IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DONALD E. NUSSBAUM,	)	
	)	
Appellant,	)	
	)	WD87727
v.	)	
	)	
STATE OF MISSOURI,	)	Opinion filed: September 22, 2026
	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
HONORABLE CORY L. ATKINS, JUDGE

Division Two: Janet Sutton, Presiding Judge, Lisa White Hardwick, Judge, and W. Douglas Thomson, Judge

Donald E. Nussbaum ("Nussbaum") appeals the motion court's denial of his amended Rule 24.035[1] motion for post-conviction relief after an evidentiary hearing. In Point I, Nussbaum argues the motion court clearly erred in not appointing counsel within 30 days of the filing of his *pro se* motion, as required by Rule 24.035(e). In Points II and III, Nussbaum argues his amended motion should be deemed timely filed, either under the abandonment doctrine or the active third-party interference exception. In Point IV, Nussbaum argues the motion court erred in denying his Rule 24.035 motion because trial

[1] All rule references are to Missouri Supreme Court Rules (2019).

counsel provided ineffective assistance in failing to call certain witnesses at sentencing. We find neither exception applies to save Nussbaum's amended motion because 1) the abandonment doctrine is limited to appointed counsel and no appointment occurred here and 2) the active third-party interference exception only applies to a movant's initial *pro se* motion. Thus, the motion court did not have the authority to review the untimely amended motion and could only adjudicate the claims in Nussbaum's *pro se* motion. Because the motion court did not dispose of all of Nussbaum *pro se* claims, we dismiss for lack of a final judgment.

Factual and Procedural History[2]

There are two underlying criminal cases relevant to this appeal. First, in May 2017, a grand jury indicted Nussbaum with first-degree robbery, armed criminal action, first-degree burglary, and first-degree kidnapping for events that occurred in late March 2017 ("the robbery case"). Second, in 2014, a grand jury indicted Nussbaum with one count of forgery, to which he later pled guilty as charged ("the forgery case"). At this point, movant has waived all post-conviction claims related to the forgery case.[3]

As to the robbery case, in mid-July 2019 Nussbaum plead guilty to the first-degree robbery and armed criminal action counts pursuant to an agreement with the State that it would dismiss the first-degree burglary and first-degree kidnapping counts. Nussbaum admitted that on March 29, 2017, he "either acting alone or in concert with others,"

[2] Nussbaum previously appealed this matter to our Court in *Nussbaum v. State*, 665 S.W.3d 414 (Mo. App. W.D. 2023) ("*Nussbaum I*"), where we remanded the case for an abandonment inquiry. Portions of that opinion are used without further attribution.

[3] *See* note 7, *infra*.

forcibly stole money and a firearm from the victim. Nussbaum also admitted that he or a co-participant threatened the victim with a handgun during the robbery. The court accepted Nussbaum's guilty plea, and on September 17, 2019, sentenced Nussbaum to eighteen years' imprisonment on each count, with those sentences to run concurrently.

Nussbaum did not file a direct appeal and instead timely filed a single *pro se* Rule 24.035 motion with an included *forma pauperis* affidavit on October 23, 2019.[4] No action was taken on the case for approximately seven months. The public defender's office learned that Nussbaum had filed a Rule 24.035 motion when Nussbaum reached out to their office regarding the status of his *pro se* motion. Although the trial court had not appointed the public defender to the case, the public defender subsequently decided to enter an appearance due to the delay in appointing counsel. Because of a conflict within the public defender's Kansas City appellate post-conviction offices, the public defender administratively designated Nussbaum's case to a special public defender, a private attorney who contracts with the public defender's office on a case-by-case basis.

