

IN THE
MISSOURI SUPREME COURT

STATE EX REL., T.W.,)
)
 Relator,)
)
)
 vs.)
)
 THE HONORABLE DAVID)
 MOUTON, CIRCUIT JUDGE,)
 29TH JUDICIAL CIRCUIT,)
)
 Respondent.)

Cause no. SC88773

RESPONDENT'S BRIEF IN OPPOSITION TO
PERMANENT WRIT OF PROHIBITION

John Nicholas, MO Bar #48120
Leah Clubb, MO Bar #59745
Attorneys for Respondent
122 W. 4th Street
Carthage, MO 64836
Phone: (417)358-9600
Fax: (417)358-9602

TABLE OF CONTENTS

Table of Contents.1

Table of Authorities 2

Jurisdictional Statement 4

Statement of the Facts5

Points Relied On

Point I. 10

Point II.11

Point III.12

Point IV.13

Argument

Standard of Review.14

Point I. 15

Point II.22

Point III.27

Point IV.29

Conclusion 33

Certificate of Compliance. 35

Certificate of Service..... .36

Appendix.37

TABLE OF AUTHORITIES

Cases

Fierstein v. DePaul Health Ctr., 24 S.W.3d 220 (Mo.App.2000) 14

In re T.J.H., 479 S.W.2d 433 (Mo. 1972).23

Sherar v. Zipper, 98 S.W.3d 628 (Mo.App. 2003). 14

State v. Boone Ret. Ctr., Inc., 26 S.W.3d 265 (Mo.App. 2000).29

State v. Davis, 988 S.W.2d 68, 71 (Mo.App. W.D. 1999). 16

State v. Decker, 591 S.W.2d 7 (Mo.App. E.D. 1979) 14

State v. Fitzpatrick, 193 S.W.3d 280 (Mo.App. W.D. 2006). 29

State v. Hall, 982 S.W.2d 675 (Mo. banc 1998) 18

State v. Larson, 79 S.W.3d 891 (Mo. 2002)27

State v. Messa, 914 S.W.2d 53 (Mo.App. 1996).29

State v. Simmons, 955 S.W.2d 729, 746 (Mo. banc 1997)18

State ex rel. Boll v. Weinstein, 295 S.W.2d 62, 67 (Mo. banc 1956)22

State ex rel. D—V—v. Cook, 495 S.W.2d 127 (Mo. App. KC District 1973) . 30, 31

State ex rel. City of Mansfield v. Crain, 301 S.W.2d 415 (Mo.App. 1957)22

Strickland v. Washington, 104 S.Ct. 2052 (1984) 18

T.J.H. V. Bills, 504 S.W.2d 76 (Mo. banc 1974).16, 22, 23

Statutes

Mo. Rev. Stat. § 211.071. 11, 15-17, 20, 27, 28

Mo. Rev. Stat. § 211.021.23

Mo. Rev. Stat. § 565.050.28, 31

Mo. Rev. Stat. § 571.015.28, 31

Mo. Rev. Stat. § 571.030.28

Mo. Rev. Stat. § 574.115.31

Mo. Rev. Stat. § 575.200.27, 28, 31

Rules

Mo. Rule of Crim. Pro. 23.08.29

Mo. Rule of Crim. Pro. 29.15.22, 24-26, 33

JURISDICTIONAL STATEMENT

Respondent adopts the jurisdictional statement of Relator.

STATEMENT OF THE FACTS

The underlying charges in this case are Assault in the First Degree (2 counts), Armed Criminal Action, Unlawful Use of a Weapon, and Attempted Escape. *Relator's Exhibit W*, pp. A679-A682. Relator, who was then a student at Memorial Middle School in Joplin Missouri, took a MAK90 Semi-automatic rifle to school, pointed the weapon at the head of school district superintendant Steve Doer, and then fired a shot into the ceiling. *Relator's Exhibit Z*, p. A699. Relator then pointed the rifle at the middle school principal, Stephen Gilbreth, and pulled the trigger. *Relator's Exhibit Z*, p. A713. Two days after his arrest, on October 11, 2006, Relator attempted to escape from confinement at the Jasper County Juvenile Detention Center. *Relator's Exhibit Z*, p. A731.

On October 9, 2006, the juvenile office filed three petitions: First Degree Assault; Armed Criminal Action; and Making a Terrorist Threat. *Relator's Exhibit P*, pp. A571, A574, A576. On October 11, 2006, the juvenile office filed an additional petition for Attempted Escape. *Relator's Exhibit P*, p. A578. On November 28, 2006, the juvenile office filed a motion to dismiss the juvenile petition and allow prosecution under the general law. *Relator's Exhibit V*, pp. A668-A675. The same day, a certification hearing was scheduled for December 6, 2006. *Relator's Exhibit P*, pp. A573, A574, A576, A578.

On December 6, 2006, a hearing was held before the Honorable William C. Crawford. *Relator's Exhibit E*, pp. A47-A224. At the hearing, Realtor was represented by Attorney at Law, Charles Lonardo. *Relator's Exhibit A*, p. A5. The juvenile office presented testimony from Juvenile Detention Officer April Foulks (*Relator's Exhibit E*, pp. A53-A90), Principal Stephen Gilbreth (*Relator's Exhibit E*, pp. A90-A112), Detective Brady Stuart of the Joplin Police Department (*Relator's Exhibit E*, pp. A112-A132), Detective Mike Gayman of the Joplin Police Department (*Relator's Exhibit E*, pp. A133-A137), Jasper County Detention Center Employee Kimberly Comstock (*Relator's Exhibit E*, pp. A137-A144), and Relator's friend, Jhoseli Pedraza (*Relator's Exhibit E*, pp. A145-A152). Relator presented evidence from Dr. Kevin Whisman, a licensed psychologist (*Relator's Exhibit E*, pp. A153-A209), Alisha Rodriguez, a fellow church member of Relator's family (*Relator's Exhibit E*, pp. A209-212), and Phyllis Sanders, another fellow church member of Relator's family (*Relator's Exhibit E*, pp. A212-A213).

Evidence presented at the hearing included testimony from Principal Stephen Gilbreth that in the morning of the day in question, he heard a loud noise, went into the hallway, and saw Relator wearing a makeshift mask and holding a gun. *Relator's Exhibit E*, pp. A93-A94. Stephen Gilbreth testified that Relator pointed a gun at his head, had his finger on the trigger, and made gestures as if he was jabbing the gun at him and then pulling back. *Relator's exhibit E*, pp. A100-

A105. Juvenile Detention Officer Kimberly Comstock testified that she overheard Relator tell another boy that he would have shot Stephen Gilbreth in the head, but his gun would not shoot. *Relator's Exhibit E*, p. A139. At the conclusion of all evidence, Judge Crawford held that Relator would be certified to stand trial under the general laws of the State of Missouri. *Relator's Exhibit E*, p. A223.

On February 26, 2007, the State filed two additional charges: First Degree Assault and Unlawful Use of a Weapon, counts IV and V, respectively and a preliminary hearing was rescheduled for March 5, 2007. *Relator's Exhibit N*, p. A553, A556. On February 26, 2007, the Missouri Court of Appeals for the Southern District denied Relator's petition for a Writ of Prohibition in case SD28298. *Relator's Exhibit N*, p. A553. On March 5, 2007, this court declined Relator's Petition for a Writ of Prohibition in case SC88350. *Relator's Exhibit B*, p. A552. These petitions focused primarily on the constitutionality of certification per se and the constitutionality of RSMO 211.071. In addition, the preliminary hearing was held and Relator was bound over on all five counts. *Relator's Exhibit N*, p. A552. Relator's case was then assigned to the Honorable David B. Mouton. *Relator's Exhibit N*, p. A552.

On March 9, 2007, Relator was arraigned before Judge Mouton. *Relator's Exhibit O*, p. A570. Relator filed an Objection to the Information that had been filed by the Jasper County Prosecuting Attorney's Office. *Relator's Exhibit O*, p.

