

No. SC84579

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IN THE SUPREME COURT OF MISSOURI

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In re SHANE BEGGS,  
Petitioner,

vs.

DAVE DORMIRE, Superintendent,  
Jefferson City Correctional Center,  
Respondent.

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PETITION FOR WRIT OF HABEAS CORPUS

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**PETITIONER'S SUBSTITUTE BRIEF**

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## **JURISDICTIONAL STATEMENT**

This is an original proceeding based on a petition for a writ of habeas corpus challenging the lawfulness of petitioner's confinement in the Jefferson City Correctional Center, in Cole County, Missouri, under the due process clauses of the United States Constitution and the Missouri Constitution. After the Circuit Court of Cole County and the Western District of the Missouri Court of Appeals denied the petition, it was filed in this Court on June 24, 2002, and this Court issued its show cause order on August 27, 2002. Jurisdiction is proper in this Court under the Missouri Constitution, Article I, section 12, and Article V, section 4, and under section 532.020, RSMo 2000, and under Civil Rule 91.

## STATEMENT OF FACTS

Petitioner Shane Beggs (Beggs) was charged with the class C felony of tampering in the first degree in the Circuit Court of Polk County, Missouri, for knowingly and without the consent of the owner possessing an automobile. (S. 163).<sup>1</sup> The first amended felony complaint alleged that Beggs was a prior and persistent offender punishable by sentence to an extended term of imprisonment under sections 558.016, and 557.036, RSMo 2000 in that he had been convicted of five felonies committed at different times. (S. 161-62). Those felonies included tampering in the first degree, stealing, possession of a controlled substance, and burglary in the second degree. (S. 161-62). Beggs waived his right to a preliminary hearing. (S. 158).

On July 15, 1999, Beggs entered a plea of guilty to the charge, and based on the plea the court found him guilty. (S. 45, 99). The audio tape containing the recording of Beggs' July 15, 1999 guilty plea proceeding, including, presumably, the terms of the plea and the factual basis therefor, is not available for transcription because it has been lost or misplaced, apparently by the Polk County Circuit Clerk's Office. (S. 42). On July 21, 1999, the court sentenced Beggs to seven years confinement in the Missouri Department of Corrections, which is the

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<sup>1</sup> Petitioner's previously-filed paginated Supplement to the Petition, which contains documents relevant to determining the facts in this proceeding, is cited herein as "S."

maximum sentence for a class C felony under 558.011.1(3), unless, of course, the offender is sentenced as a prior persistent offender. (S. 157). The court sentenced Beggs after accepting the plea bargain between Beggs and the prosecuting attorney. (S. 46-47). The plea agreement contemplated, in part, that Beggs be sentenced under section 217.362, RSMo 2000, pertaining to long-term treatment of chronic nonviolent offenders with substance addictions; and Beggs was in fact sentenced under the statute. (S. 46-47). To that end, the court determined that Beggs was a chronic nonviolent offender with serious substance addictions, as is required for sentencing under the statute. (S. 49-50).

The statute also requires that the defendant cannot have pleaded guilty to or been convicted of a dangerous felony as defined in section 556.061. That statute defines dangerous felony as the felonies of arson in the first degree, assault in the first degree, forcible rape, forcible sodomy, kidnapping, murder in the second degree and robbery in the first degree. Beggs has not pleaded guilty to nor been convicted of any of those felonies.

Concurrently with the Polk County case, Beggs pleaded guilty and was sentenced under 217.362 in seven other cases in two other courts, five in Greene County, and two in Jasper County. (S. 72-83; 85-86). The charges in those cases included stealing, tampering in the first degree, robbery in the second degree, and possession of a controlled substance. (S. 85-86). The Polk County and Greene County prosecuting attorneys communicated with each other about Beggs' cases, and the Greene County prosecutor may have considered dismissing the charges

against Beggs. (S. 17). The record does not reveal the precise nature or extent of the dealings between the prosecutors.

After sentencing in the various cases, Beggs was initially received in the Jefferson City Correctional Center (JCCC) on September 30, 1999, but because of conflicting sentencing, through no fault of his own, he was not admitted into the long-term drug program until July 31, 2000, after each of the courts amended its judgment and sentence to correct the conflict. (S. 84, 87).

