

IN THE
MISSOURI SUPREME COURT

DAVID LATHAM)
)
 Appellant,)
)
 vs.) No. SC 96315
)
 STATE OF MISSOURI,)
)
 Respondent.)

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF
JASPER COUNTY, MISSOURI
TWENTY-NINTH JUDICIAL CIRCUIT
THE HONORABLE GAYLE CRANE, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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ARGUMENT

Rule 24.035(e) allows a defendant to file a reply to appointed counsel's statement in lieu of an amended motion "not later than ten days after the statement is filed." The State admits that if appointed counsel files a statement in lieu, he or she may have abandoned the movant if counsel failed to review the record or investigate all allegations raised by the movant. (Rsp. Brf. 18-19), citing *Mason v. State*, 488 S.W.3d 135, 139 (Mo. App. S.D. 2016). Based on this, the State argues that the "purpose in allowing a response to a statement in lieu of an amended motion is to provide the defendant with an opportunity to address whether appointed counsel fulfilled the requirements set out in subsection (g) before counsel determined that an amended motion was unnecessary." (Rsp. Brf. 18).

The State seems to be equating a movant's reply with an abandonment motion. Under the State's theory, there would be a ten day time limit for filing such a motion. However, this narrow time limit would be unjust if counsel truly failed to do any work on a case before filing a statement in lieu. Neither case law nor language within Rule 24.035 suggests that there is a ten day time limit for filing an abandonment motion. Instead, such a motion would surely be allowed at any time before a judgment is rendered.

Next, the State argues that it would be "incongruous" to allow the reply to the statement in lieu to consist of a *pro se* amended motion "when the attorney appointed by the court to review the postconviction case has determined that an amended motion is unnecessary." (Rsp. Brf. 19). There is no inconsistency, though, because the vast majority of movants believe that appointed counsel will file an amended motion on their behalf.

When appointed counsel fails to file an amended motion, it is perfectly logical to allow movants to file *pro se* amended motions.

As argued in Mr. Latham's initial brief, a compelling purpose for being allowed to reply to the statement in lieu is for the movant to convince counsel to file an amended motion. (App. Brf. 16). Mr. Latham instead filed his own amended motion. Because the *pro se* amended motion was filed within ten days of the statement in lieu, it should be treated as timely.

Finally, the State asserts that allowing a movant to file a *pro se* amended motion within ten days of counsel filing a statement in lieu "would provide no deadline for the filing" of this motion "except for the ten day deadline for filing a response." (Rsp. Brf. 19). The State asserts that "a construction of the rule permitting a floating deadline for filing *pro se* amended motions would frustrate the purpose of finality behind the postconviction rules." (Rsp. Brf. 19-20), citing *Pennel v. State*, 467 S.W.3d 367, 373 (Mo. App. E.D. 2015).

At worst, Mr. Latham's construction of the rule would add ten days to the entire process. This brief period of time hardly frustrates the purpose of finality. Furthermore, the State's response here is hypocritical when it is also advocating for Rule 24.035 to be construed in a way that has no time limit whatsoever for appointed counsel to file a statement in lieu. (Rsp. Brf. 15-16). Under the State's construction of the rule, appointed counsel could delay finality for weeks, months, or even years after an amended motion is originally due. *See Scott v. State*, 472 S.W.3d 593, 595 (Mo. App. W.D. 2015)(although counsel entered an appearance on January 10, 2012, a statement in lieu was not filed until

April 17, 2014, over twenty-seven months later). A mere ten day delay is a drop in the bucket compared to what the State is advocating.

As argued in Mr. Latham's initial brief, appointed counsel should not be able to cure an abandonment by later filing a statement in lieu of an amended motion. Instead, once counsel has failed to file either an amended motion or a statement in lieu by the deadline, a presumption of abandonment should be found to have occurred.

In the alternative, if appointed counsel chooses to file a statement in lieu after the deadline for filing an amended motion has passed, the movant should nonetheless be allowed to file a *pro se* amended motion within the ten days allowed for a reply to a statement in lieu. This Court should therefore either find that a presumption of abandonment occurred when the statement in lieu was filed after the deadline for filing an amended motion or it should treat Mr. Latham's *pro se* amended motion as timely.

CONCLUSION

Because the statement in lieu of an amended motion was not filed until after the deadline for filing an amended motion had passed, this Court should remand the case for an abandonment hearing. In the alternative, because Mr. Latham's *pro se* amended motion was filed within ten days of appointed counsel's statement in lieu, it should be treated as timely, and the motion court's findings of fact and conclusions of law should be reversed.

Respectfully submitted,

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Certificate of Compliance

I, Samuel Buffaloe, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, and this certificate of compliance and service, the reply brief contains 896 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

/s/ Samuel Buffaloe

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