

No. SC96796

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

ALOK KUMAR ROHRA,

Appellant.

Appeal from the Circuit Court of the City of St. Louis
Twenty-Second Judicial Circuit
The Honorable Michael Francis Stelzer, Judge

RESPONDENT'S SUBSTITUTE BRIEF

JOSHUA D. HAWLEY

Attorney General

GREGORY L. BARNES

Assistant Attorney General

Missouri Bar No. 38946

P.O. Box 899

Jefferson City, MO 65102

Tel.: (573) 751-3321

greg.barnes@ago.mo.gov

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES3
STATEMENT OF FACTS5
ARGUMENT9
CONCLUSION..... 46
CERTIFICATE OF COMPLIANCE..... 47

TABLE OF AUTHORITIES

Cases

<i>Brant v. State</i> , 992 P.2d 590 (Ak. App. 1999).....	35, 36
<i>Brown v. Handgun Permit Review Board</i> , 982 A.2d 830 (Md. Ct. Special Appeals 2009).....	37, 39
<i>Carr v. Sheriff of Clay County</i> , 210 S.W.3d 414 (Mo. App. W.D. 2007)....	37, 38
<i>Farnsworth v. Virginia</i> , 599 S.E.2d 482 (Va. App. 2004)	38, 39, 40
<i>Garris v. State</i> , 389 S.W.3d 648 (Mo. banc 2012).....	19, 20
<i>Hampton v. State</i> , 495 S.W.2d 638 (Mo. banc 1973).....	19
<i>Hodge v. State</i> , 477 S.W.2d 126 (Mo. 1972).....	20, 21
<i>People v. Allaire</i> , 843 P.2d 38 (Colo. App. 1992)	34, 35
<i>Platt v. State</i> , 188 P.3d 196 (Okla. Crim. App. 2008)	passim
<i>State v. Evans</i> , 343 P.3d 122 (Kan. App. 2015).....	37, 43
<i>State v. Evans</i> , 410 S.W.3d 258 (Mo. App. W.D. 2013).....	33
<i>State v. Johnson</i> , 284 S.W.3d 561 (Mo. banc 2009).....	14
<i>State v. McElroy</i> , 520 S.W.3d 493 (Mo. App. W.D. 2017)	14
<i>State v. Menard</i> , 888 A.2d 57 (R.I. 2005).....	37, 40, 41
<i>State v. Merritt</i> , 467 S.W.3d 808 (Mo. banc 2015).....	23, 29
<i>State v. Moore</i> , 303 S.W.3d 515 (Mo. banc 2010)	28
<i>State v. Moya</i> , 161 P.3d 862 (N.M. 2007).....	37, 41, 42

State v. Parker, 792 S.W.2d 43 (Mo. App. E.D. 1990) 22, 23, 24

State v. Prince, 534 S.W.3d 813 (Mo. banc 2017) 11

State v. Purifoy, 495 S.W.3d 822 (Mo. App. S.D. 2016) 25

State v. Reeves, 10 S.W. 841 (Mo. 1889)..... 21

State v. Saussele, 265 S.W.2d 290 (Mo. banc 1954) 22

State v. Sparks, 916 S.W.2d 234 (Mo. App. E.D. 1995) 12, 24

State v. Wrice, 389 S.W.3d 738 (Mo. App. E.D. 2013)..... 28

U.S. v. Soloman, 826 F. Supp. 1221 (8th Cir. 1993) 36

United States v. Greenberg, 104 Fed. Appx. 34 (9th Cir. 2004)..... 36

Yale v. City of Independence, 846 S.W.2d 193 (Mo. banc 1993) 43

Statutes

18 U.S.C. § 921 36

63 Okl. St. §2-410.....passim

Section 562.021.2, RSMo (2000)..... 24

Section 558.011, RSMo (2000)..... 22

Section 560.011, RSMo (2000) 22

Section 571.070, RSMo (2000)..... 10, 12, 22

STATEMENT OF FACTS

Defendant pleaded guilty in the Circuit Court of the City of St. Louis to unlawful possession of a firearm by a felon, §571.070, a class C felony; possession of marijuana, §195.202, a class A misdemeanor; and possession of drug paraphernalia with intent to use, §195.233, a class A misdemeanor. (Tr. 11). Defendant was sentenced by the court to four years in prison for unlawful possession of a firearm, but the execution of the sentence was suspended and Defendant was placed on probation for two years. (Tr. 15). Defendant was sentenced to one year on each of the other two counts, to be served concurrently, with the execution of sentence suspended, and placed on probation for two years for each. (Tr. 15-16).

Defendant was previously “convicted of the felonies of possession of a controlled substance [ecstasy] and unlawful possession of a controlled substance with intent to distribute [marijuana] in the District Court of Canadian County, Oklahoma.” (Tr. 7, 8).¹

Defendant agreed that the following factual basis presented by the prosecutor was true:

¹ All Missouri statutory citations are to RSMo (2000), as amended through the 2015 Cumulative Supplement unless otherwise indicated. The transcript will be cited as “Tr.” and the legal file as “LF.”

Had this case proceeded to trial the State's evidence would prove beyond a reasonable doubt that on September 10, 2015, in the City of St. Louis, State of Missouri the defendant committed the following crimes: First as to Count I, the Class C felony of unlawful possession of a firearm, in that the defendant knowingly possessed a semiautomatic pistol, a firearm, and on July 10, 2013, the defendant was convicted of the felonies of possession of a controlled substance, and unlawful possession of a controlled substance with intent to distribute in the District Court of Canadian County, Oklahoma.

As to Count II the defendant committed the Class A misdemeanor possession of a controlled substance in that the defendant possessed marijuana, a controlled substance knowing of its presence and nature.

As to Count III the defendant committed the Class A misdemeanor, possession of drug paraphernalia, in that the defendant possessed a glass pipe, which was drug paraphernalia, knowing of its presence and nature with the intent to use it to ingest or inhale a controlled substance or imitation controlled substance.

Specifically, Your Honor, the State's evidence would prove that on that date and time the St. Louis Metropolitan Police Department officers observed the defendant operating a vehicle which conducted a

traffic violation. They pulled behind him to pull the vehicle he was operating over. He had already exited the vehicle and was walking to a nearby store. They returned to the vehicle that he was driving. Smelled marijuana and saw a glass pipe inside of the vehicle. Both the defendant and his brother, who was a passenger, were found to be in possession of firearms. At that time they learned that the defendant had a prior felony conviction.

