

IN THE
MISSOURI SUPREME COURT

MICHAEL A. TAYLOR,)	
)	
)	
Appellant,)	
)	
vs.)	No. SC 88784
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT, DIVISION VI
THE HONORABLE JOHN R. O'MALLEY, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Appellant, Michael A. Taylor, pleaded guilty in Jackson County to murder first degree §565.020, armed criminal action§ 571.015, kidnapping §565.110 and forcible rape §566.030 on February 8, 1991. After a judge tried penalty phase, Judge Alvin C. Randall sentenced Michael to death, ten years, fifteen years and life with each count to run consecutive to the other counts. A post-conviction action and consolidated appeal followed. On June 29, 1993 this Court overturned the case with an order that stated, “Judgment vacated. Cause remanded for new penalty hearing, imposition of sentence, and entry of new judgment.” (APP2LF 98). Judge H. Michael Coburn denied motions to vacate the plea and for a jury trial. Judge Coburn held a second penalty phase hearing and sentenced Michael to death, fifty years, fifteen years and life on each count to run consecutive to the other counts. A second post-conviction action and second consolidated appeal followed. Ms. Elizabeth Unger Carlyle represented Michael during the second post-conviction action and the second consolidated appeal. Michael filed a petition for habeas corpus in the United States District Court for the Western District. The Western District found that claims of ineffective assistance of guilty plea counsel were ruled “procedurally defaulted” *Taylor v. Bowersox*, 329 F.3d 963, 969 (8th Cir. 2002).

Michael filed the subject of this appeal, a Motion to Reopen Post-Conviction Proceedings, in the 16th Judicial Circuit on August 23, 2005. The case

was opened and transferred to Judge John R. O'Malley. Judge O'Malley denied relief without a hearing on July 25, 2007. This appeal follows. This Court has jurisdiction as Michael is appealing a sentence of death. Art.V, Sec. 3, Mo. Const. (as amended 1982).

The record in this case will be cited as follows: Legal file in this action, (LF); Second consolidated appeal legal file, (APP2LF); Second penalty phase trial transcript, (APP2TR); Second post-conviction transcript, (PCR2TR); Second post-conviction legal file, (PCR2LF); Second brief for Appellant, (2ndAppBr), Second brief for respondent, (2ndRespBr).

STATEMENT OF FACTS

Michael pleaded guilty in Jackson County to murder first degree, armed criminal action, kidnapping and forcible rape on February 8, 1991. He was represented by Leslie Delk and Martin McClain, formerly of the Missouri State Public Defender System. Ms. Delk had been fired and Mr. McClain resigned and moved to Florida during the pendency of Michael's case. After a penalty phase hearing, Judge Alvin C. Randall sentenced Michael to death for the murder conviction. Michael timely filed a motion for post-conviction relief pursuant to 24.035 on August 9, 1991. Judge Robert H. Dierker was appointed as a special judge and denied relief. Upon a consolidated appeal to this Court, Michael's sentence was overturned. On June 29, 1993, this Court entered the following

order: “Judgment vacated. Cause remanded for new penalty hearing, imposition of sentence, and entry of new judgment.” (APP2LF 98).

After the remand, Michael’s second sentencing counsel, James McMullin, K. Louis Caskey and C. John Pleban, obtained a commitment from the state not to assert procedural objections to claims and issues presented in the first appeal. On January 6, 1994 at pretrial motions defense counsel James McMullin and Jeffrey Stigall for the state made the following record before Judge H. Michael Coburn:

McMullin: I would ask, however, Judge, at this time on the record that the Court take judicial notice of all prior proceedings that have already gone up to the Court of Appeals and the Supreme Court. I would ask you to take judicial notice – which would obviously include all of the motions filed on behalf of the defendant, all of the hearings, all of the evidence, and all of the transcripts – all of it. As I understand, of course, by taking judicial notice, everything that’s gone before will be preserved in this trial in the event of appeal in the event the Court decides upon a death sentence.

Would the Court be willing to do that?

The Court: I will.

McMullin: All right. Well, that means then, Judge, does it not, that if we would have to appeal, all prior hearings, proceedings, transcripts, evidence, everything that was heard would go up with this case and be heard and be held for review by the higher courts?

The Court: Correct.

McMullin: All right, sir. I would ask the prosecutor at this time, if he would, to stipulate that he would not object – if he would state on behalf of the State of Missouri that he will stipulate that they would not object procedurally to the Court – obviously, they can, but to the Court taking judicial notice of all proceedings and the State of Missouri would not object procedurally in the Court of Appeals, the Supreme Court of Missouri, or the federal courts to all of that that the Court took judicial notice of.

Would you agree to that sir?

Stigall: I have no objection to the Court taking judicial notice of the prior proceedings and the transcripts which have been prepared in connection therewith.

McMullin: I understand, but will you stipulate on behalf of the State of Missouri that the State of Missouri will not object to any procedural issue from those proceedings. That's what I need.

Stigall: The State will not object to the Court taking judicial notice and preserving all of those proceedings and transcripts for appeal.

McMullin: I believe that covers that. Give me just a moment.

That's in both the state courts and the federal court?

Stigall: Yes.

(APP2TR 5-6).

