No. SC88895

In the
Supreme Court of Missouri

VINCENT McFADDEN,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from St. Louis County Circuit Court
Twenty-first Judicial Circuit
The Honorable John A. Ross, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from the dismissal of a motion to vacate judgment and sentence under Supreme Court Rule 29.15 in the Circuit Court of St. Louis County. The convictions sought to be vacated were two counts of first-degree assault, § 565.050, RSMo 2000, two counts of armed criminal action, § 571.015, RSMo 2000, and one count of unlawful use of a weapon, § 571.030.1(3), RSMo 2000. Appellant was sentenced to concurrent terms of 15, 10, 30, 10 and 5 years, respectively, for an aggregate total of thirty years imprisonment. The Eastern District Court of Appeals affirmed the motion court's dismissal of Appellant's post-conviction proceedings in an unpublished memorandum opinion. *McFadden v. State*, 2007 WL 2702204 (Mo. App. E.D. Sept. 18, 2007). On December 18, 2007, this Court ordered this appeal transferred. Therefore, jurisdiction lies in this Court. Mo. Const. art. V, § 10; Rule 83.04.

STATEMENT OF FACTS

Appellant, Vincent McFadden, was charged with three counts of first-degree assault, three counts of armed criminal action, and one count of unlawful use of a weapon. (L.F. 4).[1] Appellant was tried before a jury and found guilty of two counts of first-degree assault, two counts of armed criminal action, and one count of unlawful use of a weapon. *State v. McFadden*, 193 S.W.3d 305, 306 (Mo. App. E.D. 2006). Appellant was sentenced to an aggregate total of thirty years imprisonment. (L.F. 4).

Appellant was delivered to the Department of Corrections in March of 2005. (L.F. 4). Appellant's convictions and sentences were affirmed by the Eastern District on direct appeal in case number ED85858. *McFadden*, 193 S.W.3d at 306. The mandate issued on July 13, 2006. (L.F. 5).

Appellant filed a *pro se* Rule 29.15 motion with the St. Louis County Circuit Court on October 12, 2006 – 91 days after the mandate issued in ED85858. (L.F. 1, 4). On November 29, 2006, the motion court appointed the Public Defender to represent Appellant. (L.F. 1, 14). Appointed counsel, Valerie Leftwich, entered her appearance on December 19, 2006. (L.F. 1, 15).

Thereafter, the prosecutor filed a motion to dismiss Appellant's post-conviction motion due to his failure to comply with the time limits imposed in Rule 29.15(b). (L.F. 22-24). Appointed counsel filed a response, indicating that she had hand-filed

[1] The record on appeal consists of a legal file (L.F.).

Appellant's *pro se* motion, and that the untimely nature of the filing was not attributable to Appellant. (L.F. 25-28). Appointed counsel argued that she "abandoned" Appellant by failing to timely file his *pro se* motion. (L.F. 27-28). The prosecutor filed a reply to appointed counsel's response, indicating that Ms. Leftwich did not represent Appellant at the time the *pro se* motion was filed, as the motion was filed nearly a month and a half before the public defender was appointed to represent Appellant. (L.F. 37-39).

On February 8, 2007, the motion court heard argument on the State's motion to dismiss and Appellant's response. (L.F. 1, 40). After argument, the motion court dismissed Appellant's *pro se* Rule 29.15 motion. (L.F. 40). Appointed counsel filed a motion for reconsideration, arguing that the definition of abandonment should be expanded to include situations such as Appellant's. (L.F. 45). The prosecutor filed a response, arguing that Ms. Leftwich was not representing Appellant at the time the *pro se* motion was filed, and that she acted as nothing more than a messenger. (L.F. 49). The motion court denied Appellant's motion for reconsideration. (L.F. 57).

The Eastern District Court of Appeals affirmed the motion court's dismissal in a memorandum opinion. *McFadden v. State*, No. ED89470, 2007 WL 2702204 (Mo. App. E.D. Sept. 18, 2007). The Eastern District, relying on this Court's holding in *Bullard v. State*, 853 S.W.2d 921 (Mo. banc 1993), found that Ms. Leftwich's alleged error did not justify Appellant's untimely filing of the *pro se* motion. *McFadden*,

ED89470, slip op. at 4. The Eastern District further held that because Ms. Leftwich did not enter her appearance until approximately two months after the *pro se* motion was due, "it was solely Movant's responsibility to timely file his motion for post-conviction relief." *Id*. at 4-5. Finally, the Eastern District rejected Appellant's request to apply the abandonment doctrine because this doctrine was inapplicable to Appellant's case in that it did not involve the filing of an amended motion. *Id*. at 5.

