended Rule 29.15 motion, thus depriving their clients of meaningful review.

There is not, however, anything mandated by either rule or statute requiring post-conviction counsel to file a notice of appeal from the denial of a post-conviction motion. As opposed to *Luleff* and *Sanders* where the movants were "deprived of meaningful review" of their Rule 29.15 claims because no amended motion was ever filed by their post-conviction counsel, here, post-conviction counsel timely filed an amended Rule 29.15 motion and, after an evidentiary hearing and "meaningful review" by the motion court, those claims were properly denied. Appellant was not, therefore, abandoned by post-conviction counsel and "deprived of meaningful review." *See Sanders*, 807 S.W.2d at 494.

Filing a notice of appeal from the denial of a post-conviction motion is not something post-conviction counsel is mandated to do by either rule or statute. Such a claim is merely an allegation of ineffective assistance of post-conviction counsel which is categorically unreviewable. "This Court has repeatedly held it will not expand the scope of abandonment to encompass perceived ineffectiveness of post-conviction counsel." *Barnett*, 103 S.W.3d at 773-74 (declining to recognize a "third" form of abandonment – materially incomplete action); *see also Winfield v. State*, 93 S.W.3d 732, 733-39 (Mo. banc 1992); *State v. Hope*, 954 S.W.2d 537, 545 (Mo. App. S.D. 1997) (declining to broaden the scope of the abandonment concept to include perceived ineffectiveness of motion counsel). There is no constitutional right to counsel in a post-conviction proceeding; thus, a post-conviction movant has no right to effective assistance of counsel. *Barnett*, 103 S.W.3d at 773. There is no right to appeal a post-conviction proceeding. *Randol v. State*, 144 S.W.3d 874, 876 (Mo.

App. W.D. 2004). "[P]ost-conviction proceeding authorized by the rules of this Court is directed to the validity of appellant's conviction and sentence and cannot be used as a conduit to challenge the effectiveness of counsel in the post-conviction proceeding." *Lingar v. State*, 766 S.W.2d 640, 641 (Mo. banc 1989). "To address claims of ineffective assistance of post-conviction counsel other than those that allege failure of counsel to comply with the clear provisions of 29.15(e) and (f) would defeat the clear provision of subsection (k)[8] of Rule 29.15 that the court shall not entertain successive motions." *Sanders*, 807 S.W.2d at 495.

In support of his argument that "a claim of abandonment by counsel on post-conviction appeal is a potentially meritorious and litigable claim for relief" (App. Br. 25), Appellant cites to this Court's decision in *Flowers v. State*, 618 S.W.2d 655 (Mo. banc 1981). *Flowers*, however, was decided under former Rule 27.26 (repealed in 1988) and is not applicable to cases such as the one at bar brought under Rule 29.15. Former Rule 27.26 allowed for successive motions and placed no time limit on the filing of motions seeking post-conviction relief. *Thomas v. State*, 808 S.W.2d 364, 365 (Mo. banc 1991). And whether or not *Flowers* was appropriate for a case of its kind at the time, it is not applicable to the restructured post-conviction proceedings provided for in Rule 29.15. *See Fields v. State*, 950 S.W.2d 916 (Mo. App. S.D. 1997) (distinguishing *Flowers*); *Brown v. State*, 179 S.W.3d 404, 407 (Mo. App. S.D. 2005) (finding *Flowers* to be inapplicable). Appellant's attempt to apply *Flowers* to the case at bar is misplaced as it would be in direct conflict with

[8] Subsection (k) is not subsection (*l*).

this Court's later decisions regarding abandonment and the lack of a right to effective assistance of post-conviction counsel.

In *Flowers*, after pleading guilty to assault, the defendant filed two *pro se* motions which were consolidated and treated as a motion to vacate under Rule 27.26. *Id*. at 656. These motions alleged police beatings, refusal to allow a telephone call to a doctor or lawyer, and failure of trial counsel to consult with him prior to trial. *Id*. The motions were overruled and the defendant filed a timely, *pro se* notice of appeal. *Id*. Counsel was appointed to handle the appeal but nothing further was done on the appeal and it was later dismissed. *Id*. The trial court later granted the defendant leave to file a successive motion under Rule 27.26, alleging counsel had failed to perfect the appeal from the denial of his original *pro se* motion. *Id*. The trial court denied that motion and the denial was affirmed on appeal. *Id*. This Court, however, relying on its recent decision discussing ineffective assistance of direct appeal counsel in *Morris v. State*, 603 S.W.2d 938 (Mo. banc 1980), held that because it was not possible for the defendant to have raised in his original motion the ground that his appellate lawyer would abandon him, the defendant should be permitted to proceed with his "*first and only appeal* from the denial of his original 27.76 motion[.]" *Id*. at 656-57 (emphasis added). As a result, this Court directed that the trial court should hold an evidentiary hearing to determine whether or not counsel abandoned him in his original appeal. *Id*. at 657.

In *Morris*, upon which the *Flowers* Court relied, this Court found that the defendant's claim that his *direct appeal* counsel was ineffective for failing to perfect his appeal should be brought in a Rule 27.26 motion before the motion court instead of bringing the claim in a

motion to recall the mandate before the appellate court. *Morris*, 603 S.W.2d at 940-41. Therefore, the rationale underlying the holding in *Morris* is correct and still applicable because defendants have a right to directly appeal their convictions and a right to effective assistance of direct appeal counsel. Supreme Court Rules 30.01; 29.15(a). *Morris*, however, upon which the decision in *Flowers* rested, cannot be applied to the claim that post-conviction counsel was ineffective for failing to file a notice of appeal from the denial of his post-conviction motion because there is no constitutional right to counsel in a post-conviction proceeding, and thus a post-conviction movant has no right to effective assistance of counsel. *Barnett*, 103 S.W.3d at 773. Had Appellant's trial counsel failed to file his notice of *direct appeal*, then Appellant may have been entitled to relief. But in this case, where it was his *post-conviction* counsel who failed to timely file a notice of appeal from the denial of a Rule 29.15 motion, Appellant is not entitled to relief.

