

No. SC84587

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IN THE MISSOURI SUPREME COURT

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STATE ex rel. ROBERT L. MEIER

Petitioner,

v.

GENE STUBBLEFIELD, SUPERINTENDENT  
MISSOURI EASTERN CORRECTIONAL CENTER

Respondent.

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ORIGINAL HABEAS CORPUS PROCEEDING

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BRIEF OF PETITIONER ROBERT L. MEIER

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## JURISDICTIONAL STATEMENT

Petitioner Robert Meier is incarcerated in the Eastern Missouri Correctional Center. *Petition for Common Law Writ of Habeas Corpus pursuant to Article I, Section 12 of the Missouri Constitution ¶ 2* (hereinafter *Petition*). He alleges that the Superintendent of that facility, Respondent Gene Stubblefield, is unlawfully restraining his liberty. *Petition ¶¶ 3, 7, 8*. Robert petitioned the St. Louis County Circuit Court and Court of Appeals, Eastern District, for a writ of habeas corpus. *Suggestions in Support of Petition for the Writ of Habeas Corpus at 2-3* (hereinafter *Suggestions*); *see also* Rule 91.02(a). Those petitions were ultimately denied. *Suggestions at 2-3; see also* Rule 84.22(a).

Robert then petitioned this Court for habeas relief. *Petition*. This Court has jurisdiction to issue original remedial writs. Mo. Const. art. V, § 4; Rules 84.22-.24.

## STATEMENT OF FACTS

Petitioner Robert Meier was charged with three felony offenses. *Petition* ¶4; *Return to Writ of Habeas Corpus at 1* (hereinafter *Return*). At trial, attorney Timothy W. Kelly represented Robert. *Petition* ¶¶ 5-6; *Affidavit of Robert Meier* ¶ 3 (hereinafter *Affidavit*; Copy at page A1). After the jury returned guilty verdicts on June 23, 1998, Robert told Mr. Kelly that he wanted to appeal. *Petition* ¶¶ 5, 6; *Petitioner's Response to Respondent's Return to Writ of Habeas Corpus* ¶ 3 (hereinafter *Petitioner's Response*); *Affidavit* ¶ 3. Mr. Kelly said he would take care of it. *Affidavit* ¶ 3.

The sentencing hearing was not held until August, 1998. *Return, Exhibit B* (docket entries). Between the time of conviction and the sentencing hearing, Mr. Kelly spoke with Robert several times. *Affidavit* ¶ 4; *Petition* ¶ 5. Mr. Kelly suggested that Robert should spend his money on child custody proceedings after he is released instead of on an appeal of his conviction. *Affidavit* ¶ 4; *Suggestions, Exhibit D* (letter from Timothy W. Kelly; copy at page A4).<sup>1</sup> Robert rejected this advice, reiterating that he wanted to appeal. *Affidavit* ¶ 4.

At the sentencing hearing, the Judge sentenced Robert and then (wrongly) informed him that he had 90 days to appeal his conviction:

**THE COURT: Mr. Meier, you have the right to file an  
appeal from this conviction and sentence.**

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<sup>1</sup> See discussion of admissibility of the letter below.

**This is a post conviction remedy.** This remedy is available if you claim that the judgment and sentence imposed in this case violates the constitution or laws of this State, or that the court was without jurisdiction to impose such conviction or sentence, or that the sentence imposed was in excess of the maximum sentence authorized by law.

This is an exclusive remedy that you have for this type of relief. **You have 90 days after you are delivered to the Department of Corrections to file such a request.**

*Sentencing Hearing Tr. at 13* (emphasis added). In fact, Robert had 10 days to appeal after sentencing. Rule 30.01(d); *State v. Nelson*, 9 S.W.3d 687, 689 (Mo. App. 1999). If he decided not to appeal, he had 90 days after delivery to the Department of Corrections to move for post-conviction relief. Rule 29.15(b) (1998).

