

**IN THE
MISSOURI SUPREME COURT**

VINCENT McFADDEN,)	
)	
Appellant,)	
)	
vs.)	No. SC88895
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

**APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
21ST JUDICIAL CIRCUIT, DIVISION FIFTEEN
THE HONORABLE JOHN A. ROSS, JUDGE**

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Appellant, Vincent McFadden, was convicted in St. Louis County Circuit Court of two counts of first degree assault, §565.050 RSMo, two counts of armed criminal action, §571.015 RSMo, and one count of unlawful use of a weapon, §571.030.1(3) RSMo, for which he was sentenced to 15, 30, 10, 10 and 4 years in the Department of Corrections. The Missouri Court of Appeals, Eastern District, affirmed on direct appeal. *State v. McFadden*, 193 S.W.3d 305 (Mo.App.,E.D. 2006). That Court's mandate issued on July 13, 2006.

Mr. McFadden's counsel, Valerie Leftwich, filed a Rule 29.15 motion on his behalf on October 12, 2006 in St. Louis County Circuit Court. On January 23, 2007, the State filed a Motion to Dismiss because the Rule 29.15 motion had been untimely filed, on the 91st day after the Eastern District's mandate had issued. The Hon. John A. Ross granted the State's motion to dismiss and denied the motion to reconsider. On appeal, the Eastern District affirmed in a memorandum opinion, *McFadden v. State*, No. ED89470 (September 18, 2007), and subsequently denied Mr. McFadden's motion for rehearing and application for transfer on October 18, 2007.

This Court granted Mr. McFadden's application for transfer and thus has appellate jurisdiction of this case. Mo. Const., Art. V, §3; Rule 83.04.

STATEMENT OF FACTS¹

This Court found, in *State v. McFadden*, 191 S.W.3d 648 (Mo.banc 2006), that the State of Missouri, acting through Assistant Prosecuting Attorney Mark Bishop, had exercised its peremptory challenges in a racially-discriminatory fashion in that first degree murder prosecution before the Hon. John A. Ross. This Court thus reversed Mr. McFadden's judgment and sentence and reversed and remanded for a new trial. The sole statutory aggravating circumstances found by the jury in that case were the charges on which this case is based—first degree assault and armed criminal action.

The State, also acting through Assistant Prosecuting Attorney Mark Bishop, tried and convicted Mr. McFadden of those charges in St. Louis County Case No. 04CR-2658, before the Hon. John A. Ross. (LF4,25). On February 4, 2005, Judge Ross sentenced Mr. McFadden to 15, 30, 10, 10 and 4 years (this last for unlawful use of a weapon, not one of the statutory aggravating circumstances in the murder case), those sentences to run concurrently. (LF4,25).

Mr. McFadden, through counsel, filed a timely notice of appeal and the Missouri Court of Appeals, Eastern District, thereafter affirmed the judgment and sentences in *State v. McFadden*, 193 S.W.3d 305 (Mo.App.,E.D. 2006). After it denied Mr. McFadden's post-appeal motions, that Court's mandate issued on July 13, 2006.

¹ Record references will be as follows: Legal File—(LF_).

Assistant Public Defender Valerie Leftwich thereafter contacted Mr. McFadden and directed him to send his motion for post-conviction relief to her. (LF25-26,30,42-43). Ms. Leftwich told Mr. McFadden that she would hand-file his motion in the St. Louis County Clerk's Office before what she believed was its due date of October 13, 2006. (LF25-26,30,42-43). Mr. McFadden signed and had his motion notarized on September 25, 2006 and placed it in the mail. (LF10-11). Ms. Leftwich received Mr. McFadden's motion on September 28, 2006. (LF26,30,43).

As Ms. Leftwich had assured Mr. McFadden she would, she hand-filed his motion in the St. Louis County Clerk's Office on October 12, 2006. (LF26,30-31,43). This was 91 days after the appellate court's mandate had issued. (LF26).

On January 23, 2007, the St. Louis County Prosecutor's Office filed a Motion to Dismiss Mr. McFadden's motion for post-conviction relief, alleging it had been untimely filed. (LF22-24). Judge Ross heard argument in chambers on the motion on February 1 and again on February 8, 2007. (LF1,42). Ms. Leftwich stated that she was acting as Mr. McFadden's lawyer when she filed his motion for post-conviction relief and that, in filing it late, she had abandoned Mr. McFadden. (LF42).

