IN THE
SUPREME COURT OF MISSOURI

RICHARD A. MILLER,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC96754
	)	
STATE OF MISSOURI,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF PULASKI COUNTY, MISSOURI
TWENTY-FIFTH JUDICIAL CIRCUIT, DIVISION III
THE HONORABLE JOHN D. WIGGINS, JUDGE

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Cause No. 25R05060406F

Respondent, Richard A. Miller, was convicted by a Pulaski County jury of two counts of the class C felony of involuntary manslaughter in the first degree on May 15, 2007. L.F. 49-50; Tr. 272-73.[1] The trial court suspended imposition of sentence and placed Mr. Miller on five years' probation beginning August 29, 2007. L.F. 62.

On June 26, 2012, the prosecutor filed a motion to revoke probation, which sole allegation was that:

> On June 11, 2012, the Defendant violated the terms of his probation by being in possession of an imitation controlled substance and drug paraphernalia, both class A misdemeanors….

L.F. 64-67. Accompanying this filing was a notice that the prosecutor would call this revocation motion for hearing on August 8, 2012, and that a capias warrant would issue for Mr. Miller if he failed to appear. L.F. 68.

On August 3, 2012, attorney Matthew Crowell entered his appearance for Mr. Miller and filed a request for discovery. L.F. 69-70; 71-73.

On August 8, 2012, the trial court made the following docket entry:

> Per order of the court, cause passed to August 23, 2012 at 9:00am. Defendant ordered to appear. JDW

L.F. 13.

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[1] The record on appeal consists of a legal file (L.F.), trial transcript (Tr.), sentencing transcript (Sent. Tr.), and probation violation hearing transcript (PV Tr.) from the predicate criminal case number 25R05060406F, as well as the legal file (PCR L.F.) and transcript (PCR Tr.) from post-conviction case number 15PU-CV00431. Appellant also has sought leave of the Court to file a supplemental legal file (Supp. PCR L.F.), upon which the Court has delayed ruling. In the interest of fully briefing and rebutting appellant's arguments, Mr. Miller herein refers to the contents of that as-yet-unadmitted portion of the "record" as necessary.

The prosecutor filed a second motion to revoke probation on August 9, 2012, reciting identical allegations as to that filed on June 26, 2012. L.F. 74-76.

Due to a conflict between the Rolla and Lebanon offices of the Public Defender, attorney James Wilson entered his appearance for Mr. Miller on August 14, 2012 and Matthew Crowell withdrew from representation on August 17, 2012. L.F. 78, 80.

The August 23, 2012 revocation hearing was continued to October 3, 2012. L.F. 14. A *pro forma* trial court document memorializing this occurrence is signed by both counsel for Mr. Miller and the prosecutor and does not recite which party, if any, requested the continuance on August 23, 2012. Supp. PCR L.F. 1.

Mr. Miller's probationary period ended and he was discharged from supervision by the Missouri Board of Probation and Parole on August 28, 2012. PCR Tr. 6.

The October 3, 2012 revocation hearing was continued to December 5, 2012. L.F. 14.

On October 18, 2012, the prosecutor filed an amended motion to revoke probation, the third such motion filed by appellant, which added two new allegations, to wit:

> On or about September 3, 2008, the defendant was found guilty in the Circuit Court of Boone County, Missouri, of Domestic Assault in the Third Degree, in case number 08BA-CR03280, for events occurring on or about July 18, 2008.
>
> ***
>
> On or about November 23, 2009, the defendant was found guilty in the Circuit Court of the [*sic*] Phelps County Missouri of Driving with a Revoked License in case number 09PH-CR01187.

L.F. 81-82.

On December 5, 2012, the trial court held a revocation hearing wherein conflict counsel, James Wilson, made an oral motion to dismiss the amended

motion to revoke probation. PV Tr. 3-4. The trial court denied the motion, stating:

> I'm of the opinion that the State's manifest and clear intent, reasonable efforts were made. It passed the five years by agreement of the Defendant; therefore, this Court has not lost jurisdiction.

PV Tr. 4.

The trial court revoked Mr. Miller's probation for new law violations of third-degree domestic assault and possession of an imitation controlled substance. L.F. 84. As a result of revoking his probation, on February 6, 2013, the trial court sentenced Mr. Miller to consecutive sentences of five years' imprisonment for each of the two counts of involuntary manslaughter for which he had been convicted. L.F. 86-89.

Mr. Miller's convictions were affirmed on direct appeal by the December 24, 2014 mandate of the appeals court in cause number SD32730. PCR L.F. 5.

Cause number 15PU-CV00431

Mr. Miller filed a timely *pro se* Motion to Vacate, Set Aside or Correct the Sentence and Judgment pursuant to Rule 29.15 on March 19, 2015. PCR L.F. 5-8. This motion alleged, *inter alia*, that:

> (a) This court was without jurisdiction at the time of sentencing. My period of probation had expired due to the court failing to suspend my probation and no timely hearing being held; hearing was held only after the expiration of my probation after being continued four or more times.
> (b) This court was without jurisdiction because the State of Missouri filed and proceeded on an "Amended Motion to Revoke Probation" alleging new grounds after the expiration of my probation.
> (c) I suffered from ineffective assistance of counsel as to my counsel at my probation revocation hearing, James Wilson.

PCR L.F. 5-6.

At the motion hearing, motion counsel framed Mr. Miller's argument thus:

> Judge, the only thing I would add is that Mr. Miller – and we will address this – maintains that he did not agree to the – whatever Mr. Wilson may have done that he did not agree to any continuances of the hearing. And we'll just address that. I think that's one of those he said/he said type things.

PCR Tr. 5-6.

Motion counsel also confirmed that on September 5, 2012, Mr. Miller received a letter from the Department of Corrections stating that he had been discharged from supervision by the Board of Probation and Parole effective August 28, 2012. PCR Tr. 6.

Mr. Miller testified at the motion hearing:

> Initially, when the continuances, the first two continuances that were – were done prior to the expiration of my probation by – by process of law, the – *my representation, James Wilson, he did do a verbal objection on both of those occasions and argued to the court that – that I was about to be – you know, my probation was about to expire*.
>
> On both occasions, the prosecutor's office – or the prosecutor himself had argued that they maintained jurisdiction to do a revocation after expiration by satisfying one of the two conditions of 559.036.8 and without regard to the – to the third – third portion of the second condition of – which case law, you know, will show that – that it needs to be conducted prior to – prior to the expiration if – you know, if they appear – or if the defendant appears.
>
> So that – *that was the main issue, was that he did make objection and there was – it was just a verbal argument*. [T]here wasn't any research done at – at that point.

PCR Tr. 7-8 (emphases supplied).

Among the motion court's findings was that:

> The August 23, 20[12][2] hearing was reset by signed memorandum of said date to October 3, 2012. This document is signed by counsel for the Movant and counsel for the

[2] Throughout its "Findings and Judgment" granting Mr. Miller's motion, the motion court makes numerous references to revocation hearing dates set in 2007 and 2012. *See* PCR L.F. 13-14. Undersigned counsel believes the motion court intended to record this date as August 23, 2012.

> Respondent and does not indicate which party, *if* *either*, requested said continuance *nor does it indicate the* *reason* *for the continuance*.

PCR L.F. 13 (emphases supplied).

Paragraph two of the motion court's "Conclusions" in its "Findings and Judgment" states:

> The record does not support a finding that the second prong of the [*Timberlake*] test is satisfied in that there is no indication in the record for the reason for the continuance of the revocation hearing from its August 23, 20[12] date.

PCR L.F. 14. The motion court sustained Mr. Miller's motions, set aside and vacated his sentences imposed on February 6, 2013, and ordered Mr. Miller released from custody. PCR L.F. 14.

The State now appeals the judgment of The Honorable John D. Wiggins and the Pulaski County Circuit Court sustaining Mr. Miller's motion to vacate, set aside, or correct the judgment and sentence.

ARGUMENT

I.

Challenging the statutory authority of the trial court to revoke Mr. Miller's probation is a cognizable claim in a postconviction proceeding and this Court can affirm the motion court's judgment sustaining Mr. Miller's Rule 29.15 motion on any ground. (Responds to appellant's first Point Relied On).

As an initial matter, Mr. Miller reasserts the contention in his Motion to Strike Appellant's Substitute Brief, filed with this Court on January 29, 2018 and ordered taken with the case, that because appellant failed to raise the claim advanced in the first Point Relied On of its Substitute Brief in its appeals court brief, that claim is not preserved for review in this Court. *See J.A.R. v. D.G.R.*, 426 S.W.3d 624, 630 (Mo. banc 2014). Without abandoning this argument, Mr. Miller nevertheless addresses and repudiates the merits of appellant's first Point Relied On out of an abundance of caution.

Standard of Review

"Appellate review of judgment entered under Rule 29.15 is limited to a determination of whether the motion court's findings of fact and conclusions of law are clearly erroneous." *Price v. State*, 422 S.W.3d 292, 294 (Mo. banc 2014) (cleaned up).[3] "The motion court's findings are

[3] This brief uses (cleaned up) to indicate that internal quotation marks, brackets, ellipses, footnote signals, alterations, citations, and other non-substantive prior alterations have been omitted from quotations. *See, e.g.*, *Lamalfa v. Hearn*, ___ A.3d ___, No. 39, Sept. Term, 2017, 2018 WL 679687, at *10 n.5 (Md. Feb. 2, 2018); *U.S. v. Steward*, ___ F.3d ___, No. 16-3886, 2018 WL 541771, at *2 n.3 (8th Cir. Jan. 25, 2018); *Smith v. Kentucky*, 520 S.W.3d 340, 354 (Ky. 2017); *see also* Jack Metzler, *Cleaning Up Quotations*, J. App. Prac. & Process (forthcoming 2018), https//perma_cc/JZR7-P85A (arguing for use of (cleaned up) as a new parenthetical intended to simplify quotations from legal sources).

presumed correct." *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. banc 2006) (citation omitted). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made." *Price*, 422 S.W.3d at 294 (citation omitted).

"All fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached." Rule 73.01(c). "When the facts relevant to an issue are contested, the reviewing court defers to the trial court's assessment of the evidence." *Harvey v. Dir. of Revenue*, 371 S.W.3d 824, 829 (Mo. App. W.D. 2012); *see* Rule 84.13(d)(2).

