

**MISSOURI SUPREME COURT**

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**Supreme Court No. SC90000**

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**State of Missouri ex rel. Anthony Zinna,**

*Relator,*

**vs.**

**Troy Steele,**

*Respondent.*

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**RELATOR'S  
Opening Brief**

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**TABLE OF CONTENTS**

**TABLE OF CASES ..... 2**

**JURISDICTIONAL STATEMENT ..... 4**

**STATEMENT OF FACTS ..... 5**

**POINTS RELIED ON..... 8**

**ARGUMENT I..... 10**

**ARGUMENT II ..... 16**

**CONCLUSION ..... 23**

**RULE 84.06 CERTIFICATE ..... 24**

**CERTIFICATE OF SERVICE ..... 26**

**APPENDIX..... 27**

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Brown v. State</u> , 66 S.W.3d 721, 730-731 (Mo. banc 2002)	9, 16, 17, 19
<u>Drennen v. State</u> , 906 S.W.2d 880, 881 (Mo. App. E.D. 1995)	11
<u>Johnson v. State</u> , 938 S.W.2d 264 (Mo. banc 1997)	8, 10, 11, 14
<u>Murray v. Carrier</u> , 477 U.S. 478, 488, (1986)	20
<u>Rupert v. State</u> , 250 S.W.3d 442 (Mo. App. E.D. 2008)	15
<u>State v. Bulloch</u> , 838 S.W.2d 510, 513 (Mo. App. W.D. 1992)	14
<u>State v. Cooper</u> , 712 S.W.2d 27, 33 (Mo. App. E.D. 1986)	8, 14, 15
<u>State ex rel. LaChance v. Bowersox</u> , 119 S.W.3d 95 (Mo. banc 2003)	8, 11, 13, 21
<u>State ex rel. Nixon v. Jaynes</u> , 63 S.W.3d 210, 215-16 (Mo. banc 2001)	9, 16, 18, 20, 21
<u>State ex rel. Simmons v. White</u> , 866 S.W.2d 443, 446 (Mo. banc 1993)	9, 17
<u>State v Larson</u> , 79 S.W.3d 891, 895 (Mo. banc 2002)	10
<u>State v. Norsworthy</u> , 71 S.W.3d at 610 (Mo. banc 2002)	9, 17
<u>State v. White</u> , 646 S.W.2d 804, 808-09 (Mo. App. W.D. 1992)	14
<u>State v Young</u> , 969 S.W.2d 362, 364 (Mo. App. E.D. 1998)	13
<u>United States v. Munoz-Dela Rosa</u> , 495 F.2d 253, 256 (9th Cir.1974)	14, 15

**TABLE OF AUTHORITIES CONT'D**

<u>RULES AND STATUTES</u>	<u>PAGE</u>
Rule 24.035	9, 12 15, 16, 17, 18, 19, 20, 21, 23
Rule 29.07(b)(1),(2)	14
Rule 29.09	8, 10,11, 15, 19, 20, 21, 23
Sections 546.550-.570, RSMo	14
Section 558.026.1, RSMo	10

## **JURISDICTIONAL STATEMENT**

This case involves whether this Court should make its Preliminary Writ of Habeas Corpus permanent. This Court issued its Preliminary Writ of Habeas Corpus on May 5, 2009. Respondent filed his return to this Writ on May 20, 2009. This Court ordered full briefing. Accordingly, this Court has jurisdiction under *Mo. Const. art. V section 4* in that it may issue and determine original remedial writs of habeas corpus.

## STATEMENT OF FACTS

On March 14, 2003, Relator Anthony Zinna appeared before the Honorable Sandy Martinez in the Circuit Court of St. Francois County in Case No. 02CR615004 for a guilty plea hearing. (Guilty Plea Transcript found in Appendix at A-1). Relator was represented by counsel. Id. The State appeared by Assistant Prosecuting Attorney for St. Francois County, Mr. Bill Bryant. Id. Relator had been charged with one class C felony count of possession of a controlled substance (marijuana) inside the Farmington Correctional Center in St. Francis County occurring on October 26, 2000. Id. at A-8. The Court advised Relator that the range of punishment for the offense was “from two to seven years in the State Department of Corrections, up to a year in the county jail, up to a \$5,000 fine or a combination of both confinement and a fine.” Id.

