

## **Summary of SC89527, *David Gehrke v. State of Missouri***

Appeal from the Jackson County circuit court, Judge James D. Williamson Jr.

**Attorneys:** Gehrke was represented by Ruth B. Sanders of the public defender's office in Kansas City, (816) 889-7699; and the state was represented by Jayne T. Woods of the attorney general's office in Jefferson City, (573) 751-3321.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** A man seeks to reopen his postconviction relief proceedings, arguing his counsel abandoned him by telling him counsel had appealed the denial of his postconviction relief but not filing the appeal properly. In a 4-3 decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri affirms the circuit court's judgment overruling the motion to reopen the proceedings. This Court will not expand the abandonment doctrine to include postconviction counsel's failure to file a timely notice of appeal. This more properly is characterized as a claim for ineffective assistance of postconviction counsel, which is not cognizable, and other remedies are available to a postconviction movant in such a situation. In a concurring opinion, Judge Zel M. Fischer notes that abandonment occurs only when counsel fails to comply with the duties imposed by the postconviction rules, which do not impose a duty to file a timely notice of appeal when, as here, a court overrules a postconviction motion.

In a dissenting opinion joined by one other judge, Chief Justice Laura Denvir Stith disagrees this simply is a case of ineffective assistance of counsel. She would send the case back to the circuit court for a determination of whether the man in fact was misled into believing a notice of appeal was filed and whether he did not learn otherwise during the 12-month period for filing a late notice of appeal. If so, this would constitute abandonment. In a dissenting opinion joined by two other judges, Judge Richard B. Teitelman would hold the man is entitled to an evidentiary hearing on his claim of abandonment, noting that where, as here, counsel fails to file a timely, valid notice of appeal, counsel has abandoned the movant in the same way as in cases in which this Court previously has found abandonment by postconviction counsel.

**Facts:** In February 1999, David Gehrke filed a motion for postconviction relief to vacate his guilty pleas to and convictions for 12 felonies relating to sex or pornography. In September 2001, the circuit court overruled Gehrke's motion, and his counsel prepared a notice of appeal form, which was file-stamped September 14, 2001. The circuit court, however, has no record of a notice of appeal being filed after the postconviction relief motion was overruled, and no other steps were taken to perfect an appeal. In August 2006, Gehrke moved to reopen his postconviction relief proceeding, alleging his postconviction counsel abandoned him by failing to file a notice of appeal properly but telling him an appeal had been filed. The circuit court overruled his motion to reopen the proceedings. Gehrke appeals.

**AFFIRMED.**

**Court en banc holds:** (1) The facts that Gehrke claims constitute abandonment more properly are characterized as ineffective assistance of counsel, and this Court repeatedly has held that claims of ineffective assistance of postconviction counsel categorically are not cognizable. Even assuming the facts Gehrke claims constitute abandonment were a complete failure to act, they do

not fall within the scenarios this Court previously has found to constitute abandonment, and this Court declines to expand abandonment to include counsel's conduct in failing to file a notice of appeal properly of a judgment overruling a postconviction motion. In *McFadden v. State*, 256 S.W.3d 103 (Mo. banc 2008), this Court held that active interference on the part of postconviction counsel in undertaking representation and then not following through with that representation constitutes abandonment; in *Luleff v. State*, 807 S.W.2d 495 (Mo. banc 1991), this Court held that postconviction counsel's failure to take any action with respect to filing an amended postconviction motion constitutes abandonment; and in *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991), this Court held that untimely action on the part of postconviction counsel regarding the filing of an amended postconviction motion constitutes abandonment.

(2) With the remedies already available, it is unnecessary to expand the abandonment doctrine to include postconviction counsel's failure to file a timely notice of appeal after a circuit court overrules a postconviction motion. While a notice of appeal normally must be filed within 10 days after a judgment becomes final, Rule 30.03 permits a postconviction movant, for good cause shown, to file a late notice of appeal within 12 months after judgment becomes final, if the movant receives leave of court to file out of time. One year is sufficient time for a movant to discover that postconviction counsel has not filed, or not filed properly, a notice of appeal within the 10-day period and to correct counsel's failure to act. A movant whose postconviction counsel fails to perfect an appeal also may have potential relief available under habeas corpus proceedings. If this Court were to expand the scope of abandonment, it is foreseeable that federal habeas corpus claims could be denied due to a postconviction movant's failure to bring a motion to reopen postconviction proceedings, which would frustrate the legitimate goals of a prompt comprehensive review and finality.

**Concurring opinion by Judge Fischer:** The author notes that abandonment occurs only where postconviction counsel fails to comply with the duties explicitly imposed in the postconviction rules. Because these rules do not impose on counsel a duty to file a timely notice of appeal when a court overrules a postconviction motion, the circuit court correctly overruled Gehrke's motion to reopen his case.

**Dissenting opinion by Chief Justice Stith:** The author disagrees that this simply is a case of ineffective assistance of counsel. In the absence of an evidentiary hearing, the allegations must be taken as true, and here they indicate counsel purposely misled Gehrke into believing a timely notice of appeal had been filed by providing him a copy of a notice that had been file-stamped but that is not in the court records. If true, this would constitute abandonment rather than ineffective assistance. Further, the author would remand (send the case back to the circuit court) for an evidentiary hearing as to the credibility of Gehrke's claim that he believed a notice of appeal had been filed timely as well as to whether he knew or should have known, during the 12-month window provided in Rule 30.03, that no appeal, in fact, was pending. She also agrees with the reasoning of Judge Teitelman's dissent.

**Dissenting opinion by Judge Teitelman:** The author would hold Gehrke is entitled to an evidentiary hearing on his claim of abandonment, which does not require an expansion of the abandonment doctrine but simply requires its application to a new set of facts. Where, as here, postconviction counsel fails to file a timely, valid notice of appeal, counsel has abandoned the movant in the same way as that in which this Court has found abandonment by postconviction counsel in *McFadden v. State*, 256 S.W.3d 103 (Mo. banc 2008), *Luleff v. State*, 807 S.W.2d 495 (Mo. banc 1991), and *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991).