

IN THE SUPREME COURT OF MISSOURI

GARY G. ROBERTS, )  
 )  
 Appellant )  
 )  
 v. ) SC89245  
 )  
 STATE OF MISSOURI, )  
 )  
 Respondent. )

APPEAL TO THE SUPREME COURT OF MISSOURI  
FROM THE CIRCUIT COURT OF ST. FRANCOIS COUNTY  
THE HONORABLE KENNETH WAYNE PRATTE, JUDGE  
AT PLEA, SENTENCING, AND POST-CONVICTION PROCEEDINGS

---

APPELLANT'S SUBSTITUTE BRIEF

---

Jessica M. Hathaway  
Missouri Bar No. 49671  
Office of the State Public Defender  
1000 St. Louis Union Station, #300  
St. Louis, Missouri 63103  
314.340.7662  
314.340.7685  
jessica.hathaway@mspd.mo.gov

ATTORNEY FOR GARY G. ROBERTS  
**INDEX**

TABLE OF AUTHORITIES .....	2
JURISDICTIONAL STATEMENT.....	5
STATEMENT OF FACTS.....	7
POINTS RELIED ON.....	16
ARGUMENT .....	20
CONCLUSION .....	43
CERTIFICATE OF SERVICE AND COMPLIANCE .....	44
APPENDIX .....	45

## TABLE OF AUTHORITIES

### Cases

<i>Brunelle v. United States</i> , 864 S.W.2d 64 (8th Cir. 1988) .....	31
<i>Burston v. State</i> , 698 S.W.2d 557 (Mo. App. E.D. 1985).....	30
<i>Castor v. State</i> 245 S.W.3d 909 (Mo. App. E.D. 2008) .....	26
<i>Elverum v. State</i> , 232 S.W.3d 710 (Mo. App. E.D. 2007) .....	25, 34
<i>Evans v. State</i> , 28 S.W.3d 434 (Mo. App. S.D. 2000).....	17, 18, 34, 36, 42
<i>Guynes v. State</i> , 191 S.W.3d 80 (Mo. App. E.D. 2006) .....	25, 26
<i>Howell v. State</i> , 185 S.W.3d 319 (Tenn. 2006).....	28
<i>Moss v. State</i> , 10 S.W.3d 508 (Mo. banc 2000) .....	21, 40
<i>North v. State</i> , 878 S.W.2d 66 (Mo. App. W.D. 1994) .....	17, 31, 36
<i>Proctor v. State</i> , 809 S.W.2d 32 (Mo. App. W.D. 1991) .....	17, 32, 37, 43
<i>Schellert v. State</i> , 569 S.W.2d 735 (Mo. banc 1978).....	30
<i>Shepard v. State</i> , 549 S.W.2d 550 (Mo. App. K.C.D. 1977).....	17, 31
<i>State v. Deshotel</i> , 730 So.2d 994 (La. App. 1 <sup>st</sup> Cir. 1999) .....	29
<i>State v. Driver</i> , 912 S.W.2d 52 (Mo. banc 1995) .....	35
<i>State v. Verdin</i> , 845 So.2d 372 (La. App. 1 <sup>st</sup> Cir. 2003).....	28
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984) .....	18, 41
<i>Stufflebean v. State</i> , 986 S.W.2d 189 (Mo. App. W.D. 1999).....	32, 34, 42
<i>United States v. McCray</i> , 849 F.2d 304 (8th Cir. 1988) .....	31

*Vernor v. State*, 894 S.W.2d 209 (Mo. App. E.D. 1995).....21, 39

## **Statutes**

Section 195.202 .....5, 7

Section 559.115 ..... 10, 13, 16, 20, 22, 47

## **Other Authorities**

Francis Wharton, *A Treatise on Criminal Pleading and Practice* (1889) .... 27

John Frederick Archibald, et al., *A Complete Practical Treatise on Criminal Procedure, Pleading, and Evidence* (1858) ..... 27

Joseph Henry Beale, Jr., *A Treatise on Criminal Pleading and Practice* (1895)..... 27

Random House Dictionary of the English Language (Unabridged Edition, 1966) ..... 27

## **Rules**

Rule 24.02 ..... 38, 42

Rule 24.035..... 5, 9, 16, 20, 21, 39

Rule 30.25..... 6

Rule 83.02 ..... 6

## **Constitutional Provisions**

Mo. Const. Art. 1, Sec. 10 .....16, 17, 19, 39, 43

Mo. Const. Art. 1, Sec. 18(a) .....18, 19, 39, 43

Mo. Const., Art. V, Sec. 10..... 6  
U.S. Const. Amend. V ..... 16, 17, 18, 20, 39, 43  
U.S. Const. Amend. VI..... 18, 39, 43  
U.S. Const. Amend. XIV ..... 16, 17, 18, 20, 39, 43

## **JURISDICTIONAL STATEMENT**

The Appellant, Mr. Gary G. Roberts, pleaded guilty on August 25, 2006 to the class C felony of possession of a controlled substance (methamphetamine) (Count 1) in violation of Section 195.202 and to the class C felony of possession of a controlled substance (diazepam or Valium™) (Count 2) in violation of Section 195.202. On October 20, 2006, Mr. Roberts was sentenced to a term of seven years of imprisonment on each count in the Missouri Department of Corrections, to be served consecutively for a total of 14 years.