The Assistant Prosecuting Attorney announced that in exchange for a plea of guilty, he recommended “five years consecutive to his present sentence in the Missouri Department of Corrections and we have agreed not to file as a prior and persistent offender.” Id. A-9. The Assistant Prosecuting Attorney then announced his agreement to the Court that a pre-sentence investigation would be waved and that Relator “will be sentenced today.” Id. Relator’s counsel affirmed that the Assistant Prosecuting Attorney had accurately recited the terms of the plea agreement to the Court. Id. The Court then restated this agreement directly to Relator whereupon he stated that this was his understanding of the agreement too. Id.

Following this exchange, the Court then asked Relator if he understood “that no one can promise want [sic] your sentence will be and any such promises are not binding on this Court and the Court can impose any sentence within the range of punishment permitted by law?” Id. at A-10. Relator stated that he understood and thereupon changed his initial plea of not guilty to guilty. Id. at A 10-12. The Court and the Relator agreed to proceed to sentencing. Id. at A-12.

The Court pronounced sentence as follows: “It will be the sentence, order and judgment of this Court that this defendant be committed to the State Department of Corrections for a term of five years for the class C felony of possession of a controlled substance in a correctional facility.” Id. at A-14. The Court did not specify whether the sentence was to run consecutively to or concurrently with the sentences that Relator was then serving. Id. at A 14-15.

The Court, later in the proceeding after pronouncing sentence stated: “As a result of that plea of guilty, the Court sentenced you to five years to serve in the State Department of Corrections; is that your recollection?” Id. at A 15-16. Relator responded: “Yes, Your Honor.” Id. The allocution and sentencing later closed without the Court ever specifically stating whether Relator’s sentence was to run concurrently with or consecutively to the other sentences that Relator was then serving. Id.

On the date of sentencing in Case No. 02CR615004, Relator was serving other sentences in the custody of the State Department of Corrections. (Relator’s Face Sheet found in appendix at A 23-27). Relator was then serving sentences in Case No.

93CR003469, Case No. 95CR000582, Case No. 95CR003161, Case No. 97CR001257, and Case No. CR19859f. Id. at A-24. Although these sentences had different sentence completion dates, all sentences excepting the five year sentence in Case No. 02CR615004 had been completed by August 20, 2007, according to Relator's Face Sheet maintained by Respondent. Id.

The Court later entered its written Sentence and Judgment in Case No. 02CR615004. The document stated: "It is the Sentence, Order and Judgment of the Court that the Defendant be confined for a term of 5 years for the offense of Possession of a Controlled Substance in a Correctional Facility, said sentence to run consecutive to sentence now being served and to be endured in such place of confinement as may be designated by the State Department of Corrections." (Written Sentence and Judgment in case no. 02CR615004, found in appendix at A-21).

The only sentence that Relator is serving at this time is the sentence at issue in this case arising from Case No. 02CR615004. (Relator's Face Sheet found in appendix at A 23-27). Respondent, according to Relator's Face Sheet, has calculated the five year sentence to run consecutively to Relator's prior sentences. Id. According to Relator's Face Sheet maintained by Respondent, Relator's maximum discharge date and mandatory release date are both presently fixed at August 19, 2012. Id.

