IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI	)	
	)	
ex. rel.	)	
	)	
CHARLES ZIMMERMAN	)	
	)	
Relator,	)	
	)	
vs.	)	**No. SC95619**
	)	
THE HONORABLE DAVID DOLAN, CIRCUIT JUDGE MISSISSIPPI COUNTY	)	
	)	
	)	
Respondent.	)	

PETITION FOR WRIT OF PROHIBITION TO THE MISSOURI SUPREME COURT FROM THE CIRCUIT COURT OF MISSISSIPPI COUNTY, MISSOURI THIRTY THIRD JUDICIAL CIRCUIT, THE HONORABLE DAVID DOLAN, JUDGE

RELATOR'S REPLY BRIEF

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STATEMENT OF FACTS

Relator, Mr. Zimmerman, relies on the statement of facts in his initial brief.

REPLY ARGUMENT FOR POINT RELIED ON

The trial court erred in setting Relator's case for a probation revocation hearing and finding Relator in violation of the terms of his probation, because Respondent no longer has jurisdiction over Relator under RSMO 559.036, in that Relator's probation ended by operation of law years before this hearing, there was a known and readily available means to procure the presence of the relator for that hearing, and Respondent should have procured the presence of the relator and held a probation violation hearing within the time allowed by law or discharged Relator. The court's error exceeded the court's authority under RSMO § 559.036 and deprived Relator of his right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 10 of the Missouri Constitution. This error was severe enough to have resulted in a usurpation of judicial power by the lower court, as well as a miscarriage of justice requiring the issue of an extraordinary writ.

Reply Argument

Charles Zimmerman was placed on his current term of probation in the year 2000. He was sentenced to the standard felony probation term of five years. In 2005, shortly before his probation was to expire, Mr. Zimmerman'a probation was

suspended. Now, in 2016, the Court wishes to revoke that probation. This does not and cannot satisfy the demands of due process of law nor does it satisfy the dictates of Missouri's statutes.

1) There is a due process interest in a timely probation revocation proceeding:

The state argues that Mr. Zimmerman has no due process interest in avoiding extreme and unreasonable delays in probation revocation proceedings. Not only is this incorrect, but that state's discussion of the law is fundamentally flawed.

The state argues that *Carchman v. Nash* indicates that there is no due process interest in a timely probation revocation hearing. 473 U.S. 716 (1985) There is one problem with this argument-- *Carchman v. Nash* does not take up, rule on, or even substantively discuss the due process implications of a delayed probation hearing. *Id.* 733-34. It merely rules that the interstate disposition of detainers act does not apply to probation violation proceedings. In doing so, the court discussed that in some circumstances, an inmate may wish to delay proceedings, where in others, an inmate may wish to do anything possible to speed proceedings. *Carchman,* 473 U.S. 733–34 ("there are circumstances under which the prisoner may have a legitimate interest in obtaining prompt disposition of a

probation-violation charge underlying a detainer For example, the prisoner may believe that he can present mitigating evidence that will lead to a decision not to revoke probation. Alternatively, he may hope for the imposition of a concurrent sentence"). The Court found, that regardless, the interstate disposition of detainers act was not the way that could be accomplished. The *Carchman* court never addressed the issue of the due process clause, ruling solely on the statutory issue before it.[1]

The only other case the state cites to for this proposition is *Moody v. Daggett*, 429 U.S. 78 (1976). However, *Moody* is a case about a parole revocation. The Court explicitly ruled the due process clause applied to parole proceedings. It then, however, ruled that a delay over 90 days in serving a parole warrant was permissible. *Id.* One of the reasons the court ruled that this delay was permissible

[1] Despite the State claiming that *Carchman* includes the Supreme Court rejecting the application of *Barker v. Wingo* to probation violation proceedings, the sole mention of *Barker* is a passing reference, within a chain site, that the factor that is usually the most serious under *Barker* in the trial context- the interest in avoiding a long delay that would impair the ability to defend himself - would rarely be implicated in the probation context.

Carchman v. Nash, 473 U.S. 716, 732–33 (1985)

in the parole context was that "the inmate would not be deprived of his good time or his time spent on parole." *Id*. This is in stark contrast to the probation context where an inmate has no good time credit, and, in Missouri ,can be credited with no more than 6 years of time spent on probation.

This does not mean the federal courts have never ruled on this issue- As discussed in petitioners brief *Betterman v. Montana* has suggested that Supreme Court is considering the role of the due process clause in ALL post guilt proceedings. *Betterman v. Montana*,136 S. Ct. 1609 (2016). The *Betterman* court, Sotomayor concurring, suggested that the *Barker v. Wingo* test is the proper method by which a court should rule on a post finding of guilt delay in all contexts, including proceedings such as forfeiture or probation revocation.

