No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Neil R. Johnson II _____ — PETITIONER
(Your Name)

VS.

State Of Missouri,
Brock Van Loo, Warden , — RESPONDENT(S)
Kelly Morriss, Warden,
Scott Weber, Warden,

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

Please check the appropriate boxes:

☒ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

United States Distric Court Western District of Missouri

_____

☐ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☐ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☐ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☐ The appointment was made under the following provision of law: _____

_____, or

☐ a copy of the order of appointment is appended.

_____
(Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Neil R. Johnson II, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 0	$	$ 0	$
Self-employment	$ 0	$	$ 0	$
Income from real property (such as rental income)	$ 0	$	$ 0	$
Interest and dividends	$ 0	$	$ 0	$
Gifts	$ 100.00	$	$ 0	$
Alimony	$ 0	$	$ 0	$
Child Support	$ 0	$	$ 0	$
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$	$ 0	$
Disability (such as social security, insurance payments)	$ 0	$	$ 0	$
Unemployment payments	$ 0	$	$ 0	$
Public-assistance (such as welfare)	$ 0	$	$ 0	$
Other (specify):	$ 8.50	$	$ 8.50	$
Total monthly income:	$ 108.50	$	$ 8.50	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
none			$8.50 state tip
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$
			$
			$

4. How much cash do you and your spouse have? $2,500.00
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
Inmate accounbt	$ 2,500.00	$
	$	$
	$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value _____

☒ Other real estate
Value 2400.00

☒ Motor Vehicle #1
Year, make & model 98 Jeep Cherokee
Value 500.00

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets
Description _____
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
0	$ 0	$ N/A
0	$ 0	$
0	$ 0	$

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

Name	Relationship	Age
NONE		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☒ Yes ☐ No Is property insurance included? ☐ Yes ☒ No	$ 0	$ N/A
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$
Home maintenance (repairs and upkeep)	$ 0	$
Food	$ 0	$
Clothing	$ 0	$
Laundry and dry-cleaning	$ 0	$
Medical and dental expenses	$ 0	$

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 0	$
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$
Life	$ 0	$
Health	$ 0	$
Motor Vehicle	$ 0	$
Other:	$	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify): ~~property taxes~~	$ 103.30 mth.	$
Installment payments		
Motor Vehicle	$ 0	$
Credit card(s)	$ 0	$
Department store(s)	$ 0	$
Other:	$ 0	$
Alimony, maintenance, and support paid to others	$ 0	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$
Other (specify):	$	$
Total monthly expenses:	$	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☒ Yes ☒ No

If yes, how much? $3500.00

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

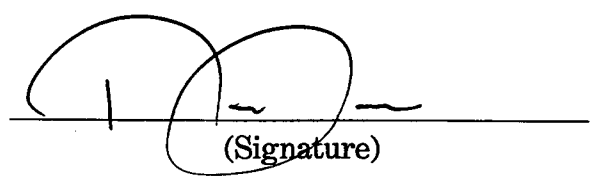
If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

Offender nno income

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: June 22, _____, 2022



(Signature)

Other Orders/Judgments

6:21-cv-03004-MDH Johnson II v. Weber

AANS,HABEAS,PPROSE

U.S. District Court

Western District of Missouri

Notice of Electronic Filing

The following transaction was entered on 1/7/2021 at 2:36 PM CST and filed on 1/7/2021

Case Name: Johnson II v. Weber
Case Number: 6:21-cv-03004-MDH
Filer:
Document Number: 4(No document attached)

Docket Text:
ORDER: ORDERED that: (1) Petitioner is granted provisional leave to proceed in forma pauperis; and (2) Respondent answer Petitioner's allegations and show cause on or before February 8, 2021, why the relief Petitioner seeks should not be granted. Signed on 1/7/2021 by District Judge M. Douglas Harpool. This is a TEXT ONLY ENTRY. No document is attached. (Willis, Kathy)

6:21-cv-03004-MDH Notice has been electronically mailed to:

6:21-cv-03004-MDH It is the filer's responsibility for noticing the following parties by other means:

Neil Roger Johnson II
510289
Moberly Correctional Center
P.O. Box 7
Moberly, MO 65270

No. _____

IN THE
SUPREME COURT
OF THE
UNITED STATES OF AMERICA

NEIL R. JOHNSON II - PETITIONER

VS.

STATE OF MISSOURI

SCOTT WEBER - WARDEN

KELLY MORRISS - WARDEN

BROCK VAN LOO - WARDEN - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

NEIL R. JOHNSON II - NO. 510289
Pro Se Petitioner
Tipton Correctional Center
609 North Osage Avenue
Tipton, Missouri 65081

QUESTION PRESENTED FOR GROUND ONE

Was there err in submitting the jury instruction, based on MAI-CR 331.02, because the verdict director for the offense of Driving While Intoxicated, Section 577.010 R.S.Mo., omits the physical evidence, the "impairment" required by State law to convict the accused, in that the jurors were not required to find petitioner's use of alcohol impaired his ability to operate a motor vehicle, reducing the States's burden of proof?

QUESTION PRESENTED FOR GROUND TWO

Was counsel ineffective for not investigating the case prior to Motion to Suppress and trial, and failing to hire a video expert to analyze the dash cam video evidence which would contradict the testimony of state's witness and would have impeached such witness providing exculpatory evidence?

RELATED CASES

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES PAGE

STATUTES AND RULES

INDEX TO EXHIBITS

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix F to the petition and is unpublished.

The opinion of the United States district court appears at Appendix E to the petition and is unpublished.

For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished.

The opinion of the Supreme Court of Missouri appears at Appendix B to the petition and is unpublished.

JURISDICTION

For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was August 5, 2021.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: January 21, 2022, and a copy of the order denying rehearing appears at Appendix F.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

For cases from **state courts:**

The date on which the highest state court decided my case was May 19, 2020. A copy of that decision appears at Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

Constitutional and Statutory Provisions Involved

We the People, a citizen of Missouri, Neil R. Johnson II, pro se petitioner, appeals his conviction following a jury trial in the Circuit Court of Greene County, Missouri, for Driving While Intoxicated under Section 577.010 R.S.Mo., Driving While Revoked, Section 302.321 R.S.Mo., and alleged probable cause for failing to drive in a single lane of traffic, Section 304.015 R.S.Mo.. The Honorable Thomas E. Mountjoy sentenced Mr. Johnson to concurrent terms of twelve years in the Department of Corrections, four years in the Department of Corrections, and fifteen days in the Greene County jail. Mr. Johnson entered a plea of guilt to Driving While Revoked. The state rejected his plea of guilt. The appeal for this Case No. 1231-CR00573-01 has been exhausted in the following courts: No. SD33553, No. 1631-CC00368, No. SD36211, No. 6:21-CV-03004 MDH, and No. 21-3018. The Supreme Court of Missouri denied the Motion for Transfer and Application for Transfer, and jurisdiction lies in the Missouri Court of Appeals, Southern District, Article V, Section 3, Missouri Constitution, Section 477.060 R.S.Mo. 2000.

NOW, jurisdiction lies in the Supreme Court of the United States. Finally, this question of law shall be determined in the eyes of justice from the nine Honorable Supreme justices with their opinions of wisdom from the greatest minds of the law. There is no doubt that these two questions presented herein are clearly valid questions of law for this Honorable Court to resolve for the state without any further dispute. This discovery will reveal that there is a violation of the accused right to due process of law and a determination of guilt by a jury, that is guaranteed by the sixth and fourteenth Amendments of the United States Constitution of America.

STATEMENT OF THE CASE
GROUND ONE

The trial court plainly erred in submitting MAI-CR 331.02, Instruction No. 5 because this verdict director for the offense of Driving While Intoxicated, §577.010 R.S.Mo., and §577.037 R.S.Mo. violated petitioner's right to due process of law and to a determination of guilt by a jury in that the jurors were not required to find that petitioner's use of alcohol impaired his ability to operate a motor vehicle. Petitioner admitted to drinking some alcohol being under the influence of alcohol, the blood alcohol level of eight-hundredths of one percent alcohol content, the legal limit required by law in Section 577.037.5 R.S.Mo. in that a person may consume some alcohol and operate a motor vehicle "under the influence" in a safe manner according to the law in Missouri. This is not evident by the jury instruction because the state omits the "physical evidence" from the Missouri Approved Instruction No. 5 which is the "impairment" required by state law to convict the accused for Driving While Intoxicated. The physical evidence of impairment is also the essential element as established by the Missouri legislature. The fact the required element is omitted it violates petitioner's right to a fair trial and effective assistance of counsel in that counsel's performance was deficient due to the failure to exercise the customary skill and dilligence that any reasonable competent attorney would in the same situation.

Because defense counsel had no objection to Instruction No. 5, it is cognizable under plain error for this Court to review in that counsel failed to properly rebut the impairment aspect of the state's case. This failure to properly instruct the jury resulted in manifest

injustice which lead petitioner's incarceration in violation of the United States Constitution with prejudice because Instruction No. 5 misdirects and fails to instruct the jurors of the blood alcohol level or percent of blood alcohol content required by law to properly define intoxicated condition necessary for a conviction that is apparent that the error affected the verdict by reducing the state's burden of proof which is a jury must find the accused guilty beyond a reasonable doubt and not more than likely. Therefore, Petitioner has met the two prong test as required by Strictland v. Washington, 466 U.S. 668 (1984).

In this case there was no evidence of intoxication to convict petitioner. The state's case was solely based on the credibility of state's witness Shane R. Monk of the Missouri State Highway Patrol. The state alleges that petitioner changes lanes and straddled the lane line as Monk was looking in his rearview mirror establishing probable cause. The state's trial strategy of proving guilt was a false narrative because there was not a lane change and petitioner knows where he was driving as Monk was profiling and looking in his rearview mirror.

REASONS FOR GRANTING THE PETITION
GROUND ONE

Under Missouri law there are two elements the state is required to prove to substantiate a Driving While Intoxicated charge. 1) operating a motor vehicle, and 2) while in an intoxicated condition. State v. Tyler, 285 S.W. 3d 353, and 354 (Mo. App. S.D. 2009). Missouri law does not recognize impairment as an element of this offense. Tyler, supra. The Supreme Court of Missouri held that "an attempt to define such words would tend to confuse rather than clarify the issue." Id. State v. Johnson, 55 S.W. 2d 967 (1932)

"[a]ny juror would readily understand what was meant..." State v. Schroeder, 330 S.W. 3d 468 (Mo. banc 2011). If jurors understand what is meant, that tends to contradict that it would confuse rather than clarify the issues." Id. The question is did the jurors understand what is required to convict the accused by state law. There is no doubt that the jury found that petitioner was under the influence of alcohol because he admitted drinking some alcohol. Was petitioner's use of alcohol at the point of intoxication, the percent or level required by law pursuant to §577.037 R.S.Mo., or was he simply under the influence? In the State of Missouri the legal limit to operate a motor vehicle "under the influence" by law is .08% blood alcohol content. In this case Monk refused petitioner a breathalizer test denying his right to present evidence to prove his innocence. After a breath sample was given it was stick him with a needle or a refusal. Ordinary Persons don't like getting stuck with a needle. Does that mean every person is afraid of needles? **Ordinary Persons Understand What is meant by "Intoxicated Condition" and "Under the Influence."**

There are two points counsel argued at trial. 1) Instruction No. 5 required to find intoxicated condition as defined "under the influence", it's legal to drink some alcohol and drive...it's just not legal to drive in an intoxicated condition. The question most people seem to have is: how can that be possible? If you're feeling the effects of alcohol and we all know there is when you first drink, how can both of these things be true? Under the influence means you're really in an "intocicated condition". They should be equal? (Trial Tr. 631 - 633) The court can clearly see that trial counsel was hard to understand and confusing the issues. Therefore, the jurors more than likely did not understand what is meant because the two terms were not defined for the jury in the instructions.

Wherefore, there is evidence trial counsel was ineffective because he failed to continue to further explain that the law requires to prove the physical evidence or the impairment of the offense which is a physical condition evidenced by unsteadiness on the feet, slurring of speach, lack of bbdy coordination and impairment of motor reflexes. State v. Hall, 201 S.W. 3d 599 (Mo. App. S.D. 2009), State v. Teaster, 962 S.W. 2d 429 (Mo. App. S.D. 1998) and State v. Ruark, 720 S.W. 2d 453 (Mo. App. S.D. 1986). Any competent counsel would have objected to the submission of Instruction No. 5 and would have assisted the jury to understand the law aspect of the impairment or the physical evidence required by law to convict.

2) Trial counsel argued that on CSI they don't stop looking for the evidence...if the trooper would have given petitioner a second breathalizer test...we wouldn't be here. (Tr. 621 - 623)

The two arguments are proof that the blood alcohol percent is crucial for the defense and gives reason to question if the jurors understand what was meant. Was petitioner in an intoxicated condition or under? Petitioner was persistent that he was not intoxicated. Intoxicated Condition shall be interpreted to the jury as the law is written. It's the court's duty to enforce these rules and to instruct the jury upon the law applicable to the case. (L.F. pg. 48) Therefore, jurors cannot assume what was meant when they was precisely instructed by the court to follow the invalid MAI-CR 331.02 jury instruction. The trial court also instructed the jury to follow MAI-CR 302.01, Instruction No. 1 that specifically directs the jury that they are not to rely on their own understanding and that they are obligated to follow the instruction as the court gives them. (L.F. pg. 48) Furthermore, MAI-CR 302.03, Instruction No. 3

"the jury must not single out certain instructions and disregard others or question the rule of law. The court does not mean to assume as true any fact referred to in these instructions, but leaves the facts for the jury to determine." (L.F. pg. 51) This leaves the jurors to find under the influence as instructed, that prohibited them from finding what was meant or what jurors readily understand what intoxicated condition means, Schroeder, supra.

The Supreme Court of Missouri makes clear that jurors readily understand what intoxicated condition means without properly defining the elements of the offense by state law to the jury. State v. Schroeder, 330 S.W. 3d 468 (Mo. banc 2011), the courts ruling is based on the assumption of the law, if the court thinks the average person understands the law of the level/percent of intoxication required by law to convict a person that may be in an intoxicated condition. The Supreme Court's ruling in Schroeder, supra implies that the jurors readily understand what was meant by the term "intoxicated condition" in connection with a charge of this nature is "drunkenness to such an extent that it interferes with the proper operation of an automobile by the defendant. However, this not evidenced by the jury instruction (L.F. pg. 53) or the jury's verdict that should have been included in MAI-CR 331.02. In Schroeder, the assumption that jurors readily understand what was meant without specifically being instructed conflicts with the Federal standards articulated in United States v. Gaudin, 515 U.S. 506 (1995) which conveys petitioner an entitlement to a jury determination of that fact. There is a need to further define the term "intoxicated condition", to define intoxicated condition as being under the influence, solely is incorrect and not consistent with case law or

statute. To assume jurors with no knowledge of the law for Driving While Intoxicated understands the law setforth in the statutes means the jurors know the changes in the laws for Driving While Intoxicated (DWI) and understand that Driving Under the Influence (DUI) is the lesser charge. The jurors know the legal limit of intoxicated condition was .10% of blood alcohol content and has been amended to .08% of blood alcohol content pursuant to §577.037.5 R.S.Mo.. The jurors understand that the statute may support a legal defense for a person under the influence and not in an intoxicated condition when determining innocence or guilt which could lead the jury to a reasonable doubt if properly instructed of the level of intoxication, the percent of blood alcohol content required by the law to convict the accused for Driving While Intoxicated in concordance with Section 577.037.5 R.S.Mo..

