IN THE
MISSOURI SUPREME COURT

DONNIE HOUNIHAN,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. SC97622**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT FOR PEMISCOT COUNTY, MISSOURI
THE HONORABLE W. KEITH CURRIE, JUDGE AT POST-CONVICTION

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Donnie Hounihan, was convicted following a bench trial of Count 1, driving while intoxicated as a chronic offender in violation of §§ 577.010 and 577.023 RSMO (2010 Supp.), and Count 2, driving while license revoked or suspended in violation of § 302.321 RSMO (2012 Supp.)[1] (D22 pp. 1-2; D26 p. 39).[2] On September 15, 2015, the Honorable Fred W. Copeland sentenced Mr. Hounihan to seven (7) years in Count 1 and a concurrent four (4) years in Count 2 (D22 pp. 1-2; D26 p. 45).

On November 15, 2015, Mr. Hounihan filed a *pro se* motion for post-conviction relief under Missouri Supreme Court Rule 29.15 (D2 pp. 1-17). The sentencing court appointed post-conviction counsel on November 19, 2015 (D1 p. 4). Appointed counsel entered his appearance on December 29, 2015 and made a contemporaneous request for 30 additional days in which to file an amended motion (D3 p. 1; D4 pp. 1-2). The motion court, the Honorable W. Keith Currie, granted counsel's request for additional time (D5 pp. 1-2). On January 7, 2016, Mr. Hounihan filed a Notice of Appeal to the Missouri Court of Appeals for the Southern District of his convictions and sentence (D23 pp. 1-2;

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[1] All statutory references are to Revised Statutes of Missouri (2012 Supp.) unless otherwise indicated.

[2] Citations to the Legal File and Supplemental Legal File are in the form prescribed by Missouri Supreme Court Rule 84.04(c). Citation to the evidentiary hearing transcript will be "Evid. Tr. __".

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D25 p. 1). On January 12, 2016 appointed post-conviction counsel requested the motion court hold open Mr. Hounihan's post-conviction case until the conclusion of the direct appeal (D6 pp. 1-3). The court granted counsel's motion to hold open the matter on January 20, 2016 (D7 pp. 1-3).

The Missouri Court of Appeals for the Southern District affirmed Mr. Hounihan's convictions and sentence on December 21, 2016. State v. Hounihan, ___ S.W.3d ___ (SD34286) (Mo. App. S.D. 2016). The Court's mandate issued January 6, 2017.

Appointed post-conviction counsel timely filed an amended motion on April 6, 2017 (D8 pp. 1-13). Following an evidentiary hearing, the motion court denied Mr. Hounihan's motion for post-conviction relief in a Judgment and Order issued January 2, 2018 (D13 pp. 1-11; App A1-A11). Mr. Hounihan filed a Notice of Appeal of the court's judgment (D15 pp. 1-16). The Missouri Court of Appeals affirmed in part and reversed in part on November 27, 2018. However, this Court sustained Mr. Hounihan's application for transfer on April 2, 2019. This Court has jurisdiction over this appeal, Article V, Section 10, Mo. Const.; Rule 83.04.

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STATEMENT OF FACTS

Facts from Trial

The State charged Appellant Donnie Hounihan with driving while intoxicated ("DWI") as a chronic offender under §§ 577.010 and 577.023, as well as driving while revoked under § 302.321 in a two-count amended information. (D19 pp. 1-2). Count 1 of the amended information recited four prior DWI convictions for Mr. Hounihan and alleged, *inter alia*, that he "operated a motor vehicle while under the influence of alcohol…." (D19 pp. 1-2).

On August 3, 2015 Mr. Hounihan underwent a bench trial in the Circuit Court of Pemiscot County before the Honorable Fred W. Copeland (D26 pp. 1-48). The following evidence bearing on this appeal was presented at trial:

The trial court took judicial notice of another case in which Mr. Hounihan pled guilty to a C felony DWI on December 7, 2010 (D26 pp. 10-11). State's Exhibit 1, Mr. Hounihan's official Missouri driver record, was offered and received into evidence (D26 p. 11).

The State first called Officer David Maclin, a patrolman with the Hayti Police Department, who encountered Mr. Hounihan on the night of September 18, 2014 (D26 p. 12). While travelling north on Highway North J that night, Officer Maclin saw a white Buick Roadmaster, also northbound, that crossed the center line three or more times (D26 p. 13). Officer Maclin stopped the car and made contact with its driver, who was Mr. Hounihan (D26 p. 13).

Officer Maclin stated Mr. Hounihan could not make eye contact with him, there were many cigarette ashes in his lap, and a strong odor of alcoholic beverage came from the car (D26 p. 14). When Officer Maclin asked him to produce his driver's license and insurance, Mr. Hounihan reportedly said he had neither and that he believed his driver's license was revoked (D26 p. 14). Officer Maclin asked Mr. Hounihan to get out of his car and, upon instructing him to come back to the patrol car, Officer Maclin observed Mr. Hounihan swayed and had uncertain footing (D26 p. 14). Inside the patrol car, Officer Maclin observed that Mr. Hounihan's eyes were bloodshot, watery, and glassy (D26 p. 15). Mr. Hounihan admitted to having consumed several beers and a pint of whiskey (D26 p. 15).

