

No. SC91652

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*In the  
Supreme Court of Missouri*

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**JESSE DORRIS,**

**Appellant,**

**v.**

**STATE OF MISSOURI,**

**Respondent.**

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**Appeal from Mississippi County Circuit Court  
Thirty-Third Judicial Circuit  
The Honorable T. Lynn Brown, Judge**

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**RESPONDENT'S SUBSTITUTE BRIEF**

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## **STATEMENT OF FACTS**

This appeal arises from the denial, following an evidentiary hearing, of Defendant's Rule 29.15 motion for post-conviction relief. Defendant was charged in Cape Girardeau County with possession of anhydrous ammonia in a non-approved container (§ 578.154, RSMo Cum. Supp. 2004) (L.F. 12-13). On Defendant's motion, venue was changed to Mississippi County (L.F. 5-6). Defendant waived his right to trial by jury, and on April 11, 2008, Appellant was tried by Judge David A. Dolan (Tr. 16-17).

At trial, the State presented evidence that a van in which Defendant was riding as a passenger was pulled over for speeding (Tr. 22-24). While the investigating officer was distracted by the driver, Defendant hid a blue plastic thermos filled with anhydrous ammonia underneath the van (Tr. 25-29, 45-47). The container was not marked or labeled as required by law for the storage of anhydrous ammonia (Tr. 47).

At the conclusion of the trial, the court found Defendant guilty of "possession of anhydrous ammonia in a non-approved container" (Tr. 72). The court asked Defendant whether he wanted a Sentencing Assessment Report prepared (Tr. 72). Defense counsel responded, "No sir. To be quite honest [Defendant] is prepared to be sentenced today" (Tr. 72). Counsel said that she knew of no "legal cause or reason why sentence and judgment should not now be pronounced" (Tr. 73, 77). The court



sentenced Defendant to four years of imprisonment, to be run concurrently with another sentence that he was already serving for an unrelated matter (Tr. 77-78).

Defendant's conviction was affirmed on direct appeal by the Court of Appeals, Southern District, in *State v. Dorris*, 277 S.W.3d 831 (Mo. App. S.D. 2009). The Southern District's mandate issued on March 18, 2009.

Defendant filed a *pro se* Rule 29.15 motion for post-conviction relief on July 1, 2009 (PCR L.F. 3-11). As Defendant concedes, this motion was filed 15 days out of time. App. Sub. Br. at 17-18, 23.

Subsequently, appointed counsel filed an amended motion on Defendant's behalf (PCR L.F. 13-32). In his amended motion, Defendant alleged, *inter alia*, that the trial court erred in entering judgment and sentence against Defendant before the time for filing a motion for new trial had expired (PCR L.F. 17-19). He alleged that his attorney did not consult with him about whether he wanted to file a motion for new trial, and he claimed that he did not expressly or voluntarily waive his right to file a motion for new trial (PCR L.F. 17-18). He claimed that because he was "tried, convicted, and sentenced all on the same day," he "never had the opportunity to file a motion for new trial before sentencing" (PCR L.F. 18). And he alleged that the judgment against him was void due to the trial court's failure to withhold judgment until the requisite time for filing a motion for new trial had passed (PCR L.F. 18). Defendant did not identify any particular claim that he would have raised in a motion

for new trial, nor did he allege that any such claim had a reasonable likelihood of resulting in a new trial (PCR L.F. 13-32).

The post-conviction motion court (Judge T. Lynn Brown) held an evidentiary hearing regarding Defendant's post-conviction claims (Tr. 3). At the hearing, Defendant's trial counsel, Jennifer Booth, testified that she did not speak with Defendant about filing a motion for new trial in this case because she never files such motions after bench trials (PCR Tr. 18). She explained that a motion for new trial is not necessary to preserve issues after a bench-tried case, and believes that filing them is actually imprudent because "it can limit the issues that the Appellate Court looks at on review" (PCR Tr. 18). Thus, Ms. Booth said, she made an "executive decision" not to file a motion for new trial (PCR Tr. 20).

To that end, Ms. Booth testified that she was not bothered by the fact that the trial court entered its judgment immediately after declaring its verdict because she would not have filed a motion for new trial in any event:

[I]t didn't give me pause [that the court sentenced Defendant on the same day that it found him guilty] because I was never going to file [a motion for new trial]. We could have waited 15 days and come all of the way back and I still wasn't going to file it. I just was not going to file it. I think it would have been foolish to do so. That is why I didn't see a problem with the Judge sentencing Mr. Dorris on that day.

(PCR Tr. 32-33).

Defendant also testified at the evidentiary hearing (PCR Tr. 4-15). He recalled that Ms. Booth had not spoken to him about whether he wanted a motion for new trial filed and said that he did not know whether he would have wanted to file one (PCR Tr. 9-10). He explained that “sitting here right now” he would probably say that he would have liked to have had a motion for new trial filed (PCR Tr. 14). But he admitted, “At the time if I would have been asked that, what would I have done, I can’t say honestly” (PCR Tr. 14).

The motion court issued its findings of fact, conclusions of law, and judgment denying Defendant’s post-conviction motion (PCR L.F. 33-39). The court concluded that, based on all the evidence, there were no grounds for a motion for new trial and no such motion would have been successful if filed (PCR L.F. 38). The court added that Defendant “was not prejudiced by being tried to the bench, convicted, and sentenced on April 11, 2008” (PCR L.F. 38).

## STANDARD OF REVIEW

This Court reviews the motion court's findings and conclusions denying post-conviction relief for clear error. Rule 29.15(k); *Forrest v. State*, 290 S.W.3d 704, 708 (Mo. banc 2009). A motion court's judgment is clearly erroneous only if this Court, "after reviewing the entire record, is left with a definite and firm impression that a mistake has been made." *Gehrke v. State*, 280 S.W.3d 54, 56-57 (Mo. banc 2009). Further, this Court will affirm the motion court's judgment for any reason that is supported by the record, even if it differs from the rationale given by the motion court. *State v. Bradley*, 811 S.W.2d 379, 383 (Mo. banc 1991) (observing that even if the motion court's stated reason for its ruling is incorrect, "the judgment should be affirmed if the action is sustainable on other grounds").

