

IN THE
SUPREME COURT OF MISSOURI

TERRY T. WATSON,)	
)	
Appellant,)	
)	
vs.)	No. SC96103
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF ST. LOUIS CITY, MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT
THE HONORABLE BRYAN L. HETTENBACH, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

Emmett D. Queener, MOBar #30603
Attorney for Appellant
Woodrail Centre
1000 W. Nifong, Bldg. 7, Suite 100
Columbia, Missouri 65203
Telephone (573) 777-9977
FAX (573) 777-9974
emmett.queener@mspd.mo.gov

INDEX

	<u>Page</u>
TABLE OF AUTHORITIES.....	3
JURISDICTIONAL STATEMENT	5
STATEMENT OF FACTS.....	6
POINTS RELIED ON.....	18
ARGUMENT.....	24
CONCLUSION.....	57
APPENDIX	

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES:</u>	
<i>Barnett v. State</i> , 103 S.W.3d 765 (Mo. banc 2003)	45
<i>Gehlert v. State</i> , 276 S.W.3d 889 (Mo. App., W.D. 2009).....	36
<i>Hankins v. State</i> , 302 S.W.3d 236 (Mo. App., S.D. 2009).....	36, 37
<i>Lafler v. Cooper</i> , 132 S.Ct. 1376 (2012)	43, 54
<i>Lewis v. State</i> , 476 S.W.3d 364 (Mo. App. S.D. 2015)	30
<i>Lomax v. State</i> , 471 S.W.3d 358 (Mo. App. E.D. 2015)	30
<i>Mann v. State</i> , 475 S.W.3d 208 (Mo. App. E.D. 2015)	30
<i>McKee v. State</i> , 336 S.W.3d 151 (Mo. App., E.D. 2011)	25, 33, 41, 42, 52
<i>Meuir v. State</i> , 182 S.W.3d 788 (Mo. App., S.D. 2006)	43, 47, 53
<i>Missouri v. Frye</i> , 132 S.Ct. 1399 (2012).....	43, 47, 48, 54
<i>Moore v. State</i> , 458 S.W.3d 822 (Mo. banc 2015)	28, 29, 30
<i>Pope v. State</i> , 87 S.W.3d 425 (Mo. App., W.D. 2002).....	34
<i>Sanders v. State</i> , 738 S.W.2d 856 (Mo. banc 1987).....	43, 53, 54
<i>State v. Bradley</i> , 811 S.W.2d 379 (Mo. banc 1991).....	34
<i>State v. Creighton</i> , 2015 WL 9240967 (Mo. App. E.D. December 15, 2015)	29

State v. Terry T. Watson, ED97120, (mandate issued
December 28, 2012) 24

Strickland v. Washington, 104 S.Ct. 2052 (1984) 42, 43, 46, 53

Trehan v. State, 835 S.W.2d 427 (Mo. App., S.D. 1992) 35

Wilkes v. State, 82 S.W.3d 925 (Mo. banc 2002) 46, 47

Williams v. State, 168 S.W.3d 433 (Mo. banc 2005) 42, 47, 52, 53

CONSTITUTIONAL PROVISIONS:

United States Constitution, Sixth Amendment 24, 31, 39, 43, 50, 54

United States Constitution, Fourteenth Amendment..... 24, 31, 39, 50

Missouri Constitution, Article I, Section 10..... 24, 31

Missouri Constitution, Article I, Section 18(a) 24, 31, 39, 50

RULES:

Rule 20.01 28

Rule 29.15..... *passim*

Rule 78.07..... 31

JURISDICTIONAL STATEMENT

Terry T. Watson appeals the denial of his Rule 29.15 motion to vacate, set aside or correct the judgment and sentence entered against him in *State v. Terry T. Watson*, St. Louis City case number 1022-CR03427, for robbery in the first degree, resisting arrest, and trafficking in the second degree, resulting in an eighteen year sentence. The Honorable Bryan L. Hettenbach denied Mr. Watson's Rule 29.15 motion without an evidentiary hearing. Jurisdiction was in the Missouri Court of Appeals, Eastern District, Article V, Section 3, Missouri Constitution; Section 477.050, RSMo 2000. On October 25, 2016, the Eastern District Court of Appeals issued an opinion remanding the cause to the motion court for an evidentiary hearing. This Court granted Appellant's and Respondent's motions for transfer on February 28, 2017.

STATEMENT OF FACTS

Terry T. Watson was charged by information in the Circuit Court of St. Louis City with robbery in the first degree, armed criminal action, two counts of resisting arrest, and trafficking in the second degree (L.F. 19-21).¹ The robbery charge alleged that “Terry Watson acting with Clinton Williams, forcibly stole US currency and coins in the possession of [victim], and in the course thereof Clinton Williams, another participant in the crime, displayed and threatened the use of what appeared to be a deadly weapon.” (L.F. 20). The armed criminal action charge alleged that “Terry Watson acting with Clinton Williams, committed the felony of Robbery in the First Degree charged in Count 1 ... and that defendant, Terry Watson acting with Clinton Williams, committed the foregoing felony of Robbery in the First Degree by, with and through, the knowing use, assistance and aid of a deadly weapon.” (L.F. 20). Mr. Watson was convicted of the robbery, one count of resisting arrest, and trafficking, and sentenced to a

¹ The record on appeal consists of the legal file from the direct appeal (L.F.), the transcript from the direct appeal (Tr.) the sentencing transcript from the direct appeal (Sent.Tr.), the legal file from the Rule 29.15 proceeding (PCR L.F.), and a supplemental legal file from the Rule 29.15 proceeding (Sup.L.F.).

total of eighteen years (L.F. 69-72). The judgment and sentence was affirmed by this Court in *State v. Terry T. Watson*, ED97120. This Court's mandate issued on December 28, 2012. ED97120.

Mr. Watson filed a *pro se* motion pursuant to Rule 29.15 on February 13, 2013, to vacate, set aside or correct the judgment or sentence (PCR L.F. 3-14). He alleged that he received ineffective assistance of counsel because his attorney, Christopher Faerber, "failed to inform Watson as a whole concerning the State's offer of ten (10) years, opted to trial due to his admitted lack of legal knowledge of the first degree robbery statute." (PCR L.F. 6). Mr. Watson directed the motion court to Mr. Faerber's statements at sentencing "that the charge of fist [sic] degree robbery is non-sustainable simply because there was no weapon." (PCR L.F. 6). Mr. Faerber told the court at sentencing: "And my argument for [his sentencing recommendation] is given the facts of the cause - yea, the robbery first is a serious charge, but the facts as I said out at trial, I think, in some ways don't point to, as I said, robbery first, when I was talking earlier, but no gun no force, no bodily harm, and - toward the victims of the robbery first." (PCR L.F. 6-7). Mr. Watson alleged that Mr. Faerber "relied completely upon his legal theory of "no gun" and his own admitted lack of legal expertise to even tell, let alone effectively relay, to Mr. Watson that

the State made an offer of ten (10) years if Mr. Watson pled guilty.” (PCR L.F. 7). Mr. Watson set out Mr. Faerber’s statements at sentencing:

“The State’s rec (sic) was ten. I may have advised him to take the ten. And I’m not going to break attorney-client as to how much I advised him or how much I didn’t in the past, but I may have – let’s say sold it harder than other-wise I might have.

