

No. 88784

In the
Missouri Supreme Court

MICHAEL A. TAYLOR,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from Jackson County Circuit Court
The Honorable John R. O'Malley, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

1. Facts of the Crime

Appellant Michael Taylor pleaded guilty in the Jackson County Circuit Court to first degree murder, §565.020, RSMo. 1994; armed criminal action, §571.050, RSMo. 1994; kidnapping, §565.110, RSMo. 1994 and forcible rape, §566.030, RSMo. Cum. Supp. 1993. This court described the circumstances surrounding appellant's crimes in the consolidated appeal opinion.

According to Taylor's testimony at his guilty plea, Taylor's videotaped statement and other evidence adduced in the sentencing hearing, Taylor and a companion, Roderick Nunley, spent the night of March 21, 1989, driving a stolen Chevrolet Monte Carlo, stealing "T-tops," smoking marijuana and drinking wine coolers. At one point during the early morning hours of March 22, they were followed by a police car, but lost the police after a high speed chase on a highway. About 7:00 a.m., they saw fifteen-year-old Ann Harrison waiting for the school bus at the end of her driveway. Nunley told Taylor, who was driving at the time, to stop so Nunley could snatch her purse. Taylor stopped the car, Nunley got out, pretended to need directions, grabbed her and put her in the front seat between Taylor and Nunley. Once in the car, Nunley blindfolded Ann with his sock and threatened to stab her with a screwdriver if she was not quiet. Taylor drove to Nunley's house and took Ann to the basement. By this time her hands were bound with cable wire. Nunley removed Ann's clothes and had forcible sexual intercourse with her. Taylor

then had forcible intercourse with her. They untied her, and allowed her to dress. Ann tried to persuade them to call her parents for ransom, and Nunley indicated he would take her to a telephone to call home. They put the blindfold back on her and tied her hands and led her to the trunk of the Monte Carlo. Ann resisted getting into the trunk until Nunley told her it was necessary so she would not be seen. Both men helped her into the trunk.

Nunley then returned to the house for two knives, a butcher knife and a smaller steak knife. Nunley argued with Taylor about whether to kill her. Nunley did not want Ann to be able to testify against him and emphasized he and Taylor were in this together. Nunley then attempted to slash her throat but the knife was too dull. He stabbed her through the throat and told Taylor to "stick her." Nunley continued to stab, and Taylor stabbed Ann "two or three times, probably four." He described how "her eyes rolled up in her head, and she was sort to like trying to catch her, her breath."

Nunley and Taylor argued about who would drive the Monte Carlo, and Nunley ended up driving it following Taylor who was driving another car. Taylor picked up Nunley after he abandoned the Monte Carlo with Ann Harrison in the trunk. They returned to Nunley's house where Nunley disposed of the sock, the cable wire, and the knives.

When the school bus arrived at the Harrison home to pick up Ann, the driver honked because she was not there. Mrs. Harrison looked out of the window and noticed Ann's purse, gym clothes, books, and flute lying on the

driveway. She waved for the bus to go on and began to look for her daughter. Police quickly mounted a ground and air search. Ann Harrison's body was discovered the evening of March 23rd when police found the abandoned Monte Carlo and a friend of the car's owner opened the trunk.

The State's physical evidence included hair matching Taylor's collected from Ann Harrison's body and the passenger side of the Monte Carlo, hair matching Ann's collected from Nunley's basement, sperm and semen belonging to Taylor found on Ann's clothes and body. An autopsy revealed a lacerated vagina, six stab wounds to Ann's chest, side, and back which penetrated her heart and lungs, and four stab wounds to her neck. The medical examiner testified Ann Harrison was alive when all the wounds were inflicted and could have remained conscious for ten minutes after the stabbing. She probably lived thirty minutes after the attack.

State v. Taylor, 929 S.W.2d 209, 214 (Mo. banc 1996) (footnote omitted).

2. Trial, Direct Appeal & Post-Conviction Litigation

The grand jury charged appellant with first degree murder, armed criminal action, kidnapping and forcible rape. On June 11, 1990, the state filed an information in lieu of indictment charging appellant as a prior, persistent and Class X offender.

On February 8, 1991, appellant appeared with his attorneys before the Honorable Alvin C. Randall and expressed his desire to enter a plea of guilty to these charges in open court and on the record pursuant to Missouri Supreme Court Rule 27.01(b). After a three day punishment phase hearing, Judge Randall sentenced appellant to death. Appellant also

received sentences of life imprisonment for rape, fifteen years imprisonment for kidnapping and ten years imprisonment for armed criminal action, all terms to run consecutively.

