

No. SC93157

In the
Supreme Court of Missouri

MARK D. VOGL,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

**Appeal to the Supreme Court of Missouri
From the Circuit Court of Jasper County, Missouri
Twenty-Ninth Judicial Circuit
The Honorable David C. Dally, Judge**

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

This is an appeal from a Jasper County Circuit Court judgment denying Mark D. Vogl's (Appellant) motion to reopen his Rule 24.035 motion for post-conviction relief.

On June 21, 2007, Appellant pled guilty to two counts of first-degree sodomy. (L.F. 6). On August 30, 2007, the Circuit Court sentenced Appellant to two concurrent terms of fifteen years imprisonment. (L.F. 3, 6, 15-16). Appellant was delivered to the Missouri Department of Corrections on September 18, 2007. (L.F. 18, 24).

Appellant filed a *pro se* motion for post-conviction relief, which needed to be received by the court by March 17, 2008, in order to be timely filed. (L.F. 18). Appellant's motion was received by the Circuit Court of Jasper County in Joplin, Missouri on March 18, 2008. (L.F. 18). Appellant was assigned counsel who subsequently informed the court that Appellant had not timely filed his motion for post-conviction relief. (L.F. 24). On April 22, 2008, Appellant's motion for post-conviction relief was dismissed as untimely. (L.F. 9). Appellant did not appeal the dismissal of his post-conviction motion.

Appellant took no action regarding his case until he filed a motion to reinstate his post-conviction motion on March 17, 2011, almost three years

after he filed his original post-conviction motion. (L.F. 10). Appellant's motion to reinstate his post-conviction motion was ultimately denied. (L.F. 12).

On May 11, 2012, Appellant filed a motion to reopen his post-conviction motion. (L.F. 11). Appellant alleged that he mailed his *pro se* motion to the circuit court in Carthage, Missouri on March 12, 2008, and that it would have arrived on March 17, 2008, and thus been timely. (App. Br. 4-5). Appellant alleged further that because the motion should have been sent to the circuit court in Joplin, the circuit court in Carthage forwarded the motion to Joplin, and it would not have been stamped as received until March 18, 2008. (App. Br. 4-6). The circuit court denied the motion to re-open, noting that it had been previously dismissed as untimely with prejudice. (L.F. 61).

The Court of Appeals remanded the case for an evidentiary hearing, holding that post-conviction counsel's actions in notifying the court of the untimeliness of Appellant's *pro se* motion would constitute abandonment by post-conviction counsel if the facts asserted by Appellant were found to be true. (*Vogl v. State*, No. SD32097 (Mo. App. S.D., January 16, 2013)).

This Court granted the State's Application for Transfer.

ARGUMENT

I.

The motion court did not clearly err in denying, without an evidentiary hearing, Appellant's motion to reopen his Rule 24.035 case because Appellant was not abandoned by post-conviction counsel when counsel informed the court that Appellant's original *pro se* motion for post-conviction relief was untimely filed more than 180 days after Appellant had been delivered to the Department of Corrections.

Appellant argues that the motion court 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 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. Appellant argues that post-conviction counsel should have conferred with Appellant, investigated the timeliness issue, and filed an amended motion that included allegations of the timely filing of Appellant's *pro se* motion.

A. Standard of review.

Review of a motion court's disposition of a Rule 24.035 motion is limited to determining whether its findings of fact and conclusions of law are clearly erroneous. *Loudermilk v. State*, 973 S.W.2d 551, 553 (Mo. App. E.D. 1998); Mo. Sup. Ct. R. 24.035(k). The motion court's findings are clearly erroneous only if, after examining the entire record, the reviewing court is left with the definite and firm impression that a mistake has been made. *Id.* "In order to be entitled to an evidentiary hearing, a movant must 1) cite facts, not conclusions, which, if true, would entitle the movant to relief; 2) the factual allegations must not be refuted by the record; and 3) the matters complained of must prejudice the movant." *Thurman v. State*, 263 S.W.3d 744, 748 (Mo. App. E.D. 2008).

