No. SC96516

In the
Missouri Supreme Court

STATE OF MISSOURI EX REL. JOSHUA D. HAWLEY,

Relator,

v.

THE HONORABLE SANDRA C MIDKIFF, et al.,

Respondents.

RELATOR'S BRIEF

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ATTORNEYS FOR RELATOR

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Statement of Grounds for Jurisdiction

This is an original action in prohibition that arises from an attempt by Circuit Court of Jackson County to rule on the merits of a habeas corpus petition challenging a judgment of conviction and sentence by an offender serving a sentence in the Crossroads Roads Correctional Center in DeKalb County. The offender was brought on a writ of habeas corpus ad testificandum to Jackson County, where he filed a petition for habeas corpus challenging his judgment of conviction and sentence and then was returned to DeKalb County. But the Circuit Court of Jackson County repeatedly declined to move the case to DeKalb County or name the Warden of the Crossroads Correctional Center as a Respondent.

This Court has jurisdiction over this case under Article V, Section 4 of the Missouri Constitution and Missouri Supreme Court Rules 84.22 and 84.24.

Case Summary

This case presents the question whether an offender serving a lengthy sentence for murder convictions in DeKalb County can manufacture jurisdiction for a habeas action in Jackson County by filing a civil proceeding in Jackson County, arranging to be transferred to Jackson County for a few days on a writ of habeas corpus ad testificandum, and then filing his habeas petition in Jackson County Circuit Court. The answer to this question is no. The petitioner's transient presence in Jackson County does not change his custody or custodian in DeKalb County for habeas purposes. Under the plain terms of this Court's Rules and the statutes governing habeas actions, a habeas petitioner's "custody" is in the county in which he or she is serving the sentence for the conviction that the habeas petition challenges—not in any county where he or she obtains transient presence. Likewise, the custodian who is the sole proper respondent for a habeas action is the custodian of the prison where the prisoner is serving the sentence that the habeas action challenges. In addition to the plain language of the rules, this conclusion is supported by a long line of decisions from this Court and the federal courts. Any other rule would result in "rampant forum shopping, [circuit] courts with overlapping jurisdiction, and . . . inconvenience, expense, and embarrassment." *Rumsfeld v. Padilla*, 542 U.S. 426, 447 (2004).

The court also had no authority because the writ of habeas corpus testificandum did not comply with statutory requirements that would make it a valid writ, and the court lacked personal jurisdiction over the Warden who was the proper respondent, but was never served nor entered an appearance.

Statement of Facts

On February 6, 1996, the Circuit Court of Jackson County convicted Ricky Kidd of two counts of first-degree murder and two counts of armed criminal action for two murders that he and accomplices committed on February 6, 1996. *State v. Kidd*, 990 S.W.2d 175, 177-78 (Mo. App. W.D. 1999). The court sentenced Kidd to two consecutive terms of life without parole for the murders, and two consecutive terms of life in prison for the armed criminal action counts. *Id*. at 177.

The evidence supporting conviction included testimony from a neighbor of the victim that he saw Kidd shoot one of the victims as the victim lay on the ground after being dragged from the house where he lived, and testimony from detectives that the four-year-old daughter of one of the victims identified Kidd as one of the killers. *Id*. at 177–78. The neighbor testified that he ran away and was chased by one of the killers. *Id.*

Kidd argued on appeal that the trial court should not have admitted testimony about the child's out-of-court identification, that the trial court should have severed Kidd's trial from that of his co-defendant, and that the trial court should not have permitted the neighbor to testify that he referred to Kidd to the police as "the Terminator" because of the way he walked and the way he executed the victim. *Id*. at 178–85. The Court of Appeals affirmed the judgment of conviction and sentence. *Id.*

Kidd filed a post-conviction relief motion alleging that his counsel on direct appeal was ineffective for not alleging that Kidd was erroneously found to be a prior offender and therefore should not have had judicial sentencing as opposed to jury sentencing. *State v. Kidd*, 75 S.W.3d 804, 806 (Mo. App. W.D. 2002). The State then dismissed the armed criminal action counts, and the motion court resentenced Kidd on only the two first-degree murder counts to two terms of life in prison without the possibility of parole, the only sentence available in the case for first-degree murder. *Id.* at 808. The court noted it was not sentencing Kidd as a prior offender. *Id.*

The motion court entered findings of fact and conclusions of law vacating the armed criminal action convictions but upholding the murder convictions and sentences. *Id.* The Missouri Court of Appeals affirmed the denial of post-conviction relief, finding that Kidd suffered no prejudice from the erroneous finding that he was a prior offender as the result of the finding was judicial sentencing as opposed to jury sentencing, and in this case the sentencing court had no discretion to impose any sentence but life without parole on the two murder counts. *Id.* at 814–15.

Kidd filed a federal habeas corpus action in the United States District Court for the Western District of Missouri, alleging gateway actual innocence in an attempt to revive claims that he had defaulted in the Missouri courts. *Kidd v. Norman*, 651 F.3d 947 (8th Cir. 2011). Kidd raised eight admittedly

defaulted claims but argued that he could overcome the defaults by showing actual innocence. *Id*. at 949.

