

Case no. SC89249

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IN THE MISSOURI SUPREME COURT

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STATE ex rel. MICHAEL SHEPHERD,

*Petitioner,*

v.

STEVE LARKINS, Warden,

*Respondent.*

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Original Proceeding in Habeas Corpus

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RESPONDENT'S STATEMENT, BRIEF, AND ARGUMENT

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JEREMIAH W. (JAY) NIXON  
Attorney General

ANDREW W. HASSELL  
Assistant Attorney General

P. O. Box 899  
Jefferson City, MO 65102-0899  
(573) 751-3321 Telephone  
(573) 751-3825 Facsimile

*Attorneys for Appellants*

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## **Jurisdictional Statement**

This Court has jurisdiction to issue original writs of habeas corpus under Article V, §4, of the Missouri Constitution (as amended 1976).

## Statement Of Facts

### A. The Crimes

After playing in a high school football game, victim Patrick Pyle and his cousin Coleman Bryan got together at Bryan's house. Resp. App. A3. Pyle then made a bad decision: he drank whiskey that he found in the refrigerator. *Id.* Unsurprisingly, the whiskey made him ill. *Id.* In an attempt to feel better, Pyle and Bryan went outside and then took a walk. *Id.* After two blocks, they decided to return to Bryan's home because it was past midnight. *Id.*

Unfortunately for Pyle, petitioner Michael Shepherd and three friends drove up, got out of their truck, and stopped Pyle and Bryan. Resp. App. A3-A4. Shepherd began yelling at them. Resp. App. A4. When Bryan told them that he and Pyle were going home, Shepherd tried to hit Bryan. *Id.* Bryan swung back and then ran away. *Id.*

Larry Jones, the driver of the truck, hit Pyle and knocked him to the ground. Resp. Ex. A4. Shepherd then stomped on Pyle, asking him if he wanted "some more of this." *Id.* Shepherd continued to stomp on Pyle even after Pyle stopped moving. *Id.* At his accomplices' urging,

Shepherd got into the truck and left with them. *Id.* Pyle suffered a broken jaw that was wired shut for six weeks. *Id.*

## **B. Procedural History**

A Cooper County jury convicted Michael Shepherd of one count of first-degree assault. Pet. Ex. 9. The trial judge sentenced Shepherd to twenty-five years in the custody of the Missouri Department of Corrections. *Id.* The Missouri Court of Appeals affirmed Shepherd's convictions and sentences. Resp. App. A1. Shepherd then filed a Rule 29.15 motion in the Cooper County Circuit Court. Resp. App. A16. The circuit court denied that motion as untimely. Resp. App. A23. Shepherd did not appeal from that ruling.

Shepherd later filed a habeas petition in the St. Francois County Circuit Court. Pet. Ex. 1. The court denied the petition for lack of jurisdiction. Pet. Ex. 2. Shepherd then filed a petition for mandamus in the Missouri Court of Appeals, Eastern District, which was summarily denied. Pet. Ex. 3 and 4. Shepherd then filed a habeas petition in the Missouri Court of Appeals, Eastern District. Pet. Ex. 5. The Court of Appeals denied the petition, holding that Shepherd had not demonstrated sufficient prejudice to overcome his defaults. Pet. Ex. 6.

Shepherd then filed another habeas petition in St. Francois County. Pet. Ex. 7. The circuit court denied that petition under Rule 91.22 because the Court of Appeals had considered and denied Shepherd's claims. Pet. Ex. 8. Shepherd then filed his habeas petition in this Court.

## Argument

This Court should quash its preliminary writ of habeas corpus because Shepherd defaulted on both of his claims. He defaulted on his improper jury communication claim by failing to raise it on direct appeal. He defaulted on his ineffective assistance of counsel claim by failing to raise it in his Rule 29.15 motion. He cannot overcome the default of his jury communication claim; he can still litigate his ineffective assistance claim in his Rule 29.15 motion because the circuit court has not entered a final judgment. Alternatively, both of his claims are meritless.

### **I. The improper jury communication claim**

#### **A. Shepherd's default bars further consideration of this claim**

Shepherd argues that the bailiff improperly communicated with the jury, Pet. Br. at 22-27.

This claim was cognizable on direct appeal. *State v. Quinn*, 405 S.W.2e 895, 896 (Mo. 1966); *State v. Herndon*, 224 S.W.3d 97 (Mo. App. W.D. 2007). Shepherd procedurally defaulted on it by failing to raise it on direct appeal. *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214 (Mo. 2001). In order to receive review of the merits of this claim, Shepherd

must show either a jurisdictional defect, cause and prejudice, or a manifest injustice (newly discovered evidence of actual innocence).

*Brown v. State*, 66 S.W.3d 721, 731 (Mo. 2002).

