

IN THE SUPREME COURT OF MISSOURI

SC 95132

**COLIN M. HENNEN,
RELATOR**

v.

**HON. DENNIS ROLF,
RESPONDENT**

**Petition for Writ of Prohibition or Mandamus to the Supreme Court of Missouri
From The Circuit Court of Lafayette County, Missouri
15th Judicial Circuit, Division 1
Honorable Dennis Rolf
Case No. 11LF-CR00982-01**

RELATOR'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

On May 21, 2012, Relator, Colin M. Hennen (“Hennen”) pled guilty to Possession of a Controlled Substance with Intent to Distribute, Deliver or Sell. The court suspended imposition of sentence and placed Hennen on five years’ probation. Pursuant to Section 559.016.2 and Section 217.703.3, due to compliance credits, Hennen’s probation expired on either March 2, 2015, or April 1, 2015. The Honorable Dennis Rolf, Circuit Judge of the Eleventh Judicial Circuit of Missouri, Lafayette County, Missouri (“Respondent”) set a probation revocation hearing for July 20, 2015.

Hennen filed a writ with the Court of Appeals Western District, which was denied on July 10, 2015, in WD78790. Relator then filed a Writ with this Court and a preliminary Writ issued. Jurisdiction lies in the Supreme Court of Missouri pursuant to the Missouri Constitution, Article V, Section 4 and Missouri Supreme Court Rule 97.01.

STATEMENT OF FACTS

On May 21, 2012, Hennen pled guilty to Possession of a Controlled Substance with Intent to Distribute, Deliver or Sell. Exh. A, p. 4.¹ Respondent suspended imposition of sentence and placed Hennen on five years' probation. *Id.* Pursuant to the Rules of the Interstate Commission for Adult Offender Supervision ("ICAOS"), Hennen executed documents to have his probation transferred to the State of Pennsylvania, where he resides. Exh. E, pp. 33-39 (Appx., pp. A01-A07). Hennen was required to sign a "Waiver of Extradition" such that the State of Missouri could effortlessly retake Hennen from the State of Pennsylvania if any probation violation occurred. *Id.* at 34 (Appx., p. A02).

Pursuant to Sections 559.016.2 and 217.703.3, Hennen began earning compliance credits on October 1, 2012 and for each month of compliance, his probationary term was automatically decreased by thirty days. Mo. Rev. Stat. §217.703.3 ("Earned compliance credits shall reduce the term of probation..."). On November 20, 2014, the State attempted to revoke Hennen's probation. Exh. A, p. 3. The State withdrew this Motion on November 25, 2014. *Id.* Hennen did not earn thirty days of compliance credit for November 2014, because of the probation violation report and motion filed by the State. Mo. Rev. Stat. §217.703.5.

¹ Pursuant to Rule 84.24(g), citations to Relator's Exhibits attached to Relator's Suggestions in Support of his Writ of Prohibition or Mandamus are in the form "Exh. [Letter]." Citations to Respondent's Exhibits are in the form "Resp.'s Exh. [Letter]."

On or about January 30, 2015, the State became aware of a possible probation violation and prepared a Field Violation Report (“FVR”). Sealed Exh. I. The FVR was not “submitted” to the court until February 4, 2015. *Id.* at 58 (Lafayette County Circuit Clerk File Stamp dated “FEB – 4 2015.”); Mo. Rev. Stat. §217.703.5; Resp.’s Return and Answer to Writ of Prohibition (“Resp.’s Answer”), ¶6 (admitted). Hennen ceased earning compliance credits again in February, when the FVR was submitted to the court. Mo. Rev. Stat. §217.703.5. Hennen earned 27 months of 30-day compliance credits (810 days) such that his “term of probation” expired on March 2, 2015. Exh. E, pp. 28-29, 40 (calculation of term of probation). The FVR incorrectly stated that Hennen’s term of probation was set to expire on April 1, 2015. Sealed Exh. I, p. 60. The FVR does not explain how it arrived at this date, but presumably the Board of Probation and Parole “the “Board”) believed that the State would expend “every reasonable effort” to “submit” the FVR in January, but the State waited until February. A later FVR was submitted on February 18, 2015 (created on February 9, 2015) which continued to assert the April 1, 2015 expiration of Hennen’s probation.² Sealed Exh. J.

On February 18, 2015, Hennen pled guilty to simple possession in Allegheny County, PA, for which he was placed on 1 year supervised probation, not required to

² The Parties disagree regarding the termination date of Hennen’s probation; both are in agreement that the Board’s April 1, 2015 date is not appealable. Hennen will continue to do the math for both dates, as it is relevant to whether the State made “every reasonable effort” to show how much time expired before the State did anything.

serve any “shock time,” and was ordered to be released under Pennsylvania law within 48 hours. Exh. E, pp. 27, 30; Exh. D, pp. 14-15. After the resolution of the Pennsylvania case, Hennen continued to be detained by the State of Pennsylvania only because of his alleged probation violation from Missouri. Exh. E, pp. 28, 31-32; Exh. F, p. 5.

The Rules of the ICAOS required the State of Missouri to “retake” Hennen from Pennsylvania within 30 days of February 18, 2015, as Hennen was held by the State of Pennsylvania only because of the State of Missouri’s allegations of parole violations:

A sending state shall retake an offender within 30 calendar days after the offender has been taken into custody on the sending state’s warrant and the offender is being held solely on the sending state’s warrant.