So, in some ways that’s also on me, and I would hate to see him unduly punished because my advice was a little off because my knowledge base was a little off, because when I asked him that question, my clarification was a little bit off.”

(PCR L.F. 7).

Mr. Watson alleged that Mr. Faerber “incorrectly told him that the State would have to show that there was a “gun” used to “forc(ibly) take the victims property, along with ‘bodily harm’ toward the victim in order to sustain a first degree robbery offense.” (PCR L.F. 8). He further alleged:

In light of counsel’s theory and allocution statements he not only represented this position to Mr. Watson but to the sentencing court itself with “no gun”, “no bodily harm”, “not a lot of money was taken”, “no conviction of ACA”. In this context, nothing, too, supports the reasonableness of counsel’s advice to not fully advise

Mr. Watson of the existence of the 10 years plea bargain the State had on the table before it's expiration, and nothing refutes the involuntariness and incorrect knowledge of the law that Mr. Watson based his decision on to go forward to trial and receive a much longer sentence."

(PCR L.F. 9).

Mr. Watson alleged that he was prejudiced because:

In this case, with the benefit of trial sentencing transcripts complete with FAEBER'S own admission that he failed in his duty that he owed to his client when he not only gave his client incorrect advise and law concerning the quantum of proof needed to sustain a first degree robbery charge and prosecution, but he, admittedly, failed, also, to even let Mr. Watson know of the existence of a deal being placed on the table by the State.

(PCR L.F. 10) (emphasis in original).

Mr. Watson also alleged in his *pro se* motion that he would testify at an evidentiary hearing "that a little bit before trial Mr. Faerber visited with him and gave him incorrect information and law regarding accomplice liability, that he was entitled to rely upon that information and counsel's mis-statements of law to him that the State needed to show that he

personally committed every element of the crime.” (PCR L.F. 7). Mr. Watson alleged that “had he been correctly advised as to the law of aiding and abetting and duly informed of the State’s ten (10) year offer he would have accepted the plea offer and avoid and [sic] lengthier prison incarceration.” (PCR L.F. 7).

The motion court notified the Post-Conviction Relief Office of the Public Defender on March 6, 2013, of Mr. Watson’s *pro se* motion (PCR L.F. 15). Leigh Carson filed her entry of appearance on Mr. Watson’s behalf on March 20, 2013 (PCR L.F. 16). On April 12, 2013, Ms. Carson filed a MOTION FOR LEAVE TO FILE AMENDED ANSWER, requesting “a period of 45 days from the date of filing within which to file an amended petition.” (PCR L.F. 17-18). The motion court granted Ms. Carson’s motion (PCR L.F. 18).

Ms. Carson filed an Amended Motion on May 30, 2013 (PCR L.F. 20-25). The amended motion alleged that Mr. Watson received ineffective assistance of counsel because Mr. Faerber failed to “fully and competently” advise Mr. Watson of the plea bargain offered by the State of ten years due to Mr. Farber’s lack of familiarity with the law regarding first-degree robbery as illustrated by his “statement to the trial court during the sentencing phase of the trial that the charge of First Degree Robbery was

not sustainable because there was not weapon....” (PCR L.F. 21). The motion alleged that if Mr. Watson had been properly advised he would have accepted the plea offer rather than go to trial (PCR L.F. 21).

The amended motion also alleged that Mr. Watson received ineffective assistance of counsel because Mr. Faerber failed to “fully and competently” advise Mr. Watson of the ten year plea offer because Mr. Faerber failed to advise Mr. Watson that for accomplice liability and aiding and abetting “the State need not show that the defendant personally committed every element of the crime and that any evidence of affirmative action within aiding the principal” was sufficient to support a conviction (PCR L.F. 21-22). The motion alleged that if Mr. Watson had been properly advised he would have accepted the plea offer rather than go to trial (PCR L.F. 22).

The amended motion further alleged that Mr. Watson received ineffective assistance of counsel because Mr. Faerber failed to “properly and competently” advise Mr. Watson regarding the elements of first degree robbery by “advising Watson that the State would have to prove that there was a gun used to forcibly take the victim’s property and it was with ‘bodily harm toward the victim....’” (PCR L.F. 22). The motion

alleged that if Mr. Faerber had correctly advised Mr. Watson, he would have accepted the plea offer rather than gone to trial (PCR L.F. 22).

The amended motion also alleged that trial counsel was ineffective in failing to familiarize himself with Mr. Watson's prior offenses, and in failing to file a motion to sever Mr. Watson's trial from his co-defendant's trial because Mr. Watson did not testify and his co-defendant testified that they were involved in drug dealing, to Mr. Watson's prejudice (PCR L.F. 23). The motion alleged that these failures caused Mr. Faerber's advice regarding the plea bargain to be ineffective (PCR L.F. 23).

Mr. Watson sent a letter to the motion court on June 27, 2013, informing the court that Ms. Carson had no contact with him prior to filing the amended motion (Sup.L.F. 1-). He informed the motion court that he sent a letter to Ms. Carson sometime between May 15 and 20, 2013, informing her of three additional claims he wanted included in his amended motion (Sup.L.F. 2). Mr. Watson included these claims in his letter to the motion court (Sup.L.F. 5-20). He complained that Ms. Carson had failed to comply with the requirement of Rule 29.15(e) that counsel ascertain whether the movant has included all claims known for attacking the judgment and sentence (Sup.L.F. 4).

Mr. Watson sent the motion court another letter of April 10, 2014 (Sup.L.F. 21). He asked the motion court to accept the three additional claims he set out in his previous letter as reasons to vacate, set aside or correct the judgments and sentences (Sup.L.F. 21).

The motion court entered Conclusions Of Law and Order on January 16, 2015, denying Mr. Watson's amended motion for relief without an evidentiary hearing (PCR L.F. 26-34). The motion court denied Mr. Watson's first claim by holding that Mr. Faerber's statements at the sentencing hearing did not reflect a misunderstanding of the law, but that Mr. Faerber was arguing for an acquittal of the robbery charge because the jurors returned a not guilty verdict on the armed criminal action charge (PCR L.F. 29). The motion court cited Mr. Faerber's argument at sentencing regarding the "inconsistent" verdicts (PCR L.F. 29-30).

The motion court denied Mr. Watson's second claim, that Mr. Faerber failed to properly advise him on the law of accomplice liability, by noting that the robbery charge in the information alleged that Mr. Watson was acting with the co-defendant, and that it was the co-defendant who displayed and threatened what appeared to be a deadly weapon (PCR L.F. 30). The motion court held that "it would be readily apparent to a person reading the indictment that only one of the participants in the crime would

have to have been a person displaying and threatening the use of what appeared to be a deadly weapon and that movant in this case could be liable based on conduct of [the co-defendant].” (PCR L.F. 30-31). The motion court further noted that Mr. Watson file a *pro se* motion in the trial court to dismiss the armed criminal action charge, citing the robbery and armed criminal action statutes, and was, therefore, on notice that the robbery charge against him was based in part on the conduct of the co-defendant (PCR L.F. 31).

