

23-7450

No. _____

FILED

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ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Jihad Ahmad Spann Sr. — PETITIONER

(Your Name)

vs.

Atty. Andrew Baily et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Missouri Eastern District Court of Appeals

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jihad Ahmad Spann Sr.

(Your Name)

300 E. Pedro Simmons Dr.

(Address)

Charleston, MO 63834

(City, State, Zip Code)

(N/A)

(Phone Number)

QUESTION(S) PRESENTED

May the due process clause of the United States Constitution that require the State Courts to provide to defendants a full and fair post-conviction proceeding, if authorized by state law and as such constitutes a protected liberty interest, be disregarded by the State Court in that (1) the State Appellate Court failed to instruct the motion court to conduct an independent inquiry of Petitioner's claim of abandonment; (2) that although appointed post-conviction counsel in a State Rule 29.15 post-conviction relief proceeding is required to meet with the movant in preparing the amended motion, said counsel failed to do so?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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RELATED CASES

State v. Jihad Spann, 604 S.W.3d 852 (Mo.App. E.D. 2020) Missouri Eastern District Court of Appeals. Judgment entered April 28 2020 Mandate entered September 1, 2020.

Jihad Spann v. State, 677 S.W.3d 897 (mo.App.E.D. 2023) Missouri Eastern District Court of Appeals. Judgment entered September 23, 2023. Mandate entered November 21, 2023.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

[X] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[x] reported at Spann v. State, 677 S.W3d 897(2023); or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the 22nd Judicial Circuit, DIV 10 court appears at Appendix B to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[x] is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was Sept. 26, 2023. A copy of that decision appears at Appendix A.

A timely petition for rehearing was thereafter denied on the following date: November 21, 2023, and a copy of the order denying rehearing appears at Appendix C.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 5. U.S. Constitution: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on the presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment 14 U.S. Constitution: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Revised Missouri Statute § 547.360.5 (1) & (2): "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 no later than 10 days after the statement

is filed."

Revised Missouri Statute § 547.360.10: "The court shall issue findings of fact and conclusions of law on all issues presented, whether or not a hearing is held. If the court finds that the judgment was rendered without jurisdiction, that the sentence imposed was illegal, or that there was a denial or infringement of the rights given movant by the Constitution of Missouri or the Constitution of United States as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the movant or resentence the movant or order a new trial or correct the judgment and sentence him as appropriate."

Revised Missouri Statute § 547.360.11: "An order sustaining or overruling a motion filed under the provision of this section shall be deemed the final judgment for purposes of appeal by the movant or the state. If the court finds that a movant allowed an appeal is an indigent person, it shall authorize an appeal in forma pauperis and furnish without cost a record of all proceedings for appellate review. When the appeal is taken, the circuit court shall order the official court reporter to promptly prepare the transcript necessary for appellate review without requiring a letter from the movant's counsel ordering the same. If the sentencing court finds against the movant on the issue of indigence and the movant so requests, the court shall certify and transmit to the appellate court a transcript and legal file of the evidence solely on the issue of indigence so as to permit review of that issue by the appellate court. Appellate review of the trial court's action on the motion filed under this section shall be limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous."

Revised Missouri Statute § 547.360.12: "The circuit court shall not entertain successive motions."

STATEMENT OF THE CASE

It is Petitioner's position that his court appointed post-conviction counsel violated Missouri State Rule 29.15(e) which govern in part the post-conviction proceeding, in that Petitioner requested counsel to file the proper motions as notices of appeal for the violation, and the attorney failed to file the said motions upon request. The failure to file the post-conviction motions resulted in the procedural default of Petitioner's claim of abandonment.

Specifically post-conviction counsel filed a standard notice of appeal without the prerequisite findings of fact, therefore making the claim insufficient; and then failed to file the subsequent Rule 78.07(c) motion to preserve the claim so that the Court could amend it's order and judgment. Rule 29.15(j).

