**No. SC 84331**

---

**IN THE**
**SUPREME COURT OF MISSOURI**

---

**JAMES WASHINGTON, JR.,**

**Appellant,**

**v.**

**STATE OF MISSOURI,**

**Respondent.**

---

APPEAL FROM THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI
SEVENTH JUDICIAL CIRCUIT, DIVISION ONE
THE HONORABLE MICHAEL J. MALONEY, JUDGE

---

# APPELLANT'S SUBSTITUTE BRIEF

---

JOHN M. SCHILMOELLER
Missouri Bar No. 42852
Attorney for Appellant
Office of State Public Defender
818 Grand, Suite 200
Kansas City, Missouri 64106-1910
Telephone: (816) 889-7699
Facsimile: (816) 889-2001

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES CITED

### Cases



### 8



### Constitutional Provisions



### Statutes



### Rules

## JURISDICTIONAL STATEMENT

James Washington, Jr., appeals the denial of his Rule 29.15 motion for postconviction relief, which was denied following an evidentiary hearing by the Honorable Michael J. Maloney, Judge of the Circuit Court of Clay County, Missouri. Mr. Washington sought to vacate his conviction of robbery in the first degree, Section 569.020, RSMo 1994[1], for which the trial court sentenced Mr. Washington to 20 years' imprisonment.

On January 22, 2002, the Missouri Court of Appeals, Western District, affirmed the denial of Mr. Washington's Rule 29.15 motion. On February 6, 2002, Mr. Washington timely filed a motion for rehearing or, in the alternative, application for transfer, which was denied on March 5, 2002. On March 20, 2002, Mr. Washington timely filed an application for transfer in this Court. On May 28, 2002, this Court sustained Mr. Washington's application for transfer. Therefore, the Missouri Supreme Court has jurisdiction to review this case.

[1] All further statutory references will be to RSMo 1994, unless otherwise noted.

## STATEMENT OF FACTS

### I. Evidence Presented at Trial

On the evening November 25, 1996, while Janice Siegried worked at the Montgomery Wards in the Metro North Mall in Clay County, she saw a black male walk out of the store carrying a blue and white box, the kind for "CD's and VCR's" in the Electric Avenue department (Tr. 336-337, 378, 446-447)[2]. The man, who was about 5'8" and was wearing a trench coat, looked over his shoulder repeatedly as he left (Tr. 446-447, 454-455). Ms. Siegried went to the Electric Avenue department to ask if a purchase had been made, and the salesman in the area, Louis Lyons, said no (Tr. 447). Ms. Siegried paged the security officer, Alan Lowry, and told Lowry what she had seen (Tr. 447-448). Mr. Lowry told Siegried to notify him if she saw the man in the store again (Tr. 379, 448).

Later, Ms. Siegried again saw the man carrying another blue and white box "that CD's and VCR's come in" (Tr. 449). She saw him leave the Electric Avenue department, walk through the apparel department, and head toward the doors (Tr. 449). Ms. Siegried paged Mr. Lowry, who responded immediately (Tr. 449). She told Mr. Lowry that the man was headed out the door, and Lowry went after him (Tr. 389, 449). At the same

[2] The record on appeal will be referenced as follows: "Transcript on Appeal" from direct appeal No. WD 55671—(Tr.); "Legal File" from direct appeal No. WD 55671—(L.F.); "29.15 Postconviction Relief Legal File"—(PCR L.F.); "Evidentiary Hearing Transcript"—(H. Tr.).

time, Mr. Lyons followed behind the man as he went toward the doors (Tr. 378, 461-463).

Mr. Lowry followed the man out of the doors (Tr. 390). As he did so, he passed another black man, whom he would later encounter in the parking lot (Tr. 390). Lowry saw the first man throw the box into the back of an Aerostar van, which was parked next to the curb (Tr. 390). While the man went around the van to get in the driver's side, Mr. Lowry got into the van on the passenger's side (Tr. 392-393, 464). The man looked at Mr. Lowry and told him to get out of the van (Tr. 393). The man started the van and began driving across the parking lot (Tr. 393-394).

Mr. Lowry reached over and turned off the key in the ignition, stopping the van (Tr. 395). As the van stopped, the passenger's side door opened, and the man Lowry had passed on his way out of the store grabbed Lowry by the arm and tried to pull him out of the van (Tr. 395). At the same time, the man in the driver's seat kicked at Mr. Lowry and told the other man to shoot Lowry (Tr. 395). After a brief struggle, the second man pierced Mr. Lowry's arm with a "shiny object" like an "ice hook or a meat hook" (Tr. 395-396). Eventually, the second man succeeded in removing Lowry from the van, and the second man got into the passenger's seat (Tr. 395-396). The two men were able to leave the parking lot in the van (Tr. 395).

In describing the incident to the police, Mr. Lowry stated that the men had driven away in a white Ford Aerostar van with Kansas plates, which he recalled as 1-2-?-2-5-J (Tr. 397). Lowry stated that the first man was black, 5'10", about 190 pounds, and 20-30 years of age (Tr. 416-418). He noted that the second man was black, 5'10", 160 pounds,

and 20-30 years of age (Tr. 416-417, 420). Ms. Siegried described the first man as black, 5'8", wearing a trench coat (Tr. 454-455). She described the second man as black or Hispanic, three to four inches shorter than the first man (Tr. 455-456).

On December 9, 1996, law enforcement personnel stopped a van in Platte County, with Missouri plates 1-P-1-2-5-G, that was occupied by Mr. Washington and Walter White (Tr. 372-373). Mr. Washington had obtained gas from a gas station in St. Joseph, realized he did not have the money needed to pay for the gas, and drove away without paying (Tr. 373-375). Mr. Washington explained that he was too embarrassed by the situation to explain his lack of money to the gas station clerk (Tr. 374-375).