The motion court held that Mr. Faerber did not provide Mr. Watson with improper advice regarding what the State had to show to find him guilty of robbery in the first degree (PCR L.F. 31). The court concluded that Mr. Watson rejected the plea offer of ten years without alleging that the offer included dismissal of the charges other than the robbery charge (PCR L.F. 32). Because Mr. Watson would have had to confess at a guilty plea hearing to the charges of robbery and armed criminal action that the co-defendant had and threatened the use of a deadly weapon, “the apparent advice of movant’s attorney was not objectively unreasonable.” (PCR L.F. 32).

The motion court denied Mr. Watson’s claim that Mr. Faerber failed to familiarize himself with Mr. Watson’s prior record by noting that Mr.

Watson did not tell his attorney about out-of-state convictions until after the trial, even though Mr. Faerber asked Mr. Watson about his prior convictions (PCR L.F. 32-33). The motion court denied Mr. Watson's claim that trial counsel failed to request a severance from his co-defendant's trial by noting that Mr. Watson did testify at his trial, and testified that they were involved in a drug deal (PCR L.F. 33).

Mr. Watson file a *pro se* motion pursuant to Rule 78.07(c) on February 13, 2015, to amend the judgment of the motion court (PCR L.F. 37-73). He alleged that Ms. Carson did not "consult with movant [to] ascertain whether or not all grounds known to movant has been raised in the motion," in violation of the requirements of Rule 29.15(e) (PCR L.F. 38). He alleged that Ms. Carson did not contact him or provide him with a copy of the amended motion (PCR L.F. 38). Mr. Watson stated in his motion that if Ms. Carson had complied with the requirements of the rule, "she would not have pled in her amended motion at p. 3 paragraph (c) line 10 stating, 'Said inaccurate advice was the basis for Watson not accepting the plea bargain of ten (10) years....'" (PCR L.F. 38). He argued that Ms. Carson's allegation "led this Court to believe that movant was aware that the State had made him an offer that he was made aware of before the trial began." (PCR L.F. 38). Mr. Watson said that this was not true, that "at all

times mentioned herein movant did not become aware of an offer on the table until sentencing occurred.” (PCR L.F. 38). He alleged that Ms. Carson had misunderstood the allegations in his *pro se* motion due to her failure to consult with him (PCR L.F. 38-39).

Mr. Watson requested the motion court to amend its Judgment to address the three claims he requested Ms. Carson to include in his amended motion, “or in the alternative to re-appoint conflict free representation providing movant with the opportunity to interact with appointed counsel to develop the three abandoned claims and the claim ruled on by this Court that they may clearly speak the facts, evidence and law to support them for a full and fair decision upon the merits of the same....” (PCR L.F. 43).

The motion court entered an Order on March 2, 2015, denying Mr. Watsons motion to amend the Judgment (PCR L.F. 74). The court concluded that Mr. Watson’s claims that Ms. Carson did not consult with him and did not include all of his claims were nothing more than claims of ineffective assistance of counsel which are “categorically” not cognizable (PCR L.F. 74).

On August 7, 2015, this Court granted Mr. Watson until September 11, 2015, to file his notice of appeal (PCR L.F. 102). Notice of appeal was filed on August 31, 2015 (PCR L.F. 103-115).

POINTS RELIED ON

I.

The motion court erred in failing to conduct an abandonment inquiry, in violation of Mr. Watson's rights to due process and the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the amended motion was untimely filed, creating a presumption of abandonment on the record, and the motion court was required to hold an abandonment hearing to determine whether abandonment occurred.

Moore v. State, 458 S.W.3d 822 (Mo. banc 2015);

Lewis v. State, 476 S.W.3d 364 (Mo. App. S.D. 2015);

State v. Creighton, 2015 WL 9240967 (Mo. App. E.D.

December 15, 2015);

United States Constitution, Sixth and Fourteenth Amendments;

Missouri Constitution, Article I, Sections 10 & 18(a); and

Rules 20.01 and 29.15.

II.

The motion court erred in denying Mr. Watson's Rule 78.07 (c) motion to amend the judgment, or in failing to conduct an abandonment inquiry, in violation of Mr. Watson's rights to due process and the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that Mr. Watson demonstrated Ms. Carson's failure to comply with the requirements of Rule 29.15(g) to ascertain whether sufficient facts supporting the claims are asserted in the motion because Ms. Carson altered the factual assertions made by Mr. Watson in his *pro se* motion, and the motion court was required to hold an abandonment hearing to determine whether abandonment occurred.

McKee v. State, 336 S.W.3d 151 (Mo. App., E.D. 2011);

Pope v. State, 87 S.W.3d 425 (Mo. App., W.D. 2002);

Trehan v. State, 835 S.W.2d 427 (Mo. App., S.D. 1992);

Gehlert v. State, 276 S.W.3d 889 (Mo. App., W.D. 2009);

United States Constitution, Sixth and Fourteenth Amendments;

Missouri Constitution, Article I, Sections 10 and 18(a); and

Rule 29.15.

III.

The motion court clearly erred in denying Mr. Watson's Rule 29.15 motion for post-conviction relief without an evidentiary hearing, because Mr. Watson pleaded factual allegations which, if proved, would warrant relief and which are not refuted by the record, in that Mr. Watson claimed that he received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, when trial counsel failed to act as a reasonably competent attorney under the same or similar circumstances by failing to adequately explain to Mr. Watson the elements of the offense of robbery in the first degree the State must meet for a conviction. Mr. Watson rejected a plea offer from the State for sentences totaling ten years based on counsel's advice, and Mr. Watson was ultimately sentenced to a total of eighteen years in prison following his trial.

Williams v. State, 168 S.W.3d 433 (Mo. banc 2005);

Strickland v. Washington, 104 S.Ct. 2052 (1984);

Missouri v. Frye, 132 S.Ct. 1399 (2012);

Lafler v. Cooper, 132 S.Ct. 1376 (2012);

United States Constitution, Sixth and Fourteenth Amendments;

Missouri Constitution, Article I, Sections 10 and 18(a); and
Rule 29.15.

IV.

The motion court clearly erred in denying Mr. Watson's Rule 29.15 motion for post-conviction relief without an evidentiary hearing, because Mr. Watson pleaded factual allegations which, if proved, would warrant relief and which are not refuted by the record, in that Mr. Watson claimed that he received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, when trial counsel failed to act as a reasonably competent attorney under the same or similar circumstances by failing to adequately explain to Mr. Watson the elements of the State must meet for a conviction against him based on accomplice liability. Mr. Watson rejected a plea offer from the State for sentences totaling ten years based on counsel's advice, and Mr. Watson was ultimately sentenced to a total of eighteen years in prison following his trial.

Williams v. State, 168 S.W.3d 433 (Mo. banc 2005);

Strickland v. Washington, 104 S.Ct. 2052 (1984);

Missouri v. Frye, 132 S.Ct. 1399 (2012);

Lafler v. Cooper, 132 S.Ct. 1376 (2012);

United States Constitution, Sixth and Fourteenth Amendments;

Missouri Constitution, Article I, Sections 10 and 18(a); and
Rule 29.15.

