

No. 83480

**IN THE
SUPREME COURT OF MISSOURI**

**STATE OF MISSOURI, ex rel.
JEREMIAH W. (JAY) NIXON, Attorney General**

Relator,

vs.

**THE HONORABLE RALPH JAYNES, Circuit Judge, Randolph County, and
NORMA PRANGE, Circuit Clerk, Randolph County**

Respondents.

Petition for Writ of Certiorari to the Circuit Court of Randolph County, Missouri

RELATOR'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This is an original proceeding in certiorari pursuant to Missouri Supreme Court Rules 84.22 to 84.26, inclusive. On January 10, 2001, the Honorable Ralph Jaynes, Circuit Judge for Randolph County, Missouri, granted a writ of habeas corpus upon the petition of Roderick Warren, filed in the Circuit Court of Randolph County on November 28, 2000. Respondent Jaynes directed that the Director of the Department of Civil Records, Jackson County Courthouse or her successor “reopen and forward to the sentencing court the case captioned Warren v. State, Jackson County Case No. CV88-013596) [sic], so that the sentencing court may appoint counsel who is free of conflict to represent Petitioner in the 29.15 motion and allow Petitioner to file an amended motion for postconviction relief.” Substitute Certified Copy of the Record and Proceedings in Roderick Warren v. James Gammon, Randolph County Circuit Court Case No. CV3-00-478-CC (hereinafter “Record”), at 147-148; Appendix (hereinafter “App.”), at A10-A11.

This Court has jurisdiction under the Missouri Constitution, Article V, § 4(1) and Missouri Supreme Court Rules 84 and 91, to hear and decide the validity of respondent Jaynes’ issuance of the writ of habeas corpus.

STATEMENT OF FACTS

On July 9, 1986, a jury found habeas petitioner Roderick Warren guilty of one count each of Arson in the First Degree, Assault in the First Degree, and Armed Criminal Action in the Circuit Court of Jackson County, Missouri. Record, at 94. A motion for new trial was not timely filed, as trial counsel's paralegal/investigator had been shot while on his way to file the motion, and that counsel did not learn that the motion had not been filed until the deadline had passed. Record, at 34. Accordingly, counsel filed a "Rule 27.26 motion" on the day of the sentencing hearing, October 3, 1986, asking that the court permit Warren to file his motion for new trial out of time. Record, at 48-49. The trial court found that counsel was ineffective for failing to timely file the motion for new trial and permitted counsel to file the motion that day. Record, at 50. The motion for new trial was subsequently overruled. Record, at 57. The circuit court thereupon sentenced Warren to consecutive terms of imprisonment of fifteen years, fifteen years, and life, respectively. Record, at 25.

Warren filed his notice of appeal through trial counsel on October 14, 1986. Record, at 69. No further action was taken by counsel on the appeal, and on January 23, 1987, the Missouri Court of Appeals, Western District dismissed the appeal. Record, at 74.

Subsequently, Warren presumably retained his trial counsel to file a motion for post-conviction relief pursuant to Rule 29.15 (1988), as counsel filed such a motion on May 31, 1988 on Warren's behalf. Record, at 77-81. The motion, filed on a copy of Form 40, was signed by counsel as "Roderick Warren by Lee Nation." Record, at 80, 81. Warren neither signed nor verified the motion. See Record, at 80, 81. The Circuit Court of Jackson County,

Missouri thereupon appointed trial counsel to represent Warren in the post-conviction proceeding. Record, at 84. Counsel did not file an amended motion. Record, at 95, 96. The circuit court overruled the motion on October 7, 1988, on the basis that the claims raised therein were not cognizable in a post-conviction collateral attack. Record, at 96-97. Warren did not appeal from the denial of his motion for post-conviction relief.