In both *Flowers* and *Morris*, the defendants effectively went through the initial stage of the appellate process without ever having had the benefit of an attorney; that is not what occurred in this case. *See also e.g.*, *Fields v. State*, 950 S.W.2d 916, 919 (Mo. App. S.D. 1997) (holding that "[u]nlike *Flowers* Movant is not attacking his criminal conviction, as provided by Rule 27.26. Rather, Movant now makes allegations of ineffective assistance of counsel not from his criminal trial, but from actions taken by counsel during the process of appealing a judgment denying a Rule 27.26 motion. Nowhere in former Rule 27.26 does this Court find any provision authorizing a review of claims regarding ineffective assistance of post-conviction appellate counsel, nor has our attention been directed to any statutory authority which authorized the relief that Movant now requests.").

The claim in *Flowers* was not a claim of abandonment as the term is understood and recognized today. Had it been, there is no reason that this Court in *Sanders*, which was decided after *Flowers* and after the restructuring of Missouri's post-conviction proceedings, would have stated:

> Until today this Court has not deviated from its firm position that failure to timely file a motion constitutes a complete bar to consideration of a movant's claim, even when the claims are entirely attributable to inaction of counsel. Our courts have traditionally held that postconviction proceedings may not under any circumstances be used to challenge the effectiveness of postconviction counsel.

Sanders, 807 S.W.2d at 494. Under the guidance of *Luleff* and *Sanders*, and as this Court most recently clarified again in *Barnett*, abandonment is an extremely limited concept which this Court has refused to expand beyond the failure to file an amended motion. Appellant's claim that counsel "abandoned" him by not filing a notice of appeal is merely an allegation of ineffective assistance of post-conviction counsel which is unreviewable. As this Court explained in *Sanders*, "To address claims of ineffective assistance of post-conviction counsel other than those that allege failure of counsel to comply with the clear provisions of 29.15(e) and (f) would defeat the clear provision of subsection (k) of Rule 29.15 that the court shall not entertain successive motions." *Sanders*, 807 S.W.2d at 495.

Appellant also cites to a recent opinion from the Western District Court of Appeals, *Fenton v. State*, 200 S.W.3d 136 (Mo. App. W.D. 2006), to support his argument that post-conviction counsel's failure to file a notice of appeal from the denial of his post-conviction

motion constituted abandonment. (App. Br. 26-27). In *Fenton*, after being found guilty of rape, the defendant filed a *pro se* Rule 27.26 motion in 1983. *Id*. at 137. Appointed counsel never filed an amended motion and the *pro se* motion was denied. *Id*. In 2005, 23 years later, the defendant filed a motion to reopen his Rule 27.26 action asserting (1) that counsel had abandoned him in his 27.26 proceeding by failing to file an amended motion and, (2) that counsel abandoned him by failing to appeal the denial of his Rule 27.26 motion. *Id*. at 138. The Western District denied the first claim – that counsel abandoned him by failing to file an amended motion, but with regards to the second claim – that counsel abandoned him by failing to perfect his appeal – the court relied on *Flowers*, *Luleff*, *Sanders*, and *Brown v. State*, 179 S.W.3d 404, 406 (Mo. App. S.D. 2005), in holding that "[w]here there is a complete failure, without explanation, to file the amended motion, such failure amounts to abandonment. However, nothing in the statutes or rules or case law bars reopening of 27.26 judgment where post-conviction counsel fails to file an appeal." *Id*. at 139. The court added that "the *Brown* opinion supplies such a remedy under these facts." *Id*.

Fenton is at best, bound by its application to *Flowers* and only applicable to Rule 27.26 proceedings. Respondent contends, however, that *Fenton* was wrongly decided and should be overruled by this Court.[9] First of all, and contrary to the *Fento*n court's analysis,

---

[9] To the extent *Fenton* would apply beyond Rule 27.26 proceedings, the Western District appears to have overruled *Fenton sub silentio* in *Simmons v. State*, --- S.W.3d --- WL2766646 (Mo. App. W.D. Sept. 25, 2007). In *Simmons*, the court explained that abandonment of post-conviction counsel is narrowly defined to two circumstances which can

the Southern District's holding in *Brown* does not supply a remedy for this situation. The court in *Brown* cited to this Court's decisions in *Luleff* and *Sanders* and reiterated that there are only *two* forms of abandonment of post-conviction counsel: where post-conviction counsel takes no action on a movant's behalf with respect to filing an amended motion and as such the record shows that the movant is deprived of a meaningful review of his claims, and when post-conviction counsel is aware of the need to file an amended post-conviction relief motion and fails to do so in a timely manner. *Brown*, 179 S.W.3d at 407. Additionally, the *Brown* court found that *Flowers* was not applicable. *Id*., fn3. Moreover, the *Brown* court held that because the defendant's claim of abandonment was not one recognized by this Court, it was merely a claim of ineffective assistance of post-conviction counsel "which are categorically unreviewable." *Id*. at 407. Therefore, *Fenton's* reliance on *Brown* is misplaced.[10]

Furthermore, contrary to the *Fenton* court's analysis, there are rules and case law barring the reopening of a judgment where post-conviction counsel fails to file an appeal.

"occur *only* in connection with an amended motion." *Id*. at *3-4 (emphasis added) (finding that failure to file a requested brief was not a claim of abandonment). *See also Smith v. State*, 215 S.W.3d 749, 750 (Mo. App. W.D. 2007).

[10] Respondent notes that it appears that the movant in *Fenton*, if entitled to any relief at all, would have suffered from abandoned counsel not from his second point – failure of post-conviction counsel to file an appeal, but from his first point – post-conviction counsel's failure to file an amended motion.

See Rule 75.01; §512.060; *Sanders*, 807 S.W.2d at 495; *Barnett*, 103 S.W.3d at 773-74. This Court has already defined what constitutes abandonment and repeatedly held that abandonment can only occur in connection with an amended motion. As this Court explained in *Sanders*, "To address claims of ineffective assistance of post-conviction counsel other than those that allege failure of counsel to comply with the clear provisions of 29.15(e) and (f) would defeat the clear provision of subsection (k) of Rule 29.15 that the court shall not entertain successive motions." *Sanders*, 807 S.W.2d at 495. Appellate courts are constrained to follow the most recent decisions of this Court; therefore, to the extent that *Fenton* has any application to the modern era of post-conviction proceedings, the *Fenton* court's decision to expand the definition of abandonment to include the failure of post-conviction counsel to file an appeal should be overruled.