Officer Maclin placed Mr. Hounihan under arrest and took him to the local hospital for a blood draw (D26 p. 15). In his custodial questioning of Mr. Hounihan at the hospital, Officer Maclin confirmed that he was driving the vehicle and that he drank beer and whiskey in the three hours prior to police contact (D26 pp. 16-17). Mr. Hounihan told him he took hydrocodone and Klonopin, among many other prescription drugs (D26 p. 17).

Phlebotomist December Jones drew a sample of Mr. Hounihan's blood at Officer Maclin's request (D26 pp. 17, 21-23). Officer Maclin watched Jones give the specimen to "the other lady" who "runs the instruments or the machines" and Officer Maclin left the lab briefly once the blood was in the machine (D26 p. 17). Ms. Jones testified she hand-delivered Mr. Hounihan's blood to "her tech" (D26 pp. 23-24).

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Medical laboratory technician Patricia Stone next testified that she subjected to spectrometry the blood samples brought to her by Jones on the night of September 18, 2014 (D26 pp. 25-26). After foundational testimony from Stone, State's Exhibit 2, a lab report printout, was admitted without objection (D26 pp. 27-28). The State rested (D26 p. 31).

Mr. Hounihan testified to his numerous chronic infirmities, including chronic obstructive pulmonary disease, asthma, black mold poisoning, memory loss and bulging spinal disks (D26 p. 32). He took various medications for these problems (D26 p. 33). He said bulging disks had caused him to walk with a cane for a couple of years and that surgery was necessary to repair the impacted spinal nerve (D26 pp. 32, 34). He he remembered being stopped in September of 2014 and, because he could not stand on his feet due to his back and leg dysfunction, he was not subjected to field sobriety tests (D26 pp. 32-33). He remembered going to the hospital and stated his multiple medications made his eyes watery and red (D26 pp. 33-34). Because he has suffered from numerous maladies for years, with his back pain beginning to extend into his legs, Mr. Hounihan was on pain medication in September of 2014 (D26 p. 34).

The trial court convicted Mr. Hounihan as charged (D26 p. 39). On September 15, 2015 the court sentenced Mr. Hounihan to seven (7) years in the Department of Corrections for Count 1 and four (4) years for Count 2, to run concurrently (D26 p. 44).

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Facts Post-conviction

Mr. Hounihan filed a *pro se* motion for post-conviction relief on November 15, 2015. (D2 pp. 1-17). The sentencing court appointed post-conviction counsel on November 19, 2015 (D1 p. 4). Appointed counsel entered his appearance on December 29, 2015 and made a contemporaneous request for 30 additional days in which to file an amended motion (D3 p. 1; D4 pp. 1-2). The motion court, the Honorable W. Keith Currie, granted counsel's request for additional time (D5 pp. 1-2).With permission of the Court of Appeals, Mr. Hounihan then filed a late Notice of Appeal on January 7, 2016 (D23 p. 1). Appointed post-conviction counsel requested the motion court hold open Mr. Hounihan's post-conviction case until the conclusion of the direct appeal (D6 pp. 1-3). The court granted counsel's motion to hold open the matter on January 20, 2016 (D7 pp. 1-3).

The Missouri Court of Appeals affirmed Mr. Hounihan's convictions and sentence on December 21, 2016. State v. Hounihan, ___ S.W. 3d ___, (SD34286) (Mo. App. S.D. 2016). The Court's mandate issued January 6, 2017.

Appointed counsel timely filed an amended motion on April 6, 2017 (D8 pp. 1-13). In his amended motion, Mr. Hounihan made two complaints of ineffective assistance of counsel affecting his convictions and sentence:

Mr. Hounihan first pled (in paragraphs 8(a) and 9(a) of the amended motion) that trial counsel, Ms. Inga Ladd, had been ineffective for failing to investigate and present evidence that he suffered from a variety of physical and mental maladies and that those

maladies and the medications he took for them affected his gait and appearance so as to make him appear intoxicated by alcohol when he was arrested (D8 pp. 2-7).

Mr. Hounihan also pled (in paragraphs 8(b) and 9(b) of the amended motion) that appellate counsel, Mr. Jedd C. Schneider, had been ineffective for failing to raise that there was insufficient evidence to convict him of driving while license revoked in violation of § 302.321 as a class D felony because the State failed to offer any evidence that his municipal DWR conviction was counseled (or featured a written waiver of counsel) or that he had received more than ten day sentences on "such prior offenses" (D8 pp. 7-11). Mr. Hounihan pled State's Exhibit # 1 from trial, a certified copy of his driving record, lacked any mention of representation and sentence as to his prior DWR convictions. Id.

