IN THE
SUPREME COURT OF MISSOURI

No. SC95953

PAUL GITTEMEIER,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

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

APPELLANT'S SUBSTITUTE OPENING BRIEF

Respectfully Submitted,

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JURSIDICTIONAL STATEMENT

After being found guilty of one count of Driving While Intoxicated and one count of first degree trespassing, Paul Gittemeier (Appellant) was sentenced to fifteen years in prison. Appellant challenged his conviction under Missouri Supreme Court Rule 29.15. An Amended Motion to Vacate, Set Aside, or Correct Judgment or Sentence and Request for Evidentiary Hearing was filed on March 14, 2014 (LF 9-25). The court granted an Evidentiary Hearing to be heard on May 7, 2015 (LF 2-7). The motion court denied relief on June 10, 2015 (LF 60-71). Appellant timely filed a Notice of Appeal on July 8, 2015 (LF 72-77). The Eastern District Court of Appeals denied Appellant relief without reaching the merits of the arguments contained in Appellant's amended motion and ordered this case to be transferred to the Supreme Court of Missouri pursuant to Rule 83.02. *Gittemeier v. State*, No. ED 103189, 2016 WL 5107095 (Mo. Ct. App. Sept. 20, 2016).

STATEMENT OF FACTS

On October 15, 2013, Appellant timely filed a Form 40 pro se motion for postconviction relief pursuant to Rule 29.15 (LF 9-25). On October 17, 2013, the motion court appointed postconviction counsel (SLF 1). In November, appointed counsel requested and received an extension of an additional thirty days to file an amended motion for postconviction relief (SLF 2-3). Thus, the amended motion was due on January 15, 2014 (i.e., 90 days from the date Appellant was appointed counsel).

On January 7, 2014, eight days before the amended motion was due, appointed counsel filed a motion with the circuit court requesting that the court rescind its appointment of him as counsel for Appellant (SLF 11). The following day, private counsel entered an appearance on behalf of Appellant and requested and received an extension of sixty days to file an amended motion for postconviction relief (SLF 8-10).[1] Thus, Appellant's amended motion was due on or before March 16, 2014. Private counsel filed the amended motion on March 14, 2014 (LF 2). The motion court held an evidentiary hearing, received Findings of Facts and Conclusions of Law, and subsequently denied Appellant's amended motion (PCR LF 60–71).

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[1] At that time, the hearing court had the authority to enter this order based on previous appellate court decisions. *See e.g.*, *State v. Stanley*, 420 S.W. 3d 532 (Mo. banc 2014); *Gittemeier v. State*, No. ED 103189, 2016 WL 5107095 at *2 n.3 (Mo. Ct. App. Sept. 20, 2016).

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Appellant timely filed a Notice of Appeal on July 8, 2015 (LF 72-77). Appellant raised two points in his opening brief. First, Appellant argued that the motion court clearly erred in denying his amended motion because trial counsel was ineffective for failing to: (a) file and prosecute a motion to suppress, (b) impeach a witness with readily available evidence, and (c) properly endorse his expert witness. Second, Appellant argued that the motion court clearly erred in concluding, without evidence, that trial counsel's "failures and obvious shortcomings were part of a coherent trial strategy."

Rather than addressing the issues raised in Appellant's opening brief, the State argued that the appeal should be dismissed for two reasons: (a) Appellant's amended postconviction motion was untimely filed and (b) the abandonment doctrine does not apply to privately retained counsel. In response, Appellant filed a reply brief contending *inter alia* that the abandonment doctrine does apply to privately retained counsel.

The Eastern District Court of Appeals issued a six page opinion holding for the first time since the abandonment doctrine's creation that the abandonment doctrine did not apply to privately retained counsel and ordered this case to be transferred to the Supreme Court of Missouri pursuant to Rule 83.02. *Gittemeier v. State*, No. ED 103189, 2016 WL 5107095 (Mo. Ct. App. Sept. 20, 2016). The appellate court interpreted *Price v. State*, 422 S.W.3d 292 (Mo.banc 2014) as support for the State's contention that the abandonment doctrine does not extend to privately retained counsel. However, the appellate court agreed with Appellant that such a rule "presents a seemingly unequal treatment of post-conviction motions depending upon whether appointed counsel or

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privately retained counsel filed the amended petition." *Gittemeier,* at *6. The court transferred the case to this Court "to address the potentially unfair consequences to movants or challenges to the public-defender system in the post-conviction process." *Id.* at *2 n.4.

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POINTS RELIED ON

I. THE COURT OF APPEALS CLEARLY ERRED BY HOLDING THAT THE ABANDONMENT DOCTRINE APPLIES ONLY TO POSTCONVICTION MOVANTS REPRESENTED BY COURT APPOINTED COUNSEL BECAUSE THIS HOLDING VIOLATED APPELLANT'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 & 14 OF THE MISSOURI CONSTITUTION IN THAT (A) THE COURT'S HOLDING UNDERMINES THE RATIONALE AND FUNDAMENTAL FAIRNESS OF RULE 29.15 AND THE ABANDONMENT DOCTRINE; (B) THE COURT'S HOLDING IS INCONSISTENT WITH THE UNITED STATES CONSTITUTION AND THE MISSOURI CONSTITUTION; AND (C) THE COURT'S HOLDING IS CONTRARY TO PUBLIC POLICY.

Barton v. State, 486 S.W.3d 332, 338 (Mo. 2016)

Bittick v. State, 105 S.W.3d 498, 504 (Mo. Ct. App. 2003)

People v. Cotto, 51 N.E.3d 802 (Ill. 2016)

II. THE COURT OF APPEALS CLEARLY ERRED BY DENYING APPELLANT DUE PROCESS AND EQUAL PROTECTION OF THE LAW, AS GUARANTEED BY THE FIFTH AND FOURTEENTH

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Sanders v. State, 807 S.W.2d 493 (Mo. banc 1991)

Moore v. State, 934 S.W.2d 289 (Mo. banc 1996)

Barnett v. State, 103 S.W.3d 765 (Mo. banc 2003)

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ARGUMENT

I. THE COURT OF APPEALS CLEARLY ERRED BY HOLDING THAT THE ABANDONMENT DOCTRINE APPLIES ONLY TO POSTCONVICTION MOVANTS REPRESENTED BY COURT APPOINTED COUNSEL BECAUSE THIS HOLDING VIOLATED APPELLANT'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 & 14 OF THE MISSOURI CONSTITUTION IN THAT (A) THE COURT'S HOLDING UNDERMINES THE RATIONALE AND FUNDAMENTAL FAIRNESS OF RULE 29.15 AND THE ABANDONMENT DOCTRINE; (B) THE COURT'S HOLDING IS INCONSISTENT WITH THE UNITED STATES CONSTITUTION AND THE MISSOURI CONSTITUTION; AND (C) THE COURT'S HOLDING IS CONTRARY TO PUBLIC POLICY.

