IN THE MISSOURI SUPREME COURT

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

APPLICATION FOR TRANSFER

Transfer is sought:	AFTER OPINION
Record on Appeal Was Filed:	October 5, 2005
Court of Appeals' Opinion Was Filed:	June 27, 2006
Motion for Rehearing/ Transfer Filed:	July 10, 2006
Motion for Rehearing/ Transfer Denied:	August 29, 2006

Party:	Attorney:
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State of Missouri	Deborah Daniels, Asst. AG

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APPLICATION FOR 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 in previous appellate decisions 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); Weeks v. State, 140 S.W.3d 39 (Mo. banc 2004); 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); Doe v. Phillips, 194 S.W.3d 833 (Mo. 2006); State v. Reeder, 182 S.W.3d 569 (Mo. App. E.D. 2005)

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 Judge Edith L. Messina of Jackson County 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. The Court of Appeals did not reach 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 and on direct appeal by Robert G. Duncan, deceased. Gerald Handley handled Middleton's "29.15" proceeding, found by Judge Messina to be inadequate.

Initially, 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, and through its time extension requests, the latest possible filing date 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.)

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 receive before it was filed. (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:

The Court of Appeals 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*, citing Mansfield v. State, 187 S.W.3d 1 (Mo. App. W.D. 2006). The appellate court wrote that the issue was one of circuit court jurisdiction. However, just weeks prior to its decision in the case at bar, this appellate district penned two decisions in complete contradiction, clearly stating that the correct 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 that court should grant Rule 29.15 relief, i.e., "clear error." 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 same day it decided Middleton's case, the Western District ruled that the standard of review for *re-opening* a Rule 27.26 motion - in no discernable way dissimilar to this Rule 29.15 proceeding - is clear error. Fenton v. State, WD65502 (6/27/06).

No reconciliation has been offered by the Court of Appeals as to why Mr. Middleton is receiving a different standard of review than previous "29.15" litigants received from this same appellate district. (It should be kept in mind that the Mansfield decision cited by the appellate 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*. But in footnote 1 of the opinion, 187 S.W.3d at 2, the appellate court acknowledged that the analysis differs when the claimed basis for re-opening such litigation is "abandonment by post-conviction counsel." Such is the case here.)

Judge Messina made a decision 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 this Supreme Court holds, "clear error" translates into 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. Weeks v. State, 140 S.W.3d 39 (Mo. banc 2004); 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).

The Court of Appeals' employment of the incorrect standard of review is not only contrary to the previous decisions above, but it is also outcome-determinative, as will be illustrated in the next section. As such, this Court should agree to transfer and consider this case under the correct standard of review, so that the "conflict" between panels of the Court of Appeals' Western District can be corrected, and the appropriate standard of review for "29.15" cases can be restated. See Weeks, 140 S.W.3d at 43-44.

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

In reversing Judge Messina, the Court of Appeals relied on State v. White, 873 S.W.2d 590 (Mo. banc 1994)(hereinafter White 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, this 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), most notably a face-to-face visit with the client prior to filing the amended motion. See White, 873 S.W.2d at 598. (As Judge Messina noted, Middleton was never visited by the Public Defender or Mr. Handley, and never had opportunity to read, much less contribute to, his "29.15" motion.)

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 White's *and* 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 dedicated 4 pages to a lengthy summary of 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. (Due to the page limitations imposed by this Court, counsel does not have the room to re-print it here, but urges this Court to read Legal File, Volume V, pages 825-828.) Ultimately, Judge Messina elected to follow White v. Bowersox, and when measured against the correct standard of review, her decision is beyond reproach.

However, the appellate court – while taking no issue with any aspect of Judge Messina's painstaking analysis - held instead that Missouri courts

"are not bound to follow" White v. Bowersox, and therefore under *de novo* analysis, found Judge Messina had no power to re-open Middleton's case on abandonment grounds since Middleton's basis for abandonment was similar to that discussed in White 1994. (See slip opinion, last sentence prior to "Conclusion") Even if somehow the Court of Appeals was correct in opining that White v. Bowersox is not technically a binding precedent in Missouri state courts, Judge Messina must still be affirmed in her decision to follow the Eighth Circuit as persuasive authority because its conclusion that this Court's White 1994 opinion can not be applied retrospectively to a 1991 litigant like Kenneth Middleton is ultimately correct. The rule announced in White 1994 is *procedural* in nature and therefore not retrospective in application. See Doe v. Phillips, 194 S.W.3d 833 (Mo. 2006)("Megan's Law" not to be retroactively applied to offenders sentenced prior to its passage); State v. Reeder, 182 S.W.3d 569, 575-76 (Mo. App. E.D. 2005)(*citing* State v. Walker, 616 S.W.2d 48, 49 (Mo. banc 1981). 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 the Court of Appeals 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. And, of course, the Court of Appeals' decision is afoul of Doe v. Phillips and State v. Reeder, *supra*.

Finally, the appellate court's analysis overlooks its own previously delineated 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), the appellate court wrote:

> 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. . . . 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.

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. 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 White 1994, Middleton was still unequivocally abandoned. See White, 873 S.W.2d at 598.

The decision of the Court of Appeals 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.

Justice requires that this Supreme Court hear this case to harmonize these conflicting outcomes, and so that it may address not only the matter of differing standards of review announced by the Western District in different cases dealing with the same issue, but also to reconcile White v. Bowersox with the current appellate court opinion herein.

Issue 3 – Remanded With Improper Instructions:

The Court of Appeals remanded the case back to the Circuit Court 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, which Judge Messina *expressly* did not reach:

> 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).
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> Legal File, Volume V, pages 825-826.

This Supreme Court should, at the very least, send the case 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,

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Certificate of Service

I hereby certify that two copies of the above and foregoing Motion for Transfer were placed in the United States mail, postage pre-paid, this 7th day of September, 2006 to: Ms. Deborah Daniels, Assistant Attorney General, Post Office Box 899, Jefferson City, Missouri 65102. A copy was also mailed to the Missouri Court of Appeals, Western District, 1300 Oak, Kansas City, Missouri 64106.

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Jonathan Laurans