No. SC96103

IN THE

Supreme Court of Missouri

TERRY T. WATSON,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the St. Louis City Circuit Court
Twenty-second Judicial Circuit
The Honorable Bryan L. Hettenbach, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

STATEMENT OF FACTS 6

ARGUMENT 15

I. 15

The motion court was not obligated to conduct an inquiry into whether Mr. Watson was abandoned by post-conviction counsel because post-conviction counsel was not appointed and because the amended motion was timely filed. 15

II. 21

The motion court did not clearly err in denying Mr. Watson's motion to amend the judgment, which alleged abandonment by post-conviction counsel. 21

III. 29

The motion court did not clearly err in denying Mr. Watson's claim that trial counsel was ineffective for failing "to fully and competently advise [him] regarding the plea bargain offered by the State of ten (10) years." (Responds to Points III and IV of Mr. Watson's brief.) 29

CONCLUSION 49

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

Cases

Arnold v. State, 509 S.W.3d 108 (Mo.App. E.D. 2016) 47

Barnett v. State, 103 S.W.3d 765 (Mo. 2003) 22, 30, 36

Barton v. State, 486 S.W.3d 332 (Mo. 2016) 23

Cornelious v. State, 2017 WL 487013 (Mo.App. W.D. Feb. 7, 2017) 17

Creighton v. State, 2017 WL1496952 (Mo. 2017) 17

DePriest v. State, 510 S.W.3d 331 (Mo. 2017) 35

Dorsey v. State, 448 S.W.3d 276 (Mo. 2014) 47

Eastburn v. State, 400 S.W.3d 770 (Mo. 2013) 28

Gehlert v. State, 276 S.W.3d 889 (Mo.App. W.D. 2009) 25

Gehrke v. State, 280 S.W.3d 54 (Mo. 2009) 23

Hankins v. State, 302 S.W.3d 236 (Mo.App. S.D. 2009) 24, 28

Jacobs v. Georgiou, 922 S.W.2d 765 (Mo.App. E.D. 1996) 19

Jensen v. State, 396 S.W.3d 369 (Mo.App. W.D. 2013) 24

Kubley v. Brooks, 141 S.W.3d 21 (Mo. 2004) 37

Lafler v. Cooper, 132 S.Ct. 1376 (2012) 31, 46

Luleff v. State, 807 S.W.2d 495 (Mo. 1991) 16

Missouri v. Frye, 132 S.Ct. 1399 (2012) 30, 31, 33

Moore v. State, 458 S.W.3d 822 (Mo. 2015) 16

Morgan v. State, 296 S.W.3d 1 (Mo.App. E.D. 2009) 28

Morrow v. State, 21 S.W.3d 819 (Mo. 2000) 35

Pope v. State, 87 S.W.3d 425 (Mo.App. W.D. 2002) 25

Price v. State, 422 S.W.3d 292 (Mo. 2014) 15, 17, 30

Russell v. State, 39 S.W.3d 52 (Mo.App. E.D. 2001) 24

Smith v. State, 443 S.W.3d 730 (Mo.App. S.D. 2014) 34

State v. Bradley, 811 S.W.2d 379 (Mo. 1991) 24

State v. Watson, 386 S.W.3d 907 (Mo.App. E.D. 2012) 6, 11

State v. Williams, 937 S.W.2d 330 (Mo.App. E.D. 1996) 41

Strickland v. Washington, 466 U.S. 668 (1984) 30

Trehan v. State, 835 S.W.2d 427 (Mo.App. S.D. 1992) 25, 27

Vogl v. State, 437 S.W.3d 218 (Mo. 2014) 21

White v. State, 939 S.W.2d 887 (Mo. 1997) 36

Wilkes v. State, 82 S.W.3d 925 (Mo. 2002) 36

Williams v. State, 168 S.W.3d 433 (Mo.App. E.D. 2012) 34

Wrice v. State, 485 S.W.3d 382 (Mo.App. E.D. 2016) 35

Statutes

§ 569.010(1), RSMo 2000 42

§ 569.020, RSMo 2000 42

§ 571.015, RMSo 2000 42

Rules

Rule 29.15(g) 11, 18

Rule 44.01(a) 11, 18

STATEMENT OF FACTS

Mr. Watson appeals the denial of his Rule 29.15 motion, in which he alleged, *inter alia*, that trial counsel was ineffective because counsel "failed to fully and competently advise [him] regarding the plea bargain offered by the State of ten (10) years" (PCR L.F. 21). The motion court denied Mr. Watson's post-conviction motion without an evidentiary hearing (PCR L.F. 26-34).

* * *

A jury found Mr. Watson guilty of robbery in the first degree, resisting arrest, and trafficking in the second degree. *State v. Watson*, 386 S.W.3d 907, 908 (Mo.App. E.D. 2012) (per curiam order). Mr. Watson was sentenced to concurrent terms of imprisonment, the longest of which was eighteen years. *Id*. In a light favorable to the verdict, the facts of the case were as follows.

At approximately 2:00 a.m. on July 6, 2010, Hassen Mohammed and his roommate, Adnan Tabakovic, decided to walk from their home to a nearby QuikTrip for cigarettes and a snack (Tr. 189, 240). As they cut through an alley, a tan Dodge Neon with Illinois plates pulled up next to them. Mr. Watson was driving, and the passenger was hanging a gun out the window on the passenger side (Tr. 192-193, 200, 241, 247, 449).

Clinton Williams got out of the car from the passenger seat wearing a surgical mask, nonprescription glasses, and a hat (Tr. 194, 241-242, 265). Mr. Williams pointed what appeared to be a revolver in Mr. Mohammed's face

and demanded that he give him money (Tr. 241-242). Mr. Williams instructed Mr. Mohammed not to move (Tr. 193). Mr. Tabakovic asked if the man was serious, and Mr. Williams responded, "Does it look like I'm joking?" and pointed the gun towards Mr. Mohammed's chest (Tr. 194, 242).

As Mr. Watson opened the driver's side door, Mr. Tabakovic ran away (Tr. 194-195, 242-243). Mr. Watson got out and told Mr. Williams to shoot him (Tr. 195). Mr. Watson then approached Mr. Mohammed and stood next to Mr. Williams (Tr. 195). They took money from Mr. Mohammed's wallet and pockets, which consisted of change (Tr. 195, 372-373). They then returned to their car and told Mr. Mohammed not to call the police (Tr. 196).

Mr. Mohammed observed the license plate of Mr. Watson's vehicle as they drove away (Tr. 200, 270). Mr. Tabakovic returned, and a neighbor came outside (Tr. 199, 222). Mr. Mohammed called 911 (Tr. 196-199, 221). He told the police that a man with a surgical mask had put a gun to his head and taken his change (Tr. 198; State's Ex. 6). Mr. Mohammed gave a close approximation of the Illinois license plate and described the car as a tan Dodge Neon (Tr. 270).