Judge Ross granted the State's Motion to Dismiss, stating he lacked jurisdiction to hear the matter because Mr. McFadden's motion had been filed out of time. (LF40,42). Judge Ross found that Ms. Leftwich was not representing Mr. McFadden on October 12, 2006 because he had not yet appointed her. (LF42).

Judge Ross further found that, in those circumstances, Ms. Leftwich did not abandon Mr. McFadden. (LF42). Judge Ross thereafter overruled Mr. McFadden's Motion to Reconsider. (LF57).

Mr. McFadden appealed to the Missouri Court of Appeals, Eastern District. In a memorandum decision, that Court affirmed. *McFadden v. State*, No.ED89470 (September 18, 2007). That Court thereafter denied Mr. McFadden's motion for rehearing and application for transfer. Mr. McFadden sought transfer from this Court and transfer was granted on December 18, 2007.

POINT RELIED ON

The motion court clearly erred in granting the State's motion to dismiss Mr. McFadden's motion for post-conviction relief because this denied Mr. McFadden due process, a full and fair hearing in state court, and freedom from cruel and unusual punishment, guaranteed by U.S. Const., Amends. VI, VIII, XIV; Mo.Const., Art.I, §§10, 18(a), 21, in that Assistant Public Defender Leftwich entered into an attorney-client relationship with Mr. McFadden whereby she agreed to file for him his motion for post-conviction relief in the St. Louis County Clerk's Office but, despite having received it from Mr. McFadden in a timely fashion, she filed it one day late. Because Mr. McFadden could not control the filing of his motion for post-conviction relief but instead relied upon Ms. Leftwich's advice and counsel, the doctrine of abandonment should operate to allow Mr. McFadden the opportunity to pursue his post-conviction remedy in state court.

Glover v. State, 225 S.W.3d 425 (Mo.banc 2007);

Spells v. State, 213 S.W.3d 700 (Mo.App., W.D., 2007);

Nicholson v. State, 151 S.W.3d 369 (Mo.banc 2004);

U.S. Const., Amends. VI, VIII, XIV;

Mo. Const., Art. I, §§10, 18(a), 21.

ARGUMENT

The motion court clearly erred in granting the State's motion to dismiss Mr. McFadden's motion for post-conviction relief because this denied Mr. McFadden due process, a full and fair hearing in state court, and freedom from cruel and unusual punishment, guaranteed by U.S. Const., Amends. VI, VIII, XIV; Mo.Const., Art.I, §§10, 18(a), 21, in that Assistant Public Defender Leftwich entered into an attorney-client relationship with Mr. McFadden whereby she agreed to file for him his motion for post-conviction relief in the St. Louis County Clerk's Office but, despite having received it from Mr. McFadden in a timely fashion, she filed it one day late. Because Mr. McFadden could not control the filing of his motion for post-conviction relief but instead relied upon Ms. Leftwich's advice and counsel, the doctrine of abandonment should operate to allow Mr. McFadden the opportunity to pursue his post-conviction remedy in state court.

The doctrine of abandonment has not been applied in the context of *pro se* post-conviction motions because, under normal circumstances, at that point in the process, lawyers are not yet involved in the case. The litigant is, as the title of the document suggests, proceeding *pro se*, without having yet obtained the assistance of counsel. This case presents the unique factual situation in which a lawyer was involved in the case from the outset. Under these unique facts, the doctrine of abandonment should apply and Mr. McFadden should be given the opportunity to proceed on his claims for post-conviction relief.

Rule 29.15(b) requires that a *pro se* Rule 29.15 motion be filed within 90 days after the appellate court issues its mandate in the appellant's direct appeal. That time limitation is valid and mandatory. *State v. Six*, 805 S.W.2d 159, 170 (Mo.banc 1991). If a *pro se* motion is not timely filed, the motion court lacks jurisdiction and, in most circumstances, must dismiss even if the State does not request that it do so. *Matchett v. State*, 119 S.W.3d 558, 559 (Mo.App., S.D. 2003); *Spells v. State*, 213 S.W.3d 700 (Mo.App., W.D. 2007).