**POINTS RELIED ON  
ARGUMENT I**

**RELATOR ZINNA IS ENTITLED TO A WRIT OF HABEAS CORPUS REQUIRING RESPONDENT STEELE TO RELEASE HIM FROM INCARCERATION BASED UPON THE SENTENCING COURT'S WRITTEN ORDER ERRONEOUSLY STATING THAT RELATOR'S FIVE YEAR SENTENCE RUN CONSECUTIVELY TO A PREVIOUS, NOW COMPLETED SENTENCE BECAUSE RULE 29.09 MANDATES THAT A SENTENCE SHALL RUN CONCURRENTLY WITH A PREVIOUS SENTENCE IF THE COURT FAILS TO STATE THAT IT RUN CONSECUTIVELY IN THAT THE SENTENCING COURT WHEN PRONOUNCING SENTENCE IN RELATOR'S PRESENCE FAILED TO STATE THAT HIS SENTENCE WAS TO BE SERVED CONSECUTIVELY WITH HIS PRIOR SENTENCES.**

Rule 29.09.

State ex rel. LaChance v. Bowersox, 119 S.W.3d 95 (Mo. banc 2003).

Johnson v. State, 938 S.W.2d 264 (Mo. banc 1997).

State v. Cooper, 712 S.W.2d 27 (Mo. App. E.D. 1986).

**POINTS RELIED ON**

**ARGUMENT II**

**RELATOR ZINNA IS ENTITLED TO A WRIT OF HABEAS CORPUS REQUIRING RESPONDENT STEELE TO RELEASE HIM FROM INCARCERATION BASED UPON THE SENTENCING COURT'S WRITTEN ORDER ERRONEOUSLY STATING THAT RELATOR'S FIVE YEAR SENTENCE RUN CONSECUTIVELY TO A PREVIOUS, NOW COMPLETED SENTENCE BECAUSE HABEAS CORPUS IS THE PROPER METHOD TO CHALLENGE A SENTENCE WHERE RELIEF UNDER RULE 24.035 IS TIME-BARRED AND CAUSE AND PREJUDICE CAN BE SHOWN IN THAT RELATOR IS OUT-OF-TIME TO FILE A RULE 24.035 CHALLENGE, HIS SENTENCE WAS NOT CALCULATED UNTIL MORE THAN TWO YEARS AFTER THE DATE ON WHICH HIS CURRENT SENTENCE WAS PRONOUNCED, AND HE IS PREJUDICED NOTING THAT HE WOULD BE FREE FROM INCARCERATION PRESENTLY IF HIS SENTENCE HAD BEEN PROPERLY CALCULATED TO RUN CONCURRENTLY WITH HIS NOW COMPLETED, PRIOR SENTENCES.**

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

State ex rel. Nixon v. Jaynes, 63 S.W.3d 210 (Mo. banc 2001).

State v. Norsworthy, 71 S.W.3d 610 (Mo. banc 2002).

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

## ARGUMENT I

RELATOR ZINNA IS ENTITLED TO A WRIT OF HABEAS CORPUS REQUIRING RESPONDENT STEELE TO RELEASE HIM FROM INCARCERATION BASED UPON THE SENTENCING COURT'S WRITTEN ORDER ERRONEOUSLY STATING THAT RELATOR'S FIVE YEAR SENTENCE RUNS CONSECUTIVELY TO A PREVIOUS, NOW COMPLETED SENTENCE BECAUSE RULE 29.09 MANDATES THAT A SENTENCE RUNS CONCURRENTLY WITH A PREVIOUS SENTENCE IF THE COURT FAILS TO STATE THAT IT RUN CONSECUTIVELY IN THAT THE SENTENCING COURT WHEN PRONOUNCING SENTENCE IN RELATOR'S PRESENCE FAILED TO STATE THAT HIS SENTENCE WAS TO BE SERVED CONSECUTIVELY WITH HIS PRIOR SENTENCES.

**Standard of Review:** The issuance of a writ is appropriate to correct an abuse of judicial discretion or to prevent an exercise of extra-jurisdictional power. State v Larson, 79 S.W.3d 891, 895 (Mo. banc 2002). In limited cases, a writ may be used when a trial court erroneously decides an important question of law, and no adequate remedy at law exists. Id.

