No. SC91713

In the
Supreme Court of Missouri

JOSE LUIS LOPEZ-McCURDY, Jr.,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from Dent County Circuit Court
Forty-Second Judicial Circuit
The Honorable William Camm Seay, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATE OF MISSOURI

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STATEMENT OF FACTS

This is an appeal from a Dent County Circuit Court judgment overruling Appellant's (Defendant's) Rule 29.15 motion for post-conviction relief after an evidentiary hearing. Defendant filed this motion seeking to vacate his conviction on one count of forcible rape involving A.M. (Victim), for which he was sentenced to 20 years' imprisonment.

In the underlying criminal case, Defendant was charged in Dent County Circuit Court with two counts of forcible rape involving A.M. (Victim). (L.F. 27-28).[1] Defendant was also charged with two counts of statutory rape and two counts of incest involving T.M. (L.F. 28). Defendant was tried before a jury on May 23-24, 2006, before Judge J. Kent Howald. (L.F. 6). Viewed in the light most favorable to the verdict, the evidence presented at trial showed that:

Defendant and Victim, who were first cousins and later became siblings when Defendant was adopted by Victim's father and step-mother, lived in the same house with Victim's parents, various siblings, and Victim's grandmother and uncle. (Tr. 90-92). Defendant and Victim had lived in the same house together since 2000. (Tr. 93). Defendant's girlfriend, Brianna Koller, and their six-month-old baby also lived in the

[1] The abbreviations "L.F". and "Tr." refer to the legal file and transcript from Defendant's direct appeal, Case No. SD27921. The abbreviations "PCR L.F." and "PCR Tr." refer to the legal file and evidentiary hearing transcript in Defendant's current post-conviction appeal.

same house with Victim, Defendant, and the rest of the family. (Tr. 100, 102, 154). Defendant was thirteen months older than Victim, and, on the day in question, Defendant was 15 years old and Victim was 14 years old. (Tr. 114).

On May 18, 2005, Defendant, Victim, and some of their siblings were playing hide-and-seek outside. (Tr. 95). Defendant gave some beer he had to Victim. (Tr. 95, 99, 108). She drank enough to make her feel "pretty dizzy." (Tr. 111).

Victim testified that Defendant told her to lie down and that after she complied, Defendant removed her pants and underwear. (Tr. 112). Defendant then used his weight to sit down on top of her. (Tr. 96-97). Victim said that Defendant, who was "much bigger" and "a lot stronger" than she was, used force to hold her down and that he also "had a hold" on her "wrists" above her head. (Tr. 101, 135-37). Victim testified that she did not consent to the intercourse and that Defendant used "force" to engage in this act. (Tr. 96).

Defendant then inserted his penis into Victim's vagina and began moving it. (Tr. 95, 129). Defendant did not ejaculate inside Victim; he "pulled out" and ejaculated on the pants she had been wearing, which were lying on the ground next to her. (Tr. 96, 113-14). Victim said that she did not wash the pants or wear them again; she simply put them in her closet, where they stayed for two months until she gave them to her mother after reporting what Defendant had done to her. (Tr. 116, 129). Later DNA testing confirmed that a semen stain found on the pants contained a mixture of Victim's DNA and that of another person, which was consistent with a DNA sample Defendant had given. (Tr. 210-11, 228-29, 237-39).

Victim also testified that Defendant raped her a second time in his room after he had asked her to watch his baby; she said this incident occurred several days after the first rape. (Tr. 97-98).

Evidence was also presented that Defendant had sexual intercourse with his half-sister, T.M., who was younger than Defendant and who also had been adopted by Victim's father and step-mother at the same time as Defendant. (Tr. 140-41, 144-45, 147-48).

Defendant did not testify, but he did call two Dent County deputies and a substitute teacher as witnesses. (Tr. 309, 314, 340-41).

