IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

ECCLESIASTES MATTHEWS,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. ED 84656
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
FROM THE CIRCUIT COURT OF MARION COUNTY, MISSOURI
TENTH JUDICIAL CIRCUIT
THE HONORABLE RONALD MCKENZIE, SPECIAL JUDGE

APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal arises from the denial of his Rule 29.15 motion without an evidentiary hearing in the Circuit Court of Marion County, Missouri, the Honorable Ronald McKenzie presiding. As this appeal does not involve any of the issues reserved for the exclusive jurisdiction of the Missouri Supreme Court, jurisdiction lies in the Missouri Court of Appeals, Eastern District. Article V, Section 3, Missouri Constitution; Section 477.050, RSMo. 2000.[1]

[1] All statutory citations will be to RSMo. 2000.

STATEMENT OF FACTS

Appellant was charged by information with two counts of the Class A felony of delivery of a controlled substance near schools in the Marion County Circuit Court, District 2, at Hannibal.[2] (L.F. 1, 7-8).[3] On October 18, 2001, appellant filed a joint motion for change of judge and change of venue (L.F. 1). Appellant's change of judge request was granted on October 25, 2001 (L.F. 1-2). On December 4, 2001, appellants request for a change of venue was "sustained" and the case was transferred to the Marion County Circuit Court, District 1, at Palmyra (L.F. 2). Prior to trial, a jury panel was selected from the population of the Palmyra District of Marion County (L.F. 3). Appellant's trial counsel did not object to the jury pool.

On January 3, 2002, an amended information was filed charging appellant with two counts of the Class B felony of delivery of a controlled substance (L.F. 3, 9-10). On the same day, a jury was chosen from the jury pool and the case

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[2] Section 478.720 divides Marion County into two districts: District 1 at Palmyra and District 2 at Hannibal.

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

proceeded to trial in the Circuit Court of Marion County at Palmyra (Tr. 1, 10, 127). The following evidence was adduced at trial.

On December 9, 1999, special agents with the Missouri Northeast Narcotics Task Force were working with a confidential informant, Craig Haley, who had agreed to cooperate with authorities in hopes of lenient treatment for a pending sale of controlled substances charge (Tr. 134-136, 171-173). The officers took Haley to Fitz's Lounge in Hannibal, searched him for contraband, supplied him with a body wire, and gave him some buy money (Tr. 136-138).

Haley entered the lounge and approached appellant (Tr. 166). He asked appellant whether he had anything for him (Tr. 166). The two went into the bathroom, and appellant told Haley that he had a $40 and $50 piece (Tr. 166). Haley asked for the $50 piece (Tr. 166). Appellant pulled something out of his mouth and handed it to Haley (Tr. 166). Haley gave appellant $50 (Tr. 166).

Haley left the building and brought the authorities a cellophane-wrapped package containing a white, chalky substance (Tr. 142). The package contained .33 gram of cocaine, a controlled substance (Tr. 251).

On May 23, 2000, another confidential informant, who faced sentencing on drug sale charges, Dennis Thomas, contacted the task force and led officers to Fitz's Lounge (Tr. 176-179, 201). After being searched, body-wired, and given buy money, Thomas entered the lounge in search of crack cocaine (Tr. 201). There he met appellant, who told Thomas that he did not have anything (Tr. 201).

As Thomas left the lounge, appellant and Karnell Fitzpatrick walked out of the bar, and Fitzpatrick told Thomas that he had some (Tr. 201). Just then a police officer drove by and observed the three, and Fitzpatrick became frightened and went back inside Fitz's (Tr. 205).

Thomas approached appellant and asked for "a sixteenth" (Tr. 205). Appellant replied that it would take 30 minutes, and would cost $110 (Tr. 205). Thomas then left (Tr. 205-206).

When Thomas returned to the bar in the back of the lounge, appellant asked if he had the money, and then took a baggie out of his mouth and placed it on a speaker (Tr. 207). Thomas picked it up and gave the money to appellant (Tr. 208). The baggie contained .6 gram cocaine base (Tr. 253).

Both informants conceded that they were facing drug sale charges and hoping to avoid prison by testifying against appellant (Tr. 171, 209, 215). The defense questioned Haley as to whether he had been charged, and he admitted that he had (Tr. 174). The state elicited that he was not currently facing charges (Tr. 174). When the defense attempted to establish what had become of these charges, the state objected, and the trial court sustained the objection (Tr. 174).

The defense cross-examined Thomas as to his claim that Fitzpatrick had no drugs, and asked Thomas whether he had previously purchased drugs from Fitzpatrick (Tr. 212). The state objected, and at the bench, the defense explained that this fact, along with a romantic relationship between Fitzpatrick and Thomas' daughter, was relevant to show a motive for identifying appellant rather than

Fitzpatrick as the source of the drugs (Tr. 212-214). The trial court agreed to the cross-examination, but the state complained, and the court reversed its ruling (Tr. 214).

