No. SC95139

In the Supreme Court of Missouri

WALTER BARTON,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Cass County Circuit Court
Fifteenth Judicial Circuit
The Honorable R. Michael Wagner, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Appellant Walter Barton appeals the denial of his request for a finding of abandonment of counsel and permission to supplement his amended post-conviction motion in his previously adjudicated Rule 29.15 post-conviction case. This Court affirmed the denial of Barton's timely filed post-conviction motion in *Barton v. State,* 432 S.W.3d 741, 746 (Mo. 2014).

Barton's murder trials and prior appeals

In 1991, eighty-one year old Gladys Kuehler was found brutally murdered in her home. *Barton,* 432 S.W.3d at 746. She was stabbed more than 50 times, including through her right eye, 11 times in the left side of the chest, three times in the right side of the chest, twice in the neck, and 23 times in the back. *Id.* There were two large slash wounds across the victim's neck and two X-shaped slash wounds to the victim's abdomen through which her intestines protruded. *Id.* Barton was charged with Ms. Kuehler's murder. The facts of Barton's crime are summarized in this Court's opinion affirming the denial of post-conviction relief. *Id.* at 746–48.

Shortly after the 1991 murder, Barton's first trial commenced. The trial court granted a mistrial at Barton's request, following his allegation that the prosecution had failed to endorse any witnesses. *Id.* at 748. Barton's second trial began in 1992, and the circuit court granted a second mistrial when the jury could not reach a verdict. *Id.* At the conclusion of Barton's third trial, the

jury found Barton guilty of first-degree murder, and the circuit court sentenced Barton to death. This Court reversed the conviction, holding that the circuit court erred in sustaining a prosecution objection to Barton's closing argument. *Id.*

Barton was tried a fourth time. The jury again found Barton guilty of first-degree murder and he was sentenced to death. This Court affirmed the conviction and sentence. *Id.* Barton filed a Rule 29.15 motion for post-conviction relief. Following a prolonged proceeding that involved a per curiam opinion by this Court remanding the case for additional findings, the circuit court ultimately vacated Barton's conviction, and the State took no appeal. *Id.*

Barton's fifth trial took place in March 2006. *Id.* For the third time, a jury found Barton guilty of first-degree murder and sentenced him to death. This Court affirmed his conviction and sentence. *Id.*

Barton's Post-Conviction Proceeding

Barton sought post-conviction relief. The circuit court appointed counsel. (2nd Supp. L.F. [1] at 18). The Missouri State Public Defender System specially assigned Gary Brotherton and Amy Bartholow[2] to represent Barton during his post-conviction proceedings. (App. Brief at 9); (PCR L.F. Vol. 1 at 21). Counsels Brotherton and Bartholow filed an amended motion on July 21, 2008, asserting forty-eight claims within the six grounds for relief. (PCR L.F. Vol. II and Vol. III at 75–394). This Court found that Barton's amended Rule 29.15 motion for post-conviction relief was timely filed. *Barton,* 432 S.W.3d at 748.

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[1] Because this appeal is Barton's second appeal from an order in his post-conviction case, respondent will cite to the record of the recent proceedings in this case as "2nd PCR L.F." and "2nd Supp. PCR L.F." and any references to the prior proceedings as "PCR L.F."

[2] At the time of appointment Brotherton and Bartholow were married, but the two subsequently divorced on July 19, 2012, nearly four years after the amended motion was filed. (2nd PCR L.F. at 26). Brotherton and Bartholow remain in litigation regarding the dissolution. *See Amy Brotherton v. Gary Brotherton,* 12BA-FC00185-01 (Boone County Cir. Ct.).

In May 2012, Brotherton moved to withdraw as Barton's post-conviction motion counsel, and the motion court granted Brotherton's motion. (2nd PCR Supp. L.F. at 7). Bartholow, who had recently returned to the Missouri State Public Defender System from private practice, remained as counsel for Barton. (*Id.* at 6); (App. Brief at 10). Public Defenders Valerie Leftwich and Pete Carter entered their appearance to represent Barton. (2nd PCR Supp. L.F. at 8).

