IN THE MISSOURI SUPREME COURT

EDWARD HOEBER,	)	
	)	
Appellant,	)	
	)	**SC95079**
vs.	)	
	)	**10BU-CV001476**
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

Rule 29.15 Appeal from the Circuit Court of Buchanan County, Missouri
Fifth Judicial Circuit, Division 4
The Honorable Daniel F. Kellogg, Judge

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Edward Hoeber incorporates the opening brief Jurisdictional Statement.

STATEMENT OF FACTS

Respondent's reference to Edward's *pro se* motion (RespBrf17) should be disregarded, as Edward's *pro se* motion was not incorporated into the amended motion (PCRLF30-62). An appellate court can consider a movant's *pro se* claims if those claims are incorporated into the amended motion. *Baugh v. State*, 870 S.W.2d 485, 490 (Mo.App.,E.D.1994), *citing* Rule 29.15(d) and (f). Furthermore, the *pro se* motion was not entered into evidence at the evidentiary hearing (HTr2).

ARGUMENT I

The motion court clearly erred in denying Edward's Rule 29.15 motion, because the record leaves the firm conviction that a mistake was made, in that Edward established that trial counsel failed to act as a reasonably competent attorney and violated Edward's rights to due process, fair trial, a properly instructed jury, a unanimous verdict, and effective assistance of counsel, U.S.Const.,Amends.V,VI,XIV; Mo.Const.,Art.I, §10,18(a),22(a), when counsel failed to object to Instructions 8 and 10—the verdict directors for counts I and II of first-degree statutory sodomy, because Instructions 8 and 10 failed to specify a particular incident of hand-to-genital deviate sexual intercourse that occurred during the charging period after the state presented evidence of multiple acts of hand-to-genital deviate sexual intercourse, thereby making it unclear as to which incidents Edward was found guilty. Edward was prejudiced, because if counsel had objected to Instructions 8 and 10 on the basis that these verdict directors failed to specify a particular incident of hand-to-genital deviate sexual intercourse, the objection would have been sustained; and but for counsel's ineffectiveness, there is a reasonable probability that the result of the trial would have been different.

Argument

In Appellant's application for transfer,[1] Edward presented the following ground

[1]Edward asks this Court to take judicial notice of Appellant's Application for Transfer.

for transfer:

> …[T]he Courts of Appeals are in conflict with the Missouri Supreme Court. Since *Celis-Garcia*[, 344 S.W.3d 150 (Mo.banc2011)] was decided, the lower appellate courts have tended to find that any instructional error to be harmless if a defendant generally attacked the credibility of the complaining witness or pursues a "unitary defense." *State v. LeSieur*, 361 S.W.3d 458,465 (Mo.App.,W.D.2012); *State v. Payne*, 414 S.W.3d 52,56-57 (Mo.App.,W.D.2013); *State v. Rose*, 421 S.W.3d 522,529 (Mo.App.,S.D.2013). These decisions are not consistent with the Missouri Supreme Court's decision in *Celis-Garcia* or fundamental concepts of due process and the right to a unanimous verdict. This type claim regarding the unanimity of the jury verdict and the current conflict in Missouri appellate courts was before the Missouri Supreme Court, which held that the issue was not preserved for appellate review. [*Mallow v. State*], 439 S.W.3d 764, 769-770 (Mo.banc.2014). Since Edward's issue *is* preserved for appellate review, this case should be transferred to the Missouri Supreme Court for a decision on the merits.

The Respondent is correct that this Court's *Celis-Garcia* opinion was handed down two years after Edward's trial (RespBrf27; AppBrf43). Yet, Respondent misunderstands Edward's claim for relief which is based upon his right to a unanimous

verdict, Mo.Const.Art.I,§22(a),[2] and long-standing legal principles and caselaw in Missouri. Edward's claim is not, as Respondent suggests, a claim of failure of trial counsel failing to anticipate a change in the law (RespBrf27-28 *citing Zink v. State*, 278 S.W.3d 170,190 (Mo.banc2009); *Glass v. State*, 227 S.W.3d 463,472 (Mo.banc2007); *Johnson v. State*, 103 S.W.3d 182 (Mo.App.,W.D.2003); *State v. Meyers*, 770 S.W.2d 312,317 (Mo.App.W.D.1989); *Felton v. State*, 753 S.W.3d 34,35 (Mo.App.,E.D.1988)). *Celis-Garcia* was based long-standing law and did not, as Respondent suggests, signify a radical change in criminal law (RespBrf27 *citing Crawford v. Washington*, 541 U.S. 36 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Batson v. Kentucky*, 476 U.S. 79 (1986)). As in *Celis-Garcia*, this Court often issue opinions the reaffirm age-old legal principles. *See*, *e.g.*, *State v Ellison*, 239 S.W.3d 603,606,fn.2 (Mo.banc2007), *quoting State v. Spray*, 74 S.W. 846, 848,851 (Mo.1903)("This rule [prohibiting the admission of evidence of crimes other than the one of which the defendant stands accused], so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Charta."); Mo.Const.Art.I,§17.

Celis-Garcia does support Edward's position, and if this Court were to side with Respondent, this Court would go against *Celis-Garcia* as well as the bedrock law that has protect Missouri defendants for over 100 years:

[2]As amended in 1900.