Petitioner's claim of total abandonment, could not be filed in an initial pro se post-conviction relief motion because he had no way of knowing that a court appointed post-conviction attorney would not comply with the specific mandates contained in Rule 29.15(e); consequently the known ground for relief was pleaded by Petitioner orally, acting in his pro se capacity, at the time of the evidentiary hearing. Rule 78.07(c) was also filed by Petitioner pro se.

In Missouri, a defendant's rights to postconviction relief are only guaranteed under Rule 29.15(e); and where the record shows a presumption counsel failed to comply with the rule, and the Court does not inquire into the issue, it is assumed he was abandoned and the Court must conduct an independent inquiry into counsel's

performance to protect the defendant's liberty interest and due process.

At the time of the post-conviction hearing, as denoted above, post-conviction counsel had failed to comply with and follow State Court Rule 29.15(e). More egregiously, post-conviction counsel refused to admit to the motion court his improper conduct and thereby created a personal conflict of interest by signing a motion attesting to have complied with Rule 29.15(e) when in fact he had not complied with Rule 29.15(e) and his failure to do so left him open to receive sanctions.

It was professionally unreasonable not to have filed a notice of appeal simply because the claim was against him.

REASONS FOR GRANTING THE PETITION

The State Court's opinion is contrary to this Court's opinion and decision in Roe v. Flores-Ortega, 528 U.S. 470 (2000) where this Court reversed because the attorney failed to comply with a state court rule in that defendant's attorney did not file a notice of appeal on behalf of the defendant; and as a result this Court held that such conduct constitutes a clear violation of Defendant's Due Process Rights.

This Court should grant Certiorari Review of Petitioner's liberty interest & claim that is guaranteed under the Due Process clause of the United States Constitution, in that the State courts ruled contrary to Supreme Court precedence in this postconviction proceedings concerning appointed post-conviction counsel's performance during the post-conviction proceeding, because said counsel failed to comply with the State Court Rules that govern post-conviction proceedings. This created an obvious conflict of interest in the motion court litigating of his claim against appointed counsel. State ex rel. Nixon v. Jaynes, 63 S.W.3d 210.

As previously stated, post-conviction counsel failed to comply with Mo. Sup. Ct. R. 29.15(e); and during a hearing Petitioner questioned his performance in that it appeared to violate the State rule as set forth by the Missouri Supreme Court in State v. White, 873 S.W.2d 590 (1994). Petitioner requested appointed counsel to file a notice of appeal of that claim in the form of (1) findings of fact & conclusions of law on the amended motion to Judge Ohmer at first chance; and (2) in the form of an after-trial motion Rule 78.07(c) (Rule 29.15(j)) to amend the judgment, once the judge failed to sua sponte address the abandonment

claim after counsel failed to raise it in the findings of facts, although Petitioner timely filed a pro se pleading with the Court regarding post-conviction counsel; ineffectiveness procedurally defaulted of Petitioner's claim against him in a prejudicial way.

Simmons v. Lockhart, 915 F.2d 372 (8th Cir. 1990).

Appointed counsel failed to file the requested notices of appeal, nor did he file a standard notice of appeal in order to protect Petitioner's interest, has resulted in detriment to Petitioner, all the while protecting post-conviction counsel acted in a manner to protect himself from the personal conflict that occurred due to his failure to comply with the State Court Rule. Mo. Sup. Ct. R. 4-1.7(a)(2). State ex rel. Nixon v. Jaynes, 63 S.W.3d 210.

Where court appointed counsel fails to comply with requirements under Rule 29.15(e), the Court may order sanctions on said counsel as well as his supervisor in certain circumstances, see State v. White, 873 S.W.2d. 590 (1994). Petitioner's request that his appointed lawyer raise a Rule 29.15(e) violation against himself conflicted with a personal interest of the attorney. The violation of the Rule created a clear conflict by evidencing a deficiency in said counsel's performance and materially limited his representation of Petitioner when he failed to perform & act on behalf of his client to make a pro se pleading timely filed in the Court legally sufficient. Luleff v. State, 807 S.W.2d. 498 (1991).

