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IN THE CIRCUIT COURT OF JASPER COUNTY, MISSOURI

DONALD SIMPSON,

Movant,

vs.

Case No. CV194-483CC

STATE OF MISSOURI,

Respondent.

FIRST AMENDED MOTION TO VACATE, SET ASIDE OR CORRECT
SENTENCE AND JUDGMENT AND REQUEST FOR EVIDENTIARY HEARING



COMES NOW Movant, Donald Simpson, by and through counsel, and pursuant to Missouri Supreme Court Rule 29.15, files his amended motion to his pro se motion previously filed with this Court on April 6, 1994, using Form 40, and in support of his request for an evidentiary hearing states:

1. Movant is incarcerated at the Potosi Correctional Center, Route 2, Box 2222, Mineral Point, Missouri.

2. Movant was charged by felony Information in the Circuit Court of Jasper County, in Case No. CR591-55FX, with the Class A felony of First Degree Murder.

3. Movant was found guilty by a jury of Murder in the First Degree, and sentenced to life without parole, on August 30, 1994.

4. Paragraphs 8 and 9 of movant's pro se Motion to Vacate, Set Aside or Correct the Judgment and Sentence, are hereby amended to add the following allegations:

a) Movant was denied effective assistance of counsel and due process of law in violation of his constitutional rights pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 10 and 18 (a) of the Missouri Constitution, when his initial trial attorney, Karen Kraft, failed to exercise the customary skill and diligence

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that a reasonably competent attorney would have exercised under similar circumstances and, as a result thereof, movant was prejudiced. Specifically, trial counsel was ineffective when she:

1) failed to file a motion for a change of venue. due to extensive pre-trial publicity concerning this case and the small, close-knit nature of the Joplin community, rendering a crime of this magnitude the "talk of the town" from its inception until the trial in Movant's case;

2) failed to file a motion for change of judge from the Honorable William Crawford, when Movant requested that she make a timely request to do so because of his belief that the judge would be biased against him because he had heard the co-defendant's plea of guilty where Movant had been implicated as the main actor and wrong-doer. Movant also wanted the judge disqualified because of his relationship with the prosecutor's office and his extensive private practice in the Joplin area that made him well-known to the jury panel in a private capacity;

3) failed to fully and adequately investigate this case during the eight months that she was assigned to the case before the Court granted her leave to Withdraw due to her need to be available at trial as a defense witness to impeach co-defendant Katura when he testified;

4) failed to keep the Movant adequately apprised of the evidence against him and maintain frequent contact with him during his incarceration in the Jasper County Jail;

5) failed to request a speedy trial, as requested by movant.

b) Movant was denied effective assistance of counsel and due process of law in violation of his constitutional rights pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 10 and 18(a) of the Missouri Constitution, when his subsequent attorney and trial counsel, Dee Wampler, failed to exercise the customary skill and diligence that a reasonably competent attorney would have exercised under similar circumstances and, as a result thereof, Movant was prejudiced. Specifically, trial counsel was ineffective when he:

i) failed to spend sufficient time with Movant at the Jasper County Jail discussing the details of the case, police reports, available defense witnesses, and Movant's proposed defenses. Movant believes that trial counsel only visited with him on three occasions prior to trial, with each visit lasting between one to two hours in duration;

ii) violated Movant's specific request and instructions that he not seek any plea offers or deals from the Jasper County prosecutor's office in that Movant had consistently maintained that he was not guilty of homicide and therefore would not plead guilty to any type of murder charge. Nonetheless, trial counsel wrote the State a counter-proposal to its offer of Murder in the Second Degree and thirty years, and suggested an offer of manslaughter and ten years would be more appropriate;

iii) refused to schedule a lie-detector or polygraph examination despite Movant's constant oral and written requests for an examination to establish his lack of criminal involvement;

iv) failed to present a defense at trial or call any witnesses during the first phase of Movant's death penalty trial. Movant had consistently maintained his innocence in this case, indicating to trial counsel that he had been "framed" by his co-defendant, John Katura, who wrongly believed that movant had "snitched" him out to his bondsman on a pending rape charge, and had threatened to pin the murder charges on Movant if he was arrested on the rape charges.

v) failed to endorse John Katura, the co-defendant and State's main witness against Movant at trial, and call him as a witness at trial when the State failed to call him in its case in chief. Movant believes that Katura would have exculpated him due to his recent discovery that Movant did not turn him into law enforcement authorities or his bondsman. Movant's belief is based upon correspondance received from Katura and other contact that Katura made with individuals, including Karen Kraft.

