

IN THE
SUPREME COURT OF MISSOURI

STEVEN GREEN,)	
)	
Appellant,)	
)	
vs.)	No. SC 95363
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF
GREENE COUNTY, MISSOURI
THIRTY-FIRST JUDICIAL CIRCUIT
THE HONORABLE THOMAS MOUNTJOY, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from the denial of appellant's motion for postconviction relief pursuant to Rule 29.15 with an evidentiary hearing by the Honorable Thomas Mountjoy, judge of the Circuit Court of Greene County, Missouri.

Appellant, Steven Green, was convicted following a jury trial of statutory rape in the first degree, and felony incest. (LF 37).¹ Mr. Green appealed these convictions, and the Southern District Court of Appeals issued a mandate in the direct appeal on November 28, 2011 in SD30605. Mr. Green timely filed a *pro se* motion pursuant to Rule 29.15 on January 27, 2012. (LF 7).

Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Southern District. Article V, section 3, Mo. Const.; section 477.060. This Court thereafter granted Mr. Clark's application for transfer, so this Court has jurisdiction. Article V, section 3 and 10, Mo. Const. and Rule 83.04.

¹ The record on appeal consists of a legal file from the trial (LF), the trial transcript (TR), the postconviction legal file (PCR LF), and the postconviction transcript (PCR TR).

STATEMENT OF FACTS

A. The Trial

Monica Martin-Green and Steven Green met in 2001 and were married on October 27, 2007. (TR 578). The couple lived together in Springfield, Missouri with their four children; the two youngest girls were Ms. Martin-Green's children from a previous relationship, the only boy was the biological child of Ms. Martin-Green and Mr. Green, and T.G. is Mr. Green's daughter from a previous relationship. (TR 544-45, 581-82). The family lived together in a three bedroom home where Ms. Martin-Green and Mr. Green shared the master bedroom, the three girls shared a bedroom, and the only boy had his own room. (TR 583).

On March 1, 2008, Ms. Martin-Green and Mr. Green went out for the evening, leaving T.G. at home to babysit her step-brother and sisters. (TR 546, 584). While the adults were out, the four minor children spent the evening watching movies in the girls' bedroom. (TR 574, 585). At some point, T.G. got sleepy and decided to go to bed. (TR 574). The other children were still watching the television, so T.G. went to her brother's room, made a pallet on the floor, and went to sleep. (TR 547-48, 574). The other children eventually fell asleep in the girls' room watching television. (TR 547, 575).

Ms. Martin-Green and Mr. Green had left their home sometime after 9:00 p.m., and they went to The Electric Cowboy. (TR 585). While there, they each consumed an alcoholic beverage; they did not stay for very long because "it wasn't a place [they] would normally go." (TR 587). The couple then went to

Confetti's, where they each consumed additional alcoholic beverages and stayed until the establishment closed at 1:15 a.m. (TR 587-88).

After leaving Confetti's, Mr. Green asked Ms. Martin-Green to take him to his vehicle, which was at his cousin's residence. (TR 588-89). Ms. Martin-Green dropped him off outside of his cousin's home, and she waited for him to get the keys so they could follow each other home. (TR 589). When Mr. Green began to drive away, he left in the opposite direction of his home. (TR 590). Ms. Martin-Green decided not to follow Mr. Green, and she instead turned to go home; she attempted to call Mr. Green, but he did not answer his phone. (TR 590).

When Ms. Martin-Green arrived home at around 1:45 a.m., she parked her car in the garage and went to check on the kids. (TR 590-91). T.G. was asleep on a pallet on the floor in her brother's room near the entryway of the bedroom. (TR 591). The lights were off in the room, and T.G. was positioned in such a way that her head was in the way of the door, so Ms. Martin-Green did not close it before leaving. (TR 549, 591). The other three children were asleep in the girls' room. (TR 590). When Ms. Martin-Green went to bed that night, Mr. Green had not yet returned home. (TR 591, 607).

During the early morning hours of March 2, 2008, Ms. Martin-Green woke up, looked outside, and saw Mr. Green's vehicle parked outside. (TR 592). When Ms. Martin-Green woke up, she also noticed a light was lit up on the security system, indicating the back door of the house was open. (TR 593-94). She got out of bed and walked toward the garage, where she assumed Mr. Green would be

sitting in his area of the garage watching television. (TR 594). However, Mr. Green was not there. (TR 594). Ms. Martin-Green checked the living room to see if Mr. Green was sleeping on the couch, but he was not. (TR 595). Ms. Martin-Green then looked down the hallway and noticed a light on in her son's room. (TR 595). She walked down the hallway, and she found that the door was closed; she opened the door. (TR 596). When she opened the door, she saw Mr. Green and T.G. having sex on top of the pallet T.G. had made earlier that night. (TR 596). When Ms. Martin-Green walked in the room, T.G. covered herself with a blanket, and Mr. Green sat up and quickly closed the door. (TR 553, 596).

After the door was shut, Ms. Martin-Green walked into the kitchen and then back down the hall to the bedroom. (TR 597). As she was about to open the door again, she heard muffled conversation, and Mr. Green came out of the room, walked past her, and stated, "I'll be back in the morning and you guys better be here." (TR 598-99).

After Mr. Green left the house, Ms. Martin-Green went back to her son's bedroom, and she found T.G. putting her clothes on. (TR 600). Ms. Martin-Green sat down and talked to T.G. about what had happened. (TR 601). T.G. and Ms. Martin-Green left the bedroom and went into the living room, where they continued to talk. (TR 603). Ms. Martin-Green called her friend Julie Gault, and asked her to come over. (TR 557, 603). Ms. Gault arrived at the house about fifteen minutes later. (TR 604).

They decided to get the children out of the house. (TR 605). Ms. Martin-Green took all four children with her, and she dropped the three younger children at a safe place. (TR 605-06). She then took T.G. to Cox South Hospital. (TR 605-06). Once at Cox South, Ms. Martin-Green reported the incident, and the police were called. (TR 607). T.G. was examined and interviewed by hospital staff, and a rape kit was collected. (TR 557-58).