The next day, at the Buchanan County Jail, Officer Aric Anderson interviewed Mr. Washington (Tr. 296-297, 317, 320-321). Mr. Washington told Officer Anderson that he was 45 years of age, was 5'11", and weighed 215 pounds (Tr. 324, 356). He told Officer Anderson that the van he had been traveling in was not his, and that he had rented the van from a man named Alonzo Wyatt in exchange for crack cocaine (Tr. 333-334). When Anderson asked Washington if he had committed any robberies, Mr. Washington said no (Tr. 334). When Anderson asked Washington specifically about the robbery at Metro North Mall, Washington asked if it involved a shoplifting (Tr. 336).

Officer Anderson met with Mr. Lowry on December 13, 1996 (Tr. 337). He received a statement from Mr. Lowry, and showed Mr. Lowry two photo spreads (Tr. 337-353). With respect to the first photo spread, Mr. Lowry told Anderson that two of the photos were of men who looked "similar" to the men who committed the robbery on November 25$^{th}$ (Tr. 343-347, 423). After this tentative identification, Officer Anderson

showed Lowry a second photo spread, which contained photos of Mr. Washington and Mr. White (Tr. 339, 398-399, 423-424). Mr. Lowry identified Washington and White (Tr. 339-340, 398-399, 424-426). Mr. Lowry again identified Mr. Washington at trial as the man involved in the robbery (Tr. 399).

Ms. Siegried attended a deposition on May 28, 1997, during which the prosecuting attorney handed her a single photograph of Mr. Washington (Tr. 456-457). At that time, Ms. Siegried identified Mr. Washington as the man involved in the robbery (Tr. 456-457). Siegried also identified Mr. Washington at trial as the man who took merchandise from the store (Tr. 447). During her deposition, Ms. Siegried stated she had seen Washington in the store a couple of times after the robbery, once in February 1997 (Tr. 457-458). At trial, after learning that Washington had been incarcerated from January 1997 to the time of trial, Siegried stated that she had seen someone "similar" (Tr. 457-458).

Mr. Lyons also testified at trial (Tr. 461-471). Even though he did not give a description of the robbery suspect to police on the day of the incident (Tr. 465), and even though he only saw the suspect for a short period of time, "[m]ainly the back of his head," (Tr. 469), Mr. Lyons identified Mr. Washington as the man who took merchandise from Montgomery Wards on the date in question (Tr. 464).

Mr. Washington presented evidence at trial that on the evening of November 25, 1996, he was working at the New Fashioneers clothing store at 4340 Troost in Kansas City (Tr. 493-494, 520-521). Dewayne Humphrey, who owned the store, testified that he and Mr. Washington—who was an investor in the store and worked there as well—were

at the store, as was a customer, Anthony Arnold (Tr. 494-496, 520-522). Mr. Washington and Mr. Humphrey had some drinks that evening, in celebration of Washington's brother's birthday (Tr. 499-500, 524-525). Mr. Washington was at the store with Mr. Humphrey until about 10:00 p.m. on the 25th (Tr. 525-526).

## II. Procedural History and Postconviction Proceedings

The state charged Mr. Washington with the class A felony of robbery in the first degree, Section 569.020, in that he "forcibly stole a compact disc player in the possession of Montgomery Wards" (L.F. 12). The state later amended the charge against Mr. Washington to allege that Washington was a prior and persistent offender (L.F. 15). The cause proceeded to trial before a jury on January 5, 1998, in the Circuit Court of Clay County, Missouri, with the Honorable Michael J. Maloney presiding (Tr. 249-611). The evidence adduced at trial is summarized above.

Prior to trial, at a hearing on a motion to suppress, John Tennison testified that as a Loss Prevention Manager for Montgomery Wards, he had contact with Mr. Lowry regarding the incident that took place on November 25, 1996 (Tr. 94-95). Mr. Tennison indicated that Mr. Lowry had shown him a surveillance videotape from November 25, 1996, which depicted the suspect in the robbery (Tr. 95-97). Mr. Washington's trial counsel examined Mr. Tennison about the videotape (Tr. 95-97), but no videotape was produced or introduced at the pretrial hearing, or at trial.

The jury received an instruction on the charged offense of first degree robbery (L.F. 74). As part of that instruction, the jury was required to find that Mr. Washington

"retained possession of a compact disk player or VCR which was property owned by Montgomery Wards" to return a guilty verdict (L.F. 74).

During closing arguments, Mr. Washington's trial counsel told the jury about his performance at trial: "I think there's more I should do, more I should say, but I don't know what it would be. I'm scared too [sic] death, scared too [sic] death that I haven't done enough, that I haven't been good enough, I did something wrong." (Tr. 589). Later, at the hearing on the motion for new trial, Mr. Washington's trial counsel noted for the court that "perhaps if Mr. Washington had a better lawyer the result would have been much different." (Tr. 625).

The jury found Mr. Washington guilty of first degree robbery as charged (L.F. 81; Tr. 609-611). On April 2, 1998, the trial court sentenced Mr. Washington to 20 years' imprisonment in the Missouri Department of Corrections for his conviction, and ordered that the sentence be served consecutively to any other sentences previously imposed against Mr. Washington (L.F. 127-128; Tr. 614, 634). Mr. Washington was delivered to the custody of the Department of Corrections on September 1, 1997 (PCR L.F. 34). Mr. Washington filed a notice of appeal to the Court of Appeals, Western District, on April 7, 1998 (L.F. 130). In an Order filed July 13, 1999, Appeal No. WD 55671, the Court of Appeals denied Mr. Washington's direct appeal and affirmed his conviction (PCR L.F. 34). The Court of Appeals issued the mandate in Mr. Washington's direct appeal on October 26, 1999 (PCR L.F. 34).

