

**IN THE SUPREME COURT  
OF MISSOURI**

<b>DANIEL K. McKAY,</b>	)	
<b>Appellant,</b>	)	
	)	
<b>vs.</b>	)	<b>Case No. SC95909</b>
	)	
<b>STATE OF MISSOURI,</b>	)	
<b>Respondent.</b>	)	

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**APPEAL TO THE SUPREME COURT OF MISSOURI  
FROM THE ST. CHARLES COUNTY CIRCUIT COURT  
THE HONORABLE NANCY L. SCHNEIDER,  
JUDGE AT TRIAL AND POST-CONVICTION PROCEEDINGS**

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**APPELLANT'S SUBSTITUTE STATEMENT, BRIEF, AND ARGUMENT**

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## JURISDICTIONAL STATEMENT

On March 14, 2012, Appellant Daniel K. McKay was found guilty of selling a controlled substance, a class B felony violating Mo. Rev. Stat. § 195.211 (Counts I and II); and unlawfully possessing a concealable firearm, a class C felony violating Mo. Rev. Stat. § 571.070 (Cum. Supp. 2009) (Count III), after a jury trial before the Hon. Nancy L. Schneider, 11<sup>th</sup> Judicial Circuit.

On May 21, 2012, Mr. McKay was sentenced as a prior drug offender under Mo. Rev. Stat. §§ 195.275.1(1), .291.1 (2000) to twenty (20) years' imprisonment in Missouri Department of Corrections' (DOC) custody in Count I; twenty (20) years' imprisonment in DOC custody in Count II; and seven years' imprisonment in DOC custody in Count III; all sentences to run concurrently.

Mr. McKay appealed his convictions and sentences to the Court of Appeals in State v. Daniel K. McKay, 411 S.W.3d 295 (Mo. App. E.D. 2013). On September 10, 2013, the Missouri Court of Appeals, Eastern District, affirmed in part and remanded in part and issued its mandate on November 14, 2013. The Court of Appeals remanded the cause to the trial court to conduct an evidentiary hearing on whether Mr. McKay's speedy trial right was violated and to assess whether Mr. McKay had been prejudiced by that violation. Id. at 303.

After the mandate was issued, Mr. McKay filed a *pro se* Motion for Post-Conviction Relief under Rule 29.15 on February 5, 2014 because the Court of Appeals had affirmed the trial court's judgments in part. Id. at 306.

On January 10, 2014, the trial court held an evidentiary hearing as ordered by the Court of Appeals. On January 31, 2014, the court decided 1) Mr. McKay's right to a speedy trial had not been violated; and 2) the state rebutted the presumption of prejudice from the delay.

Mr. McKay appealed the trial court's decision to the Court of Appeals in State v. Daniel K. McKay, No. ED101042 (Mo. App. E.D. 2015). On April 7, 2015, the Court affirmed the Circuit Court's judgments and sentences and issued its mandate on May 5, 2015.

After the second direct appeal had concluded, Mr. McKay filed a *pro se* Motion for Post-Conviction Relief under Missouri Supreme Court Rule 29.15 on May 26, 2015 in Cause No. 1511-CC00453. The motion court appointed the State Public Defender's Office, Appellate/PCR Division, to represent Mr. McKay on June 1, 2015.

On August 28, 2015, the court dismissed Mr. McKay's request for post-conviction relief.

Mr. McKay filed a Notice of Appeal on October 7, 2015. He was also granted leave to file his appeal as a poor person.

In Cause No. ED103549, on June 28, 2016, the Court of Appeals decided the motion court had clearly erred in dismissing Mr. McKay's *pro se* motion for post-conviction relief. The state filed an Application for Transfer, which was

granted on November 1, 2016. Thus, jurisdiction lies in this Court. Mo. Const. Art. V, § 10 (2000); Mo. Sup. Ct. Rules 83.04, .09.<sup>1</sup>

\* \* \* \* \*

Sources will be cited as follows: trial transcript – “Tr.”; legal file in underlying criminal cause from first direct appeal – “L.F.”; transcript of the evidentiary hearing ordered by the Court of Appeals – “2Tr.”; legal file in underlying criminal cause from second direct appeal – “2L.F.”; and legal file on appeal of post-conviction proceeding – “PCR L.F.”