In short, Appellant's notice of appeal, filed almost three and a half years late, was untimely and failed to invoke this Court's jurisdiction over the appeal. Because Appellant failed to raise a recognized claim of abandonment, the motion court lacked jurisdiction to reopen Appellant's post-conviction proceedings beyond the thirty-day time limit provided in Rule 75.01. The motion court's order allowing Appellant additional time from which to file his notice of appeal was void. Appellant's claim of abandonment is merely an attempt to evade the prohibition against claims of ineffective assistance of post-conviction counsel. Consequently, this appeal should be dismissed.

II.

The motion court did not err in denying, after an evidentiary hearing, Appellant's Rule 29.15 motion alleging ineffective assistance of trial counsel for failing to investigate, subpoena, and call Tracy Shanklin to testify at trial as an alibi witness because counsel's representation did not fail to conform to the degree of skill, care and diligence of a reasonably competent attorney rendering similar services under similar circumstances in that counsel had investigated and spoken with Shanklin on multiple occasions prior to trial and Shanklin assured counsel on multiple occasions that she was willing to testify and would be in court.

Appellant claims that counsel was ineffective for failing to investigate, subpoena, or call Shanklin to testify as an alibi witness at trial, and but for counsel's alleged ineffectiveness, there is a reasonable probability that the outcome of the trial would have been different. (App. Br. 29-37).

A. Standard of review

Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Supreme Court Rule 29.15 (k); *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *Hall v. State*, 16 S.W.3d 582, 585 (Mo. banc 2000). The findings and conclusions of the motion court are clearly erroneous only if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209, 224 (Mo. banc 1996). On review, the motion court's findings and conclusions are presumptively correct. *Wilson v. State*, 813 S.W.2d 833, 835 (Mo. banc 1991).

B. Relevant background

1. Examination of Appellant at sentencing hearing

After Appellant was sentenced, the court informed Appellant of his right to appeal and advised Appellant of his right to file a motion under Rule 29.15. (Tr. 405-06). The court then examined Appellant as to the assistance of counsel he received pursuant to Rule 29.07(b)(4). (Tr. 406-15). Appellant requested that trial counsel leave the courtroom. (Tr. 406). When Appellant was asked if counsel had investigated the case to Appellant's satisfaction, Appellant replied that he had not contacted "[his] witness," Tracy Shanklin. (Tr. 410). Appellant stated that counsel told him that he had spoken to Shanklin on the telephone and informed her of the trial date, and Shanklin told Appellant that this was the only time counsel had spoken to her. (Tr. 410, 413). Appellant stated that Shanklin would have testified that he was with her at the time of the crime. (Tr. 410-11). Appellant told that court that Shanklin was a female friend of his but it was not a romantic relationship. (Tr. 411).

The court found probable cause to believe that trial counsel failed to represent him in a reasonable, competent manner by failing to contact Shanklin, interview her, and call her as an alibi witness. (Tr. 416).

2. Amended motion

In his amended motion, Appellant alleged that counsel was ineffective for failing to investigate, subpoena, and call Tracy Shanklin to testify at trial as an alibi witness. (L.F. 27). Appellant alleged that counsel was aware of Shanklin and her testimony would have

"verif[ied]" his trial testimony and alibi defense that he was with Shanklin at another location at the time of the shooting and he had been intimate with her. (PCR L.F. 27-28).

3. Evidentiary hearing

On October 25, 2002, an evidentiary hearing was held at which Tracy Shanklin and trial counsel, Thomas Kavanaugh, testified.[11] (PCR Tr. 1-49). Shanklin testified that Appellant lived around the corner from her grandmother and she had known Appellant for about ten years. (PCR Tr. 6-7, 15). They were not in a relationship, but since 1995, they would get together and have sex approximately every 4-6 months. (PCR Tr. 15-16).

Shanklin testified that on October 1, 1999, she was with Appellant "the whole day, he spent the night, spent the evening, and he left around 4:30" the next afternoon. (PCR Tr. 8-9, 13). She met Appellant at her grandmother's house around 9:30, they went to pick up her kids from her mother's, and then they went to her apartment where they watched television, had sexual intercourse, and slept. (PCR Tr. 11-13).

Shanklin testified that she had not had any contact with Appellant since that day, October 2, 1999. (PCR Tr. 8, 17-18). She stated that she had never spoken to Thomas

---

[11] Appellant did not personally testify at the evidentiary hearing; rather, Appellant's testimony was supposed to be taken by deposition after the evidentiary hearing and submitted to the motion court. (PCR Tr. 4-5, 47-48). PCR counsel filed a notice to take the deposition on November 8, 2002, but no deposition was ever filed with the motion court prior to the court closing the record and issuing its findings of fact, conclusions of law, and order denying Appellant's Rule 29.15 motion on January 9, 2003. (PCR L.F. 2, 58).

Kavanaugh, that no one had ever contacted her about testifying at Appellant's trial, and that she was not even aware that Appellant had ever been charged with anything until sometime in September of 2002 when she was contacted about testifying at the evidentiary hearing. (PCR Tr. 9, 10-11, 13, 18). She stated that she would have testified at trial that Appellant was at her house. (PCR Tr. 10).

Upon further questioning, Shanklin stated that she did not know what day Appellant had been with her, but it was the day the alleged crime occurred. (PCR Tr. 10-11). She then stated that Appellant had spent the night on September 30. (PCR Tr. 25). Shanklin admitted that she was "really confused" about the dates "to be honest." (PCR Tr. 22). Shanklin also stated that she had heard two or three months after Appellant spent the night that he had been arrested. (PCR Tr. 26).

Thomas Kavanuagh, Appellant's trial counsel, testified that Appellant had informed him about Ms. Shanklin and provided him with information about where Shanklin worked. (PCR Tr. 30). Kavanaugh, with the assistance of the correspondence and memoranda from his files, explained that he first contacted Shanklin's workplace – St. Louis Altenheim, a nursing home – because he had been told that was Shanklin's employer. (PCR Tr. 30, 36). Shanklin returned Kavanaugh's call on June 19, 2000. (PCR Tr. 34-35). Shanklin gave Kavanaugh additional information including her work schedule, that she lived at 3044 Franklin Avenue, and the phone number of her mother, Cynthia Hicks. (PCR Tr. 18, 35-36). Kavanaugh explained that Shanklin was "very cooperative, very friendly." (PCR Tr. 36). Shanklin told him that she would be willing to help and "would be any place, anywhere, any time that [he] wanted her to be in connection with [Appellant's] trial." (PCR Tr. 36, 37-38).

