IN THE SUPREME COURT OF MISSOURI

GORDON F. GOLDSBY,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC96639
	)	
GEORGE LOMBARDI,	)	
	)	
Respondent.	)	

SUBSTITUTE BRIEF OF APPELLANT GORDON F. GOLDSBY

Appeal from the Circuit Court of Cole County
The Honorable Daniel Richard Green, Circuit Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

On July 16, 2015, Appellant Gordon Goldsby, who is serving a sentence in the Missouri Department of Corrections, filed a petition pro se in the Circuit Court of Cole County seeking a declaratory judgment as to his right to have his sentence calculated. Respondent George Lombardi was the Director of the Department of Corrections.

On June 27, 2016, the trial court entered a judgment dismissing the petition.

On July 19, 2016, Mr. Goldsby filed a motion to modify the judgment.

On July 22, 2016, the court denied the post-judgment motion. Any notice of appeal was due to be filed by August 8, 2016.

On July 28, 2016, Mr. Goldsby mailed a notice of appeal to the circuit court. The notice of appeal was received by the circuit clerk on August 5, 2016. With his notice of appeal, Mr. Goldsby included a note informing the clerk that he would be paying the full filing fee for the appeal and had submitted a request for funds to be transferred from his inmate account. The request was dated July 28, 2016.

On August 17, 2016, the circuit court stamped the notice of appeal as filed. The circuit clerk noted that August 17, 2016, was the date that the filing fee for the notice of appeal was paid.

On June 20, 2017, the Missouri Court of Appeals, Western District, dismissed the appeal, holding that the notice of appeal was untimely because it was deemed to be filed when the clerk received the docket fee.

On December 21, 2017, this Court sustained Mr. Goldsby's application for transfer.

Jurisdiction was proper in the Court of Appeals because this action for a declaratory judgment does not involve any matters over which this Court has exclusive appellate jurisdiction pursuant to Article V, Section 3 of the Missouri Constitution. The Circuit Court of Cole County is within the territorial jurisdiction of the Missouri Court of Appeals, Western District. § 477.070, RSMo.

This Court has jurisdiction to hear appeals on transfer from the Court of Appeals. Mo. Const. art V, § 10.

The argument section of this brief contains an additional discussion of the bases for appellate jurisdiction.

STATEMENT OF FACTS

Mr. Goldsby is serving a sentence for "convictions in the Circuit Court of St. Louis County for kidnapping, § 559.240 RSMo.1969; rape, § 559.260 RSMo.1969; and assault with intent to do great bodily harm with malice, § 559.180 RSMo.1969, for which he was sentenced to consecutive terms of ten years, life, and twenty-five years respectively." *See State v. Goldsby,* 845 S.W.2d 636, 637 (Mo. App. 1992); L.F. at 6-8. The crimes occurred on March 17, 1972. 845 S.W.2d at 637. Mr. Goldsby was tried and convicted in 1990, receiving a sentence on September 21, 1990. L.F. at 5, 17.

On July 16, 2015, Mr. Goldsby filed a petition in the Circuit Court of Cole County seeking a declaration of his rights under sections 556.031, RSMo 1979, and 559.260, RSMo 1969. L.F. at 5. The defendant was George Lombardi, the director of the Missouri Department of Corrections.

In his petition, Mr. Goldsby alleged that he was was sentenced to life imprisonment on September 21, 1990. L.F. at 5. Mr. Goldsby alleged that the Department of Corrections was improperly refusing to provide a calculation showing when his sentence would be completed under the 9/12ths law or his 12/12ths release date under the law in existence in 1972 when his offenses were committed. L.F. at 5-7.

On August 21, 2015, Mr. Goldsby filed an addendum to his petition to add a prayer for a declaration of his rights under section 546.490, RSMo. L.F. at 2; Supp. L.F.

Mr. Lombardi filed an answer admitting that Mr. Goldsby was sentenced to life imprisonment on September 21, 1990. L.F. at 19. Mr. Lombardi denied all of the other

factual allegations of the petition. L.F. at 19-21. Mr. Lombardi's answer did not set forth any affirmative defenses. L.F. at 19-21.

On May 23, 2016, Mr. Lombardi filed a motion to dismiss stating in part: "Gordon Goldsby continues to litigate the same meritless legal theory before the state court. The court has denied relief on that theory. This Court should now deny relief again." L.F. at 31. The motion to dismiss did not mention sections 556.031, 559.260, or 546.490 (the statutes as to which Mr. Goldsby sought a declaratory judgment in his petition). L.F. at 31-32.

Attached to Mr. Lombardi's motion to dismiss were two exhibits. Exhibit A was a copy of an unpublished memorandum from the Missouri Court of Appeals under Rule 84.16(b) dated June 23, 2009. L.F. at 34. The memorandum related to an action by Mr. Goldsby to obtain a declaratory judgment as to whether he was entitled to be released under section 216.355, RSMo 1969. L.F. at 34. Exhibit B was a copy of a judgment dated January 8, 2014, from the Circuit Court of Pike County denying a petition for habeas corpus based on Mr. Goldsby's contention "that he is being held in violation of his constitutional rights because he has completed his life sentence." L.F. at 40.

Mr. Goldsby responded to the motion to dismiss by noting that he was not seeking to be released in the present action for a declaratory judgment, but rather to be told his calculated release date under the statutes mentioned in his petition. Supp. L.F.

On June 27, 2016, the circuit court entered a dismissal judgment stating: "The matter is before the Court on Petitioner's petition for declaratory judgment, Respondent's motion to dismiss, and Petitioner's response. After consideration, the Court grants

Respondent's motion to dismiss for the reasons stated in that motion. The petition for declaratory judgment is dismissed. Any and all other pending matters are overruled, dismissed, and denied. Judgment is entered on behalf of Respondent." L.F. at 42.