The federal district court held an evidentiary hearing at which Kidd's accomplice admitted his own guilt but claimed Kidd was not involved. *Id*. But, on cross-examination, the accomplice admitted that he did not come forward with his story exonerating Kidd until he had exhausted all his own appeals. *Id.* The evidence included a letter that the accomplice had written, in which the accomplice stated that he could help Kidd get out of jail, but that in return he wanted to get out of jail as well. *Id*. Kidd's reply letter stating the following was also introduced:

> If Sean [Kidd's attorney] can … play you decent (which I am confident he can) let say three to five more. Okay, you do the first 15 and let [alternate suspects] do their share of the rest … Sean and I figured out that's where you could come in at. Indeed he is not the DA's office, but I do believe he can bring you within a range of time that you can deal with.

*Id***.** (Relator has redacted the name of the alternate suspects Kidd wished the accomplice to blame).

The accomplice admitted on cross-examination that he understood the letter to mean that if he testified for Kidd he might get his life sentence

reduced. *Id*. In a responsive letter, the accomplice asked Kidd what was needed of him and "what do I receive in return." *Id*. Kidd responded that the accomplice would become valuable to the District Attorney's Office and that they "would be in a position to offer you what you want (within reason)." *Id*. The accomplice admitted his testimony was based on his self interest in reducing his life sentence. *Id*. at 949–50.

Kidd also testified at the hearing. *Id*. at 950. Kidd testified for the first time that the real killers had met with him the day before the murder and asked him if he would be interested in robbing the victims, but he declined. *Id*. at 950. Kidd testified that the real uncharged killer later met with him and admitted the murders. *Id*. On cross-examination Kidd acknowledged not telling any of this information to the police during the investigation of the crime and lying to the police and changing his story. *Id*.

The neighbor again testified that he saw Kidd shoot one of the victims. *Id*. But he was impeached on inconsistencies and discrepancies. *Id*. He admitted smoking marijuana at a neighbor's house before witnessing the shooting, and being on the way back to his own house to get some food, because he was hungry, when he saw the shooting. *Id*. The neighbor also admitted editing the information that he initially gave to the police to avoid being a suspect, and seeing three men go into victim's house, two of whom were not Kidd or Kidd's co-defendant. *Id*.

The district court denied the habeas petition *Id*. The district court held that Kidd must present new evidence not available at trial to support his gateway actual innocence claim. *Id*. The district court found that only new evidence Kidd presented was the testimony of the accomplice, but that this testimony was not reliable due to his "blatant attempts to use his recent identification of [alternate suspects] as participants in the murders as a bargaining chip to reduce his own sentence." *Id*.

The United States Court of Appeals for the Eighth Circuit affirmed the denial of habeas relief, holding that the district court had properly interpreted Eighth Circuit precedent on the meaning of "new" evidence in the context of actual innocence claims. *Kidd*, 651 F.3d at 951–54.

On December 17, 2013, Kidd filed a motion for DNA testing in the Circuit Court of Jackson County. Record at 11. The motion asked for relief under § 547.035, RSMo.[1]

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[1] The docket sheet entry is part of the indexed record submitted in support of Relator's Petition to this Court. The writ itself is linked to the docket entry on Case.net. The same is true of other citations of the circuit court filings throughout this brief—the docket sheet entries are part of the indexed record, and the underlying pleadings filed in the circuit court are available through Case.net.

The Circuit Court of Jackson County, in December 2014, set the DNA matter for a hearing on March 6, 2015. *Id*. at 10. On February 19, 2015, Kidd, through counsel, applied for a writ of habeas corpus ad testificandum to the Warden of the Crossroads Correctional Center where Kidd serves his sentence, asking that Kidd be transferred to Jackson County by March 3, 2015, before the scheduled March 6, 2015 hearing. *Id*. The application alleged that Kidd was a material, competent, and indispensable witness in the case, but it was not accompanied by an affidavit of verification as required by section 491.250, RSMo.

Section 491.230.2(2) limits ad testificandum writs in civil cases to cases in which an offender will be substantially and irreparably prejudiced by failure to attend a trial on the merits, and gives the Department of Corrections the right to notice, and the right to make oral and written objections to the writ for security reasons. § 491.230.2(2), RSMo. The statute provides: "No person detained in a correctional facility of the department of corrections shall appear and attend or be caused to appear and attend any civil proceeding, regardless of whether he is a party, except when … [t]he offender is a party to the civil proceeding and the court finds that the offender will be substantially and irreparably prejudiced by his failure to attend a trial on the merits in the civil proceeding." The statute then provides: "In such cases the trial judge may issue a writ of habeas corpus ad testificandum

to an offender only after the department of corrections has been notified and allowed fifteen days to file written objections and been granted an opportunity to appear and make an oral presentation in opposition to the offender's appearance on the basis of security considerations." *Id.* Kidd's application for a writ ad testificandum did not indicate the Department was served or address the requirements of § 491.230.2(2).