The state called Hannibal police officer Edward Stratton to testify that in the course of this second transaction he drove by in a police car and saw appellant and Fitzpatrick together (Tr. 236). When Officer Stratton finished testifying, the trial court began a lengthy personal conversation with him regarding his service in the Guard, asking him whether he had been activated; where he was; how long he would be there; how many soldiers were up there; whether he went in with the Guard (Tr. 240-242). The judge also explained to Officer Stratton that he had been in the Guard years ago, and that this was an entrée for him to date girls in Palmyra (Tr. 241).

Appellant testified in his own defense (Tr. 265). Appellant testified that, on December 9, 1999, Craig Haley never asked him for drugs, and that Haley had his own drugs that he was selling (Tr. 266-267). Appellant said Haley spoke with him for a couple of minutes that night, then just walked off (Tr. 267-268). Appellant also testified that he never spoke with, or had any contact with, Dennis Thomas on May 23, 2000 (Tr. 269-270). Appellant denied that he sold any drugs (Tr. 270-271).

After deliberation, the jury returned verdicts of guilty on both counts (Tr. 308; L.F. 32-33). On February 7, 2002, appellant was sentenced as a prior drug

offender to consecutive prison terms of 25 years on each count (Tr. 321; L.F. 42-43).

On February 15, 2002, appellant filed a notice of appeal of his convictions (L.F. 44-45). On direct appeal, appellant's counsel asserted that the trial court erred in sustaining the state's objection to appellant's cross-examination of Haley regarding the disposition of the charges against him, in limiting appellant's cross-examination of Thomas regarding his bias against appellant, and in having a personal conversation with Officer Stratton in front of the jury. State v. Matthews, 99 S.W.3d 494 (Mo. App. E.D. 2003). On March 11, 2003, this Court issued a per curiam opinion affirming appellant's convictions. Id. This Court's mandate was issued on April 9, 2003 (PCR L.F. 31).

On May 1, 2003, appellant filed a pro se motion to vacate, set aside, or correct his judgment or sentence (PCR L.F. 1-2). On July 31, 2003, appellant filed an amended motion for post-conviction relief (PCR L.F. 1, 15). The motion alleged that appellant was denied due process and effective assistance of counsel in that: (1) his trial counsel failed to object to the court's failure to provide appellant with a proper change of venue and his appellate counsel failed to assert that issue on direct appeal, (2) his trial counsel failed to present evidence of possible alternative sources of the cocaine allegedly sold to Craig Haley, (3) his trial counsel failed to challenge the jury selection process in Marion County prior to trial, and (4) his trial counsel failed to play the surveillance tape of the alleged transactions for the jury (PCR L.F. 16-29).

On April 15, 2004, the motion court denied an evidentiary hearing and issued findings of fact and conclusions of law denying appellant's motion for post-conviction relief (PCR L.F. 1, 31-33). By leave of this Court, appellant filed a notice of appeal on June 16, 2004 (PCR L.F. 35-37).

POINT RELIED ON

I.

The motion court clearly erred in denying appellant's Rule 29.15 motion for post-conviction relief because a review of the record leaves a definite and firm impression that appellant was denied effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution in that his trial and appellate counsel failed to act as reasonably competent attorneys would under the same or similar circumstances because his trial counsel failed to object to the trial court transferring the case to another district within the same county rather than providing appellant with a proper change of venue, and because his appellate counsel failed to challenge the trial court's failure to grant appellant a proper change of venue on direct appeal. Appellant was prejudiced by his trial counsel's failure to object to the transfer between districts in the county as an inappropriate change of venue in that, had such an objection been made, a reasonable probability exists that the proper change of venue to which appellant was entitled as a matter of right would have been provided. Appellant was also prejudiced by his appellate counsel's failure to challenge the trial court's failure to grant a proper change of venue on direct appeal in that, had this issue been properly asserted, a reasonable probability exists that the appellate court would have reversed appellant's conviction.

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

State v. Cella, 976 S.W. 543 (Mo. App. E.D. 1998);

Klemme v. State, 812 S.W.2d 569 (Mo. App. E.D. 1991);

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

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

Section 545.440, RSMo.;

Section 478.720, RSMo.;

Rule 32.03; and

Rule 29.15.

POINT RELIED ON

II.

The motion court clearly erred in denying appellant's Rule 29.15 motion for post-conviction relief because a review of the record leaves a definite and firm impression that appellant was denied due process of law, equal protection under the law, and effective assistance of counsel pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that the jury pool was not selected at random from a fair cross-section of the citizens of Marion County in violation of Sections 494.400 through 494.505, and appellant's trial counsel failed to challenge the jury selection process prior to trial. Appellant was prejudiced in that, by artificially manipulating the available pool of jurors, the selection process affected the fairness and impartiality of the jury, and had trial counsel objected that the jury pool was not in compliance with the governing statutes, a reasonable probability exists that appellant would have been afforded the unbiased jury, selected from a fair cross-section of the county, to which he was entitled as a matter of right.

State v. Brooks, 960 S.W.2d 479 (Mo. banc 1997);

Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692 (1975);

State v. Gresham, 637 S.W.2d 20 (Mo. banc 1982);

Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364 (1991);

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

Mo. Const., Art. I, Sects. 10 and 18(a);

Sections 494.400 through 494.505, RSMo.;

Section 478.720, RSMo.; and

Rule 29.15**.**

POINT RELIED ON

III.