The motion court dismissed Mr. McFadden's Rule 29.15 motion on the belief that Rule 29.15(b) required it to do so. That belief was clearly erroneous, *Rule 29.15(k)*, since Mr. McFadden's counsel, Assistant Public Defender Leftwich, had told him she would file his initial post-conviction motion for him and he, relying on her counsel and assistance, sent the motion to her so that she could file it for him. Since Ms. Leftwich acted as Mr. McFadden's lawyer and removed the filing of his motion from his control, her failure to file it in a timely fashion should be deemed abandonment. This Court should remand to the motion court so that Mr. McFadden can pursue his motion for post-conviction relief.

Appellate review of the motion court's order sustaining or overruling a motion for post-conviction relief under Rule 29.15 is "limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous." *Rule 29.15(k)*. Findings and conclusions will be deemed clearly erroneous if, after a full review of the record, the appellate court has the "definite and firm

impression a mistake has been made.” *State v. Taylor*, 929 S.W.2d 209, 224 (Mo.banc 1996).

The motion court’s findings and conclusions in this case are clearly erroneous because they rest upon the false premise that Ms. Leftwich was not acting as Mr. McFadden’s lawyer when she undertook to file his motion for post-conviction for him. Ms. Leftwich was acting as Mr. McFadden’s lawyer when she filed his motion one day late. This Court should find that she abandoned Mr. McFadden and that Mr. McFadden is entitled to pursue his post-conviction motion before the motion court. If this Court fails to find that Mr. McFadden was abandoned and that he is entitled to proceed on his post-conviction motion, Mr. McFadden’s state and federal constitutional rights to due process, a full and fair hearing in state court, and freedom from cruel and unusual punishment will be denied.

The State tried and convicted Mr. McFadden of two counts of first degree assault, §565.050 RSMo², two counts of armed criminal action, §571.015 RSMo, and one count of unlawful use of a weapon, §571.030.1(3) RSMo, in St. Louis County Case No. 04CR-2658, before the Hon. John A. Ross. (LF4). On February 4, 2005, Judge Ross sentenced Mr. McFadden to concurrent sentences of 15, 30, 10, 10 and 4 years. (LF4).

Mr. McFadden, through counsel, filed a timely notice of appeal to the Missouri Court of Appeals, Eastern District, which thereafter affirmed the

² All statutory references are to Revised Statutes of Missouri (2000).

judgment and sentences in *State v. McFadden*, 193 S.W.3d 305 (Mo.App.,E.D. 2006). After it denied Mr. McFadden's post-appeal motions, that Court's mandate issued on July 13, 2006.

Assistant Public Defender Valerie Leftwich thereafter contacted Mr. McFadden and directed him to send his motion for post-conviction relief³ to her. (LF25-26,30-31,42-43). Ms. Leftwich told Mr. McFadden that she would hand-file his motion for post-conviction relief in the St. Louis County Clerk's Office before what she believed was its due date of October 13, 2006. (LF25-26,30-31,42-43). Mr. McFadden signed and had his motion for post-conviction relief notarized on September 25, 2006 and placed it in the mail. (LF26,30,42). Ms. Leftwich received Mr. McFadden's motion on September 28, 2006, 14 days before the 90-day time limit of Rule 29.15 would expire. (LF26,30,42).

³ Mr. McFadden's motion included claims of (1) actual innocence, based on physical evidence—shell casings and glass from the car—that was inconsistent with Mr. McFadden's guilt, and eye witnesses who could identify someone else as the shooter; (2) ineffective assistance of counsel for failure to challenge the late disclosure of and conclusions by the state's firearms expert; (3) ineffective assistance of counsel for failure to investigate; (4) ineffective assistance of counsel for failure to challenge Mr. Bishop's peremptory challenges, under *Batson v. Kentucky*, 476 U.S. 79 (1986), and (5) ineffective assistance of counsel for failure to object to improper argument. (LF6-7).

