**SC96516**

**IN THE SUPREME COURT OF MISSOURI**

**STATE OF MISSOURI EX REL. JOSHUA HAWLEY,**
**Missouri Attorney General,**

***Relator*,**

**v.**

**THE HONORABLE SANDRA C. MIDKIFF, et al.,**

***Respondents.***

# REPLY BRIEF OF RELATOR

**JOSHUA D. HAWLEY**
**Attorney General**

**D. John Sauer, No. 58721**
**First Assistant and Solicitor**
**Michael Spillane, No. 40704**
**Assistant Attorney General**
**P.O. Box 899**
**Jefferson City, MO 65102-0899**
**(573) 751-3321**
**(573) 751-3825 (facsimile)**
**Mike.Spillane@ago.mo.gov**

**ATTORNEYS FOR RELATOR**

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In Missouri, a petition for writ of habeas corpus challenging a prisoner's felony conviction and sentence "shall be to a circuit or associate circuit judge for *the county in which the person is held in custody* at the time of the petition." Mo. Sup. Ct. R. 91.02(a) (emphasis added). A prisoner who is serving a sentence for a murder conviction in DeKalb County is "in custody" in DeKalb County, and the location of his or her "custody" does not change merely because he or she obtains temporary presence in another county on a writ of habeas corpus ad testificandum. Compelling authority supports this conclusion, and Respondent presents no convincing argument to the contrary.

### I. A Habeas Petitioner Is "In Custody" in the County Where He or She Serves the Sentence for the "Charge of Crime" Challenged, and a Writ of Habeas Corpus Ad Testificandum Does Not Change the Petitioner's "Custody" or Custodian.

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* at the time of the petition." Mo. Sup. Ct. R. 91.02(a) (emphasis added). 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 (emphasis added). The dispositive question is whether Mr. Kidd was "in custody" in Jackson County when he filed his habeas petition. He was not.

### A. Kidd was "in custody" in DeKalb County when he filed his petition.

Respondent fails to address the meaning of the phrases "in custody" and "in custody on a charge of crime" in § 532.030, RSMo, and Rule 91.02(a). The natural meaning of the phrase "in custody," the immediate context of that phrase, the deeply rooted historical understanding of those words, and the overwhelming weight of authority interpreting the same phrase in federal habeas statutes, all confirm that Kidd was not "in custody" in Jackson County when he filed his habeas petition. Respondent thus lacks authority to proceed in Kidd's case.

As discussed in the Relator's opening brief, the natural meaning of "in custody" here refers to the location where the habeas petitioner is serving his or her sentence for the "charge of crime" of conviction—not to any county where he or she obtains temporary presence pursuant to a writ ad testificandum. *See* Relator's Br., at 24–28.

Several principles of interpretation confirm this plain meaning, and Respondent fails meaningfully to address them. First, as discussed in the Relator's opening brief, the use of the phrase "in custody *on a charge of crime*" in both § 532.030 and Rule 91.02(a) provides strong contextual evidence that the relevant "custody" is the custody where the sentence for the "charge of crime" is being served. *See* Relator's Br. 27; *Keller v. Marion Cty. Ambulance Dist.*, 820 S.W.2d 301, 302 (Mo. banc. 1991). Respondent fails to address this immediate statutory context, which "determines meaning" for the word "custody" in the Rule and statute. *Id.*

Respondent also fails to address the fact that this interpretation of "custody" has deep roots in the historical understanding of the writ of habeas corpus. As the Fourth Circuit stated in *United States v. Poole*, "the weight of historical authority is against" Respondent's view that a writ of habeas corpus ad testificandum changes the "custody" of a prisoner for habeas purposes. *United States v. Poole*, 531 F.3d 263, 272 (4th Cir. 2008). "As the Supreme Court explained long ago," the federal habeas statutes "contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary.'" *Id.* at 270–71 (quoting *Wales v. Whitney*, 114 U.S. 564, 574 (1885)). In 1867, Congress amended the federal habeas statutes "to avert the

'inconvenient and potentially embarrassing' possibility that 'every judge anywhere could issue the Great Writ on behalf of applicants far distantly removed from the courts whereon they sat.'" *Rumsfeld v. Padilla*, 542 U.S. 426, 442 (2004) (quoting *Carbo v. United States*, 364 U.S. 611, 617 (1961)) (alterations omitted). "Accordingly, with respect to habeas petitions 'designed to relieve an individual from oppressive confinement,' the traditional rule has always been that the Great Writ is 'issuable only in the district of confinement.'" *Id.* (quoting *Carbo*, 364 U.S. at 618). Respondent does not address this historical evidence of the meaning of the word "custody."

