IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

BRYAN L. DICKERSON,	)	
	)	
Appellant,	)	
	)	
vs.	)	Appeal No. ED89381
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT
FROM THE CIRCUIT COURT FOR ST. FRANCOIS COUNTY, MISSOURI
THE HONORABLE KENNETH W. PRATTE, JUDGE AT TRIAL,
SENTENCING AND POST-CONVICTION PROCEEDINGS

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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Jurisdictional Statement

Appellant Bryan L. Dickerson was convicted of voluntary manslaughter in St. Francois County Cause Number 03CR616489, the Honorable Kenneth W. Pratte, presiding. The court sentenced Appellant, as a persistent offender, to life imprisonment.

Appellant took a direct appeal from his conviction. On appeal, Appellant's convictions were affirmed. The mandate from Appellant's direct appeal issued July 13, 2006. On September 8, 2006, Appellant filed a *pro se* motion for post-conviction relief pursuant to Missouri Supreme Court Rule 29.15. The motion court appointed post-conviction counsel on September 21, 2006, and later granted assigned counsel thirty additional days in which to file an amended motion. The amended post-conviction motion was filed December 20, 2006. On January 8, 2007, the motion court denied post-conviction relief without an evidentiary hearing.

Appellant filed Notice of Appeal to this Court on February 20, 2007 – Monday, February 19th was a holiday. As this appeal presents no questions reserved for the exclusive jurisdiction of the Missouri Supreme Court, jurisdiction properly lies in this Court.

* * *

The Record on Appeal will be cited to as follows: the Legal File from the direct appeal (transferred from ED86658), "LF"; the Legal File relating to this PCR appeal, "PCR-LF"; the Trial Transcript (transferred from ED86658), "Tr."

Statement of Facts

The state charged Appellant, Bryan Dickerson, by indictment with one count of murder in the second degree for causing the death of Frederick "Buddy" Jones during a fight at Cuzzin's, a bar in St. Francois County (LF 19, 38-39). Following a trial, the jury convicted Appellant of voluntary manslaughter (LF 59). The court, the Honorable Kenneth W. Pratte, sentenced Appellant as a persistent offender to life imprisonment (LF 66-68).

The following facts from trial pertain to the post-conviction appeal:

The state charged Appellant with murder in the second degree for an incident occurring at Cuzzin's, a bar in Farmington on June 3, 2003 (LF 4, 38-39). According to Appellant, he had won a lottery prize at the bar and he found himself cornered by Buddy Jones and another man who insisted Appellant buy the house a drink with his winnings (Tr. 283-84). Appellant refused and an argument ensued between Appellant and the two men (Tr. 285).

Appellant noticed that two people had walked up and stood right up behind him, "hemming" him in (Tr. 286-87). It was like a "shakedown" (Tr. 286). The man with Buddy, Al, poked Appellant with his finger; Appellant interpreted that as a threat, and hit Al in the face with his left hand (Tr. 288). Al hit Appellant back in the face and knocked his glasses off; Appellant is nearsighted and cannot see without them (Tr. 289). After that, "all hell broke loose" and people started hitting him "left and right" (Tr. 288).

Appellant slipped off the stool and headed for the back door (Tr. 286, 289). He was trying to look for his glasses, but could not find them (Tr. 289-90). He was bent over walking, and people were kicking him and hitting him (Tr. 289). Someone threw him into the bar stools, knocking him down (Tr. 290). He heard a woman say, "Let him leave," and when he got up, he raised his hands and said, "I'm trying to leave here," and heard someone reply, "You ain't going nowhere" (Tr. 290-92). Just then, he was hit hard in his right eye, and he heard a man laugh (Tr. 291-92). His eye began swelling immediately, and he was unable to see through it (Tr. 291).

There were five or six people around Appellant, and it was like a "feeding frenzy" (Tr. 293-94). He saw someone make a fist and pull their hand back as if they were going to swing at him (Tr. 295). Bryan swung his fist and hit the person right in the face to keep the person from hitting him first (Tr. 296). Appellant was hit anyway and fell to the ground (Tr. 296). Al jumped on Appellant's back and told him to stay down; he told Appellant "they" would kill him if he did not (Tr. 298, 325).

Other patrons accused Appellant of challenging the whole bar. Denise Vandiver, Mary Lou Stapleton, and Jamie Berghaus all knew each other (Tr. 151, 156, 177, 189, 197, 208). Denise and Mary Lou worked together at Cuzzin's, and Jamie was a regular customer (Tr. 146, 177, 196-97). They all knew Buddy from the bar, and Denise lived down the street from him (Tr. 151, 177, 197).

