

IN THE
MISSOURI SUPREME COURT

State ex rel.
Micheal Shepherd,
Relator,

v.

Steve Larkins, Warden ERDCC,
Respondent.

No. SC89249

RELATOR'S OPENING BRIEF

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CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	2
JURISDICTIONAL STATEMENT	5
STATEMENT OF FACTS	6
POINTS / ARGUMENTS	
I. This Court should grant <i>habeas</i> review because Mr. Shepherd can establish “cause and prejudice” for not have litigated his claims in a Rule 29.15 action.....	14 / 17
II. This Court should issue a writ of <i>habeas corpus</i> because Mr. Shepherd was denied due process when the bailiff told the jury that Mr. Shepherd would only serve 30% of any sentence they recommended.....	15 / 22
III. This Court should issue a writ of <i>habeas corpus</i> because Mr. Shepherd received ineffective assistance of counsel when his trial attorney did not investigate and call Nick Ziegenmeyer as a witness	16 / 28
CONCLUSION.....	33
CERTIFICATE OF COMPLIANCE AND SERVICE.....	34
APPENDIX (Sentence & Judgment).....	A1-A2

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
<i>Brown v. State</i> , 66 S.W.3d 721 (Mo. banc 2002)	14, 18, 20-21
<i>Cuyler v. Sullivan</i> , 446 U.S. 335 (1980).....	28
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963)	28
<i>Kenley v. Armontrout</i> , 937 F.2d 1298 (8 th Cir. 1991).....	30
<i>Mattox v. United States</i> , 146 U.S. 140 (1892).....	22
<i>Moore v. State</i> , 827 S.W.2d 213 (Mo.banc 1992)	29
<i>Murray v. Carrier</i> , 477 U.S. 478 (1986)	19
<i>Osborn v. Orthopaedic Assoc. of K.C., Inc</i> , 844 S.W.2d 36 (Mo.App., W.D. 1992)	15, 27
<i>Rompilla v. Beard</i> , 125 S.Ct. 2456 (2005)	30
<i>Shearin v. Fletcher/Mayo/Associates</i> , 687 S.W.2d 198 (Mo. App., W.D. 1984)	22
<i>Simpson v. State</i> , 90 S.W.3d 542 (Mo. App., E.D. 2002)	14, 20
<i>State ex rel. Mertens v. Brown</i> , 198 S.W.3d 616 (Mo. banc 2006).....	8
<i>State ex rel. Nixon v. Jaynes</i> , 63 S.W.3d 210 (Mo. banc 2001)	8-9, 18
<i>State ex rel. Simmons v. White</i> , 866 S.W.2d 443 (Mo. banc 1993).....	18
<i>State ex rel. Taylor v. Moore</i> , 136 S.W.3d 799 (Mo. banc 2004)	14, 19
<i>State v. Babb</i> , 680 S.W.2d 150 (Mo. banc 1984)	15, 25

<i>State v. Butler</i> , 951 S.W.2d 600 (Mo.banc 1997).....	16, 31
<i>State v. Hayes</i> , 637 S.W.2d 33 (Mo.App., E.D. 1982).....	25
<i>State v. Hayes</i> , 785 S.W.2d 661 (Mo. App., W.D. 1990).....	16, 31
<i>State v. Herndon</i> , 224 S.W.3d 97 (Mo.App., W.D. 2007)	22
<i>State v. Quinn</i> , 405 S.W.2d 895 (Mo. 1966)	15, 22-23, 25-26
<i>State v. Shepherd</i> , 967 S.W.3d 665 (Mo.App., W.D. 1998)	7, 17
<i>State v. Stevenson</i> , 852 S.W.2d 858 (Mo. App., S.D. 1993)	16, 31-32
<i>State v. White</i> , 138 S.W.3d 783 (Mo.App., W.D. 2004)	25
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	16, 29-30
<i>Summers v. State</i> , 43 S.W.3d 893 (Mo. App., W.D. 2001).....	14, 19-20
<i>United States v. Cronin</i> , 466 U.S. 648 (1984)	28
<i>United States v. Olano</i> , 507 U.S. 725 (1993)	22-23
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000).....	30

CONSTITUTIONAL PROVISIONS:

Mo. Const., Art. I, § 10.....	15, 22
Mo. Const., Art. I, § 18(a)	15-16, 22, 28
U.S. Const., Amend. V	15, 22
U.S. Const., Amend. VI.....	15-16, 22, 28
U.S. Const., Amend XIV	15-16, 22, 28

STATUTES:

§558.019, RSMo Cum. Supp. 1994..... 16, 26

RULES:

Rule 29.15.....7, 14, 17-18, 20-21, 27

Rule 84.22..... 5

Rule 91 14, 21

Rule 91.02..... 5

JURISDICTIONAL STATEMENT

Micheal Shepherd, Relator, is being unlawfully confined by Steve Larkins, Warden of the Eastern Reception, Diagnostic & Correctional Center, Respondent. Mr. Larkins is holding Mr. Shepherd pursuant to a March 1997 judgment and sentence from the Circuit Court of Cooper County. There, the Honorable Donald L. Barnes followed the jury's recommendation and sentenced Mr. Shepherd to twenty-five years imprisonment for first degree assault. Mr. Shepherd sought *habeas* relief in the Circuit Court of St. Francois County and in the Missouri Court of Appeals, Eastern District. He now seeks *habeas* relief in this Court, which has jurisdiction pursuant to Rules 91.02(a) and 84.22(a).