On November 2, 2006, Mr. Roberts timely filed his *pro se* motion for post-conviction relief under Rule 24.035. Appointed counsel filed a timely amended motion on his behalf on March 14, 2007. The motion court denied Mr. Roberts' motion, without a hearing, in findings of fact and conclusions of law on April 17, 2007. Mr. Roberts filed a timely notice of appeal with the Missouri Court of Appeals, Eastern District on May 29, 2007.

The Court of Appeals, on January 29, 2008, issued its order and memorandum opinion affirming the judgment of the motion court under Rule 30.25(b). This Court transferred the case on August 26, 2008 upon

application by Mr. Roberts. Jurisdiction lies in the Supreme Court of Missouri. Mo. Const., Art. V, Sec. 10; Rule 83.02.

## STATEMENT OF FACTS

Fifty-four-year-old Gary G. Roberts was charged with two counts of possession of a controlled substance (Counts 1 and 2), and four counts of possession of a chemical with the intent to create a controlled substance (Counts 3-6). L.F. 61-62.<sup>1</sup>

On August 25, 2006, as part of a group of nine unrelated criminal defendants, Mr. Roberts pleaded guilty to the class C felony of possession of a controlled substance (methamphetamine) (Count 1) in violation of Section 195.202 and to the class C felony of possession of a controlled substance (diazepam or Valium<sup>TM</sup>) (Count 2) in violation of Section 195.202. L.F. 61-63. The state filed a *nolle prosequi* on the other counts. L.F. 59.

Mr. Roberts had a plea agreement with the State of Missouri. Tr. 31. The judge told the group of nine<sup>2</sup> pleading guilty that he was "bound by the terms of your plea bargain agreements, which means, there will be

---

<sup>1</sup> Appellant will cite to the Legal File as "L.F." Appellant will cite to the transcript of the guilty plea and sentencing as "Tr."

<sup>2</sup> One of the defendants was excused after confusion about whether she had voluntarily made a statement to police. Tr. 8-9.

sentencing assessment reports done in your cases by the Board of Probation and Parole." Tr. 31. "When you return before me for sentencing, if I do impose sentence upon you at that time and you have bargained for a cap, the most you could receive would be up to and including that cap." Tr. 31. "You could receive such a sentence, less than that, or probation." Tr. 31. Mr. Roberts, along with the others pleading guilty, indicated that he understood. Tr. 31-32.

The state, represented by Mr. Pat King, described the plea agreement with Mr. Roberts as, "On Counts I and II, the State will recommend seven years on each count to run consecutive, for a total of fourteen years. Both sides free to argue following a S.A.R.<sup>3</sup> The remaining counts to be dismissed. The State agreed not to oppose I.T.C.<sup>4</sup> if it's recommended." Tr. 26. Mr. Roberts indicated he understood and counsel did not object. Tr. 26.

---

<sup>3</sup> Sentencing Assessment Report. Tr. 31.

<sup>4</sup> The parties refer to "I.T.C." throughout the plea and sentencing transcript. It is a reference to the Department of Corrections' 120-

day institutional treatment program that is used in conjunction with Section 559.115.

Mr. Roberts, in his amended post-conviction motion filed under Rule 24.035, alleged that he had a different plea agreement with Assistant Prosecuting Attorney William Bryant than the one stated by Assistant Prosecuting Attorney Pat King at the guilty plea hearing. L.F. 15, 16, 21.

Mr. Roberts' motion stated that by letter dated August 1, 2006, plea counsel wrote to him: "I got you an offer for fourteen (14) years with no opposition to your receiving drug and alcohol treatment." L.F. 16. Mr. Roberts pleaded that a memo to plea counsel's file regarding plea negotiations with prosecutor William Bryant, dated August 24, 2006, states that:

This case is set for trial in October and on for plea on 8/25/06. The offer is on for seven (7) and seven (7) consecutive for a total of fourteen (14). ~~No opposed probation upon a favorable pre-sentence investigation.~~<sup>5</sup> No opposed 120 intensive treatment program.

---

<sup>5</sup> The sentence, "No opposed probation upon a favorable pre-sentence investigation" had a handwritten line drawn through it.

L.F. 16. Mr. Roberts pleaded that he agreed to plead guilty based on his understanding that the state would not oppose 120-day drug treatment pursuant to Section 559.115 with a 14-year backup sentence, consistent with both the letter and note to file. L.F. 21.

At sentencing on October 20, 2006, the following conversation took place between the Court, the prosecutor, and plea counsel regarding confusion over the plea agreement:

THE COURT: Let the record reflect that I have reviewed this [report] prior to today, subject to corrections or comments. The report has recommended that probation be denied.

Any comment the State wishes to make on the report itself or disposition.

MR. KING: Yes, your Honor. I am going to recommend that you sentence Mr. Roberts to seven years on Count I, seven years on Count II, all consecutive, for a total sentence of fourteen years in the Department of Corrections.

I do not see I.T.C. recommended.

MR. DUDLEY: Judge, I had I.T.C. as part of my deal with Mr. Bryant.

MR. KING: I don't see it recommended, though.

MR. DUDLEY: It wasn't recommended. It was not oppose.

MR. KING: It was not recommended.

MR. DUDLEY: Well, that's true.

THE COURT: Yes, it's not a recommendation that was made by the probation office.

I do think there is a note here that indicates that it's – that this sentence is to run concurrent with any sentence he may have received in Wayne County. And I don't know if he's received that sentence or not.

