

No. SC95953

In the
Supreme Court of Missouri

PAUL GITTEMEIER,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

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

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Appellant (Defendant) appeals from a Warren County Circuit Court judgment overruling his Rule 29.15 motion for postconviction relief seeking to set aside his convictions for felony DWI (chronic offender) and misdemeanor first-degree trespassing, for which he was given a total sentence of 15 years' imprisonment.

In the underlying criminal case, Defendant was charged as a persistent felony offender and a chronic DWI offender in Warren County Circuit Court with felony driving while intoxicated and misdemeanor first-degree trespassing. (PCR L.F. 61).¹ Defendant was tried before a jury on February 21, 2012, and was found guilty as charged on all counts. (PCR L.F. 61–62). The trial court imposed concurrent sentences of 15 years for felony DWI as a chronic offender and 90 days for the misdemeanor trespassing. (PCR L.F. 62).

As taken from the Court of Appeals' opinion in Defendant's direct appeal in the underlying criminal case, the evidence presented at trial showed that:

¹ The record Defendant filed in the Court of Appeals consists only of the legal file (PCR L.F.) and evidentiary-hearing transcript (PCR Tr.) in this postconviction appeal. The State filed a supplemental legal file (Supp. PCR L.F.) containing additional documents from the circuit court's file in this postconviction case.

At approximately 5:45 a.m. on July 31, 2010, Gittemeier's neighbor, James Preis, witnessed Gittemeier riding his ATV on Preis's lawn while holding what appeared to be a bottle of vodka. Preis told Gittemeier to leave and called the police. Gittemeier drove away and then returned, when he proceeded to tip over the ATV following an apparent attempt to do "donuts" on the lawn. Preis tackled Gittemeier with the intent to hold him until police came. He testified Gittemeier smelled of alcohol, was incoherent and slurring, discussed random topics, and started to doze off. After fifteen minutes, Preis released Gittemeier, who walked home.

Sheriff's Deputy Kurt Hey arrived around 6:30 a.m., and made contact with Gittemeier at his residence. Deputy Hey testified that when he interviewed Gittemeier at around 6:45 a.m., Gittemeier had bloodshot eyes, was mumbling, smelled of intoxicants, and was swaying and stumbling. Gittemeier admitted to drinking "a few" drinks and stated he had not consumed any alcohol after the incident with Preis. Deputy Hey conducted several standardized field sobriety tests, which Gittemeier failed. Deputy Hey concluded Gittemeier was intoxicated and placed him under arrest at 7:40 a.m. After he was arrested, Gittemeier again stated he had not consumed any alcohol after the incident. Gittemeier refused a breath test, and, after a warrant was obtained, a paramedic conducted two blood draws at 11:36 a.m. and 12:06 p.m. The 11:36 a.m. blood sample

revealed Gittemeier had a blood alcohol content (“BAC”) of 0.170%, and the 12:06 p.m. sample revealed a BAC of 0.167%.

State v. Gittemeier, 400 S.W.3d 838, 840 (Mo. App. E.D. 2013).

The Court of Appeals affirmed Defendant’s conviction and sentences on direct appeal. (PCR L.F. 29). The mandate in Defendant’s direct appeal was issued on July 18, 2013. (PCR L.F. 16, 63).

On October 15, 2013, Defendant timely filed a Rule 29.15 pro se motion for postconviction relief accompanied by an affidavit of indigency.² (PCR L.F. 1, 9–14). Defendant’s pro se motion contained one claim: That “[t]rial counsel was ineffective for failing to challenge whether an ATV is a motor vehicle pursuant to RSMo 577.010.” (PCR L.F. 10).

Two days later (October 17, 2013), the circuit court appointed the Public Defender’s Office as counsel for Defendant. (PCR L.F. 1; Supp. PCR L.F. 1). On November 7, 2013, an assistant public defender (Arthur Allen) entered an appearance and requested a 30-day extension to file an amended postconviction motion, which the circuit court granted that same day. (PCR L.F. 1; Supp. PCR L.F. 2–4).

² Defendant’s affidavit averred that he “was currently incarcerated and [had] no employment or financial resources to secure representation to litigate my claims for post-conviction relief.” (PCR L.F. 14).

