

No. SC 83543

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IN THE  
MISSOURI SUPREME COURT

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

Relator,

v.

THE HONORABLE GARY SPRICK,  
Associate Circuit Judge,  
Randolph County, Missouri and  
NORMA PRANGE, Circuit Clerk  
Randolph County.

Respondents.

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Petitioner for Writ of Certiorari to the  
Circuit Court of Randolph County

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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. Terry Lee Edwards, a Missouri prisoner in custody at the Moberly Correctional Center, filed a petition for writ of habeas corpus pursuant to Missouri Supreme Court Rule 91 (Relator's Exhibit 1). In the petition, Edwards contended that his eight year sentence for sodomy exceeded the statutory maximum (Relator's Exhibit 1, pages 5-7). After an evidentiary hearing, Respondent Sprick entered an order and judgment granting the writ of habeas corpus (Relator's Exhibit 10, page 7). The order also purported to "remand" the cause to the circuit court for resentencing (Relator's Exhibit 10, pages 7-8).

Relator filed his petition for writ of certiorari on April 11, 2001. The preliminary writ of certiorari issued on April 30, 2001. Because an appeal does not lie from the grant of a writ of habeas corpus, Jones v. State, 471 S.W.2d 166, 168-69 (Mo. banc 1971), this court's jurisdiction is properly invoked in a petition for writ of certiorari, In Re C.S.N., 685 S.W.2d 567, 568 (Mo. App. E.D. 1984); see Missouri Supreme Court Rule 84.22(a) (original remedial writ not available from appellate court "wherein adequate relief can be afforded by an appeal or by an application for such writ to a lower court.").

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 Sprick's issuance of the writ of habeas corpus.

### STATEMENT OF FACTS

On February 7, 1995, habeas petitioner Terry Lee Edwards stood trial for sodomy and first degree sexual abuse in the Circuit Court of Jackson County, Missouri, No. CR94-0977 (Relator's Exhibit 1; Petitioner's Exhibit A -- hereinafter Tr. -- page 2). The trial court sentenced Mr. Edwards to eight years imprisonment with the Missouri Department of Corrections for the sodomy conviction (Relator's Exhibit 1;

Petitioner's Exhibit B, page 13). Section 566.060.2, RSMo. Cum. Supp. 1992. The trial court also sentenced him to two years for first degree sexual abuse with the sentences running concurrently (Relator's Exhibit 1; Petitioner's Exhibit B, page 13; Relator's Exhibit 1; Petitioner's Exhibit D). Section 566.100, RSMo. Cum. Supp. 1992. Edwards was sentenced as a prior, persistent and Class X offender under §§558.016.2, 557.036.4 and 558.019, RSMo. Cum. Supp. 1992 (Relator's Exhibit 1, Petitioner's Exhibit D, page 2). Edwards appealed to the Missouri Court of Appeals for the Western District, and that appellate court affirmed the convictions and sentences (Relator's Exhibit 1, Petitioner's Exhibit E; State v. Edwards, 918 S.W.2d 841, 847 (Mo. App. W.D. 1996)).

In its opinion on direct appeal, the Missouri Court of Appeals discussed the facts that gave rise to Edwards' convictions.

The evidence reveals that K.E., who was thirteen years old at the time of trial, was living at her mother's house in Independence, Missouri, with the appellant (her uncle), her mother, grandmother, and two brothers prior to October 15, 1993. K.E. often referred to appellant as her father while the family was living in this arrangement.

K.E. testified that appellant had "sexually abused" her when they lived together in Independence from the time she was "five, six, or seven" years old. The last time she remembered appellant "touching" her was in early October, 1993 when she was twelve years old, stating that appellant came up to her bedroom and "kind of got on top of [her], and he touched [her] on [her] breasts and above [her] panties."

K.E. testified that events like these had occurred on three occasions while she was eleven or twelve years old. K.E. stated that she remembered appellant "touching [her] around [her] vagina" on three occasions, and said that once he touched her "below [her] panties." After these incidents, appellant would threaten to kill her if she said anything.

K.E. eventually told her mother about the incidents and her mother replied that she would "talk to [appellant] about it." On one occasion, K.E.'s mother warned appellant to stay away from K.E. Appellant ignored the warning and did "touch" her again according to K.E.

On October 15, 1993, K.E. told her counselor at school that she had been abused at her home by appellant. The school notified the Division of Family Service ("DFS"), and on the same date DFS Counselor Janice Chance was sent to the school to investigate the case. K.E. repeated her statements to Ms. Chance. K.E.'s mother was then contacted along with appellant. K.E.'s mother instructed appellant to find another place to live until the allegations could be looked into.