Respondent correctly urges that the habeas statute and rules should be read *in pari materia* with other provisions governing post-conviction review of criminal convictions, *see* Resp. Br. 12, 25, but this argument cuts strongly in favor of the Relator's interpretation of "in custody." Rule 29.15(a) authorizes post-conviction review in the sentencing court after a jury trial for constitutional challenges to conviction, claims of ineffective assistance of counsel, and claims of illegal sentencing, and it states: "This Rule 29.15 provides the *exclusive procedure* by which such person may seek relief in the sentencing court for the claims enumerated." Mo. Sup. Ct. R. 29.15(a) (emphasis added). Rule 24.035 provides for the post-conviction procedures in the sentencing court after conviction by guilty plea, and it also states: "This

Rule 24.035 provides the exclusive procedure by which such person may seek relief in the sentencing court for the claims enumerated." Mo. Sup. Ct. R. 24.035(a). Likewise, § 547.360 authorizes a convicted felon to assert such claims in the sentencing court, and it also provides that "[t]his section provides the exclusive procedure by which such person may seek relief in the sentencing court for the claims enumerated." § 547.360, RSMo. These provisions reflect a specific, precisely delineated role for the sentencing court in post-conviction review. Other claims must be asserted by a writ of habeas corpus filed in "the county in which the person is held in custody." Mo. Sup. Ct. R. 91.02(a). Permitting a habeas petitioner to establish habeas venue in the sentencing court through jurisdictional maneuvering would undermine the purportedly "exclusive" procedures for post-conviction review that are authorized in the sentencing court.

In addition, the Relator's interpretation of the phrase "in custody" is supported by overwhelming persuasive authority from federal court, which Respondent fails to address convincingly. Every court to consider the question has concluded that the meaning of the same phrase "in custody" in the federal habeas statutes, 28 U.S.C. §§ 2242, 2243, refers to the place the petitioner is serving his or her sentence for the underlying crime charged—and that neither the place of "custody" nor the custodian changes when the petitioner is moved temporarily pursuant to a writ ad testificandum. *See,*

*e.g.*, *Poole*, 531 F.3d at 265 (holding that "the district court did not have jurisdiction to consider Poole's § 2241(c)(3) motion because Poole was not 'in custody' in Maryland"). As the Fourth Circuit stated in *Poole*, "a number of our sister circuits have directly addressed the effect on custody wrought by issuance of a writ of habeas corpus ad testificandum. All agree that custody remains in the original place of incarceration." *Id.* at 271 (citing *Miller v. Hambrick*, 905 F.2d 259 (9th Cir. 1990); *United States ex rel. Quinn v. Hunter*, 162 F.2d 644 (7th Cir. 1947); and *Rheuark v. Wade*, 608 F.2d 304 (8th Cir. 1979)).

The same conclusion holds true for the similar writ of habeas corpus ad prosequendum—every federal court to consider the question has held that a temporary change in location pursuant to a writ ad prosequendum does not change the prisoner's "custody" for purposes of the federal habeas and escape statutes. A writ ad prosequendum "does not effectuate a change in custodian for purposes of the federal statute criminalizing escape from federal custody." *Poole*, 531 F.3d at 271. *See also United States v. Evans*, 159 F.3d 908, 912 (4th Cir. 1998); *Pelley v. Matthews*, 163 F.2d 700, 700 (D.C. Cir. 1947) (reaching the same conclusion for the federal habeas statute). As the D.C. Circuit held in *Pelley*, "the District Court has no jurisdiction to entertain a petition for a writ of habeas corpus attacking the petitioner's original

conviction when the petition is held in this jurisdiction solely by reason of a writ of habeas corpus ad prosequendum." *Pelley*, 163 F.2d at 700.

