

No. SC85166

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**IN THE SUPREME COURT OF MISSOURI**

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**STATE OF MISSOURI, ex rel.,  
ANDRE TAYLOR,**

*Relator,*

vs.

**STEVEN MOORE, Superintendent,  
Western Missouri Correctional Center,**

*Respondent.*

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**RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT**

**IN AN ORIGINAL ACTION IN HABEAS CORPUS**

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## JURISDICTIONAL STATEMENT

This is an original action in habeas corpus brought under § 532.020, RSMo 2000 and Missouri Supreme Court Rule 91. Relator Andre Taylor is confined in the Western Missouri Correctional Center in Cameron, Missouri.

Mr. Taylor is currently serving three concurrent fifteen year sentences from Jackson County, Missouri for trafficking drugs first degree and one concurrent ten year sentence from Jackson County for trafficking drugs second degree. He also is serving two concurrent seven year sentences for delivery/possession of drugs in a correctional facility from St. Francois County. The St. Francois County sentences expire on October 10, 2006 and are not the subject of this petition.

As Mr. Taylor has already litigated unsuccessful habeas corpus petitions in DeKalb County and the Missouri Court of Appeals, Western District, Respondent believes this Court has jurisdiction. *See* Missouri Constitution, Article I, Section 12, Article V, Section 4, § 532.020, RSMo 2000.<sup>1</sup>

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<sup>1</sup>If Mr. Taylor succeeds he is entitled only to relief on his concurrent Jackson County sentences, not his St. Francois County sentences. Habeas corpus in Missouri is a remedy only available to grant immediate release from current confinement not earlier release on some future date. *See State ex rel. Nixon v. Pennoyer*, 36 S.W.3d 767, 770 (Mo.App., E.D. 1990). Respondent believes that the fact that Mr. Taylor is seeking complete discharge from some of his current sentences is enough to bring him within this Court's

## STATEMENT OF FACTS

In 1983, Andre Taylor was convicted in Jackson County, Missouri of first degree robbery, first degree assault and two counts of armed criminal action (Appendix A3).<sup>2</sup> Mr. Taylor's convictions for first degree robbery and first degree assault make him statutorily ineligible for Long Term Drug Treatment under § 217.362, RSMo 2000 (*See* § 217.362.1, RSMo 2000 and § 556.061.8, RSMo 2000).

On October 12, 1999, Mr. Taylor appeared before the Circuit Court of Jackson County, Missouri to plead guilty to three counts of first degree drug trafficking in violation of § 195.222, RSMo 2000 and one count of second degree trafficking in violation of § 195.223, RSMo 2000 (Appendix A1). Mr. Taylor was aware of his 1983 convictions at the time of his October 12, 1999 plea hearing (Appendix 3). There is however no evidence that either the guilty plea court or Mr. Taylor's guilty plea counsel were aware of the 1983 convictions at the time of the guilty plea and sentencing (Appendix A3).

Mr. Taylor was sentenced following pleas of guilty to three concurrent terms of fifteen years' imprisonment on the first degree trafficking counts and one concurrent count of ten years' imprisonment on the second degree trafficking count (Appendix A27). The sentences

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habeas jurisdiction, and distinguishes this from the case of an inmate challenging a future consecutive sentence. However, this may be a close issue and the Court must satisfy itself of its jurisdiction.

<sup>2</sup>Respondent will refer to the appendix to this brief as "Appendix" and to the appendix to Mr. Taylor's brief as "Relator's Appendix."

were made pursuant to the Long Term Drug Treatment Statute § 217.362, RSMo 2000 (Appendix A27). The judgment of conviction sentence noted that there was no agreement on pending St. Francois County drug charges (Appendix A27). It was the understanding of all parties, and made explicit by the trial court that when Mr. Taylor could enter Long Term Drug Treatment was contingent on whatever sentences he received in St. Francois County (Appendix A2). Mr. Taylor was sentenced to two concurrent seven year sentences in St. Francois County.

So if Mr. Taylor were eligible for Long Term Drug Treatment, treatment would have begun after the completion of the two seven year sentences (Appendix A3). Long Term Drug Treatment on the Jackson County sentences was part of the plea bargain, although when this treatment would begin was not (Appendix A1).