Mr. Washington filed his *pro se* Rule 29.15 motion on December 14, 1999 (PCR L.F. 1-26). The motion court appointed postconviction counsel to represent Mr.

Washington and granted postconviction counsel an extension of time in which to file an amended Rule 29.15 motion (PCR L.F. 27). On March 14, 2000, Mr. Washington's postconviction counsel filed an amended motion to vacate, set aside or correct the judgment and sentence (PCR L.F. 33-75).

In the amended motion, Mr. Washington alleged in pertinent part that his trial counsel was ineffective for the following reasons: (1) failing to object to the fatal variance between the charging document and the verdict directing instruction which was submitted to the jury; (2) failing to request and receive a continuance for the purpose of obtaining the surveillance video from Montgomery Wards, which depicted the person who committed the robbery; (3) failing to interview and depose state's witness Louis Lyons prior to trial, and to object to Lyons's testimony at trial, because Lyons's identification of Mr. Washington was due to the fact that Washington had been pointed out as the robber by other witnesses at a pretrial hearing; and (4) failing to object during the deposition of Janice Siegried when the prosecutor showed Siegried a single photograph of Mr. Washington and asked her whether she had seen that man (PCR L.F. 36-39, 42-43).

On August 18, 2000, the motion court held an evidentiary hearing on the claims raised in Mr. Washington's Rule 29.15 motion (H. Tr. 3-79). The evidence presented at the hearing, in pertinent part, was as follows: Mr. Washington testified that during the closing argument portion of the trial, his trial counsel "broke down emotionally" and began crying (H. Tr. 12). He recalled trial counsel telling the jury that counsel had "erred" and "made mistakes," and that he was "scared to death" because of such

mistakes (H. Tr. 12-13). Mr. Washington testified that trial counsel continued to explain his mistakes at the hearing on the motion for new trial (H. Tr. 13-14).

Mr. Washington and trial counsel planned to present as a defense certain alibi witnesses, and to show that the state's witnesses had misidentified him as the perpetrator of the robbery (H. Tr. 17-18). Mr. Washington recalled that at a pretrial hearing on the motion to suppress, Ms. Siegried and Mr. Tennison made contact with Louis Lyons just outside the doors to the courtroom (H. Tr. 19-20). Washington watched as Siegried and Tennison pointed out Mr. Washington for Mr. Lyons (H. Tr. 20).

Before the trial, Mr. Washington and trial counsel also discussed obtaining the surveillance videotape from Montgomery Wards (H. Tr. 33-34). Mr. Washington never was able to view the video, because trial counsel never obtained the video, nor did trial counsel make attempts to get the video, to Mr. Washington's knowledge (H. Tr. 34).

Mr. Washington's trial counsel, Stuart Kahn, testified that the defense in Mr. Washington's trial was misidentification (H. Tr. 37). To that end, trial counsel filed a motion to suppress identification prior to trial (H. Tr. 37). Trial counsel acknowledged that any failure to object in furtherance of pretrial motions to suppress or exclude evidence would not have been a matter of trial strategy, but simply attorney error (H. Tr. 37-38).

Mr. Washington's trial counsel recalled the pretrial hearing when Mr. Lyons was present (H. Tr. 39-40). He recalled, consistent with Mr. Washington's recollection, that Lyons stood with Mr. Tennison and Ms. Siegried just outside the main doors leading into the courtroom (H. Tr. 40). Trial counsel noted that they were looking through the

windows of the door and pointing into the courtroom, at Mr. Washington (H. Tr. 40). Trial counsel did not recall trying to suppress Lyons's identification of Washington based on this contact, but did remember trying to examine Mr. Lyons at trial about the incident (Tr. 467; H. Tr. 40-42). However, trial counsel merely made some suggestive comments about Mr. Lyons's identification, and did not conduct proper questioning of Mr. Lyons on the issue (H. Tr. 42).

Trial counsel testified that he recalled statements from some of the Montgomery Wards employees indicating the existence of a surveillance videotape (H. Tr. 42-43). Trial counsel did not obtain such a videotape, though, and did not recall making any formal requests for such tape (H. Tr. 43). Trial counsel acknowledged that he should have subpoenaed the custodian of records for Montgomery Wards for all videotapes on and around the time of the alleged offense (H. Tr. 43).

Trial counsel spoke to Mr. Lyons prior to trial, in an effort to get a description of the person Lyons saw taking the merchandise (H. Tr. 44). Trial counsel acknowledged that he should have shown Lyons photographs, with and without Mr. Washington's photo included, but he did not do so (H. Tr. 44).

When trial counsel remarked, at the hearing on the motion for new trial, that Mr. Washington could have had a "better lawyer," he was commenting on several shortcomings in his performance at and before trial (H. Tr. 46-47). He believed that he should have developed the time line and alibi for Mr. Washington at the New Fashioneers more thoroughly (H. Tr. 47). He should have worked more closely with the intern to develop his questions for the defense witnesses (H. Tr. 47). He felt that he should have

obtained the surveillance videotape from Montgomery Wards to determine the identity of the robber (H. Tr. 47). Trial counsel believed that he should have pointed out the wide discrepancies in the identifications by the state's witnesses, and attacked the whole identification process more thoroughly (H. Tr. 47-48).

On August 29, 2000, the motion court entered findings of fact and conclusions of law denying Mr. Washington's Rule 29.15 motion (PCR L.F. 87-93). Mr. Washington filed a timely notice of appeal on October 4, 2000 (PCR L.F. 95-97). On January 22, 2002, the Missouri Court of Appeals, Western District, affirmed the denial of Mr. Washington's Rule 29.15 motion. **See James Washington, Jr. v. State**, No. WD 59123 (Mo.App. W.D., January 22, 2002). On February 6, 2002, Mr. Washington timely filed a motion for rehearing or, in the alternative, application for transfer, which the Court of Appeals denied on March 5, 2002. On March 20, 2002, Mr. Washington timely filed an application for transfer in this Court. On May 28, 2002, this Court sustained Mr. Washington's application for transfer.

