

**In the  
Supreme Court of Missouri**

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**LOUIS W. HILL,**

**Appellant,**

**v.**

**STATE OF MISSOURI,**

**Respondent.**

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**Appeal from Iron County Circuit Court  
Forty-Second Judicial Circuit, Division Two  
The Honorable Kelly W. Parker, 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 Appellant's Rule 24.035 motion for post-conviction relief. Appellant was charged in the Circuit Court of Wayne County with three counts of statutory rape in the first degree. (L.F. 13-16). Venue was transferred to Iron County. (L.F. 2, 25). On July 20, 2004, Appellant appeared in the Circuit Court of Iron County. (L.F. 3-4, 24-36).

The parties agreed that Appellant would enter a guilty plea to one count of statutory rape in the first degree (Count III) and that the State would enter a *nolle prosequi* on the remaining counts. (L.F. 25-26). Appellant stated that he wished to enter an *Alford*<sup>1</sup> plea to Count III. (L.F. 26). He testified that he understood his rights attendant to a trial and that he was waiving them by pleading guilty. (L.F. 26-29). Appellant testified that no threats or promises had been made to him to induce him to plead guilty, (L.F. 29), and that no one had made any promise to him regarding his sentence, other than the plea recommendation from the State. (L.F. 30). Appellant testified that he understood that no one could promise what his sentence

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<sup>1</sup> *North Carolina v. Alford*, 400 U.S. 25 (1970).



would be and that any promise would not be binding on the court, which could impose any sentence within the range of punishment. (L.F. 30).

The prosecutor announced that, should the case go to trial, the State would provide testimony from law enforcement officials, employees of the Division of Family Services, teachers from the local school district, and J.M.I., who was less than fourteen at the time of the incident. (L.F. 30).

J.M.I. would testify that on or about March 29, 2003, Appellant was living at a foster care residence owned and operated by Velva Hawkins. (L.F. 30).

J.M.I. would further testify that Appellant took her into the back yard where he had a tent set up and had sexual intercourse with her. (L.F. 30-31). The prosecutor also stated that members of the medical community, including Ken Haley with the Wayne County Regional Medical Center, would testify that the evidence from a SAFE<sup>2</sup> exam indicated that J.M.I. had sexual intercourse. (L.F. 31). The court found that there was substantial evidence against Appellant and that there was a great likelihood that a jury would convict him. (L.F. 31).

Appellant testified that he understood that his *Alford* guilty plea would have the same result as an ordinary guilty plea or conviction, even though he was denying that he committed the offense. (L.F. 31). Appellant testified

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<sup>2</sup> Acronym for sexual assault forensic evidence exam.

that he was satisfied with his attorney. (L.F. 31). Appellant's counsel stated that he had discussed all of Appellant's legal rights and defenses with him, as well as all of the evidence. (L.F. 31-32). The prosecutor announced that the State's recommendation was for a suspended imposition of sentence, with Appellant placed on supervised probation for five years. (L.F. 32-33). Both Appellant and his counsel agreed that was their understanding. (L.F. 33). The court found that Appellant's *Alford* plea was made freely, voluntarily, and intelligently, and that there was a factual basis for his plea. (L.F. 33). The court accepted Appellant's plea, suspended imposition of sentence, and placed Appellant on supervised probation for five years with special conditions. (L.F. 33-35).

On March 20, 2006, the court revoked Appellant's probation and sentenced him to twenty years imprisonment. (L.F. 1, 5). Appellant was delivered to the Department of Corrections on March 24, 2006. (L.F. 39, 55).

Appellant's *pro se* motion for post-conviction relief pursuant to Supreme Court Rule 24.035 was file-stamped in the Circuit Court of Iron County on May 5, 2008, more than two years after he was delivered to the Department of Corrections. (L.F. 39). On May 19, 2008, the circuit court appointed the Public Defender's Office to represent Appellant. (L.F. 7).