The Circuit Court of Jackson County issued a writ of habeas corpus ad testificandum on February 20, 2015, the day after Kidd applied for the writ—notwithstanding the statutory requirement that the Department of Corrections must be "allowed fifteen days to file written objections" and "granted an opportunity to appear and make an oral presentation in opposition to the offender's appearance." Record at 10; § 491.230.2(2), RSMo. The writ ordered the Warden of the Crossroads Correctional Center to deliver Kidd to the Jackson County Correctional Center by March 3, 2015, "for the purpose of proceeding with the matter now before the court." Record at 10. The order stated that, "after said proceeding, the inmate shall be returned forthwith to the custody of the Department of Corrections." *Id.*

On March 5, 2006, after Kidd had been in Jackson County for two days because of the writ of habeas corpus ad testificandum, he filed through counsel a 111-page petition for habeas corpus challenging his judgment of conviction and sentence in the Circuit Court of Jackson County. The filing

initially was listed on the docket sheet in the DNA case. Record at 9. The next day, the petition appeared as filed on separate docket sheet with a different civil case number. *Id.* at 6. The petition named the Director of the Jackson County Correctional Center as Respondent and stated that service was made electronically on the Jackson County prosecutor and the Jackson County counselor. On March 6, 2015, Kidd, through counsel, filed a CD-ROM containing exhibits that were too large for electronic filing, and filed a proposed order on the writ of habeas corpus challenging the judgment of conviction and sentence. *Id.* at 6.

On March 9, 2015, the Circuit Court of Jackson County dissolved the writ of habeas corpus ad testificandum, and Kidd was returned to the Crossroads Correctional Center. *Id.* at 9. The DNA case appears to have gone dormant from that point, with the last docket entry before the filing of this appellate proceeding in February 2016, after DNA testing was ordered. *Id.* at 7–12. In other words, no substantive proceedings have occurred in the underlying DNA case since Kidd filed his habeas petition in Jackson County. The docket sheet does not indicate that there has ever been a trial on the merits of the DNA case following the results of DNA testing. *Id.*

On March 16, 2015, counsel for Kidd filed an addendum to the Petition for habeas corpus. *Id.* at 5. On that date, upon request of Jackson County officials, the undersigned counsel entered his appearance in the habeas case

on behalf of the Director of the Jackson County Detention Center. *Id.* On March 19, 2015, the Director filed a motion to transfer the case to the proper venue, and to substitute the proper Respondent, the Warden of the Crossroads Correctional Center, with a proposed order. *Id.* Kidd filed suggestions in opposition. *Id.* Those were followed by reply suggestions in support of the motion, and a sur-reply in opposition by Kidd. *Id.* The Circuit Court of Jackson County denied the motion on April 9, 2015. *Id.*

On August 11, 2015, the Circuit Court of Jackson County issued a 60-day show cause order to the Director of the Jackson County Correctional Center. *Id.* The Director filed a response on October 5, 2015. *Id.* at 4. Kidd filed a traverse on January 4, 2016. *Id.* The Director filed a proposed judgment denying relief on August 15, 2016. *Id.*

On August 26, 2016, the Director moved to add the Warden of Crossroads Correctional Center, Ronda Pash ("the Warden"), as an additional party, because Kidd was located in the Crossroads Correctional Center, the Director of the Jackson County Detention Center had no real interest in the case, and the Warden did have an interest. *Id.* at 3. Kidd opposed the motion and the court denied the motion on November 14, 2016. *Id.* The circuit court's order denying the motion declined to add the Warden as a respondent, but it did remove the Director as a respondent, thus leaving no respondent at all. The order found that no legal authorities "require the naming of a

respondent." *Id.* "No individual respondent need be named for this action to proceed as required by the Missouri Constitution, Missouri statute and Missouri Supreme Court rule." *Id.* The order bore the caption "In re Ricky Kidd." From that point, the case proceeded with no named respondent, although undersigned counsel continued to defend the case and to respond orders from the court directing actions. On February 23, 2017, the court set the case for trial on July 17, 2017. *Id.* at 2.

On March 20, 2017, while physically located in the Crossroads Correctional Center in DeKalb County, Kidd, through counsel, filed an amended petition for habeas corpus in the Circuit Court of Jackson County. *Id.* at 2. On April 17, 2017, undersigned counsel filed a response to the amended petition and a motion for summary judgment. *Id.* at 1–2. Kidd filed responses to both pleadings on May 17, 2017. *Id.* at 1. On the same date, undersigned counsel again moved the circuit court to transfer the case to Dekalb County and to name the Warden as the respondent, which Kidd again opposed. *Id.* at 1, 172–74.

On June 12, 2017, undersigned counsel filed a notice with the circuit court of intention to apply for an extraordinary writ if the court did not transfer the case to DeKalb County and name the Warden as the respondent in the case. *Id.* at 1, 172–77. On June 14, 2017, in an evident attempt to bolster his claim for authority in Jackson County, Kidd moved for a writ of

habeas corpus ad testificandum to bring him to Jackson County from the Crossroads Correctional Center. *Id.* at 1. The Circuit Court of Jackson County issued the writ on the same day, June 14, 2017, ordering that Kidd be transported to Jackson County by June 30, 2017, 17 days before his scheduled hearing. *Id.* at 179. Again, the order granting the writ of habeas corpus ad testificandum failed to comply with section 491.230.2(2)'s requirements that the Warden be given a 15-day notice and opportunity to be heard.

