

IN THE SUPREME COURT OF MISSOURI

STATE ex. rel. ROBERT T. POUCHER,)	
Relator,)	
)	
)	
v.)	SC 88721
)	
THE HONORABLE DAVID LEE)	
VINCENT, III et al.,)	
Respondents.)	
)	

Original Proceeding in Mandamus
On Preliminary Writ From the Supreme Court of Missouri to the Honorable David Lee
Vincent, III, Circuit Judge of St. Louis County.

RELATOR’S STATEMENT, BRIEF AND ARGUMENT

Respectfully submitted,

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JURISDICTIONAL STATEMENT

Respondent exceeded his jurisdiction by imposing an invalid sentence and by exceeding his nunc pro tunc power and, accordingly, this Court has jurisdiction of this case pursuant to Article V, Section 4, of the Missouri Constitution, which allows this Court to issue and determine original remedial writs.

STATEMENT OF FACTS

In 2003, in the circuit court of St. Louis County, Relator pled guilty to the Class D felony of driving while intoxicated (Count I), the Class D felony of driving while canceled (Count II), the misdemeanor of leaving the scene of an accident (Count III) and the misdemeanor of careless and imprudent driving (Count IV) (EXHIBIT A). Relator was thereafter sentenced to a term of seven years on Count I and three years on Count II, to be served consecutively. Relator was also sentenced to one year each on Counts III and IV, both to be served concurrently with Count I.

Respondent imposed a crime victim's compensation fine of \$46.00, the fine mandated by section 595.045.8, RSMo for conviction of a Class D felony.

Relator's prison sentence was suspended and Relator was placed in the Long Term Drug Treatment Program pursuant to section 217.362.2. Relator successfully completed the Long Term Drug Treatment Program and was placed on a five year term of probation.

Thereafter, Relator was recommended for a probation revocation hearing on

allegations that he violated the conditions of his probation. On November 3, 2005, Relator waived his probation revocation hearing in exchange for assurances that the sentences he received for Counts I and II would be served concurrently rather than consecutively, resulting in a seven year sentence rather than a ten year sentence. When the case was before Respondent, the Honorable David Lee Vincent, Respondent imposed a sentence of seven years on Count I, “executed, forthwith, concurrently” with three years for Count II “for a total not to exceed seven years.” (EXHIBIT B) Respondent's imposition of concurrent sentences for Count I and II was memorialized both orally and in writing. (EXHIBIT B)

On December 12, 2005, more than 30 days after his initial Order, and, according to Respondent, after “realizing its mistake,” Respondent entered an order nunc pro tunc amending the November Order so that Counts I and II would run consecutively rather than concurrently. (EXHIBIT D). On August 14, 2007, Relator filed a petition for writ of mandamus with this Court and this Court issued a preliminary writ on September 25, 2007, ordering Respondent to vacate the judgment and order nunc pro tunc of December 7, 2005.

Relator was without counsel until October 26, 2007, when Undersigned Attorney was appointed as counsel representing Relator.

SUMMARY OF ARGUMENT

COMES NOW Relator, Robert Poucher, pursuant to Rule 94, and petitions this Court to issue a Writ of Mandamus directing the Honorable David Lee Vincent, III, to enter a final appealable judgment in the underlying criminal case or, in the alternative, directing the Honorable David Lee Vincent, III to vacate his December 7, 2005 order nunc pro tunc. In support of this petition, Relator states:

“It is well-settled that '[t]he purpose of the writ is to execute, not adjudicate,' and to be entitled to a writ, the relator must have 'a clear, unequivocal, specific right to have an act performed.'” *Clay v. Dormire*, 37 S.W.3d 214, 218 (Mo. banc 2000) (citing *State ex rel. Missouri Growth Ass'n v. State Tax Com'n*, 998 S.W.2d 786, 788 (Mo. banc 1999)). As fully expressed in Points I and II, below, Relator has demonstrated a clear and unequivocal right to have this Court issue a writ of mandamus ordering Respondent act in accordance with Missouri law.