(Tr. 7-8).

Defendant testified that he heard what the prosecutor told the court, there was nothing he needed to add that the prosecutor did not tell the court, and that the prosecutor did not tell the court anything that wasn't true. (Tr. 8).

Defendant understood that the range of punishment was up to seven years in prison and/or a fine of up to \$5,000 for unlawful use of a weapon, and up to a year in a medium security institution and/or a fine of up to \$1,000 on each of the other two counts. (Tr. 8-9). Defendant understood that the State was recommending a prison sentence of four years, that no agreement had been reached as to the sentence, and that if he pleaded guilty, the court could sentence him to any sentence within the range of punishment. (Tr. 9-10).

Defendant had discussed both the legal and factual issues of the case with his attorney and had no questions for the court. (Tr. 10-11).

Defendant understood that he was waiving both his trial and appeal rights. (Tr. 6).

The court found the plea to be voluntary and knowing, that there was a factual basis for the plea, and that Defendant was guilty of each of the charges beyond a reasonable doubt. (Tr. 11).

Defendant appealed; the Court of Appeals, Eastern District transferred the case to the Missouri Supreme Court.

To avoid repetition, further facts will be adduced as applicable in the argument section of the brief.

ARGUMENT

The plea court did not err by denying Defendant's motion to dismiss where Defendant withdrew that motion, including the oral amendment, prior to the time he agreed to plead guilty.

Defendant's allegation of error in denial of the motion to quash the indictment was not raised in the Point Relied On in the Court of Appeals and may therefore not be raised here under Rule 83.08(b).

The trial court did not err by denying the motion to quash the indictment because the indictment alleged all essential elements to charge the crime, permit Defendant to prepare a defense, and permit Defendant to plead former jeopardy.

Defendant was "convicted...under the laws of any state" of "crimes" which would be felonies in Missouri because: (a) possession of a controlled substance and possession of a controlled substance with the intent to distribute are felonies in Missouri; and (b) Defendant was "convicted" "under the laws of" Oklahoma ("any state") of those crimes.

Defendant admitted the State would prove the elements of unlawful use of a weapon where: (1) it was undisputed that Defendant knowingly possessed a firearm; and (2) Defendant's admissions and the factual basis proffered established that he was

not permitted to do so because he was a convicted felon “under the laws of any state.”

Finally, Defendant waived his alleged factual defense that he had not been “convicted” in Oklahoma of crimes which would be felonies in Missouri, both by withdrawing his Motion to Dismiss, and by knowingly, voluntarily, and intelligently pleading guilty.

A. Defendant’s altered Point Relied On violates Rule 83.08(b).

In the Court of Appeals, Defendant’s sole claim on appeal was that the plea court “erred in denying” his “motion to dismiss because the complaint did not properly charge a violation of §571.070, RSMo, and the trial court erroneously ruled that” Defendant “was convicted under Oklahoma law of a crime that would be a felony if committed in Missouri.” (Court of Appeals App. Br. 10). The action of the court challenged by Defendant in the Point Relied On below was thus the denial of his motion to dismiss the complaint, not the denial of his motion to quash a *subsequent* indictment, to which he pleaded guilty. The State pointed out that because Defendant’s Point Relied On did not challenge the sufficiency of the charging instrument to which he pleaded guilty (the indictment rendered *after* the Motion to Dismiss was filed and withdrawn) or the sufficiency of the factual basis for the plea, Defendant’s claims were waived by his guilty plea. (Court of Appeals Resp. Br. 9).

Defendant has now altered his claim in this Court by alleging that the “trial court erred in denying Appellant’s motions to dismiss *and to quash the charge against him*” “on the ground that it failed to allege an essential element....” (App. Br. 11) (emphasis added).

Rule 83.08(b) prohibits altering “the basis of any claim that was raised in the court of appeals brief[.]” Supreme Court Rule 83.08(b) (2017). “Rule 83.08(b) provides when a party files a substitute brief in this Court, the substitute brief ‘shall not alter the basis of any claim that was raised in the court of appeals brief.’” *State v. Prince*, 534 S.W.3d 813 n.2 (Mo. banc 2017). *Prince* held that because the appellant “altered the basis of his claim” with respect to an argument, “it is not preserved for review.” *Id.* Thus, the claim that the trial court erred by denying a motion to quash the indictment is not before this Court. *See, id.*

Defendant waived the remaining claim that the court erred by denying his motion to dismiss—directed at a different charging instrument in a different case number—by withdrawing his motion and by entering a knowing and voluntary plea of guilty. Moreover, the claim that Defendant did not have a prior felony “conviction” under “the laws of any state” is meritless because Defendant had two prior felony convictions “under the laws of any state” (in this case, Oklahoma).

B. Standard of review

“In a direct appeal of a guilty plea, our review is restricted to subject matter jurisdiction of the trial court and the sufficiency of the information or indictment.” *State v. Sparks*, 916 S.W.2d 234, 236 (Mo. App. E.D. 1995). If “the findings of the trial court fall into neither of these categories, defendant’s argument is unreviewable.” *Id.* at 238. All other defenses and defects are waived by a knowing and voluntary guilty plea. *Id.* at 236.

All “essential elements of the crime must be pleaded” to “prevent a defendant from being hindered in the preparation of his defense and to enable him to plead former jeopardy.” *Id.* at 237. “It is also imperative that a defendant be informed of the charges to which he is pleading guilty, in order that the defendant may make a knowing and voluntary plea.” *Id.*

C. Defendant affirmatively requested that the motion to dismiss the complaint be withdrawn, after it was amended.

On September 11, 2015, the circuit attorney filed a complaint alleging that Defendant committed the unlawful possession of a firearm in violation of §571.070 “in that on or between September 10, 2015 at 12:23 PM and September 10, 2015 at 12:59 PM, in the City of St. Louis ... the defendant knowingly possessed a semi-automatic pistol, a firearm, and on February 7, 2014, the defendant was convicted of the felony of Possession Of Controlled

Substance Except 35 Grams Or Less Of Marijuana in the 21st Judicial Circuit, St. Louis County, Missouri.” (LF 11).