Beggs successfully completed the program in about one year. (S. 88, 94-97). Counselors who treated Beggs in the Intensive Therapeutic Community (ITC) at JCCC stated that he “. . . showed good character traits of leadership, and role-modeling abilities . . .” and “. . . responded well to the treatment methods utilized by staff and the I.T.C. Program.” (S. 95-96). The Board of Probation and Parole (Board) observed that the ITC summary report of Beggs’ participation in the program shows Beggs “. . . is hard working and courageous and his efforts definitely paid off.” (S. 88). Ultimately, the Board wrote “[t]he recommendation is for probation in this case as the subject has completed the long term drug program as stipulated by the courts.” (S. 88).

The Circuit Courts of Jasper and Greene Counties followed the Board’s recommendation and immediately granted probation to Beggs in July 2001, within days of when the report was received by the courts. (S. 82-83, 85-88, 101-05, 116). The Circuit Court of Polk County, however, waited a month, and then on August 20, 2001, without a hearing or any explanation, denied probation for

Beggs despite the Board's recommendation. (S. 100). Then on September 24, 2001 the court finally held a hearing, after Beggs filed a motion requesting probation under section 217.362. (S. 100, 52-64). At that hearing, the prosecuting attorney informed the court as follows:

Your honor, I will also point out in the interest of justice. It was the State's position when we entered into this plea bargain, and we understood completely, that when Mr. Beggs entered his plea of guilty back in 1999, that he would be placed in a program for two years and then if he successfully completed that program he would be authorized or the Court could pull him back out.

As far as the number of years that Mr. Beggs has been off the street, the state feels obligated to point out that he has been off the street for two years, which is what we expected to begin with.

(S. 58-59). But after noting Beggs' eight convictions, which qualified him for sentencing under the statute in the first place (the five from Greene County and the two from Jasper County which were entered concurrently with the one in Polk County), the court again denied probation, stating:

. . . the Court finds that placement of this Defendant on probation after reviewing his file, convictions and numerous failures to appear in the various counties would be an abuse of discretion, and, therefore, declines to grant probation.

(S. 61-62). All of the factors the court relied on in determining the Board abused its discretion by recommending probation, are occurrences which predate Beggs' sentencing under section 217.362, and his enrollment in and successful completion of the treatment program.

The Circuit Court of Cole County, and the Western District of the Missouri Court of Appeals denied Beggs' petition for a writ of habeas corpus (S. 16, 30), and this Court thereafter issued its show cause order on August 27, 2002. (S. 12). The undersigned counsel was appointed to represent Beggs in this proceeding, by this Court's Order issued September 26, 2002. Leave of Court was thereafter granted on September 27, 2002 for the filing of this Substitute Brief, and this Court also extended the deadline for filing this Brief to October 26, 2002.

**POINTS RELIED ON**

**I. Petitioner is entitled to a judgment that he is unlawfully confined and an order granting him a writ of habeas corpus and releasing him from respondent's custody because his confinement is in violation of his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 10 of the Missouri Constitution in that 1) his guilty plea was entered involuntarily in light of positive representations by the state inducing him to reasonably believe that he would be released on probation if he pled guilty and served confinement of twenty-four months during which he successfully completed a long-term substance-abuse treatment program, which he did; and 2) the state has lost the record of the July 15, 1999 plea hearing containing the state's positive representations.**

Brown v. State, 66 S.W.3d 721 (Mo. banc 2002)

State ex rel. Nixon v. Jaynes, 63 S.W.3d 210 (Mo. banc 2001)

State ex rel. Nixon v. Jaynes, 61 S.W.3d 243 (Mo. banc 2001)

Skillicorn v. State, 22 S.W.3d 678 (Mo. banc 2000)

Civil Rule 55.09

Civil Rule 91.09

**II. Petitioner is entitled to a judgment that he is unlawfully confined and an order granting him a writ of habeas corpus and releasing him from respondent's custody because his confinement is in violation of his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 10 of the Missouri Constitution in that petitioner successfully completed the long-term substance-abuse treatment program under section 217.362, RSMo 2000, and the Board of Probation and Parole recommended petitioner receive probation, but the sentencing court erroneously determined that the Board abused its discretion in recommending probation, and therefore unlawfully denied probation in violation of the statute's mandate.**

Lewis v. Gibbons, 80 S.W.3d 461 (Mo. banc 2002)

State ex rel. Dreer v. Pub. Sch. Ret. Syst., 519 S.W.2d 290 (Mo. Div. I 1975)

Section 217.362, RSMo 2000.