On July 19, 2016, Mr. Goldsby filed a motion to modify the judgment. L.F. at 43.

On July 22, 2016, the court denied the post-judgment motion. L.F. at 45.

On July 28, 2016, Mr. Goldsby mailed a notice of appeal to the circuit court. The notice of appeal was received by the circuit clerk on August 5, 2016. Supp. L.F.; *see* Application for Transfer at 51. With his notice of appeal, Mr. Goldsby included a note informing the clerk that he would be paying the full filing fee for the appeal and had submitted a request for funds to be transferred from his inmate account. The request was dated July 28, 2016. Supp. L.F.; *see* Application for Transfer at 52.

On August 5, 2016, the circuit clerk wrote to Mr. Goldsby, acknowledged receipt of the notice of appeal on August 5, 2016, and noted that the filing fee had not been paid. Supp. L.F.; *see* Application for Transfer at 51.

On August 17, 2016, the circuit court stamped the notice of appeal as filed. The circuit clerk noted that August 17, 2016, was the date that the filing fee for the notice of appeal was paid. Supp. L.F.

On June 20, 2017, the Missouri Court of Appeals dismissed the appeal, holding that the notice of appeal was untimely because it was deemed to be filed when the clerk received the docket fee.

On November 21, 2017, this Court sustained Mr. Goldsby's application for transfer and appointed the undersigned as counsel to represent him.

POINTS RELIED ON

I. THE COURT HAS JURISDICTION OVER THIS APPEAL, AND THE COURT OF APPEALS ERRED IN DISMISSING MR. GOLDSBY'S APPEAL, BECAUSE THE NOTICE OF APPEAL WAS TIMELY IN THAT THE JUDGMENT WAS ENTERED ON JUNE 27, 2016, A TIMELY POST-JUDGMENT MOTION TO MODIFY WAS FILED ON JULY 19, 2016, THE MOTION WAS DENIED ON JULY 22, 2016, AND MR. GOLDSBY SUBMITTED A NOTICE OF APPEAL THAT WAS RECEIVED BY THE CIRCUIT CLERK ON AUGUST 5, 2016, IN THAT AN APPEAL IS PURELY A CREATURE OF STATUTE, SECTION 512.050, RSMO, PROVIDES THAT A PARTY MAY APPEAL FROM A JUDGMENT BY FILING A TIMELY NOTICE OF APPEAL, AND THE MISSOURI CONSTITUTION FORBIDS COURT RULES FROM CHANGING SUBSTANTIVE RIGHTS OR THE RIGHT OF APPEAL SO THAT COURT RULES (SUCH AS RULE 81.04) CANNOT PROPERLY LIMIT THE RIGHT OF APPEAL AND ACCESS TO THE COURTS, OR DENY DUE PROCESS, BY REQUIRING A FILING FEE TO ACCOMPANY THE NOTICE OF APPEAL.

Mo. Const, art. V, § 5.

Mo. Const, art.I, § 14.

§ 512.050, RSMo.

State ex rel. JCA Architects, Inc. v. Schmidt, 751 S.W.2d 756 (Mo. banc 1988).

C&F Investments, LLC v. Hall, 149 S.W.3d 557 (Mo. App. 2004).

II. IN THE ALTERNATIVE, THE COURT HAS JURISDICTION OVER THIS APPEAL, AND THE COURT OF APPEALS ERRED IN DISMISSING MR. GOLDSBY'S APPEAL, BECAUSE THE NOTICE OF APPEAL SHOULD BE DEEMED TIMELY IN THAT THE JUDGMENT WAS ENTERED ON JUNE 27, 2016, A TIMELY POST-JUDGMENT MOTION TO MODIFY WAS FILED ON JULY 19, 2016, THE MOTION WAS DENIED ON JULY 22, 2016, MR. GOLDSBY SUBMITTED A NOTICE OF APPEAL THAT WAS RECEIVED BY THE CIRCUIT CLERK ON AUGUST 5, 2016, AND MR. GOLDSBY REQUESTED FUNDS TO BE TRANSFERRED FROM HIS INMATE ACCOUNT ON JULY 28, 2016, THAT WERE RECEIVED BY THE CIRCUIT CLERK ON AUGUST 17, 2016, IN THAT MR. GOLDSBY (AN INMATE) BY DEFINITION CANNOT COMPLY WITH A REQUIREMENT TO PAY A FILING FEE ON HIS OWN, BUT RATHER MUST RELY ON THE ASSISTANCE OF ONE OR MORE THIRD PARTIES TO PROVIDE PAYMENT TO THE CIRCUIT CLERK SO THAT ANY DELAY IN PAYMENT OF THE FEE SHOULD BE DEEMED TO BE DUE TO THE ACTIVE INTERFERENCE OF THIRD PARTIES.

Price v. State, 422 S.W.3d 292 (Mo. banc 2014).

Watson v. State, 520 S.W.3d 423 (Mo. banc 2017).

Rule 41.03.

Houston v. Lack, 487 U.S. 266 (1988).

III. THE CIRCUIT COURT ERRED IN DISMISSING MR. GOLDSBY'S ACTION BECAUSE THE PETITION STATED A CLAIM FOR RELIEF IN THAT THE PETITION SET FORTH FACTS SHOWING A DISPUTE AS TO MR. GOLDSBY'S RIGHT TO HAVE A CALCULATION OF HIS RELEASE DATE UNDER SECTIONS 556.031, 559.260, AND 546.490, RSMO, AS WELL AS THE DEFENDANT'S REFUSAL TO COMPLY WITH THE STATUTES, THE PETITION DID NOT SHOW ON ITS FACE THAT IT WAS BARRED BY ANY PRIOR ACTION, THE DEFENDANT DID NOT PLEAD ANY AFFIRMATIVE DEFENSE OF RES JUDICATA OR COLLATERAL ESTOPPEL, AND THE CIRCUIT COURT COULD NOT PROPERLY DISMISS THE CLAIM ON THE BASIS OF THE DEFENDANT'S MOTION TO DISMISS THAT ATTACHED MATERIALS OUTSIDE THE PLEADINGS WITHOUT PROVIDING NOTICE THAT THE MOTION TO DISMISS WOULD BE CONSIDERED AS A MOTION FOR SUMMARY JUDGMENT.