Denise and Mary Lou were both working on June 3, 2003 (Tr. 146, 177). Denise was tending bar when Appellant came in around 2 p.m. (Tr. 147). Denise had never seen him before (Tr. 147). He ordered a drink, played some pull tabs, and talked to Denise for a while, telling her that he had been out looking for a job (Tr. 148, 152). There were no other customers in the bar (Tr. 148). After about an hour, Appellant paid for his drink and left (Tr. 148-49).

Denise finished working around 8 p.m., and was sitting at a table with Jamie Berghaus (Tr. 149, 156). She saw Appellant re-enter Cuzzin's and go straight to the end of the bar near the back door (Tr. 149, 154). She testified that Appellant approached Buddy and Al and said, "I'm going to kick your ass. I'm going to kill you" (Tr. 154-55). She had trouble hearing after that because everybody was yelling and screaming (Tr. 155). There were ten to fifteen people at the bar that night, and some of them were pushing at Appellant to get him out of the bar (Tr. 255, 261-63). She said that Buddy and Al got off their stools to get out of the way, and Buddy was "minding his own business," when Appellant struck him in the left side of his head (Tr. 256, 258).

Mary Lou had also just finished working at 8:00 p.m. and was behind the bar getting her free beer she always had at the end of her shift (Tr. 177, 179-80). Mary Lou testified that Appellant took a swing at Buddy, knocking Al off his bar stool (Tr. 184). Al had been sitting between Bryan and Buddy (Tr. 184).

Several patrons of the bar went over and separated Appellant and Buddy, but none of them kicked Appellant or hit him (Tr. 184-85). Mary Lou saw

Appellant hit Buddy the last time; Buddy went down and his head either hit the pool table or the floor (Tr. 186). He might have hit Appellant when they were going to the floor because Buddy's arms were "flailing" as he was falling (Tr. 192).

Jamie testified that she was at the bar the night the fight broke out (Tr. 198). She did not notice Appellant come in, and does not know what started the fight (Tr. 210). Jamie testified that people were pushing Appellant and telling him to leave (Tr. 198). Someone pulled him backward by his arm and he spun into the bar stools and fell to the floor (Tr. 201-02, 215). He grabbed one of the stools, but someone got it away from him (Tr. 202). At one point, she thought he was leaving, but as he got close to Buddy, he punched him in the face (Tr. 203). Buddy was standing between a pool table and the wall near the back door (Tr. 203). Jamie testified that Buddy fell backward and hit the back of his head on the concrete floor (Tr. 205).

Tony Boyer was a bouncer at Cuzzin's, and saw Appellant come into the bar earlier that day (Tr. 216-17). Tony put his hands on Appellant's back and his arm and started guiding him out the back door, saying, "go out this way" (Tr. 225). The next thing he knew, Appellant hit Buddy, but Tony could not see where Buddy was hit (Tr. 227). Tony and Buddy had been friends for twenty years (Tr. 219). Tony testified that after Appellant hit Buddy, Tony got Appellant to the back door and knocked him down and sat on his legs (Tr. 229).

Dr. Robert Deidiker testified as medical examiner and pathologist. He told jurors Buddy Jones was in a coma from the night of the incident until October 10, 2003 (Tr. 120). Though he observed there had been bleeding of the brain and bruising on the right and left sides and brain stem, Dr. Deidiker could not say whether Jones' head injuries came from the punch or hitting the floor (Tr. 122, 129-130). Ultimately, Buddy developed pneumonia; that condition along with his heart disease, long-term hypertension, kidney and vascular problems played a role in his death (Tr. 127-128, 130-133). It is difficult, Dr. Deidiker explained to jurors, to isolate causes in a case like this (Tr. 133).

One thing Dr. Deidiker was confident of was the manner of death. Asked twice by the state what the manner of death was, Dr. Deidiker opined, "Homicide" (Tr. 124, 125). Defense counsel did not object to either question. Additionally, defense counsel raised no objection to the admission of Dr. Deidiker's autopsy report which likewise listed the manner of death "Homicide" (State's exhibit no. 3 from trial).

Pre-trial, trial counsel moved to prohibiting the use physical restraints on Appellant during trial (PCR-LF 43-45). Apparently, counsel took no other steps to prevent shackling; no ruling was ever made on the motion nor any record of Appellant's shackled condition at trial.

Counsel also moved *in limine* to prohibit the state from adducing evidence that Appellant had been in a fight at another bar earlier in the day on June 3, 2003 (LF 32-33). Trial counsel argued the incident between Appellant and Kevin

Propst amounted to prior bad acts (LF 32; Tr. 20) The state retorted the evidence was necessary to prove Appellant "intent to assault", that it was part of the *res*, and that it negated Appellant's proposed defense of self-defense. The Court allowed the evidence in (Tr. 20-22). Over counsel's objection, the jury heard that Appellant had had a fight with Kevin Propst at Terry and Margie's Bar on June 3rd, before the incident at Cuzzin's (Tr. 166-169). Propst complained that Appellant hit him when he was not expecting it (Tr. 168). In his motion for new trial, Appellant reiterated his complaint about Propst's testimony (LF 60-61).

