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 REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant adopts and incorporates the jurisdictional statement set forth in his initial brief as if set forth fully herein.

STATEMENT OF FACTS

Appellant adopts and incorporates the statement of facts from his initial brief as if set forth fully herein.

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.

Argument in Reply as to Point Relied on I

In its brief, the state: a) misconstrues Appellant's argument as resting "on the premise that for accomplice liability, a defendant must have purposefully promoted an offense and had the culpable mental state for the underlying crime for

which he is charged;" b) fails to appreciate that its argument that Appellant need only have "had the purpose to promote an offense" and "need not have acted with the intent to kill or cause serious physical injury" is contrary to the plain language of §§ 562.036, 562.041 RSMo and 562.051 RSMo, the comment to the 1973 proposed code that appears while looking at 562.051 RSMo in Vernon's Annotated Missouri Statutes, MAI-CR 3d 304.04, and the directly controlling holdings of this Court, the Supreme Court of Missouri, that § 562.041.1(2) requires an aider to have the intent "to purposely promote the commission of the offense" charged; and c) fails to appreciate the fact that State v. O'Brien, a case authored by the Supreme Court of Missouri, actually went so far as to hold that the evidence in that case was insufficient to sustain a conviction for conventional murder in the second degree under a theory of accomplice liability and that it is therefore clearly incorrect to suggest, as the state does in its brief, that State v. O'Brien does not assist Appellant because it is only applicable to accomplice liability cases wherein the charge at issue is murder in the first degree.

Ultimately, Appellant requests this Court to recognize that the record from Appellant's underlying case fails to show that Appellant understood the charge and that under the law, the state could not convict him of the charged offense of assault in the first degree unless it proved that he himself knowingly caused serious physical injury to the alleged victim or he himself acted with the purpose to promote or further the commission of an assault in the first degree (and not merely some lesser offense such as an assault in the third degree). In turn, and in

accordance therewith, Appellant urges this Court to find that the guilty plea he entered in his underlying case to the charged offense of assault in the first degree was not shown to have been knowingly, voluntarily, and intelligently entered as required by due process and that the court that presided over that plea violated Rule 24.02(e) when it accepted that plea without ensuring that there was an adequate factual basis.

A. The State misconstrues Appellant's argument as resting "on the premise that for accomplice liability, a defendant must have purposefully promoted an offense *and* had the culpable mental state for the underlying crime for which he is charged."

In its brief, the state asserts that: "[d]efendant's argument rests on the premise that for accomplice liability, a defendant must have purposefully promoted an offense and had the culpable mental state for the underlying crime for which he is charged." (See Respondent's Brief 37). Thereafter, the state points out that Missouri courts have rejected the notion that a showing of a dual intent is required to sustain a conviction under a theory of accomplice liability. (See Respondent's Brief 37-40). At one point, the state actually argues that: "[d]ual intent is not required." (See Respondent's Brief 40). This whole argument should not be well taken and is nothing more than a blatant attempt to twist Appellant's argument into something it is not.

Appellant has not ever suggested that in order to find him guilty of the charged offense of assault in the first degree under a theory of accomplice liability,

a finder of fact must find that he "purposefully promoted an offense and had the culpable mental state for the underlying crime for which he is charged." Such a finding is not required under the laws or MAI-CR 3d 304.04 and Appellant has not suggested that it is. In fact such a finding is at odds with what Appellant has actually suggested.

What Appellant has actually suggested is that in order to find him guilty of the charged offense of assault in the first degree under a theory of accomplice liability, a finder of fact must find that he acted with the purpose of promoting the offense charged which, in Appellant's underlying case, was assault in the first degree. That is all Appellant has suggested. Appellant believes that this is what is required under the laws and MAI-CR 3d 304.04 and that it is not enough to show that Appellant acted with the purpose to promote *an offense* other than the one charged.

