IN THE
SUPREME COURT OF MISSOURI
EN BANC

No. SC95953

PAUL GITTEMEIER,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

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

JOINT BRIEF OF AMICUS CURIAE MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS MISSOURI SOCIETY FOR CRIMINAL JUSTICE

Respectfully Submitted,

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Statement of Interest

The Missouri Association of Criminal Defense Lawyers (MACDL) is a voluntary association of criminal defense lawyers organized to improve the quality of justice in Missouri by seeking to ensure justice, fairness, due process and equality before the law for persons accused of crime or other misconduct. MACDL is dedicated to protecting the rights of criminally accused through a strong and cohesive criminal defense bar. MACDL also works to improve the criminal justice system to those ends.

MACDL promotes study and research in the field of criminal law to disseminate and advance knowledge of the law in the area of criminal practice. The organization seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. An organizational objective is promotion of the proper administration of justice. In furtherance of that objective, at times the organization files amicus briefs in both federal and state courts.

The Missouri Society for Criminal Justice (MoSCJ) is a voluntary association of criminal defense attorneys throughout Missouri who are dedicated to the preservation of the Bill of Rights, particularly those rights applicable to criminal defendants. The attorneys involved in this organization have been informally associated for over ten years. Recently, the organization formally incorporated in the state of Missouri. Currently the organization has over 100 members.

Both MACDL's and MoSCJ's interests in this proceeding is to encourage the Court to apply the Abandonment Doctrine regarding Mo. S. Ct. R. 29.15 post-conviction proceedings to appointed and retained counsel alike. These two organizations are concerned that failing to do so would leave an inmate choosing to retain counsel after filing a *pro se* motion without the Abandonment Doctrine's intended protections. This application would effectively create a disincentive to hire private counsel, discouraging alleviation to an already overburdened public defender system.

Both MACDL and MoSCJ also have an interest in holding all defense counsel, appointed and retained alike, to the same standards of practice to ensure equal justice and protections to all criminally-accused, including those in the post-conviction process. Applying the Abandonment Doctrine's enforcement of the Rule's minimum standards of action to appointed counsel and not retained counsel arbitrarily assumes that appointed counsel's representation requires court supervision more so than privately retained counsel in order to ensure effectiveness. After all, Rule 29.15(e) burdens counsel with the affirmative duty of either filing an amended motion or affirmatively filing a statement that counsel has met his or her duty in reviewing the file and sees no reason for filing an amended motion. In fact, the Abandonment Doctrine assumes that if counsel has not so affirmatively indicated that he or she has performed his or her duty that this would be tantamount to not having a lawyer at all, leaving the client abandoned. These two organizations see no policy reason to draw a line between appointed and retained counsel in this respect. There is no assurance of the quality of representation to be drawn simply

between whether or not counsel is retained or appointed and both MACDL and MoSCJ seriously caution this Honorable Court to draw (or even suggest) such a line.

Jurisdictional Statement, Statement of Facts, and Consent of Parties

Amici curiae adopt and incorporate by reference the jurisdictional statement and statement of facts set forth in Appellant's substitute brief. Pursuant to Mo. S. Ct. R. 84.05(f)(2), amici curiae certify that consent to file this brief was granted by all parties.

Argument

I. Applying the Abandonment Doctrine to appointed and not retained counsel would leave an inmate who is able to retain counsel after filing a timely initial motion *pro se* without the Abandonment Doctrine's intended protections, creating a disincentive to hire private counsel and a disincentive to alleviate an already overburdened public defender system.

A. Refusing to extend the Abandonment Doctrine's protections to an inmate who is able to retain counsel after filing a timely initial *pro se* motion frustrates the purposes of Rule 29.15, creating a disincentive to hire private counsel.

The Abandonment Doctrine was created as an enforcement mechanism of the right to counsel created by Rule 29.15 and thus as a protection for inmates who lack the legal expertise required to review *pro se* motions. *See Price v. State,* 422 S.W.3d 292, 297 (Mo. banc 2014); *Luleff v. State*, 807 S.W.2d 195 (Mo. banc 1991); *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991).

The Court has created a limited right to assistance of counsel "after a defendant indicates an intent to seek relief under *Rule 29.15* by filing the original motion" *pro se*. *Price*, 422 S.W.3d at 298. This Court has reasoned that legal assistance is not required to file the original motion because an original motion is "relatively informal" and need only give notice that the inmate intends to pursue relief under Rule 29.15. *Id.* at 298-99. An

amended motion, by contrast, is a final pleading requiring legal expertise, which Rule 29.15 is intended to provide. *Id.* at 288.

