No. SC96516

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI EX REL. JOSHUA D. HAWLEY,

Relator,
v.

THE HONORABLE SANDRA MIDKIFF, et al.,

Respondents.

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Ricky Kidd has never wavered in his assertions that he is innocent of the February 6, 1996, homicides of George Bryant and Oscar Bridges. Neighbors who heard the gunshots saw three assailants leave the house and get into a new, white four-door car. Respondent's Appendix 26, 34, hereafter "RA." When first interviewed by police, Mr. Kidd denied the offense, and explained his whereabouts on the day of the crime, stating that he had gone by his sister's work, then driven to the Jacomo County Sherriff's Department with his girlfriend and applied for a gun permit. His then-girlfriend, Monica Gray, was separately questioned and gave a consistent account. Mr. Kidd "testified at trial and gave a detailed account of his whereabouts on the day of the offense. Trial Tr.1191-1219. The defense called multiple witnesses to corroborate the alibi, including Monica Gray, Lawson Gratts, Nichelle 'Nikki' Kidd, Alana Wesley, Kelly McGill and Jackson County Deputy Tim Buffalow." RA 33.

The State called two witnesses to tie Mr. Kidd to the crime. A neighbor and parole absconder, Richard Harris, tentatively identified Mr. Kidd from a photospread before picking him out of a video lineup. RA 25-26. Bryant's four-year-old daughter "was unable to identify Mr. Kidd as the shooter or as one of the perpetrators in the courtroom at trial." RA 37. Detective Jay Thompson testified that Kayla selected Mr. Kidd from the video lineup. *Kidd v. State*, 75 S.W.3d 805,

806-807 (Mo. App. 1998). Yet, "Not one piece of physical evidence linked Defendant Ricky Kidd with the crime or the crime scene." RA 25, 37.

Mr. Kidd asserts his innocence of the crime, and argued below that DNA testing would prove that the three perpetrators seen by Bryant's neighbors are Marcus Merrill, Gary Goodspeed, Jr., and Gary Goodspeed, Sr. RA 25. Police investigation established that Merrill lived with Gary, Jr., worked for Gary, Sr., near Atlanta, Georgia, and airline records proved that the three of them traveled to Kansas City before the crime. RA 26. Gary, Sr. rented a white Oldsmobile that matched the description of the get-away car. *Id.* Although Harris identified Gary Goodspeed, Jr., as one of the assailants, no charges were ever filed against him.

At the conclusion of state court proceedings, Mr. Kidd petitioned for federal habeas corpus relief in the Western District of Missouri. His case was accepted by the Midwest Innocence Project, which followed fruitful avenues of investigation that were obvious from the police reports. A reasonable investigation produced evidence implicating Gary Goodspeed, Sr., Gary Goodspeed, Jr., and Marcus Merrill in the homicides, impeaching the identification testimony of the State's key witness Richard Harris, and further substantiating Mr. Kidd's alibi defense. At a federal habeas hearing in this case, "Eugene Williams testified that Marcus Merrill, Gary Goodspeed Sr. and Gary Goodspeed Jr. all met at his house on the day of the murders. They discussed plans to rob someone." RA 37. Merrill testified that he

committed the crime with the two Goodspeeds, and that Ricky Kidd was never involved. RA 38-39. Based on this and other evidence, Mr. Kidd's petition was amended to include a claim of actual innocence pursuant to *Schlup v. Delo*, 513 U.S. 298 (1995), as a gateway to reach his defaulted claims of ineffective assistance of trial counsel.

The federal district court was not unsympathetic to Mr. Kidd's position. During the hearing, the judge commented that "one thing that really worries me about this case is that actually he, Kidd, he really had poor representation. God almighty." RA 71. He also observed that, "what's another tragedy is that the Goodspeeds, and particularly of the Senior, … if he's getting off free, it would be terrible." *Id.* Despite his conclusion that "Marcus Merrill…impressed me as a pretty truthful witness," the court was hamstrung by the Eighth Circuit's uniquely restricting application of the *Schlup* standard, which required that "Kidd must identify new reliable evidence *that was not available at the time of his trial* and that shows he is actually innocent of the crimes." *Kidd v. Norman*, No. 03-0079-CV-W-SOW, pp. 10-11 (W.D. Mo., Dec. 8, 2009), citing *Amrine v. Bowersox*, 128 F.3d 1222 (8th Cir. 1997) (*en banc*). Since the leads for locating and interviewing Kidd's new witnesses were apparent from the police reports, the district court was compelled by *Amrine* to ignore almost all of the evidence supporting Mr. Kidd's innocence. Conceding that "there is no doubt that Harris has given some

inconsistent statements," and that "Kidd has raised some serious concerns about how his trial counsel handled the case," *Kidd v. Norman, supra,* at 11, the district court rejected Mr. Kidd's claim of actual innocence and dismissed his petition.

A panel of the Eighth Circuit court of appeals acknowledged that other circuits have declined to follow *Amrine*'s strict rule, citing *Gomez v. Jaimet,* 350 F.3d 673, 679-80 (7th Cir. 2003), *Griffin v. Johnson*, 350 F.3d 956, 962-63 (9th Cir. 2003), and *Houck v. Stickman*, 625 F.3d 88, 94 (3d Cir. 2010), but concluded that it was powerless to overturn settled circuit precedent: "Whatever the merits of a modified approach in situations like the one faced by Kidd, our panel is not at liberty to ignore *Amrine* because we have already applied *Amrine* in situations like Kidd's." *Kidd v. Norman*, 651 F.3d 947, 953 (8th Cir. 2011). Accordingly, the panel affirmed the denial of habeas relief. *Id*. at 954. Rehearing *en banc* was denied, with Judges Bye and Judge Melloy dissenting. Thus, the federal courts declined to hear Mr. Kidd's claim that his trial and appellate counsel were constitutionally ineffective because his trial and appellate counsel were constitutionally ineffective.