STATEMENT OF FACTS

Procedural History

On March 11, 1997, following a jury trial in Cooper County, the Honorable Donald L. Barnes accepted the jury's recommendation and sentenced Mr. Shepherd to a term of twenty-five years in the Department of Corrections for the offense of first degree assault (Rel. Ex. 9;¹ Resp. Ex. G² p. 213). The next day, James F. Crews,³ who also represented Mr. Shepherd at trial, filed Mr. Shepherd's notice of appeal to the Missouri Court of Appeals, Western District (Rel. Ex. 10). Mr. Shepherd had no idea that he even had this appeal pending (Petition at 6, ¶ 7(b)). While the appeal was pending, however, Mr. Shepherd tried unsuccessfully to contact Mr. Crews. *Id.*

On June 18, 1997, the Western District placed Mr. Shepherd's appeal on the dismissal docket because Mr. Crews had failed to file the record on appeal

¹ The record consists of Relator's Petition (Petition), Relator's Exhibits (Rel. Ex.), Respondent's Suggestions in Opposition (Opposition), Respondent's Return (Return), and Respondent's Exhibits (Resp. Ex.).

² Pages 213 and 214 were inadvertently omitted from Relator's Ex. 12. Thus, for clarity, all transcript references are to Respondent's Ex. G. Counsel apologizes for any inconvenience that may have resulted.

³ Mr. Crews passed away in November 2006.

(Rel. Ex. 10). On July 1, 1997, Mr. Crews filed the record on appeal; however, he did not provide a copy to Mr. Shepherd (Petition at 6, ¶ 7(a)). On October 2, 1997, Mr. Crews filed a brief for Mr. Shepherd; however, he did not provide a copy thereof to Mr. Shepherd. *Id.* On December 17, 1997, the State filed its brief; however, Mr. Crews did not provide a copy of it to Mr. Shepherd. On April 14, 1998, the Missouri Court of Appeals, Western District, issued its *opinion* affirming Mr. Shepherd's conviction and sentence by way of a *per curiam* order, *State v. Shepherd*, 967 S.W.3d 665 (Mo.App., W.D. 1998); however, Mr. Crews did not inform Mr. Shepherd of this until May 12, 1998 (Petition at 6, ¶ 7(a)).

On May 10, 1998, Mr. Shepherd wrote to Mr. Crews, asking for his file so that he could file a post-conviction motion (Petition at 6, ¶ 7(b)). Two days later, Mr. Crews replied simply that he had lost or misplaced the file. *Id.*

On June 24, 1998, the Western District issued its *mandate* affirming Mr. Shepherd's conviction and sentence (Rel. Ex. 10). Three weeks later, on July 15, 1998, Mr. Shepherd timely filed his *pro se* Rule 29.15 motion for post-conviction relief (Rel. Ex. 11). Nevertheless, the motion court dismissed Mr. Shepherd's motion as untimely, having measured the time from the date of the Western District's *opinion* rather than from the date of its *mandate*. *Id.*

On July 9, 2007, Mr. Shepherd filed a petition for writ of *habeas corpus* in the Circuit Court of St. Francois County (Rel. Ex. 1). St. Francois County dismissed that petition for lack of jurisdiction (Rel. Ex. 2, *relying on State ex rel. Mertens v. Brown*, 198 S.W.3d 616 (Mo. banc 2006)), and on October 1, 2007, Mr. Shepherd sought a writ of *mandamus* from the Missouri Court of Appeals, Eastern District directing St. Francois County to file and litigate Mr. Shepherd's *habeas* petition (Rel. Ex. 3). On October 2, 2007, the Eastern District denied said writ of *mandamus* (Rel. Ex. 4).

On October 24, 2007, Mr. Shepherd filed his *habeas* petition in the Eastern District (Rel. Ex. 5). On October 29, 2007, the Eastern District entered an order denying said petition, holding,

The Circuit Court has misinterpreted [*Mertens, supra*]. In *Mertens*, the Supreme Court held that, in a *habeas corpus* proceeding, a circuit court in the county of incarceration could not “remand” a case to the sentencing court in a different circuit court to correct a sentencing error. *Id.* at 619. However, the circuit court in the county of incarceration has jurisdiction to consider petitions for writs of *habeas corpus* that claim the petitioner is being held in violation of the constitution or laws of the stated or federal government. *State ex rel. Nixon v. Jaynes*,

63 S.W.3d 210, 214 (Mo. banc 2001). Thus, the Circuit Court should not have denied the writ on the basis of lack of jurisdiction.