The right to counsel created under the Rule establishes minimum standards of representation by requiring "counsel to investigate the claims raised in the inmate's timely initial motion," creating an affirmative duty upon counsel to, after investigation, "then file either an amended motion or a statement explaining why no amended motion is needed." *Id.* at 297. This Court has deemed that performance of these duties is "essential because [of] the limited scope of appellate review" and the need for legal expertise which a *pro se* litigant does not typically possess. *Id.*

This Court then went on to clarify that "a complete absence of performance by appointed counsel is tantamount to a failure of the motion court to appoint counsel under *Rule 29.15(e)* in the first instance, [compromising] the integrity of the procedures set forth in the rule." *Id.* That is, a complete absence of performance frustrates the purpose of the Rule because the timely filed *pro se* initial motion does not receive the intended investigation and legal review needed to assure its proper drafting. The abandoned inmate thus is protected from such absence of performance by the court either appointing new counsel or allowing additional time for counsel to perform the duties required by *Rule 29.15(e)*.

Should this Honorable Court refuse to extend the Abandonment Doctrine's protections against complete absence of performance to private counsel, the claims raised in the previously *pro se* inmate's timely filed initial motion may go uninvestigated and

the legal expertise required for the final pleading may never be afforded to that inmate. This puts the inmate who is able to hire private counsel after filing a timely initial motion *pro se* at a disadvantage over an inmate who allows appointed counsel to remain on his case. Such application violates Article I, Sections 2 and 14 of the Missouri Constitution as well as the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which guarantee that all persons are entitled to equal rights and opportunity under the law. Such unequal application of the Abandonment Doctrine creates a strong disincentive for inmates to relieve appointed counsel by hiring private counsel.

B. The disincentive to hire private counsel exacerbates the already overburdened public defender system.

In 2013, the American Bar Association (hereinafter sometimes referred to as "the ABA"), the Missouri State Public Defender System (hereinafter sometimes referred to as "MSPD"), and RubinBrown LLP collaborated on THE MISSOURI PROJECT in order to develop data-supported workload standards by analyzing data from MSPD practitioners and experienced private-practice criminal defense attorneys. RubinBrown published the project in 2014. *See* RUBINBROWN LLP ON BEHALF OF THE AMERICAN BAR ASSOCIATION'S STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS WITH A NATIONAL BLUEPRINT (June 2014), *http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.authcheckdam.pdf* (last visited 11/18/2016).

The Project developed workload standards, creating a table with the time required for an attorney to provide a reasonably effective defense for different case types. *Id.* at 21. The Project then catalogued the average reported case-related hours which MSPD attorneys reported actually spending on each case type. *Id*. at 16. These reported numbers were significantly less than the standard, suggesting that the MSPD system is experiencing excessive caseloads.

The MSPD system has created an Appellate/Post-Conviction Division, which has been overseen since 2006 by the now Deputy Director, Mr. J. Gregory Mermelstein, who has laid out an affidavit available to the Court and incorporated herein by reference. This Division is responsible for staffing the appointed counsel across the State of Missouri in Rule 29.15 and Rule 24.035 cases and employs twenty-seven attorneys across six offices throughout the State of Missouri.

These twenty-seven appointed lawyers opened 809 new post-conviction cases in fiscal year 2016 alone, in addition to other case types for which they are responsible. According to Mr. Mermelstein's affidavit, however, based on the caseload standards developed by RubinBrown in conjunction with the ABA, the MSDP "currently needs approximately forty-three additional attorneys to meet the [D]ivision's total caseload needs." That is, the Division needs nearly 1.5 times more attorneys than are currently employed to be appointed under Rules 29.15 and 24.035.

In 2015, the Civil Rights Division of the United States Department of Justice released a report regarding its investigation of the St. Louis Family Court which also

noted that MSPD "has faced extraordinary challenges for a number of years due to extremely limited resources and a chronic budgetary crisis" and that "MSPD continues to be stretched beyond reasonable capacity despite its repeated warnings about the dire consequences this poses for indigent defendants." CIVIL RIGHTS DIVISION, UNITED STATES DEPARTMENT OF JUSTICE, INVESTIGATION OF THE ST. LOUIS COUNTY FAMILY COURT | ST. LOUIS, MISSOURI, (July 31, 2015), *https://www.justice.gov/sites/default/files/crt/legacy/2015/07/31/stlouis_findings_7-31-15.pdf* (last visited 11/20/2016) at 8-9.

