IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI	)	
EX REL. ALIS BEN JOHNS,	)	
	)	
Relator,	)	
	)	
vs.	)	**No. SC86936**
	)	
THE HONORABLE GREG KAYS,	)	
Judge, 26th Judicial Circuit,	)	
	)	
Respondent.	)	

ON PRELIMINARY WRIT
FROM THE MISSOURI SUPREME COURT EN BANC
TO THE HONORABLE GREG KAYS, JUDGE
CIRCUIT COURT OF CAMDEN COUNTY
TWENTY-SIXTH JUDICIAL CIRCUIT

RELATOR'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

The Honorable Douglas Long, Jr. adjudged Relator mentally retarded in Pulaski County Case No. CV501-0389CC, and the State did not appeal from that order. Relator filed a motion asking that Respondent, the Honorable Greg Kays, dismiss the State's notice of aggravating circumstances in the underlying Camden County proceedings, based on the preclusive effect of Judge Long's prior ruling. Respondent denied that motion.

On July 5, 2005, Relator filed in this Court a petition for a writ of prohibition or, in the alternative, a writ of mandamus. This Court issued its Preliminary Writ on July 27, 2005. This Court has jurisdiction of this original writ case pursuant to Missouri Supreme Court Rules 84.22 and 84.23 and Art. V, §§3 and 4, Mo.Const.

STATEMENT OF FACTS

Alis Ben "Joe" Johns, Relator, was charged in Newton, Pulaski, and Camden Counties with counts of first degree murder that arose out of a connected series of events. (Writ Petition at 4). In the Newton County prosecution, Case No. 40R049700744, pursuant to a negotiated plea agreement, Relator was convicted of first degree murder and sentenced to life imprisonment with no opportunity for probation or parole. *Id.*

In the Pulaski County proceeding, Case No. CR59601379F, Relator was charged with one count of first degree murder and the State sought the death penalty. (Writ Exh.1 at 1). In January, 1999, the cause proceeded to trial before the Hon. Douglas Long, Jr. (*Id.* at 1). Assistant Attorneys General Ahsens and Brown represented the State, along with Prosecuting Attorney Headrick. (*Id.*). The jury found Relator guilty and recommended a death sentence. (*Id.*). Judge Long sentenced Relator to death on February 22, 1999. (*Id.*).

Through his Assistant Public Defender, Relator appealed to this Court. He asserted that Judge Long's finding that he was competent to stand trial was erroneous since he is mentally retarded. During a competency hearing and again in penalty phase, he presented evidence of his mental retardation. Experts retained both by the State and the defense found that Relator's "IQ was below average and at times fell into the 'mentally retarded' classification. He never learned to read or write … He could not relate the date, his present location, his birth date, his age, or the current President of the United States." *State v. Johns*, 34 S.W.3d 93, 102

(Mo.banc 2001). This Court found no error in Judge Long's conclusions and affirmed his actions in all respects. *Id.* at 105-06. (Writ Exh.1 at 2).

Relator thereafter timely filed a motion for post-conviction relief under Rule 29.15 and, on July 9, 2001, appointed counsel timely filed an amended motion for post-conviction relief. (*Id.* at 2). Judge Long also served as the post-conviction judge. He heard evidence from April 28, 2003 to May 1, 2003 and took judicial notice of the transcript and legal file from the underlying criminal case. (*Id*. at 2). Assistant Attorneys General Hendrickson and Hosmer represented the State in that proceeding. (*Id.* at 2).

On July 17, 2003, Judge Long entered his Findings of Fact and Conclusions of Law. He affirmed Relator's conviction and set aside his death sentence, re-sentencing him to life without the possibility of probation or parole. (*Id.* at 29). Judge Long denied the claims of ineffective assistance of counsel raised as to both phases of trial. (*Id*. at 4-22).

Judge Long granted relief on the claim that Relator is mentally retarded and that his execution would violate the Eighth and Fourteenth Amendments to the United States Constitution, Article I, §21 of the Missouri Constitution and §565.030 RSMo. (*Id.* at 22). He specifically found that, at the post-conviction evidentiary hearing, Relator had "presented substantial, credible evidence demonstrating that he is mentally retarded." (*Id.* at 22).

In his Findings, Judge Long reviewed the evidence that Relator had presented. Dr. Denis Keyes, an expert on mental retardation,[1] evaluated Relator by measuring his IQ with the Stanford Binet Intelligence Test, Fourth Edition; assessing his adaptive skills with the Vineland Adaptive Behavior Scales, and reviewing his medical, psychological and educational records. (*Id.* at 23). He reviewed records from the Missouri Department of Corrections, the Social Security Administration, Fulton State Hospital, the University of Missouri Multiple Handicap Clinic, the Division of Family Services and the school districts from Crocker, Eldon, Iberia, St. Elizabeth and Santa Rosa, among others. (*Id.* at 23).

Dr. Keyes' intelligence testing resulted in a composite score of 49. (*Id*. at 23). That score is over two standard deviations below the mean score of 100. *Id*. It puts Relator in the range of mild mental retardation. *Id.* Dr. Keyes' review of Relator's many prior IQ tests and results showed "significantly subaverage intellectual functioning," that was documented before Relator was 18 years old. *Id*. His full scale IQ scores ranged from 61 to 84. *Id.* When Relator was 10, using the Wechsler Intelligence Scale for Children (WISC), the Eldon School District measured his full scale IQ as 66. *Id.* By the time Relator was 14, testers had

[1] In *Atkins v.* Virginia, 536 U.S. 304, 316 n.20 (2002), citing his research, the United States Supreme Court recognized Dr. Keyes as an expert on mental retardation.

administered the WISC five more times. *Id.* Judge Long noted that those tests gave Relator higher full scale scores but, he found, "these scores are spuriously high due to various factors including the practice effect, repeated administrations of the exact same test, administrations of outdated versions of the Wechsler intelligence test, and incorrect scoring." *Id.* at 23-24. When Relator was 16 and testers finally administered the correct, updated version of the Wechsler, his full scale IQ score was 64. *Id.* at 24.

