

No. SC91652

**In the
Supreme Court of Missouri**

JESSE DORRIS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Mississippi County

Thirty-Third Judicial Circuit

The Honorable T. Lynn Brown

APPELLANT'S SUBSTITUTE BRIEF, STATEMENT, AND ARGUMENT

**Gwenda Reneé Robinson
Missouri Bar No. 43213
District Defender, Office B/Area
68
Office of the State Public Defender
Eastern Appellate/PCR
1010 Market Street, Suite 1100
St. Louis, Missouri 63101
314.340.7662 (telephone)
314.340.7685 (facsimile)
Gwenda.Robinson@mspd.mo.gov**

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	3-7
JURISDICTIONAL STATEMENT.....	8-9
STATEMENT OF FACTS.....	10-18
POINT I	19
POINT II.....	20-21
ARGUMENT I.....	22-32
ARGUMENT II	33-43
CONCLUSION	44
CERTIFICATE OF SERVICE AND COMPLIANCE	45
APPENDIX	46

TABLE OF AUTHORITIES

Cases

<i>Andrews v. State</i> , 282 S.W.3d 372 (Mo. App. W.D. 2009)	27
<i>Ball v. State</i> , 479 S.W.2d 486 (Mo. 1972)	41
<i>Bank v. Pfeil</i> , 537 S.W.2d 680 (Mo. App. St.L.D. 1976)	35
<i>Belfield v. State</i> , 307 S.W.3d 680 (Mo. App. E.D. 2010)	27
<i>Chromalloy Am. Corp. v. Elyria Foundry Co.</i> , 955 S.W.2d 1 (Mo. banc 1997)22	
<i>Dorris v. State</i> , No. SD30491, 2011 WL 742548 (Mo. App. S.D. March 18, 2011)	9, 17-18, 29
<i>Gerlt v. State</i> , No. WD72225, 2011 WL 1363898 (Mo. App. W.D. April 12, 2010)	31-32
<i>Hannah v. State</i> , 816 S.W.2d 1 (Mo. App. E.D. 1991).....	33
<i>Hill v. State</i> , No. SD30530, 2011 WL 1458697 (Mo. App. S.D. April 15, 2011)29	
<i>Howard v. State</i> , 289 S.W.3d 651 (Mo. App. E.D. 2009)	23-24
<i>J.C.W. ex rel. Webb v. Wyciskalla</i> , 275 S.W.3d 249 (Mo. banc 2009)	25-28
<i>Lawrence v. State</i> , 980 S.W.2d 135 (Mo. App. E.D. 1998).....	24
<i>Lopez-McCurdy v. State</i> , No. SD30586, 2011 WL 1119069 (Mo. App. S.D. March 28, 2011)	29
<i>Mackley v. State</i> , 331 S.W.3d 733 (Mo. App. E.D. 2011).....	29

<i>Matchett v. State</i> , 119 S.W.3d 558 (Mo. App. S.D. 2003)	24
<i>Mayfield v. State</i> , 136 S.W.3d 130 (Mo. App. S.D. 2004)	39
<i>McCracken v. Wal-Mart Stores E., L.P.</i> , 298 S.W.3d 473 (Mo. banc 2009)	30
<i>Merriweather v. Grandison</i> , 904 S.W.2d 485 (Mo. App. W.D. 1995)	24
<i>Missouri Soybean Ass’n v. Missouri Clean Water Com’n</i> , 102 S.W.3d 10 (Mo. banc 2003)	
.....	22
<i>Moore v. State</i> , 328 S.W.3d 700 (Mo. banc 2010)	25
<i>Murphy v. State</i> , 796 S.W.2d 673 (Mo. App. S.D. 1990)	25
<i>Nicholson v. State</i> , 524 S.W.2d 106 (Mo. banc 1975)	41
<i>Nicholson v. State</i> , 151 S.W.3d 369 (Mo. banc 2004)	37-38
<i>Reynolds v. Carter Cnty.</i> , 323 S.W.3d 447 (Mo. App. S.D. 2010)	30
<i>Ritter v. State</i> , 119 S.W.3d 603, 604 (Mo. App. E.D. 2003)	38
<i>Robinson v. Norris</i> , 60 F.3d 457 (8th Cir. 1995)	41
<i>Roth v. State</i> , 921 S.W.2d 680 (Mo. App. W.D. 1996)	24
<i>Schmidt v. State</i> , 292 S.W.3d 574 (Mo. App. S.D. 2009)	27
<i>Schneider v. State</i> , 787 S.W.2d 718 (Mo. banc 1990)	36
<i>Searcy v. State</i> , 981 S.W.2d 597 (Mo. App. W.D. 1998)	24
<i>Sitelines, L.L.C. v. Pentstar Corp.</i> , 213 S.W.3d 703 (Mo. App. E.D. 2007)	34-35
<i>Smith v. State</i> , 63 S.W.3d 218 (Mo. banc 2001)	22

<i>Snyder v. State</i> , No. WD72071, 2011 WL 976750 (Mo. App. W.D. March 22, 2011)	
.....	29-32
<i>Starry v. State</i> , 318 S.W.3d 780 (Mo. App. W.D. 2010).....	27
<i>State ex. rel. Director of Revenue v. Rauch</i> , 971 S.W.2d 350 (Mo. App. E.D. 1998)24	
.....	
<i>State v. Braden</i> , 864 S.W.2d 8 (Mo. App. E.D. 1993).....	38-39, 42
<i>State v. Dailey</i> , 21 S.W.3d 113 (Mo. App. W.D. 2000).....	41
<i>State v. DeGraffenreid</i> , 855 S.W.2d 450 (Mo. App. S.D. 1993)	42
<i>State v. Dieter</i> , 840 S.W.2d 887 (Mo. App. S.D. 1992)	42
<i>State v. Dorris</i> , 277 S.W.3d 831 (Mo. App. S.D. 2009)	8, 15, 17, 42-43
<i>State v. Folson</i> , 940 S.W.2d 526 (Mo. App. W.D. 1997)	24
<i>State v. Goth</i> , 792 S.W.2d 437 (Mo. App. S.D. 1990)	39
<i>State v. Hauser</i> , 101 S.W.3d 320 (Mo. App. E.D. 2003).....	38, 42-43
<i>State v. Herron</i> , 136 S.W.3d 126 (Mo. App. E.D. 2004).....	38
<i>State v. Howe</i> , 171 S.W.3d 799 (Mo. App. E.D. 2005).....	35, 38, 42-43
<i>State v. Kinder</i> , 122 S.W.3d 624 (Mo. App. E.D. 2003).....	25
<i>State v. Mitchell</i> , 145 S.W.3d 21 (Mo. App. S.D. 2004)	39
<i>State v. Molsbee</i> , 316 S.W.3d 549 (Mo. App. W.D. 2010)	26-27
<i>State v. Morrison</i> , 94 S.W.3d 448 (Mo. App. E.D. 2003).....	38-39
<i>State v. Ortega</i> , 985 S.W.2d 373 (Mo. App. S.D. 1999).....	22