The motion court clearly erred in denying appellant's Rule 29.15 motion without granting an evidentiary hearing because appellant's motion pleaded factual allegations which, if proven, would warrant relief and which are not refuted by the record in that appellant claimed he was denied his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Section 18 (a) of the Missouri Constitution, and that he was prejudiced thereby, because his trial counsel failed to introduce evidence of possible alternative sources of the cocaine allegedly sold to Craig Haley by appellant on December 9, 1999.

State v. Starks, 856 S.W.2d 334 (Mo. banc 1993);

Masden v. State, 62 S.W.3d 661 (Mo. App. W.D. 2001);

Sanders v. State, 738 S.W.2d 856 (Mo. banc 1987);

Holman v. State, 88 S.W.3d 105 (Mo. App. E.D. 2002);

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

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

Rule 29.15.

POINT RELIED ON

IV.

The motion court clearly erred in denying appellant's Rule 29.15 motion without granting an evidentiary hearing because appellant's motion pleaded factual allegations which, if proven, would warrant relief and which are not refuted by the record in that appellant claimed he was denied his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Section 18 (a) of the Missouri Constitution, and that he was prejudiced thereby, because his trial counsel failed to introduce, and play for the jury, the surveillance tape recordings of the alleged drug transactions.

State v. Starks, 856 S.W.2d 334 (Mo. banc 1993);

Masden v. State, 62 S.W.3d 661 (Mo. App. W.D. 2001);

Sanders v. State, 738 S.W.2d 856 (Mo. banc 1987);

Holman v. State, 88 S.W.3d 105 (Mo. App. E.D. 2002);

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

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

Rule 29.15.

ARGUMENT

I.

The motion court clearly erred in denying appellant's Rule 29.15 motion for post-conviction relief because a review of the record leaves a definite and firm impression that appellant was denied effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution in that his trial and appellate counsel failed to act as reasonably competent attorneys would under the same or similar circumstances because his trial counsel failed to object to the trial court transferring the case to another district within the same county rather than providing appellant with a proper change of venue, and because his appellate counsel failed to challenge the trial court's failure to grant appellant a proper change of venue on direct appeal. Appellant was prejudiced by his trial counsel's failure to object to the transfer between districts in the county as an inappropriate change of venue in that, had such an objection been made, a reasonable probability exists that the proper change of venue to which appellant was entitled as a matter of right would have been provided. Appellant was also prejudiced by his appellate counsel's failure to challenge the trial court's failure to grant a proper change of venue on direct appeal in that, had this issue been properly asserted, a reasonable probability exists that the appellate court would have reversed appellant's conviction.

The motion court clearly erred in denying appellant's post-conviction claim that his trial counsel was ineffective for failing to object to the trial court not providing appellant with a proper change of venue and his appellate counsel was ineffective for failing to challenge the trial court's failure to provide a proper change of venue on direct appeal. A review of the record leaves the definite and firm impression that the ruling was erroneous because, had such an objection been made, a reasonable probability exists that appellant would have been provided with the proper change of venue to which he was entitled, or, had the issue been properly asserted, appellant's conviction would have been reversed on appeal.

The scope of review of the denial of Rule 29.15 motion is whether the findings of fact and conclusions of law of the motion court are clearly erroneous. State v. Parker, 886 S.W.2d 908, 933 (Mo. banc 1994). The motion court's determination is clearly erroneous when the appellate court has a definite and firm impression that a mistake has been made. State v. Nolan, 872 S.W.2d 99, 104 (Mo. banc 1994). Furthermore, to establish a violation of his right to effective assistance of counsel, appellant must show that his counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances and that he was prejudiced thereby. Sanders v. State, 738 S.W.2d 856, 857 (Mo. banc 1987), citing Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065 (1984).

Additionally, in addressing ineffective assistance of appellate counsel, the Missouri Supreme Court has adopted the requirements outlined in Reuscher v.

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

Appellant was charged with two felonies in the Marion County Circuit Court, District 2, at Hannibal (L.F. 1, 7-8). Appellant waived formal arraignment and pled not guilty on October 16, 2001 (L.F. 1). Upon appellant's request, trial counsel filed a joint motion for change of judge and change of venue on October 18, 2001 (L.F. 1). Appellant's motion for change of venue was pursuant to Rule 32.03, which allows for an automatic change of venue from counties with a population less than 75,000, upon timely request. Marion County has less than 75,000 inhabitants[4], and appellant's request was within the time limitations for an automatic change of venue. Rule 32.03(a). Appellant's change of judge was granted first (L.F. 1-2). Subsequently, the newly appointed judge "sustained" appellant's request for change of venue, but only transferred the case to the Marion County Circuit Court, District 1, at Palmyra (L.F. 2). Appellant's case was subsequently tried in Palmyra (Tr. 1, 10, 127).

[4] The Official Manual of the State of Missouri lists the population of Marion County as 28,289.

Marion County is statutorily divided into two districts, each having exclusive original jurisdiction depending on the township where a matter arises. Section 478.720. That statute provides for transfer between districts when a case is filed in the incorrect district and for waiver of errors for improper filings in the wrong district if that issue is not timely raised. Section 478.720.6. Pursuant to Section 545.440, in counties holding criminal court in more than one location, change of venue requests shall be subject to the same rules as applicable from one county to another. However, the application of Section 545.440 is limited to counties where "… provision has been made by law for the taking of changes of venue in criminal causes from one of such places to another …."