MR. DUDLEY: I could be glad to address and clarify things, Judge.

THE COURT: Well, there was a reference that he was to enter a plea yesterday, I believe, in Wayne County. Did that take place?

MR. DUDLEY: He pled guilty and was sentenced to ten years and was sentenced to 120-day with I.T.C.

THE COURT: Well, there is a difference here, because it was not recommended in this report. I want to make sure. Bottom of page three it does say, "bed date, institutional bed date."

But they do that. They get the date. But this is not recommended.

MR. DUDLEY: His bed date has been scheduled for about two months already, Judge.

MR. KING: Well, Judge if you interpret that to mean they are recommending it. And, you know, --

THE COURT: No, I do not, because it would be marked under this second box where it says, "deny probation, consideration for institutional program placement." I believe this is clearly just a deny probation recommendation.

MR. KING: Well, that's the way I saw it, Judge.

THE COURT: But I think they give you a bed date in case I want to do something else. And I just wanted to make sure that that was clear, that you don't think that that is recommendation for I.T.C., because it's not.

MR. KING: Well, all I'll say for the record, Judge, the plea agreement is that we would not oppose it if it is recommended.

THE COURT: And it is not. Anything you wish to say on behalf of the defendant?

Tr. 45-47.

Mr. Roberts pleaded in his motion that based upon communications with his lawyer (L.F. 15-16), he reasonably believed that in exchange for his plea of guilty the state would not oppose 120-day institutional treatment under Section 559.115. L.F. 21.

He pleaded that plea counsel's comments at sentencing, as well as testimony and letters and notes in counsel's file, would have demonstrated that Mr. Roberts' understanding of the plea agreement was that the state would not oppose 120-day institutional treatment. Tr. 45. He pleaded that this expectation was contrary to how the prosecutor characterized the agreement at the plea hearing, and contrary to what happened at sentencing. Tr. 44-55. Instead, the State argued against 120-day institutional treatment, and for a 14-year term of imprisonment. Tr. 45-49.

Mr. Roberts pleaded that consistent with plea counsel's statements at sentencing that, "Judge, I had I.T.C. as part of my deal with Mr. Bryant."

(Tr. 24), had a hearing been held in this case, plea counsel would have testified that it was his understanding with Mr. Bryant that that in exchange for the plea of guilty the state would not oppose Mr. Roberts' argument for institutional drug treatment. L.F. 21. In a related claim, Mr. Roberts alleged that plea counsel was ineffective for not objecting at the group plea hearing when the state announced a different plea agreement than what counsel had told Mr. Roberts, or not asking the court to allow Mr. Roberts to withdraw his plea. L.F. 22-24.

In its findings, the motion court stated that Mr. Roberts' claims were "utterly without merit" and denied Mr. Roberts' first claim that his plea was unknowing and involuntary based on a breached plea agreement, finding that the claim was "refuted by the record" made at the group plea of guilty because Mr. Roberts responded affirmatively when the group was asked if they understood their plea agreement, and indicated he understood his plea agreement and had no questions about it. L.F. 49.

Regarding the second claim in the amended motion, that trial counsel should have objected to the prosecutor's erroneous statement of the plea agreement at the group plea because it was different than what he had told Mr. Roberts, the motion court found that Mr. Roberts "gets nowhere" with this claim because the plea agreement "was honored." L.F. 51.

Movant timely filed a Notice of Appeal of this judgment. L.F. 54.  
Additional facts will be set forth in the Argument portion of this brief to  
minimize repetition.

## **POINTS RELIED ON**

**I - The motion court clearly erred in denying this Rule 24.035 post-conviction motion with no hearing, in violation of Mr. Roberts' right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 10 of the Missouri Constitution, because a hearing would have shown that Mr. Roberts' agreement with the State of Missouri was that the State would not oppose institutional drug treatment pursuant to Section 559.115. Instead, during a group plea hearing with eight other unrelated criminal defendants, a different prosecutor in the office erroneously stated the plea agreement, and at sentencing, the prosecutor recommended that Mr. Roberts be incarcerated for 14 years. Mr. Roberts pleaded facts that, if true, would have demonstrated that Mr. Roberts' decision to plead guilty was induced by his reasonable understanding of the State's promise not to oppose institutional treatment, and by arguing against institutional treatment, the State did not honor the plea agreement, rendering the guilty plea unknowing and involuntary.**

*Evans v. State*, 28 S.W.3d 434 (Mo. App. S.D. 2000)

*North v. State*, 878 S.W.2d 66 (Mo. App. W.D. 1994)

*Proctor v. State*, 809 S.W.2d 32 (Mo. App. W.D. 1991)

*Shepard v. State*, 549 S.W.2d 550 (Mo. App. K.C.D. 1977)

U.S. Const. Amend. V

U.S. Const. Amend. XIV

Mo. Const Art. 1, Section 10.

