

IN THE
MISSOURI SUPREME COURT

OSCAR GLOVER,)
)
 Appellant,)
)
 vs.) No. SC 88373
)
 STATE OF MISSOURI,)
)
 Respondent.)

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF TANEY COUNTY, MISSOURI
THIRTY-EIGHTH JUDICIAL CIRCUIT
THE HONORABLE JOHN R. HUTCHERSON, JUDGE

APPELLANT’S SUBSTITUTE STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal arises from the denial of appellant's Rule 29.15 motion after an evidentiary hearing in the Circuit Court of Taney County, Missouri, the Honorable John R. Hutcherson presiding. This appeal does not involve any of the issues reserved for the exclusive jurisdiction of the Missouri Supreme Court. After the Missouri Court of Appeals, Southern District, issued its opinion in Case No. SD 27441, it transferred this appeal to this Court pursuant to Rule 83.02. Thus, this Court has jurisdiction of this appeal pursuant to Article V, Section 10, Missouri Constitution.

STATEMENT OF FACTS

Appellant was charged by amended information with possession of cocaine with intent to distribute and possession of more than 35 grams of marijuana with intent to distribute (L.F. 23-24).¹ The case proceeded to a trial before a jury on October 15, 2001 (Tr. 1-2). The following evidence was adduced at trial.

In July, 1999, Lieutenant Steve Daulton of the Branson Police Department was involved in the investigation of Condo Unit No. 1 in Building 15 at Pointe Royale condominium development in Branson, Missouri (Tr. 109, 144). There had been numerous complaints of heavy traffic in and out of the condo (Tr. 109). Appellant and Nathaniel Meadows lived in Condo Unit No. 1 (Tr. 110, 243-244, 272-275, 277-278, 287-288). The rent was made in cash payments (Tr. 274, 278).

Daulton performed a surveillance of Condo No. 1 over a two-week period of time (Tr. 114). There were several vehicles and people going to and from Condo No. 1 (Tr. 114, 139). On July 22, 1999, an hour and a half after appellant had returned home, eight vehicles had come and gone, staying just a very short period of time (Tr. 114-115, 125-128). As a result of his observations, Daulton

¹The record on appeal will be designated as follows: the transcript from appellant's trial will be designated (Tr.); the legal file from appellant's direct appeal will be designated (L.F.); the transcript from the evidentiary hearing on appellant's post-conviction motion will be designated (PCR Tr.); the legal file for this appeal of appellant's post-conviction motion will be designated (PCR L.F.).

had members of the Combined Ozarks Multijurisdictional Enforcement Team (COMET) assist him in his investigation (Tr. 115, 143).

On August 5, 1999, at approximately 10:00 a.m., Daulton and members of COMET executed a search warrant at Unit No. 1 (Tr. 116-117, 144, 211-212). Nathaniel Meadows answered the door (Tr. 117, 212). Appellant was sleeping on a couch in the living room (Tr. 117, 140, 182, 212, 250).

Appellant's belongings, including some credit cards, were found in the back or master bedroom (Tr. 120, 218-219, 243-249). In a nightstand, officers found a photo ID of appellant (Tr. 124, 216-217, 237). That ID had the name of "Marcus Hadaway" on it (Tr. 131).²

In the closet of that bedroom, officers found a shoebox that contained some personal documents and six individual Ziploc baggies of marijuana (Tr. 120-122, 147, 154-155, 162, 172, 186, 241-242, 256-257). The total weight of the baggies of marijuana was 833.79 grams (Tr. 195-196). In the shoebox were numerous pieces of paper with names and telephone or pager numbers on them (Tr. 166-167, 183-186, 251-253), numerous documents with appellant's name on them (Tr. 243-

² At trial, Meadows testified that he and appellant had identification cards made up at Kinko's so that they could go to bars (Tr. 288-289). Meadows used a fake name, too (Tr. 289).

249), and an “owe list” (Tr. 167-168, 172, 180-181, 249-250).³ That list showed: “Scott” owed \$100 for drugs he had received, “Drew” owed \$100; “Bob” owed \$70; and “Nate” owed a “QP”, which officers speculated was an abbreviation for a quarter pound of drugs (Tr. 169, 171, 254). There also was \$3,460 found in a shoe located in that closet (Tr. 133, 146-147, 228-229, 255).

Officers found a small portable scale and three plastic bags of cocaine base in a red winter jacket in that closet (Tr. 120, 135-136, 148-149, 154, 157-159, 172, 186-187, 221-224, 257-258). The cocaine base weighed 79.26 grams (Tr. 197-198). Also in that jacket were some personal documents with appellant’s name on them, including appellant’s social security card (Tr. 165, 224), a videocassette tape of appellant engaged in sexual intercourse found in that jacket too (Tr. 172, 179, 255), and another “owe list” (Tr. 165, 168-170, 252). That list showed: “Drew” owed \$940 for drugs he had received; “Sean” owed \$175; “Gert” owed \$150; and John owed \$110, but had paid off an earlier debt (Tr. 170).

³ An investigator for COMET testified that an “owe list” is “a list people keep when they – it’s what we call front somebody drugs. They don’t make them pay for them right then and there. They give them a quantity of a drug and they go out and they’re – they come back later with the money to pay them for it.” (Tr. 167). In other words, it reminds a person “of who owes him how much money” (Tr. 169). Appellant’s handwriting was not compared to that owe list (Tr. 180-181, 263-264).

