IN THE SUPREME COURT OF MISSOURI

BRUCE WATSON,	)	
	)	
Appellant,	)	
	)	
v.	)	No. SC95665
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
TWENTY-SECOND JUDICIAL CIRCUIT
THE HONORABLE MARGARET M. NEILL, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Mr. Bruce Watson ("Mr. Watson"), was convicted of robbery in the first degree, in violation of § 569.020, following a jury trial in the Circuit Court for the City of St. Louis, Cause Number 0922-CR03535-01, the Honorable Margaret M. Neill presiding.[1] On March 9, 2012, the trial court sentenced Mr. Watson to 15 years in the Missouri Department of Corrections.

On March 19, 2012, Mr. Watson filed his Notice of Appeal to this Court. The Missouri Court of Appeals for the Eastern District assigned Mr. Watson's appeal Eastern District Cause Number ED98193. The Court of Appeals affirmed Mr. Watson's conviction on April 23, 2013, with a *per curiam* order with supporting memorandum. *State v. Watson*, 397 S.W.3d 539 (Mo. App. E.D. 2013). The Court of Appeals issued its mandate on May 15, 2013.

Mr. Watson filed his *pro se* motion on October 2, 2014.[2] The motion court notified the Missouri State Public Defender System that Mr. Watson had filed his *pro se* motion on October 14, 2014 and counsel filed his entry of appearance on October 23, 2014. On November 6, 2014, the motion court granted an additional 30 days to file an

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

[2] Mr. Watson's *pro se* motion pursuant to Rule 29.15 was untimely filed. Nevertheless, Mr. Watson requests that this Court review his claim on the merits. Refer to the Standard of Review and Preservation portion of Mr. Watson's brief for argument.

amended motion. Counsel subsequently filed a timely amended motion on January 12, 2015.

On February 5, 2015, the motion court filed its findings of fact, conclusions of law and judgment, denying Mr. Watson's Rule 29.15 claims on the merits of his claim. Mr. Watson timely filed his notice of appeal on March 17, 2015. Jurisdiction of this appeal originally was in the Missouri Court of Appeals for the Eastern District. Mo. Const. Art. V, § 3; § 477.050. This Court thereafter granted Mr. Watson's application for transfer, thus, this Court has jurisdiction. Mo. Const., Art. V, §§ 3 and 10; Rule 83.04.

STATEMENT OF FACTS

On the morning of July 11, 2009, Ms. Yulena Shull was working as a teller at a Check 'n Go facility in the City of St. Louis (App. Tr. 200).[3] Check 'n Go is a store-front operation which cashes checks and makes loans (App. Tr. 200). On the morning of July 11, 2009, Ms. Shull saw a man enter the store (App. Tr. 202-203). The man was pacing (App. Tr. 203-204). Ms. Shull asked if she could help the man and he responded by placing a blue plastic grocery bag on the counter and told Ms. Shull to fill up the bag (App. Tr. 204). Ms. Shull asked, "What?" (App. Tr. 204-205). Then, according to Ms. Shull, the man walked around the counter, and "in a flash", perhaps a "split second", exposed a gun to her (App. Tr. 205, 206). Ms. Shull testified that she believed the man was pointing a weapon at her (App. Tr. 206, 208). She put the money in her drawer in the bag and showed him the other drawer had no money in it (App. Tr. 208-209).

The man then demanded that Ms. Shull open the safe, but she explained that the safe featured a ten-minute delay after entering the security code, and would not open for ten minutes after the security code was entered (App. Tr. 209-210). The man responded by telling her not to give him the fake code (App. Tr. 210). She replied that she did use the correct code and the safe began a ten-minute countdown (App. Tr. 210). Upset, the man stalked out of the store and got into a waiting cab (App. Tr. 211-212). Ms. Shull

[3] Mr. Watson will cite to the record on appeal as follows: to the legal file as "L.F". Regarding the record on appeal in Mr. Watson's underlying criminal case and appeal, Mr. Watson will cite to the transcript as "App. Tr.", and the legal file as "App. L.F.".

saw the cab sitting outside for almost a minute before it pulled away (App. Tr. 212). Ms. Shull wrote down the number of the cab and gave it to police (App. Tr. 214-215). Ms. Shull later identified Mr. Watson as the robber from a mugshot picture and, later still, in a physical line-up (App. Tr. 216-217, 219-220).

During cross-examination, she could only say that "[i]t [the gun] was smaller. It was covered by his hands mostly" (App. Tr. 230). She said she told police that it was not a revolver (App. Tr. 231). She admitted she had not described the gun in her three-page written statement about the incident made to police (App. Tr. 233). She claimed that was only because police had not asked her to describe the gun (App. Tr. 234).

Ms. Suzanne Anderson was a customer of Check n' Go the day it was robbed (App. Tr. 262). A man came in while she was being waited on and stood close behind her in line (App. Tr. 263). When the teller asked the man if she could help him, he produced a plastic grocery bag and, reaching around Ms. Anderson, placed it on the counter (App. Tr. 264-265). He directed the teller to "fill it up" (App. Tr. 265). Ms. Anderson put her head down (App. Tr. 265). The man went behind the counter and muttered to himself (App. Tr. 265-266). She did not see the man with a gun, but he did have his hands inside his jacket (App. Tr. 275). She believed the man was armed (App. Tr. 275-276). The man left the store and got into a cab waiting outside (App. Tr. 266-267). She gave the number of the cab, 1611, to police (App. Tr. 268).

Felton Jones was a taxi driver for Laclede Cab Company (App. Tr. 239). On July 11, 2009, he was driving cab number 1611 (App. Tr. 240). He went to the 4100 block of West Bell Avenue that day to pick up a fare (App. Tr. 241). After waiting a few minutes

at that address, he began to pull away when he saw a door open (App. Tr. 243). His passenger wanted to go to the shopping center at Manchester and Kingshighway (App. Tr. 245-246). Once there, the man directed him to a check cashing store (App. Tr. 247). The man got out, but directed Mr. Jones to wait, and told him that it would be a roundtrip (App. Tr. 247). The man went inside the store for "maybe four minutes" (App. Tr. 248). Mr. Jones did not see what happened in the store while he was waiting (App. Tr. 249).

When the man came back out of the store, Mr. Jones asked him if he wanted to go back to West Bell, but the man said he wanted to go to the area of Jefferson and Gravois (App. Tr. 250). Mr. Jones stopped the cab moments later to have a discussion with the man (App. Tr. 250). Mr. Jones was concerned that the man had been disappointed in whatever transaction he attempted at the check-cashing store and might not have money to pay (App. Tr. 250-251). His concerns were alleviated, however, and he drove the man to the area of Victor and Jefferson (App. Tr. 251). He later spoke to the police about his trip, viewed a line-up, and identified Mr. Watson as his fare that day (App. Tr. 244-246, 252-253).

Nancy James was a police detective investigating the robbery of the Check n' Go store (App. Tr. 288). She tracked down the cab into which the robber fled and obtained the phone number from which the passenger originally called (App. Tr. 290-292). She went to the address given to her by Mr. Jones as the address he picked up his fare at (App. Tr. 294-295). A man there identifying himself as Bruce Watson, Sr., said his son Bruce Watson, Jr., lived there (App. Tr. 295). She returned to the police station and called the phone number she had been given asking for Bruce Watson; the man who

answered said he was "Bruce" but hung up once she told him she was a police officer (App. Tr. 295-296).