Warren filed a pro se “Motion To Recall Mandate With Suggestions In Support” in the Missouri Court of Appeals, Western District on or about March 10, 1998. Record, at 100-110. On June 30, 1998, the appellate court recalled its mandate in cause number WD 38826 and reinstated Warren’s direct appeal. Record, at 112. Warren did not file a pro se motion for post-conviction relief within thirty days of the filing of the transcript in the appellate court upon his reinstated appeal. The Court of Appeals affirmed the judgment of conviction and sentence, and issued its mandate on November 17, 1999. Record, at 117.

More than fourteen years after his conviction, more than twelve years after the denial of his motion for post-conviction relief, and more than one year after his reinstated direct appeal was affirmed, Warren filed a petition for writ of habeas corpus on November 28, 2000, in the Circuit Court of Randolph County, Missouri, cause number CV-3-00-478-CC. In his habeas petition, Warren claimed that he had been denied his right to conflict-free post-conviction counsel and that he had been abandoned by post-conviction counsel. Record, at 8-9, 10. Warren sought relief pursuant to Rule 91 on the basis that “[h]abeas corpus is available ‘in cases where there are circumstances so rare and exceptional that a manifest injustice would

result in the absence of habeas corpus relief.” Record, at 13 (quoting In re Brown v. Gammon, 947 S.W.2d 437 (Mo. App. 1997)).

In its January 10, 2001 Judgment, respondent Jaynes expressly held that “[b]y establishing Rule 29.15 for the protection of that right [the right to effective assistance of trial counsel], Missouri has created a liberty interest that is entitled to procedural due process protection under the Fourteenth Amendment.” Record, at 144; App., at A7. Respondent Jaynes further expressly held that Clay v. Dormire, 37 S.W.3d 214 (Mo. banc 2000), cert. denied, 121 S.Ct. 2000 (2001), “did not specifically overturn prior Missouri precedent granting habeas relief to persons, like Petitioner, who were unable to proceed with postconviction relief for reasons beyond their control.” Record, at 147; App., at A10 (emphasis in original) (citing State ex rel. Simmons v. White, 866 S.W.2d 443, 446 (Mo. banc 1993); White v. State, 779 S.W.2d 571, 573 (Mo. banc 1989); Merriweather v. Grandison, 904 S.W.2d 485, 490 (Mo. App. 1995); Brown v. Gammon, 947 S.W.2d 437, 440 (Mo. App. 1997)).

Relator subsequently filed for a writ of certiorari in the Missouri Court of Appeals, Western District. On March 2, 2001, the appellate court denied Relator’s petition for writ of certiorari and ordered that respondent Jaynes “may proceed accordingly” upon the Judgment

issued on December 22, 2000 in cause number CV-3-00-478-CC. Exhibit I.¹ Relator thereafter sought an original writ of certiorari from this Court on March 29, 2001. The Court issued its preliminary writ on April 24, 2001.

¹The exhibit was filed on March 29, 2001 with Relator's Petition for Writ of Certiorari filed in this Court.

POINTS RELIED ON

I.

RELATOR IS ENTITLED TO AN ORDER QUASHING THE WRIT OF HABEAS CORPUS BECAUSE THE CIRCUIT COURT EXCEEDED ITS JURISDICTION IN GRANTING THE PETITION FOR WRIT OF HABEAS CORPUS, IN THAT THE EXCEPTION THAT PERMITS CONSIDERATION OF CLAIMS RAISED UNDER RULE 91 TO PREVENT A MISCARRIAGE OF JUSTICE DOES NOT INCLUDE AN EXCEPTION FOR “CAUSE” TO EXCUSE THE FILING OF AN UNVERIFIED MOTION FOR POST-CONVICTION RELIEF WHICH RAISED CLAIMS NOT COGNIZABLE UNDER RULE 29.15, AS HELD BY THE HABEAS COURT.

Clay v. Dormire, 37 S.W.3d 214 (Mo. banc 2000), cert. denied, 121 S.Ct. 2000 (2001)

State ex rel. Simmons v. White, 866 S.W.2d 443 (Mo. banc 1993)

Missouri Supreme Court Rule 91

II.

