No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

HARVEY L. SHOATE — PETITIONER
(Your Name)

vs.

STATE OF MISSOURI — RESPONDENT(S)
JASON LEWIS

ON PETITION FOR A WRIT OF CERTIORARI TO

Eighth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

HARVEY L. SHOATE
(Your Name) Southeast Correctional Center

300 East Pedro Simmons Drive
(Address)

Charleston, Missouri 63834
(City, State, Zip Code)

_____
(Phone Number)

QUESTION(S) PRESENTED

In response to a specific claim, can a postconviction court find plain error in the movant's guilty plea or sentencing record and "sua sponte" order relief, when the movant neither raised that error nor requested that relief? When ruling on a post conviction claim under Rule 24.035, may the motion court "sua sponte" find the plea court committed plain error, although movant never raised the error in his amended motion, and grant relief to the movant that movant did not request? This question presents an issue of geneal interest and importance:

In this case, in Claim 8(C), the motion court found that the plea court breached the partie's plea agreement although the movant did not raise that claim. The motion court also granted a "de novo" sentencing hearing, which the movant did not request. The movant requested a limited resentencing hearing due to his plea attorney's ineffectiveness. The motion court found plea counsel ineffective on that claim, but found no prejudice, therefore denying Claim 8(C) as raised in violation 28 U.S.C. § 2254(d)(1). Mr. Sheate has a Sixth Amendment right to effective assistance of plea counsel and it is axiomatic that the relief granted for counsel's ineffectiveness should be coextensive with the harm suffered by the movants because of counsel's ineffectiveness.

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

State of Missouri Jason Lewis' Attorney:
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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[✓] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[✓] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment right to effective assistance of plea counsel.

Fourteenth Amendment right to due process of Law

STATEMENT OF THE CASE

Harvey Shoate hit a vehicle when he was driving intoxicated. As a result, the driver died and three passengers were injuried. Mr. Shoate pled guilty, as a prior and persistent offender, to 1 count of first-degree involuntary manslaughter while driving intoxicated. He also pled guilty to 3 counts of second-degree assault while driving intoxicated causing injury.

The only plea agreement was that Mr. Shoate's sentences for all four counts would run concurrently. The prosecutor recommended a 25-year sentence for involuntary manslaughter and 10 year sentences for the assault counts. Plea counsel recommended a "creative" solution: that the court sentence Mr. Shoate to the 10-year "minimum" on the enhanced B felony involuntary manslaughter, to run consecutively with his sentences on the assault counts, with a suspended execution of sentence for the assault counts.

The Honorable Charles Atwell, after conducting a sentencing hearing and ordering a sentencing assessment report sentenced Mr. Shoate as follows:

> In the State of Missouri under this new statute, if you kill someone in a car accident, in some situations it is an 85 percent crime. This case that he faces is an 85 percent crime.
>
> So there are various ways to get at sentences, but if you give a sentence of 25 years on the underlying offense, it's a much different sentence then if you give them 25 years somewhere else. 25 years on the underlying offense would mean that he would serve 85 percent of that day for day before he is released. He would have a little time on parole afterwards.
>
> If you give him a sentence under another statute like, for example, the assault statutes that apply to the mother and the two children, those are not 85% sentences, and he can be subject to parole on those sentences, which means he would

be subject to supervision. If he violated his parole, he would then be subject to go back on those sentences and his supervision would be longer...

I think that the integrity of the system - I think when you have this kind of carnage and you have the record of Mr. Shoate, it has to be a significant sentence. The dignity of the system requires it.

By the same token, I'm not sure to have him have no hope of parole ever or at least for an extended period of time, whether that's necessarily the right thing to do either. So here is what I have done, and I'll explain it to you what it is when I'm done.

As relates to Count 1, I'm going to sentence him to 12 years in the Missouri Division of Adult Institutions. Further, on Counts 2, 3, and 4 I'm going to sentence him to 12 years in the Missouri Division of Adult Institutions. Counts 2, 3, and 4 shall run concurrently with each other, but they will run consecutively to the sentence imposed in Count 1 for a total of 24 years...

The sentences I have imposed, if there is any question about it, he's received a 24-year sentence of which he is not eligible for parole until after 85 percent of 12 years. That is the sentence that I have imposed, and that's the meaning of those sentences.

Mr. Shoate filed a "prose" Rule 24.035 motion and counsel filed an amended motion. In Claim 8(c), Mr. Shoate alleged his plea attorney's perfomance fell below a constitutionally-reasonable standard when counsel failed to inform Judge Atwell that because Mr. Shoate had at least 3 prior prison commitments, he would not only have to serve 85% of the "first" 12-year sentence but also at least 80% of the "second" 12-year sentence under §558.019 RSMo.