B. The state fails to appreciate that its argument that Appellant need only have "had the purpose to promote an offense" and "need not have acted with the intent to kill or cause serious physical injury" is contrary to the plain language of §§ 562.036, 562.041 RSMo and 562.051 RSMo, the comment to the 1973 proposed code that appears while looking at 562.051 RSMo in Vernon's Annotated Missouri Statutes, MAI-CR 3d 304.04, and the directly controlling holdings of this Court, the Supreme Court of Missouri, that § 562.041.1(2) requires an aider to have the intent "to purposely promote the commission of the offense" charged.

In its brief, the state asserts that Appellant need only have "had the purpose to promote an offense" and "need not have acted with the intent to kill or cause serious physical injury." (See Respondent's Brief 34-36 and 36-42). This position should be rejected. It is contrary to the laws of the state of Missouri.

The law of accomplice liability is set forth in three statutes: §§ 562.036 RSMo, 562.041 RSMo, and 562.051 RSMo. In order to understand them, one must be cognizant of the interplay between them and the fact that they are meant to be read together and not in isolation as some courts have done. It is also important to note that two of these statutes, §§ 562.036 RSMo and 562.051 RSMo, speak to when a person can be found guilty of an offense, and that one of them, § 562.041 RSMo, merely speaks to when "[a] person is criminally responsible for the *conduct* of another." (See §§ 562.036 RSMo, 562.041 RSMo, and 562.051 RSMo). With this in mind, we turn to what the statutes actually say.

§ 562.036 says: "[a] person with the required culpable mental state is guilty of an offense if it is committed by his or her own conduct or by the conduct of another person for which he or she is criminally responsible." § 562.036 RSMo. This statute raises two questions. First, what is the required culpable mental state? Second, when is a person criminally responsible for the conduct of another person?

Fortunately, both of these questions can be answered with resort to § 562.041.1 RSMo. That statutes says: ***"[a] person is criminally responsible for the conduct of another when***…either before or during the commission of an offense with the purpose of promoting the commission of an offense, he or she agrees to aid or attempts to aid such other person in planning, committing, or attempting to commit the offense." § 562.041 RSMo. This statute obviously attempts to tell us when a person is criminally responsible for the conduct of another, but says nothing about when a person may be found guilty of an offense. It also tries to tell us the culpable mental state for an offense.

The state and some appellate level cases have seized upon the use of the words "an offense" in 562.041.1 to assert that the required culpable mental state is the purpose to commit an offense and that a person who engages in criminal conduct with others is guilty of any criminal offenses the person could reasonably anticipate would be committed by the others. (Respondent's Brief 34-42). For instance, in State v. Workes, the Missouri Court of Appeals for the Eastern District said:

> The utilization of the indefinite article "an" to describe the offense when dealing with the required purpose, i.e. mental state, reflects the statutory intention to place accountability in a co-participant for the specific crime committed by another as part of the criminal activity.

State v. Workes, 689 S.W.2d 782, 785 (Mo. App. E.D. 1985). This reading is incorrect and makes little sense[1] and is incompatible with a reading of the plain language of 562.051 RSMo. Like 562.036 RSMo, 562.051 RSMo speaks to when a person can be found guilty of an offense and says:

> 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 or her own culpable mental state and with his or her own accountability for an aggravating or mitigating fact or circumstance.

562.051 RSMo. What this statute means is that when two or more persons are criminally responsible for a crime under 562.041 RSMo and the crime can be broken down into degrees (i.e. the legislature has divided the crime of assault into

[1] One of the reasons it does not make sense is that in this reading it is unclear as to which offense the use of the words "the offense" refers to and whether it is supposed to relate back to the one referred to by the first use of the words "an offense" or the one referred to by the second use of the words "an offense" in 562.041.1.

various degrees such as assault first, assault second, and assault third), each person is guilty of the degree of the crime that they had the purpose to commit. Not surprisingly, a reading of State v. Workes reveals that the Court that presided over the matter never bothered to consider 562.051 RSMo and whether the reading of 562.041.1 it advocated for was harmonious with a reading of 562.051 RSMo. (See State v. Workes, 689 S.W.2d 782).