On June 9, 2008, Appellant's counsel filed a "Motion Requesting Appointment of Counsel Be Rescinded," alleging that the circuit court lacked

jurisdiction to appoint counsel due to the untimely filing of Appellant's motion. (L.F. 7). In his response to appointed counsel's motion filed on July 7, 2008, Appellant claimed that his girlfriend hand-delivered his original *pro se* motion on August 24, 2006, but that the circuit court lost it, as well as a subsequent motion. (L.F. 7, 53-56). On August 28, 2008, the circuit court overruled Appellant's counsel's motion, noting that the motion required the court to presume facts not in evidence or not yet proven. (L.F. 8).

Over a year later, on September 23, 2009, the State filed a "Motion to Dismiss for Lack of Jurisdiction." (L.F. 9). On November 17, 2009, the State withdrew this motion. (L.F. 10). On December 31, 2009, Appellant's amended motion was filed. (L.F. 10, 58-62).

An evidentiary hearing was held on March 8, 2010. (L.F. 11, Tr. 4-21). At the hearing, Kimberly Haley, a nurse practitioner at Wayne Medical Center, testified that she performed a SAFE exam on J.M.I. on April 10, 2003. (Tr. 6-8). She further testified that during the exam of J.M.I., she noticed a notch in the hymen which could very likely have been due to the effects of estrogen, and that there was not any evidence that it was due to sexual abuse. (Tr. 9-10). She also testified that since J.M.I. had been examined twelve days after the incident, it was most likely that anything would have healed within 24 to 48 hours. (Tr. 10). She noted that there was a possible healed scar in J.M.I.'s hymen, but she could not conclude that it

was the result of abuse. (Tr. 11). While she made no conclusion whether or not J.M.I had sexual intercourse, (Tr. 12), she did determine from J.M.I.'s history and her interview with her that her behavior was consistent with sexual abuse or neglect. (Tr. 13, 16-17).

After the evidentiary hearing, the circuit court discussed with the prosecutor and Appellant's counsel whether Appellant's *pro se* motion was timely filed. (Tr. 19-21). Appellant's counsel stated that he had filed a motion to rescind his appointment as counsel because Appellant's motion had been filed out of time. (Tr. 19). The prosecutor stated that he had filed a motion to dismiss for lack of jurisdiction because the original motion had been filed out of time but that he later withdrew the motion. (Tr. 19-20). The prosecutor stated that he believed that the issue of jurisdiction could be addressed at any time, and that he had expected to raise the issue of timeliness at the conclusion of the evidentiary hearing. (Tr. 20). Appellant's counsel responded that he had witnesses and evidence to present that would show that Appellant's motion was timely filed, but that he believed that it would be improper for the State to raise that issue once again. (Tr. 20-21). The court did not think it was a matter of jurisdiction, as it was a civil case, but that the issue was whether the motion was timely filed and should be heard. (Tr. 21). The court took the matter under advisement. (Tr. 21).

On April 8, 2010, the circuit court entered findings of fact and conclusions of law. (L.F. 64-65). The court found that a sufficient factual basis for Appellant's *Alford* plea of guilty had been adduced, and that the prosecutor's statement that the SAFE exam indicated that the victim had sexual intercourse was surplus and not necessary to the balance of the statement in support of a factual basis for the guilty plea. (L.F. 64). The court found that there was an adequate factual basis for the guilty plea, in that the statements of the victim alone would be sufficient to form a basis for a finding of guilt for statutory rape in the first degree. (L.F. 65). The motion court overruled Appellant's Rule 24.035 motion but did not address the issue of whether the *pro se* motion had been timely filed or whether its untimely filing was excusable. (L.F. 65).

In Appellant's appeal from that judgment, the Court of Appeals, Southern District, held that Appellant waived his right to post-conviction relief because he did not timely file his *pro se* motion within 180 days after he had been delivered to the Department of Corrections, and it remanded the case to the circuit court with directions to dismiss Appellant's *pro se* motion. On June 28, 2011, this Court granted Appellant's application for transfer.

## ARGUMENT

### I.

**The circuit court had no subject-matter jurisdiction over Appellant'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.**

In his first point, Appellant argues that a challenge to the timeliness of his post-conviction motion is a non-jurisdictional, affirmative defense that was raised and then expressly or explicitly waived by the State. Appellant argues that he should be afforded a chance to establish that his motion was tendered in a timely manner, which he did not do because of his reliance on the State's withdrawal of its motion to dismiss.

