

IN THE
SUPREME COURT OF MISSOURI

RWOESHAN L. BOOKER,)
)
 Appellant,)
)
 vs.) APPEAL NO. SC96184
)
 STATE OF MISSOURI,)
)
 Respondent.)

APPEAL TO THE SUPREME COURT OF MISSOURI,
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS,
DIVISION FIVE,
THE HONORABLE MARK H. NEILL,
JUDGE AT GUILTY PLEA, SENTENCING, AND POST-CONVICTION
PROCEEDINGS

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from the ruling of the Honorable Mark H. Neill, division 5 of the Circuit Court of the City of St. Louis, denying the Rule 24.035 motion for post-conviction relief Mr. Rwoeshan Booker, Appellant herein, filed in 1322-CC09126. In that Rule 24.035 motion, Mr. Booker sought relief from the sentence and judgment Judge Neill imposed and executed in his underlying case, 1122-CR03756-01.

In the underlying case, 1122-CR03756-01, Mr. Booker appeared before Judge Neill and pled guilty to committing one count of the class A felony of assault the first degree in violation of § 565.050 RSMo. Subsequently, Judge Neill sentenced Mr. Booker to serve 13 years in prison for the offense. On April 15, 2013, Mr. Booker was delivered to the Missouri Department of Corrections to serve said sentence.

On August 12, 2013, Mr. Booker timely filed his Rule 24.035 motion for post-conviction relief in 1322-CC09126. On February 19, 2014, Undersigned Counsel filed an Amended Motion on Mr. Booker's behalf. Given that the transcripts of Mr. Booker's guilty plea and sentencing in 1122-CR03756-01 were not filed until November 21, 2013 and Judge Neill granted Undersigned counsel's request for an additional 30 days to complete the Amended Motion, the Amended Motion was timely filed. Ultimately, Judge Neill denied Mr. Booker's Rule 24.035 motion without granting him an evidentiary hearing.

Mr. Booker then appealed Judge Neil's ruling to the Missouri Court of Appeals for the Eastern District in ED103213. On August 20, 2016, the Eastern District denied Mr. Booker's Appeal. Mr. Booker then sought and obtained transfer to this Court pursuant to Rules 83.04 and 83.05 and Article V, § 10 of the Missouri Constitution. Hence, this Court has jurisdiction.

STATEMENT OF FACTS

In 1122-CR03756-01, the state filed an Indictment in which it alleged that on or about June 20, 2010, the defendants, including Mr. Rwoeshan Booker (Appellant herein) and several other named codefendants, acting together, committed the class A felony of assault in the first degree in violation of § 565.050 RSMo¹ in that they, acting together, struck A.A., and such conduct was a substantial step toward the commission of the crime of attempting to kill or cause serious physical injury to A.A., and was done for the purpose of committing such assault, and in the course thereof inflicted serious physical injury. (L.F. 7-9)². On January 28, 2013, Mr. Booker appeared before the Honorable Mark H. Neill, division 5 of the Circuit Court of the City of St. Louis, and pled guilty to the offense. (L.F. 14-38). On April 5, 2013, Judge Neill sentenced Mr. Booker to serve 13 years in prison for the offense. (L.F. 11-13). On April 15, 2013, Mr. Booker was delivered to the Missouri Department of Corrections to serve said sentence. (L.F. 62).

¹ All statutory references are to Missouri Revised Statutes 2000 unless otherwise noted.

² The record on appeal consists of a Legal File, (L.F.), which contains documents pertaining to Mr. Booker's underlying case, 1122-CR03756-01, and documents pertaining to Mr. Booker's post-conviction case, 1322-CC09126.

On August 12, 2013, Mr. Booker timely filed a Rule 24.035 motion for post-conviction relief in which he sought relief from the sentence and judgment Judge Neill had imposed and executed in 1122-CR03756-01. (L.F. 62-67). This motion was assigned cause number 1322-CC09126. (L.F. 62). Thereafter, on February 19, 2014, Mr. Booker timely³ filed an Amended Motion in which he raised two claims. (L.F. 76-88). In the first claim, Mr. Booker alleged that there was an insufficient factual basis for his plea of guilty to the crime of assault in the first degree and that the record fails to show that the plea was knowingly, voluntarily, and intelligently entered. (L.F. 77, 77-83). In the second claim, Mr. Booker alleged that his attorney was ineffective in that he failed to advise him that he had a viable defense to the crime he was accused of committing, assault in the first degree, on the grounds that anything he did was done under the influence of sudden passion arising out of adequate cause. (L.F. 77, 83-85). Ultimately, Judge Neill denied Mr. Booker's Rule 24.035 motion without granting him an evidentiary hearing on either claim. (L.F. 89-101). This appeal follows.

NOTE: Additional Facts are set forth in the Argument Portion of Appellant's Brief in order to avoid unnecessary repetition.

³ Since the transcripts of Mr. Booker's guilty plea and sentencing in 1122-CR03756-01 were not filed until November 21, 2013 and Judge Neill granted Undersigned counsel's request for additional 30 days to complete the Amended Motion, it was timely filed on February 19, 2014. See L.F. 60 and Rule 24.035(g).

POINT RELIED ON

I.

Judge Neill clearly erred in denying Mr. Booker an evidentiary hearing on his Rule 24.035 claim that there was no factual basis for the plea he entered in his underlying case because that ruling violated Supreme Court Rule 24.02(e) and Mr. Booker’s constitutionally protected right to due process of law, as guaranteed by article 1, section 10 of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution, in that Mr. Booker pled facts in support of the claim which would warrant relief if proven, which are not refuted by the record, and which show that the matters complained of resulted in prejudice to Mr. Booker. In his Amended Motion, Mr. Booker alleged that there was an insufficient factual basis for the plea he entered in his underlying case, that the plea was not knowingly, voluntarily, and intelligently entered, that it is not even clear whether Mr. Booker pled guilty as a principal or as an accomplice, and that the record fails to show that Mr. Booker understood the charge and pled guilty with an awareness of the elements of the offense to which he pled guilty.

Douglas v. State, 410 S.W.3d 290 (Mo. App. E.D. 2013);

State v. Smith, 229 S.W.3d 85 (Mo. App. W.D. 2007);

Rule 24.02(e);

§§ 562.036, 562.041, and 562.051 RSMo;

Mo. Const., Article I, § 10;
and U.S. Const., Amends. XIV.

II.

