IN THE
MISSOURI SUPREME COURT

LESTER KRUPP,	)	
Appellant,	)	
vs.	)	No. SC 91613
STATE OF MISSOURI,	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT FOR ST. LOUIS COUNTY, MISSOURI,
THE HONORABLE COLLEEN DOLAN., JUDGE

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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INDEX

Page

TABLE OF AUTHORITIES

Page

CASES:

***CONSTITUTIONAL PROVISIONS*:**

***STATUTES*:**

***RULES*:**

OTHER AUTHORITY

JURISDICTIONAL STATEMENT

In the Circuit Court for St. Louis County, a jury convicted Appellant Lester F. Krupp, Jr. of felonious restraint (Ct. 1), four counts of deviate sexual assault (Ct.s 3, 5, 7, and 9), and one count of sexual misconduct in the first degree (Ct. 12) in cause number 2107R-0434-01. On April 4, 2008, the Honorable Colleen Dolan sentenced Mr. Krupp to: three (3) years in Count 1, five (5) years in Count 3, seven (7) years in Count 5, seven (7) years in Count 7, seven (7) years in Count 9, and one (1) year sentence in Count 12. The court ordered Counts 1, 3, and 5 to run consecutively and the remaining counts to run concurrently (including Ct.s 13 and 14, to which Appellant pled guilty).

Appellant filed an appeal in the Missouri Court of Appeals, Eastern District, from the judgments of conviction, State of Missouri v. Lester F. Krupp, Jr., ED92150 (Mo. App. E.D. 2009). That appeal was dismissed based upon Appellant's waiver of appeal in circuit court. The mandate issued August 4, 2009. Appellant had previously filed for post-conviction relief under Missouri Supreme Court Rule 29.15 on August 19, 2008.

With leave of court, Appellant filed his amended motion for post-conviction relief on November 2, 2009. On May 5, 2010, the motion court issued its findings of fact, conclusions and judgment denying Appellant post-conviction relief without an evidentiary hearing. Appellant timely filed his notice of appeal to the Eastern District of the Missouri Court of Appeals on June 14, 2010.

The Missouri Court of Appeals, Eastern District, on its own motion, transferred Appellant's appeal to this Court pursuant to Rule 83.02. This Court has jurisdiction of this appeal, Article V, Section 10, Mo. Const.; Rule 83.04.

* * * * *

The Record on Appeal consists of a legal file (LF) and trial transcript and supplemental transcript (Tr. and S.Tr.)(both transferred from ED92150), and the post-conviction legal file (PCR-LF).

Statement of Facts

Facts from Trial

The state charged Lester F. Krupp with felonious restraint and various sex offenses (Counts 1-11) committed against a woman, K.B., on May 10, 2006, in St. Louis County (LF 19-25). The state also charged Appellant with felonious restraint and domestic assault in the second degree (Counts 12-13) against a woman identified as S.M., on December 6 through 7, 2006 (LF 19-25). And the state charged Appellant with sexual misconduct, first degree, (Count 14) occurring April 9 through 12, 2006, against a woman, P.P. (LF 19-25). Appellant pled not guilty (LF 7). The charges involving S.M. (Counts 12-13) were severed for a separate trial and Appellant tried the remaining counts to a jury on March 31 through April 4, 2008, the Honorable Colleen Dolan, presiding (LF 12-13).

The jury was instructed that it could find Appellant guilty of forcible sodomy or deviate sexual assault, and rape or sexual assault, but not both in the charges involving K.B. (LF 107-108). The jury found Mr. Krupp not guilty on all four counts of forcible sodomy, the one count of forcible rape, and sexual assault (L.F. 115-122; Tr. 829-830). The jury found him guilty of felonious restraint and four counts of deviate sexual assault against K.B., and guilty of sexual misconduct against P.P. (L.F. 115-122; Tr. 829-830).

The next morning, Appellant's attorney announced Appellant would waive jury sentencing and enter guilty pleas to the two counts that had been severed before trial (Tr. 841). In exchange for his guilty pleas, the state would recommend a fifteen year sentence for all counts (Tr. 842). In addition, Appellant was to waive the filing of a

Motion for New Trial, his direct appeal, and his post-conviction remedies (Tr. 842, 853-856). The state announced there were no other cases against Mr. Krupp in St. Louis County (Tr. 842).

The Honorable Colleen Dolan sentenced Appellant as follows:

Count 1 – felonious restraint, 3 years concurrent with Counts 13 and 14;

Count 3 – deviate sexual assault, 5 years consecutive to Counts 1, 13, and 14;

Count 5 – deviate sexual assault, 7 years consecutive with Counts 1, 3, 13, and 14;

Count 7 – deviate sexual assault, 7 years concurrent with Counts 5 and 9;

Count 9 – deviate sexual assault, 7 years concurrent with Counts 5 and 7;

Count 12 – sexual misconduct, 1 year concurrent with Counts 1, 13, and 14;

Count 13 – felonious restraint, 3 years concurrent with Counts 1 and 14;

Count 14 – domestic assault, 3 years concurrent with Counts 1 and 13.

(Tr. 858, L.F. 125-126).

Facts post-trial

On August 19, 2008, Appellant filed a post-conviction motion for relief under Rule 29.15 in the Circuit Court for St. Louis County (PCR-LF 4-29). On November 20, 2008, Appellant filed a direct appeal in the Missouri Court of Appeals, Eastern District, State of Missouri v. Lester Krupp, Jr., (ED92150) (Mo. App. E.D. 2009). The motion court, the Honorable Colleen Dolan, held the post-conviction proceedings in abeyance while the direct appeal was pending and granted appointed post-conviction counsel thirty additional days to prepare the amended motion (PCR-LF 1, 73). Appellant's direct appeal was later dismissed because of his waiver of appeal in circuit court. State

of Missouri v. Lester Krupp, Jr., (ED92150) (Mo. App. 2009). The Court's mandate issued August 4, 2009.

On November 2, 2009, Appellant filed his amended motion for relief under Rule 29.15 as to the felony counts he was convicted of after trial (PCR-LF 34-68). Appellant pled in claim 8-9(a) of his amended motion that he was denied effective assistance of counsel in that trial counsel failed to present the testimony of a material witnesses whose testimony would have provided a viable defense (PCR-LF 35-44). Appellant pled in pertinent part,

> Mr. Krupp was denied his right rights to due process, effective assistance of trial 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 counsel, Mr. Travis Noble, failed to offer the testimony of Carlene Krupp, Movant's mother, to testify to the layout of Movant's home and demonstrate K.B. had ample opportunity to escape if she had been assaulted as she claimed. Such testimony would have seriously undermined K.B.'s already dubious credibility. But for counsel's omission, the outcome of the trial might reasonably have been different;
>
> ***
>
> When Movant's trial in cause number 2107R-0434-01 began Movant understood from Mr. Noble that Movant's mother would testify about the layout of the house at 2251 Sentier. That house, the Court will

recall, was one the places where Movant supposedly assaulted K.B. K.B. claimed she was too scared to get away from the man who was supposedly raping and sodomizing her even when Movant left K.B. alone to go outside (Tr. 311). K.B. said she did not see a telephone or the alarm on the wall (S. Tr. 109). But there was no proof there was a telephone or alarm.

