No. 86936

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI
ex rel. ALIS BEN JOHNS,

Relator,

v.

THE HONORABLE GREG KAYS,
Judge, 26th Judicial Circuit,

Respondent.

On Preliminary Writ
From the Missouri Supreme Court
To the Honorable Greg Kays, Judge
Circuit Court of Camden County, 26th Judicial Circuit

RESPONDENT=S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

On July 5, 2005, relator filed a petition for a writ of prohibition or, in the alternative, a writ of mandamus, Ato prohibit Respondent from holding any proceedings through which the Relator could be subject to the death penalty, or alternatively, to order Respondent to grant Relator=s >Motion to Dismiss the Aggravating Circumstances and to Prohibit the State from Seeking Death as a Punishment.= A On July 27, 2005, this Court issued a preliminary writ of prohibition. Respondent filed a written return on August 26, 2005. This Court has jurisdiction. Article V, ' 4, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

In a case arising out of Pulaski County, relator was found guilty of murder in the first degree and sentenced to death. *State v. Johns*, 34 S.W.3d 93 (Mo. banc 2000). Relator=s case garnered considerable notoriety, in that relator, after killing the victim in that case, evaded capture by law enforcement for six months and, during his flight, killed another victim and apparently committed various other crimes. *See id*. at 101-102.[1] On December 5, 2000, this Court affirmed relator=s conviction and sentence in the Pulaski County case. *Id*. at 100.

On July 9, 2001, relator filed a Rule 29.15 motion, seeking to vacate his conviction and sentence in the Pulaski County case (Writ Ex. 1 at 2). After an evidentiary hearing, relator=s motion was denied in part and granted in part (Writ Ex. 1 at 29). In particular, finding that

[1] Relator=s guilt for the Newton County murder has been established by his guilty plea in that case. Relator stands charged with another murder in the underlying Camden County case, but his guilt of that murder has not been proved. In referring to relator=s other crimes, respondent is merely referring to facts that were set forth in this Court=s direct-appeal opinion in the Pulaski County case.

relator had proven by a preponderance of the evidence that he was mentally retarded as defined in ' 565.030.6, RSMo Cum. Supp. 2004, the Circuit Court of Pulaski County vacated relator=s sentence of death and imposed a sentence of life imprisonment without probation or parole (Writ Ex. 1 at 29).

Relator is currently charged with murder in the first degree and armed criminal action in Camden County. The State has given notice of its intent to seek a sentence of death, and relator has sought to have the aggravating circumstances dismissed and to preclude the state from seeking the death penalty (Writ Ex. 3). On April 8, 2005, respondent denied relator=s motion to dismiss the aggravating circumstances and ruled that AThe issue of mental retardation will be an issue to be determined by a jury@ (Writ Ex. 5).

Citing the finding of mental retardation in his Pulaski County post-conviction case, relator argues that he cannot be subjected to a sentence of death (Writ at 12). Thus, relator seeks a writ of prohibition or mandamus Ato prohibit Respondent from holding any proceedings through which the Relator could be subject to the death penalty, or alternatively, to order Respondent to grant Relator=s >Motion to Dismiss the Aggravating Circumstances and to Prohibit the State from Seeking Death as a Punishment.= A (Writ at 11-12).

On July 27, 2005, this Court issued a preliminary writ of prohibition and ordered respondent to Ashow cause . . . why a writ of prohibition should not issue.@ Respondent filed a written return on August 26, 2005. These proceedings followed.

ARGUMENT

I.

A writ is not warranted, because collateral estoppel does not operate to preclude the state from seeking the death penalty in relator=s Camden County case, and, accordingly, it is within the circuit court=s authority to try relator for his crimes, submit the factual issue of relator=s alleged mental retardation to the jury, and impose any sentence authorized by law (responds to Points I-III of relator=s brief).

