SC96719

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI EX REL. BRYAN TRAVIS ROBISON,

Appellant,

vs.

CHLORA LINDLEY-MYERS, DIRECTOR, MISSOURI DEPARTMENT OF INSURANCE, FINANCIAL INSTITUTIONS AND PROFESSIONAL REGISTRATION,

Respondent.

From the Circuit Court of Cole County, Missouri,
The Honorable Patricia S. Joyce, Circuit Judge

RESPONDENT'S SUBSTITUTE BRIEF

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Statement of Facts[1]

Appellant applied to the Department of Insurance, Financial Institutions and Professional Registration ("Department") to renew his general bail bond agent license (Legal File – hereinafter "LF" – at 65-75). The Department received Appellant's "Missouri Uniform Renewal Application for Bail Bond or Surety Recovery License" ("Renewal Application") on July 14, 2016 (LF 66).

Before submitting his Renewal Application in July 2016, Appellant submitted several affidavits to the Department pursuant to § 374.760, RSMo 2000, which requires that general bail bond agents file monthly, sworn affidavits with the Department indicating whether they have any unsatisfied judgments against them (LF 99-106).

In January, February, and March 2016, Appellant submitted affidavits to the Department indicating "[t]hat there are no unsatisfied judgements against me" (LF 100-102). Appellant signed each affidavit under oath and before a notary (LF 100-102). In April, May, June, and July 2016, however,

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[1] Twice in his Statement of Facts, Appellant makes statements then cites to allegations in his Petition in Mandamus in support, even though the Director denied those specific allegations in Appellant's Petition in Respondent's General Objection and Answer (App. Sub. Br. 7, notes 1 and 3, *compare* LF 5-6, ¶s 2 and 8 *with* LF 51-52, ¶ 2 and 8). Disputed facts such as these should not be included in Appellant's Statement of Facts because the evidence must be viewed in the light most favorable to the result reached. *See Curry Inv. Co. v. Santilli*, 494 S.W.3d 18, 24 (Mo. App. W.D. 2016) (court-tried case).

Appellant submitted affidavits to the Department that indicated "[t]hat there are unsatisfied judgements against me" (LF 103-106). Appellant signed each of these affidavits under oath and before a notary (LF 103-106).

In particular, in April 2016, Appellant listed Vernon County case number 11VE-CR00290-01 in the amount of $10,000.00 with a judgment date of March 29, 2016 (LF 103). Also in his April 2016 affidavit, Appellant listed three Jackson County case numbers – 140006078, 140006079, and 140006080 – with an amount of $2,000.00 for each and a judgment date for all of March 24, 2016 (LF 103). In May 2016, Appellant again listed the Vernon County case that he listed in his April affidavit (LF 104). Appellant also listed the Jackson County cases that he had listed in his April affidavit, but he combined the amounts and listed a total of $6,000.00 (LF 104). In his June 2016 affidavit, Appellant again listed the Vernon and Jackson County cases that he had listed previously, in April and May (LF 105). Finally, in July 2016, Appellant again listed the Vernon and Jackson County cases where he had unsatisfied judgments against him (LF 106). None of the affidavits that Appellant filed with the Department from January to July 2016 disclosed the bond forfeiture judgment entered against Appellant on December 16, 2015 in *State v. Cesar Elias-Reyes*, Newton Co. Cir. Ct., Case No. 15NW-CR00782 (LF 100-106).

On July 29, 2016, the Director issued an "Order Refusing to Renew General Bail Bond Agent License" ("Refusal Order") against Appellant (LF 76-87). On August 17, 2016, Appellant filed his Petition in Mandamus in the Circuit Court of Cole County (LF 1, 5-24). There, Appellant alleged that the

Director issued the Refusal Order without giving Appellant notice and an opportunity to be heard, and maintained that "[t]o the extent that Respondent relies on § 374.750 RSMo. as authority to deny renewal of … [his] license, said Section violates the provisions of the 5th and 14th Amendments to the United States Constitution and Article I, § 10 of the Missouri Constitution" (LF 7). Appellant also filed Suggestions in Support (LF 21-24). On August 25, 2016, the Cole County Circuit Court issued a Preliminary Order in Mandamus (LF 1, 25-26).

On September 30, 2016, the Director filed Respondent's General Objection and Answer ("Answer") (LF 2, 27-187). The Director attached numerous exhibits to the Answer that included certified court records in six cases that all show unsatisfied bond forfeiture judgments against Appellant (LF 64, 107-187). Also on September 30, 2016, Respondent filed a Motion to Dismiss (LF 2; Supplemental Legal File – hereinafter "Supp. LF" – at 1-13). On October 3, 2016, Appellant filed his Relator's Brief in Support of Petition in Mandamus (LF 2, 188-192) and his Suggestions in Opposition to Motion to Dismiss (LF 2; Supp. LF 14-16). On October 14, 2016, Respondent filed Respondent's Reply to Relator's Suggestions in Opposition to Motion to Dismiss (LF 193-199; Supp. LF 17-23).

On October 17, 2016, the circuit court heard arguments in the case (LF 2-3; Transcript – hereinafter "Tr." – at 2-3). Appellant argued, "[t]his is an action in mandamus seeking an order that the director renew a license. The debate in this case, if I may phrase it that way, is whether the director has, essentially, any discretion in choosing not to renew a license. We would

suggest under the authorities cited in the petition, the – suggestions in support and the brief that it does not" (Tr. 3-4). Appellant elaborated that "although licenses do not have complete – licensees do not have complete due process rights in renewals, there is a property interest that has to be respected" and that the Director's "unilateral decision to not renew the license" deprived Appellant of his "property rights" (Tr. 4). Appellant admitted that he had outstanding bond forfeiture judgments against him (Tr. 5) ("What we have in this case is it is undisputed that Mr. Robison has outstanding judgments on his bonds").

The Director argued that Appellant's unsatisfied bond forfeiture judgments disqualified him, under Missouri Supreme Court Rule 33.17, from holding a general bail bond agent license (Tr. 6). The Director also offered the above-mentioned certified copies of records in several criminal cases wherein various circuit courts had entered bond forfeiture judgments against Appellant (LF 64, 107-187; Tr. 2, 6-11). The certified criminal records show the following bond forfeiture judgments against Appellant:

> *State v. Cesar Elias-Reyes*, Newton Co. Cir. Ct., Case No. 15NW-CR00782. On December 16, 2015, the court entered judgment against the general bail bond agent Bryan Travis Robison in the amount of $3,000.00
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> *State v. John D. Brooks*, Jackson Co. Cir. Ct., Case Nos. 140006078, 140006079, and 140006080. On March 24, 2016, the court entered a bond forfeiture judgment against the surety on the bond,

Bryan Robison, in the amount of $2,000.00 in each of the three cases, totaling $6,000.00.

State v. Jacob D. Winkleman, Vernon Co. Cir. Ct., Case No. 11VE-CR00290-011. On April 1, 2016, the court filed its bond forfeiture judgment against surety Bryan T. Robison, in the amount of $10,000.00.

State v. Zachary G. Poelma, Jasper Co. Cir. Ct., Case No. 15AO-CR00580. On June 20, 2016, the court entered a bond forfeiture judgment against the surety on the bond, Bryan Robison Bonding, in the amount of $5,000.00.

(LF 107-187; Tr. 2, 6-11).

In response, Appellant indicated, as to the certified records offered by the Director, that he had no objection (Tr. 8). Appellant amended, "[w]ell, my objection to them is to relevance, but it's pro forma" (Tr. 8) and said, "[d]oesn't matter since there's a constitutional issue, but they are what they are" (Tr. 9). The court received the certified criminal records into evidence (Tr. 2, 8-10). In response, Appellant indicated that "the AHC has no jurisdiction over constitutional issues" and "[t]his was pled and is brought before this Court as a constitutional issue" (Tr. 12); he did not specifically mention § 374.750, RSMo 2000, to the circuit court during the argument (Tr. 2-13).

On October 28, 2016, the Cole County Circuit Court issued its Judgment and Order quashing the Preliminary Order in Mandamus and denying the Petition in Mandamus (LF 3, 200). On November 7, 2016,

Appellant filed his Notice of Appeal in the Cole County Circuit Court seeking review in this Court based upon his claim as to the alleged unconstitutionality of a statute (LF 3, 201-205). On May 30, 2017, following briefing in this Court, this Court transferred the case, prior to opinion, to the Court of Appeals, Western District. *State ex rel. Bryan T. Robison v. Dir. of Dep't of Ins., Fin. Insts. and Prof'l Reg'n*, No. SC96031 (docket sheet). The Court of Appeals, Western District, heard oral argument in the case on August 16, 2017. *State ex rel. Bryan Robison v. Dir. of Dep't of Ins., Fin. Insts. and Prof'l Reg'n*, No. WD80793 (docket sheet). On August 29, 2017, the Court of Appeals, Western District, issued its opinion. *Id.*

On September 13, 2017, Appellant sought rehearing or transfer in the Court of Appeals, Western District. *Id.* That motion was denied. *Id.* On October 10, 2017, Appellant filed his Application for Transfer in this Court. *State ex rel. Bryan Robison v. Dir. of Dep't of Ins., Fin. Insts. and Prof'l Reg'n*, No. SC96719 (docket sheet). This Court transferred the case on October 31, 2017. *Id.*

Argument

I. Standard of review

"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." *State ex rel. Tivol Plaza, Inc. v. Missouri Commission on Human Rights, et al.*, 527 S.W.3d 837, 841 (Mo. banc 2017), *quoting United States Department of Veterans Affairs v. Boresi*, 396 S.W.3d 356, 358-59 (Mo. banc 2013). "An appellate court reviews the denial of a petition for a writ of mandamus for an abuse of discretion. An abuse of discretion in denying a writ occurs when the circuit court misapplies the applicable statutes." *Id*.

II. Appellant's constitutional claim is not preserved

In his Point Relied On, Appellant asserts that he "ha[d] a right to renew his license notwithstanding the provisions of § 374.750" because under the 14th Amendment to the United States Constitution and Article I, § 10 of the Missouri Constitution, "professional licenses are property" and "procedural due process … is required before the government may deprive anyone of his or her professional license" (App. Sub. Br. 11).

Appellant's Point Relied On does not say how or why § 374.750 unconstitutionally deprived him of due process. More particularly, he does not explain how § 374.750, which, among other things, allows the Director to refuse to renew a license, *see* Section IV.A., *infra*, stands in the way of that process. And because he identifies no infirmity in the statute, this tends to suggest not only a lack of preservation, but that Appellant is merely raising a due process claim that he was denied notice and an opportunity to be heard.

Plus, as noted in Respondent's Statement of Facts, *supra*, Appellant argued in the circuit court regarding the Director's discretion and due process, but never once mentioned § 374.750 or why, exactly, it is allegedly unconstitutional (Tr. 2-13).