POINTS RELIED ON

- I. This Court should issue a writ of mandamus ordering the trial court to enter a final appealable judgment including a valid sentence because respondent exceeded his jurisdiction by imposing an invalid sentence.**

Jeffers v. U.S., 432 U.S. 156 (1977)

Moskal v. U.S., 498 U.S. 103, 108 (1990)

U.S. v. Hathaway, 318 F.3d 1001, 1009 (10th Cir. 2003)

State v. Plastec Inc., 961 S.W.2d 906 (Mo. App. E.D. 1998)

- II. Even assuming, *arguendo*, that Respondent's jurisdiction of the case was exhausted, and that there was a final appealable judgment, Relator is still entitled to an extraordinary writ ordering Respondent to vacate his Order *nunc pro tunc*.**

State v. Lyons, 129 S.W.3d 873, 874 (Mo. banc 2004)

Brunton v. Floyd Withers, Inc., 716 S.W.2d 823, 826 (Mo. App. E.D. 1986)

Andrae v. Andrae, 171 S.W.3d 170, 172 (Mo. App. E.D. 2005)

ARGUMENTS

I. This Court should issue a writ of mandamus ordering the trial court to enter a final appealable judgment including a valid sentence because respondent exceeded his jurisdiction by imposing an invalid sentence.

A. This Court should issue a writ of mandamus ordering the trial court to enter a final appealable judgment including a valid sentence because Respondent exceeded his jurisdiction by imposing an invalid sentence in that Respondent doubly enhanced Relator's punishment by applying a general enhancement statute on top of a specific enhancement statute.

Relator was charged and pled guilty to Driving While Intoxicated. Under section 577.010.2, Driving While Intoxicated is ordinarily a Class B Misdemeanor. Relator, however, was charged with the Class D felony under section 577.023.4, which is part of a statutory scheme involving driving and similar offenses. That statute states that a person who has been found guilty of, or pled guilty to, two Driving While Intoxicated related offenses can be charged with a Class D felony. Under section 558.011, the maximum penalty for a Class D felony is 4 years. Respondent doubly-enhanced Relator's sentence by stacking General criminal enhancement statute in section 558.016 on top of the Driving While Intoxicated enhancement statute in section 577.010, thus impermissibly increasing the penalty for Relator's underlying crime from 4 years to 7 years. The result of applying the General enhancement statute on top of the specific one

is that Relator's punishment was increased beyond the maximum ordinarily permitted for the Class D felony of Driving While Intoxicated.

Mandamus is appropriate in this case on the basis that Respondent exceeded his jurisdiction by doubly enhancing Relator's sentence under the specific sentencing enhancement statute *and* the general sentencing enhancement statute in contravention of the intent of the General Assembly. Legislative intent to “double stack” enhancement statutes is not clear in this case and invalid in light of the rule of lenity and the double jeopardy bar against cumulative punishments. See e.g., *Rutledge v. U.S.*, 517 U.S. 292, 304 (1996) (legislative intent to impose cumulative punishments was not clearly established by statute. The fact that two convictions are authorized by different statutes does not rise to the level of clear legislative intent.); *Jeffers v. U.S.*, 432 U.S. 156 (1977) (insufficient legislative intent to impose cumulative penalties for conspiracy to distribute narcotics and continuing criminal enterprise because “statute itself” reflects a comprehensive penalty structure that leaves little opportunity for pyramiding of other penalties from other sections); *Whalen v. U.S.*, 445 U.S. 684, 694-94 (1980) (cumulative punishment not “specifically authorized.”); *U.S. v. Gonzales*, 445 F.3d 815 (5th Cir. 2006) (double jeopardy bar to application of both a two-level enhancement and a five-level enhancement even though they were both “on the books” because Congress intended the latter to supersede the former.); *U.S. v. White*, 222 F.3d 363, 373-74 (7th Cir. 2000) (double jeopardy bars cumulative sentencing enhancements for simultaneous possession of two firearms during commission of one underlying crime.).

In 1990, in the case of *State v. Ewanchen*, 799 S.W.2d 607 (Mo. banc 1990), this Court was first faced with the question of whether it is permissible to stack a general enhancement statute on top of a specific enhancement statute. With all due respect to this Honorable Court, and to the Honorable Judges who decided *Ewanchen*, that case was wrongly decided. For the reasons stated below, the question before this Court should be more closely examined and *Ewanchen* should be overruled.