Judge Neill clearly erred in denying Mr. Booker an evidentiary hearing on his Rule 24.035 claim that his plea attorney was ineffective for failing to advise him that he had a viable defense to the charged offense of assault in the first degree on the grounds that he acted under the influence of sudden passion arising out of adequate cause because that ruling violated Mr. Booker's constitutionally protected right to due process of law and to the effective assistance of counsel, as guaranteed by article 1, sections 10 and 18(a) of the Missouri Constitution and the Sixth and Fourteenth Amendments to the United States Constitution, in that Booker pled facts in support of the claim which would warrant relief if proven, which are not refuted by the record, and which show that the matters complained of resulted in prejudice to Mr. Booker. In his Amended Motion Mr. Booker alleged the following facts: a) that his plea attorney knew or should have known that the assault in the first degree he was accused of committing in his underlying case was preceded by the actions of the alleged victim's friend in sexually harassing a young lady and the actions of the alleged victim and the alleged victim's friend in swinging on Mr. Booker's friend when Mr. Booker's friend went to the aid of the young lady, b) that his plea attorney failed to exercise the skill, care, and diligence of a reasonably competent attorney when he failed to advise him that he had a viable defense to the charged offense of assault in the first degree on the grounds that he acted under the influence of sudden

passion arising out of adequate, and c) that he was prejudiced by his plea attorney's failure to advise him of the sudden passion defense in that he would not have pled guilty and would have proceeded to trial if he had been advised of the sudden passion defense.

Bequette v. State, 161 S.W.3d 905 (Mo. App. 2008);

Wiggins v. State, 2015 WL 1915324 at 2;

§ 565.060.1(1) RSMo;

Notes on Use 4 to MAI-CR: 3d 319.06;

Mo. Const., Article I, § 10 and 18(a);

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

ARGUMENT

I.

Judge Neill clearly erred in denying Mr. Booker an evidentiary hearing on his Rule 24.035 claim that there was no factual basis for the plea he entered in his underlying case because that ruling violated Supreme Court Rule 24.02(e) and Mr. Booker's constitutionally protected right to due process of law, as guaranteed by article 1, section 10 of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution, in that Mr. Booker pled facts in support of the claim which would warrant relief if proven, which are not refuted by the record, and which show that the matters complained of resulted in prejudice to Mr. Booker. In his Amended Motion, Mr. Booker alleged that there was an insufficient factual basis for the plea he entered in his underlying case, that the plea was not knowingly, voluntarily, and intelligently entered, that it is not even clear whether Mr. Booker pled guilty as a principal or as an accomplice, and that the record fails to show that Mr. Booker understood the charge and pled guilty with an awareness of the elements of the offense to which he pled guilty.

Standard of Review

Appellate review of a motion court's ruling on a Rule 24.035 motion is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. Simmons v. State, 429 S.W.3d 464, 466 (Mo. App.

E.D. 2014); see also Rule 24.035(k). An appellate court will only find that a motion court's findings and conclusions are clearly erroneous if a review of the entire record leaves the appellate court with a definite and firm impression that a mistake has been made. Simmons v. State, 429 S.W.3d at 466. A movant bears the burden of establishing his grounds for relief by a preponderance of the evidence. Id.; see also Rule 24.035(i). This burden is a heavy one as the motion court is free to believe or disbelieve any evidence, whether contradicted or undisputed, including a movant's testimony, and, as such, this Court grants deference to the motion court's credibility determinations. Simmons v. State, 429 S.W.3d at 466.

To show he was entitled to an evidentiary hearing on his Rule 24.035 Motion, a post-conviction Movant must show that (1) he alleged facts, not conclusions, warranting relief; (2) the facts alleged raise matters not refuted by the files and record of his case; and (3) the matters complained of resulted in prejudice to him. Roberts v. State, 276 S.W.3d 833, 835 (Mo. Banc. 2009) (citing Wilkes v. State, 82 S.W.3d 925, 928 (Mo. Banc. 2002)). "An evidentiary hearing may only be denied when the record *conclusively* shows that the movant is not entitled to relief." Rule 24.035(h); Roberts v. State, 276 S.W.3d at 835.

General caselaw

Rule 24.02 sets forth the procedure a plea court must follow for pleas in felony and misdemeanor cases. Douglas v. State, 410 S.W.3d 290, 295-296 (Mo. App. E.D. 2013). Pursuant to Rule 24.02(e), the plea court is prohibited from

entering a judgment upon a plea “unless it determines that there is a factual basis for the plea.” Rule 24.02(e). This factual basis requirement for a guilty plea is mandated to ensure that the guilty plea was intelligently and voluntarily entered, thereby satisfying due process requirements. Douglas v. State, 410 S.W.3d at 296.

A factual basis is established where the information or indictment clearly charges the defendant with all of the elements of the crime, the nature of the charge is explained to the defendant, and the defendant admits guilt. Id. The factual basis does not have to be established by the defendant's words or by an admission of the facts as recited by the State, but, rather, may be established on the record as a whole. Douglas v. State, 410 S.W.3d at 296. However, the defendant should express an awareness of the nature and elements of the charge to which he or she pleads guilty. Id. Accordingly, so long as the defendant understands the nature of the charge, there is no requirement that every element of a crime to which a defendant pleads guilty be explained. Id.

Furthermore, the plea itself forms a factual basis for the guilty plea if the plea of guilty is voluntarily and understandingly made and unequivocal as to the factual requisites necessary to establish each element of an offense. Id. That is, by pleading guilty, a movant waives all errors except for those affecting the voluntariness or understanding with which the plea was made. Douglas v. State, 410 S.W.3d at 296.

Argument

In 1122-CR03756-01, the state filed an Indictment in which it alleged that on or about June 20, 2010, the defendants, including Mr. Rwoeshan Booker (Appellant herein) and several other named codefendants, acting together, committed the class A felony of assault in the first degree in violation of § 565.050 RSMo⁴ in that they, acting together, struck A.A., and such conduct was a substantial step toward the commission of the crime of attempting to kill or cause serious physical injury to A.A., and was done for the purpose of committing such assault, and in the course thereof inflicted serious physical injury. (L.F. 7-9). And while it is true that Mr. Booker pled guilty to that charge, there was an insufficient factual basis for the plea.

The record fails to show that the plea was knowingly, voluntarily, and intelligently entered. How could it have been? The record is not even clear whether Mr. Booker pled guilty under a theory of principal or accomplice liability. More importantly, the record fails to show that Mr. Booker understood the nature of the charge and pled guilty with an awareness of the elements of the charge under these two theories of liability. This is highly problematic because the caselaw clearly says a defendant should understand the nature of the charge to which he pleads and express an awareness of the nature and elements of the charge

⁴ All statutory references are to Missouri Revised Statutes 2000 unless otherwise noted.

to which he pleads and that where the record fails to show that he did so, the plea is not knowingly or voluntarily entered and should be vacated on the grounds that there was no factual basis for it. Douglas v. State, 410 S.W.3d at 296.

