SD 36064

IN THE
MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

STATE OF MISSOURI,

Respondent,

VS.

JAMES SMITH,

Appellant.

Appealed from the Circuit Court
of the County of Pulaski, Missouri,
The Honorable Mark D. Calvert, Circuit Judge

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Appellant James E. Smith pleaded guilty on January 17, 2018, in the Circuit Court of Pulaski County, to one count of Assault in the First Degree, in violation of Section 565.050, RSMo. On May 25, 2018, Appellant was sentenced by the Circuit Court to a term of ten years in the Missouri Department of Corrections.

On November 20, 2018, Appellant timely filed a motion to vacate, set aside, or correct the judgment or sentence in the Circuit Court of Pulaski County. On January 24, 2019, an evidentiary hearing was held before Associate Circuit Court Judge Mark D. Calvert. On March 25, 2019, the Associate Circuit Court Judge entered his judgment, denying Appellant's motion.

Appellant timely filed his Notice of Appeal on April 2, 2019, eight days after the judgment became final. As this appeal does not involve any issues reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri, jurisdiction lies in this Court, the Missouri Court of Appeals for the Southern District. Mo. Const., art. V, sec. 3; Section 477.060, RSMo.

RULE 24.035 TIMELINESS STATEMENT

Appellant James E. Smith's motion to vacate, set aside, or correct the judgment or sentence, pursuant to Missouri Supreme Court Rule 24.035, was timely filed on November 20, 2018. (L.F., Doc. 118, p.1). Appellant's Rule 24.035 motion was timely because it was filed within 180 days of May 25, 2018, the date on which Appellant was sentenced by the Circuit Court of Pulaski County. (L.F., Doc. 118, p.1). In his judgment denying Appellant's Rule 24.035 motion, the Associate Circuit Court Judge correctly concluded that Appellant's motion was timely filed. (L.F., Doc. 133, p.2).

STATEMENT OF FACTS

James E. Smith ("Smith") is an 80-year old man with significant medical issues who is currently serving a 10-year sentence for the only criminal conviction he has ever received. The evidence is uncontroverted that, throughout the proceedings against him, Smith maintained his innocence to his lawyer, refusing to enter traditional pleas of guilty to Assault in the First Degree or Armed Criminal Action, because he did not possess the requisite *mens rea* to commit either crime. Smith believed—and when it was already too late, a world-renowned expert corroborated—that his complex diabetic medical history contributed to his alleged criminal conduct. However, rather than retaining an expert's opinion in the 19 months that transpired between being retained and the plea hearing, Smith's attorney simply negotiated an *Alford* plea and advised Smith to go along with the deal. With no prior criminal history and unaware that he had a potential complete defense to both counts of the indictment, Smith was subsequently sentenced to 10 years in the Missouri Department of Corrections. At Smith's age, and given his medical condition, this constitutes a life sentence.

Smith is detained at the Missouri Eastern Correctional Center. (Tr. at 90).[1] On January 17, 2018, Associate Circuit Court Judge Mark Calvert of the Circuit Court of Pulaski County accepted Smith's plea, pursuant to *North Carolina v. Alford*, 400 U.S. 25

[1] All "Tr." citations refer to the official certified transcript of the January 24, 2019 evidentiary hearing filed in this case. The number in each "Tr." citation refers to the official pagination.

(1970), to one count of Assault in the First Degree (hereinafter, the "plea hearing"). At the plea hearing, Judge Calvert ordered a Sentencing Assessment Report, which was subsequently prepared and filed. On May 22, 2018 and May 25, 2018, Judge Calvert held a sentencing hearing.

At the sentencing hearing, Smith was sentenced to ten years in the Missouri Department of Corrections. By statute, Judge Calvert had the authority to sentence Smith to up to life in prison. On May 25, 2018, the associate circuit court entered and filed its Judgment. On May 31, 2018, Smith was received at the Missouri Department of Corrections, and he has remained in the custody of the Missouri Department of Corrections ever since.

At all proceedings before the associate circuit court, including the plea hearing and the sentencing hearing, Smith was represented by David L. Mills ("Mills"), a licensed Missouri attorney. Smith's motion to vacate, set aside, or correct the judgment or sentence was timely filed on November 20, 2018. (L.F., Doc. 118).

On January 24, 2019, Judge Calvert held an evidentiary hearing concerning Smith's motion to vacate, set aside, or correct the judgment or sentence pursuant to Missouri Supreme Court Rule 24.035 (hereinafter, the "motion") at which Mills, Smith, and Smith's daughter, Pamela Darmody ("Darmody"), testified. The testimony set out in the record revealed the following:

Smith is 80 years old and has a significant medical history including diabetes, stage IV chronic renal disease, and signs and symptoms indicating a high likelihood of prostate

cancer. Based on allegations that Smith committed an assault, Smith retained Mills as his legal counsel on June 29, 2016. (Tr. at 7).

When retaining Mills, Smith agreed to pay all legal fees and any additional expenses including expenses necessary to retain expert witnesses. (Tr. at 8). And Smith did exactly as he agreed. (*Id.*). Between the date Smith retained Mills as his legal counsel and the plea hearing, 19 months transpired. (Tr. at 10). Immediately upon undertaking his representation of Smith, Mills learned of Smith's diabetes. (Tr. at 15, 94, 106). And throughout the entirety of Mills' representation, Smith believed his diabetes played a significant role in the two counts charged in the indictment—Assault in the First Degree and Armed Criminal Action—and Smith maintained his innocence with respect to the requisite *mens rea* for both counts. (Tr. at 14, 16).