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<sup>1</sup>All further statutory references are to Mo. Rev. Stat. Cum. Supp. 2009, unless otherwise indicated.

## STATEMENT OF FACTS

On May 27, 2010, Appellant Daniel K. McKay was charged by the St. Charles Prosecuting Attorney's Office with selling a controlled substance on May 25, 2010 and selling a controlled substance and unlawfully possessing a concealable firearm on May 26, 2010 (L.F. 13-14).

At the time, Mr. McKay was on probation in Pike County, MO in Cause No. 04P3-CR00198-01. [http: //casenet.com](http://casenet.com). He was arrested on a probation violation warrant on July 22, 2010. [http: //casenet.com](http://casenet.com). Because of the St. Charles County charges, Mr. McKay's probation was revoked on December 13, 2010 and he was sent to DOC (2Tr. 4-5). [http: //casenet.com](http://casenet.com).

Because Mr. McKay was incarcerated in DOC, he failed to appear in the St. Charles County Circuit Court in the underlying criminal cause. State v. Daniel K. McKay, 411 S.W.3d at 297. The Circuit Court issued a warrant because Mr. McKay failed to appear, but the warrant was mistakenly issued as a probation violation warrant instead of as a warrant on an untried complaint. Id.

Concerned about the pending St. Charles Complaint, Mr. McKay tried to file a request for a final disposition of detainers under the Uniform Mandatory Disposition of Detainers Act (UMDDL).<sup>2</sup> Id. He attempted to file it with the St. Charles County Circuit Court and Prosecuting Attorney's Office by giving it to DOC's Records Office on January 20, 2011. Id. The records officer, however, refused to forward it to the Circuit Court and Prosecuting Attorney's Office

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<sup>2</sup> Mo. Rev. Stat. §§ 217.490-.520 (2000).

because the arrest warrant stated that it had been issued because of a probation violation, not pending charges. Id.

Mr. McKay filed a motion to dismiss the charges against him because the state had failed to try his case within one hundred eighty (180) days after he had filed a request for disposition of detainers (L.F. 19-21).

Three hundred and sixty-four (364) days after Mr. McKay filed the request for disposition with the Records Office, the Office advised Mr. McKay it realized the arrest warrant had in fact been filed in connection with new charges. Id. at 298. The Department filed Mr. McKay's request for a final disposition of detainers with the St. Charles County Circuit Court and the Prosecuting Attorney's Office on January 20, 2012. Id.

Mr. McKay was subsequently convicted after a jury trial of the charged offenses (L.F. 58-60).

On direct appeal, Mr. McKay argued the trial court had erred when it overruled the Motion to Dismiss. Brief for Appellant at 13-22, State v. Daniel K. McKay, 411 S.W.3d 295 (Mo. App. E.D. 2015). The Court of Appeals affirmed in part and remanded in part. Id. at 303, 306. The Court issued its mandate on November 14, 2013. <http://casenet.com>.

After the mandate had been issued, Mr. McKay filed a *pro se* motion for post-conviction relief under Rule 29.15 on February 5, 2014 in St. Charles County Cause No. 1411-CC00114. <http://casenet.com>.

On direct appeal, the Court of Appeals remanded the underlying cause for the trial court to conduct an evidentiary hearing on whether Mr. McKay's constitutional right to a speedy trial under the UMDDL had been violated. State v. Daniel K. McKay, 411 S.W.3d at 306.

The evidentiary hearing was held on January 10, 2014 (2Tr. 1). Counsel called Mr. McKay (2Tr. 4).

