

Sup. Ct. # 83480

**IN THE
SUPREME COURT OF MISSOURI**

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

Relator,

v.

**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

RESPONDENTS' BRIEF

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JURISDICTIONAL STATEMENT

After the Court of Appeals for the Western District denied its petition for certiorari, the State filed the current petition for certiorari, pursuant to Missouri Supreme Court Rules 84.22 to 84.26. The State challenges the grant of habeas corpus, or alternatively, mandamus, by the Circuit Court of Randolph County to inmate Roderick Warren. The administrative relief is based on the fact that after Mr. Warren filed his Rule 29.15 postconviction motion, the motion court appointed trial counsel to represent him on the motion, despite the obvious conflict of interest, and counsel failed to investigate, consult with Mr. Warren about his claims, file an amended motion, or appeal the denial of relief.

This Court has jurisdiction under the Missouri Constitution, Article V, Section 4(1) and Missouri Supreme Court Rules 84, 91 and 94, to hear and decide the validity of the issuance of the writ of habeas corpus or mandamus.

STATEMENT OF FACTS

The State challenges a grant of administrative relief that would allow inmate Roderick Warren to pursue his Rule 29.15 motion. The Circuit Court of Randolph County granted the petition for habeas corpus, or in the alternative, mandamus (L.F. 138-49).¹ The Attorney General then filed a petition asking the Court of Appeals for the Western District to quash the grant (App. 19). After reviewing the petition and the response in opposition, the Court of Appeals denied the petition (App. 20). The State's current petition for certiorari is a third attempt to block Mr. Warren from pursuing his postconviction motion.

On July 8, 1986, Mr. Warren was convicted of one count of first degree arson, one count of first degree assault, and one count of armed criminal action (L.F. 6, 25-26). He was represented by trial counsel Lee Nation (L.F. 25). Mr. Nation failed to file a timely motion for new trial (L.F. 48-49). As a result, at sentencing, he filed a Rule 27.26 motion asking that the court find he was ineffective and to consider the motion for new trial to be timely (L.F. 48-50). The court sustained the request (L.F. 50).

Although Mr. Nation timely filed a Notice of Appeal on October 14, 1996, he failed to file the Record on Appeal (L.F. 69-72, 116). As a result, in January, 1987, the Court of Appeals dismissed the appeal for failure to proceed (L.F. 74).

¹ All page citations are to the Substitute Certified Copy of the Record and Proceedings (referenced "L.F."), the Appendix (referenced "App."), or to Relator's Brief (referenced "Rel.Br.").

On May 31, 1988, Mr. Nation filed a Rule 29.15 postconviction motion on Mr. Warren's behalf (Warren v. State, Jackson County Case No. CV88-013596) (L.F. 77-82). The motion alleged that the appeal was dismissed because Mr. Warren could not afford a lawyer or the fee for his transcript (L.F. 78). It also alleged that newly discovered evidence supported Mr. Warren's innocence (L.F. 78-79). The motion was signed, "Roderick Warren, by Lee Nation" (L.F. 80-81).

On June 8, 1988, the court appointed Mr. Nation to represent Mr. Warren on the postconviction case, despite the fact that Mr. Nation had served as trial counsel (L.F. 84). Mr. Nation failed to correct the initial motion's faulty verification, file an amended postconviction motion, or request an evidentiary hearing. On October 7, 1988, the court issued findings denying the motion (L.F. 94-98). It found that the amended motion would have been due by June 30, 1988, yet none was filed and no request was made for an evidentiary hearing (L.F. 95). It held that the issues were not cognizable in the postconviction case (L.F. 96). No appeal was taken from the ruling.

Over the next nine years, Mr. Warren repeatedly contacted Mr. Nation to learn what was happening to secure relief (L.F. 103). Mr. Nation advised Mr. Warren that he had filed papers in both state and federal court to obtain relief and was waiting on rulings from those courts (L.F. 103).

Finally, on March 12, 1998, Mr. Warren took matters in his own hands and filed a motion to recall the mandate in his direct appeal (L.F. 100-109). He argued that he had been denied an appeal due to Mr. Nation's failure to perfect his appeal (L.F. 104-108). He advised the court that he had wanted to pursue a postconviction case and thought that

Lee Nation had filed one for him, yet for some unknown reason he was not able to proceed with it (L.F. 102-104). The Court of Appeals sustained the request and recalled the mandate on June 30, 1998 (L.F. 112). Subsequently, that court affirmed Mr. Warren's convictions, issuing its mandate on November 17, 1999 (L.F. 117-18).

