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IN THE MISSOURI SUPREME COURT

APPEAL NO. SC95139

WALTER BARTON,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Missouri
Seventeenth Judicial Circuit
The Honorable R. Michael Wagner

APPELLANT'S BRIEF

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Electronically Filed - SUPREME COURT OF MISSOURI - November 18, 2015 - 11:13 AM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Rules

Cases

Electronically Filed - SUPREME COURT OF MISSOURI - November 18, 2015 - 11:13 AM

JURISDICTIONAL STATEMENT

This case involves the prosecution of Walter Barton for the October 1991 murder in the first degree of Gladys Kuehler. ***State v. Barton***, 240 S.W.3d 693, 696 (Mo.banc 2007). That prosecution has a twenty-plus-year history, involving numerous changes of venue, two mistrials, a trial and conviction followed by a reversal and remand, see ***State v. Barton***, 936 S.W.2d 781 (Mo.banc 1996), yet another trial, followed by an affirmance, see ***State v. Barton***, 998 S.W.2d 19 (Mo.banc 1999), and then a vacation of judgment and sentence upon Rule 29.15

Electronically Filed - SUPREME COURT OF MISSOURI - November 18, 2015 - 11:13 AM

Electronically Filed - SUPREME COURT OF MISSOURI - November 18, 2015 - 11:13 AM

proceedings, after this Court interceded in the middle of those proceedings, see ***Barton v. State***, 76 S.W.3d 280 (Mo.banc 2002). ***State v. Barton,*** 240 S.W.3d 693, 696 (Mo.banc 2007). Then at the fifth trial before the Circuit Court of Cass County, the jury returned against Mr. Barton a verdict of guilty of murder in the first degree and a sentence of death, and the Circuit Court entered judgment in accordance with the jury's recommendations. ***State v. Barton***, supra. Thereafter, an original and amended Rule 29.15 petition were filed with the Circuit Court of Cass County; upon the grounds then raised, the requests for relief were denied by the Circuit Court, and this Court affirmed. ***Barton v. State***, 432 S.W.3d 742, 748 (Mo.banc 2014).

On June 9, 2015, petition was brought in the Cass County Motion Court requesting that that Court conduct an evidentiary hearing and find that Mr. Barton had been abandoned by post-conviction counsel (L.F. 5, 6-25). On June 30, 2015, the Motion Court overruled the petition in all respects (L.F. 47).

This appeal challenges the rulings of the Circuit Court, involves the construction of a Rule of this Court, to wit V.A.M.R. 29.15, and concerns a death sentence. This Court has jurisdiction pursuant to Article V, Section 3 of the Constitution of the State of Missouri.

STATEMENT OF FACTS

1. Facts of the case against Mr. Barton elicited at the fifth trial

Electronically Filed - SUPREME COURT OF MISSOURI - November 18, 2015 - 11:13 AM

On the evening of October 9, 1991, the dead body of 81-year-old Gladys Kuehler, the manager of an Ozark, Missouri trailer park, was found lying in a pool of blood on the floor of the bedroom of her trailer; the cause of death was exsanguination as a result of "well in excess" of 50 stab wounds, an ear-to-ear slitting of her throat which cut the jugular vein, and two x-shaped slash marks on her abdomen deep enough to cause evisceration. ***State v. Barton***, 240 S.W.3d 693, 696, 699 (Mo.banc 2007). The body was found by Debbie Selvidge, the victim's granddaughter, Carol Horton, a neighbor, and Mr. Barton, who was asked by the other two to accompany them to check on the victim. ***State v. Barton***, 697-698.

Mr. Barton "frequented" the mobile home park, and on October 9 was there for much of the day and evening trying to borrow money from, doing odd jobs for, and otherwise interacting with, various of the residents, including the victim. ***State v. Barton***, 696-697, 699. Once police began investigating the murder, Mr. Barton almost immediately became a suspect at least in part because he was "the only person known to have been in the neighborhood on October 9, 1991 who might have done such a thing." ***State v. Barton***, 713. There likely also was suspicion raised in the minds of authorities by Mr. Barton having been twice previously convicted of first degree assault, though the jury at Mr. Barton's trial did not hear evidence about those convictions until penalty phase. ***State v. Barton***, 699-700.