On Saturday, July 15, 2000, Kavanaugh's office received three incoming calls from the Altenheim. (PCR Tr. 38). On Monday, July 17, 2000, Kavanaugh called the Altenheim looking for Shanklin and left a message that he needed to speak with her. (PCR Tr. 38-39). Later that day, Shanklin contacted Kavanaugh; he explained "the situation about the trial setting," and they reviewed her testimony. (PCR Tr. 39). Shanklin again told Kavanaugh that she would come to any courtroom when he called her. (PCR Tr. 39).

On August 17, 2000, during the trial, Kavanaugh spoke to Shanklin while she was at work and told her that she needed to be at Division 16 at 10:00 a.m. (PCR Tr. 39). Shanklin told him that she could be there by 10:30. (PCR Tr. 39). When she did not show, Kavanaugh spoke to Shanklin again at 10:30 a.m. and Shanklin said that she had gone home and went to bed. (PCR Tr. 39-40). Shanklin promised that she would be at the courthouse within the hour. (PCR Tr. 40). When she did not show again, counsel called the number of the residence where she was staying and asked if they could try and find Shanklin and get her downtown. (PCR Tr. 40, 45). Shanklin never arrived.[12] (PCR Tr. 40). Appellant was informed that Shanklin could not be located. (PCR Tr. 42).

---

[12] At some point prior to the submission of the case, Kavanaugh was approached by a young black male who was with a relative of Appellant's. (PCR Tr. 40-41). The young man asked for "the bitch's name and address" and said that he would get her to court. (PCR Tr. 41). Based on the young man's language, his tone of voice, and his demeanor, Kavanaugh was afraid Shanklin would be harmed so he did not give the man her name or address. (PCR Tr. 41, 44).

Kavanaugh explained that it was his intention to call Shanklin at trial. (PCR Tr. 42). Shanklin had been endorsed as a witness, she had been cooperative, and he did not think anything else was necessary to get her into court. (PCR Tr. 42, 45-46).

4. Motion court findings

On January 9, 2003, the motion court issued findings of fact and conclusions of law denying Appellant's Rule 29.15 motion. (PCR L.F. 61-63). The motion court found that counsel had not failed to investigate Shanklin as he had spoken to her multiple times and secured her commitment to testify in Appellant's defense. (PCR Tr. 61). Although counsel had not subpoenaed Shanklin, the court found that a reasonably skilled attorney, knowing Shanklin's relationship with Appellant and aware of her repeated assurances that she would testify, would not have deemed it necessary to subpoena her. (PCR L.F. 61), citing *State v. Norfolk*, 807 S.W.2d 105 (Mo. App. E.D. 1990). The court found trial counsel to be credible and rejected Shanklin's testimony, which the court found to be incredible. (PCR L.F. 61).

C. Analysis

To prove ineffective assistance of counsel, the movant must show both (1) that his attorney's representation failed to conform to the degree of skill, care and diligence of a reasonably competent attorney rendering similar services under similar circumstances; and (2) that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668 (1984); *Sanders v. State*, 738 S.W.2d 856, 857 (Mo. banc 1987). If the defendant fails to show either deficient performance or prejudice, the court need not address the other component. *State v. Mueller*, 872 S.W.2d 559, 566 (Mo. App. E.D. 1994). "To prove prejudice, a defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding

would have been different." *State v. Clay*, 975 S.W.2d 121, 135 (Mo. banc 1998). "A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Clark v. State*, 30 S.W.3d 879, 883 (Mo. App. S.D. 2000) (*quoting Strickland*, 466 U.S. at 694). In proving that counsel's performance did not conform to this standard, the defendant must rebut the strong presumption that counsel was competent. *Sidebottom v. State*, 781 S.W.2d 791, 796 (Mo. banc 1989).

To prevail on a claim of ineffective assistance of counsel for failure to call a witness, a defendant must show that: (1) trial counsel knew or should have known of the existence of the witness; (2) the witness could be located through reasonable investigation; (3) the witness would testify; and (4) the witness's testimony would have provided a viable defense. *Williams v. State*, 168 S.W.3d 433, 440 (Mo. banc 2005).

Appellant cannot satisfy the four parts enunciated in *Williams* because counsel had investigated and spoken to Shanklin on multiple occasions, including the day of trial, and counsel intended on calling Shanklin to testify. Moreover, Shanklin repeatedly assured counsel that she was willing to testify and she would be in court.

"A competent lawyer's duty is to utilize every voluntary effort to persuade a witness who possesses material facts and knowledge of an event to testify *and then, if unsuccessful, to subpoena him* to court in order to allow the judge to use his power to persuade the witness to present material evidence." *Eldridge v. Atkins*, 665 F.2d 228, 235 (8th Cir. 1981) (emphasis added). Therefore, as the motion court correctly found, a reasonably competent attorney who had received repeated assurances from a cooperating witness that she would appear in court and testify would not have deemed it necessary to subpoena her. (PCR L.F.

61). Although Shanklin did not arrive in court as she repeatedly assured counsel she would, counsel should not be deemed ineffective for failing to be clairvoyant. *Rotellini v. State*, 77 S.W.3d 632, 636 (Mo. App. E.D. 2002) (rejecting ineffective assistance of counsel claim for not securing a witness). S*ee also generally*, *State v. Fuller*, 880 S.W.2d 589, 595 (Mo. App. W.D. 1994) (no ineffective assistance of counsel where defense counsel was unable to locate witness despite efforts to do so); *State v. Vega*, 875 S.W.2d 216, 219-220 (Mo. App. E.D. 1994) (no ineffective assistance of counsel where defendant failed to prove that witness could have been located); *State v. Twenter*, 818 S.W.2d 628, 640 (Mo. banc 1991) (no ineffective assistance of counsel in light of total absence of evidence that witnesses were available at the time of trial); *Barker v. State*, 83 S.W.3d 677 (Mo. App. S.D. 2002) (where counsel made several telephone calls to potential witness and left messages, sent a letter to witness, and sent investigator to witness's address but was unable to locate witness, counsel's efforts were reasonable and counsel was not ineffective); *State v. Chambers*, 891 S.W.2d 21 (Mo. banc 1994) (counsel not ineffective for failing to call witness where counsel was unable to locate witness).

