

**IN THE SUPREME COURT  
OF MISSOURI**

**LOWELL CLYDE MILNER,**                    )  
  )  
  )  
**vs.**    ) **Appeal No. SC96909**  
  )  
**STATE OF MISSOURI,**                    )  
  )  
  )  
  )  
**Respondent.**                            )

---

**APPEAL TO THE SUPREME COURT OF MISSOURI  
FROM THE MADISON COUNTY CIRCUIT COURT  
STATE OF MISSOURI  
THE HONORABLE SANDY MARTINEZ  
JUDGE AT GUILTY-PLEA AND POST-CONVICTION PROCEEDINGS**

---

**APPELLANT’S SUBSTITUTE STATEMENT, BRIEF, AND ARGUMENT**

---

**Lisa M. Stroup, Bar#36325  
Attorney for Appellant  
1010 Market St.  
Ste. 1100  
St. Louis, MO 63101  
(314)340-7662  
Fax (314)340-7685  
lisa.stroup@mspd.mo.gov**

**INDEX**

	<u>Page</u>
TABLE OF AUTHORITIES .....	3-5
JURISDICTIONAL STATEMENT .....	6-8
STATEMENT OF FACTS .....	9-13
POINTS RELIED ON	
I. ....	14-16
II. ....	17-18
ARGUMENT	
I. ....	19-29
II. ....	30-38
CONCLUSION .....	39
CERTIFICATES OF SERVICE AND COMPLIANCE .....	40
APPENDIX .....	41
JUDGMENT .....	A1-A2
ORDER AND JUDGMENT .....	A3-A10

## TABLE OF AUTHORITIES

	<u>Page</u>
<b>CASES:</b>	
<i>Burroughs v. State</i> , 773 S.W.2d 167 (Mo. App. E.D. 1986) .....	20, 21
<i>Drew v. State</i> , 436 S.W.2d 727 (Mo. 1969).....	23
<i>Evans v. State</i> , 779 S.W.2d 253 (Mo. App. E.D. 1989) .....	29, 37
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S. Ct. 782 (1963) .....	21
<i>Hewitt v. State</i> , 518 S.W.3d 227 (Mo. App. S.D. 2017).....	15, 18, 28, 36
<i>Hill v. Lockhart</i> , 474 U.S. 52, 106 S. Ct. 366 (1985) .....	22, 23
<i>Moore v. State</i> , 458 S.W.3d 822 (Mo. banc 2015) .....	15, 17, 25, 34
<i>Moore v. State</i> , 488 S.W.2d 266 (Mo. App. K.C.D. 1972) .....	23
<i>Mouse v. State</i> , 90 S.W.3d 145 (Mo. App. S.D. 2002).....	20, 31
<i>Porter v. State</i> , 678 S.W.2d 2 (Mo. App. E.D. 1984).....	15, 23
<i>Powell v. Alabama</i> , 287 U.S. 45, 53 S. Ct. 55 (1932) .....	21
<i>Richardson v. State</i> , 719 S.W.2d 912 (Mo. App. E.D. 1986).....	21
<i>Sanders v. State</i> , 807 S.W.2d 493 (Mo. banc 1991) .....	7, 9, 13
<i>Seales v. State</i> , 580 S.W.2d 733 (Mo. 1979) .....	21
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052 (1984) .....	21
<i>Vogl v. State</i> , 437 S.W.3d 218 (Mo. banc 2014) .....	17, 25, 34
<i>Walker v. State</i> , 698 S.W.2d 871 (Mo. App. E.D. 1985).....	23
<i>Washington v. State</i> , 515 S.W.3d 786 (Mo. App. W.D. 2017).....	18, 25, 33

**CONSTITUTIONAL PROVISIONS:**

Mo. Const. Art. I, § 10 ..... 14, 15, 17, 18, 19, 21, 22, 29, 30, 31, 38

Mo. Const., Art. I, § 18 ..... 14, 15, 19, 21, 29

Mo. Const., Art. V, § 5..... 22, 31

Mo. Const., Art. V, § 10 ..... 8

U.S. Const., Amend. V..... 14, 15, 17, 18, 19, 22, 29, 30, 31, 38

U.S. Const., Amend. VI..... 14, 15, 19, 21, 29

U.S. Const., Amend. XIV . . . . . 14, 15, 17, 18, 19, 21, 22, 29, 30, 31, 38

**STATUTES:**

Mo. Rev. Stat. § 558.031 (Cum. Supp. 2012)..... 18, 32

Mo. Rev. Stat. § 559.115 (Cum. Supp. 2012)..... 15, 18

Mo. Rev. Stat. § 562.011 (2000)..... 16, 18, 22

Mo. Rev. Stat. § 589.414 (Cum. Supp. 2012)..... 15, 18, 22

Mo. Rev. Stat. § 589.425 (Cum. Supp. 2012)..... 6, 15, 18

Mo. Rev. Stat. § 562.011 (2000)..... 22

**RULES:**

Mo. Sup. Ct. Rule 24.035..... 6, 15, 17, 18, 19, 20, 25

Mo. Sup. Ct. Rule 83.04..... 8

Mo. Sup. Ct. Rule 83.08..... 40

Mo. Sup. Ct. Rule 83.09..... 8

Mo. Sup. Ct. Rule 84.06..... 40

***OTHER AUTHORITY:***

Mayo Clinic, Diseases and Conditions, <https://mayoclinic.org/diseases-conditions/ehrlichiosis/basics/definition/con-200227741> (last visited March 25, 2018)<sup>1</sup> .....10

---

<sup>1</sup> The designation “www” has been removed to prevent this being a hyperlink.

## JURISDICTIONAL STATEMENT

On September 14, 2014, Appellant Lowell Clyde Milner pleaded guilty in Madison County Cause No. 13MD-CR00225-01 to failing to register (two counts), a class D felony violating Mo. Rev. Stat. § 589.425 (Cum. Supp. 2012), before the Honorable Sandy Martinez, Judge, 24<sup>th</sup> Judicial Circuit.