Exh. E, p. 36 (Appx., p. A04). The State of Missouri, pursuant to the Rules of the ICAOS, was required to pay all costs to retake Hennen, but was authorized to send agents to the State of Pennsylvania to retake Hennen, and Hennen previously waived his extradition rights. Exh. E, pp. 34-39 (Appx., pp. A02-A07). Missouri was therefore required to send agents to retake Hennen by March 20, 2015. Exh. E, pp. 28, 31-32, 36; Exh. F, p. 5 (Appx., p. A04, A12). Under Pennsylvania law, Hennen was not required to be released until 48 hours after his sentencing, therefore this date could have been as late as March 22, 2015. Exh. E, pp. 27, 30; Exh. D, pp. 14-15.

On February 20, 2015, the State applied to revoke Hennen’s probation. Exh. B, pp. 5-6. Also on February 20, 2015, the State issued a no-bond warrant, as required under the ICAOS for Pennsylvania to hold Hennen for the State of Missouri. Despite asserting that the State did not have any communications from Pennsylvania, the State issued the no-

bond warrant at the last possible moment, before Pennsylvania was required to release Hennen. Exh. G, p. 56 (Appx., p. A21). Regardless of whether the “retake date” was March 20 or March 22, the State of Missouri took no further action to retake Hennen from February 20, 2015 until sometime between April 2 and April 8, 2015.³ Exh. D, pp. 21-24; Exh. G, pp. 55-57 (Appx., pp. A20-A22) (Correspondence with State’s attorney); *see also* Resp.’s Answer, ¶13 (Admitting that the State did nothing after issuing the no-bond warrant until April 6, 2015.). In the meantime, Alleghany County no longer wished to hold Hennen, so he was transferred to the State of Pennsylvania Penitentiary on March 31, 2015. Exh. D, p. 14. Because Hennen was not classified as an offender under the laws of the State of Pennsylvania, he was placed in the hole for at least 5 days. *Id.* On either March 2, 2015, or – by the Board’s decision – on April 1, 2015, Hennen’s term of probation expired. Sealed Exhs. H, I.

Rather than retake Hennen pursuant to the Rules of the ICAOS, the State of Missouri was waiting for the State of Pennsylvania to notify Missouri that Hennen was available for transport. E.g., Exh. D, p. 21; Exh. G (Appx., pp. A20-A22). Finally, on April 8, 2015, Missouri sent agents to retake Hennen. Exh. D, pp. 13-15; Exh. E, p. 28. April 8, 2015 was:

- 49 days after the State of Missouri could have sent agents to retake Hennen;

³ In front of Respondent, the State was vague as to the date that action was taken; however, in its Answer, Respondent asserts that it took action after April 6, 2015. *See e.g.*, Resp.’s Answer, ¶19.

- 47 days after the last possible day Hennen was incarcerated for any reason other than the State of Missouri's no-bond warrant;
- 17-19 days after the State of Missouri was required to send agents to retake Hennen under the Rules of the ICAOS; and
- Either 7 days or 37 days after Hennen's term of probation expired (based upon either the March 2 or April 1, 2015 expiration date).

Respondent set Hennen's probation revocation hearing for 12 days later on April 20, 2015 (19 or 49 days after the expiration of Hennen's term of probation). Exh. A, p. 2.

On April 17, 2015, Hennen moved Respondent to discharge his probation because, pursuant to Section 559.036 and *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798 (Mo. banc 2014), Respondent lacked authority to take any other action, because the State had not expended "every reasonable effort" to hold the revocation hearing before his term of probation expired. Exh. C, pp. 7-11. At the April 20, 2015 Hearing, Hennen appeared and Respondent took evidence regarding whether the State took "every reasonable effort" to hold the hearing before Hennen's term of probation expired. Exh. D, pp. 12-25. Two important incidents occurred at the April 20, 2015 Hearing:

- First, Respondent heard evidence from the Board that it had taken no action to retake Hennen until at least April 2, 2015. Exh. D, p. 21.
- Second, Respondent – on two occasions – asked both the State and Hennen to provide him with information necessary to decide this matter. Exh. D, p. 22 ("If either side wants to provide me with any information concerning the compact requirement, what took place in this case... that is the only chance I think you

have...”) & pp. 23-24 (“I don’t know what took place with regards to contact and communication between the two states... if you guys want to present me more information than that on that, I’ll be happy to look at it.”).

Also at the April 20, 2015 Hearing, Respondent re-set Hennen’s motion to discharge and the State’s probation revocation for hearing on May 18, 2015 (47 or 77 days after the expiration of Hennen’s term of probation).

Pursuant to Respondent’s request for more information, Hennen provided Respondent with a timeline, the Rules of the ICAOS, and additional information from the State of Pennsylvania regarding Hennen’s incarceration. Exh. E, pp. 27-42. The State did not provide any information to Respondent, presumably because the State’s evidence that it had done nothing until at least April 2, 2015 to retake Hennen was true and accurate. Exh. D, p. 21; *see also* Resp.’s Answer, ¶19 (Admitting that the State did not comply with Respondent’s Request.). At the May 18, 2015 Hearing, Hennen appeared and Respondent denied his motion to discharge probation. Exh. A, p. 1; Exh. F, pp. 48-49 (Appx., pp. A13-A14). Respondent then, *sua sponte*, continued the motion to revoke Hennen’s probation to July 20, 2015 (110 or 140 days after the expiration of his probation), so that Hennen could seek this Writ. Exh. F, pp. 48-53 (Appx., pp. A13-A18).

