

No. SC96315

In the
Supreme Court of Missouri

DAVID GLENN LATHAM,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

**Appeal from Jasper County Circuit Court
Twenty-Ninth Judicial Circuit
The Honorable Gayle L. Crane, Judge**

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Appellant (Defendant) appeals from a Jasper County Circuit Court judgment overruling his Rule 24.035 motion for postconviction relief in which he sought to set aside his guilty plea to one count of second-degree trafficking and resulting 15-year suspended sentence. There are several issues involved in this appeal: (1) whether the motion court had authority to adjudicate the postconviction claim of ineffective assistance Defendant raised in this appeal when that claim was asserted in a pro se amended motion filed after the deadline for filing an amended motion had expired but within ten days after appointed counsel had filed a statement in lieu of an amended motion; (2) whether this claim was properly pleaded in the amended motion and whether the claim asserted on appeal was the same one raised in the amended motion; and (3) whether the motion court clearly erred in determining, after an evidentiary hearing, that Defendant had failed to carry his burden of proving this claim.

In the underlying criminal case, Defendant was charged in Jasper County Circuit Court with one count of the class A felony of second-degree trafficking (§ 195.223, RSMo Cum. Supp. 2001) based on his June 6, 2010 alleged possession of “6 grams or more of a mixture or substance containing a cocaine base.” (L.F. 22–23). On January 9, 2012, Defendant appeared before the plea

court to enter a guilty plea to the offense as charged. (L.F. 27). Defendant acknowledged the rights he was waiving by pleading guilty, and he said that he had had sufficient time to discuss the case with his attorney and was happy with his attorney's representation of him. (L.F. 27). Defendant denied that anyone was forcing him to plead guilty, and he said he was doing so of his own "free will." (L.F. 27–28).

Defendant acknowledged that he was pleading guilty to a class A felony and that the range of punishment was 10 to 30 years. (L.F. 28). The court also asked Defendant about two documents he had signed, one of which was a plea agreement.¹ (L.F. 28). The plea agreement apparently provided for a 10-year cap on the sentence the court would impose. (L.F. 28). The court found that Defendant's guilty plea was voluntarily and intelligently made, and it ordered a sentencing assessment report as requested by Defendant. (L.F. 29).

The factual basis for the guilty plea was that during a search warrant executed at Defendant's residence police found what they believed was crack cocaine in Defendant's bedroom. (L.F. 28). Also found there was a "stolen" handgun and an identification and credit cards belonging to Defendant. (L.F.

¹ Defendant did not include either of these documents in the Legal File he filed with the Court of Appeals, which was later transferred to this Court.

28). Subsequent testing on the substance police found revealed that it contained “a cocaine solvent consistent with crack cocaine” and weighed 6.09 grams. (L.F. 28).

During the February 27, 2012 sentencing hearing, Defendant asked for probation. (L.F. 30–31). The prosecutor responded that Defendant had two previous felony convictions, one each for robbery and burglary, and in the present case he possessed cocaine and a stolen weapon. (L.F. 31). The prosecutor’s recommendation was a 10-year prison sentence, which was the sentence recommended under the aggravated guideline in Defendant’s SAR. (L.F. 31.) The court informed Defendant that it had intended to give him a 10-year prison sentence, but it gave Defendant 90 days “to prove [him]self” by getting a drug assessment, drug treatment, and a job. (L.F. 32). The court warned Defendant that if he did not complete these tasks or picked up another case, the court would sentence him to prison for ten years. (L.F. 32.) Defendant assured the court that he would “have a job and everything.” (L.F. 32.)

On May 21, 2012, the court held another hearing and said that it had informed the parties during an off-the-record discussion that it was still uncomfortable putting Defendant on probation with a backup sentence of only 10 years, but that it would grant probation if Defendant accepted a

backup sentence of 15 years. (L.F. 33). Defendant said that what the court had described was accurate, and he also confirmed that he had discussed the court's proposal with plea counsel. (L.F. 33.) Defendant then told the court that he wanted probation with a 15-year backup sentence. (L.F. 33). The court sentenced Defendant to 15 years, suspended execution of the sentence, and placed Defendant on probation for 5 years. (L.F. 33). Defendant told the court that he believed he had been effectively represented by plea counsel. (L.F. 34).

On August 12, 2013, the court held a probation-violation hearing during which Defendant admitted to having violated the conditions of his probation. (L.F. 34–36). The plea court revoked Defendant's probation and ordered his 15-year sentence to be executed. (L.F. 37). Defendant was delivered to the Department of Corrections on August 16, 2013. (L.F. 10, 12).