Carlene Krupp could have provided that proof. Ms. Krupp owned the house at 2251 Sentier at the time and could have testified there was a phone readily available and alarm mounted on the wall. Moreover, she would have told the jury that the stairs leading down from the upstairs where K.B. was supposedly held captive branched off and led to an exterior door.

Ms. Krupp was ready, willing and able to testify. Mr. Noble knew the testimony she could provide and he had asked Ms. Krupp not to go in the courtroom during trial so she could be available to testify. It is not clear from the Record whether Ms. Krupp was endorsed as a witness.

(PCR-LF 36-39). Appellant pled Ms. Krupp's testimony would have impeached K.B.'s wildly inconsistent account of what had happened (PCR-LF 39-44).

The motion court rejected Appellant's post-conviction claims without a hearing in findings May 5, 2010 (PCR-LF 69-83). Despite having appointed post-conviction counsel to amend Appellant's *pro se* filing, the motion court wrote, "Movant effectively waived his right to file a petition for post-conviction relief as part of his plea agreement" (PCR-LF 76). The court observed that such waivers might be validly enforced and

found “unconvincing” Appellant’s contention that such agreements might not ethically be required by prosecutors or encouraged by trial counsel (PCR-LF 76-80). Nevertheless, the court did not dismiss and considered and ruled on the merits of each of Appellant’s three amended post-conviction claims (PCR-LF 80-82).

As to Appellant’s claim in paragraphs 8(a) and 9(a), the court rejected Appellant’s claim that his mother would have provided a viable defense (PCR-LF 80-81). Though she might assuredly have testified, she would have only impeached K.B.’s testimony, the court reasoned (PCR-LF 81). “Trial counsel impeached [K.B.] by eliciting the same facts that Ms. Krupp purportedly would provide” the court wrote (PCR-LF 81).

Appellant’s second claim, contained in paragraph 8(b) and 9(b), was that trial counsel failed to offer an appropriate lesser-included offense instruction to the charges of deviate sexual assault, sexual misconduct (PCR-LF 44-55). Appellant pled sexual misconduct in the first degree was an appropriate lesser-included offense of deviate sexual assault because deviate sexual assault required additional proof that the defendant knew he acted without consent, but sexual misconduct does not require proof that the defendant knew he lacked consent (PCR-LF 44-55). As pled by the state in its charges, Appellant could not have committed deviate sexual assault without also committing sexual misconduct in the first degree (PCR-LF 44-53). Appellant pled the jury could have disbelieved that Appellant knew he lacked consent (PCR-LF 53). Appellant observed the joinder of the sexual misconduct allegation against P.P. – a separate

incident – was premised on the state's assertion that the May 10th and April 6th incidents represented similar conduct (PCR-LF 55).

The court rejected this claim as well concluding counsel could not be ineffective for failing to offer a lesser offense instruction not supported by the evidence (PCR-LF 81). The court wrote "There was no evidence, direct or circumstantial, that Movant was unaware that he committed the offenses at issue without [K.B.'s] consent" (PCR-LF 81).

For his third post-conviction complaint, Appellant pled his trial counsel was ineffective for advising him to waive direct appeal (PCR-LF 56-64). Appellant pled in part,

> …Mr. Travis Noble and Mr. Kyle Walsh, errantly advised Movant to waive his right direct appeal based on mistaken advice that Movant would serve but a few months of a contemplated 15-year sentence. Movant discovered on delivery to the department of corrections that he would have to serve until at least until 2011 and possibly until 2016. Counsel's mis-advice about parole eligibility caused Movant to waive his right to direct appeal. Movant was prejudiced by counsels' ineffectiveness because had Movant reserved his right to appeal, he would have prevailed on his claim that the count concerning P.P. should have been severed and would have won a retrial. But for counsel's errant advice the outcome of the proceedings would have been different.

(PCR-LF 56-57). The count concerning P.P. should have been severed because the two incidents were too dissimilar (PCR-LF 61-63). Appellate counsel for Mr. Krupp would

have testified that she expected the issue would have required reversal for a new trial had Appellant not waived his appeal (PCR-LF 63). Appellant was prepared to testify that he only waived his appeal based on errant advice from trial counsel about parole eligibility (PCR-LF 58-60). The court reviewed this last claim on the merits as well concluding Appellant's waiver was voluntary, knowing and enforceable (PCR-LF 81-82).

Appellant filed his Notice of Appeal to the Eastern District Court of Appeals with the circuit clerk on June 14, 2010 (PCR-LF 2, 86-87). The state filed a motion to dismiss the appeal based on Appellant's waiver of post-conviction rights; Appellant filed a response on December 16, 2010.[1] After briefing, the Missouri Court of Appeals, Eastern District, on its own motion, transferred Appellant's appeal to this Court pursuant to Rule 83.02 (Krupp v. State, ED95024, slip opinion at 10). The Eastern District concluded it would dismiss the appeal, but considered the matter one of general interest and thus ordered the case transferred. Id. Additional facts will be adduced in the argument portion of this brief to avoid repetition.

[1] The Court of Appeals inaccurately wrote Appellant did not respond to the state's motion (slip opinion at 7). Undersigned counsel has verified Appellant's response was deposited with the Court of Appeals and is contained in the record transferred to this Court.

Points Relied On

I.

The motion court correctly refused to dismiss Appellant's post-conviction case and ruled on the merits of Appellant's claims – albeit incorrectly – in accordance with Appellant's rights to due process, effective assistance of counsel and equal protection as guaranteed by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that Appellant's supposed waiver of post-conviction was uncounseled and consequently involuntarily and unintelligently entered. The advisory opinion of the Court of Appeals suggesting the appeal should be dismissed overlooks the unethical provision of such waivers in the absence of conflict-free counsel and Missouri precedent that the motion court is vested with determining the validity of such waivers.

Jackson v. State, 241 S.W.3d 831 (Mo. App. E.D. 2007)

Nunn v. State, 778 S.W.2d 707 (Mo. App. E.D. 1989)

Simpson v. State, 90 S.W.3d 542 (Mo. App. E.D. 2002)

Formal Opinion 126 of the Advisory Committee of the Supreme Court of Missouri

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

Missouri Supreme Court Rules 29.07 and 29.15

United States Constitution, Fifth, Sixth and Fourteenth Amendments

Errol Morris, *The Anosognosic's Dilemma: Something's Wrong but You'll Never Know What It Is* (Pt. 1), N.Y. Times online content (June 20, 2010)

II.