The Indictment filed in 1122-CR03756-01 was sufficient to put Mr. Booker on notice that he was charged with the offense of assault in the first degree and that he could be held criminally liable for the acts of another because of his participation. See State v. Badakshan, 721 S.W.2d 18, 20 (Mo. App. E.D. 1986) (noting that the phrase “acting with others” merely notifies the defendant that he is or may be criminally liable for acts of another because of his participation). However, the Indictment did not inform Mr. Booker whether the state was proceeding on a theory of principal or accomplice liability and did not sufficiently inform him as to the nature and elements of the charge of assault in the first degree under those theories of liability. Moreover, at no point during the guilty plea, did anyone make it clear whether the state was proceeding on a theory of principal or accomplice liability or make sure that Mr. Booker understood the nature and elements of the charge of assault in the first degree under those theories of liability.

When the plea court asked the prosecutor what she believed the evidence would be in case no. 1122-CR03756-01, the following exchange took place between the plea court, the prosecutor (Rachel Schwarzlose), Mr. Booker, and Mr. Booker’s plea attorney (Matthew Kallial):

THE COURT: Now, I'm going to ask Ms. Schwarzlose to tell the Court what she believes the state's evidence would be in this case if it were to go to trial, okay?

MR. BOOKER: Um-hum.

THE COURT: Go ahead.

MS. SCHWARZLOSE: Thank you, Your Honor. In Cause No. 1122-CR03756, the state would prove beyond a reasonable doubt that the defendant acting with Ernest Carter, Jasmine Jeffries, Shaquanta Monroe, and Johnnie Lane committed the class A felony of assault in the first degree in that on or about June 20, 2010, in the City of St. Louis, State of Missouri, the defendant acting with Ernest Carter, Jasmine Jeffries, Shaquanta Monroe, and Johnnie Lane struck Ali Aziz, and such conduct was a substantial step toward the commission of the crime of attempting to kill or cause serious physical injury to Ali Aziz and was done for the purpose of committing such assault, and in the course thereof inflicted serious physical injury on the person of Ali Aziz.

Specifically, Your Honor, the defendant was with Ernest Carter, Jasmine Jeffries, Johnnie Lane, and Shaquanta Monroe at the Jack in the Box located at Gravois here in the City of St. Louis. While on the parking lot, Mr. Ali Aziz and his friend Luther Jones also arrived on the Jack in the Box parking lot. At some point Mr.

Luther Jones started talking to Jasmine Jeffries and an argument ensued.

Johnnie Lane got out of his vehicle, started arguing with Luther Jones, and started pushing each other. Ali Aziz went up to the situation, and Johnnie Lane swung on Ali Aziz. Rwoeshan Booker then struck Ali Aziz, and Mr. Aziz fell on the ground. Everyone in the group joined in and continue to hit Mr. Aziz after he fell on the ground.

Specifically, Jasmine Jeffries and Shaquanta Monroe kicked Mr. Aziz at least one time in the head. Mr. Booker continued to hit Mr. Aziz once he was on the ground. While he was on the ground, Mr. Ernest Carter went through Mr. Aziz's pockets, removed currency.

As a result of this incident, Mr. Aziz suffer a traumatic brain injury. He is now unable to control his bodily functions on his own, including the fact he cannot walk on his own, he cannot feed himself, or do anything to care for himself and requires constant care as a result of these actions.

The state would prove all of this evidence beyond a reasonable doubt.

THE COURT: Did you hear what Ms. Schwarzlose told the Court regarding the 2011 case?

MR. KALLIAL: Judge, before Mr. Booker answers that question.

May I approach?

THE COURT: This on or off the record?

MR. KALLIAL: Off the record.

(A brief discussion was held off the record.)

THE COURT: Mr. Kallial, off the record you said that you had some question about the chronology of events, especially regarding the timing or the chronology concerning your client's participation in this episode, vis-a-vis Mr. Aziz being kicked in the head; is that correct?

MR. KALLIAL: That's correct.

THE COURT: Tell me what you believe the chronology is.

MR. KALLIAL: Our standpoint regarding the series of events would be that the stomping occurred subsequent to Mr. Booker's contact with the victim.

MS. SCHWARZLOSE: And I believe that is correct, Your Honor. I was simply reading the summary of the events that Mr. Booker did. Our evidence would show Mr. Booker hit Mr. Aziz while he was on the ground. It may have been before he was kicked in the head by Jasmine Jeffries.

MR. KALLIAL: And Mr. Booker did not go back and then make further contact.

MS. SCHWARZLOSE: I wasn't --

THE COURT: Let me try to clarify this, if you will. If the matter were to proceed to trial, the jury or the Court would hear the series of events took place in the early morning hours on a Jack in the Box parking lot; is that correct?

MS. SCHWARZLOSE: Yes, Your Honor.

THE COURT: And during the course of events, Rwoeshan Booker struck Ali Aziz and knocked him down; is that correct?

MR. KALLIAL: That is correct.

THE COURT: And while Aziz was on the ground, Mr. Booker hit him again?

MR. KALLIAL: I believe that would be the evidence, yes.

THE COURT: And it was subsequent to that second hitting that Mr. Aziz was kicked at least twice in the head and suffered head injuries?

MR. KALLIAL: That's true. As to the exact specific amount of time, I think that is a different question as well. There was a series of contact made with the victim.

THE COURT: But did all this happen at the same time and place on the parking lot? This is a sequence of events; is that correct?

MS. SCHWARZLOSE: Correct.

MR. KALLIAL: Correct.

THE COURT: You'll agree with that?

MR. KALLIAL: Correct.

THE COURT: Mr. Booker remained on the parking lot, at some place on the lot or on the premises of Jack in the Box?

MR. KALLIAL: I believe the evidence would be at some point in time Mr. Booker fled the scene. Exactly when, I do not know.

THE COURT: Have you heard all this, Mr. Booker?

THE DEFENDANT: Yes, sir.

THE COURT: Based on what happened, are you pleading guilty to assault in the first degree?

THE DEFENDANT: Yes, sir.

THE COURT: Now, there may be some dispute as to exactly where everybody was at every particular time or occurrence, correct?

THE DEFENDANT: Yes, sir.

THE COURT: And maybe some of you don't even know where someone was standing at the time of a particular occurrence in this series of events; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: And you probably didn't -- well, let me ask this, did you see everything that occurred there?