Standard of Review

"Appellate review of the denial of a post-conviction motion is limited to the determination of whether the findings of fact and conclusions of law are 'clearly erroneous.'" *Roberts v. State*, 232 S.W.3d 581, 583 (Mo.App., E.D. 2007) (citing *State v. Tokar*, 918 S.W.2d 753, 761 (Mo. banc 1996), *cert. denied*, 519 U.S. 933 (1996). "Findings of fact and conclusions of law are clearly erroneous only if, after a review of

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the entire record, the court is left with the definite and firm impression that a mistake has been made." *Id.* Where the question of whether an abuse of discretion has been committed depends on the interpretation of a Supreme Court Rule, this Court reviews the Rule's meaning *de novo*. *See State ex rel. Nothum v. Walsh*, 380 S.W.3d 557, 561 (Mo. 2012).

When interpreting Rule 29.15, the Court is "guided by the same standards as those used in the construction of statutes." *Rohwer v. State*, 791 S.W.2d 741, 743 (Mo. Ct. App. 1990). "Construction of a statute is a question of law, not judicial discretion." *State v. Haskins*, 950 S.W.2d 613, 615 (Mo. Ct. App. 1997). "A statute is to be given that interpretation which corresponds with the legislative objective and, where necessary, the strict letter of the statute must yield to the manifest intent of the legislature." *State v. Williams*, 693 S.W.2d 125, 127 (Mo. Ct. App. 1985). "[The Court's] primary object is to ascertain the intent of the framers of the rule from the language used, and to give effect to that intent." *Rohwer*, 791 S.W.2d at 743. "To do so, the words of the rule are considered in their plain and ordinary meaning." *Id.* When a rule can be read differently by reasonably well-informed persons, the rule is ambiguous; courts will look beyond the plain and ordinary meaning of a rule when its meaning is ambiguous. *See Haskins*, 950 S.W.2d at 615-16.

A. The Court of Appeals holding that the abandonment doctrine applies only to postconviction movants represented by court appointed counsel

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is clearly erroneous because it undermines the rationale and fundamental fairness of Rule 29.15 and the abandonment doctrine.

Plain and Ordinary Meaning of Rule 29.15

The plain and ordinary meaning of Rule 29.15 is susceptible to multiple interpretations due to the use of ambiguous language. For example, Rule 29.15(e) repeatedly uses the term "counsel."[2] "Counsel" is not defined by the Rule, and the plain and ordinary meaning of the term "counsel" encompasses appointed and privately retained counsel. The first sentence of Rule 29.15(e) explicitly indicates that the court is

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[2] Rule 29.15(e) provides: 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 (emphasis added).

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required to appoint counsel when an indigent movant files a pro se motion.[3] The Western District stated that "[t]he plain and ordinary meaning of Rule 29.15(e) is to mandate the appointment of counsel when an indigent defendant files a pro se motion." *Bittick v. State*, 105 S.W.3d 498, 504 (Mo. Ct. App. 2003). However, the sentences that follow outline the duties owed by "counsel" without concern as to whether the attorney is appointed or retained. If the intent of Rule 29.15(e) was to mandate the duties of only appointed counsel, and totally indemnify and excuse retained counsel from any responsibilities of reasonable representation, the rule would have used the term "appointed counsel," rather than "counsel," thereby making it clear to the attorneys, courts, and incarcerated movants what service is required, whether there is to be a distinction between appointed and retained counsel, and which (if any) of the services set out in the rule each are to provide. *Bittick* supports this interpretation.

In *Bittick*, the court refused to infer that the framers of Rule 29.15 intended to prohibit an indigent postconviction movant from proceeding *pro se* because Rule 29.15 does not include "express language" precluding an indigent movant from doing so. *Id*. at 504. "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*. Thus, "the denial of self-

[3] What the court is to do if it is a matter of common knowledge that an inmate is not "indigent" is left unanswered.

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representation will not be inferred." *Id*. "To determine otherwise effectively compels indigent defendants to accept the court's appointed counsel." *Id*.

The logic of *Bittick* directly conflicts with the State's argument. The State asserts that the abandonment doctrine does not apply to privately retained counsel because of its interpretation of the terms used in Rule 29.15(e), and requests this Court to hold that the Rule intends to deny postconviction movants with private counsel any guarantee of legal assistance. The State's inference is unreasonable. Rule 29.15(e) does not contain any express language suggesting that the Rule's provisions do not apply to privately retained counsel. If this Court were to decide this case consistent with the State's interpretation of the Rule, indigent movants would be compelled to accept their appointed counsel or run the risk of a private attorney's complete absence of performance. In harmony with the holding of *Bittick*, if a postconviction movant is free to represent himself, he is most certainly free to retain counsel of his choice without subjecting himself to penalty for an attorney's malfeasance.

Moreover, Rule 29.15(f) supports a finding that "counsel" and "appointed counsel" are two distinct terms and entities.[4] The Rule uses the term "counsel" in the first

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[4] Rule 29.15(f) provides: For good cause shown, **counsel** may be permitted to withdraw upon the filing of an entry of appearance by successor **counsel**. If **appointed counsel** is permitted to withdraw, the court shall cause new **counsel** to be appointed. If an indigent movant is seeking to set aside a death sentence, successor counsel shall have at least the

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sentence, suggesting that any counsel, appointed or privately retained, may withdraw for good cause shown upon the filing of successor counsel's entry of appearance. The next sentence permits the court to appoint new counsel if "appointed counsel" is allowed to withdraw. Given the express references to "counsel" and "appointed counsel," this Court should presume that the creators of this rule made a conscious decision to use the two separate terms for a reason, and that the term "counsel" includes appointed and privately retained postconviction counsel.

