No. SC97744

In the
Supreme Court of Missouri

STATE EX REL. MICHAEL KELLY,

Petitioner,

v.

JULIE INMAN,

Respondent.

Petition for a Writ of Habeas Corpus

RESPONDENT'S BRIEF

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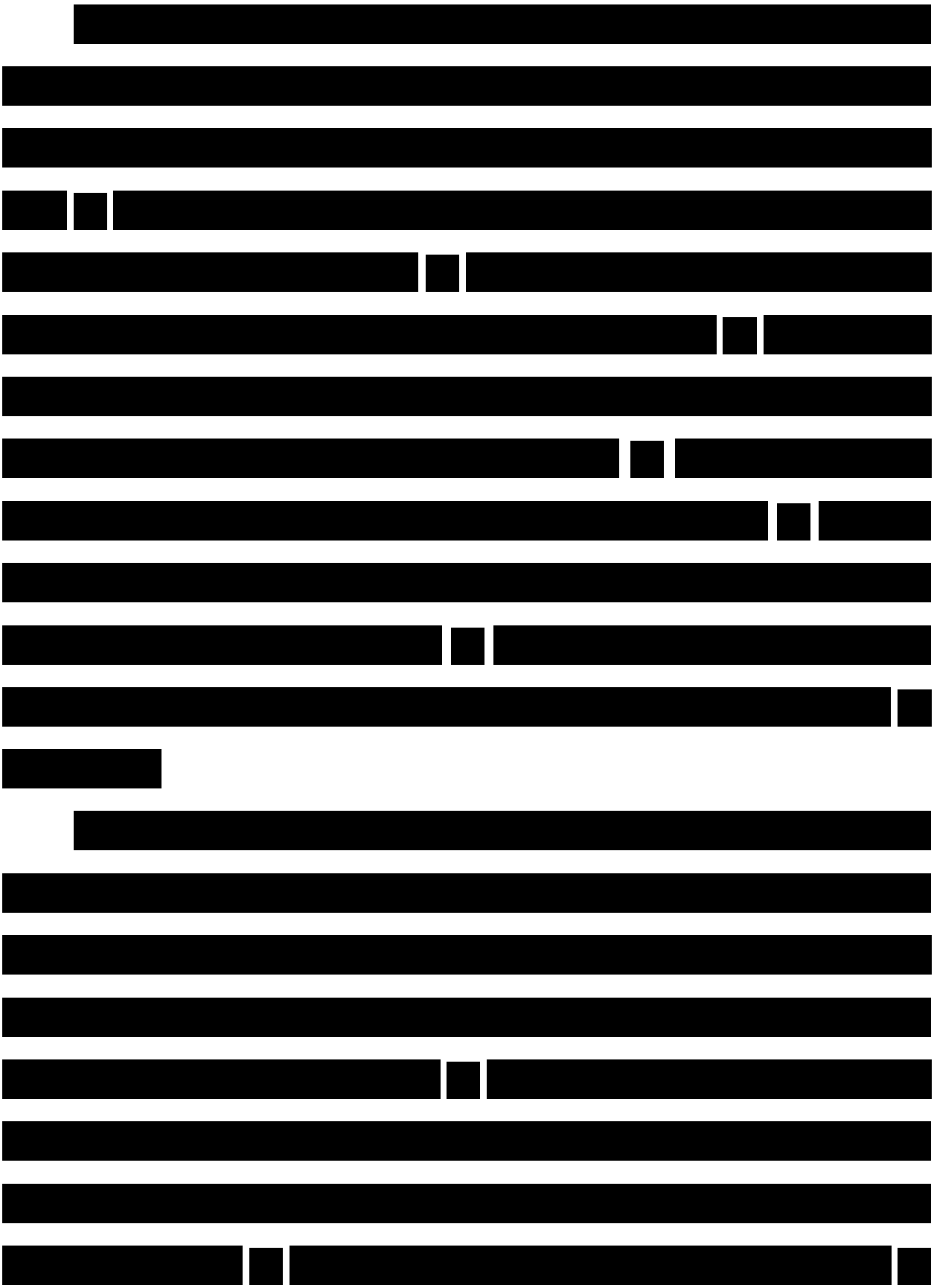
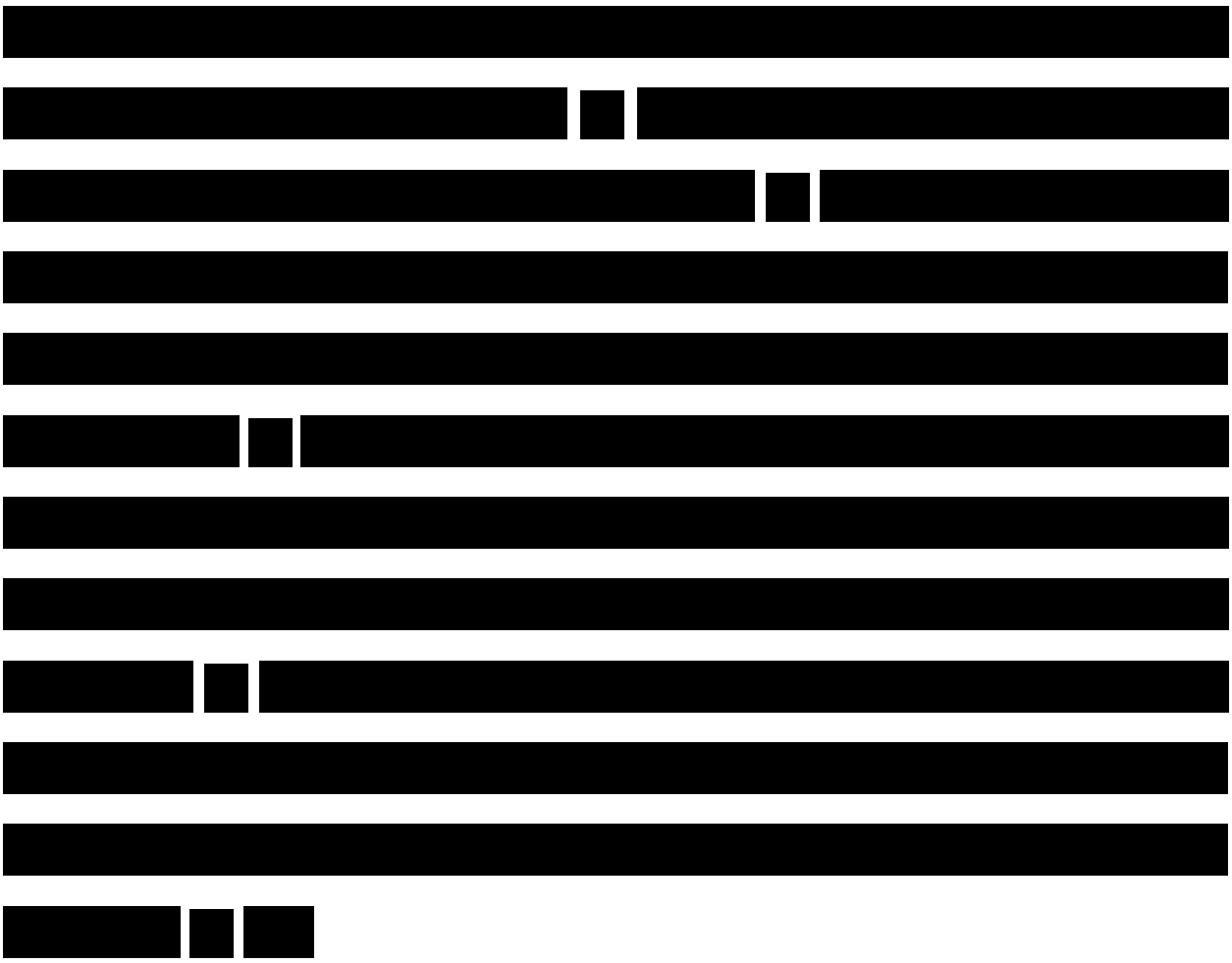
STATEMENT OF FACTS