First, this issue was not squarely before *Ewanchen* despite the fact that the defendant in that case faced a similar double-enhancement. As Judge Covington conceded, the defendant “cites no authority and makes no argument in support; therefore, this Court need not review the allegation.” *Id.* Simply stated, this Court proceeded to decide an issue that it had not been appropriately briefed to address, much less resolve for all future defendants. Additionally, it decided the issue in an extremely cursory manner, leading one to the reasonable conclusion that the specific facts of the case before the Judges had some impact on the rigor of analysis applied to resolving the double-enhancement issue. For instance, the entire opinion is just a few paragraphs long, and the double-enhancement issue is resolved in just a few sentences. Given the importance of Relator’s due process rights, and the fact that the Court is in a better position to address the issue in this case, I respectfully urge this Court to apply a more rigorous analysis than was applied in 1990.

Second, in *Ewanchen* this Court failed to consider a single case from the federal courts or any other jurisdiction. Reasonable minds may disagree on matters of

interpretation, but on issues going straight to the liberty of those being punished under the law, it is at least useful to consider how similar circumstances have been interpreted by other courts. This is especially true in this case, as the issue of double-enhancement could be incorrectly resolved in favor of allowing judges to doubly punish a defendant.

There is ample and well-reasoned authority in other jurisdictions, including neighboring jurisdictions, to support the argument that such double-stacking should not be permissible. See *Ex Parte Boatwright*, 15 P.2d 755 (Ca. 1932); *State v. Smith*, 469 P.2d 838 (Az. 1970); *State v. Chapman*, 287 N.W.2d 697 (Neb. 1980); *Lawson v. State*, 746 S.W.2d 544 (Ark. 1988); *Carroll v. Solem*, 424 N.W.2d 155 (S.D. 1988); *Stanek v. State*, 603 N.E.2d 152 (Ind. 1992); *State v. Anaya*, 933 P. 2d 223 (N.M. 1996); *State v. Hittle*, 598 N.W.2d 20, 29 (Neb. 1999); *Banks v. State*, 125 S.W. 3d 147, 152 (Ark. 2003).

The cases prohibiting double-enhancement rely on legislative intent. In a case where two statutes may apply to the same matter and there is some ambiguity as to how the General Assembly intended the two statutes to interact, it is especially important to carefully ascertain and effectuate the intent of the legislature. At the outset, it should be noted that the existence of any ambiguity as to the intended relationship of the two statutes requires us to apply the rule of lenity. *Moskal v. U.S.*, 498 U.S. 103, 108 (1990). That is, any ambiguity should be resolved in the defendant's favor. *Id.*

In 1990 Judge Covington posited that this question could be resolved by simple resort to the plain language of the two statutes. *Ewanchen*, 799 S.W.2d at 607. As the

Court stated:

There is a straightforward argument for applying both enhancements: the plain language of the statutes permits application of both. The language is broad and inclusive. Neither statute prohibits application of the other.

But simply stating that an issue is resolved by resort to the plain language of a statute does not make it so. This Court was correct to state that “neither statute prohibits application of the other.” That is because neither statute says anything about the other. But this is not persuasive logic. The Criminal Code is full of statutes that say nothing about one another but remain entirely inapplicable to one another.

In this case, both statutes encompass the same unitary conduct, and both contemplate repeat offenders. The critical difference between the two – a difference that was casually dismissed by this Court in *Ewanchen* – is that the “specific” enhancement statute, section 577.023.4, is part of an overall statutory scheme designed to regulate and penalize similar conduct, including driving violations. The enhancement provisions in that section were clearly drafted with the scheme in mind. The General provision, section 558.016, on the other hand, in no way contemplates the statutory scheme in section 577.023 and in fact should be interpreted to be superseded by the more specific scheme.

The General Assembly clearly knew what it was doing by enacting a specific enhancement statute as well as a general enhancement statute. The General Assembly is presumed to have knowledge of the laws it has enacted, and thus could have provided

some sort of internal cross-reference had it intended double-enhancement. It did not. Thus, it is reasonable to conclude that the General Assembly did not intend both enhancement provisions to be imposed for the purpose of creating cumulative punishment for a unitary set of actions. Said another way, the most plausible interpretation of the legislature's intent is that they intended to punish multiple DWI offenders differently from other repeat felons.