On November 20, 2013, Defendant timely filed a pro se Rule 24.035 motion that alleged three claims of ineffective assistance of counsel:

- (1) failure to investigate why Defendant's preliminary hearing was waived;
- (2) failure to adequately defend Defendant at the probation-violation hearing;
- and (3) failure to request long-term treatment. (L.F. 41).

The circuit court appointed the public defender to represent Defendant on December 11, 2013. (L.F. 14). The transcript in the underlying criminal case was filed on March

25, 2014. (L.F. 12). On June 20, 2014, more than 60 days after the transcript was filed, appointed counsel filed a statement in lieu of an amended motion stating that no amended motion needed to be filed. (L.F. 50–52). On June 23, 2014, Defendant filed a pro se amended motion for postconviction relief alleging that counsel was ineffective for letting him be prosecuted because no controlled buy was performed and because Defendant was not present when the search warrant was executed; a related claim alleged that counsel was ineffective for failing to investigate the possession and knowledge prongs on the trafficking charge. (L.F. 54–60). The circuit court held an evidentiary hearing on the claims asserted in both Defendant’s pro se initial and amended motions; it later issued a judgment adjudicating those claims and denied all of them. (L.F. 72–77).

STANDARD OF REVIEW

This appeal relates solely to the motion court’s judgment overruling Defendant’s postconviction motion. Appellate review of a judgment overruling a postconviction motion is limited to a determination of whether the findings of fact and conclusions of law issued by the motion court are “clearly erroneous.” *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *see also Barnett v. State*, 103 S.W.3d 765, 768 (Mo. banc 2003); Rule 24.035(k). Appellate review in postconviction cases is not de novo; rather, the findings of fact and conclusions of law are presumptively correct. *Wilson v. State*, 813 S.W.2d 833, 835 (Mo. banc 1991). “Findings and conclusions are clearly erroneous only if a full review of the record definitely and firmly reveals that a mistake was made.” *Morrow*, 21 S.W.3d at 822.

The defendant asserting postconviction claims under Rule 24.035 has the burden of proving those claims by a preponderance of the evidence. Rule 24.035(i). “The motion court is not required to believe the testimony of [the defendant] or any other witness at an evidentiary hearing even if uncontradicted, and an appellate court must defer to the motion court’s determination of credibility.” *Wilhite v. State*, 339 S.W.3d 573, 576 (Mo. App. W.D. 2011) (quoting *Proctor v. State*, 809 S.W.2d 32, 36 (Mo. App. W.D. 1991)). *See also State v. Taylor*, 929 S.W.2d 209, 224 (Mo. banc 1996) (holding

that in a Rule 24.035 postconviction proceeding the supreme court “respect[s] the motion court’s superior ability to determine matters of witness credibility”).

ARGUMENT

Defendant's postconviction claim asserted on appeal that counsel was ineffective for allowing Defendant to plead guilty to the class A felony of second-degree trafficking when he allegedly possessed an insufficient quantity of cocaine necessary to support the charge is not cognizable because: (1) this claim was not included in a timely filed motion for postconviction relief but instead was purportedly asserted in an untimely filed pro se amended motion filed within ten days after appointed counsel filed a statement in lieu of an amended motion; (2) the postconviction claim was insufficiently pleaded; and (3) the claim asserted on appeal differs from the claim pleaded in the amended motion.

Alternatively, the motion court did not clearly err in rejecting this claim because: (1) Defendant failed to carry his burden of proving there was an insufficient quantity of cocaine to support the charge; (2) the record showed that plea counsel thoroughly advised Defendant about the charge and the evidence before he decided to plead guilty; and (3) Defendant failed to carry his burden of proving prejudice since the record shows that he would have pleaded guilty despite any alleged charging defect since he wanted to avoid both

being charged as a persistent offender and the risk that additional charges could be filed, and Defendant wanted a suspended sentence and probation, which he received.

A. Defendant's claim is not cognizable.

The postconviction claim Defendant asserts on appeal is non-cognizable (and should not have been adjudicated by the motion court) on three grounds. First, the claim was raised in an untimely filed amended motion. Second, the claim is insufficiently pleaded. Third, the claim asserted on appeal differs from the claim raised in the amended motion.

