

No. 83424

**IN THE  
SUPREME COURT OF MISSOURI**

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**STATE OF MISSOURI, ex rel.  
JEREMIAH W. (JAY) NIXON, Attorney General**

*Relator,*

vs.

**THE HONORABLE RALPH JAYNES, Circuit Judge, Randolph County, and  
NORMA PRANGE, Circuit Clerk, Randolph County**

*Respondents.*

---

Petition for Writ of Certiorari to the Circuit Court of Randolph County, Missouri

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**RELATOR'S STATEMENT, BRIEF AND ARGUMENT**

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## **JURISDICTIONAL STATEMENT**

This is an original proceeding in certiorari pursuant to Missouri Supreme Court Rules 84.22 to 84.26, inclusive. On December 22, 2000, the Honorable Ralph Jaynes, Circuit Judge for Randolph County, Missouri, granted a writ of habeas corpus upon the petition of Michael Morrow, filed in the Circuit Court of Randolph County on August 31, 2000. Respondent Jaynes vacated the judgments and sentences in Morrow's criminal case, cause number 981-3703, and probation revocation case, cause number 941-1980-A, and remanded the cases in order for Morrow to withdraw his guilty plea and confession to the probation violation. Legal File (hereinafter "L.F."), at 97-98.

This Court has jurisdiction under the Missouri Constitution, Article V, § 4(1) and Missouri Supreme Court Rules 84 and 91, to hear and decide the validity of respondent Jaynes' issuance of the writ of habeas corpus.

## STATEMENT OF FACTS

Michael Morrow pled guilty on October 19, 1994 to one count of sale of a controlled substance, cocaine base under cause number 941-1980-A, in the Circuit Court of the City of St. Louis, Missouri. L.F. at 81. Morrow was placed on probation for a period of two years. L.F. at 81. Morrow's probation was ultimately revoked and he was sentenced to a term of twelve years imprisonment. L.F. at 81. Execution of sentence was suspended and Morrow was placed in the Department of Corrections' Institutional Treatment Program pursuant to § 559.115, RSMo. (2000)<sup>1</sup>. L.F. at 81. The trial court granted Morrow five-years probation on July 28, 1997. L.F. at 81-82.

On April 30, 1999, Morrow pled guilty under cause number 981-3703 to one count of possession of a controlled substance, cocaine base. L.F. at 53. The State requested that Morrow be found to be a prior and persistent drug offender and persistent offender, L.F. at 62, which would increase the range of punishment to ten to thirty years or life, see §§ 195.291; 195.275; 558.011.1(1), but then recommended a sentence of four years. L.F. at 62. The trial court advised Morrow of the correct sentencing range, notwithstanding the State's recommendation. L.F. at 62-63. Morrow expressly denied on the record that he was told that he would receive probation for pleading guilty or that he had been promised anything for pleading guilty. L.F. at 68. The trial court sentenced Morrow as a prior and persistent drug

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<sup>1</sup>All further statutory references are to RSMo. (2000) unless otherwise indicated.

offender and a prior and persistent offender within the applicable statutory range of punishment, to a term of imprisonment of eighteen years. L.F. at 73, 79-81; see §§ 195.291; 558.011.1(1). In accord with a request by the defense, the trial court ordered that Morrow enter a long-term treatment program pursuant to § 217.362, L.F. at 71, 73, which provides that “if an offender is eligible and there is adequate space, the court may sentence a person to the program which shall consist of institutional drug treatment for a period of twenty-four months, as well as a term of incarceration.” Following the guilty plea and sentencing on cause number 981-3703 on April 30, 1999, Morrow’s probation was revoked and the eighteen-year sentence was ordered to run concurrent to the twelve-year sentence Morrow had previously received under cause number 941-1980-A. L.F. at 84. A letter from the Department of Corrections, dated October 27, 1999, advised the trial court that Morrow was not eligible for the Long Term Substance Abuse Treatment Program under § 217.362. L.F. at 17.