On June 21, 2017, Relator filed an application for an extraordinary writ in the Missouri Court of Appeals Western District, requesting that Kidd's habeas case be moved to DeKalb County and heard before a DeKalb County judge. Docket Sheet, *Hawley v. Midkiff*, WD80847. The Court of Appeals denied the application on June 22, 2017. On June 22, 2017, Relator applied for an extraordinary writ in this Court. Docket Sheet *Hawley v. Midkiff*, SC96516. This Court issued a preliminary writ of prohibition on July 13, 2017. *Id.*

On July 10, 2017, after Kidd had returned to Jackson County on a writ of habeas corpus ad testificandum for the scheduled July 17, 2017 evidentiary hearing, and after Relator had applied for an extraordinary writ in this Court, the circuit court ordered Kidd to file an amended habeas corpus petition on or before July 12, 2017, and ordered "Respondent" to file its

answer the next day, by 5:30 P.M. on July 13, 2017. Docket Sheet, 1516-CV05073, Case Management Order (July 10, 2017) (available on Case.net). Kidd filed an amended petition of 83 pages and 596 paragraphs on July 12, 2017; under the circuit court's order, Relater was required to respond to this petition the next day. On July 13, 2017, this Court issued its preliminary writ of prohibition, placing proceedings in the circuit court on hold.

At the time of the filing of this brief, Kidd is still physically located in the Jackson County Detention Center on the writ ad testificandum issued on June 14, 2017.

Point Relied on

This Court should issue a permanent writ of prohibition ordering the Circuit Court of Jackson County to return Ricky Kidd to Crossroads Correctional Center in DeKalb County, to name the Warden of the Crossroads Correctional Center as the Respondent in the habeas proceeding filed by Kidd, and to transfer that habeas proceeding to DeKalb County, because the Circuit Court of Jackson County lacks authority to proceed in Kidd's habeas case, in that the Warden of Crossroads Correctional Center is the sole proper respondent and DeKalb County is the sole proper venue for Kidd's habeas action challenging the convictions and sentences for first-degree murder that he is serving at Crossroads Correctional Center in DeKalb County, and Kidd's transient presence in Jackson County pursuant to a writ of habeas corpus ad testificandum does not change his custody or custodian for habeas purposes, and the ad testificandum writ was deficient.

Missouri Supreme Court Rule 91.02(a)

Missouri Supreme Court Rule 91.07

§ 532.030, RSMo.

§ 532.080, RSMo.

United States v. Poole, 531 F.3d 263 (4th Cir. 2008)

Rheurk v. Wade, 608 F.2d 304 (8th Cir. 1979)

Lock v. Seay, 957 S.W.2d 768 (Mo. 1989)

Argument

This Court should issue a permanent writ of prohibition ordering the Circuit Court of Jackson County to return Ricky Kidd to Crossroads Correctional Center in DeKalb County, to name the Warden of the Crossroads Correctional Center as the Respondent in the habeas proceeding filed by Kidd, and to transfer that habeas proceeding to DeKalb County, because the Circuit Court of Jackson County lacks and authority to proceed in Kidd's habeas case, in that the Warden of Crossroads Correctional Center is the sole proper respondent and DeKalb County is the sole proper venue for Kidd's habeas action challenging the convictions and sentences for first-degree murder that he is serving at Crossroads Correctional Center in DeKalb County, and Kidd's transient presence in Jackson County pursuant to a writ of habeas corpus ad testificandum does not change his custody or custodian for habeas purposes, and the ad testificandum writ was deficient.

Standard of Review

"A writ of prohibition is appropriate where there is an important question of law decided erroneously that would otherwise escape review by this Court and the aggrieved party may suffer considerable hardship and expense as a consequence of the decision." *State ex rel. Wolfrum v. Wiseman*,

225 S.W.3d 409, 411 (Mo. 2007). "Statutory interpretation is an issue that this Court reviews de novo." *Id.*

A writ of prohibition is warranted for at least two reasons. *First*, under this Court's rules and the Missouri statutes governing habeas proceedings, the Warden of the Crossroads Correctional Center is the sole proper custodian, and DeKalb County is the sole proper venue, for a habeas proceeding challenging Kidd's convictions and sentences that he is serving at the Crossroads Correctional Center. Kidd's transient presence in Jackson County on a writ of habeas corpus ad testificandum does not change his custody or custodian for habeas purposes, and Kidd's attempts to manufacture authority in Jackson County through procedural maneuvering should be rejected. *Second*, even if a writ ad testificandum could be used to manufacture authority, the ad testificandum writ in this case was fatally deficient because it failed to comply with the unambiguous requirements of Missouri statutes.

A. The Jackson County Circuit Court erred as a matter of law and exceeded its authority when it concluded that it had authority over a habeas petition based on Kidd's transient presence in Jackson County.

This Court's Rule 91.02(a) provides that a petition for writ of habeas corpus "in the first instance shall be to a circuit or associate circuit judge for

the county in which the person is held in custody." Mo. Sup. Ct. R. 91.02(a) (emphasis added). Similarly, this Court's Rule 91.07 provides that a habeas writ "shall be directed to *the person having custody of the person restrained*." Mo. Sup. Ct. R. 91.07 (emphasis added). Likewise, section 532.030 provides that "[w]hen a person applies for the benefit of this chapter, who is held *in custody on a charge of crime or misdemeanor*, his application, in the first instance, shall be to a judge of the circuit court for the county in which the applicant *is held in custody*." § 532.030, RSMo (emphases added).