(Rel. Ex. 6).

On January 22, 2008, Mr. Shepherd refiled his *habeas* petition in the Circuit Court of St. Francois County (Rel. Ex. 7). On March 7, 2008, St. Francois County denied that petition, relying on Rule 91.22 (Rel. Ex. 8).

On April 14, 2008, Mr. Shepherd filed his *habeas* petition in this Court.

The Underlying Offense

On August 30, 1996, Patrick Pyle spent the night with Coleman Bryan (Resp. Ex. G, p. 39). After the high school football game,⁴ they went to Coleman's⁵ house and watched TV in Coleman's bedroom. *Id.* at 39, 139. Patrick and Coleman found a fifth of whiskey in the refrigerator and began drinking it. *Id.* at 40-41, 65, 139.⁶

⁴ Patrick Pyle was in 9th grade and played in the game, while Coleman Bryan was in 8th grade and watched the game (Resp. Ex. G, p. 38).

⁵ For ease of reference, first names will be used throughout this section of the brief. No disrespect is intended.

⁶ Toxicology showed Patrick to be legally intoxicated (Resp.Ex. G, p. 69).

A little after midnight, the boys went out on the porch so Patrick could get some air. *Id.* at 140. They then took a short walk. *Id.* at 42, 140. A couple of blocks from Coleman's house, they came upon a Ford Ranger truck with a group of older boys in it – i.e., Micheal Shepherd, Justin Friedly, Larry Jones and Nick Ziegenmeyer. *Id.* at 43, 90-91, 156. Patrick and Coleman continued walking, and the group from the truck approached them from behind. *Id.* at 44, 92. Micheal started yelling at them, asking if they had a problem. *Id.* at 44, 73, 93. Micheal swung at Coleman, but did not hit him. *Id.* Coleman swung back and then took off running for home. *Id.* at 44, 46, 95. Larry hit Patrick in the head. *Id.* at 95.

Coleman ran about a block before stopping and realizing that no one was chasing him. *Id.* at 47. Micheal had chased Coleman a short distance, but then he had turned back. *Id.* at 96. When Coleman turned around, he saw Patrick lying on the ground, and he testified that Micheal was kicking and stomping at Patrick several times. *Id.* at 47, 50. Coleman said that Micheal was wearing white tennis shoes and that that was how he could see Micheal kicking Patrick. *Id.* at 78. Justin initially disagreed, testifying that Micheal was wearing red and black Fila tennis shoes. *Id.* at 102.⁷ But the State got Justin to waiver on re-

⁷ Micheal testified that he did not own any red and black shoes. *Id.* at 153. Micheal was wearing black boots. *Id.* at 172.

direct, and he said that he couldn't completely remember the color of the shoes. *Id.* at 105.

Coleman ran back toward Patrick, yelling at Micheal to stop. *Id.* at 48. Larry and Justin told Micheal to get back in the truck. *Id.* at 98, 107. As Coleman got closer, Micheal stopped and went back to the truck. *Id.* at 48-49. Patrick was not moving. *Id.* at 51.

Patrick was taken to the Emergency Room at Bothwell Hospital in Sedalia before being transferred to University Hospital in Columbia. *Id.* at 123-125, 129, 133. His jaw was wired shut for six weeks. *Id.* at 135, 143.

Micheal testified that he and Coleman were arguing when he heard someone get punched. *Id.* at 152. Micheal turned around and saw Patrick falling to the ground. *Id.* It was then that Coleman swung at Micheal and then took off running. *Id.* Micheal chased Coleman about a block, but could not catch up to him so stopped and "cussed" him out. *Id.* Micheal then headed back toward the truck, and he noticed Larry was hitting and kicking Patrick. *Id.* at 152-153. Micheal denied kicking Patrick. *Id.*

In his petition for writ of *habeas corpus*, Mr. Shepherd has alleged that his trial attorney was ineffective in not investigating and calling Nick Ziegenmeyer (Petition p. 10, ¶ 8(c) and p. 19-22, ¶ 9(b(ii))). Nick could have

and would have testified that he saw the altercation and that Micheal only kicked Patrick one time (Petition p. 21, ¶ 9(b)(ii)).

The Jury's Deliberations

Mr. Shepherd has alleged that the bailiff made unauthorized contact with the jury while it deliberated (Petition at p. 9, ¶ 8(a) and pp. 10-17, ¶ 9(a)).

Specifically, Mr. Shepherd has alleged that he

kept a close watch on the courtroom proceedings. He will testify that he saw a uniformed bailiff, the officer in charge, walk into the jury room during deliberations, close the door, and remain inside for fifteen to twenty minutes – about half the time the jury took to deliberate. [Mr. Shepherd] saw that the officer was wearing a light brown uniform, a badge, and carrying a gun. He remembers that the officer was tall, heavy set, and approximately forty years old at the time. He also saw that the bailiff was carrying some papers. He saw that the bailiff was still carrying the papers when he came out of the jury room.