Nussbaum's special public defender ("Counsel") entered her appearance on Nussbaum's behalf on May 12, 2020. Counsel filed a request for a thirty-day extension to file an amended motion that same day. The motion court granted Counsel's request for a first thirty-day extension on May 26, 2020, making the amended motion due "ninety (90) days from the date that the entire guilty plea and sentencing transcripts are filed." The transcript of Nussbaum's guilty plea and sentencing hearing in the robbery case was

[4] Nussbaum raised various claims in his *pro se* motion including that trial counsel destroyed evidence and prosecutorial misconduct.

filed on June 12, 2020, and the transcript of Nussbaum's guilty plea and sentencing hearing in the forgery case was filed on June 30, 2020. Using the June 30, 2020 date, the amended motion would have been due by September 28, 2020.[5]

On September 28, 2020, Nussbaum's Counsel requested a second thirty-day extension to file an amended Rule 24.035 motion. The motion court granted the requested extension on October 6, 2020, after the previously amended due date of the amended motion. Counsel then filed the amended motion on October 28, 2020. The amended motion raised two claims: one claim of ineffective assistance of counsel, for failing to call certain witnesses at Nussbaum's sentencing on the robbery case, and one claim related to the forgery case.

On May 5, 2022, the motion court entered findings of fact, conclusions of law, and judgment denying the amended motion without an evidentiary hearing. Without conducting an abandonment inquiry, the motion court concluded the amended motion was timely filed but denied both claims. Nussbaum then appealed to this Court in *Nussbaum I*. There, Nussbaum argued 1) the motion court clearly erred in failing to conduct an independent abandonment inquiry and 2) the motion court clearly erred in denying, without an evidentiary hearing, his claim that his sentencing counsel was ineffective for failing to investigate and call certain witnesses at his sentencing hearing. *Nussbaum I* held the amended motion was untimely because the motion court did not

[5] Nussbaum's amended motion was originally due sixty days after the complete transcripts of his guilty plea and sentencing hearings were filed on June 30, 2020, but as mentioned the motion court had granted counsel one thirty-day extension. *See* Rule 24.035(g).

grant the requested extension within the initial filing deadline for the amended motion. Counsel filed a second request for extension of time on the day the amended motion was due, however, the motion court did not grant the extension until October 6, 2020, *after* the amended motion was due. Thus, the motion court lacked the authority to grant this extension and as a result, the amended motion was untimely. This Court explained that the untimely filing of an amended motion raises a presumption of abandonment and remanded the case to the motion court for an independent inquiry into whether Nussbaum was abandoned by his counsel.[6]

On remand, the motion court conducted an abandonment inquiry, found the special public defender had abandoned Nussbaum, deemed the amended motion timely filed, and denied the motion on the merits.[7] With regard to the motion court's failure to appoint counsel within the thirty-day timeframe, the motion court stated:

> Appellate counsel was not timely appointed by the Court. The Court notes it was appointed to Division 17 shortly before the *pro se* motion was filed. In taking over the division, a number of cases were not correctly assigned to the Court's electronic "que." For most cases this was not an issue as counsel simply reached out to division staff regarding pending matters. Mr. Nussbaum, due to his incarceration, had no such recourse. The responsibility for the delay in appointing PCR counsel lies solely with the Court.

Nussbaum now appeals to this Court for the second time, raising three points related to the timeliness of his amended motion and one point asserting error in the denial

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[6] The *Nussbaum I* court noted the record indicated Nussbaum's Counsel was a special public defender, presumably unretained, but the record was otherwise unclear regarding her appointment by the motion court. The court explained that the abandonment doctrine is limited to appointed, unretained counsel. However, the State did not argue the abandonment doctrine was inapplicable because Counsel was not appointed, thus the court did not consider the issue.

[7] At the evidentiary hearing, Nussbaum expressly waived his claim related to the forgery case.

of his motion on the merits.