## **ARGUMENT**

### **I. Defendant's post-conviction motion must be dismissed without consideration on the merits because it was untimely filed.**

In his first point, Defendant argues that this Court should address the merits of his post-conviction claim and grant him relief despite the fact that his post-conviction motion was not timely filed. App. Sub. Br. at 22-32. He contends that the timeliness requirements of Rule 29.15 are nothing more than an affirmative defense which must be asserted by the State in a responsive pleading to the motion court. App. Sub. Br. at 27-32. And he argues that because the State did not assert below that his post-conviction motion should be dismissed for untimeliness, this Court is obligated to “hear and determine” his appeal on the merits. App. Sub. Br. at 32.

Defendant's argument should be rejected. Because Defendant failed to timely file his post-conviction motion, he waived any right to proceed under the Rule. The motion court could have, and should have, dismissed the motion on its own. Requiring the State to allege, as an affirmative defense in a responsive pleading, that a post-conviction motion was untimely filed is contrary to the procedures outlined in Rule 29.15 and would subvert the purpose of the post-conviction rules. The motion court's judgment in this case should be vacated, and this Court should remand Defendant's case to the motion court with instructions that Defendant's motion must be dismissed as untimely filed.

A. *Under the plain, unambiguous language of Rule 29.15, a movant cannot proceed under the Rule unless his motion is timely filed.*

Rule 29.15(b) states, “A person seeking relief pursuant to this Rule 29.15 shall file a motion to vacate, set aside, or correct the judgment or sentence substantially in the form of Criminal Procedure Form No. 40.” The Rule sets forth explicit time limitations for filing the post-conviction motion. Rule 29.15(b). The Rule continues:

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.

Rule 29.15(b).<sup>1</sup>

This Court has routinely held that the time limitations set forth in the post-conviction rules are constitutionally valid, enforceable, and mandatory. *See State v. Schafer*, 969 S.W.2d 719, 738, 741 (Mo. banc 1998) (observing that “the time limits of [Rule 24.035] are constitutionally firm and are mandatory,” and that “any claim not raised in a timely Rule 24.035 motion is a complete waiver of that claim”); *State v. Brooks*, 960 S.W.2d 479, 499 (Mo. banc 1997) (noting that Rule 29.15 “is subject to

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<sup>1</sup> Rule 24.035, which governs post-conviction motions filed after a guilty plea, contains identical time limitations and “waiver” language. *See* Rule 24.035(b).

requirements of timely filing” and that “Rule 29.15 pleadings that are filed outside of the valid and mandatory time limits will not be reviewed”); *Day v. State*, 770 S.W.2d 692, 695 (Mo. banc 1989) (“The time limitations contained in Rules 24.035 and 29.15 are valid and mandatory.”). The availability of relief under the post-conviction rules is constrained by these time limits. *White v. State*, 779 S.W.2d 571, 572 (Mo. banc 1989) (observing that Rules 24.035 and 29.15 established a new remedy, “unknown to prior practice,” that exists “only within the limits specified”). Absent narrowly-defined circumstances where a movant is abandoned by his attorney, the motion court has no authority to extend the time for filing a post-conviction motion beyond that permitted by the rules. *See Brooks*, 960 S.W.2d at 499; *McFadden v. State*, 256 S.W.3d 103, 106 (Mo. banc 2008). “When a motion is filed outside the time limits, the motion court is compelled to dismiss it.” *Gehrke*, 280 S.W.3d at 57; *see also Moore v. State*, 328 S.W.3d 700, 703 n.2 (Mo. banc 2010) (noting that a motion court properly dismissed the movant’s untimely motion because, under Rule 29.15(b), “the court had no ‘authority’ to hear the case”).

As Defendant notes, Missouri appellate courts have, on occasion, characterized a post-conviction movant’s failure to timely file his motion as a jurisdictional defect. App. Sub. Br. at 23-27 (citing *Howard v. State*, 289 S.W.3d 651 (Mo. App. E.D. 2009); *Lawrence v. State*, 980 S.W.2d 135 (Mo. App. E.D. 1998); *Roth v. State*, 921 S.W.2d 680 (Mo. App. W.D. 1996); *Stidham v. State*, 963 S.W.2d 351 (Mo. App.

W.D. 1998)). Because the timeliness of the post-conviction motion is jurisdictional, these courts reasoned, the issue was not waived even where the State failed to object below. *See Lawrence*, 980 S.W.2d at 135; *Roth*, 921 S.W.2d at 681; *Stidham*, 963 S.W.2d at 353.

Defendant argues that these “jurisdictional” rationales are no longer viable in light of this Court’s opinion in *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009). In *Webb*, this Court cautioned against confusing issues of subject-matter or personal jurisdiction, which arise from the state and federal constitutions, with non-jurisdictional issues that relate to whether “the issue or parties affected by the court’s judgment are properly before it for resolution at that time.” *Id.* at 253-54. Defendant is correct that a post-conviction motion’s untimeliness does not pose a “jurisdictional” problem, as that term is understood in light of *Webb*. But as this Court recently noted in *Moore*, *Webb*’s clarification of the term “jurisdiction” does not prevent motion courts from dismissing untimely filed post-conviction motions. *See Moore*, 328 S.W.3d at 703 n.2. Whether or not a motion court has “jurisdiction” to entertain an untimely filed post-conviction motion, it lacks the “authority” to do so. *Id.*

In cases where the motion court fails to recognize its lack of authority and addresses the merits of an untimely post-conviction motion, it falls to the appellate courts to enforce the mandatory time limitations of the post-conviction rules. The Missouri Constitution vests this Court with the authority to “establish rules relating to



practice, procedure and pleading for all courts . . . which shall have the force and effect of law.” MO. CONST. art. V, § 5; *State v. Reese*, 920 S.W.2d 94, 95 (Mo. banc 1996). Included in this Court’s rule-making power is the authority to promulgate rules setting forth “reasonable procedures governing post-conviction relief.” *Day*, 770 S.W.2d at 695. “When properly adopted, the rules of the court are binding on courts, litigants, and counsel, and it is the court’s duty to enforce them.” *Sitelines, LLC v. Pentstar Corp.*, 213 S.W.3d 703, 707 (Mo. App. E.D. 2007); *see also State ex rel. State Highway Comm’n v. Shain*, 62 S.W.2d 711 (Mo. banc 1933) (“It is our duty to enforce the rules made to further the purpose and efficient dispatch of business.”).