Section 478.720, the statute authorizing two districts for Marion County, does not provide statutory law for a change of venue from one district to another. It only addresses transferring between districts when a case is improperly filed in the incorrect district and for waiver of that error. Further, the local court rules for the Tenth Judicial Circuit do not make any provision for transferring venue between districts when a matter has been properly filed in the correct district. Without statutory provisions for venue changes between the two districts, transferring venue between District 1 and District 2 does not sufficiently constitute an actual change of venue.

Rule 32.03, which establishes the procedure for a change of venue by right, states, "If a timely application is filed, the court immediately shall order the case transferred to some other county . . . ." Rule 32.03 does not make any provision

for transferring to another district within the same county. Section 545.440 does allow for such a transfer, but only if a provision of law authorizes moving venue from one district to another within a county. No such provision of law appears to have been established by statute, or even attempted by state or local rule.

It is reversible error for a trial judge to deny a timely filed Rule 32.03 motion for change of venue. Moss. v. State, supra. at 513. Also, in State v. Cella, 976 S.W.2d 543, 552 (Mo. App. E.D. 1998), this Court found plain error rising to the level of manifest injustice when the trial judge refused to recuse himself pursuant to a timely motion for an automatic change of judge. This Court reversed in that case without requiring a showing that the judge who heard the case was biased against the defendant. Id. at 552-553. Appellant's situation is analogous to Cella in that the prejudice is complete when he does not receive the change of venue to which he is entitled as a matter of right after making a timely request.

Because appellant was entitled to a true change of venue, the court was without jurisdiction to proceed other than to transfer the case to another county. The transfer to another district within the county was wholly insufficient to afford him his right to the change of venue to which he was entitled. In addition, this Court has determined that the two districts of Marion County are considered as one for certain purposes such as original filing. Klemme v. State, 812 S.W.2d 569, 571 (Mo. App. E.D. 1991). In Klemme, a defendant timely filed his post-conviction relief action in the wrong district. Id. at 570. This Court deemed that filing to be sufficient to establish jurisdiction in Marion County. Id. at 571. If a

filing in one district establishes jurisdiction in the whole of the county, a transfer between districts within the county cannot meet the requirements for a change of venue.

Reasonably competent trial counsel would have recognized that, under Missouri law, a change of venue requires transfer to another county, not simply to the other district within Marion County, and would have objected to that action by the trial court. An objection would have put the court on notice that its actions were not in compliance with the law on change of venue. Had counsel objected, he would have secured an appropriate change of venue on appellant's behalf. The trial court would have been compelled to grant a proper change of venue to another county at that point. If appellant's counsel had objected to the court transferring the case to another district within the county, appellant would have been given the proper change of venue to which he was entitled as a matter of right.

Likewise, the trial court's error in not providing appellant with a proper change of venue to another county was so obvious from the record that competent and effective appellate counsel would have recognized and asserted it. Appellant was prejudiced by his appellate counsel's failure in that the appellate court was not given the opportunity to review whether the mere transfer of the case to another district within the county was a sufficient change of venue. In State v. Cella, supra., the failure to grant the automatic change of judge was found to warrant reversal on plain error review, without further showing of bias or prejudice by the

trial court. Based on the logic of Cella, appellant's conviction would have been reversed on appeal even under the plain error standard, had counsel raised the issue on appeal. Had the trial court's improper action been properly challenged on direct appeal, a reasonable probability exists that the appellate court would have reversed appellant's conviction.

Moreover, the choices made by counsel must be reasonable and considered sound strategy to withstand a claim of ineffective assistance of counsel. Holman v. State, 88 S.W.3d 105, 110 (Mo. App. E.D. 2002). The decisions made in this case by trial and appellate counsel were neither sound nor reasonable. To not object when the court failed to provide a proper change of venue to another county as required under the law was patently unreasonable. And to not challenge the trial court's failure to provide a proper change of venue on direct appeal is similarly unreasonable. No sound reason exists under the circumstances of appellant's case to have not made such an objection, and to have not properly challenged the trial court's failure on appeal. Both appellant's trial and appellate counsel simply failed to protect appellant's rights, and appellant was harmed by their failure.

Appellant has established that his trial and appellate counsel failed to exercise the customary skill and diligence of a reasonably competent attorney, and that he was prejudiced by their ineffectiveness. Had trial counsel objected to the transfer to another district within the county as improper and inadequate to meet the requirements for a change of venue, appellant would have been given the

proper change of venue to which he was entitled, and had appellate counsel challenged the trial court's failure to provide a proper change of venue, there is a reasonable probability that appellant's convictions would have been reversed. As such, appellant respectfully requests that this Court reverse the motion court's denial of his Rule 29.15 motion and order a new trial.

ARGUMENT

II.