Standard of Review

"Appellate review of judgments disposing of Rule 24.035 motions is limited to a determination of whether the motion court's findings and conclusions are clearly erroneous." *Milner v. State*, 551 S.W.3d 476, 479 (Mo. banc 2018) (citing *Hall v. State*, 528 S.W.3d 360, 361 (Mo. banc 2017) and Rule 24.035(k)). "We also review the motion court's determination of whether a [m]ovant has been abandoned for clear error." *Davis v. State*, 728 S.W.3d 669, 672 (Mo. App. E.D. 2025) (quoting *Kinsella v. State*, 698 S.W.3d 858, 862 (Mo. App. E.D. 2024)).[8] "Findings and conclusions are clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made." *Milner*, 551 S.W.3d at 479 (quoting *Barton v. State*, 486 S.W.3d 332, 336 (Mo. banc 2016)).

Timeliness of Amended Motion

Nussbaum raises three points on appeal related to the timeliness of his amended motion. In Point I, Nussbaum argues the motion court clearly erred in not appointing counsel within 30 days of the filing of his *pro se* motion, as required by Rule 24.035(e). Nussbaum contends his right to appointed counsel was arbitrarily abrogated and he was

[8] *Davis* addressed a movant's appeal from the denial of his amended Rule 29.15 motion for post-conviction relief. 728 S.W.3d at 671. "Rule 29.15 contains certain substantive provisions that are identical to provisions in Rule 24.035 . . . . Accordingly, case law interpreting a provision that is identical in both rules applies equally in proceedings under either rule." *McCartney v. State*, 622 S.W.3d 729, 731 n.3 (Mo. App. S.D. 2021) (quoting *Vogl v. State*, 437 S.W.3d 218, 224 n.7 (Mo. banc 2014)). Thus, this opinion utilizes cases discussing either rule as appropriate.

prejudiced because he did not receive appointed counsel but was instead required to proceed with counsel who entered an appearance, which jeopardized the protection of the abandonment doctrine. In Point II, Nussbaum asserts the trial court did not clearly err in finding Nussbaum was abandoned and thus deeming his amended motion timely filed. In Point III, Nussbaum contends that as an alternative to Points I and II, this Court should deem his amended motion timely filed because third parties beyond his control interfered with the filing of a timely amended motion. In response, the State argues the motion court clearly erred in applying the abandonment doctrine to excuse the untimely filing of Nussbaum's amended motion because the doctrine does not apply to non-appointed counsel. The State further asserts the third-party interference exception applies only to the untimely filing of an initial, *pro se* postconviction motion, and thus does not apply to Nussbaum's amended motion. For ease of analysis, we consider these points together.

"[W]e have an independent duty to verify the timeliness of the motion for post-conviction relief." *Davis*, 728 S.W.3d at 672 (citing *Beerbower v. State*, 699 S.W.3d 556, 558 (Mo. App. S.D. 2024)). This Court has already determined in *Nussbaum I*, and the parties do not dispute, that Nussbaum's amended motion was not filed within the time limits of Rule 24.035. *Nussbaum*, 665 S.W.3d at 420. "The time limits in Rules 24.035 and 29.15 serve the legitimate end of avoiding delay in the processing of prisoner's claims and prevent the litigation of stale claims[,]" and it is this Court's duty to enforce them. *Anderson v. State*, 725 S.W.3d 708, 712 (Mo. App. E.D. 2025) (quoting *Dorris v. State*, 360 S.W.3d 260, 269 (Mo. banc 2012)). Thus, absent the application of an exception, Nussbaum will be subject to a complete waiver of the right to proceed under

the amended motion and the claims raised therein. *See Scott v. State*, 719 S.W.3d 723, 726 (Mo. banc 2025) (quoting *Dorris*, 360 S.W.3d at 266-67); Rule 24.035(b). "While the rule does not carve out exceptions that excuse late filings, court decisions have created two: (1) when post-conviction counsel abandons the movant; and (2) when rare circumstances outside the movant's control justify late receipt of the motion." *Moore v. State*, 328 S.W.3d 700, 702 (Mo. banc 2010) (citation omitted). Nussbaum argues that both exceptions are applicable here.