"[T]his Court will affirm on any ground that supports the circuit court's judgment, regardless of the grounds on which the circuit court relied." *Stanley v. State*, 420 S.W.3d 532, 543 n.9 (Mo. banc 2014) (citing *Rizzo v. State*, 189 S.W.3d 576, 578 (Mo. banc 2006)).

Relevant Facts

Mr. Miller was convicted by a jury of two counts of the class C felony of involuntary manslaughter. L.F. 49-50.

On August 29, 2007, the trial court suspended imposition of sentence and placed Mr. Miller on five years' probation. L.F. 62; PV Tr. 6. Mr. Miller's probation expired on August 28, 2012, and he was discharged from supervision by the Board of Probation and Parole. PCR Tr. 6.

A probation revocation hearing was held on December 5, 2012 during which Mr. Miller's trial counsel orally moved to dismiss on grounds the trial court "lost jurisdiction" to revoke Mr. Miller's probation. PV Tr. 3. The trial court denied Mr. Miller's motion to dismiss:

> I'm of the opinion that the State's manifest and clear intent, reasonable efforts were made. It passed the five years by

> agreement of [Mr. Miller]; therefore, this Court has not lost jurisdiction.

PV Tr. 4. At the revocation hearing, the trial court found Mr. Miller had violated his probation, ordered a sentencing assessment report (SAR), and set a subsequent sentencing hearing. L.F. 84; PV Tr. 27.

On February 6, 2013, the trial court sentenced Mr. Miller to five years' consecutive imprisonment on each of Counts I and II, for a total of ten years' imprisonment. L.F. 91. The trial court entered its Probation Revocation Judgment on that same day. L.F. 86-90.

Mr. Miller filed a timely notice of appeal on June 10, 2013.[4] L.F. 93-98. His convictions were affirmed by the Court of Appeals, Southern District on October 21, 2014. *See State v. Miller*, 448 S.W.3d 331 (Mo. App. S.D. 2014).

Mr. Miller subsequently filed a timely Rule 29.15 motion to vacate, set aside, or correct the judgment or sentence on March 19, 2015. PCR L.F. 5-8. Claim 8(a) of his motion alleged the "court was without jurisdiction at the time of sentencing[,]" in that "[m]y period of probation had expired due to the court failing to suspend my probation and no timely hearing being held; hearing was only held after the expiration of my probation after being continued four or more times." PCR L.F. 5

Claim 8(b) of Mr. Miller's motion recited the trial "court was without jurisdiction because the State of Missouri filed and proceeded on an 'Amended Motion to Revoke Probation' alleging new grounds after the expiration of my probation." PCR L.F. 5.

[4] The Court of Appeals entered a Special Order on June 3, 2013, granting Mr. Miller leave to file a late notice of appeal within ten days of the date of this order. L.F. 92.

Claim 8(c) of the motion alleged Mr. Miller "suffered prejudice from ineffective assistance of counsel as to my counsel at my probation revocation hearing, James Wilson." PCR L.F. 6.

At a July 27, 2016 evidentiary hearing, the prosecutor recited a timeline to which Mr. Miller's motion counsel allegedly "stipulated." PCR Tr. 3-5. Immediately thereafter, motion counsel stated:

> Judge, the only thing I would add is that Mr. Miller – and we will address this – maintains that he did not agree to the – whatever Mr. Wilson may have done that he did not agree to any continuances of the hearing. And we'll just address that. I think that's one of those he said/he said type things.

PCR Tr. 5-6 (emphasis supplied). When asked by the motion court if there was additional evidence, motion counsel requested "Judge, if I can get just some real brief testimony from Mr. Miller, I think that will clear up –" PCR Tr. 7. Mr. Miller testified:

> Initially, when the continuances, the first two continuances that were – were done prior to the expiration of my probation by – by process of law, the – my representation, James Wilson, he did do a verbal objection on both of those occasions and argued to the court that – that I was about to be – you know, my probation was about to expire.
>
> On both occasions, the prosecutor's office – or the prosecutor himself had argued that they had maintained jurisdiction to do a revocation after expiration by satisfying one of the two conditions of 559.036.8 and without regard to the – to the third – third portion of the second condition of – which case law, you know, will show that – that it needs to be conducted prior to – prior to expiration if – you know, if they appear – or if the defendant appears.
>
> So that – that was the main issue, was that he did make objection and there was – it was just a verbal

> argument. [T]here wasn't any research done at – at that point.

PCR Tr. 7-8 (emphases supplied). The motion court took judicial notice of the entire judicial file in cause number 25R05060406F. PCR Tr. 9.

Motion counsel and the prosecutor filed suggestions in support of and opposition to Mr. Miller's motion, respectively. Supp. L.F. 3-13. These filings each briefed the issues of whether the trial court exceeded its authority in revoking Mr. Miller's probation beyond its expiry and whether trial counsel was ineffective. *See* Supp. L.F. 3-13.

The motion court entered its findings of fact and conclusions of law sustaining Mr. Miller's motion on September 9, 2016, setting aside and vacating his sentences. PCR L.F. 13-14.

Analysis

Without citing to authority, appellant supposes Mr. Miller "did not raise a cognizable claim in his postconviction motion, and therefore, he cannot succeed in his request for postconviction relief." Appellant's Substitute Br. 12. Appellant goes on to baldly assert that Mr. Miller's "claim that the trial court was without authority to revoke his probation and sentence him could have been raised on direct appeal because the alleged error occurred in the trial court, and [Mr. Miller] was aware of the alleged error at the time it occurred." Appellant's Substitute Br. 11. This is because Mr. Miller "raised the issue before the trial court at the probation-revocation hearing, and [Mr. Miller] had the transcript from the probation-revocation hearing at the time of his direct appeal." Appellant's Substitute Br. 11.

However, while Mr. Miller does not contest that trial counsel raised the issue of the trial court's authority to revoke his probation at the revocation hearing or that the revocation hearing transcript was available

during the pendency of Mr. Miller's direct appeal, appellant's argument becomes absurd when applied to Missouri's postconviction scheme set forth by the Court. Were it simply the case, as appellant would have it, that because a criminal defendant knew his guilty plea was not knowing, voluntary, and intelligent at the time it occurred or that trial counsel's deficient performance occurred in the trial court he must always first raise those issues in a direct appeal, postconviction relief, as a collateral attack on a judgment, would be rendered illusory. To avoid this troubling result, this Court has fashioned "the exclusive procedure" by which such claims may be brought in Missouri. *See* Rule 29.15(a). What is more, as detailed, *infra*, Missouri courts have long recognized that challenging the trial court's authority to revoke probation is properly brought in a postconviction motion.

A. Challenging trial court authority to revoke probation after expiry cannot be raised on direct appeal.

Challenging the trial court's authority to revoke probation after its expiry cannot be raised on direct appeal. *See State v. Burnett*, 72 S.W.3d 212 (Mo. App. W.D. 2002); *State v. Person*, 288 S.W.3d 802 (Mo. App. E.D. 2009). Appellant's argument to the contrary is unpersuasive.

Burnett presented the appeals court with "the issue of whether a direct appeal from an adverse ruling on a probation revocation is cognizable." 72 S.W.3d at 214. The *Burnett* Court decided that while a direct appeal is cognizable when subject matter jurisdiction is at issue, "[t]he jurisdictional issue raised by Burnett, however, is one of jurisdiction over the person." *Id.* at 215. The *Burnett* Court did specifically note "each of the cases cited by Burnett on the issue of whether a probation may be revoked after the probationary period has expired, were brought either as a

writ action or as an appeal from a denial of a *post-conviction motion*." *Id.*[5] Ultimately, however, the appeals court held "[i]ssues of jurisdiction over the person due to the expiration of probation are properly presented in a writ application[,]" and dismissed Burnett's appeal. *Id.* at 215-16.

In *Person*, the defendant's probation was revoked after hearing and he was sentenced. 288 S.W.3d at 803. Person's notice of appeal alleged "his probation was revoked without personal service of the notice of revocation" and he challenged both "whether revocation is warranted under all the circumstances[ ]" and evidence received during the revocation hearing. *Id.* The court of appeals could not discern whether the notice of appeal sought an appeal from Person's "actual sentence of five years or was challenging the revocation of his probation." *Id.* Accordingly, the *Person* Court held: "[t]o the extent Defendant is appealing from the order revoking probation, a direct appeal is not the proper method to address any deficiencies in the trial court's revocation of probation." *Id.* Relying on *Burnett*, the *Person* Court concluded "an issue of a hearing after the expiration of the term of probation is an issue of *personal jurisdiction*, not subject matter jurisdiction[ ]" and issues of personal jurisdiction "are properly raised in a petition for writ, not an appeal." *Person*, 288 S.W.3d at 804 (emphasis in original) (citing *Burnett*, 72 S.W.3d at 215).

Both *Burnett* and *Person* clearly stand for the proposition that challenging the authority of the trial court to revoke probation after its expiration is not a cognizable claim on direct appeal. Accordingly, appellant's argument that this was a claim Mr. Miller could have brought

[5] In addition to citing several cases in which a claim challenging authority to revoke probation after expiration was initially raised in a postconviction motion, the *Burnett* Court also mentioned "[b]oth Rules 24.035(a) and 29.15(a) allow a claim that the court imposing the sentence was without jurisdiction to do so." 72 S.W.3d at 214 n.2.

on direct appeal is groundless. *See Burnett*, 72 S.W.3d at 215; *Person*, 288 S.W.3d at 803-804.

B. Challenging trial court authority to revoke probation after expiry is a proper claim for postconviction relief here.

Mr. Miller cannot challenge the trial court's authority to revoke his probation on direct appeal. *See Burnett*, 72 S.W.3d at 215; *Person*, 288 S.W.3d at 803-804. What is less clear is the effect of the admonition from *Burnett* and *Person* that "[i]ssues of jurisdiction over the person due to the expiration of probation are properly presented in a writ application." *Burnett*, 72 S.W.3d at 215; *see Person*, 288 S.W.3d at 803.