The motion court clearly erred when it denied Appellant's post-conviction claim 8-9(a) without a hearing because Appellant alleged facts not refuted by the record 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 his trial counsel failed to meet the standard of a reasonably competent attorney under similar circumstances by failing to present the testimony of Carlene Krupp who could have testified about the scene of the alleged assault on K.B. impeaching K.B.'s testimony that she was trapped. The motion court's conclusions that the absent evidence was merely impeachment evidence and cumulative to facts suggested by trial counsel's cross examination of K.B. leave a definite and firm impression a mistake has been made.

State v. Vinson, 800 S.W.2d 444 (Mo. banc 1990)

Trimble v. State, 693 S.W.2d 267 (Mo. App. W.D. 1985)

Washington v. Texas, 388 U.S. 14 (1967)

Formal Opinion 126 of the Advisory Committee of the Supreme Court of Missouri

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

Missouri Supreme Court Rule 29.15

United States Constitution, Fifth, Sixth and Fourteenth Amendments

III.

The motion court clearly erred when it denied Appellant's post-conviction claim 8-9(b) without a hearing because Appellant alleged facts not refuted by the record 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 his trial counsel failed to meet the standard of a reasonably competent attorney under similar circumstances by failing to tender instructions for sexual misconduct in the first degree as a lesser-included offense for deviate sexual assault where the jury might have disbelieved that Appellant knew he acted without K.B.'s consent. Had trial counsel submitted these lesser instructions it is reasonable to believe that the jury would have acquitted Appellant of deviate sexual assault. The motion court's finding that there was no evidence Appellant was "unaware he lacked consent" leaves a definite and firm impression a mistake has been made.

State v. Barnard, 972 S.W.2d 462 (Mo. App. W.D. 1997)

State v. Ellis, 639 S.W.2d 420 (Mo. App. W.D. 1982)

State v. Westfall, 75 S.W.3d 278 (Mo. banc 2002)

Missouri Approved Instructions – Criminal 3d

MAI-CR3d 320.15

MAI-CR 3d 320.21

MAI-CR3d 333.00

Missouri Constitution, Article I, Sections 10 and 18

Missouri Supreme Court Rule 29.15

Revised Statutes of Missouri § 566.010

U. S. Constitution, Fifth, Sixth and Fourteenth Amendments

IV.

The motion court clearly erred when it denied Appellant's post-conviction claim 8-9(c) without a hearing because Appellant alleged facts not refuted by the record 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 his trial counsel failed to meet the standard of a reasonably competent attorney under similar circumstances by advising Appellant to waive his right to direct appeal based on errant advice (from counsel) that Appellant would serve no more 15% of an anticipated fifteen-year sentence. The motion court's conclusion that Appellant's waiver of direct appeal was both knowing and voluntary ignores that counsel's mistaken advice motivated the waiver and should leave this Court with a definite and firm impression that a mistake has been made.

State v. Butler, 951 S.W.2d 600 (Mo. banc 1997)

State v. Saucy, 164 S.W.3d 253 (Mo. App. S.D. 2005)

State v. Tripp, 939 S.W.2d 513 (Mo. App. S.D. 1997)

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

Missouri Supreme Court Rules 23.05 and 29.15

Revised Statutes of Missouri § 545.140.2

United States Constitution, Fifth, Sixth and Fourteenth Amendments

Argument

I.

The motion court correctly refused to dismiss Appellant's post-conviction case and ruled on the merits of Appellant's claims – albeit incorrectly – in accordance with Appellant's rights to due process, effective assistance of counsel and equal protection as guaranteed by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that Appellant's supposed waiver of post-conviction was uncounseled and consequently involuntarily and unintelligently entered. The advisory opinion of the Court of Appeals suggesting the appeal should be dismissed overlooks the unethical provision of such waivers in the absence of conflict-free counsel and Missouri precedent that the motion court is vested with determining the validity of such waivers.

Standard of Review and Preservation

In addition to responding and objecting to the State's motion to dismiss the appeal, Appellant raised in his brief below an argument that Appellant's waiver should not be enforced by the Court of Appeals. Because of the centrality of this procedural issue to Eastern District's order transferring and for the sake of clarity, Appellant makes his argument in a separate point.

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).

Facts

At Appellant's guilty plea on April 4, 2008, the prosecutor stated his recommendation for disposition on all charges would be an aggregate sentence of fifteen (15) years (Tr. 842). It was a negotiated agreement (Tr. 841). The state's recommendation was conditioned upon Appellant waiving direct appeal and post-conviction relief on all charges (Tr. 842). Though the court examined Appellant as to the effectiveness of counsel, the court did not ask specific questions about Appellant's waiver of post-conviction relief other than to ask if Appellant agreed to do so (Tr. 843).

Sometime thereafter, the court sentenced Appellant (Tr. 852). The court again asked if Appellant agreed that he was waiving direct appeal and post-conviction relief (Tr. 853-854). Appellant agreed his lawyer explained his post-conviction remedies (Tr. 854). Despite Appellant's agreement, after imposing sentence the court advised Appellant of his post-conviction rights under Rules 24.035 and "29.07" [sic] (Tr. 861-862). The court made no further inquiry as to who counseled Appellant concerning his waiver of post-conviction relief or whether Appellant understood anything more than that he had the right to collaterally challenge his convictions.

Appellant filed an appeal in the Court of Appeals from the judgments of conviction, State of Missouri v. Lester F. Krupp, Jr., ED92150 (Mo. App. E.D. 2009). That appeal was dismissed based upon Appellant's waiver of direct appeal in circuit

court. The mandate issued August 4, 2009. Appellant had previously filed for post-conviction relief under Missouri Supreme Court Rule 29.15 on August 19, 2008 (PCR-LF 4-29).

The sentencing court opened a post-conviction case and appointed the Office of the Public Defender to represent Appellant on his Rule 29.15 filing (PCR-LF 4-30). The motion court rejected Appellant's post-conviction claims without a hearing in findings May 5, 2010 (PCR-LF 69-83). The motion court wrote, "Movant effectively waived his right to file a petition for post-conviction relief as part of his plea agreement" (PCR-LF 76). The court observed that such waivers might be validly enforced and found "unconvincing" Appellant's contention that such agreements might not ethically be required by prosecutors or encouraged by trial counsel (PCR-LF 76-80). Nevertheless, the court did not dismiss and considered and ruled on the merits of each of Appellant's three amended post-conviction claims (PCR-LF 80-82).

Analysis

The Respondent and the Missouri Court of Appeals ask this Court to do what the circuit court refused to do – enforce the waiver. Citing its decision in Jackson v. State, 241 S.W.3d 831, 833 (Mo. App. E.D. 2007), the Court of Appeals wrote, "A movant can waive his right to seek post-conviction relief in return for a reduced sentence if the record clearly demonstrates that the movant was properly informed of his rights and that the waiver was made knowingly, voluntarily, and intelligently." (slip opinion at 8). What the Court glosses over is that Appellant could not have been properly informed nor was his waiver voluntary and intelligent.