On January 7, 2014, appointed counsel (Arthur Allen) filed a motion to withdraw and to rescind the appointment of counsel. (Supp. PCR L.F. 5–7). The motion alleged that Defendant, who had been represented by privately retained counsel in his underlying criminal case, was sent an application for public defender services on November 5, 2013, but had failed to return this required application for over two months. (Supp. PCR L.F. 6). Without this application, the Public Defender was unable to determine whether Defendant was eligible for representation by that office. (Supp. PCR L.F. 6). The motion finally alleged that Defendant, “or someone on his behalf,” had “retained private counsel, Richard Sindel, to represent [Defendant] in this matter and Mr. Sindel has entered his appearance” for Defendant.” (Supp. PCR L.F. 6).

Also on January 7, 2014, Defendant’s privately retained counsel (Richard Sindel) fax-filed an entry of appearance on behalf of Defendant and a “motion for extension of time” to file Defendant’s postconviction motion. (PCR L.F. 1–2; Supp. PCR L.F. 8–10). The extension motion acknowledged that: (a) counsel was appointed for Defendant on October 17, 2013; (b) on November 7, 2013, appointed counsel was granted a 30-day extension to file the amended motion; and (c) Defendant’s amended motion was due on January 15, 2014. (Supp. PCR L.F. 9). The motion also alleged that retained counsel had not yet received the file and needed more time to fully review it.

(Supp. PCR L.F. 9). Retained counsel asked for a 60-day extension until March 16, 2014, to file Defendant's amended motion. (Supp. PCR L.F. 9).

On January 9, 2014, the motion court entered an order rescinding the appointment of counsel, allowing appointed counsel (Arthur Allen) to withdraw, and granting retained counsel (Richard Sindel) an extension of time to file the amended motion. (PCR L.F. 2; Supp. PCR L.F. 11–12).

Defendant's retained counsel (Richard Sindel) filed an amended postconviction motion containing 23 separate claims on March 14, 2014. (PCR L.F. 2, 15–25). One of those claims (§ 7(a)) was that Defendant's trial and direct-appeal counsel were ineffective for "fail[ing] to challenge whether an ATV is a motor vehicle pursuant to RSMo. 577.010, thus conceding to a material element of the offense charged." (PCR L.F. 17).

The motion court conducted an evidentiary hearing on the postconviction claims asserted in Defendant's amended motion. (PCR L.F. 63; PCR Tr. 2–87). Defendant called his trial counsel as a witness, but he asked him no questions about his alleged failure to challenge whether an ATV is a motor vehicle under Missouri's DWI law. (PCR Tr. 35–84). Defendant did not call

his direct-appeal counsel during the postconviction evidentiary hearing.³ The motion court later entered findings and a judgment denying the claims raised in Defendant's amended postconviction motion. (PCR L.F. 60–71). The motion court denied the claim regarding counsel's alleged failure to challenge whether an ATV is a motor vehicle on the ground that Defendant failed to present any evidence to support that claim. (PCR L.F. 64).

³ Defendant's direct-appeal counsel raised a sufficiency claim challenging whether an ATV is a motor vehicle under the DWI statute. *See Gittemeier*, 400 S.W.3d at 843–44.

STANDARD OF REVIEW

This appeal relates solely to the motion court's judgment overruling Defendant's postconviction motion. Appellate review of a judgment overruling a postconviction motion is limited to determining whether the motion court's findings of fact and conclusions of law are "clearly erroneous." *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); see also *Barnett v. State*, 103 S.W.3d 765, 768 (Mo. banc 2003); Rule 29.15(k). Appellate review in postconviction cases is not de novo; rather, the findings of fact and conclusions of law are presumptively correct. *Wilson v. State*, 813 S.W.2d 833, 835 (Mo. banc 1991). "Findings and conclusions are clearly erroneous only if a full review of the record definitely and firmly reveals that a mistake was made." *Morrow*, 21 S.W.3d at 822.

ARGUMENT

The motion court's judgment denying postconviction relief should be affirmed because: (1) retained counsel untimely filed the amended postconviction motion; (2) the circuit court had no authority to grant a second extension of 60 days in which to file the amended motion since Rule 29.15(g) permits only one 30-day extension; (3) the only claim asserted in the pro se motion—that an ATV is not a motor vehicle under the DWI law—was also asserted in the untimely filed amended motion; (4) this claim was rejected by the motion court because Defendant did not present any evidence regarding it during the postconviction evidentiary hearing; and (5) this claim is refuted by the record as the Court of Appeals held on direct appeal that an ATV may be considered a motor vehicle under Missouri's DWI law.

Furthermore, the record refutes any claim of abandonment based on the untimely filing of the amended motion by retained counsel because the abandonment doctrine applies only to appointed counsel under Rule 29.15(e) and not privately retained attorneys.⁴ (Responds to Defendant's Points I and II).

