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 REPLY BRIEF

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I. Summary of Appellant's and Respondent's Briefs, and overview of Reply Brief

Mr. Barton's Appellant's Brief separately raised two issues. First, there was a challenge that clear error was committed in the refusal by the motion Court to grant a hearing on Mr. Barton's attorney-mental-illness-based claim of abandonment of counsel (Appellant's Brief, p. 13, 15-19). Second, it was advanced that, even upon the abbreviated record before the motion Court, and even without a direct holding on the subject by this Court, there was clear error to not find abandonment, particularly in light of concessions made by the State, coupled with holdings by Courts outside Missouri that an attorney's mental illness constitutes abandonment, not mere negligence (Appellant's Brief, p. 14-15, 19-28).

The state has chosen to conglomerate its responses to these separate points premised upon its claim that this Court has already defined abandonment in a way

which cannot include what happened in this case, and its consequent conclusion from that claim that it could not have been error for the motion Court to rule in the ways that it did.

Undersigned counsel will begin his reply by pointing out the State's mischaracterization of Barton's Points Relied On and misreadings of this Court's holdings which together provide the dilapidated foundation for the state's analysis regarding abandonment of counsel. Then, relying upon verbatim readings of this Court's abandonment of counsel decisions, undersigned counsel will go on to counter the State's claims, and show that mental illness of counsel is precisely the sort of circumstance which is contemplated within the admittedly narrow definition of abandonment contemplated by the majority of this Court. Next, undersigned counsel will use the very references to the record made by the State as a means to explain the clear error wrought from failure to grant a hearing on the motion. After that, undersigned counsel will address the cases from other jurisdictions which have tackled the attorney-mental-illness situation, confronting the State's misconceptions regarding the teachings of those other Courts, and explaining why this Court should deem as applicable to this abandonment of counsel question the learned and thoughtful holdings from those Courts. Finally, undersigned counsel

will examine three other notions about the law which the State advances, and will demonstrate wherein and why the State's thoughts in those regards are mistaken.

II. The narrow, overarching point made upon this appeal is that mental illness of counsel constitutes a form of abandonment as contemplated by the holdings of this Court

In its Respondent's Brief, apparently to set up a straw man, the State repeatedly mischaracterizes the arguments made by Appellant in this case as an attempt to expand the concept of abandonment to include mere attorney negligence (Respondent's Brief, p. 7, 11). The State even goes so far as to warn, in true Chicken Little, sky-is-falling language, that "Barton implicitly asks this Court to abandon these prior precedents and embrace claims of ineffective assistance of post-conviction counsel so that inmates can circumvent the mandatory and constitutional time limits and waiver provisions of Missouri's post-conviction rules." (Respondent's Brief, p. 17). Much as the state would like to play upon fears that a favorable ruling for Mr. Barton in this case would open the floodgates for prisoner litigation, such fears are baseless. The point made upon this appeal is not the broad one, that attorney negligence constitutes abandonment, but rather the narrow one, that mental illness suffered by appointed lead and learned counsel constitutes abandonment (Appellant's Brief, p. 19-20). Contrary to the State's

fear-mongering, no one can reasonably contend that a finding that an attorney's diagnosed mental illness constitutes abandonment would affect any more than an infinitesimally small number of cases in which it was demonstrated that an attorney of record in a case suffered from a serious mental illness at the time of the representation. But no matter what the number of the cases might be, it would surely be the proper thing for this Court to examine each and every case in which the mental health of appointed counsel was legitimately questioned.

III. A fair reading of this Court's holdings would very much allow an ultimate determination that attorney mental illness constitutes abandonment

Appellant's Brief cited the general admonition by this and the lower Appellate Courts that "(t)he precise circumstances, in which a motion court may find abandonment, are not fixed." (Appellant's Brief, p. 22) ***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). In its Respondent's Brief, the State acknowledges this teaching, but then immediately and inexplicably claims the contrary, that "…this Court, in ***Price***, recently clarified that there are only two limited circumstances which may constitute abandonment of post-conviction counsel: (1) when post-conviction counsel takes no action with respect to filing an amended motion; and

(2) when post-conviction counsel is aware of the need to file an amended motion but fails to do so in a timely manner" (Respondent's Brief, p. 9-10).

