

In the Supreme Court of Missouri

STATE OF MISSOURI EX REL. CHRISTOPHER KOSTER,

Relator,

v.

THE HONORABLE PHILIP HEAGNEY, et al.,

Respondents.

Petition for a Writ of Certiorari

Relator's Substitute Brief

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ATTORNEYS FOR RELATOR

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JURISDICTIONAL STATEMENT

This is an original writ of certiorari proceeding that arose from the Circuit Court of the City of St. Louis' order granting habeas relief. Jurisdiction was proper in the Missouri Court of Appeals, Eastern District. Mo. Const. art. V, § 3; §477.050, RSMo.¹ This Court granted transfer from opinion under Rule 83.04.

¹ All statutes are current through the latest supplement, unless otherwise noted.

STATEMENT OF FACTS

This certiorari proceeding reviews the actions of the St. Louis City Circuit court, Respondent Heagney presiding (habeas court). (Relator's Exhibit M).² The habeas court considered two different fact patterns, one arising in Jackson County from 2005 until 2008, and one arising in Audrain County from 2005 until 2008.

Jackson County: Arson, A Guilty Plea, A Motion for Post-Conviction Relief

On July 4, 2005, George Fisher attempted to set his girlfriend's father's porch on fire in Jackson County, Missouri. (Relator's Exhibit M, at 4; Relator's Exhibit A, at 1–2). On January 20, 2007, Fisher pleaded guilty to the class B felony of first-degree arson. (Relator's Exhibit M, at 4). The Circuit Court of Jackson County sentenced Fisher to twelve years' imprisonment in the Department of Corrections. (Relator's Exhibit M, at 4). Fisher then filed his motion for post-conviction relief under Rule 24.035. (Relator's Exhibit M, at 4). His attorney filed an amended motion for post-conviction relief, alleging that Fisher's guilty plea was not knowing, intelligent, and voluntary because Fisher was not guilty by reason of mental disease or defect (NGRI) at the time of the

² Unlike other appeals, the record does not consist of a legal file in this case. Instead, it consists of the return from the habeas court. For ease of reference, Relator's citations are to the exhibits, all of which are in the return.

offense. (Relator's Exhibit M, at 4; Relator's Exhibit G, at 19). Fisher and the State entered into discussions on the amended motion, and Fisher produced two evaluations that supported his NGRI claim. (Relator's Exhibit M, at 4; Relator's Exhibit G, at 19). As a result of the discussions, Fisher and the State agreed that the Jackson County Circuit Court should grant relief on Fisher's motion, and that Fisher should enter a NGRI plea. (Relator's Exhibit M, at 4; Relator's Exhibit G, at 19). Fisher's attorney filed an NGRI notice as part of these proceedings. (Relator's Exhibit M, at 5; Relator's Exhibit D). The notice was not signed by Fisher. (Relator's Exhibit M, at 5).

Audrain County: Possession of a Controlled Substance, An NGRI Plea

Three months after he committed the arson, Fisher was arrested in Audrain County, and taken to the county jail. (Relator's Exhibit M, at 5). While in the Audrain County jail, Fisher was found in possession of a controlled substance and was charged with this crime. (Relator's Exhibit E, at 1–2; Relator's Exhibit M, at 6). On May 19, 2008, the Audrain County Circuit Court issued its order and judgment finding Fisher NGRI and ordering him committed to the Missouri Department of Mental Health. (Relator's Exhibit M, at 6; Relator's Exhibit E, at 1–2). The order reflected that a proper NGRI notice was filed, and the plea was accepted by the State. (Relator's Exhibit E, at 1–2; Relator's Exhibit M, at 6). Relator volunteered to the habeas court that no copy of the NGRI notice currently appears in the Audrain County Circuit Court's file.

However, a copy of the NGRI notice was in the Public Defender's electronic file. And, a copy of the NGRI notice, signed by defense counsel, was located in the prosecutor's file. (Relator's Exhibit K).

Fisher Escapes, is Re-captured, and Considers a Habeas Petition

After pleading NGRI in both Jackson and Audrain County, Fisher began to receive treatment for his mental illnesses at the Department of Mental Health. (Relator's Exhibit M, at 3; Relator's Exhibit J, at 2). While receiving treatment, Fisher "left [the Department of Mental Health] without permission to leave" on March 10, 2014. (Relator's Exhibit M, at 3; Relator's Exhibit G, at 14–15; Relator's Exhibit J, at 2). That same day, the Department of Mental Health advised the Sheriff of Jackson County that Fisher had "eloped." (Relator's Exhibit I, at 1). Fisher was re-captured on December 11, 2014. (Relator's Exhibit M, at 3; Relator's Exhibit J, at 2). During his arrest, Fisher's clavicle was broken. (Relator's Exhibit J, at 2).

Before he escaped from the Department of Mental Health, Fisher contacted the Missouri State Public Defender System and requested legal advice. (Relator's Exhibit H). This is memorialized in a May 9, 2013 letter to Fisher from the Missouri State Public Defender System, which Fisher marked as "exhibit-5" and provided to Relator. In the letter, the Missouri State Public Defender System advised Fisher that he could consider filing a habeas corpus petition and make the claim that his NGRI plea was invalid. (Relator's Exhibit

H, at 2). However, the public defender system advised Fisher that it was “unable” to represent him on this claim because his previous attorney provided him with “appropriate substantive advice on whether to enter an NGRI plea. That is, it appears your attorney discussed with you the pros and cons of such a plea.” (Relator’s Exhibit H, at 2).

The Habeas Court: One Hearing, Two Writs of Habeas Corpus

In March 2015, Fisher filed the relevant petition for habeas corpus. (Relator’s Exhibit M, at 2). After Fisher filed a petition for habeas corpus, and amended the petition, the habeas court issued an order to show cause to the Department of Mental Health. After briefing, a hearing took place on November 12, 2015. (Relator’s Exhibit M, at 1). Fisher claimed that his Jackson County NGRI plea and Audrain County NGRI plea violated the Eighth Amendment. (Relator’s Exhibit M, at 8–9). Fisher also claimed that his Eighth Amendment rights were violated by the medical treatment he was receiving at the Department of Mental Health. (Relator’s Exhibit M, at 8–9).

At the hearing, Fisher presented the testimony of Dr. James Kelly. (1st Supp. Tr., at 4–14). In addition, Fisher presented 29 exhibits of medical records, letters, and photographs. (1st Supp. Tr., at 15–77; 108–9). Both the Court and counsel for Relator helped Fisher collate and mark his exhibits. (Id). Relator called Fisher to the stand to testify. (1st Supp. Tr., at 117–38). Fisher testified that he had asked his attorney to have his Jackson County guilty plea set aside.