Proceedings at the Circuit Court Level

Mr. Warren is incarcerated at the Moberly Correctional Center, which is located within Randolph County (L.F. 8). On November 28, 2000, Mr. Warren filed a petition for a writ of habeas corpus in the Circuit Court of Randolph County, alleging that he was denied the ability to proceed with his 29.15 motion represented by conflict free counsel and that counsel had abandoned him (L.F. 6-118). The circuit court ordered the Superintendent of Moberly Correctional Center to show cause why Mr. Warren should not receive the requested relief (L.F. 121).

On December 5, 2000, this Court handed down the decision of Clay v. Dormire, 37 S.W.3d 214 (Mo. banc 2000). The next day, the Attorney General filed its response to the order to show cause (L.F. 124-26). The Attorney General did not challenge the basis for Mr. Warren's request, but instead focused solely on Clay in arguing that Mr. Warren was not entitled to habeas relief (L.F. 125-26).

On December 14, 2000, Mr. Warren filed a reply (L.F. 127-30). He argued that habeas corpus was still available to Mr. Warren, but also suggested to the circuit court that if it found that habeas relief was not appropriate, the court consider the petition as one for mandamus (L.F. 127-30). He set forth grounds for why mandamus was a proper avenue for relief (L.F. 128-30).

On December 22, 2000, the circuit court sent the parties a letter indicating its intent to grant the relief requested by Mr. Warren (L.F. 132). The Attorney General filed a motion for reconsideration, which was overruled by the court after hearing argument (L.F. 134-35). The circuit court then issued its judgment granting relief on January 10, 2001 (L.F. 138-48, App. 8-18). The judgment does not specify whether the court was granting habeas or mandamus relief (L.F. 138-48, App. 8-18). The court ordered that the Circuit Clerk of Jackson County reopen Mr. Warren's postconviction case and forward it to the sentencing court for appointment of conflict-free counsel who would file an amended motion (L.F. 147-48, App. 17-18).

The Attorney General then filed a petition for writ of certiorari in the Court of Appeals for the Western District (App. 19). The Court of Appeals stayed the administrative relief while it considered the petition and the suggestions in opposition filed on behalf of the Circuit Court of Randolph County (App. 19). On March 2, 2001, the Western District denied the petition for writ of certiorari (App. 20).

On March 29, 2001, the Attorney General filed the current petition for writ of certiorari.

POINT I

This Court should uphold the grant of administrative relief, because the Circuit Court of Randolph County did not exceed its jurisdiction in granting Roderick Warren’s writ of habeas corpus or mandamus, nor did the Court of Appeals for the Western District err in upholding the grant, in that Mr. Warren was denied the ability to pursue a Rule 29.15 postconviction motion due to the motion court’s inexplicable act of appointing trial counsel to represent Mr. Warren in raising claims of trial counsel’s own ineffectiveness and Mr. Warren has no means, other than habeas corpus or mandamus, to challenge the denial of his ability to proceed with a meaningful Rule 29.15 postconviction motion.

State ex rel. Haley v. Goose, 873 S.W.2d 221 (Mo. 1994);

Clay v. Dormire, 37 S.W.3d 214 (Mo. banc 2000);

State v. Taylor, 1 S.W.3d 610 (Mo. App. 1999);

Missouri Supreme Court Rules 29.15, 91, and 94.

POINT II

This Court should uphold the grant of administrative relief, because the Circuit Court of Randolph County did not exceed its jurisdiction in granting Roderick Warren’s writ of habeas corpus or mandamus, nor did the Court of Appeals for the Western District err in upholding the grant, in that Mr. Warren was denied the ability to pursue a Rule 29.15 postconviction motion by appointed counsel’s absolute failure to take action to protect Mr. Warren’s interests, including his failure to file a timely, verified amended motion, and by appointed counsel’s blatant conflict of interest.

Rodden v. State, 795 S.W.2d 393 (Mo. banc 1990);

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

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

Wilson v. State, 813 S.W.2d 833, 834 (Mo. 1991); and

Missouri Supreme Court Rules 24.035, 27.26 (repealed), 29.15, 55.03, and 84.04.

POINT III

This Court should not quash the grant of administrative relief by the Circuit Court of Randolph County, because even if habeas corpus is not a valid avenue of relief, the interests of justice mandate that mandamus be granted to cure the unique and unprecedented problem stemming from the appointment of trial counsel to represent Mr. Warren in his postconviction case and the subsequent lack of any action taken by the attorney to protect his client's interests, leaving Mr. Warren with nowhere to turn but to the courts for administrative relief.

Wilson v. State, 813 S.W.2d 833 (Mo. 1991);

State v. White 873 S.W.2d 590 (Mo. banc 1994);

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

Bullard v. State, 853 S.W.2d 921 (Mo. banc 1993); and

Missouri Supreme Court Rule 29.15.