Actually, in ***Price,*** this Court said no such thing. What this Court actually said in ***Price*** on the subject, verbatim, was as follows:

> Accordingly, the rationale behind the creation of the abandonment doctrine in ***Luleff*** and ***Sanders***[1] was not a newfound willingness to police the performance of postconviction counsel generally. Instead, the doctrine was created to further the Court's insistence that Rule 29.15(e) be made to work as intended. Extensions of this doctrine that do not serve this same rationale must not be indulged. ***Price v. State***, 422 S.W.3d 292, 298 (Mo.banc 2014)

Interestingly enough, later in Respondent's brief, backtracking is done in the form of an acknowledgment that the above quotation is what this Court really said in ***Price*** (Respondent's Brief, p. 17-18).

Thus, contrary to the claim by the State at pages 9 and 10 of its Brief, this Court has never held "that there are only two limited circumstances which may constitute abandonment of post-conviction counsel". To the contrary, this Court in ***Crenshaw*** and ***Price*** has allowed that other circumstances, beyond those identified in previous cases, may well also constitute abandonment, but has also placed upon

[1] Referring to ***Sanders v. State***, 807 S.W.2d 493, 494-495 (Mo.banc 1991).

that allowance a caveat that such other circumstances must "further the Court's insistence that Rule 29.15(e) be made to work as intended." ***Crenshaw v. State***, supra; ***Price v. State***, supra. This is precisely the sort of argument which has been made on behalf of Mr. Barton in this case, specifically that the ravages of counsel's mental illness constituted abandonment of counsel in that it robbed Mr. Barton of the assistance of counsel contemplated under Rules 29.15(e) and 29.16(b) (Appellant's Brief, p. 24-28).

IV. Fair examination of the State-cited instances from the record only serves to confirm Barton's point one, that it was clear error to not conduct a hearing

The State defends the rulings by the motion Court by stridently claiming that "…in light of the record, counsel fulfilled his duties under the Rules and competently represented Barton" (Respondent's Brief, p. 10). To support this global assertion, the State starts on the surface of the record, observing the obvious facts that Gary Brotherton timely filed an amended motion, and that that amended motion was over 300 pages long and could be dissected into as many as 48[2] parts (Respondent's Brief, p. 12, 23). Honing in on the mere fact of a timely filing of

[2] As this Court found on appeal, when things were boiled down to gravy, there were actually only some 10 claims. ***Barton v. State***, 432 S.W.3d 741 (Mo.banc 2014).

the amended motion is in keeping with the State's mistaken notion, noted above, that abandonment can only occur if there is no such timely filing (Respondent's Brief, p. 9-10). However, as explained above, this Court has not so limited the concept of abandonment. ***Crenshaw v. State***, supra; ***Price v. State***, supra. And as for the mere observation about the number of pages, without any attention to the content of those pages, one is reminded of the well-worn adage that there is no necessary correlation between the length of a brief and its quality. ***Nguyen v. Reynolds***, 131 F.3d 1340, 1351, (10th Cir. 1997); ***Heath v. Jones***, 941 F.2d 1126, 1141 (concurring opinion) (11th Cir. 1991).

The State further contends that, once a deeper dig is made into the case records, "replete" is the proper word to describe the number and kinds of filings made by Brotherton, all supposedly demonstrating his efforts at case investigation and preparation; however, in support of the claim, the State can only point to three rather meagre, standard motions, filed at the outset of the case, one for extension of time and two for disclosure of the State's files (Respondent's Brief, p. 12; Supp.L.F. 13). Worse than that, the State neglects to mention the adverse inference to be gleaned from the fact, also demonstrated by the same record, that for nearly two years after the filing of those three basic motions, Brotherton made but one other filing, a motion to disqualify counsel for the State, which was later