Acknowledging its obligation to enforce this Court’s rules, the Eastern District Court of Appeals held in *Swofford v. State* that it should order a post-conviction motion dismissed for untimeliness, even though the issue was not raised or addressed in the motion court below. 323 S.W.3d 60, 63-64 (Mo. App. E.D. 2010) (application for transfer denied Nov. 16, 2010). In so holding, the Eastern District recognized this Court’s longstanding principle that parties cannot waive compliance with court rules:

If counsel by expressed agreement, or even a tacit agreement, can obviate our rules, the efficacy thereof would be destroyed. It is not within the power of counsel by agreement, either expressed or implied, to obviate the provisions of the rules of this court. Those rules were established with the purpose of facilitating the business of the court, and to permit counsel to obviate the effect

thereof by either a tacit or expressed agreement would leave the court powerless.

*Swofford*, 323 S.W.3d at 63 (quoting *Hays v. Foos*, 122 S.W. 1038 (Mo. 1909)). The Court reasoned that “by failing to timely comply with the post-conviction rule, the movant waived his or her right to proceed as set out in the rule; because of the waiver, the motion court improvidently entertained the merits of the motion when it should have been dismissed; and therefore, the appellate court was required to vacate and remand the motion for dismissal.” *Swofford*, 323 S.W.3d at 64. Since *Swofford* was decided, the Eastern and Southern District Courts of Appeals have consistently ordered the dismissal of untimely-filed post-conviction motions even in cases where the State did not raise the issue in the motion court. *See e.g. Mackley v. State*, 331 S.W.3d 733 (Mo. App. E.D. 2011); *Lopez-McCurdy v. State*, No. SD30586 (Mo. App. S.D. March 28, 2011) (transferred to this Court on May 31, 2011); *Hill v. State*, No. SD30530 (Mo. App. S.D. April 15, 2011) (transferred to this Court on June 28, 2011).

These decisions are consistent with the plain language of Rule 29.15 and this Court’s express recognition that if a post-conviction movant fails to file a Rule 29.15 motion within the applicable time limit, “there is a complete waiver of the right to seek Rule 29.15 relief and a complete waiver of all claims that could be raised in the post-conviction motion.” *Moore*, 328 S.W.3d at 702. In short, because Defendant failed to timely file his post-conviction motion, he had *no right to proceed* under the

rule. The State was not required to do anything further; the motion court was obligated to *sua sponte* dismiss Defendant's motion as untimely filed. Indeed, the motion court had no "authority" to do anything else. *See Moore*, 328 S.W.3d at 703 n.2. Because it failed to dismiss the motion and instead addressed Defendant's claim on the merits, it falls to this Court to enforce the rule, vacate the motion court's judgment, and remand with instructions to the motion court to dismiss Defendant's post-conviction motion as untimely filed.

B. *The pleading requirements set forth in Rules 55.08 and 55.27(a) do not apply to Rule 29.15.*

Defendant argues that, despite the untimeliness of his post-conviction motion, the motion court properly considered the merits of his claims and, therefore, this Court must address the merits of his appeal. App. Br. at 27, 32. He contends that the fact that a post-conviction motion is untimely filed has no effect on the viability of that motion other than to provide the State with a potential affirmative defense—a defense that, if not set forth in a responsive pleading as required by Rules 55.08 and 55.27(a), is waived and may not be asserted for the first time on appeal. App. Br. at 28-32. Defendant's argument relies entirely on the Western District Court of Appeals' opinion in *Snyder v. State*, 334 S.W.3d 735 (Mo. App. W.D. 2011), in which the Court held that "the State waived its right to challenge [the defendant's] post-conviction motion based upon the time limitation contained in Rule 24.035(b) by failing to raise

the issue in the motion court.” *Id.* at 739-40; *see also Gerlt v. State*, No. WD72225 (Mo. App. W.D. April 12, 2011) (applying *Snyder* in holding that the State waived any objection to the post-conviction motion’s untimeliness by failing to raise the issue in the first instance).

*Snyder* and *Gerlt*, insofar as they hold that a defendant’s failure to timely file his post-conviction motion is excused unless the State raises the issue in a responsive pleading before the motion court, were wrongly decided and should be overruled. The holdings of these cases rely on a faulty premise—that the pleading requirements set forth in Rules 55.08 and 55.27(a) apply to Rules 24.035 and 29.15. The rules of civil procedure govern the procedure to be followed in raising post-conviction claims only “insofar as applicable.” Rule 24.035(a); Rule 29.15(a). “If a rule of civil procedure conflicts with these post-conviction rules, the civil rule should not be applied.” *Hoskins v. State*, 329 S.W.3d 695, 699 (Mo. banc 2010). As explained below, applying the pleading requirements of Rules 55.08 and 55.27 to the post-conviction rules conflicts with the motion-based procedural framework of Rules 24.035 and 29.15 and would significantly undermine the purpose and efficacy of the post-conviction rules.

1. The responsive-pleading requirements of Rules 55.08 and 55.27(a) are inconsistent with the procedures outlined in the post-conviction rules.