A sentence is presumed by operation of law to run concurrently with any previous sentence unless the court specifically provides otherwise. See section 558.026.1, RSMo. *Rule 29.09* requires the sentencing court, when pronouncing sentence, to specify whether sentences are to be served concurrently or consecutively. See id; Johnson v. State, 938

S.W.2d 264 n.9 (Mo. banc 1997); Drennen v. State, 906 S.W.2d 880, 881 (Mo. App. E.D. 1995). If the oral pronouncement is silent, the sentence runs concurrently with any other sentence. See Rule 29.09; State ex rel. LaChance v. Bowersox, 119 S.W.3d 95 (Mo. banc 2003).

When pronouncing sentence in case no. 02CR615004 – the lone sentence by which Relator is presently incarcerated – the court failed to state whether this five year sentence was to run consecutively to or concurrently with the other sentences Relator was then serving. Relator’s five year sentence in case no. 02CR615004 was thus deemed by operation of law to run concurrently with the other sentences Relator was then serving. Id.<sup>1</sup> The record reflects that the Sentencing Court pronounced Relator’s sentence as follows:

THE COURT: Let the record reflect that allocution has been granted. It will be the sentence, order and judgment of this Court that this defendant be committed to the State Department of Corrections for a term of five years for the class C felony of possession of a controlled substance in a correctional facility. Mr. Zinna, since you

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<sup>1</sup> The prior sentences that Relator was serving at the time of his sentencing have now all been completed. Consequently, Relator should now be free from incarceration in that his five year sentence was to run concurrently with those sentences due to the Sentencing Court’s failure to specify orally in Relator’s presence that the sentences run consecutively.

receive a sentence from this Court I am required to advise you of your rights under Supreme Court Rule 24.035. You have the right to file with this Court to vacate, set aside or correct the judgment of conviction or sentence if you claim: (1): that your conviction or sentence imposed violates the Constitution or laws of this State or the Constitution of the United States, or (2) : that this Court was without jurisdiction to impose a sentence, or (3) : that the sentence imposed is in excess of the maximum sentence authorized by law. If an appeal of the judgment is taken, the motion shall be filed within ninety days after the date the mandate of the Appellate Court is issued. If no appeal of the judgment is taken, the motion shall be filed within 180 days after delivery to the State Department of Corrections. The Court is now required to examine you as to assistance of counsel received by you in this case. You are still under oath. The Court will remind you that prior to taking your plea of guilty I had you placed under oath and you are still under oath. (Guilty Plea Transcript found in appendix at A 14-15) (emphasis added).

The Court, later in the proceeding, again mentioned the five year sentence without specifying that it run consecutively:

THE COURT: As a result of that plea of guilty, the Court sentenced you to five years to serve in the State Department of Corrections; is that your recollection?

RELATOR: Yes, your Honor. (Guilty Plea Transcript found in appendix at A 15-16) (emphasis added).

In sharp contrast, the written Sentence and Judgment in case no. 02CR615004 materially differs from the oral pronouncement. The written Sentence and Judgment states:

“It is the Sentence, Order and Judgment of the Court that the Defendant be confined for a term of 5 years for the offense of Possession of a Controlled Substance in a Correctional Facility, said sentence to run consecutive to sentence now being served and to be endured in such place of confinement as may be designated by the State Department of Corrections.” (Written Sentence and Judgment in case no. 02CR615004, found in appendix at A-21) (emphasis added).

The sentencing court did not have Relator returned to court for re-sentencing. Id. and (Guilty Plea Transcript found in appendix at A 13-15). Therefore, the Court did not notify Relator in his presence of this change in the calculation of his sentence from the oral pronouncement before the Sentence and Judgment was entered of record. Instead, the Court made a material change in its sentencing by the entry of an erroneous docket entry.

The clear inconsistency between the written Sentence and Judgment and the oral pronouncement made in defendant’s presence necessitates that the oral pronouncement control. When a material discrepancy exists between the oral pronouncement of sentence and the written judgment, the oral pronouncement controls. See, e.g., State ex rel. LaChance v. Bowersox, 119 S.W.3d 95 (Mo. banc 2003); State v Young, 969 S.W.2d 362, 364 (Mo. App. E.D. 1998).