Formal Opinion 126 of the Advisory Committee of the Supreme Court of Missouri discourages advice by counsel that a client waive post-conviction relief. Formal Opinion 126 is unequivocal that defense counsel may not ethically counsel a client to waive post-conviction remedies:

> It is not permissible for defense counsel to advise the defendant regarding waiver of claims of ineffective assistance of counsel by defense counsel. Providing such advice would violate Rule 4-1.7(a)(2) because there is a significant risk that the representation of the client would be materially limited by the personal interest of defense counsel. Defense counsel is not a party to the post-conviction relief proceeding but defense counsel certainly has a personal interest related to the potential for a claim that defense counsel provided ineffective assistance to the defendant. It is not reasonable to believe that defense counsel will be able to provide competent and diligent representation to the defendant regarding the effectiveness of defense counsel's representation of the defendant. Therefore, under Rule 4-1.7(b)(1), this conflict is not waivable.

Formal Opinion 126. Thus the Jackson opinion countenances waivers where a defendant is "properly informed of his rights and that the waiver was made knowingly, voluntarily, and intelligently." Jackson, 241 S.W.3d at 833. But the Advisory Committee points out defense counsel cannot ethically dispense such advice. In the absence of advice from conflict-free this Court must answer whether an uncounseled

waiver (or one counseled by an attorney with a conflict) can truly be voluntary and intelligent.

In Appellant's case, there is a factual dispute as to the voluntary, knowing and intelligent nature of Appellant's waiver. If, as Appellant pled, Mr. Noble advised Appellant to waive post-conviction remedies it was unethical of him so to do because he would be counseling Appellant to waive his sole means for testing Mr. Noble's representation. The accused in a criminal case has a right to representation uncluttered by counsel's efforts to vindicate his own conduct. Nunn v. State, 778 S.W.2d 707, 711 (Mo. App. E.D. 1989) (holding that where counsel's conduct was made an issue at trial, counsel should have moved for mistrial or to withdraw). Here, Mr. Noble advised Appellant to waive his post-conviction remedies even though it was the quality of Mr. Noble's representation that would likely be the subject of a post-conviction motion. Mr. Noble could not objectively advise Appellant as to the effectiveness of his own representation.

The Court of Appeals' proposed dismissal would also fundamentally rewrite Missouri precedent. The validity of that waiver of post-conviction relief is sufficiently important that the same Eastern District requires post-conviction counsel to be appointed to evaluate any waiver. Simpson v. State, 90 S.W.3d 542 (Mo. App. E.D. 2002). Indeed, here Appellant raised his waiver of appeal (and, of course, the corresponding waiver of post-conviction remedy) was premised on trial counsel's faulty advice that Appellant would serve but a few months in prison on his completed 15-year sentence (PCR-LF 58-60). Appellant's situation illustrates what the Advisory Committee for the

Missouri Supreme Court sought to avoid – counsel dispensed incorrect advice about the "benefit" of the plea agreement and, at the same time, insulated himself from later challenge.

Respondent suggested in its motion to dismiss that enforcing such waivers is simply about *protecting* the interests of the accused lest a defendant "be unable to secure the bargain most favorable to his interests" (Paragraph 15 of Respondent's motion quoting Chesney v. U.S., 367 F.3d 1055, 1058-1059 (8th Cir. 2004)). But Respondent leaves out the following, more pertinent, language from the same decision:

> Chesney's specific claim that his waiver was the result of ineffective assistance of counsel is more complicated. A panel of this court has held that "[a] defendant's plea agreement waiver of the right to seek section 2255 post-conviction relief does not waive defendant's right to argue, pursuant to that section, that the decision to enter into the plea was not knowing and voluntary because it was the result of ineffective assistance of counsel." DeRoo v. United States, 223 F.3d 919, 924 (8th Cir. 2000); *see also* United States v. Andis, 333 F.3d 886, 890 (8th Cir. 2003) (en banc). According to DeRoo, " '[j]ustice dictates that a claim of ineffective assistance of counsel in connection with the negotiation of a cooperation agreement cannot be barred by the agreement itself-the very product of the alleged ineffectiveness.' " DeRoo, 223 F.3d at 924 (quoting Jones v. United States, 167 F.3d 1142, 1145 (7th Cir. 1999)).

Chesney, 367 F.3d at 1058. Appellant pled his waivers were the by-product of ineffective assistance of counsel. If Appellant had elected to waive post-conviction relief against counsel's advice or with the benefit of conflict-free counsel, only then might it be appropriate to enforce such a waiver.

Waivers of post-conviction relief are not like waivers of direct appeal. The two waivers are different in kind. Trial counsel may ethically offer objective, cogent advice about trial court error in the preceding trial. That same counsel cannot offer objective advice about the adequacy of his or her own representation. Counsel's incompetence may mask his ability to recognize his incompetence. See Errol Morris, *The Anosognosic's Dilemma: Something's Wrong but You'll Never Know What It Is* (Pt. 1), N.Y. Times online content (June 20, 2010) < http://opinionator.blogs.nytimes.com /2010/06/20/the-anosognosics-dilemma-1/> (discussing the Dunning-Kruger Effect). Counsel's advice as to what is a beneficial deal or as to counsel's own representation may be flawed in ways counsel does not recognize.[2] Indeed, a court's questioning of a defendant as to the adequacy of counsel's representation –so to establish a "voluntary and knowing waiver" – carries with it the same danger. Just as counsel may have a blind spot as to his or her performance, defendant, a lay person, may be the recipient of objectively incorrect legal advice or representation and yet have no clue as to his lawyer's gaffe.

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[2] For instance, it seems Mr. Noble and the prosecutor were blind to the ethical implications of counseling or requiring a waiver of post-conviction remedies.

Finally, it seems the chief "evil" waivers of post-conviction relief are designed to address are claims of ineffective assistance of counsel. If, for example, Appellant had presented a complaint that he was sentenced to more time than permitted under Missouri statute, it is unlikely the circuit court would refuse to correct the problem because Appellant waived post-conviction relief. Appellant contends complaints about the adequacy of counsel are typically waived by defendants pleading guilty when sentencing courts address defendants as to the job their lawyers did. It is an inquiry the court must undertake when sentencing any defendant. Rule 29.07(e). In fact, the plea court even asked those questions of Appellant, despite his supposed waiver of a collateral challenge. A blanket waiver borders on unconscionable.

As noted previously, the motion court obviously had reservations about the validity of Appellant's waiver of post-conviction relief. It did not require Appellant to show cause why his 29.15 motion should not be dismissed. It did not enforce the waiver, though it recognized one existed, and it instead ruled on the merits of Appellant's post-conviction claims. This Court should address the merits of Appellant's case or remand for the Court of Appeals to do so.

II.

The motion court clearly erred when it denied Appellant's post-conviction claim 8-9(a) without a hearing because Appellant alleged facts not refuted by the record 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 his trial counsel failed to meet the standard of a reasonably competent attorney under similar circumstances by failing to present the testimony of Carlene Krupp who could have testified about the scene of the alleged assault on K.B. impeaching K.B.'s testimony that she was trapped. The motion court's conclusions that the absent evidence was merely impeachment evidence and cumulative to facts suggested by trial counsel's cross examination of K.B. leave a definite and firm impression a mistake has been made.