(1st Supp. Tr., at 118). Fisher agreed he was present at the NGRI hearing, and that he discussed the plea of NGRI with his attorney (1st Supp. Tr., at 118–9). Although Fisher testified that he was not informed that the “defendant has to file a written notice,” Fisher confirmed he discussed the case, including commitment to the Department of Mental Health, with his attorney. (1st Supp. Tr., at 121–22). Fisher also confirmed that he had eloped from the Department of Mental Health. (1st Supp. Tr., at 132). The remainder of Fisher’s testimony was about his alleged medical issues. Relator also admitted Exhibits A, B, C, D, E, G, H, I, J, and K. (1st Supp. Tr., at 85, 112, 79, 98, 91, 114, 75, 115, 117, 93). Exhibit F is the same document as Exhibit 27, which was admitted. (1st Supp. Tr., at 71).

In its order granting habeas corpus relief, the habeas court concluded that the Jackson County NGRI notice was deficient in that it was not signed by Fisher. (Relator’s Exhibit M, at 12–14). The habeas court concluded that Fisher was entitled to habeas relief in the Audrain County case because no NGRI notice was filed, or because if the notice was filed, then it was deficient in that it was not signed by Fisher and did not contain the “no other defenses” language. (Relator’s Exhibit M, at 15–16). The habeas court declined to grant Fisher relief on his medical claim. (Relator’s Exhibit M, at 19–20).

POINTS RELIED ON

I. Relator is entitled to an order quashing the habeas court’s entire record, because the habeas court abused its discretion by granting relief on Fisher’s claim that the NGRI notices were defective, in that Fisher is the one who filed the “defective” notices.

State v. Bolden, 371 S.W.3d 802 (Mo. 2012)

State v. Mayes, 63 S.W.3d 615 (Mo. 2001)

State v. Holmes, 439 S.W.2d 518 (Mo. 1969)

State v. Isa, 850 S.W.2d 876 (Mo. 1993)

II. Relator is entitled to an order quashing the habeas court’s record with respect to the Jackson County case, because the habeas court abused its discretion by granting relief on the theory that Fisher failed to sign the notice, in that Missouri law does not require the notice to be signed by the Defendant.

Section 552.030.2, RSMo

State v. Holmes, 439 S.W.2d 518 (Mo. 1969)

State v. Isa, 850 S.W.2d 876 (Mo. 1993)

III. Relator is entitled to an order quashing the habeas court's record with respect to the Jackson County case, because the habeas court abused its discretion by returning Fisher to pre-trial status, in that Fisher's Jackson County conviction was vacated by the NGRI plea, so rendering the NGRI plea a nullity must reinstate that conviction.

Thompson v. Sanders, 70 S.W.2d 1051 (Mo. banc 1934)

State ex rel. Laughlin v. Bowersox, 318 S.W.3d 695 (Mo. 2010)

State ex rel. Verweire v. Moore, 211 S.W.3d 89 (Mo. 2006)

IV. Relator is entitled to an order quashing the habeas court's record with respect to the Audrain County case, because the habeas court abused its discretion when it found that no notice was filed, in that the habeas court's determination was not supported by sufficient evidence.

State ex rel. Nixon v. Sprick, 59 S.W.3d 515 (Mo. 2001)

Obradovich v. Peterson, 566 S.W.2d 827 (Mo. 1978)

V. Relator is entitled to an order quashing the habeas court's entire record, because it was an abuse of discretion not to apply the escape rule to the habeas petition, in that Fisher's nine-month escape is ample justification to deny habeas relief.

Parsons v. State, 383 S.W.3d 71 (Mo. App. E.D. 2012)

Ingrassia v. State, 103 S.W.3d 117 (Mo. App. E.D. 2002)

State v. Troupe, 891 S.W.2d 808 (Mo. 1995)

SUMMARY OF THE ARGUMENT

In this certiorari case, the Court has the opportunity to correct two writs of habeas corpus that were erroneously granted seven years after the alleged errors. If allowed to stand, the habeas court's order will make habeas corpus a sword to punish the State instead of a shield to protect defendants. The habeas court's order also subverts the General Assembly's intent behind passing the not guilty by reason of insanity (NGRI) statute. This Court should quash the record of the habeas court for five reasons.

First, habeas relief was afforded to Fisher despite the fact that his claims exemplify self-invited error. Missouri law makes clear that it was Fisher's responsibility to draft NGRI notices that comply with the statute. Fisher did not. Now Fisher seeks to hold the State and the trial courts responsible for his alleged mistakes. That is not the purpose of habeas corpus.

Second, the habeas court's erroneous interpretation of Section 552.030.2 creates new procedures for a defendant to enter a NGRI plea. Despite the complete absence of textual support, the habeas court created a statutory requirement that the defendant must also sign the NGRI notice. Further, the legislative intent behind Section 552.030.2 was to protect the State from unfair surprise, not to protect defendants from their own legal strategy. The habeas court's ruling abrogates this legislative intent. Moreover, the habeas court's ruling was an error of law in that it misapplied this Court's precedent.

Third, the habeas court impermissibly expanded the scope of habeas relief when it returned Fisher to pre-trial status on the Jackson County case. In the Jackson County case, Fisher pleaded guilty to first-degree arson. Then, in a Rule 24.035 motion, Fisher asserted his guilty plea was involuntary because he was NGRI at the time of the offense. The State reached an agreement with Fisher where he would receive Rule 24.035 relief in exchange for entering an NGRI plea. Contrary to Missouri law, the habeas court vacated *both* the NGRI plea *and* the original guilty plea. If the NGRI plea was void, then the proper relief would have been to return Fisher to his position before he entered the NGRI plea. Certiorari relief is appropriate to confine the habeas court to the bounds of its authority.

Fourth, the habeas court's determination that no NGRI notice was filed in Audrain County was not supported by substantial evidence. At the hearing, Relator provided information that showed that a copy of the notice was found in the prosecutor's file and the public defender's computer system. The habeas court acknowledged that a notice appeared in the prosecutor's file, and that Fisher's attorney prepared the notice. Nevertheless, the habeas court concluded that the notice's current absence from the court file—produced seven years after the notice was filed—was substantial evidence that the notice was never filed. To reach that conclusion, the habeas court misapplied this Court's precedent, so certiorari relief is appropriate.

Fifth, the habeas court abused its discretion when it erroneously refused to apply the escape rule to Fisher's case. The habeas court's order is not entirely clear, but the habeas court reached its conclusion either because it believed the escape rule cannot apply to habeas cases, or because it considered the facts and circumstances of Fisher's current confinement. If the habeas court's reasoning was the former, then the habeas court was mistaken because courts can apply the escape rule to civil cases and other forms of post-conviction relief. If the habeas court's reasoning was the latter, then the habeas court was mistaken because the proper consideration is the escape and its circumstances. In either event, the habeas court made a mistake of law worthy of certiorari relief.

ARGUMENT

- I. Relator is entitled to an order quashing the habeas court’s entire record, because the habeas court abused its discretion by granting relief on Fisher’s claim that the NGRI notices were defective, in that Fisher is the one who filed the “defective” notices.**

The habeas court determined that Fisher was entitled to habeas relief in both the Jackson County case and the Audrain County case because, in the habeas court’s view, the NGRI notices were defective. But such a conclusion transforms the Great Writ from a shield to protect defendants into a sword to punish the State for Fisher’s non-compliance with technical rules. Further still, it was Fisher’s responsibility to create a NGRI notice that comports with Missouri law. When the habeas court granted relief, it punished the State for Fisher’s mistake. In other words, the habeas court’s decision to grant relief on Fisher’s self-invited error was contrary to Missouri law.