In *State v. Norfolk*, 807 S.W.2d 105 (Mo. App. E.D. 1990), a case similar to the one at bar, the defendant claimed that his trial counsel was ineffective for failing to obtain the presence of a witness. *Id*. at 108. At the evidentiary hearing, counsel testified that he had spoken with the witness who told him that she was willing to testify and would be in court the next morning so counsel did not feel the need to subpoena her. *Id*. at 109. When the witness did not arrive, counsel called the witness, who informed counsel that she did not have transportation to the courthouse, so counsel tried to make arrangements to get her a

ride. *Id*. The witness, however, did not arrive until closing arguments were already in progress. *Id*. The motion court found that trial counsel was not ineffective because he had assurance from the witness that she would appear in court, and because the witness was cooperating with the defense, a subpoena was unnecessary. *Id*. The Eastern District Court of Appeals agreed and found that trial counsel was not ineffective because he had located the witness and he intended to call her. *Id*. Moreover, he was not ineffective for failing to subpoena the witness since she agreed to testify and arrangements were made to have her in court. *Id*.

Here, similar to *Norfolk*, counsel had spoken to Shanklin in the weeks leading up to Appellant's trial, they had discussed her testimony, and counsel intended to call her as an alibi witness at trial. The morning of trial, counsel spoke to Shanklin and informed her where she needed to be and what time she needed to be in court. Shanklin assured counsel that she would be there. When she did not show up, counsel spoke to Shanklin again, and again, Shanklin told counsel that she would be there within the hour. Because Shanklin had been very cooperative, agreed to testify, and assured counsel that she would be in court, he was not ineffective for failing to subpoena her.

In support of his claim, Appellant relies on *Perkins-Bey v. State*, 735 S.W.2d 170 (Mo. App. E.D. 1987). Appellant's reliance on *Perkins-Bey*, however, is misplaced. In *Perkins-Bey*, the defendant's alibi defense was that he was at home with his mother at the time the robbery was committed. *Perkins-Bey*, 735 S.W.2d at 170. Trial counsel testified that both he and his investigator spoke to the defendant's mother over the telephone but the alibi defense was never discussed and the mother never confirmed or refuted the alibi. *Id*. at

171. In fact, trial counsel asked the mother to come to the trial "because it always helps to have some family members in the courtroom and show that somebody's there." *Id*. The motion court failed to make any findings on the issue of counsel's failure to identify or subpoena the mother. *Id*. The court held that counsel had a duty to investigate the alibi defense and the failure to do so rendered counsel's performance ineffective. *Id*. at 172.

In this case, however, distinguishable from *Perkins-Bey*, counsel not only spoke to Shanklin, but counsel specifically spoke to Shanklin about Appellant's alibi defense. Counsel and Shanklin even went over her testimony multiple times. Counsel's intention was to have Shanklin to testify at trial, not just to appear to support Appellant as in *Perkins-Bey.* Additionally, whereas the motion court in *Perkins-Bey* made no findings on the claim, here, the motion court correctly found that counsel had not failed to investigate Shanklin as he had spoken to her multiple times and secured her commitment to testify in Appellant's defense.[13] Additionally, the motion court found that a reasonably competent attorney would not have deemed it necessary to subpoena Shanklin. (PCR L.F. 61). As a result, *Perkins-Bey* is distinguishable. *See also e.g.*, *Weekly v. State*, 759 S.W.2d 312, 314 (Mo. App. E.D. 1988) (finding *Perkins-Bey* inapposite because the record indicated that trial counsel had made an investigation); *Toland v. State*, 747 S.W.2d 256, (Mo. App. E.D. 1988) (stating that *Perkins-*

[13] Although Appellant does not make the argument that counsel should have subpoenaed Shanklin on the day of trial or requested a writ of body attachment after she did not show, there is nothing in the record to suggest that Shanklin could have been found at that time.

Bey did not apply because trial counsel had interviewed the witness and intended to present her testimony at the trial but the witness failed to appear as a result of her own tardiness).

Furthermore, Appellant testified at trial that he met Shanklin at about 9:45 p.m. on September 30, 1999, that they returned to her apartment at about 11:45 p.m., were sexually intimate at about 1:00 a.m., and he remained at her apartment until the afternoon of October 1. (Tr. 293-296). Therefore, Appellant was not denied the opportunity to present his alibi defense to the jury. Shanklin's testimony, at best, would merely have been cumulative to similar testimony already admitted. Counsel is not ineffective for not putting on cumulative evidence. *Skillicorn v. State*, 22 S.W.3d 678, 683 (Mo. banc 2000); *see also Kayser v. State*, 784 S.W.2d 820, 822 (Mo. App. E.D. 1990) (when claiming ineffective assistance for failure to call alibi witness, movant must show that evidence was not cumulative of evidence presented at trial).

Moreover, Shanklin would not have been a credible witness and unqualifiedly supported Appellant's defense. Shanklin initially testified at the evidentiary hearing that she was with Appellant on the wrong day. Shanklin then stated that she did not know what day Appellant had been with her and she was "really confused" about the dates, but somehow she could still say that it was the night the crime occurred. Interestingly, Shanklin claimed that she could say that she had been with Appellant the night the crime occurred despite not knowing that any crime ever occurred. Shanklin testified at the evidentiary hearing that she did not hear that Appellant had been arrested until months later, and she was not aware that he had been charged until years later. (PCR Tr. 10-11).

Additionally, Shanklin's testimony would have conflicted with Appellant's trial testimony. Shanklin testified that she had not seen Appellant or had any contact with him since the night in question which she thought was October 1, 1999. (PCR Tr. 8, 17-18). She also stated that it was two or three months after Appellant spent the night that she heard on the street that Appellant had been arrested and she was not even aware that Appellant had been charged with anything until sometime in September of 2002 when she was contacted about testifying at the evidentiary hearing. (PCR Tr. 9, 10-11, 13, 18). Appellant's testimony, on the other hand, was that he continued to see Shanklin during the month of October, following their night together, and that he had spoken with her on the telephone since he had been incarcerated. (Tr. 306-07). Shanklin's testimony, therefore, would not have unqualifiedly supported Appellant's defense. Appellant's claim is without merit and should be denied.

III.

The motion court did not clearly err in denying Appellant's Rule 29.15 motion alleging ineffective assistance of trial counsel for moving for a continuance without his consent or knowledge because Appellant is barred from relitigating this issue under a theory of ineffective assistance of counsel because the Eastern District Court of Appeals already decided on direct appeal that the continuance was granted for good cause and in open court with Appellant present. Issues decided upon direct appeal cannot be relitigated under a theory of ineffective assistance of counsel in a post-conviction proceeding. Moreover, Appellant was not even represented by counsel at the time of the continuance in that the public defender had refused to represent Appellant and trial counsel, Thomas Kavanaugh, did not enter his appearance until months later.

