No. SC96382

In The Supreme Court of Missouri

STATE OF MISSOURI EX REL. ERIC G. ZAHND,
Platte County Prosecuting Attorney

Relator,

vs.

THE HON. THOMAS C. FINCHAM,
Circuit Judge of Platte County, Missouri, Division I

Respondent.

RESPONDENT'S BRIEF

Craig A. Johnston, MOBar #32191
Assistant State Public Defender

Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
(573) 777-9977 (telephone)
(573) 777-9963 (facsimile)
Craig.Johnston@mspd.mo.gov

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Introduction

Jack Walker ("Walker") was on probation with a seven-year suspended prison sentence for stealing scrap metal. Relator, the Platte County Prosecuting Attorney ("Prosecutor"), insists that Walker should serve those seven years in prison even though this Court has held that Walker's underlying offense (stealing over $500) is only a misdemeanor with a maximum sentence of one year in jail. *State v. James Calvin Smith*, --- S.W.3d ---, 2017 WL 2952325 (Mo. banc 2017).

The sentencing court, the Honorable Thomas C. Fincham, recognized the manifest injustice of Walker serving a seven-year prison sentence for a misdemeanor, and correctly granted relief. Prosecutor does not challenge that Walker's sentence is in excess of that authorized by law. Prosecutor also does not seriously dispute that Walker might be entitled to relief under other Missouri Court Rules (e.g., Rules 24.035, 29.07(d), and 91). Rather, Prosecutor quibbles over the mechanism used by Judge Fincham to cure the manifest injustice – Rule 29.12(b).

For instance, Prosecutor concedes that Rule 29.07(d) "authorizes a circuit court to set aside a judgment of conviction and withdraw a guilty plea when the execution of sentence has been suspended if the court finds a manifest injustice that needs to be corrected." (Relator's Brief at 17). "Being sentenced to a punishment greater than the maximum sentence of an offense constitutes plain error resulting in manifest injustice." *State v. Severe*, 307 S.W.3d 640, 642 (Mo. banc 2010). By granting Walker's Rule 29.12(b) motion, Judge Fincham found

that there was a manifest injustice. Thus, Rule 29.07(d) would have authorized Judge Fincham to set aside the judgment of conviction.

Prosecutor likewise concedes that if Walker's probation is revoked and he is later delivered to the Department of Corrections for even one day, then a Rule 24.035 motion would be appropriate (Relator's Brief at 22).

Also, habeas corpus is a proper remedy where a sentence has been imposed that is in excess of that authorized by law, and whenever any court has evidence that a person is illegally confined or restrained of his liberty, within the jurisdiction of such court, it shall be the duty of the court to issue a writ of habeas corpus for the person even if no application or petition is presented for such a writ. Rule 91.06. Prosecutor has not contested that Walker's seven-year prison sentence was in excess of that authorized by the stealing statute. Thus, Judge Fincham had a duty to issue a writ of habeas corpus setting aside Walker's felony judgment and sentence.

Further, prior cases, including from this Court, have held that a sentence that is contrary to the law when entered may be later corrected because such an illegal sentence cannot constitute a final judgment. E.g., *State v. Morris*, 719 S.W.2d 761, 763 (Mo. banc 1986). Walker's seven-year prison sentence was contrary to § 570.030.1, and thus under Rule 29.12(b), Judge Fincham was authorized to correct the manifestly unjust illegal sentence.

Writs of prohibition are extraordinary remedies that are only to be used when the facts and circumstances of the case demonstrate unequivocally that an

extreme necessity for preventative action exists. Because Judge Fincham's actions are authorized by Rule 29.12(b), Rule 29.07(d), Rule 91, and would be authorized under Rule 24.035 if Walker is later delivered to DOC, and Judge Fincham would be the judge under any action under those rules, it cannot be seriously contended that the facts and circumstances of this case demonstrate unequivocally that an "extreme necessity" for preventative action exists. This Court should quash the preliminary writ and deny the petition.