In its cursory treatment of this question in *Ewanchen*, this Court held, virtually without explanation, that the fact that the two statutes did not specifically *prohibit* application of the one in addition to the other was conclusive evidence of the legislature's intent that both should be applied. This reasoning, however, is unpersuasive. Counsel does not have time or resources to scan the Criminal Code for sentencing provisions that do not explicitly *prohibit* application of other sentencing provisions as they are vastly too numerous. Yet it is doubtful this Court would agree, for instance, that punishment for violent Felony 1 could apply to a conviction for non-violent Felony 2, solely because the two fail to prohibit the punishment of the one for the other. At the very least such logic butts heads with the double-jeopardy protections afforded by the *Blockburger* test, and its progeny, or the Eight Amendment bar against cruel and unusual punishment. Further, even if there were no constitutional bar to applying the punishment of Felony 1 for the conviction of Felony 2, it could obviously violate the intent of the legislature to do so even in the absence of an *explicit constitutional or statutory prohibition*. Simply stated, the absence of a specific

prohibition against stacking does not mean that stacking is permissible.

In summary, the absence of a specific legislative prohibition on the application of both sentencing provisions is no evidence at all. Rather, the absence of such specific prohibition is in keeping with the conventional wisdom that legislators operate with constructive and actual knowledge of the existence of rules of statutory construction applied by courts. There is sound reason in assuming, as courts do, that the General Assembly is aware of its laws. At least part of that reason must be that it would make little practical sense to require the General Assembly to specifically cross-reference other sentencing statutes in every case where it *did not* intend to apply the newly enacted sentence to every other sentencing statute “on the books.” Such a rule would be unnecessary and inefficient given the sensible rules of construction we have developed over time, including the rule of lenity (above) and the general vs. specific analysis (also above).

Accordingly, Relator is entitled to a writ of mandamus ordering Respondent to enter a valid sentence because Respondent exceeded his jurisdiction by imposing an invalid sentence in that Respondent doubly enhanced Relator's punishment by applying a general enhancement statute on top of a specific enhancement statute.

B. This Court should issue a writ of mandamus ordering the trial court to enter a final appealable judgment including a valid sentence because Respondent exceeded his jurisdiction by imposing an invalid sentence under Count I in that Respondent applied both a general and a specific enhancement statute despite the fact that Relator was not charged by indictment or information with two prior felony classified DWI convictions as required by the general enhancement statute, Article I, Section 17 of the Missouri Constitution, and the due process clause of the Missouri and United States Constitutions.

Relator was charged by indictment with the offense of DWI. The indictment also charged him with two prior DWI convictions but failed to state whether the prior convictions were felonies or misdemeanors. Despite the absence of evidence in the indictment that Relator had been convicted of prior felonies, he was sentenced under a general and under a specific enhancement statute. Because the indictment did not set forth all the elements of the offense of conviction, Relator was not on fair notice that he needed to defend against the specific charge for which he was ultimately sentenced.

“In federal prosecutions, ‘no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury’ alleging all the elements of the crime.” *U.S. v. Hathaway*, 318 F.3d 1001, 1009 (10th Cir. 2003) (*quoting* U.S. Const. amend. V and *citing Hamling v. United States*, 418 U.S. 87 (1974)). The same standard should apply in Missouri courts, where Article I, Section 17

of the Missouri Constitution states that “no person may be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information”

“An indictment is sufficient if it sets forth the elements of the offense charged, puts the defendant on fair notice of the charges against which he must defend, and enables the defendant to assert a double jeopardy defense.” *United States v. Dashney*, 117 F.3d 1197, 1205 (10th Cir.1997). Furthermore, “[i]t is generally sufficient that an indictment set forth an offense in the words of the statute itself, as long as those words themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.” *Hamling*, 418 U.S. at 117.

“When there is a failure to disclose that a party was brought into court by process that is constitutionally due, the judgment rendered in the case is void on the face of the record and is subject to direct or collateral attack at any time.” 46 Am. Jur. 2d Judgments, Section 17 (1994). That is, a person may not be punished for a particular crime without sufficient accusation even if he voluntarily submits to the jurisdiction of the court. *Albrecht v. U.S.*, 273 U.S. 1 (1927). A court’s jurisdiction to render a particular judgment in a particular case must be limited to the four corners of an indictment. *State ex rel. Dutton v. Sevier*, 336 Mo. 1236 (Mo.1935). And a court may not retrospectively redraft an indictment to support a conviction on facts never charged. *U.S. v. Marcello*, 876 F.2d 1147, 1152 (5th Cir. 1989).

