

Sup. Ct. # 93157

**IN THE
SUPREME COURT OF MISSOURI**

MARK D. VOGL,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal to the Missouri Supreme Court
from the Circuit Court of Jasper County, Missouri,
29th Judicial Circuit, Division 2
The Honorable David C. Dally, Judge

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Mark D. Vogl, incorporates the jurisdictional statement from his original brief.

STATEMENT OF FACTS

Appellant, Mark D. Vogl, incorporates the statement of facts from his original brief.

POINT

The motion court clearly erred in denying, without an evidentiary hearing, Appellant’s motion to re-open his Rule 24.035 case on the basis that his counsel had abandoned him, where Appellant alleged facts that constituted abandonment and the record shows that Appellant was deprived of a meaningful review of his claims, in violation of Appellant’s rights to due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that Appellant’s appointed counsel failed to file any amended motion and include allegations therein that Appellant’s *pro se* motion was received by the Jasper County Circuit Clerk’s Carthage office on the due date but was forwarded to its Joplin office, where it was received and stamped a day later (and thus one day late). Rather than conferring with Appellant, investigating the timeliness issue, and filing an amended motion that included allegations of the timely filing of Appellant’s *pro se* motion, appointed counsel did the opposite---he quickly moved the Court to rescind the appointment of the public defender’s office and wrongly declared Appellant’s motion to be untimely, thereby depriving Appellant of a meaningful review of his post-conviction claims, including a review of whether his *pro se* motion was timely filed.

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

Dorris v. State, 360 S.W.3d 260 (Mo. banc 2012);

Gherke v. State, 280 S.W.3d 54 (Mo banc 2009);

U.S. Const., Amends. V, XIV;

Mo. Const., Art. I, Sec. 10;

Mo. S. Ct. Rule 24.035.

ARGUMENT

The motion court clearly erred in denying, without an evidentiary hearing, Appellant's motion to re-open his Rule 24.035 case on the basis that his counsel had abandoned him, where Appellant alleged facts that constituted abandonment and the record shows that Appellant was deprived of a meaningful review of his claims, in violation of Appellant's rights to due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that Appellant's appointed counsel failed to file any amended motion and include allegations therein that Appellant's *pro se* motion was received by the Jasper County Circuit Clerk's Carthage office on the due date but was forwarded to its Joplin office, where it was received and stamped a day later (and thus one day late). Rather than conferring with Appellant, investigating the timeliness issue, and filing an amended motion that included allegations of the timely filing of Appellant's *pro se* motion, appointed counsel did the opposite---he quickly moved the Court to rescind the appointment of the public defender's office and wrongly declared Appellant's motion to be untimely, thereby depriving Appellant of a meaningful review of his post-conviction claims, including a review of whether his *pro se* motion was timely filed.

The State asserts that "Appellant's complaint is not that counsel entirely failed to conduct an investigation, but that counsel's investigation was insufficient" (Resp. Br., p.

26). *However, Mr. Vogl is in fact asserting that counsel entirely failed to conduct an investigation.*

Counsel did not conduct any investigation whatsoever. While counsel evidently added 180 days to Mr. Vogl's delivery date and observed that the file stamp on the Form 40 was 182 days after his delivery date, that is *not* an investigation into whether the Form 40 may have arrived on time but was stamped a day later. An investigation would have been very simple and would not have taken much time. An investigation would have involved: 1) conferring briefly with Mr. Vogl and asking him about the circumstances surrounding the mailing of his *pro se* Form 40; and 2) calling the Jasper County Circuit Clerk's office (or having the paralegal or investigator do so) to ask about the circumstances of the receipt of Mr. Vogl's *pro se* Form 40. Had counsel taken those two simple steps, Mr. Vogl would have told him that the Form 40 would have been mailed to the Jasper County Circuit Clerk's Office in Carthage, from Crossroads Correctional Center, on the morning of March 13, 2008 (L.F. 17). And the Jasper County Circuit Clerk's Office would have told counsel (what they later told Mr. Vogl): their office staff in Carthage determined that Mr. Vogl's original case was handled in the Joplin location and any subsequent filings must be filed in Joplin; the Carthage office placed Mr. Vogl's documents in a basket for their "runner" to pick up to deliver to Joplin; and the "runner" picks up every afternoon in Carthage and delivers to Joplin the following morning (L.F. 9, 29).