Appellant appealed his convictions to this Court on July 18, 2005 (LF 70-72). Appellate counsel did not raise as error the admission of Kevin Propst's testimony on direct appeal. After Appellant's conviction was affirmed, this Court's Mandate issued July 13, 2006. State v. Bryan Dickerson, 193 S.W.3d 797 (Mo. App. E.D. 2006).

Appellant subsequently filed a timely motion for post-conviction relief under Missouri Supreme Court Rule 29.15 on September 8, 2006 (PCR-LF 4-16). Appointed counsel filed an amended motion for post-conviction relief on December 20, 2006 (PCR-LF 21-45).

Appellant first complained that trial counsel should have objected to Dr. Deidiker's testimony:

> 8(a). Movant was denied his right to effective assistance of counsel, as guaranteed by the VI and XIV Amendments to the United States Constitution and Article I, §18(a) of the Missouri

> Constitution in that Movant's trial counsel, Mr. Wayne Williams and Ms. Jolene Taaffe, failed to meet the standard of a reasonably competent attorney under similar circumstances. Trial counsel failed to object to inadmissible, legal opinion testimony by Dr. Robert Deidiker that the manner of decedent Buddy Jones' death was "homicide." Though Dr. Deidiker may have been qualified to offer a medical opinion as to cause of Mr. Jones' death, he was not qualified to label a particular chain of events a "homicide" as that is a legal conclusion. Homicide is the killing of one human being by the act, procurement or omission of another; thus it was in Movant's case, a mixed question of law and fact for the jury to decide. Reasonable counsel in similar circumstances would have objected that asking the manner of death called for a conclusion and the offending testimony would have been kept out. But for counsel's unprofessional error, there is a reasonable probability that the outcome of the trial would have been different.

(PCR-LF 22-23). The motion court rejected this claim without a hearing stating that the state was required to prove "criminal agency" to make its case and Dr. Deidiker's testimony was thus necessary to establish Appellant's role in Jones' death (PCR-LF 47). The court noted, "Thus, the manner of death must be proven to be homicide before the trier of fact can consider the defendant's agency, if any, in the killing" (PCR-LF 47).

Appellant next claimed he was shackled during trial and that while counsel moved to prohibit shackling on due process grounds prior to trial, they did nothing to perfect the claim when Appellant appeared before the jury shackled:

> 8(b). Where there was no compelling reason to have Movant shackled, it was Trial Court error to have Movant shackled. Movant had a right to appear at trial free of handcuffs and leg irons. Movant had no history of escape or disruptive courtroom behavior and the Court made no record of the necessity for shackling. But the appearance of Movant in shackles could convey but one message to the jury: that Movant was a violent and dangerous individual. Though shackling is ideally a topic for direct appeal, trial counsel having objected to the prospect of shackling made no further record, thus counsel waived the issue.
>
> Movant was additionally denied effective assistance of counsel because counsel failed to object to Movant's shackling. For the reason outlined above - - that Movant did not warrant shackling - - counsel should have objected. Though counsel did file a motion to that effect months before trial, counsel never sought a ruling and effectively withdrew the motion. Reasonably effective counsel in similar circumstances would have sought a ruling and, at least, made a record of the shackling. Trial counsel, Mr. Wayne Williams and Ms. Jolene Taaffe, failed to to do either here. Effective counsel

would have hastened to defeat any suggestion that their client, who claimed self-defense, was a violent, uncontrollable person.

(PCR-LF 28-29). The motion court rejected this claim as well by finding that Appellant had not demonstrated from the record that he was shackled nor did Appellant plead that he alerted counsel to his shackled condition (LF 48).

Finally, Appellant claimed appellate counsel was deficient for failing to raise the admissibility of evidence of Appellant's encounter with Kevin Propst:

> 8(c). Movant was denied his right to effective assistance of appellate counsel, as guaranteed by the VI and XIV amendments to the United States Constitution and Article I, §18(a) of the Missouri Constitution in that Appellate counsel failed to appeal the admission of evidence of a prior, uncharged assault on Kevin Propst at Terry and Margie's Bar in the hours before the charged offense. Such evidence had minimal probative value, but significant prejudicial value; the error of its admission was apparent from the record and fully preserved, yet appellate counsel did not raise the issue. Had counsel conducted herself as reasonably competent counsel would have in these circumstances, there is a reasonable probability the outcome of the appeal would have been different.