Police arrived after a few minutes (Tr. 199, 268). Mr. Mohammed and Mr. Tabakovic described the car and gave a description of the robbers (Tr. 201, 244-245, 270-272). They described the passenger as a black male with dreadlocks, wearing a baseball cap, dark glasses, a white surgical mask, a

white t-shirt, and blue jeans (Tr. 271, 245, 286). Mr. Mohammed described the driver as a black male with darker skin, a stockier build, gold teeth, shoulder-length braids, and a white t-shirt, and Mr. Tabakovic gave a similar description (Tr. 245, 271, 285)

Shortly after the description was broadcast, Officer Cora spotted a vehicle matching the description approximately 16 blocks from where the crime occurred, at the intersection of Tennessee, Gravois, and Cherokee (Tr. 303-306). After trailing the vehicle for a few blocks and waiting for backup, Officer Cora activated his lights and sirens, whereupon Mr. Watson "just took off" at a high rate of speed (Tr. 308, 452). Mr. Watson drove through red lights and stop signs and exceeded speed limits, driving approximately 55 miles per hour in a 30 mile per hour zone (Tr. 309, 359, 452).

As the police chased the vehicle westbound on Gravois, Officer Bosler saw them approach as he neared the intersection of Gravois, Wyoming, and Compton (Tr. 336-338). Officer Bosler saw Mr. Watson reach out the window and discard an object (Tr. 338, 340-343, 362-363). Officer Bosler stopped and picked up the discarded object—a plastic bag containing 2.8 grams of cocaine base (Tr. 343, 387).

As Mr. Watson approached Interstate 55, he braked and the car spewed smoke and debris. He tried to turn onto the entrance ramp, missed, and went down the grass embankment, where he struck the median and came to a stop

(Tr. 312, 453). Mr. Watson made an unsuccessful attempt to continue to drive; then he and Mr. Williams got out, jumped over the concrete median, and ran across the northbound lanes of the interstate (Tr. 312-313). They jumped over a fence and ran toward Ann Street (Tr. 314). Officer Cora chased them and told them to stop, but they did not stop (Tr. 314, 454).

Officer Bosler drove to the corner of Ann and South 13th Street, where he saw one of the men turn south onto 13th Street and the other try to jump over a privacy fence and then go around the corner onto South 13th Street (Tr. 318). The police found Mr. Watson and Mr. Williams lying behind a big bush, partially concealed on a residential porch two houses from the corner (Tr. 318-319).

Mr. Mohammed and Mr. Tabakovic identified the Neon (Tr. 274-275). They were transported separately to the location where Mr. Watson and Mr. Williams were in custody, and they both identified Mr. Watson and Mr. Williams as the robbers (Tr. 275-277).

During a search incident to arrest, officers discovered a surgical mask stuffed in Mr. Williams's right sock (Tr. 279, 281-282, 422-423). Both men were wearing white t-shirts and blue jeans (Tr. 282). Mr. Watson had gold teeth (Tr. 285). Mr. Williams had $5.28 on his person—$2.00 in one dollar bills and the rest in change, including ten quarters, six dimes, three nickels and three pennies (Tr. 373). The officers seized a baseball cap and

nonprescription glasses from Mr. Williams (Tr. 298, 300).

The State charged Mr. Watson with robbery in the first degree, armed criminal action, resisting arrest, and trafficking in the second degree (L.F. 19-21). The case went to trial on May 10, 2011 (Tr. 5).

At trial, Mr. Watson testified and admitted various aspects of the case (*e.g.*, that he fled from the police) (*see* Tr. 451-452), but his account of his interaction with Mr. Mohammed and Mr. Tabakovic differed from the State's evidence. He said that, after they drove by a QuikTrip, he and Mr. Williams were flagged down by Mr. Mohammed and Mr. Tabakovic (Tr. 448-449). He testified that the "flag down" "looked like a potential drug sale, so [they] pull[ed] over to them" (Tr. 449).

He said that Mr. Williams talked to the potential customers about "drug buying" (Tr. 449). He said that one of the customers was "irritated about the fact that it might be too small," and that Mr. Williams said, "I don't give a f--- you don't like it" (Tr. 449-450). He said that Mr. Williams then kept the money and ran back to the car (Tr. 450). He said that one of the customers also took off running after Mr. Williams stepped out and said, "I'll beat your ass" (Tr. 450). He testified that Mr. Williams then got back into the car and said, "let's go" (Tr. 450). He said that he drove off slowly and that he did not "speed away" (Tr. 450). He also said that he never had a gun that night, and that to his knowledge, Mr. Williams never had a gun (Tr. 455).

On cross-examination, Mr. Watson denied that he pulled over because he was "looking for people to rob" (Tr. 466). He denied that he told Mr. Williams to shoot one of the men (Tr. 466).

The jury ultimately found Mr. Watson guilty of robbery in the first degree, resisting arrest, and trafficking in the second degree (L.F. 51, 53-54). The jury found him not guilty of armed criminal action (L.F. 52).

On December 4, 2012, the Court of Appeals affirmed Mr. Watson's convictions and sentences. *State v. Watson*, 386 S.W.3d at 907. The Court of Appeals issued its mandate on December 28, 2012.

On February 11, 2013, Mr. Watson timely filed a *pro se* motion pursuant to Rule 29.15 (PCR L.F. 3). On March 6, 2013, the motion court notified the public defender that Mr. Watson had filed a post-conviction motion (PCR L.F. 15). The memorandum notifying the public defender did not appoint the public defender (PCR L.F. 15). On March 20, 2013, a special public defender entered appearance on Mr. Watson's behalf (PCR L.F. 16-17). Accordingly, Mr. Watson's amended motion was due by May 20, 2013. *See* Rule 29.15(g); Rule 44.01(a).

On April 15, 2013, the motion court granted Mr. Watson's request for an extension of time (PCR L.F. 18). On May 30, 2013, Mr. Watson filed an amended motion in which he alleged, *inter alia*, that trial counsel was ineffective because counsel "failed to fully and competently advise [him]

regarding the plea bargain offered by the State of ten (10) years" (PCR L.F. 20-21). He alleged specifically that counsel failed to properly advise him on the elements of robbery in the first degree and "about the law relating to accomplice liability and of the law of aiding and abetting" (PCR L.F. 21-22). He alleged that if counsel had properly advised him on these matters, he would have accepted the State's 10-year plea offer (PCR L.F. 21-22).

On January 16, 2015, the motion court denied Mr. Watson's post-conviction motion (PCR L.F. 26-34). The motion court found that Mr. Watson's claim that he did not understand that his guilt was based on the conduct of his co-actor was refuted by the record (PCR L.F. 30-31). The motion court observed that "the robbery charge specifically charged [Mr. Watson] as acting with Clinton Williams and recited that Clinton Williams was the person who displayed and threatened what appeared to be a deadly weapon" (L.F. 30). The motion court observed that Mr. Watson had filed a *pro se* motion to dismiss the armed criminal action count, and it concluded that "[t]he record indicates [Mr. Watson] read and understood the robbery count in his indictment and was on notice that the robbery charge against him was based in part on the conduct of Clinton Williams" (L.F. 31).