Appellant brought a post-conviction action pursuant to Missouri Supreme Court Rule 24.035, challenging his guilty plea and sentence. Because of the allegations contained in his post-conviction pleadings, the entire bench in the Sixteenth Judicial Circuit in Jackson County recused itself from the post-conviction litigation by order of the presiding judge, and the Missouri Supreme Court appointed Special Judge Robert H. Dierker, Jr. After an extensive evidentiary hearing, mostly centered on the issue of Judge Randall's alleged drinking during the sentencing proceeding, Judge Dierker denied appellant's post-conviction motion.

A consolidated appeal challenging the guilty plea, the imposition of the death penalty and the denial of the Rule 24.035 motion for post-conviction relief came to the Missouri Supreme Court alleging some fifteen claims of error. After the case was fully briefed by the parties and after hearing oral argument in the matter, the Missouri Supreme Court issued the following order on June 29, 1993:

ORDER

Judgment vacated. Cause remanded for new penalty hearing, imposition of sentence, and entry of new judgment.

On January 14, 1994, appellant filed a motion in the circuit court to withdraw his guilty plea; he filed suggestions in support of this motion on January 20, 1994. After denial by the circuit court, appellant filed a motion for reconsideration of appellant's motion to withdraw his guilty plea, which was denied on April 8, 1994. Immediately before

resentencing, defense counsel reasserted appellant's motion and argued its merits before Circuit Judge H. Michael Coburn, which Judge Coburn denied.

Appellant's second punishment phase hearing before Judge Coburn began on May 2, 1994, and the court heard evidence for three days. The evidence was held open for over a month, and appellant presented the testimony of additional witnesses on May 12, 1994, and June 6, 1994. The state adduced evidence concerning the abduction and murder of Ann Harrison, as well as evidence of appellant's escape from custody. The defense called ten witnesses in purported mitigation of punishment, including three witnesses who testified about appellant's mental condition and the effects of his drug and alcohol abuse, a minister who was opposed to the death penalty, a Catholic brother who had witnessed an execution by lethal injection and numerous relatives of appellant who recounted his relatively normal background and upbringing. In addition, Judge Coburn agreed to consider testimony from four witnesses' prior proceedings: Professor Nunn, an expert in the study of patterns of racial discrimination in the imposition of the death penalty; Dr. Patricia Fleming, a psychologist who testified as to her mental health evaluation of appellant; the Reverend Albert Johnson, appellant's minister; and Kareem Hurley's testimony from co-defendant Nunley's second sentencing proceeding.

On June 17, 1994, over three years after he had first received the penalty of death, appellant appeared before Judge Coburn for formal sentencing. In oral and written findings, Judge Coburn found six statutory aggravating circumstances beyond a reasonable doubt, as well as three non-statutory aggravating circumstances. Judge Coburn found the existence of one mitigating circumstance, rejecting several others offered by appellant, and concluded

that the mitigating circumstance did not outweigh the aggravating circumstances of this case, making the sentence of death appropriate. Appellant also received fifty years for armed criminal action, fifteen years for kidnapping and life imprisonment for rape, all terms to run consecutively. Appellant filed an appeal.

On September 15, 1994, appellant filed his pro se motion for state post-conviction relief pursuant to Missouri Supreme Court Rule 24.035, challenging his guilty plea and challenging his second sentencing proceeding and sentence of death. An amended motion was filed by appointed counsel on December 27, 1994. The circuit court held an evidentiary hearing on May 18, 1995, wherein appellant presented evidence almost exclusively on the issue of ineffective assistance of counsel for failing to investigate and present sufficient mitigating evidence. On June 20, 1995, the motion court, the Honorable Edith Messina presiding, issued findings of fact and conclusions of law denying appellant's Rule 24.035 motion.

Because appellant pled guilty, his consolidated appeal was limited to the Missouri Supreme court's mandatory sentence review (proportionality), §565.035.5, RSMo. 1994, and review of the denial of the motion to withdraw plea and the denial of post-conviction relief. The Missouri Supreme Court affirmed. State v. Taylor, 929 S.W.2d 209 (Mo. banc 1996). The United States Supreme Court denied discretionary review. Taylor v. Missouri, 519 U.S. 1152 (1997).