THE DEFENDANT: No, sir.

THE COURT: Okay. And you're not denying any of these events occurred, correct?

THE DEFENDANT: Yes, sir.

THE COURT: You are denying?

THE DEFENDANT: I mean no, sir. Sorry about that.

THE COURT: And you understand that the state would show and hopefully prove beyond a reasonable doubt that Mr. Aziz was severely struck and has suffered and continues to suffer head injuries. You understand that?

THE DEFENDANT: Yes, sir.

(L.F. 30-36).

That was the extent of what was said on the record as far as a factual basis is concerned.

This was an insufficient factual basis for the plea court to accept Mr. Booker's plea of guilty. The record fails to show that Mr. Booker was aware that in order to commit the class A felony of assault in the first degree resulting in serious physical injury *as a principal* he needed to have acted with the requisite mental state (meaning that he had to have attempted to kill or cause serious physical injury to the alleged victim) and actually been the one that caused the alleged victim to sustain serious physical injury. Similarly, the record fails to show that Mr. Booker was aware that in order to commit the class A felony of assault in the first degree resulting in serious physical injury *as an accomplice* he

needed to have acted with others for the common purpose of attempting to kill or cause serious physical injury to the alleged victim (or at least aided or encouraged others with the common purpose of attempting to kill or cause serious physical injury to the alleged victim). As such, it is possible that Mr. Booker pled guilty to the charged offense of assault in the first degree just because he did not understand the charge, but did have some involvement in a fight that ended with an individual sustaining serious physical injury even though he was not attempting to cause serious physical injury, even though he was not the one that actually caused the alleged victim to sustain serious physical injury, and even though it was never his purpose to promote or further the commission of an assault in the first degree.

Moreover, the plea colloquy in Mr. Booker's underlying case is particularly troubling because after the state advised the plea court as to what it believed the state's evidence would be at trial, Mr. Booker's attorney advised the plea court that he disputed the state's version of events and the plea court acknowledged that there was: "some question about the chronology of events, especially regarding the timing or the chronology concerning [Mr. Booker's] participation in this episode, vis-a-vis Mr. Aziz being kicked in the head." (L.F. 32-33). It is even more troubling given that Mr. Booker's attorney advised the plea court that after Mr. Booker had hit Mr. Aziz, Mr. Aziz was kicked multiple times in the head by other people and that it was as a result of those kicks that Mr. Aziz "suffered head injuries." (L.F. 32-34).

All of this begs the question: was it Mr. Booker's intention to promote or further the commission of an assault first or did he simply plead guilty because he erroneously believed that the intentions of others could be imputed to him even though he did not have the purpose to promote or further the commission of an assault in the first degree? This question is particularly compelling given this Court's holding in State v. O'Brien wherein this Court held that although there was evidence from which it could be found that O'Brien lured the alleged victim outside a bar so that his codefendant could rob him, there was no evidence that he intended for his codefendant to kill the alleged victim by stomping him to death, and that as such, the evidence was insufficient to impute his codefendant's intent in killing the alleged victim to him and insufficient to sustain a conviction for murder in the first degree or murder in the second degree. State v. O'brien, 857 S.W.2d 212, 218-220 (Mo. Banc. 1993).

Ultimately, Mr. Booker was entitled to an evidentiary hearing on his claim that there was no factual basis for the plea he entered in his underlying case. In his Amended Motion, he alleged that there was an insufficient factual basis for finding that it was knowingly, voluntarily, and intelligently entered. (L.F. 83). His Amended Motion also alleged that it is not clear whether he pled guilty as a principal or as an accomplice, (L.F. 81), and that the record fails to show that he pled guilty with an awareness of the elements of the offense he pled guilty to under either theory. (L.F. 81-82). Therefore, given the standard for when a post-

conviction movant is entitled to an evidentiary hearing,⁵ Mr. Booker was entitled to an evidentiary hearing. If proven these facts would warrant relief. Moreover, they demonstrate prejudice because they show that the plea was not knowingly, voluntarily, and intelligently entered. Finally, they are not refuted by the record.

In denying Mr. Booker an evidentiary hearing on the claim, the motion court relied heavily on the fact that the indictment in Mr. Booker's case complied with the language of MACH-CR 19.02 for assault first degree as a class A felony with added language for charging him as acting together with his codefendants in striking the victim and serious physical injury. (L.F. 95-96). The plea court pointed out this fact and then asserted the following:

The Court believes the charge was sufficient to put [Mr. Booker] on notice that he was being charged as an accessory, and the record of the guilty plea indicates that [Mr. Booker] understood his plea was based on the acts of the group and not just his own conduct. The charge was also sufficient to put [Mr. Booker] on notice that the group conduct was for the purpose of causing the victim serious injury or death.

(L.F. 96). The motion court then proceeded to discuss how an accessory could be held liable for the acts of a principal and how the necessary intent to act as an accomplice could be inferred from circumstantial evidence or from the accessory's conduct before, during, and after the crime in question. (L.F. 96-97). The motion

⁵ See Roberts v. State, 276 S.W.3d at 835. Alternatively, see P. 14 of this brief.

court then ultimately found that the facts alleged in the indictment as well as the facts recited by the prosecutor during the plea were sufficient for the plea court to accept Mr. Booker's plea of guilty. (L.F. 97).

The motion court clearly erred. The state does not establish a factual basis for a guilty plea simply by reciting facts which if proven at trial could support a finding of guilt. Rather, the record must show that the person pleading guilty understood the charge and was aware of the nature and elements of the charge to which he or she pled guilty. Douglas v. State, 410 S.W.3d at 296. Only then, is there a factual basis. Id. Only then can it be said that the plea was intelligently and voluntarily offered as necessary to satisfy due process requirements. Id. Hence, the issue before the motion court was not simply whether the facts recited by the prosecutor during Mr. Booker's guilty plea would have been sufficient to support a finding of guilt if the case had proceeded to trial, but also whether Mr. Booker understood the nature of the charge he pled guilty to and whether he pled guilty to that charge with an awareness of the nature of the charge and the elements of the offense under a theory of principal or accomplice liability. Douglas v. State, 410 S.W.3d at 296.

In Mr. Booker's case, the motion court found that Mr. Booker understood that he was being charged as an accessory, that he understood that his plea was based on the acts of the group and not just his own conduct, and that the charge was sufficient to put Mr. Booker on notice that *the group conduct* was for the purpose of causing the victim serious physical injury or death. (L.F. 96).