1. The amended motion was untimely filed.

The deadline for filing an amended postconviction motion in this case was 60 days after the date the transcript was filed since no motion for a 30-day extension to file an amended motion was filed. Rule 24.035(g). Since the transcript was filed on March 25, 2014, (L.F. 25), any amended motion had to be filed by May 27, 2014.² Instead of filing an amended postconviction

² Since the 60th day after the transcript was filed was Saturday, May 24, 2014, and the following Monday (May 26, 2014) was Memorial Day, the deadline was extended to Tuesday, May 27, 2014. *See* Rules 20.01(a) and 44.01(a); *Edwards v. State*, 514 S.W.3d 68 (Mo. App. E.D. 2017).

motion, appointed counsel instead filed a statement in lieu of an amended motion under Rule 24.035(e), which provides:

When an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant. Counsel shall ascertain whether sufficient facts supporting the claims are asserted in the motion and whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence. If the motion does not assert sufficient facts or include all claims known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and claims. If counsel determines that no amended motion shall be filed, counsel shall file a statement setting out facts demonstrating what actions were taken to ensure that (1) all facts supporting the claims are asserted in the pro se motion and (2) all claims known to the movant are alleged in the pro se motion. The statement shall be presented to the movant prior to filing. The movant may file a reply to the statement not later than ten days after the statement is filed.

Rule 24.035(e).

Appointed counsel's statement in lieu of an amended motion stated that counsel had reviewed "all the pertinent documentation," including

Defendant's Form 40, a postconviction questionnaire, the probation-violation report, transcripts of the plea and sentencing hearings, and Defendant's "complete case file" in the underlying criminal case. (L.F. 50.) The statement also said that appointed counsel's associate had interviewed Defendant by phone on May 21, 2014. (L.F. 50.) Although one additional claim about the elements of the offense with which Defendant had been charged was investigated, appointed counsel determined after further research that Defendant was properly charged under a previous version of the statute.³ (L.F. 50–51.) The statement concluded by saying that after reviewing Defendant's pro se claims "it was determined that there is no legal or factual basis to amend those claims" and that no amended motion was required for Defendant "to pursue the claims already asserted in his form 40 [pro se] motion." (L.F. 51.)

The postconviction rules provide no deadline for the filing of a statement in lieu of an amended motion. *See Mason v. State*, 488 S.W.3d 135, 141 (Mo. App. S.D. 2016) (holding that "Rule 29.15(g)'s time limits do not apply to

³ The statute under which Defendant was charged was amended in 2012, two years after Defendant committed the offense in this case. *See* section 195.223, RSMo Cum. Supp. 2012.

statements filed in lieu of amended motions); *Pennell v. State*, 467 S.W.3d 367, 373 (Mo. App. E.D. 2015) (holding that Rule 29.15(g)'s filing deadline "appl[ies] to only the amended motion and not to the statement in lieu of an amended motion").⁴ Defendant's postconviction counsel filed the statement in lieu of an amended motion on June 20, 2014, which was beyond the 60-day deadline for filing the amended motion. But because there was no deadline for the filing of a statement in lieu of an amended motion, no presumption of abandonment was raised and a remand for an abandonment inquiry is not warranted. *See Mason*, 488 S.W.3d at 141 (holding that a statement in lieu of an amended motion filed beyond the deadline for filing an amended postconviction motion does "not create a presumption of abandonment" and a remand for an abandonment inquiry is not warranted); *Pennell*, 467 S.W.3d at (holding that since postconviction counsel's statement in lieu of an amended motion "was not untimely...there was no presumption of

⁴ Although *Mason* and *Pennell* involved a construction of Rule 29.15(g), their holdings apply equally in this Rule 24.035 case. *See Vogl v. State*, 437 S.W.3d 218, 224 n.7 (Mo. banc 2014) ("[C]ase law interpreting a provision that is identical in both [postconviction] rules applies equally in proceedings under either rule.").

abandonment” and a remand for an abandonment inquiry was not necessary).⁵

Although the motion court adjudicated the claims asserted in Defendant’s pro se amended motion, this amended motion was untimely filed and should not have been adjudicated. Under the holding in *Johnson v. State*, 210 S.W.3d 427 (Mo. App. S.D. 2006), Defendant could have filed an amended pro se motion (or motions) until the deadline (May 27, 2014) for filing any amended motion had passed. *Id.* at 432. The pro se amended motion Defendant filed on June 23, 2014, was, therefore, untimely and should not have been adjudicated.

