

Case No. 90000

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IN THE MISSOURI SUPREME COURT

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STATE ex rel. ANTHONY ZINNA,

*Relator,*

v.

TROY STEELE, Warden,

*Respondent.*

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Original Proceeding in Habeas Corpus

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RESPONDENT'S STATEMENT, BRIEF, AND ARGUMENT

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## **JURISDICTIONAL STATEMENT**

This Court has jurisdiction to issue original writs of habeas corpus under Article V, §4, of the Missouri Constitution (as amended 1976).

## **SUMMARY OF THE ARGUMENT**

Relator Anthony Zinna (“Zinna”) argues that his written sentence, which states that he is to serve his five year sentence for possession of a controlled substance in a correctional facility consecutively, is inconsistent with the formal oral pronouncement of his sentence which was silent on this issue. (Petition at 3).

This Court should quash its preliminary writ of habeas corpus because Zinna defaulted his claim by failing to raise it in a Rule 24.035 post-conviction motion. He cannot overcome this default. Alternatively, this Court should find that his claim is without merit because the circuit court adopted the plea agreement of the parties and sentenced Zinna in accordance with its terms to a consecutive five year sentence. Furthermore, the oral and written judgments are not conflicting.

## STATEMENT OF FACTS

On March 14, 2003, Anthony Zinna, pled guilty to possession of a controlled substance in a correctional facility. (App. pgs. 8, 20-22). The St. Francois County Circuit Court accepted Zinna's guilty plea and sentenced him in accordance with his plea agreement with the state. (App. pgs. 13-14, 20-22). At his guilty plea hearing, the circuit court discussed the terms of his plea bargain, including the consecutive sentence:

Mr. Bryant: For a plea of guilty we recommend **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.

Court: And also, he would waive his right to a pre-sentence investigation?

Mr. Bryant: That is correct Judge, he will be sentenced today.

Court: Mr. Siegler is that your understanding of the plea agreement?

Mr. Siegler: It is, Your Honor.

Court: **Mr. Zinna, is that your understanding of the plea agreement?**

[Defendant] Zinna: **Yes, Your Honor.**

Court: You understand that under the plea agreement the state would be recommending to this Court that **I sentence you to five years** in the Department of Corrections, and that **I run that consecutive to the time that you are currently** serving and that you would be waiving your right to a pre-sentence investigation?

Zinna: **Yes, Your Honor.**

Court: Do you have any questions whatsoever about that plea agreement?

Zinna: No, Your Honor.

Court: Do you know of any other plea bargains or promises that have been made that have not been entered on the record here today by Mr. Bryan[t] or Mr. Siegler?

Zinna: No.

(App. pgs. 9-10) (emphasis added). After finding that there was a factual basis for Zinna's guilty plea and that his plea was made voluntarily, intelligently and with a full understanding of his rights, the circuit court restated the terms of the plea agreement:

Court: ... Again, the recommendation to this Court is **five years consecutive** to the time he is currently serving and you will not pursue the defendant as a prior and persistent offender; is that correct?

Mr. Bryant: That is correct, Judge.

Court: Mr. Siegler, is there anything you would like to say?

Mr. Siegler: No, Your Honor.

Court: Mr. Zinna, do you know of any legal reason **why this Court should not now impose sentence upon you in accordance with your plea agreement?**

Zinna: **No, Your Honor.**

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.

(App. pgs. 13-14) (emphasis added). Pursuant to the plea agreement the court sentenced Zinna to five years of imprisonment, to be served consecutive to the sentence he was currently serving in Missouri Department of Corrections in the written judgment. (App. pgs. 20-22).

Zinna was received by the Missouri Department of Corrections on March 14, 2003. (App. pgs. 28, 33). On May 14, 2003, the Missouri Department of Corrections added Zinna's new five year consecutive sentence for possession of a controlled substance in a correctional facility to his Adult Institutions Face Sheet. (App. pgs. 24, 30, listed as sequence 12).

Zinna did not appeal the judgment, nor did he file a post-conviction Rule 24.035 motion. Instead, nearly three years after his sentencing, on August 6, 2007, he filed a motion in the sentencing court to correct his sentence *nunc pro tunc*. (Petition at 2). The court denied petitioner's motion on November 7, 2007. (Petition at 2).

## ARGUMENT

This Court should quash its preliminary writ of habeas corpus because Zinna defaulted his claim by failing to raise it in a Rule 24.035 post-conviction motion. He cannot overcome this default. Alternatively, this Court should find that his claim is without merit.