**II – The motion court clearly erred in denying Mr. Roberts' Rule 24.035 post-conviction motion with no hearing, in violation of Mr. Roberts' right to due process of law and effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, Sections 10 and 18(a) of the Missouri Constitution, because a hearing would have shown that plea counsel was ineffective for failing to object to the State's misstatement of the plea agreement at the guilty plea hearing or request at sentencing that Mr. Roberts be allowed to withdraw his plea. Mr. Roberts pleaded facts that, if true, would have demonstrated that Mr. Roberts' decision to plead guilty was induced by the State's promise not to oppose institutional treatment, which was breached. Counsel's handling of this matter prejudiced Mr. Roberts and rendered the guilty plea unknowing and involuntary.**

*Evans v. State*, 28 S.W.3d 434 (Mo. App. S.D. 2000)

*Strickland v. Washington*, 466 U.S. 668 (1984)

U.S. Const. Amend. V

U.S. Const. Amend. VI

**U.S. Const. Amend. XIV**

**Mo. Const. Art. 1, Section 10**

**Mo. Const. Art. 1, Section 18(a)**

## **ARGUMENT**

**I - The motion court clearly erred in denying this Rule 24.035 post-conviction motion with no hearing, in violation of Mr. Roberts' right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, because a hearing would have shown that Mr. Roberts' agreement with the State of Missouri was that the State would not oppose institutional drug treatment pursuant to Section 559.115. Instead, during a group plea hearing with eight other unrelated criminal defendants, a different prosecutor in the office erroneously stated the plea agreement, and at sentencing, the prosecutor recommended that Mr. Roberts be incarcerated for 14 years. Mr. Roberts pleaded facts that, if true, would have demonstrated that Mr. Roberts' decision to plead guilty was induced by his reasonable understanding of the State's promise not to oppose institutional treatment, and by arguing against institutional treatment, the State did not honor the plea agreement, rendering the guilty plea unknowing and involuntary.**

### *Preservation and Standard of Review*

Appellate review of the denial of a Rule 24.035 motion is limited to whether the findings, conclusions, and judgment of the motion court are clearly erroneous. *Vernor v. State*, 894 S.W.2d 209, 210 (Mo. App. E.D. 1995); Rule 24.035(k). The motion court's findings, conclusion, and judgment are clearly erroneous if a review of the record leaves this Court with the definite and firm impression that a mistake has been made. *Moss v. State*, 10 S.W.3d 508, 511 (Mo. banc 2000).

This claim was included in Mr. Roberts' timely filed amended motion under Rule 24.035 and addressed in the motion court's findings of fact and conclusions of law denying that motion. L.F. 14-22, 48-50. The claim is preserved for appellate review.

### *Relevant Facts*

Plea counsel negotiated an agreement with the State of Missouri that Mr. Roberts would plead guilty in exchange for the state agreeing to a maximum of 14 years of imprisonment on two counts, and that the state would not oppose alternative sentencing under Section 559.115.<sup>6</sup> L.F. 15-19.

---

<sup>6</sup> Section 559.115 provides for a "call back" after 120 days and a term of probation after an offender successfully completes drug treatment while in prison. If an offender fails to successfully complete the drug treatment

By letter to Mr. Roberts dated August 1, 2006, plea counsel wrote, "I got you an offer for fourteen (14) years with no opposition to your receiving drug and alcohol treatment." L.F. 15-16. A written memo to plea counsel's file dated August 24, 2006, the day before the plea, states:

This case is set for trial in October and on for plea on 8/25/06.

The offer is on for seven (7) and seven (7) consecutive for a total of fourteen (14). ~~No opposed probation upon a favorable pre-sentence investigation.~~ No opposed 120 intensive treatment program.

MBD/llk

L.F. 16. Consistent with counsel's letter to Mr. Roberts explaining the plea agreement, the note to counsel's file indicated that the state would not oppose 120-day treatment under Section 559.155. L.F. 15-16.

At the plea, however, Mr. Pat King—not Mr. Bryant—appeared for the state, and recited the plea agreement differently, as, in part, "Both sides free to argue following a S.A.R. The remaining counts to be dismissed. The program, he must complete the "back up" sentence, which was negotiated here as, at most, 14 years. Alternatively, if the offender fails to complete the term of probation successfully, the court would retain jurisdiction to execute the sentence.

State agreed not to oppose I.T.C. if it's recommended." Tr. 26. Counsel did not object. Tr. 26. Mr. Roberts pleaded that this characterization of the agreement was different than what plea counsel told Mr. Roberts as reflected in plea counsel's notes and counsel's letter to Mr. Roberts. L.F. 16, 21.

Specifically, plea counsel's file reflects that the agreement was that in exchange for Mr. Roberts' guilty plea the state would not oppose the 120-day drug treatment sentencing option at Mr. Roberts' sentencing. L.F. 16. This is what plea counsel told Mr. Roberts, as reflected by correspondence and the note in plea counsel's file, as well as testimony that would have been presented at an evidentiary hearing. L.F. 16, 20, 21. The state breached this agreement, perhaps due to the fact that a different prosecutor other than Mr. Bryant, which whom negotiations took place, was in court that day.

The confusion was not revealed until sentencing. Tr. 44. The State argued for a 14-year term of incarceration because he "did not see [institutional treatment] recommended." Tr. 45. Plea counsel said that institutional treatment or I.T.C. was part of his agreement with Mr. Bryant. Tr. 45. The attorneys argued about what the plea agreement was—whether it was that the state would not oppose institutional treatment, or not

oppose it only if it was expressly “recommended” in the presentence investigation report prepared by the office of probation and parole. Tr. 45-46. The prosecutor argued for a sentence of incarceration of 14 years. Tr. 45-47, 49.

