

No. SC89527

**In the
Supreme Court of Missouri**

DAVID GEHRKE,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

**Appeal from Jackson County Circuit Court
Sixteenth Judicial Circuit
The Honorable J.D. Williamson, Jr., Judge**

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from the denial of a motion to re-open Rule 24.035 post-conviction proceedings in the Circuit Court of Jackson County. The felony convictions sought to be vacated were for one count of forcible sodomy, § 566.060, RSMo 2000; one count of deviate sexual assault, § 566.070, RSMo 2000; four counts of first-degree statutory sodomy, § 566.062, RSMo 2000; and four counts of first-degree child molestation, § 566.067, RSMo 2000. Appellant was sentenced to a total of one hundred and seven years imprisonment. The Western District Court of Appeals reversed the motion court's denial of Appellant's motion to re-open and remanded for an evidentiary hearing on Appellant's claim of abandonment by post-conviction counsel. *Gehrke v. State*, 2008 WL 2219194 (Mo. App. W.D. May 30, 2008). On October 28, 2008, this Court ordered this appeal transferred. Therefore, jurisdiction lies in this Court. Mo. Const. art. V, § 10; Rule 83.04.

STATEMENT OF FACTS

On February 20, 1999, Appellant, David Gehrke, timely filed a *pro se* Rule 24.035 motion asking the court to vacate his guilty pleas and sentences to the following felonies: one count of forcible sodomy, one count of deviate sexual assault, four counts of statutory sodomy in the first degree, and four counts of child molestation in the first degree. (L.F. 4). Appointed counsel timely filed an amended motion on June 2, 1999. (L.F. 22, 42). The motion court denied the amended motion without a hearing on May 17, 2000. (L.F. 43, 52). Appellant appealed, and on May 29, 2001, the Western District remanded the case for an evidentiary hearing. *Gehrke v. State*, 41 S.W.3d 615, 620 (Mo. App. W.D. 2001); (L.F. 58, 60).

Before the evidentiary hearing, Appellant hired W. Geary Jaco to represent him. (L.F. 67). The evidentiary hearing was held on August 24, 2001. (L.F. 77). The motion court denied Appellant's motion and issued its Findings of Fact, Conclusions of Law, and a Judgment on September 7, 2001. (L.F. 77, 85). Mr. Jaco filled out what appeared to be a notice of appeal form that was file-stamped by the circuit court on September 14, 2001. (L.F. 88, 90-91). No other steps were taken, however, to perfect the appeal.

On August 10, 2006, Appellant filed a motion to reopen his Rule 24.035 post-conviction case. (L.F. 87). He alleged that Mr. Jaco abandoned him by failing to properly file a notice of appeal after the Circuit Court denied the post-conviction

motion. (L.F. 88). Specifically, he alleged that the “notice of appeal was not in proper form, and it was unaccompanied by either an in forma pauperis affidavit or a filing fee. The Jackson County Circuit Court does not have a record of a notice of appeal being filed in this case.” (L.F. 88). Appellant also claimed that he asked Mr. Jaco to appeal the motion court’s denial of his Rule 24.035 motion and that Mr. Jaco not only agreed to do so, but told him that an appeal had been filed. (L.F. 88).

On September 14, 2006, the motion court entered an “Order” denying Appellant’s motion to re-open his post-conviction proceedings. (L.F. 102). Appellant appealed the motion court’s Order, but the Western District dismissed his appeal on December 5, 2006, after finding that the motion court’s Order was “neither final nor otherwise appealable” because it was not denominated a “judgment.” (L.F. 110). On December 6, 2006, the motion court re-issued its previous order denying Appellant’s motion to re-open his post-conviction case and denominated it a “Judgment.” (L.F. 111).

The Western District reversed the motion court’s judgment and remanded the case for an evidentiary hearing on Appellant’s claim that post-conviction counsel abandoned him by failing to perfect an appeal from the denial of his Rule 24.035 motion. *Gehrke*, 2008 WL 2219194, at *2. Specifically, the Western District, relying on its previous holding *Mitchem v. State*, 250 S.W.3d 749 (Mo. App. W.D. 2008), held that Appellant stated a valid claim of abandonment by alleging that post-

conviction counsel failed to file a timely appeal from the denial of his post-conviction motion. *Id.* This Court subsequently transferred this appeal.