More than ten months later, on August 31, 2000, Morrow filed a petition for writ of habeas corpus pursuant to Missouri Supreme Court Rule 91 in the Circuit Court of Randolph County, Missouri. L.F. at 1, 7. Morrow contended in his petition that his guilty plea was entered involuntarily because he was not eligible to participate in the long-term treatment program that he was sentenced pursuant to. L.F. at 10. Morrow had failed to file a motion for post-conviction relief pursuant to Rule 24.035 within the requisite time limits. L.F. at 8. Instead, Morrow contended in his habeas petition that the circumstances were so rare and exceptional that a manifest injustice would result if the court did not review the claim, L.F. at

7-8, asserting that he “was not and could not have been cognizant of his claim” during the ninety-day period in which he had to seek post-conviction relief. L.F. at 8.

In its’ Judgment dated December 22, 2000, the Circuit Court granted Morrow relief having found that “[s]ince Petitioner did not know, nor could he have known, that he was not going to be placed in the long-term treatment program under §217.362, RSMo., until the 90 day time limit had expired under Rule 24.035, habeas corpus relief is appropriate,” citing Merriweather v. Grandison, 904 S.W.2d 485 (Mo. App. 1995) and Brown v. Gammon, 947 S.W.2d 437 (Mo. App. 1997). L.F. at 96-97. The Circuit Court expressly held that Clay v. Dormire, 37 S.W.3d 214 (Mo. banc 2000) was “inapplicable because the Petitioner in this proceeding did not have the opportunity to raise the voluntariness of his plea in a post-conviction proceeding.” L.F. at 97. The Circuit Court further stated that it “is not addressing ‘manifest injustice’ but is following Brown v. Gammon, 947 S.W.2d 437 (Mo. App. 1997).” L.F. at 97. On January 11, 2001, Judge Jaynes denied the motion for reconsideration filed by the underlying habeas respondent, Superintendent Gammon. Relator’s Exhibit 12.<sup>2</sup>

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<sup>2</sup>Reference to Relator’s Exhibits are to those exhibits filed with Relator’s petition for writ of certiorari. Exhibit 12, an Order issued by the Circuit Court, is not, however, included with the certified copy of the record submitted by respondents as the Legal File in this cause.

Relator subsequently filed for a writ of certiorari in the Missouri Court of Appeals, Western District. On March 2, 2001, the appellate court summarily denied that petition. Relator's Exhibit 15. Relator thereafter sought an original writ of certiorari from this Court on March 5, 2001. The Court issued its preliminary writ on March 16, 2001. L.F. at 117.

**POINTS RELIED ON**

**I.**

**RELATOR IS ENTITLED TO AN ORDER QUASHING THE WRIT OF HABEAS CORPUS BECAUSE THE CIRCUIT COURT EXCEEDED ITS JURISDICTION IN GRANTING THE PETITION FOR WRIT OF HABEAS CORPUS, IN THAT THE EXCEPTION THAT PERMITS CONSIDERATION OF CLAIMS RAISED UNDER RULE 91 TO PREVENT A MISCARRIAGE OF JUSTICE DOES NOT INCLUDE AN EXCEPTION FOR “LACK OF KNOWLEDGE” OR “CAUSE” TO EXCUSE THE UNTIMELY FILING OF A MOTION FOR POST-CONVICTION RELIEF FOR WHICH THE CIRCUIT COURT RELIED.**

Clay v. Dormire, 37 S.W.3d 214 (Mo. banc 2000)

State ex rel. Simmons v. White, 866 S.W.2d 443 (Mo. banc 1993)