The motion court clearly erred in denying appellant's Rule 29.15 motion for post-conviction relief because a review of the record leaves a definite and firm impression that appellant was denied due process of law, equal protection under the law, and effective assistance of counsel pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that the jury pool was not selected at random from a fair cross-section of the citizens of Marion County in violation of Sections 494.400 through 494.505, and appellant's trial counsel failed to challenge the jury selection process prior to trial. Appellant was prejudiced in that, by artificially manipulating the available pool of jurors, the selection process affected the fairness and impartiality of the jury, and had trial counsel objected that the jury pool was not in compliance with the governing statutes, a reasonable probability exists that appellant would have been afforded the unbiased jury, selected from a fair cross-section of the county, to which he was entitled as a matter of right.

The jury pool selection process used in Marion County does not comply with Sections 494.400 through 494.505. As a result, appellant's state and federal constitutional rights to due process, equal protection, and a representative jury drawn from a fair cross-section of the community were violated. Appellant was

also denied effective assistance of counsel when his trial counsel failed to challenge the selection process prior to trial.

The scope of review of the denial of a Rule 29.15 motion is whether the findings of fact and conclusions of law of the motion court are clearly erroneous. State v. Parker, 886 S.W.2d 908, 933 (Mo. banc 1994). The motion court's determination is clearly erroneous when the appellate court has a definite and firm impression that a mistake has been made. State v. Nolan, 872 S.W.2d 99, 104 (Mo. banc 1994). Furthermore, to establish a violation of his right to effective assistance of counsel, appellant must show that his counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances and that he was prejudiced thereby. Sanders v. State, 738 S.W.2d 856, 857 (Mo. banc 1987), citing Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065 (1984).

It is well established that a criminal defendant has a constitutional right to the unbiased selection of a jury drawn from a fair cross-section of the community. State v. Brooks, 960 S.W.2d 479, 487 (Mo. banc 1997). The Sixth and Fourteenth Amendments also require that jury selection procedures not violate the venirepersons' right to equal protection. Taylor v. Louisiana, 419 U.S. 522, 526-527, 95 S.Ct. 692, 696 (1975). The fair cross-section right is essential to fulfill the Sixth Amendment's guarantee of an impartial jury in criminal trials. Id. In part because venirepersons lack the opportunity to even lodge the challenge, defendants in criminal cases have standing to raise the excluded venirepersons'

equal protection challenge. Powers v. Ohio, 499 U.S. 400, 415, 111 S.Ct. 1364, 1373 (1991). "Given the requirements of the Sixth Amendment and the importance of both the reality and appearance of fairness in our criminal justice system, creating a jury pool that represents a fair cross section of the community is a compelling governmental interest." United States v. Ovalle, 136 F.3d 1092, 1106 (6th Cir. 1998).

To comply with the foregoing constitutional provisions, the Missouri Legislature promulgated Section 494.400, which states:

> All persons qualified for grand or petit jury service shall be citizens of the state and *shall be selected at random from a fair cross section of the citizens of the county* . . . and all such citizens shall have the opportunity to be considered for jury service and an obligation to serve as jurors when summoned for that purpose. [Emphasis added].

Pursuant to Section 478.720, Marion County is divided into two districts: District 1, at Palmyra, and District 2, at Hannibal. It is the practice of the jury commission in Marion County, or the designated officer of the Marion County Circuit Court, to select potential jurors for each district from their respective district. In other words, the jury pool for cases tried in the Palmyra district is selected from citizens residing in the Palmyra district, and the jury pool for cases tried in the Hannibal district is selected from citizens residing in the Hannibal

district. This process of jury selection is not authorized by Section 478.720 or by Sections 494.400 through 494.505.

Section 494.410.1 RSMo requires that the county jury commissioner board compile a master jury list of potential jurors and their addresses, updating the list periodically.

> The master jury list shall be comprised of not less than five percent of the *total population of the county*…as determined from the last decennial census. In no event shall the master jury list contain less than four hundred names….The master jury list shall be the result of random selection of names from public records.

Id. [Emphasis added]. Jurors not qualified to serve because of age, citizenship, residency, felony conviction, or otherwise pursuant to Section 494.425 are to be notified by the board that their service is not required. Section 494.415.2. "Upon application by a prospective juror, the jury supervisor or board of jury commissioners, acting in accordance with written guidelines adopted by the circuit court, may postpone that prospective juror's service to a later date." Section 494.415.3. There is no statute that authorizes the jury commissioner, or designated officer of the court, to disqualify a resident of the Palmyra district from serving on a jury in the Hannibal district.

Section 494.465 provides that a party may move for appropriate relief within fourteen days after the moving party discovers that the jury selection process fails to comply substantially with the declared policy of Sections 494.400 through 494.505. The policy is that no citizen may be excluded from jury selection because of race, color, religion, sex, national origin, or economic status, and selection must be random, from a fair cross-section of the county's citizenry. Section 494.400.

The question becomes then whether the jury selection process complies with the governing statutes.

> We do not mean to say that there was any fraud practiced in this case. That is beside the point. The legislature has seen fit to prescribe the manner of selecting juries. The officers charged with this duty must at least substantially comply with the procedure prescribed. Courts are not authorized to ignore, emasculate, or set aside the statutory provisions.

State v. Gresham, 637 S.W.2d 20, 26 (Mo. banc 1982), citing State v. McGoldrick, 236 S.W.2d 306, 308 (Mo. 1951).