Under Article V, § 3 of the Missouri Constitution, the Missouri Supreme Court has exclusive jurisdiction over, *inter alia*, cases involving the validity of a statute. That said, "[t]his Court's exclusive appellate jurisdiction is not invoked simply because a case involves a constitutional issue." *McNeal v. McNeal-Sydnor*, 472 S.W.3d 194, 195 (Mo. banc 2015). Likewise, "a party's mere assertion that a statute is unconstitutional does not deprive the court of appeals of jurisdiction." *State v. Perdomo-Paz*, 471 S.W.3d 749, 763 n.3 (Mo. App. W.D. 2015). Rather, "this Court's exclusive appellate jurisdiction is invoked when a party asserts that a state statute directly violates the constitution either facially or as applied." *McNeal*, 472 S.W.3d at 195, *citing Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907, 912 (Mo. banc 1997).[2]

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[2] Appellant appears to raise an as-applied challenge, *i.e.*, he maintains that § 374.750 is unconstitutional as applied to him, though he does not explain how. For a facial challenge to the statute, Appellant would have to show that the statute could not be applied constitutionally under any set of circumstances. *State v. Perry*, 275 S.W.3d 237, 240, 243 (Mo. banc 2009). Appellant would be hard-pressed to mount such a challenge here; § 374.750 permits the Director to refuse to issue a license, among other things, and Appellant admits that "[r]efusal to issue a license is not an issue" (App. Sub. Br. 12).

"The allegation concerning the statute's constitutional validity must be real and substantial for jurisdiction to vest in the Supreme Court." *State v. Perdomo-Paz*, 471 S.W.3d at 763 n. 3. A constitutional claim "is[ ] … substantial when, upon preliminary inquiry, the contention discloses a contested matter of right, involving some fair doubt and reasonable room for controversy; but if such preliminary inquiry discloses the contention is so obviously insubstantial and insufficient, either in fact or law, as to be plainly without merit and a mere pretense, the claim may be deemed merely colorable." *Id.*, *quoting State v. Stone*, 926 S.W.2d 895, 898 (Mo. App. W.D. 1996) (internal quotation omitted).

Appellant's claim is merely colorable. As noted, Appellant's Point Relied On formulates no reasons as to why § 374.750 is unconstitutional; Appellant simply claims that a license cannot be taken away without procedural due process (App. Sub. Br. 11). Section 374.750 addresses an applicant's notice and an opportunity to be heard ("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"). Notice and opportunity to be heard being the very essence of procedural due process, *see* Section VI.C., *infra*, it is difficult to ascertain how § 374.750 unconstitutionally deprives Appellant of anything. Indeed, Appellant received notice in the Refusal Order in

conformance with § 374.750 and it included a notice that instructed Appellant of his right to request a hearing (LF 10-20, especially LF 19).[3]

Appellant's preservation problems continue with his discussion of the alleged constitutional question. Under the heading, "Due Process Issue," Appellant sets out more than half a page that is lifted directly and practically verbatim from his Statement of Facts. *Compare* App. Sub. Br. 13-14 *with* App. Sub. Br. 7-8. He follows with a summary of *Gurley v. Missouri Bd. of Private Investigator Examiners,* 361 S.W.3d 406 (Mo. banc 2012), a lengthy block quote from *Stone v. Missouri Dep't of Health and Senior Services*, 350 S.W.3d 14 (Mo. banc 2011), and the conclusion, "[u]nlike 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" (App. Sub. Br. 15). Appellant's discussion of due process basically ends there (App. Sub. Br. 15-16).

"To properly brief a case, an appellant is required to develop the issue raised in the point relied on in the argument portion of the brief." *Gardner v. Bank of America, N.A.*, 466 S.W.3d 642, 649 (Mo. App. E.D. 2015), *quoting Kuenz v. Walker*, 244 S.W.3d 191, 194 (Mo. App. E.D. 2007). "If a party does not support contentions beyond conclusory statements, the point is deemed abandoned." *Gardner*, 466 S.W.3d at 649; *see also Coleman v. Gilyard*, 969 S.W.2d 271, 274 (Mo. App. W.D. 1998), *quoting Luft v. Schoenhoff*, 935 S.W.2d 685, 687 (Mo.App. E.D. 1996) ("[i]f a party fails to support a

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[3] *Compare* the Notice portion of the Refusal Order, LF 19, *with* § 621.120, RSMo 2000.

contention with relevant authority or argument beyond conclusions, the point is considered abandoned."). *See generally*, Missouri Supreme Court Rule 84.04(e); *Thummel v. King*, 570 S.W.2d 679 (Mo. banc 1978). "It is not the duty of an appellate court to become an advocate for the appellant and search the record for error." *Conaway v. State*, 912 S.W.2d 92, 94 (Mo. App. S.D. 1995). Further, it is not fair to a respondent to have to divine an appellant's undeveloped contentions and then respond to them in the hopes that those guesses are correct. *See Thummel v. King*, 570 S.W.2d at 686 (explaining, as to points relied on, their importance in terms of "giving notice to the party opponent of the precise matters which must be contended with and answered" and noting that "[a]bsent that, it is difficult, at the very least, for respondent's counsel to properly perform his briefing obligation" and it is "unfair to the other party to the appeal").

Appellant's procedural due process argument suffers from such briefing deficiencies. Appellant has basically inserted a section from his Statement of Facts into the argument section, without showing why those facts matter or how they should interact with the law to yield a result in his favor. Appellant then does nothing more than summarize a case and provide a block quote from another, and declares, without any analysis, that his cited case is "on point and dispositive" (App. Sub. Br. 15). This preserves nothing for review. *See Gardner*, 466 S.W.3d at 649 ("Appellants' argument consists of a few conclusory statements followed by block quotations of case law. Appellants do not explain how the case law applies to their case, or how the case law supports their claim of error."). Consequently, Appellant's constitutional

claim is not preserved and this Court should decline to consider it or, if it does, it should consider it for plain error only under Missouri Supreme Court Rule 84.13.[4]

III. Relevant bail bond statutes and rule

Should the court overlook these preservation issues, Appellant challenges the constitutionality of Section § 374.750, RSMo 2000,[5] on the grounds that its application violated his procedural due process rights. That section provides as follows:

> 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, RSMo.

Section 374.750 is part of the Professional Bail Bondsman and Surety Recovery Agent Licensure Act, and several other sections within that Act address bail bond agent licensing and provide context to § 374.750. For

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[4] That Appellant can only summarize and block quote two cases (*Gurley* and *Stone*) – one where the court found the procedural due process issue was moot and another involving an existing license, not an applicant seeking license renewal (App. Sub. Br. 14-15), *see* Section VII.A., *infra* – also suggests that the claim is not real or substantial, but merely colorable.

[5] All further references to § 374.750 are to RSMo 2000.

example, § 374.702.1[6] provides, "No person shall engage in the bail bond business as a bail bond agent or general bail bond agent without being licensed as provided in sections 374.695 to 374.775." Section 374.715 gives further detail regarding the required qualifications to obtain or renew a bail bond agent license:

> 1. Applications for examination and licensure as a bail bond agent or general bail bond agent shall be in writing and on forms prescribed and furnished by the department, and shall contain such information as the department requires. Each application shall be accompanied by proof satisfactory to the department that the applicant is a citizen of the United States, is at least twenty-one years of age, has a high school diploma or general education development certificate (GED), is of good moral character, **and meets the qualifications for surety on bail bonds as provided by supreme court rule**. Each application shall be accompanied by the examination and application fee set by the department. Individuals currently employed as bail bond agents and general bail bond agents shall not be required to meet the education requirements needed for licensure pursuant to this section.
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> 2. In addition, each applicant for licensure as a general bail bond agent shall furnish proof satisfactory to the department

[6] This and all further statutory references are to RSMo Supp. 2013, unless otherwise indicated.

> that the applicant or, if the applicant is a corporation, that each officer thereof has completed at least two years as a bail bond agent, **and that the applicant possesses liquid assets of at least ten thousand dollars, along with a duly executed assignment of ten thousand dollars to the state of Missouri**. The assignment shall become effective upon the applicant's violating any provision of sections 374.695 to 374.789. The assignment required by this section shall be in the form and executed in the manner prescribed by the department. The director may require by regulation conditions by which additional assignments of assets of the general bail bond agent may occur when the circumstances of the business of the general bail bond agent warrants additional funds. However, such additional funds shall not exceed twenty-five thousand dollars.

(Emphasis supplied).

Section 374.720.1, RSMo 2000, discusses bail bond licensing, too:

> Each applicant for licensure as a general bail bond agent, **after complying with this section and the provisions of section 374.715**, shall be issued a license by the department unless grounds exist under section 374.755 for denial of a license.

(Emphasis supplied).

Several other sections address bail bond agent licensing. Section 374.730 provides:

> All licenses issued to bail bond agents and general bail bond agents under the provisions of sections 374.700 to 374.775 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.

Section 374.760, RSMo 2000, provides:

> Each general bail bond agent shall file, between the first and tenth day of each month, sworn affidavits with the department stating that there are no unsatisfied judgments against him. Such affidavits shall be in the form and manner prescribed by the department.

Section 374.763.1 provides:

> If any final judgment ordering forfeiture of a defendant's bond is not paid within a six-month period of time, the court shall extend the judgment date or notify the department of the failure to satisfy such judgment. The director shall draw upon the assets of the surety, remit the sum to the court, and obtain a receipt of such sum from the court. The director may take action as provided by section 374.755, regarding the license of the surety and any bail bond agents writing upon the surety's liability.

Finally, Missouri Supreme Court Rule 33.17 sets forth qualifications for surety on bail bonds; it provides:

> A person shall not be accepted as a surety on any bail bond unless the person:

* * *

(f) Has no outstanding forfeiture or unsatisfied judgment thereon entered upon any bail bond in any court of this state or of the United States.

Read together, these statutes and Missouri Supreme Court Rule 33.17 give shape to the bail bond licensing scheme in this state.

IV. Mandamus is inappropriate

Instead of filing an appeal with the Administrative Hearing Commission ("Commission") to challenge the Director's decision to issue the Refusal Order, Appellant filed a Petition in Mandamus in circuit court (LF 5-9).

"The extraordinary relief of mandamus has limited application." *Jones v. Carnahan*, 965 S.W.2d 209, 212 (Mo. App. W.D. 1998). It is reserved for those who seek enforcement of a clear, unequivocal, and specific right, *State ex rel. Mo. Growth Ass'n v. State Tax Comm'n*, 998 S.W.2d 786, 788 (Mo. banc 1999), and who have no other adequate legal remedy. *State ex rel. J. C. Nichols Co. v. Boley*, 853 S.W.2d 923, 924 (Mo. banc 1993).

The use of the writ is appropriate "to prevent great injury or injustice." *State ex rel. Red Cross Pharmacy, Inc. v. Harman*, 423 S.W.3d 258, 262 (Mo. App. W.D. 2013), *quoting State ex rel. Farley v. Jamison*, 346 S.W.3d 397, 399 (Mo. App. E.D. 2011). Mandamus is an "unreasoning writ [that] is reserved for extraordinary emergencies." *State ex rel. Meyer v. Ravenhill*, 20 S.W.3d 543, 545 (Mo. App. W.D. 2000). Accordingly, "[m]andamus is a discretionary writ, and no right exists to have the writ issue." *State ex rel. Mason v. County*

Legislature, 75 S.W.3d 884, 887 (Mo. App. W.D. 2002). "The object of a writ of mandamus is 'not to supercede but to supply the want of a legal remedy.'" *St. Louis Bd. of Election Commissioners v. McShane*, 492 S.W.3d 177, 180 (Mo. App. E.D. 2016), *quoting Kelley v. Mitchell*, 595 S.W.2d 261, 266-67 (Mo. banc 1980).

