IN THE

MISSOURI SUPREME COURT

STATE ex rel. WILLIAM J. SITTON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**No. SC93020**
	)	
JEFF NORMAN, WARDEN,	)	
	)	
Respondent.	)	

PETITIONER'S REPLY BRIEF

Respectfully submitted,

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STATEMENT OF FACTS

There is some dispute or confusion as to how many prospective jurors chose to serve community service rather than serve for jury duty in Lincoln County during the court term encompassing Petitioner's trial (Petitioner's Brief, pg. 13; Respondent's Brief, pg. 24). There were *five prospective jurors* who chose the option to serve *six hours* of community service within 60 days at their convenience (and a fine not to exceed $500.00 if they did not complete the community service) (Habeas Exhibit E-1 to E-16).[1] Respondent suggests that one prospective juror should not count because she dated the paperwork choosing the community service option the day after Petitioner's *voir dire* (Resp. Br. at 24, fn. 1) (Habeas Exhibit E-5). That does not preclude that she had not been in contact with the circuit court or the circuit clerk before then. Further, in a letter dated June 7, 2005, more than a month before Petitioner's trial, the circuit court wrote that prospective juror, "Your request to be excused from jury duty has been received.…" (Habeas Exhibit E-6). That later also noted that the court needed to "hear" from that juror before June 15, 2005, which was still more than a month before Petitioner's trial (Habeas Exhibit E-6). In any event, Respondent does not argue that the difference between five or four prospective jurors would change the result in this case. Regarding a $50 fee to pay for the administrative coasts of the

[1] In one sentence of Petitioner's Brief, he inadvertently put "six" instead of "five," but the "six" was the number of hour of community service to be served.

community service program (Petitioner's Brief at pgs. 12-13, Respondent's Brief at pg. 24), that fact was noted in the opinion for ***State ex rel. Koster v. McCarver***, 376 S.W.3d 46, 48 (Mo. App. E.D. 2012) ("…the Lincoln County Circuit Court employed a program that allowed potential jurors to 'opt out' of jury service by performing six hours of community service and paying a $50 fee to cover the administrative costs (the 'opt-out program')").

ARGUMENT

Petitioner was denied due process and equal protection of the law and a jury drawn from a fair cross-section of the population, guaranteed by the 6th and 14th Amendments to the U.S. Constitution and Art. I, §§ 10 and 18(a) of the Missouri Constitution, and *§§ 494.400-494.505*, in that the opt-out practice for qualified jurors in Lincoln County under which petitioner's jury was selected constituted a fundamental and systemic failure to comply with the statutory jury selection requirements under *§§ 494.400-494.505*, as held in *Preston v. State* and *State ex rel. Koster v. McCarver*.

Petitioner did not procedurally default this claim. He followed the procedure established in § 494.465 and filed an amended motion for new trial raising the issue within fourteen days of discovering the facts establishing the claim. Habeas corpus is the appropriate remedy to enforce this violation of his rights as the claim was not known to him during the time in which he could have raised the issue on direct appeal or in a 29.15 action. He has established prejudice because under *Preston* and *McCarver* prejudice is presumed in such situation.

Petitioner has not defaulted on his jury selection claim

Respondent argues that this Court "should decline review of the jury selection claim because Sitton defaulted on the claim by failing to present it to the

trial court and, if necessary, on direct appeal." (Respondent's Brief at pg. 12). But there has been no default. Petitioner complied with the jury-selection challenge statute governing the jury selection in this case.

Under ***§ 494.465.1***, a party is given statutory authority to move for "appropriate relief … on the ground of substantial failure to comply with the provisions of sections 494.400 to 494.505 … within fourteen days after the moving party discovers ….the grounds therefor." Petitioner followed the procedure set out in ***§ 494.465***, and held to be appropriate in ***State v. Sardeson***, 174 S.W.3d 598 (Mo. App. S.D. 2005) and ***Preston v. State***, 325 S.W.3d 420, 421-422 (Mo. App. E.D. 2010). Within fourteen days of actual discovery of the issue (October 18, 2010), Petitioner filed an amended motion for new trial in the Circuit Court of Lincoln County on October 25, 2010, which alleged that the opt-out practice for qualified jurors in Lincoln County constituted a fundamental and systemic failure to comply with the statutory jury selection requirements, under ***§§ 494.400-494.505***. (Habeas Exhibits A-11 to A-15).

Thus, because Petitioner complied with the statutory procedure set out in ***§ 494.465***, there was no procedural default, and this Court is free to address the merits of the issue (whether there was substantial compliance with the statutory jury selection requirements) with no procedural impediments. Only if there had not been compliance with the statutory procedure would this Court need to turn to a cause-and-prejudice analysis to decide the issue.

Respondent relies on ***State ex rel. Koster v. McCarver***, 376 S.W.3d 46 (Mo. App. E.D. 2012) to argue that because Rules 24.035 and 29.15 created a single unitary post-conviction remedy, a motion under ***§ 494.465*** does not avoid default of this type of claim when raised after appeal and post-conviction proceedings (Respondent's Brief at 13). The ***McCarver*** court held that under such circumstances, the petitioner "may petition for a writ of habeas corpus but must demonstrate cause and prejudice sufficient to overcome his procedural default." ***McCarver***, 376 S.W.3d at 52. But because Petitioner did not know about the claim until *after* trial, *after* direct appeal, and *after* an amended Rule 29.15 motion was filed, this claim could not have been part of "a single, unitary system of post-conviction relief." ***Id***. Petitioner disagrees with that aspect of the ***McCarver*** holding and believes that ***§ 494.465*** is the appropriate vehicle since by its own terms it allows such a motion to be filed within the time limit that Petitioner filed his motion. ***See***, ***§ 494.465.3***, which provides, "[t]he procedures prescribed by this section are the exclusive means by which a party in a case may challenge a jury on the ground that the jury was not selected in conformity to sections 494.400 to 494.505."