(Petition at p. 12, ¶ 9(a)(i)). Mr. Shepherd further alleged that, while in the jury room, the bailiff told the jurors that

The bailiff, according to jurors Marsha Scott⁸ and Mary L. Gerke, stated that [Mr. Shepherd] would only serve about 30% of any sentence the jury recommended. More specifically, the bailiff instructed the jury that on a twenty-five (25) year sentence, [Mr. Shepherd] would only serve eight (8) years.

(Petition at p. 15, ¶ 9(a)(ii)). In moving to quash this Court's writ, Respondent has answered that these two jurors, as well as the jury foreperson, deny this (Return p. 6, *citing* Resp.Exs. D, E, F). However, in March 2005, both Ms. Scott and Ms. Gerke executed hand-written statements corroborating Mr. Shepherd's allegations (Rel. Exs. 13, 14).

No trier of fact has ever addressed the factual disputes in this case.

⁸ Ms. Scott is now known as Marsh Van Boerring (Return p.6, n. 2).

POINTS RELIED ON

I.

Mr. Shepherd is entitled to *habeas corpus* review under Rule 91 because he can show “cause and prejudice” for his failure to seek post-conviction relief under Rule 29.15. Indeed, Mr. Shepherd sought post-conviction relief by timely submitting his Form 40 to the Circuit Court of Cooper County, but the court calculated the due date by measuring from the Western District’s opinion rather than its mandate and the motion court dismissed Mr. Shepherd’s *pro se* motion as untimely and did not appoint counsel for him. Further, since Mr. Shepherd’s rights to due process and effective assistance of counsel were violated, he can establish the requisite prejudice.

State ex rel. Taylor v. Moore, 136 S.W.3d 799 (Mo. banc 2004);

Summers v. State, 43 S.W.3d 893 (Mo. App., W.D. 2001);

Simpson v. State, 90 S.W.3d 542 (Mo. App., E.D. 2002);

Brown v. State, 66 S.W.3d 721 (Mo. banc 2002); and

Rules 29.15 and 91.

II.

This Court should issue a writ of *habeas corpus* because Mr. Shepherd did not receive a fair trial and is being held in violation of his rights to due process of law. See U.S. Const., Amends. V, VI and XIV; Mo. Const., Art. I, §§ 10 and 18(a). The bailiff made unauthorized contact with the jury, telling the jurors that Mr. Shepherd would only serve 30% of any sentence they recommended. Under Missouri law, this type of unauthorized conduct is presumed prejudicial, and the verdict must be overturned unless the State can prove that the unauthorized conduct was harmless beyond a reasonable doubt.

State v. Quinn, 405 S.W.2d 895 (Mo. 1966);

State v. Babb, 680 S.W.2d 150 (Mo. banc 1984);

Osborn v. Orthopaedic Assoc. of K.C., Inc, 844 S.W.2d 36 (Mo.App.,
W.D. 1992);

U.S. Const., Amends. V, VI and XIV;

Mo. Const., Art. I, §§ 10 and 18(a); and

§558.019, RSMo Cum. Supp. 1994.

III.

This Court should issue a writ of *habeas corpus* because Mr. Shepherd received ineffective assistance of trial counsel. See U.S. Const., Amends. VI and XIV; Mo. Const., Art. I, § 18(a). Trial counsel, James F. Crews, did not act as a reasonably competent attorney when he failed to investigate Nick Ziegenmeyer and present evidence from him that Mr. Shepherd only kicked Patrick one time as that evidence would have refuted the State's case Mr. Shepherd repeatedly kicked and stomped Patrick. Nick's testimony would have corroborated the premise of Mr. Shepherd's defense that he did not do what the State alleged. There is a reasonable probability that the result would have been different but for Mr. Crews' failure to present Nick as a witness.

Strickland v. Washington, 466 U.S. 668 (1984);

State v. Hayes, 785 S.W.2d 661 (Mo. App., W.D. 1990);

State v. Butler, 951 S.W.2d 600 (Mo.banc 1997);

State v. Stevenson, 852 S.W.2d 858 (Mo. App., S.D. 1993);

U.S. Const., Amends. VI and XIV; and

Mo. Const., Art. I, § 18(a).

ARGUMENT

I.

Mr. Shepherd is entitled to *habeas corpus* review under Rule 91 because he can show “cause and prejudice” for his failure to seek post-conviction relief under Rule 29.15. Indeed, Mr. Shepherd sought post-conviction relief by timely submitting his Form 40 to the Circuit Court of Cooper County, but the court calculated the due date by measuring from the Western District’s opinion rather than its mandate and the motion court dismissed Mr. Shepherd’s *pro se* motion as untimely and did not appoint counsel for him. Further, since Mr. Shepherd’s rights to due process and effective assistance of counsel were violated, he can establish the requisite prejudice.