Appellant claims that trial counsel was ineffective for moving for a continuance without his consent or knowledge. (App. Br. 21, 38-44). Appellant argues that he properly requested final disposition within the statutory 180 days under the Uniform Mandatory Disposition of Detainers Law ("UMDDL"), and but for trial counsel's continuance, the trial court would have been required to dismiss all charges against him for lack of jurisdiction. (App. Br. 38-44).

A. Standard of review

Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Supreme Court Rule 29.15 (k); *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *Hall v. State*, 16 S.W.3d 582, 585 (Mo. banc 2000). The findings and conclusions of the motion

court are clearly erroneous only if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209, 224 (Mo. banc 1996). On review, the motion court's findings and conclusions are presumptively correct. *Wilson v. State*, 813 S.W.2d 833, 835 (Mo. banc 1991).

To prove ineffective assistance of counsel, the movant must show both (1) that his attorney's representation failed to conform to the degree of skill, care and diligence of a reasonably competent attorney rendering similar services under similar circumstances; and (2) that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668 (1984); *Sanders v. State*, 738 S.W.2d 856, 857 (Mo. banc 1987). If the defendant fails to show either deficient performance or prejudice, the court need not address the other component. *State v. Mueller*, 872 S.W.2d 559, 566 (Mo. App. E.D. 1994). "To prove prejudice, a defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *State v. Clay*, 975 S.W.2d 121, 135 (Mo. banc 1998). "A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Clark v. State*, 30 S.W.3d 879, 883 (Mo. App. S.D. 2000) (*quoting Strickland*, 466 U.S. at 694). In proving that counsel's performance did not conform to this standard, the defendant must rebut the strong presumption that counsel was competent. *Sidebottom v. State*, 781 S.W.2d 791, 796 (Mo. banc 1989).

B. Relevant background

1. UMDDL

Missouri's Uniform Mandatory Disposition of Detainers Law ("UMDDL") governs the disposition of detainers based on untried state charges pending against a prisoner

incarcerated in the Missouri Department of Corrections. *State v. Branstetter*, 107 S.W.3d 465, 471 (Mo. App. W.D. 2003); §§ 217.450-460. Section 216.460, provides:

> Within one hundred eighty days after the receipt of the request and certificate, pursuant to sections 217.450 and 217.455, by the court and the prosecuting attorney or within such additional necessary or reasonable time as the court may grant, for good cause shown in open court, the offender or his counsel being present, the indictment, information or complaint shall be brought to trial. The parties may stipulate for a continuance or a continuance may be granted if notice is given to the attorney of record with an opportunity for him to be heard. If the indictment, information or complaint is not brought to trial within the period, no court of this state shall have jurisdiction of such indictment, information or complaint, nor shall the untried indictment, information or complaint be of any further force or effect; and the court shall issue an order dismissing the same with prejudice.

Section 217.460.

2. Pretrial proceedings

On January 13, 2000, the St. Louis Metropolitan Police Department placed a detainer on Appellant, which the Fulton Reception and Diagnostic Center received on January 18,

2000 (L.F. 24).[14] Appellant completed his request for final disposition on January 18, 2000, which the Circuit Clerk's Office and the State received on January 20, 2000 (L.F. 25-27).

On February 9, 2000, Appellant appeared in court, and the charges were read to him. (L.F. 1). The docket sheet reflects that the case was continued by Appellant to March 9, 2000. (L.F. 1). The continuance states, "Cause continued at the request of the Deft to 3/9 for the reasons that: [blank]." (Supp. L.F. 2). The continuance was not signed by Appellant; the only signature was the judge's. (Supp. L.F. 2).

Trial counsel, Thomas Kavanaugh, entered his appearance on April 20, 2000. (L.F. 1).

On the morning of trial, August 15, 2000, counsel filed a motion to dismiss the indictment, claiming that more than 180 days had elapsed since Appellant's request for disposition had been lodged, and therefore the trial court no longer had jurisdiction pursuant to §217.460. (L.F. 28-30). The Honorable Anna C. Forder heard argument on Appellant's motion. (Tr. 5-19). The State argued that delays resulting from a defendant's affirmative actions are excluded from the 180-day time limit and the 30-day continuance granted on February 9, 2000, was attributable to Appellant. (Tr. 9-10). Appellant did not have counsel on February 9, 2000, and had been found to be ineligible for a public defender. (Tr. 9-13).

---

[14] According to Appellant's motion to dismiss, at the time of his arrest on the instant charge, he was on parole from an earlier charge. After this arrest, his parole was revoked and he was placed back in the custody of the Missouri Department of Corrections. (L.F. 28).

Defense counsel argued that if the court had done something on its own, then it should not be charged against Appellant. (Tr. 12). The court then noted the following:

> So, there was a certain amount of time here and the Court granted the continuance, not the defendant, the Court granted the defendant further continuance to be able to obtain the services of an attorney, which is what he obviously wanted to do[.]

(Tr. 13). The court decided "to hold the motion in abeyance" because the court was without sufficient evidence and ordered the parties to begin *voir dire*. (Tr. 14, 18-19). *Voir dire* commenced that afternoon before the Honorable Julian L. Bush. (Tr. 19).

2. Hearing prior to sentencing

Prior to sentencing, Appellant filed a *pro se* motion to dismiss the proceedings for violating the UMDDL pursuant to §217.450. (Tr. 369-70). Counsel had also included the claim in Appellant's motion for judgment of acquittal or in the alternative for a new trial. (L.F. 71). After the parties discussed the hearing that was conducted the morning of trial before Judge Forder, the court conducted its own hearing on whether the case should be dismissed pursuant to the UMDDL. (Tr. 372-). Appellant took the witness stand and claimed that he never asked any lawyer, judge, or court official to continue his case. (Tr. 380-81). During the State's cross-examination, Appellant admitted that he did not have an attorney at the time he filed his request for final disposition but he intended on hiring an attorney. (Tr. 383). Appellant also claimed that he did not remember a court appearance in which anyone asked him if he had an attorney. (Tr. 383-84).

The court questioned Appellant and after taking judicial notice of the file, noted that Appellant made his initial court appearance on February 9, 2000, in front of the Honorable Angela Turner Quigless (Tr. 386). The record indicated, and defense counsel conceded, that the public defender's office had twice refused to represent Appellant because he did not qualify for their representation. (Tr. 387-88).