This commitment by Stigall on behalf of the State not to object to any procedural issue from the prior proceeding would later form the basis of postconviction/appeal counsel's decision not to pursue claims of ineffective assistance of counsel by Delk and McClain during the second post-conviction hearing and appeal (LF 32-34). Counsel, Elizabeth Unger Carlyle, presumed from the state's position on procedural issues could be reasonably relied upon in later proceedings.

After the denial of the motion to withdraw the guilty plea, and the re-sentencing to death by Judge Coburn, Michael's counsel in the second consolidated appeal/ post-conviction action, Elizabeth Unger Carlyle sought to re-raise his claims of ineffective assistance of guilty plea and initial-sentencing counsel. The claims were rewritten in the second action from claims from Michael's first postconviction action and the first post-conviction action was attached.

At the second post-conviction hearing before Judge Edith L. Messina, the prosecution objected to all testimony regarding plea /initial-sentencing counsel (PCR2TR 16- 162). One of his second sentencing counsel volunteered the opinion that Michael did not understand what was going on at the guilty-plea proceeding when the prosecution objected (PCR2TR 161). The Court sustained those objections: "Again, the scope of this hearing is not the previous plea, but rather the second sentencing procedure." (PCR2TR 160-163).

In denying relief on the second round of post-conviction claims, Judge Messina held that points raised regarding the plea and initial-sentencing counsel, “are not properly before this court for reconsideration.” PCR2LF 256.

The Court went on to state that no issue with regard to the ineffectiveness of trial attorney Leslie Delk was considered. Judge Messina did not consider claims that:

1. Ms. Delk was unable to effectively represent Michael because she had a conflict of interest with her employer.
2. Ms. Delk did not obtain expert witnesses to assist in preparation of the defense of Michael, specifically Mr. Lippman on the effects of drugs, because Ms. Delk was unable to obtain funds.
3. Ms. Delk labored under a conflict of interest between her employer and Michael because the Public Defender sought to use its claimed cash shortage in the Michael Taylor case to obtain more funding in future cases.
4. Ms. Delk failed to contact witnesses who could have provided mitigating evidence at sentencing.
5. Ms. Delk failed to inform Michael of his options regarding the guilty plea and a jury.
6. Ms. Delk failed to attempt to obtain an agreement from the state that Michael could enter a plea of guilty and be sentenced by a jury.

7. Ms. Delk failed to inform Michael that Judge Randall had a reputation for imbibing alcoholic beverages.
8. Ms. Delk failed to make any objection, inquiry, investigation or motion to take any other action when she believed that the trial court had been imbibing alcoholic beverages prior to the sentencing.
9. Ms. Delk failed to inform Michael fully of the elements of the offense.
10. Ms. Delk failed to inform Michael of the possible availability of the defense of diminished capacity.
11. Ms. Delk failed to inform Michael that he did not have to plead guilty and had a right to a jury trial.

(PCR2LF 253-254).

Judge Messina found that “The Supreme Court by its order of June 29, 1993, by remanding for sentencing only, affirmed the voluntariness of the guilty plea, and thus ruled Movant’s points regarding Ms. Delk’s representation against him.” (PCR2LF 256-257). Therefore the Court did not consider any issue with regard to plea/initial sentencing counsel or the involuntariness of Michael’s plea. The Court followed the state’s position that the ineffectiveness issues had been fully litigated and were preserved.

Ms. Carlyle filed Michael's second consolidated appeal (2ndAppBr). In Michael's opening brief before this Court, Ms. Carlyle argued that Judge Messina had erred in ignoring the effect on the second death-penalty hearing of errors and omissions by Michael's counsel in the first death-penalty hearing (Delk and McClain), such as advising witnesses not to testify to the abuse and other negative things in Michael's past but to present a falsely positive image of him (2ndAppBr-88). The argument referred only to the effect that McLain and Delk had on the mitigation witnesses. In this second appeal Ms. Carlyle failed to brief and argue ineffective assistance of plea/initial-sentencing counsel (2ndAppBr).

In its brief, the Attorney General's Office of the State of Missouri repeated the representation by the State in the Circuit Court of Jackson County that Michael's claims of guilty-plea and initial-sentencing ineffective assistance of counsel had been exhausted in the first post-conviction proceeding: "the claims with respect to appellant's counsel prior to this Court's remand were fully litigated and were precluded from consideration in appellant's post-conviction challenge to the resentencing proceeding." (2ndRespBr-76). The State also argued that any claims regarding Delk and McClain were "moot" because this Court had reversed the first sentence, and were "successive" because he had already raised them in his first PCR action. *Id* This Court did not address the question of prejudice in the second sentencing hearing due to acts or omissions of counsel in the first sentencing hearing. *State v. Taylor*, 929 S.W.2d 209, 223-25(Mo.banc 1996).

Michael filed for a writ of habeas corpus in the United States District Court for the Western District of Missouri and Judge Fernando J. Gaitan denied relief without a hearing on July 10, 2000. *Taylor v. Bowersox*, 329 F.3d 963 (8th Cir. 2002). Michael appealed and on May 7, 2003 the United States Court of Appeals, Eighth Circuit affirmed Judge Gaitan’s ruling.¹

Michael filed a pro-se, Motion to Reopen Post-Conviction Proceedings Due to Abandonment of Rule 24.035 Counsel on September 2, 2005 (LF2-35). On April 20, 2006 Judge Messina appointed the Office of the Public Defender to represent Michael (LF36). Michael filed a Memorandum in Support of Movant’s Motion to Reopen Postconviction Case on January 9, 2007 (LF37-63).