Mr. Shoate asserted he was prejudiced because there was at least a reasonable probability that Judge Atwell would have sentenced him to an overall lesser sentence had he known that Mr. Shoate would be required to serve at least 80% of his "second" 12-year sentence. He noted the court's own explanation for imposing consecutive sentences, even though the plea agreement was for concurrent sentences, was to avoid Mr. Shoate having to serve an "extended period of time with no hope of parole".

Unfortunately, in the last sentence of Claim 8(c), post conviction counsel inadvertently requested that Mr. Shoate's convictions and sentences be vacated and his charges set for trial, but in the body of the claim argued "there is at least a reasonable likelihood that the Court would have sentenced Movant to a lesser sentence but for plea counsel's ineffective assistance.[1]" (L.F. 131).

The motion court (not Judge Atwell) conducted an evidentiary hearing and notified the parties he was granting Claim 8(c). The court set a date for resentencing. Counsel for Mr. Shoate had not received a copy of the court's judgment by the time of resentencing, although the state had reviewed a copy. The motion court realized it had not been e-filed. When counsel reviewed the judgment, it indicated that plea counsel was ineffective for failing to inform Judge Atwell that Mr. Shoate was required to serve at least 80% of his second 12-year sentence, but stated there was no reasonable probability that Judge Atwell would have sentence Mr. Shoate to a lesser overall sentence if he had known of the additional 80% mandatory minimum; Mr. Shoate was not prejudiced.

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[1] Similary, in counsel's subsequent Motion to Amend the judgment, counsel argued that the appropriate remedy would be for the motion court to order that Movant be resentenced to the term originally intended by the sentencing court: a sentence with the net effect of requiring Mr. Shoate to serve no more than an 85% mandatory minimum of 12 year's imprisonment before becoming eligible for parole.

However, the motion court "sua sponte" found that Judge Atwell had breached the partie's plea agreement -- a claim Mr. Shoate had not raised. The court ordered "specific performance", i.e., a "de novo" sentencing hearing, as a remedy for the breach - which Mr. Shoate had not requested. The prosecutor maintained the state could argue for any possible sentences, even greater sentences than Mr. Shoate's current sentences, as long as the court ordered all 4 sentences to run concurrently pursuant to the plea agreement.

Mr. Shoate disagreed and filed a Motion to Amend the judgment. He argued the court's finding that the plea court breached the plea agreement was "not responsive" to his claim that counsel was ineffective for failing to inform the court that he must serve a mandatory 80% of any prison sentence. Mr. Shoate further argued that the motion court's finding that there was not a reasonable likelihood that Judge Atwell would have sentenced Mr. Shoate to a lesser overall sentence but for counsel's ineffectiveness was clearly erroneous. He argued that a "de novo" resentencing would not redress the harm from plea counsel's failure and requested that the court order that Mr. Shoate be resentenced in accordance with the sentencing court's unmistakable intention that he serve a mandatory minimum sentence no greater than 10.2 years before becoming eligible for parole.

The motion court denied Mr. Shoate's Motion to Amend the judgment and Mr. Shoate appealed the court's denial of Claim 8(C). The Missouri Court of Appeals, Western District, dismissed his appeal finding he was not an "aggrieved party". The Appellate Court ruled that Mr. Shoate had received the relief he asked for in Claim 8(C). The United States District Court for the Western District of Missouri denied Shoates petition as moot and denied a certificate of appealability. The Eighth Circuit Court of Appeals also denied

REASONS FOR GRANTING THE PETITION

In Claim 8(C) of his amended Rule 24.035 motion, Mr. Shoate alleged his plea counsel was ineffective for failing to inform the court that he must serve 80% of any sentence before even becoming eligible for parole. He alleged had counsel done so, there was at least a reasonable probability that the sentencing court would have sentenced him to a lesser overall sentence, given the court's own explanation of its sentencing.

The motion court found the first Strickland[2] prong of Mr. Shoate's claim of ineffective assistance of counsel in 8(C), that counsel was ineffective for failing to inform the sentencing court of his 80% mandatory minimum. But the court found there was not a reasonable probability that Judge Atwell would have sentenced Mr. Shoate to an overall lesser sentence so he was not prejudiced by counsel's ineffectiveness. Thus, the motion court "denied" Claim 8(C).

Nowhere in Claim 8(C) did Mr. Shoate argue the plea court breached his plea agreement.

Nowhere in Claim 8(C) did Mr. Shoate request a "de novo" sentencing hearing. He indicated that only a limited resentencing in accordance with Judge Atwell's plainly stated intention that he not serve an extended mandatory minimum sentence could correct the harm from counsel's ineffectiveness. Yet the motion court found that the sentencing court breached the plea agreement and ordered a full "de novo" sentencing hearing. And the Court of Appeals dismissed Mr. Shoate's appeal, not ruling on the denial of Claim 8(C) and finding he was not an "aggrieved party" because he was granted resentencing for the breach of the plea agreement - which he did not raise.