### *The Group Guilty Plea*

This case involves a guilty plea with nine unrelated criminal defendants pleading guilty under different plea agreements at the same time. The court called the criminal cases simultaneously. Tr. 1. The court advised the defendants collectively: “Now, your cases, as far as I know, don’t have anything to do with each other. The reason you’re all up here together, in a group is to save some time.” Tr. 3. Six of the defendants were represented by Mr. Blake Dudley, plea counsel. Tr. 1-2, 5. Two other defense attorneys were present and representing other defendants. Tr. 2. Going down the line of defendants, the judge asked each person how he or she pleaded and explained the charges against them and the elements of the crimes. Tr. 12-15, 18-15. The court addressed the remainder of the inquiries required under Rule 24.02 to the group, with each defendant responding in turn. Tr. 12, 15-18, 26, 31, 32, 33, 39, 40, 41, 42.

On May 16, 2006, the Missouri Court of Appeals called this practice in the St. Francois County Circuit Court “far from ideal.” *Guynes v. State*,

191 S.W.3d 80, 83 n.2 (Mo. App. E.D. 2006). In this post-conviction case, the motion court judge characterized the *Guynes* note regarding group guilty pleas as dicta and suggested that he did not intend to change his practice. L.F. 50. See also *Elverum v. State*, 232 S.W.3d 710 (Mo. App. E.D. 2007) (reiterating that simultaneous guilty pleas is a procedure “far from ideal and should be discontinued.”). Most recently, in *Castor v. State* 245 S.W.3d 909 (Mo. App. E.D. 2008), the Court of Appeals noted:

We note the trial court in this case conducted a group plea and chose to accept three guilty pleas with three unrelated defendants simultaneously. This procedure of addressing multiple defendants simultaneously was disapproved by this court in [*Guynes*]. We reiterate that this procedure is not preferred and should be discontinued. However, in this case, Movant's guilty plea proceedings directly refute any assertion that Movant's plea was involuntary.

*Id.*, at 915 n.8.

Rule 24.02(b) states that before entering a plea of guilty, “the court must address the defendant personally in open court” and inform the defendant of, and ensure he understands, certain rights.

Illustration of what the word “personally” means can be gleaned from common law, as Missouri’s requirement that an accused person enter a plea of guilty personally in open court appears to have roots in English and American common law. *See* Joseph Henry Beale, Jr., *A Treatise on Criminal Pleading and Practice*, 51 (1895) (“The accused must plead personally.”); Francis Wharton, *A Treatise on Criminal Pleading and Practice*, 485 (1889) (“The plea of guilty should be given by the defendant personally.”)

These sources do not elaborate on what it means to address a criminal defendant “personally,” however, they do suggest both a face-to-face and individual interaction with the court. This interpretation is consistent with a plain reading of the word personally, which is defined as, “through direct contact; in person; directly.” *Random House Dictionary of the English Language* (Unabridged Edition, 1966).

The concept of bringing persons accused of felonies to the bar in groups appears to be unknown at common law, as there is no reference to a similar practice in any Missouri case or other source that Appellant could locate. In fact, descriptions of common law criminal arraignments and pleas describe a procedure much like what is seen in typical courtrooms today, where a prisoner is brought to “the bar” individually and is

addressed by the court. *See* John Frederick Archibald, et al., *A Complete Practical Treatise on Criminal Procedure, Pleading, and Evidence*, 107-108 (1858). This is particularly the case when a defendant is pleading guilty to a felony. *Id.*, at 107 (“But the court will not dispense with the prisoner’s standing at the bar, whatever his station in life, particularly in the case of felony.”)

Other states have expressed strong disapproval of group guilty pleas in felony criminal cases but have not banned them. A recent case from the State of Tennessee found, for example, that an *en masse* guilty plea may be permissible:

when the trial court communicates the entire litany of rights and other required information to multiple defendants in the presence of their respective attorneys, so long as the number involved is not so great as to make individual understanding unlikely; and provided that each defendant is addressed individually to establish on the record the understanding and agreement of each defendant.

*Howell v. State*, 185 S.W.3d 319, 332 (Tenn. 2006) (internal citation omitted). “Therefore, while we caution trial courts against conducting group plea hearings, such hearings do not constitute *per se* violations . . .”

*Id.*; *State v. Verdin*, 845 So.2d 372, 376-377 (La. App. 1<sup>st</sup> Cir. 2003)

(“Although a personal colloquy between a trial judge and the defendant is preferred, group guilty pleas are not automatically invalid.”); *State v.*

*Deshotel*, 730 So.2d 994, 996 (La. App. 1<sup>st</sup> Cir. 1999) (“We note that this court does not approve of taking simultaneous guilty pleas from seventeen defendants. Such a practice too easily leads to invalid waivers of constitutionally protected rights.”)

Calling numerous felony criminal cases at the same time is a bad practice, for the reasons that the Missouri Court of Appeals and other courts have stated. There is a danger that important rights will be unknowingly or involuntarily waived through mistake or confusion. It adds an unnecessary layer of disorder to the process, making mistakes by all parties more likely and the record more unreliable.

Additionally, the practice of lining up criminal defendants in groups is degrading to those facing a felony conviction and long term of imprisonment, as well as damaging to the criminal justice system. It is antithetic to historic norms of criminal practice, where a certain degree of decorum has long been attached to the State depriving an individual of his liberty. And yet, this substantial change to the look of a felony guilty plea is

supported by no compelling interest. It is only for the convenience of the court and lawyers, as the judge in this case readily admitted. Tr. 3.