A570. On June 8, 2007, Relator filed a Second Amended Objection to the Information. *Relator's Exhibit F*, pp. A225-A292. On June 14, 2007, the State filed a response to the Objection to the Information. *Relator's Exhibit Y*, pp. A684-A685. On June 15, 2007, a hearing was held on the objection to the information. *Relator's Exhibit G*, pp. A293-A386. At that hearing, Relator presented testimony from Vince Hillyer, a licensed criminal therapist and the President of Boys and Girls Town of Missouri. *Relator's Exhibit G*, pp. A305-A322. Relator also paraphrased what he believed Psychiatrist Dr. Stephen Peterson, Clinical Psychologist Dr. Kevin Whiseman, and Supervisor of the Division of Youth Services Sue Kidd, would have testified to. *Relator's Exhibit G*, pp. A329-330; A334-A335; A356-A358. At the end of the hearing, Judge Mouton gave Relator three more weeks to come up with additional arguments. *Relator's Exhibit G*, p. A358.

On July 6, 2007, Relator filed additional arguments and requested a continuance to depose more witnesses. *Relator's Exhibit H*, pp. A387-A407; *Relator's Exhibit I*, pp. A437-A438. Judge Mouton granted the continuance. *Relator's Exhibit O*, p. A 438.

On July 20, 2007, a hearing was held before Judge Mouton in which Relator again argued that his certification was improper, asserting that he had received ineffective assistance from counsel from his attorney in juvenile court. *Relator's*

Exhibit J, pp. A440-A479. On July 23, 2007, Judge Mouton, after hearing this additional evidence, overruled Relator's Second Amended Objection to the Information. *Docket Entry*, pp. A754-A756. On August 15, 2007, Relator filed a Petition for Writ of Prohibition with the Missouri Court of Appeals for the Southern District, which they denied on August 22, 2007. *Relator's Exhibit X*, p. A683. Relator then filed a petition with this Court, which was granted on November 7, 2007.

POINTS RELIED ON

I. The Honorable David B. Mouton, Circuit Judge, of the 29th Judicial Circuit, Jasper County, did not abuse his discretion in overruling Relator's Second Amended Objection to the Information because the circuit court had proper jurisdiction over the case in that the order dismissing Relator's juvenile case to allow prosecution under the general law had no flaws on its face and had not been challenged by Relator, and Relator had effective assistance of counsel at the juvenile court hearing because Relator was not prejudiced by his previous counsel's acts.

State v. Davis, 988 S.W.2d 68 (Mo.App. W.D. 1999)

State v. Hall, 982 S.W.2d 675 (Mo. banc 1980)

State v. Simmons, 955 S.W.2d 729 (Mo. banc 1997)

T.J.H. V. Bills, 504 S.W.2d 76 (Mo. banc 1974)

Mo. Rev. Stat. § 211.071

II. The circuit court did not err in overruling Relator's Second Amended Objection to the Information because circuit court review of the juvenile court order dismissing the case is improper in that the court of appeals is the appropriate forum in which Relator may challenge the validity of the Juvenile Court Order dismissing a juvenile petition by filing a writ of prohibition challenging the juvenile court order, or through seeking post conviction relief under Rule 29.15.

In re T.J.H., 479 S.W.2d 433 (Mo. 1972)

State ex rel. Boll v. Weinstein, 295 S.W.2d 62, 67 (Mo. banc 1956)

State ex rel. City of Mansfield v. Crain, 301 S.W.2d 415 (Mo.App. 1957)

T.J.H. V. Bills, 504 S.W.2d 76 (Mo. banc 1974)

Mo. Rev. Stat. § 211.021

Mo. Rule of Crim. Pro. 29.15

III. The Honorable David B. Mouton retains proper jurisdiction of Count III of the Information because Count III was correctly charged in that Relator was under arrest for a felony offense, if not for the protection of the juvenile court, which was removed upon dismissal of the Juvenile Petition, when he attempted to escape from police custody.

State v. Larson, 79 S.W.3d 891 (Mo. 2002)

Mo. Rev. Stat. § 211.071

Mo. Rev. Stat. § 575.200

Mo. Rev. Stat. § 571.015

Mo. Rev. Stat. § 565.050

IV. The Honorable David B. Mouton retains proper jurisdiction of Counts IV and V of the Information because the amendment to the Information adding Counts IV and V was proper in that Relator received notice that he had been charged with felonies and the defense was not prejudiced by the amendment.

State v. Boone Ret. Ctr., Inc., 26 S.W.3d 265 (Mo.App. 2000)

State v. Fitzpatrick, 193 S.W.3d 280 (Mo.App. W.D. 2006)

State v. Messa, 914 S.W.2d 53 (Mo.App. 1996)

State ex rel. D—V—v. Cook, 495 S.W.2d 127 (Mo. App. KC District
1973)

Mo. Rev. Stat. § 565.050

Mo. Rev. Stat. § 571.015

Mo. Rev. Stat. § 574.115

Mo. Rev. Stat. § 575.200

Mo. Sup. Ct. Rule 23.08

ARGUMENT

Standard of Review

This court applies the abuse of discretion standard in reviewing a circuit court's decision overruling an objection to the information. *See State v. Decker*, 591 S.W.2d 7 (Mo.App. E.D. 1979). In *Decker*, a defendant argued that the trial court had erred in refusing to sever offenses listed in an Indictment. *Id.* at 9. The *Decker* court held that a trial court's decision regarding whether to sever offenses in an indictment should be reviewed for an abuse of discretion. *Id.* at 9-10. This Court should review a circuit court's denial of an Objection to the Information under the same abuse of discretion standard. Accordingly, this court should not reverse the circuit court's order "unless there is a substantial or glaring injustice." *Fierstein v. DePaul Health Ctr.*, 24 S.W.3d 220, 225 (Mo.App.2000). Moreover, if "reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." *Sherar v. Zipper*, 98 S.W.3d 628, 632 (Mo.App. 2003).

I. The Honorable David B. Mouton, Circuit Judge, of the 29th Judicial Circuit, Jasper County, did not abuse his discretion in overruling Relator’s Second Amended Objection to the Information because the circuit court had proper jurisdiction over the case in that the order dismissing Relator’s juvenile case to allow prosecution under the general law had no flaws on its face and had not been challenged by Relator, and Relator had effective assistance of counsel at the juvenile court hearing because Relator was not prejudiced by his previous counsel’s acts.

A dismissal of a juvenile case pursuant to RSMO 211.071(9) divests the juvenile court of jurisdiction and subjects the juvenile to prosecution under the general laws of the state. Section 211.071(9) states, “When a petition has been dismissed thereby permitting a child to be prosecuted under the general law, the jurisdiction of the juvenile court over that child is forever terminated, except as provided in subsection (10) of this section, for an act that would be a violation of a state law or municipal ordinance.” Mo. Rev. Stat. § 211.071(9) (2007).

Section (10) of the statute describes a situation in which a defendant found not guilty under the general laws commits a subsequent offense while still under age 17. In that case, the juvenile could still be within the jurisdiction of the juvenile court. The statute makes clear that such a situation would be unique because once a juvenile case is dismissed, the juvenile court no longer has jurisdiction over the

case, and the juvenile is then subject to the general laws of the state. *Id.* The Western District interpreted this statute, stating, “The statute lists no conditions under which the juvenile court regains jurisdiction other than a finding of “not guilty” by the court of general jurisdiction.” *State v. Davis*, 988 S.W.2d 68, 71 (Mo.App. W.D. 1999). There has been no such finding here. Thus, once the Information was filed in the circuit court, Judge Mouton had lawful jurisdiction over the proceeding.

The Order Dismissing Relator’s Juvenile Case to Allow Prosecution under the General law had no flaws on its face and had not been challenged by Relator.