However, the motion court did not even suggest, much less find, that the record was sufficient to show that Mr. Booker understood that the state could not convict him of the offense of assault in the first degree under a theory of accomplice liability unless it proved that HE HIMSELF acted with the purpose to promote or further the commission of the offense of assault in the first degree as opposed to some lesser offense such as assault in the second degree or assault in the third degree. This is highly problematic. Unless Mr. Booker understood this fact, it cannot be said that his plea was intelligently and voluntarily entered so as to satisfy the requirements of due process and it is very possible that Mr. Booker pled guilty because he erroneously believed that the intentions of others could simply be imputed to him.

The fact that the state could not convict Mr. Booker of the charged offense of assault in the first degree under a theory of accomplice liability unless it proved that HE HIMSELF acted with the purpose to promote or further the commission of the offense of assault in the first degree is plain to see just by looking at plain language and legislative history of § 562.036 RSMo, § 562.041 RSMo, and § 562.051 RSMo. § 562.036 RSMo states as follows:

A person **with the required culpable mental state** is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is criminally responsible, or both.

§ 562.036 RSMo. § 562.041 RSMo states as follows:

A person is criminally responsible for the conduct of another when

- (1) The statute defining the offense makes him so responsible; or
- (2) **Either before or during the commission of an offense with the purpose of promoting the commission of an offense, he aids or agrees to aid or attempts to aid such other person in planning, committing or attempting to commit *the* offense.**

2. However, a person is not so responsible if:

- (1) He is the victim of the offense committed or attempted;
- (2) The offense is so defined that his conduct was necessarily incident to the commission or attempt to commit the offense. **If his conduct constitutes a related but separate offense, he is criminally responsible for that offense but not for the conduct or offense committed or attempted by the other person;**

§ 562.041 RSMo. And § 562.051 RSMo states as follows:

Except as otherwise provided, **when two or more persons are criminally responsible for an offense which is divided into degrees, each person is guilty of such degree as is compatible with his own culpable mental state and with his own accountability for an aggravating or mitigating fact or circumstance.**

§ 562.051 RSMo. Read together, these three statutes establish the rule of law that a person can be held accountable for a given offense under a theory of accomplice

liability if and only if he acted with the purpose to promote or further the commission of that offense. § 562.036 RSMo; § 562.041 RSMo; and § 562.051 RSMo. Lest there be any doubt that this rule of law is correct, Mr. Booker requests this Court to note that the following comment appears while looking at § 562.051 RSMo in Vernon’s Annotated Missouri Statutes:

At common law there was a question whether an “aidor and abettor” could be guilty of a higher (or lower) degree of the offense assisted.

This section clearly permits the degree of punishment to be apportioned according to the culpability of each person.

See Comment to § 562.051 RSMo 1979, V.A.M.S.

In accordance with this rule of law, MAI-CR 3d 304.04, the verdict directing instruction to be used in almost every accomplice liability case that goes to jury trial, requires a jury to find that an accused defendant acted with the purpose to promote or further the commission of the offense at issue (not just any offense, but the offense at issue) before finding him guilty of that offense under a theory of accomplice liability. That jury instruction reads as follows:

A person is responsible for his own conduct and he is also responsible for the conduct of (another person) (other persons) in committing an offense **if he acts with the other person(s) with the common purpose of committing that offense or if, for the**

purpose of committing that offense, he aids or encourages the other person(s) in committing it.

(As to Count _____, if) (If) you find and believe from the evidence beyond a reasonable doubt:

First, that (on) (on or about) [*date*], in the (City) (County) of _____, State of Missouri, [*Continue using the paragraphs from the MAI-CR 3d verdict director applicable to the offense and set out all the elements of the offense, ascribing the elements to the defendant or other person or persons with whom the defendant acted. See Notes on Use 5 for suggestions on handling various types of situations. See Notes on Use 7(b) for handling murder in the first degree. Place a comma at the end of the last paragraph submitting the elements of the offense. Then add the following:*]

then you are instructed that the offense of [*name of offense*] has occurred, and if you further find and believe from the evidence beyond a reasonable doubt:

(Second) (Third) ([*next numbered paragraph*]), **that with the purpose of promoting or furthering the commission of that [*name of offense*]**, the defendant [*Insert basis for defendant's conduct being sufficient for being criminally responsible, using one of the following "(acted together with) (aided or encouraged) (acted*

together with or aided)." See Notes on Use 5 for the various options and when they should be used. After the appropriate option(s), state the name(s) of other person(s) or, if unknown, a general identification of the other(s) involved, such as "another person," "other person(s)," etc.] in committing the offense, (and ([next numbered paragraph], that [Continue in this and other paragraphs to deal with defenses as directed in MAI-CR 3d 304.11 and MAI-CR 3d 304.02.],)

then you will find the defendant guilty (under Count _____) of [name of offense] (, unless you find and believe [Continue with a reference to any affirmative defense applicable to the defendant and supported by the evidence. See MAI-CR 3d 304.11.]).

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense. [Omit this paragraph if an affirmative defense is submitted.]

[If the MAI-CR 3d verdict director form for the offense contains mandatory definitions, insert those definitions here.]

(MAI-CR 3d 304.04). Clearly, under this instruction, a jury must find that a defendant acted together with or aided his codefendant AND that he did so with the purpose of promoting or furthering the commission of the offense at issue in

order to find him guilty of the offense at issue under a theory of accomplice liability.

It should be noted that Missouri Courts have recognized this rule of law as evidenced by the holdings of the Supreme Court of Missouri in State v. White, 622 S.W.2d 939, 942-946 (Mo. Banc. 1981) and the Missouri Court of Appeals for the Western District in State v. Smith, 229 S.W.3d 85, (Mo. App. W.D. 2007). In State v. White, the Supreme Court of Missouri considered the statutory framework of §§ 562.016 RSMo, 562.036 RSMo, 562.041 RSMo, and 562.051 and held that: a) "...to be found guilty of a particular offense, an aider must aid another or others with the conscious object of causing that offense," b) that a person could be held liable for an offense under a theory of accomplice liability if and only if the state proves that the person acted with the purpose to promote the commission of that particular offense, and c) that a defendant is free to present evidence of a mitigating factor and argue that they are not guilty of the charged offense and/or guilty of a lesser offense because they lacked the purpose to promote or further the commission of the offense charged and/or had the purpose to promote or further a lesser offense. State v. White, 622 S.W.2d at 944-946. And while it is true that State v. White has been overruled to the extent that it can be read as holding that it is proper to submit a verdict directing instruction on murder first under a theory of accomplice liability that does not require the jury to find that the defendant himself deliberated on the murder, State v. White has continued vitality in terms of the other principles of law set forth therein. (See State v. O'brien, 857 S.W.2d at

218) (explicitly recognizing that State v. White has been overruled, but only “to the extent that [it] has been read to require less than proof of the defendant’s own [deliberation]” in a murder first case submitted on a theory of accomplice liability).