Mills testified that 19 months was more than enough time to conduct a thorough investigation and to pursue all leads and possible defenses. (Tr. at 10). But during those 19 months, Mills did not retain an expert to evaluate the extent to which Smith's diabetes and other health issues played a role in Smith's alleged conduct. (Tr. at 17, 19).

Rather than investigating a defense based on Smith's complex medical history, Mills negotiated an *Alford* plea because, as Mills admitted, Smith could not say under oath that he possessed the requisite criminal intent to be convicted of either count in the indictment. (Tr. at 14). This is critical. Both before and during the plea hearing, Smith had no idea that diminished capacity provided a potential complete defense to both charges in the indictment. (Tr. at 94). And most significantly, Smith's lawyer did not know this either. Indeed, at Smith's sentencing hearing several months later, Mills represented to Judge

Calvert that "diminished capacity is not a complete defense to a criminal charge." (Tr. at 27-28). Had Smith known that diminished capacity was a complete defense to both charges in the indictment, he would have pleaded not guilty and would have exercised his constitutional right to a jury trial. (*See* Tr. at 94-95).

Mills eventually retained Dr. Garry Tobin ("Tobin"), the director of the Diabetes Center at Washington University in St. Louis School of Medicine, because Mills believed he needed an expert opinion concerning the effect of Smith's medical conditions on his mental functioning on the date of the assault alleged in the indictment. (Tr. at 17). However, Mills did not retain Dr. Tobin until 8 days *after* the plea hearing. (Tr. at 19). There was a dispute at the evidentiary hearing about the extent to which, if at all, Mills explored and discussed a possible diminished capacity defense with Smith.[2] However, the associate circuit court did not need to resolve the dispute because the evidence and testimony was undisputed that when deciding whether to plead guilty or to proceed to trial, neither Smith nor Mills had the benefit of any opinion that Dr. Tobin would offer about a possible diminished capacity defense—and, therefore, neither could evaluate the strength of Dr.

[2] Mills testified about a picture of a whiteboard he provided to the prosecutor during the lunch break which included information such as the amount of additional legal fees for trial that was inconsistent with his fee agreement with Smith. Darmody testified that the picture of the whiteboard was not what was shown to her and Smith at a pre-plea meeting with Smith.

Tobin's opinions and potential testimony when considering whether to proceed to trial. (Tr. at 23).

Several months after the plea hearing, Dr. Tobin provided Mills and Smith his opinions and report which, without reservation, strongly supported a diminished capacity defense. (Tr. at 29-31). Having the benefit of an expert's opinion on an issue so fundamental as to whether a defendant has a potential complete defense to a criminal charge could have—and would have—factored into Smith's decision concerning whether to proceed with a diminished capacity defense to trial or to, instead, plead guilty. (Tr. at 38). And Dr. Tobin's expert opinion bolstering the diminished capacity defense would have applied to any specific intent crime including any lesser included offense relevant to the charges in the indictment. (Tr. at 40). When pressed on the witness stand, Mills admitted that Smith would have benefitted from knowing what Dr. Tobin was going to say before making the decision to plead guilty. (Tr. at 41). Critically, Mills testified that Smith "did not have Dr. Tobin's opinion…when he made the decision to accept the plea agreement." (Tr. at 41-42). Instead, having no idea what Dr. Tobin's opinions would be or that he had a potential complete defense to both counts pending against him, Smith proceeded with the *Alford* plea. (Tr. at 94).

At the plea hearing, Smith was not asked whether—and Judge Calvert did not make a finding on the record that—the *Alford* plea represented a voluntary and intelligent choice among the alternative courses of action open to the defendant. (Tr. at 33). No one recited, and Smith was not asked about, the elements of the count of conviction. (Tr. at 32). Judge Calvert did not ask Smith whether he was satisfied with his legal counsel. (Tr. at 33). Judge

Calvert did not ask Smith whether his attorney had answered his questions. (Tr. at 33). Smith did not say anything concerning his motivation for entering into the *Alford* plea. (Tr. at 35). Smith subjected himself to a possible sentence of life in prison. (Tr. at 37). Nothing was said by anyone about Smith's potential complete defenses including, but not limited to, diminished capacity. (Tr. at 37). Mills did not object to the way in which the plea hearing was administered but, critically, Mills admitted under oath that it is "a requisite part of the plea hearing colloquy" in an *Alford* plea that a defendant must be asked "whether this represented a voluntary and intelligent choice among alternative courses of action open to him." (Tr. at 36, 86).

The plea hearing was legally inadequate because, among other things, Smith was not asked whether the *Alford* plea represented a voluntary and intelligent choice among alternative courses of action open to him and Judge Calvert did not make a finding that the *Alford* plea did, in fact, represent a voluntary and intelligent choice among alternative courses of action open to him. Furthermore, Smith was not asked a single question about his motivation for pleading guilty pursuant to *Alford*.