In *Snyder*, the Western District reasoned that, in typical civil actions, affirmative defenses must be asserted in a responsive pleading or else the defenses are waived and cannot be raised for the first time on appeal. *See Snyder*, 334 S.W.3d at 738-40 (citing Rules 55.08 and 55.27(a)). Relying on these rules of civil procedure, the Court held that, in post-conviction cases, the State waives any complaint about the movant's failure to timely file his post-conviction motion unless it raises the issue in a responsive pleading. *Id.*

This analysis, however, overlooks the difference between the pleadings in civil actions governed by Rules 55.08 and 55.27(a) and the pleadings involved in post-conviction actions. The “pleadings” at issue in Rules 55.08 and 55.27(a) are petitions and answers. *See* Rule 55.01, 55.08, 55.27(a). The post-conviction rules, on the other hand, do not require the movant to file a petition. Instead, a person seeking post-conviction relief must file a *motion* to vacate, set aside, or correct the judgment or sentence. Rules 24.035(b), 29.15(b). “Motions,” as defined within Rule 55, are distinct from “pleadings.” *See* Rule 55.26(a). And nothing in Rule 55 requires that a party file a response to a motion. Rules 55.08 and 55.27(a)—the rules relied upon by the Western District in *Snyder*—require that parties assert their defenses to claims raised in a preceding “pleading,” but neither rule says anything about preserving defenses to claims raised by motion. Rules 55.08; 55.27(a).

Missouri courts have repeatedly recognized that no responsive pleading is required in post-conviction cases. *See e.g. Thomas v. State*, 808 S.W.2d 364, 369 (Mo. banc 1991) (Rendlen, J., dissenting) (observing that Rule 24.035 “does not require a formal answer to the pleading” and that “the response is not mandatory”); *DeBold v. State*, 772 S.W.2d 29, 30 (Mo. App. E.D. 1989) (“In a Rule 29.15 proceeding, the State is not required to file an ‘answer.’”); *Clark v. State*, 578 S.W.2d 60, 62 (Mo. App. St.L. Dist. 1978) (noting that a motion under Rule 27.26<sup>2</sup> was “indeed a motion in form” and required no responsive pleading); *Bonner v. State*, 535 S.W.2d 289, 291-92 (Mo. App. St.L. Dist. 1976) (noting that the initial pleading required by the post-conviction rule is a motion, not a petition, and no responsive pleading is required); *Dean v. State*, 535 S.W.2d 301, 302 (Mo. App. St.L. Dist. 1976) (“A responsive pleading is not required by Rule 27.26 nor by Rule 55.01 nor by any rule of Civil or Criminal procedure.”). The Western District’s assumption in *Snyder* that Rules 55.08

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<sup>2</sup> Rule 27.26, the predecessor to Rules 24.035 and 29.15, was governed by the rules of civil procedure “insofar as applicable,” just like the modern post-conviction rules. *See* Rule 27.26(a) (1987); *Thomas*, 808 S.W.2d at 366.

and 55.27(a) require the State to file a responsive pleading to post-conviction motions in order to preserve defenses is thus contrary to longstanding authority.<sup>3</sup>

The language of Rules 24.035 and 29.15 also support the conclusion that the State need not file a responsive pleading to a post-conviction motion, and thus cannot waive an objection to the motion's untimeliness by failing to assert it in an answer. The Rules describe in detail the requirements for the initial post-conviction motion, but do not contemplate that the prosecutor must file a response to that motion. *See* Rules 24.035(b)-(d), 29.15(b)-(d). The only response mentioned by the Rules comes after the amended motion is filed. The Rules require that "[a]ny response to the motion by the prosecutor shall be filed within thirty days after the date an amended motion is required to be filed." Rules 24.035(g), 29.15(g). The use of the word "any" implies that the response is optional. This is starkly different from the mandatory language of Rule 55, which states that there "shall be" an answer (Rule 55.01), a party "shall set forth all applicable affirmative defenses" in pleading to a preceding pleading (Rule 55.08), and "[e]very defense, in law or in fact, to a claim in any pleading . . . shall be asserted in the responsive pleading thereto" (Rule 55.27(a)). Reading the strict

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<sup>3</sup> Judge Scott, of the Southern District Court of Appeals, recently relied on many of these cases in discussing the flawed analysis in *Snyder*. *See Hill*, No. SD30530, slip op. at 2 (Scott, J., concurring) (transferred June 28, 2011).

responsive-pleading requirements of Rules 55.08 and 55.27(a) into the post-conviction rules would conflict with the optional nature of the responsive pleading anticipated by Rules 24.035(g) and 29.15(g).

Moreover, the reach of the Western District's analysis in *Snyder* is not, by its terms or logic, necessarily limited to the waiver of the post-conviction rules' time limitations. If the State must file a responsive pleading and expressly assert that a post-conviction motion is untimely, or else waive any complaint about that defect, why not require the State to include in its responsive pleading a specific denial of each and every factual allegation in the post-conviction motion, or else be subject to a default judgment? Rule 55.09 states that "[s]pecific averments in a pleading to which a responsive pleading is required . . . are admitted when not denied in the responsive pleadings." By applying Rules 55.08 and 55.27(a) to post-conviction proceedings, the Court in *Snyder* implicitly held that a responsive pleading is required in such cases. *See Snyder*, 334 S.W.3d at 739; Rule 55.027(a). If this is so, under Rule 55.09 the State would "admit" any factual allegation made in the post-conviction motion unless it files a responsive pleading denying those allegations.

Applying Rule 55.09 to the post-conviction rules in this manner would conflict with the plain language of Rules 24.035(h) and 29.15(h), which empower the motion court to determine, based on its own review of the motion, files, and records of the case, whether the movant is entitled to relief. Nothing in the rule requires the State to



do anything to contest the allegations in the post-conviction motion. But the holding in *Snyder* opens the door to other potential waivers and admissions by the State if a proper responsive pleading is not filed.

Finally, *Snyder*'s holding that the time limitations of the post-conviction rules may be unilaterally waived by the prosecutor is inconsistent with this Court's pronouncements on the motion court's duty to dismiss untimely filed post-conviction motions. As noted above, this Court has held that a motion court has "no authority" to entertain an untimely filed post-conviction motion, and that when a post-conviction motion is filed out of time, the motion court is "compelled to dismiss it." *Moore*, 328 S.W.3d at 703 n.2; *Gehrke*, 280 S.W.3d at 57. If the Western District's analysis in *Snyder* is correct, motion courts will be unable to dismiss untimely filed post-conviction motions unless the prosecutor first files a responsive pleading raising the issue as an affirmative defense.

