

IN THE
SUPREME COURT OF MISSOURI

JOSE LOPEZ-MCCURDY, JR.,)	
)	
Appellant,)	
)	
vs.)	No. SC 91713
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

APPEAL FROM THE CIRCUIT COURT OF
DENT COUNTY, MISSOURI
FORTY-SECOND JUDICIAL CIRCUIT, DIVISION ONE
THE HONORABLE WILLIAM C. SEAY, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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INDEX

	<u>Page</u>
TABLE OF AUTHORITIES.....	2
JURISDICTIONAL STATEMENT	4
STATEMENT OF FACTS.....	5
POINT RELIED ON I.....	6
ARGUMENT I.....	7
CONCLUSION	19
CERIFICATE OF COMPLIANCE AND SERVICE	20

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>CASES:</u>	
<u>Belcher v. State</u> , 299 S.W.3d 294 (Mo. banc 2009).....	6, 8
<u>Benton v. State</u> , 128 S.W.3d 901 (Mo. App. W.D. 2004).....	12
<u>Broom v. State</u> , 111 S.W.3d 563 (Mo. App. W.D. 2003)	11-12
<u>Gerlt v. State</u> , 339 S.W.3d 578 (Mo. App. W.D. 2011)	9
<u>Glover v. State</u> , 225 S.W.3d 425 (Mo. banc 2007)	9
<u>Hall v. State</u> , 992 S.W.2d 895 (Mo. App. W.D. 1999)	14
<u>Howard v. State</u> , 289 S.W.3d 651 (Mo. App. E.D. 2009).....	12
<u>Jones v. State</u> , 24 S.W.3d 701 (Mo. App. E.D. 1999).....	12
<u>Laseter v. Griffin</u> , 968 S.W.2d 774 (Mo. App. S.D. 1998).....	10
<u>Lewis v. State</u> , 845 S.W.2d 137 (Mo. App. W.D. 1993)	12
<u>Malady v. State</u> , 748 S.W.2d 69 (Mo. App. S.D. 1988)	9
<u>McFadden v. State</u> , 256 S.W.3d 103 (Mo. banc 2008)	12, 15
<u>Nicholson v. State</u> , 151 S.W.3d 369 (Mo. banc 2004).....	9, 12
<u>Roth v. Roth</u> , 176 S.W.3d 735 (Mo. App. E.D. 2005)	6, 10
<u>Snyder v. State</u> , 334 S.W.3d 735 (Mo. App. W.D. 2011).....	6, 8
<u>Spells v. State</u> , 213 S.W.3d 700 (Mo. App. W.D. 2007)	12
<u>State ex rel. Nixon v. Daugherty</u> , 186 S.W.3d 253 (Mo. banc 2006)	8
<u>State ex rel. Reed v. Reardon</u> , 41 S.W.3d 470 (Mo. banc 2001)	13
<u>State v. Baker</u> , 859 S.W.2d 805 (Mo. App. E.D. 1993)	9

<u>State v. Ferguson</u> , 20 S.W.3d 485 (Mo. banc 2000)	9
<u>State v. Gateley</u> , 907 S.W.2d 212 (Mo. App. S.D. 1995)	9
<u>Thomas v. State</u> , 180 S.W.3d 50 (Mo. App. S.D. 2005).....	9
<u>Thomas v. State</u> , 808 S.W.2d 364 (Mo. banc 1991)	6, 8, 16-17
<u>Thummel v. King</u> , 570 S.W.2d 679 (Mo. banc 1978).....	12
<u>Usher v. State</u> , 741 S.W.2d 677 (Mo. App. E.D. 1987)	9
<u>8182 Maryland Associates, Ltd. v. Sheehan</u> , 14 S.W.3d 576 (Mo. banc 2000)	12

RULES:

Supreme Court Rule 24.035	6, 8-11, 13, 15, 17
Supreme Court Rule 29.15	6-11, 13, 15, 17-18
Supreme Court Rule 51.10	9
Supreme Court Rule 55.03	9
Supreme Court Rule 55.08	6-8, 10, 16-17
Supreme Court Rule 55.27	6-8, 10, 16-17
Supreme Court Rule 57.03	9
Supreme Court Rule 75.01	9
Supreme Court Rule 78.07	9
Supreme Court Rule 81.05	9

JURISDICTIONAL STATEMENT

Appellant adopts and incorporates by reference the Jurisdictional Statement from his Substitute Brief.

