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No. SC95953

IN THE
MISSOURI SUPREME COURT

Paul Gittemeier,
Appellant

v.

State of Missouri,
Respondent.

Appeal from the Circuit Court of Warren County, Missouri
Twelfth Judicial Circuit
The Honorable Wesley C. Dalton, Circuit Judge

Brief of American Civil Liberties Union of Missouri Foundation as *Amicus Curiae* in Support of Appellant Filed with Consent of the Parties

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Jurisdictional Statement

Amicus adopts the jurisdictional statement as set forth in Appellant's brief.

Interests of Amicus Curiae

The American Civil Liberties Union (ACLU) is a nonprofit, nonpartisan membership organization founded in 1920 to protect and advance civil liberties throughout the United States. The ACLU has more than 500,000 members nationwide. The ACLU of Missouri Foundation, whose forerunner was also founded in 1920, is an affiliate of the national ACLU. The ACLU of Missouri has more than 4,500 members. In furtherance of its mission, the ACLU engages in litigation, by direct representation and as *amicus curiae*, to encourage the protection of all rights guaranteed by the federal and state constitutions.

This amicus brief is filed with consent of the parties to this appeal.

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Statement of Facts

Amicus adopts the statement of facts as set forth in Appellant's brief.

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Argument[1]

I. Rules adopted by this Court governing post-conviction proceedings should be interpreted in a manner consistent with the constitution.

The Missouri Constitution has protected an individual's right to open courts since 1820. *Kilmer v. Mun*, 17 S.W.3d 545, 547 (Mo. banc 2000). Article I, section 14, of the Missouri Constitution provides: "That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay." Thus, statutes imposing procedural bars to court access are unconstitutional. *Bromwell v. Nixon*, 361 S.W.3d 393, 399 (Mo. banc 2012). "'An open courts violation is established upon a showing that: (1) a party has a recognized cause of action; (2) that the cause of action is being restricted; and (3) the restriction is arbitrary or unreasonable.'" *Id.* (quoting *Snodgras v. Martin & Bayley, Inc.*, 204 S.W.3d 638, 640 (Mo. banc 2006)).[2] Moreover,

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[1] Pursuant to the protocol of the Missouri Supreme Court, all hyperlinks in this brief are separated with the insertion of a []. This is done, pursuant to this Court's protocol, so that the links do not automatically take a reader to the cited website when that link is clicked on. Thus, in order to find the internet source used in this brief, the reader will have to retype the link without the inserted []. Each bracket is inserted around the "period" following "www" or around the first "period" following the "//".

[2] *Bromwell* held that the Missouri Prisoner Litigation Reform Act (MPLRA) did "not create a procedural bar to seeking habeas relief because a prisoner is not denied

"[a]n examination of both the history and the language of our constitution supports the conclusion that article I, section 14, 'applies against all impediments to fair judicial process, be they legislative or judicial in origin.'" *Kilmer*, 17 S.W.3d at 548.

In *Kilmer*, this Court recognized that, "[p]ut most simply, article I, section 14 'prohibits any law that *arbitrarily or unreasonably* bars individuals or classes of individuals from accessing our courts in order to enforce *recognized* causes of action for personal injury.'" *Id.* at 548-50. "Both the common law and our statutes recognize various legal injuries to person, property and character and provide remedies for such

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the right to file a cause of action in the circuit court based on his or her inability to pay a filing fee" and the "petition fails to explain why the MPLRA's requirement that indigent prisoners pay a percentage of their prisoner accounts to satisfy the filing fee is arbitrary and unreasonable." 361 S.W.3d at 399. *Snodgras* held that the Dram Shop Act's bar of "a cause of action against commercial sellers of packaged alcohol who sell alcohol to a minor" … "does not impose any barriers to pursuing a recognized cause of action, it simply defines the scope of the cause of action," and it therefore did not violate the open courts clause. 204 S.W.3d at 640. *But see Kilmer*, 17 S.W.3d at 547, 554 (examining the Dram Shop Act's provision limiting civil causes of action to only those cases where the prosecutor has first filed criminal charges against the dram shop operator responsible for serving the alcohol and holding that where a person's "dram shop injury is recognized in section 537.053.3, the statute may not erect arbitrary or unreasonable barriers" such as this provision).