Electronically Filed - SUPREME COURT OF MISSOURI - November 18, 2015 - 11:13 AM

At Mr. Barton's trial, the key evidence concerned small blood stains found on Mr. Barton's clothes and DNA testing which confirmed that one of the small stains was the victim's blood. ***State v. Barton***, 699. When police discovered the blood stains on Mr. Barton's clothes on the night of the murder, Mr. Barton explained that the stains must have happened when, at the time of the discovery of the body, he slipped while pulling Debbie Selvidge, the granddaughter, away from the body. ***State v. Barton***, 698. The granddaughter originally confirmed this account to police, but later "altered her story, testifying that Barton had never entered the bedroom where the body lay." ***State v. Barton***, 716. A blood spatter expert was ultimately called upon to opine that certain of the blood stains on Mr. Barton's clothes got there because "the blood was ejected from the source by a blow or 'transfer of energy' and not by simply rubbing up against already-present blood." ***State v. Barton***, 699.

Also important to the State's case was the testimony of a jailhouse informer, Katherine Allen, who averred that "on more than one occasion, appellant threatened her, asking her if she knew what he was in jail for and saying that he would kill her 'like he killed that old lady.'" ***State v. Barton***, 699.

The rest of the case against Mr. Barton depended upon the drawing of adverse inferences from various items of circumstantial evidence. ***State v. Barton***, 700.

Electronically Filed - SUPREME COURT OF MISSOURI - November 18, 2015 - 11:13 AM

Carol Horton testified that Mr. Barton appeared to her to be in a "happy-go-lucky" mood earlier in the day of October 9, but changed to "distant and ...in a hurry" later, after he said he had visited the victim in an effort to borrow money. ***State v. Barton***, 696-697. Horton added that, after his return, Mr. Barton asked to use the restroom, and spent about ten minutes in there washing his hands, explaining his hands were dirty due to working on his car. ***State v. Barton***, 697. On the other hand, lab testing found no blood in the sink or on the soap or towel. ***State v. Barton***, 714. Horton additionally testified that, before she left in the late afternoon to check on the victim, Mr. Barton discouraged Horton from going, saying that the victim was napping. ***State v. Barton***, 697. Along similar lines, Horton and Debbie Selvidge also testified that, when they and Mr. Barton entered the trailer, and just before the body was discovered in the bedroom, Mr. Barton discouraged Selvidge from going down the hallway toward the bedroom. ***State v. Barton***, 698. Police testified that, in Mr. Barton's original statement, he reported that he last saw the victim between 2:00 and 2:30 in the afternoon, but later admitted, when specifically asked, that he had answered the phone for the victim for a call reportedly made about 3:15. ***State v. Barton***, 698. And, a fifty dollar check payable to Mr. Barton and confirmed by a handwriting expert as made out and signed by the victim was found discarded three days later along a nearby highway. ***State v. Barton***, 699.

Electronically Filed - SUPREME COURT OF MISSOURI - November 18, 2015 - 11:13 AM

In sum, and as put by the three Judges who dissented, the evidence in the case was "certainly not overwhelming". ***State v. Barton***, 713.

2.. The 29.15 proceedings challenging the fifth trial conviction dragged on for six years due to problems with post-conviction defense counsel,Gary Brotherton, but eventually ended with the rejection of the issues raised by Brotherton

On April 11, 2008, Mr. Barton's Rule 29.15 petition was filed in Cass County Circuit Court under case # 08CA-CV01371 (Supp.L.F. 15). On April 22, 2008, the motion Court ordered that the Public Defender represent Mr. Barton; the motion Court ultimately granted 90 days from that point for the filing of an amended petition (Supp.L.F. 14-15). By special appointment by the Missouri State Public Defender System, Gary Brotherton and Amy Bartholow represented Mr. Barton at this stage of the proceedings (Supp.L.F. 14; L.F. 26). An amended petition, prepared by Mr. Brotherton, was filed on July 21, 2008 (Supp.L.F. 14; L.F. 26-27). Ten days later, Mr. Brotherton filed a motion to disqualify Counsel for the State (Supp.L.F. 13). Thereafter, for nearly 2 years, Mr. Brotherton made no filings in the case (Supp.L.F. 13). Then, on September 23, 2010, the Missouri Public Defender System sought to have Mr. Brotherton removed as Counsel for Mr. Barton (Supp.L.F. 11-14). Mr. Brotherton resisted those efforts (Supp.L.F. 11). On September 27, 2010, the motion Court conducted a hearing, at which time the