Michael alleged two grounds for re-opening the post-conviction proceedings.

First, the failure by appellate/post-conviction relief counsel, Elizabeth Unger Carlyle, to perfect and advance on appeal the grievance that this Court should have entertained Michael’s claims of ineffective assistance of plea and first-sentencing counsel—with the effect that the federal courts held these constitutional claims to have been procedural defaulted—is an “abandonment” under the

¹ This is not a comprehensive list of all actions Michael has filed, but those pertinent to this proceeding. Others include an action under Missouri Supreme Court Rule 74.06(d) and a federal 1983 case seeking injunction against his execution.

caselaw applying Mo. S. Ct. R. 24.035, entitling the Movant to reopen the proceedings before this Court.

Second, Michael's rights to due process, fundamental fairness, right to counsel and to be free from cruel and unusual punishment as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Missouri Constitution Article I, sections 10, 18(a) and 21 were violated when the State took the position that Michael's claims were fully litigated and were precluded from consideration during Michael's second PCR challenge then turning around and claiming that the claims were barred in federal court based upon failure to fully litigate the issue in state court. The State's promise that the issues were preserved must be held as promissory and judicial estoppel requiring the Court to re-open the claims to allow full and fair consideration of the involuntariness of Michael's plea due to ineffective assistance of counsel.

(LF37-38).

Judge Messina requested transfer of the case on March 16, 2007 (LF64). The prosecution filed State's Opposition to Movant's Motion to Reopen Post-Conviction Case on June 13, 2007 (LF 65-75). Judge O'Malley denied relief without a hearing on the matter by order dated July 25, 2007 (LF76). The Court held, "The record is clear that Movant has not been abandoned by his second Post-

Conviction counsel nor is there any compelling reason to reopen this case under an equitable theory.” (LF76).

POINTS RELIED ON

I. Court Would Not Reopen Postconviction Case on Abandonment Grounds

The motion court clearly erred in denying Michael's Motion to re-open his Rule 24.035 motion for post-conviction relief on the grounds of abandonment because the error denied Michael his rights to effective assistance of counsel and due process of law under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that appellate/post-conviction counsel's abandonment effected a total default of Michael's legitimate claims of ineffective assistance of initial plea and sentencing counsel. Appellate/post-conviction relief counsel failed to perfect and advance on appeal the grievance that the motion court erred in denying Michael the opportunity to present evidence about his claims of ineffective assistance of plea and first-sentencing counsel. The motion court's ruling leaves a definite and firm impression a mistake has been made because Michael alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records. Michael was prejudiced because the federal courts errantly held these constitutional claims were procedurally defaulted and no court has reviewed the claims on the merits.

Barnett v. State, 103 S.W.3d 765 (Mo. banc 2003),

Fenton v. State, 200 S.W.3d 136 (Mo.App. W.D. 2006),

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

II. Court Would Not Reopen Postconviction Case on Judicial/Collateral Estoppel Grounds

The motion court clearly erred in denying Michael's Motion to re-open his Rule 24.035 motion for post-conviction relief on the grounds of judicial/collateral estoppel because the error denied Michael his rights due process, fundamental fairness, counsel and to be free from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a) and 21 of the Missouri Constitution in that the State (1) promised that not to object on procedural grounds in the second penalty phase, (2) took the position that Michael's ineffective assistance of counsel claims were fully litigated and precluded from consideration during Michael's second post-conviction challenge and consolidated appeal, but (3) prevailed in federal court by taking a contrary position that the claims were barred from consideration based upon failure to fully litigate the issues in state court. Thus, the motion court erred by refusing to reopen the post-conviction case in light of the equitable principles of promissory and judicial estoppel since the State succeeded in foreclosing Michael from receiving a review on the merits. The motion court's ruling leaves a definite and firm impression a mistake has been made because Michael alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records. Michael was prejudiced because

the federal courts errantly held these constitutional claims were procedurally defaulted and no court has reviewed the claims on the merits.

Commercial Bank of Gideon v. Bien Co. Inc., 830 S.W.2d 503 (Mo. App. 1992),

Taylor v. Bowersox, 329 F.3d 963 (8th Cir. 2002),

Zedner v. United States, 126 S.Ct. 1976 (U.S.,2006).

ARGUMENT

I. Court Would Not Reopen Postconviction Case on Abandonment Grounds

The motion court clearly erred in denying Michael's Motion to re-open his Rule 24.035 motion for post-conviction relief on the grounds of abandonment because the error denied Michael his rights to effective assistance of counsel and due process of law under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that appellate/post-conviction counsel's abandonment effected a total default of Michael's legitimate claims of ineffective assistance of initial plea and sentencing counsel. Appellate/post-conviction relief counsel failed to perfect and advance on appeal the grievance that the motion court erred in denying Michael the opportunity to present evidence about his claims of ineffective assistance of plea and first-sentencing counsel. The motion court's ruling leaves a definite and firm impression a mistake has been made because Michael alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records. Michael was prejudiced because the federal courts errantly held these constitutional claims were procedurally defaulted and no court has reviewed the claims on the merits.