B. The relevant facts.

On June 21, 2007, Appellant pled guilty to two counts of first degree sodomy. (L.F. 3, 6, 15-16). On August 30, 2007, the Circuit Court of Jasper County sentenced Appellant to two concurrent terms of fifteen years imprisonment. (L.F. 3, 6, 15-16). Appellant was delivered to the Missouri Department of Corrections on September 18, 2007. (L.F. 18, 24).

Pursuant to Rule 24.035(b), any *pro se* Form 40 filed by Appellant would have been due within 180 days of his delivery to the Missouri

Department of Corrections. Appellant's motion would have been due by March 16, 2008, but because that was a Sunday, the last date for the motion to have been timely filed would have been March 17, 2008.¹

The Joplin office of the Jasper County Circuit Clerk received and file stamped a *pro se* Form 40 filed by Appellant on March 18, 2008. (L.F. 9, 17, 18-23). A cover letter dated March 12, 2008 was filed with the *pro se* Form 40. (L.F. 9, 17). In the cover letter, Appellant wrote that the prison mail went out every morning at 8 a.m., and he needed to get the Form 40 in the mail on the day he received it, March 12, 2008, in order to make the deadline; therefore, he did not include copies of the Form 40. (L.F. 17).

On April 3, 2008, the Circuit Court of Jasper County appointed counsel to represent Appellant in his Rule 24.035 case. (L.F. 9). On April 16, 2008, Appellant's appointed counsel, Stephen Harris, Office of the Post-Conviction Division, Missouri State Public Defender, filed a "Motion Requesting Appointment of Counsel be Rescinded." (L.F. 9, 24-26). In the motion, appointed counsel requested that the Court rescind its order appointing

¹ Rule 44.01(a) provides that if a period of time ends on a Saturday, Sunday, or legal holiday the deadline is extended to the end of the next day that is not a Saturday, Sunday, or legal holiday.

counsel in Appellant's case and set forth as follows:

At the time of filing of his Form 40, Movant has spent 182 days in the Department of Corrections ... The Court is without jurisdiction to appoint counsel ... [and] has no authority to proceed ... Rule 4-3.3(a)(3) mandates that a lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel ... Rule 24.035 and case law defining the limitations for filing under the rule are clear and it is not within counsel's means to obviate those requirements.

(L.F. 24-25).

On April 22, 2008, the Circuit Court granted appointed counsel's motion requesting rescission of counsel and found that "Movant has failed to comply with Rule 24.035 and file his Criminal Procedure Form 40 within 180 days." (L.F. 9, 27). Having found that Appellant's *pro se* Form 40 was untimely, the Circuit Court also dismissed the case with prejudice. (L.F. 9). Appellant did not appeal the dismissal of his post-conviction motion.

On November 9, 2009, Appellant wrote to the Jasper County Circuit Clerk's Office, requesting copies of documents from his post-conviction case.

(L.F. 9, 28). The office responded and sent Appellant a copy of all documents contained in the post-conviction file but wrote: “Unfortunately, we do not have the envelope you mailed your documents to us in as part of the file.” (L.F. 9, 28).

On January 10, 2010, Appellant wrote to the Jasper County Circuit Clerk’s Office, requesting information on how mail received in the Carthage office of the Jasper County Circuit Clerk’s Office was forwarded to its Joplin office. (L.F. 9, 29). On February 3, 2010, the clerk responded and wrote as follows:

Mail is received in whichever office the envelope is addressed to ... When mail is opened and determined to belong to a different office in the Courthouse, the mail is taken to the correct office (in this case the correct office was the Jasper County Circuit Clerk’s Office) ... Jasper County Circuit Clerk’s Office in Carthage determined your original case was handled in the Joplin location and any subsequent filings must also be filed in the Joplin location and placed your documents in a basket for our “runner” to pick up to deliver to Joplin. Our “runner” picks up every afternoon in Carthage and delivers to the Circuit Clerk’s

Office in Joplin the following morning. He also delivers mail received in Joplin that needs to go to Carthage.