Judge Long also considered the IQ testing done on Relator as an adult. That testing also demonstrated Relator's "significantly subaverage intellectual functioning." *Id.* at 24. The Social Security Administration's testing, when Relator was 18, showed a full scale IQ score of 72. *Id*. In March, 1989, the Department of Corrections testing showed Relator's score of less than 60. *Id.* In March, 2000, the Department of Corrections testing showed a full scale score of 66. *Id.*

Judge Long further noted that Relator has "demonstrated continual extensive related deficits and limitations in two or more adaptive behaviors." *Id.* at 25. Dr. Keyes administered the Vineland Adaptive Behavior Scales, an instrument designed to evaluate a person's adaptive functioning, to a host of people well-acquainted with Relator, including his mother, three sisters, a brother, sisters- and brothers-in-law, acquaintances and elementary school teachers. *Id.* at 25, n.6. That assessment showed that Relator functions below the first percentile in the areas of communication, daily living and socialization. *Id.* at 25. Relator's

communications skills put him on a level with a child aged three years, three months. His daily living skills put him on a level of a child aged five years, one month. His socialization skills put him on a level of a child aged two years, eleven months. *Id.*

In determining whether Relator was disabled and thus entitled to Social Security benefits, in 1979, the Social Security Administration also assessed Relator's adaptive skills, using the Vineland instrument. *Id.* at 25-26. Although Relator was chronologically 18, he was found to function on a level of a child aged five years, two months. *Id.* The examiner found Relator was incapable of handling his own funds. *Id.* at 26. The federal agency determined that Relator was disabled. *Id.*

Relator's psychological and educational records also revealed the extensive limitations in his adaptive behaviors, Judge Long found. *Id.* Judge Long concluded that he is "severely deficient" in the area of functional academics, having been placed in Special Education classes for the mentally retarded throughout his school years. *Id.* Relator's Wide Range Achievement Test scores show that he consistently functioned below his grade level. For example, when the University of Missouri's Multiple Handicap Clinic tested him at age ten, he performed only at the first grade level in both arithmetic and spelling and his reading skills were only at a beginning readiness level. *Id.* Department of Corrections records demonstrate that Relator then performed at below a third grade level in arithmetic, reading and spelling. *Id.* Dr. Keyes' testing, through the

Woodcock-Johnson-Psycho-Educational Battery-Revised, corroborated those earlier evaluations, Judge Long found, as Relator scored no higher than the second percentile in all academic areas. *Id*.

Judge Long also found that Relator had presented sufficient evidence that he suffers severe deficits in the areas of communication skills. The University of Missouri's Multiple Handicap Clinic documented that Relator only knew eleven letters of the alphabet and that Clinic, along with his school records, documented that his speech deficits required therapy. *Id.* at 26-27.

Judge Long finally found that the records amply demonstrated Relator's deficient social skills. *Id.* at 27. Fulton State Hospital records, documenting an evaluation when Relator was 16, refer to Relator as a "socially isolated loner" and a "small, socially backward and anxious, retarded youth." *Id.* Department of Corrections records called Relator someone "habitually afraid of people," "uncomfortable in crowds," and a "lonely, neurologically sensitive person." *Id.*

Recognizing the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002); this Court's decision in *Johnson v. State*, 102 S.W.3d 535 (Mo.banc 2003) and the Missouri Legislature's enactment of §565.030.4(1) RSMo Supp. 2001, Judge Long concluded that executing a mentally retarded person violates the Eighth Amendment to the United States Constitution and Article I, §21 of the Missouri Constitution. *Id.* at 27. He further concluded that, despite the statutory language purporting to make the statute's application prospective only, it had retrospective effect. Thus, those in Relator's procedural

posture could gain immunity from the death penalty if they could prove, by a preponderance of the evidence, that they were mentally retarded. *Id*. at 28, citing *Johnson v. State, supra*.

Based on his factual findings, Judge Long concluded that Relator had proved the statutory criteria for mental retardation by a preponderance of the evidence. (Writ. Exh. 1 at 29). "He has significantly subaverage intellectual functioning, continual extensive related deficits and limitations in two or more adaptive behaviors, and these conditions manifested before the age of eighteen. Johns is mentally retarded and cannot be executed under the cruel and unusual punishment clauses of the state and federal constitutions and Section 565.030, RSMo Supp. 2002." *Id.*

Judge Long affirmed Relator's conviction. *Id.* He vacated the previously-imposed death sentence and imposed a sentence of life imprisonment with no opportunity for probation or parole. *Id.*

The State chose not to appeal to this Court from Judge Long's order. It thus became a final order by operation of law. *See Webb v. Kidd*, 128 S.W.3d 640, 641 (Mo.App.,E.D. 2004).

