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**SUPREME COURT OF MISSOURI**

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**STATE OF MISSOURI EX REL. BRYAN TRAVIS ROBISON**

**Relator/Appellant,**

**vs.**

**CHLORA LINDLEY-MYERS, DIRECTOR**  
**Department of Insurance, Financial Institutions & Professional Registration,**

**Respondent.**

.....

**Case No. SC96719**

.....

**APPELLANT'S SUBSTITUTE BRIEF**

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**David F. Barrett**  
**Attorney at Law**  
**Missouri Bar No. 43781**  
**P.O. Box 104151**  
**Jefferson City, MO 65110**  
**(573) 340-9119**  
**Fax: (573) 636-1003**

**dfbarrett@outlook.com**

**ATTORNEY FOR APPELLANT**

## TABLE OF CONTENTS

Table of Contents.....	1
Table of Cases, Statutes and Other Authorities.....	3
Jurisdictional Statement.....	6
Statement of Facts .....	7
Point Relied On:	
<b>The trial court erred in quashing the Preliminary Order in Mandamus and denying Relator’s Petition in Mandamus, because a general bail bond agent has a right to renew his license notwithstanding the provisions of § 374.750 RSMo. (absent notice and opportunity for hearing), in that professional licenses are property for Constitutional purposes under the 14<sup>th</sup> Amendment of the United States Constitution and Art. I § 10 of the Missouri Constitution, and procedural due process under those same Constitutional provisions is required before the government may deprive anyone of his or her professional license. ....</b>	<b>10</b>
Argument .....	11
I. The Due Process Issue .....	13
II. The Lack of an Administrative Remedy.....	16
III. The Propriety of Mandamus .....	18
IV. Rule 33.17 .....	20
Conclusion .....	23
Certification .....	23

Certificate of Service .....	24
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Appendix

## **TABLE OF CASES, STATUTES AND OTHER AUTHORITIES**

### **Cases:**

<i>Austell v. Sprenger</i> , 690 F.3d 929 (8th Cir. 2012) .....	16
<i>Caranchini v. Mo. Bd. of Law Examiners</i> , 447 S.W.3d 768 (Mo. App. W.D. 2014) .....	21
<i>City of St. Louis v. Butler Co.</i> , 219 S.W.2d 372 (Mo. banc. 1949) .....	17
<i>City of St. Peters v. Roeder</i> , 466 S.W.3d 538, 546 (Mo. banc 2015).....	19
<i>Duncan v. Missouri Board of Architects, Professional Engineers &amp; Land Surveyors</i> , 744 S.W.2d 524, 531 (Mo. App. E.D. 1988) .....	17
<i>Gabriel v. Saint Joseph License, LLC</i> , 425 S.W.3d 133 (Mo. App. W.D. 2013) .....	21
<i>Gillespie v. Rice</i> , 224 S.W.3d 608 (Mo. App. W.D. 2006).....	21
<i>Gurley v. Missouri Board of Private Investigator Examiners</i> , 361 S.W.3d 406 (Mo. banc 2012) .....	10, 13, 18, 19, 22
<i>Jamison v. Dep't of Soc. Serv.</i> , 218 S.W.3d 399 (Mo. banc 2007) .....	15
<i>Mo. Real Estate Comm'n v. Rayford</i> , 307 S.W.3d 686 (Mo. App. W.D. 2010).....	15
<i>Nowden v. Div. of Alcohol &amp; Tob. Control</i> , No. WD79897 (Mo. App. W.D. 2017).....	17
<i>St. Louis County Board of Election Comm'rs v. McShane</i> , 492 S.W.3d 177 (Mo. App. E.D. 2016) .....	20
<i>Sanders v. City of Columbia</i> , 481 S.W.3d 136 (Mo. App. W.D. 2016) .....	17
<i>Silcox v. Silcox</i> , 6 S.W.3d 899 (Mo. banc 1999) .....	22
<i>State v. Elliott</i> , 225 S.W.3d 423 (Mo. banc 2007) .....	15
<i>State ex rel. DePaul Health Center v. Mummert</i> , 870 S.W.2d 820 (Mo. banc 1994) .....	18