As Ms. Leftwich had assured Mr. McFadden she would, she hand-filed his motion for post-conviction relief in the St. Louis County Clerk's Office. (LF25-26,31,42). But, she filed it on October 12, 2006, **91** days after the Eastern District's mandate had issued. (LF26,31,42).

On January 23, 2007, the St. Louis County Prosecutor's Office filed a Motion to Dismiss Mr. McFadden's motion for post-conviction relief, alleging it had been untimely filed. (LF22-24). On February 1 and February 8, 2007, Judge Ross heard argument, in chambers, on the motion to dismiss. (LF42). At the hearing, Ms. Leftwich stated that she was acting as Mr. McFadden's lawyer when she filed his motion for post-conviction relief. (LF42). She acknowledged that she had miscalculated the time for filing the motion and had filed it late. She acknowledged that, by her actions, she had abandoned Mr. McFadden. (LF42).

Judge Ross granted the State's Motion to Dismiss, stating he lacked jurisdiction to hear the matter because Mr. McFadden's motion had been filed out of time. (LF40,42). Judge Ross found that Ms. Leftwich had not been representing Mr. McFadden on October 12, 2006 because he had not yet appointed her. (LF42). Judge Ross further found that, in those circumstances, Ms. Leftwich did not abandon Mr. McFadden. (LF42). Judge Ross thereafter overruled Mr. McFadden's Motion to Reconsider. (LF57).

Judge Ross's decision was clearly erroneous in two respects. First, his finding that Ms. Leftwich was not acting as Mr. McFadden's lawyer when she filed his post-conviction motion one day late is contrary to established law.

Second, since Ms. Leftwich was acting as Mr. McFadden's lawyer, Judge Ross should have found that, by filing his post-conviction motion late, she had abandoned her client. That finding should have required that Mr. McFadden be allowed to proceed, despite that his post-conviction motion had been untimely-filed.

Judge Ross specifically found that Ms. Leftwich was not representing Mr. McFadden when she filed his post-conviction motion late because he had not yet appointed her. This finding misapprehends how an attorney-client relationship is established.

An attorney-client relationship does not depend for its existence upon a court's action appointing the attorney to represent the client. The relationship "is sufficiently established when it is shown that the advice and assistance of the attorney are sought and received in matters pertinent to his profession." *State v. Longo*, 789 S.W.2d 812, 815 (Mo.App., E.D. 1990); *Fox v. White*, 215 S.W.3d 257 (Mo.App., W.D. 2007); *Collins v. Mo. Bar Plan*, 157 S.W.3d 726, 736 (Mo.App., W.D. 2005); *Erickson v. Civic Plaza Nat'l. Bank of Kansas City*, 422 S.W.2d 373, 378 (Mo.App., K.C.D. 1967); Catherine J. Lancot, "Attorney-Client Relationships in Cyberspace: The Peril and the Promise," 49 Duke L.J. 147, 181 (1999); Bruce A. Hake, "Dual Representation in Immigration Practice: The Simple Solution is the Wrong Solution," 5 Geo. Immigr. L.J. 581, 595-96 (1991). In fact, "Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has

agreed to do so.” Missouri Supreme Court Rule 4, Scope of Rules of Professional Conduct. The relationship is established by the **parties’** interaction, not by some artificial and external factor, such as a court’s act of appointing counsel on a day unrelated to anything occurring within the relationship itself.

Whether an attorney-client relationship exists when the attorney is a Missouri Public Defender, is clearly a question governed first by the above-stated law and second, by Chapter 600 RSMo. That Chapter makes it clear that the attorney, not the court, makes the determination of indigency and thus is ultimately responsible for determining whether to accept the representation. §600.086.3 RSMo. Only upon motion by a party may the court make the determination whether the defendant is eligible for public defender services. §600.086.3 RSMo; *State ex rel. Robinson v. Franklin*, 48 S.W.3d 64, 68 (Mo.App., W.D. 2001); *State ex rel. Shaw v. Provaznik*, 708 S.W.2d 337, 341 (Mo.App., E.D. 1986). Judge Ross’s conclusion that Ms. Leftwich was not acting as Mr. McFadden’s lawyer because he, Judge Ross, had not appointed her, is thus contrary to the law. It is also contrary to the undisputed facts.