Mr. McKay testified about the effect of being incarcerated (2Tr. 4-15). He had been incarcerated for three years at that point (2Tr. 4). Before his arrest, Mr. McKay was living with his girlfriend in a rented home, making car payments, and earning an income (2Tr. 5-6). Because of his incarceration, Mr. McKay could not contribute to the rent, and his girlfriend lost the apartment (2Tr. 5). Because Mr. McKay could not make payments on the car, it was returned to the finance company (2Tr. 5-6).

Mr. McKay testified he had had only seen his six-year-old son three times while incarcerated (2Tr. 6). Before his arrest, he had been with him every day (2Tr. 7). While incarcerated, he was unable to financially support his son (2Tr. 7). He only saw his mother, whom he had seen every day when not incarcerated, once a month after being incarcerated (2Tr. 6).

Mr. McKay was also unable to attend the funerals of family members who died while he was incarcerated (2Tr. 7).

The untried St. Charles County charges also made his DOC incarceration resulting from the Pike County case more difficult (2Tr. 7-10). When Mr.

McKay's Pike County probation was revoked and he was returned to DOC, he was not allowed to attend GED classes because of the pending St. Charles County charges (2Tr. 8). The stress from the pending cases kept Mr. McKay from being able to sleep (2Tr. 8). He was worried he would be sentenced to life imprisonment because the state mistakenly classified the pending charges as class A felonies in an Amended Information (2Tr. 8; L.F. 29-31). Mr. McKay was eventually prescribed Trazodone for his anxiety and to help him sleep (2Tr. 9).

Mr. McKay also needed medication for a prior injury (2Tr. 9-10). But the Department of Corrections many times did not send his medication with him when he was transported to the St. Charles County Jail for hearings in the underlying criminal case (2Tr. 10, 15).<sup>3</sup>

After holding the evidentiary hearing, the trial court decided 1) Mr. McKay's right to a speedy trial had not been violated; and 2) the state had rebutted the presumption of prejudice (2L.F. 48).

Mr. McKay appealed that order to the Court of Appeals on direct appeal (2L.F. 49-51). The Court decided Mr. McKay's ability to present a defense had not been prejudiced. State v. Daniel K. McKay, No. ED101042, memo. at 9-10 (Mo. App. E.D. April 7, 2015)[hereinafter Memorandum]. Because of that, the

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<sup>3</sup> Undersigned counsel thanks Mr. McKay's second direct appeal attorney, Margaret Johnston, for agreeing to her borrowing liberally from the Statement of Facts in the second direct appeal brief.

trial court had not erred in deciding Mr. McKay's right to a speedy trial had not been violated. Memorandum at 10. The Court of Appeals affirmed the trial court's judgment and issued its mandate on May 5, 2015. Memorandum at 10; <http://casenet.com>.

Mr. McKay filed a *pro se* motion for post-conviction relief under Rule 29.15 on May 26, 2015 (PCR L.F. 4-9). He asked for post-conviction relief because 1) DOC did not allow him to file a Motion for Disposition of Detainers because the St. Charles County Prosecuting Attorney's Office had incorrectly filed a detainer for a probation violation warrant, instead of for an untried complaint; and 2) counsel had not called the witnesses Mr. McKay had asked her to call (PCR L.F. 5).

Counsel was appointed to represent Mr. McKay on June 1, 2015 (PCR L.F. 10). The court granted counsel an additional thirty (30) days to file an amended motion (PCR L.F. 1-2). An amended motion would have been due to be filed on August 31, 2015.<sup>4</sup> Rule 29.15(g).

On August 28, 2015 the motion court granted the state's motion to dismiss the underlying post-conviction case, No. 1511-CC00453 (PCR L.F. 11). The court

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<sup>4</sup> The thirtieth (30<sup>th</sup>) day after the sixtieth (60<sup>th</sup>) day would have been Sunday, August 30; therefore, the amended motion would have been due to be filed on Monday, August 31. Rule 44.01(a).

decided Mr. McKay's *pro se* motion was successive because he listed "arguments that should have been made in 1411-CC00114" (PCR L.F. 11).