Notably, Respondent does not address, or even cite, the Fourth Circuit's opinion in *Poole*, which interprets the same phrase "in custody." *Poole* is on all fours with this case. In *Poole*, as here, the habeas petitioner sought to manufacture authority to hear his petition in the sentencing court, rather than in the district of confinement, by filing a motion to reconsider the sentence in the sentencing court and then arranging to be transferred there by a writ ad testificandum. *Poole*, 531 F.3d at 265–69. The Fourth Circuit held that the phrase "in custody" in the federal habeas statutes—*i.e.*, the same operative phrase that appears in § 532.030 and Rule 91.02(a)—does not encompass temporary presence in another district pursuant to a writ ad testificandum. Even though Poole was physically present and temporarily confined in Maryland, "the district court did not have jurisdiction to consider Poole's § 2241(c)(3) motion because Poole was not 'in custody" in Maryland." *Id.* at 265. So also here, even though Kidd was physically present and temporarily confined in Jackson County pursuant to a writ ad testificandum, he was not "in custody" in Jackson County within the meaning of § 532.030 or Rule 91.02(a). Rather, his "custody" for habeas purposes remained in DeKalb County, and his custodian remained the Warden of Crossroads Correctional Center.

Respondent attempts to distinguish this overwhelming federal authority by arguing that "[i]n the federal system, venue is jurisdictional," but "[t]his is not so with a Missouri court." Resp. Br. 13–14. This argument fails for two reasons. First and foremost, the distinction makes no difference. Regardless of whether the limitation on Respondent's authority relates to "jurisdiction" or "venue," that authority is delimited by the statute and Rule that require habeas petitions to be filed in "the county in which the applicant is held in custody," and against the Warden who is personally responsible for the "custody" in that county. § 532.030, RSMo; Mo. Sup. Ct. R. 91.02(a). These requirements restrict the authority of a circuit court to proceed on a habeas petition that was not filed where the petitioner is "in custody." Thus, a writ of prohibition is warranted to prevent habeas proceedings from occurring in a county other than "the county in which the applicant is held in custody." *State ex rel. Lock v. Seay*, 957 S.W.2d 768 (Mo. banc 1997) (per curiam) (granting a permanent writ of prohibition to forestall habeas proceedings filed in Wayne County, where the petitioner had been sentenced, while petitioner was serving his sentence in another county).

Second, Respondent's contention that the federal rules for habeas venue are "jurisdictional" is not correct. Though federal statutes use the word "jurisdiction" in this context, the Supreme Court has clarified that this word does not refer to jurisdiction in the traditional sense, *i.e.*, subject-matter

jurisdiction. "The word 'jurisdiction,' of course, is capable of different interpretations. We use it in the sense that it is used in the habeas statute, 28 U.S.C. § 2241(a), and not in the sense of subject-matter jurisdiction of the District Court." *Rumsfeld v. Padilla*, 542 U.S. 426, 434 n.7 (2004). "[T]he question of the proper forum to determine the legality of Padilla's incarceration is not one of federal subject-matter jurisdiction. . . . Rather, the question is one of venue, *i.e.*, in which federal court the habeas inquiry may proceed." *Id.* at 463 (Kennedy, J., concurring).

In short, it makes no difference whether the statutory and Rule-based limitations relate to "jurisdiction" or "venue." If Kidd was not "in custody" in Jackson County when he purported to file his habeas petition there, the Jackson County Circuit Court lacked authority to proceed on his petition. "For the purposes of this case, it is enough to note that, even under the most permissive interpretation of the habeas statute as a venue provision, the [Jackson County Circuit Court] was not the proper place for this petition." *Id.* at 453 (Kennedy, J., concurring). Thus, Respondent's sole attempt to distinguish the overwhelming weight of federal authority is unconvincing. His petition was filed in the wrong county, and a writ of prohibition is warranted to prevent further proceedings in Jackson County and to direct Respondent to transfer the petition to DeKalb County. *Lock*, 957 S.W.2d 768.

### B. The Warden of Crossroads Correctional Center was "the person having custody of the person restrained" when Kidd filed his habeas petition.