TABLE OF AUTHORITIES

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Argument

Mr. Walker was given a suspended seven-year prison sentence for felony stealing. But the offense Walker pleaded guilty to (stealing over $500) is only a misdemeanor with the maximum sentence of one year in jail. After Walker filed a request for relief under Rules 19.04 and 29.12(b), Respondent correctly found that such a sentence, which exceeded that authorized by law, resulted in a manifest injustice, and resentenced Walker accordingly. Thus, Prosecutor is not entitled to a permanent writ prohibiting that action because an extreme necessity for such a writ does not exist in that:

(1) Missouri case law has consistently held that a judgment is not final unless the imposed sentence is one authorized by law, and a sentence that is contrary to the law when entered may be corrected at any time;

(2) Prosecutor concedes that Rule 29.07(d) authorizes a court to set aside a judgment of conviction when the execution of sentence has been suspended if the court finds a manifest injustice that needs to be corrected, and being sentenced to a punishment greater than the maximum sentence authorized by law results in manifest injustice;

(3) Habeas corpus is a proper remedy where a court imposes a sentence that is in excess of that authorized by law, and under Rule 91.06 whenever any court has evidence that a person is illegally confined or restrained of his liberty, within the jurisdiction of such court, it shall be the

duty of the court to issue a writ of habeas corpus for the person even if no application or petition is presented for such a writ; and,

(4) Prosecutor concedes that if Walker's probation is revoked and he is later delivered to the Department of Corrections, then a Rule 24.035 motion would be appropriate, and if a defendant receives a sentence in excess of the maximum sentence authorized by law, then he is entitled relief under Rule 24.035.

General Standards for Writs of Prohibition

"Prohibition will lie only where necessary to prevent an usurpation of judicial power, to remedy an excess of jurisdiction, or to prevent an absolute irreparable harm to a part." *State ex rel. Director of Revenue v. Gaertner*, 32 S.W.3d 564, 566 (Mo. banc 2000). Whether a writ should issue in a case is left to the sound discretion of the court to which application has been made. *State ex rel. Hannah v. Seier*, 654 S.W.2d 894, 895 (Mo. banc 1983).

A court should only exercise its discretionary authority to issue this extraordinary remedy when the facts and circumstances of the case demonstrate unequivocally that there exists an extreme necessity for preventative action. *Derfelt v. Yocum*, 692 S.W.2d 300, 301 (Mo. banc 1985). Absent such conditions, this Court should decline to act. *Id*. If there is any doubt of its necessity or

propriety, it will not be issued. *McDonald v. City of Brentwood*, 66 S.W.3d 46, 50-51 (Mo. App. E.D. 2001).

Relief is appropriate under Rule 29.12(b)

Rule 29.12(b), directed toward trial courts, provides:

> Plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.

This Rule has no express time limitation and it gives the trial court great discretion to grant relief when a manifest injustice has resulted. *See, State v. Tinoco*, 967 S.W.2d 87 (Mo. App. W.D. 1998) (circuit court had the authority under Rule 29.12(b) to grant a new trial before sentencing because of ineffective assistance of counsel).

Walker received a seven-year prison sentence for felony stealing, which is a significantly harsher punishment than the maximum one-year jail sentence he should have received for misdemeanor stealing. *State v. James Calvin Smith*, --- S.W.3d ---, 2017 WL 2952325 (Mo. banc 2017). "Being sentenced to a punishment greater than the maximum sentence of an offense constitutes plain error resulting in manifest injustice." *State v. Severe*, 307 S.W.3d 640, 642 (Mo. banc 2010). Thus, Judge Fincham correctly found that a manifest injustice had resulted as a result of Walker's judgment and sentence.

Prosecutor cites cases such as *State v. Paden*, --- S.W.3d ---, 2017 WL 2644088 (Mo. App. E.D. 2000) for the proposition that "Rule 29.12(b) does not give a court authority to provide post-conviction relief to defendants." (Relator's Brief at 22-23).[1] In reaching that conclusion, *Paden* relied in part on cases that had held that "Rule 29.12(b) does not provide an independent basis under which a person convicted of a crime can subsequently challenge his conviction or sentence." *Paden*, 2017 WL 2644088, at * 4. That conclusion is wrong, and is not supported either by the text of Rule 29.12(b) or any case from this Court.