From her investigation, Detective James composed a photo array containing Bruce Watson, Jr.'s picture and other subject of similar characteristics (App. Tr. 298-299). Detective James showed her composition to Ms. Shull, and she chose Mr. Watson's photo as that of the robber (App. Tr. 299-300). Mr. Jones identified Mr. Watson in a live lineup, and Ms. Shull viewed a photo of the physical lineup and identified Ms. Jones in the lineup (App. Tr. 303, 305). After viewing Mr. Watson a third time, Ms. Shull picked him out of a second live lineup held a view days later (App. Tr. 306-307). Additionally, video clips and still photos from the surveillance cameras were displayed to the jury (App. Tr. 308-309).

On cross-examination, Detective James agreed that Officer Lammert, who spoke with Ms. Shull, wrote that Ms. Shull could not describe the gun to the officers (App. Tr. 315). "Well, at the time, all [Ms.] Shull could tell us was that it was a weapon. She couldn't even give a description of the weapon" (App. Tr. 315-316). Officer Lammert likewise testified Ms. Shull could not describe the gun she saw and, though Lammert thought Ms. Anderson told her she saw a gun, she admitted that information was not contained in her report (App. Tr. 325-326).

During closing argument, the prosecutor told the jury that it could infer Mr. Watson was reaching into his pocket because he was "going for a gun" (App. Tr. 344-345). The prosecutor told the jurors to watch the body language of the man on the surveillance tape (App. Tr. 345). Ms. Shull, the prosecutor argued, knew what a gun

looked like (App. Tr. 345). The prosecutor said, discussing the elements, he need only prove Mr. Watson displayed what appeared to be a gun (App. Tr. 348).

Mr. Watson's trial counsel, focused squarely on the absence of proof that a gun was used (App. Tr. 349). In fact, trial counsel conceded that the prosecutor probably did prove beyond a reasonable doubt that Mr. Watson forcibly stole money from Check n' Go (App. Tr. 354). Nevertheless, trial counsel argued that the state's case had to fail because there was no proof of a gun (App. Tr. 355). Trial counsel argued that Ms. Shull made an "honest mistake" because the videotape refuted what she said (App. Tr. 349). Again and again, trial counsel told the jury that there was no proof a gun was used (App. Tr. 350, 351, 353, 354, 356). Trial counsel reminded the jury that the victims had to actually see what appeared to be a deadly weapon:

> The fourth element is the one you cannot find. Fourth, that in the course of taking the property, the defendant displayed or threatened the use of what appeared to be a deadly weapon or dangerous instrument. Someone has to see something that appears to be a deadly weapon or a dangerous instrument, and that possibility's [sic] refuted by clear and convincing, unmistakable videotape evidence. Human observation is prone to assumption and mistakes. The videotape is not.

(App. Tr. 353).

The state countered that defense counsel was "hidin' the ball" (App. Tr. 357). The defense was "coming up with some excuses about how I did this on purpose to show you how the State proved their case. That is going for a technicality, okay?" (App. Tr. 357). The prosecutor argued that Mr. Watson's "intention" in his movements was "to display

what appears to be a deadly weapon. What appears to be a gun" (App. Tr. 357-358). To illustrate his argument about a gun, the prosecutor placed a finger in his coat pocket and posed:

> If I do this, that is a robbery in the first degree. Now, can you guys tell that's a gun? Of course not. It's my finger. That's robbery. It's what appeared to be a weapon. Not what is a weapon.

(App. Tr. 359). Trial counsel objected at sidebar that the example used by the prosecutor was unsupported by the evidence, but the court overruled the objection (App. Tr. 359-360). The prosecutor repeated his demonstration and reminded the jury of the court's ruling made out of its hearing:

> So, as I was saying, ladies and gentlemen, if I do this, all right, and you think that's a gun, that's robbery in the first degree, plain and simple. We just actually talked about it over there. That's robbery.

(App. Tr. 360).

The state again said defense counsel's argument was an effort to free his client on a "technicality" prompting trial counsel's rhetorical objection, "how is it a technicality?" (App. Tr. 361). The objection was overruled, and the prosecutor asked the jury to find Mr. Watson guilty of robbery in the first degree (App. Tr. 361-362).

The trial court excused the jury to deliberate at 1:48 P.M. (App. Tr. 362). Twenty minutes later, the jury asked to see videotaped surveillance footage which was then shown to them in the courtroom (App. Tr. 363-367). At 3:20 P.M., the jury announced it had verdicts (App. Tr. 367). The jury found Mr. Watson guilty of robbery in the first

degree and not guilty of armed criminal action (App. Tr. 368). On March 9, 2012, the trial court sentenced Mr. Watson to 15 years in the Missouri Department of Corrections (App. Tr. 377; App. L.F. 48-51).

On March 19, 2012, Mr. Watson filed his Notice of Appeal to this Court. This Court assigned Mr. Watson's appeal Eastern District Cause Number ED98193. This Court affirmed Mr. Watson's conviction on April 23, 2013, with a *per curiam* order with supporting memorandum. *State v. Watson*, 397 S.W.3d 539 (Mo. App. E.D. 2013). This Court issued its mandate on May 15, 2013.

Mr. Watson filed his *pro se* motion on October 2, 2014 (L.F. 4-36). The motion court notified the Missouri State Public Defender System that Mr. Watson had filed his *pro se* motion on October 14, 2014 and counsel filed his entry of appearance on October 23, 2014 (L.F. 37, 38). On November 6, 2014, the motion court granted an additional 30 days to file an amended motion (L.F. 41-42).

Counsel subsequently filed a timely amended motion on January 12, 2015 (Supp. L.F. 1-56). In his amended motion, Mr. Watson alleged that his trial counsel was ineffective for failing to submit a lesser-included offense instruction for the class B felony of robbery in the second degree, pursuant to § 569.030, and for failing to submit a lesser-included offense instruction for the class C felony of stealing, pursuant to either § 570.030.3(1), RSMo. Cum. Supp. 2008 or § 570.030.3(2), RSMo. Cum. Supp. 2008 in relationship to Count I – the class A felony of robbery in the first degree. § 569.020 (Supp. L.F. 8). Mr. Watson alleged that, because the jury could have found that he did not display what appeared to be a dangerous instrument or deadly weapon, but did use

force in stealing the money, the submission of the lesser-included robbery in the second degree was warranted (Supp. L.F. 12). Additionally, Mr. Watson alleged that because the jury could have found that Mr. Watson did not use force in stealing the money, but in fact did steal over five hundred dollars and/or physically took the property from the person of the victim, the submission of the lesser included class C felony of stealing was warranted (Supp. L.F. 12). Mr. Watson also alleged that he anticipated that trial counsel would testify at an evidentiary hearing that he did not request a lesser-included instruction and had no reasonable trial strategy for failing to do so (Supp. L.F. 17). Mr. Watson alleged that trial counsel would testify that his trial strategy was to argue to the jury that the state met its burden on the first three elements of the offense, but failed to meet its burden in proving that Mr. Watson displayed what appeared to be a dangerous instrument or deadly weapon (Supp. L.F. 17). Mr. Watson also alleged that, had trial counsel requested the submission of a lesser-included instruction, there is a reasonable probability that the trial court would have submitted it, and that the jury would have acquitted of the greater offense of robbery in the first degree, but convicted on robbery in the second degree or felony stealing (Supp. L.F. 17-18).