Rule 55.27.

Hoover v. Mercy Health, 408 S.W.3d 140 (Mo. banc 2013).

Raster v. Ameristar Casinos, Inc., 280 S.W.3d 120 (Mo. App. 2009).

Sandy v. Schriro, 39 S.W.3d 853 (Mo. App. 2001).

ARGUMENT

The first issue on appeal is whether the submission of a filing fee is a jurisdictional requirement when filing a notice of appeal. Rule 81.04 and cases stating such a requirement are based on a former version of section 512.050, RSMo, which no longer requires a filing fee to accompany a notice of appeal. Under the Missouri Constitution, this Court has the power to establish rules relating to practice and procedure, but the Court's rules "shall not change substantive rights, or the law relating to . . . the right of appeal." *See* Mo. Const, art. V, § 5. Mr. Goldsby's notice of appeal was timely, and it invoked appellate jurisdiction regardless of whether it was accompanied by a filing fee within the time for filing a notice of appeal. Imposition of a fee requirement contrary to the statute would also improperly deny access to the courts. *See* Mo. Const, art.I, § 14.

Second, in the alternative, Mr. Goldsby's notice of appeal should be deemed to be timely. The notice of appeal was received by the circuit clerk on August 5, 2017, well within the time for filing a notice of appeal. Mr. Goldsby requested payment of the filing fee from his inmate account on July 28, 2017, but payment was not received by the clerk until August 17, 2017. As an inmate, Mr. Goldsby must rely on third parties to assist with litigation requirements. Mr. Goldsby did everything in his power to comply with Rule 81.04 so that the payment delay was the result of active interference by a third party.

Third, the dismissal of Mr. Goldsby's claim should be reversed. The petition stated a claim for a declaratory judgment. The dismissal was reversible error. The defendant's motion, raising an unpleaded affirmative defense and relying on matters outside the pleadings, provided no basis for dismissal.

I. THE COURT HAS JURISDICTION OVER THIS APPEAL, AND THE COURT OF APPEALS ERRED IN DISMISSING MR. GOLDSBY'S APPEAL, BECAUSE THE NOTICE OF APPEAL WAS TIMELY IN THAT THE JUDGMENT WAS ENTERED ON JUNE 27, 2016, A TIMELY POST-JUDGMENT MOTION TO MODIFY WAS FILED ON JULY 19, 2016, THE MOTION WAS DENIED ON JULY 22, 2016, AND MR. GOLDSBY SUBMITTED A NOTICE OF APPEAL THAT WAS RECEIVED BY THE CIRCUIT CLERK ON AUGUST 5, 2016, IN THAT AN APPEAL IS PURELY A CREATURE OF STATUTE, SECTION 512.050, RSMO, PROVIDES THAT A PARTY MAY APPEAL FROM A JUDGMENT BY FILING A TIMELY NOTICE OF APPEAL, AND THE MISSOURI CONSTITUTION FORBIDS COURT RULES FROM CHANGING SUBSTANTIVE RIGHTS OR THE RIGHT OF APPEAL SO THAT COURT RULES (SUCH AS RULE 81.04) CANNOT PROPERLY LIMIT THE RIGHT OF APPEAL AND ACCESS TO THE COURTS, OR DENY DUE PROCESS, BY REQUIRING A FILING FEE TO ACCOMPANY THE NOTICE OF APPEAL.

The issue of appellate jurisdiction was raised for the first time on appeal and preserved in Mr. Goldsby's transfer application to this Court. This Court determines its own jurisdiction de novo. *See Dunkle v. Dunkle,* 158 S.W.3d 823, 827 (Mo. App. 2005).

The right of appeal is purely statutory. *Speck v. Union Elec. Co.,* 731 S.W.2d 16, 20 (Mo. banc 1987) (superseded by rule change on other grounds). "Although this Court may establish rules relating to practice and procedure for all courts which shall have the force and effect of law, such rules shall not change the right of appeal." *Id.; see* Mo. Const. art. V, § 5.

The right of access to the courts, which has been held to be an aspect of the right to petition the government contained in the First Amendment to the United States Constitution, is explicitly preserved in the Constitution of Missouri. *See State ex rel. Cardinal Glennon Memorial Hosp. v. Gaertner,* 583 S.W.2d 107, 110 (Mo. banc 1979) (abrogated by statutory amendment on other grounds); Mo. Const. art. I, § 14.

The Fourteenth Amendment prohibits state governments from depriving any person of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1. Missouri courts interpret Missouri's due process clause as congruent with the Fourteenth Amendment. *See Doe v. Phillips,* 194 S.W.3d 833, 841 (Mo. banc 2006). Due process requires states to provide individuals with a meaningful opportunity to be heard *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971). Likewise, article I, section 14 of the Missouri Constitution prohibits any law that arbitrarily or unreasonably bars individuals or classes of individuals from accessing our courts. *Missouri Alliance for Retired Americans v. Department of Labor & Indus. Relations,* 277 S.W.3d 670, 675 (Mo. banc 2009). Thus, article I, section 14 is "a second due process clause" to the state constitution. *Id.* While a fee requirement can be facially valid, such a requirement "may offend due process because it operates to foreclose a particular party's opportunity to be heard." *Boddie,* 401 U.S. at 380.