After the sentencing hearing, Robert again stated that he wanted to appeal. *Petition ¶ 5; Affidavit ¶ 5*. Mr. Kelly agreed to file the appeal. *Affidavit ¶ 6*. Mr. Kelly later delivered to Robert a document file-stamped October 7, 1998. *Affidavit ¶ 6; Suggestions, Exhibit A* (Copy at page A5). That document was signed by Mr. Kelly as “Attorney for Appellant” and submitted under his bar number. *Suggestions, Exhibit A*. It requests that “Robert L. Meier, Jr. [Petitioner] ... be found to be an indigent person in that he is currently incarcerated serving 6 years in Fulton, Missouri and does not have any funds to pay for the fee for appeal or the cost of the transcript of the trial.” *Suggestions, Exhibit A*. The document had a handwritten note: “So Ordered, 10/7/98, [illegible

initials].” *Suggestions, Exhibit A*. Based on this document, Robert believed his conviction was being appealed. *Affidavit ¶ 6; Suggestions at 1-2*.

However, contrary to Robert’s belief, Mr. Kelly was not appealing his conviction. *Petition ¶ 6; Suggestions at 1-2; Return, Exhibit B*. The motion to proceed as a poor person was the only document that Mr. Kelly ever filed. *Petition ¶ 6; Suggestions at 1-2; Return, Exhibit B*. Mr. Kelly did not file a Notice of Appeal. *Petition ¶ 6; Suggestions at 1-2; Return, Exhibit B*. The record reflects no other attempts to further Robert’s appeal, even though Mr. Kelly identified himself as “Attorney for Appellant.” *Suggestions, Exhibit A; Return, Exhibit B*.

Robert did not know his appeal was not proceeding. *Suggestions at 1-2; Affidavit ¶¶ 6-10*. The trial judge had told him he had 90 days to file his appeal. *Sentencing Hearing Tr. at 13*. He had a copy of a document dated October 7 (40 days after his sentencing) that implied Mr. Kelly was appealing his conviction. *Suggestions, Exhibit A*. Accordingly, he thought the appeal was on track. *Affidavit ¶ 6*. When time passed with no progress, he inquired of Mr. Kelly. *Affidavit ¶ 7*. Mr. Kelly did not respond. *Affidavit ¶ 7*. For a while, his office would accept Robert’s collect calls. *Affidavit ¶ 7*. Eventually, the office stopped accepting Robert’s calls. *Affidavit ¶ 7*. Even when the calls were accepted, Robert never spoke to Mr. Kelly. *Affidavit ¶ 7*. Mr. Kelly did not answer Robert’s letters. *Affidavit ¶ 7*.

Frustrated, Robert filed a complaint with the Region X Disciplinary Committee. *Suggestions at 2; Affidavit ¶ 8*. He also wrote Douglas Hoff – a Public Defender – to inquire about the status of his appeal. *Suggestions at 2; Affidavit ¶ 10*. Mr. Hoff

informed Robert that he had not appealed, sending him a copy of the docket sheet. *Suggestions, Exhibit A-1; Affidavit ¶ 10.* This was the first time Robert realized that Mr. Kelly had not filed his appeal. *Suggestions at 1-2; Affidavit ¶ 10.*

Apparently, Mr. Kelly decided not to appeal Robert's convictions. *Suggestions, Exhibit D.* In a letter<sup>2</sup> to Region X Disciplinary Authority employee Adrienne Anderson, Mr. Kelly explained that he thought Mr. Meier's "money would be better spent [trying to obtain child custody] than in an-appeal [*sic*] that has no chance of success." *Suggestions, Exhibit D.* Mr. Kelly represented to Ms. Anderson that he had filed a motion to proceed as a pauper **and** a Notice of Appeal. *Suggestions, Exhibit D.* In fact, the docket sheet shows that Mr. Kelly never filed a Notice of Appeal. *Return, Exhibit B.*

Recognizing that his attorney had abandoned him, Mr. Meier began looking for a new attorney. *Affidavit ¶ 11; Suggestions at 2.* He also petitioned, *pro se*, to the Circuit Court and Court of Appeals for a writ of habeas corpus. *Suggestions at 2-3; Affidavit ¶ 11.* The Circuit Court originally issued the writ, but retracted its order after the State moved for reconsideration based on a Supreme Court docket entry denying a case on (purportedly) similar facts. *Petitioner's Response, Exhibit A; Return at 6 n.1; Return, Exhibits C, E.* The Court of Appeals also denied the petition. *Return, Exhibit G.* Robert now petitions this Court for relief. *Petition.*

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<sup>2</sup> See discussion of admissibility of the letter below.