⁴ Defendant's claims on appeal are: (1) that the abandonment doctrine should be expanded to apply when retained counsel fails to timely file an amended

A. Defendant's amended postconviction motion was untimely filed.

Defendant's timely filed pro se motion was accompanied by an affidavit of indigency ("Forma Pauperis Affidavit") asserting that he had no means to hire an attorney. (PCR L.F. 14). In response to this filing, the circuit court, acting in accordance with the postconviction rules, appointed the public defender as counsel for Defendant on October 17, 2013. (PCR L.F. 1; Supp. PCR L.F. 1). *See* Rule 29.15(e) ("When an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant.").

Under Rule 29.15, the 60-day deadline for filing the amended postconviction motion began on the day the court appointed counsel for Defendant:

If an appeal of the judgment sought to be vacated, set aside, or corrected is taken, the amended motion shall be filed within sixty days of the earlier of: (1) the date both the mandate of the appellate court is issued and counsel is appointed or (2) the date both the mandate of the appellate court is issued and an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant.

postconviction motion (Point I); and (2) that Defendant was abandoned by retained counsel in this case (Point II). Defendant does not contend that he was abandoned by any other attorney.

Rule 29.15(g). Appointed counsel from the public defender's office sought and received a 30-day extension in which to file an amended postconviction motion. (PCR L.F. 1; Supp. PCR L.F. 2–3). The postconviction rules permit the circuit court to grant only one extension, which may not exceed 30 days, in which to file an amended motion: “The court may extend the time for filing the amended motion for *one* additional period *not to exceed thirty days*.” Rule 29.15(g) (emphasis added).

As calculated by these rules, the deadline for filing Defendant's amended postconviction motion was Wednesday, January 15, 2014. Consequently, Defendant's amended postconviction motion filed on March 14, 2014, was untimely. (PCR L.F. 2, 15).

Defendant contends that a second extension was permissible when the motion court allowed appointed counsel from the public defender's office to withdraw from the case, rescinded its order of appointment, accepted the entry of appearance of retained counsel, and granted a 60-day extension in which to file an amended motion. The problem with this argument is that the motion court had no authority to reset the deadline by rescinding the order of appointment and giving private counsel an additional 60 days in which to file an amended motion.

A nearly identical situation occurred in *Silver v. State*, 477 S.W.3d 697 (Mo. App. E.D. 2015). There, the motion court appointed the public defender

as counsel for the postconviction defendant and granted appointed counsel an extension of 30 days in which to file an amended postconviction motion. *Id.* at 698. About a month later, appointed counsel withdrew from the case and retained counsel entered an appearance and asked for an extension of time to file the amended motion, which was granted. *Id.* The Court of Appeals held that the time period for filing the amended motion began when the public defender was appointed, and it did not reset or restart upon the entry of retained counsel:

The rule provides that the sixty-day time period begins to run when the appellate court's mandate is issued and either counsel is appointed or non-appointed counsel enters an appearance. The time limit begins to run on one date; it does not start and re-start whenever new counsel enters an appearance on the movant's behalf.

Id. at 699.

The court further held that to construe the rule otherwise “would allow post-conviction movants to indefinitely toll the sixty-day deadline any time new counsel entered an appearance.” *Id.* Such a construction, the court explained, “would contradict ‘the purpose of the rule, which is to serve as an effective and *efficient* substitute for the writ of habeas corpus.’” *Id.* (emphasis in original) (quoting *Dougan v. State*, 118 S.W.3d 593, 596 (Mo. banc 2003)).

Since the amended motion had been filed more than 90 days after the

original appointment of counsel, it was untimely. *Id.* See also *Pulliam v. State*, 484 S.W.3d 877, 881 (Mo. App. E.D. 2016) (holding that postconviction motion courts have no authority to grant more than one 30-day extension in which to file an amended motion).

The court's decision in *Silver* broke no new ground. It faithfully followed the principles set down a year earlier by this Court in *Stanley v. State*, 420 S.W.3d 532 (Mo. banc 2014). There, the appointed counsel for the Rule 24.035 postconviction defendant timely filed an amended postconviction motion and then was allowed to withdraw from the case. *Id.* at 538. Although a second lawyer, also from the public defender's office, entered an appearance after the 60-day deadline for filing the amended motion had expired, the motion court nevertheless permitted a second amended postconviction motion to be filed out of time. *Id.* at 539.