Appellant initiated a petition for writ of habeas corpus in the United States District Court for the Western District of Missouri. The district court denied the petition, and the

United States Court of Appeals affirmed. Taylor v. Bowersox, 329 F.3d 963 (8th Cir. 2003), cert. denied, 541 U.S. 947 (2004).

3. Other Litigations

Then appellant filed a motion to recall the mandate in the Supreme Court of Missouri. The court denied that motion, and the United States Supreme Court denied discretionary review. Taylor v. Missouri, 126 S.Ct. 737 (2005). On January 3, 2006, the Missouri Supreme Court set February 1, 2006 as appellant's execution date, a date eventually stayed. Crawford v. Taylor, 546 U.S. 1161 (2006).

Meanwhile, on November 8, 2005, appellant filed a petition in the Jackson County Circuit Court alleging that he was entitled to relief from his criminal judgment and sentence because of "fraud" in the post-conviction proceeding. Missouri Supreme Court Rule 74.06(d). On January 31, 2006, on the eve of the execution, the circuit court conducted an evidentiary hearing and indicated it would rule on the petition on February 1, 2006 (App. 28). Also on January 31, 2006, the state filed with the Missouri Supreme Court a petition for writ of prohibition, and on February 1, the Missouri Supreme Court granted a preliminary writ. The Jackson County Circuit Court also denied the petition on February 1, 2006. Appellant did not appeal that judgment. After briefing, the Missouri Supreme Court made the preliminary writ absolute. State ex rel. Nixon v. Daugherty, 186 S.W.3d 253 (Mo. banc 2006), cert. denied, 127 S.Ct. 493 (2006).

In state habeas litigation, petitioner argued that he was abandoned during his Rule 24.035 litigation, and the court rejected the contention. State ex rel. Taylor v. Purkett, No. SC87412 (Mo.). Similarly, one of the claims in one of appellant's motions to recall the

mandate was a claim that he received ineffective assistance of counsel at the guilty plea and on post-conviction appeal, State v. Taylor, No. SC77365 (Mo.). The court denied that motion.

Also, pending before the Supreme Court is a challenge to lethal injection as a means of execution. Taylor v. Crawford, No. 07-303 (U.S.).

Meanwhile, on September 2, 2005, appellant filed a “Motion to Reopen Post-Conviction Proceeding Due to Abandonment of Rule 24.035 Counsel” in the Jackson County Circuit Court (Legal File – hereinafter LF – pages 1, 2). The circuit court assigned the matter a new cause number, Michael A. Taylor v. State of Missouri, No. 0516CV30200 (Jackson County Circuit Court) (LF, page 2). Sixteen months later, counsel filed a “Memorandum In Support of Movant’s Motion to Reopen Post-Conviction Case” (LF, page 37). On July 25, 2007, the circuit court entered an “Order” denying the motion (LF, page 76). Appellant appealed on August 31, 2007 (LF, page 78).

ARGUMENT

I.

The Missouri Supreme Court has no jurisdiction to entertain this appeal because (1) the trial court had no jurisdiction to consider the litigation; and (2) appellant does not appeal a “Judgment.”

Appellant initiated his litigation on September 2, 2005, by filing a “Motion to Reopen Post-Conviction Proceedings Due to Abandonment of Rule 24.035 Counsel” (LF, page 2). In the motion, appellant did not identify a statute or rule that gave the circuit court jurisdiction to decide the motion (LF, pages 2-29). Similarly, in appellant’s memorandum in support, appellant did not identify a statute or rule that gave the circuit the jurisdiction (LF, pages 37-63). The failure to identify the source of jurisdiction for the circuit court continues in appellant’s brief on appeal (App. Brf., pages 4, 5). Because the circuit court had no jurisdiction to consider the motion, the appeal should be dismissed. See State v. Bryant, 237 S.W.3d 603, 605 (Mo. App. S.D. 2007).

It is possible to read appellant’s brief as suggesting that the litigation in the court below was authorized by Missouri Supreme Court Rule 24.035. That inference arises from appellant’s assertion that “appellate review of decisions under Rule 24.035 is limited to whether the findings, conclusions and judgment of the motion court are clearly erroneous” (App. Brf., page 21). But such a reading is of no benefit to appellant because there is no authority under Rule 24.035 for the filing of a second post-conviction motion. Indeed, the Rule states, “the circuit court shall not entertain successive motions.” Missouri Supreme Court Rule 24.035(l). And even if such a motion were allowed, it would not be a timely

motion. Missouri Supreme Court Rule 24.035(b). Treating the litigation below as a second Rule 24.035 motion leads to the result that it must be summarily dismissed.

