

**IN THE  
MISSOURI SUPREME COURT**

STATE EX REL. JEFFREY MERRELL,	)	
Relator,	)	
	)	
	)	
v.	)	Case No. SC95932
	)	Circuit Court No. 14AF-CR00050-02
THE HONORABLE R. CRAIG	)	
CARTER, CIRCUIT JUDGE, 45 <sup>TH</sup>	)	
JUDICIAL CIRCUIT.	)	
Respondent.	)	

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**ORIGINAL PETITION FOR WRIT OF PROHIBITION IN THE MISSOURI  
SUPREME COURT FROM THE CIRCUIT COURT OF CHRISTIAN COUNTY  
THE HONORABLE R. CRAIG CARTER, VISITING JUDGE**

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**RELATOR'S STATEMENT, BRIEF AND ARGUMENT IN SUPPORT OF HIS  
PERMANENT WRIT OF PROHIBITION**

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### **JURISDICTIONAL STATEMENT**

This action is one involving Relator's request for an original writ of prohibition, seeking the vacating of an order entered on August 23, 2016 in the underlying cause, *State v. Malcolm Pearce*, Case No. 14AF-CR00050-02, Circuit Court of Christian County, on the grounds that the Respondent did not have the authority to enter that order directing Taney County and the Relator to pay fees associated with a court-appointed special master, as Respondent had no authority to appoint a special master and had no authority to collect the costs associated with said special master from Taney County or the Prosecuting Attorney's Office. Therefore, jurisdiction lies with this Court pursuant to Missouri Supreme Court Rules 84.22 through 84.26 and Rule 97.

No petition for the relief sought has been made to any higher court.

Relief was sought from, and denied by, the Missouri Court of Appeals, Southern District, in Case No. SD34606 on September 13, 2016.

## **STATEMENT OF FACTS**

On May 1, 2014, an Information was filed in the Circuit Court of Taney County by the Relator's office charging Defendant Malcolm Brian Pearce with eight (8) felony counts – two (2) counts of statutory sodomy in the first degree involving a child less than fourteen years of age, two (2) counts of child molestation in the first degree, two (2) counts of endangering the welfare of a child in the first degree, and two (2) counts of sexual misconduct or attempted sexual misconduct involving a child under fifteen (15) years of age. On the same day, Relator and Defendant agreed for the case to be assigned to the Respondent. Subsequently, a change of venue was granted to Christian County.

On May 27, 2016, the Defendant's attorney filed a "Motion to Disqualify the Taney County Prosecuting Attorney," alleging that the Taney County Prosecutor's Office disclosed jail phone calls made by the Defendant from the Christian County Jail, some of which included allegedly privileged phone calls to his attorneys. (Exhibit A, A1-A2). Subsequently, on May 31, 2016, a hearing was held on Defendant's motion. Evidence was presented in the form of testimony from the Christian County Jail administrator, who testified that the phone call system announces all phone calls are being recorded. The Respondent denied the Defendant's motion for disqualification, but ordered the appointment of a special master to review all phone call evidence from this case and further ordered that any future phone calls be directed to the special master. (Exhibit B, A4). The Respondent made no finding as to whether or not the phone calls were actually privileged. (Exhibit B, A4). On June 21, 2016, the Respondent appointed retired Greene County judge Mark Fitzsimmons as special master. (Exhibit C, A5).

Judge Fitzsimmons, acting as special master, filed a three (3) page report detailing his actions in this case on August 9, 2016. (Exhibit D, A6-A8). The special master made no finding as to whether or not the phone calls were privileged, as he was directed to do.

On August 23, 2016, the Respondent issued an order directing that “Taney County pay Mark Fitzsimmons, Special Master, two thousand eight hundred twenty-four and 23/100 dollars (\$2,824.34) within thirty days. Jeff Merrell is directed to forward this order to the appropriate official in Taney County to process this payment.” (Exhibit E, A9). The Relator filed a “Motion to Reconsider” on August 24, 2016 (Exhibit F, A14-A17), which was taken up by the Respondent on the following day. The Respondent overruled the motion.

On August 29, 2016, the Relator filed a petition for a Writ of Prohibition with the Missouri Court of Appeals, Southern District, which it denied on September 13, 2016 (Exhibit G, A18). That same day, the Relator filed a petition for writ of prohibition with this Court, which it sustained and issued its preliminary writ on September 22, 2016.