RELATOR IS ENTITLED TO AN ORDER QUASHING THE WRIT OF HABEAS CORPUS BECAUSE THE CIRCUIT COURT EXCEEDED ITS JURISDICTION IN GRANTING THE PETITION FOR WRIT OF HABEAS CORPUS, IN THAT THE HABEAS COURT HELD THAT THE PETITIONER HAD A LIBERTY INTEREST IN THE POST-CONVICTION RELIEF PROCEEDINGS UNDER RULE 29.15 AND WAS ENTITLED TO PROCEDURAL DUE PROCESS PROTECTED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THUS OF NECESSITY HOLDING THAT THE HABEAS PETITIONER HAD A CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF POST-CONVICTION RELIEF COUNSEL, WHEREIN THE PETITIONER'S COMPLAINTS REGARDING COUNSEL'S REPRESENTATION PERTAINED TO THE ADEQUACY OF POST-CONVICTION COUNSEL'S PERFORMANCE IN REPRESENTING PETITIONER IN THE COLLATERAL PROCEEDING.

Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)

Moore v. State, 934 S.W.2d 289 (Mo. banc 1996)

State v. Owsley, 959 S.W.2d 789 (Mo. banc 1997), cert. denied, 525 U.S. 882 (1998)

Tooley v. State, 20 S.W.3d 519 (Mo. banc 2000)

III

RELATOR IS ENTITLED TO AN ORDER QUASHING THE WRIT OF HABEAS CORPUS BECAUSE THE CIRCUIT COURT EXCEEDED ITS JURISDICTION IN GRANTING THE PETITION FOR WRIT OF HABEAS CORPUS, BECAUSE A CLAIM OF INADEQUATE REPRESENTATION BY POST-CONVICTION COUNSEL CANNOT ESTABLISH THE REQUISITE “CAUSE” TO EXCUSE THE FILING OF AN UNVERIFIED MOTION FOR POST-CONVICTION RELIEF WHICH RAISED CLAIMS NOT COGNIZABLE UNDER RULE 29.15.

Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)

Kilgore v. State, 791 S.W.2d 393 (Mo. banc 1990)

STANDARD OF REVIEW

Certiorari lies to correct judgments of lower courts that are without jurisdiction, or are in excess or abuse of their jurisdiction. State ex rel. Reorganized School District R-9 of Grundy Co. v. Windes, 513 S.W.2d 385, 390 (Mo. 1974). Certiorari does not determine the merits of the underlying controversy. State ex rel. Hill v. Davis, 488 S.W.2d 305, 308 (Mo. App., K.C. Distr. 1972) (citing State ex rel. Miller v. O'Malley, 342 Mo. 641, 117 S.W.2d 319 (Mo. 1938)). Rather, “the superior court determines the jurisdictional issue from the face of the return and either quashes it or upholds the tribunal’s action.” State ex rel. Tolliver v. Board of Public Service of the City of St. Louis, 453 S.W.2d 622, 623 (St. Louis Court of Appeals, 1970). When the facts alleged and proved in a proceeding for habeas corpus are insufficient to justify the relief granted, a superior court has the authority, pursuant to a writ of certiorari, to quash an inferior court’s writ of habeas corpus. State ex rel. Stewart v. Blair, 207 S.W.2d 268, 276 (Mo. banc 1947).

I.

RELATOR IS ENTITLED TO AN ORDER QUASHING THE WRIT OF HABEAS CORPUS BECAUSE THE CIRCUIT COURT EXCEEDED ITS JURISDICTION IN GRANTING THE PETITION FOR WRIT OF HABEAS CORPUS, IN THAT THE EXCEPTION THAT PERMITS CONSIDERATION OF CLAIMS RAISED UNDER RULE 91 TO PREVENT A MISCARRIAGE OF JUSTICE DOES NOT INCLUDE AN EXCEPTION FOR “CAUSE” TO EXCUSE THE FILING AN UNVERIFIED MOTION FOR POST-CONVICTION RELIEF WHICH RAISED CLAIMS NOT COGNIZABLE UNDER RULE 29.15, AS HELD BY THE HABEAS COURT.