Diane Gwin, a registered nurse at the hospital, treated T.G. at the hospital and collected evidence for a rape kit. (TR 653-654). T.G. told her during the examination that Mr. Green had had sex with her for the past two months. (TR 657). Ms. Gwin did not notice any bruising on T.G.'s neck. (TR 672).

While at the hospital, Ms. Martin-Green spoke with Officer Bob Dante, and she recounted the events of that morning as she recalled them. (TR 607). Officer Dante eventually went with Ms. Martin-Green to her home so that evidence could be collected. (TR 609-10). T.G. testified at trial that Mr. Green had had sex with her other times, at "lots of places," including having "penis and mouth" contact. (TR 556).

Two days later, on March 3, 2008, Ms. Martin-Green took T.G. to an interview at the Child Advocacy Center. (TR 615). When Ms. Martin-Green took her to the interview, she noticed bruising and scratching on T.G.'s neck. (TR 615).

After nearly three hours of deliberation, the jury found Mr. Green guilty of statutory rape in the first degree and incest. (PCR LF 67). Mr. Green's convictions were affirmed on direct appeal.

B. The Postconviction Relief Action

Mr. Green timely filed a *pro se* motion pursuant to Rule 29.15 on January 27, 2012. (PCR LF 7). Counsel was appointed on January 31, 2012. (PCR LF 1). Counsel was given an additional thirty days to file the amended motion, which was timely filed on April 30, 2012, ninety days after counsel was appointed. (PCR LF 1, 51).

At an evidentiary hearing held on the amended motion, trial counsel testified that his defense strategy was to show that “Mr. Green did not commit the offense because he was elsewhere at the time of the claimed offense, coupled with the wife’s and daughter’s motive to testify falsely against him.” (PCR TR 97).

In the amended motion, counsel raised numerous claims. Counsel argued, for instance, that trial counsel had been ineffective for failing to call Dr. Samuel Alexander at trial. (PCR LF 45-46). At a deposition introduced into evidence at the evidentiary hearing, Dr. Alexander testified that he had conducted an examination on T.G. at Cox South Hospital. (Ex. 15A, 5-6). He testified that he did not find any bruising on T.G.’s neck. (Ex. 15A, 6). Dr. Alexander additionally stated, though, that bruising does not necessarily show up right away. (Ex. 15A, 7). However, he testified that bruising on the neck shows up more quickly than on an arm or a leg. (Ex. 15A, 11).

Counsel also argued in the amended motion that trial counsel was ineffective for failing to call Kim Chapman to testify at trial. (PCR LF 46). Ms. Chapman was a nurse practitioner at the Children’s Advocacy Center, and she

conducted an examination on T.G. on March 3, 2008. (Ex. 16A, 3-5; PCR TR 93). Ms. Chapman testified that she observed bruising on T.G.'s neck. (Ex. 16A, 7). She did not observe anything else out of the ordinary on T.G.'s body. (Ex. 16A, 8). In Ms. Chapman's report, she found that T.G.'s hymen was abnormal. (Ex. 16, 6). However, she did not find any other abnormal findings on T.G.'s genital or anal area. (Ex. 16, 6). The report shows that T.G. told Ms. Chapman that she had been abused by her step uncle when she was seven years old. (Ex. 16, 4).

Next, counsel argued in the amended motion that trial counsel was ineffective for failing to call Kelly Halphin to testify at trial. (PCR LF 46). Ms. Halphin testified at the evidentiary hearing that she had known Mr. Green for five or six years. (PCR TR 5). She testified that on the night that the alleged statutory rape occurred, Steven Green had come over to her house at between 12:30 and 1:00 a.m. (PCR TR 8). She testified that she went with Mr. Green and others to Waffle House, and that they stayed there until sunrise. (PCR TR 8). Ms. Halphin testified that if she had been called to testify at Mr. Green's trial, she would have given this same testimony. (PCR TR 9).

Finally, counsel argued in his amended motion that trial counsel was ineffective for failing to adequately demand relief for the State's failure to turn over a recording of the preliminary hearing. (PCR LF 47). The amended motion alleged that trial counsel had deferred to the State's position that no recording had been made. (PCR LF 47). However, counsel had written a memorandum for his file stating the following: "State, thru [sic] APA Ami Miller, recorded PH." (PCR

LF 47; Ex. 5). The amended motion asserted that trial counsel “failed to request any kind of relief from the failure to comply with the discovery request or the misplacement or destruction of the recording.” (PCR LF 48). Finally, the amended motion alleged that “[r]easonably competent trial counsel would have introduced his memo . . . in support of his assertions that the proceeding was recorded by the state and would have requested appropriate sanctions including striking the witnesses in question or dismissing the charges against him or even continuing the case until the state produced the recording or transcript thereof.” (PCR LF 49).

Counsel attached numerous *pro se* claims to the amended motion. (PCR LF 52-64). Mr. Green, for instance, claimed that his trial counsel was ineffective for failing to file a motion demanding a speedy trial. (PCR LF 60). Counsel presented evidence on this claim at the evidentiary hearing. (PCR TR 24-34). Mr. Green also alleged that his trial counsel was ineffective for failing to interview witnesses in a timely fashion. (PCR LF 61). Counsel also presented evidence relating to this claim at the evidentiary hearing. (PCR TR 60-61).

After the evidentiary hearing, the motion court issued findings of fact and conclusions of law. (PCR LF 65-75). The motion court addressed each of the claims in the amended motion, but it did not address any of the claims in the attached *pro se* motion. (PCR LF 65-75). This appeal follows.

POINTS RELIED ON

Point I.

The motion court clearly erred in overruling Mr. Green's amended motion filed pursuant to Rule 29.15, because the court's findings of fact and conclusions of law violated Rule 29.15(j), in that the motion court failed to adjudicate the *pro se* claims attached to the amended motion; specifically, the trial court failed to address claim 8.C.2, which asserted that trial counsel was ineffective for failing to request a speedy trial and 8.C.3, which asserted that trial counsel was ineffective for failing to investigate and interview witnesses in a timely fashion.