As this Court has explained, after its decision in *J.C.W. ex rel. Webb v. Wyciskalla*, there are only two types of jurisdiction in Missouri circuit courts: personal and subject matter. 275 S.W.3d 249, 254 (Mo. banc 2009). Inasmuch, "claims [of Section 559.036.8 violations] are characterized more precisely as the trial court exceeded its statutory authority." *Strauser*, 416 S.W.3d at 800 n.1 (citation omitted). Because *Strauser* dealt with and confirmed the availability of writs of prohibition to, *inter alia*, "remedy an excess of authority, jurisdiction or abuse of discretion where the lower court lacks the power to act as intended[ ]" it neither addressed nor expressly held that Section 559.036.8 challenges to trial court authority to revoke probation could be brought in postconviction actions. 416 S.W.3d at 801. Seemingly instead, a sharp split in appeals court authority persists as to whether Mr. Miller's claim the trial court lacked statutory authority to revoke his probation beyond its expiration is proper in his Rule 29.15 motion. *Compare State ex rel. Hawley v. Spear*, ___ S.W.3d ___, No. WD81140, 2018 WL 501591, at *3, n.2 ("An attack on a probation ruling does not constitute a challenge to a sentence and is, therefore, beyond the scope of a Rule 24.035 proceeding." (citations omitted)), *with State ex rel.*

Whittenhall v. Conklin, 294 S.W.3d 106, 109 (Mo. App. S.D. 2009) (Where relator claimed respondent exceeded its statutory authority to hold a revocation hearing beyond probation expiration, "[r]elator can choose to bring his claim under a Rule 24.035(a) motion or to seek a writ of prohibition."). Nevertheless, under the plain language of the Court's postconviction Rules and the facts of Mr. Miller's case, his instant claim that the trial court lacked statutory authority to revoke his probation after its expiry was proper in a Rule 29.15 motion.

Rule 29.15 permits any person convicted of a felony after trial to claim, *inter alia*, "the conviction or sentence imposed violated the constitution and laws of this state or the constitution of the United States, including claims of ineffective assistance of counsel[and] that the court imposing the sentence was without jurisdiction to do so[.]" Rule 29.15(a). "This Rule 29.15 provides the exclusive procedure by which such person may seek relief in the sentencing court for the claims enumerated." *Id.*

In a challenge to the trial court's statutory authority to revoke his probation after expiration of the probationary period, Mr. Miller "can choose to bring his claim under a Rule 24.035(a) motion or to seek a writ of prohibition." *State ex rel. Whittenhall v. Conklin*, 294 S.W.3d 106, 109 (Mo. App. S.D. 2009) (rejecting the government's argument that Rule 24.035(a) provides the exclusive procedure for a person challenging the trial court's "jurisdiction."). As the post-conviction rule applicable to movants convicted of a felony after trial, "Rule 29.15 contains certain substantive provisions that are identical to provisions in Rule 24.035[.]" *Vogl v. State*, 437 S.W.3d 218, 224 n.7 (Mo. banc 2014). "Accordingly, case law interpreting a provision that is identical in both rules applies equally in proceedings under either rule." *Id.* (citation omitted).

Here, Mr. Miller's claim the trial court exceeded its statutory authority under Section 559.036.8 to revoke his probation after it had

expired was properly before the motion court in a Rule 29.15 postconviction action. Mr. Miller's case presents the somewhat unusual circumstance of his sentence being imposed and executed only *after* his probation was revoked beyond the probationary period. L.F. 86-90, 91. "Once the probationary term expires, the circuit court retains no authority over a probationer, for any purpose, whether to cite him or her for probation violations, revoke probation, or order execution of the sentence previously imposed." *Zimmerman*, 514 S.W.3d at 608 (cleaned up); *see also Strauser*, 416 S.W.3d at 801 n.3 (rejecting appellant's argument "that a court may circumvent the requirements of section 559.036.8 by suspending the imposition of sentence.").

Accordingly, it is axiomatic that where the trial court here exceeded its authority to revoke Mr. Miller's probation after expiry, it had no authority to subsequently pronounce sentence. In this way, Mr. Miller's challenge to the trial court's authority to revoke his probation functions as a claim that "the court imposing the sentence was without jurisdiction to do so[.]" Rule 29.15(a); *see also Moore v. State*, 328 S.W.3d 700, 703 n.2 (the motion court did not err in dismissing an untimely postconviction motion for lack of "jurisdiction" rather than lack of "authority," since "there is no significance to the motion court's use of improper terminology in its judgment dismissing the motion."). Therefore, and because Mr. Miller's postconviction motion explicitly recites the trial "court was without jurisdiction at the time of *sentencing*[ ]" due to the expiration of his probation, Mr. Miller's challenge to the trial court's authority to revoke his probation after expiration under Section 559.036.8 is a proper claim in a 29.15 action. *See* PCR L.F. 5-6 (emphasis supplied).

C. This court can affirm the motion court's judgment on any ground stated in Mr. Miller's postconviction motion.

Even were this Court to affirmatively hold that a challenge to the trial court's authority to revoke probation after expiry is not cognizable in a postconviction action, the motion court's judgment sustaining Mr. Miller's Rule 29.15 motion will be affirmed on any other ground. *See Stanley*, 420 S.W.3d at 543 n.9. In addition to claiming the trial court "was without jurisdiction at the time of sentencing[ ]" because his probation had expired, claim 8(b) of Mr. Miller's postconviction motion alleged the trial "court was without jurisdiction because the State of Missouri filed and proceeded on an 'Amended Motion to Revoke Probation' alleging new grounds after the expiration of my probation." PCR L.F. 5. Claim 8(c) further alleged Mr. Miller "suffered from ineffective assistance of counsel as to my counsel at my probation revocation hearing[.]" PCR L.F. 6. As facts supporting these claims, the motion recited "[trial counsel] will testify that…he brought the issue of the expiry of my probation to the trial court's attention and that he failed to file a writ of prohibition after his objections were overruled." PCR L.F. 6.

Mr. Miller's motion hearing testimony corroborated the allegations of ineffective assistance of counsel in his motion. Mr. Miller testified trial counsel made verbal objections to continuing both the August 23, 2012 and October 3, 2012 revocation hearings. PCR Tr. 7-8. Both motion counsel and the prosecutor briefed this precise issue for the motion court. *See* Supp. PCR L.F. 4-5, 11-12. There is no indication in the record trial counsel petitioned for a writ of prohibition.

It is true trial counsel did not testify at the evidentiary hearing. However, together with the other evidence adduced by motion counsel at the evidentiary hearing and the record of cause no. 25R05060406F of which the motion court took judicial notice – including the probation

violation hearing transcript – Mr. Miller's hearing testimony could have permitted the motion court to find Mr. Miller met his burden to show trial counsel's ineffectiveness and thus sustain claim 8(c) of his motion.

Moreover, were this Court to affirmatively hold that challenges to the trial court's authority to revoke probation under Section 559.036.8 may only be brought as petitions for extraordinary writ,[6] trial counsel's deficient performance would be brought into sharper relief, because there would be no legitimate strategic reason for deciding against doing so. *See, e.g.*, *Zink*, 278 S.W.3d at 176 ("Trial strategy decisions only may serve as a basis for ineffective counsel if they are unreasonable."). Furthermore, where the motion court sustained Mr. Miller's Rule 29.15 motion on grounds the trial court exceeded its statutory authority to revoke his probation after its expiration, there was a reasonable probability that, but for trial counsel's failure to file a writ of prohibition, Mr. Miller's probation would not have been revoked after expiration. *See, e.g.*, *Johnson v. State*, 406 S.W.3d 892, 899 (Mo. banc 2013) (reciting the standard for prejudice under *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). Therefore, because trial counsel was ineffective for failing to seek a writ of prohibition, this Court can also affirm the motion court's judgment on this or any ground recited in Mr. Miller's motion. *See Stanley*, 420 S.W.3d at 543 n.9.

[6] Mr. Miller does not concede that claims 8(a) and 8(b) of his postconviction motion are not proper grounds for relief under Rule 29.15.

II.

The motion court did not clearly err in sustaining Mr. Miller's Rule 29.15 motion to vacate, set aside, or correct the judgment or sentence in that, where the findings and conclusions of the motion court confirm that the record in the underlying revocation proceeding was silent as to the reason for the trial court's unilateral resetting of the revocation hearing from August 23, 2012, beyond the August 28, 2012 expiration of Mr. Miller's probation, and Mr. Miller's testimony at the motion hearing that his counsel objected to a continuance on August 23, 2012, corroborates the assertion that he did not consent to that continuance, upon review of the record, this Court cannot be left with a definite and firm impression that the motion court was mistaken in finding that the trial court failed to make every reasonable effort to hold a revocation hearing prior to the end of the probationary period and exceeded its statutory authority in revoking Mr. Miller's probation more than three months after its expiry. (Responds to appellant's second Point Relied On).

Standard of Review

"Appellate review of judgment entered under Rule 29.15 is limited to a determination of whether the motion court's findings of fact and conclusions of law are clearly erroneous." *Price v. State*, 422 S.W.3d 292, 294 (Mo. banc 2014) (internal quotations and citation omitted). "The motion court's findings are presumed correct." *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. banc 2006) (citation omitted). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made." *Price*, 422 S.W.3d at 294 (citation omitted). This reviewing Court will "view the record in the light most favorable to the motion court's judgment, accepting as true all evidence and inferences that support the judgment and disregarding evidence and inferences that are contrary to the

judgment." *Hardy v. State*, 387 S.W.3d 394, 399 (Mo. App. S.D.) (citing, *inter alia*, *Storey v. State*, 175 S.W.3d 116, 125 (Mo. banc 2005)). The Court "will defer to the motion court's determinations of credibility, and the motion court is free to disbelieve all, part, or none of the witnesses' testimony." *Laub v. State*, 481 S.W.3d 579, 582 (Mo. App. S.D. 2015) (citing *Zink v. State*, 278 S.W.3d 170, 192 (Mo. banc 2009)).

"All fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached." Rule 73.01(c). "When evidence is contested by disputing a fact in any matter, this Court defers to the trial court's determination of credibility." *White v. Dir. of Revenue*, 321 S.W.3d 298, 308 (Mo. banc 2010); *see* Rule 84.13(d)(2).

"[T]his Court will affirm on any ground that supports the circuit court's judgment, regardless of the grounds on which the circuit court relied." *Stanley*, 420 S.W.3d at 543 n.9 (citing *Rizzo*, 189 S.W.3d at 578).

Relevant Facts

Cause No. 25R05060406F

On June 26, 2012, the prosecutor filed a motion to revoke Mr. Miller's probation, which sole allegation was that:

> On June 11, 2012, the Defendant violated the terms of his probation by being in possession of an imitation controlled substance and drug paraphernalia, both class A misdemeanors….

L.F. 64-67. Accompanying this filing was a notice that the prosecutor would call this revocation motion for hearing on August 8, 2012, and that a capias warrant would issue for Mr. Miller if he failed to appear. L.F. 68.

