

IN THE CIRCUIT COURT  
OF JACKSON COUNTY, MISSOURI

KENNETH G. MIDDLETON, )  
)  
Movant, )  
)  
v. )  
)  
STATE OF MISSOURI, )  
)  
Respondent. )

Case No. CV91-23437

Division No. 12

FILED  
DEPT. OF CIVIL RECORDS  
COURT ADMINISTRATORS OFFICE  
OCT 30 2010  
CIRCUIT COURT OF JACKSON CO., MO.  
PCV

**MOVANT'S REPLY IN SUPPORT OF HIS MOTION TO REOPEN HIS  
29.15 PROCEEDING AND HIS MOTION FOR DEFAULT JUDGMENT**

COMES NOW movant, Kenneth G. Middleton, by and through counsel, and hereby replies to the State's responses to his motions to reopen his 29.15 action and his subsequent motion for default judgment.

**INTRODUCTION**

Due to no fault of his own, Kenneth Middleton has never had a full and fair review of his compelling Constitutional claims that demonstrate that his first degree murder conviction resulted from a fundamentally unfair trial. In prior state court and federal court post-conviction proceedings, attorneys for the state of Missouri have successfully erected procedural roadblocks to any court's review of the merits of movant's claims that he received ineffective assistance of counsel.

It is common knowledge in the Kansas City legal community that every defendant facing a murder charge who was convicted in the late 1980s and early

1990s who was represented by Robert G. Duncan did not receive constitutionally effective representation. Mr. Duncan failed as an advocate because of his personal, financial, and legal difficulties that subsequently resulted in his conviction on federal criminal charges and the loss of his license to practice law. *See Greg Kuhl, Tax Offenses Threaten Area Lawyer's Practice. Suspension Is Proper, High Court Says, Kansas City Star, Dec. 19, 1992, at C1.* In fact, with the notable exception of Mr. Middleton, almost every murder case tried by Mr. Duncan during that time period was reversed due to ineffective assistance of counsel. *See White v. Roper, 416 F.3d 728, 730-732 (8th Cir. 2005); Reuscher v. State, 73463 (Mo. banc Nov. 21, 1996) (Report of Special Master Charles Blackmar).*<sup>1</sup>

In order to continue to advance and protect his pecuniary interests and professional reputation after movant's conviction, Mr. Duncan remained as counsel of record on movant's direct appeal and recruited Gerald Handley to file movant's 29.15 action in order to continue to collect attorney fees from movant and shield

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<sup>1</sup> Before former Chief Justice Blackmar found Duncan ineffective in *Reuscher*, Judge David Darnold, also acting as a special master, found that Reuscher did not file a timely 29.15 motion because of Mr. Duncan's "malfeasance" and a conflict of interest that occurred while Duncan continued to represent Reuscher on direct appeal, *State v. Reuscher*, No. 73463, at 8-9 (Mo. banc Dec. 1, 1995). (Report of Special Master David Darnold); *see also Reuscher v. State*, 887 S.W.2d 588, 592-593 (Mo. banc 1994) (Thomas, J. dissenting).

himself from the meritorious allegations of incompetence that led this Court to overturn Mr. Middleton's convictions in 2005. (See Mov. Exh. 1, ¶¶ 6-15).

Mr. Duncan's "eleventh hour" collusion with Mr. Handley just days before the deadline for filing movant's amended 29.15 motion put movant in an untenable position. Mr. Middleton was confronted with a classic "Hobson's choice." He could sign a blank verification provided to him by Mr. Handley that was not accompanied by a motion setting forth any claims for relief or, he could refuse to sign the verification, which would have resulted in all of his claims being procedurally barred. Movant, because he was incarcerated at the time in Potosi Correctional Center with Missouri's death row inmates, reluctantly chose the former course.