<i>State ex rel. Kessler v. Shay</i> , 820 S.W.2d 311 (Mo. App. W.D. 1991) .....	18
<i>State ex rel. Seigh v. McFarland</i> , 532 S.W.2d 206, 207 (Mo. banc 1976) .....	19
<i>State Tax Com'n v. Administrative Hearing Com'n</i> , 641 S.W.2d 69 (Mo. banc 1982) ....	16
<i>Stone v. Missouri Department of Health and Senior Services</i> , 350 S.W.3d 14 (Mo. banc 2011) .....	10, 13, 14
<i>Strup v. Dir. of Revenue</i> , 311 S.W.3d 793 (Mo. banc 2010).....	15
<i>StopAquila.org v. City of Peculiar</i> , 208 S.W.3d 895 (Mo. banc 2006).....	22
<i>Tadrus v. Missouri Bd. of Pharmacy</i> , 849 S.W.2d 222 (Mo. App. W.D. 1993) .....	16
<i>Turner v. Sch. Dist. of Clayton</i> , 318 S.W.3d 660 (Mo. banc 2010) .....	33
<i>U.S. Dep't of Veterans Affairs v. Boresi</i> , 396 S.W.3d 356 (Mo. banc 2013) .....	11
<i>Zenco Dev. Corp. v. City of Overland</i> , 843 F.2d 1117 (8th Cir. 1988).....	16

**Statutes:**

§ 374.051 RSMo.....	17, 18
§§ 374.695 to 374.789 RSMo.....	12, 21
§ 374.700(10) RSMo. ....	22
§ 374.702.7 RSMo.....	8, 21
§ 374.730 RSMo.....	18
§ 374.750 RSMo.....	11, 12
§ 374.755 RSMo.....	12, 18, 20
§ 374.763 RSMo.....	21
§ 374.783.1 RSMo.....	20

§ 374.789 RSMo.....	8, 21
§ 477.010 RSMo.....	21
Ch. 621 RSMo. ....	12
§ 621.120 RSMo.....	17
42 U.S.C. § 1983 .....	17

**Other Authorities:**

U.S. Const. Amend. 14 .....	10, 11, 12, 15, 16
Mo. Const. Art. I § 10.....	10, 11, 12, 15, 16
Mo. Const. Art. II § 1 .....	16
Mo. Const. Art. V § 5 .....	21
Mo. Const. Art. V § 10 .....	6
Rule 33.17.....	20, 21
Rule 55.03.....	23
Rule 84.06(b) .....	23
Merriam-Webster Dictionary .....	19

## **JURISDICTIONAL STATEMENT**

Relator/Appellant Bryan Travis Robison sought relief in mandamus from the Circuit Court of Cole County when the Director's predecessor in office, in his official capacity, refused to renew his license as a general bail bond agent. The Circuit Court issued a Preliminary Order in Mandamus, but after briefing and argument quashed the preliminary order and denied relief.

An appeal was taken to this Court in Case No. SC96031, but the Court determined on its own motion that jurisdiction was vested in the Court of Appeals and transferred the case. The Court of Appeals decided the case by opinion in Case No. WD80793. Upon Appellant's application this Court granted transfer on October 31, 2017. The case is now numbered SC96719. The Missouri Supreme Court has jurisdiction, therefore, under Mo. Const. Art. 5 § 10.

## **STATEMENT OF FACTS**

Bryan Travis Robison has been licensed by Department of Insurance, Financial Institutions & Professional Registration in various capacities in the bail bond industry since 2007.<sup>1</sup> His license as a General Bail Bond Agent expired on August 8, 2016.<sup>2</sup> The expiration occurred after he had timely and duly filed an application to renew his license.<sup>3</sup>

On July 29, 2016, Director's predecessor, John Huff, issued, without prior notice to Robison and without granting him any opportunity to be heard, an, "Order Refusing to Renew General Bail Bond Agent License."<sup>4</sup> A copy of the "Order Refusing to Renew General Bail Bond Agent License," was attached to the Petition in Mandamus as Exhibit 1. The "Order Refusing to Renew General Bail Bond Agent License," purports to have been issued after, "the Consumer Affairs Division ("Division") submitted a Petition to the

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<sup>1</sup> This fact is taken from ¶ 2 of Director's Order Refusing to Renew General Bail Bond Agent License (Order). L.F. 10; App. A-2. It was alleged as ¶ 2 of the Petition in Mandamus (Petition). L.F. 5. It was denied without explanation in Director's Answer and General Objection § VIII ¶ 2 (Answer). L.F. 51.