vi) failed to endorse John Katura as a defense witness, even if Katura would not exculpate Movant, in that the trial counsel could have called him as a "hostile" witness and impeached him with his numerous inconsistent statements, extensive prior record of violent acts, plea of guilty to the charges, statements made to Karen Kraft regarding movant's lack of involvement in the homicide, use of the deceased phone after the homicide, possession of handcuffs, possession of the deceased's sunglasses, possession of high top tennis shoes, (size 11) that were identical to those possessed by the victim, history of threats against the victim, and access to the victim Masters' apartment, the alleged sale of a rented VCR

to provide his girlfriend and himself with travelling money to leave town and jump bail; denial that he had purchased a bus ticket for his girlfriend with money in his possession; statements that he made indicating that he had lied at the preliminary hearing at the request of the State, and had followed the State's instructions to drag out the length of Movant's alleged strangulation of the deceased to 45 minutes, involving torturous methods; letters to a variety of law enforcement officials seeking to reduce or ameliorate his sentences on the murder and rape charges and improve his terms and location of incarceration; Katura's threats of harm to Movant's family, Angela Head, Carla Kelly, Betty Pruitt and her family, and numerous other individuals;

vii) failed to call Katura as a witness in that Katura was essential to Movant's proposed defense that he had been "framed" by Katura on the homicide charges;

viii) failed to call Robin Beachner as a witness in that she had heard Katura threaten Masters with bodily injury or death shortly before the homicide;

ix) failed to call Peggy Wright as a witness to testify that she saw Katura with a set of handcuffs and knew about his history of violence;

x) failed to call Troy Shenefield to testify as to statements that he made to Amy Poulson, Don Poulson and/or Lois Adams regarding his involvement in the homicide of Masters and his knowledge about facts of the crime that were not available to members of the public through media reports, etc.;

+ xi) failed to call Lois Adams, Don and Amy Poulson as witnesses regarding statements by Troy Shenfield;

xii) failed to call Keith Rand, Movant's landlord, to testify as to payment that he gave to Movant for painting, that would explain how Movant had the funds to leave town and return to Texas, as opposed to stealing funds from the deceased;

xiii) failed to call Karen Kraft, State Public Defender and her investigator, Kim Gray, and other office staff, to testify as to the numerous phone calls from Katura and his denial that Movant was involved in the homicide, to impeach Katura's credibility and support Movant's defense that he was totally innocent of the homicide charges;

xiv) failure to fully investigate and impeach bondsman Dick Glaze, about his prior criminal history and involvement with drugs, requiring him to "assist" law enforcement, by providing information regarding other individuals' alleged illegal involvement;

xv) failure to move to strike Jerry Clay's testimony at trial after it became apparent that he had never seen or met the Movant, therefore had no basis for knowledge as to whether Movant had called him regarding Katura and pending criminal charges;

xvi) encouragement and inducement of Movant not to testify at trial due to his belief that Katura would have to testify at trial due to his extensive involvement and fact that it was too late to back out at that stage, and that it would not be necessary to testify at trial in order to secure

an acquittal;

xvii) failure to request a mistrial and change of venue when it became apparent during the voir dire examination that a large majority of the venire panel knew members of the prosecutor's office, in a public or private capacity;

xviii) failure to call Don Locke, a criminologist and handwriting expert, at trial to testify regarding his analysis of letters written by Katura, that were replete with inconsistencies about the homicide case and seeking deals and offers of leniency from law enforcement agencies, in addition to containing threats against individuals and their families;

xix) failure to employ and call a fingerprint examiner to compare and testify regarding a latent print found at the apartment of Katura, on handcuffs that belonged to him and were supposedly used to bind Masters' arms during the homicide;

xx) failure to call the Movant as a witness to testify as to his foot size, size 8, which would make it highly unlikely that he would steal shoes from Masters that were a Size 11;

xxi) failure to object during closing argument to the State's highly personalized and improper remarks to the jury;

xxii) failure to object to the presence of Sally Collins, the deceased's aunt, who remained in the courtroom during the second and thied day of trial, openly crying in the presence of the jury, and failure to seek a mistrial based upon the prejudicial effect of her actions and her violation of the defendant/movant's request for the rule on witnesses;

xxiii) failure to investigate and talk with Elizabeth Wood, an individual that Katura, according to his preliminary hearing testimony, had talked to about the murder of Masters;

xxiv) failure to object to testimony regarding the cause of death by strangulation, in that the coroner and autopsy reports said the cause of death was unknown;

xxv) failure to object to the entry into evidence of testimony and exhibits regarding the presence of blood, in that such blood samples had not been conclusively established to be Masters';

xxvi) failure to object to testimony concerning the use of a towel for strangulation, in that no towel was ever introduced at trial and it was alleged by the State that if such towel had existed, it had been destroyed and was unavailable as an exhibit;

xxvii) failed to object to the testimony regarding and entry into evidence of a pair of handcuffs, in that ownership was never established, and the print found on the handcuffs was allegedly inconclusive;

xxviii) failure to seek a presentence investigation to get independent information on the Movant's background, when such investigation was not waived by the Movant or defense;

xxix) failure to submit lesser included instructions on murder in the second degree and voluntary and involuntary manslaughter, in the first phase of trial, in that such instructions were supported by the evidence;