To date, Robert has never had an appeal of his convictions. *Suggestions at 1; Affidavit ¶ 12.* Robert has always wanted to appeal the convictions to clear his name. *Suggestions at 1; Affidavit ¶ 12.*

**POINT RELIED ON**

**I. Petitioner Robert Meier is unlawfully restrained by Respondent and is entitled to a writ of habeas corpus ordering him re-sentenced even though he procedurally defaulted under Rule 29.15 because**

**A. Petitioner was actually and substantially disadvantaged when he received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and article I, § 10 of the Missouri Constitution in that Petitioner’s attorney abandoned him without filing his appeal as directed, resulting in the complete denial of his right to appeal his conviction – a presumptively prejudicial attorney error; and**

**B. The cause of Petitioner’s procedural default – his attorney’s abandonment – was external to the defense in that he was not responsible for the abandonment and did not know about it.**

U.S. Const. amend. VI

U.S. Const. amend. XIV

Mo. Const. art. I, § 10

Rule 29.15

*Roe v. Flores-Ortega*, 528 U.S. 470 (2000)

*Brown v. State*, 66 S.W.3d 721 (Mo. banc 2002)

*Luleff v. State*, 807 S.W.2d 495 (Mo. banc 1991)

*State v. Frey*, 441 S.W.2d 11 (Mo. 1969)

## SUMMARY OF THE CASE

Petitioner Robert Meier believed that his attorney Timothy W. Kelly was appealing his convictions. Instead, Mr. Kelly misled and then abandoned Robert. After Robert was sentenced, Mr. Kelly moved for leave for Robert to proceed as a poor person on appeal and delivered a copy of the motion to Robert. In that document, Mr. Kelly identified himself as “Attorney for Appellant.” Based on this document, Robert thought Mr. Kelly was appealing his convictions. But, Mr. Kelly – the “Attorney for Appellant” – never filed a notice of appeal to perfect Robert’s right to appeal.

The abandonment had two legal effects on Robert’s rights. First, the abandonment prejudiced Robert by denying him the right to appeal. The client, not the attorney, decides whether to appeal. Since Robert wanted to appeal, Mr. Kelly’s failure to file the appeal was ineffective assistance of counsel, regardless of Mr. Kelly’s motives. The complete denial of the right to appeal actually and substantially disadvantaged Robert and requires that this Court order him re-sentenced so he can appeal.

Second, the abandonment caused Robert to not seek relief – “procedurally default” – under Rule 29.15 (an “exclusive” procedure for raising ineffective assistance of counsel claims). When a petitioner seeks relief that might have been available in a Rule 29.15 proceeding, habeas corpus relief is not generally available. To obtain relief, Robert must prove an exception, such as cause for the procedural default and resulting prejudice (the “cause and prejudice” standard). Here, the abandonment and resulting deprivation of the right to appeal satisfy the “cause and prejudice” standard and justify habeas corpus relief for Robert.

## LEGAL ARGUMENT

**I. Petitioner Robert Meier is unlawfully restrained by Respondent and is entitled to a writ of habeas corpus ordering him re-sentenced even though he procedurally defaulted under Rule 29.15 because**

**A. Petitioner was actually and substantially disadvantaged when he received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and article I, § 10 of the Missouri Constitution in that Petitioner’s attorney abandoned him without filing his appeal as directed, resulting in the complete denial of his right to appeal his conviction – a presumptively prejudicial attorney error; and**

**B. The cause of Petitioner’s procedural default – his attorney’s abandonment – was external to the defense in that he was not responsible for the abandonment and did not know about it.**

A habeas corpus case is an original civil proceeding. *Rule 91.03; see also* Mo. Const. art. V, § 4. The record consists of the petition, the suggestions in support and accompanying exhibits, the writ and return of service, the answer, and “all other papers, documents, orders, and records filed in the appellate court.” Rule 84.24(g). The petitioner has the burden of proof. *State ex rel. Shields v. Purkett*, 878 S.W.2d 42, 45 (Mo. banc 1994).