The motion court convened an evidentiary hearing on September 26, 2017. Mr. Hounihan was present in person and by counsel, Mr. Scott Thompson (Evid. Tr. 4, 19). The Respondent appeared by Mr. Jeremy Lytle and Mr. Michael Anderson (Evid. Tr. 4, 13). Ms. Ladd and Dr. Abdullah Arshad testified on behalf of Mr. Hounihan. Appellate counsel's testimony was received by an affidavit stipulated to by the parties (Appellant's Ex. 3).

Ms. Ladd testified she was aware before trial that Mr. Hounihan wanted Dr. Arshad to be a witness on his behalf (Evid. Tr. 7-8). She admitted she penned a letter advising Mr. Hounihan she would not have his doctor testify "[d]ue to the high amount of unpaid fees." (Evid. Tr. 12-13; Appellant's Ex. 2). Mr. Hounihan, she further wrote,

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would have to pay the "full fee" immediately and additionally forward her $1000.00 for the expert's fee for her to subpoena Dr. Arshad (Appellant's Ex. 2).

Ms. Ladd testified she did not think Dr. Arshad's testimony would assist Mr. Hounihan's defense based on admissions he made to her concerning the offense (Evid. Tr. 9). She further stated that based on her "two decades" as an attorney it is rarely a good idea to force a medical professional to testify without paying them as an expert (Evid. Tr. 11). Asked about her specific experience in that regard, Ms. Ladd admitted that it was not firsthand, but rather advice from a mentor (Evid. Tr. 11-12). Because she had not talked to Mr. Hounihan's doctor, she admitted she did not know whether he would charge a fee (Evid. Tr. 12).

Dr. Arshad testified he was Mr. Hounihan's primary physician and had been so for approximately ten years (Evid. Tr. 19-20). He was, by agreement of the parties, confirmed as an expert witness (Evid. Tr. 19). Dr. Arshad explained Mr. Hounihan had many physical conditions affecting his balance and gait, including degenerative discs, bulging discs, osteoarthritis in his knee and back, and peripheral vascular disease (Evid. Tr. 21-22). Dr. Arshad also testified Mr. Hounihan showed signs of dementia (Evid. Tr. 22-23, 25-27).

Dr. Arshad said he had testified in court cases previously (Evid. Tr. 19). He had not spoken to Ms. Ladd about Mr. Hounihan's medical condition or the prospect of testifying (Evid. Tr. 24). Dr. Arshad stated he did not usually charge a fee to testify

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(Evid. Tr. 24). If called, he explained, he would have testified similarly at Mr. Hounihan's trial (Evid. Tr. 24).

Appellate counsel, Mr. Schneider, stated in his affidavit that he did not raise the sufficiency of evidence to support either charge in his brief on appeal (Appellant's Ex.s 1 and 3). Mr. Schneider, a public defender, conceded he should have argued on direct appeal that there was insufficient evidence to convict Mr. Hounihan of the felony form of driving while license revoked in violation of § 302.321 (Appellant's Ex. 3). Mr. Schneider agreed there was no evidence presented from which the trial court could determine Mr. Hounihan had been represented by counsel for his Hayti Municipal conviction or about the duration of his sentences in his prior driving while revoked offenses (Appellant's Ex. 3). Mr. Schneider wrote,

> I believe I failed to raise this claim of insufficient evidence under a mistaken understanding of the quantum of proof necessary for the trial court to make a finding of Mr. Hounihan's prior convictions required for enhancement from misdemeanor to felony DWR under Section 302.321.1 and overlooked the relationship of Section 302.321.1 to the formal strictures governing findings of prior offenses under Section 558.021.

(Appellant's Ex. 3). Mr. Schneider had no strategic or other legal reason not to raise the sufficiency of evidence in Count 2 (Appellant's Ex. 3).

The motion court denied Mr. Hounihan's motion for post-conviction relief in a Judgment and Order issued January 2, 2018 (D13 pp. 1-11; App A1-A11). On January 12, 2018, Mr. Hounihan filed a Notice of Appeal of the court's judgment in the Missouri Court of Appeals for the Southern District (D15 pp. 1-16). The Court of Appeals affirmed

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in part and reversed in part on November 27, 2018. However, this Court sustained Mr. Hounihan's application for transfer on April 2, 2019. This appeal follows. To avoid repetition additional facts may be adduced in the Argument portion of this brief.

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POINTS RELIED ON

I.

The motion court erred in denying Mr. Hounihan's Rule 29.15 motion for post-conviction relief because he proved by a preponderance of the evidence that he was denied his rights to due process of law and effective assistance of counsel as guaranteed by the V, VI, and XIV Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that his trial counsel, Inga Ladd, was ineffective for failing to call Dr. Abdullah Arshad as a witness when she had notice that Dr. Arshad was Mr. Hounihan's attending physician and could testify to his various maladies as well as the side effects of the medications he took to treat those maladies. The motion court's conclusion that Mr. Hounihan was not prejudiced is error because had the trial court heard support for Mr. Hounihan's assertion that he was not intoxicated the night of his arrest from someone with the medical training to testify to such a complicated subject, there is a reasonable probability it would have found the evidence of his intoxication insufficient and acquitted him of the charge of driving while intoxicated.