Appellant's argument should be rejected, for even if the circuit court had subject-matter jurisdiction over Appellant's untimely motion, Appellant's failure to timely file his post-conviction motion waived any right to proceed under Rule 24.035. The circuit court could have, and should have, dismissed the motion on its own. The circuit court's judgment in this case should be

vacated, and this Court should remand Appellant's case to the circuit court with instructions that Appellant's motion be dismissed as untimely filed.

**A. The circuit court had no subject-matter jurisdiction to consider Appellant'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). In *J.C.W. ex rel. Webb v. Wyciskalla*, 278 S.W.3d 249 (Mo. banc 2009), 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 253-254. This does not mean, however, that circuit courts have jurisdiction over every matter brought before them, as *J.C.W.* 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.

In *McCracken v. Wal-Mart*, 298 S.W.3d 473 (Mo. banc 2009), 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 assert 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.*



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 24.035 or 29.15, 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-conviction 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* Rule 24.035(b) (“Failure to file a motion within the time provided by this Rule shall constitute a complete waiver of any right to proceed under this Rule and a complete waiver of any claim that could be raised in a motion filed pursuant to this Rule.”).

Although the post-conviction rules state that the “procedure to be followed for motions filed pursuant to this Rule is governed by the rules of civil procedure insofar as applicable,” Rules 24.035 (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 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”).

Thus, the sole authority for a circuit court to consider a motion for post-conviction relief stems from statute or this Court’s post-conviction rules. 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.

Further, the time limits provided for the filing of post-conviction actions contained in Rule 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 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 effect of the State filing a motion to dismiss for lack of jurisdiction and later withdrawing the motion (although without conceding the issue of timeliness) 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 Appellant's motion for post-conviction relief be dismissed.

**B. Appellant waived his right to relief under Rule 24.035 by failing to file a timely motion.**

Under Supreme Court Rule 24.035 (b), a post-conviction motion that relates to a criminal case where there was no appeal taken must be filed within 180 days of the date the movant was delivered to the custody of the Department of Corrections. Therefore, Appellant's *pro se* motion filed under Rule 24.035 was required to have been filed no later than September 20, 2006.

"Failure to file a motion within the time provided by this Rule 24.035 shall constitute a complete waiver of any right to proceed under this Rule 24.035." Supreme Court Rule 24.035 (b). "The time limitations of Rules 24.035 and 29.15 are valid and mandatory." *Day v. State*, 770 S.W.2d 692, 695 (Mo. banc 1989). *See also State v. Simmons*, 955 S.W.2d 752, 771 (Mo. banc 1997); *State v. Storey*, 901 S.W.2d 886, 900 (Mo. banc 1995). These limitations "serve the legitimate end of avoiding delay in the processing of prisoner claims and prevent[ing] the litigation of stale claims." *Day*, 770 S.W.2d at 695.

In rare circumstances, the courts have held that the untimely filing of a *pro se* motion does not preclude review where a post-conviction movant completes a *pro se* motion which is then not timely filed due to the active interference of some third party. *See McFadden v. State*, 256 S.W.3d 103, 108 (Mo. banc 2008); *Nicholson v. State*, 151 S.W.3d 369, 370 (Mo. banc 2004); *Howard v. State*, 289 S.W.3d 651, 653 (Mo. App. E.D. 2009); *Spells v. State*, 213 S.W.3d 700, 701 (Mo. App. W.D. 2007). But these cases do not stand for the generic principle that an untimely filing may be excused any time the post-conviction movant can demonstrate good cause. Rather, they stand for the more narrow principle that a movant is entitled to relief under the concept of abandonment when he demonstrates “active interference” of a third party which prevented his timely filing. *McFadden*, 256 S.W.3d at 109.