The genesis behind that proposition of law is *State v. Massey*, 990 S.W.2d 201, 204 (Mo. App. S.D. 1999), which came to that conclusion without citation to any authority: "This court holds that Rule 29.12(b) provides no basis for an independent motion." *Massey* was a situation where the defendant had filed a Motion for New Trial under Rule 29.11, and after that motion was denied, but prior to sentencing, the defendant filed a Motion to Correct Plain Error to allege a ground of ineffective assistance of counsel. *Id*. at 203. *Massey* held that Rule 29.12(b) could not be used as a motion independent from Rule 29.11 to raise additional grounds not asserted in the motion for new trial. Thus, *Massey* is distinguishable from the facts in this case.

[1] Prosecutor is taking an inconsistent position in this case than it did in *Paden* where the Platte County Prosecutor's Office joined in a joint motion under Rule 29.12(b). *Paden*, 2017 WL 2644088 at *2.

Further, *Massey* was wrongly decided. *Massey* distinguished its situation from *Tinoco* by noting that *Tinoco* involved a situation where the claim was included in an amended motion for new trial. *Massey*, 990 S.W.2d at 203-04. But that distinction does not make sense because the amended motion for new trial in *Tinoco* was untimely, and as a result the trial court in *Tinoco* granted relief under Rule 29.12(b). *Id*. at 203. *Tinoco* was correctly decided because the court still had jurisdiction over the case and thus it had discretion under Rule 29.12(b) to correct a manifest injustice. *Massey* should have followed *Tinoco* because the trial court in *Massey* still had jurisdiction over the case, and thus it could have granted relief under Rule 29.12(b) if it found that there was a manifest injustice.

Other Rule 29.12(b) cases cited by Prosecutor involve situations like *Vernor v. State*, 30 S.W.3d 196 (Mo. App. E.D. 2000) where the trial court no longer had jurisdiction over the petitioner, who had already filed a 24.035 motion, appealed it, and lost that appeal. The essence cases like *Vernor* is that Rule 29.12(b) cannot be used to enlarge the time limits of Rule 24.035 to raise grounds not timely raised under that Rule.

But here, unlike those cases, the exercise of Rule 29.12(b) is not being used to make an end-run around the time limits of Rule 24.035, because Walker's right to proceed under Rule 24.035 has not started.

Further, Rule 29.12(b) is not an independent cause of action in this case because the Judge Fincham still had jurisdiction over Walker, who was on probation. As recently noted by Judge Fischer of this Court, "the circuit court

itself has discretion pursuant to Rule 29.12(b) if it determines during any time that it still has jurisdiction that it has erred in a manner that would cause manifest injustice or a miscarriage of justice." *State v. Collings*, 450 S.W.3d 741, 769 n. 1 (Mo. banc 2014).

It is true, as noted by Prosecutor, that this Court has held that once judgment and sentencing occur in a criminal proceeding, the trial court can take no further action in that case except when otherwise expressly provided by statute or rule, such as Rule 24.035. *State ex rel. Simmons v. White*, 866 S.W.2d 443 (Mo. banc 1993). Correspondingly, this Court has also held that a trial court does not have the authority to alter a defendant's sentence after a revocation of probation. *State ex rel. Poucher v. Vincent*, 258 S.W.3d 62, 65 (Mo. banc 2008).

But that general rule is tempered by prior cases, including from this Court, holding that a judgment is not final unless the imposed sentence is one authorized by law. As held by this Court in *State v. Morris*, 719 S.W.2d 761, 763 (Mo. banc 1986), "a sentence that is contrary to law cannot constitute a final judgment," and if the sentence is not entered in compliance with the law, the sentence is void and can be corrected. *In accord, State v. Ferrier*, 86 S.W.3d 125, 127 (Mo. App. E.D. 2002), which held that the trial court had the authority to re-sentence Ferrier over one year after the original sentence because the first sentence was not a correct sentence for a persistent or predatory sexual offender, and a sentence that does not comply with a statute is void and cannot constitute a final judgment; *Ossana v. State*, 699 S.W.2d 72 (Mo. App. E.D. 1985) (concurrent sentence imposed on the

defendant for attempted rape was invalid as violating a statute, and thus, the trial court retained jurisdiction to re-sentence the defendant in accordance with the statute).