Chapter 512 specifies the method for initiating an appeal from a civil judgment:

> ***When an appeal is permitted by law from a trial court and within the time prescribed, a party or his agent may appeal from a judgment or order by filing with the clerk of the trial court a notice of appeal.*** No such appeal shall be effective unless the notice of appeal shall be filed not later than ten

> days after the judgment or order appealed from becomes final. All charges due to the court reporter for preparation of the transcript of the record of the trial court shall be paid within ten days of the ordering of the transcript. In the event that actual charges due for the preparation of the transcript cannot be readily determined, a deposit in the amount of the estimated charges due for preparation of the transcript shall be paid within ten days of the written notification by the court reporter of the amount of such estimated charges. The court reporter shall provide such written notification within ten days of any request for transcript. ***After a timely filing of such notice of appeal, failure of the appellant to take any of the further steps to secure the review of the judgment or order appealed from does not affect the validity of the appeal, but is ground for such action as the appellate court deems appropriate, which may include dismissal of the appeal.***

§ 512.050, RSMo (emphasis added).

Thus, by the plain terms of section 512.050, all that is required to appeal a judgment is to file a timely notice of appeal. Failure of the appellant to take any further steps to secure review of the judgment does not affect the validity of the appeal.

Contrary to section 512.050 and the constitutional requirement that this Court's rules cannot change substantive rights or the right of appeal, Rule 81.04 attempts to engraft another limitation on the substantive right to appeal. Except in cases in which a party is seeking to proceed in forma pauperis, Rule 81.04(e) states that the circuit clerk shall note the date a notice of appeal was received if it is accompanied by the docket fee or a statement citing specific authority demonstrating a docket fee is not required by law. Rule 81.04(f) states that a notice of appeal received by the circuit clerk with a docket fee or with a statement demonstrating no docket fee is required is deemed filed on the date the clerk receives it.

Courts have repeatedly stated that the payment of the docket fee is a jurisdictional requirement: "In Missouri paying the docket fee is a jurisdictional requirement for an effective appeal. Numerous cases have held that there can be no valid filing of a notice of appeal until the docket fee is paid." *See, e.g., Harris v. Wallace,* 524 S.W.3d 88, 89 (Mo. App. 2017) (citations and internal quotations omitted).

Respectfully, this conception of the law is based on cases considering a former version of section 512.050, which used to require the payment of a docket fee. This statute was amended in 1997 to its present form, which does not require a filing fee. In 1997, the Missouri legislature deleted the following sentence from Section 512.050: "The docket fee of ten dollars in the appellate court shall be deposited with the clerk of the trial court at the time of filing the notice of appeal." *Moore v. Bi-State Dev. Agency,* 87 S.W.3d 279, 295 (Mo. App. 2002).

The effect of this statutory change is explained in *State ex rel. JCA Architects, Inc. v. Schmidt,* 751 S.W.2d 756 (Mo. banc 1988), in which the Court considered another part of Chapter 512. Section 512.180, RSMo, provides that the right to a trial de novo in an action in associate court "shall be perfected by filing an application for trial de novo with the clerk serving the associate circuit judge within ten days after the judgment is rendered." *See JCA,* 751 S.W.2d at 757. This Court rejected the contention that the filing fee for the trial de novo was required to be submitted within the time for the filing of the application:

> The statute makes no reference to the payment of a filing fee. The Circuit Court is without power to impose jurisdictional requirements in addition to those set out in the statutes. . . .

> The plaintiff's filing on May 29, 1987, was in full compliance with all statutory jurisdictional requirements, and the circuit court had the mandatory duty to proceed with the trial de novo, even though the filing fee was not paid until after the time for filing the application for trial de novo had expired.

Id.

In reaching this decision, the Court contrasted the statute allowing for a trial de novo with the pre-1997 version of section 512.050: "While the [trial de novo] fee is required, payment at any particular time is not made a jurisdictional prerequisite. If it were a jurisdictional prerequisite the legislature would have explicitly so provided, as was done in § 512.050, RSMo 1986, (the foundation for Rule 81.04(c)), which provides that the docket fee must be paid at the time a notice of appeal to an appellate court is filed." *Id.* Thus, the filing fee was held to be jurisdictional because it was required by the former version of section 512.050.

The Court of Appeals has noted that the amendment of section 512.050 should lead to the same result that this Court reached in *JCA* -- the filing fee for a notice of appeal should no longer be considered jurisdictional. In *C&F Investments, LLC v. Hall,* 149 S.W.3d 557 (Mo. App. 2004), the Court of Appeals noted that *JCA* compared section 512.190 to section 512.050 and concluded that, if payment of the filing fee were a jurisdictional prerequisite in section 512.190, the legislature would have explicitly said so, as it did in section 512.050: "However, in 1997, the legislature deleted the language in Section 512.050 referred to by the Court. Yet, Missouri Supreme Court Rule of Civil Procedure 81.04 and subsequent case law still require the docket fee to be paid when the

notice of appeal is filed. Nonetheless, we are constitutionally bound to follow the last controlling decision of the Missouri Supreme Court." *Id.* at 559 n.4.

Under the clear logic of *JCA* and *C&F*, submission of a filing fee is no longer a jurisdictional requirement under section 512.050. Indeed, this is what section 512.050 says explicitly: "After a timely filing of such notice of appeal, failure of the appellant to take any of the further steps to secure the review of the judgment or order appealed from does not affect the validity of the appeal, but is ground for such action as the appellate court deems appropriate, which may include dismissal of the appeal." § 512.050.