ARGUMENT I

This Court should uphold the grant of administrative relief, because the Circuit Court of Randolph County did not exceed its jurisdiction in granting Roderick Warren’s writ of habeas corpus or mandamus, nor did the Court of Appeals for the Western District err in upholding the grant, in that Mr. Warren was denied the ability to pursue a Rule 29.15 postconviction motion due to the motion court’s inexplicable act of appointing trial counsel to represent Mr. Warren in raising claims of trial counsel’s own ineffectiveness and Mr. Warren has no means, other than habeas corpus or mandamus, to challenge the denial of his ability to proceed with a meaningful Rule 29.15 postconviction motion.

Although Roderick Warren validly initiated a Rule 29.15 postconviction motion,² the motion court inexplicably appointed trial counsel to assess his own ineffectiveness (L.F. 84). As a result, Mr. Warren did not have the ability to pursue postconviction relief, through no fault of his own. The only means available to Mr. Warren to cure this bizarre problem is a writ of habeas corpus or mandamus. The Circuit Court was correct in granting Mr. Warren’s petition for administrative relief, and the Court of Appeals was correct to deny the Attorney General’s attempt to have the writ quashed.

² This will be discussed in Argument II, *infra*.

The Circuit Court Was Warranted in Granting a Writ of Mandamus

This Court need not proceed into a lengthy consideration of whether a writ of habeas corpus is appropriate in this case, because administrative relief may be granted through a writ of mandamus. Whether or not habeas was proper, the Circuit Court acted well within its jurisdiction to grant relief through mandamus. After all, where appropriate, the court may treat a petition for habeas corpus as a petition for mandamus. State ex rel. Haley v. Goose, 873 S.W.2d 221, 223 (Mo. 1994). Where a petitioner has mislabeled his claim for administrative relief, and the interests of justice would not be served by dismissal of petition, the court should treat the petition as asking for the type of administrative relief which is appropriate. Cooper v. Gammon, 943 S.W.2d 699, 703 (Mo. App. 1997).

When Mr. Warren initially petitioned for administrative relief, this Court had not yet issued Clay v. Dormire, 37 S.W.3d 214 (Mo. banc 2000). Thus, Mr. Warren initially requested relief solely through habeas corpus (L.F. 6-16). The Attorney General filed its response the day after Clay was issued and argued that Clay barred habeas relief (L.F.124-26). Mr. Warren replied that a writ of mandamus would also be warranted and urged the Circuit Court to issue a writ of mandamus if it did not find that habeas was proper (L.F. 127-30).

The interests of justice would not be served by dismissing Mr. Warren's petition for habeas corpus, when it properly could be considered as a petition for writ of mandamus. Mr. Warren's problem has been considered by the Circuit Court of Randolph County, the Court of Appeals for the Western District, and now the Missouri Supreme

Court. If this Court were to consider the case solely as one for habeas corpus and find that habeas was not proper, the process would start from scratch, with a petition for mandamus being filed in the Circuit Court of Randolph County. In the interests of justice and preserving scarce judicial resources, this Court should consider the grant of administrative relief first as one for mandamus.

The purpose of a writ of mandamus is “to execute, not adjudicate” and one seeking the writ must show he has a “clear, unequivocal, specific right to have an act performed.” Clay, citing State ex rel. Missouri Growth Ass’n v. State Tax Com’n, 998 S.W.2d 786, 788 (Mo. banc 1999). The act sought to be performed must be ministerial, not discretionary. Jones v. Carnahan, 965 S.W.2d 209, 212 (Mo. App. 1998). A ministerial act is defined as an act that the law directs the official to perform upon a given set of facts, independent of what the officer may think of the propriety or impropriety of doing the act in a particular case. *Id.*, at 213.

The motion court had a clear duty to appoint conflict-free counsel to represent Mr. Warren in his postconviction motion. Rule 29.15(e). The motion court knew that Lee Nation had represented Mr. Warren at trial, since the motion court presided over the trial and sentencing (L.F. 25-26, 47). Inexplicably, however, the court appointed Mr. Nation to represent Mr. Warren in the postconviction motion (L.F. 84). Such an act violates both Missouri Supreme Court Rule 29.15 and well-established Missouri caselaw. After all, Rule 29.15(e) guarantees postconviction movants the right to counsel. It provides that, “when an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant” (emphasis added). Counsel, furthermore, must represent the

movant free of conflict of interest. *See, e.g., Nunn v. State*, 778 S.W.2d 707, 711 (Mo. App. 1989).