<sup>2</sup> Petition ¶ 7. L.F. 6. Admitted in Answer § VIII ¶ 2. L.F. 52.

<sup>3</sup> This fact is taken from ¶¶ 34-38 of Director's Order. L.F. 15-16. Petition ¶ 8. L.F. 6. Denied without explanation in Answer § VIII ¶ 8. L.F. 52. The Application itself is at L.F. 66.

<sup>4</sup> L.F. 10; App. A-2.



Director alleging cause for refusing to renew Bryan Travis Robison's general bail bond agent license.” The order then states that it was made, “After reviewing the Petition, the Investigative Report, and the entirety of the file[.]” It was done entirely ex parte, affording Robison neither notice nor an opportunity to be heard.

The Circuit Court issued its Preliminary Order in Mandamus on August 25, 2016.<sup>5</sup> The Director filed her Answer and General Objection on September 30, 2016.<sup>6</sup> At a hearing on October 27, 2016, the trial court heard argument that essentially repeated the points and authorities from the briefs, and formally received the exhibits attached to the briefs into the record.<sup>7</sup> After briefing and argument the Circuit Court quashed the preliminary order and denied relief in its Judgment and Order of October 28, 2016.<sup>8</sup>

Robison timely filed a Notice of Appeal to this Court on November 7, 2016,<sup>9</sup> and the matter was assigned Case No. SC96031, but the Court determined on its own motion

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<sup>5</sup> L.F. 25.

<sup>6</sup> L.F. 27.

<sup>7</sup> The Director cited four cases where Robison’s bonds had been forfeited. Tr. 9-10. Two were cited in the denial order; the defendants were Cesar Elias-Reyes and John Brooks. Two other forfeitures – those of Jacob Winkelman and Zachary Poelma – became final for licensure purposes after Robison’s’ license expired, thus any attempt he might make to take action on them would be a crime. §§ 374.702.7 and .789 RSMo.

<sup>8</sup> L.F. 200; App. A-1.

<sup>9</sup> L.F. 201.

that jurisdiction was vested in the Court of Appeals and transferred the case. The Court of Appeals decided the case by opinion in Case No. WD80793. Upon Appellant's application this Court granted transfer on October 31, 2017.

**POINT RELIED ON**

**The trial court erred in quashing the Preliminary Order in Mandamus and denying Relator's Petition in Mandamus, because a general bail bond agent has a right to renew his license notwithstanding the provisions of § 374.750 RSMo. (absent notice and opportunity for hearing), in that professional licenses are property for Constitutional purposes under the 14<sup>th</sup> Amendment of the United States Constitution and Art. I § 10 of the Missouri Constitution, and procedural due process under those same Constitutional provisions is required before the government may deprive anyone of his or her professional license.**

*Gurley v. Missouri Bd. of Private Invets. Examiners*, 361 S.W.3d 406 (Mo. banc 2012)

*Stone v. Missouri Dept. of Health and Senior Serv.*, 350 S.W.3d 14 (Mo. banc 2011)

United States Constitution, Amendment 14

Missouri Constitution Article I, Section 10

## **ARGUMENT**

**The trial court erred in quashing the Preliminary Order in Mandamus and denying Relator’s Petition in Mandamus, because a general bail bond agent has a right to renew his license notwithstanding the provisions of § 374.750 RSMo. (absent notice and opportunity for hearing), in that professional licenses are property for Constitutional purposes under the 14<sup>th</sup> Amendment of the United States Constitution and Art. I § 10 of the Missouri Constitution, and procedural due process under those same Constitutional provisions is required before the government may deprive anyone of his or her professional license.**

### **Introduction**

Bryan Travis Robison’s license as a general bail bond agent expired after the Director of the Department of Insurance, Financial Institutions and Professional Registration denied his renewal application. The denial decision was made, purportedly pursuant to § 374.750 RSMo., without any notice or opportunity to be heard being granted to Robison, in violation of previous decisions of this Court. The statute thus violates the state and federal Constitutions. A writ of mandamus was sought, a preliminary writ was granted, but the trial court ultimately denied relief.