Missouri Supreme Court Rule 91

## II.

**RELATOR IS ENTITLED TO AN ORDER QUASHING THE WRIT OF HABEAS CORPUS BECAUSE THE CIRCUIT COURT EXCEEDED ITS JURISDICTION IN GRANTING THE PETITION FOR WRIT OF HABEAS CORPUS, IN THAT, EVEN IF THE EXCEPTION THAT PERMITS CONSIDERATION OF CLAIMS RAISED UNDER RULE 91 TO PREVENT A MISCARRIAGE OF JUSTICE DOES INCLUDE AN EXCEPTION FOR “LACK OF KNOWLEDGE” OR “CAUSE” TO EXCUSE THE UNTIMELY FILING OF A MOTION FOR POST-CONVICTION RELIEF, AND NOTWITHSTANDING THE HABEAS PETITIONER’S FAILURE TO ASSERT THAT A CONSTITUTIONAL VIOLATION PROBABLY RESULTED IN THE CONVICTION OF ONE WHO IS ACTUALLY INNOCENT, THE HABEAS PETITIONER IN THIS CASE DID NOT ESTABLISH THAT THE GROUND RELIED ON WAS NOT KNOWN TO HIM WHILE PROCEEDINGS UNDER RULE 24.035 WERE AVAILABLE, AND TO THE CONTRARY, THE RECORD AFFIRMATIVELY DEMONSTRATES THAT THE HABEAS PETITIONER KNEW OR SHOULD HAVE KNOWN OF THE GROUND RELIED ON.**

White v. State, 779 S.W.2d 571 (Mo. banc 1989)

Kilgore v. State, 791 S.W.2d 393 (Mo. banc 1990)

Missouri Supreme Court Rule 91

## STANDARD OF REVIEW

Certiorari lies to correct judgments of lower courts that are without jurisdiction, or are in excess or abuse of their jurisdiction. State ex rel. Reorganized School District R-9 of Grundy Co. v. Windes, 513 S.W.2d 385, 390 (Mo. 1974). Certiorari does not determine the merits of the underlying controversy. State ex rel. Hill v. Davis, 488 S.W.2d 305, 308 (Mo. App., K.C. Distr. 1972) (citing State ex rel. Miller v. O'Malley, 342 Mo. 641, 117 S.W.2d 319 (Mo. 1938)). Rather, “the superior court determines the jurisdictional issue from the face of the return and either quashes it or upholds the tribunal’s action.” State ex rel. Tolliver v. Board of Public Service of the City of St. Louis, 453 S.W.2d 622, 623 (St. Louis Court of Appeals, 1970). When the facts alleged and proved in a proceeding for habeas corpus are insufficient to justify the relief granted, a superior court has the authority, pursuant to a writ of certiorari, to quash an inferior court’s writ of habeas corpus. State ex rel. Stewart v. Blair, 207 S.W.2d 268, 276 (Mo. banc 1947).

## I.

**RELATOR IS ENTITLED TO AN ORDER QUASHING THE WRIT OF HABEAS CORPUS BECAUSE THE CIRCUIT COURT EXCEEDED ITS JURISDICTION IN GRANTING THE PETITION FOR WRIT OF HABEAS CORPUS, IN THAT THE EXCEPTION THAT PERMITS CONSIDERATION OF CLAIMS RAISED UNDER RULE 91 TO PREVENT A MISCARRIAGE OF JUSTICE DOES NOT INCLUDE AN EXCEPTION FOR “LACK OF KNOWLEDGE” OR “CAUSE” TO EXCUSE THE UNTIMELY FILING OF A MOTION FOR POST-CONVICTION RELIEF FOR WHICH THE CIRCUIT COURT RELIED.**

In State ex rel. Simmons v. White, 866 S.W.2d 443, 445 n.3 (Mo. banc 1993), this Court enumerated five examples where Rule 91 applies: (1) decisions on bail; (2) confinement past the expiration of a sentence; (3) parole revocation; (4) held without charges or judgment; and (5) jurisdictional issues. A petition for state habeas corpus relief is limited to determining the *facial validity of confinement*. State ex rel. Haley v. Groose, 873 S.W.2d 221, 222 (Mo. banc 1994) (emphasis added). Because Rule 91 was not designed for duplicative and unending challenges to the finality of a criminal judgment, the only exceptions for seeking review of procedurally-defaulted claims are “to raise jurisdictional issues or in circumstances so rare and exceptional that a manifest injustice results’ if habeas corpus is not granted.” Clay v. Dormire, 37 S.W.3d 214, 217 (Mo. banc 2000) (quoting State ex rel. Simmons, 866 S.W.2d at 446).