“If no legal cause is shown for the restraint, the court shall forthwith order the person discharged.” Rule 91.18. When a petitioner is unlawfully deprived of his right to

appeal by ineffective assistance of counsel, the proper remedy is to vacate the petitioner's conviction, remand the case for re-sentencing, and order the time to appeal to run from the date of re-sentencing. *See, e.g., State v. Frey*, 441 S.W.2d 11, 14 (Mo. 1969); *State ex rel. Hahn v. Stubblefield*, 996 S.W.2d 103, 108 (Mo. App. 1999).

When a person believes that he has received ineffective assistance of trial or appellate counsel, that person may “seek relief in the sentencing court pursuant to the provisions of this Rule 29.15.” Rule 29.15(a). *Cf.* Rule 24.035 (the corresponding rule for post-conviction challenges to guilty pleas). The Rule 29.15 motion must include all claims “known to the movant.” Rule 29.15(d).

By its own terms, Rules 29.15 is an “exclusive” procedure. Rule 29.15(9). When defendants have claims that could be raised under Rule 29.15, they must move for relief under that rule within 90 days of appealing their conviction or, if no appeal is filed, within 90 days of being delivered to the Department of Corrections. Rule 29.15(b). In general, when defendants do not raise their claims in a Rule 29.15 motion (“procedurally default”), they cannot raise them in a later procedure. *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214-215 (Mo. banc 2001).

But, in certain circumstances, the writ of habeas corpus can be used to raise claims that might have been brought under Rule 29.15. *See* Rule 91.01(b) (“Any person restrained of liberty within this state may petition for a writ of habeas corpus to inquire into the cause of such restraint.”). Historically, Missouri courts determined the availability of habeas corpus relief according to the general “manifest injustice” standard, in contrast to the “more detailed guidelines” of federal habeas corpus. *Reuscher v. State*,

887 S.W.2d 588, 591 (Mo. banc 1994). Recently, this Court adopted the federal framework for evaluating state habeas claims. *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc 2000); *Jaynes*, 63 S.W.3d at 215.

Now, three types of procedurally defaulted claims can be raised in a habeas corpus petition:

- (1) claims of actual innocence;
- (2) claims of jurisdictional defect; and
- (3) claims which meet the “cause and prejudice” standard.

*Brown v. State*, 66 S.W.3d 721, 731 (Mo. banc 2002). Thus, the writ of habeas corpus ensures that post-conviction relief is available for the most serious claims, and important claims that could not have been raised in a Rule 29.15 motion. *See id.*

In this case, Petitioner Robert Meier alleges that he was denied the right to reasonably effective assistance of counsel. *Petition*. Ordinarily, this claim should have been raised in a Rule 29.15 motion. Rule 29.15(a). Since Robert did not actually appeal (even though he wanted to), he was required to move for relief under Rule 29.15 within 90 days of being delivered to the Department of Corrections. Rule 29.15(b). He never filed a Rule 29.15 motion, and thus procedurally defaulted.

Nonetheless, habeas corpus relief is appropriate for Robert under the “cause and prejudice” exception. Robert has proven cause and prejudice by showing “(a) that the procedural default was caused by something external to the defense, that is, a cause for which the defense is not responsible, and (b) prejudice resulted from the underlying error

that worked to his actual and substantial disadvantage.” *Brown*, 66 S.W.3d at 721; *see also Jaynes*, 63 S.W.3d at 216.