"A party seeking the writ must allege and prove that it had an unequivocal, clear specific right to the thing claimed." *State ex rel. Red Cross Pharmacy*, 423 S.W.3d at 262, *quoting State ex rel. Farley*, 346 S.W.3d at 399. Thus, "[m]andmus will only issue when there is an unequivocal showing that the public official failed to perform a ministerial duty imposed by law." *Jones*, 965 S.W.2d at 213. That said, while a litigant must show the "existence of a clear, unequivocal, and specific right to enforce an act required by law, the Court may not coerce the performance of an unlawful act." *State ex rel. Sayad v. Zych*, 642 S.W.2d 907, 911 (Mo. banc 1982).

"To determine whether the right to mandamus is clearly established and presently existing, the court examines the statute under which the relator claims the right…. If the statute involves a determination of facts or a combination of facts and law, a discretionary act rather than a ministerial act is involved and this discretion cannot be coerced by the courts." *Jones*, 965 S.W.2d at 213 (internal citation omitted). Therefore, "[t]he purpose of mandamus is to execute and not to adjudicate." *State ex rel. Mason*, 75 S.W.3d at 887.

A. No clear, ministerial duty

Against this legal backdrop, the difficulties with Appellant's request for mandamus relief come into sharper focus. Again, Appellant argues that § 374.750 is unconstitutional (App. Sub. Br. 11); that statute provides, in relevant part: "**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" (emphasis added).

Appellant fails to identify any ministerial duty imposed by law that the Director failed to do. To the contrary, the statute under which Appellant claims a right (or, at least the statute that he is challenging as unconstitutionally standing in the way of that right, *see* Section IV.B., *infra*), says that "[t]he Department may refuse to … renew" – the exact opposite of what Appellant claims the Director must automatically do – renew his license. Section § 374.750. Appellant's claim to mandamus relief fails for this reason alone.

Appellant, however, suggests that mandamus is appropriate because the renewal of his license was mandatory under § 374.730 (App. Sub. Br. 18-20). That statute provides:

> All licenses issued to bail bond agents and general bail bond agents under the provisions of sections 374.700 to 374.775 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.

In his Point Relied On (App. Sub. Br. 11), Appellant does not mention this statute or even hint that it might be the basis of the ministerial duty he claims the Director failed to carry out; his claim on this score is therefore not preserved. *Coleman v. Missouri Secretary of State*, 313 S.W.3d 148, 152 (Mo. App. W.D. 2010) (Missouri Supreme Court Rule 84.04(c) "requires that the argument be limited to those errors included in the point relied on.").[7]

Even if he had preserved this claim, though, it is unavailing. While the "shall" language in § 374.730 is arguably mandatory, it appears to be mandatory in reference to the timing of renewal (*i.e.*, "biennially"); § 374.730 also provides that the renewal "shall be in the form and manner prescribed by the department." Moreover, § 374.730 talks about all bail bond licenses issued "under the provisions of sections 374.700 to 374.775" and those sections include § 374.715, which sets forth, among other requirements, the "qualifications for surety on bail bonds as provided by supreme court rule." Thus, licenses renewed are renewed pursuant to the bail bond statutes which incorporate by reference the requirements of Missouri Supreme Court Rule 33.17. Far from mandating automatic license renewal, § 374.730 dovetails

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[7] Appellant did not mention this particular statute in his Petition in Mandamus or in his argument in circuit court, either (LF 5-9, 21-24; Tr. 2-13), which also means that his claim is not preserved. *Dieser v. St. Anthony's Medical Ctr.*, 498 S.W.3d 419, 432 (Mo. banc 2016), *quoting State v. Davis*, 348 S.W.3d 768, 770 (Mo. banc 2011) ("An issue that was never presented to or decided by the trial court is not preserved for appellate review.").

with § 374.750, which allows the Director to refuse to renew where the applicant has not met the statutory requirements.

But Appellant, by his own admission, did not meet the qualifications set forth in Missouri Supreme Court Rule 33.17, as incorporated by § 374.715. Indeed, at the hearing in circuit court, Appellant indicated, "[w]hat we have in this case is it is undisputed that Mr. Robison has outstanding judgments on his bonds." (Tr. 5). Appellant also agreed with the court that he had no objection when the Director offered certified copies of unsatisfied bond forfeiture judgments against Appellant into evidence (Tr. 8-10; LF 107-187). Further, in the months preceding the filing of his Renewal Application with the Department, Appellant, as is required by statute, *see* § 374.760, RSMo 2000, filed several affidavits, some detailing and admitting outstanding bond forfeiture judgments against him (LF 99-106). Refusal to renew Appellant's license was thus appropriate under bail bond statutes that do not contravene the United States or Missouri Constitutions; Appellant's cited authorities, *Gurley* and *Stone*, do not say otherwise. *See* Section VII.A., *infra*.

B. No direct constitutional challenge in mandamus

Absent a clear, ministerial duty, Appellant's argument for mandamus relief, as best Respondent can discern it,[8] is that he has an absolute right to

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[8] At the circuit court argument on his Petition in Mandamus, Appellant maintained, "This is an action in mandamus seeking an order that the director renew a license. The debate in this case, if I may phrase it that way, is **whether the director has, essentially, any discretion in choosing**

have his general bail bond agent license renewed, that § 374.750 unconstitutionally stands in the way of that right, and that § 374.750 is unconstitutional because it does not provide a licensee proper notice and opportunity to be heard (App. Sub. Br. 12-20).

But § 374.750, as noted, provides at the outset that "department **may** refuse to issue or renew any license" (emphasis added); Appellant acknowledges as much: he says that § 374.750 "allows the department to refuse to issue or renew a required license" (App. Sub. Br. 12). Thus, in order to find the clear duty required for mandamus relief, Appellant must of necessity be arguing that the Department, at some point prior to July 29, 2016, had to declare § 374.750 unconstitutional in order to unearth the duty to renew Appellant's license. Stated differently, Appellant apparently expected the Director to find an alleged constitutional infirmity in § 374.750, and ignore the statute's permissive language authorizing the refusal to renew a general bail bond agent license in favor of automatic renewal of licenses. Not only is this logic tortured (and wrong), it is also completely inappropriate for mandamus relief.

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not to renew a license." (Tr. 3) (emphasis added). In his Petition in Mandamus, similarly, Appellant indicated that he had presented a license renewal application to the Department that "was complete and proper in all respects" (LF 6) and that he was therefore entitled to renewal of his license (LF 6-9). Finally, in his Point Relied On, Appellant maintains that "a general bail bond agent has a right to renew his license" (App. Sub. Br. 11).

In *State ex rel. Seigh v. McFarland*, 532 S.W.2d 206, 207 (Mo. banc 1976)), Seigh and another defendant were charged by complaint with drug crimes. *Id.* At the preliminary hearing, the magistrate court found no probable cause to bind over the defendants and ordered them discharged from custody. *Id.*) The prosecutor then immediately filed a new verified complaint once again charging the defendants with the same drug crimes. *Id.*) The clerk of court issued arrest warrants for appellants and they were rearrested. *Id.*) The clerk did so based upon Missouri Supreme Court Rule 21.08 which at that time provided, in essence, that whenever the clerk received a verified complaint in writing, the clerk had a duty to issue an arrest warrant. *Id.*) The defendants 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 first looked to whether mandamus relief was appropriate in this situation, and concluded that it was not. *Id.* at 208.) Noting that mandamus may only be used to enforce ministerial duties, where "the right to action requested has already been established," *id.*), *citing* MoBar CLE, Missouri Appellate Practice and Extraordinary Remedies (Second Edition), Chapter 8, § 8.10 (1974), this Court held that "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.*) In other words,

> [t]he view has been taken in some cases that since mandamus lies only to enforce a plain ministerial duty, and that since a plain ministerial duty cannot exist which is made to appear only by declaring a statute unconstitutional, the writ will not issue if it is necessary in order to fix upon the respondent the duty sought to be enforced to declare a statute in conflict with such alleged duty unconstitutional.

Id.) at 209, *quoting* 52 Am.Jur.2d, Mandamus, § 95, p. 419.[9] Ultimately, then, "[m]andamus will not lie to directly challenge and thereby determine the validity or constitutionality of an ordinance or statute respecting the duty involved." *State ex rel. City of Crestwood v. Lohman*, 895 S.W.2d 22, 27 (Mo. App. W.D. 1995) (City could not obtain mandamus relief to make the Director of Revenue collect a certain local tax where Missouri statute provided that the City could not place and should not have placed the tax on the ballot; City had argued the statute was unconstitutional); *State ex rel. Mason*, 75 S.W.3d at 888 (relators could not adjudicate in a mandamus action the constitutionality of the requirement in the Jackson County Charter that all candidates for public office must have been registered voters for the three

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[9] Appellant attempts to distinguish *State ex rel. Seigh v. McFarland*) with the mere conclusion that "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" (App. Sub. Br. 19). Since neither *Gurley* nor *Stone* relate to actions in mandamus, though, it is difficult to see how those cases controvert or explain *State ex rel. Seigh v. McFarland*) at all.

years immediately preceding the election); *cf. St. Louis County Bd. of Election Commissioners*, 492 S.W.3d at 183-84 (voters prevented from voting at their polling places because of a lack of ballots could challenge § 115.407 regarding times that polling places could be open as applied to them; "[t]here is a difference between a statute that is wholly unconstitutional, and thus void *ab initio* – for instance one that cannot be constitutionally applied in any circumstance – and a statute that is otherwise constitutional but rendered unconstitutional when applied to a particular person or group of people.").[10]

Appellant demonstrates the inappropriateness of mandamus relief in this situation in his Point Relied On: "the trial court erred … because a general bail bond agent has a right to renew his license **notwithstanding the provisions of § 374.750**" (App. Sub. Br. 11) (emphasis added). Thus, the only way Appellant gets an opportunity for relief in the mandamus scenario is if the Director erroneously failed to find § 374.750 unconstitutional and failed to renew Appellant's license in spite of the alleged

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[10] Appellant claims that *St. Louis County Bd. of Election Commissioners* supports him because "[i]n both that case and this one the Constitutional issues are indisputable" (App. Sub. Br. 20). Putting aside the hyperbole, Appellant then concludes that, "[u]pon excision of the ability to deny renewals, § 374.755 RSMo. is constitutionally adequate" (App. Sub. Br. 20). This is the first time – ever – in this litigation that Appellant has raised the constitutionality of § 374.755 as opposed to that of § 374.750; any such claim is obviously not preserved and should not be considered by this Court.

statutory illegality. But relief for that type of claim does not lie in mandamus.

Indeed, relief for Appellant's claim **cannot** lie in mandamus. Appellant would have the Director ignore the language in § 374.750, that the department may refuse to renew a license, in favor of automatic renewal. But, as noted, Appellant has admitted time and again the unsatisfied bond forfeiture judgments against him; he filed affidavits with the Department admitting some of them (Tr. 8-10, LF 99-106). Manifestly, Appellant was not qualified to have his general bail bond agent license renewed under Missouri Supreme Court Rule 33.17, as required by § 374.715.1, yet Appellant argues that the Director is at fault for declining to renew a license for which Appellant was not qualified. On mandamus, a "Court cannot coerce the performance of an unlawful act," *State ex rel. Sayad*, 642 S.W.2d at 911, but that is exactly what Appellant would have this Court do by ordering the Director to renew a license for an applicant (Appellant) who concedes that he is not qualified to hold that license under Missouri Supreme Court Rule 33.17(f) because of unsatisfied bond forfeiture judgments.