Mr. Middleton reluctantly made this Hobson's choice because he was familiar with the similar dilemma faced by Missouri death row inmate Richard Oxford. Mr. Oxford, like movant, was asked by his 29.15 counsel to sign a blank verification before his amended motion was prepared for his review. Mr. Oxford refused to sign the verification. As a result, Oxford's post-conviction claims were found to be procedurally barred in both state and federal court and he was subsequently executed on August 21, 1996. (See Exh. 1, p.3, ¶ 8; see also *State v. Oxford*, 791 S.W.2d 396 (Mo. banc 1990); *Oxford v. Delo*, 59 F.3d 741 (8th Cir. 1995).

In opposing the reopening of this action on grounds of abandonment by the public defender, conflict of interest, and a fraud upon the court committed by Mr. Handley, the State relies almost entirely upon the Court of Appeals' opinion in *Middleton v. State*, 200 S.W.3d 140 (Mo. App. W.D. 2006). However, the Court of Appeals' opinion only addresses the issue of abandonment by Mr. Handley and made no ruling on any of the other grounds for reopening the judgment that are currently before the Court.

The State's response to the present motion is also more remarkable for its omissions rather than its substance. The State says nary a word about movant's judicial estoppel argument based upon the fact that the State conceded in prior proceedings that petitioner was abandoned by post-conviction counsel of record from the public defender's office, who was not relieved of its appointment until after the defective amended motion was filed by Mr. Handley. The State also has little to say regarding the fact that they neglected to timely respond to the motion to reopen the judgment. Procedural rules, including time limits, in 29.15 actions should be a two-way street. In situations where an inmate fails to meet a deadline or another technical requirement of 29.15, the prisoner, like Mr. Middleton, is procedurally precluded from obtaining any meaningful post-conviction review. In several Missouri death

penalty cases, like those involving Mr. Oxford and Kelvin Malone<sup>2</sup>, the prisoner later forfeited his life without any meaningful review of his conviction or death sentence. Unless this Court intervenes, Mr. Middleton, like Oxford and Malone, will suffer a sentence of “death by incarceration” without any meaningful post-conviction review.

Counsel for the state also argues that the Court of Appeals’ decision in *Middleton* conclusively forecloses any consideration of movant’s current arguments because that court held that this Court lacked jurisdiction to reopen the case. Apart from the fact that judicial estoppel principles prevent the state from reversing course when they conceded that this Court had jurisdiction to reopen the case due to abandonment by the public defender, it is also clear that this jurisdictional argument was waived because of the concession by the prosecutor’s office that the court did have jurisdiction on this basis during the prior proceedings that culminated in this Court’s 2005 judgment. *See Phillips v. Hasty*, 775 S.W.2d 191, 194 (Mo. App. E.D. 1989).

The Court of Appeals’ prior opinion in *Middleton* also does not address movant’s fraud upon the court argument involving the irrefutable fact that Mr. Handley’s amended motion, which falsely asserted that movant had read the motion

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<sup>2</sup> *See Malone v. State*, 798 S.W.2d 149 (Mo. banc 1990); *Malone v. Vasquez*, 138 F.3d 711 (8th Cir. 1998).

and had raised all known claims for relief, contained material falsehoods that deprived Middleton of a new trial to which this Court held he was entitled in its 2005 judgment. In this regard, this intentional fraud upon the court perpetrated by Mr. Handley is indistinguishable from the intentional fraud perpetrated by the Jackson County prosecutor's office in *Davis v. State*, No. 0616-CV-00545 (Mo. Cir. Ct. Feb. 10, 2009). This Court, who also presided over the matter in *Davis*, found that an intentional fraud upon the court committed by the prosecution required relief for Mr. Davis under Rule 24.035 despite similar procedural hurdles that were present in that case.

In the sections below, movant will reply to the State's arguments in greater detail regarding each of the previously unaddressed grounds for reopening this proceeding. Because each of these enumerated grounds for reopening the proceeding based upon judicial estoppel, abandonment, conflict of interest, and fraud upon the court are legally sound, elementary principles of justice require that this Court reopen the judgment and grant Mr. Middleton a new trial. In addressing another obvious and similar injustice that occurred in the *Reuscher* case where a murder conviction and the state post-conviction process were also tainted by Mr. Duncan's handiwork, the words of the late Elwood Thomas are appropriate here: "It is often said that where there is a wrong, there is a remedy. This may be true, but sometimes [the courts] have

to help it become true.” *Reuscher v. State*, 887 S.W.2d 588, 592 (Thomas, J. dissenting).