This Court held that the second amended motion was untimely because the deadline for filing the amended motion had passed before the second lawyer had entered the case.⁵ *Id.* at 539. Moreover, the fact that the

⁵ Although *Stanley* involved a construction of Rule 24.035(g), its holding applies with equal force in this Rule 29.15 case. See *Vogl v. State*, 437 S.W.3d 218, 224 n.7 (Mo. banc 2014) (“[C]ase law interpreting a provision that is

defendant’s “first post-conviction counsel had the motion court’s permission to withdraw [made] no difference because the date of first appointment of counsel controls the time for filing an amended motion, regardless of whether the court later appoints new counsel or allows new counsel to enter an appearance.” *Id.* at 540–41. This Court further held that the motion court had no authority to extend the deadline and permit the filing of an untimely amended motion.⁶ *Id.* at 541 (“A motion court has no authority to extend this time limit for filing an amended motion.”).

This Court also explained that the postconviction “rules have mandatory time limits because a post-conviction motion is a collateral attack on the final judgment of a court.” *Id.* See also *Price v. State*, 422 S.W.3d 292, 296 (Mo. banc 2014) (noting that postconviction proceedings “come at the expense of the public’s substantial interest in preserving the finality of criminal convictions”). The “purpose of the time limits in the post-conviction rules is to prevent ‘duplicative and unending challenges to the finality of a judgment.’”

identical in both [postconviction] rules applies equally in proceedings under either rule.”).

⁶ This Court also noted that the State’s failure to object to the filing of the untimely amended motion was of no moment since the State “cannot waive compliance” with the postconviction time limits. *Id.* at 540 n.5.

Stanley, 420 S.W.3d at 541 (quoting *Dorris v. State*, 360 S.W.3d 260, 269 (Mo. banc 2012)). See also *Price*, 422 S.W.3d at 296 (noting that the purpose of the postconviction 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.”). *Stanley* expressly holds that the mandatory deadline for filing an amended motion cannot be restarted or reset by the later entry or appointment of new postconviction counsel once the deadline has begun running:

Post-conviction counsel cannot usurp this purpose by withdrawing and replacing lawyers to reestablish when the limitations period begins running for amended motions, and neither can the circuit court by giving counsel permission to withdraw and “reappointing” another lawyer.

Stanley, 420 S.W.3d at 541. “The earlier of the date of first appointment or entry of appearance continues to control the time limit for filing an amended motion, regardless of whether a new lawyer appears.” *Id.*

Defendant contends that the motion court had authority to grant a second extension after appointed counsel withdrew, and that this Court’s opinion in *Stanley* should not control because it was handed down two weeks after the motion court had granted the second extension.

This argument is unavailing because the plain language of Rule 29.15(e) expressly states that only one extension for no more than 30 days may be granted. Here retained counsel sought a second extension period of sixty days, which is clearly unauthorized by the rule. Second, the principle that a postconviction motion court may grant only one extension for filing the amended motion—even if the defendant’s counsel withdraws and is replaced by another attorney—was established well before *Stanley* was decided.

In *State v. White*, 873 S.W.2d 590 (Mo. banc 1994), the postconviction defendant’s first appointed counsel received a 30-day extension to file an amended motion. *Id.* at 596. This attorney later withdrew without the court’s permission before the time for filing an amended motion had expired, and a second appointed attorney entered and filed an amended motion 4 days after the deadline and was also granted an additional 60 days to file a second amended motion. *Id.* at 596. This Court held that the motion court had no authority to grant a second extension of time to file an amended postconviction motion “because Rule 29.15 clearly states that the court may grant only one extension not to exceed thirty days.”⁷ *Id.*

⁷ Although this Court in *White* found that the defendant had been abandoned by appointed counsel when the Public Defender’s Office switched attorneys without the motion court’s permission, *id.* at 598–99, the principle of

Thus, the time limit for filing Defendant's amended postconviction motion began running with the motion court's October 17, 2013 appointment of the public defender as counsel. (PCR L.F. 1; Supp. PCR L.F. 1). The initial 60-day deadline was then extended on November 7, 2013, for one additional 30-day period as permitted under Rule 29.15(g). (PCR L.F. 1). This made the deadline for filing Defendant's amended motion January 15, 2014. That deadline was not reset when retained counsel entered an appearance and appointed counsel withdrew. The motion court had no authority to extend the deadline a second time for an additional 60 days at the request of Defendant's newly retained private counsel. Consequently, the amended motion filed on March 14, 2014 was untimely.