> The Missouri Constitution provides, in pertinent part, "[t]hat the right of trial by jury *as heretofore enjoyed* shall remain inviolate...." Mo. Const. art. I, sec. 22(a) (emphasis added). This Court has interpreted the phrase "as heretofore enjoyed" as protecting "all the substantial incidents and consequences that pertain to the right to jury trial at common law." *State v. Hadley*, 815 S.W.2d 422,425 (Mo.banc1991), *citing State ex rel. St., K. & N.W. Ry. Withrow*, 36 S.W. 43,48 (Mo.1896). One of the "substantial incidents" protected by article I, section 22(a) is the right to a unanimous jury verdict. *State v. Hadley*, 815 S.W.2d at 425, *citing State v. Hamey*, 67 S.W. 620,623 (Mo.1902). For a jury verdict to be unanimous, "the jurors [must] be in substantial agreement as to the defendant's acts, as a preliminary step to determining guilt." 23A C.J.S. *Criminal Law* §1881 (2006); *State v. Jackson*, 146 S.W 1166,1169 (Mo.1912)("The defendant is entitled to a concurrence of the minds of the 12 jurors upon one definite charge of crime.").

State v. Celis-Garcia, 344 S.W.3d at 155. *See also*, AppBrf36 *citing State v. Gardner*, 231 S.W. 1057,1058 (Mo.App.,Sprngfld.Dist.1921)(verdict must be clear and unambiguous, and must show that all twelve of the jurors agreed on finding the same thing); AppBrf38 *citing State v. Oswald*, 306 S.W.2d 559,563 (Mo.1957).

Respondent also incorrectly imputes a trial strategy reason to counsel for failing to object (RespBrf30), when, in fact, counsel did not have a strategy—he did not review or consider the notes on use at issue in order to make a strategic decision. Edward's case is

analogous to *Rompilla v. Beard*, 545 U.S.374,395-396 (2005). Counsel's failure to review the instructions and consider them "'was the result of inattention, not reasoned strategic judgment.'" *Rompilla v. Beard*, 545 U.S. at 395-396 (O'Connor,J.,concurring), *citing Wiggins v. Smith*, 539 U.S. 510,534 (2003). "'As a result, their conduct fell below constitutionally required standards.'" *Rompilla v. Beard*, 545 U.S. at 396 (O'Connor,J.,concurring), *citing Wiggins v. Smith*, 539 U.S. at 533, *quoting Strickland v. Washington*, 466 U.S. 688,690-691 (1984)("'[S]trategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation'"

Conclusion

The motion court was clearly erroneous in finding find that counsel was not entitled to relief in this claim (PCLF66-67,A6-A7). *State v. Schaal*, 806 S.W.2d 659,667 (Mo.banc1991); Rule 29.15(k)(A52). Edward was prejudiced by counsel's failure to object to Instructions 8 and 10. Had counsel objected, the trial court would have sustained the objection, and there is a reasonable probability that the result of Edward's trial would have been different. Counsel's ineffectiveness violated Edward's constitutional rights, U.S.Const.,Amends.V,VI,XIV; Mo.Const.,Art.I,§§10,18(a),22(a). Thus, this Court should vacate the motion court's judgment and remand for a new trial.

II

The motion court clearly erred in denying Edward's Rule 29.15 motion, because the record leaves the firm conviction that a mistake was made, in that Edward established that trial counsel failed to act as a reasonably competent attorney and violated Edward's rights to due process, fair trial, individualized sentencing, and effective assistance of counsel, U.S.Const.,Amends.V,VI,XIV; Mo.Const.,Art.I, §§10,18(a), when counsel failed at sentencing to present testimony of a mental health expert, such as that of Dr. Bill Geis, regarding mitigating evidence of Edward's mental disability. Edward was prejudiced, because had counsel presented such mitigating evidence and testimony, there is a reasonable probability that the result of the sentencing would have been different.

Respondent's references to Edward's *pro se* motion (RespBrf51-52,58) should be disregarded, as Edward's *pro se* motion was not incorporated into the amended motion (PCRLF30-62). An appellate court can consider a movant's *pro se* claims if those claims are incorporated into the amended motion. *Baugh v. State*, 870 S.W.2d 485, 490 (Mo.App.,E.D.1994), *citing* Rule 29.15(d) and (f). Furthermore, the *pro se* motion was not entered into evidence at the evidentiary hearing (HTr2).

Conclusion

The motion court was clearly erroneous in finding find that counsel was not entitled to relief in this claim (PCLF67-68,A7-A8). *State v. Schaal*, 806 S.W.2d 659,667 (Mo.banc1991); Rule 29.15(k)(A52). Counsel's ineffectiveness violated Edward's

constitutional rights, U.S.Const.,Amends.V,VI,XIV; Mo.Const.,Art.I,§§10,18(a). Thus, this Court should vacate the motion court's judgment and remand for a new sentencing.

CONCLUSION

Based on Argument I, this Court should vacate the motion court's judgment and remand for a new trial.

Based on Argument II, this Court should vacate the motion court's judgment and remand for a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Laura G. Martin, hereby certify as follows:

1. The brief was completed in compliance with Rule 84.06 and using Microsoft Word, Office 2003, in Times New Roman size 13 point font. Excluding the cover page, the index, the signature block, the certificate of compliance and service, and the appendix, the brief contains 1,708 words, which does not exceed the 7,750 words allowed for an appellant's brief under Rule 84.06.

2. On December 6, 2015, a true and correct copy of Appellant's Substitute Brief was served on Evan Buccheim, Assistant Attorney General, Office of the Attorney General, PO Box 899, Jefferson City, MO 65102 (e-mail: evan.buchheim@ago.mo.gov), through the e-filing system of the Missouri Office of the State Courts Administrator.

/S/ Laura G. Martin
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