## ARGUMENT

**I. Petitioner is entitled to a judgment that he is unlawfully confined and an order granting him a writ of habeas corpus and releasing him from respondent's custody because his confinement is in violation of his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 10 of the Missouri Constitution in that 1) his guilty plea was entered involuntarily in light of positive representations by the state inducing him to reasonably believe that he would be released on probation if he pled guilty and served confinement of twenty-four months during which he successfully completed a long-term substance-abuse treatment program, which he did; and 2) the state has lost the record of the July 15, 1999 plea hearing containing the state's positive representations.**

This is an original writ proceeding, so there is no applicable standard of review to set forth, as is otherwise required by Rule 84.04(e).

### **A. Habeas Corpus is the proper mechanism for seeking relief**

As an initial procedural matter, a petition for a writ of habeas corpus is the appropriate means of challenging the lawfulness of Beggs' confinement because a denial of probation is not appealable, see State v. Williams, 871 S.W.2d 450, 452 (Mo. banc 1994), and by the time the sentencing court denied probation on September 24, 2001, more than two years after Beggs' sentencing and delivery to the JCCC, the time for seeking post-conviction relief challenging the validity of the guilty plea had expired, thus Beggs could not have timely known of the

existence of his claim herein. See Rule 24.035(b); see also, State v. Norsworthy, 71 S.W.3d 610, 611-12 (Mo. banc 2002) (citing Brown v. State, 66 S.W.3d 721, 730-31 (Mo. banc 2002) (holding habeas corpus is the mechanism to seek relief when petitioner asserts prejudice from a procedural default caused by something external to the defense)).

## **B. Beggs' guilty plea was involuntary**

### **1. Legal framework**

The essential issue is whether Beggs' guilty plea was knowingly and voluntarily made. See Boykin v. Alabama, 395 U.S. 238, 242 (1969). If the record does not adequately disclose that the defendant knowingly and voluntarily entered his plea of guilty, the conviction should be reversed. See id. at 244 (explaining “. . . there was reversible error ‘because the record does not disclose that the defendant voluntarily and understandingly entered his pleas of guilty’”) (citation omitted).

A plea is entered involuntarily when the defendant is reasonably mistaken about an essential term of the plea agreement. State ex rel. Nixon v. Jaynes, 61 S.W.3d 243, 245 (Mo. banc 2001). “In evaluating a claim that that a guilty plea is based on a mistaken belief about the sentence and plea agreement, ‘the test is whether a reasonable basis exists in the record for such belief.’” Brown, 66 S.W.3d at 731 (quoting McNeal v. State, 910 S.W.2d 767, 769 (Mo. App. 1995)). “A reasonable mistake exists only if the belief is reasonably based on positive representations upon which the defendant is entitled to rely.” Id.

## **2. Beggs' specific claim and the missing record**

Here, Beggs' plea was involuntary because, due to the state's positive representations, he was reasonably mistaken in his belief that he would be granted probation if he completed the long-term drug program and received the Board's recommendation of probation. (S. 27, 3) (Beggs' writ petition and response to the answer assert that his belief about probation was induced by positive representations made by the plea court). See State v. Roach, 447 S.W.2d 553, 556 (Mo. Div. I 1969) (holding plea is involuntary if defendant reasonably believed he would get probation). In that connection, however, the state has severely impeded Beggs' ability to argue his case by losing or misplacing the audio tape recording of the July 15, 1999 plea hearing, when Beggs entered his plea. (S. 42). See Rule 24.03(a) (requiring the court reporter to "[r]ecord accurately all courts [sic] proceedings in connection with the plea").