Mr. Taylor is in fact not eligible to begin Long Term Drug Treatment after completion of his St. Francois County sentences because of his 1983 dangerous felony convictions making compliance with the Jackson County plea bargain impossible. *See* § 217.362.1, RSMo 2000 and § 556.061.8, RSMo 2000.

Mr. Taylor was received by the Missouri Department of Corrections on October 13, 1999 (Appendix A16). The ninety day period for filing a Rule 24.035 motion would have therefore begun to run on October 13, 1999 and expired on January 11, 2000. At a hearing held by the Special Master appointed by this Court, there was conflicting testimony as to whether Mr. Taylor was informed of his ineligibility for Long Term Drug Treatment during the period from October 13, 1999 to November 24, 1999 when Mr. Taylor was at the Western Reception Diagnostic and Correctional Center. A Department of Corrections employee

testified at the hearing before the Special Master that Mr. Taylor had admitted to him that Mr. Taylor had been informed while at the Western Reception Diagnostic and Correctional Center, that he was ineligible for Long Term Drug Treatment due to his past violent behavior (Appendix A12-A20). Mr. Taylor denied being informed of his ineligibility until he received a letter from his attorney dated January 19, 2000 and denied admitting that he had been informed prior to that date (Appendix A22-A23). The Special Master made a fact finding that there was no credible evidence that Taylor knew of the fact or reason for his ineligibility until he received the January 19, 2000 letter (Appendix A5).

The Special Master however, found that Mr. Taylor's counsel was informed by a letter of December 27, 1999 that Taylor was ineligible for Long Term Drug Treatment due to his 1983 convictions (Appendix A2-A3). On October 14, 1999, counsel had sent Taylor a letter advising that Taylor would only have to serve nine to eighteen months on the Jackson County sentences but when he would have to serve this time was contingent on the St. Francois County sentences (Appendix A2). It was not until January 19, 2000, after the ninety day period for filing a Rule 24.035 motion had expired on January 11, that counsel informed Mr. Taylor of the information about ineligibility for Long Term Drug Treatment he had received in the December 27, 1999 letter (Appendix A3). Mr. Taylor's counsel was admonished in writing by the Region IV Disciplinary Committee of the Missouri Bar for failing to represent Mr. Taylor in a competent manner and failing to be diligent in his representation of Mr. Taylor (Relator's Appendix A23).

Mr. Taylor filed a habeas corpus petition in the Circuit Court of DeKalb County, Missouri challenging his Jackson County convictions and sentences on September 16, 2002. The petition was denied on November 22, 2002 (Appendix A4). Mr. Taylor filed a petition for habeas corpus relief dated December 17, 2002 in the Missouri Court of Appeals, Western District. That petition was denied on January 15, 2003 (Appendix A4).

Mr. Taylor filed a habeas corpus petition in this Court challenging the Jackson County convictions and sentences. This Court appointed a Special Master who held an evidentiary hearing on November 13, 2003 (Appendix A1). The Special Master filed suggestions on December 29, 2003 recommending that the writ of habeas corpus be granted. Respondent filed objections on January 20, 2003 which were overruled on February 12, 2004 (Docket Entries 01/20/04, 02/17/04 - Case SC85166).

## ARGUMENT

Andre Taylor's claims that the sentencing court erred in not having the Department of Corrections screen Mr. Taylor for eligibility for Long Term Drug Treatment prior to sentencing, and that the sentencing court erred in sentencing Mr. Taylor to Long Term Drug Treatment although he is not eligible for the program and his claim that counsel was ineffective during the guilty plea proceedings are not cognizable in habeas corpus. These claims are not jurisdictional and Mr. Taylor has not demonstrated cause and actual prejudice or new evidence of factual innocence excusing the failure to raise the claims in a Rule 24.035 motion. The trial error claims are also examples of self-invited error that should not entitle Taylor to relief and the ineffective assistance of counsel claim is meritless (*Addresses Relator's Arguments I, II and III*).