Further facts will be stated as necessary in the Argument section.

## POINT RELIED ON

**The motion court clearly erred in dismissing Appellant Daniel K. McKay's Rule 29.15 *pro se* motion for post-conviction relief because he was denied his due-process right<sup>5</sup> in that his *pro se* motion was not successive. It was not successive because 1) the second direct appeal and the evidentiary hearing intervened; 2) Mr. McKay's *pro se* motion was directed to claims relative to the hearing on remand; and 3) the motion court dismissed his case before an amended motion was due.**

Zeigenbein v. State, 364 S.W.3d 802 (Mo. App. S.D. 2012)

Turpin v. State, 223 S.W.3d 175 (Mo. App. W.D. 2007)

Kniest v. State, 133 S.W.3d 70 (Mo. App. E.D. 2003)

Bain v. State, 59 S.W.3d 625 (Mo. App. E.D. 2001)

U.S. Const., Amends. V, VI, XIV;

Mo. Const., Art. I, §§ 10, 18;

Mo. Sup. Ct. Rule 24.035;

Mo. Sup. Ct. Rule 29.15; and

Mo. Rev. Stat. § 217.490 (2000).

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<sup>5</sup> These rights are guaranteed by the United States Constitution, Fifth and Fourteenth Amendments, and the Missouri Constitution, Article I, § 10.

## ARGUMENT

**The motion court clearly erred in dismissing Appellant Daniel K. McKay's Rule 29.15 *pro se* motion for post-conviction relief because he was denied his due-process right<sup>6</sup> in that his *pro se* motion was not successive. It was not successive because 1) the second direct appeal and the evidentiary hearing intervened; 2) Mr. McKay's *pro se* motion was directed to claims relative to the hearing on remand; and 3) the motion court dismissed his case before an amended motion was due.**

### *Preservation Statement*

In State v. Daniel K. McKay, 411 S.W.3d 295 (Mo. App. E.D. 2013), the Court of Appeals remanded the underlying criminal cause for the trial court to conduct an evidentiary hearing to determine if Mr. McKay's right to a speedy trial under § 217.490 (2000) was violated (2L.F. 33). An evidentiary hearing was held on January 10, 2014 (2L.F. 42). After the hearing, the trial court decided the presumption of prejudice from the delay in trying the case had been rebutted by the state (2L.F. 48).

Mr. McKay appealed that decision to the Court of Appeals (2L.F. 49-51). The Court affirmed the trial court's judgment. State v. Daniel K. McKay, No.

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<sup>6</sup> These rights are guaranteed by the United States Constitution, Fifth and Fourteenth Amendments, and the Missouri Constitution, Article I, § 10.

ED101042 (Mo. App. E.D. April 7, 2015). After the affirmance, Mr. McKay filed a *pro se* motion under Rule 29.15 (PCR L.F. 4-9).

### ***Review Standard***

This Court will reverse a motion court's disposition of a Rule 29.15 motion if the court's findings of fact and conclusions of law are clearly erroneous. Rule 29.15(k); Lenoir v. State, 475 S.W.3d 139, 141 (Mo. App. E.D. 2014)(citing Jones v. State, 394 S.W.3d 475, 476 (Mo. App. E.D. 2013)). This Court will find error if it is left with a definite and firm belief that a mistake has been made. Lenoir v. State, 475 S.W.3d at 141(citing Barnes v. State, 364 S.W.3d 765, 766 (Mo. App. E.D. 2012)).

### ***The court clearly erred in dismissing Mr. McKay's pro se motion***

### **General Case Law**

The United States Constitution's Sixth Amendment – as applied to the states through the Missouri Constitution's Fourteenth Amendment and Article I, Sections 10 and 18(a) – guarantees defendants in state criminal proceedings the right to effective assistance of counsel. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963). This right is designed to assure fairness, and thus to give legitimacy to the adversarial process. Id. To ensure a fair trial, the right to counsel must be the right to “effective” assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2594 (1986); McMann v. Richardson, 397 U.S. 759, 90 S. Ct. 1441 (1970).

