No. SC97002

In the Missouri Supreme Court

STATE OF MISSOURI EX REL.
GARY D. SAMPSON,

Relator,

v.

THE HONORABLE WILLIAM E. HICKLE,

Respondent.

On Petition for Writ of Mandamus
from the Circuit Court of Phelps County
Twenty-Fifth Judicial Circuit
The Honorable William Hickle, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

On November 8, 2012, Relator ("Defendant") pleaded guilty to Possession of a Controlled Substance Except 35 Grams or Less of Marijuana, a Class C felony in violation of Section 195.202.1-.2, RSMo (Cum. Supp. 2011), in the Circuit Court of Phelps County. (Petition For Writ of Mandamus, or in the Alternative, Writ of Prohibition and Suggestions in Support, hereinafter "Petition," at 2; Relator's Ex. A at 1-3; Answer at para. 1).

On that same date, a judge other than Respondent granted Defendant a suspended imposition of sentence ("SIS") and ordered him placed on probation for five years. (Petition at para. 1; Answer at para. 1; Relator's Ex. A at 2-3).

On November 14, 2013, Defendant waived counsel, admitted to violating probation "by committing the new offense of misdemeanor unlawful use of drug paraphernalia," and consented to the revocation of probation by Judge Warren (a judge other than Respondent). (Answer at para. 2; Petition at 2). Judge Warren sentenced Defendant to six years in the Missouri Department of Corrections but suspended execution of the sentence and placed Defendant "on a new five (5) year term of probation." (Answer at para. 2; Petition at para. 2).

On December 11, 2014, Defendant appeared in person and by counsel and admitted violating probation "by Using Controlled Substances." Judge Warren continued Defendant on probation and added the condition that he successfully complete the Crawford County Alternative Treatment Court Program.

On April 14, 2015, Respondent issued an Amended Order of Probation noting, *inter alia*, that Defendant's probation had previously been "revoked from an SIS to 6 years DOC SES 5 year probation" on "11/14/2013"; including the order that Defendant "shall be screened for Crawford County Drug Court and if accepted, Defendant will be ordered to complete Crawford County Drug Court" as an amendment of "11/14/2013"; and including the order that "defendant shall successfully complete the Crawford County Alternative Treatment Court Program" as an amendment of "12/11/2014[.]"

On July 9, 2015, Defendant appeared, knowingly and voluntarily waived his right to counsel, knowingly, voluntarily, and intelligently waived his right to a probation revocation hearing, and admitted violating probation" by failing to complete the Crawford County Alternative Court Program." The Judgment and Order of the Drug Court Commissioner found that Defendant had committed "multiple violations of the rules and conditions of the Crawford County Alternative Court[,]" including "missed meetings," an "association violation," and his "continued failure to comply with terms and

conditions of the Alternative Court Program" and that "the aforesaid violations are substantive violations." Defendant's continued participation was found to be "not feasible" and he was "unsuccessfully terminated and discharged" and referred to Respondent for further action and to the Prosecuting Attorney "to review Defendant's probation status."

On June 15, 2015, Defendant appeared *pro se*, was advised of the hearing on the State's Motion to Revoke Probation set for July 9, 2015, ordered Defendant to appear on the set date and time "with counsel if he wishes to be represented" and appointed the Office of the Public Defender "to represent defendant if he otherwise qualifies for its services." The court found that due process required that Defendant be represented by counsel.

On June 22, 2015, the "Rolla Public Defender Office" wrote Defendant that he was eligible for services but only if the court found that due process required he be represented by counsel and suggested he ask the court to make such a finding at the next court setting.

On July 9, 2015, Respondent ordered that "Defendant's probation is revoked, set aside, and held for naught." Respondent ordered Defendant's sentence "herein executed" and ordered Defendant "committed under § 559.115 RSMo, with placement in the Institutional Treatment Center." Defendant was advised of his rights under Rule 24.035 and was "provided a

copy of that Rule in open court." (Answer at para. 3; Petition at para. 3; Relator's Ex. A at 6-7).

On October 2, 2015, a Department of Corrections Institutional Treatment Program parole officer reported to the court that in his opinion, Defendant would successfully complete the program on October 30, 2015, issued a purported "NOTICE OF STATUTORY DISCHARGE," and recommended that Defendant be released on his 120th day of incarceration, which was to be November 10, 2015. (Answer at para. 4; Petition at 4; Relator's Ex. B at 13-16).