In the underlying proceedings, the State charged Relator on April 3, 2001, in Camden County Case No.CR299-51F, with one count of first degree murder and one count of armed criminal action, arising out of an incident that occurred on February 28, 1997. (Writ Exh. 3 at 2). Thereafter, on November 8, 2001, **before** Judge Long issued his Findings and Conclusions in the Pulaski County post-

conviction proceeding, defense counsel filed a *Motion to Find that Alis Ben "Joe" Johns is Mentally Retarded, To Declare §§565.020 and 565.030, RSMo 1994 Unconstitutional As Applied to Joe, and to Preclude the State from Seeking the Death Penalty Since Joe is Mentally Retarded.* (Writ Exh. 2). On May 16, 2003, again **before** Judge Long had made his post-conviction ruling, the Hon. Mary Dickerson, who was then the judge assigned to the Camden County case, denied defense counsel's request for a pre-trial hearing to determine whether Relator was mentally retarded. (Writ Exh. 4). On February 3, 2004, after *Atkins* had been decided but still **before** Judge Long had made his post-conviction ruling, defense counsel filed a *Motion to Dismiss the Aggravating Circumstances and to Prohibit the State from Seeking Death as a Punishment*. (Writ Exh. 3). Judge Dickerson, who was battling and ultimately succumbed to cancer, never ruled that motion.

On October 21, 2004, before a successor judge had been appointed to the case, defense counsel filed an application for a Writ of Prohibition in this Court, seeking to have the State barred from seeking the death penalty against Relator in the Camden County proceedings. This Court denied the writ application without prejudice on December 21, 2004.

On April 8, 2005, the Hon. Greg Kays, who had been appointed to fulfill Judge Dickerson's duties in Camden County, finally heard the previously-filed *Motion to Dismiss the Aggravating Circumstances...."* Judge Kays then entered the following order: "… upon consideration of argument and law Court denies motion to dismiss and denies the collateral estoppel argument of the defendant.

The issue of mental retardation will be an issue to be determined by a jury." (Writ Exh. 5).

On May 12, 2005, counsel filed an application for a writ of prohibition in the Missouri Court of Appeals, Southern District, seeking relief from Judge Kays' order. That Court summarily denied the application on June 28, 2005. (Writ Exh. 7).

On July 5, 2005, counsel filed an application for a writ of prohibition, or, alternatively, a writ of mandamus in this Court, again seeking relief from Judge Kays' order. This Court issued a preliminary writ on July 27, 2005. The State filed its written return, as ordered by this Court, on August 26, 2005.

These proceedings follow.

POINTS RELIED ON

POINT ONE

Relator is entitled to a writ of prohibition or, alternatively, a writ of mandamus, ordering that the Respondent, the Hon. Greg Kays, take no action in Camden County Case No. CR299-51F through which Relator could be subject to the death penalty or that he grant Relator's *Motion to Dismiss the Aggravating Circumstances and to Prohibit the State from Seeking Death as a Punishment* because no adequate remedy by appeal exists if the State is allowed to continue seeking Relator's death and Respondent would act in excess of his jurisdiction if he were to allow the State to continue to seek the death penalty against Relator in that, continuing to seek Relator's death and subjecting him to capital proceedings for which he is ineligible is an action that Respondent lacks the authority to take; Relator will be caused irreparable harm not capable of remedy by appeal; cause the unnecessary waste of judicial time and resources, and cause the citizens of this State unnecessary hardship.

Ashe v. Swenson, 397 U.S. 436 (1970);

United States v. Green, 343 F.Supp.2d 23 (D.Mass. 2004);

State ex rel. Hamilton v. Dalton, 652 S.W.2d 237 (Mo.App.,E.D. 1983);

State ex rel. Malan v. Hueseman, 942 S.W.2d 424 (Mo.App.,W.D. 1997).

POINT TWO

Relator is entitled to a writ of prohibition or, alternatively, a writ of mandamus, ordering that the Respondent, the Hon. Greg Kays, take no action in Camden County Case No. CR299-51F through which Relator could be subject to the death penalty or that he grant Relator's *Motion to Dismiss the Aggravating Circumstances and to Prohibit the State from Seeking Death as a Punishment* because the Eighth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, Article I, §21 of the Missouri Constitution and §565.030.4 RSMo preclude the execution of a mentally retarded person.

Atkins v. Virginia, 536 U.S. 304 (2002);

Johnson v. State, 102 S.W.3d 535 (Mo.banc 2003);

Section 565.030.6 RSMo;

United States Constitution, Amends. VIII, XIV;

Missouri Constitution, Article I, §21.

POINT THREE

Relator is entitled to a writ of prohibition or, alternatively, a writ of mandamus, ordering that the Respondent, the Hon. Greg Kays, take no action in Camden County Case No. CR299-51F through which Relator could be subject to the death penalty or that he grant Relator's *Motion to Dismiss the Aggravating Circumstances and to Prohibit the State from Seeking Death as a Punishment* because Judge Long's findings and conclusions in Pulaski County Case No. CV501-0389CC that Relator is mentally retarded operate to collaterally estop the State from seeking Relator's death in the Camden County proceedings in that the issue and the burden of proof in the Camden County proceedings are identical to the issue and burden of proof in the Pulaski County proceedings; the Pulaski County proceedings resulted in a final judgment from which the State chose not to appeal; the parties in both actions are the same--Relator being the defendant and the State being the other party in both actions, and the State had a full and fair opportunity to litigate the issue of Relator's mental retardation in the Pulaski County proceedings.

Ashe v. Swenson, 397 U.S. 436 (1970);

State v. Nunley, 923 S.W.2d 911 (Mo.banc 1996);

State ex rel. Hines v. Sanders, 803 S.W.2d 649 (Mo.App.,E.D. 1991);

State v. Lundy, 829 S.W.2d 54 (Mo.App.,S.D. 1992).