Whether the State tries to shoehorn a tortured interpretation of Rule 29.15 into specifically excluding retained counsel from its provisions completely ignores the myriad of holdings in this and other courts, that the duties imposed is upon **post-conviction counsel**, without reference to counsel's source of financing. *See*, *e.g.*, *Barton v. State,* 486 S.W.3d 332, 338 (Mo. 2016) (recognizing that the holding in *Price* involved the interference of counsel in the filing of a new motion for post-conviction relief, "not counsel abandonment."); *See also,* p. 18 *supra.* Based on the facts in this case, the third party interference resulted, not from any Appellant missteps but found its genesis in the ruling of the hearing judge improperly granting counsel the extension of time.

Because the plain and ordinary meaning of the terms used in Rule 29.15 can be read differently by reasonably well-informed persons, the Rule is ambiguous. Thus, this

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same qualifications as required by Rule 29.16 as the withdrawing counsel (emphasis added).

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Court must look beyond the plain and ordinary meaning of the Rule, and consider the rationale and fundamental fairness of Rule 29.15 and the abandonment doctrine.

Rationale of Rule 29.15

Because there is no constitutional right to an attorney in state post-conviction proceedings, *see Coleman v. Thompson*, 501 U.S. 722, 752 (1991), "States have substantial discretion to develop and implement programs to aid prisoners seeking to secure postconviction review." *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987). "In 1988, this Court exercised this discretion by adopting Rule 29.15 as the single, unified procedure for inmates seeking post-conviction relief after trial." *Price v. State*, 422 S.W.3d 292, 296 (Mo. 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 [Rule 29.15] 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 *White v. State*, 939 S.W.2d 887, 893 (Mo. banc 1997)). "[T]his Court decided that appointing counsel for all indigent inmates who assert post-conviction claims was the best way to further the purpose of ensuring thorough review without undue delay in achieving finality of criminal convictions." *Id*. at 297 (citation omitted). "While courts are solicitous of post-conviction claims that present

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a genuine injustice, that policy must be balanced against the policy of bringing finality to the criminal process." *White v. State*, 939 S.W.2d 887, 893 (Mo. 1997). "If a meritorious collateral claim exists, the rule is designed to bring it to the fore promptly and cogently." *Fields v. State*, 572 S.W.2d 477, 483 (Mo. banc 1978).

In *Price,* the delay was four years, in the case *sub judice*, the delay was less than four months, hardly an affront to the "finality of the criminal process." Furthermore, the legality of Appellant's conviction is at issue, but it cannot be properly adjudicated unless the Court considers his amended motion. Making a distinction on whether an untimely amended motion will be considered based upon whether the postconviction movant's counsel was appointed or retained fails to serve the underlying rationale of Rule 29.15, as such a distinction fails to bring a "meritorious claim" "to the fore promptly and cogently."

Rationale of the Abandonment Doctrine

The abandonment doctrine was created by this Court in two companion cases issued on the same day, *Luleff v. State*, 807 S.W.2d 495 (Mo. banc 1991) and *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991). Prior to *Luleff* and *Sanders*, this Court consistently held that postconviction counsel's failure to timely file a motion constituted a complete bar to consideration of a movant's claims, even when the claims were entirely attributable to inaction of counsel. Moreover, the Court "traditionally held that postconviction proceedings may not under any circumstances be used to challenge the effectiveness of postconviction counsel." *Sanders*, 807 S.W.2d at 494. However, this

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Court correctly rejected prior precedent when it recognized the need to provide some form of relief for aggrieved prisoners, and accordingly established the abandonment doctrine.

In *Luleff*, the movant argued that his postconviction counsel failed to comply with the provisions in Rule 29.15(e), which require postconviction counsel to either (1) file an amended motion or (2) file a statement setting out facts demonstrating what actions were taken to ensure that all facts supporting the claims asserted in the *pro se* motion and all claims known to the movant are alleged in the *pro se* motion. *See* Rule 29.15(e). The movant contended that his postconviction counsel's inaction did not meet the "minimal level of assistance contemplated by the postconviction rules." *Luleff*, 807 S.W.2d at 497. The Court found that postconviction counsel's failure to comply with the provisions of Rule 29.15(e) constituted a "complete absence of performance . . . [which] is tantamount to a failure of the motion court to appoint counsel under Rule 29.15(e) in the first instance." *Price*, 422 S.W.3d at 298 (interpreting *Luleff*, 807 S.W.2d at 498).

Here, Appellant's postconviction counsel failed to comply with the provisions of Rule 29.15(e) by failing to timely file an amended motion. As in *Luleff*, counsel's inaction constituted a "complete absence of performance . . . [which] is tantamount to a failure of the motion court to appoint counsel under Rule 29.15(e) in the first instance." *Id*. Moreover, counsel's inaction could not be said to have provided the "minimal level of assistance contemplated by the postconviction rules." *Luleff*, 807 S.W.2d at 497.

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In *Sanders*, postconviction counsel failed to timely file an amended motion for postconviction relief. 807 S.W.2d at 494. According to this Court's precedent prior to *Sanders*, the amended motion should have been dismissed and the inmate allowed to proceed only on the claims raised in his initial motion. Rather than rigidly following precedent or acceding to a strict and draconian interpretation of the language in Rule 29.15, this Court held that "the purposes of Rule 29.15(e) are frustrated as much by appointed counsel's failure to follow through with a timely amendment as by the 'complete absence of performance' in *Luleff*." *Price*, 422 S.W.3d at 298 (interpreting *Sanders*, 807 S.W.2d at 494). "[W]here the record reflects that **counsel** has determined that there is a sound basis for amending the pro se motion but fails timely to file the amended motion as required by Rule 29.15(f) . . . [t]he failure is, in effect, another form of 'abandonment' by **postconviction counsel**." *Sanders*, 807 S.W.2d at 494-95 (emphasis added). Thus, the court must treat the tardy amended motion as timely in order to restore the intended effect of Rule 29.15. *Id*. at 495.

Sanders further demonstrates that the rationale of the abandonment doctrine is to mitigate the issue of **postconviction counsel's** failure to timely file an amended motion on behalf of the movant. The provisions of Rule 29.15(e) should be interpreted as the minimal level of legal assistance required by all postconviction counsel. Abandonment by postconviction counsel, whether appointed or privately retained, directly harms the postconviction movant, and entirely undermines and frustrates the rationale of Rule 29.15, while inviting an unjust result.