As noted above, Appellant’s motion was not filed until May 5, 2008, and was thus untimely. Both Appellant’s appointed counsel and the prosecutor apparently filed motions alleging as much, with counsel’s motion being overruled, (L.F. 8), and the State’s motion being withdrawn for reasons not reflected in the record. (L.F. 10). Although Appellant alleged in his *pro se* motion that his girlfriend hand-delivered his original *pro se* motion on August 24, 2006, but that the court lost it, as well as a subsequent motion, (L.F. 53-55), there is no record of such evidence being presented or any finding of fact that Appellant’s motion had been either timely filed or that its untimely

filing was excusable. This failure to make any findings does not allow for meaningful review by this Court. The movant has the burden of demonstrating the timely filing of a *pro se* motion. *Shields v. State*, 87 S.W.3d 355, 357 (Mo. App. E.D. 2002).

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 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”). “When a motion is filed outside the time limits, the motion court is compelled to dismiss it.” *Gehrke*, 280 S.W.3d at 57.

In *Moore v. State*, 328 S.W.3d 700, 703 n.2 (Mo. banc 2010), this Court noted 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.” Notwithstanding *Webb’s* clarification of the term “jurisdiction,” courts are not prevented from dismissing untimely filed post-conviction motions. This Court held that 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), and the present case.

These decisions are consistent with the plain language of Rule 24.035 and this Court’s express recognition that if a post-conviction movant fails to file a post-conviction 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 Appellant 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 Appellant’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 Appellant’s claim on the merits, it falls to this Court to enforce the strict time limitations for filing under Rule 24.035, 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 24.035.**

Although Appellant concedes that the State was not required to file a responsive pleading to Appellant's Rule 24.035 motion, he nevertheless argues that the State must raise the issue of an untimely post-conviction motion at the evidentiary hearing or waive any claim of untimeliness. (App. Br. 17). Moreover, Appellant asserts that because the State did file a motion to dismiss Appellant's motion but subsequently withdrew it, it explicitly or expressly waived any claim that Appellant's motion was untimely. (App. Br. 12, 18-19).

Appellant's argument (App. Br. 15-16) relies 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 movant'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, embraced by Appellant (App. Br. 14-18), 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). "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. Rule 24.035(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>3</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*

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<sup>3</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.

that Rules 55.08 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>4</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* Rule 24.035(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." Rule 24.035(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

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<sup>4</sup> In his concurring opinion, Judge Scott relied on many of these cases in discussing the flawed analysis in *Snyder*. *See Hill*, No. SD30530, slip op. at 2 (Scott, J., concurring).

... 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 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 Rule 24.035(h), which empowers 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.<sup>5</sup>

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<sup>5</sup> See also *Petry v. State*, No. ED95664 (Mo. App. E.D. July 19, 2011), where the Eastern District rejected the Western District's reasoning in *Snyder* and *Gerlt* and held that in those cases, the court failed to acknowledge that a party seeks relief under Rule 24.035 by filing a motion, and that a motion is not a petition to which an answer is required under Rule 55.01; nor is a response necessary, and if no responsive pleading is required, the State's failure to file a responsive pleading cannot constitute a waiver of its right to claim that the movant waived his right to pursue post-conviction relief. *Petry*, slip op. at 8.

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 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 366-367. 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 or subsequent withdrawal of a motion to dismiss, 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 or where it is raised but later withdrawn 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 (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).

Transforming the strict time limits for filing post-conviction motions 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 movant 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 movants 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>6</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, 743-744 (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.* These limits are all fundamental to the core purpose of the post-conviction rules—to resolve claims without delay. The

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<sup>6</sup> When *McMillin* was decided, the bar against successive motions was found in Rule 29.15(k). *See* 783 S.W.2d at 90.

circuit court does not need an objection by the State to enforce the rules, and neither does this Court.

**D. The State's filing and subsequent withdrawal of a motion to dismiss for lack of jurisdiction did not waive or preclude the circuit court from addressing the requirement that Appellant's motion be timely filed.**

Appellant's contention that the State explicitly or expressly waived any claim that Appellant's Rule 24.035 motion was untimely filed by first raising the untimely filing in a motion to dismiss and then subsequently withdrawing the motion to dismiss (App. Br. 12, 18-19) is inconsistent with this Court's standard of review. First, it is speculative at best for Appellant to claim that the State's actions, first in filing a motion to dismiss for lack of jurisdiction (because the original motion had been filed out of time) and then withdrawing the motion, amounted to an express or explicit waiver by the State to challenge the untimely filing of Appellant's *pro se* motion. (App. Br. 12, 18-19).