The procedures followed in Marion County clearly violate the statutory mandate. The procedures affect the randomness of the selection process by their manipulation of the available pool of names. As a result, appellant was denied a fair cross-section of the county, a structural error, which necessarily rendered his

trial fundamentally unfair.[5] Reasonably competent counsel would have challenged the jury pool on that basis. Yet, appellant's trial counsel did nothing.

Appellant's trial counsel knew of the jury pool selection practices in Marion County, yet failed to challenge the jury pool on the grounds that there had been a "substantial failure to comply with the declared policies of Sections 494.400 to 494.505." Section 494.465. A reasonably competent attorney in similar circumstances would have challenged the jury pool and moved to stay the proceedings until such time as the Marion County jury commission, or its designated officer of the court, revised its jury pool selection practice to comply with the polices of Sections 494.400 through 494.505.

Appellant was prejudiced in that, due to the non-compliant selection procedure and trial counsel's failure to challenge that procedure, the jury did not consist of a random selection of a fair cross-section of the citizens of Marion County, which rendered appellant's trial fundamentally unfair. Had the jury pool been in compliance with the statutes, appellant's constitutional rights would not have been violated, and appellant would have been afforded the unbiased jury selected from a fair cross-section of the county to which he was entitled.

Moreover, an attorney's discretion is not absolute. The choices made by counsel at trial must be reasonable and considered sound trial strategy to defeat a

[5] See: State v. Goucher, 111 S.W.3d 915, 917 (Mo. App. S.D. 2003); Arizona v. Fulminante, 499 U.S. 279, 309-310, 111 S.Ct. 1246, 1264-1265 (1991).

claim of ineffective assistance of counsel. Holman v. State, 88 S.W.3d 105, 110 (Mo. App. E.D. 2002). Trial counsel's decisions in this case were neither reasonable nor sound. Rather, to not challenge a jury selection process that does not comply with the governing statutes or constitutional mandates was patently unreasonable. Trial counsel simply failed to protect appellant's constitutional rights, and appellant was prejudiced by that failure..

Appellant has established that he was denied due process of law and equal protection under the law, that his trial counsel failed to exercise the customary skill and diligence of a reasonably competent attorney, and that he was prejudiced thereby. A reasonable probability exists that, if appellant's trial counsel had objected to the improper jury pool, appellant's constitutional rights would not have been violated. As such, appellant respectfully requests that this Court reverse the denial of his Rule 29.15 motion and order a new trial.

ARGUMENT

III.

The motion court clearly erred in denying appellant's Rule 29.15 motion without granting an evidentiary hearing because appellant's motion pleaded factual allegations which, if proven, would warrant relief and which are not refuted by the record in that appellant claimed he was denied his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Section 18 (a) of the Missouri Constitution, and that he was prejudiced thereby, because his trial counsel failed to introduce evidence of possible alternative sources of the cocaine allegedly sold to Craig Haley by appellant on December 9, 1999.

The motion court clearly erred in denying appellant's Rule 29.15 motion without granting an evidentiary hearing. Review of the motion court's denial is limited to determining whether the findings of fact and conclusions of law of the motion court are clearly erroneous. State v. Parker, 886 S.W.2d 908, 933 (Mo. banc 1994). The motion court's determination is clearly erroneous when the appellate court has a definite and firm impression that a mistake has been made. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). Appellant has alleged that he received ineffective assistance of counsel in that his trial counsel failed to introduce evidence of alternative sources of the cocaine allegedly sold to Craig Haley by appellant.

Appellant is entitled to a hearing if he has pled facts in his motion which, if true, would entitle him to relief and such factual allegations are not refuted by the files and records of the case. State v. Starks, 856 S.W.2d 334, 336 (Mo. banc 1993). The issue in this case is whether the motion court erred in refusing to grant appellant an evidentiary hearing on his Rule 29.15 motion, not whether appellant is entitled to relief. Masden v. State, 62 S.W.3d 661, 664 (Mo. App. W.D. 2001).

The evidence against appellant on the December 9, 1999 charge consisted essentially of the testimony of Craig Haley (Tr. 164-175). None of the officers witnessed the alleged transaction, the tape of the transaction did not provide any support for the allegation that appellant sold Haley the drugs, and the physical evidence was not linked to appellant except by Haley's testimony.

Because of this dependence on Haley's testimony, the state presented substantial evidence as to the procedures followed by the investigators to ensure the credibility of the transaction (Tr. 134-143). They searched Haley thoroughly before and after the alleged transaction (Tr. 136-138, 143). However, no officers were in position to verify that Haley obtained the cocaine from appellant, as opposed to getting it from someone else in the lounge that night. Appellant testified that he was indeed in the lounge that night but that Haley did not ask him for any drugs, and that he did not sell or deliver any drugs to Haley (Tr. 266-268).

