

IN THE
SUPREME COURT OF MISSOURI

MICHAEL WILLIAMS,)	
)	
)	Appellant,
)	
vs.)	No. SC97272
)	
STATE OF MISSOURI,)	
)	
)	Respondent.

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF WARREN COUNTY, MISSOURI
TWELFTH JUDICIAL CIRCUIT
THE HONORABLE WESLEY CLAY DALTON, JUDGE

APPELLANT’S SUBSTITUTE BRIEF

Ellen H. Flottman, MOBar #34664
Attorney for Appellant
Woodrail Centre, 1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Telephone (573) 777-9977, ext. 323
FAX (573) 777-9974
E-mail: Ellen.Flottman@mspd.mo.gov

INDEX

	<u>Page</u>
TABLE OF AUTHORITIES.....	2
JURISDICTIONAL STATEMENT.....	4
STATEMENT OF FACTS.....	5
POINTS RELIED ON	8
ARGUMENT	10
CONCLUSION	19
APPENDIX	

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>CASES:</u>	
<i>Coates v. State</i> , 939 S.W.2d 912 (Mo. banc 1997)	15
<i>Coker v. State</i> , 995 S.W.2d 7 (Mo. App., E.D. 1999)	15
<i>Copas v. State</i> , 15 S.W.3d 49 (Mo. App., W.D. 2000)	17
<i>Edwards v. State</i> , 794 S.W.2d 249 (Mo. App., W.D. 1990).....	9, 18
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963).....	15
<i>Haskett v. State</i> , 152 S.W.3d 906 (Mo. App., W.D. 2005)	9, 16
<i>Hill v. Lockhart</i> , 474 U.S. 52 (1985).....	16
<i>McNeal v. State</i> , 910 S.W.2d 767 (Mo. App., E.D. 1995)	8, 11
<i>Pettis v. State</i> , 212 S.W.3d 189 (Mo. App., W.D. 2007)	9, 17, 18
<i>State ex rel. Taylor v. Moore</i> , 136 S.W.3d 799 (Mo. banc 2004)	8, 11, 12
<i>State v. Leisure</i> , 838 S.W.2d 49 (Mo. App., E.D. 1992).....	8, 10, 13
<i>State v. Roll</i> , 942 S.W.2d 370 (Mo. banc 1997)	9, 17
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	15
<i>Stufflebean v. State</i> , 986 S.W.2d 189 (Mo. App., W.D. 1999)	16
 <u>CONSTITUTIONAL PROVISIONS:</u>	
U.S. Const., Amend. VI.....	9, 13, 15
U.S. Const., Amend. XIV	8, 9, 10, 11, 13, 15
Mo. Const., Art. I, Sec. 10.....	8, 10, 11
Mo. Const., Art. I, Sec. 18(a)	9, 13, 15
 <u>STATUTES:</u>	
Section 217.362	8, 9, 12, 16
Section 577.010	4, 5

RULES:

Rule 24.035..... 4, 8, 9, 10, 12, 13, 16
Rule 83.04..... 4

JURISDICTIONAL STATEMENT

This is an appeal from the denial of appellant's motion for postconviction relief, pursuant to Rule 24.035, after an evidentiary hearing in the Circuit Court of Warren County, by the Honorable Wesley Clay Dalton. Appellant sought to vacate his conviction after a guilty plea of driving while intoxicated, chronic offender, Section 577.010, and resultant sentence of eight years imprisonment. The Eastern District of the Court of Appeals reversed, and this Court granted transfer upon the State's application pursuant to Rule 83.04.

STATEMENT OF FACTS

Michael Williams was charged by information filed June 28, 2016, with driving while intoxicated as a chronic offender, Section 577.010 (L.F. 4). He appeared before the Honorable Wesley Clay Dalton on July 5, 2016, to enter his plea of guilty (L.F. 5). The agreement was for eight years with long-term treatment, and the court imposed that sentence (L.F. 13, 18). Mr. Williams told the court that there were no other threats or promises inducing his plea of guilty (L.F. 11).

Mr. Williams was delivered to the Department of Corrections on July 8, and filed his *pro se* motion for postconviction relief on November 28 (L.F. 21, 26). Counsel was appointed, and filed a timely amended motion on March 2, 2017 (L.F. 21-22).¹ The motion alleged that Mr. Williams received ineffective assistance of counsel when counsel misadvised him that he would get long-term treatment, although Mr. Williams was in fact ineligible; and that Mr. Williams was denied due process of law when the trial court failed to have the Department of Corrections determine his eligibility for long-term treatment before sentencing (L.F. 34).