### **Standard of Review**

As stated in *United States Department of Veterans Affairs v. Boresi*, 396 S.W.3d 356, 358 (Mo. banc 2013), “An appeal will lie from the denial of a writ petition when a

lower court has issued a preliminary order in mandamus but then denies a permanent writ.” Denial of a petition for a writ of mandamus is reviewed for an abuse of discretion. *Id.* at 359. An abuse of discretion in denying a writ occurs when the circuit court misapplies the applicable statutes. *Id.*

### **Argument**

The Department of Insurance, Financial Institutions and Professional Registration administers the, “Professional Bail Bondsman and Surety Recovery Agent Licensure Act.” §§ 374.695 to 374.789 RSMo. Section 374.750 RSMo. allows the department to refuse to issue or renew a required license:

**The department may refuse to issue or renew any license required pursuant to sections 374.700 to 374.775 for any one or any combination of causes stated in section 374.755. The department shall notify the applicant in writing of the reasons for the refusal and shall advise the applicant of his right to file a complaint with the administrative hearing commission as provided by chapter 621.**

Refusal to issue a license is not an issue. But refusal to renew a license implicates the Due Process clauses of the state and federal Constitutions, specifically the 14th Amendment of the United States Constitution and Art. I § 10 of the Missouri Constitution:

**Because professional licenses are considered to be “property” for the purposes of the Fourteenth Amendment, procedural due process is required**

**before the government may deprive anyone of his or her professional license.**

***See Stone v. Missouri Dept. of Health and Senior Serv.*, 350 S.W.3d 14, 27 (Mo. banc 2011).**

*Gurley v. Missouri Board of Private Investigator Examiners*, 361 S.W.3d 406, 414 (Mo. banc 2012) (emphasis added).

### **I. The Due Process Issue**

Robison has been licensed by Department of Insurance, Financial Institutions & Professional Registration in various capacities in the bail bond industry since 2007.<sup>10</sup> His license as a General Bail Bond Agent expired on August 8, 2016.<sup>11</sup> The expiration occurred after he had timely and duly filed an application to renew his license.<sup>12</sup>

On July 29, 2016, Director's predecessor issued, without prior notice to Robison and without granting him any opportunity to be heard, an, "Order Refusing to Renew

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<sup>10</sup> This fact is taken from ¶ 2 of Director's Order Refusing to Renew General Bail Bond Agent License (Order). L.F. 10; App. A-2. It was alleged as ¶ 2 of the Petition in Mandamus (Petition). L.F. 5. It was denied without explanation in Director's Answer and General Objection § VIII ¶ 2 (Answer). L.F. 51.

<sup>11</sup> Petition ¶ 7. L.F. 6. Admitted in Answer § VIII ¶ 2. L.F. 52.

<sup>12</sup> This fact is taken from ¶¶ 34-38 of Director's Order. L.F. 15-16. Petition ¶ 8. L.F. 6. Denied without explanation in Answer § VIII ¶ 8. L.F. 52. The Application itself is at L.F. 66.

General Bail Bond Agent License.” A copy of the Order was attached to the Petition in Mandamus as Exhibit 1.<sup>13</sup> The Order purports to have been issued after, “the Consumer Affairs Division ("Division") submitted a Petition to the Director alleging cause for refusing to renew Bryan Travis Robison's general bail bond agent license.” The Order then states that it was made, “After reviewing the Petition, the Investigative Report, and the entirety of the file[.]” It was done entirely ex parte, affording Robison neither notice nor an opportunity to be heard.

The *Gurely* case arose during the state’s initiation of licensing for private investigators. Gurley had been licensed as a private investigator in the City of Columbia which, during the transition to state licensing, discontinued its licensing program. Gurley’s application for a state license was denied by the board, but granted on appeal to the Administrative Hearing Commission. Gurley perfected an appeal to this Court seeking declaration that the initial denial of his application denied him due process. Although the Court determined Gurley’s due process complaints were moot, it cited *Stone v. Missouri Department of Health and Senior Services*, 350 S.W.3d 14 (Mo. banc 2011), for the proposition professional licenses are property for the purposes of the Fourteenth Amendment, and that procedural due process is required before the government may deprive anyone of his or her professional license. *Stone v. Missouri Dept. of Health and Senior Serv.*, 350 S.W.3d 14, 27 (Mo. banc 2011). The *Stone* court cited the following authority for the proposition:

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<sup>13</sup> L.F. 10; App. A-2.