[redacted] Kelly's appointed attorney sought an order from the trial court for a mental examination to determine: (1) Kelly's competency to stand trial and (2) whether Kelly was not guilty of the charged offenses by reason of insanity ("NGRI"). (Pet. Ex. E5).[1]

[redacted]

[1] Kelly suggests that the State moved for his mental evaluation. (Pet. Br. at 5). But according to Kelly's exhibits, his attorney filed a "Motion for Mental Examination … pursuant to Sections 552.020 and 552.030 RSMo (1986)" on March 27, 1991. (Pet. Ex. E5). Shortly thereafter, the trial court ordered Kelly's mental examination. *Id.* at E8.





On June 20, 1991, Kelly returned to court with his attorney. (Pet. Ex. E3–E4, E8). Kelly filed his notice of intent to rely solely on a defense of mental disease or defect on that date. *Id.* The State accepted Kelly's NGRI defense. *Id.* at E3. The trial court entered its order committing Kelly to the Department of Mental Health ("DMH"). *Id.* In its order, the trial court found that Kelly was incompetent to proceed with the charges. *Id.* It also found based on the evidence, Kelly's plea, and the State's acceptance of Kelly's plea, that Kelly "is not guilty of the crimes charged in the information by reason of a mental disease or defect excluding responsibility." *Id.* The trial court committed Kelly

to DMH "for custody, care and treatment in a state mental hospital as provided by law" and acquitted Kelly of his charges. *Id.* at E4; *see also* § 552.040.2.[2] Kelly did not file an appeal. (Resp. Ex. C); (Pet. Brief at 20). Kelly's treatment in DMH continues to this day.

[redacted]

[2] All statutory references are to RSMo. as supplemented through (1991) unless otherwise noted.

ARGUMENT

I. Kelly's claim for relief is procedurally defaulted because he failed to raise it in the trial court or on direct appeal – Responds to Petitioner's Point I.