Hennen attempted to force the State to provide information regarding what efforts the State of Missouri used to retake Hennen with both standard and Rule 25.04 Discovery. Exh. A, p. 1. The State continued to ignore the mandates of *Merriweather v. State*, 294 S.W.3d 52, 55-56 (Mo. banc 2009), and simply asserted that the prosecutor did not have the requested documents. Exh. G, p. 56 (Appx., p. A21) (“This office does not

send anything to anyone. So I don't know what documents would be sent. I will agree to provide a copy of the warrant that would've been issued but beyond that, I don't what [sic], if anything, else exists."'). Respondent would not set Hennen's Motion to Compel for hearing before the already-scheduled July 20, 2015 Hearing date.

Hennen's probation was never suspended. Exh. A, pp. 1-4. Hennen sought a writ of prohibition or mandamus from the Court of Appeals, Western District, on July 9, 2015, and was denied on July 10, 2015 in WD78790 Exh. H, p. 58.

This Court first requested that Respondent file Suggestions in Opposition to this Writ. As part of these Suggestions – for the first time ever – the State acknowledged that it did, indeed, have some documents which it should have produced, including a “teletype” (dated April 6, 2015) from SCI-Pittsburg, notifying the Lafayette County Missouri Sheriff that Hennen was available for pick up on his Missouri warrant. Resp.'s Suggs, p. 3. The State did not produce this teletype at that time. After this Court ordered Respondent to Answer Relator's Petition for Writ, the State finally provided this teletype, as well as two self-serving affidavits that (a) *still* do not make it clear whether there were other communications between Missouri and Pennsylvania; and (b) *still* do not produce documents required under the ICAOS, which are discoverable:

- *None* of these documents were produced to Relator;
- *None* of these documents were provided to Respondent (as requested);
- The State previously asserted that *none* of these documents existed (by asserting that it was unaware of documents which the State was required to be aware of, under *Merriweather v. State*, 294 S.W.3d 52, 55-56 (Mo. banc 2009)); and

- Until Respondent's Answer was filed, Hennen had not seen these documents.

POINT RELIED ON

I. Hennen is entitled to an Order prohibiting Respondent from doing anything other than vacating Respondent's Order scheduling a probation violation hearing on July 20, 2015, because Respondent has no statutory authority to hold a probation violation hearing or revoke Hennen's probation, in that his probation has expired and neither the State, nor Respondent, took every reasonable effort to conduct the probation violation hearing before Hennen's probation expired.

State ex rel. Strauser v. Martinez, 416 S.W.3d 798 (Mo. banc 2014)

Merriweather v. State, 294 S.W.3d 52 (Mo. banc 2009)

Missouri Revised Statute Section 559.036

ARGUMENT

I. Hennen is entitled to an Order prohibiting Respondent from doing anything other than vacating Respondent's Order scheduling a probation violation hearing on July 20, 2015, because Respondent has no statutory authority to hold a probation violation hearing or revoke Hennen's probation, in that his probation has expired and neither the State, nor Respondent, took every reasonable effort to conduct the probation violation hearing before Hennen's probation expired.

A. Writ Standard of Review.

Missouri's Constitution vests appellate courts with discretion to issue remedial writs. Mo. Const. art. V, Sec. 4.1; *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861, 862-63 (Mo. banc 1986). When no effective remedy by appeal exists, the

orderly and economical administration of justice requires issuance of a writ. *State ex rel. Noranda Aluminum, Inc.*, 706 S.W.2d at 862-63.

A writ of prohibition is appropriate: (1) to prevent the usurpation of judicial power when a lower court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted.

Strauser, 416 S.W.3d at 801. Prohibition “may be appropriate to prevent unnecessary, inconvenient, and expensive litigation.” *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 856-57 (Mo. banc 2001). Prohibition is appropriate to determine whether a trial judge has abused his discretion. *State ex rel. Kinder v. McShane*, 87 S.W.3d 256, 257-58 (Mo. banc 2002).

Alternatively, “Mandamus is a discretionary writ that is appropriate where a Court has exceeded its jurisdiction or authority and where there is no remedy through appeal.” *State ex rel. Poucher v. Vincent*, 258 S.W.3d 62, 64 (Mo. banc 2008) (quoting *State ex rel. Kauble v. Hartenbach*, 216 S.W.3d 158, 159 (Mo. banc 2007)). A writ of mandamus is appropriate “to compel a Court to do what it is obligated by law to do and to undo that which the Court was by law prohibited from doing.” *State ex rel. Schnuck Markets, Inc. v. Koehr*, 859 S.W.2d 696, 698 (Mo. banc 1993). While mandamus is usually the proper remedy to compel the discharge of ministerial functions and not to control the exercise of discretionary powers, “[i]f, as a matter of law, the action of respondent is wrong, then he

has abused any discretion which he may have had.” *State ex rel. Mertens v. Brown*, 198 S.W.3d 616, 618 (Mo. banc 2006).

In this case, a writ of prohibition or mandamus is appropriate because Respondent has no statutory authority, because Hennen’s probation has expired and the required mandates of Section 559.036.8 were not met to extend Respondent’s authority. This Court has specifically held that a writ of prohibition is the appropriate remedy in cases where the trial court exceeds its statutory authority to hold a probation violation hearing. *E.g., Strauser*, 416 S.W.3d at 801.