In this case the state assumes that the jury understands that if the B.A.C. Evidence ticket was disclosed with a test result or would have given petitioner a second breath sample as Mignone with a blood alcohol content and if the test results was over the legal limit of .08% blood alcohol content, by law the jury would find the petitioner guilty for Driving While Intoxicated and finally, if the blood alcohol content was less than the legal limit of .08% blood alcohol content, by law the jury would find the petitioner not guilty of Driving While Intoxicated. Section 577.037.5 R.S.Mo. states that any charge alleging a violation of §577.010 R.S.Mo. Driving While Intoxicated...shall be dismissed with prejudice if a chemical analysis (is less than .08% blood alcohol content). §577.010.3 R.S.Mo. and MAI-CR 331.02 both define intoxicated condition as under the influence conflicting with §577.037.5 R.S.Mo..

In 2011, a Missouri State Highway Patrol trooper arrested both petitioner and Mignone for alleged DWI, in both cases the trooper testified that there was a strong odor of alcohol, did not find any alcohol in the vehicle, both admitted to drinking some alcohol, the trooper noticed the eyes where blood shot and glassy, and submitted to the HGN test, walk and turn and one leg stand tests. The trooper testified he assumed Mignone could not operate a motor vehicle safely. Mignone was provided a breathalizer test with a B.A.C. of .075% and Monk denied petitioner a breathalizer test. Mignone was under the legal limit by law and the court dismissed the case with prejudice pursuant to §577.037.5 R.S.Mo., "the court held that the states case had no substantial evidence of intoxication from the physical observation of the state's witness. State v. Mignone, 411 S.W. 3d 361 (Mo. App W.D. 2013) In City of Bellefontaine Neighbors v. Meziere, 926 S.W. 2d 875 (Mo. App. E.D. 1996), the court held that "there was no evidence to support a finding he was guilty beyond a reasonable doubt of the charged offense." [noting] that (DWI) is not the same as driving under the influence (DUI). In Mignone's case the Western District Court of Appeals affirmed the trial court's ruling Mignone, supra. The fact Mignone was .005% under the legal limit of intoxication and without a doubt he was under the influence of alcohol, but pursuant to §577.037.5 R.S.Mo. was not legally in an "intoxicated condition" which substantiates a conflict of the two statutes. Missouri lawmakers have determined that .08% blood alcohol content is the percent of the legal limit or the level of intoxication required by law to be in an "intoxicated condition" which is the "impairment" that causes a person to be unable to operate a motor vehicle safely. The law reflects that the two terms are not equal.

In this case the jury may have debated that there was also no "physical" evidence observed by Monk leading to a verdict of not guilty if the jury was correctly instructed by the law for Driving While Intoxicated. The jury Instruction No. 5, MAI-CR 331.02 if corrected before being submitted to the jury may have given the jurors reasonable doubt rather than more than likely. If instructed of the physical evidence, the "impairment" the jury may have found that petitioner was under the influence of alcohol, but was not in an intoxicated condition to be found guilty by the law in that the jury found that there was no evidence of impairment which is the element of the offense for Driving While Intoxicated.

There are two courts that agree with petitioners point relied on in that giving the jury an instruction based on MAI-CR 331.02 was error because the definition of intoxicated condition does not accurately reflect the substantive law.

1) The Western Court of Appeals recognized that it was bound by the Supreme Court of Missouri's opinion. However, the court also understands that there is a need to further define intoxicated condition. Id.

> That said, practical experience leads this court to conclude that it may now be prudent to give further definition to the term "intoxicated condition" in MAI-CR 331.02. Specifically, if the Supreme Court of Missouri believes that a driver is in an "intoxicated condition" when "his use of alcohol impairs his ability to operate an automobile," would it not make sense for the instruction to state this in unambiguous language?

Id. at 199. The Supreme Court of Missouri denied the petitioner's Application for Transfer. Id. at 192, State v. Brightman, 388 S.W. 3d 192 (Mo. App. W.D. 2012).

The State of Missouri shall be constitutionally bound to follow the Supreme Court of the United States ruling In re Winship, 397 U.S. 358 (1970) holding that states shall prove every element of the offense where the accused are charged. The Western District Court of Appeals opinion reflects a burden on the court that it may now be the time for the Supreme Court of Missouri to see that the accused are grieving a constitutional violation of the United States Constitution for the accused right to a fair and impartial trial.

2) The Court of Appeals of the State of Kansas held that the Missouri law for Driving While Intoxicated is not equal, "after comparing the Missouri and Kansas statutes the court concluded that the Missouri statute does not contain an essential element of the offense - that the accused was rendered incapable of safely driving a vehicle...leading the court to ask is the Missouri statute equivalent? If the Missouri statute is broader than the Kansas statute...the Missouri statute on it's face is too broad to count as a prior conviction...clearly driving "under the influence" of alcohol covers a wider range of activity than driving under the influence of alcohol "to a degree that renders the person incapable of safely driving a vehicle" or "driving with an alcohol concentration of .08% or more." In fact the Missouri Supreme Court refused to clarify." Schroeder, 330 S.W. 3d at 475 "a jury would readily understand what is meant by an "intoxicated condition"...to such an extent that it interferes with the proper operation of an automobile by the defendant'". 330 S.W. 3d at 475 (quoting State v. Rains, 333 Mo. 538, 543 62 S.W. 2d 727 [1933]). State v. Stanley, 367 p. 3d 1284 (Kan. App. 2016).

If jurors readily understand what was meant there would definitely be no need to omit the "physical evidence", the "impairment" from the jury instruction for Driving While Intoxicated. In State v. Cox, 478 S.W. 2d at 341, the court held that such instruction "the impaired condition of thought and action and the loss of normal control of one's facilities, or a condition that in any manner impairs the ability of a person to operate an automobile." It is clearly evident that Instruction No. 5 omits the required element of the offense for Driving While Intoxicated which is the impairment. The jury in this case was instructed by the court that they are not to rely on their own understanding and that they are obligated to follow the instruction as the court gives them. MAI-CR 302.01 and MAI-CR 302.03 enforces the jury to follow the trial courts instructions. "jurors are presumed to know and follow the instruction they are given when deciding the issue of a defendant's guilt or innocence." State v. Madison, 997 S.W. 2d 16 (Mo. banc 1999) MAI-CR 3d 331.02, specifically instructed the jury to find petitioner guilty if he 1) operated a motor vehicle and 2) if he did so while under the influence of alcohol, which are the two elements the State of Missouri is required to prove to substantiate a Driving While Intoxicated charge under Missouri law. Clearly, this violates the Federal standard due to a conflict among the states creating the question of law for this court to determine a resolution. Wherefore, the State of Missouri is the only state to omit the element of the offense for Driving While Intoxicated in the jury instruction.

It is legal in the State of Missouri to drink some alcohol and then drive if a person is not over the legal limit of intoxication which is .08% blood alcohol content by state law. If a person drinks a

beer and begins to feel the effect of the alcohol and that person drives under the influence of alcohol, is that person Driving While Impaired. Would it not make sense to include the "impairment" in the jury instruction in concordance with Kansas? It is demeaning to the jury system to assume that jurors are universally to ignorant to make decisions determining innocence or guilt if they follow the trial courts direction. State v. Madison, 997 S.W. 2d 16 (Mo. banc 1999), State v. Garrison, 292 S.W. 3d 555 (Mo. App. S.D. 2009), (quoting: State v. Neff, 978 S.W. 2d 341 (Mo. banc 1998) and State v. Wheeler, 219 S.W. 3d 811 (Mo. App. S.D. 2007)).

The reasoning Schroeder is flawed in two ways:

1) Of course jurors may understand what is meant, however, what was meant is not what was instructed. What was meant is not the same as what was instructed. To impute what was meant to the jury implies that the jurors found "drunkenness to such an extent that it interfered with the proper operation of an automobile by the petitioner" when in fact the jurors found 1) Petitioner was operating a motor vehicle and 2) While under the influence. Madison, supra.

Instruction No. 1, MAI-CR 302.01 clearly instructed the jury in this case, "It's the courts duty to enforce these rules and instruct you upon the law applicable to the case. It is your duty to follow the law as the court gives it to you." (L.F. pg. 48)

2) There is a need to further define the term "intoxicated condition" as being instructed to the jury as being "under the influence" of alcohol, solely is incorrect and not consistent with state law or statute. §577.010.3 R.S.Mo. defines "intoxicated condition" as being "under the influence" conflicting with §577.037.5 R.S.Mo. that provides a legal defense for a person that is "under the

influence of alcohol, but not legally in an "intoxicated condition". §577.037.5 R.S.Mo. states that any allegation against the accused for Driving While Intoxicated shall be dismissed with prejudice if there is less than .08% blood alcohol content in a person's blood. This section of Missouri law the legislature has distiguished the impairment as the difference of the two terms.

Because MAI-CR 3d 331.02 omits the impairment it conflicts with the Federal standard articulated In re Winship, 397 U.S. 358 (1970) holding that "the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every element necessary to constitute the crime with which the accused is charged." Id.

The state's burden to prove guilt was only if petitioner was in an intoxicated condition, as being instructed which means under the influence of alcohol. In this case petitioner admitted to drinking a few beers, but was drinking coffee during that time visiting a girlfriend at her work place on a Thursday night, not Friday night at closing time for bars as trial counsel stated in his opening and closing statements at trial. (Tr. 394, Tr. 405, L ln. 13-25, Tr. 625 - 626) Of course the jurors are more than likely going to think that a person may be under the influence of alcohol after leaving a bar. However, the state was not concerned about disclosing the truth to the jury. (Tr. 40 ln. 6-22)

The state relied on Instruction No. 5, "So what Missouri did is they defined it--it's in the instruction--evidence that leaves you--and you can read it in the instruction. Evidence that leaves you firmly convinced. This evidence should leave everyone firmly convinced of all of the elements of each crime." (Tr. 641 ln.15-20)

It is clear Instruction No. 5 relieves the State of Missouri of the burden of proof. MAI-CR 331.02 and instructions based upon it mislead jurors regarding the evidence necessary to return a guilty verdict for the offense of Driving While Intoxicated. The question for this Honorable Court is whether the jurors simply found petitioner to be under the influence of alcohol or if they found him to be in an intoxicated condition in that his ability to safely operate a motor vehicle was impaired. The trial court plainly erred in submitting the jury instruction to the jury.

CONCLUSION FOR GROUND ONE

There are two views for the State of Missouri to clearly see this injustice and correct it through the eyes of justice.

1) The Supreme Court of Missouri shall further define "what was meant" of intoxicated condition in the jury instruction. Or 2) The Missouri legislature shall write into law that the State of Missouri is a no tolerance State forbidding any person from operating a motor vehicle under the influence of alcohol. If a person consumes any alcohol at an establishment that serves alcohol shall by no means operate an automobile. Petitioner believes that fairness should be for all citizens of the United States of America. In this case Monk chose two persons of interest leaving a place that serves alcohol in the State of Missouri. Is the ordinary person more than likely under the influence leaving any similar establishment? Only two are subjected to be stopped by law enforcement and that's fairness under the rule of law? We know that as the law is written legislators intent is for all citizens to be equal under the rule of law. The courts duty is to follow the law as written, not omit an element the court deems fair for the intent to convict.

Therefore, Petitioner prays this Honorable Court consider the question of law and "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Estelle v. McGuire, 502 U.S. 62. Did the jurors readily understand if petitioner was in an intoxicated condition as the law is written or more than likely due to the invalid jury Instruction No. 5 because MAI-CR 331.02 omits the necessary element to constitute the crime with which the accused is charged. In re Winship, supra. The element for Driving While 'Impaired', the standard required by law is the 'physical evidence' which is the key element of the offense.

Petitioner did not burden the Missouri Courts with one argument on direct appeal, prayed that the Supreme Court would take a bite of the apple and review the invalid ruling in Schroeder, but denied the application to transfer with a miscarriage of justice. Now, the scales of justice lean to the Supreme Court of the United States to make the decision for the Missouri Courts clearly established question of law.

Petitioner, Neil R. Johnson II, pro se litigant incorporates by reference his claims as follows: His Direct Appeal argument, Application for Transfer to the Supreme Court of Missouri in support of Ground One for relief in that it properly setsforth the facts and argument in support of his incarceration being in violation of the United States Constitution of America.

Furthermore, Petitioner suggests to this Honorable Court that his claims appear to be a claim of first impression and that MAI-CR 331.02, Instruction No. 5 clearly is in violation of the United States Constitution as it lowers the burden of which a jury must find a defendant guilty beyond a reasonable doubt to more than likely.

Petitioner states he is not a lawyer so he is incorporating by reference all his claims as it is the question of law which he petitions this Honorable Court to determine what the proper relief for Ground One and Ground Two as follows.

Wherefore, Petitioner prays this Honorable Court grant him relief as the Supreme Court of the United States deems proper and just.

STATEMENT OF THE CASE

GROUND TWO

On December 2, 2011, Petitioner, Neil R. Johnson II exited the parking lot of Cartoons Oyster Bar and Grill located on Glenstone Avenue, Springfield, Missouri driving a 1996 Jeep Cherokee Sport with a lift that is higher than a standard vehicle. (Trial Tr. 625 ln. 13-18), as the vehicle exited Cartoons it entered the northbound left lane. (PCR Tr. 102 - 103) Shane R. Monk of the Missouri State Highway Patrol was patrolling Glenstone Avenue looking for drunk drivers leaving the bars. Monk was traveling in the southbound right lane. There are five lanes of traffic; two for northbound, two for southbound, and a center turn lane. (See: Petitioner's EXHIBIT NO. 1) Monk testified "that he came into contact with a white Jeep Cherokee he noticed the vehicle driving northbound in the right lane as he met the vehicle and watched as it passed, it moved from the right lane and straddled the lane line between the left and right lane traveling that way straddling the lines for approximately eight to ten seconds and then moved over into the left lane. (Tr. 4 - 5)

Monk further testified that he watched this through his rearview mirror the vehicle just traveling down the middle of the roadway. (Tr. 4 - 5) Monk testified "that's why he stopped the vehicle for failing to drive within a single lane of traffic and that he believed he had probable cause." (Tr. 7) The arrest report only states that the Jeep was partially on the right and partially on the left lanes. (See: Petitioner's EXHIBIT NO. 9) Monk testified that he can only see at the portion where the video starts, then denied he saw the Jeep pull out of Cartoons. (Tr. 15 - 16) Monk claims he can see better than the video, "the video photographic is not a true and accurate representation of what I saw." (Tr. 11) The front-facing dash cam video shows Monk's patrol vehicle after he passes the Petitioner's vehicle changing lanes, moving from the right lane into the left lane. As Monk falsely alleges he watched in his rearview mirror the Jeep change lanes and straddle the lane line for eight to ten seconds. If the court will watch the front-facing dash cam video starting at 01:13:53 it can see on the video Monk changing lanes from the right lane into the left lane, he then moves into the center turning lane as he does a u-turn in those eight to ten seconds exactly according to the time stamp on the video evidence. In those eight to ten seconds Monk alleges he was watching in his rearview mirror if the court will watch the in-car rear-facing dash cam video the court can see if it's even possible for Monk to see in his rearview mirror for that time period when the evidence captured the Jeep through the rearview the Petitioner's vehicle for approximately three seconds then nolonger can be viewed due to the visibility constraints of the darkness. (See; Petitioner's EXHIBIT NO. 12, (interior), note: the rear-facing dash cam video has no time stamp)).

