IN THE
MISSOURI SUPREME COURT

STEVEN CRENSHAW,	)	
	)	
Appellant,	)	
	)	
v.	)	No. SC 88584
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 4
THE HONORABLE JULIAN L. BUSH, JUDGE AT TRIAL
AND POST-CONVICTION PROCEEDINGS

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

On August 18, 2000, in St. Louis Circuit Number 991-4051, a jury convicted Appellant Steven Crenshaw of Count 1 of assault in the first degree in violation of § 565.050, and Count 2 of armed criminal action in violation of § 571.015. On December 1, 2000, the trial court sentenced Mr. Crenshaw to consecutive terms of imprisonment of nineteen years (Count 1), and eleven years (Count 2).

Mr. Crenshaw appealed his convictions and sentences. The Missouri Court of Appeals, Eastern District affirmed Mr. Crenshaw's convictions in ***State v. Crenshaw***, 66 S.W.3d 109 (Mo. App. E.D. 2002) and issued its mandate on March 1, 2002.

Mr. Crenshaw timely filed a Rule 29.15 motion on May 29, 2002 and the motion court appointed counsel to represent him on June 21, 2002. Appointed counsel timely filed an amended motion on August 20, 2002. On January 9, 2003, the motion court denied Mr. Crenshaw's Rule 29.15 motion after an evidentiary hearing. Mr. Crenshaw did not file a timely appeal from the motion court's denial.

On March 25, 2005, Mr. Crenshaw filed a motion to reopen his post-conviction case on the ground of abandonment, and on June 2, 2006, Mr. Crenshaw filed a motion to set aside the motion court's judgment for lack of notice. On August 7, 2006, after argument and a hearing, the motion court found post-conviction counsel had abandoned Mr. Crenshaw by failing to file a timely notice of appeal and granted Mr. Crenshaw until August 18, 2006 within which to file an appeal. Mr. Crenshaw filed his appeal on August 7, 2006.

By opinion dated April 10, 2007, the Missouri Court of Appeals, Eastern District held Mr. Crenshaw was not entitled to re-open his post-conviction proceedings on the basis that post-conviction counsel abandoned him by failing to timely file a notice of appeal.

This Court granted transfer on September 25, 2007 pursuant to Missouri Supreme Court Rule 83.04, and therefore jurisdiction lies in this Court. Mo. Const., Art. V, § 10.

STATEMENT OF FACTS

Appellant Steven Crenshaw will cite to the record as follows: Legal File (ED 78958), "(L.F.)"; Transcript (ED 78958), "(Tr.)"; Post-conviction Legal File (ED 88500), "(PCR L.F.)"; Abandonment Hearing Transcript (ED 88500), "(A. Tr.)"; and, Evidentiary Hearing Transcript (ED 88500), "(H. Tr.)." He states the following facts and will cite other facts as necessary in the argument portion of his brief.

On September 30, 1999 at approximately 11:30 p.m. to 12:00 a.m., Darwin Beck arrived alone at the Royal Palace nightclub in St. Louis (Tr. 193-194, 197). He drank "two shots of Hennessey" and remained at the club until it closed at approximately 1:15 to 1:30 a.m. (Tr. 197, 214). He left the club with two female friends, Tasha and Shalon, who he agreed to drive home (Tr. 199). He, Tasha, and Shalon walked to his parked car and got in (Tr. 200).

As Mr. Beck attempted to make a right turn out of the parking lot, the woman in the backseat alerted Mr. Beck that a man with a gun was walking towards the car (Tr. 201-202). The man shot at the car, hitting Mr. Beck in the abdomen (Tr. 202-204, 245-246). The women drove Mr. Beck to the hospital (Tr. 205).

While hospitalized, Mr. Beck told police that Steven Crenshaw, or "Herk," shot him (Tr. 206, 254-256). Mr. Beck knew Mr. Crenshaw was friends with a man named Charlie with whom Mr. Beck had argued at the nightclub (Tr. 195-197, 222). Mr. Beck also knew Mr. Crenshaw was friends with another man named Andre with whom Mr. Beck had fought years before (Tr. 223). Mr. Beck identified Mr. Crenshaw from photo and live lineups (Tr. 258-260, 265-266, 275).

The State charged Mr. Crenshaw with Count 1 of assault in the first degree and Count 2 of armed criminal action (L.F. 7-8). Mr. Crenshaw was on parole at the time, but his parole was revoked and he was returned to the custody of the Missouri Department of Corrections (L.F. 28).

On January 18, 2000, Fulton Reception and Diagnostic Center received a detainer on Mr. Crenshaw (L.F. 24; Tr. 6-7). Mr. Crenshaw completed a request for speedy disposition of detainer the same day and on January 20, 2000, the Circuit Attorney for the City of St. Louis and the Circuit Clerk for the City of St. Louis received Mr. Crenshaw's request for disposition of the indictment and the certification (L.F. 24-27; Tr. 7).

On February 9, 2000, Mr. Crenshaw appeared in court and was arraigned (L.F. 1). After Mr. Crenshaw's appearance in court, the trial court continued Mr. Crenshaw's case to March 9, 2000 and on March 9, 2000, the trial court continued Mr. Crenshaw's case to March 30, 2000 (L.F. 1).

When the State brought Mr. Crenshaw's case to trial on August 15, 2000, Mr. Crenshaw filed a motion to dismiss the indictment because more than 180 days had elapsed from the date of the receipt of Mr. Crenshaw's detainer request (Tr. 5-19; L.F. 2, 28). However, the trial court charged that Mr. Crenshaw had delayed his trial from February 9, 2000 to March 9, 2000 (L.F. 44; Tr. 18). On February 9, 2000, the public defender's office had interviewed Mr. Crenshaw and determined him financially ineligible for its services (Tr. 11). On the same date, a memo indicated the cause was continued to March; "D-E-F-T" was written on the memo (Tr. 12).

The trial court noted:

[T]here was a certain amount of time here and the Court granted the continuance, not the defendant, the Court granted the defendant further continuance to be able to obtain the services of an attorney, which is what he obviously wanted to do . . .

(Tr. 13).

The trial court did not rule on Mr. Crenshaw's motion to dismiss and Mr. Crenshaw's case proceeded to trial (Tr. 14, 18-19). On August 17, 2000, the trial court denied Mr. Crenshaw's motion to dismiss (L.F. 44).

At trial, Mr. Crenshaw testified that at approximately 9:50 p.m. on Thursday, September 30, 1999, he met Tracy Shanklin at his grandmother's house (Tr. 294). They rode in her car to her mother's house to pick up her children and then to Ms. Shanklin's apartment on Franklin Avenue where he remained until 3:00 p.m. on Friday, October 1, 1999 (Tr. 295, 331). Mr. Crenshaw further testified that he did not know or shoot Mr. Beck (Tr. 296-297, 303). Ms. Shanklin did not testify (Tr. 291-317).

During trial counsel's closing argument, the following exchange occurred:

[Trial Counsel]: You ask yourself – tell you, you know, first of all, what I think Tracy Shanklin. I can't say too much to you about our rules and I won't, I'll simply say I wish she were here too.

{Prosecutor}: Objection, your Honor, that is improper.

THE COURT: I'll overrule the objection.

(Tr. 356-357).

The trial court submitted an alibi instruction along with the verdict directors, and the jury began deliberations at 2:55 p.m. on August 17, 2000 (L.F. 3, 56). At 10:20 a.m. on August 18, 2000, in St. Louis Circuit Number 991-4051, a jury convicted Appellant Steven Crenshaw of Count 1 of assault in the first degree, and Count 2 of armed criminal action (L.F. 4, 43, 66-67).

At the end of trial, Mr. Crenshaw submitted further evidence on his motion to dismiss (Tr. 377-389). Mr. Crenshaw testified that he did not consent to, or authorize anyone to consent to, any continuance, including the continuance from February 9, 2000 to March 9, 2000 (Tr. 380-381). He further testified that he had intended on obtaining an attorney before taking his case to trial, and that before trial, he wanted the assistance of an attorney if he could afford one (Tr. 383).

The trial court found that there was a defense continuance regardless and charged Mr. Crenshaw with delaying his trial beyond the statutory 180 days under the Uniform Mandatory Disposition of Detainers Law (UMDDL) (Tr. 390, 396). The trial court held that once the delay from the February 9, 2000 to March 9, 2000 delay was subtracted, Mr. Crenshaw was tried within 180 days and denied Mr. Crenshaw's motion to dismiss (Tr. 396-397).