(PCR-LF 33). About this last claim, the motion court made no findings. The motion court, the Honorable Kenneth W. Pratte, denied post-conviction relief without an evidentiary hearing in Findings issued January 8, 2007 (LF 46-49).

The notice of appeal would have been due February 17, 2007, but it was a Saturday and the 19th was a holiday, thus Appellant's appeal to this Court was timely-filed on February 20, 2007. This appeal follows (LF 54). Additional facts will be adduced in the argument portion of this brief to avoid repetition.

Points Relied On

I.

The motion court clearly erred when it denied Appellant's post-conviction motion without a hearing because Appellant pled facts showing he was denied his rights to due process and effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that trial counsel failed to object to opinion evidence by Dr. Diediker that Buddy Jones was a victim of "homicide." Dr. Diediker's testimony on this point was unqualified opinion evidence as to an ultimate issue, yet counsel made no objection. Appellant was prejudiced because Dr. Diediker's opinion bore the *imprimatur* of scientific evidence that rebutted Appellant's claim of accident/self-defense. The motion court's conclusion that Dr. Diediker's opinion was required to establish Appellant's "criminal agency" demonstrates the prohibited conclusion fostered by Diediker's opinion and leaves a definite impression a mistake has been made.

State v. Clements, 789 S.W.2d 101 (Mo. App., S.D. 1990)

United States v. Edwards, 819 F.2d 262 (11th Cir. 1987)

Mo. Constitution, Article I, Sections 10 and 18(a)

Mo. Supreme Court Rule 29.15

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

II.

The motion court clearly erred when it denied Appellant's post-conviction motion without a hearing because Appellant pled facts showing he was denied his rights to due process and effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that trial counsel failed to object – at trial – to Appellant's unwarranted shackling in front of the jury. Though counsel moved pre-trial to prohibit such shackling as prejudicing their client in the jurors' eyes, counsel failed to make a record at trial of Appellant's shackled condition. The motion court's conclusion that the trial transcript is silent as to Appellant's restraints demonstrates counsels' inaction. The court's further holding that it was incumbent on Appellant to alert his counsel that he was shackled implies that defendants – lay persons – must notify trial counsel of due process violations and the corresponding objections. The motion court's conclusions leave a definite and firm impression a mistake has been made.

Deck v. Missouri, 544 U.S. 622, 125 S. Ct. 2007 (2005)

Holbrook v. Flynn, 475 U.S. 560, 106 S. Ct. 1340 (1986)

Morrow v. State, 21 S.W.3d 819 (Mo. banc 2000)

Mo. Constitution, Article I, Sections 10 and 18(a)

Mo. Supreme Court Rule 29.15

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

III.

The motion court clearly erred when it denied Appellant's post-conviction motion without a hearing because Appellant pled facts showing he was denied his rights to due process and effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that appellate counsel failed to appeal the admission of evidence that Appellant was in a fight earlier the day of the charged incident though such evidence amounted prior bad acts. Though the matter was apparent from the record and fully preserved, appellate counsel did not raise it. The motion court failed to make any findings regarding Appellant's claim of ineffective assistance of appellate counsel.

Crews v. State, 7 S.W.3d 563 (Mo. App. E.D. 1999)

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

State v. Douglas, 917 S.W.2d 628 (Mo. App. W.D. 1996)

Mo. Constitution, Article I, Sections 10 and 18(a)

Mo. Supreme Court Rule 29.15

Revised Statutes of Missouri, Section 547.070 (2000)

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

Argument

I.

The motion court clearly erred when it denied Appellant's post-conviction motion without a hearing because Appellant pled facts showing he was denied his rights to due process and effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that trial counsel failed to object to opinion evidence by Dr. Diediker that Buddy Jones was a victim of "homicide." Dr. Diediker's testimony on this point was unqualified opinion evidence as to an ultimate issue, yet counsel made no objection. Appellant was prejudiced because Dr. Diediker's opinion bore the *imprimatur* of scientific evidence that rebutted Appellant's claim of accident/self-defense. The motion court's conclusion that Dr. Diediker's opinion was required to establish Appellant's "criminal agency" demonstrates the prohibited conclusion fostered by Diediker's opinion and leaves a definite impression a mistake has been made.

Standard of Review

Appellate review of post-conviction motions is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. Burroughs v. State, 773 S.W.2d 167, 169 (Mo. App. E.D. 1989). Findings of facts and conclusions of law are clearly erroneous if the appellate court, upon reviewing the record, is left with the definite and firm impression that a mistake has been

made. Id.; Richardson v. State, 719 S.W.2d 912, 915 (Mo. App. E.D. 1986); Rule 29.15(k).