Under Rule 24.02(d)(2), the terms of Beggs' plea agreement, including the state's or trial court's positive representations about probation, were necessarily disclosed in open court. But because of the state's mistake it is impossible to know precisely what positive representations were offered to induce Beggs' plea. To be sure, the court sentenced Beggs under section 217.362 (S. 47), so sentencing under the statute was obviously part of the offer. The issue, however, is whether, in conjunction with that sentence, Beggs also was told he "could" or "would" get probation after completing the treatment program. The former would not entitle Beggs to relief; the latter indisputably would.

Perhaps the best that can be done now is to consider the prosecutor's comments about his understanding of the plea and other evidence from the record filed in this Court (discussed in subsection 3 below), and then determine by a preponderance of the evidence what terms the state offered Beggs to induce his plea. See State v. Shafer, 969 S.W.2d 719, 727-28 (Mo. banc 1998) (preponderance of the evidence standard applies to prove plea was involuntary). On that point, however, note that the state, and not Beggs, has the initial burden of producing evidence showing that Beggs' plea was voluntary and not in violation of due process. Id. at 727 (explaining "[w]hen [petitioner] claims that a . . . guilty plea violates due process, the state bears the burden of producing evidence . . ." to rebut the claim). Of course, if the state meets its burden of production, Beggs would still, in all likelihood, be fundamentally impaired in his ability to produce evidence by the state's loss of the July 15, 1999 record.

In any event, the usual remedy where the record is inadequate through no fault of the parties is to reverse the judgment and remand for a new proceeding (at least in the context of appeals, and there is no reason that rule should not apply in habeas proceedings). See, e.g., Skillicorn v. State, 22 S.W.3d 678, 688 (Mo. banc 2000) (reversal warranted if appellant exercised due diligence to correct record, and is prejudiced by the incomplete nature of the record); State v. Middleton, 995 S.W.2d 443, 466 (Mo. banc 1999) (accord); Jackson v. Director of Rev., 60 S.W.3d 707, 708 (Mo. App. 2001) (trial court lost tape of the proceedings); Oyler v. Director of Rev., 10 S.W.3d 226, 228 (Mo. App. 2000).

Thus, on the basis of the missing plea-hearing record alone, this Court should reverse and enter a judgment declaring Beggs' confinement unlawful.

**3. Although the state lost or misplaced the record of the July 15, 1999 proceeding, there is enough evidence of the terms of Beggs' guilty plea to support a judgment that Beggs' confinement is unlawful.**

The specific claim is that Beggs' plea was involuntary because it was induced by positive representations which proved to be false. Again, Beggs is unable to provide this Court with the best record of the state's positive representations, the transcript of the July 15, 1999 hearing, through no fault of his own, but the record filed with this Court contains enough other evidence to support that claim by a preponderance of the evidence.

First, at the September 24, 2001 proceeding (when the sentencing court denied probation) the prosecutor's comments show that Beggs was induced to reasonably believe he would get probation if he pled guilty and completed the substance abuse program. As the prosecuting attorney himself explained to the court:

Your honor, I will also point out in the interest of justice. It was the State's position when we entered into this plea bargain, and we understood completely, that when Mr. Beggs entered into his plea of guilty back in 1999, that he would be placed in a program for two years and then if he successfully completed that program he would be authorized or the Court could pull him back out.

As far as the number of years that Mr. Beggs has been off the street, the State feels obligated to point out that he has been off the street for two years, which is what we expected to begin with.

(S. 58-9) (emphasis added). The state admits that it expected Beggs to get probation after two years -- like he did in Greene and Jasper counties. The reasonable inference to be drawn is that the state's expectation that Beggs would only be "off the street" for two years was communicated to Beggs, causing him to believe he would, indeed, be out in two years, and thereby inducing him to plead guilty.

Further, the writ petition itself asserts that "[Beggs'] belief that he would receive probation after completing long-term treatment is reasonably based on positive representations made by the trial court. . . ." (S. 27) (Beggs also alleges substantially the same thing in his response to the answer, at S. 3).