On August 3, 2012, attorney Matthew Crowell entered his appearance for Mr. Miller and filed a request for discovery. L.F. 69-70; 71-73.

On August 8, 2012, the trial court made the following docket entry:

> Per order of the court, cause passed to August 23, 2012 at 9:00am. Defendant ordered to appear. JDW

L.F. 13.

The prosecutor filed a second motion to revoke probation on August 9, 2012, reciting identical allegations as to that filed on June 26, 2012. L.F. 74-76.

Due to a conflict between the Rolla and Lebanon offices of the Public Defender, attorney James Wilson entered his appearance for Mr. Miller on August 14, 2012 and Matthew Crowell withdrew from representation on August 17, 2012. L.F. 78, 80.

The August 23, 2012 revocation hearing was continued to October 3, 2012. L.F. 14. A *pro forma* trial court document memorializing this occurrence is signed by both counsel for Mr. Miller and the prosecutor and does not recite which party, if any, requested the continuance on August 23, 2012. Supp. PCR L.F. 1.

Mr. Miller's probationary period ended and he was discharged from supervision by the Missouri Board of Probation and Parole on August 28, 2012. PCR Tr. 6.

The October 3, 2012 revocation hearing was continued to December 5, 2012. L.F. 14.

On October 18, 2012, the prosecutor filed an amended motion to revoke probation, the third such motion filed by appellant, which added two new allegations, to wit:

> On or about September 3, 2008, the defendant was found guilty in the Circuit Court of Boone County, Missouri, of Domestic Assault in the Third Degree, in case number 08BA-CR03280, for events occurring on or about July 18, 2008.
>
> ***
>
> On or about November 23, 2009, the defendant was found guilty in the Circuit Court of the [*sic*] Phelps County Missouri of Driving with a Revoked License in case number 09PH-CR01187.

L.F. 81-82.

On December 5, 2012, the trial court held a revocation hearing wherein conflict counsel, James Wilson, made an oral motion to dismiss the amended motion to revoke probation. PV Tr. 3-4. The trial court denied the motion, stating:

> I'm of the opinion that the State's manifest and clear intent, reasonable efforts were made. It passed the five years by agreement of the Defendant; therefore, this Court has not lost jurisdiction.

PV Tr. 4.

The trial court revoked Mr. Miller's probation for new law violations of third-degree domestic assault and possession of an imitation controlled substance. L.F. 84. As a result of revoking his probation, on February 6, 2013, the trial court sentenced Mr. Miller to consecutive sentences of five years' imprisonment for each of the two counts of involuntary manslaughter for which he had been convicted. L.F. 86-89.

Mr. Miller's convictions were affirmed on direct appeal by the December 24, 2014 mandate of the appeals court in cause number SD32730. PCR L.F. 5.

Cause number 15PU-CV00431

Mr. Miller filed a timely *pro se* Motion to Vacate, Set Aside or Correct the Sentence and Judgment pursuant to Rule 29.15 on March 19, 2015. PCR L.F. 5-8. This motion alleged, *inter alia*, that:

> (a) This court was without jurisdiction at the time of sentencing. My period of probation had expired due to the court failing to suspend my probation and no timely hearing being held; hearing was held only after the expiration of my probation after being continued four or more times.
> (b) This court was without jurisdiction because the State of Missouri filed and proceeded on an "Amended Motion to Revoke Probation" alleging new grounds after the expiration of my probation.
> (c) I suffered from ineffective assistance of counsel as to my counsel at my probation revocation hearing, James Wilson.

PCR L.F. 5-6.

At the motion hearing, motion counsel framed Mr. Miller's argument thus:

> Judge, the only thing I would add is that Mr. Miller – and we will address this – maintains that he did not agree to the – whatever Mr. Wilson may have done that he did not agree to any continuances of the hearing. And we'll just address that. I think that's one of those he said/he said type things.

PCR Tr. 5-6.

Motion counsel also confirmed that on September 5, 2012, Mr. Miller received a letter from the Department of Corrections stating that he had been discharged from supervision by the Board of Probation and Parole effective August 28, 2012. PCR Tr. 6.

Mr. Miller testified at the motion hearing:

> Initially, when the continuances, the first two continuances that were – were done prior to the expiration of my probation by – by process of law, the – *my representation, James Wilson, he did do a verbal objection on both of those occasions and argued to the court that – that I was about to be – you know, my probation was about to expire*.
>
> On both occasions, the prosecutor's office – or the prosecutor himself had argued that they maintained jurisdiction to do a revocation after expiration by satisfying one of the two conditions of 559.036.8 and without regard to the – to the third – third portion of the second condition of – which case law, you know, will show that – that it needs to be conducted prior to – prior to the expiration if – you know, if they appear – or if the defendant appears.
>
> So that – *that was the main issue, was that he did make objection and there was – it was just a verbal argument*. [T]here wasn't any research done at – at that point.

PCR Tr. 7-8 (emphases supplied).

Among the motion court's findings was that:

> The August 23, 20[12][7] hearing was reset by signed memorandum of said date to October 3, 2012. This document

[7] Throughout its "Findings and Judgment" granting Mr. Miller's motion, the motion court makes numerous references to revocation hearing dates set in 2007

> is signed by counsel for the Movant and counsel for the Respondent and does not indicate which party, *if* *either*, requested said continuance *nor does it indicate the* *reason* *for the continuance*.

PCR L.F. 13 (emphases supplied).

Paragraph two of the motion court's "Conclusions" in its "Findings and Judgment" states:

> The record does not support a finding that the second prong of the [*Timberlake*] test is satisfied in that there is no indication in the record for the reason for the continuance of the revocation hearing from its August 23, 20[12] date.

PCR L.F. 14. The motion court sustained Mr. Miller's motions, set aside and vacated his sentences imposed on February 6, 2013, and ordered Mr. Miller released from custody. PCR L.F. 14.

Analysis

"A term of probation begins the day it is imposed." *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798, 801 (Mo. banc 2014); Mo. Rev. Stat. § 559.036.1.[8] If violated, a defendant's probation may be revoked. *Id.*; Mo. Rev. Stat. §§ 559.036.3, 559.036.5. However, the court's authority to so revoke only extends through the duration of the probation term. *Id.*; Mo. Rev. Stat § 559.036.8. "When the probation term ends, so does the court's authority to revoke probation." *Id.* (citation omitted). "Once the probationary term expires, the circuit court retains no authority over a probationer, for any purpose, whether to cite him or her for probation violations, revoke probation, or order execution of a sentence previously imposed." *State ex rel. Zimmerman v. Dolan*, 514 S.W.3d 603, 608 (Mo. banc 2017) (cleaned up).

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and 2012. *See* PCR L.F. 13-14. Undersigned counsel believes the motion court intended to record this date as August 23, 2012.

[8] All statutory references are to Mo. Rev. Stat. 2000, current through the Cum. Supp. 2011, unless otherwise noted.

Section 559.036.8:

> 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*.

Id. (emphases supplied) (citation omitted). "Unless the court meets both of these conditions, it cannot hold a revocation hearing after probation expires." *Id.*

Mr. Miller "bears the burden of demonstrating the circuit court failed to make every reasonable effort to conduct the probation revocation hearing prior to the expiration of the probationary period." *Zimmerman*, 514 S.W.3d at 608 (Mo. banc 2017). "However, [Mr. Miller] need not prove he suffered prejudice or an inordinate delay to be afforded relief." *Id.* (citing *Strauser*, 416 S.W.3d at 803 n.4; *Timberlake*, 419 S.W.3d at 230 n.9).

As an initial matter, Mr. Miller clarifies his argument below that the trial court lacked "jurisdiction" to hold his revocation hearing beyond the probationary period is "characterized more precisely as the trial court exceeded its statutory authority." *See Strauser*, 416 S.W.3d at 800 n.1 (confirming that Missouri circuit courts only recognize personal and subject matter jurisdiction after *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 248, 254 (Mo. banc 2009)). Therefore, Mr. Miller maintains that the trial court exceeded its statutory authority under Section 559.036.8 by holding a revocation hearing more than three months after the expiration of his probation and that this same contention was espoused by the motion court in sustaining Mr. Miller's Rule 29.15 motion to vacate his February 6, 2013 sentence. *See id*; PCR L.F. 13-14.

A. *Connett, Roark, Petree,* and *Suber* are inapposite under the facts of Mr. Miller's case.

The chief cases cited by appellant in support of its argument are easily distinguishable from the instant matter or are outright helpful to Mr. Miller. He addresses these cases *seriatim*.

State ex rel. Connett v. Dickerson, 833 S.W.2d 471 (Mo. App. S.D. 1992)

Appellant relies on dicta in *Connett* for the proposition that when a probation violation hearing is continued at a defendant's request within the probationary period, "he cannot complain that it was not conducted prior to the expiration of the five-year period." Appellant's Substitute Br. 20 (quoting *State ex rel. Connett v. Dickerson*, 833 S.W.2d 471, 474 (Mo. App. S.D. 1992)). Nonetheless, simple application of this rule to the instant matter discounts the uncontested facts of that case and flouts the Court's standard of review for the disputed facts here.

In *Connett*, the defendant was placed on a five-year term of probation and the trial court's docket entry clearly recounted that Connett unequivocally requested a continuance of a revocation hearing beyond the date of probation expiration to obtain counsel. *Id.* at 473. The *Connett* Court considered it "obvious that the court affirmatively manifested an intent to conduct a revocation hearing and that the relator was notified and requested a continuance within the five-year period." *Id.* at 474. Accordingly, under the "obvious" fact of Connett's affirmative request to continue the revocation hearing past probation expiration to secure counsel, his later complaint the trial court lacked authority to revoke his probation was meritless. *Id.*

By contrast here, whether or not trial counsel for Mr. Miller either sought or consented to continuing the August 23, 2012 revocation hearing beyond the expiration of Mr. Miller's probationary period was the hotly-contested factual fulcrum on which the motion court's judgment hinged. *See* PCR Tr. 7-8; PCR

L.F. 13-14. As trier of fact, the motion court was entitled to, and did, resolve this issue in Mr. Miller's favor. *See* PCR L.F. 13-14. Because this Court defers to the motion court's assessment of the evidence in contested factual issues, there is now no question that Mr. Miller did not request or consent to continuing the hearing past his probation's expiry, and the *Connett* dicta on which appellant relies is inapplicable to these facts. *See White* 321 S.W.3d at 308; Rule 84.13(d)(2).