Mr. Kidd thereafter filed in Respondent Judge Midkiff's division a motion pursuant to RSMo § 547.035, which authorizes a movant to file a "postconviction motion in the sentencing court seeking [DNA] testing." RA 1. Judge Midkiff ordered an evidentiary hearing on that motion, RA 12, and ordered Mr. Kidd

transferred to the custody of the Director of the Jackson County Detention Center, 1300 Cherry, Kansas City, Jackson County, Missouri, for purposes of providing testimony relevant to the DNA issue. RA 16. While present before Judge Midkiff, Mr. Kidd filed a petition for habeas corpus relief pursuant to Missouri Rule 91 challenging the same convictions and sentences that are the subject of his pending DNA motion. RA 206. Relator conceded that at the time of filing, venue and jurisdiction were proper in Division 1 of the Sixteenth Circuit. RA 18.

After hearing evidence, Judge Midkiff enumerated items of evidence available for DNA testing, including duct tape used to bind victim Oscar Bridges and human hairs found on his body, and based on the testimony of Chief Criminalist Scott Hummel, found that the existing evidence meets the requirements of 547.035.2(2) RSMo, and further that the type of DNA testing necessary to obtain a profile from "touch DNA" was not available until three years after Mr. Kidd's trial. RA 27. Hummel also testified that, with the newly available technology, it is possible to obtain a match with alternative suspects in the case. RA 31. Respondent found that "Mr. Kidd has met the requirements of 547.035.2(3)(a) RSMO that the technology for the testing was not reasonably available to Mr. Kidd at the time of his trial." RA 35. Respondent also found, after reviewing the trial record, that "[t]here was no physical evidence tying Mr. Kidd to

the murders or the crime scene. The case was based upon eyewitness identification. The requirement of 547.035.2(4) is met." RA 37. Finally, Judge Midkiff held:

> Movant has proven by a preponderance of the evidence that a reasonable probability exists that movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing. This case presents an elimination process. One of the perpetrators was Marcus Merrill. He was convicted along with Mr. Kidd. Mr. Kidd claims that it was not him, but rather Gary Goodspeed, Sr. and Gary Goodspeed, Jr., who were the two other perpetrators -- Gary Goodspeed, Jr. being the first perpetrator outside the garage who restrained George Bryant when he tried to run from the garage. Any DNA matches for Gary Goodspeed Jr. and Gary Goodspeed Sr. on the duct tape, bullet fragments, shell casings or hairs found on the victims' bodies, would, by a process of elimination, be exculpatory evidence that would present a reasonable probability that the movant Ricky Kidd would not have been convicted. It is undisputed that other evidence establishes that Marcus Merrill, Gary

> Goodspeed, Jr. and Gary Goodspeed, Sr. were together around the time of these crimes. They flew to Kansas City together from Atlanta. Gary Goodspeed Sr. rented a car for their use while in Kansas City. In fact, the police undertook significant investigation of the Goodspeeds after their return to their home in Atlanta. There is now evidence that the three were armed with guns when they headed for Bryant's house on the morning of 2/6/96.

RA 41-42. Based on these findings, Judge Midkiff concluded that Mr. Kidd satisfied all requirements of RSMo § 547.035, and ordered DNA testing through the Kansas City Regional Crime Lab. RA 45. That testing is now complete, though reports were not filed on the docket. Generally, there was too little DNA to render DNA profiles suitable for comparison. DNA testing of the duct tape revealed a DNA profile consistent with victim George Bryant. Testing of George Bryant's fingernail scrapings produced a mixture that included Bryant and definitively excluded Mr. Kidd as the source of the DNA. Updates regarding testing were provided at the February 21, 2017 status conference in Mr. Kidd's Rule 91 proceeding. RA 209.

Respondent proceeded to dispose of Mr. Kidd's Motion for DNA Testing and his Petition for Writ of Habeas Corpus in tandem. Counsel for Relator agreed

to pretrial orders fixing deadlines for discovery and pleadings, and setting the matter for evidentiary hearing on July 17, 2017. RA 206-213. Without objection, Judge Midkiff ordered Mr. Kidd returned to the custody of the Director of the Jackson County Detention Center on June 20, 2017. RA 207. This Court on July 13, 2017, issued its preliminary writ of prohibition, and subsequently ordered briefing of the issues addressed herein. Mr. Kidd remains in Jackson County to this day.

POINTS RELIED ON

VENUE IS PROPER IN DIVISION ONE OF THE JACKSON COUNTY CIRCUIT COURT, THE HONORABLE SANDRA C. MIDKIFF (RESPONDENT) PRESIDING, BECAUSE

1) ALL PRINCIPLES GOVERNING VENUE IN CIVIL AND CRIMINAL CASES ARE SATISFIED IN THIS CASE,

2) MR. KIDD WAS PERSONALLY PRESENT IN RESPONDENT'S COURT AND IN CUSTODY IN JACKSON COUNTY ON A HEARING PURSUANT TO A PROPERLY FILED, NONPRETENSIVE, SUBSTANTIALLY-RELATED POSTCONVICTION DNA MOTION CHALLENGING THE SAME CONVICTION AND SENTENCE, AND

[In response to Relator's Argument, sub-part A]

Abel v. Wyrick, 574 S.W.2d 411 (Mo. banc 1978)

State ex rel. Kansas City S. Ry. Co. v. Nixon, 282 S.W.3d 363, 365 (Mo. 2009)

State ex rel. Riordan v. Dierker, 956 S.W.2d 258, 260, 261 (Mo. banc 1997)

Missouri Supreme Court Rule 91.01

Missouri Supreme Court Rule 91.06

§ 532.030 R.S.Mo.

§ 532.070 R.S.Mo.

§ 547.035 R.S.Mo.

3) RELATOR'S CONCESSION THAT "[A]T THE TIME OF FILING [RESPONDENT'S] COURT WAS THE PROPER VENUE," AND WAITING OVER TWO YEARS TO SEEK THIS WRIT, WAIVED HIS VENUE OBJECTION.

[Response to Relator's Argument, sub-part B]

Laws v. O'Brien, 718 S.W.2d 615, 618 (Mo. App. 1986)

Hitchinson v. Steinke, 353 S.W.2d 137 (Mo. App. 1962)

State ex rel. Heartland Title Servs. v. Harrell, 500 S.W.3d 239 (Mo.2016)

§ 491.230 R.S.Mo.

§ 532.520 R.S.Mo.