Significantly, the state's answer does not deny this averment, as required by Rule 55.09. And the answer is a mandatory responsive pleading under Rule 91.09, which provides the answer ". . . shall be directed to the petition. . . ." Accordingly, Beggs' averment that the court told him he would get probation is deemed admitted, and is competent evidence in this Court. See Rule 55.09 ("[s]pecific averments in a pleading to which a responsive pleading is required . . . are admitted when not denied in the responsive pleadings"); see also, State ex rel. Nixon v. Jaynes, 63 S.W.3d 210, 216 (Mo. banc 2001) (explaining "[p]etitions for

habeas corpus are civil proceedings and, as Rule 91 indicates, are governed by the rules of civil procedure”).

In light of the foregoing evidence, Beggs has proved by a preponderance of the evidence that his guilty plea was induced by the state’s positive representations that he would get out on probation after he completed the long-term treatment program. Yet, he remains unlawfully confined in the JCCC. Therefore, this Court should enter a judgment finding that Beggs’ confinement is unlawful, and forthwith order Beggs discharged. Rule 91.18.

#### **4. The sentencing court violated Rule 24.02(e)**

Further muddying the water, when accepting Beggs’ plea the court believed “Beggs pled guilty to the charge of witness tampering on July 15.<sup>th</sup>” (S. 45) (emphasis added). The court accepted Beggs’ guilty plea without correcting that mistake and without any reference to the actual charge alleged in the felony complaint, tampering with an automobile (witness tampering can be either a class C felony or class A misdemeanor under section 575.270.3). In fact, rather than correct the error, the court compounds it by asking Beggs if he pled guilty “. . . to the charge of class B felony tampering (indiscernible)” (S. 47) (emphasis added), instead of the class C felony tampering he was charged with. (S. 161).

Thus, as far as the incomplete record shows, the plea court accepted Beggs’ guilty plea, convicted him, and imposed sentence without even comprehending what specific crime Beggs was actually charged with and pled guilty to. Worse, the court did all of that without discussing the facts supporting any charge to

establish that Beggs understood the nature of the crime and charges against him. That much is affirmatively required by law. See Rule 24.02(e) (commanding “[t]he court shall not enter a judgment upon a plea of guilty unless it determines that there is a factual basis for the plea”); see also, Brown v. State, 45 S.W.3d 506, 508 (Mo. App. 2001) (plea proceeding must show defendant understood the nature and elements of the charge to which he pled guilty).

Without question, the mere fact that Beggs was apparently not even apprised of the nature and elements of the crime charged is enough to vitiate the voluntary and knowing character of the plea, and alone merits relief. But Beggs’ claims about the lack of a factual basis for the plea, meritorious or not, are time-barred under Rule 24.035(b). Therefore much of this subsection 4 of the Argument section merely serves to highlight the variety and pervasiveness of the judicial improprieties surrounding Beggs’ conviction.

But, as noted above, Beggs has proved by a preponderance of the evidence that his guilty plea was induced by positive representations that he would get out on probation after he completed the long-term treatment program. Plus, the state has lost the record which would be the best evidence of the terms of Beggs’ plea. That mistake alone is sufficient to reverse Beggs’ conviction. Nonetheless, Beggs remains unlawfully confined in the JCCC. So, Beggs respectfully requests this Court’s judgment that he is unlawfully confined, and an order that he be discharged immediately.

**II. Petitioner is entitled to a judgment that he is unlawfully confined and an order granting him a writ of habeas corpus and releasing him from respondent's custody because his confinement is in violation of his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 10 of the Missouri Constitution in that petitioner successfully completed the long-term substance-abuse treatment program under section 217.362, RSMo 2000, and the Board of Probation and Parole recommended petitioner receive probation, but the sentencing court erroneously determined that the Board abused its discretion in recommending probation, and therefore unlawfully denied probation in violation of the statute's mandate.**

**A. This Court's role in applying section 217.362**

The following guideposts of statutory construction are well established, and quite familiar to this Court, but worth reiterating in each case: “. . . [T]he primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning.” Lewis v. Gibbons, 80 S.W.3d 461, 465 (Mo. banc 2002). When construing a statute, the Court must keep in mind the purpose or goal the statute serves, as well as relevant social conditions existing when the statute was enacted. State v. Withrow, 8 S.W.3d 75, 80 (Mo. banc 1999). “The legislature—not this Court—determines the wisdom, social desirability and

economic policy underlying a statute.” Miss Kitty’s Saloon, Inc. v. Dept. of Rev., 41 S.W.3d 466, 467 (Mo. banc 2001) (citation omitted).