B. The State and Respondent did not expend “every reasonable effort” to hold the revocation hearing before Hennen’s term of probation expired, therefore Respondent is without authority to revoke Hennen’s probation.

1. Suspension of an individual’s probation does not extend the period of probation and Hennen’s probation was never suspended.

Hennen anticipates that Respondent will assert that Hennen’s probation was suspended and that this somehow tolled Respondent’s authority to revoke Hennen’s probation. This argument was rejected in *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798 (Mo. banc 2014), and in a number of lower court cases. Furthermore, Hennen’s probation was never suspended. Exh. A, pp. 1-4.

2. Neither Respondent, nor the State, made “every reasonable effort” to conduct the revocation hearing prior to the expiration of probation.

In *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798 (Mo. banc 2014), the respondent attempted to conduct probation revocation hearings for two defendants in

which the motions to revoke probation had been timely filed, but the hearings were scheduled to take place after the expiration of probation. In that respect, *Strauser* is identical to the underlying case and this Court's explanation of a trial court's authority to revoke probation controls:

At issue in these cases is whether the trial court made every reasonable effort to conduct hearings on pending probation revocation motions prior to the expiration of Defendants' probation so as to have the authority to conduct the hearings after their probation terms ended under section 559.036.8.

Section 559.036.2 governs the duration of probation terms and the power of a court to revoke a defendant's probation. A term of probation begins the day it is imposed. Section 559.036.1. If a defendant violates his or her probation, the court may revoke it. Sections 559.036.3, 559.036.5. But the court's authority to do so only extends through the duration of the probation term. Section 559.036.8. When the probation term ends, so does the court's authority to revoke probation. *State ex rel. Stimel v. White*, 373 S.W.3d 481, 484 (Mo. App.2012).

Section 559.036.8 allows the court to extend this authority if certain conditions are met. It states:

The power of the court to revoke probation shall extend for the duration of the term of probation designated by the court and for any further period which is reasonably necessary for

the adjudication of matters arising before its expiration, provided that some affirmative manifestation of an intent to conduct a revocation hearing occurs prior to the expiration of the period and that every reasonable effort is made to notify the probationer and to conduct the hearing prior to the expiration of the period.

In effect, this section sets out two conditions under which a court may revoke probation after a probation term has ended. First, the court must have manifested its intent to conduct a revocation hearing during the probation term. Second, it must make every reasonable effort to notify the probationer and hold the hearing before the term ends. *See Stelljes v. State*, 72 S.W.3d 196, 200 (Mo.App.2002). **Unless the court meets both of these conditions, it cannot hold a revocation hearing after probation expires.** In the present cases, the trial court manifested its intent to conduct the revocation hearings before the Defendants' probation terms ended, and the Defendants were notified. **At issue here is whether it made every reasonable effort to conduct the revocation hearings during the Defendants' probation terms.**

Strauser, 416 S.W.3d at 801 (emphasis added). Respondent misunderstood the conjunctive nature of the test set forth in Section 559.036.8, stating:

[I]f a Motion to Revoke is filed prior to discharge and a warrant is issued showing an intent to proceed on the revocation, that is all that has to happen

prior to expiration to allow the State to proceed on a Motion to Revoke with a hearing after his date of discharge. Okay? And that was done.

Exh. D, p. 19. Here, as in *Strauser*, the State, which includes both the prosecutor's office and Respondent, must have *also* expended every reasonable effort to hold the probation revocation hearing *before* the expiration of Hennen's probation. *Strauser*, 416 S.W.3d at 803-04. The State admits that – at most – it did nothing from February 20 through April 6, 2015, despite the requirements of the ICAOS. Resp.'s Answer, ¶13 (Asserting that the State did nothing after issuing the no-bond warrant until April 6, 2015.). Because the State did nothing (and may have ignored requests from Pennsylvania), it did not make “every reasonable effort” to conduct the hearing prior to Hennen's probation expiring on April 1, 2015, and Respondent has no authority to revoke Hennen's probation.

a. Hennen's probation expired on March 2, 2015, or – according to the State – on April 1, 2015.

Hennen entered his guilty plea on May 21, 2012. Exh. A, p. 4. The court suspended imposition of sentence and placed Hennen on five years' probation. *Id.* Pursuant to Sections 559.016.2 and 217.703.3, Hennen began earning compliance credits on October 1, 2012 and for each month of compliance, his probationary term was automatically decreased by thirty days. Mo. Rev. Stat. §217.703.3. Hennen did not earn thirty days of compliance credit for November 2014, because of the baseless probation violation report and motion filed by the State. Mo. Rev. Stat. §217.703.5.

Hennen ceased earning compliance credits again in February, when the FVR was submitted. Mo. Rev. Stat. §217.703.5. Therefore, Hennen earned 27 months of 30-day

compliance credits (810 days) such that his “term of probation” expired on March 2, 2015. Exh. E, pp. 28-29, 40 (calculation of term of probation). However, the FVR and the State incorrectly assert that Hennen’s term of probation expired on April 1, 2015, and this decision by the Board is not appealable. Sealed Exhs. H, I.