The state demonstrated, over a relevance objection, that the videotape found in the jacket showed appellant engaged in sexual intercourse (Tr. 174-176, 179). Appellant's trial counsel asserted that a description of what was on the tape was more prejudicial than probative and thus legally irrelevant (Tr. 173, 176). But, the jury was told that the videotape showed appellant engaged in sexual intercourse (Tr. 179).

There was a small bag of marijuana located on a tray behind the door of the front, or smaller, bedroom (Tr. 123, 131, 156-157, 182, 234, 236). There was a baggie of cocaine base found in a camera case hanging from a mirror in that bedroom (Tr. 132-133, 150, 152-153, 182, 234-236). That cocaine weighed 21.46 grams (Tr. 196-197). Meadows' driver's license was found in a nightstand in the front bedroom (Tr. 232, 234-235, 237).

Appellant and Meadows were arrested (Tr. 250). After his arrest, appellant put on the same size of shoes as the shoes found in the back or master bedroom (Tr. 250-251).

Nathaniel Meadows testified at trial.⁴ Meadows testified that he occupied the small, front bedroom, and appellant stayed in the large, master bedroom (Tr. 307-308). He said that he and appellant sold drugs out of the condo (Tr. 317-318). After Meadows was arrested, he gave a written confession saying that all of the

⁴ Although endorsed as a witness by the state (L.F. 11), Meadows was called as a witness by appellant.

drugs that were in the apartment were his drugs and that none of the drugs were appellant's (Tr. 290, 313, 322-323).⁵ According to Meadows, appellant, who was a cellmate of Meadows, requested Meadows to make the statement (Tr. 309, 313, 327). At the time that Meadows made that statement, he believed he would get probation (Tr. 291, 313). Appellant asked Meadows to "take the charge because he had a daughter he was just getting in school; he couldn't take it, he would hang himself." (Tr. 310). So appellant, who was crying, asked Meadows to "take the rap for him" (Tr. 310). Over objection, Meadows testified that appellant was on probation (Tr. 310-12).⁶

Meadows recanted his confession, saying that the drugs found in the front bedroom were his, and the drugs found in the back bedroom were appellant's (Tr. 291-293, 309, 315, 317, 319-320, 323).

Eventually, Meadows pled guilty to two Class C felony drug-related charges regarding the possession of cocaine and possession of marijuana, agreeing to testify against appellant (Tr. 296-297, 310, 323-324). He received probation (Tr. 296-297). During trial, over appellant's objections (Tr. 301-304), Meadows

⁵ He testified that he wrote the statement the night of his arrest, but turned it in the following day after he was arraigned (Tr. 322).

⁶ The prosecutor also asked Meadows what appellant was on probation for, and when Meadows replied, "marijuana" the trial court, sua sponte, ordered the jury to disregard the statement (Tr. 312).

testified that he would purchase his drugs from appellant (Tr. 303-304). Not only did Meadows admit to possessing drugs, but he also testified that he sold drugs for appellant (Tr. 297, 300, 303-305, 317-318).

The case then proceeded to closing arguments (Tr. 334). In closing, regarding Nathaniel Meadows' testimony, the prosecutor argued, in part: "Yes, [Nathaniel Meadows] had an agreement with the State, but that makes no difference because Nate told you the truth. He sat there and told you He changed his story because he wanted to tell the truth." (Tr. 366). Later, the prosecutor argued that, "Nate did, however, come back in and tell the truth, and he you the truth in court today." (Tr. 367-368).

After deliberation, the jury returned verdicts of guilty on both counts (Tr. 378-379; L.F. 46-47). On January 7, 2002, appellant was sentenced as a prior drug offender to consecutive prison terms of twenty years and ten years (Tr. 430-431; L.F. 64-68).

On March 28, 2002, by leave of this Court, appellant filed a notice of appeal of his convictions (L.F. 70-71). On March 19, 2003, this Court issued an opinion affirming appellant's convictions. State v. Glover, 98 S.W.3d 917 (Mo. App. S.D. 2003). This Court's mandate was issued on April 4, 2003 (PCR L.F. 34).

On June 19, 2003, appellant filed a pro se motion to vacate, set aside, or correct his judgment or sentence (PCR L.F. 1, 3). Appellant failed to sign the

motion, though he did sign the in forma pauperis affidavit (PCR L.F. 7-8). The lack of appellant's signature was not noticed.

On March 1, 2004, appellant filed an amended motion for post-conviction relief (PCR L.F. 1, 14). The motion alleged, inter alia, that appellant received ineffective assistance of counsel in that his appellate counsel failed to assert on direct appeal that the trial court had erred in overruling appellant's objection to testimony concerning a videotape described as showing appellant engaged in sexual intercourse, and in that his trial counsel failed to object to the prosecutor's improper closing argument that vouched for the testimony of a witness (PCR L.F. 25-27). Again, the lack of appellant's signature on the pro se motion was not noticed.

On September 19, 2005, an evidentiary hearing was held concerning appellant's post-conviction motion (PCR Tr. 2). Craig Johnston, appellant's direct appeal counsel, and Jeffrey Merrell, appellant's trial counsel, testified at the hearing, among others (PCR Tr. 4, 65). No notice was taken and no mention made of the lack of appellant's signature on the pro se motion.

At the hearing, Craig Johnston recalled that he asserted two points of plain error in appellant's direct appeal (PCR Tr. 7). Johnston also testified that he did not raise the issue regarding testimony about the videotape because he believed the evidence was admissible (PCR Tr. 8-10).

