Summary of SC91012, *Eric Webb v. State of Missouri*
Appeal from the Franklin County circuit court, Judge Gael D. Wood
Argued and submitted Dec. 7, 2010; opinion issued March 29, 2011

Attorneys: Webb was represented by Ellen H. Flottman of the public defender's office in Columbia, (573) 882-9855, and the state was represented by John W. Grantham of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man who pleaded guilty to involuntary manslaughter and armed criminal action appeals the circuit court's judgment overruling his motion for post-conviction relief, in which he alleged his trial counsel provided ineffective assistance. In a per curiam decision that is joined by four judges but that cannot be attributed to any particular judge, the Supreme Court of Missouri reverses the circuit court's judgment and remands (sends back) the case, holding the man is entitled to an evidentiary hearing on his claims. There is a difference between failure to inform and providing misinformation. Here, the man alleges his trial counsel misinformed him as to the minimum sentence he would be required to serve before becoming eligible for parole – 40 percent, or 4.8 years, instead of the 85 percent, or 10.2 years, required by the applicable statute.

In a concurring opinion that is joined by two other judges, Judge Michael A. Wolff discusses the possible implications of the analysis of the United States Supreme Court's recent opinion in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010) (holding it is ineffective assistance of counsel for a defense attorney not to advise a defendant about the "truly clear" immigration consequences of a guilty plea). He believes *Padilla* leaves open the question of whether a plea can be considered voluntary if the defendant is not informed of other inevitable consequences of his plea – including that he must serve at least 85 percent of his sentence behind bars – noting that certain state and national guidelines show that the prevailing professional norms require defense counsel to inform the client at least as to the statutory minimum sentence before parole eligibility.

In a dissenting opinion that is joined by two other judges, Judge Zel M. Fischer writes that he would hold the man failed to establish facts not refuted by the record and that nothing in the record shows the circuit court clearly erred in overruling the man's motion for post-conviction relief. The circuit court followed the exact language of the applicable rule in inquiring into whether the man's guilty plea was knowing and voluntary, and it should not be required to ask additional questions about the defendant's understanding of his parole eligibility or other innumerable questions about the advice given by defense counsel. He does not believe the United States Supreme Court will expand the analysis of *Padilla* beyond the deportation context, especially given that it never has held that defendants must be given information about parole eligibility for the defendants' guilty pleas to be voluntary.

Facts: Eric Webb, driving a Jeep in April 2007 while under the influence of alcohol, collided with a truck, killing Terry Parker, who was an occupant in the truck. The state indicted Webb as a persistent offender with one count of the class B felony of first-degree involuntary manslaughter, one count of armed criminal action and one count of failure to drive on the right half of the roadway. When Webb appeared at a June 2008 plea hearing, the prosecutor told the court the state

was dropping the charge for failure to drive on the right half of the roadway in exchange for Webb's guilty pleas to the other two charges. The prosecutor recommended that Webb receive two 10-year sentences, to run concurrently. After Webb pleaded guilty, the court asked him a series of questions, to which Webb responded that no one had threatened him or promised him anything to get him to plead guilty; that he understood he was waiving all his rights at trial; that he understood the range of punishment available for both crimes to which he was pleading; that his attorneys had not made him plead guilty against his free will; that his attorneys could not have done anything differently in handling his case; and that he was satisfied with his attorneys' legal services. The court found that Webb's pleas were voluntary, knowing and intelligent but deferred accepting the pleas until Webb could see the sentencing assessment report (SAR) that the court was ordering under section 217.760, RSMo Supp. 2007. When Webb appeared in July 2008 for sentencing, his attorney said she had reviewed the SAR and discussed it with Webb. The court told Webb that, based on the SAR, the court intended to reject the plea agreement and instead sentence Webb to two concurrent terms of 12 years in prison rather than 10 years in prison. The court allowed Webb to withdraw his plea, but he chose to maintain it and accept the longer sentence. Webb timely sought post-conviction relief in which he alleged, in part, that his guilty plea was involuntary and unknowing because he was denied the right to effective assistance of counsel. He alleged his counsel told him that, as a result of the guilty plea, he would be required to serve only 40 percent of his sentence and not 85 percent. In fact, the statutes required Webb to serve 85 percent of the sentence. The circuit court overruled Webb's motion without an evidentiary hearing. He appeals.

REVERSED AND REMANDED.