Atchison v. State, 420 S.W.3d 559 (Mo. App. S.D. 2013);

Moore v. State, 458 S.W.3d 822 (Mo. Banc 2015);

Wallar v. State, 403 S.W.3d 698 (Mo. App. W.D. 2013);

White v. State, 57 S.W.3d 341 (Mo. App. E.D. 2001); and

Rules 29.15 and 78.07.

Point II.

The motion court clearly erred in denying Mr. Green’s claim that his trial counsel was ineffective for failing to call Dr. Samuel Alexander as a witness, because this violated Mr. Green’s rights to due process of law and effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that Dr. Alexander would have testified that he did not observe any bruises on T.G.’s neck when he examined her, and this would have supported counsel’s theory of defense that T.G. had falsely accused Mr. Green of committing the crimes against her.

Strickland v. Washington, 466 U.S. 668 (1984);

State v. Baldridge, 857 S.W.2d 243 (Mo. App. W.D. 1993);

State v. Davis, 814 S.W.2d 593 (Mo. banc 1991);

Wallar v. State, 403 S.W.3d 698 (Mo. App. W.D. 2013);

United States Constitution, Sixth and Fourteenth Amendments;

Missouri Constitution, Article I, Sections 10 and 18(a); and

Rule 29.15.

Point III.

The motion court clearly erred in denying Mr. Green’s claim that his trial counsel was ineffective for failing to call Kim Chapman as a witness, because this violated Mr. Green’s rights to due process of law and effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that Ms. Chapman’s report does not indicate evidence of any recent injuries to T.G.’s genitalia, and her testimony regarding the contents of her report would have supported counsel’s theory of defense that T.G. had falsely accused Mr. Green of committing the crimes against her.

Strickland v. Washington, 466 U.S. 668 (1984);

State v. Baldridge, 857 S.W.2d 243 (Mo. App. W.D. 1993);

State v. Davis, 814 S.W.2d 593 (Mo. banc 1991);

Wallar v. State, 403 S.W.3d 698 (Mo. App. W.D. 2013);

United States Constitution, Sixth and Fourteenth Amendments;

Missouri Constitution, Article I, Sections 10 and 18(a); and

Rule 29.15.

Point IV.

The motion court clearly erred in denying Mr. Green's claim that his trial counsel was ineffective for failing to call Kelly Halphin as a witness, because this violated Mr. Green's rights to due process of law and effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that Ms. Halphin would have testified that Mr. Green was with her at Waffle House when the alleged crime against T.G. was committed, and this would have supported counsel's alibi defense.

Strickland v. Washington, 466 U.S. 668 (1984);

State v. Baldridge, 857 S.W.2d 243 (Mo. App. W.D. 1993);

State v. Davis, 814 S.W.2d 593 (Mo. Banc 1991);

State v. Hayes, 785 S.W.2d 661 (Mo. App. W.D. 1990);

United States Constitution, Sixth and Fourteenth Amendments;

Missouri Constitution, Article I, Sections 10 and 18(a); and

Rule 29.15.

Point V.

The motion court clearly erred in denying Mr. Green's claim that his trial counsel was ineffective for failing to seek sanctions for the State's failure to turn over a copy of the recording of the preliminary hearing, because this violated Mr. Green's rights to due process of law and effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the motion court improperly overruled Mr. Green's amended motion based on what the trial court believed about the existence of a recording at the time of trial; the motion court failed to consider Mr. Green's argument that counsel was ineffective for failing to show the trial court a memorandum written by trial counsel shortly after the preliminary hearing indicating that the hearing was recorded; this memorandum would have changed the trial court's mind about whether sanctions should have been assessed against the State for failing to produce the recording.

Strickland v. Washington, 466 U.S. 668 (1984);

State v. Walker, 460 S.W.3d 81 (Mo. App. W.D. 2015)

Wallar v. State, 403 S.W.3d 698 (Mo. App. W.D. 2013);

United States Constitution, Sixth and Fourteenth Amendments;

Missouri Constitution, Article I, Sections 10 and 18(a); and

Rule 29.15.

ARGUMENT

Point I.

The motion court clearly erred in overruling Mr. Green's amended motion filed pursuant to Rule 29.15, because the court's findings of fact and conclusions of law violated Rule 29.15(j), in that the motion court failed to adjudicate the *pro se* claims attached to the amended motion; specifically, the trial court failed to address claim 8.C.2, which asserted that trial counsel was ineffective for failing to request a speedy trial and 8.C.3, which asserted that trial counsel was ineffective for failing to investigate and interview witnesses in a timely fashion.

A. Standard of Review

This Court reviews the denial of a Rule 29.15 motion to determine whether the motion court's findings of fact and conclusions of law are clearly erroneous. *Wallar v. State*, 403 S.W.3d 698, 705 (Mo. App. W.D. 2013). The motion court's findings and conclusions are clearly erroneous when the reviewing court is left with a definite and firm impression that a mistake has been made. *Id.* The movant bears the burden of demonstrating clear error. *Id.*

B. Analysis

Rule 29.15(j) states that "[t]he court shall issue findings of fact and conclusions of law on all issues presented, whether or not a hearing is held." In the

present case, counsel for Mr. Green included numerous claims within the amended motion. Each of these claims was addressed in the motion court's findings of fact and conclusions of law. (PCR LF 65-75). However, counsel also attached several of Mr. Green's *pro se* claims to the amended motion. *See Reynolds v. State*, 994 S.W.2d 944, 945-946 (Mo. banc 1999)(holding that counsel can incorporate *pro se* claims into the amended motion by physically attaching the claims to the motion).