In State ex rel. Simmons v. White, 866 S.W.2d 443, 445 n.3 (Mo. banc 1993), this Court enumerated five examples where Rule 91 applies: (1) decisions on bail; (2) confinement past the expiration of a sentence; (3) parole revocation; (4) held without charges or judgment; and (5) jurisdictional issues. A petition for state habeas corpus relief is limited to determining the *facial validity of confinement*. State ex rel. Haley v. Groose, 873 S.W.2d 221, 222 (Mo. banc 1994) (emphasis added). Because Rule 91 was not designed for duplicative and unending challenges to the finality of a criminal judgment, the only exceptions for seeking review of procedurally-defaulted claims are “to raise jurisdictional issues or in circumstances so rare and exceptional that a manifest injustice results’ if habeas corpus is not granted.” Clay v. Dormire, 37 S.W.3d 214, 217 (Mo. banc 2000) (quoting State ex rel. Simmons, 866 S.W.2d at 446), cert. denied, 121 S.Ct. 2000 (2001).

Here, Warren’s allegation did not challenge the facial validity of his confinement. Nor did Warren raise a jurisdictional issue. That is, Warren did not assert that the trial court was without jurisdiction to sentence him to a term of life and two fifteen-year terms of imprisonment. Any contention otherwise would be without merit in any event, as Warren was convicted of two class B felonies (Assault in the First Degree and Arson in the First Degree), and one unclassified felony, thereby subjecting him to two maximum sentences of fifteen years and one maximum sentence of life imprisonment. See §§ 565.050.2; 569.040.2; 571.015.1; 558.011.1(1); 558.011.1(2), RSMo. (1986). Thus the trial court sentenced him to terms within the applicable ranges of punishment.

Warren invoked Rule 91 asserting that “the circumstances are so rare and exceptional that a manifest injustice will result in the absence of habeas corpus relief” Record, at 13. The Circuit Court concluded that the writ “must issue in this case to correct manifest injustice.” Record, at 146; App., at A9.

This Court recently clarified the scope of state habeas corpus under Rule 91 in the context of a claim of manifest injustice:

Following the lead of the United States Supreme Court’s habeas corpus cases, and most recently *Schlup v. Delo*, 513 U.S. 298, 327 (1995), this Court holds that the manifest injustice or miscarriage of justice standard requires the habeas corpus petitioner “to show that ‘a constitutional violation has probably resulted in the conviction of one who is actually innocent,’” *id.* (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)), and further, “[t]o establish the requisite probability, the petitioner must show that it is more

likely than not that no reasonable juror would have convicted him in the light [of new evidence of innocence],” *id.* As explained in *Schlup* and earlier cases, the actual innocence component of the miscarriage of justice standard is “a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits, [and] . . . [w]ithout any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not enough in itself to establish a miscarriage of justice” *Id.* at 315-16 (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)).

* * * * *

Clay, 37 S.W.3d at 217.

In its Judgment, the habeas court expressly held that Clay “did not specifically overturn prior Missouri precedent granting habeas relief to persons, like Petitioner, who were unable to proceed with postconviction relief for reasons beyond their control.” Record, at 147; App. at A10 (emphasis in original) (citing State ex rel. Simmons v. White, 866 S.W.2d at 446; White, 779 S.W.2d at 573; Merriweather, 904 S.W.2d at 490; Brown, 947 S.W.2d at 440).

Warren failed to contend in his habeas petition that he was actually innocent of the

offense, which this Court made clear is a necessary component of the “manifest injustice” exception under Rule 91. Id. at 217-218.²

²In his post-conviction relief motion, Warren equated his contention that someone else confessed to the crimes as a claim of actual innocence. See Record, at 79, 128. No such claim was raised before the habeas court. Compare Record, at 6-16.