### STANDARD OF REVIEW FOR CLAIMS IN HABEAS CORPUS

#### *Cognizability*

Habeas corpus review of a judgment of conviction and sentence is permissible only for jurisdictional claims, or claims that may have been but were not raised in the direct appeal or post-conviction review process if the petitioner can show cause and prejudice excusing the failure to raise the claims or newly discovered evidence establishing actual innocence. *See Brown v. State*, 66 S.W.3d 721, 731 (Mo.banc 2002).

### **Jurisdiction**

A sentencing court lacks jurisdiction if it imposes a sentence that is in excess of that permitted by a statute for a particular offense. *Merriweather v. Grandison*, 904 S.W.2d 485, 488-489 (Mo.App., W.D. 1995). This occurs if one can hold the judgment up against the statute authorizing punishment and see that the judgment is facially invalid. *Id.* at 488-489. See also *Osowski v. Purkett*, 908 S.W.2d 690, 691 (Mo.banc 1995) (If a court imposes a sentence that is in excess of that authorized by law, habeas corpus is the proper remedy).

The analysis in *Merriweather* makes clear that jurisdiction does not exist if a sentence was in excess of that permitted by law and this is patent from the face of the record without resort to extrinsic evidence. See *Merriweather v. Grandison*, 904 S.W.2d at 487. This Court's recent decision in *State ex rel. Green v. Moyer*, slip op. SC 85234 (Mo.banc April 13, 2004) is consistent with that analysis. In *Green*, this Court found an unauthorized double punishment for the same offense to be jurisdictional error where this was patent on the face of the record defined as the charging document, the guilty plea and sentencing transcript and the judgment of conviction and sentence.

In *State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 (Mo.banc 1993), this Court found that when a court erroneously sentenced an offender as a persistent offender despite an inadequacy of proof of the appropriate number of prior convictions, this was not a jurisdictional defect. Similarly, in *Clay v. Dormire*, 37 S.W.3d 214 (Mo.banc 2000), this

Court rejected the idea that sentencing an offender as a prior offender based on an expunged conviction was a jurisdictional defect, rather than error that is not cognizable in habeas corpus.

The teaching of this Court is therefore that a sentencing court exceeds its jurisdiction when it imposes a sentence in excess of that statutorily permitted for the offense and this can be determined from the face of a limited record, *i.e.* the sentence is facially invalid. The teaching of this Court is also that it is not a jurisdictional error for a trial court to erroneously find a defendant to be eligible to be sentenced as a prior or persistent offender and to sentence an offender as such. The later is error but not an act in excess of jurisdiction.

This teaching is logically consistent because it is quite a different thing to erroneously believe a defendant is eligible for a particular sentence enhancement or reduction, than it is to sentence an offender in accordance with the proper statute but impose a sentence in excess of what that statute permits. The former is error. The later is acting outside of jurisdiction.

### **The Cause and Actual Prejudice Gateway**

In *Brown v. State*, 66 S.W.3d 721, 731 (Mo.banc 2002), the Missouri Supreme Court adopted “cause and actual prejudice” gateway to habeas review used by the federal courts. Cause to excuse a default occurs if some factor external to the defense impeded efforts to file the claim such as the factual or legal basis of a claim being not reasonably available or interference by state officials making compliance with the proper procedural rules for presenting a claim impracticable. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Actual prejudice results if the underlying error worked to the actual and substantial disadvantage of the party. *Brown v. State*, 66 S.W.3d at 731. Alleged ineffective assistance by post-conviction

counsel cannot be cause to excuse a default. *Sidebottom v. Delo*, 46 F.3d 744, 751 (8<sup>th</sup> Cir. 1995).

Lack of legal knowledge is not cause that may excuse a default. *See McKinnon v. Lockhart*, 921 F.3d 830, 832, n.5 (8<sup>th</sup> Cir. 1990) (lack of legal knowledge is not cause which can excuse a default); *see also Duvall v. Purkett*, 15 F.3d 745, 748 (8<sup>th</sup> Cir. 1994) (noting that an inmate who allegedly did not discover his delayed eligibility for parole, until after the time for filing a post-conviction motion had passed, could have consulted a post-conviction attorney who would have read the statute and learned of this and the potential for a claim that guilty plea counsel was ineffective).