Defendant contends that the deadline for filing the amended motion was extended by the filing of appointed counsel’s statement in lieu of an amended

⁵ Although the court in *Harper v. State*, 404 S.W.3d 378 (Mo. App. S.D. 2013), found a presumption of abandonment from the untimely filing of a statement in lieu of an amended motion, both *Mason* and *Pennell* dismissed this as dicta and observed that the court in *Harper* simply presumed, without analyzing the issue, that the deadline for filing the amended motion also applied to the statement in lieu of an amended motion. *See Mason*, 488 S.W.3d at 141 n.7; *Pennell*, 467 S.W.3d 374 n.2.

motion. If appointed counsel makes the inquiry required under the postconviction rules and then files a statement in lieu of an amended motion, the postconviction defendant “may file a *reply to the statement* not later than ten days after the statement is filed.” Rule 24.035(e) (emphasis added). Defendant does not contend that appointed counsel failed to perform the inquiries required by the rule or that appointed counsel’s statement was deficient. Instead, Defendant argues that the filing of a statement in lieu of an amended motion gave him an additional ten days in which to file a pro se amended motion. There are several reasons to reject this argument.

First, the plain language of the rule simply does not support Defendant’s argument. Rule 24.035(e) allows the defendant to file a “reply” to the statement, not to file a pro se amended postconviction motion after the deadline. Moreover, the language describing the form of an amended motion and setting the deadline for its filing is contained in a different subsection of the rule. *See* Rule 24.035(g). The purpose in allowing a response to a statement in lieu of an amended motion is to provide the defendant with an opportunity to address whether appointed counsel fulfilled the requirements set out in subsection (g) before counsel determined that an amended motion was unnecessary. If those duties were not performed, appointed counsel may be found to have abandoned the defendant. *See Mason*, 488 S.W.3d at 139

(“Counsel who files a statement in lieu of an amended motion is not considered to have abandoned the movant *as long as the record demonstrates counsel reviewed the record and investigated all allegations raised by the movant.*”) (emphasis added) (quoting *Pennell*, 467 S.W.3d at 372). Defendant makes no claim that appointed counsel did not fulfill the duties prescribed under Rule 24.035(e).

Second, it seems rather incongruous to construe the rule to permit the defendant to reply to a statement in lieu of filing an amended motion by filing a pro se amended motion when the attorney appointed by the court to review the postconviction case has determined that an amended motion is unnecessary.

Third, construing the rule in the manner advocated by Defendant would provide no deadline for the filing of a pro se amended motion following the filing of a statement in lieu of an amended motion—except for the ten day deadline for filing a response—because there is no deadline for the filing of statements in lieu of an amended motion. This construction of the rule would contravene the plain language of the rule providing a firm deadline on the filing of amended motions. Moreover, construing the rule in this way would provide an avenue for circumventing the deadline when an amended motion has not been timely filed. Finally, a construction of the rule permitting a

floating deadline for filing pro se amended motions would frustrate the purpose of finality behind the postconviction rules. *See Pennell*, 467 S.W.3d at 373.

Defendant contends the Court of Appeals' cases holding that the postconviction rules provide no deadline for the filing a statement in lieu of an amended motion are incorrect. He suggests that the holdings in those cases are contrary to *Stanley v. State*, 420 S.W.3d 532 (Mo. banc 2014), and *Moore v. State*, 934 S.W.2d 289 (Mo. banc 1996). But neither *Stanley* nor *Moore* support Defendant's argument.

In dicta generally describing the duties of appointed counsel following the filing of a pro se postconviction motion, the *Stanley* opinion states that "appointed counsel must timely file either an amended motion or a statement that the pro se motion is sufficient." *Stanley*, 420 S.W.3d at 540. The timeliness of a statement in lieu of an amended motion was not at issue in *Stanley* as appointed counsel had timely filed an amended motion. The *Moore* opinion described appointed counsels' filings of statements in lieu of amended motions as being "timely," but the opinion does not specifically discuss what those time limits were. *Moore*, 934 S.W.2d at 290–91. *See also Mason*, 488 S.W.3d at 141 n.7 (noting that "neither *Stanley* nor *Moore* addressed,

analyzed, or determined whether the rule's amended motion time limits apply to statements").