On September 29, 2015, Defendant filed a “Motion to Dismiss for Misstatement of Fact and Lack of Jurisdiction” with multiple attachments. (LF 13-22). Defendant contended that the felony conviction referenced “was a clerical error in Case.net” and that he pleaded guilty to “the Class A Misdemeanor of Possession of Marijuana on 4/13/2013.” (LF 13-14).

On October 6, 2015, the State filed an Amended Complaint alleging unlawful possession of the firearm at the same date and time but substituting the following language of a prior felony: “on July 10, 2013, the defendant was convicted of the felonies of Count I: Possession of Controlled Dangerous Substance (Ecstasy) and Count II: Unlawful Possession of a Controlled Dangerous Substance with Intent to Distribute in the District Court of Canadian County Oklahoma.” (LF 23).

On that same date, the State filed its Response to Defendant’s Motion to Dismiss, noting that the Amended Complaint “charging the defendant with Unlawful Possession of a Firearm based on felony convictions arising out of a case in Canadian County, Oklahoma” had been provided to the court and defense counsel at “a hearing on the motion to dismiss and a new motion to reduce bond” on October 1, 2015. (LF 24-35). The State noted that, “At that time, defendant orally amended his motion to dismiss, stating that the case

in Oklahoma did not result in a felony conviction.” (LF 24). The State’s response included the guilty plea documents from that case. (LF 28-35).

Two days later, on October 8, 2015, Defendant’s new attorney filed a Court Order granting his request that the “motion to dismiss” be “withdrawn.” (LF 36). No further “motion to dismiss” appears in the record. Defendant cannot attach error to denial of a motion he requested be withdrawn, or to the court taking an action he affirmatively requested (i.e., withdrawal of the motion to dismiss). Affirmatively acquiescing to an action by the trial court waives even plain error review. *State v. Johnson*, 284 S.W.3d 561, 582 (Mo. banc 2009); *State v. McElroy*, 520 S.W.3d 493, 496 (Mo. App. W.D. 2017). Defendant affirmatively waived his claim of error by not only acquiescing in, but urging the court to take precisely the action it took that is now the subject of his assignment of error; Defendant is therefore not entitled to any review of that claim. *See, id.*

Moreover, that Motion to Dismiss was directed to a different charging instrument than the one he pleaded guilty to, and preceded the grand jury indictment to which he pleaded guilty (under a new case number).

D. Indictment and post-indictment proceedings resulting in plea

In December of 2015, months after Defendant’s Motion to Dismiss was withdrawn, Defendant was indicted by the grand jury on the three counts to which he pleaded guilty. (LF 5, 37-38). The unlawful possession of a firearm

count pleaded the aforementioned Oklahoma felonies. (LF 37). No Motion to Dismiss was ever filed directed at this indictment. A motion to quash the indictment was filed and denied, but no error was assigned to that ruling by the Point Relied On in the Court of Appeals, so any such claim is waived. Rule 83.08(b); *Prince*, 534 S.W.3d at n.2.

For reasons which are not apparent from the record, on February 4, 2016, Associate Circuit Judge Theresa C. Burke (who was not the plea judge and was not previously involved in the case based on what appears in the record), perhaps unaware that another judge had ordered the motion withdrawn at Defendant's request, denied Defendant's prior, apparently oral "motion to dismiss" in a four-page order. (LF 39-42). No motion to dismiss was pending at this time based on the record submitted by Defendant on appeal.

Judge Burke rejected Defendant's alleged contention that "deferred sentences" in Defendant's Oklahoma felony case "are the equivalent of a suspended imposition of sentence in Missouri," such that they did "not constitute a 'conviction' under Missouri law." (LF 39).

The court noted that Defendant "does not contend possession of Ecstasy is not a felony under Missouri law, nor does he contend possession with intent to distribute is not a felony in Missouri." (LF 40).

The court observed that:

Section 570.010.1(1) provides that a person commits the crime of unlawful possession of a firearm if the person has a firearm in his possession and “[s]uch person has been convicted of a felony under the laws of this state, **or of a crime under the laws of any state** or the United States **which, if committed within this state, would be a felony.**”

(LF 39-40) (emphasis added).

The court found the “relevant portion” of Oklahoma law to be the specific language of section B of 63 Okl. St. §2-410, which it held was controlling on the question of whether Defendant had “been convicted of a felony” under the laws of Oklahoma:

[A]ny plea of guilty or nolo contendere or finding of guilt to a violation of the Uniform Controlled Dangerous Substances Act **shall constitute a conviction of the offense for the purpose of the Uniform Controlled Dangerous Substances Act or any other criminal statute under which the existence of a prior conviction is relevant** for a period of ten (10) years following the completion of any court imposed probationary term

(LF 40) (emphasis added).

Under the law of that state, Defendant’s “plea of guilty” constituted a “conviction” for this purpose, even though other subsections of the statute

provided that a court may “defer further proceedings” including entry of “a judgment of guilt” while the defendant underwent drug treatment which, if successful, could ultimately result in dismissal and discharge “without court adjudication of guilt” which “shall not be deemed a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime.” (LF 40) (quoting “Section A of 63 Okl. St. §2-410”).

Notably, Defendant does not contend that he met this subsection’s requirement that the defendant fulfill “the terms and conditions” of probation in Oklahoma since he was arrested for drugs in this case in Missouri during that probation. (LF 40). The court below cited the Oklahoma Court of Criminal Appeals holding in *Platt v. State*, 188 P.3d 196 (Okla. Crim. App. 2008), which rejected a defendant’s claim in a case charging Unlawful Possession of a Firearm that “he had no prior felony conviction because he had previously entered a guilty plea to the felony charge of Unlawful Possession of methamphetamine and had received a five-year deferred sentence.” (LF 41).

The defendant had not completed the deferred sentence at the time he was charged with the crime of Unlawful Possession of a Firearm. The Court concluded that the statute means that earlier pleas of guilty, of defendants who are within the period of a sentencing deferral,

constitute convictions of the offense for the purpose of any criminal statute under which the existence of a prior conviction is relevant. At the time the defendant possessed the pistol in this case, the defendant had not successfully completed the term of his probation, nor had the earlier drug possession charge been dismissed. Therefore his guilty plea constituted a “conviction” for purposes of the unlawful possession of a firearm statute. *Id.*, at 199.

(LF 41).