In the Jackson County case, Fisher’s alleged self-invited error was that Fisher did not personally sign the NGRI notice. In the Audrain County case, Fisher’s alleged self-invited error was that his attorney did not properly file the notice, that the notice was not signed by Fisher, and that the notice did not include the required “no other defenses” language.

In Missouri, “[i]t is axiomatic that a defendant may not take advantage of self-invited error or error of his own making.” *State v. Bolden*, 371 S.W.3d 802,

806 (Mo. 2012). It is well settled that “[o]ne cannot lead a court into error and then complain of it.” *Montana v. Nenert*, 226 S.W.2d 394, 401 (Mo. App. St.L. 1950). This long standing rule applies to errors made by counsel. *State v. Mayes*, 63 S.W.3d 615, 632 n.6 (Mo. 2001) (holding that a petitioner “cannot ... convict the trial court of error as to a procedure to which his counsel agreed”). The Court of Appeals has explained that “a party cannot complain on appeal of any alleged error in which, by his or her own conduct at trial, he or she joined in or acquiesced to.” *Johnson v. Moore*, 931 S.W.2d 191, 195 (Mo. App. E.D. 1996).

A. Fisher was not entitled to relief because of the format of the Jackson County case notice.

The habeas court made the following relevant factual findings in the Jackson County case. Fisher attempted to set fire to the porch of his girlfriend’s father. Fisher pleaded guilty to first-degree arson, and Fisher was sentenced to twelve years in the Department of Corrections. (Relator’s Exhibit M, at 4). Fisher filed a motion for post-conviction relief, and counsel filed an amended petition on his behalf. (Relator’s Exhibit M, at 4). Fisher’s amended motion asserted that his guilty plea was involuntary because Fisher was NGRI at the time of the offense. (Relator’s Exhibit M, at 4). Fisher negotiated with the State, filed a NGRI notice, and the State agreed to accede to his amended motion in exchange for his NGRI plea. (Relator’s Exhibit M, at 4–5). The NGRI notice included the “no oth-

er defenses language” but was not signed by Fisher. (Relator’s Exhibit M, at 5; *see also* Relator’s Exhibit D). These facts do not entitle Fisher to relief.

Even if it was an error for Fisher to have not signed the notice—which it was not³—Fisher’s attorney is the one who provided the notice. (Relator’s Exhibit M, at 5). Missouri law requires that the defendant file the NGRI notice. §552.030.2, RSMo. It is a reversible error for the State or the trial court to attempt to raise the NGRI defense for a defendant. *State v. Lewis*, 188 S.W.3d 483, 487 (Mo. App. W.D. 2006).

The habeas court has empowered defendants to create a scenario where they always win. Under the habeas court’s rule, a defendant may induce the State to accept a deficient NGRI plea, and then, years later, force the State to vacate the NGRI plea because of deficiencies created by the defendant. This places prosecutors in a difficult situation. If the prosecutor agrees with the defendant and believes that the defendant was NGRI at the time of the offense, then the prosecutor may be under a duty to accept the NGRI plea because it violates due process to convict a defendant who was NGRI at the time of the offense. *See* Rule 4–3.8[1] (“A prosecutor has the responsibility of a minister of

³ Relator demonstrates that Missouri law does not require the NGRI notice to be signed by the defendant in point II, *infra*.

justice....”). Yet, a defendant could create a procedural error to void his own plea. That is not justice.

When Fisher’s attorney filed the amended motion on his behalf in the Jackson County case and negotiated the NGRI disposition, Fisher injected the NGRI issue into the case. Fisher cannot now blame the State or the trial court for accepting a notice that he created. Fisher cannot create an error, and then obtain relief from that putative error.

B. Fisher was not entitled to relief because of the alleged errors in the Audrain County Case notice.

The habeas court made the following relevant factual findings in the Audrain County case. Fisher’s attorney prepared the NGRI notice. (Relator’s Exhibit M, at 5–6). That notice was found in the prosecutor’s file, but was not found in the circuit court’s file. (Relator’s Exhibit M, at 6). The Audrain County Circuit Court’s commitment order indicated that the proper notice was filed. (Relator’s Exhibit M, at 6). That notice does not contain the “no other defenses” language. (Relator’s Exhibit M, at 6).

Assuming that the notice was filed and did not contain the “no other defenses” language, these facts did not entitle Fisher to relief.⁴ Again, it was

⁴ The habeas court’s conclusion that the NGRI notice was never filed is not supported by substantial evidence, as demonstrated in point IV, *infra*.

Fisher's responsibility to create a notice that complied with Missouri law. §552.030.2, RSMo. Fisher's complaint is, essentially, that he prepared a defective notice, and the State accepted that notice *at Fisher's request*. This is the very definition of self-invited error. Here, Fisher is attempting to benefit from "lead[ing] court into error." *Montana*, 226 S.W.2d at 401. Moreover, this error does not seem to be well understood given that the Missouri Practice Series provides a NGRI notice form that omits the "no other defenses" language. 27 Mo. Prac. Crim. Prac. Forms § 7.38 (2nd ed.).

In sum, the habeas court granted habeas relief to Fisher because the habeas court found that the NGRI notices filed in the Jackson County case and the Audrain County case did not comply with Missouri law. Assuming that is true, the fault lies with Fisher, not with the State or the courts. By granting relief on Fisher's self-invited errors, the habeas court abused its discretion. Relator is entitled to relief on point I.

II. Relator is entitled to an order quashing the habeas court's record with respect to the Jackson County case, because the habeas court abused its discretion by granting relief on the theory that Fisher failed to sign the notice, in that Missouri law does not require the notice to be signed by the Defendant.

When the habeas court concluded that Fisher was entitled to relief because he did not sign the NGRI notice, the habeas court was necessarily interpreting Section 552.030.2. The habeas court's interpretation is contrary to the plain text of the statute, it is contrary to the legislative intent of the statute, and it is contrary to the General Assembly's established drafting procedure. Moreover, the habeas court's interpretation is based on the misapplication of the case law cited in the order.

In its order, the habeas court acknowledged that Section 552.030.2 was the controlling law. (Relator's Exhibit L, at 7, 9–10). Section 552.030.2 states, in relevant part, as follows:

Evidence of mental disease or defect excluding responsibility shall not be admissible at trial of the accused unless the accused, at the time of entering such accused's plea to the charge, pleads not guilty by reason of mental disease or defect excluding responsibility, or unless within ten days after a plea of not guilty, or at such later date as the court may for good cause permit, the accused files a

written notice of such accused's purpose to rely on such defense.

Such a plea or notice shall not deprive the accused of other defenses.

