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JURISDICTIONAL STATEMENT, STATEMENT OF FACTS,

POINT RELIED ON, AND ARGUMENT AFFIRMED

Relators affirm, and incorporate by reference as though fully set forth herein, their initial Jurisdictional Statement, Statement of Facts, Point Relied On, and Argument. In limiting their reply to specific parts of respondent's brief, Relators are not conceding any portion of, or argument in, respondent's brief not expressly addressed.

## REPLY ARGUMENT

The brief for Respondent places a great deal of emphasis on the fact that Respondent Melvyn Wiesman informed Stanley Johnson that his refusal to consent to reasonable time for his counsel to prepare “could have a negative impact on his defense.” (Brief for Respondent, page 10.) “In clear, unambiguous terms, Johnson told the court that he wished to proceed to trial within 180 days, *with counsel*, whether or not counsel was prepared. The record of this case shows, overwhelmingly, that this was a knowing, intelligent and voluntary position taken by Johnson.” (Brief for Respondent, page 13.) Emphasis added.

The brief prepared for Respondent by the St. Louis County Prosecuting Attorney’s Office also says, “In fact, distilled to its essence, Relators’ argument is that Johnson cannot knowingly and voluntarily proceed to trial with attorneys who are not prepared, that is, he cannot waive his right to effective counsel.” (Brief for Respondent, page 14.) This suggests that the author of Respondent’s brief believes that defendant Johnson has already waived his right to effective assistance of counsel.

What the Respondent’s brief fails to mention is that Respondent himself found no such waiver of effective counsel. To the contrary, Respondent predicted on the record that, under the course of action he

was choosing, the case might well get reversed for ineffective assistance of counsel. “If I deny the request for extension of time to prepare, I think there is a likelihood, possibility that if there is a conviction, that it will be overturned for lack of adequate representation of counsel.” (Relator’s Exhibit H, page A26.) So while *counsel* for Respondent seems to find a waiver of effective counsel within the brief, Respondent certainly found no such waiver on the record in court. In fact, Respondent’s words suggested that two trials were available, a fast one, then a second one when the first is overturned. (See Relators’ Exhibit H, page A26.) This statement made it clear that Respondent didn’t think that there had been a waiver of effective counsel.

Respondent spends the entirety of page 14 of his brief setting out numerous rights possessed by the defendant. He can completely waive his right to counsel, Respondent states. He can plead guilty. He can have a bench trial. He can waive post conviction relief. He can waive an appeal. He could waive his rights under the UMDDL. Relators agree that he has each and every one of those rights. But none of the six cases cited on that page deal with the issue in this case on which trial courts need guidance. None of those cases say that a trial court cannot, at the request of defense counsel, grant necessary or reasonable time for preparation when there has been a request for counsel *and* an exercise of

rights under the UMDDL. None of those cases say that such a request by counsel is not good cause for a grant of additional time under the UMDDL.

Respondent's brief also says, "Respondent found no waiver of the right to counsel because, at that time, Johnson had not expressed any desire to proceed to trial without counsel." (Brief for Respondent, page 13.) The Respondent's Brief is clearly saying that, while Mr. Johnson has not waived his right to counsel, he has prospectively waived his right to effective counsel. (Brief for Respondent, page 14.) In addition to being a fairly cynical view of the function of counsel in a capital case, this statement fails to deal with the case law, cited in Relators' Brief, that the right to counsel is the right to effective counsel. *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

The Respondent's Brief seems to suggest, without citation, that there is a type of representation by counsel that accused individuals may opt for that is somewhere between effective counsel and no counsel at all.

Respondent's brief fails to explain in what case law this intermediate level of assistance of counsel is explained or authorized. Respondent fails to provide the citation for the repeal of Missouri Rules of Professional Conduct, Section 4-1.1. "A lawyer shall provide competent representation to a client. Competent representation requires the legal

knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” The comment to this rule states, “Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. *The required attention and preparation are determined in part by what is at stake*; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.” Emphasis added.

Respondent’s brief also fails to explain how this lesser standard for assistance of counsel comports with the standards for investigation and representation enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984), and *Wiggins v. Smith*, 539 U.S. 510 (2003).

