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JURISDICTIONAL STATEMENT

A jury found Mr. Moore guilty of the class C felony of assaulting a probation and parole officer in the second degree, Section 565.082, for purposely putting a probation officer in apprehension of immediate serious physical injury by kicking a chair at him, and walking towards him with a clenched fist.

The trial court sentenced Mr. Moore as a persistent felony offender to the maximum allowable sentence of 15 years of imprisonment.

After his conviction was affirmed by the Court of Appeals, Mr. Moore timely filed a Rule 29.15 motion for post-conviction relief. Appointed counsel timely filed an amended motion and request for an evidentiary hearing. The court denied the motion without a hearing.

This appeal was initially heard in the Missouri Court of Appeals, Eastern District. Mo. Const., Art. V, Sec. 3; Section 477.050. After an opinion remanding the case for an evidentiary hearing, this Court ordered transfer on August 19, 2014 after the State's application. Mo. Const. Art. V, Sec. 9; Rule 83.04.

STATEMENT OF FACTS

The state charged appellant Charles Moore, as a persistent offender, with the class C felony of assaulting a probation and parole officer in the second degree for “purposely placing Lewis Helton, a probation and parole officer, in apprehension of immediate serious physical injury, by kicking a chair at him then walking toward him with a clenched fist.”

L.F. 11-12.¹

The evidence at trial was that Helton supervised Moore on probation. Tr. 91-92. On April 28, 2010, they met as scheduled. Tr. 93. Helton testified that during the meeting Moore grew angry and argumentative. Tr. 93. Moore pounded his fist on the desk and challenged Helton to send him to prison. Tr. 93. At one point, he stared at the floor and his right arm twitched. Tr. 93.

Helton opined that Moore’s conduct was a manifestation of the “fight or flight” syndrome. Tr. 93. He told Mr. Moore to leave the office. Tr. 93. While walking Moore to the lobby, Helton took out pepper spray. Tr. 94. Moore was still shouting. Tr. 94. Helton kept his pepper spray out because he thought Moore might attack him. Tr. 97.

After Helton left the lobby, Moore paced around the room. State’s Ex. 4 – 2:09:48. The lobby was a large space with 24 chairs arranged in the middle of the room. *Id.* After

¹ The Record on Appeal in this case will be cited as PCR L.F. The record in the direct appeal (ED96458), which has been made part of the record in this case, will be cited as L.F. (legal file) and Tr. (trial transcript).

walking around for about two minutes, Moore pushed over a chair. State's Ex. 4 – 2:11:48. Helton came into the lobby about a minute later and picked up the chair. State's Ex. 4 – 2:12:06. About 20 seconds later while Helton standing is some distance away, Moore kicked the chair towards Helton. State's Ex. 4 - 12:12:22. Helton testified that he blocked the chair with his foot. Tr. 101, 110. The video shows Helton did not make contact with the chair. Stat's Ex. 4 - 2:12:24.

Helton testified that Moore then came toward him and pulled his fist back trying to strike Helton in the face. Tr. 102. Helton testified that he thought Moore was going to seriously injure him. Tr. 102. The video shows Moore moving toward Helton at the same time as Helton moved toward Moore as Helton sprayed Moore with pepper spray; the recording shows that Moore's fist was not clenched and he did not pull back his arm or swing at Helton. State's Ex. 4 - 2:12:04, 2:12:24. Moore immediately left the building after being sprayed with the pepper spray. Tr. 114.

Based on this evidence, a jury convicted Moore as charged for placing Helton in apprehension of immediate, serious physical injury. L.F. 49. The trial court sentenced him as a prior and persistent offender to a term of 15 years to be served consecutively to another sentence. Tr.159.

Examined by the trial court after sentencing, Moore stated that he didn't "have a fair trial in this county" and that his requests for change of venue to other counties had been denied. Tr. 166. He said, "I . . . had told [counsel] that I had been convicted of two

robberies here in this county and you [the court] was one of the prosecutors of my case back then, and that is why I did not want to be in front of you.” Tr. 167.