The record does not reflect why the State withdrew its motion to dismiss. But the record from the evidentiary hearing does reflect that the State expected the issue of timeliness to be addressed at Appellant's evidentiary hearing, possibly with Appellant presenting evidence as to why



the late filing was excusable. (Tr. 20). Appellant claims that it relied to its detriment on the State's withdrawal of its motion to dismiss, and therefore was not prepared to present evidence at the evidentiary hearing as to the timeliness of his filing his Rule 24.035 motion. (App. Br. 12, 18-19). But the record does not reflect that the State abandoned its claim that the motion was untimely. While the State did withdraw its motion to dismiss, such a motion or response was not required to be filed, particularly before an amended motion was filed. 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." Rule 24.035(g).

Moreover, the record tends to show that the State believed that since Appellant was afforded an evidentiary hearing to prove his claims for relief, the issue of whether his motion was timely filed would be taken up at that time. But Appellant presented no evidence to support his claim that the untimely filing of his post-conviction motion should be excused. While Appellant's counsel said that he had witnesses and evidence as to that issue, he was not prepared to present them that day. But Appellant cannot complain that he relied on the actions of the prosecutor in not presenting evidence as to why his untimely filing should not be dismissed because it is always 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. And it was Appellant's burden to prove such facts. Inasmuch as the burden was always on Appellant, and no act by the State could serve to obviate that burden, as previously discussed, Appellant cannot excuse his failure to plead and prove the timeliness of his motion. There is thus no evidentiary basis for finding that the untimely filing of Appellant's motion is excusable.

Even an express or explicit agreement by the State and the movant as to the timeliness (or excuse for the lack thereof) of his Rule 24.035 motion does not relieve the circuit court from its duty to dismiss untimely filed post-conviction motions. "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

The circuit court did not need an objection by the State to enforce the rules, and neither does this Court. In this case, the motion court should not have addressed the merits of Appellant'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 that the post-conviction motion was untimely filed. This Court can and should enforce the mandatory time limitation expressed in Rule 24.035(b) and hold that by failing to comply with the time limits Appellant 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 dismiss Appellant's untimely filed Rule 24.035 motion.

## ARGUMENT

### II.

**The motion court did not did not clearly err in overruling, after an evidentiary hearing, Appellant's Rule 24.035 motion claiming that his guilty plea lacked a factual basis because the prosecutor erroneously stated that evidence from a SAFE exam indicated that J.M.I. had sexual intercourse and that his plea counsel was ineffective for failing to object to the prosecutor's statement. This claim is meritless as the record from Appellant's guilty plea established a factual basis for his plea, even omitting the reference to the SAFE exam, and Appellant failed to establish that he was prejudiced by the alleged failure of counsel to object.**

#### **A. Standard of Review.**

Appellate review of the denial of a Rule 24.035 motion is limited to determining whether the trial court's findings and conclusions are clearly erroneous. Supreme Court Rule 24.035 (k); *State v. Taylor*, 929 S.W.2d 209, 224 (Mo. banc 1996). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made. *Taylor*, 929 S.W.2d at 224. On review, the motion court's findings and conclusions are

presumptively correct. *Wilson v. State*, 813 S.W.2d 833, 835 (Mo. banc 1991). When a movant seeks post-conviction relief following a guilty plea, appellate review is limited to a determination of whether the guilty plea was knowing and voluntary. *Rollins v. State*, 974 S.W.2d 593, 595 (Mo. App. W.D. 1998).

To establish ineffective assistance of counsel, Appellant must show both (1) that his attorney failed to conform his representation to the degree of skill, care, and diligence of a reasonably competent attorney under similar circumstances and (2) that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nunley*, 980 S.W.2d 290, 292 (Mo. banc 1998).