In September 2012, the circuit court held an evidentiary hearing on Barton's amended motion. (2nd PCR Supp. L.F. at 6). Following the hearing, the circuit court denied the motion. *Barton,* 432 S.W.3d at 748. Barton appealed.

Barton raised thirteen points on appeal. *Id.* at 749. He raised ten claims of ineffective assistance of trial counsel, two claims alleging that the State failed to disclose evidence in violation of *Brady,*[3] and a claim that the twenty-year delay in carrying out Barton's death sentence violated the Eighth Amendment's ban on cruel and unusual punishment. *Id.* at 749. This Court rejected Barton's claims and ultimately affirmed the denial of post-conviction relief. *Id.* Barton filed a motion for rehearing, which this Court denied in June 2014.

[3] *Brady v. Maryland,* 373 U.S. 83 (1963).

Barton's Second Post-Conviction Proceeding

A year later, in June 2015, Barton returned to the motion court to file a request for a finding of abandonment of counsel and for permission to supplement his amended post-conviction motion in his Rule 29.15 case. (2nd PCR L.F. at 6–31; 2nd PCR Supp. L.F. at 4). In his motion, Barton claimed that he was abandoned by one of his post-conviction counsels, Brotherton, because Brotherton allegedly suffered from Bipolar Disorder, and other personal issues, at the time he filed his amended post-conviction motion. (2nd PCR L.F. at 7–13). Barton claims, as a result of this alleged mental illness, Brotherton did not adequately research and did not artfully draft two claims in the amended motion that ultimately led to these points being defaulted[4] (*Id.* at 12–13), and that Brotherton raised "many issues of little to no merit" (*Id.* at 12), and failed to raise "half-dozen of the most critical, obvious issues" (*Id.* at 13). As sole support of his allegations against Brotherton's

[4] On post-conviction appeal, this Court found that two of Barton's claims on appeal were defaulted because they were not the same claims raised in the amended motion. *Id.* at 756 n. 5, 763–64. While Barton now embraces this Court's finding, in his motion for rehearing Barton challenged this determination arguing, *inter alia,* that the claims were raised in the post-conviction motion.

competency, Barton provided an affidavit from Brotherton's now ex-wife, Bartholow. (*Id.* at 26–31).

The State filed suggestions in opposition to Barton's motion. (*Id.* at 32–35). The State argued that Barton's amended post-conviction motion, asserting forty-eight claims, was timely filed and Barton did not allege facts reflecting that he had been abandoned as recognized by this Court's prior precedent. (*Id.* at 33–34). Further, although Barton characterized these alleged deficiencies by post-conviction counsel as abandonment, his claims really constituted claims of ineffective assistance of post-conviction counsel that are "categorically unreviewable" under this Court's prior precedent. (*Id.* at 32).

On June 22, 2015, the motion court held a hearing and denied Barton's motion. (2nd PCR Supp. L.F. at 4). Barton filed a motion to reconsider and the court denied that motion on June 28, 2015. (2nd PCR L.F. at 4, 47). The court entered its judgment on June 30, 2015. (*Id.* at 4).

ARGUMENT

The motion court did not clearly err in denying, without a hearing, Barton's request for finding of abandonment of counsel and permission to supplement his timely amended post-conviction motion because Barton was not abandoned by his post-conviction counsels. (Responds to Points I and II).

This Court should affirm the motion court's judgment denying Barton's request for finding of abandonment of counsel and permission to supplement his amended post-conviction motion without a hearing, because the record refutes Barton's allegations that he was abandoned by post-conviction counsel Brotherton. Brotherton and his co-counsel Bartholow complied with their duties under Rule 29.15 and timely filed an amended motion asserting nearly fifty claims. Barton seeks to circumvent this Court's previous denial of post-conviction relief under the abandonment doctrine. He asks this Court to expand this doctrine to include claims of alleged attorney negligence. This Court should decline the request.