Counsel's failure to act as requested in the proceedings denied the Petitioner a full and fair proceeding and resulted in a dete-

mination not worthy of confidence. This is true because; the judge's attention would have been directed to the claim against counsel by counsel in two separate instances: (1) in the findings of facts & conclusions of law motion to the Court on all issues presented during the hearing, RSMo § 547.360.10; and (2) in the motion to amend the order & judgment once the court issued without sua sponte addressing the pro se pleading. Mo.Sup.Ct. R. 29.15(j), Rule 78.07(c).

There is no doubt that the motion court would have then had the cause to: (1) address the attorney's performance within his order & judgment when reviewing the amended motion; and (2) re-opened the proceedings for independent inquiry into post-conviction counsel's performance. The State Court would be required to ascertain what steps the lawyer took in regards to the pro se motion; which in and of itself would have made the outcome of the proceeding different. The failure of the State Court to take this step resulted in a plain denial of an amended motion with any further inquiry concerning Petitioner's participation.

The transcript of the independent inquiry is needed for an effective defense to appeal. This Court has identified two factors that are relevant to an indigent defendant's claim of right to a free transcript to the determination of need: (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a

transcript. Britt v. North Carolina, 404 U.S. 226 (1971). Petitioner has a Due Process Right to the inquiry into post-conviction counsel's performance in the motion court, and the free transcript it would provide to effectively appeal his 'total abandonment' claim as a part of his claims within counsel's amended motion.

The Court should have ascertained that the performance of appointed counsel was a violation of Rule 29.15(e) because; Petitioner was never asked by counsel if he had included all grounds for relief within the pro se motion that was known to him. Had post-conviction counsel complied with the State rule, he would have learned that Petitioner had no need to raised a claim of abandonment at that time as a grounds for relief since he had no way of knowing that the Court would appoint him counsel that would fail to comply with the requirements of the Rule 29.15(e). Clearly the claim of abandonment on the improper amended motion was timely filing, by Petitioner orally, at the time of post-conviction hearing. Briggs v. State, 466 S.W. 3d 714 at 722 (2014).

One does not have to speculate as to what Judge Ohmer would have done or if he would have found the claim meritorious. No claim has ever been denied where 'total abandonment' occurred in Missouri. The remains no doubt Petitioner's Due Process rights were violated when the counsel refused to file the prerequisite notices to the State Court that Petitioner requested him to do so in order to perfect the appeal his claim of abandonment in lieu of filing the standard notice of appeal. Roe v. Flores-Ortega, 528 U.S.

Petitioner acknowledges that a claim of violation of state law, even if true is not in and of itself, equivalent to a violation of federal constitutional rights to Due Process of law. Johnson v. Clinton, 763 F. 2d. 326 (8th Cir. 1985). However state law, or regulations such as in the present case created a constitutionally protected liberty interest. Bonds v. Mo Dept' of Mental Health, 887 S.W2d 418; citing Williams, 852 F.2d 377 (1988).

Such an interest is deemed created if (1) the statute contains particularized substantive standards or criteria that significantly guide decision makers; and (2) the statute uses mandatory language requiring the decision makers to action in a certain way.

Put another way a statute which creates a certain right or entitlement imposing substantive limits on the discretion to state officials and is subject to specified factual findings. Meis v. Gunter, 906 F. 2d. 364 (8th Cir. 1990). E.g.

In this case, Petitioner's protected liberty interest required an independent inquiry conducted by the motion court to determine whether or not the appointed post-conviction counsel complied with guarantees that are mandated under Mo. Sup. Ct. Rule 29.15(e) e.g. appointment of an attorney to investigate his pro se motion; which allows the Court to issue findings of facts & conclusions of law specifically to the pro se pleadings pursuant to RSMo. § 547.360.5 and § 547.360.10 RSMo.

These statutes require State Court judge's to issue findings of facts & conclusions of law on all issues presented during the evidentiary hearing on the amended motion. RSMo. § 547.360.10. And, when a defendant timely files pro se pleadings on the record against appointed counsel for failure to comply with RSMo § 547.360.5 (1) & (2), and the Court fails to address the claim, abandonment is automatically presumed and the Court reverses and remands for an independent inquiry in the motion court, under Luleff supra. Pope v. State, 87 S.W3d 425.