Adding to Smith's prejudice, there is no dispute that Mills did not have the benefit of Dr. Tobin's opinion when he negotiated the *Alford* plea, and Mills himself admitted under oath that Dr. Tobin's report and opinion could have affected plea negotiations, that his duty as a criminal defense attorney is to take anything that might help a defendant and use it to leverage a better plea deal, and that to do that, he would need everything in his hands before reaching a plea deal. (Tr. at 78).

Smith testified that he did not have the benefit of Dr. Tobin's report and opinion when he entered the *Alford* plea and that it would have been helpful to have them before making the decision to plead guilty and waive his right to a trial. (Tr. at 95-96). Smith testified that he did not know that withdrawal of the guilty plea before sentencing was a potential option, because his lawyer, Mills, never told him of that option. (Tr. at 98, 103). Smith relied heavily on his daughter, Darmody, in evaluating whether to plead guilty or to proceed to trial. (Tr. at 93, 105-06). And Darmody, who participated in all important meetings between Smith and Mills, also did not understand that Smith had a diminished capacity defense to both charges, because Mills never explained that to them—presumably because Mills himself did not know that diminished capacity constituted a potential complete defense to the charges against Smith. (Tr. at 105-06, 110-12).

Mills testified that he had a duty to fully understand and appreciate Dr. Tobin's opinions so that he could competently advocate on behalf of Smith at sentencing. (Tr. at 43). Nonetheless, prior to the sentencing hearing, Mills did not review Dr. Tobin's *curriculum vitae* in its entirety and Mills represented to the associate circuit court that he did not understand much of what Dr. Tobin wrote in his report. (Tr. at 43-44).

Before the sentencing hearing, Mills did not disclose to Smith that he did not fully understand Dr. Tobin's report when he decided to not have Dr. Tobin appear in court to testify as to his opinions. (*See* Tr. at 83). At the sentencing hearing, the associate circuit court did not inquire as to whether Smith received effective assistance of counsel. (Tr. at 47). And the sentencing court did not conduct an examination of Smith pursuant to Missouri Supreme Court Rule 29.07(b)(4). (Tr. at 47). Mills testified he was aware that

this inquiry at sentencing regarding effective assistance of counsel was required by Missouri law and did not recall why he did not object to the absence of those mandatory questions. (Tr. at 47). Smith signed, but did not read, the court's standard acknowledgement of rights form. (Tr. at 97). Nothing in the standard form addresses the requirements of an *Alford* plea, the mandate of an examination of the defendant at sentencing pursuant to Missouri Supreme Court Rule 29.07(b)(4), or the diminished capacity defense. (*See* Exhibit A).

Smith, who answered every question asked of him by the prosecutor at the January 24, 2019 evidentiary hearing, provided uncontroverted testimony that he would not have pleaded guilty and would have, instead, proceeded to trial if he had known he had a potential complete defense. And Mills himself acknowledged under oath that having Dr. Tobin's report would constitute "data that's relevant to me and my client, there's no doubt about that." (Tr. at 80).

On March 25, 2019, Judge Calvert entered his Findings of Fact, Conclusions of Law, and Judgment (the "Judgment"). In it, he did not address the majority of Smith's legal arguments in support of his motion. Instead, the Judgment inaccurately and unfairly mischaracterizes Smith's arguments, fails to address Smith's actual arguments, and fails to acknowledge and credit significant uncontroverted testimony and evidence which would require a ruling in Smith's favor.

POINTS RELIED ON

I. The motion court clearly erred in its conclusion that the Alford plea was knowingly and voluntarily made and that Mills was not ineffective, because the plea hearing was insufficient, in that it did not provide the sentencing court with essential information to determine whether Appellant's decision to enter into the Alford plea represented a voluntary and intelligent choice among alternative courses of action open to Appellant, which it could not, as it did not limit the maximum punishment Appellant could receive.

Porter v. State, 928 S.W.2d 1 (Mo. Ct. App. 1996)

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

North Carolina v. Alford, 400 U.S. 25 (1970)

Michaels v. State, 436 S.W.3d 404 (Mo. Ct. App. 2011)

II. The motion court clearly erred in its conclusion that Mills' investigation was adequate, because a reasonable investigation would have improved Appellant's position, in that Appellant's medical condition provided him with a potential complete defense to the charges against him.

Porter v. State, 928 S.W.2d 1 (Mo. Ct. App. 1996)

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

Hendrix v. State, 473 S.W.3d 144 (Mo. Ct. App. 2015)

Davis v. State, 486 S.W.3d 898 (Mo. banc 2016)

Mo. Rev. Stat. § 552.015

III. The motion court clearly erred in its conclusion that Mills was not ineffective for failing to understand the expert witness' report and for failing to call the expert as a witness at the sentencing hearing, because if had Mills understood the report or called the expert witness at the sentencing hearing, Appellant would have benefitted, in that the sentencing court would have had the benefit of the expert witness' opinions and their effect on the sentencing court's determination of an appropriate sentence.

Porter v. State, 928 S.W.2d 1 (Mo. Ct. App. 1996)

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

ARGUMENT

I. The motion court clearly erred in its conclusion that the *Alford* plea was knowingly and voluntarily made and that Mills was not ineffective, because the plea hearing was insufficient, in that it did not provide the sentencing court with essential information to determine whether Appellant's decision to enter into the *Alford* plea represented a voluntary and intelligent choice among alternative courses of action open to Appellant, which it could not, as it did not limit the maximum punishment Appellant could receive.