Monk testified he could not see in front of him how far in advance he could see Petitioner's vehicle as he was meeting it, just that he could only see at the portion where the video starts at 01:13:51 the exact location after Petitioner vehicle exited Cartoons into the left lane. (Tr. 15 - 16) It is clearly evident that these are signs of testimony from what Monk assumed he seen on the dash cam video, not what he falsely alleged he seen as he passed Petitioner's vehicle and the ridiculous testimony of what he falsely observed in his rearview mirror. 'Tale tale' signs of the truth being revealed in this case, such as his false claim of watching a vehicle driving down the middle of the roadway, he thought it was necessary to check the vehicle for speeding (Tr. 16 ln. 2), and if the driver was wearing a safety belt. (Tr. 443 ln. 21-25) The false accusation of the lane change Monk alleged he observed through his rearview mirror during the night with two lanes of traffic seperating the two vehicles for eight to ten seconds was a fabricated narrative and an abuse of his authority as a law enforcement officer. Petitioner attempted to shine the light on the truth concerning these false allegations to the Missouri Courts with no avail as stated in the record in the Petitioner's SUGGESTIONS IN SUPPORT OF AMENDED MOTION TO VACATE, SET ASIDE OR CORRECT JUDGMENT, AND SENTENCE AND FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.This testimony was crucial to the defense as to the probable cause and the credibility of state's witness. The jury Instruction No. 1, MAI-CR 302.01 states in part "In determining the believability of a witness and the weight to be given to testimony of a witness...to observe and which testimony is given; whether there's any bias, or prejudice the witness may have and the reasonableness of the witness' testimony in the light

of all the evidence in the case; and any other matter that has a tendency in reason to prove or disaprove the truthfulness of the testimony of the witness." "Fairness and our system of justice require giving both sides the opportunity to view and comment on all evidence." (L.F. pg. 48-49) In a trial fairness is giving both sides the opportunity to challenge the credibility of the witness, however, this case fell short of that requirement. The state was only required to challenge the video evidence..Monk testified, "I don't know if video is honest or dishonest." (Tr. 517 ln. 17) This case is clear and convincing that defense counsel failed the duty of any competent attorney would have done in any similar circumstance when challenging the credibility of a witness. Specifically, when counsel failed to investigate the case and present any witness' to dispute the testimony of Monk. This failure allowed the state the benefit of doubt, reducing the state's burden of proof. The final conclusion of the results of the analysis of the video expert would have contradicted the testimony of Monk and would have provided the court and jury with exculpatory evidence on Petitioner's behalf. Therefore, there is reason for the court to conclude that the outcome of the trial would have been different. The question for this Court to consider is "whether the conviction violated the Constitution, laws or treaties of the United States. Estelle v. McGuire, 502 U.S.62. Wherefore, a trial governed by the Constitution shall give both sides a fair "due process" to present the facts to the jury.

On June 21, 2018 a Post-Conviction Relief hearing was held, Matthew Gabler, a forensic audio and video expert and case manager for the National Center for Audio and Video Forensics, NCAVF, Los Angeles, California testified that he and a team of experts analized

the dash cam video evidence in this case. The conclusion with regard of the location of the Petitioner's vehicle is that it was in fact traveling in the left lane as he met Monk's patrol vehicle in the video at 01:13:51 - 01:13:53. The video expert Matthew Gabler explains to the court how their analist determined which lane of travel the Petitioner's vehicle was traveling in those 3 seconds. The final determination is that the vehicle in question is in the left lane (inside lane) and not in the right lane (outside lane) (PCR Tr. 37). (See: Petitioner's EXHIBIT NO. 8)(PCR EXHIBIT NO. 8))). The vehicle is not in the right lane as Monk testified. Matthew Gabler, forensic video expert further testified as he showed the court the dash cam video enhanced version for the court to see what it could not see the tires cross any lines as Monk testified (MTS Tr. 62 ln. 5-19, and 67). Mr. Gabler further testified that at no point do we see the vehicle cross over the line (PCR Tr. 44). Therefore, the conclusion is that there was no lane change as Monk met Petitioner's vehicle and his **vehicle did not cross any lines as Monk was overtaking and following the** Cherokee. The video expert evidence proves Monk is not more accurate than the dash cam video, especially looking through a rearview mirror. (MTS Tr. 11 ln. 24-25 and Trial Tr. 517 ln. 6-7 and PCR Tr. 118 ln. 15-21). This testimony clearly shows that Monk's alleged probable cause cannot be found credible as the trial court found at the Motion to Suppress hearing and at trial (MTS Tr. 60 ln. 12-24, Tr. 62 ln. 5-9, and Tr.67). The video expert testimony was crucial for the defense to impeach Monk, "everything about what we see with Monk's testimony is that he is credible, he's honest, he would never lie and he can see what we can't' (Trial Tr. 613 ln. 10-11, Tr. 639 ln. 8-20, and Tr. 640). "Trooper Monk's testimony is better evidence than the video".

REASONS FOR GRANTING THE WRIT

GROUND TWO

Petitioner, Neil R. Johnson II stands before this Honorable Supreme Court of the United States presenting his argument because he believes the facts have been clear and convincing for the courts to see, the evidence presented proves there is reason to doubt that Petitioner was not Driving While Intoxicated. It is evident that Monk was profiling a jurisdiction off I44 and 65 Highway.

On Thursday, December 1, 2011 not Friday at closing time, lie one, and not "you're going to see on that video Neil Johnson changing lanes as he goes past the trooper", lie No. two (Trial Tr. 405 ln. 13-14, Tr. 406 ln. 5-7, and PCR Tr. 118). The lane change was the trooper's lie. Trial counsel points out that Monk was profiling; however he fails to condemn the prejudiced actions as being illegal and not grounds for probable cause. "It's closing time, we've got a Jeep Cherokee lifted with a canoe rack...what the trooper was thinking was about the profile (Trial Tr. 625 ln. 13-25 and Tr. 626). Profiling and checking vehicle licence with dispatch for prior history is not grounds for probable cause. The evidence in support shall prove that was the case for Monk to stop Petitioner's vehicle when he was visiting a girlfriend at her workplace (PCR Tr. 101 ln. 16-17). Video evidence proves Monk did not have probable cause to stop his Jeep leaving Cartoons. The dash cam video evidence proves Monk stoped the vehicle for 1) he seen a Jeep with a lift with 33's leaving a place that serves alcohol, and 2) he followed the vehicle for too long, atleast one or two miles to his girlfriends apartment. The court can hear from the audio on the video evidence Monk state to patrol dispatch "I'm going to go ahead and pull him over now".

Monk activated his emercency equipment and stopped the Petitioner's vehicle when he should have stopped the vehicle when he claimed to see it driving down the middle of the roadway? Petitioner exited his Jeep and approached Monk in front of his Jeep,, and stated "good morning, officer", Monk stated "I need you to get back into your vehicle, sir." Petitioner got back into his Jeep and shut the door. Monk testified that he was not wearing his safety belt (Trial Tr. 375 ln.12). (Also, see: Petitioner's EXHIBIT NO. 11)). Monk testified Petitioner gave him proof of insurance and attempted to pull his Id out of his wallet and missed on first attempt. Petitioner only reached over to retrieve his insurance card from his glove department. Monk testified he had Petitioner sit in the front seat of his vehicle and that he held onto the door to position himself as he sat in the front seat (Trial Tr. 431 ln. 4-8). Video evidence captured this false testimony. (See: Petitioner's EXHIBIT NO. 12, in-car rear-facing dash cam video). Monk had Petitioner perform sobriety tests, during the walk and turn test he falsely testified that Petitioner lost his balance while walking, stepped off line, twice...used arms for balance, and lost his balance while attempting an 'about face' (Trial Tr. 465 ln. 22-25, Tr. 466 and Tr. 616). Video evidence captured all these false testimonies (See: Petitioner's EXHIBIT NO. 12 at 01:26:00). Trial counsel failed to object to any of these false claims of signs of intoxication as Monk testified. Another lie was Trial counsels response, "you didn't know that Neil had seven surgeries on his legs" (Trial Tr. 525 ln. 5-6). Petitioner did not fail any of the sobriety tests and provided a breathalizer test that never was disclosed in the discovery. Records show that the prosecutor's office did not receieve Monk's arrest report until January 17, 2012, 45 days after

the incident occurred. Monk testified that he sent a copy of the B.A.C. Evidence ticket the same day he sent the prosecutor his report (Tr. 509-10). The state testified they never received the evidence ticket (Trial Tr. 98 ln. 1-2). The state indicated the ticket is in existence (Trial Tr. 99 ln. 10-11), for two days the prosecutor and Monk denied accountability for the missing evidence (Trial Tr. 378 ln. 19-23, and Tr. 496 ln. 7-12). This issue denying Petitioner a right to present evidence itself is a violation of his Constitutional rights according to the Supreme Court of the United States. Brady v. Maryland, 373 U.S. 83 (1963). This testimony is relevent because it's crucial to impeach Monk's credibility. It's tough to admit that a state trooper would lie under oath, maybe he had mistaken or his memory had failed him (Trial Tr. 507 ln. 23-25). It's more than likely Monk had confused his testimony with his other arrest of unknown subject that was arrested by Monk leaving Cartoons just one hour before Petitioner. Monk had written the two Alcohol Influence Report Narrative's almost identical especially the signs of intoxication. One, Petitioner denied being intoxicated and two, unknown subject pointed at Cartoons, stated: he was just at Cartoons decided he had to much to drink and drive then pulled into a parking lot because Monk was following him. (See: Petitioner's EXHIBITS NO. 9 and NO. 10). Trial court did not review all the evidence on appeal. All the testimony of the signs of intoxication was more than likely unknown subject or the many other profiling arrests by Monk to prosecute his 605th DWI arrest (Trial Tr. 639 ln. 8-13). The trial court stated, "I couldn't see the defendant cross any lines...the trooper was very precise that the court couldn't see on the video to the extent that the trooper can see...the video is just one piece of evid-

ence in conjuntion with the trooper'd testimony. I certainly did not observe anything on the video that contradicted the trooper. I think his credibility carries it forward...in terms of what Monk saw, whether whether a trier of fact would find that it will be up to them in connection with the probable cause issue (MTS Tr. 67). Two reasons the credibility is at issue concerning Monk's testimony. 1) The state relied on Monk's testimony to establish probable cause. 2) State's trial stategy, and without Monk and the dash cam video the state had no case. Trials are about getting to the truth and if the state honored their system of justice they should approve of the video expert. The video expert testimony was crucial at the Motion to Suppress and at trial to impeach Monk. The only evidence Petitioner had was the dash cam video. Was the evidence equivelent to the state? The dash cam video was poor quality and difficult to see due to the visibility constraints of the darkness from being recorded at night(Trial Tr.421 ln. 25). Therefore, the video expert testimony shall be allowed in this case. Who can tell if the outcome of the trial would not be any different if the video expert evidence was not presented to the jury to observe?

To see or not to see, can the court have it both ways? The court in this case did have it in these two ways. 1) Monk testified that he can see further than the video can (Trial Tr. 423 ln. 23-25), "you can see if you watch real carefully", "you can see on the video the tires cross the line", "you can see, twice", "again, if you look closely you can see" and 2) The state testified, "it's something you really can't see on the video", "why can't we see them on the video?" (MTS Tr. 12 ln. 1-2, Tr. 23 ln. 22-25, Tr. 24 ln. 3, Trial Tr. 423 ln. 16-22, Tr. 427 ln. 15-25). Trial counsel testified, "so let's

talk about what's not on the video., There's no video of the lane change...Don't you have to straddle the line to change lanes?" (Trial Tr. 517 ln. 24-25 and Tr. 518). There was no lane change and no straddling any lines. It is clear there is need for a second opinion, a forensic audio and video expert. When a person's life is on the line, they have a right to a second opinion, and why would any court deny them that right? If a person is told by one doctor that they have cancer and only has a month to live, reverence for their life they are going to want a second opinion from a more experienced doctor. That person is not going to except the first opinion and die, that's ridiculous. This case is no different in Petitioner's opinion because this case has been a cancer that has taken his life for twelve years. I pray this Honorable court sees that the video expert testimony is not only crucial, but life saving also. Petitioner feels that he's not prejudiced because he may be a gay man that just wants a wedding cake, but a man that likes beer that wants to do so responsibly and live his life without having another person looking over shoulder every time he leaves his home. If given a fair opportunity Petitioner will be able to get his licence reinstated and so help him god, he will never violate any law that will take that from him again or the State of Missouri can give him life of incarceration. At this point Petitioner only asks this Honorable court is to allow him fair due process of law and allow the video expert to testify in his behalf.