(L.F. 9, 29).²

On May 26, 2010, Appellant wrote to Mr. Harris to inform him of what he had learned regarding the procedures employed by the Circuit Clerk's Office in processing his Form 40. (L.F. 33). On June 1, 2010, Mr. Harris responded, "Yes, I would like for you to send me a copy of the letter [from] Ms. Williams indicating the day your Form 40 was received. If that appears [sic] to make a difference, I will request the Court reopen your case" (L.F. 33).

On June 11, 2010, Appellant again wrote to Mr. Harris, who responded in a letter dated June 22, 2010, as follows:

I received your letter dated June 11, 2010 on June 18 along with your and enclosures [sic], you make a case for your original form 40 being timely filed. It would require some conjecture to

² Jasper County Local Court Rule 4.3 provides that "[a]ll Circuit Court actions shall be filed with the Circuit Clerk of this County in Joplin or Carthage." "A post-conviction motion is considered filed when deposited with the circuit court clerk." *Graves v. State*, 372 S.W.3d 546, 548-549 (Mo. App. W.D. 2012), quoting *Trice v. State*, 344 S.W.3d 277, 278 (Mo. App. E.D. 2011).

state that it was actually timely filed, however, the inference is certainly there. I see two possible ways to go at this time, you could either file a motion to open the case back up, or file another Form 40 and if the issue of timeliness comes up address that situation with the facts, as you know them, from your first attempt to file. If you decide to file a motion to reopen your case, set out the facts and attache [sic] the evidence you have, and cite to applicable case law.

(L.F. 34).

On June 27, 2010, Appellant wrote to the Jasper County Circuit Clerk's Office in Carthage, stating that he "need[ed] to know when your office received [his Form 40], not when the Joplin office received it, after your office forwarded the mailing. If nothing was stamped received by your office[,] I need written reason why mailing or envelope was not stamped by your Carthage office" (L.F. 10, 30-31). Appellant cited relevant case law and wrote: "Supreme Court of Missouri has held that where a motion for postconviction relief is filed within the time period but sent to the wrong court, it should be considered timely filed and should be transferred to the proper court rather than be dismissed." (L.F. 30-31). The letter was initially file stamped on July 1, 2010 as filed with the "Jasper County Circuit Clerk, Carthage, Missouri,"

but that file stamp was crossed out. (L.F. 30). A file stamp of July 2, 2010 indicated that the letter was file stamped the next day by the “Jasper County Circuit Clerk, Joplin, Missouri.” (L.F. 30).

On August 6, 2010, the clerk responded to Appellant’s letter and wrote as follows:

In response to your letter dated June 27, 2010, and bears a postmark of June 28, 2010 and was received in our Carthage office on July 1, 2010 and in our Joplin office on July 2, 2010, you were previously notified that the envelope you mailed your Motion to Vacate, Set Aside or Correct the Judgment or Sentence is not in the file.

According to your letter dated March 12, 2008, your Motion was being mailed without copies since your housing unit was locked down and it needed to be mailed immediately. It is my presumption that your Motion went out in the next morning’s mail, being Thursday, March 13, 2008. If, as you state, mail takes three (3) days from Cameron to Carthage, that would put it being received on Sunday, March 16, 2008 on which there is no mail delivery, subsequently being delivered to our Carthage office on

Monday, March 17, 2008 and received in our Joplin office on Tuesday, March 18, 2008.

On Mondays, when we receive an abundant amount of mail, it is our normal procedure for mail to be delivered to another office to stamp one (1) envelope with the date received and then rubber band anything else to that piece of mail. ...

(L.F. 10, 32).

On August 20, 2010, Mr. Harris responded to Appellant's letters seeking help with how to reinstate his *pro se* Form 40, and provided the following advice:

I have finally found the time to go over your letters and try to determine if you have an argument for asking the Court to reinstate your Rule 24.035 postconviction case. Based on the correspondence you received from Ms. Williams it appears there is potential evidence to support your argument. Whether or not the Court has jurisdiction at this late of date is questionable. I think [it] is worth filing such a motion. ... You seem to have a good handle on the facts and the ability to draft such a motion. Attach copies of any evidence you have supporting the fact your

Form 40 arrived in Carthage on Monday March 17, 2008 and cite the relevant case law you included in your letters. (L.F. 35).