Fortunately, there is a perfectly reasonable alternative reading of 562.041 RSMo which is that each time the words "an offense" and "the offense" are used in 562.041, they refer to the same offense, which is the offense at issue. This reading makes much more sense and has real appeal in that it is harmonious with a reading of 562.051 RSMo.

In its response brief, the state cites to State v. Johnson, for the position that: "[t]he only shared intent required to find an accomplice criminally responsible for the conduct of a principal is the intent to promote the commission of *an* offense." (See Respondent's Brief 37) (citing State v. Johnson, 456 S.W.3d 521, 525 (Mo. App. E.D. 2015)). In addition, in its response brief, the state cites to a string of other cases which support this position. These cases include: State v. Liles, 237 S.W.3d 636 (Mo. App. S.D. 2007); State v. Ward, 473 S.W.3d 686 (Mo. App. W.D. 2015); State v. Anderson, 953 S.W.2d 646 (Mo. App. S.D. 1997); State v. Hicks, 203 S.W.3d 241 (Mo. App. S.D. 2006); and State v. Forister, 823 S.W.2d 504 (Mo. App. E.D. 1992). (See Respondent's Brief 39). However, there are

major problems with the state's reliance on these cases from the Missouri Courts of Appeals.

The position that the only shared intent required to find an accomplice criminally responsible for the conduct of a principal is the intent to promote the commission of *an offense* is contrary to the plain language of §§ 562.036, 562.041, and 562.051 RSMo (see supra and Appellant's Brief 28-30); the comment to the 1973 proposed code that appears while looking at 562.051 RSMo in Vernon's Annotated Missouri Statutes (see Appellant's Brief 30); MAI-CR 3d 304.04 (see Appellant's brief 32); and the directly controlling holdings of this Court, the Supreme Court of Missouri, that § 562.041.1(2) requires an aider to have the intent "to purposely promote the commission of the offense" charged[2]. Not surprisingly, the cases from the Missouri Court of Appeals which the state relies on either ignore 562.051 or attempt to read 562.051 in a manner that renders it meaningless and otherwise read 562.041.1(2) in a manner that is contrary to the manner in which this Court, the Supreme Court of Missouri, has read 562.041.1(2).

In its brief the state cites to State v. Johnson, for the position that: "[t]he Missouri Supreme Court has held that 'Section 562.051 does not create any elements of intent in addition to that of Section 562.041 RSMo'" (Respondent's Brief 34). However, what the state's brief fails to recognize and/or acknowledge is that in taking this position, the Missouri Court of Appeals for the Eastern District cited to the Missouri Supreme Court's opinion in State v. White for the

[2] See discussion Infra.

position, but then proceeded to ignore what the Missouri Supreme Court had determined those elements to be in State v. White and wound up interpreting 562.041 and 562.051 in a way that is contrary to the way in which the Missouri Supreme Court interpreted these statutes in State v. White. This is particularly egregious and/or odd because in State v. Sims, 684 S.W.2d 555 (Mo. App. E.D. 1984), the Missouri Court of Appeals for the Eastern District itself acknowledged the following:

> In *White*, the court ruled: "[Section] 562.051, RSMo. 1978, does not create any elements of intent in addition to that of § 562.041, RSMo. 1978". The court went on to further rule that § 562.041.1(2) requires an aider to have the intent "to purposely promote the commission of the offense." The court was ruling that this is the "required culpable mental state" referenced in § 562.036."

State v. Sims, 684 S.W.2d 557. And in State v. Mills, the Missouri Court of Appeals for the Eastern District acknowledged the following:

> What must be shown is that the defendant acted with the "required culpable mental state". [citation omitted] If an accomplice has the purpose to promote an offense, he may be found to have the required culpable state of mind for that offense. [citation omitted].

State v. Mills, 809 S.W.2d 1, 4 (Mo. App. E.D. 1990) (citing § 562.036 RSMo 1986 and State v. Roberts, 709 S.W.2d 857, 863 (Mo. Banc. 1986)). As such, both

the state and the Missouri Court of Appeals for the Eastern District knew or should have known that their interpretations of 562.041 conflicted with this Court's.