The court below in the case at bar concluded that “the reasoning of the” *Platt* “decision applies to defendant’s case.” (LF 41). Since defendant had pleaded guilty under Oklahoma law to a “crime that would be a felony if committed in Missouri, and the guilty plea constituted a ‘conviction’ under Oklahoma law at the time he allegedly possessed the firearm, defendant may be charged for a violation of § 570.010.1(1).” (LF 41-42).

The court dated its order denying Defendant’s defunct motion to dismiss on February 3, 2016, and the order was entered into the system on February 4, 2016. (LF 39, 42).

On February 8, 2016, Defendant waived formal reading of the indictment and, through counsel, entered a plea of not guilty to the charged offenses before Judge Burke. (LF 43).

Although the ruling was not challenged on appeal in the Point Relied On below, and may therefore not be added to the claim in this Court under Rule 83.08(b), on June 27, 2016, Defendant filed a Motion to Quash the indictment; on August 18, 2016, the motion was heard and submitted; and on August 22, 2016, the trial court denied that motion. (LF 44-46). Defendant created no record of these proceedings and the grounds for the motion do not appear in the pleading or the record. (LF 44-46).

On December 1, 2016, Defendant knowingly and voluntarily waived his trial and appeal rights, entered his pleas of guilty, and was sentenced. (Tr. 1-16).

E. Defendant's guilty plea waived the claim.

“A guilty plea ‘represents a break in the chain of events which has preceded it in the criminal process.’ *Hampton v. State*, 495 S.W.2d 638, 642 (Mo. banc 1973). ‘When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.’ *Id.*” *Garris v. State*, 389 S.W.3d 648, 651-652 (Mo. banc 2012).

Here, Defendant chose to plead guilty in open court, admitting to the conduct which constituted the offense, and admitting, after the prosecution

stated (*inter alia*) “that the defendant had a prior felony conviction[,]” that the prosecutor hadn’t stated anything that wasn’t true. (Tr. 6-8).

The plea court found that Defendant’s plea was knowing and voluntary, and that there was a factual basis. (Tr. 11).

The plea therefore waived “claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea[,]” including those based on a defunct Motion to Dismiss a Complaint and/or an Amended Complaint that preceded the indictment to which he pleaded guilty. *See, Garris*, 389 S.W.3d at 651-652.

F. The denial of the Motion to Quash the indictment, even if preserved, was proper because the indictment alleged all required elements of the offense, enabled Defendant to prepare his defense, and permitted Defendant to plead double jeopardy. Moreover, Defendant failed to meet his burden of establishing the facts upon which he sought relief because there is no record of the grounds of the motion or the evidence, if any, before the court.

In *Hodge v. State*, 477 S.W.2d 126 (Mo. 1972), this Court held in a postconviction context that the denial of a motion to quash the indictment was not erroneous where the evidence of only one witness before the grand jury was presented because the record was “inconclusive as to whether there was additional evidence before the Grand Jury” and the “fact a court reporter

cannot find notes does not compel the conclusion that the Grand Jury had no other evidence before it. Movant had the burden of establishing the facts upon which he sought relief. He failed to carry his burden on the lack of evidence before the Grand Jury.” *Id.* at 127. “Whether the facts if established would furnish any basis for relief we necessarily do not reach.” *Id.*

Here, Defendant’s pleading contains no mention of the grounds for the Motion to Quash the indictment or any evidence presented in support thereof; neither does the order submitting the matter or the ruling denying the motion. (LF 44-46). Defendant’s failure to create a record establishing that the point was preserved as to the indictment to which he pleaded guilty is a failure to demonstrate circuit court error on appeal. *See, id.*

Regardless, the indictment was sufficient to: 1) allege all essential elements of the offense; 2) permit Defendant to prepare his essentially factual defense that he was never “convicted”; and 3) permit Defendant, had he gone to trial, to have pleaded former jeopardy in the event of an acquittal. The indictment was therefore sufficient and the denial of the Motion to Quash was proper.

“A motion to quash is in the nature of a demurrer” to “the sufficiency thereof[.]” *State v. Reeves*, 10 S.W. 841, 843 (Mo. 1889). It is sufficient to charge “statutory offenses in substantially the language of the statutes creating them, when the statute in question sets forth the constituent

elements of the offense” and “it is sufficient to frame the indictment in the words of the statute in all cases when the statute so far individuates the offense that the offender has proper notice, from the mere adoption of statutory terms, what the offense he is to be tried for really is.” *State v. Saussele*, 265 S.W.2d 290, 293 (Mo. banc 1954) (internal citations omitted). “The test for the sufficiency of an indictment is not whether the indictment was a model of perfection, but whether the indictment contains all the essential elements of the offense set out in the statute creating the offense and clearly apprises the defendant of facts constituting the offense.” *State v. Parker*, 792 S.W.2d 43, 44 (Mo. App. E.D. 1990).

Here, the relevant portion of the indictment pleaded:

The defendant, in violation of 571.070, RSMo, committed the class C felony of unlawful possession of a firearm, punishable under Sections 558.011 and 560.011, RSMo, in that on or between September 10, 2015 at 12:23 PM and September 10, 2015 at 12:59 PM, in the City of St. Louis, State of Missouri, the defendant knowingly possessed a semi-automatic pistol, a firearm, and on July 10, 2013, the defendant was convicted of the felonies of Count I: Possession of Controlled Dangerous Substance (Ecstasy) and Count II: Unlawful Possession of a Controlled Dangerous Substance with Intent to Distribute in the District Court of Canadian County Oklahoma.

(LF 37).

“A person commits the crime of unlawful possession of a firearm if such person knowingly has any firearm in his or her possession and ... [s]uch person has been convicted of a felony under the laws of this state, or of a crime under the laws of any state or of the United States which, if committed within this state, would be a felony.” Section 571.070.1(1); *State v. Merritt*, 467 S.W.3d 808, 811 (Mo. banc 2015).²

The indictment charged: (1) knowing possession of a firearm; (2) by a person who has been convicted of a crime under the laws of any state (Oklahoma) which, if committed within this state, would be a felony.³ Thus, it both tracked the language of the statute, and “clearly apprised” Defendant “of facts constituting the offense.” *Parker*, 792 S.W.2d at 44. The indictment contained all “essential elements” of the offense. *Id.*

² *Merritt* held that felon-in-possession laws are constitutional and pass “strict scrutiny,” notwithstanding Defendant’s argument that Defendant’s right to gun ownership is somehow violated. *See, id.*

³ Defendant conceded below and concedes on appeal that the referenced Oklahoma crimes constituted felonies in Missouri.