Convenience or expediency is far outweighed by the damage to the criminal justice system that would result if the individual guilty plea colloquy disappears. The public's trust in the criminal justice system will deteriorate if an assembly-line style of justice becomes the norm. However routine criminal cases become to the judges and lawyers involved, the system should never forget that felony criminal cases are serious matters to defendants, victims of crime, and their families. Felony criminal cases, because of the interests at stake for all parties involved, deserve undivided attention.

### *Plea Agreements*

A prosecuting attorney has the power to enter into a plea agreement. Rule 24.02(d). A plea agreement made by one assistant prosecuting attorney binds all others. *Burston v. State*, 698 S.W.2d 557, 559 (Mo. App. E.D. 1985). In formulating a plea agreement, the prosecuting attorney and the defendant should act fairly so that the reasonable expectations of both sides are met. *Schellert v. State*, 569 S.W.2d 735, 739 (Mo. banc 1978).

When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the

inducement or consideration, such promise must be fulfilled. *North v. State*, 878 S.W.2d 66, 67 (Mo. App. W.D. 1994) (prosecutor breached agreement to remain silent on sentence). "If a prosecutor fails to fulfill a promise which induced a guilty plea, [a] movant is entitled to relief." *Id.*; see also *Shepard v. State*, 549 S.W.2d 551 (Mo. App. K.C.D. 1977) (state breached the plea bargain agreement by making a recommendation as to sentences). "[Plea] agreements [must] be kept inviolate by the prosecutorial authorities." *Shepard*, 549 S.W.2d at 69. "Whenever the government breaches a plea agreement with respect to a sentence recommendation, . . . a substantive violation has occurred and at the least, resentencing before a different judge is required." *North*, 878 S.W.2d at 68, citing *Brunelle v. United States*, 864 S.W.2d 64, 65 (8th Cir. 1988); *United States v. McCray*, 849 F.2d 304, 305 (8th Cir. 1988) (when the government breaks its promise to remain silent at sentencing, resentencing is required).

"Where a plea bargain is based to a significant degree on a promise by the prosecutor, to the extent that it is part of the inducement or consideration for entering the plea, the promise must be fulfilled." *Stufflebean v. State*, 986 S.W.2d 189, 192 (Mo. App. W.D. 1999). If the promise is not fulfilled, the defendant must get relief in some form. *Id.* The

defendant may get either specific performance of the plea agreement or an opportunity to withdraw his guilty plea. *Proctor v. State*, 809 S.W.2d 32, 35 (Mo. App. W.D. 1991) (holding plea court did not err in ordering resentencing). The reviewing court has discretion to decide whether specific performance or an opportunity to withdraw is the most appropriate relief. *Id.*

*The Motion Court Clearly Erred*

The motion court's denial of Mr. Roberts' motion, with no hearing, was based on a few lines from the group plea of guilty in which the court asked Mr. Roberts if he understood the plea agreement:

THE COURT: Mr. King and Mr. Dudley, what plea bargain agreement do you have in Mr. Roberts' case?

MR. KING: On Counts I and II, the State will recommend seven years on each count to run consecutive, for a total of fourteen years.

Both sides to argue following an S.A.R. The remaining counts to be dismissed. The State agreed not to oppose I.T.C. if it's recommended.

MR. DUDLEY: That's correct, Judge.

COURT: Do you understand that agreement, Mr.

Roberts?

A: Yes, Sir.

COURT: Do you have any questions about it at all?

A: No.

Tr. 26.

However, it is unreasonable to expect Mr. Roberts to have immediately noted the difference between what his lawyer explained regarding the plea agreement, and what the prosecutor said at the plea hearing. The prosecutor's statement of the plea agreement was full of acronyms (S.A.R./I.T.C.) that seemed geared more toward expediency than allowing Mr. Roberts an opportunity to hear and understand the state's characterization of the plea agreement. Given the circumstances of this plea, it is likely that Mr. Roberts simply did not understand that what the prosecutor said was different than what his lawyer had previously explained to him.

And, significantly, the part of the transcript the court relied upon was the product of a hearing where all parties—the judge, prosecutor, and defense attorney—were attempting to juggle the fates of nine people with nine different charges and nine different plea agreements at the same time.

“It was not an ideal situation to ensure that the defendant understood the proceedings against him.” *Elverum* 232 S.W.3d at 716. It was also not an ideal situation for the plea agreements with the individual defendants—which all differed—to be accurately conveyed and honored.

Because Mr. Roberts had a "reasonable basis for believing that there was an agreement" he should be "given the benefit of the agreement he thought he had" in this case, or allowed to withdraw his plea. *Evans v. State*, 28 S.W.3d 434, 441 (Mo. App. S.D. 2000). Here, the record shows that not only was there such an agreement, but that it was Mr. Roberts' reasonable belief that there was an agreement that the state would not oppose 120-day drug treatment. That belief induced his guilty plea. *Stufflebean*, 986 S.W.2d at 192. If an evidentiary hearing had been granted, Mr. Roberts would have testified that based on communications with his lawyer, which are clearly documented in plea counsel's file, he believed before his guilty plea hearing that the agreement with the state was for a maximum of 14 years of imprisonment and that the state would stand silent and not oppose institutional treatment with the possibility of parole after 120 days. L.F. 21. He would have testified that he would not have pled guilty without that assurance. L.F. 21. This is not what happened at his sentencing. Tr. 44-55. The state in fact opposed 120-day institutional

treatment with backup time, and argued for a straight 14-year period of incarceration. Tr. 45-47.