ARGUMENT

VENUE IS PROPER IN DIVISION ONE OF THE JACKSON COUNTY CIRCUIT COURT, THE HONORABLE SANDRA C. MIDKIFF (RESPONDENT) PRESIDING, BECAUSE:

1) ALL PRINCIPLES GOVERNING VENUE IN CIVIL AND CRIMINAL CASES ARE SATISFIED IN THIS CASE,

2) MR. KIDD WAS PERSONALLY PRESENT IN RESPONDENT'S COURT AND IN CUSTODY IN JACKSON COUNTY ON A HEARING PURSUANT TO A PROPERLY FILED, NONPRETENSIVE, SUBSTANTIALLY-RELATED POSTCONVICTION DNA MOTION CHALLENGING THE SAME CONVICTION AND SENTENCE, AND

[In response to Relator's Argument, sub-part A]

3) RELATOR'S CONCESSION THAT "[A]T THE TIME OF FILING [RESPONDENT'S] COURT WAS THE PROPER VENUE," AND WAITING OVER TWO YEARS TO SEEK THIS WRIT, WAIVED HIS VENUE OBJECTION.

[Response to Relator's Argument, sub-part B]

In challenging Judge Midkiff's proper exercise of habeas corpus jurisdiction, Relator ignores pertinent provisions of Missouri statutes and court rules that require Judge Midkiff's to exercise habeas corpus jurisdiction to correct a manifest injustice that became evident in proceedings before her:

> Whenever any court of record, or any judge thereof, shall have evidence, from *any judicial proceedings had before such court or judge*, that any person is illegally confined or restrained of his liberty, within the jurisdiction of such court or judge, *it shall be the duty of the court or judge to issue a writ of habeas corpus for his relief*, although no application or petition be presented for such writ.

Section 532.070 R.S.Mo. (emphasis added). This Court's Rule 91.06 tracks this statutory language, which is clearly framed to preserve the role of the "the Great Writ," *Lonchar v. Thomas*, 517 U.S. 314, 322 (1996), as "a bulwark against convictions that violate fundamental fairness." *Amrine v. Roper*, 102 S.W.3d 541, 545 (Mo. 2003), *quoting Engle v. Isaac*, 456 U.S. 107, 126 (1982). Missouri's Habeas Corpus Act and statutory venue principles *in pari material* makes clear that Respondent was well within her power and duty to exercise habeas corpus jurisdiction based on the record of proceedings that are properly before her. "Inasmuch as Rule 91.05 makes it the duty of this and every other court to issue a writ of habeas corpus for any person, regardless whether application for such a writ is presented, where there is evidence from judicial proceedings before it that a person is illegally confined, we cannot, in conformity with rule 91.05, dismiss the suit at this juncture." *Abel v. Wyrick*, 574 S.W.2d 411, 416 (Mo. banc 1978).

I. All principles governing venue in habeas cases are satisfied.

Respondent's argument relies almost exclusively on federal cases, which are of limited value to this Court because of an important distinction between federal law and Missouri law: In the federal system, venue is jurisdictional; a district court is not able to act on a custodian outside its territory. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). Thus, to obtain jurisdiction in a habeas matter over a custodian outside its territory, at a minimum, a federal court would have to invoke "long-arm" jurisdiction. *Id*., at 445-46. *See also Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 495 (1973) (holding that the inability to serve process on the warden was important to federal habeas corpus jurisdiction).[1] This is not so with a Missouri

[1] Likewise, Relator's reliance on *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34 (1975), Relator's Brief at 34, is misplaced because that case dealt solely with the authority of federal courts to order U.S. Marshalls to take custody of and transport state prisoners under 28 U. S. C. §§ 567 and 569(b). This is far removed from the issues in controversy in Mr. Kidd's case. *Rheurk v. Wade*, 608 F.2d 304 (8th Cir. 1979), *see* Relator's Brief at 35, is even further removed from Mr. Kidd's situation; there, a Texas prisoner transported by U.S. Marshalls to testify in an Arkansas federal prosecution could not file a § 2254 in Arkansas challenging his Texas conviction, a matter clearly outside the territorial and subject matter jurisdiction of the Arkansas federal district judge. The reasoning of *Padilla*, *Poole*, and *Rheurk* do not apply here.

court entertaining a petition for writ of habeas corpus filed by a petitioner in custody and personally present in court in a matter over which the court has both subject matter and personal jurisdiction. *See* R.S.Mo. § 506.170 ("All process may be served anywhere within the territorial limits of the state and may be forwarded to the sheriff of any county for the purpose of service."); R.S.Mo. § 508.010.7 (In all actions, process shall be issued by the court in which the action is filed and process may be served in any county within the state.); R.S.Mo. § 491.230 (Circuit courts may issue writs to produce prisoners.). Therefore, in Missouri, an argument that "minimum contacts" are required for personal jurisdiction "confuses the requirements for venue with the requirements of jurisdiction." *State ex rel. Heartland Title Servs. v. Harrell*, 500 S.W.3d 239, 241 (Mo. 2016). In short, for federal courts, "jurisdiction" and "venue" are equivalent concepts. This is not so in Missouri.

In Missouri, venue is not jurisdictional:

> Jurisdiction describes the power of a court to try a case, while venue relates to the locale where the trial is to be held. A court's authority, or jurisdiction, to hear a case is based upon constitutional principles. Venue, in contrast, is determined by the applicable rule or statute. Venue

> assumes the existence of jurisdiction and determines, among many courts with jurisdiction, the appropriate forum for the trial. Because it involves a procedural rather than a jurisdictional question, venue is a matter that goes to process rather than substantive rights.

State ex rel. Kansas City S. Ry. Co. v. Nixon, 282 S.W.3d 363, 365 (Mo. 2009), citing *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 252 (Mo. banc 2009); 77 AM. JUR. 2D VENUE § 2 (2008). Therefore, territorial limits on federal court jurisdiction imposed by federal statutes have limited application to issues of venue in Missouri habeas corpus proceedings.