Where the record shows that the court did not have the authority to render the particular judgment which it did render, the judgment is void and subject to collateral attack. *State ex rel. Dutton v. Sevier*, 336 Mo. 1236, 83 S.W.2d 581, 582 (Mo. banc 1935). This is in accord with the rule followed by most jurisdictions to the effect that an unlawful sentence is of no legal effect, allowing the court to correct the sentence by imposing lawful terms at any time the illegibility is discovered. See 28 A.L.R. 4th 147 (originally published in 1984). It was also well established under common law that the court has continuing jurisdiction to correct an illegal sentence. See, e.g., *Bozza v. United States*, 330 U.S. 160, 166 (1947) ("It is well established that a sentence which does not comply with the letter of the criminal statute which authorizes it is so erroneous that it may be set aside ... in habeas corpus proceedings."). *Accord*, *People v. Petrenko*, 237 Ill. 2d 490, 503, 931 N.E.2d 1198, 1206 (2010) ("It is well settled that a sentence that is in conflict with statutory guidelines is void and may be challenged at any time."). Thus, Rule 29.12(b) was properly used in this case.[2]

[2] Rule 19.04 provides that "[i]f no procedure is specially provided by rule, the court having jurisdiction shall proceed in a manner consistent with judicial

Walker's case is distinguishable from *Simmons* because in *Simmons* this Court found that the circumstances did not rise to a level of manifest injustice to excuse Simmons' failure to raise the issue by Rule 24.035 because this Court was convinced that his procedural default stemmed from a calculated, strategic decision to forego a Rule 24.035 motion in the hope of receiving probation. No evidence of such a strategy exists in this case and Walker's right to file his Rule 24.035 motion has not commenced because he has not been delivered to DOC.

Poucher is also distinguishable from Walker's case because that case involved a *nunc pro tunc* changing the sentences to run consecutively instead of concurrently, and thus did not involve Rule 29.12(b) or an illegal sentence that is present in Walker's case.

The instant case is also distinguishable from *State v. Carrasco*, 877 S.W.2d 115 (Mo. banc 1994). In that case, Carrasco was sentenced to ten years imprisonment even though the maximum penalty was for not more than five years imprisonment. *Id*. at 116. Carrasco did not file a Rule 24.035 motion and the time for filing such a motion had expired. *Id*. On appeal, Carrasco argued for a *nunc pro tunc* relief under Rule 29.12(c). *Id*. During argument before this Court, Carrasco made an oral petition for relief by writ of habeas corpus, which this Court denied without prejudice. *Id*.

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decision or applicable statutes." Thus, Judge Fincham was entitled to proceed in a manner consistent with *Morris*, *Ferrier*, and *Ossana*.

Thus Carrasco is inapposite because it involved a request for relief under Rule 29.12(c), and clearly a *nunc pro tunc* was not appropriate because it only applies to corrections of clerical mistakes and what occurred in *Carrasco* was a judicial error, not a clerical mistake. Further, Carrasco did not avail himself of the remedy afforded by Rule 24.035, and thus Carrasco could not evade that time limit under the guise of Rule 29.12(c).

Walker's seven-year prison sentence was "contrary to law," § 570.030, RSMo Supp. 2010, and thus it was not a final judgment, because his offense of stealing was only a misdemeanor, and a sentence for a misdemeanor cannot be more than a year in the county jail. Therefore, Judge Fincham had the authority or jurisdiction to subsequently render a sentence that conformed to the law. This Court should quash the preliminary writ and deny the petition.

Rule 29.07(d)

Rule 29.07(d) provides, in pertinent part, that a "court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea" "to correct manifest injustice." Thus, if a defendant, like Walker, receives a suspended execution of sentence and was never delivered to DOC, a Rule 29.07(d) motion can be filed since Rule 24.035 would not be applicable without a delivery to DOC. *State v. Ison*, 270 S.W.3d 444 (Mo. App. W.D. 2008).

Prosecutor admits that "Rule 29.07(d) authorizes a circuit court to set aside a judgment of conviction and withdraw a guilty plea when a defendant has been sentenced and when the execution of sentence has been suspended if the court finds a manifest injustice that needs to be corrected" (Relator's Brief at 17, 22). Judge Fincham necessarily found a manifest injustice exited when he granted the Rule 29.12(b) motion because a manifest injustice is required under that rule too. That was a correct finding because "[b]eing sentenced to a punishment greater than the maximum sentence of an offense constitutes plain error resulting in manifest injustice." *Severe*, 307 S.W.3d at 642.

If Walker would be entitled to relief under a different Rule as a result of a manifest injustice, it cannot be said that there is an "extreme necessity" for granting the writ Petition. *Derfelt*, 692 S.W.2d at 301.