Kelly attacks the constitutionality of his NGRI more than twenty-eight years after the plea. Neither he nor his attorney raised any objections at the time of the plea. Neither he nor his attorney filed an appeal after the plea. Under the well-settled law governing writs of habeas corpus, Kelly's claim in this Court is procedurally barred. And Kelly cannot meet any of the exceptions to excuse his procedural default. Accordingly, the petition should be denied.

Standard of Review

Under Rule 91, "habeas corpus proceedings are limited to determining the facial validity of confinement on the basis of the entire record of the proceeding in question and to allege entitlement to immediate discharge from current confinement." *State ex rel. Nixon v. Kelly*, 58 S.W.3d 513, 516 (Mo. 2001) (citing *State ex rel. Simmons v. White*, 866 S.W.2d 443, 445 (Mo. 1993)). The petitioner bears the burden of proving that his confinement is illegal. *Id.* The habeas court may either grant relief and order the petitioner discharged, or deny relief. Rules 91.18, 91.20. "[H]abeas corpus is available as a remedy for a person confined pursuant to Chapter 552 procedures if an application therefor is properly pleaded, filed in a court having jurisdiction,

and facts are proven showing entitlement to relief." *State v. McKee*, 39 S.W.3d 565, 569 n.6 (Mo. App. S.D. 2001).

Analysis

Habeas corpus is a limited remedy. *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. 2000). This Court has previously explained the traditionally narrow role of habeas corpus. "At common law, a final judgment by a court of competent jurisdiction was immune from challenge by application for a writ of habeas corpus." *Simmons*, 866 S.W.2d at 445 (citing *Ex parte Watkins*, 28 U.S. 193, 203 (1830); *Ex parte Dixon*, 52 S.W.2d 181, 182 (Mo. banc 1932)). The writ "merely required the custodian to show the basis on which the prisoner was being held[,]" and collateral review of judgments "was extreme limited." *Id.* The common law writ was later codified in statute and Rule, but the writ has remained "limited to determining the facial validity of confinement." *Id.*; *see also State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214 (Mo. 2001); § 532.010 *et seq* RSMo. (2019); Rule 91.

Recognizing the narrow role habeas fills, objections which may have been meritorious if made at trial or raised as a claim of error on appeal or in post-conviction relief proceedings are not cognizable in habeas corpus. *State ex rel. Strong v. Griffith*, 462 S.W.3d 732, 739 (Mo. 2015). "Habeas corpus is not a substitute for either a failure to object to trial court error or a procedural default of a post-conviction remedy." *State ex rel. Nixon v. Sprick*, 59 S.W.3d

515, 519 (Mo. 2001). Litigants must present a claim of error at the earliest opportunity. *See Simmons*, 866 S.W.2d at 446 (holding that criminal defendants must raise "timely" challenges to convictions). If a litigant fails to object at trial or fails to raise claims on appeal and when seeking post-conviction relief, then the claims are waived and cannot be raised in habeas. *State ex rel. Koster v. McElwain*, 340 S.W.3d 221, 243 (Mo. App. W.D. 2011). And it is well settled that constitutional violations must be challenged at the earliest opportunity or they are waived. *Garris v. State*, 389 S.W.3d 648, 651 (Mo. 2012); *State v. Gonzales*, 253 S.W.3d 86, 88 (Mo. App. E.D. 2008).

A. Kelly's claim is procedurally defaulted.

There is no record that any objection was raised to Kelly's NGRI plea in the trial court. Kelly requested to plead NGRI. *See* (Pet. Ex. E3) (commitment order); (Pet. Ex. E5) (Kelly's motion for mental examination); (Pet. Ex. E8) (docket entry showing Kelly's notice to rely solely on defense of mental disease or defect). Kelly or his attorney could have asserted at the time of his NGRI plea that his plea violated due process but did not. Nearly the same scenario occurred in *Strong*. In habeas, Strong argued that his mental illness at the time of his crimes rendered him not competent to be executed. *Strong*, 462 S.W.3d at 733. But this Court *sua sponte* recognized that Missouri court procedures would have permitted Strong to raise his claim during trial. *Id.* at 738–39. "Due to either a lack of evidence or as a trial strategy, Mr. Strong

presented no mitigating evidence related to his mental condition." *Id.* at 738. Therefore, because Strong did not raise his mental illness claim at trial, this Court found that his claim was procedurally barred from habeas review. *Id.* at 738–39.

Likewise, because Kelly could have objected to further proceedings before his NGRI plea, but did not, his claim is procedurally barred in habeas. "Habeas review of a conviction is not appropriate where a defendant could have raised claims at trial… but did not do so for reasons internal to the defense." *Id.* at 733. Moreover, even if Kelly had not defaulted this claim by his actions at the NGRI plea, he still procedurally defaulted his claim by not raising it on direct appeal. All defendants have the right to a direct appeal from a final judgment. § 547.070. And the Missouri Court of Appeals has recognized a defendant's ability to appeal from a commitment order after an NGRI finding. *State v. Lewis*, 188 S.W.3d 483, 484 (Mo. App. W.D. 2006) (appealing NGRI commitment order after bench trial). Ordinarily, a guilty plea waives the possibility of filing a direct appeal challenging the merits of the underlying action. *See State v. Craig*, 287 S.W.3d 676, 679 (Mo. 2009). But Kelly did not plead guilty. Kelly pleaded NGRI, which results in an acquittal, not a conviction. § 552.030.