Standard of Review and Preservation

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). Appellant reiterates his argument from Point I of this brief that Appellant's waiver of post-conviction relief was invalid in light of the court's appointment of counsel and review of Appellant's claims on their merits.

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, 372 U.S. 335 (1963). This right is designed to assure fairness, and thus to give legitimacy to the adversary process. To fulfill its role of assuring a fair trial, the right to counsel must be the right to "effective" assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365 (1986); McMann v. Richardson, 397 U.S. 759 (1970).

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 (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 Id. 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 (1994).

Due process demands that a person accused of a crime be allowed to present witnesses in his defense so that the jury has his version of the facts as well as the state's. Washington v. Texas, 388 U.S. 14, 19 (1967). Indeed, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 301 (1973). Towards this end, the Missouri Constitution

specifically provides "[t]hat in criminal prosecutions, the accused shall have the right to appear and defend, in person and by counsel; to have process to compel the attendance of witnesses in his behalf." Mo. Const. Art. I, § 18(a).

Appellant pled below his lawyers failed to produce a material witness, Ms. Carlene Krupp, Appellant's mother, to testify about the house at 2251 Sentier so to impeach K.B.'s testimony (PCR-LF 35-44). Appellant pled,

> When Movant's trial in cause number 2107R-0434-01 began Movant understood from Mr. Noble that Movant's mother would testify about the layout of the house at 2251 Sentier. That house, the Court will recall, was one the places where Movant supposedly assaulted K.B. K.B. claimed she was too scared to get away from the man who was supposedly raping and sodomizing her even when Movant left K.B. alone to go outside (Tr. 311). K.B. said she did not see a telephone or the alarm on the wall (S. Tr. 109). But there was no proof there was a telephone or alarm.
>
> Carlene Krupp could have provided that proof. Ms. Krupp owned the house at 2251 Sentier at the time and could have testified there was a phone readily available and alarm mounted on the wall. Moreover, she would have told the jury that the stairs leading down from the upstairs where K.B. was supposedly held captive branched off and led to an exterior door.
>
> Ms. Krupp was ready, willing and able to testify. Mr. Noble knew the testimony she could provide and he had asked Ms. Krupp not to go in

the courtroom during trial so she could be available to testify. It is not clear from the Record whether Ms. Krupp was endorsed as a witness. (PCR-LF 38-39). Where the alleged ineffectiveness of counsel concerns the failure to present testimony of a witness, Missouri courts specifically require a post-conviction show: (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, 448-449 (Mo. banc 1990).

Ms. Krupp's testimony would have provided further impeachment of K.B.'s incredible and wholly inconsistent account of the events of March 10, 2006. K.B. could not get her story straight. As to the events of May 10, 2006, she gave different accounts at every retelling.

For instance:

In her written statement, K.B. asserted that she had had no contact with Appellant after their date (S.Tr. 11). She testified at trial that she had seen him at Harpo's (a bar) close to the time of the crimes (Tr. 299). She and Appellant could have discussed modeling but K.B. could not recall (S.Tr. 10). She and Appellant discussed modeling while sitting in his car (S.Tr. 16, Tr. 522). K.B. testified she did not know she was signing a modeling contract (S.Tr. 35), and that she had not read the entire contract she signed (Tr. 332).

She was raped at Appellant's home (Tr. 304, 305). She told the manager of the tanning salon in which she worked she was raped in a field (Tr. 496). She knew

Appellant as a customer of the tanning salon (Tr. 298). He was a "regular" customer (Tr. 184). But she also said she did not know if Appellant even came to the tanning salon (S.Tr. 51).

K.B. testified that she never agreed to go with Appellant to see a photo shoot (S.Tr. 59). She told Appellant "Okay, alright, I guess" or "okay, but have me back here before I have to open." (S.Tr. 60). Yes, she remembered saying that (S.Tr. 61). "No, I didn't say that but it is in the deposition" (S.Tr. 61).

K.B. did not know that West Dr. existed (S.Tr. 62). West Dr. was three streets down from where K.B.'s sister lived (S.Tr. 63). The cul-de-sac at the end of West Dr. was two blocks from Harpo's (S.Tr. 75).

When she tried to get out of the car, Appellant pulled her back by her shorts, put her in a headlock, and told her he could snap her neck (Tr. 302). She told Detective Krause Appellant threatened to put her in a headlock but did not do so (Tr. 735). She did not say anything about a headlock to Officer Mainieri (Tr. 424).

K.B. omitted any mention of oral sex in her written statement (S.Tr. 99). She did not tell Mainieri, Brandt, or Krause about this. She also omitted the allegation that she and Appellant performed oral sex on one another (S.Tr. 100). The first time these things were mentioned was at her deposition (S.Tr. 101).

K.B. testified that when they got to Appellant's bedroom at 2251 Sentier, he told her to undress (Tr. 304). She told Officer Mainieri that he ripped her clothes off (Tr. 424). When Carlene Krupp came to 2251 Sentier and Appellant went downstairs, he was gone for approximately 10 minutes (S.Tr. 107). K.B. did not try to leave and stayed

in the doorway (S.Tr. 107). However, she told Detective Brandt that she walked all around the upstairs and gave a description of each bedroom (Tr. 531). She told Detective Krause that Appellant did not respond to his mother's call and they waited for her to leave and then got dressed (Tr. 740, 744).

Not only was K.B.'s testimony full of contradictions, it was completely at odds with common experience. K.B. testified that during the drive to Appellant's home in Wildwood from West Dr., he kept her on his lap (S.Tr. 96). He told her to keep her head down and her eyes shut (Tr. 303). And yet an hour later he forced her to take down the directions to his home (Tr. 313). She told Officer Mainieri that she got his address from the membership cards at the tanning salon (Tr. 736). She claimed Appellant told her his last name was Colton even though she knew his real name because they had been on a date and she knew him as a customer of the tanning salon (Tr. 298, 310).

Once at his home, it was possible they "made out" before stripping (S.Tr. 101). She did not think they did, but she did not know if she had told anyone they had (S.Tr.101). While Appellant was either downstairs (Tr. 310) or outside (Tr. 532) for ten minutes (S.Tr. 107), K.B. made no attempt to find a telephone or an exit (Tr. 311). She was too scared to run and did not scream because she did not know who it was downstairs and thought "she" might cover up for him (Tr. 311). This was minutes after Appellant reportedly responded to the call of his name with, "Mom, don't come up, I'm naked" (Tr. 310).

The court rejected Appellant's claim that his mother would have provided a viable defense (PCR-LF 80-81). Though she might assuredly have testified, she would

have only impeached K.B.'s testimony, the court reasoned (PCR-LF 81). "Trial counsel impeached [K.B.] by eliciting the same facts that Ms. Krupp purportedly would provide" the court wrote (PCR-LF 81).