Rule 91.07 provides that every habeas writ or order to show cause "shall be directed *to the person having custody of the person restrained* and shall designate a time for filing an answer to the petition." Mo. Sup. Ct. R. 91.07 (emphasis added). Likewise, § 532.080 provides that such writs "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. Because the word "custody" in Rule 91 refers to the county of confinement for the underlying "charge of crime," the "person having custody of the person restrained" is the custodian in that same county. A writ ad testificandum does not change the county of "custody" for habeas purposes, and thus it also does not change "the person having custody," *i.e.*, the custodian. The Warden of the Crossroads Correctional Center in DeKalb County was the only relevant custodian, and the sole proper respondent, for Kidd's habeas petition. Any other reading would entail that the word "custody" means two different things in Rules 91.02(a) and 91.07, as well as two different things in §§ 532.030 and 532.080. This result would violate fundamental principles of interpretation. *See, e.g., See Earth Island Inst. v. Union Elec. Co.*, 456 S.W.3d 27, 39 n.4 (Mo. banc 2015) ("Statutes addressing the same subject matter (in other words, *in pari*

*materia*) are intended to be read consistently and harmoniously."); *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 668 (Mo. banc 2010) (same).

For these reasons, Respondent's arguments that the custodian of the Jackson County Detention Center is also a proper custodian have no merit. Respondent argues that Rule 91.01(c) contemplates that a habeas action may have "multiple respondents," Resp. Br. 17-18, but Respondent omits quoting the rest of that provision. Rule 91.01(c) states: "*If appropriate*, there may be multiple petitioners or multiple respondents." Mo. Sup. Ct. R. 91.01(c) (emphasis added). It is not "appropriate" for there to be "multiple respondents" in the specific case of a habeas application filed by "a person who is held in custody on a charge of crime," Rule 91.02(a), in which case the writ "shall be directed to the person having custody of the person restrained," Rule 91.07. "The consistent use of the definite article in reference to the custodian indicates that there is generally only one proper respondent to a given prisoner's habeas petition." *Padilla*, 542 U.S. at 434. Notably, Rule 91.01 governs habeas cases in "general," including not just cases involving a "person restrained of liberty," but also child-custody and other cases. Mo. Sup. Ct. R. 91.01(b) ("Custody of a child may be the subject of a proceeding in habeas corpus."); *see also In re Cook*, 691 S.W.2d 243, 244 (Mo. 1985) (resolving a child custody dispute through a writ of habeas corpus). Such other cases can involve "multiple respondents" under Rule 91.01(c). *See, e.g.,*

*E.W. v. K.D.M.*, 490 S.W.2d 64, 65 (Mo 1973) (habeas corpus action related to child custody filed by the natural mother of the children against three respondents—the children's father, and the father's mother and stepfather).

## II. Other Missouri Statutes Cited by Respondent Do Not Alter the Meaning of "In Custody" in Rule 91.02(a) and § 532.030.

Respondent relies on various other Missouri statutes to attempt to defeat the plain meaning of "in custody" in § 532.030 and Rule 91.02(a). These attempts are unavailing.

### A. Rule 91.06 and § 532.070 do not contradict § 532.030 and Rule 91.02 by conferring authority on the Jackson County Circuit Court here.

Respondent's principal argument is that the Jackson County Circuit Court may proceed on Kidd's habeas petition because that court has independent authority to issue a writ of habeas corpus ordering Kidd's release under § 532.070, RSMo, and this Court's Rule 91.06. *See* Resp. Br. 11–12, 19, 25–27. This argument has no merit.

First, both § 532.070 and Rule 91.06, by their plain terms, apply to cases where "no petition [was] presented for such writ." Rule 91.06; *see also* § 532.070, RSMo (authorizing a court to issue a writ of habeas corpus "although no application or petition be presented for such writ"). Here, Kidd did "present" a habeas petition to the Jackson County Circuit Court. The

question here is what forum is proper to adjudicate a habeas petition that *was* "presented" to the Jackson County Circuit Court.