<i>State v. Ramos</i> , 751 S.W.2d 135 (Mo. App. S.D. 1988)	35, 38-39, 42
<i>State v. Randolph</i> , 119 S.W.3d 186 (Mo. App. E.D. 2003)	35, 42
<i>State v. Vinson</i> , 833 S.W.2d 399 (Mo. App. E.D. 1992)	34
<i>State v. Williams</i> , 871 S.W.2d 450 (Mo. banc 1994)	35
<i>State v. Wilson</i> , 15 S.W.3d 71 (Mo. App. S.D. 2000)	43
<i>Stidham v. State</i> , 963 S.W.2d 351 (Mo. App. W.D. 1998)	24
<i>Swofford v. State</i> , 323 S.W.3d 60 (Mo. App. E.D. 2010)	28-30, 32
<i>Thomas v. State</i> , 808 S.W.2d 364 (Mo. banc 1991)	34
<i>Three Bears Camp & Camping Inc. v. Johnson</i> , 790 S.W.2d 951 (Mo. App. S.D. 1990)	24
<i>Tisius v. State</i> , 183 S.W.3d 207 (Mo. banc 1996)	36

Statutes

§ 195.420	10
§ 558.016	10
§ 578.154	8, 10

Rules

Rule 29.11	34-36, 38, 41-43
Rule 29.15	23, 27, 34-35, 38
Rule 55.08	30
Rule 55.27	31

Rule 83.04	9
------------------	---

Constitutional Provisions

Mo. Const., Art. I, § 10	43
--------------------------------	----

Mo. Const., Art. V, § 10	9
--------------------------------	---

Mo. Const., Art. V, § 14	25-26
--------------------------------	-------

U.S. Const., Amend. V	43
-----------------------------	----

U.S. Const., Amend. XIV	25, 43
-------------------------------	--------

JURISDICTIONAL STATEMENT

On April 11, 2008, after a bench trial, the Honorable David A. Dolan found Jesse Dorris guilty of Count 2 of the class D felony of possession of anhydrous ammonia in violation of § 578.154, RSMo Cum. Supp. 2007. The same day, the Honorable David A. Dolan sentenced Mr. Dorris to a term of imprisonment of four years in the Missouri Department of Corrections.

Mr. Dorris appealed to the Missouri Court of Appeals, Southern District, and in *State v. Dorris*, 277 S.W.3d 831 (Mo. App. S.D. 2009), the Missouri Court of Appeals, Southern District affirmed Mr. Dorris' conviction and sentence. The Missouri Court of Appeals, Southern District issued its mandate on March 18, 2009.

Mr. Dorris untimely filed his *pro se* Rule 29.15 motion on July 1, 2009. The motion court appointed counsel to represent him on July 22, 2009, and on October 16, 2009, counsel timely filed Mr. Dorris' amended Rule 29.15 motion and request for evidentiary hearing.

The motion court granted Mr. Dorris' request and held an evidentiary hearing on January 21, 2010. On March 8, 2010, the motion court issued its judgment denying Mr. Dorris' Rule 29.15 motion. On April 6, 2010, Mr. Dorris timely filed his notice of appeal.

On appeal, the Missouri Court of Appeals, Southern District vacated the motion court's judgment on the merits, and remanded with directions to dismiss Mr. Dorris' Rule 29.15 post-conviction cause for the untimely filing of Mr. Dorris' *pro se* Rule 29.15 motion. *Dorris v. State*, No. SD30491, slip op. at 2-3 (Mo. App. S.D. March 1, 2011).

On April 26, 2011, this Court sustained Mr. Dorris' application for transfer, and transferred this case to this Court. Consequently, this Court has jurisdiction over Mr. Dorris' appeal. Mo. Const., Art. V, § 10 (as amended 1982); Rule 83.04.

STATEMENT OF FACTS

By amended information, the State charged Appellant Jesse Dorris in Mississippi County Cause No. 07MI-CR00197 with Count 1 of the class C felony of possession of a precursor ingredient of methamphetamine with the intent to manufacture methamphetamine in violation of § 195.420, and Count 2 of the class D felony of possession of anhydrous ammonia in violation of § 578.154, RSMo Cum. Supp. 2007 (L.F. 3-4).¹ The State also charged that Mr. Dorris is a persistent felony offender under § 558.016 because he has pleaded guilty to, or has been found guilty of, two or more felonies committed at different times (L.F. 12-14).

On September 17, 2007, the State tried Mr. Dorris on the charges in a jury trial, but the jury hung (*see* Tr. 1-15). The State *nolle prossed* Count 1 and struck the persistent felony offender charge in exchange for Mr. Dorris' waiver of a jury trial (Tr. 16-17). Then, on April 11, 2008, the State bench-tried Mr. Dorris on Count 2 (Tr. 16).

¹ All statutory references are to RSMo 2000 unless otherwise indicated. Appellant Jesse Dorris will cite to the record on appeal as follows: Legal File (SD29094), "(L.F.)"; Trial Transcript (SD29094), "(Tr.)"; Post-conviction Legal File (SD30491), "(PCR L.F.)"; and, Hearing Transcript (SD30491), "(H. Tr.)."

The State presented the following evidence at trial. At approximately 9:00 to 9:30 p.m. on a cold February night, Officer Verlan Graham was patrolling Delta, Missouri in his car when he saw a green van turn the corner (Tr. 22-23). The speed limit was 35 miles per hour and he believed the van was going 7 to 8 miles over the speed limit, so he pulled behind it and followed it through town (Tr. 23).

To Officer Graham, the passenger in the van appeared nervous (Tr. 23). He activated his lights as the van entered town (Tr. 23).

The van pulled into the lighted area of a gas station lot and Officer Graham called the plates in (Tr. 24). Then, the van pulled back onto the street and drove to the Corner Pocket parking lot where it stopped (Tr. 23-24).

Officer Graham approached the van and asked the female driver, Cynthia Pender, for her “license and everything” (Tr. 24-25). When Ms. Pender told him that she did not have anything with her, Officer Graham looked into the passenger’s seat and recognized the passenger as Jesse Dorris (Tr. 24).

Officer Graham resumed questioning Ms. Pender about her license, and Ms. Pender eventually admitted that she had no license (Tr. 25). Officer Graham took Ms. Pender from the van to his patrol car where he had her sit down while he wrote her a ticket (Tr. 25).

As he did, he looked up and saw that Mr. Dorris had exited the van (Tr. 25, 32). Mr. Dorris was on the rear passenger's side of the van (Tr. 25, 32). Officer Graham instructed Mr. Dorris to get back inside the van (Tr. 25, 33).

Mr. Dorris responded by telling Officer Graham that "he was just wanting [sic] to know if there was a problem or something," and got back in the van (Tr. 26, 32). Officer Graham completed writing Ms. Pender's ticket and instructed Ms. Pender to get back in her van (Tr. 26). Then, he returned to his patrol car and started to drive off (Tr. 26).

But as he circled the van, he spotted a blue container under the passenger's side of the van and immediately became suspicious (Tr. 26-27). He did not think that Ms. Pender could have pulled into that area without having run over the container, and he had not seen the container, a coffee container or plastic thermos with a screw-on lid, before (Tr. 27, 30).