abandoned, and that the inactivity by Brotherton prompted the motion Court to dismiss the case for want of prosecution (Supp.L.F. 12). Instead, the State highlights Brotherton's own, one-line assertion that he did not abandoned Mr. Barton (Respondent's Brief, p. 12). However, the State fails to mention the context in which that self-serving boast by Brotherton occurred, that is in a motion to reinstate the case which had been dismissed because Brotherton had made not a single filing in the case for nearly two years (Supp.L.F. 12; Original 29.15 L.F. Vol. 4, p. 481). The State's final reference to the record spotlights another self-serving claim by Brotherton, this one a nebulous assertion about expending "more than 700 hours on Mr. Barton's case" (Respondent's Brief, p. 12). But, once again, the State omits context, that is that Brotherton's averment was set forth as part of his eleventh hour motion to withdraw from service in the Barton case (Original 29.15 L.F. Vol. 5, p. 594). And, the State fails to mention Brotherton's admission, appearing on the same page of the withdrawal motion, and continued thereafter, that his predicament owed to him being hooked into accepting this complex case for an up-front payment of $12,000.00, a figure which might have looked big at the outset, but which became a paltry sum when it had to be offset against the long-term, monumental task of handling a capital post-conviction case (Original 29.15 L.F. Vol. 5, p. 594, 601).

The inferences to be fairly drawn from this record are antithetical against the State's claim that Brotherton "competently represented Barton". Rather, this mess lends credence to the explanation, given by Amy Bartholow, Brotherton's former business partner and spouse, that Gary Brotherton was "having tremendous difficulties with mood swings which in turn adversely impacted Gary's ability to do effective legal work" (L.F. p. 27).

The State chooses to respond to Ms. Bartholow's revelations by lobbing salvos against her, citing first her own general appearance on behalf of Mr. Barton, and estimating that she should be held responsible for any shortcomings in the representation of Barton (Respondent's Brief, p. 13-14). What the State chooses to not acknowledge is that Ms. Bartholow's entry of appearance, general as it might have been, cannot be read as a claim of qualification to serve as necessary learned counsel per the mandate of Rule 29.16(b)(1-4). Ms. Bartholow was clearly not qualified to serve in that capacity (L.F. p. 26-27). The State also blasts that, if Ms. Bartholow's affidavit-contained revelations are deemed to be true, she should be held in violation of her professional duty, pursuant to Rule 4-8.3(a), to report ethical violations of another attorney (Respondent's Brief, p. 15, fn. 8). In concocting such a personal attack against Ms. Bartholow, the State resorts to nothing less than obfuscation, ignoring completely Ms. Bartholow's clear

statements that, because of her inexperience with capital cases, she did not, at the time of her representation, realize the gross errors being committed by Brotherton, and only came to grasp all of that when it was detailed for her by undersigned counsel (L.F. 28-30).

The State also seeks to alchemize some sort of favorable inference from the fact that Brotherton did not mention his mental illness as a ground for withdrawing in this case, whereas his mental illness had come up in connection with his withdrawing from other cases (Respondent's Brief, p. 16, fn. 9; L.F. p. 28; Original 29.15 L.F. Vol. V, p. 590-604). But, it should surely occur to the State how much it is damning Brotherton with such faint praise. Likewise, it should be obvious to all, including the State, that the much stronger and pernicious inference from these bare facts is that Brotherton's penchant is to hide from the Courts the seriousness of his illness, and make revelations only when forced by peculiar circumstances to do so.

The State ends its resort to the record by complaining, in a footnote, that there have not been provided copious details about the issues which Brotherton should have raised but did not raise (Respondent's Brief, p. 16, fn. 10). Naturally, in so complaining, the State neglects to mention that, in urging that the motion Court not allow a hearing to develop these and other facts, it conceded the viability

of the contentions made on behalf of Mr. Barton in Barton's motion for relief; specifically, the State's contention to the motion Court was, accepting all allegations in the Petition as true, Barton would still not be entitled to relief (L.F. 6-24, 33-34; Tr. 3-4, 11). The Petition clearly included explanation about the very points sought in the State's footnote (L.F. p. 18-23). As observed in Appellant's Brief, the concessions upon the facts by a party are binding on that party (Appellant's Brief, p. 26). ***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).