Even if the postconviction rules were construed to apply the deadline for filing an amended motion to statements in lieu of an amended motion, a defendant cannot demonstrate any prejudice resulting from the "untimely" filing of a statement. Defendant argues that this Court should create yet another category of abandonment when a statement in lieu of an amended motion is untimely filed. But abandonment occurs only when appointed counsel takes no action whatsoever with respect to the filing of an amended motion or when appointed counsel is aware of the need to file an amended motion but fails to do so in a timely manner. *See Luleff v. State*, 807 S.W.2d 495, 498 (Mo. banc 1991) (holding that when appointed counsel fails to take any action with respect to the amended motion, or "abandons" the defendant, the motion court shall appoint new counsel, as long as counsel's failure to act was not attributable to the negligence or conduct of the defendant); *Sanders v. State*, 807 S.W.2d 493, 495 (Mo. banc 1991) (holding that when appointed counsel untimely files an amended motion, the court shall permit the untimely filing "only when [the defendant] is free of responsibility for the failure" to timely file). Although "the precise circumstances constituting abandonment naturally may vary, the categories of claims of abandonment

long have been fixed: in general ‘abandonment is available when (1) post-conviction counsel takes no action on movant’s behalf with respect *to filing an amended motion*...or (2) when post-conviction counsel is aware of the need *to file an amended post-conviction relief motion* and fails to do so in a timely manner.’” *Barton v. State*, 486 S.W.3d 332, 338 (Mo. banc 2016) (emphasis added) (quoting *Crenshaw v. State*, 266 S.W.3d 257, 259 (Mo. banc 2008)).

If after an abandonment inquiry the motion court determines that counsel’s failure to timely file the statement in lieu of an amended motion was not attributable to the defendant, the only remedy under the abandonment doctrine would be to permit the late filing of the statement in lieu of an amended motion. If, on the other hand, the court determined that the defendant was responsible for the late filing, nothing would be accomplished by refusing to allow the late filing of a statement in lieu of an amended motion. The filing of a statement in lieu of an amended motion, whether timely or not, demonstrates that appointed counsel performed the duties required under the postconviction rules.

Since Defendant’s pro se amended motion was untimely filed, it should not have been considered by the motion court. *Stanley*, 420 S.W.3d at 540 n.5 (holding that a motion court is required to dismiss untimely claims).

Moreover, Defendant's claim is not cognizable despite the motion court's granting a hearing on it because the only claim Defendant asserts on appeal (that plea counsel was ineffective for allowing Defendant to plead a guilty to a charge not supported by the evidence) is one that was purportedly asserted only in his untimely pro se amended postconviction motion. *See Flenoy v. State*, 446 S.W.3d 297, 302 (Mo. App. W.D. 2014) (holding that "a claim for relief not raised in a timely filed Rule 24.035 motion is not preserved for appellate review merely because a motion court accepts evidence and makes findings of fact and conclusions of law regarding the waived claim, as a motion court only has the authority to decide claims that have been *timely* asserted in a post-conviction motion") (emphasis added); *Hoskins v. State*, 329 S.W.3d 695, 699 (Mo. banc 2010) (holding that plain-error review is unavailable to review a postconviction claim asserted for the first time on appeal).

2. The claim in Defendant's amended motion was both improperly pleaded and differs from the claim asserted on appeal.

Defendant's claim in this appeal is that counsel was ineffective "for allowing [Defendant] to plead guilty...to trafficking" because "at most" Defendant possessed "six grams of cocaine salt" which was insufficient to support a charge of either class A or B felony trafficking. Deft's Brief, p. 10.

In his pro se amended postconviction motion, Defendant alleged, among other claims, that counsel was ineffective for allowing him “to be prosecuted for the criminal offense of trafficking...when no element of trafficking existed that involved [sic] a controlled buy conducted by police officials nor was [Defendant] present in the ‘shared’ domicile when law enforcement searched the premises.” (L.F. 55). Another claim alleged that plea counsel was ineffective for “fail[ing] to investigate and prove, for the sake of instructing Movant to offer a guilty plea, both the possession prong and the knowledge prong in this case for trafficking.” (L.F. 57).

The claims in both the initial pro se motion and the untimely filed pro se amended motion were not sufficiently pleaded and were thus not properly before the motion court or this Court on appeal. A postconviction motion must plead specific facts, not mere conclusions, supporting the claim for relief:

In sum, pleading requirements are not merely technicalities. The purpose of a Rule 29.15 motion is to provide the motion court with allegations sufficient to enable the court to decide whether relief is warranted. Where the pleadings consist only of bare assertions and conclusions, a motion court cannot meaningfully apply the *Strickland* standard for ineffective assistance of counsel.