On December 1, 2000, the trial court sentenced Mr. Crenshaw to consecutive terms of imprisonment of nineteen years (Count 1), and eleven years (Count 2) (L.F. 81-83; Tr. 404).

Afterwards, the trial court asked Mr. Crenshaw about the effectiveness of his trial counsel and Mr. Crenshaw told the trial court that he had wanted trial counsel to present

the testimony of Tracy Shanklin (Tr. 413). The trial court found "defendant's counsel failed to represent him in a reasonable, competent manner, by failing to interview Miss Shanklin, failed to contact her and failed to call her as a witness" (Tr. 416). The trial court concluded that there was probable cause to believe Mr. Crenshaw received ineffective assistance of counsel (Tr. 416).

Mr. Crenshaw appealed his convictions and sentences (L.F. 84-85). The Missouri Court of Appeals, Eastern District affirmed Mr. Crenshaw's convictions in ***State v. Crenshaw***, 66 S.W.3d 109 (Mo. App. E.D. 2002) and issued its mandate on March 1, 2002 (PCR L.F. 20, 35-36).

Mr. Crenshaw timely filed a Rule 29.15 motion on May 29, 2002 (PCR L.F. 4-14), and the motion court appointed counsel to represent him on June 21, 2002 (PCR L.F. 15-16). Appointed counsel timely filed an amended motion on August 20, 2002 (PCR L.F. 19-39).

In his amended motion, Mr. Crenshaw alleged trial counsel was ineffective for moving for a continuance without Mr. Crenshaw's knowledge or consent because Mr. Crenshaw had properly requested final disposition of the underlying criminal case within 180 days under the Uniform Mandatory Disposition of Detainers Law (UMDDL) (PCR L.F. 22-27). In his amended motion, Mr. Crenshaw also alleged that trial counsel was ineffective for failing to investigate, subpoena, and call Mr. Crenshaw's alibi witness, Tracy Shanklin, to testify at trial (PCR L.F. 27). The motion court granted an evidentiary hearing on Mr. Crenshaw's motion, and on October 25, 2002, the hearing was held (PCR L.F. 40; H. Tr. 1-48).

Tracy Shanklin testified that she had known Mr. Crenshaw for ten years (H. Tr. 6, 15, 27). They were good friends and were once lovers (H. Tr. 6-7, 15). She would have testified for Mr. Crenshaw at trial, but was never contacted (H. Tr. 10).

Though she had become a little confused about the dates due to the passage of three years, she maintained that Mr. Crenshaw was at her home on the date and time the charged offense was committed (H. Tr. 22, 24). She testified that at 9:30 or 10:00 p.m. on or about September 30, 1999, she met Mr. Crenshaw at her grandmother's house (H. Tr. 8-9, 11-12, 20-23, 25). She and Mr. Crenshaw went to her mother's apartment to pick up her children and then to her apartment in the same apartment complex (H. Tr. 11-12, 16-17). She testified that she and Mr. Crenshaw were "together the whole day, he spent the night, spent the evening, and he left" around 4:30 p.m. the next day (H. Tr. 8-9, 13, 17).

Mr. Crenshaw's trial attorney testified that Mr. Crenshaw identified Ms. Shanklin as his alibi witness and provided him with her contact information (H. Tr. 30, 34). Ms. Shanklin did not have her own phone, but was living with relatives with whom she shared a phone (H. Tr. 14, 45-46).

Also, on June 19, 2000, Ms. Shanklin telephoned trial counsel and gave him her name, address, and telephone number (H. Tr. 35). To trial counsel, Ms. Shanklin appeared "articulate," "bright," "very cooperative" and "very friendly" (H. Tr. 36, 38). Ms. Shanklin told trial counsel that she picked Mr. Crenshaw up from his home on Ashland Avenue at 11:00 p.m. on September 30, 1999 (H. Tr. 37). She said that they rode to a McDonald's on Lindell, to her mother's house at 2931 Samuel Shepherd Drive

to pick up her children, and back to her home on Franklin Avenue where Mr. Crenshaw remained until 4:30 p.m. the next day, Friday, October 1, 1999 (H. Tr. 35, 37). She told trial counsel that Mr. Crenshaw left with a friend at or around the same time her son arrived home from school (H. Tr. 37).

Trial counsel intended Ms. Shanklin to testify at trial (H. Tr. 42). Ms. Shanklin said, "[S]he would be any place, anywhere, any time that [trial counsel] wanted her to be in connection with this trial" (H. Tr. 36). Trial counsel endorsed Ms. Shanklin as a witness (H. Tr. 42).

Trial counsel testified that he received subsequent telephone calls from Ms. Shanklin on July 15, 2000 and July 17, 2000 (H. Tr. 38-39). They reviewed Ms. Shanklin's testimony and Ms. Shanklin again assured trial counsel that she would come to any courtroom whenever he called her (H. Tr. 39).

Trial counsel testified that he did not subpoena Ms. Shanklin because he thought there was no need to do so (H. Tr. 43). Trial counsel had no reason to believe that Ms. Shanklin, who had been intimate with Mr. Crenshaw and was apparently in love with him, would not cooperate in his defense (H. Tr. 46).

Trial counsel telephoned Ms. Shanklin on Thursday, August 17, 2000 at 6:00 a.m. at her workplace and informed her to report to the courtroom at 10:00 a.m. (H. Tr. 39). Ms. Shanklin said that she would be there by 10:30 a.m. (H. Tr. 39).

When Ms. Shanklin did not arrive by 10:30 a.m., trial counsel telephoned her at her home and awakened her from sleep (H. Tr. 40). Ms. Shanklin told trial counsel that she would report to court in forty-five minutes to an hour (H. Tr. 40).

When Ms. Shanklin did not arrive by 12:30 p.m., trial counsel telephoned Ms. Shanklin's home again and an older woman answered the phone (H. Tr. 40). Trial counsel asked the older woman, who he believed was Ms. Shanklin's aunt, to find Ms. Shanklin and try to get her to the downtown courthouse (H. Tr. 40, 44). Ms. Shanklin never showed up at the courthouse and the defense's case closed after the taking of Mr. Crenshaw's testimony (H. Tr. 40).

Trial counsel further testified that before the trial court submitted the case to the jury, a young man whose name trial counsel did not know asked trial counsel for Ms. Shanklin's name and address so that he could get Ms. Shanklin to the courthouse (H. Tr. 41). Trial counsel did not give the young man Ms. Shanklin's name or address because he was afraid the young man would harass or physically harm someone (H. Tr. 41, 44). Trial counsel said the young man was black, called Ms. Shanklin a bitch, and had a look in his eyes (H. Tr. 44).

On January 9, 2003, after the taking of trial counsel's and Ms. Shanklin's testimony, the motion court denied Mr. Crenshaw's Rule 29.15 motion (PCR L.F. 60-63). The motion court found the following about Mr. Crenshaw's UMDDL claim: "Mr. Crenshaw, not [trial counsel], moved for a continuance of Mr. Crenshaw's trial on February 9, 2000. The Court so found before sentencing Mr. Crenshaw, and this finding was affirmed on appeal" (PCR L.F. 61).

The motion court further found trial counsel did not fail to investigate Ms. Shanklin, and that in failing to call Ms. Shanklin, trial counsel did not fail to exercise the customary skill a reasonably competent attorney would exercise under similar

circumstances (PCR L.F. 62). The motion court concluded that Mr. Crenshaw was not prejudiced by trial counsel's failure to call Ms. Shanklin (PCR L.F. 62). The motion court concluded that "[i]n all likelihood, the jury would have concluded that Ms. Shanklin's testimony was perjured, and its presentation would have hindered Mr. Crenshaw rather than have aided him" (PCR L.F. 62). Mr. Crenshaw did not file a timely appeal from the motion court's denial (PCR L.F. 64).