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injuries." *Id.* at 550. And, while a statute "may modify or abolish a cause of action that had been recognized by common law or by statute[,]" when a "barrier is erected in seeking a remedy for a recognized injury, the question is whether it is arbitrary or unreasonable." *Id.*

In 1988, this Court adopted Rules 29.15 and 24.035, thereby implementing "the single, unified procedure for inmates seeking post-conviction relief after" trial or a guilty plea. *Price v. State*, 422 S.W.3d 292, 296 (Mo. banc 2014). These rules were adopted to provide post-conviction procedures for "[i]ndividuals convicted of state crimes [who] have 'no federal constitutional right to a state post-conviction proceeding[.]'" *Id.* (quoting *Smith v. State*, 887 S.W.2d 601, 602 (Mo. banc 1994)). The purpose of Missouri's post-conviction "rules is to 'adjudicate claims concerning the validity of the trial court's jurisdiction and the legality of the conviction or sentence of the defendant … [while] avoiding delay in the processing of prisoners' claims and preventing the litigation of stale claims.'" *Id.* (quoting *State ex rel. Nixon v. Daugherty*, 186 S.W.3d 253, 254 (Mo. banc 2006)). And, while "'courts are solicitous of post-conviction claims that present a genuine injustice, that policy must be balanced against the policy of brining finality to the criminal process.'" *Id.* (quoting *White v. State*, 939 S.W.2d 887, 893 (Mo. banc 1997)). "That 'balance' is reflected in the requirement that an inmate must initiate his post-conviction proceedings within the specified period or forever waive both the right to such a proceeding and all of the claims that might have been raised in timely motion." *Id.* (citing Rule 29.15(b) and 24.035(b)).

"A postconviction relief hearing is a civil proceeding governed by the rules of civil procedure wherever applicable." *Bittick v. State*, 105 S.W.3d 498, 501 (Mo. App. W.D. 2003). And, while the state is not required to provide post-conviction relief to defendants or counsel to those defendants who are indigent and seek relief, a state may, as Missouri has done here, make such proceedings and counsel available to movants. *Price*, 422 S.W.3d at 297. "Under the predecessor to Rule 29.15, … this Court decided that appointing counsel for all indigent inmates who assert post-conviction claims was the best way to further the propose of ensuring thorough review without undue delay in achieving finality of criminal convictions." *Id.* Additionally, a post-conviction movant could obtain private counsel, or, in some cases, proceed *pro se*. *See, e.g.*, *Bittick*, 105 S.W.3d at 504-05 (holding that a post-conviction movants are not required to accept appointed counsel and may proceed pro se); *see also* Rules 29.15(g)(2) and 24.035(g)(2) (providing filing deadlines for both appointed and privately retained counsel). However, with the Court's decision to provide appointed counsel in post-conviction proceedings along with its "steadfast refusal to acknowledge claims based on the ineffectiveness of post-conviction counsel[], a collision was bound to occur." *Price*, 422 S.W.3d at 297. This conflict was resolved in 1991 when this Court decided *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991) and *Luleff v. State*, 807 S.W. 2d 495 (Mo. banc 1991). Thus, this Court recognizes the abandonment doctrine as it applies to the filing of untimely amended motions under Rules 29.15 and 24.035.

A post-conviction movant has been abandoned when counsel either takes no action with regard to filing an amended motion or files an untimely motion. *Gehrke v.*

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State, 280 S.W.3d 54, 57 (Mo. banc 2009). Under the abandonment doctrine, if post-conviction counsel fails to investigate a pro se movant's initial motion or otherwise files an untimely amended motion, this creates a presumption that counsel has abandoned the movant. *Moore v. State*, 458 S.W.3d 822, 825 (Mo. banc 2015). A court must then conduct an individual inquiry to determine if there was actual abandonment or if the movant's own negligence or intentional negligence (and not counsel's) caused the amended motion to be untimely filed. *Id.* at 825-26. If the court finds abandonment, then it will accept the tardy amended motion (and when a pro se movant has filed the initial motion but appointed counsel has done nothing at all, the court will appoint new counsel).