Here, Morrow's allegation did not challenge the facial validity of his confinement. Nor did Morrow raise a jurisdictional issue. That is, Morrow did not assert that the trial court was without jurisdiction to sentence him to a term of eighteen years. Any contention otherwise would be without merit in any event, as Morrow was found to be a prior and persistent drug offender, thereby subjecting him to a sentence of ten to thirty years or life. See §§ 195.291; 195.275; 558.011.1(1). Thus the trial court sentenced him to a term within the applicable range of punishment. In regard to the § 217.362 provision, that Morrow enter a long-term treatment program, by law it was conditioned upon the defendant's eligibility for the program and availability of space in the program, see § 217.362.2, and the trial court included that provision not pursuant to the plea agreement but upon a request by the defense, compare L.F. at 62 with L.F. at 71. In addition, Morrow admitted in court that he was not told that he would receive probation or "a certain sentence in return for pleading guilty." L.F. at 68. Thus the fact that Morrow was ultimately determined ineligible for the long-term treatment program has no bearing on the validity of the eighteen-year sentence.

Morrow invoked Rule 91 asserting that "the circumstances are so rare and exceptional that a manifest injustice will result in the absence of habeas corpus relief . . . ." L.F. at 7-8. Thus contrary to its pronouncement in the Judgment, L.F. at 97, the Circuit Court did address an allegation of manifest injustice. This Court recently clarified the scope of state habeas corpus under Rule 91 in the context of a claim of manifest injustice:

Following the lead of the United States Supreme Court's habeas corpus cases, and most recently *Schlup v. Delo*, 513 U.S. 298, 327 (1995), this Court holds that the manifest

injustice or miscarriage of justice standard requires the habeas corpus petitioner “to show that ‘a constitutional violation has probably resulted in the conviction of one who is actually innocent,’” *id.* (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)), and further, “[t]o establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light [of new evidence of innocence],” *id.* As explained in *Schlup* and earlier cases, the actual innocence component of the miscarriage of justice standard is “a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits, [and] . . . [w]ithout any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not enough in itself to establish a miscarriage of justice . . . .” *Id.* at 315-16 (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)).

\* \* \* \* \*

*Errors during sentencing in non-capital cases are only actionable in habeas if it is show that the court had no jurisdiction to impose the sentence in question, as in the case where a court imposes a sentence that is in excess of that authorized by law, Osowski v. Purkett, 908 S.W.2d 690, 691 (Mo. banc 1995), or where the sentencing court utilized a repealed and inapplicable statute. State v. Edwards, 983 S.W.2d 520, 522 (Mo. banc 1999).*

Clay, 37 S.W.3d at 217-218 (emphasis added).

In addition to seeking review of a non-capital sentencing issue on manifest injustice grounds held impermissible by this Court in Clay, 37 S.W.3d at 218, Morrow failed, in any event, to contend that he was actually innocent of the offense, which this Court made clear is a necessary component of the “manifest injustice” exception under Rule 91. Id. at 217-218. Moreover, it is questionable whether a claim of a fundamental miscarriage of justice survives a guilty plea. Weeks v. Bowersox, 119 F.3d 1342, 1354 (8th Cir. 1997) (en banc), cert. denied, 522 U.S. 1093 (1998).

In Clay, this Court did not incorporate a “lack of knowledge” or “cause” component to its discussion of the “miscarriage of justice” exception. That is understandable, as the “‘miscarriage of justice’ or ‘fundamental miscarriage of justice’ used in federal habeas cases,” which this Court relied, id. at 217, does not include a “cause” exception. Rather, the “cause and prejudice” exception that permits consideration of a procedurally defaulted claim in a federal habeas proceeding is entirely separate from the “miscarriage of justice” exception. Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991).

For this Court to engraft upon Rule 91 a “cause” exception would eviscerate the time limitations of Rule 24.035 and Rule 29.15, which the Court has long upheld as constitutional. See Day v. State, 770 S.W.2d 692, 695 (Mo. banc), cert. denied, 493 U.S. 866 (1989); see also Duvall v. Purkett, 15 F.3d 745, 748 n.6 (8<sup>th</sup> Cir.), cert. denied, 512 U.S. 1241 (1994) (agreeing that the time limits of Missouri’s post-conviction relief procedure are

constitutional). Accordingly, Respondent Jaynes' reliance upon Brown, 947 S.W.2d at 440, contravenes this Court's decision in Clay and requires quashing the writ.<sup>3</sup>

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<sup>3</sup>In Brown, the Missouri Court of Appeals, Western District concluded that the habeas petitioner's failure to raise his claim that his guilty plea was involuntary, not raised in a timely Rule 24.035 motion, was not barred from review under Rule 91. That court relied upon the rationale that the petitioner's

complaint was not known to him nor was it reasonably discoverable to him during the applicable ninety-day time limitation of Rule 24.035. It was impossible for [petitioner] to realize that he would be denied probation until 120 days after he began his sentence, or thirty days after the time limits of Rule 24.035 had run.