On March 25, 2005, Mr. Crenshaw filed a motion to reopen his post-conviction case on the ground of abandonment (PCR L.F. 64-71). Mr. Crenshaw alleged that he desired an appeal from the motion court's denial of his Rule 29.15 motion, and that post-conviction counsel had not filed his appeal (PCR L.F. 64, 67, 69). He stated that post-conviction counsel had neither received nor obtained a copy of the motion court's order denying his Rule 29.15 motion within time to timely file a notice of appeal or within time to petition for leave to file a late notice of appeal (PCR L.F. 68). He stated that post-conviction counsel first learned about the motion court's order denying his Rule 29.15 motion after the St. Louis City Circuit Clerk's office established its website in March of 2004 (PCR L.F. 67). Mr. Crenshaw requested that the motion court reopen his post-conviction proceedings and re-file its previously filed findings of fact, conclusions of law, and order to permit him to file a timely notice of appeal (PCR L.F. 64, 69-70).

On June 2, 2006, Mr. Crenshaw also filed a motion to set aside the motion court's judgment for lack of notice (PCR L.F. 72-77).

On June 6, 2006, the motion court heard argument on both Mr. Crenshaw's motion to set aside the motion court's judgment for lack of notice and his motion to reopen his

post-conviction proceedings on the ground of abandonment (PCR L.F. 81). The motion court denied the motion to set aside the judgment for lack of notice, but granted a hearing on the motion to reopen Mr. Crenshaw's Rule 29.15 motion on the ground of abandonment (PCR L.F. 81).

On August 7, 2006, the motion court held the hearing (PCR L.F. 3, 82). At that hearing, post-conviction counsel stated that "to [her] knowledge, Mr. Crenshaw wanted an appeal" (A. Tr. 2). Post-conviction counsel stated:

> I did not file the notice of appeal. I did not receive a copy of the Court's findings of fact and conclusions of law within time to file a timely notice of appeal or a late notice of appeal with permission of the Missouri Court of Appeals Eastern District. However, it is, to my knowledge, Mr. Crenshaw wanted an appeal.
>
> I handled Mr. Crenshaw's case the same way as I handle most post-conviction cases with intent to file a notice of appeal under the presumption the client desires an appeal unless I am told otherwise. To the best of my belief, Mr. Crenshaw did not [sic] want to appeal for denial of his post-conviction case in this instance. I was unable to file that notice of appeal for him and did not file that notice of appeal for him.

(A. Tr. 2).

The motion court found post-conviction counsel had abandoned Mr. Crenshaw by failing to file a timely notice of appeal and granted Mr. Crenshaw until August 18, 2006 within which to file an appeal (PCR L.F. 82). Mr. Crenshaw filed his appeal on August 7, 2006 (PCR L.F. 85-87).

By opinion dated April 10, 2007, the Missouri Court of Appeals, Eastern District held Mr. Crenshaw was not entitled to re-open his post-conviction proceedings on the basis that post-conviction counsel abandoned him by failing to timely file a notice of appeal. ***State v. Crenshaw***, ED No. 88500, 2007 WL 1052480 (Mo. App. E.D. April 10, 2007). The Missouri Court of Appeals, Eastern District dismissed the appeal for lack of jurisdiction.

This Court granted transfer on September 25, 2007 pursuant to Missouri Supreme Court Rule 83.04, and therefore, jurisdiction lies in this Court. To avoid unnecessary repetition, additional facts may be set forth in the Argument portion of this brief.

POINT – I.

This Court has jurisdiction to hear this appeal because the motion court did not err in granting Mr. Crenshaw's motion to reopen his post-conviction proceedings on the basis that post-conviction counsel abandoned him by failing to timely file a notice of appeal, or in providing Mr. Crenshaw additional time to file a timely notice of appeal as a remedy for post-conviction counsel's abandonment, in that post-conviction counsel failed to file a post-conviction appeal, though Mr. Crenshaw wanted one, and both *Flowers v. State*, 618 S.W.2d 655 (Mo. banc 1981) and *Fenton v. State*, 200 S.W.3d 136 (Mo. App. W.D. 2006) authorize remedying post-conviction counsel's failure in the manner in which the motion court did.

Flowers v. State, 618 S.W.2d 655 (Mo. banc 1981);

Fenton v. State, 200 S.W.3d 136 (Mo. App. W.D. 2006);

State v. Frey, 441 S.W.2d 11 (Mo. banc 1969);

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

Mo. Const., Art. 1, § 10;

Rules 27.26 and 29.15.

POINT – II.

The motion court clearly erred in denying Mr. Crenshaw's Rule 29.15 motion because trial counsel was ineffective in failing to subpoena and call alibi witness Tracy Shanklin to testify at trial, and but for trial counsel's unreasonable failure, there is a reasonable probability the outcome of Mr. Crenshaw's trial would have been different. Mr. Crenshaw was denied his rights to due process of law, to effective assistance of counsel, to present a defense, and to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, §§ 10 and 18(a) of the Missouri Constitution. This Court must reverse the motion court's judgment and remand for a new trial.

Lawrence v. Armontrout, 900 F.2d 127 (8th Cir. 1990);

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984);

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

Perkins-Bey v. State, 735 S.W.2d 170 (Mo. App. E.D. 1987);

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

Mo. Const., Art. 1, §§ 10 and 18(a);

Rules 29.15.

POINT – III.

The motion court clearly erred in denying Mr. Crenshaw's Rule 29.15 motion because trial counsel was ineffective for moving for a continuance without Mr. Crenshaw's consent or knowledge, in that: Mr. Crenshaw had properly requested final disposition of the underlying criminal case within the statutory 180 days under the Uniform Mandatory Disposition of Detainers Law, and but for trial counsel's continuance of Mr. Crenshaw's trial from February 9, 2000 to March 9, 2000, the trial court would have been required to dismiss all charges against Mr. Crenshaw for lack of jurisdiction. Mr. Crenshaw was denied his right to due process of law, his right to effective assistance of counsel, and his right to a speedy trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article 1, §§ 10 and 18(a) of the Missouri Constitution, and §§ 217.450 – 217.485. This Court must reverse the motion court's judgment and remand with directions to discharge Mr. Crenshaw from his conviction and sentence.

State v. Allen, 954 S.W.2d 414 (Mo. App. E.D. 1997);

State v. Laramore, 965 S.W.2d 847 (Mo. App. E.D. 1998);

Carson v. State, 997 S.W.2d 92 (Mo. App. S.D. 1999);

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

Mo. Const. Art. 1, §§ 10 and 18(a); and,

§§ 217.450 – 217.485.

ARGUMENT – I.

This Court has jurisdiction to hear this appeal because the motion court did not err in granting Mr. Crenshaw's motion to reopen his post-conviction proceedings on the basis that post-conviction counsel abandoned him by failing to timely file a notice of appeal, or in providing Mr. Crenshaw additional time to file a timely notice of appeal as a remedy for post-conviction counsel's abandonment, in that post-conviction counsel failed to file a post-conviction appeal, though Mr. Crenshaw wanted one, and both *Flowers v. State*, 618 S.W.2d 655 (Mo. banc 1981) and *Fenton v. State*, 200 S.W.3d 136 (Mo. App. W.D. 2006) authorize remedying post-conviction counsel's failure in the manner in which the motion court did.

Preservation of the Error

This Court has a duty to determine *sua sponte* whether it has jurisdiction to hear an appeal. ***Smith v. State***, 63 S.W.3d 218, 219 (Mo. banc 2001). This Court's jurisdiction is predicated on that of the motion court, and if the motion court lacked authority to grant the relief Appellant Crenshaw sought, then this Court has no jurisdiction to review the matter appealed on its merits. ***State v. Ortega***, 985 S.W.2d 373, 374 (Mo. App. S.D. 1999).

On March 25, 2005, Mr. Crenshaw filed a motion to reopen his post-conviction case on the ground of abandonment (PCR L.F. 64-71). Mr. Crenshaw requested that the motion court reopen his post-conviction proceedings and re-file its previously filed findings of fact, conclusions of law, and order to permit him to file a timely notice of appeal (PCR L.F. 64, 69-70).

The motion court found post-conviction counsel had abandoned Mr. Crenshaw by failing to file a timely notice of appeal and granted Mr. Crenshaw until August 18, 2006 within which to file an appeal (PCR L.F. 82). Mr. Crenshaw filed his appeal on August 7, 2006 (PCR L.F. 85-87).

Standard of Review

Appellate review of a ruling on a motion to reopen post-conviction proceedings is treated the same as the appellate review of rulings of post-conviction motions. It is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. ***Daugherty v. State***, 159 S.W.3d 405, 407 (Mo. App. E.D. 2005). "Findings and conclusions are deemed clearly erroneous only if, after reviewing the entire record, [this Court is] left with the definite and firm impression that a mistake has been made." ***Id***.; ***Edgington v. State***, 189 S.W.3d 703, 705 (Mo. App. W.D. 2006).

