

No. SC96909

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In the  
**Supreme Court of Missouri**

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**LOWELL C. MILNER,**

**Appellant,**

**v.**

**STATE OF MISSOURI,**

**Respondent.**

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**Appeal from Madison County Circuit Court  
Twenty-Fourth Judicial Circuit  
The Honorable Sandra Martinez, Judge**

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**RESPONDENT'S SUBSTITUTE BRIEF**

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## ISSUES PRESENTED

Postconviction counsel untimely filed an amended Rule 24.035 motion accompanied by a *Sanders* motion alleging that: a) the movant was not at fault for the untimely filing; b) the delay resulted from plea counsel's destruction of a file containing copies of the movant's medical records; and c) postconviction counsel had to obtain the medical records, which were needed for the postconviction case, directly from the hospitals. The prosecutor responded by filing a motion to dismiss alleging that the movant was at fault for the untimely filing because the movant had not done anything to obtain the medical records or provide release forms to postconviction counsel. Relying on these filings, the motion court determined that the movant was not abandoned because he could have timely procured the medical records and given them to postconviction counsel.

This case presents two related issues: (1) Was the motion court's reliance on these filings in determining that the movant was not abandoned sufficient to constitute an independent abandonment inquiry? (2) Did the motion court produce a sufficient record from which an appellate court could review whether the abandonment determination was clearly erroneous?

## STATEMENT OF FACTS

Appellant (Defendant) appeals a Madison County Circuit Court judgment in which the motion court: 1) found that Defendant was not abandoned by postconviction counsel, and; 2) dismissed a Rule 24.035 motion for postconviction relief seeking to set aside a guilty plea to two counts of failing to register as a sex offender.

In the underlying criminal case, Defendant was charged on September 3, 2014, with one count of failing to register as a sex offender. (L.F. 6–7.) The information alleged that Defendant resided in Madison County on February 6, 2013, and failed to register as a sex offender with the county’s chief law enforcement official within three days of changing his residency. (L.F. 6–7.) An amended information was filed the next day adding a second count of failing to register as a sex offender that alleged Defendant resided in Madison County on May 16, 2013, and failed to register after changing his residency. (L.F. 8–9.)

On the same day the amended information was filed (September 4, 2015), Defendant and his plea counsel appeared in court and announced that Defendant wanted to plead guilty to the charges alleged in the amended information in exchange for the prosecutor’s recommendation of two consecutive sentences of four years on each count with execution of those sentences suspended and for Defendant to be placed on five years of

probation. (L.F. 14, 23–24.) Defendant also waived a sentencing assessment report. (L.F. 24–25, 32.)

Defendant, who had completed two years of college, acknowledged the rights he was waiving by pleading guilty. (L.F. 18–20, 28.) He told the court that he had discussed his case with plea counsel seven or eight times for a total of three or four hours. (L.F. 16.) He said that plea counsel had “investigated this case to [his] full satisfaction,” had interviewed all witnesses, and had done everything Defendant had requested. (L.F. 16–17.) Defendant agreed that he had had sufficient time to discuss the case with counsel before deciding to plead guilty, that plea counsel had explained all defenses available to him, and that he was satisfied with the advice of counsel. (L.F. 17–18.) Defendant told the court that he had no “complaints whatsoever” with his attorney’s handling of the case. (L.F. 18.)

The court read the charges from the amended information, and Defendant stated that he understood each element of those charges and admitted that he committed the offenses. (L.F. 20–21.) Defendant also acknowledged the range of punishment for each offense, which was two to four years in DOC, a year in the county jail, or up to a \$5,000 fine. (L.F. 21–22.) Defendant, who had been convicted of sodomy of a victim under 18 years old, admitted that he knew that the law required him to register as a sex offender within three days, but he had failed to do so. (L.F. 27–28.)

The court accepted Defendant's guilty pleas and sentenced him, in accordance with the parties' recommendation, to consecutive four-year sentences on each count, with those sentences suspended and Defendant placed on five years of probation. (L.F. 33–34.)

After a February 3, 2016 probation-revocation hearing, Defendant was delivered to the Department of Corrections on February 5, 2016. (L.F. 4–5, 43; Prob-Rev. Tr. 27.) On April 11, 2016, Defendant timely filed a pro se Rule 24.035 motion for postconviction relief. (L.F. 39, 43.) Paragraph 8 of the pro se motion, which asked the movant to state the claims known for setting aside the conviction, stated:

(a) Prosecuting attorney recommended 120 sentence (DOC) Medford Dwight Robbins (34842)

(b) Sandra Martinez (41766) has had a bias towards me since a [sic] I had with her from 2006 when she was a judge for D.F.S.

(c) The judges commison [sic] in St. Louis, Mo. can answer more questions on my attorney Kevin Chase!