This is in line with the lower federal courts which already use this standard in most circuits. The lower federal courts have ruled that an unreasonable delay in a probation or a parole hearing violates the due process clause of the federal constitution. See, e.g., *United States v. Tyler*, 605 F.2d 851, 853 (5th Cir.1979); *Greene v. Michigan Department of Corrections*, 315 F.2d 546, 547 (6th Cir.1963). *United States v. Hamilton*, 708 F.2d 1412, 1415 (9th Cir. 1983). As summarized by the Seventh Circuit:

Under Gagnon [*v. Scarpelli,* 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 279 (1973)], then, the fifth amendment guarantees a probationer a reasonably prompt revocation hearing. In defining how long is too long, we decline to follow an arbitrary and illogical path which would define this right based solely on the amount of time that has elapsed between arrest and a hearing. *United States v. Companion,* 545 F.2d 308, 311 (2d Cir.1976). Instead, we think the Supreme Court's decision in *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), where the Court enunciated a balancing test to determine whether a defendant has been provided a speedy trial under the sixth amendment, provides the proper approach. The Court held that three factors, in addition to the length of the delay, should be weighed to determine whether there has been a constitutional deprivation: "the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530, 92 S.Ct. at 2192. Because probation proceedings are not a part of the criminal prosecution, the unique protections of the sixth amendment, see **320 Barker,* 407 U.S. at 519-22, 92 S.Ct. at 2186-88, do not attach to probationers. Nevertheless, probationers do face the risk of incarceration and other "substantial restrictions on their liberty," *United States v. Loud Hawk,* 474 U.S. 302, 312, 106 S.Ct. 648, 654, 88 L.Ed.2d 640 (1986), the same types of restraints the speedy trial clause is

> supposed to protect. Id.4 Thus, although the sixth amendment's speedy trial clause does not apply directly to probationers, its guarantees provide a framework for defining the contours of a probationer's right to a prompt revocation hearing. We therefore adopt the balancing test outlined in Barker and apply it here to determine whether Scott has been denied his constitutional right to a prompt revocation hearing
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> *United States v. Scott*, 850 F.2d 316, 319–20 (7th Cir. 1988)

In Short, Mr. Zimmerman did have a due process interest in a timely hearing. The correct standard to use is all but certainly the *Barker* test. As discussed in relator's brief, applying this test shows that Mr. Zimmerman's rights were violated. This Court should issue the writ.

2) The State did not make reasonable efforts to hold the hearing within the statutory period

The State proposes several reasons it views the Courts efforts in this case as reasonable efforts to revoke probation within the time span. None of them are persuasive.

First the State argues that the Court would have had to go through a burdensome process to find some means to procure Mr. Zimmerman from his out of state confinement. This ignores that the state already knew how to get Mr.

Zimmerman, and had, in this same cause, gotten him from the same other jurisdiction before. The court was clearly aware how to procure Mr. Zimmerman, because it had done so before. This is not a cause where the court had to perform onerous research in order to procure the petitioner. The court knew where the petition was, how to procure him, and had done so before. [Exhibit 5, Extradition Invoice]

The state argues that the State of Missouri avoided picking up Mr. Zimmerman as a cost saving measure. This ignores that the state of Missouri did, after delaying 13 years, pick up Mr. Zimmerman. [Exhibit 9, Probation Violation Report dated 02/05/16]. In addition, because of that delay, should Mr. Zimmerman's probation be revoked at this late juncture, Missouri will pay for every additional year of Mr. Zimmerman's incarceration. If not for the unreasonable delay, this cost would have been allocated instead to Indiana. Given that it is estimated to cost 22,350 dollars per year[2] to house an inmate in Missouri each year, this cost considerably outweighs the cost of transporting Mr. Zimmerman back to Indiana. The last bill for prisoner transport to and from Indiana in the record was for approximately seven hundred (700) dollars. [Exhibit 5, Extradition Invoice]

[2] http://www.vera.org/files/price-of-prisons-missouri-fact-sheet.pdf

A delay of over a decade due to no one filing the necessary paperwork is not holding a hearing as soon as reasonably possible. It is not fundamentally fair. It is not due process. There was a way to procure Mr. Zimmerman, which had been used before in this same case, and would have been used again had the Court taken reasonable efforts to hold the hearing.

CONCLUSION

WHEREFORE, based on the argument as set forth in this brief and relator's initial brief, relator Charles Zimmerman respectfully requests that this Honorable Court make its preliminary writ permanent and prohibit the honorable David Dolan from taking any action on this case other than discharging relator, Charles Zimmerman, from probation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd of August 2016 a true and complete copy of the foregoing was submitted to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, shaun.mackelprang@ago.mo.gov, via the Missouri e-filing system, care of Mr. Michael Spillane, Mike.spillane @ago.mo.gov Office of the Attorney General.

/s/ Amy E. Lowe_____
Amy E. Lowe

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 14 point font, and does not exceed the word and page limits for a reply brief in this court. The word-processing software identified that this brief contains 2147 words, and 15 pages including the cover page, signature block, and certificates of service and of compliance. In addition, I hereby certify that this document has been scanned for viruses with Symantec Endpoint Protection Anti-Virus software and found virus-free. It is in searchable PDF form.

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