Also on April 10, 2013, the Court sentenced Mr. Milner to four years' imprisonment in DOC custody in Count II, to run consecutively to a four-year term in Count I. The Court suspended executing those sentences and placed Mr. Milner on five years' supervised probation.

On February 4, 2016, the Court revoked Mr. Milner's probation and ordered the previously-imposed sentences executed. On February 5, 2016, Mr. Milner was delivered to DOC.

Mr. Milner filed a Motion for Post-Conviction Relief under Missouri Supreme Court Rule 24.035 on April 11, 2016. On April 11, 2016, this Court appointed the Appellate/PCR Public Defender's Office to represent Mr. Milner. On April 29, 2016, counsel requested an additional thirty (30) days under Rule 24.035(g) to file the amended motion. According to the motion court's Order and Judgment, that request was granted (L.F. 80).

A transcript of the guilty plea and sentencing proceedings was filed in the underlying criminal cause on May 20, 2016 (L.F. 5). Under Rule 24.035, the amended motion was due to be filed on or before August 18, 2016. Instead, the

amended motion was filed on November 2, 2016. Accompanying it was a motion under *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991).

In the motion, counsel advised the motion court the amended motion was being filed out of time because the file maintained by plea counsel – containing Mr. Milner’s medical records germane to Point I – was destroyed by plea counsel and because counsel needed additional time to herself obtain those medical records (L.F. 57-60).

The Court dismissed Cause No. 16MD-CC00057 in an “Order and Judgment Dismissing the Plaintiff’s 24.035 Motion to Vacate, Set Aside, or Correct the Judgment or Sentence” on March 2, 2017 without having held an evidentiary hearing.

Mr. Milner filed a “Motion to Vacate Dismissal Order” on March 22, 2017. That motion has not been ruled on.

On April 11, 2017, Mr. Milner filed a Notice of Appeal to the Missouri Court of Appeals. Mr. Milner was also granted leave to file his appeal as a poor person.

The Court of Appeals issued an opinion on November 21, 2017. The Respondent filed an Application for Transfer, which was granted on March 6,

2017. Thus, jurisdiction lies in this Court. Mo. Const. Art. V, § 10 (2000); Mo. Sup. Ct. Rules 83.04, .09.<sup>2</sup>

\* \* \* \* \*

The record on appeal of post-conviction proceeding – including the legal file and guilty plea and sentencing transcript from Madison County Cause No. 13MD-CR00225-01 – will be cited as “L.F.” A transcript of the probation violation hearing and subsequent sentencing on February 4, 2016 will be cited as “Supp.L.F.”

---

<sup>2</sup>All further statutory references are to Mo. Rev. Stat. 2000, unless otherwise indicated in the index.



## STATEMENT OF FACTS

Appellant Lowell Milner timely filed a *pro se* motion for post-conviction relief after pleading guilty to failing to register as a sex offender (two counts) (L.F. 11, 26-28, 43-48). In his *pro se* motion, Mr. Milner raised the following points as to why his convictions and sentences should be vacated, set aside, or corrected: 1) the court had executed the sentences previously imposed, even though the state had recommended the court retain jurisdiction under § 559.115 (Cum. Supp. 2012); and 2) the court had a bias against Mr. Milner because of a previous, unrelated, family-court matter (L.F. 44). Mr. Milner also stated who could confirm what he was stating in his motion (L.F. 44).

An amended motion was also filed, alleging 1) Mr. Milner's guilty pleas were involuntary, unknowing, and unintelligent because plea counsel failed to advise Mr. Milner of the defense that he did not commit voluntary acts in failing to register on or about February 6 and May 16, 2013 because he could not appear in person to register in that he was hospitalized; and 2) Mr. Milner was denied due process because his sentences have not been reduced by the time he spent in pre-trial incarceration (L.F. 63-71).

With the amended motion, post-conviction counsel filed a Motion for this Court to Consider Movant's Amended Motion as Timely Filed under *Sanders v. State, supra* (L.F. 57-60). In the motion, counsel advised the motion court the amended motion was being filed out of time because the file maintained by plea counsel – containing Mr. Milner's medical records germane to Point I – was

destroyed by plea counsel and because counsel needed additional time to herself obtain those medical records (L.F. 57-60). Counsel also stated that Mr. Milner was not at fault for the amended motion being filed untimely (L.F. 59). In the motion, counsel did not claim to have been ineffective (L.F. 57-60).

***Point I***

Mr. Milner was charged with two counts of failing to register as a sex offender (L.F. 64). The state accused him in Count I of knowingly failing to register on or about February 6, 2013, within three days of a change in residency (L.F. 8). The state accused him of the same conduct in Count II on or about May 16, 2013 (L.F. 9).

Mr. Milner is willing and available to testify to the information in this paragraph (L.F. 64). On February 6, 2013, he was hospitalized with a nervous breakdown; on May 16, 2013, with Ehrlichiosis (L.F. 64). Ehrlichiosis is a bacterial disease spread by tick bite. Mayo Clinic, Diseases and Conditions, <https://mayoclinic.org/diseases-conditions/ehrlichiosis/basics/definition/con-200227741> (last visited March 25, 2018). Ehrlichiosis caused so much damage Mr. Milner was placed on life support (L.F. 64). Mr. Milner was hospitalized at Parkland and Mineral Area Hospitals in Farmington, MO (L.F. 64).

Mr. Milner's wife, Ms. Sharron Milner, his son, Mr. Daniel Milner, and his sister, Ms. Rose Jenkins, are also willing and available to testify to the information in the above paragraph (L.F. 64).