## GROUNDS FOR REOPENING THE PROCEEDING

### I.

**BECAUSE THE STATE OF MISSOURI CONCEDED DURING PRIOR PROCEEDINGS THAT THE COURT HAD JURISDICTION DUE TO THE ABANDONMENT OF APPOINTED 29.15 COUNSEL FROM THE PUBLIC DEFENDER’S OFFICE, THE DOCTRINE OF JUDICIAL ESTOPPEL PRECLUDES THE STATE FROM OPPOSING THE REOPENING OF THE JUDGMENT ON THIS GROUND.**

The state of Missouri has not refuted, nor could it do so, the fact that it conceded during prior proceedings that movant was abandoned by his appointed 29.15 counsel from the public defender’s office. As a result, the doctrine of judicial estoppel precludes the state from opposing the reopening in the case on the same ground in the motion to reopen that is currently before the Court.

The doctrine of judicial estoppel is grounded upon fundamental principles of justice that it is unfair to allow a party to a lawsuit to change his position in a later stage in the same proceeding in order to gain an unfair advantage. *Davis v. Wakelee*, 156 U.S. 680, 691 (1895). The Supreme Court recently described this legal doctrine in the following terms: “[W]here a party assumes a certain position in a legal proceeding, . . . , he may not thereafter, simply because his interests changed, assume

a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.” *Zedner v. United States*, 547 U.S. 489, 504 (2006).

Reviewing courts usually consider three factors in deciding whether to apply the judicial estoppel doctrine in a particular case. First, a party’s later position must be clearly inconsistent with its earlier position. Second, the party must have succeeded in persuading a court to accept that party’s earlier position. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *New Hampshire v. Maine*, 532 U.S. 742, 750-751 (2001). It is clear, based upon the record in this case, that all three of these factors are present in this case. It is clear that by opposing relief on this ground in the present procedural posture of the case, the State is taking a position that is inconsistent with its concession in prior proceedings that movant was abandoned by the public defender. Second, as noted in the motion to reopen, this Court accepted the State’s earlier position. Finally, there is no dispute that movant is prejudiced by the State’s “flip-flop.”

The doctrine of judicial estoppel has also been adopted by the courts in the state of Missouri. *See, e.g., Dick v. Children’s Mercy Hosp.*, 140 S.W.3d 131, 141 n.5 (Mo. App. W.D. 2004) (noting that judicial estoppel is often invoked to prohibit



parties from deliberately changing positions according to the exigencies of the moment and that the circumstances under which judicial estoppel may be appropriately invoked are probably not reducible to any general formulation of principle). In Missouri, the doctrine of judicial estoppel “embodies the notions of common sense and fair play.” *Egan v. Craig*, 967 S.W.2d 120, 126 (Mo. App. E.D. 1998). Thus, the State is clearly estopped from arguing at this stage of the case that this Court lacks jurisdiction because movant was not abandoned by his counsel of record from the public defender’s office.

## II.

**MOVANT’S 29.15 ACTION SHOULD BE REOPENED BECAUSE THE RECORD CLEARLY ESTABLISHES THAT TRIAL AND DIRECT APPEAL COUNSEL, ROBERT DUNCAN, AND HIS SURROGATE GERALD HANDLEY, LABORED UNDER A CONFLICT OF INTEREST WHICH PRECLUDED MOVANT FROM OBTAINING MEANINGFUL REVIEW OF HIS CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.**

