IN THE MISSOURI COURT OF APPEALS FOR THE WESTERN DISTRICT OF MISSOURI

KENNETH MIDDLETON,
Respondent/ Cross Appellant,

v.

STATE OF MISSOURI,
Appellant,

Circuit Court No. 91CV23437
Court of Appeals No. 65540

Court of Appeals, Western District
Circuit Court of Jackson County

MOTION FOR REHEARING AND/OR TRANSFER

Transfer is sought:	AFTER OPINION
Record on Appeal Was Filed:	October 5, 2005
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Party:	Attorney:
Kenneth Middleton	Jonathan Laurans
State of Missouri	Deborah Daniels, Asst. AG

Prepared and Filed by:
JONATHAN LAURANS, MO #43105
819 Walnut Street
Kansas City, Missouri 64106
Telephone No.: (816) 421-5200
Facsimile No.: (913) 384-5099
COUNSEL FOR CROSS-APPELLANT MIDDLETON

MOTION FOR REHEARING AND/OR TRANSFER

Issue 1: Whether the Court of Appeals erroneously applied a *de novo* standard of review to an appeal of a Rule 29.15 motion granted by the Circuit Court, where the standard of review has always been "clear error," which has been stated specifically in this context as "whether the appellate court is left with a definite and firm impression that a mistake has been made."

Existing Law Requiring Re-examination: Mansfield v. State, 187 S.W.3d 1 (Mo. App. W.D. 2006)

Existing precedents contrary to the Court of Appeals' Opinion: Johnson v. State, 189 S.W.3d 698, 700 (Mo. App. W.D. 2006); Edgington v. State, 189 S.W.3d 703, 705 (Mo. App. W.D. 2006); Fenton v. State, WD65502 (6/27/06); State v. Butler, 951 S.W.2d 600, 608, 610 (Mo. banc 1997); State v. Jones, 955 S.W.2d 5 (Mo. App. W.D. 1997)

Issue 2: Whether the Court of Appeals erroneously applied State v. White, 873 S.W.2d 590 (Mo. banc 1994) when the United States Court of Appeals held in White v. Bowersox, 206 F.3d 776 (8th Cir. 2000) that the new rule announced in State v. White could not be applied to a Rule 29.15 movant whose case was litigated prior to 1994.

Existing precedents contrary to the Court of Appeals' Opinion: White v. Bowersox, 206 F.3d 776 (8th Cir. 2000)

Issue 3: Whether the Court of Appeals erroneously ordered Kenneth Middleton's filing in the Circuit Court dismissed when there was an independent ground asserted therein for reversal of his convictions, but was specifically not addressed by the Circuit Court in light of its granting of Mr. Middleton's Rule 29.15 motion.

Existing precedents contrary to the Court of Appeals' Opinion: None on point. The Court of Appeals acknowledged in its opinion that the alternative basis for relief (Habeas Corpus pursuant to Rule 91) was pled but not reached by the Circuit Court. However the Court of Appeals failed to remand with directions for the Circuit Court to consider and decide this alternative basis for relief, which is in essence that a gross miscarriage of justice occurred in Mr. Middleton's trial.

SUGGESTIONS IN SUPPORT - STATEMENT OF FACTS

The Honorable Edith L. Messina, Judge of the Jackson County Circuit Court, granted Cross-Appellant Kenneth Middleton's "Motion to Re-open Previously Filed Rule 29.15 Proceeding Upon Showing of Abandonment, or in the Alternative, Petition for Writ of Habeas Corpus." Judge Messina ruled in January, 2004 that Mr. Middleton's 1991 "29.15" litigation should be reopened because he had been abandoned by post-conviction counsel. Then, following a June, 2004 evidentiary hearing, she ruled in May, 2005 that Middleton's 1991 trial counsel was ineffective in many respects, thus requiring that Mr. Middleton receive a new trial. This Court has not reached the underlying merits of the case, instead ruling that Judge Messina erred in re-opening the Rule 29.15 litigation at all.

As specifically pertains to the re-opening, the facts are these:

Mr. Middleton was represented at trial by Robert G. Duncan, deceased. Duncan also represented Middleton on direct appeal, and shared space within that brief with Gerald Handley, who handled Middleton's "29.15" proceeding. Handley's efforts were the focus of Judge Messina's scrutiny in deciding to re-open Middleton's case.

Following sentencing, Mr. Middleton timely filed his own *pro se* "29.15" motion on September 9, 1991. The Public Defender was then

appointed to prepare for him an amended motion. Through the granting of time extensions sought by the Public Defender, the latest possible filing of the amended motion was fixed at Monday, November 25, 1991.