Missouri State Public Defender System abandoned its efforts to remove Mr. Brotherton from the case (Supp.L.F. 11). Thereafter, the case was passed on the motion Court's docket several times (Supp.L.F. 9-11). Then, on January 9, 2012, the motion Court set the matter for trial on September 25, 2012 (Supp.L.F. 9). On May 2, 2012, just less than two years after he had resisted his removal from the case, Mr. Brotherton sought leave of Court to withdraw as Counsel for Mr. Barton (Supp.L.F. 9). On May 14, 2012, the motion Court granted Mr. Brotherton leave to withdraw (Supp.L.F. 8). Ms. Bartholow, who had returned to the Missouri State Public Defender System from the private practice, remained as one counsel (L.F. 28; Supp.L.F. 6). Two new attorneys entered their appearances for Mr. Barton, Public Defender Valerie Leftwich on May 24, 2012, and Public Defender Pete Carter on September 6, 2012 (Supp.L.F. 8). On June 21, 2012, Ms. Leftwich filed a motion for continuance of the hearing; on July 26, 2012, the motion Court overruled that request (Supp.L.F. 8). Hearing on the amended motion filed by Brotherton began, as scheduled, on September 26, 2012 (Supp.L.F. 6). On February 14, 2013, the motion Court issued findings of fact and conclusions of law denying the petition for relief (Supp.L.F. 5). Thereafter, this Court unanimously affirmed that judgment, and issued its mandate on June 24, 2014. ***Barton v. State***, 432 S.W.3d 741 (Mo.banc 2014).

Electronically Filed - SUPREME COURT OF MISSOURI - November 18, 2015 - 11:13 AM

Electronically Filed - SUPREME COURT OF MISSOURI - November 18, 2015 - 11:13 AM

3. The affidavit of Amy Bartholow accounting the mental illness suffered by Gary Brotherton while acting as counsel for Mr. Barton

The affidavit of Amy Bartholow was filed with the motion Court (L.F. 26-31). In that affidavit, Ms. Bartholow explained that, at the time that she and Gary Brotherton were engaged to represent Mr. Barton, they were husband and wife and also business partners (L.F. 26). Ms. Bartholow accounted that Gary Brotherton, because of his prior experience and training, was hired by the Missouri State Public Defender System to be lead and learned counsel (L.F. 26-27). Ms. Bartholow explained that she was not so qualified and trained, and so was hired to assist in limited ways not requiring capital case training and experience (L.F. 26-27). Ms. Bartholow also noted that, at that time, she was restricting her law practice duties in order to devote significant portions of her time to her three young children (L.F. 26). As a consequence of these factors, duties of review of the records and of preparing an amended 29.15 petition were to be solely handled by Mr. Brotherton (L.F. 26-27).

Ms. Bartholow indicated that, prior to accepting employment in connection with Mr. Barton's case, Gary Brotherton had received a diagnosis of Bipolar Disorder, and had been placed on medication for that condition (L.F. 26). Ms. Bartholow indicated that she had misgivings in accepting appointment to this capital case in part because of her inexperience and in part because of Mr. Brotherton's

ongoing mental health issues (L.F. 26-27). Mr. Bartholow said that her worst fears were realized when, at the very time that Mr. Brotherton needed to be fully engaged in preparation of the amended petition in Mr. Barton's case, Mr. Brotherton was in the throes of out-of-control mood swings which created tremendous difficulties for Mr. Brotherton to do effective work (L.F. 27).

Finally, Ms. Bartholow, upon review of the work product of current counsel for Mr. Barton, acknowledged the failures by Mr. Brotherton to raise, in the amended petition which he filed, a host of issues which she deemed to be very significant (L.F. 28-31).

4. Mr. Barton's requests for relief based upon abandonment of counsel, and the Circuit Court's denial of same

Via motion to the Circuit Court, supported by the Bartholow affidavit, Mr. Barton contended that he had been abandoned by appointed counsel, and requested that a hearing first be conducted to establish the facts, followed by a determination of abandonment and the granting of an opportunity to supplement the original, amended petition (L.F. 6-31). The State opposed even conducting a hearing upon the matter, contending that "the facts that are alleged in the motion do not constitute abandonment" (Tr. 3-4). Counsel for Mr. Barton urged the necessity of conducting a hearing in order to create a proper record upon the issues for possible appeal (Tr.

Electronically Filed - SUPREME COURT OF MISSOURI - November 18, 2015 - 11:13 AM

5). The Circuit Court denied the motion in all respects (L.F. 47; Tr. 11). This appeal followed (L.F. 49-50).