C. Failure to exhaust administrative remedies

"The doctrine of exhaustion of administrative remedies requires that where a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the courts will act." *State ex rel. Oakwood Manor Nursing Ctr. v. Stangler*, 809 S.W.2d 90, 92 (Mo. App. W.D. 1991), *quoting Sperry Corp. v. Wiles*, 695 S.W.2d 471, 472 (Mo. banc 1985). The doctrine "serves to conserve judicial resources and prevent premature

interruption of the administrative process." *State ex rel. Oakwood Manor Nursing Ctr.*, 809 S.W.2d at 92. "Agencies have special expertise," *Coleman*, 313 S.W.3d at 154, and the exhaustion doctrine allows agencies to correct errors, potentially resolve issues without court involvement, and develop a factual record. *Id.*; *Shelton v. Farr*, 996 S.W.2d 541, 543 (Mo. App. W.D. 1999); *see also St. Louis Metro. Towing v. Director of Revenue*, 450 S.W.3d 303, 307 (Mo. App. W.D. 2014). "A factual record can be more fully developed by pursuing the designated channels for relief with the agency, or a matter may be resolved by the agency, rendering review by the court unnecessary." *Coleman*, 313 S.W.3d at 154.

By declining to take his case to the Commission and instead seeking a writ, Appellant failed to exhaust administrative remedies. Appellant had this administrative procedure available to him,[11] but he chose not to pursue it.[12] He may not seek relief in the courts having bypassed the statutory

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[11] Appellant received written notice of this administrative procedure under § 621.120 in the Refusal Order (LF 10-20, especially LF 19).

[12] Appellant declined to pursue the administrative remedy available to him even though he received the notice regarding that procedure in sufficient time to do so. As Appellant admits, he received the Refusal Order that contained the Notice that conforms to § 621.120 on August 4, 2016 (LF 6). Since the Refusal Order was mailed on July 29, 2016, Appellant had thirty days, or until August 29, 2016, to file a Complaint with the Commission. Indeed, Appellant filed his Petition in Mandamus within that time frame, on August 17, 2016 (LF 1).

procedure provided for review. *See Shelton v. Farr*, 996 S.W.2d at 542-43 (finding that Shelton impermissibly "attempted to bypass the AHC and the procedures mandated by the General Assembly for judicial review" and rejecting the contention that Shelton could do so because the issues in his case involved only issues of law); *Coleman*, 313 S.W.3d at 153-58 (Coleman "failed to exhaust his administrative remedies when he withdrew his request for a hearing."); *Callaway Farrowing, LLC v. State ex rel. Friends of Responsible Agriculture*, No. WD80350, slip op. at 9-10 (Mo. App. W.D. Dec. 5, 2017) ("Because the Friends organization has an available statutory remedy to obtain judicial review of the [Clean Water] Commission's decision, it was not entitled to seek judicial review by filing a petition for writ of mandamus.").

V. Contested versus non-contested cases

Appellant claims in this Court that any Commission hearing in his case would have been nothing more than "window dressing" (App. Sub. Br. 17, *citing Sanders v. City of Columbia*, 481 S.W.3d 136, 143-44 (Mo. App. W.D. 2016)), "because a contested case requires development of a record that will ultimately be relied upon by the person or entity making the final decision" (App. Sub. Br. 17). Appellant raises this issue for the first time on appeal to this Court and it is therefore not preserved. Assuming this Court were to review despite the lack of preservation, and based upon a review of the contested versus non-contested case distinction, had Appellant availed himself of a hearing at the Commission, that would have been a contested case. And, because Appellant had contested case review available to him, he

was required to exhaust that administrative remedy before seeking circuit court relief.

A. Lack of preservation

In the trial court, Appellant attempted to justify seeking a writ of mandamus and to excuse his consequent failure to seek Commission review by arguing, as to the Commission, that "[t]here are no administrative procedures to exhaust" (LF 190). Appellant reached this conclusion based upon two theories: 1) that the Director's "suggestion that Relator should have appealed this case to the … Commission invites violation of the Separation of Powers doctrine under the Missouri Constitution" (LF 190), and 2) because the "Commission is not empowered to determine the constitutionality of statutes so a party is not required to raise those issues at that level" (LF 190, *citing Tadrus v. Missouri Bd. of Pharmacy*, 849 S.W.2d 222, 225 (Mo App. W.D. 1993) and *Duncan v. Missouri Bd. of Architects, Professional Engineers and Land Surveyors*, 744 S.W.2d 524, 531 (Mo. App. E.D. 1988)).

Neither theory supports Appellant's decision to bypass the Commission in favor of (inappropriately) seeking mandamus relief. As to his first theory, Appellant cites *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69 (Mo. banc 1982), for the proposition that any suggestion that Appellant should have first sought relief at the Commission "invites violation of the Separation of Powers provision of the Missouri Constitution, Art. II, § 1" (App. Sub. Br. 16). Not only does *State Tax Comm'n* not say that (it found that statutes that purported to authorize the Commission to determine the validity of rules, not licensing appeals, to be unconstitutional under the

separation of powers doctrine), Appellant makes no mention of this theory in his Point Relied On, so any such argument is waived. *Coleman*, 313 S.W.3d at 152 (Missouri Supreme Court Rule 84.04(c) "requires that the argument be limited to those errors included in the point relied on.").

As to his second theory, Appellant cites *Tadrus v. Missouri Bd. of Pharmacy*, 849 S.W.2d 222 (Mo. App. W.D. 1993) for the proposition that it permits him to bypass the Commission (App. Sub. Br. 16). This reliance is misplaced. In *Tadrus*, the Court of Appeals, Western District, confronted the question of whether Tadrus had preserved a constitutional claim for appellate review. *Id*. at 225. Tadrus had raised his constitutional issue before the circuit court, but he did not raise it at the Commission. *Id*. The Western District found that "[s]ince an administrative hearing commission is not empowered to determine the constitutionality of statutes, a party is not required to raise those issues at that level." *Id*. Thus the Court held that while Tadrus' claim was not raised in the administrative forum, it was raised at the circuit court level (the earliest level where it could be considered) and it was therefore preserved. *Id*.

From this Appellant has extrapolated that, since the Commission is not empowered to consider constitutional questions, he can simply skip administrative review altogether and go straight to circuit court. That is not what *Tadrus* says. *Tadrus* addresses the preservation of claims for appellate purposes and indicates that if a claim cannot be considered in a particular forum as a matter of law, there is no reason to raise it in that forum, though the claim must still be raised at the earliest opportunity. *Id*. *Tadrus* thus

teaches that, after making a record in a contested case in the Commission, the licensee, Tadrus, could raise his constitutional challenge. *Id.* *Tadrus* does not give a licensee carte blanche to bypass the Commission for a forum of one's own choosing.[13]

On transfer to this Court, though, Appellant's excuses for having skipped Commission review have changed. To be sure, he still has no use for the Commission, but for different reasons. Whereas in the trial court he made the above separation of powers and *Tadrus* arguments, now he has parasitically reached to the concerns raised in *Nowden v. Div. of Alcohol and Tobacco Control, Mo. Dep't of Public Safety,* No. WD79897 (Mo. App. W.D. April 25, 2017) (transferred on October 31, 2017, No. SC96496) and asserts that "decisions of the … Commission are illusory in a case like this one" and are, therefore, "mere 'window dressing'" (App. Sub. Br. 17, *citing Sanders*, 481 S.W.3d at 143-44 and *Nowden*). In invoking *Sanders*' "window dressing" language, Appellant seems to allude to the distinction between contested and non-contested cases and, thus, is now trying to imply that he justifiably rejected a Commission appeal of his license renewal refusal on that basis.

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[13] Appellant also cites *Duncan v. Missouri Board of Architects, Professional Engineers and Land Surveyors*, 744 S.W.2d 524, 531 (Mo. App. E.D. 1988), for the same reason that he relies upon *Tadrus* (App. Sub. Br. 17). *Duncan* does not assist Appellant for the same reasons that his reliance on *Tadrus* is misplaced. *Duncan*, like *Tadrus*, does not sanction Commission avoidance; rather, it indicates that failure to raise a constitutional challenge at the administrative level does not affect preservation of the constitutional issue for purposes of appellate review. *Duncan*, 744 S.W.2d at 531.

"On transfer to this Court, an appellant may not 'alter the basis of any claim that was raised in the brief filed in the court of appeals." *Linzenni v. Hoffman*, 937 S.W.2d 723, 727 (Mo. banc 1997), *quoting* Missouri Supreme Court Rule 83.08; *see also*, *Blackstock v. Kohn*, 994 S.W.2d 947, 953 (Mo. banc 1999) ("The Blackstocks did not raise this claim before the court of appeals. This Court, therefore, may not review the claim."). Similarly, while a party may refine the analysis in its substitute brief before this Court, as compared to the brief filed in the Court of Appeals, *Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 114 n. 4 (Mo. banc 2015), a party cannot present entirely new issues or bases for claims. Yet that is precisely what Appellant seems to have done here. Appellant has maintained his earlier constitutional argument regarding separation of powers and his theory about the Commission's inability to consider constitutional issues, but he has tried to morph them into a post hoc attempt to justify bypassing the Commission by claiming that any such hearing would have been "illusory" (App. Sub. Br. 17).[14]

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[14] *Compare* App. Sub. Br. 17 *with* Tr. 12 ("The reason we're not at the AHC . . . the AHC has no jurisdiction over constitutional issues. This was pled and brought before this Court as a constitutional issue. The AHC cannot give relief. The AHC can't even consider the issue"), LF 190 (Relator's Brief in Support of Petition in Mandamus; raising only the separation of powers and *Tadrus* issues), and Appellant's Brief at 12-13, *State ex rel. Bryan Robison v. Dir. of Dep't of Ins., Fin. Insts. and Prof'l Reg'n*, No. WD80793 (raising only the separation of powers and *Tadrus* issues).

B. Classifying contested and non-contested cases

Should this Court overlook Appellant's failure to timely and properly raise the new issue he asserts here, this Court must consider the distinction between contested and non-contested cases. As noted, Appellant cites cases that cry out for contested versus non-contested case analysis though, interestingly, he does not really provide it; indeed, he does not even commit one way or the other as to whether his case is contested or non-contested (App. Sub. Br. 17).

"The classification of case[s] as 'contested' or 'noncontested' is not left to discretion of the agency but rather is to be determined as a matter of law." *Cade v. State*, 990 S.W.2d 32, 36 (Mo. banc 1999), *citing State ex rel. Valentine v. Board of Police Comm'rs of Kansas City*, 813 S.W.2d 955, 957 (Mo. App. W.D. 1991). A contested case is defined as "a proceeding before an agency in which legal rights, duties, or privileges of specific parties are required by law to be determined after hearing." *McCoy v. Caldwell County*, 145 S.W.3d 427, 428 (Mo. banc 2004), *quoting* § 536.010(2). "The 'law' referred to in this definition includes any ordinance, statute, or constitutional provision that mandates a hearing." *Id.*, *citing State ex rel. Yarber v. McHenry*, 915 S.W.2d 325, 328 (Mo. banc 1995).