In *State v. Taylor*, 1 S.W.3d 610 (Mo. App. 1999), the defendant's trial attorney also represented the defendant on appeal. Two days before a Rule 29.15 postconviction motion would have been due, the attorney told the defendant that any issues for postconviction relief could be raised as plain error in the direct appeal. *Id.*, at 611. The attorney told the defendant that he would raise the postconviction issues in the direct appeal so the direct appeal would not be delayed. *Id.* The defendant did not file a 29.15 motion, and none of his claims of ineffective assistance of counsel were presented to any court. *Id.*

The Court of Appeals for the Western District held that the attorney had an "inherent" conflict of interest in representing the defendant at trial and in the postconviction motion. *Id.*, at 612. The Western District recognized that such a situation "puts the attorney in the untenable position of litigating his or her own incompetence." *Id.* The attorney "was caught between his obligation to do his best for [the defendant] and a desire to protect his own reputation and financial interests." *Id.* The attorney's conduct demonstrated that his actual conflict of interest adversely affected his performance, since it prevented the defendant from litigating his attorney's competence. *Id.* If the defendant had filed the 29.15 motion, the court would have been obligated to appoint new counsel to represent him in his postconviction motion. *Id.* Because the defendant showed that his attorney had an actual conflict of interest that adversely affected his attorney's performance, prejudice was presumed. *Id.* The Court of Appeals

for the Western District recalled its mandate, vacated the previous opinion, and remanded to the circuit court for resentencing, so that the defendant could pursue a new appeal and a postconviction motion. *Id.*

However the State attempts to mud the issue, the simple fact remains that the Circuit Court of Jackson County had a clearly-established duty which it failed to execute, to Mr. Warren's detriment. A writ of mandamus must issue to cure this unique problem. The Circuit Court of Randolph County was warranted in remanding the case to the Circuit Court of Jackson County to allow Mr. Warren to pursue his motion represented by conflict-free counsel.

Alternatively, A Writ of Habeas Corpus Should Issue

Mr. Warren acknowledges that the relief available under a writ of habeas corpus is very limited. Clay v. Dormire, 37 S.W.3d 214, 217 (Mo. 2000). Courts are not required to issue this writ when other remedies are available and adequate. *Id.* A person may not receive habeas relief for claims that could have been raised on direct appeal or in a postconviction case, but were not. *Id.* The exception to this rule lies where the person seeks the writ to raise jurisdictional issues or in circumstances so rare and exceptional that a manifest injustice would result if habeas relief is not granted. *Id.*

This Court does not need to reach the exception to the rule, since the claim asserted by Mr. Warren could not possibly have been raised on either direct appeal or a postconviction motion. The claim is that he was denied the ability to proceed with his postconviction case due to lack of counsel, in violation of Rule 29.15(e). This claim could not be raised in the direct appeal. And Mr. Warren could not raise this claim in his

postconviction case, because that was precisely the problem - he was denied the ability to pursue his postconviction case.

The State has never contested the fact that the motion court appointed counsel with a clear conflict of interest to represent Mr. Warren in his postconviction case. Mr. Warren did not bypass his postconviction remedies; rather, he was denied the ability to proceed with his motion in any meaningful way. It was through no fault of his own that the motion court inexplicably appointed trial counsel to represent him on the motion, despite the inherent conflict of interest. Unlike the defendant in Clay, Mr. Warren never truly had the chance to proceed with postconviction relief. Mr. Warren is merely asking for the same right that all indigent postconviction movants automatically possess – the right under Rule 29.15(e) to proceed with his motion represented by counsel.

Mr. Warren's case is also unlike Clay in that Clay's claim related solely to sentencing. Clay, 37 S.W.3d at 216-17. Mr. Warren's claim was that he was denied the opportunity to demonstrate that he did not have a fair trial due to the ineffectiveness of trial counsel. Mr. Warren's claim related to the fundamental fairness of the entire proceeding, not a mere sentencing error. While Clay's claim could have been discovered and presented in either the direct appeal or postconviction case, Mr. Warren was denied the ability to present any claims of ineffective assistance of counsel. Trial counsel's numerous blunders in failing to file a timely motion for new trial, allowing the direct appeal to be dismissed for failure to prosecute, and allowing himself to be appointed in the postconviction case strongly suggest that Mr. Nation also made blunders at trial that affected the outcome of the trial.

Mr. Warren has no means, other than by administrative relief, by which to secure a review of his postconviction issues. Once the motion court appointed Mr. Nation on the postconviction case, Mr. Warren had no means to challenge Mr. Nation's effectiveness as trial counsel. Mr. Warren could not file a new Rule 29.15 motion, since successive motions are barred by Rule 29.15. Nor could he avail himself of the most recent version of Rule 29.15 (effective date 7-1-97), since that version applies only to cases where sentence was pronounced on or after January 1, 1996 (ten years after Mr. Warren was sentenced, on October 3, 1986). By the time Mr. Warren had conflict-free counsel, in his direct appeal, the time for filing an appeal of the postconviction case had long expired.