A. Standard of Review

Appellate review of the motion court's action on the motion filed pursuant to Rule 24.035 is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. *See* Mo. Sup. Ct. R. 24.035(k).

B. Applicable Law

A movant claiming ineffective assistance of counsel must prove two elements: first, that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would have exercised under similar circumstances; and second, that he was thereby prejudiced. *Porter v. State*, 928 S.W.2d 1, 2 (Mo. Ct. App. 1996) (citing *Sanders v. State,* 738 S.W.2d 856, 857 (Mo. banc 1987)). *See also Strickland v. Washington,* 466 U.S. 668, 687 (1984). "The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence." Mo. Sup. Ct. R. 24.035(i).

It is black letter law that an *Alford* plea is valid only "if it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Michaels*

v. State, 436 S.W.3d 404, 408 (Mo. Ct. App. 2011); *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). Whether an *Alford* plea is made freely, voluntarily, and intelligently requires an understanding by the defendant of what an *Alford* plea is, and a decision by the defendant that the *Alford* plea is a better alternative than a different course of action. *See, e.g., Nguyen v. State*, 184 S.W.3d 149, 153 (Mo. Ct. App. 2006) ("[The defendant] freely, voluntarily, and intelligently made his plea by acknowledging to the trial judge that he understood what was meant by an *Alford* plea and that pleading guilty was a better alternative than going to trial").

The motion court in this case clearly erred in concluding the *Alford* plea was knowingly and voluntarily made and that Mills was not ineffective for several reasons. *See, e.g., Dorsey v. State*, 115 S.W.3d 842, 845 (Mo. banc 2003). *First*, the *Alford* plea was invalid because Smith was not asked whether, and the court did not make a finding on the record that, the *Alford* plea represented a voluntary and intelligent choice among the alternative courses of action open to him. *Second*, Mills did not object to the court's failure to engage in the requisite colloquy. *Third*, the *Alford* plea was invalid because it did not limit the maximum punishment Smith could receive compared to a conviction after trial.

On this point, the associate circuit court judge presiding over the motion hearing was in no better position than this Court to evaluate these profoundly important and fundamental constitutional and legal issues.

C. The *Alford* Plea Was Invalid Because It Did Not Represent a Voluntary and Intelligent Choice Among the Alternative Courses of Action Open to Smith

In its Judgment, the motion court addresses only whether there was an adequate factual basis for the plea. (*See* L.F., Doc. 133). But that is not all that is required before a court may accept an *Alford* plea. Rather, the validity of an *Alford* plea—as a matter of binding United States Supreme Court precedent—turns on "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Alford*, 400 U.S. at 31. And it is undisputed in the record before this Court that, during the plea colloquy, the court did not make this inquiry, Mills did not object or make this inquiry himself, and, accordingly, Smith did not provide the court with this information. (Tr. at 33). As such, the motion court had no basis from which to conclude that the *Alford* plea was knowingly and voluntarily made.

Missouri courts have long recognized the need to engage in the requisite *Alford* inquiry when evaluating the legal validity of an *Alford* plea. For example, in *Nguyen*, a defendant challenged the validity of his *Alford* plea in the context of a Rule 24.035 challenge. *Nguyen*, 184 S.W.3d at 149. In upholding the plea, the appellate court explained that the defendant "obtained a negotiated sentence without admitting guilt by entering an *Alford* plea." *Id.* at 152. The appellate court concluded that the plea was made freely, voluntarily, and intelligently in that the defendant acknowledged "to the trial court that he understood what was meant by an *Alford* plea and that pleading guilty was a better

alternative than going to trial." *Id*. at 153. And, as the appellate court explained by referring to the plea transcript, that is precisely what happened:

> When asked if he knew what an *Alford* plea was, Nguyen replied, "An *Alford* plea is enough evidence to convict me but I'm not the shooter." The court then proceeded to inquire whether or not Nguyen understood the plea agreement of concurrent sentences for all four counts. Next, the court questioned Nguyen's intelligence and competence level both at the time of the events and at the hearing, with which the court was satisfied. Finally, the court informed Nguyen of his rights with regard to his counsel and his right to trial, and Nguyen indicated he understood.
>
> Once the court completed its questioning, Nguyen's counsel began questioning. Through the questioning, Nguyen's discussions with his counsel were developed to demonstrate Nguyen's understanding of the options he had with regard to pleading guilty compared to going to trial. Nguyen's counsel examined possible defenses that could be raised and why they would not work. After completing those questions, Nguyen's counsel and the State developed the evidence.

Id. at 150.

In another case assessing the validity of an *Alford* plea, the appellate court again looked to the plea transcript. There, the court specifically questioned the defendant with respect to his "Alford plea."

The court: You are saying you are not guilty of manslaughter?

The defendant: Yes.

The court: But you would rather enter a plea of guilty to manslaughter and be subject to the punishment by the court rather than be found guilty by the jury of murder in the second degree?

The defendant: Yes.

Bounds v. State, 556 S.W.2d 497, 499 (Mo. Ct. App. 1977).