Mr. and Mrs. Milner are also willing and available to testify they gave plea counsel Mr. Milner's hospital records (L.F. 64). The records would have shown Mr. Milner was hospitalized on or about February 6 and May 16, 2013 (L.F. 64).

Plea counsel is also willing and available to testify to the information in this paragraph (L.F. 64). He did get Mr. Milner's hospital records from the Milners (L.F. 64). According to plea counsel, the records showed Mr. Milner was hospitalized on either February 6 or May 16, 2013 (L.F. 64-65). Counsel no longer has those records because he destroyed Mr. Milner's file when he moved from Jackson to Kansas City, MO (L.F. 65).

Mr. Milner would also be willing and available to testify counsel advised him that he did not have a defense to the charges of failing to register as a sex offender on the basis that he was physically incapable of registering as a sex offender on or about February 6 or May 16, 2013 (L.F. 65).

On February 4, 2016, the court asked Mr. Milner if counsel had properly represented him (Supp.L.F. 30-31). Mr. Milner responded he had not:

A. At the time I thought he did, but he didn't admit any of the medical evidence, Your Honor.

THE COURT: You thought he should have entered medical evidence to counter your failing to register as a sex offender. That would be your – that would be your, I guess –

A. Yeah.

THE COURT: Okay. So you thought he should have entered medical – medical – now physical medical evidence or mental?

MR. CHASE: Evidence about your mental health or –

A. Yeah.

MR. CHASE: -- your physical health, sir?

A. Physical.

THE COURT: Physical health.

A. Yes.

THE COURT: Okay. So he did everything that you asked him to do except enter medical evidence as to why – as to your failing to register as a sex offender; is that correct?

A. Yes, Your Honor

(Supp.L.F. 31).

### ***Point II***

Before his probation was revoked in Cause No. 13MD-CR00225-01, Mr. Milner was incarcerated two days in the Phelps County Jail, and from December 3, 2015 until February 4, 2016 in the Madison County Jail – a total of sixty-six (66) days (L.F. 71). To date, Mr. Milner’s sentences have not been reduced by the time he spent in the Phelps and Madison County Jails (L.F. 71).

***The motion court's ruling in Points I and II***

The motion court denied the motion filed by undersigned counsel to accept the amended motion as timely filed under *Sanders v. State, supra* (L.F. 84). The court decided *Sanders* did not apply because it was Mr. Milner's responsibility to procure for post-conviction counsel the hospital records at issue in Point I (L.F. 84-85). The motion court decided counsel had not abandoned Mr. Milner (L.F. 84).

Because it denied the *Sanders* motion, the motion court decided Mr. Milner must proceed on his *pro se* motion (L.F. 85). The motion court decided that – in his *pro se* motion – Mr. Milner had “made no claims of ineffective assistance of counsel, and made no claims that his guilty plea[s were] not voluntary” (L.F. 85). The court also decided that Mr. Milner had not listed any facts “that would support, or by which any such claims could be inferred” (L.F. 85).

Because it decided that Mr. Milner had not made any claims in his *pro se* motion that concerned ineffective assistance of counsel or the voluntariness of his guilty pleas, and that Mr. Milner had not listed any facts supporting issues concerning those claims, the motion court denied Mr. Milner's request for an evidentiary hearing and dismissed his Motion to Vacate, Set Aside or Correct and Judgment and Sentence (L.F. 86).

Mr. Milner appeals the motion court's findings of facts and conclusions of law dismissing the underlying post-conviction cause. Further facts will be stated as necessary in the Argument section.

## POINTS RELIED ON

### I.

The motion court clearly erred in dismissing Appellant Lowell Milner's Rule 24.035 motion for post-conviction relief by determining that Mr. Milner had been at fault for the amended motion's being untimely filed because he was denied his right to due process of law<sup>3</sup> in that 1) the motion court could only dismiss the underlying post-conviction cause if Mr. Milner had untimely filed his *pro se* post-conviction motion; and 2) post-conviction counsel was at fault for the amended motion's untimely filing.

In the amended motion, Mr. Milner argued he had been denied effective assistance of counsel and due process of law<sup>4</sup> in that plea counsel failed to advise Mr. Milner of the defense that he did not commit voluntary acts in failing to register on or about February 6 and May 16, 2013 because he could not appear in person to register in that he was hospitalized.

The court dismissed Mr. Milner's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not

---

<sup>3</sup> This right is guaranteed by the United States Constitution, Fifth and Fourteenth Amendments, and the Missouri Constitution, Article I, § 10.

<sup>4</sup> These rights are guaranteed by the United States Constitution, Fifth, Sixth, and Fourteenth Amendments, and the Missouri Constitution, Article I, §§ 10 and 18(a).

**conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.**

**Mr. Milner was prejudiced by counsel's ineffectiveness. If counsel had advised him that he had the defense that he was not physically capable of appearing in person to register on or about February 6 or May 16, 2013, Mr. Milner would not have pleaded guilty, but would have proceeded to trial instead.**

*United States v. Wimbley*, No. CRIM. 11-0019-WS (S.D. Ala. July 27, 2011) (WESTLAW);

*Porter v. State*, 678 S.W.2d 2 (Mo. App. E.D. 1984)

*Moore v. State*, 458 S.W.3d 822 (Mo. banc 2015);

*Hewitt v. State*, 518 S.W.3d 227 (Mo. App. S.D. 2017), *transfer denied* (May 30, 2017);

U.S. Const., Amend. V;

U.S. Const., Amend. VI;

U.S. Const., Amend. XIV;

Mo. Const., Art. I, § 10;

Mo. Const., Art. I, § 18;

Mo. Sup. Ct. Rule 24.035;

Mo. Rev. Stat. § 559.115 (Cum. Supp. 2012);

Mo. Rev. Stat. § 589.414 (Cum. Supp. 2012);

Mo. Rev. Stat. § 589.425 (Cum. Supp. 2012); and

Mo. Rev. Stat. § 562.011 (2000).