The motion court further found that Mr. Watson's claim that he was not properly advised about the elements of robbery in the first degree was without merit (PCR L.F. 31-32). The motion court observed that Mr. Watson

had not alleged that the State's plea offer "included the dismissal of the charges other than the robbery charge," and it further observed that "[t]o support convictions for robbery and armed criminal action the State would have had to show at trial that Mr. Williams threatened the use of what appeared to be a deadly weapon and that he did in fact use a deadly weapon" (PCR L.F. 32). Thus, the motion court reasoned that "[i]n order for his guilty plea to be accepted [Mr. Watson] would have had to admit that Mr. Williams did have a deadly weapon and that use of the deadly weapon was threatened during the robbery" (PCR L.F. 32). The motion court concluded, "Under the circumstances, the apparent advice of [Mr. Watson's] attorney was not objectively unreasonable" (PCR L.F. 32). The motion court noted in addition that Mr. Watson's claim was "pleaded in a somewhat confusing and conclusory manner" (PCR L.F. 32).

On February 13, 2015, Mr. Watson filed a *pro se* motion to amend the judgment (PCR L.F. 37). In that motion, Mr. Watson alleged that he was abandoned by post-conviction counsel because counsel did not consult with Mr. Watson to ascertain whether all grounds known to Mr. Watson had been included in the amended motion (PCR L.F. 38). Mr. Watson alleged that post-conviction counsel omitted allegations or claims that Mr. Watson wanted to include (*see* PCR L.F. 38-43).

On March 2, 2015, the motion court denied Mr. Watson's motion to

amend the judgment (PCR L.F. 74). The motion court observed that Mr. Watson had claimed in his motion that "his attorney in this proceeding did not consult with him and did not include in the amended motion particular grounds that he wanted counsel to raise" (PCR L.F. 74). The motion court concluded, "Movant's claims in his motion to amend are nothing more than claims of ineffective assistance of post-conviction counsel which are 'categorically' not cognizable" (PCR L.F. 74).

ARGUMENT

I.

The motion court was not obligated to conduct an inquiry into whether Mr. Watson was abandoned by post-conviction counsel because post-conviction counsel was not appointed and because the amended motion was timely filed.

In his first point, Mr. Watson asserts that the motion court erred in "failing to conduct an abandonment inquiry." He asserts 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" (App.Sub.Br. 24).

A. The standard of review

"Appellate review of a judgment entered under Rule 29.15 'is limited to a determination of whether the motion court's findings of fact and conclusions of law are clearly erroneous.' " *Price v. State*, 422 S.W.3d 292, 294 (Mo. 2014). " 'Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made.' " *Id*.

B. No abandonment inquiry was required

"[W]hen 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." *Moore v. State*, 458 S.W.3d 822, 825 (Mo. 2015). "[W]hen an amended motion is untimely filed, the record creates a presumption that counsel failed to comply with the rule because the filing of the amended motion indicates that counsel determined there was a sound basis for amending the initial motion but failed to file the amended motion timely." *Id.*

Accordingly, "[w]hen an untimely amended motion is filed, the motion court has a duty to undertake an 'independent inquiry under *Luleff*' to determine if abandonment occurred." *Id.* "If the motion court finds that a movant has not been abandoned, [*i.e.*, the late filing was caused by the movant,] the motion court should not permit the filing of the amended motion and should proceed with adjudicating the movant's initial motion." *Id.*; *see Luleff v. State*, 807 S.W.2d 495, 498 (Mo. 1991) ("If counsel's apparent inattention results from movant's negligence or intentional failure to act, movant is entitled to no relief other than that which may be afforded upon the pro se motion."). "If the motion court determines that the movant was abandoned by appointed counsel's untimely filing of an amended motion, the court is directed to permit the untimely filing." *Moore*, 458 S.W.3d at 826.

Here, the record shows that no abandonment inquiry was required. First, based on recent case law, the abandonment doctrine arguably has no application in this case. Here, rather than appointing counsel to represent

Mr. Watson, the motion court notified the public defender that Mr. Watson had filed a post-conviction motion (PCR L.F. 15). Under the Court's recent holding in *Creighton v. State*, 2017 WL1496952, *2-*4 (Mo. 2017), the motion court's notification was not an appointment.

The abandonment doctrine, however, has been held applicable only in cases where counsel has been appointed. As the Court of Appeals recently held, the abandonment doctrine applies only to appointed counsel, since only appointed counsel has obligations under subdivision (e) of the post-conviction rule. *See Cornelious v. State*, 2017 WL 487013, *5 (Mo.App. W.D. Feb. 7, 2017) (Rule 29.15(e) "applies ***only*** to describe the obligations imposed on appointed counsel"); *see also Price v. State*, 422 S.W.3d at 303 (holding that "Rule 29.15(e) deals only with appointed counsel and amended motions").[1] In short, because Mr. Watson did not have appointed counsel, he cannot assert that he was abandoned, and it cannot be said that the motion court clearly erred in failing to conduct an abandonment inquiry.

Second, even assuming that Mr. Watson could claim abandonment, the

[1] The Court of Appeals' decision in *Cornelious* is not final, and an application for transfer is pending (No. SC96304). The question of whether abandonment applies to counsel who is not appointed is currently pending in *Gittemeier v. State*, No. SC95953.

motion court did not err because the record shows that the amended motion was timely filed.[2] The mandate on direct appeal issued on December 28, 2012. On February 11, 2013, Mr. Watson timely filed a *pro se* motion pursuant to Rule 29.15 (PCR L.F. 3). On March 20, 2013, a special public defender entered appearance on Mr. Watson's behalf (PCR L.F. 16-17). Accordingly, Mr. Watson's amended motion was due by May 20, 2013. *See* Rule 29.15(g); Rule 44.01(a).

However, on April 15, 2013, the motion court granted Mr. Watson's request for an extension of time to file the amended motion (PCR L.F. 18). Although Mr. Watson requested "a period of 45 days from the date of filing within which to file an amended petition," Rule 29.15 permitted only a thirty-day extension. *See* Rule 29.15(g). Thus, giving maximum effect to the motion court's order, Mr. Watson's amended motion was due by June 19, 2013.

Post-conviction counsel filed Mr. Watson's amended motion on May 30, 2013 (PCR L.F. 20). As such, the amended motion was timely filed, and the motion court was not obligated to inquire into the issue of abandonment.