Officer Graham exited his car, walked up to Mr. Dorris' side of the van, and picked up the thermos (Tr. 27). The thermos was warm, clean, and looked new (Tr. 28, 36). He loosened the lid (Tr. 28-29). He saw a clear liquid (Tr. 44), and smelled what he thought was ammonia (Tr. 27-29, 34).

You can't buy the clear liquid called anhydrous ammonia in a store (Tr. 42), and federal law requires that anhydrous ammonia be in specially-labeled containers because of its "corrosive nature and pressurized nature" (Tr. 39).

“[T]he containers have to be properly placarded and have to be regulated to transport or store anhydrous ammonia in” (Tr. 42). There were no warning labels on the thermos, or labels stating that it contained anhydrous ammonia (Tr. 47).

Though Mr. Dorris told Officer Graham that the thermos wasn't his (Tr. 27, 30, 34-35), and informed yet another officer that he knew nothing about the thermos (Tr. 57), Officer Graham arrested Mr. Dorris (Tr. 29, 34). Officer Graham had never seen the plastic thermos in Mr. Dorris' physical possession, had never seen Mr. Dorris touch the plastic thermos, and had not seen Mr. Dorris in the area where he found the thermos (Tr. 30-31, 33). Mr. Dorris did not smell of ammonia and the van belonged to Ms. Pender whom police charged with possession of the same thermos of anhydrous ammonia (Tr. 54, 58-59; H. Tr. 22).² Testing later confirmed that the thermos contained anhydrous ammonia (Tr. 46-47).

Mr. Dorris' defense at trial was that the plastic thermos was in the sole possession of Ms. Pender, and that nothing connected Mr. Dorris to the

² In March 2007, the State accepted Ms. Pender's guilty plea to the charge of possession of anhydrous ammonia (H. Tr. 22-23).

anhydrous ammonia other than his proximity to it when Officer Graham found it (H. Tr. 23-24).

At trial, absent objection, Sergeant Brenda Cohn testified that her search of Cynthia Pender's van revealed that the van contained items commonly used by individuals in stealing anhydrous ammonia, and manufacturing methamphetamine (Tr. 47-52). Specifically, she testified that she found one pair of pliers in the driver's door pocket, a second pair of pliers, a pipe wrench under the passenger's seat in the second row, a functioning flashlight in the center console, white powder in a cup holder in the back of the van, and a bottle of vanilla body spray on the driver's floor board (Tr. 51-52, 54-57). She testified that the discovery of these items raised her suspicions, and that based on what she had found, she believed a crime had occurred (Tr. 47, 52).

Again, without objection from trial counsel, she told the trial court the following: "[T]he pliers and pipe wrench would be used to open valves on the actual anhydrous ammonia tanks themselves to a co-op or out in the field" (Tr. 49); the flashlight was so "whoever was obtaining anhydrous ammonia illegally could have a way to see whenever they are walking to the tanks" (Tr. 49); "white powder is commonly seen in the manufacture of methamphetamine, [and] specifically ephedrine or pseudoephedrine powder is seen in the powder form prior to it being added to other ingredients in the

manufacturing process” (Tr. 49); and, the vanilla body spray was a “masking scent of some kind” (Tr. 48).³

She testified that she seized all of the items that she had found during her search, and the State moved to admit all of the items at trial, including: State’s Exhibits #4 and #6, two pairs of pliers; State’s Exhibit #5, a pipe wrench; State’s Exhibit #7, a flashlight; and State’s Exhibit #8, the cup holder containing white powder (Tr. 50-51). When the trial court asked if trial counsel had any objection, trial counsel said, “No, sir” (Tr. 51).

On April 11, 2008, the Honorable David A. Dolan found Mr. Dorris guilty of Count 2 of the class D felony of possession of anhydrous ammonia (Tr. 71). The same day, the Honorable David A. Dolan sentenced Mr. Dorris to a term of imprisonment of four years in the Missouri Department of Corrections (Tr. 77-78).

³ Sergeant Cohn’s field test of the white powder in the cup holder indicated that the powder contained ephedrine or pseudoephedrine (Tr. 49-50). But the lab later determined that Sergeant Cohn’s field test had yielded a false-positive result, and that the white powder did not contain ephedrine or pseudoephedrine as initially believed (Tr. 57; H. Tr. 25).

Mr. Dorris appealed to the Missouri Court of Appeals, Southern District, and in *State v. Dorris*, 277 S.W.3d 831 (Mo. App. S.D. 2009), the Missouri Court of Appeals, Southern District affirmed Mr. Dorris' conviction and sentence (L.F. 23-25; PCR L.F. 17, 29). The Missouri Court of Appeals, Southern District issued its mandate on March 18, 2009 (PCR L.F. 17, 29).

Mr. Dorris untimely filed his *pro se* Rule 29.15 motion on July 1, 2009 (PCR L.F. 3-11). The motion court appointed counsel to represent him on July 22, 2009 (PCR L.F. 12), and on October 16, 2009, counsel timely filed Mr. Dorris' amended Rule 29.15 motion and request for evidentiary hearing (PCR L.F. 13-32).

In his amended motion, Mr. Dorris alleged that the motion court entered judgment and sentence against Mr. Dorris before the time for filing a motion for new trial expired, and that as a result, Mr. Dorris' conviction and sentence is void (PCR L.F. 17-19). Mr. Dorris also alleged that trial counsel was ineffective for failing to object to the admission at trial of evidence of uncharged crimes (PCR L.F. 19-27). Mr. Dorris requested an evidentiary hearing on his allegations and the motion court granted his request (PCR L.F. 2).

On January 21, 2010, the motion court held an evidentiary hearing at which Mr. Dorris and his trial counsel, Jennifer Booth, testified (H. Tr. 3-37).

As to his first allegation, Mr. Dorris testified that he and trial counsel never discussed his right to file a motion for new trial (H. Tr. 9). He testified that he

never told her that he did not want to file a new-trial motion, or to forget filing a new-trial motion (H. Tr. 10). He testified now that he knows he had a right to file a new-trial motion, he probably would have wanted one filed (H. Tr. 14).

But he said he didn't really know (H. Tr. 10). He stated, "If I was asked that [whether I wanted to file a new-trial motion] would I have? Well, sitting here right now I probably would say yes. At the time if I would have been asked that, what would I have done, I can't say honestly" (H. Tr. 14).

Trial counsel testified that she had never spoken with Mr. Dorris about filing a new-trial motion (H. Tr. 17). She indicated that she never files a new-trial motion in a bench-tried case because the Missouri Supreme Court Rules don't require a new-trial motion in a bench-tried case, and filing one can limit the issues on appeal (H. Tr. 18, 32). She thinks it's imprudent and "foolish" to file new-trial motions in bench-tried cases, and she decided not to file a new-trial motion in Mr. Dorris' case (H. Tr. 18, 20, 33-34). She did not include Mr. Dorris in her decision-making process (H. Tr. 18).