STATEMENT OF FACTS

Appellant adopts and incorporates by reference the Statement of Facts from his Substitute Brief.

POINT RELIED ON¹

I.

This Court has jurisdiction over appellant's Rule 29.15 motion, and authority to hear and determine it on the merits, despite the untimely filing of appellant's 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.

Snyder v. State, 334 S.W.3d 735 (Mo. App. W.D. 2011);

Thomas v. State, 808 S.W.2d 364 (Mo. banc 1991);

Belcher v. State, 299 S.W.3d 294 (Mo. banc 2009);

Roth v. Roth, 176 S.W.3d 735 (Mo. App. E.D. 2005);

Rules 24.035 and 29.15; and

Rules 55.08 and 55.27.

¹ With this Substitute Reply Brief, appellant intends to reply to respondent's Point I and Argument I only, but in no way waives Point II and Argument II of his original Substitute Brief.

ARGUMENT

I.

This Court has jurisdiction over appellant's Rule 29.15 motion, and authority to hear and determine it on the merits, despite the untimely filing of appellant's 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.

In its brief, respondent argues that application of Rules 55.08 and 55.27(a) to require the state to timely assert a pro se filing is untimely is inconsistent with the procedures outlined in the post-conviction rules, and inconsistent with the purpose of the post-conviction rules (Respondent's Substitute Brief, pp. 27-40). Specifically, respondent argues that application of these rules to post-conviction proceedings would make mandatory the state's filing of a responsive pleading in all post-conviction proceedings, and that absent a response, the state would admit all factual allegations in the post-conviction motion (Respondent's Substitute Brief, pp. 29-33). Respondent cites Rules 55.01 and 55.09 as support (Respondent's Substitute Brief, pp. 29-33).

Respondent's analysis, though, is far too expansive. The issue before this Court is neither whether to require the state to file responsive pleadings in all post-conviction proceedings, nor whether the state's failure to deny each and every factual allegation in a post-conviction motion in a responsive pleading should

result in waiver and a default judgment. The issue is also not whether Rule 55.01, Rule 55.09, or Rules 55.01 through 55.34, apply to post-conviction proceedings.

The narrow issue before this Court is whether a challenge to the timeliness of a post-conviction filing is a non-jurisdictional, affirmative defense that is waived if not timely asserted. Appellant asserts that this Court should find that a challenge to the timeliness of a post-conviction filing is a non-jurisdictional, affirmative defense that is waived if not timely asserted. Snyder v. State, 334 S.W.3d 735 (Mo. App. W.D. 2011). In Snyder, the Western District Court of Appeals reasoned that the civil rules apply to post-conviction cases, and that Rules 55.08 and 55.27(a) dictate that the state set forth in its responsive pleading to the post-conviction motion an assertion that the post-conviction movant waived his or her right to proceed by untimely filing his post-conviction motion. Id. at 739.

While Rules 24.035(a) and 29.15(a) state that the rules of civil procedure govern post-conviction proceedings, courts have been selective in determining which civil rules apply to post-conviction proceedings and which do not. To determine whether a rule applies in the context of post-conviction review, the essential inquiry is whether the rule enhances, conflicts with, or is of neutral consequence to, the purposes of the post-conviction rule in question. Belcher v. State, 299 S.W.3d 294, 297 (Mo. banc 2009); State ex rel. Nixon v. Daugherty, 186 S.W.3d 253, 254 (Mo. banc 2006). If the rule enhances the purposes of the post-conviction rule or bears a neutral consequence, it applies. Thomas v. State, 808 S.W.2d 364, 366 (Mo. banc 1991).

For example, the civil rules of discovery apply to post-conviction proceedings. State v. Ferguson, 20 S.W.3d 485, 504 (Mo. banc 2000); State v. Gateley, 907 S.W.2d 212, 228 (Mo. App. S.D. 1995); State v. Baker, 859 S.W.2d 805, 810 (Mo. App. E.D. 1993). There is case law indicating that Rule 57.03 applies to the taking of depositions in post-conviction actions. State v. Baker, 859 S.W.2d at 810. And there is also authority for the proposition that the rules of civil procedure apply to motions for continuance filed in post-conviction cases. Usher v. State, 741 S.W.2d 677, 678 (Mo. App. E.D. 1987); Malady v. State, 748 S.W.2d 69, 73 (Mo. App. S.D. 1988).