## POINTS RELIED ON

**I.**

**The motion court clearly erred in overruling Mr. Washington's Rule 29.15 motion for postconviction relief, because Mr. Washington was denied effective assistance of trial counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that Mr. Washington's trial counsel failed to object to the fatal variance between the charging document and the verdict directing instruction that was submitted to the jury, since the state charged Mr. Washington with forcibly stealing a compact disc player, then asked the jury to find that Washington had "retained possession of a compact disk player or VCR." There is a reasonable probability that the outcome of the proceedings would have been different had trial counsel acted appropriately, because the variance between the two described acts was fatal.**

**State v. Kennedy**, 396 S.W.2d 595 (Mo. 1965);

**State v. Weekley**, 967 S.W.2d 190 (Mo. App. S.D. 1998);

**State v. Plant**, 107 S.W. 1076 (Mo. 1908);

**State v. White**, 431 S.W.2d 182 (Mo. 1968);

U.S. CONST., AMENDS. VI and XIV;

MO. CONST., ART. I, SEC. 18(a); and

Rule 29.15.

## II.

**The motion court clearly erred in overruling Mr. Washington's Rule 29.15 motion for postconviction relief, because Mr. Washington was denied effective assistance of trial counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that Mr. Washington's trial counsel failed to request and receive a continuance for the purpose of obtaining the surveillance video from Montgomery Wards, which allegedly depicted the person who committed the robbery. There is a reasonable probability that the outcome of the proceedings would have been different had trial counsel acted appropriately, because such video either could have been used to show that Washington was not the person responsible for the robbery, or to further show the errors in the identifications made by the store employees.**

**Kenley v. Armontrout**, 937 F.2d 1298 (8th Cir. 1991);

**State v. Butler**, 951 S.W.2d 600 (Mo. banc 1997);

**Poole v. State**, 671 S.W.2d 787 (Mo.App. E.D. 1983);

**State v. Shafer**, 969 S.W.2d 719 (Mo. banc 1998);

U.S. CONST., AMENDS. VI and XIV;

MO. CONST., ART. I, SEC. 18(a); and

Rule 29.15.

**III.**

**The motion court clearly erred in overruling Mr. Washington's Rule 29.15 motion for postconviction relief, because Mr. Washington was denied effective assistance of trial counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that Mr. Washington's trial counsel failed to interview and depose state's witness Louis Lyons prior to trial, and to object to Lyons' testimony at trial, because Mr. Lyons' identification of Mr. Washington was the product of witnesses Siegried and Tennison pointing out Mr. Washington to Mr. Lyons at a pretrial hearing. There is a reasonable probability that the outcome of the proceedings would have been different had trial counsel acted appropriately, because the jury would not have heard Lyons' tainted identification of Mr. Washington as the person who committed the robbery.**

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

**Eldridge v. Atkins**, 665 F.2d 228 (8th Cir. 1981), **cert. denied**, 456 U.S. 910 (1982);

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

**Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984);

U.S. CONST., AMENDS. VI and XIV;

MO. CONST., ART. I, SEC. 18(a); and

Rule 29.15.

## IV.

**The motion court clearly erred in overruling Mr. Washington's Rule 29.15 motion for postconviction relief, because Mr. Washington was denied effective assistance of trial counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that Mr. Washington's trial counsel failed to object during the deposition of Janice Siegried when the prosecuting attorney showed Siegried a single photograph of Mr. Washington and asked her whether she had "seen that man." There is a reasonable probability that the outcome of the proceedings would have been different had trial counsel acted appropriately in this instance, in that an objection to the suggestive identification process would have been sustained and Ms. Siegried's identification would not have been allowed before the jury.**

**Neil v. Biggers**, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972);

**State v. Parker**, 458 S.W.2d 241 (Mo. 1970);

**State v. Holt**, 603 S.W.2d 698 (Mo.App. S.D. 1980);

**Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984);

U.S. CONST., AMENDS. VI and XIV;

MO. CONST., ART. I, SEC. 18(a); and

Rule 29.15.

## ARGUMENT

### I.

**The motion court clearly erred in overruling Mr. Washington's Rule 29.15 motion for postconviction relief, because Mr. Washington was denied effective assistance of trial counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that Mr. Washington's trial counsel failed to object to the fatal variance between the charging document and the verdict directing instruction that was submitted to the jury, since the state charged Mr. Washington with forcibly stealing a compact disc player, then asked the jury to find that Washington had "retained possession of a compact disk player or VCR." There is a reasonable probability that the outcome of the proceedings would have been different had trial counsel acted appropriately, because the variance between the two described acts was fatal.**

The state charged Mr. Washington with the first degree robbery in that he "forcibly stole a compact disc player in the possession of Montgomery Wards" (L.F. 12). However, as described in the verdict directing instruction, the jury was required to find that Mr. Washington "retained possession of a compact disk player or VCR which was property owned by Montgomery Wards" to return a guilty verdict (L.F. 74). This instruction was fatally defective, since the jury was not required to find beyond a reasonable doubt that Mr. Washington had acted in the manner described in the charge, or

that he stole the specific item of property described in the charge. Mr. Washington's trial counsel did not object to this flaw in the instruction (Tr. 550-555).