B. The abandonment doctrine does not apply in this case.

Since Defendant's amended motion was untimely filed, this Court must determine what action to take. In the usual case, this Court would remand the case without considering the underlying merits and direct the motion court to conduct an abandonment inquiry. *See Moore v. State*, 458 S.W.3d 822

abandonment does not apply in Defendant's case because, as explained below, Defendant retained private counsel to represent him after he initially sought appointed counsel.

(Mo. banc 2015); *Silver*, 477 S.W.3d at 699–700.⁸ But this is not the usual case. A remand for an abandonment inquiry is not warranted in this case because the abandonment doctrine, which derives from the requirements placed on appointed counsel by Rule 29.15(e), applies only to appointed counsel, not to privately retained counsel.

⁸ Although *Silver* involved a potential claim of abandonment stemming from a privately retained attorney’s failure to timely file an amended postconviction motion, the State did not argue in that appeal—as it does now—that the abandonment doctrine does not apply to retained, or non-appointed, counsel. Defendant also cites *Roberts v. State*, 473 S.W.3d 672 (Mo. App. E.D. 2015), and *Bustamante v. State*, 478 S.W.3d 431 (Mo. App. W.D. 2015), to support his argument that abandonment applies to retained counsel. But the opinion in *Roberts* is ambiguous on whether counsel was retained or appointed, and the court in *Bustamante* determined that an abandonment inquiry was unnecessary. In neither case, however, did the court consider whether abandonment applied to retained counsel, and the State did not argue that abandonment does not apply to retained counsel.

1. The abandonment doctrine does not apply to privately retained counsel.

Before considering whether the abandonment doctrine applies in this case, it is worth noting that counsel’s failure to timely file the amended motion cannot be considered constitutionally ineffective assistance of counsel. This is because “there is no federal constitutional right to post-conviction proceedings.” *Price*, 422 S.W.3d at 297. “Because the state is not compelled to provide such proceedings, it is not required by the federal constitution to provide counsel to indigent inmates when the state—in its discretion—makes such proceedings available.” *Id.* See also *Barton v. State*, 486 S.W.3d 332, 336 (Mo. banc 2016) (noting that there is no Sixth Amendment right to counsel in postconviction cases and that the appointment of counsel for indigent defendants in postconviction cases is based on statute and rule). “The lack of any constitutional right to counsel in post-conviction proceedings...precludes claims based on the diligence or competence of post-conviction counsel (appointed or retained), and such claims are ‘categorically unreviewable.’” *Price*, 422 S.W.3d at 296. Consequently, Defendant cannot claim that his retained counsel’s failure to timely file an amended motion constituted ineffective assistance of counsel. The only potential relief available to excuse the untimely filing of an amended motion is through the abandonment doctrine, which, as explained below, does not apply here.

This doctrine emanates from the requirements placed on appointed counsel by the postconviction rules, Rules 29.15 and 24.035. These rules direct the motion court to appoint counsel for indigent defendants who have filed pro se postconviction motions, and the rules require appointed counsel to either file an amended motion or a statement explaining why an amended motion is unnecessary:

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.

Rules 29.15(e) and 24.035(e). *See also Price*, 422 S.W.3d at 297 (“When counsel is *appointed* under Rule 29.15(e), this rule requires *this* counsel to investigate the claims raised in the inmate’s timely initial motion and then file either an amended motion or a statement explaining why no amended motion is needed.”) (emphasis added).

In *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991), and *Luleff v. State*, 807 S.W.2d 495 (Mo. banc 1991), this Court considered what, if anything, should be done when appointed counsel fails to comply with these requirements. This Court ultimately held that if “appointed counsel” fails to take any action with respect to the amended motion, or “abandons” the defendant, the motion court shall appoint new counsel, as long as counsel’s failure to act was not attributable to the negligence or conduct of the defendant. *Luleff*, 807 S.W.2d at 498. If, on the other hand, “appointed counsel” untimely files an amended motion, the court shall permit the untimely filing “only when [the defendant] is free of responsibility for the failure” to timely file. *Sanders*, 807 S.W.2d at 495.

This Court has never held that the abandonment doctrine applies to privately retained counsel (or defendants who choose to represent themselves) who untimely file an amended postconviction motion. Although this Court has not directly held that this doctrine does not apply to retained

counsel, its opinions nevertheless either directly state, or unmistakably suggest, that the doctrine does not apply to retained counsel.