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[2] Strickland v. Washington, 466 U.S. 668 (1984).

Mr. Shoate could locate no authority allowing a Missouri postconviction court to find plain error "sua sponte" and to grant relief not requested by a movant under Rule 24.035 or 29.15. See, e.g. Lynn v. State, 417 S.W. 3d 789, 797 (Mo. App. E.D. 2013) (plain error review does not apply on appeal to review of claims that were not raised in the Rule 24.035 motion) (internal citation omitted).

It is true that the type of postconviction relief chosen is within the motion court's discretion. See, Croney v. State, 860 S.W. 2d 17, 19 (Mo. App. E.D. 1993) (internal citation omitted). But a motion court has the discretion, and the obligation, to grant the relief "appropriate to the claim". See, e.g. Lafler v. Cooper, 566 U.S. 156, 170 (2012). It is axiomatic that the relief granted for counsel's ineffectiveness should be "coextensive" with the harm suffered by the movant because of counsel's ineffectiveness. Sixth Amendment remedies should be "tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests". Lafler v. Cooper, 566 U.S. 156, 170 (2012) (quoting United States v. Morrison, 499 U.S. 361, 364 (1981)).

So, the question becomes: what relief would be narrowly tailored to remedy the harm caused by plea counsel's ineffectiveness in failing to inform the sentencing court that Mr. Shoate would have to serve not only 85% of his "first" 12-year sentence but also 80% of his "second" 12-year sentence?

In this unusual case, the sentencing court itself explained the reasoning for its departure from the plea agreement: it did not intend that Mr. Shoate be required to serve more than 10.2 years before even becoming eligible for parole. Therefore, Mr. Shoate alleged and proved there is at least a reasonable probability that Judge Atwell would have sentenced him

to an overall net sentence of less than the 24-year sentence he received -- the only remedy that would neutralize the harm from counsel's ineffective assistance in this case.

The Court of Appeals previously considered a similar case, but it is easily distinguishable. Pettis v. State, 212 S.W. 3d 189 (Mo. App. W.D. 2007). In Pettis, the state recommended a 5-year sentence to be served consecutively to the life sentence Pettis was then serving. Id. at 192-193. The court asked if Pettis "had an outdate anyway or not?" Id. at 192. Defense counsel told the court his current sentence would be "pushed back" regardless of whether he received a consecutive sentence or not. Id. The court sentenced Pettis to 4 years' imprisonment to be served consecutively to his life sentence. Id.

Pettis claimed in his amended Rule 24.035 motion that he received ineffective assistance of counsel at sentencing for failing to inform the court that a consecutive sentence automatically converted his parole-eligible life sentence into a life sentence without the possibility of parole. Id. at 192, 194. In addition, Pettis claimed his attorney misled the court into believing his release on parole would only be delayed by his consecutive sentence.[3] Id. at 192. The motion court denied his claim. Id.

The Court of Appeals found that "it [was] apparent that none of the participants in the hearing was aware of the real effect a consecutive sentence would have on Appellants parole eligibility." Id. at 194-195. "Thus, the court sentenced Appellant while under the mistaken belief that Appellant's parole eligibility would be pushed back as represented to it by Appellant's counsel, with no inkling that it would be entirely extinguished by a consecutive sentence". Id. at 195. "The court was obviously

[3] It is not clear from the opinion if Pettis requested resentencing as a result of his counsel's ineffectiveness at sentencing.

taking Appellant's parole eligibility into consideration in making a sentencing decision because it specifically asked about it. This is important because the record makes it clear that the court wanted to show Appellant some leniency and, in fact, did so by imposing only a four-year sentence, as opposed to the five years permitted under the plea agreement and requested by the state" Id. The Court of Appeals reversed and remanded for resentencing because it could not say counsel's error did not affect the trial court's decision at sentencing. Id. at 196.

In Pettis, unlike in this case, the motion court denied the actual claim Pettis raised. The Court of Appeals also reviewed the claim raised by Pettis in his amended motion. Moreover, while the sentencing court in Pettis may have given "some consideration" to the effect of its sentence on Pettis' parole eligibility, here Judge Atwell unambiguously and expressly explained he did not intend Mr. Shoate to serve a mandatory minimum sentence greater than 85% of 12 years and that was his reason for deviating from the plea agreement, should a reviewing court subsequently question his motives.

The Court of Appeals' opinion states that Mr. Shoate claimed in his Point on Appeal that the motion court's award of relief was "too broad". But the opinion inaccurately overlooks that Appellant did "not" allege the motion court's relief was "too broad;" he alleged in his Point on Appeal that the court clearly erred in "denying" Claim 8(C) by finding he was not prejudiced by plea counsel's ineffective assistance.