"Contested cases provide the parties with an opportunity for a formal hearing with the presentation of evidence, including sworn testimony of witnesses and cross-examination of witnesses, and require written findings of fact and conclusions of law." *Furlong Companies, Inc. v. City of Kansas City*, 189 S.W.3d 157, 165 (Mo. banc 2006), *citing Hagely v. Board of Education of*

the Webster Groves School District, 841 S.W.2d 663, 668 (Mo. banc 1992). Thus, "[t]he relevant inquiry is not whether the party received a hearing, but whether a statute, ordinance, or constitutional provision required the agency to provide one." *450 N. Lindbergh Legal Fund, LLC v. City of Creve Coeur*, 477 S.W.3d 49, 54 (Mo. App. E.D. 2015); *Winter Brothers Material Co. v. County of St. Louis*, 518 S.W.3d 245, 253 (Mo. App. E.D. 2017); *see also Bodenhausen v. Missouri Board of Registration for Healing Arts*, 900 S.W.2d 621, 623 (Mo. banc 1995) ("Because Dr. Bodenhausen had a *right* to a hearing before discipline could be imposed, his case was 'contested'" (emphasis in original)).[15] Such formal hearings include procedural formalities like "notice of the issues, § 536.067; oral evidence taken upon oath or affirmation, § 536.070; the calling, examining and cross-examining of witnesses, § 536.070; the making of a record, § 536.070; adherence to evidentiary rules,

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[15] On this score, Appellant suggests that the Director could have renewed Appellant's general bail bond agent license and then "filed a complaint for discipline under § 374.755" (App. Sub. Br. 18). Ironically, had the Director done so, Appellant would have gotten a hearing at the Commission, the venue which he now otherwise eschews. Plus, the Director would have had to renew Appellant's license prior to attempting to discipline it, yet the Director was prohibited from doing so by § 374.715 and Missouri Supreme Court Rule 33.17(f) , under which Appellant was disqualified from licensure because he has outstanding bail bond forfeiture judgments. In this appeal from a denial of a writ, the same statute and rule preclude the relief Appellant originally requested of the courts, *i.e.*, renewal of his license.

§ 536.070; and written decisions including findings of fact and conclusions of law, § 536.090." *Cade*, 990 S.W.2d at 37, *citing Hagely*, 841 S.W.2d at 668. In order to seek judicial review of a contested case, a party must exhaust administrative remedies. *Impey v. Missouri Ethics Comm'n*, 442 S.W.3d 42, 47 (Mo. banc 2014).

Review of a contested case "is review by the trial court of the record created before the administrative body." *Furlong Companies*, 189 S.W.3d at 165. "The trial court's decision upon such review is appealable, but the appellate court also looks back to the record created before the administrative body." *Id.*, *citing City of Cabool v. Missouri State Board of Mediation*, 689 S.W.2d 51, 53 (Mo. banc 1985). *See generally* §§ 536.100-536.140 (regarding contested case review).

In contrast, "[n]on-contested cases do not require formal proceedings or hearings before the administrative body." *Furlong Companies*, 189 S.W.3d at 165, *citing Farmer's Bank of Antonia v. Kostman*, 577 S.W.2d 915, 921 (Mo. App. K.C.D. 1979). Thus, "[i]n the review of a non-contested decision, the circuit court does not review the administrative record, but hears evidence, determines facts, and adjudges the validity of the agency decision." *Furlong Companies*, 189 S.W.3d at 165, *citing Phipps v. School District of Kansas City*, 645 S.W.2d 91, 94-95 (Mo. App. W.D. 1982). *See generally* § 536.150 (regarding non-contested case review).

Ultimately, then, classification of a case as contested versus non-contested depends upon whether any hearing, with or without attendant

formality, occurs (though an opportunity for such a hearing must rest somewhere):

> The difference is simply that in a contested case the private litigant must try his or her case before the agency, and judicial review is on the record of that administrative trial, whereas in a non-contested case the private litigant tries his or her case to the court. Depending upon the circumstances, this difference may result in procedural advantages or disadvantages to the parties, but in either situation, the litigant is entitled to develop an evidentiary record in one forum or another.

Furlong Companies, 189 S.W.3d at 165.

Just because a hearing at the administrative level has been held, though, that "is not dispositive of whether … [a case] is a contested case as defined by section 536.010(4)." *Sanders*, 481 S.W.3d at 142. "Not all hearings are sufficient to comply with the requirements of the MAPA and thereby create a contested case." *Id.*, *quoting Wooldridge v. Greene County*, 198 S.W.3d 676, 684 (Mo. App. S.D. 2006).

In evaluating whether a hearing constitutes a contested case hearing, this Court has looked at whether the hearing had sufficient formality. *See, e.g., Strozewski v. City of Springfield,* 875 S.W.2d 905, 907 (Mo. banc 1994) (firefighter grievance procedure "provide[d] a method for communicating complaints through ascending levels of management," but the process lacked the formality required for those procedures to create a contested case). This Court has also looked to whether the ultimate decision-maker "has the final

decision-making authority" and whether the statute subjects the decision to any "gauge or criteria." *McCoy*, 145 S.W.3d at 428-29.

For example, in *McCoy*, two sheriff's deputies were fired. *Id*. at 427-28. The deputies requested a hearing, and the sheriff appointed a three-person board to review the reasons for the dismissals. *Id*. at 428. After a hearing at which witnesses testified, the board issued written findings that supported the sheriff's decision and the sheriff affirmed the dismissals of the deputies. *Id*.

Even though there was a "hearing" in *McCoy*, this Court held that the case was not a contested case hearing, because by statute, "[t]he sheriff will review the findings [of the board], and has the final decision-making authority." *Id*., *quoting* § 57.275.1, RSMo 2000. Because the statute did "not subject that decision [by the sheriff] to any gauge or criteria," the case was not contested. *Id*. at 428. This was because the sheriff could terminate or retain the deputies at his pleasure, regardless of what the board had found. *Id*. So even though there was a "hearing," the case was not a contested case for purposes of MAPA.

Kunzie v. City of Olivette, 184 S.W.3d 570 (Mo. banc 2006) is similar. There, the city fired an employee and the employee appealed. *Id*. at 571. The city's municipal code "created a personnel appeals board to review certain employment decisions." *Id*. at 572. However, the personnel appeals board was explicitly an "advisory body to hear and make written recommendation to the City Manager" regarding any employment action. *Id*., *quoting* Olivette Municipal Code No. 20.511. As was the case with *McCoy*, this Court found

that whatever the personnel appeals board did by way of review, the city manager ultimately was "vested with the ultimate decision making authority." *Id*. at 573. Further, the city manager's decision was "not subject to any 'gauge or criteria.'" *Id*., *quoting McCoy*, 145 S.W.3d at 428-29.

Finally, in *Sanders*, the City of Columbia's Internal Affairs Unit investigated Sanders after an incident involving a defendant who was injured in a holding cell. *Id*. at 140. The Internal Affairs Unit concluded that the allegations that Sanders violated various General Orders were unfounded. *Id*. The chief of police, however, was not bound by the Internal Affairs Unit's conclusions and he terminated Sanders' employment. *Id*. After appealing unsuccessfully to the chief and the city's human resources director, Sanders requested a hearing before Columbia's Personnel Advisory Board ("PAB"). *Id*. at 141. The PAB held a hearing and recommended that Sanders be terminated. The PAB then reported its findings to the city manager, pursuant to city code. *Id*.

The city manager issued findings of fact, conclusions of law and a final determination finding that Sanders should be terminated, though only upon some of the grounds raised against him. *Id*. Sanders then petitioned the circuit court for judicial review and the court reviewed the matter as a contested case. *Id*.

Ultimately, the Court of Appeals, Western District, determined that the circuit court erred and the matter should have been reviewed at the circuit court as a non-contested case. *Id*. at 140-45. While the PAB had held a hearing, and while the city manager had issued extensive findings of fact and

conclusions of law, ultimately the city manager, by city code, was not limited to the evidence before the PAB in making the ultimate employment decision. *Id*. at 142. Indeed, the PAB record "did *not* serve as an *exclusive* record to which the decision maker was limited in arriving at a final decision. Instead, the final decision-making authority was vested in the independent discretion of the City Manager." *Id*. at 143 (emphasis in original). The city manager could consider the PAB's record and recommendation, or not, and nothing in the code prohibited the city manager from considering matters that were not before the PAB. *Id*. Consequently, the city manager's "discretion was not subject to adequate gauge and criteria." *Id*. The Western District in *Sanders* put additional flesh on the bones of *McCoy*'s "gauge and criteria" in this way:

> Simply put, in order to achieve "contested case" status, the "hearing" portion of the grievance process must allow each party to be heard and to address the evidence of the opposing party that ultimately will be relied upon by the person or entity making the final decision. In other words, the result of the hearing must be "meaningful." Absent a hearing that, in some real sense, confines the final decision maker, the evidentiary hearing is nothing more than "window dressing," and any claimed due process afforded by such a hearing is fictional.
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> Guided by *McCoy* and *Kunzie*, if in the end the ultimate decision maker operates independently from the hearing (as is the case here), no meaningful hearing has been afforded, and the

grievance process cannot be considered a contested case proceeding. This is what our Supreme Court meant when it stated in *McCoy* and *Kunzie* that the ultimate decision maker must be subject to some "gauge or criteria."

Sanders, 481 S.W.3d at 144.

C. Any hearing for Appellant at the Commission would have been a contested case

Applying these principles to the facts here, a Commission hearing would have been a contested case hearing. Had Appellant appealed to the Commission, there would have been a proceeding before that Commission where Appellant's legal rights, duties or privileges would have been required to be determined by law after a hearing. Taking each component individually, the right, duty or privilege at issue in Appellant's case was whether he was entitled to a renewal of his general bail bond agent license. In particular, § 621.120, RSMo 2000,[16] provides that,

> **Upon refusal by any agency listed in section 621.045** to permit an applicant to be examined upon his qualifications for licensure or upon refusal of such agency to issue or renew a license of an applicant who has passed an examination for licensure or who possesses the qualifications for licensure without examination, **such applicant may file, within thirty days after the delivery or mailing by certified mail of written notice of such refusal to the applicant, a**

[16] All further references to § 621.120 are to RSMo 2000.

complaint with the administrative hearing commission. Such written notice of refusal shall advise such applicant of his right to file a complaint with the administrative hearing commission and have a hearing pursuant to this section. Such complaint shall set forth that the applicant has passed an examination for licensure or is qualified to be examined for licensure or for licensure or renewal without examination under the laws and administrative regulations relating to his profession and shall set out with particularity the qualifications of such applicant for same. Upon receipt of such complaint the administrative hearing commission shall cause a copy of said complaint to be served upon the agency by certified mail or by delivery of such copy to the office of the agency, together with a notice of the place of and the date upon which the hearing on said complaint will be held. **If at the hearing the applicant shall show that under the law he is entitled to examination for licensure or licensure or renewal, the administrative hearing commission shall issue an appropriate order to accomplish such examination or licensure or renewal, as the case may be**.

Section 621.120 (Emphasis supplied).

This statute is the "law" that requires a hearing; it manifestly applies to the Department because the Department is one of the agencies listed in

§ 621.045.[17] Hearings before the Commission provide many evidentiary and other formalities that are the hallmark of contested case hearings. *See, e.g.,* § 536.070.