Trial counsel stated:

[Another attorney] did the intake interview with Mr. Moore As part of our procedure when we get an indictment and an application in court, the attorney[,] whoever takes the application[,] asks them whether they wish to proceed with change of judge or change of venue because I do know there is a timeliness requirement for those. At the time that she talked to him she indicated in the file that he did not request a change of judge.

Tr. 167-68.

Judge Martinez responded: “And for the record, the Court will note that this is the very first time that that issue has been raised before the Court.” Tr. 168.

On Mr. Moore’s direct appeal, finding sufficient evidence to support his conviction, the Court of Appeals affirmed by *per curiam* order. *State v. Moore*, 362 S.W.3d 509 (Mo. App. E.D. 2012).

The mandate in Mr. Moore’s direct appeal issued on April 18, 2012 and he timely filed a Rule 29.15 motion on June 20, 2012. PCR L.F. 3-20; Rule 29.15(b). Counsel entered an appearance on September 19, 2012 and timely filed an amended motion alleging violations of Mr. Moore’s rights to a change of judge, effective assistance of counsel, fair trial, and due process under the 5th, 6th, and 14th Amendments to the United States Constitution and Art. I, §§10 and 18(a) of the Missouri Constitution, and requesting an

evidentiary hearing. PCR L.F. 21, 22-32; Rule 29.15(g). The amended motion alleged counsel was ineffective for filing, and then withdrawing, a motion to change judge that Mr. Moore wished to be filed, and in not filing a later change of judge motion alleging cause. PCR L.F. 26.

The motion alleged that Mr. Moore told both attorneys he wanted a different judge because Judge Martinez was involved in prosecuting his 1998 Washington County robbery case (CR1098-3FX). PCR L.F. 26. On September 3, 2010, an attorney named Goodwin moved for a change of judge. PCR L.F. 26; L.F.2. At arraignment, also on September 3, the motion was withdrawn. L.F. 2; PCR L.F. 26-27. Trial counsel, Ms. Sanders, did not file a motion for change of judge. L.F. 1-7.

Marks on the public defender intake form indicated that Mr. Moore both did request, and did not request, a change of judge; a red line was then drawn through both those marks. PCR L.F. 27. “No” was written in red next to Judge Martinez’s name. PCR L.F. 27.

The motion court found that it asked Moore about this allegation at sentencing and that “there had been a motion filed which was later withdrawn.” PCR L.F. 34. Taking “judicial notice of its own file in the underlying criminal case,” the motion court said it “indicated via transcript filed [that] the motion to withdraw was withdrawn in the Movant’s presence and with his consent in open court September 3, 2010.” PCR L.F. 34.

The motion court then found that Mr. Moore “essentially contends his attorney was ineffective for failing to request a change and he was thereby prejudiced, because [Judge Martinez] had been involved in prosecuting his 1998 robbery case.” PCR L.F. 34. The

motion court found Mr. Moore's "contention fails to allege prejudice sufficient to trigger relief." PCR L.F. 34.

Noting that "cases have repeatedly held that simply because a trial judge may have received knowledge of facts through prior court hearings involving the defendant, the judge need not disqualify themselves for cause," the motion court found Mr. Moore "failed to allege any objective facts that would necessitate disqualification." PCR L.F. 34. Concluding that "the motion and the files and records of the case conclusively show [Mr. Moore] was entitled to no relief," the motion court denied Mr. Moore's post-conviction motion without a hearing. PCR L.F. 34-35.

From this judgment, Mr. Moore now appeals. PCR L.F. 38. To avoid repetition, additional necessary facts will be presented in the argument.

POINTS RELIED ON

I. The motion court clearly erred in denying Mr. Moore's Rule 29.15 motion without a hearing because this violated his rights to counsel, due process, and fair trial, U.S. Const., Amend. V, VI & XIV, Mo. Const., Art. I, §§ 10 & 18(a), in that his motion raised a meritorious claim based on facts not refuted by the record warranting a hearing: that he told his lawyers he wanted a change of judge and counsel timely moved for a change of judge but inexplicably withdrew that motion, and where the intake form was ambiguous as to Mr. Moore's wishes and had the word "no" written next to Judge Martinez's name. Mr. Moore was prejudiced because but for counsel's withdrawal of the motion without explanation and without his consent, a change of judge under Rule 32.07 would have been automatic and his case would have been heard before a judge who had not previously prosecuted him.