K.E. was then sent for treatment and admitted to the Independence Regional Health Center. She was released, removed from the home of her mother, and placed in the Evangelical Children's Home where she resided through trial. She received treatment and counseling at the hospital under the supervision of Leanne Wilson, a licensed clinical social worker and Dr. Jose Menendez, a psychiatrist. Michael Manade and Stacey Beisel, a psychologist and a social worker, respectively, aided Wilson and Menendez in implementing the prescribed treatment for K.E.

The case was also presented to the Independence Police Department for further investigation. On December 8, 1993, Detective Rast interviewed K.E. and her mother, with K.E. relating the same allegations of sexual abuse against appellant. The following day, after being contacted by the detective, appellant voluntarily appeared at Detective Rast's office to discuss the allegations against him. After receiving and waiving his Miranda rights, appellant was questioned by Detective Rast with the questions and answers recorded by the detective

in the form of a written statement. Appellant reviewed the written statement after the interview ended, initialed all the answers as being correct, and signed the statement.

In his statement, appellant admitted that he had touched K.E. in an improper way, the first time being when she was five or six years old. Appellant also admitted to an incident when he was laying on top of K.E. to swat roaches off the headboard of her bed and wrestled some with K.E. after he had been drinking, which led to one of the improper touching incidents. Appellant could not deny that he had touched K.E.'s breast or put his hand inside her panties on this occasion. He also admitted that K.E.'s mother had confronted him on occasion about the questionable behavior. Appellant admitted to having touched K.E.'s breasts twenty times over the years, that he had touched her "between the legs," and that he knew it was wrong to touch her in this way.

At trial, appellant testified that K.E.'s allegations were made in retaliation to his grounding her on the morning that she went to her counselor and that no improper conduct occurred. With regard to his statement to the police, appellant claims that he and Detective Rast had a misunderstanding of the term "touching" as it was used in his statement. Appellant states that any "touching" was a playful gesture, and not of a sexual nature. Detective Rast, however, testified that appellant knew he was talking about sexual abuse when he used the term "touching" and that there was no doubt in his mind that appellant meant he had touched K.E. in an improper and sexual manner.

(Relator's Exhibit 1; Petitioner's Exhibit E, pages 1-3); State v. Edwards, 918 S.W.2d at 843-44. From these facts, the jury found Edwards guilty of sodomy and first degree sexual abuse pursuant to §§566.060.2 and 566.100, RSMo. Cum. Supp. 1992. The Missouri Court of Appeals affirmed Edwards' convictions and sentences (Relator's Exhibit 1; Petitioner's Exhibit E, page 6).

Edwards then filed a motion to recall the mandate with the Missouri Court of Appeals for the Western District (Relator's Exhibit 1; Petitioner's Exhibit F). Edwards contended he received ineffective assistance of direct appeal counsel because counsel did not argue that due to the 1994 amendment to the definition of deviate sexual intercourse, §566.010(1), RSMo. 1994, his sentence for sodomy was improper and that he should be resentenced for either child molestation in the first or second degree (Relator's Exhibit 1; Petitioner's Exhibit F, page 7). Sixteen months after Edwards filed his motion to recall the mandate, the Missouri Court of Appeals entered an order recalling the mandate finding Edwards had received ineffective assistance of direct appeal counsel (Relator's Exhibit 1; Petitioner's Exhibit G, page 3). On July 16, 1998, this court ordered transfer of the cause (Relator's Exhibit 1; Petitioner's Exhibit H). Then on January 5, 1999, this court retransferred the case to the court of appeals with directions to overrule the motion to recall the mandate (Relator's Exhibit 1; Petitioner's Exhibit I, page 6). This court found an insufficient basis to conclude that Edwards received ineffective assistance of direct appeal counsel (Relator's Exhibit 1; Petitioner's Exhibit I, page 4). Even though Edwards did not demonstrate that he had received ineffective assistance of appellate counsel, the court wrote that Edwards might want to seek state habeas relief for a claim that his sentence was unlawfully imposed (Relator's Exhibit 1; Petitioner's Exhibit I, page 5). The court wrote:

In the trial court, he will have to establish that the sentencing court did sentence him under the old sodomy law that had been repealed and that his sentence exceeds the term that would have been imposed by the sentencing court for his conduct, whether the appropriate punishment is that established for child molestation in the first or second degree under the new statute.

(Relator's Exhibit 1; Petitioner's Exhibit I, pages 5-6).