In *T.J.H. v. Bills*, 504 S.W. 2d 76, 79 (Mo. banc 1974), this Court held that a juvenile court order relinquishing jurisdiction over a juvenile under the juvenile law was ineffective where such order did not set forth findings explaining the basis of its decision. *T.J.H. V. Bills*, 504 S.W.2d 76, 79 (Mo. banc 1974). Conversely, this Court held, “A juvenile court order transferring a juvenile for prosecution under the general law, which is supported by findings in compliance with our holding in this case, will pass jurisdiction of the cause to the adult court and will not be subject to attack [on the grounds that the juvenile court order is ineffective to divest the juvenile court of jurisdiction on its face] by a writ of prohibition.” *Id.*

In the present case, the juvenile court order relinquishing jurisdiction over Relator set forth a number of facts explaining the basis of the juvenile court's decision. *See Relator's Exhibit K*, pp. A480-A487. Indeed, the current juvenile court order complied with the requirements set forth in RSMO 211.071(7) in every respect. RSMO 211.071(7) requires that a juvenile court order state findings that the court had jurisdiction of the cause and of the parties, the juvenile was represented by counsel, the hearing was held in the presence of the juvenile and his counsel, and the reasons underlying the court's decision to transfer jurisdiction. Mo. Rev. Stat. § 211.071(7) (2007). The juvenile court order in Relator's case stated that the court had jurisdiction over the cause and the parties, and Relator was present and represented by counsel at the juvenile certification hearing. *Relator's Exhibit K*, pp. A480-A487. The order also listed reasons why the juvenile court found that Relator was "not a proper subject to be dealt with under the provisions of the Juvenile Code." *Id.* Because the juvenile order certifying Relator to be prosecuted under the general laws of the State of Missouri complied with all of the requirements of RSMO 211.071, and because Relator has not challenged the order, this Court should deny Relator's Petition for a Writ of Prohibition.

Relator had effective assistance of counsel at the juvenile court certification hearing because Relator was not prejudiced by counsel's acts.

In order to prove that he received ineffective assistance of counsel, Relator must prove two elements. First, Relator must show that his “counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney.” Second, Relator must demonstrate that his “defense was prejudiced by his counsel's poor performance.” *State v. Hall*, 982 S.W.2d 675, 680 (Mo. banc 1998) (citing *Strickland v. Washington*, 104 S.Ct. 2052 (1984)). To satisfy the first prong, Relator “must overcome the presumptions that any challenged action was sound trial strategy and that counsel rendered adequate assistance and made all significant decisions in the exercise of professional judgment.” *State v. Simmons*, 955 S.W.2d 729, 746 (Mo. banc 1997); see *Strickland* 104 S.Ct. at 2064-65. Relator has not overcome the presumption that his attorney, Charles Lonardo, used sound trial strategy during the Juvenile Certification Hearing, and Relator has not shown that Mr. Lonardo's performance prejudiced his defense.

On October 9, 2006, Relator, who was then a student at Memorial Middle School in Joplin, Missouri, took a MAK90 Semi-Automatic Rifle to school, pointed the weapon at the head of the school district superintendant, Dr. Steve Doerr, and then fired a shot into the ceiling. *Relator's Exhibit Z*, p. A699. Relator

then pointed the gun at the school principal, Stephen Gilbreth, and tried to fire it at him several times. *Relator's Exhibit Z*, p. A713. After this incident, both Dr. Doerr and Mr. Gilbreth gave statements to the police regarding this incident. *Relator's Exhibit Z*, pp. A701; A716-718. Given the weight of the evidence against Relator, including statements from these two credible and respected community leaders, it is reasonable to assume that Relator's counsel considered compliance with authorities an effective trial strategy. While it is not possible to know Mr. Lonardo's exact thought processes, it makes sense, in light of the circumstances of this case, that Mr. Lonardo would have sought to achieve the most favorable verdict for his client by amicably working with authorities. Relator has failed to overcome the presumption that Mr. Lonardo exercised his professional judgment in developing this defense strategy.

On June 23, 2007, the Honorable Judge David Mouton overruled Relator's Second Amended Objection to the Information. *Docket Entry*, pp. A754-A756. Before ruling, Judge Mouton carefully considered all evidence presented by Relator in support of his claim that he had received ineffective assistance of counsel during the Juvenile Certification Hearing. *Id.* In Relator's Brief before this Court, Relator presents a litany of reasons why he believes Mr. Lonardo's performance was deficient, and he sites a number of ways in which he believes his counsel's performance prejudiced his defense. *Relator's Brief In Support of His*

Permanent Writ of Prohibition, pp. 33-59. In his current brief, Relator proffers much evidence that he contends would have changed the outcome of the Juvenile Certification Hearing, had Relator's counsel presented it. *Id.* However, the fact remains that even if Mr. Lonardo did fail to present relevant evidence during the Juvenile Certification Hearing, Relator was subsequently afforded the opportunity to present that allegedly missing evidence during his hearings before Judge Mouton. *Docket Entry*, pp. A754-A756. Relator effectively was given the opportunity to present the facts and evidence he felt was left out of the juvenile proceeding at the circuit court, and he was given the opportunity to point out evidence he felt should have been objected to or excluded at the juvenile court hearing. *Relator's Exhibit E*, pp. A47-A224. After hearing all of the evidence that Relator claimed should have been presented during the Juvenile Certification Hearing, Judge Mouton explained, ". . . defense counsel have submitted in great detail what they believe the evidence should have been. [The 29th Judicial Circuit Court, Jasper County] carefully considered that additional evidence and is not convinced that the result in this case would have been any different had that evidence been introduced." *Id.* Judge Mouton, after considering Relator's additional evidence and arguments and reviewing the requirements set forth in Section 211.071 for dismissal of a juvenile petition, then appropriately exercised his discretion and overruled Relator's objection to prosecution under the general

law. *Docket Entry*, pp. A754-A756. Because Relator had the opportunity to present evidence to Judge Mouton, and because Judge Mouton found that such evidence would not have altered the outcome of the Juvenile Hearing, any alleged deficiencies in Relator's counsel's performance did not prejudice his defense. For the reasons stated, Relator received effective assistance of counsel during the Juvenile Certification Hearing.

II. The circuit court did not err in overruling Relator’s Second Amended Objection to the Information because circuit court review of the juvenile court order dismissing the case is improper in that the court of appeals is the appropriate forum in which Relator may challenge the validity of the Juvenile Court Order dismissing a juvenile petition by filing a writ of prohibition challenging the juvenile court order, or through seeking post conviction relief under Rule 29.15.

In *T.J.H. v. Bills*, this Court held that a juvenile challenging an order certifying him to stand trial as an adult could pursue the remedy of prohibition. *T.J.H.*, 504 S.W.2d at 79. This court explained in *T.J.H.* that the “issuance of a writ of prohibition. . .is substantially a proceeding between two judicial authorities, a superior and an inferior, and is a means by which the superior judicial authority exercises its superintendence over the inferior authority to keep it within the bounds of its lawful jurisdiction.” *Id.* at 78 (citing *State ex rel. City of Mansfield v. Crain*, 301 S.W.2d 415, 418 (Mo.App. 1957) and *State ex rel. Boll v. Weinstein*, 295 S.W.2d 62, 67 (Mo. banc 1956)). The instant case is substantially similar to *T.J.H.* (1974) because, like the juvenile in *T.J.H.*, Relator asserts that jurisdiction was not properly transferred from the juvenile court to the adult circuit court. *Relator’s Point Relied on 1*; See also *T.J.H.*, 504 S.W.2d at 79. Thus, like in *T.J.H.*, it would have been appropriate for Relator to file a Writ of Prohibition

challenging the juvenile court order. However, Relator never filed a Writ of Prohibition challenging the order. Instead, Relator followed the procedures outlined in *In re T.J.H.*, 479 S.W.2d 433 (Mo. 1972) by filing an Objection to the Information in the circuit court. This procedure is inappropriate.

Filing an Objection to the Information before Judge Mouton is improper because such action effectively requested that one circuit court judge overrule another circuit court judge's decision. The juvenile court is a division of the circuit court and is not an inferior court to the circuit court. *See* Mo. Rev. Stat. § 211.021 (2007). According to RSMO 211.021, the juvenile court is "the juvenile division or divisions of the circuit court of the county, or judges while hearing juvenile cases assigned to them." *Id.* Because the Juvenile Certification Order was issued by a circuit court judge, requesting another circuit court judge to review the order is inappropriate. Further, in 1974, this Court made it clear that a juvenile may seek a writ of prohibition from the appellate court following an order dismissing a juvenile petition. *T.J.H.*, 504 S.W.2d at 79. This Court reasoned that to deny a writ would subject the juvenile to adult court process unnecessarily, if the order dismissing the case from juvenile court was defective on its face. *Id.* Relator has not sought a writ of prohibition declaring the dismissal of the juvenile order void, and the order is not defective on its face. To require a circuit judge to find he has no jurisdiction over an information in the face of an order that has no defects and

has not been challenged by a writ of prohibition is an inappropriate use of criminal procedure.