A. Standard of review.

"Appellate review of a motion court's decision to allow a motion to file a post-conviction motion out of time is limited to a determination of whether the motion court's findings and conclusions are clearly erroneous." *Eastburn v. State,* 400 S.W.3d 770, 773 (Mo. 2013) (citing *Gehrke v. State,* 280 S.W.3d

54, 56 (Mo. 2009)). "Findings and conclusions are clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made." *Id.* The movant must prove by a preponderance of the evidence that the motion court clearly erred. *Roberts v. State,* 276 S.W.3d 833, 835 (Mo. 2009).

B. Barton's post-conviction motion was timely filed.

Barton's post-conviction case is governed by Missouri Supreme Court Rule 29.15 (2003).[5] Under this rule, "[t]he movant is responsible for timely filing the initial motion, and appointed counsel must timely file either an amended motion or a statement that the pro se motion is sufficient." *Stanley v. State*, 420 S.W.3d 532, 540 (Mo. 2014) (citations omitted).

The maximum time allowed to file an amended motion is sixty days from the date counsel is appointed. Rule 29.15(g). The court may extend the time for filing the amended motion for an additional time period not to exceed thirty days. *Id.* "The time limits for filing a post-conviction motion are mandatory." *Stanley*, 420 S.W.3d at 540 (citing to *Eastburn,* 400 S.W.3d at 773 (Rule 29.15 motions); *Wilkins v. State,* 802 S.W.2d 491, 504 (Mo. 1991) (Rule 24.035 motions)). A motion court has no authority to extend the time

[5] References to rules are to Missouri Supreme Court Rules 2003 unless otherwise noted.

limits for filing an amended motion and is compelled to dismiss any late-filed motions. *Stanley,* 420 S.W.3d at 541; *see also State v. Six,* 805 S.W.2d 159, 170 (Mo. 1991) (motion court does not have discretion to grant extension beyond the time limits sets forth in the rule); *Gehrke,* 280 S.W.3d at 57.

This Court has already determined that Barton's amended post-conviction motion was timely. *Barton,* 432 S.W.3d at 748. This finding is supported by the record, and Barton does not dispute this finding.

C. Barton was not abandoned by his post-conviction counsels.

Abandonment is a narrow and limited doctrine

This Court has allowed circuit courts to accept a late filing in post-conviction proceedings only when a movant has shown that he was abandoned by post-conviction counsel. *Eastburn v. State,* 400 S.W.3d 770, 774 (2013). "[T]he abandonment doctrine was created to excuse the *untimely* filing of *amended motions* by appointed counsel under Rule 29.15(e)." *Price v. State,* 422 S.W.3d 292, 297 (Mo. 2014) (emphasis supplied). Although this Court has stated that the "precise circumstances, in which a motion court may find abandonment are not fixed," *Crenshaw v. State,* 266 S.W.3d 257, 259 (Mo. 2008), 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.[6] *Price,* 422 S.W.3d at 297–98; *Vogl v. State,* 437 S.W.3d 218, 228–29 (Mo. 2014). These circumstances are not present here.

Barton concedes that his post-conviction counsels timely filed an amended post-conviction motion, but argues that the amended motion was not "competently done" because Brotherton, one of Barton's post-conviction counsels, allegedly suffered from Bipolar Disorder and was on medication when he prepared the amended motion. (App. Brief at 11, 18, 27). Barton exploits counsel's alleged personal struggles by arguing that counsel's "mental illness…constituted abandonment of the duties owed by counsel to Mr. Barton under Rules 29.15 and 29.16" despite the fact that, in light of the record, counsel fulfilled his duties under the Rules and competently represented Barton, although he had no constitutional right to effective

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[6] This Court also permits defendants to file an initial motion after the time limits have expired when an offender can demonstrate that the tardiness of the filing was caused "solely from the active interference of a third party beyond the inmate's control…." *Price,* 422 S.W.3d. at 301. However, the Court in *Price* clarified that this third-party interference exception does not fall within the narrow doctrine of abandonment. *Id.* at 303–06.

counsel during his post-conviction proceedings. (App. Brief at 20, 26). This Court should not expand the abandonment doctrine to include claims of alleged attorney negligence.