"Excessive workloads result in insufficient time available to provide reasonably effective assistance of counsel to all clients." RUBENBROWN at 5. Therefore, alleviation of the excessive caseload facing these twenty-seven appointed lawyers would benefit all inmates filing *pro se* Rule 29.15 or Rule 24.035 motions and should be encouraged by this Honorable Court. An interpretation of the duties under Rule 29.15(e) that creates a disincentive to hire private counsel should be carefully examined and interpreted in a manner consistent with alleviation of appointed counsel.

When inmates retain private counsel on Rule 29.15 and Rule 24.035 cases, the twenty-seven MSPD attorneys of the Appellate/Post-Conviction Division are alleviated from responsibility in those cases, lessening their workload and allowing for more time to spend on the remaining clients. For the reasons expounded upon above, refusing to extend the Abandonment Doctrine protections to private counsel creates a disincentive to

hire private counsel and a disincentive to alleviate the excessive MSPD caseloads. Rule 29.15(e) should not be interpreted as such.

II. The Abandonment Doctrine should hold all defense counsel, appointed and retained alike, to the same minimum standards created by Rule 29.15(e) in order to ensure the timely-filed initial *pro se* motion obtains the legal expertise it requires because failing to do so draws an arbitrary bright line between the quality of representation afforded by appointed and retained counsel, which should be discouraged.

This Court has determined that no federal constitutional right to post-conviction counsel exists; therefore review of claims regarding ineffective assistance of post-conviction counsel in a post-conviction proceeding is prohibited. *Price v. State,* 422 S.W.3d 292, 296 (Mo. banc 2014). However, this Honorable Court has recognized the limited right to post-conviction counsel which attaches "*after* a defendant indicates an intent to seek relief under Rule 29.15 by filing the original motion" created by Rule 29.15. *Id.* at 299 (emphasis in original). To enforce this limited right, this Court established the Abandonment Doctrine in *Luleff* and *Sanders*. *Luleff v. State,* 807 S.W.2d 195 (Mo. banc 1991); *Sanders v. State,* 807 S.W.2d 493 (Mo. banc 1991).

Entitled "*Pro Se Motion – Appointment of Counsel – Amended Motion, Required When,*" Rule 29.15(e) provides in whole:

> When an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant.

> Counsel shall ascertain whether sufficient facts supporting the claims are asserted in the motion and whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence. If the motion does not assert sufficient facts or include all claims known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and claims. If counsel determines that no amended motion shall be filed, counsel shall file a statement setting out facts demonstrating what actions were taken to ensure that (1) all facts supporting the claims are asserted in the pro se motion and (2) all claims known to the movant are alleged in the pro se motion. The statement shall be presented to the movant prior to filing. The movant may file a reply to the statement not later than ten days after the statement is filed.

This Rule establishes the minimum standard of representation by imposing an affirmative duty on post-conviction counsel to investigate the claims made in a *pro se* motion and then either (1) file an amended motion fixing deficiencies in or adding additional claims to the original motion or (2) essentially assuring the court that counsel did his or her job by affirmatively filing "a statement setting out facts demonstrating what actions were taken." Rule 29.15(e).

The *Luleff* Court found Abandonment where there was a complete absence of performance by counsel after Luleff's initial *pro se* motion was timely filed. *Luleff*, 807 S.W.2d at 498. The *Sanders* Court found Abandonment where there was an untimely filing of an amended motion by counsel, which the Court determined was tantamount to not having a lawyer's assistance at all. *Sanders,* 807 S.W.2d at 495. Therefore, "Abandonment occurs when (1) post-conviction counsel takes no action on a movant's behalf with respect to filing an amended motion and as such the record shows that the movant is deprived of a meaningful review of his claims; 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." *Taylor v State,* 245 S.W.3d 856, 857 (Mo. banc 2008)(quoting *Barnett v. State*, 103 S.W.3d 765, 773-74 (Mo. banc 2003))[*]*; see also Stanley v. State*,