Deck v. State, 68 S.W.3d 418 (Mo. banc 2002)

Seales v. State, 580 S.W.2d 733 (Mo. banc 1979)

State v. Johnson, 901 S.W.2d 60 (Mo. banc 1995)

Missouri Constitution, Article I, Sections 10 and 18(a)

U.S. Constitution, Amendments V, VI and XIV

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II.

The motion court erred in denying Mr. Hounihan's Rule 29.15 motion for post-conviction relief after an evidentiary hearing because he proved by a preponderance of the evidence that he was denied his rights to due process of law and effective assistance of counsel as guaranteed by the V, VI, and XIV Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that appellate counsel, Jedd Schneider, failed to raise that there was insufficient evidence to convict Mr. Hounihan of driving while his license was revoked in violation of § 302.321 as a class D felony. Section 302.321 requires specific qualifications for predicate offenses, including previous representation by an attorney or waiver of that right and a sentence of at least ten days for the prior offenses, neither of which were found in the Driving Record (State's Exhibit #1 from trial), the sole evidence submitted by the State concerning Mr. Hounihan's priors. The court's conclusion that appellate counsel was not ineffective because the issue was not recognized at trial leaves a definite and firm impression a mistake has been made because the error was obvious, counsel confessed to overlooking it, and, had the issue been raised, the outcome of the appeal would have been different.

Moss v. State, 10 S.W. 3d 508 (Mo. banc 2000)

Seals v. State, 551 S.W.3d 653 (Mo. App. S.D. 2018)

Missouri Supreme Court Rule 30.20

Revised Statutes of Missouri, § 302.321 (2012 Supp.)

Missouri Constitution, Article I, Sections 10 and 18(a)

U.S. Constitution, Amendments V, VI and XIV

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ARGUMENT

I.

The motion court erred in denying Mr. Hounihan's Rule 29.15 motion for post-conviction relief because he proved by a preponderance of the evidence that he was denied his rights to due process of law and effective assistance of counsel as guaranteed by the V, VI, and XIV Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that his trial counsel, Inga Ladd, was ineffective for failing to call Dr. Abdullah Arshad as a witness when she had notice that Dr. Arshad was Mr. Hounihan's attending physician and could testify to his various maladies as well as the side effects of the medications he took to treat those maladies. The motion court's conclusion that Mr. Hounihan was not prejudiced is error because had the trial court heard support for Mr. Hounihan's assertion that he was not intoxicated the night of his arrest from someone with the medical training to testify to such a complicated subject, there is a reasonable probability it would have found the evidence of his intoxication insufficient and acquitted him of the charge of driving while intoxicated.

Preservation of Error

In the amended motion, Mr. Hounihan alleged his trial counsel was ineffective for failing to present Dr. Arshad as a witness to his claims about his ailments and medications. Because the claim was included in the amended motion and tried by the parties at an evidentiary hearing, it is preserved for appellate review. *See* Mouse v. State,

90 S.W.3d 145, 152 (Mo. App. S.D. 2002) (the claim raised on post-conviction appeal must have been either raised in amended post-conviction motion or tried by implicit consent of the parties at an evidentiary hearing to be preserved for appellate review).

Argument

Mr. Hounihan's defense hinged on his assertion that he was not intoxicated the night of the arrest and his peculiar mannerisms were a result of his ailments and the medications he took for those ailments. At trial, the State presented Officer David Maclin, the police officer who arrested Mr. Hounihan (D26 p. 12). He testified that Mr. Hounihan's behavior after he was pulled over was atypical, that he "couldn't make eye contact with me." (D26 p. 14). He "swayed and his footing was uncertain." (D26 p. 14). His eyes were bloodshot and watery, and he smelled of alcohol (D26 p. 15). When asked about medication, Mr. Hounihan told Officer Maclin that he was on "too many to list." (D26 p. 17).

This was the only behavioral evidence presented by the State – that Mr. Hounihan had difficulty making eye contact, his eyes were bloodshot and watery, and his gait was unsteady. Other evidence included a blood test, which provided a single data point that was not indicative of what his blood-alcohol content (BAC) was at the time of his arrest (D8 p. 5).

The only testimony provided on behalf of Mr. Hounihan was that of Mr. Hounihan himself, despite his request that his attending physician be contacted (D26 p.3; Evid. Tr. 7). Trial counsel, Ms. Ladd, later stated she did not believe that Dr. Arshad's testimony

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would have provided a defense. She said, "I told Mr. Hounihan that being old and sick was not a defense to driving while intoxicated and I didn't think that that testimony would be relevant to his defense in the case." (Evid. Tr. 8). She did not talk to Mr. Hounihan's doctor before rejecting him as witness (Evid. Tr. 8). She did not obtain authorization from Mr. Hounihan to contact Dr. Arshad (Evid. Tr. 8).