It is important to note that the FVR likely contains the incorrect date because it was created in January 2015, but not “submitted” until February 2015. Sealed Exh. I. The Board likely believed that the State would make “every reasonable effort” to “submit” the FVR in January, but the State waited until February. This highlights the cavalier attitude of the State towards the execution of its responsibility to make “every reasonable effort” to hold the probation revocation hearing. Even if the State’s date of expiration is correct, the analysis is the same, because the State and Respondent did not make every reasonable effort to hold the probation revocation hearing before the expiration of either date, as explained below and in the Statement of Facts. Further, the State had every opportunity to retake Hennen before the expiration of either date.

b. Neither Respondent, nor the State, made every reasonable effort to conduct Hennen’s probation revocation hearing before either the March 2 or April 1, 2015, expiration date of Hennen’s probation.

On February 18, 2015, Hennen pleaded guilty to simple possession in Allegheny County, PA, for which he was placed on 1 year supervised probation, not required to serve any “shock time,” and was ordered to be released under Pennsylvania law within 48 hours. Exh. E, pp. 27, 30; Exh. D, pp. 14-15. During those 48 hours, on February 20,

2015, Respondent issued a no-bond warrant, requiring the State of Pennsylvania to hold Hennen for at least 30 days, to allow the State of Missouri to retake Hennen.⁴ Exh. E, p. 31. Pursuant to the Rules of the ICAOS, the State of Missouri was required to “retake” Hennen from Pennsylvania within 30 days of February 18, 2015 (or, at most, within 30 days of February 20, 2015) as Hennen was held by the State of Pennsylvania only because of the State of Missouri’s no-bond warrant:

A sending state shall retake an offender within 30 calendar days after the offender has been taken into custody on the sending state’s warrant and the offender is being held solely on the sending state’s warrant.

Exh. E, pp. 28, 31-32, 36; Exh. F, p. 5. The Rules of the ICAOS authorized Missouri to send agents to the State of Pennsylvania to retake Hennen at any time and Hennen previously waived his extradition rights. Exh. E, pp. 34-39 (Appx., pp. A02-A07).

Missouri was therefore required to send agents to retake Hennen by March 20, 2015 (or March 22, 2015, if calculating from February 20, 2015). Exh. D, pp. 14-15; Exh. E, pp.

⁴ Despite asserting that the only communication from Pennsylvania is the April 6, 2015 “teletype,” the State filed the no-bond warrant at the exact last moment before Hennen was required to be released in Pennsylvania. This assertion would be more palatable if the State had not previously asserted that the April 6, 2015 teletype did not exist (until it was necessary to produce to this Court), by asserting that it was unaware of documents that the State was required to be aware of, under *Merriweather v. State*, 294 S.W.3d 52, 55-56 (Mo. banc 2009).

27, 28, 30-32, 36; Exh. F, p. 5. Also on February 20, 2015, the State applied to revoke Hennen's probation. Exh. B, pp. 5-6. **However, the State took no further action to retake Hennen until after April 6, 2015.** Exh. D, pp. 21-24; Exh. G, pp. 55-57 (Appx., pp. A02-A07) (Correspondence with State's attorney). In the meantime, Pennsylvania transferred Hennen to the Penitentiary and placed him in solitary confinement, because he was not being held on a Pennsylvania-classified offense. Exh. D, p. 14. In Respondent's Answer, the State asserts that it received a teletype from Pennsylvania to pick up Hennen on April 6, 2015, and that is the first action taken by the State (after issuing the no-bond warrant on February 20, 2015).

Finally, on April 7 or 8, 2015, Missouri sent agents to retake Hennen. Exh. D, pp. 13-15; Exh. E, p. 28. Until filing its Answer, the State refused to provide essential information regarding what happened between January 30 and April 8, 2015, as requested by Respondent (at least twice) and required under *Merriweather v. State*, 294 S.W.3d 52, 55-56 (Mo. banc 2009). *E.g.*, Exh. G, p. 56 (Appx., p. A21). Viewing the facts in a light most favorable to the State, the State did not begin the process to retake Hennen until April 6, 2015. However, the State could have easily "retaken" Hennen **after** February 18 or 20, 2015, and **before** either March 2, 2015 (Hennen's probation termination date) or April 1, 2015 (the date on which the Board asserts Hennen's probation expired).

In either event, the State did nothing and Hennen's term of probation expired. Sealed Exhs. H, I. Further, the date that Missouri finally sent agents to retake Hennen was: (1) 49 days after the State of Missouri *could have* sent agents to retake Hennen; (2) 47 days after the last possible day Hennen was incarcerated for any reason other than the

State of Missouri's no-bond warrant; (3) 17-19 days after the State of Missouri was *required* to have sent agents to retake Hennen under the Rules of the ICAOS; and (4) Either 7 days or 37 days after Hennen's term of probation expired.

Even after Hennen was brought back to Missouri, the State delayed and did not take every reasonable effort to hold Hennen's probation revocation hearing in a timely fashion: Respondent set Hennen's probation revocation hearing for 12 days later on April 20, 2015 (19 or 49 days after the expiration of Hennen's term of probation). Exh. A, p. 2. Hennen's Motion to Discharge Probation even alerted Respondent to the fact that he lacked authority to take any other action, because the State had not expended "every reasonable effort" to hold the revocation hearing before Hennen's term of probation expired. Exh. C, pp. 7-11. Even after this Motion was filed, the State delayed Hennen's probation violation hearing even further: At the April 20, 2015 Hearing (at which Hennen was present), Respondent continued Hennen's motion to discharge and the State's probation revocation hearing to May 18, 2015 (47 or 77 days after the expiration of Hennen's term of probation).