ARGUMENT

The motion court did not clearly err in dismissing Appellant's *pro se* Rule 29.15 motion because Appellant's motion failed to comply with the 90-day time limit set forth in Rule 29.15(b) in that Appellant's *pro se* motion was filed 91 days after the Court of Appeals' mandate in the direct appeal issued.

Appellant complains that the motion court erred in dismissing his *pro se* Rule 29.15 motion because the late filing of the motion was allegedly due to a miscalculation of time by Assistant Public Defender Valerie Leftwich. Appellant argues that the abandonment doctrine, which applies to appointed counsel's failure to file, or untimely filing of, the amended motion, should be expanded to cover situations involving the filing of the *pro se* motion as well. Even if the abandonment doctrine applied to the filing of the *pro se* motion, it would not apply here because the record shows that Ms. Leftwich did not represent Appellant when the *pro se* motion was filed. Furthermore, Appellant's argument should be rejected because this Court has repeatedly held that abandonment does not excuse the untimely filing of the *pro se* motion.

A. Standard of review.

"Review of denial of relief under Rule 29.15 is limited to determining whether the motion court's findings and conclusions are clearly erroneous." *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. banc 2006). "The motion court's findings are presumed

correct." *Id*. "The motion court's disposition will only be disturbed if, after a review of the entire record, the reviewing court is left with the definite impression that a mistake has been made." *Id*.

B. Appellant's *pro se* motion was untimely.

Rule 29.15(b) provides that "[i]f an appeal of the judgment or sentence sought to be vacated, set aside or corrected was taken, the motion shall be filed within 90 days after the date the mandate of the appellate court is issued affirming such judgment or sentence." The mandate affirming Appellant's convictions and sentences in his direct appeal (Case No. ED85858) was issued on July 13, 2006. (L.F. 5). Appellant's *pro se* motion was filed on October 12, 2006 – 91 days after this mandate was issued.

This Court has repeatedly held that the time limits imposed by Rule 29.15 are constitutional, valid, and mandatory. *State v. Simmons*, 955 S.W.2d 752, 771 (Mo. banc 1997); *State v. Roll*, 942 S.W.2d 370, 374 (Mo. banc 1997); *State v. Weaver*, 912 S.W.2d 499, 520 (Mo. banc 1995); *Smith v. State*, 887 S.W.2d 601, 602 (Mo. banc 1994).

Appellant concedes that his *pro se* motion was untimely. (App. Br. 15). "Failure to file a motion within the time provided by this Rule 29.15 shall constitute a complete waiver of any right to proceed under this Rule 29.15 and a complete waiver of any claim that could be raised in a motion filed pursuant to this Rule 29.15." Rule

29.15. "An untimely motion deprives the motion court of jurisdiction, and the court must dismiss the motion even if not requested to do so by the state." *Matchett v. State*, 119 S.W.3d 558, 559 (Mo. App. S.D. 2003); *see also State v. White*, 873 S.W.2d 590, 595 (Mo. banc 1994); *Patterson v. State*, 164 S.W.3d 546, 548 (Mo. App. E.D. 2005), and *Foley v. State*, 143 S.W.3d 679, 680 (Mo. App. W.D. 2004).

Appellant argues, however, that the motion court should not have dismissed his untimely *pro se* motion because its late filing was the fault of Assistant Public Defender, Valerie Leftwich. (App. Br. 15). Appellant claims that because Ms. Leftwich was acting as his attorney at the time, her failure to file the *pro se* motion in a timely fashion constituted abandonment by counsel. (App. Br. 16). Because Ms. Leftwich did not represent Appellant when the *pro se* motion was filed, and because the abandonment doctrine does not excuse untimely filing of a *pro se* motion, Appellant's argument should be rejected.