The accompanying report stated that Defendant's "drug of choice" is methamphetamine "which he started using at the age of 16 and progressed to doing 3 grams per day[.]" (Relator's Ex. B at 15). Defendant claimed to have last used methamphetamine "in November 2014." (*Id.*) Defendant "started using marijuana at the age of 10 and progressed to using 1-2 ounces per day" and reported his last use "being in November 2014." (*Id.*)

On October 13, 2015, Respondent signed a form order in this case labeled, "120 Day Orders of Probation," which stated that Defendant had completed the 120-day program "pursuant to 559.115 RSMo." and checked a line and filled in appropriate blanks that read: "The Court orders supervision by the Board of Probation and Parole effective 11-10-15 (date) for a term of 5

years. Special Conditions are as follows: Per P + P report." (Relator's Ex. B at 10).

On June 20, 2016, the Board of Probation and Parole's (hereinafter, "Board's" or "Board") Case Summary Report noted that in addition to the 6-year "SES" and 5-year term of probation upon which supervision began on November 10, 2015 and was due to expire on November 9, 2020 in the case at issue, Defendant had "Court Probation Reinstated" on an offense of Distribution, Delivery, Manufacture, Production or Attempt to or Possession with Intent to Distribute, Deliver, Manufacture, or Produce a Controlled Substance upon which he had received an "SIS" and upon which supervision began on September 24, 2015 and was due to expire on September 23, 2018 in Case Number 13AB-CR01893 in St. Francois County. The report concluded that Defendant had an "EARNED DATE" of discharge of "5/13/2020" in the case at issue and an "OPTIMAL DATE" OF 6/1/2018. (Relator's Ex. C at 18).

On December 27, 2016, Defendant received a Field Violation Report for failing to pay intervention fees and failing to pay court costs in his other case. The report noted that Defendant had "an Earned Discharge Date of 11/15/2019" in the case at issue and an "optimal Discharge Date of 6/1/2018." The Report cited previous probation violations on March 18, 2013; April 12, 2013; July 16, 2013; April 18, 2014; July 17, 2014; September 24, 2014;

October 1, 2014; December 16, 2014; and April 29, 2015. Defendant had received Citations on March 18, 2013 and on January 7, 2015.

On December 29, 2016, the Board's Case Summary Report noted that Defendant had reported as directed "for the most part" during that period but had incurred violations for intervention fees and court costs in his other case. In the case at issue, he was to submit to collection of a urine sample and had an Earned Discharge Date of "11/15/2019" and an Optimal Discharge Date of "06/01/2018."

On April 13, 2017, Defendant received a Notice of Citation after he admitted using marijuana on March 7, 2017. Defendant was ordered to have an outpatient substance abuse treatment assessment completed on or before April 30, 2017 and to follow any and all recommendations set forth, and to complete a 500-word essay on the importance of remaining clean and sober.

On June 6, 2017, Defendant received a Field Violation Report after being charged with "Stealing – 4 Subsequent Stealing Offense in 10 Years" for an offense which took place on March 18, 2017. Charges were filed on May 31, 2017 and the court issued a warrant on June 2, 2017. The Report itemized 11 prior probation violations between March 2013 and December 2016, and three citations, including the January 2015 violation of reporting directives and the April 13, 2017 violation for drugs.

On June 7, 2017, the Board's Case Summary Report noted that Defendant had violated the laws condition through the pending stealing charge, and the drugs condition on April 13, 2017 and had "admitted to using marijuana during an office visit on 3/7/2017." Defendant was also in arrears on his intervention fees and owed $6,443.01 in court costs. The Report stated that Defendant had an Earned Discharge Date of "07/18/2019 (RSMO 217.703)" and that continued supervision compliance would result in an optimal discharge date of "07/01/2018."

On October 25, 2017, Defendant was issued yet another Field Violation Report for multiple probation violations. Defendant violated the Laws condition by driving while revoked or suspended, operating a motor vehicle owned by another knowing the vehicle has not maintained financial responsibility, and failing to wear a proper safety belt on July 3, 2017.