Furthermore, appellant's invocation of *Connett* impermissibly encumbers Mr. Miller with the burden of ensuring his revocation hearing occurred prior to August 28, 2012. Where Mr. Miller need not demonstrate prejudice or an unreasonable delay under Section 559.036.8, he likewise cannot invite trial court error to exceed its statutory authority. *See Strauser*, 416 S.W.3d at 803 n.4. Assuming, *arguendo*, trial counsel requested a continuance on August 23, 2012, the trial court would have regardless been obliged to hold the revocation hearing before the expiration of Mr. Miller's probation absent some compelling reason that does not appear on this record. *See id.* at 803. Therefore, appellant's argued application of *Connett* to this case does not comport with this Court's exegesis of Section 559.036.8 requiring the trial court, and not Mr. Miller, to make every reasonable effort to hold the revocation hearing prior to probation expiry. *See Strauser*, 416 S.W.3d at 803.

State v. Roark, 877 S.W.2d 678 (Mo. App. S.D. 1994)

Appellant points to the *Roark* opinion for its "finding that the defendant did not challenge the trial court's statement that the hearing was held on the soonest date it could be held, and therefore, the defendant failed to show that the trial court did not make every reasonable effort to hold the hearing before the expiration of the probation period." Appellant's Substitute Br. 19 (citing *State v. Roark*, 877 S.W.2d 678, 680 (Mo. App. S.D. 1994)). In analogizing the facts of *Roark* to those of this case, appellant apparently supposes that the trial court's silence in the record as to how and through whom the August 23, 2012 revocation hearing was

continued permits the inference that Mr. Miller did not challenge that continuance. However, for the reasons that follow, appellant's reliance on *Roark* to support this supposition is misguided.

First and foremost, under this Court's standard of review, appellant's argument that Mr. Miller acceded to a continuance must yield to the motion court's contrary, correct conclusion that there was nothing in the record indicating the reason for continuing the August 23, 2012 hearing. *See Strauser*, 416 S.W.3d at 801. Accordingly, *Roark* does nothing to overcome the presumption that the motion court's findings are correct. *See Anderson*, 196 S.W.3d at 33.

Moreover, while the record in *Roark* clearly showed that that defendant filed a request to continue an August 9, 1993 hearing setting, a date which already eclipsed Roark's probation expiry, the scant record in the instant case makes no such conclusive showing. *Cf. Roark*, 877 S.W.2d at 680. Although it is true that the trial court passed the August 8, 2012 setting to August 23, 2012, at that point conflict counsel had not yet entered his appearance for Mr. Miller. L.F. 13. Even where the motion court found that the August 8, 2012 hearing date was reset to August 23, 2012 "due to the entry of conflict counsel for [Mr. Miller,]" there is nothing in the record to explain the trial court's failure to proceed with the revocation hearing on the August 23, 2012 setting prior to the expiration of his probationary period. PCR L.F. 13.[9]

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[9] A docket entry dated August 8, 2012, for the underlying criminal case number 25R05060406F shows the trial court entered its order resetting the August 8 revocation hearing to August 23, 2012 and bears the judicial initials "JDW." L.F. 13. These initials ostensibly refer to The Honorable John D. Wiggins presiding over the August 8, 2012 continuance. Judge Wiggins also heard and determined Mr. Miller's motion. PCR Tr. 1; PCR L.F. 13-14. Accordingly, although this continuance was given six days before conflict counsel James Wilson actually entered his appearance for Mr. Miller on August 14, 2012, a reasonable inference is that Judge Wiggins himself had continued the August 8, 2012 hearing to August 23, 2012 upon an awareness of conflict counsel's impending entry. This squares with Judge Wiggins' subsequent factual finding in paragraph 4 of the motion court's judgment that "the hearing set for August 8, 2012 was continued or reset to

Furthermore, appellant's reliance on *Roark* for its proposition that Mr. Miller failed to challenge the continuances unfairly shoulders Mr. Miller with the onus of assuring the trial court's compliance with statutory authority. As this Court has held, "it was not [Mr. Miller's] duty to ensure the trial court ruled on a probation revocation prior to expiration[.]" *Timberlake*, 419 S.W.3d at 230 (citing *Strauser*, 416 S.W.3d at 803). Thus, even if Mr. Miller tacitly accepted the continuance of the August 23, 2012 setting,[10] the trial court was derelict in its duty to hold a revocation hearing before Mr. Miller's probation expired.

Petree v. State, 190 S.W.3d 641 (Mo. App. W.D. 2006)

Petree v. State also bears marked distinctions from the facts of Mr. Miller's case here. 190 S.W.3d 641 (Mo. App. W.D. 2006). There, the defendant's probation was set to expire on May 27, 2002, and a revocation hearing was set for May 6, 2002. *Id.* at 642. Defendant appeared at the May 6 hearing and requested a continuance to July 1, 2002 to obtain counsel. *Id.* at 643. Subsequent to the defendant's continuance request:

> [t]he motion court found that after Petree requested a continuance to obtain counsel, his attorney 'did not file an entry of appearance or otherwise appear upon the record until the hearing on November 4, 2002. There is no indication that the Defendant was prepared to proceed to hearing prior to November 4, 2002.'

Id. Consequently, the Western District found that, where there was nothing in the record to indicate why the hearing was continued to November 4, 2002,

> if the normal procedures of the court were followed and the matter was called on each of the Law Days scheduled by the court, it is not unreasonable to assume Petree and his attorney

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August 23, 20[12] due to the entry of conflict counsel for [Mr. Miller]." *See* PCR L.F. 13.

[10] As recited, *supra*, Mr. Miller testified that his conflict counsel made verbal objections to continuing the August 23, 2012 revocation hearing. PCR Tr. 7-8.

> were not present, or, if present, not prepared to proceed when the matter was called.

Id.

Conversely here, the record cannot support a conclusion that Mr. Miller requested a continuance for any reason on August 23, 2012. Instead, Mr. Miller's motion hearing testimony was that attorney James Wilson verbally objected to continuing the revocation hearings both on August 23, 2012 and October 3, 2012. PCR Tr. 7-8. This testimony then permits the inference that he and his attorney *were* prepared to proceed on each date. *Petree* stands for the proposition that a trial court's continuance of revocation hearings despite the readiness of the defendant and counsel to proceed as not being redolent of that court making "every reasonable effort" to hold the hearing before expiry of the probationary period. Hence, under the facts here, *Petree* can be read to support affirming the motion court's judgment granting Mr. Miller's motion. *See Petree*, 190 S.W.3d at 643.

Moreover, despite evidence suggesting he stood ready to proceed on August 23, 2012, Mr. Miller did not have to make such a showing that he was so poised before his probation expired on August 28, 2012. This Court expressly rejected appellant's reliance on *Petree* for this intimation that a defendant had to demonstrate his readiness to proceed prior to probation expiration. *See Strauser*, 416 S.W.3d at 803. This is because "[n]othing in section 559.036.8 suggests that the defendant must prove he or she is ready to proceed." *Id.* Accordingly, any attempt by appellant to distort *Petree* to extend its assertions here beyond the issue of whether Mr. Miller requested a continuance is erroneous. *See id.* Therefore, and because there is nothing in the record to conclusively show that Mr. Miller requested a continuance on August 23, 2012, *Petree* is wholly inapposite to appellant's argument.

Suber v. State, 516 S.W.3d 386 (Mo. App. E.D. 2017)

In *Suber*, the more-than-three-year delay in holding the revocation hearing for the defendant in was reasonable because such stagnant prosecution was attributable to the defendant's *actions* consenting to or filing motions for most of twelve continuances "based on the parties' mutual desire to resolve Movant's new charges prior to holding a revocation hearing." 516 S.W.3d 386, 387 (Mo. App. E.D. 2017).

Here, the motion court found that, rather than because of any manifestation of Mr. Miller's consent, the record was silent as to the reason for the trial court's continuance of the revocation hearing from its August 23, 2012 setting beyond the August 28, 2012 expiry of his probation, much less as to any expression of Mr. Miller's desire to protract his unsettled revocation status. Moreover, where Mr. Miller's testimony at the motion hearing was that his attorney argued *against* continuing the August 23, 2012 hearing, in no way could Mr. Miller even be said to have tacitly assented to the trial court's unilateral resetting of the hearing past the endpoint of his probationary period to October 3, 2012, and beyond. Accordingly, as the motion court so presciently noted in contrast to *Suber*, there is nothing in this record to show that the trial court would have held the revocation hearing during Mr. Miller's probationary period. *See* PCR L.F. 14; *cf. Suber*, 516 S.W.3d at 388.

B. "Facts" recited in motion counsel's suggestions in support of Mr. Miller's postconviction motion are neither stipulations nor judicial admissions.

Mr. Miller reincorporates and reasserts herein argument from his Motion to Strike Appellant's Substitute Brief that any argument Mr. Miller's motion counsel made a stipulation to or judicial admission of fact materially alters the basis of appellant's claim raised in its court of appeals brief, and appellant's Substitute

Brief should accordingly be stricken in violation of Rule 83.08(b). *See Barkley v. McKeever Enters., Inc.*, 456 S.W.3d 829, 839-40 (Mo. banc 2015). This motion notwithstanding, Mr. Miller briefs these issues for the Court from an abundance of caution.

i. No stipulation on this record.

"A stipulation is an agreement between counsel with respect to business before a court, and is not one of the usual pleadings, but is a proceeding in the cause and as such is under the supervision of the court." *Howard v. Mo. State Bd. of Educ.*, 847 S.W.2d 187, 190 (Mo. App. S.D. 1993) (citing *Pierson v. Allen*, 409 S.W.2d 127, 130 (Mo. 1966)). Although stipulations are ordinarily controlling, conclusive, and courts are bound to enforce them, "[a] stipulation must be interpreted in the light of the circumstances surrounding the parties and in view of the result which the parties were attempting to accomplish." *Huegel v. Huegel*, 46 S.W.2d 157, 158 (Mo. banc 1932).

Because rules of contractual construction govern courts in interpreting stipulations, "stipulations will receive a reasonable construction with a view to effecting the intent of the parties; but in seeking the intention of the parties, the language used will *not* be so construed as to give it the effect of an admission of a fact obviously intended to be controverted, or the waiver of a right not plainly intended to be relinquished." *Howard*, 847 S.W.2d at 190-91 (emphases supplied) (citing *Huegel*, 46 S.W.2d at 158). "The general rule is that stipulations of litigants cannot be invoked to bind or circumscribe a court in its determination of questions of law." *Id.* at 191 (citing *State v. Biddle*, 599 S.W.2d 182, 186 n.4 (Mo. banc 1980)).