The relief Relator has requested from this court is also inappropriate. Relator has appealed to this Court to issue a Writ of Prohibition ordering Judge Mouton not to take any further action in Relator's case, or in the alternative, to order Judge Mouton to sustain Relator's *Second Amended Objection to the Information*. Instead of challenging Judge Mouton's decision, Relator should have challenged the original juvenile court order directly after the Juvenile Certification Hearing. Had Relator challenged the original order, an appellate court could have determined conclusively whether or not Judge Mouton had jurisdiction to hear Relator's case. Requiring Relator to have challenged the certification order directly after the Juvenile Certification Hearing is sound public policy as this would prevent circuit court judges from being asked to review other circuit court judges' decisions, and such a requirement would conserve judicial resources by determining at the outset of a circuit court trial whether the circuit court has jurisdiction over the case.

Because Relator failed to challenge the juvenile court order directly after the Juvenile Certification Hearing, Relator is limited to seeking post conviction relief under Rule of Criminal Procedure 29.15, which states, in pertinent part, "(a) Nature of Remedy – Rules of Civil Procedure Apply. A person convicted of a

felony after trial claiming that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, *including claims of ineffective assistance of trial and appellate counsel, that the court imposing the sentence was without jurisdiction to do so*, or that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court pursuant to the provisions of this Rule 29.15. This Rule 29.15 provides the *exclusive procedure* by which such person may seek relief in the sentencing court for the claims enumerated. . .” Mo. Rule of Crim. Pro. 29.15(*emphasis added*).

Further, the Rule states, “(k) Appeal – Standard of Appellate Review. An order sustaining or overruling a motion filed under the provisions of this Rule 29.15 shall be deemed a final judgment for purposes of appeal by the movant or the state. . . Appellate review of the trial court’s action on the motion filed under this Rule 29.15 shall be limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. . .” *Id.*

Rule 29.15 provides the exclusive procedure by which a defendant may seek relief for claims that a conviction or sentence imposed violates the Constitution or laws of the State or United States, including claims of ineffective assistance of trial counsel or lack of jurisdiction. *Id.* Relator’s objection to the information in this case is premised on his claims of ineffective assistance of counsel during the

Juvenile Certification Hearing. Therefore, an adequate and exclusive remedy is available through Rule 29.15, which precludes the issuance of a writ in this matter. Relator must wait until the issue of his guilt has been finally adjudicated in the circuit court before appealing his conviction pursuant to Rule 29.15.

The procedure Relator has chosen in this matter was neither to allow the Court of appeals to review the juvenile order, nor to seek post-conviction relief under Rule 29.15. Rather, Relator asks the circuit court to review the juvenile court hearing and consider additional evidence, and then seeks this Court's review on an abuse of discretion standard upon the circuit judge's denial. To uphold this procedure would further confuse the issue of what is the appropriate method a juvenile should seek in order to challenge a dismissal of a juvenile case against him. It would also invite the possibility of three appellant reviews arising out of one case. The first review could come by a writ of prohibition challenging the order dismissing the juvenile petition. The second review could follow a denial of an objection to the information as has occurred here. The last review would follow conviction under Rule 29.15. The procedure advanced by Relator is inefficient and weighs against the public policy of judicial economy and efficient administration of justice which fails to serve either the state or Relator.

III. The Honorable David B. Mouton retains proper jurisdiction of Count III of the Information because Count III was correctly charged in that Relator was under arrest for a felony offense, if not for the protection of the juvenile court, which was removed upon dismissal of the Juvenile Petition, when he attempted to escape from police custody.

When a person between the ages of twelve and seventeen commits an offense that would be a felony if committed by an adult, a juvenile court may dismiss a juvenile petition, and such person may be “transferred to the court of general jurisdiction and prosecuted under the general law.” *State v. Larson*, 79 S.W.3d 891 (Mo. 2002) (*citing* Mo. Rev. Stat. § 211.071). Once the protections of the juvenile court have been lifted, the offender is subject to the general laws of the State of Missouri, including Missouri Revised Statute Section 575.200, which states, “A person commits the crime of escape from custody or attempted escape from custody if, while being held in custody after arrest for any crime, he escapes or attempts to escape from custody. Escape or attempted escape from custody is a class A misdemeanor unless . . .the person escaping or attempting to escape is under arrest for a felony, in which case escape from custody is a class D felony.” Mo. Rev. Stat. § 575.200 (2007).

Relator argues that he has been incorrectly charged with felony attempted escape because he was not under arrest for a felony when he attempted escape as

he had not yet been certified to stand trial as an adult at that point. *Relator's Brief*, p. 68. This reasoning is flawed. The issue of whether Relator would be afforded the protections of the juvenile court is a different issue than whether Relator's conduct would constitute a felony if the juvenile petition was dismissed. When Relator attempted escape, he was in custody for having committed crimes that are felonies under the general laws of the state of Missouri. Specifically, Relator is charged with two counts of assault in the first degree under RSMO 565.050, armed criminal action under RSMO 571.015, unlawful use of a weapon under RSMO 571.030, and attempted escape under RSMO 575.200. *See Relator's Exhibit W*, p. A679. Once the protections of the juvenile code are lifted, Relator is then subject to those general laws. Mo. Rev. Stat. § 211.071(9) (2007). Because Relator's juvenile case was dismissed and the juvenile court made all necessary findings under RSMO 211.071, Relator's attempted escape is correctly charged as a felony.

IV. The Honorable David B. Mouton retains proper jurisdiction of Counts IV and V of the Information because the amendment to the Information adding Counts IV and V was proper in that Relator received notice that he had been charged with felonies and the defense was not prejudiced by the amendment.

Allowing the State to amend an Information rests within the discretion of the trial court. *State v. Boone Ret. Ctr., Inc.*, 26 S.W.3d 265, 268 (Mo.App. 2000). The trial court's decision is reviewed for an abuse of discretion. *Id.* According to Missouri Supreme Court Rule 23.08, "Any information may be amended . . .at any time before verdict or finding if (a) no additional or different offense is charged, and (b) a defendant's substantial rights are not thereby prejudiced. Rule 23.08. The test of prejudice is whether the planned defense to the original charge would still be available after the amendment, and whether the defendant's evidence would be applicable both before and after the amendment. *State v. Messa*, 914 S.W.2d 53, 54 (Mo.App. 1996).

In *State v. Fitzpatrick*, the Missouri Court of Appeals for the Western District held that an amendment adding a second intended victim to an Information charging a defendant with Conspiracy to Commit Murder was permissible because the amendment "did not create [an] additional or different offense." *State v. Fitzpatrick*, 193 S.W.3d 280, 285 (Mo.App. W.D. 2006). Like the *Fitzpatrick* amendment, the amendment at issue in the current case adds counts arising out of

the same operative facts as the original counts but adding a second victim. Count I charges Relator with Class B Felony Assault in the First Degree in that Relator aimed a semi-automatic rifle at a middle school principal and pulled the trigger. Count IV charges Relator with the same crime for aiming a semi-automatic rifle at the school superintendant and pulling the trigger. The events alleged in Count IV and V occurred as part of the same event as alleged in Count I. Count V charges Relator with Class B Felony Unlawful Use of a Weapon for the same conduct already charged. Counts IV and V do not allege any unforeseen facts that would make Relator's planned defense unavailable or his evidence inapplicable. Therefore, Relator's substantial rights were not prejudiced by the amendment to the Information, and the circuit court did not abuse its discretion in allowing the amendment.