Defendant violated the Reporting/Directives provision by failing to report or call for his scheduled appointments on August 7, 2017; September 29, 2017; and October 12, 2017. Defendant was "willfully avoiding his supervision and has refused to report per his supervision."

Defendant had also violated the intervention fees condition of his probation.

A "DOC Warrant" had been issued but the Board recommended that a capias warrant be issued in its place.

On November 1, 2017, Respondent issued a capias warrant for Defendant's arrest. The capias warrant was served on December 12, 2017.

On December 13, 2017, the State filed a Motion to Revoke Probation. (Petition at para. 9; Answer at para. 9; Relator's Ex. A at 7). The State cited six violations, including three violations of the law and three failures to report.

Defendant appeared *pro se* on that date and, the court appointed the Office of the Public Defender to represent him "if he otherwise qualifies for its services" at a hearing scheduled for January 4, 2018 on the Motion to Revoke. The court found that due process required that he be represented by counsel at such a hearing.

On December 28, 2017, Defendant's probation and parole officer filed a Supplemental Report following an interview with Defendant in which he reported he had been fired from his job after missing work, allegedly because of transportation issues. Despite one of the violations being for a fourth stealing offense within 10 years, the probation officer claimed that the violations did not pose a threat to the community and recommended "Continuance," Electronic Monitoring, and the Pathways to Change Program. The Report, which was signed by a unit supervisor on January 2, 2018 and filed on January 4, 2018, concluded that Defendant was in custody and had

an earned discharge date of March 20, 2019, and an optimal discharge date of August 1, 2018 under Section 217.703.

On January 4, 2018, Defendant was released on his own recognizance.

According to the Public Defender's Office, on January 11, 2018, the Public Defender was ordered to enter an appearance in the matter at issue during a hearing on the new charges in the 2017 case.

On January 18, 2018, Katherine Schmidt of the Public Defender's Office filed an Entry of Appearance Under Objection and Order of Court. Counsel objected "to being compelled to enter an appearance for the reasons stated in the letter to court of September 29, 2017," which claimed that "the Area 25 Office of the Public Defender" and its attorneys "could not ethically take on any additional cases and would take steps to waitlist applicants when no attorney is available." Counsel professed to reserve the right to seek appellate remedies to vacate the appointment and claimed that being compelled to enter in this case "is causing counsel to violate or risk violating" Missouri Supreme Court Rules 4-1.1 (competence), 4-1.4 (communication), and 4-1.7 (conflict of interest), as well as the Sixth Amendment right to effective assistance of counsel.

On January 29, 2018, the State filed a Motion for Disclosure and a Response to an apparent defense request for disclosure.

On February 5, 2018, appointed counsel filed "Defendant's Motion for Discharge of Defendant from Probation," a Motion to Shorten Time, and a Notice of Hearing purporting to set the Motion to Discharge for February 8, 2018. (Petition at para. 10; Answer at para. 10; Relator's Ex. A at 8).

On February 8, 2018, Defendant's Motion for Discharge was heard, argued, and taken under advisement. (Petition at para. 11; Relator's Ex. A at 9; Answer at para. 11).

On February 14, 2018, Respondent issued an Order Denying Defendant's Motion for Discharge of Defendant from Probation. The court held that while it did not have the power to grant a third term of probation, it "*does* have the power to revoke" Defendant's "second term of probation, and to order the six year sentence executed, so long as the execution is accomplished within the original term of the second, valid, order of probation." The court further held that by revoking Defendant's "last, valid term of probation" on July 9, 2015, it had rescinded all earned compliance credits "otherwise accumulated by Defendant." (Relator's Ex. D at 19-20). The court concluded that it still had authority "to execute Defendant's sentence" and set a hearing "to determine whether to execute Defendant's sentence" for March 8, 2018. (*Id.*)

On March 1, 2018, Defendant filed a Petition for Writ of Mandamus or, in the Alternative, a Writ of Prohibition in the Missouri Court of Appeals, Southern District. (Petition at para. 14; Answer at para. 14).

On March 2, 2018, the Missouri Court of Appeals, Southern District, issued an order denying the petition for writ. (Petition at para. 15; Answer at para. 15; Relator's Ex. E).

On March 2, 2018, Defendant filed a Petition for Writ of Mandamus or, in the Alternative, a Writ of Prohibition in this Court, along with Suggestions in Support, and Exhibits A-E.

