



**INDEX**

	<u>Page</u>
TABLE OF AUTHORITIES.....	2
JURISDICTIONAL STATEMENT.....	4
STATEMENT OF FACTS.....	4
POINTS RELIED ON.....	5
ARGUMENT.....	9
CONCLUSION.....	24
APPENDIX	

**TABLE OF AUTHORITIES**

	<u>Page</u>
<b><u>CASES:</u></b>	
<i>Brown v. State</i> , 66 S.W.3d 721 (Mo. banc 2002).....	6, 8, 11, 20
<i>Naddi v. Hill</i> , 106 F.3d 275 (9th Cir. 1997).....	6, 14
<i>State ex rel. Amrine v. Roper</i> , 102 S.W.3d 541 (Mo. banc 2003).....	11, 12
<i>State ex rel. Lee v. Sweeney</i> , No. SC 85577.....	11
<i>State ex rel. Marshall v. Blaeuer</i> , 709 S.W.2d 111 (Mo. banc 1986).....	8, 20
<i>State ex rel. Meier v. Stubblefield</i> , 97 S.W.3d 476 (Mo. banc 2003) .	6, 8, 11, 21, 22
<i>State ex rel. Rogers v. Board of Police Commissioners of Kansas City</i> , 995 S.W.2d 1 (Mo. App., W.D. 1999).....	7, 9, 16, 19
<i>Wiglesworth v. Wyrick</i> , 531 S.W.2d 713 (Mo. banc 1976).....	6, 12

**CONSTITUTIONAL PROVISIONS:**

Mo. Const., Article I, Section 12.....	10
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**STATUTES:**

28 U.S.C. Section 1915.....	13
28 U.S.C. Section 2254.....	13
28 U.S.C. Section 2255.....	13
Section 506.387 .....	10
Section 506.390.....	10

Section 514.040 .....7, 8, 12, 16, 17, 18, 19, 22, 23

**RULES:**

Rule 24.035 .....10, 11, 14, 20

Rule 29.15.....10, 11, 14, 20

Rule 84.04..... 9

Rule 91.01..... 10

## **JURISDICTIONAL STATEMENT**

Relator's original Jurisdictional Statement is incorporated by reference.

## **STATEMENT OF FACTS**

Relator's original Statement of Facts is incorporated by reference.

**POINTS RELIED ON**

**I.**

**(Responds to Respondent IB)**

**A writ of mandamus should issue to Respondent to allow Relator to proceed in his state habeas corpus action in Dekalb County without payment of filing fees because the Missouri PLRA, fashioned after the federal PLRA, only applies to purely civil actions, not habeas corpus challenges to the validity of judgment and sentence.**

*Brown v. State*, 66 S.W.3d 721 (Mo. banc 2002);

*State ex rel. Meier v. Stubblefield*, 97 S.W.3d 476 (Mo. banc 2003);

*Wiglesworth v. Wyrick*, 531 S.W.2d 713 (Mo. banc 1976); and

*Naddi v. Hill*, 106 F.3d 275, 277 (9th Cir. 1997).

## II.

### (Responds to Respondent's Point II)

**Relator should be allowed to proceed in this mandamus action in forma pauperis due to the nature of this action, to determine if respondent should have imposed \$135 filing fees on Relator to proceed in a writ of habeas corpus, pursuant to the provisions of the PLRA. Further, since Relator is represented in this writ by an organization funded in whole by the General Assembly to provide legal services to the indigent, under Section 514.040.3, any indigent client of the Public Defender who must petition the courts by writs involving an issue or concern in their case should do so without paying filing fees or costs.**

*State ex rel. Rogers v. Board of Police Commissioners of Kansas*

*City*, 995 S.W.2d 1 (Mo. App., W.D. 1999).

### III.

#### (Responds to Respondent's Point III)

**Relator should be allowed to proceed in forma pauperis in this mandamus action and the underlying Dekalb County habeas corpus action without payment of filing fees or costs as the Public Defender may represent clients whose rights have been violated by imposition of invalid sentence and judgment, and Section 514.040.3 includes the Public Defender within its scope to obviate costs to the indigent clients it represents when proceeding in court.**

*Brown v. State*, 66 S.W.3d 721 (Mo. banc 2002);

*State ex rel. Marshall v. Blaeuer*, 709 S.W.2d 111 (Mo. banc 1986);

and

*State ex rel. Meier v. Stubblefield*, 97 S.W.3d 476 (Mo. banc 2003).