**Standard of Review**

Appellate review of the denial of postconviction relief is limited to whether the findings, conclusions and judgment of the motion court are clearly erroneous. Rule 29.15 (k); **Skillicorn v. State**, 22 S.W.3d 678, 681 (Mo. banc 2000). Findings and conclusions of the motion court are deemed clearly erroneous if this Court, after a review of the entire record, is left with a firm and definite impression a mistake has been made. **Sanders v. State**, 738 S.W.2d 856, 857 (Mo. banc 1987).

**Analysis**

To prove a claim of ineffective assistance of counsel, appellant must show (1) that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would demonstrate under similar circumstances, and (2) that appellant was prejudiced as a result of such failure. **Sanders**, 738 S.W.2d at 857-858, **citing Strickland v. Washington**, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). The prejudice prong is satisfied by showing 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.

When an information charges one crime and a new and distinct offense is submitted to the jury from that which a defendant was charged, the variance is fatal. **State v. Powell**, 783 S.W.2d 489 (Mo.App. W.D. 1990). In **State v. Kennedy**, 396 S.W.2d 595, 600 (Mo. 1965), this Court considered whether a challenged instruction for

stealing was fatally defective, where the instruction referred to the stealing of any property owned by the victim, generally, rather than to the specific items of the victim's personal property as provided in the charging document. **Id**. at 600. This Court held that the variance in the instruction and the charge was fatal, because the jury was not required to find beyond a reasonable doubt that the appellant stole any of the specific items of property described in the charge. **Id. See also State v. White**, 431 S.W.2d 182, 186 (Mo. 1968) (because the challenged instruction did not require the jury to find all of the elements of the offense charged, the variance was fatal and required reversal).

In **State v. Plant**, 107 S.W. 1076 (Mo. 1908), this Court addressed the question of whether "evidence tending to prove larceny of a diamond shirt stud is sufficient proof, or, in other words, does it constitute any proof of the larceny of a diamond ring as charged in the information?" **Id**. at 1077. This Court noted that the diamond ring described in the charge against defendant was a separate and distinct article of property from the diamond shirt stud. **Id**. In reversing the conviction, this Court noted that where the property described in the charge is separate and distinct from the "property which the proof tends to show was stolen," the conviction cannot stand due to the "absolute failure of proof" of a stealing of the article identified in the charge. **Id**.

The decision of the Missouri Court of Appeals, Southern District, in **State v. Weekley**, 967 S.W.2d 190 (Mo. App. S.D. 1998) also is instructive. In **Weekley**, the state charged the appellant with one count of stealing a Ford dump truck identified by "VIN 1FDPF70J5RVA41864" (VIN 4), and with a second count of stealing a Ford dump truck identified by "VIN 1FDPF70J5RVA41865" (VIN 5). **Id**. at 191. The only

difference in the verdict directing instructions was that Instruction 5, consistent with Count I, hypothesized the VIN was "VIN 4", while Instruction 6, consistent with Count II, hypothesized the VIN was "VIN 5." **Id**. The jury acquitted the appellant of the second count of stealing, but found him guilty on the first count. **Id**. The Southern District of the Court of Appeals held that, because there was no evidence that the truck the appellant was found guilty of stealing bore VIN 4, as opposed to VIN 5, the evidence was insufficient to support a conviction for stealing that truck. **Id**. at 193-194. The Court reasoned that the jurors may have "unwittingly acquitted [the appellant] of the alleged theft as to which they believed him guilty." **Id**.

The Southern District's decision in **Weekley** supports the argument that in order for a conviction to be supported by sufficient evidence, the state must prove that the accused stole the specific property that was alleged to have been stolen in the corresponding charge. This further emphasizes the need for the instruction to correspond to the specific charge brought. In the present case, the instruction expanded the charge from forcibly stealing a compact disc player to retaining possession of a compact disc player or VCR. This difference was significant in light of the evidence presented. The state's evidence showed that a person left the store with one item, but that no force was used in the taking or keeping of such item. The evidence further showed that, to the extent that a forcible stealing took place, the force was used by a second person in the keeping of the second item removed from the store. The stealing of a VCR could warrant a new and distinct charge from the stealing of a compact disc player, particularly where, as here, the items were taken separately over a period of time.

In denying this claim, the motion court found that "Whether the forcibly stolen item was a compact disc player or a VCR is known only to the robbers. Under the evidence, the instruction was not objectionable. Had an objection been made, it would have been overruled." (PCR L.F. 88). This finding misses the point of Mr. Washington's claim. The error lies in the fact that the specific property and the act that constituted the robbery do not match up between the charge and the instruction. Thus, the instruction charged a separate and distinct offense, and the variance between the two was fatal.

This Court should reverse the motion court's denial of Mr. Washington's Rule 29.15 motion, vacate his conviction of first degree robbery and the related sentence, and remand the cause for a new trial.

## II.

**The motion court clearly erred in overruling Mr. Washington's Rule 29.15 motion for postconviction relief, because Mr. Washington was denied effective assistance of trial counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that Mr. Washington's trial counsel failed to request and receive a continuance for the purpose of obtaining the surveillance video from Montgomery Wards, which allegedly depicted the person who committed the robbery. There is a reasonable probability that the outcome of the proceedings would have been different had trial counsel acted appropriately, because such video either could have been used to show that Washington was not the person responsible for the robbery, or to further show the errors in the identifications made by the store employees.**

Prior to trial, at a hearing on a motion to suppress, John Tennison testified that he had contact with Mr. Lowry regarding the incident that took place on November 25, 1996 (Tr. 94-95). Mr. Tennison indicated that Lowry had shown him a surveillance videotape from November 25, 1996, which depicted the suspect in the robbery (Tr. 95-97). Mr. Washington's trial counsel examined Mr. Tennison about the videotape (Tr. 95-97), but no videotape was produced or introduced at the pretrial hearing, or at trial.