These cases are consistent with Missouri precedent as well which has consistently taught that lack of legal as opposed to factual knowledge may not excuse a default. *See, e.g. Missouri v. Sales*, 772 S.W.2d 739 (Mo.App., S.D. 1989) (Alleged lack of legal knowledge of the significance of known facts could not excuse failure of a movant to raise a claim of ineffective assistance of guilty plea counsel in the first Rule 27.26 motion). *Wright v. State*, 614 S.W.2d 325, 327 (Mo.App., W.D. 1981) (rejecting ineffective assistance of guilty plea counsel claim in successive Rule 27.26 and providing a string of seven citations back to a case from this Court in 1972 holding that lack of legal knowledge cannot excuse failure to place a claim in the initial post-conviction relief motion).

### *Actual Innocence Analysis*

The standard for actual innocence review of a defaulted claim in federal habeas corpus is set out in *Schlup v. Delo*, 513 U.S. 298, 327 (1994). In order to pass through this gateway, a petitioner must present new evidence in light of which it is more likely than not that no reasonable juror would have been convicted. *Id.* at 327. Actual innocence analysis involves analysis of all the evidence including that alleged to have been illegally admitted, that alleged to have been wrongly excluded and that which has been newly discovered. *Id.* at 327-328. Actual innocence analysis focuses on new reliable evidence of factual not legal innocence such as credible declarations of guilt by another, trustworthy eyewitness accounts and exculpatory scientific evidence. *Pitts v. North*, 85 F.3d 348, 350-351 (8<sup>th</sup> Cir. 1996). “New evidence” in this context means evidence the factual basis of which could not previously have been discovered through due diligence. *Meadows v. Delo*, 99 F.3d 280, 282 (8<sup>th</sup> Cir. 1996). In *Clay v. Dormire*, 37 S.W.3d 214, 217-218 (Mo.banc 2000), this Court adopted federal actual innocence analysis for reviewing defaulted claims in habeas corpus. *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 215 (Mo.banc 2001) (stating “This Court in *Clay v. Dormire* adopted the federal standard for manifest injustice. . .”).

**Standard of Review in Analyzing The**

**Special Master's Suggestions**

The Special Master's suggestions receive the weight and deference given to a trial court in court tried cases in light of the Master's opportunity to judge and view the credibility of witnesses. *State ex rel. Busch v. Busch*, 776 S.W.2d 374, 377 (Mo. 1989).

**Public Policy Reason for Continuing to Have Missouri Cause**

**And Prejudice Analysis Mirror Federal Analysis and For Not**

**Expanding The Concept of Jurisdictional Error**

The theoretical underpinning for this Court's adoption of federal cause and prejudice analysis, is that the adoption of this standard eliminates a class of cases that could be reviewed by the federal courts without initial review by the Missouri courts. These are cases in which a Missouri prisoner has defaulted his direct appeal or post-conviction review remedies but can show cause and actual prejudice to permit federal habeas corpus review of his claims. *Reuscher v. State*, 887 S.W.2d 588, 591 (Mo.banc 1994). In short habeas corpus is available in well defined rare and exceptional circumstances on conditions that come close to duplicating the availability of relief for defaulted state law claims in the federal courts. This serves the public policy of giving Missouri courts the first chance to review and correct claims of constitutional error allegedly committed in the Missouri courts, while not permitting unending multiple rounds of collateral review.

However, if Missouri habeas corpus some day grows to become an ordinary part of the review of criminal convictions in Missouri cases, it will become necessary for every Missouri inmate to exhaust the procedure in order to move his case forward through federal review. *See Wright v. Norris*, 299 F.3d 926,928 n.5 (8<sup>th</sup> Cir. 2002) (expressing confusion over whether a particular Arkansas procedure was necessary to exhaust state remedies and noting that if the procedure was part of the ordinary course of review then it must be exhausted).

In *Duvall v. Purkett*, 15 F.3d 745, 746-747 (8<sup>th</sup> Cir. 1994), the United States Court of Appeals declined to find a federal habeas petition containing claims defaulted in the Rule 24.035 process to be unexhausted because of the limited nature of Missouri habeas corpus which would have made raising the claims in a Rule 91 motion futile. The United States Court of Appeals for the Eighth Circuit noted that the limitations on Rule 91 cognizability involved the application of concepts with which federal judges are quite familiar and that the Court could apply the applicable tests and determine that a Rule 91 action would be futile and the claims in the federal petition were defaulted.