Shepherd does not allege that the circuit court lacked jurisdiction to try him or that he is actually innocent. He asserts only that he can show cause to overcome his default because the Cooper County Circuit Court wrongly denied his Rule 29.15 motion as untimely without appointing counsel. Pet.Br. 19-21.

Shepherd is wrong. Cause occurs when “some objective factor external to the defense impeded counsel’s [or the petitioner’s] efforts to comply with the State’s procedural rule.” *Jaynes*, 63 S.W.3d at 215, quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Here, nothing prevented Shepherd or his attorney from raising his improper jury communication claim on direct appeal. Shepherd could have raised that claim on direct appeal; he admits in his habeas petition and in his brief that he observed the alleged impropriety and that counsel knew about it three weeks before filing his motion for new trial. Pet. at 19; Pet. Br. at 23-24. The circuit court’s actions in the Rule 29.15 proceeding had no bearing on Shepherd’s ability to raise this claim on direct appeal.

**B. This claim is meritless**

Shepherd alleges that the bailiff was in the jury room for twenty minutes while the jury was deliberating and improperly communicated with the jury, Pet. at 11-17. He states in his petition that jurors Marsha Scott and Mary Gerke would testify that the bailiff told the jury during deliberations that Shepherd would only serve eight years on a twenty-five-year sentence. Pet. at 15. Shepherd's petition does not contain any affidavits from these jurors or any other supporting evidence about the content of any conversations between the bailiff and the jury.

Jurors Scott and Gerke, as well as Mary Ellen Vollmer, the jury foreperson, disagree with these assertions. Juror Scott<sup>1</sup>, in a signed affidavit, stated that the bailiff did not tell the jurors anything about Shepherd's parole eligibility during deliberations. Resp. Ex. D. She also states that the bailiff did not have any substantive conversations with the jury during their deliberations. Resp. Ex. D. Juror Vollmer agrees with Juror Scott on each of these points in a signed affidavit. Resp. Ex.

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<sup>1</sup> Juror Scott has since changed her name. She is now Marsha Van Boerring. For convenience, counsel will refer to her by her name at the time of Shepherd's trial.

E. Juror Gerke, in a signed affidavit, stated that she does not remember any conversations with the bailiff during deliberations. Resp. Ex. F.

In an attempt to counter these affidavits, Shepherd argues that jurors Gerke and Scott gave conflicting statements three years ago. Pet. Br. 24. He is wrong. Neither of the unverified and unsworn statements he submits states that the bailiff told the jury about parole eligibility. They merely state that the jury was “under the impression” that Shepherd would only have to serve thirty percent of his sentence. Pet. Ex. 13 and 14. The statements are silent about where that impression may have come from. These statements provide no support for Shepherd’s position that the bailiff was the source of the impression.

The jurors’ affidavits conclusively establish that the bailiff did not discuss parole eligibility with the jury. Shepherd fails to adduce any direct evidence rebutting that point. He therefore has failed to state facts that would establish a viable claim for relief. He is not entitled to a hearing or any other relief on this claim.

## II. The ineffective assistance of counsel claim

### A. Shepherd may still raise this claim in a Rule 29.15 motion

The Court should deny the petition with respect to Shepherd's ineffective assistance claim because Shepherd's Rule 29.15 action is still pending in the Cooper County Circuit Court. When the circuit court found that Shepherd's Rule 29.15 petition was untimely, the court entered its judgment only in an unsigned docket entry. Resp. App. A23. The circuit court's ruling is not final because the judge did not sign it. Mo.S.Ct.R. 74.01(a); *Lindquist v. Mid America Orthopaedic Surgery, Inc.*, 224 S.W.3d 593, 595 (Mo. 2007). Thus, Shepherd's Rule 29.15 motion is still pending.

Shepherd therefore may ask the Cooper County circuit court to reconsider its determination that his Rule 29.15 action was untimely and may ask for counsel to be appointed. Shepherd would likely be successful in such a motion; he appears to be correct that the circuit

court erred in dismissing his Rule 29.15 motion as untimely.<sup>2</sup> He then could seek to file an amended motion raising his ineffective assistance claim.

Shepherd therefore has a remedy for his claim other than an extraordinary writ from this Court. This Court therefore should deny the petition without prejudice with respect to this claim in order to allow Shepherd the opportunity to fully litigate his Rule 29.15 motion.

**B. Alternatively, Shepherd defaulted on this claim**

If this Court determines that Shepherd does not have a viable remedy under Rule 29.15, this Court should hold that Shepherd defaulted on his claim and that he cannot overcome his default.