On March 8, 2010, the motion court issued its judgment denying Mr. Dorris' Rule 29.15 motion after an evidentiary hearing (PCR L.F. 33-39). As for Mr. Dorris' first amended motion allegation, the motion court concluded that there were no grounds for a motion for new trial and that a motion for new trial would not have proven successful (PCR L.F. 38). The motion court further concluded

that Mr. Dorris was not prejudiced by “being tried to the bench, convicted, and sentenced on April 11, 2008” (PCR L.F. 38).

On April 6, 2010, Mr. Dorris timely filed his appeal to the Missouri Court of Appeals, Southern District, and raised one point on appeal (PCR L.F. 40-43).

On appeal, the Southern District vacated the motion court’s judgment on the merits, and remanded with directions to dismiss Mr. Dorris’ Rule 29.15 post-conviction cause for the untimely filing of Mr. Dorris’ *pro se* Rule 29.15 motion. *Dorris v. State*, No. SD30491, slip op. at 2-3 (Mo. App. S.D. March 1, 2011). The Southern District noted that it affirmed Mr. Dorris’ conviction on direct appeal in *State v. Dorris*, 277 S.W.3d 831 (Mo. App. S.D. 2009), and issued its mandate on March 18, 2009. *Id.* at 2. One-hundred-five days later, on July 1, 2009, Mr. Dorris untimely filed his *pro se* Rule 29.15 motion. *Id.* at 2. Neither in the motion court, nor on appeal, had the State requested the dismissal of Mr. Dorris’ Rule 29.15 motion based on Mr. Dorris’ untimely *pro se* filing. *Id.* at 2-3.

Mr. Dorris applied for transfer to this Court. On April 26, 2011, this Court sustained Mr. Dorris’ application for transfer, and transferred this case to this Court. This appeal follows. Mr. Dorris will state other facts as necessary in the following arguments.

POINT – I.

This Court has jurisdiction over Mr. Dorris’ untimely-filed Rule 29.15 motion, and authority to hear and determine it on the merits, despite the untimely filing of Mr. Dorris’ *pro se* Rule 29.15 motion, because a challenge to the timeliness of a *pro se* Rule 29.15 post-conviction motion is a non-jurisdictional, affirmative defense that is waived if not timely asserted, and the State waived this defense by failing to assert it in either the motion court or appellate court.

J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. banc 2009);

Snyder v. State, No. WD72071, 2011 WL 976750 (Mo. App. W.D. March 22, 2011);

Gerlt v. State, No. WD72225, 2011 WL 1363898 (Mo. App. W.D. April 12, 2010);

Rule 29.15.

POINT – II.

The motion court clearly erred in denying Mr. Dorris’ Rule 29.15 motion because the trial court entered judgment and sentence against Mr. Dorris before the time for filing a motion for new trial expired, and as a consequence, Mr. Dorris’ judgment and sentence is void, premature, and not a final, appealable judgment. The trial court’s failure to comply with Rule 29.11(c) in the absence of an express waiver of the filing of a new-trial motion prejudiced Mr. Dorris, and resulted in fundamental unfairness. This Court must reverse the motion court’s ruling, vacate Mr. Dorris’ sentence, and remand for resentencing with directions to grant Mr. Dorris the opportunity to file and obtain a ruling on a new-trial motion or to expressly waive his right to do so before resentencing. The motion court’s ruling and the trial court’s error denied Mr. Dorris’ right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, Article I, § 10 of the Missouri Constitution, and Missouri Supreme Court Rule.

Ball v. State, 479 S.W.2d 486 (Mo. 1972);

State v. Herron, 136 S.W.3d 126 (Mo. App. E.D. 2004);

State v. Ramos, 751 S.W.2d 135 (Mo. App. S.D. 1988);

State v. Wilson, 15 S.W.3d 71 (Mo. App. S.D. 2000);

U.S. Const., Amend. V, VI & XIV;

Mo. Const., Art. I, §§ 10 & 18(a);

Rules 29.11 & 29.15.

ARGUMENT – I.

This Court has jurisdiction over Mr. Dorris’ untimely-filed Rule 29.15 motion, and authority to hear and determine it on the merits, despite the untimely filing of Mr. Dorris’ *pro se* Rule 29.15 motion, because a challenge to the timeliness of a *pro se* Rule 29.15 post-conviction motion is a non-jurisdictional, affirmative defense that is waived if not timely asserted, and the State waived this defense by failing to assert it in either the motion court or appellate court.

Preservation of the Error

A reviewing court has a duty to determine *sua sponte* whether it has jurisdiction to hear an appeal. *Smith v. State*, 63 S.W.3d 218, 219 (Mo. banc 2001); *Chromalloy Am. Corp. v. Elyria Foundry Co.*, 955 S.W.2d 1, 3 (Mo. banc 1997). This Court’s jurisdiction is predicated on that of the motion court, and if the motion court lacked jurisdiction to rule on Mr. Dorris’ Rule 29.15 motion on the merits, then this Court has no jurisdiction to review the matter appealed on its merits. *State v. Ortega*, 985 S.W.2d 373, 374 (Mo. App. S.D. 1999).

Standard of Review

Subject-matter jurisdiction of a court is purely a question of law, which this Court reviews *de novo*. *Missouri Soybean Ass’n v. Missouri Clean Water Com’n*, 102 S.W.3d 10, 22 (Mo. banc 2003).

Argument

Rule 29.15(b) provides in pertinent part:

If an appeal of the judgment or sentence sought to be vacated, set aside or corrected was taken, the motion shall be filed within 90 days after the date the mandate of the appellate court is issued affirming such judgment or sentence.

. . .

Failure to file a motion within the time provided by this Rule 29.15 shall constitute a complete waiver of any right to proceed under this Rule 29.15 and a complete waiver of any claim that could be raised in a motion filed pursuant to this Rule 29.15.

Mr. Dorris concedes that he untimely filed his *pro se* Rule 29.15 motion. His *pro se* Rule 29.15 motion was due on June 16, 2009, and he filed it a mere fifteen days later on July 1, 2009 (PCR L.F. 3-11). Rule 29.15(b).

- **This Court has jurisdiction over Mr. Dorris' untimely-filed Rule 29.15 motion.**

Mr. Dorris acknowledges that courts previously held that failure to file a motion within the time limits of Rule 29.15 was a fatal defect that deprived the motion court of "jurisdiction." *Howard v. State*, 289 S.W.3d 651, 652 (Mo. App.

E.D. 2009) (quoting *Matchett v. State*, 119 S.W.3d 558, 559 (Mo. App. S.D. 2003)). “Jurisdiction,” as applied to criminal courts, “refers to the power of a court to hear and resolve the case of a criminal offense, to render a valid judgment, and to declare punishment.” *Searcy v. State*, 981 S.W.2d 597, 598-599 (Mo. App. W.D. 1998). Subject-matter jurisdiction cannot be conferred by agreement of the parties or waiver. *State ex. rel. Director of Revenue v. Rauch*, 971 S.W.2d 350, 353 (Mo. App. E.D. 1998); *Merriweather v. Grandison*, 904 S.W.2d 485, 489 (Mo. App. W.D. 1995). And, unless the court has subject-matter jurisdiction, the court has no jurisdiction to act, its judgments are invalid, and its proceedings are void. *Three Bears Camp and Camping Inc. v. Johnson*, 790 S.W.2d 951, 954 (Mo. App. S.D. 1990); *State v. Folson*, 940 S.W.2d 526, 527 (Mo. App. W.D. 1997).