## II.

The motion court clearly erred in dismissing Appellant Lowell Milner's Rule 24.035 motion for post-conviction relief by determining that Mr. Milner had been at fault for the amended motion's being untimely filed because he was denied his right to due process of law<sup>5</sup> in that 1) the motion court could only dismiss the underlying post-conviction cause if Mr. Milner had untimely filed his *pro se* post-conviction motion; and 2) post-conviction counsel was at fault for the amended motion's untimely filing.

In the amended motion, Mr. Milner argued he had been denied due process of law<sup>6</sup> because his sentences have not been reduced by the time he spent in pre-trial incarceration.

The court dismissed Mr. Milner's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

Mr. Milner was prejudiced because one of his sentences has not been reduced by sixty-six (66) days' credit for time served.

*Moore v. State*, 458 S.W.3d 822 (Mo. banc 2015);

*Vogl v. State*, 437 S.W.3d 218 (Mo. banc 2014);

---

<sup>5</sup> See n.4.

<sup>6</sup> See n.4.

*Hewitt v. State*, 518 S.W.3d 227 (Mo. App. S.D. 2017), *transfer denied* (May 30, 2017);

*Washington v. State*, 515 S.W.3d 786 (Mo. App. W.D. 2017);

U.S. Const., Amend. V;

U.S. Const., Amend. XIV;

Mo. Const., Art. I, § 10;

Mo. Sup. Ct. Rule 24.035;

Mo. Rev. Stat. § 558.031;

Mo. Rev. Stat. § 559.115 (Cum. Supp. 2012);

Mo. Rev. Stat. § 589.414 (Cum. Supp. 2012);

Mo. Rev. Stat. § 589.425 (Cum. Supp. 2012); and

Mo. Rev. Stat. § 562.011 (2000).

## ARGUMENT

### I.

The motion court clearly erred in dismissing Appellant Lowell Milner's Rule 24.035 motion for post-conviction relief by determining that Mr. Milner had been at fault for the amended motion's being untimely filed because he was denied his right to due process of law<sup>7</sup> in that 1) the motion court could only dismiss the underlying post-conviction cause if Mr. Milner had untimely filed his *pro se* post-conviction motion; and 2) post-conviction counsel was at fault for the amended motion's untimely filing.

In the amended motion, Mr. Milner argued he had been denied effective assistance of counsel and due process of law<sup>8</sup> in that plea counsel failed to advise Mr. Milner of the defense that he did not commit voluntary acts in failing to register on or about February 6 and May 16, 2013 because he could not appear in person to register in that he was hospitalized.

The court dismissed Mr. Milner's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

---

<sup>7</sup> See n.3.

<sup>8</sup> See n.4.

**Mr. Milner was prejudiced by counsel's ineffectiveness. If counsel had advised him that he had the defense that he was not physically capable of appearing in person to register on or about February 6 or May 16, 2013, Mr. Milner would not have pleaded guilty, but would have proceeded to trial instead.**

### **Preservation Statement**

Mr. Milner argued in his amended motion plea counsel failed to advise him of the defense that he did not commit voluntary acts in failing to register on or about February 6 and May 16, 2013 because he could not appear in person to register (L.F. 63-71). Because the claim was included in the amended motion, it has been preserved for appellate review. *See Mouse v. State*, 90 S.W.3d 145, 152 (Mo. App. S.D. 2002) (to be preserved for appellate review, the claim raised on post-conviction appeal must have been either raised in amended post-conviction motion or tried by the parties' implicit consent at the evidentiary hearing).

### **Review Standard**

The motion court clearly erred in dismissing Mr. Milner's requests for an evidentiary hearing and post-conviction relief because Missouri Supreme Court Rule 24.035(h) requires an evidentiary hearing be held when the motion pleads facts, not conclusions, warranting relief, not refuted by the record, and the matters complained of resulted in prejudice to the movant. *Burroughs v. State*, 773 S.W.2d 167, 169 (Mo. App. E.D. 1986).

Appellate review is limited to determining whether the motion court's findings and conclusions are clearly erroneous. *Id.* Findings of fact and conclusions of law are clearly erroneous if an appellate court, upon reviewing the record, is left with the definite and firm impression a mistake has been made. *Id.*; *Richardson v. State*, 719 S.W.2d 912, 915 (Mo. App. E.D. 1986).

***Counsel failed to advise Mr. Milner of the defense  
that he did not commit voluntary acts in failing to register***

### **General Case Law**

Mr. Milner has alleged he was deprived of both effective assistance of counsel and due process of law (L.F. 63, 71).

The United States Constitution, Sixth Amendment, and the Missouri Constitution, Article I, §§ 10 and 18(a), guarantee the right to counsel's assistance. *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 782 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55 (1932). The Fourteenth Amendment mandates the assistance be effective. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984).

To establish that a conviction must be set aside due to ineffective assistance of counsel, a movant must show counsel did not demonstrate the customary skill and diligence a reasonably competent attorney would display when rendering similar services under the existing circumstances, and movant was prejudiced thereby. *Id.*; *Seales v. State*, 580 S.W.2d 733, 736-737 (Mo. 1979). A person who

pleads guilty is as entitled to effective assistance of counsel as one who has had a trial. *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366 (1985).

To establish prejudice, a movant must show, but for counsel's error, he would not have pleaded guilty but would have insisted on going to trial. *Hill*, 466 U.S. at 59, 106 S. Ct. at 370.

Both the United States and Missouri mandate that no person shall "be deprived of life, liberty or property without due process of law." U.S. Const., Amend. XIV; Mo. Const., Art. I, § 10.

This Court may establish rules "relating to practice, procedure and pleading for all courts . . . which shall have the force and effect of law." Mo. Const., Art. V, § 5.