The state may accept a defense of mental disease or defect excluding responsibility, whether raised by plea or written notice, if the accused has no other defense and files a written notice to that effect. The state shall not accept a defense of mental disease or defect excluding responsibility in the absence of any pretrial evaluation as described in this section or section 552.020....

The habeas court erroneously determined that Section 552.030.2 requires that a criminal defendant sign the notice of intent to plead not guilty by reason of mental disease or defect. (Relator's Exhibit L, at 13–14).

When faced with a question of statutory interpretation, a reviewing court gives the words their plain and ordinary meaning. *Short v. Missouri Board of Probation and Parole*, 456 S.W.3d 72, 78 (Mo. App. W.D. 2015). No construction is necessary when the language of the statute is “clear and unambiguous.” *Short*, 456 S.W.3d at 78, *quoting Kinder v. Missouri Department of Corrections*, 43 S.W.3d 369, 372 (Mo. App. W.D. 2001). Furthermore, “[p]rovisions not found plainly written or necessarily implied from what is written will not be imparted or interpolated therein in order that the existence of a right may be made to appear when otherwise, upon the face of the statutes, it would not appear.” *Missouri Public Service Commission v. Platte-Clay Electric Co-op, Inc.*, 407

S.W.2d 833, 891 (Mo. Div. 1, 1966), *cited with approval by Short*, 456 S.W.3d at 78. In this case, the habeas court imparted or interpolated a “right” which does not appear on the face of the statute.

No provision of Section 552.030.2 requires that the written notice be signed by the defendant. When the habeas court created that requirement, it “imparted or interpolated...the existence of a right...when otherwise, upon the face of the statutes, it would not appear.” *Platte-Clay Electric Co-op, Inc.*, 407 S.W.2d at 891.

Furthermore, the habeas court’s interpretation of Section 552.030.2 is contrary to the General Assembly’s intent—as recognized by this Court—when it enacted the statute. The purpose of the notice requirement is not to create technical rules for defendants to exploit, but to protect the State from unfair surprise while empowering Defendants to raise the defense.

Secondary sources reveal that the drafters of Section 552.030.2 wanted to protect the State from the unfair surprise that results when a defendant pleads NGRI without notice. The Drafters of Section 552.030.2 explained that, prior to the statute’s passage, “Missouri and 32 other states allowed proof of insanity under a plea of ‘not guilty’ even though it was an affirmative defense.” 4B Mo. Prac. Probate & Surrogate Laws Manual § 552.030 (2nd ed.), *quoting*, Orville Richardson, Daniel Reardon Jr., & Joseph Simeone, *An Analysis of the Law*, 19

J. Mo. B. 677, 706 (1963). The Drafters described the unfair surprise as part of the “grave abuses” that Section 552.030.2 was designed to remedy. *Id.*

This Court has recognized the General Assembly’s purpose. *State v. Isa*, 850 S.W.2d 876, 886 (Mo. 1993) (“The purpose of Section 552.030, fixing a time at which notice of intention to rely upon a defense of mental disease or defect must be raised, is to prevent surprise to the State”), *citing State v. Holmes*, 439 S.W.2d 518, 520–21 (Mo. Div. 1, 1969). In fact, to provide the State with additional protection, this Court adopted Rule 25.05(A)(4), which also requires defendants to give notice to the State.

Despite these “grave abuses,” the Drafters wanted to preserve the availability of the defense. The notice requirement preserved that availability and prevented trial courts from raising the defense *sua sponte*. *Id.* at 707; *see also Lewis*, 188 S.W.3d at 487.

The habeas court’s interpretation does not protect the State; it subjects the State to the unfair surprise the General Assembly tried to prevent. And, the habeas court’s interpretation did not protect Fisher from the Jackson County Circuit Court injecting the issue. Instead, it punished the Jackson County Circuit Court for doing what Fisher wanted.

The habeas court also attempted to bolster its reading of Section 552.030.2 by comparing that section to a defendant’s right to testify or to remain silent at trial. (Relator’s Exhibit L, at 14). But when the General Assembly wants a

waiver to be in writing and signed by the defendant, it places that requirement directly in the statute. *See* § 600.051, RSMo. (Defendant’s right to waive counsel). Section 552.030.2 contains no provisions that require a hearing on the record. Further still, it is not the practice of Missouri attorneys to have a defendant sign the NGRI notice. In fact, the Missouri Practice Series has a form notice, and that form does not contemplate a space for the Defendant’s signature. 27 Mo. Prac. Crim. Prac. Forms § 7.38 (2nd ed.).

The habeas court’s interpretation runs contrary to the plain language of the statute, the General Assembly’s legislative intent behind the statute, and the General Assembly’s established practice with respect to written waivers. Nevertheless, the habeas court concluded that filing a NGRI notice without the defendant’s signature “is insufficient to meet the requirements of Section 552.030.2 RSMo in that it is not signed by the defendant.” (Relator’s Exhibit L, at 13). When the habeas court reached that interpretation, it misapplied the cases it relied on.

To reach its conclusion, the habeas court relied on *Ex Parte Kent*, 490 S.W.2d 649 (Mo. 1973); *Briggs v. State*, 509 S.W.2d 154 (Mo. App. K.C. 1974); *State v. Grantham*, 519 S.W.2d 19 (Mo. 1975); *Obradovich v. Peterson*, 566 S.W.2d 827 (Mo. 1978); and *Latoya Tureaud v. Laurent Javois*, 1122-CC00627 (St. Louis City Cir. Ct., Order filed Nov. 8, 2012). (Relator’s Exhibit L, at 10–12). But, *Kent*, *Briggs*, *Grantham*, *Obradovich*, and *Tureaud* require only what the

statute requires: that the NGRI notice be (1) in writing and (2) filed with the court. *See Kent*, 490 S.W.2d at 651; *Briggs*, 509 S.W.2d at 157–58 (alternative holding); *Grantham*, 519 S.W.2d at 21; *Obradovich*, 566 S.W.2d at 829.

In fact, no Missouri appellate court has ever held that the defendant must sign the notice. When the Missouri Court of Appeals, Western District, was confronted with this argument, it rejected it. *State ex rel. Koster v. Oxenhandler*, 491 S.W.3d 576, 599 n. 31 (Mo. App. W.D. 2016).

The habeas court's interpretation runs contrary to (1) the plain language of the statute, (2) the legislative intent behind the statute, and (3) the established drafting practice of the General Assembly. As such, the habeas court abused its discretion, and Relator is entitled to relief under point two.

III. Relator is entitled to an order quashing the habeas court's record with respect to the Jackson County case, because the habeas court abused its discretion by returning Fisher to pre-trial status, in that Fisher's Jackson County conviction was vacated by the NGRI plea, so rendering the NGRI plea a nullity must reinstate that conviction.

The habeas court exceeded its authority when it fashioned a remedy beyond the scope of the alleged wrong. In this case, the habeas court found the NGRI procedures deficient. Before his NGRI plea, Fisher had entered a guilty plea, was serving his sentence, and had a pending Rule 24.035 motion. Instead

of returning Fisher to the position he was in *before* his NGRI plea, the habeas court vacated *all* the proceedings and returned Fisher to pre-trial detention status. That remedy went beyond the scope of the alleged wrong, and therefore violated Missouri Supreme Court precedent.