She also claimed that she did not think Mr. Hounihan would be able to pay to have Dr. Arshad testify (Evid. Tr. 11). It was a "practice point" to not subpoena a medical professional without retaining them as a paid expert (Evid. Tr. 11). She told Mr. Hounihan that she would not contact Dr. Arshad without retaining him as a paid witness, and requested that he pay upfront for this expense (Evid. Tr. 12). She made this assessment without ever actually contacting Dr. Arshad (Evid. Tr. 24). Dr. Arshad testified at the evidentiary hearing that he would not have charged a fee to testify (Evid. Tr. 24).

The motion court appears to concede that Ms. Ladd's excuses were lacking – "While perhaps none of Ms. Ladd's various explanations . . . excuse her failure to speak to Dr. Arshad prior to trial . . . " (D13 p. 7; App A7) – but still found that there was no prejudice to Mr. Hounihan as a result of this failure. This is clearly erroneous.

The Sixth Amendment to the United States Constitution, incorporated to the states via the Fourteenth Amendment, and Article I, Sections 10 and 18(a) of the Missouri Constitution, guarantee defendants in state criminal proceedings the right to effective assistance of counsel. Gideon v. Wainwright, 372 U.S. 334, 343 (1963). This right is

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designed to assure fairness and give legitimacy to the adversarial process. Id. To fulfill its role of ensuring a fair trial, the right to counsel must be the right to "effective" assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 375 (1986).

When a criminal defendant seeks post-conviction relief due to ineffective assistance of counsel, he must prove his allegations by the preponderance of the evidence, and he must show (1) his counsel failed to exercise the customary skill and diligence a reasonably competent attorney would display when rendering similar services under similar circumstances, and (2) he was prejudiced as a result of that lack of skill and diligence. Strickland v. Washington, 466 U.S. 668, 687 (1984); Seales v. State, 580 S.W.2d 733, 736-37 (Mo. banc 1979); State v. Butler, 951 S.W.2d 600 (Mo. banc 1997). To prove prejudice, a movant must show he or she suffered a genuine deprivation of his right to effective assistance of counsel, such that the Court's confidence in the fairness of the proceeding is undermined. Deck v. State, 68 S.W.3d 418, 428 (Mo. banc 2002).

To establish a claim of ineffective assistance of counsel for failure to call a witness, a movant must show that the witness would have testified if called, and the witness' testimony would have aided the movant's defense. State v. Johnson, 901 S.W.2d 60, 63 (Mo. banc 1995). Missouri specifically requires a movant to show that: (1) the witness could have been located through reasonable investigation; (2) the witness would have testified if called; and (3) the testimony would have provided a viable defense, Williams v. State, 8 S.W.3d 217, 219 (Mo. App. E.D. 1999) citing State v. Vinson, 800

S.W.2d 444, 448-49 (Mo. banc 1990), in order to establish a claim for ineffective assistance of counsel.

Had Dr. Arshad testified at trial, he would have described Mr. Hounihan's various diagnoses and the side effects of the medication he was on (Evid. Tr. 24). Had the bench heard these explanations from the mouth of trained physician rather than a man diagnosed with dementia facing many years in prison, there is a reasonable probability that it would have found Officer Maclin's behavioral evidence lacking and that Mr. Hounihan was not intoxicated beyond a reasonable doubt.

Trial counsel did not exercise the customary skill and diligence that a reasonably competent attorney would exercise under like circumstances. Ms. Ladd claimed that her decision to ignore Dr. Arshad was a matter of trial strategy (Evid. Tr. 8, 17). But she had not even talked to Dr. Arshad. "'[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitations on investigation.' " Henderson v. Sargent, 926 F.2d 706, 712 (8th Cir. 1991) (quoting Strickland, 466 U.S. at 690-91). At trial, she instead focused on cross-examining the State's witnesses – the phlebotomist and lab technician who performed the blood tests on Mr. Hounihan (D26 pp. 20-30). This was not reasonable trial strategy. This was a defense theory that pitted the testimony of a septuagenarian with diagnosed memory issues against that of a police officer and trained medical professionals. The bench was not presented with anything that could cast reasonable

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doubt as to whether he was intoxicated at the time of his arrest, despite Dr. Arshad's willingness to testify on Mr. Hounihan's behalf.

The motion court erred in finding this claim without merit, and deprived Mr. Hounihan of his rights to due process of law and effective assistance of counsel under the V, VI, and XIV Amendments to the United States Constitution and under Articles I, Sections 10 and 18(a) of the Missouri Constitution.

This Court must reverse the motion court's denial of Mr. Hounihan's motion for post-conviction relief.