But even if the State's complaints could be taken seriously, those complaints would just support grant of a hearing so that these and other applicable facts could be more fully developed for consideration by a reviewing courts.

In light of all of the points about the record made by the State, it is just that much more clear that a hearing was necessary in order to make a proper record for this Court's consideration of the pertinent issues.

V. Supporting of Barton's Point Two are the Courts who have addressed the case-related ravages of attorney mental illness, and have all characterized the situation as abandonment and not negligence, the State's arguments to the contrary notwithstanding

Because this Court has never before had the opportunity to address the matter of attorney mental illness as impacting on delivery of counsel services to a capital post-conviction case client, undersigned counsel briefed for this Court pertinent holdings in other types of cases by five different State and Federal Courts across the country (Appellant's Brief, p. 25-26). To remind, all of those Courts characterized attorney-mental-illness-caused error, not as common negligence, but rather as 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).

In initial response, the State belabors the obvious, that these cases from other jurisdictions "do not discuss Missouri's doctrine of 'abandonment' by post-conviction counsel" (Respondent's Brief, p. 19). However, the State does not point to any deficiency in the common reasoning by all five of these Courts that there is a clear legal distinction between attorney miscues, properly characterized as mere negligence, and errors wrought by the ravages of an attorney's mental illness, properly characterized as abandonment.

Instead, the State notes the obvious difference between original actions and post-conviction actions, and then urges that these distinctions should impact upon the significance to be attributed when attorney mental illness ravages the respective sorts of cases; particularly, the State claims that while attorney mental illness might be deemed significant when it has an impact upon an original action, *ala* the situation confronted in one of the cited cases, ***Cantrell v. Knoxville Community Development Corp.***, supra, that same condition should not be deemed significant when it impacts upon a post-conviction case, like Mr. Barton's case (Respondent's Brief, p. 19-20). The State claims to find support for this position from the holding by the Seventh Circuit in ***Modrowski v. Mote***, 322 F.3d 965, 968 (7th Cir. 2003)

(Respondent's Brief, p. 20). There are two problems with the State's reliance on ***Modrowski***; the first is that the limited point made by the Seventh Circuit in ***Modrowski*** does not support the far-reaching postulate advanced by the State; the second is that, in light of more recent holdings by the United States Supreme Court and other Federal Courts, the continued viability of the Seventh Circuit's limited point is itself highly suspect.

In ***Modrowski***; appointed counsel was suffering from mental illness, and as a result he filed, one day after the expiration of the limitations period, Petitioner's Federal Habeas petition. ***Modrowski v. Mote***, 966. In considering the question of whether the limitations period should be equitably tolled in order to forgive the late filing, the Seventh Circuit first reminded that ultimate responsibility for the filing of a habeas petition rests, not with the attorney, but with the petitioner himself. ***Modrowski v. Mote***, 967. As the Seventh Circuit saw the matter, because the ultimate responsibility for filing rested with the petitioner, the attorney's failures made no difference, no matter whether those failures owed to mere negligence or to abandonment due to mental illness, and therefore that Court denied relief. ***Modrowski v. Mote***, 968-969. This holding is actually very much akin to the majority holding in ***Price***, finding that since it is a movant's responsibility to file an original Rule 29.15 petition, the mistakes of an attorney, whether deemed

negligence or abandonment, cannot serve to excuse an untimely original petition filing. ***Price v. State***, 298. However, like this Court in ***Price***, the Seventh Circuit in ***Modrowski*** never was called upon to address whether mental-illness-caused abandonment of counsel should be considered when the mentally ill counsel fails to carry out duties which the law assigns to that attorney.[3]

[3] The State also claims support from the unpublished holding by the Tenth Circuit in ***Bradford v. Horton***, 350 Fed.Appx. 307 (10th Cir. 2007) (Respondent's Brief, p. 21). In that case, the Tenth Circuit addressed an attorney's failure to timely file his client's Federal Habeas petition in part because, about two weeks before the filing deadline, the attorney had to be hospitalized for four days for a medical condition. ***Bradford v. Horton***, 308-309. The Tenth Circuit had little sympathy for the hospitalization excuse, observing that the attorney had been involved in the case all tolled for some four months, and concluding that there should have been ample time for preparation both before and after the hospitalization. ***Bradford v. Horton***, 309-310. In passing the Tenth Circuit also referenced the limited point made in ***Modrowski***, and concluded that since the movant was the one responsible for the petition filing, the failure by the attorney in that case should not excuse the late filing. ***Bradford v. Horton***, 310. However, the Tenth Circuit distanced itself from some of the more harsh-sounding language in ***Modrowski***, allowing that "(i)t may