In this case, the plea transcript reflects that Smith was not asked whether the *Alford* plea represented a voluntary and intelligent choice among the alternative courses of action open to him. (*See* Tr. at 33; Ex. 4). Furthermore, Mills did not object to the court's failure to engage in this inquiry and did not make these mandated queries himself. As such, the court did not—and could not—make the requisite finding. (*Id.*).

Smith was not asked a single question about his motivation for entering the *Alford* plea and he did not make any statements at all about his understanding of what an *Alford* plea was and why he was entering into it. (*Id.*) Underscoring the extent to which his trial counsel was ineffective, Mills did not object to the way the plea hearing was administered even though he admitted under oath at the 24.035 hearing that it is "a requisite part of the plea hearing colloquy" in an *Alford* plea that the defendant pleading guilty must be asked "whether this represented a voluntary and intelligent choice among alternative courses of action open to him." (*See* Tr. at 36, 86).

The plea colloquy in this case was woefully insufficient.

Unlike the defendant in *Nguyen*, Smith was not asked by the court or his attorney whether he knew what an *Alford* plea was. *Nguyen*, 184 S.W.3d at 150; *see also O'Neal v. State*, 236 S.W.3d 91, 94 (Mo. Ct. App. 2007) (At plea hearing, "Movant also acknowledged that he understood what was meant by an *Alford* plea").

Unlike Nguyen, whose "counsel examined possible defenses that could be raised and why they would not work," that topic did not come up at Smith's plea hearing. *Id*. And unlike the defendant in *Bounds*, Smith was not asked about his motivation in pursuing an *Alford* plea. *Bounds*, 556 S.W.2d at 499. Mills himself admitted more was required at the plea hearing and he testified under oath that he did not object. (*See* Tr. at 36, 86). Throughout its judgment, the motion court repeatedly credits Mills' testimony as credible—but the Judgment is silent as to Mills' under-oath admissions that "a requisite part of the plea hearing colloquy" did not occur. (*See* Tr. at 86).

D. The *Alford* Plea Was Invalid Because It Did Not Limit the Maximum Punishment Smith Could Receive Compared to a Conviction After Trial

An *Alford* plea is legally invalid where, as here, the defendant does not limit the maximum penalty. *See Alford*, 400 U.S. at 31 ("Confronted with the choice between a trial for first-degree murder, on the one hand, and a plea of guilty to second-degree murder, on the other, Alford quite reasonably chose the latter *and thereby limited the maximum penalty* to a 30-year term") (emphasis added). In other words, *Alford* inherently forecloses an open *Alford* plea.

This is a question of first impression in Missouri. While this issue was raised on appeal once, the appellate court ruled that the movant in that case "did not present this argument to the motion court" and therefore failed to preserve it. *See Lynn v. State*, 417 S.W.3d 789, 796-97 (Mo. Ct. App. 2013), *abrogated on other grounds by Booker v. State*, 552 S.W.3d 522 (Mo. banc 2018). In the context of the Rule 24.035 appeal, the appellate court "decline[d] to review Movant's claim that *Alford* 'inherently forecloses' an open *Alford* plea"). Smith, however, did raise this issue in his Rule 24.035 motion and it is thereby preserved for appellate review by this Court.

While this is a question of first impression in Missouri, it is a settled question in Smith's favor in several other states. For instance, the Arizona Court of Appeals explained, "[i]n deciding whether to enter an *Alford* plea, the defendant essentially performs a risk-benefit analysis…and measures the probability of a guilty verdict and a longer sentence *against a definite and lesser sentence to be imposed in accordance with the plea agreement*." *Duran v. Superior Court for Maricopa*, 782 P.2d 324, 326 (Ariz. Ct. App. 1989) (emphasis added). The Ohio Court of Appeals explained, "[t]he essence of an *Alford* plea is that a Defendant's decision to enter the plea against his protestations of factual innocence is clearly and unequivocally supported by evidence that he exercised that calculus *for the purpose of avoiding some more onerous penalty that he risks by, instead, going to trial* on the charges against him." *State v. Gossard*, 2003 Ohio 3770 (Ohio App. 2 Dist. 2003) (emphasis added). The Ohio court vacated the invalid *Alford* plea because the defendant "never stated or explained what his motivation was for entering the *Alford*

plea" and the record completely lacked a "positive response portraying an *Alford* calculus." *Id*.

In this case, the maximum sentence Smith faced based on the two-count indictment was life in prison—and, under the *Alford* plea, Smith subjected himself to a possible sentence of life in prison. (*See* Tr. at 37). This fact is undisputed. (*See* L.F., Doc. 133, p.9-10) ("While it's true the Court had the full range of punishment for count I, the State dismissed count II as part of Movant's plea"). Thus, the State's argument which was adopted by the motion court evolved into a theory that the *Alford* plea was valid because the dismissal of Count II removed the mandatory *minimum* sentence.