In Clay, this Court did not incorporate a “cause” component to its discussion of the “miscarriage of justice” exception.³ That is understandable, as the “‘miscarriage of justice’ or ‘fundamental miscarriage of justice’ used in federal habeas cases,” which this Court relied, id. at 217, does not include a “cause” exception. Rather, the “cause and prejudice” exception that permits consideration of a procedurally defaulted claim in a federal habeas proceeding is entirely separate from the “miscarriage of justice” exception. Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991). For this Court to engraft upon Rule 91 a “cause” exception would eviscerate the time limitations of Rules 24.035 and 29.15, which the Court has long upheld as constitutional and mandatory. See Day v. State, 770 S.W.2d 692, 695 (Mo. banc), cert. denied, 493 U.S. 866 (1989); see also Duvall v. Purkett, 15 F.3d 745, 748 n.6 (8th Cir.), cert. denied, 512 U.S. 1241 (1994) (agreeing that the time limits of Missouri’s post-conviction relief procedure are constitutional). With a “cause” exception, Missouri prisoners who either failed to avail themselves of Rule 24.035 or Rule 29.15 or who

³The Missouri Court of Appeals, Western District, however, held on June 26, 2001, that “it is readily apparent that the [Clay] Court was adopting a ‘cause and prejudice’ standard similar to that utilized in Federal habeas jurisprudence, as well as the ‘manifest injustice’ exception to that standard recognized by the United States Supreme Court in Schlup [v. Delo, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995)].” Covey v. Moore, WD 57889, slip op. at 5 (Mo. App., W.D. June 26, 2001). Other than declaring it “readily apparent” from the Clay opinion, the Covey court provided no authority for its reading of Clay.

improperly did so would circumvent the timeliness requirement thereunder by asserting any variety of reasons to excuse the failure to comply with that requirement, thus rendering the time limits advisory as opposed to mandatory. Moreover, a “cause” exception would “result in a chaos of review unlimited in time, scope, and expense,” an outcome which this Court previously disavowed in State ex rel. Simmons, 866 S.W.2d at 446.

Accordingly, respondent Jaynes’ reliance upon Brown, 947 S.W.2d at 440, contravenes this Court’s decision in Clay and requires quashing the writ.⁴

⁴In Brown, the Missouri Court of Appeals, Western District concluded that the habeas petitioner’s failure to raise his claim that his guilty plea was involuntary, not raised in a timely Rule 24.035 motion, was not barred from review under Rule 91. That court relied upon the rationale that the petitioner’s

complaint was not known to him nor was it reasonably discoverable to him during the applicable ninety-day time limitation of Rule 24.035. It was impossible for [petitioner] to realize that he would be denied probation until 120 days after he began his sentence, or thirty days after the time limits of Rule 24.035 had run.

Brown, 947 S.W.2d at 440. In addition to creating a “lack of knowledge” or “cause” exception, Brown did not require that the petitioner assert that a constitutional violation probably resulted in the conviction of someone who was actually innocent. Clay therefore overruled Brown, which was not premised upon a jurisdictional issue but upon an asserted manifest injustice -- i.e., that a constitutional violation, an involuntary guilty plea, resulted that

the petitioner could not have discovered until after the time for seeking post-conviction relief had expired. Id. at 440.

II.

RELATOR IS ENTITLED TO AN ORDER QUASHING THE WRIT OF HABEAS CORPUS BECAUSE THE CIRCUIT COURT EXCEEDED ITS JURISDICTION IN GRANTING THE PETITION FOR WRIT OF HABEAS CORPUS, IN THAT THE HABEAS COURT HELD THAT THE PETITIONER HAD A LIBERTY INTEREST IN THE POST-CONVICTION RELIEF PROCEEDINGS UNDER RULE 29.15 AND WAS ENTITLED TO PROCEDURAL DUE PROCESS PROTECTED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THUS OF NECESSITY HOLDING THAT THE HABEAS PETITIONER HAD A CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF POST-CONVICTION RELIEF COUNSEL, WHEREIN THE PETITIONER'S COMPLAINTS REGARDING COUNSEL'S REPRESENTATION PERTAINED TO THE ADEQUACY OF POST-CONVICTION COUNSEL'S PERFORMANCE IN REPRESENTING PETITIONER IN THE COLLATERAL PROCEEDING.