The indictment was therefore sufficient as a legal matter on its face and not subject to a demurrer. The court below therefore did not err in overruling the Motion to Quash the indictment.

Defendant's argument on appeal, while purporting to challenge the sufficiency of the indictment, is merely an allegation that he had a factual defense to one of the allegations (i.e., that he had not been "convicted" of the Oklahoma crimes). Factual defenses do not constitute pleading insufficiencies or defects in an indictment. *See, id.* Moreover, they are waived by subsequent guilty pleas, precisely because they do not go to the sufficiency of the charging document or to the jurisdiction of the court. *Sparks*, 916 S.W.2d at 236-237. Here, as noted below, Defendant conceded during his plea hearing that he had been "convicted" as alleged of the Oklahoma crimes.

While Defendant contended that he had not realized he was ineligible to carry a weapon, that is not a defense, as the term, "knowingly" merely modifies "possessed" the weapon. "If the definition of an offense prescribes a culpable mental state with regard to a particular element or elements of that offense, the prescribed culpable mental state shall be required only as to the specified element or elements, and a culpable mental state shall not be required as to any other element of the offense." Section 562.021.2, RSMo (2000).

In *State v. Purifoy*, 495 S.W.3d 822 (Mo. App. S.D. 2016), the Court of Appeals held that the State was not required to prove that the defendant knew of his prior felony conviction in order to convict him of unlawful possession of a firearm. *Id. See*, § 562.021.2.

G. There was a sufficient factual basis for the plea, both because Defendant admitted to prior convictions which would be felonies in Missouri and waived his appellate rights and factual defense, and because the State proffered sufficient evidence to support each of the elements of the crime of unlawful possession of a firearm under Missouri law.

During the plea colloquy, the prosecutor offered the following factual basis for the crimes:

Had this case proceeded to trial the State's evidence would prove beyond a reasonable doubt that on September 10, 2015, in the City of St. Louis, State of Missouri the defendant committed the following crimes: First as to Count I, the Class C felony of unlawful possession of a firearm, in that the defendant knowingly possessed a semiautomatic pistol, a firearm, and on July 10, 2013, the defendant ***was convicted of*** the felonies of possession of a controlled substance, and unlawful possession of a controlled substance with intent to distribute in the District Court of Canadian County, Oklahoma.

As to Count II the defendant committed the Class A misdemeanor possession of a controlled substance in that the defendant possessed marijuana, a controlled substance knowing of its presence and nature.

As to Count III the defendant committed the Class A misdemeanor, possession of drug paraphernalia, in that the defendant possessed a glass pipe, which was drug paraphernalia, knowing of its presence and nature with the intent to use it to ingest or inhale a controlled substance or imitation controlled substance.

Specifically, Your Honor, the State's evidence would prove that on that date and time the St. Louis Metropolitan Police Department officers observed the defendant operating a vehicle which conducted a traffic violation. They pulled behind him to pull the vehicle he was operating over. He had already exited the vehicle and was walking to a nearby store. They returned to the vehicle that he was driving. Smelled marijuana and saw a glass pipe inside of the vehicle. Both the defendant and his brother, who was a passenger, were found to be in possession of firearms. At that time they learned that ***the defendant had a prior felony conviction.***

(Tr. 7-8) (emphasis added).

Defendant testified that he heard what the prosecutor told the court, there was nothing he needed to add that the prosecutor did not tell the court, and that the prosecutor did not tell the court anything that wasn't true. (Tr. 8).

Defendant further testified that he had discussed "the legal and factual issues of this case" with his attorney, including "some legal issues that had to get resolved before we got to this point[.]" (Tr. 11).

It is undisputed that Defendant was in possession of a firearm. It is undisputed that possession of Ecstasy and unlawful possession of a controlled substance with intent to distribute constitute felonies in the State of Missouri. Defendant admitted during the plea colloquy that he was convicted of those crimes "under the laws of another state," i.e., in Oklahoma. There was sufficient factual basis for the court to find Defendant guilty of unlawful possession of a firearm under the law of Missouri.

The plea court so found beyond a reasonable doubt, stating:

I've heard the statements of the prosecutor *and the defendant's admissions*. I'll accept the plea of guilty as being voluntary and I find that the defendant understands what he is doing. I further find a factual basis for the plea, and I find him guilty beyond a reasonable doubt.

(Tr. 11) (emphasis added).

There was a sufficient factual basis for the plea. *See, State v. Wrice*, 389 S.W.3d 738, 742 (Mo. App. E.D. 2013) (a trial court “may properly rely on a defendant’s admission in court of prior convictions” for purposes of sentence enhancement). Defendant waived his factual defense and admitted the facts alleged by the State were true, including that he had been “convicted of” two crimes constituting felonies in Missouri under the laws of Oklahoma. The plea of guilty was properly entered.

H. The plain language of the statute was satisfied.

When interpreting a statute, the primary goal is to give effect to legislative intent as reflected in the plain language of the statute.” *State v. Moore*, 303 S.W.3d 515, 520 (Mo. banc 2010). “When interpreting a statute, this Court must give meaning to every word or phrase of the legislative enactment.” *Id.* “While statutes in different chapters of the criminal code can be considered in determining the intent of the legislature, the provisions in another section should not be utilized to alter the legislature’s intent as apparent from the plain and ordinary language of a criminal statute.” *Id.* at 521.

“A person commits the crime of unlawful possession of a firearm if such person knowingly has any firearm in his or her possession and ... [s]uch person has been *convicted of ... a crime under the laws of any state ...*

which, if committed within this state, would be a felony.” Section 571.070.1(1); *State v. Merritt*, 467 S.W.3d at 811 (emphasis added).

The plain language of the statute, and the rules of ordinary grammar demonstrate that Defendant need only have been “convicted of a crime ... under the laws of any state” and need not have been “convicted” under the laws of Missouri. Section 571.070.1(1).

Here, Defendant was convicted of possession of Ecstasy and unlawful possession of a controlled substance with intent to distribute “under the laws of any state,” i.e., Oklahoma. It is undisputed that Defendant entered pleas of guilty to both of these offenses. While the Oklahoma court chose to give Defendant an opportunity to obtain an eventual “expungement” of the conviction, the pleas resulted in convictions of crimes “under the laws of any State” because the convictions were in place at the time of Defendant’s new offense, and remain in place today.