Ms. Leftwich filed a verified pleading in which she set forth the pertinent facts relating to the abandonment. She averred that she “was acting as Mr. McFadden’s attorney...” when she directed Mr. McFadden to send his completed motion for post-conviction relief to her so that she could hand-file it in the St. Louis County Clerk’s Office. (LF46). Mr. McFadden relied on Ms. Leftwich’s advice and he signed and had his motion notarized 17 days before its due date.

(LF11,26,30,42-43). He then mailed it to Ms. Leftwich and she received it 14 days before its due date. (LF26,30-31,42-43). Had Mr. McFadden been acting *pro se*, he clearly could have filed his motion in a timely fashion. Indeed, if he had sent it to the court, rather than to Ms. Leftwich, as she had advised him to, his motion would have been timely filed. Instead, acting in reliance on his lawyer's advice, he relinquished control of it to her and she then filed it—out of time. The State never disputed any of the facts of this case in the court below. The motion court's conclusion that Ms. Leftwich was not acting as Mr. McFadden's attorney is contrary to the uncontroverted record evidence. It is clearly erroneous.

Since Ms. Leftwich was acting as Mr. McFadden's lawyer and he relied on her to file his Rule 29.15 motion timely in the Circuit Court, the question becomes whether Mr. McFadden has any recourse from her failure to file it in a timely fashion. To resolve that question, this Court must consider the law of abandonment in the context of post-conviction proceedings.

The time limits imposed in Rule 29.15(b) are intended to avoid delays in processing prisoners' claims and to prevent the litigation of stale claims. *Day v. State*, 770 S.W.2d 692, 695 (Mo.banc 1989). Those time limits are valid and mandatory. *Six*, 805 S.W.2d at 170. Untimely motions generally deprive the motion court of jurisdiction and that court is obligated to dismiss the motion even if the State does not request that it do so. *Matchett*, 119 S.W.3d at 559. The Rule, however, has not been applied mechanistically to deny the opportunity to litigate constitutional claims.

In *Nicholson v. State*, 151 S.W.3d 369 (Mo.banc 2004), for example, Nicholson filed his Rule 29.15 motion in St. Louis City Circuit Court within the 90 days mandated by the Rule. Under Rule 29.15(a), however, he should have filed the motion in Cape Girardeau County Circuit Court. By the time St. Louis City had forwarded the motion to Cape Girardeau County for filing, it was two days late. *Id.* at 370. The motion court dismissed with prejudice, finding the motion untimely filed. *Id.*

Relying on Rule 51.10, this Court reversed and remanded. It noted that Rule 51.10 provides that the court to which an action is transferred treat the action as if it had originated in that court and use the original filing date to determine its timeliness. But, perhaps of more importance here, this Court considered fairness and practicality concerns in determining the appropriate result. *Id.* at 371, n.5.

It would be patently unfair to prohibit incarcerated, *pro se* litigants from availing themselves of section 476.410 and Rule 51.10 while permitting other civil litigants to have their cases transferred to an appropriate venue. Given the facts of this case, there is no legal or just basis for holding Mr. Nicholson to a higher standard of legal competence than that of experienced attorneys representing clients in other civil matters.

Id. This Court thus did not find itself bound by the Rule's mandatory language.

Most recently, in *Glover v. State*, 225 S.W.3d 425 (Mo.banc 2007), this Court reaffirmed that the seemingly mandatory language of Rule 29.15 should be interpreted in light of the purpose of the Rule's requirements. Mr. Glover filed his

Rule 29.15 motion but failed to sign either the *pro se* or the amended motion. *Id.* at 427. The State sought dismissal because of Mr. Glover's failure to sign or verify the motions but this Court refused.