In *dicta*, the Missouri Court of Appeals stated in *State ex rel. Koster v. Oxenhandler* that, because Rules 24.035 and 29.15 only apply to felony

convictions, "[h]abeas is thus the only viable means by which the lawfulness of confinement as a result of the NGRI defense can be challenged."[3] 491 S.W.3d 576, 589 n.21 (Mo. App. W.D. 2016). But *Oxenhandler's dicta* directly conflicts with the Court of Appeals' prior decision in *Lewis*. The *Lewis* Court decided an appeal from a commitment order after an NGRI finding. *Lewis*, 188 S.W.3d at 484. *Lewis* is consistent with Missouri law, which permits appeals "[i]n all cases of final judgment rendered upon any indictment or information[.]" § 547.070. *Oxenhandler*'s conflicting *dicta* should not be followed.

Neither counsel for Kelly nor undersigned counsel have been able to find any record that Kelly filed a direct appeal from his NGRI plea. (Pet. Brief at 21); (Resp. Ex. C) (Case.net search for "Michael Kelly" in the Western District Court of Appeals). Therefore, both because Kelly failed to timely raise his claim in the trial court and because Kelly did not file an appeal, his claim is procedurally defaulted in habeas corpus now.

B. Kelly cannot excuse his procedural default.

There are narrow exceptions to procedural default. *First*, a habeas petitioner may present new evidence to make a showing of actual innocence "as a gateway to allow consideration of an underlying constitutional claim" which was not raised in a timely manner. *State ex rel. Amrine v. Roper*, 102

[3] *Oxenhandler* did not consider whether application of this Court's precedent in *Strong* would bar Kelly's claim.

S.W.3d 541, 546 (Mo. 2003); *see also McKim v. Cassady*, 457 S.W.3d 831, 841 (Mo. App. W.D. 2015). This is also known as "the manifest injustice or miscarriage of justice standard[.]" *Clay*, 37 S.W.3d at 217.[4] To pass through this gateway, a petitioner is required to show that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* (quoting *Schlup v. Delo,* 513 U.S. 298, 327 (1995)). Importantly, "[w]ithout any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice[.]" *Id.* (quoting *Schlup*, 513 U.S. at 315–16). A gateway innocence claim is not an independent claim for review, but only permits review of an otherwise procedurally barred claim. *Id.* at 217–18; *In re Lincoln v. Cassady*, 517 S.W.3d 11, 17 (Mo. App. W.D. 2016).

Kelly does not argue that gateway actual innocence applies. And the record would not support that claim. Kelly has presented no new evidence that he is innocent of first-degree robbery and armed criminal action. A claim of mental illness does not "equate[ ] with actual innocence." *Stanley v. Lockhart*, 941 F.2d 707, 710 (8th Cir. 1991); *see also Pitts v. Norris*, 85 F.3d 348, 350–51

[4] The terms "manifest injustice" or "miscarriage of justice" do not refer to any claim other than a claim of actual innocence. "[T]his Court holds that the manifest injustice or miscarriage of justice standard requires the habeas corpus petitioner to show that a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Clay*, 37 S.W.3d at 217 (quotations omitted).

(8th Cir. 1996) (only evidence of factual innocence is sufficient to trigger gateway innocence, not "legal innocence").

Second, a petitioner's claim that his or her sentence is in excess of that allowed by law may be raised in habeas even if it was not raised in the ordinary course of review. *State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 516–17 (Mo. 2010). This exception to procedural default was traditionally referred to as the "jurisdictional defect" exception. *Id.* at 517; *see also Clay*, 37 S.W.3d at 217. But in *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. 2009), this Court explained that "there are only two types of jurisdiction—personal and subject matter." *State ex rel. Griffith v. Precythe*, 574 S.W.3d 761, 762 n.1 (Mo. 2019). Thus, while a claim that a sentence is in excess of that allowed by law may still survive a procedural default, the term "jurisdictional defect" no longer accurately applies to it. *Zinna*, 301 S.W.3d at 517 (quoting *State ex rel. Osowski v. Purkett*, 908 S.W.2d 690, 691 (Mo. 1995)). But, this Court cast doubt on the continued validity of the *Zinna* exception when it held in *State ex rel. Fite v. Johnson*, 530 S.W.3d 508, 510 (Mo. 2017) that a challenge to a sentence exceeding the maximum allowed by law was "procedurally defaulted due to [the petitioner's] failure to file a Rule 24.035 motion for post-conviction relief."[5]

[5] *Fite* was a writ of prohibition action filed after a trial court's Rule 29.07(d) order allowing a defendant to withdraw his guilty plea, not a habeas action. But the Court's statement regarding the exclusivity of Rule 24.035 proceedings would logically apply in all proceedings challenging a conviction.

