

INDEX

<u>ARGUMENTS</u>	4
<u>CERTIFICATE OF SERVICE</u>	9
<u>CONCLUSION</u>	8
<u>INDEX OF EXHIBITS</u>	10
<u>TABLE OF AUTHORITIES</u>	3

TABLE OF AUTHORITIES

CASES

Heath v. Jones, 863 F.2d 815, 821 (11th Cir. 1989)..... 6
In re Marriage of Hendrix, 183 S.W.3d 582, 590 (Mo. banc 2006) 6
Mo. Soybean Ass'n v. Mo. Clean Water Comm'n, 102 S.W.3d 10, 21 (Mo. banc 2003)..... 6
O'Leary v. United States, 856 F.2d 1142, 1143 (8th Cir. 1988)..... 6
Ossana v. State, 699 S.W.2d 72, 73 (Mo. App. E.D. 1985)..... 5
State ex rel. Simmons v. White, 866 S.W.2d 443 (Mo. banc 1993)..... 5
State ex rel. Simmons v. White, 866 S.W.2d 443, 446 (Mo. banc 1993) 7
State ex rel. Wagner v. Ruddy, 582 S.W.2d 692 (Mo. banc 1979)..... 4
State v. Briscoe, 847 S.W.2d 792, 794 (Mo. banc 1993) 6
State v. Ferrier, 86 S.W.3d 125, 127 (Mo. App. 2002) 4
***State v. Morris*, 719 S.W.2d 761, 763 (Mo. banc 1986)**..... 3
State v. Parkhurst, 845 S.W.2d 31(Mo. banc 1992) 5
State v. Plastec Inc., 961 S.W.2d 906 (Mo. App. 1998) 4
U.S. v. Czeck, 671 F.2d 1195, 1197 (8th Cir. 1982) 6
U.S. v. Fitzhugh, 78 F.3d 1326, 1330 (8th Cir. 1996) 6
U.S. v. Lucas, 932 F.2d 1210, 1218 (8th Cir. 1991) 6
Uresti v. Lynaugh, 821 F.2d 1099, 1102 (5th Cir. 1987) 6

ARGUMENTS

- I. Mandamus is appropriate because Respondent retains jurisdiction to enter a sentence that accords with Missouri law. *State v. Morris*, 719 S.W.2d 761, 763 (Mo. banc 1986) (Respondent maintains jurisdiction of Relator’s case until it renders a sentence in accordance with the law).**

Respondent’s brief dismisses Relator’s Argument I by stating that Relator should have brought the arguments presented therein by way of Direct Appeal or Rule 24.035 motion. Respondent, however, fails to address the fact that Respondent did not enter a final appealable judgment in that the trial court has *not* fully decided and disposed of all

issues of the criminal proceeding against Relator. See *State ex rel. Wagner v. Ruddy*, 582 S.W.2d 692 (Mo. banc 1979) (addressing the issue of finality in the criminal context, stating that a decree is final “when it fully decides and disposes of the whole merits of the cause, and leaves no further questions therein for the future judgment of the court.”)

By failing to impose the appropriate crime victims’ compensation fine in contravention of the section 595.045.8 use of the term “shall,” Respondent has not done what the law plainly orders him to do. Respondent flippantly suggests that Relator should feel free to pay whatever fine that was not paid. This suggestion is creative but avoids the issue. Respondent may consider payment to the crime victims’ compensation fund insignificant, but it is the law and the plain language of section 595.045.8 leaves no discretion for Respondent to sweep the statute’s mandate under the door at trial or in the instant case.¹ See *U.S. v. Baytank (Houston), Inc.*, 934 F.2d 599, 616 (5th Cir. 1991) (The district court's erroneous refusal to impose the mandatory special assessment . . . is properly corrected by the exercise of this Court's mandamus jurisdiction); *State v. Plastec Inc.*, 961 S.W.2d 906 (Mo. App. 1998) (failure of the court to include a mandatory fine in the judgment renders the sentence “incomplete and not appealable.”) See also, *State v. Ferrier*, 86 S.W.3d 125, 127 (Mo. App. 2002) (“A sentence that does not comply with the statute is void and cannot constitute a final judgment.”); *Ossana v.*

¹ Respondent’s suggestion that Relator can make up any deficit by writing a check himself also ignores the fact that Relator is a poor person who is incarcerated.

State, 699 S.W.2d 72, 73 (Mo. App. 1985) (Until the trial court renders a sentence that is in accordance with the law, it does not exhaust its jurisdiction). Finality in the criminal context is of particular importance because the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law and the Sixth Amendment guarantee of a speedy trial. *See Di Bella v. U.S.*, 369 U.S. 121, 126 (1962).