Appellant does not dispute that sufficient evidentiary and other formalities exist at the Commission. Rather, Appellant argues (again, for the first time on appeal) that any Commission hearing would have been mere "window dressing" (App. Sub. Br. 17, *quoting Sanders*) because of the existence of § 374.051.1 and the discretion it grants to the Director. Appellant selectively quotes that portion of the statute relating to the Director's discretion, but the full text of the statute is set forth here:

> **Any applicant refused** a license or the **renewal of a license** by order of the director **under sections 374.755**, 374.787, and 375.141 **may file a petition with the administrative hearing commission** alleging that the director has refused the license. The administrative hearing commission shall conduct hearings and make findings of fact and conclusions of law in determining whether the applicant may be disqualified by statute.

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[17] As to § 621.120, Appellant argues that the Court of Appeals held that "Robison's failure to seek review before the … Commission was fatal to Robison's claim because § 621.120 RSMo., vests the administrative decision on issuing [sic] a license with the Commission …. In doing so the Court of Appeals missed a key point: the Director is not subject to 621.120" (App. Sub. Br. 17). Of course, the Director is "subject to" § 621.120 because the plain language of § 621.045 says so.

> 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.

Section 374.051.1 (emphasis added).

Appellant thus suggests that any Commission hearing would have been meaningless because the Director ultimately has discretion as to license refusal or renewal. Appellant confuses process, of which there was plenty at the Commission, with result and the Director's discretion to refuse Appellant's license renewal under § 374.051.1 and the mandate under § 374.715, § 374.755.1 and Missouri Supreme Court Rule 33.17(f).

Taking process first, the earlier part of § 374.051.1 actually affirms the arrangement under § 621.120, and indicates (with specific reference to § 374.755) that anyone refused a general bail bond agent license renewal has a right to file a petition with the Commission. Further, and importantly, § 621.120 provides that the Commission shall conduct a hearing and make findings and conclusions as to "whether the applicant may be disqualified by statute." This language dovetails perfectly with the general bail bond agent statutory scheme and § 374.715, wherein general bail bond agents may have automatic disqualifiers that bar licensure, for example, unsatisfied bail bond forfeiture judgments. Thus, nothing in § 374.051.1 allows the Director to truncate the constitutionally adequate process provided via § 621.120. And, of course, after any such Commission hearing, an applicant can file a petition for judicial review in the circuit court under §§ 536.100-536.140. In this case,

then, the only person who truncated what is otherwise constitutionally adequate process under Missouri's statutes was Appellant.

As to result, § 374.051.1 does give discretion to the Director. But that discretion is not without bounds. Unlike the city manager in *Sanders*, for example, who could ultimately terminate Sanders for any reason or no reason at all, *Sanders*, 481 S.W.3d 142-43, the Director's decision to issue the Refusal Order would have been reviewed and potentially constrained or rejected when considered by the Commission at any hearing. Put another way, had Appellant gone to the Commission, that body could have heard evidence that might have shown that the Director's conclusion that Appellant lacked the necessary qualifications under the law was inaccurate, either factually or legally, or was completely without basis in either fact or law.

In this way, the Director's discretion is channeled and tempered. The decision maker's decision would have therefore been subjected to sufficient "gauge and criteria," *McCoy*, 145 S.W.3d at 428-29, when the Commission looked behind the Director's decision to see if Appellant really did lack the necessary qualifications to have his general bail bond license renewed. And Appellant could have appealed any such Commission determination to the circuit court on a petition for judicial review under §§ 536.100-536.140.

Despite Appellant's selective quoting then, § 374.051.1 does not render a Commission hearing for a general bail bond agent a meaningless exercise.[18]

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[18] Actually, any Commission hearing under these facts may well have been meaningless, but not for any of the reasons raised by Appellant related to the contested versus non-contested case distinction. Rather, any hearing before

Likewise, Appellant's opportunistic attempt to paint the Director's discretion as being without limits by absenting himself from the very statutory procedures that provide checks and balances as against arbitrary or erroneous decisions by the Director fails.

D. Failure to exhaust administrative remedies, Part 2

By declining to take his case to the Commission, Appellant failed to exhaust administrative remedies, as is required for contested cases. *Impey*, 442 S.W.3d at 47. As explained in Section IV.C. *supra*, exhaustion is required in order to seek the extraordinary remedy of mandamus when other legal remedies are available. Similarly, where the law provided an opportunity for Appellant to have a contested case hearing at the Commission (which it did), Appellant was required to exhaust that remedy before seeking relief in circuit court.

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the Commission would have been meaningless to the extent that the facts below were uncontroverted and Appellant admitted that he had disqualifying bond forfeiture judgments against him. Just because any hearing at the Commission would have likely been unavailing from a factual standpoint, however, does not mean that Appellant can decide that his case is non-contested from a legal standpoint and skip the Commission altogether. Rather, whether a hearing is contested versus non-contested is determined as a matter of law, based upon the governing statutes, *Cade*, 990 S.W.2d at 36, *450 N. Lindbergh Legal Fund*, 477 S.W.3d at 54, not as a matter of litigant preference.

VI. Constitutional challenge and analysis

Assuming that Appellant could overcome his preservation issues and his failure to seek an appropriate remedy, his constitutional claim would fail anyway.

A. Due process analysis

Should this Court choose to undertake a constitutional analysis, "[a] statute is presumed to be constitutional," *State ex inf. Hensley v. Young*, 362 S.W.3d 386, 390 (Mo. banc 2012), and a court should not invalidate a statute unless "it clearly and undoubtedly violates some constitutional provision and palpably affronts fundamental law embodied in the constitution." *Id.*, *quoting State v. Richard*, 298 S.W.3d 529, 531 (Mo. banc 2009). The party who challenges the statute's validity bears the burden of proving that the statute "clearly and undoubtedly violates the constitution." *Id.*; *Garozzo v. Missouri Dep't of Ins., Fin. Insts. and Prof'l Reg'n*, 389 S.W.3d 660, 663 (Mo banc 2013). Here, Appellant bears that burden.

Appellant claims that the Director declined to renew his license without notice or an opportunity to be heard (App. Sub. Br. 14).

B. No property interest

In order to determine whether Appellant was denied procedural due process,[19] this Court must first determine whether Appellant's case involves

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[19] Appellant argues, in his Point Relied On, that he was denied procedural due process (App. Sub. Br. 11). He does not explicitly mention the concept elsewhere in the argument portion of the brief, raising again the issue of preservation. *See Gardner,* 466 S.W.3d at 649 (regarding claims raised in the

an interest for which procedural due process protections apply. "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property … [and] the range of interests protected by procedural due process is not infinite." *Clark v. Bd. of Directors of Sch. Dist. of Kansas City*, 915 S.W.2d 766, 770 (Mo. App. W.D. 1996). In order "'[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'" *Zenco Dev. Corp. v. City of Overland*, 843 F.2d 1117, 1118 (8th Cir. 1988), *quoting Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972); *Austell v. Sprenger*, 690 F.3d 929, 935 (8th Cir. 2012).

"Property interests 'are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.'" *Zenco Dev. Corp.*, 843 F.2d at 1118, *quoting Roth*, 408 U.S. at 577, 92 S.Ct. at 2709; *see also*, *Movers Warehouse, Inc. v. City of Little Canada*, 71 F.3d 716, 718 (8th Cir. 1995) (footnote omitted), *quoting Craft v. Wipf*, 836 F.2d 412, 416 (8th Cir. 1987) and *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709 (property interests "'are created and

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point relied on that are not developed in the argument portion of the brief and how such claims are not preserved). Appellant makes no substantive due process claim.

their dimensions are defined' not by the Constitution but by an independent source such as state law").

Appellant claims that he has a property interest in his general bail bond agent license (App. Sub. Br. 11) ("a general bail bond agent has a right to renew his license … in that professional licenses are property for Constitutional purposes.").[20] And certainly, "[p]rofessional licenses are 'property' for the purposes of the Fourteenth Amendment to the United States Constitution; consequently, procedural due process is required before the government may deprive anyone of his or her professional license." *Garozzo*, 389 S.W.3d at 667, *citing Stone*, 350 S.W.3d at 27. That said, the question of whether a licensee has a property interest in the **renewal** of a professional license for purposes of procedural due process is less than clear. *Austell*, 690 F.3d at 935; *see also, Small Hearts Daycare Center II, LLC v. Quick*, 2014 WL 186158 (E.D. Mo. 2014), *citing Zenco Dev. Corp.*, 843 F.2d at 1118-119 (noting that "Missouri law is less clear when it comes to license renewal proceedings").[21] The inquiry as to whether a licensee has a protected property interest in a renewal license is fact-specific and relates to the degree of discretion vested in the individual or agency charged with considering such license renewals. *Austell*, 690 F.3d at 935-36.

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[20] Appellant makes no claim that he has a **liberty** interest in renewal of his general bail bond agent license.

[21] Appellant glosses over the distinction between license renewal, which he sought, and impairment of an existing license (App. Sub. Br. 11-16), so he does not engage in any analysis differentiating the two.

In *Austell*, for example, the court found that the Missouri Department of Health and Senior Services ("DHS") could only deny a license renewal application for cause. *Id*. But the court also noted that the "statutes and regulations governing DHS's licensing determination are broad, subjective, and give the Department substantial discretion to determine violations." *Id*. Because of the degree of discretion involved, in contrast to facility licenses that must simply be renewed upon presentation of an application and fee and evidence of a recent inspection, the renewal of Austell's day care facility license was dependent upon an exercise of that agency discretion. *Id*. at 936-37. Accordingly, Austell had no property interest in the renewal of that license. *See id*. (grant of summary judgment proper because various officials entitled to qualified immunity in a § 1983 case where there was no constitutionally protected property interest in the renewal of the day care facility license).[22]

Likewise here, Respondent has discretion to consider whether general bail bond agent renewal applicants should have their licenses renewed based upon their qualifications and upon delineated statutory criteria. As noted above in Section III., various statutes and Missouri Supreme Court Rule 33.17 govern the renewal of general bail bond agent licenses. Section 374.715 requires that renewal applicants meet certain qualifications, among them,

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[22] Appellant tries to distance himself from *Austell* (yet provides no alternative to it) because "it is bereft of mention of *Gurley* and *Stone*" (App. Sub. Br. 15-16, n. 14). This is hardly surprising; *Austell* involved day care licensing, not private investigator licensing or the employee disqualification list.

the qualifications for surety set forth in Missouri Supreme Court Rule. And that rule, Missouri Supreme Court Rule 33.17, mandates that a person not have any unsatisfied bail bond forfeiture judgments against him. Missouri Supreme Court Rule 33.17(f) . Missouri state law thus suggests that Appellant has no property interest in the renewal of his license. "Where … state law places no substantive limitations on the discretion of the licensing authority to deny renewal, such an expectation is not a protected property interest." *Movers Warehouse*, 71 F.3d at 720; c*f.*, *Stauch v. City of Columbia Heights*, 212 F.3d 425, 429-30 (8th Cir. 2000) *as discussed in Austell*, 690 F.3d at 935-36 (licensed rental unit operator had a property interest in license renewal where Minnesota law required that the license be renewed if the licensee completed the application, paid the fee, and had a property inspection within the last two years). Here there are no such substantive limitations on the discretion as to result (versus process, *see* Section V.C., *supra*) because § 374.750 indicates, without qualification, that the Director may refuse to renew a license. The statutes and rule delineating qualifications, and § 621.120 and MAPA may channel that discretion, but the Director retains that discretion nonetheless.