Jeffrey Merrell testified at the hearing that the defense strategy was to blame the drugs on Nathaniel Meadows because he had once confessed (PCR Tr.

71-72). Merrell also acknowledged that the prosecutor's vouching for Meadows was objectionable, but testified that he tries not to object during closing because of how he believes it looks to the jury (PCR Tr. 77-78).

On November 28, 2005, the motion court issued findings of fact and conclusions of law denying appellant's motion for post-conviction relief (PCR L.F. 2, 34-41; Appendix, pp. A1-A8). The motion court made no mention of the lack of appellant's signature on the pro se motion.

On December 27, 2005, appellant filed a notice of appeal to the Court of Appeals, Southern District (PCR L.F. 2, 43-44), and on July 31, 2006, appellant filed his brief with the Court of Appeals. Again, no notice was taken that the pro se motion lacked appellant's signature.

On September 29, 2006, the state filed the respondent's brief with the Court of Appeals. Within its brief, the state pointed out that appellant had not signed his pro se motion and suggested that the Court of Appeals dismiss and remand this case to allow appellant the opportunity to sign his pro se motion (Respondent's Brief, pp. 10-11).

When the lack of appellant's signature was brought to his attention by the state's brief, appellant's counsel, in an effort to promptly correct the oversight, had a copy of the pro se motion taken to appellant, had appellant sign the pro se motion before a notary, and on October 10, 2006, mailed the signed pro se motion to the Taney County Circuit Clerk for filing (Appendix, pp. A10-A22). The signed pro se motion was received and filed by the Circuit Clerk on October 16,

2006, and a certified copy was sent to the Court of Appeals by the Circuit Clerk that same day (Appendix, pp. A9-A22).

On March 6, 2007, the Court of Appeals issued an Opinion affirming the motion court's judgment (Case No. SD 27441; Appendix, pp. A23-A45).⁷ The Court of Appeals found that the motion court had the jurisdiction to hear and decide appellant's post-conviction motion during the period of time in which the pro se motion remained unsigned (Appendix, p. 25, 34).⁸ The Court concluded that appellant's unsigned pro se motion met all the definitional requirements of a motion for post-conviction relief under Rule 29.15 so as to invoke the jurisdiction of the circuit court, and that the application of Rule 55.03(a) to post-conviction motions does nothing to defeat the motion court's jurisdiction unless the unsigned motion is stricken pursuant to Rule 55.03 (Appendix, p. 34). The Court went on to affirm the motion court's judgment on the merits (Appendix, 35-41).

The Court of Appeals subsequently transferred this appeal to this Court pursuant to Rule 83.02 (Appendix, p. 46).

⁷ The Court also remanded the case for correction of a clerical error within the Sentence and Judgment (Appendix, p. 41).

⁸ Two Judges dissented from the Court's Opinion (Appendix, pp. 42-45).

POINT RELIED ON

I.

Appellant's case should not be dismissed for lack of jurisdiction despite appellant initially failing to sign his timely-filed pro se motion for post-conviction relief because appellant promptly corrected the oversight upon being notified of it, and pursuant to Supreme Court Rule 55.03(a) and Wallingford v. State, 131 S.W.3d 781 (Mo. banc 2004), a post-conviction movant is entitled to an opportunity to fix the missing signature if he does so promptly after being notified of the error, even after the time limit for filing the pro se motion has expired as long as the motion was originally filed within the deadline, as appellant's was. Thus, this Court should afford appellant the opportunity to remedy the omission by either remanding the case to the circuit court with directions to allow appellant to correct the error, or by ruling that the circuit court had the jurisdiction to rule on appellant's post-conviction motion during the period of time in which the pro se motion remained unsigned so long as the unsigned motion had not been stricken pursuant to the provisions of Rule 55.03. A dismissal would prejudice appellant by denying his rights to due process of law and access to the courts under the Fourteenth Amendment to the United States Constitution and Article I, Sections 10 and 14 of the Missouri Constitution because he is entitled to proceed in accordance with the provisions of Rule 29.15.

Wallingford v. State, 131 S.W.3d 781 (Mo. banc 2004);

Tooley v. State, 20 S.W.3d 519 (Mo. banc 2000);

Carter v. State, 181 S.W.3d 78 (Mo. banc 2006);

Hensel v. American Air Network, Inc., 189 S.W.3d 582 (Mo. banc 2006);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sects. 10 and 14;

Rule 55.03;

Rule 29.15; and

Rule 24.035.

POINT RELIED ON

II.

The motion court clearly erred in denying appellant's Ruling 29.15 motion for post-conviction relief because a review of the record leaves a definite and firm impression that appellant was denied effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution in that his appellate counsel failed to act as a reasonably competent attorney would under the same or similar circumstances by failing to assert on direct appeal that the trial court had erred by overruling appellant's relevancy objection to testimony concerning a videotape described as showing appellant engaged in sexual intercourse. Appellant was prejudiced by his appellate counsel's failure to assert said issue on direct appeal in that the description of what was on the tape was more prejudicial than probative and thus legally irrelevant, and had this issue been presented, a reasonable probability exists that the appellate court would have reversed appellant's convictions.

State v. Smith, 32 S.W.3d 532 (Mo. banc 2000);

State v. Sanders, 126 S.W.3d 5 (Mo. App. W.D. 2003);

State v. Haddock, 24 S.W.3d 192 (Mo. App. W.D. 2000);

Moss v. State, 10 S.W.3d 508 (Mo. banc 2000);

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

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

Rule 29.15.

POINT RELIED ON

III.