An evidentiary hearing was held May 4, 2017 (H.Tr. 1). Mr. Williams testified that he was not put in the long-term treatment program (H.Tr. 3-4). He was ineligible because he did not have three felony convictions (H.Tr. 4).

Mr. Williams met with his plea attorney, Katy Thoman, and discussed the case with her after he was charged (H.Tr. 4). They discussed plea offers, and Ms. Thoman advised Mr. Williams that if he pleaded guilty, he would get long-term treatment with an out date of July after he finished treatment (H.Tr. 5). He thought that she checked that he was eligible, and he thought the court did its own check as well (H.Tr. 5). When Mr. Williams pleaded guilty, he believed he would

¹ Appointment order: 12/1/16; transcript: 12/13/16; entry of appearance: 12/30/16; motion for extension of time: 2/9/17; order granting extension: 2/14/17; amended motion: 3/2/16 (L.F. 3, 21-22).

be placed in the long-term treatment program because of what Ms. Thoman told him (H.Tr. 5). He knew that he had to successfully complete the program to get out (H.Tr. 6). But if he had known he was not eligible, he would not have pleaded guilty (H.Tr. 6).

Katy Thoman testified that Mr. Williams pleaded guilty to an eight-year sentence with long-term treatment, but he was not placed in the long-term treatment program because he did not have the requisite prior convictions (H.Tr. 9-10). A person has to have two prior felony convictions and a new one, and Mr. Williams did not have them (H.Tr. 10). Before he pleaded guilty, Ms. Thoman met with Mr. Williams and they discussed the case (H.Tr. 10). She told him the plea recommendation from the prosecutor: eight years with long-term treatment (H.Tr. 10).

Ms. Thoman testified that she told Mr. Williams if he pleaded guilty, he would be placed in the long-term treatment program and would do two years in the Department of Corrections (H.Tr. 10-11). He would probably do some of that before they put in him the year-long program, so that he would be released after two years and after he completed the program (H.Tr. 11). Ms. Thoman assured Mr. Williams he would be placed in the program, but never checked beforehand to determine if he was eligible (H.Tr. 11). She did not think the court did either; she testified that it is usually the attorney who does that (H.Tr. 11).

Ms. Thoman testified that Mr. Williams was incorrect if he thought she checked on his eligibility; she did not check (H.Tr. 12). She guaranteed him he would get into the program (H.Tr. 11). She did not get him screened (H.Tr. 14). She did not look at the felony priors (H.Tr. 14).

On May 26, 2017, the Honorable Wesley Clay Dalton entered findings of fact and conclusions of law and denied Mr. Williams relief (L.F. 43). In his findings, Judge Dalton concluded that Mr. Williams' testimony at the guilty plea that no one had promised him what his sentence would be defeated his claim "even if this Court were to believe [his] claim that [Ms. Thoman] affirmatively

represented to him that he was eligible for the long term treatment program” (L.F. 46). The court found that his belief was not reasonable and refuted by the record (L.F. 46-47). Judge Dalton further found that Mr. Williams was “pleading guilty because he was guilty” and that he was sentenced to less than the maximum sentence, so he was not prejudiced (L.F. 47). He found that Mr. Williams’ testimony that he would have insisted on going to trial to lack credibility (L.F. 47).

As to the due process claim, the motion court found that Mr. Williams’ claim was “not cognizable” and waived by pleading guilty (L.F. 48). “To the extent Williams wanted this Court to determine his eligibility for long term treatment prior to sentencing him, either he or Plea Counsel could have, and were in fact required to raise that issue prior to the plea or sentencing.” (L.F. 48).

Notice of appeal was filed on June 16, 2017 (L.F. 51).

POINTS RELIED ON

I.

The motion court clearly erred in denying Mr. Williams' motion for postconviction relief pursuant to Rule 24.035 because the sentencing court violated his right to due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, when it sentenced Mr. Williams to long term treatment without verifying his eligibility for the program. Because Mr. Williams' plea rested upon the guarantee that he was being sentenced to long term treatment, the sentencing court's action rendered his plea involuntary.