Mr. Warren has been prejudiced by counsel's conflict of interest, as it has resulted in the complete inability to pursue any claims of ineffectiveness of trial counsel. Mr. Warren must serve a sentence of life imprisonment plus fifty years without ever having a court evaluate his claims of trial counsel's ineffectiveness (L.F. 25). In this regard, Mr. Warren has not been provided with the protection that other similarly situated citizens of this state receive when their liberty has been taken by judgment and sentence and they timely seek review through Rule 29.15 postconviction relief.

A writ of habeas corpus can provide corrective action under these circumstances, by a remand for appointment of counsel in the Rule 29.15 proceeding, which in turn will allow appointed counsel to review Mr. Warren's transcript, his claims for postconviction relief, and file an amended motion. Unquestionably, habeas is an available remedy to take corrective action by some disposition less than vacating a conviction. *See, e.g., Merriwether v. Grandison*, 904 S.W.2d 485 (Mo. App. 1995). That it should issue in this

case to correct this rare and unprecedented problem should also be unquestioned. This Court should follow the Court of Appeals for the Western District in upholding the grant of administrative relief by the Circuit Court of Randolph County.

ARGUMENT II

This Court should uphold the grant of administrative relief, because the Circuit Court of Randolph County did not exceed its jurisdiction in granting Roderick Warren’s writ of habeas corpus or mandamus, nor did the Court of Appeals for the Western District err in upholding the grant, in that Mr. Warren was denied the ability to pursue a Rule 29.15 postconviction motion by appointed counsel’s absolute failure to take action to protect Mr. Warren’s interests, including his failure to file a timely, verified amended motion, and by appointed counsel’s blatant conflict of interest.

The State makes two arguments under its Argument II (Rel.Br. 21-25). First, it argues that Mr. Warren’s claim of abandonment is truly just a claim of ineffective assistance of postconviction counsel (Rel.Br. 21-24). And second, it argues that Mr. Warren’s *pro se* motion did not invoke the jurisdiction of the motion court (Rel.Br. 24-25). Because the second argument is not raised in the Point Relied On, this Court should not consider it.

Mr. Warren’s claim that he was abandoned by postconviction counsel does not amount to a claim of ineffective assistance of postconviction counsel. Mr. Warren acknowledges that allegations of ineffective assistance of postconviction counsel are generally not cognizable. *See* Lingar v. State, 766 S.W.2d 640 (Mo. banc 1989). This Court, however, has recognized that a postconviction movant’s rights may be violated when postconviction counsel fails to abide by the procedures and requirements of Rule

24.035 and 29.15. *See, e.g., State v. White*, 873 S.W.2d 590 (Mo. 1994); *Luleff v. State*, 807 S.W.2d 495 (Mo. 1991); *Sanders v. State*, 807 S.W.2d 493 (Mo. 1991). The Court of Appeals for the Western District recently held that even privately retained counsel may be considered to have abandoned a postconviction movant when the attorney's failure to abide by procedural requirements significantly thwarts the movant's ability to seek postconviction relief. *Boydston v. State*, 26 S.W.3d 845, 849 (Mo. App. 2000).

Mr. Warren's counsel failed to take even the most basic steps to advance Mr. Warren's claims for postconviction relief and to protect his interests after the initial motion was filed. In particular, counsel failed to (1) withdraw as counsel due to the obvious conflict of interest; (2) request or review the trial transcript; (2) confer with Mr. Warren regarding his claims for relief; (3) set forth legally cognizable claims for relief; (4) set forth claims for relief with specificity and sufficient detail; (4) file an amended motion; (5) obtain Mr. Warren's verification that all claims had been raised;³ (6) request an evidentiary hearing; (7) take any action to protect Mr. Warren's interests even after receiving the State's motion to dismiss; and (8) file an appeal from the dismissal.

Mr. Warren wanted to file a postconviction motion. In documents attached to his original habeas petition, Mr. Warren advised the court that his family had paid Lee Nation to represent him on appeal (L.F. 102). After the appeal was dismissed for failure to prosecute, Mr. Warren contacted Mr. Nation to find out why the appeal had been dismissed (L.F. 103). Mr. Nation told Mr. Warren not to worry; that he could not get the

³Required by the original version of Rule 29.15, effective January 1, 1988.

appeal reinstated, but would file a Rule 27.26 proceeding as an alternate route to get Mr. Warren's conviction reversed (L.F. 103). Later, Mr. Nation told Mr. Warren that he would appear at a hearing on the postconviction motion he had filed, yet no hearing was ever held (L.F. 103). Over the next nine years, Mr. Warren repeatedly contacted Mr. Nation to learn what was happening to secure relief (L.F. 103). Mr. Nation advised Mr. Warren that he had filed papers in both state and federal court to obtain relief and was waiting on rulings from those courts (L.F. 103). Finally, Mr. Warren took matters in his own hands and filed a motion to recall the mandate in his direct appeal (L.F. 100-109). The Court of Appeals granted the motion, and Mr. Warren finally was able to proceed with his direct appeal (L.F. 112).