In the Jackson County case, Fisher first pleaded guilty to first-degree arson and received a sentence of twelve years' imprisonment in the Missouri Department of Corrections. (Relator's Exhibit L, at 4; Relator's Exhibit A, at 1–2). Then, Fisher filed a pro se motion for post-conviction relief. (Relator's Exhibit A, at 4). As a result of that motion, Fisher and the State agreed to set aside his guilty plea and for Fisher to enter a plea of not guilty by reason of mental disease or defect. (Relator's Exhibit A, at 1). Part of the State's decision to agree to that disposition was Fisher's representation that he had entered a not guilty by mental disease or defect plea in the Audrain County Case. (Relator's Exhibit A, at 1). That agreement resulted in the order of commitment that Fisher challenged in the habeas court.

In its order, the habeas court held that the Jackson County "Court's order committing George W. Fisher to the custody of the Department of Mental Health, dated December 19, 2008, is null and void." (Relator's Exhibit M, at 14). Then, the habeas court returned Fisher to pre-trial status. But, in that circumstance, the Missouri Supreme Court would have returned Fisher to prison because habeas relief should extend back only to the first void action.

In *Thompson v. Sanders*, 70 S.W.2d 1051 (Mo. banc 1934), the petitioner requested a writ of habeas corpus asserting that the trial court lacked jurisdiction over the case, and that the judgment and sentence were issued on a Sunday in violation of Missouri law. *Thompson*, 70 S.W.2d at 1053. The Missouri Supreme Court agreed, issued the writ, and returned the petitioner to pre-trial status. *Id.* at 1053–55. The Missouri Supreme Court explained that if the only error was that the judgment was void because it was issued on a Sunday, then the proper remedy would be to return the petitioner for resentencing. *Id.* at 1055. Under that scenario, the Missouri Supreme Court explained that the verdict was not void and so the remedy would not vacate the verdict. *Id.* But the trial—and therefore the verdict—was void because the court was without jurisdiction to hear the case, in that a proper motion to disqualify the trial judge had been filed but not ruled upon. *Id.* Accordingly, the proper remedy was to return the petitioner to pre-trial detention status. *Id.* (“A void trial is no trial”).

The rule in *Thompson* was clarified by this Court in *State ex rel. Laughlin v. Bowersox*, 318 S.W.3d 695 (Mo. 2010). In *Laughlin*, the petitioner sought a writ of habeas corpus because he alleged the trial court was without jurisdiction to hear the case in that the crime occurred on federal land. *Id.* at 697. This Court agreed, issued the writ, and discharged the petitioner. *Id.* at 703. In *Laughlin*, complete discharge was the appropriate remedy because no Missouri

circuit court had subject matter jurisdiction to try the petitioner. *Id.* at 701. In other words, the State’s prosecution was void from its beginning.

The rule in *Thompson* and *Laughlin* required that the habeas court grant more limited relief in this case. The habeas court did not find that the entire proceeding was void, or even that the guilty plea was void. Instead, the habeas court found only the order of commitment—which was a negotiated disposition of the motion for post-conviction relief—was void. (Relator’s Exhibit M, at 14). Accordingly, under *Thompson* and *Laughlin*, the habeas court should have returned Fisher to his pre-commitment status: a prisoner with a pending Rule 24.035 motion.

Other cases also demonstrate that the proper scope of relief is to vacate only the last void action. *See, e.g., State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 129–30 (Mo. 2010); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 549 (Mo. 2003). In a case where a habeas writ is granted after a guilty plea, this Court vacated the conviction, ordered that the petitioner be allowed to withdraw his guilty plea, and returned petitioner pre-plea detention status. *State ex rel. Verweire v. Moore*, 211 S.W.3d 89, 93 (Mo. 2006).⁵ Where the NGRI plea ended

⁵ This Court’s opinion in *State v. Lammers*, 479 S.W.3d 624, 636 (Mo. 2016) does not change this portion of the holding, even though “*Verweire* was wrongly decided....”

pre-trial status, the writ returns the petitioner to pre-trial status. *See, e.g., Kent*, 490 S.W.2d at 651.

Thompson, Laughlin, Engel, Amrine, Verweire, and *Kent* all illustrate the rule: if a writ is granted, then the proper scope of relief is to return the petitioner to the position he was in before the error occurred. In *Thompson, Engel*, and *Amrine* that was pre-trial status. In *Laughlin*, it was pre-charge status. In *Verweire*, it was pre-guilty plea status. In *Kent*, it was pre-commitment status. If the writ is upheld, then Fisher should be returned to pre-commitment status. That means Fisher should return to prison with a pending Rule 24.035 motion. To hold otherwise would reward Fisher for filing a defective notice, punish the State for trying to reach the right result, and greatly expand the scope of habeas corpus relief.

IV. Relator is entitled to an order quashing the habeas court's record with respect to the Audrain County case, because the habeas court abused its discretion when it found that no notice was filed, in that the habeas court's determination was not supported by sufficient evidence.

With respect to the Audrain County case, the habeas court's primary determination was that no NGRI notice was ever filed. But a habeas court's determination must be supported by substantial evidence; otherwise a permanent writ of certiorari is proper. Relator presented evidence that the

notice was in the prosecutor's file, that a computer version of the notice was in the public defender's computer system, and that the commitment orders reflected a notice was filed. Fisher provided no contrary evidence. But the habeas court determined that no notice was filed because there is not now—years later—a copy of the notice in the Audrain County Circuit Court's file. That is not substantial evidence to support the habeas court's decision.

On certiorari review, this Court will not consider questions of fact; however, this Court may consider whether the habeas court's order is supported by sufficient evidence. *State ex rel. Nixon v. Sprick*, 59 S.W.3d 515, 518 (Mo. 2001). When a habeas court's decision is not supported by sufficient evidence, then Relator is entitled to certiorari relief. *State ex rel. Koster v. Suter*, 447 S.W.3d 673, 679 (Mo. App. W.D. 2014); *State ex rel. Koster v. Fitzsimmons*, 425 S.W.3d 166, 167 (Mo. App. S.D. 2014). When the habeas court concluded that no NGRI notice was filed in the Audrain County case, that conclusion was not supported by sufficient factual evidence.

In its order, the habeas court concluded that Fisher was entitled to habeas relief on the Audrain County case because there was no notice found in the Audrain County Circuit Court's file, and because the notice found in the prosecutor's file was not signed by Fisher and did not include the "no other

defenses” language. (Relator’s Exhibit M, at 15–17).⁶ Specifically, the habeas court made the following factual findings. First, there is currently no NGRI notice in the Audrain County Circuit Court’s file. (Relator’s Exhibit M, at 6, 15). Relator obtained the file when Fisher filed his petition—seven years after the alleged error. Relator has acknowledged this fact at the hearing and to this Court. Second, Fisher’s Audrain County public defender prepared a NGRI notice. (Relator’s Exhibit M, at 5–6). The prepared notice does not include the “no other defenses” language, is not signed by Fisher, but is signed by his attorney. (Relator’s Exhibit M, at 6). The habeas court concluded that “the only evidence supporting the State’s position is the Notice of Intent which the State found in the prosecutor’s file.” (Relator’s Exhibit M, at 16). But that is not so.