On March 5, 2018, this Court requesting Respondent to file Suggestions in Opposition by March 7, 2018.

On March 7, 2018, Respondent (through previous counsel) filed Suggestions in Opposition, a Motion to Dismiss the Petition, and State's Exhibits 1 and 2.

On March 7, 2018, this Court issued a Preliminary Writ of Mandamus.

On March 9, 2018, this Court issued an Amended Preliminary Writ of Mandamus commanding Respondent to cancel the probation violation hearing set for March 8, 2018 "and in lieu thereof, continue Defendant on probation," and to show cause on or before April 6, 2018 "why you have authority to revoke probation" and commanding Respondent "in the mean time to take no action in said cause until the further order of this Court."

On April 2, 2018, at the request of Respondent, the Attorney General's Office entered its appearance. On April 6, 2018, counsel filed an Unopposed Motion for Extension of Time to File Return, which was sustained by the Court, which ordered the Answer/Return filed on or before April 23, 2018.

On April 23, 2018, Respondent filed an Answer, activating the briefing schedule.

On May 21, 2018, Defendant filed his brief and appendix.

ARGUMENT

I.

The sentencing court had jurisdiction to deny Defendant's Motion to Discharge Defendant from probation and to set the matter for a probation revocation hearing because Defendant was, as a matter of law, still serving a statutorily-required continuation of a second term of probation.

Defendant's multifarious Point Relied On begins by arguing that the sentencing court impermissibly imposed "an invalid third term of probation." It then argues that the sentencing court did not manifest an intent to revoke Defendant's "second term of probation, for the second time" prior to its expiration of that term by operation of Defendant's calculation of Earned Compliance Credits, which he admits does not square with the calculation of the Board of Probation and Parole ("Board"). Defendant has not brought an action against the Board to challenge that calculation and the Board is not a party to this action. Defendant bifurcates his Point Relied On into two argument sections, so the State will do the same.

A. Standard of review

This Court has jurisdiction to issue original remedial writs, including writs of mandamus. MO. CONST., art. V, sec. 4.1; *State ex rel. Fite v. Johnson*, 530 S.W.3d 508, 510 (Mo. banc 2017). A writ of mandamus is an

extraordinary remedy and is not appropriate to correct every alleged trial court error. *State ex rel. Chassing v. Mummert*, 887 S.W.2d 573, 576–77 (Mo. banc 1994). Mandamus will not issue to compel the performance of a discretionary duty—a duty that requires "the exercise of reason in determining how or whether the act should be done." *Jones v. Carnahan*, 965 S.W.2d 209, 213 (Mo. App. W.D. 1998). The purpose of mandamus is to execute, not adjudicate. *State ex rel. Sprague v. City of St. Joseph*, 549 S.W.2d 873, 879 (Mo. banc 1977).

"A relator must demonstrate" a "clear, unequivocal, specific right to a thing claimed." *State ex rel. Healea v. Tucker*, 545 S.W.3d 348, 352 (Mo. banc 2018). However, mandamus cannot be used to establish a legal right. *Chassing*, 887 S.W.2d at 576.

B. By operation of law, Defendant was serving a continuation of his second term of probation.

Defendant's contention that he was serving an impermissible third term of probation ignores statutory amendments which took effect prior to Defendant's crime in November of 2012, and prior to Defendant's revocations in November of 2013 and July of 2015, which required courts to sentence drug offenders whose probation had been revoked to 120-day institutional programs with highly-limited exceptions, and further required that if the offender successfully completed such programs, the sentencing court was

virtually required to release the offender to "continue to serve the term of probation[.]" Section 559.036.4, RSMo (Supp. 2012); Section 559.036.4, RSMo (Supp. 2013); Section 559.036.4, RSMo (Supp. 2017). Importantly, the legislature chose the language "continue to serve the term of probation" and did not provide that such a release resulted in a new term of probation. *Id*. The legislature thereby made plain its desire that fear of the third-term of probation prohibition should not interfere with sending, *inter alia*, drug offenders to 120-day programs for violations incurred during their second term of probation.[1]

The 2012 amendments to Section 559.036.4(1) provided as follows (new language underlined):