As the Western District pointed out in *Snyder*, this Court observed in *McCracken v. Wal-Mart Stores East, LP*, 298 S.W.3d 473, 476 (Mo. banc 2009), that procedural matters required by statute or rule or affirmative defenses such as those listed in Rule 55.08 "generally may be waived if not raised timely." But the time limitations expressed in Rules 24.035(b) and 29.15(b) are more than mere procedural matters. Compliance with the time limitation is a necessary precondition of the defendant's right to proceed under the rule, and the defendant's failure to comply

divests the motion court of any authority to hear the case. Rules 24.035(b), 29.15(b); *Moore*, 328 S.W.3d at 703 n.2. The prosecutor cannot supersede the rule and bestow upon the court the authority to hear the untimely motion by simply not objecting. To give the prosecutor such an ability would, as the Eastern District observed in *Swofford*, “leave the court powerless” to enforce its own rules. 323 S.W.3d at 63 (quoting *Hays*, 122 S.W. at 1038). The motion court must dismiss untimely filed post-conviction motions, whether the prosecutor objects on that ground or not. The issue cannot be waived.

2. Excusing a post-conviction movant’s failure to comply with the time limitations where the prosecutor does not object would be inconsistent with the purpose of the post-conviction rules.

Permitting untimely post-conviction claims to be heard on the merits would not only conflict with the procedural framework set forth in the post-conviction rules, it would also undermine the purpose of those rules. Rules 24.035 and 29.15 are intended to allow defendants to litigate claims concerning the validity of the trial court’s jurisdiction and the legality of the conviction or sentence of the defendant. *Schleeper v. State*, 982 S.W.2d 252, 253 n.1 (Mo. banc 1998). But the rules have an additional purpose—“to avoid delay in the processing of prisoners’ claims and prevent the litigation of stale claims.” *Id.* (citations omitted).

Allowing untimely filed post-conviction motions to proceed on the merits, even with the agreement of the parties, would undercut the strict time limitations that distinguish Rules 24.035 and 29.15 from former Rule 27.26, which allowed for much longer delays. *See Thomas*, 808 S.W.2d 366-67. In *Thomas*, this Court considered whether Rule 51.05, which authorizes parties in civil suits to request a change of judge, applied to post-conviction proceedings under Rules 24.035 and 29.15. *Id.* The Court recognized that the change-of-judge rule had previously been held to apply in Rule 27.26 proceedings. *Id.* at 366. But the Court held that “the new time limitations” in Rules 24.035 and 29.15 required a different analysis. *Id.* The Court observed that under Rule 27.26 “the long delays in filing post-conviction motions” limited the availability of the sentencing judge and diminished the judge’s familiarity with the case. *Id.* The time limits of Rules 24.035 and 29.15 made it more likely that the sentencing judge would be available and would have a fresh recollection of the issues in the case. *Id.* Moreover, the Court noted that allowing for a change of judge would necessarily slow the proceedings, “build[ing] in the very delay Rules 24.035 and 29.15 are designed to eliminate.” *Id.* at 367.

These same concerns exist here. If a defendant’s failure to comply with the time limitations of the post-conviction rules may be excused by the State’s failure to object in a responsive pleading, some cases that would otherwise have been dismissed will invariably slip in after the mandatory deadline. The motion courts will be forced to

grapple with stale claims, in some cases where the sentencing judge is no longer available or has no recollection of the case. The post-conviction rules would, in essence, return post-conviction proceedings to the Rule 27.26 regime, with the deadline for claims limited only by the preferences of the prosecutor. This cannot be what this Court envisioned in enacting the rigid, mandatory time limits of Rules 24.035 and 29.15.

In addition, enforcing the time limitations on post-conviction claims only in cases where the prosecutor raises the issue in a responsive pleading would weaken the clear procedural bar that prevents defendants from bypassing the post-conviction rules and advancing their stale claims in a *habeas corpus* proceeding. “Rule 29.15 and Rule 24.035 are designed to provide a single, unitary, post-conviction remedy, to be used in place of other remedies, including the writ of habeas corpus.” *State ex rel. Laughlin v. Bowersox*, 318 S.W.3d 695, 701 (Mo. banc 2010) (internal citations omitted). With limited exception, a defendant may not obtain relief in a state *habeas* proceeding on claims that could have been, but were not, timely presented in a post-conviction motion. *See State ex rel. Simmons v. White*, 866 S.W.2d 443, 445-46 (Mo. banc 1993). Likewise, the failure to timely present post-conviction claims to the appropriate state court is considered a procedural default that will typically bar the defendant from raising the claim on federal habeas. *See e.g. Armstrong v. Kemna*, 590 F.3d 592, 606 (8<sup>th</sup> Cir. 2010). But a claim is considered procedurally defaulted “only if the state

procedural rule is firmly established, regularly followed, and readily ascertainable.” *White v. Bowersox*, 206 F.3d 776, 780 (8<sup>th</sup> Cir. 2000); *see also Kilgore v. State*, 791 S.W.2d 393, 396 (Mo. banc 1990) (suggesting that a defendant might be able to avoid a procedural bar in a state *habeas* action if he could show that his failure to timely file his post-conviction claim was attributable to an ambiguity in the rule).