Mr. Watson argues that the amended motion was untimely because the

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[2] Even absent Mr. Watson's claim of abandonment, the timeliness of the amended motion should be analyzed, as the motion court could adjudicate only a timely amended motion.

extension of time that the motion court granted actually ran from April 12, 2013 (the date the extension motion was filed) to May 28, 2013 (the forty-fifth countable day after April 12)—which was eight days after the original due date of May 20, 2013 (*see* App.Sub.Br. 28). Thus, he argues that the amended motion (which was filed on May 30, 2013) was filed two days out of time (*see* App.Sub.Br. 28).

Mr. Watson bases this argument on language in the extension motion, namely, counsel's request for "a period of 45 days from the date of filing within which to file an amended petition" (App.Sub.Br. 26). But while the awkward syntax of the extension motion could be read as suggested by Mr. Watson (*i.e.*, as requesting an extension from the date the extension motion was filed), the motion court's order granting the 45-day extension request should not be interpreted as granting an eight-day extension of time from May 20 to May 28, 2013.

"Construction of a court order is a question of law calling for the independent judgment of this court." *Jacobs v. Georgiou*, 922 S.W.2d 765, 769 (Mo.App. E.D. 1996). In construing an ambiguous order, the Court should consider the intention of the court that made the order and the intentions of the parties. *See id.*

Here, consistent with standard practice, it is reasonable to conclude that the motion court understood the extension motion as requesting an

extension of the actual deadline, *i.e.*, a 45-day extension of time from the due date for filing the amended motion. The extension motion did not expressly request a 45-day extension from the date of the "filing of the extension motion," and it stands to reason that counsel would not request an "extension" for a period of time when the amended motion was not actually due. In short, in requesting a 45-day extension, it is apparent that counsel was not seeking merely an eight-day extension of time.

In sum, the record does not show clear error on the part of the motion court in failing to conduct an inquiry on the issue of abandonment. First, because post-conviction counsel was not appointed by the motion court, the abandonment doctrine arguably was not applicable. In any event, the amended motion was timely filed. Point I should be denied.

II.

The motion court did not clearly err in denying Mr. Watson's motion to amend the judgment, which alleged abandonment by post-conviction counsel.

In his second point, Mr. Watson asserts that the motion court "erred in denying [his] Rule 78.07(c) motion to amend the judgment, or in failing to conduct an abandonment inquiry" based on the allegations in the motion to amend judgment (App.Sub.Br. 31). He asserts that he "demonstrated [post-conviction counsel'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 [post-conviction] counsel altered the factual assertions made by Mr. Watson in his *pro se* motion" (App.Sub.Br. 31).

A. The standard of review

"When a motion court overrules a motion claiming abandonment by post-conviction counsel, appellate review is limited to a determination of whether the motion court's findings and conclusions are clearly erroneous." *Vogl v. State*, 437 S.W.3d 218, 225 (Mo. 2014). "After reviewing the entire record, a motion court's findings and conclusions are clearly erroneous only if the reviewing court is 'left with the definite and firm impression that a mistake has been made.' " *Id*.

To be entitled to an evidentiary hearing, a movant must allege facts,

not conclusions, that would warrant relief if true. *Barnett v. State*, 103 S.W.3d 765, 769 (Mo. 2003). The alleged facts must raise matters not refuted by the record and files in the case, and the matters complained of must have resulted in prejudice to the movant. *Id*.

B. The motion court properly concluded that Mr. Watson failed to allege facts showing abandonment

After his post-conviction motion was denied, Mr. Watson filed a *pro se* motion to amend the judgment (PCR L.F. 37). In that motion, Mr. Watson alleged that he was abandoned by post-conviction counsel because counsel did not consult with Mr. Watson to ascertain whether all grounds known to Mr. Watson had been included in the amended motion (PCR L.F. 38). Mr. Watson alleged that post-conviction counsel omitted allegations or claims that Mr. Watson wanted to include (*see* PCR L.F. 38-43).

The motion court denied Mr. Watson's motion to amend the judgment (PCR L.F. 74). The motion court observed that Mr. Watson had claimed in his motion that "his attorney in this proceeding did not consult with him and did not include in the amended motion particular grounds that he wanted counsel to raise" (PCR L.F. 74). The motion court then concluded, "Movant's claims in his motion to amend are nothing more than claims of ineffective assistance of post-conviction counsel which are 'categorically' not cognizable" (PCR L.F. 74). The motion court did not clearly err.

First, as discussed above in Point I, the abandonment doctrine arguably has no application in Mr. Watson's case, as post-conviction counsel was not appointed. Second, even if Mr. Watson could assert abandonment, he would not be entitled to the requested relief of an abandonment hearing.

The Court has recognized only two categories of abandonment: "when counsel fails to act in a timely manner or fails to act at all in filing an amended motion." *Barton v. State*, 486 S.W.3d 332, 337 (Mo. 2016). The Court stated, "while the precise circumstances constituting abandonment naturally may vary, the *categories* of claims of abandonment long have been fixed: in general 'abandonment is available "when (1) post-conviction counsel takes no action on movant's behalf with respect to filing an amended motion ... or (2) when post-conviction counsel is aware of the need to file an amended post-conviction relief motion and fails to do so in a timely manner." ' " *Id*. at 338.

Mr. Watson's assertion that counsel abandoned him because she did not consult with him and "altered the factual assertions made by Mr. Watson in his *pro se* motion" does not fall into either category identified in *Barton*. As the motion court concluded, Mr. Watson's assertion is a claim of ineffective assistance of post-conviction counsel, and it is categorically unreviewable. *Gehrke v. State*, 280 S.W.3d 54, 58 (Mo. 2009). " 'Abandonment' by post-conviction counsel, as opposed to mere ineffective assistance, 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). *See Jensen v. State*, 396 S.W.3d 369, 375 (Mo.App. W.D. 2013) ("for purposes of abandonment, Appellant must establish that his PCR counsel 'completely shirked his obligations imposed under' " the relevant post-conviction rule); *see also Hankins v. State*, 302 S.W.3d 236, 238-239 (Mo.App. S.D. 2009) (assertions that post-conviction counsel "did not 'confer and ascertain from [Movant] all of the grounds known as a basis for attacking the judgment and sentence' and failed to amend his pro se motion 'to include any omitted claims and, if necessary, to more fully and accurately allege the grounds stated in the pro se motion(s) and support them with facts from the record' " were not claims of abandonment).

Here, it cannot be said that post-conviction counsel totally defaulted her responsibilities under the rule. The record shows that counsel timely filed an amended motion (*see* Point I, above) and asserted several claims of ineffective assistance of counsel (*see* PCR L.F. 20-24). Accordingly, there was not a total default in carrying out her duties under Rule 29.15(e).