And, while the initial motion must be filed by movant within the time limits set forth, and there can be no excuse for an untimely initial filing, abandonment applies to amended motions because, unlike initial motions which merely provide notice that the movant is seeking relief and do not require legal assistance, they are "final pleading[s], which require legal expertise[.]"*Gehrke*, 280 S.W.3d at 57; *see also Bullard v. State*, 853 S.W.2d 921, 922-23 (Mo. banc 1993) (noting that an initial motion "need only give notice" and amended motions require legal expertise).[3] The reason for appointed counsel

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[3] This Court has consistently held that failure of a movant to file an initial motion within the time provided in the rules "'shall constitute a complete waiver of any right to proceed … and a complete waiver of any claim that could be raised in a motion

in these proceedings, therefore, is to assure the motion's proper drafting. *Bullard*, 853 S.W.2d at 922. Thus, the right to assistance of counsel in post-conviction proceedings attaches after the initial motion is timely filed and abandonment of post-conviction counsel "will excuse the untimely filing of an amended motion if the movant is without fault." *Bullard*, 853 S.W.2d at 922-23. This safeguard ensures that those with plausible claims that their convictions are erroneous will have those claims considered on the merits rather than ignored because of a procedural error.

"When considering the scope of abandonment, this Court must balance the need to protect the rights of postconviction movants against the need for finality and a reasonable end to postconviction proceedings." *Gehrke*, 280 S.W.3d at 58. In *Sanders*, appointed counsel failed to file a timely amended post-conviction motion. 807 S.W.2d at 494-95. In *Bittick*, the Western District refused to "infer from Rule 29.15 that the framers intended to prohibit an indigent incarcerated litigant from proceeding *pro se*." 105 S.W.3d at 504. The court noted further that, "[w]ithout express language precluding an indigent incarcerated litigant from self-representation, the denial of self-representation will not be inferred." *Id.* "Similarly, the fact that the framers omitted an express provision that an indigent defendant may dismiss appointed counsel and proceed *pro se* does not necessarily indicate that the rule intends denial of such option." *Id.* Likewise, here, there is no express language in Rules 29.15 or 24.035 regarding whether the abandonment

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under [these] Rule[s].'" *Dorris v. State*, 360 S.W.3d 260, 263 (Mo. banc 2012) (quoting Rules 29.15 and 24.035). The late filing of an initial motion is not at issue in this appeal.

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doctrine applies to appointed counsel only. This Court created the abandonment doctrine and, as such, should apply it fairly and equally to all movants seeking relief under Rules 29.15 and 24.035.

There is no principled reason why the abandonment doctrine should be available when counsel is appointed but not privately retained. While there might be justifications for refusing to apply the abandonment doctrine to *initial* motions as opposed to *amended* ones,[4] Gittemeier timely filed his initial motion. The court refused to allow the abandonment doctrine to apply *solely* because Gittemeier had retained his counsel privately rather than relied on the state to pay for an attorney to represent him. But the purposes of requiring counsel for amended motions apply regardless of whether counsel is appointed or retained. In fact, given recent challenges faced by the Missouri public defender system, discussed *infra*, privately retained counsel might be better situated than appointed counsel to promote Rule 29.15's goals of providing an efficient and legally

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[4] Most of this Court's decision in *Price*, on which the appellate court heavily relies here, deals with the initial-amended distinction without offering principled reasons for an appointed-retained distinction. And, while the appellate court recognizes that it has previously found the abandonment doctrine applies to both appointed and privately retained counsel, after *Price*, it has decided that it can no longer stand by those decisions. *See, e.g.*, *Castor v. State*, 245 S.W.3d 909 (Mo. App. E.D. 2008); *Roberts v. State*, 473 S.W.3d 672 (Mo. App. E.D. 2015); *Silver v. State*, 477 S.W.3d 697 (Mo. App. E.D. 2015).

informed procedure. Similarly, retained counsel might also be better situated to handle Rule 29.15(j)'s narrow standard of review. Retained counsel is also at least equally capable of avoiding undue delay in order to minimize any compromise to the finality of convictions.