## ARGUMENT

### I.

#### (Responds to Respondent IB)

**A writ of mandamus should issue to Respondent to allow Relator to proceed in his state habeas corpus action in Dekalb County without payment of filing fees because the Missouri PLRA, fashioned after the federal PLRA, only applies to purely civil actions, not habeas corpus challenges to the validity of judgment and sentence.**

#### Standard of Review<sup>1</sup>

Mandamus is the appropriate remedy when there is a clear legal duty to act, and it compels the performance of an act by one who has a duty to perform it. *State ex rel. Rogers v. Board of Police Commissioners of Kansas City*, 995 S.W.2d 1 (Mo. App., W.D. 1999). As Relator has the right to proceed in a state habeas action challenging the validity of judgment and sentence and since habeas corpus

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<sup>1</sup> While included at pages 2-3 of Relator's Suggestions in Support of Petition for Writ of Mandamus, Relator's opening brief did not include a concise statement of the applicable standard of review, Rule 84.04(e), and Relator's counsel apologizes for the oversight and includes it here. The same is true with regard to Rule 84.04(h)(1), the docket sheet involving Respondent's order challenged in the instant case. Counsel again apologizes for the oversight in the opening brief.

challenges to validity of judgment and sentence are outside of the scope of the PLRA, Respondent should be ordered to allow Relator to proceed without payment of filing fees or other costs.

Habeas Challenging Validity of Judgment and Sentence is Outside the PLRA

Is Habeas truly civil? It is governed by the rules of civil procedure to the extent applicable. Rule 91.01(a). However, the habeas corpus challenge to the validity of sentence and judgment is not a purely civil action, but a special proceeding founded in constitutional provisions to protect the rights and liberties of incarcerated citizens. Article I, Section 12 of the Missouri Constitution. Under the PLRA, when an inmate files a purely civil action seeking monetary damages and successfully recovers, those damages are off-set by costs of the incarceration of the successful plaintiff, and proceeds are used to satisfy any outstanding court judgments or victim compensation funds, awards, etc. Section 506.387. Further, under 506.390, the Attorney General shall notify any victims of the incarcerated plaintiff's crime of the pending payment to the incarcerated plaintiff of any monetary judgments. Reading all the provisions of the Prison Litigation Reform Act *in para materia*, the concern is with offenders seeking to obtain money damages from named defendants, and not with proceedings, like state habeas founded in constitutional provisions, to evaluate the propriety and validity of a citizen's incarceration in this state.

Further, state habeas may be the only available remedy to challenge judgment and sentence where 24.035 or 29.15 is otherwise not available. See for

example, *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003); *Brown v. State*, 66 S.W.3d 721 (Mo. banc 2002); and *State ex rel. Meier v. Stubblefield*, 97 S.W.3d 476 (Mo. banc 2003). Incarcerated citizens deprived of liberty are entitled, as Respondent notes on page 15 of his brief, to file and pursue legal challenges under Rule 24.035 and 29.15. Fair policy would provide those who may only challenge validity of judgment and sentence by the only available remedy to them to do so, state habeas corpus, to proceed without costs, as do their incarcerated counterparts filing under Rule 29.15 or 24.035.

Respondent also expresses a concern that inmates might combine conditions of confinement challenges with legality of confinement, or other damage type claims in a writ of habeas corpus, thereby making an “end run around the PRA’s payment requirements and would raise claims clearly under the PLRA’s intended target.” (Resp. Brief at 14). Relator agrees such damage claims are the PLRA’s intended target, but not a habeas challenge to validity of judgment and sentence. However, despite respondent’s concern, courts can easily glean if a habeas action makes such truly civil claims for damages, and apply the act if those pleadings do so.<sup>2</sup> Any court can cursorily review pleadings and determine if they

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<sup>2</sup> Indeed, this Court recently applied the PLRA to a writ case in *State ex rel. Lee v. Sweeney*, No. SC 85577, where the incarcerated plaintiff not only made an oblique challenge to fairness of his conviction, even though he had fully litigated those claims on direct appeal and under the postconviction rules, but also requested

have civil claims for monetary damages or injunctive relief, and apply the PLRA if they do. But if it is a habeas corpus action seeking relief from potentially unconstitutional judgment and sentence, they should proceed, so as not to chill valid challenges, without cost as can a movant in a postconviction proceeding.

#### Response to Relator's Argument 1C

Relator contends that the postconviction rules were intended to provide a forum for evaluation of the propriety of judgment and sentence formally litigated by writ of habeas corpus. See *Wiglesworth v. Wyrick*, 531 S.W.2d 713 (Mo. banc 1976). However, state habeas corpus is available to challenge validity of judgment and sentence where the postconviction rules are not otherwise available to the litigant. See for example, *Amrine, supra*; *Stubblefield, supra*.<sup>3</sup> In any event, the ten dollar filing fee listed in Section 514.040.2 is much less likely to turn away an incarcerated habeas petitioner than the \$135 filing fee required by Respondent,

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monetary damages against certain named defendants. The Court appropriately dismissed the case when plaintiff failed to provide filing fee payments.