The current level of Rule 91 review which mirrors federal standards for excusing a default, with the addition of a narrowly defined jurisdictional exception, serves the sound public policy of allowing federal courts to clearly see when a Rule 91 action would be futile and therefore not require every petitioner to pursue Rule 91 relief in Missouri as a prerequisite to federal review. Expansion of the jurisdictional exception to include claims that are essentially claims of sentencing court error or a widening of the concept of cause beyond

that recognized in current precedent runs the risk of destroying the delicate and beneficial balance that now exists, between federal and state review of Missouri convictions.

If the Missouri Supreme Court Rule 91 becomes an ordinary method for reviewing claims of trial or sentencing error, it would inevitably become a necessary step every Missouri inmate may be compelled to exhaust after direct and post-conviction review. Sound policy dictates that result should be avoided.

### ANALYSIS

*The guilty plea and sentencing court did not exceed its jurisdiction by sentencing Mr. Taylor to Long Term Drug Treatment without notifying the Missouri Department of Corrections and having Mr. Taylor screened for eligibility.*

Mr. Taylor's jurisdictional argument essentially reduces to the claim that the guilty plea and sentencing court acted illegally in sentencing Mr. Taylor to Long Term Drug Treatment for which he was ineligible and acted illegally in not having Taylor screened for eligibility, and therefore the court acted outside its jurisdiction (Relator's Brief at 11-15).

Mr. Taylor's argument confuses error with lack of jurisdiction. A court may make a mistake, a legal error, and still have subject matter and personal jurisdiction. In *State ex rel. Simmons v. White*, 866 S.W.2d 443 (Mo.banc 1993), this Court rejected the idea that a guilty plea and sentencing court did not have jurisdiction to sentence a defendant as a persistent offender even though the state had only proven two as opposed to the required three prior convictions. Similarly, in *Clay v. Dormire*, 37 F.3d 214 (Mo.banc 2000), this Court rejected

the idea that a guilty plea court lacked jurisdiction to sentence a defendant as prior offender even though the conviction on which prior offender status was based had been ordered expunged and was not a proper basis to sentence the defendant as a prior offender. In both those cases, like Mr. Taylor's, case the sentencing court had erroneously found an offender eligible for a change of his offender status based on an erroneous calculation of prior convictions or an erroneous understanding of prior convictions. In neither case was the judgment of conviction facially invalid. See *State ex rel. Simmons v. White*, 866 S.W.2d at 443 (stating "Proceedings Under Rule 91 are thus limited to determining the facial validity of confinement").

In cases in which this Court has granted relief in habeas corpus because of an extra-jurisdictional sentence, the sentence has been in excess of that permitted by law and has been facially invalid.

In *Merriweather v. Grandison*, 904 S.W.2d 485 (Mo.App., W.D. 1985), a criminal defendant was convicted of an offense that carried a statutory maximum punishment of seven years but was sentenced to twenty years' imprisonment by the sentencing court and this defect was patent on the face of the record in the sense that one could hold the judgment of conviction up against the statute and see that no existing law authorized the punishment. Similarly, in *State ex rel. Osowski v. Purkett*, 908 S.W.2d 690 (Mo.banc 1995), a guilty plea court sentenced an offender to fifteen years' imprisonment for a crime that has a maximum punishment of seven years' imprisonment and this defect was patent on the face of the record. In *State ex rel. Green v. Moyer*, slip op. 85234 (April 13, 2004), this Court found a

jurisdictional defect when a sentencing court twice punished an offender for the same crime in a manner unauthorized by law and that defect was evident on the face of the record.

Mr. Taylor's case has nothing to do with *Merriweather*, *Osowski* and *Green* and is controlled by *Simmons* and *Clay*. There is no doubt the sentencing court made an error but this error is not jurisdictional and it is not patent on the face of the record. In fact without matter outside the record of the guilty plea and sentencing court proceedings, it is impossible to tell that Mr. Taylor is not eligible for Long Term Drug Treatment. In short, Mr. Taylor's claims cannot fit through the jurisdictional gateway to habeas corpus review of defaulted claims, as that gateway has been defined by the precedent of this Court.