On April 14, 1998, the Missouri Court of Appeals, Western District, issued its *opinion* affirming Mr. Shepherd’s conviction and sentence by way of a *per curiam* order, *State v. Shepherd*, 967 S.W.3d 665 (Mo.App., W.D. 1998). Not even aware that he had had an appeal pending (Petition p. 6, ¶ 7(b)), on May 10, 1998, Mr. Shepherd wrote to Mr. Crews, asking for his file so that he could file a post-conviction motion (Petition at 6, ¶ 7(b)). Two days later, Mr. Crews replied simply that he had lost or misplaced Mr. Shepherd’s file. *Id.*

On June 24, 1998, the Western District issued its *mandate* affirming Mr. Shepherd's conviction and sentence (Rel. Ex. 10). Three weeks later, on July 15, 1998, Mr. Shepherd timely filed his *pro se* Rule 29.15 motion for post-conviction relief (Rel. Ex. 11). Nevertheless, the Circuit Court of Cooper County measured the deadline for seeking post-conviction relief from April 14, 1998, and it dismissed Mr. Shepherd's motion as untimely (Rel. Ex. 11). Unfortunately, the motion court made this error without appointing counsel so Mr. Shepherd had no idea that he could appeal this clearly erroneous ruling.

Rule 29.15 provides the exclusive procedure for Missouri defendants seeking post-conviction relief. *Brown v. State*, 66 S.W.3d 721, 725 (Mo. banc 2002), *citing* Rule 29.15(a). This Court, after all, designed Rule 29.15 "to provide a 'single, unitary, post-conviction remedy, to be used in place of other remedies,' including the writ of *habeas corpus*." *Id.* This Court has also recognized, however, that a failure to litigate claims in Rule 29.15 does not preclude all possibility of relief. *Id.*, *citing State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 (Mo. banc 1993). One can avoid the procedural default by showing *cause* for the failure to timely raise the claim at an earlier juncture and *prejudice* resulting from the error that forms the basis of the claim. *Brown*, *supra* at 726, *citing State ex rel. Nixon v. Jaynes*, 63 S.W.3D 210, 215 (Mo. banc 2001)

For Mr. Shepherd to obtain review in *habeas corpus*, then, he must show that some “objective factor external to the defense” impeded his efforts to comply with Rule 29.15. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Erroneous court action, like that which Mr. Shepherd has suffered, is such an “objective factor external to the defense.” *See State ex rel. Taylor v. Moore*, 136 S.W.3d 799, 801 (Mo. banc 2004). In *Taylor*, the defendant pleaded guilty, and the court sentenced him to the Long Term Drug Program (LTDP). *Id.* at 800. The LTDP, however, was not available to Taylor because of a prior conviction for a dangerous felony. *Id.* at 801. Neither the court, nor counsel knew of the prior conviction at the time of sentencing. *Id.* This Court held that the trial court erred because it was obliged to confirm Taylor’s eligibility for LTDP *before* sentencing him to it. *Id.* Similarly, here, the motion court was obliged to confirm the deadline for filing Mr. Shepherd’s motion *before* dismissing it – and certainly before doing so without providing Mr. Shepherd with counsel.

Mr. Shepherd has suffered the identical fate of the movant in *Summers v. State*, 43 S.W.3d 893 (Mo. App., W.D. 2001). There, the motion court dismissed Summers’ *pro se* post-conviction motion as untimely – having also measured the timeliness from the date of the appellate court’s opinion rather than its mandate. *Id.* at 894. Further, Summers’ motion was dismissed

without the appointment of counsel. *Id.* The Western District reversed and remanded for further proceedings under Rule 29.15. *Id.* at 895.

Similarly, in *Simpson v. State*, 90 S.W.3d 542, 543 (Mo. App., E.D. 2002), the motion court dismissed the *pro se* motion without appointing counsel. In *Simpson*, the defendant had pleaded guilty and waived his right to pursue post-conviction relief. *Id.* Consequently, upon receiving Mr. Simpson's Rule 24.035 motion, the motion court simply dismissed it without appointing counsel – though it pondered whether it should do so, and it did appoint an attorney to represent Mr. Simpson on his post-conviction appeal. *Id.* at 544. The Eastern District reversed and remanded, holding that the motion court was obliged to appoint counsel before considering the validity of any waiver of post-conviction rights. *Id.* Similarly, the motion court, here, was obliged to appoint counsel before dismissing Mr. Shepherd's motion as untimely. Had counsel been appointed, the dismissal would have been appealed, and it would have been reversed because it was clearly erroneous.

The State's argument that Mr. Shepherd "chose not to file an appeal" is patently false (Opposition at 4). Mr. Shepherd received the motion court's dismissal with no further explanation, and he had no counsel to advise him. He had no way of knowing when or how to appeal the motion court's ruling. That shows the "cause" required for obtaining *habeas* review. *See Brown, supra* at

728; (If a petitioner can show that he was unaware of the need for action until after the 90 day period for filing his post-conviction motion, he had made the necessary showing of “cause” to permit him to proceed under Rule 91). As was the case in *Simpson*, the motion court, here, was obliged to appoint counsel to help Mr. Shepherd preserve his post-conviction rights. The only reason Mr. Shepherd was unable to litigate his claims in Rule 29.15 is that the motion court clearly erred in dismissing his case without appointing counsel.