ARGUMENT

I.

The motion court erred in failing to conduct an abandonment inquiry, in violation of Mr. Watson's rights to due process and the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the amended motion was untimely filed, creating a presumption of abandonment on the record, and the motion court was required to hold an abandonment hearing to determine whether abandonment occurred.

Mr. Watson's judgment and sentence was affirmed by this Court in *State v. Terry T. Watson*, ED97120. This Court's mandate issued on December 28, 2012. ED97120. Mr. Watson filed a *pro se* motion pursuant to Rule 29.15 on February 13, 2013, to vacate, set aside or correct the judgment or sentence (PCR L.F. 3-14).

The motion court notified the Post-Conviction Relief Office of the Public Defender on March 6, 2013, of Mr. Watson's *pro se* motion (PCR L.F. 15). Leigh Carson filed her entry of appearance on Mr. Watson's behalf on March 20, 2013 (PCR L.F. 16). On April 12, 2013, Ms. Carson filed a

MOTION FOR LEAVE TO FILE AMENDED ANSWER, requesting “a period of 45 days from the date of filing within which to file an amended petition.” (PCR L.F. 17-18). The motion court granted Ms. Carson’s motion (PCR L.F. 18).

Ms. Carson filed an Amended Motion on May 30, 2013 (PCR L.F. 20-25).

Standard of Review

Appellate review of the denial of a post-conviction relief motion is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. *McKee v. State*, 336 S.W.3d 151, 153 (Mo. App., E.D. 2011). The motion court’s findings of fact and conclusions of law are clearly erroneous if the reviewing court, having examined the entire record, is left with a definite and firm impression that a mistake has been made. *Id.*

Analysis

Rule 29.15(g) states:

If an appeal of the judgment sought to be vacated, set aside, or corrected is taken, the amended motion shall be filed within sixty

days of the earlier of: (1) the date both the mandate of the appellate court is issued and counsel is appointed or (2) the date both the mandate of the appellate court is issued and an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of the movant. The court may extend the time for filing the amended motion for one additional period not to exceed thirty days.

The motion court notified the Public Defender's Office on March 6, 2013, that Mr. Watson had filed his *pro se* motion (PCR L.F. 15). But this was only a "notification," not an order of appointment (PCR L.F. 15). Interpreting this notice liberally, the time for filing an amended motion did not begin to run until Ms. Carson filed her entry of appearance on March 20, 2013 (PCR L.F. 16) Rule 29.15(g). The initial time period would have expired on May 19, 2013. Ms. Carson's MOTION FOR LEAVE TO FILE AMENDED ANSWER filed on April 12, 2013, requested "a period of 45 days from the date of filing within which to file an amended petition." (PCR L.F. 17-18). This request extended the time for filing the amended motion until May 27, 2013, which was beyond the initial sixty-day period but permitted by Rule 29.15(g). While Rule 29.15(g) permits an addition

period *not to exceed thirty days*, Ms. Carson did not request nor did the motion court grant that amount of time.

There is nothing in counsel's motion to support an interpretation that motion counsel was actually requesting the statutorily permitted extension beginning *from the date of her entry of appearance* (PCR L.F. 17). Nor is it "standard practice" for motion counsel to request an additional 45 days beyond the initial time allowed under the statute because the statute allows only an additional 30 days. Rule 29.15(g).

The State claimed below: "Indeed, it stands to reason that counsel would not artificially shorten the time for filing by an extension request well before the deadline and asking for an extension from that earlier date (instead of the deadline)." (State's Br. 13-14). To the contrary, it is reasonable that motion counsel believed that she could secure the transcript and prepare Mr. Watson's in the 45 days she requested.

The State's argument demonstrates the precise reason why the motion court erred in failing to hold an abandonment hearing. At a minimum, the motion court had a duty to clarify the meaning of counsel's motion and thereby determine the due date for the amended motion. It was incumbent upon the motion court to determine the timeliness of the amended motion.

Because May 27, 2013, was the Memorial Day Holiday, Ms. Carson's amended motion was due on May 28, 2013. Rule 20.01. Ms. Carson filed the amended motion on May 30, 2013, beyond the time granted by the motion court pursuant to Rule 29.15(g). The motion court did not conduct an independent inquiry into abandonment by appointed counsel in the late filing of the amended motion.

When post-conviction counsel is appointed to an indigent movant, an amended motion filed beyond the deadline in Rule 29.15(g) can constitute abandonment of the movant. *See Moore v. State*, 458 S.W.3d 822, 825 (Mo. banc 2015). An untimely amended motion creates a presumption that counsel failed comply with Rule 29.15(e), which requires counsel to ascertain whether sufficient facts support claims asserted in the *pro se* motion, to ascertain whether the movant has included all claims known to him, and to file an amended motion if the *pro se* motion is insufficient. *Id.* at 825. When an untimely amended motion is filed, the motion court has a duty to undertake an independent inquiry to determine whether abandonment occurred. *Id.* "When the independent inquiry is required but not done, this Court will remand the case because the motion court is the appropriate forum to conduct such an inquiry." *Id.* at 826. The

result of the inquiry determines which motion – the *pro se* motion or the amended motion – the court should adjudicate. *Id.*

In *State v. Creighton*, 2015 WL 9240967 (Mo. App. E.D. December 15, 2015), the appellate Court reversed Creighton’s post-conviction case for an abandonment hearing due to an untimely-filed amended motion. The Court noted that nothing in the record indicated that the motion court made an independent inquiry into whether Creighton was abandoned by counsel; the motion court ruled on the amended motion with no reference to timeliness or abandonment. *Id.* at *3. This Court had “no alternative but to remand [the] matter to the motion court so that it [could] conduct the legally-required inquiry.” *Id.*

The importance of the inquiry by the motion court is to determine which motion the post-conviction court should adjudicate – the *pro se* motion or the amended motion. *Id.* Here, Appellant’s *pro se* motion included claims not discussed in the court’s findings of fact, conclusions of law and order. The amended motion did not incorporate any of the *pro se* claims, and the evidentiary hearing was limited to the issue raised in the amended motion. Appellant’s *pro se* motion was not even mentioned.

It is now clear that when an untimely amended motion is filed, and the motion court does not consider all the claims in a movant’s *pro se*

motion, the motion court has a duty to undertake an independent inquiry to determine if abandonment occurred and which claims - those in the *pro se* motion or those in the amended motion - are properly before the motion court. See *Lewis v. State*, 476 S.W.3d 364 (Mo. App. S.D. 2015); *Mann v. State*, 475 S.W.3d 208 (Mo. App. E.D. 2015); *Lomax v. State*, 471 S.W.3d 358, 359 (Mo. App. E.D. 2015).

This is important in Mr. Watson's case because he alleged in his *pro se* motion that Mr. Faerber did not inform him of the State's plea offer, but Ms. Carson alleged that Mr. Faerber did inform Mr. Watson of the plea offer, though not "fully and competently" (PCR L.F. 6, 7, 9, 10, 21-22). The motion court relied upon Ms. Carson's allegations in the amended motion to conclude that Mr. Watson rejected the plea offer upon reasonable advice by Mr. Faerber (PCR L.F. 32).