The State contends that Mr. Warren has never contested that he hired Mr. Nation to represent him in the postconviction proceedings (Rel.Br. 21-22). Nothing in the record indicates that Mr. Nation was hired to represent Mr. Warren in the postconviction proceedings; rather, the reasonable inferences from the record show that Mr. Nation was trying to patch up the mess he created in the direct appeal by commencing the postconviction case for Mr. Warren (L.F. 102-103). The record shows that Mr. Warren could not afford to hire a lawyer, and his appeal had been dismissed in part due to that problem (L.F. 78). The motion court would not have appointed counsel if Mr. Warren had already hired an attorney to represent him in the postconviction proceedings.

Additionally, the motion court must have considered the Form 40 as an initial motion filed just to commence the postconviction proceedings, not as a final pleading. It was not a motion that one would expect to see filed by an attorney who hopes to maintain

a bar license. The motion court appointed counsel and clearly anticipated that Mr. Nation would file an amended motion (L.F. 84, 95). It stressed in the judgment denying relief that no amended motion had been filed and that the two claims in the initial motion were not cognizable (L.F. 95-97).

Finally, the motion court considered Roderick Warren to be indigent. No filing fee was paid, as would have been required unless the court considered it to be filed *in forma pauperis*. The motion itself advised the court that Mr. Warren's appeal was dismissed because Mr. Warren could not afford a lawyer or a transcript (L.F. 78). The court then appointed Lee Nation to represent Mr. Warren (L.F. 84).

The State asserts that because trial counsel filed the *pro se* motion for Mr. Warren, trial counsel could not ever be considered to have abandoned Mr. Warren (Rel.Br. 21-22). There is a good reason why Rule 29.15(e) requires that counsel be appointed for indigent movants. Missouri courts have recognized the need for finality of judgments, and thus the postconviction proceedings must resolve all cognizable claims for relief. It is essential that the indigent postconviction movant receive legal counsel to review the transcript, investigate, conduct legal research as needed, consult with the movant regarding his claims, and set forth those claims in the proper format in a valid, timely amended motion. Without the guarantee that an indigent movant will receive the barest form of such legal guidance and representation, the courts cannot assume that the movant's claims for relief have been heard, and we can place no faith in the finality of the judgment. To follow the State's logic, counsel could write the lyrics of the Star Spangled Banner on a piece of paper, sign the movant's name to it, submit it as the postconviction

motion, do nothing further, and there would be no abandonment. Actually, what counsel did was not too far from such an action. Our system of justice cannot stand for such a flippant, dismissive attitude toward the rights of indigent movants.

The State next argues that the initial motion did not invoke the jurisdiction of the motion court, since it was signed “Roderick Warren by Lee Nation” (Rel.Br. 24-25). As an initial matter, Rule 84.04(e) requires that the argument be limited to those errors included in the “Points Relied On.” The Attorney General failed to mention this argument in its Point Relied On, and so this Court should not consider it. Even if the Court were to consider the argument, though, it is meritless.

Rule 55.03(a) requires that every motion “be signed by at least one attorney of record in the attorney’s individual name or, if the party is not represented by an attorney, shall be signed by the party.” It really is not clear how one should consider “Roderick Warren by Lee Nation.” This “signature” is located at two places within the motion: (1) at the end of the 18 initial questions, following immediately after the indigency question; and (2) on the line where the verification normally would be. Mr. Warren’s place of incarceration, or address, was listed on the motion, as was Mr. Nation’s address (L.F. 78, 80).

This was not the first time that Mr. Nation had filed a postconviction motion by signing the motion on behalf of the client. Ironically, in Rodden v. State, 795 S.W.2d 393 (Mo. banc 1990), Mr. Nation had filed a “*pro se*” Rule 27.26 motion by signing it “James Rodden by Lee Nation.” This Court held that the motion court had jurisdiction over the parties and subject matter of the postconviction motion, despite the lack of

verification. *Id.*, at 395. The Court stressed that, “Even an essential element of a pleading, like verification, may be added by amendment.” *Id.* The Court distinguished this case, as a Rule 27.26 motion, from those filed under Rules 29.15 or 24.035, suggesting that those cases would be guided by the holding of Kilgore v. State, 791 S.W.2d 393 (Mo. banc 1990).