> If a continuation, modification, enlargement or extension is not appropriate under this section, the court shall order placement of the offender in one of the department of corrections' one hundred twenty-day programs so long as:
>
> (a) The underlying offense for the probation is a class C or D felony or an offense listed in chapter 195; except that, the court may, upon its

[1] Indeed, the language authorizing a second term of probation, which courts had interpreted as impliedly prohibiting a third term, was cabined into a different paragraph pertaining to those offenders who were not eligible for 120-day programs, and for whom a continuation or extension of probation was otherwise "not appropriate[.]" Section 559.036.5, RSMo (Supp. 2012, 2013, 2017). Beginning with 2013 amendments, this included cases in which "the defendant consents to the revocation of probation[.]" *Id.* (Supp. 2013).

own motion or a motion of the prosecuting or circuit attorney, make a finding that the offender is not eligible if the underlying offense is involuntary manslaughter in the first degree, involuntary manslaughter in the second degree, aggravated stalking, assault in the second degree, sexual assault, domestic assault in the second degree, assault of a law enforcement officer in the second degree, statutory rape in the second degree, statutory sodomy in the second degree, deviate sexual assault, sexual misconduct involving a child, incest, endangering the welfare of a child in the first degree under subdivision (1) or (2) of subsection 1 of section 568.045, abuse of a child, invasion of privacy or any case in which the defendant is found guilty of a felony offense under chapter 571;

(b) The probation violation is not the result of the defendant being an absconder or being found guilty of, pleading guilty to, or being arrested on suspicion of any felony, misdemeanor, or infraction. For purposes of this subsection, "**absconder"** shall mean an offender under supervision who has left such offender's place of residency without the permission of the offender's supervising officer for the purpose of avoiding supervision[.]

Section 559.036.4(1), RSMo (Supp. 2012).[2]

A 2013 amendment inserted language at the beginning of Section 559.036.4(1), "Unless the defendant consents to the revocation of probation," the same procedure would apply. Section 559.036.4(1), RSMo (Supp. 2013).

Here, Defendant's underlying offense was for a violation of "an offense" then "listed in chapter 195" and was a class C felony not listed in the exceptions. Defendant pleaded guilty on November 8, 2012, to the class C felony of Possession of a Controlled Substance Except 35 Grams or Less of Marijuana in violation of Section 195.202.1-.2, RSMo (Cum. Supp. 2011). (Petition at 2; Relator's Ex. A at 1-3; Answer at para. 1).

Hence, assuming the 2013 amendment in effect at the time of the July 9, 2015 revocation applied, in the absence of Defendant consenting to a revocation of probation once the court had found that a continuation, modification, enlargement, or extension of probation was not appropriate, the statute required that the court "shall order" Defendant's placement in a department of corrections' 120-day program. Section 559.036.04(1)(a), RSMo (Supp. 2013). If the 2012 statute in effect at the time of the crime applied, Defendant's consent would not have been relevant.

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[2] The statute also retained previous exclusions for those violations involving weapons, stay-away conditions, and offenders who had previously "been placed in one of the programs by the court for the same underlying offense or during the same probation term[.]" Section 559.036.4(c) & (d), RSMo (Supp. 2012).

Similarly, express statutory language required the court to release Defendant to "continue to serve the term of probation" previously imposed—the second term—upon his successful completion of the 120-day program in November of 2015. The 2012 amendments to Section 559.036.4(3) provided:

> Notwithstanding any of the provisions of subsection 3 of section 559.115 to the contrary, once the defendant has successfully completed the program under this subsection, the court ***shall release the defendant to continue to serve the term of probation, which shall not be modified***, enlarged, or extended based on the same incident of violation. Time served in the program shall be credited as time served on any sentence imposed for the underlying offense.

Section 559.036.4(3), RSMo (Supp. 2013) (emphasis added).

Here, the sentencing court agreed with the Board's assessment that Defendant had successfully completed the 120-day program to which the court had been obligated to send him; it therefore was required by statute to "release the defendant to continue to serve the term of probation[.]" *Id*. The phrase "continue to serve the term of probation" clearly connotes the previously extant term of probation and the phrase, "continue to serve" clearly excludes Relator's contention that a new, third term of probation was thereby imposed.