Kelly acknowledges that the "jurisdictional defect" exception does not apply to his claim. (Pet. Brief at 21–22). Kelly's claim does not challenge either the subject-matter or personal jurisdiction of the trial court. *Id.* Kelly was acquitted, not sentenced, so he cannot claim his sentence is in excess of that allowed by law. *Zinna*, 301 S.W.3d at 517. And he recognizes that competency is not a question of jurisdiction. (Pet. Brief at 21–22); *see also Webb*, 275 S.W.3d at 254.

Third, a petitioner may show cause for failing to previously raise a claim and prejudice resulting therefrom. *Jaynes*, 63 S.W.3d at 215 (adopting the federal cause and prejudice standard in Missouri habeas). Cause and prejudice are conjunctive criteria; a petitioner must satisfy both criteria to obtain relief. *Murray v. Carrier,* 477 U.S. 478, 488 (1986). Cause occurs when "some objective factor external to the defense impeded counsel's [or the petitioner's] efforts to comply with the State's procedural rule." *Jaynes,* 63 S.W.3d at 215 (quoting *Murray*, 477 U.S. at 488). "[A] petitioner with the *factual* knowledge for a legal claim cannot argue that ignorance of the law is 'cause' for procedural default." *State ex rel. Taylor v. Moore*, 136 S.W.3d 799, 802 (Mo. 2004) (emphasis in original). To establish prejudice, a petitioner "bears the burden of showing, not merely that errors at his trial created possibility of prejudice, but that they 'worked to his actual and substantial disadvantage, infecting his entire trial

with error of constitutional dimensions.'" *Jaynes*, 63 S.W.3d at 215-16 (citing *United States v. Frady*, 456 U.S. 152, 170 (1982)).

Though Kelly argues that the cause and prejudice exception applies here, it does not. Kelly relies on *Holt v. Bowersox*, 191 F.3d 970, 974 (8th Cir. 1999) to argue that "[s]erious mental illness can constitute cause and prejudice excusing procedural default." (Pet. Brief at 22). But the *Holt* Court addressed cause and prejudice for failure to raise a claim at the *post-conviction* stage of review, not for failing to object at trial or failing to file an appeal. *Holt*, 191 F.3d at 974–75.[6] This is significant because Holt was *pro se* at the time the procedural default occurred. *Id.* at 975 n.5. Thus, *Holt* is inapplicable to this case because Kelly was represented by an attorney throughout the pre-trial and NGRI plea process. *Holt* should not be read to hold that mental illness can be cause to excuse a default when the default occurred during trial and the time to file a direct appeal, while the petitioner was represented by counsel.[7]

On the contrary, the United States Supreme Court has held that "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor *external* to the defense impeded

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[6] Holt pleaded guilty and was sentenced to life without parole, not acquitted like Kelly. *Holt* 191 F.3d at 972.

[7] Other circuits have refused to find that a defendant's mental illness at any point in the litigation can constitute cause under *Murray*'s framework. *C.f. Gonzales v. Davis*, 924 F.3d 236, 244 (5th Cir. 2019); *Harris v. McAdory*, 334 F.3d 665, 669 (7th Cir. 2003); *Hull v. Freeman*, 991 F.2d 86, 91 (3d Cir. 1993).

counsel's efforts to comply with the State's procedural rule." *Murrary*, 477 U.S. at 488 (emphasis added). Examples include "a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable[.]" *Id.* (citations omitted). "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective … we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." *Id.* This Court follows the same rule. *Jaynes*, 63 S.W.3d at 215 (adopting *Murray's* cause and prejudice test).

There is no evidence of any official interference here. And Kelly does not claim—and did not claim in his previous two habeas petitions—that his plea attorney provided ineffective assistance. Moreover, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Kelly cannot show cause under *Murray*.

Kelly also cannot show actual prejudice.[8] To prove prejudice, Kelly must show that errors in the trial court "worked to his actual and substantial

[8] The *Holt* standard relied on by Kelly erroneously melds cause and prejudice into one finding by holding that mental illness can be both cause *and* prejudice. *Holt*, 191 F.3d at 974. But both this Court and the United States Supreme Court require separate findings. *See Jaynes*, 63 S.W.3d at 215; *Murray*, 477 U.S. at 488.

disadvantage[.]" *Jaynes*, 63 S.W.3d at 215 (quoting *Frady*, 456 U.S. at 170). Kelly was not prejudiced by entering an NGRI plea because he was acquitted of his criminal charges. He only remains in the care and custody of DMH because he presently has a mental disease or defect and is a danger to himself and others. *See* (Resp. Ex. E); § 552.040 RSMo. (2019). And all of the evidence in the record demonstrates that Kelly *was* NGRI. (Resp. Ex. B). Kelly has presented no facts to suggest that if he had not pleaded NGRI, he would not have been found NGRI after a trial.

For all of the above reasons, Kelly's more than twenty-eight-year-old claim is procedurally defaulted and he cannot excuse that default. The petition must be denied.

II. Kelly's NGRI plea did not violate Missouri law or due process – Responds to Petitioner's Point I.

Missouri's statutory procedures protect both the defendant and the State from abuses of the NGRI plea. There are strict procedural requirements in place before an NGRI plea can be accepted. These procedures were followed in Kelly's case, and he has not shown a violation of his due process rights. All of the evidence in the record demonstrates that Kelly is properly committed to DMH.