Under these provisions, the only proper venue for a habeas action is "the county in which the person is held in custody," and the only proper respondent is "the person having custody of the person restrained." Mo. Sup. Ct. R. 91.02(a), 91.07. Under the plain language of these Rules and statutes, and following the universal consensus of the courts that have considered this issue, the "person having custody of the person restrained" and "the county in which the person is held in custody" are the Warden of the Crossroads Correctional Center and Dekalb County, respectively, regardless of whether Kidd obtains transient presence in another county pursuant to a writ of habeas corpus ad testificandum.

As an initial matter, the circuit court's conclusion that a habeas action may proceed with *no respondent at all* is plainly untenable. This Court's Rule 91.01(c) provides: "A habeas corpus proceeding shall be a civil action in which

the person seeking relief is petitioner and the person against whom such relief is sought is respondent." Mo. Sup. Ct. R. 91.01(c). Under Rule 91.07, a habeas writ must be directed to "the person having custody of the person restrained." Mo. Sup. Ct. R. 91.07. And section 532.080, RSMo, provides that "[e]very writ of habeas corpus shall be . . . directed to the officer or person by whom the party to be relieved is imprisoned or restrained of his liberty." § 532.080, RSMo. Under the plain language of both the Rules and the statute, there must be a respondent, and that respondent must be "the person having custody of the person restrained." Mo. Sup. Ct. R. 91.07. The plain language forecloses a situation in which there is no respondent at all.

Second, the plain language of both the Rules and the statute indicate that the "custody" in question is the custody *pursuant to the original judgment of conviction*, not transient confinement pursuant to a writ of habeas corpus ad testificandum. For example, this Court's Rule 91.02(a) provides that "when a person who is held *in custody on a charge of crime* seeks the benefit of this Rule 91, the petition in the first instance shall be to a circuit or associate circuit judge for the county *in which the person is held in custody*." Mo. Sup. Ct. R. 91.02(a). Similarly, section 532.030 provides that "[w]hen a person applies for the benefit of this chapter, who is *held in custody on a charge of crime or misdemeanor*, his application, in the first instance, shall be *to a judge of the circuit court for the county in which the applicant is*

held in custody." § 532.030, RSMo (emphases added).

In other words, the "custody" in question is the "custody" resulting from the charge or conviction that the habeas petition challenges—*i.e.*, the location where the sentence for the underlying crime is being served. This conclusion is mandated by the immediate context in which the word "custody" appears in both the statute and the Rule—both of which refer to the "custody" pursuant to the "charge of crime." *See, e.g., Keller v. Marion Cty. Ambulance Dist.*, 820 S.W.2d 301, 302 (Mo. banc 1991) ("Traditional rules of construction dictate looking at words in the context of … the particular provision in which they are located …. Context determines meaning.").

In Kidd's case, Kidd is serving his sentence for first-degree murder in DeKalb County, not in Jackson County, and his presence in Jackson County is the result of a transient writ in another proceeding. Because his habeas petition challenges the validity of his conviction for first-degree murder, the relevant "custody" is his custody in DeKalb County where he is serving that sentence, not his transient presence in Jackson County to testify in a civil proceeding. A habeas petition challenging his convictions and sentences for the first-degree murder charges must be filed in the county where Kidd is serving his sentences for those convictions, *i.e.* DeKalb County.

Further, because the relevant "custody" is the service of his sentence for first-degree murder at the Crossroads Correctional Center, the relevant

custodian is the Warden of that facility. As noted above, Rule 91.07 provides that a habeas writ "shall be directed to *the person having custody of the person restrained* and shall designate a time for filing an answer to the petition, which shall not be later than three days after service." Mo. Sup. Ct. R. 91.07. Because the "custody" is Kidd's service of the sentence at Crossroads Correctional Center, the "person having custody" is the Warden.

This conclusion is directly supported both by this Court's cases and by the overwhelming consensus of courts that have addressed the same issue. For example, in rejecting the idea that a motion for post-conviction relief filed in the sentencing court could be construed as a habeas corpus action, this Court has held that the "present action is not a habeas corpus action which must be brought in the place having jurisdiction over the place or confinement or detention." *White v. State,* 779 S.W.2d 571, 572 (Mo. 1989). Likewise, in *Lock v. Seay*, 957 S.W.2d 768, 769 (Mo. 1989), this Court held that, when a sentencing court receives a writ of habeas corpus, it should transfer the case to the court where the offender is held.

The only distinction between this case and *White* and *Seay* is that here the offender was brought to the sentencing court by means of a writ of habeas corpus ad testificandum. But this is a distinction without a difference, because a writ of habeas corpus ad testificandum does not change the custodian of an offender for purposes of litigating a habeas corpus action or

the proper location of the suit. Moreover, the Circuit Court had neither authority to act, nor personal jurisdiction over the only proper respondent, the Warden, who was not served with and was never made a party to the habeas action challenging confinement. *See Maul v. Maul*, 103 S.W.3d 819 (Mo. App. W.D. 2003) (proper service of process on a person is necessary for personal jurisdiction). Here the writ of habeas corpus ad testificandum, even if it was properly issued, did not and could not change Kidd's custodian or create authority to hear the case in Jackson County. *See infra* Part B.