Here, motion counsel's suggestions in support of Mr. Miller's motion cannot be construed as any stipulation to the fact that trial counsel requested a continuance from August 23, 2012 past the end of Mr. Miller's probationary period. Despite motion counsel's use of the word "stipulated" in her suggestions

in support of Mr. Miller's motion, nothing in this document or appellant's suggestions in opposition suggests that there was any intent to be mutually bound by the "facts" alleged therein. *See* Supp. PCR L.F. 3-5, 6-13. Therefore, under fundamental precepts of contractual construction, motion counsel's suggestions in support cannot be interpreted as a "stipulation." *See Howard*, 847 S.W.2d at 190-91; *see also Devitre v. Orthopedic Ctr. of St. Louis, LLC*, 349 S.W.3d 327, 334 (Mo. banc 2011) ("[A] pleading is judged by its subject and substance of its recitals and not its rubric or caption.").

Although these separate filings contain similar factual recitations, the documents assume clearly antagonistic positions on legal issues to which these "facts" are relevant. *See* Supp. PCR L.F. 3-4, 9-12. Accordingly, in light of the circumstances surrounding the parties and in view of the result Mr. Miller was attempting to achieve with his Rule 29.15 motion, any "fact" alleged in motion counsel's suggestions in support cannot be framed as a "stipulation." *See Huegel*, 46 S.W.2d at 158. Further, given case law intimating that a probationer's consent to continuing a revocation hearing beyond the probationary period can preclude relief on a claimed Section 559.036.8 violation, the language of motion counsel's suggestions in support cannot be so construed as to give it the effect of an admission of fact obviously intended to be controverted or a waiver of Mr. Miller's right not plainly intended to be relinquished. *See Connett*, 833 S.W.2d at 474; *cf. Howard*, 847 S.W.2d at 190-91.

What is more, appellant framing anything in motion counsel's suggestions in support of Mr. Miller's motion as a factual "stipulation" would impermissibly bind or circumscribe the motion court in its determination of a question of law, *viz.* whether the trial court made every reasonable effort to hold the revocation hearing prior to expiration of Mr. Miller's probation under Section 559.036.8. *See Howard*, 847 S.W.2d at 191. This is because any "stipulation" that trial counsel sought a continuance of the revocation proceedings on August 23, 2012, would also effectively concede a potentially dispositive point of law. *See Connett*, 833

S.W.2d at 474; *cf. State v. Kennedy*, 894 S.W.2d 723, 727 (Mo. App. S.D. 1995) (Court of Appeals is "not required to accept the State's concession of error."). Thereby, the motion court would be constrained to disregard any contrary evidence, including Mr. Miller's hearing testimony, and also would be impermissibly circumscribed in its determination the trial court made every reasonable effort to hold the revocation hearing prior to August 28, 2012, compelling denial of Mr. Miller's motion. *See Howard*, 847 S.W.2d at 191. This absurd result is clearly not what motion counsel was intending to accomplish in representing Mr. Miller's challenge to the trial court's authority to revoke his probation after expiration, and the Court must construe any alleged "stipulation" by motion counsel as avoiding such result. *See id.* at 190. Stated another way, as it attempts to do now, appellant cannot invoke a stipulation to fix a conclusion of law in this matter. *See Bull v. Excel Corp.*, 985 S.W.2d 411, 415 (Mo. App. W.D. 1999) (citation omitted).

Furthermore, assuming, *arguendo*, motion counsel's suggestions in support of Mr. Miller's motion functioned as some sort of stipulation, Mr. Miller could not be relieved of his burden of proving the allegations of his Rule 29.15 motion. This is because, while stipulations of fact may relieve a party of proving those matters stipulated, stipulations do not necessarily prove, as a matter of law, the trial court exceeded its authority in revoking Mr. Miller's probation beyond its expiry. *See, e.g., Pearson v. Koster*, 367 S.W.3d 36, 54 (Mo. banc 2012); *cf. State v. Mullen*, 528 S.W.2d 517, 523 (Mo. Ct. App. 1975) ("…the accused cannot use stipulation or admission to 'cut-off' the State's right to offer evidence."); *State v, Brandt*, 467 S.W.2d 948, 952 (Mo. 1971) ("…the State having the burden of proving the guilt of the accused beyond a reasonable doubt should not be unduly limited as to the quantum of its proof.").

In this way, even where a purported "stipulation" that trial counsel sought and received a continuance from the August 23, 2012 revocation hearing might be unfavorable to a finding the trial court made every reasonable effort, through his

testimony at the evidentiary hearing, Mr. Miller zealously disputed this and other factual issues relevant to determining whether he met his burden of proving the claims in his motion. *Cf. Pearson*, 367 S.W.3d at 54 (Some of the stipulated evidence favorable to a finding that plaintiff met its burden, but "through evidence presented at trial and the cross-examination of Plaintiffs' expert…, Defendants zealously disputed multiple factual issues relevant to determining whether district 5 was 'as compact…as may be.'"). This record clearly betrays a factual dispute as to whether trial counsel sought or consented to continuing the August 23, 2012 revocation hearing. *See* PCR L.F. 5-6; PCR Tr. 7-8; Supp. PCR L.F. 1, 3, 7. Accordingly, where he at all times retains the burden of proving the allegations in his motion, Mr. Miller should not be unduly limited as to his quantum of proof on this or any other relevant issue. *See Mullen*, 528 S.W.2d at 523; *Brandt*, 467 S.W.2d at 952.

Lastly, it is important to note neither Mr. Miller's motion counsel nor the assistant prosecutors litigating the motion were present for the August 23, 2012 hearing at which the trial court unilaterally set out the revocation hearing past the expiration of Mr. Miller's probation. *See* Supp. PCR L.F. 1; *cf.* PCR Tr. 3; Supp. PCR L.F. 5, 13. Neither motion counsel nor the government, then, had anything other than second-hand knowledge of what occurred when the trial court continued the August 23, 2012 hearing. Conversely, Mr. Miller gave testimony to the events occurring that day and others, which the motion court found credible. PCR Tr. 7-8. Inasmuch, Mr. Miller offered a compelling first-hand account of the revocation proceedings as countervailing evidence refuting appellant's contention drawn from the alleged "stipulation" that trial counsel sought a continuance of the August 23, 2012 hearing. *Cf. State v. Ward*, 745 S.W.2d 666, 672 (Mo. banc 1988) (in face of defendant's stipulation used by the state with contention contrary to defendant's expectations, defendant "could have refuted this contention with countervailing evidence, but failed to do so."). The motion court, as trier of fact, was entitled to, and did, find Mr. Miller's testimony highly persuasive to its

conclusion that there is no indication in the record for the reason for the continuance of the revocation hearing from August 23, 2012. *See* PCR L.F. 14; *see also Zink*, 278 S.W.3d at 192 ("As the trier of fact, the trial court determines the credibility of witnesses and is free to believe or disbelieve all or part of the witnesses' testimony."). Therefore, because in mounting a direct challenge to the trial court's authority to revoke his probation after its expiration, neither Mr. Miller nor motion counsel had any interest in admitting a fact obviously intended to be controverted or waiving a right plainly not intended to be relinquished, and so viewing this intent of motion counsel's suggestions in support of Mr. Miller's motion, the Court cannot construe anything recited therein as a conclusive, binding "stipulation" of fact. *See Howard*, 847 S.W.2d at 190-91.

ii. No judicial admission on this record.

"A judicial admission is an act done in the course of judicial proceedings that concedes for the purpose of litigation that a certain proposition is true." *Moore Automotive Grp., Inc. v. Goffstein*, 301 S.W.3d 49, 54 (Mo. banc 2009) (citation omitted) [hereinafter *Moore Automotive*]. "Judicial admissions are generally conclusive against the party making them." *Id.* (citation omitted). "The rationale of such admissions is to act as a substitute for evidence and obviate the need for evidence relative to the subject matter of the admission." *Mitchell Eng'g Co. v. Summit Realty Co., Inc.*, 647 S.W.2d 130, 140 (Mo. App. W.D. 1982) (citation omitted).

As the court of appeals once explained:

> The true judicial admission is sharply distinguished from the ordinary or quasi admission, which is usually some form of self-contradiction and which is merely an item of evidence, available against the party on the same theory any self-contradiction is available against a witness. The person whose act or utterance it is may nonetheless proceed with his proof in denial of its correctness. It is merely an inconsistency which discredits, in greater or lesser degree, his

> present claim and his other evidence. It is to be considered along with the other evidence and circumstances of the case.

May v. May, 294 S.W.2d 627, 634 (Mo. Ct. App. 1956).

"Improvident or erroneous statements or admissions resulting from unguarded expressions or mistake should not be binding on the client." *Klinkerfuss v. Cronin*, 199 S.W.3d 831, 843 (Mo. App. E.D. 2006) (cleaned up).

"When a party does not rely on the judicial admissions of an adversary and introduces evidence which has the effect of proving the admission, the party making the admission is not bound." *Piel v. Piel*, 918 S.W.2d 373, 376 (Mo. App. E.D. 1996) (citation omitted). Where a party does not argue the existence of a judicial admission at trial or otherwise object to the introduction of evidence on the issue, that party cannot raise the admission on appeal. *See id.* at 375-76; *see also Hobbs v. Dir. of Revenue*, 109 S.W.3d 220, 222 (Mo. App. E.D. 2003) ("[T]he Director did not argue at trial that there had been a judicial admission or otherwise object to the introduction of evidence on the issue of whether there was a conviction…, and, thus, the Director cannot raise the admission now.").

Here, motion counsel's mention in her suggestions in support to Mr. Miller's motion that "conflict counsel asked for a continuance without consultation from [Mr. Miller] and without objection by the State of Missouri[ ]" is not a judicial admission nor is it binding. Supp. PCR L.F. 3. Implicit in the definition of a judicial admission as concessive act disposing of a disputed fact or subject, is that such act be done with the intention of having such a conclusive effect. *See Moore Automotive*, 301 S.W.3d at 54. Juxtaposed against Mr. Miller's hearing testimony that trial counsel objected to continuing the revocation hearing beyond the expiration of probation and the argument in the suggestions in support, any alleged "facts" recited by motion counsel's suggestions plainly lack the intention to function as substitute for or obviation of other evidence relevant to whether trial counsel sought a continuance on August 23, 2012. In this way, the statements in motion counsel's suggestions in support are best described as quasi-

admissions, which, as mere inconsistencies, would be considered by the motion court along with all other evidence and circumstances of the case. *See May*, 294 S.W.2d at 634.