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Almost two years after the holdings of *Luleff* and *Sanders*, the Court provided clarity on the purpose of the abandonment doctrine in *Bullard v. State*, 853 S.W.2d 921 (Mo. 1993). The Court held that postconviction counsel's failure to timely file an initial motion, rather than an amended motion, does not constitute abandonment. *Id*. at 922-23. The Court's logic for distinguishing between amended and initial motions was based on the "legal expertise" required to draft each motion. *Id*. The Court stated:

> An amended motion differs significantly from the original motion. An amended motion is a final pleading, which **requires legal expertise**. Counsel must be appointed for indigent movants in order to assure its proper drafting. An original motion, on the other hand, is relatively informal, and need only give notice to the trial court, the appellate court, and the State that movant intends to pursue relief under Rule 29.15. As legal assistance is not required in order to file the original motion, the absence of proper legal assistance does not justify an untimely filing.

Id. (citations omitted).

The holding of *Bullard* supports Appellant's proposed application of the abandonment doctrine by paying homage to the "legal expertise" required to fulfil the requirements of Rule 29.15(e). The holding in *Bullard* strongly suggests that in situations where postconviction counsel fails to timely file an amended motion, the movant suffers from an absence of proper legal assistance, and the only method of circumventing this injustice is to treat the untimely amended motion as if it were timely. In the case at hand,

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Appellant timely filed his original motion *pro se*, but relied on the legal expertise of postconviction counsel to timely file his amended motion. Clearly, postconviction counsel's inaction constitutes a "complete absence of performance" and a failure to provide Appellant with any level of legal assistance.

The Holding of Price

The State is convinced that the Court in *Price*, for the first time since the abandonment doctrine was created, held that abandonment applies only to the failures of appointed counsel. Appellant believes that this was not the Court's intention for two reasons. First, the issue in *Price* was whether the abandonment doctrine applied when Price's hired attorney failed to timely file an **initial** Rule 29.15 motion. 422 S.W.3d at 297. The Court in *Price* cited *Bullard* for the proposition that, unlike amended motions, initial motions do not require legal assistance. *Id*. at 299-301. The Court in *Price* was not asked to rule on whether the abandonment doctrine applies in the applicable circumstances in this case; to-wit, the initial Rule 29.15 motion was filed on time by Appellant. Second, this Court has already interpreted the holding of *Price* in accordance with Appellant's interpretation stating that: "*Price* held that a claim of abandonment by counsel does not apply to untimely **initial** motions, as those motions are to be filed by the movant, not by counsel." *Barton v. State*, 486 S.W.3d 332, 338 (Mo. 2016), *reh'g denied* (May 24, 2016) (emphasis in original). The Court in *Barton* further stated that abandonment exists "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**

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is aware of the need to file an amended post-conviction relief motion and fails to do so in a timely manner." *Id.* (citing *Barnett v. State*, 103 S.W.3d 765, 773–74 (Mo. banc 2003)) (emphasis added).

The State cherry picks the language of *Price* to support their position. For example, the Court in *Price* stated that "the abandonment doctrine was created to excuse the untimely filing of **amended motions** by appointed counsel under Rule 29.15(e). The rationale for this excuse does not apply to untimely **initial motions**, and the purposes of Rule 29.15(b) would not be served by extending this doctrine to such circumstances." *Price*, 422 S.W.3d at 297 (emphasis in original).The State interprets this quote (and other similar language in the opinion) as establishing that the abandonment doctrine no longer applies to all postconviction counsel, but only to those appointed to the task. However, there is an abundance of post-*Price* cases applying the abandonment doctrine to privately retained postconviction counsel. *See*, *e.g.*, *Silver v. State*, 477 S.W.3d 697, 699–700 (Mo.App.E.D.2015); *Roberts v. State*, 473 S.W.3d 672, 674 (Mo.App.E.D.2015); and *Bustamante v. State*, 478 S.W.3d 431, 435 n. 2 (Mo.App.W.D.2015). Additionally, there is a profusion of post-*Price* cases affirming that the abandonment doctrine applies to "postconviction counsel." *See, e.g.*, *Watson v. State*, No. ED 103245, 2016 WL 6236630, at *2 n. 4 (Mo. Ct. App. Oct. 25, 2016) ("The Missouri Supreme Court has limited the scope of abandonment claims to cases in which **post-conviction counsel** essentially takes no action on a movant's behalf or fails to file an amended motion in a timely manner, and the court has repeatedly declined to expand its scope.") (emphasis added); *James v. State*, 477 S.W.3d 190, 193 (Mo. Ct. App. 2015) ("Abandonment occurs when (1) **post-**

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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.") (emphasis added); *Hicks v. State*, 473 S.W.3d 204, 207 (Mo. Ct. App. 2015) ("Where the record reflects that **post-conviction counsel** failed to comply with the requirements set out in Rule 24.035(e), raising a presumption of abandonment, the motion court must undertake an independent inquiry into the performances of both the movant and counsel.") (emphasis added).

The post-*Price* case law, particularly *Barton* which distinguishes the holding in *Price* from the facts of this case, demonstrate that the language in *Price* limiting the abandonment doctrine to appointed counsel was dicta. This is far more of a logical explanation than interpreting *Price* as an unprecedented paradigm shift in postconviction cases.

Application of the Abandonment Doctrine in Other States

Application of the abandonment doctrine to privately retained counsel is consistent with how the issue is handled in other states. Because the issue presented to this Court is one of first impression in Missouri, it is appropriate to seek guidance from other states with similar postconviction rules.

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In a factually similar case, the Supreme Court of Illinois recently overturned an appellate court decision[5] for erroneously ruling that privately retained postconviction counsel had no duty to provide a postconviction movant a "reasonable level of assistance." *People v. Cotto*, 51 N.E.3d 802 (Ill. 2016), *reh'g denied* (Sept. 26, 2016). The court's ruling was based on an interpretation of the Illinois Postconviction Hearing Act (codified in 725 ILCS 5/122–1 *et seq.*) and Illinois Supreme Court Rule 651(c)[6], which requires the court to appoint counsel to all indigent movants and assign them certain duties. The court sensibly held that "[b]oth retained and appointed counsel must provide

[5] The court in *Cotto* overturned *People v. Csaszar*, 2 N.E.3d 435 (Ill.App. 1 Dist. 2013).