Under the plain language of the Missouri statute, the laws of Missouri come into play as to the previous foreign offense only in determining whether the crime, if committed within this state, would constitute a felony. Section 571.070.1(1). It is undisputed that these crimes, “if committed within this state” would constitute felonies.

Section B of 63 Okl. St. §2-410 is, as the lower court held, controlling on the question of whether Defendant had been “convicted of” the prior offenses under the laws of Oklahoma:

[A]ny plea of guilty or nolo contendere or finding of guilt to a violation of the Uniform Controlled Dangerous Substances Act **shall constitute a conviction of the offense for the purpose of the Uniform Controlled Dangerous Substances Act or any other criminal statute under which the existence of a prior conviction is relevant** for a period of ten (10) years following the completion of any court imposed probationary term

(LF 40) (emphasis added).

Under the governing law, Defendant’s “plea of guilty” constituted a “conviction” for this purpose, even though other subsections of statute held that a court may “defer further proceedings” including entry of “a judgment of guilt” while the defendant underwent drug treatment which, if successful, could ultimately result in dismissal and discharge “without court adjudication of guilt” which “shall not be deemed a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime.” (LF 40) (quoting “Section A of 63 Okl. St. §2-410”).

Defendant did not and does not contend that he met this subsection's prerequisites for expungement under the deferred sentencing procedure, including the requirement that the defendant fulfill "the terms and conditions" of probation in Oklahoma, since he was arrested for drugs in this case in Missouri during that probation. (LF 40).

In *Platt v. State*, 188 P.3d 196 (Okla. Crim. App. 2008), the Oklahoma Court of Criminal Appeals rejected a defendant's claim in a case charging Unlawful Possession of a Firearm that he had no prior felony conviction because he had previously entered a guilty plea to the felony charge of Unlawful Possession of methamphetamine and had received a five-year deferred sentence. The defendant had not completed the deferred sentence at the time he was charged with the crime of Unlawful Possession of a Firearm. *Id.*, 188 P.3d at 199. The Court held that earlier pleas of guilty of defendants who are within the period of a sentencing deferral constitute convictions of the offense for the purpose of any criminal statute under which the existence of a prior conviction is relevant. *Id.* At the time the defendant possessed the pistol in *Platt*, the defendant had not successfully completed the term of his probation, nor had the earlier drug possession charge been dismissed. Therefore his guilty plea constituted a "conviction" for purposes of the unlawful possession of a firearm statute. *Id.*

The court below in the case at bar concluded that “the reasoning of the” *Platt* “decision applies to defendant’s case.” (LF 41). Since defendant had pleaded guilty under Oklahoma law to a “crime that would be a felony if committed in Missouri, and the guilty plea constituted a ‘conviction’ under Oklahoma law at the time he allegedly possessed the firearm, defendant may be charged for a violation of § 570.010.1(1).” (LF 41-42).

Platt found that a defendant in the identical posture in Oklahoma was guilty of unlawful possession of a firearm because he had been “convicted” of a felony. *Platt*, 188 P.3d at 197-200. The court emphasized that “during this time” of sentencing deferral, an earlier “plea of guilty or finding of guilt ‘shall constitute a conviction of the offense for the purpose of ... any [] criminal statute under which the existence of a prior conviction is relevant.” *Id.* at 199. The court emphasized that, essentially, the defendant has the opportunity to obtain an “expungement” if he successfully completes the terms of probation. *Id.* at 198. Indeed, the statute, in section 2-410, states in describing the culmination of a successful invocation of the procedure: “Any *expunged* arrest or conviction shall not thereafter be regarded as an arrest or conviction for purposes of employment, civil rights, or any statute, regulation, license, questionnaire or any public or private purpose....” *Id.* (emphasis added). However, at “the time he possessed the pistol at issue in this case,” the defendant “had not successfully completed the term of his probation; nor had

his earlier drug possession charge (to which he pled guilty) been dismissed. Hence the § 2-410 language about a charge that has been ‘dismissed’ or ‘expunged’ under this section not being ‘deemed’ or ‘regarded’ as a ‘conviction’ did not even arguably apply to Platt.” *Id.* at 199.

The court concluded:

The existence of a prior felony conviction is an element of the § 1283 Unlawful Possession of a Firearm offense that Platt was charged with in the current case. And Platt’s prior drug possession charge, to which he pled guilty, had not been dismissed or expunged. Hence, Platt’s guilty plea to possession of methamphetamine, the sentencing upon which had been deferred under § 2-410, did constitute a “conviction” under § 1283, at the time Platt possessed the pistol. Platt was properly charged and convicted of Unlawful Possession of a Firearm under § 1283.

Id.

Similarly, in the case at bar, all elements of the statute were proven. Defendant: 1) knowingly had a firearm in his possession; 2) had “been convicted ... of a crime under the laws of any state” (i.e., under the laws of Oklahoma); and 3) the crime, “if committed within this state, would be a felony....” Section 571.070.1(1). *State v. Evans*, 410 S.W.3d 258, 262, 264 (Mo. App. W.D. 2013) (affirming conviction for felon-in-possession of a firearm

despite claim of defendant that he had received a “Restoration of Citizenship” from the Governor of Iowa following his prior felony conviction in Iowa because he had been convicted of a crime in Iowa under the laws of Iowa which would constitute a felony in Missouri).

I. Other authorities agree based on policy and proper forum grounds.

Other states with “deferred sentencing” schemes reach the same conclusion. In *People v. Allaire*, 843 P.2d 38 (Colo. App. 1992), the Colorado Court of Appeals held that a defendant was properly convicted under its felon-in-possession statute because he had been “previously convicted” when he pleaded guilty despite the absence of any evidence that the defendant had ever been sentenced prior to his arrest for possessing the firearm, which occurred after his deferred judgment had been revoked. *Id.* at 40. The Court held that despite a specific definition of a “judgment of conviction” as encompassing “a recital of the plea, the verdict or findings, the sentence, the finding of the amount of presentence confinement, and costs, if any” contained in Colorado’s Rules of Criminal Procedure, “the term ‘conviction’ also has a less formal meaning: the establishment of guilt by a plea or verdict of guilty prior to judgment and sentencing.” *Id.*

The Colorado court further held that under its statutory scheme, acceptance of a guilty plea with a deferred judgment “acts as a ‘conviction.’”