Having not ever heard from, or met with, the Public Defender, Middleton had his family retain Gerald Handley some time in late October, 1991. But Handley did not thereafter meet with Middleton or discuss with him what the contents of the amended motion might be. In fact, Handley did not even enter his appearance as counsel of record until Friday, November 22, 1991, the last business day before the jurisdictional deadline for filing the Rule 29.15 motion. (And like the P.D., Handley did not meet with Middleton at any time, before or after entering his appearance in November.)

On that same day, Middleton received from Handley, some time after 4:30 p.m., a one-page affidavit with instructions in the cover letter that Kenneth *"must"* sign it and return it immediately. Although the attestation form states that it is appended to an amended Rule 29.15 motion containing all claims known to Middleton for relief from his conviction and sentence, the affidavit was *not* accompanied by the amended motion. (Legal File, Volume V, p. 824; see also Legal File, Volume I, pp. 104-105, Ex. 6, "Tomorrow I will Federal Express a rough draft . . . ")

Middleton was unable to read the amended motion prior to its filing on Monday, November 25, 1991, much less contribute to its contents. The affidavit was delivered by fax to Handley's office at 9:55 a.m. on Monday, November 25th, so the motion could be filed that day. Although Handley claimed he sent a draft of the issues to be included in the amended motion to Mr. Middleton on November 22, 1991, he did so separately from the affidavit, and prison records reflect that Handley's package was not received by a Potosi Correctional Center employee until 2:29 p.m. on Monday, November 25, 1991. Handley actually filed the pleading just over an hour later, at 3:41 p.m. Thus, Handley's mailing of the draft motion was too late for Middleton to read and comprehend its contents, much less contact Handley to offer suggested modifications or additions. (Legal File, Volume V, pp. 824-825; see also Legal File, Volume I, pp. 86-110, Ex's 1 through 8 which were admitted in evidence by stipulation at the December 18, 2003 hearing on whether the Circuit Court should re-open Middleton's "29.15" litigation - See 2004 "29.15" Hearing, Volume I, pp. 9-10).

SUGGESTIONS IN SUPPORT - LEGAL BASIS FOR RELIEF

Issue 1 - Incorrect Standard of Review:

This Court held that the standard of review applicable to Judge Messina's decision to re-open Mr. Middleton's Rule 29.15 proceeding is *de*

novo. Mansfield v. State, 187 S.W.3d 1 (Mo. App. W.D. 2006) This Court wrote that the issue was one of circuit court jurisdiction. However, the Mansfield decision cited by this Court dealt with whether the circuit court lost jurisdiction to consider the movant's decade-old request for post-conviction relief *because Rule 75.01 operated to make such a request untimely*. In footnote 1 of the opinion, this Court recognized that the analysis differs when the claimed basis for re-opening such litigation is "abandonment by post-conviction counsel." That issue, which implicates facts as well as law, should be reviewed for "clear error," as precedents from this Court make clear that each case presents its own unique circumstances.

Indeed, this Court, just weeks prior to its decision in the case at bar, penned two decisions which quite clearly state that the standard of review applicable to whether a circuit court should *re-open* a Rule 29.15 proceeding is the same as it is for whether a circuit court should grant Rule 29.15 relief. Johnson v. State, 189 S.W.3d 698, 700 (Mo. App. W.D. 2006); Edgington v. State, 189 S.W.3d 703, 705 (Mo. App. W.D. 2006). Moreover, on the very same day Middleton's case was decided, this Court inconsistently ruled that the standard of review for re-opening a Rule 27.26 motion - which is in no discernable way dissimilar to the Rule 29.15 proceeding herein - is also "clear error." Fenton v. State, WD65502 (6/27/06).

Judge Messina made a determination to re-open Middleton's case after a careful examination of *uncontroverted facts*. As such, her ruling should be reviewed like all other circuit court rulings on "29.15" motions, for "clear error." As the Missouri Supreme Court has held, "clear error" translates into an affirmance of the circuit court's judgment *unless* the appellate court is left with a *definite and firm impression* that a mistake has been made. State v. Butler, 951 S.W.2d 600, 608, 610 (Mo. banc 1997); State v. Jones, 955 S.W.2d 5 (Mo. App. W.D. 1997).

For this reason, this Court should agree to re-hear this case under the correct standard of review, or agree to transfer it to the Supreme Court so that the "conflict" between panels of this Court of Appeals can be corrected, and the appropriate standard of review for "29.15" cases can be restated.

Issue 2 – Erroneous Retrospective Application of State v. White:

In reversing Judge Messina, this Court relied on State v. White, 873 S.W.2d 590 (Mo. banc 1994), in which a Rule 29.15 movant, who signed the indispensably requisite verification appended to the back of his post-conviction motion without first having been provided the motion to read by his attorney, was precluded from later claiming abandonment. However, the Supreme Court's rationale for so doing was based most significantly on the fact that movant's counsel had complied with virtually every mandate of

Rule 29.15(e), the most notable of which was a face-to-face visit with the client prior to filing the amended motion. See White, 873 S.W.2d at 598.