This Court noted that, when it initially adopted Rule 29.15, the Movant was required to sign and verify the *pro se* and amended motions and an "unsigned, unverified motion failed to invoke the motion court's jurisdiction to grant relief." *Id.* at 428; *Kilgore v. State*, 791 S.W.2d 393, 395 (Mo.banc 1990). This Court recognized that, over time, the consequences of failing to sign post-conviction motions have become less severe. *Glover, supra* at 428. Since the lack of a signature on an initial pleading had been held to not deprive civil litigants of their right of action, *Id.*, citing *Hensel v. American Air Network, Inc.*, 189 S.W.3d 582, 583 (Mo.banc 2006), this Court decided that the same rule should prevail in post-conviction actions. It held that, "for purposes of Rule 29.15 and Rule 24.035 the signature requirement is not jurisdictional and is subject to the sanctions of Rule 55.03." *Glover*, 225 S.W.3d at 428. Yet again, the purpose of the requirement, not just its existence, was considered. And, as to the signature requirement, it was held not jurisdictional.

The Missouri Court of Appeals, Western District, has continued this trend. In *Spells v. State*, 213 S.W.3d 700 (Mo.App.,W.D. 2007), Spells mailed his Rule 29.15 motion to the Lafayette County Circuit Court at P.O. Box 340, the proper address when the notice of appeal was filed. *Id.* at 701. The post office received the motion on July 1, 2005 but returned it to Spells as undeliverable because the

Court's new address was P.O. Box 10 and the forwarding order had expired. *Id.* Spells then mailed the motion to P.O. Box 10 and the court received it on July 13, 2005, seven days after its due date of July 6. *Id.*

The Western District noted that a mechanical application of the Rules would result in the motion being deemed untimely filed. *Id.* It nonetheless reversed. It first recognized that prisoners who seek review of their convictions without counsel are in a unique position since they lack the ability to ensure that the clerk's office actually receives and file-stamps their pleadings before the deadline. *Id.* at 701-02. It also noted that, while the purpose of the Rule's time limits is to avoid delay and prevent litigating stale claims, nothing in the record even suggested that Spells had intended to cause delay. *Id.* at 702. Rather, that the post office initially received Spells' motion five days before the deadline suggests that Spells' intention was to timely file his motion. *Id.*

The Western District acknowledged that, distinct from *Nicholson*, Spells could avail himself of no rule that would somehow render his motion timely. *Id.* But, like *Nicholson*, the Court found, Spells had made "an honest, minor clerical mistake in filing his *pro se* motion to the circuit court." *Id.* Given the specific facts of the case and, "[c]onsistent with the spirit of Rule 29.15 and *Nicholson*," the Western District reversed and remanded. *Id.*

Mr. McFadden's case is similar to Mr. Spells'. Mr. McFadden's clear intent was to file his motion in a timely fashion. He completed and signed it 17 days before it was due and then sent it for filing to Ms. Leftwich, who received it

14 days before it was due. The Rule's purpose to avoid delay and prevent litigating stale claims would not be subverted by allowing Mr. McFadden to proceed in circuit court.

The question is whether the doctrine of abandonment should apply in these unique circumstances so as to excuse the untimely filing of Mr. McFadden's motion. Mr. McFadden suggests that it should.

No constitutional right to counsel or to the effective assistance of counsel exists in post-conviction proceedings. *Winfield v. State*, 93 S.W.3d 732, 738 (Mo.banc 2002); *Butts v. State*, 85 S.W.3d 132, 134 (Mo.App., S.D. 2002). While claims of ineffective assistance of post-conviction counsel are "categorically unreviewable," *Krider v. State*, 44 S.W.3d 850, 859 (Mo.App., W.D. 2001), an exception to that rule applies if the record shows that post-conviction counsel has abandoned the Movant. *Butts*, 85 S.W.3d at 134. That exception derives from the principle that, once a State creates a right—such as the right to counsel under Rule 29.15—it may not be arbitrarily abrogated or due process will be denied. *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974).

Thus far, post-conviction counsel's abandonment that supports a motion to re-open has been found in two situations. First, it has been found when post-conviction counsel takes no action on the Movant's behalf with respect to filing the Movant's amended motion and the record shows that the Movant is deprived of a meaningful review of his claims. *Winfield*, 93 S.W.3d at 738-39. Second, it has been found if post-conviction counsel is aware of the need to file an amended

motion but fails to do so in a timely fashion. *Id.*; *Brown v. State*, 179 S.W.3d 404, 407 (Mo.App., S.D. 2005).