Relator cites *State ex rel. D—V—v. Cook*, 495 S.W.2d 127 (Mo. App. KC District 1973) for the proposition that Relator's right to notice of the crimes for which he is charged was violated when Counts IV and V were added to the Information because Relator had not been certified on those counts. In *Cook*, the Missouri Court of Appeals, Kansas City District, granted a juvenile's request for a writ of prohibition on the grounds that the juvenile petition did not adequately state that he had committed what would be a felony if committed by an adult. *Id.* at 129. The juvenile petition alleged that the juvenile "participated . . . in unnecessary

aggressive sexual behavior with a female minor. . .” *Id.* The *Cook* court explained that the juvenile petition “did not set forth facts demonstrating that the relator had ‘violated a state law’ and did not allege facts demonstrating that the relator had ‘committed an offense which would be a felony if committed by an adult.’” *Id.* The key holding in the case was that the “relator was entitled to know, whether by statutory reference or lucidity of allegations, that he was being proceeded against for an offense ‘which would be a felony if committed by an adult.’” *Id.*

The present case differs from *Cook* in that Relator was aware at the initial Juvenile Hearing that he had violated at least four state laws and he was being proceeded against for offenses which would be felonies if committed by an adult. The juvenile office had filed the following four petitions: First Degree Assault, Armed Criminal Action, Making a Terrorist Threat, and Attempted Escape from Custody. *Relator’s Exhibit P*, p. A572, A574, A576, A578. Each petition alleged a charge named in the Missouri Revised Statutes as a felony offense. *See* Mo. Rev. Stat. §§ 565.050, 571.015, 574.115, 575.200. In Counts IV and V of the Information, Relator is charged with First Degree Assault and Unlawful Use of a Weapon. These counts do not change the fact that Relator had been put on notice that he was being proceeded against for offenses that would be felonies if committed by an adult. Since Relator was given the requisite notice, the Honorable

Judge David Mouton retains proper jurisdiction of Counts IV and V of the Information.

CONCLUSION

The circuit court gained jurisdiction of Relator's case once the order dismissing the juvenile petition was granted. The order dismissing the juvenile petition facially complies with the statutory requirements of RSMO. 211.071, and Relator has not sought a writ of prohibition challenging that order. Judge Mouton allowed Relator the opportunity to present evidence and argue matters that Relator believed his previous attorney should have presented at the juvenile hearing. Then, Judge Mouton determined the additional evidence and omissions asserted would not have changed the outcome of the juvenile hearing. Judge Mouton did not abuse his discretion in so finding.

Procedurally, in the interest of judicial economy and the efficient and effective administration of justice, a juvenile who wishes to challenge an order dismissing a juvenile petition should do so pursuant to a writ of prohibition challenging the order dismissing the juvenile petition, or post-conviction pursuant to Rule 29.15. To allow another review after a denial of an objection to the information invites the possibility of three appellate reviews on the same issue. This procedure fails to efficiently serve the public or the accused.

Counts III, IV, and V of the Information are correctly charged, and the trial court has jurisdiction over those counts. Count III alleges felonious attempted escape. Relator was in custody for crimes that are felonies at the time of his

attempted escape, making this charge appropriate. The trial court also has jurisdiction over Counts IV and V. Once the juvenile petition is dismissed, the defendant is subject to prosecution under the general laws of the state. The facts alleged in Counts IV and V arose out of the same facts as those pled in the juvenile petition. Relator was on notice of those facts and was not surprised by the allegations set forth therein.

For the reasons stated herein, Respondent respectfully requests that this Court uphold the denial of Relator's objection to the information, and deny Relator's writ of prohibition, remanding this case back to the circuit court with instructions to proceed to trial on all counts as charged. Respectfully submitted.

John Nicholas, MO Bar #48120
Attorney for Respondent
122 W. 4th Street
Carthage, MO 64836
Phone: (417)358-9600
Fax: (417)358-9602

Leah Clubb, MO Bar #59745
Attorney for Respondent
610 S. Pearl
Joplin, MO 64836
Phone: (417)625-4314
Fax: (417)625-4315

CERTIFICATE OF COMPLIANCE WITH RULE 84.06

Appellant hereby certifies that this Brief complies with the requirements set forth in Rule 84.06 and contains 7,832 words and 737 lines of monospaced type. Further that filed with this brief is a CD-ROM of the brief in electronic format using Microsoft Word and that disk has been scanned for viruses and it is virus-free.

John Nicholas, MO Bar #48120
Attorney for Respondent
122 W. 4th Street
Carthage, MO 64836
Phone: (417)358-9600
Fax: (417)358-9602

Leah Clubb, MO Bar #59745
Attorney for Respondent
610 S. Pearl
Joplin, MO 64836
Phone: (417)625-4314
Fax: (417)625-4315

CERTIFICATE OF SERVICE

The undersigned counsel for Respondent hereby certifies that a copy of the foregoing was served upon James Egan, 115 Lincoln Street, Carthage, Missouri, 64836, by United States mail, postage prepaid, on this _____ day of February, 2008.

John Nicholas, MO Bar #48120
Attorney for Respondent
122 W. 4th Street
Carthage, MO 64836
Phone: (417)358-9600
Fax: (417)358-9602

Leah Clubb, MO Bar #59745
Attorney for Respondent
610 S. Pearl
Joplin, MO 64836
Phone: (417)625-4314
Fax: (417)625-4315

RESPONDENT'S APPENDIX

APPENDIX TABLE OF CONTENTS

Statutes

Mo. Rev. Stat. § 211.071. A2

Mo. Rev. Stat. § 211.021. A6

Mo. Rev. Stat. § 565.050. A8

Mo. Rev. Stat. § 571.015. A9

Mo. Rev. Stat. § 571.030. A11

Mo. Rev. Stat. § 574.115. A18

Mo. Rev. Stat. § 575.200. A20

Rules

Mo. Sup. Ct. Rule 23.08.A21

Mo. Rule of Crim. Pro. 29.15.A22

Title XII. Public Health and Welfare

Chapter 211. Juvenile Courts (Refs & Annos)

**211.071. Certification of juvenile for trial as adult--procedure--
misrepresentation of age, effect**

1. If a petition alleges that a child between the ages of twelve and seventeen has committed an offense which would be considered a felony if committed by an adult, the court may, upon its own motion or upon motion by the juvenile officer, the child or the child's custodian, order a hearing and may, in its discretion, dismiss the petition and such child may be transferred to the court of general jurisdiction and prosecuted under the general law; except that if a petition alleges that any child has committed an offense which would be considered first degree murder under section 565.020, RSMo, second degree murder under section 565.021, RSMo, first degree assault under section 565.050, RSMo, forcible rape under section 566.030, RSMo, forcible sodomy under section 566.060, RSMo, first degree robbery under section 569.020, RSMo, or distribution of drugs under section 195.211, RSMo, or has committed two or more prior unrelated offenses which would be felonies if committed by an adult, the court shall order a hearing, and may in its discretion, dismiss the petition and transfer the child to a court of general jurisdiction for prosecution under the general law.

2. Upon apprehension and arrest, jurisdiction over the criminal offense allegedly committed by any person between seventeen and twenty-one years of age over whom the juvenile court has retained continuing jurisdiction shall automatically terminate and that offense shall be dealt with in the court of general jurisdiction as provided in section 211.041.

3. Knowing and willful age misrepresentation by a juvenile subject shall not affect any action or proceeding which occurs based upon the misrepresentation. Any evidence obtained during the period of time in which a child misrepresents his age may be used against the child and will be subject only to rules of evidence applicable in adult proceedings.

4. Written notification of a transfer hearing shall be given to the juvenile and his

custodian in the same manner as provided in sections 211.101 and 211.111. Notice of the hearing may be waived by the custodian. Notice shall contain a statement that the purpose of the hearing is to determine whether the child is a proper subject to be dealt with under the provisions of this chapter, and that if the court finds that the child is not a proper subject to be dealt with under the provisions of this chapter, the petition will be dismissed to allow for prosecution of the child under the general law.

5. The juvenile officer may consult with the office of prosecuting attorney concerning any offense for which the child could be certified as an adult under this section. The prosecuting or circuit attorney shall have access to police reports, reports of the juvenile or deputy juvenile officer, statements of witnesses and all other records or reports relating to the offense alleged to have been committed by the child. The prosecuting or circuit attorney shall have access to the disposition records of the child when the child has been adjudicated pursuant to subdivision (3) of subsection 1 of section 211.031. The prosecuting attorney shall not divulge any information regarding the child and the offense until the juvenile court at a judicial hearing has determined that the child is not a proper subject to be dealt with under the provisions of this chapter.