Also at the April 20, 2015 hearing, the State confirmed that it took no action to retake Hennen until at least April 2, 2015. Exh. D, p. 21. Given the State's unwillingness to provide information, Respondent – on two occasions – asked **both** the State and Hennen to provide him with information necessary to decide this matter. Exh. D, pp. 22, 23-24. Hennen complied with Respondent's request, providing Respondent with a timeline, information regarding the Rules of the ICAOS, and additional information from the State of Pennsylvania regarding Hennen's incarceration. Exh. E, pp. 27-42. The State

did not provide any information to Respondent. Exh. D, p. 21; *see also* Resp.’s Answer, ¶6 (admitted).

Even after the State refused to supply Respondent with additional information regarding what occurred between January 30 and April 8, 2015, at the May 18, 2015 Hearing, Respondent denied Hennen’s motion to discharge probation. Exh. A, p. 1; Exh. F, pp. 48-49 (Appx., pp. A13-A14). Respondent then, *sua sponte*, continued the motion to revoke Hennen’s probation to July 20, 2015 (110 or 140 days after the expiration of Hennen’s term of probation). Exh. F, pp. 48-53 (Appx., pp. A13-A18). Respondent’s Answer incorrectly asserts that “the transcript clearly shows that counsel for Relator notified Respondent of their plans to seek a writ in this matter to keep Respondent from holding a hearing” at the May 18, 2015 Hearing. Resp.’s Answer, at 7. As previously noted by Hennen, Respondent *sua sponte* continued the hearing, likely because Respondent believed he did not have the authority to revoke Hennen’s probation:

What I think I’m going to do is, I’m going to deny the motion, but I’m going to continue the hearing to allow you an opportunity to get a writ.

Exh. A, p. 1; Exh. F, pp. 48-49 (Appx., pp. A13-A14). Regardless, even if Hennen had requested the extensions, Hennen is not vested with any authority to extend Respondent’s statutory authority under Section 559.036, as specifically addressed in *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798, 804 (Mo. banc 2014).

Under Section 559.036 and *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798 (Mo. banc 2014), Respondent has no authority to revoke Hennen’s probation, because the State did not make “every reasonable effort” to hold the revocation hearing before his

term of probation expired. The State could have easily sent agents to retake Hennen and held the revocation hearing before the expiration of his probation, pursuant to the Rules of the ICAOS. Instead, the State waited until either 7 or 37 days after his probation expired to send agents. Once Hennen *was* back in Missouri, the State continued to delay the probation revocation hearing such that it was scheduled to occur on July 20, 2015 – which was 110 or 140 days after the expiration of Hennen’s term of probation.

Further, Hennen has never once delayed these proceedings. Hennen executed a waiver of extradition, such that Missouri could retake him at any time. Exh. E, p. 34 (Appx., p. A02). Nor did Hennen ever once ask for a continuance. Exhs. A, D, F. It is likely that the State will assert that Respondent granted continuances in order to permit Hennen to pursue this remedy and for other benefits for Hennen. This misses the mark for at least three reasons:

- Respondent has no authority to revoke Hennen’s probation;
- Any continuances granted do not mitigate the fact that the State did not retake Hennen before his probation expired; and
- *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798, 804 (Mo. banc 2014), denied the argument that extensions for the benefit of the relator would mitigate the result under Section 559.036.8

3. The Rules of the ICAOS place the burden on Missouri to retake Hennen, more importantly, Section 559.036 places additional burdens on the State to conduct the probation violation hearing before probation expires such that doing nothing is not expending “every reasonable effort.”

Respondent repeatedly asserts that Pennsylvania has shirked some duty to cause Hennen to end up back in Missouri. *E.g.*, Resp.’s Suggs, pp. 3-5; Resp.’s Answer, pp. 5-7. The Rules of the ICAOS place every burden on the “sending state,” to retake the offender. Exh. E, pp. 33-39 (Appx., p. A01-A07). The “sending state” under the Rules of the ICAOS in this case is Missouri. *Id.* Pennsylvania notified Missouri of the violation and from that point, all burden was on Missouri to retake Hennen – Respondent cannot point the finger at Pennsylvania.⁵

At best, assuming that the “first” communication with Missouri from Pennsylvania regarding the ability of Missouri to retake Hennen occurred on April 6, 2015, Respondent *still* admits that the State did not make “every reasonable effort” to conduct the probation violation hearing before Hennen’s probation expired on April 1, 2015. Mo. Rev. Stat. §559.036.8; *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798 (Mo. banc 2014). Under the facts, as asserted by Respondent:

- The State received the notice of the violation;
- The State sent a no-bond warrant on February 20, 2015;
- The State knew that Hennen’s probation would expire by April 1, 2015;
- The State did nothing, while an allegedly recalcitrant Pennsylvania sat idly by, shirking their duties under the Rules of the ICAOS;

⁵ In actuality Pennsylvania went above and beyond the requirements of the ICAOS by continuing to hold Hennen after thirty days.

- The State knew that the 30-day period for which Pennsylvania was required to hold Hennen, under the ICAOS Rules, expired by March 22, 2015; and
- The State finally sent agents to retake Hennen within two days of receiving notice from Pennsylvania, but at least 7 days after Hennen's probation expired.