In support of his argument, Mr. Watson relies on cases where counsel filed an amended motion that amounted to a legal "nullity" (App.Sub.Br. 34-36). But the cases cited by Mr. Watson do not compel reversal, as they all involved situations where counsel effectively filed no amended motion at all. *See State v. Bradley*, 811 S.W.2d 379, 382 (Mo. 1991) ("On its face the motion

filed by counsel is clearly a nullity. Nowhere did movant sign or verify it nor does it state facts sufficient to warrant post-conviction relief."); *Trehan v. State*, 835 S.W.2d 427, 428-429 (Mo.App. S.D. 1992) (instead of amending the *pro se* claims, counsel simply incorporated the *pro se* claims into the purported amended motion exactly as they had been set forth in the *pro se* motion, including a "blank paragraph 9," which should have set forth factual allegations in support of the post-conviction claims);[3] *Pope v. State*, 87 S.W.3d 425, 427 (Mo.App. W.D. 2002) (counsel filed a motion that merely "replicated [the movant's] *pro se* motion except for minor grammatical changes.").[4]

Here, by contrast, counsel's amended motion was not a legal "nullity,"

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[3] In *Trehan*, post-conviction counsel did include two additional claims in the amended motion, but the two claims were not "cognizable" claims. *Trehan*, 835 S.W.2d at 429. Because counsel included additional claims, *Trehan* is not consistent with more recent cases requiring a "total default" by post-conviction counsel. In any event, the amended motion in Mr. Watson's case was not a "nullity" as contemplated in *Trehan*.

[4] Mr. Watson also cites *Gehlert v. State*, 276 S.W.3d 889 (Mo.App. W.D. 2009) (App.Sub.Br. 36). But *Gehlert* is inapposite because there counsel never filed an amended motion, and the record did not otherwise show that counsel had complied with Rule 24.035(e). *Id.* at 892-893.

and it did not simply replicate the *pro se* motion. To the contrary, post-conviction counsel obviously amended Mr. Watson's *pro se* motion, as it differs significantly from the *pro se* motion filed by Mr. Watson—both in its factual allegations and number of claims (*see* PCR L.F. 6-11, 21-23). Indeed, one of Mr. Watson's complaints in this case is that post-conviction counsel "altered the factual assertions" so that they did not match the allegations in the *pro se* motion (App.Sub.Br. 31; *see* App.Sub.Br. 35, 37-38). But inasmuch as counsel perceived a need to file an *amended* motion, it only stands to reason that counsel might alter or omit some of the factual allegations that were made in the *pro se* motion. To suggest that such changes are proof of abandonment is antithetical to the very nature of abandonment in this context, which means that counsel has *not* amended the *pro se* motion.

Mr. Watson points out that "[n]othing in the record below explains how motion counsel came to allege facts in complete opposition to those alleged by Mr. Watson," and he asserts that, "[a]s in *Trehan*, an abandonment hearing was necessary to explain the reversal of the claims in the amended motion" (App.Sub.Br. 35). He then contrasts his case to *Hankins*, *supra*, and observes that "failing to confer with a client to determine if additional claims should be raised is vastly different then failing to confer with a client before contradicting claims already made" (App.Sub.Br. 37).

But to the extent that an abandonment hearing was warranted in

Trehan, it was because post-conviction counsel filed an amended motion that was, in the Court's view, a "nullity." *See Trehan v. State*, 835 S.W.2d at 428-429. In other words, the abandonment perceived in *Trehan* was an effectively complete failure to file an amended motion.

Here, by contrast, Mr. Watson's claim is that counsel—due to deficient performance in communicating with Mr. Watson—made factual allegations in the amended motion that were incorrect inasmuch as they contradicted the factual allegations in his *pro se* motion. However, while Mr. Watson's claim is factually different from the claim in *Hankins*, it is not legally different. Regardless of the nature of post-conviction counsel's alleged errors in amending the motion—whether they were due to a lack of effective communication, effort, or drafting—such claims implicate the effectiveness of counsel's performance, and this Court has consistently refused to expand the abandonment doctrine to encompass such claims.

In sum, the abandonment doctrine arguably has no application in Mr. Watson's case because post-conviction counsel was not appointed to represent Mr. Watson. In any event, Mr. Watson's claim that post-conviction counsel incorrectly alleged his claims, or that post-conviction counsel omitted claims, was a "categorically unreviewable" claim of ineffective assistance of post-conviction counsel. It is well settled that counsel's failing to include certain claims or allegations in the amended motion is not "abandonment." *See*

Eastburn v. State, 400 S.W.3d 770, 774 (Mo. 2013); *see also Hankins*, 302 S.W.3d at 238-239; *Morgan v. State*, 296 S.W.3d 1, 3-4 (Mo.App. E.D. 2009) (assertion that "counsel failed to set forth sufficient facts to warrant relief" was not a claim of abandonment). Point II should be denied.

III.

The motion court did not clearly err in denying Mr. Watson's claim that trial counsel was ineffective for failing "to fully and competently advise [him] regarding the plea bargain offered by the State of ten (10) years." (Responds to Points III and IV of Mr. Watson's brief.)

In his third and fourth points, Mr. Watson asserts that the motion court clearly erred in denying his claim that trial counsel was ineffective for failing "to fully and competently advise [him] regarding the plea bargain offered by the State of ten (10) years" (App.Sub.Br. 39, 50).

In his third point, he asserts that counsel failed "to adequately explain to [him] the elements of the offense of robbery in the first degree the State must meet for a conviction" (App.Sub.Br. 39). In his fourth point, he asserts that counsel failed "to adequately explain to [him] the elements of [sic] the State must meet for a conviction against him based on accomplice liability" (App.Sub.Br. 50). In both points, he asserts that he "rejected a plea offer from the State for sentences totaling ten years based on counsel's [incorrect or inadequate] advice" (App.Br. 39, 50).

A. The standard of review

"Appellate review of a judgment entered under Rule 29.15 'is limited to a determination of whether the motion court's findings of fact and conclusions

of law are clearly erroneous.' " *Price v. State*, 422 S.W.3d 292, 294 (Mo. 2014). " 'Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made.' " *Id.*

To be entitled to an evidentiary hearing, a movant must allege facts, not conclusions, that would warrant relief if true. *Barnett v. State*, 103 S.W.3d 765, 769 (Mo. 2003). The alleged facts must raise matters not refuted by the record and files in the case, and the matters complained of must have resulted in prejudice to the movant. *Id.*

B. Mr. Watson failed to allege facts warranting an evidentiary hearing

To prevail on a claim of ineffective assistance of counsel, the movant must "show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The movant must also "affirmatively prove prejudice." *Id.* at 693.

"To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." *Missouri v. Frye*, 132 S.Ct. 1399, 1409 (2012). "Defendants must also demonstrate a reasonable probability the plea would have been entered

without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law." *Id*. And, finally, "[t]o establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Id*.; *see Lafler v. Cooper*, 132 S.Ct. 1376, 1385 (2012).