Appellant appealed only Claim 8(C) on appeal. As raised, the motion court denied that claim. Each legal claim on appeal must be considered separately lest the Court become an advocate for a party. As the opinion itself notes, a claim not raised on appeal is not properly before an appellate court (citing Rule 84.04; Howell v. State, 357 S.W. 2d 236, 248 (Mo. App. W.D. 2012)).

Appellant did [not] appeal the motion court's findings on any of his claims other than Claim 8(C) as he raised it, which the motion court purported to grant but actually denied.

It is well settled that, under Rule 24.035, "any allegations or issues that are not raised in the [post-conviction and/or amended motion] are waived on appeal". See McLaughlin v. State, 378 S.W. 3d 328, 340 (Mo. 2012) (quoting Johnson v. State, 333 S.W. 3d 459, 471 (Mo. 2011) (citation omitted))." Furthermore, there is no plain error review in appeals from post-conviction judgments for claims that were not presented in the post-conviction motion." Id. (citing Hoskins v. State, 329 S.W. 3d 695, 696-697 (Mo. 2010))." Claims are waived if not presented in the motion, regardless of whether evidence on that claim was presented". Dorsey v. State, 448 S.W. 3d 276, 285 (Mo. 2014); Day v. State, 495 S.W. 3d 773, 776 (Mo. App. S.D. 2016).

Here in the case at bar, the Western Districts, Court of Appeals, opinion addressed [not] the denial of Mr. Shoate's claim 8(C), as he raised it, but the motion court's determination "sua sponte" of its own allegation of "plain error" and remedy that Mr. Shoate never requested in either his post-conviction and/or amended motion. The opinion addressed "what [the motion court] perceived to be" as another aspect of Claim 8(C). But Mr. Shoate "without a doubt" did [not] claim in Claim 8(C) that the sentencing court breached his plea agreement nor did he request a full resentencing hearing. Here Mr. Shoate alleged his plea attorney's performance fell below a constitutionally-reasonable standard when counsel failed to inform Judge Atwell that because Mr. Shoate had at least 3 prior prison commitment and that he was required to serve a mandatory minimum of 80% of any sentence under §558.019 RSMo.

Mr. Shoate asserted he was prejudiced because there was at least a resonable probability that Judge Atwell would have sentenced him to an overall lesser sentence had he known that Mr. Shoate was required to serve at least 80% of any sentences. He noted the courts own explanation for imposing consecutive sentences, even though the plea agreement was for concurrent sentences, was to avoid Mr. Shoate having to serve an "extended period of time with no hope of parole."

Here Mr. Shoate made no complaint whatsoever at the time the sentencing courts proposed the entry of the consecutive sentences made by Judge Atwell, it could even be said that defendant waived any such breach. There is no doubt that any default in the performance of a contract may be waived. See 17 Am. Jur. 2d, Contracts Section 447 (1964); 7A Mo. Digest, Contracts Key No. 316 (1952). Such a waiver did occur here. We can assume that Mr. Shoate, when he came into open court, he made no mention of the [concurrent sentences] plea agreement, nor did he make any complaints of any breach of that agreement. He admitted to Judge Atwell that he understood the new sentence to be consecutive and he further testified that his plea, in contemplation of that new sentence, was being made freely and voluntarily,

It is easy to understand why Mr. Shoate was willing to make the new deal with consecutive sentences because the sentencing court itself explained the reasoning for its departure from the plea agreement: "it did not intend that Mr. Shoate be required to serve more than 10.2 years before even becoming eligible for parole. The court was obviously taking his parole eligibility into consideration in making a sentencing decision because it specifically mention it". This is important because because the record makes it clear that Judge Atwell wanted to show Mr. Shoate some leniece and, in fact, did so by imposing only a 12-year sentence on the 85% mandatory minimum sentence of manslaughter and 12 year sentences on the assault statutes that apply to the mother and the two children, that are not 85% sentences, and he can be subject to parole on those sentences, which means he would be subjected to supervision. If he violated his parole, he would be subjected to go back on those sentences and his supervision would be longer... Its clear from the record in this case Mr. Shoate knew exactly what he was doing and that what he was doing by pleading guilty to consecutive sentences was beneficial to him

In the case at bar; the motion courts findings in Claim 8(c) that the sentencing court plainly erred in breaching the plea agreement, not raised in Claim 8(c); the motion courts "sua sponte" remedy of a "de novo" sentencing hearing, not requested in Claim 8(c); and the Missouri Court of Appeals opinion affirming the motion courts [erroneous] findings of "plain error" and "sua sponte" relief in violation of 28 U.S.C. § 2254(d)(1), requires this Court's review to determine if a motion court may grant plain error not raised in a post-conviction motion and relief not requested by a post-conviction movant.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted

Harvey Lee Shoate Jr. #508428

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