IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI ex rel, JEREMIAH W. (JAY) NIXON, Attorney General Relator, v. THE HONORABLE JAMES H. KELLY, Associate Circuit Judge, St. Francois County, Missouri, and Shirley Williford, Circuit Clerk St. Francois County, Respondents.	)))))))))))))))	No. SC83319

RESPONDENT THE HONORABLE JAMES H. KELLY'S

SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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Jurisdictional Statement

This is an original proceeding on a petition for a writ of certiorari pursuant to Missouri Supreme Court Rules 84.22 through 84.26 and Missouri Supreme Court Rule 91. On August 16, 2000, respondent the Honorable James H. Kelly, Associate Circuit Judge for the Circuit Court of St. Francois County, Missouri, granted Paul Haldeman's writ of habeas corpus and ordered him released from confinement. Jurisdiction properly lies in this Court, the Missouri Supreme Court. Missouri Constitution, Article V, Sec. 4(1).

Statement of Facts

Paul Haldeman, petitioner in the underlying habeas corpus proceeding, was convicted of two counts of sexual assault in State of Missouri v. Paul Haldeman, St. Louis County Cir. No. 93CR-794 (Relator's Exhibit A, Petition for Habeas Corpus, 1). Both counts involved the same victim, and charged conduct occurring on different dates – Count I occurred in July 1987 and Count II took place between October 1 and December 31, 1998 (Relator's Exhibits A and B, Sentence and Judgment, 1; Rel. Br. 2).

Mr. Haldeman was convicted after trial on both counts on April 28, 1994 (Relator's Exhibit A, Petition for Writ of Habeas Corpus). On June 10, 1994, the Circuit Court of St. Louis County sentenced Mr. Haldeman to a term of seven years imprisonment for Count II (Relator's Exhibit A, Judgment and Sentence). However, the Circuit Court granted Mr. Haldeman's motion for new trial on Count I (Relator's Exhibit F). Appellant posted $150,000.00 bond pending appeal (Relator's Exhibit A, Petition for Writ of Habeas Corpus).

On September 26, 1995, Mr. Haldeman's conviction on Count II was affirmed on appeal, his bond was revoked, and he was remanded to the Department of Corrections on October 6, 1995 (Relator's Exhibit A, Petition for Writ of Habeas Corpus; Relator's Exhibit F, Department of Corrections Face Sheet [labeled Respondent's Exhibit F] and Circuit Court Judgment). On May 13, 1996, Mr. Haldeman was found guilty on Count I and remanded to the Missouri Department of Corrections for a term of seven years imprisonment, to be served

concurrently with his term on Count II (Relator's Exhibit A, Sentence and Judgment). On December 9, 1999, the Department of Corrections notified Mr. Haldeman that his scheduled release date was April 28, 2000 (Relator's Exhibit A, Petition for Writ of Habeas Corpus). The Department of Corrections subsequently informed Mr. Haldeman that his release date was December 4, 2000, refusing to credit against his sentence on Count I the time he spent incarcerated on Count II (Relator's Exhibit A, 2; Letter of Donna Ann Coleman dated May 15, 2000).

After exhausting his administrative remedies within the Missouri Department of Corrections, Mr. Haldeman filed a petition for a writ of habeas corpus in the Circuit Court for St. Francois County, seeking credit for the time he spent in the Department's custody awaiting the disposition of Count I (Relator's Exhibit A, Petition for Writ of Habeas Corpus).

Mr. Haldeman argued that he was entitled to the time credit pursuant to Goings v. Missouri Department of Corrections, 6 S.W.3d 906 (Mo. banc 1999) (Relator's Exhibit A, Petition for Writ of Habeas Corpus). Relator filed a response to Mr. Haldeman's petition, arguing that Goings did not apply because Mr. Haldeman's conviction for Count I was not "related to" his conviction for Count II, and therefore the Goings court's interpretation of Section 558.031 did not apply (Relator's Exhibit D, Response to Order to Show Cause Why a Writ of Habeas Corpus Should Not Be Granted). Respondent, the Honorable James H. Kelly, granted Mr. Haldeman's petition on August 16, 2000. Relator filed a petition for certiorari in the Missouri Court of Appeals, Eastern District, seeking to

overturn respondent's grant of the writ. State ex rel Nixon v. Kelly, ED78322 (Mo.App. E.D. November 21, 2000), slip op at 1 (hereinafter Kelly, slip op). The Court of Appeals quashed the writ of certiorari. Kelly, slip op at 1. Relator's application for transfer was granted on February 13, 2001.