A. A Writ is Not Warranted

AThe power to issue a writ of prohibition is limited to correction or limitation of an inferior court or agency that is acting without, or in excess of, its jurisdiction.@ *State ex rel. AG Processing Inc. v. Thompson*, 100 S.W.3d 915, 919 (Mo.App. W.D. 2003). AA writ of prohibition does not issue as a matter of right, and whether a writ should be issued in a particular case is a question left to the sound discretion of the court to which the application is made.@ *Id*. AThe discretionary authority of a court to issue a writ of prohibition is exercised when the facts and circumstances of a particular case demonstrate unequivocally that an extreme necessity for preventative action exists.@ *Id*. AA writ of prohibition is an extraordinary remedy and should be used with >great caution, forbearance, and only in cases of extreme necessity.=@ *Id*.

Because the writ of prohibition is such a powerful writ, this Court has generally

Alimited the use of prohibition to three, fairly rare, categories of cases.@ *State ex rel. Riverside Joint Venture v. Missouri Gaming Com=n*, 969 S.W.2d 218, 221 (Mo. banc 1998). AFirst, prohibition lies where a judicial or quasi-judicial body lacks personal jurisdiction over a party or lacks jurisdiction over the subject matter the body is asked to adjudicate.@ *Id*. ASecond, prohibition is appropriate where a lower tribunal lacks the power to act as contemplated.@ *Id*. AThird, prohibition will issue in those very limited situations when an >absolute irreparable harm may come to a litigant if some spirit of justifiable relief is not made available to respond to a trial court=s order,= or where there is an important question of law decided erroneously that would otherwise escape review on appeal and the aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision.@ *Id*. (citation omitted; emphasis in original).

Respondent submits that relator=s case does not fall into any of these categories. First, as relator implicitly acknowledges (Rel.Br. 21-22), the circuit court has jurisdiction to try his criminal case. Second, because there has been no binding factual determination in the Camden County criminal case as to relator=s alleged mental retardation (as will be discussed in greater detail below), the circuit court does not lack authority to Aact as contemplated.@ And third, again because relator=s mental retardation has not been established by any binding factual determination, relator cannot claim irreparable harm from merely standing trial like any other criminal defendant.

In arguing that such a trial *is* outside the circuit court=s power to act (and will result

in irreparable harm that can only be avoided by the issuance of a writ), relator makes various arguments, all of which are premised upon one simple fact, namely, that Judge Long in the Pulaski County case determined that relator *is* mentally retarded. Relator argues that this factual finding by Judge Long (in an unrelated post-conviction case) should apply in the Camden County criminal case and collaterally estop the state from seeking the death penalty in the Camden County criminal case.

Thus, relator=s arguments in favor of the writ (both those that refer to respondent=s jurisdiction and those that argue the irreparable harm that relator will allegedly suffer[2]) simply take the view that Judge Long=s factual determination is binding, and that all Missouri criminal courts are bound to accept the fact that relator is mentally retarded.

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[2] Respondent has previously pointed out in its responses that some of relator=s alleged harms cannot support the issuance of a writ in themselves. He cannot, for example, cite to the costs that the state will bear to show harm to himself. *See State ex rel. Riverside Joint Venture v. Missouri Gaming Com=n*, 969 S.W.2d at 221 (prohibition will issue when Airreparable harm@ may come to a litigant and when Athe aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision@). Also, his claim regarding the alleged bias of Adeath-qualified@ juries is speculative, at best. *See generally Patton v. Yount*, 467 U.S. 1025, 1038 (1984) (AIt is fair to assume that the method we have relied on since the beginning [voir dire], usually identifies bias.@).

And, relator argues, if he *is* mentally retarded, then he is ineligible for the death sentence under *Atkins v. Virginia*, 536 U.S. 304 (2002), and it violates the constitution to subject him to a capital trial where a sentence of death might be imposed.[3]

But aside from presupposing that Judge Long=s factual determination is binding, relator=s argument suffers from another flaw. In arguing that he should not be required to Arun the gauntlet@ a second time (after being Aacquitted@ of the death penalty in the Pulaski County case), relator relies heavily upon *Ashe v. Swenson*, 397 U.S. 436 (1970). The case, however, is distinguishable on two points. There, the defendant was acquitted of involvement in a single robbery incident that involved six victims (and the only rational basis of acquitting was to conclude that the defendant had not been involved in the crime). *Id*. at 445. Then, after being acquitted of robbing one of the victims, the state prosecuted the defendant for robbing one of the *other* victims. This was held to violate the

[3] In Point II, relator makes the well-settled point that a mentally retarded person who commits murder cannot be executed for that crime (Rel.Br. 28). Respondent has not argued otherwise; respondent simply maintains that no binding factual determination of relator=s alleged mental retardation has been made in the Camden County criminal case.

prohibition against double jeopardy. *Id*. at 445-446.