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[*]The case of David Barnett illustrates why it matters whether this Court maintains at least a minimal standard of performance for all counsel in actions under Mo. S. C. R. 24.035 and 29.15. In *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), the Supreme Court of the United States held that acts or omissions of state post-conviction relief (PCR) counsel may be "cause" for a federal habeas corpus petitioner's overcoming a procedural default created by an act or omission of state PCR counsel. In Mr. Barnett's case, this Court held that PCR counsel had failed to comply with this Court's rules in the presentation of his claims of ineffective assistance of trial counsel in the penalty phase. The U.S. District Court for the Eastern District of Missouri, the Hon. E. Richard Webber, found that under

420 S.W.3d 532, 542 (Mo. banc 2014)(citing *State v. Bradley*, 811 S.W.2d 379, 384 (Mo. banc 1991)). Both appointed and retained counsel alike can default in carrying out the obligations imposed by the post-conviction rules. Such default leaves an inmate with appointed counsel and an inmate able to retain counsel, who have both timely filed a *pro se* motion, in the same position: without the Rule's intended legal expertise and, thus, abandoned.

"Absent some performance by appointed counsel, the motion court cannot determine whether the *pro se* pleading can be made legally sufficient by amendment or whether there are other grounds for relief known to movant but not included in the *pro se* motion." *Luleff*, 807 S.W.2d at 497. Drawing a line between appointed and retained

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Martinez, Mr. Barnett was entitled to overcome the resulting procedural default which it had enforced before *Martinez*, *Barnett v. Roper*, 941 F.Supp.2d 1099 (E.D. Mo. 2013), and granted an evidentiary hearing, in light of which nine-day hearing it granted relief, then denied the respondent's motion under Fed. R. Civ. P. 59(e). 2016 WL 278861 (Jan. 22, 2016). Judge Webber's grant of relief is now on the respondent's appeal before the U.S. Court of Appeals for the Eighth Circuit. No. 16-1467.

The *Barnett* case illustrates what happens when the state's PCR practice does not come up to the expectations this Court has set for PCR counsel. This Court has established a remedy for what happens when they do not. The question before it now is whether the accident that counsel is retained should be the reason for any departure from the standard the Court has set.

counsel in this instance is arbitrary because there is no assurance based on that distinction alone regarding the quality of representation or that the motion court will be able to determine "whether the *pro se* pleading can be made legally sufficient by amendment or whether there are other grounds for relief known to movant by not included in the *pro se* motion." Applying the Abandonment Doctrine to appointed counsel arbitrarily assumes that appointed counsel's representation requires court supervision more so than privately retained counsel in order to ensure these minimum standards have been met. After all, the Abandonment Doctrine assumes that if counsel has not so affirmatively indicated that he or she has performed his or her duty that this would be tantamount to not having a lawyer at all, leaving the client abandoned.

This Court has recognized Abandonment as a narrow exception to the time limits in the rules for filing amended post-conviction motions. *Taylor*, 245 S.W.3d at 858. While the Court recognizes this limited right to assistance of counsel, the Court has been wary of "ineffective assistance claims masquerading as abandonment claims." *Price*, 422 S.W.3d at 299. This wariness has been addressed in cases where counsel's timely amended motion is alleged to be substantively deficient, or where counsel failed to act in filing an *initial* motion on behalf of the inmate. See *Stanley,* 420 S.W.3d at 541(finding no abandonment where original Rule 29.15 counsel timely filed amended motion alleging claims outside of initial motion but allegedly failed to include all known claims and substitute counsel filed second amended motion with missing claims out of time); *Taylor*, 254 S.W.3d 856 (Mo. banc 2008)(finding no abandonment where timely-filed amended

motion allegedly failed to brief a certain issue because such amounted to a non-cognizable allegation of ineffective assistance of post-conviction appellate counsel); *Bullard v. State*, 853 S.W.2d 921(Mo. banc 1993) (finding no abandonment where counsel filed initial Rule 29.15 motion out of time); *Price,* 422 S.W.3d 292 (finding no abandonment where retained counsel filed initial Rule 29.15 motion out of time).

The historical approach with which this Honorable Court has treated the Abandonment analysis and its wariness towards ineffective assistance claims should not be overlooked. In both *Bullard* and *Price*, the counsel at issue were retained and not appointed, yet the Court did not address this would-be dispositive issue in either case or even draw much attention in its analysis to the nature of counsel. See generally *Price*, 422 S.W.3d 292; *Bullard,* 853 S.W.2d 921. It is likely that the Court did not address the nature of counsel in its analysis intentionally because no bright line exists between the quality of representation afforded by retained and appointed counsel.