The motion court clearly erred in denying appellant's Rule 29.15 motion for post-conviction relief because a review of the record leaves a definite and firm impression that appellant was denied effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution in that his trial counsel failed to act as a reasonably competent attorney under the same or similar circumstances by failing to object to the state's improper closing argument in which the prosecutor personally vouched for a witness, Nathaniel Meadows. Appellant was prejudiced by his counsel's failure to object to the prosecutor's improper arguments in that the jury was allowed to consider the improper arguments in determining its verdict, rather than deciding the case upon independent evaluation of the evidence alone. Had objections been made, they would have properly been sustained, the jury would not have been allowed to consider the improper argument, and a reasonable probability exists that the result of appellant's trial would have been different.

Lawn v. United States, 355 U.S. 339, 78 S. Ct. 311 (1958);

State v. Storey, 901 S.W.2d 886 (Mo. banc 1995);

Berger v. United States, 295 U.S. 78, 55 S.Ct. 629 (1935);

State v. Jackson, 499 S.W.2d 467 (Mo. 1973);

U.S. Const., Amends. VI and XIV;
Mo. Const., Art. I, Sect. 18(a); and
Rule 29.15.

ARGUMENT

I.

Appellant's case should not be dismissed for lack of jurisdiction despite appellant initially failing to sign his timely-filed pro se motion for post-conviction relief because appellant promptly corrected the oversight upon being notified of it, and pursuant to Supreme Court Rule 55.03(a) and Wallingford v. State, 131 S.W.3d 781 (Mo. banc 2004), a post-conviction movant is entitled to an opportunity to fix the missing signature if he does so promptly after being notified of the error, even after the time limit for filing the pro se motion has expired as long as the motion was originally filed within the deadline, as appellant's was. Thus, this Court should afford appellant the opportunity to remedy the omission by either remanding the case to the circuit court with directions to allow appellant to correct the error, or by ruling that the circuit court had the jurisdiction to rule on appellant's post-conviction motion during the period of time in which the pro se motion remained unsigned so long as the unsigned motion had not been stricken pursuant to the provisions of Rule 55.03. A dismissal would prejudice appellant by denying his rights to due process of law and access to the courts under the Fourteenth Amendment to the United States Constitution and Article I, Sections 10 and 14 of the Missouri Constitution because he is entitled to proceed in accordance with the provisions of Rule 29.15.

On June 19, 2003, appellant timely filed a pro se motion to vacate his judgment or sentence (PCR L.F. 1, 3). Appellant failed to sign the motion, though he did sign the in forma pauperis affidavit (PCR L.F. 7-8).

Appellant's post-conviction case proceeded normally: the motion was timely amended (PCR L.F. 1, 14), an evidentiary hearing was held (PCR Tr. 2), and the circuit court ultimately denied appellant's motion (PCR L.F. 2, 34-41; Appendix, pp.A1-A8). No notice was taken and no mention made of the lack of appellant's signature on the pro se motion.

Appellant timely filed a notice of appeal (PCR L.F. 2, 43), and on July 31, 2006, appellant filed his brief with the Court of Appeals. Again, no notice was taken that the pro se motion lacked appellant's signature.

On September 29, 2006, the state filed the respondent's brief with the Court of Appeals. Within its brief, the state pointed out that appellant had not signed his pro se motion and suggested that the Court of Appeals dismiss and remand this case to allow appellant the opportunity to sign his pro se motion (Respondent's Brief, pp. 10-11).

When the lack of appellant's signature was brought to his attention by the state's brief, appellant's counsel, in an effort to promptly correct the oversight, had a copy of the pro se motion taken to appellant, had appellant sign the pro se motion before a notary, and on October 10, 2006, mailed the signed pro se motion to the Taney County Circuit Clerk for filing (Appendix, pp. A10-A22). The signed pro se motion was received and filed by the Circuit Clerk on October 16,

2006, and a certified copy was sent to the Court of Appeals by the Circuit Clerk that same day (Appendix, pp. A9-A22).

While an unsigned pro se motion does not invoke the jurisdiction of the circuit court, Tooley v. State, 20 S.W.3d 519, 520 (Mo. banc 2000), and signing the informia pauperis affidavit does not constitute signing the motion, Wallingford v. State, 131 S.W.3d 781, 782 (Mo. banc 2004), Supreme Court Rule 55.03 gives a post-conviction movant an opportunity to fix the missing signature if he does so promptly after being notified of the error. Wallingford, id. A movant may fix a missing signature even after the time limit for filing the pro se motion has expired as long as the motion was originally filed within the deadline (as appellant's was). Wallingford, id.

Thus, appellant is entitled to an opportunity to remedy the omission of his signature and to court review of his post-conviction motion. This Court has at least two options from which to choose the manner in which it affords appellant the opportunity to correct his missing signature.

One option for this Court would be to remand the case to the circuit court with directions to allow appellant to correct the error at which point his post-conviction case would start anew. This option is discussed in Denny v. State, 179 S.W.3d 381 (Mo. App. W.D. 2005).

A second option for this Court would be to determine that the circuit court had the jurisdiction to rule on appellant's post-conviction motion during the period of time in which the pro se motion remained unsigned and review appellant's

motion on the merits. This option was discussed in this case below by the Southern District Court of Appeals (Case No. SD27441; Appendix, pp. A23-A45).

Some discussion of the history of the signature requirement in relation to post-conviction motions could be helpful in deciding which option to choose.