Argument

This Court has jurisdiction to hear this appeal because the motion court did not err in granting Mr. Crenshaw's motion to reopen his post-conviction proceedings on the basis that post-conviction counsel abandoned him by failing to timely file a notice of appeal, or in providing Mr. Crenshaw additional time to file a timely notice of appeal as a remedy for post-conviction counsel's abandonment.

The motion court initially had jurisdiction to hear Mr. Crenshaw's motion to reopen his Rule 29.15 post-conviction proceedings. Claims for post-conviction relief under Rule 29.15 are governed by the rules of civil procedure. ***Mansfield v. State***, 187 S.W.3d 1, 2 (Mo. App. W.D. 2006). Under Rule 75.01, the circuit court retains

jurisdiction to "vacate, reopen, correct, amend, or modify" a judgment within thirty days following its entry. ***Cook v. State***, 156 S.W.3d 418, 420 (Mo. App. E.D. 2005).

However, even after the expiration of thirty days, the motion court in which the original post-conviction proceeding was held retains jurisdiction to reopen the proceedings to consider claims of abandonment so long as the original *pro se* motion was timely filed. ***State ex rel. Nixon v. Jaynes***, 63 S.W.3d 210, 217-218 (Mo. banc 2001); ***Daughterty v. State***, 116 S.W.3d 616, 617 (Mo. App. E.D. 2003). Mr. Crenshaw's original *pro se* motion was timely filed. Rule 29.15 provides that "[i]f an appeal of the judgment or sentence sought to be vacated, set aside or corrected was taken, the motion, shall be filed within 90 days after the date the mandate of the appellate court is issued affirming such judgment or sentence." On May 29, 2002, eighty-nine days after the appellate court's issuance of its March 1, 2002 mandate in his direct appeal, Mr. Crenshaw timely filed his *pro se* Rule 29.15 motion (PCR L.F. 20, 35-36). He also subsequently filed a timely amended motion (PCR L.F. 19-39).

Moreover, the motion court had jurisdiction to reopen Mr. Crenshaw's Rule 29.15 post-conviction proceedings because Mr. Crenshaw's motion to reopen included a legally cognizable claim of abandonment. Mr. Crenshaw alleged that he desired an appeal from the motion court's denial of his Rule 29.15 motion, and that post-conviction counsel had not filed his appeal (PCR L.F. 64, 67, 69). He stated that post-conviction counsel had neither received nor obtained a copy of the motion court's order denying his Rule 29.15 motion within time to timely file a notice of appeal or within time to petition for leave to file a late notice of appeal (PCR L.F. 68). Mr. Crenshaw requested that the motion court

reopen his post-conviction proceedings and re-file its previously filed findings of fact, conclusions of law, and order to permit him to file a timely notice of appeal (PCR L.F. 64, 69-70).

Effective abandonment occurs if a defendant desires to appeal and his counsel fails to take the proper and necessary steps to perfect the defendant's appeal. ***State v. Frey***, 441 S.W.2d 11, 14-15 (Mo. banc 1969). In ***Flowers v. State***, 618 S.W.2d 655 (Mo. banc 1981), this Court acknowledged that a claim of abandonment by counsel on post-conviction appeal is a potentially meritorious and litigable claim for relief. The motion court denied Mr. Flowers' Rule 27.26 motion, and although the court appointed counsel to represent him on appeal from the motion court's denial, appointed counsel failed to perfect the appeal. ***Flowers***, 618 S.W.2d at 656.

After the appellate court dismissed the appeal, Mr. Flowers filed a second Rule 27.26 motion alleging several grounds, including abandonment of counsel on appeal from his first Rule 27.26 motion. ***Id***. The motion court denied the second Rule 27.26 motion, and the denial was affirmed on appeal by the court of appeals. ***Id***.

But this Court accepted transfer of the case, and held Mr. Flowers' claim of abandonment was not "an absurd or patently meritless claim." ***Id***. at 656. This Court decided Mr. Flowers was permitted a determination of whether counsel abandoned him on appeal from his first post-conviction motion and of whether he should be permitted to proceed with his "first and only appeal from the denial of his original 27.26 motion." ***Id***. at 657. This Court reversed the motion court's judgment dismissing the second Rule 27.26 motion and remanded the cause to the trial court with directions to conduct an

evidentiary hearing and make findings of fact and conclusions of law on the issue of abandonment. ***Id***. This Court instructed the motion court that if abandonment was found, the motion court should "vacate the 1976 judgment and enter a new judgment therein, with the time for appeal commencing to run from the date thereof." ***Id***. at 657.

Similarly, Mr. Crenshaw's claim of abandonment by post-conviction counsel on his first and only appeal from the denial of his Rule 29.15 motion is not an absurd or patently meritless claim.

Recently, in ***Fenton v. State***, 200 S.W.3d 136 (Mo. App. W.D. 2006), the Western District Court of Appeals held that failure to file an appeal when requested can undoubtedly amount to an abandonment of the client by post-conviction counsel. Mr. Fenton wanted to appeal from the denial of his post-conviction (Rule 27.26 motion) and believed an appeal would be filed, but post-conviction counsel failed to file a notice of appeal. 200 S.W.3d at 139. Years later, Mr. Fenton filed a motion to reopen his post-conviction proceedings on the grounds of abandonment by post-conviction counsel, and in support of his motion, he asserted a number of claims, including that post-conviction counsel had abandoned him by failing to appeal the denial of his Rule 27.26 motion. ***Id***. at 138. The motion court denied Mr. Fenton's motion. ***Id***.

On appeal of the motion court's denial, the Western District Court of Appeals noted that "[u]ndoubtedly, the failure to file an appeal, when so requested, can in fact amount to an abandonment of the client by motion counsel." ***Id***. at 139. The Western District further held that the motion court had jurisdiction to hear the reopening of the Rule 27.26 motion, but declined to rule on the ultimate issue of whether post-conviction

counsel ("motion counsel") had abandoned Mr. Fenton and remanded to the trial court for this determination. ***Id***. at 140.

Here, the motion court made the determination that post-conviction counsel had abandoned Mr. Crenshaw by failing to timely file a notice of appeal and entered judgment to that effect (PCR L.F. 82). The motion court then granted Mr. Crenshaw additional time within which to file an appeal (PCR L.F. 82).

The motion court's rulings were supported by the record (*see* A. Tr. 2), and ***Flowers*** and ***Fenton*** authorize what the motion court did in this instance. Though ***Flowers*** and ***Fenton*** involved Rule 27.26, and not Rule 29.15, motions, ***Flowers*** and ***Fenton*** cannot be distinguished on that basis. Rules 27.26 and 29.15 serve a common purpose to adjudicate the legality of the conviction and sentence of the defendant, to avoid delay, and to prevent the litigation of stale claims. ***Fenton***, 200 S.W.3d at 138; ***Brown v. State***, 179 S.W.3d 404, 406 (Mo. App. S.D. 2005); ***Schleeper v. State***, 982 S.W.2d 252, 253 (Mo. banc 1998). "Rules 29.15 and 24.035, effective January 1, 1988, replaced Rule 27.26." ***Fincher v. State***, 795 S.W.2d 505, 506 (Mo. App. W.D. 1990). And, like the current rules, Rule 27.26 did not allow successive motions against motion counsel on matters that could have been raised in the initial motion. ***Flowers***, 618 S.W.2d at 657.

Post-conviction movants who filed their post-conviction motions after 1988 should be able to obtain relief for their post-conviction counsel's failure to file or perfect a post-conviction appeal in the same manner that movants who filed their motions under Rule 27.26 did. Nothing in either Rule 29.15 or Missouri Supreme Court cases says that

the post-conviction movant should be made to suffer the consequences of counsel's failure to timely file a notice of appeal from an adverse post-conviction ruling.

A holding that the motion court erred in granting Mr. Crenshaw's motion to reopen his post-conviction proceedings and remedying post-conviction counsel's failure to file a timely notice of appeal would penalize Mr. Crenshaw and result in the denial of his rights to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, § 10 of the Missouri Constitution.

ARGUMENT – II.