Abandonment

"When postconviction counsel is appointed to an indigent movant, an amended motion seeking postconviction relief that is filed beyond the [Rule 24.035(g)] deadline can constitute 'abandonment' of the movant." *Garretson v. State*, 695 S.W.3d 255, 263 (Mo. App. W.D. 2024) (citing *Moore v. State*, 458 S.W.3d 822, 825 (Mo. banc 2015)). "The abandonment doctrine authorizes a motion court to accept a late-filed amended motion when the movant filed 'a timely *pro se* motion for postconviction relief, the motion court appointed counsel to represent the movant, and appointed counsel failed to file the amended motion in a timely manner.'" *Kinsella*, 698 S.W.3d at 862 (cleaned up) (quoting *Jendro v. State*, 680 S.W.3d 585, 591 (Mo. App. S.D. 2023)).

"[T]he abandonment doctrine arose out of the need to balance two important policies: 'the Court's decision to provide counsel for all indigent inmates and the Court's steadfast refusal to acknowledge claims based on the ineffectiveness of post-conviction counsel.'" *Gittemeier v. State*, 527 S.W.3d 64, 69 (Mo. banc 2017) (citing *Price v. State*, 422 S.W.3d 292, 297 (Mo. banc 2014)). The Supreme Court's adoption of the

abandonment exception was "purposefully limited both in its rationale (i.e., to enforce the requirements and ensure the benefits of Rule 29.15(e)) and in its application (i.e., to amended motions filed by appointed counsel)." *Id.* (quoting *Price*, 422 S.W.3d at 298). In short, the abandonment doctrine was "created to excuse the untimely filing of amended motions by appointed counsel under Rule 29.15(e)."[9] *Id.* (quoting *Price*, 422 S.W.3d at 297).

Our Supreme Court and appellate courts have consistently, repeatedly, and emphatically held the abandonment doctrine applies only to appointed counsel, not counsel who voluntarily enter an appearance, even if said counsel is a public defender.[10] "If counsel is not appointed as counsel of record by an appointment order, the abandonment doctrine does not apply." *Scott*, 719 S.W.3d at 728. *Appointed* counsel's failure to perform the tasks required by 24.035(e) leaves everyone in the same practical position—as if "counsel had not been appointed at all, for counsel has abandoned his or her client." *Gittemeier*, 527 S.W.3d at 69 (quoting *Barton v. State*, 486 S.W.3d 332, 337 (Mo. banc 2016)); *see also Cornelious v. State*, 526 S.W.3d 161, 167 (Mo. App. W.D. 2017) (noting same). However, "[w]hen counsel voluntarily enters his or her appearance on behalf of a movant, as opposed to being appointed by the court, counsel has

[9] Again, we note that 29.15(e) and 24.035(e) are identical in all relevant respects, thus case law interpreting both are applicable. *McCartney*, 622 S.W.3d at 731 n.3 (quoting *Vogl*, 437 S.W.3d at 224 n.7); *see also Cornelious v. State*, 526 S.W.3d 161, 168 (Mo. App. W.D. 2017) (noting "the abandonment doctrine seeks only to enforce Rules 24.035(e) and 29.15(e)").

[10] *See, e.g.*, *Scott*, 719 S.W.3d at 728; *Mack v. State*, 716 S.W.3d 260, 262 (Mo. banc 2025); *Mills v. State*, 732 S.W.3d 513, 515-16 (Mo. App. E.D. 2026); *Anderson*, 725 S.W.3d at 713; *Davis*, 728 S.W.3d at 673-74; *State ex rel. Hanaway v. Curless*, 722 S.W.3d 842, 847 (Mo. App. S.D. 2025); *Beerbower*, 699 S.W.3d at 559; *Kinsella*, 698 S.W.3d at 863-64; *Kemper v. State*, 681 S.W.3d 611, 614-15 (Mo. App. E.D. 2023).

voluntarily taken an action indicating he or she has knowledge of the case and intends to represent the client." *Beerbower*, 699 S.W.3d at 559-60. "In that situation, it is not 'as if counsel had never been appointed at all.'" *Id.* "As a result, 'there is no meaningful distinction between a privately retained counsel who enters an appearance and a public defender who voluntarily enters an appearance since both have taken an action in the case acknowledging their representation of the movant.'" *Anderson*, 725 S.W.3d at 713 (quoting *Beerbower*, 699 S.W.3d at 560).