### **I. Zinna procedurally defaulted on his claim and cannot overcome his default (response to Relator’s argument II).**

“[H]abeas corpus is not a substitute for appeal or post-conviction proceedings.” *State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 (Mo. banc 1993). Under Missouri law, “[a] person who has suffered criminal conviction is bound to raise all challenges thereto timely and in accordance with the procedures established for that purpose.” *Id.* “A defendant who fails to raise such claims in post-conviction proceedings is said to have procedurally defaulted on those claims.” *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214 (Mo. banc 2001).

Missouri Supreme Court Rule 24.035 provides the exclusive procedure by which a person who has pled guilty to an offense may challenge his conviction and sentence. During sentencing, the circuit court advised Zinna about his rights under Rule 24.035 and instructed that his motion to vacate, set aside, or correct the judgment of conviction or sentence must be filed within 90 days after the mandate of the appellate court if an appeal is filed, and 180 days after delivery to the Department if no appeal is filed. (App. pgs. 14-15). However, Zinna did not file a Rule 24.035 motion.

Zinna was returned to the Missouri Department of Corrections on March 14, 2003. (App. pgs. 28, 33). Because he did not file an appeal, he had 180 days to file his Rule 24.035 motion from the date he was delivered to the Missouri Department of Corrections. Mo. Sup. Ct. R. 24.035(b)(3)(1) (2003). Therefore, Zinna had until September 10, 2003, to file a Rule 24.035 motion to challenge the judgment.

Because Rule 24.035 provides the exclusive procedure by which Zinna could seek relief for his claim, he was subject to the time limits imposed by that rule. *State v. Ralston*, 41 S.W.3d 620, 622 (Mo. App. W.D. 2001). Zinna's failure to file a Rule 24.035 motion precludes the assertion of his claim in a state habeas proceeding. *Simmons*, 866 S.W.2d at 446; *see Nixon*, 63 S.W.3d at 214. Thus, his claim is procedurally barred. In order to obtain a review of the merits of this claim, Zinna must show either a jurisdictional defect, cause and prejudice, or a manifest injustice (newly discovered evidence of actual innocence). *Brown v. State*, 66 S.W.3d 721, 731 (Mo. banc 2002). He cannot satisfy any of these tests.

**A. Zinna does not show sufficient cause to overcome his default**

Zinna concedes that his claim should have been raised in a Rule 24.035 motion, and agrees that no such motion was filed. (Relator's Brief pg. 17). However, he suggests that he can show cause to overcome his default because the Missouri Department of Corrections allegedly failed to calculate his consecutive sentence until March 27, 2006. (Relator's Brief pg. 20). Zinna is wrong.

Cause occurs when "some objective factor external to the defense impeded counsel's [or the petitioner'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). Furthermore, habeas relief is available where the petitioner's claim was not known or reasonably discoverable during the filing period under Rule 24.035. See *Brown v. Gammon*, 947 S.W.2d 437, 440 (Mo. App. W.D. 1997); see also *Brown*, 66 S.W.3d at 731.

The record demonstrates that this claim was known to him and reasonably discoverable during the 180 day time period in which he could file for relief under Rule 24.035. First, Zinna was personally present at his plea and sentencing hearing. He orally acknowledged that the five year consecutive sentence was part of the terms of the plea agreement. The court specifically inquired as to whether Zinna understood the terms of the agreement. He said that he did, and affirmatively stated that no other promises had been made. The court then asked Zinna if there was any reason it should not sentence him in accordance with the agreement, and he stated no. If there was a question with his sentence Zinna could have inquired immediately. Second, Zinna received a copy of the written judgment shortly after the court issued it on March 18, 2003. And third, Zinna received a copy of his Adult Institutions Face Sheet showing that the Department added a new five year consecutive sentence on or shortly after May 14, 2003. (App. pgs. 23-28). Thus, Zinna's claim was known to him or reasonably discoverable well before the time limits of the Rule expired on September 10, 2003.

Indeed, numerous inmates have challenged a discrepancy between their oral pronouncement of sentence and written judgment in timely filed post-conviction motions. See e.g., *Johnson v. State*, 938 S.W.2d 264 (Mo. banc 1997); *Rupert v. State*, 250 S.W.3d 442 (Mo. App. E.D. 2008); *Foster v. State*, 183 S.W.3d 308 (Mo. App. W.D. 2006); *State*

*v. Kuhlenberg*, 981 S.W.2d 617 (Mo. App. E.D. 1998); *State v. Johnson*, 864 S.W.2d 449 (Mo. App. W.D. 1993). Zinna should not be allowed to circumvent post-conviction remedies, only to present his claim long after his sentencing occurred.