The rule Defendant proposes—that a untimely post-conviction motion waives the movant’s right to proceed *only if* the State objects in a responsive pleading—would muddle the clear standard necessary to enforce procedural default in a *habeas corpus* action. This would cause at least two problems. First, a defendant who skipped the post-conviction procedures altogether and simply filed a petition for *habeas corpus* could not be said to have necessarily defaulted on his claims, even if the time period for timely filing a post-conviction motion had passed, because there would still be the possibility that the prosecutor would not object to an untimely filed motion. Second, transforming the strict time limits into an affirmative defense to be raised at the option of the prosecutor eliminates the “firmly established, regularly followed, and readily ascertainable” nature of the current rule. A defendant will not be able to predict in advance whether his untimely post-conviction claim will be summarily dismissed. Such a rule would inevitably be inconsistently applied. Some defendants would be able to proceed with untimely-filed motions, while others would not. This sort of inconsistent application might encourage the federal *habeas* courts to review

the claims of the unlucky petitioners whose claims were dismissed as untimely, reasoning that other similarly-situated defendants had the merits of their claims heard.

Moreover, if the time limits of Rules 24.035 and 29.15 stand for nothing more than affirmative defenses to be raised or waived at the prosecutor's pleasure, the enforceability of several other special provisions of the post-conviction rules would need to be re-examined. For example, this Court has previously held that Rule 67.01, permitting a petitioner to refile a civil action after a dismissal without prejudice, does not apply to post-conviction proceedings because it conflicts with Rule 29.15(l)'s<sup>4</sup> prohibition against successive motions. *State v. McMillin*, 783 S.W.2d 82, 90 (Mo. banc 1990) (abrogated on other grounds by *Morgan v. Illinois*, 504 U.S. 719 (1992)).

Likewise, in *Rohwer v. State*, the Western District Court of Appeals held that Rule 55.33(b) did not apply to post-conviction actions. 791 S.W.2d 741, 743-44 (Mo. App. W.D. 1990). Rule 55.33(b) allows issues not raised by the pleadings to be tried and considered by the court with the "express or implied consent of the parties." The Western District held that this Rule was not applicable to post-conviction proceedings because it conflicted with language in the post-conviction rules stating that any claim not asserted in the motion is waived. *Rohwer*, 791 S.W.2d at 744. The Court

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<sup>4</sup> When *McMillin* was decided, the bar against successive motions was found in Rule 29.15(k). *See* 783 S.W.2d at 90.

concluded that to allow the parties to circumvent the mandatory pleading requirement through Rule 55.33(b) would “make that portion of [the post-conviction rules] meaningless and useless.” *Id.*

But if the post-conviction time limits may be waived by the state simply by failure to object, there is no obvious reason why the prohibition on successive motions or the restriction on consideration of claims not raised in the motion would not be subject to waiver as well. These limits are all fundamental to the core purpose of the post-conviction rules—to resolve claims without delay. The motion court does not need an objection by the State to enforce the rules, and neither does this Court.

Finally, Defendant’s contention that this Court cannot consider the untimeliness of his post-conviction motion if the issue is raised for the first time on appeal is inconsistent with this Court’s standard of review. Appellate courts review the denial of a post-conviction motion to determine whether the motion court’s findings of fact and conclusions of law are clearly erroneous. *See* Rules 24.035(k), 29.15(k). In applying this standard, this Court is not bound by the legal theory relied upon by the motion court in denying the movant’s post-conviction claims. *See Bradley*, 811 S.W.2d at 383. Even if the motion court’s stated reason for its ruling is incorrect, this Court will affirm the judgment for any reason sustainable by the record. *Id.*

In this case, the motion court should not have addressed the merits of Defendant’s untimely post-conviction claim. But this Court’s review is not

constrained by the motion court's legal analysis. It is apparent on the record (indeed, Defendant concedes) that the post-conviction motion was untimely filed. This Court can and should enforce the mandatory time limitation expressed in Rule 29.15(b) and hold that by failing to comply with the time limits Defendant waived any right to proceed under the rule. The motion court's judgment should thus be vacated and the case remanded with instructions that the court to dismiss Defendant's untimely filed post-conviction motion.



**II. The motion court did not clearly err in denying Defendant's claim that the trial court erred in entering judgment without waiting until the time for filing a motion for new trial had elapsed.**

If this Court concludes that Defendant should be allowed to proceed with his post-conviction claim despite having failed to timely file his motion, the Court should still deny relief because Defendant's claim fails on the merits. Defendant argues that the motion court clearly erred in denying post-conviction relief because the trial court's failure to wait the requisite number of days to allow Defendant to file a motion for new trial rendered the trial court's judgment void. App. Sub. Br. at 33-43. Although he implicitly acknowledges that this claim could have been raised on direct appeal, he argues that "fundamental fairness requires review of this 29.15 claim." App. Sub. Br. at 36. Defendant claims that, due to the trial court's error, he is entitled to remand for resentencing. App. Br. at 33, 43.

Defendant's claim fails for at least three reasons: (1) the claim should have been raised on direct appeal and is not cognizable in a Rule 29.15 post-conviction motion; (2) any requirement that the court delay in entering judgment to allow Defendant to file a motion for new trial was obviated when counsel informed the court that Defendant was ready for sentencing immediately; (3) Defendant cannot have been prejudiced by the court's immediate entry of judgment because counsel would not

have filed a motion for new trial even if the court had waited the requisite period of time. The motion court's judgment was not clearly erroneous and should be affirmed.

A. *Defendant's post-conviction claim alleges trial error that is not cognizable in a Rule 29.15 motion for post-conviction relief.*

A post-conviction motion is not a substitute for a direct appeal. *Tisius v. State*, 183 S.W.3d 207, 212 (Mo. banc 2006). "Issues capable of being raised on direct appeal—even constitutional issues—may not be raised in post-conviction proceedings except where fundamental fairness requires otherwise and only in rare and exceptional circumstances." *Franklin v. State*, 24 S.W.3d 686, 693 (Mo. banc 2000).

Defendant asserted in his post-conviction motion that the trial court erred in that it entered judgment prematurely because the time for filing a motion for new trial had not yet expired (PCR L.F. 17-19). This sort of trial error is routinely raised by defendants on direct appeal. *See e.g. State v. Franklin*, 307 S.W.3d 205, 206 (Mo. App. S.D. 2010); *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); *State v. Goth*, 792 S.W.2d 437, 438 (Mo. App. W.D. 1990); *State v. Randolph*, 119 S.W.3d 186, 187-88 (Mo. App. E.D. 2003); *State v. Ramos*, 751 S.W.2d 135, 135-36 (Mo. App. S.D. 1988). But Defendant did not raise this issue on direct appeal. *State v. Dorris*, 277 S.W.3d 831 (Mo. App. S.D. 2009).