Impeachment is an important weapon in the arsenal of the competent trial attorney. Impeachment evidence that is likely to have created a reasonable doubt concerning a key witness' credibility, and thus a doubt as to the accused's guilt, will provide a basis for a meritorious claim of ineffective assistance of counsel. Trimble v. State, 693 S.W.2d 267, 274 (Mo. App. W.D. 1985); See also Bonner v. State, 765 S.W.2d 286, 288 (Mo. App. W.D. 1989)(finding trial counsel ineffective for failing to impeach state's witness with his prior conviction). Because the jury assesses credibility, it is entitled to any information that might bear significantly on the veracity of a witness. Kuehne v. State, 107 S.W.3d 285, 294 (Mo. App. W.D. 2003). Of course trial counsel did not impeach K.B. with "facts" during cross-examination.

Trial counsel asked K.B. if she had seen a phone or alarm system (S.Tr. 108-109), but she denied it. Counsel's questions did not prove any facts as to the real layout of the house. Indeed, the jury was explicitly instructed to the contrary,

> You must not assume as true any fact solely because it is included in or suggested by a question asked a witness. A question is not evidence, and may be considered only as it supplies meaning to the answer.

MAI-CR 3D 302.02 (Tr. 760). The way to further discredit K.B. with facts was by introducing evidence of a phone and alarm system through Ms. Krupp. The court's conclusion that these were matters of mere impeachment and that trial counsel proved

these facts through his questions of K.B. leaves a definite and firm impression a mistake has been made.

The motion court's denial of relief on this record thus violated Appellant's 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. This Court should vacate Appellant's convictions and sentence and remand the case for a new, fair trial with competent, prepared trial counsel.

III.

The motion court clearly erred when it denied Appellant's post-conviction claim 8-9(b) without a hearing because Appellant alleged facts not refuted by the record 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 his trial counsel failed to meet the standard of a reasonably competent attorney under similar circumstances by failing to tender instructions for sexual misconduct in the first degree as a lesser-included offense for deviate sexual assault where the jury might have disbelieved that Appellant knew he acted without K.B.'s consent. Had trial counsel submitted these lesser instructions it is reasonable to believe that the jury would have acquitted Appellant of deviate sexual assault. The motion court's finding that there was no evidence Appellant was "unaware he lacked consent" leaves a definite and firm impression a mistake has been made.

Standard of Review and Preservation

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). Appellant reiterates his argument from Point I of this brief that Appellant's waiver of post-

conviction relief was invalid in light of the court's appointment of counsel and review of Appellant's claims on their merits.

Analysis

As noted *infra*, the Sixth Amendment to the Constitution of the United States 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*. 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*. The United States Supreme Court has recognized that the reasonableness of counsel's performance is to be judged by prevailing professional norms. Strickland Id. at 688.

Appellant's particular complaint of ineffectiveness was that counsel erred by failing to offer instructions – in the deviate sexual assault counts – for lesser-included counts of sexual misconduct in the first degree. A defendant is entitled to an instruction on any theory that the evidence and the reasonable inference therefrom tends to establish. State v. Westfall, 75 S.W.3d 278, 280 (Mo. banc 2002); State v. Zumwalt, 973 S.W.2d 504, 507 (Mo. App. S.D. 1998). In determining whether there was substantial evidence to support the giving of an instruction, this Court must consider the evidence in the light most favorable to the defendant. State v. Weems, 840 S.W.2d 222, 226 (Mo. banc 1992). Thus, if the evidence tends to establish the defendant's theory, or supports differing conclusions, the defendant is entitled to an instruction on it. Westfall,

75 S.W.3d at 280. Appellant pled counsel was ineffective for failing to offer an appropriate lesser-offense to deviate sexual assault.

These were the instructions from trial as to deviate sexual assault counts. Instruction 9 for deviate sexual assault in Count 3 read as follows:

> *As to Count III, if you find and believe from the evidence beyond a reasonable doubt:*
>
> *First, that on or about May 10, 2006, at or near West Drive in the County of St. Louis, State of Missouri, the defendant placed his penis into the mouth of [K.B.], and*
>
> *Second, that such conduct constituted deviate sexual intercourse, and*
>
> *Third, that defendant did so without the consent of [K.B.], and*
>
> *Fourth, that defendant knew or was aware that he did not have the consent of [K.B.],*
>
> *then you will find the defendant guilty under Count III of deviate sexual assault.*
>
> *However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.*

(LF 84; patterned after MAI-CR3d 320.15).

Instruction 13 in Count 5 was similar and read as follows:

As to Count V, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about May 10, 2006, in the County of St. Louis, State of Missouri, the defendant touched the vagina of [K.B.] with his hand, and

Second, that such conduct constituted deviate sexual intercourse, and

Third, that defendant did so without the consent of [K.B.], and

Fourth, that defendant knew or was aware that he did not have the consent of [K.B.],

then you will find the defendant guilty under Count IV of deviate sexual assault.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

(LF 88; patterned after MAI-CR3d 320.15).

Instruction 17 in Count 7 likewise pled four elements and read as follows:

As to Count VII, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about May 10, 2006, at 2251 Sentier in the County of St. Louis, State of Missouri, the defendant placed his penis into the mouth of [K.B.], and

Second, that such conduct constituted deviate sexual intercourse, and

Third, that defendant did so without the consent of [K.B], and

Fourth, that defendant knew or was aware that he did not have the consent of [K.B.],

then you will find the defendant guilty under Count VII of deviate sexual assault.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

(LF 92; patterned after MAI-CR3d 320.15).

Instruction 21 in Count 9 also pled four elements and read as follows:

As to Count IX, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about May 10, 2006, in the County of St. Louis, State of Missouri, the defendant touched the vagina of [K.B.] with his mouth, and

Second, that such conduct constituted deviate sexual intercourse, and

Third, that defendant did so without the consent of [K.B], and

Fourth, that defendant knew or was aware that he did not have the consent of [K.B.],

then you will find the defendant guilty under Count IX of deviate sexual assault.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

(LF 96; patterned after MAI-CR3d 320.15).

Instruction 29 defined "Deviate sexual intercourse" as:

any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any person.

(LF 104; patterned after MAI-CR3d 333.00). As the Court is aware, the "sexual contact" prohibited by the sexual misconduct statute is:

any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying the sexual desire of any person.

§566.010(3).

Finally, the instruction for sexual misconduct in the first degree – including the propositions supported by the evidence – that trial counsel should have tendered here – would have required the jury to find:

First, that on or about May 10, 2006, … in St. Louis County, State of Missouri, defendant [touched the genitals of [K.B.] with his hand [or] mouth][or][touched his genitals to the mouth of [K.B.] , and

Second, that he did so for the purpose of gratifying his own sexual desire, and

Third, that defendant did so without the consent of [K.B.],

then you will find the defendant guilty (under Count __) of sexual misconduct in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

MAI-CR 3d 320.21. In fact, the above instruction parallels what the state submitted in Instruction 27 as to Count 12 involving sexual misconduct in the first degree against P.P. (LF 102).