Not only does Appellant have unsatisfied bail bond judgments against him, he disclosed at least some of those judgments to the Department months in advance of his application for renewal and he freely admits these judgments. *See* Sections IV.A. and B., *supra*. It is difficult, therefore, to see how Appellant could have an expectation that the Director would renew his general bail bond agent license when Appellant has conceded that he has

disqualifying bail bond forfeiture judgments against him. Stated differently, Appellant could hardly expect the Director to renew his license when Appellant himself established – by filing monthly affidavits from April to July of 2016 listing unsatisfied bond forfeiture judgments against him – that he was no longer qualified. Appellant has provided nothing in his brief to suggest otherwise and, as indicated, the burden to prove the constitutional claim – including the existence of a property interest that would trigger procedural due process protections – lies with him.

Interestingly, and at the same time, Missouri Supreme Court Rule 33.17 operates in such a way as to deprive the Director of any discretion to renew a general bail bond agent license once it is determined that the renewal applicant is unqualified. Missouri Supreme Court Rule 33.17(f) provides that a person cannot be a surety on a bond unless the person "[h]as no outstanding forfeiture or unsatisfied judgment thereon entered upon any bail bond in any court of this state or the United States." Thus, if a renewal applicant, like Appellant, has unsatisfied bond forfeiture judgments against him, the Director has no discretion – the Director simply cannot renew the license as the applicant is unqualified for licensure under Missouri Supreme Court Rule 33.17(f).

C. Sufficient procedural due process was available

Even if Appellant had shown the existence of a property interest that entitled him to procedural due process protections, his claim still fails.

If a protected property interest were involved here, the next step in the analysis would be to determine whether the procedures provided were

sufficient. *Clark*, 915 S.W.2d at at 770-71. "The fundamental requirement of the Due Process Clause is to provide notice and an opportunity for a hearing to a person subjected to a denial of a protected interest." *Id*. at 771.[23] "Due process contemplates the opportunity to be heard at a meaningful time and in a meaningful manner." *Moore v. Board of Educ. of Fulton Public Sch. No. 58*, 836 S.W.2d 943, 947 (Mo. banc 1992). The nature of this constitutional guarantee is flexible, however, and varies with the particular situation. *Gilbert v. Homar*, 520 U.S. 924, 930, 117 S.Ct. 1807, 1812, 138 L.Ed.2d 120 (1997)). A post-deprivation hearing can be sufficient process. *Id.*) (rejecting the proposition that due process always requires a hearing before the deprivation).

The United States Supreme Court's seminal decision in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976), sets forth the factors that courts must consider in determining whether any process provided was constitutionally adequate:

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[23] Appellant does not provide any due process argument or analysis regarding the notice that he received (App. Sub. Br. 14) probably because the notice Appellant received was more than adequate. The Refusal Order set out, over multiple pages, the numerous grounds supporting the Director's decision to refuse the license, and it contained a section actually entitled "Notice" that tracked the language of § 621.120 and explained how Appellant could appeal the Director's decision to the Commission under that statute (LF 76-87). *See* Section VII.A., *infra*, for more on the ample notice that Appellant received.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest.

Gilbert, 117 S.Ct. at 1812), *quoting Mathews*, 424 U.S. at 335, 96 S.Ct. at 903.

As to the first factor, the private interest affected, Appellant complains that the Director's decision not to renew Appellant's general bail bond agent license will prevent him from performing fugitive recovery (App. Sub. Br. 21). Also, in his Petition in Mandamus, Appellant argued that the Director's refusal to renew Appellant's general bail bond agent license "made the practice of his profession illegal after August 8, 2016, denying him the ability to earn an income and support himself and his family" (LF 7).

Though Appellant may not now work as a general bail bond agent or perform surety recovery, nothing prevents him from working in another type of job. While he "may be forced to work in a field with which … [he has] no experience and for which … [he has] no special training or skills" he can still support himself. *Jamison v. State, Dep't of Social Services, Div. of Family Services*, 218 S.W.3d 399, 415 (Mo. banc 2007). Balanced against this, the state has a strong interest in making sure that its general bail bond agents are qualified and do not have outstanding judgments against them, because the Director and the courts[24] must follow Missouri Supreme Court Rule

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[24] Significantly, even if the Director had not refused Appellant's renewal, Missouri Supreme Court Rule 33.17 mandates who the courts shall accept as

33.17, and because general bail bond agents who do not have sufficient assets set aside to execute the bonds they have written or would write will disincentivize defendants from appearing in court as required.

Further, the United States Supreme Court has "emphasized that in determining what process is due, account must be taken of 'the *length*' and '*finality* of the deprivation.'" *Gilbert*, 520 U.S. at 932, 117 S.Ct. at 1813) (emphasis in original), *citing Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434, 102 S.Ct. 1148, 1157, 71 L.Ed.2d 265 (1982). Here, as to the length and finality, the Director issued the Refusal Order on July 29, 2016. As early as April 2016, though, Appellant acknowledged via affidavits the outstanding bond forfeiture judgments against him (LF 103); this was nearly three months before he submitted his Renewal Application in mid-July 2016 (LF 66). In those three months, Appellant could have satisfied his admitted unsatisfied bond forfeiture judgments or engaged in the surety recovery he pines for now (App. Sub. Br. 21). He did not do so.

As to the second *Mathews v. Eldridge* factor, the risk of erroneous deprivation through the procedures used, as noted, Appellant maintains that

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a surety on a bail bond. Stated differently, even if the Director had flouted Missouri Supreme Court Rule 33.17 and renewed Appellant's general bail bond agent license despite the outstanding bond forfeiture judgments against him, the courts would be required, under that same rule, to still refuse to accept Appellant as a surety. The courts thus play a vital role when they make sure that bail bond agents writing in their courts should actually be doing so under Missouri Supreme Court Rule 33.17.

any appeal to the Commission would have been useless, in part, because the Commission could not consider his constitutional issue (App. Sub. Br. 16-17). As explained in Section V.A., *supra*, though, Appellant's interpretation of cases like *Tadrus* is incorrect; *Tadrus* governs preservation only, and does not give Appellant permission to skip the Commission in favor of circuit court. Had Appellant gone to the Commission first, the procedural protections there would have been fairly extensive under Chapter 536 where "fundamental rules of evidence" would apply. *State Bd. of Reg'n for Healing Arts v. McDonagh*, 123 S.W.3d 146, 154 (Mo. banc 2003), *quoting Missouri Church of Scientology v. State Tax Comm'n*, 560 S.W.2d 837, 839 (Mo. banc 1977). Indeed, any hearing at the Commission would have had all the formality of a contested case. *See* Section V.C., *supra*. But Appellant failed to avail himself of the tribunal that could have heard Appellant's and Respondent's evidentiary bases for their positions with the Commission's decision being appealable to the circuit court on a petition for judicial review under §§ 536.100-536.140. *See* Section V.B., *supra*. Similar statutory schemes, that provide post-deprivation hearings following summary decisions based upon statutory criteria, pass constitutional muster. *See Jarvis v. Dir. of Revenue*, 804 S.W.2d 22, 24 (Mo. banc 1991), *citing Dixon v. Love*, 431 U.S. 105, 115, 97 S.Ct. 1723, 1729, 52 L.Ed.2d 172 (1977) ("a statutory scheme which permits an initial summary decision to suspend a driving privilege without a hearing based on objective statutory criteria involving public safety does not violate due process provided a full, post-deprivation hearing is available to challenge the suspension").

Indeed, Appellant would be hard-pressed to demonstrate the risk of an erroneous deprivation here since he has consistently admitted that he has unsatisfied bond forfeiture judgments against him. As part of the second prong of the *Mathews v. Eldridge* test, courts look to the "probable value, if any, of additional or substitute procedural safeguards." *Mathews v. Eldridge*, 424 U.S. at 343, 96 S.Ct. at 907. But Appellant can hardly complain about the adequacy of procedures designed to reveal error where the facts underlying the refusal to renew his license are facts upon which both parties agree. The Director issued the Refusal Order based upon unsatisfied bond forfeiture judgments – that Appellant admitted were true – and no amount of procedure would change that.

Finally, under the third prong of the *Mathews v. Eldridge* test, courts look at the government's interest. As discussed above, that interest is strong. Courts have an interest in making sure that defendants appear for required court dates; in fact, that is the very purpose of a bond. *See* Missouri Supreme Court Rule 33.01 (purpose of bond is to "reasonably insure the appearance of the accused"). But where general bail bond agents have unsatisfied bond forfeiture judgments against them and continue to write bonds, those bonds are obviously not worth the paper on which they are written because the general bail bond agent does not have the assets to cover them, or at least to cover all his outstanding bonds (hence, the unsatisfied judgments).

When this happens, and the value and integrity of that general bail bond agent's bonds becomes questionable, defendants may become aware of this and the fact that the general bail bond agent likely does not have the

resources to apprehend defendants and decide that the risks of non-appearance in court are worth it. Courts, in turn, may face additional absconders and law enforcement will have to bear the expense and burden of apprehending defendants. This potential chain of events could undermine the entire system, slowing resolution of criminal cases and eroding the public's trust.

Appellant does not even mention *Mathews v. Eldridge*, much less undertake any analysis of its factors. Even if Appellant had shown a property interest in the renewal of his general bail bond agent license (which he did not), the post-deprivation procedures available to Appellant (had he actually availed himself of them) were more than sufficient to satisfy any due process concerns. *Gilbert*, 520 U.S. at 930, 117 S.Ct. at 1812).

VII. Appellant's cited authorities and claims

A. *Gurley* and *Stone*

Appellant cites *Gurley* for the proposition that he was due his process before the Director refused to renew his general bail bond agent license (App. Sub. Br. 12-16). But in *Gurley*, this Court ultimately declined to consider Gurley's procedural due process claims because those claims were moot – the Commission, wherein Gurley had also filed an appeal of the initial denial of his private investigator license – had ordered the private investigator board

to issue a license to Gurley, which the board did. *Gurley*, 361 S.W.3d at 410 and 414.[25]

Stone, the other case upon which Appellant principally relies (App. Sub. Br. 11-12), similarly offers little assistance. In *Stone*, Stone's procedural due process issue related to the notice she received. *Id*. at 26-27. Stone claimed that the notice was faulty because it did not cite the regulation she supposedly violated. *Id*. This Court found no deficiency, however, because the underlying decision was based upon statutory violations, not the violation of any regulation, so the notice was appropriate. *Id*. at 27.

Similarly, in Appellant's case, the Director provided specific, detailed notice of the reasons for the refusal to renew Appellant's license; indeed, the Refusal Order explicitly sets forth, over nine pages, the various unsatisfied bond forfeiture judgments against Appellant that served to disqualify him from holding a general bail bond agent license (LF 76-87). *See* Missouri Supreme Court Rule 33.17(f) . Further, the Director provided an explicit "Notice" that if Appellant wished to appeal that refusal, he could do so under § 621.120 (LF 86). Appellant received notice that was both clear and direct as to the reasons that the Director refused to renew his general bail bond agent license and how to refute the Director's decision and the facts on which it was based.

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[25] Interestingly, contrary to helping Appellant, *Gurley* underscores that if Appellant had appealed to the Commission as Gurley did, Appellant may have attained a different result than his failed circuit court writ action.