The Court of Appeals mentioned the amendment to section 512.050 in *Moore v. Bi-State Dev. Agency,* 87 S.W.3d 279 (Mo. App. 2002). In light of Rule 81.04, the Court of Appeals dismissed a cross appeal, stating that "we continue to hold that no valid filing of a notice of appeal occurs until the docket fee is paid." *Id.* at 296. The Court of Appeals did not consider the Missouri Constitution or this Court's ruling in *JCA* in its analysis. Respectfully, *Moore* was wrongly decided for the reasons stated above.

After remand, the *Moore* case eventually came to this Court, which addressed an issue of post-judgment interest implicated by the pendency of the cross appeal that was dismissed in the Court of Appeals. *See Moore v. Bi-State Dev. Agency,* 132 S.W.3d 241 (Mo. banc 2004). Without addressing the amendment of section 512.050, or the Missouri Constitution, or *JCA*, this Court in *Moore* stated: "Even though the court received Moore's timely notice of cross-appeal and accepted his brief that contained both his response to Bi-State's appeal and the argument of his cross-appeal issue, without the

docket fee, no valid cross-appeal was ever filed. See, *Kattering v. Franz,* 360 Mo. 854, 231 S.W.2d 148, 150 (1950)." *Id.* at 243.

Of course, the *Kattering* case on which this Court relied in *Moore* was based on the former version of section 512.050 (then codified as section 847.129), which provided: "The docket fee of $10.00 in the appellate court shall be deposited with the clerk of the trial court at the time of filing the notice of appeal." 231 S.W.2d at 149. Respectfully, the reliance on *Kattering* was misplaced, and the *Moore* opinion was incorrect in assuming that a docket fee was still a jurisdictional requirement for an appeal.

The right of appeal is purely statutory, and section 512.050 means what it says. The Court cannot enact rules of procedure that change the right of appeal. *See* Mo. Const. art. V, § 5. Respectfully, as shown by *JCA* and the plain language of section 512.050, a filing fee is not a jurisdictional requirement to commence an appeal. Cases so stating should be overruled, and Rule 81.04 should not be interpreted to bar this appeal.

In this case, the trial court's judgment was entered on June 27, 2016.

Mr. Goldsby filed a motion to modify on July 19, 2016. The trial court denied the motion to modify on July 22, 2016.

Because Mr. Goldsby filed a timely after-trial motion that was ruled on by the trial court, the judgment became final on "the date of ruling of the last motion to be ruled or thirty days after entry of judgment, whichever is later." Rule 81.05(a)(2)(B).

Thirty days after the entry of judgment was July 27, 2016, which is later than the date the after-trial motion was denied (July 22, 2016). Thus, the judgment became final on July 27, 2016. Rule 81.05(a).

The notice of appeal shall be filed not later than ten days after the judgment or order appealed from becomes final. § 512.050. August 6, 2016 (ten days after July 27, 2016) was a Saturday, so the notice of appeal was due by August 8, 2016. Rule 44.01(a).

On August 5, 2016, the circuit clerk wrote to Mr. Goldsby and acknowledged receipt of the notice of appeal on August 5, 2016. Supp. L.F.; *see* Application for Transfer at 51.

Mr. Goldsby's appeal was timely.

II. IN THE ALTERNATIVE, THE COURT HAS JURISDICTION OVER THIS APPEAL, AND THE COURT OF APPEALS ERRED IN DISMISSING MR. GOLDSBY'S APPEAL, BECAUSE THE NOTICE OF APPEAL SHOULD BE DEEMED TIMELY IN THAT THE JUDGMENT WAS ENTERED ON JUNE 27, 2016, A TIMELY POST-JUDGMENT MOTION TO MODIFY WAS FILED ON JULY 19, 2016, THE MOTION WAS DENIED ON JULY 22, 2016, MR. GOLDSBY SUBMITTED A NOTICE OF APPEAL THAT WAS RECEIVED BY THE CIRCUIT CLERK ON AUGUST 5, 2016, AND MR. GOLDSBY REQUESTED FUNDS TO BE TRANSFERRED FROM HIS INMATE ACCOUNT ON JULY 28, 2016, THAT WERE RECEIVED BY THE CIRCUIT CLERK ON AUGUST 17, 2016, IN THAT MR. GOLDSBY (AN INMATE) BY DEFINITION CANNOT COMPLY WITH A REQUIREMENT TO PAY A FILING FEE ON HIS OWN, BUT RATHER MUST RELY ON THE ASSISTANCE OF ONE OR MORE THIRD PARTIES TO PROVIDE PAYMENT TO THE CIRCUIT CLERK SO THAT ANY DELAY IN PAYMENT OF THE FEE SHOULD BE DEEMED TO BE DUE TO THE ACTIVE INTERFERENCE OF THIRD PARTIES.

The issue of appellate jurisdiction was raised for the first time on appeal and preserved in Mr. Goldsby's transfer application to this Court. This Court determines its own jurisdiction de novo. *See Dunkle v. Dunkle,* 158 S.W.3d 823, 827 (Mo. App. 2005).

If the Court disagrees with Point I, the Court should nevertheless permit this appeal to go forward. As the Court has recognized, there are practical limitations on an inmate's ability to control all of the circumstances that can affect compliance with the

Supreme Court Rules. *See Price v. State,* 422 S.W.3d 292, 301 (Mo. banc 2014). These practical limitations include the inmate's inability to control when payments are made from the inmate's accounts.

Mr. Goldsby requested payment of the filing fee for this appeal on July 28, 2016, well in advance of the deadline for filing a notice of appeal (August 8, 2016). On the same date that he requested payment, Mr. Golsby sent his notice of appeal to the circuit clerk, who received it on August 5, 2016. Having done everything in his power to obtain a payment by August 8, 2016, Mr. Goldsby should not suffer dismissal of his appeal solely because he is an inmate.