On February 5, 2015, the motion court filed its findings of fact, conclusions of law and judgment, denying Mr. Watson's Rule 29.15 claims on the merits of his claim (L.F. 76-87). In its findings of fact and conclusions of law, the motion court held that Mr. Watson was not entitled to an evidentiary hearing (L.F. 81). Citing *State v. Taylor*, 373 S.W.3d 513, 524 (Mo. App. E.D. 2012), the motion court held that Mr. Watson's claim was without merit, because there would have been no basis for an instruction on robbery

in the second degree at Mr. Watson's trial (L.F. 83). The motion court reached this conclusion by holding that trial counsel's conduct should be determined by the law in effect at the time of trial, citing *State v. Parker*, 886 S.W.2d 908, 923 (Mo. banc 1994) (L.F. 100). Thus, according to the motion court, the Missouri Supreme Court's decision in *State v. Jackson*, 433 S.W.3d 390 (Mo. banc 2014) did not apply to Mr. Watson's case because the decision occurred after Mr. Watson's trial (L.F. 83). Citing *State v. Humphrey*, 789 S.W.2d 186, 189 (Mo. App. E.D. 1990), the motion court held that an instruction on second degree robbery was not required at the time of Mr. Watson's trial where there was evidence that he used or threatened the use of a deadly weapon or dangerous instrument in the course of the robbery (L.F. 84). Mr. Watson timely filed his notice of appeal on March 17, 2015 (L.F. 90-105). This appeal follows.

POINT RELIED ON

The motion court clearly erred and violated Mr. Watson's right to due process of law and effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10, 14, and 18(a) of the Missouri Constitution in denying Mr. Watson's Rule 29.15 motion for post-conviction relief claim without an evidentiary hearing because he alleged facts, not refuted by the record, which, if true, warranted relief, in that Mr. Watson alleged that he was denied his rights to due process of law and effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10, 14 and 18(a) of the Missouri Constitution when his trial counsel, Mr. Srikant Chigurupati, was ineffective for failing submit a lesser-included offense instruction for the class B felony of robbery in the second degree, pursuant to § 569.030, and for failing to submit a lesser-included offense instruction for the class C felony of stealing, pursuant to either § 570.030.3(1), RSMo. Cum. Supp. 2008 or § 570.030.3(2), RSMo. Cum. Supp. 2008 in relationship to Count I – the class A felony of robbery in the first degree (§ 569.020) and Mr. Watson alleged that trial counsel's ineffectiveness prejudiced him, in that, but for trial counsel's ineffectiveness, there is a reasonable probability that the outcome of Mr. Watson's trial would have been different.

Strickland v. Washington, 466 U.S. 668 (1984);

State v. Santillan, 948 S.W.2d 574 (Mo. banc 1997);

State v. Pond, 131 S.W.3d 792 (Mo. banc 2004);

State v. Jackson, 433 S.W.3d 390 (Mo. banc 2014);

Rule 29.15;

U.S. Const., Amend. V;

U.S. Const., Amend VI;

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

Mo. Const., Art. I, §§ 10, 14, and 18.

ARGUMENT

The motion court clearly erred and violated Mr. Watson's right to due process of law and effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10, 14, and 18(a) of the Missouri Constitution in denying Mr. Watson's Rule 29.15 motion for post-conviction relief claim without an evidentiary hearing because he alleged facts, not refuted by the record, which, if true, warranted relief, in that Mr. Watson alleged that he was denied his rights to due process of law and effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10, 14, and 18(a) of the Missouri Constitution when his trial counsel, Mr. Srikant Chigurupati, was ineffective for failing submit a lesser-included offense instruction for the class B felony of robbery in the second degree, pursuant to § 569.030, and for failing to submit a lesser-included offense instruction for the class C felony of stealing, pursuant to either § 570.030.3(1), RSMo. Cum. Supp. 2008 or § 570.030.3(2), RSMo. Cum. Supp. 2008 in relationship to Count I – the class A felony of robbery in the first degree (§ 569.020) and Mr. Watson alleged that trial counsel's ineffectiveness prejudiced him, in that, but for trial counsel's ineffectiveness, there is a reasonable probability that the outcome of Mr. Watson's trial would have been different.

Preservation

Mr. Watson was the defendant in cause number 0922-CR03535-01 (App. L.F. 19-20). Mr. Watson was charged with one count of the class A felony of robbery in the first

degree, pursuant to § 569.020 and with one count of the unclassified felony of armed criminal action, pursuant to § 571.015 (App. L.F. 19-20). Mr. Watson was also charged as a prior felony offender pursuant to § 558.016.2 (L.F. 19-20). From October 18, 2011 to October 19, 2011, Mr. Watson was tried by jury before the Honorable Margaret M. Neill (App. L.F. 24-25).

On October 19, 2011, the parties stipulated to Mr. Watson's status as a prior offender and Mr. Watson waived jury sentencing (App. L.F. 22, App. Tr. 283). On October 19, 2011, the jury returned a verdict of guilty on Count I for the class A felony of robbery in the first degree and not guilty on Count II for the unclassified felony of armed criminal action (App. L.F. 41-42). On March 9, 2012, the Court sentenced Mr. Watson to 15 years in the Missouri Department of Corrections (App. L.F. 48-51). The sentence was ordered to run concurrently to any sentence federal sentence Mr. Watson was serving (App. Tr. 377).

Mr. Watson specifically requested that the motion court conduct a hearing to determine whether his *pro se* motion pursuant to Rule 29.15 was timely, that the motion court determine whether his *pro se* motion pursuant to Rule 29.15 was timely, and to consider his claims on the merits (L.F. 49). In its findings of fact and conclusions of law, the motion court noted that there was case law holding that a court is not specifically required to inform a criminal defendant of the time limits and a failure of the trial court to inform a criminal defendant of his right to a Rule 24.035 or 29.15 motion pursuant to Rule 29.07(b)(4) does not override the mandatory time limits (L.F. 80). However, the motion court also noted that Mr. Watson's case did not involve a failure to inform, but

rather a misrepresentation, by the trial court, to Mr. Watson about the time limit (L.F. 81). Thus, out of an abundance of caution, the motion court addressed the merits of Mr. Watson's motion (L.F. 81).

Pursuant to Rule 29.15(b), if an appeal of the judgment or sentence sought to be vacated, set aside or corrected was taken, the movant's *pro se* motion (i.e. Form 40) shall be filed within 90 days after the date the mandate of the appellate court is issued affirming such judgment or sentence. *See* Rule 29.15(b). Thus, Mr. Watson's *pro se* motion (i.e. Form 40) was due on or before Tuesday, August 13, 2013. *Id.* Mr. Watson's *pro se* motion was not filed until October 2, 2014 (L.F. 4). Missouri has one of the more stringent time limitations for filing a motion for post-conviction relief. Rule 29.15(b). Under Rule 29.15(b), failure to file a motion within the time provided under Rule 29.15 constitutes a "complete waiver of any right to proceed" under Rule 29.15 and a complete waiver of any claim that could be raised in a motion filed pursuant to Rule 29.15. *Dorris v. State*, 360 S.W.3d 260, 266 (Mo. banc 2012). Additionally, the State of Missouri cannot waive the time limitation set forth under Rule 29.15. *Id*. at 268.

Post-conviction relief time restrictions in other states are usually set by statute. However, not all claims under post-conviction relief are barred by statutory time limitations in other states. These include claims based on jurisdictional defects, excessive sentences, issues which would have likely changed the outcome of the initial criminal case, newly discovered evidence, or claims relating to a parole or conditional release being unlawfully revoked. *Limitation of Time*, 39 Am. Jur. 2d Habeas Corpus § 179 (2016). While some jurisdictions consider the time limitations for post-conviction relief

to be jurisdictional in nature (i.e., preventing a court from granting relief on an untimely petition for post-conviction relief), other jurisdictions are relatively relaxed for allowing a filing of a post-conviction petition "if there is sufficient cause to do so after considering the extent and cause of delay, the prejudice to the state, and the importance of the petitioner's claim, or if the defendant alleges sufficient facts to show that the delay in filing the petition was not due to his or her culpable negligence." *Limitation of Time*, 39 Am. Jur. 2d Habeas Corpus § 179 (2016).