In claim 8.C.2, Mr. Green asserted that trial counsel was ineffective for failing to request a speedy trial. (PCR LF 60). Mr. Green alleged that he asked trial counsel to file such a motion, but counsel failed to do so. (PCR LF 60). Mr. Green further alleged that he was prejudiced by counsel's failure to file the motion because by the time of trial, Mr. Green's witnesses' memories had faded, and a surveillance tape from Waffle House was no longer available. (PCR LF 60). Evidence was presented on this claim at the evidentiary hearing. (PCR TR 24-33). Mr. Green stated that waiting in jail for a significant amount of time before trial caused undue stress. (PCR TR 32). He stated that his youngest daughter died, his mother was very ill, and he did not have access to his trial counsel. (PCR TR 32).

In claim 8.C.3, Mr. Green asserted that trial counsel was ineffective for failing to investigate and interview witnesses in a timely fashion. (PCR LF 61). Evidence was presented on this claim at the evidentiary hearing. (PCR TR 60-61). Mr. Green asserted that his witnesses' faded memories made it sound as if they were lying at trial. (PCR TR 60-61). Mr. Green also asserted that by waiting, trial

counsel was unable to locate a witness from Waffle House who could have shown Mr. Green's innocence. (PCR TR 60).

The motion court did not address either of these claims in its findings of fact and conclusions of law. (PCR LF 65-75). Counsel acknowledges that no motion to modify the judgment was ever filed alerting the motion court of its failure to address these claims. Counsel also acknowledges previous case law holding that "[u]nder the rules of civil procedure, a claim regarding the form or language of the judgment must be raised in a motion to amend the judgment in order to be preserved for appellate review." *Atchison v. State*, 420 S.W.3d 559, 561 (Mo. App. S.D. 2013)(citations and internal quotations omitted); *Johnson v. State*, 388 S.W.3d 159, 168 (Mo. banc 2012). Despite this Rule, the appropriate remedy in the present case is nonetheless to reverse the motion court's judgment and to remand for further findings.

First, a recent opinion issued by this Court has arguably overruled *Atchison* and other cases with the same holding. See *Moore v. State*, 458 S.W.3d 822, 826 (Mo. Banc 2015). In *Moore*, this Court determined that the amended motion was not timely filed. *Id.* at 825. Because the motion court had failed to conduct an independent inquiry into whether counsel had abandoned the movant, this Court remanded the case for such a hearing. *Id.* at 826.

A dissenting opinion pointed out that the motion court had treated the amended motion as timely. *Id.* at 827-28 (Wilson, J. dissenting). The dissenting opinion also pointed out that the movant's *pro se* motion had been attached to the

amended motion, and that the motion court had rejected all claims. *Id.* at 828 (“Those claims were incorporated in Moore’s amended motion, however, and were rejected (together with his new claims) in the motion court’s December 2012 ruling”). The dissenting opinion asserted that because of these facts, remanding the case would serve no purpose. *Id.* at 828, 831.

In response to the dissenting opinion, the majority opinion asserted the following:

The dissenting opinion advocates that this Court should deny Mr. Moore’s postconviction claims rather than remand the case because all claims made in his initial *pro se* motion were incorporated into the amended motion and have been adjudicated against him by the motion court or the court of appeals in his direct appeal, citing Rule 84.14 for the principle that this Court should finally dispose of a case, unless justice otherwise requires. Contrary to the suggestions made in the dissenting opinion, neither the motion court nor the court of appeals in Mr. Moore’s direct appeal adjudicated against him all of his *pro se* claims. In his *pro se* motion, Mr. Moore alleged that he received ineffective assistance of trial counsel, that the prosecutor committed misconduct, that the key witness for the state presented false testimony, and that his trial counsel failed to investigate all of the witnesses who were present. The motion court did not reference these claims or adjudicate them with written

findings of fact and conclusions of law as required by Rule 29.15(j).

Additionally, in Mr. Moore's direct appeal, the court of appeals adjudicated only a claim that there was not sufficient evidence to convict him. Mr. Moore has not received the process that justice requires.

Id. at 826, n. 3.

Because the majority opinion was actually refuting the dissenting opinion, remanding the case to address the *pro se* claims was not merely dicta, but an actual holding of the case. However, it is clear from the opinion as a whole that no motion to modify the findings of fact and conclusions of law was ever filed. Therefore, the only way the holding of *Moore* makes sense is if no such motion is required. It is true that *Moore* did not discuss Rule 78.07(c), but Footnote 3 states that Rule 29.15(j) required the motion court to address the *pro se* claims attached to the amended motion, and that because this did not happen, the movant did not receive "the process that justice requires." *Id.* In the present case, because the motion court failed to address all of Mr. Green's claims, Mr. Green similarly did not receive the process that justice requires.

Arguably, Rule 78.07(c) should not apply to Rule 29.15, where findings are mandated by rule and not by statute.² Rule 78.07(c) states that "[i]n all cases,

² This specific argument was not made in the Court of Appeals. Counsel acknowledges that normally, a substitute brief "shall not alter the basis of any

allegations of error relating to the form or language of the judgment, including the failure to make statutorily required findings, must be raised in a motion to amend the judgment in order to be preserved for appellate review.” (Emphasis added).

By its own terms, Rule 78.07(c) only mentions the failure to make statutorily required findings. It does not mention the failure to make findings required by court rules. Here, Rule 29.15(j) states that “[t]he court shall issue findings of fact and conclusions of law on all issues presented, whether or not a hearing is held.” Since this requirement comes from a rule and not a statute, Rule 78.07(c) does not apply to it.

A similar issue was addressed in *Crow v. Crow*, 300 S.W.3d 561, 564 (Mo. App. E.D. 2009). In that case, the Eastern District stated that Rule 88.01 required the trial court to “make findings on the record to rebut the presumed correct child support amount[.]” *Id.* The Court considered, in what it characterized as an issue of first impression, whether Rule 78.07(c) applied to claim that was raised in the court of appeals brief[.]” Rule 83.08(b). However, in the Court of Appeals, counsel based his argument that remand was necessary on the proposition that the Southern District was required to follow this Court’s opinion in *Moore v. State*. This Court, though, is not bound by its own decisions, so it is necessary to make arguments here that were unnecessary in the Court of Appeals.