The reasoning for this bright-line rule is that an Order and Judgment derives its force from the court's judicial act of pronouncing sentence in front of the defendant rather than from the court's ministerial act of memorializing the sentence in written judgment. See, id. Here, the oral sentence controls, and the written judgment is erroneous. See Johnson v. State, 938 S.W.2d 264, 265 (Mo. banc 1997).<sup>2</sup>

An additional reason for this rule is the Sentencing Court's power to increase a defendant's sentence vis-à-vis its Written Sentence and Judgment without the defendant being present when the punishment is increased. See State v. Cooper, 712 S.W.2d 27, 33 (Mo. App. E.D. 1986). Accordingly, a court has no power to modify sentences in this manner and the oral pronouncement controls. See, id.; and, State v. Bulloch, 838 S.W.2d 510, 513 (Mo. App. W.D. 1992).

Critical due process concerns are implicated in this case. A defendant has a right to be present at the time of sentencing. See sections 546.550-.570, RSMo; and, *Rule 29.07(b)(1),(2)*. Courts have recognized the dangerous ramifications of lack of notice when a modification is made to a defendant's sentence in his absence. See, Bulloch, 838 S.W.2d at 513; State v. White, 646 S.W.2d 804, 808-09 (Mo. App. W.D. 1992); United

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<sup>2</sup> This Court in Johnson noted two exceptions to the general rule which do not apply in Relator's case. Relator's oral sentence was materially different from the written sentence and the Sentencing Court had the discretion to make the sentences run concurrently or consecutively.

States v. Munoz-Dela Rosa, 495 F.2d 253, 256 (9th Cir.1974).<sup>3</sup> Further, at least one Missouri court has opined that modification of a defendant's sentence made in his absence may violate the defendant's right to protection from double jeopardy. See Cooper, 712 S.W.2d at 33 n.6.

Without Relator being present, the Sentencing Court had authority to enter only the sentence as it was orally pronounced. This authority must be strictly limited because the “possibility of abuses inherent in broad judicial power to increase sentences outweighs the possibility of windfalls to a few prisoners.” Rupert v. State, 250 S.W.3d 442 (Mo. App. E.D. 2008); Cooper, 712 S.W.2d at 33 *quoting* Munoz-Dela Rosa, 495 F.2d at 255.

Had Respondent properly calculated and carried out the sentence in case no. 02CR615004 as required by *Rule 29.09*, Relator would have been released from incarceration on August 20, 2007. Consequently, this Court should make its preliminary Writ of Habeas Corpus permanent, and command Respondent to immediately release Relator from incarceration.

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<sup>3</sup> The Relator’s Due Process rights of in person notice of a change in his sentence dovetails into Argument II, *infra*. A Petition for Writ of Habeas Corpus is the only vehicle available to Relator to correct the erroneous sentencing effect given to the Written Sentence and Judgment by Respondent Troy Steele because Relator lacked notice to file a timely *Rule 24.035* motion.

## ARGUMENT II

RELATOR ZINNA IS ENTITLED TO A WRIT OF HABEAS CORPUS REQUIRING RESPONDENT STEELE TO RELEASE HIM FROM INCARCERATION BASED UPON THE SENTENCING COURT'S WRITTEN ORDER ERRONEOUSLY STATING THAT RELATOR'S FIVE YEAR SENTENCE RUN CONSECUTIVELY TO A PREVIOUS, NOW COMPLETED SENTENCE BECAUSE HABEAS CORPUS IS THE PROPER METHOD TO CHALLENGE A SENTENCE WERE RELIEF UNDER RULE 24.035 IS TIME-BARRED AND CAUSE AND PREJUDICE CAN BE SHOWN IN THAT RELATOR IS OUT-OF-TIME TO FILE A RULE 24.035 CHALLENGE, HIS SENTENCE WAS NOT CALCULATED UNTIL MORE THAN TWO YEARS AFTER THE DATE ON WHICH HIS CURRENT SENTENCE WAS PRONOUNCED, AND HE IS PREJUDICED NOTING THAT HE WOULD BE FREE FROM INCARCERATION PRESENTLY IF HIS SENTENCE HAD BEEN PROPERLY CALCULATED TO RUN CONCURRENTLY WITH HIS NOW COMPLETED, PRIOR SENTENCES.