**A. Petitioner was actually and substantially disadvantaged when he received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and article I, § 10 of the Missouri Constitution in that Petitioner’s attorney abandoned him without filing his appeal as directed, resulting in the complete denial of his right to appeal his conviction – a presumptively prejudicial attorney error.**

Robert was actually and substantially disadvantaged when his trial attorney abandoned him: (1) without filing the notice of appeal as directed; and (2) without informing Robert that the notice of appeal had not been filed. These errors were exacerbated when the attorney (3) misled Robert into believing that an appeal had been filed. When a defendant instructs his attorney to appeal and that appeal is not filed due to his attorney’s ineffectiveness, prejudice is presumed without a specific allegation of error at the underlying trial. *Roe v. Flores-Ortega*, 528 U.S. 470, 484-85 (2000).

The Sixth Amendment to the United States Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.” U.S. Const. amend. VI. This right applies to the States through the due process clause of the Fourteenth Amendment to the United States Constitution. *Duncan v. Louisiana*, 391 U.S. 145, 148 & n.8 (1968) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)). *See also* Mo. Const. art. I, § 10 (due process requirement of Missouri

Constitution). The right to assistance of counsel presumes that counsel will be reasonably effective. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The result of an adversarial judicial proceeding is unreliable and must be set aside when (1) counsel acts in a professionally unreasonable manner and (2) those actions prejudice the defendant. *Id.* at 687.

In assisting in preparing the defendant's case, counsel has a duty to consult with the defendant on important decisions and to keep the defendant informed of important developments. *Id.* The client, not the lawyer, decides whether to appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). *Cf.* Rule 4-1.2(a) ("A lawyer shall abide by a client's decisions concerning the objectives of representation . . ."). Ordinarily, a lawyer must consult with the client about the right to appeal. *Flores-Ortega*, 528 U.S. at 479-80. *Cf.* Rule 4-1.3 cmt. (trial lawyers should advise their clients about the right to appeal before ending the representation).

When a client informs his lawyer that he wants to appeal, the lawyer must file the appeal. *Flores-Ortega*, 528 U.S. at 477. "[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Flores-Ortega*, 528 U.S. at 477. Since the defendant decides whether to appeal, a lawyer who is directed to file an appeal but fails to do so is ineffective regardless of his motive for not appealing. *See, e.g., Schlup v. State*, 771 S.W.2d 895, 898 (Mo. App. 1989).

If the lawyer believes that an appeal is frivolous, he should attempt to persuade the client not to appeal. *See Shelton v. State*, 724 S.W.2d 274, 276 (Mo. App. 1986); *Schlup*,

771 S.W.2d at 897-98. If the client persists, the lawyer should present the case unless doing so would be unethical. *Shelton*, 724 S.W.2d at 276; *Schlup*, 771 S.W.2d at 898. If a lawyer feels he cannot ethically appeal the conviction, the attorney should formally withdraw from the representation. *Shelton*, 724 S.W.2d at 276; *Schlup*, 771 S.W.2d at 898. *Cf.* Rule 4-1.16 (withdrawal).

In this case, Robert specifically instructed Mr. Kelly that he wanted to appeal. *Petition* ¶ 5; *Suggestions at 1*; *Petitioner's Response* ¶ 3; *Affidavit* ¶¶ 3-5. Mr. Kelly agreed to file the appeal, but never did so. *Suggestions, Exhibits A, D; Affidavit* ¶¶ 3, 6. He never formally withdrew from the representation or notified Robert that he was not appealing his conviction. Instead, Mr. Kelly misrepresented that he had filed the appeal of Robert's convictions. *Suggestions Exhibit A; Affidavit* ¶ 6.

Mr. Kelly moved for leave for Robert to appeal as a poor person, and identified himself as "Attorney for Appellant." *Suggestions Exhibit A*. Mr. Kelly delivered a copy of this document to Robert, leading Robert to believe that his convictions were being appealed. *Suggestions at 1-2; Affidavit* ¶ 6. When Robert became frustrated that his appeal was not proceeding, he filed a complaint against Mr. Kelly with the disciplinary committee. *Suggestions at 2; Affidavit* ¶ 8. A disciplinary committee employee forwarded to Robert a copy of a letter that Mr. Kelly wrote in response to the complaint. *Suggestions at 4; Affidavit* ¶ 9.

Ordinarily, a letter to the disciplinary committee might be privileged: "Communications submitted to [disciplinary authorities and their employees] are absolutely privileged **if submitted in good faith.**" Rule 5.315(a) (emphasis added).