**Mr. Taylor Has Not Established Cause and Actual Prejudice to Excuse**

**The Default of Either His Claims of Error or His Claims of**

**Ineffective Assistance of Trial Counsel**

Mr. Taylor argues that he has cause to excuse the default of his claims because he did not have the "factual knowledge" required to bring his claim until January 19, 2000, ninety-eight days after he was received into the Department of Corrections (Relator's Brief at 17-18). Taylor quotes this Court for the proposition that "[o]ne acceptable reason for failure to bring Rule 24.035 claims is that the claims were not known to movant within the time period set out in the rule for such claims could never be brought within the rules time limitations" (Relator's Brief at 17). Mr. Taylor is in fact quoting an appellant's argument that this Court noted in *Brown v. State*, 66 S.W.3d 721, 728 (Mo.banc 2002) not a holding of this Court. The entire

sentence Mr. Taylor quotes reads as follows: ‘Rather, he asserts that Rule 24.035 by its terms cannot be intended to apply to claims that were not known to the movant within the time period set out in the rule, for such claims could never be brought within the rules limitation period.’” *Id.* at 728 (emphasis added).

The teaching of *Brown v. State* is not that lack of knowledge of a claim excuses default of a claim in the Rule 24.035 process. The teaching of *Brown* is that cause and prejudice or actual innocence is required for review of a defaulted Rule 24.035 claim. *Id.* at 731. Cause to excuse a default occurs if some factor external to the defense impeded efforts to file the claim such as the factual or legal basis<sup>3</sup> of a claim being not reasonably available or interference by state officials making compliance with the proper procedural rules for presenting a claim impracticable. *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

In this case, the trial court erred in sentencing Mr. Taylor to Long Term Drug Treatment. However, the trial court’s error is not itself cause to excuse a default. If that were the case every criminal defendant could claim reliance on a trial court’s mistake in not raising

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<sup>3</sup>The legal basis of a claim is unavailable when a claim would have been so novel at the proper time for presenting it that could not reasonably be expected have been raised, but a subsequent change in the law has made the claim viable. See *Reed v. Ross*, 468 U.S. 1 (1984). Lack of knowledge of existing law is not cause. See *McKinnon v. Lockhart*, 921 F.3d 830, 832 n.5 (8<sup>th</sup> Cir. 1990).

claims in a direct or collateral challenge to his conviction or sentence, and default rules would be meaningless.

In this case, the factual basis of Mr. Taylor's claims, that he had prior violent convictions, was admittedly known to him at the time he pled guilty (Appendix A3). The legal basis of his claims is that the prior violent felony convictions made him ineligible for the sentence he received, thereby supporting theories of error and ineffective assistance of counsel. Mr. Taylor admittedly had access to a law library and the mails at every institution where he was confined (Appendix A24-A25). Therefore, no government action external to the defense made it impracticable for him to discover the legal basis of his claim and timely present it. Mr. Taylor did not do so. But the basis of the claim was available, which is the test. Assuming he did not know the legal basis of that claim, Mr. Taylor had the means to obtain that knowledge available to him.

Mr. Taylor knew the factual basis of his claim and his lack of legal knowledge of the significance of those facts cannot excuse his default of the claim under long standing federal and Missouri precedent. *See, e.g. McKinnon v. Lockhart*, 921 F.3d 830, 832 n.5 (8<sup>th</sup> Cir. 1990) (lack of legal knowledge is not cause to excuse default); *Duvall v. Purkett*, 15 F.3d 745, 748 (8<sup>th</sup> Cir. 1994) (Inmate could have consulted post-conviction review attorney to learn of ineligibility for parole and ineffective assistance of counsel claim based on this ineligibility); *Missouri v. Sales*, 772 S.W.2d 739 (Mo.App., S.D. 1989) (Lack of legal knowledge did not excuse failure challenge the effectiveness of guilty plea counsel in the initial Rule 27.26

proceeding). This analysis is sufficient defeat Mr. Taylor's assertion of cause and actual prejudice.