Because courts held the issue of the timeliness of the *pro se* filing was “jurisdictional,” courts permitted the State to raise the issue for the first time on appeal. *Lawrence v. State*, 980 S.W.2d 135[1] (Mo. App. E.D. 1998); *Roth v. State*, 921 S.W.2d 680, 682 (Mo. App. W.D. 1996); *Stidham v. State*, 963 S.W.2d 351, 353 (Mo. App. W.D. 1998). Also, because the appellate court has an affirmative duty to determine jurisdiction *sua sponte*, appellate courts dismissed appeals from the denial of untimely-filed post-conviction motions for lack of jurisdiction, regardless of whether the parties ever addressed the timeliness issue in the

motion court or on appeal. *Murphy v. State*, 796 S.W.2d 673, 674 (Mo. App. S.D. 1990); *State v. Kinder*, 122 S.W.3d 624, 628 (Mo. App. E.D. 2003).

This Court, however, should neither permit the State to raise the untimeliness of Mr. Dorris' Rule 29.15 motion for the first time on appeal, nor dismiss Mr. Dorris' Rule 29.15 motion based on his untimely *pro se* filing because the time limitations under Rules 24.035 and Rule 29.15 are no longer perceived as restrictions on the circuit court's jurisdiction. *Moore v. State*, 328 S.W.3d 700, 703 n. 2 (Mo. banc 2010).

In *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 251-253 (Mo. banc 2009), this Court noted that Missouri recognizes only two types of jurisdiction, personal and subject-matter, and stated that both derive from constitutional principles. "[P]ersonal jurisdiction refers quite simply to the power of a court to require a person to respond to a legal proceeding that may affect the person's rights or interests." *Id.* at 253. It derives from the due process clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 252-253.

On the other hand, subject-matter jurisdiction, or "the court's authority to render a judgment in a particular category of case," derives from article V, section 14 of the Missouri Constitution, which states that "[t]he circuit court

shall have original jurisdiction over all cases and matters, civil and criminal.”

Id. at 253.

This Court recognized that aside from subject-matter and personal jurisdiction, prior case law purported to create yet another type of jurisdiction called “jurisdictional competence.” *Id.* at 254. An issue of “jurisdictional competence” arises when there is no question about the court’s subject-matter jurisdiction over the issue, but there is a question of whether the parties or issues were properly before the court for its resolution at the time. *Id.* at 254. This Court held that “jurisdictional competence” does not deal with jurisdiction in the true sense, and that it is not derived from constitutional principles. *Id.* This Court specifically stated, “Because the authority of a court to render judgment in a particular case is, in actuality, the definition of subject[-]matter jurisdiction, there is no constitutional basis for this third jurisdictional concept that would bar litigants from relief.” *Id.*

As a consequence, this Court further directed that Missouri courts should not construe statutory restrictions on claims for relief as restrictions on the court’s subject-matter jurisdiction, or as matters of “jurisdictional competence.” *Id.* The Court indicated that elevating statutory restrictions to matters of “‘jurisdictional competence’ erodes the constitutional boundary established by article V of the Missouri Constitution, as well as robs the

concept of subject[-]matter jurisdiction of the clarity that the constitution provides.” *Id.*

Since the Court’s holding in *J.C.W.*, courts no longer perceive statutory or rule limitations on the trial court’s ability to act as capable of depriving the circuit courts of subject-matter jurisdiction. *See, e.g., State v. Molsbee*, 316 S.W.3d 549, 552 (Mo. App. W.D. 2010); *Starry v. State*, 318 S.W.3d 780, 782 (Mo. App. W.D. 2010); *Andrews v. State*, 282 S.W.3d 372, 375 n. 3 (Mo. App. W.D. 2009) (stating the State’s argument for the dismissal of the untimely Rule 24.035 motion was “a question of jurisdictional competence,” and “not an issue of jurisdiction”); *Schmidt v. State*, 292 S.W.3d 574, 576-577 (Mo. App. S.D. 2009) (holding failure to comply with the Uniform Mandatory Disposition of Detainers Law no longer deprives the circuit court of subject-matter jurisdiction); *Belfield v. State*, 307 S.W.3d 680, 683 n. 3 (Mo. App. E.D. 2010).

Applying the principle in *J.C.W.*, Mr. Dorris’ untimely filing of his Rule 29.15 motion did not deprive the motion court or any subsequent reviewing court of jurisdiction over his Rule 29.15 post-conviction case. A Rule 29.15 post-conviction case is a civil case, governed by the civil rules. Rule 29.15(a). Because, as noted in *J.C.W.*, the circuit courts have jurisdiction over all civil cases, the circuit court has subject-matter jurisdiction over even an untimely-filed Rule 29.15 motion. *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d at 254.

So, despite the untimely filing of Mr. Dorris' Rule 29.15 motion, the motion court had, and this Court has, jurisdiction over Mr. Dorris' Rule 29.15 post-conviction case.

- **This Court has the authority to hear and determine Mr. Dorris' Rule 29.15 motion on the merits, despite the untimely filing of Mr. Dorris' *pro se* Rule 29.15 motion, because a challenge to the timeliness of a *pro se* Rule 29.15 post-conviction motion is a non-jurisdictional, affirmative defense that is waived if not timely asserted, and the State waived this defense by failing to assert it in either the motion court or appellate court.**

Mr. Dorris acknowledges that the courts of appeal are split on the answer to the question whether post-*J.C.W.*, a challenge to the timeliness of a *pro se* motion is a non-jurisdictional, affirmative defense that is waived if not timely asserted. In *Swofford v. State*, 323 S.W.3d 60, 62 (Mo. App. E.D. 2010), Swofford untimely filed his *pro se* Rule 29.15 motion, but the State never raised the untimeliness in the motion court, and the motion court denied Swofford's Rule 29.15 motion on the merits. On appeal, when the motion's untimeliness came to the appellate court's attention, Swofford argued that the untimeliness of the Rule 29.15 was waived because the State never raised the issue of the untimeliness in

the motion court and the motion court ruled on the merits of Swofford's untimely-filed Rule 29.15 motion. *Swofford*, 323 S.W.3d at 62.

The Eastern District disagreed with this argument, and held the untimeliness of Swofford's *pro se* filing under Rule 29.15 was unwaivable. *Id.* at 63. It held it was authorized to consider and act on the untimeliness of the Rule 29.15 motion, regardless of whether the State had raised the untimeliness in the motion court or on appeal, and without regard for whether the motion court had ruled on the merits of the untimely-filed Rule 29.15 motion. *Id.* It enforced the Missouri Supreme Court rule, vacated the motion court's judgment, and remanded with directions to dismiss Swofford's Rule 29.15 motion. *Id.* at 63-64.