Brown, 947 S.W.2d at 440. In addition to creating a "lack of knowledge" or "cause" exception, Brown did not require that the petitioner assert that a constitutional violation probably resulted in the conviction of someone who was actually innocent. Clay therefore overruled Brown, which was not premised upon a jurisdictional issue but upon an asserted manifest injustice -- i.e., that a constitutional violation, an involuntary guilty plea, resulted that the petitioner could not have discovered until after the time for seeking post-conviction relief had expired. Id. at 440.

In this case, although the Missouri Court of Appeals did not issue an opinion explaining its rationale for denying Relator's petition for writ of certiorari, it appears from the oral argument in a factually-similar case, Covey v. Moore, WD 57889, held on February 28, 2001,

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and that the appellate court’s denial of Relator’s petition, that the appellate court either engrafted a “lack of knowledge” exception to the miscarriage of justice exception or has adopted such an exception independent of the actual innocence exception. To date, the Missouri Court of Appeals has not issued its opinion in Covey.



## II.

**RELATOR IS ENTITLED TO AN ORDER QUASHING THE WRIT OF HABEAS CORPUS BECAUSE THE CIRCUIT COURT EXCEEDED ITS JURISDICTION IN GRANTING THE PETITION FOR WRIT OF HABEAS CORPUS, IN THAT, EVEN IF THE EXCEPTION THAT PERMITS CONSIDERATION OF CLAIMS RAISED UNDER RULE 91 TO PREVENT A MISCARRIAGE OF JUSTICE DOES INCLUDE AN EXCEPTION FOR “LACK OF KNOWLEDGE” OR “CAUSE” TO EXCUSE THE UNTIMELY FILING OF A MOTION FOR POST-CONVICTION RELIEF, AND NOTWITHSTANDING THE HABEAS PETITIONER’S FAILURE TO ASSERT THAT A CONSTITUTIONAL VIOLATION PROBABLY RESULTED IN THE CONVICTION OF ONE WHO IS ACTUALLY INNOCENT, THE HABEAS PETITIONER IN THIS CASE DID NOT ESTABLISH THAT THE GROUND RELIED ON WAS NOT KNOWN TO HIM WHILE PROCEEDINGS UNDER RULE 24.035 WERE AVAILABLE, AND TO THE CONTRARY, THE RECORD AFFIRMATIVELY DEMONSTRATES THAT THE HABEAS PETITIONER KNEW OR SHOULD HAVE KNOWN OF THE GROUND RELIED ON.**

Even if there is a “lack of knowledge” or “cause” component to the miscarriage of justice exception to raising procedurally-defaulted claims, and notwithstanding his failure to assert that a constitutional violation probably resulted in the conviction of someone who is

actually innocent,<sup>4</sup> Morrow was not entitled to habeas corpus relief. At a minimum, Morrow would have had to establish that the grounds relied on were not known to him while proceedings under Rule 24.035 were available, see White v. State, 779 S.W.2d 571, 572 (Mo. banc 1989), and that only upon proof that the failure to comply with the rules providing for post-conviction relief was not the result of petitioner's intentional or negligent conduct and due entirely to an ambiguity in the rule, may habeas corpus relief possibly not be procedurally barred. See Kilgore v. State, 791 S.W.2d 393, 396 (Mo. banc 1990).