In State v. Smith, the Western District held that because there was evidence from which a reasonable jury could have found that Mr. Smith intended to promote a robbery in the second degree, but did not intend to promote a robbery in the first degree, he was entitled to an instruction on the lesser included offense of robbery in the second degree. State v. Smith, 229 S.W.3d 85, 91-98 (Mo. App. W.D. 2007). In holding as such, the Western District relied on the plain language of 562.051 RSMo, the plain language of MAI-CR 3d 304.04, and the Supreme Court of Missouri’s opinion in State v. White, 622 S.W.2d 939 (Mo. Banc. 1981). (See State v. Smith, 229 S.W.3d at 94-96). The Western District actually said:

Consistent with the [Supreme] Court's holding in State v. White, as to the requisite mental state for accomplice liability, the applicable MAI-CR3d, MAI-CR3d 304.04 (9-1-03), requires the jury to find, in order to convict, that the defendant, with the purpose of promoting or furthering the commission of the underlying offense, acted together with, aided, or encouraged the other or others involved in committing the offense.

State v. Smith, 622 S.W.3d at 94-95. In addition, the Western District also said:

Ironically, although the Court's holding in State v. White refutes the appellant's contention that in convicting him of robbery in the first degree the State was required to prove dual criminal intents, it nonetheless provides support for his claim in this point. In that regard, although holding as a general proposition that when the aider is found to have purposely aided in the underlying offense and “thus has the same intent of the active participant, all other things being equal, they are liable *to the same degree*,” the Court recognized that “[s]ituations can exist where the liability of each is not the same.” [citing State v. White, 622 S.W.2d at 945] (emphasis added). With respect to such situations, the [Supreme] Court held that: “§ 562.051, RSMo 1978, permits the defendant or the [S]tate to present evidence aggravating or mitigating the matter,” by introducing evidence showing that he did not have the purpose or conscious object of aiding in the commission of the *particular degree* of the underlying offense... [citing State v. White, 622 S.W.2d at 945].

State v. Smith, 229 S.W.3d at 95.

It should also be noted that this rule of law is not unique to Missouri law as demonstrated by the holding of the Supreme Court of the United States in Rosemund v. United States, 134 S.Ct. 1240 (2014). In Rosemund v. United States, the Supreme Court of the United States analyzed a federal criminal statute, 18 U.S.C. § 924(c), which prohibits the using or carrying of a firearm during and

in relation to any crime of violence or drug trafficking crime, and considered that statute's interaction with the federal aiding and abetting statute, codified at 18 U.S.C. § 2. Rosemund v. United States, 134 S.Ct. at 1243. The question considered by the Court was what the Government must prove when it charges a defendant of aiding and abetting the offense of using a firearm in relation to any crime of violence or a drug trafficking crime. Id. In relevant part, the Supreme Court held that, under the federal aiding and abetting statute, a defendant charged as an accomplice must have advance knowledge that one of his confederates will possess a gun during the commission of the offense. Rosemund v. United States, 134 S.Ct. at 1249. The Supreme Court reasoned that, for the purposes of federal aiding and abetting law, “a person who actively participates in a criminal scheme knowing its extent and character intends that scheme's commission.” Id. A person who does not know that a firearm will be used does not appreciate the full extent and character of the crime to be committed, whereas a person who has advance knowledge that a firearm will be used in an offense is able to make the relevant legal and moral choice. Rosemund v. United States, 134 S.Ct. at 1249.

Ultimately, the record of Mr. Booker's underlying case fails to show that Mr. Booker pled guilty with an awareness of the fact that the state could not convict him of the charged offense of assault in the first degree under a theory of accomplice liability unless it proved that he acted with others with the purpose to promote or further the commission of the offense of assault in the first degree as opposed to some lesser offense. The Indictment filed in Mr. Booker's underlying

case failed to inform of this fact and the transcript of Mr. Booker's guilty plea in his underlying case fails to show that he understood this fact. As such, the record fails to establish a factual basis for the plea in Mr. Booker's underlying case. The record fails to show that Mr. Booker understood the nature of the charge and the elements of the offense he pled guilty to, assault in the first degree, under a theory of accomplice liability. The fact is that Mr. Booker may have pled guilty simply because he erroneously thought the mental state of others in his group could be imputed to him.

For all of the foregoing reasons, Mr. Booker requests this Court to grant him an evidentiary hearing on his claim that there was no factual basis for the plea he entered in his underlying case.

II.

Judge Neill clearly erred in denying Mr. Booker an evidentiary hearing on his Rule 24.035 claim that his plea attorney was ineffective for failing to advise him that he had a viable defense to the charged offense of assault in the first degree on the grounds that he acted under the influence of sudden passion arising out of adequate cause because that ruling violated Mr. Booker's constitutionally protected right to due process of law and to the effective assistance of counsel, as guaranteed by article 1, sections 10 and 18(a) of the Missouri Constitution and the Sixth and Fourteenth Amendments to the United States Constitution, in that Booker pled facts in support of the claim which would warrant relief if proven, which are not refuted by the record, and which show that the matters complained of resulted in prejudice to Mr. Booker. In his Amended Motion Mr. Booker alleged the following facts: a) that his plea attorney knew or should have known that the assault in the first degree he was accused of committing in his underlying case was preceded by the actions of the alleged victim's friend in sexually harassing a young lady and the actions of the alleged victim and the alleged victim's friend in swinging on Mr. Booker's friend when Mr. Booker's friend went to the aid of the young lady, b) that his plea attorney failed to exercise the skill, care, and diligence of a reasonably competent attorney when he failed to advise him that he had a viable defense to the charged offense of assault in the first degree on the grounds that he acted under the influence of sudden

passion arising out of adequate, and c) that he was prejudiced by his plea attorney's failure to advise him of the sudden passion defense in that he would not have pled guilty and would have proceeded to trial if he had been advised of the sudden passion defense.

