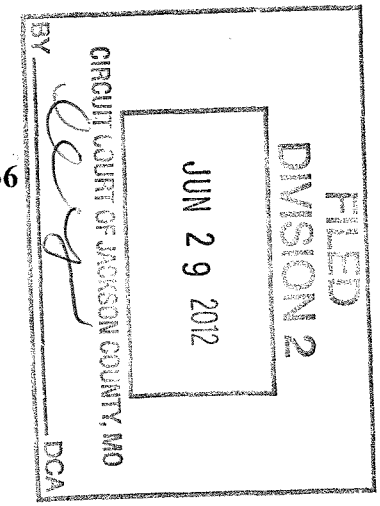
IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

ARTHUR J. MAITLAND, **Movant,**	)	
vs.	)	**Case No. 1116CV04036**
STATE OF MISSOURI, **Respondent.**	)	**Division 2**



FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

On February 22, 2011, Movant, Arthur J. Maitland, filed his "Motion to Vacate, Set Aside, or Correct the Judgment or Sentence" in the above cause. This Motion was filed on behalf of Movant by Valerie Vance, one of the attorneys who represented him at the trial of his criminal case. On October 19, 2011, Movant filed his "Amended Motion to Vacate, Set Aside, or Correct Conviction and/or Sentence, Pursuant to Supreme Court Rule 29.15, or in the Alternative, Petition for Writ of Habeas Corpus." The Amended Motion was filed by his new attorney, Jonathan Laurans.

The Court set a hearing on the Amended Motion for January 20, 2012. On that date Movant appeared in person and by counsel, Mr. Laurans. The State appeared by counsel, David Luna, an Assistant Prosecuting Attorney for Jackson County, Missouri, who had been one of the prosecutors in the trial of the criminal matter.

The Court heard evidence and arguments of counsel and took the matter under advisement. The parties submitted proposed judgments the following month.

On this 29th day of June, 2012, the Court again takes up this matter. The Court makes the following Findings of Fact, Conclusions of Law, and Judgment:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court finds that it has jurisdiction over the parties and the subject matter of this action. The Court has made judgments on the credibility of various witnesses that are consistent with the Findings of Fact made in this Judgment.

PROCEDURAL HISTORY

Movant was charged by indictment with one count of the Class B Felony of Child Molestation in the First Degree, pursuant to R.S.Mo. § 566.067 (2000), in the case of State v. Maitland, Case No. 0716-CR06308-01 (hereafter, the "criminal case").

Movant entered a plea of not guilty to the charge, and the case was tried to a jury in bifurcated proceedings from October 14 to October 16, 2008. In the first phase of the trial, the jury found Movant guilty of Child Molestation in the First Degree. In the second phase the jury recommended a 15 year sentence.

The Court ordered preparation of a Sentencing Assessment Report, and at a sentencing hearing on December 30, 2008, the Court adopted the jury's recommended sentence of 15 years in the custody of the Missouri Department of Corrections. However, the sentence was pursuant to R.S.Mo. § 559.115 (2010 Cum.Supp.), in the Sexual Offender Assessment Unit (SOAU).

On January 13, 2009, Movant filed a Notice of Appeal of his conviction to the Western District of the Missouri Court of Appeals.

On April 1, 2009, after receiving a report from the SOAU, the Court ordered the execution of Movant's sentence and ordered that he remain in the custody of the Missouri Department of Corrections.

On September 10, 2010, Movant's conviction was affirmed by the Court of Appeals, State v. Maitland, 323 S.W.3d 796. On November 2, 2010, Movant's Motion for a Rehearing was denied by the Western District, which issued its Mandate on November 24, 2010.

On February 22, 2011, Movant filed a "Motion to Vacate, Set Aside, or Correct Judgment and Sentence" with this Court. On October 19, 2011 Movant filed his "Amended Motion to Vacate, Set Aside, or Correct Conviction and/or Sentence, Pursuant to Supreme Court Rule 29.15, or in the Alternative Petition for Writ of Habeas Corpus."