This is the case of she said he said for the State of Missouri, Greene County had two prosecutors witness for Monk with theories and false allegations without investigating the arresting officer report first. 1) Witness one, Ms. Larison in state's closing argument she failed to investigate, she left that part of her job in the hands of

Monk. "First thing I want to talk about is Monk's credibility, he saw a driver who was driving in a manner that he thought merited more investigation...there was no reason to change lanes, none that he could see. He does a good investigation. He has no reason to make this up or lie". Monk testified that, "as a whole, all of these are indicators of intoxication. Now this is a pretty long list of physical observations" (Trial Tr. 612 ln. 20-21, Tr. 613 Ln. 10-22, Tr. 614 ln. 23-25 and Tr. 615 ln. 1-2). and 2) Witness No. two Kevin Young, "everything about what we see is that Monk is credibile, he knows what he's talking about. He's honest, he would never lie under oath... for what? To prosecute his 605th DWI? That's ridiculous. You watched the video. Was there anyting in the video that you think exonerated Mr. Johnson? There's nothing...alot of the driving that Monk saw, you couldn't see in the video because either the camera was pointed in the wrong direction or he was too far away; the video couldn't capture it. But officer Monk could see it. His testimony is better evidence than the video. It's something more, it's more evidence of intoxication and the officer stops the vehicle for probable cause. I think the evidence supports this...he passes Monk, he does one of these (indicating), oh no, it's a trooper...he went over the line, he thinks, oh no, I'd better go ahead and change lanes, make it look like I was doing a lane change, and that's what Monk was seeing when he was looking back in his rearview mirror behind him. Immediately all the 'tell tale' signs of intoxication; strong odor of alcohol--you've heard it all before" (Trial Tr. 518 ln. 15-25, Tr. 639 ln. 8-20, Tr. 640 ln. 6-23, Tr. 641 ln. 7-20, Tr. 642 ln. 9-13, Tr. 643 ln. 2-12, and Tr. 644 ln. 5-7). Again we talked about the inial stop. Why can't we see them on the video? This case should not be closed without further

investigation. Therefore, that is exactly what Petitioner seeks in the name of justice. Petitioner made an attempt to point these things out to counsel and they failed to do their duty required by the law. Due to this failure of effective assistance of counsel Petitioner has hired a highly respected forensics audio and video expert, an Emmy award winning multi-faceted video and audio forensic evidence expert. Mr. David Notowitz is the founder of NCAVF, based in Los Angelos, he has worked as a forensic video, audio, and still image expert on cases investigated by police officers, detectives, private ivèstigators, insurance investigators, public defenders, and criminal defense attorneys with cases across California and the country. (See: Petitioner's EXHIBIT NO. 8). There is no reason that the National Center for Video and Audio Forensics, NCVAF should be questioned. Matthew Gabler, case manager for NCVAF is well known jewish man in the community and is a honest public servant. He has no reason to lie. "As it is written as it is with the good, so with the bad as it is with those who take oaths, so with those who are afraid to take them" Ecclesiastes 9:2.

Reasoning the video expert evidence is important, the dash cam video does not show any alleged lane violations, state's witness Shane R. Monk testified to establish probable cause (MTS Tr. 4-5, Tr. 6 ln. 1-15, Tr. 7 ln. 8-18, Tr. 11 - 13, Tr. 23 ln. 22-25, Tr. 24, and Tr. 30). However, all the claims of observations of intoxication have been false for there are no lane violations (MTS Tr. 21 - 22, Tr. 61 - 63, PCR Tr. 37 and 44). There is also the false testimony of the sobriety tests (MTS Tr. 7 - 8, Tr. 27, Tr. 60 - 63, Trial Tr. 400 and Tr. 426, PCR Tr. 76 - 82, and Tr. 88 - 99). Finally, all Monk's observations of intoxication have been proven to be falso.

Therefore, the video expert evidence was crucial for the defense to investigate and to have the video analized, also as to the false observations and signs of intoxication. Specifically in the light of the fact that the court was persistent that the video does not show any of the alleged lane violations because the dash cam video lacks clarity and the fact that the court did not see any lane change and straddling the lane line, twice (MTS Tr. 4-5, Tr. 15, 16, and 19, Trial Tr. 528 ln. 15-25, Tr. 639 ln. 1-25, and PCR Tr. 37, 44 and70). Moreover, the court and defense counsel was not interested in investigating Monk's false claims "We do have to take the officers word for it" (MTS Tr. 60, 62 and 67). The court testified, "I think the Monk was credible". Monk testified that the lane violation was on video for his probable cause (Trial Tr. 521 ln. 10-25). Monk was also more accurate than the video (MTS Tr. 11, Trial Tr. 517, and PCR Tr. 128 - 136, and Tr. 140 - 143). Trial counsel testified that "the video was his best piece of evidence (PCR Tr. 90 ln. 6-7, and Tr. 96 ln.16 - 25, Tr. 97 ln. 1-6). The fact is the video was the only evidence and counsel failed to investigate or even meet with Petitioner prior to trial. Unfortunately he also had taken Monks word against ours. (PCR Tr. 80 ln. 1-7). Trial counsel did not take Petitioner's word for it or bother to listen.

Due process for Petitioner consists of one witness, the dash cam video that was flawed, mute, and unable to speak for itself, however the video could see and did capture the true events that occurred on December 1 and 2, 2011. What happened in this picture is that the defense's hands were tied and the state was allowed to speak for the one witness, the dash cam video. These three interpreted their view of what they think Monk seen captured on the video. 1) Prosecutor

Shane R. Monk, 2) Kevin Young, and 3) Ms. Larison. For the defense one, dash cam video and two, Peter G. Bender who refused to listen, leaving Petitioner with 1) no eyes, 2) no ears, and 3) no voice. How can a person have a successful defensive trial strategy without the three key elements of defense? The court and jury must see, hear, and receive the facts of the evidence of the case. Wherefore, without the video expert testimony to be the voice and speak in the defense of the dash cam video the court and jury were deaf and blind to the truth of what truely occurred on the night Petitioner was arresred and incarcerated. The court and jury could not see the truth because there was no witness to aid the court or assist the trier of fact to understand the evidence or to determine a fact at issue. In conclusion forensic audio and video expert David Notowitz, and Co., NCAVF are qualified witness' as experts with knowledge, skill, experience, training, and education. §490.065 R.S.Mo.. The courts view as such in a murder case would use a ballistics expert, would the court deny such witness?, quite the contrary, the court would grant such witness to assist the court of the facts of the case giving a clear and convincing picture of what occurred. Therein, giving the state the benefit of doubt allowing such trained specialist or expert to testify. Would not the court except such testimony from a forensic video expert if the state's evidence was not clear and convincing? It's the states sworn duty to investigate all cases, therefore what makes a defense attorney exempt from the same said duty. The most concerning question is what makes Shane Monk exempt from his sworn duty under penalty of perjury? We the People pay his salary with the American tax dollars. (See: Trial Tr. 507 ln. 23-24 and Tr. 639 ln. 8-13).

The tale of two prosecutors, state's closing theory, "Here's what I think happened...he's driving wherever he's going...he went over the center line and starts straddling it, of course, it takes him a while to figure it out, and once he realizes he's straddling the line...I'd better go ahead and change lanes, make it look like I was doing a lane change. That's what he did, and that's what Monk was seeing when he was looking back in his rearview mirror behind him (Trial Tr. 642 ln. 20 - Tr. 643 ln. 12). The state explained that Monk saw what the jurors could not see in the video because the video couldn't capture it (Trial Tr. 640 ln. 6-11). Monk testified that there was no camera that points out the rear of his vehicle , "it just wasn't captured on the video at the time and that's why we can't see the lane violations for the initial stop on the video? Because it happened after you met the Jeep and you saw it through your side-view and rearview mirror, right? (Trial Tr. 528 ln. 15-25 and Tr. 443 ln. 21-25). This testimony was found to be not credible because Matthew Gabler,forensic video expert testified **to assist the court to see that a vehicle cannot move from the right** lane into the left lane and straddle a center lane line changing lanes if the vehicle was traveling in the left lane, right? (PCR Tr. 37, 38 and 44)(Also, see: PCR EXHIBIT NO. 8)). The lane change was a theory, 'state's trial strategy' to mislead the court and jury. Concluding that the state had no case without state's false witness. Trial counsel supports the false narrative of a lane change "you're going to see on that video, Neil Johnson changing lanes as he goes past the trooper" (Trial Tr. 406 ln. 5-7 and PCR Tr. 108 - 118). Trial counsel told another tale "what I see is a vehicle yielding to an emergency vehicle" (Trial Tr. 627 ln. 1-3). Petitioner was

only attempting to visit his girlfriend and turned onto Grand Street going to her apartment. This case was not about getting to the truth and trial counsel's 'tell tale' strategy did not give justice for the accused. Mr. Johnson had his tail tucked between his legs when honest Monk came up to him as the jury was deliberating and shook his hand, wished him luck. Petitioner was not prepared to lose his life the day of trial. He was instructed to bring his medication by the Public Defender because you might go to jail. After receiving the verdict Petitioner swallowed two bottles of his medication and woke up in a hospital two days later. Trial counsel was not prepared for trial and we needed a little more time to prepare for trial because Mr. Bender was new to the case. Unfortunely, the court denied the Motion for Continuance on November 12, 2013, my son's 12th birthday (Trial Tr. 100 ln. 3-4, Tr. 101 ln. 18-19, Tr. 692 - 693 ln. 1-2, and PCR Tr. 78 ln. 17-22, Tr. 96, ln. 14-25). The other issue for a continuance was discovery had not been produced in it's entirely by the state and the state had not produced the B.A.C. Evidence ticket (Trial Tr. 94 ln. 15-19, and Tr. 97).

This case was about the state winning and Petitioner's past mistakes, six years of sobriety meant nothing because it was all about the profile and conviction. The only side that was prepared was the state with the goal to strip a person of their right to live his life without prejudice. The state crossed the line with the biggest 'tale of all tales' "this guy just pissed in the corner of the cell' (Trial Tr. 583 ln. 11-12). The state didn't attempt to investigate, maybe Mr. Johnson was misplaced with the other subject that vomited (Trial Tr. 633 ln. 21-23), or inmate flooding his cell. Video evidence shows Petitioner standing at his cell door the entire

time trying to get an officer to give him a breathalizer test (See: State's Exhibit No. 6). Petitioner does not pass out, vomit, or piss himself or in the corner of the cell.

The dash cam video was the only defense allowed to testify in Petitioner's behalf. Petitioner prays this Honorable court will take time to look and see for itself the following evidence enclosed; legal media disc, 8 X 12 color photographs, and still frames from the dash cam video evidence (See: EXHIBITS NO. 1 through 7, NO. 12).

Under the law in the State of Tennessee counsel was found to be ineffective for failing to investigate the case supports petitioner's claim of ineffective assistance of counsel (See: Sims v. Livesay, 970 F. 2d 1575 (Tenn. App. 1992), the court held that p.1577, [counsel was ineffective because of his]...failure to investigate the case. Specifically, Sims contended that it was [counsel's] duty to obtain the services of a forensic expert to examine the quilt. In this case Petitioner testified that he knows nothing about the law and that it's the duty of counsel to investigate and retain the services of a video expert to examine the dash cam video evidence (PCR Tr. 119 ln. 15-25). Trial counsel testified that he thinks he recalls Petitioner asked him about a video expert, however the truth is that he never met with his client prior to trial (PCR Tr. 78 ln 17-25, Tr. 106 ln. 17-20, Tr. 107 ln. 4-9).

Therefore, the State of Missouri, counsel Shawn Markins, and trial counsel Peter Bender failed to do their duty as sworn, and guaranteed by the sixth and fourteenth Amendments of the United States Constitution of America. Petitioner has met the standard for forensic expert testimony as Sims v. Livesay, supra at * p.1581... Strictland, 466 U.S. at 694. Petitioner has met this burden.

Wherefore, Petitioner has met the two prong test as required by Strickland v. Washington, 466 U.S. 668 (1984) in that there was evidence of ineffective assistance of counsel as guaranteed by the sixth and fourteenth Amendments of the United States Constitution and that he was denied due process of law his right to a fair trial.

Counsel failed to investigate, locate, retain, hire, and present at the Motion to Suppress and at trial the testimony of a forensic audio and video expert to analize and enhance the dash cam video (State's Exhibit No. 2) and testify about the results of that analysis and present such video evidence results that show the court and jury that Monk's testimony conflicts with the results of the video expert's analysis. The video evidence proves that Petitioner did not violate any lane violations for failure to drive in a single lane of traffic and that Monk did not have probable cause to stop Petitioner's vehicle. This failure to impeach state's witness Shane Monk allowed him to mislead the court and jury of the facts of the case. Impeachment is crucial when the ability to perceive the subject matter of the testimony is at issue. Evidence that contradicts is a direct attack on the accuracy of the witness testimony through the use of factual evidence to contradict that testimony, Krokstrom v. Van Dolah, 826 S.W. 2d 402 (Mo. App. W.D. 1992). The dash cam video contradicts Monk and the evidence should be directed to the accuracy of such testimony which would provide additional factual evidence. State v. Dale, 874 S.W. 2d 446 (Mo. App. W.D. 1994). Monk admits the evidence refutes his testimony (MTS Tr. 24 ln. 1-3).

As to the probable cause the court has painted itself inside a box. The court testified about a couple of things that is contradictory to what the court thinks gave Monk credibility for probable

cause. One, the court testified; 1) "I could not see the tires crossing the center line" (MTS Tr. 67 ln. 4-5), and two 2) "I certainly did not observe anything on the video that was contradictory to what Monk said, I think he's credible" (MTS Tr. 67 ln. 14-17). The court further testified "Reasonable grounds to stop the defendant doesn't require you to be right in connection with it, but whether or not there's reasonable grounds at that point, to add that into the probable cause equation, which I think there was sufficient grounds. 3) "He could have stopped him after he crossed the center line, twice" (MTS Tr. 68 ln. 4-11). The record reflects that the court could not 1) see or observe anything on the video, 2) did not see anything on the video that was contradictory, and 3) He could have stopped him after he crossed the center line, twice". Is this not a contradiction? (Also, see: PCR Tr. 37 and 44 ln. 22-23). Final question that was never asked that proves that Monk's testimony contradicts what he alleged he observed through his rearview mirror. Why didn't the court ask Monk why he didn't stop the vehicle immediately after he claims he seen a 2000 pound missle going down the middle of the roadway? If there were any truth to what alleged he observed through his rearview mirror, there would be no reason to further investigate by following the vehicle for so long, allowing the vehicle to drive through all the intersections and then over railroad tracks, putting others lives at risk. Why would Monk need to check the vehicle if it was speeding or if the driver was wearing a seat belt? He could have stopped him after he crossed the line, twice? If the driver was driving so reckless why did Monk wait so long to stop the vehicle when other lives where at risk or harm? Lastly, why so long, Monk you had to ask yourself if it was time to pull

the vehicle over,"I'm going to go ahead and pull him over now"? "Trooper, it's tough to admit you lied under oath, isn't it"! (Trial Tr. 507 ln. 23-25)

In the case State v. Neil R. Johnson II, No. 1231 CR 00573-01, in the 31st Judicial Circuit Court of Greene County, Missouri, honorable Thomas E. Mountjoy. Petitioner thinks the evidence provided in this case proves there's sufficient grounds to warrant a new trial in that Monk wasn't honest "One accustom to telling lies, in his heart, his lies become his truth, and he believes everything he says is true."

" One witness is not enough to convict anyone accused of any crime or offense they may have committed. The matter shall be established by the testimony of two or three witnesses." Deuteronomy 19:15

I, Neil R. Johnson, pro se Petitioner, a prisoner of the Almighty righteous judge, is confident that he would have not executed his right to a fair trial if he had knowledge of jury Instruction No. 5 before hand and two, Petitioner would have invested his monies for trial hiring a video expert, not an attorney because the trial would have gotten to the truth. Petitioner's monies would have been well spent and he prays that it's not the case now to late. Petitioner testifies truth in that Matthew Gabler's testimony is truth, so help me god and from the beginning of this petition until now the last prays for two things he requires of this Honorable Court deny him not before I die, remove from me vanity and lies, give me neither poverty nor riches and feed me with your ruling of justice.