The motion court here clearly erred in failing to conduct an abandonment inquiry to determine whether Mr. Watson was abandoned and which motion should be adjudicated. This Court should reverse the motion court's order and remand the case for an abandonment inquiry as required by *Moore, supra*.

II.

The motion court erred in denying Mr. Watson's Rule 78.07 (c) motion to amend the judgment, or in failing to conduct an abandonment inquiry, in violation of Mr. Watson's rights to due process and the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that Mr. Watson demonstrated Ms. Carson's failure to comply with the requirements of Rule 29.15(e) to ascertain whether sufficient facts supporting the claims are asserted in the motion because Ms. Carson altered the factual assertions made by Mr. Watson in his *pro se* motion, and the motion court was required to hold an abandonment hearing to determine whether abandonment occurred.

The motion court entered Conclusions Of Law and Order on January 16, 2015, denying Mr. Watson's amended motion for relief without an evidentiary hearing (PCR L.F. 26-34).

Mr. Watson filed a *pro se* motion pursuant to Rule 78.07(c) on February 13, 2015, to amend the judgment of the motion court (PCR L.F. 37-73). He alleged that Ms. Carson did not "consult with movant [to]

ascertain whether or not all grounds known to movant has been raised in the motion,” in violation of the requirements of Rule 29.15(e) (PCR L.F. 38). He alleged that Ms. Carson did not contact him or provide him with a copy of the amended motion (PCR L.F. 38). Mr. Watson stated in his motion that if Ms. Carson had complied with the requirements of the rule, “she would not have pled in her amended motion at p. 3 paragraph (c) line 10 stating, ‘Said inaccurate advice was the basis for Watson not accepting the plea bargain of ten (10) years....’” (PCR L.F. 38). He argued that Ms. Carson’s allegation “led this Court to believe that movant was aware that the State had made him an offer that he was made aware of before the trial began.” (PCR L.F. 38). Mr. Watson said that this was not true, that “at all times mentioned herein movant did not become aware of an offer on the table until sentencing occurred.” (PCR L.F. 38). He alleged that Ms. Carson had misunderstood the allegations in his *pro se* motion due to her failure to consult with him (PCR L.F. 38-39).

Mr. Watson requested the motion court to amend its Judgment to address the three claims he requested Ms. Carson to include in his amended motion, “or in the alternative to re-appoint conflict free representation providing movant with the opportunity to interact with appointed counsel to develop the three abandoned claims and the claim

ruled on by this Court that they may clearly speak the facts, evidence and law to support them for a full and fair decision upon the merits of the same....” (PCR L.F. 43).

The motion court entered an Order on March 2, 2015, denying Mr. Watsons motion to amend the Judgment (PCR L.F. 74). The court concluded that Mr. Watson’s claims that Ms. Carson did not consult with him and did not include all of his claims were nothing more than claims of ineffective assistance of counsel which are “categorically” not cognizable (PCR L.F. 74).

Standard of review

Appellate review of the denial of a post-conviction relief motion is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. *McKee v. State*, 336 S.W.3d 151, 153 (Mo. App., E.D. 2011). The motion court’s findings of fact and conclusions of law are clearly erroneous if the reviewing court, having examined the entire record, is left with a definite and firm impression that a mistake has been made. *Id.*

Analysis

Generally, claims of ineffective assistance of post-conviction counsel are unreviewable on appeal, because there is no constitutional right to counsel in a Rule 29.15 proceeding. *Pope v. State*, 87 S.W.3d 425, 427 (Mo. App., W.D. 2002). The only exception to this rule arises when the record shows that a movant has been abandoned by post-conviction counsel. *Id.* Abandonment typically occurs when post-conviction counsel fails to comply with Rule 29.15(e). *Id.* This rule requires post-conviction counsel to determine whether the *pro se* motion “is sufficiently supported by facts” and includes all claims known to the movant. *Id.* The motion court is the proper forum to address an issue of abandonment involving post-conviction counsel. *Id.*

Although the abandonment doctrine has been narrowly applied to serious violations of Rule 29.15, it is not limited to cases where counsel took absolutely no action or filed the amended motion too late. *Pope*, at 428. In *State v. Bradley*, 811 S.W.2d 379, 384-385 (Mo. banc 1991), the Court held that an abandonment hearing was required where appointed counsel filed an unverified Rule 29.15 motion that was dismissed by the motion court for failure to state sufficient facts warranting relief.

The *pro se* motion in *Trehan v. State*, 835 S.W.2d 427, 429 (Mo. App., S.D. 1992), alleged only conclusions without any supporting facts.

Appointed counsel filed an amended motion which simply incorporated the *pro se* motion's conclusions and also failed to set out any facts in support of the claims. *Id.* The Court noted that it was possible that appointed counsel, in compliance with the rule, attempted to ascertain facts to support the claims in order to file an amended motion that, in the language of the Rule, "sufficiently alleges the additional facts," but no such attempt appeared in the record. *Id.* The Court presumed that appointed counsel failed to comply with the Rule and remanded for a hearing on appointed counsel's performance. *Id.* at 430.

The record below is clear that the factual assertions made by motion counsel - that trial counsel did not fully and competently advise Mr. Watson regarding the plea offer - was contrary to Mr. Watson's assertions in the *pro se* motion - that trial counsel failed to advise him of the plea offer at all. (PCR L.F. 6, 7, 9, 10, 22). Nothing in the record below explains how motion counsel came to allege facts in complete opposition to those alleged by Mr. Watson. As in *Trehan*, an abandonment hearing was necessary to explain the reversal of the claims in the amended motion.

The record in *Gehlert v. State*, 276 S.W.3d 889, 892 (Mo. App., W.D. 2009), showed that appointed counsel contacted the movant and attempted to secure the guilty plea and sentencing transcripts to prepare an amended motion, but no amended motion was never filed because the court reporter informed counsel that the recording was damaged and unusable. *Id.* at 891. The movant filed a *pro se* petition to vacate the judgment and sentence with prejudice if the delay was attributable to the court reporter. *Id.* The motion court held a hearing and denied this motion for failing to raise any issues against plea counsel, but raising only issues not cognizable under the Rule. *Id.*

The Court reversed the motion court's judgment and remanded the cause for an abandonment hearing. *Id.* at 893. The Court noted that the lack of a guilty plea does not automatically require a guilty plea to be set aside. *Id.* at 892. Nothing in the record indicated that appointed counsel had contacted or attempted to contact the movant or anyone else to determine if there were additional facts outside the record that might warrant relief. *Id.* at 893.

In *Hankins v. State*, 302 S.W.3d 236 (Mo. App., S.D. 2009), the Court of Appeals held that Hankins alleged ineffective assistance rather than abandonment by claiming that motion counsel failed to confer with him to

determine if any additional claims should be raised. *Id.* at 329. But failing to confer with a client to determine if additional claims should be raised is vastly different than failing to confer with a client before contradicting claims already made.