In *Mackley v. State*, 331 S.W.3d 733, 735 (Mo. App. E.D. 2011), the Eastern District followed *Swofford* in dismissing an appeal from an untimely-filed Rule 24.035 motion. The Southern District also followed *Swofford* in dismissing appeals from untimely-filed post-conviction motions in *Hill v. State*, No. SD30530, 2011 WL 1458697 (Mo. App. S.D. April 15, 2011), *Lopez-McCurdy v. State*, No. SD30586, 2011 WL 1119069 (Mo. App. S.D. March 28, 2011), and in the instant case, *Dorris v. State*, No. SD30491, 2011 WL 742548 (Mo. App. S.D. March 18, 2011), on which this Court took transfer.

Yet, when faced with the same question of whether a challenge to the timeliness of a *pro se* motion is waivable, the Western District answered it

differently. In *Snyder v. State*, No. WD72071, 2011 WL 976750, at *2 (Mo. App. W.D. March 22, 2011), the State raised the untimeliness of Snyder’s *pro se* Rule 24.035 motion for the first time on appeal from the denial of Snyder’s Rule 24.035 motion. Like Swofford, Snyder argued that the State waived its challenge to the timeliness of Snyder’s *pro se* Rule 24.035 motion by failing to lodge an objection in the motion court. *Id.*

The Western District agreed with the argument. *Id.* at *3. While the Western District acknowledged the contrary law in *Swofford*, it noted that *Swofford* conflicted with this Court’s prior holding that “if a matter is not jurisdictional but rather is a procedural matter required by statute or rule or an affirmative defense of the sort listed in Rule 55.08, then it generally may be waived if not raised timely.” *Id.* (citing *McCracken v. Wal-Mart Stores E., L.P.*, 298 S.W.3d 473, 476 (Mo. banc 2009) and *Reynolds v. Carter Cnty.*, 323 S.W.3d 447, 452 (Mo. App. S.D. 2010)). It concluded that this Court’s prior holding made clear that “the rules of court may, indeed, be waived,” and that, as a consequence, the reasoning of *Swofford* is “fundamentally flawed.” *Id.*

The Western District reasoned that the civil rules apply to post-conviction cases, and that Rule 55.08⁴ and Rule 55.27(a)⁵ dictate that the State set forth in

⁴ Rule 55.08 provides:

its responsive pleading to the post-conviction motion an assertion that the movant waived his or her right to proceed by untimely filing his post-conviction motion. *Id.*

In pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses and avoidances, including but not limited to accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, comparative fault, state of the art as provided by statute, seller in the stream of commerce as provided by statute, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, truth in defamation, waiver, and any other matter constituting an avoidance or affirmative defense.

⁵ Rule 55.27(a) further provides: “Every defense, in law or fact, to a claim in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required,” with the exception of certain named defenses.

It concluded that should the State fail to do so, then it waives its right to challenge the timeliness of the post-conviction filing because the time limitation in the post-conviction rule, like the statute of limitations, is a non-jurisdictional defense that can be waived if not asserted by the conclusion of the case. *Id.* at *3-4.

Based on this rationale, the Western District held the State waived its right to challenge the untimeliness of Snyder's Rule 24.035 motion by failing to raise the issue in the motion court, and reviewed the motion court's decision to deny the Rule 24.035 motion on the merits. *Id.* at *4-5.

The Western District recently relied on *Snyder* in reaching the same conclusion in *Gerlt v. State*, No. WD72225, 2011 WL 1363898, at *2 (Mo. App. W.D. April 12, 2010). There, as in *Snyder*, the State failed to raise the untimeliness of Gerlt's *pro se* filing in the motion court, and the motion court decided the motion on its merits. *Id.* at *1-2. On appeal, the State raised the issue of the untimeliness of Gerlt's *pro se* Rule 24.035 motion filing for the first time. *Id.* at *2.

The Western District reaffirmed its decision in *Snyder*. *Id.* at *2-3. It rejected *Swofford*, and relied on the rationale in *Snyder* in holding that the State had waived its right to challenge the timeliness of Gerlt's post-conviction filing by failing to raise the issue in the motion court. *Id.*

This Court should similarly reject *Swofford* and its progeny, and find that the rationale in *Snyder* is sound. This Court should hold that a challenge to the timeliness of a *pro se* Rule 29.15 post-conviction motion is a non-jurisdictional, affirmative defense that is waived if not timely asserted.

Because the State waived this defense by failing to assert it in either the motion court or appellate court, this Court has the authority to hear and determine Mr. Dorris' Rule 29.15 motion on the merits, despite the untimely filing of Mr. Dorris' *pro se* Rule 29.15 motion. This Court should hear and determine Mr. Dorris' Rule 29.15 post-conviction appeal on the merits.

ARGUMENT – II.

The motion court clearly erred in denying Mr. Dorris’ Rule 29.15 motion because the trial court entered judgment and sentence against Mr. Dorris before the time for filing a motion for new trial expired, and as a consequence, Mr. Dorris’ judgment and sentence is void, premature, and not a final, appealable judgment. The trial court’s failure to comply with Rule 29.11(c) in the absence of an express waiver of the filing of a new-trial motion prejudiced Mr. Dorris, and resulted in fundamental unfairness. This Court must reverse the motion court’s ruling, vacate Mr. Dorris’ sentence, and remand for resentencing with directions to grant Mr. Dorris the opportunity to file and obtain a ruling on a new-trial motion or to expressly waive his right to do so before resentencing. The motion court’s ruling and the trial court’s error denied Mr. Dorris’ right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, Article I, § 10 of the Missouri Constitution, and Missouri Supreme Court Rule.

Preservation of the Error

Because Mr. Dorris asserted this claim in his amended motion, and presented evidence on this claim at his evidentiary hearing, this claim is preserved for appellate review. *See, e.g., Hannah v. State*, 816 S.W.2d 1, 3 (Mo.

App. E.D. 1991) (finding movant's claim procedurally barred because it was not raised in *pro se* or amended motions); *see also State v. Vinson*, 833 S.W.2d 399, 410 (Mo. App. E.D. 1992) (finding movant's claim waived for failure to present evidence on it at the evidentiary hearing).

Cognizability of the Error

Mr. Dorris asserts that his claim is cognizable under Rule 29.15. Rule 29.15(a) provides in pertinent part: "a person convicted of a felony after trial claiming *that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States*, including claims of ineffective assistance of trial and appellate counsel, *that the court imposing the sentence was without jurisdiction to do so*, or that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court pursuant to the provisions of this Rule 29.15." [Emphasis added.] The rule's common purpose is "to adjudicate claims concerning the validity of the trial court's jurisdiction and the legality of the conviction or sentence of the defendant." *Thomas v. State*, 808 S.W.2d 364, 366 (Mo. banc 1991).

In claim 8(a) of his amended motion, Mr. Dorris challenged the legality of his conviction and sentence (PCR L.F. 17-19). He claimed the trial court violated a law of this state, Rule 29.11, by entering judgment and sentence

against him before the time for filing a motion for new trial expired (PCR L.F. 17-19).

Rule 29.11(c) was binding on Mr. Dorris' trial court and the court had a duty to enforce it. *See Sitelines, L.L.C. v. Pentstar Corp.*, 213 S.W.3d 703, 707 (Mo. App. E.D. 2007) (citing *Bank v. Pfeil*, 537 S.W.2d 680, 681 (Mo. App. St.L.D. 1976)). Rule 29.11(c) states: "No judgment shall be rendered until the time for filing a motion for new trial has expired and if such motion is filed, until it has been determined."