Here, in denying Mr. Watson's claims, the motion court found that Mr. Watson's claim that he did not understand his guilt was based on the conduct of his co-actor was refuted by the record (PCR L.F. 30-31). The motion court observed that "the robbery charge specifically charged [Mr. Watson] as acting with Clinton Williams and recited that Clinton Williams was the person who displayed and threatened what appeared to be a deadly weapon" (L.F. 30). The motion court observed that Mr. Watson had filed a *pro se* motion to dismiss the armed criminal action count, and it concluded that "[t]he record indicates [Mr. Watson] read and understood the robbery count in his indictment and was on notice that the robbery charge against him was based in part on the conduct of Clinton Williams" (L.F. 31).

The motion court further found that Mr. Watson's claim that he was not properly advised about the elements of robbery in the first degree was without merit (PCR L.F. 31-32). The motion court observed that Mr. Watson had not alleged that the State's plea offer "included the dismissal of the

charges other than the robbery charge," and it further observed that "[t]o support convictions for robbery and armed criminal action the State would have had to show at trial that Mr. Williams threatened the use of what appeared to be a deadly weapon and that he did in fact use a deadly weapon" (PCR L.F. 32). Thus, the motion court reasoned that "[i]n order for his guilty plea to be accepted [Mr. Watson] would have had to admit that Mr. Williams did have a deadly weapon and that use of the deadly weapon was threatened during the robbery" (PCR L.F. 32). The motion court concluded, "Under the circumstances, the apparent advice of [Mr. Watson's] attorney was not objectively unreasonable" (PCR L.F. 32). The motion court noted in addition that Mr. Watson's claim was "pleaded in a somewhat confusing and conclusory manner" (PCR L.F. 32). The motion court did not clearly err.

1. Mr. Watson failed to allege facts showing prejudice, and his conclusory allegation of prejudice was, in part, refuted by the record

As to the claims asserted in Points III and IV, Mr. Watson failed to allege facts showing prejudice. In his amended motion, with regard to counsel's alleged failure to advise him about aider liability, Mr. Watson alleged that had he been "properly advised . . . regarding these issues, he (Watson) would have accepted the plea bargain and been sentenced to ten (10) years of incarceration instead of eighteen (18)" (PCR L.F. 22). With

regard to counsel's alleged misadvice about the elements of robbery in the first degree, he alleged that had he been "properly advised . . . of what the State would have to prove in order for [him] to be convicted of Robbery First Degree, [he] would have accepted the plea bargain that was offered by the State" (PCR L.F. 22).

In light of the test outlined in *Missouri v. Frye* and *Lafler v. Cooper*, these allegations failed to allege the facts necessary to prove prejudice. Wholly absent from Mr. Watson's amended motion was any allegation that the State would not have withdrawn its offer, and that the court would have accepted the pleas and followed the terms of the offer (L.F. 21-23). He did not allege, for instance, whether the State's plea offer had an expiration date and what the ordinary practices of the prosecutor's office were. He did not allege what the ordinary practices of the jurisdiction were with regard to acceptable plea offers and the acceptance of such offers by the court. *See Missouri v. Frye*, 132 S.Ct. at 1410 ("It can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences. So in most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain.").

Mr. Watson argues that his general allegations that he would have

accepted the offer and been sentenced to a shorter sentence were sufficient to warrant an evidentiary hearing (App.Sub.Br. 46-47). He observes that a movant's failure to allege the particulars of the test outlined in *Frye* (and *Lafler v. Cooper*) was essentially overlooked by the Court of Appeals in *Williams v. State*, 168 S.W.3d 433 (Mo.App. E.D. 2012), and he asserts that "no Missouri court has yet required such allegations to be plead [sic] even though we are years beyond *Frye*" (App.Sub.Br. 48).

But the reason the Court of Appeals did not adhere strictly to the test outlined in *Frye* in deciding *Williams* was because, as the court stated, "it is a new requirement that movants allege a reasonable probability that both the prosecutor and trial court assent to the plea agreement[.]" *Id.* at 658. In other words, because the movant in that case could not have anticipated the new test, the Court did not require compliance with it. Nevertheless, it was still a "new requirement that movants allege a reasonable probability that both the prosecutor and trial court assent to the plea agreement."

Since *Williams*, Missouri courts have repeatedly recognized that the test outlined in *Frye* sets forth the showing that a movant must make in alleging and subsequently proving prejudice. In *Smith v. State*, 443 S.W.3d 730, 735-736 (Mo.App. S.D. 2014), after quoting from *Frye*, the Court stated, "In order to prove prejudice as required to show ineffective assistance of counsel, Movant must show three things: (1) a reasonable probability he

would have accepted the earlier, less severe plea offer had he been afforded effective assistance of counsel; (2) a reasonable probability that the plea would have been entered without the prosecution canceling it; and (3) a reasonable probability that the trial court would have accepted the agreement." *See also DePriest v. State*, 510 S.W.3d 331, 338 n. 3 (Mo. 2017) (noting that under *Frye*, to prove prejudice, the movant must prove that "it was likely that defendant would have accepted the offer, prosecution would not have withdrawn it, and the trial court would have approved it"); *Wrice v. State*, 485 S.W.3d 382, 385 (Mo.App. E.D. 2016) (quoting *Frye* and stating, "The defendant must also show, 'if the prosecution had the discretion to cancel [the plea] or if the trial court had the discretion to refuse to accept it, there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented.' ").

Thus, because Mr. Watson's amended motion was filed well after *Frye* was decided, he was required to plead the requisite facts showing prejudice. These facts must be included in the amended motion because, as this Court has long recognized, "[t]he purpose of an evidentiary hearing is to determine whether the facts alleged in the motion are accurate, not to provide appellant with an opportunity to produce new facts." *Morrow v. State*, 21 S.W.3d 819, 827 (Mo. 2000). In addition, this Court made plain in *Barnett* that factual implications will not be drawn from bare conclusions in a post-conviction

motion. "Unlike 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." *Barnett*, 103 S.W.3d at 769. *See also White v. State*, 939 S.W.2d 887, 893 (Mo. 1997) ("A Rule 29.15 motion is treated differently than pleadings in other civil cases because it is a collateral attack on a final judgment of a court. While courts are solicitous of post-conviction claims that present a genuine injustice, that policy must be balanced against the policy of bringing finality to the criminal process. Requiring timely pleadings containing reasonably precise factual allegations demonstrating such an injustice is not an undue burden on a Rule 29.15 movant and is necessary in order to bring about finality.").

Mr. Watson cites *Wilkes v. State*, 82 S.W.3d 925, 929 (Mo. 2002) (App.Sub.Br. 46-47), a case in which the Court held that, although the movant had failed to expressly alleged that a witness (Howard) was available to testify, the other allegations in the motion setting forth Howard's anticipated testimony "contain[ed] a necessary implication that Howard was available to testify." Drawing this implication is arguably inconsistent with *Barnett*, which was decided after *Wilkes*. But even if it was permissible to imply a witness's availability to testify from the related allegation that the witness *would testify*, that would not permit the more extended implications urged by Mr. Watson here, namely, that both the State and the trial court

would have abided by a plea agreement simply because the defendant alleged he would have accepted the State's offer.