When a criminal defendant seeks post-conviction relief claiming ineffective assistance of counsel, he must establish first, that his counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would display when rendering similar services under similar circumstances, and second, that he was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Seales v. State, 580 S.W.2d 733, 736-737 (Mo. banc 1979). A person establishes prejudice when he or she demonstrates “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, 104 S. Ct. at 2068. A “reasonable probability” is “a probability sufficient to undermine confidence in the outcome.” Id.

### **Analysis**

Rule 29.15(l) prohibits successive motions for post-conviction relief. A motion is successive if it follows an earlier motion addressing the same conviction. Zeigenbein v. State, 364 S.W.3d 802, 804 (Mo. App. S.D. 2012)(citing Turpin v. State, 223 S.W.3d 175, 176 (Mo. App. W.D. 2007)); Kniest v. State, 133 S.W.3d 70, 71 (Mo. App. E.D. 2003).

Successive motions are prohibited to avoid delay in processing prisoners’ claims and to prevent litigating stale claims. Burston v. State, 343 S.W.3d 691, 695 (Mo. App. E.D. 2011)(citations omitted). To that end, in post-conviction *pro se* motions, movants are required to state that they have listed every claim known to

them for vacating, setting aside or correction the conviction and sentence attacked in the motion (PCR L.F. 8).

The motion court clearly erred in dismissing Mr. McKay's second *pro se* motion as successive on the because it had not followed upon the first *pro se* motion. In Kniest, the movant had requested post-conviction relief under Rule 24.035. 133 S.W.3d at 71. The motion court granted resentencing in part and denied in part. Id.

After Mr. Kniest was resentenced, he filed a second *pro se* post-conviction motion. Id. He alleged that – at the resentencing – the state had failed to present evidence of prior convictions necessary to sentence him as a prior/persistent offender. Id. The motion court dismissed the second motion as successive. Id.

The Court of Appeals reversed. Id. at 72. It decided Mr. Kniest's second *pro se* motion had not been successive because it had not followed upon the earlier post-conviction motion. Id. at 71. After Mr. Kniest had filed the first post-conviction motion, the resentencing hearing had intervened. Id.

Similarly, in Bain v. State, the Court of Appeals decided that a second post-conviction motion had not been successive. 59 S.W.3d 625, 628 (Mo. App. E.D. 2001). Mr. Bain had been convicted after trial, but counsel had not filed a Notice of Appeal or requested leave to file a late Notice. Id. at 626. Because of that, he could not file a direct appeal. Id.

Mr. Bain argued, in an amended post-conviction motion, that counsel had been ineffective for failing to appeal his convictions. Id. The motion court

agreed, and resentenced Mr. Bain so he could file a Notice of Appeal. Id. Mr. Bain's convictions were affirmed on direct appeal. Id.

After the direct appeal was concluded, Mr. Bain filed a second *pro se* motion for post-conviction relief. Id. In it, he alleged several grounds for relief he had asserted in his first *pro se* motion. Id. The motion court dismissed the *pro se* motion without appointing counsel. Id. The court decided the second *pro se* motion was "untimely filed and moot." Id.

The Court of Appeals decided that the motion court had clearly erred in dismissing Mr. Bain's second *pro se* motion. Id. at 628. It also remanded so counsel could be appointed. Id. The Court decided Mr. Bain could assert "claims of error with respect to his resentencing, or ineffective assistance of appellate counsel in his timely-filed direct appeal." Id.

The Court decided the second *pro se* motion had not been successive because it did not follow on the earlier post-conviction motion. Id. at 627. Instead, it followed on the resentencing and the direct appeal because those events had intervened after the first post-conviction motion had been filed. Id.

