

**IN THE MISSOURI COURT OF APPEALS,
WESTERN DISTRICT**

STATE OF MISSOURI,)	Jackson County Circuit Court
Appellant,)	The Honorable Edith L. Messina
v.)	Circuit Court Case No. 91CV23437
KENNETH MIDDLETON,)	Division 12
Respondent/ Cross-Appellant,)	Appellate No. 65540

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IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

NOW on this 26th day of May, 2005, the Court takes up and considers Movant's Motion to Reopen Previously Filed Rule 29.15 Motion, filed on July 16, 2003 and Movant's Motion for Post-conviction relief, also filed on July 16, 2003, and issues the following Findings of Fact and Conclusions of Law as to both motions:

FINDINGS OF FACT – JURISDICTION

A hearing was held on December 18, 2003 solely to address the issue of this Court's jurisdiction to re-open Mr. Middleton's 1991 "29.15" proceeding. The following facts precede the Court's Conclusions of Law:

1. Movant Kenneth Middleton is currently incarcerated at Crossroads Correctional Center in Cameron, Missouri, following his convictions in case number CR90-0348 for Murder in the First Degree, in violation of RSMo. 565.020, and Armed Criminal Action, in violation of RSMo. 571.015. He was sentenced on April 5, 1991 to terms of confinement in the Missouri DOC for concurrent periods of life without parole and 200 years. (Court file.)
2. The precise date Mr. Middleton was delivered to the Department of Corrections is unknown. However, that date is jurisdictionally irrelevant because Movant timely filed a *pro se* motion for post-

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conviction relief on September 9, 1991. His amended Rule 29.15 motion was timely filed on November 25, 1991. (Court file.)

3. The Missouri Court of Appeals, Western District, affirmed Mr. Middleton's convictions on April 6, 1993, and issued its mandate on July 1, 1993. (*State v. Middleton*, 854 S.W.2d 504 (Mo. App. W.D. 1993).)

4. Thereafter, Mr. Middleton 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. (Movant's Ex. 55 - Order Denying Petitioner's Second Amended Petition for Writ of Habeas Corpus.)¹

5. Mr. Middleton was represented at preliminary hearing, arraignment, and trial by Robert G. Duncan, now deceased. Mr. Duncan also represented Mr. Middleton on direct appeal, acting as co-counsel with Gerald Handley, who handled Mr. Middleton's original Rule "29.15" proceeding. (Court file; *Middleton*, 854 S.W.2d at 504.)

6. Following the timely filing of his own *pro se* motion on September 9, 1991, Mr. Middleton received an order from the trial court appointing the Appellate Public Defender's office to prepare an amended motion for him. 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. (Ex. 4 - Circuit Court docket sheet.)

7. After the appointment of the public defender, Mr. Middleton sought to hire private counsel, and did so by retaining Gerald Handley some time in late October, 1991. But Mr. Handley did not

¹ "Ex." is abbreviated for "Exhibit," followed by the document number in the binder accompanying Movant's Motion to Re-open Previously Filed Rule 29.15 Proceeding, which was submitted to this Court July 16, 2003. The State offered no exhibits through the pendency of this proceeding, so all exhibits are those provided by Movant.

thereafter meet with Mr. Middleton. (Ex. 1 – Affidavit of Kenneth Middleton; Ex. 2 – Affidavit of Sean D. O’Brien.)

8. Mr. Handley did not 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. (Ex. 4 – Circuit Court docket sheet; Ex. 1 – Affidavit of Kenneth Middleton.)

9. It is not clear whether the Public Defender appointed to represent Movant had performed any work on Movant’s behalf up to that point, but even if he did, he failed to provide Mr. Handley with any file materials. (Ex. 2 – Affidavit of Sean D. O’Brien; Ex. 1 – Affidavit of Kenneth Middleton.)

10. On Friday, November 22, 1991, the last business day before the jurisdictional deadline for filing the Rule 29.15 motion, Mr. Middleton received from Mr. 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. (Ex. 6 – Letter from Mr. Handley to Mr. Middleton – p. 10; Ex. 1 – Affidavit of Kenneth Middleton; Ex. 2 – Affidavit of Sean D. O’Brien.)

11. Although the attestation form states that it is appended to an amended Rule 29.15 motion containing all claims known to Mr. Middleton for relief from his conviction and sentence, the affidavit was not accompanied by the amended motion. (Ex. 6 – Letter from Mr. Handley to Mr. Middleton; Ex. 1 – Affidavit of Kenneth Middleton; Ex. 2 – Affidavit of Sean D. O’Brien.)