Because Defendant should have raised this claim of trial error on direct appeal, it is not cognizable in his post-conviction motion.

Defendant argues that a judgment prematurely entered, in violation of Rule 29.11(c), is void as a matter of law. App. Br. at 34-35. He points out that Rule 29.15 authorizes claims that “the conviction or sentence imposed violates the constitution and laws of this state,” and argues that his claim is a cognizable challenge to the legality of his conviction. App. Br. at 34-35.

Defendant cites three cases in which Missouri courts have held that a judgment entered before the time for filing a motion for new trial has expired is void. App. Br. at 35 (citing *State v. Ramos*, 751 S.W.2d 135, 136 (Mo. App. S.D. 1988); *State v. Randolph*, 119 S.W.3d 186, 187-88 (Mo. App. E.D. 2003); *State v. Howe*, 171 S.W.3d 799, 801 (Mo. App. E.D. 2005)). Notably, in every case cited by Defendant, the trial court’s failure to comply with Rule 29.11(c) was presented to the appellate court on direct appeal. Defendant has not identified a single case in which a defendant, having already taken a direct appeal and lost, was permitted to reset the proceedings by complaining for the first time in a post-conviction motion that the judgment in his case had been entered prematurely.

Moreover, each of the holdings upon which Defendant relies is premised, at least in part, on the belief that the courts lacked jurisdiction to consider the merits of the appeals. See *Howe*, 171 S.W.3d at 801 (“[W]ithout a final judgment, this court

lacks jurisdiction and cannot resolve an appeal on the merits.”); *Ramos*, 751 S.W.2d at 135 (citing *State v. Summers*, 477 S.W.2d 721 (Mo. App. St.L. Dist. 1979) (“We have no jurisdiction to hear this appeal in the absence of a final judgment.”)); *Randolph*, 119 S.W.3d at 187 (citing *State v. Frezzell*, 66 S.W.3d 762, 763 (Mo. App. E.D. 2002) (relying on *Ramos* for the proposition that there is nothing to appeal in the absence of a final judgment)). To the extent these cases rely on the assumption that a trial court’s premature entry of judgment creates a jurisdictional defect for the appellate court, that rationale is no longer valid in light of this Court’s decision in *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009).

Instead, a trial court’s failure to comply with Rule 29.11(c) is simply a procedural error and does not entitle a defendant to relief absent a showing of prejudice. *See* § 545.030.1(18) (stating that a court’s judgment shall not be “in any manner affected” for any “defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits.”); *see also* Rule 29.12 (“Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.”). As is argued in detail below, the trial court’s immediate entry of judgment in this case was done at Defendant’s request and was in no way prejudicial to him. Even if this defect, in some cases, requires that the judgment be vacated so that the defendant has an opportunity to file a motion for new trial, the circumstances in this case do not so require.

Defendant contends that his claim of trial error poses such a “rare and exceptional circumstance” that fundamental fairness requires that this Court review it. App. Br. at 36. But he makes no effort to explain how, in his case, the trial court’s entry of judgment and sentence immediately after announcing the verdict was unfair to him. The record shows that counsel had no intention of filing a motion for new trial, thinking it unwise, and Defendant himself admitted that he did not know whether he would have wanted such a motion filed (PCR Tr. 9-10, 14, 18-20, 32). Because nothing would have changed had the trial court waited a further two weeks before entering its judgment, it cannot be said that this case poses such “rare and exceptional circumstances” that fundamental fairness requires that this Court consider Defendant’s non-cognizable claim.

Indeed, it would be fundamentally *unfair* to vacate Defendant’s conviction at this point and order that Defendant be resentenced. Significantly, although Defendant demands that he is entitled to resentencing due to the failure of the trial court to give him time to file a motion for new trial, he does not argue that, if the case were remanded, he actually *would* file a motion for new trial, nor has he alleged any claim of error that he would include in such a motion. The only conceivable benefit to Defendant in having the judgment vacated and the case remanded for resentencing is that it may give Defendant a second shot at filing a direct appeal, even though he has had a full and fair opportunity to litigate his claims of trial error once already. *See*

*Wilson*, 15 S.W.3d at 72 (holding that a defendant would be able to pursue his direct appeal after the trial court entered a valid judgment after remand). Here, having lost on direct appeal, Defendant seeks to exploit a procedural irregularity that did not prejudice him in any way to obtain a second opportunity to attack his convictions on direct appeal. This cannot be what this Court had in mind when it held that allegations of trial error could be considered in post-conviction motions only if fundamental fairness required it.

Because fundamental fairness actually militates against the cognizability of Defendant's claim, rather than for it, and because Defendant's case does not pose such "rare and exceptional circumstances" that the general rule should be ignored, this Court should deny Defendant's claim and affirm the motion court's judgment.

B. *Defendant chose not to file a motion for new trial, obviating the need for the trial court to wait to enter its judgment.*

Not only is Defendant's claim of trial error non-cognizable in a post-conviction motion, it is substantively meritless. The trial court did not err in entering a judgment and sentence without giving Defendant time to file a motion for new trial because the defense explicitly asked the court to proceed with sentencing immediately. Although the right to file a motion for new trial is valuable, even in court-tried cases, a defendant may choose not to file such a motion. *Wilson*, 15 S.W.3d at 72 (citing *State v. Braden*, 864 S.W.2d 8, 9 (Mo. App. E.D. 1993)).

In this case, Defendant, through counsel, signaled that he did not want the court to wait for a motion for new trial by asking the trial court to proceed with sentencing immediately after the verdict was announced. At the conclusion of the bench trial, right after the court announced its verdict, the trial court asked defense counsel whether she wanted to request a Sentencing Assessment Report (Tr. 72). Counsel answered that Defendant preferred to proceed with sentencing without delay:

To be quite honest, Mr. Dorris is prepared to be sentenced today. He will waive his Sentencing Assessment rights. He is on parole from the State of Missouri—his parole has been revoked. He is a prisoner in DOC. He would rather be sentenced today and go back.