Indeed, nowhere in the court's October 13, 2015 order does the court state that it is imposing a third term of probation. Rather, the court signed a form labeled, "120 Day Orders of Probation," stating that effective 11-10-15 (following completion of the 120th day), the court was ordering the Board to supervise defendant "for a term of 5 years." State's Exhibit 2. Such a term had previously been imposed; hence, construed in tandem with the statutory language, this order merely operated to provide that Defendant would "continue to serve the term of probation." It was necessary to list the effective date of the order to make clear that supervision would not resume until the completion of the program, which was then in the future. The term of 5 years, which the form required to be listed, was that previously imposed. *Id.*[3]

While Defendant points to language in the trial court's order denying the Motion to Discharge pointing out that both sides had argued that it erred by imposing a third term of probation, this Court does "not need to agree with the trial court's reasoning in order to affirm," and "will affirm even if the trial court gives a wrong or insufficient reason." *Covert v. Fisher*, 151 S.W.3d 70, 74 (Mo. App. E.D. 2004) (citing *Fix v. Fix*, 847 S.W.2d 762, 766 (Mo. banc 1993)). The court correctly concluded that the second term of probation

[3] Even if a blind eye is turned to the context supplied by the statutory language and previous probation order, at most the court erred by expanding the term of probation beyond its previous end date of November 18, 2018. This did not affect the court's ability to subsequently revoke probation prior to that date.

authorized its action. *See, State ex rel. Brown v. Combs*, 994 S.W.2d 69, 72-73 (Mo. App. W.D. 1999) (holding "void" the portion of an order granting a third term of probation but suggesting that remainder of order remained in place and that court could have executed sentence any time prior to the expiration of the second term of probation had an affirmative manifestation of the court's intent existed within that time and every reasonable effort been made to notify the probationer and conduct the hearing prior to the expiration of the probationary period under now-Section 559.036.8). Indeed, the case here is far clearer than in *Combs* due to the subsequent statutory amendments making it clear that in the scenario at bar, there was merely a continuation of the second term of probation and not a third term of probation.

C. The court had not "lost jurisdiction."

Nor had the court "lost jurisdiction" as alleged in the Point Relied On. *See, J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 253-254 (Mo. banc 2009) (under Article V, section 14 of the Missouri Constitution, circuit courts have plenary jurisdiction over all cases and matters, civil and criminal). "Authority concerns a court's power to render a particular judgment or take a particular action in a particular case based on the existing law, while jurisdiction concerns a court's power to render *any* judgment or take *any* action in a particular case." *State ex rel. Fite v. Johnson*, 530 S.W.3d at 510 n.5.

Under Section 559.100.2, the circuit court "shall have the power to revoke the probation or parole previously granted under section 559.036 and commit the person to the department of corrections." Section 559.100.2, RSMo (Supp. 2012, 2017).

Because the court was not just authorized, but virtually required to release the defendant to continue to serve his second term of probation following the successful completion of the 120-program virtually mandated by his previous violation, the court did not exceed its statutory authority, and certainly did not exceed its jurisdiction.

Defendant's first argument should be rejected.

II.

In the alternative, if the sentencing court's October 2015 order is construed as imposing a prohibited third term of probation, it is "void," and could not authorize Defendant's release from prison. The remedy, therefore, is to return Defendant to prison to serve the remainder of his sentence. (Addresses Defendant's Argument I)

Defendant contends that the trial court was without "jurisdiction" (authority) to issue its October 13, 2015 order placing Defendant on what he contends is a third term of conditional probation. For the reasons outlined in Point I, this is inaccurate. However, even assuming *arguendo* that the argument is correct, Defendant is mistaken as to the implications for the remedy.

In *State ex rel. Brown v. Combs*, *supra*, the Court of Appeals held that the portion of an order imposing a third term of probation was entered without authority and was "void" as a matter of law. *Combs*, 994 S.W.2d at 72-73. However, the court did have authority to revoke the relator's probation and that portion of the order was not "a nullity." *Id*.