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

State ex rel. Mountjoy v. Bonacker, 831 S.W.2d 241 (Mo. App. S.D. 1992);

Missouri v. Frye, 132 S.Ct. 1399 (2012);

McNeal v. State, 412 S.W.3d 886 (Mo. banc 2013);

U.S. Const. Amend. VI and XIV;

Mo. Const. Art. I, §§ 10 and 18(a).

II. The motion court clearly erred in denying Mr. Moore's Rule 29.15 motion without a hearing because this violated his rights to counsel, due process, and fair trial, U.S. Const. Amend. V, VI & XIV and Mo. Const. Art. I, §§ 10 & 18(a), in that his motion raised a meritorious claim based on facts not refuted by the record warranting a hearing: he told his attorneys Judge Martinez was involved in prosecuting him for robbery in 1998 and he wanted a change of judge, but his automatic Rule 32.07 change of judge motion was withdrawn without his consent, and no later motion to change of judge for cause under Rule 32.09 was filed. Counsel's deficient performance prejudiced Mr. Moore because a reasonable person would doubt the impartiality of a judge who had previously prosecuted the defendant, and that judge, in fact, sentenced him to the maximum 15-year term allowable by law, consecutive to a previously-imposed sentence.

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

State ex rel. Mountjoy v. Bonacker, 831 S.W.2d 241 (Mo. App. S.D. 1992);

State v. Smulls, 935 S.W.2d 9 (Mo. banc 1996);

State v. Whitfield, 939 S.W.2d 361 (Mo. banc 1997);

U.S. Const. Amend. VI and XIV;

Mo. Const. Art. 1 §§ 10 and 18(a).

ARGUMENT

I. The motion court clearly erred in denying Mr. Moore's Rule 29.15 motion without a hearing because this violated his rights to counsel, due process, and fair trial, U.S. Const., Amend. V, VI & XIV, Mo. Const., Art. I, §§ 10 & 18(a), in that his motion raised a meritorious claim based on facts not refuted by the record warranting a hearing: that he told his lawyers he wanted a change of judge and counsel timely moved for a change of judge but inexplicably withdrew that motion, and where the intake form was ambiguous as to Mr. Moore's wishes and had the word "no" written next to Judge Martinez's name. Mr. Moore was prejudiced because but for counsel's withdrawal of the motion without explanation and without his consent, a change of judge under Rule 32.07 would have been automatic and his case would have been heard before a judge who had not previously prosecuted him.

Preservation and Standard of Review

The motion court reviewed the claim raised in Mr. Moore's amended motion: that he told his lawyers he wanted a change of judge, that counsel timely moved for a change of judge, but counsel then inexplicably withdrew that motion, denying him effective assistance of counsel and prejudicing him because had counsel not withdrawn the motion Mr. Moore would have had an automatic change of judge under Rule 32.07. PCR L.F. 26-28.

Appellate review of a judgment entered under Rule 29.15 "is limited to a determination of whether the motion court's findings of fact and conclusions of law are

clearly erroneous.” *Price v. State*, 422 S.W.3d 292, 294 (Mo. banc 2014). “Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made.” *Moss v. State*, 10 S.W.3d 508, 511 (Mo. banc 2000). To be entitled to an evidentiary hearing, 1) Moore must cite facts, not conclusions, that, if true, would entitle him to relief; 2) the factual allegations must not be refuted by the record; and 3) the claims of error must prejudice him. *Id.*

Discussion

Mr. Moore could have proved at a hearing that he wanted a change of judge but counsel withdrew the motion she filed under Rule 32.07 without his consent. Critical to this claim were the notes of the attorney who conducted the intake interview. Those notes reflected both boxes requesting, and not requesting, a change of judge were marked, then a red line drawn through those marks and “no” written next to Judge Martinez’s name. L.F. 27. Taking as true Mr. Moore’s claim that he wanted a different judge, as this Court must, a hearing was required to give Mr. Moore the opportunity to prove the facts pleaded in this motion. And the fact, if true, demonstrate prejudice. Had Mr. Moore received an automatic change of judge, he would not have been tried and sentenced by a judge who had previously prosecuted him for serious crimes.