Rule 88.01. *Id.* at 565. The Court held Rule 78.07(c) *did* apply to Rule 88.01. *Id.* at 566. However, in reaching this holding, the Court pointed out that Rule 88.01 was adopted “by the Missouri Supreme Court in compliance with a statutory mandate in section 452.340.8 that there be a rule in effect establishing child supported guidelines.” *Id.* In other words, although the language requiring findings can be found in Rule 88.01, the requirement ultimately can be traced back to section 452.340.8.

In contrast, the language requiring findings in Rule 29.15 cannot be traced back to a statute. This Court pointed out in *Schleeper v. State* that “this Court has provided procedural rules for criminal defendants seeking post-conviction relief from the sentencing court.” 982 S.W.2d 252, 253 (Mo. banc 1998). It is true that the General Assembly passed section 547.360, which contains almost identical language to Rule 29.15, but this Court pointed out that the statute was enacted shortly *after* Rule 29.15 took effect. *Id.* at 253-54. Furthermore, this Court stated that Rule 29.15 “is the ‘exclusive’ procedure to obtain” post-conviction relief, and that section 547.360 did not create a second and independent avenue for post-conviction relief. *Id.* at 254.

Based on the language of Rule 78.07(c) and the logic of *Crow*, because the requirement for findings of fact and conclusions of law in Rule 29.15 comes from a rule instead of a statute, Rule 78.07(c) should not apply to it. This is

further true because Rule 78.07 only applies to after-trial motions. The evidentiary hearing held in the present case is not the equivalent of a trial.

In the alternative, even if Rule 78.07(c) applies generally to Rule 29.15, it arguably should not apply when the motion court makes findings as to some claims, but fails to address other claims.³ If a motion court denies all claims with no findings, it can be assumed that the court considered and rejected all claims. The error in this situation is therefore not the failure to consider all claims, but merely the “form or language of the judgment.” In that situation, it would be necessary to file a motion to amend the judgment asking for specific findings. In both the present case and in *Moore*, though, it cannot be assumed that the motion court considered all claims, since specific findings were made on some issues but not on others. The complaint is therefore not related to the form or language of the judgment; instead, the complaint is the failure to address each issue presented, as required by Rule 29.15(j); *See Reynolds v. State*, 994 S.W.2d 944, 946 (Mo. banc 1999)(“The motion court clearly erred when it failed to consider claims raised in movant’s attached *pro se* motions”).

It is true that “not every failure to enter a finding or conclusion for an issue requires reversal and remand.” *White v. State*, 57 S.W.3d 341, 343 (Mo. App. E.D.

³ Once again, this argument was not made in the Court of Appeals because it was unnecessary to make it to that Court.

2001)(citation omitted). There are five exception to the Rule 29.15(j) requirement for findings and conclusions:

- 1) No finding of fact is necessary where the only issue is one of law, but the court must still enter a conclusion of law;
- 2) An appellate court will not order a useless remand to direct the court to issue a proper conclusion of law on an isolated issue where it is clear that the movant is entitled to no relief as a matter of law and will suffer no prejudice by denying a remand;
- 3) Findings and conclusion are not required on an allegation if the court grants a hearing on the motion and the movant fails to present substantial evidence at the hearing to support that allegation;
- 4) Findings and conclusions are not required for issues that were not properly raised or are not cognizable in a post-conviction motion; and
- 5) Reversal is not required if the motion itself was insufficient.

Id.

Here the two claims at issue in the *pro se* motion were not questions of law. Instead, they pertained to trial counsel's failure to file a motion for a speedy trial and a failure to contact witnesses before their memories faded. (PCR LF 60-61). A remand would not be useless because Mr. Green presented compelling evidence on both claims as to how he was prejudiced by these failures. (PCR TR 24-33; 60-61). Furthermore, both of these claims are cognizable in a post-conviction motion, and the motion was sufficient.

Because the motion court failed to address the *pro se* claims attached to the amended motion, this Court should remand this case to the motion court to issue additional findings of fact and conclusions of law.⁴

⁴ Counsel believes that the appropriate remedy is for reversal and remand. The Southern District, though, determined that the proper remedy was to dismiss the appeal for lack of a final judgment. (Slip Opinion, *3). Mr. Green would be satisfied with either remedy.

Point II.

The motion court clearly erred in denying Mr. Green's claim that his trial counsel was ineffective for failing to call Dr. Samuel Alexander as a witness, because this violated Mr. Green's rights to due process of law and effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that Dr. Alexander would have testified that he did not observe any bruises on T.G.'s neck when he examined her, and this would have supported counsel's theory of defense that T.G. had falsely accused Mr. Green of committing the crimes against her.

A. Standard of Review

A defendant has the right to effective assistance of counsel, a violation of which is shown by establishing that (1) trial counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances; and (2) appellant was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The "purpose of the effective assistance guarantee of the Sixth Amendment" is "to ensure that criminal defendants receive a fair trial." *Id.*

This Court reviews the denial of a Rule 29.15 motion to determine whether the motion court's findings of fact and conclusions of law are clearly erroneous. *Wallar v. State*, 403 S.W.3d 698, 705 (Mo. App. W.D. 2013). The motion court's

findings and conclusions are clearly erroneous when the reviewing court is left with a definite and firm impression that a mistake has been made. *Id.* The movant bears the burden of demonstrating clear error. *Id.*

B. Analysis

At the evidentiary hearing held in the present case, trial counsel testified that his defense strategy was to show that “Mr. Green did not commit the offense because he was elsewhere at the time of the claimed offense, coupled with the wife’s and daughter’s motive to testify falsely against him.” (PCR TR 97). During his closing argument at trial, counsel asserted that the evidence showed Mr. Green’s wife would have been upset about the fact that Mr. Green had recently fathered a child with another woman. (TR 982). Counsel also asserted that T.G. was upset at her father for being overly strict, and at times not letting her talk to boys, go to the mall, chat on the computer, and for making her study. (TR 986). Finally, counsel argued that Mr. Green was not home between 3:00 and 4:45 a.m., when the rape allegedly occurred. (TR 981).