Point Relied On

Relator is not entitled to an order quashing Mr. Haldeman's writ of habeas corpus because Respondent properly granted the writ. Respondent properly applied the 1995 version of Section 558.031 RSMo because (1) State v. Whiteaker, 499 S.W.2d 412 (Mo. 1973), Section 1.160 RSMo (1986) and Article I, Section 10, Clause 1 of the United States Constitution guarantee him the benefit of the change in Section 558.031 RSMo which occurred after the offenses; or, in the alternative, (2) the 1995 amendment applies because it was in effect when the Department of Corrections calculated appellant's release date. Pursuant to the 1995 amendment to Section 558.031 Mr. Haldeman was entitled to time credit against his sentence on Count I because it was "related to" his incarceration on Count II. Both counts were tried together, involved the same complaining witness, were only separated when Mr. Haldeman received a new trial on Count I, and he was incarcerated awaiting trial on Count I because he lost his appeal on Count II.

State ex rel Nixon v. Kelly, ED78322 (Mo.App. E.D. November 21, 2000);

Goings v. Missouri Dept. of Corrections, 6 S.W.3d 906 (Mo. banc 1999);

State v. Whiteaker, 499 S.W.2d 412 (Mo. 1973);

Roy v. Missouri Dept. of Corrections, 23 S.W.3d 738 (Mo.App. W.D. 2000);

Lynce v. Mathis, 519 U.S. 433, 117 S.Ct. 891 (1997);

State ex rel. Nixon v. Dierker, 22 S.W.3d 787 (Mo.App. E.D. 2000);

State ex rel. Danforth v. Bondurant, 566 S.W.2d 478 (Mo. banc 1978);

Walker v. Walker, 954 S.W.2d 425 (Mo. App. E.D. 1997);

Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960 (1981);

State v. Jones, 899 S.W.2d 126 (Mo.App. E.D. 1995);

State v. Liffick, 815 S.W.2d 132 (Mo.App. E.D. 1991);

Section 1.160 RSMo (1969);

Section 1.160 RSMo (1993);

Section 558.031 RSMo (1986);

Section 558.031 RSMo (1995);

U.S. Con., Art. I, Sec. 10, Cl. 1.

Argument

Relator is not entitled to an order quashing Mr. Haldeman's writ of habeas corpus because Respondent properly granted the writ. Respondent properly applied the 1995 version of Section 558.031 RSMo because (1) State v. Whiteaker, 499 S.W.2d 412 (Mo. 1973), Section 1.160 RSMo (1986) and Article I, Section 10, Clause 1 of the United States Constitution guarantee him the benefit of the change in Section 558.031 RSMo which occurred after the offenses; or, in the alternative, (2) the 1995 amendment applies because it was in effect when the Department of Corrections calculated appellant's release date. Pursuant to the 1995 amendment to Section 558.031 Mr. Haldeman was entitled to time credit against his sentence on Count I because it was "related to" his incarceration on Count II. Both counts were tried together, involved the same complaining witness, were only separated when Mr. Haldeman received a new trial on Count I, and he was incarcerated awaiting trial on Count I because he lost his appeal on Count II.

This matter presents a single question: was the Missouri Department of Corrections required to grant Mr. Haldeman credit from October 6, 1995 to May 13, 1996 - the time he spent incarcerated on Count II awaiting the disposition of Count I of the same criminal cause from the same court. The Missouri Supreme Court's decision in Goings v. Missouri Dept. of Corrections, 6 S.W.3d 906 (Mo. banc 1999) controls and this Court should not quash the writ of habeas corpus in this case. Section 558.031 RSMo requires the Department of Corrections to credit

Mr. Haldeman for the period of time he served awaiting disposition of Count I. Relator makes two arguments in support of its writ of certiorari. Both arguments must fail, for reasons that follow.