(L.F. 44.) In the next paragraph, which asked for facts supporting the claims, Defendant merely listed the names of two attorneys (Kevin Chase and Wayne Williams) and Sharron Milner. (L.F. 44.) On the same day Defendant file his pro se motion (April 11, 2016), the motion court appointed the public defender as counsel for Defendant. (L.F. 49.) Although appointed counsel filed a



motion for a 30-day extension to file an amended motion,<sup>1</sup> the record does not clearly show that the motion court sustained it.<sup>2</sup> The transcript of the guilty-plea and sentencing hearings was filed on May 20, 2016.<sup>3</sup> (L.F. 5.) On

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<sup>1</sup> That motion does not appear in the legal file but appears in case.net under the Madison County Circuit Court's Case No. 16MD-CC00057.

<sup>2</sup> The record shows that the motion court granted appointed counsel's motion to continue a case-review hearing, but it does not show that appointed counsel's separate request for a 30-day extension to file an amended postconviction motion was ever granted. The parties' and the court's filings repeatedly state that an extension to file the amended motion was granted, (L.F. 58, 76–77, 80), but the record does not clearly show that it was. In any event, Defendant's amended motion was still untimely even if a 30-day extension had been granted.

<sup>3</sup> The motion court's judgment incorrectly states that the guilty-plea transcript was filed on May 24, 2016. (L.F. 5.) The transcript of the probation-revocation hearing was filed on May 24, 2016. (L.F. 5.) *See Bearden v. State*, 530 S.W.3d 504, 506 (Mo. banc 2017) (holding that a "complete transcript" under Rule 24.035 that triggers the 60-day deadline for filing the amended postconviction motion consists of the "guilty plea and sentencing

September 30, 2016, 133 days after the transcript was filed, the prosecutor moved to dismiss the case because no amended motion had been filed and Defendant's pro se motion failed to allege any facts supporting a claim for postconviction relief. (L.F. 51–56.)

On November 2, 2016, 166 days after the transcript had been filed, appointed counsel *untimely* filed an amended postconviction motion. (L.F. 40.) *See* Rule 24.035(g) (requiring the amended motion to be filed within 60 days after both the filing of the guilty-plea and sentencing transcripts *and* counsel's appointment with allowance for one 30-day extension).<sup>4</sup> The amended motion contained two claims: (1) that plea counsel was ineffective for failing to advise Defendant of a potential defense premised on his not having committed a "voluntary act" in failing to register because he was hospitalized and could not appear in person to register; and (2) Defendant was denied due process on the ground that his sentences had not been

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hearing," and "does not include a transcript of the probation revocation hearing."

<sup>4</sup> The deadline for filing the amended motion was either July 19, 2016 (without an extension) or August 18, 2016 (with an extension). Either way, the amended motion filed on November 2, 2016, was clearly untimely filed.

reduced by the amount of time he spent in pretrial incarceration. (L.F. 61–75.)

The amended motion was accompanied by a motion asking the court to consider the amended motion timely filed under *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991). Appointed counsel alleged in this *Sanders* motion that Defendant was not responsible for the untimely filing because on September 16, 2016, plea counsel informed postconviction counsel that he had destroyed Defendant’s file which had contained copies of the medical records referred to in the amended motion. (L.F. 57–60.) The motion further alleged that after receiving this information, postconviction counsel had attempted to obtain the medical records directly from the hospitals. (L.F. 58–59.)

The prosecutor responded to the *Sanders* motion with another motion to dismiss in which he alleged that Defendant had made no effort to obtain his medical records, that a HIPPA release was necessary to obtain these records, that neither Defendant nor his family members obtained and completed those release forms, and that Defendant should not be allowed to shift the blame to appointed counsel for not obtaining the records. (L.F. 76–78.)

The motion court later entered a judgment without an evidentiary hearing dismissing Defendant’s postconviction case. (L.F. 79–86.) The court first determined that Defendant was not abandoned by appointed counsel because Defendant was responsible for the late filing of the amended motion since the

execution of releases to obtain his medical records was within his control yet he failed to timely complete those releases. (L.F. 84–85.) The court then considered Defendant’s pro se postconviction motion and found nothing to adjudicate because there were no allegations of either ineffective assistance of counsel or that his guilty plea was involuntary. (L.F. 82–84.)