The jury found Defendant guilty only on Count I relating to the May 18, 2005 rape of Victim during the game of hide-and-seek. (Tr. 381-83; L.F. 49). The jury found Defendant not guilty on all the other charges. (Tr. 383; 50-54). After a penalty-phase proceeding, the jury recommended a sentence of 20 years. (Tr. 413-14, 439; L.F. 59).

In an untimely amendment to his motion for new trial, Defendant alleged that he had recently discovered that the semen-stained pants the victim was wearing on the night of the rape actually belonged to Defendant's girlfriend, Ms. Koller.[2] (L.F. 65).

[2] The jury returned its guilty verdict on May 24, 2006, and the trial court gave Defendant 10 additional days (for a total of 25 days under Rule 29.11(b)) to file his motion for new trial. (L.F. 6; Tr. 414). Defendant timely filed a motion for new trial on June 16, 2006. (L.F. 7, 62-63). It was not until an untimely amendment to that motion was filed on June

Defendant alleged that Defendant's semen "could have been on these slacks from earlier relations with his female friend." (L.F. 65).

During the hearing on Defendant's motion for new trial, Ms. Koller testified that while she did not "actually see the evidence," she believed that the pants belonged to her based on what she had "heard." (Tr. 423). She testified that the victim did not own any pants like that and that the other girls living in the house wore her clothes. (Tr. 423-24). She claimed that she told Defendant's attorneys about the pants after she testified during the sentencing-phase proceeding at trial. (Tr. 424). She said that there was a "good possibility" that she wore the pants after she and Defendant had had sex. (Tr. 424).

The trial court overruled Defendant's "amended" motion for new trial. (Tr. 426). It then sentenced Defendant to the jury-recommended sentence of 20 years. (Tr. 439-40).

The court of appeals affirmed Defendant's conviction on direct appeal. *See State v. Lopez-McCurdy*, 266 S.W.3d 874 (Mo. App. S.D. 2008). It issued its mandate on November 13, 2008. (PCR L.F. 5).

Ninety-six days later, on February 17, 2009, Defendant filed a Rule 29.15 pro se motion for post-conviction relief, and appointed counsel later filed a statement in lieu of an amended motion attesting that he had reviewed the record and that all meritorious claims known had been alleged in Defendant's pro se motion. (PCR L.F. 1, 4-12). In his pro se motion, Defendant alleged that trial counsel was ineffective for failing to submit

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26, 2006, that Defendant alleged this claim of newly discovered evidence. (L.F. 7, 64-65).

his fiancée's DNA sample for laboratory testing. (PCR L.F. 5). Following an evidentiary hearing during which only Defendant testified, the motion court entered a judgment overruling Defendant's post-conviction motion. (PCR L.F. 13-16).

In Defendant's appeal from that judgment, the Court of Appeals, Southern District, held that Defendant waived his right to post-conviction relief because he did not timely file his pro se motion within 90 days after that court had issued its mandate in Defendant's direct appeal. The court held that the timing requirements for the filing of the initial motion under Rule 29.15 cannot be waived by the parties, and it remanded the case to the circuit court with directions to dismiss Defendant's pro se motion.

ARGUMENT

I (untimely motion).

The circuit court had no subject-matter jurisdiction over Defendant's untimely post-conviction motion, and it should have dismissed the motion on that basis. Alternatively, the time limits on the filing of post-conviction motions are mandatory, and the circuit court had no authority to consider the motion on its merits, but was required to dismiss it.

Although Defendant concedes that his Rule 29.15 pro se motion was untimely filed, he nevertheless claims that the circuit court had jurisdiction over it because the timeliness of that motion is simply a "non-jurisdictional affirmative defense that is waived if not timely asserted." App. Br. 19. Defendant argues that because the State failed to assert this defense either before the circuit court or the court of appeals, it is waived and his untimely motion should be treated as having been timely filed. Defendant's argument rests on an overly broad reading of this Court's recent opinions in *J.C.W. v. Wyciskalla*, 278 S.W.3d 249 (Mo. banc 2009) and *McCracken v. Wal-Mart*, 298 S.W.3d 473 (Mo. banc 2009).