Post-conviction counsels fulfilled their duties under Rule 29.15

Abandonment by post-conviction counsel means conduct that is tantamount to "a total default in carrying out the obligations imposed upon appointed counsel" under the rules. *Russell v. State,* 39 S.W.3d 52, 54 (Mo. App. E.D. 2001) (citing to *State v. Bradley,* 811 S.W.2d 379, 384 (Mo. 1991)). "When counsel is appointed under Rule 29.15(e), this rule requires counsel to investigate the claims raised in the inmate's timely initial motion and then file either an amended motion or a statement explaining why no amended motion is needed." *Price,* 422 S.W.3d at 297–98. Only when post-conviction counsel totally defaults in carrying out the obligations imposed by the post-conviction rules, is counsel deemed to have taken no action at all. *Stanley,* 420 S.W.3d at 542 (citations omitted). For example, Missouri courts have found abandonment by post-conviction counsel after a timely filed amended motion when counsel filed an unverified amended motion (as required under the prior version of the post-conviction rules), or when counsel merely replicated a facially deficient *pro se* motion. *Stanley,* 420 S.W.3d at 542 (citing to *Crawford v. State,* 834 S.W.2d 749, 754 (Mo. 1992); *see also Bradley,* 811 S.W.2d at 383; *Pope v. State,* 87 S.W.3d 425, 427–29 (Mo. App. W.D.

2002)). Here, the record refutes Barton's allegations that his post-conviction counsels failed to carry out their obligations under Rule 29.15.

The Court appointed counsel for Barton. The Missouri State Public Defenders selected Brotherton and Bartholow to represent Barton. A timely amended motion was filed and signed by both Brotherton and Bartholow. (PCR L.F. Vol. II and Vol. III at 75–394). The amended motion, comprised of 319 pages, asserted forty-eight claims within the six grounds for relief (*Id.*), and was well beyond the three blanket assertions raised by Barton in his *pro se* motion (PCR L.F. Vol. I at 12). Furthermore, the record is replete with counsels' efforts to obtain the necessary records to investigate potential claims to determine what claims and facts must be alleged in the amended motion. (PCR L.F. Vol. I at 19–21, 26–32, 39–44, 58–64). These records also reveal counsels' knowledge of their obligations under Rule 29.15. (*Id.* at 19–20, 31–32, 62). Both Brotherton and Bartholow spent hundreds of hours representing Barton and researching the issues presented in the amended motion. (PCR L.F. Vol. V at 594; 2nd PCR L.F. at 27). Tellingly, both counsels Brotherton and Bartholow expressly denied any suggestion that Barton had been abandoned by them in Barton's pleading asking the motion court to rescind its prior order dismissing the matter for "want of prosecution." (PCR L.F. Vol. IV at 481). In short, the record provides ample evidence for the motion court to conclude that post-conviction counsels made "some effort to

'ascertain whether sufficient facts supporting the claims' were asserted in the pro se motion and 'whether the movant had included all claims known to the movant as basis for attacking the judgment and sentence.'" *Stanley,* 420 S.W.3d at 543 (citations omitted). The motion court's conclusion was not clearly erroneous.