Plea counsel's comments, as well as letters and notes in his file, would have demonstrated that the plea agreement with Mr. Bryant was that the state would not oppose 120-day institutional treatment. *See* Tr. 45 ("Judge, I had I.T.C. as part of my deal with Mr. Bryant."). Had a hearing been held, plea counsel would have testified that it was his understanding with Mr. Bryant that that in exchange for the plea of guilty the state would recommend a cap of 14 years of imprisonment and would stand silent and not oppose 120-day institutional treatment. L.F. 21.

Mr. Roberts pleaded facts that, if true, would entitle him to relief. Therefore, an evidentiary hearing was required. *State v. Driver*, 912 S.W.2d 52, 55 (Mo. banc 1995). If a hearing had been held in this case, Mr. Roberts would have presented clear evidence from plea counsel's file that would show, in black and white, what plea counsel told Mr. Roberts regarding his plea agreement. L.F. 16. A hearing would have shown that what plea counsel told Mr. Roberts differed in a material way from what the prosecutor recited at the group hearing. L.F. 16, 21. The promise that the state would stand silent and not oppose institutional treatment induced Mr. Roberts' plea, but was not honored. *North*, 878 S.W.2d at 67.

Even if the agreement had been how the prosecutor stated, Mr. Roberts is still entitled to relief. In *Evans*, 28 S.W.3d 434 (Mo. App. S.D. 2000), a written plea agreement reflected that the state “would not recommend a sentence in this case.” *Id.*, at 436. At sentencing, however, the state argued for two life sentences. *Id.* A hearing on the post-conviction motion revealed that there was no agreement that the state would stand silent, but that under the circumstances, the defendant could have reasonably believed there was. *Id.*, at 440. The Court found that regardless of what the plea agreement was, that if the defendant has a reasonable basis for believing there was a certain agreement, and should “receive the benefit of the agreement he thought he had.” *Id.*, at 441. See also *North*, 878 S.W.2d 66 (Mo. App. W.D. 1994). Alternatively, depending on the circumstances, a court may allow the defendant to withdraw his plea completely. *Proctor*, 809 S.W.2d at 35.

The motion court’s dismissive treatment of Mr. Roberts, even though there was a genuine misunderstanding between him, his lawyer, and the prosecutor’s office, is clearly erroneous. It is appropriate to give a person like Mr. Roberts the benefit of the doubt in this case, given that the motion court skated so close to the precipice by accepting Mr. Roberts’ plea to these serious charges assembly-line-style, where there is a high likelihood of that

a misunderstanding could happen. Notably, the confusion finally revealed itself at sentencing, when plea counsel was not representing multiple defendants simultaneously, and Mr. Roberts' case finally had the undivided attention of the court and both lawyers. Tr. 1-2, 44-49.

At the very least, Mr. Roberts was entitled to an evidentiary hearing to present evidence regarding the discrepancy. Based on the facts pleaded in the motion, it was clear that there was confusion between defense counsel and the state as to whether the state would stand silent on the issue of sentence.

### *Conclusion*

Collective guilty pleas to felonies are contrary to a dignified and ordered system of justice. Rule 24.02 arguably does not allow the practice. Even if the Rules do not forbid it, if a court chooses to take pleas in this manner, it assumes the risk that there will occasionally be a misunderstanding that renders a guilty plea invalid. A court should not take group guilty pleas, done solely for its own convenience, and then dismiss a very credible post-conviction claim that there was a misunderstanding or a mistake that affected the voluntariness of a guilty plea.

Mr. Roberts prays that this Court will remand this case to St. Francois County for an evidentiary hearing.

**II – The motion court clearly erred in denying Mr. Roberts' Rule 24.035 post-conviction motion with no hearing, in violation of Mr. Roberts' right to due process of law and effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, Sections 10 and 18(a) of the Missouri Constitution, because a hearing would have shown that plea counsel was ineffective for failing to object to the State's misstatement of the plea agreement at the guilty plea hearing or request at sentencing that Mr. Roberts be allowed to withdraw his plea. Mr. Roberts pleaded facts that, if true, would have demonstrated that Mr. Roberts' decision to plead guilty was induced by the State's promise not to oppose institutional treatment, which was breached. Counsel's handling of this matter prejudiced Mr. Roberts and rendered the guilty plea unknowing and involuntary.**

*Preservation and Standard of Review*

Appellate review of the denial of a Rule 24.035 motion is limited to whether the findings, conclusions, and judgment of the motion court are clearly erroneous. *Vernor v. State*, 894 S.W.2d 209, 210 (Mo. App. E.D.

1995); Rule 24.035(k). The motion court's findings, conclusion, and judgment are clearly erroneous if a review of the entire record leaves this Court with the definite and firm impression that a mistake has been made. *Moss v. State*, 10 S.W.3d 508, 511 (Mo. banc 2000). This claim was included in Mr. Roberts's timely filed amended motion under Rule 24.035 and addressed in the motion court's findings of fact and conclusions of law denying that motion. L.F. 22-25, 50. The claim is preserved for appellate review.