Warren contended that he was abandoned by post-conviction counsel. Warren presumably retained trial counsel before filing his pro se post-conviction motion, and counsel filed the original motion on behalf of petitioner. Record, at 77-81. At no time has Warren disputed this fact. Indeed, Warren has never contended that he did not hire trial counsel to represent him in the post-conviction relief proceedings; nor has Warren ever asserted that he was unaware of the fact that trial counsel filed the post-conviction motion on his behalf. Thus

counsel did not abandon Warren. Instead, the matters that Warren complained of in his habeas petition, including the denial of his right to conflict-free post-conviction counsel, and that post-conviction counsel failed to (1) withdraw due to a conflict of interest, (2) request or review the trial transcript, (3) set forth legally cognizable claims for relief, (4) set forth claims for relief with specificity and sufficient detail, (5) file an amended motion, (6) obtain Warren's verification, (7) request an evidentiary hearing, (8) respond to the State's motion to dismiss the post-conviction relief motion, and (9) file an appeal from the dismissal of the motion, see Record, at 8-10, 11, pertain to the effectiveness of counsel's representation during the post-conviction proceedings. Compare Moore v. State, 934 S.W.2d 289, 291 (Mo. banc 1996) (abandonment by post-conviction counsel recognized only where counsel takes no action on behalf of movant or where counsel determines that an amended motion is warranted but fails to timely file same through no fault of movant).

By his Judgment, respondent Jaynes engrafted a constitutional right to counsel in a post-conviction relief proceeding, contrary to United States Supreme Court precedent, see Coleman, 501 U.S. at 752, 111 S.Ct. at 2566, 115 L.Ed.2d 640; Pennsylvania v. Finley, 481 U.S. 551, 557, 107 S.Ct. 1990, 1994, 95 L.Ed.2d 539 (1987), and decisions of this Court, see, e.g., State v. Owsley, 959 S.W.2d 789, 799 (Mo. banc 1997) ("The fact that its poor content and structure resulted in its dismissal does not mean that [movant] was abandoned. His abandonment claim is nothing more than a claim of ineffective assistance of post-conviction counsel, which is 'categorically unreviewable.'"), cert. denied, 525 U.S. 882 (1998); State v. Parker, 886 S.W.2d 908, 932 (Mo. banc 1994), cert. denied, 514 U.S. 1098 (1995) ("Parker's

real argument is that post-conviction counsel ‘did not do everything which might have been done,’ which (even if true) does not constitute abandonment.”); State v. Chambers, 891 S.W.2d 93, 113 (Mo. banc 1994) (no constitutional right to the effective assistance of post-conviction counsel); State v. Ervin, 835 S.W.2d 905, 928-929 (Mo. banc 1992), cert. denied, 507 U.S. 954 (1993) (same); State v. Hunter, 840 S.W.2d 850 (Mo. banc 1992), cert. denied, 509 U.S. 926 (1993) (same).

Absent a constitutional right to counsel, there cannot exist the right to the effective assistance of counsel. Coleman, 501 U.S. at 752, 111 S.Ct. at 2566, 115 L.Ed.2d 640 (counsel not constitutionally required on appeal from denial of state habeas corpus petition); Wainwright v. Torna, 455 U.S. 586, 587-588, 102 S.Ct. 1300, 1301, 71 L.Ed.2d 475 (1982) (per curiam) (counsel not constitutionally required for discretionary review by state supreme court); Ross v. Moffitt, 417 U.S. 600, 610, 94 S.Ct. 2437, 2443-2444, 41 L.Ed.2d 341 (1974) (counsel not constitutionally required for discretionary review by state supreme court and United States Supreme Court). That is, only if attorney error amounts to ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068-2069, 80 L.Ed.2d 674 (1984), does the Sixth Amendment dictate that the attorney’s error must be imputed to the state. See Coleman, 501 U.S. at 754, 111 S.Ct. at 2567, 115 L.Ed.2d 640; Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). The Judgment granting the writ of habeas corpus also ignores this Court’s precedent holding that a post-conviction movant does not have a “constitutional right to effective counsel for the purpose of filing an initial motion for post-conviction relief.” Reuscher v. State, 887 S.W.2d