Standard of Review

Appellate review of decisions under Rule 24.035 is limited to whether the findings, conclusion, and judgment of the motion court are clearly erroneous. *Vernor v. State*, 894 S.W.2d 209, 210 (Mo. App. E.D. 1995); Rule 24.035(k). The motion court's findings, conclusion, and judgment are clearly erroneous if a review of the entire record leaves this Court with the firm and definite impression that a mistake has been made. *Dudley v. State*, 903 S.W.2d 263, 265 (Mo. App. E.D. 1993). In reviewing the motion court's dismissal, this Court is required to assume every pleaded fact as true and to give the pleader the benefit of every favorable inference which may be reasonably drawn therefrom. *Frederick v. State*, 754 S.W.2d 934 (Mo. App. E.D. 1988)(citations omitted).

Michael appeals from a finding from the Circuit Court of Jackson County, where he timely filed his post-conviction action and received representation from an attorney appointed to him by that court. The proper jurisdiction to address claims of abandonment by post-conviction/appeal counsel is in the court with original jurisdiction of the post-conviction action. The court in the case of *Simmons v. State*, 190 S.W.2d 558, 559 (Mo.App. E.D. 2006), citing *Daugherty v. State*, 116 S.W.3d 616 (Mo.App. E.D. 2003), "held that courts where original postconviction motions were filed have jurisdiction to consider motions seeking to re-open post-conviction proceedings to address claims of abandonment by postconviction motion counsel." Additionally, the courts can consider abandonment only where a timely filed pro-se motion began the proceedings and

an attorney was appointed pursuant to Rule 24.035(e). *Daugherty v. State*, 159 S.W.3d 405, 408 (Mo.App. E.D. 2005). Michael has filed within the proper jurisdiction and requested review of a claim within the Circuit Court’s jurisdiction to address.

Abandonment

Thirteen years after this Court created the right to post-conviction relief counsel in *Fields*, the Court recognized that merely appointing counsel was insufficient. *Fields v. State*, 572 S.W.2d 477 (Mo.banc 1978). In *Luleff v. State*, 807 S.W.2d 495, 498 (Mo banc 1991), this Court decided, once the trial judge has appointed counsel, it must not allow PCR counsel to “abandon” their clients’ efforts to obtain relief. Thus far Missouri Courts have recognized *three* forms of “abandonment”—complete inaction, untimely action and patently defective action—and have held that when one of these occurs, the trial judge must reappoint new counsel, and newly appointed counsel has sixty days from the entry of their appearance to file an amended motion. *Moore v. State*, 934 S.W.2d 289, 291 (Mo. banc 1996), *Simmons v. State*, 190 S.W.2d 558 (Mo.App.E.D. 2006).

Failures of counsel in post-conviction representation do not automatically rise to the level of abandonment. In *Barnett v. State*, 103 S.W.3d 765, 773 (Mo. banc 2003), this Court refused to extend the concept of “abandonment” to the decision by PCR counsel not to present a claim in the amended motion. In *Barnett*, PCR counsel had undisputedly filed a timely amended motion and complied with all logistical or ministerial duties in respect to the presentation of

the grounds for relief contained in it; the issue was whether they should have included additional grounds for relief. Barnett alleged that failure by counsel to include the issues was ineffective assistance of post-conviction counsel and abandonment. *Id.* This Court refused to extend abandonment to “perceived ineffectiveness of post-conviction counsel.” *Id.* at 774.

Failure of post-conviction counsel in the appeal context can be a basis for abandonment. In 1981 this Court first dealt with failure of appointed counsel to file an appeal in, *Flowers v. State*, 618 S.W.2d 655 (Mo.banc 1981). Although the Movant filed a successive Rule 27.26 motion, which was forbidden under that rule, this Court remanded the case for an evidentiary hearing to determine whether appellate counsel abandoned the client. *Id.* at 657. The Court held, “An evidentiary hearing is required, which the trial court is best suited to handle.” *Id.*

Abandonment of counsel in the appeal context can serve as the basis to reopen a post-conviction case. In *Fenton v. State*, 200 S.W.3d 136 (Mo.App. W.D. 2006), the Western District Court of Appeals recognized the need to allow a Movant to reopen a post-conviction proceeding for failure of counsel to file an appeal, when Movant so requested. The court found that the state’s interest in finality of postconviction judgments could be overborne by the particularly egregious failure of Movant’s counsel to file an appeal as directed. *Id.* at 140. The court treated this type of failure as equal to a ministerial failure on the part of post-conviction counsel and sent the case back for a hearing on abandonment. *Id.*

In the instant case there is not a complete failure to file an appeal but a total default of the issues of ineffective assistance of counsel. In Michael's second appeal Ms. Carlyle failed to brief and argue ineffective assistance of plea/initial-sentencing counsel. She relied on the State's position that the issues were already ruled on their merits in the first post-conviction case and need not be considered on the second post-conviction action and on the appeal. Ms. Carlyle, therefore, abandoned all issues of the ineffectiveness of Michael's original trial lawyers and the involuntariness of his guilty plea. This was not a strategic decision because Ms. Carlyle had attempted to offer evidence on the claims at the post-conviction hearing and fully intended to preserve the issues.

Michael believed that counsel had filed an appeal after the denial of his post-conviction case that preserved all issues concerning the ineffective assistance of counsel rendered by Delk and McClain. He neither waived nor indicated in any way that he did not wish to pursue the issues. In fact, Michael expressed a desire to pursue the claims in both written and verbal communications with Ms. Carlyle. Michael was informed that the issues were fully preserved for appeal.