The motion court clearly erred in denying Mr. Crenshaw's Rule 29.15 motion because trial counsel was ineffective in failing to subpoena and call alibi witness Tracy Shanklin to testify at trial, and but for trial counsel's unreasonable failure, there is a reasonable probability the outcome of Mr. Crenshaw's trial would have been different. Mr. Crenshaw was denied his rights to due process of law, to effective assistance of counsel, to present a defense, and to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, §§ 10 and 18(a) of the Missouri Constitution. This Court must reverse the motion court's judgment and remand for a new trial.

Preservation of the Error

Appellant Steven Crenshaw asserts that this assignment of error is preserved for appellate review because he raised the claim in his Rule 29.15 motion and presented evidence on the claim at his evidentiary hearing. *See, e.g.*, ***Hannah v. State***, 816 S.W.2d 1, 3 (Mo. App. E.D. 1991) (finding movant's claim procedurally barred because it was not raised in *pro se* or amended motions); *see also* ***State v. Vinson***, 833 S.W.2d 399, 410 (Mo. App. E.D. 1992) (finding movant's claim waived for failure to present evidence on it at evidentiary hearing).

In his amended motion, Mr. Crenshaw alleged that trial counsel was ineffective for failing to investigate, subpoena, and call Mr. Crenshaw's alibi witness, Tracy Shanklin, to testify at trial (PCR L.F. 27).

The motion court found trial counsel did not fail to investigate Ms. Shanklin, and that in failing to call Ms. Shanklin, trial counsel did not fail to exercise the customary skill a reasonably competent attorney would exercise under similar circumstances (PCR L.F. 62). The motion court further concluded that Mr. Crenshaw was not prejudiced by trial counsel's failure to call Ms. Shanklin (PCR L.F. 62). The motion court stated that "[i]n all likelihood, the jury would have concluded that Ms. Shanklin's testimony was perjured, and its presentation would have hindered Mr. Crenshaw rather than have aided him" (PCR L.F. 62).

Standard of Review

Appellate review is limited to determining whether the findings and conclusions of the trial court are clearly erroneous. ***Nicholson v. State***, 151 S.W.3d 369, 370 (Mo. banc 2004). Rule 29.15(k). The findings and conclusions are clearly erroneous only if after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made. ***Ritter v. State***, 119 S.W.3d 603, 604 (Mo. App. E.D. 2003).

Argument

In this case, the motion court clearly erred in denying Mr. Crenshaw's Rule 29.15 motion because trial counsel was ineffective in failing to subpoena and call alibi witness Tracy Shanklin to testify at trial, and but for trial counsel's unreasonable failure, there is a reasonable probability the outcome of Mr. Crenshaw's trial would have been different. The Sixth Amendment to the United States Constitution establishes the fundamental right to counsel, which extends to state defendants through the due process clause of the Fourteenth Amendment. ***Gideon v. Wainwright***, 372 U.S. 335, 340, 83 S.Ct. 792, 9

L.Ed.2d 799 (1963); ***Powell v. Alabama***, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed.2d 159 (1932). To fulfill its role of assuring a fair trial, the right to counsel must be the right to "effective" assistance of counsel. ***Kimmelman v. Morrison***, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

"[T]he duty to render effective assistance of counsel encompasses an obligation to investigate the evidence available on behalf of one's clients." ***Thomas v. State***, 761 S.W.2d 246, 253 (Mo. App. S.D. 1988). "A competent lawyer's duty is to utilize every voluntary effort to persuade a witness who possesses material facts and knowledge of an event to testify and then, if unsuccessful, to subpoena him to court to allow the judge to use his power to persuade the witness, to present material evidence." ***Perkins-Bey v. State***, 735 S.W.2d 170, 171 (Mo. App. E.D. 1987) (citing ***Eldridge v. Atkins***, 665 F.2d 228, 235 (8th Cir. 1981)).

Trial counsel's failure to investigate, interview, and subpoena potential alibi witnesses can constitute ineffective assistance of counsel. *See* ***Thomas v. State***, 516 S.W.2d 761, 766 (Mo. App. K.C.D. 1974) (finding trial counsel ineffective for failing to investigate defendant's alibi); *see also* ***Lawrence v. Armontrout***, 900 F.2d 127, 130-131 (8th Cir. 1990) (same).

Trial counsel's assistance is ineffective if his performance was so deficient as to fall below an objective standard of reasonable competence, and the deficient performance prejudiced the defendant's defense. ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); ***Lawrence***, 900 F.2d at 129. Prejudice is established if the defendant can show that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the trial would have been different. ***Strickland***, 466 U.S. at 694.

Generally, in order to be entitled to relief on a claim of ineffective assistance of counsel for failing to investigate, subpoena, and call an alibi witness, the defendant must show: 1) the witness could have been located through reasonable investigation; 2) the witness would have testified if called; and, 3) the testimony of the witness would have presented a viable defense. ***Taylor v. State***, 198 S.W.3d 636, 642 (Mo. App. S.D. 2006); *see also* ***Ursery v. State***, 119 S.W.3d 165, 167 (Mo. App. E.D. 2003) (remanding for an evidentiary hearing on claim that counsel was ineffective for not calling alibi witnesses); ***Masden v. State***, 62 S.W.3d 661, 666-669 (Mo. App. W.D. 2001) (same). If trial counsel's failure to investigate or call an alibi witness was not justifiable as trial strategy or a conscious decision, trial counsel deprived the criminal defendant of effective assistance of counsel at trial. ***Poole v. State***, 671 S.W.2d 787, 788 (Mo. App. E.D. 1983); *see also* ***State v. Hayes***, 785 S.W.2d 661, 663 (Mo. App. W.D. 1990).

For instance, in ***Perkins-Bey***, the Eastern District Court of Appeals held trial counsel was ineffective for failing to interview and subpoena the defendant's mother as an alibi witness. 735 S.W.2d at 172. The evidence supported a finding that the defendant gave trial counsel his mother's name as an alibi witness, and that trial counsel and his investigator contacted the defendant's mother. ***Id***. at 171-172. But there was no evidence that trial counsel or his investigator met the mother in person, interviewed her about the defendant's alibi, or subpoenaed her to testify at trial. ***Id***. at 171. They made appointments with the defendant's mother, which they testified she did not make, and

within a day or two of trial, trial counsel told the mother to come down to the courtroom for emotional support. ***Id***. at 171.

The Eastern District Court of Appeals held that trial counsel was aware of the defendant's alibi defense and the identity of a readily available supporting witness, but failed to diligently pursue the defendant's alibi defense. ***Id***. at 172. The failure to interview the mother represented an "underlying lack of diligence" and the "failure to subpoena [her] merely enhance[d] the deficiency." ***Id***. at 172.

Here, trial counsel was similarly deficient in failing to subpoena and call alibi witness Tracy Shanklin to testify at trial. It was unreasonable for trial counsel to fail to subpoena Ms. Shanklin because Ms. Shanklin was so crucial a witness to Mr. Crenshaw's alibi defense that trial counsel had endorsed her as a witness and had planned on calling her as a witness at trial (*see* H. Tr. 42). Trial counsel knew prior to trial that Ms. Shanklin was willing to testify at trial that Mr. Crenshaw was at her home on the date and time that the charged offense was committed (H. Tr. 22, 24, 37). Trial counsel knew how to reach Ms. Shanklin because both Mr. Crenshaw and Ms. Shanklin had provided trial counsel with her address, her phone number, her place of employment, and her work hours (H. Tr. 35, 37, 45). Most importantly, trial counsel knew of the importance that Ms. Shanklin testify in Mr. Crenshaw's defense because other than himself, Ms. Shanklin was the only alibi witness Mr. Crenshaw had identified (H. Tr. 30; Tr. 291-316). Yet, trial counsel failed to subpoena Ms. Shanklin (H. Tr. 43).

Under these circumstances, a reasonably competent attorney would have subpoenaed Ms. Shanklin. Reasonably competent attorneys know that there is always the

possibility that a willing witness will become a reluctant one and prepare for that possibility by subpoenaing the witness. A reluctant witness's testimony may be compelled through the issuance of a subpoena, and for employed witnesses, the issuance of a subpoena to show to employers justifying missed work may remove any reluctance about testifying.