Although Barton urges this Court to consider only Brotherton's competency in his abandonment claim, Barton had a second counsel, Bartholow, assisting Brotherton in filing the amended motion and both were required to carry out their obligations under Rule 29.15. Even if Bartholow now disavows her involvement in drafting the amended motion because she states that she was not qualified under Rule 29.16 due to her inexperience in capital litigation,[7] she accepted the appointment and entered her appearance

[7] Throughout his brief Barton states that Brotherton was lead counsel and does not dispute Brotherton's qualifications under Rule 29.16. Barton contends that Bartholow was not similarly qualified under the rule. (App. Brief at 11). However, Rule 29.16(b) only requires "at least one counsel" representing the capital offender to meet certain additional qualifications. Additional counsels are qualified to accept appointment if they are members of the Missouri bar or admitted to practice under Rule 9. Bartholow was a

on behalf of Barton, she signed the amended motion, and she actively represented Barton until the adjudication of the motion, including remaining as counsel during the evidentiary hearing. (PCR L.F. Vol. I at 19–21, 26–32, 39–44, 58–64; PCR L.F. Vol. II and Vol. III at 75–394; PCR L.F. Vol. V at 612, 619; PCR Tr.). As discussed above, the record reflects that Bartholow complied with her duties under Rule 29.15 and under Rule 4-1.1.

By entering her appearance in the case Bartholow represented Barton for all purposes in his post-conviction matter. Rule 55.03(b). There is nothing in the record suggesting that she filed a limited appearance. *Id.* Furthermore, by signing the amended pleading, Bartholow certified that to the "best of [her] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that the arguments and claims included in the amended motion were proper, warranted by existing law and nonfrivolous, and enjoyed evidentiary support. Rule 55.03(c). Although Bartholow now seeks to distance herself from the claims raised in the amended motion, she states that she spent hours assisting Brotherton preparing the motion and recalled how she and Brotherton discussed legal issues she believed had merit in the record before filing the amended motion. (PCR L.F. at 27, 29–30).

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member of the Missouri bar at the time; therefore, she was qualified to accept appointment. Rule 29.16(b).

If Bartholow had "misgivings in accepting this appointment" because of her alleged inexperience and her co-counsel's alleged mental health issues, as she now claims, and if she was in fact aware that Brotherton "was in the throes of out-of-control mood swings" while drafting the amended motion (App. Brief at 11–12), she provides no plausible explanation as to why she accepted appointment as Barton's counsel, and no explanation as to why she did not alert the motion court or this Court of her fears concerning co-counsel during the prior post-conviction proceeding, (2nd PCR L.F. at 26–31).[8]

Although the record refutes Barton's allegations that Brotherton and Bartholow failed to fulfill their duties under Rule 29.15, even if Brotherton's alleged mental illness affected his performance, alleged poor performance of counsel does not constitute abandonment.

Barton's claim is one of ineffective assistance of post-conviction counsel

Barton's claim is really an impermissible claim of ineffective assistance of post-conviction counsel. Even assuming Barton's allegations were true, which the State did not and does not concede, poor performance by counsel

[8] If Brotherton's mental condition impaired his ability to represent Barton in 2008, as Bartholow suggests seven years later, she does not explain how she complied with her ethical obligation under Rule 4-8.3 to report such conduct.

does not establish abandonment of counsel.[9] At the core of his petition, Barton faults one of his post-conviction counsels for not raising *additional* claims[10] in the amended motion, revealing Barton's claim for what it really is—an impermissible claim of ineffective assistance of post-conviction counsel. *Price,* 422 S.W.3d at 300; *Stanley,* 420 S.W.3d at 542; *Gehrke*, 280 S.W.3d at 58; *Edgington v. State*, 189 S.W.3d 703, 707 (Mo. App. W.D. 2006).

"This Court continually has refused to expand the circumstances that constitute abandonment to include claims for ineffective assistance of post-

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[9] Respondent also notes that even if Brotherton suffered from a mental illness at the time of Barton's representation, that in and of itself does not warrant a finding that Barton was denied counsel. Tellingly, Bartholow states that on at least one occasion she was aware that Brotherton had sought leave to withdraw in another matter due to his alleged mental illness. (2nd PCR L.F. at 28). If that allegation was true, that shows only that Brotherton recognized his requirements under Rule4–1.16(a)(2) and complied with those requirements. Brotherton did not seek to withdraw based on any alleged mental illness in Barton's case. (PCR L.F. Vol. V at 590–04).