Second, both Rule 91.06 and § 532.070 authorize the granting of writs of habeas corpus only when it is "*within the jurisdiction of such court or judge*." Rule 91.06 (emphasis added); *see also* § 532.070, RSMo ("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.") (emphasis added). The Missouri habeas statutes and rules adopted this phrase from the federal habeas statute, which provides that "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions*." 28 U.S.C. § 2241(a) (emphasis added).

As the Supreme Court noted in *Padilla*, the purpose of this amendment was to impose the same geographic restrictions on habeas proceedings that the Relator invokes here: "Congress added the limiting clause—'within their respective jurisdictions'—to the habeas statute in 1867 to avert the 'inconvenient and potentially embarrassing' possibility that 'every judge anywhere could issue the Great Writ on behalf of applicants far distantly

removed from the courts whereon they sat.'" *Padilla*, 542 U.S. at 442 (quoting *Carbo*, 364 U.S. at 617) (square brackets omitted). In other words, the phrase "within the jurisdiction of such court or judge" in Rule 91.06 and § 532.070 refers to the very same geographical limitations imposed by the correct interpretation of "in custody" in Rule 91.02(a) and § 532.030.

Further, Respondent's overbroad interpretation of § 532.070 and Rule 91.06 would authorize any circuit court in any county to issue a writ of habeas corpus ordering the release of any prisoner anywhere in the State of Missouri, so long as the habeas petitioner filed a habeas petition in that circuit and served his or her warden with process. This result would effectively abolish any venue restrictions on habeas proceedings and would deprive § 532.030 and Rule 91.02(a) of any independent effect. "When ascertaining the legislature's intent in statutory language, it commonly is understood that each word, clause, sentence, and section of a statute should be given meaning. The corollary to this rule is that a court should not interpret a statute so as to render some phrases mere surplusage." *Middleton v. Missouri Dep't of Corr.*, 278 S.W.3d 193, 196 (Mo. 2009) (citation omitted).

Finally, Respondents' interpretation directly contradicts this Court's holding in *State ex rel. Lock v. Seay*, which held that a circuit court lacked authority to adjudicate a habeas petition that was filed in the wrong county.

957 S.W.2d at 769. When the habeas petition is filed in the wrong county, the circuit court is not authorized to proceed anyway by invoking section 532.070. "Venue does not exist," and "[u]nder section 476.410, RSMo 1994, the respondent was required to transfer the case to any circuit in which the action could have been brought." *Id.*

Thus, Rule 91.06 and § 532.070 merely give a court that would otherwise have authority to grant a writ of habeas corpus, if a petition were filed, authority to do so even if a petition is not filed. It does not change the offender's place of custody or custodian.

**B. Respondent's reliance on general venue rules for civil cases is unavailing.**

Respondent argues that "Habeas Corpus is a civil action, and any gaps in Rule 91 governing habeas corpus cases are filled by general principles of civil procedure." Resp. Br. 16 (citing Mo. Sup. Ct. R. 91.01(a)). Respondent argues that the general venue statute for civil actions authorizes venue in multiple locations, *see* § 508.010, RSMo, and concludes that venue is proper in both DeKalb County and Jackson County. *Id.* at 17–18.

This argument lacks merit. Here, there are no "gaps in Rule 91" to be "filled" by the civil venue statute—Rule 91.02(a) squarely addresses the question of venue for habeas actions by requiring that "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*." Rule 91.02(a) (emphases added). The statement in Rule 91.01(a) that "proceedings in habeas corpus shall be governed by and conform to the rules of civil procedure" applies only "[i]n all particulars not provided for by the foregoing provisions," including Rule 91. Here, Rule 91 specifically addresses venue in Rule 91.02(a), so Rule 91.01(a) does not incorporate by reference the general principles of venue for ordinary civil lawsuits.

Similarly, Respondent relies on case law from non-habeas cases to argue that "the applicable statutes did not indicate 'a legislative intent to provide a sole, *exclusive* venue'" for certain non-habeas civil actions. Resp. Br. 18 (quoting *State ex rel. Riordan v. Dierker*, 956 S.W.2d 258, 260–61 (Mo. banc 1997)). This reliance is misplaced. Rule 91.02(a) does, in fact, provide a sole, exclusive venue for habeas petitions, by directing that "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) (emphasis added). "The consistent use of the definite article" before the word "county" in Rule 91.02 and § 532.030 "indicates that there is generally only one proper respondent to a given prisoner's habeas petition." *Padilla*, 542 U.S. at 434.