Ms. Shanklin was employed, but according to trial counsel, she was "articulate," "bright," "very cooperative," "very friendly," and otherwise willing to testify at trial to Mr. Crenshaw's alibi (H. Tr. 36, 38-39). Ms. Shanklin told trial counsel that she picked Mr. Crenshaw up from his home on Ashland Avenue at 11:00 p.m. on September 30, 1999 (H. Tr. 37). She said that they rode to a McDonald's on Lindell, to her mother's house at 2931 Samuel Shepherd Drive to pick up her children, and back to her home on Franklin Avenue where Mr. Crenshaw remained until 4:30 p.m. the next day, Friday, October 1, 1999 (H. Tr. 35, 37). She told trial counsel that Mr. Crenshaw left with a friend at or around the same time her son arrived home from school (H. Tr. 37).

Had Ms. Shanklin testified to these facts at trial, her testimony would have provided a viable alibi defense. Mr. Crenshaw was charged with assaulting Mr. Beck on October 1, 1999 at approximately 1:15 to 1:30 p.m. outside a nightclub on Natural Bridge Road in the City of St. Louis, and Ms. Shanklin would have testified at trial that Mr. Crenshaw was someplace else at the time the charged offense was committed (L.F. 7; Tr. 192-195).

Ms. Shanklin showed her willingness to testify for Mr. Crenshaw at trial by testifying at Mr. Crenshaw's evidentiary hearing to substantially the same facts about his

alibi (H. Tr. 8-9, 11-13, 20-23, 25). Though she had become a little confused about the dates due to the passage of three years, she maintained that Mr. Crenshaw was at her home on the date and time the charged offense was committed (H. Tr. 22, 24). She testified that at 9:30 or 10:00 p.m. on or about September 30, 1999, she met Mr. Crenshaw at her grandmother's house (H. Tr. 8-9, 11-12, 20-23, 25). She and Mr. Crenshaw went to her mother's apartment to pick up her children and then to her apartment in the same apartment complex (H. Tr. 11-12, 16-17). She testified that she and Mr. Crenshaw were "together the whole day, he spent the night, spent the evening, and he left" around 4:30 p.m. the next day (H. Tr. 8-9, 13, 17).

No reasonable trial strategy justified trial counsel's failure to subpoena and call Ms. Shanklin to testify at trial that she and Mr. Crenshaw were together at her home at the time the charged offenses were committed. Though Mr. Crenshaw would take the stand to testify about his alibi at trial, "the defendant's own testimony on a decisive issue in a case is always received with doubt because of his interest in the result of the case." ***Hayes***, 785 S.W.2d at 663. For this reason, corroboration of Mr. Crenshaw's alibi testimony was critical. *See* ***id***. (reversing for counsel's failure to call an alibi witness whose testimony the motion court deemed cumulative).

The motion court clearly erred in concluding that Ms. Shanklin's testimony would have hindered, rather than helped, Mr. Crenshaw at trial. Ms. Shanklin's testimony about Mr. Crenshaw's alibi would have corroborated Mr. Crenshaw's testimony and rehabilitated his credibility. The State attempted to impeach Mr. Crenshaw's credibility on cross-examination by disclosing his prior felony convictions (Tr. 292, 298, 308, 310,

341-342). The disclosure of Mr. Crenshaw's prior felony convictions and the fact that he was on parole from the Missouri Department of Corrections at the time of the charged offense decreased Mr. Crenshaw's credibility in the eyes of the jury (Tr. 292, 298, 308). The additional absence of evidence corroborating Mr. Crenshaw's alibi testimony made it extremely unlikely that jurors would find Mr. Crenshaw's alibi defense credible.

Had Ms. Shanklin testified at Mr. Crenshaw's trial corroborating his alibi, there is a reasonable probability that the outcome of Mr. Crenshaw's trial would have been different. The only thin thread tying Mr. Crenshaw to the charged offenses was the suspect identification testimony of Mr. Beck, who believed Mr. Crenshaw was the cohort of men with whom he had fought in the past. The two women who were in the car with Mr. Beck at the time of the offense did not testify at trial, and no physical or forensic evidence, such as a gun or fingerprints, connected Mr. Crenshaw to the charged offenses (Tr. 192-285; *see also* Tr. 225-227, 237, 241). Under the circumstances, had jurors heard Ms. Shanklin's testimony, there is a reasonable probability that jurors would have had a significantly different impression of the credibility of Mr. Crenshaw and his alibi defense and would have had reasonable doubt about his guilt.

Consequently, trial counsel was ineffective and Mr. Crenshaw was denied his rights to due process of law, to effective assistance of counsel, to present a defense, and to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, §§ 10 and 18(a) of the Missouri Constitution. Every criminal defendant has a right to a fair and impartial trial and depriving a defendant of relevant and material testimony of a defense witness violates a defendant's constitutional

rights. ***State v. Hill***, 817 S.W.2d 584, 587 (Mo. App. E.D. 1991). The defendant's right to call witnesses in defense of the State's accusations is essential to due process. ***Chambers v. Mississippi***, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *see also* ***State v. Bashe***, 657 S.W.2d 321, 324 (Mo. App. S.D. 1983). The due process standard of fundamental fairness has long been interpreted to "require" that criminal defendants be afforded a meaningful opportunity to present a "complete" defense. ***California v. Trombetta***, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

Because trial counsel's failure to subpoena and call Ms. Shanklin deprived Mr. Crenshaw of a complete defense, a fair trial, and effective assistance of counsel, this Court must reverse the motion court's judgment and remand for a new trial. In ***Hayes***, the Western District Court of Appeals vacated the defendant's conviction and remanded for a new trial because trial counsel failed to call a witness who would have corroborated the defendant's alibi testimony. 785 S.W.2d at 663. The Court noted that the alibi witness's testimony may not have changed the result at trial, but concluded that it could not ignore the probability that it might have. ***Id***. at 664.

Though the motion court found that "[i]n all likelihood, the jury would have concluded that Ms. Shanklin's testimony was perjured," this Court cannot ignore the reasonable probability that jurors would have found Ms. Shanklin a credible alibi witness and that her testimony would have changed the result of Mr. Crenshaw's trial (PCR L.F. 62). This Court must reverse Mr. Crenshaw's convictions and remand for a new trial.

ARGUMENT – III.

The motion court clearly erred in denying Mr. Crenshaw's Rule 29.15 motion because trial counsel was ineffective for moving for a continuance without Mr. Crenshaw's consent or knowledge, in that: Mr. Crenshaw had properly requested final disposition of the underlying criminal case within the statutory 180 days under the Uniform Mandatory Disposition of Detainers Law, and but for trial counsel's continuance of Mr. Crenshaw's trial from February 9, 2000 to March 9, 2000, the trial court would have been required to dismiss all charges against Mr. Crenshaw for lack of jurisdiction. Mr. Crenshaw was denied his right to due process of law, his right to effective assistance of counsel, and his right to a speedy trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article 1, §§ 10 and 18(a) of the Missouri Constitution, and §§ 217.450 – 217.485. This Court must reverse the motion court's judgment and remand with directions to discharge Mr. Crenshaw from his conviction and sentence.

Preservation of the Error

Appellant Steven Crenshaw asserts that this assignment of error is preserved for appellate review because he raised the claim in his Rule 29.15 motion and the evidence supporting the claim is found in the criminal case file of which the motion court took judicial notice.

In his amended motion, Mr. Crenshaw alleged trial counsel was ineffective for moving for a continuance without Mr. Crenshaw's knowledge or consent because Mr. Crenshaw had properly requested final disposition of the underlying criminal case within

180 days under the Uniform Mandatory Disposition of Detainers Law (UMDDL) (PCR L.F. 22-27). The motion court concluded the following about Mr. Crenshaw's allegation: "Mr. Crenshaw, not [trial counsel], moved for a continuance of Mr. Crenshaw's trial on February 9, 2000. The Court so found before sentencing Mr. Crenshaw, and this finding was affirmed on appeal" (PCR L.F. 61).

Standard of Review

Appellate review is limited to determining whether the findings and conclusions of the trial court are clearly erroneous. ***Nicholson v. State***, 151 S.W.3d 369, 370 (Mo. banc 2004). Rule 29.15(k). The findings and conclusions are clearly erroneous only if after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made. ***Ritter v. State***, 119 S.W.3d 603, 604 (Mo. App. E.D. 2003).