Even if a defendant did not receive competent advice, he must still prove prejudice. *Franklin v. State*, 156 S.W.3d 507, 512 (Mo. App. S.D. 2005). To prove prejudice, the movant must show that but for his counsel's errors, he would not have pleaded guilty but would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *see also Nunley*, 980 S.W.2d at 292. In the context of a guilty plea, any claim of ineffective assistance of counsel is immaterial except to the extent that it impinges on the voluntariness and knowledge with which the plea is made. *State v. Roll*, 942 S.W.2d 370, 375 (Mo. banc 1997). Hence, when a movant alleges ineffective assistance of counsel after a guilty plea, he must show that counsel's inadequate

representation rendered the plea involuntary or affected the understanding upon which it was made. *Peiffer v. State*, 88 S.W.3d 439, 445 (Mo. banc 2002).

**B. A factual basis for Appellant's plea was established.**

Appellant's claim that his guilty plea lacked a factual basis because the prosecutor stated that evidence from a SAFE exam indicated that J.M.I. had sexual intercourse and that his plea counsel was ineffective for failing to object is meritless as the record from Appellant's guilty plea establishes a factual basis for his plea, even omitting the reference to the SAFE exam. Moreover, Appellant has failed to either allege or prove prejudice from counsel's failure to object.

Rule 24.02(e) states that the court shall not enter a judgment upon a plea of guilty unless it determines that there is a factual basis for the plea. Rule 24.02 ensures that a defendant understands the specific charges against him, the minimum and maximum possible penalties, and that he is waiving certain rights by pleading guilty. *State v. Taylor*, 929 S.W.2d 209, 216 (Mo. banc 2005).

A plea of guilty is an admission as to the facts alleged in the information. *Milligan v. State*, 772 S.W.2d 736, 739 (Mo. App. W.D. 1989). It is not necessary that every element of the crime be explained to the defendant so long as he understands the nature of the charges against him.

*Franklin v. State*, 989 S.W.2d 678, 679 (Mo. App. E.D. 1999). It is not necessary for a defendant to admit to or recite facts constituting the offense in a guilty plea proceeding, so long as a factual basis for the plea exists. *State v. Morton*, 971 S.W.2d 335, 339 (Mo. App. E.D. 1998).

A factual basis is established if the defendant indicates an understanding of, and an agreement with, the facts underlying his crimes as recited by the judge or the prosecutor. *Morton*, 971 S.W.2d at 340. A prosecutor's statement that he is prepared to prove facts which would constitute the crime to which defendant is pleading guilty is sufficient. *Id.*

The factual basis required by Rule 24.02(e) need not be established by the accused's testimony at the guilty plea hearing. *Pittman v. State*, 796 S.W.2d 413, 414 (Mo. App. S.D. 1990). It is acceptable if the defendant simply admits to the charges as read where the language used is ". . . simple, specific and sufficient to inform the defendant in terms that a layman would understand what acts he was charged with committing, and the commission of which constituted the crimes charged." *Hoskin v. State*, 863 S.W.2d 637, 639 (Mo. App. E.D. 1993).

In *North Carolina v. Alford*, 400 U.S. 25 (1970), the United States Supreme Court approved the acceptance of a plea of guilty from a defendant who is unwilling or unable to admit participation in acts constituting the crime charged so long as the plea is knowingly and voluntarily entered and is

supported by a strong factual basis. The Missouri Supreme Court has ruled that an *Alford* plea stands on equal footing with one in which an accused specifically admits the commission of the particular act charged. *Wilson v. State*, 813 S.W.2d 833, 843 (Mo. banc 1991). In *Wilson*, the Court specifically rejected the appellant's claim that his admissions of guilt during the plea hearing, after he had announced his guilty plea as being an *Alford* plea, demonstrated a lack of understanding and the voluntariness of the plea. *Id.*

Prior to accepting a plea of guilty or an *Alford* plea, the plea court is required to determine facts which a defendant admits by his plea and that those facts would result in defendant being guilty of the offense charged. *Brown v. State*, 45 S.W.3d 506, 508 (Mo. App. W.D. 2001). As with any guilty plea, an *Alford* plea is valid if it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Sexton v. State*, 36 S.W.3d 782, 785 (Mo. App. S.D. 2001).