POINTS RELIED ON

POINT ONE

The Motion Court clearly erred in overruling Mr. Barton's request for evidentiary hearing with respect to Barton's allegations of abandonment of counsel in Rule 29.15 proceedings because said inaction of the Court violated applicable provisions of Missouri law as interpreted by this Court, and further violated Mr. Barton's rights to enjoy due process of law and effective assistance of counsel, and to be free from cruel and unusual punishment, in derogation of the 6th, 8th and 14th Amendments to the Constitution of the United States and Article I, Sections 10, 18(a) and 21 of the Constitution of the State of Missouri in that, in light of the allegations made in the petition and the clear procedural mandates set down by this and the other Appellate Courts of this State, it was required that the Motion Court conduct an evidentiary hearing to allow Mr. Barton to present all available evidence to support his allegations of abandonment of counsel in order for the Motion Court, and ultimately this Court, to have a proper record upon which to determine the matter.

Electronically Filed - SUPREME COURT OF MISSOURI - November 18, 2015 - 11:13 AM

Electronically Filed - SUPREME COURT OF MISSOURI - November 18, 2015 - 11:13 AM

V.A.M.R. 29.15 and 29.16

Vogl v. State, 437 S.W.3d 218 (Mo.banc 2014)

Eastburn v. State, 400 S.W.3d 770, 773 (Mo.banc 2013)

POINT TWO

The Motion Court clearly erred in overruling Mr. Barton's request for finding of abandonment of counsel in Rule 29.15 proceedings because said action of the Court violated applicable provisions of Missouri law as interpreted by this Court, and further violated Mr. Barton's rights to enjoy due process of law and effective assistance of counsel, and to be free from cruel and unusual punishment, in derogation of the 6th, 8th and 14th Amendments to the Constitution of the United States and Article I, Sections 10, 18(a) and 21 of the Constitution of the State of Missouri in that

A. learned and lead counsel for Mr. Barton suffered from mental illness at the time that he was representing Mr. Barton

B. the mental illness of learned and lead counsel for Mr. Barton constituted abandonment of the duties owed by counsel to Mr. Barton under Rules 29.15 and 29.16,,

C. Mr. Barton was prejudiced by the mental-illness-related abandonment

by counsel.

V.A.M.R. 29.15 and 29.16

Crenshaw v. State, 266 S.W.3d 257, 259 (Mo.banc 2008)

Price v. State, 422 S.W.3d 292 (Mo.banc 2014)

Cantrell v. Knoxville Community Development Corp., 60 F.3d 1177 (6th Cir. 1995)

ARGUMENT

POINT ONE

A. Restatement of Point Relied On

The Motion Court clearly erred in overruling Mr. Barton's request for evidentiary hearing with respect to Barton's allegations of abandonment of counsel in Rule 29.15 proceedings because said inaction of the Court violated applicable provisions of Missouri law as interpreted by this Court, and further violated Mr. Barton's rights to enjoy due process of law and effective assistance of counsel, and to be free from cruel and unusual punishment, in derogation of the 6th, 8th and 14th Amendments to the Constitution of the United States and Article I, Sections 10, 18(a) and 21 of the Constitution of the State of Missouri in that, in light of the allegations made in the petition and the clear procedural mandates set down by this and the other Appellate Courts of this State, it was required that the Motion Court

Electronically Filed - SUPREME COURT OF MISSOURI - November 18, 2015 - 11:13 AM

Electronically Filed - SUPREME COURT OF MISSOURI - November 18, 2015 - 11:13 AM

conduct an evidentiary hearing to allow Mr. Barton to present all available evidence to support his allegations of abandonment of counsel in order for the Motion Court, and ultimately this Court, to have a proper record upon which to determine the matter.

B. Standard of Review

The standard of review for all determinations by a Rule 29.15 motion court, including those related to abandonment of counsel issues, amounts to whether the findings and conclusions of the motion court, on the particular subject, are clearly erroneous. ***State v. Link*** 25 S.W.3d 136, 148-149 (Mo.banc 2000); ***Eastburn v. State***, 400 S.W.3d 770, 773 (Mo.banc 2013).