The abandonment doctrine was created to enforce the provisions of Rule 29.15(e) (and Rule 24.035(e)) relating to the duties of appointed counsel and the filing of the amended motion. *Price*, 422 S.W.3d at 298. This doctrine is “purposely limited both in its rationale (i.e., to enforce the requirements and ensure the benefits of Rule 29.15(e)) and in its application (i.e., to amended motions filed by *appointed* counsel).” *Id.* (emphasis added). The abandonment doctrine should not apply to actions or inactions taken by retained, or non-appointed, counsel, and a postconviction defendant who retains counsel cannot claim abandonment if, as in this case, retained counsel fails to timely file an amended motion. Unlike appointed counsel, retained counsel have no responsibilities to fulfill under subparagraph (e) of the postconviction rules. That being the case, there is no need to apply the abandonment doctrine to retained counsel to ensure that they perform tasks that the rule does not require them to perform.

In *Price*, this Court observed that there were only two circumstances in which a defendant can avoid being bound by an attorney’s actions: (1) when the defendant suffers ineffective assistance of counsel during a criminal prosecution; and (2) when an indigent defendant timely files a pro se

postconviction motion and his *court-appointed* counsel fails to comply with the duties imposed on such counsel by Rule 29.15(e):

There are only two potentially applicable grounds on which a client is not bound by the actions or inactions of his counsel: (1) the client is a defendant in a criminal prosecution and counsel's performance is so deficient that it constitutes a violation of the defendant's constitutional right to effective assistance of counsel; and (2) the client is an indigent inmate who initiates a timely post-conviction proceeding and his *court-appointed counsel's* failure to fulfill the duties imposed by Rule 29.15(e) is not merely incompetent but tantamount to the motion court having failed to *appoint* counsel at all.

Id. at 302 (emphasis added).

“Rule 29.15(e) deals only with *appointed* counsel and amended motions.”

Id. at 303 (emphasis added). This is because Rule 29.15(e) “requires the motion court to *appoint* counsel to perform certain tasks and, under *Luleff* and *Sanders*, counsel's complete failure to do so leaves everyone (including the appellate courts) in the same practical position as if the motion court had failed to make the *appointment* at all.” *Id.* (emphasis added). *See also id.* at 307 (noting “that the abandonment doctrine created in *Luleff* and *Sanders* is limited to *appointed* counsel and the timeliness of amended motions”) (emphasis added).

This Court’s opinions in a number of other cases are in accord and state that the abandonment doctrine applies only to appointed counsel. *Moore v. State*, 458 S.W.3d at 825 (“[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.”) (emphasis added); *Id.* (“Abandonment by *appointed* counsel ‘extend[s] the time limitations for filing an amended Rule 29.15 motion.’”) (emphasis added) (quoting *Moore v. State*, 934 S.W.2d 289, 290 (Mo. banc 1996)); *Vogl v. State*, 437 S.W.3d at 228 (“A movant is abandoned when *appointed* counsel fails to comply with the requirements in Rule 24.035(e) by not filing either an amended motion or a statement setting out facts that demonstrate the actions that were taken to ensure that an amended motion is not needed.”) (emphasis added); *Stanley*, 420 S.W.3d at 541–42 (noting that “abandonment” occurs when “*appointed* counsel” completely fails to perform “or when *appointed* counsel” untimely files an amended motion) (emphasis added); *Bennett v. State*, 88 S.W.3d 448, 449 (Mo. banc 2002) (“Failure of the *appointed counsel* to fulfill the requirements of Rule 24.035(e) results in abandonment....”) (emphasis added); *State v. Bradley*, 811 S.W.2d 379, 384 (Mo. banc 1991) (abandonment occurs when there is “a total default in carrying out the obligations imposed upon *appointed counsel*”) (emphasis added); *Luleff*, 807 S.W.2d at 497

(framing the issue as “determining whether *appointed counsel* complied with the provisions of Rule 29.15(e)” (emphasis added).

Defendant contends that this Court’s recent decision in *Barton v. State* departs from the language in its previous opinions, including *Price*, and suggests that abandonment applies to both appointed and retained postconviction counsel. But this argument rests on an incomplete reading of the opinion. Defendant focuses on the opinion’s citation to *Price* and its use of the term *post-conviction counsel* in describing the abandonment doctrine.⁹ *Barton*, 486 S.W.3d at 338. But Defendant overlooks the fact that the language on which he relies was a quote from *Crenshaw v. State*, which was decided six years before *Price*. In any event, *Price* unequivocally states that the abandonment doctrine applies only to appointed counsel, and the

⁹ “*Price* thereby makes clear that 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 (quoting *Crenshaw v. State*, 266 S.W.3d 257, 259 (Mo. banc 2008)).

language of the rule itself makes plain that the duties outlined therein apply only to appointed counsel.