As required by Rule 24.035, counsel would then have filed an Amended Motion, including those facts regarding the timeliness of the *pro se* Form 40. *See Dorris v. State,*

360 S.W.3d 260, 267 (Mo. banc 2012) (This Court held that Rule 24.035 requires counsel to allege in the Amended Motion facts to show that the *pro se* Form 40 was timely filed.).

The State asserts that “...it was not improper for Mr. Harris, a public defender, to assess whether he had been properly appointed under the rule, and to apprise the circuit court of legal authority that was adverse to his client’s position” (Resp. Br., pp. 22). Actually, it was improper for Mr. Harris to inform the Court that it did not have the jurisdiction to appoint counsel, because that representation was false. Such representation should never be made to a circuit court, causing a dismissal of a client’s claims with prejudice, without an investigation as required by Rule 24.035.

The State’s brief suggests that because counsel filed a motion to rescind appointment and therefore took “some action,” Mr. Vogl is really arguing that counsel was ineffective (i.e., Mr. Vogl is really arguing that counsel was ineffective for including inaccurate information in the motion to rescind) (Resp. Br., pp. 27-28). However, in considering abandonment issues, this Court has considered the content of a motion filed by appointed counsel. This Court has never declared that as long as appointed counsel took “some action,” abandonment can never occur and the case shifts to an ineffective assistance of counsel claim.

In *Carr v. State*, 934 S.W.2d 289, 290 (Mo. banc 1996), appointed counsel timely filed a Statement in Lieu of Amended Motion. *Id.* Nevertheless, the Court held that counsel abandoned the movant, because counsel admitted in the Statement in Lieu of Amended Motion that he had not reviewed the necessary materials or conducted any investigation. *Id.* at 292.

Likewise, in the case at bar, the record demonstrates that counsel conducted no investigation or review of Mr. Vogl's case (other than to add 180 days to Mr. Vogl's D.O.C. delivery date and observe that the file stamp on the *pro se* Form 40 was more than 180 days after the delivery date).

The State asserts that Appellant is asking this Court to expand the abandonment doctrine (Resp. Br., pp. 27-29). However, as the Court of Appeals correctly determined, this case falls within the well-established category of "abandonment" that occurs in situations when post-conviction counsel takes no action with respect to filing an amended motion or a statement in lieu of amended motion, and the records shows the movant is deprived of a meaningful review of his claims.

The State's argument is complicating a straightforward issue—the record here demonstrates that Mr. Harris did not investigate, confer with his client, file an amended motion, or file a statement in lieu of amended motion. Rather, he quickly moved to withdraw from the case and totally defaulted in carrying out the obligations imposed by Rule 24.035. He did none of the duties required of him by Rule 24.035, and that constitutes abandonment, simply and clearly. *See Gehrke v. State*, 280 S.W.3d 54, 57 (Mo. banc 2009) (One form of abandonment occurs when appointed counsel takes no action with respect to filing an amended motion and the records shows that the movant is deprived of a meaningful review of his claims.).

Mr. Vogl's case should have been resolved on its merits long ago. Counsel could have easily checked into the timeliness issue and included those facts and Mr. Vogl's claims in an Amended Motion. Based on undersigned counsel's experience and

knowledge, this is what is typically done and required of a post-conviction attorney. Had counsel acted as he was required under Rule 24.035, the circuit court would have considered Mr. Vogl's substantive claims, and this case would have been appropriately ruled on and concluded years ago (Supp. L.F. 1-2).

CONCLUSION

Appellant, Mr. Vogl, respectfully requests that this Court reverse the motion court's denial of his motion to re-open the post-conviction case and remand the case back to the Circuit Court for a hearing on the issues of whether Mr. Vogl's *pro se* Rule 24.035 motion was timely filed and whether he was abandoned by post-conviction counsel. Because the motion court has already factually found that Mr. Vogl's *pro se* Form 40 may have very well been timely filed and that Mr. Vogl is entitled to have counsel file an amended motion or a statement in lieu of amended motion, undersigned counsel respectfully requests that this Court also consider remanding the case to permit undersigned counsel to file an amended motion (without the additional requirement of a hearing on the issues of timeliness or abandonment).

Respectfully submitted,

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Certificate of Compliance and Service

I, Jeannie Willibey, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2007, in Times New Roman size 13 point font. The brief contains 1,860 words, which does not exceed the 7,750 words allowed for an appellant's brief.

A true and correct copy of the attached brief was e-filed on this 9th day of August, 2013, and a copy thereby delivered to: Mr. Andrew C. Hooper, Office of the Attorney General, at andrew.hooper@ago.mo.gov.

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