The undisputed facts in this case present a textbook example of a conflict of interest by Mr. Duncan and Mr. Handley that provides a legally sufficient ground to reopen this proceeding. The record is undisputed that Mr. Handley was brought into the case shortly before the amended 29.15 motion was due to be filed at Mr. Duncan’s behest so that Mr. Duncan could remain on the case as appellate counsel. Although the counsel for the State attempts to distinguish the *Taylor* and *Griddine* cases

because those cases involved a total failure to file a 29.15 due to trial/direct appeal counsel's conflict, there is no material difference with the conflict of interest issue in this case which had the same effect of denying a prisoner any meaningful post-conviction review of his conviction. As in *Griddine* and *Taylor*, it is clear that the collusion between Duncan and Handley was calculated to allow Mr. Duncan to remain as counsel of record on the direct/consolidated appeal so that he could continue to "milk" movant and his family for legal fees and salvage his waning professional reputation. Movant was prejudiced by the conflict because Handley filed a clearly deficient and legally defective three page amended 29.15 motion that the State correctly labeled as patently defective in its motion to dismiss filed on December 5, 1991, because the amended motion contained no supporting facts and raised non-cognizable claims for relief. (See Reply Exh. A, attached hereto).

The existence of a clear-cut conflict is further underscored by the fact that both Mr. Handley and Mr. Duncan continued to represent movant on consolidated appeal. Duncan remained on the case for the consolidated appeal despite the language of the pre-1996 version Rule 29.15(1) which required post-conviction counsel to represent the movant on appeal where ineffective assistance of counsel claims are raised. Settled conflict of interest principles as well as the text of Rule 29.15(1) precluded

Duncan from remaining on the case as counsel of record after claims alleging Duncan's ineffectiveness were raised in the 29.15 motion.

The State argues that regardless of whether a conflict of interest existed, which it implicitly conceded, there is no remedy available to movant. This argument ignores not only the *Griddine* and *Taylor* cases where extraordinary remedies were crafted, but also the actions and decisions from the Missouri Supreme Court in the *Reuscher* case. As noted earlier, the Missouri Supreme Court, echoing Judge Thomas's eloquent dissent, crafted an unusual remedy for Mr. Reuscher to ensure that his claims of ineffective assistance of counsel involving Robert Duncan could be heard by Missouri courts because Reuscher's right to post-conviction review was tainted by Duncan's conflict of interest and "malfeasance." The same result is warranted here.

### III.

**MOVANT'S 29.15 ACTION SHOULD BE REOPENED UNDER RULE 74.06(d) BECAUSE GERALD HANDLEY COMMITTED A FRAUD UPON THE COURT BY FALSELY ASSERTING IN THE AMENDED MOTION THAT MOVANT HAD RAISED ALL KNOWN CLAIMS FOR RELIEF.**

The State's response to movant's fraud on the court argument does not contest that Mr. Handley knowingly filed an amended petition that contained a material falsehood. Instead, the State attempts to place all of the blame for this fraud upon

movant, rather than the attorney who signed the pleading that contained this material falsehood. This position is fundamentally unfair and ignores the realities of the time pressures and the “Hobson’s choice” that movant faced.

In addition, the State’s argument was expressly rejected by this Court in its 2005 judgment where this Court stated at page 5: “Here, the amended motion Gerald Handley attempted to file in 1991 did not confer jurisdiction on the court because it was improperly verified, *through no fault of Mr. Middleton’s.*” As noted above, in light of movant’s firsthand knowledge of what occurred in Richard Oxford’s case, movant chose the lesser of two evils by signing the blank verification. Had he taken the path of Richard Oxford and refused to sign the blank verification, his entire 29.15 action would have been procedurally barred.

It is well settled that a reviewing court has the equitable power, established under English Common Law, to overturn a judgment to correct an injustice involving a fraud upon the court. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944). The Missouri Supreme Court, following the lead of the Supreme Court in *Hazel-Atlas*, also held that Missouri courts have the equitable power to overturn a final judgment where an attorney for one of the parties committed an extrinsic fraud upon the court that impacted the outcome. *Sutter v. Easterly*, 189 S.W.2d 284, 285 (Mo. 1945).