Also, “[e]ach word, clause, sentence and section of a statute should be given meaning if possible.” Hovis v. Daves, 14 S.W.3d 593, 595 (Mo. banc 2000) (citation omitted). Courts will not assume that the legislature intended an absurd result. Budding v. SSM Healthcare Syst., 19 S.W.3d 678, 681 (Mo. banc 2000). Finally, ambiguous statutes are to be more strictly construed against the state, and not against the individual. Withrow, 8 S.W.3d at 80.

**B. Beggs’ sentencing under section 217.362, and the legislature’s goals.**

It is undisputed that Beggs qualified and was sentenced under section 217.362 (S. 47), pertaining to the treatment of chronic nonviolent offenders with serious substance abuse addictions. Section 217.362.1. Although the statute contemplates that the treatment program will usually take twenty-four months to complete, see section 217.362.2, the legislature has also expressly provided that offenders may successfully complete the program sooner, with no time restriction, and then may be granted probation immediately, upon the Board’s request to the court. Section 217.362.3.

Manifestly, then, the legislative intent embodied in section 217.362, is not at all directed at the length of confinement, but rather, it is directed at the goal, or the codified public policy hope, that people who frequently commit petty nonviolent crimes because they have a drug problem will successfully complete treatment for their addiction, and, as a corollary, they will become more useful

members of society -- out on probation, and not in jail where they financially burden Missouri's taxpayers. So, in view of this public policy, incarceration for a definite period is, at the most, a tertiary concern, intended to aid the primary goals of treatment, rehabilitation, and release, whether conducted over twelve or twenty-four months, once a court deems a defendant is qualified for sentencing under the statute. Thus, the Polk county court's objection to the number of months it took Beggs to complete the program (S. 61) (twelve months instead of twenty-four) is completely irrelevant in the context of the legislature's purpose in enacting section 217.362.

Section 217.362 is most accurately characterized as a statute intended to facilitate rehabilitation, not to impose punishment. Therefore, if a court wishes to punish an offender, or otherwise does not have faith in the offender's potential for rehabilitation, it simply should not sentence him under this statute in the first place, because to do so is to judicially acquiesce to the General Assembly's conclusion, embodied in the statute, that some people will benefit from treatment, and, once treated, they "shall" get probation if recommended by the Board. The relevant statutory language provides as follows:

Notwithstanding any other provision of law to the contrary, upon successful completion of the program, the board of probation and parole may advise the sentencing court of the eligibility of the individual for probation. The original sentencing court shall hold a hearing to make a determination as to the fitness of the offender to be placed on probation. The court shall follow

the recommendation of the board unless the court makes a determination that such a placement would be an abuse of discretion. If an offender successfully completes the program before the end of the twenty-four month period, the department may petition the court and request that probation be granted immediately.

Section 217.362.3, RSMo 2000.

**C. Beggs completed the program and the Board recommended probation**

Beggs successfully completed the treatment program in about one year. (S. 88, 94-97). Counselors who treated Beggs in the Intensive Therapeutic Community (ITC) at JCCC stated that he “. . . showed good character traits of leadership, and role-modeling abilities . . .” and “. . . responded well to the treatment methods utilized by staff and the I.T.C. Program.” (S. 95-96). The Board of Probation and Parole (Board) observed that the ITC summary report of Beggs’ participation in the program shows Beggs “. . . is hard working and courageous and his efforts definitely paid off.” (S. 88). Also, during his incarceration, Beggs did not incur any conduct violations, “. . . which is highly unusual.” (S. 87).