Edwards filed a verified petition for writ of habeas corpus in the Circuit Court of Randolph County on May 10, 2000 (Relator's Exhibit 1). Circuit Judge Channing Blauer issued a show cause order (Relator's

Exhibit 2). On May 12, 2000, Judge Blauer assigned the cause for determination to Respondent Sprick (Relator's Exhibit 3). Relator filed a response to order to show cause why a writ of habeas corpus should not be granted (Relator's Exhibit 4), and Edwards filed a traverse (Relator's Exhibit 5) and a "post-argument evidentiary supplement" (Relator's Exhibit 6). An evidentiary hearing was held before Respondent Sprick on December 18, 2000 (Relator's Exhibit 7, page 1; Relator's Exhibit 11). After the hearing, the parties filed post-hearing suggestions (Relator's Exhibits 7, 8, 9). On January 22, 2001, Respondent Sprick entered judgment granting the petition for writ of habeas corpus (Relator's Exhibit 10). Relator pursued relief via a writ of certiorari in the Missouri Court of Appeals (Relator's Exhibit 12). On March 28, 2001, the court of appeals denied the writ of certiorari (Relator's Exhibit 13). On April 11, 2001, relator filed the petition for writ of certiorari with this court. On April 30, 2001, the court issued the preliminary writ of certiorari. This brief ensues.

**POINT RELIED ON**

**RELATOR IS ENTITLED TO AN ORDER QUASHING THE WRIT OF HABEAS CORPUS BECAUSE THE CIRCUIT COURT EXCEEDED ITS JURISDICTION IN GRANTING THE WRIT OF HABEAS CORPUS IN THAT EDWARDS DID NOT DEMONSTRATE AND RESPONDENT SPRICK DID NOT FIND THAT EDWARDS' SENTENCE EXCEEDED THE TERM THAT WOULD HAVE BEEN IMPOSED BY THE SENTENCING COURT.**

State ex rel. Stewart v. Blair, 207 S.W.2d 268 (Mo. banc 1947);

State v. Edwards, 983 S.W.2d 520 (Mo. banc 1999);

State v. Edwards, 918 S.W.2d 841 (Mo. App. W.D. 1996);

State ex rel. Mack v. Purkett, 825 S.W.2d 851 (Mo. banc 1992);

§566.010, RSMo. Cum. Supp. 1992;

§566.060, RSMo. Cum. Supp. 1992;

§556.067, RSMo. 1994;

§558.018, RSMo. 1994;

§558.016, RSMo. 1994;

## ARGUMENT

**RELATOR IS ENTITLED TO AN ORDER QUASHING THE WRIT OF HABEAS CORPUS BECAUSE THE CIRCUIT COURT EXCEEDED ITS JURISDICTION IN GRANTING THE WRIT OF HABEAS CORPUS IN THAT EDWARDS DID NOT DEMONSTRATE AND RESPONDENT SPRICK DID NOT FIND THAT EDWARDS' SENTENCE EXCEEDED THE TERM THAT WOULD HAVE BEEN IMPOSED BY THE SENTENCING COURT.**

During this court's 1999 review of Edwards' sentencing claim, the court informed Edwards what he needed to show in a state habeas corpus proceeding in order to be entitled to a writ of habeas corpus (Relator's Exhibit 1; Petitioner's Exhibit I, pages 5-6). Before the habeas circuit court, Edwards did not demonstrate that his sentence exceeded the term that would have been imposed by the sentencing court for his conduct (Relator's Exhibit 1; Petitioner's Exhibit I, page 6). The circuit court made no findings to that effect (Relator's Exhibit 10). Since neither Edwards nor the circuit court followed the express instructions of this court, the circuit court had no jurisdiction to issue the writ of habeas corpus. The court should quash the writ.

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 County v. Windes, 513 S.W.2d 385, 390 (Mo. 1974). 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). This court has used certiorari to quash the writ of habeas corpus when it has been issued erroneously. State ex rel. Nixon v. Campbell, 906 S.W.2d 369 (Mo. banc 1995). The court should do so in the present case.

Respondent Sprick exceeded his jurisdiction by granting the writ. Because the circuit court did not allocate the burden of proof as required by the Missouri Supreme Court decision in State v. Edwards, 983 S.W.2d 520 (Mo. banc 1999), there was no legitimate basis for the circuit court's writ of habeas corpus. Accordingly, this court has the authority and indeed the obligation to quash the circuit court's writ of habeas corpus via its writ of certiorari.