Analysis

The right to counsel guaranteed by the Sixth Amendment is a fundamental right. Argersinger v. Hamlin, 407 U.S. 25, 29-33, 92 S. Ct. 2006 (1972). A defendant who must face felony charges in state court without the assistance of counsel guaranteed by the Sixth Amendment has been denied due process of law. Gideon v. Wainwright, 372 U.S. 335, 344, 83 S. Ct. 792 (1963); Mo. Constitution, Article I, Sections 10 and 18(a); U.S. Constitution, V, VI and XIV Amendments.

When a criminal defendant seeks post conviction relief on a claim of ineffective assistance of counsel, he must establish first, that his attorney's performance was deficient and second, that he was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 687-689, 104 S. Ct. 2052, 2064-65 (1984); Seales v. State, 580 S.W.2d 733, 735-736 (Mo. banc 1979). The United States Supreme Court has recognized that the reasonableness of counsel's performance is to be judged by prevailing professional norms. Strickland at 688. To prove prejudice, Appellant must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." State v. Shurn, 866 S.W.2d 447, 468 (Mo. banc 1993), *cert. denied*, 513 U.S. 837, 115 S. Ct. 118 (1994).

In State v. Clements, 789 S.W.2d 101 (Mo. App., S.D. 1990), the Southern District of this Court reversed the defendant's conviction of murder in the first degree where a state's witness was permitted to testify as to the ultimate issue of

an element of the crime. The Court quoted United States v. Edwards, 819 F.2d 262, 265 (11th Cir. 1987):

> When, however, "ultimate issue" questions are formulated by the law and put to the expert witness who must then say "yea" or "nay," then the expert witness is required to make a leap in logic. He no longer addresses himself to medical concepts but instead must infer or intuit what is in fact unspeakable, namely, the probable relationship between medical concepts and legal or moral constructs such as free will. These impermissible leaps in logic made by expert witnesses confuse the jury.

Clements, 789 S.W.2d at 108. The situation in Appellant's case is identical to the Clements case. In Clements, the state offered a psychiatrist as to Mr. Clement's mental status; the expert additionally testified in that murder, first degree, case that Clement had "deliberated." Likewise here, after Dr. Diediker registered his medical opinion as to the cause of death, Dr. Dieker opined the manner of death was "homicide." (Tr. 124, 125).

Dr. Diediker's opinion was terrifically prejudicial because it amounted to "expert" testimony about an element of the charge the state sought to prove. The state had to prove Appellant had the purpose of causing Jones serious physical injury (LF 46, 47); yet Appellant's defense was that he acted in self-defense and may have accidently struck Jones. The state elicited an opinion that the charged incident was an unjustified killing: a homicide. Webster's American College

Dictionary defines homicide as a noun meaning "1. the killing of one human being by another. 2. a person who kills another; murderer." Webster's American College Dictionary 389 (1998). In the vernacular, homicide has a singularly sinister connotation. Even the legal definition connotes intentional conduct on the part of one so accused; "the killing of one human being by the act, procurment, or omission of another" Black's Law Dictionary 375 (Abridged 5th ed. 1983). So Dr. Diediker's opinion conveyed to jurors that Appellant's actions were sinister and not accidental.

Additionally, there was also a question of fact whether Appellant was the cause of Jones' death. Jones was not immediately killed and while in a coma, Buddy Jones was beset by complications. Dr. Diediker told jurors Mr. Jones was in a coma from the night of the incident until October 10, 2003 (Tr. 120). Though he observed there had been bleeding of the brain and bruising on the right and left sides and brain stem, Dr. Deidiker could not say whether Jones' head injuries came from the punch or hitting the floor (Tr. 122, 129-130). Ultimately, Mr. Jones developed pneumonia; that condition along with Mr. Jones' heart disease, long-term hypertension, kidney and vascular problems played a role in Jones' death (Tr. 127-128, 130-133). It is difficult, Dr. Deidiker explained to jurors, to isolate causes in a case like this (Tr. 133). So whether Appellant was the cause of Jones' death was also a question for the jury (LF 46, 47), yet Diedeker opined, medically, that this was a case of one man killing another.

The motion court concluded that because the state had to prove criminal agency in Jones' death, Diedeker's opinion was not objectionable (PCR-LF 47). Put another way, because the state had to prove Appellant killed Jones, no objection could be had to opinion evidence by a witness on this fundamental jury question. Admissibility, however, rests on principles of evidentiary law and not on whether the challenged evidence aids the state's theory of the case (cf. PCR-LF 47 "The State must demonstrate the victim's death was neither self-inflicted nor the result of natural causes or accident" citing State v. Hayes, 15 S.W.3d 779, 786 (Mo. App. S.D. 2000)). Criminal agency may be what the state has to prove; but they should prove it by cogent, admissible evidence, not opinion.