In *Strickland*, the United States Supreme Court wrote, “That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.” *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

In *Wiggins*, the United States Supreme Court held that the “mitigating evidence counsel failed to discover and present in this case is powerful.” *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). The Court found “prejudice as the result of counsel’s failure to investigate and present mitigating evidence.” *Id.* at 538. The sentence in that case was vacated on the ground that his trial counsel’s investigation of potential mitigating evidence was incomplete.” *Id.* at 538. For a similar United States Supreme Court case discussing the obligations of counsel in capital cases, see *Williams v. Taylor*, 529 U.S. 362 (2000).

The brief of Respondent also fails to explain what obligations of defense counsel in capital cases those counsel are allowed to ignore in cases where, as Respondent’s brief phrases it, an accused states that he wishes to “proceed to trial within 180 days, with counsel, whether or not counsel was prepared.” What obligations, under this lesser standard for performance of counsel that Respondent is positing, remain for counsel with regard to exploring areas like mental retardation, mental illness, the validity of DNA evidence, psychological conditions, psychiatric conditions, social background, records collection, or even basic investigation regarding guilt?

Respondent’s brief says that the plain language of the statute “will not bear” a reading that finds an implied waiver of the time limitations of

Section 217.460 “whenever a prisoner makes a speedy trial request under the UMDDL and also requests that counsel be appointed.” (Brief of Respondent, page 15.) That broad statement is actually more than Relators advocate. But Section 217.460 must allow for counsel requested by a defendant to be effective. It is an undeniable truth that reasonable time to prepare is a component of attorney effectiveness. A request of reasonable time to prepare is good cause for the granting of additional time under the statute.

In a case where, as here, the trial court feels that proceeding to trial without giving counsel time to prepare results in a situation where there is a “likelihood” of any conviction being “overturned for lack of adequate representation of counsel,” and where, as here, the court finds that counsel’s “request for additional time would be reasonable given that counsel from the Capital Division of the Public Defender office entered on the case on December 22, 2006, fewer than 30 days prior to the request for additional time,” the decision of that trial court to proceed on to trial warrants intervention in prohibition by this court. (See Relators’ Exhibit H, page A26, and Relators’ Exhibit J, page A30.) The avoidance of the unnecessary second trial predicted by Respondent is just the type of “unnecessary, inconvenient and expensive litigation” that prohibition is appropriate to prevent. *State ex rel. the Police Retirement System of St.*

*Louis v. Mummert*, 875 S.W.2d 553, 555 (Mo. 1994). See also, *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. 2001). This is particularly the case when the plain language of the statute gives Respondent the power to grant the reasonable request for good cause, yet Respondent refuses to exercise that power. Respondent has improperly added a condition not found in the statute, in that “good cause” extensions of time beyond 180 days under Section 217.460 do not require consent of the defendant.

Respondent’s brief notes, “Relators’ client now no longer wishes to be represented by Relators.” (Brief for Respondent, page 11.) Respondent’s brief continues, “whatever limited standing Relators might have had before the Court of Appeals is further diminished by Johnson’s stated intention to dismiss them and proceed without counsel.” *Id.* The fact is that, as the case is presently postured before this Court, Relators are the counsel of record. No requests to dismiss Relators or to proceed pro se have been granted. Any prospect that such a thing may come to pass is speculative at this point. As for standing to bring this matter of a request for reasonable time to prepare, and as for asserting counsels’ ethical and constitutional obligations before this Court, Relators are the persons whom the trial court, at the beginning of a trial will ask, “Is the defense ready?” There has been a request for counsel. (See Relator’s

Exhibit N, page A38.) Relators are the requested and appointed counsel of record. Unless and until that changes, Relators are obligated to provide counsel in a meaningful manner consistent with constitutional and ethical obligations and strictures. The ruling of the Respondent will substantially interfere with the quality of the representation of Mr. Johnson by Relators. *Hampton v. State*, 10 S.W.3d 515 (Mo. 2000), cited by the Respondent, is not analogous to the present situation.