In preparation for the trial, Mr. Washington and trial counsel discussed obtaining the surveillance videotape from Montgomery Wards (H. Tr. 33-34). Mr. Washington

never was able to view the video, because trial counsel never obtained the video, nor did trial counsel make attempts to get the video, to Mr. Washington's knowledge (H. Tr. 34). Trial counsel testified at the evidentiary hearing that he recalled statements from some of the Montgomery Wards employees indicating the existence of a surveillance videotape (H. Tr. 42-43). Trial counsel did not obtain such a videotape, though, and did not recall making any formal requests for such tape (H. Tr. 43). Trial counsel acknowledged that he should have subpoenaed the custodian of records for Montgomery Wards for all videotapes on and around the time of the alleged offense (H. Tr. 43).

**Standard of Review**

Appellate review of the denial of postconviction relief is limited to whether the findings, conclusions and judgment of the motion court are clearly erroneous. Rule 29.15(k); **Skillicorn v. State**, 22 S.W.3d 678, 681 (Mo. banc 2000). Findings and conclusions of the motion court are deemed clearly erroneous if this Court, after a review of the entire record, is left with a firm and definite impression a mistake has been made. **Sanders v. State**, 738 S.W.2d 856, 857 (Mo. banc 1987).

**Analysis**

To prove a claim of ineffective assistance of counsel, appellant must show (1) that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would demonstrate under similar circumstances, and (2) that appellant was prejudiced as a result of such failure. **Sanders**, 738 S.W.2d at 857-858, **citing Strickland v. Washington**, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). The prejudice prong is satisfied by showing 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.

The state is required to disclose evidence favorable to the accused when the evidence is material to guilt or to punishment. **State v. Shafer**, 969 S.W.2d 719, 740-41 (Mo. banc 1998); **see Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). However, "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." **Shafer**, 969 S.W.2d at 741.

Trial counsel has a duty to investigate the case against his client. **Poole v. State**, 671 S.W.2d 787, 788 (Mo.App. E.D. 1983), **citing Thomas v. State**, 516 S.W.2d 761, 765 (Mo.App. K.C.D. 1974)(trial counsel's duty to investigate includes contacting and calling potential witnesses named by defendant). Mr. Washington recognizes that a Rule 29.15 movant "must overcome a strong presumption that counsel provided effective assistance . . ." **State v. Butler**, 951 S.W.2d 600, 608 (Mo. banc 1997), **citing Antwine v. Delo**, 54 F.3d 1357, 1365 (8th Cir. 1995). However, it is also true that trial counsel must make "a *reasonable* decision not to conduct a particular investigation." **Butler**, 951 S.W.2d at 608, **citing Kenley v. Armontrout**, 937 F.2d 1298, 1304 (8th Cir. 1991)(emphasis added). " '[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitations on investigation.'" **Butler**, 951 S.W.2d at 608, **citing Henderson v. Sargent**, 926 F.2d 706, 712 (8th Cir. 1991) (**quoting Strickland v. Washington**, 466 U.S. at 690-91).

From the record before the motion court, it is clear that a surveillance video from Montgomery Wards on November 25, 1996, existed at some point in time. The statements of Mr. Tennison confirm this fact (Tr. 95-97). It is equally clear that Mr. Washington's trial counsel knew of Washington's desire to locate the tape, and knew that such tape possibly could aid Washington's defense. By failing to obtain the tape, or to request a continuance in order to obtain the video which may have exculpated Mr. Washington, trial counsel made an unreasonable decision not to pursue that line of investigation. Such a decision cannot be dismissed as a reasonable trial strategy, in light of witness Tennison's statements, and Washington's trial counsel did not try to explain away the issue as a matter of trial strategy. Instead, trial counsel acknowledged his error in this regard at the evidentiary hearing on the 29.15 motion (H. Tr. 42-43).

Still, the motion court denied this claim, finding that "no such video existed" (PCR L.F. 88), despite the clear evidence to the contrary. Had trial counsel sought such video in a timely manner, at the point when the video was known to be in existence, he could have obtained the videotape for use at trial and preserved such evidence for review at a later date. Trial counsel's performance is measured by what he could have or should have done under the circumstances as they existed. In light of this fact, and in light of trial counsel's admissions at the evidentiary hearing, the findings of the motion court were clearly erroneous.

This Court should reverse the motion court's denial of Mr. Washington's Rule 29.15 motion, vacate his conviction of first degree robbery and the related sentence, and remand the cause for a new trial.

## III.

**The motion court clearly erred in overruling Mr. Washington's Rule 29.15 motion for postconviction relief, because Mr. Washington was denied effective assistance of trial counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that Mr. Washington's trial counsel failed to interview and depose state's witness Louis Lyons prior to trial, and to object to Lyons' testimony at trial, because Mr. Lyons' identification of Mr. Washington was the product of witnesses Siegried and Tennison pointing out Mr. Washington to Mr. Lyons at a pretrial hearing. There is a reasonable probability that the outcome of the proceedings would have been different had trial counsel acted appropriately, because the jury would not have heard Lyons' tainted identification of Mr. Washington as the person who committed the robbery.**

Trial counsel spoke to Mr. Lyons prior to trial, in an effort to get a description of the person Lyons saw taking the merchandise (H. Tr. 44). However, trial counsel acknowledged that he should have shown Lyons photographs, with and without Mr. Washington's photo included, but he did not do so (H. Tr. 44). Lyons did not give a description of the suspect to the police on the date of the incident, because he only saw the suspect for a short period of time, and "[m]ainly the back of his head" (Tr. 469). Yet even though he could not describe the man on the date of the robbery, Mr. Lyons became

a key witness for the state at the time of the trial, when he identified Mr. Washington as the man who took merchandise from Montgomery Wards on the date in question (Tr. 464).