Missouri courts have further determined that the following rules of civil procedure enhance the purposes of post-conviction rules: Rule 51.10 on the treatment of filings received by the circuit clerk on transfer from another court, Nicholson v. State, 151 S.W.3d 369, 371 (Mo. banc 2004); Rules 75.01 and 81.05(a) on the finality of judgments and time limits for filing a notice of appeal, Thomas v. State, 180 S.W.3d 50, 54 (Mo. App. S.D. 2005); and Rule 78.07(c) on motions to amend the judgment, Gerlt v. State, 339 S.W.3d 578, 585 (Mo. App. W.D. 2011).

Additionally, in Glover v. State, 225 S.W.3d 425, 428 (Mo. banc 2007), this Court determined that Rule 55.03 is applicable to the signature requirement for a pro se motion under Rules 29.15 and 24.035. This Court found that the signature requirement is not jurisdictional, is subject to Rule 55.03, and can be corrected pursuant to Rule 55.03. Id.

This Court should similarly determine that application of Rules 55.08 and 55.27(a) to post-conviction proceedings will enhance and would not be inconsistent with the purposes of Rules 24.035 and 29.15. Rules 55.08 and 55.27(a) serve the purposes of providing notice to the plaintiff of affirmative defenses, and presenting, defining, and isolating the controverted issues. Roth v. Roth, 176 S.W.3d 735, 738 (Mo. App. E.D. 2005); Laseter v. Griffin, 968 S.W.2d 774, 775 (Mo. App. S.D. 1998).

Requiring the state to timely assert that the post-conviction movant's motion was untimely filed, as required by Rules 55.08 and 55.27(a), would provide the post-conviction movant with formal notice that the state will seek dismissal of the post-conviction motion on the basis that the movant's post-conviction motion is untimely, and would present the post-conviction movant with the opportunity to contest the state's assertion of untimeliness in the motion court, the preferred forum for litigating the timeliness issue. Requiring the state to assert the issue would also place the motion court on notice that there is an issue about the timeliness of the movant's motion, so that the court may hear evidence and argument on the issue, if it so chooses, and produce a prompt disposition of the issue and the post-conviction motion.

Although imposing such a requirement on the state would serve such beneficial purposes, respondent argues against it. Respondent argues that imposing such a requirement would mandate that the state file a response to an untimely-filed Rule 24.035 or Rule 29.15 motion, and that such a mandatory

requirement would be inconsistent with Rules 24.035(g) and 29.15(g), which make the filing of such a response optional (Respondent's Substitute Brief, pp. 29-33).

But requiring the state to assert that the post-conviction motion was untimely filed, or otherwise waive the issue, would have no such effect. The language of Rules 24.035(g) and 29.15(g) would remain unchanged. The state could still opt to not file a response to a timely-filed post-conviction motion, and could still even choose to not file a response where the post-conviction motion is filed untimely.

Waiver would, of course, be the consequence for the state's failure to file a response to an untimely-filed post-conviction motion, and this consequence would provide an incentive for the state to put an issue that is the subject of increasing litigation before the motion court for the motion court to hear and determine.

Past litigation on appeal of the timeliness of a post-conviction movant's motion filing has resulted in favorable appellate opinions reversing the motion court's dismissal of post-conviction motions that appeared, on their face, to be untimely-filed, but that were, in fact, timely-filed by application of the law. Missouri law states that, in determining the timeliness of the filing, the date the clerk's office received the motion, and not the date the clerk's office file-stamped the motion, is the deciding factor. Broom v. State, 111 S.W.3d 563, 566 (Mo. App. W.D. 2003). Though the law holds the movant responsible for timely delivery of the post-conviction motion to the clerk's office, it does not hold the movant

responsible for the disposition, or filing, of the document by the clerk's office. Lewis v. State, 845 S.W.2d 137, 138 (Mo. App. W.D. 1993). Post-conviction movants have obtained reversal of the dismissal of their post-conviction motions as untimely-filed by submitting copies of their certified mail receipts showing prompt delivery of their motions to the clerk's office. Broom v. State, 111 S.W.3d at 567-568; Jones v. State, 24 S.W.3d 701, 703 (Mo. App. E.D. 1999).