Standard of Review

Reviewing a habeas corpus proceeding by way of a writ of certiorari, this court will examine the record and reverse for "the absence or an excess or usurpation of jurisdiction on the part of the court from which the proceedings were removed." State ex rel. Danforth v. Bondurant, 566 S.W.2d 478, 480 (Mo. banc 1978).

A.

The 1995 amendment to Section 558.031 RSMo, not the 1986 version of the Section, applies to Mr. Haldeman's incarceration.

First, Relator argues that the 1986 version of Section 558.031, not the 1995 amendment, is the controlling statute in this case (Rel. Br. 7-14). As a preliminary matter, this Court should not consider this argument at all as it was not raised below in the habeas corpus proceedings. In the Circuit Court, Relator only argued that Goings did not apply because the two Counts were not "related" (Relator's Exhibit D, Response to Order to Show Cause Why a Writ of Habeas Corpus Should Not Be Granted). "In Missouri, parties are estopped from raising issues on appeal which were not raised at the trial court level." Walker v. Walker, 954 S.W.2d 425, 428 (Mo. App. E.D. 1997), quoted in Roy v. Missouri Dept. of Corrections, 23 S.W.3d 738 (Mo.App. W.D. 2000).

Although this proceeding is not a direct appeal, it functions as such and the same principle should apply – if the lower court was not given the opportunity to consider this argument, a party should not be allowed to raise it for the first time in a reviewing court, surprising the opposing party with a new position. The Court of Appeals recognized this, and only reviewed Relator's arguments *ex gratia*. Kelly, slip op at 3.

Now, Relator suggests that this argument was not available to it because the Court of Appeals did not issue its final opinion in Roy until after Relator filed its response to Mr. Haldeman's petition for habeas corpus (Rel. Br. 10, [FN1]). He does not state why the lack of a modified opinion in Roy prevented him from raising the argument below.

Should this Court consider it on the merits, Relator's argument still fails. Prior to amendment, the section provided that a prisoner's pre-conviction jail time only counted towards the charges for which he was incarcerated, with a limited exception. Section 558.031.1 RSMo (1986). That exception was that a prisoner incarcerated on Offense A who remained incarcerated because of a detainer lodged for pending Offense B, would be credited on Offense B for the time he spent incarcerated as a result of the detainer. Section 558.031.1.

In 1995, Section 558.031 was amended to provide that a prisoner "shall receive credit toward the service of a sentence of imprisonment for all time in prison, jail or custody after the offense occurred and before the commencement of the sentence, **when the time in custody was related to that offense**" (emphasis

added). Relator asserts that, since the exception in the 1986 statute does not apply to Mr. Haldeman's incarceration, he is not entitled to the time credit (Rel. Br. 7-15). Relator's assertion is erroneous however, since the 1995 amendment to Section 558.031 – not the 1986 version – applies to Mr. Haldeman.

The crux of Relator's argument is that since the offenses took place prior to 1995, the amendment does not apply "retroactively" to grant Mr. Haldeman the time credit on his sentences (Rel. Br. at 8). Relator's position fails for two reasons (1) Section 1.160 RSMo (1986) as applied in this Court's decision in State v. Whiteaker, 499 S.W.2d 412 (Mo. 1973) guaranteed appellant the benefit of the 1995 amendment to Section 558.031 RSMo. or, in the alternative, (2) Mr. Haldeman became entitled to the time credit *after* the amendment took effect by virtue of the fact that he was remanded to the Department of Corrections *after* the effective date of the amendment.

(1)

Section 1.160 RSMo (1986) and State v. Whiteaker, 499 S.W.2d 412 (Mo. 1973) guarantees Mr. Haldeman the benefit of the change in Section 558.031 RSMo which occurred after the offenses.