In the present case, however, relator has never been similarly Aacquitted@ of the death penalty in a criminal case with regard to the murder of the Camden County victim. The first time relator Aran the gauntlet,@ he was convicted and sentenced to death for the murder of the victim in Pulaski County. Judge Long=s judgment in the subsequent civil case then vacated that sentence of death. Relator, however, has *never* Arun the gauntlet@ with regard to the murder of the victim in Camden County; thus, double jeopardy is not implicated. In other words, while the Eighth Amendment=s prohibition against cruel and unusual punishment might ultimately preclude relator=s execution (if he is sentenced to death in the Camden County case), the Fifth Amendment=s prohibition against double jeopardy is not here implicated because relator is neither being tried or punished twice for the same act.[4]

Additionally, unlike *Ashe v. Swenson* where there was a binding factual determination that the defendant *was not* involved in the robberies, here, there is no binding factual determination that relator is mentally retarded. And for the reasons set

[4] *State ex rel. Hines v. Sanders*, 803 S.W.2d 649 (Mo.App. E.D. 1991), which is cited in relator=s brief, is similarly distinguishable from relator=s case.

forth below, respondent submits that relator is *not* correct in his assertion that Judge Long=s factual determination is binding in the Camden County criminal case.

B. Collateral Estoppel Should Not Apply

Respondent again acknowledges that relator has, to an extent, correctly outlined the principles that govern the application of collateral estoppel. In its simplest formulation, collateral estoppel Ameans >when an issue of ultimate fact has been determined by a valid judgment, it may not again be litigated between the same parties.= A *State v. Nunley*, 923 S.W.2d 911, 922 (Mo. banc 1996); *Ashe v. Swenson*, 397 U.S. at 443. Generally, A[i]n deciding whether collateral estoppel applies, the following four factors are considered: (1) is the issue in the present case identical to the issue decided in the prior adjudication; (2) was there a judgment on the merits in the prior adjudication; (3) is the party against whom collateral estoppel is asserted the same party or in privity with a party in the prior adjudication; and (4) did the party against whom collateral estoppel is asserted have a full and fair opportunity to litigate the issue in the prior suit.@ *State v. Nunley*, 923 S.W.2d at 922.

Relator repeatedly points out that Judge Long decided this issue on the merits, and that the state did not appeal his decision. Respondent would note that he is not disputing whether Judge Long=s factual determination was supported by sufficient evidence or whether the state had an opportunity to litigate the issue in Pulaski County; rather, respondent simply does not conclude that Judge Long=s factual determination is binding in the Camden County criminal case. Judge Long was presiding over a post-conviction case, where evidence had been presented, and where Judge Long had to

make factual findings to resolve the claims raised in the post-conviction motion. *See* Rule 29.15(j) (AThe court shall issue findings of fact and conclusions of law on all issues presented[.]@). Respondent does not know whether Judge Long *should* have made the factual finding, or whether Judge Long should have simply ordered a new penalty phase, as this Court did in *Johnson v. State*, 102 S.W.3d 535, 540-541 (Mo. banc 2003). Here, however, relator=s claim arises in a criminal trial, and the factual issue of relator=s alleged mental retardation is supposed to be submitted to a jury. ' 546.040, RSMo 2000 (AAll issues of fact in any criminal cause shall be tried by a jury[.]@); ' 565.030.4.(1), RSMo Cum. Supp. 2004.