On March 9, 2011, Appellant wrote to Mr. Harris and enclosed a motion that he had drafted for his review. (L.F. 35). On March 10, 2011, Mr. Harris informed Appellant that the motion appeared to be a “well thought out and thorough motion” and suggested that Appellant file the motion. (L.F. 35).

On March 17, 2011, Appellant filed a *pro se* “Motion to Reinstate Post-Conviction Action Brought Pursuant to Rule 24.035 On the Basis of Timely Filing, and to Vacate Order Rescinded [sic] Appointment of Counsel and Dismissing 24.035 Action.” (L.F. 10, 37-44). The envelope, in which Appellant mailed the motion and attachments, was retained by the Circuit Clerk’s Office in Joplin. (L.F. 44). The envelope indicates that the motion and enclosures were “mailed from Crossroads Correctional Center;” the envelope was postmarked March 15, 2011; the envelope was addressed to the Joplin office of the Circuit Clerk’s Office; and the envelope was file stamped as received at the Joplin office on March 17, 2011. (L.F. 44). Thereafter, Appellant wrote to the clerk’s office periodically to check on the status of his motion. (L.F. 10, 45).

On November 4, 2011, the Circuit Court entered the following order: “...This Court has previously dismissed this action with prejudice for failure to file Motion within the time allowed by the rules. This Court will take no further action on this file” (L.F. 10, 46).³

On May 11, 2012, Appellant filed a *pro se* motion to reopen post-conviction proceedings, request for evidentiary hearing, and attachments. (L.F. 11, 47-56). Appellant’s motion alleged that he had been abandoned by post-conviction counsel when counsel requested his appointment as counsel be rescinded and failed to file an amended motion. (L.F. 11, 48-50). On May 21, 2012, the Circuit Court of Jasper County overruled Appellant’s Motion to Reopen Post-Conviction Proceeding and Request for Hearing. (L.F. 11, 57).

The Court of Appeals, Southern District, reversed the motion court’s denial of Appellant’s motion to re-open the post-conviction case and remanded the case for a hearing on the issue of whether Appellant timely filed his *pro se* Form 40. *Vogl v. State*, No. SD32097 (Mo. App. S.D. January

³ Appellant attempted to perfect an appeal from that order. (L.F. 10-11). He sought the appointment of counsel in the Court of Appeals, but such motion was denied, and the appeal was ultimately dismissed in May 2012, due to Appellant’s “Failure to Perfect Appeal.” *Vogl v. State*, SD31797.

16, 2013). Following the appellate court's decision, the Circuit Court of Jasper County ordered the case reopened and appointed a public defender to represent Appellant. (Supp. L.F. 1-2).

This Court granted the State's Application for Transfer.

C. Analysis.

Rule 24.035 provides the exclusive procedure by which a person convicted of a felony on a plea of guilty may seek relief in the sentencing court for claims that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, including claims of ineffective assistance of trial and appellate counsel. Mo. Sup. Ct. R. 24.035(a). A motion under Rule 24.035 must be filed within 180 days of the later of (1) the date the person is delivered to the custody of the department of corrections; or (2) the date the new judgment or sentence was final for purposes of appeal. Mo. Sup. Ct. R. 24.035(b).

"Failure to file a motion within the time provided by this Rule 24.035 shall constitute a complete waiver of any right to proceed under this Rule 24.035 and a complete waiver of any claim that could be raised in a motion filed pursuant to this Rule 24.035." Mo. Sup. Ct. R. 24.035(b). It is the court's duty to "enforce the mandatory time limits and the resulting complete waiver

in the post-conviction rules—even if the State does not raise the issue.”
Dorris v. State, 360 S.W.3d 260, 268 (Mo. 2012).

In this case, Appellant was delivered to the Missouri Department of Corrections on September 18, 2007. (L.F. 18, 24). Pursuant to Rule 24.035(b), Appellant’s motion was due by March 17, 2008.⁴ The Joplin office of the Jasper County Circuit Clerk received and file stamped a *pro se* Form 40 filed by Appellant on March 18, 2008. (L.F. 9, 17, 18-23).