If, as appellant contends, the suggestions in support or opposition to Mr. Miller's motion were meant as a stipulation of fact or judicial admission that trial counsel sought a continuance from August 23, 2012, past the expiration of the probationary period, there would have been no necessity for Mr. Miller's testimony at the evidentiary hearing, since the issue of whether the trial court lacked authority to revoke his probation after expiry would have effectively been conceded by motion counsel. *See Ezenwa v. Dir. of Revenue*, 791 S.W.2d 854, 859 (Mo. App. W.D. 1990); *see also Connett*, 833 S.W.2d at 474 ("When that [probation revocation] hearing was continued at relator's request, he cannot complain that it was not conducted prior to the expiration of the five-year period."). Insofar as the professional obligations of loyalty to and zealous advocacy for a ruling sustaining Mr. Miller's motion were incumbent on motion counsel, that she would wittingly stipulate to this ostensibly dispositive "fact" at any point in the litigation seems an improvident mistake, at best, and dereliction of duty to her client, at worst. *See Klinkerfuss*, 199 S.W.3d at 843. In either case, such an "admission" that trial counsel requested a continuance of the August 23, 2012 revocation hearing beyond the probationary period should not be binding on Mr. Miller here. *See id.*

Furthermore, Mr. Miller again asserts that appellant is clearly precluded from raising the issue of a judicial admission on appeal.[11] Appellant did not argue the existence of a judicial admission at the evidentiary hearing (or at any point below) nor did appellant object to Mr. Miller's hearing testimony on the issue of

[11] Additional discussion that appellant has waived argument on the effect of any alleged "judicial admission" at this stage of the proceedings is set forth in Mr. Miller's Motion to Strike Appellant's Substitute Brief, filed with this Court on January 29, 2018.

whether trial counsel objected to continuing the August 23, 2012 hearing. *See* PCR Tr. 7-9; *see Hobbs*, 109 S.W.3d at 222. Appellant adduced no evidence and even declined to cross-examine Mr. Miller on this issue. PCR Tr. 7, 9, 10. Therefore, notwithstanding that motion counsel's suggestions in support of Mr. Miller's motion contained no binding "judicial admission," appellant is still precluded from raising this issue now. *See Hobbs*, 109 S.W.3d at 222.

C. The motion court's findings of fact and conclusions of law were not clearly erroneous because the trial court did not make every reasonable effort to conduct a revocation hearing prior to the expiration of Mr. Miller's probation on August 28, 2012.

The crux of appellant's argument is that "[t]his case is more like *Dickerson*, *Roark*, *Petree*, and *Suber* in that the trial court initially set hearing dates during the time [Mr. Miller] was still on probation, but because of continuances sought and consented to by [Mr. Miller], the hearing ultimately was held outside of the probationary period." Appellant's Substitute Br. 23. Appellant also contends "the motion court failed to consider the fact that [Mr. Miller's] conflict counsel asked for the continuance[,]" ultimately averring that "the continuances beyond the end of the probation period were caused by or consented to by [Mr. Miller]." Appellant's Br. 21, 22. Nevertheless, these assertions rest solely on the factual supposition that trial counsel sought a continuance of the revocation hearing past August 28, 2012; a supposition refuted by the record before the motion court and its right to determine disputed facts. Moreover, appellant's argument must be disregarded where it relies on inapposite cases while sharply contravening the facts of this case as determined by the motion court, the motion court's judgment, and this Court's standard of review.

The *Dickerson*, *Roark*, *Petree*, and *Suber* cases are distinguishable from the facts of Mr. Miller's case. Consequently, they render appellant's argument

unpersuasive for reasons articulated in section II.A, *supra*, and undersigned counsel need not repeat those here. Rather, numerous other arguments detailed below compel the Court to affirm the motion court's findings and conclusion that the trial court failed to make every reasonable effort to conduct a revocation hearing before Mr. Miller's probation expired.

This Court's precedent makes clear that it was incumbent on the trial court to rule on appellant's probation revocation motion prior to expiration. *See Strauser*, 416 S.W.3d at 803. To that end, Mr. Miller had no duty to goad the trial court into fulfilling its obligation to rule on the prosecutor's revocation motion before August 28, 2012. *See id.* This Court's precedent also plainly rejects any similar argument that Mr. Miller must show some inscrutable minimum delay between the expiration of his probation and the ultimate revocation hearing date. *See Zimmerman*, 514 S.W.3d at 608 ("[Defendant] need not prove he suffered prejudice or an inordinate delay to be afforded relief."); *see also Timberlake*, 419 S.W.3d at 230 n.9 ("…the length of delay is not an issue.").

The motion court's judgment is consistent with an understanding of these rules. The motion court found that, where there was nothing in the record explaining the reason for the continuance of the hearing from August 23, 2012, the trial court failed to make every reasonable effort to hold the revocation hearing prior to the end of the probationary period. PCR L.F. 13-14. Because it found the record silent as to why the hearing was reset, rather than wrongly saddle Mr. Miller with the affirmative responsibility of ensuring the trial court ruled on the revocation motion prior to August 28, 2012, the motion court correctly invoked *Timberlake*'s suggestion that this duty to make every reasonable effort to stage a hearing within the probationary period fell squarely on the shoulders of the trial court. *See Timberlake*, 419 S.W.3d at 230; PCR L.F. 14. Moreover, that the motion court did not weigh the time from August 28, 2012 to December 5, 2012 in sustaining Mr. Miller's motion comports with case law articulating the legal standard for Section 559.036.8. PCR L.F. 13-14.

Appellant attempts to highlight alleged inconsistencies in the motion court's findings of fact to argue the "findings are not supported by the record, including the facts stipulated to by both parties[,]" but can only do so by flouting this Court's standard of review. Appellant's Substitute Br. 21. First, appellant takes exception to the motion court's finding that "the hearing set for August 8, 2012 was continued or reset to August 23, 20[12] due to the entry of conflict counsel[ ]" by contending "this cannot be true because the August 8, 2012 hearing was reset before conflict counsel entered his appearance on August 14." Appellant's Substitute Br. 21 (citing L.F. 13); *see* PCR L.F. 13. However, where the record shows the trial court was likely made aware of the conflict with the Rolla office of the Public Defender at the August 8, 2012 revocation hearing setting,[12] a reasonable inference is the trial court reset the hearing to August 23, 2012 to permit conflict counsel sufficient time to enter his appearance. *See* L.F. 13; *cf.* Supp. PCR L.F. 3, 7.[13] Accordingly, even per the record cited by appellant's brief, its contention could only have merit by drawing an inference contrary to the motion court's factual finding that the August 8, 2012 hearing date was reset to August 23, 2012 due to the impending entry of conflict counsel James

[12] The docket entry for August 8, 2012 bears the initials "JDW," which ostensibly stands for The Honorable John D. Wiggins of the Pulaski County Circuit Court. *See* L.F. 13. Judge Wiggins thus personally presided over the August 8, 2012 continuance and both heard and determined Mr. Miller's motion. PCR Tr. 1; PCR L.F. 13-14.

[13] Without conceding the pleadings of motion counsel and the prosecutor in their respective suggestions in support of and opposition to Mr. Miller's motion constitute a stipulation or a judicial admission, Mr. Miller notes that each of these documents make similar overtures to the trial court's awareness of counsel's impending conflict on August 8, 2012. Supp. PCR L.F. 3, 7. Mr. Miller's evidentiary hearing testimony also did not contest that issue. PCR Tr. 7-8. By contrast, the entire conceit of Mr. Miller's evidentiary hearing testimony was to challenge and eliminate any factual doubt that trial counsel affirmatively objected to continuing the August 23, 2012 revocation hearing past Mr. Miller's probation expiry; and the motion court was accordingly entitled to and did make a credibility finding, resolving any ambiguity in Mr. Miller's favor. *See White*, 321 S.W.3d at 308; *Zink*, 278 S.W.3d at 192.

Wilson, which ultimately occurred on August 14, 2012. *See* PCR L.F. 13. This Court will not indulge in drawing such a contrary inference and appellant's argument fails. *See Storey*, 175 S.W.3d at 125.

Next, appellant frames the August 23, 2012 trial court memorandum, coupled with the suggestions in support of and opposition to Mr. Miller's motion, as "agreement and stipulation of fact" that Mr. Miller's "conflict counsel asked for the continuance of the August 23 hearing[,]" which functions as a binding "judicial admission." Appellant's Substitute Br. 22. For the reasons articulated in section II.B, *supra*, there was no stipulation of fact or judicial admission on this record. Furthermore, because Mr. Miller was entitled to give testimony clarifying that trial counsel objected to continuing the August 23, 2012 hearing beyond Mr. Miller's probationary period, the motion court properly considered that testimony against the rest of the record and made a credibility determination, leading to its ultimate conclusion that "there is no indication in the record for the reason for the continuance of the revocation hearing from its August 23, 20[12] date." PCR L.F. 14; *see White*, 321 S.W. 3d at 308; *see* Rules 73.01(c) and 84.13(d)(2).

Any argument that Mr. Miller consented to the August 23, 2012 and October 3, 2012 continuances is also unavailing here. It is true the trial court denied conflict attorney James Wilson's oral motion to dismiss the prosecutor's motion to revoke at the December 5, 2012 revocation hearing, noting that the hearing setting "passed the five years by agreement of the Defendant[.]" PV Tr. 4. It is further true the suggestions in support of and opposition to Mr. Miller's motion allege that trial counsel sought a continuance of the revocation hearing on August 23, 2012. *See* Supp. PCR L.F. 3, 7. However, Mr. Miller testified at the motion hearing for the instant matter that his counsel unequivocally lodged objections to continuances of the August 23, 2012 and October 3, 2012 hearing settings. PCR Tr. 7-8. "[T]he motion court is free to believe or disbelieve any evidence, whether contradicted or undisputed[.]" *Stacker v. State*, 3576 S.W.3d 300, 303 (Mo. App. S.D. 2012); *see also State v. Jackson*, 433 S.W.3d 390, 392

(Mo. banc 2014) ("A [fact-finder] *always* can disbelieve all or any part of the evidence, just as it always may refuse to draw inferences from that evidence."). Accordingly, the motion court obviously found Mr. Miller's testimony sufficiently persuasive to cast aspersion on the evidence grounding the trial court's determination and anything alleged in the parties' suggestions in support and opposition, especially where the motion court concluded "there is no indication in the record for the reason for the continuance of the revocation hearing from its August 23, 20[12] date." PCR L.F. 13-14; *see* Rules 73.01(c) and 84.13(d)(2); *see also Harvey*, 371 S.W.3d at 829. [14]

Further, that Mr. Miller would harbor any motivation to consent to continuing either the August 23, 2012 or October 3, 2012 hearing settings is absurd. On August 23, 2012, Mr. Miller was merely five days away from the expiration of his probationary period. *See* PCR L.F. 14. This termination was confirmed by a letter from the Missouri Department of Corrections, received

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[14] In *Harvey*, the Director of Revenue appealed the decision of the trial court to reinstate movant's driving privileges. Where the trial court explained its decision orally, but failed to issue any findings of fact and conclusions of law, the Western District held:

> Because the validity of the test results was contested, the trial court was free to assess the credibility and weight to be afforded to the evidence presented related to chewing tobacco and breath tests. Since all fact issues upon which no specific written findings are made must be considered as having been found in accordance with the result reached, the trial court must be deemed to have found the test results to be unreliable in this particular instance and that the Director, therefore, failed to prove that element of her case. Under our standard of review, we must defer to that determination.