Even if the circuit court had subject-matter jurisdiction over Defendant's untimely motion, Defendant's failure to timely file his post-conviction motion should preclude any right to proceed under Rule 29.15. 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. The circuit court had no subject-matter jurisdiction to consider Defendant's untimely-filed post-conviction motion.

The Missouri Constitution provides that the "circuit courts shall have original jurisdiction over all cases and matters, civil and criminal." MO. CONST. art V, § 14(a). Defendant reads this provision as if the circuit courts have subject-matter jurisdiction over any case brought before it, no matter how frivolous it may be, and that the circuit court simply decides whether to exercise the authority within its jurisdiction to render the relief sought. But this Court implicitly recognized in *J.C.W.*, and expressly so in *McCracken*, that the concept of subject-matter jurisdiction still exists and will operate in certain classes of cases to limit a circuit court's subject-matter jurisdiction.[3]

Defendant's cursory reading of *J.C.W.* leads to his argument that every action filed in the circuit courts constitutes a case that falls within either one of two classes—civil or criminal. In other words, his argument implies that the concept of subject-matter jurisdiction does not apply to circuit courts because they have jurisdiction over every

[3] *See also State ex rel. Laughlin v. Bowersox*, 318 S.W.3d 695, 698-700 (Mo. banc 2010) (holding that the circuit court lacked "subject-matter jurisdiction" over a criminal case when the crime occurred on property owned by the United States government).

matter brought before them. But *J.C.W.* itself suggests that this cannot be true since it defines subject-matter jurisdiction as "the authority of a court to render judgment in a particular case." *J.C.W.*, 275 S.W.3d at 249. This implies that for certain types of cases, the circuit courts may lack authority to render a judgment.

Any doubt about the continued viability of the concept of subject-matter jurisdiction as a limitation on the circuit courts authority was laid to rest in *McCracken*, in which this Court expressly recognized the long-standing principle that "[s]ubject-matter jurisdiction cannot be waived." *McCracken*, 298 S.W.3d at 477. This statement is supported by a citation to *Gunn v. Director of Revenue*, 876 S.W.2d 42 (Mo. App. E.D. 1994), a case that provides a useful analogy to the jurisdictional issue present in this case.

In *Gunn*, the court of appeals held that the circuit court lacked subject-matter jurisdiction to consider a driver's petition for judicial review of the director's administrative revocation of driving privileges that was filed in circuit court 102 days after the director's notice of revocation was mailed. *Id.* at 43. The court reached this holding because the statute governing the filing of petitions for judicial review (§ 536.110, RSMo 1986) required such petitions to be filed within 30 days of the director mailing the notice revocation. *Id.* The court considered the timeliness of the petition as a matter invoking the circuit court's authority to consider the case and held that the "[f]ailure to timely file such a petition deprives the circuit court of subject matter jurisdiction." *Id.* The court reached this holding notwithstanding the fact that the State had confessed the petition for judicial review before the circuit court (though it did later asserted that the petition was untimely) and the circuit court granted the petition and set

aside the director's action based on this confession. *Id.* The court of appeals nevertheless reversed the circuit court's judgment and remanded the case with directions that the petition be dismissed for lack of subject-matter jurisdiction. *Id.* This Court has reached similar holdings in cases involving untimely filed petitions for judicial review and has held that circuit courts lack subject-matter jurisdiction over such cases. *See Randles v. Schaffner*, 485 S.W.2d 1, 2-3 (Mo. 1972); *Cullen v. Director of Revenue*, 804 S.W.2d 749, 750 (Mo. banc 1991).