However, this letter is not privileged because it was not submitted in good faith. *Id.* To justify his actions, Mr. Kelly's letter claims that he (1) moved for leave for Robert to proceed on appeal as a poor person, **and** (2) filed a notice of appeal for Robert. *Suggestions, Exhibit D.* As the docket sheet shows, the second claim is false. *Return, Exhibit B.* Mr. Kelly did **not** file a notice of appeal. *Return, Exhibit B.* The motion to proceed as a poor person was the only document filed in preparation for an appeal. *Return, Exhibit B.* Since Mr. Kelly misrepresented his actions to the disciplinary committee, his letter was not submitted in good faith and is not privileged. Rule 5.315(a).

In the letter, Mr. Kelly acknowledges that Mr. Meier wanted to appeal his conviction: "I told Mr. Meier that I would appeal his conviction if the appeal had any merit but I do not feel that there was any error in the trial." *Suggestions, Exhibit D.* Mr. Kelly thought Robert's money would be better spent on child custody proceedings. *Suggestions, Exhibit D.* Thus, he did not appeal the conviction.

By not filing the appeal, Mr. Kelly was ineffective. Robert has always wanted to clear his name. *Suggestions at 1; Affidavit ¶ 12.* It was not Mr. Kelly's place to decide how Robert should spend his money. Robert was entitled to decide whether to spend his money on an appeal or on child custody proceedings. In choosing to appeal, Robert likely realized that a court would not grant him child custody or would seriously curtail the custody unless he was cleared of the felony child molestation convictions (even though his attorney was obviously not advising him about this risk). Moreover, the stigma of such convictions will follow Robert forever if he is not cleared. Robert was

entitled to weigh the costs and benefits of appealing his convictions. He – not his attorney – should have ultimately decided whether the costs of appeal were justified. *Jones*, 463 U.S. at 751 (“the accused has ultimate authority to make certain fundamental decisions regarding the case [including whether] . . . to take an appeal”).

Mr. Kelly’s failure to file the appeal is not justified because he thought the appeal had no merit.<sup>3</sup> In *Schlup*, the trial court appointed a retired Missouri Supreme Court Commissioner to represent the defendant. 771 S.W.2d at 897. After trial, the defendant informed the Judge that he wanted to appeal. *Id.* The Judge refused, saying the appeal had “no merit.” *Id.* The Judge then abandoned defendant’s appeal, contrary to the defendant’s express wishes. *Id.* The Court of Appeals found that the Judge had been ineffective. *Id.* The Judge could either file the appeal or withdraw. *Id.* at 897-98. He could not just abandon his client.

If Mr. Kelly did not think that he could appeal consistent with the ethical rules, he should have withdrawn so Robert could search for a new attorney to file his appeal. *Shelton*, 724 S.W.2d at 276; *Schlup*, 771 S.W.2d at 898; Rule 4-1.16 (withdrawal). Mr. Kelly did not do so. Rather, he led Robert to believe that he was appealing the conviction. *Suggestions at 1-2; Affidavit ¶ 6.* By not telling Robert that he would not appeal his conviction and, in fact, leading Robert to believe that he was appealing the

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<sup>3</sup> Mr. Kelly represented to the disciplinary authority that he had filed a notice of appeal. *Suggestions, Exhibit D.* Though not true, this representation shows that Mr. Kelly did not claim that the issues raised on appeal would be frivolous.

conviction, Mr. Kelly compounded the harm done to Robert by the failure to file the notice of appeal. As discussed in the next section, this conduct caused Robert to “procedurally default” under Rule 29.15.