Apparently, Prosecutor is arguing that Walker should have sought relief under Rule 29.07(d) instead of 29.12(b) because Prosecutor is under the misguided belief that "[i]f the defendant had sought relief under Rule 29.07(d) and the defendant's guilty plea had been withdrawn,[] Relator could have moved to amend the charge from felony stealing more than $500 … to felony receiving stolen property." (Relator's Brief at 19). That assertion ignores a couple of important problems.

First, Rule 23.08(a) specifically prohibits an amendment of an information if a "different offense is charged." *See State v. McKeehan*, 894 S.W.2d 216 (Mo. App. S.D. 1995) (Amended information, alleging that defendant possessed 35

grams of marijuana, rather than original charge that he possessed more than five grams of marijuana with the intent to distribute, violated Rule 23.08, which prohibits the amendment of an information to charge an offense different from the one originally charged). Stealing is a different offense than receiving stolen property.

Second, the statute of limitations for felony receiving stolen property is three years, § 556.036.2(1), RSMo Supp. 2010, and since the alleged crime here was committed on April 20, 2013, the statute of limitations for that offense expired last year, which was before Walker even filed his Motion for Resentencing to Correct Plain Error and Manifest Injustice.

Because Walker would have been entitled to relief under Rule 29.07(d), it cannot be said that there is an "extreme necessity" for granting the writ, *Derfelt*, 692 S.W.2d at 301, and this Court should quash the preliminary writ and deny the petition.

Walker is entitled to a writ of habeas corpus (Rule 91)

Even if this Court decides that Walker is not entitled to proceed under either Rule 29.12(b) or 29.07(d), Judge Fincham was authorized to grant relief to

Walker on his claim under a writ of habeas corpus (Rule 91); in fact, this Court also could grant relief to Walker and issue a writ of habeas corpus.[3]

Rule 91.06 provides that "[w]henever any court of record, or any judge thereof, shall have evidence from any judicial proceedings had before such court or judge that any person is illegally confined or restrained of his liberty within the jurisdiction of such court or judge, *it shall be the duty of the court or judge to issue a writ of habeas corpus for the person's relief, although no petition be presented for such writ*" (emphasis added). Section 532.070 requires the same.

Where a court imposes a sentence that is in excess of that authorized by law, habeas corpus is a proper remedy. *State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 516-17 (Mo. banc 2010). *Accord, State ex rel. Osowski v. Purkett*, 908 S.W.2d 690, 691 (Mo. banc 1995) (sentencing court acted beyond its authority when it sentenced the defendant to fifteen years in prison where the maximum authorized term of imprisonment was seven years); *State ex rel. Koster v. Jackson*, 301 S.W.3d 586, 589 (Mo. App. W.D. 2010) (petitioner was entitled to habeas corpus relief on the basis that he was improperly sentenced on his DWI conviction as a persistent offender based on a prior municipal DWI offense for which he had received a suspended imposition of sentence because the imposition of a sentence

[3] Prosecutor's brief concedes that "the rules of this Court" provide that habeas corpus is an "appropriate" way "by which defendants may challenge convictions." (Relator's Brief at 8, 19-20).

beyond that permitted by the applicable statutory may be raised by way of a writ of habeas corpus); *Sevier*, *supra* (defendant who was charged with assault with intent to kill, which was an offense with a maximum prison sentence of five years, was entitled to habeas corpus relief because the court was without authority to impose a sentence of twelve years' imprisonment).

At the time of Walker's offense, the crime of stealing was a class A misdemeanor with a maximum sentence of one year in jail. *Smith*, 2017 WL 2952325, at * 7-8. Thus, Walker's seven-year prison sentence was in excess of the statutory maximum for a misdemeanor stealing offense. This is patent upon the face of the record. Walker was entitled to be resentenced for a misdemeanor stealing. *Smith*, 2017 WL 2952325, at *8. As a result, habeas corpus is a proper remedy under Rule 91.06. *Zinna*, 301 S.W.3d at 516-17; *Osowski*, 908 S.W.2d at 691; *Koster*, 301 S.W.3d at 589; *Sevier*, 83 S.W.2d at 582-583.