C. Ms. Leftwich did not represent Appellant when the *pro se* motion was filed.

According to Ms. Leftwich's pleadings, the motion court rejected Appellant's abandonment argument in part because it found that Ms. Leftwich was not representing Appellant at the time the motion was filed. (L.F. 42). Although the motion court's dismissal order did not explicitly address such a finding,[2] to the extent

[2] The motion court's order dismissing the motion indicates that the court "considered the State's Motion to Dismiss and Movant's responses thereto." The order then

the court's dismissal was based on a determination that Ms. Leftwich did not represent Appellant, it is not clearly erroneous.

The following timeline is important to consider in evaluating Appellant's claim on appeal:

10/12/06 – the *pro se* motion is filed. (L.F. 1, 4).

11/29/06 – the motion court appoints the Public Defender's Office to represent Appellant. (L.F. 1).

12/7/06 – Assistant Public Defender, Valerie Leftwich, is assigned Appellant's case. (L.F. 16).

12/19/06 – Ms. Leftwich files an entry of appearance on Appellant's behalf. (L.F. 15).

Because the Public Defender's Office was not appointed until after Appellant's motion was filed, it did not represent Appellant on this case at the time of filing. Appellant argues that this rationale is contrary to the statutes regulating the Missouri Public Defender System. (App. Br. 17). Appellant argues that because the determination of indigency belongs to the Public Defender's office, the formation of the relationship is not dependent upon the court's appointment. (App. Br. 17).

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dismisses Appellant's Rule 29.15 motion because it "was not timely filed[.]" (L.F. 40).

Contrary to Appellant's assertion, it is the court that ultimately determines whether a defendant may use the services of the public defender. "Upon motion by either party, *the court* in which the case is pending shall have authority to determine whether the services of the public defender may be utilized by the defendant." Section 600.086.3, RSMo 2000 (emphasis added). Obtaining the services of the Public Defender is a two-step process: first, a defendant must be found indigent by both the Public Defender's standards and *the court*; then, once a defendant is determined to be eligible, *the court* ultimately decides whether the defendant may use the Public Defender's services. *Id*.

The statutes do not indicate that the Public Defender will automatically represent every indigent defendant in a court proceeding. For example, an indigent defendant may desire to represent himself, or the proceedings may not be the kind where a defendant is entitled to counsel, such as the re-opening of, or successive, post-conviction motions. *See e.g. Duisen v. State*, 504 S.W.2d 3, 5 (Mo. 1974) (defendant not entitled to counsel for improper successive Rule 27.26 motion) and *Strickland v. State*, 2007 WL 4482157, slip op. at *2 (Mo. App. W.D. Dec. 26, 2007) (defendant not entitled to counsel in successive post-conviction motion). In such cases, despite a finding of indigence, the defendant would not be represented by the Public Defender without the court's prior approval. Therefore, the motion court's determination is not contrary to the statutes regulating the Missouri Public Defender.

Because the Public Defender's Office was not representing Appellant at the time the *pro se* motion was filed, any actions Ms. Leftwich allegedly took in relation to Appellant's case were outside the scope of her duties as an Assistant Public Defender. Thus, the question becomes whether Ms. Leftwich, acting on her own, formed an attorney-client relationship with Appellant regarding the *pro se* motion. The record indicates that she did not.

Ms. Leftwich's alleged act of soliciting Appellant's *pro se* motion in order to timely file it did not cause an attorney-client relationship to form. The first problem with Appellant's argument is that Ms. Leftwich, according to her own pleadings, had no responsibilities in Appellant's case until it was first assigned to her on December 7, which was 56 days after the *pro se* motion was untimely filed.[3] (L.F. 16). Consequently, to the extent that the motion court may have determined that Ms.

[3] According to the transcripts and files from Appellant's other cases, it does not appear that Ms. Leftwich ever represented Appellant prior to her appointment for his post-conviction proceedings. In the underlying case, No. ED85858, Appellant's trial counsel was Charlton Chastain and his appellate counsel was Kristina Starke. In Appellant's first capital case, No. SC86857, his trial counsel were Sharon Turlington and Karen Kraft, and his appellate counsel was Rosemary Percival. In Appellant's second capital case, No. SC87753, his trial counsel were again Sharon Turlington and Karen Kraft, and his appellate counsel was Janet Thompson.

Leftwich did not represent Appellant at the time the motion was filed,[4] that determination is not clearly erroneous.