ARGUMENT

POINT ONE

Relator is entitled to a writ of prohibition or, alternatively, a writ of mandamus, ordering that the Respondent, the Hon. Greg Kays, take no action in Camden County Case No. CR299-51F through which Relator could be subject to the death penalty or that he grant Relator's *Motion to Dismiss the Aggravating Circumstances and to Prohibit the State from Seeking Death as a Punishment* because no adequate remedy by appeal exists if the State is allowed to continue seeking Relator's death and Respondent would act in excess of his jurisdiction if he were to allow the State to continue to seek the death penalty against Relator in that, continuing to seek Relator's death and subjecting him to capital proceedi ngs for which he is ineligible is an action that Respondent lacks the authority to take; Relator will be caused irreparable harm not capable of remedy by appeal; cause the unnecessary waste of judicial time and resources, and cause the citizens of this State unnecessary hardship.

Respondent, the Honorable Greg Kays, denied Relator's *Motion to Dismiss the Aggravating Circumstances and to Prohibit the State from Seeking Death as a Punishment*. (Writ Exhs. 3 and 5). That motion was premised upon the prior finding, by the Honorable Douglas Long, Jr., in Pulaski County Case No. CV501-0389CC, that Relator had proved by a preponderance of the evidence that he was mentally retarded and that he was therefore ineligible for the death penalty. (Writ

Exh. 3). Respondent's actions are properly the subject of a writ of prohibition or mandamus since, in denying Relator's motion, the Respondent acted in excess of his jurisdiction and since Relator lacks an adequate remedy by appeal from the Respondent's actions.

Writs of prohibition properly are issued if judicial power is usurped because the lower court lacks either personal or subject matter jurisdiction; if there exists a clear excess of jurisdiction or an abuse of discretion such that the lower court lacks the power to act as contemplated, and if the circumstances are such that no adequate remedy by appeal exists. *See, e.g., State ex rel. New Liberty Hospital District v. Pratt*, 687 S.W.2d 184, 187 (Mo.banc 1985); *State ex rel. Twiehaus v. Adolf*, 706 S.W.2d 443, 444 (Mo.banc 1986); *State v. Godfrey*, 883 S.W.2d 550 (Mo.App.,E.D. 1994). Writs of prohibition are the appropriate remedy to prevent lower courts from acting beyond their jurisdiction. *State ex rel. Malan v. Hueseman*, 942 S.W.2d 424, 425 (Mo.App.,W.D. 1997); *State ex rel. Coyle v. O'Toole*, 914 S.W.2d 871, 872 (Mo.App.,E.D. 1996). They are not substitutes for a direct appeal and will issue only if the lower courts lack or act in excess of their jurisdiction and an adequate remedy on appeal does not exist. *Hueseman*, 942 S.W.2d at 425. "Nonetheless, '[w]here unnecessary, inconvenient and expensive litigation can be avoided, prohibition is the appropriate remedy.'" *Id.*; *citing State ex rel. Anhueser-Busch, Inc. v. Mummert*, 887 S.W.2d 736, 737 (Mo.App.,E.D. 1994); *see also New Liberty Hospital*, 687 S.W.2d at 187. Similarly, writs of mandamus will lie if the Relator has a clear and specific right to

the relief requested and no adequate remedy at law exists. *State ex rel. Westfall v. Crandall*, 610 S.W.2d. 45 (Mo.App.,E.D. 1980). Such writs are appropriate if the lower court exercises its discretion in an arbitrary and capricious fashion. *Id.* The writ will lie to compel the lower court "to do that which it is obligated by law to do…." *State ex rel. Svejda v. Roldan*, 88 S.W.3d 531, 532 (Mo.App., W.D. 2002); *State ex rel. Schnuck Markets Inc. v. Koehr*, 859 S.W.2d 696, 698 (Mo.banc 1993).

In this case, Respondent acted in excess of his jurisdiction in denying Relator's *Motion to Dismiss the Aggravating Circumstances and to Prohibit the State from Seeking Death as a Punishment*. Respondent was obligated to grant that motion in light of Judge Long's prior findings and conclusions.

This error cannot be remedied by appeal because of the irreparable harm that Relator will suffer by being forced to run the gantlet of another capital prosecution after already having been adjudged ineligible for the death penalty. *See, Ashe v. Swenson*, 397 U.S. 436, 443, 447 (1970); *see also, State ex rel. Ballenger v. Franklin*, 114 S.W.3d 883 (Mo.App.,W.D. 2003).

In both Respondent's initial Suggestions in Opposition to Relator's Petition for Writ of Prohibition or Mandamus and in its Written Return to Order to Show Cause Why a Writ of Prohibition Should Not Issue, Respondent states that this case does not fall within any of the categories of cases for which the issuance of a writ is appropriate. Since Respondent likely again will raise these arguments in its brief to this Court, Relator chooses to address them now.

Respondent has asserted that Relator

> is apparently arguing that the circuit court does not have 'jurisdiction' because relator is, in light of his alleged mental retardation, ineligible for the death sentence … This assertion, however, is not well taken. Assuming for the sake of argument that relator *is* ineligible for the death sentence, that does not deprive the circuit court of jurisdiction or immunize him from standing trial for the crimes with which he is charged.

(Suggestions in Opposition at 3-4). Respondent further has asserted that

> the Circuit Court of Camden County certainly has jurisdiction over appellant and his crimes. "The circuit courts … have original jurisdiction over all cases and matters, civil and criminal." §478.070, RSMo 2000. "Circuit judges and associate circuit judges may hear and determine all cases and matters within the jurisdiction of their circuit courts"….