The testimony of Dr. Samuel Alexander would have supported counsel’s theory of defense. At a deposition introduced into evidence at the evidentiary hearing, Dr. Alexander testified that he conducted an examination on T.G. at Cox South Hospital. (Ex. 15A, 5-6). He testified that he did not find any bruising on T.G.’s neck. (Ex. 15A, 6). While Dr. Alexander stated that bruising does not

necessarily show up right away, he testified that bruising on the neck shows up quicker than bruising on an arm or a leg. (Ex. 15A, 7, 11).

“When a defendant alleges that his or her trial counsel is ineffective for failing to call witnesses at trial, Defendant is required to show the existence of such witnesses at the time of trial, that they could be located through reasonable investigation, and that the witnesses’ testimony would have benefitted Defendant’s theories of defense.” *State v. Baldrige*, 857 S.W.2d 243 (Mo. App. W.D. 1993), citing *State v. Davis*, 814 S.W.2d 593, 603-04 (Mo. Banc 1991).

In the present case, Dr. Alexander certainly existed and could have been located at the time of trial. After all, he examined T.G. shortly after the alleged rape. (Ex. 15A, 4). Dr. Alexander’s testimony also would have benefitted Mr. Green’s defense. Ms. Martin-Green testified that she observed bruising and scratching on T.G.’s neck two days after the alleged rape. (TR 615). Counsel could have used Dr. Alexander’s testimony to show that T.G. and Ms. Martin-Green fraudulently caused the bruising to make it appear that a crime had occurred.

While Dr. Alexander’s testimony would not have been definitive since bruising can take time to show up, the testimony would have given the jury one more reason to acquit Mr. Green of the charges—especially considering Dr. Alexander’s testimony that bruising on the neck shows up in a relatively quick amount of time. (Ex. 15A, 11). It is true that Diane Gwin, the registered nurse who examined T.G., testified that she did not observe any bruising on T.G.’s neck. (TR

672). However, she was never questioned about how long bruising on the neck takes to be visible. Dr. Alexander's testimony therefore would not have been merely cumulative. Furthermore, "corroborative testimony by a single witness can never be discounted as 'merely cumulative.'" *State v. Hayes*, 785 S.W.2d 661, 663 (Mo. App. W.D. 1990). The motion court clearly erred in finding that Mr. Green was not prejudiced by counsel's failure to call Dr. Alexander as a witness.

The motion court determined that this claim failed primarily because "counsel was never questions [sic] regarding" this witness. (PCR LF 73). This is a clearly erroneous conclusion because counsel *was* questioned about his decision not to call Dr. Alexander. (PCR TR 89-90). Trial counsel was informed that Dr. Alexander was the doctor who first examined T.G. when she was taken to the hospital. (PCR TR 89). Trial counsel testified that he had no memory of Dr. Alexander. (PCR TR 89). When told that Dr. Alexander had written a report indicating he did not observe any bruising, counsel admitted that this information "certainly sounds relevant." (PCR TR 90). Counsel further stated that he could not offer an explanation as to why he did not call Dr. Alexander to testify at trial. (PCR TR 90).

Dr. Alexander would have been available to testify at trial; his testimony would have benefitted Mr. Green's defense; and trial counsel had no strategic reason for not calling him to testify. Thus, the motion court clearly erred in overruling this claim. Mr. Green respectfully asks this Court to reverse Mr. Green's convictions and to remand for a new and fair trial.

Point III.

The motion court clearly erred in denying Mr. Green’s claim that his trial counsel was ineffective for failing to call Kim Chapman as a witness, because this violated Mr. Green’s rights to due process of law and effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that Ms. Chapman’s report does not indicate evidence of any recent injuries to T.G.’s genitalia, and her testimony regarding the contents of her report would have supported counsel’s theory of defense that T.G. had falsely accused Mr. Green of committing the crimes against her.

A. Standard of Review

A defendant has the right to effective assistance of counsel, a violation of which is shown by establishing that (1) trial counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances; and (2) appellant was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The “purpose of the effective assistance guarantee of the Sixth Amendment” is “to ensure that criminal defendants receive a fair trial.” *Id.*

This Court reviews the denial of a Rule 29.15 motion to determine whether the motion court's findings of fact and conclusions of law are clearly erroneous. *Wallar v. State*, 403 S.W.3d 698, 705 (Mo. App. W.D. 2013). The motion court's findings and conclusions are clearly erroneous when the reviewing court is left with a definite and firm impression that a mistake has been made. *Id.* The movant bears the burden of demonstrating clear error. *Id.*

B. Analysis

At the evidentiary hearing held in the present case, trial counsel testified that his defense strategy was to show that "Mr. Green did not commit the offense because he was elsewhere at the time of the claimed offense, coupled with the wife's and daughter's motive to testify falsely against him." (PCR TR 97). During his closing argument at trial, counsel asserted that the evidence showed Mr. Green's wife would have been upset about the fact that Mr. Green had recently fathered a child with another woman. (TR 982). Counsel also asserted that T.G. was upset at her father for being overly strict, and at times not letting her talk to boys, go to the mall, chat on the computer, and for making her study. (TR 986). Finally, counsel argued that Mr. Green was not home between 3:00 and 4:45 a.m., when the rape allegedly occurred. (TR 981).

The testimony of Kim Chapman would have supported counsel's theory of defense. Ms. Chapman was a nurse practitioner at the Children's Advocacy Center, and she conducted an examination on T.G. on March 3, 2008. (Ex. 16A, 3-

5; PCR TR 93). Ms. Chapman testified that she observed bruising on T.G.'s neck. She did not observe anything else out of the ordinary on T.G.'s body. (Ex. 16A, 8). In Ms. Chapman's report, she found that T.G.'s hymen was abnormal. (Ex. 16, 6). However, she did not find any other abnormal findings on T.G.'s genital or anal areas. (Ex. 16, 6). The report shows that T.G. had told Ms. Chapman that she had been abused by her step uncle when she was seven years old. (Ex. 16, 4).