The *Hankins* Court also noted that a “[m]ovant is presumed abandoned by counsel *when the record, on its face, establishes non-compliance with the duties imposed by the*” rule. *Id.* at 238. On the face of the record below, it is clear that Mr. Watson’s allegation that he was not informed about the plea offer was altered by motion counsel to allege that trial counsel did not “fully and competently” advise Mr. Watson regarding the plea offer. It is clear on the face of the record that motion counsel failed to confer with Mr. Watson before filing the amended motion.

These cases are important in Mr. Watson’s case because they demonstrate the requirement of Rule 29.15(e) that appointed counsel determine the facts, and allege in the amended motion facts supporting the movant’s claims. While Ms. Carson alleged “facts” in her amended motion, critical facts were at odds with the factual assertions Mr. Watson made in his *pro se* motion. Mr. Watson alleged in his *pro se* motion that Mr. Faerber did not inform him of the State’s plea offer (PCR L.F. 6, 7, 9, 10). But Ms. Carson alleged in her amended motion that Mr. Faerber did inform

Mr. Watson of the plea offer, though not “fully and competently” (PCR L.F. 6, 7, 9, 10, 21-22). She asserted: “Said inaccurate advice was the basis for Watson not accepting the plea bargain....” (PCR L.F. 22). The motion court relied upon Ms. Carson’s allegations in the amended motion to conclude that Mr. Watson rejected the plea offer upon reasonable advice by Mr. Faerber (PCR L.F. 32).

Mr. Watson pointed out in his motion to amend the judgment these factual discrepancies, and attributed them to Ms. Carson’s failure to contact him and ascertain the facts supporting his claims (PCR L.F. 37-43). Rather than set a hearing upon notification of these facts to determine whether Ms. Carson complied with the requirements of Rule 29.15(e), the motion court simply denied Mr. Watson’s motion as failing to present a cognizable claim (PCR L.F. 74). In doing so, the motion court clearly erred.

The motion court’s judgment denying Mr. Watson’s Rule 29.15 motion, and order denying his motion to amend the judgment, must be vacated and the cause remanded for a hearing to determine whether Ms. Carson complied with the responsibilities imposed by Rule 29.15(e).

III.

The motion court clearly erred in denying Mr. Watson's Rule 29.15 motion for post-conviction relief without an evidentiary hearing, because Mr. Watson pleaded factual allegations which, if proved, would warrant relief and which are not refuted by the record, in that Mr. Watson claimed that he received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, when trial counsel failed to act as a reasonably competent attorney under the same or similar circumstances by failing to adequately explain to Mr. Watson the elements of the offense of robbery in the first degree the State must meet for a conviction. Mr. Watson rejected a plea offer from the State for sentences totaling ten years based on counsel's advice, and Mr. Watson was ultimately sentenced to a total of eighteen years in prison following his trial.

For the purpose of argument in this Point, Mr. Watson will assume, without conceding, that Mr. Faerber discussed the State's plea offer with Mr. Watson because the motion court's judgment was based on that conclusion.

The amended motion alleged that Mr. Watson received ineffective assistance of counsel because Mr. Faerber failed to “fully and competently” advise Mr. Watson of the plea bargain offered by the State of ten years due to Mr. Faerber’s lack of familiarity with the law regarding first-degree robbery as illustrated by his “statement to the trial court during the sentencing phase of the trial that the charge of First Degree Robbery was not sustainable because there was no weapon....” (PCR L.F. 21). The motion alleged that if Mr. Watson had been properly advised he would have accepted the plea offer rather than go to trial (PCR L.F. 21).

The amended motion further alleged that Mr. Watson received ineffective assistance of counsel because Mr. Faerber failed to “properly and competently” advise Mr. Watson regarding the elements of first degree robbery by “advising Watson that the State would have to prove that there was a gun used to forcibly take the victim’s property and it was with ‘bodily harm toward the victim....’” (PCR L.F. 22). The motion alleged that if Mr. Faerber had correctly advised Mr. Watson, he would have accepted the plea offer rather than gone to trial (PCR L.F. 22).

The motion court denied Mr. Watson’s first claim by holding that Mr. Faerber’s statements at the sentencing hearing did not reflect a misunderstanding of the law, but that Mr. Faerber was arguing for an

acquittal of the robbery charge because the jurors returned a not guilty verdict on the armed criminal action charge (PCR L.F. 29). The motion court cited Mr. Faerber's argument at sentencing regarding the "inconsistent" verdicts (PCR L.F. 29-30).

The motion court further held that Mr. Faerber did not provide Mr. Watson with improper advice regarding what the State had to show to find him guilty of robbery in the first degree (PCR L.F. 31). The court concluded that Mr. Watson rejected the plea offer of ten years without alleging that the offer included dismissal of the charges other than the robbery charge (PCR L.F. 32). Because Mr. Watson would have had to confess at a guilty plea hearing to the charges of robbery and armed criminal action that the co-defendant had and threatened the use of a deadly weapon, "the apparent advice of movant's attorney was not objectively unreasonable." (PCR L.F. 32).

Standard of review

Appellate review of the denial of a post-conviction relief motion is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. *McKee v. State*, 336 S.W.3d 151, 153 (Mo. App., E.D. 2011). The motion court's findings of fact and conclusions

of law are clearly erroneous if the reviewing court, having examined the entire record, is left with a definite and firm impression that a mistake has been made. *Id.*

An evidentiary hearing is required if: 1) the motion alleges facts, not conclusions, warranting relief; 2) the facts alleged raise matters not refuted by the records in the case; and 3) the matters complained of resulted in prejudice. *Williams v. State*, 168 S.W.3d 433, 439 (Mo. banc 2005). For an evidentiary hearing based on claims related to ineffective assistance of counsel, a movant must allege facts, not refuted by the record, showing that counsel's performance did not conform to the customary skill and diligence of a reasonably competent attorney under similar circumstances, and that his counsel's deficient performance prejudiced him. *Strickland v. Washington*, 104 S.Ct. 2052, 2065 (1984). To demonstrate prejudice, the facts must show a reasonable probability that, but for counsel's unprofessional errors, the results of the proceedings would have been different. *Williams*, at 439. A reviewing court presumes that counsel's conduct was reasonable and effective, and that any challenged action was part of counsel's reasonable trial strategy. *Id.*

The issue in this appeal is whether the motion court erred in refusing to grant Mr. Watson an evidentiary hearing on his claims, not

whether Mr. Watson is actually entitled to relief. *Meuir v. State*, 182 S.W.3d 788, 790-791 (Mo. App., S.D. 2006).

Analysis

To establish a violation of his right to effective assistance of counsel, an appellant must satisfy a two-pronged test. First, it must be shown that appellant's counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances. *Sanders v. State*, 738 S.W.2d 856, 857 (Mo. banc 1987); citing *Strickland v. Washington*, 104 S.Ct. 2052, 2065 (1984). Second, appellant must demonstrate that he was prejudiced by the ineffective assistance of counsel. *Id.* A criminal defendant has a Sixth Amendment right to effective counsel during plea negotiations. *Missouri v. Frye*, 132 S.Ct. 1399, 1407-1408 (2012). In the context of counsel's advice regarding plea offers, an appellant must show that the outcome of the plea process would have been different with competent advice. *Lafler v. Cooper*, 132 S.Ct. 1376, 1384 (2012).