Mr. McFadden maintains that the doctrine of abandonment should apply in the unique and distinctive facts of his case. Ms. Leftwich and Mr. McFadden had entered into an attorney-client relationship when she told him to send his original Rule 29.15 motion to her so that she could file it for him. Mr. McFadden complied. He did what his lawyer told him to do. He sent the motion to her in ample time for her to file it timely in the appropriate circuit court.

Mr. McFadden relinquished control of his post-conviction action to Ms. Leftwich when he mailed it to her. He then relied upon her to file his motion in a timely fashion. While Mr. McFadden **could** have gone ahead and filed his motion himself, he should not be obligated to do so under these circumstances. He should be entitled to rely upon his lawyer to do that which she promised to do—timely file his motion.

While in the normal course of events, a lawyer would not be involved in a post-conviction case at its outset, in the unique facts of this case, a lawyer was involved. She had entered into an attorney-client relationship with Mr. McFadden and had acted, to his detriment, by filing his post-conviction motion late. Ms. Leftwich abandoned Mr. McFadden by filing his motion late.

This situation should be analogized to those cases in which counsel, knowing that the Movant has viable constitutional claims of error that should be included in the amended motion, inexplicably fails to file an amended motion in a

timely fashion and is deemed to have abandoned the Movant. *Sanders v. State*, 807 S.W.2d 493, 495-96 (Mo.banc 1991); *Luleff v. State*, 807 S.W.2d 495, 497-98 (Mo.banc 1991)⁴. This case is distinguishable from *Bullard v. State*, 853 S.W.2d 921 (Mo.banc 1993). There, the Movant did not file his Rule 29.15 motion in a timely manner and this Court rejected his claim of abandonment.

In *Bullard*, Bullard was convicted, sentenced and timely filed his notice of appeal. *Id.* at 922. On appeal, Bullard hired a new attorney who also agreed to represent him in the Rule 29.15 action. *Id.* The record appeared to indicate that appellate counsel told Bullard “that a 29.15 motion could be timely filed *after* the appellate court ruled on the direct appeal.” *Id.* (emphasis in original). The record indicated that the record on appeal in the direct appeal was filed on March 28, 1991, making the 29.15 motion actually due April 29, 1991, not after the appellate court had ruled on the direct appeal, as appellate counsel had advised. *Id.* No Rule 29.15 motion was filed by April 29, 1991. *Id.*

⁴ Noteworthy is that the *Luleff* Court discussed whether a state habeas proceeding might provide the mechanism for review of the Movant’s claims when post-conviction counsel is derelict in her duties. The *Luleff* Court was persuaded by the State’s arguments that the most “expeditious and convenient” forum in which to adjudicate all claims was the 29.15 court, rather than in a state habeas proceeding. *Luleff*, 807 S.W.2d at 497.

After the Western District Court of Appeals affirmed Bullard's conviction, *State v. Bullard*, 847 S.W.2d 68 (Mo.App., W.D. 1991), in October, 1991, Bullard fired appellate counsel and hired a third attorney to pursue his post-conviction action, filing a Rule 29.15 motion in December, 1991 and thereafter filing an amended motion in January, 1992. *Bullard*, 853 S.W.2d at 922. This Court took transfer of the case post-opinion and affirmed the motion court's action that dismissed the Rule 29.15 motion for failing to comply with the Rule's time limits. *Id.*

In so ruling, this Court first noted that abandonment by counsel excuses the untimely filing of an amended motion if the Movant is without fault. *Id.*; *Sanders*, 807 S.W.2d at 495; *Luleff*, 807 S.W.2d at 497-98. The Court went on to distinguish between amended and *pro se* motions and the applicability of the abandonment doctrine.

The Court noted that amended motions differ significantly from *pro se* motions, since they require legal expertise by counsel to ensure their proper drafting. *Bullard*, 853 S.W.2d at 922-23. By contrast, the Court said, a *pro se* motion is "relatively informal, and need only give notice to the trial court, the appellate court, and the State that movant intends to pursue relief under Rule 29.15. As legal assistance is not required in order to file the original motion, the absence of proper legal assistance does not justify an untimely filing." *Id.* at 923. This Court thus rejected the applicability of the doctrine of abandonment to the filing of a *pro se* motion.