Rule 32.07 provides in part:

(a) Except as provided in Rule 32.06, a change of judge shall be ordered in any criminal proceeding upon the timely filing of a written application therefor by any party. The applicant need not allege or prove any reason for such change. The

application need not be verified and may be signed by any party or an attorney for any party. . . .

(b) In felony and misdemeanor cases the application must be filed not later than ten days after the initial plea is entered. If the designation of the trial judge occurs more than ten days after the initial plea is entered, the application shall be filed within ten days of the designation of the trial judge or prior to commencement of any proceeding on the record, whichever is earlier. . . .

(d) Upon the presentation of a timely application for change of judge, the judge promptly shall sustain the application.

In the underlying criminal case, the September 3, 2010 minute entries show that before arraignment, attorney Goodwin filed a motion for change of judge, and then later withdrew it. L.F. 2.

Mr. Moore's amended motion alleged that he told both Goodwin and his later attorney, Sanders, that he wanted a different judge at trial because Judge Martinez was involved in prosecuting his 1998 Washington County robbery case. PCR L.F. 26-27; L.F. 2. The amended motion alleged that on the public defender intake form, Goodwin made ambiguous markings indicating that Mr. Moore both requested and did not request a change of judge. PCR L.F.27. A red line was drawn through those markings and the word "no" was written next to Judge Martinez's name. PCR L.F. 27. Mr. Moore alleged that Goodwin and Sanders were ineffective because he told them he wanted a change of judge. Instead,

they filed and then withdrew the motion for change of judge as of right pursuant to Rule 32.07. PCR L.F. 27.

The United States Supreme Court set out the standard for granting post-conviction relief based on allegations of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984). To meet *Strickland's* standard a movant must show by a preponderance of the evidence: (1) that trial counsel failed to exercise the customary skill and diligence of a reasonably competent attorney under similar circumstances and (2) that counsel's deficient performance prejudiced the defense. *Deck v. State*, 68 S.W.3d 418, 425 (Mo. banc 2002).

“It is well settled that the [Sixth Amendment] right to the effective assistance of counsel . . . guarantees a defendant the right to have counsel present at all ‘critical’ stages of the criminal proceedings . . . includ[ing] arraignments.” *Missouri v. Frye*, 132 S.Ct. 1399, 1405 (2012). In *Frye*, the Supreme Court held that counsel has “responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.” 132 S.Ct. at 1407. The right to effective assistance during a pretrial stage of criminal proceedings is clear.

Rule 32.07(d) requires that upon the timely filing of a motion for change of judge “the judge promptly shall sustain the application.” Had counsel not withdrawn the motion, Mr. Moore would have been entitled to, and would have had, a change of judge. Rule 32.07; *State v. Rulo*, 173 S.W.3d 649, 651-52 (Mo. App. E.D. 2005). Here, upon receipt of the timely-filed motion for change of judge, Judge Martinez had a duty to sustain the motion and could do nothing further other than to transfer the case. 173 S.W.3d at 652; Rule

32.07(d) (“Upon the presentation of a timely application for change of judge, the judge promptly shall sustain the application.”)

Although there is no constitutional right to an automatic, Rule 32.07 change of judge, Mr. Moore’s claim was that his counsel was ineffective in filing then withdrawing such a motion. And Mr. Moore does have a constitutional right to the effective assistance of counsel at critical pretrial stages including arraignment. *Frye*, 132 S.Ct. at 1405. During the arraignment stage, defense attorneys have “responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process.” *Frye*, 132 S.Ct. at 1407.

One such responsibility is to timely file for a change of judge if requested by the defendant. At this early stage of the proceedings, the defendant knows more about his case than an attorney whose job is to simply check boxes on an intake form on the issue of whether he wants a change of judge or venue, and determine his eligibility for public defender services.