Given that Rule 29.15(e) imposes a positive duty on counsel to either file an amended motion or file a statement assuring the court counsel has done his or her job, requiring appointed counsel and not retained counsel to provide such assurances arbitrarily draws a bright line between the quality of representation the Court expects to be provided by counsel based simply on whether or not counsel is paid by the inmate or by the State. Rule 29.15 should not be interpreted as such.

The Court cannot rely on retained post-conviction counsel having as extensive a background and experience as retained counsel possesses in the instant case in order to

draw a bright line rule between appointed and retained counsel. "Retained counsel" may have extensive experience or be a "newly admitted lawyer" who may incorrectly think he is or can become "as competent as a practitioner with long experience" under the ethical rules. *See* Comments 1 and 2 to Rule 4-1.1. Contrarily, "appointed counsel" in Missouri is more likely to have at least ten years experience in applicable post-conviction proceedings, or even as many as thirty-one years experience in applicable post-conviction proceedings. *See* Affidavit by Mr. J. Gregory Mermelstein, Deputy Director of the Appellate/Post-Conviction Division of MSPD (16 out of 27, or 59%, of the available attorneys for appointment in Missouri's post-conviction cases have at least ten years experience in such cases).

Mo. S. Ct. R. 4-1.1 requires that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment 1 establishes a factor test to determine whether a lawyer has the requisite knowledge and skill in a particular matter, encouraging counsel to consider "the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question." However, Comment 2 goes on to suggest that counsel "need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar" and

that "[a] newly admitted lawyer can be as competent as a practitioner with long experience."

To help ensure competence, every lawyer actively practicing law in Missouri must annually complete fifteen hours of continuing legal education, including two hours of professionalism, substance abuse and mental health, ethics or malpractice prevention credit. Mo. S. Ct. R. 15.05. However, lawyers newly admitted to the Missouri Bar are excepted from the reporting year in which they are admitted. *Id.* Furthermore, while common sense would suggest lawyers participate in CLEs applicable to their practice, there is no requirement that they do so. *Id.* This means that retained counsel may be extensively trained and experienced or have little to no education in post-conviction proceedings.

By contrast, the twenty-seven lawyers employed by the Missouri Public Defender System (hereinafter sometimes referred to as "MSPD") to be appointed in Rule 29.15 and 24.035 cases "tend to have high experience levels in post-conviction practice." These twenty-seven lawyers have an average of twelve years experience in post-conviction representation. Of the available twenty-seven appointed attorneys, sixteen have at least ten years of experience in circuit-court level of post-conviction proceedings, with one having as much as thirty-one years experience.

In addition to this experience, MSPD provides post-conviction in-house training and updates on post-conviction case law. All attorneys are supervised by an experienced

post-conviction District Defender who oversees cases and provides in-house, hands-on training.

There is no assurance of the quality of representation to be drawn simply between whether or not counsel is retained or appointed. Drawing a bright line between representation afforded by retained and appointed counsel is arbitrary and contrary to the spirit of the Abandonment Doctrine, which seeks to enforce the minimum standards of representation in order to ensure that the intended legal expertise and review is afforded to the *pro se* litigant after he has notified the court of his intent to seek relief under *Rule 29.15*.

Conclusion

Applying the Abandonment Doctrine to appointed and not retained counsel would leave an inmate who is able to retain counsel after filing a timely initial motion *pro se* without the Abandonment Doctrine's intended protections, creating a disincentive to hire private counsel and a disincentive to alleviate an already overburdened public defender system. Furthermore, the Abandonment doctrine should hold all defense counsel, appointed and retained alike, to the same minimum standards created by Rule 29.15(e) in order to ensure the initial motion obtains the legal expertise it requires after its timely *pro se* filing because failing to do so draws an arbitrary bright line between the quality of representation afforded by appointed and retained counsel, which should be discouraged.

WHEREFORE, the amici pray the Court for its order that the judgment of the court below be vacated, and the cause remanded.