Although the record demonstrate otherwise, Zinna argues that he was unaware of his claim until March 27, 2006, when the Missouri Department of Corrections calculated his consecutive sentence in relation to his other sentences. (Relator’s Brief at 18). Yet, this argument is disingenuous. Indeed, Zinna’s institutional records do not support this claim. On May 14, 2003, the Department of Corrections added Zinna’s five year consecutive sentence to his adult institutional face sheet. (App. pgs. 24, 30). On that date, his consecutive sentence was calculated to start on September 2, 2007. (App. pg. 28). On March 27, 2006, the Department of Corrections “recalculated” the start date of his consecutive sentence, because Zinna was credited with an additional 13 days of jail time credit on his previous sentences from the Circuit Court of St. Louis County, case no. 97CV-001257. (App. pg. 30). Due to the 13 day credit, his consecutive sentence start date was recalculated and moved up to August 21, 2007. (App. pgs. 27-28, 30, 33). His sentence was always listed as a consecutive sentence. (App. pgs. 28, 33). Thus, his argument is meritless.

Zinna knew of this claim at the time of his sentencing and was reasonably aware of his claim prior to the expiration of his state post-conviction remedies. His failure to present this claim in a timely Rule 24.035 motion was not due to any conduct by the state or the Missouri Department of Corrections. Thus, he fails to demonstrate “cause” to overcome his default. Because “cause and prejudice” are conjunctive criteria and Zinna

has not shown “cause” for the default, this Court need not reach the issue of prejudice. *See Murray*, 477 U.S. at 496-97.

**B. Zinna cannot show that he is actually innocent**

The standard for showing manifest injustice is “actual innocence.” *Jaynes*, 63 S.W.3d at 216; *see also Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc 2000). In *Clay*, this Court explicitly adopted the federal standard set out in *Schlup v. Delo*, 513 U.S. 298, 315-16 (1995). Therefore, in order to show a “manifest injustice,” Zinna must show newly discovered evidence of actual innocence. *Clay*, 37 S.W.3d at 217.

Zinna does not suggest that he is actually innocent of the crime of possession of a controlled substance in a correctional facility. Indeed, he presents no new evidence that he did not commit that crime. Instead, Zinna argues that he meets this requirement because his continued incarceration is tantamount to actual innocence. (Relator’s Brief pg. 21). Yet, this blanket assertion does not meet the definition of “actual innocence” as required by this Court or the United States Supreme Court.

The United States Supreme Court has explicitly held that, in non-capital cases, “the concept of ‘actual innocence’ is easy to grasp” and means only that the charged person did not commit the crime. *Sawyer v. Whitley*, 505 U.S. 333, 341 (1992). Following *Sawyer*, the Eighth Circuit and Tenth Circuit have held that non-capital sentencing errors do not fit into *Sawyer*’s definition of “actual innocence.” *United States v. Wiley*, 245 F.3d 750, 752 (8th Cir. 2001); *Embry v. Herschberger*, 131 F.3d 739 (8th Cir. 1997) (*en banc*); *Reid v. State of Oklahoma*, 101 F.3d 628, 630 (10th Cir. 1996).

The United States Supreme Court has distinguished claims of factual innocence (a claim that the defendant did not commit the illegal act) from claims that the sentence was flawed. The Supreme Court has held that “‘actual innocence’ means factual innocence, not mere legal insufficiency.” *Bousley v. United States*, 523 U.S. 614, 623-24 (1998). In *Schlup*, the Supreme Court reinforced the message of factual innocence, and required that the defendant must provide “new reliable evidence” of his innocence to meet this exception. *Schlup*, 513 U.S. at 324. The Court contrasted claims of factual innocence with claims of sentencing error: “the threat to judicial resources, finality, and comity posed by claims of actual innocence is thus significantly less than that posed by claims relating only to sentencing.” *Id.*

If this Court were to adopt Zinna’s standard for “manifest injustice,” it would significantly alter the test for “manifest injustice” and distort the purpose of this exception. The United States Supreme Court has not extended the exception of “manifest injustice” to situations beyond those involving a petitioner's actual innocence. *Wiley*, 245 F.3d at 752. Indeed, the Court has emphasized the narrowness of the exception and has expressed its desire that it remain “rare” and available only in the “extraordinary case.” *Id.* Because Zinna does not suggest that he was actually innocent of the crime to which he pled guilty, and does not present any evidence demonstrating his innocence, this Court should not extend this exception to Zinna.