Both Mr. Washington and trial counsel were able to view the transformation of Mr. Lyons from nonwitness to eyewitness. Mr. Washington and trial counsel both recalled the pretrial hearing when Mr. Lyons was present (H. Tr. 19-20, 39-40). Trial counsel recalled, consistent with Mr. Washington's recollection, that Lyons stood with Mr. Tennison and Ms. Siegried just outside the main doors leading into the courtroom (H. Tr. 19-20, 40). Trial counsel and Washington both noted that they were looking through the windows of the door and pointing into the courtroom, at Mr. Washington (H. Tr. 20, 40). Trial counsel did not recall trying to suppress Lyons' identification of Washington based on this contact, but did remember trying to examine Mr. Lyons at trial about the incident (Tr. 467; H. Tr. 40-42). However, trial counsel merely made some suggestive comments about Mr. Lyons' identification, and did not conduct proper questioning of Mr. Lyons on the issue (H. Tr. 42).

**Standard of Review**

Appellate review of the denial of postconviction relief is limited to whether the findings, conclusions and judgment of the motion court are clearly erroneous. Rule 29.15(k); **Skillicorn v. State**, 22 S.W.3d 678, 681 (Mo. banc 2000). Findings and conclusions of the motion court are deemed clearly erroneous if this Court, after a review of the entire record, is left with a firm and definite impression a mistake has been made. **Sanders v. State**, 738 S.W.2d 856, 857 (Mo. banc 1987).

## Analysis

To prove a claim of ineffective assistance of counsel, appellant must show (1) that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would demonstrate under similar circumstances, and (2) that appellant was prejudiced as a result of such failure. **Sanders**, 738 S.W.2d at 857-858, **citing Strickland v. Washington**, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). The prejudice prong is satisfied by showing 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.

The duty to render effective assistance of counsel encompasses an obligation to investigate the evidence available on behalf of one's client. **Perkins-Bey v. State**, 735 S.W.2d 170, 171 (Mo. App. 1987), **citing Eldridge v. Atkins**, 665 F.2d 228, 232 (8th Cir. 1981), **cert. denied**, 456 U.S. 910 (1982). With respect to this claim, trial counsel knew that Mr. Lyons had not given a description of the suspect to the police, but did not take steps to see whether Lyons would independently identify Mr. Washington as the man who helped rob Montgomery Wards. More importantly, when trial counsel observed Mr. Lyons meeting with other state's witnesses at a pretrial hearing, and saw the other witnesses pointing out Mr. Washington to Lyons, trial counsel did not take any steps to suppress or eliminate Mr. Lyons's testimony from the trial.

Trial counsel admitted at the evidentiary hearing that his handling of Mr. Lyons' tainted identification was not proper. By waiting for Lyons to testify, then trying to cross-examine Lyons on the issue, trial counsel forced himself into a position where he

would have to testify or otherwise provide facts supporting the finger-pointing incident he witnessed at the pretrial hearing. Moreover, by trying to challenge the identification on cross-examination, rather than before trial or before Lyons' direct examination, trial counsel forced himself into a position of trying to "unring the bell." In a case where the critical issue was the identity of the alleged robber, trial counsel's actions and inactions with respect to Mr. Lyons resulted in significant prejudice to Mr. Washington.

This Court should reverse the motion court's denial of Mr. Washington's Rule 29.15 motion, vacate his conviction of first degree robbery and the related sentence, and remand the cause for a new trial.

## IV.

**The motion court clearly erred in overruling Mr. Washington's Rule 29.15 motion for postconviction relief, because Mr. Washington was denied effective assistance of trial counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that Mr. Washington's trial counsel failed to object during the deposition of Janice Siegried when the prosecuting attorney showed Siegried a single photograph of Mr. Washington and asked her whether she had "seen that man." There is a reasonable probability that the outcome of the proceedings would have been different had trial counsel acted appropriately in this instance, in that an objection to the suggestive identification process would have been sustained and Ms. Siegried's identification would not have been allowed before the jury.**

Ms. Siegried attended a deposition on May 28, 1997, during which the prosecuting attorney handed her a single photograph of Mr. Washington (Tr. 456-457). At that time, Ms. Siegried identified Mr. Washington as the man involved in the robbery (Tr. 456-457). Siegried later identified Mr. Washington at trial as the man who took merchandise from the store (Tr. 447). Mr. Washington's trial counsel did not object to the single photo show-up during the deposition.

In denying this claim, the motion court stated: "No objection was made. No grounds for a proposed objection are suggested by [Washington]. No valid grounds for

an objection come to mind. Counsel was not ineffective. No prejudice resulted." (PCR L.F. 90).

**Standard of Review**

Appellate review of the denial of postconviction relief is limited to whether the findings, conclusions and judgment of the motion court are clearly erroneous. Rule 29.15(k); **Skillicorn v. State**, 22 S.W.3d 678, 681 (Mo. banc 2000). Findings and conclusions of the motion court are deemed clearly erroneous if this Court, after a review of the entire record, is left with a firm and definite impression a mistake has been made. **Sanders v. State**, 738 S.W.2d 856, 857 (Mo. banc 1987).

**Analysis**

To prove a claim of ineffective assistance of counsel, appellant must show (1) that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would demonstrate under similar circumstances, and (2) that appellant was prejudiced as a result of such failure. **Sanders**, 738 S.W.2d at 857-858, **citing Strickland v. Washington**, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). The prejudice prong is satisfied by showing 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.