Harvey, 371 S.W.3d at 829 (emphasis supplied) (citations omitted). As applied here, to the extent the motion court's judgment did not make a specific factual finding on the veracity of the trial court's determination that the hearing setting passed the end of the probation period by agreement, this Court must find this and any other contested issue in accord with the result reached by the motion court, *viz.* "that there is no indication in the record for the reason for the continuance of the revocation hearing from its August 23, 20[12] date." *See id.*; PCR L.F. 13-14.

September 5, 2012, discharging Mr. Miller from supervision by the Missouri Board of Probation and Parole effective August 28, 2012. PCR Tr. 6. Moreover, conflict counsel James Wilson had entered his appearance on August 14, 2012 and there is no indication in the record that he was not ostensibly prepared to proceed with a hearing on August 23, 2012. L.F. 78; *see* PCR Tr. 7-8.

By the prosecutor filing its amended motion to revoke Mr. Miller's probation on October 18, 2012, with two new allegations of laws violations, the trial court's unilateral continuances beyond the expiration of the probationary period on August 28, 2012, unquestionably prejudiced Mr. Miller. Mr. Miller need not make a showing of prejudice for this Court to affirm the motion court's judgment. *See Timberlake*, 419 S.W.3d at 230 (citing *Strauser*, 416 S.W.3d at 803). Nevertheless, the devastating prejudicial impact the additional allegations in appellant's amended motion wrought on Mr. Miller highlights the absurdity of any argument that Mr. Miller stood to benefit from seeking any continuance of the revocation hearing. The sole allegation of probation violation levied in the motion to revoke set for hearing on August 23, 2012, was merely for as-yet-undisposed charges of possession of an imitation controlled substance and possession of drug paraphernalia. L.F. 64-66. Conversely, were Mr. Miller to seek prolongation of the revocation proceeding beyond August 28, 2012, he risked the prosecution seeking to revoke his probation for previous convictions garnered in other jurisdictions – the precise outcome accomplished by the filing of appellant's amended motion nearly two months later. *See* L.F. 81-82.

As a result, the reasonable inference is that, rather than subject himself to additional latent allegations of probation violations of which he was not originally accused, Mr. Miller's interest was best served by resolving the revocation proceeding prior to August 28, 2012. Such a concern for the fair consideration of Mr. Miller's rights squares with the General Assembly's mandate that the court make "every reasonable effort…to conduct the hearing prior to the expiration of the period." Mo. Rev. Stat. § 559.036.8. Stated another way, it would be

incongruous with due process to permit appellant to seek to artificially enlarge the court's statutory authority past the end of Mr. Miller's probationary period purely as pretense to further investigate, levy new allegations, and unduly broaden its case for revocation. *See Reiter v. Camp*, 518 S.W.2d 82, 87 (Mo. Ct. App. 1974).[15]

The motion court accordingly intuited from the record this obvious conclusion that appellant's argument conveniently overlooks, *viz.* that with his probation set to expire in five days, neither Mr. Miller nor the trial court had any justifiable legal interest in prolonging resolution of the pending revocation motion beyond August 23, 2012. Therefore, coupled with Mr. Miller's motion hearing testimony that his counsel verbally objected to the August 23, 2012 and October 3, 2012 continuances, appellant's claim that these re-settings were "sought and consented to by" Mr. Miller's counsel is groundless.

The motion court's judgment must be affirmed because the facts of this case show by a preponderance of the evidence that the trial court failed to make every reasonable effort to hold a revocation hearing prior to the end of Mr. Miller's probationary period. The docket entry dated August 23, 2012, in the underlying criminal proceeding, cause number 25R05060406F, merely recites:

> Case reset for probation violation hearing on October 3, 2012 at 9:00am. Defendant is ordered to appear. TLS

L.F. 14. A signed *pro forma* memorandum from the August 23, 2012 proceeding merely bears the signatures of Mr. Miller's trial counsel and the prosecutor, along with the judge. Supp. PCR L.F. 1. As such, this part of the record is facially silent as to which party, if either, requested a continuance or whether the trial court reset it *sua sponte*. Accordingly, this docket entry and memorandum comport with the

[15] The *Reiter* Court held that that "since a revocation of probation represents a 'grievous loss' and deprivation of liberty, substantial procedural safeguards must be measured by those protections vouchsafed by the Fourteenth Amendment." 518 S.W.2d at 87 (citing *Morissey v. Brewer*, 408 U.S. 471 (1972)).

motion court's findings and conclusion that the record does not support a finding that the second prong of the test to extend the trial court's authority under Section 559.036.8 to hold a revocation beyond a probationary period's expiration. *See* PCR L.F. 13-14.

Moreover, at the motion hearing, motion counsel advised the court:

> Judge, the only thing I would add is that Mr. Miller – and we will address this – maintains that he did not agree to the – whatever Mr. Wilson may have done that he did not agree to any continuances of the hearing. And we'll just address that. *I think that's one of those he said/he said type things*.

PCR Tr. 5-6 (emphasis supplied).

Mr. Miller's motion hearing testimony confirmed this discrepancy:

> Initially, when the continuances, the first two continuances that were – were done prior to the expiration of my probation by – by process of law, the – *my representation, James Wilson, he did do a verbal objection on both of those occasions and argued to the court that – that I was about to be – you know, my probation was about to expire*.
>
> On both occasions, the prosecutor's office – or the prosecutor himself had argued that they maintained jurisdiction to do a revocation after expiration by satisfying one of the two conditions of 559.036.8 and without regard to the – to the third – third portion of the second condition of – which case law, you know, will show that – that it needs to be conducted prior to – prior to the expiration if – you know, if they appear – or if the defendant appears.
>
> So that – *that was the main issue, was that he did make objection and there was – it was just a verbal argument*. [T]here wasn't any research done at – at that point.

PCR Tr. 7-8 (emphases supplied).

Furthermore, under this Court's standard of review, the August 23, 2012 trial court memorandum signed by trial counsel cannot be termed a consent agreement much less proof that trial counsel then requested a continuance. Supp. PCR L.F. 1; *see* Rule 73.01(c); *see White*, 321 S.W.3d at 308. Reviewing the

entirety of the probation revocation proceedings in conjunction with the testimony given at the motion hearing, the motion court, as finder of fact, was entitled to find:

> The August 23, 20[12] hearing was reset by signed memorandum of said date to October 3, 2012. This document is signed by counsel for the movant and counsel for the Respondent and does not indicate which party, if either, requested said continuance nor does it indicate the reason for the continuance.

PCR L.F. 13. Accordingly, where the motion court's findings are silent on the issue of whether trial counsel requested a continuance on August 23, 2012, this issue must be considered as having been reached in accordance with the motion court's conclusion "[t]he record does not support a finding that the second prong of the test is satisfied in that there is no indication in the record for the reason for the continuance of the revocation hearing from its August 23, 20[12] date." PCR L.F. 14; *see* Rule 73.01(c).

On review of the entire record, this Court cannot find that the motion court clearly erred in sustaining Mr. Miller's Rule 29.15 motion. Where this Court is constrained by the motion court's superior position to assess Mr. Miller's credibility as a witness, and where the motion court's findings and conclusions are presumed correct, appellant's contrary arguments and assertions have failed to overcome this presumption. *See Anderson*, 196 S.W.3d 33. This is because the facts and applicable case law discussed, *supra*, resolutely support the motion court's conclusion that the trial court exceeded its Section 559.036.8 authority in holding Mr. Miller's revocation hearing more than three months after his probation's expiry. Furthermore, given the clarity of the record in the instant case and the ambiguities of that in Mr. Miller's revocation proceeding, upon review of the entire record, this Court cannot be left with a definite and firm impression that any mistake has been made. Therefore, because the motion court did not clearly err in concluding that the trial court failed to make every reasonable effort to stage

a revocation hearing prior to the expiration of Mr. Miller's probationary period, this Court must affirm the judgment of the motion court vacating and setting aside his sentences.

CONCLUSION

For all of the foregoing, because the motion court did not clearly err in concluding that the trial court exceeded its statutory authority when it failed to make every reasonable effort to hold a revocation hearing before the expiration of his probationary period, Mr. Miller respectfully requests this Court affirm the motion court's judgment sustaining his Rule 29.15 motion to vacate, set aside, or correct the judgment and sentence.

Respectfully submitted,

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Certificate of Compliance and Service

I, Jedd C. Schneider, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 15,608 words, which does not exceed the 27,900 words allowed for a respondent's substitute brief.

On this 20th day of February, 2018, electronic copies of Respondent's Substitute Brief and Respondent's Substitute Brief Appendix were placed for delivery through the Missouri e-Filing System to Christine Lesicko, Assistant Attorney General, at Christine.Lesicko@ago.mo.gov.

/s/ Jedd C. Schneider

_____

Jedd C. Schneider

IN THE
SUPREME COURT OF MISSOURI

RICHARD A. MILLER,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC96754
	)	
STATE OF MISSOURI,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF PULASKI COUNTY, MISSOURI
TWENTY-FIFTH JUDICIAL CIRCUIT, DIVISION III
THE HONORABLE JOHN D. WIGGINS, JUDGE

RESPONDENT'S SUBSTITUTE BRIEF APPENDIX

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