A significant body of federal case law strongly supports the conclusion that transient presence pursuant to a writ of habeas corpus ad testificandum does not change the location of "custody" or the identity of the custodian for purposes of habeas writs. In Missouri, civil collateral challenges to judgments of conviction and sentence have generally been handled in the first instance through actions under Rules 27.26, 24.035, and 29.15, and such challenges are filed against the "State" in the county of conviction. *See Wigglesworth v. Wyrick*, 531 S.W.2d 713 (Mo. 1976) (noting that in 1952 the original Rule 27.26 was adopted based on 28 U.S.C §2255, the federal statute that permits a post-conviction relief motion in the sentencing court, Rule 27.26 cases are filed in the sentencing court, and such cases fall within the authority for relief that would otherwise be within the authority of a habeas corpus court); *see also Clay v. Dormire*, 37 S.W.3d 214 (Mo. 2000) (discussing limited

exceptions when a Rule 91 habeas action may be used as a type of backstop to litigate a claim that was not raised in the ordinary course of review). Thus, in Missouri, post-conviction review closely parallels federal proceedings under 28 U.S.C. § 2255, and habeas review pursuant to this Court's Rule 91 closely parallels proceedings under the federal backstop habeas statute, 28 U.S.C. § 2241.

The federal post-conviction relief remedy provided in 28 U.S.C. § 2255 contains a provision allowing an offender to also file a habeas corpus action under 28 U.S.C. § 2241 when "the remedy by motion is ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). Therefore, the federal writ of habeas corpus, like the Missouri writ of habeas corpus, provides a limited backstop in the court of the place of confinement under section 2241, to post-conviction remedies conducted in the sentencing court under section 2255.

The federal courts have repeatedly addressed attempts to use the writ of habeas corpus ad testificandum to move habeas litigation away from the district of the prison where the offender serves his sentence. Federal rejection of such attempts has created case law addressing the effect of a writ of habeas corpus ad testificandum codified at 28 U.S.C. § 2241(c)(5) on the identity of the custodian of a prison inmate and his place of confinement for purposes of adjudicating a writ of habeas corpus challenging confinement under 28 U.S.C. § 2241(a). The settled result of these cases is that the

warden of the prisoner where the offender was confined in the first place remains the custodian, and a habeas case challenging confinement must be brought in the place where the warden and the original prison are located, not where the offender was transported as the result of a writ of habeas corpus ad testificandum. These cases are instructive here.

In *Rumsfeld v. Padilla*, 542 U.S. 426, 427–29 (2004), the United States Supreme Court found that there is generally only one person who has custody over a prisoner and therefore is the proper respondent in a habeas corpus action. The Court found that Padilla's custodian was the commander of the military brig in South Carolina where he was confined, and thus the United States District Court for the Southern District of New York could not gain authority over the case by treating the Secretary of Defense or the President of the United States as the custodian. *Id*.

Then, in a case very similar to this case, the Fourth Circuit found that *Padilla* supports the long-established principle that writs of habeas corpus ad testificandum and ad prosequendam do not change the custodian or custody of an inmate and cannot be used to seize authority to litigate a writ of habeas corpus challenging confinement under 28 U.S.C. § 2241. *United States v. Poole*, 531 F.3d 263 (4th Cir. 2008).

The offender in *Poole* was confined in a federal prison in Kentucky, serving a 262-month sentence for a drug offense. *Id*. at 266–67. He filed

unsuccessful § 2255 post-conviction relief motions in the district court in Maryland where he had been sentenced, then filed a § 2241 habeas petition in the district court in Kentucky where he was confined. *Id.* The court in Kentucky denied that petition. Poole then obtained counsel who filed a motion to reconsider the sentence in the Maryland court and successfully convinced the federal district court in Maryland to issue a writ of habeas corpus ad testificandum ordering the warden in Kentucky to transport Poole to Maryland. *Id.* at 267–68. Once Poole was in Maryland, Poole's counsel asked that the resentencing motion be held in abeyance and that Poole be allowed to file § 2241 habeas petition in the district court in Maryland, and the court agreed. *Id.* at 268. The Maryland federal court granted relief on the habeas petition. *Id.* at 269.

The Fourth Circuit held that Poole's jurisdictional maneuvering was improper and reversed the order granting habeas relief. The court held that "neither [the district court's] issuance of the writ of habeas corpus ad testificandum nor its order keeping Poole in Maryland transmuted Poole's temporary presence in the district into a permanent stay that effected a change in custodian." *Id.* at 271. A writ causing a transient change of the prisoner's location, such as the writ of habeas corpus ad prosequendum and ad testificandum, constitutes a "mere loan of the prisoner to [different] authorities and does not effectuate a change in custodian." *Id.* (quotation and

alterations omitted).