In the end, the Board wrote “[t]he recommendation is for probation in this case as the subject has completed the long term drug program as stipulated by the courts.” (S. 88). And consistent with the legislative purpose underlying section 217.362, which is to treat people with drug problems and assist them in being more productive citizens, out on probation if warranted, the Circuit Courts of

Jasper and Greene Counties followed the Board's recommendation and immediately granted probation to Beggs in July 2001. (S. 82-83, 101-05, 116).

**D. The sentencing court denied Beggs probation, despite the Board's recommendation.**

But despite Beggs' exemplary completion of the program, as detailed by the counselors who most closely worked with him, and the Board's unqualified recommendation, the Circuit Court of Polk County denied probation. Although the statute commands "[t]he original sentencing court shall hold a hearing to make a determination as to the fitness of the offender to be placed on probation," nonetheless, the court denied probation without holding the required hearing, or explaining the denial, and instead merely denied Beggs probation with an entry on a docket sheet. (S. 100).

Then on September 24, 2001 the court finally held a hearing, after Beggs filed a motion requesting probation under section 217.362. (S. 100, 52-64). At the hearing, the court noted Beggs' eight convictions (the five from Greene County and the two from Jasper County which were entered concurrently with the one in Polk County), and the fact that he completed the program in under twenty-four months, and again denied probation, stating:

. . . the Court finds that placement of this Defendant on probation after reviewing his file, convictions and numerous failures to appear in the various counties would be an abuse of discretion, and, therefore, declines to grant probation.

(S. 61-62).

#### **D. The statute is mandatory**

The court's denial of probation is wrong as a matter of law, and therefore Beggs is unlawfully confined. To explain, in the first instance, the statute mandates that "[t]he court shall follow the recommendation of the board. . . ." Section 217.362.3; see State ex rel. Dreer v. Pub. Sch. Ret. Syst., 519 S.W.2d 290, 296 (Mo. Div. I 1975) (explaining the word "shall" is indicative of a statutory mandate). As mentioned, the Board unqualifiedly recommended Beggs be granted probation. (S. 88). Thus, at least within the initial statutory mandate, the court had no choice but to grant Beggs probation.

However, the statute permits a court to deviate from the Board's recommendation, if the court determines the Board has abused its discretion in reaching that recommendation. Section 217.362.3. But that judicial loophole in what is otherwise a legislative mandate cannot be all-encompassing (or the mandate is emasculated), and instead must be limited by the answers to two questions: 1) In determining the Board abused its discretion, may the court exercise its own discretion? 2) What factors may the court permissibly rely on in finding the Board abused its discretion?

As to the first question, may the judge exercise his own discretion to avoid what is in the first instance mandatory (that the court follow the Board's recommendation)? Certainly not. That scenario would be ridiculous because it would effectively nullify the legislature's use of the word "shall" in section

217.362.3. See Hovis v. Daves, 14 S.W.3d 593, 595 (Mo. banc 2000) (explaining “[e]ach word, clause, sentence and section of a statute should be given meaning if possible”); Murray v. Hwy. and Trans. Com’n, 37 S.W.3d 228, 233 (Mo. banc 2001) (citation omitted) (stating “[c]onstruction of statutes should avoid unreasonable or absurd results”).

Simply put, if the sentencing judge can exercise discretion, the word “shall” is meaningless. To be sure, the loophole exists, so the mandatory language is not absolute, but in circumventing the statutory mandate to follow the Board’s decision the court must do more than merely perform an unreviewable coin toss. And even if this Court holds the sentencing court has discretion to avoid what is otherwise mandatory, still, that discretion must itself be guided by the legislative purpose manifested in section 217.362, and must not be abused.

All of which leads to question two: In determining that the Board abused its discretion in recommending probation, what factors may the court properly consider? Here, inexplicably, the court relied on, in part, Beggs’ “numerous convictions,” which are the very thing that qualified Beggs for the treatment program in the first place (as a chronic offender). Surely those convictions (from Greene and Jasper counties, where Beggs was also sentenced under the statute, and where he received probation), cannot serve as grounds for determining the Board abused its discretion by recommending probation. The very thing that opened the door to treatment and probation, cannot justly be used to slam that door shut. Further, the Polk County prosecutor was aware of the five cases pending in

Greene County (S. 60), as well as Beggs' five prior convictions, which were enumerated in the Felony Complaint. (S. 161). The sentencing court must have been well aware of Beggs' status as a habitual petty criminal, before sentencing Beggs.