588, 590 (Mo. banc 1994), cert. denied, 514 U.S. 1119 (1995); Smith v. State, 887 S.W.2d 601, 602 (Mo. banc 1994), cert. denied, 514 U.S. 1119 (1995); Bullard v. State, 853 S.W.2d 921, 923 (Mo. banc), cert. denied, 510 U.S. 979 (1993).

Moreover, “[i]t has long been held that an unsigned, unverified motion for post-conviction relief is a nullity and does not invoke the jurisdiction of the court.” Tooley v. State, 20 S.W.3d 519, 520 (Mo. banc 2000) (quoting Malone v. State, 798 S.W.2d 149, 151 (Mo. banc 1990), cert. denied, 500 U.S. 929 (1991)); see also State v. Bradley, 811 S.W.2d 379, 383 (Mo. banc 1991); Kilgore v. State, 791 S.W.2d 393, 395 (Mo. banc 1990). That this Court, subsequent to the completion of Warren’s post-conviction motion proceedings, relaxed the verification requirement for defendants’ pro se 29.15 motions, State v. White, 873 S.W.2d 590, 594 (Mo. banc 1994), does not retroactively vest jurisdiction in the motion court. This Court’s ruling in White expressly held “that *henceforth*, for purposes of filing a pro se 29.15 motion, the defendant’s signature will be sufficient verification ‘that he has listed all grounds for relief known to him and acknowledging his understanding that he waives any ground for relief known to him that is not listed in the motion.’ Rule 29.15(d).” Id. Moreover, Warren’s reliance upon Rodden v. State, 795 S.W.2d 393, 395 (Mo. banc 1990), cert. denied, 499 U.S. 970 (1991), see Record, at 10, for the proposition that the unsigned, unverified Rule 29.15 motion could be cured through an amended motion, ignores relevant precedent. See Kilgore, 791 S.W.2d at 395 (and citing cases). Rodden involved a Rule 27.26 motion, for which the amendment of pleadings was governed by the Rules of Civil Procedure. As the Court observed in Rodden, 795 S.W.2d at 395, such is not the case under Rules 24.035 and Rule 29.15. Thus

the habeas court erroneously held that Warren's unverified Rule 29.15 motion invoked the jurisdiction of the post-conviction court. See Record, at 141; App., at A4.

Because Warren did not have a constitutional right to post-conviction relief counsel, respondent Jaynes' determination that "[f]airness and due process mandate that Petitioner be allowed to proceed under Rule 29.15", Record, at 143; App., at A6, to "cure the defects within the initial motion," to correct "the claims contained in the initial motion [that] were not presented in sufficient detail and specificity and [that] were not cognizable in a 29.15 proceeding," Record, at 143; App., at A6, contravenes United States Supreme Court and Missouri Supreme Court precedent, as discussed, supra. The holding that a post-conviction relief motion that failed to properly invoke the motion court's jurisdiction, for which there was not a constitutional right to counsel, somehow gives rise to a due process right to the effective assistance of counsel requires that the Court quash the writ of habeas corpus.