Judge Fincham and this Court have evidence that Walker was illegally confined or restrained of his liberty,[4] Walker is within the jurisdiction of Judge Fincham and this Court, and thus it was Judge Fincham's duty, and it would be this Court's duty, to issue a writ of habeas corpus granting Walker relief from a seven-year prison sentence for misdemeanor stealing. If Walker is entitled to the

[4] A defendant who is on probation or parole is restrained of his liberty for purposes of seeking habeas relief. *State ex rel. Fleming v. The Missouri Board of Probation or Parole*, 515 S.W.3d 224, 228 n.6 (Mo. banc 2017).

same relief under a habeas corpus as was granted under Walker's Rule 29.12(b) motion, then it cannot be said that there is an "extreme necessity" for granting Prosecutor's writ Petition, and this Court should quash the preliminary writ and deny the petition.

Walker would be entitled to relief under Rule 24.035

Rule 24.035 provides that a person convicted of a felony on a plea of guilty and delivered to the custody of the department of corrections, who claims that the sentence imposed was in excess of the maximum sentence authorized by law, may seek relief in the sentencing court under the provisions of Rule 24.035. But in order to proceed under Rule 24.035 motion, the defendant must be delivered, physically, into the custody of the DOC.[5] *Thomas v. State*, 808 S.W.2d 364, 365 (Mo. banc 1991) (rejecting the state's argument that the date of sentencing rather than the date of delivery to DOC was the significant date for measuring the time period to file a Rule 24.035 motion).

Prosecutor concedes that if Walker's probation is revoked, and he is delivered to DOC, "then a Rule 24.035 motion would the appropriate procedure to challenge the conviction" (Relator's Brief at 22). Such a motion would be appropriate, and should be granted, because if a defendant receives a sentence that

[5] Effective January 1, 2018, Rule 24.035 will no longer require that the movant be delivered to the department of corrections in order to proceed under that rule.

exceeds the statutory maximum, then the defendant is entitled to post-conviction relief. *Olds v. State*, 891 S.W.2d 486, 492 (Mo. App. E.D. 1994). *Also see*, Rule 24.035(a), which provides that a movant who claims that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court under Rule 24.035.

Implicit in Prosecutor's argument is that if Walker is physically delivered to DOC for at least one day (instead of the county jail where he is presently incarcerated for this offense),[6] then the sentencing court (Judge Fincham) could grant relief under Rule 24.035, and do what Judge Fincham has already done. If, as implied by Prosecutor, the only thing preventing Judge Fincham from doing what he has already done in this case is for Walker to spend at least one day in prison instead of the county jail, then it cannot be said that there is an "extreme necessity" for granting Prosecutor's writ, and this Court should quash the preliminary writ and deny the petition.

[6] By the time that this case is argued, Walker will have served more than a year in custody on his stealing offense.

CONCLUSION

Mr. Walker was given a suspended seven-year prison sentence for felony stealing. But the offense Walker pleaded guilty to (stealing over $500) is only a misdemeanor with the maximum sentence of one year in jail. Judge Fincham correctly found that such a sentence, which exceeded that authorized by law, resulted in a manifest injustice, and resentenced Walker accordingly.

Because Judge Fincham's actions are authorized by Rule 29.12(b), Rule 29.07(d), Rule 91, and would be authorized under Rule 24.035 if Walker is later delivered to DOC, and Judge Fincham would be the judge under any action under those rules, it cannot be seriously contended that the facts and circumstances of this case demonstrate unequivocally that an "extreme necessity" for preventative action exists. This Court should quash the preliminary writ and deny the petition.

Respectfully submitted,

/s/ Craig A. Johnston

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Craig A. Johnston, MOBar #32191
Assistant State Public Defender

Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
(573) 777-9977 (telephone)
(573) 777-9963 (facsimile)
Email: Craig.Johnston@mspd.mo.gov

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, hereby certify that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b), it was completed using Microsoft Word 2010, in Times New Roman size 13 point font, and it includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 4,921 words. On this 3rd day of August, 2017, electronic copies of Respondent's Brief, was sent through the Missouri e-Filing System to Joseph W. Vanover, Attorney for Relator.

/s/ Craig A. Johnston

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Craig A. Johnston, MOBar #32191
Assistant State Public Defender

Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
(573) 777-9977 (telephone)
(573) 777-9963 (facsimile)
Email: Craig.Johnston@mspd.mo.gov