Robert’s affidavit, his verified petition, his suggestions in support, and his response to the answer, the motion to proceed as a poor person, and Mr. Kelly’s letter all demonstrate that Robert directed Mr. Kelly to file his appeal. Mr. Kelly was ineffective for not filing Robert’s appeal as specifically directed. *Flores-Ortega*, 528 U.S. at 477. He was ineffective for not informing Robert that he was not filing the appeal. *Strickland*, 466 U.S. at 688 (counsel has a duty to consult with defendant and keep him informed of important developments). He was ineffective for misleading Robert into believing that an appeal had been filed. *Id.*

Since Robert directed Mr. Kelly to file his appeal, prejudice is presumed. *Flores-Ortega*, 528 U.S. at 484. This is not a normal *Strickland* case where the defendant is tried or appeals and later challenges the adequacy of counsel during those proceedings. *Id.* at 481-82. In those cases, the process is presumed fair, and the defendant must allege a specific instance of prejudice to be entitled to relief. *Id.* at 482. Here, Robert was completely deprived of assistance on appeal. *Id.* at 483. Where the defendant receives no assistance, the process cannot be presumed to be fair. *Id.* Rather, the process is presumptively unreliable. *Id.* Robert has proven prejudice by showing that he directed his attorney to appeal, but Mr. Kelly failed to file the appeal. *Id.* at 485. Moreover, the complete denial of Robert’s right to appeal worked to his actual and substantial disadvantage: he was completely deprived of an appeal due to counsel’s ineffectiveness.

Thus, the prejudice component of the cause and prejudice test is satisfied. *Brown*, 66 S.W.3d at 731.

**B. The cause of Petitioner’s procedural default – his attorney’s abandonment – was external to the defense in that he was not responsible for the abandonment and did not know about it.**

A cause is external to the defense if the petitioner does not bear responsibility for it. *Brown*, 66 S.W.2d at 731. Mr. Kelly’s abandonment caused the procedural default. Robert is not responsible for the abandonment for at least two reasons.

**1. Robert is not responsible for his attorney’s ineffective assistance, which violated the Sixth and Fourteenth Amendments.**

Under the Sixth Amendment, the State is obligated to provide reasonably effective assistance of counsel. *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986). Normally, a defendant bears the risk of attorney error. *Id.* But, when trial or appellate counsel is ineffective, the Sixth Amendment requires the State – not the defendant – to bear the risk. *Id.* Thus, the defendant is not responsible for attorney error constituting ineffective assistance of counsel. *Id.*

As described above, Mr. Kelly was constitutionally ineffective in representing Robert between trial and appeal when Robert was constitutionally entitled to effective assistance of counsel. *Frey*, 441 S.W.2d at 15. This ineffectiveness was the “cause” for Robert’s procedural default. Since Mr. Kelly did not tell Robert that his conviction was not being appealed and in fact misled him to believe that it **was** being appealed, Robert did not know the time limit for his post-conviction remedy was running. Rule 29.15

(establishing different time limits for convictions that are appealed and those that are not appealed). These unreasonable attorney errors must be imputed to the State. See discussion Part I.A above. As Robert was not responsible for them, they constitute cause for the procedural default.

**2. Robert was not responsible for his attorney’s total abandonment, which prevented him from filing a timely Rule 29.15 motion.**

This Court has held that defendants are not always responsible for their failure to comply with the procedural requirements of the post-conviction rules. When a post-conviction movant is totally abandoned by his attorney, the attorney – not the movant – is responsible for the abandonment. *State v. White*, 873 S.W.2d 590, 598 (Mo. banc 1994). This minimum competence requirement is implied in Rules 29.15(e) and 29.15(g) (formerly subsection (f)), which require appointment of counsel who will ascertain whether all claims have been pled and timely file an amended motion if necessary. *Luleff v. State*, 807 S.W.2d 495, 497-98 (Mo. banc 1991); *Sanders v. State*, 807 SW.2d 493, 494-95 (Mo. banc 1991).

Recently, this Court in *Brown* noted that lack of knowledge is another “cause” of procedural default for which defendants are not responsible. 66 S.W.3d at 731. Like the *Luleff-Sanders* total abandonment standard, the lack of knowledge standard is grounded in the post-conviction rules. While Rule 29.15(d) requires the post-conviction movant to raise “every claim known to the movant,” it recognizes the obvious: Defendants are not responsible for pleading claims when they have no knowledge of the claim. Rule 29.15(d).