The court also relied on Beggs' "numerous failures to appear," (he was incarcerated at least some, if not all of those times), all of which occurred before he was sentenced to the program and before he completed treatment. Those things cannot be used as factors to determine the Board abused its discretion in recommending probation. The reason is simple. The statute constitutes a legislative recognition that some people are habitual petty criminals because they are afflicted with an addiction, and once they are treated for their addiction, they will continue on the road to recovery and no longer commit petty crimes. That is why the statute mandates probation when the Board, the party in the best position to make the assessment, recommends it.

As a practical matter, once the Board made its recommendation, the court's role under the statute was limited to determining whether Beggs was fit for probation; and if he was not, then the Board abused its discretion. In making that determination, however, the court should have considered Beggs conduct after sentencing, and after he entered treatment, not the conduct that actually qualified him for sentencing under the statute.

For example, if Beggs had not completed the program, or if he had done drugs or possessed drugs or drug paraphernalia while in the program, or assisted

another inmate in acquiring drugs, or otherwise committed a crime or behaved in any way indicating he was not rehabilitated, then his “. . . fitness . . . to be placed on probation,” which is what the statute requires the court to determine, would indeed be doubtful, and the Board’s recommendation would undeniably have been an abuse of discretion. But Beggs’ conduct in the treatment program, and his response to the treatment modalities, was nothing short of first rate.

By the accounts, indeed by the praise, of his counselors, who intensively worked with him on a day-to-day basis, Beggs was admirably recovering from his addictions, and he was ready to re-enter society and become a productive citizen. (S. 87-88, 94-97). Getting people off of drugs and back into society is exactly what the legislature hoped to accomplish in enacting section 217.362. And, because he was off of drugs, getting Beggs back into society is exactly what the Board recommended. Denial of probation in these circumstances was an abuse of discretion (assuming the court even had discretion in light of the statutory mandate to follow the Board’s recommendation). See Giddens v. Kansas City Southern Ry. Co., 29 S.W.3d 813, 819 (Mo. banc 2000) (explaining “[j]udicial discretion is abused when the trial court’s ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration”).

Finally, it is noteworthy that the court openly admitted “I haven’t looked up the statute,” (S. 53) and also “I have used some of the programs as a way to get a Defendant treatment, having no intention of releasing them.” (S. 59). Those

expressions on the record of the court's ignorance of the very law under which it sentenced Beggs, and its concomitant blind and willful disobedience of the legislature's mandate to follow the Board's recommendation, demonstrate a clear abuse of discretion.

### **CONCLUSION**

Because Beggs has proved by a preponderance of the evidence that his guilty plea was induced by positive representations that he would get out on probation after he completed the long-term treatment program, and because the state has lost the record which would be the best evidence of the terms of Beggs' plea, and because the sentencing court erred under section 217.362 in deviating from the Board's recommendation of probation, Beggs respectfully requests this Court's judgment that he is unlawfully confined, and its order that he be discharged immediately.

Respectfully submitted,

COOK, VETTER, DOERHOFF, &  
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**CERTIFICATE OF COMPLIANCE**

The undersigned certifies that the foregoing Petitioner's Substitute Brief complies with the limitations set forth in Rule 84.06(b), contains 6516 words, as counted by the word-processing software used, Microsoft Word, and that the floppy disk filed together with this Brief in accordance with Rule 84.06(g) has been scanned for viruses and is virus-free.

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**CERTIFICATE OF SERVICE**

I hereby certify that one copy of Petitioner's Substitute Brief and one copy of the disk required by Rule 84.06(g) were served by hand-delivery this 28<sup>TH</sup> day of October, 2002 on Mr. Frank A. Jung, Assistant Attorney General, Office of the Attorney General, State of Missouri, P.O. Box 899, Jefferson City, MO 65102, Attorneys for respondent.

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