### **Analysis**

Counsel was ineffective for mistakenly advising Mr. Milner that he did not have a defense to the charges of failing to register as a sex offender (L.F. 66). In Missouri, a person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act. Mo. Rev. Stat. § 562.011.1 (2000). With respect to failing to register, a voluntary act is an omission to perform an act of which the actor is physically capable. Mo. Rev. Stat. §§ 562.011.2(2) (2000); 589.425.1 (Cum. Supp. 2012). To register, a person shall appear in person and shall inform law enforcement in writing within three business days of his or her new address and phone number. Mo. Rev. Stat. § 589.414.1, .2 (Cum. Supp. 2012).

Therefore, to be guilty of failing to register, a person must be physically capable of registering (L.F. 66). For example, if Mr. Milner had been incarcerated on or about February 6 or May 16, 2013, he would have been unable to register. *United States v. Wimbley*, No. CRIM. 11-0019-WS at 3 (S.D. Ala. July 27, 2011) (WESTLAW). If he had been unable to fulfill his registering requirements because he was incarcerated, that may have been a defense. *Id.*

Mr. Milner had a defense to the two counts of failing to register as a sex offender (L.F. 67). Because of his nervous breakdown and Ehrlichiosis, Mr. Milner was not physically capable on or about February 6 or May 16, 2013 of appearing in person before a law enforcement officer (L.F. 67). Because counsel did not advise Mr. Milner about this defense, he was ineffective (L.F. 67).

Counsel's effectiveness is relevant only to the extent it affects the guilty pleas' voluntariness. *Porter v. State*, 678 S.W.2d 2, 3 (Mo. App. E.D. 1984); *Walker v. State*, 698 S.W.2d 871, 874 (Mo. App. E.D. 1985). A guilty plea is not made voluntarily if it is induced by fraud or mistake, misapprehension or fear, persuasion or the holding out of hopes which prove to be false or ill-founded. *Drew v. State*, 436 S.W.2d 727, 729 (Mo. 1969); *Moore v. State*, 488 S.W.2d 266 (Mo. App. K.C.D. 1972). Mr. Milner's guilty pleas were involuntary, unknowing, and unintelligent because he mistakenly believed he did not have a defense to the charges of failing to register (L.F. 67).

Mr. Milner was prejudiced by counsel's ineffectiveness (L.F. 67). If counsel had advised him that he had the defense that he was not physically capable

of appearing in person to register on or about February 6 or May 16, 2013, Mr. Milner would not have pleaded guilty, but would have proceeded to trial instead (L.F. 67). Thus, Mr. Milner was prejudiced by counsel's ineffectiveness (L.F. 67).

***The motion court's ruling***

The motion court denied the motion filed by undersigned counsel to accept the amended motion as timely filed under *Sanders v. State, supra* (L.F. 84). The court decided *Sanders* did not apply because it was Mr. Milner's responsibility to procure for post-conviction counsel the hospital records at issue in this point (L.F. 84-85). The motion court decided counsel had not abandoned Mr. Milner (L.F. 84).

Because it denied the *Sanders* motion, the motion court decided Mr. Milner must proceed on his *pro se* motion (L.F. 85). The motion court decided that – in his *pro se* motion – Mr. Milner had “made no claims of ineffective assistance of counsel, and made no claims that his guilty plea[s were] not voluntary” (L.F. 85). The court also decided that Mr. Milner had not listed any facts “that would support, or by which any such claims could be inferred” (L.F. 85).

Because the motion court decided that Mr. Milner had not made any claims in his *pro se* motion that concerned ineffective assistance of counsel or the voluntariness of his guilty pleas, and because it decided that Mr. Milner had not listed any facts supporting issues concerning those claims, the motion court denied Mr. Milner's request for an evidentiary hearing and dismissed his Motion to Vacate, Set Aside or Correct and Judgment and Sentence (L.F. 86).



The motion court clearly erred in dismissing the underlying post-conviction case. Firstly, dismissal would only have been called for if Mr. Milner had filed his *pro se* motion out of time, which he did not. Where a *pro se* motion has been filed late, a movant has waived his right to proceed in the post-conviction case and has waived any claim that might have been raised in a post-conviction motion.

*Washington v. State*, 515 S.W.3d 786, 791 (Mo. App. W.D. 2017). Mr. Milner had one-hundred-eighty (180) days after being delivered to DOC to file a *pro se* motion. Rule 24.035(b). He was sentenced on February 4, and delivered to DOC on February 6, 2016 (L.F. 62). Therefore, he had until August 4, 2016 to file the *pro se* motion. He filed it on April 11, 2016 (L.F. 43). Thus, he filed the *pro se* motion timely, which meant that the court clearly erred in dismissing the post-conviction case.

The motion court also clearly erred in refusing to accept the untimely-filed amended motion. The court erred because it did not follow this Court's guidelines in *Moore v. State*, 458 S.W.3d 822, 824 (Mo. banc 2015). Under that case, if an amended motion has been untimely filed, a presumption of abandonment by post-conviction counsel has been raised. *Id.* at 825. Because of the presumption, the court must conduct an independent inquiry to determine if the amended motion was filed late because of counsel or movant. *Vogl v. State*, 437 S.W.3d 218, 229 (Mo. banc 2014).

Here, after undersigned counsel filed the amended motion untimely and asked the court to consider it timely filed under *Sanders v. State*, *supra*, the motion

court did not conduct an independent inquiry to determine whether the amended motion's untimely filing was caused by movant or counsel. Thus, the motion court clearly erred.