Although the Court of Appeals in *Castor v. State*, 245 S.W.3d 909 (Mo. App. E.D. 2008), held that “the concept of abandonment for the failure to file a timely amended motion is equally applicable to both appointed and retained counsel,” this holding was based on an incomplete understanding of the rationale behind the abandonment doctrine. In reaching this holding, the *Castor* opinion notes that the time limits in Rule 24.035(g) are the same for both appointed and retained counsel. *Id.* at 912. While this is undoubtedly true, the abandonment doctrine does not emanate from the time limits set out in subdivision (g), but from the duties required of *appointed* counsel outlined in subdivision (e). Moreover, the rationale behind the abandonment doctrine and how it evolved from the Court’s efforts to enforce subdivision (e) was more fully explained by this Court in *Price*, which was decided after *Castor*. The holding in *Castor* conflicts with this rationale and should be overruled.

In the end, the plain language of Rule 29.15(e) (and Rule 24.035 (e)) demonstrates that the duties outlined in that subdivision do not apply when counsel is not appointed and a postconviction defendant retains private counsel. Defendant was certainly entitled to hire his own counsel to file his amended postconviction motion (or even his initial pro se motion), “but, by

doing so, he took the same risk that every other civil litigant takes when retaining counsel, i.e., he chose to substitute counsel's performance for his own and bound himself to the former as though it were the latter." *Price*, 422 S.W.3d at 302 (holding that the doctrine of abandonment did not apply when retained counsel failed to timely file the initial postconviction motion).

Defendant argues that limiting abandonment to appointed counsel denies defendants who retain counsel the "guarantee" of legal assistance and penalizes defendants who retain counsel that fail to perform. But the abandonment doctrine did not create a general right to effective counsel. It was created solely to ensure that *appointed* counsel complied with the provisions of subdivision (e). Moreover, this provision was designed to aid indigent inmates, who would otherwise labor under an inherent disadvantage not shared by those with the ability to retain counsel. The fact that a postconviction defendant must bear the consequences of his retained attorney's failure to timely file the amended motion, which must be dismissed as untimely filed, is not a "penalty."

Just like the defendant in *Price* bore the consequences of his retained counsel's failure to timely file the initial motion for postconviction relief, which resulted in the complete denial of any state postconviction remedy, Defendant too must bear the consequences of his retained counsel's failure to timely file an amended motion.

Defendant’s reliance on several out-of-state cases to support his argument for applying abandonment to retained counsel is also misplaced. In *People v. Cotto*, 51 N.E.3d 802 (Ill. 2016), the court held that a provision of Illinois law requiring appointment of counsel for indigent postconviction defendants required counsel to provide “reasonable assistance” during postconviction proceedings and that this concept generally applied to all postconviction counsel, whether appointed or retained, apart from the provision permitting the appointment of counsel for indigent defendants.¹⁰ *Id.* at 810. The “reasonable assistance” requirement found in Illinois law is the equivalent of requiring the “effective assistance” of postconviction counsel. This Court, on the other hand, has repeatedly and emphatically refused to hold that postconviction defendants are entitled to effective assistance of postconviction counsel, and claims of ineffective assistance during postconviction proceedings are “categorically unreviewable.” *See Price*, 422 S.W.3d at 297; *Stanley*, 420 S.W.3d at 542.

Frazier v. State, 303 S.W.3d 674 (Tenn. 2014), is also unhelpful since it dealt with a conflict-of-interest issue involving a postconviction defendant’s

¹⁰ The State of Illinois conceded on appeal “that all postconviction [defendants] are entitled to reasonable assistance from their counsel, regardless of whether counsel is appointed or retained.” *Id.* at 807.

representation by the same attorney who handled the direct appeal in his underlying criminal case. The court simply held that the statute authorizing appointment of counsel in postconviction proceedings “includes the right to conflict-free counsel.” *Id.* at 685. Finally, *Steele v. Kehoe*, 747 So.2d 931 (Fla. 1999), is also inapplicable because it dealt with retained counsel’s failure to file an initial motion for postconviction relief. This Court specifically addressed that issue in *Price*, and it rejected the argument that the doctrine of abandonment applied in that situation.