Nussbaum does not dispute this established law but instead argues an amendment to Rule 24.035(e) mandates a different result. Effective January 1, 2018, Rule 24.035(e) was amended to require that "Within 30 days after an indigent movant files a *pro se* motion, the court shall cause counsel to be appointed for the movant."[11] *See Watson v. State*, 536 S.W.3d 716, 718 n.2 (Mo. banc 2018). Before January 1, 2018, Rule 24.035(e) did not provide a specific timeframe within which the court must appoint counsel. *See id.* Thus, Nussbaum argues previous cases considering the issue did not analyze the court's violation of Rule 24.035(e). *See Kinsella*, 698 S.W.3d at 864 ("[A]lthough the motion court did not appoint counsel as required by Rule 29.15(e), the rule provides no specific time within which the court must appoint counsel . . . only that, at some point, the court must ensure counsel is appointed to represent an indigent movant." (internal quotations and citation omitted)). Here, there is no dispute that the motion court did not follow Rule 24.035(e)'s mandate as it never appointed counsel, let

[11] This change to Rule 24.035(e) continues in effect through the latest amendment to said Rule, effective July 1, 2023.

alone within the required 30 days. Nussbaum asserts the court's clear violation of the rule should allow the motion court to utilize the abandonment doctrine and find his amended motion timely filed.

To start, Nussbaum acknowledges the Supreme Court's decision in *Scott v. State*, 719 S.W.3d 723 (Mo. banc 2025) presents an analogous factual situation. In *Scott*, the movant timely filed his *pro se* Rule 29.15 motion and a motion to proceed *in forma pauperis*, however the motion court never appointed counsel and instead, a public defender entered an appearance on the movant's behalf. *Id.* at 725. Movant argued the motion court did not comply with Rule 29.15(e) as it failed to appoint him counsel within 30 days.[12] *Id.* at 728. The Supreme Court in *Scott* noted the public defender entered an appearance *within* the 30-day deadline for the motion court to appoint counsel. *Id.* The Court held, "The public defender's entry of an appearance without an appointment order obviates the need for the motion court to appoint counsel under Rule 29.15(e) because the movant is shown of record as represented by counsel." *Id.* at 728-29. It further noted, "The deadlines in Rules 29.15 and 24.035 are mandatory, however, and movants remain free to seek appropriate relief to ensure a motion court's appointment of counsel complies with the deadlines in Rules 29.15(e) and 24.035(e)." *Id.* at 729. The Court did not specify what that relief might be. Nussbaum points out the motion court in *Scott* did not commit the error present here because counsel entered their appearance before the expiration of the motion court's 30-day window, thus cutting the time short for it to act.

[12] As here, *Scott* was decided under a version of Rule 29.15 requiring the motion court to appoint counsel within 30 days of the filing of an indigent *pro se* motion. 719 S.W.3d at 725 n.1.

Thus, Nussbaum argues *Scott* did not address the effect of a motion court's violation of Rule 24.035(e). Nussbaum similarly argues the vast majority of appellate cases either analyzed the pre-2018 Rule with no time limit for appointment or involved counsel entering an appearance before the expiration of the court's 30-day window. *See Mack v. State*, 716 S.W.3d 260, 262 (Mo. banc 2025) (analyzing the pre-2018 Rule); *Beerbower*, 699 S.W.3d at 558 (counsel entered appearance 29 days after *pro se* motion filed); *Kemper v. State*, 681 S.W.3d 611, 613 (Mo. App. E.D. 2023) (counsel entered appearance nine days after *pro se* motion filed). Nussbaum posits that a violation of 24.035(e) must lead to a different result. We disagree.