Respondent also argues that the sentencing court in Kidd's case is uniquely qualified to adjudicate his habeas petition, because "Mr. Kidd's habeas petition was filed in tandem with a DNA motion which, by statute,

can *only* be filed in the sentencing court." Resp. Br. at 18. This Court has explicitly rejected this argument. "The argument that the judge of the sentencing court is much more capable of hearing and disposing of the petitioner's claim than a judge in a different area may be a reasonable one, but the governing rules place the venue of habeas actions elsewhere." *Lock*, 957 S.W.2d at 769 (quoting *White v. State*, 779 S.W.2d 571, 572 (Mo. banc 1989)). For the same reason, Respondent's appeal to "principles of judicial economy and efficiency," Resp. Br. 19, founders on the plain language of Rule 91.02(a) and § 532.030, RSMo.

Respondent also relies on Section 532.520, which states that after a return is filed to the writ, the court may commit the petitioner to the custody of the sheriff in which proceedings are had or arrange for the care or custody that the circumstances or age of the petitioner may require. Resp. Br. 27–29. But that statute does not authorize a sentencing court to proceed on a habeas application filed by a prisoner serving a sentence in a prison in another county. In Missouri, challenges to judgments of convictions and sentences for felonies are only a subgroup of numerous types of confinement that may be challenged through petitions. *See State ex rel. Simmons v. White*, 866 S.W.2d 443, 445–46 (Mo. 1991) (noting the limited role of habeas corpus in challenging felony convictions and listing in a footnote some other uses of the writ); *In re Cook*, 691 S.W.2d 243 (Mo. 1985) (this Court resolves a child

custody dispute through a writ of habeas corpus); *State v. Brown*, 360 S.W.3d 919, 926 (Mo App. W.D. 2012) (habeas corpus is the proper way to challenge the effectiveness of trial counsel in a *misdemeanor* case). Section 532.520 provides for the numerous cases where a circuit court might need to provide for a habeas petitioner. It does not contradict Rule 91.02(a) or § 532.030 by authorizing the circuit court to proceed on Kidd's petition.

Respondent also cites habeas cases in which the caption of the case does not include the name of respondent. *Id.* at 30–31. But Rule 91.02 requires that "the writ or order shall be directed to the person having custody." Section 532.080 contains a similar requirement. Here, the proper custodian was never served with process.

**C. Respondent's concerns for judicial economy are unconvincing.**

Respondent argues that it is necessary to permit the Jackson County Circuit Court to adjudicate Kidd's habeas petition because the same court is presiding over his DNA motion, and it would be unduly burdensome to require a habeas petitioner "to litigate simultaneously in two jurisdictions, at increased expense." Resp. Br. 20. On the contrary, it is Respondent's approach that would result in the increased expense and inconvenience of multiplied litigation. If adopted, Respondent's rule would give enterprising prisoners the incentive to file post-conviction motions or lawsuits in counties

deemed more favorable to their cause, apply for writs of habeas corpus ad testificandum in those civil cases, and then file habeas petitions in their preferred venue. In other words, Respondent's rule would encourage prisoners to bring a raft of pretextual proceedings in counties remote from their counties of confinement.

As the Fourth Circuit stated in *Poole*, "the immediate custodian rule 'serves the important purpose of preventing forum shopping by habeas petitioners. Without it, the result would be rampant forum shopping.'" *Poole*, 531 F.3d at 273 (quoting *Padilla*, 542 U.S. at 447) (alteration and ellipsis omitted). The purpose of preventing forum shopping "would be thwarted by a rule allowing a prisoner to file a [habeas] petition anytime he is able to secure a hiatus to another jurisdiction." *Id.* at 273. "Followed to its logical end, [Respondent's] proposed rule might encourage the proliferation of [habeas] filings by prisoners testifying in jurisdictions outside their district of incarceration." *Id.* If Respondent's approach were adopted, "[t]he result would be rampant forum shopping, [circuit] courts with overlapping jurisdiction, and the very inconvenience, expense, and embarrassment [the legislature] sought to avoid when it added the jurisdictional limitation years ago." *Padilla*, 542 U.S. at 447.