Next, Defendant and amicus curiae contend that the failure to extend the abandonment doctrine to retained counsel will overload the already burdensome caseload of the Public Defender’s Office. This argument is apparently based on the assumption that defendants who might otherwise have the means to retain private counsel will choose not to hire them because of the off-chance that retained counsel might not timely file an amended motion. This argument is neither logical nor compelling.

First, the relatively small number of criminal defendants with the means to retain counsel for a postconviction action would probably be ineligible for public defender services in the first place. *See Bennett*, 88 S.W.3d at 450. Second, criminal defendants choosing between retained or appointed counsel would not base their decision on whether counsel might untimely file their amended motion. Contrary to Defendant’s argument, if this Court were to

hold that the abandonment doctrine does not apply to retained counsel, the effect on the Public Defender's caseload, if any, would be negligible.

This case is not about the Public Defender's caseload, and Defendant's attempt to exploit concerns about that matter is nothing more than a red herring. This case is about the faithful application of the plain language of the postconviction rules and adherence to this Court's prior opinions that unmistakably show that the abandonment doctrine applies only to appointed counsel.

Finally, Defendant argues that the failure to expand abandonment to retained counsel who untimely file an amended postconviction motion, would violate the open courts provision of the Missouri Constitution, which 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." MO. CONST. Art. I, § 14. "[S]tatutes that impose procedural bars to access of the courts are unconstitutional, and 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" violates the open courts provision." *Weigand v. Edwards*, 296 S.W.3d 453, 461 (Mo. banc 2009) (quoting *Wheeler v. Briggs*, 941 S.W.2d 512, 514 (Mo. banc 1997), and *Kilmer v. Mun*, 17 S.W.3d 545, 549 (Mo. banc 2000)) (citation omitted). "An open

courts violation is established on 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)).

Failure to expand abandonment to retained counsel who fail to timely file an amended motion does not violate the open-courts provision. It does not restrict a postconviction defendant’s ability to file a postconviction action, and the imposition of time limits on the filing of either the initial or amended motion is not arbitrary or unreasonable. Here, Defendant timely filed an initial postconviction motion and commenced his postconviction proceeding. The fact that his untimely amended motion may not be considered did not unreasonably restrict his access to the courts. The open-courts provision “does not deprive the courts of general jurisdiction of their power to make reasonable rules governing the order of trial of cases and regulating their proceedings in their administration of the law.” *State ex rel. Odell v. Johnson*, 182 S.W. 969, 971 (Mo. 1916). In a related context, this Court has held that statutes of limitations do not violate the open-courts provision unless they are plainly and clearly unreasonable. *See Magee v. Blue Ridge Professional Bldg. Co. Inc.*, 821 S.W.2d 839, 845 (Mo. banc 1991); *Cooper v. Minor*, 16 S.W.3d 578, 582 (Mo. banc 2000). Restricting the doctrine of abandonment to appointed counsel is neither arbitrary nor unreasonable.

2. A remand for an adjudication of the pro se motion is unnecessary.

Under *Moore v. State*, when a motion court fails to conduct an abandonment inquiry and adjudicates only the claims contained in an untimely filed amended postconviction motion, this Court reverses the motion court's judgment and remands the case for an abandonment inquiry so the motion court can determine which motion to adjudicate. *See Moore*, 458 S.W.3d at 825–26. But, as explained above, since abandonment does not apply to retained counsel, it is unnecessary for this Court to remand this case to the motion court for an abandonment inquiry.

Moreover, this Court need not remand this case to the motion court for an adjudication of Defendant's pro se motion because the motion court already adjudicated a virtually identical claim contained in Defendant's untimely filed amended motion and rejected it because Defendant failed to present any evidence to support it. Consequently, this Court may and affirm the motion court's judgment denying relief on Defendant's Rule 29.15 motion. Moreover, it appears that this claim was also refuted by the record because the Court of Appeals on direct appeal rejected the argument that an ATV cannot be considered a motor vehicle under Missouri's DWI law. *See Gittemeier*, 400 S.W.3d at 843–45. If this Court decides this case cannot be finally resolved

without a remand, it should be limited only to an adjudication of the claim asserted in the pro se motion.

CONCLUSION

The motion court did not clearly error, and its judgment overruling Defendant's motion for postconviction relief should be affirmed. Alternatively, this case should be remanded for an adjudication of Defendant's initial, pro se motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 7,137 words, excluding the cover, signature block, and this certificate, as determined by Microsoft Word 2010 software; and that a copy of this brief was sent through the electronic filing system on December 30, 2016, to:

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