The principle under which these cases were decided provides that "[w]hen a court is engaged in the exercise of a special statutory power—in this case a method of review that designates the court and the time within which the review should be sought—the court's jurisdiction is limited by the statutory power." *Cullen*, 804 S.W.2d at 750. *See also Randles*, 485 S.W.2d at 3 ("Although the court may be a court of general jurisdiction, when it is engaged in the exercise of a special statutory power its jurisdiction is limited by such statutory power."). This Court has not abandoned this principle of subject-matter jurisdiction, and its citation to *Gunn* in the *McCracken* opinion at least impliedly suggests that this is still a valid restriction on a circuit court's authority to hear a particular case.

Similar to its consideration of petitions for judicial review of administrative decisions, when a circuit court considers a motion for post-conviction relief under Rules 29.15 or 24.035, it acts as a court of general jurisdiction engaging in the exercise of a special statutory or regulatory power. The source of a circuit court's power to consider and enter a judgment in a proceeding collaterally attacking a final criminal judgment

derives solely from either the post-convictions rules or § 547.360, RSMo 2000, which provides for the same basic relief found under this Court's post-conviction rules, including a requirement that post-conviction motions be timely and that the failure to timely file such a motion "shall constitute a complete waiver of the right to proceed pursuant to this section and a complete waiver of any claim that could be raised in a motion filed pursuant to this section." *See* § 547.360.2, RSMo 2000. *Compare* Rules 29.15(b) and Rule 24.035(b) ("Failure to file a motion within the time provided by this Rule [29.15 or 24.035] shall constitute a complete waiver of any right to proceed under this Rule [29.15 or 24.035] and a complete waiver of any claim that could be raised in a motion filed pursuant to this Rule [29.15 or 24.035]."

Although the post-conviction rules state that the "procedure to be followed for motions filed pursuant to this Rule [24.035 or 29.15] is governed by the rules of civil procedure insofar as applicable," *See* Rules 24.035 (a) and 29.15(a), this does not mean that post-conviction proceedings are "civil" cases as that term is used in § 14(a) of the Missouri Constitution. A simple comparison between the underlying causes of action at issue in *J.C.W.* and *McCracken* and the proceedings based upon petitions for judicial review and post-conviction motions demonstrates why the former are considered civil cases under the constitution and the latter are not. In *J.C.W.* the cause of action at issue was a motion to modify the judgment in a dissolution action, while *McCracken* involved a simple tort claim. Both of these types of cases have long been considered civil cases under the common law and were recognized as such when the Missouri Constitution, which included § 14(a), was adopted in 1945. But petitions for judicial review of

administrative decisions and collateral attacks on final judgments in criminal cases through post-conviction motions have no common law roots. *See 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").

With this in mind, it is certainly not surprising that the failure to comply with later-imposed statutory requirements in matters the circuit courts have long held jurisdiction to consider were not found to implicate a circuit court's subject-matter jurisdiction in *J.C.W.* and *McCracken*. But the sole authority for a circuit court to consider a petition for judicial review from administrative decision or a motion for post-conviction relief stems from statute or this Court's post-conviction rules.[4] Without that authority, the circuit courts have no power, i.e., subject-matter jurisdiction, to consider these causes of action, since these types of cases were not considered "civil" cases when the Missouri Constitution was adopted.

The time limits provided for the filing of post-conviction actions contained in Rules 29.15 and 24.035 strictly limit the circuit court's subject-matter jurisdiction to consider these motions. If a post-conviction motion is untimely, the circuit court has no

[4] The Missouri Constitution provides for the right to judicial review of administrative decisions "as provided by law." MO. CONST. art. V, § 18. Section 536.110 provides that petitions for judicial review "may be instituted by filing a petition in the circuit court . . . within thirty days after the mailing or delivery of the notice of the agency's final decision." Section 536.110.1, RSMo Cum. Supp. 2010.