ARGUMENT

The motion court did not clearly err in overruling Appellant’s motion to re-open his post-conviction proceedings because he alleged nothing more than a claim of ineffective assistance of post-conviction counsel in that he claimed that post-conviction counsel “abandoned” him by failing to timely file a notice of appeal from the denial of his post-conviction motion, which is not – and should not be considered – a recognized form of abandonment.

Appellant appeals the denial of his motion to re-open his post-conviction proceedings, claiming that post-conviction counsel “abandoned” him by failing to file a notice of appeal. Because Appellant’s claim amounts to nothing more than a claim of ineffective assistance of post-conviction counsel, which is “categorically unreviewable” and does not constitute abandonment, the motion court was correct in overruling Appellant’s motion to re-open.

A. Standard of review.

“The review of the denial of a motion to reopen post-conviction proceedings is limited to a determination of whether the motion court’s findings and conclusions of law are clearly erroneous.” *White v. State*, 265 S.W.3d 850 (Mo. App. E.D. 2008). “The motion court’s findings and conclusions will be deemed clearly erroneous only if we are left with the definite and firm impression that a mistake has been made after reviewing the entire record.” *Id.*

B. Failure to file a notice of appeal from the denial of a post-conviction motion does not constitute abandonment.

Although Rule 75.01 limits a trial court's authority to re-open a judgment to the thirty-day period following entry of the judgment, current case law recognizes a single exception to that time limit, "which allows the post-conviction court to reopen the proceeding to address a claim of abandonment by post-conviction counsel." *Johnson v. State*, 189 S.W.3d 698, 701 (Mo. App. W.D. 2006). This Court "has repeatedly held it will not expand the scope of abandonment to encompass perceived ineffectiveness of post-conviction counsel." *Barnett v. State*, 103 S.W.3d 765, 774 (Mo. banc 2003). Yet this is exactly what Appellant asks this Court to do.

Here, Appellant argues that post-conviction counsel "abandoned" him by failing to file a notice of appeal from the denial of his post-conviction motion. With a few rare exceptions, this Court has consistently held that abandonment occurs only where: (1) post-conviction counsel takes no action at all on the movant's behalf with respect to filing an amended motion; or (2) post-conviction counsel is aware of the need to file an amended motion, but fails to file a timely one. *McFadden v. State*, 256 S.W.3d 103, 108 (Mo. banc 2008). Failure to file a notice of appeal from the denial of a post-conviction motion does not fall into either category. Thus, it is nothing more than a claim of ineffective assistance of post-conviction counsel, which is "categorically unreviewable."

The failure to file an appeal of the denial of a post-conviction motion is not “abandonment” under this Court’s case law, and such inaction does not warrant an extension of the abandonment doctrine. Expanding the doctrine to cover situations where post-conviction counsel fails to timely file a notice of appeal does not comport with the purpose of the doctrine. The purpose of the abandonment doctrine is to ensure that post-conviction counsel complies with the duties imposed by the post-conviction rules. *Kennedy v. State*, 210 S.W.3d 417, 420 (Mo. App. S.D. 2006) (citing *Luleff v. State*, 807 S.W.2d 495, 498 (Mo. banc 1991)). Counsel’s only obligations include reviewing the file and determining whether an amended motion is warranted, and if so, filing that amended motion in a timely fashion. Rules 29.15(e) and 24.035(e). Nowhere in either Rule 29.15 or Rule 24.035 is post-conviction counsel harnessed with the obligation of filing a timely notice of appeal when the post-conviction motion is denied by the motion court.

Essentially, the abandonment exception to Rule 75.01’s 30-day time limit recognizes that a motion court’s jurisdiction to consider claims contemplated by the post-conviction rules is not exhausted until all procedures under the rules have been satisfied. In other words, while the motion court would not ordinarily have any jurisdiction to take further action beyond the 30-day limit of Rule 75.01, where counsel fails to comply with the dictates of the post-conviction rules, the motion court’s jurisdiction under the post-conviction rules was never exhausted. But where,

as here, all procedural requirements have been met, the trial court's jurisdiction is exhausted, and there is no rule or statute that would reinstitute jurisdiction for reconsideration of the underlying claims.

As this Court pointed out in *Crenshaw v. State*, 266 S.W.3d 257 (Mo. banc 2008), the motion court always has jurisdiction to determine the threshold issue of whether a valid claim of abandonment has been raised that would support a motion to reopen. *Crenshaw*, 266 S.W.3d at 258. But where a motion court determines that a movant has not raised a valid claim of abandonment (*i.e.* one addressing the failure of post-conviction counsel to comply with his obligations under the post-conviction rules), the motion court lacks jurisdiction to reopen its earlier judgment without a statute or rule conferring such jurisdiction. Expanding the abandonment doctrine to cover situations such as Appellant's begs the question of how the motion court would re-acquire jurisdiction absent some rule or other statutory authority.