The jurisdiction of the circuit court to try a defendant for a particular felony

comes originally from the former accusation by indictment or information. *State ex rel. Morton v. Anderson*, 804 S.W.2d 25, 27 (Mo. banc 1991). That is, the circuit courts have general jurisdiction over the type of case pursuant to the Missouri Constitution, but do not have gain jurisdiction to render particular judgments in particular cases until the defendant is charged in the manner required by law and the Constitution. Simply stated, due process requires that a defendant be charged in the manner required by law before he can be convicted of an offense. *State v. Smith*, 592 S.W.2d 165 (Mo. banc 1979). A court may not proceed beyond the allegation of the proceedings and if it does it is without jurisdiction to render the judgment in that particular case. *In re Marriage of Hendrix*, 183 S.W.3d 582, 589 (Mo. banc 2006).

The state will argue that *State v. Parkhurst*, 845 S.W.2d 31 (Mo. banc 1992) holds that the issue of the circuit court's jurisdiction and the issue of the sufficiency of the indictment or information are separate and distinct issues. To the contrary, *Parkhurst* never considered Article I, Section 17 of the Missouri Constitution nor the form of jurisdiction dealing with the power to render a particular judgment in a particular case, as outlined in *Hendrix* well after *Parkhurst* in 2006. Further, the courts cited by the court in *Parkhurst* have unanimously held that if an indictment or information is so defective that it fails to state the offense for which defendant was convicted, then the court in fact was without jurisdiction to render the particular judgment in the particular case.

C. This Court should issue a writ of mandamus ordering the trial court to enter a final appealable judgment including a valid sentence because Respondent's judgment and order failed to dispose of all issues in the particular case in that Respondent failed to enter a crime victims' compensation fine for Count II.

Relator pled guilty to Count II, the Class D felony of driving while suspended in addition to pleading guilty to Count I, the Class D felony DWI. Respondent erroneously entered a judgment of only \$46.00, the fine imposed by 595.045.8 in the case of a *single* Class D felony. As set forth in the record, and above, Relator pled guilty to *two* Class D felonies.

The plain language of section 595.045.8 makes clear that a judge “shall” enter a judgment of \$46.00 for a plea or finding of guilt for “a” class C or D felony. The word “shall” leaves the court with no discretion on the issue and any sentence lacking an assessment in accord with the term “shall” is illegal. *State v. Plastec Inc.*, 961 S.W.2d 906 (Mo. App. E.D. 1998) (failure of the court to include a mandatory fine in the judgment renders the sentence “incomplete and not appealable.”) See also, *State v. Morris*, 719 S.W.2d 761, 763 (Mo. banc 1986); *State v. Ferrier*, 86 S.W.3d 125, 127 (Mo. App. E. D. 2002) (“A sentence that does not comply with the statute is void and cannot constitute a final judgment.”); *Ossana v. State*, 699 S.W.2d 72, 73 (Mo. App. E.D. 1985) (Until the trial court renders a sentence that is in accordance with the law, it does not exhaust its jurisdiction).

Though this Court has not explicitly stated that the crime victims' compensation fine is to be assessed per count of felony, rather than per defendant adjudicated in a single proceeding, it is clear from the plain language of section 595.045.8 that it was the intent of the General Assembly that the fine be assessed per count of felony.

This interpretation of section 595.045 is supported by the 8th Circuit Court of Appeals and at least four federal appellate courts that have addressed the same issue in the context of a similarly worded federal statute referring to “a” felony. See *United States v. Dobbins*, 807 F.2d 130, 131 (8th Cir. 1986); *United States v. Pagan*, 785 F.2d 378, 381 (2nd Cir. 1986) ; *United States v. Donaldson*, 797 F.2d 125, 128 (3d Cir. 1986); *U.S. v. Smith*, 857 F.2d 682, 686 (10th Cir. 1988).

Respondent's failure to impose the proper fine leaves the decree incomplete. Indeed, the failure to impose a mandatory fine for the second felony is no different than a scenario wherein a court fails to enter any sentence at all a any count for which a conviction was entered. In such a scenario, there can be no question that the state would request an extraordinary writ for the purpose of having the court enter a sentence that accords with Missouri law.