The Missouri and United States constitutions both prohibit states from depriving a person of a property interest without due process of law. U.S. Const. Amend. 14; Mo. Const. art. I, sec. 10. A person has a property right in a license that requires sufficient procedural due process before the license can be “impaired, suspended, or revoked.” *Mo. Real Estate Comm'n v. Rayford*, 307 S.W.3d 686, 692 (Mo.App.2010). Moreover, “[t]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference, implicates constitutionally protected liberty interests.” See *Jamison v. Dep't of Soc. Serv.*, 218 S.W.3d 399, 407 (Mo. banc 2007) (internal citations omitted). If the government wishes to deprive a person of a liberty or property interest, due process requires the government to provide notice and the opportunity for a meaningful hearing appropriate to the nature of the case. *Strup v. Dir. of Revenue*, 311 S.W.3d 793, 796 (Mo. banc 2010). “Due process [requires] notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *State v. Elliott*, 225 S.W.3d 423, 424 (Mo. banc 2007).

Unlike the appellant in *Gurley*, Robison was seeking renewal of the state’s license. Its teachings regarding the reach of *Stone* are directly on point and dispositive.<sup>14</sup> Failure

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<sup>14</sup> The Director complained in her principal brief that the right to renew a professional license is not clear, reaching back more than 25 years to a federal court



to renew Robison's license violated his rights under the 14th Amendment of the United States Constitution and Art. I § 10 of the Missouri Constitution. Any statute to the contrary is thus unconstitutional.

## II. The Lack of an Administrative Remedy

The Director suggested to the circuit court (and the Court of Appeals) that Robison should have sought relief from the Administrative Hearing Commission. That suggestion invites violation of the Separation of Powers provision of the Missouri Constitution, Art. II § 1. In *State Tax Com'n v. Administrative Hearing Com'n*, 641 S.W.2d 69 (Mo. banc 1982) it was held that the Administrative Hearing Commission could not constitutionally exercise the judicial power of declaratory judgment. In *Tadrus v. Missouri Bd. of Pharmacy*, 849 S.W.2d 222, 225 (Mo. App. W.D. 1993), it was held that although a constitutional challenge must be raised at the earliest possible stage or it is

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decision. That case, *Zenco Dev. Corp. v. City of Overland*, 843 F.2d 1117, 1118–19 (8th Cir. 1988), predates *Gurley* and *Stone*. *Zenco* is cited in the Director's lead case on the issue, *Austell v. Sprenger*, 690 F.3d 929 (8th Cir. 2012). *Austell* not only is bereft of mention of *Gurley* and *Stone*, it was not prosecuted on the basis of licensing law. Rather Rufus Tate, a well-known Missouri civil rights attorney, sought damages for his clients under 42 U.S.C. § 1983 and unspecified state law claims. The 8th Circuit cursorily described the underlying administrative law proceedings, apparently abandoned in pursuit of civil rights damages.

waived, *City of St. Louis v. Butler Co.*, 219 S.W.2d 372 (Mo. banc. 1949), the Administrative Hearing Commission is not empowered to determine the constitutionality of statutes, so a party is not required to raise those issues at that level. *Duncan v. Missouri Board of Architects, Professional Engineers & Land Surveyors*, 744 S.W.2d 524, 531 (Mo. App. E.D. 1988).

The Court of Appeals agreed, holding that Robison's failure to seek review before the Administrative Hearing Commission was fatal to Robison's claim because § 621.120 RSMo., vests the final administrative decision on issuing a license with the Commission. Opinion at 5-6. In doing so the Court of Appeals missed a key point: the Director is not subject to § 621.120 RSMo. Section 374.051.1 RSMo. provides, in relevant part:

**Notwithstanding section 621.120, the director shall retain discretion in refusing a license or renewal and such discretion shall not transfer to the administrative hearing commission.**

As a result, decisions of the Administrative Hearing Commission are illusory in a case like this one. Or, using this Court of Appeal's language in previous case, the administrative process is mere, "window dressing." *Sanders v. City of Columbia*, 481 S.W.3d 136, 143-44 (Mo. App. W.D. 2016) and *Nowden v. Div. of Alcohol & Tobacco Control*, No. WD79897 (Mo. App. W.D. 2017) (transferred to the Supreme Court on the same date as this matter and currently pending in case no. SC96496), because a contested case requires development of a record that will ultimately will be relied upon by the person or entity making the final decision.