6. A written report shall be prepared in accordance with this chapter developing fully all available information relevant to the criteria which shall be considered by the court in determining whether the child is a proper subject to be dealt with under the provisions of this chapter and whether there are reasonable prospects of rehabilitation within the juvenile justice system. These criteria shall include but not be limited to:

(1) The seriousness of the offense alleged and whether the protection of the community requires transfer to the court of general jurisdiction;

(2) Whether the offense alleged involved viciousness, force and violence;

(3) Whether the offense alleged was against persons or property with greater weight being given to the offense against persons, especially if personal injury resulted;

(4) Whether the offense alleged is a part of a repetitive pattern of offenses which indicates that the child may be beyond rehabilitation under the juvenile code;

(5) The record and history of the child, including experience with the juvenile justice system, other courts, supervision, commitments to juvenile institutions and other placements;

(6) The sophistication and maturity of the child as determined by consideration of his home and environmental situation, emotional condition and pattern of living;

(7) The age of the child;

(8) The program and facilities available to the juvenile court in considering disposition;

(9) Whether or not the child can benefit from the treatment or rehabilitative programs available to the juvenile court; and

(10) Racial disparity in certification.

7. If the court dismisses the petition to permit the child to be prosecuted under the general law, the court shall enter a dismissal order containing:

(1) Findings showing that the court had jurisdiction of the cause and of the parties;

(2) Findings showing that the child was represented by counsel;

(3) Findings showing that the hearing was held in the presence of the child and his

counsel; and

(4) Findings showing the reasons underlying the court's decision to transfer jurisdiction.

8. A copy of the petition and order of the dismissal shall be sent to the prosecuting attorney.

9. When a petition has been dismissed thereby permitting a child to be prosecuted under the general law, the jurisdiction of the juvenile court over that child is forever terminated, except as provided in subsection 10 of this section, for an act that would be a violation of a state law or municipal ordinance.

10. If a petition has been dismissed thereby permitting a child to be prosecuted under the general law and the child is found not guilty by a court of general jurisdiction, the juvenile court shall have jurisdiction over any later offense committed by that child which would be considered a misdemeanor or felony if committed by an adult, subject to the certification provisions of this section.

11. If the court does not dismiss the petition to permit the child to be prosecuted under the general law, it shall set a date for the hearing upon the petition as provided in section 211.171.

CREDIT(S)

(L.1957, p. 642, § 1 (§ 211.070). Amended by L.1983, S.B. No. 368, p. 511, § 1; L.1989, H.B. Nos. 502, 503 & 130, § A; L.1995, H.B. Nos. 174, 325, & 326, § A.)

Vernon's Annotated Missouri Statutes

Title XII. Public Health and Welfare

Chapter 211. Juvenile Courts (Refs & Annos)

211.021. Definitions

As used in this chapter, unless the context clearly requires otherwise:

(1) "**Adult**" means a person seventeen years of age or older;

(2) "**Child**" means a person under seventeen years of age;

(3) "**Juvenile court**" means the juvenile division or divisions of the circuit court of the county, or judges while hearing juvenile cases assigned to them;

(4) "**Legal custody**" means the right to the care, custody and control of a child and the duty to provide food, clothing, shelter, ordinary medical care, education, treatment and discipline of a child. Legal custody may be taken from a parent only by court action and if the legal custody is taken from a parent without termination of parental rights, the parent's duty to provide support continues even though the person having legal custody may provide the necessities of daily living;

(5) "**Parent**" means either a natural parent or a parent by adoption and if the child is illegitimate, "**parent**" means the mother;

(6) "**Shelter care**" means the temporary care of juveniles in physically unrestricting facilities pending final court disposition. These facilities may include:

(a) "**Foster home**", the private home of foster parents providing twenty-four-hour care to one to three children unrelated to the foster parents by blood, marriage or adoption;

(b) "**Group foster home**", the private home of foster parents providing twenty-four-hour care to no more than six children unrelated to the foster parents by blood, marriage or adoption;

(c) "**Group home**", a child care facility which approximates a family setting, provides access to community activities and resources, and provides care to no more than twelve children.

CREDIT(S)

(L.1957, p. 642, § 1 (§ 211.020). Amended by L.1978, H.B. No. 1634, p. 771, § A(§ 1), eff. Jan. 2, 1979; L.1982, S.B. No. 497, § A.)

Vernon's Annotated Missouri Statutes

Title XXXVIII. Crimes and Punishment; Peace Officers and Public Defenders

Chapter 565. Offenses Against The Person

565.050. Assault, first degree, penalty

1. A person commits the crime of assault in the first degree if he attempts to kill or knowingly causes or attempts to cause serious physical injury to another person.

2. Assault in the first degree is a class B felony unless in the course thereof the actor inflicts serious physical injury on the victim in which case it is a class A felony.

CREDIT(S)

(L.1977, S.B. No. 60, p. 662, § 1, eff. Jan. 1, 1979. Amended by L.1983, p. 931, S.B. No. 276, § 1; L.1984, S.B. No. 448, § A, eff. Oct. 1, 1984.)

Title XXXVIII. Crimes and Punishment; Peace Officers and Public Defenders

Chapter 571. Weapons Offenses (Refs & Annos)

General Provisions

571.015. Armed criminal action, defined, penalty

1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the department of corrections and human resources for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the department of corrections and human resources for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the department of corrections and human resources for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.

4. The provisions of this section shall not apply to the felonies defined in sections 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo.

CREDIT(S)

(L.1977, S.B. No. 60, p. 662, § 1, eff. Jan. 1, 1979.)

Vernon's Annotated Missouri Statutes

Title XXXVIII. Crimes and Punishment; Peace Officers and Public Defenders

Chapter 571. Weapons Offenses (Refs & Annos)

General Provisions

571.030. Unlawful use of weapons--exceptions--penalties--qualified retired peace officers, identification

1. A person commits the crime of unlawful use of weapons if he or she knowingly:

(1) Carries concealed upon or about his or her person a knife, a firearm, a blackjack or any other weapon readily capable of lethal use; or

(2) Sets a spring gun; or

(3) Discharges or shoots a firearm into a dwelling house, a railroad train, boat, aircraft, or motor vehicle as defined in section 302.010, RSMo, or any building or structure used for the assembling of people; or

(4) Exhibits, in the presence of one or more persons, any weapon readily capable of lethal use in an angry or threatening manner; or

(5) Possesses or discharges a firearm or projectile weapon while intoxicated; or

(6) Discharges a firearm within one hundred yards of any occupied schoolhouse, courthouse, or church building; or

(7) Discharges or shoots a firearm at a mark, at any object, or at random, on, along or across a public highway or discharges or shoots a firearm into any outbuilding; or

(8) Carries a firearm or any other weapon readily capable of lethal use into any church or place where people have assembled for worship, or into any election precinct on any election day, or into any building owned or occupied by any agency of the federal government, state government, or political subdivision thereof; or

(9) Discharges or shoots a firearm at or from a motor vehicle, as defined in section 301.010, RSMo, discharges or shoots a firearm at any person, or at any other motor vehicle, or at any building or habitable structure, unless the person was lawfully acting in self-defense; or

(10) Carries a firearm, whether loaded or unloaded, or any other weapon readily capable of lethal use into any school, onto any school bus, or onto the premises of any function or activity sponsored or sanctioned by school officials or the district school board.

2. Subdivisions (1), (3), (4), (6), (7), (8), (9) and (10) of subsection 1 of this section shall not apply to or affect any of the following:

(1) All state, county and municipal peace officers who have completed the training required by the [FN1] police officer standards and training commission pursuant to sections 590.030 to 590.050, RSMo, and possessing the duty and power of arrest for violation of the general criminal laws of the state or for violation of ordinances of counties or municipalities of the state, whether such officers are on or off duty, and whether such officers are within or outside of the law enforcement agency's jurisdiction, or all qualified retired peace officers, as defined in subsection 10 of this section, and who carry the identification defined in subsection 11 of this section, or any person summoned by such officers to assist in making arrests or preserving the peace while actually engaged in assisting such officer;

(2) Wardens, superintendents and keepers of prisons, penitentiaries, jails and other institutions for the detention of persons accused or convicted of crime;

(3) Members of the armed forces or national guard while performing their official duty;

(4) Those persons vested by article V, section 1 of the Constitution of Missouri with the judicial power of the state and those persons vested by Article III of the Constitution of the United States with the judicial power of the United States, the members of the federal judiciary;

(5) Any person whose bona fide duty is to execute process, civil or criminal;

(6) Any federal probation officer or federal flight deck officer as defined under the federal flight deck officer program, 49 U.S.C. Section 44921;

(7) Any state probation or parole officer, including supervisors and members of the board of probation and parole;

(8) Any corporate security advisor meeting the definition and fulfilling the requirements of the regulations established by the board of police commissioners under section 84.340, RSMo; and

(9) Any coroner, deputy coroner, medical examiner, or assistant medical examiner.