Shepherd contends that trial counsel was ineffective for failing to investigate and call Nick Ziegenmeyer, an eyewitness to the crime, who

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<sup>2</sup> The circuit court stated that the Court of Appeals' mandate was issued on April 14, 1998. Resp. App. A23. That statement is not correct. The Court of Appeals issued its opinion on April 14, 1998. Resp. Ex. A1. The court issued its mandate on June 24, 1998. Pet. Ex. 8. Shepherd's PCR motion was due on September 22, 1998, ninety days later. He filed it on July 15, 1998. Resp. App. A16, A23.

would have corroborated Shepherd's testimony, Pet. Br. at 28-32. This ineffective assistance claim was cognizable in a Rule 29.15 motion.

Mo.S.Ct.R. 29.15(a). Shepherd defaulted on it by failing to raise it in his Rule 29.15 motion, Resp. App. A16-A22. *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214 (Mo. 2001). In order to receive review of the merits of this claim, Shepherd must show either a jurisdictional defect, cause and prejudice, or a manifest injustice. *Brown v. State*, 66 S.W.3d 721, 731 (Mo. 2002).

Shepherd admits that his claim is defaulted and attempts only to show cause to overcome his default. He cannot do so. He filed a Rule 29.15 motion, Resp. App. A16-A22, and could have raised his claim at that time. He did not do so. He, not the circuit court, is responsible for his decision not to raise his claim in his *pro se* motion. Shepherd made that choice before the circuit court dismissed his motion as untimely.

The circuit court's decision to deny Shepherd's Rule 29.15 motion as untimely without appointing counsel also does not constitute cause. If Shepherd believed that the circuit court erred in not appointing counsel and in denying his motion as untimely, he could have appealed. This precise situation has occurred before. In *Summers v. State*, 43

S.W.3d 893, 894 (Mo.App. W.D. 2001), the circuit court erroneously dismissed a Rule 29.15 motion as untimely without appointing counsel. The inmate appealed *pro se*, and the Court of Appeals reversed. *Id.* Here, Shepherd chose not to file an appeal. Neither the circuit court nor the State made it impossible for him to appeal. Shepherd merely did not do so. Therefore, he cannot show sufficient cause to overcome his default.

**C. This claim is meritless**

Shepherd alleges that trial counsel was ineffective for failing to investigate and call Nick Ziegenmayer, an eyewitness to the crime, who would have corroborated Shepherd's testimony. Pet. at 19-22. According to Shepherd, Ziegenmayer would have testified that Shepherd only kicked the victim once. Pet. at 20-22.

In order to prevail on this claim, Shepherd must demonstrate that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise in similar circumstances, and that he was prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In order to prove prejudice, Shepherd must show that there

is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U.S. at 694.

Shepherd cannot prevail under *Strickland* because Ziegenmeyer does not corroborate Shepherd’s testimony. Shepherd testified that he never kicked the victim. Tr. 153.<sup>3</sup> Ziegenmeyer’s statement that Shepherd kicked the victim only once thus **contradicts** Shepherd’s testimony. Counsel reasonably could have chosen not to present evidence that undercut his client’s testimony and that may have badly hurt his case.

Shepherd also cannot show prejudice. Ziegenmeyer’s testimony would have contradicted Shepherd and bolstered the State’s case by showing that Shepherd had kicked the victim. This evidence would have hurt Shepherd’s case. He cannot reasonably contend that presenting it would have created a reasonable probability of a different verdict.

Counsel’s decision not to present Ziegenmeyer’s testimony therefore does not constitute ineffective assistance of counsel. This claim fails.

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<sup>3</sup> The trial transcript is attached to the respondent’s return as Exhibit G.

## Conclusion

For these reasons, this Court should quash its preliminary writ and deny Shepherd habeas relief.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON  
Attorney General

ANDREW W. HASSELL  
Assistant Attorney General  
Missouri Bar No. 53346

P. O. Box 899  
Jefferson City, MO 65102  
(573) 751-3321  
(573) 751-3825 (fax)  
[andrew.hassell@ago.mo.gov](mailto:andrew.hassell@ago.mo.gov)

*Attorneys for Appellants*

## Certificate Of Compliance And Service

I hereby certify that the attached brief complies with the limitations contained in Rule 84.06(b) of the Supreme Court of Missouri and contains \_\_\_\_\_ words, excluding the cover and this certification, as determined by Microsoft Word 2003 software; that the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses, using Norton Anti-virus software, and is virus-free; and that a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, on September 2, 2008, to:

Mr. Gary Brotherton, Legal Writes LLC  
601 Nifong Blvd., Building 1, Suite C  
Columbia, Missouri 65203  
*Attorney for Petitioner Shepherd*

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ANDREW W. HASSELL  
Assistant Attorney General

## **Respondent's Appendix**

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Opinion and Memorandum Opinion in *State v. Michael Shepherd*,  
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