The conclusion from both Kniest and Bain is that second *pro se* motions are not successive if they follow, not upon a first post-conviction motion, but upon an intervening event such as a resentencing hearing or a direct appeal.

Here, Mr. McKay's second *pro se* motion did follow upon a direct appeal. After the trial court conducted the hearing required by the Court of Appeals after Mr. McKay's first direct appeal, the trial court decided 1) Mr. McKay's right to a

speedy trial had not been violated; and 2) the state had rebutted the presumption of prejudice (2L.F. 48).

Mr. McKay appealed that order to the Court of Appeals (2L.F. 49-51). That Court decided Mr. McKay's ability to present a defense had not been prejudiced. Memorandum at 9-10. Because of that, the trial court had not erred in deciding Mr. McKay's right to a speedy trial had not been violated. Memorandum at 10. The Court of Appeals affirmed the trial court's judgment and issued its mandate on May 5, 2015. Memorandum at 10; <http://casenet.com>. Therefore, the second direct appeal intervened between the filing of the first and second *pro se* motions. Thus, Mr. McKay's second *pro se* motion was not successive.

Mr. McKay's second *pro se* motion was also not successive because the evidentiary hearing ordered by the Court of Appeals in the first direct appeal intervened between the filing of the first and second *pro se* motions. Mr. McKay argues that the evidentiary hearing was sufficiently substantive to qualify as an intervening event between the first and second *pro se* motions. He does not argue that the evidentiary hearing was a resentencing hearing. Brief for Appellant at 19, Daniel McKay v. State, No. ED103549 (Mo. App. E.D. 2016).

But it was more substantive than what occurred between the filing of the first and second *pro se* motions in Zeigenbein v. State and Turpin v. State, where the second *pro se* motions were held successive. 364 S.W.3d at 805; 223 S.W.3d at 176. In Zeigenbein, the only thing that occurred between the filing of the first and second *pro se* motions was the filing of an Amended Judgment that changed

the description of an offense from “forcible” to “statutory” sodomy. 364 S.W.3d at 803. In Turpin, nothing seems to have occurred between the filing of the first and second *pro se* motions. 223 S.W.3d at 176.

In contrast, between the filing of the first and second *pro se* motions in Mr. McKay’s case, the trial court held the evidentiary hearing ordered by the Court of Appeals. At that hearing, Mr. McKay was present (2Tr. 1). Trial counsel introduced documents and testimonial evidence (2Tr. 3, 4-20). The state also adduced testimonial evidence (2Tr. 22-28). Therefore, Mr. McKay’s evidentiary hearing was more akin to the resentencing hearings in Kniest and Bain than to the filing of an Amended Judgment in Zeigenbein and nothing occurring in Turpin. Thus, Mr. McKay’s second *pro se* motion was not successive because the evidentiary hearing intervened between the filing of the first and second *pro se* motions.

The Respondent argued in its Application for Transfer that the Court of Appeals basing its decision on Kniest “conflicts with the existing law and creates a question of general interest and importance” because Kniest is “inapplicable” in that Kniest concerned a resentencing hearing, which did not occur here. Respondent’s Application for Transfer at 4-5, Daniel McKay v. State, No. SC95909 (Mo. banc filed August 30, 2016).

The Respondent ignores the fact that the Court of Appeals did not hold that Kniest was controlling precedent. Instead the Court ruled, “[W]e find the remand evidentiary hearing here *similar* to the re-sentencing in Kniest.” Slip op. at

6(material in brackets and emphasis added). The Court found it similar because Mr. McKay “could only raise claims related to the remand hearing in a second post-conviction motion, not in his first post-conviction motion prior to the remand hearing’s occurrence.” Slip op. at 6.

The Respondent also ignores the fact that the Court of Appeals may have discussed Kniest because neither Mr. McKay nor Respondent could cite in their briefs any prior cases involving hearings to determine prejudice after the state failed to try a defendant within one-hundred-eighty (180) days of the defendant’s filing a Request for Disposition of Detainers under the UMDDL.