The American Bar Association ("ABA") states in Standard 22-2.4(a) that "[a] specific time period as a statute of limitations to bar post-conviction review of criminal convictions is unsound." While the ABA does not explicitly refer to filing of motions or petitions for post-conviction relief in this standard, however, it can be inferred that any filing deadline would ultimately affect post-conviction review. If an appellate court must render a decision on a post-conviction case within a specific time period, naturally this must also mean that the defendant has to file the motion or petition within a set time period. Missouri's 29.15(b) rule therefore is not in conformity with this ABA standard. Having said that, Mr. Watson recognizes that other states are not in conformity with this ABA standard because they have imposed various deadlines and restrictions in post-conviction relief cases. But most of these states do not impose deadlines as strict as Missouri.

For example, the neighboring states of Illinois, Iowa, Tennessee, Kentucky, Kansas, and Nebraska all have deadlines for commencing a post-conviction which are far more lenient than Missouri's. Some of these states have set the time limitation at one

year from the date the conviction or sentence were handed down or judgment from the highest appellate court in the state. K.S.A. 60-1507; Nebraska Revised Statute 29-3001; Tenn. Code Ann. § 40-30-102. Illinois, Iowa, and Kentucky have a three-year limit on filing post-conviction petitions or motions. 725 ILCS 5/122-1; I.C.A § 822.2; Kentucky Rules of Criminal Procedure 11.42. The disparity between Missouri's 90-day and 180-day time limitations and its neighboring states is far too great to be ignored. Post-conviction relief is recognized as an additional, independent remedy in special cases. That is why approximately a dozen states have adopted the Uniform Post-Conviction Act while others have enacted similar provisions. *Types of state remedies*, 7 Crim. Proc. § 28.11(b) (4th ed.). The Act's basic policy and reason has been to provide a necessary remedy to state courts and ensure defendants' due process rights are not violated. Claims under post-conviction essentially challenge the validity of a conviction. (Uniform Law Commission, Post-Conviction Procedure Act, Model Summary). As such, they remain an integral part of criminal procedure. In one sense, the length of time signifies how seriously a state takes its post-conviction cases and is willing to grant relief to a defendant who raises reasonable claims. Oftentimes, defendants may include new evidence which can challenge their conviction. The gathering and collecting of such evidence may require additional time. A strict deadline for relief therefore would bar such claims from ever reaching a court of law.

However, it is not just neighboring states which offer lenient time limitations; across the country many states have done so as well. Again, many of these states have

placed a one-year time limit on commencing a post-conviction relief petition.[4] Others have a two to five year time limit.[5] Maryland has a ten-year filing period after the sentence is imposed while Hawaii as of now has no time restrictions on filing for post-conviction relief. Hawai'i Rules of Penal Procedure, Rule 40; MD Code, Criminal Procedure, § 7-103. The variety of time limitations among states is evident, but what is also evident is the fact that many of these states grant more time to defendants to file their post-conviction petitions/motions. As such, Missouri's time limitation on post-conviction filing is unreasonable given the multitude of claims defendants can bring under such relief and the time required investigating such claims.

Missouri courts have recognized exceptions to this waiver in certain rare circumstances involving active interference of third parties, but have not as of yet adopted any exceptions excusing a late filing for good cause as other states have codified. *Price v. State*, 422 S.W.3d 292, 301 (Mo. banc 2014). Specifically, when an inmate prepares a motion and does everything he reasonably can to ensure that it is timely filed under Rule 29.15(b), any tardiness that results solely from the active interference of a third party beyond the inmate's control may be excused and the waivers imposed by Rule 29.15(b) not enforced. *Id.*

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[4] E.g. Idaho, Montana, South Carolina, and Utah. I.C. § 19-4902; MCA 46-21-101 and 102; S.C. Code Ann. § 17-27-45; Utah Code Ann. § 78B-9-107.

[5] E.g. Minnesota, New Jersey, and Oregon. MSA § 590.01; N.J. Court Rules, Rule 7:10-2; O.R.S. § 138.510.

For instance, in *Nicholson v. State*, the movant timely filed a *pro se* motion pursuant to Rule 29.15 in the wrong venue, which forwarded the motion along to the proper venue, but was not received by the proper venue until after the filing deadline. *Nicholson v. State*, 151 S.W.3d 369 (Mo. banc 2004). In *Nicholson*, this Court wrote that, "An incarcerated person seeking post-conviction relief must prepare and file his or her motion only 'with such help as he can obtain within the prison walls or the prison system." *Id.* In *Spells v. State*, the untimely filing of a *pro se* motion was excused because the inmate relied on an outdated address for the sentencing court and the court's forwarding order was not renewed. *Spells v. State*, 213 S.W.3d 700, 702 (Mo. App. W.D. 2007)). The *Spells* Court focused on the motivating factor in *Nicholson*, noting that "such 'prisoners cannot take the steps other litigants can take . . . to ensure that the court clerk receives and stamps theirs notices of appeal before the . . . deadline.'" *Spells*, 213 S.W.3d at 701-702 (quoting *Houston v. Lack*, 487 U.S. 266, 270-271 (1988)).

Here, like the defendants in *Nicholson* and *Spells*, Mr. Watson was relying only on whatever resources were available to him at the St. Louis City Justice Center and in the Missouri Department of Mental Health and the information each had received from the trial court regarding the filing deadline of their *pro se* post-conviction motions. The critical distinction between Mr. Watson's case and *Nicholson* and *Spells* is that Mr. Watson received objectively inaccurate and misleading advice from the trial court.

The sentencing court's advice was inaccurate and misleading. Although it is true that under Rule 29.15(b), a movant has 180 days from the date he or she is delivered to the Missouri Department of Corrections to file his or her *pro se* motion if he or she does

not appeal, if an appeal *is* taken, a movant must file his or her *pro se* motion within 90 days after the date the mandate of the appellate court is issued affirming such judgment or sentence. *See* Rule 29.15(b). Here, Mr. Watson appealed. The trial court knew or should have known that Mr. Watson intended to appeal. Mr. Watson filed his motion to proceed *in forma pauperis* on a handwritten memorandum the same day as his sentencing hearing (App. L.F. 52). The memorandum bears the signature of the trial court (App. L.F. 52). Despite this, the incorrect and misleading advice from the trial court regarding Mr. Watson's right to proceed under Rule 29.15 was wholly inaccurate, given the fact that Mr. Watson intended to appeal his convictions and sentences and the trial court knew of that desire. The trial court's incomplete advice included only the information that did not apply to Mr. Watson's circumstances; where the court knew or could have reasonably inferred based on his actions at sentencing that Mr. Watson and his attorney intended to appeal his conviction and sentence.[6] The trial court advised Mr. Watson as follows:

> In order to obtain review of your conviction and sentence, you must file a verified Criminal Procedure Form 40 within 180 days after your delivery to

[6] At his sentencing hearing, Mr. Watson and trial counsel expressed their belief that he was innocent of the charged offenses (App. Tr. 373, 373-374). Mr. Watson also complained about the representation he received from trial counsel (App. Tr. 373, 379-381, 382, 382-383, 383). Despite all of Mr. Watson's complaints, the trial court still found no probable cause of ineffective assistance of counsel (App. Tr. 384). Further, the trial court specifically advised Mr. Watson of his right to a direct appeal (App. Tr. 378).