Standard of Review

Appellate review of a motion court's ruling on a Rule 24.035 motion is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. Simmons v. State, 429 S.W.3d 464, 466 (Mo. App. E.D. 2014); see also Rule 24.035(k). An appellate court will only find that a motion court's findings and conclusions are clearly erroneous if a review of the entire record leaves the appellate court with a definite and firm impression that a mistake has been made. Simmons v. State, 429 S.W.3d at 466. A movant bears the burden of establishing his grounds for relief by a preponderance of the evidence. Id.; see also Rule 24.035(i). This burden is a heavy one as the motion court is free to believe or disbelieve any evidence, whether contradicted or undisputed, including a movant's testimony, and, as such, this Court grants deference to the motion court's credibility determinations. Simmons v. State, 429 S.W.3d at 466.

To show he was entitled to an evidentiary hearing on his Rule 24.035 Motion, a post-conviction Movant must show that (1) he alleged facts, not conclusions, warranting relief; (2) the facts alleged raise matters not refuted by the files and record of his case; and (3) the matters complained of resulted in prejudice

to him. Roberts v. State, 276 S.W.3d 833, 835 (Mo. Banc. 2009) (citing Wilkes v. State, 82 S.W.3d 925, 928 (Mo. Banc. 2002)). “An evidentiary hearing may only be denied when the record *conclusively* shows that the movant is not entitled to relief.” Rule 24.035(h); Roberts v. State, 276 S.W.3d at 835.

General Caselaw

To prevail on an ineffective assistance of counsel claim, a Movant must demonstrate: 1) that his plea counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances, and 2) that his plea counsel's deficient performance prejudiced his defense. Johnson v. State, 318 S.W.3d 313, 317 (Mo. App. E.D. 2010) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). A defendant who pleads guilty waives all claims of error except those affecting the voluntariness of the plea or the understanding with which the plea was made. Id. To satisfy the prejudice requirement, a defendant who has pleaded guilty must demonstrate that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Id.

A plea must be a voluntary expression of the defendant's choice and a knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences of the act. State v. Roberts, 276 S.W.3d 833, 836 (Mo. Banc. 2009). “A plea of guilty is not made voluntarily if the defendant is misled, or is induced to plead guilty by fraud or mistake, by misapprehension, fear, persuasion, or the holding out of hopes which prove to be

false or ill founded.” State v. Roberts, 276 S.W.3d at 836. Failure by plea counsel to advise a defendant of a possible defense may render a guilty plea unknowing and involuntary. Wiggins v. State, 2015 WL 1915324 at 2 (citing Bequette v. State, 161 S.W.3d 905, 908 (Mo. App. 2008)).

Argument

§ 565.050.1 RSMo states as follows:

A person commits the crime of assault in the first degree if he attempts to kill or knowingly causes or attempts to cause serious physical injury to another person.

§ 565.050.1 RSMo. However, § 565.060.1(1) RSMo states as follows:

A person commits the crime of assault in the second degree if he attempts to kill or knowingly causes or attempts to cause serious physical injury to another person under the influence of sudden passion arising out of adequate cause.

§ 565.060.1(1) RSMo. And Notes on Use 4 to MAI-CR: 3d 319.06, the Missouri Approved Pattern Jury Instruction for assault in the first degree, states as follows:

Assault in the first degree is "mitigated" to assault in the second degree when the defendant acted under the influence of sudden passion arising out of adequate cause. Section 565.060.1(1), RSMo 2000. The defendant has the burden of injecting this issue. Section 565.060.2, RSMo 2000. Paragraph (Third) on this issue should not

be used unless supported by evidence. Once such evidence has been introduced, paragraph (Third) must be used. Further, MAI-CR 3d 319.10 submitting assault in the second degree shall be given upon request of a party or on the Court's own motion. For a converse instruction on sudden passion, see MAI-CR 3d 308.02.

MAI-CR: 3d 319.06, Notes on Use 4. Hence, it is clear that acting under the influence of sudden passion arising out of adequate cause is a defense that mitigates the offense of assault in the first degree to assault in the second degree.

In his Amended Motion, Mr. Booker claimed that the plea attorney in his underlying case was ineffective in that he failed to advise him that he had a viable defense to the crime he was accused of committing, assault in the first degree resulting in serious physical injury, on the grounds that anything he did was done under the influence of sudden passion arising out of adequate cause. (L.F. 77).

And in support of the claim, Mr. Booker alleged the following facts:

Movant's plea of guilty to the class A felony of assault in the first degree was not knowingly, voluntarily, and intelligently entered. It was the result of the ineffective assistance of counsel. Movant's attorney was ineffective in that he failed to advise Movant that he had a viable defense to the crime he was accused of committing, assault in the first degree resulting in serious physical injury, on the grounds that anything he did was done under the influence of sudden

passion arising out of adequate cause. (see third element of MAI-CR 319.06, #4 in notes on use of MAI-CR 319.06, and 565.060 RSMo). In this case, Movant's attorney knew or should have known that Movant's actions in hitting the alleged victim were preceded by the reprehensible conduct of the alleged victim and the alleged victim's friend. More specifically, Movant's attorney knew or should have known that the alleged victim's friend had sexually harassed a young lady and that the alleged victim and the alleged victim's friend had swung on Movant/Movant's friend when Movant's friend tried to intervene on behalf of the young lady. Movant had told his attorney that this is what happened.

Moreover, the police reports corroborate Movant's account of what happened. According to the police reports, a witness named Melissa Gregory had told police that: "the whole incident started because the passenger of the victim's vehicle (Mr. Jones), who later took off, was 'messaging' with Jasmine." In addition, according to the police reports, a witness/codefendant named Jasmine Jeffries had told police that Mr. Jones got out of a vehicle he had been in and began talking to her and she kept pushing this subject back "as she was uncomfortable with the way he was talking to her and trying to 'put himself' on her." The police reports further indicate that Jasmine Jeffries went on to tell the police that Movant's friend, Johnny L.,

then exited his vehicle and approached Mr. Jones, at which point the alleged victim got out of the vehicle Mr. Jones had previously gotten out of and went to Johnny L. and pushed Johnny L. and tried to punch Johnny L.

Ultimately, Movant's attorney should have advised Movant that he had a viable defense to the charge of assault in the first degree on the grounds that anything he did was done under the influence of sudden passion arising out of adequate cause. Movant's attorney was ineffective for failing to advise Movant of this defense. In failing to advise Movant of this defense, Movant's attorney failed to exercise the skill, care, and diligence that a reasonably competent attorney would have exercised under similar circumstances. Moreover, Movant was prejudiced. If Movant, had known that he could have argued that he was not guilty of assault in the first degree and was guilty instead of assault in the second degree based on the presence of the mitigating factor that he acted under the influence of sudden passion arising out of adequate cause, Movant would not have pled guilty and would have insisted on proceeding to trial.