This court is familiar with the fact pattern this case presents. State v. Edwards, 918 S.W.2d 841 (Mo. App. W.D. 1996) (direct appeal); State v. Edwards, 983 S.W.2d 520 (Mo. banc 1999) (order concerning motion to recall the mandate). In its opinion, the Missouri Supreme Court gave clear instruction to a future state habeas court. This court placed on Edwards the burden to prove a sentencing error and prejudice. State v. Edwards, 983 S.W.2d at 522.

In the trial court, he will have to establish that the sentencing court did sentence him under the old sodomy law that had been repealed and that his sentence exceeded the term that would have been imposed by the sentencing court for his conduct, whether the appropriate punishment is that established for child molestation in the first degree or second degree under the new statute.

Id. One could think that the Missouri Supreme Court was clear with this language.

Apparently, the words from this court were not clear enough for respondent since respondent placed on Relator the burden to show the age of the victim. As is clear from respondent's judgment, respondent had no legitimate basis for deviating from the language of this court (Relator's Exhibit 10, page 5). Respondent accused Relator of interpreting language to place the burden on Edward (Relator's Exhibit 10, page 5). No interpretation of the Supreme Court's language is necessary. The language is clear without interpretation, and it places the burden of proving an error and prejudice upon Edwards, the habeas petitioner seeking relief. That makes sense because the habeas petitioner is a plaintiff, and in American jurisprudence, the plaintiff has the

burden of proof. See State ex rel. Mack v. Purkett, 825 S.W.2d 851, 858 (Mo. banc 1992) (denying claim because prisoner showed no prejudice).

The circuit court disagreed with the language from this court because it "seems to switch the burden of proof from the state to the defendant" (Relator's Exhibit 10, page 5). The circuit court's responsibility was not to disagree with the Missouri Supreme Court's direction, but to apply that direction in resolving the dispute.<sup>1</sup> As noted, a habeas petitioner has the burden of demonstrating error and prejudice. There is nothing odd about that. Respondent seems to focus on whether the state proved that the victim was less than twelve years old when Edwards molested the girl. That, however, is not the issue framed by the Missouri Supreme Court. Instead, the Missouri Supreme Court said that the habeas petitioner had to show an error ["he will have to establish that the sentencing court did sentence him under the old sodomy law that had been repealed"]. The Missouri Supreme Court also required Mr. Edwards to show prejudice ["he will have to establish. . . . that his sentence exceeds the term that would have been imposed by the sentencing court for his conduct, whether the appropriate punishment is that established for child molestation in the first degree or second degree under the new statute."]. In other words, Edwards was given an opportunity to show an error and prejudice in a state habeas corpus proceeding. The Missouri Supreme Court did not contemplate a state habeas hearing as a criminal trial where the state would prove age beyond a reasonable doubt -- that is not the function of state habeas. State v. Edwards, 983 S.W.2d at 522.

Respondent goes on to comment that "it is difficult to see how [Edwards] could establish the victim's age in this proceeding" (Relator's Exhibit 10, page 6). Respondent seems to suggest that the Missouri Supreme Court sent Edwards on a fool's task to prove what could not be proved. Relator does not believe

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<sup>1</sup>If Edwards disagreed with the Missouri Supreme Court's 1999 decision, then he could have sought rehearing from the Missouri Supreme Court.

that the Missouri Supreme Court sends litigants on such tasks. How could Edwards establish the victim's age?

He could call the victim to testify. He could have used a birth certificate. He could have called his victim's mother to testify about the date of birth. He could have presented hospital records from the time of birth.

There are many ways of showing age.

Respondent then asked "How is it possible to show in this proceeding what the jury believed about the victim's age at the time of this offense as to whether she was twelve or less than twelve?" (Relator's Exhibit 10, page 6). As noted, that was not the issue framed by this court for resolution by the state habeas court. In any event, the criminal trial record amply demonstrated that the offense for which Edwards was convicted, the sodomy, occurred when Edwards' victim was eleven. Edwards' conviction for sodomy had to have been based on one of three incidents that occurred when the victim was eleven years old. At trial, she testified that Edwards touched her "around [her] vagina" three times when she was eleven, including once "below [her] panties" (Tr. 30-31). In a statement to police, Edwards admitting touching her inappropriately between her legs on only one occasion, and said that he touched her for the last time when she was "eleven years old" (Tr. 54). In determining that there was sufficient evidence to sustain the conviction for sodomy, the Missouri Court of Appeals looked only to evidence of skin-to-skin touching when the victim was eleven years old. State v. Edwards, 918 S.W.2d at 846 (direct appeal). The trial record clearly showed that the act of hand-to-genital contact for which petitioner was convicted occurred when the victim was eleven. There was absolutely no evidence to support a contrary conclusion. Consequently, the jury's verdict finding Edwards guilty of sodomy had to be based upon the hand-to-genital touching that occurred when the victim was eleven years old.