**POINTS RELIED ON**

Relator is entitled to a writ of prohibition ordering that the Respondent be prohibited from enforcing his order of August 23, 2016 ordering Taney County pay the costs associated with a special master as

(1) the Rules of Criminal Procedure do not contain provisions for the appointment of a special master and furthermore, the Rules of Civil Procedure that allow the appointment of a special master do not apply to criminal proceedings and grant that costs are to be shared by the parties or paid out of a fund under the control of the court,

(2) costs are a creature of statute and should be strictly construed and only be granted by virtue of express statutory authority, and

(3) a special master was unnecessary in this matter, as the phone calls were not protected by attorney-client privilege under Missouri law.

**Sup. Ct. Rule 68.01**

**Sup. Ct. Rule 19.01**

*Heiden v. General Motors Corporation*, 567 S.W.2d 401 (Mo. App. 1978)

*Starling v. Union Pac. R.R. Co.*, 22 S.W.3d 213 (Mo. App. W.D. 2000)

*State v. Fingers*, 564 S.W.2d 579 (1978)



## **ARGUMENT**

**Relator is entitled to a writ of prohibition ordering that the Respondent be prohibited from enforcing his order of August 23, 2016 ordering Taney County pay the costs associated with a special master as**

**(1) the Rules of Criminal Procedure do not contain provisions for the appointment of a special master and furthermore, the Rules of Civil Procedure that allow the appointment of a special master do not apply to criminal proceedings and grant that costs are to be shared by the parties or paid out of a fund under the control of the court,**

**(2) costs are a creature of statute and should be strictly construed and only be granted by virtue of express statutory authority, and**

**(3) a special master was unnecessary in this matter, as the phone calls were not protected by attorney-client privilege under Missouri law.**

A Writ is appropriate whenever “...the trial court exceeds its jurisdiction or abuses its discretion to such an extent that it lacks the power to act as it did; or where there is no adequate remedy by appeal for the party seeking the writ and the ‘aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision [of the lower court].’” *State ex rel. Steeley v. Oswald*, 147 S.W.3d 81 (Mo. 2004) citing *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573 (Mo. Banc 1994). Although prohibition is discretionary, it “may be appropriate to prevent unnecessary, inconvenient, and expensive litigation.” *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 856-57 (Mo. banc 2001). “The extraordinary remedy of a writ of prohibition is appropriate in one of three circumstances:

(1) to prevent the usurpation of judicial power when the trial court lacks jurisdiction; (2) to remedy [an] excess of jurisdiction or an abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not made available in response to the trial court's order." *State ex rel. Nothum v. Walsh*, 380 S.W.3d 567, 561 (Mo. Banc 2012)(citation omitted).

A Writ of Prohibition is appropriate to determine whether or not a trial judge has abused his or her discretion. *State ex rel. Kinder v. McShane*, 87 S.W.3d 256, 257-258 (Mo. banc 2002). The Missouri Supreme Court in that case "issued a preliminary writ of prohibition to determine whether the trial judge abused her discretion in refusing to accept Adrian Kinder's attempted waiver of a potentially serious conflict of interest." *Id.*

In this case, a writ of prohibition is appropriate because Respondent has no statutory authority to appoint a special master and has no statutory or inherent authority to assess costs for the improperly appointed special master.

**THE RULES OF CRIMINAL PROCEDURE CONTAIN NO PROVISIONS FOR  
THE APPOINTMENT OF A SPECIAL MASTER AND THE RULES OF CIVIL  
PROCEDURE CHARGE THE COSTS AGAINST THE PARTIES**

Rules 19 to 36 govern the procedure in all courts of this state having jurisdiction over criminal proceedings. Rule 19.01. (Exhibit I, A22). Except in the case of depositions conducted in a criminal case, the civil rules – Rules 41 through 101 – do not apply to criminal proceedings. The Rules of Criminal Procedure contain no provisions for the appointment of a special master, while the Rules of Civil Procedure do make such provisions, they are not applicable to a criminal proceeding. (see Rule 68.01).

Furthermore, even if Rule 68.01 were found to apply to a criminal proceeding, “the compensation to be allowed a master shall be charged upon such of the **parties**, or paid out of any fund or subject matter of the action which is in the custody or control of the court, as the court may direct,” (emphasis added). Rule 68.01(a). (Exhibit H, A19). Rule 68.01(a) would seemingly indicate that **all** of the parties of the action would bear the costs of a special master, unless the Court were to take it out of another fund under the custody and control of the Court. (Exhibit H, A19).