(Written Return at 3-4).

Respondent misapprehends the meaning of "jurisdiction" as it is used in this context. This is not a case involving lack of subject matter or personal jurisdiction. Rather, what is at issue is Respondent's action in excess of his jurisdiction.

Instructive is *State ex rel. Hamilton v. Dalton*, 652 S.W.2d 237 (Mo.App.,E.D. 1983). There, where the pleadings alone conclusively demonstrated that the petition before the court attempted to state a cause of action that was barred by res judicata or by the applicable statute of limitations, the

Eastern District held that summary judgment should have been entered as a matter of law and that prohibition would lie for the court's failure to do so. *Id.* at 239. The Court first noted that prohibition is "generally allowed to avoid useless suits and thereby minimize inconvenience, and to grant relief when proper under the circumstances at the earliest possible moment in the course of litigation." *Id*. The Court went on to state that "A writ of prohibition is a proper remedy where a judge, **with jurisdiction of the subject matter and the parties**, threatens to act or proceed in a manner so in excess of jurisdiction possessed that he may be said to be acting without jurisdiction." *Id.* (emphasis added).

As the Eastern District thus made clear, when addressing whether the lower court acted "in excess of his jurisdiction," the question is **not** whether that court lacked subject matter or personal jurisdiction. The question, rather, is whether the lower court acted in excess of the authority granted to him—under the Constitution, court rules, statute, or case law. Thus, for example, in *Hueseman, supra*, the Western District found prohibition appropriate based on improper disclosure. 942 S.W.2d at 425. Similarly, in *State ex rel. Bullington v. Mason*, 593 S.W.2d 224, 225 (Mo.1980), this Court found prohibition proper because the lower court had failed to follow court rules. As this Court stated in *State ex rel. Riverside Joint Venture v. Missouri Gaming Comm'n*, 969 S.W.2d 218, 221 (Mo.banc 1998), the question is whether the lower court "lacks the power to act as contemplated."

In this case, Respondent clearly acted in excess of his jurisdiction in denying Relator's Motion to Dismiss the Aggravating Circumstances. Judge Long had already decided that Relator is mentally retarded—the identical issue upon which Relator's motion is based—; Judge Long's findings and conclusions became a final order from which the State chose not to appeal; the parties to both the Pulaski County and the Camden County proceedings are identical, and in four days of evidentiary hearing, along with written pleadings and responses, the State had a full and fair opportunity to litigate the issue in the Pulaski County proceedings. As Relator laid out in his Motion, principles of collateral estoppel now bar the State from seeking the death penalty against him. (See also Point and Argument III, *infra*). Respondent's decision to ignore this fundamental rule of law was an action in excess of his jurisdiction. *See State ex rel. Nixon v. Sprick*, 59 S.W.3d 515, 519-20 (Mo.banc 2001).

Respondent has also argued that Relator suffers no current harm from Respondent's actions since Relator is not currently subject to the death penalty. Respondent argues:

> [t]he state's notice of aggravating circumstances and its stated intent to seek a death sentence … does not subject relator to a sentence of death or cause any harm to relator. Indeed, the notice of aggravating circumstances will only be of any consequence if (1) the state persists in its desire to seek a sentence of death, (2) relator is found guilty of murder in the first degree, (3) the jury is actually instructed to determine whether relator's crime

> warrants the imposition of a death sentence, (4) the jury recommends a sentence of death, and (5) the respondent then imposes a sentence of death. Thus, until this case proceeds to formal sentencing, it is not possible (due to his alleged mental retardation) for relator to be subjected to a ruling that violates his constitutional right to be free from cruel and unusual punishment. In short, relator has not been subjected to any ruling that violates his rights, and respondent has not refrained from taking any action that he is obligated to take under the law.

(Suggestions in Opposition at 4-5; Written Return at 4-5). Respondent cavalierly suggests that, since the verdict has not yet been issued, there is "no harm no foul" in holding proceedings that are intended to result in a verdict that, by statute and constitution, cannot be imposed. This argument makes a mockery of the Constitution and promotes the waste of already scarce judicial time and resources. *See Anhueser-Busch*, 887 S.W.2d at 737.

Respondent's argument is akin to the State's argument in *Ashe v. Swenson*, 397 U.S. 436 (1970). There, the Court addressed various protections granted by the Double Jeopardy Clause of the Fifth Amendment, which is made applicable to the States through the Fourteenth Amendment. In holding that collateral estoppel, or issue preclusion, is part of the constitutional guarantee against double jeopardy, *Id.* at 445, the Court did "not hesitate to hold that [the Fifth Amendment guarantee against double jeopardy] surely protects a man who has been acquitted from having to 'run the gantlet' a second time." *Id.* at 445-46.

It is not merely the second conviction or sentence against which the Clause protects. It is also the **process**. Just as the Petitioner in *Ashe* was protected against an armed robbery prosecution for a second of six poker players, once he had been acquitted of the armed robbery of the first such player, so too, Relator is protected against a second capital prosecution, once Judge Long "acquitted" him by having found him ineligible for death because of his mental retardation. Respondent's argument is directly contrary to *Ashe* since it would approve the second, third, fourth, fifth and sixth prosecutions in that case despite the earlier acquittal because, during those later prosecutions, formal sentencing would not yet have occurred. Adopting Respondent's argument would promote the waste of precious judicial time and resources.