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II.

The motion court erred in denying Mr. Hounihan's Rule 29.15 motion for post-conviction relief after an evidentiary hearing because he proved by a preponderance of the evidence that he was denied his rights to due process of law and effective assistance of counsel as guaranteed by the V, VI, and XIV Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that appellate counsel, Jedd Schneider, failed to raise that there was insufficient evidence to convict Mr. Hounihan of driving while his license was revoked in violation of § 302.321 as a class D felony. Section 302.321 requires specific qualifications for predicate offenses, including previous representation by an attorney or waiver of that right and a sentence of at least ten days for the prior offenses, neither of which were found in the Driving Record (State's Exhibit #1 from trial), the sole evidence submitted by the State concerning Mr. Hounihan's priors. The court's conclusion that appellate counsel was not ineffective because the issue was not recognized at trial leaves a definite and firm impression a mistake has been made because the error was obvious, counsel confessed to overlooking it, and, had the issue been raised, the outcome of the appeal would have been different.

Preservation of Error

In the amended motion, Mr. Hounihan alleged his appellate counsel was ineffective for failing to raise the sufficiency of evidence at trial to support the felony

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charge of driving while revoked. Because the claim was included in the amended motion and tried by the parties at an evidentiary hearing, it is preserved for appellate review. Mouse, *supra*.

Argument

To enhance Mr. Hounihan's act of driving while revoked from a misdemeanor to a class D felony, the State alleged in its amended Information:

> On or about February 4, 2013, the defendant was convicted of driving while revoked in the Circuit Court of Pemiscot County for events occurring January 4, 2013, and
>
> On or about January 13, 2005, defendant was convicted of driving while revoked in Hayti Municipal Court and defendant was represented by an attorney or waived counsel in writing, for events occurring on December 29, 2004, and
>
> On or about December 7, 2010, defendant was convicted of driving while intoxicated in the Circuit Court of Pemiscot County and, [sic] for events that occurred May 21, 2010, and served a sentence of more than ten days for said conviction.

(D 19 pp. 1-2).

At trial, the State tendered its Exhibit #1, a copy of Mr. Hounihan's driving record. That document, in the section titled "Court Convictions," listed offenses seemingly corresponding to those pled by the State in its amended Information (State's Exhibit #1 from trial). However, State's Exhibit #1 did not contain any evidence as to whether Mr. Hounihan had counsel or filed a written waiver of counsel before his Hayti Municipal Court conviction nor did it indicate if he had served more than ten days on either of the DWR convictions. Id.

Section 302.321 has requirements for what must be proven to enhance a charge of driving while revoked from a misdemeanor to a felony and the State did not prove them at Mr. Hounihan's trial. In pertinent part, § 302.321.2 penalizes as a felon any person driving while revoked who has "a prior alcohol-related enforcement contact as defined in section 302.525, convicted a third or subsequent time of driving while revoked or a county or municipal ordinance of driving while suspended or revoked where the defendant was represented by or waived the right to an attorney in writing, and where the prior two driving-while-revoked offenses occurred within ten years of the date of occurrence of the present offense and where the person received and served a sentence of ten days or more on such previous offenses." State's Exhibit 1 from trial did not establish the prerequisites conatined in § 302.321.

Appellate counsel, Mr. Schneider, conceded he missed that the evidence was insufficient to conclude beyond a reasonable doubt that Mr. Hounihan's Hayti offense met the requirements of § 302.321 when he wrote the direct appeal. (Appellant's Ex. 3 pp. 2-3). He did not have any strategic or legal reason to not raise the issue of sufficiency on Count 2 (Appellant's Ex.3 p. 2). Nevertheless, the motion court found that the error was not "so obvious from the record that a competent and effective lawyer would have recognized and asserted it." The court found that trial counsel, the prosecuting attorney, and the trial court also failed to recognize it (D13 p. 11; App A11).

The effectiveness prong for evaluating an error of appellate counsel, one that overcomes the presumption of effectiveness, is comparable to the standard imposed on

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trial attorneys. The error must be "so obvious from the record that a competent and effective lawyer would have recognized and asserted it." Moss v. State, 10 S.W. 3d 508, 514-15 (Mo. banc 2000). To establish prejudice, a movant must prove, "if counsel had raised the claims, there is a reasonable probability the outcome of the appeal would have been different." Taylor v. State, 262 S.W.3d 231, 253 (Mo. banc 2008). As with trial counsel, appellate counsel may appeal to reasonable strategy to defend his or her conduct. Appellate counsel is not required to raise every possible claim in a defendant's motion for a new trial and has no duty to present non-frivolous issues where appellate counsel makes a strategic decision only to pursue a select avenue on appeal. Tisius v. State, 519 S.W.3d 413, 431-32 (Mo. banc 2017); *see also* Jones v. Barnes, 463 U.S. 745, 751-754 (1983).