Moreover, there is considerable doubt whether ***Modrowski*** continues to be good law in light of subsequent holdings by the United States Supreme Court and the other lower Federal Courts.

In ***Holland v. Florida***, 560 U.S.631, 636-643 (2010), a capital habeas petitioner sought equitable tolling because his appointed counsel failed to timely file a Federal habeas petition despite having been specifically assigned to handle petitioner's state and Federal post-conviction matters, despite having particularly promised the petitioner that he would timely file all necessary state and Federal post-conviction petitions, and despite repeated attempts by the petitioner to cajole action from counsel, through multiple letters to counsel, to the courts and to the Florida Bar Association. When the Eleventh Circuit considered the matter, it did not side with the strict notions set forth by the Seventh Circuit in ***Modrowski***, but to the contrary allowed that the attorney errors in the case could have constituted grounds for tolling had those been coupled with other facts, for instance possible

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well be that in some cases an attorney's medical condition could provide a basis for a showing of extraordinary circumstances, but this case is not one of them." ***Bradford v. Horton***, 310. Therefore, when it is examined *in toto*, the decision by the Tenth Circuit stands contrary to the point made by the State, and actually supports the point made by Mr. Barton.

"mental impairment…on the lawyer's part"; having found no such additional facts, the Eleventh Circuit decided that equitable tolling should not be allowed. ***Holland v. Florida***, 944. For its part, the United States Supreme Court found that even the standards employed by the Eleventh Circuit were "too rigid" and remanded for consideration of whether the "attorney misconduct" present in the case, by itself, should constitute reason enough for the tolling. ***Holland v. Florida***, 949-954.

Shortly after ***Holland*** was decided, the Sixth Circuit had the opportunity to consider a District Court's refusal to grant equitable tolling in an instance in which the late filing of a habeas petition happened due to mis-advice given by an attorney who, at the time, was abusing cocaine; in deciding to remand for further evidence-gathering, the Sixth Circuit drew support from ***Holland*** and from its own holding in ***Cantrell***, and never once mentioned the contrary notions espoused by the Seventh Circuit in ***Modrowski***. ***Robertson v. Simpson***, 624 F.3d 781, 784-786 (6th Cir. 2010). It should also be noted that, at the end of July of 2015, the United States District Court for the District of Arizona specifically rejected the reasoning of the Seventh Circuit in ***Modrowski***, allowing that "…it is possible that an attorney's incapacity could result in abandonment." ***Traverso v. Ryan***, 2015 WL 4606543, *4, fn. 3 (D. Ariz. July 31, 2015).

Therefore, save for the limited and highly questionable holding in ***Modrowski***, all of the available cases clearly teach that an attorney's mental illness constitutes abandonment of the client.

VI. This Court's holding in State v. Carter provides no help for the State

The State also refers to this Court's holding in ***State v. Carter***, 955 S.W.2d 548 (Mo.banc 1997), and claims that, in light of the holding in ***Carter***, "Missouri courts have not distinguished claims of attorney incapacity and attorney negligence" (Respondent's Brief, p. 20). However, the truth of the matter is that, in ***Carter***, this Court was never asked to, and therefore did not, address such a distinction.

In that case, in the timely filed Rule 29.15 motion, Carter chose to raise, not an abandonment of counsel claim, but rather an ineffectiveness claim; specifically, Carter engaged the bare yet sweeping assertion that "consumption of alcohol" by Carter's trial counsel "caused every instance of ineffective assistance of counsel" which was asserted against counsel in the motion. ***State v. Carter***, 554. However, Carter offered evidence which showed, at most, that counsel "was less than a teetotaler", and advanced nothing which would support a finding of intoxication-based failures; consequently this Court rejected the intoxication-based ineffectiveness claim as simply unproven. ***State v. Carter***, 554.