Moreover, the court reflects the prejudicial effect of Diedeker's opinion when it stresses the necessity of the state proving "criminal" agency by Appellant. Even the court recognized that labeling something a homicide communicated Appellant's guilt. But answering whether Appellant's actions were unintentional or sinister, justified or unexcused was the very reason a jury was assembled and a trial held. Trial counsel should have objected to Dr. Deideker's opinion as to Appellant having committed a homicide. Whether this incident was a homicide was a decision the jury was to make, not Dr. Diedeker.

In conclusion, Appellant pled facts, which were supported by the record and which entitled him to relief. Therefore, the motion court clearly erred when it denied Point 8(a) and 9(a) of Appellant's amended motion. This Court should, therefore, reverse the judgment of the motion court and remand this case for a new

trial with attentive counsel and free from the taint of inadmissible opinion evidence, or at the very least, remand this case for an evidentiary hearing.

II.

The motion court clearly erred when it denied Appellant's post-conviction motion without a hearing because Appellant pled facts showing he was denied his rights to due process and effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that trial counsel failed to object – at trial – to Appellant's unwarranted shackling in front of the jury. Though counsel moved pre-trial to prohibit such shackling as prejudicing their client in the jurors' eyes, counsel failed to make a record at trial of Appellant's shackled condition. The motion court's conclusion that the trial transcript is silent as to Appellant's restraints demonstrates counsels' inaction. The court's further holding that it was incumbent on Appellant to alert his counsel that he was shackled implies that defendants – lay persons – must notify trial counsel of due process violations and the corresponding objections. The motion court's conclusions leave a definite and firm impression a mistake has been made.

Standard of Review

Appellate review of post-conviction motions is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. Burroughs v. State, *supra*. Findings of facts and conclusions of law are clearly erroneous if the appellate court, upon reviewing the record, is left with the definite

and firm impression that a mistake has been made. Id.; Richardson v. State, *supra*; Rule 29.15(k).

Analysis

The Sixth Amendment established the right to counsel, a fundamental right of all criminal defendants through the due process clause of the Fourteenth Amendment. Gideon v. Wainwright, *supra*; Mo. Constitution, Article I, Sections 10 and 18(a); U.S. Constitution, V, VI and XIV Amendments. When a criminal defendant seeks post-conviction relief on a claim of ineffective assistance of counsel, he must establish first, that his attorney's performance was deficient and second, that he was prejudiced thereby. Strickland v. Washington, *supra*; Seales v. State, *supra*.

To prove ineffective assistance, a defendant must show that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the defendant was thereby prejudiced. State v. Butler, 951 S.W.2d 600 (Mo. banc 1997) *citing* Strickland v. Washington, *supra* at 687; State v. Wise, 879 S.W.2d 494, 524 (Mo. banc 1994). To prove prejudice, a defendant must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." State v. Shurn, *supra* at 468.

As a general rule, handcuffing, shackling, or restraining a defendant before conviction in such a manner that a juror can see the restraint violates due process absent some essential state interest. Holbrook v. Flynn, 475 U.S. 560, 568-69, 106

S. Ct. 1340 (1986); see also Deck v. Missouri, 544 U.S. 622, 630, 125 S. Ct. 2007 (2005). As the United States Supreme Court noted in the Deck case, "…the criminal process presumes that the defendant is innocent until proved guilty. Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process. It suggests to the jury that the justice system itself sees a 'need to separate a defendant from the community at large.'" Deck at 544 U.S. at 630-631(citations omitted).

Trial counsel recognized the due process violation and prejudice to their client inherent in shackling when they moved, pre-trial, to prohibit the state from having their client shackled (PCR-LF 43-45). But though Appellant was shackled during trial, counsel did nothing to make a record or seek a ruling on the shackling issue. Appellant pled it was a complaint counsel should have pursued:

> In Movant's case there was no compelling state interest in shackling Movant. Not only should the Court not have had Movant shackled while in the courtroom, counsel should have raised the issue. Reasonably effective counsel would have not only sought to prohibit shackling (as counsel did here), but also would have sought a ruling on that motion or made a record as to why Movant was shackled. As it happened, trial counsel effectively abandoned any complaint about shackling. The danger of Movant being shackled is that it made Movant appear a violent person who could not be counted on to

control his behavior, though he was defending he acted in self-defense and it was the decedent who had been the aggressive one.

(PCR-LF 31-32).

The motion court rejected this claim writing that Appellant had not shown where in the transcript it reflected Appellant was shackled (PCR-LF 48). But this is precisely the ineffectiveness about which Appellant complained; because counsel made no record, it was impossible to address Appellant's shackling at trial or on appeal. The motion court may only reject a post-conviction claim without a hearing if the record conclusively refutes a movant's claim. Rule 29.15(h). Appellant pled that he was shackled and the record does not refute that claim. If Appellant was not shackled, the motion court which presided over trial, would have said Appellant was not shackled.