Respondent also asserts that Relator will not suffer any harm by allowing the State to continue to seek the death penalty against him. (Suggestions in Opposition at 5-6; Written Return at 5-6). Once again, as the *Ashe* Court noted, one of the harms against which the prohibition against double jeopardy protects is "having to 'run the gantlet' a second time." *Ashe*, 397 U.S. at 446. This is not an ephemeral harm but is real and substantial. It cannot be remedied by appeal.

Further, if the State is allowed to proceed with a capital prosecution, Relator will be subjected to a death-qualified jury in guilt phase, despite that death qualification is not relevant for a defendant who has been adjudged mentally retarded. The death qualification process will create a jury that is more conviction-prone than a non-death-qualified jury. *United States v. Green*, 343

F.Supp.2d 23, 34 (D.Mass. 2004); William Bowers & Wanda Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 30 Crim. L.Bull. 51, 56 (2003); Susan Rozelle, *The Utility of Witt: Understanding the Language of Death Qualification*, 54 Baylor L.Rev. 677, 691-95 (2002). To proceed against Relator with a death-qualified jury is akin to proceeding with a death-qualified jury against a 15 year old defendant charged with murder or any defendant charged with an offense such as passing bad checks. The harm resulting from this action cannot be remedied by appeal.

Finally, despite the Respondent's assertion that it is irrelevant, (Respondent's Suggestions in Opposition at 5; Respondent's Written Return at 5), both the judiciary and the citizens of Missouri will be harmed by ignoring Judge Long's ruling and proceeding with a capital prosecution. The trial court will be forced to set aside a substantial period of time within which to try this as a death penalty case; the jury will be sequestered; and, if a death sentence results, this Court will automatically hear the appeal. Moreover, if it proceeds as a death penalty case, state and federal post-conviction proceedings will ensue, all contributing to the enormous expenditure of time and resources.

The Respondent acted in excess of his jurisdiction in denying Relator's *Motion to Dismiss the Aggravating Circumstances and to Prohibit the State from Seeking Death as a Punishment*. A writ should issue in this case to protect Relator from running "the gantlet" before a death-qualified jury after Judge Long has already ruled that he is ineligible for the death penalty.

POINT TWO

Relator is entitled to a writ of prohibition or, alternatively, a writ of mandamus, ordering that the Respondent, the Hon. Greg Kays, take no action in Camden County Case No. CR299-51F through which Relator could be subject to the death penalty or that he grant Relator's *Motion to Dismiss the Aggravating Circumstances and to Prohibit the State from Seeking Death as a Punishment* because the Eighth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, Article I, §21 of the Missouri Constitution and §565.030.4 RSMo preclude the execution of a mentally retarded person.

The Respondent wisely concedes that one who is mentally retarded may not be subjected to the death penalty. "Relator's alleged mental retardation could certainly 'immunize' him from a particular sentence, *see Atkins v. Virginia*, 536 U.S. 304 (2002)…." (Return at 4).

In *Atkins*, the United States Supreme Court reviewed the judgment of state legislatures, including Missouri's, which had addressed whether the death penalty should be imposed upon mentally retarded individuals. The Court concluded that a national consensus now exists that precludes the execution of the mentally retarded. The Court stated:

> the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that

> today our society views mentally retarded offenders as categorically less culpable than the average criminal.

Atkins, 536 U.S. at 315-16. The Court further held that:

> Our independent evaluation of the issue reveals no reason to disagree with the judgment of "the legislatures that have recently addressed the matter" and concluded that death is not a suitable punishment for a mentally retarded criminal. We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our "evolving standards of decency," we therefore conclude that such punishment is excessive and that the Constitution "places a substantive restriction on the State's power to take the life" of a mentally retarded offender.

Id. at 321 (internal citations omitted).

In reaching its decision, the *Atkins* Court relied, in part, upon the Missouri Legislature's enactment of §565.030.4 RSMo Supp. 2001. *Atkins*, 536 U.S. at 315 n.15. Section 565.030.4(1) RSMo provides that, "If the trier finds by a preponderance of the evidence that the defendant is mentally retarded," the trier "shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor." Missouri's Legislature defined mental retardation as

> a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.

§565.030.6 RSMo.

In *Johnson v. State*, 102 S.W.3d 535 (Mo.banc 2003), this Court was asked to consider whether a death sentence violates the state and federal constitutions when it is imposed upon one who is adjudged mentally retarded, even if neither Missouri's statutory prohibition nor *Atkins* was in effect at the time of the offender's trial. This Court held that, despite the statutory language making the protection prospective only, §565.030.7, the constitutional protection applies to any such offender. This Court thus deemed the protection retroactive. *Johnson*, 102 S.W.3d at 537, 539, n.12. This Court specifically held that, if "a defendant can prove mental retardation by a preponderance of the evidence, as set out in section 565.030.6, [he] shall not be subject to the death penalty." *Id.* at 540.

Once a defendant has proved by a preponderance of the evidence that he is mentally retarded, he is ineligible for the death penalty. A writ should issue in this case to protect Relator from a death penalty prosecution in the underlying Camden

County proceedings since Judge Long has adjudged him mentally retarded as defined by Missouri's Legislature.

POINT THREE

Relator is entitled to a writ of prohibition or, alternatively, a writ of mandamus, ordering that the Respondent, the Hon. Greg Kays, take no action in Camden County Case No. CR299-51F through which Relator could be subject to the death penalty or that he grant Relator's *Motion to Dismiss the Aggravating Circumstances and to Prohibit the State from Seeking Death as a Punishment* because Judge Long's findings and conclusions in Pulaski County Case No. CV501-0389CC that Relator is mentally retarded operate to collaterally estop the State from seeking Relator's death in the Camden County proceedings in that the issue and the burden of proof in the Camden County proceedings are identical to the issue and burden of proof in the Pulaski County proceedings; the Pulaski County proceedings resulted in a final judgment from which the State chose not to appeal; the parties in both actions are the same—Relator being the defendant and the State being the other party in both actions, and the State had a full and fair opportunity to litigate the issue of Relator's mental retardation in the Pulaski County proceedings.