In *Sutter*, the court held that an attorney's scheme to fabricate evidence constituted extrinsic fraud that required relief from the judgment. *Id.* at 287. In reaching this result, the Missouri Supreme Court noted that this scheme was "a violation of a lawyer's duty to the court - - a duty imposed not alone by principles of honesty and good morals but also by a code of ethics adopted as rules of court, as to amount to a fraud on the court for which equity will grant relief." *Id.*

The Missouri Supreme Court also later held:

"The rule is well settled that a court of equity will not interfere with a judgment at law unless there was fraud in the procurement of the judgment extrinsic or collateral to the matters tried upon which the judgment was rendered. A judgment cannot be set aside on the ground of fraud unless it is shown that fraud was practiced in the very act of obtaining the judgment; that the fraud went to the manner in which the judgment was procured rather than operating upon matters pertaining to the judgment itself; *that the fraud prevented the unsuccessful party from presenting his case or defense*; or that the fraud otherwise went to extrinsic, collateral acts or matters not before the court for examination or determination in the suit or proceeding in which the judgment was rendered." *Reis v. La Presto*, 324 S.W.2d 648, 653-654 (Mo. 1959) (emphasis added).

The undisputed facts in this case clearly show that Mr. Handley committed an extrinsic fraud that affected the manner in which movant's original 29.15 action was resolved and was prejudicial because Handley's fraud prevented him from fully and fairly presenting his case that he received an unfair trial due to the ineffectiveness of Mr. Duncan.

The Missouri Court of Appeals has also held that relief from a judgment on the ground of extrinsic fraud was warranted due to fraudulent and unconscionable acts that were extraneous to the merits of the case. *J. R. Watkins Co. v. Hubbard*, 343 S.W.2d 189, 191-192 (Mo. App. W.D. 1961). In reaching this result, the court in *Watkins* noted that the equities of the case required relief from the judgment because the court was misled by fraudulent acts which deprived the defendant of an opportunity to present his defense. In this regard, the court in *Watkins* stated:

“We believe the judgment should not stand. Defendants have shown a valid, litigable defense. They were deprived of it by a false promise. There is no showing that any harm would be done plaintiff by setting aside the judgment, other than being put to a trial of the case on its merits. It is the policy of courts that causes should be determined on merit whenever such a course will not result in hurtful delay.”

*Id.* at 197.

It cannot be seriously disputed that Handley's conduct constituted a fraud on the court because it falsely asserted that all known claims were advanced in the three page amended motion he filed in 1991. In the prior proceeding to reopen where an amended motion was filed in 2003 that presented all of movant's claims for relief, this Court, after reviewing the merits of those claims, granted movant a new trial. This chronology of events clearly demonstrates that this fraud was material and prejudicial to movant's case. Like the Matthew Davis case that this Court addressed

which involved an intentional fraud committed by the prosecution, the fraud perpetrated by Handley was clearly prejudicial in the present case and in collateral civil litigation involving wrongful death actions brought by the family of Mr. Middleton's deceased wife, who obtained a default judgment of one million three hundred fifty thousand dollars (\$1,350,000.00) and Mrs. Middleton's entire estate. Like Matthew Davis, the equities of this situation clearly present extraordinary circumstances that justify this Court's use of its discretionary power under Rule 74.06(d) to reopen this action and reissue its 2005 decision on the merits of movant's claims for relief granting movant a new and fair trial.

#### IV.

**MOVANT'S 29.15 ACTION SHOULD BE REOPENED DUE TO ABANDONMENT BY MR. HANDLEY BECAUSE THE THREE PAGE AMENDED MOTION HE FILED ON NOVEMBER 25, 1991 WAS SO PATENTLY DEFECTIVE AS TO CONSTITUTE A NULLITY.**

In opposing relief from the judgment on this ground, the State argues that because an amended motion containing some claims was filed, no abandonment occurred. Instead, according to the State, movant is raising a claim of ineffective assistance of post-conviction counsel that is not a cognizable ground to reopen a 29.15 action.