Under *Padilla*, the Fourth Circuit reasoned, the only proper respondent in a habeas action is the warden who confines the offender, and this holding is consistent with decisions of several circuit courts of appeals holding that writs of habeas corpus ad testificandum and ad prosequendam do not change the custodian of the offender and thus do not change the proper venue of a habeas corpus action. *Id*. at 271–74; *see also United States v. Evans*, 158 F.3d 908, 912 (4th Cir. 1998) (holding that transfer by ad prosequendam writ does not change custody); *Pelley v. Mathews*, 163 F.2d 700 (D.C. Cir. 1947) (same). The Fourth Circuit also found that in the case of ad testificandum writs, circuits that have considered the matter found that "custody remains in the original place of incarceration." *Id*. at 272; *see also Miller v. Hambrick*, 905 F.2d 259, 271–72 (9th Cir. 1990) (prisoner brought to Los Angeles from Texas on a habeas corpus ad testificandum writ could not file habeas petition in the Central District of California because custody remained in the official to whom the ad testificandum writ was issued in Texas and the writ authorized a trip, not a change in custody); *United States ex rel. Hunter v. Quinn v. Hunter*, 162 F.2d 644 (7th Cir. 1947) (same); *Rheurk v. Wade*, 608 F.2d 304 (8th Cir. 1979) (same). Under all these cases, a writ of habeas corpus ad testificandum does not remove custody from the original warden.

The Fourth Circuit in *Poole* noted that, in *Padilla*, the United States

Supreme Court warned about "rampant forum shopping" that would result if an offender did not have a single custodian for purposes of filing an original habeas petition. *Poole,* 531 F.3d at 273. The Court of Appeals held that a rule permitting an offender to transfer his location through a writ of habeas corpus ad testificandum, and then file a habeas petition in the new location, would encourage the proliferation of habeas petitions outside the district of incarceration—the very species of "forum shopping" that the Supreme Court had sought to prevent in *Padilla*. *Id*. at 273–74.

The Fourth Circuit in *Poole* also held that "the extraordinary actions of the Maryland district court of sequestering the offender after his arrival from Kentucky in an attempt to solidify its own jurisdiction," and of conducting an equitable analysis in an attempt to explain why the case was better heard in Maryland district court than in the district of original confinement, were acts in excess of its authority. *Id*. at 274–75. The Court of Appeals held that, even if Poole's maneuver were not a "transparent manipulation of the court system," the effect was the same as if it was. *Id*.

A long line of cases supports the Fourth Circuit's holding in *Poole* that a writ of habeas corpus ad testificandum does not change the petitioner's location of confinement for habeas purposes. For example, in *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34 (1975), the federal district court had ordered state officials to transport offenders

from state facilities to the county jail nearest the federal courthouse, where the United States Marshals would pick them up and bring them to federal court so they could testify. The United States Supreme Court held that a writ of habeas corpus ad testificandum could only be issued to the custodian of the offenders, *i.e.*, the state wardens; the United States Marshals were not the custodians of the offenders, so the district court had no authority to order the Marshals to transport the offenders to court for their testimony. If the Marshals, through the act of taking physical possession of the offenders became their custodians, then the district court would have acted within its authority to order the Marshals to bring the offenders to the federal court house. But the United States Supreme Court found the district court acted outside its authority.

The United States Court of Appeals for the Eighth Circuit reached a similar result in *Rheurk v. Wade*, 608 F.2d 304 (8th Cir. 1979) (per curiam). In that case, a petitioner sought to file a petition for habeas corpus in Arkansas where he had been brought from prison in Texas by the United States Marshals on a writ of habeas corpus ad testificandum. The Court of Appeals found that the Marshals were merely following a court order in bringing the offender to Arkansas and were not responsible for defending the underlying conviction, that the custodian was the official who had custody of the offender in Texas, and that agency theory could not be used to argue that

the marshals were agents of the official in Texas. *Id.* at 305. The Eighth Circuit held: "In the present case, Rheuark is challenging his Texas conviction. The Texas officials responsible for his confinement *pursuant to that conviction*, therefore, are the custodians over whom the Arkansas court must have had jurisdiction." *Id.* (emphasis added).

The reasoning of *Padilla*, *Poole*, and *Rheurk* applies here. The Missouri writ of habeas corpus has the same common law roots as the federal writ. The holding of *Padilla* that the warden has custody over the offender, and that authority cannot be created over a case by naming someone else with general supervisory authority over the warden, is persuasive here. Similarly, the holding of *Poole* that the original warden has custody over an offender, and that an ad testificandum writ does not transfer "custody" to a new location with a new respondent, squarely applies here.

The same forum shopping that concerned the federal courts in *Padilla* and *Poole* is also of concern here. In Missouri, habeas corpus petitions by the most serious offenders are heard in the few counties with maximum security prisons where the courts hear hundreds of such cases and are extremely familiar with the complicated law of habeas corpus. An offender with a weak case under existing precedent has an incentive to move his case to a court

less experienced in habeas corpus litigation.[2]

The holding of *Rheurk*—that the person who has custody over an offender and an interest in defending the case is the warden—applies to Missouri prisoners as well. Under *Rheurk*, the person having temporary physical possession of the offender in connection with his court testimony has no real interest in defending a challenge to permanent confinement and cannot be an agent of the warden for the purpose of creating jurisdiction or custody. The Circuit of Jackson County never named the Warden as a respondent in this case, and realizing the Director of the Jackson County Detention Center where Kidd was temporarily housed had no real interest in the case, dismissed the Director as a respondent, leaving a case with no respondent at all. This was error—the Warden is the proper respondent.