Movant is currently incarcerated at the Crossroads Correctional Center, Cameron, Missouri.

Movant alleges the following grounds for relief in his Amended Motion:

In Movant's Claim 1 he alleges that the Court failed to provide him with a statutorily-required evidentiary hearing between days 90 and 120 of his "120 day callback" pursuant to § 559.115.3.

In Movant's Claim 2 he alleges trial counsel was ineffective, and Movant was thereby prejudiced, by trial counsel's failure to contemporaneously object to the State's playing of a videotape in which Movant was interrogated, despite his attempt to obtain a court-appointed attorney.

In Movant's Claim 3 he alleges trial counsel was ineffective, and Movant was prejudiced, in that said counsel failed to investigate and depose Kim Curtis, an expert witness for the State. Movant claims that the witness offered no scientific data to support

her opinions and was unqualified to give an opinion. Movant alleges appellate counsel was ineffective by failing to raise the witness' lack of qualifications on his direct appeal.

In Movant's Claim 4 he alleges that appellate counsel was ineffective, and Movant was prejudiced, by appellate counsel's failure to appeal the sufficiency of the indictment as regards the State's failure to ever provide a date on which the alleged offense was committed.

In Movant's Claim 5 Movant alleges appellate counsel was ineffective, and Movant was prejudiced, by Counsel's failure to raise the issue of whether the trial Court erred in allowing the jury to hear allegations from [redacted].

STATEMENT OF FACTS IN THE CRIMINAL CASE

In 2003 Movant lived in Independence, Missouri with his wife (Tr. 473, 588-589). At that time Movant was sometimes in contact with his adopted granddaughter, J.J., who was the victim in the underlying case (Tr. 473). [redacted]

[redacted]

SUMMARY OF LAW

Movant alleges in his motion that his trial counsel was ineffective. The Missouri Supreme Court recently noted in Baumruk v. State, -- S.W.3d --, SC91564, Slip Opinion at 6 (April 17, 2012), that:

> To succeed on an allegation of ineffective assistance of counsel, [a movant] must show 1) "that his counsel's representation 'fell below an objective standard of reasonableness;'" and 2) "that this deficiency prejudiced him, meaning that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Edwards v. State, 200 S.W.3d 500, 518 (Mo. *en banc.* 2006) (quoting Strickland v. Washington, 466 U.S. 668, 687-88 (1984)).

A movant "must satisfy both the performance prong and the prejudice prong to prevail on an ineffective assistance of counsel claim." Sanders v. State, 738 S.W.2d 856, 857 (Mo. *en banc.* 1987). If a movant fails to satisfy either the performance or the prejudice prong, then the Court does not need to consider the other, and the claim of ineffective assistance of counsel must fail. Bode v. State, 203 S.W.3d 262, 267 (Mo. App. 2006).

Prejudice is not presumed from a showing of deficient performance by counsel, but must be affirmatively proven. Strickland, *supra,* 466 U.S. at 693; Sidebottom v.

State, 781 S.W.2d 791 (Mo. *en banc.* 1989). A movant's "counsel's performance is presumed reasonable." Baumruk, *supra,* Slip Opinion at 6. A movant has the burden of establishing prejudice by a preponderance of the evidence. State v. Young, 844 S.W.2d 541 (Mo. App.1992). In order to show prejudice, a movant must show that there is a reasonable probability that, absent the alleged error, the results of the proceeding would have been different. Baumruk, *supra,* Slip Opinion at 6; State v. White, 798 S.W.2d 694, 697 (Mo. *en banc.* 1990); Bode, *supra*, 203 S.W.3d at 267. Simply showing that the alleged error had a conceivable effect on the trial outcome is not sufficient, *Ibid.* Reasonable probability means "probability sufficient to undermine confidence in the outcome of the proceeding." Baumruk, *supra*, Slip Opinion at 6. In order to determine if a reasonable probability exists, this Court must consider the totality of the evidence. Strickland, *supra*, 466 U.S. at 691-696; Jones v. State, 773 S.W.2d 156, 158 (Mo. App. 1989). As the Western District noted in Bode:

> To satisfy the performance prong of the Strickland test, the movant must identify specific acts or omissions of counsel that resulted from unreasonable professional judgment, which the motion court must find are outside the range of competent assistance. Peterson v. State, 149 S.W.3d 583, 585 (Mo.App. 2004). In identifying such acts or omissions of counsel, the movant "must overcome the presumptions that any challenged actions was sound trial strategy and that counsel rendered adequate assistance and made all the significant decisions in the exercise of professional judgment." Anderson v. State, 66 S.W.3d 770, 775 (Mo. App. 2002) (*quoting* State v. Simmons, 955 S.W.2d 729, 746 (Mo. *en banc.* 1997)). The Supreme Court in Strickland refused to define "sound trial strategy" since "there are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689. A reviewing court, therefore, "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Ibid.* at 690. Because of the inherent difficulty of this review, the movant has a heavy burden to overcome the presumption that counsel was competent. *Ibid* at 689.

A motion court should make every effort to eliminate the distortion wrought by hindsight and to evaluate the challenged conduct from counsel's perspective at the time

of the conduct, Plant v. State, 766 S.W.2d 732 (Mo.App. 1989). There is a strong presumption that criminal defense counsel's conduct falls within the "wide range of professional assistance," and a movant must overcome the presumption that certain actions of counsel might be regarded as sound trial strategy. Jones v. State, 773 S.W.2d at 158.

In addition to allowing a claim that trial counsel was ineffective, Supreme Court Rule 29.15(a) also authorizes a movant to challenge the sentence when claiming "the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law." Rule 29.15 provides the exclusive procedure by which such person may seek relief in the sentencing court for such a claim.

CONCLUSIONS OF LAW

Movant's Claim 1

In his first claim Movant alleges that the Court failed to provide him with his statutorily-guaranteed evidentiary hearing between days 90 and 120 of his "120 day callback" pursuant to § 559.115.3. Movant claims his report and recommendation from Missouri Department of Corrections was without reservation as to his candidacy for probation. Movant claims he had satisfied all conditions precedent both within the program and for his anticipated community placement and supervision.

On December 30, 2008, the court sentenced Movant to 15 years in the Missouri Department of Corrections, but ordered that the sentence be made to the Sexual Offender Assessment Unit (SOAU) pursuant to § 559.115. During the sentencing hearing the Court stated the following:

> I'm going to sentence the defendant to fifteen years in the custody of the Missouri Department of Corrections pursuant to Section 559.115, which means he will go down to the Sex Offender Assessment Unit—I Require that—for 120 days. When he goes to the Sex Offender Assessment Unit, he will – he will – you will, Mr. Maitland – acknowledge what you have done in this case. He will seek help, and he has to first acknowledge that he has a problem before he can be given help. That is the requirement. And there are some people who serve their entire sentence because they refuse to ever acknowledge that they have a problem. He will acknowledge that problem or he will be kept and serve the entire fifteen years.

(Tr. 928.)

On April 1, 2009, after receiving a report from the SOAU, this Court ordered execution of Movant's sentence and ordered that he remain at the Missouri Department of Corrections.

The report provided by the SOAU clinical evaluator concluded:

> Offender Maitland's denial around index offense and facts surrounding previous allegations of sexual offenses should be considered as a risk factor. Another risk factor is his tendency to blame others for his actions which demonstrates a low level of remorse. Additionally, he has trouble admitting to psychological symptoms and does not see the value of therapy/treatment for himself nor does he view himself as a risk to reoffend.

In spite of these concerns, Movant's clinical evaluator concluded, "There is however no clear indication that he wouldn't be compliant with attending mandated community based treatment." (SOAU Court Investigation Report – Page 4.)