subject-matter jurisdiction to consider it. The time limits contained in these rules were adopted to avoid delay in the processing of post-conviction claims and to avoid the litigation of stale claims that were rampant under Rule 27.26 (the predecessor to Rules 29.15 and 24.035), which contained no time limits on post-conviction filings. *See Day v. State*, 770 S.W.2d 692, 693 (Mo. banc 1989). This Court has held that the "special purpose" of the post-conviction rules is "to achieve finality in criminal proceedings" and that "exceptions" to the time limits contained in those rules "should be disfavored." *State v. Owsley*, 959 S.W.2d 789, 798 (Mo. banc 1997). In *White v. State*, 939 S.W.2d 887 (Mo. banc 1997), this Court noted that because post-conviction motions are collateral attacks on the final judgment of a court, the ability of courts to consider such claims "must be balanced against the policy of bringing finality to the criminal process." *Id.* at 893. Although post-conviction claims filed under the rules will be honored, "that policy must be balanced against the policy of bringing finality to the criminal process." *Id. See also Smith v. State*, 798 S.W.2d 152, 153-54 (Mo. banc 1990) (noting that the post-conviction rules "make no allowance for excuse" for untimely filings and "contain[] no authority for extension of the time limits expressly stated").

Consequently, the timeliness of a post-conviction motion, much like the timeliness of a petition for judicial review, is inseparable from a circuit court's subject-matter jurisdiction to consider the case. When a circuit court considers a motion for post-conviction relief, it is engaged in the exercise of a special statutory or regulatory power that provides for review only within specified time limits. The circuit court's jurisdiction is thus limited by those time constraints, which means that a circuit court has no subject-

matter jurisdiction to consider an untimely post-conviction motion. And as noted by this Court in *McCracken*, subject-matter jurisdiction cannot be waived or conferred by the parties. Thus, the State's failure to contest the timeliness of Defendant's pro se motion before the motion court does not act as a waiver or confer subject-matter jurisdiction on the circuit court. The court of appeals thus acted within the law when it vacated the motion court's judgment and directed that Defendant's motion for post-conviction relief be dismissed.

B. 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).[5]

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.*

[5] 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).

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 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 at 692 ("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 at 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").

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. Even if 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*, this Court recently noted in *Moore* that *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); *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.

C. 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. 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. 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[6] 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 and 55.27(a) require the State to file a responsive

[6] 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.

pleading to post-conviction motions in order to preserve defenses is thus contrary to longstanding authority.[7]

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 responsive-pleading requirements of Rules 55.08 and 55.27(a) into the post-conviction rules would conflict

[7] 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).

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* 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.

Any complaint that the post-conviction movant would have no notice of an untimely filing if a responsive pleading alleging untimeliness were not required is answered by the fact that it is the post-conviction movant's responsibility to plead facts showing the timely filing of the post-conviction motion in the initial pleading. *See Jones v. State*, 2 S.W.3d 825, 826 (Mo. App. E.D. 1999). This must occur well before any response by the prosecutor.

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 at 701 (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 (8th 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 (8th 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[8]

[8] When *McMillin* was decided, the bar against successive motions was found in Rule 29.15(k). *See* 783 S.W.2d at 90.

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 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 (ineffectiveness claim).

The motion court did not clearly err in overruling Defendant's post-conviction claim that trial counsel was ineffective for failing to submit Defendant's girlfriend's (Ms. Koller's) DNA to the crime lab for testing because Defendant failed to carry his burden of proving either that counsel acted incompetently or that Defendant was prejudiced.

If this Court should determine that the motion court had jurisdiction over Defendant's untimely post-conviction motion and was not under a mandatory duty to dismiss it without considering the merits, the record shows that Defendant failed to prove that he received ineffective assistance of counsel.

A. The record pertaining to the ineffectiveness claim.

In his pro se post-conviction motion, Defendant alleged that counsel was ineffective for failing to submit his fiancée's (Brianna Koller's) DNA sample to the crime lab for testing. (PCR L.F. 5).