## 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 a determination of whether the findings of fact and conclusions of law issued by the motion court 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 24.035(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

**This case should be remanded to the circuit court for an abandonment inquiry without considering the merits of Defendant's appeal because the motion court's determination that Defendant was responsible for the untimely filing of the amended motion was based only on the allegations contained in the parties' competing motions and not on an independent abandonment inquiry. Moreover, the court determined Defendant was not abandoned without producing a record from which an appellate court could determine whether that abandonment determination was clearly erroneous. [Responds to Defendant's Points I and II.]**

No one disputes that Defendant's amended postconviction motion was untimely filed. But an untimely filing alone does not automatically result in a finding of abandonment. Abandonment occurs only when appointed counsel takes no action whatsoever with respect to filing an amended motion (or a statement in lieu of an amended motion) or when appointed counsel is aware of the need to file an amended motion but fails to do so in a timely manner. *See Luleff v. State*, 807 S.W.2d 495, 498 (Mo. banc 1991) (holding that when 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); *Sanders v. State*, 807 S.W.2d 493, 495 (Mo. banc 1991) (holding that when 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). Although “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.’” *Barton v. State*, 486 S.W.3d 332, 338 (Mo. banc 2016) (quoting *Crenshaw v. State*, 266 S.W.3d 257, 259 (Mo. banc 2008)).

Defendant’s abandonment claim falls under *Sanders* because it involves appointed counsel’s untimely filing of the amended motion. The question then becomes whether Defendant was free from any responsibility for the untimely filing. But before addressing that question, this Court must consider whether the motion court conducted an adequate and independent abandonment inquiry before finding that Defendant was at fault for the untimely filing.

When an untimely amended motion is filed, the motion court has a duty to undertake an “independent inquiry under *Luleff* ‘to determine if abandonment occurred.’” *Moore v. State*, 458 S.W.3d 822, 825 (Mo. banc 2015)

(quoting *Vogl v. State*, 437 S.W.3d 218, 228–29 (Mo. banc 2014)). “If the motion court finds that a movant has not been abandoned, the motion court should not permit the filing of the amended motion and should proceed with adjudicating the movant’s initial [pro se] motion.” *Id.* “If the motion court determines that the movant was abandoned by appointed counsel’s untimely filing of an amended motion, the court is directed to permit the untimely filing.” *Id.* at 826.

“[W]hen the record raises a presumption of abandonment because appointed counsel...failed to comply with Rule 24.035(e), [which requires] that counsel file a timely amended motion..., a motion court must conduct a *sufficient* independent inquiry of a post-conviction movant’s claim of abandonment.” *Vogl*, 437 S.W.3d at 229 (emphasis added). Defendant complains that the motion court dismissed his postconviction case without conducting an independent abandonment inquiry.

Although the law does not require any particular formality for these inquiries, the motion court must nevertheless make a sufficient record from which an appellate court can determine whether the abandonment determination was clearly erroneous:

[T]he trial court should, as part of its independent inquiry under *Luleff*, inquire not only of postconviction counsel, but ensure that movant is informed of counsel’s response and given an opportunity to reply. The



method of making this inquiry may be as formal or informal as the motion court deems necessary to resolve the question of abandonment by counsel, including, but not limited to, a written response and opportunity to reply, a telephone conference call, or a hearing. However, a sufficient record must be made to demonstrate on appeal that the motion court's determination on the abandonment issue is not clearly erroneous.

*McDaris v. State*, 843 S.W.2d 369, 371 n.1 (Mo. banc 1992).

The inquiry *McDaris* suggests is designed to determine where fault lies when an amended motion is filed out of time. This is important because *Sanders* permits a hearing on the merits only if movant is innocent of responsibility for the late filing. But where the record shows on its face that post-conviction counsel did not abandon movant, there is no need to proceed to such an inquiry. The record refutes the claim of abandonment, and no independent inquiry is required of the motion court.

*Moore v. State*, 934 S.W.2d 289, 291–92 (Mo. banc 1996). *See also Vogl*, 437 S.W.3d at 229 (“When the record refutes the claim of abandonment, however, no independent inquiry is required of the motion court.”). The record on its face in Defendant's case does not refute the claim of abandonment.

The motion court apparently determined solely from the allegations contained in the parties' motions that the record either refuted the claim of abandonment or sufficiently showed that Defendant was not free from

responsibility for the late filing of the amended motion. Postconviction counsel alleged in her *Sanders* motion that the delay in filing the motion was attributable to counsel's inability to get medical records from plea counsel, who had allegedly destroyed Defendant's file, and the necessity of retrieving the records from the hospitals themselves. (L.F. 58–59.) The motion court apparently concluded that postconviction counsel would not have had to rely on these sources for the records if Defendant had timely executed releases to obtain the records. It was Defendant's presumed negligence in failing to provide postconviction counsel with either a release or the actual hospital records on which the motion court relied in determining that Defendant was not abandoned. *See Brooks v. State*, 304 S.W.3d 764 (Mo. App. S.D. 2010) (remand for an abandonment hearing is required “unless the record reflects that non-compliance is a direct result of [the defendant]'s negligence”).