The court found that the record showed that the public defender determined that they would not represent Appellant, and the court order dated February 9th, 2000, said that the matter was continued at the request of Appellant to March 9th, although the reason indicated was blank. (Tr. 389). The court further explained that based on what the file showed:

> that what happened when he made his initial appearance, the public defender decided he would not represent [Appellant].
>
> There might have been some confusion in his mind because he did see a public defender that day,[15] and he may have been confused what the public defender was saying to him. I don't really know, but the case appears to have been continued for 30 days in order that he might obtain counsel at his request.
>
> * * *
>
> The same day they declined to represent him, the matter, according to the court file, the matter was continued at his request for 30 days which makes

[15] Appellant was apparently interviewed by the public defender's office on February 9, 2000 in order to determine if he was eligible for their representation; however, Appellant did not qualify because he was determined not to be indigent. (Tr. 378-89, 391).

sense. If the public defender was not going to represent him, he needed time to get a lawyer, and it would seem that there's even a case here, 777 S.W.2d 636, period of time during which the prosecution was continued to insure compliance with defendant's right to representation by counsel cannot be included in 180 day period mandate for trial in prosecutions involving interstate detainers. That would - - that would seem to be right on point here.

* * *

The court file shows that the defendant requested representation by the public defender who refused him. I have no reason to believe that's not true. And the court file shows that the continuance - - the month long continuance was at the request of the defendant, which only makes sense since he was turned down by the public defender, he needed time, so I believe the court file is accurate that defendant requested a continuance for a month.

Given that, I think this case was brought to trial within the statutory limit, just barely, but barely is good enough, so I am going to overrule all of the post-trial motions.

(Tr. 390, 391-92, 396-97).

3. Direct Appeal

In his sole point on direct appeal, Appellant alleged that the trial court clearly erred in overruling his motion to dismiss the indictment because he was not brought to trial within the 180-day time limit prescribed by the UMDDL. *State v. Crenshaw*, ED78958, memo op. at 2. (App. Dir. Br. 12-17). Appellant argued that the court erroneously charged the

continuance to him, and it could not be said that either Appellant or his attorney had either stipulated to the continuance, or had the notice and opportunity to be heard in opposition. (App. Dir. Br. 15, 17).

The Eastern District Court of Appeals explained that the 180-day time limitation can be extended for "such additional necessary or reasonable time as the court my grant, for good cause shown in open court, [with] the offender or his counsel being present." *Crenshaw*, ED78958, memo op. at 4, citing Section 217.460. As a result, the court held as follows:

> Although no reason was provided, the February 9, 2000 order granting a continuance stated that it was at defendant's request. A form dated February 9, 2000, shows that the public defender found that defendant was not indigent. Defendant testified at the post-trial hearing that he intended to hire an attorney prior to trial. On April 20, 2000, private counsel entered his appearance for defendant. Compliance with a defendant's right to representation by counsel constitutes good cause for purposes of section 217.460. Murphy v. State, 777 S.W.2d 636, 638 (Mo. App. 1989). Under the circumstances presented here, the February 9, 2000 continuance was granted for good cause in open court with defendant present. Defendant's point is denied.

Crenshaw, ED78958, memo op. at 5.

4. Appellant's Rule 29.15 amended motion

In section 8(a)(1) of his amended motion, Appellant claims that trial counsel, *Thomas Kavanaugh*, was ineffective for moving for a continuance without his consent or knowledge. (PCR L.F. 21-27) (emphasis added). Appellant asserted that "on February 9, 2000, after

[Appellant's] appearance in court, trial counsel continued [Appellant's] criminal case to March 9, 2000." (PCR Tr. 23). Appellant further asserted that "[s]ince trial counsel knew [Appellant] had asserted his speedy trial rights under the UMDDL, it was unreasonable for trial counsel to move for a continuance without [Appellant's] knowledge and/or consent." (PCR L.F. 24). Appellant argued that he was entitled to present evidence or contest contrary evidence regarding trial counsel's ineffectiveness and his right to a speedy trial. (PCR L.F. 26).

5. Evidentiary Hearing

The motion court ordered an evidentiary hearing. (PCR L.F. 40). An evidentiary hearing was held on October 25, 2002. (PCR Tr. 1-49). There was no evidence, testimony, or argument presented at Appellant's evidentiary hearing regarding his claim that trial counsel was ineffective for moving for a continuance. (PCR Tr. 4-49). Appellant did not personally testify at the evidentiary hearing; rather, Appellant's testimony was supposed to be taken by deposition after the evidentiary hearing and submitted to the motion court. (PCR Tr. 4-5, 47-48). PCR counsel filed a notice to take the deposition on November 8, 2002, but no deposition was ever filed with the motion court prior to the court closing the record and issuing its findings of fact, conclusions of law, and order denying Appellant's Rule 29.15 motion on January 9, 2003. (PCR L.F. 2, 58).

6. Motion court findings

The motion court found that it was Appellant, not his counsel that had moved for a continuance on February 9, 2000. (PCR L.F. 61). And as the motion court noted, this finding was affirmed on direct appeal. (PCR L.F. 61).

C. Analysis

1. Claim cannot be relitigated

The rule in Missouri is that "[i]ssues decided upon direct appeal cannot be relitigated on a theory of ineffective assistance of counsel in a post-conviction proceeding." *Leisure v. State*, 828 S.W.2d 872, 874 (Mo. banc 1992). As this Court explained in *Leisure*, the Court specifically rejects "attempts to convert trial errors into viable theories of ineffective assistance of counsel in the post-conviction proceeding." *Id*., citing *O'Neal v. State*, 766 S.W.2d 91, 92-93 (Mo. banc 1989). "Issues decided on direct appeal will not be reconsidered." *Id*. In *Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002), this Court clarified the rule from *Leisure*, and held that the "denial of a *plain error* claim is not dispositive of the question whether counsel was ineffective." *Id*. at 428 (emphasis added). The court determined that "there are a small number of cases in which the application of the two tests [manifest injustice and *Strickland* prejudice] will produce different results." *Id*. *See also Ringo v. State*, 120 S.W.3d 743, 746 (Mo. banc 2003) (where the appellate court reviews for plain error and no error is found, an appellant cannot succeed on a claim in a post-conviction proceeding that counsel was ineffective); *Shifkowski v. State*, 136 S.W.3d 588, 590-91 (Mo. App. S.D. 2004) (describing five different ways appellate court may review unpreserved error on appeal and finding that issue had been decided on direct appeal).