3. Subdivisions (1), (5), (8), and (10) of subsection 1 of this section do not apply when the actor is transporting such weapons in a nonfunctioning state or in an unloaded state when ammunition is not readily accessible or when such weapons are not readily accessible. Subdivision (1) of subsection 1 of this section does not apply to any person twenty-one years of age or older transporting a concealable firearm in the passenger compartment of a motor vehicle, so long as such concealable firearm is otherwise lawfully possessed, nor when the actor is also in possession of an exposed firearm or projectile weapon for the lawful pursuit of game, or is in his or her dwelling unit or upon premises over which the actor has possession, authority or control, or is traveling in a continuous journey peaceably through this state. Subdivision (10) of subsection 1 of this section does not apply if

the firearm is otherwise lawfully possessed by a person while traversing school premises for the purposes of transporting a student to or from school, or possessed by an adult for the purposes of facilitation of a school-sanctioned firearm-related event.

4. Subdivisions (1), (8), and (10) of subsection 1 of this section shall not apply to any person who has a valid concealed carry endorsement issued pursuant to sections 571.101 to 571.121 or a valid permit or endorsement to carry concealed firearms issued by another state or political subdivision of another state.

5. Subdivisions (3), (4), (5), (6), (7), (8), (9), and (10) of subsection 1 of this section shall not apply to persons who are engaged in a lawful act of defense pursuant to section 563.031, RSMo.

6. Nothing in this section shall make it unlawful for a student to actually participate in school-sanctioned gun safety courses, student military or ROTC courses, or other school-sponsored firearm-related events, provided the student does not carry a firearm or other weapon readily capable of lethal use into any school, onto any school bus, or onto the premises of any other function or activity sponsored or sanctioned by school officials or the district school board.

7. Unlawful use of weapons is a class D felony unless committed pursuant to subdivision (6), (7), or (8) of subsection 1 of this section, in which cases it is a class B misdemeanor, or subdivision (5) or (10) of subsection 1 of this section, in which case it is a class A misdemeanor if the firearm is unloaded and a class D felony if the firearm is loaded, or subdivision (9) of subsection 1 of this section, in which case it is a class B felony, except that if the violation of subdivision (9) of subsection 1 of this section results in injury or death to another person, it is a class A felony.

8. Violations of subdivision (9) of subsection 1 of this section shall be punished as follows:

(1) For the first violation a person shall be sentenced to the maximum authorized

term of imprisonment for a class B felony;

(2) For any violation by a prior offender as defined in section 558.016, RSMo, a person shall be sentenced to the maximum authorized term of imprisonment for a class B felony without the possibility of parole, probation or conditional release for a term of ten years;

(3) For any violation by a persistent offender as defined in section 558.016, RSMo, a person shall be sentenced to the maximum authorized term of imprisonment for a class B felony without the possibility of parole, probation, or conditional release;

(4) For any violation which results in injury or death to another person, a person shall be sentenced to an authorized disposition for a class A felony.

9. Any person knowingly aiding or abetting any other person in the violation of subdivision (9) of subsection 1 of this section shall be subject to the same penalty as that prescribed by this section for violations by other persons.

10. As used in this section "**qualified retired peace officer**" means an individual who:

(1) Retired in good standing from service with a public agency as a peace officer, other than for reasons of mental instability;

(2) Before such retirement, was authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and had statutory powers of arrest;

(3) Before such retirement, was regularly employed as a peace officer for an aggregate of fifteen years or more, or retired from service with such agency, after completing any applicable probationary period of such service, due to a service-connected disability, as determined by such agency;

(4) Has a nonforfeitable right to benefits under the retirement plan of the agency if such a plan is available;

(5) During the most recent twelve-month period, has met, at the expense of the individual, the standards for training and qualification for active peace officers to carry firearms;

(6) Is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and

(7) Is not prohibited by federal law from receiving a firearm.

11. The identification required by subdivision (1) of subsection 2 of this section is:

(1) A photographic identification issued by the agency from which the individual retired from service as a peace officer that indicates that the individual has, not less recently than one year before the date the individual is carrying the concealed firearm, been tested or otherwise found by the agency to meet the standards established by the agency for training and qualification for active peace officers to carry a firearm of the same type as the concealed firearm; or

(2) A photographic identification issued by the agency from which the individual retired from service as a peace officer; and

(3) A certification issued by the state in which the individual resides that indicates that the individual has, not less recently than one year before the date the individual is carrying the concealed firearm, been tested or otherwise found by the state to meet the standards established by the state for training and qualification for active peace officers to carry a firearm of the same type as the concealed firearm.

CREDIT(S)

(R.S.1939, § 4425. Amended by L.1959, H.B. No. 43, § 1; L.1981, H.B. No. 296, p. 641, § 1; L.1993, H.B. No. 562, § A; L.1993, S.B. No. 250, § A; L.1995, H.B. No. 160, § A; L.1997, S.B. No. 367, § A; L.1998, S.B. No. 478, § A; L.2000, S.B. No. 944, § A; L.2003, S.B. No. 5, § A, eff. June 27, 2003; L.2003, 2nd Ex.Sess., H.B. Nos. 349, 120, 136 & 328, § A, eff. Oct. 11, 2003; [FN2] L.2007, S.B. Nos. 62 & 41, § A.)

Title XXXVIII. Crimes and Punishment; Peace Officers and Public Defenders
Chapter 574. Offenses Against Public Order (Refs & Annos)

574.115. Crime of making a terroristic threat

1. A person commits the crime of making a terrorist threat if such person communicates a threat to cause an incident or condition involving danger to life, communicates a knowingly false report of an incident or condition involving danger to life, or knowingly causes a false belief or fear that an incident has occurred or that a condition exists involving danger to life:

(1) With the purpose of frightening ten or more people;

(2) With the purpose of causing the evacuation, quarantine or closure of any portion of a building, inhabitable structure, place of assembly or facility of transportation; or

(3) With reckless disregard of the risk of causing the evacuation, quarantine or closure of any portion of a building, inhabitable structure, place of assembly or facility of transportation; or

(4) With criminal negligence with regard to the risk of causing the evacuation, quarantine or closure of any portion of a building, inhabitable structure, place of assembly or facility of transportation.

2. Making a terrorist threat is a class C felony unless committed under subdivision (3) of subsection 1 of this section in which case it is a class D felony or unless committed under subdivision (4) of subsection 1 of this section in which case it is a class A misdemeanor.

3. For the purpose of this section, "threat" includes an express or implied threat.

4. A person who acts in good faith with the purpose to prevent harm does not commit a crime pursuant to this section.

CREDIT(S)

(L.2000, S.B. No. 944, § A (§ 574.150). Amended by L.2002, S.B. No. 712, § A.)

Vernon's Annotated Missouri Statutes

Title XXXVIII. Crimes and Punishment; Peace Officers and Public Defenders

Chapter 575. Offenses Against The Administration of Justice (Refs & Annos)

575.200. Escape or attempted escape from custody

1. A person commits the crime of escape from custody or attempted escape from custody if, while being held in custody after arrest for any crime, he escapes or attempts to escape from custody.

2. Escape or attempted escape from custody is a class A misdemeanor unless:

(1) It is effected or attempted by means of a deadly weapon or dangerous instrument or by holding any person as hostage, in which case escape or attempted escape from custody is a class A felony;

(2) The person escaping or attempting to escape is under arrest for a felony, in which case escape from custody is a class D felony.