Regardless, in State v. White, the Supreme Court of Missouri held that:

> …[T]o be found guilty of a particular offense, an aider must aid another or others with the conscious object of causing that offense. A finding that the aider had this intent is equivalent to finding that the aider and active participant shared a common intent or purpose.

State v. White, 622 S.W.2d 939, 945 (Mo. Banc. 1981). In addition, in State v. White, the Supreme Court of Missouri said the following:

> As shown above, the required mental state is the purpose to promote the commission of *the* offense. Section 562.051, RSMo 1978 expressly permits variance in the degree of culpability of one defendant relative to another. This express provision is necessary because "At common law there was a question whether an 'aider and abettor' could be guilty of a higher (or lower) degree of the offense assisted." Comment to s 562.051, V.A.M.S. 1979. When, as in the present case, the aider is found to have purposely aided in capital murder and thus has the same intent of the active participant, all other things being equal, they are liable to the same degree. Situations can exist where the liability of each is not the same. In such cases, s 562.051, RSMo 1978, permits the defendant or the state to present evidence aggravating or mitigating the matter. For

> example, defendant may introduce evidence showing that he did not have the purpose or conscious object of aiding in capital murder.

State v. White, 622 S.W.2d at 945.

Now the state might argue that State v. White is a red flagged that has been overruled to some extent. However, as noted in Appellant's initial brief, this Court, the Supreme Court of Missouri, has held 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. (See Appellant's Brief 33-34 and State v. O'brien, 857 S.W.2d 212, 218 (Mo. Banc. 1993). As such, the interpretations of the laws of accomplice liability set forth in State v. White are still valid and controlling to this day.

Moreover, the Supreme Court of Missouri has never wavered from its interpretations of the law of accomplice liability as set forth in State v. White. In State v. Roberts, the Supreme Court of Missouri asserted the following:

> [a]s previously noted, under the general rule if an accomplice has a purpose to promote an offense, he may be found to have the required culpable state of mind for *that* offense.

State v. Roberts, 709 S.W.2d at 863. In State v. Ervin, the Supreme Court of Missouri asserted the following:

> And where the State's theory is accomplice/accessory liability, the jury must also find that the defendant had a purpose to aid another in the commission of *the* crime.

State v. Ervin, 835 S.W.2d 905, 923 (Mo. Banc. 1992). And in State v. O'Brien, the Supreme Court of Missouri quoted to this very passage from State v. Ervin and reaffirmed this holding. State v. O'Brien, 857 S.W.2d 212, 218 (Mo. Banc. 1993).

Ultimately, the position that the"[t]he only shared intent required to find an accomplice criminally responsible for the conduct of a principal is the intent to promote the commission of *an* offense," is irreconcilable with the opinions of the Supreme Court of Missouri. Such a position cannot be reconciled with the holdings of State v. Ervin and State v. O'Brien that the state must prove that the defendant acted after deliberation in order to convict him/her under a theory of accomplice liability in murder first cases. (See State v. Ervin, 835 S.W.2d at 922-924 and State v. O'Brien, 857 S.W.2d at 215-220). Those holdings can only be reconciled with the position that an accomplice must act with the purpose to promote the offense charged (or at issue) and not merely some lesser offense. Essentially, those holdings recognized that what separates murder first from murder second is that murder first requires the additional element of deliberation and that consistent with the law of accomplice liability as codified in 562.036, 562.041, and 562.051, the state cannot convict someone of murder in the first degree under a theory of accomplice liability unless it proves that he acted with the purpose to promote a murder in the first degree as opposed to a murder in the

second degree or some lesser offense. (See State v. Ervin, 835 S.W.2d at 922-924 and State v. O'Brien, 857 S.W.2d at 215-220).