As the habeas court found, both the commitment orders indicated that the NGRI notice was filed. (Relator’s Exhibit M, at 16). Those commitment orders were provided to this Court. (Relator’s Exhibit E; Relator’s Exhibit G). Further, Relator also introduced the copy of the NGRI notice found in the prosecutor’s file, as the habeas court’s order indicates. (Relator’s Exhibit M, at 15). The NGRI notice found in the prosecutor’s file has been submitted to this Court. (Relator’s Exhibit K). The habeas court also accepted evidence that the Missouri Public

⁶ Relator has addressed the non-necessity of a signature in point II, and has addressed complaints about the wording of a NGRI notice in point I, *supra*.

Defender System had an unsigned copy of the NGRI notice in its files. (Relator's Exhibit H). In the letter, the public defender system indicated that, although it could not locate a filed notice, it did locate a "computer version in the computer file." (Relator's Exhibit H, at 2). Further, the public defender system indicated that "we believe you received appropriate substantive advice on whether to enter an NGRI plea. That is, it appears that your attorney discussed with you the pros and cons of such a plea." (Relator's Exhibit H, at 2). Although this information was submitted to the habeas court, it was not reflected in the habeas court's order.

Against this evidence, the habeas court was presented with evidence that there was no notice currently found in the Audrain County Circuit Court's file, and that no minutes were filed. The habeas court then concluded that the present lack of a notice was sufficient evidence to determine that the notice was not filed. (Relator's Exhibit M, at 16).

The current absence of the notice in the Audrain County Circuit Court's file was not sufficient evidence to support Fisher's claim that the notice was never filed. Even when the habeas petitioner is the only party to adduce evidence, that does not mean that evidence is sufficient. *Sprick*, 59 S.W.3d at 519; *Suter*, 447 S.W.3d at 679–80. In *Sprick*, this Court granted a perempt writ of certiorari because the habeas court's conclusion was not supported by sufficient evidence. *Id.* In that case, the habeas court concluded that, at the

criminal trial, the State had failed to prove that the victim of the charged sexual abuse was twelve years old. *Id.* This Court found that this conclusion was not supported by substantial evidence because the transcript revealed that “the only evidence of an act constituting sodomy was one act that occurred when the child was eleven.” *Id.*

In *Suter*, the Missouri Court of Appeals, Western District, also granted a permeant writ of certiorari, finding that the habeas court’s decision was not supported by substantial evidence. *Suter*, 447 S.W.3d at 679–80. In that case, the petitioner sought to avoid civil commitment by asserting that his probation was improperly denied in that his performance in the Sex Offender Assessment Unit required the trial court to hold a hearing before denying probation. *Id.* at 677. In support of his argument, the petitioner pointed to portions of the report as well as the “conduct of the parties.” *Id.* at 679. The Missouri Court of Appeals found that these facts did not constitute substantial evidence. *Id.*

To reach its conclusion that the current absence of the notice is evidence the notice was never filed, the habeas court again relied on *Kent* and *Obradovich*. (Relator’s Exhibit M, at 16). The habeas court’s reliance on *Kent* was misplaced because the parties in *Kent* agreed that the notice was not filed. *Kent* 490 S.W.2d at 651.

In *Obradovich*, this Court appointed a special master to determine whether the NGRI notice was filed on behalf of the petitioner. *Obradovich*, 566

S.W.2d at 828. During the pleadings stage, the petitioner filed a petition where he asserted that no NGRI notice was filed, and in an amended petition, the petitioner asserted that the petitioner did not authorize such a notice. *Id.* at 828. The special master concluded that a NGRI notice was filed because the evidence at the hearing was: (1) petitioner’s testimony at the hearing that no notice was filed; (2) petitioner’s amended petition asserting that a notice was filed; (3) a certified copy of the court file, which did not contain a notice; (4) the order and judgment of commitment which indicated that a written notice was filed. *Id.* The special master declined to find the petitioner’s testimony credible. *Id.*

This Court found that “the evidence support[ed] and call[ed] for the conclusion reached by the master.” *Id.* at 829. Specifically, the Missouri Supreme Court found that the special master correctly concluded that the commitment order’s language in addition to the admission in the amended petition was substantial evidence. *Id.*

Obradovich’s holding undercuts the habeas court’s findings in this case. While it is true that the amended petition in *Obradovich* admitted that the notice was filed, no such admission is necessary in this case. Here, unlike *Obradovich*, the State produced evidence from the prosecutor’s file that a notice was filed. Further, the State produced a letter—given to the State by Fisher—that the public defender system maintained a computer copy of the notice in the computer file. And, like *Obradovich*, the commitment order indicated that a

proper notice was filed. In light of this evidence, the absence of the NGRI notice in the court's file was not substantial evidence for the habeas court to base its judgment on.

In sum, Relator is entitled to a permanent writ because the habeas court's judgment is not supported by substantial evidence. Relator produced evidence that the notice was created and filed. Even if the habeas court disbelieved the notice found in the prosecutor's file and the public defender's file, Relator is still entitled to relief. The absence of the notice from the file—seven years later—is not substantial evidence that the notice was filed.

V. Relator is entitled to an order quashing the habeas court's entire record, because it was an abuse of discretion not to apply the escape rule to the habeas petition, in that Fisher's nine-month escape is ample justification to deny habeas relief.

In its order, the habeas court found that "the escape rule is not applicable." (Relator's Exhibit L, at 21). The habeas court held that the escape rule was "inapplicable" in this case, most likely because it believed the escape rule may never be applied in a habeas case. (Relator's Exhibit L, at 21). That holding was an abuse of discretion. In the alternative, this Court has the power to apply the escape rule in the first instance. Under either theory, Relator is entitled to relief.

A. The escape rule applies to collateral review cases, and habeas corpus is a type of collateral review.

When enforced, the escape rule bars collateral review, as well as direct appeals. *State v. Troupe*, 891 S.W.2d 808, 809 (Mo. 1995). In the collateral review relief context, the escape rule acts as a complete bar to both the initial petition and the appeal. *See Straford v. State*, 787 S.W.2d 832, 833 (Mo. App. E.D. 1990). In *Parsons v. State*, 383 S.W.3d 71 (Mo. App. E.D. 2012) the Missouri Court of Appeals enforced and discussed Missouri’s escape rule in a collateral review case. The rule applies to alleged errors that occur before an escape. *Id.* at 73. The escape rule holds that “if it is determined the escape has produced or created adverse effects upon our criminal justice system,” then it is appropriate to dismiss the case. *Id.* Some of the reasons justifying dismissal include the need for the court to maintain control over the defendant; curtailment of administrative problems caused by a long absence; prevention of prejudice to the state; preventing defendants from selectively abiding by court decisions; discouraging escapes; encouraging voluntary surrenders; preserving respect for the criminal justice system; and promoting the dignity of the courts. *Id.* at 73–74. “No criminal defendant may selectively accept only those decisions of the courts which are favorable to him, for those who seek protection from the legal system in the form of post-conviction relief must be willing to abide by all the

rules and decisions of that legal system.” *Id.* at 74 (internal quotation marks and citation omitted).