> the Missouri Department of Corrections; otherwise, you waive or give up your rights under 29.15.

(App. Tr. 379).

The trial court's misadvice omitted the only relevant information to Mr. Watson; that it only applied to people who were not appealing, and more importantly, that it did not apply to him. It was inaccurate and misleading. It was prejudicially misleading because it led Mr. Watson to miss the deadline for filing his *pro se* motion. The trial court's error robbed Mr. Watson of the opportunity to take every reasonable step he could within the limitations of his confinement at the Justice Center (the jail in the City of St. Louis) or in the Missouri Department of Mental Health. Advice coming from a position of authority, such as the voice of the trial court, is further likely to carry weight over other voices of authority such as attorneys and jailhouse lawyers. The trial court's error was particularly troublesome in Mr. Watson's case given the fact that he was not immediately delivered to the Missouri Department of Corrections (and in fact has never been delivered on this case) and given the Mr. Watson's lack of legal training or acumen, and particularly worrisome given Mr. Watson's potential competency issues. Mr. Watson's actions and inactions were also consistent with the trial court's inaccurate and misleading admonition. Unlike most criminal defendants, Mr. Watson was not immediately delivered to the Missouri Department of Corrections. Instead, he was initially held, after his conviction and sentence on another pending case in the St. Louis City Justice Center. Later, based on competency findings in that case, Mr. Watson was delivered to the Missouri Department of Mental Health as opposed to the Missouri

Department of Corrections. In fact, as of the filing of this substitute brief, Mr. Watson has never set foot inside a Missouri Department of Corrections facility, and because he has no prior convictions, has never been assigned a Missouri Department of Corrections number.

Mr. Watson alleged that the motion court should find that his *pro se* motion was timely (Supp. L.F. 7). Mr. Watson alleged that, when asked if he understood his rights under Rule 29.15, Mr. Watson answered, "Yes, your Honor" (Supp. L.F. 5, App. Tr. 379). Mr. Watson alleged that it appears from the record that this is the only information that the trial court gave Mr. Watson regarding the filing deadline of his *pro se* motion under Rule 29.15 (Supp. L.F. 5, App. Tr. 372-384).

Mr. Watson appealed from the judgment of conviction to this Court, where his appeal was assigned ED98193. This Court issued its *per curiam* order on April 23, 2013 in Appeal No. ED98193, *State v. Watson*, 397 S.W.3d 539 (Mo. App. E.D. 2013), affirming Mr. Watson's conviction. This Court issued its mandate on May 15, 2013.

In his amended motion, Mr. Watson alleged that he would testify at a hearing (to determine the timeliness of his *pro se* motion) that, based on this statement from the trial court, he believed that his *pro se* motion pursuant to Rule 29.15 was not due until 180 days after he was delivered to the Missouri Department of Corrections (Supp. L.F. 5).

However, Mr. Watson alleged that he was never delivered to the Missouri Department of Corrections for his conviction and sentence in St. Louis City Cause Number 0922-CR03535-01 (Supp. L.F. 5-6). Mr. Watson alleged that before his jury trial in St. Louis City Cause Number 0922-CR03535-01, the State of Missouri charged

him with a separate criminal offense in St. Louis City Cause Number 1122-CR02338 (Supp. L.F. 2). Mr. Watson alleged that, in lieu of being delivered to the Missouri Department of Corrections on St. Louis City Cause Number 0922-CR03535-01, he was detained at the St. Louis City Justice Center on St. Louis City Cause Number 1122-CR02338 (Supp. L.F. 2-3). Mr. Watson alleged that on or about March 25, 2014, the Honorable Mark H. Neill, Division 5 of the City of St. Louis Circuit Court, issued an order for a pre-trial psychiatric examination to determine Mr. Watson's competency to stand trial in that case (Supp. L.F. 3). Mr. Watson alleged that, on or about August 4, 2014, the Honorable Mark H. Neill issued a commitment order, finding Mr. Watson incompetent to stand trial in St. Louis City Cause Number 1122-CR02338 and further ordered that Mr. Watson be committed to the custody of the Director of the Missouri Department of Mental Health (Supp. L.F. 3). Mr. Watson alleged that, shortly thereafter, he was transferred from the St. Louis City Justice Center to Fulton State Hospital, 600 East 5th Street, Fulton, Missouri 65251, a Missouri Department of Mental Health facility. Mr. Watson alleged that his case in St. Louis City Cause Number 1122-CR02338 has not yet been disposed (Supp. L.F. 3).

Mr. Watson alleged that, if granted a hearing on the timeliness of his *pro se* motion, Mr. Watson would testify that, based on this statement from the trial court, he believed that his *pro se* motion pursuant to Rule 29.15 was not due until 180 days after he was delivered to the Missouri Department of Corrections (Supp. L.F. 5-6). Mr. Watson alleged that he would testify that, since he has never been delivered to the Missouri Department of Corrections, he was under the impression that the deadline to file his *pro*

se motion had not yet begun to run (Supp. L.F. 5-6). Mr. Watson alleged that he would testify that it was not until he spoke with another inmate in the St. Louis City Justice Center, whom he had asked to review his case for him, that he discovered that he needed to file his *pro se* motion sooner (Supp. L.F. 6-7). Mr. Watson alleged that his *pro se* motion was untimely because the trial court misinformed him as to the deadline for filing such a motion (Supp. L.F. 6).

Mr. Watson also alleged that, if granted a hearing on the timeliness of his *pro se* motion, he expected his appellate counsel, Mr. Scott Thompson ("appellate counsel") to testify that, at the end of his representation of Mr. Watson, he believes that he sent a letter to Mr. Watson in the St. Louis City Justice Center informing him that his *pro se* motion pursuant to Rule 29.15 was due on or before August 13, 2013 (Supp. L.F. 6). However, appellate counsel was not certain that Mr. Watson received the letter (Supp. L.F. 6). Mr. Watson alleged that, if granted a hearing on the timeliness of his *pro se* motion, he would testify that he never received a letter informing him of a deadline to file his *pro se* motion from appellate counsel (Supp. L.F. 6).

Additionally, Mr. Watson alleged that he was adjudicated to be incompetent to stand trial on or about August 4, 2014, by the Honorable Mark H. Neill in St. Louis City Cause Number 1122-CR02338 (Supp. L.F. 3, 6). Mr. Watson alleged that Judge Mark H. Neill further ordered that he be committed to the custody of the Director of the Missouri Department of Mental Health sometime shortly thereafter (Supp. L.F. 3, 6). Thus, Mr. Watson alleged that a genuine issue existed as to whether he understood or could comprehend Rule 29.15 and its filing deadline provisions (Supp. L.F. 6).

Based on the foregoing, Mr. Watson requested that the motion court conduct a hearing to determine whether his *pro se* motion pursuant to Rule 29.15 was timely, and that the motion court determine his *pro se* motion pursuant to Rule 29.15 was timely, and to consider his claims on the merits (Supp. L.F. 7). Based on the foregoing, Mr. Watson now requests that this Court find that his *pro se* motion was timely, or in the alternative, reverse and remand for a hearing on the matter. Mr. Watson was given inaccurate information by the trial court regarding the deadline for filing his amended motion. Additionally, Mr. Watson has been adjudicated incompetent to stand trial. Thus, just as the movant in *Price* and *Nicholson*, Mr. Watson's tardiness resulted solely from the active interference of a third party (i.e. the inaccurate advice of the trial court) beyond Mr. Watson's control, which should excuse the waiver imposed by Rule 29.15(b).