Clearly, Mr. Shepherd can establish good “cause” for his not having litigated his claims in a Rule 29.15 proceeding. The prejudice prong of the “cause and prejudice” standard is satisfied by showing the merits of the claims which could have been advanced in a Rule 29.15 proceeding. That is, if Mr. Shepherd would have prevailed on any claim in the Rule 29.15 action he tried to litigate, he has shown prejudice from the failure to litigate that claim in such a Rule 29.15 motion. The merits of each of these claims are discussed in Points II and III, *infra*, and the Court is respectfully referred to those Points for a determination of prejudice.

II.

This Court should issue a writ of *habeas corpus* because Mr. Shepherd did not receive a fair trial and is being held in violation of his rights to due process of law. See U.S. Const., Amends. V, VI and XIV; Mo. Const., Art. I, §§ 10 and 18(a). The bailiff made unauthorized contact with the jury, telling the jurors that Mr. Shepherd would only serve 30% of any sentence they recommended. Under Missouri law, this type of unauthorized conduct is presumed prejudicial, and the verdict must be overturned unless the State can prove that the unauthorized conduct was harmless beyond a reasonable doubt.

“Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or *the officer in charge*, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.” *State v. Quinn*, 405 S.W.2d 895, 896 (Mo. 1966), quoting *Mattox v. United States*, 146 U.S. 140, 150 (1892) (emphasis added); see also *State v. Herndon*, 224 S.W.3d 97 (Mo.App., W.D. 2007). Court officials should not do anything that may have the effect of influencing the conduct of the jury to the disadvantage of either party. See, e.g., *Shearin v. Fletcher/Mayo/Associates*, 687 S.W.2d 198, 204 (Mo.App., W.D. 1984). “[T]he primary if not exclusive

purpose of jury privacy and secrecy is to protect the jury’s deliberations from improper influence.” *United States v. Olano*, 507 U.S. 725, 737-38 (1993).

In *Quinn*, this Court overturned a rape conviction based on court misconduct because the sheriff was seen entering the jury room during deliberations. *Quinn, supra*. Quinn testified, post-conviction, that “he observed the sheriff open the door of the jury room, look in, go to a desk in the courtroom, pick up a tablet, tear some sheets out of it, take a pencil and go into the jury room and *close the door*.” *Quinn*, 405 S.W.2d at 896 (emphasis added). Quinn then stated that the sheriff remained in the jury room for several minutes. *Id.* On these facts, this Court reversed the conviction and remanded the case for a new trial. *Id.* at 897.

In the instant case, Mr. Shepherd has alleged that the bailiff made unauthorized contact with the jury while it deliberated (Petition at p. 9, ¶ 8(a) and pp. 10-17, ¶ 9(a)). Specifically, Mr. Shepherd has alleged that he

kept a close watch on the courtroom proceedings. He will testify that he saw a uniformed bailiff, the officer in charge, walk into the jury room during deliberations, close the door, and remain inside for fifteen to twenty minutes – about half the time the jury took to deliberate. [Mr. Shepherd] saw that the officer was wearing a light brown uniform, a badge, and carrying a gun. He

remembers that the officer was tall, heavy set, and approximately forty years old at the time. He also saw that the bailiff was carrying some papers. He saw that the bailiff was still carrying the papers when he came out of the jury room.

(Petition at p. 12, ¶ 9(a)(i)). Mr. Shepherd further alleged that, while in the jury room, the bailiff told the jurors that

The bailiff, according to jurors Marsha Scott and Mary L. Gerke, stated that [Mr. Shepherd] would only serve about 30% of any sentence the jury recommended. More specifically, the bailiff instructed the jury that on a twenty-five (25) year sentence, [Mr. Shepherd] would only serve eight (8) years.

(Petition at p. 15, ¶ 9(a)(ii)). In moving to quash this Court's writ, Respondent has answered that these two jurors, as well as the jury foreperson, deny this (Return p. 6, *citing* Resp. Exs. D, E, F). However, in March 2005, both Ms. Scott and Ms. Gerke executed hand-written statements corroborating Mr. Shepherd's allegations (Rel. Exs. 13, 14). No trier of fact has ever addressed this discrepancy.