Morrow, 21 S.W.3d at 824.⁶ “As distinguished from other civil pleadings, courts will not draw factual inferences or implications in a Rule 29.15 motion from bare conclusions or from a prayer for relief.” *Morrow*, 21 S.W.3d at 822. The requirement to plead specific facts is found in the rule itself:

(e) When an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant. Counsel shall ascertain whether *sufficient facts* supporting the claims are asserted in the motion and whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence. If the motion does not assert *sufficient facts* or include all claims known to the movant, counsel shall file an amended motion that *sufficiently alleges the additional facts* and claims.

Rule 24.035(e) (emphasis added). “The redundant requirement to plead facts [contained in Rule 29.15(e)] makes clear that a Rule 29.15 motion is no ordinary pleading where missing factual allegations may be inferred from bare conclusions or implied from a prayer for relief.” *White v. State*, 939

⁶ Because the language in Rules 24.035 and 29.15 are identical, “it is appropriate to refer to cases interpreting” either rule. *Crews v. State*, 7 S.W.3d 563, 567 n.1 (Mo. App. E.D. 1999).

S.W.2d 887, 893 (Mo. banc 1997). This pleading requirement advances the twin policies of the need to bring finality to the criminal process and to preserve scarce judicial resources that would otherwise be wasted on speculative claims unsupported by any factual basis:

A Rule 29.15 motion is treated differently than pleadings in other civil cases because it is a collateral attack on a final judgment of a court.

While courts are solicitous of post-conviction claims that present a genuine injustice, that policy must be balanced against the policy of bringing finality to the criminal process. Requiring timely pleadings containing reasonably precise factual allegations demonstrating such an injustice is not an undue burden on a Rule 29.15 movant and is necessary in order to bring about finality. Without requiring such pleadings, finality is undermined and scarce public resources will be expended to investigate vague and often illusory claims, followed by unwarranted courtroom hearings.

Id. (citation omitted). *See also Dorris v. State*, 360 S.W.3d 260, 269 (Mo. banc 2012).

Nowhere in his initial pro se motion or his untimely filed amended motion did Defendant specifically plead that plea counsel was ineffective for advising Defendant to plead guilty to the trafficking charge because the charge was

not supported by sufficient evidence. Moreover, he failed to plead any facts alleging in what manner the charge was deficient. Instead of alleging that the charge was deficient because he did not possess the requisite amount of cocaine base as shown by the lab report, Defendant raised this issue for the first time during the evidentiary hearing when he attempted to admit hearsay evidence of the highway patrol's lab report. (PCR Tr. 7–11.) The prosecutor repeatedly objected that a claim involving the lab report and the amount of cocaine Defendant possessed had not been alleged in any postconviction motion. (PCR Tr. 7–8.) Because this claim was not pleaded in either the initial or amended motion, it provides no basis for postconviction relief and is waived. *See McLaughlin v. State*, 378 S.W.3d 328, 340 (Mo. banc 2012).

To the extent a claim is properly alleged in either the initial or amended postconviction motions, neither motion specifically alleged the claim that Defendant pursues on appeal, which is that counsel was ineffective for allowing Defendant to plead guilty to an offense when the lab report showed that he did not possess the requisite amount of cocaine to support the charge. Claims asserted on appeal that differ from those raised in the postconviction motion are “waived.” *State v. Clay*, 975 S.W.2d 121, 144 (Mo. banc 1998). *See Clay v. State*, 310 S.W.3d 733, 736 (Mo. App. W.D. 2010) (holding that an

appellate court will not review a post-conviction claim on appeal that materially differs from that alleged in the post-conviction motion).

B. The motion court did not clearly err in rejecting this claim.

1. The record regarding this claim.

Defendant asserts on appeal that plea counsel was ineffective for allowing Defendant to plead guilty to second-degree trafficking because the highway patrol lab report showed that he possessed only six grams of cocaine salt rather than cocaine base.⁷

⁷ Under the statute in effect when Defendant committed his offense in 2010, a person was guilty of second-degree trafficking if he or she possessed “more than one hundred fifty grams of a mixture or substance containing a detectable amount of coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; cocaine salts and their optical and geometric isomers, and salts of isomers; ecgonine, its derivatives, their salts, isomers, and salts of isomers; or any compound, mixture, or preparation which contains any quantity of any of the foregoing substances. Section 195.223.2, RSMo Cum. Supp. 2001. Second-degree trafficking was also committed if a person