Of course, the United States Court of Appeals for the Eighth Circuit later ruled that this pronouncement limiting and defining the concept of "abandonment" could not be applied retrospectively to litigants whose cases – like Middleton's - were pending prior to 1994. White v. Bowersox, 206 F.3d 776, 779, 781-82 (8th Cir. 2000).

In her May 26, 2005 Order, Judge Messina aptly summarized the law applicable to considering the re-opening of a Rule 29.15 proceeding, and therein discussed Middleton's own experience with post-conviction counsel:

> The attorney in White had his client execute a blank affidavit nine days prior to the deadline for filing the Rule 29.15 motion, and counsel then stapled it to the amended motion he filed with the court. The Court of Appeals opined, "Mr. White was presented with a very *difficult* decision when his attorneys abandoned him: to lose all of his claims in an untimely motion or to sign an improper verification and hope that the motion would be at least timely." White, 206 F.3d at 782. Here, Mr. Middleton had even less time than Mr. White, as his attorney forwarded to him the verification page only the weekend before the Monday filing deadline, rather than nine days beforehand.
> Regardless of the motion's contents, and through no fault of Mr. Middleton, the amended motion was filed without an original verification signed by Mr. Middleton as required under Rule 29.15. At the time Mr. Middleton's amended motion was due to be filed, the Missouri Supreme Court enforced strict requirements that the amended motion be accompanied by the movant's original verification of its contents. As such, this Court had no jurisdiction to proceed

on such an improperly verified amended motion. See Boydston v. State, 26 S.W.3d 845, 848 (Mo. App. W.D. 2000)(Rule 24.035 proceeding addresses lack of verification before considering counsel's alleged professional deficiencies; footnote 4 acknowledges that the verification requirements of Rule 24.035 and Rule 29.15 "are identical.").

Where the movant is personally without fault in the defective filing of an amended motion, the failure of the Rule 29.15 attorney to properly file a correctly verified amended motion constitutes abandonment such as that first recognized in Luleff, *supra*. White, 206 F.3d at 779. A circuit court in such instance is required to conduct a hearing to determine whether the movant is at fault for the failure to file a properly verified amended motion. This Court has done so, and finds Middleton is not at fault. With that said, then the court is obligated to appoint new counsel. Thereafter, the time deadline within which to file an amended Rule 29.15 motion begins anew. Boydston, 26 S.W.3d at 850. This procedure should have been followed in Mr. Middleton's case, but was not. However, the issue of timeliness is moot, because Movant elected to proceed with retained counsel, Jonathan Laurans, and Mr. Laurans filed a brief setting forth all claims Mr. Middleton wished to raise earlier at the same time he filed Movant's Motion to Re-open the original Rule 29.15 proceeding.

In light of the above and foregoing facts and legal conclusions, this Court holds that Mr. Middleton was abandoned by post-conviction counsel in his first Rule 29.15 proceeding in 1991. Because the defects arising therefrom are jurisdictional in nature, this Court will allow Mr. Middleton to proceed anew with his motion under Rule 29.15, with the aid of counsel, Jonathan Laurans.

(Legal File, Volume V, pp. 825-828)

This Court took no issue with this analysis, holding instead that Missouri courts "are not bound to follow" White v. Bowersox. (See slip opinion, last sentence prior to "Conclusion") Put aside for the moment that

this precedent is indeed binding on Missouri state courts because the opinion clearly states that the application, retrospectively, of State v. White would be unfair and could not constitute a procedural bar as contended by the State. See Bowersox, 206 F.3d at 781 ("In White, II, the Missouri Supreme Court stated a new rule limiting the remedy for abandonment.")

The issue here is – *when the correct standard of review is employed* - whether Judge Messina clearly erred by *electing to follow* White v. Bowersox. For if she was not bound by the Bowersox decision, that says one thing. But this Court is claiming by its opinion that she *could not follow it*, without the support of any authority whatsoever for the proposition that she erred when she did so.

In this vein, this Court's analysis overlooks the role of the circuit court in examining abandonment claims on their individual merits. In Pope v. State, 87 S.W.3d 425, 428 (Mo. App. W.D. 2002), this Court wrote that:

> Although the abandonment doctrine has been narrowly applied to remedy serious violations of Rule 24.035(e) or Rule 29.15(e), we disagree that its application has been limited to cases where counsel took absolutely no action or filed the amended motion too late. . . .In Trehan v. State, 835 S.W.2d 427, 429 (Mo. App. S.D. 1992), a hearing was similarly required when appointed counsel, *inter alia*, filed an amended motion that "merely incorporated the allegations of [the movant's] pro se motion." These cases establish that abandonment arises from conduct that is tantamount to a 'total default in carrying out the obligations imposed upon appointed counsel' under the rules." Russell

v. State, 39 S.W.3d 52, 54 (Mo. App. E.D. 2001)(quoting Bradley, 811 S.W.2d at 384).