Here, Robert's trial attorney totally abandoned him without his knowledge. This abandonment was ineffective assistance of counsel because it deprived Robert of his right to appeal. Robert did not know that Mr. Kelly had ineffectively failed to appeal his conviction within the 90-day time limit for moving for post-conviction relief because Mr. Kelly misled Robert into believing that he **had** appealed. Moreover, based on the trial judge's statement at the sentencing hearing, Robert would have believed that he had 90 days to appeal. *Sentencing Hearing Tr. at 13*. Apparently, the judge confused Robert's right to appeal, and his right to move for post-conviction relief under Rule 29.15. Due to this error, Robert had no reason to believe that his appeal should be proceeding faster. Under these circumstances, Robert was clearly not responsible for his lack of knowledge. It thus constitutes "cause" for his procedural default. *Brown*, 66 S.W.3d at 731.

In *Luleff* and *Sanders*, this Court held that the sentencing court was the proper forum for addressing claims of abandonment by post-conviction counsel. In those cases, however, the movants filed timely *pro se* motions, invoking the jurisdiction of the sentencing court. Robert did not timely file a Rule 29.15 motion because he did not know that his Rule 29.15 time limit was running. Nonetheless, a timely motion is required to obtain relief under Rule 29.15. *Bullard v. State*, 853 S.W.2d 921, 922-23 (Mo. banc 1993). Because the sentencing court would not have jurisdiction over a late Rule 29.15 motion, the remedy in *Luleff* and *Sanders* (remand to the sentencing court) is not appropriate. To address this Catch-22, *Brown* recognized that habeas corpus is the proper mechanism to seek relief for post-conviction claims that were not timely filed.

66 S.W.3d at 730. Thus, Robert properly sought habeas relief as his post-conviction remedy.

Finally, it would be incongruous and unfair to hold that an attorney could abandon his client, (1) thus violating the client's Sixth Amendment right to effective assistance of counsel but (2) at the same time, depriving him of his "exclusive" state remedy to seek relief for the federal violation. The right to appeal is a fundamental protection for persons accused of crimes. Since 1969, Missouri courts have provided remedies for defendants deprived of their appeals due to no fault of their own. *See, e.g., Frey*, 441 S.W.2d at 14-15; *Morris v. State*, 603 S.W.2d 938, 941 (Mo. banc 1980); *Chastain v. State*, 688 S.W.2d 58, 61 (Mo. App. 1985); *Hahn*, 996 S.W.2d at 108. This Court should continue to provide a state remedy in such instances. *Reuscher*, 887 S.W.2d at 591 (opining that Missouri courts should not defer habeas corpus jurisdiction to the federal courts); *Hahn*, 996 S.W.2d at 108 (same).

As *Brown* recognized, defendants are not responsible for pleading claims that they could not know about within the time limit for moving for Rule 29.15 relief. Here, Robert missed the Rule 29.15 filing deadline and procedurally defaulted when Mr. Kelly abandoned him. Since the cause was external to the defense, habeas corpus relief is appropriate.

## **CONCLUSION**

Robert was not afforded reasonably effective assistance of counsel as required by the Sixth and Fourteenth Amendments. Though he did not bring his claim under Rule 29.15, he has shown that his procedural default was caused by events for which he is not responsible and that he was actually and substantially disadvantaged. His sentence should be vacated, and his case remanded for re-sentencing so he may appeal his convictions.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 84.06(g)**

The undersigned certifies:

1. That this Brief complies with Rule 84.06(g) of this Court; and  
That this Brief contains 5,946 words according to the word count feature of Microsoft Word Version 1997 software with which it was prepared.
  2. That the disks accompanying this Brief have been scanned for viruses, and to the best of her knowledge are virus-free.
  3. That this Brief meets the standards set out in Mo. Civil Rule 55.03.
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**CERTIFICATE OF SERVICE**

I hereby certify that two true and accurate copies and one copy on diskette of the foregoing were served by hand-delivery, facsimile transmission, certified mail or United States mail, postage prepaid, this \_\_\_\_ day of November, 2002, to:

Andrew W. Hassell  
Assistant Attorney General  
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