Petitioner has shown cause

If this Court holds that Petitioner must meet the cause and prejudice standard for habeas corpus, Petitioner has done so. As noted in Petitioner's opening brief, Petitioner did not know about the improper jury selection methods in Lincoln County until after his direct appeal and after his amended Rule 29.15

motion were filed (Petitioner's Brief at 6, 12-13, 16). The ***McCarver*** court held that a habeas petitioner may satisfy the "cause" standard and thereby overcome a procedural default by demonstrating that his claim was not known to him in tiem to include it in a Rule 29.15 motion. 376 S.W.3d at 54, *citing* ***Brown v. State***, 66 S.W.3d 721, 726 (Mo. banc 2002). *Also see,* ***State ex rel. Engel v. Dormire***, 304 S.W.3d 120, 126 (Mo. banc 2010) ("This Court will not undertake habeas review of Engel's claims unless he can establish that the grounds relied on were not known to him during his direct appeal or post-conviction case." (internal quotes omitted); ***State ex rel. Simmons v. White***, 866 S.W.2d 443, 446 (Mo. banc 1993), suggesting that a claim not raised in a Rule 29.15 motion might be raised in a petition for habeas corpus if the petitioner can show that the claim was not known to him in time to include it in a Rule 29.15 motion.

Respondent argues that in order to show "cause," Petitioner must allege that he could not have reasonably discovered the jury selection process issue at the time of trial (Respondent's Brief at 16-17). But that standard is more onerous than that set out in the cases cited immediately above as well as ***§ 494.465.1***, which allows such a challenge to be made within fourteen days after the moving party discovers the grounds to challenge the jury selection process. Petitioner did not know about the claims until after his direct appeal and Rule 29.15 amended motion had been filed. Cause has been established.

Prejudice can be presumed

Six judges of the Eastern District of the Missouri Court of Appeals have held that prejudice can be presumed in such a situation. They should be followed. In ***Preston***, the Eastern District held that because the evidence showed that the Lincoln County Circuit Court failed to substantially comply with the jury selection statues due to its opt-out program, "Preston need not demonstrate prejudice, and the motion court clearly erred in requiring him to do so." 325 S.W.3d at 426 (Odenwald, P.J.; Dowd Jr., J., Baker, J, concur). In ***McCarver***, 376 S.W.3d at 54, the Eastern District noted that the State argued that the writ of habeas corpus should be quashed because the habeas petitioner could not show that the Lincoln County jury selection procedures resulted in prejudice to him, while conceding that its argument conflicted with ***Preston***. The ***McCarver*** court determined that it found no basis to reconsider its decision in ***Preston***. ***McCarver***, 376 S.W.3d at 54 (Cohen, P.J.; Crane, J., Richter, J., concur).

Similarly, in ***State ex rel. Koster v. McElwain***, 340 S.W.3d 221 (Mo. App. W.D. 2011), where the court was addressing a claim after a petition for writ of habeas corpus had been granted in part on a claim that during jury deliberation, the jury had considered a map that had not been offered into evidence the court held:

> We conclude that there is no reasoned basis under Missouri law to deprive a petitioner in a habeas corpus proceeding of the benefit of a presumption of prejudice in the face of an established constitutional violation if the benefit of that presumption would have been afforded to the defendant on

> direct appeal. This conclusion is particularly appropriate where the gateway of cause and prejudice is relied upon to permit review of an otherwise procedurally defaulted claim.

Id. at 256.

Had Petitioner known about this opt-out program prior to filing for direct appeal or post-conviction relief, relief would have been granted without a showing of actual prejudice. ***State v. Sardeson***, 174 S.W.3d 598, 602 (Mo. App. S.D. 2005); ***State v. Gresham***, 637 S.W.2d 20, 24-26 (Mo. banc 1982). The degree of the Lincoln County "opt-out" program violation was so fundamental or systematic in nature, that Petitioner is not required to show actual prejudice; prejudice is presumed. ***Preston***, 325 S.W.3d at 426; ***McCarver***, 376 S.W.3d at 54. *Also see*, ***State v. Anderson***, 79 S.W.3d 420, 432 n.4 (Mo. banc 2002), noting that "certain violations of the statutory jury selection requirements may be so fundamental or systemic in nature as to amount to a 'substantial' failure to comply with the statutes, thereby entitling a defendant to relief, even in the absence of a clear showing of actual prejudice or of a constitutional violation."

Petitioner respectfully requests that this Court grant this writ of habeas corpus and order that the judgment and sentence in Lincoln County Case No. 04L6-CR01535 be vacated, and that the case be remanded to Lincoln County for a new trial.

CONCLUSION

For the reasons presented, petitioner William J. Sitton prays that this Court issue a writ of habeas corpus vacating his convictions for the crimes of involuntary manslaughter in the first degree, § 565.024 (Count 1), and armed criminal action, § 571.01 (Count 2), and remand the case to the Circuit Court of Lincoln County for a new trial and grant such other and further relief as the Court deems just and equitable.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, and this certificate of compliance and service, the brief contains 2,078 words, which does not exceed the 3,875 words allowed for an a reply brief.

On the 26th day of April, 2013, the foregoing brief was placed for filing and delivery through the E-file system to Stephen D. Hawke, Assistant Attorney General, at stephen.hawke@ago.mo.gov. The electronic file has been scanned for viruses using Symantec Endpoint Protection, updated on April 26, 2013, and according to that program, the file is virus-free.

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