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IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

KENNETH G. MIDDLETON,)
)
Movant,)
vs.) Case No.: CV91-23437
)
STATE OF MISSOURI,)
) Division 12
Respondent.)

FILED - CIRCUIT COURT
JACKSON CO., MO - KC
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**STATE'S RESPONSE TO MOTION TO REOPEN PREVIOUS RULE 29.15
PROCEEDINGS**

COMES NOW, the State of Missouri, by and through Assistant Prosecuting Attorney Jordan Stanley, and files this response to Movant Kenneth G. Middleton's Motion to Reopen Previous Rule 29.15 Proceeding Due to Abandonment of Appointed Counsel, Trial and Appellate Counsel's Conflict of Interest, and for Fraud Against the Court. In support of this motion, the State avers the following:

Procedural History

1. Movant was convicted in case number CR90-0348 of the offenses of Murder in the First Degree, in violation of RSMo. § 565.020, and Armed Criminal Action, in violation of RSMo. § 571.015. Movant is currently sentenced to concurrent periods of life without parole and 200 years.¹
2. The Missouri Court of Appeals, Western District, affirmed Movant's convictions on April 6, 1993 and issued its mandate on July 1, 1993.
3. Thereafter, Movant applied for habeas corpus relief pursuant to 28 U.S.C. 2254, in the United States District Court for the Western District of Missouri. That petition was denied on April 29, 1998 on the basis of procedural default by post-conviction counsel.
4. Movant was represented at preliminary hearing, arraignment, and trial by Robert G. Duncan, now deceased. Mr. Duncan also represented Movant on direct appeal, acting as co-counsel with Gerald Handley, who handled Mr. Middleton's original Rule "29.15" proceeding.

¹ Points 1-8 of this procedural history are adopted from the jurisdictional findings in the Court's previous Findings of Fact and Conclusions of Law, issued on May 26, 2005.

5. Following the timely filing of his own pro se motion on September 9, 1991, Movant received an order from the trial court appointing the Appellate Public Defender's office to prepare an amended motion. Through the granting of time extensions permissible under Rule 29.15, the deadline for the latest possible filing of the amended motion was fixed at Monday, November 25, 1991.

6. After the appointment of the public defender, Movant sought to hire private counsel, and retained Gerald Handley in October, 1991.

7. Mr. Handley did not enter his appearance as counsel of record until Friday, November 22, 1991.

8. Movant's initial motion pursuant to Rule 29.15 was filed on November 25, 1991.

9. Movant's initial motion pursuant to Rule 29.15 was denied.

10. On July 16, 2003, Movant filed a Motion to Reopen Previously Filed Rule 29.15 Motion. Movant also filed a Rule 29.15 motion asserting additional claims of ineffective assistance of counsel at his 1991 trial.

11. On December 19, 2003, this Court held an evidentiary hearing to address the Court's jurisdiction to reopen the 1991 29.15 proceeding. A second evidentiary hearing was conducted on June 24th and 25th, 2004 on the merits of the new motion.

12. On May 26, 2005, this Court issued a ruling that Movant had been abandoned by post-conviction counsel Handley, thus granting jurisdiction upon the court to re-open the prior proceeding.

13. This court ruled that Movant had received ineffective assistance of counsel, and that numerous errors of counsel cumulatively prejudiced the Movant. The convictions and sentences were ordered vacated and set aside, and a new trial was ordered.

14. The State appealed the order, which Movant cross-appealed. The Missouri Court of Appeals Western District reversed this Court's findings, and remanded the matter to this Court with directions to dismiss the motions. *State v. Middleton*, 200 S.W.3d 140 (Mo. App. W.D. 2006).

15. On August 5, 2010, Movant filed the current motion, seeking the same relief granted by the Court in the previous Rule 9.15 motion. Movant requests that the Court exercise jurisdiction to reopen the previous Rule 29.15 motion pursuant to Rule 74.06(d) or pursuant to a finding of abandonment of counsel.

Argument

Movant's current motion asserts four distinct arguments for reopening the 2003 motion for relief pursuant to Rule 29.15, none of which are persuasive in establishing jurisdiction for review of the claims. Movant asserts that jurisdiction is vested by (1) the abandonment of retained counsel Gerald Handley, (2) the abandonment of appointed counsel from the office of the Public Defender, (3) the conflict of interest of Robert G. Duncan, or (4) fraud upon the court by retained counsel Gerald Handley.

Abandonment by Retained Counsel

Though the Court of Appeals fully rejected the notion that Movant was abandoned by his retained counsel, Movant again asks this Court to exercise jurisdiction under a theory of abandonment by counsel Gerald Handley. Movant asserts that "intervening case law" such as *Dudley v. State*, 254 S.W.3d 109 (Mo. App. W.D. 2008), allows this Court to enter a finding that the 29.15 motion was "patently defective." (Motion at 5).

Movant artificially inflates the meaning of "patently defective" to include the omission of "compelling claims of relief." However, the case law Movant seeks to invoke stem from the decision in *State v. Bradley*, 811 S.W.2d 379 (Mo., 1991). While the Court there recognized that an amended motion may be so patently defective as to constitute abandonment, the facts invoking that finding included a "motion filed by appointed counsel, not signed by defendant nor verified and stating no facts." *Bradley*, 811 S.W.2d 383. Movant's initial amended motion was clearly sufficient to invoke jurisdiction, and therefore cannot be considered a "nullity" within the meaning of *Bradley* and its progeny.