Further, there is significant evidence that Mr. Watson's tardiness was exacerbated by at least some deficit in the information the sentencing court provided about the filing deadlines. In *Moore v. State*, this Court excused an appellate attorneys' failure to advise the defendant that it was time to file his *pro se* motion before the deadline to file passed. 328 S.W.3d 700, 701 (Mo. banc 2010). In its analysis, this Court held that appellate counsel could not have abandoned movant because appellate counsel had no duty to represent the defendant in post-conviction relief filings and there was nothing on the record indicating that appellate counsel undertook that duty. *Id.* at 702-703. In reaching this conclusion, the this Court reasoned:

> The judicial branch is already obligated to inform the defendant of such information. Under Rule 29.07(b), the trial court must conduct a post-

> sentencing hearing in which it questions the defendant concerning the effectiveness of trial counsel. The court must also advise the defendant of the right to proceed under Rule 29.15. Here, the transcript indicates that the trial court informed Moore of his right to file a Rule 29.15 motion by using Criminal Procedure Form 40 within 90 days of the appellate court mandate's issuance. Moore indicated in open court that he understood those rights.

Moore, 328 S.W.3d at 703.

In *Moore*, this Court recognized that the obligation of the trial court to advise the defendant and the obligation of appellate counsel to advise are not the same. *Id.* *Moore* instructs that an appellate attorney's failure to advise of a filing deadline for a *pro se* post-conviction motion is excusable, at least in part, because of the trial court's duty to advise the defendant of the right to proceed under Rule 29.15. *See also* Rule 29.07(b)(4). In *Gunn v. State*, the Missouri Court of Appeals for the Western District issued a *per curiam* opinion holding that, appellate counsel's miscalculation notwithstanding, "even in circumstances where counsel grossly breaches his duties to a client, the courts are 'not responsible for this breach and have no obligation to remedy it'." *Gunn v. State*, 2015 WL 8776885, 3, slip op. (Mo. App. W.D. 2015).

Moore and *Gunn* are not analogous to Mr. Watson's case. Here, it is not trial or appellate counsel that erred, but the trial/sentencing court itself. Unlike trial counsel, the trial court has a duty to advise defendants of their right to proceed under Rule 29.15. Rule 29.07(b)(4). Mr. Watson would submit to this Court that a duty to advise would be a

poor and incomplete duty if it were not a duty to completely and accurately advise. Further, unlike appellate counsel, Mr. Watson did not choose to substitute the trial court's performance for his own and bind himself to the competence or incompetence of the trial court's skill and ability to advise him properly. Here, the trial court is totally responsible for the breach and has an obligation to remedy it.

In short, Mr. Watson was entitled to complete and accurate advice from the trial court about his right to proceed under Rule 29.15 and he was entitled to rely on that advice. The holding in *Moore* would be hollow if this Court were to hold that the trial court's advisement under Rule 29.07(b)(4) as to the defendant's right to proceed under Rule 29.15 need not be wholly accurate or complete. Further, given Missouri's strict and short time limits for filing a *pro se* post-conviction motion, this Court should adopt a more lenient, good faith exception based on the inaccurate admonishment of a trial or sentencing court pursuant to Rule 29.07(b).

Thus, the motion court should not have dismissed Mr. Watson's post-conviction relief cause of action.

If the criminal defendant cannot trust the advice he or she receives from the trial court, which is duty bound to provide that advice, whose advice can he or she trust? Based on the Court of Appeals ruling, a criminal defendant cannot even rely on the information about filing deadlines for post-conviction motions provided by trial courts, even if the trial court is advising him those deadlines, on the record, after his sentencing hearing, as required by law. This Court should not adopt that position.

Thus, this Court should find that Mr. Watson's filing of his *pro se* motion pursuant to Rule 29.15 is timely, or in the alternative, should reverse and remand for a hearing on the matter.

Mr. Watson raised the issue in this point relied on in his amended motion (Supp. L.F. 1-56). The issue is preserved for appellate review. *See Mouse v. State*, 90 S.W.3d 145, 152 (Mo. App. S.D. 2002) (to be preserved for appellate review, the claim raised on post-conviction appeal must be raised in the amended post-conviction motion).

Standard of Review

"[A] court may resolve claims for post-conviction relief without a hearing [when] the motion, files, and records of the case conclusively show the movant is entitled to no relief." *Eichelberger v. State*, 71 S.W.3d 197, 200 (Mo. App. W.D. 2002) (citing *Holt v. State*, 24 S.W.3d 708, 710 (Mo. App. E.D. 1999)). Review of the denial of a motion for post-conviction relief is for whether the motion court's conclusions are clearly erroneous. *Rotellini v. State*, 77 S.W.3d 632, 634 (Mo. App. E.D. 2002); Rule 29.15(k). The findings and conclusions of a motion court are clearly erroneous if, "after a review of the entire record, the reviewing court is left with the definite and firm impression that a mistake has been made." *Id.*

When a criminal defendant alleges ineffective assistance of counsel in a post-conviction relief proceeding, he must prove that his attorney's performance was deficient and the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Lawrence v. Armontrout*, 900 F.2d 127, 129 (8th Cir. 1990); *Sanders v. State*, 738 S.W.2d 856, 857 (Mo. banc 1987). First, he must show that

counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 686-689; *Lawrence*, 900 F.2d at 129. To do this, movant must overcome the presumption that trial counsel's challenged acts or omissions were sound trial strategy. *State v. Cunningham*, 863 S.W.2d 914, 921 (Mo. App. E.D. 1993). Second, to establish prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Analysis

The motion court clearly erred in denying Mr. Watson's Rule 29.15 claim wherein he alleged that his trial attorney was ineffective for failing to submit a lesser-included offense instruction for the class B felony of robbery in the second degree, pursuant to § 569.030, and for failing to submit a lesser included offense instruction for the class C felony of stealing, pursuant to either § 570.030.3(1), RSMo. Cum. Supp. 2008 or § 570.030.3(2), RSMo. Cum. Supp. 2008 in relationship to Count I – the class A felony of robbery in the first degree. § 569.020.

Mr. Watson alleged facts, and not conclusions, which were not refuted by the record, and if true, warranted relief. The state of Missouri charged Mr. Watson with one count of the class A felony of Robbery in the First degree and with one count of the unclassified felony of armed criminal action (App. L.F. 19-20). After jury trial, the jury acquitted Mr. Watson of the unclassified felony of armed criminal action, but found him guilty of the class A felony of robbery in the first degree (App. L.F. 41-42). A trial court is required to instruct on the lesser-included offense if the defense requests it, and the

evidence, in fact or by inference, provides a basis for both an acquittal of the greater offense and a conviction of the lesser-included offense. *See Patterson v. State*, 110 S.W.3d 896, 904 (Mo. App. W.D. 2003) (finding trial counsel ineffective for failing to present the court with a properly-worded lesser-included instruction).

An offense is a lesser-included offense when (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged, (2) it is specifically denominated by statute as a lesser degree of the offense charged, or (3) it consists of an attempt to commit the offense charged or to commit an offense otherwise included therein. § 556.046.1. RSMo. Cum. Supp. 2010.

Robbery in the second degree is a lesser-included offense of robbery in the first degree because it is specifically denominated by statute as a lesser degree of the offense. *Brooks v. State*, 51 S.W.3d 909, 914 (Mo. App. W.D. 2001); § 556.046.1(2). Stealing is a lesser-included offense of robbery in the first degree because it may be established by proof of the same or less than all the facts required to establish the commission of robbery in the first degree. *State v. Williams*, 313 S.W.3d 656, 659 (Mo. banc 2010). A person commits robbery in the first degree, pursuant to § 569.020.1(4), when he or she "forcibly steals property and in the course thereof he [or she], or another participant in the crime . . . displays or threatens the use of what appears to be a deadly weapon or dangerous instrument."