The evidence presented at trial focused on three incidents that had occurred when the victim was eleven and twelve years old; only one of those acts was committed when she was twelve (Tr. 30-31). With regard to the single touching that occurred when she was twelve, the victim said that Edwards "touched [her]

on [her] breast and above [her] panties" (Tr. 30; emphasis added). Since this incident involved a touching "above the panties," i.e. above or through her clothing, it could not have formed the basis of petitioner's conviction for sodomy which required skin-to-skin touching.

Indeed, at the time the offense charge was committed, the statute defining "deviate sexual intercourse" and "sexual contact" distinguished between a touching of a person's genitals directly (which was defined as "deviate sexual intercourse") and any touching through the clothing (which was defined as "sexual contact"). See §566.010(1), (2), RSMo. Cum. Supp. 1992.

Since Edwards was charged with and convicted of sodomy under §566.060.1, RSMo. Cum. Supp. 1992, which required proof of "deviate sexual intercourse," then Edwards touching of the victim "over [her] panties" or "on top of" her panties when she was twelve years old could not have supplied the proof necessary to support Edwards' conviction of sodomy.

Rather, his conviction of sodomy had to have been based on one of the incidents that occurred when the victim was eleven years old. She testified that Edwards had touched her "around [her] vagina" three times when she was eleven, including once "below [her] panties" (Tr. 30-31). In a statement to police, Edwards admitted touching her inappropriately between her legs on only one occasion (Tr. 56), and said that he touched her for the last time when she was "eleven years old" (Tr. 54).

This analysis from the trial record answered the question Respondent Sprick found unanswerable. This analysis shows that the jury believed that the victim was eleven years old at the time of the sodomy because she was eleven at the time of the skin-to-skin contact, the contact the jury found for the sodomy conviction. Hand-to-genital contact underneath clothing involving a child less than twelve years of age is now child molestation in the first degree, punishable as a Class C felony under §556.067.1, RSMo. 1994. The range of punishment for a Class C felony that is enhanced by a persistent offender finding is a term of years

not to exceed 20 years. Section 558.018.7(3), RSMo. 1994. Since the eight year sentence is within the range, Edwards is not entitled to resentencing.

Edwards received an evidentiary hearing before respondent on December 18, 2000 (Relator's Exhibit 11). Edwards adduced no evidence about his victim's age when he molested her. He did not fulfill his burden of proof required by this court in its 1999 decision.

Respondent suggests that the Missouri Supreme Court did not reach this conclusion from the transcript when the case was before it (Relator's Exhibit 10, page 6). Of course, such a conclusion was unnecessary to the decision by this court since its holding was limited to the issue of whether a motion to recall the mandate was an appropriate remedy. Undoubtedly, the state Supreme Court could have reached the conclusion based on its review of the trial record, and its decision not to publish that conclusion does not mean that it actually formed an opposite conclusion, as suggested by respondent.

Even if Edwards prevailed by showing that this conduct was only second degree child molestation, Edwards was still entitled to no relief. Even if the sentence should have been only for second degree child molestation, Edwards did not challenge the lawfulness of his other sentence for first degree sexual abuse. If Edwards had brought his complained of error to the trial court at the time of sentencing and if the trial court had agreed, then he remained eligible for the sentence he actually received. For a persistent offender, conviction of a Class D felony, such as first degree sexual abuse carried a sentence of "a term of years not to exceed ten years." Section 558.016.7(4), RSMo. 1994. Edwards failed to show prejudice from the complained of error.

Undoubtedly, respondent exceeded the jurisdiction of the state habeas court as described by this court in State v. Edwards, 983 S.W.2d 520 (Mo. banc 1999). Edwards did not fulfill his burden of proof before the circuit court; thus, he is not entitled to a writ of habeas corpus. Under these circumstances, the court should order the writ of state habeas corpus to be quashed.

**CONCLUSION**

For the foregoing reasons, Relator respectfully requests 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 COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b)/Local Rule 360 of this Court and contains \_\_\_\_\_ words, excluding the cover, this certification and the appendix, as determined by WordPerfect 6 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this day of September 21, 2001.

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**RELATOR'S APPENDIX**

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