A prisoner may file a writ of habeas corpus to challenge a guilty plea in those limited instances where a proceeding under *Rule 24.035* is time-barred and the prisoner can establish "cause and prejudice" warranting an exception to the post conviction relief motion's procedural default. See *Brown v. State*, 66 S.W.3d 721, 730-731 (Mo. banc 2002); and, *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 215-16 (Mo. banc 2001).

The relief sought in this petition for writ of habeas corpus is release from confinement based upon a sentencing error. This is the type of relief that ordinarily must be raised in a timely *Rule 24.035* motion. See, Norsworthy, 71 S.W.3d 610, 611 (Mo. banc 2002). Relator filed no such motion. Here, the procedural default for filing a *Rule 24.035* motion expired, at the latest, 180 days following his sentencing on May 14, 2003. (Guilty Plea Transcript found in appendix at A 1). Accordingly, habeas corpus is the proper mechanism to challenge Relator's sentence and confinement. See Norsworthy, 71 S.W.3d at 611-12.

Habeas corpus relief is available after the time has expired to file a motion pursuant to *Rule 24.035* if a movant can show: (1) a claim of actual innocence or (2) a jurisdictional defect or (3)(a) that the procedural default was caused by something external to the defense-that is, a cause for which the defense is not responsible-and (b) prejudice resulted from the underlying error that worked to the a movant's actual and substantial disadvantage. Norsworthy, 71 S.W.3d at 611-12.

Additionally, the movant must show, at a minimum, that the grounds relied upon in the habeas corpus petition were not known to him while proceedings under *Rule 24.035* were available. State ex rel. Simmons v. White, 866 S.W.2d 443, 446 (Mo. banc 1993). If a claim could have been raised in a *Rule 24.035* motion but was not raised, the movant waives that claim and cannot raise the claim in a subsequent petition for habeas corpus. Brown, 66 S.W.3d at 726.

Relator did not and could not have known that his sentence would be erroneously calculated to run consecutively with the sentences he was serving during the time period for filing a *Rule 24.035* motion. Relator's adult institutions Face Sheet, supplied by Respondent as Exhibit A to its Response and added to the appendix of Relator's Brief, amply demonstrates this point. (Relator's Face Sheet found in appendix at A 23-27). On May 14, 2003, case no. 02CR615004 was added to Relator's Face Sheet. Id. at A-24. This was one day after the Sentencing Court accepted his guilty plea. (Guilty Plea Transcript found in appendix at A-1). However, the sentence was not calculated in relation to his other sentences until March 27, 2006, more than two years after the Sentencing Court accepted Relator's plea and pronounced sentence in Relator's presence. On March 27, 2006, the face sheet was amended to show: "ADJUSTED RELEASE DATES AND RECALCULATED CS SENTENCE ON 12/02CR615004. RENUMBERED SEQUENCES AND PUT IN CHRONOLOGICAL ORDER. NECC." (Relator's Face Sheet found in appendix at A-24).

Relator did not know that his sentence in case no. 02CR615004 would be calculated by Respondent to run consecutively with his other sentences until March 27, 2006. Relator therefore did not know within the time for filing a *Rule 24.035* motion that his sentence would be "stacked" to run consecutively with his other sentences. The only other information on this crucial point appearing in the record is the Sentencing Court's oral pronouncement of sentence in Relator's presence on May 13, 2003. The Sentencing Court made no mention in its oral pronouncement that the sentence would run

consecutively. (Guilty Plea Transcript found in appendix at A 14-16). Although the prosecuting attorney in case no. 02CR615004 recommended that the sentence run consecutively and Relator agreed to this recommendation, the Sentencing Court warned before pronouncing sentence that it was not bound by the parties' recommendation. (Guilty Plea Transcript found in appendix at A 9-10). The only information appearing in the record about what Relator knew relative to his sentence during *Rule 24.035*'s filing period was that his sentence in case no. 02CR615004 was to run concurrently with his previous sentences based upon the Sentencing Court's oral pronouncement of his sentence in Relator's presence. (Guilty Plea Transcript found in appendix at A 14-16).