For good reason, in both criminal cases and civil actions, the right to disqualify a judge is “one of the keystones of our legal administrative edifice.” *State ex rel. Mountjoy v. Bonacker*, 831 S.W.2d 241, 244 (Mo. App. S.D. 1992) (quoting *State ex rel. Campbell v. Kohn*, 606 S.W.2d 399, 401 (Mo. App. E.D. 1980)). This “highly prized right” is liberally granted by the courts, and the one-time right to disqualify a judge is “virtually unfettered.” *State ex rel. Director of Revenue v. Scott*, 919 S.W.2d 246, 247-248 (Mo. banc 1996). “No system of justice can function at its best or maintain broad public confidence if a litigant can be compelled to

submit his case in a court where the litigant sincerely believes the judge is incompetent or prejudiced.” *Bonacker*, 831 S.W.2d at 244.

That reasonable counsel would abide by a client’s desire for a change of judge is evidenced by Rule 32.07(a) which provides that an application for change of judge “may be signed by any party or an attorney for any party.” Another indication that it is the defendant, not the attorney, who determines whether to seek a change of judge is that, as shown by the record in this case, the defendant’s choice of whether or not to change judge is noted on the public defender intake form. That form is completed just minutes after the attorney meets the defendant for the first time, at a time she knows essentially nothing about him or his case. PCR L.F. 26-27.

In this case, there is no real dispute that a motion for change of judge was filed on September 3, 2010 and that later, at Mr. Moore’s arraignment, the motion for change of judge was inexplicably withdrawn. PCR L.F. 33-34. The only real question is why the motion was withdrawn. The motion court’s findings state that according to the trial transcript the motion to withdraw was withdrawn in the Movant’s presence and with his consent in open court September 3, 2010. PCR L.F. 34.

But this finding is clearly erroneous because it is not supported by the record. The transcript of Mr. Moore’s trial does not show that he consented to the withdrawal of his motion. The motion court’s findings reference page 168 of the transcript but nothing on page 168 or on any other page indicates that Mr. Moore wished to have his motion for change of judge withdrawn or consented to its withdrawal. PCR L.F. 34.

Mr. Moore's own comments at sentencing – that he told his attorney that he had been convicted of two robberies “here at this county” and Judge Martinez “was one of the prosecutors of [his] case back then, and that is why [he] did not want to be in front of [her]” support his claim that he wanted a change of judge, and neither Judge Martinez nor Ms. Sanders disputed Mr. Moore's statements. Tr. 167.

Further, Ms. Sanders' statements that the intake attorney noted “he did not request a change of judge” conflicts with those notes that reflect both that Mr. Moore did want, and that he did not want, a change of judge, with a red line drawn through those marks and the word “no” written next to Judge Martinez's name. PCR L.F. 26-27; Tr. 167-68. Nothing in the record indicates that Ms. Sanders was at the arraignment or that she had even spoken to the intake attorney about her notes. Her comments contradict the actual notes, fail to conclusively show that Mr. Moore is entitled to no relief, and are not specific enough to refute conclusively the movant's allegation.

“[Post-conviction rules] instruct that a motion court should deny a post-conviction movant an evidentiary hearing if the record conclusively shows he is not entitled to relief. *Roberts v. State*, 276 S.W.3d 833, 837 (Mo. banc 2009). Mr. Moore's post-conviction motion and the files and records of the case do not conclusively show he is entitled to no relief. *Id.*; Rule 29.15(h). Nor is the total record in this case specific enough to refute conclusively the movant's allegation. To justify the denial of a hearing, the existing record must “specifically and conclusively refute the allegation.” *Lomax v. State*, 163 S.W.3d 561, 564 (Mo. App. E.D. 2005).