(Tr. 72). The court asked counsel whether she knew of any legal cause or reason why the sentence should “not now be pronounced,” and counsel responded, “No, sir” (Tr. 73, 77). Defendant was present during this discussion and did not object that counsel was misrepresenting his position. Because Defendant urged the court to impose sentence immediately, Rule 29.11(c)’s requirement that the trial court wait an additional 15 days before entering judgment and sentence was obviated.

Defendant argues that he neither knowingly nor expressly waived his right to file a motion for new trial because he was not advised of his right and was not consulted before counsel made the decision not to file the motion. App. Br. at 22. But the decision whether to advance claims of trial error in a motion for new trial is a

strategic matter that is left to counsel. *See State v. White*, 798 S.W.2d 694, 698 (Mo. banc 1990) (holding that counsel’s decision not to pursue an evidentiary claim in a motion for new trial “falls within the reasonable discretion accorded counsel in matters of trial strategy”); *see also State v. Thompson*, 955 S.W.2d 828, 831 (Mo. App. W.D. 1997) (finding that counsel made a reasonable strategic decision not to include particular issues in a motion for new trial because he wanted to focus on other issues that he deemed more important).

In this case, counsel made a conscious, strategic decision not to file a motion for new trial following Defendant’s bench trial. She explained that she never files motions for new trial following court-tried cases—indeed, she thought it would be foolish and imprudent to do so—because the motions are not required to preserve issues and can, in fact, limit the scope of appellate review (PCR Tr. 18, 32-33); *See Rule 29.11(e)* (stating that a motion for new trial is not necessary to preserve issues in court-tried cases, but the issues available for review on appeal are substantially limited if a motion for new trial is filed). Counsel said that she did not discuss whether to file a motion for new trial with Defendant because she would not have filed one no matter what; it was an “executive decision” on her part (PCR Tr. 20). Because she had no intention to file a motion for new trial, counsel was comfortable with the trial court sentencing Defendant immediately after announcing its verdict (PCR Tr. 33).



In addition, the record suggests that Defendant had a strategic reason to want to be sentenced right away. First, he was anxious to get started on his direct appeal (PCR Tr. 19-21). In addition, the court ordered Defendant's sentence for this offense to run concurrently with a sentence Defendant was already serving in the Department of Corrections for another, unrelated offense (Tr. 77-78). With this in mind, Defendant may have wanted the sentence in this case to be imposed immediately so he could begin receiving credit on all of his sentences, rather than just the pre-existing sentence. If the trial court had waited the requisite 15 days before entering judgment, Defendant would not have received credit toward his sentence for this offense for that period of time. *See e.g. Pettis v. Missouri Dept. of Corrections*, 275 S.W.3d 313, 317-18 (Mo. App. W.D. 2008) (explaining that an inmate may receive credit for time served only if the reason the inmate was in custody was "related to" the offense at issue).

Because the defense expressly stated on the record that Defendant wished to proceed to sentencing immediately, Defendant abandoned any complaint about the court declining to wait the 15 days otherwise required by Rule 29.11(c) before entering judgment. Thus, the motion court did not clearly err in denying Defendant's claim for relief.

C. *Defendant was not prejudiced by the trial court's entry of judgment immediately after announcing its verdict.*

Finally, the motion court did not clearly err in concluding that Defendant was not prejudiced by the trial court's alleged error in this case. As noted above, a trial court's judgment will not be "in any manner affected" by an error or irregularity that does not prejudice the substantial rights of the defendant. § 545.030.1(18); Rule 29.12.

Here, trial counsel candidly stated that she was never, under any circumstances, going to file a motion for new trial in this case (PCR Tr. 32). As counsel put it, "[W]e could have waited 15 days and come all the way back and I still wasn't going to file it" (PCR Tr. 32). And even Defendant admitted that he did not know whether he would have asked counsel to file a motion for new trial (Tr. 9-10, 14).

Defendant asserts in his brief that he "was prejudiced by the unknowing waiver of his right to file a new-trial motion," but he fails to support this assertion with any reasonable explanation. At no point, either in his amended motion or in his brief, does Defendant identify any claim of error that he would have liked to raise in a motion for new trial. It appears that he is upset about what he characterizes as "the Southern District's unauthorized review and affirmance of his conviction and sentence on the merits." App. Sub. Br. at 42-43. But it was Defendant, not the State, who appealed the trial court's judgment and asked the Court of Appeals to review his claims. The Court of Appeals granted Defendant's request, reviewed each of Defendant's claims, and

found them to be without merit. If the Court of Appeals had found otherwise and decided that Defendant's substantive claims had merit, it is unlikely that Defendant would now reject the Court's holding as "unauthorized." Defendant cannot now complain that he was prejudiced by a procedural irregularity in the trial court simply because he was unsuccessful in having his conviction overturned on appeal.

It is undisputed that Defendant would not have filed a motion for new trial had the trial court waited 15 days before entering its judgment as Rule 29.11(c) instructs. Nevertheless, Defendant demands that his conviction be vacated and the entire process started over due to the trial court's failure to wait for a motion for new trial to be filed—an issue about which Defendant was not concerned until after his substantive claims were defeated on direct appeal. No statute, case, or rule of law requires that Defendant be granted relief in circumstances such as these. The motion court did not clearly err in denying Defendant's post-conviction claim.

## **CONCLUSION**

For the reasons outlined in Point I, the motion court's judgment should be vacated, and this Court should remand the case with instructions to the motion court to dismiss Defendant's post-conviction motion as untimely filed. Alternatively, for the reasons set forth in Point II, the motion court's judgment should be affirmed.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 8,750 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2007 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 6<sup>th</sup> day of July, 2011, to:

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## **APPENDIX**

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