C. The Motion Court clearly erred in failing to follow the procedure, mandated by the Appellate Courts of Missouri, for handling of claims of abandonment of counsel, which is conduct of an evidentiary hearing to establish the pertinent facts

Rule 29.15 contains limitations periods, forbids follow-up petitions, and deems as abandoned any issue which is not timely raised. ***Price v. State***, 422 S.W.3d 292, 296-297 (Mo.banc 2014); ***Eastburn v. State***, supra. Nevertheless, as early as 1991, this Court unanimously found that abandonment by post-conviction counsel constituted an exception to the otherwise hard and fast rule that failure to raise an issue in a timely filed Rule 29.15 amended motion constitutes a complete

Electronically Filed - SUPREME COURT OF MISSOURI - November 18, 2015 - 11:13 AM

waiver of that issue. V.A.M.R. 29.15; ***Luleff v. State***, 807 S.W.2d 495 (Mo.banc 1991). In the years since, this Court and the lower Appellate Courts have repeatedly declined to fix precise circumstances in which abandonment of counsel may be found. ***Crenshaw v. State***, 266 S.W.3d 257, 259 (Mo.banc 2008); ***Kreidler v. State***, 419 S.W.3d 870, 872 (Mo.App.S.D. 2013). Rather, this Court and the various lower appellate courts have commanded that, if such an abandonment by post-conviction counsel is perceived to have occurred, the proper procedure is for the movant to raise the facts concerning the alleged abandonment and make request to the motion court to restore the movant to the place he would have been had the abandonment not occurred, that is by permitting the movant to file an untimely, further-amended post-conviction motion. ***Luleff v. State***, 498; ***State v. Bradley***, 811 S.W.2d 379, 384-385 (Mo.banc 1991); ***Crenshaw v. State***, supra; ***Eastburn v. State***, 774; ***Williams v. State***, 415 S.W.3d 764, 768-769 (Mo.App.W.D. 2013); ***Gasa v. State***, 415 S.W.3d 141, 143-144 (Mo.App.E.D. 2013). When a motion Court receives a claim of abandonment, the motion Court is to conduct "…an evidentiary hearing to determine whether Movant had been abandoned." ***Eastburn v. State***, 774; ***Kreidler v. State***, supra. Clear error is committed if a motion Court refuses follow these procedures with respect to a claim of abandonment so long as the allegations of the petition, taken as true, establish grounds for relief. ***Vogl v. State***,

Electronically Filed - SUPREME COURT OF MISSOURI - November 18, 2015 - 11:13 AM

437 S.W.3d 218, 229 (Mo.banc 2014); ***State ex rel Thomas v. Neill***, 260 S.W.3d 441, 443 (Mo.App.E.D. 2008); ***Hicks v. State***, 2015 WL 6274805, *3 (Mo.App.S.D. 2015).

In his filings before the Motion Court, undersigned counsel endeavored to provide more than just the basics of the facts supporting the request for an abandonment of counsel finding (L.F. 6-31). As to the particulars of the mental illness of counsel, undersigned counsel included the affidavit of Amy Bartholow detailing those circumstances (L.F. 26-31). Undersigned counsel went on to detail case holdings which found that mental illness of counsel constitutes abandonment rather than mere negligence of counsel (L.F. 16, 43-44). Undersigned counsel also endeavored to explain that, though an amended motion had been prepared and filed by mentally ill learned and lead counsel, that work was not competently done (L.F. 17-23). These basics could have and should have been copiously detailed through the calling of witnesses, including the recalcitrant Brotherton himself, in a hearing before the Motion Court. This Court has made abundantly clear that an evidentiary hearing conducted by the Motion Court, to allow for just such fleshing out of the record, is necessary to provide a proper record for judgment upon the abandonment question. ***Eastburn v. State***, supra; ***Kreidler v. State***, supra. By refusing to conduct the hearing mandated by this Court, the Motion Court committed clear error, and left

Electronically Filed - SUPREME COURT OF MISSOURI - November 18, 2015 - 11:13 AM

this Court without a full record to properly address the weighty issues raised in Mr. Barton's petition (L.F. 47; Tr. 11). ***State v. Vogl***, supra; ***State ex rel Thomas v. Neill***, supra; ***Hicks v. State***, supra. This is a capital case in which the death penalty has been imposed. ***State v. Barton***, 240 S.W.3d 693, 696 (Mo.banc 2007). Consequently, errors such as this take on the Constitutional dimension of violating the right to be free from cruel and unusual punishment. Thus, for reasons based in statute and in the Constitution, this Court should reverse the judgment of the Motion Court and should remand with instructions that the Motion Court conduct an evidentiary hearing with respect to the allegations made in Mr. Barton's motion.