Consequently, there is nothing to be found in ***Carter*** to support the State's claims.

VII. Since Mr. Barton invokes principles of abandonment of counsel, the State's arguments about successive petitions under Rule 29.15 (g) and (i) are inapposite

Despite acknowledging that Mr. Barton filed his motion pursuant to this Court's abandonment of counsel "doctrine" (Respondent's Brief, p. 7), the State nevertheless details for this Court the Rule 29.15(g) and (i) prohibitions against successive petitions, and urges that his Court find that Mr. Barton's abandonment of counsel motion amounts to such a forbidden successive petition (Respondent's Brief, p. 23-25). This Court's holdings related to abandonment of counsel do not allow what the State urges.

As noted in Appellant's Brief at page 17, abandonment of counsel amounts to an exception to the otherwise hard-and-fast rule requiring timely filing of a Rule 29.15 amended motion. ***Luleff v. State***, 807 S.W.2d 495 (Mo.banc 1991). If a finding of abandonment is made, the movant is restored to the place he would have been had the abandonment not occurred, that is he is permitted to file a fresh amended motion, including all issues which should have been raised in the first place. ***Luleff v. State***, 498; ***State v. Bradley***, 811 S.W.2d 379, 384-385 (Mo.banc 1991); ***Crenshaw v. State***, supra; ***Eastburn v. State***, 400 S.W.3d 770, 774

(Mo.banc 2013); ***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). Consequently, upon a petition for and finding of abandonment of counsel, no problems regarding "successive petitions" can arise.

VIII. Contrary to the State's purported concerns, this Court's consideration of abandonment of counsel issues in no way jeopardizes Federal Habeas

The State professes paternalistic worries for Mr. Barton and like litigants that, if this Court permits the sort of thorough examination of abandonment of counsel issues sought by Mr. Barton, that might compromise a litigant's ability to properly bring and maintain Federal habeas proceedings (Respondent's Brief, p. 18-19). However, there are no legitimate reasons for the State, and more importantly for this Court, to have any such concerns.

Per the dictates of 28 U.S.C 2244(d)(1), a State Court convict is given one year from the date of final judgment in his case to raise a habeas challenge to that judgment in Federal Court. However, 28 U.S.C. 2244(d)(2) permits tolling of that limitations period during any time while a properly filed application for state post-conviction relief is pending. A request for state court determination regarding abandonment of post-conviction counsel is one of the sorts of state post-conviction motions which allows such tolling of the limitations period. ***Streu v. Dormire***, 557

F.3d 960, 963-965 (8th Cir. 2009); ***Bishop v. Dormire***, 526 F.3d 382, 384 (8th Cir. 2008). Consequently, the rights of the convict to later bring his Federal habeas petition are protected while his State abandonment of counsel claim is pending.

There is an additional way in which Federal law allows the convict to further vouchsafe his right to Federal habeas. The convict can file his Federal habeas action well within the limitations period, and prior to the disposition of the state court post-conviction motion, and can seek and obtain from the Federal District Court a stay of the Federal Court proceedings to permit disposition by the State Court upon the post-conviction issues. ***Rhines v. Weber***, 544 U.S. 269, 273-277 (2005). As the State notes, undersigned counsel has employed this additional protection on behalf of Mr. Barton by filing Mr. Barton's 2254 petition, and by seeking and obtaining a stay of those proceedings while the Missouri Courts, including this Court, decide the abandonment of counsel issue (Respondent's Brief, p. 19). See ***Barton v. Steele***, W.D.Mo. Case # 14-8001-CV-W-GAF, Doc. 20, 26.

Thus, all can rest assured that this Court's thorough evaluation of the abandonment of counsel issue before it will in no way jeopardize Mr. Barton's ability to have full consideration of any Federal habeas claims which might eventually be ripe.

IX. Conclusion

WHEREFORE, in light of the foregoing, and in light of the premises set forth in his Appellant's Brief, 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 4,807 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 4th day of January, 2015 to the following

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