Respondent clearly has jurisdiction in this case. Missouri courts recognize two kinds of jurisdiction: subject matter and personal. *J.C.W. ex rel. Webb v. Wyciskalla*, *supra*, 252. Subject matter jurisdiction refers to a court's authority to render judgment in a particular category of cases. *Id*. at 253. Respondent's subject matter jurisdiction is indisputable: "[t]he Missouri constitution provides circuit courts with subject matter jurisdiction over all civil and criminal cases." *State ex rel. Heartland Title Servs. v. Harrell*, 500 S.W.3d 239, 241 (Mo. 2016), citing Mo. Const. art. V, § 14. "Personal jurisdiction, on the other hand, refers to the power of a court to require a party to respond to a legal proceeding affecting the party's rights or interests. The requirement that a court have personal jurisdiction flows

mostly from the Due Process Clause, either in the Fifth or the Fourteenth amendments to the United States Constitution." *Id.*, citing *J.C.W. ex rel. Webb v. Wyciskalla*, *supra*, 253, and *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). While subject matter jurisdiction can never be waived, a party can waive objections to personal jurisdiction. *State ex rel. Heartland Title Servs. v. Harrell*, *supra*, 241. It is not alleged that Respondent lacks either subject matter or personal jurisdiction over Mr. Kidd. Thus, any potential objection to personal jurisdiction has been waived. (*See* Part III, *infra*).

Critically, Relator does not address important principles of Missouri statutes and court rules governing venue. Habeas Corpus is a civil action, and any gaps in Rule 91 governing habeas corpus cases are filled by general principles of civil procedure:

> Proceedings in habeas corpus in a circuit court shall be as prescribed in this Rule 91 and in this Court or the court of appeals shall be as prescribed in Rule 84.22 to 84.26, inclusive, and this Rule 91. *In all particulars not provided for by the foregoing provisions, proceedings in habeas corpus shall be governed by and conform to the rules of civil procedure and the existing rules of general law upon the subject*. The court may, by order, direct the form of

> such further details of procedure as may be necessary to the orderly course of the action to give effect to the remedy.

Rule 91.01(a) (emphasis added). Relator argues that the Habeas Corpus Act dictates exclusive habeas venue in DeKalb County. That section provides in relevant part that an application for habeas corpus relief "shall be to a judge of the circuit court for the county in which the applicant is held in custody." § 532.030 R.S.Mo; *see also* Rule 91.02. Relator's Brief at 24-26. Relator then contends that "custody" can only exist in the county "where Mr. Kidd is serving his sentence for those convictions." Relator's Brief at 27. The notion that venue can only be in one place or that custody can only be in one person is inconsistent with Missouri law, and would require this Court to ignore applicable statutes and court rules. Indeed, the Court Rule provides that there may be "multiple respondents," Rule 91(c), and Missouri's venue statute provides that in "all actions in which no count alleges a tort" that "[w]hen there are several defendants, and they reside in different counties, the suit may be brought in any such county." Section 508.010.7 R.S.Mo.

The fact that venue over Mr. Kidd's petition for writ of habeas corpus is proper in DeKalb County does not mean that venue does not lie in Jackson County. "[When] venue is proper in one county [it] does not mean that venue is improper in another." *State ex rel. Riordan v. Dierker*, 956 S.W.2d 258, 260, 261 (Mo. banc

1997), citing *State ex rel. City of Springfield v. Crouch*, 687 S.W.2d 639, 642 (Mo. App. 1985). In *Riordan*, relator argued that because § 84.015 R.S.Mo. provides for venue in the City of St. Louis in certain claims involving the Board of Police Commissioners, that venue could not lie in Cole County. However, in *Riordan*, the claims were joined with a properly filed declaratory judgment action in Cole County. There, this Court concluded that the applicable statutes did not indicate "a legislative intent to provide a sole, *exclusive* venue. As such, these sections can be harmonized by interpreting them as providing alternative venues." *State ex rel. Riordan v. Dierker, supra,* 260-61 (emphasis added). Likewise, Rule 91 and Chapter 547 "do [ ] not use the word 'exclusive' or any synonym thereof." *Id.* at 260. To the contrary, Rule 91.01(c) provides that "there may be … multiple respondents," and that the habeas court "may, by order, direct the form of such further details of procedure as may be necessary to the orderly course of the action to give effect to the remedy."

Further, Mr. Kidd's case for venue in Jackson County is more compelling than that in *Riordan*; Mr. Kidd's habeas petition was filed in tandem with a DNA motion which, by statute, can *only* be filed in the sentencing court, and Mr. Kidd was in custody in the physical presence of the Jackson County circuit court. Even in federal court where habeas venue is jurisdictional, venue "lies *either* in the district of actual physical confinement *or* in the district where *a* custodian

responsible for the confinement is present." *Propotnik v. Putnam*, 538 F.2d 806 (8th Cir. 1976) (emphasis added), *citing Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 495 (1973). Therefore, since Mr. Kidd was in the custody of the Jackson County Department of Corrections pursuant to the DNA action, the sentencing court could also take up Mr. Kidd's habeas claims. When an action is "filed in a proper venue, any other claim may be joined against the opposing party under Rule 55.06(a)." *Riordan*, at 261. Indeed, only this reading gives effect to *all* the language in Missouri's habeas corpus statute, including the requirement that Respondent issue the writ when faced with evidence "from any judicial proceedings had before such court or judge." Section 532.070 R.S.Mo. Since Mr. Kidd's petition for writ of habeas corpus arises from the same "transaction or occurrence" which is the subject of Mr. Kidd's properly filed Motion for DNA testing, the principles of judicial economy and efficiency embodied in civil joinder Rules 55.02 and 55.06 are advanced by consolidating both properly filed actions in the circuit court. *See, e.g., Hillman v. Hedgpeth*, 600 S.W.2d 625 (Mo. App. 1980).