This case illustrates the wisdom undergirding *Rule 29.09*'s bright-line rule that multiple sentences run concurrently unless the Sentencing Court advises in the presence of the defendant / relator that the sentences run consecutively. This is a Due Process notice requirement at its core.

Relator has met the "cause and prejudice" exception to filing a timely *Rule 24.035* motion. A movant can avoid the motion's procedural default by showing cause for the failure to timely raise the claim at an earlier juncture and prejudice resulting from the error that forms the basis of the claim. See *Brown v State*, 66 S.W.3d 721, 722 (Mo. banc 2002); *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214 (Mo. banc 2001). "[T]he 'cause' of procedural default 'must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with

the State's procedural rule.” Jaynes, 63 S.W.3d at 215, *quoting*, Murray v. Carrier, 477 U.S. 478, 488 (1986).

The cause of the procedural default was the failure by the Respondent to timely calculate Relator’s sentence in case no. 02CR615004. Prior to Respondent improperly calculating Relator’s sentence on March 27, 2006, based upon the erroneous Written Sentence and Judgment as opposed to the Sentencing Court’s oral pronouncement in Relator’s presence, any *Rule 24.035* motion would have been moot. The improper effect given to the sentencing error was unknown to Relator. This is the kind of cause external to the defense – or plea – for which the “cause and prejudice” analysis was so wisely and fairly engrafted upon the strict procedural time frame set forth in *Rule 24.035*.

The prejudice analysis could not be more straightforward. The Relator is presently incarcerated in Respondent’s control even though his sentence expired on August 20, 2007. (Relator’s Face Sheet found in appendix at A-24). On September 5, 2007, Relator’s Face Sheet was modified to reflect that all of his institutional sentences had expired excepting case no. 02CR615004. Id. This document sets forth in bold relief that the only sentence by which the Relator is presently incarcerated is case no. 02CR615004. As previously set forth in Argument I, *supra*, this sentence by operation of law under *Rule 29.09* should have been properly calculated to run concurrently with the other sentences for which the Relator was then serving. Those sentences all expired on August 20, 2007. Respondent was under a legal duty to release Relator from incarceration on that date.

Thus, as noted in Jaynes, 63 S.W.3d at 215, in the course of its discussion of habeas corpus, Relator has demonstrated that his claim was not “known to him” during the period in which he could have challenged his sentence under *Rule 24.035*.

Alternatively, this case presents the type of unique manifest injustice that alone should allow for habeas relief for a movant who is in procedural default under *Rule 24.035*. Procedurally-defaulted prisoners can obtain habeas relief only by demonstrating “cause and prejudice” **or** “manifest injustice.” Jaynes, 63 S.W.3d at 215 (emphasis added). Manifest Injustice is typically thought of as a showing of “actual innocence,” however, a period of incarceration past the time for release is tantamount to actual innocence.

Finally, Relator filed his writ with this Court as one for Mandamus based upon the similar factual and legal precedent established by this Court in State ex rel. LaChance v. Bowersox, 119 S.W.3d 95 (Mo. banc 2003). This Court in the instant case, *sua sponte*, re-styled Relator’s *pro se* pleading and issued its preliminary Writ of Habeas Corpus prior to ordering full briefing. Relator alternatively requests that this Court issue a permanent writ of mandamus affording Relator his deserved release from confinement if this Court determines that a writ of habeas corpus should not issue.