In Kilgore, a Rule 29.15 postconviction movant filed a timely *pro se* motion that was unsigned and unverified. *Id.*, at 394. Counsel was appointed, yet failed to file a timely amended motion. *Id.* This Court held that the motion court did not err in denying relief because the motion was unverified. *Id.*, at 395. The Court stressed that the verification is essential to ensure that all claims for relief are adjudicated in a single proceeding. *Id.* The Court stressed that any amendment to the *pro se* motion, to supply the missing verification, would have to have been filed within the time limits set forth in Rule 29.15(f). *Id.* The opinion implies that the defect could have been cured if the movant’s verification had been included in an amended motion. *Id.*

Judge Holstein, writing for the Court, expressed the troubling nature of the case, including the fact that appointed counsel failed to amend the pleadings. *Id.* The Court suggested that in limited circumstances, habeas corpus may provide the appropriate relief:

If, in an appropriate state habeas corpus proceeding, movant were to plead and prove facts showing he was entitled to post-conviction relief and that the failure to timely file a verified Rule 29.15 motion was not attributable to movant’s intentional or negligent conduct and was due entirely to an ambiguity in the rule,

coupled with abandonment by appointed counsel, the question would then be whether, in such limited circumstances, Rule 29.15 provided an adequate post-conviction remedy. If the remedy is inadequate, it might not bar state habeas corpus.

Id., citing Wiglesworth v. Wyrick, 531 S.W.2d 713, 717 (Mo. banc 1976).

A year ago, this Court again dealt with the issue of an unsigned *pro se* motion for postconviction relief. Tooley v. State, 20 S.W.3d 519 (Mo. banc 2000). The Court emphasized that the signature requirement “constitutes a certificate that the filing is not for any improper purpose and is well grounded in fact and primarily has the objective of the elimination from the court system of groundless actions.” *Id.*, at 520. It also ensures that the movant actually assents to the filing on his behalf. *Id.* This Court concluded that the movant’s failure to sign the motion rendered it a nullity. *Id.*

However, the Court held that Rule 55.03 applies to motions for postconviction relief. *Id.* Under Rule 55.03(a), “[a]n unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.” The Court held that the movant should have the opportunity to correct the deficiency, and remanded the case back to the motion court. Tooley, 20 S.W.3d at 520.

The remedy given in Tooley is fundamentally the same remedy that Mr. Warren sought in his petition for administrative relief – he asked the Circuit Court of Randolph County to send his case back to Jackson County to cure the problems caused by his counsel, including the lack of verification. Mr. Warren was advised by counsel that he would file the postconviction motion for him (L.F. 102-103). Mr. Warren relied on Mr.

Nation, as an attorney, to abide by the procedural requirements of Rule 29.15 and to protect his interests. Mr. Warren was never made aware of the need for him to sign the *pro se* motion; filing of the *pro se* motion was an act for which Mr. Nation had taken responsibility, and Mr. Warren was not aware that he needed to take any action himself (L.F. 102-103).

In Wilson v. State, 813 S.W.2d 833, 834 (Mo. 1991), the Rule 24.035 postconviction movant failed to verify his *pro se* motion, but the defect was corrected by counsel with the filing of a timely and verified amended motion. This Court held that, “[b]ecause the sole deficiency in the *pro se* motion, the absence of verification, was remedied by a timely filed, verified, amended motion, . . . the motion court had jurisdiction to proceed on the amended motion.” *Id.* Missouri appellate courts have repeatedly followed Wilson. See, e.g., State v. Johnson, 851 S.W.2d 547, 551-52 (Mo. App. 1993); Phelps v. State, 827 S.W.2d 742, 744 (Mo. App. 1992); State v. Ojeda, 814 S.W.2d 9, 11 (Mo. App. 1991); State v. Kumping, 812 S.W.2d 571, 572 (Mo. App. 1991). In State v. White 873 S.W.2d 590, 594 (Mo. banc 1994), this Court confirmed that the *pro se* motion need not be verified as long as the amended motion was verified.

Fundamental fairness mandates that Roderick Warren be allowed to pursue his postconviction motion. Counsel assured Mr. Warren that he would file a postconviction motion on Mr. Warren’s behalf so that Mr. Warren could challenge his conviction (L.F. 102-103). The motion court believed that it had jurisdiction over the case and that Mr. Warren was indigent (L.F. 84). It appointed Mr. Nation to represent Mr. Warren in the motion, despite a blatant conflict of interest, and Mr. Nation then did absolutely nothing

further in the case, despite the need to file a properly verified amended motion (L.F. 84). Mr. Warren has done everything in his power to receive review of his case, through direct appeal and postconviction relief (L.F. 99, 102-103, 110). It would be truly unfair to deny Mr. Warren the ability to pursue postconviction relief solely through counsel's mistakes and the court's appointment of an attorney with a blatant conflict of interest.