The SOAU Unit Supervisor also reported:

> of concern to this officer is the fact that he has prior victims (his daughters) by his self admission to the police, the SAR writer, this officer, the SOAU clinicians, and a church member. Although he has never been charged with any other sexual crimes, this officer is concerned about public safety.

The Unit Supervisor concluded, however, "given his age, and provided he understands there is little tolerance of any violation of his probation, this officer recommends probation be granted based on the clinician's recommendation."

Section 559.115.3 provides:

> The court may recommend placement of an offender in a department of corrections one hundred twenty-day program. Upon the recommendation of the court, the department of corrections shall determine the offender's eligibility for the program, the nature, intensity, and duration of any offender's participation in a program and the availability of space for an offender in any program. When the court recommends and receives placement of an offender in a department of corrections one hundred twenty-day program, the offender shall be released on probation if the department of corrections determines that the offender has successfully completed the program except as follows. Upon successful completion of a *treatment program*, the board of probation and parole shall advise the sentencing court of an offender's probationary release date thirty days prior to release. The court shall release the offender unless such release constitutes an abuse of discretion. If the court determined that there is an abuse of discretion, the court may order the execution of the offender's sentence only after conducting a hearing on the matter within ninety to one hundred twenty days of the offender's sentence. If the court does not respond when an offender successfully completes the program, the offender shall be released on probation. Upon successful completion of a *shock incarceration program*, the board of probation and parole shall advise the sentencing court of an offender's probationary release date thirty days prior to release. The court shall follow the recommendation of the department unless the court determines that probation is not appropriate. If the court determines that probation is not appropriate, the court may order the execution of the offender's sentence only after conducting a hearing on the matter within ninety to one hundred twenty days of the offender's sentence. If the department determines that an offender is not successful in a program, then after one hundred days of incarceration the circuit court shall receive from the department of corrections a report on the offender's participation in the program and department recommendations for terms and conditions of an offender's probation. The court shall then release the offender on probation *or order the offender to remain in the department to serve the sentence imposed.*

(Emphasis added.)

The foregoing section is not exactly a model of legislative draftsmanship. It is lengthy and, at times, difficult to follow, but as near as the Court can tell, it contemplates three different possibilities for defendants sentenced thereunder, two expressly and one implicitly: (1) Defendants sentenced to a treatment program; (2) Defendants sentenced to a shock incarceration program; and (3) Defendants sentenced to some other kind of program, i.e., something other than a treatment or shock incarceration program. Each of

these programs imposes different responses for a trial court when the Department of Corrections makes recommendations.

As to the first two possibilities, § 559.115.3 expressly requires that, upon *successful completion* of a "*treatment program*" or "*a shock incarceration program,*" the court *shall* release the defendant on probation *unless,* following a hearing that *must be* conducted within the 30 day window between 90 and 120 days of the offender's sentence, the court determines that probation would be an abuse of discretion or inappropriate. In both of these instances the statute expressly requires that an offender successfully complete some kind of program. In those express instances, the sentencing court is not required to release the offender on probation even if he or she successfully completes a program, but only if the court provides the offender a hearing within the aforedescribed window and determines that release would be an abuse of discretion in the case of "treatment programs," or that probation is not appropriate in the case of "shock incarceration programs."

What about the third possibility? What if the offender is not sent to a program that has no treatment that can be successfully completed? Is there a requirement for a hearing in the 30 day window if an offender is not sent to a treatment program or to shock incarceration? The statute is silent on that point. It only *requires* a hearing when there is treatment or shock incarceration. Stated another way, there is no requirement for a hearing when there is no treatment program or shock incarceration.

It can hardly be gainsaid that the primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning. State ex rel. Etter, Inc. v. Neill, 70 S.W.3d 28, 31 (Mo.App. 2002). In determining the reach of a

statute, the express mention of one thing in a statute implies exclusion of another, Harrison v. MFA Mutual Insurance Company, 607 S.W.2d 137, 146 (Mo. *en banc.* 1980). Thus, when "a statute enumerates the subjects or things on which it is to operate, or the persons affected, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned . . . ." Giloti v. Hamm-Singer Corp., 396 S.W.2d 711, 713 (Mo. 1965).