The omission in this case is far closer to the omissions held to be "abandonment" in *Luleff* and *Fenton* than it is to the omission of a potential ground for relief from a timely filed amended motion, held not to be "abandonment" in *Barnett*. Like the failure to file an amended motion at all, the failure to file it within the jurisdictional deadline, or the failure to file an appeal, this omission does not reflect action within the discretion of an attorney and

officer of the court, but a failure to act when the Missouri Supreme Court has consistently held that PCR counsel must do *X* in order to preserve *Y* ground for relief. Here, PCR counsel raised claims of ineffective assistance of plea and initial-sentencing counsel and of the involuntariness of the plea in the post-conviction motion, then attempted to present evidence on those claims but counsel did not perfect and advance the grievance concerning this Court's ruling on the cognizability of Michael's claims. Therefore, counsel, relying on the State's position, essentially failed to appeal any of his guilt phase/plea issues, resulting in total abandonment. This was a total denial of counsel, not mere ineffective assistance due to strategic winnowing of issues. The end result of counsel's abandonment was that none of these claims could be heard on their merits. Thus, counsel's inaction is more akin to the failures in *Luleff* and *Fenton*.

In *Taylor v. Bowersox*, 329 F.3d 963 (8th Cir. 2002) the federal court found a procedural bar to the claim that Michael's plea was involuntary because of ineffective assistance of counsel. *Id* at 969. The Court decided that although Michael raised the claims in his first post-conviction case before Judge Dierker and attempted to raise them before Judge Messina, the abandonment of the issues on the second appeal made the claims unreviewable on federal habeas.

Michael's Claims of Ineffective Assistance of Counsel Have Never been Reviewed

Two judgments were reviewed by this court at the first consolidated appeal in 1993. The plea and sentencing by Judge Randall and the denial of post-

conviction relief by Judge Robert Dierker. After that first consolidated appeal this Court entered the following order: “Judgment vacated. Cause remanded for new penalty hearing, imposition of sentence, and entry of new judgment.” (APP2LF 98). No issues regarding the appeal or post-conviction action were addressed or ruled upon by the Court. Additionally no findings or opinion addressing the plea proceeding and the effectiveness of plea/ initial sentencing counsel ever issued from this Court. Therefore no inference of effective assistance of counsel could be drawn from the order.

A misreading of the order caused further litigation. It was assumed, by not vacating the plea of guilty and remanding for new proceedings, this Court made some unannounced finding regarding the plea. Later, the opinion in the second consolidated appeal, *State v. Taylor*, 929 S.W.2d 209 (Mo banc 1996) cleared up any misconception. The Court stated, “[T]his Court’s summary order remanding the cause neither affirmed nor reversed the guilty plea...” *Id* 215. The Court made clear that no inference of any kind was to be made from the order. The clarification came after the hearing in the second post-conviction action and on the second consolidated appeal.

This Court’s position was not clear at the hearing in the second post-conviction action. Judge Messina did not understand this Court’s order and precluded counsel from adducing evidence about the actions of plea/ first sentencing counsels actions. The Court sustained the State’s objections: “Again, the scope of this hearing is not the previous plea, but rather the second sentencing

procedure.” (PCR2TR 160-63). Judge Messina found that “The Supreme Court by its order of June 29, 1993, by remanding for sentencing only, affirmed the voluntariness of the guilty plea, and thus ruled Movant’s points regarding Ms. Delk’s representation against him.” (PCR2LF 256-257). Because counsel failed to appeal the ruling, this Court conducted no review of whether plea/ first sentencing counsels provided effective assistance of counsel on the second consolidated appeal. *Taylor*, 929 S.W.2d 209. Appellate/post-conviction counsel caused complete waiver of all issues of effective assistance of counsel.

The State claims that the federal court’s conclusion that Michael cannot satisfy the prejudice prong under *Strickland* for the purpose of overcoming federal procedural bar of issues must be treated as *res judicata*. (LF 29, citing, *Strickland v. Washington*, 466 U.S.668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). The 8th Circuit stated, “We agree with Judge Dierker’s determination that Lelie Delk, despite being fired by the [P]ublic [D]efender’s office, performed well within the bounds of professional competence in representing Taylor during his plea proceedings, and in fact, acted in a ‘very professional manner’ during these events and ‘displayed commendable loyalty to Taylor’s interests’” 329 F3d at 973, quoting *Taylor v. Missouri*, Nos. CV91-20562, CV91-20638, 64 (Mo.Cir.Ct. July 1, 1992).

Again, a misreading of this Court’s 1993 order causes confusion. On consolidated appeal, two judgments came to this Court. It cannot be assumed that Judge Dierker’s judgment stands. Some guidance is to be found in the Court’s

decision in the co-defendants case, *State v. Nunley*, 923 S.W.2d 911 (Mo banc 1996). This Court held:

Defendant's first 24.035 motion contained troubling allegations regarding the original trial judge. This Court, as a matter of discretion, declined to issue a written opinion. By remanding for a new penalty hearing and imposition of sentence, certain allegations regarding the original trial judge were rendered moot. The order vacated the judgment and did not affirm any portion of the judgment, including the plea.

Id at 919.