One additional piece of information worth noting is that the actual jury instructions that are submitted to the jury in every case are based on MAI-CR 3d 304.04 and always have been. Appellant intends to submit, as exhibits, actual jury instructions from two cases cited by the state in support of its position, State v. Johnson and State v. Ward, to show that in reality it is and always has been the law that accomplice liability is predicated on the notion that the state must prove that the defendant acted with the purpose to promote the offense at issue. Appellant requests this Court to note that he would provide other examples, but that these two cases are the only ones recent enough to be readily available on casenet.

C. The state fails to appreciate the fact that State v. O'Brien, a case authored by the Supreme Court of Missouri, actually went so far as to hold that the evidence in that case was insufficient to sustain a conviction for conventional murder in the second degree under a theory of accomplice liability and that it is therefore clearly incorrect to suggest, as the state does in its brief, that State v. O'Brien does not assist Appellant because it is only applicable to accomplice liability cases wherein the charge at issue is murder in the first degree.

In its brief, the state asserts that: "*White* and *O'Brien* do not assist [Appellant] because both cases involved accomplice liability for first-degree

murder as opposed to first-degree assault." (Respondent's Brief 39). This argument is clearly erroneous. Those cases interpreted the accomplice liability statutes (§§ 562.036 RSMo, 562.041 RSMo, and 562.051 RSMo) and the interpretation of those statutes does not change based on what the offense is. Moreover, as argued in Appellant's initial brief, in State v. O'Brien, this Court did not merely hold that the evidence in that case was insufficient to sustain a conviction for murder in the first degree under a theory of accomplice liability, it also held that the evidence in that case was insufficient to sustain a conviction for murder in the second degree under a theory of accomplice liability. (See Appellant's Brief 25 and State v. O'brien, 857 S.W.2d at 218-220).

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.

Argument in Reply as to Point Relied on II

In its brief, the state says that what Appellant alleged in connection with the second claim raised in his Amended Motion was that *the victim and* the victim's friend sexually harassed a young lady and that the victim and his friend swung on Appellant and Appellant's friend when Appellant's friend tried to intervene on behalf of the young lady. (Respondent's Brief 57). The state then proceeds to argue that the claim was refuted by the record in part because the victim did not sexually harass anyone. (Respondent's Brief 57-58). However, the reality is that Appellant's Amended Motion does not assert that the victim sexually harassed the young lady. (L.F. 83). Appellant's Amended Motion did allege that Appellant's actions in hitting the alleged victim were preceded by the reprehensible conduct of the alleged victim and the alleged victim's friend, but went on to explain that what happened was 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 Appellant/Appellant's friend when Appellant's friend tried to intervene on her behalf. (L.F. 83). In addition, Appellant's Amended Motion alleged that the

alleged victim got out of his car and pushed Appellant's friend and tried to punch Appellant's friend when Appellant's friend tried to intervene on behalf of the young lady. (L.F. 83-84).

Appellant maintains that the factual allegations he made in connection with the second claim raised in his Amended Motion were not refuted by the record and are consistent with what was said during Appellant's guilty plea. Appellant requests this Court to recognize that the prosecutor who was called upon by the plea judge to inform him of what Appellant had done conceded that the incident began when the victim's friend began talking to the young lady and that an argument ensued. (L.F. 31). In addition, Appellant requests this Court to recognize that the prosecutor also conceded that Appellant's friend then exited his vehicle and started arguing with the victim's friend and that the two of them then started pushing each other. (L.F. 31). Moreover, Appellant requests this Court to recognize that the prosecutor also conceded that the victim then got out of his car and went up to the situation. (L.F. 31). Ultimately, Appellant asserts that all of this is entirely consistent with what Appellant alleged in connection with the second claim raised in his Amended Motion and that the claim is not refuted by the record. And while it may be true that Appellant did not say anything about sudden passion or sexual harassment or his friend get attacked during the guilty plea, it is entirely plausible that Appellant was not aware that it would make a difference. After all, the claim at issue is that his attorney failed to advise him that under the law what would otherwise be an assault first is mitigated to assault

second if the person who committed the assault acted under the influence of sudden passion arising out of adequate cause. Undersigned counsel fails to see how that would be obvious to a lay person such as Appellant.