In short, Respondent's exercise of venue over Mr. Kidd's Petition for Writ of Habeas Corpus is a straightforward application of the concurrent jurisdiction doctrine. *See McClure v. Hopper*, 577 F.2d 938, 940 (5th Cir. 1978) ("While [McClure's] transfer to the Northern District may have given both courts concurrent jurisdiction, it did not destroy the power of the Southern District court

to rule in his case"). This is precisely how Missouri Courts approach the issue. "Although several courts initially may have concurrent jurisdiction to decide a particular issue . . . , 'the . . . court having first validly assumed and found its jurisdiction … may proceed to a completion of the matter, with continuing jurisdiction, to the exclusion of any other court.'"[2] *Denton v. Denton,* 169 S.W.3d

[2] This is true even in federal habeas corpus cases, where venue is jurisdictional. As long as a court has jurisdiction when the petition is filed, it "does not lose jurisdiction when a habeas corpus petitioner is transferred out of the court's jurisdiction after the petition is filed." *McCoy v. United States Board of Parole*, 537 F.2d 962, 966 (8th Cir. 1976). Further, the habeas court's jurisdiction "[is] not defeated in that manner, no matter how proper the motive behind the removal." *Ahrens v. Clark*, 335 U.S. 188, 193 (1948); *accord, Smith v. Campbell*, 450 F.2d 829 (9th Cir. 1971), citing *Bishop v. Medical Superintendent*, 377 F.2d 467, 468 (6th Cir. 1967) ("The District Court for the Western District of Michigan, having jurisdiction of the action at the time the petition was filed, did not lose jurisdiction when the appellant was subsequently transferred to the Ypsilanti State Hospital in the Eastern District of Michigan"); *see also Harris v. Ciccone*, 386 F.2d 825, 827 (8th Cir. 1967) ("Having had jurisdiction when the petition was filed, the retransfer of the petitioner did not destroy that jurisdiction"). If this were not so, an innocent prisoner's unjust incarceration could be prolonged indefinitely by transfer from one venue to another, temporarily or permanently disrupting trial schedules, and

604, 610 (Mo. App. 2005); *accord, State ex rel. Standefer v. England*, 328 S.W.2d 732 (Mo. App. 1959) ("[W]here two courts have concurrent jurisdiction of a person or particular subject with power to make determination as to the thing in controversy, the court which first assumes that jurisdiction has the exclusive right to proceed without interference from the second."); *Moreau v. Royster*, 161 S.W.3d 402 (Mo. App. 2005). Therefore, the filing of a petition for writ of habeas corpus in Respondent's court vested exclusive jurisdiction there. *State ex rel. O'Connell v. Nangle,* 280 S.W.2d 96 (Mo. banc 1955). To hold otherwise would mean that indigent habeas petitioners and pro bono lawyers who represent them could be made to litigate simultaneously in two jurisdictions, at increased expense. Courts "have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." *Hensley v. Municipal Court*, 411 U.S. 345, 350 (1973). In none of the cases relied upon by Respondent, such as *Lock v. Seay*, 957 S.W.2d 768 (Mo. 1989), was the habeas petitioner

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depriving habeas petitioners of a timely judgment on the legality of their confinement. Depriving Respondent of properly acquired venue would result in the "transient" venue that Relator decries.

physically present in custody in the court's jurisdiction pursuant to active, properly filed litigation in the habeas court involving common issues of law and fact.

Since venue in Missouri is determined at the time of filing, *see Allstate Ins. Co. v. Dejarnett*, 175 S.W.3d 692, 694 (Mo. Ct. of App. 2005), Relator's concession that "[a]t the time of filing this Court was the proper venue," is fatal to his argument. *See* RA 18. Further, Mr. Kidd's Petition for Writ of Habeas Corpus arises from the same transactions, occurrences and issues involved in his statutory motion for DNA testing pursuant to R.S.Mo. § 547.035.1, which *must* be filed in the sentencing court. Therefore Respondent has authority and duty to adjudicate Mr. Kidd's Petition for Writ of Habeas Corpus pursuant to Mo. Sup. Ct. R. 52.05, which permits joint proceedings on separate cases "arising out of the same transaction, occurrences or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action." All of these principles provide that proper venue lies in Jackson County, Missouri.

Based on the aforementioned principles of jurisdiction and venue and on relevant statutes and court rules governing habeas corpus proceedings, Respondent is the proper venue for the adjudication of the legality of Mr. Kidd's custody.

II. Mr. Kidd was personally present in Respondent's court and in custody in Jackson County on a hearing pursuant to a properly filed, nonpretensive, substantially-related postconviction DNA motion challenging the same conviction and sentence.

Mr. Kidd, on December 17, 2013, filed a Motion for DNA testing of evidence collected in connection with the crime, which, pursuant to R.S.Mo § 547.035.3, must be filed in the sentencing court.[3] Jackson County Division One, is therefore the sole venue for that action, and it is Respondent's duty to preside over that action. In the performance of her judicial duties, Respondent conducted an evidentiary hearing on March 6, 2015, and on February 19, 2015, issued a writ of habeas corpus ad testificandum to secure Mr. Kidd's presence and testimony at the hearing. The writ was directed to the Superintendent of Crossroads Correctional Center, and provided:

> You are hereby commanded to bring the body of Ricky Kidd, Missouri Department of Corrections Identification No. 528343, now detained in your custody at Crossroads

[3] Mr. Kidd was convicted and sentenced to life imprisonment in Division 1, Sixteenth Judicial Circuit, the Honorable David Shinn presiding. The Honorable Sandra Midkiff was appointed Circuit Judge of Division 1 in March, 2002.

> Correctional Center, 1115 East Pence Road, Cameron, Missouri, by whatsoever name the said inmate may be known, and to deliver him to the Director of the Jackson County Detention Center, 1300 Cherry Street, in Kansas City, Missouri, or the Correctional Officer working under his jurisdiction. It is further ordered that *the Jackson County Detention Center shall receive of said inmate and have and produce said inmate under safe and secure custody on March 3rd, 2015, and at such time or times thereafter as said court from time to time may find proper to order, then and there to be produced and had for the purpose of proceeding with a matter presently pending before the court*. Be it further ordered that after said proceeding the inmate shall be returned forthwith to the custody of the Department of Corrections.

RA 16, Writ of Habeas Corpus ad Testificandum. (emphasis added). Neither counsel for the State nor the Superintendent objected to the application or the writ, RA 202-203, which Respondent had the discretion to issue. *See* § 491.230 R.S.Mo.; *Laws v. O'Brien,* 718 S.W.2d 615, 618 (Mo. App. 1986); *Beckwith v.*

Giles, 32 S.W.3d 659 (Mo. App. 2000). Thus, at the time of filing, Mr. Kidd was in the custody of the Director of the Jackson County Detention Center.