The failure to timely file a notice of appeal amounts to nothing more than ineffective assistance of counsel, and even then, only under certain factual scenarios. *See Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). "The abandonment doctrine does not modify the requirements of Rule 29.15 nor is it a substitute for an impermissible claim of ineffective assistance of counsel." *McFadden*, 256 S.W.3d at 106. "[C]laims of ineffective assistance of postconviction counsel are categorically unreviewable." *Hutchison v. State*, 150 S.W.3d 292, 303 (Mo. banc 2004). Because a

claim that counsel failed to timely file a notice of appeal from the denial of a post-conviction motion is simply a claim of ineffective assistance of post-conviction counsel, it does not fall within the umbrella of the abandonment doctrine, which applies specifically to counsel's duties under the post-conviction rules. *See Luleff*, 807 S.W.2d at 497 (in promulgating the abandonment doctrine, the Court stated, "The question then becomes one of determining whether appointed counsel complied with the provisions of Rule 29.15(e)."). As Rule 24.035 imposes no obligation on counsel to file a timely notice of appeal, the failure to do so does not constitute abandonment.

That being said, the Western District recently reached the opposite conclusion in *Mitchem v. State*, 250 S.W.3d 749 (Mo. App. W.D. 2008). But *Mitchem's* conclusion was nothing more than incorrect dicta that need not – and should not – be followed.¹

¹ This Court recently had the opportunity to address the question of whether failure to file a notice of appeal from the denial of a post-conviction motion constituted abandonment in *Crenshaw*. But this Court determined that "[s]ince Mr. Crenshaw's claims of ineffective assistance of counsel are without merit and the judgment denying relief under Rule 29.15 is affirmed, the Court need not address whether the motion court erred in its finding that Mr. Crenshaw was abandoned." *Crenshaw*, 266 S.W.3d at 261, n.3. Unlike the situation in *Crenshaw*, the only issue on appeal in this case is

Mitchem's conclusion that the failure to timely file a notice of appeal from the denial of a post-conviction motion constitutes abandonment is not binding. The opinion's language regarding the abandonment issue appears to be dicta in light of this Court's decision in *Crenshaw*. Since the *Mitchem* court ultimately affirmed the denial of the movant's post-conviction motion, its determination of the abandonment issue was not necessary to its holding. *Mitchem*, 250 S.W.3d at 757; *Crenshaw*, 266 S.W.3d at 261, n.3. In any event, the *Mitchem* opinion's conclusion on the abandonment issue was incorrect.

In *Mitchem*, post-conviction counsel failed to file a notice of appeal from the motion court's original entry of its findings of fact and conclusions of law. *Mitchem*, 250 S.W.3d at 750. Approximately a year and a half later, the motion court, on post-conviction counsel's motion, reopened the case and reissued its findings. *Id.* Post-conviction counsel thereafter filed a facially timely notice of appeal based on the date of the reissued findings. *Id.* On appeal, the State argued that the Western District lacked jurisdiction over the appeal because the motion court had no authority to reopen the case and reissue its findings a year and a half after entering its original judgment. *Id.* at 751. Thus, it argued, the notice of appeal was untimely. *Id.*

whether the motion court erred in denying Appellant's motion to reopen his post-conviction proceedings on his claim of abandonment.

The Western District first recognized that motion courts typically lose jurisdiction over a case thirty days after entry of a judgment, but a movant's valid claim of abandonment operates to expand the deadline. *Id.* Then, relying on language from this Court's opinions in *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991), and *Luleff v. State*, 807 S.W.2d 495 (Mo. banc 1991), the Western District noted, "[i]t appears that the supreme court found abandonment in both situations because PCR counsel's omission deprived the movant meaningful review of his claims." *Id.* While the Western District recognized that "[s]ince 1991, the supreme court has declined to recognize other grounds for abandonment," it determined that the question of whether failure to timely file a notice of appeal also constituted abandonment was an open question. *Id.*

The Western District then examined the holdings of *Flowers v. State*, 618 S.W.2d 655 (Mo. banc 1981), and *Fenton v. State*, 200 S.W.3d 136 (Mo. App. W.D. 2006), which determined that failure to timely file a notice of appeal constituted abandonment under former Rule 27.26, the predecessor to Rules 24.035 and 29.15. *Id.* at 751-752. Based upon the reasoning in *Flowers* and *Fenton*, the Western District held that "the failure to file a timely appeal of a denial of post-conviction relief under Rule 29.15(k) constitutes abandonment because it would forfeit the movant's right to appeal." *Id.* at 752.