The motion court also clearly erred by deciding undersigned counsel was not exclusively at fault for the amended motion's being untimely filed (L.F. 85). As counsel explained in the Motion to Vacate Dismissal Order, the amended motion was filed late because – in addition to counsel's needing the additional time to obtain Mr. Milner's medical records – counsel wanted to review plea counsel's file in the underlying criminal cause in order to determine what points to raise in the amended motion (L.F. 88). When plea counsel destroyed Mr. Milner's file, not only did it force counsel to obtain Mr. Milner's medical records from their original sources, it also deprived post-conviction counsel of the opportunity to review the rest of the information in the file. Undersigned counsel attempted to review the file by contacting plea counsel, who had moved since representing Mr. Milner (L.F. 65). But that took time. And when counsel was able to contact plea counsel, she discovered the file no longer existed and she would have to obtain the medical records herself (L.F. 65). Therefore, the motion court clearly erred in deciding post-conviction counsel did not abandon Mr. Milner.

The motion court also clearly erred in deciding that Mr. Milner, and not undersigned counsel, had been at fault for the untimely filing of the amended motion. The motion court ruled that Mr. Milner had been at fault because he had

“done absolutely nothing to obtain the medical records,” and did not have his family members get them (L.F. 84-85).

The court clearly erred in deciding that Mr. Milner was at fault for the untimely filing by doing “absolutely nothing” to obtain his medical records. When Mr. Milner was free on bond, he obtained the records and gave them to plea counsel (L.F. 64). But those records were not available to post-conviction counsel because plea counsel admitted destroying them when he destroyed Mr. Milner’s file (L.F. 65).

After Mr. Milner was incarcerated in DOC and no longer able to obtain the medical records, he signed release forms so undersigned counsel and her investigator could obtain the records (L.F. 90). Mr. Milner also advised undersigned counsel when and at which hospitals he had received treatment (L.F. 64). Thus, the motion court clearly erred in deciding that Mr. Milner had “done nothing” to obtain his medical records.

The motion court also clearly erred in deciding Mr. Milner had been at fault for the untimely filing of his amended motion by deciding his family members could have obtained the medical records (L.F. 84). Because undersigned counsel was appointed to represent Mr. Milner, it was her responsibility to obtain the medical records. It was not Mr. Milner’s family members’ responsibility. Nor was Mr. Milner obliged to recruit his family to help him obtain the records. Therefore, the motion court clearly erred in deciding that Mr. Milner, and not counsel, was at fault for not obtaining the records.

Lastly, the motion court clearly erred in dismissing the case after determining Mr. Milner was at fault for the untimely filing of the amended motion. If Mr. Milner had been at fault, the correct remedy would have been to proceed on the points in the *pro se* motion. *Hewitt v. State*, 518 S.W.3d 227, 232 (Mo. App. S.D. 2017), *transfer denied* (May 30, 2017)(citing *Luleff v. State*, 807 S.W.2d 495, 498 (Mo. banc 1991)). Instead, the motion court dismissed the underlying post-conviction case *de haut en bas*.

The motion court decided to dismiss the case instead of proceeding on the *pro se* points because in them Mr. Milner “made no claims of ineffective assistance of counsel, and made no claims that his guilty plea[s were] not voluntary” (L.F. 85). In his *pro se* motion, Mr. Milner raised the following points as to why his convictions and sentences should be vacated, set aside, or corrected: 1) the court had executed the sentences previously imposed, even though the state had recommended the court retain jurisdiction under § 559.115 (Cum. Supp. 2012); and 2) the court had a bias against Mr. Milner because of a previous, unrelated family-court matter (L.F. 44). Mr. Milner also stated who could confirm what he was stating in his motion (L.F. 44).

The motion court clearly erred in dismissing this case by deciding that Mr. Milner did not make any claims regarding ineffective assistance of counsel or the voluntariness of his guilty pleas. Mr. Milner was not limited to raising claims regarding ineffective assistance of counsel or the voluntariness of his guilty pleas. According to Rule 24.035, a movant may raise any claim “that the conviction or

sentence imposed violates the constitution and laws of this state or the constitution of the United States, including claims of ineffective assistance of trial and appellate counsel, that the court imposed the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law.” Rule 24.035(a). Although the rule does mention ineffective assistance, a movant is not limited to that type of claim.

Nor is a movant limited to claims concerning the voluntariness of the guilty plea. For example, if a court accepts a guilty plea, but orders a sentence beyond the permissible punishment range, Rule 24.035 would provide relief whereby the sentence could be reduced. *See, e.g., Evans v. State*, 779 S.W.2d 253 (Mo. App. E.D. 1989). Therefore, the motion court clearly erred in dismissing the underlying post-conviction case.

For the reasons cited above, the court clearly erred in dismissing Appellant Lowell Milner’s Rule 24.035 motion for post-conviction relief because plea counsel failed to advise Mr. Milner of the defense that he did not commit voluntary acts in failing to register on or about February 6 and May 16, 2013 because he could not appear in person to register. Mr. Milner’s rights under the United States Constitution, Fifth, Sixth, and Fourteenth Amendments, and the Missouri Constitution, Article I, §§ 10 and 18(a) were thus violated. Mr. Milner therefore requests this Court reverse the motion court’s order of dismissal and remand this cause for an evidentiary hearing; or in the alternative, remand this cause with directions his convictions and sentences be set aside.

## II.

The motion court clearly erred in dismissing Appellant Lowell Milner's Rule 24.035 motion for post-conviction relief by determining that Mr. Milner had been at fault for the amended motion's being untimely filed because he was denied his right to due process of law<sup>9</sup> in that 1) the motion court could only dismiss the underlying post-conviction cause if Mr. Milner had untimely filed his *pro se* post-conviction motion; and 2) post-conviction counsel was at fault for the amended motion's untimely filing.

In the amended motion, Mr. Milner argued he had been denied due process of law<sup>10</sup> because his sentences have not been reduced by the time he spent in pre-trial incarceration.

The court dismissed Mr. Milner's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

Mr. Milner was prejudiced because one of his sentences has not been reduced by sixty-six (66) days' credit for time served.

---

<sup>9</sup> See n.4.

<sup>10</sup> See n.4.