Rules 24.035 and 29.15 were amended in 1996 to delete the verification requirement for pro se motions in each rule. The verification-by-movant requirement for amended motions was also deleted in each rule, but the following was added: "Any amended motion shall be signed by movant or counsel." Rules 24.035 and 29.15. Following these changes, the first case to address a movant's failure to sign a motion for post-conviction relief was Tooley v. State, 20 S.W.3d 519 (Mo. banc 2000).

In Tooley, the movant failed to sign his pro se motion for post-conviction relief, and, within the applicable time period within which to file such a motion, the motion court dismissed it. Id. at 520. This Court in its opinion acknowledged, *"It has long been held that an unsigned, unverified motion for post-conviction relief is a nullity and does not invoke the jurisdiction of the court."* Id. This Court also stated, without any citation to authority or other analysis, *"The movant's signature remains as a mandatory element for jurisdiction to attach. Tooley's failure to sign his motion rendered it a nullity. The motion court's jurisdiction was not invoked at the time the motion was dismissed."* Id.

The Tooley Court apparently did not premise the requirement for a movant's signature on Rule 24.035, but rather, found the signature requirement for

a post-conviction motion in Rule 55.03. Id. Rule 55.03(a) requires any filing with the court must be signed by the filing party or its attorney. The Court referenced Rule 55.03 for how to deal with the unsigned motion, "*An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.*" Rule 55.03(a). Appellant should have the opportunity to correct the deficiency." Id.

The Tooley Court reversed the dismissal of the motion and remanded the case to the motion court for compliance with Rule 55.03. Id. This result was based on the Court's application of Rule 55.03(a) and not by whether or not the motion court had jurisdiction to hear and decide the unsigned motion.

In 2004, this Court once again addressed the signature requirement on a motion for post-conviction relief in Wallingford v. State, 131 S.W.3d 781 (Mo. banc 2004). In Wallingford, the movant had filed his unsigned motion on the last possible date, so there was no possibility of correcting the omission under Rule 55.03 within the applicable time period for filing a motion for post-conviction relief. Id. The motion court dismissed the unsigned motion citing the Tooley decision. Id. at 782. The Wallingford Court acknowledged that the "*general propositions [in Tooley] are accurate,*" but then limited the holding in Tooley by stating: "*[T]he specific holding of Tooley is that under Rule 55.03(a), movants have the opportunity to correct omission of a signature.*" Id. This Court went on to hold that Rule 55.03(a) applies at any time in the case, including after the time period for filing a post-conviction relief motion has expired. Id.

Then in 2006, this Court decided Carter v. State, 181 S.W.3d 78 (Mo. banc 2006). In Carter, the movant did not sign his pro se Rule 29.15 motion but signed the amended motion. Id. at 79. The motion court dismissed the motion as untimely filed. Id. On appeal, the state conceded that the pro se motion was timely filed, but argued that the motion court did not acquire jurisdiction of the original motion because Carter had not signed it. Id.

This Court, citing Wallingford and Rule 55.03, found that when Carter's attorney called the lack of signature to Carter's attention, it was corrected promptly by the filing of a properly signed amended motion. Id. at 80. This Court noted that under Wallingford, the movant was allowed to correct the lack of signature four days after the amended motion was filed. Id. at 80, n.4. The Carter Court did not dismiss the appeal, but reversed and remanded with no discussion regarding any lack of jurisdiction. Id. at 80.

Hensel v. American Air Network, Inc., 189 S.W.3d 582 (Mo. banc 2006) was not a post-conviction appeal, but it discusses the application of Rule 55.03 and provides guidance as to the issue of whether jurisdiction attaches to an unsigned Rule 29.15 motion. In Hensel, the issue was whether jurisdiction attached when an attorney, not authorized to practice law in Missouri, was the only attorney to sign a petition prior to the expiration of the statute of limitations. Id. at 582. The trial court found a lack of jurisdiction and granted summary judgment to the defendants. Id. at 582-583. This Court stated:

This Court has recently reaffirmed that the lack of a signature is not necessarily fatal to the filing of a petition. Carter v. State, 181 S.W.3d 78, 79-80 (Mo. banc 2006). A different rule should not apply to a petition not properly signed. This is consistent with the purposes set out in Rule 55.03 The signature requirement is not intended to deprive litigants of a right of action.

Id. at 583.

The Hensel Court found the petition was not a nullity even though it was "unsigned" because of "[t]he purpose of declaring certain acts by those not authorized to practice law a nullity is to protect the public." Id. at 584. In analyzing the purpose under the facts of the case, the Court found when "the only issue of unauthorized practice is the signature on the petition required by Rule 55.03, the sanction of depriving the litigant of a cause of action [was] disproportionate to the harm." Id. "Where a petition is not signed or signed by an improper person, Rule 55.03 provides the sanction—the petition shall be stricken unless the omission is corrected promptly after being called to the attention of the attorney or party filing same." Id.

Thus, pursuant to Wallingford, supra. and Rule 55.03, appellant is entitled to an opportunity to remedy the omission of his signature on his post-conviction motion. This raises the question of how best to provide appellant the opportunity to correct his missing signature.

In 2005, the Western District Court of Appeals decided the case of Denny v. State, 179 S.W.3d 381 (Mo. App. W.D. 2005). Denny filed a pro se motion under Rule 24.035. Id. at 382. The motion court appointed counsel for Denny and then later denied the motion without an evidentiary hearing. Id. On appeal, Denny claimed that the motion court erred in failing to enter specific findings of fact and conclusions of law on each of his claims. Id. The court did not reach the merits of the appeal after discovering that Denny had failed to sign the pro se motion. Id. at 382-383. Quoting Tooley, supra., the Denny Court held, "*Because the motion court never acquired jurisdiction, it did not have the power to appoint counsel or rule on the motion. Its judgment must be reversed.*" Id. at 383.