### **C. The trial court had jurisdiction**

Zinna does not allege that the circuit court lacked jurisdiction to try him. Nor could he demonstrate otherwise. There are only two types of jurisdiction: subject-matter

jurisdiction and personal jurisdiction. *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 252 (Mo. banc 2009). The court below had personal jurisdiction over Zinna because he was present in the State of Missouri and the crime occurred in the State of Missouri. *Id.* at 252-53. The circuit court had subject-matter jurisdiction to try the criminal case because possession of a controlled substance in a correctional facility is a felony and circuit courts have the power to try felonies. *Id.* at 253-54; Mo. Const., Art. V, §14 (as amended 1976); Rev. Mo. Stat. §565.020.2 (2000). Thus, the circuit court had both personal jurisdiction over Zinna and subject-matter jurisdiction over Zinna's case.

Furthermore, Zinna does not allege that the circuit court had no jurisdiction to impose the sentence in question, or that the circuit court imposed a sentence that exceeded that authorized by law. *Clay v. Dormire*, 37 S.W.3d 214, 218 (Mo. banc 2000). The circuit court's five year sentence for possession of a controlled substance in a correctional center, a class C felony, was well within the authorized term of imprisonment. Rev. Mo. Stat. §558.011 (2000). Further, the circuit court had discretion to run his sentence consecutively to his previous sentences. Rev. Mo. Stat. §558.026 (2000).

In conclusion, Zinna's claim should have been included in a timely filed Rule 24.035 motion. Because Zinna does not allege that a jurisdictional defect was present, and does not demonstrate either cause and prejudice, or a claim of actual innocence, he cannot overcome his default. Therefore, this Court should quash its preliminary writ of habeas corpus.

**II. Zinna is not entitled to the granting of his petition for a writ of habeas corpus because his claim is meritless (response to Relator’s argument I).**

Zinna contends that the written judgment of conviction and sentence conflicts with the oral pronouncement of sentence because the court did not explicitly state that his five year sentence would run consecutively with his previous sentences. (Relator’s Brief at 11). A second sentence runs concurrently “unless the court specifies that they shall run consecutively.” Rev. Mo. Stat. §558.026.1 (2000). However, the factual premise this argument is erroneous because the record of his sentencing demonstrates that the circuit court adopted the plea agreement and sentenced him to a consecutive sentence in accordance with its terms of the agreement.

**A. The court specified that the sentence runs consecutive**

“[t]he Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner.” *Jones v. Thomas*, 491 U.S. 376, 386 (1989) quoting *Bozza v. United States*, 330 U.S. 160, 166-67 (1947). Under Missouri Supreme Court Rule 29.09, “the court, when pronouncing sentence, shall state whether the sentence shall run consecutively to or concurrently with sentences on one or more offenses for which defendant has been previously sentenced. If the court fails to do so at the time of pronouncing the sentences, the respective sentences shall run concurrently.” The sentencing transcript demonstrates that Rule 29.09’s requirement was satisfied here. Therefore, there was no “wrong move by the judge.”

During his sentencing, Zinna, his attorney, and the assistant prosecuting attorney, asked the judge to sentence him in accordance with his plea agreement, so that Zinna

would receive a five year consecutive sentence. The judge accepted the plea agreement and sentenced him in accordance with the terms. The court questioned Zinna about his understanding and desire to accept the terms of the plea agreement. (App. pgs. 9-10). Each time he informed the court that he understood the plea was for a consecutive five year sentence. (App. pgs. 9-10). After the court accepted Zinna's guilty plea, it immediately moved to his sentencing. (App. pgs. 13-14).

During sentencing, the court again restated the terms of the plea agreement, "Again, the recommendation to this Court is five years consecutive to the time he is currently serving and [the prosecutor] will not pursue the defendant as a prior and persistent offender; is that correct?" The assistant prosecutor stated, "That is correct Judge." (App. pg. 14). The court then inquired directly of Zinna, "Mr. Zinna, do you know of any legal reason why this Court should not now impose sentence upon you in accordance with your plea agreement?" Zinna replied "No, Your Honor." The court then stated, "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." (App. pg. 14). Thus, the record reflects that the court specified that Zinna's sentence would run consecutive when it stated that it was going to impose Zinna's sentence upon him in accordance with the plea agreement.