Appellant accuses the motion court of "misapprehend[ing] how an attorney-client relationship is established." (App. Br. 16). Appellant asserts that the relationship "does not depend for its existence upon a court's action appointing the attorney to represent the client." (App. Br. 16). Appellant then points to the following to support his claim that Ms. Leftwich was acting as his counsel when the motion was filed: Ms. Leftwich asserted that she had directed Appellant to send his completed motion to her and that she would hand-file it in the St. Louis County Clerk's office before the 90-day deadline. (L.F. 26). Appellant completed the motion and had it notarized on September 25, 2006. (L.F. 26). Ms. Leftwich allegedly received Appellant's motion on September 28, 2006. (L.F. 26). Ms. Leftwich then miscalculated the due date and filed Appellant's motion on the 91st day.[5] (L.F. 26).

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[4] As mentioned earlier, the motion court's dismissal order did not explicitly determine whether Ms. Leftwich represented Appellant when the *pro se* motion was filed. (L.F. 40).

[5] Although Ms. Leftwich averred in her pleadings that she filed the motion on Appellant's behalf, the legal file indicates that the person who actually filed the motion was "Lisa B. Bartlett." (L.F. 3).

Although there do not appear to be any cases specifically addressing the formation of the attorney-client relationship between a defendant and the Public Defender, the general rule is that "[t]he creation of an attorney-client relationship is sufficiently established when the advice and assistance of [an] attorney is sought and received in matters pertinent to her profession." *State v. Longo*, 789 S.W.2d 812, 815 (Mo. App. E.D. 1990) (cited with approval in *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624, 626 (Mo. banc 1995)). Here, there was no legal advice sought or received between Appellant and Ms. Leftwich to establish an attorney-client relationship.

Even taking the facts presented in Ms. Leftwich's motion as true, her offer to timely hand-file Appellant's motion does not constitute legal advice. In any event, "reliance alone upon the advice or conduct of a lawyer does not create an attorney-client relationship." *Donahue*, 900 S.W.2d at 626. At most, Ms. Leftwich was simply a courier and was not acting as Appellant's attorney at the time the *pro se* motion was filed.

Because Appellant cannot show that Ms. Leftwich represented him at the time the motion was filed, he cannot succeed on his claim of abandonment by Ms. Leftwich. Ultimately, however, the question whether Ms. Leftwich in fact represented Appellant when the *pro se* motion was filed is wholly academic and has no bearing on

the outcome of Appellant's appeal, as this Court has repeatedly held that abandonment does not excuse untimely filing of an initial post-conviction relief motion.

D. The abandonment doctrine does not excuse untimely filing of a *pro se* motion.

"Abandonment occurs 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; 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." *Barnett v. State*, 103 S.W.3d 765, 773-774 (Mo. banc 2003) (emphasis added). This Court has "repeatedly held it will not expand the scope of abandonment to encompass perceived ineffectiveness of post-conviction counsel." *Id.*

Yet, Appellant urges this Court to enlarge the abandonment doctrine to encompass the peculiar situation in which a not-yet-appointed public defender, allegedly acting in a representative capacity, untimely files the *pro se* motion. Appellant's proposed expansion to cover this unique situation, however, does not comport with the notion of abandonment and is contrary to existing law.

The doctrine of abandonment stems from appointed counsel's duties under the rules for post-conviction relief. *See Luleff v. State*, 807 S.W.2d 495, 498 (Mo. banc 1991) and *Sanders v. State*, 807 S.W.2d 493, 495 (Mo. banc 1991). Rule 29.15(e) specifies the precise duties imposed on appointed counsel:

> Counsel shall ascertain whether sufficient facts supporting the claims are asserted in the motion and whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence.

Rule 29.15(e). The rule further provides that appointed counsel may either amend the *pro se* motion if it is deficient, or file a statement in lieu of an amended motion indicating that an amended motion is unnecessary. *Id*. Logically, nothing in the rule requires appointed counsel to take any action with respect to the filing of the *pro se* motion because in all but the rarest of cases, *see* Rule 29.07(b)(4), counsel is appointed only after the *pro se* motion is filed.