The Western District, however, noted the applicability of Rule 55.03 and the fact that the record contained no indication that the omitted signature had been brought to Denny's attention, and determined that Denny should be afforded an opportunity pursuant to Rule 55.03(a) to correct the error. Id. The Denny Court stated, without any citations, "*If [Denny] chooses to remedy the oversight, the motion court will have jurisdiction to rule on the motion.*" Id.

Within the context of the foregoing precedents, the Southern District Court of Appeals decided this current case below (Case No. SD27441; Appendix, pp. A23-A45). In the present case, appellant timely filed a pro se motion, but failed to sign the motion, though he did sign the in forma pauperis affidavit. No notice was taken and no mention made of the missing signature until the state pointed it out in its appellate brief, at which time appellant promptly corrected the oversight.

The Southern District determined that the motion court had the jurisdiction to hear and decide appellant's post-conviction motion during the period of time in which the pro se motion remained unsigned (Appendix, pp. 25, 34). The Court reviewed the precedents regarding the affect on jurisdiction of an unsigned post-conviction motion, much the same as the foregoing discussion in this brief (Appendix, pp. 25-33). The Court then concluded that appellant's unsigned pro se motion met all the definitional requirements of a motion for post-conviction relief under Rule 29.15 so as to invoke the jurisdiction of the circuit court, and that the application of Rule 55.03(a) to post-conviction motions does nothing to defeat the motion court's jurisdiction unless the unsigned motion is stricken pursuant to Rule 55.03 (Appendix, p. 34). In addition, the Southern District stated:

While we recognize and understand the seeming allure of the purported black-letter statements of the jurisdictional discussion in Tooley and why it forms the basis for the decision in Denny, we are unwilling to yield to its charms. First, either the motion court has jurisdiction to decide a motion for post-conviction relief at the time it is filed or it does not.

(Appendix, pp. 33-34). The Court then added:

We respectfully reject the holding in Denny, which finds the unsigned Rule 29.15 motion a nullity conferring no jurisdiction but allows, under Rule 55.03, an unlimited tolling of time requirements for filing a signed motion, as unmanageable as a practical matter

and leading to the ultimate untenable conclusion that no judgment on an unsigned Rule 29.15 motion is final.

(Appendix, pp. 34-35). The Court went on to affirm the motion court's judgment on the merits (Appendix, 35-41).

Thus, this Court is presented with at least two possible methods of providing post-conviction movants the opportunity to correct a missing signature on the pro se motion: either reverse for a lack of jurisdiction and remand the case to the circuit court with directions to allow the movant to correct the error at which point the post-conviction case would start anew, as done by the Western District in Denny, or find that the circuit court had the jurisdiction to rule on the post-conviction motion during the period of time in which the pro se motion remained unsigned and allow the case to proceed on the merits, as done by the Southern District in the present case below.

The process utilized by the Western District in Denny, supra. is supported by precedent, particularly Tooley, supra., by which the Western District apparently felt bound.⁹ This procedure, though, results in a duplication of judicial effort in that any actions taken with regard to an unsigned motion must be done again once the missing signature has been corrected, regardless of how far along the case has

⁹ The dissenters to the Southern District decision in this case also felt bound by such precedent, even as they expressed a preference for the majority analysis (Appendix, pp. 43-45).

proceeded, and as pointed out by the Southern District, precludes finality for any judgment on an unsigned motion.

On the other hand, the analysis of the Southern District is also based on precedent, such as Tooley, supra., Wallingford, supra., Carter, supra., and Hensel, supra., and on Supreme Court Rules, particularly Rule 55.03. The Southern District's analysis would promote judicial economy and efficiency by allowing the post-conviction cases to proceed normally and with finality, while at the same time providing for correction of the unsigned motion pursuant to Rule 55.03.

Appellant's case should not be dismissed for lack of jurisdiction because he is entitled to an opportunity to remedy the omission of his signature and to court review of his post-conviction motion. Therefore, appellant respectfully requests that this Court not dismiss his post-conviction case, but provide him with the opportunity to correct the missing signature on his pro se motion and secure review of his motion by either of the procedures discussed above.

ARGUMENT

II.

The motion court clearly erred in denying appellant's Ruling 29.15 motion for post-conviction relief because a review of the record leaves a definite and firm impression that appellant was denied effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution in that his appellate counsel failed to act as a reasonably competent attorney would under the same or similar circumstances by failing to assert on direct appeal that the trial court had erred by overruling appellant's relevancy objection to testimony concerning a videotape described as showing appellant engaged in sexual intercourse. Appellant was prejudiced by his appellate counsel's failure to assert said issue on direct appeal in that the description of what was on the tape was more prejudicial than probative and thus legally irrelevant, and had this issue been presented, a reasonable probability exists that the appellate court would have reversed appellant's convictions.

The motion court clearly erred in denying appellant's post-conviction claim that his appellate counsel was ineffective for failing to assert on direct appeal that the trial court had erred by overruling appellant's objection to testimony concerning a videotape described as showing appellant engaged in sexual intercourse. A review of the record leaves the definite and firm impression that

the ruling was erroneous because appellant's convictions would have been reversed had the issue been presented to this Court.