<sup>3</sup> Relator contends an incarcerated person challenging validity of judgment and sentence by state habeas when it is the only means to do so, is in a similar legal posture to those incarcerated persons challenging judgment and sentence by way of petition under Missouri postconviction rules, and neither litigant should bear costs to pursue their challenge to the validity and constitutionality of their conviction.

with the prospect of successive filing fees in appellate courts if Respondent were to deny relief.

### Response to Respondent 1D

Respondent's Brief at page 16 notes the many comparisons with the federal and Missouri prison litigation reform acts, but points out one difference, that in the federal scheme, the filing of three cases dismissed for frivolity will prevent an inmate from successively filing another pleading under the act unless the prisoner is in eminent danger of serious physical injury. 28 U.S.C. Section 1915(g). This distinction doesn't really matter. Clearly, the federal law was enacted one year before Missouri's PLRA, and Missouri's act was quite clearly based on the federal law. Therefore, how the federal courts have interpreted "prisoner seeking to bring a civil action ...", 28 U.S.C. Section 1915(a)(2), and whether this applies to habeas corpus petitions, is persuasive authority in interpreting the Missouri PLRA provisions.

Respondent accurately notes that "federal courts have consistently held the federal habeas corpus petitions under Section 2254 and 2255 fall outside the confines of the federal PLRA, and thus relators may be excused from paying a filing fee in its entirety upon a showing of indigency." Respondent's brief at 19. There is no reason for Relator to reiterate here the numerous cases respondent cites in his brief for that very proposition. Congress did not intend to apply the PLRA to an action challenging the constitutionality of judgment and sentence, but the legislation was enacted to stem the tide of litigation concerning prison

conditions and civil rights cases. *Naddi v. Hill*, 106 F.3d 275, 277 (9th Cir. 1997), citing congressional record.

While Missouri does not have a counterpart to the federal congressional record, passing a prison litigation reform act close on the heels of the passage of a federal PLRA, and modeled closely after the statutory language of the federal PLRA, is indicative that the Missouri legislature was also concerned with stemming the tide of frivolous inmate law suits for monetary damages and prison condition suits, much as the federal authorities were. Respondent's elaborate statutory arguments between federal habeas corpus statutes and the PLRA is unpersuasive. The simple fact is the Missouri legislature was tired of and sought a method to control what seemed an endless flood of meritless suits seeking monetary damages against correctional officials, prosecutors, judges, court personnel, private citizens and even public defenders, and sought to require inmates subjecting named defendants to such potentially meritless litigation to pay filing fees, as is required of non-incarcerated citizens as well seeking to file a civil suit. If the inmate's case has merit, a monetary reward will be forthcoming. If it doesn't, the filing fee requirements may prevent the inmate from filing a suit he or she knows is designed and born of a desire to vex or harass.

Finally, state habeas cannot, just as a 29.15 or 24.035 action cannot, be successfully pursued in a successive action. It can be filed, but should be summarily dismissed if it is nothing more than a repeated attempt to obtain relief on a pleading already rejected. Successive 29.15 and 24.035 actions are filed and

summarily dismissed under subsection (k) of the postconviction rules frequently in Missouri courts. So too can a successive habeas corpus action be summarily dismissed.

Respondent's brief at page 23 simply paints too broadly in claiming that "Thus, in Missouri, payment of fees may be reasonably construed as a manner, and potentially the only manner, to filter out frivolous habeas lawsuits from habeas lawsuits that have merit." The problem is those suits that have merit are lumped in with ones that may not by the requirement of filing fees, and these meritorious habeas actions may not be filed when the inmate is faced with the Hobson's Choice of sacrificing scant and precious resources in their inmate account or pursuing a challenge to validity of judgment and sentence which they may think will be denied in any event, causing them to question risking their limited treasury account. Applying the PLRA to state habeas challenges to the validity of judgment and sentence is not sound policy, and chills potentially valid challenges to constitutionality of judgment and sentence from being filed when a state habeas action is the only means to challenge validity of judgment and sentence.