(L.F. 83-85). Given that Mr. Booker pled these facts and given the legal standard set forth in Roberts v. State⁶ as to when a post-conviction court must grant an evidentiary hearing, Judge Neill clearly erred in denying Mr. Booker's request for

⁶ See Roberts v. State, 276 S.W.3d at 835. Alternatively, see p. 35-36 of this brief.

an evidentiary hearing on the claim. These facts would warrant relief if proven, are not refuted by the record, and show that the matters complained of resulted in prejudice to Mr. Booker.

In denying Mr. Booker an evidentiary hearing on the claim, Judge Neill made the following findings:

Movant alleges the victim's friend (Jones) had sexually harassed a young lady, Movant's friend (Lane) tried to intervene on her behalf, and the victim and his friend Jones swung at Movant's friend Lane. The facts admitted to by Movant during the guilty plea were that Lane and Jones started arguing and pushing each other, the victim "went up to the situation" and Lane swung on the victim. It was at this point that Movant interjected himself into the dispute and struck the victim knocking the victim to the ground.

The facts admitted to by Movant would not support a finding that he could have been found guilty of assault second degree. Movant's co-defendant Lane got out of his car and approached Jones and co-defendant Jeffries, and Lane started arguing with Jones. When the victim approached it was movant's s co-defendant Lane who swung at the victim, at which point movant interjected himself and struck the victim. These facts would not support a finding that movant acted out of provocation by the victim or Jones. There was no

conduct by the victim that would have provoked any response by movant, and the conduct by Jones would not reasonably produce a reaction in a person of ordinary temperament to engage in the conduct engaged in by movant and his companions. This claim is without merit.

(L.F. 98-99).

The motion court's findings are clearly erroneous. In its findings, the motion court asserted the following:

The facts admitted to by Movant during the guilty plea were that Lane and Jones started arguing and pushing each other, the victim "went up to the situation" and Lane swung on the victim.

(L.F. 97). However, the motion court was obviously biased against Mr. Booker because in making these findings, it completely ignored the fact that during the plea colloquy, the prosecutor conceded that the incident started when "Mr. Luther Jones started talking to Jasmine Jeffries and an argument ensued." (L.F. 31). In addition, it is clear that the motion court also ignored the fact that Mr. Booker pled the following facts in his Amended Motion in support of his claim:

According to the police reports, a witness named Melissa Gregory had told police that: "the whole incident started because the passenger of the victim's vehicle (Mr. Jones), who later took off, was 'messaging' with Jasmine." In addition, according to the police reports, a witness/codefendant named Jasmine Jeffries had told police that

Mr. Jones got out of a vehicle he had been in and began talking to her and she kept pushing this subject back "as she was uncomfortable with the way he was talking to her and trying to 'put himself' on her." The police reports further indicate that Jasmine Jeffries went on to tell the police that Movant's friend, Johnny L., then exited his vehicle and approached Mr. Jones, at which point the alleged victim got out of the vehicle Mr. Jones had previously gotten out of and went to Johnny L. and pushed Johnny L. and tried to punch Johnny L.

(L.F. 83-84). It does not take a degree in rocket science to know what Jasmine Jeffries meant when she told the police that Mr. Jones was "trying to 'put himself' on her." (L.F. 84). She meant that Mr. Jones was trying to put his penis on her. That is sexual harassment.

Ultimately, it is clearly erroneous to suggest that anything that was said during Mr. Booker's guilty plea refutes his claim that he acted under the influence of sudden passion arising out of adequate cause. As previously noted, the state itself conceded that the incident started when "Mr. Luther Jones started talking to Jasmine Jeffries and an argument ensued." (L.F. 31). This is consistent with the allegation contained in Mr. Booker's Amended Motion that Mr. Booker's attorney "knew or should have known that the alleged victim's friend had sexually harassed a young lady," (L.F. 83), and other allegations contained in Mr. Booker's Amended Motion which tended to show that the police reports showed that two

witnesses had made statements tending to show that the incident started when Mr. Jones began sexually harassing a young lady. (L.F. 83-84). From there, it is totally consistent that Mr. Booker's friend, Mr. Lane, exited his vehicle and approached Mr. Jones, at which point the two of them started arguing and pushing each other. And from there, it is totally consistent that Mr. Jones's friend, the alleged victim, then "went up to the situation." This begs the question: did the alleged victim peaceably go up to the situation or did he do so by swinging on Mr. Lane? In his Amended motion, Mr. Booker specifically alleged that the alleged victim and the alleged victim's friend swung on Mr. Booker's friend, Mr. Lane, when he tried to intervene on behalf of the young lady who was being sexually harassed. (L.F. 83). In addition, in his Amended Motion, Mr. Booker specifically alleged that the police reports indicated that witness Jasmine Jeffries told the police that the alleged victim tried to punch Mr. Booker's friend, Mr. Lane (aka Johnny L.), when he got of his vehicle and "went up to the situation." (L.F. 84).

Mr. Booker submits that the allegations contained in his Amended Motion as to how the "situation" went down is totally consistent with what the prosecutor said as to what happened during Mr. Booker's guilty plea and that the prosecutor simply was not completely forthcoming about all the details. In turn, Mr. Booker submits that his claim is not refuted by what was said during the guilty plea, that the facts pled in support of that claim if proven would support a finding that Mr. Booker acted under the influence of sudden passion arising out of adequate cause,

and that the motion court clearly erred in denying Mr. Booker an evidentiary hearing on the claim.

For all of the foregoing reasons, Mr. Booker requests this Court to grant him an evidentiary hearing on his claim that his plea attorney was ineffective for failing to advise him that he had a viable defense to the charged offense of assault in the first degree on the grounds that he acted under the influence of sudden passion arising out of adequate cause.

CONCLUSION

WHEREFORE, for the forgoing reasons, Mr. Booker prays this Honorable Court to find that he is entitled to an evidentiary hearing on both of the claims raised in the Amended Motion he filed in 1322-CC09126 and to remand that post-conviction case for an evidentiary hearing (and/or for such other relief as this Court deems just and proper).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 2017, an electronic version of this brief was sent via the Missouri E-filing System to the Court and to Nathan Aquino, assistant attorney general, Office of the Attorney General.

/s/Srikant Chigurupati
Srikant Chigurupati

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify I signed the original copy of this brief, that this brief conforms with Rule 84.04, that this brief contains all the information required by Rule 55.03, and that this brief complies with the limitations contained in Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed 31,000 words. The word-processing software identified this brief as containing 10,711 words and 51 pages including the cover page, signature block, and certificates of service and of compliance.

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