Further, there is no alternative basis for jurisdiction by the circuit court for an independent lawsuit challenging the original Rule 24.035 judgment. See State ex rel. Nixon v. Daugherty, 186 S.W.3d 253 (Mo. banc 2006). At least in that litigation, appellant identified the purported source of jurisdiction as Missouri Supreme Court Rule 74.06(d). Identifying that rule as the source of jurisdiction allowed the reviewing court to determine that circuit court jurisdiction did not exist under that rule. In contrast, in the present litigation, appellant does not even identify the source of jurisdiction.

Conceivably, appellant intended for his September 2, 2005 motion to be filed with the original Rule 24.035 litigation (LF, page 2). That assertion is belied by appellant's leaving a blank for a case number in the initiating document (LF, page 2). That assumption is also belied by the circuit court's assigning the cause a new case number, Number 0516-CV30200 (LF, page 2). That assumption is further belied by appellant's failure to protest that action by the circuit court (LF, page 37). But assuming that was appellant's intent, the circuit court had no jurisdiction. Under Missouri Supreme Court Rule 75.01, a trial court has jurisdiction to reopen a Rule 29.15 proceeding in the 30 days following the court's ruling granting or denying post-conviction relief. E.g., Cook v. State, 156 S.W.3d 418, 420 (Mo. App. E.D. 2005). Obviously, more than thirty days had passed since the original Rule 24.035 judgment.

Some appellate courts have written, however, that an exception to Rule 75.01's strict time limit exists when there is abandonment by post-conviction counsel. E.g., Edgington v.

State, 189 S.W.3d 703, 706 (Mo. App. W.D. 2006). There is no authority in the text of Rules 24.035, 29.15 and 75.01 for that proposition. Edgington identified this court's decision in State ex rel. Nixon v. Jaynes, 63 S.W.3d 210, 217-18 (2001), as authority for such a motion. But the dicta in Jaynes does not purport to create jurisdiction past the 30 day period. Nothing in Jaynes directs the circuit court to reopen the original post-conviction relief litigation. See id. at 212. And since the Jaynes decision, this court has not modified Rules 24.035, 29.15 or 75.01 to create jurisdiction for abandonment-of-counsel claims.¹

Furthermore, the court has no appellate jurisdiction. In the circuit court's July 25, 2007 decision, the circuit court entered an "Order" in which appellant's motion was denied (App. A-1; LF, page 76). The circuit court did not purport to enter judgment (LF, page 76). The docket sheet does not reflect a judgment (LF, page 1) attached to his notice of appeal (LF, page 78), only the circuit court's "Order" (LF, page 8). Rule 74.01(a) requires that a judgment be "denominated 'judgment' or 'decree.'" Because appellant does not appeal from a circuit court judgment, the court has no appellate jurisdiction.

¹ Even if there is no 30 day time limit in which to file a "Motion to Reopen," there should be a requirement that the "Motion to Reopen" be filed within a reasonable time period, not nine years after the affirmance of the denial of post-conviction relief.

II.

The court should decline to reopen the Rule 24.035 litigation.

Appellant contends that he should be entitled to reopen his post-conviction proceeding because of abandonment by post-conviction counsel (App. Brf., page 20) and because of estoppel (App. Brf., pages 31-41). The reasons appellant asserts do not warrant reopening the post-conviction litigation; thus, the circuit court properly denied appellant's motion to reopen.

Different divisions of the court of appeals address the abandonment question in different ways. For example, the Court of Appeals for the Eastern District suggests that a motion to reopen is available in three circumstances.

A narrow exception to this limitation allows the post-conviction court to reopen the proceeding to address a claim of abandonment by post-conviction counsel in two instances: 1) when post-conviction counsel fails to take any action on a movant's behalf and the record shows the movant is deprived of a meaningful review of his claims; or 2) when post-conviction counsel is aware of the need to file an amended motion and fails to do so in a timely fashion. [Edgington v. State, 189 S.W.2d 703, 706 (Mo. App. W.D. 2006)]. Abandonment occurs if post-conviction counsel files an amended motion so patently defective that it amounts to a nullity. Robinson v. State, 211 S.W.3d 162, 163 (Mo. App. E.D. 2007). Johnson v. State, ____ S.W.3d ____ 2008 WL 220623, at *1 (Mo. App. E.D. Jan. 29, 2008).