Collateral estoppel, or issue preclusion, is part of the Fifth Amendment's guarantee against double jeopardy. *Ashe v. Swenson*, 397 U.S. 436, 445 (1970). That protection extends to the States through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969). The *Ashe* Court held that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue

cannot again **be litigated** between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 443 (emphasis added). In short, the "first trial [cannot be treated] as no more than a dry run for the second prosecution." *Id.* at 447. That is "precisely what the constitutional guarantee forbids." *Id.*

In *Ashe*, the State originally prosecuted the Petitioner for the armed robbery of one of six poker players. That prosecution resulted in an acquittal. The State then prosecuted the Petitioner for the armed robbery of another of the same six poker players. The Supreme Court noted that the "single rationally conceivable issue in dispute before the jury" in the first prosecution was whether the Petitioner was one of the robbers. *Id*. at 445. The Court concluded that, by its verdict acquitting Petitioner, the first jury had found that he was not. *Id.* Therefore, the State could not retry that issue before a second jury. *Id*. It could not force the Petitioner, who had been acquitted, to "run the gantlet" a second time. *Id.* at 445-46.

This Court has adopted this analysis. In *State v. Nunley*, 923 S.W.2d 911 (Mo.banc 1996), this Court addressed whether a post-conviction court's finding on a second Rule 24.035 motion was barred by the doctrine of collateral estoppel. It acknowledged that collateral estoppel means "when an issue of ultimate fact has been determined by a valid judgment, it may not again be litigated between the same parties." *Id.* at 922. The test to determine whether collateral estoppel applies is whether: (1) the issue in the case is identical to the issue decided in the prior proceeding; (2) there was a judgment on the merits in the prior adjudication; (3)

the party against whom collateral estoppel is asserted is the same party or is in privity with a party in the prior proceedings; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceedings. *Id*. All four prongs of this test are satisfied in this case.

IDENTICAL ISSUES

The issue in this case—whether Relator is mentally retarded—is identical to the issue Judge Long decided in the Pulaski County proceedings. Using the same standard and burden of proof as would be applicable in the Camden County proceedings, Judge Long found that Relator had "presented substantial, credible evidence demonstrating that he is mentally retarded." (Writ Exh. 1 at 22). Judge Long further found that Relator had

> proven the statutory criteria [for mental retardation] by a preponderance of the evidence. He has significantly subaverage intellectual functioning, continual extensive related deficits and limitations in two or more adaptive behaviors, and these conditions manifested before the age of eighteen. Johns is mentally retarded and cannot be executed under the cruel and unusual punishment clauses of the state and federal constitutions and Section 565.030, RSMo Supp. 2002.

(Writ Exh. 1 at 29). Clearly, the identical issue, subject to the identical standard of proof and the identical definition of mental retardation, is present and outcome-determinative in both the Pulaski County and Camden County proceedings.

Helpful to our understanding of this case is *State ex rel. Hines v. Sanders*, 803 S.W.2d 649 (Mo.App.,E.D. 1991). There, the Relator had been prosecuted for and acquitted of kidnapping and armed criminal action in St. Louis County, an action arising out of an incident on November 22, 1987. *Id.* at 649. He sought a writ of prohibition when the State initiated a prosecution in St. Louis City, arising out of the same incident, for two counts of rape and one count of sodomy. *Id.* He asserted that the second proceeding was barred by principles of collateral estoppel since the prior acquittal on the kidnapping meant that the jury necessarily found that the complainant had consented to his conduct. *Id.* The Court stated that, based on *Ashe v. Swenson*, it had to determine what issues that jury **must have decided** in reaching that initial verdict. *Id.* at 650. The Court found that

> rationally, the only issue tried by the parties, in the first case, was whether defendant used force to effectuate a kidnapping or whether the complainant's removal was consensual. The operative facts considered by the jury for this determination constituted one inextricably intertwined continuum. There simply is no rational basis for a finding of no forcible compulsion in the abduction alleged in the first case, but the presence of such compulsion in the rape and sodomy, alleged in the present case… We [] hold that, under the facts of this case, to prove the element of forcible compulsion in the rape and sodomy charges against relator, the state will have to prove operative facts the first jury found absent. This the state may not do.

Id. at 653. Here, it is unquestioned that the issue before Judge Long was whether Relator is mentally retarded. Judge Long concluded that Relator is, after finding that he had presented "substantial, credible evidence" of his mental retardation and had met the statutory standard of proof. (Writ Exh. 1 at 22, 29). That issue is the same one before the Respondent here. This thus differs substantially from the hypothetical the Court proposed in *Standefer v. United States*, 447 U.S. 10 (1980), in which a jury may have decided the prior case based on some factor like emotion. *Id.* at 22-23.

MERITS RULING

Judge Long's decision in the Pulaski County proceedings was on the merits. It finally decided the issues in that case, including that Relator had proved the statutory criteria for mental retardation by a preponderance of the evidence such that Judge Long could conclude that Relator is mentally retarded. The State of Missouri chose not to appeal from Judge Long's order. It thus became a final judgment by operation of law.