Mr. Warren therefore requests that the this Court uphold the grant of administrative relief that was issued by the Circuit Court of Randolph County and upheld by the Court of Appeals for the Western District.

ARGUMENT III

This Court should not quash the grant of administrative relief by the Circuit Court of Randolph County, because even if habeas corpus is not a valid avenue of relief, the interests of justice mandate that mandamus be granted to cure the unique and unprecedented problem stemming from the appointment of trial counsel to represent Mr. Warren in his postconviction case and the subsequent lack of any action taken by the attorney to protect his client’s interests, leaving Mr. Warren with nowhere to turn but to the courts for administrative relief.

The Circuit Court of Randolph County did not exceed its jurisdiction in granting administrative relief. This case can be resolved without even turning to the issue of whether habeas corpus was appropriate. A writ of mandamus was warranted to order the Circuit Court of Jackson County to take action that it was obligated to take by Rule 29.15(e) – that is, to appoint conflict-free counsel to represent Mr. Warren in his postconviction case. Counsel then would file a properly verified, timely, amended motion alleging Mr. Warren’s claims for relief.

The State asserts that the Circuit Court of Randolph County exceeded its jurisdiction, because a claim of ineffectiveness of postconviction counsel cannot establish the requisite “cause” to excuse the filing of an unverified motion that contains non-cognizable claims (Rel.Br. 26-27).

The State’s argument muddies the waters unnecessarily. In Missouri, postconviction movants do not have to establish “cause” to excuse the filing of an

unverified motion. As mentioned in Argument II above, this Court has acknowledged that the defect of lack of verification can be cured through a timely filed, verified, amended motion. Wilson v. State, 813 S.W.2d 833, 834 (Mo. 1991); State v. White 873 S.W.2d 590, 594 (Mo. banc 1994). So, too, where the movant did not sign his *pro se* motion, this Court remanded to give the movant that opportunity. Tooley v. State, 20 S.W.3d 519, 520 (Mo. banc 2000). After all, the original motion “is relatively informal, and need only give notice to the trial court, the appellate court, and the State that movant intends to pursue relief under Rule 29.15. Bullard v. State, 853 S.W.2d 921, 922-23 (Mo. banc 1993).

The fact that the original motion contains non-cognizable claims is immaterial (L.F. 78-79). Once the motion was filed, the court had the obligation to appoint conflict-free counsel, who would consult with movant, review his transcript, investigate the case, and raise valid claims for relief in a properly verified, timely amended motion. Here, the court appointed counsel with a blatant conflict of interest (L.F. 84). That attorney then failed to take any further action in the case, despite the need for an amended motion and the expectation by the motion court that an amended motion be filed.

Mr. Warren therefore requests that the this Court uphold the grant of administrative relief that was issued by the Circuit Court of Randolph County and upheld by the Court of Appeals for the Western District.

CONCLUSION

Whether it be by habeas corpus or mandamus, Mr. Warren should have the right to proceed with his Rule 29.15 motion represented by counsel who is free to zealously protect his interests. The Circuit Court of Randolph County recognized this fundamental fact and acted well within its jurisdiction in granting administrative relief.

WHEREFORE, for the foregoing reasons, Respondents pray this Court deny Relator's request that it quash the grant of administrative relief.

Respectfully submitted,

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CERTIFICATE OF MAILING

I certify that on July 19, 2001 a copy of the above and a disk containing this material was mailed, postage prepaid, to Cassandra Dolgin, Assistant Attorney General, Office of the Attorney General, PO Box 899, Jefferson City, MO 65102.

Rosemary E. Percival

Certificate of Compliance

I, Rosemary E. Percival, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Special Rule 1(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 7,023 words, which does not exceed the 27,900 words allowed for a respondent's brief.

The floppy disk filed with this brief contains a copy of this brief. The disk has been scanned for viruses using a McAfee VirusScan program. According to that program, the disk is virus-free.

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APPENDIX

Form 40/Postconviction Motion, Warren v. State, CV88-013596 (Circuit Court
of Jackson County, May 31, 1988) A-2

Judgment, Roderick Warren v. Tony Gammon, No. CV3-00-478-CC (Circuit
Court of Randolph County, Jan. 10, 2001) A-8

Order, State ex rel. Jeremiah (Jay) Nixon v. The Honorable Ralph Jaynes,
Circuit Judge, Randolph County et al., WD#59578 (Missouri Court of
Appeals, Western District, Jan. 31, 2001) A-19

Order, State ex rel. Jeremiah (Jay) Nixon v. The Honorable Ralph Jaynes,
Circuit Judge, Randolph County et al., WD#59578 (Missouri Court of
Appeals, Western District, Mar. 2, 2001) A-20