Relator's attempt to limit the meaning of the word "custody" is inconsistent with the facts of the case and the meaning of Missouri's Habeas Corpus Act. Relator argues that "context" requires venue to lie exclusively within the county where Mr. Kidd is assigned to serve his sentence, Relator's Brief at 27, but that argument ignores important factual and statutory context. The custody requirement of § 532.030 R.S.Mo. must be construed *in pari materia* with other provisions of Missouri's Habeas Corpus Statute. "Statutes are *in pari materia* when they relate to the same matter or subject. The rule of construction in such instances proceeds upon the supposition that the statutes in question are intended to be read consistently and harmoniously in their several parts and provisions." *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. 1991), *citing Rothschild v. State Tax Commission of Missouri*, 762 S.W.2d 35, 37 (Mo. banc 1988). "[S]tatutory provisions are 'not read in isolation but [are] construed together, and if reasonably possible, the provisions will be harmonized with each other.'" *Brinker Mo., Inc. v. Dir. of Revenue*, 319 S.W.3d 433, 437 (Mo. 2010), quoting *Bachtel v. Miller Cnty. Nursing Home Dist.*, 110 S.W.3d 799, 801 (Mo. banc 2003).

Relator's overly restrictive reading of the word "custody" fails to give effect to all provisions of Missouri's Habeas Corpus statute, which requires *any* court

with personal jurisdiction over a confined person to grant a writ of habeas corpus when evidence appears "from *any* judicial proceedings had before such court or judge, that any person is illegally confined or restrained of his liberty, within the jurisdiction of such a court or judge." Section 532.070 R.S.Mo. That is precisely what happened here; Mr. Kidd personally appeared, restrained of his liberty, in judicial proceedings before Respondent, wherein Respondent heard evidence that Mr. Kidd may be illegally confined or restrained of his liberty. Judge Midkiff was presented with a petition for writ of habeas corpus setting forth *prima facie* claims on Mr. Kidd's behalf. Pursuant to § 532.070 R.S.Mo., Respondent was under a duty to act, whether or not Mr. Kidd filed a petition.[4] Relator does not and cannot

[4] Section 532.070 has not changed since enacted in 1939. Until this Court adopted Rules 29.15 and 24.035 in 1986, all habeas corpus litigation challenging a criminal conviction was channeled by Rule 27.26 to the sentencing court, regardless of the venue of incarceration. Rule 27.26 "provide[d] a remedy as broad as habeas corpus which is intended to incorporate and protect all rights presently available under habeas corpus and other remedies and is adequate to test the legality of detention." *Wiglesworth v. Wyrick*, 531 S.W.2d 713 (Mo. banc 1976). It is impossible to think that the legislature intended to exempt sentencing courts from the directive of § 532.070 R.S.Mo. or that such courts are incapable of understanding habeas.

argue that Mr. Kidd was not within Respondent's subject matter or personal jurisdiction when he filed his petition.

Further, Relator ignores § 532.520, which authorizes Respondent to retain custody of Mr. Kidd pending disposition of his petition or move him as other circumstances may require:

> Until judgment be given upon the return, the court before whom the party shall be brought may either commit such party to the custody of the sheriff of the county in which the proceedings are had, or place him in such care or custody as his age or other circumstances may require.

Section 532.520 R.S.Mo.; *see also* Rule 91.11 ("Pending determination of the issues, the court may either commit the restrained person to the custody of the sheriff or make such other orders pertaining to the care or custody as circumstances may require."). Respondent's statutory power and duty to entertain Mr. Kidd's petition is clear. Mr. Kidd was and is in custody in Jackson County, Missouri, pursuant to the proper exercise of Respondent's power and duty to exercise habeas corpus jurisdiction over litigants in proceedings before her. Relator's argument that Mr. Kidd was not in custody in Jackson County is unpersuasive.

Nor is there any merit to Relator's argument that the warden of Crossroads Correctional Center is "the only proper respondent." Relator's Brief at 29. Relator

relies on federal cases and a divorce action, *Maul v. Maul*, 103 S.W.3d 819 (Mo. App. W.D. 2003), to argue that the superintendent of Crossroads Correctional Center is an essential party to Mr. Kidd's Petition for Writ of Habeas Corpus. At the time of filing, Mr. Kidd was in the custody of Kenneth Conlee, Director of the Jackson County Detention Center, which was where Mr. Kidd was being held in custody, satisfying the requirements of § 532.080 that the writ shall be "directed to the officer or person by whom the party to be relieved is imprisoned *or* restrained of his liberty." (Emphasis added). That requirement continues to be satisfied here. The superintendent of Crossroad's Correctional Center is not the only possible custodian. Under § 532.520 R.S.Mo, Respondent can order Petitioner Kidd to remain in the custody of the Jackson County Sheriff pending judgment on the writ, as she has done in this matter. Should she decide, after hearing, that Mr. Kidd is entitled to the writ, she could direct Director Conlee or his successor[5] to release Mr. Kidd. Indeed, the Habeas Corpus Act provides that the writ shall be served at "the jail or other place in which the prisoner may be confined," § 532.140, which, at the time of filing, was the Jackson County Detention Center. In fact, Respondent

[5] Mr. Conlee's successor is Mr. Joe Piccinni, Director, Jackson County Detentions Center, *see* JACKSON COUNTY OFFICIAL WEB SITE, CORRECTIONS, *http://www.jacksongov.org/201/Corrections*.

has the explicit statutory power to direct Mr. Kidd to be detained at the Jackson County Detention Center until she renders judgment:

> Until judgment be given upon the return, the court before whom the party shall be brought may either *commit such party to the custody of the sheriff of the county in which the proceedings are had*, or place him in such care or custody as his age or other circumstances may require.

Section 532.520 R.S.Mo. (emphasis added). If at the time of judgment Mr. Kidd remains in the Jackson County Detention Center, a writ directed to the Director of the Jackson County Detention Center would be legally effective.