Additionally, "the burden is on the accused to timely file an original post-conviction motion." *Smith v. State*, 21 S.W.3d 830, 831 (Mo. banc 2000). This fact should have been evident to Appellant, as the motion form itself instructs that "[w]hen the motion is completed, the original and two copies *shall be mailed to the Clerk of the Circuit Court* from which movant was sentenced." (L.F. 4) (emphasis added).[6]

[6] Respondent filed a motion requesting this Court to transfer the transcript from Appellant's direct appeal, case number ED85858, which was not yet ruled on at the time this brief was filed. Specifically, Respondent would like to direct the Court's attention to page 92 of the sentencing transcript, wherein the trial court advised Appellant of the specific time limits and filing requirements for a Rule 29.15 motion to further demonstrate Appellant's awareness of these requirements.

The fact that Appellant chose to ignore the instructions and allegedly sent his motion to Ms. Leftwich rather than mail it to the circuit court does not excuse him from compliance with the mandatory time limits of 29.15(b).

This Court rejected a similar claim in *Bullard v. State*, 853 S.W.2d 921 (Mo. banc 1993). There, the defendant's appellate counsel erroneously instructed him that a Rule 29.15 motion could be timely filed after the appellate court ruled on the direct appeal.[7] *Id*. at 922. Consequently, when the defendant filed a *pro se* Rule 29.15 motion after his conviction was affirmed, the motion court dismissed it as untimely filed. *Bullard*, 853 S.W.2d at 922. On appeal, the defendant argued that he was abandoned by counsel and that this abandonment should excuse the untimely filing of his original motion. *Id*.

This Court first recognized "that abandonment will excuse the untimely filing of an *amended* motion if the movant is without fault," but found such a situation not to be analogous to the defendant's because "[a]n amended motion differs significantly from the original motion." *Id*. (emphasis added). Specifically, this Court noted that "[a]n amended motion is a final pleading, which requires legal expertise," and that the

[7] Rule 29.15 in effect at that time provided, rather, that "[i]f an appeal of the judgment sought to be vacated, set aside or corrected was taken, the motion shall be filed within thirty days after the filing of the transcript in the appeal." Rule 29.15(b) (effective Jan. 1, 1988).

purpose of appointed counsel is to assure proper drafting. *Id*. A *pro se* motion, "on the other hand, is relatively informal, and need only give notice to the trial court, the appellate court, and the State that movant intends to pursue relief under Rule 29.15." *Id*. at 922-923. "As legal assistance is not required in order to file the original motion, the absence of proper legal assistance does not justify an untimely filing." *Id*. at 923.

Appellant attempts to distinguish *Bullard* by claiming that appellate counsel in *Bullard* only misstated the applicable time limits, and did not take from Bullard his ability to file the motion himself, while "Ms. Leftwich wrested from [Appellant] the ability to file that initial motion himself." (App. Br. 26).[8] Appellant's distinction is unsupportable. Ms. Leftwich did not take anything away from Appellant. Appellant had the apparent ability to draft and mail a *pro se* motion. Thus, he had the ability to mail the *pro se* motion to the court himself for timely filing. He opted, however, to follow Ms. Leftwich's alleged instructions instead of those contained in the form. But

[8] Appellant also questions the continued validity of *Bullard* in light of the changed time limits in Rule 29.15 and the now-recognized claim of ineffective assistance of appellate counsel. (App. Br. 26 n.5). The holding in *Bullard*, however, has been reaffirmed by this Court since the recognition of claims of ineffective assistance of appellate counsel and the alteration of the Rule 29.15 time limits. *See Smith v. State*, 21 S.W.3d 830, 831 (Mo. banc 2000). Consequently, the rationale advanced in *Bullard* still applies.

nothing required him to do so. Appellant's decision to send the motion to Ms. Leftwich was an exercise of his own free will.

Expansion of the abandonment doctrine as Appellant suggests would conflict not only with *Bullard*, but also with the holdings in other cases decided by this Court. After *Bullard*, this Court had two more opportunities to determine whether abandonment by post-conviction counsel would excuse the untimely filing of the *pro se* motion.