State v. Leisure, 838 S.W.2d 49 (Mo. App., E.D. 1992);

McNeal v. State, 910 S.W.2d 767 (Mo. App., E.D. 1995);

State ex rel. Taylor v. Moore, 136 S.W.3d 799 (Mo. banc 2004);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 10;

Section 217.362; and

Rule 24.035.

II.

The motion court clearly erred in denying Mr. Williams' motion for postconviction relief pursuant to Rule 24.035, because he was denied effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that guilty plea counsel failed to verify that he was eligible for long term treatment in advising him to accept the plea agreement and enter a plea of guilty. Because Mr. Williams' plea rested upon the guarantee that he was being sentenced to long term treatment, the ineffective assistance of counsel he received rendered his plea involuntary.

Haskett v. State, 152 S.W.3d 906 (Mo. App., W.D. 2005);

Pettis v. State, 212 S.W.3d 189 (Mo. App., W.D. 2007);

State v. Roll, 942 S.W.2d 370 (Mo. banc 1997);

Edwards v. State, 794 S.W.2d 249 (Mo. App., W.D. 1990);

U.S. Const., Amends. VI and XIV;

Mo. Const., Art. I, Sec. 18(a);

Section 217.362; and

Rule 24.035.

ARGUMENT

I.

The motion court clearly erred in denying Mr. Williams' motion for postconviction relief pursuant to Rule 24.035 because the sentencing court violated his right to due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, when it sentenced Mr. Williams to long term treatment without verifying his eligibility for the program. Because Mr. Williams' plea rested upon the guarantee that he was being sentenced to long term treatment, the sentencing court's action rendered his plea involuntary.

Standard of review

Review on appeal of a Rule 24.035 motion is limited to a determination of whether the findings, conclusions, and judgment of the motion court are clearly erroneous. *State v. Leisure*, 838 S.W.2d 49, 54 (Mo. App., E.D. 1992). They are clearly erroneous only if a review of the entire record leaves the reviewing court with a definite and firm impression that a mistake has been made. *Id.*

Facts

Mr. Williams was charged with driving while intoxicated as a chronic offender (L.F. 4). He appeared before Judge Dalton to enter his plea of guilty; the plea agreement was for eight years with long-term treatment (L.F. 13). Judge Dalton imposed that sentence (L.F. 13, 18). Mr. Williams told the court that there were no other threats or promises inducing his plea of guilty (L.F. 11).

In his postconviction motion, Mr. Williams alleged that he was denied due process of law when the trial court failed to have the Department of Corrections determine his eligibility for long-term treatment before sentencing (L.F. 34). At the evidentiary hearing on the motion, Mr. Williams testified that he was not put in

the long-term treatment program (H.Tr. 3-4). He was ineligible because he did not have three felony convictions (H.Tr. 4).

Mr. Williams thought that his plea attorney checked that he was eligible, and he thought the court did its own check as well (H.Tr. 5). When Mr. Williams pleaded guilty, he believed he would be placed in the long-term treatment program (H.Tr. 5). He knew that he had to successfully complete the program to get out (H.Tr. 6). But if he had known he was not eligible, he would not have pleaded guilty (H.Tr. 6).

In his findings denying relief, Judge Dalton concluded that Mr. Williams' claim was "not cognizable" and waived by pleading guilty (L.F. 48). "To the extent Williams wanted this Court to determine his eligibility for long term treatment prior to sentencing him, either he or Plea Counsel could have, and were in fact required to raise that issue prior to the plea or sentencing." (L.F. 48).

This finding is clearly erroneous.

Analysis

The sentencing court's actions violated Mr. Williams' right to due process of law. U.S. Const., Amend. XIV; Mo. Const., Art. I, Sec. 10. The motion court clearly erred in failing to so find. The sentencing court's failure to screen Mr. Williams for long term treatment eligibility before sentencing him rendered his plea involuntary because his plea rested on the plea agreement to long term treatment. When considering whether a defendant pleaded guilty based on a mistaken belief about the sentence and plea agreement, "the test is whether a reasonable basis exists in the record for such belief." *McNeal v. State*, 910 S.W.2d 767, 769 (Mo. App., E.D. 1995). Here, the plea agreement was for eight years with long-term treatment, and the court imposed that sentence (L.F. 13, 18).