This Court has already described Rules 29.15 and 24.035 as “habeas-like post-conviction relief” proceedings. *Clay v. Dormire*, 37 S.W.3d 214, 218 (Mo. 2000). Previous decisions from this Court have held that post-conviction relief procedures derived from, but did not suspend, habeas corpus. *See Wigglesworth v. Wyrick*, 531 S.W.2d 713, 715–16 (Mo. 1976).

The escape rule has been applied in other civil cases. In *Nitchter v. Thompson*, 832 S.W.2d 933 (Mo. App. W.D. 1992), the Missouri Court of Appeals upheld the dismissal of a suit for the negligent loss of property where, during the pendency of the suit, the inmate plaintiff overcame a guard during transport and briefly escaped down a street before being chased down and recaptured. In *Citizens Nat. Bank of Greater St. Louis v. Boatmen’s National Bank of St. Louis*, 934 S.W.2d 6 (Mo. App. E.D. 1996), the Court of Appeals dismissed claims by real estate developer debtors because the debtors fled to Chile to avoid federal real estate fraud charges. The Court of Appeals has also applied the escape rule against sexually violent predators who have escaped. *Ingrassia v. State*, 103 S.W.3d 117, 121 (Mo. App. E.D. 2002).

Given that the escape rule applies to cases collateral review and civil cases, the escape rule must also apply to habeas cases because they are both a collateral review case and a civil case. If the habeas court was holding that the

escape rule cannot be applied in Fisher's case because the escape rule cannot be applied to any habeas case, then the habeas court abused its discretion.

B. If the habeas court held that the escape rule should not apply in Fisher's case, then that holding was an abuse of discretion.

Typically, application of the escape rule is left to the "sound discretion" of a court. *See, e.g., Troupe*, 891 S.W.2d at 811. However, if application of a rule is left to the discretion of a court, then that means a court could abuse its discretion by applying or by refusing to apply the rule to the particular facts of a case. That is what happened here; when the habeas court refused to apply the escape rule, it abused its discretion.

When a trial court misinterprets the law, it has abused its discretion. *See Preston v. State*, 33 S.W.3d 574, 581 (Mo. App. W.D. 2000) (dismissal for lack of subject matter jurisdiction is "within sound discretion of trial court" dismissal was reversed because trial court committed "error under our interpretation of controlling law"). A trial court has also abused its discretion when it issues a ruling that "is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Lozano v. BNSF Railroad Co.*, 421 S.W.3d 448, 451 (Mo. 2014), *quoting In re Care and Treatment of Donaldson*, 214 S.W.3d 331, 334 (Mo. 2007).

In this case, the Court held that the escape rule was “not applicable” after “considering all of the facts and circumstances surrounding George W. Fisher’s current confinement by the Missouri Department of Mental Health....” (Relator’s Exhibit L, at 21). The habeas court applied the wrong standard. In the alternative, this Court should apply the escape rule.

C. The habeas court applied the wrong standard because it considered Fisher’s circumstances, not the system’s circumstances.

A court is supposed to consider only the circumstances of the escape and its impacts when it considers whether to apply the escape rule, not the offender’s circumstances. *See, e.g. Troupe*, 891 S.W.2d at 810–11; *see also Harvey v. State*, 150 S.W.3d 128, 129 (Mo. App. E.D. 2004). But in this case, the habeas court considered “all the facts and circumstances surrounding George W. Fisher’s current confinement by the Missouri Department of Mental Health....” (Relator’s Exhibit L, at 21).

The escape rule calls for courts to consider *the escape* and its impact, not the facts and circumstances surrounding a petitioner’s current confinement. Specifically, the habeas court should have considered if (1) Fisher’s escape produced or created adverse effects upon our criminal justice system; (2) the need for the court to maintain control over the petitioner; (3) the need to curtail administrative problems caused by a long absence; (4) the need to prevent

prejudice to the state; (5) the need to prevent petitioners from selectively abiding by court decisions; (6) the need to discourage escapes; (7) the need to encourage voluntary surrenders; (8) the need to preserve respect for the criminal justice system; and (9) the need to promote the dignity of the courts. *Parsons*, 383 S.W.3d at 73–4. But the habeas court failed to consider these elements and instead considered “the facts and circumstances surrounding [Fisher’s] current confinement by the Missouri Department of Mental Health.” That was the wrong standard.

D. This Court can, and should, apply the escape rule.

Even though the habeas court did not invoke the escape rule, this Court remains free to do so because application of the escape rule “is left to the sound discretion of the appellate tribunal.” *Troupe*, 891 S.W.2d at 811. The appellate courts may apply the escape rule even when a lower court or earlier appellate court declined to do so. *See Echols v. State*, 168 S.W.3d 448, 452 (Mo. App. W.D. 2005). In *Echols*, the State requested that the Court of Appeals apply the escape rule on direct appeal. *Id.* The Court of Appeals refused. *Id.* The State then requested the post-conviction relief court apply the escape rule. *Id.* The circuit court agreed and denied the petition. *Id.* On appeal, the prisoner argued that the circuit court could not impose the escape rule because the Court of Appeals declined to enforce the rule on direct appeal. *Id.* The Court of Appeals disagreed and affirmed the circuit court. *Id.* Thus, the law allows a later-in-time court to

apply the escape rule even if an earlier-in-time court decides not to do so. Under the facts of Fisher's case, this Court should employ the escape rule to prevent him from receiving relief.

First, Fisher's escape produced or created adverse effects on our criminal justice system. Fisher escaped for over nine months. (Relator's Exhibit L, at 21; Relator's Exhibit J, at 2). In *Troupe*, this Court held "that a delay of more than eight months necessarily has an adverse impact on the criminal justice system." *Troupe*, 891 S.W.2d at 811. Furthermore, this Court explained that "[i]t strains credulity to postulate that such a delay does not have an adverse impact on the criminal justice system and the state's case." *Id.* at 810–11. In this case, Fisher's escape allowed more time to pass between the events he complained of and the first judicial review of those events. If the mere absence of the NGRI notice is sufficient evidence for relief, then the State is prejudiced by defendants waiting years to raise their claims.

Second, there is a need for the courts to maintain control over Fisher. When the Jackson County and Audrain County Circuit Courts accepted Fisher's pleas of not guilty by reason of mental disease or defect, they remanded him to the Department of Mental Health's custody for care. (Relator's Exhibit C and G, at 16). Since that time, Fisher has filed petitions for unconditional release, which have been unsuccessful. (*See, e.g.*, Relator's Exhibit G at 30). A recent social services assessment indicates that Fisher suffers from several mental

diseases (Relator's Exhibit J, at 3, 8–9) and that Fisher refuses to take all his prescribed medications (Relator's Exhibit J, at 3). Simply put, Fisher remains ill, and the courts should maintain control over him through the mechanisms of Chapter 552, RSMo. to ensure he receives the treatment he needs.