This situation is distinguishable from *Bullard* and this Court should find that Ms. Leftwich abandoned Mr. McFadden. Mr. McFadden acknowledges that, under most circumstances, the filing of the *pro se* motion is something within the capabilities of a Movant who acts without the assistance of counsel. In fact, had Mr. McFadden actually been acting *pro se*, his motion undoubtedly would have been filed timely since he mailed it to Ms. Leftwich over two weeks before it was due. Had he not been acting in reliance on her, the Postal Service surely could have delivered his motion to St. Louis County as easily as it did to Columbia. But, Ms. Leftwich wrested from Mr. McFadden the ability to file that initial motion himself. Instead, she told him that **she**, his attorney, would file it for him.

This is drastically different from *Bullard*. There, by contrast, while appellate counsel misstated the applicable time limits, there is no indication that appellate counsel took from Bullard the ability to file the motion himself. Indeed, the Court’s opinion states that counsel told Bullard that the motion “could be timely filed,” suggesting, by its use of the passive voice, that no actor for that event was designated. *Bullard*, 853 S.W.2d at 922. Counsel’s advice, while inaccurate, plainly left the ball in Bullard’s court—he could file the motion himself.⁵

⁵ Whether the *Bullard* opinion maintains validity even under its own facts in light of the current Rule 29.15 is questionable since Rule 29.15(a) now explicitly provides for the review of claims of ineffective assistance of appellate counsel.

Under the highly unique and distinctive facts of this case, this Court should find that Ms. Leftwich was acting as Mr. McFadden's counsel when she prevailed upon him to send his post-conviction motion to her so that she could file it for him. The entire blame for the untimely filing of the motion rests with counsel, not with Mr. McFadden. Mr. McFadden should not be denied the opportunity to litigate his substantial and meritorious constitutional claims, including actual innocence and a *Batson* challenge, (LF6-7), because of counsel's error.

This Court should find that counsel abandoned Mr. McFadden and should reverse and remand for the appointment of counsel, the filing of an amended motion, and further proceedings consistent with the intent of Rule 29.15. If it does not, Mr. McFadden will be denied his state and federal constitutional rights to due process, a full and fair hearing in state court, and freedom from cruel and unusual punishment.

See Anderson v. State, 196 S.W.3d 28, 36 (Mo.banc 2006). Bullard's appellate counsel's erroneous advice about the time limits for filing the Rule 29.15 motion should, under the current Rule, constitute ineffective assistance of appellate counsel. *See State ex rel. Meier v. Stubblefield*, 97 S.W.3d 476, 477 (Mo.banc 2003); *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000).

CONCLUSION

Mr. McFadden requests, based upon the foregoing argument, that this Court reverse and remand for appointment of counsel and for further proceedings consistent with the purposes of Rule 29.15.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of January, 2008, two true and correct copies of the foregoing brief and floppy disk(s) containing a copy of this brief were mailed, postage pre-paid, to Jayne Woods, Office of the Attorney General, Missouri Supreme Court Building, P.O. Box 899, Jefferson City, MO 65102.

Janet M. Thompson

CERTIFICATE OF COMPLIANCE

I, Janet M. Thompson, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, signature block, this certification and the certificate of service, this brief contains 5,560 words, which does not exceed the 31,000 words allowed for an appellant's opening brief.

The floppy disk(s) filed with this brief contain(s) a copy of this brief. The disk(s) has/have been scanned for viruses using a McAfee VirusScan program. According to that program, the disk(s) is/are virus-free.

Janet M. Thompson

**IN THE
MISSOURI SUPREME COURT**

VINCENT McFADDEN,)	
)	
Appellant,)	
)	
vs.)	No. SC88895
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

**APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
21ST JUDICIAL CIRCUIT, DIVISION 15
THE HONORABLE JOHN A. ROSS, JUDGE**

APPENDIX TO APPELLANT'S SUBSTITUTE BRIEF

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I hereby certify that on this ____ day of January, 2008, two true and correct copies of the foregoing Appendix to Appellant's Brief were attached to Appellant's Brief and were mailed, postage pre-paid, to Jayne Woods, Office of the Attorney General, Missouri Supreme Court Building, P.O. Box 899, Jefferson City, MO 65102.

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