Flowers, upon which the decision in *Fenton* was based, was decided under former Rule 27.26, six years before the advent of Rules 29.15 and 24.035. *Fenton* was also decided under former Rule 27.26. At best, the *Flowers* and *Fenton* decisions are applicable to only Rule 27.26 proceedings since the post-conviction rules have subsequently changed.

In reaching its holding, the *Mitchem* Court acknowledged – but ignored – a significant distinction between Rule 27.26 and current Rules 24.035 and 29.15. In a footnote, the Western District recognized that former Rule 27.26 explicitly provided a right to appeal the denial of a Rule 27.26 motion, whereas the current post-conviction rules do not contain such language. *Id.* at 752, n.8. Despite the distinction, the Western District relied on *Robinson v. State*, 854 S.W.2d 393 (Mo. banc 1993), and *Echols v. State*, 168 S.W.3d 448 (Mo. App. W.D. 2005), to find that case law has interpreted Rule 29.15(k) as granting a right to appeal the denial of post-conviction relief. *Id.*

But the relevant question here is not whether a post-conviction movant has a right to appeal the denial of his motion. Rules 24.035(k) and 29.15(k), as well as the rules of civil procedure contemplate and provide procedures for a movant to appeal the denial of his motion.² The relevant question is whether the post-conviction rules

² While there is a statutory right under Missouri law, there is no constitutional right to appeal the denial of a post-conviction motion. *See Randol v. State*, 144 S.W.3d 874,

impose a duty on post-conviction counsel to take the necessary steps to perfect an appeal, thus bringing the failure to do so within the realm of the abandonment doctrine. They do not.

Former Rule 27.26 provided that “[a]n appeal may be taken from the order entered on the motion as in a civil case as authorized by Section 512.020, RSMo.” Rule 27.26(j) (1987). The rule also provided for the appointment of counsel to perfect an appeal upon a finding of indigence. Rule 27.26(l) (1987). None of this language is present in the current post-conviction rules.

By omitting the appellate language from the new post-conviction rules, this Court apparently intended to change the current state of the law. “The same principles of construction are used in interpreting statutes and rules.” *Felton v. Hulser*, 957 S.W.2d 394, 397 (Mo. App. W.D. 1997). It is presumed that in amending a rule or enacting a new one on the same subject, this Court’s intent is to effect some change in the existing law. *Kilbane v. Director of Dept. of Revenue*, 544 S.W.2d 9, 11 (Mo. banc 1976). Otherwise, the change would accomplish nothing, and it is presumed that this Court would not have intended a useless act. *Id.*

It is further presumed that this Court was aware of its own decision in *Flowers* when it adopted the new post-conviction rules omitting language supporting the

876 (Mo. App. W.D. 2004) (“neither a right to appeal a conviction nor to a state post conviction proceeding exists”).

decision in *Flowers*. Under the rules of construction, the omission must have meant that this Court no longer wished to recognize the failure to timely file a notice of appeal from the denial of a post-conviction motion as abandonment.

Thus, the Western District's determination that the reasoning in *Flowers* and *Fenton* was equally applicable to the current post-conviction rules was improper. Consequently, the Western District's determination in *Mitchem* of the abandonment issue was incorrect and should not be followed.

C. This Court has already provided an avenue of relief for a post-conviction movant desiring an appeal where post-conviction counsel fails, for whatever reason, to timely file such appeal.

Limiting the abandonment doctrine in this fashion does not leave post-conviction litigants without recourse or relief from counsel's failure to file a notice of appeal. This Court has already provided alternative relief to protect a movant's interests in appellate review should his post-conviction counsel fail to timely file a notice of appeal. Rule 30.03 allows a movant to petition for leave to file a late notice of appeal up to one year after the judgment denying his post-conviction motion becomes final. Rule 30.03; *see State v. McClain*, 541 S.W.2d 351, 357 (Mo. App. Spfld. Dist. 1976) ("the fact we permitted an out-of-time appeal under Rule 28.07, would seem to obviate defendant's complaint that trial counsel did not file a notice therefor."). One year is sufficient time for a movant both to determine whether he

wishes to appeal the denial of his post-conviction motion and to discover whether counsel has taken the necessary steps to do so.