Refusing the abandonment doctrine to movants with retained counsel would violate the Equal Protection guarantees of the Missouri and federal Constitutions.[5] This is because the law treats 29.15 movants who have filed untimely amended motions differently based on whether their counsel is appointed or retained. This classification lacks a rational basis because there is no articulable reason for the disparity in treatment. In fact, as explained above, retained counsel may even be more likely than appointed counsel to promote the goals and purposes of Rule 29.15.

This Court should refrain from focusing its analysis on one subsection of Rules 29.15 and 24.035. While it is true that Rules 29.15(e) and 24.035(e) apply to pro se motions, indigent movants, and the right to appointed counsel, and require appointed counsel to "investigate the claims raised in the inmates' timely initial motion and the file either an amended motion or a statement explaining why no amended motion is needed," *Price*, 422 S.W.3d at 297, these sections should not be read to mean that the

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[5] Missouri's guarantee of "equal rights and opportunity under the law," Mo. Const. art. I, § 2, is coextensive with the Fourteenth Amendment's guarantee of equal protection. *Glossip v. Mo. Dep't of Transp. & Highway Patrol Emps' Ret. Sys.*, 411 S.W.3d 796 (Mo. banc 2013).

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abandonment doctrine applies only to appointed counsel. In *Price*, this Court noted that, "the rationale behind the creation of the abandonment doctrine in *Luleff* and *Sanders* was not a newfound willingness to police the performance of postconviction counsel generally." 422 S.W.3d at 298. "Instead, the doctrine was created to further the Court's insistence that Rule 29.15(e) be made to work as intended." *Id.* "Extensions to this doctrine that do not serve this same rationale must not be indulged." *Id.* Requiring the same standards of representation for private and appointed counsel *does* serve the same rationale. No less should be required of private counsel than is required of appointed counsel. This Court has been clear that amended motions require expertise. And while 29.15(e) does spell out what is required of appointed counsel, the same should be required of private counsel, regardless of whether it is spelled out in the rule. The purpose of the post-conviction proceedings are to allow limited relief to defendants and, ultimately, a final decision. Applying the abandonment doctrine to appointed and private counsel alike in no way frustrates this purpose. Nothing in this appeal is asking the Court to extend the abandonment doctrine to apply to untimely initial motions. Thus, that type of expansion of the doctrine, as discussed in *Price*, is not at issue here.

While the abandonment doctrine might have been first recognized in cases where counsel was appointed, it is arbitrary and unreasonable to limit its application to appointed counsel. This Court has created the right to post-conviction relief in order to provide relief when a convicted person is injured. Once this right to relief exists, this Court should not then bar certain movants from actually obtaining relief, or even review of their claims, simply because they have retained counsel instead of having counsel

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appointed. Post-conviction proceedings are a recognized cause of action and access to such proceedings is arbitrarily and unreasonably restricted when a court refuses to extend the application of the abandonment doctrine to private counsel.

II. Refusing to apply the abandonment doctrine to privately retained counsel places a burden on the already overly burdened the Missouri State Public Defender System (MSPD).

With its landmark decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Supreme Court of the United States cemented the principle that the amount of money in one's bank account should never determine whether one receives justice in a court of law. And, while no constitutional right to counsel in a post-conviction proceeding in Missouri has been recognized, this Court has guaranteed, through Rules 29.15 and 24.035, that counsel will be appointed to indigent defendants because representation is necessary in order for a defendant to effectively prepare and present a post-conviction motion. *See Price*, 422 S.W.3d at 297.