Instead, the court rejected Appellant's claim asserting his pleadings were deficient. The court adds to its finding that Appellant's claim must fail because Appellant did not plead that he raised his shackled condition with his attorneys (PCR-LF 48). Like the earlier finding, this finding is clear error. Appellant had no responsibility to point out a legal objection concerning a due process violation to his counsel because Appellant – a lay person – would have no reason to know his counsel could object. The court's cite to Morrow v. State, 21 S.W.3d 819, 827 (Mo. banc 2000) is inapplicable. Mr. Morrow complained that numerous potential mitigation witnesses went unused by trial counsel in his capital murder trial. Id. at 823-824. The Morrow court reasoned Mr. Morrow was responsible for notifying

trial counsel of those witnesses and thus he had to plead as much. Id.[1] The existence and utility of certain witness may be something of which only the defendant is aware.

But the situation is different when the alleged ineffectiveness has to do with the failure to make an objection or safeguard certain of a defendant's rights. It is axiomatic that trial counsel are presumed to know the law. See e.g. King v. Kemna, 266 F.3d 816, 824 (8th Cir. 2001)(held that a reasonably competent attorney would know that an expert's opinion would rule out diminished capacity defense under Missouri law). Indeed, the law indulges in a heavy presumption that trial counsel is competent. But Appellant has searched in vain for any cases suggesting that a criminal defendant bears the responsibility for alerting his counsel to an apparent constitutional deprivation when it is of the type readily apparent. The guarantee of the assistance of counsel assures that the lay person has a vigilant, knowledgeable advocate at his or her side. Mo. Constitution, Article I, Sections 10 and 18(a); U.S. Constitution, V, VI and XIV Amendments.

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[1] Though not addressing pleading requirements *per se*, many courts now suggest competent counsel must pursue mitigation even when their client is "uncooperative." See e.g. Commonwealth v. Sneed, 899 A2d 1067 (Pa 2006); Marshall v. Cathel, 428 F3d 452 (3rd Cir. 2005); Daniels v. Woodford, 428 F3d 1181 (9th Cir. 2005).

In fact, Appellant could have reasonably thought counsel had done everything possible to prevent shackling given that counsel filed a motion to prohibit shackling but that they were unsuccessful (PCR-LF 43-45). Appellant would not necessarily realize counsel failed to get anything but an implicit overruling of their motion when he was marched into court in anklets.

In conclusion, Appellant pled facts, which were supported by the record and which entitled him to relief. Therefore, the motion court clearly erred when it denied Point 8(b) and 9(b) of Appellant's amended motion. This Court should, therefore, reverse the judgment of the motion court and remand this case for a new trial with competent counsel and free of shackles or, at the very least remand this case for an evidentiary hearing on Appellant's claims.

III.

The motion court clearly erred when it denied Appellant's post-conviction motion without a hearing because Appellant pled facts showing he was denied his rights to due process and effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that appellate counsel failed to appeal the admission of evidence that Appellant was in a fight earlier the day of the charged incident though such evidence amounted prior bad acts. Though the matter was apparent from the record and fully preserved, appellate counsel did not raise it. The motion court failed to make any findings regarding Appellant's claim of ineffective assistance of appellate counsel.

Standard of Review

Appellate review of post-conviction motions is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. Burroughs v. State, *supra*. Findings of facts and conclusions of law are clearly erroneous if the appellate court, upon reviewing the record, is left with the definite and firm impression that a mistake has been made. Id.; Richardson v. State, *supra*; Rule 29.15(k).

Analysis

The Sixth Amendment established the right to counsel, a fundamental right of all criminal defendants through the due process clause of the Fourteenth

Amendment. Gideon v. Wainwright, *supra*. Mo. Constitution, Article I, Sections 10 and 18(a); U.S. Constitution, V, VI and XIV Amendments. When a criminal defendant seeks post-conviction relief on a claim of ineffective assistance of counsel, he must establish first, that his attorney's performance was deficient and second, that he was prejudiced thereby. Strickland v. Washington, *supra*; Seales v. State, *supra*. To prove prejudice, a defendant must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." State v. Shurn, 866 S.W.2d 447, 468 (Mo. banc 1993).

Defendants in Missouri have an appeal of right after a final judgment on an indictment or information. Section 547.070 RSMo (2000). The Due Process Clause guarantees effective assistance of counsel on a first appeal as of right. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 836-7 (1985). To allege and prove ineffective assistance of appellate counsel, the error overlooked must have been "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).