II. *Parkhurst and Simmons are distinguishable.*

Respondent relies on *State v. Parkhurst*, 845 S.W.2d 31(Mo. banc 1992), and *State ex rel. Simmons v. White*, 866 S.W.2d 443 (Mo. banc 1993), for the proposition that Respondent was not deprived of jurisdiction to enter a sentence for a crime Relator was not charged with. Relator’s sentence was enhanced under section 558.016 (General enhancement statute) despite the fact that the four corners of the indictment did not charge prior felony classified DWI convictions as required by the general enhancement statute.

In *Simmons* this Court clearly stated that a trial court could be deprived of jurisdiction if the charging document failed “by any reasonable construction [to] charge the offense of which the defendant was convicted.” In contrast to *Parkhurst* and *Simmons*, which dealt with deficiencies in the charging document – for instance, charging only two prior felony convictions rather than three – the four corners of the indictment in this case did not charge defendant with any felony DWI convictions. Thus, even though the trial court may have had personal jurisdiction and subject matter

jurisdiction, the sentence imposed by Respondent was illegal on the basis that the court had no jurisdiction to render the particular judgment in the particular case. (See *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 21 (Mo. banc 2003); *In re Marriage of Hendrix*, 183 S.W.3d 582, 590 (Mo. banc 2006)).

In this case the defendant was charged with a crime with one penalty but convicted with a crime with a stiffer penalty. The elements were distinct. The severity of punishment was distinct. Thus, it is jurisdictionally indistinguishable from a case wherein a defendant is charged with stealing but convicted of murder and given a sentence of death. And, contrary to Respondent's assertion, this error should be treated as a jurisdictional defect. See *State v. Briscoe*, 847 S.W.2d 792, 794 (Mo. banc 1993); *U.S. v. Czeck*, 671 F.2d 1195, 1197 (8th Cir. 1982); *O'Leary v. United States*, 856 F.2d 1142, 1143 (8th Cir. 1988); *U.S. v. Lucas*, 932 F.2d 1210, 1218 (8th Cir. 1991); *U.S. v. Fitzhugh*, 78 F.3d 1326, 1330 (8th Cir. 1996); *Uresti v. Lynaugh*, 821 F.2d 1099, 1102 (5th Cir. 1987); *Heath v. Jones*, 863 F.2d 815, 821 (11th Cir. 1989).

III. Purpose of Rule 24.035 better served by issuing extraordinary writ.

A final appealable judgment has not been entered. If Relator were required to present the arguments raised in the instant case in a Rule 24.035 motion, before Relator has had the option of filing a Direct Appeal, then the corresponding conclusion must be that the Rule 24.035 bar against successive motions would prevent Relator from raising a claim of ineffective assistance of appellate counsel once the Direct Appeal were

presented and disposed of by the appellate court.

The purpose of Rule 24.035 would be better served by simply concluding that the trial court in this case did not enter a final appealable judgment and that an extraordinary writ is the appropriate vehicle for addressing the trial court's errors, which created a clear and unequivocal right to have Respondent act in accordance with Missouri law.²

CONCLUSION

For all reasons set forth above, Relator respectfully requests this Court to issue a

² In *State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 (Mo. banc 1993), this Court held that the writ of habeas corpus "may be used to challenge a final judgment after an individual's failure to pursue appellate and post-conviction remedies" if raising jurisdictional issues or in circumstances so rare and exceptional that a manifest injustice results. Though this Court granted Relator's preliminary writ in mandamus, there is nothing preventing this Court from treating the claims herein as requests for a writ of habeas corpus. See e.g., *State ex rel. Mertens v. Brown*, 198 S.W.3d 616, 619 (Mo. banc 2006), and Rule 91.06 stating:

Whenever any court of record, or any judge thereof, shall have evidence from any judicial proceedings had before such court or judge that any person is illegally confined or restrained of liberty within the jurisdiction of such court or judge, it shall be the duty of the court or judge to issue a writ of habeas corpus for the person's relief, although no petition be presented for such writ.

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,

Jonathan R. Bunch
Missouri Bar No. 57490
4609 Hockaday Pl.
Columbia, MO 65202
(573) 289-4766
Attorney for Relator

CERTIFICATE OF SERVICE

I hereby certify that this brief complies with Supreme Court rules relating to format and word count (1,357 words) and that a true and correct copy of the foregoing was mailed this 10th day of March, 2008, to:

The Honorable David Lee Vincent, III
Division 9
Circuit Court of St. Louis County
7900 Carondelet Ave.
Clayton, MO 63105
Phone: (314) 615-1509
Fax: (314) 615-7658

Michael J. Spillane
Assistant Attorney General
Post Office Box 899
Jefferson City, MO 65102-0899
Phone: (573) 751- 3321
Fax: (573) 751-2096

INDEX OF EXHIBITS

Exhibit A pages 1-4

Indictment