## II.

### (Responds to Respondent's Point II)

**Relator should be allowed to proceed in this mandamus action in forma pauperis due to the nature of this action, to determine if respondent should have imposed \$135 filing fees on Relator to proceed in a writ of habeas corpus, pursuant to the provisions of the PLRA. Further, since Relator is represented in this writ by an organization funded in whole by the General Assembly to provide legal services to the indigent, under Section 514.040.3, any indigent client of the Public Defender who must petition the courts by writs involving an issue or concern in their case should do so without paying filing fees or costs.**

#### Standard of Review

Mandamus is the appropriate remedy when there is a clear legal duty to act, and it compels the performance of an act by one who has a duty to perform it. *State ex rel. Rogers v. Board of Police Commissioners of Kansas City*, 995 S.W.2d 1 (Mo. App., W.D. 1999). As Relator has the right to proceed in a state habeas action challenging the validity of judgment and sentence and since habeas corpus challenges to validity of judgment and sentence are outside of the scope of the PLRA, Respondent should be ordered to allow Relator to proceed without payment of filing fees or other costs.

Relator does not contend that all extraordinary writs should not be subject to the provisions of the PLRA. There are some that might be, including declaratory judgment actions or other actions seeking sweeping changes in conditions of confinement, or requesting monetary damages or other forms of injunctive relief. However, writs that challenge the validity of judgment and sentence, or that a sentence was excessive or impermissible, or some other issue pertaining directly to the propriety and length of the prisoner's incarceration, should not be subject to the PLRA, just as Relator has argued a writ of habeas corpus challenging the validity of judgment and sentence should not be subject to the PLRA.

Further, as Relator has argued that the Office of Public Defender falls within the scope of Section 514.040.3, despite Respondent's contentions to the contrary, where a public defender organization is representing their client in pursuing a writ which is necessary to adjudicate issues crucial to a case, involving the underlying criminal action and necessity to test validity of rulings by writ of prohibition or otherwise, or as in this case involving a writ of habeas corpus and the refusal of Respondent to allow Relator access to the courts without payment of an onerous filing fee, no fees or costs for that indigent client should be collected so that they can pursue the property of their judgment and sentence, or court action relating to their underlying cases. The public defender, as do other legal services or legal aid organizations funded by the state, act as a screening mechanism to take to the courts meritorious cases, and not frivolous or meritless cases.

Therefore, writs filed on behalf of an indigent client of the public defender should not be subjected to filing fee. 514.040.3.

### III.

#### (Responds to Respondent's Point III)

**Relator should be allowed to proceed in forma pauperis in this mandamus action and the underlying Dekalb County habeas corpus action without payment of filing fees or costs as the Public Defender may represent clients whose rights have been violated by imposition of invalid sentence and judgment, and Section 514.040.3 includes the Public Defender within its scope to obviate costs to the indigent clients it represents when proceeding in court.**

#### Standard of Review

Mandamus is the appropriate remedy when there is a clear legal duty to act, and it compels the performance of an act by one who has a duty to perform it. *State ex rel. Rogers v. Board of Police Commissioners of Kansas City*, 995 S.W.2d 1 (Mo. App., W.D. 1999). As Relator has the right to proceed in a state habeas action challenging the validity of judgment and sentence and since habeas corpus challenges to validity of judgment and sentence are outside of the scope of the PLRA, Respondent should be ordered to allow Relator to proceed without payment of filing fees or other costs.

#### Section A: The Public Defender has authority to represent Relator

Contrary to Respondent's contention, the Public Defender can represent Relator, or other indigent citizens such as Relator, whose rights have been clearly violated by imposition of invalid judgment and sentence, and especially where the

only available means for those clients to litigate the validity of judgment and sentence is by state habeas corpus proceeding. Under these circumstances, these clients no longer have Rule 29.15 or 24.035 proceedings available to them because the time limitations have expired, yet they do have a remedy in Missouri, and that is state habeas corpus. *Brown v. State*, 66 S.W.3d 721 (Mo. banc 2002).

Respondent's insistence that *State ex rel. Marshall v. Blaeuer*, 709 S.W.2d 111 (Mo. banc 1986), stands for the position that the Public Defender *lacks authority* to represent clients in a state habeas action that challenges judgment and sentence, is misguided. What that case stood for was the proposition that a *circuit court lacked authority to appoint* the Public Defender to represent clients in a state habeas corpus action that did not challenge the validity of judgment and sentence, but rather challenged conditions of confinement. Those are truly civil actions, unlike the quasi-criminal state habeas action that seeks to set aside judgment and sentence for constitutional invalidity.