[6] **Record for Indigents; Appointment of Counsel**. Upon the timely filing of a notice of appeal in a post-conviction proceeding, if the trial court determines that the petitioner is indigent, it shall order that a transcript of the record of the post-conviction proceedings, including a transcript of the evidence, if any, be prepared and filed with the clerk of the court to which the appeal is taken and shall appoint counsel on appeal, both without cost to the petitioner. The record filed in that court shall contain a showing, which may be made by the certificate of petitioner's attorney, that **the attorney** has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, **and has made any amendments to the petitions filed pro se** that are necessary for an adequate presentation of petitioner's contentions. IL R S CT Rule 651(c) (emphasis added).

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reasonable assistance to their clients after a petition is advanced from first-stage proceedings." *Id.* at 810. In reaching this conclusion, the court in *Cotto* cited *People v. Anguiano*, 4 N.E.3d 483 (Ill.App. 1 Dist. 2013).

In *Anguianao*, the defendant was convicted and sentenced to 15 years' imprisonment for delivery of more than 900 grams of cocaine. *Id.* at 484. On direct appeal, Anguianao argued that his private counsel was ineffective because he failed to pursue a viable entrapment defense. *Id.* at 485. The court held that Anguianao failed to "explain on appeal how the record indicates he was entrapped to commit the offense merely by the fact [that] someone's cousin induced him to find buyers for cocaine." *Id.* On postconviction appeal, Anguianao hired private counsel to draft and file his postconviction petition. *Id.* The State then filed a motion to dismiss, arguing that the claim was barred by *res judicata*. *Id.* At the hearing on the State's motion, Anguianao's postconviction counsel argued that trial counsel was ineffective, but emphasized that he was presenting new evidence of a viable entrapment defense. *Id.* The moving court granted the State's motion, and Anguianao timely appealed. *Id.*

Anguianao argued on appeal that "his privately retained attorney failed to provide a reasonable level of assistance or comply with Rule 651(c), where he failed to consult with [Anguianao] and raised precisely the same issue on direct appeal and in his postconviction proceedings." *Id.* at 486. In response, the State argued that postconviction movants are not entitled to a reasonable level of assistance and, regardless, postconviction counsel's performance in this case was not deficient. *Id.* The court held that Anguianao was entitled to a reasonable level of assistance, but agreed with the

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State's contention that postconviction counsel's performance in this case was not deficient. *Id*.

The court in *Anguianao* reached its conclusion by analyzing Illinois Supreme Court Rule 651(c) and the "reasonable level of assistance" standard.[7] Much like the provisions of Rule 29.15(e), Illinois' Rule 651(c) does not provide a "general guarantee of counsel's performance," nor does Rule 651(c) expressly guarantee a "reasonable level of assistance." *Id*. at 487. Rather, Rule 651(c) imposes the following duties on postconviction counsel: (1) consult with the defendant to ascertain his or her contentions of deprivation of constitutional rights; (2) examine the record of the proceedings at trial; and (3) make any amendments to the petition filed *pro se* that are necessary for an adequate presentation of defendant's contentions. IL R S CT Rule 651(c). The duties listed in Rule 651(c) have been interpreted as providing "post-conviction defendants with

[7] The "reasonable level of assistance" standard was created in *People v. Owens*, 564 N.E.2d 1184 (Ill. 1990). *See Anguianao*, 4 N.E.3d at 487. "Because the right to counsel in post-conviction proceedings is derived from a statute rather than the Constitution, post-conviction defendants are guaranteed only the level of assistance which that statute provides. Section 122–4 of the Code of Criminal Procedure and Supreme Court Rule 651 provide post-conviction defendants with a **reasonable** level of assistance in post-conviction proceedings, but do not guarantee that they will receive the same level of assistance that the Constitution guarantees to defendants at trial." *Owens*, 564 N.E.2d at 1189 (Emphasis in original).

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a **reasonable level of assistance** in post-conviction proceedings, but do not guarantee that they will receive the same level of assistance that the Constitution guarantees to defendants at trial." *Anguianao*, 4 N.E.3d at 487 (quoting *People v. Owens*, 564 N.E.2d 1184, 1189 (Ill. 1990)) (emphasis added).

Although this was an issue of first impression in Illinois, the court recognized that "case law and common sense strongly suggest that all defendants represented by counsel have the right to a reasonable level of assistance."[8] *Id.* at 489. The court elaborated by stating:

There is no convincing policy or commonsense reason that we have discerned—or to which the State has pointed—that suggests that defendants counseled at the first and second stages are not entitled to a reasonable level of assistance at the second stage. In *People v. Perkins*, 229 Ill.2d 34, 44, 321 Ill.Dec. 676, 890 N.E.2d 398 (2007), for instance, our supreme court applied both the reasonable-level-of-assistance standard and Rule 651(c) to hold that "[a]n adequate or proper presentation of a petitioner's substantive claims necessarily includes attempting to overcome procedural bars, including timeliness,

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[8] The Postconviction Hearing Act (codified in 725 ILCS 5/122–1 *et seq.*) provides a three-stage process for adjudicating petitions. During second-stage proceedings, the court determines whether it must appoint counsel for an indigent defendant, who may amend the petition as necessary. At the conclusion of the second stage, the court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. *See Cotto*, 51 N.E.3d at 807-08.

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that will result in dismissal of a petition if not rebutted." It is difficult to imagine why counsel appointed or retained at the second stage would be required to attempt to overcome a procedural bar, while counsel retained through the first and second stages would not.

Id. 490.

In an attempt to conceive a rational basis for which a distinction between appointed and privately retained counsel was warranted, the court stated:

The only conceivable reason for denying the right to a reasonable level of assistance to a defendant who **retained an attorney** through the first and second stages is that the attorney's mere presence ensures that a defendant will be adequately represented. *See, e.g.*, *Doggett*, 255 Ill.App.3d at 187, 192 Ill.Dec. 768, 625 N.E.2d 923 (holding in the Rule 651(c) context that defendant had an opportunity to adequately present his claims, where his petition was drafted by private counsel). From the many postconviction decisions regarding counsel's deficient performance, however, we know this is not the case. While retaining counsel at the first stage may give a defendant an advantage over pro se defendants in surviving first-stage proceedings, it by no means guarantees a reasonable level of assistance at the second stage. All defendants should enjoy the right to a reasonable level of assistance at the second stage of postconviction proceedings, as **there is no compelling reason for disparate treatment**.