This is a distinction without a difference—because *Alford* and its progeny focus on the *definiteness* of a lesser sentence. *See Alford*, 400 U.S. at 31 ("…thereby limited the *maximum penalty* to a 30-year term") (emphasis added); *see also Duran*, 782 P.2d at 326 ("…measures the probability of a guilty verdict and a longer sentence *against a definite and lesser sentence to be imposed* in accordance with the plea agreement") (emphasis added). The notion that a septuagenarian defendant with no prior criminal history would plead guilty pursuant to *Alford* to a count which carries a sentencing range of 10 years to life based on a calculus that he would remove a 3-year mandatory minimum sentence for armed criminal action does not cure the *Alford* error. In fact, Smith—now an octogenarian—is sitting in the penitentiary precisely because he received a 10-year sentence.

Because Smith was not asked whether, and the court did not make a finding on the record that, the *Alford* plea represented a voluntary and intelligent choice among the

alternative courses of action open to him, because the *Alford* plea in this case did not limit the maximum punishment Smith could receive compared to a conviction after trial, and because Mills did not object, the *Alford* plea was legally invalid as it was not knowingly and voluntarily made, and Smith received ineffective assistance of counsel.

II. The motion court clearly erred in its conclusion that Mills' investigation was adequate, because a reasonable investigation would have improved Appellant's position, in that Appellant's medical condition provided him with a potential complete defense to the charges against him.

A. Standard of Review

Appellate review of the trial court's action on the motion filed under Rule 24.035 is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. *See* Mo. Sup. Ct. R. 24.035(k).

B. Applicable Law

A movant claiming ineffective assistance of counsel must prove two elements: first, that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would have exercised under similar circumstances; and second, that he was thereby prejudiced. *Porter*, 928 S.W.2d at 2 (citing *Sanders,* 738 S.W.2d at 857). *See also Strickland,* 466 U.S. at 687. "The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence." Mo. Sup. Ct. R. 24.035(i).

C. Introduction

Mills provided ineffective assistance of counsel because he failed to investigate, prior to advising Smith to enter into a blind *Alford* plea, that Smith's medical condition

provided him with a potential complete defense to the charges against him. Had Smith known that he had a viable complete defense to the charges against him, Smith would have proceeded to trial or negotiated a more favorable resolution. The motion court clearly erred in its conclusion that Mills' investigation was adequate, and that Smith was not prejudiced by Mills' failure to investigate.

D. Legal Standard

To succeed on an ineffective assistance of counsel claim based on inadequate investigation, a movant must specifically describe: (1) the information his attorney failed to discover; (2) allege that a reasonable investigation would have resulted in the discovery of such information; and (3) prove that the information would have aided or improved movant's position. *Hendrix v. State*, 473 S.W.3d 144, 148 (Mo. Ct. App. 2015); *Smith v. State*, 413 S.W.3d 709, 716 (Mo. Ct. App. 2013); *Yoakum v. State*, 849 S.W.2d 685, 688 (Mo. Ct. App. 1993).

By statute and case law, Missouri recognizes that a defendant may negate the *mens rea* of a crime by establishing diminished capacity. Specifically, Section 552.015(8) of the Revised Statutes of Missouri permits a defendant to establish that he suffers from a mental disease or defect to "prove that the defendant did or did not have a state of mind which is an element of the offense." *See Davis v. State*, 486 S.W.3d 898, 912 (Mo. banc 2016) ("This is commonly referred to as the diminished capacity defense"). *See also State v. Walkup*, 220 S.W.3d 748, 756 (Mo. banc 2007) ("A diminished capacity defense, if successful, does not absolve the defendant of responsibility entirely, *but makes him responsible only for the crime whose elements the state can prove*") (emphasis added). Stated otherwise,

diminished capacity is not an affirmative defense; rather, it is a means of negating the *mens rea* element of a crime requiring proof of criminal intent—and, if successful, the jury is instructed to find the defendant not guilty because the State has not proven an element of the offense beyond a reasonable doubt. *See id.*

E. Discussion

The motion court clearly erred by concluding that Mills investigated the potential diminished capacity defense prior to the plea hearing and by concluding that Smith would not have been aided by discovery of the viable diminished capacity defense. (*See* L.F., Doc. 133, p.8).

The motion court's conclusion that Mills investigated the diminished capacity defense prior to the plea is clearly erroneous because it is readily refuted by the record. It is undisputed that Mills failed to consult with an expert witness prior to Smith's plea about the potential diminished capacity defense. Instead, Mills retained Dr. Tobin *after* the plea, but before sentencing, and Dr. Tobin ultimately concluded that Smith's hypoglycemia may have made it impossible for him to form the requisite *mens rea* for the crime to which he pled guilty.

Having the expert's opinion prior to the plea would have caused Smith to exercise his right to plead not guilty and to proceed to trial. (Tr. at 95-96). Moreover, having the expert's opinion prior to the plea would unquestionably have improved Smith's leverage in plea negotiations to reach what might have been a reasonable *Alford* plea—one in which the parties agreed to a maximum sentence. *See Alford*, 400 U.S. at 31 ("…thereby limited the *maximum penalty*").

Making matters worse, Mills expressly stated—*incorrectly*—at the sentencing hearing, that diminished capacity does not constitute a complete defense to the charges against Smith. (*See* Tr. at 27-28) ("Diminished capacity is not a complete defense to a criminal charge"). Mills' failure to investigate Smith's complete defense to the charges prior to the guilty plea and Mills' failure to comprehend the law governing the diminished capacity defense at the time of sentencing constituted ineffective assistance of counsel.