In the first case, *Reuscher v. State*, 887 S.W.2d 588 (Mo. banc 1994), the defendant was sentenced to death on January 11, 1991. *Reuscher*, 887 S.W.2d at 589. In March of 1991, the defendant asked trial counsel if he planned to file a Rule 29.15 motion and inquired whether the trial transcript had been completed. *Id*. Counsel told the defendant that the transcript had not been prepared and that he would be seeking an extension of time in which to file it until July 1, 1991. *Id*. Counsel requested the extension, but the Court granted him only until May 15, 1991 to file the transcript. *Id*. Counsel filed the transcript on May 15, 1991, but failed to inform the defendant. *Id*. On July 9, 1991, the defendant wrote counsel again and asked about the transcript and the filing of a Rule 29.15 motion. *Id*. On July 15, 1991, counsel wrote back, informing the defendant that the transcript had been filed on May 15, 1991 and that it

was too late to file a Rule 29.15 motion.[9] *Id*. Counsel filed an affidavit, alerting the court that he had failed to notify the defendant of the filing of the transcript and asserting that the defendant had no way of knowing when the transcript was filed. *Id*.

On October 22, 1992, the defendant filed a *pro se* Rule 29.15 motion. *Id*. at 590. The motion court appointed counsel, and appointed counsel filed an amended motion claiming, among other things, that trial counsel was ineffective for failing to advise the defendant of the filing of the transcript. *Id*. The motion court dismissed the motion as untimely because it was filed more than thirty days after the transcript had been filed. *Id*.

This Court rejected the defendant's claims on appeal, holding that "[t]here is no constitutional right to a state post-conviction proceeding, nor is there a constitutional right to effective counsel for the purpose of filing an initial motion for post-conviction relief." *Id*. This Court further noted that:

> Nothing in Rule 29.15 compels a movant to wait until the transcript on appeal is filed to seek relief. If he had complaints about [counsel]'s representation,

[9] Rule 29.15 in effect at that time provided that "[i]f an appeal of the judgment sought to be vacated, set aside or corrected was taken, the motion shall be filed within thirty days after the filing of the transcript in the appeal." Rule 29.15(b) (effective Jan. 1, 1988).

movant could have filed his motion for post-conviction relief at any time after conviction and sentence.

Id.

As in *Reuscher*, nothing in Rule 29.15 compelled Appellant to send his motion to Ms. Leftwich for filing, rather than mailing it directly to the circuit court as the form directed. Assuming, *arguendo*, that Appellant's allegations are true, the defendant in *Reuscher*, like Appellant, was relying on information from counsel in order to timely file a post-conviction motion, but counsel failed to take the steps necessary to ensure a timely filing. But because there is no constitutional right to the effective assistance of counsel for the purposes of filing the initial post-conviction relief motion, Appellant's claim, like that of the defendant in *Reuscher*, should be denied.

In the second case, *Smith v. State*, 21 S.W.3d 830 (Mo. banc 2000),[10] the trial court appointed the Public Defender to represent the defendant in his post-conviction proceedings pursuant to Rule 29.07(b)(4) after he had voiced complaints about trial counsel's representation at sentencing. *Id*. at 831. No one from the Public Defender's Office contacted the defendant until the time in which to file the original post-

[10] Although largely irrelevant for purposes of Appellant's case, the long procedural history in *Smith* can be found in a predecessor case, *Smith v. State*, 887 S.W.2d 601, 602 (Mo. banc 1994).

conviction motion had elapsed. *Id*. The defendant asserted that he was not informed of the date when the transcript on appeal was filed, and, thus, he presumably did not know when his motion was due. *Id*. But the defendant was aware of the time limits for requesting post-conviction relief, and he knew that the transcript was due no later than November 28, 1988. *Id*. Yet, the defendant did not file an original Rule 29.15 motion until January 6, 1989. *Id*. On appeal, the defendant alleged that he was abandoned by both trial counsel and the Public Defender. *Id*.

This Court first restated its holding from one of the defendant's prior appeals, which relied on *Bullard*, stating that "abandonment by an attorney does not excuse the untimely filing of an original post-conviction motion." *Id*. The defendant argued that "where an attorney is appointed under Rule 29.07(b)(4) and fails to timely file an original Rule 29.15 motion, the time limits of Rule 29.15 are tolled." *Id*. After noting that the burden for timely filing is on the accused, this Court rejected the defendant's claim, again holding that "[t]he assistance of counsel or lack thereof in filing such an original Rule 29.15 motion does not excuse its untimely filing." *Id*.