It cannot be reasonably argued that doing nothing for approximately a month and a half is making "every reasonable effort." The State knew that Hennen's probation would expire by April 1, 2015, so the most minimal of effort (a phone call to Allegheny County) would have alerted Missouri to the fact that Hennen was available for pick up. The State asserts that Respondent issued the no-bond warrant and the State was justified in sitting idly by, waiting for Pennsylvania to call, until after Hennen's probation expired. Taken to its logical conclusion, the State's argument would mean that it is completely within Section 559.036.8 for Hennen to *still* be sitting in solitary confinement in a Pennsylvania State Penitentiary, waiting to be retaken by Missouri, so long as Pennsylvania had not sent a teletype about Hennen's availability.

Further, the State's discovery practices in this case cast a cloud over its assertion that the April 6, 2015 teletype is the only communication from Pennsylvania regarding Hennen's availability. As mentioned, the State ignored Respondent's request for this information, the State ignored Hennen's discovery requests for this information, and the State denied that this information even existed (by failing to be aware of documents that the State was required to be aware of, before responding to Hennen's requests.). Exh. D, pp. 21-24; Exh. G, pp. 55-57 (Appx., pp. A20-A22). Thus, the State admits that at least

one document was withheld regarding the correspondence between Missouri and Pennsylvania, until it benefited the State to produce the document to this Court.

Now that the State admits that there was something which it has failed to produce, the question remains: “What else does the State have?” For example, ICAOS Rule 4.109(c)(1) requires Missouri to send Pennsylvania a response to the violation report within 10 days. This response has never been provided. There may be a number of other communications from Pennsylvania which show that – at a minimum – Missouri was aware of Hennen’s availability for pick up earlier than April 6, 2015. The facts of this case indicate that other communications exist: For example, on February 18, 2015, Hennen pleaded guilty to simple possession in Allegheny County, for which he was placed on probation and ordered to be released under Pennsylvania law within 48 hours. Exh. E, pp. 27, 30; Exh. D, pp. 14-15. Missouri’s no-bond warrant was issued on February 20, 2015. Exh. E, p. 31. If Missouri had not issued the warrant on February 20, 2015, Hennen was required to be released under Pennsylvania law. Given that the State now admits that at least one previously-undisclosed communication exists, it is reasonable to question whether a communication between Missouri and Pennsylvania occurred between February 18 and 20, 2015.

Even without these discovery issues, under the facts as asserted by Respondent, the State did not make “every reasonable effort” to conduct the probation violation hearing before it expired, because the State asserts that it did nothing. Even if the Rules of the ICAOS placed the burden on Pennsylvania to contact Missouri regarding Hennen’s availability (which they do not), the Rules of the ICAOS do not override the State’s duty

to make “every reasonable effort” under Section 559.036.8 to conduct the probation violation hearing before Hennen’s probation expired.

4. The State’s affidavits do not make it clear whether other communications from Pennsylvania regarding Hennen exist.

The State asserts that the only communication from Pennsylvania is the April 6, 2015 teletype. As noted above, Hennen is in the precarious situation where he and this Court must take this at face value, even though the State previously asserted that the April 6, 2015 teletype did not exist (until it was necessary to produce to this Court). Under *Merriweather v. State*, 294 S.W.3d 52, 55-56 (Mo. banc 2009), the State is **required** to seek this kind of information out from other state agencies. It appears that the State simply did not ask about this information. Without asking – despite being fully aware of its duties under *Merriweather* – the State told counsel for Hennen that it was unaware of other documents. Exh. G, p. 56 (Appx., p. A21). This begs the question: “What else did the State fail to ask about?” For example, there is an ICAOS Rule 4.109(c)(1) Response which is missing and Hennen remains curious as to how the State filed the no-bond warrant at the exact last moment before Hennen was required to be released in Pennsylvania.

At first blush, the affidavits provided by the State seem as though they clarify this issue; but upon closer inspection, they muddy the water even more. Gene Luehrman’s affidavit swears that “[t]he Lafayette County Sheriff’s Department received the first notice that Colin Hennen was available to be retaken from the State of Pennsylvania on April 6, 2015.” Resp.’s Exh. A, p. 1. It is unclear from this statement what *other*

communications or notices were received from Pennsylvania regarding Hennen. It is also not clear whether Luehrman is using “notice” to mean only written notifications (such as the teletype) or if it includes other oral communications.⁶

The affidavit of Deborah Smith confuses the issue even more. As the custodian of records for Lafayette County Missouri 911, Smith asserts that two pages of records are produced. Resp.’s Exh. A, pp. 3-5. These two pages of records are the previously-mentioned teletype. *Id.* at 4-5. At no point does Smith assert that these are the *only* records relating to Hennen at Lafayette County Missouri 911. *Id.* at 3. Taken together with Luehrman’s affidavit – and the State’s admission that it simply did not look for these documents previously – Hennen is left to wonder what other communications occurred (and what other notices exist).

These affidavits do not clarify what actions Missouri took, but even assuming that no other communications or notices exist, the State still admits that it simply did nothing while Hennen’s probation term expired.

5. *The State’s cause-and-effect arguments do not relieve the State of its strict duty to exercise “every reasonable effort” to retake Hennen.*

The State makes two cause-and-effect arguments which are without merit.

a. The State cannot avoid the ICAOS’s 30-day requirement, and even if the State could, that does not relieve the State of its

⁶ Luehrman’s affidavit also does not mention whether he, or another agent of the State ever contacted Pennsylvania (nor does it mention why he did not contact Pennsylvania).