During Defendant's trial, the victim (A.M.) testified that during the hide-and-seek game when she was sexually assaulted, she was wearing sweat pants that had been pulled down her legs when Defendant ejaculated on them. (Tr. 95-96, 113-14). She testified that she put the sweat pants in "my closet" and did not wash them or wear them again. (Tr. 116, 132-33). A detective put the pants in a bag about a month or two later. (Tr. 116, 131-33).

The detective who seized the pants testified that the victim's mother brought the sweat pants to the police station and that he put them in a paper bag. (Tr. 195-97). The pants were inside-out, which is the way the victim said she wore them that night to conceal a white stripe during the hide-and-seek game. (Tr. 196). He also said that he obtained buccal swabs from several individuals, including Defendant's fiancée, Brianna Koller. (Tr. 194-95, 198, 204). He sent the buccal swabs and the sweat pants to the crime lab. (Tr. 197-99).

A lab technician testified that the sweat pants had semen stains on them. (Tr. 210-12). A DNA analyst testified that the DNA profile from the semen stain "appears to have been a mixture of at least two individuals and it appears to have been a mixture of both [the victim] and [Defendant]." (Tr. 228). The major contributor of the DNA was the victim and the minor contributor's DNA profile was "partially consistent" with Defendant. (Tr. 229). During cross-examination, defense counsel suggested that the minor contributor was identified from the semen, indicating it was left by a male. (Tr. 234). The analyst said that the DNA profile of the major contributor, the victim, was "predominately X chromosome," showing that she was a female and that the minor contributor had a "Y chromosome" consistent with a male. (Tr. 234-35). He also said that all of Defendant's "genetic markers, except for a few, [were] present" on the sweat pants. (Tr. 239).

During the sentencing hearing, the victim's biological father, who was also Defendant's adopted father, testified that Defendant had been placed in a boys' home in Idaho for six months to undergo group therapy and treatment by a psycho-sexual

therapist based on Defendant's inappropriate sexual behaviors with the victim and his half-sister, T.M. (Tr. 391-94). He had also received information from a prosecutor in Idaho that Defendant had had "finger sex" with the victim before the incident in this case occurred. (Tr. 400).

During the hearing on Defendant's motion for new trial, Defendant offered the testimony of his girlfriend and mother of his child, Brianna Koller, who testified that while she did not "actually see the evidence," she believed that the pants belonged to her based on what she had "heard." (Tr. 423). She testified that the victim did not own any pants like that and that the other girls living in the house wore her clothes. (Tr. 423-24). She claimed that she told the defense about the pants after she testified during the sentencing-phase proceeding at trial. (Tr. 424). She testified that there was a "good possibility" that she wore the pants after she and Defendant had had sex. (Tr. 424).

The only witness called by the defense during the post-conviction evidentiary hearing was Defendant. (PCR Tr. 4-22). Defense counsel was not called as a witness and did not testify. Defendant testified that his fiancée's, Brianna Koller's, DNA was not sent to the crime lab, but that he did not tell trial counsel that the sweat pants belonged to Ms. Koller until after trial had concluded. (PCR Tr. 11-12, 19-20). He said that he did not fault trial counsel about not knowing that the pants belonged to Ms. Koller. (PCR Tr. 20).

B. Standard of review.

Appellate review of a judgment overruling a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law issued by the motion

court are "clearly erroneous." *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *see also Barnett v. State*, 103 S.W.3d 765, 768 (Mo. banc 2003); Rule 29.15(k). Appellate review in post-conviction cases is not de novo; rather, the findings of fact and conclusions of law are presumptively correct. *Wilson v. State*, 813 S.W.2d 833, 835 (Mo. banc 1991). "Findings and conclusions are clearly erroneous only if a full review of the record definitely and firmly reveals that a mistake was made." *Morrow*, 21 S.W.3d at 822.