Appellant complained in his post-conviction motion that appellate counsel failed to challenge on appeal the error of admitting Kevin Propst's testimony. Appellant wrote:

> The State charged Movant with murder in the second degree for an incident occurring at Cuzzin's bar in Farmington on June 3, 2003. According to Movant he was attacked by several patrons and

> in defending himself blindly struck a man with his fist. According to the state's witnesses, some of whom were friends of the victim Buddy Jones, Movant started acting belligerently and picked a fight with Jones before striking him and causing Jones to hit the concrete floor. All the witnesses agreed Movant had landed a single blow.
>
> Though trial counsel moved *in limine* to prohibit it, the State introduced evidence that Movant had been in a bar fight mere hours before the alleged assault on Buddy Jones. According to Kevin Propst, Movant came to Terry and Margie's Bar on June 3, 2003, and picked a fight with him.

(PCR-LF 33-34). Such evidence, trial counsel complained represented a prior bad act that would prejudice Appellant's defense.

Indeed, the trial court abused its discretion in admitting evidence of the earlier incident. Evidence of other crimes or bad acts committed by defendant may not be used at trial to show that the defendant had a propensity to commit the crime with which he is charged, because such evidence may violate the defendant's right to be tried only for the offense for which he is charged. State v. Douglas, 917 S.W.2d 628, 631 (Mo. App. W.D. 1996), *citing*, State v. Harris, 870 S.W.2d 798, 810 (Mo. banc 1994), *cert. denied*, 513 U.S. 953, 115 S. Ct. 371 (1994). Such evidence may be admissible, however, if it is relevant to a legitimate issue in the case such as: (1) motive; (2) intent; (3) absence of mistake or accident; (4) common scheme or plan; (5) identity; or (6) signature/modus

operandi/corroboration. Douglas, 917 S.W.2d at 631. *See also*, State v. Bernard, 849 S.W.2d 10, 13-18 (Mo. banc 1993). The state's argument that the evidence bore on Appellant's intent was a thinly-veiled propensity argument; if Appellant *intended* to punch Kevin Propst, that made it more likely he later *intended* to punch Buddy Jones. Moreover, the evidence simply made Appellant seem like a dangerous person.

Rule 29.15(j) requires that the motion court in a post-conviction proceeding issue findings of fact and conclusions of law "on all issues presented." Crews v. State, 7 S.W.3d 563, 567 (Mo. App. E.D. 1999). "There is no ambiguity in this directive and its requirements are not a mere formality." Id., citing State v. Deprow, 937 S.W.2d 748, 751 (Mo. App. S.D. 1997) (internal quotes omitted). The findings need not be "itemized," but they must be "sufficient to permit meaningful appellate review." Crews, Id., at 567, citing State v. Oris, 892 S.W.2d 770, 773 (Mo. App. W.D. 1995). "The absence of findings or conclusions giving the basis of the trial court's action leaves an appellate court in the dark as to the reasons for the trial court's action and presents nothing of substance to review." Crews, supra, quoting Deprow, supra, at 751. In the instant matter, the motion court has preserved nothing for review.

In conclusion, Appellant pled facts, which were supported by the record and which entitled him to relief. Therefore, the motion court clearly erred when it implicitly denied Point 8(c) and 9(c) of Appellant's amended motion. This Court

should, therefore, reverse the judgment of the motion court and remand this case for new appeal or an evidentiary hearing, or at the least, for findings of fact.

Conclusion

WHEREFORE, for the foregoing reasons, Appellant, prays this Honorable Court to reverse the denial of his post-conviction motion, to vacate, set aside, and correct the judgments and sentence, and remand the case for a new trial or a new appeal or, at the very least, an evidentiary hearing.

Respectfully Submitted,

_____

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CERTIFICATE OF SERVICE

Two copies of the forgoing Appellant's Statement, Brief, and Argument were mailed to the Attorney General, State of Missouri, Jefferson City, Missouri 65102 on this 24th day of September 2007

_____

Attorney for the Appellant

Certificate of Counsel Pursuant to Local Rule 360 and 361

Pursuant to Rule 84.06, counsel certifies that this brief complies with the limitations contained in Local Rule 360. Based upon the information provided by undersigned counsel's word processing program, Microsoft Word, this brief contains 846 lines of text and 7530 words. Further, a copy of appellant's brief, in MS Word 1997-2003 format, on floppy disk accompanies his written brief and that disk has been scanned for viruses using McAffee Virus Scan, with updated virus definitions and is virus-free as required by Local Rule 361.

Respectfully Submitted,

_____

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IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

BRYAN L. DICKERSON,	)	
	)	
Appellant,	)	
	)	
vs.	)	Appeal No. ED89381
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPELLANT'S APPENDIX

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND JUDGMENT A1-A4