Moreover, although habeas corpus petitions are typically styled to name the director of the penal facility where the petitioner is housed, the superintendent has no real interest in the case. The habeas corpus statute requires that "the applicant shall cause reasonable notice of the time and place of making the application to be given to the circuit or prosecuting attorney for the county in which the application is to be made," Section 532.030 R.S.Mo, as was done in this case. Since the Attorney General answers all habeas petitions, as he did in this case, Relator cannot show that he may suffer "considerable hardship and expense" as a consequence of naming the actual present custodian as the respondent in Mr. Kidd's underlying habeas action. *State ex rel. Wolfrum v. Wiseman*, 225 S.W.3d

409, 411 (Mo. 2007). Regardless of who is named, the Attorney General will answer.

Further, from a venue standpoint, the warden of the prison is analogous to a defendant *ad litem* pursuant to Sec. 537.021 R.S.Mo., who is "merely … a nominal defendant—one who has no personal interest in or liability for the litigation. As the statute provides, he serves merely as the deceased's legal representative." *State ex rel. Gannon v. Gaertner*, 592 S.W.2d 214, 216 (Mo. App. 1979). Given the defendant *ad litem*'s nominal role in the case, "that status does not bestow upon him the right of a real defendant to choose venue on the basis of his own residence." *Id.* Therefore, where a habeas petitioner is in custody of one other than the warden of the prison to which he is assigned, the warden's place of business is not the sole determiner of venue.

Like the statutory defendant *ad litem*, Superintendent Ronda Pash has no real interest in Mr. Kidd's petition. She has no personal knowledge of events underlying this cause, will never appear in this Court, and has no conceivable personal, professional or financial interest in the outcome.[6] This Court directed the

[6] Indeed, throughout the history of the United States and the State of Missouri, habeas corpus petitions have proceeded to disposition with no named respondent. *See, e.g., Ex Parte McCardle*, 74 U.S. 506 (1868); *In re Sanford*, 236 Mo. 665, 139 S.W. 376 (1911);

parties "to include in their briefs a discussion of who is the correct Respondent to this action." The statute instructs that the writ be "directed to the officer or person by whom the party to be relieved is imprisoned or restrained of his liberty," § 532.080 R.S.Mo., and since Mr. Kidd is presently confined in the Jackson County Detention Center, the appropriate respondent, if one must be named, is Mr. Joe Piccinni, the current Director of the Jackson County Detention Center.

Additional provisions of The Habeas Corpus Act make it clear that the identity of the custodian is not determinative of the court's power and duty to grant the writ. The custodian "may be designated either by his name of office, if he have any, or by his own name; or, if both names be uncertain or unknown, he may be described by an assumed appellation." § 532.100 R.S.Mo. Further, a writ of habeas corpus "shall not be disobeyed for any defect of form; and *anyone* who shall be served therewith shall be deemed to be the person to whom it is directed, although it may be directed to him by a wrong name or description, or to another person." §

Ex Parte Creasy, 243 Mo. 679, 148 S.W. 914 (1912); *In re Petition of McDonald*, 19 Mo. App. 370 (Mo. App. K.C. 1885); *Ex Parte Marmaduke*, 4 S.W. 91 (Mo. 1886); *In the Matter of the Competency of Steven Parkus*, 219 S.W. 3d 250 (Mo. banc 2007); *In re C.T.*, 432 S.W.3d 283 (Mo. Ct. App. 2014). The absence of a named Respondent was not an obstacle to habeas corpus adjudication or relief in any of those cases.

532.110 R.S.Mo. The Supreme Court noted that case law "suggest[s] that the issue of who is the proper respondent is not always subject to a formulaic answer, and may turn on the facts before the court." *Rumsfeld v. Padilla*, 542 U.S. 426, 581 (2004).

Missouri law intentionally gives Respondent the power to enforcing any writ of habeas corpus that might issue on Mr. Kidd's behalf. Indeed, if Respondent, after hearing evidence, grants the writ, she has all the jurisdiction necessary to order his release, and thereby extinguish Superintendent Pash's authority to detain him further. Section 532.160 R.S.Mo. provides, "It shall be the duty of every officer and other person upon whom a writ of habeas corpus shall be served, according to the provisions of this chapter, whether such writ be directed to him or not, to obey and return such writ, according to the exigency thereof, to the court or associate circuit judge by whom the writ was awarded." *See also* 532.660 R.S.Mo. ("Everyone who, knowing that any person has been discharged by competent authority on a habeas corpus, shall, contrary to the provisions of this chapter, arrest such person again for the same cause, shall be deemed guilty of a misdemeanor, and shall also pay to the party aggrieved five hundred dollars.")

In addition, Relator's argument that recognizing venue in Respondent's court raises the specter of "rampant forum shopping," Relator's Brief at 7, 34, is unpersuasive. Such an argument is based on the absurd premise that a prisoner

being transported across Missouri could file a habeas petition in any county he happened to pass through at the time. *See* Relator's Brief at 2, 7, 23, 24, 25, 26, 27, 29, 32 (arguing that venue does not lie based on "transient presence."). Further, Relator fails to address Respondent's proper jurisdiction over Mr. Kidd in his DNA proceeding. *See* RA 21. As demonstrated above, Mr. Kidd's presence in Respondent's venue is not merely transient, and all principles of Missouri law relating to venue in civil cases are satisfied. Habeas venue would be proper only in rare cases in which the sentencing court proceeds on a meritorious DNA motion which requires a defendant's presence in the sentencing court.[7]

Indeed, Missouri law offers ample protections against the kind of forum shopping that Relator fears through its pretensive joinder doctrine which prohibits bad faith joinder to manipulate venue. *State ex rel. Breckenridge v. Sweeney*, 920 S.W.2d 901, 902-03 (Mo. banc 1996), citing *State ex rel. Malone v. Mummert*, 889 S.W.2d 822 (Mo. banc 1994); *State ex rel. Shelton v. Mummert*, 879 S.W.2d 525

[7] Indeed, a defendant's presence is not mandatory in a DNA hearing. §547.035(6) R.S.Mo. provides that "If a hearing is ordered, counsel shall be appointed to represent movant if the movant is indigent. The hearing shall be on the record. *Movant need not be present at the hearing*. The court may order that testimony of the movant shall be received by deposition." (Emphasis added).