In the instant cause § 559.115.3 expressly mentions the requirement for a hearing if a court seeks to prevent an offender's release on probation upon successful completion of a treatment program or shock incarceration, but it is silent as to the need for a hearing in other circumstances. Hence, § 559.115.3 must be construed as excluding the requirement for a hearing for those circumstances not expressly mentioned. In the context of the instant cause, then, there was no requirement for a hearing if Movant did not successfully complete a treatment program. (Movant's Amended Motion does not claim that his time in SOAU was a form of shock incarceration.)

It follows that the critical issue at bar is this: Is the SOAU a treatment program? The State adduced testimony at the 29.15 hearing from Julie Motley, the Director of the Missouri Sex Offender Program. Ms. Motley testified credibly that Movant went through the SOAU and that he received no treatment and that he was only assessed during his participation in the program. This was consistent with Movant's Exhibit 7, a printout of the Missouri Department of Corrections Webpage, which states that:

> The Sex Offender Assessment Unit (SOAU) at Farmington Correctional Center is a 120-day residential program that was established in FY '94. It is designed to assess community risks and sex offender treatment needs. Information is then shared with the court for release considerations. During CY '08, 98 offenders were assessed for the courts at the SOAU.

Ms. Motley testified that the actual treatment of sex offenders is provided by the Missouri Sex Offender Program (MOSOP) which is a nine to 12 month program that cannot be completed within the 120 days during which an offender is in the SOAU. This is again consistent with the DOC webpage which states that, "The MOSOP program, consisting of approximately 12 months of therapy, is provided at the Farmington Correctional Center for men . . . ."

Based on this evidence the State argues that Movant did not complete a "treatment program," so that a hearing was not required pursuant to 559.115.3. It should be noted that none of the case law cited by Movant in his Amended Motion regarding this claim dealt specifically with the denial of probation after a sentence to the SOAU. Furthermore, at the time of the 29.15 hearing there were no cases directly on point which dealt specifically with the issue of the denial of probation after completion of the Sex Offender Assessment Unit.

Fortunately, for Movant that is no longer the case. On June 12, 2012, the Supreme Court decided State ex rel. Valentine v. Orr, -- S.W.3d -- , SC92434. Valentine was decided, literally, a few days before this Court was ready to enter this Judgment. It is squarely on point of the issue of whether the SOAU is a treatment program: "[T]he SOAU is a 'program' for purposes of section 559.115.3 and provides a treatment component through the assessment process." Slip Opinion at 10. Valentine is dispositive of the issue before this Court.

Valentine requires this Court to recall Movant from the Department of Corrections so that he may be placed on probation. His Claim 1 is SUSTAINED.

[redacted]

JUDGMENT AND ORDERS

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that for the reasons set forth hereinabove in the Findings of Facts and Conclusions of Law, Claim 1 of Movant's Amended Motion is found in favor of Movant, and it is Ordered that Movant appear before this Court for a hearing as to the appropriate terms of probation to be imposed in his case.

IT IS FURTHER ORDERED AND ADJUDGED that the balance of Movant's Amended Motion is found in favor of the State and against Movant, Arthur Maitland.

Date: June 29, 2012

MICHAEL W. MANNERS,
JUDGE OF DIVISION 2

I certify that on the 29th day of June, 2012 a true and correct copy of the foregoing was mailed via U.S. First Class mail, postage prepaid, to:

Jonathan Laurans
819 Walnut Street, Suite 107
Kansas City, MO 64106,
Attorney for Movant

And personally delivered to:

David Luna
308 W. Kansas, Suite 220
Independence, MO 64050
Assistant Prosecuting Attorney

Erin D. Lawrence, Law Clerk for Division 2