A person commits the crime of robbery in the second degree when he or she forcibly steals property. § 569.030. A person commits the class C felony of stealing, if he or she:

> [A]ppropriates property or services of another with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion.

§ 570.030.1, RSMo. Cum. Supp. 2008. Additionally, stealing is a class C felony if the value of the property or services taken is five-hundred dollars, but less than twenty-five thousand dollars, or the actor physically takes the property from the person of the victim. §§ 570.030.3(1) and (2), RSMo. Cum. Supp. 2008. Thus, under both robbery in the first degree and robbery in the second degree, the state must prove that the defendant stole property and used force in doing so. §§ 569.020, 569.030. However, robbery in the first degree requires additional proof that the defendant displayed or threatened the use of what appeared to be a deadly weapon or dangerous instrument. § 569.020.1(4). The class C felony of stealing, simply requires proof that the defendant appropriated property or services of another with the purpose to deprive him or her thereof, and that value of the property or services was in excess of five hundred dollars but less than twenty-five thousand dollars, or that the defendant physically took the property from the person of the victim, but does not require proof of the use of force like robbery in the first and second degree require. §§ 570.030.1; 570.030.3(1) and (2), RSMo. Cum. Supp. 2008.

In making the determination to submit a lesser-included instruction, the trial court should leave to the jury the task of determining the credibility of the witnesses, resolving conflicts in testimony, and weighing evidence. *See State v. Pond*, 131 S.W.3d 792, 794 (Mo. banc 2004). An instruction on the lesser-included offense is required if reasonable jurors could draw inferences from the evidence presented that an essential element of the

greater offense of robbery in the first degree is lacking, such as whether the defendant displayed what appeared to be a dangerous or deadly weapon and/or whether the defendant did in fact used any kind of force to steal, and there is a basis for conviction of the lesser-included offense. *State v. Pond*, 131 S.W.3d at 794; *State v. Santillan*, 948 S.W.2d 574, 576 (Mo. banc 1997). Further, under § 556.046.3, the trial court shall be obligated to instruct the jury with respect to a particular included offense, ". . . only if there is a basis in the evidence for acquitting the defendant of the immediately higher included offense and there is a basis in the evidence for convicting the defendant of that particular included offense." "All decisions as to what evidence the jury must believe and what inferences the jury must draw are left to the jury, not to judges deciding what reasonable jurors must and must not do." *State v. Jackson*, 433 S.W.3d 390 (Mo. Banc 2014).

To side-step *Jackson*, the motion court held that *Jackson* could not be applied to Mr. Watson's case because an attorney's conduct must be determined by what the law is considered at the time of trial (L.F. 100). The motion court cited *State v. Parker* to support this proposition (L.F. 100). 886 S.W.2d 908, 923 (Mo. banc 1994). But in *Parker*, the Missouri Supreme Court was dealing with a jury instruction that was determined to be unconstitutional after Parker's trial in a case that specifically limited its holding to cases tried in the future and cases subject to direct appeal where the issue had been preserved. *Parker*, 886 S.W.2d at 928 (citing *State v. Erwin*, 848 S.W.2d 476, 481-484 (Mo. banc 1993). Here, *Jackson* had no such limitation. *Jackson*, 433 S.W.3d at 392. In fact, *Jackson* can best be characterized as the Missouri Supreme Court

reaffirming already existing law established by such cases as *State v. Williams*, 313 S.W.3d 656, 659 (Mo. banc 2010), *State v. Santillan*, 948 S.W.2d 574 (Mo. banc 1997), and *State v. Pond*, 131 S.W.3d 792, 794 (Mo. banc 2004). All of these cases were decided before Mr. Watson's October 18-19, 2011 trial (App. L.F. 24-25). Thus, *Jackson* can best be described as a restatement of already existing law. Further, the Missouri Supreme Court just upheld *Jackson* in *State v. Anwar Randle* and *State v. Brandon Roberts*. *State v. Randle*, 2015WL4627381; *State v. Roberts*, 2015WL4627393. Mr. Roberts was tried on January 24, 2013; prior to the *Jackson* decision. *See Substitute Brief of Respondent* at 8, *State v. Roberts*, 2015WL4627393. Mr. Randle was tried on August 20, 2012; again, prior to the *Jackson* decision. *See Substitute Brief of Respondent* at 6, *State v. Randle*, 2015WL4627381. Thus, this aspect of the motion court's findings of fact and conclusions of law is clearly erroneous. *Jackson* applies to Mr. Watson's case.

The motion court went on to hold that under the evidence presented at Mr. Watson's trial, an instruction on the lesser-included offenses of robbery in the second degree or the class C felony of stealing would not have been warranted because there was evidence he used or threatened to use a deadly weapon or dangerous instrument in the course of the robbery (L.F. 101).

This finding is clearly erroneous. Because the jury could have found that Mr. Watson did not display what appeared to be a dangerous instrument or deadly weapon, but did use force in stealing the money, the submission of the lesser included robbery in the second degree was warranted. Additionally, because the jury could have found that Mr. Watson did not use force in stealing the money, but did in fact steal over five

hundred dollars in money and/or physically took the property from the person of the victim, the submission of the lesser included class C felony of stealing was warranted.

Here, Mr. Watson alleged that a reasonably competent attorney under the same or similar circumstances would have requested the submission of a lesser-included offense instruction on robbery in the second degree: the evidence provided a basis for the jury to acquit Mr. Watson of the class A felony of robbery in the first degree, and to convict Mr. Watson of the class B Felony of robbery in the second degree (Supp. L.F. 13). Additionally, Mr. Watson alleged that a reasonably competent attorney under the same or similar circumstances would have requested the submission of a lesser-included offense instruction on the class C felony of stealing: the evidence provided a basis for the jury to acquit Mr. Watson of the Class A felony of robbery in the first degree, and to convict Mr. Watson of the class C felony of stealing (Supp. L.F. 13).

Reasonable jurors could have concluded that Mr. Watson did not actually display or threaten to use a gun, or that the object that Mr. Watson displayed (or threatened to use) did not reasonably appear to Ms. Shull or Ms. Anderson to be a gun. *State v. Jackson*, 433 S.W.3d 390, 397 (Mo. banc 2014). Likewise, reasonable jurors could have concluded that Mr. Watson did not use force when stealing the money. *State v. Williams*, 313 S.W.3d at 660.

Consequently, under the circumstances, it would have been reasonable for trial counsel to request the submission an instruction on the lesser-included offense of assault in the third degree based on MAI-CR 3d 319.16. The defendant is entitled to an

instruction on any theory the evidence establishes. *State v. Hopson*, 891 S.W.2d 851, 852 (Mo. App. E.D. 1995); *Hibler*, 5 S.W.3d at 150.