POINT TWO

A. Restatement of Point Relied On

The Motion Court clearly erred in overruling Mr. Barton's request for finding of abandonment of counsel in Rule 29.15 proceedings because said action of the Court violated applicable provisions of Missouri law as interpreted by this Court, and further violated Mr. Barton's rights to enjoy due process of law and effective assistance of counsel, and to be free from cruel and unusual punishment, in derogation of the 6th, 8th and 14th Amendments to the Constitution of the United States and Article I, Sections 10, 18(a) and 21 of the Constitution of the State of Missouri in that

Electronically Filed - SUPREME COURT OF MISSOURI - November 18, 2015 - 11:13 AM

A. learned and lead counsel for Mr. Barton suffered from mental illness at the time that he was representing Mr. Barton,

B. the mental illness of learned and lead counsel for Mr. Barton constituted abandonment of the duties owed by counsel to Mr. Barton under Rules 29.15 and 29.16,

C. Mr. Barton was prejudiced by the mental-illness-related abandonment by counsel.

B. Standard of Review

The standard of review for all determinations by a Rule 29.15 motion court, including those related to abandonment of counsel issues, amounts to whether the findings and conclusions of the motion court, on the particular subject, are clearly erroneous. ***State v. Link*** 25 S.W.3d 136, 148-149 (Mo.banc 2000); ***Eastburn v. State***, 400 S.W.3d 770, 773 (Mo.banc 2013).

C. In keeping with its own precedents on the subject, and upon the record made, including admissions by the State, this Court should find that the mental-illness-caused failures by appointed counsel constitute abandonment of Mr. Barton by that counsel, requiring permission to file an amended petition including issues left out by mentally ill counsel

Mr. Barton made motion to the Circuit Court contending that, due to the

Electronically Filed - SUPREME COURT OF MISSOURI - November 18, 2015 - 11:13 AM

mental illness of Gary Brotherton, his appointed lead and learned counsel, Barton had been abandoned by said appointed counsel; in the motion, request was made that a hearing be conducted to establish the facts; the motion also sought, on the basis of the facts, that a determination of abandonment be made and that an opportunity be granted to supplement the original, amended petition filed on Mr. Barton's behalf (L.F. 6-25). Not just the bare bones were set forth in support of the motion; as to the particulars of the mental illness of counsel, the affidavit of Amy Bartholow, Brotherton's ex-wife and ex-law-partner was provided, detailing the pertinent circumstances (L.F. 26-31); as well, explanations were given as to the mental-illness-caused errors committed (L.F. 17-23; 28-31).

In its argument to the Motion Court, the State essentially conceded the allegations of mental illness made against Brotherton, but argued that, even assuming the allegations to be true, the definition of abandonment by post-conviction counsel is limited strictly to those situations in which post-conviction counsel wholly failed to file an amended motion on behalf of the 29.15 movant; according to the State, since Brotherton filed an amended motion, whatever the quality, he did not abandon Mr. Barton (L.F. 33-34). The State's take on things finds support in the holdings by certain of the lower Missouri Appellate Courts. ***Duvall v. State***, 434 S.W.3d 112, 113 (Mo.App.E.D. 2014); ***Hill v. State***,

193 S.W.3d 390, 392 (Mo.App.S.D. 2006). Based upon that interpretation of the law, the State persuaded the Motion Court that, since Mr. Barton's counsel filed an amended petition on Barton's behalf, and since other work was done on Mr. Barton's behalf, Barton was not abandoned in the fashion countenanced by this Court's definition of that term, counsel's mental-illness-caused failures notwithstanding (L.F. 33-34; Tr. 3-4, 11).

Standing firmly contrary to these notions is the general admonition by this Court and the lower Appellate Courts that "(t)he precise circumstances, in which a motion court may find abandonment, are not fixed." ***Crenshaw v. State***, 266 S.W.3d 257, 259 (Mo.banc 2008); ***Kreidler v. State***, 419 S.W.3d 870, 872 (Mo.App.S.D. 2013).