The scope of appellate review of the denial of a Rule 29.15 motion is whether the findings of fact and conclusions of law are clearly erroneous. State v. Parker, 886 S.W.2d 908, 933 (Mo. banc 1994). The motion court's determination is clearly erroneous when the appellate court has a definite and firm impression that a mistake has been made. State v. Nolan, 872 S.W.2d 99, 104 (Mo. banc 1994).

Appellate counsel was constitutionally ineffective for failing to raise on direct appeal the issue of the trial court's error in overruling appellant's objection to the testimony concerning the videotape. To establish a violation of his right to effective assistance of counsel, appellant must satisfy a two-part test. First, it must be shown that appellant's counsel "...failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances." Sanders v. State, 738 S.W.2d 856, 857 (Mo. banc 1987), citing Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065 (1984). Second, it must be demonstrated that appellant was prejudiced by the ineffective assistance of counsel. Id. The prejudice prong is satisfied when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. A reasonable probability is "...the minimum standard of undermining confidence in the outcome of the case." Moore v. State, 827 S.W.2d 213, 215 (Mo. banc 1992).

Additionally, in addressing ineffective assistance of appellate counsel, the Missouri Supreme Court has adopted the requirements outlined in Reuscher v. State, 887 S.W.2d 588, 591 (Mo. banc 1994). “To support a [Rule 29.15] motion due to ineffective assistance of appellate counsel, strong grounds must exist showing that counsel failed to assert a claim of error which would have required reversal had it been asserted and which was so obvious from the record that a competent and effective lawyer would have recognized it and asserted it.” Moss v. State, 10 S.W.3d 508, 514 (Mo. banc 2000).

At trial, the state demonstrated, over a relevance objection, that appellant appeared on a videotape engaged in sexual intercourse (Tr. 174-176, 179). The tape was found in a jacket in which drugs were alleged to have been found (Tr. 172-173). Trial counsel asserted that a description of what was on the tape was more prejudicial than probative and thus legally irrelevant (Tr. 173, 176). Nevertheless, the jury was told that the videotape showed appellant engaged in sexual intercourse (Tr. 179).

Evidence is relevant if it tends to prove or disprove a fact at issue or corroborates other relevant evidence. State v. Smith, 32 S.W.3d 532, 546 (Mo. banc 2000); State v. Sanders, 126 S.W.3d 5, 21 (Mo. App. W.D. 2003). Evidence is admissible if it is relevant to a material issue or helps to better understand a witness’ testimony. State v. Haddock, 24 S.W.3d 192, 197 (Mo. App. W.D. 2000).

Even if logically relevant, evidence should not be admitted if its “costs” - prejudice, confusion of the issues, misleading the jury, cumulativeness – outweigh

its probative value. State v. Smith, 32 S.W.3d at 546; State v. Sanders, 126 S.W.3d at 21. If the offered evidence causes “prejudice wholly disproportionate to the value and usefulness of the evidence, it should be excluded.” State v. Smith, id.

Testimony regarding the activity on the videotape should not have been allowed because any description beyond that appellant appeared on the tape was unnecessary for the state’s declared purpose of showing appellant’s ownership of the coat in which the tape was found. The testimony that the tape showed appellant engaged in sexual intercourse served only to highlight appellant’s illicit sexual activity to the jury in an attempt to inflame the jury against appellant. The testimony became more prejudicial than probative once the description went beyond appellant’s appearance on the tape.

The trial court’s error in allowing the testimony regarding appellant’s sexual activity on the videotape was so obvious from the record that competent and effective appellate counsel would have recognized and asserted it. Moss, supra. Appellant was prejudiced by his appellate counsel’s failure in that the appellate court was not given the opportunity to review the relevancy of the testimony, the offered foundation for its admission, and its prejudicial affect on appellant’s trial. Had this issue been asserted on direct appeal, a reasonable probability exists that the appellate court would have reversed appellant’s conviction.

Furthermore, the choices made by counsel must be reasonable and considered sound strategy to withstand a claim of ineffective assistance of counsel.

Johnson v. State, 125 S.W.3d 872, 876 (Mo. App. S.D. 2003). The decisions made in this case by appellate counsel were neither sound nor reasonable. To not challenge the court overruling appellant's objection and allowing prejudicial, irrelevant testimony was patently unreasonable. There can be no reasonable strategy under the circumstances of appellant's case to not challenge the court's erroneous action and allow such improper testimony to be used to convict appellant. Appellant's direct appeal counsel simply failed to properly represent appellant and protect his rights, and appellant was harmed by that failure.

Allowing such a legitimate and important issue to just fall by the wayside is highly prejudicial, and a reasonable probability exists that the outcome would have been different had the prejudicial, irrelevant testimony been properly challenged by appellate counsel. The probability that asserting this issue would have affected the result of appellant's case cannot be ignored and meets the minimum standard of undermining confidence in the outcome. Moore, supra.

Appellant has established that his appellate counsel failed to exercise the customary skill and diligence of a reasonably competent attorney, and that he was prejudiced by his counsel's ineffectiveness. Had the court's error in allowing the testimony regarding appellant's sexual activity on the videotape been properly challenged on appeal, there is a reasonable probability that the result of appellant's case would have been different. As such, appellant respectfully requests that this Court reverse the motion court's denial of his Rule 29.15 motion and order a new trial.

ARGUMENT

III.