Standard of Review

Under Rule 91, "habeas corpus proceedings are limited to determining the facial validity of confinement on the basis of the entire record of the proceeding in question and to allege entitlement to immediate discharge from current confinement." *Kelly*, 58 S.W.3d at 516 (citing *Simmons*, 866 S.W.2d at 445). The petitioner bears the burden of proving that his confinement is illegal. *Id.* The habeas court may either grant relief and order the petitioner discharged, or deny relief. Rules 91.18, 91.20. "[H]abeas corpus is available as a remedy for a person confined pursuant to Chapter 552 procedures if an application therefor is properly pleaded, filed in a court having jurisdiction, and facts are proven showing entitlement to relief." *McKee*, 39 S.W.3d at 569 n.6.

Analysis

When a criminal defendant lacks the mental capacity to understand the nature of the proceedings against him or assist in his defense, he should not be subjected to a trial. *Drope v. Missouri*, 420 U.S. 162, 171 (1975). Likewise, a defendant may not waive counsel or plead guilty unless they are competent to do so. *Godinez v. Moran*, 509 U.S. 389, 396 (1993). The United States Supreme Court has recognized that mental competence "is fundamental to an adversary system of justice." *Drope*, 420 U.S. at 171–72.

Kelly was found incompetent to proceed to trial at the same time he pleaded NGRI. (Pet. Ex. E3). He did not have a trial. He was represented by counsel throughout his criminal proceedings. And he was acquitted of his criminal offenses. Thus, under these circumstances, Kelly's NGRI plea did not violate either Missouri law or due process.

NGRI pleas are different from guilty pleas. An NGRI plea results in the immediate acquittal of the criminal offense. § 552.030.2. There is no possibility of further adversarial criminal proceedings after an NGRI plea is accepted. Once an individual is no longer a danger to themselves or others, they can be entitled to unconditional release from DMH, with no risk of future prosecution for the crime. § 552.040.6. Much like procedures under section 632.335 RSMo. (2019), individuals committed after an NGRI plea are only committed for as long as necessary for their treatment. And due process is satisfied for civil commitment procedures if the individual to be committed is represented by effective counsel—there is no competency requirement. When the client is incompetent, counsel in guardianship proceedings can make decisions "to safeguard and advance the interest of the client[,]" such as waiving the requirement of a trial. *In re Link*, 713 S.W.2d 487, 496 (Mo. 1986). The same should be true for NGRI pleas.

A. The trial court followed Missouri law.

The trial court fully complied with Missouri law here. Missouri law provides that defendants who are not competent to proceed shall not "be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures." § 552.020.1. A person is not responsible for their criminal conduct if, as a result of mental disease or defect, "did not know or appreciate the nature, quality, or wrongfulness of his conduct." § 552.030.1. Criminal proceedings against an incompetent defendant "shall be suspended and the court shall commit him to [DMH.]" § 552.020.8. Where a defendant pleads NGRI, the State accepts the plea, and the record supports a finding that the defendant has no other defenses, "the court shall proceed to order the commitment of the accused as provided in section 552.040[.]" § 552.030.2. The State may accept an NGRI plea "whether raised by plea or written notice[.]" *Id.*

Here, Kelly was not tried, convicted, or sentenced; he was immediately acquitted of his offenses and committed to the care and custody of DMH. (Pet. Ex. E3–E4); §§ 552.030–.040. There were no further criminal proceedings after the trial court found Kelly incompetent; he was only acquitted and committed to DMH under sections 552.030–.040. (Pet. Ex. E3–E4). Section 552.020 does not prohibit the acquittal of an incompetent defendant. § 552.020.1. Indeed, the trial court is required to acquit a defendant when an NGRI plea is

supported by the evidence and accepted by the State. § 552.040. Therefore, based on the record of the proceedings below, the trial court correctly followed Missouri law when it acquitted Kelly and committed him to DMH.

B. The NGRI plea did not violate due process.

Due process requires competency before a trial or a traditional plea because there are a number of choices surrounding those events. *See Godinez*, 509 U.S. at 398. Defendants who stand trial or enter traditional pleas will be presented with options that require "the capacity for 'reasoned choice' among the alternatives available to him." *Id.* at 397. These defendants must decide "whether to waive [their] 'privilege against compulsory self-incrimination,'" "whether to waive [their] 'right to trial by jury,'" and "whether to waive [their] 'right to confront [their] accusers.'" *Id.* at 398 (quoting *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)). Defendants who enter traditional pleas may also "be called upon to decide, among other things, whether (and how) to put on a defense and whether to raise one or more affirmative defenses." *Id.* Importantly, "a plea of guilty is more than an admission of conduct; it is a conviction." *Boykin*, 395 U.S. at 242.