Proverbs 30:7

CONCLUSION

GROUND TWO

In conclusion Petitioner believes the denial of the video expert and his claims on appeal are a violation of his Constitutional rights of the sixth and fourteenth Amendmendments of the United States Constitution to a fair due process of law for the following reasons: 1) There was no probable cause for the initial stop. Monk illegally stopped Petitioner's vehicle. The conclusion of the matter, Monk did not have probable cause and the video expert evidence shows the court that there was no cause and profiling is a hunch that a crime had been committed. Terry v. Ohio, 392 U.S. 1 (1968). 2) Petitioner has a Constitutional right for the jury to determine probable cause. 3) The right for a jury to determine the credibility of state's witness, 4) The right to present witness', and 5) The right to effective assistance of counsel. Mr. Markins should have investigated and presented a video expert at the Motion to Suppress hearing to impeach Shane R. Monk and also, Peter G. Bender, trial counsel should have investigated the case and hired a video expert to present the court and jury with the evidence to impeach state's witness Shane R. Monk showing the court and jury Monk is not credible and not take his word for what he falsely claimed he observed through his rearview mirror. The evidence presented herein shows the court that Petitioner investigated, located, and hired forensic audio and video expert David Notowitz, National Center for Audio and Video Forensics, NCAVF from the Department of Corrections, both counsel for Petitioner could have easily did the same. Therefore, Petitioner prays this Honorable Court in the eyes of justice grant his one witness to testify in his behalf in his request of justice for a unbias and fair trial.

Petitioner incorporates by reference all his claims presented in the Missouri courts, U.S. District Court for the Western District of Missouri, and U.S. Court of Appeals for the Eighth Circuit. All records and evidence should be transfered to this court upon being accepted and filed. For the record with highest respect for the court Petitioner would offer his apology for the Missouri courts because this case could have been resolved in their jurisdiction. Lastly, Petitioner asks this Honorable Court to provide a proper inquiry into this case with a full investigation because the State of Missouri, Missouri Public Defender and trial counsel, Missouri State Highway Patrol failed to properly investigate this case, Petitioner is awaiting a response for his request for Governor Michael Parson to investigate his case. Therefore, there is need to investigate this case because Petitioner has exhaused all his remedies for relief. This stated for the record, let the record also reflect that Petitioner places his hand on his bible, states as follows: [illegible]

I, Neil R. Johnson II, pro se litigant, hereby swear to tell the truth, nothing but the truth, upon my oath, do state the facts herein are true and accurate, I do certify that the information I have provided is correct without any false testimony under penalties of perjury, so help me god. I shall not bear false witness violating the ninth commandment. Wherefore, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

NEIL ROGER JOHNSON II
Pro se Petitioner
Tipton Correctional Center
609 North Osage Avenue
Tipton, Missouri 65081

STANDING ON THE SEVENTH GROUND

by

Neil R. Johnson II

Americans desire to be heard, believing in the First Amendment of the United States Constitution of America. Petitioner desires to be heard standing on level ground, even with balance and justice. That's never heard from standing on ground behind prison walls. Petitioner cries out and seeks justice from the Almighty Righteous Judge. In the course of writing his brief, he had to fight the fight of life for all those in court that didn't fight for him and learn to become his own lawyer, when all counsel had to do was listen to him. Justice is crying out in pain in this country, while lady liberty stands tall looking over us all, but it's not the eyes that are blind folded,,it's her mouth, who shall be her voice?

Life of liberty, pursue of happiness, and justice will only come the day the law removes the blindfold over their eyes before the law can balance the scales in the ladies hand. No man is above the law and justice for all you see written on the monuments that represent the law.

In this great country of laws, every citizen of the United States shall honor the laws setforth, bad actors are the ones behind the walls, why not the ones who think their above the law, no honest officer shall be the one to fall. An officers duty is to honor and uphold the law, if not, the voice of us all, says get another job. The United States Constitution doesn't make one exempt or above the law.

We the People as a whole are beginning to see the birth pains of justice in the law, hateful acts against the law. The acts of violence is not justice for all. We the People know that there is

good in us all. We can all work for a better cause, as the code of honor and blue, even all that are under the law. We shall all do our part of upholding the law. That's justice for all.

We the People exhaused by the law, do know the law shall not harass a citizen without good cause, disturbing our peace, that's against the law, and not probable cause.

The accused are tax payers with Constitutional rights just like us all. Harassment is not a good cause for us all in this great nation of laws, nor is it written in the law by our founding fathers. God bless us all.

DWI is the only offense that a person can be convicted by a machine and by the testimony of a law enforcement officer, In the State of Missouri if convicted a person may receive a sentence up to life of incarceration in the Department of Corrections.

Don't you think the accused shall receive a fair due process of law?

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Neil R. Johnson II, pro se, hereby certify to the following: This Petition for Writ of Certiorari hopefully complies with the limitations contained in the Supreme Court of the United States rule.

This brief was written in solitary confinement cell No. 222, Tipton Correctional Center, it originally was hand written in twenty-two days. Excluding the cover page, the signature block, and standing on seventh ground by Neil R. Johnson II, a personal poem to the honor of the nine justices of the Supreme Court of the United States of America and Lastly, the brief contains words. Petitioner prays it's within exceptable limitations and pleases the court because it was written from the heart of a man grieving eight years of incarceration.

On this 22nd day of June, 2022, Petitioner Writ for Certiorari was placed for delivery through the United States Postal Service of the United States to the Supreme Court of the United States.

Delivered with the highest respect to this Honorable Court,

NEIL R. JOHNSON II
Pro se Petitioner

Missouri Court of Appeals

Southern District

Division One

STATE OF MISSOURI,	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	No. SD33553
	)	
NEIL ROGER JOHNSON, II,	)	**Filed: October 20, 2015**
	)	
Defendant-Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY

Honorable Thomas E. Mountjoy

(Before Scott P.J., Bates, J., and Sheffield, C.J.)

MEMORANDUM OPINION

AFFIRMED

PER CURIAM. This is a direct appeal from a criminal conviction following a jury trial. The decision is unanimous, and all of the judges believe that no jurisprudential purpose would be served by a written opinion. The parties have been provided with a written statement, for their use only, explaining the reasons for this Court's decision. The judgment is affirmed pursuant to Rule 30.25(b), Missouri Court Rules (2015).

APPENDIX A

Missouri Court of Appeals

Southern District

Division One

STATE OF MISSOURI,	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	No. SD33553
	)	
NEIL ROGER JOHNSON, II,	)	**Filed: October 20, 2015**
	)	
Defendant-Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY

Honorable Thomas E. Mountjoy

STATEMENT

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS UNANIMOUS AND NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED OR OTHERWISE USED IN ANY CASE BEFORE ANY COURT. A COPY OF THIS STATEMENT SHALL BE ATTACHED TO ANY MOTION FOR REHEARING OR TRANSFER TO THE SUPREME COURT FILED WITH THIS COURT.

APPENDIX A

Neil Roger Johnson, II ("Defendant"), appeals from his conviction for driving while intoxicated. Defendant claims the trial court plainly erred when it submitted a verdict director for driving while intoxicated that allegedly did not require the jury to find that Defendant's intoxication "impaired his ability to operate a motor vehicle." Defendant's argument is without merit, and the trial court's judgment is affirmed.

Factual and Procedural Background

On December 2, 2011, Sergeant Shane Monk ("Sergeant Monk") of the Missouri State Highway Patrol stopped Defendant after he noticed Defendant's vehicle straddling two lanes of traffic and swerving in its lane. Sergeant Monk then noticed that Defendant exhibited several indicators of intoxication: a strong smell of alcoholic beverages; watery, bloodshot eyes; slurred speech; and poor performance on several field sobriety tests. Defendant admitted that his driver's license had been revoked and that he had been drinking that evening.

Defendant was charged with driving while intoxicated as a chronic offender, driving while revoked, and failing to drive in a single lane. *See* §§ 302.321, 304.015, 577.010, 577.023, RSMo Cum. Supp. (2013). After a two-day jury trial concluded, the jury found Defendant guilty as charged. Defendant appeals.

Discussion

In his sole point on appeal, Defendant argues the trial court plainly erred in submitting the verdict director for driving while intoxicated because the verdict director "fail[ed] to instruct the jurors of the level of intoxication necessary for a conviction[.]" This argument is without merit.

As Defendant concedes, this claim is not preserved for appellate review because he did not object to the instruction at trial, so review is limited to plain error review. *See* ***State v. Wallis***, 204 S.W.3d 732, 735 (Mo. App. S.D. 2006). "Plain-error review is discretionary and involves a two-step analysis." ***State v. Robinson***, 392 S.W.3d 545, 553 (Mo. App. S.D. 2013). In the first step, the court must determine "whether the claim of plain error, on its face, establishes substantial grounds for believing manifest injustice or miscarriage of justice has occurred." ***Wallis***, 204 S.W.3d at 735. "If the error does not rise to the level of evident, obvious, and clear error, the court will not exercise its discretionary plain error review." ***Id.*** In the second step, the court determines "whether manifest injustice or a miscarriage of justice, resulted." ***Robinson***, 392 S.W.3d at 554.

In the present case, there was no error, plain or otherwise. Under the Missouri Rules of Criminal Procedure, "[w]henever there is an MAI-CR instruction or verdict form applicable under the law and Notes on Use, the MAI-CR instruction or verdict form shall be given or used to the exclusion of any other instruction or verdict form." Rule 28.02(c), Missouri Court Rules (2015). Thus, "when an MAI is applicable, its use is mandatory[.]" ***State v. Tyler***, 285 S.W.3d 353, 355 (Mo. App. S.D. 2009) (quoting ***Angeles v. Larson***, 249 S.W.3d 278, 281 (Mo. App. E.D. 2008)). Here, MAI-CR and the Notes on Use require the use of MAI-CR3d 331.02 for the submission of a charge of driving while intoxicated. *See* MAI-CR3d 331.02, Notes On Use 1. The verdict director in this case matched the applicable approved instruction.

Defendant counters this conclusion by arguing that the approved instruction does not comply with substantive law because it does not require the

jury to find the drunkenness "interferes with or impairs the person's ability to properly operate a motor vehicle." Defendant is incorrect.

The Supreme Court of Missouri directly rejected the argument Defendant advances in ***State v. Raines***, 62 S.W.2d 727, 730 (Mo. 1933), where the Supreme Court of Missouri stated, "[a] jury would readily understand that what is meant by an 'intoxicated condition' in connection with a charge of this nature is drunkenness to such an extent that it interferes with the proper operation of an automobile by the defendant." ***Id.*** at 729. That is, the ordinary juror knows what intoxication means, and the ordinary juror's definition of intoxication complies with what Defendant claims intoxication should mean, *i.e.*, intoxication to the extent that it impairs the defendant's ability to operate a motor vehicle. Furthermore, the Supreme Court of Missouri has recently reaffirmed the validity of that holding. *See* ***State v. Schroeder***, 330 S.W.3d 468, 475 (Mo. banc 2011).

In spite of the holdings in ***Raines*** and ***Schroeder***, Defendant urges this Court to find the pattern instruction is ambiguous and does not comply with substantive law. The Court of Appeals is "constitutionally bound to follow the most recent controlling decision of the Supreme Court of Missouri." ***State v. Brightman***, 388 S.W.3d 192, 199 (Mo. App. W.D. 2012) (quoting ***State v. Clinch***, 335 S.W.3d 579, 584 (Mo. App. W.D. 2011)).

Defendant's sole point on appeal is denied.

Decision

The trial court's judgment is affirmed.

Supreme Court of Missouri
en banc

SC95380
SD33553

September Session, 2015

State of Missouri,
Respondent,

vs. (TRANSFER)

Neil Roger Johnson II,
Appellant.

Now at this day, on consideration of the appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Southern District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Bill L. Thompson, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session, 2015, and on the 22nd day of December, 2015, in the above-entitled cause.

Given under my hand and seal of
said Court, at the City of Jefferson,
this 22nd day of December, 2015.

Bill L. Thompson Clerk

Deputy Clerk

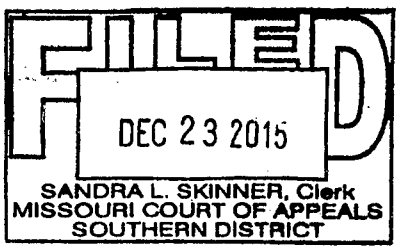
APPENDIX B

Missouri Court of Appeals
Southern District

No. SD33553

Circuit Court Case No. 1231-CR00573-01

STATE OF MISSOURI,)
)
Plaintiff-Respondent,)
)
vs.)
)
NEIL ROGER JOHNSON, II,)
)
Defendant-Appellant.)



MANDATE

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY

The Court has ruled as follows:

"Judgment affirmed pursuant to Rule 30.25(b), Missouri Court Rules (2015)."

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Missouri Court of Appeals, Southern District, at my office in the City of Springfield this 23rd day of December, 2015.

Sandra L. Skinner
SANDRA L. SKINNER, Clerk

APPENDIX B

MISSOURI COURT OF APPEALS

SOUTHERN DISTRICT
300 Hammons Parkway
SPRINGFIELD, MISSOURI 65806-2518

SANDRA L. SKINNER
CLERK

CONNIE PLATTER
CHIEF DEPUTY CLERK

TRACI WYGLE
DEPUTY CLERK

TELEPHONE
417-895-6811

FAX
417-895-6817

December 23, 2015

Mr. Thomas R. Barr
Clerk of the Circuit Court
Greene County Judicial Facility
1010 Boonville
Springfield, MO 65802

Re: State of Missouri, Respondent
vs. Neil Roger Johnson, II, Appellant
Case No. SD33553-1

Dear Mr. Barr:

Upon receipt of a mandate from the Supreme Court of Missouri denying appellant's application to transfer the above-captioned cause, I am giving to you herewith mandate issued from this Court today, with certified copy of the Memorandum Opinion attached thereto.

Sincerely yours,

Sandra Skinner

SANDRA L. SKINNER, Clerk

SLS/ss
Enclosures
cc: Mr. Emmett D. Queener
Ms. Christine K. Lesicko
Hon. Thomas E. Mountjoy

IN THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
DIVISION IV

NEIL ROGER JOHNSON II,	)	
	)	
Movant,	)	
	)	
vs	)	Case No. 1631-CC00368
	)	
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

ORDER DENYING MOVANT'S AMENDED MOTION UNDER RULE 29.15

After careful consideration of both Movant and Respondent's motions, files, records, evidence and argument in this case, this Order is entered denying Movant's Motion to Vacate, Set Aside, or Correct the Judgment and Sentence Under Rule 29.15 based upon the following findings of fact and conclusion of law.