Providing the safeguard of the abandonment doctrine to *only* those represented by a public defender—and withholding this safeguard from those with private counsel—discourages petitioners from securing retaining counsel and private attorneys from taking on post-conviction cases. Petitioners and private attorneys know that employment of retained counsel robs a petitioner of an important safeguard to ensure that all viable claims are considered on their merits. This recognition adds to the already heavy burdens placed on Missouri's public defenders.

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The Missouri State Public Defender's crushing workloads and lack of sufficient resources already prevent public defenders from providing their clients with the hallmarks of a zealous defense, namely: competent representation at all critical stages of the case, including post-conviction proceedings. Missouri currently faces a growing constitutional and ethical crisis that will continue to spiral out of control because MSPD attorneys are not equipped with the tools and resources they need to provide indigent defendants with the level of representation to which they are entitled. And this Court's failure to extend the application of the abandonment doctrine to those defendants who retain private counsel will only further burden the MSPD System.

MSPD was created in 1982 as an independent department housed within—but not supervised by—the judicial branch, as the system transitioned away from the appointed counsel programs and toward a hybrid of local defender offices in some counties and contract counsel arrangements in others. In 1989, the State abandoned the contract counsel portion of the system and began to rely exclusively on local public defender offices responsible for providing indigent defense services in all 114 counties and St. Louis City. Since the establishment of the MSPD in its current form in 1989, there have been several independent studies critiquing Missouri's public defense system, all of which identified serious deficiencies in its implementation.

In 1993, the Spangenberg Group (TSG) was commissioned to study the internal operations of the public defense system, including issues related to budgeting, staffing, and allocation of resources, in addition to Missouri's standing among the other states with respect to public defender caseloads and levels of funding. Among other things, the

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report determined that heavy caseloads and low salaries led to significant turnover among public defenders around the state, and that "[m]any attorneys feel that without additional resources, they will not be able to provide competent representation to all of their clients." The Spangenberg Group, *A Report on the Operation of the Missouri State Public Defender* (June 1993) http://www[.]nlada.net/sites/default/files/1993%20TSG%20Missouri%20Report.pdf.

Having failed to adequately address the problems identified in the 1993 report, the State confronted a similar caseload and resource crisis over a decade later. In 2005, at the behest of then-Missouri State Public Defender J. Marty Robinson, the Missouri Bar Association formed a Public Defender Task Force to work in conjunction with the Public Defender Commission in an effort to address the still-raging deficiencies in indigent defense services. The Task Force ultimately contracted with TSG to conduct another assessment of the system, very similar in its focus to the study conducted more than a decade earlier. The Spangenberg Group, *Assessment of the Missouri State Public Defender System*, final report (October 2005) [TSG 2005 Report] https://www[.]aclu-mo.org/files/6214/7854/9745/2005_TSG_Missouri_Report.pdf; *see also* The Spangenberg Group and the Center for Justice, Law and Society at George Mason University, *Assessment of the Missouri State Public Defender System*, final report (October 2009) [TSG 2009 Report] http://www[.]nlada.net/sites/default/files/2009%20Assessment%20of%20the%20Missouri%20State%20Public%20Defender%20System%20(TSG).pdf. The findings of the 2005 study were even bleaker than the 1993 findings. In addition to their observations

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regarding staff turnover, low salaries, dwindling morale, and case overload, TSG researchers expressed serious concern that, despite their best efforts, many public defenders were routinely failing to comply with MSPD's Public Defender Guidelines for Representation, the Missouri Supreme Court Rules of Professional Conduct, and, most significantly, the United States Constitution. TSG 2009 Report, at 6; TSG 2005 RPT, at 4-10. The 2005 report noted the "triage" nature of representation among public defenders, as well as the attorneys' inability to communicate with their clients consistently and effectively, both of which were byproducts of extremely high caseloads and lack of sufficient resources—and both of which are still indicative of Missouri's public defense system today. TSG 2005 RPT, at 8-9. The 2005 study also determined that Missouri's public defense system fell short of seven of the ABA's Ten Principles of a Public Defense Delivery System.[6] TSG 2005 RPT, at 2-3; American Bar Association, *ABA Ten Principles of a Public Defense Delivery System* (Feb. 2002), http://www[.]americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