The Court of Appeals held that Whiteaker controls and that Mr. Haldeman was entitled to the benefit of the 1995 amendments to Section 558.031. Kelly, slip op at 4-5. In Whiteaker, the defendant argued that the trial court erred in refusing to grant him jail time credit and that an amended statute made jail time credit mandatory. Whiteaker, supra, at 420. The Whiteaker court, citing Section

1.160(1) RSMo (1969), held that the proceedings below had to be conducted "according to existing laws." Whiteaker, supra, at 420-21. The new statute, making jail time credit mandatory, was part of the "existing laws" when Whiteaker's sentence became final, so he was entitled to the credit. Id. at 421.

In this case, the Court of Appeals' reliance on Whiteaker was sound – the amendment to Section 558.031 took effect in 1995. Mr. Haldeman was sentenced for Count I on May 13, 1996. Kelly, slip op at 5. The new version of Section 558.031 was an "existing law" when Mr. Haldeman was sentenced, and therefore it must apply to his sentence on Count I.

However, Relator states that Whiteaker does not apply to this case (Rel. Br. 10-14). Relator notes that Section 1.160, which the Whiteaker court cited, has been amended since that decision (Rel. Br. 11-12). The version of 1.160 applied by Whiteaker stated that criminal proceedings "shall be conducted according to existing laws." Section 1.160 RSMo, Whiteaker, supra, at 420-21. In 1994, Section 1.160 was amended to read that such proceedings "shall be conducted according to existing **procedural** laws" (emphasis added). Relator states that the grant of jail time is not a procedural matter so that law in effect at the time that Count I occurred should apply (Rel. Br. 11-13).

However, the *ex post facto* clause of the U.S. Constitution, Article I, Section 10, Clause 1, prohibits the State from applying the 1994 amendment to Section 1.160 so as to deprive him of jail time credit. In Lynce v. Mathis, 519 U.S. 433, 435, 117 S.Ct. 891, 893 (1997), Florida enacted statutes in 1983

granting prisoners various forms of time credit against their sentences. Lynce was convicted in 1986 and, based upon the credits he had accumulated pursuant to the 1983 statutes, was granted early release in 1992. Id. at 435-36, 117 S.Ct. at 893. However, in 1992 the Legislature repealed the earlier statutes, effectively revoking the credits, and Lynce was returned to custody. Id.

The Lynce Court held that Florida could not revoke Lynce's time credits because it would have the effect of increasing his punishment for an offense after he had committed it which would be prohibited by the *ex post facto* clause. Id. at 435-46, 117 S.Ct. at 895-99. In other words, he was entitled to the credits he received under the law in effect at the time of the offense. See also: Weaver v. Graham, 450 U.S. 24, 30, 101 S.Ct. 960 (1981) (retroactively decreasing the amount of "good time" credit violated the *ex post facto* clause). There is no material difference between what Florida did in Lynce and what Relator proposes to do here – both cases involve applying an amendatory law to deprive an inmate of time credit he was entitled to at the time of the offense. Therefore, the *ex post facto* clause of the U.S. Constitution prohibits the retroactive application of the amendment to Section 1.160 if the effect would be to deny Mr. Haldeman jail time credit.[1]

[1] It does not matter if that was not the intent of the Legislature in changing Section 1.160. It is the effect, not the intent, of the amendment that causes it to run afoul of the *ex post facto* clause. Lynce, supra at 444, 117 S.Ct. at 897.

In the law, as in life, timing can be everything. It is the date of the offense that distinguishes this case from Roy v. Missouri Dept. of Corrections, 23 S.W.3d 738 (Mo.App. W.D. 2000), upon which Relator relies. In Roy, the offenses – apparently – occurred while the 1994 version of Section 558.031 was in effect. He was charged in May of 1994. Id. at 741-42. However, Section 1.160 was amended effective in 1993. It was this amendment that redacted the provision that criminal proceedings "shall be conducted according to existing laws" and changed it to read that such proceedings "shall be conducted according to existing **procedural** laws." The Roy court stated that Section 558.031 was not a procedural law and the 1995 revision did not apply to Roy's case, since it was not in effect at the time of the offense. Id. at 741[FN1]. Since Section 1.160 had already been amended by the time Roy evidently committed his offenses, he was not entitled – as was Mr. Haldeman – to have the older version apply to his case.[2]

The Court of Appeals also found Roy readily distinguishable, noting that the two convictions about which Roy complained were unrelated and he would not benefit from the application of the 1995 version of Section 558.031:

> Since the time in custody in Roy was *unrelated* to the offense pending trial, the 1995 version of section 558.031 would not be applicable and thus the

[2] The Roy court did not discuss any *ex post facto* concerns with the application of Section 1.160 and did not explicitly state the date on which Roy's offenses occurred.