CREDIT(S)

(L.1977, S.B. No. 60, p. 662, § 1, eff. Jan. 1, 1979. Amended by L.1986, S.B. No. 450, § A, eff. March 17, 1986.)

Vernon's Annotated Missouri Rules

Supreme Court Rules

Rules of Criminal Procedure

Rule 23. Misdemeanors or Felonies--Indictment or Information (Refs & Annos)

23.08. Misdemeanors or Felonies--Indictment or Information--Amendment or Substitution--Delay

Any information may be amended or an information may be substituted for an indictment at any time before verdict or finding if:

(a) No additional or different offense is charged, and

(b) A defendant's substantial rights are not thereby prejudiced.

No such amendment or substitution shall cause delay of a trial unless the court finds that a defendant needs further time to prepare a defense by reason of such amendment or substitution.

CREDIT(S)

(Adopted June 13, 1979, eff. Jan. 1, 1980. Amended Jan. 28, 2002, eff. Jan. 1, 2003.)

Vernon's Annotated Missouri Rules

Supreme Court Rules

Rules of Criminal Procedure

Rule 29. Misdemeanors or Felonies--Verdict, Sentence and New Trial (Refs & Annos)

29.15. Conviction After Trial--Correction

(a) Nature of Remedy--Rules of Civil Procedure Apply. A person convicted of a felony after trial claiming that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, including claims of ineffective assistance of trial and appellate counsel, that the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court pursuant to the provisions of this Rule 29.15. This Rule 29.15 provides the exclusive procedure by which such person may seek relief in the sentencing court for the claims enumerated. The procedure to be followed for motions filed pursuant to this Rule 29.15 is governed by the rules of civil procedure insofar as applicable.

(b) Form of Motion--Cost Deposit Not Required--Time to File--Failure to File, Effect of. A person seeking relief pursuant to this Rule 29.15 shall file a motion to vacate, set aside or correct the judgment or sentence substantially in the form of Criminal Procedure Form No. 40.

No cost deposit shall be required.

If an appeal of the judgment or sentence sought to be vacated, set aside or corrected was taken, the motion shall be filed within 90 days after the date the mandate of the appellate court is issued affirming such judgment or sentence.

If no appeal of such judgment or sentence was taken, the motion shall be filed within 180 days of the date the person is delivered to the custody of the department of corrections.

If:

- (1) An appeal of such judgment or sentence is taken;
- (2) The appellate court remands the case resulting in entry of a new judgment or sentence; and
- (3) An appeal of the new judgment or sentence is taken, the motion shall be filed within 90 days after the date the mandate of the appellate court is issued affirming the new judgment or sentence.

If no appeal of such new judgment or sentence is taken, the motion shall be filed within 180 days of the later of:

- (1) The date the person is delivered to the custody of the department of corrections; or
- (2) The date the new judgment or sentence was final for purposes of appeal.

Failure to file a motion within the time provided by this Rule 29.15 shall constitute a complete waiver of any right to proceed under this Rule 29.15 and a complete waiver of any claim that could be raised in a motion filed pursuant to this Rule 29.15.

(c) Clerk's Duties. Movant shall file the motion and two copies thereof with the clerk of the trial court. The clerk shall immediately deliver a copy of the motion to the prosecutor. Upon receipt of the motion, the clerk shall notify the sentencing judge and shall notify the court reporter to prepare and file the complete transcript of the trial if the transcript has not yet been prepared or filed. If the motion is filed by an indigent pro se movant, the clerk shall forthwith send a copy of the motion to

the counsel who is appointed to represent the movant.

(d) Contents of Motion. The motion to vacate shall include every claim known to the movant for vacating, setting aside, or correcting the judgment or sentence. The movant shall declare in the motion that the movant has listed all claims for relief known to the movant and acknowledging the movant's understanding that the movant waives any claim for relief known to the movant that is not listed in the motion.

(e) Pro Se Motion--Appointment of Counsel--Amended Motion, Required When. When an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant. Counsel shall ascertain whether sufficient facts supporting the claims are asserted in the motion and whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence. If the motion does not assert sufficient facts or include all claims known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and claims. If counsel determines that no amended motion shall be filed, counsel shall file a statement setting out facts demonstrating what actions were taken to ensure that (1) all facts supporting the claims are asserted in the pro se motion and (2) all claims known to the movant are alleged in the pro se motion. The statement shall be presented to the movant prior to filing. The movant may file a reply to the statement not later than ten days after the statement is filed.

(f) Withdrawal of Counsel. For good cause shown, counsel may be permitted to withdraw upon the filing of an entry of appearance by successor counsel. If appointed counsel is permitted to withdraw, the court shall cause new counsel to be appointed. If an indigent movant is seeking to set aside a death sentence, successor counsel shall have at least the same qualifications as required by Rule 29.16 as the withdrawing counsel.

(g) Amended Motion--Form, Time for Filing--Response by Prosecutor. Any amended motion shall be signed by movant or counsel. The amended motion shall not incorporate by reference material contained in any previously filed motion. If no appeal of the judgment sought to be vacated, set aside, or corrected is taken, the amended motion shall be filed within sixty days of the earlier of: (1) the date both a complete transcript has been filed in the trial court and counsel is appointed or

(2) the date both a complete transcript has been filed in the trial court and an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant. If an appeal of the judgment sought to be vacated, set aside, or corrected is taken, the amended motion shall be filed within sixty days of the earlier of: (1) the date both the mandate of the appellate court is issued and counsel is appointed or (2) the date both the mandate of the appellate court is issued and an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant. The court may extend the time for filing the amended motion for one additional period not to exceed thirty days. Any response to the motion by the prosecutor shall be filed within thirty days after the date an amended motion is required to be filed.

(h) Hearing Not Required, When. If the court shall determine the motion and the files and records of the case conclusively show that the movant is entitled to no relief, a hearing shall not be held. In such case, the court shall issue findings of fact and conclusions of law as provided in Rule 29.15(j).

(i) Presence of Movant--Record of Hearing--Continuance of Hearing--Burden of Proof. At any hearing ordered by the court the movant need not be present. The court may order that testimony of the movant shall be received by deposition. The hearing shall be on the record and shall be confined to the claims contained in the last timely filed motion. The court may continue the hearing upon a showing of good cause. The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence.

(j) Findings and Conclusions--Judgment. The court shall issue findings of fact and conclusions of law on all issues presented, whether or not a hearing is held. If the court finds that the judgment was rendered without jurisdiction, that the sentence imposed was illegal, or that there was a denial or infringement of the rights given movant by the constitution of Missouri or the constitution of the United States as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the movant or resentence the movant or order a new trial or correct the judgment and sentence as appropriate.

(k) Appeal--Standard of Appellate Review. An order sustaining or overruling a motion filed under the provisions of this Rule 29.15 shall be deemed a final

judgment for purposes of appeal by the movant or the state. If the court finds that a movant allowed an appeal is an indigent person, it shall authorize an appeal in forma pauperis and furnish without cost a record of all proceedings for appellate review. When the appeal is taken, the circuit court shall order the official court reporter to promptly prepare the transcript necessary for appellate review without requiring a letter from the movant's counsel ordering the same. If the sentencing court finds against the movant on the issue of indigence and the movant so requests, the court shall certify and transmit to the appellate court a transcript and legal file of the evidence solely on the issue of indigence so as to permit review of that issue by the appellate court. Appellate review of the trial court's action on the motion filed under this Rule 29.15 shall be limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous.

(l) Successive Motions. The circuit court shall not entertain successive motions.

(m) Schedule. This Rule 29.15 shall apply to all proceedings wherein sentence is pronounced on or after January 1, 1996. If sentence is pronounced prior to January 1, 1996, postconviction relief shall continue to be governed by the provisions of Rule 29.15 in effect on the date the motion was filed or December 31, 1995, whichever is earlier.

CREDIT(S)

(Added Feb. 11, 1987, eff. Jan. 1, 1988. Amended May 23, 1987, eff. Jan. 1, 1988; June 20, 1995 and corrected Nov. 21, 1995, eff. Jan. 1, 1996; amended Nov. 19, 1996, eff. July 1, 1997; Oct. 6, 1999, eff. July 1, 2000; June 21, 2002, eff. Jan. 1, 2003.)