This claim is refuted by the guilty-plea record. In reciting the factual basis for the trafficking charge, the prosecutor stated that Defendant possessed crack cocaine, that the substance weighed 6.09 grams, and that it contained a solvent consistent with crack cocaine. (L.F. 28). *See State v. Wilson*, 359 S.W.3d 60, 62 (Mo. App. W.D. 2011) (noting that “cocaine base” is commonly referred to as “crack cocaine”); *State v. Jackson*, 419 S.W.3d 850, 854 n.3 (Mo. App. S.D. 2013) (same). Moreover, Defendant did not present sufficient evidence during the postconviction evidentiary hearing to prove that he was in possession of an insufficient quantity of cocaine base to support the trafficking charge. Postconviction counsel’s efforts to get plea counsel to repeat the contents of the lab report during the evidentiary hearing does not constitute substantial evidence supporting this claim. (PCR Tr. 26–27.)

During the postconviction evidentiary hearing, Defendant’s plea counsel testified that she reviewed the statute and the elements of the offense with Defendant. (PCR Tr. 16). When it was suggested to counsel that the substance that Defendant was charged with possessing might not have weighed enough to support a trafficking charge, plea counsel responded that

possessed “more than two grams of a mixture or substance described in subsection 2 of this section which contains cocaine base.” Section 195.223.3.

she would have had discussions about that matter with the prosecutor and that she had talked to the prosecutor about that matter. (PCR Tr. 17–18). When asked why she did not file motions challenging the propriety of the charge, plea counsel replied that she would have discussed the matter with Defendant. (PCR Tr. 18). When asked whether counsel had discussed a lab report that showed Defendant possessed cocaine salt, counsel said that the “totality of discovery” was discussed, including issues that the State could amend the charges to allege that Defendant was a persistent offender and that a weapon was found. (PCR Tr. 27–28).

During cross-examination, plea counsel confirmed that she and Defendant discussed additional charges, such as a gun charge, that could have been filed against him. (PCR Tr. 33). Counsel said the decision to plead guilty was Defendant’s alone. (PCR Tr. 36).

Defendant testified that counsel never told him that he was charged under the wrong statute. (PCR Tr. 38). He claimed that if he had known he possessed cocaine salt rather than cocaine base, he would not have pleaded guilty. (PCR Tr. 39). But Defendant agreed that plea counsel had told him that since the State had not brought up the gun charge, they should not do so either. (PCR Tr. 46).

The motion court rejected Defendant’s postconviction claims asserted in his initial pro se motion and the claims asserted in his pro se amended motion. (L.F. 72–77). With respect to the claim asserting that Defendant was charged with the wrong offense, the court found that Defendant failed to carry his burden of proving prejudice because Defendant wanted to plead guilty to receive immediate probation and avoid additional charges. (L.F. 75–76).

2. Ineffective assistance relating to guilty pleas.

A claim of ineffective assistance of counsel related to a guilty-plea proceeding is evaluated under the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984), which was modified for the guilty-plea context in *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). In evaluating any claim of ineffective assistance of counsel, it must be remembered that “[s]urmounting *Strickland*’s high bar is never an easy task.” *Premo v. Moore*, 562 U.S. 115, 122 (2011) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)).

First, it must be shown that plea counsel’s representation fell below “the range of competence” for attorneys in criminal cases as set forth in *Tollett v. Henderson*, 411 U.S. 258 (1973), and *McMann v. Richardson*, 397 U.S. 759 (1970). *Hill*, 474 U.S. at 56, 58. In *McMann*, the Court held that a defendant seeking to set aside a guilty plea must “allege and prove serious derelictions

on the part of counsel sufficient to show [the] plea was not, after all, a knowing and intelligent act.” *McMann*, 397 U.S. at 772.

Even if it can be shown that counsel acted incompetently, the movant must additionally show that counsel’s actions resulted in prejudice—the second prong of the *Strickland-Hill* test. *See Hill*, 474 U.S. at 58-59. “[I]n order to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Id.* at 59; *see also Stanley v. State*, 420 S.W.3d 532, 543 (Mo. banc 2014).

“If a conviction results from a guilty plea, any claim of ineffective assistance of counsel is immaterial except to the extent that it impinges the voluntariness and knowledge with which the plea was made.” *Peiffer v. State*, 88 S.W.3d 439, 445 (Mo. banc 2002). Consequently, “[a]ll errors are waived by a guilty plea except those that are relevant to the voluntary nature of the plea.” *Waters v. State*, 128 S.W.3d 648, 651 (Mo. App. S.D. 2004).

