

IN THE SUPREME COURT OF MISSOURI

DENNIS PAUL KRIDER,)	
)	
Movant-Appellant,)	
)	No. _____
vs.)	Court of Appeals Western District
)	No. WD 58053
STATE OF MISSOURI,)	
)	
Respondent.)	

**Court of Appeals, Western District
Circuit Court for Henry County**

APPLICATION FOR TRANSFER

Is transfer sought prior to opinion _____ or after opinion X

The date the record on appeal was filed March 29, 2000

The date the Court of Appeals opinion was filed February 27, 2001

The date the application for transfer (and rehearing) was filed
in the Court of Appeals March 12, 2001
and ruled on May 1, 2001

Party	Attorney
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APPLICATION FOR TRANSFER

COMES NOW appellant, Dennis Paul Krider, by and through counsel, and pursuant to Rule 83.04, and moves this Court to transfer this case to this Court for the reason that this appeal presents questions of general interest and importance and because this case gives the Court an opportunity to re-examine existing law. Transfer should be granted to consider the following questions:

1. Whether Mr. Krider’s guilty plea to the charge of second degree murder, which took place on the second day of his death-waived first degree murder trial, was rendered involuntary by defense counsel’s false representation to Krider that he faced the likelihood of a death sentence if he did not plead guilty and proceeded with the trial.

2. Was Mr. Krider's reliance upon his trial attorney's advice regarding the likelihood he could receive a death sentence at the culmination of trial "objectively reasonable"?

3. Whether the state-created right to post-conviction motion counsel established by this Court's Rules 24.035 and 29.15 also guarantees a prisoner the right to effective assistance of counsel in proceedings before the post-conviction motion court.

SUGGESTIONS IN SUPPORT OF APPLICATION FOR TRANSFER

This Rule 24.035 appeal presents three issues of general interest or importance rendering this case worthy of this Court's discretionary review. The first issue involves whether Mr. Krider's guilty plea was involuntary and his counsel was ineffective because of appellant's plea of guilty, entered on the second day of his death-waived first degree murder trial, was induced by false threats from counsel that appellant would likely receive the death penalty if he proceeded with the trial. Based upon almost identical facts, the Eighth Circuit granted federal habeas corpus relief to a Missouri prisoner finding that the prisoner's guilty plea to a reduced second degree murder charge was not knowingly and voluntarily entered because the prisoner's

attorney falsely told him that he would be eligible for the death penalty if he took his case to trial. Ivy v. Caspari, 173 F.3d 1136 (8th Cir. 1999).

The second important issue presented in this application is the interrelated question of whether it was objectively reasonable for Mr. Krider to rely on the false advice given to him by his trial attorney who told him he would get the death penalty if he did not plead guilty, despite the fact that the state had waived the death penalty earlier in the proceedings. The court of appeals based its decision affirming the denial of post-conviction relief upon their view that it was not objectively reasonable for Mr. Krider to believe and rely upon his attorney's false representations about receiving a death sentence in light of the fact that Mr. Krider had been informed earlier in the case and at the commencement of trial that life without parole was the maximum penalty he could receive if he was convicted at the culmination of trial. (Slip op. at 8-12). For the reasons set forth below, appellant believes that the court of appeals' finding and reasoning on this question places an undue and almost insurmountable burden upon criminal defendants whose pleas of guilty are induced by false or mistaken legal advice given to them by their lawyers.

The final question of general interest and importance involves whether the right to post-conviction counsel, created by this Court under Rules 24.035 and 29.15, guarantees a prisoner a right to an effective lawyer at his post-conviction motion

hearing. Appellate courts of other states have held that a statutorily created right to counsel in a state post-conviction action is rendered meaningless unless a prisoner is also guaranteed the right to a competent and effective attorney during those proceedings. See e.g., Jackson v. Weber, 623 N.W.2d 71 (S.D. 2001).

On the interrelated questions surrounding the “threat of the death penalty” issue, it is readily apparent that the facts presented by appellant in this case are virtually identical to the facts found worthy of federal habeas relief by the Eighth Circuit in Ivy. The court of appeals attempted to distinguish Ivy by noting that in Ivy it appeared that Ivy’s counsel honestly, but mistakenly, believed that Ivy faced a possible death sentence and incorrectly advised him of this fact. (Slip op. at 10). This case, in contrast, involves a situation where the trial attorney knew that the death penalty was not a possibility but deliberately lied to his client about a material matter of law to induce him to plead guilty. If the court of appeals’ reasoning is allowed to stand, reviewing courts’ attention will be diverted from the true issue in such cases, which is whether a defendant’s guilty plea was involuntarily induced by an attorney’s false advice. Instead, reviewing courts will focus on the irrelevant considerations regarding the attorney’s subjective intent in misadvising his client. The attorney’s subjective intent is totally irrelevant to the question of whether a guilty plea was involuntarily induced by false or mistaken advice. See e.g. Henderson v. Morgan, 426 U.S. 637

(1976). Although it is debatable as to whether this Court is bound to follow Eighth Circuit authority (See Lockhart v. Fretwell, 506 U.S. 364, 375-376 (1993) (Thomas, J., concurring), the practicalities involving the availability of federal habeas review of state court decisions in criminal post-conviction cases make it desirable for this Court avoid direct conflicts with the federal courts on important questions of federal constitutional law. As a result, transfer should be granted to resolve the conflict with Ivy.