Third, Fisher's actions and escape have prejudiced the State. As in any habeas case, there are real costs to the criminal system when a writ of habeas corpus is granted. Here, the costs are doubled because this case involves two writs of habeas corpus for two different cases in two different counties. Additionally, many habeas petitions involve the litigation of claims that were litigated closer in time to the direct appeal or collateral review. That means that the record in those cases is more complete. But here, Fisher waited nearly seven years before challenging his not guilty by reason of mental disease or defect pleas. As a result, the record is substantially weaker than it might otherwise be on the question of whether a notice was filed in the Audrain County case. Further still, the Missouri Supreme Court has found an eight-month delay prejudicial to the State's case because an appeal—like a writ of habeas corpus—might result in a new trial and evidence could be “lost or destroyed” and witnesses may be “no longer available” or subjected to “impeachment and consequent diminished credibility.” *Id.* at 811.

In this case, Fisher was gone for over nine months, not just eight months. (Relator's Exhibit L, at 21). In total, nearly ten years have passed since the

arson in the Jackson County case. (Relator's Exhibit L, at 4). Likewise, nearly ten years have passed since Fisher possessed a controlled substance in a county jail as charged in the Audrain County case. (Relator's Exhibit L, at 5). There is a strong likelihood that evidence and witness memories have diminished over the last seven years, including the nine months when Fisher was at large.

And, Section 552.030's timing requirements are based, in part, on making sure that the State has access to evidence and that defendants have access to accurate mental health information. Shortly after Section 552.030 was passed, Chief Justice Warren E. Burger—then a Judge on the United States Court of Appeals for the District of Columbia—wrote “[b]oth the accused and the prosecution are entitled to lay the issue to rest at a point near to the alleged crime.” Warren E. Burger, *Comments of Professors of Law*, J. Mo. B. 672, 672 (1963).⁷ Fisher's escape (and his decision to wait years to file his habeas petition) deprived the courts of access to the best information. That hurts the State, the Courts, and Fisher.

Fourth, it is important to prevent habeas petitioners from selectively abiding by court decisions. Before Fisher escaped, he filed a series of petitions for conditional release that were unsuccessful. (See, e.g., Relator's Exhibit G at

⁷ Chief Justice Burger joined the United States Supreme Court as Chief Justice on June 23, 1969.

30). When clients escape from institutions (like St. Louis Psychiatric Rehabilitation Center), they are placed in higher security institutions (like Fulton State Hospital). Now, Fisher has obtained a favorable ruling that he presumably wants enforced against the State. Fisher, like other habeas petitioners, should not be allowed to pick and choose which orders from which jurisdictions they wish to follow.

Fifth, Fisher's escape diminishes respect for the criminal justice system and it diminishes the dignity of the courts. When Fisher's petitions for conditional release were unsuccessful, he escaped. (Relator's Exhibit G, at 14). This is a classic example of an individual who has sought the "self-help remedy of escape." *Straford*, 787 S.W.2d at 833. The Court of Appeals has previously said, "[b]y absconding, [a petitioner] shows contempt for the very process he now seeks to utilize." *Johnson v. State*, 427 S.W.3d 299, 302 (Mo. App. E.D. 2014). Fisher's conduct appeared in several news sources. *See, e.g.*, Joel Currier, *Accused arsonist escapes from mental hospital in St. Louis*, St. Louis Post Dispatch, March 12, 2014.⁸ If the habeas court's writs are allowed to stand, then respect for the criminal justice system and the court's dignity will be diminished.

⁸ Available at http://www.stltoday.com/article_5acf4575-20e5-59d0-8b50-550bf3507c71.html

Finally, Relator acknowledges that the Missouri Court of Appeals recently rejected an argument that the escape rule can apply to habeas corpus cases. *Oxenhandler*, 491 S.W.3d at 604. Relator filed an application to transfer that opinion, which was denied. See SC95717. This Court should overrule *Oxenhandler*'s discussion of the escape rule because it contains several legal errors.

For instance, the *Oxenhandler* court found that the escape rule cannot be applied to a habeas proceeding because, in that court's view, the escape rule acts to bar "the ***right of appeal***" in "the exercise of an appellate court's discretion." *Oxenhandler*, 491 S.W.3d at 604 (emphasis in original). But that is not the law. The Missouri Court of Appeals, Western District, has held that it was not error for a post-conviction relief court—that is a circuit court—to enforce the escape rule to bar an initial motion for post-conviction relief. *Echols*, 168 S.W.3d at 452. In fact, all districts of the Missouri Court of Appeals agree on this point. *Rulo v. State*, 804 S.W.2d 866, 867 (Mo. App. E.D. 1991); *Brown v. State*, 23 S.W.3d 930, 931–32 (Mo. App. S.D. 2000).

The *Oxenhandler* court, as a matter of policy, also found it inappropriate to apply the escape rule to a habeas petition challenging an NGRI notice because application could "leave a person confined for the rest of his or her life with no recourse for the unlawful commitment." *Oxenhandler*, 491 S.W.3d at 604 n. 37. This appears to reflect the *Oxenhandler* court's belief that habeas is the

exclusive remedy to challenge an improper NGRI commitment. *See Id.* at 589 n.21, *citing State v. McKee*, 39 S.W.3d 565, 569 n.6 (Mo. App. S.D. 2001). But *McKee* says only that habeas corpus is a potential remedy, not that it is the exclusive remedy. Furthermore, the Missouri Court of Appeals has previously granted *direct appeal* relief to an individual who contested NGRI commitment procedures. *Lewis*, 188 S.W.3d at 486. Fisher has never taken a direct appeal, but Relator did not assert a procedural default at the habeas hearing.⁹

Because the *Oxenhandler* decision suffers from erroneous legal conclusions, this Court should examine Relator's escape rule arguments on their own merits, and should overrule the *Oxenhandler* decision.

If the habeas court categorically excluded the escape rule from habeas corpus cases, then it committed an abuse of discretion. And, if habeas court did not categorically exclude the escape rule, then it erroneously considered "the facts and circumstances surrounding George W. Fisher's current confinement by the Department of Mental Health." As the facts in the record demonstrate, this Court should apply the escape rule to bar Fisher's petition.

⁹ However, this Court *may* enforce a procedural bar *sua sponte*. *See State ex rel. Strong v. Griffith*, 462 S.W.3d 732, 738 (Mo. 2015) (In a death penalty case, Missouri Supreme Court *sua sponte* enforced procedural default when the State only made arguments on the merits).

CONCLUSION

This Court should issue a permanent writ of certiorari quashing the habeas court's record, either wholly or in part.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed electronically via Missouri Case.Net on this 15th day of December, 2016, and that counsel for Respondents will be served by the Case.Net system.

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 10,955 words.

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