Had Respondent properly calculated and carried out the sentence in case no. 02CR615004 as required by *Rule 29.09*, Relator would have been released from incarceration on August 20, 2007. Consequently, this Court should make its preliminary

Writ of Habeas Corpus permanent, or in the alternative to issue a permanent writ of mandamus, and command Respondent to immediately release Relator from incarceration.

## CONCLUSION

Respondent Troy Steele failed to properly calculate Relator's sentences as he enforced the erroneous written Sentence and Judgment stating that Relator's Five year sentence in case no. 02CR615004 run consecutively to Relator's other sentences (which were completed on August 20, 2007) rather than the sentence as pronounced by the Court. Rule 29.09 requires that the sentence in case no. 02CR615004 run concurrently with – as opposed to consecutively to – Relator's previous sentences. The Sentencing Court, when pronouncing sentence in Relator's presence, failed to specify how that sentence should be calculated. As such, there is a material discrepancy between the Sentencing Court's oral pronouncement of sentence and its written Sentence and Judgment which is resolved under Rule 29.09 by giving effect to the oral pronouncement and nullifying the Written Sentence and Judgment's treatment of the sentence as a consecutive sentence. Relator could not have known during the time frame established by Rule 24.035 that his sentence would be improperly calculated because his release date on that five year sentence was not calculated until more than two years after the Sentencing Court pronounced sentence in case no.02CR615004. Relator has thus shown a cause external to his defense excusing his procedural default under Rule 24.035. Relator has shown prejudice in that had Respondent properly calculated and carried out his five year sentence per the Sentencing Court's oral pronouncement, Relator would have been released from incarceration on August 20, 2007. Accordingly, this Court

should make its preliminary Writ of Habeas Corpus permanent and command Respondent Troy Steele to immediately release Relator from incarceration.

## **RULE 84.06 CERTIFICATE**

1. a. The undersigned certifies pursuant to Rule 55.03(3) that this brief is signed by at least one attorney of record in the attorney's individual name. The signer's address, Missouri Bar Number and telephone number are as follows:

John E. Cozean                      Mo. Bar No. 47740  
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The undersigned certifies that this brief is not verified or accompanied by affidavit.

b. The undersigned certifies pursuant to Rule 55.03(b) to the best of his knowledge, information and belief, formed after an inquiry reasonable under the circumstances, that: (1) the matters set forth in this brief are not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the matters set forth in this brief are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contents have evidentiary support of, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

c. The undersigned certifies pursuant to Rule 55.03(c) that this brief is not sanctionable.

2. The undersigned certifies that this brief complies with the limitations contained in Rule 84.06(b).

3. Relying on the word and line count of the word-processing system used to prepare this brief, the undersigned certifies that this brief contains 5,218 words and 716 lines of text.

4. Pursuant to Rule 86.06(g), the undersigned certifies that the disks containing this brief that are filed with the Court and served to the parties have been scanned for viruses and that they are virus-free.

Respectfully submitted,

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**IN THE SUPREME COURT OF MISSOURI**

STATE OF MISSOURI EX REL.	)	
ANTHONY ZINNA,	)	
	)	
Relator,	)	
	)	
v.	)	Case No. SC900000
	)	
TROY STEELE,	)	
	)	
Respondent.	)	

**CERTIFICATE OF SERVICE**

THE UNDERSIGNED hereby certifies that a copy of *Relator's Opening Brief* were served up the following attorneys of record by mailing the same, first class mail, postage prepaid, this \_\_\_\_ day of July, 2009. This brief contains the information required by Rule 55.03 and contains 5,218 words.

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**APPENDIX**

TRANSCRIPT OF PLEA SENTENCING .....A-1, A-2, A-3, A-4, A-5,  
A-6, A-7, A-8, A-9, A-10, A-11, A-12, A-13, A-14, A-15, A-16, A-17, A-18, A-19

SENTENCE AND JUDGMENT .....A-20, A21, A-22

FACE SHEET.....A-23, A-24, A-25, A-26, A-27

RULE 20.09.....A-28