On the other hand, recognizing the failure to timely file a notice of appeal as a new form of abandonment allows a trial court to usurp the authority of the Court of Appeals by expanding the time in which to file a notice of appeal beyond that allowed by Rule 30.03 to a seemingly infinite amount of time. Additionally, allowing a movant to allege abandonment in this situation and thereby file a notice of appeal well beyond the one-year period is contrary to the purposes of the post-conviction rules and results in prejudice to the State.

The purpose of the post-conviction rules is “to adjudicate claims concerning the validity of the trial court’s jurisdiction and the legality of the conviction or sentence of the defendant.” *State ex rel. Nixon v. Daugherty*, 186 S.W.3d 253, 254 (Mo. banc 2006). The rules also have “the purpose of avoiding delay in the processing of prisoners’ claims and preventing the litigation of stale claims.” *Id.*

By recognizing the failure to timely file a notice of appeal beyond the one-year limitation imposed in Rule 30.03 as abandonment, the Western District has opened the door for a post-conviction movant to appeal the denial of his motion at any time. Without the application of Rule 30.03’s time limit, a movant can request an appeal

from the denial of his motion ten, twenty, or any number of years later, so long as he alleges that he wished to appeal and counsel failed to file a notice of appeal.³

In *Daugherty*, this Court rejected the defendant's contention that Rule 74.06(d), allowing a party to seek relief from a judgment or order, applied in a manner allowing the defendant to attack his post-conviction proceedings. *Daugherty*, 186 S.W.3d at 254. The defendant had filed a motion pursuant to Rule 74.06(d) "seeking to vacate the circuit court judgment denying [him] post-conviction relief" approximately nine years after this Court had affirmed the denial of his post-conviction motion. *Id.* This Court found that allowing a defendant to attack his post-conviction proceedings through Rule 74.06 frustrated the purpose of the post-conviction rules "to provide a prompt method to correct error and to avoid stale claims." *Id.*

So too does an expansion of the abandonment doctrine to cover the failure to timely file a notice of appeal. The abandonment doctrine itself already recognizes an

³ At a minimum, if counsel's failures in this regard are found to constitute abandonment, this Court should clarify the requirements for a movant to obtain relief on such a claim. Specifically, a movant should be required to make the same showings as those required to demonstrate ineffective assistance of trial counsel for failing to file a notice of appeal as outlined in *Flores-Ortega*, 528 U.S. at 480-484. As in *Luleff*, a movant should be required to show that he is not at fault in counsel's failure. *Luleff*, 807 S.W.2d at 498.

exception to Rule 75.01's thirty-day jurisdictional time limit, but this exception should be limited to cases where counsel's failure to comply with the procedural requirements of the post-conviction rules has failed to exhaust the motion court's jurisdiction. Expanding it further to allow an exception to the one-year time limit for filing a late notice of appeal under Rule 30.03 is excessive and unwarranted.

Additionally, allowing a movant to file an appeal multiple years after the denial of his post-conviction motion is prejudicial to the State. The State has a legitimate and valid interest in the finality of its judgments. "[T]he final judgments of courts should be surrounded with all the safeguards and protections available, lest the barriers be opened for promiscuous and fraudulent invalidation of judgments and thus more harm would be done in violating the finality of judgments than the worth of aiding the occasional person found in the situation of these defendants." *Johnson v. Wilson Estate, Inc.*, 256 S.W.2d 297, 300 (Mo. App. St.L.D. 1953).

The State's interest in finality stems from the fact that it cannot realistically be expected to defend a stale conviction, such as the one in this case that is now almost ten years old. The passage of time can cause the loss of witnesses or their recollections of events. "If witnesses die or disappear during a delay, the prejudice is obvious." *Barker v. Wingo*, 407 U.S. 514, 532 (1972). "There is also prejudice if . . . witnesses are unable to recall accurately events of the distant past." *Id.* Because this

expansion of the abandonment doctrine is unwarranted and prejudicial to the State's ability to defend its convictions, it should not be recognized.

CONCLUSION

The motion court did not err in denying Appellant's motion to reopen his Rule 24.035 proceedings. The motion court's denial of the motion to reopen should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 4,353 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this _____ day of January, 2009, to:

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APPENDIX

Judgment	A1
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