Zinna takes one sentence from the oral sentencing proceeding out of context and attempts to invalidate the meaning of what the court actually said. Zinna argues that pronouncement of his sentence did not occur until the court stated, "It will be the

sentence...” (Relator’s Brief pgs. 6, 11). Yet, his argument ignores the discussion between the parties at Zinna’s sentencing, the court’s intent to sentence Zinna in accordance with the terms, and more importantly, Zinna’s implicit request that the court adopt the terms of the agreement. Missouri Supreme Court Rule 24.02(d)(3) requires such a discussion with the defendant so the court “will embody the disposition provided for in the plea agreement in the judgment and sentence.”

Ignoring the court’s intent to sentence Zinna to a consecutive sentence, in accordance with his plea agreement, would result in an unjust windfall in Zinna’s favor, “penalizing the judge for failing to pronounce exactly the right word at exactly the right time, despite the parties and the court’s clear intent to the contrary.” *Johnson v. State*, 938 S.W.2d 264, 265 (Mo. banc 1997). The record reflects the judge pronounced “consecutive” twice during the plea and sentencing proceeding, but Zinna interprets Rule 29.09 to require one more. Zinna argues the judge had to say “consecutive” after allocution. But Zinna offers no legal or policy reasons to support that argument. The natural consequence of this argument is that any statements regarding the plea bargain made on the record and approved by the court, yet made before allocution are irrelevant, and that this Court should not consider those statements to determine the intent of the court and the parties. Yet this would lead to an absurd and unjust result, especially here, when the record unequivocally demonstrates the intent of the parties and the court that Zinna receive a consecutive sentence.

Instead, this Court should examine the entire plea and sentencing proceeding to determine the oral pronouncement of Zinna’s sentence. This type of review allows the

Court determine the parties and the circuit court's intent. That result would not sidestep Rule 29.09. For example, in situations where the court is silent as to the issue of consecutive and concurrent sentences, and the court's intent is unclear or unascertainable from review of the sentencing proceedings, then the defendant should have his sentences run concurrently. Yet, in cases such as this, where the parties and the court's intent are clear and ascertainable, the defendant should receive exactly what he bargained for. This is especially true in the context of a guilty plea where the defendant bargains for a lesser sentence with the state and reaps benefits from that bargain.

Zinna received from the court exactly the sentence he bargained for: five years consecutive. Zinna willingly chose to limit his exposure to criminal liability by accepting that sentence, in exchange for the state's concession not to pursue him as a prior and persistent offender under §558.016.7(3). This Court should hold Zinna to his bargain.

**B. There is no conflict between the oral and written sentence**

Generally, if the oral pronouncement of sentence conflicts with the written judgment, the oral pronouncement controls. *State v. Hargrave*, 915 S.W.2d 387, 391 (Mo. App. W.D. 1996). The written judgment exactly reflected the terms of guilty plea agreement: Zinna's pre-sentence report was waived, Zinna's five year sentence was to run consecutively, and the State did not pursue Zinna as a prior and persistent offender (which may have resulted in a possible twenty year sentence). The record of the sentencing transcript reflects that the circuit court intended to impose a five year consecutive sentence. The parties bargained for that sentence. Thus, there is no conflict between the oral and written sentences.

If the circuit court chose to reject the terms of the plea agreement, it would have been required to explicitly state that on the record. Mo. Sup. Ct. R. 24.02(d)(4). The circuit court did not do so. Thus, the circuit court accepted the plea agreement and imposed the bargained for sentence.

If the Court were to determine that the circuit court erred in failing to say the word “consecutive” again, after allocution was granted, then an order requiring a full-resentencing would be the proper remedy. Because the record reveals that the trial court, the state and Zinna, intended for Zinna to receive a consecutive sentence, this Court should allow the trial court the discretion to sentence Zinna orally in accordance with the expectations of all involved in the litigation.

## CONCLUSION

For these reasons, this Court should quash its preliminary writ and deny Zinna habeas relief. In the alternative, this case should be remanded for a full re-sentencing.

Respectfully submitted,

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## **Certificate Of Compliance And Service**

I hereby certify that the attached brief complies with the limitations contained in Rule 84.06(b) of the Supreme Court of Missouri and contains \_\_\_\_\_ words, excluding the cover and this certification, as determined by Microsoft Word 2003 software; that the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses, using Norton Anti-virus software, and is virus-free; and that a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, on August 25th 2009, to:

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