3. Defendant did not prove prejudice.

The motion court did not clearly err in finding that Defendant failed to carry his burden of proving prejudice. The record shows that notwithstanding Defendant’s current claim about being prosecuted under the wrong statute, he still would have pleaded guilty because he wanted both immediate

probation and to avoid the possibility that the State would amend the charges to allege that he was a persistent offender and was in possession of a stolen gun. As the motion court found, even if the charge had been amended to a mere possession charge, Defendant would have still faced a seven-year sentence and possibly more if the charges had been amended. (L.F. 76.)

In assessing plea counsel's representation, courts must not second-guess the advice given because "the decision to plead guilty before the evidence is in frequently involves the making of difficult judgments." *McMann*, 397 U.S. at 769. Plea counsel's representation must be viewed with the knowledge that the information upon which advice is given in plea situations is oftentimes incomplete: "All the pertinent facts normally cannot be known unless witnesses are examined and cross-examined in court. Even then the truth will often be in dispute." *Id.* "In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case." *Id.* In making these judgments, plea counsel must decide questions that cannot be definitively answered when the decision to enter a plea is made:

Counsel must predict how the facts, as he understands them, would be viewed by a court. If proved, would those facts convince a judge or jury of the defendant's guilt? On those facts would evidence seized without a

warrant be admissible? Would the trier of fact on those facts find a confession voluntary and admissible? Questions like these cannot be answered with certitude; yet a decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be.

Id. at 769-70.

Consequently, the focus of any such inquiry is not a retrospective analysis of whether plea counsel's advice was ultimately right or wrong, but whether it was "within the range of competence for attorneys in criminal cases." *Id.* at 770-71. "That a guilty plea must be intelligently made is not a requirement that all advice offered by [plea counsel] withstand retrospective examination in a post-conviction hearing." *Id.* at 770.

Although *McMann* was decided over forty years ago, in 2011 the Court reiterated these principles with renewed vigor in *Moore*:

Plea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks. The opportunities, of course, include pleading to a lesser charge and obtaining a lesser sentence, as compared with what might be the outcome not only at trial but also from a later plea offer if the case grows stronger and prosecutors find stiffened resolve.

Moore, 131 S. Ct. at 741. The Court further noted that “[u]nlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge.” *Id.* at 740. The Court then went on to stress that a postconviction court should strictly adhere to the *Strickland* standard in assessing ineffective-assistance claims:

These considerations make strict adherence to the *Strickland* standard all the more essential when reviewing the choices an attorney made at the plea bargain stage. Failure to respect the latitude *Strickland* requires can create at least two problems in the plea context. First, the potential for the distortions and imbalance that can inhere in a hindsight perspective may become all too real. The art of negotiation is at least as nuanced as the art of trial advocacy and it presents questions farther removed from immediate judicial supervision. There are, moreover, special difficulties in evaluating the basis for counsel’s judgment: An attorney often has insights borne of past dealings with the same prosecutor or court, and the record at the pretrial stage is never as full as it is after a trial.

* * * *

Second, ineffective-assistance claims that lack necessary foundation may bring instability to the very process the inquiry seeks to protect. *Strickland* allows a defendant “to escape rules of waiver and forfeiture[.]” Prosecutors must have assurance that a plea will not be undone years later because of infidelity to the...teachings of *Strickland*. The prospect that a plea deal will afterwards be unraveled when a court second-guesses counsel’s decisions while failing to accord the latitude *Strickland* mandates...could lead prosecutors to forgo plea bargains that would benefit defendants, a result favorable to no one. *Id.* (quoting *Harrington v. Richter*, 131 S. Ct. 770, 778 (2011)).

Plea counsel repeatedly testified that she and Defendant considered numerous factors, including the propriety of the charge he was facing, when assessing whether to enter a guilty plea. The record also shows that Defendant was adamant about being placed on immediate probation with a suspended sentence. He even agreed to an increased backup sentence beyond the cap agreed to by the State to obtain probation from the court. The motion court did not clearly err in finding that Defendant had failed to carry his burden of proving that he would have rejected probation and gone to trial if he had been advised that he was allegedly charged under the wrong statute. The motion court did not clearly err in rejecting this claim.

CONCLUSION

The motion court did not clearly err, and its judgment overruling Defendant's motion for postconviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 7,235 words, excluding the cover, signature block, and this certificate, as determined by Microsoft Word 2010 software.

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