> defendant would not benefit with a reduction in his punishment by the change in the law. Therefore, the court of appeals applied the pre-1995 version of section 558.031, as section 1.160 requires that a defendant be punished according to the laws in effect when the crime occurred. Id. at 741 n. 1. The facts in the case herein differ in that the "time in custody was related to that offense pending trial"

Kelly, supra at 7.

When Count I occurred in 1987, Section 1.160 guaranteed Mr. Haldeman any benefit that a subsequent statutory change that would gain him additional jail time credit. Whiteaker, supra. The *ex post facto* clause prohibits the State from subsequently taking that away by retroactively applying an amendment to Section 1.160. The prohibition against *ex post facto* legislation prohibits the State from imposing additional burdens upon a defendant but does not prohibit the retroactive grant of benefits. Therefore, Section 1.160 and Whiteaker provide that the 1995 version of Section 558.031 applies to his case and he was entitled to credit against Count I for the incarceration he had already served for Count II.

(2)

The 1995 amendment applies because it was in effect when the Department of Corrections calculated appellant's release date.

Mr. Haldeman was remanded to the Department of Corrections for Count I – the count on which he seeks the time credit – on May 13, 1996. It was at that point the Department had to calculate how much time credit he was entitled to for

that sentence on that count. State ex rel. Nixon v. Dierker, 22 S.W.3d 787, 789-90 (Mo.App. E.D. 2000). ("[T]he award of jail credit was not a matter of discretion for the sentencing court, but was a matter for the DOC.") The amendment to Section 558.031 had already been enacted and taken effect.

The language of the Section 558.031.1 is an unambiguous directive to the Department that a prisoner "shall receive credit toward the service of a sentence of imprisonment for all time in prison, jail or custody after the offense occurred and before the commencement of the sentence, when the time in custody was related to that offense." Section 558.031 RSMo. Since that was the law in effect when the Department of Corrections was to calculate Mr. Haldeman's jail time credit on Count I, that was the law that the Department should have applied.

Section 558.031 is an unmistakable direction to the Missouri Department of Corrections and other authorities that they shall receive this jail time credit. Section 558.031 flatly, plainly, and unambiguously mandates that the Department **shall** calculate jail time credit in the manner prescribed by the amendment. It makes no provision whatsoever for continuing the previous criteria for determining what qualifies as jail time or for granting the Department the option of which statute to apply. Therefore, the Department of Corrections was obliged to apply the law that was in effect when Mr. Haldeman was remanded to its custody for Count I – the 1995 amendment to Section 558.031.

B.

Count I and Count II are "related."

In addition to its new argument above, Relator reiterates its previous contention that Count I and II are not "related," requiring the Department to credit the time Mr. Haldeman spent incarcerated on Count II to his sentence on Count I. Clearly the two counts are "related." This Court's opinion in Goings controls.

Again, Section 558.031 provides that a prisoner "shall receive credit toward the service of a sentence of imprisonment for all time in prison, jail or custody after the offense occurred and before the commencement of the sentence, when the time in custody was related to that offense." In Goings, the appellant was convicted in Franklin County and subsequently released on parole. Goings, supra, at 906-07. He was then arrested on a stealing charge in Stoddard County, his Franklin County parole was revoked because of his arrest, and he was remanded to the Department of Corrections on the Franklin County sentence. Id. at 907. He was subsequently convicted and sentenced on his Stoddard County case. Id. He filed a declaratory judgment action, asserting that he was entitled to have the time spent in prison as a result of his parole revocation on the Franklin County case credited towards his subsequent Stoddard County sentence. Id.