As part of discovery from the state, counsel received a document entitled "NEMO TASK FORCE INTELLIGENCE REPORT", which indicated CI#287 (Craig Haley) advised officers that Deena Haley had allegedly stolen

approximately four ounces of crack cocaine from Euron Matthews (appellant's brother) sometime between December 6 and December 11, 1999. CI#287 advised that shortly after this alleged theft, Deena Haley had been in possession of a large quantity of crack cocaine. Deena Haley and Craig Haley are related. Evidence that Deena Haley possibly had a supply of crack at or near the time that this alleged transaction occurred, and that Craig was aware of her possession of such drugs, is relevant to provide a possible alternative source for the drugs Haley provided to officers, which he claimed he purchased from appellant. The transaction took place in a public location with an unknown number of unidentified persons around. Haley had motive to give authorities some drug dealers to avoid going to prison. Evidence of this alternative source for the cocaine would have significantly diminished the reliability of Haley's testimony.

In addition to the information about Deena Haley provided to counsel in discovery, appellant advised counsel that another relative of Craig Haley, Tina Haley, was available and willing to testify that during this period in December, 1999, Craig Haley possessed, used, and even sold crack cocaine. Her testimony would have provided additional evidence amounting to an alternative source for the drugs allegedly purchased from appellant.

The alleged transaction between appellant and Haley took place in a public location, which had not been secured or searched by officers. Haley contacted officers advising that he could make a purchase. It is arguable to a jury that he had previously hidden some of his own drugs in the bar so that he could obtain them,

provide them to investigators, and then name someone as the seller. Haley actually conducted a large number of alleged "buys" for the task force, resulting in numerous charges against many persons. Evidence of Haley's personal possession, use, and delivery of cocaine would significantly undermine his credibility by providing an alternative source for the drugs he allegedly purchased from appellant.

Counsel was aware of the allegations involving Deena Haley's theft of crack cocaine and of Tina Haley's possible testimony regarding Craig's use and delivery of crack cocaine, both during the time period of this alleged transaction with appellant. A reasonably competent attorney would have introduced evidence of both of these issues to show alternative sources for the cocaine Craig Haley supplied to investigators. A reasonable probability exists that, with the introduction of such evidence, the result of appellant's trial would have been different. This allegation presents facts warranting relief under Rule 29.15 by so depriving appellant of effective assistance of counsel that he was thereby denied a fair trial.

The Sixth Amendment's guarantee that an accused shall have the right to assistance of counsel applies to state prosecutions via the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 334, 83 S.Ct. 792 (1963); Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975). This guarantee would be little more than an empty promise if it did not also require such assistance of counsel to be effective.

Cuyler v. Sullivan, 466 U.S. 335, 100 S.Ct. 1708 (1980); Sanders v. State, 738 S.W.2d 856 (Mo. banc 1987).

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

Appellant has alleged that his trial counsel failed to introduce evidence of possible alternative sources for the cocaine allegedly sold to Craig Haley by appellant. An evidentiary hearing would allow appellant to establish how such evidence would have supported his defense, would have raised a reasonable doubt with the jury, and would have changed the outcome of appellant's trial. Establishing such facts is exactly why an evidentiary hearing should be held. The post-conviction motion is merely a pleading asserting factual allegations. Such facts must be established through evidence and testimony, and that can only be done in an evidentiary hearing.

While the decision of whether to present particular evidence may appear initially as trial strategy within the discretion of the trial attorney, the decision in this case to not present evidence of alternative sources for the cocaine Craig Haley allegedly purchased from appellant could have just as easily been an inadvertent mistake on the part of trial counsel. There is no way to know without an evidentiary hearing to determine trial counsel's intentions and state of mind.

Furthermore, an attorney's discretion is not absolute. The choices made by counsel at trial must be reasonable and considered sound trial strategy to defeat a claim of ineffective assistance of counsel. Holman v. State, 88 S.W.3d 105, 110 (Mo. App. E.D. 2002). An evidentiary hearing would provide appellant the opportunity to show his trial counsel's choices were unsound and unreasonable.

Appellant has alleged facts not refuted by the record which demonstrate deficiencies in the performance of his trial counsel. Counsel's errors were critical to the outcome of this case. Appellant should be given the opportunity to establish his counsel's ineffectiveness, and prejudice arising therefrom, in an evidentiary hearing. Thus, appellant respectfully requests this Court remand this cause with direction that an evidentiary hearing be held on appellant's Rule 29.15 motion.

ARGUMENT

IV.

The motion court clearly erred in denying appellant's Rule 29.15 motion without granting an evidentiary hearing because appellant's motion pleaded factual allegations which, if proven, would warrant relief and which are not refuted by the record in that appellant claimed he was denied his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Section 18 (a) of the Missouri Constitution, and that he was prejudiced thereby, because his trial counsel failed to introduce, and play for the jury, the surveillance tape recordings of the alleged drug transactions.

The motion court clearly erred in denying appellant's Rule 29.15 motion without granting an evidentiary hearing. Review of the motion court's denial is limited to determining whether the findings of fact and conclusions of law of the motion court are clearly erroneous. State v. Parker, 886 S.W.2d 908, 933 (Mo. banc 1994). The motion court's determination is clearly erroneous when the appellate court has a definite and firm impression that a mistake has been made. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). Appellant has alleged that he received ineffective assistance of counsel in that his trial counsel failed to play the surveillance tape recordings of the alleged drug transactions for the jury.