Moreover, in ***Crenshaw***, this Court very specifically declined to take the very hard-and-fast position urged by the State and by the aforementioned lower appellate courts. In ***Crenshaw***, the movant filed his initial motion, counsel was appointed, counsel filed an amended motion, a hearing was had, and the motion court denied relief; thereafter, counsel failed to timely file notice of appeal; the movant then urged he was abandoned by counsel, the motion court found abandonment, and reentered its judgment, thereby permitting movant to appeal. ***Crenshaw v. State***, 258. The State argued in that case precisely as it does in Mr. Barton's case, that the

Electronically Filed - SUPREME COURT OF MISSOURI - November 18, 2015 - 11:13 AM

Electronically Filed - SUPREME COURT OF MISSOURI - November 18, 2015 - 11:13 AM

filing of an amended motion by counsel precludes a finding of abandonment, and that consequently the appeal should be dismissed. ***Crenshaw v. State***, 259. This Court chose to save that question for another day, leaving intact the motion court's finding of abandonment, and deciding the appeal based upon the merits of the motion court's reinstated judgment overruling Crenshaw's motion. ***Crenshaw v. State***, 260-261. Therefore, at most, Mr. Barton's case presents for this Court a case in which the matter, left undecided in ***Crenshaw***, must be decided.

Since ***Crenshaw***, four of the seven Judges of this Court decided the case of ***Price v. State***, 422 S.W.3d 292 (Mo.banc 2014), and in so doing, took specific steps to explain certain limits upon the definition of abandonment which they deem appropriate. In ***Price***, the movant, based upon faulty advice by direct appeal counsel, failed to timely file his original Rule 29.15 motion; the movant endeavored to remedy this failure by claiming abandonment by his miscreant counsel; the motion court found that movant was abandoned, permitted late-filing of the original and amended motion, conducted a hearing upon the matters, and ordered Price's conviction and sentence set aside. ***Price v. State***, 294-296. Judges Stith, Draper and Teitelman would have affirmed the motion court's determination of abandonment, allowance of late filing of the motion, and setting aside of the conviction and sentence. ***Price v. State***, 308-312.

Electronically Filed - SUPREME COURT OF MISSOURI - November 18, 2015 - 11:13 AM

Judge Wilson, writing for himself and Judges Russell, Breckenridge and Fischer, did not agree, finding that the rationale behind the abandonment doctrine did not apply to what occurred in Price's case, that is the failure to file an original petition, but only applied to the stage after which counsel is appointed, in other words after the filing of the original petition, and at the time of the creation of an amended motion. ***Price v. State***, 297. Judge Wilson noted that the issue in ***Price*** regarding the failure to file an initial motion could and should be controlled by the Court's holding in ***Bullard v. State***, 853 S.W.2d 921, 922-923 (Mo.banc 1993), in which case the Court specifically refused to extend the abandonment doctrine to the attorney-induced failure to timely file an original postconviction motion. Judge Wilson went on to explain the firm belief by the majority that the abandonment doctrine should be limited so as to not "police the performance of postconviction counsel generally" but rather address instances in which there was an "absence of performance" by counsel which was "tantamount to a failure" to appoint counsel at all. ***Price v. State***, 298; ***Luleff v. State***, 807 S.W.2d 495, 497-498 (Mo.banc 1991); ***Sanders v. State***, 807 S.W.2d 493, 494-495 (Mo.banc 1991).

The arguments which have been raised on behalf of Mr. Barton are in keeping with the holdings by this Court in ***Luleff***, ***Sanders***, ***Crenshaw*** and ***Price***. In Mr. Barton's case, the failures by his counsel were not due to mere garden variety

Electronically Filed - SUPREME COURT OF MISSOURI - November 18, 2015 - 11:13 AM

negligence, or classic ineffectiveness of counsel, but rather to the ravages of counsel's mental illness. While mental illness as a circumstance for attorney failures has not been directly addressed in the context of Rule 29.15 proceedings, in other types of cases such infirmity has been clearly distinguished from common forms of attorney negligence, and has instead been described in terms identical to abandonment. See ***Cantrell v. Knoxville Community Development Corp.***, 60 F.3d 1177, 1179-1180 (6th Cir. 1995) (remanding for hearing on attorney mental incapacity while clarifying that mental-illness-related failures by counsel are not "garden variety attorney negligence" but rather "abandonment"); ***Dellinger v. Colson***, 2013 WL 2635501, *7-*8, *11-*12 (E.D.Tn. 2013) (evidentiary hearing on equitable tolling question granted based in part on determination that mental-illness-related failures by counsel, if proven, are not "a garden variety claim of excusable neglect" but instead amount to "abandonment" by that counsel); ***United States v. Cirami***, 563 F.2d 26, 34 (2nd Cir. 1977) (granting relief, using the term "constructive disappearance" to describe the mental-illness-related-failures by counsel); ***Ituarte v. Chevrolet Motor Div.***, 1989 WL 10562, *4-*5, fn. 7 (E.D.N.Y 1989) (granting equitable tolling, following logic in ***Cirami*** regarding distinction between attorney negligence and attorney mental illness); ***Barr v. MacGugan***, 78 P. 3d 660, 662-663 (Wash.App. 2003) (granting relief, finding that