Id. (emphasis added).

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As in *Anguianao*, the State in this case failed to propose a compelling reason for the disparate treatment of postconviction movants based upon their financial abilities. Common sense, coupled with the rationales of Rule 29.15 and the abandonment doctrine, dictates an application of the abandonment doctrine in accordance with Appellant's suggestion. Holding to the contrary creates a bizarre distinction that essentially punishes postconviction movants for hiring a private attorney.

In *Frazier v. State*, 303 S.W.3d 674, 680 (Tenn. 2010), the Supreme Court of Tennessee held that "[t]he rationale for the appointment of counsel in the post-conviction setting is to afford a petitioner the full and fair consideration of all possible grounds for relief." The court's holding was based on the obligations and responsibilities set forth by Tennessee's Supreme Court Rule regarding postconviction claims. *See* Tenn. Sup.Ct. R. 28, § 6(C). The court in *Frazier* explained:

Appointed and retained attorneys in post-conviction cases "shall be required to review the pro se petition, file an amended petition asserting other claims which petitioner arguably has or a written notice that no amended petition will be filed, interview relevant witnesses, including petitioner and prior counsel, and diligently investigate and present all reasonable claims." Tenn. Sup.Ct. R. 28, § 6(C)(2). Retained counsel has the duty to file a certificate of counsel that certifies that he or she: (1) has "thoroughly investigated the possible constitutional violations alleged by petitioner ... and any other ground that petitioner may have for relief"; (2) has "discussed other possible constitutional grounds with petitioner"; (3) has "raised all non-frivolous constitutional

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grounds warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law which petitioner has"; and (4) is "aware that any ground not raised shall be forever barred ... and ha[s] explained this to petitioner." Tenn. Sup.Ct. R. 28 § 6(C)(3), app. C. While these rules do not provide any basis for relief from a conviction or sentence, they do set forth a **minimum standard of service** to which post-conviction counsel is held.

Frazier, 303 S.W.3d at 680-81 (emphasis added).

The reasoning in these cases protects the rights of imprisoned litigants to pursue, with the assistance of counsel of their choice, claims that the convictions are infirm or improper without punishing those who seek the assistance of retained attorneys. The courts' rational analysis in *Cotto*, *Anguianao*, and *Frazier* support a finding that the provisions of Rule 29.15(e) are intended to provide all postconviction movants with a minimal level of legal assistance. For discussion of another out of state case applying its postconviction rules to privately retained counsel, *see infra Steele v. Kehoe*, 747 So. 2d 931 (Fla. 1999) at pp. 29-32.

The Court of Appeals holding that the abandonment doctrine applies only to postconviction movants represented by court appointed counsel is clearly erroneous because it is inconsistent with the United States Constitution and the Missouri Constitution.

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

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person, property or character, and that right and justice shall be administered without sale, denial or delay." "Therefore, 'those statutes that impose procedural bars to access of the courts are unconstitutional.'" *Bromwell v. Nixon*, 361 S.W.3d 393, 399 (Mo. banc 2012) (citing *Weigand v. Edwards*, 296 S.W.3d 453, 461 (Mo. banc 2009)). "'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)). "An 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 v. Mun,* 17 S.W.3d 545, 548 (Mo. 2000) (quoting David Schuman, *The Right to A Remedy*, 65 Temp. L. Rev. 1197, 1203 (1992)).

"A postconviction relief hearing is a civil proceeding governed by the rules of civil procedure wherever applicable." *Bittick*, 105 S.W.3d at 501. "Put 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." *Kilmer v. Mun*, 17 S.W.3d 545, 549 (Mo. 2000) (citing *Wheeler v. Briggs*, 941 S.W.2d 512, 515 (Mo. banc 1997). "[W]here a barrier is erected in seeking a remedy for a recognized injury, the question is whether it is **arbitrary or unreasonable**." *Id*. at 550 (emphasis added).

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Here, Appellant is seeking postconviction relief for the claims asserted in his amended motion in accordance with Rule 29.15. Rule 29.15 was adopted by this Court to provide a remedy to inmates seeking postconviction relief. While the Court's decision to create this Rule was entirely discretionary, the Court must apply Rule 29.15 in a manner that is not arbitrary or unreasonable. Thus, the Court must reject the State's proposed application of the Rule because such an arbitrary and capricious application will deprive postconviction movants (who retain private counsel) an opportunity for their meritorious amended motions to be heard. Such a deprivation constitutes a violation of the fundamental due process guaranteed by the United States Constitution and the Missouri Constitution. *See* U.S. Const. amends. V and XIV; Mo. Const. art. I, §§ 2, 10, and 14.

Steele v. Kehoe, 747 So. 2d 931 (Fla. 1999) is illustrative of the constitutional concerns that would arise were the Court to hold in the State's favor. In *Steele*, the Supreme Court of Florida amended its postconviction rule to specifically address the issue of retained counsel's failure to file a postconviction motion. Steele was convicted of first-degree murder and was sentenced to life in prison. *Id.* at 932. Steele then claimed that his privately retained appellate attorney orally agreed to file his postconviction motion, but failed to do so in a timely manner. *Id.* Because Steele failed to timely file his *pro se* motions for postconviction relief, the trial court and Fifth District Court of Appeals dismissed the motions. *Id.* In response, Steele filed a legal malpractice complaint against his privately retained postconviction counsel; however, Steele could not demonstrate that he was improperly convicted as a result of his attorney's negligence

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since his postconviction motions were dismissed. *Id*. Thus, the trial court dismissed his complaint stating that Steele "cannot prove his actual innocence in the underlying first-degree murder charge which he was convicted of; nor can he establish or allege that his underlying conviction has been set aside." *Id*.