It should be noted that in Relator's opening brief at page 20, Relator indicated the Courts of Appeals has appointed the Public Defender in writs of habeas corpus actions. As clarified in footnote 4, the Courts do not appoint, but rather on occasion request that we provide counsel in apparently meritorious state habeas actions which challenge validity of judgment and sentence, and to those clients with such meritorious claims, we generally agree to provide that representation. Relator's case here falls in this ambit, a meritorious habeas action for which an incarcerated person has no other recourse, and who has an available

remedy fashioned by this Court in *State ex rel. Meier v. Stubblefield*, 97 S.W.3d 476 (Mo. banc 2003) and the public defender, who is charged with protecting the constitutional rights of indigent incarcerated citizens, should have and does have the authority to act in defending those constitutional rights.

#### Response to Respondent's Section B

The Office of Public Defender is an agency funded completely by the General Assembly to provide legal services to indigent persons in the State of Missouri.

The General Assembly enacted, two years after the Prison Litigation Reform Act, subsection 3 of Section 514.040, providing that

where a party is represented in a civil action by a legal aid society *or* a legal services *or* other non-profit organization funded in whole or substantial part by monies appropriated by the General Assembly in the State of Missouri which has as its primary purpose the furnishing of legal services to indigent persons, or by private counsel working on behalf of or under the auspices of such society, all costs and expenses related to prosecution of the suit may be waived without the necessity of motion and court approval ... [emphasis added].

Relator contends the Public Defender is a non-profit organization, even as a state agency, funded entirely by monies appropriated by the General Assembly to provide legal services to indigent persons. Webster's Dictionary defines "non-profit" as "not conducted or maintained for the purpose of making a profit." It is

unnecessary to go to an Ohio case for a definition of legal aid society or legal services, because the statute utilizes terms in the disjunctive, and includes non-profit organizations. The Public Defender is not funded as an organization seeking to obtain profit from representing indigent persons. Any organization funded by the General Assembly that provides services to indigent persons will screen lawsuits out and proceed on meritorious actions. This is a screening process that the General Assembly had in mind when enacting 514.040.3, and it determined in fairness that persons who are indigent and who need access to the courts of this state shall have it. They should not be chilled from seeking access to the courts by fear of paying substantial filing fees or other costs to proceed to defend and protect their rights.

This is what Respondent would have Relator do. Relator only has an available remedy of state habeas corpus to challenge the validity of his judgment and sentence under this Court's decision in *Stubblefield, supra*. The Public Defender served as a screening agency in this case to determine if the client's case has merit, and it does, and has sought to protect Relator's rights in court by seeking state habeas relief. The prospect of paying substantial filing fees could and would chill incarcerated people from proceeding to court to vindicate their constitutional rights, especially when they are forced to use their scarce resources to have the ability to file and have access to the courts for review of the merits of their pleadings. Regardless of whether the Prison Litigation Reform Act seeks to encompass state habeas corpus actions challenging, not conditions to confinement,

but to the validity of judgment and sentence, where a public defender is representing an indigent person, and has screened for merit the indigent person's case, that person should have access to courts without payment of fees under 514.040.3.

It is unlikely that the General Assembly would ever intend a result that a prisoner, who is pursuing purely a civil action and could be represented by some sort of legal aid society or organization in doing so, would be entitled to access to the courts without payment of fees or costs, but one whose liberty was unlawfully denied by an unconstitutional judgment and sentence, could not have access to the courts without payment of substantial filing fees. As an agency funded entirely by the General Assembly to protect the rights of indigent citizens, the Public Defender should fall within the scope of 514.040.3 in those cases it determines has merit, and its clients should be excused from paying filing fees as are other indigent persons in this state.

## CONCLUSION

Because the PLRA does not include writs of habeas corpus challenging the validity of judgment and sentence, Relator should not have to pay the filing fee of \$135, and this writ of mandamus should issue to Respondent to allow Relator to file his habeas corpus petition without costs and fees. Alternatively, even if the PLRA does include writs of habeas corpus, where the Public Defender is undertaking representation of an indigent citizen deprived of liberty interest in a civil action, and certifies to the court that the person is in fact indigent as has been done here, the prisoner should be allowed to proceed without payment of costs or fees.

Respectfully submitted,

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### **Certificate of Compliance and Service**

I, Lew Kollias, hereby certify to the following. The attached reply brief complies with the limitations contained in Rule 84.06(b). The reply brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 4,057 words, which does not exceed the 7750 words allowed for Relator's reply brief.

The floppy disk filed with this reply brief contains a complete copy of this reply brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in November, 2003. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached reply brief and a floppy disk containing a copy of this reply brief were mailed, postage prepaid this 19th day of November, 2003, to Andrew Hassell, Assistant Attorney General, P.O. Box 899, Jefferson City, MO 65102.

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Lew Kollias