The defendant in *Smith* had a stronger claim of abandonment than Appellant does insofar as attorneys appointed under Rule 29.07(b)(4), like the Public Defender in *Smith*, arguably have the duty to timely file the original post-conviction motion.[11]

[11] Rule 29.07(b)(4) indicates that if the trial court, after sentencing, determines that the defendant has received ineffective assistance of counsel, new counsel shall be

Yet, this Court still determined that any "abandonment" by post-conviction counsel in *Smith* did not excuse the untimely filing of the defendant's *pro se* motion. Here, the Public Defender was not appointed pursuant to Rule 29.07(b)(4), but instead pursuant to Rule 29.15(e), which imposes certain duties upon counsel in relation only to the *amended* motion and says nothing about counsel's responsibilities regarding the original motion.

To the extent that Ms. Leftwich was acting on her own, she cannot be considered "appointed counsel" at all, and it is not clear whether the abandonment doctrine applies to privately-retained counsel. *See e.g. Daugherty v. State*, 159 S.W.3d 405, 408 (Mo. App. E.D. 2005) (rejecting claim of abandonment where retained counsel, rather than defendant, filed the original motion and defendant did not complain about *appointed* counsel).

It is also of no consequence that Appellant's motion allegedly would have been timely filed if sent to the court as opposed to Ms. Leftwich. "The appellate courts of this state have historically rejected applying the mailbox rule to the filing of post-conviction relief motions." *Patterson*, 164 S.W.3d at 548. "The only relevant inquiry

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appointed and "[w]hether or not an appeal is filed, new counsel shall be directed to ascertain whether facts and grounds exist for the filing of a motion pursuant to Rule 24.035 or Rule 29.15." The rule further states that "[i]f such facts and grounds exist, new counsel shall timely file the appropriate motion." *Id*.

under Missouri law is when the post-conviction motion was filed with the clerk of the circuit court, not when it was mailed." *Id.*

Appellant relies on three cases to support his claim: *Nicholson v. State*, 151 S.W.3d 369 (Mo. banc 2004), *Glover v. State*, 225 S.W.3d 425 (Mo. banc 2007), and *Spells v. State*, 213 S.W.3d 700 (Mo. App. W.D. 2007). (App. Br. 19-22). Appellant claims that these cases represent a trend towards avoiding a mechanical application of the post-conviction rules. Each case, however, is distinguishable.

In *Nicholson*, the defendant timely filed his *pro se* Rule 29.15 motion, but filed it in the wrong court. *Nicholson*, 151 S.W.3d at 370. By the time the filing court forwarded the motion to the proper court, the time limit had expired. *Id*. The motion court dismissed the motion as untimely. *Id*. However, under Rule 51.10, the motion court was required to treat the motion as if it had originated in the proper court. *Id*. at 371. Had it done so, the motion would have been timely filed. *Id*. Because the motion court did not comply with Rule 51.10, this Court reversed the dismissal and remanded for further proceedings. *Id*.

Similarly, in *Glover*, the defendant timely filed a Rule 29.15 motion, but failed to sign it. *Glover*, 225 S.W.3d at 427. Nothing was said about the lack of a signature until the State pointed it out on appeal. *Id*. Mr. Glover immediately filed a signed motion in the circuit court, and a certified copy was sent to the court of appeals. *Id*. at 427-428. Rule 55.03 allows a party to promptly correct a signature omission in a Rule

29.15 motion, even after the time to file an amended motion has expired. *Id*. This Court determined that the signature requirement for post-conviction relief motions should be controlled by Rule 55.03. *Id*.

Appellant's case is distinguishable from both *Nicholson* and *Glover* because, unlike the defendants in *Nicholson* and *Glover*, Appellant did not timely file his *pro se* Rule 29.15 motion in any court. Instead, Appellant allegedly opted to send the motion to Ms. Leftwich. Additionally, there is no rule or statute allowing the time of filing to relate back to the time Appellant completed the motion. In *Nicholson*, on the other hand, Rule 51.10 allowed the filing of the motion in the proper court to relate back to the filing of the motion in the improper court. Similarly, in *Glover*, Rule 55.03 allowed the defendant to sign the motion promptly upon receiving notice of his failure to sign it and thereby correct the omission. Because *Nicholson* and *Glover* are distinguishable, they do not support Appellant's claim.