In comparing Missouri to other states, TSG's 2005 study further concluded that a) Missouri had a lower per-capita annual indigent defense spending than all southern states other than Mississippi; b) Missouri had the lowest per capita expenditure of all statewide public defender systems around the country; c) between 1993 and 2005, Missouri dropped from 42nd to 47th in the country with respect to per capita spending on indigent

[6] These included Principles 2, 4, 5, 6, 7, 8, and 10.

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defense; and d) Missouri would have had to spend an additional $16 million on public defense in order to equal the average per capita spending for the southern states. TSG 2009 Report, at 11-12; TSG 2005 RPT, at 22-23.

Following the 2005 study, in January 2006, an interim committee of the Missouri Senate released its "Report on the Missouri State Public Defender System," stating in no uncertain terms that "the probability that public defenders are failing to provide effective assistance of counsel and are violating their ethical obligations to their clients increases every day." *Corrected Report of Senate Interim Committee on The Missouri State Public Defender System* (Jan. 2007), http://www[.]senate.mo.gov/06info/comm/interim/publicdefenderReport.pdf. Among other things, the committee based its conclusion on the fact that the MSPD caseload had increased by more than 12,000 cases over the previous six years, despite MSPD being unable to bring any additional attorneys on staff during that same period. *Id.*

In August 2009, the American Bar Association released its "Eight Guidelines of Public Defense Related to Excessive Workloads" (Guidelines) in an effort to set forth a "detailed action plan … to which those providing public defense should adhere as they seek to comply with their professional responsibilities." *ABA Eight Guidelines of Public Defense Related to Excessive Workloads*, 1 (Aug. 2009), http://www[.]americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_train_eight_guidelines.authcheckdam.pdf. Among other things, the Guidelines include an assessment of "whether excessive workloads are preventing [public defenders] from fulfilling performance obligations"; supervision and monitoring of

workloads; training with regard to an attorney's ethical duties in the face of excessive workloads; and the need for those managing the public defense system to determine whether excessive workloads exist. *Id.*

That same year, TSG was back in Missouri, having been retained by the Missouri Bar Association to assess the state's public defender system yet again. According to TSG's 2009 study, "the Eight Guidelines point to a growing crisis of constitutional magnitude, which despite MSPD's longstanding, systemic efforts, has been permitted to worsen, placing indigent persons accused of crimes, victims of crime, and the larger system of criminal justice in great peril." TSG 2009 Report, at 13. Using the Eight Guidelines as a reference point, TSG's 2009 Report concluded that public defender workloads had only gotten worse since 2005. *Id.* at 18-28. The 2009 Report further concluded that, due in large part to the caseloads being carried by supervising attorneys within the district offices, the MSPD system lacked adequate supervision for its Trial Division lawyers. *Id.* at 29.

Even the public defenders themselves, who have a powerful incentive to downplay the extent to which their advocacy had been compromised by their high workloads and deficient resources, admitted to TSG researchers that they were "constantly being forced into being ineffective," *Id.* at 27, and that the triage-style approach to their work "requires public defenders to divvy effective legal assistance to a narrowing group of clients," rather than providing quality representation for all indigent defendants, as required by the Sixth Amendment. *Id.* at 8.