(Mo. banc 1994); *State ex rel. Cross v. Anderson*, 878 S.W.2d 37 (Mo. banc 1994). Relator could argue that Mr. Kidd's joinder of his habeas claims with his DNA motion is pretensive if he could show that the DNA motion is frivolous. However, that showing could not be made here, where Respondent found that Mr. Kidd's requests for testing satisfied all the statutory criteria. Judge Midkiff found that Mr. Kidd's Motion for DNA testing satisfied the standard of § 547.035 R.S.Mo, including a finding that "by a preponderance of the evidence that a reasonable probability exists that movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing." RA 41. Only prisoners who demonstrate entitlement to a hearing on their DNA motion, i.e., a reasonable probability of innocence of the crime, and whose presence is ordered by the court, could have habeas corpus petitions adjudicated in the sentencing court ancillary to a properly filed DNA motion, unless they were otherwise incarcerated in the venue of the sentencing court. The DNA statute borrows its "reasonable probability" of innocence standard from the United States Supreme Court, which noted that cases falling under its actual innocence standard "would remain 'rare' and would only be applied in the 'extraordinary case,' while at the same time ensuring that the exception would extend relief to those who were truly deserving." *Schlup v. Delo*, 513 U.S. 298, 321 (1995). A decision recognizing that venue properly lies in

Respondent's court would not open the floodgates of "rampant forum shopping," contrary to Relator's suggestion.

III. Relator's concession that "[a]t the time of filing [Respondent's] Court was the proper venue," and waiting over two years to seek this writ, waived his venue objection.

As noted above, a party can waive objections to personal jurisdiction and venue. *State ex rel. Heartland Title Servs. v. Harrell*, supra, 241. After admitting that Respondent's court was the proper venue when Mr. Kidd's petition was filed, Relator belatedly claims that notice provisions of § 491.230, R.S.Mo. mean that Mr. Kidd was not in custody in Jackson County, Missouri, at the time of filing his petition, Relator's Brief at 38-40, because of time limits that apply to such writs in civil cases. Respondent's argument omits reference to the pertinent section of that statute:

> Courts of record, and any judge or justice thereof, shall have power, upon the application of any party to a criminal suit or proceeding, pending in any court of record, to issue a writ of habeas corpus for the purpose of bringing before such court any person who may be detained in jail or prison, within the state, for any cause, to be examined as a

> witness in such suit or proceeding, on behalf of the applicant.

Section 491.230.1 R.S.Mo. No notice requirements or time limitations are set out in the statute. When Mr. Kidd filed his petition for writ of habeas corpus, he was present in Jackson County pursuant to writ of habeas corpus ad testificandum, issued without objection by Relator, in the criminal proceeding in which Mr. Kidd filed his DNA action, styled *State of Missouri v. Ricky L. Kidd,* Jackson County No. 16CR9602137A.[8] Further, Respondent clearly has authority pursuant to Section 532.520 R.S.Mo., which contains no notice requirements, to order Mr. Kidd detained in the custody of the Jackson County Sheriff pending disposition of his habeas corpus petition. Regardless, Mr. Kidd's counsel filed for a writ of habeas corpus ad testificandum on February 19, 2015. RA 13. The Court granted it on February 20, 2015. RA 16. At no time in the weeks between filing on February 19 and the hearing on March 6, 2015, did counsel for the State object to Mr. Kidd's presence, nor did Relator complain about Respondent's issuance of the Writ of Habeas Corpus ad Testificandum in the eighteen months since. RA 202-204.

[8] A Motion for DNA Testing pursuant to R.S.Mo. 547.035 is filed in the underlying criminal case; this section is codified under Title 37, "Criminal Procedure," and organized under Chapter 547, "Appeals, New Trials and Exceptions" in criminal cases.

Respondent did not exceed her discretion in issuing the writ. *Laws v. O'Brien,* 718 S.W.2d 615, 618 (Mo. App. 1986); *Beckwith v. Giles,* 32 S.W.3d 659 (Mo. App. 2000).

In the year and a half since the Mr. Kidd filed his Petition for Writ of Habeas Corpus, Relator has actively joined in the litigation of it, including scheduling conferences, dispositive motions, and discovery. *See* RA 206-212. The docket reflects that Relator has answered the petition, engaged in discovery, participated in scheduling conferences, agreed to hearing dates, and requested continuances. *Id*. Relator did not seek a writ until well after a trial date was fixed for Mr. Kidd's petition. Missouri courts find that similar conduct waives a party's objection to venue:

> Such waiver may take the form of an act that would constitute a general appearance, as by pleading to the merits, *Robinson v. Field*, 342 Mo. 778, 117 S.W.2d 308]; *Buerck v. Mid-Nation Iron Products Co.*, 295 Mo. 263, 245 S.W. 45; *Worley v. Worley*, Mo. App., 176 S.W.2d 74; by filing an application for a change of venue, *Cook v. Globe Printing Co. of St. Louis*, 227 Mo. 471, 127 S.W. 332; *Lieffring v. Birt*, Mo. App., 154 S.W.2d 597; by agreeing to a resetting of the cause, and to a continuance,

> *Baisley v. Baisley*, 113 Mo. 544, 21 S.W. 29, 35 Am.St.Rep. 726; *Columbia Brewery Co. v. Forgey*, 140 Mo.App. 605, 120 S.W. 625; by obtaining additional time to answer, *Harrison v. Murphy*, 106 Mo.App. 465, 80 S.W. 724; and by requesting and obtaining a continuance, *Gray v. Grand River Coal & Coke Co.*, 175 Mo.App. 421, 162 S.W. 277.

Hitchinson v. Steinke, 353 S.W.2d 137 (Mo. App. 1962). Relator's substantial delay in seeking a writ from this Court waived his objection to venue.

REQUEST FOR ORAL ARGUMENT

Respondent requests oral argument in this matter.

CONCLUSION

For the foregoing reasons, this Court should dissolve its preliminary writ, and permit Respondent to proceed to hear Mr. Kidd's Petition for Writ of Habeas Corpus.

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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 8,361 words, excluding the cover, certificate of service, and signature block, as determined by Microsoft Word software and

2. That on the 3rd day of November, 2017, this brief was filed using the CM/ECF system which sent notification of such filing to all counsel of record.

_/s/Tricia Bushnell_____
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