Mr. Watson argues that "[t]he 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' " (App.SubBr. 48). But even if the motion court overlooked or did not include other specific grounds for denying relief, this Court should affirm the motion court's judgment. *See Kubley v. Brooks*, 141 S.W.3d 21, 27 n. 5 (Mo. 2004) ("Although the trial court reached this result on a different ground, we will affirm where it reached the right result, even if for the wrong reason.").

The record shows, however, that the motion court also noted that Mr. Watson's claim that he would have pleaded guilty but for counsel's alleged failure to advise him about the elements of robbery was "pleaded in a somewhat confusing and conclusory manner" (PCR L.F. 32). Thus, the motion court did find generally that Mr. Watson's pleadings were deficient due to a general failure to allege specific facts instead of conclusions.

In any event, the fact that Mr. Watson failed to allege the specific terms of the State's plea offer was a sufficient basis in itself to conclude that Mr. Watson failed to allege facts showing prejudice. Aside from alleging that the State's plea offer included a ten-year sentence, Mr. Watson failed to identify any terms of the State's plea offer. He did not allege, for instance,

whether he would have been required to plead guilty to all of the charged offenses, including armed criminal action (*see* PCR L.F. 21-23).

It was, however, critically important to allege the terms of the plea agreement because the terms of the agreement bore directly upon—and ultimately governed—the question of prejudice. In evaluating prejudice from a lost plea offer, the facts must be viewed in light of what the defendant knew or believed *before* trial, *i.e.*, at the moment when the defendant would have had to make the decision to plead guilty.

Accordingly, the terms of the agreement must be alleged in the post-conviction motion, as the defendant's willingness to plead guilty must be gauged in terms of what the defendant is required, willing, and able to admit at the guilty plea hearing. Here, absent allegations about the terms of the agreement, it is not apparent whether Mr. Watson would have been required to plead guilty to armed criminal action in conjunction with robbery. This was important both because Mr. Watson was ultimately *acquitted* of armed criminal action and because the record refuted any notion that he would have been willing to admit that he knowingly used a gun in committing the robbery or had the purpose of aiding his co-actor's knowing use of a gun.

Under the unspecified terms of the plea offer, however, it is possible Mr. Watson would have had to admit to all of the elements of robbery in the first degree, all of the elements of armed criminal action, all of the elements

of resisting arrest, and all of the elements of trafficking in the second degree (see L.F. 20). Thus, he would have had to admit, *inter alia*, that he purposely acted together with or aided his co-actor in forcibly stealing money from the victim, that his co-actor displayed and threatened the use of what appeared to be a deadly weapon, that his co-actor actually used a deadly weapon during the robbery, and that he had the purpose of promoting the commission of armed criminal action.

At trial, however, Mr. Watson testified that he was not involved in any conduct that would have constituted robbery in the first degree and armed criminal action. On direct examination, Mr. Watson testified that he and Mr. Williams were flagged down by Mr. Mohammed and Mr. Tabakovic (Tr. 448-449). He said that the "flag down" "looked like a potential drug sale, so [they] pull[ed] over to them" (Tr. 449).

He said that Mr. Williams talked to the potential customers about "drug buying" (Tr. 449). He said that one of the customers was "irritated about the fact that it might be too small," and that Mr. Williams said, "I don't give a f--- you don't like it" (Tr. 449-450). He said that Mr. Williams then kept the money and ran back to the car (Tr. 450). He said that one of the customers also took off running after Mr. Williams stepped out and said, "I'll beat your ass" (Tr. 450). He testified that Mr. Williams then got back into the car and said, "let's go" (Tr. 450). He said that he drove off slowly and that he

did not "speed away" (Tr. 450). He also said that he never had a gun that night, and that to his knowledge, Mr. Williams never had a gun (Tr. 455).

On cross-examination, Mr. Watson expressly denied that he pulled over because he was "looking for people to rob" (Tr. 466). He denied that he told Mr. Williams to shoot one of the men (Tr. 466).

In light of Mr. Watson's sworn testimony at trial that he was not involved in any robbery or armed criminal action, and that he had no purpose to commit robbery or armed criminal action, the record flatly refutes Mr. Watson's implicit allegation that he would have pleaded guilty to either of those offenses and admitted his guilt after accepting the State's plea offer. Mr. Watson did not allege in his amended motion that he was lying when he testified at trial (*i.e.*, there is no reason to believe that his sworn testimony at a plea hearing would have been any different), and he did not allege that he would have attempted to enter an *Alford* plea in accepting the State's plea offer (PCR L.F. 21-23).

Mr. Watson also did not allege that an *Alford* plea was permitted under the State's offer, that the State would have agreed to an *Alford* plea (*i.e.*, that the State would not have withdrawn its offer if Mr. Watson was not willing to admit his guilt), or that an *Alford* plea would have been accepted by the judge (PCR L.F. 21-23). Except where the entry of an *Alford* plea is part of the agreement, a defendant's proposal that he be permitted to enter an *Alford*

plea is a significant "intervening circumstance" that could cause a plea offer to be revoked by the prosecutor or rejected by the court. *See State v. Williams*, 937 S.W.2d 330, 334 (Mo.App. E.D. 1996) (". . . we find that the trial court did not abuse its discretion in refusing to accept appellant's guilty plea solely because it was made pursuant to *Alford*. The original plea agreement was made with the intention that the appellant was entering a guilty plea, thereby admitting his guilt and taking responsibility for his actions. A subsequent guilty plea pursuant to *Alford* eliminates any showing of remorse or taking of responsibility by the appellant."). In short, Mr. Watson failed to allege facts showing that a factual basis could have been established for his plea, or that his guilty plea would have been accepted by the court.

In sum, Mr. Watson failed to allege the facts necessary to demonstrate prejudice. Mr. Watson failed to allege the terms of the plea agreement, and his trial testimony refuted his unadorned allegation that he would have successfully pleaded guilty without the State cancelling the agreement or the trial court refusing to accept his plea.

2. Mr. Watson's allegations about trial counsel's performance either failed to allege facts warranting relief or were refuted by the record

In addition, Mr. Watson failed to allege facts warranting relief (or that were not refuted by the record) showing that counsel's performance fell below

an objective standard of reasonableness.

a. The elements of robbery in the first degree. In alleging that counsel gave him incorrect advice about the elements of robbery in the first degree, Mr. Watson alleged that counsel told him 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,' " none of which is actually required in order to establish that [he] committed the crime of Robbery First Degree" (PCR L.F. 22). But inasmuch as Mr. Watson was charged with robbery in the first degree and an associated count of armed criminal action, it is not apparent that trial counsel's alleged advice in this case fell below an objective standard of reasonableness.