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Additional assessments of Missouri's indigent defense system, conducted in more recent years, have identified many of the same recurring problems. In 2010, a report issued by DOJ's Bureau of Justice Assistance found that, from 1999 to 2007, the number of cases assigned to MSPD increased by 13 percent, while the state's indigent defense expenditures decreased by 12 percent. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *State Public Defender Programs, 2007* (Sept. 2010, NCJ 228229), https://www[.]bjs.gov/content/pub/pdf/spdp07.pdf. Also in 2010, the ABA released a study on indigent defense expenditures nationwide during fiscal year 2008. George Mason University, *State, County an Local Expenditures for Indigent Defense Services Fiscal Year 2008*, Prepared For the American Bar Association Standing Committee on Legal Aid and Indigent Defendants Bar Information Program (Nov. 2010), http://www[.]americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fy08.authcheckdam.pdf. Missouri was ranked 49 out of 50 states, again second only to Mississippi. *Id.*

According to a study conducted by the Sixth Amendment Center (6AC) just this year, Missouri's indigent defense expenditures have only gotten more abysmal over the last several years. David Carroll, Sixth Amendment Center, *An Open Letter to the Next Missouri Governor*, Aug. 11, 2016, http://[]sixthamendment.org/an-open-letter-to-the-next-missouri-governor/. After surveying 35 comparable states, 6AC researchers found that, in fiscal year 2015, Missouri ranked last in per capita spending on public defender services. *Id*. More specifically, Missouri spent an average of just $6.20 per person for indigent defense services in FY2015—significantly below the national average of $18.41

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per person. *Id.* Put another way, based on the FY2015 expenditures, the state of Missouri would have to spend an additional $73.2 million on indigent defense just to reach the $112 million national average. *Id.*

Perhaps most significantly, in June 2014, the American Bar Association (ABA), in collaboration with the accounting firm of RubinBrown LLP, released the most recent comprehensive study of Missouri's public defender system, including an in-depth assessment of public defender workloads in this state. *See* The Missouri Project, *A Study of the Missouri Public Defender System and Attorney Workload Standards* (June 2014) [The Missouri Project], http://www[.]americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.authcheckdam.pdf. As part of the study, the ABA commissioned RubinBrown to utilize the "Delphi method" in developing comprehensive workload standards based on MSPD's existing time records and a series of data-driven surveys completed by public defenders and other attorneys across the state over a six-month period in 2013.[7] *Id.* One goal of the study was to "estimate the amount

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[7] The ABA/RubinBrown report explicitly declined to rely on the standards developed and introduced by the National Advisory Commission on Criminal Justice Standards and Goals (NAC) in 1973, which determined that public defender caseloads should not exceed 150 felonies, 400 misdemeanors, 200 juvenile court cases, 200 Mental Health Act cases, or 25 appeals per attorney per year. While those standards have been widely recognized across the country, the ABA researchers point out that those standards

of time that should be allotted for those tasks that MSPD line defenders identified as often not having sufficient time to complete with reasonable effectiveness." The Missouri Project, at 6. The ABA and RubinBrown researchers ultimately determined that the minimum time allotments required for each case type (excluding court time, travel, and related administrative tasks) are as follows: at least 106.6 hours for non-capital murder/homicide; at least 47.6 hours for A/B felonies; at least 25.0 hours for C/D felonies; at least 63.8 hours for sex felonies; at least 11.7 hours for misdemeanors; at least 19.5 hours for juvenile cases; and at least 9.8 hours for probation violations. These standards "reflect the consensus time expectations (under prevailing norms and

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were not based on any empirical study and have been roundly criticized in recent years for being too high. The Missouri Project at 5. Indeed, experts in the field have suggested that the NAC standards are outdated and fail to account for the added complexities that have been infused into criminal defense practice over the last 40 years, including the introduction of sexually violent offender commitment proceedings, persistent offender or "three-strikes" statutes, significant collateral consequences resulting from convictions, and a growing recognition of the unique nature of juvenile defense. As such, commentators have argued that the NAC standards are themselves too high. *See* Norman Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense* 43–48 (2011), http://www[.]americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf.

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standards) of a group of both private practice and public defender experts from across the state of Missouri." *Id.* Because of their outrageously inflated workloads, MSPD attorneys routinely fall short of the newly developed standards.