In virtually any other licensing case the Court of Appeals Opinion in this matter would be well taken. But the extraordinary provision of § 374.051.1 RSMo., allowing denial of a renewal of a professional license, require an extraordinary remedy. There are no administrative procedures to exhaust. On the other hand, Director could have filed a complaint for discipline under § 374.755 RSMo. But before cause for discipline is found Relator is entitled to renewal of his license in accord with *Gurley v. Missouri Bd. of Private Investigator Examiners*, 361 S.W.3d 406 (Mo. banc 2012).

### **III. The Propriety of Mandamus**

Mandamus is appropriate to compel the performance of a ministerial act. *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820, 823 (Mo. banc 1994)(transfer of case to proper venue). Missouri law defines a ministerial act as a specific duty that the law directs the official to perform upon a given set of facts, regardless and independent of what the official may think of the propriety of doing the act under the given facts. *State ex rel. Kessler v. Shay*, 820 S.W.2d 311, 314 (Mo. App. W.D. 1991)(even though “traffic exaction” not satisfied prerequisites for issuance of building permit existed and could be enforced by mandamus).

In this case § 374.730 RSMo., provides:

**All licenses issued to bail bond agents and general bail bond agents under the provisions of sections(sic) to (sic) shall be renewed biennially, which renewal shall be in the form and manner prescribed by the department and shall be accompanied by the renewal fee set by the department.**

The term shall, in ordinary parlance, is mandatory. Merriam-Webster Dictionary (<https://www.merriam-webster.com/dictionary/shall>, last visited 11/27/17). The legal definition is more nuanced -- this Court determines whether “shall” is mandatory or directory by considering the context and ascertaining the legislature's intent. *City of St. Peters v. Roeder*, 466 S.W.3d 538, 546 (Mo. banc 2015). In this case a mandatory construction is counseled by the Constitutional imperatives identified in *Gurley v. Missouri Board of Private Investigator Examiners*, 361 S.W.3d 406, 414 (Mo. banc 2012).

In her original brief Director cited a single case that suggests mandamus is not an appropriate forum to vindicate Constitutional rights. That case, *State ex rel. Seigh v. McFarland*, 532 S.W.2d 206, 207 (Mo. banc 1976), arose in a criminal prosecution. After a judge found a lack of probable cause to bind over relators after a preliminary hearing, the prosecutor filed a new complaint again charging the same crimes. *Id.* The clerk issued arrest warrants in due course. *Id.* The relators sought a writ of mandamus arguing, inter alia, “that issuance of the arrest warrant under those circumstances violated rights of appellants under the fourth and fourteenth amendments to the Constitution of the United States.” *Id.*

This Court concluded that mandamus was inappropriate because, “it cannot be said that the magistrate was under a clear legal duty to determine that said rule was unconstitutional and that on such basis the arrest warrant would be quashed.” *Id.* at 208. But the *Gurley* and *Stone* decisions make it clear that the rule is different in this matter – the Director’s action in this case was clearly beyond the pale.

This case is more like *St. Louis County Board of Election Comm'rs v. McShane*, 492 S.W.3d 177 (Mo. App. E.D. 2016) (statute that cannot be constitutionally applied in any circumstance subject to action for extraordinary relief), as noted by the Director in her brief. In both that case and this one the Constitutional issues are indisputable. And the statute that prevented implementation of the Constitutional mandate has to fail.

The Director suggests that Robison must prove the entire licensing system is infirm. Robison is not so bold. He complains about the very narrow group of people positioned like himself and Rick Gurley: those who hold licenses taken at the whim of government officials. Upon excision of the ability to deny renewals, § 374.755 RSMo. is constitutionally adequate. It is that single issue – denial of renewal – that has harmed Robison.