However, it is also undisputed that Mr. Taylor's counsel was informed by a letter of December 27, 1999 by the Missouri Department of Corrections that Mr. Taylor was ineligible for Long Term Drug Treatment due to his prior felony convictions (Appendix A2-A3). Therefore, within the period for filing a Rule 24.035 motion, the record demonstrates Mr. Taylor's counsel knew both the factual and legal basis of his current claims. Counsel did not act on that knowledge but that omission is not external to Mr. Taylor's defense. *See Covey v. Moore*, 72 S.W.3d 204, 211 (Mo.App., W.D. 2002) (Receipt of letter by inmate stating his ineligibility for drug treatment program defaulted assertion of cause for not challenging guilty plea in a Rule 24.035 motion). Ineffective assistance of counsel in a post-conviction role, in which Mr. Taylor's counsel was functioning when he received the letter, cannot be cause to excuse a default. *See Sidebottom v. Delo*, 46 F.3d 744, 751 (8<sup>th</sup> Cir. 1995). Therefore, Mr. Taylor is bound by his counsel's apparent lack of understanding of the significance of the information provided to him by the Department of Corrections from which a Rule 24.035 claim could have been constructed.

Finally, Respondent notes that testimony was presented, by a former Department of Corrections' employee, that Mr. Taylor acknowledged that he was informed verbally of his ineligibility for Long Term Drug Treatment while at the Western Reception Diagnostic and Correctional Center between October 13, 1999 and November 24, 1999 (Appendix A12-A21). Mr. Taylor denied making this admission or knowing of his ineligibility until after January 19,

2000 (Appendix A23). The Special Master found that there was no credible evidence that Mr. Taylor knew of his denial of entry into Long Term Drug Treatment until after January 19, 2000 (Appendix A5). This is presumably a credibility determination and therefore the testimony that Mr. Taylor knew of the denial no later than November 24, 1999 would seem to be of little value to this Court's analysis.

However, disregarding this testimony, Mr. Taylor clearly has not shown cause to excuse his default. Actual prejudice appears in this case to be tied to merits analysis of Mr. Taylor's specific claims which Respondent will analyze next.

### *Analysis of The Ineffective Assistance of*

#### *Guilty Plea Counsel Claim*

Mr. Taylor alleges guilty plea counsel was constitutionally ineffective for two reasons. First, he alleges counsel should have been aware of the eligibility requirements for Long Term Drug Treatment and investigated to make sure Mr. Taylor qualified (Relator's Brief at 19-20). Second, he alleges counsel should have made sure that the guilty plea court carried out the statutorily required notification to the Department of Corrections for eligibility screening of Mr. Taylor which it apparently did not do (Relator's Brief at 20).

To grant Mr. Taylor relief, this Court must find that counsel acted outside of the wide range of professional competence and that but for counsel's incompetent acts or omissions, there is a reasonable probability that Mr. Taylor would not have pled guilty and would have insisted on going to trial. See *Hill v. Lockhart*, 474 U.S. 52 (1985).

“The reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements of actions.” *Strickland v. Washington*, 466 U.S. 668, 691 (1984). There is no evidence that anyone involved in the case but Mr. Taylor knew or had any reason to believe Mr. Taylor had sixteen year-old violent felony convictions that would make him ineligible for treatment. It is questionable whether under these circumstances counsel acted outside the wide range of professional competence in not investigating the matter or putting himself in the role of supervising the trial court’s investigation of the matter.

But even if counsel’s actions rose to level of constitutional ineffectiveness, it is doubtful proposition that Mr. Taylor would have insisted on going to trial but for these omissions. Mr. Taylor had exposure to four consecutive life sentences on his Jackson County cases alone. *See* § 195.222.3 (describing the penalty for selling more than two grams of crack cocaine); § 195.223.3 (describing the penalty for possessing more than six grams of crack cocaine). Further, the timing of his receiving Long Term Drug Treatment was contingent on the completion date of St. Francois County sentences that was then an unknown number of years away (Appendix A3). If for instance Mr. Taylor’s seven year St. Francois County sentences had been run consecutively with each other, there would have been little or no shortening of the Jackson County sentences.