Morrow failed to make such a showing:

First, this case did not involve a defendant having entered a guilty plea upon a promise that he would be placed in long-term treatment in order to become eligible for release on probation. That is, Morrow's guilty plea was not induced by the sentencing court's subsequent acceptance of Morrow's request that the sentence include the provision of § 217.362. Instead, *after pleading guilty and having receiving the prosecutor's recommendation of four-years imprisonment*, see L.F. at 62, 72, Morrow himself requested that the court impose the long-term treatment provision. L.F. at 71. The same is true in regards to Morrow's admission of his probation violations. L.F. at 85.

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<sup>4</sup>Relator questions whether a claim of a fundamental miscarriage of justice survives a guilty plea. Weeks, 119 F.3d at 1354.

Secondly, Morrow was not placed into the treatment program from the beginning of his incarceration in the Department of Corrections and thus from the very start he knew or should have known that he was not eligible for probation release because he was not participating in the treatment program -- a prerequisite for probation release consideration under § 217.362.3. Compare Brown, 947 S.W.2d at 440 (petitioner was placed into treatment program but completed eleven weeks of twelve-week program). Morrow presented no evidence upon his habeas petition that he was told or otherwise notified by the Department of Corrections that he would be placed in the treatment program or was otherwise eligible for the program. Moreover, pursuant to § 217.362.2, “[p]rior to sentencing, any judge considering an offender for this program shall notify the department. The potential candidate for the program shall be screened by the department to determine eligibility.” Accordingly, Morrow knew or should have known at the time of sentencing that the trial court either did not ascertain Morrow’s eligibility for the long-term treatment program or had not received such information, particularly as it was the defense that requested that placement into the long term treatment program under § 217.362. Morrow should therefore have raised in a timely Rule 24.035 motion his claim raised in the habeas petition that his plea was involuntary because he was not placed in the treatment program -- though the record does not substantiate any claim that the treatment provision induced the plea -- and/or challenged the effective assistance of trial counsel in failing to have the trial court make the appropriate inquiry to the Department of

Corrections. Morrow presented no evidence that, for the period he had to seek post-conviction relief, he took any action while obviously having not been placed into the treatment program.

Finally, Morrow had been advised of his rights under Rule 24.035. L.F. at 75-76. For whatever reason, Morrow elected to not avail himself of his right to challenge his sentence, though he obviously was aware or should have been aware that he had not been placed into long-term treatment. Morrow previously had been in an institutional treatment program, L.F. at 81, so there can be no doubt that he should have recognized that he was not placed into treatment during the ninety-day period that he could have sought post-conviction relief. Instead, even after the trial court was advised that the defendant was not eligible for treatment under § 217.362, for which petitioner was provided a copy, see L.F. at 17, petitioner waited an additional ten months to seek habeas corpus relief. Compare L.F. at 17 (letter dated October 27, 1999) with L.F. at 7 (habeas petition file stamped August 31, 2000).

The habeas court's conclusion that Morrow could not have known that he was not going to be placed in the long-term treatment program misses the mark. Rather, before the expiration of the ninety-day period for which he could seek post-conviction relief, Morrow knew or should have known that he could not be released pursuant to § 217.362 because he was not participating in the treatment program and thus obviously could not successfully complete the program to become eligible for probation consideration. § 217.362.3. Accordingly, Respondent Jaynes' reliance upon Brown, 947 S.W.2d at 440, contravenes this Court's decision in Clay and requires quashing the writ.

**CONCLUSION**

WHEREFORE, for the reasons herein stated, relator respectfully submits that the petition for writ of certiorari should be granted and the writ of habeas corpus issued by respondents quashed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that two true and correct copies of the foregoing were mailed, postage prepaid, on this \_\_\_\_ day of May, 2001, to:

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-----  
CASSANDRA K. DOLGIN

**CERTIFICATE OF COMPLIANCE**

Pursuant to Missouri Supreme Court Rule 84.06(c), the undersigned counsel hereby certifies that this brief complies with Rule 55.03 and the type-volume limitation, in that this brief was prepared with WordPerfect 9.0 (Times New Roman 13 point font) and contains 21266 words as identified by the word-processing software, excluding the cover page, signature block and certificates of service and of compliance. In addition, the undersigned counsel hereby certifies that the enclosed diskette has been scanned for viruses with Norton Anti-Virus software and found virus-free.

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CASSANDRA K. DOLGIN