In recent years, Missouri courts have also recognized that exceptional circumstances beyond the movant's control can excuse the untimely filing of a post-conviction motion. Nicholson v. State, 151 S.W.3d at 370; Howard v. State, 289 S.W.3d 651, 652-654 (Mo. App. E.D. 2009); Spells v. State, 213 S.W.3d 700, 701-702 (Mo. App. W.D. 2007); McFadden v. State, 256 S.W.3d 103, 108-109 (Mo. banc 2008). Although such exceptional circumstances are by definition, rare, they exist, and it is preferable that the litigation of the existence of such exceptional circumstances occur in the motion court, rather than on appeal.

Generally, appellate courts will not consider evidence outside the record on appeal. 8182 Maryland Associates, Ltd. Partnership v. Sheehan, 14 S.W.3d 576, 587 (Mo. banc 2000). "[A]n appellate court sits as a court of review. Its function is not to hear evidence, and based thereon, to make an original determination." Thummel v. King, 570 S.W.2d 679, 686 (Mo. banc 1978). The appellate court, in general, does not hear or consider on appeal evidence that the motion court did not hear or entertain below. Benton v. State, 128 S.W.3d 901, 904 (Mo. App. W.D. 2004).

The motion court is the proper forum for the hearing of evidence and testimony on all issues raised on post-conviction, including issues raised about the timeliness of the post-conviction motion. Indeed, the provisions in Rule 24.035 (h), (i), and (j) and Rule 29.15(h), (i), and (j) relegate to the motion court the functions of determining whether to grant evidentiary hearings in post-conviction cases, conducting post-conviction hearings on post-conviction issues, preserving the hearing records, and issuing findings of fact and conclusions of law on all issues presented.

Requiring the state to timely assert that the post-conviction motion is untimely would ensure that the issue of the timeliness of the post-conviction motion would be first addressed in the motion court. Also, requiring timely notice to the movant of the timeliness issue would promote litigation of the issue in the motion court, where the parties would have an opportunity to present evidence for and against dismissal of the post-conviction motion as untimely-filed.

Presently, however, because there is no requirement that the state first assert the untimeliness of the post-conviction motion in the motion court, the parties often are forced to litigate the issue of the timeliness of the motion on appeal. Though the motion court may have decided the motion on the merits, the untimeliness of the motion may be raised for the first time on appeal. As an exception to the general rule, an appellate court may consider matters outside the record to determine whether a case is moot. State ex rel. Reed v. Reardon, 41 S.W.3d 470, 473 (Mo. banc 2001). But such late notice to the movant that the

state will seek dismissal of the post-conviction motion and appeal on the basis of the untimely filing of the motion places the movant at an obvious disadvantage.

Around the time of the post-conviction motion's filing, and for a time during the pendency of the post-conviction motion in the motion court, the post-conviction movant may have retained proof of the post-conviction motion's timely delivery to the circuit court, such as a certified mail receipt. At or around that time, the post-conviction movant may also have been able to identify and locate the persons, upon whom the movant relied in delivering the post-conviction motion to the court for filing. For a time, those persons may even have been available to testify about the existence of exceptional circumstances.

But by the time the post-conviction motion is on appeal, months and possibly even years have passed. At that late date, even should the appellate court make an exception to the general rule and agree to receive evidence on the issue of untimeliness, it is possible that the movant's witnesses will have become unavailable, or that the movant's evidence will have become lost or spoiled due to the passage of time.

If the post-conviction movant is unable to show on appeal that the post-conviction motion filing is timely, or that exceptional circumstances justify the untimely motion filing, then the consequence is dismissal of the appeal and the motion. Hall v. State, 992 S.W.2d 895, 898 (Mo. App. W.D. 1999). This is true regardless of whether the post-conviction movant would have been able to present convincing evidence of timeliness or exceptional circumstances to the motion

court that is not available to present to the appellate court. Consequently, post-conviction movants whose motions would have been deemed timely filed but for the unavailability of evidence caused by the late notice, are undeservedly foreclosed from seeking the exclusive remedies provided under post-conviction rules. Rules 24.035(a) and 29.15(a).