Id. at 41. The court held that: “This construction is consistent with the purpose of” the statute prohibiting convicted felons from possessing firearms “which is to limit possession of firearms by persons whose past conduct demonstrates their unfitness to be entrusted with such deadly weapons.” *Id.*

Similarly, the Alaska Court of Appeals concluded in *Brant v. State*, 992 P.2d 590 (Ak. App. 1999), that “defendants who have entered a plea or have been found guilty at trial are ‘convicted of a felony’ for purposes of” its felon in possession of a concealable firearm statute. *Id.* The defendants in that case had each pleaded no contest to third-degree assault charges but had not been sentenced at the time they were arrested for being felons-in-possession. *Id.* at 591. The Court held that the “public safety purpose of the statute stems from a conclusion that a felon’s past conduct reflects on the felon’s fitness to possess a concealable firearm. That past conduct is proven factually-beyond a reasonable doubt-when a court accepts a defendant’s plea to a felony or when a defendant is convicted of a felony in a court or a jury trial. The procedural step of sentencing does not provide any additional confirmation that a defendant engaged in conduct that permits classification of the defendant as a felon.” *Id.* at 592. The Court held that “precedent, policy, and reasoning” supported the “most persuasive interpretation” of the term, “convicted” as taking place “when a defendant has been found guilty by a jury or other

factfinder” and rejected a requirement of proof that a defendant has “also been sentenced on that felony conviction.” *Id.*

The federal courts have made explicit the fact that the law where the “conviction” was entered determines whether or not a Defendant has a prior conviction for purposes of the federal felon-in-possession statute.

In *U.S. v. Soloman*, 826 F. Supp. 1221, 1222 (8th Cir. 1993), the Eighth Circuit held that what “constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held[.]” *See also, United States v. Greenberg*, 104 Fed. Appx. 34 (9th Cir. 2004) (applying Alaska law to affirm imposition of 15-year sentence for felon-in-possession where defendant had yet to be sentenced on predicate felony because “Congress provided that ‘[w]hat constitutes a conviction’ of a prior felony ‘shall be determined in accordance with the law of the jurisdiction in which the proceedings were held’”). *See*, 18 U.S.C. § 921(a)(20).

These holdings are consistent with the plain language of the Missouri statute; principles of comity; and the policy of protecting the public while providing maximum incentive for offenders to rehabilitate themselves.

Indeed, the sentencing judge in Oklahoma may well have taken into consideration the fact that Defendant would not have access to guns when granting him deferred sentencing because he faced felon-in-possession

charges if he decided to engage in future drug deals with weapons. Missouri should not volunteer to import Oklahoma felons seeking a haven in which to do so without facing such charges and should not undercut Oklahoma's penal system by permitting such circumvention.

J. Defendant's cases are unpersuasive.

1. None are appeals from guilty pleas where the claim was waived.

Tellingly, none of Defendant's cases involve appeals of guilty pleas *per se*.

Brown v. Handgun Permit Review Board, 982 A.2d 830 (Md. Ct. Special Appeals 2009), was an appeal from the denial of an administrative application to renew a permit to carry, wear, or transport a handgun. *Carr v. Sheriff of Clay County*, 210 S.W.3d 414 (Mo. App. W.D. 2007), was an appeal from the denial by a sheriff of a permit to carry concealable weapons.

State v. Menard, 888 A.2d 57 (R.I. 2005), was a state appeal from the grant of a motion to dismiss. *State v. Evans*, 343 P.3d 122 (Kan. App. 2015), was also a state appeal from the grant of a motion to dismiss.

State v. Moya, 161 P.3d 862 (N.M. 2007), although originally a guilty plea, was an appeal from the use of an out-of-state conviction to enhance a sentence and not an appeal of the guilty plea itself.

Farnsworth v. Virginia, 599 S.E.2d 482 (Va. App. 2004), was an appeal from a trial based on stipulated facts.

None of the defendants in any of those cases waived their claims by pleading guilty and acknowledging prior convictions after unsuccessful procedural moves or by withdrawing their motions to dismiss.

2. Most of Defendant's cases are based on plain language reviews of other state's statutes, which are distinguishable, and on public policy grounds (which support the State).

Carr, supra, held that the plain language of a Missouri statute prohibiting those who have “pled guilty to or been convicted of a crime punishable by imprisonment for a term exceeding one year under the laws of any state or of the United States other than a crime classified as a misdemeanor under the laws of any state and punishable by a term of imprisonment of two years or less that does not involve an explosive weapon, firearm, firearm silencer or gas gun” operated to deny a Missouri applicant for a concealable weapon a permit, despite the fact that he had received a suspended imposition of sentence. *Carr*, 210 S.W.3d at 415-417. *See*, Section 571.090.1(2). This does not support Defendant's position.

Brown involved an esoteric question of Maryland law on how to treat out-of-state convictions insofar as they related to equivalent Maryland convictions (and under which year's version of Maryland law) in interpreting

Maryland's definition of "disqualifying crime" for handgun permits. The Court concluded that a conviction classified as a misdemeanor in the District of Columbia carried a sentence that brought it within the ambit of the definition prohibiting such a permit under Maryland law. The court held:

An interpretation of the statute that completely eliminated out-of-State convictions as disqualifying crimes would be contrary to "the strong desire to keep firearms away from felons and potentially violent persons" that underlay this law.

Brown, 982 A.2d at 843.

There was no issue in *Brown* as to whether the applicant had a conviction; the sole issue was which was the comparable crime and punishment in Maryland that defined his ineligibility. Thus, the case is consistent with the State's argument here that whether the foreign crime would be a felony in Missouri is a matter of Missouri law, and whether it is a conviction under the laws of any State is to be determined by reference to the State which convicted the defendant.

Farnsworth affirmed the defendant's conviction for being a felon-in-possession because the defendant had been convicted of a predicate felony in West Virginia. *Farnsworth*, 599 S.E.2d at 493-497. The court held that the "statute draws no distinction between those felons previously convicted of a felony in Virginia and those previously convicted in another state." *Id.* at 497.