## III. Relator Has Not Waived Objections to Habeas Venue in Jackson County.

Respondent makes two waiver arguments. First, Respondent argues that Relator waived objection to venue because an early motion to transfer the case to DeKalb County, filed in March 2015 on behalf of the Jackson County custodian who is no longer a party to the case, stated that "[a]t the time of filing this Court was the proper venue." Resp. App'x 18. Second, Respondent argues that Relator impliedly consented to the Jackson County Circuit Court's exercise of jurisdiction here by defending the case for some time before applying for an extraordinary writ. Neither of these arguments has merit. Even if waiver principles apply in this context, there is no basis to conclude that any waiver occurred.

### A. Relator is not judicially estopped by a legal conclusion asserted in a motion to transfer filed on behalf of a different party.

On March 15, 2017, Jackson County Detention Center Director Ken Conlee, who was then the sole named respondent in the case, filed a "Motion to Transfer the Proper Venue and Motion to Substitute Proper Respondent." Resp. App'x 18–19. This motion argued that the case should be transferred to DeKalb County "[b]ecause Ricky L. Kidd is no longer in custody in Jackson County, Missouri." *Id.* at 18. The motion stated that "[a]t the time of filing

this Court was the proper venue," but it argued that the case should be transferred to DeKalb County because Kidd was no longer in Jackson County. *Id.* Respondent argues that this statement in the motion "is fatal to [Respondent's] argument" in this Court. Resp. Br. 22. For several reasons, this argument has no merit.

First, the motion was filed on behalf of Director Conlee, who was never a proper respondent and is no longer a party to the case. It is axiomatic that admissions by one party do not bind another party. *See, e.g., Perry v. Blum*, 629 F.3d 1, 9 (1st Cir. 2010) ("Ordinarily, the party against whom judicial estoppel is invoked must be the same party who made the prior (inconsistent) representation."). In particular, no admission by Director Conlee can bind Warden Pash, the proper custodian, who has never been served with process and has never been made a party to the case.

Second, the statement asserted a legal conclusion regarding the propriety of venue in Jackson County. Statements of legal conclusions do not bind parties as factual admissions do, because parties frequently take legal positions in the alternative and/or develop their legal positions through further research (as occurred here). "The doctrine of judicial estoppel precludes a party from taking inconsistent factual positions, but does not preclude parties from arguing different legal opinions or conclusions from one set of facts." *First Nat'l Ins. Co. v. FDIC*, 977 F. Supp. 1051, 1058 (S.D. Cal.

1997); s*ee also, e.g., Palcesz v. Midland Mutual Life Ins. Co.*, 87 F. Supp. 2d 409, 413 (D.N.J. 2000) ("[C]ourts have been reluctant to apply judicial estoppel where a statement contains a legal conclusion, as distinguished from a purely factual inconsistency."). For this reason, Missouri courts hold that the doctrine of judicial estoppel applies to parties taking inconsistent *factual* positions "under oath." *State Bd. of Accountancy v. Integrated Fin. Solutions, LLC*, 256 S.W.3d 48, 54 (Mo. banc 2008). "Judicial estoppel will lie to prevent litigants from taking a position, *under oath*, in one judicial proceeding, thereby obtaining benefits from that position in that instance and later, in a second proceeding, taking a contrary position in order to obtain benefits at that time." *Id.* (emphasis added) (quotation marks and ellipsis omitted) (quoting *Shockley v. Dir., Div. of Child Support Enforcement*, 980 S.W.2d 173, 175 (Mo. App. 1998)). Here, an erroneous statement of a legal conclusion in a motion to transfer venue is not a factual assertion made "under oath," so judicial estoppel does not apply.