NGRI pleas like Kelly's are different. The defendant is not simply asserting a defense to the crime; he is actually acquitted. § 552.040.1(3). There are no further court proceedings. Thus, when a defendant's NGRI plea is accepted by the State, the choices which are important to presenting a defense

are no longer present. The case law addressing pre-trial competence has focused on the defendant's ability to affirmatively waive aspects of the defense. But defendants like Kelly need not present a defense because they are not placed in jeopardy of a criminal conviction.[9]

There are strict procedural requirements surrounding an NGRI plea that protect both the defendant and the State. For a defendant to plead NGRI and be acquitted without a trial, the State must accept the plea. § 552.030.2. Before the State can accept a defendant's NGRI plea, there must be no other available defense to the crime. *Id.* "As a prerequisite to a criminal commitment being ordered under sections 552.030 and 552.040, it is essential that the defendant have committed a criminal act." *State v. Kee*, 510 S.W.2d 477, 480 (Mo. banc 1974). This is an objective inquiry into the evidence. The evidence must also show that the defendant had a mental disease or defect which rendered him unable of knowing and appreciating the wrongfulness of his conduct, or conforming his conduct to the law. § 552.030.1. Given that Kelly has presented no evidence to suggest that he is not NGRI, these procedural protections were sufficient here.

[9] It is noteworthy that Kelly's petition in this Court, if successful, would place him back in jeopardy of a criminal conviction by vacating his acquittal and returning him to pre-trial status.

The Supreme Court of Connecticut has declined to find that due process requires competence before an NGRI plea. *See, e.g.*, *State v. Ouellette*, 271 Conn. 740, 768, 859 A.2d 907, 927 (2004) ("We know of no court, however, that has required, as a matter of *constitutional law*, a *Boykin*-type canvass of a defendant who pleads [NGRI]."); *c.f. State v. Shegrud*, 131 Wis.2d 133, 138, 389 N.W.2d 7, 9 (1986) (stating without citation that an NGRI plea "waives several constitutional rights"); *People v. Rizer*, 5 Cal.3d 35, 484 P.2d 1367 (1971) (deciding only whether *Boykin* applied at time of NGRI plea, not if *Boykin* should have applied). Undersigned counsel has identified only three states which have expressly held that an incompetent defendant cannot enter an NGRI plea, but these decisions were based on interpretations of state law. *See State v. Smith*, 88 Wash.2d 639, 642, 564 P.2d 1154, 1156 (1977) (overruled on other grounds); *Thompson v. Crawford*, 479 So.2d 169, 180–82 (Fla. Dist. Ct. App. 1985) (court independently found defendant NGRI after stipulation); *State v. Champagne*, 127 N.H. 266, 274, 497 A.2d 1242, 1247–48 (1985) (citing a state case analyzing competence to stand trial).

Kelly relies on *Miller v. Angliker*, 848 F.2d 1312, 1319 (2d Cir. 1988), which states that an NGRI plea resembles a guilty plea. But *Miller* ultimately held only that "the *Brady v. Maryland* principles are also applicable where the defendant has pleaded [NGRI]." *Id.* at 1320. *Miller* did not address competency to enter an NGRI plea. *Duperry v. Kirk*, 563 F.Supp.2d 370 (D. Conn. 2008), a

federal district court case cited by Kelly, relied on *Miller* and *United States v. Brown*, 428 F.2d 1100, 1103–04 (D.C. Cir. 1970), to find that NGRI pleas are "more like a 'guilty' plea than a 'not guilty' plea." *Duperry*, 563 F.Supp.2d at 387. But again, *Miller* did not hold this. And the *Brown* decision addressed a stipulation and *trial* on the issue on insanity, whereas there were no further criminal proceedings after Kelly's plea. Also unlike Kelly, the appellant in *Brown* was actually convicted after a trial. 428 F.2d at 1101–02. And *Brown* was based on an interpretation of the Federal Rules of Criminal Procedure, not the right to due process. *Id.* at 1102–03.

Kelly also relies on Justice Kennedy's dissent in *Foucha v. Louisiana*, 504 U.S. 71 (1992), for the proposition that a defendant must be competent to enter an NGRI plea. (Pet. Brief at 17). Justice Kennedy's dissent cited *Drope*, 420 U.S. at 171, for that proposition, but the *Drope* Court only reaffirmed that a person who is incompetent may not be subjected to a trial. *Drope*, 420 U.S. at 171, 180–82. Kelly also cites *Medina v. California*, 505 U.S. 437, 448–49 (1992), which stated, without citation to authority, that an NGRI plea "presupposes that the defendant is competent[.]" (Pet. Brief at 17). But the *Medina* decision addressed only the question of whether it was constitutional to require a defendant to bear the burden of proving competence to stand trial; any comment on competence to enter an NGRI plea is *dicta*. *Id.* at 439.