Based on the ABA/Rubin Brown standards, the state would need to hire approximately 270 additional attorneys statewide in order to enable MSPD to meet its constitutional and ethical obligations to each of its clients. Having hovered near the bottom of the list since at least the mid-1980s,[8] Missouri currently ranks 49 out of 50 states in the amount of funding allocated for indigent defense services statewide. Unfortunately, even when the Legislature has committed, in recent years, to increasing the resources for public defense, those efforts have been repeatedly thwarted by the Governor restricting all or some of the additional funding.

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[8] In its open letter to the current Missouri gubernatorial candidates, 6AC researchers note that Missouri ranked 48 out of the 50 states in indigent defense cost per capita spending as early as 1984, when DOJ-BJS released the first comprehensive study of the right to counsel in America. David Carroll, Sixth Amendment Center, *An Open Letter to the Next Missouri Governor*, Aug. 11, 2016, http://[]sixthamendment.org/an-open-letter-to-the-next-missouri-governor/. Notably, Tennessee ranked 50 in the 1984 survey, but now spends almost three times more ($108,743,348) than Missouri ($37,704,654), despite having roughly the same size population. *Id.*

This Court has recognized the dire nature of the situation in recent years. Referencing the Missouri Senate's 2006 Report, the court noted in 2009 that, despite the startling conclusions outlined in the report with respect to MSPD's exploding caseloads and the resulting harm to indigent defendants across the state, "the caseload crisis of the public defender's office has continued to grow." *See State ex rel. Missouri Pub. Def. Comm'n v. Pratte*, 298 S.W.3d 870, 878 (Mo. banc 2009). Moreover, the court stated that "[t]he excessive number of cases to which the public defender's offices currently are being assigned calls into question whether any public defender fully is meeting his or her ethical duties of competent and diligent representation in all cases assigned." *Id.* at 880. Three years later, in further recognition of MSPD's ongoing workload issues and the fact that the Sixth Amendment requires more than "just a pro forma appointment whereby the defendant has counsel in name only," the Court ruled that the Missouri Public Defender Commission had the authority to create and implement a protocol that would allow public defenders to refuse to be assigned to additional cases if they could demonstrate that they had reached their caseload maximum. *See State ex rel. Mo. Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592, 597, 610-612 (Mo. banc 2012).[9]

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[9] Subsequently, the Legislature passed § 600.063.1 giving courts the authority, upon motion from any district defender, to provide relief to an "individual public defender [who] … will be unable to provide effective assistance of counsel due to caseload concerns."

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Applying the abandonment doctrine to appointed counsel only will encourage movants to file pro se motions and then seek appointment of counsel and will discourage inmates from retaining counsel for post-conviction proceedings. This will place an additional burden on the MSPD that it quite clearly cannot withstand. The above-referenced studies clearly demonstrate that the MSPD is already overburdened and underfunded. Placing additional burdens on the system by refusing to extend this doctrine—arbitrarily and unreasonably—to private counsel will do far more harm than good for both movants and their attorneys.

Conclusion

This Court should not restrict the application of the abandonment doctrine to appointed counsel in post-conviction proceedings. The purpose of Rules 29.15 and 24.035 is not thwarted by applying the doctrine equally in cases with private counsel. This Court has repeatedly found that legal expertise is necessary when filing amended motions in post-conviction proceedings. Having recognized that legal expertise is necessary, this court should hold counsel to equal standards and petitioners who retain private counsel should not be punished for doing so by losing all ability to pursue claims when their counsel abandons them. Restricting the abandonment doctrine to appointed counsel only is arbitrary and unreasonable and inconsistent with the Missouri Constitution's open courts clause. This Court should apply the doctrine to all counsel representing movants in post-conviction proceedings. As such, the judgment of the circuit court should be reversed and the case remanded.

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Certificate of Service and Compliance

The undersigned hereby certifies that on November 16, 2016, the foregoing amicus brief was filed electronically and served automatically on counsel for all parties.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06 and Local Rule XLI; (3) contains 5,507 words, as determined using the word-count feature of Microsoft Office Word. Finally, the undersigned certifies that electronically filed brief was scanned and found to be virus-free.

/s/ Anthony E. Rothert

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