Even the failure to satisfy the formal requirements of Rule 24.02 does not entitle the movant to automatic vacation of his guilty plea. *Moore v. State*, 974 S.W.2d 658, 659 (Mo. App. E.D. 1998). Rather, to establish a claim based on a violation of Rule 24.02, the movant must show that he was prejudiced because his guilty plea was rendered unknowing or involuntary. *Dean v. State*, 901 S.W.2d 323, 328 (Mo. App. W.D. 1995). Relief under Rule 24.02(e) is available only for an error of law that is jurisdictional,



constitutional, or constitutes a fundamental defect which inherently results in a complete miscarriage of justice. *Schuerenberg v. State*, 98 S.W.3d 922, 923-924 (Mo. App. S.D. 2003).

To prove that Appellant committed statutory rape in the first degree, the State was required to show that Appellant had sexual intercourse with J.M.I. who was less than fourteen years old at the time. § 566.032.1, RSMo. At Appellant's plea hearing, the prosecutor announced that, should the case go to trial, J.M.I., who was less than fourteen at the time of the incident, would testify that on or about March 29, 2003, Appellant took her into the back yard where he had a tent set up and had sexual intercourse with her. (L.F. 30-31). The prosecutor also stated that members of the medical community would testify that the evidence from a SAFE exam indicated that J.M.I. had sexual intercourse. (L.F. 31). Thus, a factual basis for statutory rape in the first degree was established. While Appellant takes issue with the prosecutor's statement that the SAFE exam would show that the victim had sexual intercourse, this statement was not necessary to establish a factual basis.

Although he denied that he committed the offense, Appellant testified that he understood that his *Alford* guilty plea would have the same result as an ordinary guilty plea or conviction. (L.F. 31). Appellant further testified that he had discussed all of his legal rights and defenses with counsel, as well

as all of the evidence. (L.F. 31-32). Appellate courts consistently deny post-conviction relief based on alleged Rule 24.02(e) violations where it is expressly established that the defendant understood the charges, discussed the charges with his attorney, and understood the facts of the case. *See Holloway v. State*, 989 S.W.2d 216, 222 (Mo. App. W.D. 1999), *overruled on other grounds by State v. Withrow*, 8 S.W.3d 75 (Mo. 1999).

Appellant also attempts to tie a claim of ineffective assistance of counsel to his factual basis claim. Specifically, he argues that plea counsel was ineffective for failing to “object” to the prosecutor’s statement regarding the SAFE exam. (App. Br. 8-9). It is not clear that the prosecutor’s statement, “that evidence of the SAFE exam did in fact indicate that there had been sexual intercourse,” (L.F. 8), was objectionable, for while the physical findings of the SAFE exam were inconclusive as to whether the victim had sexual intercourse, the nurse practitioner determined from J.M.I.’s history and her interview with her that her behavior was consistent with sexual abuse or neglect. (Tr. 13, 16-17). But even if counsel was derelict in failing to object, Appellant must still prove that he was prejudiced by counsel’s failure. To prove prejudice, the movant must show that but for his counsel’s errors, he would not have pleaded guilty but would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Appellant never alleged in his amended motion nor on appeal that had the prosecutor

refrained from mentioning the SAFE exam, he would have gone to trial. Neither did Appellant testify at the evidentiary hearing; hence, there is a complete lack of evidence proving that the prosecutor's statement or counsel's lack of response to it caused him to plead guilty and that had it been otherwise, he would have gone to trial.

The motion court's denial of Appellant's Rule 24.035 motion was not clearly erroneous when it found that the plea court had found a factual basis for Appellant's guilty plea. Appellant understood the nature of the charges against him and admitted that there was a substantial likelihood that a jury, upon hearing the State's evidence, would convict him of statutory rape in the first degree. Appellant failed to prove that he either relied on or was compelled to plead guilty due to the prosecutor's alleged misstatement regarding the SAFE exam. This point should be denied.

## 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 Appellant'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 11,173 words, excluding the cover and certification, 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 7<sup>th</sup> day of September, 2011, to:

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