On April 3, 2008, the Circuit Court of Jasper County appointed counsel to represent Appellant in his Rule 24.035 claim. (L.F. 9). On April 16, 2008, Appellant’s appointed counsel filed a motion requesting the appointment be rescinded because Appellant’s motion had been filed more than 180 days after being delivered to the Department of Corrections and was untimely, and therefore the court was without jurisdiction to hear the case. (L.F. 9, 24-26).

On April 22, 2008, the motion court rescinded its appointment of counsel and dismissed Appellant’s case with prejudice because the motion was untimely filed more than 180 days after Appellant was delivered to the

⁴ Appellant’s motion would have been due by March 16, 2008, but because it was a Sunday, the last date for the motion to have been timely filed would have been March 17, 2008. Mo. Sup. Ct. R. 44.01(a).

Department of Corrections. (L.F. 9, 27). Appellant's untimely filed post-conviction motion was a fatal defect that could not be cured by a timely amended motion, and resulted in a complete waiver of Appellant's right to proceed under Rule 24.035. *Dorris*, 360 S.W.3d at 267.

Appellant's post-conviction motion may only be reopened if the record shows that Appellant was abandoned by his post-conviction counsel. *Carroll v. State*, 131 S.W.3d 907, 909 (Mo. App. S.D. 2004). There are only three recognized scenarios in which a court may find that a movant was abandoned by post-conviction counsel: (1) when post-conviction counsel takes no action with respect to filing an amended motion, and the record shows movant is deprived of a meaningful review of his claims; (2) when post-conviction counsel is aware of the need to file an amended post-conviction relief motion and fails to do so in a timely manner; or (3) when post-conviction counsel overtly acts to prevent the movant's timely filing of a post-conviction motion. *Kirk v. State*, 360 S.W.3d 859, 864 (Mo. App. S.D. 2011).

In the present case, Appellant asserts that he timely filed his pro se motion for post-conviction relief, pursuant to Rule 24.035, on March 17, 2008, when the Jasper County Circuit Clerk's Office in Carthage allegedly received the motion. (App. Sub. Br. 20). Appellant speculates that the clerk in Carthage forwarded it to the Joplin office, where it was received and file-

stamped March 18, 2008, one day past the deadline. (App. Sub. Br. 20-21). Appellant argues that he was abandoned by post-conviction counsel when counsel informed the motion court that Appellant's motion was untimely and asked to be removed because counsel took no action with respect to filing an amended motion or a statement in lieu of amended motion. (App. Sub. Br. 21). Specifically, Appellant argues that he was abandoned because appointed counsel was required to inquire as to whether Appellant's Form 40 was timely received but misfiled by the clerk as part of his duty to investigate and timely file an amended motion under Rule 24.035. (App. Sub. Br. 22). Appellant's argument is without merit because it inaccurately characterizes potential ineffective assistance of post-conviction counsel as abandonment.

To be entitled to an evidentiary hearing under Rule 24.035, the movant must allege facts demonstrating a basis for relief as well as facts establishing that the motion is timely filed. *Dorris*, 360 S.W.3d at 267. One manner in which the movant may allege facts showing he timely filed his motion is by "alleging and proving by a preponderance of the evidence in his amended motion that the court misfiled the motion." *Id.*

Under Rule 24.035(e), appointed post-conviction counsel is required to ascertain whether the *pro se* motion is supported by sufficient facts and includes all claims known to the movant for attacking the judgment and

sentence. *Gehlert v. State*, 276 S.W.3d 889, 892 (Mo. App. W.D. 2009); Mo. Sup. Ct. R. 24.035(e). If the *pro se* motion is deficient in either regard, counsel must file an amended motion that sufficiently alleges the additional facts or claims. *Id.*, citing *Pope v. State*, 87 S.W.3d 425, 427 (Mo. App. W.D. 2002); Mo. Sup. Ct. R. 24.035(e). Alternatively, if counsel determines an amended motion is not necessary, counsel must file a statement explaining what actions were taken to ensure the sufficiency and completeness of the *pro se* motion. *Id.*; Mo. Sup. Ct. R. 24.035(e).