Therefore, it cannot be held that Judge Dierker's order was affirmed in whole or part and cannot have value as a review on the merits. Without a full and fair hearing on the merits, his opinion of lack of prejudice cannot be treated as *res judicata*. Judge Dierker overruled all claims made in the first post-conviction action. This included the claim regarding alcohol consumption by the first sentencing court. In remanding for a new sentencing hearing, this Court found error somewhere. This Court dealt with collateral estoppel in *Nunley*:

After defendant's first appeal, this Court vacated the judgment in its summary order. When an appellate court vacates a judgment, the lower court's judgment cannot be considered a final judgment on the merits for purposes of collateral estoppel. *See Ogle v.*

Guardsman Ins. Co., 701 S.W.2d 469, 471 (Mo.App.1985). In the

present case, there was not a final judgment on the merits for purposes of collateral estoppel; therefore, the doctrine did not preclude any of defendant's claims.

Id at 922. It follows that Judge Dierker's order cannot form the basis for precluding any of Michael's claims of ineffective assistance of counsel.

Although the federal court found that by vacating the lower courts judgment, no prior rulings were to be followed, the federal court chose to follow Judge Dierker's ruling in their prejudice determination. The 8th Circuit found this Court's order "vacated" Judge Dierker's judgment. 329 F.3d at 969. In discussing Judge Messina's ruling disallowing evidence of ineffective assistance of plea/ initial sentencing counsel the 8th Circuit stated, "We find neither precedent nor rationale for a holding that an appellate court, in vacating a lower court judgment, affirms by implication, the trial court's rulings in that judgment." 329 F3d at 970. The federal court goes on to use Judge Dierker's determination that no prejudice can be found on the issues of ineffective assistance of counsel. 329 F.3d at 973. The State demands that this Court be bound by a ruling by Judge Dierker that was overturned by the Court's previous order. The 8th Circuit's ruling following Judge Dierker's order and finding of insufficient showing of prejudice to overcome procedural default cannot become *res judicata* in this case.

Additionally, Michael cannot suffer collateral estoppel from the federal ruling because the State prevented him from offering evidence in the second post-conviction action in front of Judge Messina. The Judge wrongly decided that this

Court determined that plea/ initial sentencing counsel was effective and precluded evidence on the matter on the State's motion. The State would play both sides of an issue. It succeeded in preventing the presentation of evidence at the post-conviction hearing and then turned around and claimed that Michael could not prove that he was prejudiced after preventing that evidence from being adduced.

Summary

Appellate/post-conviction relief counsel failed to perfect and advance on appeal the grievance that the motion court erred in denying Michael the opportunity to present evidence about his claims of ineffective assistance of plea and first-sentencing counsel. The failure was abandonment because counsel's default caused Michael to get no review of these issues and was tantamount to a denial of counsel. The motion court's ruling leaves a definite and firm impression a mistake has been made because Michael alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records. Michael was prejudiced because the federal courts errantly held these constitutional claims were procedurally defaulted and refused him review on the merits.

II. Court Would Not Reopen Postconviction Case on Judicial/Collateral

Estoppel Grounds

The motion court clearly erred in denying Michael's Motion to re-open his Rule 24.035 motion for post-conviction relief on the grounds of judicial/collateral estoppel because the error denied Michael his rights due process, fundamental fairness, counsel and to be free from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a) and 21 of the Missouri Constitution in that the State (1) promised that not to object on procedural grounds in the second penalty phase, (2) took the position that Michael's ineffective assistance of counsel claims were fully litigated and precluded from consideration during Michael's second post-conviction challenge and consolidated appeal, but (3) prevailed in federal court by taking a contrary position that the claims were barred from consideration based upon failure to fully litigate the issues in state court. Thus, the motion court erred by refusing to reopen the post-conviction case in light of the equitable principles of promissory and judicial estoppel since the State succeeded in foreclosing Michael from receiving a review on the merits. The motion court's ruling leaves a definite and firm impression a mistake has been made because Michael alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not

conclusively refuted by the files and records. Michael was prejudiced because the federal courts errantly held these constitutional claims were procedurally defaulted and no court has reviewed the claims on the merits.

Standard of Review

Appellate review of decisions under Rule 24.035 is limited to whether the findings, conclusion, and judgment of the motion court are clearly erroneous. *Vernor v. State*, 894 S.W.2d 209, 210 (Mo. App. E.D. 1995); Rule 24.035(k). The motion court's findings, conclusion, and judgment are clearly erroneous if a review of the entire record leaves this Court with the firm and definite impression that a mistake has been made. *Dudley v. State*, 903 S.W.2d 263, 265 (Mo. App. E.D. 1993). In reviewing the motion court's dismissal, this Court is required to assume every pleaded fact as true and to give the pleader the benefit of every favorable inference which may be reasonably drawn therefrom. *Frederick v. State*, 754 S.W.2d 934 (Mo. App. E.D. 1988)(citations omitted).

Promissory/ Judicial Estoppel

Missouri Supreme Court Rule 24.035 provides the exclusive remedy for an individual to challenge constitutional issues surrounding the effectiveness of his plea representation. Subsection (a) states, "The procedure to be followed for motions filed pursuant to this Rule 24.035 is governed by the rules of civil procedure insofar as applicable." Therefore, the motion court could consider equitable principles in considering whether to uphold a sentence of death.