SAME PARTIES

The parties in the Camden County proceedings are the same parties as the parties in the Pulaski County proceedings before Judge Long. In both proceedings, Relator is the person against whom the State of Missouri has sought the death penalty. As the Southern District noted in *State v. Lundy*, 829 S.W.2d 54, 56 (Mo.App., S.D. 1992), "The courts of this state have consistently held that

the doctrine of collateral estoppel will be applied in criminal cases only when the same person is the defendant."

In both its Suggestions in Opposition at 8 and its Written Return at 7-8, the Respondent has cited *Lundy* to support its position that collateral estoppel does not apply because, had Judge Long ruled against Relator in the Pulaski County proceedings, Relator would not be bound by that finding here. Relator agrees that he would not be bound by such an adverse finding since he is constitutionally entitled to present evidence in his defense and to rebut the State's case, and counsel would be constitutionally-obligated to present that evidence on his behalf. That, however, does not preclude a finding of mutuality of parties.

The *Lundy* Court's language on which the Respondent relies refers only to whether the defendant in both actions was the same. In *Lundy*, the defendant asserted that the court in his case was bound by the finding of another trial court which had ruled on a suppression motion involving another defendant. As the Court noted, "Lundy was not a party to that proceeding and would not be bound by the result of that proceeding had it been determined the marijuana was admissible." *Id.* at 56. The Respondent's assertion that the *Lundy* Court's holding means anything more than that the defendant must be the same in both criminal cases for collateral estoppel to apply is simply a misreading of that text.

The Respondent's citation to *Standefer v. United States*, 447 U.S. 10 (1980) is similarly unavailing. There, the Petitioner challenged the State's prosecution of him, as an aider and abettor, after an earlier fact-finder had acquitted the principal

of the charged offense. After first finding that each participant, whether principal or aider and abettor, is "punishable for their criminal conduct; the fate of other participants is irrelevant," *Id*. at 20, the Court declined to give preclusive effect to a fact finding made in a different case **involving a different defendant**. *Id.* at 21-26. In reaching that decision, the Court noted, for example, that evidence deemed inadmissible against one defendant may be admissible against another defendant. *Id.* at 23-24. Since different facts and considerations may control in cases involving different defendants, issue preclusion will not apply.

As to the other side of the coin, the State of Missouri is a party to both the Pulaski County and these Camden County proceedings. Further, in the Pulaski County post-conviction proceedings, the State of Missouri was represented by Assistant Attorneys General. At the Pulaski County trial, Assistant Attorney General Robert Ahsens represented the State, along with the Pulaski County Prosecuting Attorney. In the underlying Camden County proceedings, the State of Missouri is represented again by Assistant Attorney General Ahsens and by the Camden County Prosecuting Attorney. It is clear that the same party is represented here—the State of Missouri. Making this conclusion even more apparent is that Assistant Attorneys General have represented the State at every level of the two proceedings.

FULL AND FAIR OPPORTUNITY

As Judge Long noted in his Findings and Conclusions in the Pulaski County post-conviction proceedings, "An evidentiary hearing was held from April

28, 2003 to May 1, 2003, wherein the Court took judicial notice of the transcript and the legal file in the underlying criminal case." (Writ Exh. 1 at 2). Judge Long's Findings further reveal that evidence was heard on the majority of claims in the amended motion. (Writ Exh. 1 at 7-18, 19-27). As his Findings detail, and his Conclusions make clear, Relator "presented substantial, credible evidence" of his mental retardation and proved "the statutory criteria by a preponderance of the evidence." (Writ Exh. 1 at 22, 29).

Counsel for the State had ample opportunity, throughout the four days of hearings, to challenge Relator's evidence on all claims, including those addressing mental retardation. That Judge Long denied some of those claims indicates that counsel for the State made use of that opportunity. Further, that the State chose not to appeal from Judge Long's findings and conclusions suggests that it believed they should be given deference.

Relator proved by a preponderance of the evidence in the Pulaski County proceedings that he is mentally retarded and that issue is the same one presented in the Camden County proceedings; the Pulaski County proceedings resulted in a final judgment on the merits from which the State chose not to appeal; the parties in both actions are identical, and the State had a full and fair opportunity in the Pulaski County proceedings to litigate the issue of Relator's mental retardation and chose to abide by Judge Long's decision in that case. Collateral estoppel must therefore bar the State's attempt in the Camden County proceedings to seek the death penalty against Relator. A writ should issue in this case to protect Relator

from a death penalty prosecution in the underlying Camden County proceedings since Judge Long has adjudged him mentally retarded as defined by Missouri's Legislature.

CONCLUSION

For the foregoing reasons, Relator is entitled to a writ of prohibition or, alternatively, a writ of mandamus, ordering the Respondent to take no action in Camden County Case No. CR299-51F through which Relator could be subject to the death penalty or, in the alternative, that he grant Relator's *Motion to Dismiss the Aggravating Circumstances and to Prohibit the State from Seeking Death as a Punishment.* Relator thus requests that this Court make its preliminary writ absolute.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of September, 2005, one true and correct copy of the foregoing brief and floppy disk(s) containing a copy of this brief was hand-delivered to the Office of the Attorney General, Missouri Supreme Court Building, Jefferson City, MO 65102.

_____

Janet M. Thompson

CERTIFICATE OF COMPLIANCE

I, Janet M. Thompson, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, signature block, this certification and the certificate of service, this brief contains 8,437 words, which does not exceed the 31,000 words allowed for an appellant's opening brief.

The floppy disk(s) filed with this brief contain(s) a copy of this brief. The disk(s) has/have been scanned for viruses using a McAfee VirusScan program. According to that program, the disk(s) is/are virus-free.

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Janet M. Thompson