But, as noted, Appellant did not heed that notice; unlike Gurley, he did not appeal the refusal by filing a complaint with the Commission under § 621.120. Instead he filed a petition for writ of mandamus in the circuit court. But just because Appellant did not avail himself of the statutory procedure that would have provided him the process he claims is lacking does not mean that the statutory procedure is unconstitutional. Indeed, "[d]ue process merely affords the *opportunity* to be heard and, thus, a party can waive his due process right to be heard by voluntarily absenting himself from the proceedings." *Moore*, 836 S.W.2d at 947 (emphasis in original); *see also State Bd. of Registration for Healing Arts v. Masters*, 512 S.W.2d 150, 166 (Mo. App. 1974) ("[O]pportunity not taken when given is not opportunity denied.").

Since Appellant decided not to file an appeal in the Commission to challenge the Director's refusal to renew his general bail bond agent license, Appellant waived the process that he alleges was due him that he otherwise would have received under MAPA.[26] Had Appellant pursued this avenue, he could have had an opportunity for a hearing before the Commission to consider evidentiary issues, for example.[27] But Appellant did not do that.

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[26] Notably, Appellant does not challenge the constitutionality of MAPA or § 621.120.

[27] In his Suggestions in Support of the Petition in Mandamus (LF 21-24), Appellant claimed that the Refusal Order "is rife with hearsay and misstatements that…[he] has had no opportunity to rebut" (LF 23). A hearing at the Commission would have provided him with that opportunity.

And while Appellant challenges § 374.750, which permits the Department to decline to renew his license, he did not challenge and presented no evidence below regarding the adequacy or timeliness of the hearing that he could have obtained at the Commission. Appellant has the burden to show that the statute (§ 374.750) is unconstitutional and, as part and parcel of that burden, Appellant needs to show why the procedure referenced in § 621.120 (*i.e.*, a hearing at the Commission) was insufficient or too remote in time to satisfy the requirements of procedural due process. He fails to even lift that burden, much less carry it.

B. Missouri Supreme Court Rule 33.17 and fugitive recovery

Section 374.715 indicates that applicants for bail bond agent and general bail bond agent licenses must, among other things, meet the

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Appellant's actions run contrary not only to the law regarding exhaustion of administrative remedies, *see* Sections IV.C. and V.D., *supra*, but also the law regarding consideration of constitutional issues. In circuit court, Appellant did not object to Respondent's bond forfeiture judgment evidence because it "[d]oesn't matter since there's a constitutional issue, but they are what they are" (Tr. 9). But courts should address factual issues first on which constitutional law claims are based before reaching the constitutional law issues. *Conseco Finance Servicing Corp. v. Missouri Dep't of Revenue*, 98 S.W.3d 540, 546 (Mo. banc 2003). By going directly to circuit court, and bypassing the Commission, Appellant has prevented the Commission from resolving evidentiary and other issues, perhaps in his favor, in order to raise an issue regarding the alleged constitutionality of a statute here.

qualifications for surety on bail bonds as provided by supreme court rule, and Appellant seems to admit this ("Rule 33.17 certainly applies to sureties")[28] (App. Sub. Br. 20). But in a complete *non sequitur*, Appellant asserts that licensed bail bond agents and general bail bond agents may perform fugitive recovery without being separately licensed to do so, and that the Director's refusal to renew his general bail bond agent license "has prevented him from self-help in exonerating the judgments: he cannot arrest the fugitives in question" (App. Sub. Br. 21).[29] Besides bearing little relation to Missouri Supreme Court Rule 33.17, this argument fails.

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[28] While Appellant admits that Rule 33.17 applies to sureties, in the next breath, he suggests that Missouri Supreme Court Rule 33.17 was repealed by implication by the Professional Bail Bondsman and Surety Recovery Agent Licensure Act (App. Sub. Br. 21-22). Appellant maintains that the rule was adopted in 1980, but the latest version was amended in 2006, and effective in 2007. Further, Appellant demonstrates no conflict as between the rule and the law governing bail bondsmen (App. Sub. Br. 21-22). Indeed, Missouri Supreme Court Rules may only be "'annulled or amended in whole or in part by a law' enacted solely for that purpose." *State ex rel. Union Elec. v. Barnes*, 893 S.W.2d 804, 805 (Mo. banc 1995), *quoting* Missouri Constitution, Article V, § 5. Appellant fails to show any such purpose or repeal by implication.

[29] In his note 15, Appellant discusses what allegedly happened to some of the bond forfeiture judgments against him "after the trial court hearing," though he admits that "this Court has refused to permit the record to be supplemented with evidence thereof" (App. Sub. Br. 21, n. 15). *See* Docket

sheets for *State ex rel. Robison v. Director, Dep't of Ins., Fin. Insts. and Prof'l Reg'n*, No. SC96031 (denying Motion to Supplement the Record on Appeal, February 28, 2017). Appellant asks, "[n]ow that the record is fully developed," for "this Court to reconsider that decision" (App. Sub. Br. 21, note 15). But then, as now, this Court cannot consider matters outside the record. *See* Respondent's Suggestions in Opposition to Appellant's Motion to Supplement the Record on Appeal, filed with this Court on February 9, 2017 in Case No. SC96031. Indeed, to say that "the record is fully developed" now (App. Sub. Br. 21, n. 15) is wrong on many levels; the "record" was what was before the trial court, and this Court cannot convict the trial court of error (or lack of clairvoyance) for failing to consider matters that supposedly occurred after the court entered its judgment. Accordingly, Respondent moves to strike that portion of Appellant's note 15 referring to anything that supposedly occurred "after the trial court hearing" as outside the record and impermissible. Appellant presents no principled reason, grounded in law, for this Court to reconsider its earlier, entirely correct ruling.

Appellant also asserts, again in note 15, that the Winkleman and Poelma bond forfeiture judgments "became final for licensure purposes after Robison's license expired" and "[a]ny attempt Robison might take to cure the forfeiture (other than payment) after denial of renewal is a crime" (App. Sub. Br. 21, n. 15). *See* note 30, *infra*, regarding the particulars of the Winkleman and Poelma bond forfeiture judgments and fugitive recovery.

Whether Appellant could or would otherwise "exonerat[e] the judgments" (App. Sub. Br. 21) is irrelevant because the bond forfeiture judgments were all final some time ago and remained outstanding (LF 61, 107-177). In two cases involving the Michael R. Thomas Bail Bond Company, the Court of Appeals, Western District, considered whether the trial court erred in failing to extend the judgment dates on bond forfeiture judgments under § 374.763. *State v. Michael R. Thomas Bail Bond Co.*, 367 S.W.3d 632, 633 (Mo. App. W.D. 2012) ("*Thomas Bail Bond I*"); *State v. Michael R. Thomas Bail Bond Co.*, 408 S.W.3d 794, 796 (Mo. App. W.D. 2013) ("*Thomas Bail Bond II*"). In neither case did the Court of Appeals find error. *Id.*

Rather, in *Thomas Bail Bond I*, the Court noted that "[o]nce the judgment was final, Thomas Bail Bond was obligated to satisfy the judgment" and, while the court could extend the judgment date under § 374.763 as a matter of grace, that "does not erase the final judgment or obligations owed thereon." *Thomas Bail Bond I*, 367 S.W.3d at 634-35. "Because surrender of the defendant occurred after final judgment, Thomas Bail Bond was not entitled to discharge." *Id.* at 635. The Court of Appeals also debunked any notion that refusal to set aside a final judgment served as a disincentive to produce the defendant to the court:

> The surety has an incentive to find and produce a defendant; the incentive is to avoid bond forfeiture. Once the bond is finally forfeited, the surety no longer has a duty to produce the defendant but has an incentive under section 374.763 to timely remit the forfeiture or risk discipline. To construe section

> 374.763 as Thomas Bail Bond desires would lessen a surety's incentive to produce defendants prior to a judgment of forfeiture and would obliterate any incentive for the surety to timely remit a forfeited bond.

Id. at 636. Likewise, in *Thomas Bail Bond II*, Thomas Bail Bond unsuccessfully moved to set aside a bond forfeiture judgment on the grounds that the trial court should have extended the judgment date under § 374.763. *Thomas Bail Bond II*, 408 S.W.3d at 796). Following *Thomas Bail Bond I*, the Court rejected the claim. *Id*.

Appellant's argument, therefore, that the Director is preventing him from picking up defendants who have absconded (App. Sub. Br. 21) is completely beside the point. Prior to bond forfeiture, nothing prevented Appellant from attempting to locate fugitives. *See Michael Thomas Bail Bond I*, 367 S.W.3d at 634-36. Further, and perhaps more importantly, Appellant's unsatisfied judgments were final (and disqualifying) when the circuit courts issued their judgments.[30] Thus, even assuming that Appellant

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[30] On December 16, 2015, the Newton County Circuit Court entered judgment against general bail bond agent Bryan Travis Robison in the amount of $3,000.00 in *State v. Cesar Elias-Reyes* (LF 61, 107-117). On March 24, 2016, the Jackson County Circuit Court entered judgment against the surety on the bond, Bryan Robison, in the amount of $2,000.00 in three cases, totaling $6,000.00, in *State v. John D. Brooks* (LF 61, 118-147). On April 1, 2016, the Vernon County Circuit Court entered judgment against surety Bryan T. Robison in the amount of $10,000.00 in *State v. Jacob D. Winkleman* (LF 61,

had a license and could or would "perform[ ] fugitive recovery" (App. Sub. Br. 22), and while this may be helpful from a criminal justice standpoint, it does nothing to "erase the final judgment or obligations owed thereon." *Thomas Bail Bond I*, 367 S.W.3d at 635. And, contrary to Appellant's assertion that this contravenes the Constitution and *Gurley* (App. Sub. Br. 22), there is nothing unconstitutional about final judgments being just that – final.[31] Appellant's argument to the contrary does not persuade.

148-177). On July 20, 2016, the Jasper County Circuit Court entered judgment against the surety on the bond, Robison Bonding, in the amount of $5,000.00 in *State v. Zachary G. Poelma* (LF 61, 178-187).

[31] Missouri Supreme Court Rule 81.05 addresses the finality of judgments. Generally, judgments are final after 30 days if no one files a post-trial motion. Appellant did not file any timely, authorized post-trial motions in any of the cases where the courts entered bail bond forfeiture judgments against him (LF 108-109, 126-127, 177, 186) (docket sheets in each case showing judgment entries and no timely, authorized post-trial motions filed); *see generally* Missouri Supreme Court Rule 78 (regarding post-trial motions). Thus, all of the bail bond forfeiture judgments set forth in note 30, *supra*, save for that in *State v. Zachary G. Poelma*, became final in advance of the Director's July 29, 2016 Refusal Order (LF 85).

Conclusion

In view of the foregoing, Respondent Director requests that the judgment be affirmed.

Respectfully Submitted,

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Certificate of Filing and Service

I hereby certify that on this 2nd day of January, 2018, I filed a true and accurate Adobe PDF copy of this Substitute Brief of the Respondent and its Appendix via the Court's electronic filing system, which notified the following of that filing:

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I further certify that I prepared this brief using Microsoft Word in Century Schoolbook size 13 font, which is not smaller than Times New Roman size 13 font. I further certify that this brief complies with the word limitations of 84.06(b) and that it contains 18,420 words.

/s/ Cheryl C. Nield
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