Appellate Counsel was Ineffective

The motion court's conclusion that the error was not so obvious that competent and effective counsel would have asserted it must fail. If a claim of ineffective assistance of appellate counsel can be defeated by the mere assertion that an issue wasn't noticed until post-conviction proceedings, there is no point in having such a claim available in the first place. For instance, in Seals v. State, 551 S.W.3d 653 (Mo. App. S.D. 2018), appellate counsel failed to request relief on a count of victim tampering alongside a reversal for domestic assault in the first degree – as a result, the defendant found himself charged with and serving time for victim tampering when he was no longer charged with the crime that created that victim in the first place. Id. at 660-661. Although that issue

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was not recognized until post-conviction proceedings, it did not mean that it was excusably neglected.

This case is comparable – the deficiency was missed by multiple persons – but that fact does not legitimize Mr. Hounihan's judgment and sentence in count 2. Section 302.321 requires formal findings concerning predicate offenses, specifically that that the defendant was "represented by or waived the right to an attorney in writing" and "received and served a sentence of ten days or more on such previous offenses." Nothing in the driving record submitted to the trial court indicates anything about his representation or sentences, yet he is serving the enhanced felony sentence.

The motion court offered no justification for finding that appellate counsel was effective beyond the fact that he was not the only person to miss this error and it takes a cynical approach to the entire appellate process (D16 p. 14; App. A 11). There is no point in reviewing the trial court for error (or the effectiveness of appellate counsel) if mistakes can be brushed off by intoning, as the motion court did, "[h]indsight is 20/20." (D16 p. 14; App. A 11).

Mr. Hounihan was Prejudiced Thereby

Conviction on the basis of insufficient evidence is the very definition of a manifest injustice. The State is required, as a matter of due process, to prove every element of a criminal offense beyond a reasonable doubt, and its failure to do so requires the reversal of any conviction obtained under those circumstances. In re Winship, 397 U.S. 358, 361-64 (1970); State v. Johnson, 741 S.W.2d 70, 73 (Mo. App. S.D. 1987). Appellate

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counsel's error here was sufficiently serious that had it been raised it would have changed the outcome of the appeal. About this, the State and Mr. Hounihan agree. This is one of those rare cases in which the "prejudice wags the performance" in that the prejudice is so clear that it is virtually *per se* ineffective not to raise the issue.

No Objectively Reasonable Appellate Strategy Excuses Appellate Counsel's Failure to Raise Obvious and Prejudicial Error in this Case

As with trial counsel, appellate counsel are entitled to employ reasonable strategy in deciding which claims to raise and which claims not to raise. *See e.g.*; Tate v. State, 461 S.W.3d 15, 22 (Mo. App. E.D. 2015). The concept of employing "appellate strategy" to raise strong claims and winnow out weak claims finds its origin in Jones v. Barnes, *supra* at 751-754. In that case, the United States Supreme Court reversed a Ninth Circuit decision imposing a *per se* rule that appointed appellate counsel raise every colorable claim insisted upon by the appellant. Id. at 749. The Supreme Court reversed and concluded the ultimate duty of appellate counsel was to scour the record for the strongest appellate issues as, "[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." Id. at 752.

Nothing in Jones suggests counsel may dispense with meritorious claims which, left uncorrected, would amount to a manifest injustice, only that counsel may omit weak, non-frivolous claims. The language of Jones is clear; appellate counsel discharges his or her duty by raising the strongest issues available. In Jones, the objection to the inclusion

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of weak issues is not their weakness *per se* (indeed some cases may only present only weak claims), but that weak arguments may dilute strong arguments and/or limit time and space devoted to stronger points. Id. at 752-753.

In most cases, determing the objective reasonableness of appellate strategy requires weighing the relative strength of the claims raised and the claims ignored.[3] "The effect of adding weak arguments will be to dilute the force of the stronger ones." Id. at 752 *quoting* R. Stern, Appellate Practice in the United States 266 (1981). This Court has likewise held that effective appellate counsel may strategically winnow out claims with little chance of success. Baumruk v. State, 364 S.W.3d 518, 539 (Mo. banc 2012) *citing* Storey v. State, 175 S.W.3d 116, 148 (Mo. banc 2005). As the Seventh Circuit wrote, a weighing must occur,

> When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.

Gray v. Greer, 800 F.2d 644, 646 (C.A. 7th Cir. 1986). In the instant case, the ignored issue was clearly stronger than the two claims raised on direct appeal.

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[3] Granted, in some circumstances, an appellant and counsel may reasonably decide to abandon a strong claim if, for instance, the remedy for that claim might expose the appellant to greater incarceration. That is not the situation here.