A final judgment in a criminal case occurs when the sentence is entered. *State v. Williams*, 871 S.W.2d 450, 452 (Mo. banc 1994). Where the trial court sentences the defendant in violation of Rule 29.11(c), however, the trial court's judgment and sentence is premature, void, and does not constitute a final judgment from which the defendant may appeal. *State v. Ramos*, 751 S.W.2d 135, 136 (Mo. App. S.D. 1988) (dismissing the appeal because the trial court entered sentence before the time for filing a motion for new trial expired); *see also State v. Randolph*, 119 S.W.3d 186, 187-188 (Mo. App. E.D. 2003) (same).

Case law further holds that should the defendant attempt to appeal from such a judgment, the appellate court must dismiss the appeal: without a final

judgment, the appellate court lacks jurisdiction and cannot resolve the appeal on the merits. *State v. Howe*, 171 S.W.3d 799, 801 (Mo. App. E.D. 2005).

Consequently, claim 8(a) of Mr. Dorris' Rule 29.15 motion is within the scope of claims cognizable under Rule 29.15. Mr. Dorris claimed "*that the conviction or sentence imposed violates the . . . laws of this state,*" and raised an issue bearing upon the jurisdiction of the appellate court to hear and determine his former direct appeal. *See* Rule 29.15(a).

In the alternative, Mr. Dorris contends that fundamental fairness requires review of his claim of error. Movants can raise claims of trial court error on Rule 29.15 in rare and exceptional circumstances where fundamental fairness requires it. *Schneider v. State*, 787 S.W.2d 718, 721 (Mo. banc 1990); *Tisius v. State*, 183 S.W.3d 207, 212 (Mo. banc 1996). That the trial court failed to comply with Rule 29.11(c), and the Missouri Court of Appeals, Southern District failed to *sua sponte* dismiss Mr. Dorris' direct appeal for lack of jurisdiction or for the court's failure to comply with Rule 29.11(c) is no less than extraordinary.

Facts

In his amended motion, Mr. Dorris alleged the motion court entered judgment and sentence against Mr. Dorris before the time for filing a motion for new trial expired, and as a result, Mr. Dorris' conviction and sentence is void

(PCR L.F. 17-19). Mr. Dorris requested an evidentiary hearing on his allegation (PCR L.F. 31-32).

On January 21, 2010, the motion court held an evidentiary hearing at which Mr. Dorris and his trial counsel, Jennifer Booth, testified (H. Tr. 3-37).

Mr. Dorris testified that he and trial counsel never discussed his right to file a motion for new trial (H. Tr. 9). He testified that he never told her that he did not want to file a new-trial motion, or to forget filing a new-trial motion (H. Tr. 10). He testified now that he knows he had a right to file a new-trial motion, he probably would have wanted one filed (H. Tr. 14).

But he said he didn't really know (H. Tr. 10). He stated, "If I was asked that [whether I wanted to file a new-trial motion] would I have? Well, sitting here right now I probably would say yes. At the time if I would have been asked that, what would I have done, I can't say honestly" (H. Tr. 14).

Trial counsel testified that she had never spoken with Mr. Dorris about filing a new-trial motion (H. Tr. 17). She indicated that she never files a new-trial motion in a bench-tried case because the Missouri Supreme Court Rules don't require a new-trial motion in a bench-tried case, and filing one can limit the issues on appeal (H. Tr. 18, 32). She thinks it's imprudent and "foolish" to file new-trial motions in bench-tried cases, and she decided not to file a new-trial

motion in Mr. Dorris' case (H. Tr. 18, 20, 33-34). She did not include Mr. Dorris in her decision-making process (H. Tr. 18).

On March 8, 2010, the motion court issued its judgment denying Mr. Dorris' Rule 29.15 motion after an evidentiary hearing (PCR L.F. 33-39). The motion court concluded that there were no grounds for a motion for new trial and that a motion for new trial would not have proven successful (PCR L.F. 38). The motion court further concluded that Mr. Dorris was not prejudiced by "being tried to the bench, convicted, and sentenced on April 11, 2008" (PCR L.F. 38).

Standard of Review

Appellate review is limited to determining whether the findings and conclusions of the trial court are clearly erroneous. *Nicholson v. State*, 151 S.W.3d 369, 370 (Mo. banc 2004). Rule 29.15(k). The findings and conclusions are clearly erroneous only if after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made. *Ritter v. State*, 119 S.W.3d 603, 604 (Mo. App. E.D. 2003).

Argument

The motion court clearly erred in denying Mr. Dorris' Rule 29.15 motion because the trial court entered judgment and sentence against Mr. Dorris before the time for filing a motion for new trial expired, and as a consequence,

Mr. Dorris' judgment and sentence is void, premature, and not a final, appealable judgment.

Mr. Dorris had the right to file a motion for new trial within fifteen days after the trial court found him guilty. Rule 29.11(b) and (e). *Howe*, 171 S.W.3d at 801; *State v. Herron*, 136 S.W.3d 126, 128 (Mo. App. E.D. 2004); *State v. Hauser*, 101 S.W.3d 320, 321 (Mo. App. E.D. 2003). "The right to file a motion for new trial is a valuable right and cannot be denied unless *expressly* waived in court-tried cases." *State v. Morrison*, 94 S.W.3d 448 (Mo. App. E.D. 2003) (citing *State v. Braden*, 864 S.W.2d 8, 9 (Mo. App. E.D. 1993)). The record should indicate, either by lapse of time or express waiver, that the defendant has been given the chance to file such a motion. *Ramos*, 751 S.W.2d at 136.

Here, the record shows that Mr. Dorris was tried, convicted and sentenced, all on the same day of April 11, 2008, and that no new-trial motion was ever filed (Tr. 71-72, 77-78).

- **There was no express waiver of Mr. Dorris' right to file a new-trial motion.**

The record further indicates that Mr. Dorris did not expressly or knowingly waive his right to file a new-trial motion. Even in court-tried cases like Mr. Dorris', the law requires that the waiver of the right to file a motion

for new trial be “express,” and not implicit. *Ramos*, 751 S.W.2d at 136; *Morrison*, 94 S.W.3d at 448 (citing *Braden*, 864 S.W.2d at 9).

An express waiver is one that appears from the record with unmistakable clarity. *See, e.g., State v. Mitchell*, 145 S.W.3d 21, 23-24 (Mo. App. S.D. 2004) (discussing requirement that jury-trial waiver be in open court and entered of record); *see also State v. Goth*, 792 S.W.2d 437, 438 (Mo. App. W.D. 1990); *Ramos*, 751 S.W.2d at 136. This Court should not presume an express waiver from a silent record. *See, e.g., Mayfield v. State*, 136 S.W.3d 130, 132 (Mo. App. S.D. 2004) (stating representation by counsel or waiver thereof cannot be presumed from a silent record).