The motion court presumed that Defendant acted negligently in failing to provide either signed medical-release forms or the hospital records themselves to appointed counsel. But it appears the court made this finding solely on the allegations contained in the parties' motions without conducting an *independent* abandonment inquiry in accordance with *McDaris*. Moreover, nothing in the record, other than the fact that appointed counsel was allegedly not advised that plea counsel had destroyed copies of Defendant's medical records until after the deadline for filing the amended motion had

passed, supported a finding that Defendant either acted negligently or was at fault in failing to provide appointed counsel with either a medical-records release or the records themselves. Consequently, there is an insufficient record from which this Court can determine whether the motion court's finding that Defendant was *not* abandoned was clearly erroneous.

“When the independent [abandonment] inquiry is required but not done, [an appellate court] will remand the case because the motion court is the appropriate forum to conduct such an inquiry.” *See Moore*, 458 S.W.3d at 826. “The result of the inquiry into abandonment determines which motion—the initial motion or the amended motion—the court should adjudicate.” *Id.* Since the motion court cannot know which motion to adjudicate without an abandonment inquiry, Missouri courts have repeatedly held that the merits of a defendant's postconviction claims on appeal will not be considered when the record shows that the amended postconviction motion was untimely filed and the motion court has not conducted an abandonment inquiry. *See Moore*, 458 S.W.3d at 826 n.4; *Silver v. State*, 477 S.W.3d 697, 700 n.1 (Mo. App. E.D. 2015); *Hicks v. State*, 473 S.W.3d 204, 208 n.7 (Mo. App. S.D. 2015); *Price v. State*, 500 S.W.3d 324, 325 (Mo. App. W.D. 2016).

Here, the motion court considered only the claims in Defendant's pro se motion, but the only claims Defendant asserts on appeal come from the untimely filed amended motion. Consequently, the exception outlined in

*Childers v. State*, 462 S.W.3d 825, 828 (Mo. App. E.D. 2015), which permits the appellate court to consider the merits when the motion court has adjudicated all claims asserted in both the pro se and amended motions, does not apply.

If this Court were to conclude that the record is sufficient to find that the motion court's abandonment determination was not clearly erroneous, Defendant is not entitled to any relief. The only claims Defendant asserts on appeal are contained in the untimely filed amended motion, which are not cognizable. See *Flenoy v. State*, 446 S.W.3d 297, 302 (Mo. App. W.D. 2014) (holding that "a claim for relief not raised in a timely filed Rule 24.035 motion is not preserved for appellate review merely because a motion court accepts evidence and makes findings of fact and conclusions of law regarding the waived claim, as a motion court only has the authority to decide claims that have been *timely* asserted in a post-conviction motion"); *Hoskins v. State*, 329 S.W.3d 695, 699 (Mo. banc 2010) (holding that plain-error review is unavailable to review a postconviction claim asserted for the first time on appeal); *Clay v. State*, 310 S.W.3d 733, 736 (Mo. App. W.D. 2010) (holding that an appellate court will not review a postconviction claim on appeal that materially differs from that alleged in the postconviction motion). Consequently, this Court may reject Defendant's claims on appeal without

addressing the merits because the claims he raises were not contained in his timely filed pro se motion.

If, on the other hand, this Court were to conclude that the record is sufficient to find that the motion court's abandonment determination was clearly erroneous and that a remand for an abandonment inquiry is not necessary, Defendant's claims on appeal, which are derived exclusively from his amended postconviction motion, are not yet ripe for appellate review because the motion court erroneously disposed of those claims by finding that they were raised in an untimely filed amended motion. The motion court considered, and then dismissed, only the claims asserted in the original, pro se postconviction motion. (L.F. 85–86.) When a motion court disposes or dismisses postconviction claims on an erroneous legal ground rather than consider them on the merits, the proper remedy is for an appellate court to reverse the motion court's judgment and remand the case with directions to consider those claims on the merits. *See Creighton v. State*, 520 S.W.3d 416, 423 (Mo. banc 2017). *Compare Green v. State*, 494 S.W.3d 525, 532–33 (Mo. banc 2016) (holding that when the motion court's judgment fails to acknowledge, dispose of, or adjudicate every postconviction claim asserted in the postconviction motion, the judgment is not final for purposes of appeal).

The motion court did not conduct an independent abandonment inquiry that complied with the requirement set out in *McDaris*. This failure resulted

in a record that is insufficient to permit meaningful appellate review of the motion court's abandonment determination. This case should be remanded with directions to conduct an independent abandonment inquiry.

## CONCLUSION

The motion court's judgment dismissing Defendant's postconviction motion should be reversed and this case should be remanded to the motion court to conduct an independent abandonment inquiry.

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 3,923 words, excluding the cover, signature block, and this certificate, as determined by Microsoft Word 2010 software.

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