#### **IV. Rule 33.17**

In the circuit court Director attempted to hide her unconstitutional action under the skirts of Supreme Court 33.17. Rule 33.17 certainly applies to sureties. But the work of a bondsman under is not limited to acting as the surety on a bond. Section 374.783. 1 RSMo. states:

**No person shall hold himself or herself out as being a surety recovery agent in this state, unless such person is licensed in accordance with the provisions of sections 374.783 to (sic). Licensed bail bond agents and general bail bond agents may perform fugitive recovery without being licensed as a surety recovery agent.**

Ironically, by refusing to renew Relator's license the Director has prevented him from self-help in exonerating the judgments: he cannot arrest the fugitives in question.<sup>15</sup>

From a different perspective, Supreme Court Rule 33.17 was adopted in 1980. Missouri Supreme Court Rules are given the same effect as statutes so long as they are not in conflict. *Caranchini v. Mo. Bd. of Law Examiners*, 447 S.W.3d 768, 775 (Mo. App. W.D. 2014), citing *Gabriel v. Saint Joseph License, LLC*, 425 S.W.3d 133, 139 (Mo. App. W.D. 2013) (quoting *Gillespie v. Rice*, 224 S.W.3d 608, 612 (Mo. App. W.D. 2006)); *see also* Mo. Const. Art. V, § 5; § 477.010 RSMo.

The, "Professional Bail Bondsman and Surety Recovery Agent Licensure Act,"

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<sup>15</sup> Four cases where Robison's bonds had been forfeited are cited in the record. Tr. 9-10. Two were cited in the denial order; the defendants were Cesar Elias-Reyes and John Brooks. Those forfeitures were set aside after the trial court hearing, although this Court has refused to permit the record to be supplemented with evidence thereof. Now that the record is fully developed Appellant respectfully requests the Court reconsider that decision. The other two forfeitures – those of Jacob Winkelman and Zachary Poelma – became final for licensure purposes after Robison's license expired. § 374.763 RSMo. (when final judgment ordering forfeiture not paid within six months the court shall extend the judgment date or notify the department of the failure). Any attempt Robison might make to cure the forfeiture (other than payment) after denial of the renewal is a crime. §§ 374.702.7 and .789 RSMo.

§§ 374.695 to .789 RSMo., was adopted in 2004 by S.B. 1122. If laws (a rule and a statute in this case) conflict they can be harmonized, *Silcox v. Silcox*, 6 S.W.3d 899, 903 (Mo. banc 1999), or the earlier can be deemed repealed by implication (*but see Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660 (Mo. banc 2010) (repeals by implication disfavored, citing *StopAquila.org v. City of Peculiar*, 208 S.W.3d 895, 905 n. 14 (Mo. banc 2006))).

Even if Relator can be barred from acting as a surety under the rule, the statute allowing denial of his renewal – thus prohibiting him from performing fugitive recovery<sup>16</sup> – clearly contravenes the Constitution as set out in *Gurley v. Missouri Bd. of Private Investigator Examiners*, 361 S.W.3d 406 (Mo. banc 2012) and is thus unconstitutional for the same reasons discussed above.

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<sup>16</sup> § 374.700(10) RSMo.

### **CONCLUSION**

For each and every of the foregoing reasons, the circuit court's judgment quashing the preliminary order in mandamus and denying relator relief should be reversed, and the cause remanded for issuance of a permanent order in mandamus directing renewal of Robison's license as a general bail bond agent.

Respectfully submitted,

*David F. Barrett*

David F. Barrett  
Missouri Bar No. 43781  
P.O. Box 104151  
Jefferson City, MO 65110  
(573) 340-9119  
Fax: (573) 636-1003

dfbarrett@outlook.com

**ATTORNEY FOR APPELLANT**

### **RULE 84.06 CERTIFICATION**

The undersigned counsel certifies that this brief complies in all respects with Rule 84.06, in that he has signed it, above, in accordance with Rule 55.03, and that this brief complies with the limitations contained in Rule 84.06(b), to wit: according to MS Word it contains 4,537 words.

Respectfully submitted,

*David F. Barrett*

David F. Barrett



**CERTIFICATE OF SERVICE**

A copy of this brief (including the Appendix thereto) was served upon Director's attorney, Cheryl Nield, through the Court's e-filing system on November 27, 2017.

Respectfully submitted,

*David F. Barrett*

David F. Barrett