As charged in this case, the State had to prove that Mr. Watson and his co-actor "forcibly stole" money from the victim, and that Mr. Williams "displayed and threatened the use of what appeared to be a deadly weapon" (L.F. 20). *See* § 569.020, RSMo 2000. To prove forcible stealing, the State had to prove that Mr. Watson and his co-actor used or threatened "the immediate use of physical force upon another person." *See* § 569.010(1), RSMo 2000.

In conjunction with the robbery charge, the State also alleged that Mr. Watson was guilty of armed criminal action, and to prove that charge, the State had to prove that Mr. Watson and his co-actor actually used the deadly weapon charged, namely, a gun. *See* § 571.015, RMSo 2000. Accordingly, as

the motion court found (PCR L.F. 32), in advising Mr. Watson of what the State had to prove in this case, it would have been reasonable for counsel to tell Mr. Watson that the State had to prove that he and his co-actor used a gun to forcibly steal money from the victim while threatening "bodily harm toward the victim."

Mr. Watson cites to trial counsel's argument at sentencing to suggest that counsel admitted that he misinformed Mr. Watson of the elements of robbery in the first degree (App.Sub.Br. 44-45). But a review of the record made at sentencing does not support Mr. Watson's claim.

At sentencing, counsel initially argued that the jury's verdicts were not consistent (Sent.Tr. 3-4). It is apparent, however, that counsel was arguing for logical (and not legal) consistency; he argued that, factually, if the jury was not convinced that there was a gun, the jury should have found Mr. Watson guilty of robbery in the second degree, which had also been submitted to the jury (Sent.Tr. 3-4; *see* L.F. 34). Trial counsel did not argue that, as a matter of law, the robbery conviction could not stand, or that it was legally impossible for the jury to both acquit of armed criminal action and convict of robbery in the first degree (Sent.Tr. 3-4).

Mr. Watson's own statements at the sentencing hearing confirm that he understood the elements of robbery in the first degree, as he argued that he did not believe the evidence was sufficient to support his conviction for

that offense (Sent.Tr. 5). Mr. Watson even admitted that he knew that a "gun doesn't have to be involved in it," but he argued that no one was placed at risk of serious physical injury by the "threat of instrument or anything like that" (Sent.Tr. 5). In short, the record shows that Mr. Watson understood both that the State did not have to prove the use of an actual gun, and that the State had to prove a threat of force.

The portion of the sentencing hearing that Mr. Watson cites in his brief also does not support his claim. In discussing Mr. Watson's criminal history, counsel observed that the State had informed him of two prior felonies that he had not been aware of previously (Sent.Tr. 6). Then, in arguing for a minimum sentence, counsel observed that Mr. Watson had not mentioned all of his prior convictions (Sent.Tr. 8). Counsel then lamented that it might have been counsel's fault that Mr. Watson did not tell him about the prior convictions, and counsel opined that if he had known about the prior convictions, he might have urged Mr. Watson more strongly to accept the State's earlier ten-year plea offer (Sent.Tr. 8-9). Counsel stated:

> Because when we discussed it after trial when this [the additional prior convictions] came out, his response was more or less well, that's in Illinois. And if I would have known that, if possibly I would have been clearer with him, we may not have gone down the trial route and we may not be sitting here right

> now facing those kind of numbers [in the sentencing assessment report].
>
> 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 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. 8-9).

It is apparent, when viewed in context, that trial counsel was referring to the gap in his knowledge of Mr. Watson's criminal history when he said that his "knowledge base was a little off." Trial counsel did not suggest that he misled Mr. Watson about the elements of the offense; rather, counsel merely suggested that he might have urged Mr. Watson a little more strongly to accept the State's ten-year plea offer if counsel had known about Mr. Watson's lengthier criminal history.

b. Aider liability. In alleging that counsel gave him inadequate advice about aider liability, Mr. Watson alleged that counsel failed to tell him that "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, whether before, during, or after the crime is sufficient to support a conviction" (PCR L.F. 22). But inasmuch as Mr. Watson was expressly charged with robbery based on acting together with Mr. Williams, and inasmuch as Mr. Watson did not allege that counsel actually misadvised him about his potential criminal liability, Mr. Watson failed to allege facts warranting relief that were not refuted by the record.

Count I alleged that Mr. Watson, "acting with Clinton Williams, forcibly stole US currency and coins" from the victim, and that "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). Thus, as the motion court found (PCR L.F. 30-31), Mr. Watson was put on notice that his conduct in acting together with Mr. Williams was conduct that made him guilty of robbery in the first degree.

In addition, inasmuch as Mr. Watson did not allege that trial counsel affirmatively misadvised him about his criminal liability as an aider, he failed to allege facts showing that counsel's performance fell below an objective standard of reasonableness. Mr. Watson did not allege, for example, that counsel told him that he could not be found guilty of robbery based on his degree of involvement in the crime relative to his co-actor. *Cf. Lafler v. Cooper*, 132 S.Ct. at 1383-84 (counsel incorrectly told the defendant that "the

prosecution would be unable to establish his intent to murder [the victim] because she had been shot below the waist").[5]

While counsel obviously must advise a client about an existing offer, and while counsel obviously must not give incorrect advice that misleads a defendant to reject an offer, there is no requirement that counsel specifically instruct a defendant on the law related to aider liability. *See generally Arnold v. State*, 509 S.W.3d 108, 114 (Mo.App. E.D. 2016). "The Supreme Court has addressed two specific and narrow instances of attorney error in the context of plea bargaining: (1) *failing to communicate* an existing offer to the defendant; and (2) *providing bad advice* about an existing offer." *Id.*

In short, unless counsel affirmatively misadvised Mr. Watson that he

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[5] In his brief, Mr. Watson asserts, "If [trial counsel] 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" (App.Sub.Br. 55). But there was no allegation in the amended motion that counsel misadvised Mr. Watson along those lines. "Claims not raised in a [post-conviction] motion are waived on appeal." *Dorsey v. State*, 448 S.W.3d 276, 284 (Mo. 2014). " 'Pleading defects cannot be remedied by the presentation of evidence and refinement of a claim on appeal.' " *Id.*

could not be found guilty as an aider under the facts of his case, it cannot be said that counsel's advice fell below an objective standard of reasonableness. Counsel's obligation is not to instruct the defendant on all aspects of the law but, rather, to give advice about the potential advantages and disadvantages of either accepting a plea offer or going to trial. Thus, here, if counsel provided realistic advice about Mr. Watson's chances at trial—and there is no allegation suggesting counsel did not—then, counsel's advice was reasonable, and Mr. Watson failed to allege facts overcoming the presumption that counsel's advice was reasonable.

C. Conclusion

In sum, Mr. Watson failed to allege facts warranting relief that were not refuted by the record. Points III and IV should be denied.

CONCLUSION

The Court should affirm the denial of Mr. Watson's Rule 29.15 motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that this brief complies with Rule 84.06(b) and contains 10,453 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word.

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