**burden under Section 559.036 to retake Hennen before his
probation expired.**

Pursuant to the Rules of the ICAOS, Missouri was required to retake Hennen within 30 calendar days after Hennen was “being held solely on [Missouri’s] warrant.” Exh. E., p. 36 (Appx., p. A04). After Hennen’s plea in Pennsylvania, on February 18, 2015, Pennsylvania law required that Hennen be released within 48 hours, and therefore after February 20, 2015, Hennen was held solely on Missouri’s no-bond warrant.

The State attempts to avoid this deadline by asserting that Hennen was not being held “solely” on Missouri’s no-bond warrant, because Pennsylvania issued a warrant, based on Missouri’s no-bond warrant for Hennen’s probation violation. Resp.’s Answer, ¶10. According to the State, Pennsylvania’s warrant – which issued because of Missouri’s no-bond warrant, so that Hennen could be constrained under Pennsylvania law – means that Hennen was not being held “solely” because of Missouri’s no-bond warrant. This argument is meritless (and confusing), as Pennsylvania’s warrant only issued as a requirement under Pennsylvania law because of Missouri’s no-bond warrant. Without the no-bond warrant, Hennen would have been released by February 20, 2015. Nowhere is this more clear than in the fact that Hennen was “unclassified” under Pennsylvania law and was, therefore, placed in solitary confinement after being transferred to the Penitentiary on March 31, 2015. Exh. D, p. 14.

Further, even if the 30-day deadline under the Rules of the ICAOS had not yet started, the Rules of the ICAOS do not override the State’s duty to make “every

reasonable effort” under Section 559.036.8 to conduct the probation violation hearing before Hennen’s probation expired.

b. The State cannot place the burden on Hennen to “retake himself” because Section 559.036 requires that the State retake Hennen before his probation expired.

The State also asserts that Hennen was in Pennsylvania by his own request, under the ICAOS, and he cannot complain that Missouri did not act quickly to retake him. The State asserts that “[i]t was Relator who contributed to any delay in bringing him back to Missouri by his own conduct.” Resp.’s Answer, p. 6. This argument is without merit, because it does not relieve the State of its duty under Section 559.036 to hold the probation revocation hearing before Hennen’s probation expired. Hennen was not a fugitive or in any way avoiding Missouri. The State of Missouri knew where Hennen was at all times. The State of Missouri knew that Hennen’s probation term was expiring. The State of Missouri knew that Hennen executed a waiver of extradition, such that he could be effortlessly retaken. Resp.’s Answer, ¶3 (admitted). The State of Missouri took no action to retake Hennen, despite this knowledge, therefore violating Section 559.036.

The State’s citation to *Carchman v. Nash*, 473 U.S. 716 (1985), only serves to support Hennen’s position (and undercut the State’s position). The Interstate Agreement on Detainers is a means by which a *defendant* can force a state to resolve pending criminal matters against the defendant, while the he is incarcerated in another state. *Id.* The State helpfully points out that “[t]he United States Supreme Court has also ruled that the Interstate Agreement on Detainers does not apply to probation revocation cases.”

Resp.'s Answer, p. 6. As such, the State helpfully points out that there was nothing Hennen could have done to speed up the process, because the Interstate Agreement on Detainers was not available to Hennen to force Missouri to retake Hennen before his probation expired.

6. *Doing nothing cannot satisfy the requirements of Section 559.036 or Merriweather v. State, 294 S.W.3d 52, 55-56 (Mo. banc 2009).*

Section 559.036 places a specific and strict duty on the State to take “every reasonable effort” to hold a probation revocation hearing before a term of probation expires. This Court, in *Merriweather v. State*, 294 S.W.3d 52, 55-56 (Mo. banc 2009), specifically required the State to take reasonable efforts to obtain discoverable information from other State agencies (and even other States). In this case, due to lack of communication or lack of awareness of these mandates, the State failed to take any action from February 20 until April 6-8, 2015 (after Hennen’s probation expired). Even the FVRs urged the State to quickly retake Hennen, because his probation was expiring soon, yet the State did nothing. *See e.g.*, Sealed Exhs. H, I. When action is required by statute and case law, the State cannot meet this burden by doing nothing. Therefore Respondent is without authority to revoke Hennen’s probation.

CONCLUSION

The State did not make every reasonable effort to conduct a hearing before the expiration of Hennen’s probation, as required by Section 559.036.8 and *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798 (Mo. banc 2014). As such, Respondent is without authority to revoke Hennen’s probation. Thus, a writ of prohibition, or in the alternative,

a writ of mandamus, prohibiting Respondent from doing anything other than vacating Respondent's Order scheduling a probation violation hearing on July 20, 2015, is the appropriate remedy.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned hereby certifies that the foregoing document, has a word count of 7,544 using Microsoft Word's tools calculated in accordance with the Missouri Supreme Court Rules and is otherwise in compliance with this Court's Rules and was filed (along with the accompanying Appendix thereto) via this Court's Electronic Filing System on September 14, 2015, and thereby served upon all counsel of record:

/s/ Clayton E Gillette

The undersigned hereby additionally certifies that a true and correct copy of the foregoing document (along with the accompanying Appendix thereto) was sent via electronic mail, pursuant to agreement under the Rules, to the party below on September 14, 2015:

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