Both the deviate sexual assault statute and the sexual misconduct in the first degree statute prohibit touching of the actor's hand to the genitals of another and the touching of the actor's genitals to another person for the purpose of arousing or gratifying the sexual desire of any person. This Court must decide whether sexual misconduct first degree was a lesser-included offense by examining the elements.

The statutory elements test for determining whether an offense is a lesser-included offense of another requires the Court focus on the elements of each offense, and to then determine whether it would be possible to commit the greater offense

without committing the lesser. State v. Barnard, 972 S.W.2d 462, 465 (Mo. App. W.D. 1997) citing State v. Mizanskey, 901 S.W.2d 95, 98 (Mo. App. W.D. 1995). Here, as pled by the state, Appellant could not have committed deviate sexual assault without also committing sexual misconduct in the first degree. As the jury was instructed here, deviate sexual assault contained an extra element not contained in the lesser: that Appellant knew or was aware he did not have K.B.'s consent.

For a lesser-included offense instruction to be submitted, it "must be supported by substantial evidence and [the] reasonable inferences to be drawn therefrom." State v. Howard, 896 S.W.2d 471, 492 (Mo. App. S.D. 1995); quoting, State v. Daugherty, 631 S.W.2d 637, 639 (Mo. banc 1982). If there is a basis in the evidence for an acquittal of the higher offense and a conviction only on the lesser, then the jury must be instructed on the lesser included offense. State v. Booker, 631 S.W.2d 854, 856 (Mo. banc 1982); § 556.046.2. As the Western District of the Court of Appeals noted, trial courts should err on the side of giving a lesser-included offense instruction:

> As a general proposition, a trial court should resolve all doubts upon the evidence in favor of instructing on the lower degree of the crime, leaving it to the jury to decide which of two or more grades of an offense, if any, the defendant is guilty. . . . Sometimes . . . a fine line separates the higher and lower degree of the offense, though a finely milled analysis of the evidence might lead to the conclusion that it supported the submission only of the higher degree of the offense.

State v. Ellis, 639 S.W.2d 420, 423 (Mo. App. W.D. 1982). A defendant is entitled to an instruction on any theory which the evidence tends to establish. State v. Hopson, 891 S.W.2d 851, 852 (Mo. App. E.D. 1995). Though the analysis may appear complicated, the conclusion is simple: were the jurors presented with the alternative of convicting Appellant of misdemeanor sexual misconduct against K.B., they would have done so.

The unusual facts of this case warranted lesser-included offense instructions. The evidence established Appellant may have acted without consent but was unaware he lacked consent; K.B. described a variety of activities such as "making out" and mutual oral sex, that appeared consensual. Indeed, the state joined the count involving P.P. – an entirely separate incident – with the counts involving K.B. on the grounds that Appellant's conduct represented similar conduct. Thus, the state could not have objected to lesser-included offenses of sexual misconduct in the first degree as to the counts involving K.B. because it was averring Appellant had a *modus operandi*. That is, Appellant touched P.P.'s vagina with his hand without her consent and approximately a month later he did the same thing to K.B. (in Count 5), but on that later occasion he "knew" he lacked consent.

Appellant's convictions in Counts 5 and 12 were for the exact same conduct, hand-to-genital touching, involving two different women. But in Count 5 Appellant is serving seven years and in Count 12 he is serving but a one-year sentence. Therein lies the prejudice. Had trial counsel tendered instructions for sexual misconduct in the first degree, the trial court would have so instructed and Appellant would have been acquitted

of deviate sexual assault in Counts 3, 5, 7, and 9 and convicted instead of the corresponding misdemeanor charges.

The motion court summarily rejected Appellant's claim about the lesser offenses. The court merely wrote, "There was no evidence, direct or circumstantial, that Movant was unaware that he committed the offenses at issue without [K.B.'s] consent" (PCR-LF 81). But this finding is factually inaccurate because there was copious evidence from which a reasonable juror could have concluded that K.B. appeared to consent when really she did not.

K.B. knew Appellant as a customer of the tanning salon (Tr. 298). He was a "regular" customer (Tr. 184). Asked to accompany Appellant she said "Okay, alright, I guess" or "okay, but have me back here before I have to open." (S.Tr. 60). She and Appellant discussed modeling while sitting in his car (S.Tr. 16, Tr. 522). Once at Appellant's home, it was possible they "made out" before stripping (S.Tr. 101-102). The two had mutual oral sex, "sixty-nine" (S. Tr. 100). She told Detective Brandt that she walked all around the upstairs and gave a description of each bedroom while Appellant was absent (Tr. 531). While Appellant was either downstairs (Tr. 310) or outside (Tr. 532) for ten minutes (S.Tr. 107), K.B. made no attempt to find a telephone or an exit (Tr. 311). She claimed Appellant "forced" her to take down the directions to his home (Tr. 313). There was evidence that K.B. appeared to consent and Appellant was unaware she did not.

The motion court's denial of relief on this record thus violated Appellant's 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. Trial counsel was ineffective for not offering instructions for sexual misconduct in the first degree. This Court should vacate Appellant's convictions and sentence and remand the case for a new, fair trial with competent trial counsel and a properly instructed jury.

IV.

The motion court clearly erred when it denied Appellant's post-conviction claim 8-9(c) without a hearing because Appellant alleged facts not refuted by the record 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 his trial counsel failed to meet the standard of a reasonably competent attorney under similar circumstances by advising Appellant to waive his right to direct appeal based on errant advice (from counsel) that Appellant would serve no more 15% of an anticipated fifteen-year sentence. The motion court's conclusion that Appellant's waiver of direct appeal was both knowing and voluntary ignores that counsel's mistaken advice motivated the waiver and should leave this Court with a definite and firm impression that a mistake has been made.

Standard of Review and Preservation

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). Appellant reiterates his argument from Point I of this brief that Appellant's waiver of post-conviction relief was invalid in light of the court's appointment of counsel and review of Appellant's claims on their merits.

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*. 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*. The United States Supreme Court has recognized that the reasonableness of counsel's performance is to be judged by prevailing professional norms. Strickland *supra* at 688.

To prove ineffective assistance, Appellant must show that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney. 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." Shurn, 866 S.W.2d at 468.

Appellant complained trial counsel was ineffective for advising him to waive his direct appeal based on an inaccurate prediction of parole eligibility (PCR-LF 55-64). Appellant pled:

> When Movant's trial in cause number 2107R-0434-01 concluded during the early morning hours of April 4, 2008, Movant was in shock at having been convicted.

Mr. Noble explained Movant did not have much time. On the one hand, Mr. Noble explained, Movant faced up to thirty-five (35) years on the counts for which he had just been convicted.[3] However, counsel went on, the State would agree to a fifteen-year package deal on the tried counts should Movant agree to plead guilty on the two remaining counts and waive his direct appeal.