The trial transcript points out that the jury asked the judge a question during deliberations (Resp. Ex. G at 212), but this fact does not forgive the bailiff's misconduct or the prejudice caused by it. The jury's question to the

judge was impermissible, as it asked about parole law, and the judge instructed the bailiff to tell the jury that the question would not be answered. *Id.* The bailiff had a duty to relay this information to the jury, but this duty did not warrant the bailiff staying in the jury room for fifteen minutes. The official duty of providing the jury with the judge's answers and orders also does not give the bailiff the authority to interject his own opinions about Missouri parole law. Here, Mr. Shepherd has alleged that the officer did precisely that – telling the jury that Mr. Shepherd would only serve eight (8) years on a twenty-five (25) year sentence. By doing this, the bailiff grossly exceeded the scope of his duties. By talking with the jury about things other than the judge's explicit instructions, the bailiff participated in impermissible exchanges with the jury.

Missouri courts presume prejudice when a third-party has unauthorized communication with jurors. *State v. Babb*, 680 S.W.2d 150, 152 (Mo. banc 1984). When the improper communication is also an intrusion on the jury deliberations, the State can avoid a new trial *only* by establishing that the defendant was not prejudiced by the communication. *State v. Hayes*, 637 S.W.2d 33, 38 (Mo.App., E.D. 1982); *State v. White*, 138 S.W.3d 783, 786 (Mo.App., W.D. 2004). In the face of *prima facie* evidence of improper communication between jurors and third persons, the State's burden is to show

that the communication did *not* influence the jurors. *Quinn*, 405 S.W.2d at 896; *White*, 138 S.W.3d at 786.

Here, prejudice is not only presumed, but it can be established at a hearing. In March 2005, Ms. Scott and Ms. Gerke made hand-written notes describing the jury's misapprehension that Mr. Shepherd would only serve eight (8) years on a twenty-five (25) year sentence (Rel. Exs. 13, 14). Now, the State has obtained affidavits from both of these jurors, as well as the foreperson, stating that the bailiff did not communicate with the jury during deliberations (Resp. Exs. D, E, F), but these assertions have not been tested by a trier of fact. None of Respondent's affidavits contradict Ms. Scott and Ms. Gerke on the point that the jury was "under the impression" that Mr. Shepherd would only serve 30% of their recommended sentence. That information came from someone, and Mr. Shepherd has alleged that it came from the bailiff. If he can prove that, he is entitled to relief because that information was patently false. *See* §558.019, RSMo Cum. Supp. 1994 (persons found guilty of a dangerous felony, i.e., first degree assault, must serve a minimum of eighty-five (85%) percent of the sentence imposed). Ms. Scott and Ms. Gerke have stated that the jury used this false information as a basis for giving Mr. Shepherd a more severe punishment, believing he would only serve eight years (about 30% of 25).

Where the facts amounting to misconduct are in dispute, courts have used their discretionary powers to determine whether prejudice existed. In *Osborn v. Orthopaedic Assoc. of K.C., Inc.*, 844 S.W.2d 36 (Mo.App., W.D. 1992), for example, the jurors wanted clarification of a jury instruction. While deliberating, they asked the bailiff whether the judge would “explain an instruction.” *Id.* at 39. Without consulting anyone, the bailiff told the jurors that the judge would simply refer them back to the instructions as given without further explanation. *Id.* Because the bailiff’s response was neither incorrect nor misleading, the *Osborn* court found no prejudice stemming from this improper contact with the jury. *Id.*

Unlike *Osborn*, where the bailiff did not mislead the jury, here, Mr. Shepherd has alleged that the bailiff’s instruction that Mr. Shepherd would serve only thirty (30%) percent of any sentence did mislead and prejudice the jury. Had Mr. Shepherd been able to litigate this issue in his Rule 29.15 proceeding, there is a reasonable probability that he would have received a new trial. Therefore, this Court should (a) issue its writ of *habeas corpus* or (b) appoint a master and order a hearing be held to determine the facts.

III.

This Court should issue a writ of *habeas corpus* because Mr. Shepherd received ineffective assistance of trial counsel. See U.S. Const., Amends. VI and XIV; Mo. Const., Art. I, § 18(a). Trial counsel, James F. Crews, did not act as a reasonably competent attorney when he failed to investigate Nick Ziegenmeyer and present evidence from him that Mr. Shepherd only kicked Patrick one time as that evidence would have refuted the State's case Mr. Shepherd repeatedly kicked and stomped Patrick. Nick's testimony would have corroborated the premise of Mr. Shepherd's defense that he did not do what the State alleged. There is a reasonable probability that the result would have been different but for Mr. Crews' failure to present Nick as a witness.

Our constitutions guaranteed Mr. Shepherd the right to be assisted by effective counsel. U.S. Const., Amends. VI, XIV; Mo. Const., Art. I, §18(a); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Cuyler v. Sullivan*, 446 U.S. 335 (1980). That guarantee is not made as a matter of mere etiquette, but as a necessity to ensure that a fair trial is had. *United States v. Cronin*, 466 U.S. 648, 658 (1984). While counsel is presumed to be effective, Mr. Shepherd need only show the contrary by a preponderance of the evidence. Rule

29.15(i); *but see Strickland v. Washington*, 466 U.S. 668, 694-695 (1984) (“The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, *even if* the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.”) (emphasis added).