The motion court clearly erred in concluding that the record refutes Mr. Watson's claims for relief. To refute Mr. Watson's claims, the motion court turned to Mr. Faerber's arguments at sentencing that Mr. Watson

should be acquitted of the robbery charge because it was inconsistent with the jury's verdict of not guilty on the armed criminal action charge (PCR L.F. 29). It is true that Mr. Faerber made this argument in support of his post-trial motion for a judgment of acquittal on the robbery charge (Tr. 3-4).

But the motion court disregarded statements Mr. Faerber made during the sentencing portion of the hearing after the trial court denied the motion for acquittal. In his argument regarding sentencing, Mr. Faerber informed the trial court:

The State's rec was ten. I may have advised him to take the ten. And I'm not going to break attorney-client as to how much I advised him or how much I didn't in the past, but I may have - let's just say sold it harder than otherwise I might have.

So, in some ways that's also on me, and I would hate to see him unduly punished *because my advice was a little bit off because my knowledge base was a little off, because when I asked him that question, my clarification was a little bit off.*

(Sent.Tr. 9) (emphasis added). The emphasized portion of Mr. Faerber's statement clearly supports Mr. Watson's allegation that he was misinformed regarding the elements of the offense and the evidence

necessary to support a conviction because Mr. Faerber's "knowledge base was a little off." Mr. Faerber's statement went to the issue of his advice to Mr. Watson regarding whether to accept the State's plea offer, not to whether the verdicts were inconsistent. The motion court completely disregarded this portion of the record when it denied Mr. Watson an evidentiary hearing. This record supports Mr. Watson's allegation, and demanded that the motion court set the cause for an evidentiary hearing to fully develop this claim.

The motion court concluded that Mr. Watson failed to allege that the rejected plea offer included dismissal of the charges other than the robbery charge (PCR L.F. 32). Respondent goes farther and argues that Mr. Watson was required to allege the specifics of the plea offer, as well as allege that the prosecutor would have continued with the plea offer and the court would have accepted it. Mr. Watson disagrees that he is required to make those allegations in his pleading.

It is true that this Court held in *Barnett v. State*, 103 S.W.3d 765, 769 (Mo. banc 2003), that "[u]nlike some other civil pleadings, courts will not draw factual inferences or implications in a Rule 29.15 motion from bare conclusions or from a prayer for relief." But Mr. Watson did not allege "bare conclusions" or simply "pray for relief." He specifically alleged that

Mr. Faerber failed to “properly and competently” advise Mr. Watson regarding the elements of first degree robbery by “advising Watson that the State would have to prove that there was a gun used to forcibly take the victim’s property and it was with ‘bodily harm toward the victim...’ (PCR L.F. 22). Mr. Watson alleged facts demonstrating counsel’s ineffective advice. And he did more than simply pray for relief. He alleged that Mr. Faerber’s “inaccurate advice was the basis for Watson not accepting the plea bargain of ten (10) years and had Faerber properly advised Watson of what the State would have to prove in order for Watson to be convicted of Robbery First Degree, Watson would have accepted the plea offer that was offered by the State.” (PCR L.F. 22). The amended motion alleged generally that but for Mr. Faerber’s inaccurate advice “he (Watson) would have accepted the plea bargain and been sentenced to ten (10) years of incarceration instead of eighteen (18).” (PCR L.F. 21).

These allegations are sufficient to warrant an evidentiary hearing. This Court advised in *Wilkes v. State*, 82 S.W.3d 925, 929 (Mo. banc 2002), that the post-conviction rules encourage evidentiary hearings. This Court held: “Thus, a movant may successfully plead a claim for relief under Rule 29.15 by providing the motion court with allegations sufficient to allow the motion court to meaningfully apply the *Strickland* standard and

decide whether relief is warranted.” Mr. Watson did that here. He alleged Mr. Faerber’s deficient performance in failing to adequately advise him of the requirements for a conviction of robbery in the first degree. And he alleged that he was prejudiced because he rejected a ten year plea offer and was sentenced to eighteen years following trial. The *Wilkes* standard does not require a movant to plead the specifics of a plea offer or the specific admissions of guilt the movant would make at a guilty plea hearing. The issue in this appeal is whether the motion court erred in refusing to grant Mr. Watson an evidentiary hearing on this claims, not whether he is actually entitled to relief. *Meuir*, at 790-791.

Respondent also alleges that Mr. Watson’s amended motion was insufficient to warrant a hearing because the amended motion did not allege that the State would not have withdrawn the plea offer or that the court would have accepted his guilty plea as required by *Frye*.

Respondent faults the Eastern District for relying upon *Williams, supra.* to excuse this failure. It is true that the Court in *Williams* held that the movant’s motion failed to allege that the State would not have withdrawn the plea offer or that the court would have accepted the guilty plea but that such allegations were not required there because the motion was filed shortly after *Frye* was decided. 367 S.W.3d at 658. Respondent now

argues that because the necessary elements of proof required by *Frye* are no longer “new,” that the allegations are required to be pleaded in the motion for relief.

But no Missouri court has yet required such allegations to be plead even though we are years beyond *Frye*. It is noteworthy that the motion court did not deny Mr. Watson an evidentiary hearing because he failed to allege that the State would have maintained the plea offer and the court would have accepted his guilty plea. The only pleading deficiency relied upon by the motion court was the failure of the amended motion to allege that “the offer included dismissal of the charges other than the robbery charge.” (PCR L.F. 32).

Respondent criticizes the Eastern District Court of Appeals for shifting the burden of proof to the State by suggesting that the State can refute the allegations at an evidentiary hearing. In practice, this happens every time there is an evidentiary hearing on allegations of a post-conviction relief motion. If the motion court grants a hearing, the movant presents evidence in support of his or her allegations. The State, through cross-examination or presentation of evidence, seeks to refute the movant’s evidence and testimony in order to deny relief. The Eastern District did nothing more than recognize this practice.

Because the motion court clearly erred in denying Mr. Watson's Rule 29.15 motion without an evidentiary hearing, the judgment of the motion court must be reversed and the cause remanded for an evidentiary hearing.

IV.

The motion court clearly erred in denying Mr. Watson's Rule 29.15 motion for post-conviction relief without an evidentiary hearing, because Mr. Watson pleaded factual allegations which, if proved, would warrant relief and which are not refuted by the record, in that Mr. Watson claimed that he received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, when trial counsel failed to act as a reasonably competent attorney under the same or similar circumstances by failing to adequately explain to Mr. Watson the elements of the State must meet for a conviction against him based on accomplice liability. Mr. Watson rejected a plea offer from the State for sentences totaling ten years based on counsel's advice, and Mr. Watson was ultimately sentenced to a total of eighteen years in prison following his trial.

For the purpose of argument in this Point, Mr. Watson will assume, without conceding, that Mr. Faerber discussed the State's plea offer with Mr. Watson because the motion court's judgment was based on that conclusion.