**COSTS ARE A CREATURE OF STATUTE AND SHOULD BE STRICTLY  
CONSTRUED**

Costs did not exist at common law, and their allowance is a creature of statute. *Heiden v. General Motors Corporation*, 567 S.W.2d 401, 403 (Mo. App. 1978) (Exhibit J, A23-A27); *McClue v. Epstein*, 492 S.W.2d 97, 98 (Mo. App. 1973). Statutes allowing taxation of costs are strictly construed. *Dorn-Chrysler Plymouth, Inc. v. Roderique*, 487 S.W.2d 48, 49 (Mo. App. 1972). No item is taxable as costs unless specifically so provided by statute. *McClue* at 98. Furthermore, courts have “no inherent power to award costs, which can only be granted by virtue of express statutory authority.” *Starling v. Union Pac. R.R. Co.*, 22 S.W.3d 213, 216 (Mo. App. W.D. 2000). (Exhibit K, A28-A30).

Chapters 448 and 550, RSMo<sup>1</sup>, governs court costs in criminal cases. Chapter 448 contains over fifty separate sections related to court costs, identifying several different items for which costs may be collected, including witness fees (Section 488.032), juror

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<sup>1</sup> All statutory references are from RSMo. Supp. 2016.

compensation (488.040), criminal surcharges (488.5017), and special prosecutor fees (488.5342). Additionally, Sections 550.020 and 550.030, RSMo, directs the costs that are chargeable against the State of Missouri in felony criminal actions<sup>2</sup> and against the County in misdemeanor criminal actions. In both Chapters 448 and 550, there is no provision for the payment of special master fees by the State of Missouri or the County. Furthermore, there is no provision in the Rules of Criminal Procedure for the payment of special master fees, unlike fees for other traditionally civil discovery procedures, such as depositions in a criminal case, which Rule 25.17 specifically taxes as court costs. Finally, Section 550.310, RSMo makes it a misdemeanor offense for “[e]very judge, prosecuting attorney, clerk or judge [*sic*]” to violate any provision of Chapter 550, punishable by a \$1,000 fine.

**RECORDED PHONE CALLS MADE FROM A COUNTY JAIL ARE NOT  
PRIVILEGED**

Finally, the Relator asserts that the special master was not necessary in this case because under the laws of the State of Missouri and the laws of the United States, “attorney-client privilege attaches to: 1) information transmitted by voluntary act of disclosure; 2) between a client and his lawyer; 3) in confidence; and 4) by a means which, so far as a client is aware, discloses the information to no third parties other than those reasonably

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<sup>2</sup> Arguably, if this Court were to find that special master fees could be assessed, as this is a felony criminal case, costs should be assessed against the State of Missouri, not Taney County.

necessary for the transmission of the information or for the accomplishment of the purpose which it is transmitted.” *State v. Fingers*, 564 S.W.2d 579 (1978). (Exhibit L, A31-A34).

In this case, the claim of privilege fails, as the jail phone system announces, “This call will be recorded and subject to monitoring at any time.” Because the phone calls were made to his lawyers on a recorded line and subject to monitoring by third parties, there was no legal basis or reason for the Respondent to appoint a special master in this case, and therefore there is no basis for assessing the costs of said special master to the State of Missouri or to Taney County.

## **CONCLUSION**

The preliminary writ of prohibition issued in this case on September 22, 2016 should be made permanent as the Respondent has clearly abused his discretion and authority. Missouri courts have consistently held that court costs must be provided for by statute and courts do not have inherent authority to award costs. Missouri law has no provision for the taxing of special master fees as costs in a criminal case, and furthermore, Missouri law has no provision for the appointment of a special master in a criminal case. The Respondent should be prohibited from assessing and ordering the costs of a special master to be paid by Taney County and the Taney County Prosecuting Attorney's Office.

Respectfully submitted:

/s/ Anthony M. Brown

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### **CERTIFICATE OF SERVICE**

I, the undersigned counsel, hereby certify that on this 12<sup>TH</sup> day of December, 2016, true and correct copies of the foregoing petition and exhibits were delivered via the Missouri eFiling System to the following individuals:

Respondent:

Honorable R. Craig Carter

44<sup>th</sup> Judicial Circuit Judge

PO Box 489

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/s/ Anthony M. Brown

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ANTHONY M. BROWN

Assistant Prosecuting Attorney

**CERTIFICATE OF COMPLIANCE**

I, Anthony M. Brown, 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 2013 in Times New Roman, 13 point font. Excluding the cover page, signature block, appendix, this certification and the certificate of service, this brief contains 2,381 words, which does not exceed the 31,000 words allowed for a Relator's brief.

/s/ Anthony M. Brown

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