In sum, the Circuit Court of Jackson County exceeded its authority by retaining the habeas case filed in Jackson County when Kidd's custodian was

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[2] *See* "Innocence isn't enough to free wrongly imprisoned." July 13, 2017, Patrick Fazio, Produced by Terrence Shaw http://ww.kshb.com at 12 of 14 downloaded 7/18/2017. Counsel for Kidd stated in an interview with a television reporter: "Judges don't have clear law to cite in Missouri or federal courts. O'Brien said the few judges who do free innocent prisoners usually go beyond their jurisdiction and power."

and is the custodian of the Crossroads Correctional Center in DeKalb County, and the Circuit Court of Jackson County exceeded its authority when it proceeded on the habeas case when it had no personal jurisdiction over Kidd's custodian, the Warden, who was never served and was never a party in the habeas case.[3]

B. The Circuit Court of Jackson County lacked authority because the writs of habeas corpus ad testificandum that brought Kidd to Jackson County were fatally deficient.

[3] Relator understood this Court's question as to who is the correct respondent in this case to inquire as to who is the correct respondent in the underlying habeas corpus action in Jackson County. If the Court meant to inquire as to who is the correct respondent in the appellate proceeding before this Court, then if this Court construes this action as an action in prohibition or mandamus, the proper respondent is the circuit judge in the underlying habeas action. 24 Mo. Prac., Appellate Practice § 1215 (2017). If this Court construes this case as a certiorari action because the underlying action is in habeas corpus, then the proper respondents are the circuit judge and the circuit clerk. *Id.* (noting that the judge who granted relief habeas and the circuit clerk are traditionally named as respondents in a certiorari action challenging a peremptory habeas writ).

Even if it were possible to manufacture authority based on transient presence pursuant to a writ ad testificandum—which it is not—the Jackson County Circuit Court would still lack authority in this case because the writs of habeas corpus ad testificandum that brought Kidd to Jackson County were fatally deficient.

"The writ of habeas corpus ad testificandum is a common law writ of ancient origin. Its desired object is to direct the custodian of a desired witness who is incarcerated into court to give testimony." *Gilmore v. United States*, 129 F.2d 199, 2002 (10th Cir. 1942). This Court has found that the "writ of habeas corpus ad testificandum under any practice in this country or England, never issued except to bring a witness competent and qualified to testify." *Ex Parte Marmaduke*, 4 S.W. 91, 92 (Mo. 1886).

The Missouri legislature codified the common law writ of habeas corpus ad testificandum in Sections 491.230 through 491.270 of the Missouri Revised Statutes. Those statues limit the use of the writ of habeas corpus ad testificandum in civil case to cases to terminate parental rights, and otherwise to trials on the merits where the offender would be substantially and irreparably prejudiced by not attending the trial on the merits, and only then after the Department has been given fifteen days' notice, and an opportunity to object orally and in writing for security reasons. § 491.230, RSMo. The application for the writ must be verified by affidavit. § 491.250,

RSMo. And a "prisoner brought before any court, public body or officer to testify, shall be remanded, after having testified to the prison from which he was taken." § 491.270, RSMo.

None of that happened here. The writ issued without notice to the Warden of the Crossroads Correctional Center, who was not named as party in the habeas case; no affidavit accompanied the application; and Kidd has not had a final trial on the merits of his DNA case that was the basis of the writ of habeas corpus ad testificandum.

Perhaps most notably, neither writ ad testificandum satisfied the statutory requirements of notice and opportunity for hearing to the Warden, as set forth in section 491.230.2(2), RSMo. As discussed above, that section provides: "No person detained in a correctional facility of the department of corrections shall appear and attend or be caused to appear and attend any civil proceeding, regardless of whether he is a party, except when . . . [t]he offender is a party to the civil proceeding and the court finds that the offender will be substantially and irreparably prejudiced by his failure to attend a trial on the merits in the civil proceeding." § 491.230.2(2), RSMo. "In such cases the trial judge may issue a writ of habeas corpus ad testificandum to an offender *only after* the department of corrections has been notified and allowed fifteen days to file written objections and been granted an opportunity to appear and make an oral presentation in opposition to the

offender's appearance on the basis of security considerations." *Id.* (emphasis added).

In this case, because the DNA case in which the writ issued was a civil proceeding, the writ ad testificandum could not issue unless and until the Warden had been "notified and allowed fifteen days to file written objections and been granted an opportunity to appear" to oppose the writ. *Id.* None of that happened in this case. Because these unambiguous statutory mandates were not followed, the writs were fatally deficient.

Conclusion

This Court should make permanent its writ of prohibition, order Kidd to be returned to the Crossroads Correctional Center, order that the Warden be listed as the proper respondent in this case, and transfer Kidd's habeas petition to the Circuit Court of DeKalb County.

Dated: October 13, 2017

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 8,615 words, excluding the cover, certificate of service, and signature block, as determined by Microsoft Word software and

2. That on the 13th day of October, 2017, this brief was filed using the CM/ECF system which sent notification of such filing to all counsel of record.

/s/ Michael J. Spillane