Transfer is also warranted to correct the court of appeals' clearly erroneous finding that Mr. Krider's reliance upon his trial attorney's legal advice was objectively unreasonable. (Slip op. at 8-12). The court of appeals' finding that Mr. Krider's reliance upon his attorney's advice was objectively unreasonable places an unprecedented and unrealistic burden upon a prisoner's ability to obtain post-conviction relief even where it is undisputed that his guilty plea was induced by a material mistake of fact. This ruling also rests upon unrealistic assumptions regarding the nature of the attorney/client relationship. A criminal defendant's reliance upon his attorney's advice on a legal issue connected to a case should always be deemed reasonable unless the advice in question is so bizarre that a reasonably intelligent layman would be convinced that this advice could not possibly be true. A hypothetical variation of the facts presented in this case illustrates this point. If, for

example, this claim was based upon an allegation that appellant's trial attorney had told him that, if he was convicted, he would be drawn and quartered and tortured in medieval fashion in front of a sell-out crowd at Arrowhead Stadium in Kansas City, the court of appeals' finding that Krider's reliance on this advice was objectively unreasonable would undoubtedly be correct. However, the true facts in this case, where trial counsel told Mr. Krider he would "get the needle" if he proceeded to trial is undoubtedly objectively believable to an average layman, in light of the fact that it is common knowledge that Missouri has executed over 40 men by lethal injection in the last 12 years.

On the "objective reasonableness" question, the court of appeals also gave undue weight to the undisputed fact that in prior proceedings Mr. Krider was informed that the death penalty had been waived and that life without parole was the maximum punishment. (Slip op. at 11). This reasoning ignores the fact that it was reasonable for a person in Mr. Krider's position, who is untrained in the law, to believe that the prosecution had the power to change its mind during trial and decide to pursue the death penalty despite the previous death waiver. Although such a tactic would probably be prohibited by Missouri statutes and the Due Process Clause of the Fourteenth Amendment (See e.g., Langford v. Idaho, 500 U.S. 110 (1991)), Mr. Krider certainly did not know, nor did he have any duty to know, of the statutory and

constitutional restrictions upon a prosecutor's power to revoke a death waiver in the middle of a capital murder trial. Therefore, Mr. Krider's reliance on his counsel's false advice was reasonable, under either an objective or subjective test. Transfer should be granted to rectify this clear error of law.

The final important question presented in this application is whether a state-created right to counsel requires that appointed counsel be effective to avoid rendering this state-created right to counsel totally meaningless. In the context of parental rights litigation, the Missouri Court of Appeals, Western District, has held that a statutory right to appointed counsel was rendered meaningless unless it includes the right to effective counsel. In the interest of J.C., Jr., 781 S.W.2d 226 (Mo. App. W.D. 1989). In the context of state post-conviction review, appellate courts from at least two other states have recognized that a state-created right to post-conviction counsel should also, as a matter of fairness and common sense, include a right to effective assistance of counsel. Odem v. State, 483 N.W.2d 17 (Ia. App. 1992); Jackson v. Weber, 623 N.W.2d 71 (S.D. 2001).

This Court has implicitly recognized that if a post-conviction counsel incompetently prepares an amended motion for post-conviction relief, he is ineffective and, in such circumstances, it is unfair to punish the prisoner for his counsel's incompetence. See e.g. Luleff v. State, 807 S.W.2d 495, 498 (Mo. banc 1991). As

a matter of logic and common sense, an appointed post-conviction counsel can also be ineffective in his preparation or presentation of evidence at a post-conviction motion hearing. Whether counsel's incompetence at a post-conviction hearing is labeled "abandonment," or just plain "ineffectiveness," a prisoner should not be denied a meaningful review of his conviction because he was appointed an incompetent lawyer. Transfer should be granted in this case to decide whether the principles of Luleff apply to the situation presented here, in which post-conviction counsel is accused of ineffectiveness in his preparation and performance in proceedings before the post-conviction motion court.

CONCLUSION

For all the foregoing reasons, transfer should be granted in this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been mailed this ____ day of _____, 2001, to Susan Glass, Office of Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

Attorney for Appellant