This Court has long and repeatedly held that, in a criminal case, the trial court's jurisdiction is not exhausted, and a final appealable judgment does not exist, until all issues in the criminal proceeding have been decided. *State ex rel. Wagner v. Ruddy*, 582 S.W.2d 692, 693 -695(Mo. 1979). See also, *State v. Domini*, 391 S.W.2d 206, 207 (Mo. 1965) (per curiam); *State v. Lowe*, 365 S.W.2d 613, 614 (Mo. 1963) (per curium); *State*

Missouri law.

In order to constitute a final judgment, it is axiomatic that the sentence not be contrary to law. Since the original sentence in this case did not comply with Missouri law, the trial court did not exhaust its jurisdiction and Relator has a clear, unequivocal, specific, right to have Respondent enter a final appealable judgment that accords with Missouri law.

(Mo. banc 1994)).

(citing Mo. Const. art. V, sec. 4; *State ex rel. Castillo v. Clark*, 881 S.W.2d 627, 628

an aggrieved party without a final judgment is ordinarily by extraordinary writ.” *Id.*

adjudicated. And in the event that a final judgment does not exist, “the proper course for

until *all* matters before the court in the particular cause have been fully and finally

In summary, the trial court’s jurisdiction in a criminal case is not fully exhausted

Employees, 43 S.W.3d 293, 298 (Mo. banc 2001) (citing *Ruddy*, 582 S.W.2d at 694-95).

.” *Transit Cas. Co. ex rel. Pultizer Publishing Co. v. Transit Cas. Co. ex rel. Intervening*

judgment of the court.... In order to be final the decree must be complete and certain . . .

whole merits of the cause, and leaves no further questions therein for the future

Further, a decree can only be final “when it fully decides and disposes of the

1954).

Parker, 310 S.W.2d 923, 924 (Mo. 1958); *State v. Robbins*, 269 S.W.2d 27, 29 (Mo.

(Mo. 1960) (per curiam); *State v. Morrow*, 316 S.W.2d 527, 529 (Mo. 1958); *State v.*

v. Henderson, 344 S.W.2d 96, 97 (Mo. 1961); *State v. Johnson*, 331 S.W.2d 551, 552

D. A writ of mandamus ordering the trial court to enter a final appealable judgment is also necessary in this case because Respondent's written judgment imposed court costs on the state of Missouri, in direct violation of Missouri statute.

Respondent's written judgment unequivocally imposed the responsibility for paying court costs against the state, in direct violation of section 550.010. (EXHIBIT A) section 550.010 states very simply that:

Whenever any person shall be convicted of any crime or misdemeanor he shall be adjudged to pay the costs, and no costs incurred on his part, except fees for the cost of incarceration, including a reasonable sum to cover occupancy costs, shall be paid by the state or county.

According to the plain language of section 550.010, and the specific use of the term “shall,” the court has no jurisdiction to impose court costs on anyone other than the person convicted. Moreover, assuming *arguendo* that the term “shall” does not mean that only convicted persons can pay court costs, then the court costs imposed against the state in this case fit squarely within the ordinary definition of “costs incurred on his part.” Either way, Respondent's actions ran afoul of Missouri law. Accordingly, Respondent's written judgment is illegal and not final or appealable. *Morris*, 719 S.W.2d at 763. See also, *Ferrier*, 86 S.W.3d at 127 (“A sentence that does not comply with a statute is void and cannot constitute a final judgment.”).

This interpretation of section 550.010 is consistent with the intent of the General

Assembly, as further demonstrated by the plain language of section 488.020. Under that section, “If any court cost is not paid when due . . . The court may refuse to enter any order or judgment in favor of the defaulting party, or if within the time period allowed by law before the order or judgment is final, may withdraw such order or judgment.”

As demonstrated by these statutes, the imposition of court costs is not a mere technicality unworthy of this Court's consideration in a petition for extraordinary writ. To the contrary, the form and process for making and collecting these costs is the subject of a number of Missouri statutes, including a statute that ties the finality of a judgment to those costs. Until the trial court renders a sentence that is in accordance with the law, it has not exhausted its jurisdiction, *Ossana*, 699 S.W.2d at 73, even where the law in question contemplates something that may appear as trivial as the proper imposition of a court cost.