“It is concerned only with ‘preventing a person, who is known to have committed a serious crime in the past, from becoming dangerously armed’ while in Virginia.” *Id.* (internal citation omitted). The holding of *Farnsworth* was that an exception for expungements or restorations of rights, based on the plain language of the statute, applied only to expungements or restorations of rights by the Governor of Virginia. *Id.* at 495-501. *Farnsworth* is of no assistance in defining what constitutes being “convicted of” a crime in another state, except to hold that a person convicted in another state has been convicted under the laws of any state and is thereby subject to prosecution for being a felon-in-possession, a holding compatible with the State’s position here.

Menard also did not deal with what constituted being “convicted of” a crime in another state. The issue there was whether arson was a “crime of violence” under Rhode Island law, where the predicate crime was committed in Arizona, which did not regard it as such. *Menard*, 888 A.2d at 59-64. This is again more analogous to the third element of the Missouri FIP statute: whether the “crime” of which the defendant was “convicted” constitutes a felony in Missouri disqualifying a defendant from possessing firearms and subjecting him to prosecution as an FIP. It does not speak to the question of what “convicted of” a “crime under the law of any State” means.

Interestingly, *Menard* rejected the trial court’s use of the rule of lenity as to an alleged ambiguity and held on plain-language and policy grounds that a felon-in-possession prosecution could proceed after it had been dismissed by the trial court. *Id.* The plain language interpretation was applied to a Rhode Island statute which read:

No person who has been convicted in this state or elsewhere of a crime of violence or who is a fugitive from justice shall purchase, own, carry, transport, or have in his or her possession any firearm.

Id. at 62 (emphasis deleted).

Consistent with the State’s position in this case, the court determined that the defendant had been “convicted” in Arizona (which met the “convicted in this state or elsewhere” requirement) but applied Rhode Island law to whether the equivalent crime element was met. In other words, it is at best persuasive on the third, rather than the second element of FIP in Missouri. *Id.* at 62-63.

Moya also rejected the rule of lenity to resolve an alleged ambiguity as to whether a foreign conviction could be used for sentence-enhancement purposes and relied instead on a plain-language interpretation of a New Mexico statute. *Moya*, 161 P.3d 862. Consistent with the third prong of the Missouri test, *Moya*’s holding is that “prior out-of-state misdemeanor

convictions can be used to enhance a sentence if the offense would have been classified as a felony in New Mexico at the time of conviction.” *Id.* at 863.

Moya is of no help on the second prong, except insofar as it illuminates the choice of language of the statute (convicted of a crime under the laws of any state that would be a felony if committed in this state). *Moya* points out that some states “do not classify crimes as felonies or misdemeanors. In those states, crimes are classified by classes or degrees, and punishment is based on that classification.” *Id.*, 161 P.3d at 864 (citing Maine and New Jersey statutes).

In deferring to legislative intent and in holding “there is not insurmountable ambiguity” in the phrases, “prior felony conviction” and “prior felony” which were defined in different ways within the statute (thereby rejecting the rule of lenity), the *Moya* court emphasized “the legitimate legislative goal of reducing recidivism.” *Id.* at 866. The court held that the two chief purposes served by the statute were:

(1) the deterrent/rehabilitative purpose of discouraging those who have previously committed serious crimes from engaging in similar conduct within New Mexico; and (2) the punitive/protective purpose of incarcerating for a longer period of time those who have shown a repeated inclination to commit serious offenses.

Id. at 867.

Defendant relies heavily on *State v. Evans*, 343 P.3d 122 (Kan. App. 2015). Interestingly, *Evans* holds both that a guilty plea is enough to constitute a prior conviction, even without a sentence. *See, id.* While it is true that the Kansas court applied Kansas law to determine what constituted a conviction, the opinion (as with all of those cited by both parties) heavily emphasized the public policy “of prohibiting firearm possession by a person who has previously been convicted of a serious felony” in order “to protect the public.” *Id.*, 343 P.3d at 127.

Moreover, *Evans* is somewhat undermined by its flagrant misreading of Missouri law, which it purported to interpret, on the question of whether a mere guilty plea constituted a “judgment of guilt.” *See, id.* at 126.

In any event, the case is authority only for a question of statutory interpretation in Kansas. *Id.* at 125.

Finally, Defendant’s claim that *Yale v. City of Independence*, 846 S.W.2d 193 (Mo. banc 1993), governs because the Oklahoma procedure is the equivalent of a suspended imposition of sentence is mistaken because the Oklahoma procedure has significant differences. First, it expressly deems this situation to be a “conviction.” Second, it subjects a defendant on a deferred sentence for a drug crime who possesses a weapon to prosecution for being a felon-in-possession. Third, it is more analogous to an expungement procedure which applies if and only if the defendant completes probation and avoids

other drug or firearm possession crimes for ten years after the expiration of probation. Indeed, the statute references “expungement” expressly multiple times.

Hence, contrary to the expectations of a Missouri judge granting a suspended imposition of sentence, an Oklahoma judge justifiably relies on the deterrent effect of potential FIP prosecution when allowing a defendant to plead guilty and enter the deferred sentence procedure to prevent such defendants from attending future drug deals with firearms. This defendant had both drugs and firearms, the combustible combination the Oklahoma criminal procedure is expressly designed to avoid. Defendant should not be permitted to escape justice merely by crossing state lines.

K. Summary

Defendant’s motion to dismiss was abandoned and did not apply to the charging indictment to which Defendant pleaded guilty. Defendant’s Motion to Quash is not before this Court because it was not part of the Point Relied On raised in the Court of Appeals. In any event, the Motion to Quash preserved no record of Defendant’s grounds and was properly denied because the charging document stated all essential elements of the charged offense and permitted Defendant to prepare his alleged factual defense and to claim prior jeopardy had he gone to trial and been acquitted.

Defendant waived his claim by acknowledging his awareness of it and still admitting under oath that he had been convicted of both alleged crimes in Oklahoma and by pleading guilty. Defendant admitted that he knowingly possessed a firearm despite being “convicted of” crimes “under the laws of any State” (here, Oklahoma) which would be felonies if committed in Missouri.

Defendant’s sole point on appeal should be rejected.

CONCLUSION

Defendant's convictions and sentences should be affirmed.

Respectfully submitted,

JOSHUA D. HAWLEY
Attorney General

/s/ Gregory L. Barnes

GREGORY L. BARNES
Assistant Attorney General
Missouri Bar No. 38946

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
greg.barnes@ago.mo.gov

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with Rule 84.06(b) and contains 9,251 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word 2010.

/s/ Gregory L. Barnes
GREGORY L. BARNES