Mr. Shepherd must prove two things: (1) trial counsel, James F. Crews, did not exercise the skill and diligence of reasonably competent attorney working under similar circumstances and (2) Mr. Shepherd suffered prejudice as a result. *Strickland*, 466 U.S. at 689. Prejudice exists whenever counsel’s error undermines confidence in the outcome. *Moore v. State*, 827 S.W.2d 213, 215 (Mo.banc 1992). Such is true whenever a *reasonable probability* exists that, but for counsels’ deficiencies, the result would have been different. *Id.*

Mr. Crews did not act as a reasonably competent attorney in that he failed to investigate and call Nick Ziegenmeyer to testify at Mr. Shepherd’s trial. While counsel is presumed to have made a strategic choice,

strategic choices made *after less than complete investigation* are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to

make a reasonable decision that makes particular investigations unnecessary.

Strickland, 466 U.S. at 690-691 (emphasis added). Many courts have found counsel's performance unreasonable in cases challenging a failure to present evidence favorable to a defendant, where counsel failed to make "reasonable investigations or to make a reasonable decision that makes a particular investigation unnecessary," *Strickland*, 466 U.S. at 691. See, e.g., *Rompilla v. Beard*, 125 S.Ct. 2456 (2005); *Williams v. Taylor*, 529 U.S. 362, 396 (2000); *Kenley v. Armontrout*, 937 F.2d 1298, 1309 (8th Cir. 1991).

In his petition for writ of *habeas corpus*, Mr. Shepherd has alleged that Mr. Crews was ineffective in not investigating and calling Nick Ziegenmeyer to testify (Petition p. 10, ¶ 8(c) and p. 19-22, ¶ 9(b(ii))). Nick could have and would have testified that he saw the altercation and that Mr. Shepherd only kicked Patrick one time (Petition p. 21, ¶ 9(b)(ii)). Respondent answers that Mr. Crews could not be ineffective in failing to call Nick because he contradicts Mr. Shepherd's testimony that he did not kick or stomp Patrick (Return p. 7-8). This paints the issue with too broad a brush. Nick could have rebutted the State's evidence that Mr. Shepherd repeatedly kicked and stomped the victim. Mr. Shepherd denied that.

“The defendant’s own testimony on a decisive issue in a case is always received with doubt because of his interest in the result of the case. Corroboration is critical, and corroboration by a single witness can never be discounted as ‘merely cumulative.’” *State v. Hayes*, 785 S.W.2d 661, 663 (Mo. App., W.D. 1990)). Any reasonable attorney would have called Nick to testify. Mr. Crews didn’t call Nick because he did not investigate the matter – describing it was “just a kid fight” that would wind up with Mr. Shepherd “walking with probation.” (Petition p. 20). Furthermore, Mr. Crews knew how to contact Nick – Nick’s contact information was contained in the police reports. *See State v. Butler*, 951 S.W.2d 600, 608-609 (Mo.banc 1997) (Counsel rendered ineffective assistance in failing to investigate a police report, which would have alerted counsel to suspicious activities by an alternative suspect. A pursuit of those leads and a proper investigation of that suspect inevitably would have led to an interview of other witnesses.). He simply did not investigate the matter because he did not take it seriously.

There is a reasonable probability that Nick’s testimony would have changed the outcome. Even if the jury had still found Mr. Shepherd guilty, there is a reasonable probability that Nick’s testimony would have mitigated the damage and lowered the jury’s sentencing recommendation. In *State v. Stevenson*, 852 S.W.2d 858, 861 (Mo. App., S.D. 1993), the Southern District

observed, “We would be hard-pressed not to reverse the judgment because of the introduction of the two photographs were it not for two facts: punishment was assessed by the court and not the jury, and the evidence of the defendant’s guilt was strong.” *Id.* at 863. Here, Mr. Shepherd was sentenced by the jury, and it sentenced him harshly (Resp. Ex. G at 214). The prejudice from that cannot be ignored. Thus, this Court should (a) issue its writ of *habeas corpus* or (b) appoint a master and order a hearing be held to determine the facts.

CONCLUSION

For the foregoing reasons, Micheal Shepherd prays that this Court direct that an evidentiary hearing be conducted, and, upon hearing, to grant him relief from his unlawful conviction and sentence.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Gary E. Brotherton, hereby certify the following.

- The attached brief complies with the limitations contained in Rule 84.06(b).
- It was completed using Microsoft Word, Office 2003, in Times New Roman size 14-point font.
- It includes the information required by Rule 55.03.
- Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 6,244 words, which does not exceed the 31,000 words allowed for an opening brief.
- The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using Norton AntiVirus, which is updated daily. According to that program, the disks provided to this Court and to the Attorney General are virus-free.
- One true and correct copy of the attached brief and a floppy disk containing a copy of this brief were mailed, first-class, postage prepaid this ___ day of August, 2008, to Andrew Hassell, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

Gary E. Brotherton