1. *Mills Failed to Discover that Appellant's Medical Condition Provided a Complete Defense to the Charges Against Smith*

Mills learned of Smith's diabetes immediately upon being retained. (Tr. at 15, 94, 106). Throughout the representation, Smith maintained that his diabetes and hypoglycemia caused him to lack the ability to form the requisite criminal intent to commit the crimes he was charged with. (Tr. at 14-16). Nonetheless, Mills did not contact an expert on diabetes until *after* Smith pled guilty. (Tr. at 17). Accordingly, the motion court's conclusion that Mills investigated the diminished capacity defense prior to the plea hearing is clearly erroneous.

The motion court's erroneous conclusion is based on a false premise. Specifically, the motion court appears to base this conclusion on Mills' testimony that "he told the Smith family that they could *assume* he would be able to find an expert who would testify at a trial that Movant suffered from diminished capacity at the time of the offense." (L.F., Doc. 133, p.8) (emphasis added). The difference between an *assumption* and an actual written report by a respected medical expert cannot be overstated. And, indeed, this definitionally means that Mills did not discover that Smith had a viable diminished capacity defense prior

to his plea. Instead, Mills, at most, "assumed" that Smith might have this defense but took absolutely no steps to investigate it.

Furthermore, Mills represented to the court at sentencing that "diminished capacity is not a complete defense to a criminal charge." (Tr. at 27-28). Not only did Mills fail to investigate the existence of a diminished capacity defense, he failed to comprehend that diminished capacity could constitute a complete defense. Had Smith known that he had a viable diminished capacity defense, and that this defense was a potential complete defense to the charges in the indictment, he would have pleaded not guilty and proceeded to trial. (Tr. at 94-95).

2. *A Reasonable Investigation Would Have Resulted in Discovery of the Fact that Appellant's Medical Condition Provided Him a Complete Defense*

It cannot reasonably be disputed that a reasonable investigation would have resulted in the discovery of a complete defense to the charges in this case. Indeed, a reasonable investigation *did* discover a complete defense in this case—it was simply discovered far too late.

Eight days after Smith's *Alford* plea, Mills retained Dr. Garry Tobin, a renowned expert in diabetes. (Tr. at 17-19). Ultimately, Dr. Tobin concluded, "based on the cognitive evaluation and the above data linking hypoglycemia to personality and behavioral issues that [Smith's] diabetes control or the lack of control contributed to his violent behavior on the day in question." Stated simply, Dr. Tobin concluded, and was willing to testify at trial,

that Smith's violent behavior was caused, at least in part, by his severe hypoglycemia and uncontrolled diabetes.

Because Mills successfully—but tardily—retained a well-respected medical expert who was willing to testify that Smith's uncontrolled diabetes "contributed to his violent behavior" the day of the alleged offense, it cannot be disputed that a reasonable investigation would have resulted in the discovery of information beneficial to Smith's position. *Hendrix*, 473 S.W.3d at 148.

3. *If Appellant Had Known that His Medical Condition Provided Him a Complete Defense His Position Would Have Been Aided as His Leverage in Plea Negotiations Would Have Improved or He Would Have Proceeded to Trial*

Smith was prejudiced by Mills' failure to investigate and to discover the complete defense that Smith possessed in this case because he maintained throughout this litigation that he did not have the necessary intent to commit the crimes he was charged with. Indeed, this is why Mills negotiated the *Alford* plea in the first place. (*See* Tr. at 14). Moreover, Smith testified under oath before the motion court that he would have pleaded not guilty and proceeded to trial had he known he had a legitimate diminished capacity defense to the charges. (Tr. at 94-96).

Smith's testimony that he would not have pled guilty and would have, instead, proceeded to trial, was unrefuted as even Mills acknowledged under oath that having Dr. Tobin's report would constitute "data that's relevant to me and my client, there's no doubt about that." (Tr. at 80). *See Willoughby v. State*, 81 S.W.3d 676, 678 (Mo. Ct. App. 2002)

("To prevail on a claim of ineffective assistance of counsel in connection with the entry of a guilty plea, the defendant must show that, but for counsel's unprofessional errors, there is a reasonable probability that defendant would not have pled guilty and would have insisted on going to trial"). If Mills had obtained Dr. Tobin's report prior to the guilty plea, there is a reasonable probability—indeed, a certainty according to Smith's under oath testimony—that Smith would not have pled guilty and would have, instead, insisted on proceeding to trial.

The motion court's conclusion that Smith, "with the benefit of counsel from his Attorney, made a calculated strategic decision not to proceed to trial due to the risk associated with the Armed Criminal Action count" was clearly erroneous. (L.F., Doc. 133, p.8).

III. The motion court clearly erred in its conclusion that Mills was not ineffective for failing to understand the expert witness' report and for failing to call the expert as a witness at the sentencing hearing, because if had Mills understood the report or called the expert witness at the sentencing hearing, Appellant would have benefitted, in that the sentencing court would have had the benefit of the expert witness' opinions and their effect on the sentencing court's determination of an appropriate sentence.

A. Standard of Review

Appellate review of the trial court's action on the motion filed under Rule 24.035 is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. *See* Mo. Sup. Ct. R. 24.035(k).