Even if the parties were the same and principles of judicial estoppel did apply, Relator would not be estopped in this case. "There are three factors in determining if judicial estoppel applies, whether (1) the party's two positions are clearly inconsistent; (2) the party succeeded in persuading a court to accept his earlier position; and (3) the party asserting the 'inconsistent position would derive an unfair advantage or impose an unfair detriment on

the opposing party if not estopped.'" *Vacca v. Mo. Dep't of Labor and Industrial Relations*, -- S.W.3d --, 2017 WL 5146154, at *8 (Mo. App. E.D. Nov. 7, 2017) (quoting *Vinson v. Vinson*, 243 S.W.3d 418, 421–22 (Mo. App. E.D. 2007)). Here, neither the second nor the third factor is satisfied. Director Conlee did not "succeed in persuading a court to accept his earlier position," *id.*, because his motion to transfer venue was denied, and Respondent has declined to transfer the habeas case to DeKalb County to this day. And Relator did not "derive an unfair advantage" from taking inconsistent legal positions, because counsel corrected the legal argument based on further legal research in subsequent motions, which were also denied by Respondent.

**B. Relator did not waive objection to venue by litigation conduct.**

Respondent also argues that Relator waived objection to habeas venue in Jackson County Circuit Court by "waiting over two years to seek this writ." Resp. Br. 35, 37–38. This argument is unconvincing. Counsel in the Attorney General's Office unsuccessfully moved to transfer the case to DeKalb County on March 19, 2015, the day he entered the case on behalf of Director Conlee. Relator's Ex. 1, at 5. On August 31, 2016, the same counsel unsuccessfully moved the court to name the warden of the prison where Kidd was confined as a respondent. Kidd filed an amended habeas petition in

Jackson County on March 20, 2017, despite being physically located in DeKalb County at the time. Relator's Ex. 1, at 2. On May 17, 2017, counsel again unsuccessfully moved the circuit court to transfer the case. Relator's Ex. 1, at 1. On June 12, 2017, the same counsel notified the court of his intention to seek an extraordinary writ if the case was not transferred. Relator's Ex. 1, at 1. Relator did not waive objection to habeas venue by repeatedly seeking relief on the issue and exhausting every opportunity to request that the circuit court correct the error. The writ of prohibition is an extraordinary remedy reserved for extraordinary circumstances. Counsel should not be faulted for seeking to convince the trial court to transfer the case and name the proper respondent on several occasions before applying for an extraordinary writ.

Respondent appears to assert that Relator waived lack of personal jurisdiction over the Warden. Resp. Br. 35–39. But the Warden never entered an appearance and was never served with the petition. The fact that the Attorney General's Office defended the Jackson County superintendent and did not abandon the case when the circuit court dismissed Director Conlee as a respondent does not create personal jurisdiction over the Warden.

Respondent argues that Relator did not object to the original writ ad testificandum in the DNA case issued on February 9, 2015. Resp. Br. at 36. But the petition for habeas corpus was not filed until March 6, 2015. The

writ ad testificandum was dissolved on March 9, 2015, and Kidd returned to prison in DeKalb County. Relator's Ex. 3, at 9. Counsel in the Attorney General's Office entered his appearance on March 19, 2015, and the same day moved to transfer the case to DeKalb County. Resp. Ex. 1 at 5. Nothing about this litigation conduct could possibly imply a waiver of objections to venue in Jackson County.

## CONCLUSION

For the foregoing reasons, this Court's should make its writ of prohibition permanent, order Kidd to be returned to his place of confinement in DeKalb County, and order the Circuit of Jackson County to transfer the underlying habeas case to DeKalb County.

Respectfully submitted,

**JOSHUA D. HAWLEY**
Attorney General

*/s/ D. John Sauer*
D. John Sauer, Mo. Bar #58721
First Assistant and Solicitor

*/s/ Michael Spillane*
Michael Spillane, Mo. Bar #40704
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
(573) 751-8870
(573) 751-3825 (facsimile)
Michael.Spillane@ago.mo.gov

**ATTORNEYS FOR RELATOR**

## CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed and served electronically via Missouri Case.Net on November 17, 2017 to:

Sean D. O'Brien
5100 Rockhill Road
Kansas City, MO 64110

Tricia Bushnell
3619 Broadway Blvd., #2
Kansas City, MO 64111

Cynthia M. Dodge
233 SW Greenwich Drive
Lee's Summit, MO 64082

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 6,348 words.

/s/ *Michael Spillane*
Assistant Attorney General