In contrast, the Western District articulates the standard as follows:

The pertinent question, then is whether Simmons raised any claims in his motion that fall within the narrow definition of “abandonment.” Abandonment by post-conviction counsel is limited to two circumstances: (1) where counsel fails to take any action with respect to filing an amended motion and the movant is thereby deprived of a meaningful review of his claims; and (2) where counsel fails to file a timely amended motion despite being aware of the need to do so. Barnett v. State, 103 S.W.3d 765, 773-74 (Mo. banc 2003); [Middleton v. State, 200 S.W.3d 140, 143 (Mo. App. W.D. 2006)]. The Missouri Supreme Court has consistently refused to expand the scope of abandonment. Middleton, 200 S.W.3d at 143 (citing Barnett, 103 S.W.3d at 774).

A few cases have included in the definition of “abandonment” counsel’s filing an amended motion that is “so patently defective that it amounts to ‘a nullity.’” See, e.g., Robinson v. State, 211 S.W.3d 162, 163 (Mo. App. E.D. 2007); Simmons v. State, 190 S.W.3d 558, 559-60 (Mo. App. E.D. 2006).

Simmons v. State, 240 S.W.3d 166, 171 (Mo. App. W.D. 2007). And the Southern District appears to follow the take-no-action approach and the basis-to-amend approaches. Brown v. State, 179 S.W.3d 404, 407 (Mo. App. S.D. 2005). But in Shifkowski v. State, 181 S.W.3d 633, 634 (Mo. App. S.D. 2006), the Southern District cites with approval Cook v. State, 156 S.W.3d 418, 420 (Mo. App. E.D. 2005) that includes the so-patently-defective approach to

abandonment. Id. at 420. Under none of these theories of abandonment does appellant demonstrate an entitlement to reopen his post-conviction litigation.

The circuit court concluded that “the record is clear that movant has not been abandoned by his second post-conviction counsel . . .” (LF, page 80; App. A-5). Assuming that the appellate standard of review is clearly erroneous, Missouri Supreme Court Rule 24.035(k), appellant does not demonstrate that that conclusion is clearly erroneous. During appellant’s second PCR proceeding, he was not abandoned by counsel. On September 15, 1994, appellant filed his pro se motion for state post-conviction relief under Missouri Supreme Court Rule 24.035 challenging his guilty plea and challenging his second sentence of death and the effectiveness of counsel (PCR 2 LF, pages 1, 5-35). Appointed counsel filed an amended motion on December 27, 1994 (PCR 2 LF, pages 2, 49-80). The circuit court held an evidentiary hearing on May 18, 1995 wherein appellant presented evidence on the issue of ineffective assistance of counsel for failing to investigate and present sufficient mitigating evidence (PCR 2 Tr.). The circuit court issued findings of fact and conclusions of law denying the Rule 24.035 motion (PCR 2 LF, pages 4, 238-76).

From this discussion, it is apparent that there was no abandonment by post-conviction counsel. Post-conviction counsel filed an amended post-conviction relief motion, and that motion was not “so patently defective.” As noted, the motion was sufficient to invoke the circuit court’s discretion to hold an evidentiary hearing on the claims.

On appeal, appellant contends that abandonment did not occur at the post-conviction trial court level, but that it did occur at the post-conviction appellate level only (App. Brf., pages 23-25). Appellant asserts that appellate counsel’s decision to present a 100 page

appellate brief containing allegations of error concerning sentencing, concerning the trial court's decision not to allow withdrawal of a guilty plea and concerning ineffective assistance of trial counsel at the penalty phase issues constitutes "abandonment." Understandably, appellant offers no controlling precedent for this view point. Appellant cites Flowers v. State, 618 S.W.2d 655 (Mo. banc 1981), to support the idea that there is "abandonment" when post-conviction counsel did not appeal the denial of a Rule 27.26 motion (App. Brf., pages 23 citing Flowers v. State, 618 S.W.2d 655 (Mo. banc 1981)). But PCR counsel timely appealed appellant's conviction, his sentence and the denial of the Rule 24.035 relief to this court, and this court affirmed. State v. Taylor, 929 S.W.2d 209 (Mo. banc 1996). This court did not dismiss the appeal due to the lack of a notice of appeal.