The amended motion alleged that Mr. Watson received ineffective assistance of counsel because Mr. Faerber failed to “fully and competently” advise Mr. Watson of the ten year plea offer because Mr. Faerber failed to advise Mr. Watson that for accomplice liability and aiding and abetting “the State need not show that the defendant personally committed every element of the crime and that any evidence of affirmative action within aiding the principal” was sufficient to support a conviction (PCR L.F. 21-22). The motion alleged that if Mr. Watson had been properly advised he would have accepted the plea offer rather than go to trial (PCR L.F. 22).

The motion court denied Mr. Watson’s claim by noting that the robbery charge in the information alleged that Mr. Watson was acting with the co-defendant, and that it was the co-defendant who displayed and threatened what appeared to be a deadly weapon (PCR L.F. 30). The motion court held that “it would be readily apparent to a person reading the indictment that only one of the participants in the crime would have to have been a person displaying and threatening the use of what appeared to be a deadly weapon and that movant in this case could be liable based on conduct of [the co-defendant].” (PCR L.F. 30-31). The motion court further noted that Mr. Watson file a *pro se* motion in the trial court to dismiss the armed criminal action charge, citing the robbery and armed

criminal action statutes, and was, therefore, on notice that the robbery charge against him was based in part on the conduct of the co-defendant (PCR L.F. 31).

Standard of review

Appellate review of the denial of a post-conviction relief motion is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. *McKee v. State*, 336 S.W.3d 151, 153 (Mo. App., E.D. 2011). The motion court's findings of fact and conclusions of law are clearly erroneous if the reviewing court, having examined the entire record, is left with a definite and firm impression that a mistake has been made. *Id.*

An evidentiary hearing is required if: 1) the motion alleges facts, not conclusions, warranting relief; 2) the facts alleged raise matters not refuted by the records in the case; and 3) the matters complained of resulted in prejudice. *Williams v. State*, 168 S.W.3d 433, 439 (Mo. banc 2005). For an evidentiary hearing based on claims related to ineffective assistance of counsel, a movant must allege facts, not refuted by the record, showing that counsel's performance did not conform to the customary skill and diligence of a reasonably competent attorney under similar circumstances,

and that his counsel's deficient performance prejudiced him. *Strickland v. Washington*, 104 S.Ct. 2052, 2065 (1984). To demonstrate prejudice, the facts must show a reasonable probability that, but for counsel's unprofessional errors, the results of the proceedings would have been different. *Williams*, at 439. A reviewing court presumes that counsel's conduct was reasonable and effective, and that any challenged action was part of counsel's reasonable trial strategy. *Id.*

The issue in this appeal is whether the motion court erred in refusing to grant Mr. Watson an evidentiary hearing on his claims, not whether Mr. Watson is actually entitled to relief. *Meuir v. State*, 182 S.W.3d 788, 790-791 (Mo. App., S.D. 2006).

Analysis

To establish a violation of his right to effective assistance of counsel, an appellant must satisfy a two-pronged test. First, it must be shown that appellant's counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances. *Sanders v. State*, 738 S.W.2d 856, 857 (Mo. banc 1987); citing *Strickland v. Washington*, 104 S.Ct. 2052, 2065 (1984). Second, appellant must demonstrate that he was prejudiced by the ineffective

assistance of counsel. *Id.* A criminal defendant has a Sixth Amendment right to effective counsel during plea negotiations. *Missouri v. Frye*, 132 S.Ct. 1399, 1407-1408 (2012). In the context of counsel's advice regarding plea offers, an appellant must show that the outcome of the plea process would have been different with competent advice. *Lafler v. Cooper*, 132 S.Ct. 1376, 1384 (2012).

The motion court clearly erred in concluding that the record refutes Mr. Watson's claims for relief. The robbery charge of the indictment alleged that the co-defendant displayed a deadly weapon, but the indictment charged armed criminal action in the following manner: "Terry Watson acting with Clinton Williams, committed the felony of Robbery in the First Degree charged in Count 1 ... and the defendant, Terry Watson acting with Clinton Williams, committed the foregoing felony of Robbery in the First Degree by, with and through, the knowing use, assistance and aid of a deadly weapon." (L.F. 13). It is not readily apparent that this language makes clear "that only one of the participants in the crime would have to have been a person displaying and threatening the use of what appeared to be a deadly weapon and that movant in this case could be liable based on conduct of [the co-defendant]." (PCR L.F. 30-31). The language of the information might suggest that only one person

had to have displayed the deadly weapon, but it in no way suggests which person that can be. If Mr. Faerber told Mr. Watson that the State would have to show that he had the gun in order to convict him, it is reasonable that Mr. Watson could have rejected the plea offer believing that because the co-defendant had the gun the State could not win a conviction against him. The language of the information does not refute Mr. Watson's claim. The record supports Mr. Watson's request for a hearing on this claim to consider evidence of what Mr. Faerber actually told Mr. Watson.

Nor is Mr. Watson's claim refuted by the fact that he filed a motion to dismiss the armed criminal action statute, "citing the robbery and armed criminal action statutes." (PCR L.F. 31). The language of the statutes would not define or clarify the law of accessory liability. If Mr. Faerber's advice misled Mr. Watson to believe that it would be necessary for the State to prove that he, rather than the co-defendant had the gun, the same basis for him to reject the State's plea offer exists. That Mr. Watson cited criminal statutes in a *pro se* motion does not refute allegations that his attorney misled him on the elements of accomplice liability.

In its Brief in the Eastern District Court of Appeals, the State combined its arguments against Points III and IV of Mr. Watson's brief into a single argument. Therefore, Mr. Watson's responses to the State's

arguments about pleading requirements and burden-shifting set out in Point III above are equally applicable in this Point.

Because the motion court clearly erred in denying Mr. Watson's Rule 29.15 motion without an evidentiary hearing, the judgment of the motion court must be reversed and the cause remanded for an evidentiary hearing.

CONCLUSION

Because the motion court clearly erred in failing to conduct an abandonment inquiry to determine whether Mr. Watson was abandoned by the late filing of the amended motion, and which motion should be adjudicated, as set out in Point I, this Court should reverse the motion court's order and remand the case for an abandonment inquiry. Because the motion court clearly erred in denying Mr. Watson's Rule 29.15 motion, and denying his motion to amend the judgment, as set out in Point II, the judgement and order must be vacated and the cause remanded for a hearing to determine whether Ms. Carson complied with the responsibilities imposed by Rule 29.15(e). Because the motion court clearly erred in denying Mr. Watson's Rule 29.15 motion without an evidentiary hearing, as set out in Points III and IV, the judgment of the motion court must be reversed and the cause remanded for an evidentiary hearing.

Respectfully submitted,



Emmett D. Queener, MOBar #30603
Attorney for Appellant
Woodrail Centre
1000 W. Nifong, Bldg. 7, Suite 100
Columbia, Missouri 65203
Telephone (573) 777-9977
FAX (573) 777-9974
emmett.queener@mspd.mo.gov

Certificate of Compliance and Service

I, Emmett D. Queener, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Book Antiqua size 13 point font, which is no smaller than Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 10,471 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 17th day of March, 2017, electronic copies of Appellant's Brief and Appellant's Brief Appendix were placed for delivery through the Missouri e-Filing System to Shaun Mackelprang, Assistant Attorney General, at Shaun.Mackelprang@ago.mo.gov.



Emmett D. Queener