xxx) failure to call Roy Griffith, Elmer Sinclair, Ron Huey, Ronnie Baldwin, and Albert Derrickson, and Shelly Beavers, regarding impeachment of statements by Katura, and his bad

character;

xxxi) failure to request a motion to strike testimony at trial and seek a mistrial, due to references made throughout the trial, from the State and its witnesses, regarding statements allegedly made by John Katura, that were hearsay and inadmissible in that he failed to testify at trial;

xxxii) failure to request a motion for acquittal based upon the fact that there was no direct physical evidence or testimony admitted at trial to connect Movant with being present in the crime scene;

xxxiii) failure to investigate the presence of a repairman who was allegedly present at Masters' apartment subsequent to his demise and prior to the discovery of his body and a pillow in the apartment;

xxxiv) failure to investigate a phone call to Amarillo, Texas, that appeared on Masters' phone bill and was inferred to be a call made by Movant to his stepfather, Larry Gray, but did not check out to Larry Gray's home and work phone numbers, and was made at a time that Movant did not even know that his stepfather lived in Amarillo, Texas;

xxxv) failure to adequately investigate the manner in which phone calls were made on John Masters' phone, after his death;

xxxvi) failure to request scientific analysis of the handcuffs that were seized from Katura's apartment to see if any skin particles remained that could be traced to Masters;

xxxvii) failure to object to the entry into evidence of the handcuffs in that there was no direct evidence that anyone had seen the victim wearing the handcuffs, or that the victim had

marks on his arms suggesting the presence of handcuffs;

4. In all of the foregoing respects, Movant has been prejudiced by his trial attorneys' failure to exercise the customary skill and diligence that a reasonably competent attorney would have exercised under similar circumstances. There is a reasonable probability that, but for counsels' unprofessional errors, the result of the proceedings would have been different.

5. Movant will rely upon the following evidence and testimony in support of the above allegations:

a) the trial transcript, official court file of Jasper County concerning Movant's case, Katura's homicide case, Katura's rape case, and other charges;

b) the police reports, investigations, witness statements, mental reports, rap sheets, photographs, diagrams, and physical evidence and tests performed by and at the request of the State and its agents, and the defense attorneys;

c) materials contained in the defense file on Movant;

d) letters written by Katura;

e) testimony of the Movant, Donald Simpson;

f) testimony of trial counsel, Dee Wampler;

g) testimony of pre-trial counsel, Karen Kraft, and her investigator, Kim Gray, and support staff;

h) materials contained in the Movant's trial file concerning impeachment materials gathered on Katura, concerning prior convictions, pen packs, rap sheets, mental and physical examinations; letters, witness statements, and other materials;

i) Don Locke, criminologist, Missouri Highway Patrol,

Jefferson City, Missouri;

j) Betty Pruitt, address to be determined later;

h) Amy and Don Poulson, address to be determined later;

l) Troy Shenfield, address to be determined later;

m) Elmer Sinclair, address to be determined later;

n) Ron Huey, address to be determined later;

o) Robin Beachner, address to be determined later;

p) Lois Adams, address to be determined later;

q) John Katura, address to be determined later;

r) Kay Hamblin, address to be determined later;

s) Ronnie Baldwin, address to be determined later;

t) Shelly Beavers, address to be determined later;

u) Pat Hayes, investigator, address to be determined later;

v) Albert Derrickson, address to be determined later;

w) Employee of Colortyme, Joplin, address to be
determined later;

x) Lt. Ron Spier, address to be determined later;

y) Dan Curtner, address to be determined later;

aa) Dick Glaze, address to be determined later;

aa) Keith Rand, address to be determined later;

bb) Peggy Wright, address to be determined later;

cc) Jerry Clay, address to be determined later;

dd) Angela Head, address to be determined later;

ee) Carla Kelly, address to be dermined later;

ff) Larry Gray, address to be determined later.

6. Movant has not filed any motion to vacate judgment under Missouri Supreme Court Rule 24.035, 27.26, or 29.15, other than his pro se motion filed in this cause, which is incorporated herein by reference;

7. Movant has not filed any petitions in state or federal court for habeas corpus or in the United States Supreme Court.

8. Movant was represented in Case No. CR591-55FX, at the preliminary stages, including the preliminary hearing and arraignment, by Karen Kraft, State Public Defender's Office, Capital Division, St. Louis, Missouri.

9. Movant was represented at trial and sentencing by Dee Wampler, Attorney at Law, 1200 Woodhurst Drive, Springfield, Missouri.

10. Movant is currently represented on direct appeal by the State Public Defender's Office in Columbia, Missouri.

11. Movant is represented in this post-conviction action by Elise Branyan, Attorney at Law, 1740 S. Glenstone, Springfield, Missouri, 65804.

12. Movant is not under sentence by any other court.

13. Movant is proceeding in forma pauperis by leave of Court previously granted herein.

WHEREFORE, Movant prays that the Court grant him an evidentiary hearing in this cause, and that the trial court sustain his motion to vacate his conviction and sentence in the underlying criminal cause of action.