As to Count I, that instruction for robbery in the second degree would have read as follows:

> As to Count I, if you do not find the defendant guilty of robbery in the first degree as submitted in Instruction No. 5, you must consider whether he is guilty of robbery in the second degree.
>
> As to Count I, if you find and believe from the evidence beyond a reasonable doubt:
>
> As to Count I, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, That on or about July 11, 2009, in the City of St. Louis, State of Missouri, the defendant took U.S. Currency which was property in the possession of Check N Go, and
>
> Second, that defendant did so for the purpose of withholding it from the property owner permanently, and
>
> Third, that defendant in doing so used physical force or threatened the use of physical force against Yelena Shull for the purpose of forcing Yelena Shull to deliver up the property,
>
> Then you will find defendant guilty under Count I of robbery in the second degree. However, unless you find and believe from the

evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense. (Based on MAI-CR.3d 323.04). As to Count I, that instruction for felony stealing would have read as follows:

> As to Count I, if you do not find the defendant guilty of robbery in the second degree as submitted in Instruction No. ___, you must consider whether he is guilty of stealing under this instruction.
>
> As to Count I, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or about July 11, 2009, in the City of St. Louis, State of Missouri, the defendant took U.S. Currency owned by Check N Go, and
>
> Second, that the defendant did so without the consent of Check N Go, and
>
> Third, that defendant did so for the purpose of withholding it from the owner permanently, and
>
> Fourth, that the property obtained had a combined value of at least five-hundred dollars . . . OR . . . that the property was physically taken from the person of Yelena Shull,
>
> then you will find the defendant guilty under Count I of felony stealing under this instruction.

> However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

(Based on MAI-CR.3d 324.02.1)

Mr. Watson alleged that a reasonably competent attorney would have requested the submission of such instructions on the lesser-included offenses of robbery in the second degree and felony stealing (Supp. L.F. 16). Mr. Watson alleged that a conviction of the class B felony of robbery in the second degree would have exposed him to a maximum punishment of 15 years in the Missouri Department of Corrections, rather than to a maximum of life (thirty years) for the class A felony of robbery in the first degree and a maximum sentence of seven years in the Missouri Department of Corrections for the class C felony of stealing (Supp. L.F. 16). §§ 569.020.2; 569.030.2; 570.030.3(1) and (2), RSMo. Cum. Supp. 2008; 557.016; 558.011.1.

Mr. Watson alleged that, under these circumstances, trial counsel could only have helped Mr. Watson's position by requesting the submission of a lesser-included offense instruction on either robbery in the second degree and/or felony stealing (Supp. L.F. 16). Mr. Watson alleged that no reasonable trial strategy reason justified the failure of trial counsel to do so (Supp. L.F. 16). Although it is possible that trial counsel had would not have testified as anticipated and would have testified that he had a reasonable trial strategy for not requesting the lesser-included instructions, such a determination is appropriate only after trial counsel testifies to facts supporting such a conclusion at an

evidentiary hearing. Thus, the motion court's findings of fact and conclusions of law denying Mr. Watson's claim without an evidentiary hearing was clearly erroneous.

Mr. Watson alleged that trial counsel did not act as reasonably competent counsel would have acted and prejudiced Mr. Watson (Supp. L.F. 16). Mr. Watson alleged that, if granted an evidentiary hearing, he was willing and available to testify that he trusted trial counsel to request all instructions relevant to his defense, including lesser-included offense instructions if applicable (Supp. L.F. 16-17). Mr. Watson alleged that he would testify that trial counsel never advised him that he could submit a lesser-included offense instruction (Supp. L.F. 17).

Also, Mr. Watson alleged that, if granted an evidentiary hearing, trial counsel would testify that he did not request the submission of an instruction on the lesser-included offenses of robbery in the second degree and/or felony stealing, and that he had no reasonable trial strategy reason for failing to do so (Supp. L.F. 17). Mr. Watson alleged that, given trial counsel's defense theory, the submission of a lesser included instruction for robbery in the second degree and/or felony stealing would have been appropriate (Supp. L.F. 17). Mr. Watson alleged that expected the testimony of trial counsel to show the unreasonableness of his failure to request the submission of an instruction on the lesser-included offense of assault in the third degree (Supp. L.F. 17).

Mr. Watson further alleged that, had trial counsel requested the submission of an instruction on the lesser-included offense of assault in the third degree, there is a reasonable probability that the trial court would have submitted them (Supp. L.F. 17). If the evidence shows a lack of an essential element of the greater offense, and the lack of

this essential element authorizes not only acquittal of the greater offense but conviction of the lesser, then instruction on the lesser-included offense is required. *State v. Pond*, 131 S.W.3d 792, 794 (Mo. banc 2004); *State v. Crane*, 728 S.W.2d 656, 658 (Mo. App. S.D. 1987).

"If the evidence supports differing conclusions, the judge must instruct on each." *State v. Williams*, 313 S.W.3d 656, 659-660 (Mo. banc 2010) (citing *Pond*, 131 S.W.3d at 794). "[T]he trial court should resolve any doubts in favor of instructing on the lower degree of the crime, leaving it to the jury to decide of two or more grades an offense, if any, the defendant is guilty." *State v. Edwards*, 980 S.W.2d 75, 76 (Mo. App. E.D. 1998) (citing *State v. Santillan*, 948 S.W.2d 574, 577 (Mo. banc 1997)).

Here, as stated in the preceding paragraphs, the evidence provided a basis for acquittal of Mr. Watson of robbery in the first degree, possibly conviction of robbery in the second degree, but also the lesser-included offense of robbery in the second degree and would have also provided a basis for his conviction of the lesser-included offense of felony stealing. Reasonable jurors could draw inferences from the evidence presented at trial that Mr. Watson did not use force, but did take more than five-hundred dollars from Check N Go or physically took the money from Yelena Shull. Thus, if requested, the trial court would have been *required* to submit a lesser-included offense instruction on robbery in the second degree and felony stealing.

Consequently, Mr. Watson alleged sufficient facts, and not conclusions, not refuted by the record, and of true, demonstrate that trial counsel was ineffective and, but for trial counsel's ineffectiveness, the outcome of Mr. Watson's trial would have been

different. In fact, it would appear that the jury believed that no gun was used in the incident as they acquitted Mr. Watson of armed criminal action (App. L.F. 42). Mr. Watson also alleged that, if granted an evidentiary hearing, he expected trial counsel to testify that the jury sent down a question about how it was they could convict Mr. Watson of robbery in the first degree if there was no gun (Supp. L.F. 18-19). Mr. Watson alleged that, based on this evidence, he would demonstrate that, if given the opportunity to convict Mr. Watson of either robbery in the second degree or felony stealing, the jury would likely have done so (Supp. L.F. 19).

Because Mr. Watson alleged facts, and not conclusions, which were not refuted by the record, and if true, warrant relief, Mr. Watson alleged sufficient facts to justify an evidentiary hearing. Thus, the motion court's findings of fact and conclusions of law denying Mr. Watson's Rule 29.15 claim without an evidentiary hearing are clearly erroneous, and denied Mr. Watson's right to effective assistance of counsel, right to due process of law, right to a fair trial, and right to present a defense in violation of his constitutional rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10 14, and 18(a) of the Missouri Constitution. This Court should reverse and remand for an evidentiary hearing, or in the alternative, sustain Mr. Watson's motion, vacate his conviction and sentence for robbery in the first degree in relation to Count I, and grant him a new trial.

CONCLUSION

WHEREFORE, based on the Argument portion of Mr. Watson's brief, Mr. Watson requests that this Court find that his *pro se* motion pursuant to Rule 29.15 was

timely, or in the alternative reverse and remand for a hearing on the matter, and that this Court reverse the motion court's findings of fact and conclusions of law and remand for an evidentiary hearing, or in the alternative remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I, Matthew W. Huckeby, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 12,148 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 22nd day of June, 2016, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were placed for delivery through the Missouri e-Filing System to Shaun Mackelprang, Assistant Attorney General, at Shaun.Mackelprang@ago.mo.gov.

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