In this case, the circumstances of the photographic "showup" to Ms. Siegried made the identification of Mr. Washington inherently unreliable. Although the same test has been used for both lineups and showups (in which only the actual suspect or suspects are shown to the witness in question), in fact, showups offer much more potential for

"irreparable misidentification." **Neil v. Biggers**, 409 U.S. 188, 198, 93 S.Ct. 375, 381, 34 L.Ed.2d 401 (1972); **State v. Parker**, 458 S.W.2d 241, 243 (Mo. 1970). With no other potential suspects to choose from, a witness is much more likely to choose the suspect presented.

> One-on-one showups raise serious doubts about the accuracy of human perception and recognition. When the police present a lone suspect to a witness for identification, the possibility of undue suggestion becomes so strong as often to require inquiry into issues of fundamental fairness and due process of law. The interests of fair and efficient administration of criminal justice would be better served if lineups, presenting alternatives to witnesses, were used whenever circumstances permitted.

**Holt v. State**, 494 S.W.2d 657, 659 (Mo.App. St.L.D. 1973).

With respect to this claim, Mr. Washington argues that there was no urgency in this case to show the single photo at Siegried's deposition, as in other similar cases, since Washington was incarcerated and waiting to go to trial on this case. There was a less suggestive photo spread available, with the suspect and five others; it was marked in as evidence, and the prosecutor could have used it. Furthermore, the evidence at trial showed that Ms. Siegried did not have an extended period of time to view the perpetrator of the crime, in the midst of her duties as an employee, and that she gave an inaccurate description of the man in question.

The totality of the circumstances must be reviewed to determine whether a very substantial likelihood of irreparable misidentification was created. **State v. Higgins**, 592

S.W.2d 151, 159 (Mo. banc 1979), **appeal dismissed** 446 U.S. 902 (1980). The court must consider whether the procedures were impermissibly suggestive, and if so, whether they were so impermissibly suggestive as to create a very substantial likelihood of irreparable misidentification at trial. **Id**., **citing** **State v. Charles**, 542 S.W.2d 606, 609 (Mo.App. K.C.D. 1976); **State v. McDonald**, 527 S.W.2d 46, 49 (Mo.App. St.L.D. 1975). The inquiry does not end with a finding of impermissibly suggestive procedures. Rather, "[r]eliability, not suggestiveness, is the linchpin in determining the admissibility of identification testimony.. . ." **Higgins**, 592 S.W.2d at 160 (citations omitted). Reliability, like suggestiveness, is to be evaluated under the totality of the circumstances. **Id**. This Court in **Higgins** adopted the factors for determining reliability which were announced in **Neil v. Biggers**, *supra*. They are:

> (1) The opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. **Neil v. Biggers**, 409 U.S. [at] 199-200, 93 S.Ct. [at 382].

**Higgins**, 592 S.W.2d at 160.

The evidence at trial showed that while Ms. Siegried worked at her job at the Montgomery Wards on November 25, 1996, she saw a black male walk out of the store carrying a blue and white box, the kind for "CD's and VCR's" in the Electric Avenue department (Tr. 336-337, 378, 446-447). She noted that the man, who was about 5'8" and was wearing a trench coat, looked over his shoulder repeatedly as he left (Tr. 446-

447, 454-455). Later, Ms. Siegried again saw the man carrying another blue and white box "that CD's and VCR's come in" (Tr. 449). She saw him leave the Electric Avenue department, walk through the apparel department, and head toward the doors (Tr. 449).

Ms. Siegried attended a deposition on May 28, 1997, and at that time the prosecuting attorney handed her a single photograph of Mr. Washington (Tr. 456-457). Six months after the incident, Ms. Siegried identified the photograph of Mr. Washington as a photo of the man involved in the robbery (Tr. 456-457); she repeated this identification at trial (Tr. 447). During her deposition, Ms. Siegried also stated she had seen Washington in the store a couple of times after the robbery, once in February 1997 (Tr. 457-458). At trial, after learning that Washington had been incarcerated from January 1997 to the time of trial, Siegried stated that she had seen someone "similar" (Tr. 457-458).

Based on the record presented, the motion court clearly erred in overruling Mr. Washington's Rule 29.15 motion with respect to this claim. Trial counsel should have objected to the suggestive photographic showup made by the prosecuting attorney to Ms. Siegried. Had trial counsel done so, there is a reasonable probability that Ms. Siegried's identification of Mr. Washington would not have been allowed. The procedure used at the deposition was suggestive, and Ms. Siegried's identification was inherently unreliable. Mr. Washington respectfully suggests that the failure to contest the photographic showup cannot be excused as a reasonable trial strategy, in light of the defense of misidentification that was employed.

This Court should reverse the motion court's denial of Mr. Washington's Rule 29.15 motion, vacate his conviction of first degree robbery and the related sentence, and remand the cause for a new trial.

## CONCLUSION

For the reasons presented and argued in Points I, II, III and IV above, Mr. Washington respectfully requests this Court reverse the motion court's denial of his Rule 29.15 motion, vacate his conviction of first degree robbery, and remand the cause for a new trial.

Respectfully submitted,

John M. Schilmoeller
Missouri Bar No. 42852
Attorney for Appellant
Office of State Public Defender
818 Grand, Suite 200
Kansas City, Missouri 64106-1910
Telephone: (816) 889-7699
Facsimile: (816) 889-2001

## CERTIFICATE OF COMPLIANCE AND SERVICE

I, John M. Schilmoeller, hereby certify as follows:

1. The attached brief complies with the limitations contained in Supreme Court Rule 84.06. 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 certification and the certificate of service, the brief contains 9060 words, which does not exceed the 31,000 words allowed for an appellant's brief.

2. Pursuant to Special Rule XXXII, the floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which the Public Defender System installed on June 12, 2002. According to that program, this disk is virus-free.

3. Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid, to Karen Kramer, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102 on the 17th day of June, 2002.

_____
John M. Schilmoeller