APPENDIX C

FACTUAL BACKGROUND

On November 15, 2013, Movant was found guilty of the class B felony of driving while intoxicated, the class D felony of driving while revoked, and the class C misdemeanor of failure to drive within a single lane following a jury trial in the Greene County Circuit Court. On September 30, 2014, Movant was sentenced to twelve years in the Department of Corrections and probation was denied. On October 22, 2015, the Court of Appeals, Southern District affirmed this Court's convictions, ruling against Movant on appeal. Movant timely filed his Motion to Vacate, Set Aside, or Correct Judgment or Sentence on March 21, 2016. Counsel was appointed by this Court on March 23, 2016, with an entry granting an additional 60 days for filing of Amended Motion. The maximum extension the court may give is 30 days. *Rule 29.15(g)*. Appointed counsel interpreted this entry to be granting the maximum 30 day extension and at motion hearings on August 30, 2016, this Court confirmed this interpretation. Appointed counsel filed Movant's Amended Motion on June 21, 2016. On that same day, Respondent filed a Motion to Dismiss based on a perceived untimely filed Amended Motion and a Motion to Dismiss based on the merits of Movant's Pro Se Motion to Vacate. At the motion hearing of August 30, 2016 Respondent's Motion to Dismiss based on untimely filing was dismissed and Movant's Amended Motion was shown timely filed. As such, Respondent's Motion to Dismiss the original Pro Se Motion to Vacate was dismissed as moot. Respondent was granted an additional 30 days to file an Amended Motion to Dismiss Movant's Motion to Vacate, and filed same. Movant's motion claims that his conviction and sentence should be vacated, set aside, or corrected due to ineffective assistance of counsel. This case was set for hearing on Movant and Respondent's motions numerous times, however, due to scheduling conflicts was not heard until

June 21, 2018. After hearing argument on the motions, this Court dismissed Movant's claims C and D (failure to advance appellate argument and failure to object to MAI, respectively) without evidentiary hearing. Following that, Movant presented evidence in the form of testimony from Michael Cabler (aka Motti), Peter Bender, and Neil Johnson. Movant entered into evidence Exhibits 1, 4, 8, 11, and 12.[1] Movant then requested the hearing be bifurcated for the testimony of Shawn Markin. On April 8, 2019, Movant presented evidence in the form of testimony from Shawn Markin. Movant rested. Respondent put on no evidence and the matter was taken under advisement.

---

1 Exhibit 1 – An aerial view 'Google Map' of the location of town where the DWI occurred.
Exhibit 4 – Movant's medical records.
Exhibit 8 – Report of Michael Cabler.
Exhibits 11 & 12 – Video exhibits created by Mr. Cabler in conjunction with his report.

STANDARD OF REVIEW – INEFFECTIVE ASSISTANCE OF COUNSEL

Movant has the burden of proving his claims by a preponderance of the evidence. *Rule 29.15(i)*. In order to succeed in each of his claims, Movant must show that his counsel failed to exercise the customary skill and diligence of a reasonably competent attorney under similar circumstances and that Movant was prejudiced by this failure. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This is a high burden, as Movant must show his counsel's work was "below an objective standard of reasonableness." *Id.* at 688.

It is necessary that both prongs of the test be proven by Movant. *State v. Kinder*, 942 S.W.2d 313, 335 (Mo. 1996). This means that even if Movant shows counsel was ineffective he must also show that but for counsel's ineffectiveness, there was a reasonable probability the outcome would be different. *Id.* at 694. In evaluating the effectiveness of counsel, the court presumes counsel acted professionally and that decisions alleged to be ineffective where a part of counsel's "sound trial strategy." *Barton v. State*, 432 S.W.3d 741, 749 (Mo. 2014). "Ineffective assistance of counsel will not lie where the conduct involves the attorney's use of reasonable discretion in a matter of trial strategy, and it is the exceptional case where a court will hold a strategic choice unsound." *State v. White,* 798 S.W.2d 694, 698 (Mo. 1990).

This court is not required to grant Movant an evidentiary hearing unless (1) Movant pleads facts, not conclusions, which, if true, would warrant relief; (2) the acts alleged are not refuted by the record; and (3) the matters complained of resulted in prejudice to Movant. *Williams v. State*, 168 S.W.3d 433, 439 (Mo. 2005). It is Movant's burden to prove the factors necessary for him to receive an evidentiary hearing on his motion. *Id.*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Movant's counsel was not ineffective for failing to impeach State's witness Sergeant Shane Monk.

Simply failing to impeach on a specific topic does not automatically create an issue of counsel's effectiveness. *Londagin v. State*, 141 S.W.3d 114 (Mo.App. S.D. 2004). In order to prevail on this issue, Movant must show that impeachment would have provided a defense or changed the outcome of the trial. *Id.*

Movant articulates his claim by stating facts from the testimony of Sgt. Monk at preliminary hearing and then drawing ultimate conclusions concerning Sgt. Monk's ability to perceive his vehicle. (Am.Mot. A-2).[2] These claims are conclusions, not facts. In his motion, Movant claims it is impossible for Sgt. Monk, to have seen Movant's conduct prior to the traffic stop. (Am.Mot. A-2). These are conclusions made by Movant and no transcript record is cited to support these claims. Movant claims that his attorney should have asked additional questions regarding factors which would have limited Sgt. Monk's vision. Movant further claims the dash cam video (State's Trial Exhibit 2), an edited copy of which was introduced as evidence, directly refutes Sgt. Monk's testimony.

The record reflects that Sgt. Monk was questioned at length by Movant's counsel at his motion to suppress hearing as well as at his trial. (Tr. 14-37, 42-57, 507-527)[3]. Numerous times

---

2 All references to "Am.Mot." are in reference to Movant's Amended Motion to Vacate, Set Aside or Correct Judgment and Sentence filed in this case. All uses of "Am.Mot." in this motion are followed by a number, indicating the page number or numbers of the motion being referenced.

3 All references to "Tr." are in reference to the transcript the proceedings in the underlying case with case number 1231-CR00573-01. The document is a comprehensive collection of transcripts including two motion to suppress hearings, a jury trial and various pretrial motion hearings. All uses of "Tr." in this motion are followed by a number, indicating the page number or numbers of the transcript being referenced.

Movant's counsel specifically questioned Sgt. Monk as to his observations compared to the dash cam video (State's Trial Exhibit 2). (Tr. 15-16, 22, 24, 517-519). These questions were attacking the officer's observations by comparing them to video evidence. This is trial strategy. Movant claims counsel allowed Sgt. Monk to testify that his perception is more accurate than a video, calling the statement "rediculous." (Am.Mot. A-4). However, Movant's counsel at trial impeached Sgt. Monk with regards to his recollection of the events versus the video evidence with prior statements. (Tr. 517). The record clearly refutes the claim that Movant's counsel did not impeach Sgt. Monk's testimony based on recorded visual evidence.

Peter Bender testified that the reason for the traffic stop was not contained on the video. Mr. Bender indicated that the video did show clear inconsistencies with the officer's testimony and he believed the video spoke for itself in that regard. Further, he indicated his choice, as a matter of trial strategy, was to focus on attacking the credibility of the officer through inconsistencies about the officer's recollection of events at the jail after the arrest which, included the conduct surrounding the breathalizer.

Movant testified at these proceedings about his recollection of the motion to suppress and the trial. He indicated that at the motion to suppress Shawn Markin pointed out that the video contradicted Sgt. Monk in that the video showed no lane change or weaving. Movant also recalled Peter Bender pointing out the different between Sgt. Monk's testimony and the video at trial by asking, "You think you are more accurate than the video?"

Further, Movant has not shown prejudice based on this alleged lack of impeachment. The dash cam evidence as well as the witnesses' testimony was before the jury. Movant's

counsel cross examined the witness on his testimony versus the video. This information was before the fact finder to consider. Movant makes only generalized conclusions, stating that there is "no question" it would provide a viable defense and that competent counsel would "no doubt" have impeached the witness. (Am.Mot. A-4). These speculative statements are not sufficient for Movant to prevail. Movant's allegations create no new defense nor has he shown a reasonable likelihood that the outcome of the trial would have been different.

The record reflects that Sgt. Monk was questioned and impeached as to his observations and that information was before the fact finders to consider. Not only did Mr. Bender impeach Sgt. Monk, but he indicated his trial strategy to let the video speak for itself with regards to how it affected Sgt. Monk's credibility. Movant has failed to show that his counsel was ineffective for failing to impeach Sgt. Monk. Movant's claim first claim is denied.

II. Movant's trial counsel was not ineffective for failing to call a medical expert witness.

In order for Movant to prove ineffective assistance of counsel for failure to call an expert witness, Movant must show what the evidence would have been from the expert and that evidence must not be cumulative. *State v. Twenter*, 818 S.W.2d 628, 630 (Mo. 1991). The decision to not call a specific witness is "presumptively a matter of trial strategy" and a claim of ineffective assistance of counsel based on those grounds will not stand unless Movant "clearly establishes otherwise." *Hutchinson v. State*, 150 S.W.3d 292, 304 (Mo. 2004).

First, the Movant has failed to show what evidence would have been provided by an expert witness. Movant argues that his counsel attempted to blame Movant's impaired movements on a medical condition and that an expert would provide a viable defense. (Am.Mot

A-5). However, Movant's motion wholly fails to state what that defense would be or what evidence the expert witness would provide, saying only there is "no doubt" that a medical expert would provide a defense. (Am.Mot. A-5). As such, Movant's claim B fails on its face to meet the burden necessary to prevail. *Twenter* at 630.

Further, any evidence a medical expert *could* provide as to the Movant's physical condition would be cumulative to evidence that was already before the fact finder. Movant's counsel cross examined the officer at trial as to Movant's medical condition and how that might explain the officer's observations. (Tr. 523-525). Specifically, counsel elicited testimony that the Movant informed the officer of his bone disorder. (Tr. 523). During closing argument at trial, Movant's counsel argued that Sgt. Monk was aware of Movant's bone condition. (Tr. 631). Movant himself testified during these proceedings that he told Mr. Bender about his medical issues and that he recalled Mr. Bender arguing his medical issues at trial.

The fact that Movant had a bone condition was already in evidence through Movant's statements present on the dash cam video (State's Trial Exhibit 2) as well as confirmed on cross examination of Sgt. Monk. A medical expert's testimony as to Movant's condition would have been cumulative and thus not satisfied his burden. *Twenter* at 630.

Movant has failed to show his counsel was ineffective for failing to call an expert medical witness. Movant's second claim is denied.

III. Movant's appellate counsel was not ineffective for failing to advance on appeal the trial court's error in failing to sever trial charges.

The determination of whether to sever counts to avoid prejudice is within the trial court's

discretion. *State v. Hood*, 451 S.W.3d 758, 763 (Mo.App. E.D. 2014). To reverse a denial of severance of counts, there must be a showing of both abuse of discretion and clear prejudice. *State v. Forister*, 823 S.W.2d 504, 510 (Mo.App. E.D. 1992). Appellate counsel need not raise every possible issue for appeal and to show ineffective assistance of appellate counsel Movant must show and counsel "failed to assert a claim of error that was so obvious from the record that a competent and effective lawyer would have recognized it and asserted it." *Cole v. State,* 223 S.W.3d 927, 931 (Mo App. S.D. 2007). The standard for severance of offenses is found in Missouri Supreme Court Rule 24.07.

> "When a defendant is charged with more than one offense in the same indictment or information, the offenses shall be tried jointly unless the court orders an offense to be tried separately. An offense shall be ordered to be tried separately only if:
>
> (**a**) A party files a written motion requesting a separate trial of the offense;
>
> (**b**) A party makes a particularized showing of substantial prejudice if the offense is not tried separately; and
>
> (**c**) The court finds the existence of a bias or discrimination against the party that requires a separate trial of the offense."
>
> *Rule 24.07*

Movant argues that his appellate counsel was ineffective for failing to advance the theory that the trial court was in error for denying Movant's motion to sever the trial for the counts of Driving While Intoxicated and Driving with a Revoked License. Movant concedes the counts were properly joined but claims this Court erred in later not severing the charges for trial.

Movant failed to show a substantial prejudice if the charges were tried together and the Court specifically found no existence of bias or discrimination and thus denied Movant's oral motion to severe. (Tr. 352, 354). Movant cites two venire persons' statements, venire person Simpson and venire person Kirsch, as a showing of substantial prejudice. (Tr. 269, 349, Am.Mot. A-8, A-9). However, neither of these two venire people were on the final jury for this

case. (Tr. 369-370). As the Court in this matter stated, the beliefs and assumptions of one potential juror cannot be imposed on all other jurors. (Tr. 354). In fact, the venire person who stated she could not be fair and impartial due to the belief that a revoked license was because of a previous driving while intoxicated charged specifically did not voice concerns in front of the jury pool so as to not influence them with her opinion. (Tr. 351). Movant has failed to show any substantial prejudice existed that would require the trial court to sever the counts and thus Movant's appellate counsel had no such meritorious claim to advance on appeal.

Movant again makes conclusions, as opposed to facts, in order to support his claim. Claiming "jurors specifically associate a revoked license with a prior driving while intoxicated charge" is Movant's conclusion and is not supported by any fact other than the statement of a single venire person that a family member had their license taken away because of a DWI. (Tr. 269; Am.Mot. A-9)[4].

Movant fails to state facts showing his appellate counsel was ineffective because Movant fails to show appellate counsel did not advance an obvious issue at appeal. The trial judge acted within his discretion and determined on the record there was no articulated prejudice to Movant by trying both counts together. Movant has failed to show a reasonable probability that the outcome of his appeal would have been different had appellate counsel advanced his proposed theory.

With regards to Movant's third claim, he has failed to show factors necessary to receive an evidentiary hearing on the claim and thus Movant's third claim is denied without hearing.

4 The statement belonged to venire person Kirsch who, as stated earlier, was not selected for the jury.

IV. Movant's trial counsel was not ineffective for failing to object to MAI-CR 3d 331.02.

"Whenever there is an MAI-CR instruction or verdict form applicable under the law and Notes on Use, the MAI-CR instruction or verdict form shall be given or used to the exclusion of any other instruction or verdict form." *Rule 28.02(c)*. Failing to give the appropriate MAI-CR or giving a different MAI-CR constitutes error. *Rule 28.02(f)*.

Movant argues that the instruction used, MAI-CR 3rd 331.02, is improper as it omits an essential element of the crime and his trial counsel was ineffective by not objecting to its submission. However, MAI-CR 3rd 331.02 was the proper instruction and contains all elements of the crime charged by the State.

Movant correctly cites Missouri case law that clearly establishes the elements required to prove the charge of driving while intoxicated: (1) operation of a motor vehicle, and (2) while in an intoxicated condition. *State v. Tyler*, 285 S.W.3d 353, 354 (Mo.App. S.D. 2009). Movant's motion goes on to cite further case law supporting these two elements as the only elements required for the charge of driving while intoxicated. However, Movant then states he disagrees with the *flawed* case law. While Movant makes numerous arguments regarding the validity or logic of current Missouri case law, Movant fails to state any case law overturning the ruling in *Tyler* or distinguishing it from his own case. The elements required for a DWI stated in *Tyler* are encompassed and stated within MAI-CR 3rd 331.02.