[10] Barton does not state in his brief what claims he would like to assert in addition to the forty-eight claims he already raised in the amended post-conviction motion.

conviction counsel." *Stanley,* 420 S.W.3d at 542 (citing *Eastburn,* 400 S.W.3d at 774 and *Gehrke,* 280 S.W.3d at 58); *see also Price,* 422 S.W.3d at 297–98; *Taylor v. State*, 254 S.W.3d 856, 858 (Mo. 2008); *Barnett v. State*, 103 S.W.3d 765, 774 (Mo. 2003); *Winfield v. State*, 93 S.W.3d 732, 733–39 (Mo. 2002). Moreover, this Court has repeatedly held that claims of ineffective post-conviction counsel are categorically unreviewable. *State v. Hunter*, 840 S.W.2d 850, 871 (Mo. 1992); *Hutchison v. State*, 150 S.W.3d 292, 303 (Mo. 2004); *Gehrke*, 280 S.W.3d at 58; *Eastburn,* 400 S.W.3d at 774. 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. This Court should not do so.

As this Court recently reaffirmed in *Price,* there is "no federal constitutional right to a state post-conviction proceeding[.]"*Price,* 422 S.W.3d at 296 (quotation omitted). Therefore, "[t]he lack of any constitutional right to counsel in post-conviction proceedings…precludes claims based on the diligence or competence of post-conviction counsel (appointed or retained), and such claims are 'categorically unreviewable.'" *Id.* (internal citations omitted). The abandonment doctrine "balances the Court's need to enforce the requirements of Rule 29.15(e) and its unwillingness to allow ineffective assistance claims regarding post-conviction counsel…." *Id.* As the Court

explained, "the rationale behind the creation of the abandonment doctrine in *Luleff*[11] and *Sanders*[12] 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." *Id.* at 298. The Court warned that "[e]xtensions of this doctrine that do not serve this same rationale must not be indulged." *Id.* But this is exactly what Barton seeks to do – to extend the abandonment doctrine to claims of perceived ineffective assistance of post-conviction counsel.

This Court has also intentionally limited the scope of abandonment to preserve potential relief under federal habeas corpus proceedings. *Id.* at 306–07; *see also Gehrke*, 280 S.W.3d at 59. This is because federal habeas proceedings require that a movant exhaust all available state remedies, including appeal and post-conviction remedies, before bringing a federal claim. *Id.* These remedies are exhausted only when they are no longer available, regardless of the reason. *Id.* "If the scope of abandonment were expanded further, it is foreseeable that federal habeas corpus claims could be denied due to a movant's failure to bring a motion to reopen post-conviction proceedings. This would frustrate the legitimate goals of a prompt

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[11] *Luleff v. State,* 807 S.W.2d 495 (Mo. 1991).

[12] *Sanders v. State,* 807 S.W.2d 493 (Mo. 1991).

comprehensive review and finality." *Id.* at 307 (*quoting Gehrke*, 280 S.W.3d at 59). Notably, Barton has filed a petition for a writ of habeas corpus in federal court and persuaded the federal court to stay that matter to allow him to return to state court to complete these proceedings. *Barton v. Steele,* No. 14-08001-CV-W-GAF, ECF No. 26 (W.D. Mo., August 19, 2015).

Barton seeks to distinguish his case from these prohibited claims by contending that the alleged "failures by his counsel were not due to mere garden variety negligence, or classic ineffective assistance of counsel, but rather to the ravages of counsels' mental illness." (App. Brief at 8–10). Barton cites several cases from other states and federal circuits suggesting that attorney incapacity should be considered outside the bounds of ordinary attorney negligence. To support his argument, Barton principally cites to *Cantrell v. Knoxville Community Development Corp.,* 60 F.3d 1177 (6th Cir. 1995) – a case that held that equitable tolling for a tardy Equal Employment Opportunity Commission complaint was appropriate if petitioner could demonstrate that he diligently pursued his claim, but was "abandoned" by counsel who suffered from a mental illness. (App. Brief at 14–15, 25). However, the cases cited by Barton do not discuss Missouri's doctrine of "abandonment" by post-conviction counsel.