Respondent's argument ignores the fact that Missouri law, most notably the *Dudley* decision cited in the motion to reopen, allows for a finding of abandonment where the amended motion is so patently defective as to constitute a nullity. The most compelling evidence that abandonment occurred under *Dudley* comes from the words of Assistant Prosecutor James Pener in a motion to dismiss Handley's amended 29.15 motion that was filed in this Court on December 5, 1991. In Mr. Pener's motion to dismiss, he correctly notes that Handley's amended motion was patently defective and could appropriately be dismissed without any further judicial proceedings. Specifically, Mr. Pener correctly noted that none of the cognizable claims in the amended motion alleging ineffective assistance of counsel provided any supporting facts that would justify relief. In addition, Mr. Pener noted that the motion was also patently defective and demonstrated a startling ignorance of Missouri post-conviction law by including claims of trial error involving the suppression of movant's statements to the police and claims of instructional error that are only cognizable on direct appeal could not be raised in a 29.15 motion. A copy of Mr. Pener's motion to dismiss, for the Court's convenience, is attached hereto as Exhibit A.

As was the case with the State's prior admission of abandonment of post-conviction counsel from the public defender's office, Mr. Pener's motion to dismiss



constitutes a judicial admission that Mr. Handley's amended motion was patently defective under *Dudley*. Thus, principles of judicial estoppel noted above preclude the State from taking a contrary position in the present posture of this proceeding. Under *Dudley*, this action should be reopened due to the abandonment of movant by Mr. Handley.

V.

**THIS COURT SHOULD ENTER A DEFAULT JUDGMENT REOPENING THIS PROCEEDING BECAUSE THE STATE FAILED TO FILE A TIMELY RESPONSE TO MOVANT'S MOTION TO REOPEN HIS 29.15 PROCEEDING.**

It is indeed ironic that the state of Missouri, who has championed the doctrine of procedural bar in this case in order to thwart the review of the merits of movant's Constitutional claims at every stage of this proceeding, would fall victim to a similar procedural rule by failing to file a timely response to the present motion to reopen this proceeding. It would be an ultimate case of poetic justice to finally allow Mr. Middleton's claims to be heard on the merits because the State also failed to meet a technical requirement of Rule 29.15.

Counsel for the State offers no excuse for his failure to comply with the time limits of 29.15 for filing a response. Thus, because procedural rules in post-

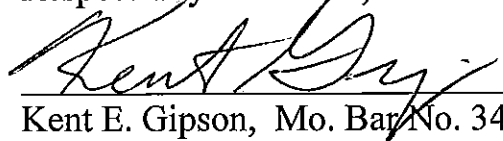
conviction actions should be a two-way street, the entry of a default judgment reopening the case is clearly appropriate.

As noted earlier, if where a prisoner misses a deadline or fails to comply with any other requirement of Rule 29.15, he faces the draconian consequence of having his entire case dismissed for lack of jurisdiction. The prosecution should not be able to flaunt the same deadlines and technical rules with impunity. *See Burdine v. Johnson*, 87 F. Supp. 2d 711, 718 (S.D. Tex. 2000).

### CONCLUSION

For all the foregoing reasons, as well as those reasons advanced in the underlying motion to reopen, movant Kenneth G. Middleton respectfully requests that this Court reopen its 1992 judgment on the grounds enumerated above and, thereafter, reissue the portion of its 2005 judgment granting movant a new trial on ground of ineffective assistance of counsel.

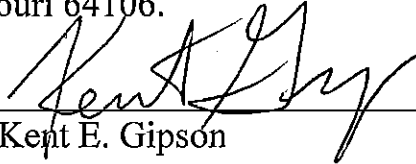
Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on October 29, 2010, a true and correct copy of the foregoing was sent via U.S. Mail to: Jordon Stanley, Assistant Prosecuting Attorney, 415 East 12th Street, 7M, Kansas City, Missouri 64106.