The Court of Appeals affirmed the dismissal, holding that "exoneration" is a prerequisite to a legal malpractice action arising from a criminal conviction.[9] *Steele v. Kehoe*, 724 So. 2d 1192, 1193 (Fla. 5th DCA 1998). However, the court also held that "if counsel is determined to have failed to timely file the postconviction motion, then our procedure should permit the defendant to belatedly file the motion." *Steele*, 747 So. 2d at 933 (Fla. 1999). The Court of Appeals explained how a legal malpractice action is an inadequate remedy for those convicted, and that fundamental due process requires an adequate remedy:

Under the facts of this case, the requirement of exoneration places Steele in a Catch 22 situation. Steele cannot sue his lawyer for malpractice because of the consequence of the alleged malpractice. **Justice requires that some relief be provided**. Therefore, the real issue before us now is what **due process rights** a convicted defendant has in post-conviction matters when he relies on his attorney to pursue remedies designed to prove his innocence and to obtain his freedom and the attorney fails to file within the

[9] Missouri courts have held that "innocence of the criminal charges for which [the defendant] was convicted is essential to satisfy the causation element of [a legal malpractice] claim." *Kuehne v. Hogan*, 321 S.W.3d 337, 342 (Mo. Ct. App. 2010)

limitation period. Such a situation highlights the **inadequacy of a malpractice action** when exoneration is not required. Should a criminal defendant who loses his opportunity to gain freedom and to restore his good name because of the malpractice of his lawyer be limited to civil damages? An award of money damages is an acceptable substitutionary remedy only because the law knows of no other remedy that will make the injured party whole. Money damages would never be awarded for a lost arm if the law could replace the arm. In a case such as the one before us, although money damages would be appropriate to compensate the victim for having been improperly incarcerated before the error was rectified, public policy should not recognize such damages as a substitute for an innocent person's future incarceration. It would truly be an anomaly if the civil jury awarded Steele $100,000 a year for the years that he had to remain in prison while the taxpayers of this state are required to pay the cost of incarceration for one improperly convicted. If a defendant can prove that he was improperly convicted, he should be set free. If he is denied the opportunity to offer such proof because of the malpractice of his lawyer, **fundamental due process** requires that he have a remedy that will address his future incarceration and not merely compensate him for improperly staying in prison.

Steele, 724 So. 2d at 1193-94 (Fla. 5th DCA 1998) (emphasis added).

In consideration of the Court of Appeals analysis provided above, the Supreme Court of Florida held that "**due process** entitles a prisoner to a hearing on a claim that he or she missed the deadline to file a [postconviction] motion because his or her attorney had agreed to file the motion but failed to do so in a timely manner." *Steele*, 747 So. 2d at

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934 (Fla. 1999) (emphasis added). "[I]f the prisoner prevails at the hearing, he or she is authorized to belatedly file a [postconviction] motion challenging his or her conviction or sentence." *Id.* In order to reflect the court's decision, the court amended rule 3.850(b), Florida's postconviction rule, by adding a provision that permits the untimely filing of a postconviction motion when "the defendant **retained** counsel to timely file a 3.850 motion and counsel, through neglect, failed to file the motion." *Id.* (emphasis added).

Steele demonstrates the complete lack of justice provided to a postconviction movant that is abandoned by her private counsel under the State's application of the Rule. Not only is a postconviction movant prohibited from having a legitimate amended postconviction motion heard, but, since the court will dismiss the untimely amended motion, the postconviction movant also will not be able to establish her innocence in order to pursue a legal malpractice claim against the attorney who abandoned her. Ultimately, a postconviction movant who is abandoned by private counsel is left with no means of relief. A result as unconscionable and arbitrary that can be imagined in recent jurisprudence.

The Court of Appeals holding that the abandonment doctrine applies only to postconviction movants represented by court appointed counsel is clearly erroneous because it is contrary to public policy.

The State contends that the abandonment doctrine and the provisions of Rule 29.15(e) should apply only to appointed counsel. This application arbitrarily and capriciously discriminates against movants that retain private counsel. A more

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appropriate and pragmatic approach is to apply the abandonment doctrine and the provisions of Rule 29.15(e) to all postconviction counsel. This would allow all postconviction movants, regardless of their financial abilities, to receive the minimal level of legal assistance contemplated by Rule 29.15. Ruling that the abandonment doctrine does not apply to privately retained counsel is contrary to the rationale of Rule 29.15 and the abandonment doctrine because such a ruling: (i) greatly prejudices movants who later retain private counsel and will deter movants from retaining private counsel; (ii) will unnecessarily overburden the already compromised state public defender system; and (iii) entirely disregards Rule 4-1.3 of the Missouri Rules of Professional Conduct.

The State's proposed application of the abandonment doctrine greatly prejudices postconviction movants who retain private counsel and will deter postconviction movants from retaining private counsel.

Limiting the application of the abandonment doctrine only to situations where postconviction counsel is appointed will deter postconviction movants from hiring private counsel. Essentially, the State's proposed application of the abandonment doctrine will serve as a declaration that those inmates who wish to choose counsel outside of the public defender system will be forced to proceed at their own risk, hoping that counsel will properly perform their responsibilities, or as in this case, not be subject to a sea change in the law. Otherwise, postconviction movants will receive no assurance that privately retained postconviction counsel will act on their behalf at all. In Sixth Amendment jurisprudence there is no distinction drawn between appointed or retained counsel. An

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error is an error. Appellant is aware that there is no Sixth Amendment right to postconviction counsel, but under circumstances such as exist in this case, there is no reasonable or logical reason to punish Appellant and others so situated, especially when they have proceeded with diligence and in a timely manner. Because of the great prejudice suffered by postconviction movants who hire private counsel, the inevitable consequence of the arbitrary application of the abandonment doctrine will be a decrease in private attorneys hired as postconviction counsel and an increase in public defenders appointed as postconviction counsel.

The State's proposed application of the abandonment doctrine will unnecessarily overburden the already compromised state public defender system.

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.

Applying the abandonment doctrine to only those represented by a public defender discourages postconviction movants from retaining private attorneys. As a matter of fact, a postconviction movant's best interests can only be assured by a public defender who

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can be excused of a mistake, rather than investing money in someone who is not so indemnified under such an arbitrary and capricious application of the abandonment doctrine. If this Court were to hold that only appointed counsel are required to follow the provisions in Rule 29.15(e), the consequence would only add to the already oppressive burden yoked upon Missouri's public defenders.

The Missouri State Public Defender's (MPSD) 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.

According to a study conducted this year by the Sixth Amendment Center (6AC), 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 (FY2015), 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 per person. *Id*. 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.*

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 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).

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Appellant need not further detail the enormous amount of research demonstrating the extreme burden placed on the Missouri State Public Defender System, because the excellent brief of the American Civil Liberties Union of Missouri Foundation as Amicus Curiae in Support of Appellant at 18-29, *Gittemeier v. State*, No. SC95953 (Mo. 2016), is readily available to the Court.

Applying the abandonment doctrine only to appointed counsel 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.