Argument

In this case, the motion court clearly erred in denying Mr. Crenshaw's Rule 29.15 motion because trial counsel was ineffective for moving for a continuance without Mr. Crenshaw's consent or knowledge. Mr. Crenshaw had properly requested final disposition of the underlying criminal case within the statutory 180 days under the Uniform Mandatory Disposition of Detainers Law, and but for trial counsel's continuance of Mr. Crenshaw's trial from February 9, 2000 to March 9, 2000, the trial court would have been required to dismiss all charges against Mr. Crenshaw for lack of jurisdiction (L.F. 24-27, 44; Tr. 6-7, 18, 396-397).

The Uniform Mandatory Disposition of Detainers Law (UMDDL) provides for the prompt disposition of detainers based on untried state charges pending against a prisoner

held within the state's correctional system. ***State ex rel. Kemp v. Hodge***, 629 S.W.2d 353, 354 (Mo. banc 1982). It applies to persons confined in state correctional institutions who have charges pending in the state, and establishes the right to disposition of any untried charges within one-hundred eighty days after the proper request. ***State v. White***, 728 S.W.2d 564, 566 (Mo. App. W.D. 1987); *see also* ***State v. Harris***, 108 S.W.3d 127, 128 (Mo. App. E.D. 2003) ("As the UMDDL states, defendants have a right to a disposition of any untried charges within 180 days 'while so imprisoned.'").

The criminal defendant may invoke the provisions of the UMDDL by delivering his written request for "final disposition of any untried indictment, information or complaint" to the director of the division of adult institutions. ***State v. Laramore***, 965 S.W.2d 847, 849 (Mo. App. E.D. 1998); §§ 217.450 and 217.455. Once the defendant delivers his request to the director, the director bears the burden of sending the defendant's request, as well as a certificate stating the "the term of commitment under which the [defendant] is being held," to the court and the prosecuting attorney. ***Id***.; § 217.455(1). Absent exception, the defendant shall be brought to trial "[w]ithin one-hundred eighty days after the receipt of the request and certificate ... by the court and the prosecuting attorney," or the untried indictment, information or complaint must be dismissed. ***White v. State***, 835 S.W.2d 529, 530 (Mo. App. E.D. 1992) (citing ***State v. Walker***, 795 S.W.2d 628, 629 (Mo. App. E.D. 1990)); § 217.460.

"[A] loss of jurisdiction over a pending charge results if it is not tried within the statutorily designated period." ***Kenneth-Smith v. State***, 838 S.W.2d 113, 116 (Mo. App. E.D. 1992); *see also* ***Ellsworth v. State***, 964 S.W.2d 455, 458 (Mo. App. E.D. 1998)

(discussing the UMDDL). Failure to bring the defendant to trial within the statutorily designated one-hundred eighty day period wholly divests the trial court of subject matter jurisdiction over the indictment, and results in a jurisdictional statutory violation that cannot be waived, even through the defendant's entry of a guilty plea. ***Carson v. State***, 997 S.W.2d 92, 98-100 (Mo. App. S.D. 1999) (reversing and remanding with directions to set aside the defendant's guilty plea on grounds of violation of UMDDL); *see also* ***Russell v. State***, 597 S.W.2d 694, 697 (Mo. App. W.D. 1980) (reversing and remanding for an evidentiary hearing).

In this case, but for trial counsel's continuance of Mr. Crenshaw's trial from February 9, 2000 to March 9, 2000, the trial court would have been required to dismiss all charges against Mr. Crenshaw for lack of jurisdiction (L.F. 24-27, 44; Tr. 6-7, 18, 396-397). On January 18, 2000, Fulton Reception and Diagnostic Center received a detainer on Mr. Crenshaw (L.F. 24; Tr. 6-7). Mr. Crenshaw completed a request for speedy disposition of detainer the same day and on January 20, 2000, the Circuit Attorney for the City of St. Louis and the Circuit Clerk for the City of St. Louis received Mr. Crenshaw's request for disposition of the indictment and the certification (L.F. 24-27; Tr. 7).

The statutory 180 days under the UMDDL began to run on January 20, 2000, the date when the circuit attorney and circuit clerk received Mr. Crenshaw's request and certification. ***Laramore***, 965 S.W.2d at 850. More than 180 days elapsed between January 20, 2000 and August 15, 2000, the first date of Mr. Crenshaw's trial. Two-hundred and eight days elapsed.

However, all delay resulting from Mr. Crenshaw's affirmative action was excludable from the 180-day period under the UMDDL. ***State v. Smith***, 686 S.W.2d 543, 547 (Mo. App. S.D. 1985). Where the defendant asks for additional time to prepare, requests or consents to a continuance, or causes delay through the filing of pretrial motions, the period of limitation is tolled. ***State v. Moore***, 882 S.W.2d 253, 258-259 (Mo. App. E.D. 1994); *see also* ***State v. Galvan***, 795 S.W.2d 113, 118 (Mo. App. S.D. 1990).

The trial court found that Mr. Crenshaw continued his trial and that the continuance from February 9, 2000 to March 9, 2000 tolled the 180-day period of limitation (Tr. 9, 396-397). After subtracting the 29 days from February 9, 2000 to March 9, 2000 from the total 208-day delay in bringing Mr. Crenshaw to trial, the trial court found Mr. Crenshaw was brought to trial within 179 days (Tr. 396-397).

The motion court clearly erred in finding that Mr. Crenshaw continued his trial from February 9, 2000 to March 9, 2000 and trial counsel was ineffective for continuing Mr. Crenshaw's trial without his knowledge and consent. Mr. Crenshaw testified that he did not consent to, or authorize anyone to consent to, any continuance, including the continuance from February 9, 2000 to March 9, 2000 (Tr. 380-381).

Through its ruling in ***State v. Allen***, 954 S.W.2d 414 (Mo. App. E.D. 1997), the Eastern District Court of Appeals recognized that trial counsel's failure to obtain the defendant's consent to continuances that are binding on the defendant for speedy trial purposes can constitute ineffective assistance of counsel. Though the defendant had asserted his speedy trial rights under the UMDDL, trial counsel's continuances caused

the majority of the delay in bringing the defendant to trial. ***Allen***, 954 S.W.2d at 417-418. After subtracting the delay attributable to trial counsel's continuances, the delay in bringing the criminal defendant to trial was not presumptively prejudicial and was within the 180 days allowed under the UMDDL. ***Id***. at 418. On post-conviction, the criminal defendant alleged that he was opposed to trial counsel's continuances and that his attorney obtained them without his approval. ***Id***. at 419.

The Eastern District Court of Appeals held that the defendant's allegation presented a factual question and remanded for a hearing. ***Id***. at 419. The Court held that if, after an evidentiary hearing, the motion court finds the evidence supports the defendant's arguments, then the trial court lacked jurisdiction and the motion court should discharge the defendant. ***Id***.

The evidence supports Mr. Crenshaw's argument that trial counsel was ineffective. Trial counsel's assistance is ineffective if his performance was so deficient as to fall below an objective standard of reasonable competence, and the deficient performance prejudiced the defendant's defense. ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); ***Lawrence v. Armontrout,*** 900 F.2d 127, 129 (8th Cir. 1990). Prejudice is established if the defendant can show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. ***Strickland***, 466 U.S. at 694.

Here, reasonably competent trial counsel would have known that a consequence of moving for a defense continuance was the tolling of the 180-day period under the UMDDL. Reasonably competent trial counsel would have informed Mr. Crenshaw of

this consequence, discussed the benefits versus the costs of moving for a continuance, and obtained Mr. Crenshaw's consent to a continuance. No reasonable trial strategy justified trial counsel's failure to obtain Mr. Crenshaw's consent prior to moving for a continuance.

Mr. Crenshaw was prejudiced by trial counsel's failure to act as a reasonably competent attorney under the same or similar circumstances would have acted. But for trial counsel's continuance of Mr. Crenshaw's trial from February 9, 2000 to March 9, 2000, the trial court would have been required to dismiss all charges against Mr. Crenshaw for lack of jurisdiction.

Mr. Crenshaw was denied his right to due process of law, his right to effective assistance of counsel, and his right to a speedy trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article 1, §§ 10 and 18(a) of the Missouri Constitution, and §§ 217.450 – 217.485. This Court must reverse the motion court's judgment and remand with directions to discharge Mr. Crenshaw from his conviction and sentence.