Requiring the state to timely give notice to the post-conviction movant that the motion filing was untimely would make it less likely that post-conviction movants, who can show that their motion was timely filed, or that exceptional circumstances justify the untimely filing, will undeservedly suffer the consequence of dismissal of their post-conviction actions. Post-conviction movants with timely notice would have more adequate opportunity to adduce evidence contesting the state's assertion of untimeliness.

Given time and opportunity, post-conviction movants would likely present their evidence and arguments to the motion court for determination. When faced with proof of timeliness or the existence of exceptional circumstances, the motion court would have to permit the movant to proceed with the post-conviction motion, or commit reversible error. McFadden v. State, 256 S.W.3d at 108-109.

Decreasing the probability that the court will commit such errors and unfairly deprive a post-conviction movant of the right to proceed under post-conviction rules advances the purposes of Rules 24.035 and 29.15. The primary purpose of those rules 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 at 366.

Application of Rules 55.08 and 55.27(a) to require the state to timely assert the untimeliness of a post-conviction motion filing will promote this purpose by placing the motion court on notice of the timeliness issue, so that the motion court can give prompt and fair consideration to the issue before ruling. By ensuring that the motion court will entertain the issue before ruling on the merits of the post-conviction motion, the application of Rules 55.08 and 55.27(a) would increase the probability of an accurate ruling, and promote prompt disposition of the issue and the post-conviction motion.

To the contrary, respondent argues that application of Rules 55.08 and 55.27(a) to post-conviction proceedings will result in the motion court's consideration of the merits of untimely-filed motions by agreement of the parties or simply due to the state's failure to timely assert the untimely motion filing in a responsive pleading (Respondent's Substitute Brief, pp. 29-33). Respondent, however, assumes that prosecutors will continue to neglect to file a motion to dismiss an untimely post-conviction motion. Respondent also ignores that motion courts across Missouri are hearing and determining the merits of untimely-filed motions, and the most plausible reason for their doing so is not agreement of the parties, but the court's inadvertence because it has not been notified of the untimeliness of the motion by the prosecutor.

The review of untimely-filed motions by the motion court would decrease if the state has to timely assert that a post-conviction motion is untimely, or otherwise waive the defect. It is unlikely that prosecutors would be willing to waive the defect, and in order to avoid waiver, prosecutors would make concerted efforts to promptly identify untimely-filed motions and file motion to dismiss those motions. In those dismissal motions, prosecutors would assert that the movants had waived their rights to proceed under Rule 24.035 or Rule 29.15 by untimely filing their post-conviction motions.

Requiring such efforts on the part of the state also advances the additional purposes of Rules 24.035 and 29.15. The additional purposes of the rules are to avoid delay in the processing of prisoners' claims and to prevent the litigation of stale claims. Thomas v. State, 808 S.W.2d at 366. A motion court that is on notice of the issue will make a more expeditious decision to dismiss a post-conviction motion as untimely filed, or to permit a post-conviction movant to proceed with the motion because the untimely filing is excusable.

Consequently, this Court should find that the application of Rules 55.08 and 55.27(a) to post-conviction proceedings would enhance the purposes of the post-conviction rules by promoting the motion court's prompt and accurate determination of those movants who are permitted by law to adjudicate their claims on post-conviction, and of those who have waived their rights to adjudicate their post-conviction claims through untimely motion filings.

Therefore, appellant respectfully requests that this Court determine appellant's Rule 29.15 post-conviction appeal on the merits, and reverse the denial of his Rule 29.15 motion and order a new trial.

CONCLUSION

For the reasons discussed above, and in appellant's Substitute Brief, appellant respectfully requests that this Court reverse the motion court's denial of post-conviction relief and remand for a new trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Mark A. Grothoff, hereby certify to the following:

This substitute reply brief complies with the limitations contained in Supreme Court Rule 84.06(b). The substitute reply brief was completed using Microsoft Office Word, 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, and this certificate of compliance and service, the substitute reply brief contains 3,434 words, which does not exceed the 7,750 words allowed for a substitute reply brief.

On this 6th day of September, 2011, an electronic copy of the foregoing was sent through the Missouri e-Filing System to Evan J. Buchheim, Assistant Attorney General, at evan.buchheim@ago.mo.gov.

/s/ Mark A. Grothoff

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