As it was the proper instruction to be given, counsel was not ineffective for failing to object to the submission of MAI-CR 3rd 331.02 and Movant has not stated a claim for which relief may be granted. Further, Movant has to failed to show how he was prejudiced by this lack

of objection and the use of the correct rule. In fact, *Rule 28.02* dictates that to use a *different* instruction would have been error.

With regards to Movant's fourth claim, he has failed to show factors necessary to receive an evidentiary hearing on the claim and thus Movant's fourth claim is denied without hearing.

V. Movant's counsel was not ineffective for failing to hire an audiovisual expert to analyze the dash cam video.

The decision to not call a specific witness is "presumptively a matter of trial strategy" and a claim of ineffective assistance of counsel based on those grounds will not stand unless Movant "clearly establishes otherwise." *Hutchinson* at 304.

Both Shawn Markin and Mr. Bender testified as to their trial strategy involving the dash cam video. Both believed the video clearly refuted Sgt. Monk's testimony. Mr. Bender even went so far as to say he believed the dash cam video was the best piece of evidence he had, and if the State had not introduced the exhibit, he would have done so on cross examination. Both attorneys indicated relying on the video as a means of contradicting Sgt. Monk and challenging his credibility was a trial strategy. As a decision in furtherance of the trial strategy neither sought an audio-visual expert.

Mr. Bender testified that an audio-visual expert would be time consuming, expensive, and have the potential to damage his own case. He testified there was little to be gained by hiring such a witness, regardless of their findings.

Movant presented evidence in the form of an audio-visual expert, Michael Gabler, and an accompanying report and videos. The report includes a three-dimensional model of the vehicle and the roadway as the videos are enhanced and visually stabilized edits of portions of the dash

cam. None of the enhancements or models shows anything different than the testimony of the witnesses at the hearings and trials. The State conceded at the motion to suppress hearing and trial that the lane violation which was the basis for the stop was not contained on the dash cam video.

No prejudice has been shown by defense counsel not calling an audio-visual expert as there is no reasonable probability that the outcome of Movant's motion to suppress or trial would have been different had such an expert been called. At the suppression hearing the Court declared that while they could not see the lane crossing testified to, "The Sergeant very precisely explained the fact that you could not see on the video the extent that he could" and based on the credible testimony and the video denied Movant's motion to suppress. (Tr. 68 – 69). At trial the dash cam video (State's Trial Exhibit 2) was played and Sgt. Monk testified to his observations. As noted previously, Movant's attorney crossed Sgt. Monk about his observations when compared to the dash cam video. (Tr. 15-16, 22, 24, 517-519). At all proceedings this information was before the fact finder, allowing them to judge the evidence for themselves and come to their own conclusion about the credibility of the evidence. Movant fails to factually support a conclusion that the jury would have found Sgt. Monk not credible and the outcome of the trial would have been different.

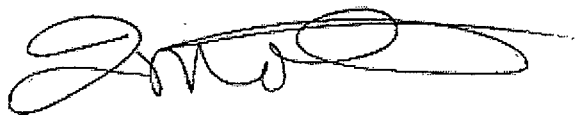
Movant has failed to show how an audio-visual expert witnesses testimony and evidence would not be cumulative and has failed to rebut the presumptive sound trial strategy of his counsel. Movant's fifth claim is denied.

JUDGMENT

WHEREFORE, the Court denies Movant's Amended Motion to Vacate, Set Aside or Correct Judgment and Sentence under Rule 29.15.

DONE AND ORDERED THIS _____DAY OF _____, 2019

6/4/2019



Honorable Thomas Mountjoy
Circuit Court Judge
Division IV
Greene County, Missouri

APPENDIX C

Missouri Court of Appeals
Southern District
Division One

NEIL ROGER JOHNSON, II,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SD36211
	)	
STATE OF MISSOURI,	)	FILED: May 19, 2020
	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY

Thomas E. Mountjoy, Judge

WRITTEN STATEMENT

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED, OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT. THIS STATEMENT SHALL BE ATTACHED TO ANY MOTION FOR REHEARING OR APPLICATION FOR TRANSFER TO THE SUPREME COURT FILED WITH THIS COURT.

Neil Johnson ("Movant") appeals the denial, following an evidentiary hearing, of his amended Rule 29.15 post-conviction relief ("PCR") motion, in which he alleged that he received

APPENDIX D

ineffective assistance of counsel ("IAC").[1] Finding no clear error as alleged in Movant's single point, we affirm.

Factual and Procedural Background[2]

On December 2, 2011, Sergeant Shane Monk ("Sergeant Monk") of the Missouri State Highway Patrol stopped Movant after he noticed Movant's vehicle straddling two lanes of traffic and swerving in its lane. Sergeant Monk then noticed that Movant exhibited several indicators of intoxication: a strong smell of alcoholic beverages; watery, bloodshot eyes; slurred speech; and poor performance on several field sobriety tests. Movant admitted that his driver's license had been revoked and that he had been drinking that evening.

Movant was charged with driving while intoxicated as a chronic offender, driving while revoked, and failing to drive in a single lane. *See* sections 302.321, 304.015, 577.010, 577.023, RSMo Cum.Supp. (2013). Before trial, Movant unsuccessfully sought to have certain evidence suppressed on the basis that the dash camera in Sergeant Monk's patrol vehicle ("the dash cam video") did not show Movant driving in a manner that would give rise to probable cause for initiating a traffic stop. After a two-day jury trial concluded, the jury found Movant guilty as charged. The evidence received at the suppression hearing and at trial, in pertinent part, included the testimony of Sergeant Monk and the dash cam video.

Movant's convictions were affirmed on direct appeal and, thereafter, he filed timely *pro se* and amended PCR motions. Movant alleged, among other matters, an IAC claim that

> Counsel failed to investigate, locate, retain, hire, and present at trial and at a motion to suppress hearing, the testimony of an audio/visual expert, such as Don Gifford of Springfield, or another similarly qualified expert, who could analyze and/or enhance the dash cam video (State's trial exhibit #2) and the in car video, and testify about the results of that analysis and the content of the videos as well

[1] All rule references are to Missouri Court Rules (2020).

[2] Movant's convictions were affirmed in appeal number SD33553 by way of an order and unpublished statement issued on October 20, 2015. Portions of that statement appear in these facts without further attribution.

> as present any enhanced videos for the court or jury to observe. On belief and information such testimony and evidence would contradict the testimony of [Sergeant] Monk and would have provided exculpatory evidence on [M]ovant's behalf and there is a reasonable probability that the outcome of the trial would have been different.

Following an evidentiary hearing, at which testimony was received from Movant, two attorneys who represented Movant at trial, and Matthew Gabler (who testified that he was "a forensic expert and case manager for the National Center for Audio & Video Forensics"), the motion court denied the claims in Movant's amended PCR motion. Movant timely appeals.

Standard of Review

This Court's review of the denial of a Rule 29.15 motion for post-conviction relief is limited to determining whether the motion court's findings of fact and conclusions of law are clearly erroneous. Rule 29.15(k); ***Williams v. State***, 168 S.W.3d 433, 439 (Mo. banc 2005). Such "[f]indings and conclusions are clearly erroneous only if a full review of the record definitely and firmly reveals that a mistake was made." ***Morrow v. State***, 21 S.W.3d 819, 822 (Mo. banc 2000). It is incumbent upon the movant in a post-conviction motion to prove his or her claims for relief by a preponderance of the evidence, Rule 29.15(i), and this Court presumes that the motion court's findings and conclusions are correct, ***Wilson v. State***, 813 S.W.2d 833, 835 (Mo. banc 1991). "The trial court has the 'superior opportunity to determine the credibility of witnesses,' and this Court defers to the trial court's factual findings and credibility determinations." ***Zink v. State***, 278 S.W.3d 170, 178 (Mo. banc 2009) (quoting ***State v. Rousan***, 961 S.W.2d 831, 845 (Mo. banc 1998)).

Discussion

In order to prevail on a post-conviction motion alleging IAC, a movant must overcome a strong presumption of competence and demonstrate, by a preponderance of the evidence, that (1) counsel did not exercise the customary skill and diligence that a reasonably competent attorney

would have exercised under the same or similar circumstances, and (2) counsel's failure to exercise such skill and diligence prejudiced the movant in some way. ***Strickland v. Washington***, 466 U.S. 668, 687, 689 (1984); ***Sanders v. State***, 738 S.W.2d 856, 857 (Mo. banc 1987). To satisfy the performance prong, a movant "must overcome the presumptions that any challenged action was sound trial strategy and that counsel rendered adequate assistance and made all significant decisions in the exercise of professional judgment." ***State v. Simmons***, 955 S.W.2d 729, 746 (Mo. banc 1997). In order to demonstrate the requisite prejudice, a movant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. ***Strickland*** defines "a reasonable probability" as "a probability sufficient to undermine confidence in the outcome." ***Id.*** In reviewing such claims, we are not required to examine both prongs; if a movant fails to satisfy the performance prong, we need not consider the prejudice prong, and vice versa. ***Strickland***, 466 U.S. at 697; ***Sanders***, 738 S.W.2d at 857.

For an IAC claim pertaining to the failure to call an expert witness, a movant must show that: "(1) such an expert witness existed at the time of trial; (2) the expert witness could be located through reasonable investigation; and (3) the expert witness's testimony would have benefited the defense." ***Johnson v. State***, 388 S.W.3d 159, 165 (Mo. banc 2012) (internal quotation marks omitted).

In its written judgment denying Movant's amended PCR motion, the motion court made specific findings of fact and conclusions of law. As to the IAC claim relevant to this appeal, the motion court found and concluded the following:

- Movant failed to refute the presumption that his counsels' decision not to utilize expert testimony at trial was a reasonable strategy. The motion court found credible the testimony of counsel, which it summarized as follows: counsel believed that the dash cam video "clearly refuted

[Sergeant] Monk's testimony"; "the dash cam video was the best piece of evidence he had"; and "there was little to be gained by hiring [an expert] witness, regardless of their findings."

- Movant failed to demonstrate prejudice. The motion court found that nothing presented by Gabler "show[ed] anything different than the testimony of the witnesses at the hearings and trials." The motion court noted that the trial court stated, during the suppression hearing, "that while they could not see the lane crossing testified to, 'The Sergeant very precisely explained the fact that you could not see on the video the extent that he could' and based on the credible testimony and the video denied Movant's motion to suppress." It further noted that "[t]he State conceded at the motion to suppress hearing and trial that the lane violation which was the basis for the stop was not contained on the dash cam video."

In his sole point on appeal contending that the motion court clearly erred, Movant essentially reiterates the same IAC allegations that were presented in his amended PCR motion. Specifically, Movant contends that

> his trial counsel failed to act as a reasonably competent attorney would under the same or similar circumstances by failing to investigate and call as a witness at the motion to suppress hearing and at trial an audio/visual expert, such as Matthew Gabler, to enhance and analyze the dash-cam video, testify about the results of that analysis, and present such enhanced videos for the court and jury to observe. [Movant] was prejudiced by his trial counsel's failure to investigate and call an audio/visual expert as a witness in that such testimony and evidence would have contradicted the testimony of [Sergeant] Monk, would have provided exculpatory evidence for [Movant], and had such testimony and evidence been adduced, a reasonable probability exists that the result of [Movant]'s trial would have been different.

In the argument section of his brief, Movant goes on to cite various facts from the record as well as various legal propositions that are generally applicable in the context of IAC claims. At no point in his brief, however, does Movant quote, summarize, or cite to any specific finding of fact or conclusion of law issued by the motion court in its written judgment.

We note that Movant does cite the proposition that "[a]n argument based on trial strategy or tactics is appropriate only if counsel is fully informed of facts which should have been discovered by investigation[,]" ***Perkey v. State***, 68 S.W.3d 547, 552 (Mo.App. 2001) (internal

quotation marks omitted), and then goes on to argue that "[c]ounsel lacked the information to make an informed judgment because of the inadequacy of the investigation; therefore, any argument as to trial strategy is inappropriate." Here, Movant, arguably, can be said to tacitly challenge the motion court's conclusion that the actions of trial counsel were based on reasonable trial strategy.

Movant's argument as to prejudice, however, is another matter. Movant never challenges, much less addresses (tacitly or otherwise), the motion court's finding, which supports its no-prejudice conclusion, that the substance of Gabler's testimony—that the dash cam video contradicted Sergeant Monk's testimony—was already before the trial court and the jury in the form of the dash cam video and the cross-examination of Sergeant Monk. Instead, Movant merely reiterates the same general prejudice allegation as found in his amended PCR motion—that because the trial court and jury had no opportunity to consider Gabler's testimony, which would have contradicted Sergeant Monk's testimony, Movant was thereby prejudiced.

A witness's testimony is considered to be cumulative when it "relates to a matter fully developed by other testimony." ***Barnes v. State***, 334 S.W.3d 717, 722 (Mo. App. 2011). As relevant here, counsel will not be deemed ineffective for failing to present cumulative testimony. ***Tisius v. State***, 519 S.W.3d 413, 428 (Mo. banc 2017).

As already noted, we review for whether the motion court's *findings and conclusions* are clearly erroneous. Rule 29.15(k); ***Williams***, 168 S.W.3d at 439. Presuming that the motion court's *unchallenged* findings and conclusions are correct, *see* ***Wilson***, 813 S.W.2d at 835, Movant has failed to demonstrate that the motion court committed any clear error in denying his IAC claim. Point denied.

Decision

The motion court's judgment is affirmed.

Missouri Court of Appeals

Southern District

No. SD36211
Circuit Court Case No. 1631-CC00368

NEIL ROGER JOHNSON, II,

Appellant,

vs.

STATE OF MISSOURI,

Respondent.

FILED
JUN 04 2020
CRAIG A. STREET
MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

MANDATE

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY

The Court has ruled as follows:

The judgment is affirmed in compliance with Rule 84.16(b).

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Missouri Court of Appeals, Southern District, at my office in the City of Springfield on this day, June 4, 2020.

CRAIG A. STREET, Clerk of Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

NEIL ROGER JOHNSON II,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 6:21-cv-03004-MDH-P
	)	
SCOTT WEBER,	)	
	)	
Respondent.	)	

ORDER

Petitioner, a convicted state prisoner currently confined at Algoa Correctional Center in Jefferson City, Missouri, has filed pro se a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Doc. 1. For the reasons set forth below, Petitioner's petition (Doc. 1) is denied, a certificate of appealability is denied, and this case is dismissed.