In addition, the equitable tolling of a statute of limitations is a distinctly different issue. In *Dorris v. State,* this Court distinguished the

equitable tolling of a statute of limitation from the mandatory time limits in Missouri's post-conviction rules because of the rationale behind each doctrine. *Dorris v. State,* 360 S.W.3d 260, 268–69. This Court reasoned that post-conviction motions are collateral attacks on a final judgment of a court, and while Missouri allows these attacks, "that policy of openness must be balanced against the policy of 'bringing finality to the criminal process.'" *Id.* at 269 (quotation omitted). The Court recognized that if movants were not required to timely file their motions, "finality would be undermined and scare public resources will be expended to 'investigate vague and often illusory claims, followed by unwarranted courtroom hearing.'" *Id.* (quotation omitted). Statutes of limitations were created to encourage lawsuits close in time to the act and provide the defendant with a right to know that no claim will be filed against him after a certain time; they do not preserve the finality of a judgement. *Id.* at 269–70. Thus, a party who files out of time under a statute of limitations may be allowed to proceed on his claim, unlike a movant under Missouri's post-conviction rules that is barred from presenting untimely claims. *Id.* at 269.

In any event *Cantrell* does not help Barton. Missouri courts have not distinguished claims of attorney incapacity and attorney negligence. *See State v. Carter,* 955 S.W.2d 548 (Mo. 1997) (rejecting petitioner's "bare allegation" that trial counsel's consumption of alcohol at trial rendered

ineffective assistance of counsel). Furthermore, the United States Court of Appeals in the Seventh and Tenth Circuit have refused to follow the Sixth Circuit's decision in *Cantrell* because "*Cantrell* provides no principled distinction between attorney incapacity and negligence for equitable tolling purposes." *Modrowski v. Mote,* 322 F.3d 965, 968 (7th Cir. 2003). The Seventh Circuit held that "attorney incapacity is equivalent to attorney negligent for equitable tolling purposes." *Id.* In *Modrowski,* the Seventh Circuit rejected petitioner's argument that counsel's depression, physical illness, the death of his father, and the disintegration of his law practice justified equitable tolling for the untimely filing a federal habeas petition under 28 U.S.C. § 2254. *Id.* at 967–69. In *Bradford v. Horton,* the Tenth Circuit rejected petitioner's argument that counsel's illness and hospitalization justified equitable tolling, to allow an untimely federal habeas petition. *Bradford v. Horton,* No. 08-7111, 2009 WL 3437789 (10th Cir. 2009). Like the Seventh Circuit in *Modrowski*, the Tenth Circuit found that counsel's medical condition presents "no analytical difference from our cases examining the myriad instances of attorney negligence." *Bradford,* 2009 WL 3437789, at *2. In sum, Barton's claim is not distinguishable from a claim of ineffective assistance of counsel – a claim that he cannot raise against his post-conviction counsel.

In short, based on this Court's prior precedent, the motion court did not clearly err in denying Barton's motion because the record refutes Barton's allegations that he was abandoned by post-conviction counsel Brotherton.

D. The motion court did not err in denying Barton's motion without a hearing.

Barton contends that the motion court was required to hold an evidentiary hearing on his claim of abandonment and the court's failure to do so was reversible error. (App. Brief at 15–16). Barton cites to this Court's decision in *Eastburn* for the proposition that "[w]hen a motion Court receives a claim of abandonment, the motion Court is to conduct '…an evidentiary hearing to determine whether Movant has been abandoned.'" (*Id.* at 17). But Barton's reliance on *Eastburn* is misplaced.