III

RELATOR IS ENTITLED TO AN ORDER QUASHING THE WRIT OF HABEAS CORPUS BECAUSE THE CIRCUIT COURT EXCEEDED ITS JURISDICTION IN GRANTING THE PETITION FOR WRIT OF HABEAS CORPUS, BECAUSE A CLAIM OF INADEQUATE REPRESENTATION BY POST-CONVICTION COUNSEL CANNOT ESTABLISH THE REQUISITE “CAUSE” TO EXCUSE THE FILING OF AN UNVERIFIED MOTION FOR POST-CONVICTION RELIEF WHICH RAISED CLAIMS NOT COGNIZABLE UNDER RULE 29.15.

Warren relied upon the inadequate representation by post-conviction counsel to excuse the filing of his unverified Rule 29.15 containing noncognizable grounds for relief. But as discussed, supra, at 23, Warren did not have a constitutional right to the assistance of counsel in the filing of his initial post-conviction relief motion. And in the context of federal habeas corpus, the United States Supreme Court in Coleman, 501 U.S. at 752-753, 111 S.Ct. at 2566, 115 L.Ed.2d 640, and the federal circuit courts of appeals, in accord with Coleman, have held that the performance of counsel in a collateral proceeding cannot constitute “cause” to permit habeas corpus review of a procedurally defaulted constitutional claim. See, e.g., Hull v. Freeman, 991 F.2d 86, 91 (3rd Cir. 1993); Mackall v. Angelone, 131 F.3d 442, 449 (4th Cir. 1997) (en banc), cert. denied, 522 U.S. 1100 (1998); Fairman v. Anderson, 188 F.3d 635, 643 (5th Cir. 1999); Byrd v. Collins, 209 F.3d 486, 516 (6th Cir. 2000); Cawley v. DeTella, 71 F.3d 691, 695 (7th Cir. 1995); Burns v. Gammon, 173 F.3d 1089, 1093 (8th Cir. 1999); Poland v.

Stewart, 169 F.3d 573, 587 (9th Cir. 1999); Parkhurst v. Shillinger, 128 F.3d 1366, 1371 (10th Cir. 1997); Hill v. Jones, 81 F.3d 1015, 1025 (11th Cir. 1996). The circuit courts of appeals have so held even though the collateral proceeding was the first opportunity in which to raise a constitutional claim. See, e.g., Mackall, 131 F.3d at 449; Nolan v. Armontrout, 973 F.2d 615, 617 (8th Cir. 1992); Bonin v. Vasquez, 999 F.2d 425, 429-430 (9th Cir. 1993); Parkhurst, 128 F.3d at 1371; Hill, 81 F.3d at 1024-1025.

Because the Judgment of the habeas court rested upon the erroneous holding that Warren had a constitutional right to conflict-free representation during the post-conviction relief proceedings, Record, at 141; App., at A4, the writ of habeas corpus should be quashed. Cf. State v. Clay, 975 S.W.2d 121, 140 (Mo. banc 1998), cert. denied, 525 U.S. 1085 (1999); see also State v. Roll, 942 S.W.2d 370, 379 (Mo. banc) (no constitutional right to counsel during Rule 29.07 proceedings), cert. denied, 522 U.S. 954 (1997); Ervin, 835 S.W.2d at 931 (same).

CONCLUSION

WHEREFORE, for the reasons herein stated, relator respectfully submits that the petition for writ of certiorari should be granted and the writ of habeas corpus issued by respondents quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that one true and correct copy of the foregoing, and one copy of the disk required by Special Rule No. 1(f), were mailed, postage prepaid, on this ____ day of July, 2001, to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), the undersigned counsel hereby certifies that this brief complies with Rule 55.03 and the type-volume limitation, in that this brief was prepared with WordPerfect 9.0 (Times New Roman 13 point font) and contains 27656 words as identified by the word-processing software, excluding the cover page, signature block and certificates of service and of compliance. In addition, the undersigned counsel hereby certifies that the enclosed diskette has been scanned for viruses with Norton Anti-Virus software and found virus-free.

CASSANDRA K. DOLGIN

APPENDIX

Judgment, Roderick Warren v. Tony Gammon, No. CV3-00-478-CC (Randolph County Circuit
Court Jan. 10, 2001)