In *State ex rel. Taylor v. Moore*, 136 S.W.3d 799 (Mo. banc 2004), the petitioner sought a writ of habeas corpus in this Court. He had pleaded guilty to drug trafficking and the plea agreement called for him to be placed in long term

treatment. However, after sentencing, the Department of Corrections determined that he was ineligible. 136 S.W.3d at 801.

Mr. Taylor claimed in his habeas petition that the trial court erred in sentencing him to long term treatment without determining his eligibility under Section 217.362. *Id.* This Court noted that the statute requires the sentencing judge to notify the DOC before sentencing someone to long term treatment. The judge may only sentence someone to long term treatment if he is eligible. Section 217.362.2.

This Court further held that Mr. Taylor's proper remedy would have been in a Rule 24.035 motion for postconviction relief, but they considered his claim under a cause and prejudice analysis. 136 S.W.3d at 801. Here, Mr. Williams has raised this claim properly. And as the trial court in *Taylor* erroneously placed the burden on Mr. Taylor to request an eligibility check, so too did the findings here ("To the extent Williams wanted this Court to determine his eligibility for long term treatment prior to sentencing him, either he or Plea Counsel could have, and were in fact required to raise that issue prior to the plea or sentencing.") (L.F. 48). This was clearly erroneous. Section 217.362 requires the judge to notify the DOC for screening. It does not require the offender to request screening. *Taylor*, 136 S.W.3d at 802.

The actions of the sentencing court denied Mr. Williams due process of law, and the motion court clearly erred in failing to so find. This Court should reverse the motion court's denial of postconviction relief and vacate Mr. Williams' judgment and sentence.

II.

The motion court clearly erred in denying Mr. Williams' motion for postconviction relief pursuant to Rule 24.035, because he was denied effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that guilty plea counsel failed to verify that he was eligible for long term treatment in advising him to accept the plea agreement and enter a plea of guilty. Because Mr. Williams' plea rested upon the guarantee that he was being sentenced to long term treatment, the ineffective assistance of counsel he received rendered his plea involuntary.

Standard of review

Review on appeal of a Rule 24.035 motion is limited to a determination of whether the findings, conclusions, and judgment of the motion court are clearly erroneous. *State v. Leisure*, 838 S.W.2d 49, 54 (Mo. App., E.D. 1992). They are clearly erroneous only if a review of the entire record leaves the reviewing court with a definite and firm impression that a mistake has been made. *Id.*

Facts

Mr. Williams was charged with driving while intoxicated as a chronic offender (L.F. 4). He appeared before the Honorable Wesley Clay Dalton to enter his plea of guilty (L.F. 5). The agreement was for eight years with long-term treatment, and the court imposed that sentence (L.F. 13, 18). Mr. Williams told the court that there were no other threats or promises inducing his plea of guilty (L.F. 11).

Mr. Williams' postconviction motion alleged that Mr. Williams received ineffective assistance of counsel when counsel misadvised him that he would get long-term treatment, although Mr. Williams was in fact ineligible (L.F. 34). At the evidentiary hearing, Mr. Williams testified that he was not put in the long-term

treatment program (H.Tr. 3-4). He was ineligible because he did not have three felony convictions (H.Tr. 4).

Mr. Williams met with his plea attorney, Katy Thoman, and discussed the case with her after he was charged (H.Tr. 4). They discussed plea offers, and Ms. Thoman advised Mr. Williams that if he pleaded guilty, he would get long-term treatment with an out date of July after he finished treatment (H.Tr. 5). He thought that she checked that he was eligible, and he thought the court did its own check as well (H.Tr. 5). When Mr. Williams pleaded guilty, he believed he would be placed in the long-term treatment program because of what Ms. Thoman told him (H.Tr. 5). He knew that he had to successfully complete the program to get out (H.Tr. 6). But if he had known he was not eligible, he would not have pleaded guilty (H.Tr. 6).

Katy Thoman testified that Mr. Williams pleaded guilty to an eight-year sentence with long-term treatment, but he was not placed in the long-term treatment program because he did not have the requisite prior convictions (H.Tr. 9-10). A person has to have two prior felony convictions and a new one, and Mr. Williams did not have them (H.Tr. 10). Before he pleaded guilty, Ms. Thoman met with Mr. Williams and they discussed the case (H.Tr. 10). She told him the plea recommendation from the prosecutor: eight years with long-term treatment (H.Tr. 10).