To be entitled to an evidentiary hearing, a movant must 1) allege facts, not conclusions, which, if true, would entitle the movant to relief; 2) the factual allegations must not be refuted by the record; and 3) the matters complained of must prejudice the movant. *Thurman v. State*, 263 S.W.3d 744, 748 (Mo. App. E.D. 2008). In the context of abandonment claims, the motion court is required to conduct an independent inquiry only if the record shows that appointed counsel did not file an amended motion or submit a statement setting out facts demonstrating what actions counsel took to ensure that no amended motion was needed. *Vogl,* 437 S.W.3d at 229–230; *see also Moore v.*

State, 458 S.W.3d 822, 825 (Mo. 2015). When the record shows on its face that post-conviction counsel did not abandon movant, no hearing is required. *Vogl,* 437 S.W. 3d at 229; *see also Stanley,* 420 S.W.3d at 534; *Moore v. State,* 934 S.W.2d 289, 291–92 (Mo. 1996) (no abandonment hearing is necessary when the record refutes the claim of abandonment).

The motion court did not err in denying Barton's motion without a hearing because the record on its face reflected that Barton's post-conviction counsels did not abandon him when they filed a timely amended motion that included nearly fifty claims for relief.

E. Barton's motion is a successive post-conviction motion that is prohibited under Rule 29.15.

Under Rule 29.15, a "circuit court shall not entertain successive motions." Rule 29.15(*l*) (2003). "A motion is successive if it follows a previous post-conviction relief motion addressing the same conviction." *Zeignebein v. State,* 364 S.W.3d 802, 804 (Mo. App. S.D. 2012) (quoting *Turpin v. State,* 223 S.W.3d 175, 176 (Mo. App. W.D. 2007)). Because successive motions are prohibited by Rule 29.15, the motion court did not clearly err in refusing to consider it. *See Turpin,* 223 S.W.3d at 176 (dismissing the appeal from the denial of a successive post-conviction motion for lack of jurisdiction).

This Court affirmed Barton's conviction and sentence in 2007. *State v. Barton,* 240 S.W.3d 693 (Mo. 2007). He subsequently sought post-conviction

relief, but that motion was denied. This Court affirmed that denial in 2014. *Barton v. State,* 432 S.W.3d 741 (Mo. 2014). Barton now seeks a *second* post-conviction proceeding to assert *additional* claims. As a result, his motion is successive.

Alternatively, even if the motion was not "successive" as contemplated by Rule 29.15(*l*), it is plainly an attempt to file an untimely amended post-conviction motion. This is also prohibited by Rule 29.15(g). Arguments raised for the first time in a second amended motion filed after the time limit are barred from consideration. *Stanley,* 420 S.W.2d at 540–41.

Allowing Barton to file a successive or untimely amended motion, after the adjudication of his prior motion, would only serve to circumvent the purpose of Missouri's post-conviction time limits. If this Court were to adopt Barton's argument, it is reasonable to anticipate that other offenders would join Barton's ranks and claim that they too should be allowed to file a second or supplemental post-conviction motion after the time limits have expired because of alleged counsel deficiencies resulting in the very thing Missouri's post-conviction rules have sought to avoid – unending challenges to the final judgment.

Here, absent any factual finding that Barton was abandoned by post-conviction counsel Barton's motion was either a successive post-conviction motion or an untimely second amended motion. Under the rule, and

according to well-settled case law, the motion court did not have discretion or authority to permit a successive motion approximately a year after this Court affirmed the denial of post-conviction relief. The motion court did not clearly err in denying Barton's motion.

CONCLUSION

The motion court did not clearly err in denying Barton's request for finding of abandonment of counsel and permission to supplement his amended post-conviction motion. The motion court's ruling should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 5,840 words, excluding the cover and certification, as determined by Microsoft Word 2010 software, and that a copy of this brief was sent through the electronic filing system on December 23, 2015 to:

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