A threshold issue in this case is whether Appellant has identified any sort of abandonment by post-conviction counsel. The apparent untimely filing of the *pro se* motion was not attributable to post-conviction counsel; thus, this case does not involve any overt action or active interference by post-conviction counsel that prevented the timely filing of the *pro se* motion. *Cf. McFadden v. State*, 256 S.W.3d 103 (Mo. 2008). And because the *pro se* motion was, on its face, untimely, Appellant had no right to proceed under the rule. In short, his untimely filing constituted a “complete waiver” of his right to proceed under Rule 24.035, and, accordingly, he was not entitled to the appointment of counsel. *See generally Morgan v. State*, 8 S.W.2d 151, 152-154 (Mo.App. S.D. 1999) (the motion court did not clearly err in rescinding the appointment of counsel and dismissing the post-conviction motion

because “movant filed his *pro se* motion out of time, thereby making it impossible to timely file an amended motion”).

Notwithstanding the lack of any overt action by counsel preventing the timely filing of the *pro se* motion, and ignoring the fact that the untimely filing constituted a complete waiver to proceed under the rule, Appellant nevertheless argues that Rule 24.035(e) “require[d] appointed counsel to investigate and then timely file an amended motion or a statement in lieu of amended motion” (App. Sub. Br. 22). He asserts that instead of moving to rescind the appointment, counsel should have conferred with Appellant and investigated the timeliness issue to ascertain whether there were facts excusing the untimely filing (App. Sub. Br. 20, 23-24). He asserts that a lawyer must be zealous, and he points out that “it is possible for a *pro se* Form 40 to have been timely and yet the file stamp on the face of the motion indicates a date past the deadline” (App. Sub. Br. 24-25).

But even if the initial appointment of counsel gave rise to an attorney-client relationship, 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. To the contrary, as Mr. Harris stated in his motion to rescind the appointment, Rule 4-3.3(a)(3) requires “that a lawyer shall not knowingly fail

to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client[.]” (L.F. 25). Moreover, even if the facts alleged by Appellant were found to be true, and even if post-conviction counsel had some obligation under Rule 24.035(e), the actions taken by post-conviction counsel would constitute only ineffective assistance of counsel, and not abandonment.

Abandonment generally occurs when the record shows that post-conviction counsel totally defaulted in carrying out the obligations imposed by Rule 24.035, or when counsel files an amended motion that is so patently defective that it amounts to a nullity.⁵ *Dudley v. State*, 254 S.W.3d 109, 111 (Mo. App. W.D. 2008), citing *State v. Bradley*, 811 S.W.2d 379, 384 (Mo. 1991), *Robinson v. State*, 211 S.W.3d 162, 163 (Mo. App. E.D. 2007), see also *Sanders v. State*, 807 S.W.2d 493 (Mo. 1991); *Luleff v. State*, 807 S.W.2d 495

⁵ An amended motion that is so patently defective that it amounts to a nullity has been defined as “conduct that is tantamount to ‘a total default in carrying out the obligations imposed upon appointed counsel’ under the rules.” *Pope v. State*, 87 S.W.3d 425, 428 (Mo. App. W.D. 2002), citing *State v. Bradley*, 811 S.W.2d 379, 384-385 (Mo. 1991), *Trehan v. State*, 835 S.W.2d 427, 429 (Mo. App. S.D. 1992), *Russell v. State*, 39 S.W.3d 52, 54 (Mo. App. E.D. 2001).

(Mo. 1991). Missouri courts have repeatedly held that failing to draft a good amended motion does not constitute abandonment by post-conviction counsel. *Gehrke*, 280 S.W.3d at 58; *Howard v. State*, 302 S.W.3d 739, 742 (Mo. App. E.D. 2010); *Edgington v. State*, 189 S.W.3d 703, 707 (Mo. App. W.D. 2006).