II. Even assuming, *arguendo*, that Respondent's jurisdiction of the case was exhausted, and that there was a final appealable judgment, Relator is still entitled to an extraordinary writ ordering Respondent to vacate his Order nunc pro tunc for the following reasons:

A. Respondent's December Order nunc pro tunc, which had the effect of increasing Relator's sentence by three years, is a legal nullity because the court exceeded its nunc pro tunc power in that a nunc pro tunc is for the correction of mere clerical errors and not for the substantive amendment of orders.

Though Respondent could have used an order nunc pro tunc to correct a mere clerical error, as is common practice in Missouri courts, Respondent had no authority to modify the structure of Relator's sentence by issuing a nunc pro tunc more than 30 days after his initial order. That is because the nunc pro tunc power only extends far enough to correct a ministerial or clerical error or oversight. Rule 29.12(c). It cannot be used to correct a judicial error or omission or to change or revise an order or judgment. *State v. Lyons*, 129 S.W.3d 873, 874 (Mo. banc 2004) (citing *State v. Carrasco*, 877 S.W.2d 115, 117 (Mo. banc 1994)).

“An order nunc pro tunc cannot be utilized to correct judicial inadvertence, omission, oversight or error, or to conform to what the court intended to do but did not do.” *Andrae v. Andrae*, 171 S.W.3d 170, 172 (Mo. App. E.D. 2005) (citing *Brunton v. Floyd Withers, Inc.*, 716 S.W.2d 823, 826 (Mo. App. E.D. 1986)). Missouri courts

“presume that the judgment entered is not the result of clerical error, but, rather, is the judgment the court actually rendered.” *Id.* (citing *Pfeifer v. Pfeifer*, 788 S.W.2d 780, 781 (Mo. App. E.D. 1990)). “The respondent must provide this court with competent evidence demonstrating that a different judgment was in fact entered.” *Id.*

Literally translated, *nunc pro tunc* means “now for then.” Accordingly, a court is, by definition, incapable of using a *nunc pro tunc* to do something “now” that it never did “then.” Said another way, a *nunc pro tunc* cannot do more than supply a record of something that actually was done at the time to which it is retroactive.

As demonstrated by the transcript of Respondent's entry of sentence, Respondent clearly understood and contemplated the difference between imposing “concurrent” sentences and imposing “consecutive” sentences for Relator's convictions. Additionally, Respondent confirmed his intent to enter concurrent sentences by clearly stating that Relator would serve no more than seven years. Had Respondent simply confused one “c” term for another – concurrent and consecutive – he still would not have clarified that Relator was to serve no more than seven years.

The fact of the case is that Respondent changed his mind more than 30 days after the entry of his initial order. The consequences of Respondent's change of mind had far more than clerical impact, as the enforcement of the *nunc pro tunc* would result in Relator being imprisoned for an additional three years. It would be an understatement to say that such a result was never contemplated by Rule 29 or the case law relating to the *nunc pro tunc* power.

Relator simply must not be forced to bear the cost of having Respondent reverse course more than 30 days after the entry of his original sentence, even if he were to do so after coming to the conclusion that he had made a mistake. To allow such abuse of the nunc pro tunc power would be to provide a vehicle for any court that has lost jurisdiction to make an end-around the substantive or procedural bars standing in the way of its entry of modifications to final orders. It would also undermine the very purpose of a nunc pro tunc power, which is to allow courts to retain some authority to correct clerical errors while respecting the fact that finality in legal proceedings is of utmost importance.

Accordingly, this Court must conclude that Respondent's entry of a nunc pro tunc to modify and increase Relator's sentence is a legal nullity and order him to withdraw that order and impose the previously entered sentence of seven years. Alternatively, this Court should at the very least order Respondent to provide Relator with the opportunity to reconsider the waiver of his probation revocation hearing and present him with such hearing if so requested.

CONCLUSION

For all reasons set forth above, Relator respectfully requests this Court to issue a Writ of Mandamus directing the Honorable David Lee Vincent, III, to enter a final appealable judgment in the underlying criminal case or, in the alternative, directing the Honorable David Lee Vincent, III to vacate his December 7, 2005 order nunc pro tunc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this brief complies with Supreme Court rules relating to format and word count(6,461 words) and that a true and correct copy of the foregoing was mailed this 1st day of February, 2008, to:

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Exhibit B	pages 7-12	Transcript of Probation Revocation and Sentence
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