Rule 29.15(j). RSMo § 547.360.10. Specified factual findings.

Petitioner's conflicted court appointed counsel failed to file a proper notice of appeal to the court that reflected a claim of abandonment because counsel failed to comply with requirements under Rule 29.15(e). The failure, based on part to post-conviction counsel's personal conflict of interest; and his failure to comply with Rule 29.15(e) necessitates that this matter be treated as if counsel had not been appointed at all to Petitioner. State ex rel Nixon v. Jaynes, 63 S.W3d 210. Rule 4-1.7(a)(2).

Under Strickland v. Washington, 466 U.S. 688 (1984), counsel's performance in resolving the issue concerning abandonment and his failure to comply with requirements under Rule 29.15(e) were unreasonable; and prejudiced Petitioner's ability to receive a full and fair hearing in the post-conviction proceedings because he was deprived of an opportunity to have the motion court to examine a claim against counsel himself. Clearly, it was necessary for

the Court to ascertain if counsel acted in accordance with the specific requirements of Rule 29.15(e).

No doubt, this is a reasonable probability that, but for counsel's unprofessional errors, specifically his failure to comply with State Court Rule 29.15(e), the result of the proceedings would have been different; and the procedural default would not have occurred. Stokes v. Armontrout, 851 F.2d 1085 (8th Cir. 1988).

Ineffective assistance of counsel can be cause for overcoming a procedural bar, otherwise, a Petitioner would be stuck with whatever his postconviction lawyer had done, however incompetent. It is certainly true that the ineffectiveness of post-conviction counsel is not, in and of itself, a ground for habeas relief. That, however is not the same thing as saying it cannot be cause to excuse a procedural default. The procedural default in question, of course, must be one that occurred in the postconviction proceeding.

Simmons v. Lockhart, 915 F.2d 372 (8th Cir. 1990).

Petitioner timely filed Rule 78.07(c) pro se motion; however only when post-conviction counsel failed and refused to do so. The Appellate Court's jurisdiction derives from that of the motion court, but the motion court lost jurisdiction to litigate the claim once it denied the pro se Rule 78.07(c). As such the State Appellate Court's opinion in the case acted outside of its authority in that it provided findings of fact & conclusions of law for the motion court by implication in violation of Rule 29.15(k).

In re Jeffery v. Jeffery, 53 S.W.3d 173 (Mo.App. E.D. 2001).

The only vehicle to litigate these Due Process violations is a U.S. Writ of Certiorari... to protect Petitioner's liberty interest to Due Process Rights guarantee pursuant to the United States Constitution. In a state post-conviction proceeding where a state agent deliberately disobeys a directive from a defendant to comply with court rules & statutes, and such failure falls on the shoulders of the defendant this Court must intervene. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L. Ed. 2d. 640; citing White, 873 S.W2d 590 at 598.

Thus, a defendant's right to postconviction counsel exists only under Rule 29.15(e) and Missouri's holding in Luleff v. State, 807 S.W2d 495 (Mo.banc 1991).

At every step Petitioner requested the Court and appointed counsel to comply with the State rules & statutes in order to properly appeal the claim of total abandonment. But due to post-conviction counsel's personal conflict due to his failure to comply with State Court Rule 29.15(e) and his failure to admit to the State Court this conduct, constitutes an external factor that provides sufficient cause to overcome the procedural, defaulted appeal of Petitioner's claim which cannot be attributed to him.

Clearly, the personal conflict of interest would not have occurred had counsel filed a proper notice with the court, that advised the State Court that Petitioner intended to appeal based upon the claim of total abandonment.

This Court has held that, "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can sh-

ow that some objective factor external to the defense impeded co-
unsel's efforts to comply with the state's procedural rules."

Murray v. Carrier, 477 U.S. at 488. E.g.