Our Eastern District recently decided *Anderson v. State*, 725 S.W.3d 708, 712 (Mo. App. E.D. 2025) and *Mills v. State*, 732 S.W.3d 513, 515-16 (Mo. App. E.D. 2026), which directly address the question at hand. In both *Anderson* and *Mills*, the movants timely filed *pro se* Rule 29.15 motions, but neither motion court appointed counsel within 30 days, and several months later a public defender entered their appearance and filed an untimely amended motion.[13] *Anderson*, 725 S.W.3d at 711; *Mills*, 732 S.W.3d at 515. In both, the motion court later appointed counsel, found that counsel had abandoned the movants, and ultimately found the amended motions timely filed. *Anderson*, 725 S.W.3d at 711; *Mills*, 732 S.W.3d at 515. On appeal, both cases found the abandonment doctrine does not apply to unappointed public defenders. *Anderson*, 725 S.W.3d at 713; *Mills*,

[13] Both *Anderson* and *Mills* were also decided under a post-2018 version of Rule 29.15 requiring the motion court to appoint counsel within 30 days of the filing of an indigent *pro se* motion. *Anderson*, 725 S.W.3d at 710 n.1; *Mills*, 732 S.W.3d at 514 n.1.

732 S.W.3d at 515-16. *Anderson* explained the "motion court's *post hoc* appointment of the attorney of record was unnecessary because 'the public defender's entry of an appearance without an appointment order obviates the need for the motion court to appoint counsel under Rule 29.15(e) because the movant is shown of record as represented by counsel.'" 725 S.W.3d at 713 (quoting *Scott*, 719 S.W.3d at 728-29); *see also Kinsella*, 698 S.W.3d at 865 ("We will not interpret Rule 29.15(e) as requiring a motion court to appoint counsel for an indigent movant when it appears from the record that the movant is already represented."); *Kemper*, 681 S.W.3d. at 614 n.2 ("[W]e are unaware of any authority that such a *post hoc* appointment would be sufficient to satisfy Rule 29.15([e])'s[14] appointment requirement."). *Anderson* held "the motion court's appointment of counsel was invalid and the untimely filing of the amended motion could not be cured by appointing counsel after an evidentiary hearing." 725 S.W.3d at 713. *Mills* likewise held the motion court lacked the authority to adjudicate the amended motion and gave the following words of caution: "Words matter in the law and the court encourages continued close coordination between the public defender's office and motion courts on these important issues." 732 S.W.3d at 516. We agree with the *Mills* court in this regard.

Anderson and *Mills* each involve situations where the motion court took action nearly identical to the action the motion court took here, which Nussbaum requests we

[14] While *Kemper* references Rule 29.15(g), it appears the court intended to refer to Rule 29.15(e) as that is the subdivision containing the appointment requirement.

affirm.[15] In each, the court held the motion court erred in finding the movant abandoned by his unappointed public defender, and that this error could not be cured by a late appointment order. Likewise, here, the motion court found Nussbaum was abandoned by Counsel and deemed his amended motion timely filed. While the motion court did not attempt to appoint counsel, it is established law that the abandonment doctrine does not apply to unappointed counsel,[16] and any attempt to appoint counsel at this point would be futile.