To establish ineffective assistance of counsel, the defendant must show both (1) that his counsel's performance failed to conform to the degree of skill, care, and diligence of a reasonably competent attorney under similar circumstances; and, (2) that the defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Barnett*; 103 S.W.3d at 768. To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was so deficient as to be unreasonable under the circumstances and that counsel's errors were so serious as to deprive the defendant of a fair trial, the result of which is unreliable. *See Strickland*, 466 U.S. at 687-88. "To demonstrate prejudice, a movant must show that, but for counsel's poor performance, there is a reasonable probability that the outcome of the court proceeding would have been different." *Id.* "The movant has the burden of proving the . . . claims for relief by a preponderance of the evidence." Rule 29.15(i).

In proving that counsel's performance did not conform to this standard, the defendant must rebut the strong presumption that counsel was competent and that any challenged action was part of counsel's sound trial strategy. *Barnett*, 103 S.W.3d at 769;

Sidebottom v. State, 781 S.W.2d 791, 796 (Mo. banc 1989). The motion court is not required to address both components of the inquiry if the movant makes an insufficient showing on one. *Strickland*, 466 U.S. at 697.

C. The motion court did not clearly err.

Defendant has failed to carry his burden of proving either that counsel acted incompetently or that Defendant suffered any prejudice.

1. Counsel did not act incompetently.

It is difficult to discern from Defendant's pro se motion for post-conviction relief precisely what his claim of ineffective assistance of counsel is. The record shows that Defendant's fiancée's (Ms. Koller's) DNA sample obtained from a buccal swab was sent to the crime lab with the other swabs. Post-conviction "pleading requirements are not merely technicalities." *Morrow*, 21 S.W.3d at 824. "The purpose of a Rule 29.15 motion is to provide the motion court with allegations sufficient to enable the court to decide whether relief is warranted." *Id.* Consequently, considering only the allegations contained in Defendant's pro se motion, counsel's alleged failure to submit Ms. Koller's DNA sample to the crime lab provides no basis for relief.

Presumably, Defendant's claim is that counsel should have had the sweat pants tested to see if they contained Ms. Koller's DNA. But "[a]s distinguished from other civil pleadings, courts will not draw factual inferences or implications in a Rule 29.15 motion from bare conclusions or from a prayer for relief." *Id.* at 822. Even if the allegations in Defendant's pro se motion are generously construed, the motion falls well short of making such an allegation.

Defendant candidly admitted during the post-conviction evidentiary hearing that he did not fault counsel for not knowing that there may have been an issue regarding the pants ownership. In fact, he said that he could not have told trial counsel that the sweat pants may have allegedly belonged to Ms. Koller until after the jury had found him guilty. *See State v. Howard*, 896 S.W.2d 471, 490 (Mo. App. S.D. 1995) ("[I]t is not ineffective assistance for counsel to fail to present evidence that he was never told existed.").

Finally, even if it can be assumed that counsel had some knowledge of the sweat-pant issue, Defendant failed to carry his burden of proving that counsel's failure to seek DNA testing of the sweat pants with respect to Ms. Koller's DNA profile was not reasonable trial strategy. Having such a test conducted without any assurance that Ms. Koller's DNA would be present on the sweat pants would have entailed great risk, as it may have only reinforced the State's evidence that the sweat pants belonged to the victim.

2. Defendant failed to prove prejudice.

Defendant wholly failed to prove any prejudice from counsel's alleged failure to conduct DNA testing on the victim's sweat pants. In this situation, Defendant could prove prejudice only by presenting evidence of DNA testing establishing that Ms. Koller's DNA was on the sweat pants. Defendant presented no such evidence. The only evidence Defendant presented during the post-conviction hearing was his own testimony. Thus, Defendant failed to prove that he suffered any prejudice when no evidence was

presented showing what the results of any DNA testing would have been, much less that DNA would have revealed the presence of Ms. Koller's DNA on the sweat pants.