Movant's attempt is nothing more than an effort to expand the meaning of abandonment to include allegations of ineffective assistance of post-conviction counsel. The Missouri Supreme Court has "long held a post-conviction proceeding cannot be used to challenge the effectiveness of counsel in the post-conviction proceeding, but is limited to the validity of Movant's conviction and sentence." *Sloan v. State*, 779 S.W.2d 580, 583 (Mo., 1989).

Abandonment by Appointed Counsel

Movant's second assertion is that this Court retains jurisdiction pursuant to *Luleff v. State*, 807 S.W.2d 495 (Mo. 1991), and subsequent case law addressing the abandonment of post-conviction counsel. The Court's previous findings include a reference indicating that Movant was abandoned by his appointed counsel from the office of the Public Defender. In a footnote of the Court's 2005 order, the Court noted the following:

Technically, the public defender also abandoned Mr. Middleton pursuant to *Luleff* and *Sanders* [internal citations omitted], because he also failed to file an amended motion prior to November 25, 1991, as he was not released from representing Mr. Middleton by virtue of this Court granting him leave to withdraw until November 26, 1991. In this regard, it is axiomatic that an attorney's duties to the client are not suspended by the mere act of filing a withdrawal motion, but continue until such time as a judge grants the motion.

Movant asserts that based upon the technical abandonment of the Public Defender, sufficient grounds exist for reopening the Movant's motion pursuant to Rule 29.15. Movant further contends that because this issue was not addressed by the Court of Appeals, "this issue is now ripe for consideration by this Court" (Motion at 3).

While the Court of Appeals failed to directly address the concept of abandonment by the Public Defender, the Court's rulings clearly preclude any relief upon these grounds. The Court of Appeals specifically noted that "there is no constitutional right to post-conviction counsel or effective postconviction counsel." *Middleton v. State*, 200 S.W.3d 140, 143 (Mo. App. 2006); citing *Barnett v. State*, 103 S.W.3d 765, 773-74 (Mo. banc 2003). The Court of Appeals further noted that abandonment is limited to those situations in which "post-conviction counsel takes no action on a movant's behalf with respect to filing an amended motion and as such the record shows that the movant is deprived of a meaningful review of his claims." *Id.*

Movant asks this court to disregard the essence of the Court of Appeals decision, which held that Movant was not abandoned by his hired post-conviction counsel based upon his actions. The Court of Appeals ruled that "we will not allow Middleton to complain of improper verification where his own conduct resulted in the verification being signed prior to the completion of the amended motion." *Middleton v. State*, 200 S.W.3d 140, 144 (Mo. App. 2006);

enter a finding of ineffective assistance of post-conviction counsel in violation of *Sloan v. State*, 779 S.W.2d 580, 583 (Mo., 1989). Movant's request of the court to find this purported conflict of interest sufficient grounds to re-open the 29.15 hearing is yet another attempt to improperly raise claims which the Court lacks jurisdiction to hear.

Fraud Upon the Court

In his final point, Movant asks the Court to re-open 29.15 proceedings pursuant to Rule 74.06(d) for fraud upon the Court. Specifically, Movant avers that submitting a "verification signed by movant that falsely indicated that movant had read the amended motion, constituted an egregious falsehood that is sufficient to allow this Court to reopen its judgment under Rule 74.06(d)." (Motion at 7).

Movant seeks to sidestep the Court of Appeals ruling that Movant himself committed the alleged fraud. The direct findings of the Court of Appeals found that "Middleton signed the affidavit declaring that he had read the amended motion... we will not allow Middleton to complain of improper verification where his own conduct resulted in the verification being signed prior to completion of the amended motion." *Middleton at 144*.

Movant asserts that the verification was "coerced fraud" brought about by the actions of counsel. However, the Court of Appeals relied heavily upon the Supreme Court's decision in *State v. White*, which found that signing a verification prior to completion of an amended motion implicated the defendant as being "an active participant in falsely verifying a document that had not yet been written" 873 S.W.2d 590, 595 (Mo., 1994). Movant seeks relief from the Court from a fraud which, if true, was in fact perpetuated by the Movant himself.

WHEREFORE, the Movant has failed to allege any grounds by which the Court has jurisdiction to reopen the previous 29.15 motion, and Movant has failed to advance sufficient grounds for setting aside judgment pursuant to Rule 74.06(d), the State respectfully requests that the Motion to Reopen Previous Rule 29.15 Proceeding Due to Abandonment of Appointed Counsel, Trial and Appellate Counsel's Conflict of Interest, and for Fraud Against the Court be denied in its entirety.

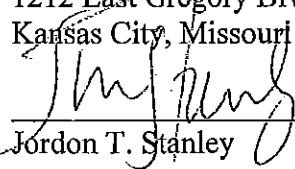
Respectfully Submitted,
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I certify that a copy of the foregoing was delivered
via U.S. mail this 24th day of September, 2010 to:

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