The motion court clearly erred in denying appellant's Rule 29.15 motion for post-conviction relief because a review of the record leaves a definite and firm impression that appellant was denied effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution in that his trial counsel failed to act as a reasonably competent attorney under the same or similar circumstances by failing to object to the state's improper closing argument in which the prosecutor personally vouched for a witness, Nathaniel Meadows. Appellant was prejudiced by his counsel's failure to object to the prosecutor's improper arguments in that the jury was allowed to consider the improper arguments in determining its verdict, rather than deciding the case upon independent evaluation of the evidence alone. Had objections been made, they would have properly been sustained, the jury would not have been allowed to consider the improper argument, and a reasonable probability exists that the result of appellant's trial would have been different.

The scope of review of the denial of a Rule 29.15 motion is whether the findings of fact and conclusions of law of the motion court are clearly erroneous. State v. Parker, 886 S.W.2d 908, 933 (Mo. banc 1994). The motion court's determination is clearly erroneous when the appellate court has a definite and firm

impression that a mistake has been made. State v. Nolan, 872 S.W.2d 99, 104 (Mo. banc 1994).

Appellant received ineffective assistance of counsel in that his trial counsel failed to object to improper arguments made by the prosecutor during closing argument. To establish a violation of his right to effective assistance of counsel, appellant must satisfy a two-part test. First, it must be shown that appellant's counsel "...failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances." Sanders v. State, 738 S.W.2d 856, 857 (Mo. banc 1987), citing Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065 (1984). Second, it must be demonstrated that appellant was prejudiced by the ineffective assistance of counsel. Id. The prejudice prong is satisfied when there is reasonable probability that, but for counsel's ineffectiveness, the result would have been different. Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. A reasonable probability is "...the minimum standard of undermining confidence in the outcome of the case." Moore v. State, 827 S.W.2d 213, 215 (Mo. banc 1992).

During closing argument, the state argued that "Yes, [Nathaniel Meadows] had an agreement with the State, but that makes no difference because Nate told you the truth. He sat there and told you He changed his story because he wanted to tell the truth." (Tr. 366). Later, the state argued that, "Nate did, however, come back in and tell the truth, and he you the truth in court today." (Tr.

367-368). Appellant's trial counsel made no objection to these statements, though the prosecutor's comments are clearly improper.

The prosecutor's argument was improper because it constituted improper personal vouching for a witness. It is well established that a prosecutor should not vouch for a witness' trial testimony and credibility. Lawn v. United States, 355 U.S. 339, 359, 78 S.Ct. 311, 323 (1958). Vouching may occur in two ways: the prosecutor may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness' testimony.

Id.

Furthermore, a prosecutor has a special obligation to avoid "improper suggestions, insinuations, and especially assertions of personal knowledge." Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935). A prosecutor's statement of personal opinion or belief not drawn from the evidence is improper. State v. Storey, 901 S.W.2d 886, 901 (Mo. banc 1995), citing State v. Jackson, 499 S.W.2d 467, 471 (Mo. 1973). This form of argument essentially turns the prosecutor into an unsworn witness not subject to cross-examination. Storey, id. The error is compounded because the jury believes that the prosecutor has a duty to serve justice, not merely to win the case. Id.

Appellant was prejudiced by the prosecutor's improper argument because Nathaniel Meadows' credibility was a key issue in his trial. Meadows was a vital witness in that the jury's decision primarily turned on whether or not to believe

him. The prosecutor did not vouch for Meadows' credibility once, as an isolated incident, but rather, it was done repeatedly.

A conviction should be based on independent evaluation of the evidence alone, not on consideration of improper arguments personally vouching for witnesses. The probability that objections to these improper arguments would have affected the verdict cannot be ignored and meets the minimum standard of undermining confidence in the outcome. Moore, supra. Had trial counsel objected to the improper arguments, there is a reasonable probability that the outcome of appellant's case would have been different.

Moreover, an attorney's discretion is not absolute. The choices made by counsel at trial must be reasonable and considered sound trial strategy to defeat a claim of ineffective assistance of counsel. Johnson v. State, 125 S.W.3d 872, 876 (Mo. App. S.D. 2003). Trial counsel's decisions in this case were neither sound nor reasonable. Particularly in this case, it was patently unreasonable to not object when the prosecutor blatantly vouched for a witness to improperly bolster his case against appellant. There can be no reasonable strategy under the circumstances of appellant's case to not challenge the prosecutor's blatant vouch for the credibility of a witness and allow such improper arguments to be used to convict appellant. Appellant's counsel simply failed to properly represent appellant and protect his rights, and appellant was harmed by that failure.

Appellant has established that his trial counsel failed to exercise the customary skill and diligence of a reasonably competent attorney and that he was

prejudiced by his counsel's ineffectiveness. Had trial counsel objected to the prosecutor's improper arguments, there is a reasonable probability that the result of appellant's case would have been different. As such, appellant respectfully requests that this Court reverse the denial of his Rule 29.15 motion and order a new trial.

CONCLUSION

For the foregoing reasons, as set out in appellant's Argument I, appellant respectfully requests that this Court not dismiss his post-conviction case, but provide him with the opportunity to correct the missing signature on his pro se motion and secure review of his motion by either of the procedures discussed herein, and as set out in appellant's Arguments II and III, reverse the motion court's denial of post-conviction relief and remand for a new trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Mark A. Grothoff, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b) and Special Rule 1(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 8,498 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in June, 2006. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this ____ day of March, 2007, to Shaun Mackelprang, Chief Counsel, P.O. Box 899, Jefferson City, Missouri 65102-0899.

Mark A. Grothoff