In *Morgan v. State*, post-conviction counsel filed a letter informing the motion court of the untimeliness of the movant's pro se motion. *Morgan v. State*, 8 S.W.3d at 152-154. The movant argued that his post-conviction counsel abandoned him when counsel failed to file an amended motion and acquiesced in the dismissal of his pro se motion. *Id.* at 153. The court noted that abandonment may occur when post-conviction counsel takes no action on movant's behalf, so that it appears on the face of the record that movant is deprived of a meaningful review of post-conviction claims. *Id.* (citing *Moore v. State*, 934 S.W.2d 289, 291 (Mo. 1996)). The court found that the record rebuffed this proposition because post-conviction counsel's letter to the court recognizing the untimeliness of the pro se motion indicated that counsel did take some action on the movant's behalf. *Id.* at 154. The instant case is similar because post-conviction counsel's letter to the court recognizing the untimeliness of Appellant's pro se motion demonstrates that counsel did take action on Appellant's behalf and therefore did not abandon Appellant.

Appellant argues that *Morgan* does not apply because the movant therein “[did] not argue that his Rule 24.035 motion was timely filed,” but rather, he wanted to challenge the constitutionality of the time limits. (App. Sub. Br. 41). While the movant in *Morgan* did challenge the constitutionality of the time limits, he also argued that “postconviction counsel abandoned him when counsel failed to file an amended motion and acquiesced in the dismissal of the pro se motion.” *Id.* at 153. After holding that the time limits were reasonable, valid, mandatory, and constitutional, the court went on to address the movant’s abandonment claim independently of his constitutional claim. *Id.*

Appellant also distinguishes *Morgan* by arguing that appointed counsel in that case correctly represented to the court that the movant was untimely and that there was nothing counsel could have alleged in an amended motion to permit a meaningful review of the movant’s post-conviction claims. (App. Sub. Br. 41). But this alleged distinction does not aid Appellant because, in the instant case, even if post-conviction counsel incorrectly informed the court that Appellant’s motion was untimely, or failed to raise allegations that could have permitted meaningful review of Appellant’s claims, counsel’s conduct amounted to ineffective assistance of counsel and not abandonment. Unlike the effective assistance of counsel—which can depend on whether

counsel was correct or incorrect—abandonment depends on whether counsel totally defaulted in carrying out duties.

In the instant case, assuming that the rule even applied, the record does not demonstrate that post-conviction counsel totally defaulted in carrying out the obligations imposed by Rule 24.035(e). Instead, the record shows that post-conviction counsel did in fact investigate whether Appellant's *pro se* motion was supported by sufficient facts establishing that the motion was timely filed. See *Dorris*, 360 S.W.3d at 267, *Gehlert*, 276 S.W.3d at 892. Post-conviction counsel's request for rescission of his appointment shows that counsel investigated Appellant's motion and determined that Appellant's motion was untimely. *Morgan*, 8 S.W.3d at 154. Appellant's complaint is not that counsel entirely failed to conduct an investigation, but that counsel's investigation was insufficient because it did not uncover Appellant's alleged reasons for being untimely. This constitutes potential ineffective assistance of counsel rather than abandonment.

The Court of Appeals addressed a similar matter in *Stewart v. State*, 261 S.W.3d 678 (Mo. App. E.D. 2001). In *Stewart*, the *pro se* motion was due October 3, 2001, but was file stamped October 4, 2001 and subsequently denied by the circuit court as untimely. *Id.* at 678. Four years later, upon a motion by Stewart, the motion court vacated its earlier order, considered the

merits of Stewart's *pro se* motion, and ultimately denied relief. *Id.* On appeal, the State challenged the motion court's jurisdiction to entertain the merits of the motion after previously denying it as untimely. *Id.* at 679. Stewart alleged that his post-conviction counsel abandoned him by failing to investigate the timeliness of his *pro se* motion and failing to file an amended motion. *Id.* Evidence in the record suggested that the clerk's office actually received Stewart's *pro se* motion on October 1, 2001, which would have been timely. *Id.* Evidence also indicated that counsel requested leave to file an amended motion out of time, and the court essentially forbade her from filing an amendment based on their shared belief that it was untimely. *Id.* The court held that counsel's conduct did not constitute abandonment because "counsel took *some action* and had *some explanation*." *Id.* (emphasis in original). Furthermore, the court stated that while Stewart had framed the issue as abandonment in order to fit within the exception to Rule 75.01, he actually asserted a claim of ineffective assistance of post-conviction counsel for her failure to investigate the facts surrounding delivery and receipt of his *pro se* motion. *Id.*