The Missouri Supreme Court, applying Section 558.031.1, determined that the Franklin County case was "related to" the Stoddard County case because it was the arrest in the Stoddard County case that resulted in his Franklin County parole being revoked. Id. at 908. The court noted that criminal statutes are to be "construed strictly against the [s]tate and liberally in favor of the defendant." Id., quoting State v. Jones, 899 S.W.2d 126, 127 (Mo.App. E.D. 1995); State v.

Liffick, 815 S.W.2d 132, 134 (Mo.App. E.D. 1991). Construing "related to" liberally in favor of Goings, the court held that his incarceration for the Franklin County Case was "related to" the Stoddard County Case. Id.

This same reasoning and approach applies here for the same result. The two counts for which Mr. Haldeman was imprisoned were originally tried together before the same judge in the same criminal cause in St. Louis County (Relator's Petition for Writ of Certiorari, 1). Both counts involved the same victim, and merely charged conduct occurring on different dates – Count I occurred in July 1987 and Count II took place between October 1 to December 31, 1998 (Relator's Petition for Writ of Certiorari, 1). Obviously the two convictions and sentences were "related to" each other far more closely than the different cases in different counties that were found to be related in Goings.

The Court of Appeals examined these facts very closely and came to this same conclusion:

> Haldeman posted one bond of $150,000 pending appeal of the first conviction and pending the new trial which was revoked upon the first conviction being final. Haldeman's incarceration after his first conviction on one count of sexual assault was seven months prior to his new trial and sentencing on the other count of sexual assault with the same victim. Both charges were originally tried together and only became separated when Haldeman was granted a new trial on one of the counts. The second sentence was for the same length of time and was to run concurrent with the

first sentence. **His incarceration was related to the offense which he was tried for in May 1996, as he was not permitted to post bond pending that trial due to his April 1994 conviction becoming final. As in Goings, Haldeman's incarceration from October 1995 to May 1996 was related to both offenses and, thus, the statutory credit should apply.**

Kelly, slip op at 6-7 (emphasis added).

Nonetheless, Relator argues that Goings is essentially to be confined to its facts (Rel. Br. 15). Under the Relator's interpretation of Goings, Mr. Haldeman's incarceration on Count II would have **to be the result of** the conduct that caused him to be charged in Count I for the two counts to be "related" (Rel. Br. 16). Goings itself noted that the sweeping language of Section 558.031 encompassed far more than is contemplated by the Relator's reading of the opinion. In Goings, the court specifically noted that the Legislature chose to use "the very broad term 'related to' instead of, for example 'caused by' or 'the result of" when deciding whether time for one conviction should be credited to the other. Goings, supra, at 908. Thus, Relator's argument is refuted by Goings itself and the clear intent of the statute's encompassing language. Clearly Counts I and II were "related to" each other, and the St. Francois County Court did not err in ordering Mr. Haldeman's time served on Count II to be credited towards his sentence on Count I.

Conclusion

Wherefore, for the forgoing reasons, respondent the Honorable James H. Kelly, Associate Circuit Judge, St. Francois County, Missouri, prays this Honorable to deny relator's petition for a writ of certiorari and not quash the writ of habeas corpus granted herein.

Respectfully Submitted,

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Certificate of Service

One written copy of the forgoing Appellant's Statement, Brief, and Argument and one copy on floppy disk were mailed to Troy Allen, Assistant Attorney General, State of Missouri, Jefferson City, Missouri 65102 on this ___ day of _____, 2001.

_____

Attorney for Appellant

Certificate of Counsel Pursuant to Special Rule 1(b)

Pursuant to Special Rule No. 1, counsel certifies that this brief complies with the limitations contained in Special Rule No. 1(b). Based upon the information provided by undersigned counsel's word processing program, Microsoft Word 2000, this brief contains 458 lines of text and 4543 words. Further, a copy of appellant's brief on floppy disk accompanies his written brief and that disk has been scanned for viruses and is virus-free as required by Special Rule 1(f).

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