I. Statement of Facts

Petitioner was found guilty in the Circuit Court of Greene County, Missouri of driving while intoxicated, chronic offender; driving while revoked; and failure to drive in a single lane. Doc. 9. In affirming the denial of post-conviction relief, the Missouri Court of Appeals stated the facts as follows:

> On December 2, 2011, Sergeant Shane Monk ("Sergeant Monk") of the Missouri State Highway Patrol stopped Movant after he noticed Movant's vehicle straddling two lanes of traffic and swerving in its lane. Sergeant Monk then noticed that Movant exhibited several indicators of intoxication: a strong smell of alcoholic beverages; watery, bloodshot eyes; slurred speech; and poor performance on several field sobriety tests. Movant admitted that his driver's license had been revoked and that he had been drinking that evening.
>
> Movant was charged with driving while intoxicated as a chronic offender, driving while revoked, and failing to drive in a single lane. *See* sections 302.321, 304.015, 577.010, 577.023, RSMo Cum.Supp. (2013). Before trial, Movant unsuccessfully sought to have certain evidence suppressed on the basis that the dash camera in Sergeant Monk's patrol vehicle ("the dash cam video") did not show Movant driving in a manner that would give rise to probable cause for initiating a traffic stop. After a two-day jury trial concluded, the jury found Movant guilty as charged. The evidence received at the suppression hearing and at trial, in pertinent part, included the testimony of Sergeant Monk and the dash cam video.

Movant's convictions were affirmed on direct appeal and, thereafter, he filed timely *pro se* and amended PCR motions. Movant alleged, among other matters, an IAC claim that

> Counsel failed to investigate, locate, retain, hire, and present at trial and at a motion to suppress hearing, the testimony of an audio/visual expert, such as Don Gifford of Springfield, or another similarly qualified expert, who could analyze and/or enhance the dash cam video (State's trial exhibit #2) and the in car video, and testify about the results of that analysis and the content of the videos as well as present any enhanced videos for the court or jury to observe. On belief and information such testimony and evidence would contradict the testimony of [Sergeant] Monk and would have provided exculpatory evidence on [M]ovant's behalf and there is a reasonable probability that the outcome of the trial would have been different.

Following an evidentiary hearing, at which testimony was received from Movant, two attorneys who represented Movant at trial, and Matthew Gabler (who testified that he was "a forensic expert and case manager for the National Center for Audio & Video Forensics"), the motion court denied the claims in Movant's amended PCR motion.

Doc. 9-10, pp. 3-4. Petitioner now seeks relief pursuant to 28 U.S.C. § 2254.

II. Legal Standard

State prisoners who believe that they are incarcerated in violation of the Constitution or laws of the United States may file a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. "[H]abeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011) (internal quotation and citation omitted). When a petitioner seeks federal habeas relief raising a claim that was adjudicated on the merits in the state court proceedings, the federal habeas court's inquiry is limited to whether (1) the state proceedings resulted in a decision that is contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or (2) the state proceedings resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

A state court decision is contrary to clearly established federal law if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or . . . decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts."

Jones v. Luebbers, 359 F.3d 1005, 1011 (8th Cir. 2004) (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)) (alteration in original). A state court decision unreasonably applies clearly established federal law if "the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* (quoting *Williams*, 529 U.S. at 413) (alteration in original). Finally, a state court decision involves an unreasonable determination of the facts only if Petitioner shows the state court's factual findings lack even fair support in the record. *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *see Jones*, 359 F.3d at 1011; § 2254(e)(1) (Petitioner bears the burden to rebut the presumption of correctness applied to state determinations of factual issues by "clear and convincing evidence"). Credibility determinations are left for the state court to decide. *Graham v. Solem*, 728 F.2d 1533, 1540 (8th Cir. 1984) (en banc), cert. denied, 469 U.S. 842 (1984). Because the state court's findings of fact have fair support in the record and because Petitioner has failed to establish by clear and convincing evidence that the state court findings are erroneous, the Court defers to and adopts those factual conclusions.

III. Analysis

Petitioner raises multiple grounds for habeas relief: (1) the trial court erred by submitting instruction no. 5; (2) five claims of ineffective assistance of counsel for failure to impeach Shane Monk, call a medical expert, brief a severance issue on appeal, object to instruction no. 5, and use an audio/video expert; (3) appellate court erred issuing *per curiam* decisions; and (4) ineffective assistance of trial counsel for failure to present state's Exhibit 5. Doc. 1.

A. Grounds One, Three and Four

In Ground One, Petitioner directs the Court to page one of the attachment, which claims "[t]he trial court plainly erred in submitting Instruction No. 5, based on MAI-CR 331.02, because this verdict director for the offense of driving while intoxicated, Section 577.010, violated Mr. Johnson's right to due process of law and to a determination of guilt by a jury, ... in that the jurors were not required to find that Mr. Johnson's use of alcohol impaired his ability to operate a motor vehicle." Doc. 2, p. 1. Petitioner further argues that "[t]his failure to properly instruct the jurors resulted in manifest injustice because Instruction No. 5 so misdirects or fails to instruct the jurors of the level of intoxication necessary for a conviction that it is apparent that the error affected the verdict by reducing the State's burden of proof." *Id.*

In Ground Three, Petitioner alleges the appellate court erred issuing *per curiam* decisions, affirming his conviction and sentence and/or affirming the motion court's denial of post-conviction relief. Doc.1, p. 8. Lastly, in Ground Four, Petitioner contends that he received ineffective assistance of trial counsel because counsel did not present State's Exhibit 5, "a copy of the original BAC Data Master Evidence ticket" Doc. 1, p. 9.

Generally, federal habeas review for state prisoners is permitted only after petitioners have "exhaust[ed] the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). "A habeas petitioner is required to pursue all available avenues of relief in the state courts before the federal courts will consider a claim." *Sloan v. Delo*, 54 F.3d 1371, 1381 (8th Cir. 1995), *cert. denied*, 516 U.S. 1056 (1996). "[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process" before presenting those issues in an application for habeas relief in federal court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). "If a petitioner fails to exhaust state remedies and the court to which he should have presented his claim would now find it procedurally barred, there is a procedural default." *Sloan,* 54 F.3d at 1381.

Petitioner failed to present these issues to the Missouri courts. As a result, his claims are procedurally defaulted. *Sweet v. Delo*, 125 F.3d 1144, 1149 (8th Cir. 1997) (recognizing that failure to present claims in the Missouri Courts at any stage of direct appeal or post-conviction proceedings is a procedural default), *cert. denied*, 523 U.S. 1010 (1998). A federal court may not review procedurally defaulted claims "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Under the cause and prejudice test, cause "must be something *external* to the petitioner, something that cannot fairly be attributed to him." *Id.* at 753 (emphasis in original).

Here, Petitioner did not plead any facts attempting to excuse his failure to present these claims before the state court. Furthermore, as to Ground One, this claim also fails as it is not cognizable in a § 2254 action. *See Estelle v. McGuire*, 502 U.S. 62 (1991). Consequently, Petitioner has not exhausted his remedies and these claims are procedurally defaulted. Grounds One, Three and Four are denied.

B. Ground Two

In Ground Two, Petitioner asserts five claims of ineffective assistance of counsel for failure to (1) impeach the State's witness, Shane Monk; (2) call a medical expert; (3) brief a severance issue concerning the driving while intoxicated charge on appeal; (4) object to the submission of instruction no. 5; and (5) use an audio/video expert concerning the dash cam video at the motion to suppress hearing and at trial. Doc. 2, pp. 5-6.

As to allegations one through four in Ground Two, Petitioner presented these claims to the trial court during his post-conviction Rule 29.15 litigation, which the motion court found to be meritless. *See* Docs. 9-6, pp. 46, 61, 86-93. Petitioner appealed this decision, but he did not brief these issues on post-conviction appeal. *See* Doc. 9-8. Thus, the Court finds these claims have been procedurally defaulted. *Sweet*, 125 F.3d at 1149 (recognizing that failure to present claims in the Missouri Courts at any stage of direct appeal or post-conviction proceedings is a procedural default). As previously explained, a federal court may not review procedurally defaulted claims "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

Here, Petitioner did not plead any facts attempting to excuse his failure to present this claim before the state court. Consequently, this Court is barred from reviewing these claims.

As to Petitioner's fifth allegation concerning counsel's alleged failure to use an audio/visual expert, upon review of the record, the Missouri Court of Appeals denied Petitioner's claim and explained:

> In its written judgment denying Movant's amended PCR motion, the motion court made specific findings of fact and conclusions of law. As to the IAC claim relevant to this appeal, the motion court found and concluded the following:
>
> > Movant failed to refute the presumption that his counsels' decision not to utilize expert testimony at trial was a reasonable strategy. The motion court found credible the testimony of counsel, which it summarized as follows: counsel believed that the dash cam video "clearly refuted [Sergeant] Monk's testimony"; "the dash cam video was the best piece of evidence he had"; and "there was little to be gained by hiring [an expert] witness, regardless of their findings."
> >
> > Movant failed to demonstrate prejudice. The motion court found that nothing presented by Gabler "show[ed] anything different than the testimony of the witnesses at the hearings and

> trials." The motion court noted that the trial court stated, during the suppression hearing, "that while they could not see the lane crossing testified to, 'The Sergeant very precisely explained the fact that you could not see on the video the extent that he could' and based on the credible testimony and the video denied Movant's motion to suppress." It further noted that "[t]he State conceded at the motion to suppress hearing and trial that the lane violation which was the basis for the stop was not contained on the dash cam video."

In his sole point on appeal contending that the motion court clearly erred, Movant essentially reiterates the same IAC allegations that were presented in his amended PCR motion. Specifically, Movant contends that his trial counsel failed to act as a reasonably competent attorney would under the same or similar circumstances by failing to investigate and call as a witness at the motion to suppress hearing and at trial an audio/visual expert, such as Matthew Gabler, to enhance and analyze the dash-cam video, testify about the results of that analysis, and present such enhanced videos for the court and jury to observe. [Movant] was prejudiced by his trial counsel's failure to investigate and call an audio/visual expert as a witness in that such testimony and evidence would have contradicted the testimony of [Sergeant] Monk, would have provided exculpatory evidence for [Movant], and had such testimony and evidence been adduced, a reasonable probability exists that the result of [Movant]'s trial would have been different. In the argument section of his brief, Movant goes on to cite various facts from the record as well as various legal propositions that are generally applicable in the context of IAC claims. At no point in his brief, however, does Movant quote, summarize, or cite to any specific finding of fact or conclusion of law issued by the motion court in its written judgment.

We note that Movant does cite the proposition that "[a]n argument based on trial strategy or tactics is appropriate only if counsel is fully informed of facts which should have been discovered by investigation[,]" *Perkey v. State*, 68 S.W.3d 547, 552 (Mo.App. 2001) (internal quotation marks omitted), and then goes on to argue that "[c]ounsel lacked the information to make an informed judgment because of the inadequacy of the investigation; therefore, any argument as to trial strategy is inappropriate." Here, Movant, arguably, can be said to tacitly challenge the motion court's conclusion that the actions of trial counsel were based on reasonable trial strategy. Movant's argument as to prejudice, however, is another matter. Movant never challenges, much less addresses (tacitly or otherwise), the motion court's finding, which supports its no-prejudice conclusion, that the substance of Gabler's testimony—that the dash cam video contradicted Sergeant Monk's testimony—was already before the trial court and the jury in the form of the dash cam video and the cross-examination of Sergeant Monk. Instead, Movant merely reiterates the same general prejudice allegation as found in his amended PCR motion— that because the trial court and jury had no opportunity to consider Gabler's testimony, which would have contradicted Sergeant Monk's testimony, Movant was thereby prejudiced.

> A witness's testimony is considered to be cumulative when it "relates to a matter fully developed by other testimony." *Barnes v. State*, 334 S.W.3d 717, 722 (Mo. App. 2011). As relevant here, counsel will not be deemed ineffective for failing to present cumulative testimony. *Tisius v. State*, 519 S.W.3d 413, 428 (Mo. banc 2017). As already noted, we review for whether the motion court's findings and conclusions are clearly erroneous. Rule 29.15(k); *Williams,* 168 S.W.3d at 439. Presuming that the motion court's unchallenged findings and conclusions are correct, see Wilson, 813 S.W.2d at 835, Movant has failed to demonstrate that the motion court committed any clear error in denying his IAC claim. Point denied.

Doc. 9-10, pp. 4-6.

In denying Petitioner's claim, this Court finds the state court reasonably determined that the evidence and the reasonable inferences derived therefrom were sufficient to show trial counsel provided reasonable representation. The Court also finds that the Missouri courts' adjudication of this claim was not contrary to or involved an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence presented to the state court. §§ 2254(d)(1) and (2). Therefore, because Petitioner has failed to provide clear and convincing evidence that the state court's findings are erroneous, Petitioner is not entitled to habeas relief on this basis. Ground Two is denied.

IV. Certificate of Appealability

Under 28 U.S.C. § 2253(c), the Court may issue a certificate of appealability only "where a petitioner has made a substantial showing of the denial of a constitutional right." To satisfy this standard, Petitioner must show that "reasonable jurists" would find the district court ruling on the constitutional claim(s) "debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274, 276 (2004). Because Petitioner has not met this standard, a certificate of appealability is denied.

V. Conclusion

For the foregoing reasons, Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DENIED, a certificate appealability is DENIED, and this case is DISMISSED.

IT IS SO ORDERED.

/s/ Douglas Harpool
DOUGLAS HARPOOL, JUDGE
UNITED STATES DISTRICT COURT

Dated: August 5, 2021

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

JUDGMENT IN A CIVIL CASE

NEAL ROGER JOHNSON, II,

Petitioner,

v. Case No. 21-03004-CV-S-MDH-P

SCOTT WEBER,

Respondent.

O **JURY VERDICT**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

x **DECISION OF THE COURT**. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DENIED, a certificate appealability is DENIED, and this case is DISMISSED.

Entered on: August 5, 2021

PAIGE WYMORE-WYNN
CLERK OF COURT

/s/ K. Willis
(By) Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-3018

Neil Roger Johnson, II

Appellant

v.

Kelly Morriss, Warden

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Springfield
(6:21-cv-03004-MDH)

ORDER

If the original file of the United States District Court is available for review in electronic format, the court will rely on the electronic version of the record in its review. The appendices required by Eighth Circuit Rule 30A shall not be required. In accordance with Eighth Circuit Local Rule 30A(a)(2), the Clerk of the United States District Court is requested to forward to this Court forthwith any portions of the original record which are not available in an electronic format through PACER, including any documents maintained in paper format or filed under seal, exhibits, CDs, videos, administrative records and state court files. These documents should be submitted within 10 days.

September 08, 2021

Order Entered Under Rule 27A(a):
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-3018

Neil Roger Johnson, II

Petitioner - Appellant

v.

Kelly Morriss, Warden

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Springfield
(6:21-cv-03004-MDH)

JUDGMENT

Before BENTON, SHEPHERD, and STRAS, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

Appellant's motion for leave to proceed in forma pauperis is denied as moot.

November 18, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-3018

Neil Roger Johnson, II

Appellant

v.

Kelly Morriss, Warden

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Springfield
(6:21-cv-03004-MDH)

ORDER

The petition for rehearing by the panel is denied.

January 21, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-3018

Neil Roger Johnson, II

Appellant

v.

Kelly Morriss, Warden

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Springfield
(6:21-cv-03004-MDH)

MANDATE

In accordance with the judgment of 11/18/2021, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

February 02, 2022

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX F

Additional material from this filing is available in the Clerk's Office.