*Counsel Handled This Case in an Ineffective Manner*

Mr. Roberts pleaded that plea counsel was ineffective for failing to object at plea and sentencing to the state's mischaracterization of the agreement that had been reached, and failing to request at sentencing that Mr. Roberts be allowed to withdraw his plea on the grounds that he had pled guilty pursuant to an agreement that had not been honored. L.F. 22-25.

Mr. Roberts pleaded that if an evidentiary hearing was granted, Mr. Roberts will testify that based on communications with his lawyer, he believed before his guilty plea hearing that in exchange for his plea of guilty the state would recommend a cap of 14 years of imprisonment and would stand silent and not oppose 120-day institutional treatment. L.F. 23. Mr.

Roberts pleaded that is not what happened at his sentencing. L.F. 23; Tr. 44-55. He pleaded that plea counsel's comments at sentencing, as well as letters and notes in plea counsel's file, would demonstrate that his reasonable understanding of the plea agreement was that the state would not oppose 120-day institutional treatment. L.F. 23, 24; Tr. 45.

Plea counsel would have testified at a hearing that it was his understanding with Mr. Bryant that that in exchange for the plea of guilty the state would stand silent and not oppose institutional treatment with the possibility of parole after 120 days. L.F. 23. This is consistent with what plea counsel said at sentencing. Tr. 45.

If these facts were proven after a hearing they would have demonstrated that counsel handled the misunderstanding regarding the plea agreement in an ineffective manner. To prevail on a claim of ineffective assistance of counsel, Mr. Roberts must show that his plea attorney failed to exercise the customary skill and diligence a reasonably competent attorney would have exercised under similar circumstances, and that he was prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Reasonably competent counsel would have objected when the terms of the plea agreement were misstated at the plea hearing. Tr. 26. Notably,

plea counsel was attempting to represent six different criminal defendants at the same time during this group guilty plea hearing. Tr. 1-2.

Reasonably competent counsel would have also, when he realized that Mr. Roberts had pleaded guilty pursuant to an agreement that had not materialized at sentencing, would have alerted the court and requested the court's permission for Mr. Roberts to withdraw his plea. Rule 24.02. Instead, he simply told the court that he had "I.T.C." or institutional treatment as part of his deal with Mr. Bryant, and argued with the prosecutor over the substance of the agreement with Mr. Bryant. Tr. 45.

Whether the misunderstanding in this case was due to a miscommunication in the prosecutor's office is irrelevant if Mr. Roberts pleaded guilty pursuant to a plea bargain that was not honored, and if that plea bargain was the inducement for the guilty plea. *Stufflebean*, 986 S.W.2d at 192.

Under these circumstances, Mr. Roberts should have been "given the benefit of the agreement he thought he had." *Evans v. State*, 28 S.W.3d at 441. Counsel should have spoken up at the plea hearing regarding the difference between Mr. King's statement of the agreement and what he had negotiated. Mr. Roberts was clearly prejudiced by counsel's ineffectiveness because he waived his rights and pleaded guilty and yet lost the benefit of

his bargain with the state. Plea counsel's ineffectiveness in not either objecting to the state's characterization of the plea agreement at the plea hearing, or seeking relief for Mr. Roberts at sentencing after the confusion revealed itself, prejudiced Mr. Roberts and warrants withdrawal of this guilty plea, or resentencing with the agreement that Mr. Roberts reasonably believed existed. *Proctor*, 809 S.W.2d at 35.

Mr. Roberts has been denied his right to due process of law and his right to his plea agreement in violation of his constitutional rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. He prays that this Court will remand this case to St. Francois County for an evidentiary hearing.

## **CONCLUSION**

This case must be remanded to St. Francois County for an evidentiary hearing on Mr. Roberts' claims. Mr. Roberts pleaded facts that, if true, would have shown that the state did not honor what Mr. Roberts reasonably believed was his plea agreement with the state, rendering the plea unknowing and involuntary. He also pleaded facts that, if true, would show that his lawyer was ineffective in his handling of the problem. He prays that this Court will remand this case to St. Francois County for an evidentiary hearing on both of these claims.

Respectfully submitted,

---

Jessica M. Hathaway  
Missouri Bar No. 49671  
Office of the State Public Defender  
1000 St. Louis Union Station, Ste 300  
St. Louis, Missouri 63103  
314.340.7662  
314.340.7685  
jessica.hathaway@mspd.mo.gov

ATTORNEY FOR GARY G. ROBERTS

## **CERTIFICATE OF SERVICE AND COMPLIANCE**

Pursuant to Missouri Supreme Court Rules 84.06(g) and 83.08(c), I hereby certify that on this 15<sup>th</sup> day of October, 2008, two true and correct copies of the foregoing brief and a floppy disk containing the foregoing brief were mailed postage prepaid to Ms. Jamie P. Rasmussen of the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the word count limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, using Lucida Bright Serif 14-point font. The word-processing software identified that this brief contains **7,248** words. The enclosed diskette has been scanned for viruses with a currently updated version of McAfee VirusScan Enterprise 7.1.0 software and found to be virus-free.

---

Jessica M. Hathaway  
Missouri Bar 49671  
1000 St. Louis Union Station #300  
St. Louis, Missouri 63103  
314.340.7662  
314.340.7685  
jessica.hathaway@mspd.mo.gov

**APPENDIX**

Findings of Fact, Conclusions of Law and Judgment ..... A1  
Section 559.115 ..... A5  
Rule 24.02 ..... A9