

IN THE  
MISSOURI SUPREME COURT

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ERIC D. WEBB, )  
 )  
 Appellant, )  
 )  
 vs. ) No. SC 91012  
 )  
 STATE OF MISSOURI, )  
 )  
 Respondent. )

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APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF FRANKLIN COUNTY, MISSOURI  
TWENTIETH JUDICIAL CIRCUIT, DIVISION ONE  
THE HONORABLE GAEL D. WOOD, JUDGE

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APPELLANT'S SUBSTITUTE REPLY BRIEF

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Ellen H. Flottman, MOBar #34664  
Attorney for Appellant  
Woodrail Centre, 1000 West Nifong  
Building 7, Suite 100  
Columbia, Missouri 65203  
Telephone (573) 882-9855, ext. 323  
FAX (573) 884-4793  
E-mail: Ellen.Flottman@mspd.mo.gov

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## **JURISDICTIONAL STATEMENT**

Appellant adopts and incorporates by reference the Jurisdictional Statement from his original brief.

## **STATEMENT OF FACTS**

Appellant adopts and incorporates by reference the Statement of Facts from his original brief.

## ARGUMENT

**The motion court clearly erred in denying appellant’s Rule 24.035 motion without an evidentiary hearing, because appellant pleaded factual allegations which, if proved, would warrant relief and which are not refuted by the record, in that appellant claimed that he received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, when counsel misadvised appellant as to the effect of his guilty plea on his parole eligibility, which was deficient performance under prevailing professional norms. The ineffective assistance of counsel appellant received rendered his plea involuntary, because parole eligibility is intimately related to the criminal process, and without this misadvice, appellant would have chosen to go to trial rather than plead guilty.**

Before *Padilla*, the State of Kentucky distinguished between direct and collateral consequences of a guilty plea. *Padilla v. Kentucky*, 130 S.Ct. 1473, 1481 (2010). So far, Missouri does also. But the United States Supreme Court declined to distinguish those in the case of deportation, because the sole question that matters is whether counsel’s conduct is “reasonable under prevailing professional norms.” *Id.* at 1482. The Court also declined to distinguish between misadvice and failure to advise, and subjected both to an analysis under *Strickland v. Washington*, 466 U.S. 668 (1984).

Respondent argues that there is still a difference between collateral and direct consequences, whether or not the *Padilla* Court reached the issue. (Resp. br. at 17). Respondent opines that it does not matter “even if prevailing profession[al] norms call for counsel to inform the defendant about parole eligibility” (Resp. br. at 20), so long as parole eligibility is deemed “collateral.” But the holding of *Padilla* informs otherwise. So long as it violates prevailing professional norms to fail to advise one’s client of the consequences of pleading guilty, then misadvice and failure to advise of those consequences render the plea involuntary. The State finds only two District Court cases, one from New Jersey, in support of its position. (Resp. br. at 21).

The State’s brief argues in length that deportation is different than parole eligibility since parole eligibility is not as “severe” and is not a “consequence which extends the consequences of the guilty plea beyond the sentence of the court.” (Resp. br. at 18-19). But this is just another way of saying that deportation is a more *direct* consequence than parole eligibility. The distinction between direct and collateral consequences becomes merely a factor to consider when analyzed in terms of the critical test: prevailing professional norms.

Respondent also attempts, as it did in the Court of Appeals, to expand the record to include the SAR (Resp. br. at 12-13). Respondent goes so far as to cite to appellant’s duty to include in the record all matters necessary to the determination of issues on appeal. (Resp. br. at 13). But the SAR is not part of the record (See Resp. br. at 13, n. 4). It was never before the motion court. If it

will assist the motion court in resolving the issues in this matter, then an evidentiary hearing can be held. As the State appears to concede (Resp. br. at 13), an evidentiary hearing is necessary in this case, and has been appellant's prayer for relief all along. Then if the State wants to offer the SAR into evidence, it will be in the record.

Without an evidentiary hearing, it cannot be determined whether counsel advised appellant regarding his eligibility for parole, whether he misadvised him, or whether his advice was misunderstood by appellant. It cannot be determined whether counsel acted within or without reasonable professional norms. It cannot be determined whether appellant's reliance on his counsel was reasonable, and whether it induced his plea of guilty. As *Padilla* makes clear, the questions of collateral or direct; misadvice or failure to advise are irrelevant. This Court should reverse the motion court's denial of postconviction relief and remand for an evidentiary hearing.

## **CONCLUSION**

For the reasons presented in this reply brief and in appellant's original brief, appellant respectfully requests that this Court reverse the motion court's denial of postconviction relief and remand for an evidentiary hearing.

Respectfully submitted,

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Ellen H. Flottman, MOBar #34664  
Attorney for Appellant  
Woodrail Centre, 1000 W. Nifong  
Building 7, Suite 100  
Telephone: (573) 882-9855, ext. 323  
FAX: (573) 884-4793  
E-mail: Ellen.Flottman@mspd.mo.gov

### **Certificate of Compliance and Service**

I, Ellen H. Flottman, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 792 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a Symantec VirusScan program, which was updated in November, 2010. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 17<sup>th</sup> day of November, 2010, to John W. Grantham, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri, 65102.

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Ellen H. Flottman