This situation is analogous to proceedings seeking relief under Rule 29.15, in which the Court has recognized exceptions to filing deadlines in light of "the practical reality that an inmate cannot comply with Rule 29.15 without relying on a third party to some extent." *Id.* at 302. Rule 29.15(b) requires that an inmate "shall file" his or her motion in the sentencing court, but an inmate by definition "cannot comply with such a requirement on his own. Instead, inmates—unlike nearly every other category of civil litigants—cannot initiate post-conviction proceedings without relying on the assistance of one or more third parties to take the motion from the inmate and deliver it to the circuit clerk for filing. Accordingly, where an inmate writes his initial post-conviction motion and takes every step he reasonably can within the limitations of his confinement to see that the motion is filed on time, a motion court may excuse the inmate's tardiness when the active interference of a third party beyond the inmate's control frustrates those efforts and renders the inmate's motion untimely." *Id.*

The time limits for filing a Rule 29.15 motion are mandatory, and Rule 29.15 does not carve out exceptions that excuse late filings. *Watson v. State,* 520 S.W.3d 423, 428-429 (Mo. banc 2017). Generally, when a movant fails to file his or her Rule 29.15 motion within the applicable time limits, there is a complete waiver of the right to seek post-conviction relief and a complete waiver regarding all claims that could be raised in a Rule 29.15 motion. *Id.*

Nevertheless, this Court has recognized exceptions, including situations when post-conviction counsel abandons the movant and when circumstances outside the movant's control justify late receipt of the motion. *Id.* at 429. The Court also recently held that an untimely post-conviction motion "will be excused when the circuit court misinforms a defendant about the appropriate deadlines to file his or her motion during the sentencing colloquy." *Id.* at 434.

The limitations on an inmate's ability to comply with Rule 81.04 are the same as the limitations on an inmate's ability to comply with Rule 29.15. This Court's rules, including Rule 81.04, "shall be construed to secure the just, speedy and inexpensive determination of every action." Rule 41.03. As noted in Point I, there is no statutory requirement that payment of a filing fee must be made within the time for the filing of a notice of appeal, and the Court's rulemaking power does not include the ability to change the right of appeal. *See* § 512.050, RSMo; Mo. Const. art. V, § 5.

A just application of Rule 81.04 would recognize an inmate's limited ability to comply as well as an inmate's necessary reliance on others. The logic of the Court's decisions on the filing deadlines of Rule 29.15 should apply equally to the requirements

of Rule 81.04, and Mr. Goldsby's inability to pay the filing fee within the time for the filing of his notice of appeal -- despite his effort to do so -- should be excused.

In the federal court system, Mr. Goldsby's filing would have been considered "filed" the day it left his hands and entered the prison mail system. *See Houston v. Lack,* 487 U.S. 266 (1988). In *Houston,* the Supreme Court of the United States held that a pro se prisoner's notice of appeal should be deemed filed when the prisoner delivers it to prison officials for forwarding to the district court. *Id.* at 270-276. The Court observed that a prisoner cannot control the notice of appeal after it has been delivered to prison officials, the prisoner lacks legal counsel to institute and monitor the process, and the prison authorities have incentive to delay a filing beyond the applicable time limit. *Id.* at 270-272. The *Houston* holding was later incorporated into Federal Rule of Appellate Procedure 4(c), which, as written, applies only to notices of appeal. Nevertheless, the benefits of the "prison mailbox rule" have been extended to pro se state and federal prisoners filing petitions for habeas corpus as well as inmates filing complaints under 42 U.S.C. § 1983. *See Grady v. United States,* 269 F.3d 913, 916 (8th Cir. 2001); *Sulik v. Taney County,* 316 F.3d 813, 815 (8th Cir. 2003) (overruled on other grounds in later appeal, 393 F.3d 765 (8th Cir. 2005)).

In *Sulik,* the Eighth Circuit noted that the "foundation of *Houston* is the inherent disadvantage suffered by pro se prisoners in their ability to monitor the course of their litigation. . . . The pro se prisoner has no control over the processing of his complaint after he turns it over to prison authorities for mailing, the prisoner lacks legal counsel to institute and monitor the process, and the prison authorities have reason to delay the

filing of lawsuits, especially those against prison officials. We thus join our sister circuits and hold the prison mailbox rule governs the determination of when a prisoner's civil complaint has been filed." 316 F.3d at 815.

Based on the logic of *Houston,* which is similar to this Court's reasoning in *Price,* many state courts across the country have adopted and applied the prison mailbox rule under their own procedural rules. *See, e.g., Commonwealth v. Hartsgrove,* 553 N.E.2d 1299, 1302 (Mass. 1990); *Ex parte Allen,* 825 So. 2d 271 (Ala. 2002); *McClinton v. State,* 506 S.W.3d 227, 228 (Ark. 2016).

The Court of Appeals has stated numerous times that the prison mailbox rule does not apply in Missouri. *See Baird v. State,* 512 S.W.3d 867, 869 (Mo. App. 2017) (citing prior cases). In *Baird,* a movant under Rule 24.035 argued that the filing date of his motion should be determined by the date he placed it in the outgoing prison mailbox (six days before the filing deadline), not the date it was received by the circuit court clerk (five days after the deadline). The Court of Appeals disagreed: "Missouri appellate courts have consistently rejected this argument. As has been observed, the only relevant inquiry under Missouri law is when the post-conviction motion was filed with the clerk of the circuit court, not when it was mailed. We see no reason to depart from this long list of well-reasoned precedent unless and until our Supreme Court instructs us otherwise." *Id.* (citations and internal quotations omitted).