Undersigned Relators have not brought a post conviction proceeding against the wishes of Mr. Johnson. Mr. Johnson has requested counsel. Undersigned Relators are the assigned attorneys. In the context of the action in which undersigned Relators are his counsel, they are attempting to ensure that the representation accorded him is effective under the Sixth Amendment.

In addition, Respondent suggests that because Relators are not “parties” to the lawsuit, they are not permitted to request a continuance. (Respondent’s brief, page 16.) Respondent misreads Section 217.460 which provides that the case be tried within 180 days “or within such additional necessary or reasonable time as the *court* may grant for good cause shown in open court, the offender or his counsel being present.... The *parties may stipulate* for a continuance or a continuance may be granted if notice is *given to the attorney of record with an opportunity for*

*him to be heard.*” Emphasis added. First, the granting of additional time for good cause is a separate clause of Section 217.460 that does not suggest that the “parties” stipulate to a continuance. Second, in the clause which refers to a stipulation of the parties, the statute even allows for notice and opportunity for *counsel* to be heard. The language of the statute itself suggests counsel does have the right to be heard on the matter of continuances.

“Evidently, according to Relators, defendant is only permitted to object to an extension of time when the state requests it, not when his attorneys do,” says the Brief of Respondent at page 16. Actually that is not what Relators are saying. Defendant is permitted to object when either the state or his attorneys request additional time. But if the request of the attorney that defendant himself has requested is reasonable or necessary to attempt to provide effective counsel, the court may grant it for good cause shown. Section 217.460, Revised Statutes of Missouri.

Respondent’s Brief continues, “Moreover, in a case such as this, when defendant has been afforded the opportunity to object to an extension of time and does, emphatically, express his objection to such an extension, there is no basis for any court to find that he nevertheless implicitly waived his rights under the statute.” (Brief of Respondent, page 16.)

Relators are not claiming that Mr. Johnson has implicitly waived *all* rights under the statute. Relators are saying that his request for counsel, while asserting rights under the UMDDL, necessarily compels a holding that necessary or reasonable time for that attorney to effectively prepare is good cause for additional time under Section 217.460, Revised Statutes of Missouri.

Respondent's counsel in his brief is notably much more hesitant to find an implied waiver of rights under the UMDDL than he is to find an implied waiver of the constitutional right to effective assistance of counsel, a waiver which his brief seems to take for granted in spite of the fact that Respondent himself found no such waiver.

The United States Supreme Court wrote, in *Johnson v. Zerbst*, 304 U.S. 458 (1938), "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused- whose life or liberty is at stake- is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record." *Id.* at 465. In this case, the

trial court made no finding of a waiver of counsel and no finding of a waiver of effective counsel. As quoted above, the Respondent predicted that the case might well be reversed for “for lack of adequate representation of counsel.” How could that be if Respondent found a waiver of counsel? If Respondent was finding a waiver of counsel, why did he deny the request of counsel to withdraw? (Relator’s Exhibit H, page A25, Relator’s Exhibit I, page A28.)

Was the prediction by the Respondent that the case might well be reversed for “for lack of adequate representation of counsel,” a sound basis for the suggestion in Respondent’s brief that Mr. Johnson has made a “knowing, voluntary and intelligent decision”? (Brief of Respondent, page 18.) How can Respondent suggest that Mr. Johnson has waived effective counsel if the Respondent also says that he will be able to use counsel’s performance to obtain a second trial?

The folly of the assertion by Respondent that an accused may assert a right to counsel who is “less than adequately prepared” becomes clear if it is applied to analogous constitutional rights. Would Respondent stand up for the rights of an accused to assert partially his right to a trial, and limit it to only the part of the trial where he is presenting exculpatory evidence? Would Respondent stand up for a partial exercise by an accused of his right to testify, limiting his participation only to direct

examination? May an accused limit his calling of witnesses in his own behalf to their direct examination?