“When a defendant alleges that his or her trial counsel is ineffective for failing to call witnesses at trial, Defendant is required to show the existence of such witnesses at the time of trial, that they could be located through reasonable investigation, and that the witnesses' testimony would have benefitted Defendant's theories of defense.” *State v. Baldrige*, 857 S.W.2d 243 (Mo. App. W.D. 1993), citing *State v. Davis*, 814 S.W.2d 593, 603-04 (Mo. banc 1991).

Ms. Chapman certainly existed at the time of trial and could have been located since she was a nurse practitioner at the Children's Advocacy Center, and she conducted an examination on T.G. just a day after the alleged rape. (Ex. 16A, 3-5). Her testimony also would have benefitted Mr. Green's defense. Ms. Chapman found that T.G.'s hymen was abnormal, but this could be explained by the fact that T.G. had been abused by her step uncle when she was seven years old. (Ex. 16, 4, 6). Other than the abnormal hymen, Ms. Chapman did not discover any other abnormalities on T.G.'s genital or anal areas. (Ex. 16, 6). This testimony would have supported Mr. Green's defense that Ms. Martin-Green and T.G. fabricated the rape charges against Mr. Green. The motion court therefore clearly

erred in finding that Mr. Green was not prejudiced by counsel's failure to call Ms. Chapman as a witness.

The motion court determined that this claim should fail primarily because "counsel was never questions [sic] regarding" this witness. (PCR LF 73). This is a clearly erroneous conclusion because counsel *was* questioned about his decision not to call Ms. Chapman. (PCR TR 90-96). Trial counsel testified that it could have been favorable to his defense to show through Ms. Chapman's testimony that there was no indication of recent trauma. (PCR TR 96).

The motion court also misunderstood counsel's claim as it related to Ms. Chapman. The motion court, for instance, stated that Mr. Green contended "Kim Chapman should have been called by trial counsel to show that there was no bruising to victim's neck . . ." (PCR LF 73). However, the amended motion *actually* alleged that Ms. Chapman would have testified that there was no recent trauma to T.G. (PCR LF 46). The motion court's conclusions of law were therefore clearly erroneous.

Ms. Chapman would have been available to testify at trial; her testimony would have benefitted Mr. Green's defense; and trial counsel had no strategic reason for not calling her to testify. Thus, the motion court clearly erred in overruling this claim. Mr. Green respectfully asks this Court to reverse Mr. Green's convictions and to remand for a new and fair trial.

Point IV.

The motion court clearly erred in denying Mr. Green’s claim that his trial counsel was ineffective for failing to call Kelly Halphin as a witness, because this violated Mr. Green’s rights to due process of law and effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that Ms. Halphin would have testified that Mr. Green was with her at Waffle House when the alleged crime against T.G. was committed, and this would have supported counsel’s alibi defense.

A. Standard of Review

A defendant has the right to effective assistance of counsel, a violation of which is shown by establishing that (1) trial counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances; and (2) appellant was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The “purpose of the effective assistance guarantee of the Sixth Amendment” is “to ensure that criminal defendants receive a fair trial.” *Id.*

This Court reviews the denial of a Rule 29.15 motion to determine whether the motion court’s findings of fact and conclusions of law are clearly erroneous. *Wallar v. State*, 403 S.W.3d 698, 705 (Mo. App. W.D. 2013). The motion court’s findings and conclusions are clearly erroneous when the reviewing court is left

with a definite and firm impression that a mistake has been made. *Id.* The movant bears the burden of demonstrating clear error. *Id.*

B. Analysis

At the evidentiary hearing held in the present case, trial counsel testified that his defense strategy was to show that “Mr. Green did not commit the offense because he was elsewhere at the time of the claimed offense, coupled with the wife’s and daughter’s motive to testify falsely against him.” (PCR TR 97). Counsel asserted during his closing argument that Mr. Green was not home between 3:00 and 4:45 a.m., when the rape allegedly occurred. (TR 981).

The testimony of Kelly Halphin would have supported counsel’s theory of defense. Ms. Halphin testified at the evidentiary hearing that she had known Mr. Green for five or six years. (PCR TR 5). She testified that on the night that the alleged statutory rape occurred, Steven Green had come over to her house at between 12:30 and 1:00 a.m. (PCR TR 8). She testified that she went with Mr. Green and others to Waffle House, and that they stayed there until sunrise. (PCR TR 8). Ms. Halphin testified that if she had been called at Mr. Green’s trial, she would have given this same testimony. (PCR TR 9). Her testimony would have supported Mr. Green’s alibi defense.

“When a defendant alleges that his or her trial counsel is ineffective for failing to call witnesses at trial, Defendant is required to show the existence of such witnesses at the time of trial, that they could be located through reasonable

investigation, and that the witnesses' testimony would have benefitted Defendant's theories of defense." *State v. Baldridge*, 857 S.W.2d 243 (Mo. App. W.D. 1993), citing *State v. Davis*, 814 S.W.2d 593, 603-04 (Mo. banc 1991).

The motion court rejected this claim first because it determined that trial counsel either did not know or should not have known about Ms. Halphin's existence. (PCR LF 73). This is clearly erroneous, though, because at trial, Lance Hill testified that Ms. Halphin was at the Waffle House with him. (TR 919). Since Mr. Hill was a defense witness, trial counsel *should* have known about the existence of Ms. Halphin.

The motion court also rejected this claim because it determined that Mr. Green's alibi defense was rejected by the jury. This is clearly erroneous because of the circular nature of the conclusion. Mr. Green's allegation is that his trial counsel was ineffective for not calling a witness which would have benefited the alibi defense. It is true that Ms. Halphin's testimony would have been similar to Mr. Hill's, but "corroborative testimony by a single witness can never be discounted as 'merely cumulative.'" *State v. Hayes*, 785 S.W.2d 661, 663 (Mo. App. W.D. 1990). There is a reasonable probability that the jury would have reached a different result had they heard from a second witness corroborating Mr. Green's alibi defense. The jury, for instance, deliberated for almost three hours in this case, and they asked the court two questions during deliberation. (TR 1018-1021). Clearly, the jury considered Mr. Green's defendant, and it is reasonably

likely that the additional testimony of Ms. Halphin would have resulted in a different verdict.