The trial and sentencing record in this case are silent on the issue of waiver of Mr. Dorris’ right to file a new-trial motion. Neither the record of Mr. Dorris’ trial nor the record of his sentencing reflects any mention, either before or after Mr. Dorris’ sentencing, of Mr. Dorris’ right to file a new-trial motion (*see* Tr. 1-80; Tr. 72-73). The words, “motion for new trial” or “new-trial motion,” do not appear on any pages of transcript (Tr. 1-80; L.F. 1-44). And, the only “waiver,” mentioned on record before sentencing, is that of the Sentencing Assessment Report (Tr. 72-73).

- **The purported implicit waiver to which trial counsel testified at Mr. Dorris’ evidentiary hearing was ineffective against Mr. Dorris**

because it was entered without Mr. Dorris' assent or acquiescence, and without Mr. Dorris' knowledge of his right to file a new-trial motion.

Moreover, although trial counsel later testified at the evidentiary hearing that she implicitly waived Mr. Dorris' right to file a motion for new trial, her purported implicit waiver is ineffective against Mr. Dorris because it was entered without Mr. Dorris' assent or acquiescence, and without Mr. Dorris' knowledge of his right to file a new-trial motion (*see* H. Tr. 17-18, 20, 32-34). The evidentiary hearing record reflects that Mr. Dorris was never advised of his right to file a new-trial motion, and that trial counsel made her decision not to file one without ever consulting him (H. Tr. 9-10, 17-18). It further shows that Mr. Dorris neither assented to, nor acquiesced in, trial counsel's decision, and would probably have requested the filing of a new-trial motion had he known he could file one (H. Tr. 14).

Mr. Dorris, who did not acquiesce in his attorney's decision about the non-filing of a new-trial motion, had not only the right to file a new-trial motion, despite his attorney's decision not to file a new-trial motion, but also the right to the assistance of appointed counsel in filing that new-trial motion.

See Ball v. State, 479 S.W.2d 486, 488 (Mo. 1972).⁶ Yet, through its violation of Rule 29.11(c), the trial court deprived Mr. Dorris of any opportunity to file a new-trial motion.

- **The trial court’s failure to comply with Rule 29.11(c) in the absence of an express waiver of the filing of a new-trial motion resulted in a judgment and sentence that is void, premature, and not a final, appealable judgment.**

Missouri courts have repeatedly held that (absent an express waiver) any purported judgment and sentence entered before the expiration of the time for filing a motion for new trial is premature and void. *State v. Wilson*, 15 S.W.3d 71, 72 (Mo. App. S.D. 2000); *State v. DeGraffenreid*, 855 S.W.2d 450, 451 (Mo. App. S.D. 1993); *State v. Dieter*, 840 S.W.2d 887 (Mo. App. S.D. 1992).

Rule 29.11(c) provides that “[n]o judgment shall be rendered until the time for filing a motion for new trial has expired and if such motion is filed,

⁶ The time for filing a motion for new trial is a “critical stage” of a criminal proceeding for which the defendant is entitled to representation by counsel. *State v. Dailey*, 21 S.W.3d 113, 116-117 (Mo. App. W.D. 2000); *Ball*, 479 S.W.2d at 488; *Nicholson v. State*, 524 S.W.2d 106, 111 (Mo. banc 1975); *see also Robinson v. Norris*, 60 F.3d 457, 459-460 (8th Cir. 1995).

until it has been determined.” A judgment and sentence entered before the expiration of the time for filing a new-trial motion does not constitute a final judgment from which the defendant can appeal. *Howe*, 171 S.W.3d at 801; *Hauser*, 101 S.W.3d at 321; *Braden*, 864 S.W.2d at 9.

When the trial court enters judgment and sentence in violation of Rule 29.11(c), the trial court’s judgment and sentence is premature, void, and does not constitute a final judgment from which the defendant may appeal. *Ramos*, 751 S.W.2d at 136 (dismissing the appeal because the trial court entered judgment and sentence before the time for filing a motion for new trial expired); *see also Randolph*, 119 S.W.3d at 187-188 (Mo. App. E.D. 2003) (same).

- **The trial court’s failure to comply with Rule 29.11(c) prejudiced Mr. Dorris.**

Here, Mr. Dorris was prejudiced by the unknowing waiver of his right to file a new-trial motion, and by the Southern District’s unauthorized review and affirmance of his conviction and sentence on the merits. *See State v. Dorris*, 277 S.W.3d 831 (Mo. App. S.D. 2009); *see also Wilson*, 15 S.W.3d at 72. Because Mr. Dorris’ trial court failed to comply with Rule 29.11(c) and Mr. Dorris did not expressly waive his right to file a new-trial motion, there was no final judgment from which to appeal, and the Southern District had no authority to resolve Mr.

Dorris' appeal on the merits. *Wilson*, 15 S.W.3d at 72; *Hauser*, 101 S.W.3d at 321. Despite this, it did not dismiss Mr. Dorris' appeal and remand to the trial court as case law dictates, but entered an adverse opinion against Mr. Dorris. *See Howe*, 171 S.W.3d at 801.

Consequently, the motion court clearly erred in denying Mr. Dorris' Rule 29.15 motion. This Court must reverse the motion court's ruling, vacate Mr. Dorris' sentence, and remand for resentencing with directions to grant Mr. Dorris the opportunity to file and obtain a ruling on a new-trial motion or to expressly waive his right to do so before resentencing. The motion court's ruling and the trial court's error denied Mr. Dorris' right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, Article I, § 10 of the Missouri Constitution, and Missouri Supreme Court Rule.

CONCLUSION

WHEREFORE, based on the arguments in Points I and II of his brief, Appellant Jesse Dorris respectfully requests this Court to reverse the motion court's judgment, vacate Mr. Dorris' sentence, and remand for resentencing with directions to grant Mr. Dorris the opportunity to file and obtain a ruling on a new-trial motion or to expressly waive his right to do so before resentencing.

Respectfully submitted,

Gwenda Reneé Robinson, Mo. Bar #43213
District Defender, Office B/Area 68
Office of the State Public Defender
Eastern Appellate/PCR
1010 Market Street, Suite 1100
St. Louis, Missouri 63101
314.340.7662 (telephone)
314.340.7685 (facsimile)
Gwenda.Robinson@mspd.mo.gov

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g) and Special Rule 361, I hereby certify that on Friday, May 13, 2011, a true and correct copy of the foregoing brief and a floppy disk containing the foregoing brief were mailed postage prepaid to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102. In addition, I hereby certify that this brief includes the information required by Rules 55.03 and 84.06, and that it complies with the word limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, uses Californian FB 14 point font, and contains 9,144 words. Finally, I hereby certify that the enclosed diskette has been scanned for viruses with Symantec Endpoint Protection software and found virus-free.

Gwenda Reneé Robinson, Mo. Bar No.
43213
District Defender, Office B/Area 68
Office of the State Public Defender
Eastern Appellate/PCR
1010 Market Street, Suite 1100
St. Louis, Missouri 63101
314.340.7662 (telephone)
314.340.7685 (facsimile)
Gwenda.Robinson@mspd.mo.gov

ATTORNEY FOR APPELLANT

APPENDIX

INDEX

Findings of Fact and Conclusions of Law.....A1-7