There is a notable dichotomy between the statements of Respondent in the trial court and the brief prepared for him by the prosecutor. Respondent clearly struggled with this issue. He was not willing to rely upon the plain language of the statute to find that time for attorney preparation was good cause for additional time. But the dilemma that he described in court- his “rock and a hard place” discussion- exhibited none of the confidence of the brief filed in this Court by the prosecutor on his behalf. He did not find the waiver of effective counsel that the State on his behalf confidently asserts. It is a fair reading of Respondent Judge Wiesman’s concerns to say that he believes that a request for additional time in this case is reasonable, that he thinks a grant of additional time would be proper, that he thinks that if he doesn’t grant it the case may be overturned, yet he is worried that the statute does not explicitly tell him that time for attorney preparation can constitute good cause under the statute. Absent clear law on the matter, he feels he is “caught between a rock and a hard place” in deciding Relators’ request for additional time.

This Court, more than any other Court in the state, is aware of the complexities and difficulties of capital litigation. The best prepared

counsel, even given what seems adequate time, make mistakes in every case. One hopes that those mistakes are not result-changing mistakes. Do we really want to establish a right to counsel who is “less than adequately prepared,” or, as the Respondent terms it at another part of his brief, “not sufficiently prepared,” or a right to counsel “whether or not counsel [is] prepared”? (Brief of Respondent, pages 13 and 18.) Would the Sixth Amendment even allow that? Do we really want to prospectively, before the trial even starts, set up defense counsel to fail? That is what Respondent admitted here that he might be doing. The “assignment of counsel in a state prosecution at such time and under such circumstances as to preclude the giving of effective aid in the preparation and trial of a capital case is a denial of due process of law. The effective assistance of counsel in such a case is a constitutional requirement of due process which no member of the Union may disregard.” *Reece v. Georgia*, 350 U.S. 85, 89 (1955).

It is worth noting that nowhere in Respondent’s brief does he cite *State ex rel. Clark v. Long*, 870 S.W.2d 932 (Mo. App. S.D. 1994), cited by the Eastern District Court of Appeals in the Order denying relief to Relators. (Relator’s Exhibit L, A35.) It is obvious that Respondent realizes that the Eastern District misapplied *Long* to this case. This

Court should take the opportunity to settle this matter so that further confusion among trial courts and appellate courts can be resolved.

The procedure that trial courts should follow in instances where there are concurrent assertions of 1) the rights of an accused under the UMDDL and 2) the right to counsel, which means effective counsel, is simple. If, to use the terms of Section 217.460, Revised Statutes of Missouri, the trial court determines that the request of counsel- whose representation has been requested by the defendant- for time to prepare is “necessary or reasonable” to ensure that the accused receives effective assistance of counsel, then the trial court may make a finding on the record that the time granted pursuant to that request is granted for “good cause shown,” and shall not be included in the calculation of time under the statute. Relators urge this Court to clearly hold that trial courts may make such findings.

## CONCLUSION

For the foregoing reasons, Relators are entitled to a writ of prohibition ordering respondent not to convene a trial without giving Relators time to prepare for trial.

Respectfully submitted,

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Relators

CERTIFICATE OF COMPLIANCE AND SERVICE

I, the undersigned attorney, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's 84.06(b). The brief comprises 3765 words according to Microsoft word count.

The floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses using the McAfee Virus Scan 7.1.0 program which was updated on May 2, 2007 and according to that program is virus-free.

A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were mailed, first-class postage prepaid, this 3rd day of May, 2007, to counsel for respondent, Mr. Douglas Sidel, Assistant Prosecuting Attorney, 100 South Central, St. Louis, Missouri, 63105, (314) 615-2600, and an email containing a copy of said brief was sent to aforesaid counsel for respondent at [dsidel@stlouisco.com](mailto:dsidel@stlouisco.com), and a true and correct copy was mailed, first-class postage prepaid, to respondent, the Hon. Melvyn W. Wiesman, St. Louis County Courts Building, Division 19, 7900 Carondelet, Clayton, Missouri 63105 (314) 615-1519, fax (314)615-7658. A true and correct copy of the attached brief was mailed, first class postage

prepaid, to the defendant, Stanley Johnson, #1517 8-B-8, St. Louis  
County Jail, 100 South Central, Clayton, MO 63105.

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Bevy Beimdiek  
Relator