The motion court clearly erred in overruling this claim. Mr. Green respectfully asks this Court to reverse his convictions and to remand for a new and fair trial.

Point V.

The motion court clearly erred in denying Mr. Green's claim that his trial counsel was ineffective for failing to seek sanctions for the State's failure to turn over a copy of the recording of the preliminary hearing, because this violated Mr. Green's rights to due process of law and effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the motion court improperly overruled Mr. Green's amended motion based on what the trial court believed about the existence of a recording at the time of trial; the motion court failed to consider Mr. Green's argument that counsel was ineffective for failing to show the trial court a memorandum written by trial counsel shortly after the preliminary hearing indicating that the hearing was recorded; this memorandum would have changed the trial court's mind about whether sanctions should have been assessed against the State for failing to produce the recording.

A. Standard of Review

A defendant has the right to effective assistance of counsel, a violation of which is shown by establishing that (1) trial counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances; and (2) appellant was prejudiced thereby. *Strickland*

v. Washington, 466 U.S. 668, 689 (1984). The “purpose of the effective assistance guarantee of the Sixth Amendment” is “to ensure that criminal defendants receive a fair trial.” *Id.*

This Court reviews the denial of a Rule 29.15 motion to determine whether the motion court’s findings of fact and conclusions of law are clearly erroneous. *Wallar v. State*, 403 S.W.3d 698, 705 (Mo. App. W.D. 2013). The motion court’s findings and conclusions are clearly erroneous when the reviewing court is left with a definite and firm impression that a mistake has been made. *Id.* The movant bears the burden of demonstrating clear error. *Id.*

B. Analysis

Counsel argued in Mr. Green’s amended motion that trial counsel was ineffective for failing to adequately demand relief for the State’s failure to turn over a recording of the preliminary hearing. (PCR LF 47). The amended motion alleged that trial counsel deferred to the State’s position that no recording was made. (PCR LF 47). However, counsel had written a memorandum for his file stating the following: “State, thru [sic] APA Ami Miller, recorded PH.” (PCR LF 47; Ex. 5). The amended motion asserted that trial counsel “failed to request any kind of relief from the failure to comply with the discovery request or the misplacement or destruction of the recording.” (PCR LF 48). Finally, the amended motion alleged that “[r]easonably competent trial counsel would have introduced his memo . . . in support of his assertions that the proceeding was recorded by the

state and would have requested appropriate sanctions including striking the witnesses in question or dismissing the charges against him or even continuing the case until the state produced the recording or transcript thereof.” (PCR LF 49).

The motion court’s conclusions of law on this issue were clearly erroneous because they focused on what the trial court believed, and they did not factor in the new evidence presented at the evidentiary hearing. The conclusions of law, for instance, stated the following: “There was never proof that a recording existed. There was evidence that trial counsel wrote in his notes that the preliminary hearing was recorded and Movant testified that it was recorded to his knowledge, but the trial court was satisfied that, despite this, a recording did not exist.” (PCR LF 74). However, the notes indicating that the preliminary hearing was recorded were never presented to the trial court.

The motion court’s conclusion therefore misses the mark because Mr. Green alleged that reasonably competent trial counsel would have introduced the memo trial counsel wrote shortly after the preliminary hearing to prove to the trial court that the preliminary hearing *was* recorded. (Ex. 5). Whether or not the *trial* court believed a recording existed is therefore irrelevant. The motion court did not take into account the *new* evidence presented at the evidentiary hearing that the hearing was actually recorded. (Ex. 5).

The Western District Court of Appeals recently held that when a court fails to consider a relevant argument, remand is appropriate. *State v. Walker*, 460 S.W.3d 81, 84 (Mo. App. W.D. 2015). In *Walker*, the defendant filed a motion to

suppress evidence found during a search of his vehicle. *Id.* at 84. The trial court granted the motion, finding that the search was not a proper “search incident to arrest.” *Id.* at 83. On appeal, the State argued that the trial court had failed to consider whether the search was proper under the “automobile exception.” *Id.* The Western District agreed, stating that the “trial court overlooked consideration of the ‘automobile exception,’ thus, we cannot determined based on this record whether the State met its burden of persuasion to establish by credible evidence that this exception to the warrant requirement applies, making remand appropriate.” *Id.* at 87.

Remand is also appropriate in the present case. The motion court failed to consider whether the trial court would have made a different ruling concerning the preliminary hearing if it had been presented with evidence that trial counsel wrote a memorandum shortly after the hearing indicating a recording was made. Trial counsel admitted at the evidentiary hearing that he could have used the recording to impeach trial witnesses with their preliminary hearing testimony. (PCR TR 74). Mr. Green testified that there were numerous contradictions between the testimony presented at the preliminary hearing and the testimony at trial. (PCR TR 17).

Because the motion court failed to take into account Mr. Green’s argument that showing the memorandum in question to the trial court would have changed the trial court’s mind about applying sanctions for not producing the recording, this Court should remand the case back to the motion court.

CONCLUSION

As argued in Point I, this Court should remand the case back to the motion court to consider the claims presented in the attached *pro se* motion.

As argued in Points II, III, and IV, this Court should reverse the judgment of the motion court and order a new and fair trial.

As argued in Point V, this Court should remand the case back to the motion court to consider whether evidence of a memorandum written by trial counsel indicating the preliminary hearing was recorded would have resulted in the trial court assessing sanctions against the State for failing to produce the recording.

Respectfully submitted,

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Certificate of Compliance and Service

I, Samuel E. Buffaloe, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 9,410 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 29th day of January, 2016, electronic copies of Appellant's Brief and Appellant's Brief Appendix were placed for delivery through the Missouri e-Filing System to Dora Fichter, Assistant Attorney General, at Dora.Fichter@ago.mo.gov.

/s/ Samuel Buffaloe

Samuel Buffaloe