B. Applicable Law

A movant claiming ineffective assistance of counsel must prove two elements: first, that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would have exercised under similar circumstances; and second, that he was thereby prejudiced. *Porter*, 928 S.W.2d at 2 (citing *Sanders,* 738 S.W.2d at 857). *See also Strickland,* 466 U.S. at 687. "The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence." Mo. Sup. Ct. R. 24.035(i).

C. Introduction

Even after Mills obtained Dr. Tobin's report, concluding that Smith's medical conditions "contributed to his violent behavior on the day in question," Mills failed to

sufficiently grasp the expert's conclusions and failed to notify Smith of this lack of understanding. Had Smith known that Mills did not fully comprehend the expert's report, Smith would have insisted on the expert providing live in-person testimony at his sentencing hearing.

D. Had Appellant Known that Mills Did Not Understand the Expert's Report, He Would Have Insisted on Having the Expert Witness Testify at the Sentencing Hearing

At sentencing, Mills confessed that he did not understand and appreciate the Dr. Tobin's report. Had Mills informed his client prior to the sentencing hearing that he lacked an understanding of the expert's conclusions, Smith would have insisted that the expert be present to testify at his sentencing hearing.

Mills did not call Dr. Tobin at sentencing. Instead, Mills provided documents to the court and explained them in an entirely unreasonable way, well below the minimum standard for any effective defense attorney. (*See* L.F., Doc. 121, p.110) ("And, by the way, Judge, I'll be honest, *I haven't read every page of Dr. Tobin's CV*, but I'm told he is the foremost expert on diabetes and blood sugar in the country, if not the world, and he's at Washington University") (emphasis added); (*Id*. at 114) ("Dr. Tobin, in his report – I mean, the guy strikes me as brilliant, but *I'll be honest, a lot of it I don't understand*. And it just dawned on me in looking at that report that he never really gave us the definition of hypoglycemia") (emphasis added). Thus, Mills provided "Googled definitions of hypoglycemia." (*Id*. at 114).

This was not a matter of reasonable litigation strategy. Rather, Smith was entitled to the effective assistance of counsel—an attorney who reads the documents he provides a court in their entirety, who fully understands the credentials of an expert on whom he is relying so that he can convey the expert's background in greater detail rather than hyperbolized generalities, who makes sure to understand the opinions of an expert on whom he is relying in his advocacy, and who uses research far more sophisticated and well-recognized than whatever source happens to pop up from a haphazard Google search for definitions of serious, complex medical conditions.

Mills testified that he had a duty to fully understand and appreciate Dr. Tobin's opinions so that he could advocate on behalf of Smith at sentencing. (Tr. at 43). By his own admission at the evidentiary hearing, which the motion court found credible, he failed to satisfy this duty. Prior to sentencing, Mills did not disclose to Smith that he did not fully understand Dr. Tobin's report when he advised Smith not to have Dr. Tobin come to court to testify live. (Tr. at 83). These failures were prejudicial because, but for counsel's errors, the outcome would have been different in that the sentencing court would have given Smith a lower sentence.

Mills represented to Smith—and Smith relied on his attorney's representations when deciding to plead guilty—that Mills would thoroughly and effectively advocate for Smith to receive the lowest possible sentence at the sentencing hearing. To the extent it can even be argued that entering an "open" *Alford* plea is reasonable (a contention Smith adamantly rejects), the only reasonable strategy for any "open" plea would be to present the strongest case possible at sentencing. In the context of an "open" plea, failure to

introduce the testimony of relevant witnesses at sentencing and failure to read and understand what is provided to the court on a client's behalf are not matters of reasonable strategy; rather, it was counsel's responsibility in the context of an "open" plea to investigate and present the most effective case in mitigation that could be presented—and no strategic decision could have been made that it was somehow in Smith's best interest for his attorney not to present relevant testimony to the court and not to read or understand the credentials and opinions of a world renowned expert witness, Dr. Tobin, who opined that Smith's medical conditions likely factored into the criminal actions allegedly taken by Smith.

These failures of Mills were prejudicial to Smith because, had Mills provided effective assistance of counsel, it is reasonably likely that Smith would have received a lower sentence. And had Smith understood that Mills would advocate for him in this ineffective capacity at sentencing, Smith would not have entered a plea of guilty, would have entered a plea of not guilty, and would have proceeded to trial—or, at the very least—insisted on Dr. Tobin's testimony at the sentencing hearing.

CONCLUSION

Appellant respectfully requests that this Court reverse the judgment of the motion court and grant Appellant's motion to vacate, set aside, or correct the judgment or sentence, pursuant to Missouri Supreme Court Rule 24.035.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Appellant James E. Smith's Brief includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this Brief is _____, exclusive of the cover, table of contents, table of authorities, signature blocks, and certificates of service and compliance. The undersigned further certifies that this Brief was scanned for viruses and found to be virus-free.

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CERTIFICATE OF SIGNED ORIGINAL AND CERTIFICATE OF SERVICE

The undersigned hereby certifies that the attorney filing the foregoing document signed the original of the same. Said original will be maintained, as required by the Rules of Civil Procedure. The undersigned further certifies that, on _____, 2019, the foregoing was served via this Court's electronic filing system upon the following:

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