### **Preservation Statement**

Mr. Milner argued in his amended motion he had been denied due process of law because his sentences have not been reduced by the time he spent in pre-trial incarceration (L.F. 67-71). Because the claim was included in the amended motion, it has been preserved for appellate review. *See Mouse v. State*, 90 S.W.3d at 152 (to be preserved for appellate review, the claim raised on post-conviction appeal must have been either raised in amended post-conviction motion or tried by the parties' implicit consent at the evidentiary hearing).

### **Review Standard**

The review standard set forth in Point I applies equally to this point and is adopted and incorporated herein.

***Mr. Milner's sentences need to be reduced by his pre-trial incarceration***

### **General Case Law**

Both the United States and Missouri mandate that no person shall "be deprived of life, liberty or property without due process of law." U.S. Const., Amend. XIV; Mo. Const., Art. I, § 10.

This Court may establish rules "relating to practice, procedure and pleading for all courts . . . which shall have the force and effect of law." Mo. Const., Art. V, § 5.

### **Analysis**

Mr. Milner is entitled to have one of his sentences credited by the time he was incarcerated before his probation was revoked (L.F. 71). Mr. Milner was

entitled to receive credit toward the service of a sentence of imprisonment for all time in prison, jail or custody after the offense occurred and before the commencement of the sentence, when the time in custody was related to that offense. Mo. Rev. Stat. § 558.031.1.

One of Mr. Milner's sentences should have been credited with the time he spent in the Phelps and Madison County jails because that time met the requirements of § 558.031.1 (L.F. 71-72). He spent time in jail; that time occurred after the offenses had allegedly been committed and before he was delivered to DOC; and the time was related to the offenses because he was in custody because of the state's alleging he had violated probation on those offenses (L.F. 72). Therefore, one of Mr. Milner's sentences should have been credited with the time he spent in the Phelps and Madison County jails (L.F. 72).

Mr. Milner was prejudiced because his one of his sentences has not been reduced by sixty-six (66) days' credit for time served (L.F. 72).

#### ***The motion court's ruling***

The motion court denied the motion filed by undersigned counsel to accept the amended motion as timely filed under *Sanders v. State, supra* (L.F. 84). The court decided *Sanders* did not apply because it was Mr. Milner's responsibility to procure for post-conviction counsel the hospital records at issue in this point (L.F. 84-85). The motion court decided counsel had not abandoned Mr. Milner (L.F. 84).



Because it denied the *Sanders* motion, the motion court decided Mr. Milner must proceed on his *pro se* motion (L.F. 85). The motion court decided that – in his *pro se* motion – Mr. Milner had “made no claims of ineffective assistance of counsel, and made no claims that his guilty plea[s were] not voluntary” (L.F. 85). The court also decided that Mr. Milner had not listed any facts “that would support, or by which any such claims could be inferred” (L.F. 85).

Because the motion court decided that Mr. Milner had not made any claims in his *pro se* motion that concerned ineffective assistance of counsel or the voluntariness of his guilty pleas, and because it decided that Mr. Milner had not listed any facts supporting issues concerning those claims, the motion court denied Mr. Milner’s request for an evidentiary hearing and dismissed his Motion to Vacate, Set Aside or Correct and Judgment and Sentence (L.F. 86).

The motion court clearly erred in dismissing the underlying post-conviction case. Firstly, dismissal would only have been called for if Mr. Milner had filed his *pro se* motion out of time, which he did not. Where a *pro se* motion has been filed late, a movant has waived his right to proceed in the post-conviction case and has waived any claim that might have been raised in a post-conviction motion.

*Washington v. State*, 515 S.W.3d 786, 791 (Mo. App. W.D. 2017). Mr. Milner had one-hundred-eighty (180) days after being delivered to DOC to file a *pro se* motion. Rule 24.035(b). He was sentenced on February 4, and delivered to DOC on February 6, 2016 (L.F. 62). Therefore, he had until August 4, 2016 to file the *pro se* motion. He filed it on April 11, 2016 (L.F. 43). Thus, he filed the *pro se*

motion timely, which meant that the court clearly erred in dismissing the post-conviction case.

The motion court also clearly erred in refusing to accept the untimely-filed amended motion. The court erred because it did not follow this Court's guidelines in *Moore v. State*, 458 S.W.3d 822, 824 (Mo. banc 2015). Under that case, if an amended motion has been untimely filed, a presumption of abandonment by post-conviction counsel has been raised. *Id.* at 825. Because of the presumption, the court must conduct an independent inquiry to determine if the amended motion was filed late because of counsel or movant. *Vogl v. State*, 437 S.W.3d 218, 229 (Mo. banc 2014).

Here, after undersigned counsel filed the amended motion untimely and asked the court to consider it timely filed under *Sanders v. State, supra*, the motion court did not conduct an independent inquiry to determine whether the amended motion's untimely filing was caused by movant or counsel. Thus, the motion court clearly erred.

The motion court also clearly erred by deciding undersigned counsel was not exclusively at fault for the amended motion's being untimely filed (L.F. 85). As counsel explained in the Motion to Vacate Dismissal Order, the amended motion was filed late because – in addition to counsel's needing the additional time to obtain Mr. Milner's medical records – counsel wanted to review plea counsel's file in the underlying criminal cause in order to determine what points to raise in the amended motion (L.F. 88). When plea counsel destroyed Mr. Milner's

file, not only did it force counsel to obtain Mr. Milner's medical records from their original sources, it also deprived post-conviction counsel of the opportunity to review the rest of the information in the file. Undersigned counsel attempted to review the file by contacting plea counsel, who had moved since representing Mr. Milner (L.F. 65). But that took time. And when counsel was able to contact plea counsel, she discovered the file no longer existed and she would have to obtain the medical records herself (L.F. 65). Therefore, the motion court clearly erred in deciding post-conviction counsel did not abandon Mr. Milner.