But relator, in citing these general propositions of collateral estoppel, seeks to avoid an important requirement that must be considered in criminal cases when a defendant seeks to use collateral estoppel defensively: mutuality of parties. Here, because the defendant in this case is the same person that was charged in the Pulaski County case, it would appear at first blush that there is mutuality of parties. *See generally State v. Lundy*, 829 S.W.2d 54, 56 (Mo.App. S.D. 1992) (AThe 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.@); *see also Standefer v. Untied States*, 447 U.S. 10, 21-26 (1980). Mutuality, however, deals with more than the mere *identity* of the litigants. The rule of mutuality provides that Acollateral estoppel does not operate *unless the party seeking to take advantage of it would have been likewise bound by an adverse judgment in the prior adjudication*.@ *State v. Lundy*, 829 S.W.2d at 56. (new emphasis added). In other words, collateral estoppel does not operate unless it has the

power to preclude *all* of the parties from relitigating the issue.

It does not seem likely, however, that relator would have been bound in this case by a decision adverse to him in his Pulaski County case (if one had been entered). And, in fact, relator has confirmed that he also believes Ahe 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@ (Rel.Br. 37). In other words, if the Pulaski County Circuit Court had made an affirmative finding of fact that relator was *not* mentally retarded, relator essentially admits that he would never allow such an adverse ruling to preclude (or estop) him from presenting evidence on the issue in another case and arguing that the issue be submitted to the jury. But this is directly contrary to the rule set forth in *Lundy*, which states that Acollateral estoppel does not operate unless the party seeking to take advantage of it would have been likewise bound by an adverse judgment in the prior adjudication.@ *Id*.

Relator attempts to dismiss *Lundy*, and he asserts that respondent is Asimply . . . misreading@ the text of *Lundy* (Rel.Br. 37). But the meaning of the text is quite plain, and it appears that relator simply wants to have collateral estoppel work in his favor regardless of whether he would similarly submit to its dictates. This, however, cannot be the rule. Relator cannot have the issue both ways: if he desires to use a favorable ruling as a shield, he must necessarily accept that an adverse ruling would be available to the other party as a sword.

Relator also argues that respondent=s citing to *Standefer v. United States*, is

unavailing (Rel.Br. 37). But respondent has only cited that case for general propositions that are relevant to the larger question of whether collateral estoppel should apply. For instance, relator argued in his petition that litigating this issue again will adversely affect the Camden County Docket and perhaps result in a finding that is inconsistent with the finding in Pulaski County (Writ at 24-25). But those considerations are not controlling in criminal cases, which (unlike civil cases) involve Athe important state interest in enforcement of the criminal law.@ *State v. Lundy*, 829 S.W.2d at 56; *see Standefer v. United States*, 447 U.S. at 24. This public interest in criminal cases outweighs the concerns for crowded court dockets and the consistency of verdicts B two important considerations that favor collateral estoppel in civil cases. *State v. Lundy*, 829 S.W.2d at 56; *see Standefer*, 447 U.S. at 24-25 (AWhile symmetry of results may be intellectually satisfying, it is not required.@). Here, therefore, the public=s interest in this criminal case tends to militate against the application of collateral estoppel B especially where the relator would not be similarly bound if the ruling had been adverse to him.

In sum, a writ is not warranted because respondent has neither exceeded his authority or failed to take actions required by the law. Relator has been charged with murder in the first degree, and, inasmuch as there has been no binding factual determination that relator is mentally retarded, the circuit court does not lack the power to act as contemplated in this criminal case. The prohibition against double jeopardy does not apply, because relator has never been subjected to jeopardy for the murder of the victim in Camden County. Moreover, collateral estoppel should not apply because relator

(who here seeks to use a prior ruling as a shield) would not be similarly bound if the state were attempting to use that ruling as a sword.

CONCLUSION

In view of the foregoing, respondent submits that relator=s application for a writ in mandamus or prohibition should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

(1) That the attached brief complies with the limitations contained in this Supreme Court Rule 84.06(b), and that the brief, excluding the cover, the certificate of service, this certificate, the signature block, and appendix, contains 3,233 words (as determined by WordPerfect 9 software);

(2) That the floppy disk filed with this brief, and containing a copy of this brief, has been scanned for viruses and is virus-free; and

(3) That two true and correct copies of the brief, and a copy of the floppy disk containing a copy of the brief, were mailed, postage prepaid, this _____ day of November, 2005, to:

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