In *Spells*, the remaining case upon which Appellant relies, the defendant mailed his motion in a timely fashion, but addressed it to the wrong post office box. *Spells*, 213 S.W.3d at 701. The defendant mailed his motion to the former address of the court, but the court had since changed post office box numbers. *Id*. When the defendant's motion ultimately arrived at the proper address, it was untimely. *Id*. The State filed a motion to dismiss for failure to comply with the time limits of 29.15. *Id*. Relying on *Nicholson*, the Western District reversed the dismissal, holding that

because Mr. Spells "made an honest, minor clerical mistake in filing his *pro se* motion to the circuit court[,]" the motion court misapplied the law laid out in *Nicholson* when it dismissed the motion. *Id*. at 702. The Western District noted that its decision was "narrowly focused on and dependent on the specific facts of [Spells'] case." *Id*.

The holding in *Spells* does not aid Appellant. The *Spells* Court indicated that its holding was limited to the specific facts of that case. Appellant's facts are nothing like those in *Spells*. According to Ms. Leftwich's pleadings, Appellant made no effort to mail his motion to the court; instead, he chose to send it to Ms. Leftwich. Additionally, the untimely nature of Appellant's motion was not due to his "honest, minor clerical mistake," but rather was due to his deliberate decision to send his motion someplace other than the circuit court as instructed.

Although *Spells* purports to rely on *Nicholson,* it misapplies the *Nicholson* holding. *Nicholson* relied on a *rule* of this Court that rendered the defendant's untimely motion timely; yet, there was no such rule to rely on in *Spells*. *Nicholson* specifically held that "[a] Rule 29.15 motion, whether filed in a proper or an improper court, is still considered untimely if filed after the filing period expired." *Nicholson*, 151 S.W.3d at 371. Because *Spells* misapplied *Nicholson*, it should not be followed.

In any event, *Spells* does not stand for the proposition that "good cause" can excuse the untimely filing of *pro se* motions, and it should not be so interpreted. If defendants are allowed to excuse the untimely filing of their *pro se* motions by relying

on a third party to file them, the time limits of Rule 29.15(b) and the filing instructions of 29.15(c) would be rendered meaningless. To circumvent the time limits, a defendant need only allege that he relied upon a third party to timely file the motion, and that the third party failed to file the motion within the proper time. Defendants could then, as a matter of course, assert claims that they had sent their *pro se* motions to friends or family members to file and thereby avoid the time limits of Rule 29.15(b). Such a practice is contrary to the purpose of the post-conviction rules and in direct contravention of the filing directions in Rule 29.15(c), which state that "Movant shall file the motion and two copies thereof with the clerk of the trial court."

"The [post-conviction] rule[s] . . . ha[ve] the purpose of avoiding delay in the processing of prisoners' claims and preventing the litigation of stale claims." *State ex rel. Nixon v. Daugherty*, 186 S.W.3d 253, 254 (Mo. banc 2006). "To further that purpose, [the rules] contain[] strictly enforced time constraints that, if not followed, procedurally bar consideration of a movant's claims." *Id*. This Court has stated, "[a]lthough we wish to avoid any unnecessary technicalities that hinder a movant's ability to file timely a *pro se* 29.15 motion, we remain stringent about the time requirements for post-conviction motions." *White*, 873 S.W.2d at 594.

If defendants are permitted to rely on third parties to file their *pro se* motions and thereby excuse any untimely filing, where is the court to draw the line on how late

a motion can be filed? Is one day excusable while two is not?[12] The time limits of the rule are mandatory and allow a movant "sufficient time to list those facts known to the movant that would justify relief." *Bullard*, 853 S.W.2d at 923. Furthermore, the rule informs defendants where to send their motions, and if they choose to send it elsewhere under the assumption that it will still arrive at the court on time, they should not be excused from the time limits should their assumption prove false.

Because Ms. Leftwich did not represent Appellant at the time the *pro se* motion was filed, and because the doctrine of abandonment does not excuse the untimely filing of *pro se* motions, Appellant's claim fails. The dismissal of his Rule 29.15 motion should be affirmed.

[12] In *Patterson*, the Eastern District upheld the dismissal of the defendant's *pro se* motion as untimely where it arrived and was filed in the circuit court ninety-two (92) days after the mandate issued from the direct appeal. *Patterson*, 164 S.W.3d at 548.

CONCLUSION

The motion court did not err in dismissing Appellant's Rule 29.15 motion. The motion court's dismissal of the Rule 29.15 motion should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 6,541 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 _____ day of January, 2008, to:

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APPENDIX