The State will argue that no possible prejudice can come from ignoring, at an intake interview, a defendant's wishes about an automatic change of judge. But it is risky and unnecessary for this Court to make sweeping statements about whether attorney error can "never" be prejudicial, and this Court has before rejected such an argument. In *McNeal v. State*, the State urged this Court to find that failing to submit a lesser-included offense when the defendant was convicted of a greater offense is, as a matter of law, never prejudicial under *Strickland*. 412 S.W.3d 886, 892 (Mo. banc 2013). The State alleged that it was impossible for a movant to demonstrate the jury might have selected a lesser offense if he had been convicted of the greater. *Id.* In *McNeal*, this Court found that while the facts of a particular case might make it "difficult" to prove prejudice, it "does not necessarily preclude a finding a prejudice as a matter of law such that a movant . . . never can obtain an evidentiary hearing." *Id.*

On this issue, the Court should rule consistent with *McNeal* and decline to impose a broad restriction on a movant's opportunity to prove facts and prejudice at a hearing. And here, the prejudice analysis is less amenable to guesswork, because a Rule 32.07 "request for change of judge . . . affords the court no discretion." *State ex rel. Joyce v. Baker*, 141 S.W.3d 54, 56 (Mo. App. E.D. 2004). "The court is required to promptly grant such request." *Id.* So here, but for counsel's actions that only a hearing can explain, Mr. Moore was entitled to, and would have had, a change of judge. *Id.*; Rule 32.07. Had Mr. Moore's application for automatic change of judge not been withdrawn, we know he would have been tried and sentenced before a judge who had *not* prosecuted him for two robberies previously. Most

reasonable people, including Mr. Moore, would make this request, and expect that an intake attorney who at that time knew nothing about Mr. Moore or his case would abide by his wishes.

The record in this case supports the facts alleged in Mr. Moore's amended motion that his reasonable wishes regarding an automatic change of judge were essentially ignored or overruled by an intake attorney with no explanation. His allegations were not conclusively refuted by the record. A mistake has clearly been made and the cause must be reversed and remanded for an evidentiary hearing.

II. The motion court clearly erred in denying Mr. Moore's Rule 29.15 motion without a hearing because this violated his rights to counsel, due process, and fair trial, U.S. Const. Amend. V, VI & XIV and Mo. Const. Art. I, §§ 10 & 18(a), in that his motion raised a meritorious claim based on facts not refuted by the record warranting a hearing: he told his attorneys Judge Martinez was involved in prosecuting him for robbery in 1998 and he wanted a change of judge, but his automatic Rule 32.07 change of judge motion was withdrawn without his consent, and no later motion to change of judge for cause under Rule 32.09 was filed. Counsel's deficient performance prejudiced Mr. Moore because a reasonable person would doubt the impartiality of a judge who had previously prosecuted the defendant, and that judge, in fact, sentenced him to the maximum 15-year term allowable by law, consecutive to a previously-imposed sentence.

Preservation and Standard of Review

The motion court reviewed the claim raised in Mr. Moore's amended motion: that he told his lawyers he wanted a change of judge, that counsel timely moved for a change of judge, but counsel then withdrew that motion and failed to move for a change of judge for cause under Rule 32.09 based on the fact that Judge Martinez had prosecuted Mr. Moore for robbery in 1998. PCR L.F. 26-28.

Appellate review of a judgment entered under Rule 29.15 "is limited to a determination of whether the motion court's findings of fact and conclusions of law are clearly erroneous." *Price*, 422 S.W.3d at 294. "Findings and conclusions are clearly

erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made.” *Moos*, 10 S.W.3d at 511. To be entitled to an evidentiary hearing, 1) Moore must cite facts, not conclusions, that, if true, would entitle him to relief; 2) the factual allegations must not be refuted by the record; and 3) the claims of error must prejudice him. *Id.*

Discussion

“[N]o system of justice can function at its best or maintain broad public confidence if a litigant can be compelled to submit his case in a court where the litigant sincerely believes the judge is incompetent or prejudiced.” *Bonacker*, 831 S.W.2d at 244. “This crucial need for public confidence in the judicial system requires us to liberally construe statutes and rules in favor of the right to disqualify.” *Id.* “It is not surprising, then, that the right of a litigant to disqualify a judge has been described as virtually unfettered.” *Id.*

Rules 32.09 and 32.10 permit a change of judge for cause. Determination of whether to grant a request for disqualification for cause is left to the judge before whom the case is pending. *State v. McDaniel*, 236 S.W.3d 127, 135 (Mo. App. S.D. 2007). “A judge’s decision whether his or her own bias threatens the fundamental fairness of the proceedings is left to the court itself, and we will defer to that decision if there is no abuse of discretion.” *Id.*

Due process, however, requires that biased, prejudiced or impartial arbiters be removed. *In re Murchison*, 349 U.S. 133, 136 (1955). “[T]he law on judicial bias is clearly established: a criminal defendant is constitutionally required to be tried before an impartial judge, and the likelihood or appearance of bias, even in the absence of actual bias, may

prevent a defendant from receiving a fair trial.” *Kinder v. Bowersox*, 272 F.3d 532, 540 (8th Cir. 2001).