CONCLUSION

WHEREFORE, for the foregoing reasons, Appellant Steven Crenshaw requests that this Court reverse the motion court's judgment and discharge him from his conviction and sentence, or remand his cause for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g) and Special Rule 361, I hereby certify that on this day, December 7, 2007, two true and correct copies of the foregoing brief and a floppy disk containing the foregoing brief were mailed postage prepaid to the office of the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed 31,000 words, 2,200 lines, or one hundred pages. The word-processing software identified that this brief contains 10,752 words, excluding the cover page, signature block, and certificates of service and of compliance. Finally, I hereby certify that the enclosed diskette has been scanned for viruses with McAfee Anti-Virus software and found virus-free.

Respectfully submitted,

_____

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APPENDIX

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Supreme Court Rule **29.15**

Vernon's Annotated Missouri Rules Currentness
Supreme Court Rules
Rules of Criminal Procedure
Rule 29. Misdemeanors or Felonies--Verdict, Sentence and New Trial (Refs & Annos)
29.15. Conviction After Trial--Correction

(a) Nature of Remedy--Rules of Civil Procedure Apply. A person convicted of a felony after trial claiming that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, including claims of ineffective assistance of trial and appellate counsel, that the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court pursuant to the provisions of this Rule 29.15. This Rule 29.15 provides the exclusive procedure by which such person may seek relief in the sentencing court for the claims enumerated. The procedure to be followed for motions filed pursuant to this Rule 29.15 is governed by the rules of civil procedure insofar as applicable.

(b) Form of Motion--Cost Deposit Not Required--Time to File--Failure to File, Effect of. A person seeking relief pursuant to this Rule 29.15 shall file a motion to vacate, set aside or correct the judgment or sentence substantially in the form of Criminal Procedure Form No. 40.

No cost deposit shall be required.

If an appeal of the judgment or sentence sought to be vacated, set aside or corrected was taken, the motion shall be filed within 90 days after the date the mandate of the appellate court is issued affirming such judgment or sentence.

If no appeal of such judgment or sentence was taken, the motion shall be filed within 180 days of the date the person is delivered to the custody of the department of corrections.

If:

(1) An appeal of such judgment or sentence is taken;

(2) The appellate court remands the case resulting in entry of a new judgment or sentence; and

(3) An appeal of the new judgment or sentence is taken, the motion shall be filed within 90 days after the date the mandate of the appellate court is issued affirming the new judgment or sentence.

If no appeal of such new judgment or sentence is taken, the motion shall be filed within 180 days of the later of:

(1) The date the person is delivered to the custody of the department of corrections; or

(2) The date the new judgment or sentence was final for purposes of appeal.

Failure to file a motion within the time provided by this Rule 29.15 shall constitute a complete waiver of any right to proceed under this Rule 29.15 and a complete waiver of any claim that could be raised in a motion filed pursuant to this Rule 29.15.

(c) Clerk's Duties. Movant shall file the motion and two copies thereof with the clerk of the trial court. The clerk shall immediately deliver a copy of the motion to the prosecutor. Upon receipt of the motion, the clerk shall notify the sentencing judge and shall notify the court reporter to prepare and file the complete transcript of the trial if the transcript has not yet been prepared or filed. If the motion is filed by an indigent pro se movant, the clerk shall forthwith send a copy of the motion to the counsel who is appointed to represent the movant.

(d) Contents of Motion. The motion to vacate shall include every claim known to the movant for vacating, setting aside, or correcting the judgment or sentence. The movant shall declare in the motion that the movant has listed all claims for relief known to the movant and acknowledging the movant's understanding that the movant waives any claim for relief known to the movant that is not listed in the motion.

(e) Pro Se Motion--Appointment of Counsel--Amended Motion, Required When. When an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant. Counsel shall ascertain whether sufficient facts supporting the claims are asserted in the motion and whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence. If the motion does not assert sufficient facts or include all claims known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and claims. If counsel determines that no amended motion shall be filed, counsel shall file a statement setting out facts demonstrating what actions were taken to ensure that (1) all facts supporting the claims are asserted in the pro se motion and (2) all claims known to the movant are alleged in the pro se motion. The statement shall be presented to the movant prior to filing. The movant may file a reply to the statement not later than ten days after the statement is filed.

(f) Withdrawal of Counsel. For good cause shown, counsel may be permitted to withdraw upon the filing of an entry of appearance by successor counsel. If appointed counsel is permitted to withdraw, the court shall cause new counsel to be appointed. If an indigent movant is seeking to set aside a death sentence, successor counsel shall have at least the same qualifications as required by Rule 29.16 as the withdrawing counsel.

(g) Amended Motion--Form, Time for Filing--Response by Prosecutor. Any amended motion shall be signed by movant or counsel. The amended motion shall not incorporate by reference material contained in any previously filed motion. If no appeal of the judgment sought to be vacated, set aside, or corrected is taken, the amended motion shall be filed within sixty days of the earlier of: (1) the date both a complete transcript has been filed in the trial court and counsel is appointed or (2) the date both a complete transcript has been filed in the trial court and an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant. If an appeal of the judgment sought to be vacated, set aside, or corrected is taken, the amended motion shall be filed within sixty days of the earlier of: (1) the date both the mandate of the appellate court is issued and counsel is appointed or (2) the date both the mandate of the appellate court is issued and an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant. The court may extend the time for filing the amended motion for one additional period not to exceed thirty days. Any response to the motion by the prosecutor shall be filed within thirty days after the date an amended motion is required to be filed.

(h) Hearing Not Required, When. If the court shall determine the motion and the files and records of the case conclusively show that the movant is entitled to no relief, a hearing shall not be held. In such case, the court shall issue findings of fact and conclusions of law as provided in Rule 29.15(j).

(i) Presence of Movant--Record of Hearing--Continuance of Hearing--Burden of Proof. At any hearing ordered by the court the movant need not be present. The court may order that testimony of the movant shall be received by deposition. The hearing shall be on the record and shall be confined to the claims contained in the last timely filed motion. The court may continue the hearing upon a showing of good cause. The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence.

(j) Findings and Conclusions--Judgment. The court shall issue findings of fact and conclusions of law on all issues presented, whether or not a hearing is held. If the court finds that the judgment was rendered without jurisdiction, that the sentence imposed was illegal, or that there was a denial or infringement of the rights given movant by the constitution of Missouri or the constitution of the United States as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the movant or resentence the movant or order a new trial or correct the judgment and sentence as appropriate.

(k) Appeal--Standard of Appellate Review. An order sustaining or overruling a motion filed under the provisions of this Rule 29.15 shall be deemed a final judgment for purposes of appeal by the movant or the state. If the court finds that a movant allowed an appeal is an indigent person, it shall authorize an appeal in forma pauperis and furnish without cost a record of all proceedings for appellate review. When the appeal is taken, the circuit court shall order the official court reporter to promptly prepare the transcript necessary for appellate review without requiring a letter from the movant's counsel ordering the same. If the sentencing court finds against the movant on the issue of indigence and the movant so requests, the court shall certify and transmit to the appellate court a transcript and legal file of the evidence solely on the issue of indigence so as to permit review of that issue by the appellate court. Appellate review of the trial court's action on the motion filed under this Rule 29.15 shall be limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous.

(l) Successive Motions. The circuit court shall not entertain successive motions.

(m) Schedule. This Rule 29.15 shall apply to all proceedings wherein sentence is pronounced on or after January 1, 1996. If sentence is pronounced prior to January 1, 1996, postconviction relief shall continue to be governed by the provisions of Rule 29.15 in effect on the date the motion was filed or December 31, 1995, whichever is earlier.

V.A.M.S. 217.460

Vernon's Annotated Missouri Statutes Currentness

Title XIII. Correctional and Penal Institutions
Chapter 217. Department of Corrections (Refs & Annos)
Uniform Mandatory Disposition of Detainers (Refs & Annos)
217.460. Trial to be held, when--failure, effect

Within one hundred eighty days after the receipt of the request and certificate, pursuant to sections 217.450 and 217.455, by the court and the prosecuting attorney or within such additional necessary or reasonable time as the court may grant, for good cause shown in open court, the offender or his counsel being present, the indictment, information or complaint shall be brought to trial. The parties may stipulate for a continuance or a continuance may be granted if notice is given to the attorney of record with an opportunity for him to be heard. If the indictment, information or complaint is not brought to trial within the period, no court of this state shall have jurisdiction of such indictment, information or complaint, nor shall the untried indictment, information or complaint be of any further force or effect; and the court shall issue an order dismissing the same with prejudice.