"A showing that the factual or legal basis for a claim was not reasonably available to counsel... or that 'some interference by officials' ... made compliance impracticable, would constitute cause under this standard. (Cause for a procedural default on appeal ordinarily requires a showing that some external impediment preventing counsel from constructing or raising the claim.)

Hence, this is Petitioner's dilemma. Post-conviction counsel failed to comply with the rule's requirements in failing to meet with Petitioner in order to ascertain what claims & facts should be included in the pro se motion; and thus failed to sufficiently communicate & confer with Petitioner about what grounds for relief he knew of that were not included in the pro se motion, i.e. abandonment for his (counsel) failure to comply with Rule 29.15 (e). This reflects not only a failure by post-conviciton counsel to comply with Rule 29.15(e); but also, evidence that the factual basis for the claim & legal basis for the claim was not reasonably available to said counsel, based upon a personal conflict of interest. Moreover Judge Ohmer failed to sua sponte address the abandonment issue in the order & judgment where he denied the amended motion drafted by counsel, thereby making compliance with rules and statutes, and the law under Luleff *supra* impracticable.

Significantly, it should be noted that post-conviciton counsel

admitted to the State Court, after a judgment & order denying relief to his client (who has no constitutional right to his representation in the proceedings other than that contained in Rule 29.15); that he had not actually complied with the requirements of the State rule. Despite this admission the Court failed to act *sua sponte* in addressing this claim of abandonment.

In Missouri, abandonment may occur when the overt action of post-conviction counsel prevent the movant from filing a timely original motion. Moore, 328 S.W3d 700. Hence, this is Petitioner's dilemma. Post-conviction counsel failed to timely file Rule 78.07(c). The circumstances in which a motion court may find abandonment are not fixed in Missouri. Crenshaw, 266 S.W3d 257. E.g. see, Pope v. State, 87 S.W3d. 425.

The abandonment claim was not inside the attorney's amended motion, however the abandonment claim was a pro se pleading timely filed, and on the record; thus not a successive motion. Rule 29.15(L).

It was counsel's duty to Petitioner to make the pro se pleading legally sufficient even though it was an obvious complaint against him & his performance. More than that, it was professionally unreasonable for counsel to NOT FILE with the Court, a NOTICE OF APPEAL, for abandonment, after Petitioner requested appointed Counsel do so.

"A lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." Roe v. Flores-Ortega, 528 U.S. 470 (2000).

State ex rel Meier v. Stubblefield, 97 S.W. 3d. 476 (2003).

"A claim of ineffective assistance of post-conviction motion counsel is generally not cognizable on appeal of a post-conviction judgment. State v. Meinhardt, 900 S.W. 2d. 242 (1995). However, such a claim may be considered if there is a total abandonment of counsel. Luleff, 807 S.W.2d. at 497."

The Rule 78.07(c) after-trial motion, and findings of fact and conclusions of law motion to the motion court serves as a notice of appeal in this circumstance; not a standard notice of appeal.

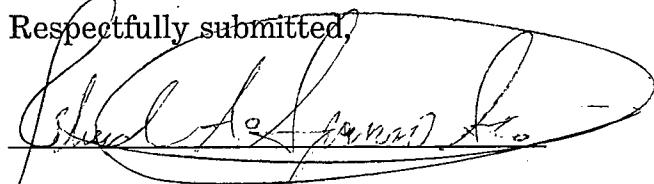
The former, was NOT FILED because of an apparent conflict of interest that caused a procedural default of this claim.

Petitioner prays the Court grant certiorari review & thereafter vacate the State Appellate Court's decision and instruct it to: reverse & remand his case to the State motion court, for an independent inquiry into counsel's performance consistent with Due Process under Missouri law, see: Pope v. State, 87 S.W. 3d. 425, 428 (Mo.App.W.D. 2002); and Luleff v. State, 807 S.W. 2d. 498 (Mo.banc 1991), U.S. Ct. Rule 10(c). Because the state court's decision is contrary to Roe v. Flores-Ortega, 528 U.S. 470.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael J. Fenni". The signature is enclosed within a large, irregular oval outline.

Date: February 2, 2024