Another argument made by the state in an effort to derail this second claim is that Appellant could not have acted out of sudden passion because the alleged sexual harassment was not directed at him. (Respondent's Brief 59). Appellant concedes that the sexual harassment was not directed at him, but submits that the fact that the victim's friend had sexually harassed the young lady was an act that inflamed him and that the actions of the victim in getting out of his car to help his friend beat up Appellant's friend, who had merely intervened on behalf of the young lady, inflamed him even more. In support of this contention, Appellant asserts that in making the claim at issue, he alleged that the victim got out of his car and pushed Appellant's friend and tried to punch him and that this took place after Appellant's friend tried to intervene on behalf of a young lady who had been sexually harassed by the victim's friend. (L.F. 83-84). In addition, in support of this contention, Appellant submits that sudden passion "means passion directly caused *by the victim or another acting with the victim* which passion arises at the time of the offense and is not solely the result of former provocation." 565.002(7) RSMo. There is nothing in this definition that requires the harassment to have been directed at Appellant.

In its brief, the state cites to State v. Everage, 124 S.W.3d 11, 16 (Mo. App. W.D. 2004) for the notion that any sudden passion had to have arisen out of

conduct directed at Appellant in order for Appellant to claim that he acted under the influence of sudden passion. (Respondent's brief 59-60). However, in State v. Turner, this Court, the Supreme Court of Missouri, made it clear that one CAN act under the influence of sudden passion based on conduct directed at another. State v. Turner, 152 S.W.3d 313, 316-317 (Mo. Sup. Ct. Div 2). This Court actually said: "[t]o mitigate a homicide, it is not necessary that the assault or other provocation should have been made upon or given to the slayer." Id. at 316. This Court actually held that the Turner defendant was entitled to a jury instruction on voluntary manslaughter given that there was evidence that the victim was in the process of beating up the Turner defendant's brother at the time of the killing. Id. at 316-317.

The state also argues that there was no adequate cause or "adequate provocation." (Respondent's Brief 61). In doing so, the state attempts to downplay the factual allegations Appellant made in asserting the claim that his attorney was ineffective for failing to advise him that assault first can be mitigated to assault second if the person who committed the assault acted under the influence of sudden passion arising out of adequate cause. The state goes so far as to pretend that the allegations were merely that the victim's friend made the young lady uncomfortable with some innocent flirting. (Respondent's Brief 61-62). However, the actual allegations as to the nature of the provocation was that the victim's friend was sexually harassing a young lady and that the victim pushed and tried to punch Appellant's friend when Appellant's friend tried to intervene on

behalf of the young lady. (L.F. 83-84). Moreover, as noted by this Court in State v. Turner, the passion such provocation may or may not generate "is for the jury to determine in the light of all the circumstances and under the guidance of proper instructions." State v. Turner, 152 S.W.3d at 317.

CONCLUSION

WHEREFORE, for the forgoing reasons, Mr. Booker prays this Honorable Court to vacate the sentence and judgment given that there was no factual basis, and in the alternative, to find that he is entitled to an evidentiary hearing on one or 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). Appellant requests this Court to note that although he originally sought an evidentiary hearing on his claim that there was no factual basis, the caselaw holds that the proper remedy is simply to vacate the sentence and judgment. (See Douglas v. State, 410 S.W.3d 290 (Mo. App. E.D. 2013)).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of September, 2017, an electronic version of this brief was sent via electronic mail to the Court and to Mr. Nathan Aquino, assistant attorney general, Office of the Attorney General.

/s/Srikant Chigurupati
Srikant Chigurupati

CERTIFICATE OF COMPLIANCE

Pursuant to Mo. S. Ct. R. 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of E.D. Special Rule 360. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed the limitations of [31,000/7,750] words for an [initial/reply] brief in this court. The word-processing software identified that this brief contains 5,798 words and 27 pages, including the cover page, signature block, and certificates of service and of compliance. In addition, I hereby certify that this document has been scanned for viruses with Symantec Endpoint Protection Anti-Virus software and found virus-free. It is in text-searchable PDF form.

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