Appellate counsel raised two points of unpreserved error in a bench trial on direct appeal. State v. Hounihan, *supra*; (Appellant's Ex. 1). Appellate counsel wrote: 1) the trial court plainly erred when it briefly questioned certain witnesses before it and 2) the trial court plainly erred by denying defense counsel the opportunity for re-cross examination. (Appellant's Ex. 1). The Court of Appeals summarily rejected both claims in a terse four-page memorandum. First, it found the trial court's questioning did not display any bias and the court merely exercised its discretion by attempting to "elicit the truth more fully or to clarify a witness's testimony." Hounihan, *supra* (memorandum at pp. 2-3). As to the latter claim, the Court noted that defense counsel had not asked for re-cross examination writing, "[w]e will not convict the trial court of error for not being able to divine that counsel wished to re-cross-examine a witness." Id. (memorandum at pp. 3-4). Appellate counsel raised two points which the appellate court had the discretion not to review while neglecting a meritorious sufficiency claim that the court would have had to review and which it might have reviewed even if not briefed. Missouri Supreme Court Rule 30.20.

Additionally, nothing in Missouri caselaw suggests that appointed appellate counsel may discard meritorious appellate claims in order to husband "appellate resources." Were it the case that appointed appellate counsel might reject meritorious claims to preserve resources, it would run afoul of the Fourteenth Amendment's due process and equal protection clauses as well as the Sixth Amendment's guarantee of the right to counsel. Indigent appellants are entitled to the appointment of counsel on a first

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appeal. Entsminger v. Iowa, 386 U.S. 748, 751 (1967). If appointed counsel could pull punches to protect resources it would create separate guarantees of effective assistance: one for appellants who can afford private appellate counsel and another for indigent appellants who would compete for finite appellate resources.

In any case, appellate counsel did not claim he neglected the sufficiency claim to preserve appellate resources or because it was weak or because he lacked time or space to raise it. Indeed, appellate counsel sought no extensions of time to file Mr. Hounihan's direct appeal brief and he filed his brief a mere 16 days following his entry of appearance. Appellate counsel raised two points of unpreserved error in a 37-page brief containing 7,534 words – well below the 31,000 word maximum allowed by Rule 84.06. Appellate counsel would have had ample time to brief the issue – had he requested it – and ample room in his initial brief to raise the issue. Post-conviction counsel was able to raise the issue in a mere four pages of the amended post-conviction motion (D8 pp. 7-11).

Finally, it does not matter that Mr. Hounihan's four-year sentence in count two is swallowed up by his seven-year sentence in count one. It is not right that Mr. Hounihan should serve four years for facts establishing only a misdemeanor regardless of his other sentences. Certainly an appellate court would not decline to review and correct such an error merely because it adds nothing to the sentence. State v. Reynolds, 819 S.W.2d 322, 323-327 (Mo. banc 1991)(noting the myriad of collateral consequences that follow from a felony conviction and overruling the "concurrent sentence doctrine" which previously made such review discretionary). A meritorious sufficiency claim is a risk-free

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proposition; if Mr. Hounihan had prevailed, the conviction and sentence in count two would have been vacated and he would have faced no more than a year on resentencing. By contrast, had Mr. Hounihan won on either of the claims included in his direct appeal he would have received a new trial and with it the risk of a greater sentence – he faced up to fifteen years in count one.

Ultimately, the objective reasonableness of a particular strategy may only be sensibly evaluated when a strategy has been invoked or is apparent from the record. In Sanders v. State, 564 S.W.3d 380, 383 (Mo. App. S.D. 2018), the Court of Appeals reversed for additional findings because although trial counsel confessed an oversight in failing to object to non-specific jury instructions in a sex case, she also testified it would would have been "horrible" to have the multiple incidents detailed in the instructions, that she would not have been "happy" with the more specific instructions, and her unitary defense was that all three victims were lying. *See also* Sanders v. State, 535 S.W.3d 403, 409 (Mo. App. S.D. 2017). In this case appellate counsel stated he had no strategy and the record does not indicate or even hint at any objectively reasonable strategy not to raise the sufficency of the evidence in count two. For the motion court to assign an objectively reasonable strategy to appellate counsel's lapse in this case, it would have to conjur it out of thin air.

This Court must reverse the motion court's denial of Mr. Hounihan's motion for post-conviction relief. The motion court's ruling deprived Mr. Hounihan of his rights to due process of law and effective assistance of counsel as guaranteed by the V, VI, and

XIV Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution.

CONCLUSION

WHEREFORE, for the forgoing reasons, Appellant Donnie Hounihan prays this Honorable Court reverse the motion court's denial of his Rule 29.15 motion for post-conviction relief, remand for a new trial in count one and discharge Mr. Hounihan in count two, or, at the very least, remand for resentencing in count two for the misdemeanor form of that offense.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Scott Thompson, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, in Times New Roman size 13-point font. I hereby certify that this brief includes the information required by Rule 55.03. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 7,425 words, which does not exceed the 31,000 words allowed for an appellant's opening brief.

On this 20th day of April, 2019, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Appendix were placed for delivery through the Missouri e-Filing System to Daniel McPherson, Assistant Attorney General, at dan.mcpherson[at]ago.mo.gov.

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