Ms. Thoman testified that she told Mr. Williams if he pleaded guilty, he would be placed in the long-term treatment program and would do two years in the Department of Corrections (H.Tr. 10-11). He would probably do some of that before they put in him the year-long program, so that he would be released after two years and after he completed the program (H.Tr. 11). Ms. Thoman assured Mr. Williams he would be placed in the program, but never checked beforehand to determine if he was eligible (H.Tr. 11). She did not think the court did either; she testified that it is usually the attorney who does that (H.Tr. 11).

Ms. Thoman testified that Mr. Williams was incorrect if he thought she checked on his eligibility; she did not check (H.Tr. 12). She guaranteed him he would get into the program (H.Tr. 11). She did not get him screened (H.Tr. 14). She did not look at the felony priors (H.Tr. 14).

In his findings, Judge Dalton concluded that Mr. Williams' testimony at the guilty plea that no one had promised him what his sentence would be defeated his claim "even if this Court were to believe [his] claim that [Ms. Thoman] affirmatively represented to him that he was eligible for the long term treatment program" (L.F. 46). The court found that his belief was not reasonable and refuted by the record (L.F. 46-47). Judge Dalton further found that Mr. Williams was "pleading guilty because he was guilty" and that he was sentenced to less than the maximum sentence, so he was not prejudiced (L.F. 47). He found that Mr. Williams' testimony that he would have insisted on going to trial to lack credibility (L.F. 47). The motion court's findings were clearly erroneous.

Analysis

The right to effective assistance of counsel is mandated by the Sixth Amendment to the United States Constitution and by Article I, § 18(a) of the Missouri Constitution. *Coker v. State*, 995 S.W.2d 7, 9 (Mo. App., E.D. 1999), citing *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963). It is also a fundamental right guaranteed to state defendants through the Fourteenth Amendment. *Id.* To prove that his attorney was ineffective, Mr. Williams must show that (1) Ms. Thoman's performance was deficient in that she failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances, and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To show prejudice, Mr. Williams must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Coates v. State*, 939 S.W.2d 912, 914 (Mo. banc 1997), quoting

Hill v. Lockhart, 474 U.S. 52, 59 (1985). In a negotiated guilty plea, any claim of ineffective assistance of counsel is material only to the extent that it interfered with the voluntariness and knowledge with which the plea was made. *Stufflebean v. State*, 986 S.W.2d 189, 192 (Mo. App., W.D. 1999).

Mr. Williams' claim that his guilty plea was involuntary is based on the fact that he was misinformed about his eligibility for long term treatment, a form of probation (L.F. 34). Section 217.362. Generally, information about probation and parole is a collateral consequence about which trial counsel is not required to inform the defendant in order for a guilty plea to be voluntary and intelligent. *Haskett v. State*, 152 S.W.3d 906, 910 (Mo. App., W.D. 2005). But erroneous advice about collateral consequences can affect the voluntariness of a guilty plea. *Id.*

In *Haskett*, Mr. Haskett testified at his 24.035 hearing that he was not told that he would have to serve eighty-five percent of the sentence imposed for first degree assault. 152 S.W.3d at 908-09. His attorney testified that he advised Mr. Haskett accurately, but Mr. Haskett might have been confused because there were so many charges. *Id.* at 910. The motion court found that Mr. Haskett's convictions should be set aside because he did not completely understand the consequences of his plea. *Id.* When the state appealed the ruling, the Western District Court of Appeals ruled that Mr. Haskett did not have to understand the parole consequences in order for his guilty plea to be voluntary. *Id.* Rather, the question is whether the attorney affirmatively misrepresented what parole would be, and whether Mr. Haskett relied on that advice. *Id.* The Court remanded Mr. Haskett's case for the motion court to make a finding on the issue of whether the attorney made an affirmative misrepresentation. *Id.* at 910-911.

Missouri distinguishes between a defendant *not being informed* about possible probation or parole and being *affirmatively misinformed*. *Id.* When plea counsel affirmatively misinforms his client about a consequence of pleading guilty and the client relies upon that misrepresentation in deciding to enter his guilty

plea, counsel's incorrect advice may rise to the level of constitutionally ineffective assistance of counsel. *Copas v. State*, 15 S.W.3d 49, 55-56 (Mo. App., W.D. 2000)(remand for motion court to determine whether counsel's misinforming defendant that defendant had the burden of proof at trial may have affected the voluntariness of defendant's plea).