Respectfully Submitted,

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Certificate of Compliance

I certify that (1) the foregoing brief complies with the limitations contained in Mo. S. Ct. R. 84.06(b), and contains 4543 words in Times New Roman 13, excluding the cover, the signature block, this certification, the certificate of service, as determined by Microsoft Word for Mac 2011; and (2) the electronic copy of this brief submitted electronically has been scanned for viruses and the program used reports that it is virus-free or words to that effect.

s/Denise L. Childress
Attorney for Amici

Certificate of Service

I hereby certify that electronic copies of the joint amicus brief of the Missouri Association of Criminal Defense Lawyers and the Missouri Society for Criminal Justice was delivered through the Missouri e-Filing System, this twenty-first day of November 2016, to counsel for all parties.

s/Denise L. Childress
Attorney for Amici

ADDENDUM

AFFIDAVIT

Comes now, J. Gregory Mermelstein, being duly sworn and states on his oath the following:

1. My name is J. Gregory Mermelstein.

2. I am the Deputy Director of Specialty Practices and Resources for the Missouri Public Defender System (MSPD). Among my duties is to oversee the Public Defender's Appellate/Postconviction Division. I was the Public Defender's Appellate/Postconviction Director from 2006-2015 before becoming Deputy Director.

3. MSPD has six offices which provide representation under Rules 24.035 and 29.15. Five of those offices – two in St. Louis, two in Kansas City and one in Columbia -- provide circuit court-level representation in 24.035 and 29.15 cases, in addition to providing representation in direct and/or postconviction appeals. One of the offices – in Columbia -- provides representation in direct and postconvictions appeals only.

4. MSPD's six appellate/postconviction offices employ a total of 37 attorneys, 27 of whom provide representation in circuit court-level 24.035 and 29.15 cases. Most of the 27 also provide representation in some appellate cases.

5. The attorneys who provide circuit-court level 24.035 and 29.15 representation tend to have high experience levels in postconviction practice. Of

the 27 attorneys who provide circuit court-level 24.035 and 29.15 representation, the average years of experience doing postconviction representation is 12 years. Of those 27, the attorney with the greatest years of experience has 31 years of postconviction experience; the two newest attorneys have approximately one year experience each. Eight attorneys have more than 20 years of postconviction experience each. Another eight attorneys have between 10 and 19 years of postconviction experience each. In other words, 16 of the 27 attorneys have at least 10 years of circuit-court level postconviction experience.

6. MSPD provides postconviction training for its postconviction attorneys. MSPD provides in-house (and some limited out-of-house) postconviction training for attorneys. All attorneys are supervised by a District Defender who is experienced in postconviction representation, and who provides "hands-on" training for new attorneys in how to do postconviction cases. In addition, MSPD produces and publishes an internal quarterly case law update, which includes new case law on postconviction matters. MSPD also holds occasional in-house formal or informal CLE programs on how to do postconviction cases, and current developments in postconviction. MSPD's death penalty postconviction attorneys are required to meet the additional training requirements set forth in Rule 29.16(b)(1).

7. Although MSPD has 27 attorneys who provide circuit-court level postconviction representation, this is too few attorneys to adequately meet the caseload need. In fiscal year 2016 (July 1, 2015 through June 30, 2016), MSPD opened 547 new Rule 24.035 cases and 262 new Rule 29.15 cases, for a total of 809 new postconviction cases. This 809 number does not include cases that remained open (unfinished) from prior fiscal years. (This 809 number also does not include direct or postconviction appeals, which are also handled by the Appellate/Postconviction Division and most of the 27 attorneys who also do circuit-court level postconviction representation. The Division's total new cases in FY16 was 1,630.) MSPD has a caseload standard developed by the RubinBrown accounting firm in conjunction with the American Bar Association. That standard indicates that the Appellate/Postconviction Division currently needs approximately 43 additional attorneys to meet the Division's total caseload needs.

8. Because MSPD is understaffed, MSPD cannot meet Missouri's need for postconviction representation by itself. The private bar plays an important role in meeting that need. If postconviction case law were to develop in such a way that postconviction movants would be discouraged from hiring private counsel, that would further exacerbate MSPD's caseload problems since MSPD would likely be appointed to more postconviction cases. If Rules 24.035 and 29.15 do not require the same level of competence for private counsel as for public defender

counsel – i.e., the same level of protection from abandonment by private counsel as for public defender counsel – there could develop a disincentive for postconviction movants to hire private counsel.

Respectfully submitted,

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STATE OF MISSOURI)
) ss.
COUNTY OF Boone)

Subscribed and sworn to before me this 21st day of November 2016.

JANET DIEMLER
Notary Public - Notary Seal
State of Missouri, Callaway County
Commission # 12500024
My Commission Expires Apr 9, 2020

Janet Diemler
Notary Public

My Commission Expires: April 9, 2020.