Despite this controlling case law, Nussbaum argues Rule 24.035(e) provides a due process right to receive appointed counsel within 30 days of the filing of his *pro se* motion. He argues the failure to appoint counsel was prejudicial in that he was denied the protection of the abandonment doctrine. While a "post-conviction movant has no constitutional right to counsel," indigent post-conviction movants do have a rule-based right to be represented by counsel. *Williams v. State*, 494 S.W.3d 638, 641 (Mo. App. W.D. 2016) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 553–54 (1987)). A similar claim was raised and rejected in *Borschnack v. State*, 614 S.W.3d 561, 569 (Mo. App. S.D. 2020). In *Borschnack*, the motion court failed to notify counsel of its appointment

[15] A third case which we find factually indistinguishable is *Davis v. State*, 728 S.W.3d 669, 672 (Mo. App. E.D. 2025). *Davis* was decided under a post-2018 version of Rule 29.15. *Id.* at 671 n.1. The movant filed a *pro se* Rule 29.15 motion and an entry of appearance was filed over 30 days later by a public defender who ultimately filed an untimely amended motion. *Id.* at 671-73. The motion court did not appoint counsel. *Id.* The motion court subsequently found the movant abandoned and proceeded to the merits of the amended motion. *Id.* at 672. On appeal, *Davis* held, "[b]ecause [counsel] was never appointed, the motion court clearly erred in applying the abandonment doctrine to excuse her untimely filing and rule on the [a]mended [m]otion." *Id.* at 674 (citing *Beerbower*, 699 S.W.3d at 560 and *Kinsella*, 698 S.W.3d at 865). *See also State ex rel. Hanaway v. Curless*, 722 S.W.3d 842 (Mo. App. S.D. 2025) (similarly holding).

[16] *See supra*, note 10.

order, making the appointment ineffective. *Id.* at 569. The motion court subsequently declined to apply the abandonment doctrine when the movant's retained counsel filed an untimely amended motion. *Id.* at 568. On appeal, the movant argued he was unable to file a timely amended motion due to the actions of the State, which resulted in prejudice in that he was denied review of the merits of the motion. *Id.* at 569. The court denied the claim, finding that abandonment was "directed solely at the conduct of appointed counsel," and thus did not apply. *Id.*

In sum, we find the current state of the case law forecloses Nussbaum's argument. The abandonment doctrine is not available to cure the motion court's failure to appoint counsel. Accordingly, we hold the motion court erred in applying the abandonment doctrine to deem Nussbaum's amended motion timely filed.

Third-Party Active Interference

Next, Nussbaum argues this Court should deem his amended motion to be timely filed pursuant to the third-party or active interference exception. Our courts recognize "a narrow exception that excuses the untimely filing of a *pro se* motion under Rule 24.035. Such an exception occurs 'when the *active interference* of a third party beyond the inmate's control frustrates those efforts and renders the inmate's motion untimely.'" *Propst v. State*, 535 S.W.3d 733, 735 (Mo. banc 2017) (quoting *Price*, 422 S.W.3d at 302). "In this factual situation, a motion court may excuse the untimely filing '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.'" *Id.* (quoting *Price*, 422 S.W.3d at 302). "The active interference exemption 'arises out of the

practical reality that an inmate cannot comply with [the postconviction relief rules] without relying on a third party to some extent.'" *Kirk v. State*, 590 S.W.3d 897, 903 (Mo. App. W.D. 2019) (quoting *Price*, 422 S.W.3d at 302).

By its plain language, the exception only applies to an untimely initial *pro se* motion. *See Propst*, 535 S.W.3d at 735 (describing a narrow exception that excuses the untimely filing of a *pro se motion*). Courts have specifically phrased the third-party interference exception as an exception to Rule 24.035(b) and 29.15(b). *Trapp v. State*, 696 S.W.3d 890, 895 (Mo. App. E.D. 2024) ("Missouri Courts have held a recognized exception to the time limits of Rule 24.035(b) exists when a movant-inmate pleads and proves facts showing" third-party active interference. (citing *Ross v. State*, 659 S.W.3d 368, 371, 374 (Mo. App. E.D. 2023))); *Price*, 422 S.W.3d at 301 ("[T]ardiness that results solely from the active interference of a third party beyond the inmate's control may be excused and the waivers imposed by Rule 29.15(b) not enforced."). Rule 24.035(b) contains the time limits for filing an initial motion. It is Rule 24.035(g) that contains the time limits for filing an amended motion. We have not identified a case, nor have the parties provided us any authority, applying the third-party interference exception to Rule 24.035(g).