mental-illness-related failures by counsel were NOT mere negligence by counsel). See also to similar effect ***Robertson v. Simpson***, 624 F.3d 781, 785-786 (6th Cir. 2010). Therefore, this Court should find that mental illness of counsel amounts to a denial of counsel, and consequently an abandonment of counsel .

As noted in Point One, it would have been far better had the Motion Court followed this Court's clear mandate and conducted a hearing so that this Court would have a complete record to judge the mental-illness-related abandonment of lawyerly duties by appointed lead and learned counsel, Gary Brotherton. However, that lack of a complete record does not keep this Court from deciding this issue right now because there is sufficient information about the matter in the pleadings and because the State has conceded the point about Brotherton's mental illness, arguing only that that illness does not constitute abandonment (L.F. 33-34; Tr. 3-4). Admissions of fact made in the pleadings by a party are binding upon that party. ***Wehrli v. Wabash R. Co.***, 315 S.W.2d 765, 773 (Mo. 1958); ***Rauch Lumber Co. V. Medallion Development Corp.***, 808 S.W.2d 10, 12 (Mo.App.E.D. 1991).

In light of the weight of the pertinent case holdings, noted above, mental-illness-caused failures of counsel do constitute abandonment, the State's arguments to the contrary notwithstanding. Brotherton, not through mere negligence, but rather because of mental illness, failed to discharge his Rule 29.15

Electronically Filed - SUPREME COURT OF MISSOURI - November 18, 2015 - 11:13 AM

and Rule 29.16 duties to review this capital case record and raise all issues. See. V.A.M.R. 29.15 and V.A.M.R. 29.15. Though under abandonment, prejudice would seem to be presumed, undersigned counsel has endeavored to explain the prejudice suffered by Mr. Barton due to his attorney's mental-illness-induced incompetence. Specifically, while an amended petition was filed, it did not contain the issues most vital for a fair disposition of Mr. Barton's 29.15 proceeding. Moreover, since this is a capital case in which the death penalty has been imposed, the mental illness errors of counsel take on Constitutional dimension as a violation of the right to be free from cruel and unusual punishment. Because this was mental-illness-caused abandonment, principles of abandonment of counsel as set forth in ***Luleff***, ***Sanders***, ***Crenshaw*** and ***Price*** would dictate that Mr. Barton be permitted to remedy these failings by his mentally ill counsel by allowing Mr. Barton to be placed in the situation he would have been in had Mr. Brotherton not abandoned him; that is, Mr. Barton should be allowed by this Court to file an amended motion to include those issues mis-raised or left out while Mr. Brotherton was in the grips of his mental illness. Consequently, Mr. Barton requests that this Court set aside the judgment of the Motion Court, find that Mr. Barton was abandoned due to the mental illness of his lead and learned counsel, and order that Mr. Barton be permitted an opportunity to offer a further amended Rule 29.15

Electronically Filed - SUPREME COURT OF MISSOURI - November 18, 2015 - 11:13 AM

motion so as to include those issues left out by mentally ill counsel.

CONCLUSION

WHEREFORE, in light of the foregoing, Mr. Barton prays that this Honorable Court reverse the judgment of the Motion Court, and remand the matter with directions that the Motion Court permit Mr. Barton to amend his Rule 29.15 petition to add whatever additional issues which Barton and his counsel deem advisable. In the alternative, Mr. Barton prays that this Honorable Court reverse the judgment of the Motion Court and remand the matter with directions that the Motion Court conduct a hearing with respect to the allegations of abandonment of counsel set forth in Mr. Barton's petition. Mr. Barton additionally prays for any other and further relief which the Court may deem just and proper under the circumstances.

Respectfully submitted

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CERTIFICATE OF COMPLIANCE

I do hereby certify that the foregoing has been prepared in Microsoft Word format, which reports a content, in Rule limited part, of 5,567 words.

/s/Frederick A. Duchardt, Jr.
FREDERICK A. DUCHARDT, JR.

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing was e-mailed this 18th day of November, 2015 to the following

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/s/Frederick A. Duchardt, Jr.
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