12. Mr. Middleton was unable to read the amended motion prior to its filing on Monday, November 25, 1991, much less contribute to its contents. Movant’s signed affidavit was delivered by fax to Mr. Handley’s office at 9:55 a.m. on Monday, November 25th, so the motion could be filed that day. (Ex. 6 – Affidavit of Mr. Middleton; Ex. 1 – Affidavit of Mr. Middleton; Ex. 3 – Affidavit of Lynn Middleton.)

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13. Although Mr. 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 Mr. Handley's package was not received by a Potosi Correctional Center employee until 2:29 p.m. on Monday, November 25, 1991. (Ex. 7 – Affidavit of Mitchell A. Jensen; Ex. 2 – Affidavit of Sean D. O'Brien.)

14. Mr. Handley actually filed the pleading just over an hour later, at 3:41 p.m. Thus, Mr. Handley's mailing of the draft motion was too late for Mr. Middleton to read and comprehend its contents, much less contact Handley to offer suggested modifications. (Ex. 8 – Movant's Amended Motion for Post Trial Correction.)

CONCLUSIONS OF LAW – JURISDICTION

As a general rule, Missouri courts will not entertain successive motions under Rule 29.15. However, the Missouri Supreme Court has recognized exceptions in two categories of cases, the first being abandonment by post-conviction counsel. In "abandonment" cases, a movant is entitled to a full and fair post-conviction proceeding with new counsel if the original post-conviction attorney either failed to comply with the precise jurisdictional mandates of Rule 29.15, see *Luleff v. State*, 807 S.W.2d 495 (Mo. 1991), or if the original post-conviction attorney failed to file a timely amended motion through no fault of the movant, see *Sanders v. State*, 807 S.W.2d 493 (Mo. 1991). The case at bar presents the type of error addressed in *Luleff v. State*, 807 S.W.2d 495 (Mo. 1991).

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)

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("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 does 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).

The procedural requirements and time limits under Missouri Rule 29.15 are mandatory and jurisdictional. *Day v. State*, 770 S.W.2d 692 (Mo. 1989). The Court has no jurisdiction to proceed on a motion that is not properly verified by the movant. *State v. Davis*, 814 S.W.2d 593 (Mo. 1991). Here, the amended motion Gerald Handley attempted to file in 1991 did not confer jurisdiction on the Court because it was improperly verified, through no fault of Mr. Middleton. This case is indistinguishable from *White v. Bowersox*, 206 F.3d 776 (8th Cir. 2000) (summarizing and correcting *State v. White*, 873 S.W.2d 590 (Mo. 1994) ("*White I*"), which examined circuit court findings issued after the remand ordered in *State v. White*, 813 S.W.2d 862 (Mo. 1991) ("*White I*"), where the Supreme Court initially recognized the possibility that White's Rule 29.15 proceeding was infected with irregularities occasioned by post-conviction counsels' abandonment.²

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.

² White's claims in his first motion were rejected in *White v. State*, 939 S.W.2d 887 (Mo. 1997) ("*White III*"), and the Eighth Circuit did not disturb the Missouri Supreme Court's conclusions as to those few matters. Remand was for evidentiary development of those issues in the amended motion filed late by the attorney, who had only 14 days to complete all responsibilities. Compare *White*, 206 F.3d at 779-782 with *White*, 206 F.3d at 782-783.

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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 contents of the motion, 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 Mr. Middleton is not at fault. With that said, the Court is then 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.³ However, the issue of

³Technically, the public defender also abandoned Mr. Middleton pursuant to *Luleff, supra*, and *Sanders, supra*, 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. See *Luleff*, 807 S.W.2d at 498 (record that does not indicate whether counsel made determinations regarding the *pro se* Rule 29.15 motion creates presumption of counsel's non-compliance with professional obligations mandated by Rule 29.15).

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As set forth above in the Court's holdings with respect to re-opening the Rule 29.15 proceeding, the claims abandoned by Mr. Middleton's trial and post-conviction counsel, Robert G. Duncan, have now been stated by Mr. Middleton's current counsel and considered by the Court. This point is denied as moot.

CONCLUSION

WHEREFORE, in light of the above and foregoing, this Court finds Mr. Middleton was abandoned by post-conviction counsel, thus providing just cause to re-open his Rule 29.15 proceeding. Further, in light of the evidence and law presented at hearing and in the briefs submitted by counsel, the Court finds that Movant was denied effective assistance of counsel and orders Mr. Middleton's convictions and sentences vacated and set aside, and grants Mr. Middleton a new trial. !

IT IS SO ORDERED.

5/26/05
Date

Edith L. Messina
Honorable Edith L. Messina
Division 12

CERTIFIED COPY
I certify that the foregoing document is a full, true
and complete copy of the original on file in my
office and of which I am legal custodian
Teresa J. York
Court Administrator
Circuit Court of Jackson County, Missouri
By _____
Date _____