In the instant case, post-conviction counsel also took *some action* and had *some explanation* for failing to file an amended motion. Post-conviction counsel acted on Appellant's behalf by investigating the timeliness of

Appellant's *pro se* motion and by requesting to be removed as counsel when he discovered that it was untimely. This also explained why counsel did not file an amended motion. Appellant argues that *Stewart* is not applicable to his case because in *Stewart* post-conviction counsel sought leave to file an amended motion but was not permitted to do so. (App. Sub. Br. 42). However, post-conviction counsel in both cases investigated their client's claim, filed the results of their investigation with the court, and failed to file an amended motion. Essentially, Appellant implicitly argues that the actions of counsel in *Stewart* were reasonable while the actions of counsel in the instant case were not reasonable. Arguing that counsel acted in manner that failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise in similar circumstances constitutes a claim of ineffective assistance of counsel and not a claim of abandonment.

Historically, both this Court and the Court of Appeals have repeatedly held that claims of ineffective post-conviction counsel are categorically unreviewable. *Gehrke v. State*, 280 S.W.3d 54, 58 (Mo. 2009); *Hutchison v. State*, 150 S.W.3d 292, 303 (Mo. 2004); *State v. Hunter*, 840 S.W.2d 850, 871 (Mo. 1992); *Yarberry v. State*, 372 S.W.3d 568, 574 (Mo. App. S.D. 2012); *Kirk v. State*, 360 S.W.3d 859, 864 (Mo. App. S.D. 2011); *Dean v. State*, 314 S.W.3d 402, 405 (Mo. App. S.D. 2010). This Court and the Court of Appeals have also

repeatedly declined to expand abandonment to include ineffective assistance of post-conviction counsel. *Taylor v. State*, 254 S.W.3d 856, 858 (Mo. 2008); *Barnett v. State*, 103 S.W.3d 765, 774 (Mo. 2003); *Winfield v. State*, 93 S.W.3d 732, 733-739 (Mo. 2002); *Kirk v. State*, 360 S.W.3d 859, 864 (Mo. App. S.D. 2011); *State v. Hope*, 954 S.W.2d 537, 545 (Mo. App. S.D. 1997).

In *Gehrke v. State*, this Court was asked to expand the abandonment doctrine to include counsel's conduct in failing to properly file a notice of appeal of a judgment overruling a post-conviction motion because it was not accompanied by an *in forma pauperis* affidavit or a filing fee. *Gehrke*, 280 S.W.3d at 58. The Court found that counsel's actions constituted ineffective assistance of counsel rather than abandonment and refused to expand the scope of abandonment to include ineffective assistance of counsel claims. *Id.*

This Court has also intentionally limited the scope of abandonment to preserve potential relief under federal habeas corpus proceedings. *Gehrke*, 280 S.W.3d at 59. This is because federal habeas proceedings require that a movant exhaust all available state remedies, including appeal and post-conviction remedies, before bringing a federal claim. *Id.* These remedies are exhausted only when they are no longer available, regardless of the reason. *Id.* "If the scope of abandonment were expanded further, it is foreseeable that federal habeas corpus claims could be denied due to a movant's failure to

bring a motion to reopen post-conviction proceedings. This would frustrate the legitimate goals of a prompt comprehensive review and finality.” *Id.*

The motion court did not clearly err in denying, without an evidentiary hearing, Appellant’s motion to reopen his Rule 24.035 case because Appellant was not abandoned by post-conviction counsel when counsel informed the court that Appellant’s original *pro se* motion for post-conviction relief was untimely filed more than 180 days after Appellant had been delivered to the Department of Corrections.

CONCLUSION

The motion court did not clearly err in denying Appellant's motion to reopen his Rule 24.035 case. The ruling of the motion court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 5,565 words, excluding the cover and certification, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 30th day of July, 2013, to:

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