Mr. Taylor’s current decision to risk greater sentences on his Jackson County cases does not and cannot say much about his thought process in October, 1999. Mr. Taylor now knows when the St. Francois County sentences will expire. He also may assume that cases that were prepared and a priority for prosecution in 1999 are a lower priority now due to the age

of the crimes and that evidence may have been lost or memories may have faded. In short the decision Mr. Taylor would have faced in October, 1999 was much different than the one he now faces. It seems unlikely that in October, 1999 Mr. Taylor would have chosen to risk consecutive life sentences at trial for the possibility that he would receive Long Term Drug Treatment some unknown number of years down the road. The choice Mr. Taylor now faces is between serving out his sentences or hoping for a more favorable plea bargain. It is not reasonable to conclude that Mr. Taylor would have insisted on a trial in October, 1999 with such a potential small advantage to be gained and such a great danger of increased punishment if he had rejected the bargain absent the provision for Long Term Drug Treatment. Were the claim of ineffective assistance of counsel cognizable in habeas corpus, which it is not, it should be rejected as meritless.

*Although The Trial Court Erred in Sentencing Mr. Taylor*

*to Long Term Drug Treatment That Error Was*

*Self-Invited By Mr. Taylor*

Mr. Taylor alleges the trial court erred in not notifying the Missouri Department of Corrections about the possibility of sentencing Mr. Taylor for Long Term Drug Treatment so that he could be screened for eligibility and in sentencing Mr. Taylor to Long Term Drug Treatment although he was ineligible (Relator's Brief at 22-24).

Mr. Taylor was aware of his 1983 convictions at the time of his October 12, 1999 guilty plea and sentencing hearing (Appendix A3). There is no evidence that the guilty plea and sentencing court was aware of the 1983 convictions that made Mr. Taylor ineligible for Long Term Drug Treatment at the time of the guilty plea and sentencing (Appendix A3).

The guilty plea and sentencing hearings were held on one day, October 12, 1999 (Relator's Appendix A1). At the very opening of the hearing, the guilty plea court was told that the plea offer included Long Term Drug Treatment (Relator's Appendix A3). Neither Mr. Taylor nor his counsel ever asked for an eligibility check under § 217.362, RSMo but both wished to proceed with a plea and sentencing that day (Relator's Appendix A1-A15). Mr. Taylor and his counsel had no objection to the procedures used at the guilty plea and sentencing (*Id.*).

It is well established that "it is axiomatic that a defendant may not take advantage of self-invited error or error of his own making." *State v. Wise*, 879 S.W.2d 494, 519 (Mo.banc

1994). In *Wise*, a defendant proceeded pro se throughout the guilt phase of capital trial and then decided he desired to be represented at the penalty phase, leaving counsel less than one day between the end of the guilt phase and the start of the penalty phase to prepare. *Id.* He could not do this and then claim the court erred in denying him a continuance when any error was generated by his own actions. See also *State v. Mayes*, 63 S.W.3d 615, 632 n.6 (Mo.banc 2001) (Noting that counsel cannot agree to a procedure and then convict the trial court of error for following it).

In this case, Mr. Taylor in effect invited the trial court to accept the guilty plea immediately and sentence him to Long Term Drug Treatment in spite of the requirement in § 217.362, RSMo 2000 of screening for eligibility. At the same time, Mr. Taylor was apparently the only person in the room who knew of his own sixteen year-old violent felony convictions. Mr. Taylor should not be allowed to invite error from the guilty plea court and then, almost five years later, take advantage of that error to invalidate his convictions when memories may have faded and evidence may have been disposed of. Were the trial error claim cognizable in habeas corpus, which it is not, it should be rejected as a claim of self-invited error. This is a classic example of a case in which a defendant invited an erroneous disposition he viewed as favorable, and when the error was caught blames the trial court. This conduct should not be rewarded.

**CONCLUSION**

The petition for habeas corpus should be denied.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE AND SERVICE**

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains \_\_\_\_\_ words, excluding the cover, this certification, the signature block, and the appendix, as determined by WordPerfect 9 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That true and correct copies of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this \_\_\_\_ day of April, 2004, to:

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**APPENDIX**

The Special Master's suggestions ..... A1-A11

The transcript of the hearing before the Special Master ..... A12-A27