Promissory estoppel has evolved in civil litigation to protect people from losing money and property to unscrupulous people who would use the letter of the law to achieve an unfair result by allowing them to back out of a promise previously given. In 1919 the Missouri Supreme Court held that “estoppel in pais stands simply on a rule of law which forecloses one from denying his own expressed or implied admission which has in good faith and in pursuance of its purpose been accepted and acted upon by another.” *McFarland v. McFarland et al.*, 278 Mo.1, 211 S.W. 23, 27 (Mo.1, 1919).

The Southern District Court of Appeals listed the elements of promissory estoppel in *Commercial Bank of Gideon v. Bien Co. Inc.*, 830 S.W.2d 503, 505 (Mo. App. 1992).

The elements of promissory estoppel are: “1) a promise; 2) detrimental reliance on the promise; 3) the promisor should have or did in fact clearly foresee the precise action which the promisee took in reliance; and 4) injustice can only be avoided by enforcement of the promise.”

Id at 505.

Judicial estoppel applies the same equitable principles to the stand a party takes in the different phases of litigation. Justice Alito, in *Zedner v. United States*, 126 S.Ct. 1976, 1987 (U.S.,2006), outlined the doctrine of judicial estoppel.

“ ‘[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.’ *Davis v. Wakelee*, 156 U.S. 680, 689, 15 S.Ct. 555, 39 L.Ed. 578 (1895). This rule, known as judicial estoppel, ‘generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.’ *Pegram v. Herdrich*, 530 U.S. 211, 227, n. 8, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000).” *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001).

Although this estoppel doctrine is equitable and thus cannot be reduced to a precise formula or test,

“several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position …. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the

opposing party if not estopped.” *Id.*, at 750-751, 121 S.Ct. 1808
(citations and internal quotation marks omitted).

Zedner v. U.S., 126 S.Ct. 1976, 1987 (U.S.,2006).

Discussion

Michael’s first consolidated appeal/post-conviction action resulted in this Court issuing an order stating: “Judgment vacated. Cause remanded for new penalty hearing, imposition of sentence, and entry of new judgment.” (APP2LF 98).

After the remand, Michael’s second sentencing counsel, James McMullin, K. Louis Caskey and C. John Pleban, obtained a commitment from the state not to assert procedural objections to claims and issues presented in the first appeal. On January 6, 1994 at pretrial motions defense counsel James McMullin and Jeffrey Stigall for the state made the following record before Judge H. Michael Coburn:

McMullin: I would ask, however, Judge, at this time on the record that the Court take judicial notice of all prior proceedings that have already gone up to the Court of Appeals and the Supreme Court. I would ask you to take judicial notice – which would obviously include all of the motions filed on behalf of the defendant, all of the hearings, all of the evidence, and all of the transcripts – all of it. As I understand, of course, by taking judicial notice, everything that’s gone before will be preserved in this trial in the event of appeal in the event the Court decides upon a death sentence.

Would the Court be willing to do that?

The Court: I will.

McMullin: All right. Well, that means then, Judge, does it not, that if we would have to appeal, all prior hearings, proceedings, transcripts, evidence, everything that was heard would go up with this case and be heard and be held for review by the higher courts?

The Court: Correct.

McMullin: All right, sir. I would ask the prosecutor at this time, if he would, to stipulate that he would not object – if he would state on behalf of the State of Missouri that he will stipulate that they would not object procedurally to the Court –obviously, they can, but to the Court taking judicial notice of all proceedings and the State of Missouri would not object procedurally in the Court of Appeals, the Supreme Court of Missouri, or the federal courts to all of that that the Court took judicial notice of.

Would you agree to that sir?

Stigall: I have no objection to the Court taking judicial notice of the prior proceedings and the transcripts which have been prepared in connection therewith.

McMullin: I understand, but will you stipulate on behalf of the State of Missouri that the State of Missouri will not object to any procedural issue from those proceedings. That's what I need.

Stigall: The State will not object to the Court taking judicial notice and preserving all of those proceedings and transcripts for appeal.

McMullin: I believe that covers that. Give me just a moment.

That's in both the state courts and the federal court?

Stigall: Yes.

(APP2TR 5-6).

This commitment by Stigall on behalf of the State not to object to any procedural issue from the prior proceeding would later form the basis of postconviction/appeal counsel's decision not to pursue claims of ineffective assistance of counsel by Delk and McClain during the second post-conviction hearing and appeal (LF 33). Counsel, Elizabeth Unger Carlyle, presumed from the state's position on procedural issues could be reasonably relied upon in later proceedings.

At the second post-conviction hearing, the prosecution objected to all testimony regarding plea and initial-sentencing counsel. At the hearing, one of his second sentencing counsel volunteered the opinion that Michael did not understand what was going on at the guilty-plea proceeding. This Court sustained those objections: "Again, the scope of this hearing is not the previous plea, but rather the second sentencing procedure." (PCR2TR 160-63). Ms. Carlyle let the matter drop because the state had in an earlier proceeding agreed not to object to procedural matters from the plea and appeal/post-conviction case.

In denying relief on the second round of post-conviction claims, Judge Messina held that points raised regarding the plea and initial-sentencing counsel, “are not properly before this court for reconsideration.” (PCR2LF 256).