The State's proposed application of the abandonment doctrine entirely disregards Rule 4-1.3 of the Missouri Rules of Professional Conduct.

Rule 4-1.3 of the Missouri Rules of Professional Conduct provides: "A lawyer shall act with reasonable diligence and promptness in representing a client." Comment 4 to Rule 4-1.3 provides: "Unless the relationship is terminated as provided in Rule 4-1.16, a lawyer should carry through to conclusion all matters undertaken for a client." Thus, applying the abandonment doctrine to all postconviction counsel is consistent with the duties imposed by the Missouri Rules of Professional Conduct. Following the State's

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logic, privately retained postconviction counsel can completely disregard this ethical responsibility when representing a postconviction movant and the movant would be left entirely without recourse. This is precisely the type of conduct that the Missouri Rules of Professional Conduct were created to govern. Clearly, the State's proposed application of the abandonment doctrine would be inconsistent with the Missouri Rules of Professional Conduct and would impute postconviction counsel's failure to follow through with his representation to his client.

II. THE COURT OF APPEALS CLEARLY ERRED BY DENYING APPELLANT DUE PROCESS AND EQUAL PROTECTION OF THE LAW, AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION, WHEN THE APPELLATE COURT FAILED TO CONSIDER APPELLANT'S MERITORIOUS AMENDED POSTCONVICTION MOTION IN LIGHT OF THE FACT THAT APPELLANT WAS ABANDONED BY HIS RETAINED POSTCONVICTION COUNSEL IN THAT COUNSEL FAILED TO TIMELY FILE HIS AMENDED MOTION, THROUGH NO FAULT OF THE APPELLANT, IN CONTRAVENTION OF RULE 29.15.

Standard of Review

"Appellate review of the denial of a post-conviction motion is limited to the determination of whether the findings of fact and conclusions of law are 'clearly

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erroneous.'" *Roberts v. State*, 232 S.W.3d 581, 583 (Mo.App., E.D. 2007) (citing *State v. Tokar*, 918 S.W.2d 753, 761 (Mo. banc 1996), *cert. denied*, 519 U.S. 933 (1996). "Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Id.*

Appellant was Abandoned by Postconviction Counsel

"*Luleff v. State*, 807 S.W.2d 495 (Mo. banc 1991), and *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991), extend the time limitations for filing an amended Rule 29.15 motion where **post-conviction counsel** abandons the movant." *Moore v. State*, 934 S.W.2d 289, 290 (Mo. banc 1996). "[A]s occurred in *Sanders*, when 'the record reflects that counsel has determined that there is a sound basis for amending the *pro se* motion but fails to file the amended motion [in a timely manner] as required by Rule 29.15(f) [,] [t]he failure is, in effect, another form of 'abandonment' by **post-conviction counsel**." *Id.* at 291 (quoting *Sanders*, 807 S.W.2d at 494–95) (emphasis added). "The *Sanders* scenario is abandonment because failure to file an amended motion in a timely manner constitutes a complete bar to consideration of the movant's claims not raised in the *pro se* motion." *Id.* "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

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do so in a timely manner." *Barnett v. State*, 103 S.W.3d 765, 773–74 (Mo. banc 2003) (emphasis added).

Appellant was not Responsible for the Amended Motion's Untimely Filing

Because Appellant's postconviction counsel failed to make the determinations required by Rule 29.15(e), there is "a presumption that counsel failed to comply with the rule." *Luleff*, 807 S.W.2d 495, 498.

> If counsel's apparent inattention results from movant's negligence or intentional failure to act, movant is entitled to no relief other than that which may be afforded upon the *pro se* motion. If the court determines, on the other hand, that counsel has failed to act on behalf of the movant, the court shall appoint new counsel, allowing time to amend the *pro se* motion, if necessary, as permitted under Rule 29.15(f).

Id. (footnote omitted).

On January 7, 2014, privately retained post-conviction counsel filed his entry of appearance and a motion for an extension of 60 days to file amended motion (SLF 8-10). Two days later, the court granted counsel's motion for an extension of time beyond the recently imposed time limit in Rule 29.15(g). In accordance with the hypertechnical interpretation of Rule 29.15(g), the amended motion was due on January 15, 2014. Relying on the court's "erroneous" order extending the amended motion due date, counsel filed the amended motion on March 14, 2014, within the time limit set by the court's order, but outside the time limit imposed by Rule 29.15(g) (LF 15-27).

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The record is void of any evidence of negligent or intentional conduct by Appellant that caused the untimely filing of the amended motion. Appellant and his postconviction counsel reasonably believed that the motion court had authority to grant an extension of time outside of the strict time requirements set forth in Rule 29.15. Counsel's belief was reasonable because, at the time the court granted the extension, the holding in *Stanley v. State*, 420 S.W.3d 532 (Mo. banc 2014) had not been issued yet. "Prior to the Court's ruling in *Stanley*, [Appellant's] counsel could reasonably rely upon the motion court's exercise of its purported authority to grant additional extensions of time beyond the initial thirty-day extension." *Gittemeier*, at *2 n. 2.

The mere fact that Appellant retained private counsel eight days before his amended motion was due does not constitute negligence or intentional conduct that caused counsel to believe he was acting appropriately. Rather, the cause of counsel's mistake was in part because of the court's "erroneous" order granting a 60-day extension to file the amended motion. However, even if the Court decides that the motion court should have **crystal-balled** the holding in *Stanley*, the court's "erroneous" order serves as probative evidence refuting any contention that Appellant somehow caused counsel to miss the filing deadline. Obviously, any allegation that Appellant was responsible for postconviction counsel's late filing is beyond the pale when considering the particular circumstances in this case.

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Conclusion

Wherefore, for the foregoing reasons, the Court of Appeals decision should be reversed and remanded to consider the issues raised by Appellant's amended motion

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 21st day of November, 2016, one true and correct copy of the foregoing brief, were served via the court's electronic filing system on:

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned counsel hereby certifies that pursuant to Rule 84.06(c) this brief: 1) contained the information required by Rule 55.03; 2) complies with the limitations in Rule 84.06(b); and 3) contains 9,977 words determined using the word count in WordPerfect 12. A copy of this brief was submitted, in WordPerfect 12 format, via electronic copy. All digital copies of this brief were scanned for viruses and found to be virus free as required pursuant to Rule 84.06(h).

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