A guilty plea must be a voluntary expression of a defendant's choice, and must also be a knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences. *State v. Roll*, 942 S.W.2d 370, 375 (Mo. banc 1997). In *Pettis v. State*, 212 S.W.3d 189 (Mo. App., W.D. 2007), Pettis was in DOC on a life sentence for murder when he entered into a plea agreement to plead guilty to possessing a controlled substance in DOC in exchange for a sentence of five years. At the time of the plea, Pettis's forthcoming parole release date had been delayed until the pending charges were resolved. *Id.* at 193. Plea counsel agreed to leave it to the court's discretion to sentence Pettis concurrently or consecutively to his life sentence. *Id.* at 191. At sentencing, defense counsel argued that the five-year sentence would "push back" Pettis' parole release date on his murder sentence, whether it were ordered to be served concurrently or consecutively to his life sentence. *Id.* at 192. The state argued that a concurrent sentence would lack a deterrent effect and asked the court to order the five years to run consecutively. *Id.* The court sentenced Pettis to a four-year consecutive term. *Id.*

After sentencing, Pettis learned that his consecutive sentence converted his life sentence into a life sentence without eligibility for parole. *Id.* at 193. He filed a postconviction action alleging ineffective assistance of counsel for counsel's failure to investigate the impact a consecutive sentence would have upon his parole eligibility, and for counsel's failure to inform Pettis that a consecutive sentence would make him ineligible to ever receive parole on his life sentence. *Id.* On appeal, the court found no ineffective assistance of counsel at the time of Pettis's guilty plea; counsel made no representations during the sentencing hearing

about Pettis's parole being "pushed back" until after the court had already accepted the plea of guilty. *Id.* at 194.

But the record did conclusively demonstrate that counsel's representation at sentencing fell below an objective standard of reasonableness that affected the outcome of the plea process. *Id.*, citing *Edwards v. State*, 794 S.W.2d 249, 250 (Mo. App., W.D. 1990). At sentencing, counsel affirmatively stated that Pettis's release date would only be "pushed backward," when in fact, the consecutive term imposed in that case "definitely, immediately, and automatically" converted Pettis's life sentence to one without possibility of parole. *Id.* By stating that the parole date would only be "pushed back," counsel was affirmatively misrepresenting to both Pettis and the court that a consecutive sentence would not result in the loss of Pettis's opportunity for parole. *Id.* "By any objective measure, a reasonably competent attorney would not make such a representation when he or she had no knowledge of the consequences." *Id.*

In Mr. Williams' case, Ms. Thoman made an affirmative misrepresentation to Mr. Williams that he would be eligible for long term treatment, and Mr. Williams reasonably relied upon that representation in deciding to plead guilty rather than go to trial.

Mr. Williams showed a reasonable probability that but for Ms. Thoman's misadvice, he would not have pleaded guilty and would have insisted on going to trial; he testified to this effect at the hearing (H.Tr. 6). The motion court's findings that Mr. Williams would have pleaded guilty even if he had known he was not eligible for long-term treatment are not supported by the record.

As in *Pettis*, it is clear from the plea record that none of the participants was aware that Mr. Williams was not eligible for long term treatment. 212 S.W.3d at 194-195. *See Point I.* Mr. Williams was prejudiced by counsel's misadvice; the motion court's judgment should be reversed, and his conviction and sentence vacated.

CONCLUSION

For the reasons presented, appellant respectfully requests that this Court reverse the motion court's denial of postconviction relief and vacate his conviction and sentence.

Respectfully submitted,

/s/ Ellen H. Flottman

Ellen H. Flottman, MOBar #34664
Attorney for Appellant
Woodrail Centre, 1000 W. Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Telephone: (573) 777-9977, ext. 323
FAX: (573) 777-9974
E-mail: Ellen.Flottman@mspd.mo.gov

Certificate of Compliance

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 in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance, and the appendix, the brief contains 4,399 words, which does not exceed the 31,000 words allowed for an appellant’s substitute brief.

/s/ Ellen H. Flottman

Ellen H. Flottman