Mr. Handley's improperly verified, 3 page "amended" motion, filed the next business day after he entered his appearance in this first degree murder case where the penalty imposed was life without parole, is proof of conduct "that is tantamount to a 'total default in carrying out the obligations imposed upon appointed counsel' under the rules." Id. Judge Messina did not err in so holding. For even if this Court applies State v. White instead of White v. Bowersox, the conclusion must *still* be that Middleton was abandoned, and the outcome remains the same. While this Court cited page 598 of State v. White for the proposition that Middleton signing his own affidavit is damning, this Court overlooks that State v. White is instead a case mandating that the requirements of Rule 29.15(e) must be followed by post-conviction counsel in preparing the amended motion and then procuring the signed last-page-affidavit from the client. Counsel must meet with his client before getting the affidavit signed. This did not occur between Handley and Middleton. As such, even applying State v. White, Middleton was still unequivocally abandoned. See White, 873 S.W.2d at 598.

Judge Messina correctly found that Middleton had been abandoned by his post-conviction counsel. The 1994 White decision stated a new rule of law inapplicable to Rule 29.15 movants prior to 1994. The Eighth Circuit's

2000 ruling on the matter, White, 206 F.3d 776, can not be ignored by this Court because that precedent addresses the *unconstitutionality* of applying the 1994 White decision retrospectively to cases arising before the date of that opinion. Middleton's 1991 Rule 29.15 proceeding was one such case. See Doe v. Phillips, SC86573 (Mo banc 6/30/06)("Megan's Law" can not apply to offenders convicted prior to 1995 *because of Missouri's Constitution*).

The decision of this Court implicates both a due process violation (as regards the retroactivity of White) and the equal protection clause. Leamon White's post-conviction counsel forced upon him the same Hobson's Choice as Mr. Handley did upon Mr. Middleton: Sign the verification page although it was not accompanied by the "29.15" amended motion, or forever lose the right to seek such review because an amended motion filed without a verification page is a nullity due to that being a jurisdictional defect. So then - without being facetious – how can this Court justify the disparate treatment of litigant Middleton from litigant White, on indistinguishable facts? Their only difference thus far is that Mr. White's case was re-opened by a federal court situated in St. Louis applying Missouri law, while Mr. Middleton's case was terminated by a state appellate court in Kansas City.

Justice requires that this Court rehear this case *en banc* to harmonize these conflicting outcomes, or transfer the matter to the Supreme Court so

that it may address not only the matter of differing standards of review announced by this Court on the same day in different cases dealing with the same issue, but also to reconcile White v. Bowersox with the opinion herein.

Issue 3 – Remanded With Improper Instructions:

This Court remanded the case back to Judge Messina with instructions to dismiss Mr. Middleton's July 16, 2003 filing. This overlooks the fact that Middleton raised an alternative basis for post-conviction relief:

> Additionally, the Supreme Court also recognizes as a separate and distinct category those cases in which the record displays a fundamental miscarriage of justice. Clay v Dormire, 37 S.W.3d 214 (Mo. 2000)(characterization as a "miscarriage of justice" case denied because issue was one of sentencing error, not movant's innocence); State *ex rel.* Simmons v. White, 866 S.W.2d 443, 446 (Mo. 1993)("miscarriage of justice" claim considered and denied; conviction nevertheless set aside on jurisdictional grounds). Because this Court finds Mr. Middleton was abandoned by his Rule 29.15 counsel, this Court did not address the alternative basis urged for jurisdiction, namely that the record reflects a gross miscarriage of justice. See State *ex rel.* Nixon v. Jaynes, 63 S.W.3d 210 (Mo. 2001); State *ex rel.* Amrine v. Roper, 102 S.W.3d 541 (Mo. 2003).

This Court should, at the very least, amend its remand instructions to read that the case is being sent back to the Circuit Court for findings of fact and conclusions of law pertaining to the "miscarriage of justice" issue Judge Messina explicitly reserved reaching in light of her decision to grant Mr. Middleton a new trial under Rule 29.15.

Respectfully submitted,

Jonathan Laurans, MO #43105
819 Walnut Street
Kansas City, Missouri 64106
(816)421-5200/(913)384-5099 FAX

Certificate of Service

I hereby certify that two copies of the above and foregoing Motion for Rehearing and/or Transfer were placed in the United States mail, postage pre-paid, this 10th day of July, 2006 to: Ms. Deborah Daniels, Assistant Attorney General, Post Office Box 899, Jefferson City, Missouri 65102.

Jonathan Laurans