Thus the existence or nonexistence of actual bias against the defendant is not the benchmark for determining whether a judge should be disqualified or recused. *State v. Smulls*, 935 S.W.2d 9, 24 (Mo. banc 1996). A judge should be disqualified if a reasonable person would doubt the impartiality of the court. *State v. Whitfield*, 939 S.W.2d 361, 367 (Mo. banc 1997). “Whether to file a motion to disqualify a judge is a matter of trial strategy.” *Prince v. State*, 390 S.W.3d 225, 237 (Mo. App. W.D. 2013).

For many of the same reasons argued in Point I, on this record, this Court cannot assume that counsel’s failure to pursue Mr. Moore’s request for a change of judge was trial strategy. To meet *Strickland*’s standard a movant must show by a preponderance of the evidence: (1) that trial counsel failed to exercise the customary skill and diligence of a reasonably competent attorney under similar circumstances and (2) that counsel’s deficient performance prejudiced the defense. *Deck*, 68 S.W.3d at 425. An evidentiary hearing is necessary so Mr. Moore’s trial attorneys can testify concerning their reasons – or lack of reasons – for failing to seek a change of judge for cause.

Because the pleadings allege Mr. Moore wanted a change of judge and informed trial counsel of his wishes, trial counsel acted unreasonably in failing to file a motion for a change of judge for cause under Rule 32.09 after the Rule 32.07 motion had been withdrawn for reasons that remain unproven due to the fact no hearing has been held in this case. PCR L.F. 22-28. Counsel’s failure deprived Mr. Moore of his right to change judge, his right to

effective assistance of counsel, his right to a fair trial and due process of law. Reasonably competent counsel under the same or similar circumstances would have filed a motion to change judge.

And Mr. Moore was prejudiced. Judge Martinez sentenced Mr. Moore to the maximum sentence of 15 years, well more than the State's recommendation of ten. Tr. 155. She also ordered his sentence was to run consecutive to another sentence. Tr. 159. Counsel was aware of Judge Martinez's prior history with Mr. Moore as a prosecutor. PCR L.F. 26-28. Trial counsel failed to act as reasonably competent trial counsel would have acted under the same or similar circumstances; trial counsel was ineffective.

Trial counsel's ineffectiveness deprived Mr. Moore of his right to change judge, his right to persist in his plea of not guilty, his right to effective assistance of counsel, his right to a fair trial and due process of law in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution.

For the foregoing reasons, the judgment of the motion court should be reversed and the Court should grant Mr. Moore an evidentiary hearing.

CONCLUSION

Mr. Moore asks this Court to reverse and remand this case for an evidentiary hearing.

Respectfully submitted,

/s/ Jessica Hathaway

Jessica M. Hathaway, Mo. Bar #49671
Office of the State Public Defender
1010 Market Street, Suite 1100
St. Louis, Missouri 63101
Phone: (314) 340-7662
Fax: (314) 340-7685
jessica.hathaway@mspd.mo.gov

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rules 84.06(g) and 83.08(c), I certify that a copy of this brief was served via the Court's electronic filing system to Shaun Mackelprang of the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102 on **September 16, 2014**. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I certify that this brief includes the information required by Rule 55.03 and that it complies with the word count limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, using Garamond 13-point font. The word-processing software identified that this brief contains **5,813** words.

/s/ Jessica Hathaway

Jessica M. Hathaway, Mo. Bar #49671
Office of the State Public Defender
1010 Market Street, Suite 1100
St. Louis, Missouri 63101
Phone: (314) 340-7662
Fax: (314) 340-7685
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ATTORNEY FOR APPELLANT