As an alternative to the piecemeal, case-by-case analysis required by *Price* and other Rule 29.15 cases, the Court should adopt the prison mailbox rule, either by amending Rule 81.04 or by allowing an exception to the rule for inmate appeals. The

reasoning of *Houston* and *Price* applies equally in this context, and fairness requires the appeal rights of inmates not to be limited by the circumstances of their confinement. A blanket rule stating that the date of delivery to prison officials is deemed to be the date of filing would provide certainty for parties and the court system. It would also provide a just application of the civil rules. *See* Rule 41.03.

Regardless of whether a general rule is adopted, Mr. Goldsby's notice of appeal was timely mailed on July 28, 2016, along with a proper request for withdrawal of funds. The delay in the receipt of the funds from prison officials is not a proper basis for dismissal of his appeal.

III. THE CIRCUIT COURT ERRED IN DISMISSING MR. GOLDSBY'S ACTION BECAUSE THE PETITION STATED A CLAIM FOR RELIEF IN THAT THE PETITION SET FORTH FACTS SHOWING A DISPUTE AS TO MR. GOLDSBY'S RIGHT TO HAVE A CALCULATION OF HIS RELEASE DATE UNDER SECTIONS 556.031, 559.260, AND 546.490, RSMO, AS WELL AS THE DEFENDANT'S REFUSAL TO COMPLY WITH THE STATUTES, THE PETITION DID NOT SHOW ON ITS FACE THAT IT WAS BARRED BY ANY PRIOR ACTION, THE DEFENDANT DID NOT PLEAD ANY AFFIRMATIVE DEFENSE OF RES JUDICATA OR COLLATERAL ESTOPPEL, AND THE CIRCUIT COURT COULD NOT PROPERLY DISMISS THE CLAIM ON THE BASIS OF THE DEFENDANT'S MOTION TO DISMISS THAT ATTACHED MATERIALS OUTSIDE THE PLEADINGS WITHOUT PROVIDING NOTICE THAT THE MOTION TO DISMISS WOULD BE CONSIDERED AS A MOTION FOR SUMMARY JUDGMENT.

The trial court erred in dismissing Mr. Goldsby's action. The petition stated a claim for a declaratory judgment. The motion to dismiss seemed to be based on an affirmative defense of res judicata or collateral estoppel that was never pleaded, and those theories were not supported by the motion. Further, the trial court explicitly dismissed this action on the basis of a motion to dismiss that included matters beyond the pleadings without giving Mr. Goldsby notice that the motion would be considered one seeking summary judgment. The judgment should be reversed, and the case should be remanded to the trial court for a resolution of this dispute on the merits.

A. The standard of review is de novo.

Appellate courts review a trial court's grant of a motion to dismiss de novo. A motion to dismiss for failure to state a claim tests the adequacy of a plaintiff's petition. The petition is reviewed in an almost academic manner to determine if the plaintiff has alleged facts that meet the elements of a recognized cause of action or of a cause that might be adopted in that case. The facts alleged in the petition are assumed to be true and are construed liberally in favor of the plaintiff. *Conway v. CitiMortgage, Inc.,* 438 S.W.3d 410, 413-414 (Mo. banc 2014); *Ridgell v. McDermott,* 427 S.W.3d 310, 312 (Mo. App. 2014).

Rule 55.27(a) allows a trial court to treat a motion to dismiss as a motion for summary judgment if matters outside the pleadings are presented and not excluded by the trial court, and if the parties are given a "reasonable opportunity" to present a summary judgment record as set forth in Rule 74.04. *Hoover v. Mercy Health,* 408 S.W.3d 140, 141-142 (Mo. banc 2013). When the record gives no indication that the trial court notified the parties that it would be treating a motion to dismiss as a motion for summary judgment pursuant to Rule 55.27(a), the trial court is deemed not to have considered any facts outside the pleadings; in those circumstances, an appellate court reviews only whether the petition states a claim. *Id.* at 142. It is error to consider matters outside the pleadings on a motion to dismiss. *Raster v. Ameristar Casinos, Inc.,* 280 S.W.3d 120, 131 (Mo. App. 2009).

In this case, the defendant's motion included exhibits beyond the pleadings. L.F. at 34-41. The trial court did not notify the parties that it would be treating the motion as a

motion for summary judgment pursuant to Rule 55.27(a), but rather stated that "the Court grants Respondent's motion to dismiss for the reasons stated in that motion." L.F. at 42. Therefore, this Court reviews de novo to determine whether Mr. Goldsby's pleading states a claim for relief. *See Hoover,* 408 S.W.3d at 142.

B. Mr. Goldsby stated a claim for a declaratory judgment.

In his petition, Mr. Goldsby alleged that he was sentenced to life imprisonment on September 21, 1990. L.F. at 5. Mr. Goldsby alleged that the Department of Corrections was improperly refusing to provide a calculation showing when his sentence would be completed under the 9/12ths law or his 12/12ths release date under the law in existence in 1972 when his offenses were committed. L.F. at 5-7. On August 21, 2015, Mr. Goldsby filed an addendum to his petition to add a prayer for a declaration of his rights under section 546.490, RSMo. L.F. at 2; Supp. L.F.

Mr. Lombardi filed an answer admitting that Mr. Goldsby was sentenced to life imprisonment on September 21, 1990. L.F. at 19. Mr. Lombardi denied all of the other factual allegations of the petition. L.F. at 19-21. The answer did not mention sections 556.031, 559.260, or 546.490. L.F. at 19-21.

The Missouri Constitution dictates that "no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted." Mo. Const. art. I, § 13. The current law (which would govern Mr. Goldsby's sentencing if he had been convicted of a crime committed after 1979) specifically indicates that it has no retroactive effect on offenses committed before 1979. *See* § 556.031, RSMo. Generally, the date of the

commission of an offense determines which version of a statute applies. *State v. Griffin,* 172 S.W.3d 861, 865 (Mo. App. 2005). Mr. Goldsby's conviction rests on acts committed in 1972, so his sentence is subject to the laws as they existed in 1972.