Similarly, appellant cites Fenton v. State, 200 S.W.3d 136 (Mo. App. W.D. 2006), for the proposition that abandonment by Rule 27.26 counsel can occur when that counsel did not file a notice of appeal. But again, appellant's post-conviction counsel filed a notice of appeal on appellant's behalf; thus, there was no "abandonment."

Finally, appellant cites this court's decision in Luleff v. State, 807 S.W.2d 495 (Mo. banc 1991) (App. Brf., page 24). But Luleff involved "abandonment" at the motion court level, not the appellate court level as claimed by appellant on appeal. In any event, unlike Luleff, post-conviction counsel filed an amended motion.

Given appellant's counsel's efforts on his behalf during the appeal of the second sentencing and the appeal of the second post-conviction litigation, appellant cannot demonstrate "abandonment." The circuit court's finding of no abandonment is not clearly erroneous.

Alternatively, appellant contends that the circuit court should have allowed him to reopen his PCR litigation on the basis of “judicial/collateral estoppel” (App. Brf., page 31). Appellant presents no decision that compels that result (App. Brf., pages 32-41). Appellant presents no decision that even hints at that result (App. Brf., pages 32-41).

But assuming such were a cognizable basis upon which to reopen a post-conviction proceeding, facts supporting that basis do not exist in the present case. Appellant contends that at the start of the second penalty phase proceeding, the state agreed “not to assert procedural objections to claims and issues presented in the first appeal” (App. Brf., page 35). A review of the record, however, demonstrates that the state did not object “to the Court taking judicial notice of the prior proceedings and the transcripts which have been prepared in connection therewith” (App. 2 Tr. 5-6). The prosecutor’s agreement that the circuit court could take judicial notice of its prior proceedings is clear. But assuming appellant could disregard that clear language, appellant defaulted upon the ineffective assistance of guilty plea counsel claims by failing to brief those claims on consolidated appeal, an event that occurred long after the quoted language at resentencing. The interpretation appellant places upon the prosecutor’s language does not justify his later default from a failure to include issues in the brief on consolidated appeal.

Appellant contends that he is entitled to review of those guilt phase ineffective issues by this court and if appellant had made that argument during consolidated appeal, this court would have considered it and ruled appropriately. See State v. Nunley, 923 S.W.2d 911, 922 (Mo. banc 1996) citing Ogle v. Guardsman Ins. Co., 701 S.W.2d 469-71 (Mo. App. 1985).

But appellant's failure to brief challenges to the effectiveness of guilty plea counsel at the time of the consolidated appeal constituted default.

Appellant contends that the second motion judge ruled erroneously on the cognizability of guilty plea counsel issues at the second post-conviction litigation (App. Brf., page 37). And that could have been a ground for appellant's appeal during the consolidated appeal, like it was for co-defendant Nunley. State v. Nunley, 923 S.W.2d at 922. But appellant alleges that he consciously decided not to brief that ground because the effectiveness of guilty plea counsel was preserved for appeal (App. Brf., page 37). But the preservation of the issue does not explain or excuse the decision of consolidated appeal counsel not to brief those issues on consolidated appeal. Merely because an issue is "preserved" in the trial court, does not relieve appellate counsel of the obligation to brief an issue for the state appellate court. Indeed, if "preserved," it is preserved for appellate review.

But in any event, appellant can demonstrate no prejudice because the underlying guilt phase issues are meritless. On appeal, appellant contends that the initial judgment by Judge Dierker concerning the effectiveness of guilty plea counsel should not be dispositive (App. Brf., pages 25-30). Appellant's theory is that Judge Dierker's judgment no longer existed after the court's initial remand order. The court need not resolve that contention because the United States Court of Appeals for the Eighth Circuit reviewed appellant's guilt phase issues and determined that they did not warrant a new proceeding. Taylor v. Bowersox, 329 F.3d 963, 971-72 (8th Cir. 2002). "Thus, we would still affirm the district court's denial of relief even if we found that Taylor's claims of ineffective assistance of plea counsel was not

procedurally defaulted.” Id. at 972. Appellant has received review, and his claims of ineffective assistance of guilty plea counsel are meritless.

CONCLUSION

WHEREFORE, for the foregoing reasons, respondent prays the court dismiss the appeal. Alternatively, respondent prays the court affirm the order of the circuit court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains _____ words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this _____ day of February, 2008, to:

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