The court went on to state that no issue with regard to the ineffectiveness of trial attorney Leslie Delk was considered. Judge Messina held that “The Supreme Court by its order of June 29, 1993, by remanding for sentencing only, affirmed the voluntariness of the guilty plea, and thus ruled Movant’s points regarding Ms. Delk’s representation against him.” (PCR2LF 256-257). Therefore the Court did not consider any issue with regard to plea/initial sentencing counsel or the involuntariness of Michael’s plea. Judge Messina followed the state’s position that the ineffectiveness issues had been fully litigated and were preserved.

The second consolidated appeal followed. In its brief before this Court, the Attorney General’s Office of the State of Missouri repeated the representation by the State in the Circuit Court of Jackson County that Michael’s claims of guilty-plea and initial-sentencing ineffective assistance of counsel had been exhausted in the first post-conviction proceeding: “the claims with respect to appellant’s counsel prior to this Court’s remand were fully litigated and were precluded from consideration in appellant’s post-conviction challenge to the re-sentencing proceeding.” (2ndRespBr-76). The State also argued that any claims regarding Delk and McClain were “moot” because the Missouri Supreme Court had reversed the first sentence, and were “successive” because he had already raised them in his first post-conviction action. *Id.* This Court did not address the question of

prejudice in the second sentencing hearing due to acts or omissions of counsel in the first sentencing hearing. *State v. Taylor*, 929 S.W.2d 209, 223-25(Mo.banc 1996). The State, therefore, succeeded in asserting its position before Judge Messina and before the Missouri Supreme Court.

In this second appeal Ms. Carlyle failed to brief and argue ineffective assistance of plea/initial-sentencing counsel. She relied on the State's position that the issues were already ruled on their merits in the first post-conviction action and need not be considered on the second post-conviction action and on the appeal. Ms. Carlyle, therefore, abandoned all issues of the ineffectiveness of Michael's original trial lawyers and the involuntariness of his guilty plea. This was not a strategic decision because Ms. Carlyle had attempted to offer evidence on the claims at the post-conviction hearing and fully intended to preserve the issues.

In *Taylor v. Bowersox*, 329 F.3d 963 (8th Cir. 2002) the federal court found a procedural bar to the claim that Michael's plea was involuntary based on ineffective assistance of counsel. *Id* at 969. The court decided that although Michael raised the claims in his first post-conviction case before Judge Dierker and attempted to raise them before Judge Messina, the abandonment of the issues on the second consolidated appeal made the claims unreviewable on federal habeas.

The State made a 180 degree shift in its position on the claims in federal court. In 2003, the State argued that Judge Messina was wrong in ruling that the claims were fully litigated by the first post-conviction case and Michael had a duty

to appeal that erroneous ruling to this Court. 329 F.3d at 970. The federal court agreed with the State's new position and found a procedural bar to the issues. 329 F.3d at 971.

This Court should treat the State's promise not to object to procedural issues as promissory estoppel in the case. The State made the promise not to object. Michael relied to his detriment on that promise because the State achieved a procedural bar against review of his claims in federal court. The State should have clearly foreseen that Michael would rely on their position that the issues were fully litigated and preserved for appeal. Finally, Michael cannot get review of the ineffective assistance of his plea/initial sentencing counsel claims and will surely be executed so injustice can only be avoided by enforcement of the state's promise.

Additionally this Court should apply judicial estoppel to this case. First, the State prevailed in the state court system arguing that the first post-conviction action settled the question of ineffective assistance and the voluntariness of the plea therefore the issues could not be re-litigated in the second post-conviction action. Then, in federal court, the State unfairly switched positions claiming that Michael was barred from raising those issues because they were not fully litigated since Michael did not advance them on his second appeal to the Missouri Supreme Court. By taking these two clearly inconsistent positions, the state has convinced two separate courts not to consider the merits of Michael's ineffective assistance of counsel claims. Michael stands to be executed without full and fair appellate

review. The State must be estopped from unfairly preventing meaningful review of legitimate claims.

Summary

The motion court clearly erred in denying Michael's Motion to re-open his Rule 24.035 motion for post-conviction relief on the grounds of judicial/collateral estoppel. The State prevailed in state court by taking the position that Michael's ineffective assistance of counsel claims were fully litigated and precluded from consideration during Michael's second post-conviction challenge, then prevailed in federal court by taking a contrary position that the claims were barred from consideration based upon failure to fully litigate the issues in state court. The motion court refused to re-open the post-conviction action to allow full and fair consideration of the involuntariness of Michael's plea due to ineffective assistance of counsel based on the State's promise that the issues were preserved or the State's victory using diametrically opposing positions in two different phases of litigation. The motion court's ruling leaves a definite and firm impression a mistake has been made because Michael alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records. Michael was prejudiced because the federal courts errantly held these constitutional claims were procedurally defaulted and refused him review on the merits.

CONCLUSION

Michael was denied a full and fair review of his constitutional claims of ineffective assistance of plea/first sentencing counsel. He was abandoned by second appellate/post-conviction counsel. The State unfairly prevented review by succeeding in the advance of opposing positions in different phases of litigation. Accordingly, Michael requests this Court remand for further post-conviction proceedings.

Respectfully submitted,

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Certificate of Compliance and Service

I, Robert W. Lundt, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, in Times New Roman size 13 point font. The brief contains 8,683 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in November, 2007. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed this 10th day of December, 2007, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

Robert W. Lundt