Appellant is entitled to a hearing if he has pled facts in his motion which, if true, would entitle him to relief and such factual allegations are not refuted by the

files and records of the case. State v. Starks, 856 S.W.2d 334, 336 (Mo. banc 1993). The issue in this case is whether the motion court erred in refusing to grant appellant an evidentiary hearing on his Rule 29.15 motion, not whether appellant is entitled to relief. Masden v. State, 62 S.W.3d 661, 664 (Mo. App. W.D. 2001).

Both of the alleged confidential informants involved in these transactions were equipped with body microphones, which transmitted to some degree the sounds around the informants throughout the alleged transactions (Tr. 136-138, 201). Appellant listened to the tapes of both transactions on at least two occasions. Appellant asked trial counsel to play the tapes for the jury as evidence so that they could hear that the tapes did not contain any alleged transactions between appellant and the informants. Counsel refused to play the tapes and made a record that he was refusing appellant's request to do so (Tr. 264). Appellant maintains that counsel's decision was unreasonable under the circumstances and facts of his case.

Appellant alleges that the tapes were sufficiently audible to allow an argument that, had appellant been involved in a transaction with either individual, it would have been discernable on the recordings. Appellant further alleges that the tapes actually indicate that at least one of the informants can be heard arranging a drug buy with someone other than appellant.

The state's evidence hinges on the testimony of each confidential informant that they obtained crack cocaine from appellant. The lack of any evidence on the

tapes to verify their testimony would cast substantial doubt on the testimony of each.

In addition, the extent of general conversation on the tapes would have furthered the argument that either informant could have obtained drugs from an alternative source while in the bar. The bar was not searched or secured to ensure that drugs were not previously hidden in the bar prior to the alleged transactions. There were numerous unidentified persons in the bar who could have provided the drugs, either in a transaction, or in collusion with the informants to fake transactions in order to ensure goodwill toward the informants by police and prosecutors.

Playing the surveillance tapes for the jury would have furthered this argument by highlighting the lack of evidence of a transaction involving appellant and by demonstrating the facts and circumstances surrounding the time period when the informants were out of sight and control of task force investigators. A reasonably competent attorney would have played the tapes for the jury. A reasonable probability exists that, with the introduction of the surveillance tape recordings, the result of appellant's trial would have been different. This allegation presents facts warranting relief under Rule 29.15 by so depriving appellant of effective assistance of counsel that he was thereby denied a fair trial.

The Sixth Amendment's guarantee that an accused shall have the right to assistance of counsel applies to state prosecutions via the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 334, 83 S.Ct. 792 (1963); Faretta v. California,

422 U.S. 806, 95 S.Ct. 2525 (1975). This guarantee would be little more than an empty promise if it did not also require such assistance of counsel to be effective. Cuyler v. Sullivan, 466 U.S. 335, 100 S.Ct. 1708 (1980); Sanders v. State, 738 S.W.2d 856 (Mo. banc 1987).

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

Appellant has alleged that his trial counsel unreasonably failed to introduce, and play for the jury, the surveillance tape recordings of the alleged drug transactions. An evidentiary hearing would allow appellant to establish how the surveillance tapes would have supported his defense, would have raised a reasonable doubt with the jury, and would have changed the outcome of appellant's trial.

In addition, within its decision, the motion court speculated that the tapes could have bolstered the informants' testimony and been detrimental to appellant's defense (PCR L.F. 33). However, establishing the facts is exactly why an evidentiary hearing should be held. The post-conviction motion is merely a pleading asserting factual allegations. Such facts must be established through evidence and testimony, and that can only be done in an evidentiary hearing.

While the decision of whether to present particular evidence may appear initially as trial strategy within the discretion of the trial attorney, the decision in this case to not present appellant's exculpatory statements to non-law enforcement persons could have just as easily been an inadvertent mistake on the part of trial counsel. There is no way to know without an evidentiary hearing to determine trial counsel's intentions and state of mind.

Furthermore, an attorney's discretion is not absolute. The choices made by counsel at trial must be reasonable and considered sound trial strategy to defeat a claim of ineffective assistance of counsel. Holman v. State, 88 S.W.3d 105, 110 (Mo. App. E.D. 2002). An evidentiary hearing would provide appellant the opportunity to show his trial counsel's choices were unsound and unreasonable.

Appellant has alleged facts not refuted by the record which demonstrate deficiencies in the performance of his trial counsel. Counsel's errors were critical to the outcome of this case. Appellant should be given the opportunity to establish his counsel's ineffectiveness, and prejudice arising therefrom, in an evidentiary

hearing. Thus, appellant respectfully requests this Court remand this cause with direction that an evidentiary hearing be held on appellant's Rule 29.15 motion.

CONCLUSION

For the foregoing reasons, as set out in appellant's Arguments I and II, appellant respectfully requests that this Court reverse the motion court's denial of post-conviction relief and remand for a new trial; or in the alternative, as set out in appellant's Arguments III and IV, reverse and remand for an evidentiary hearing.

Respectfully Submitted,

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Certificate of Compliance and Service

I, Mark A. Grothoff, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b) and Special Rule 1(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 8,788 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in June, 2004. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 23rd day of September, 2004, to Deborah Daniels, Chief Counsel, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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Mark A. Grothoff