In *State v. Williams*, 861 S.W.2d 670 (Mo. App. E.D. 1993), a post-conviction defendant claimed that he was prejudiced by trial counsel's failure to conduct DNA testing on the victim's vaginal smear. *Id.* at 678. The court held that the defendant failed to carry his burden of proving prejudice because he "presented no evidence to show that had DNA testing been performed he would have been exonerated of responsibility for the crimes with which he was charged." *Id.* The court went on to stress that the mere showing that DNA testing might have had some conceivable effect on the outcome of the trial is insufficient to prove *Strickland* prejudice:

> The fact that an alleged error by trial counsel might have had some conceivable effect on the outcome is not sufficient. Rather, the movant, when challenging a conviction, must show there is a reasonable probability that, absent the alleged error, the fact finder would have reasonable doubt respecting guilt.

Id. In fact, the court noted that "DNA testing might have produced scientific evidence which could have helped ensure [defendant]'s conviction." *Id.* Defendant's claim of prejudice is indistinguishable from the claim raised in *Williams*.

Moreover, the record refutes Defendant's speculative claim that DNA testing would have revealed the presence of Ms. Koller's DNA. The DNA analyst testified that a mixture of two DNA profiles was found on the sweat pants, the victim's and one belonging to a male that had characteristics consistent with Defendant's DNA profile.

The analyst did not identify the existence of an unknown profile belonging to a third person.

This Court's opinion in Defendant's direct appeal also refutes his current claim that he was prejudiced by counsel's failure to submit the sweat pants for DNA testing:

> Koller only testified that it was possible she had worn the pants to bed after having intercourse with Defendant. However, no semen was found anywhere on the inside of the pants. The only semen stain on Exhibit 1 [the sweat pants] was found on the outside, rear of the pants about three to four inches above the crotch. This particular stain contained DNA from A.M. and Defendant. Therefore, Koller's testimony did not provide an alternative explanation for the presence of Defendant's semen on Exhibit 1.

Lopez-McCurdy, 266 S.W.3d at 879.

Finally, even if DNA testing would have revealed the presence of Ms. Koller's DNA on the sweat pants, this would have been mere impeachment evidence to the victim's testimony that she was wearing the sweat pants when the rape occurred. In other words, the fact that Ms. Koller might have owned and worn the sweat pants either before or after the rape would have only impeached the victim's testimony that Defendant ejaculated on the pants while she was wearing them.

But the "failure to call impeachment witnesses does not warrant relief where the facts, even if true, do not establish a defense." *State v. Gollaher*, 905 S.W.2d 542, 548 (Mo. App. E.D. 1995); *see also State v. Phillips*, 940 S.W.2d 512, 524 (Mo. banc 1997) ("The mere failure to impeach a witness, however, does not entitle a movant to

postconviction relief"). Mere impeachment evidence that does not give rise to a reasonable doubt, is not the basis for a claim of ineffective assistance of counsel. *See State v. Twenter*, 818 S.W.2d 628, 640 (Mo. banc 1991); "[N]either the failure to call a witness nor the failure to impeach a witness will constitute ineffective assistance of counsel unless such action would have provided a viable defense or changed the outcome of the trial." *State v. Ferguson*, 20 S.W.3d 485, 506 (Mo. banc 2000).

To prove prejudice from trial counsel's failure to present evidence, Defendant must prove that the evidence would have provided a viable defense or changed the outcome of the trial. *See Kates v. State*, 79 S.W.3d 922, 927 (Mo. App. S.D. 2002). The proposed evidence in this case would not have accomplished either of these goals.

The motion court did not clearly err in rejecting Defendant's claim that counsel was ineffective for failing to submit Ms. Koller's DNA to the crime lab for testing.

CONCLUSION

Because Defendant's post-conviction motion was untimely filed, the motion court's judgment should be vacated and the court should be directed to dismiss Defendant's motion. Otherwise, the record shows that the motion court did not clearly error, and its judgment overruling Defendant's motion for post-conviction relief 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 11,070 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 on August 19, 2011, to:

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