  
\_\_\_\_\_  
Kent E. Gipson

**Exhibit**

IN THE CIRCUIT COURT OF JACKSON COUNTY  
INDEPENDENCE, MISSOURI

Kenneth G. Middleton,  
Movant,

CV91-23437

vs.

Division 12

State of Missouri,  
Respondent.

FILED-CIRCUIT COURT  
JACKSON CO., MO-1  
91 DEC -5 PM 3:50

MOTION TO DISMISS MOVANT'S RULE 29.15 MOTION

COMES NOW the State of Missouri by and through counsel James Pender, Assistant Prosecuting Attorney, and moves this Court to dismiss Movant's Rule 29.15 Motion for the following reasons:

1. A Rule 29.15 motion to vacate sentence must state facts, not conclusions, which if true, would entitle Movant to relief. Further, the facts must raise matters not refuted by the record and must have resulted in prejudice to the Movant's defense. Burroughs v. State, 773 S.W. 2d 167 (Mo. App. 1989). Movant herein has not so stated.

2. To warrant a hearing on a claim of inadequate investigation, the motion must state what specific information counsel failed to discover, that a reasonable investigation would have disclosed the information, and that the information would have aided or improved the movant's position. Morris v. State, 756 S.W. 2d 654, 656 (Mo. App. 1988).

3. Movant's allegation that counsel failed to present evidence through Movant's testimony at the suppression hearing fails to entitle Movant to an evidentiary hearing because it is conclusory in nature, and does not set out specifically what Movant would have testified.

4. Movant's allegation that he unknowingly forfeited his right to testify at the suppression hearing fails to entitle Movant to an evidentiary hearing because no prejudice is alleged.

5. Movant's allegation that counsel failed to investigate, counsel and prepare expert testimony on blood pattern evidence and ballistics fails to entitle Movant to an evidentiary hearing because it is conclusory in nature, alleging no supporting facts in support thereof.

6. Movant's allegation that counsel failed to investigate the crime scene and call witnesses to testify in regard to the crime scene is also conclusory in

nature. Movant does not allege what witnesses should have been called nor what specifically they would have said.

7. Movant's allegation that his conviction was illegal because his statements to police were obtained after Movant was placed in custody and without being advised of his right to remain silent and without counsel does not entitle Movant to an evidentiary hearing. This allegation is not cognizable in a post conviction motion since it is an allegation of trial error. Morris v. State, 772 S.W. 2d 703 (Mo. App. 1989).

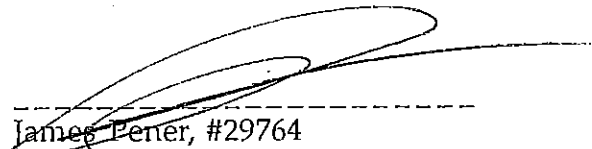
8. Movant's allegation that the reasonable doubt instruction was erroneous does not entitle him to an evidentiary hearing. Section 546.070(4) RSMo, and MAI-CR3rd require the giving of MAI-CR3rd 302.04. The instruction has been upheld as valid in Missouri. Roberts v. State, \_\_\_ S.W. 2d \_\_\_, (Mo. App. 1991) (No. 58973), decided September 17, 1991.

9. Movant's allegation that instruction numbers 5 and 8 were erroneous are conclusory in nature, alleging no facts in support thereof.

10. Movant's allegation that counsel failed to introduce medical records fails because it is conclusory, alleging no facts in support thereof. Movant nowhere alleges specifically what was contained in these medical records or what type of medical condition Movant was suffering from. Movant nowhere alleges that these medical records were available to counsel through reasonable investigation.

WHEREFORE, for the reasons stated, Respondent respectfully moves this Court to dismiss Movant's Rule 29.15 Motion without evidentiary hearing.

Respectfully submitted,

  
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James Pender, #29764  
Assistant Prosecuting Attorney  
Jackson County - Independence  
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816/881-4488

A copy of the foregoing was mailed postage prepaid to the office of: Gerald Handley, 1150 Grand, Suite 810, Kansas City, MO 64106

*Movant's Exhibit A attached to Reply*