The motion court also clearly erred in deciding that Mr. Milner, and not undersigned counsel, had been at fault for the untimely filing of the amended motion. The motion court ruled that Mr. Milner had been at fault because he had "done absolutely nothing to obtain the medical records," and did not have his family members get them (L.F. 84-85).

The court clearly erred in deciding that Mr. Milner was at fault for the untimely filing by doing "absolutely nothing" to obtain his medical records. When Mr. Milner was free on bond, he obtained the records and gave them to plea counsel (L.F. 64). But those records were not available to post-conviction counsel because plea counsel admitted destroying them when he destroyed Mr. Milner's file (L.F. 65).

After Mr. Milner was incarcerated in DOC and no longer able to obtain the medical records, he signed release forms so undersigned counsel and her investigator could obtain the records (L.F. 90). Mr. Milner also advised

undersigned counsel when and at which hospitals he had received treatment (L.F. 64). Thus, the motion court clearly erred in deciding that Mr. Milner had “done nothing” to obtain his medical records.

The motion court also clearly erred in deciding Mr. Milner had been at fault for the untimely filing of his amended motion by deciding his family members could have obtained the medical records (L.F. 84). Because undersigned counsel was appointed to represent Mr. Milner, it was her responsibility to obtain the medical records. It was not Mr. Milner’s family members’ responsibility. Nor was Mr. Milner obliged to recruit his family to help him obtain the records. Therefore, the motion court clearly erred in deciding that Mr. Milner, and not counsel, was at fault for not obtaining the records.

Lastly, the motion court clearly erred in dismissing the case after determining Mr. Milner was at fault for the untimely filing of the amended motion. If Mr. Milner had been at fault, the correct remedy would have been to proceed on the points in the *pro se* motion. *Hewitt v. State*, 518 S.W.3d 227, 232 (Mo. App. S.D. 2017), *transfer denied* (May 30, 2017)(citing *Luleff v. State*, 807 S.W.2d 495, 498 (Mo. banc 1991)). Instead, the motion court dismissed the underlying post-conviction case *de haut en bas*.

The motion court decided to dismiss the case instead of proceeding on the *pro se* points because in them Mr. Milner “made no claims of ineffective assistance of counsel, and made no claims that his guilty plea[s were] not voluntary” (L.F. 85). In his *pro se* motion, Mr. Milner raised the following points

as to why his convictions and sentences should be vacated, set aside, or corrected: 1) the court had executed the sentences previously imposed, even though the state had recommended the court retain jurisdiction under § 559.115 (Cum. Supp. 2012); and 2) the court had a bias against Mr. Milner because of a previous, unrelated family-court matter (L.F. 44). Mr. Milner also stated who could confirm what he was stating in his motion (L.F. 44).

The motion court clearly erred in dismissing this case by deciding that Mr. Milner did not make any claims regarding ineffective assistance of counsel or the voluntariness of his guilty pleas. Mr. Milner was not limited to raising claims regarding ineffective assistance of counsel or the voluntariness of his guilty pleas. According to Rule 24.035, a movant may raise any claim “that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, including claims of ineffective assistance of trial and appellate counsel, that the court imposed the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law.” Rule 24.035(a). Although the rule does mention ineffective assistance, a movant is not limited to that type of claim.

Nor is a movant limited to claims concerning the voluntariness of the guilty plea. For example, if a court accepts a guilty plea, but orders a sentence beyond the permissible punishment range, Rule 24.035 would provide relief whereby the sentence could be reduced. *See, e.g., Evans v. State*, 779 S.W.2d 253 (Mo. App.

E.D. 1989). Therefore, the motion court clearly erred in dismissing the underlying post-conviction case.

For the reasons cited above, the court clearly erred in denying Appellant Lowell Milner's Rule 24.035 motion for post-conviction relief because his sentences have not been reduced by the time he spent in pre-trial incarceration. Mr. Milner's rights under the United States Constitution, Fifth and Fourteenth Amendments, and the Missouri Constitution, Article I, § 10 were thus violated. Mr. Milner therefore requests this Court reverse the motion court's order of dismissal and remand this cause for an evidentiary hearing; or in the alternative, remand this cause with directions his convictions and sentences be set aside.

## CONCLUSION

WHEREFORE, for the reasons set forth, Appellant Lowell Milner requests this Honorable Court reverse the motion court's order of dismissal and remand this cause for an evidentiary hearing; or in the alternative, remand this cause with directions his convictions and sentences be set aside.

Respectfully submitted,

/s/ Lisa M. Stroup  
Lisa M. Stroup, Bar#36325  
Attorney for Appellant  
1010 Market St.  
Ste. 1100  
(314)340-7662  
Fax (314)340-7685  
lisa.stroup@mspd.mo.gov

**CERTIFICATE OF SERVICE**

Under Missouri Supreme Court Rules 84.06(g) and 83.08(c), I hereby certify that on this 26<sup>th</sup> day of March, 2016, a copy of this Substitute Brief was served via the Court's electronic filing system to Assistant Attorney General Evan J. Buchheim, Attorney General's Office, P.O. Box 899, Jefferson City, MO 65102 at evan.buchheim@ago.mo.gov.

/s/ Lisa M. Stroup  
Lisa M. Stroup

**CERTIFICATE OF COMPLIANCE**

Under Mo. Sup. Ct. Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed the limitations of 31,000 words for a Substitute Brief in this Court. The word-processing software identified that this brief contains 8,308 words. It is in text-searchable PDF form.

/s/ Lisa M. Stroup  
Lisa M. Stroup, Mo. Bar No. 36325  
Assistant Public Defender  
1010 N. Market St., Ste. 1100  
St. Louis, Missouri 63101  
(314) 340-7662 (telephone)  
(314) 340-7685 (facsimile)  
lisa.stroup@mspd.mo.gov  
ATTORNEY FOR APPELLANT