The Department of Corrections has a duty to calculate Goldsby's sentence because between 1879 and 1979, the applicable law dictated that the three-fourths rule, including a calculation of a prisoner's sentence, "must be read into every judgment of conviction." *Parrish v. Wyrick,* 589 S.W.2d 74, 77 (Mo. App. 1979). Because the 1879 statute must be applied to Mr. Goldsby's conviction, he is entitled to a calculation of his sentence under that law.

The defendant's motion in this case did not even dispute that Mr. Goldsby's petition stated a claim. Rather, the motion declared that Mr. Goldsby's claim was "meritless." L.F. at 31. This assertion was not a proper basis for dismissal.

A court cannot properly dismiss a plaintiff's petition for failure to state a claim by finding in favor of respondent on the merits. *Sandy v. Schriro,* 39 S.W.3d 853, 856 (Mo. App. 2001). "The test for sufficiency of a petition for declaratory judgment is whether the pleaded facts along with any reasonable inferences therefrom demonstrate the parties' entitlement to a declaration of rights or status. We accept as true all well-pleaded facts and their concomitant reasonable inferences, ignoring all conclusions. If the facts demonstrate any justiciable controversy, the trial court should declare the rights of the parties. It is improper for a trial court to decide the merits of a properly pleaded declaratory relief action by dismissal." *City of St. Peters v. Concrete Holding Co.,* 896 S.W.2d 501, 503 (Mo. App. 1995) (citations omitted).

This Court should reverse the judgment of dismissal and remand this action for further proceedings on the merits.

C. The petition did not support any defense of claim or issue preclusion.

Mr. Lombardi's answer did not set forth any affirmative defenses. L.F. at 19-21. Nevertheless, his motion to dismiss stated: "Gordon Goldsby continues to litigate the same meritless legal theory before the state court. The court has denied relief on that theory. This Court should now deny relief again." L.F. at 31. This seemingly was an effort to assert the affirmative defenses of res judicata or collateral estoppel as a basis for dismissal.

When an affirmative defense is asserted as a basis for dismissal, the petition may not be dismissed unless it clearly establishes on its face and without exception that it is barred. *Edoho v. Board of Curators of Lincoln University,* 344 S.W.3d 794, 797 (Mo. App. 2011); *Sheehan v. Sheehan,* 901 S.W.2d 57, 59 (Mo. banc 1995). In reviewing whether a petition should be dismissed on the basis of an affirmative defense, an appellate court must allow the pleading its broadest intendment, treat all facts alleged as true, and construe the allegations favorably to the plaintiff. *Sheehan,* 901 S.W.2d at 59.

The petition in this case made no mention of any prior litigation or any facts that could support an inference of res judicata or collateral estoppel. The pleading certainly did not show on its face that the claim for a declaratory judgment was barred; therefore, the defendant's unpleaded affirmative defenses could not properly support dismissal.

The judgment of dismissal cannot be supported as a judgment on the pleadings, which is reviewed to determine whether the moving party is entitled to judgment as a

matter of law on the face of the pleadings. *Shelter Mut. Ins. Co. v. MacVittie,* 423 S.W.3d 252, 254 (Mo. App. 2013). The non-moving party's alleged facts are treated as admitted. *Id.* A judgment on the pleadings will be affirmed only "if the facts pleaded by the petitioner, together with the benefit of all reasonable inferences drawn therefrom, show that petitioner could not prevail under any legal theory." *Id.* As noted, taking the allegations as true, there is no basis for a finding of res judicata or collateral estoppel.

A defendant asserting an affirmative defense must set forth "a short and plain statement of the facts showing that the pleader is entitled to the defense." Rule 55.08. An affirmative defense is asserted by the pleading of additional facts not necessary to support a plaintiff's case. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.,* 854 S.W.2d 371, 383 (Mo. banc 1993). Bare legal conclusions are not adequate to plead an affirmative defense. *Id.* The defendant in this case made no attempt to plead any affirmative defenses. L.F. at 19-21.

Further, even the exhibits improperly attached to the defendant's motion to dismiss did not support any claim of res judicata or collateral estoppel. In his petition, Mr. Goldsby requested a declaratory judgment as to whether the Department of Corrections was improperly refusing to provide a calculation showing when his sentence would be completed under the 9/12ths law or his 12/12ths release date under the law in existence in 1972 when his offenses were committed. L.F. at 5-7.

The defendant's exhibits did not raise any question as to whether Mr. Goldsby might be entitled to a declaratory judgment. Exhibit A related to an action by Mr. Goldsby to obtain a declaratory judgment as to whether he was entitled to be ***released***

under section 216.355, RSMo 1969. L.F. at 34. Exhibit B was a copy of a judgment dated January 8, 2014, from the Circuit Court of Pike County denying a petition for ***habeas corpus*** based on Mr. Goldsby's contention "that he is being held in violation of his constitutional rights because he has completed his life sentence." L.F. at 40.

Mr. Goldsby responded to the motion to dismiss by noting that he was not seeking to be released in the present action for a declaratory judgment, but rather to be told his calculated release date under the statutes mentioned in his petition. Supp. L.F.

This action is not barred by any former action.

CONCLUSION

Mr. Goldsby's notice of appeal was timely. His petition stated a claim for a declaratory judgment, and the circuit court erred when it considered matters outside the pleadings in granting the defendant's motion to dismiss. The dismissal should be reversed, and the action should be remanded for resolution on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document was served on counsel of record through the Court's electronic notice system on January 26, 2018.

This brief includes the information required by Rule 55.03 and complies with Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 8,220, excluding the cover, signature block, appendix, and this certificate.

The electronic copies of this brief were scanned for viruses and found virus-free through the Symantec anti-virus program.

/s/ Jeffery T. McPherson