Secondly, the second *pro se* motion should not have been dismissed as successive because it was directed to claims relative to the evidentiary hearing on remand. The Court of Appeals had ruled in Kniest that the second *pro se* motion was not successive because it was “directed to claims relative to the re-sentencing.” 133 S.W.3d at 71.

In his second *pro se* motion, Mr. McKay listed the following as the claims known to him for vacating, setting aside or correcting his convictions and sentences: 1) DOC did not allow him to file a Motion for Disposition of Detainers because the St. Charles County Prosecuting Attorney’s Office had incorrectly filed a detainer for a probation violation warrant, instead of for an untried complaint; and 2) counsel had not called the witnesses Mr. McKay had asked her to call (PCR L.F. 5). The first issue was relative to the hearing on remand because it stemmed from Mr. McKay’s having invoked his right to a speedy trial under the UMDDL,

which was the issue at the hearing. The second issue would have been relative because it may have referred to counsel's not calling witnesses at the hearing on remand. Therefore, the second *pro se* motion was directed to claims relative to the hearing on remand. Thus, the motion court clearly erred in dismissing Mr. McKay's *pro se* motion as successive.

Thirdly, the motion court clearly erred in dismissing Mr. McKay's *pro se* motion as successive because the court dismissed the post-conviction before an amended motion was due. In an amended motion, counsel could have raised issues relative to the hearing on remand, including claims of ineffective assistance both of trial counsel at the hearing and appellate counsel on direct appeal. For example, the movant in Chappel v. State had been granted a second sentencing hearing. 319 S.W.3d 494, 495 (Mo. App. E.D. 2010). At the hearing, he presented evidence he had a mental disease or defect and was given a reduced sentence. Id. In exchange for the second sentencing, Mr. Chappel dismissed his first post-conviction motion. Id.

After the second sentencing, Mr. Chappel again filed a *pro se* post-conviction motion. Id. He was appointed post-conviction counsel who filed an amended motion. Id. The amended motion did not challenge the second sentencing. Id. Instead, it challenged Mr. Chappel's waiving his first post-conviction motion. Id. The Court of Appeals decided such a claim was not cognizable under Rule 24.035 because it did not allege any error with regard to his sentence or conviction on the grounds enumerated in Rule 24.035. Id. at 496. The

Court ruled that Mr. Chappel through counsel could have challenged his second sentence in the second amended motion. Id.

Mr. McKay did not have that chance, though, because the motion court dismissed his case before an amended motion was due. Because of that, the motion court clearly erred in dismissing the *pro se* motion.

For the reasons cited above, the motion court clearly erred in dismissing Mr. McKay's *pro se* post-conviction relief motion, thus violating his rights under the United States Constitution, Fifth and Fourteenth Amendments, and the Missouri Constitution, Article I, § 10. Mr. McKay therefore requests this Court reverse the motion court's dismissal and remand this cause with directions that the underlying post-conviction cause be reinstated.

## CONCLUSION

WHEREFORE, for the reasons set forth, Appellant Daniel McKay requests this Court reverse the motion court's dismissal and remand this cause with directions that the underlying post-conviction cause be reinstated.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

Under Missouri Supreme Court Rules 84.06(g) and 83.08(c), I hereby certify that on this 30<sup>th</sup> day of November, 2016, a copy of this Substitute Brief was served via the Court's electronic filing system to Assistant Attorney General Dora Fichter, Attorney General's Office, P.O. Box 899, Jefferson City, MO 65102 at Dora.Fichter@ago.mo.gov.

/s/ Lisa M. Stroup  
Lisa M. Stroup

### **CERTIFICATE OF COMPLIANCE**

Under Mo. Sup. Ct. Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed the limitations of 31,000 words for a Substitute Brief in this Court. The word-processing software identified that this brief contains 6,130 words. It is in text-searchable PDF form.

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