**MISSOURI COURT OF APPEALS**
**WESTERN DISTRICT**

**DONALD E. NUSSBAUM**, **Appellant**,
**v.**
**STATE OF MISSOURI**, **Respondent**.

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DOCKET NUMBER WD87727

DATE: September 22, 2026

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Appeal From:

Jackson County Circuit Court
The Honorable Cory L. Atkins, Judge

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Appellate Judges:

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

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Attorneys:

Evan Buchheim, Jefferson City, MO, for respondent
John Mermelstein, Columbia, MO, for appellant

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# MISSOURI APPELLATE COURT OPINION SUMMARY

## MISSOURI COURT OF APPEALS
## WESTERN DISTRICT

**DONALD E. NUSSBAUM, Appellant,**
**v.**
**STATE OF MISSOURI, Respondent.**

WD87727 Jackson County

Before Division Two Judges: 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 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 counsel provided ineffective assistance in failing to call certain witnesses at sentencing.

**DISMISSED.**

**Division Two holds:**

The untimeliness of Nussbaum's amended motion is dispositive of this appeal. In *Nussbaum I* our Court held Nussbaum's amended motion was not timely filed. The parties do not dispute this fact, however Nussbaum argues two exceptions apply which excuse the late filing of his amended motion. We disagree.

First, Nussbaum argues this Court should deem his amended motion timely filed pursuant to the abandonment doctrine. However, the abandonment doctrine is not applicable here because the motion court never appointed counsel, instead Nussbaum's counsel voluntarily entered her appearance. Our courts have made clear that the abandonment doctrine applies only to appointed counsel, not counsel who voluntarily enter an appearance, even if said counsel is a public defender. Several appellate cases have affirmed this principle after the 2018 amendment to Rule 24.035(e), which requires the motion court to appoint counsel within 30 days after an indigent movant files a *pro se* motion. These cases held the motion court erred in finding the movant abandoned by their unappointed public defenders. The abandonment doctrine is not available to cure the motion court's failure to appoint counsel and is not available to remedy the late filing of Nussbaum's amended motion.

Second, Nussbaum argues this Court should deem his amended motion timely pursuant to the third-party or active interference exception. This is a narrow exception that excuses the untimely filing of an initial *pro se* motion. Neither our Court nor the parties have identifed a case applying the third-party interference exception to an amended post-conviction motion. Expanding exceptions to the time limits contained within the post-conviction rules is disfavored and we decline to do so here. Thus, the third-party interference exception is also not available to remedy the late filing of Nussbaum's amended motion.

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 the motion court had no authority to consider it. Nussbaum's *pro se* motion was the only motion properly before the court. Because the motion court did not consider the differing, and additional, claims raised in Nussbaum's *pro se* motion, we must dismiss for lack of a final judgment.

**Opinion by: W. Douglas Thomson, Judge** September 22, 2026

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