Court en banc holds: The circuit court erred in failing to grant Webb an evidentiary hearing on his claims of ineffective assistance of counsel. In 2005, the legislature amended section 565.024.2, RSMo, to require a defendant who is convicted of involuntary manslaughter as a class B felony to serve a "minimum prison term" of 85 percent of his sentence. Webb alleges his attorney advised him that the minimum prison term he would be required to serve was 40 percent of his 12-year sentence, or about 4.8 years, before becoming eligible for parole. In reality, he is required to serve at least 10.2 years of his sentence before becoming eligible for parole. Although this Court previously has held that not knowing a crime carries a mandatory minimum penalty does not render a defendant's guilty plea to that crime involuntary, it also noted that misinforming – in contrast with failing to inform – may affect the voluntariness of a defendant's plea. *Reynolds v. State*, 994 S.W.2d 944, 946 (Mo. banc 1999). Since *Reynolds*, the court of appeals has distinguished between misinformation and failure to inform. Here, the circuit court determined Webb was not entitled to an evidentiary hearing because Webb's claim that his attorney told him he only would have to serve 40 percent of his sentence was refuted by the portion of the record in which Webb said that his attorney had not "promised" him anything to get him to plead guilty and that he was "satisfied" with his attorney's services. But a negative response is not sufficient to refute the record. The attorney promising nothing does not mean the attorney gave Webb correct advice as to the effects of his plea, and when Webb said he was satisfied, he did not yet know his plea attorney's alleged advice had been incorrect. Further, the SAR prepared in Webb's case failed to contain the information that Webb would be required to serve at least 85 percent of whatever sentence he would be given. Webb is entitled to an evidentiary hearing on his claims of ineffective assistance of counsel, and he may be entitled to relief if he can prove the facts he has alleged and can establish that he was prejudiced by relying on misinformation from his attorney.

Concurring opinion by Judge Wolff: The author agrees that Webb is entitled to an evidentiary hearing on his claims of ineffective assistance of counsel. He notes that in *Padilla v. Kentucky*, ___ U.S. ___, 130 S.Ct. 1473, 1483 (2010), the United States Supreme Court held that it is ineffective assistance of counsel for a defense attorney not to advise a defendant about the "truly clear" immigration consequences of his guilty plea. He believes this leaves open the question of whether a plea can be considered voluntary if the defendant is not informed of other inevitable consequences of his plea, including that he must serve at least 85 percent of his sentence behind bars. As such, this Court's previous cases may need to be expanded to take into account *Padilla*'s analysis when considering whether counsel rendered deficient performance. Deportation (the subject of *Padilla*) and parole eligibility have similar characteristics – deportation is "practically inevitable" for a noncitizen who commits a removable offense, while certain offenses require one convicted to serve a mandatory minimum sentence, and both are severe results that are intimately related to the criminal process. In *Padilla*, 130 S.Ct. at 1482, the United States Supreme Court stated that defense counsel's representation is unreasonable if it does not meet "the practice and expectations of the legal community" as outlined by "prevailing professional norms." As such, the question here is whether it was unreasonable for Webb's trial counsel to misadvise him about how much time he would be required to spend in prison before becoming eligible for parole. Guidelines released by the National Legal Aid and Defender Association, the American Bar Association and the Missouri public defender system all show that the "prevailing professional norms" require defense counsel to inform the client at least as to the statutory minimum sentence before parole eligibility. Here, Webb will be required to spend at least 10.2 years in prison before becoming eligible for parole, more than twice as long in prison as the 4.8 years he alleges his attorney advised him he would have to serve. Until the Supreme Court provides further specific guidance, counsel and the courts should be as vigilant as possible to explain that a guilty plea to which a defendant agrees may carry serious consequences beyond the immediate punishment. Accordingly, Webb should have the opportunity to show prejudice – that is, that he would not have pleaded guilty had he been informed accurately of the clear sentencing consequences.

Dissenting opinion by Judge Fischer: The author would hold that Webb has failed to establish any facts not refuted by the record and that nothing in the record shows the circuit court clearly erred in overruling Webb's motion for post-conviction relief. At no point in the record did Webb state that his plea was based on his counsel's statement that he only would serve 40 percent of his sentence before becoming eligible for parole. The circuit court followed the exact language of Rule 24.02(4)(c) in inquiring into whether Webb's guilty plea was knowing and voluntary; it should not be required to ask additional questions relating to the defendant's understanding of his parole eligibility or other innumerable questions about every piece of advice given by the defendant's counsel. Further, the author does not believe the United States Supreme Court will expand the analysis of *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), beyond the context of deportation. Parole eligibility has been held to be a collateral consequence of a guilty plea of which defense counsel and the sentencing court have no duty to inform the defendant. For example, in *Reynolds v. State*, 994 S.W.2d 944, 946 (Mo. banc 1999), this Court held that the duty of defense counsel is to advise of the direct consequences of a guilty plea. The Supreme Court's last word about parole eligibility was in *Hill v. Lockhart*, 474 U.S. 52, 56 (1985), in which it said it never had held that the federal constitution requires that defendants be given information about parole eligibility for the defendant's guilty plea to be voluntary. In fact, the author notes, in the context of whether a plea is voluntary, advising a defendant of when he first *may* become eligible for parole may be more harmful than helpful because it may create a false expectation that the defendant *will* be paroled at the first opportunity.