Mr. Noble told Movant it did not make any sense to try the severed counts because the time on the counts where they had a verdict could be so great. Counsel further noted Movant had thirteen months of incarceration already in, so Movant would only have to do eight months more if he pled in exchange for the sentencing recommendation. Counsel stated the offenses were, on the whole, non-violent, C felonies and prisons were already overcrowded. Movant asked Mr. Noble: "Let me make sure I understand this, I'll do eight months?" "Yes," counsel assured. Mr. Lester Krupp, Sr., Movant's father asked counsel to confirm. Mr. Noble assured "this case is not severe" and "[Movant] will do 15% as a first-time offender."

Counsel's legal advice seemed reasonable and reliable to Movant. Movant understood counsel's advice was an assurance he would be out on parole in eight (8) months after being sent to the department of corrections.

[3] Actually, thirty-six (36) years adding the misdemeanor verdict in count 12.

> Movant relied on counsel's advice on parole in deciding to plead guilty. Counsel did not discuss whether they believed the Court committed error or what Movant's prospects would have been if he appealed. At an evidentiary hearing, Movant will testify that but for counsel's advice, he would not have pled guilty and waived his right to direct appeal.
>
> Because Movant was not paroled after eight (8) months and may instead have to serve until 2011 or 2016, counsel's advice about parole eligibility was wrong.

(PCR-LF 58-59).

Appellant was prejudiced because, had he not waived direct appeal, he would have gotten appellate relief because of the trial court's refusal to sever the count involving P.P., for trial (PCR-LF 60-64). Whether joinder is proper is a question of law, "while severance is within the trial court's discretion." State v. Tripp, 939 S.W.2d 513, 517 (Mo. App. S.D. 1997). Because the question of proper or improper joinder is one of law, the trial court's decision is not entitled to deference. State v. Eiland, 809 S.W.2d 169, 171 (Mo. App. E.D. 1991).

There is no constitutional right to be tried for one offense at a time. State v. Olds, 831 S.W.2d 713, 718 (Mo. banc 1992). Liberal joinder is favored as a means of achieving judicial economy. Id. But the fundamental purpose of a criminal trial is the fair ascertainment of the truth. State v. Carter, 641 S.W.2d 54, 58 (Mo. banc 1982). The goal is to obtain a fair determination of the accused's guilt or innocence of *each* charge. State v. Conley, 873 S.W.2d 233, 238 (Mo. banc 1994).

Multiple offenses may be joined in the same information or indictment if:

1. they are of the same or similar character; or

2. they are based on two or more acts that are part of the same transaction; or

3. they are connected or constitute parts of a common scheme or plan.

Rule 23.05; § 545.140.2.

The trial court abused its discretion in finding that Count 14 was of the same or similar character as Counts 1 through 11. §545.140.2 and Rule 23.05 do not require that the crimes be of the "same" character, as long as they are sufficiently "similar". State v. Harris, 705 S.W.2d 544, 549 (Mo. App. E.D. 1986). "Similar" means "[n]early corresponding; resembling in many respects; somewhat alike; have general likeness." Id. quoting Webster's New International Dictionary (2d ed.). But the manner in which the crimes were committed should be so similar that it is likely that the same person committed all the charged offenses. State v. Saucy,164 S.W.3d 253, 529 (Mo. App. S.D. 2005).

Had these counts been tried separately, evidence of each of the two incidents would have been inadmissible in the trial of the other because the allegations of P.P. have no relevance to the allegations of K.B. and introduction of that evidence would have been improper propensity evidence.

"To join offenses which are not part of a common scheme or plan exposes a defendant to prejudice by allowing proof of the commission of unrelated crimes."

Saucy, 164 S.W.3d at 529, citing State v. Brown, 954 S.W.2d 396, 398 (Mo. App. E.D. 1997). To determine that the evidence of the other crimes did not prejudice the defendant, a court must find beyond doubt that the tainted evidence did not affect the jury in its fact-finding process. *Id*. If offenses are improperly joined, "prejudice is presumed and severance is mandated." State v. Kelly, 956 S.W.2d 922, 926 (Mo. App. WD. 1997).

Even if prejudice was not presumed, it is clear in this case that Appellant was prejudiced by the court's failure to sever counts 1 through 11 from count 14. The jury obviously had serious doubts about the testimony of K.B., rejecting her claims of forcible rape, forcible sodomy, and sexual assault (L.F. 115-122). The testimony of P.P. bolstered K.B.'s testimony just enough to convince the jury to err on the side of conviction and return guilty verdicts on deviate sexual assault and felonious restraint even though they did not believe K.B.'s version of events.

Appellant did appeal from the judgments of conviction in State v. Lester F. Krupp, Jr., (ED91250)(Mo. App. E.D. 2009). And Appellant's counsel raised the improper joinder/failure to sever in her brief on Movant's behalf. Appellant pled that his appellate lawyer would testify at a hearing that she expected the joinder issue would have resulted in a reversal and remand for a new trial, had Appellant not waived his right to appeal (PCR-LF 64). That appeal was dismissed because of Appellant's waiver of his direct appeal. The Mandate issued August 4, 2009.

The court reviewed this last claim on the merits as well concluding Appellant's waiver was voluntary, knowing and enforceable (PCR-LF 81-82). But Appellant pled

he was given bad advice. Appellant's expression of satisfaction with trial counsel (Tr. 862-867) did not refute his claim because Appellant did not know, at the time, he had been given wrong advice about how much time he would serve on a fifteen-year sentence. The court's sole inquiry of Appellant, concerning the waiver of his right to appeal, was to ask if counsel explained he had that right (Tr. 854). The motion court simply failed to consider that Appellant's waiver, while voluntary, was unintelligent because it was based on faulty advice from counsel.

The motion court's denial of relief on this record thus violated Appellant's 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. Trial counsel was ineffective for advising Appellant to waive appeal based on inaccurate information about parole eligibility. This Court should vacate Appellant's convictions and sentence and remand the case for a new, fair trial with competent trial counsel or at the very least order Appellant resentenced so he might take a direct appeal from his convictions.

Conclusion

For the foregoing reasons, this Court should not dismissal Appellant's post-conviction case and should remand Appellant's case for an evidentiary hearing on all issues.

Respectfully submitted,

_____

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Certificate of Compliance and Service

I, Scott Thompson, hereby certify 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. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 11,614 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using Symantec Endpoint Protection, with updated virus definitions. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 26th day of March, 2011, to the Office of the Attorney General, State of Missouri, Jefferson City, Missouri 65102,

_____
Scott Thompson

IN THE
MISSOURI SUPREME COURT

LESTER KRUPP,	)	
Appellant,	)	
vs.	)	No. SC91613
STATE OF MISSOURI,	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT FOR ST. LOUIS COUNTY, MISSOURI,
THE HONORABLE COLLEEN DOLAN, JUDGE

APPELLANT'S APPENDIX