Nussbaum acknowledges the exception has only been applied to initial post-conviction motions; however, he contends the facts of his case warrant a new application of the exception to his amended motion. We decline to recognize such an extension. The Supreme Court's decision to adopt the third-party interference exception was "motivated by the practical limitations on an inmate's ability to control all of the circumstances that

can affect compliance with Rule 29.15(b)." *Price*, 422 S.W.3d at 301 (citing *Nicholson v. State*, 151 S.W.3d 369, 371 n. 1 (Mo. banc 2004)). This concern is not applicable to an amended motion as post-conviction counsel is not limited to the resources available within the prison system. *See id.* at 302 (noting that Rule 29.15(b) requires an inmate to file their motion with the sentencing court and an inmate, unlike other civil litigants, cannot comply with this requirement on their own but must rely on third parties to deliver the motion to the court); *Nicholson*, 151 S.W.3d at 371 n. 1 ("An incarcerated person seeking post-conviction relief must prepare and file his or her motion only 'with such help as he can obtain within the prison walls or the prison system.'" (quoting *Johnson v. Avery*, 393 U.S. 483, 488 (1969))). Further, the exception is "narrow" and intended to be so. *See Pulliam v. State*, 644 S.W.3d 321, 324 (Mo. App. S.D. 2022) (quoting *Propst*, 535 S.W.3d at 735). Expanding exceptions to the time limits contained within the post-conviction rules is disfavored. *Price* described the "carefully circumscribed environs" of the abandonment doctrine discussed above and narrated a "cautionary tale concerning the uncertain proliferation of unwritten exceptions to the deadlines in Rule 29.15(b)." 422 S.W.3d at 303, 307 n.9; *see also Cornelious*, 526 S.W.3d at 166 ("The parameters of the abandonment doctrine have since been the topic of considerable debate, though *Price* went to great lengths to clarify the limited reach of the doctrine."). Such cautions militate against recognizing a new exception to the time limits contained within Rule 24.035.

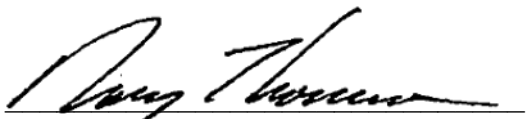
Disposition

While we are sympathetic to the circumstances here, where the motion court explained it did not receive notice of Nussbaum's *pro se* motion in time to appoint

counsel within the thirty-day timeframe, case law does not support the application of any recognized exception to the time limits of Rule 24.035. Nussbaum's amended motion was not timely filed and thus the motion court had no authority to consider its substantive claims. *Garretson*, 695 S.W.3d at 263. Accordingly, we do not reach Nussbaum's Point IV, addressing the denial of his amended motion on the merits. Nussbaum's *pro se* motion was the operative filing as the only timely filed motion before the court. *Mack*, 716 S.W.3d at 262 n.4. Here, this is problematic, as the evidentiary hearing was limited to the claims raised in Nussbaum's amended motion and failed to dispose of the differing, and additional, claims raised in Nussbaum's *pro se* motion. "A judgment denying post-conviction relief is not final and appealable if it fails to acknowledge, adjudicate, or dispose all of the claims asserted in the post-conviction motion." *Creighton v. State*, 520 S.W.3d 416, 423 n.9 (Mo. banc 2017) (internal quotations and citation omitted). Absent a final judgment, the appeal must be dismissed. *Garretson*, 695 S.W.3d at 263.

Conclusion

We dismiss the appeal for lack of a final judgment and remand this matter to the motion court for further proceedings consistent with this opinion.



W. Douglas Thomson, Judge

All concur.