Here, the appellate court was not reviewing the claim for plain error on direct appeal.[16] *Crenshaw*, ED78958, memo op. Thus, Appellant's case falls under *Leisure*. And because the appellate court found that the continuance was granted by the trial court for "good cause in open court with [Appellant] present," in accordance with §217.460, Appellant cannot now relitigate his claim under a theory of ineffective assistance of counsel. *Crenshaw*, ED78958, memo op. at 4-5. Consequently, this Court should reject Appellant's attempt "to convert trial errors into viable theories of ineffective assistance of counsel in the post-conviction proceeding." *Leisure,* 828 S.W.2d at 874.

2. Claim abandoned

---

[16] Although the opinion does not mention a standard of review, there is no mention that review was for plain error. Furthermore, Respondent notes that whether a criminal case should be dismissed based on the UMDDL is a question of law which the court reviews *de novo*. *See State v. Lybarger*, 165 S.W.3d 180, 184 (Mo. App. W.D. 2005) (construing the Interstate Agreement on Detainers ("IAD")). To the extent the application of law is based on the evidence presented, the facts are viewed in the light most favorable to the judgment, with deference given to the trial court's factual findings and credibility determinations. *Id*. The IAD and the UMDDL are *in pari materia*, "are to be construed in harmony with each other, and the principles of one may be applied to the other." *Carson v. State*, 997 S.W.2d 92, 96 (Mo. App. S.D. 1999); *State v. Walton*, 734 S.W.2d 502, 503 (Mo banc 1987).

Generally the "[f]ailure to present evidence at a hearing in support of factual claims in a post-conviction motion constitutes abandonment of that claim." *State v. Nunley*, 980 S.W.2d 290, 293 (Mo. banc 1998); *State v. Boone*, 869 S.W.2d 70, 78 (Mo. App. W.D. 1993) (held that failure to present evidence on an ineffective assistance of counsel claim at Rule 29.15 evidentiary hearing constituted abandonment of that claim). Allegations in a post-conviction motion are not self-proving and movant bears the burden of proving grounds for relief by a preponderance of the evidence. *Boone*, 869 S.W.2d at 78; *see also Clemmons v. State*, 795 S.W.2d 414 (Mo. App. E.D. 1990); Rule 29.15(i).

In this case, Appellant was granted an evidentiary hearing; however, counsel failed to produce any testimony, present any evidence, or make any argument addressing his claim that trial counsel was ineffective for moving for a continuance. Perhaps post-conviction counsel did not question trial counsel, Thomas Kavanaugh, about moving for a continuance because Kavanaugh was not even involved in the case at the time of the continuance.

3. No ineffective assistance of counsel

Appellant's claim that trial counsel, *Thomas Kavanaugh*, was somehow ineffective is utterly bereft of merit and should be summarily denied. Whereas Appellant asserted on direct appeal that neither he nor counsel moved for the continuance, in his Rule 29.15 motion and in his brief in this appeal, Appellant claims that trial counsel was ineffective for "moving for a continuance." (PCR L.F. 22; App. Br. 21, 38).

First of all, Thomas Kavanaugh, whom Appellant asserts in his amended motion was the ineffective trial counsel (PCR L.F. 21), was not even representing Appellant on February 9, 2000, when the continuance was granted. Kavanaugh did not enter his appearance until

April 20, 2000. (L.F. 1). As a result, it is obvious that Kavanaugh could not be deemed ineffective for moving for a continuance when he was not even involved in the case.

Secondly, as the appellate court found, and as the trial court explained after examining the record, Appellant was not represented by counsel *at all* when the continuance was ordered on February 9, 2000. Although the public defender had interviewed Appellant, the public defender had determined that Appellant was not indigent and therefore the public defender's officer refused to represent Appellant. Consequently, and contrary to Appellant's claim in this appeal, there was no attorney representing Appellant who moved for the continuance.

Furthermore, although Appellant claimed that he did not remember his February 9th appearance, as both the trial court and the appellate court correctly found, the order granting the continuance stated that it was done at Appellant's request. The trial/motion court was free to believe or disbelieve Appellant's testimony and this Court defers to the lower court on issues of credibility. *See State v. Simmons*, 955 S.W.2d 752, 773 (Mo. banc 1997). Any delay attributable to a defendant's action or agreement, such as a continuance, is not included in the period of limitation, and therefore, tolls the 180-day period. *State v.Morehouse*, 851 S.W.2d 714, 715 (Mo. App. W.D. 1993). And under §217.460, the court may grant "additional necessary or reasonable time … for good cause shown in open court," provided that the offender or his counsel is present. §217.460; *see also State v. Walker*, 795 S.W.2d 628, 629 (Mo. App. E.D. 1990) (stating three exceptions to 180-day requirement under §217.460, including that court may grant for good cause shown in open court when inmate is present). Given that Appellant was not represented by counsel at that time, but he intended

on hiring counsel, the continuance was granted for good cause. *See e.g., Murphy v. State*, 777 S.W.2d 636, 638 (Mo. App. W.D. 1989) (good cause being compliance with the defendant's right to representation by counsel).

In short, Appellant is barred from relitigating this issue under a theory of ineffective assistance of counsel because this issue was already decided on direct appeal that. As this Court explained in *Leisure*, "Issues decided on direct appeal will not be reconsidered." *Leisure*, 828 S.W.2d at 874. In any event, Appellant's claim that trial counsel was ineffective for moving for a continuance is bereft of merit because Appellant did not even have counsel when the continuance was ordered. As a result, this claim must be denied.

CONCLUSION

In view of the foregoing, Respondent submits that Appellant's conviction and sentence be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

_____

JOSHUA N. CORMAN
Assistant Attorney General
Missouri Bar No. 58608

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-332l
Fax: (573) 751-5391

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 14,454 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 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 a floppy disk containing a copy of this brief, were mailed this 11th day of January, 2008, to:

Gwenda Robinson
Grand Central Building
1000 St. Louis Union Station, Suite 300
St. Louis, Missouri 63103
Attorney for Appellant

_____

JOSHUA N. CORMAN
Assistant Attorney General
Missouri Bar No. 58608

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Fax (573) 751-5391

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

APPENDIX