The Missouri Court of Appeals in *State ex rel. Koster v. Oxenhandler*, 491 S.W.3d at 599, also suggested that an NGRI plea constitutes "both the literal lack of other defenses, as well as an accused's knowing and voluntary waiver of other defenses[.]"[10] The *Oxenhandler* Court's only support for that statement was a line in *Kee* which suggested that a defendant "waives all other defenses" when the State accepts an NGRI plea under section 552.030.2. *Kee*, 510 S.W.2d at 480. But the language in *Kee* does not track the language of section 552.030.2. That section requires that "the accused *has no* other defenses[.]" § 552.030.2 (emphasis added). A waiver implies that the defendant is giving up the right to something. But a defendant cannot be required to "waive" a defense that does not exist. *Oxenhandler*, 491 S.W.3d at 598 (noting that the State has no authority to accept an NGRI defense unless the defendant has no other defenses); § 552.030.2.

In sum, Missouri's NGRI plea procedures were correctly followed in this case. Once the trial court found Kelly NGRI and incompetent, the criminal

[10] *Oxenhandler* is also not directly on point for Kelly's claim. In *Oxenhandler*, the criminal responsibility report contained some "bona fide doubt" as to whether or not the defendant had any other defenses when he pleaded NGRI. 491. S.W.3d at 599. There is no conflict in the record of Kelly's case. The report that was prepared before Kelly's NGRI plea stated that Kelly did not understand the nature or circumstances of his offense when he committed it. (Resp. Ex. B at 4–5). Kelly made no conflicting statements about the facts of his offense. Therefore, there was no "bona fide doubt" for the trial court to resolve in Kelly's case.

proceedings immediately ceased and Kelly was acquitted. Missouri's procedures are sufficient to protect both defendants and the State during NGRI pleas. Kelly's claim should be denied.

C. Even if Kelly's NGRI plea was erroneous, the Court should not vacate it while he remains incompetent.

The Supreme Court of the State of Washington has held that, when an incompetent defendant has pleaded NGRI, a court cannot subsequently "deprive him of the rights acquired by reason of his acquittal" by vacating the plea *while he remains incompetent*, even if the defendant could not have originally entered the NGRI plea. *State v. Coville*, 88 Wash.2d 46, 49, 558 P.2d 1346, 1349 (1977). This is because the defendant "is now armed with a judicial proclamation that prohibits him forever from being tried for the crime charged in the information." *Super. Ct. for Pierce Cty. v. Coville*, 14 Wash. App. 869, 874, 545 P.2d 1243, 1247 (1976). Likewise, Kelly has been acquitted of his underlying criminal offenses, and he has presented no evidence that he is currently competent. Therefore, even if the Court were to find that the proceedings here were erroneous, Kelly's NGRI plea should not be vacated while he remains incompetent and not able to understand that he would again be put in jeopardy of a criminal conviction.

III. Kelly's claim is barred by the doctrine of self-invited error – Responds to Petitioner's Point I.

Even if there was error here, Kelly cannot obtain relief under the doctrine of self-invited error. Like the petitioner in *Strong*, Kelly was represented by counsel. *See* (Pet. Ex. at E8). "It is axiomatic that a defendant may not take advantage of self-invited error or error of his own making." *State v. Bolden*, 371 S.W.3d 802, 806 (Mo. 2012); *see also Miller v. State*, 558 S.W.3d 15, 22 (Mo. 2018). And it is well settled that "[o]ne cannot lead a court into error and then complain of it." *Montana v. Nenert*, 226 S.W.2d 394, 401 (Mo. App. St.L. 1950). This long-standing rule applies to errors made by counsel. *State v. Mayes*, 63 S.W.3d 615, 632 n.6 (Mo. 2001) (holding that a petitioner "cannot … convict the trial court of error as to a procedure to which his counsel agreed").

Through the efforts of Kelly's attorney, his NGRI plea was accepted more than twenty-eight years ago. He has not alleged that he received ineffective assistance of counsel in this Court or in any of his previous habeas petitions. Now, he seeks to be returned to pre-trial status by claiming that his NGRI plea was erroneous. The more than twenty-eight-year delay between Kelly's NGRI plea and this action would almost certainly work to the State's detriment. "Delay is not an uncommon defense tactic." *Barker v. Wingo*, 407 U.S. 514, 521 (1972). "As the time between the commission of the crime and trial lengthens,

witnesses may become unavailable or their memories fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so." *Id.* Kelly should be bound by his attorney's efforts to secure an NGRI plea in this case.

IV. If the Court finds that Kelly is entitled to relief, then the proper remedy is to direct the trial court to order Kelly treated by DMH until he is permanently incompetent or restored to competency – Responds to Petitioner's Point I.

Respondent maintains that Kelly is not entitled to extraordinary relief. But if the Court grants Kelly's petition, the correct scope of relief is to vacate Kelly's acquittal and direct the trial court to order Kelly to continue to be treated by DMH according to section 552.020.8. The parties agree that Kelly was properly found incompetent based on the report submitted to the trial court. (Resp. Ex. B). Therefore, if the petition were granted, then the Court should vacate the acquittal and issue an order directing the trial court to order Kelly's treatment and evaluation for competency under section 552.020 until he is restored to competency or is found permanently incompetent.

CONCLUSION

The Court should deny the petition for a writ of habeas corpus.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 7,426 words, excluding the cover and certification, as determined by Microsoft Word 2016 software, and that a copy of this brief was sent through the electronic filing system on August 26, 2018 to:

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