Here, it is undisputed that the sentencing court had the authority to revoke Defendant's second term of probation and execute his sentence on July 9, 2015, which it did. The fact that the court recommended Defendant for a 120-day program did not affect its statutory authority in ordering his

sentence to be executed. Thus, Defendant was properly serving a six-year sentence in the Department of Corrections at the time the October 2015 order was entered. Assuming the court was without authority to enter that order releasing Defendant on a "third term" of probation, that portion of its order is "void" under *Combs*. *Id*. However, the earlier order executing Defendant's sentence is not "a nullity" because the court had the authority to revoke probation and execute his sentence. *See, id*.

Thus, the remedy is to restore the *status quo ante* before the order entered without authority. *Abel v. Wyrick*, 574 S.W.2d 411, 421 (Mo. banc 1978) (returning offender to the position he was in when unlawful revocation occurred, which was in custody pending a hearing or other disposition of probation violations). *See also*, *Mack v. Purkett*, 825 S.W.2d 851 (Mo. banc 1992) (returning offender in a parole revocation case to status as a parolee); *Ex parte Kent*, 490 S.W.2d 649, 651 (Mo. banc 1973) (after finding order authorizing custody in mental health facility was unlawful, remanded with suggestions for future proceedings in trial court). These cases restore equity without providing a windfall to the convict or other person in custody.

Here, the Court should decline to order Defendant discharged where he procured an improper release in 2015, then sat on his alleged rights until 2018. *See, Kay v. Vatterott*, 657 S.W.2d 80, 83 (Mo. App. E.D. 1983) (discussing doctrine of unclean hands where improper conduct is the source of

the equitable right asserted); *Peltzer v. Gilbert*, 169 S.W. 257, 262 (Mo. 1914) (majority of court agreed that doctrine of unclean hands applied in an action for a restraining order). Moreover, the doctrine of laches should preclude relief. *State ex rel. Lowry v. Yates*, 251 S.W.2d 834 (Mo. App. K.C. D. 1952); *State ex rel. Missouri Glass Co. v. Reynolds*, 148 S.W. 623 (Mo. 1912) (laches precluded issuance of a writ of mandamus).

If, despite the argument made in Point I, this Court concludes that Respondent's October 13, 2015 order was "void" because it released Defendant on a third term of probation which it lacked the authority to do, the Court should make clear that the result is that the prior order executing Defendant's sentence remains in place. If the Court believes that by being at large since that order, Defendant has acquired a sufficient liberty interest to require a hearing before returning Defendant to custody under the sentencing court's previous order, the Court should decline to enjoin, but should rather state that the hearing scheduled by the circuit court should go forward. *See, Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

Defendant's first point argument should therefore still be rejected.

III.

The sentencing court has not lost authority as the result of Defendant's "earned compliance credits" because Defendant cannot have accumulated such credits if the October 2015 order established a third term of probation and is therefore a nullity. In the alternative, if Defendant has been continuing to serve a second term of probation, Defendant has failed to establish a "clear" and "unequivocal" right to relief where the Board of Probation and Parole's calculation, which is controlling, holds that Defendant has not accumulated sufficient credits to divest the court of authority and Defendant has not brought an action to which the Board is a party to rectify any alleged error. Moreover, mandamus cannot be used to establish a "legal right." (Addresses Defendant's Argument II)

The second half of Defendant's multifarious Point Relied On, and his second point of Argument, contends that this Court should ignore the Board of Probation and Parole's calculation of his earned compliance credits, recalculate them, and then apply them to the second term of probation he contends he is no longer serving. Defendant contends that the result of such an exercise would be to conclude that the sentencing court no longer has the authority to revoke his probation.

If, however, Defendant is improperly serving a third term of probation, the order was "void" and Defendant was on a third term of probation and thus never entitled to earned compliance credits since losing all of those he accumulated when his sentence was ordered to be executed in July of 2015. *See, Combs, supra*; Section 217.703, RSMo (Supp. 2013). As the court's order stated, "This Court revoked Defendant's last, valid term of probation (probation #2) on July 9, 2015, thereby rescinding all earned credits otherwise accumulated by the Defendant." (Ex. D at 20). "All credits shall be rescinded if the court or board revokes the probation or parole or the court places the offender in a department program under subsection 4 of section 559.036." Section 217.703(5), RSMo (Supp. 2013).

Thus, this argument is only relevant if the Court agrees with the State that Defendant was released to "continue to serve" the second "term of probation."

A. Standard of review

The general standard of review for writs of mandamus is as outlined in Point I.

This Court's "review is limited to the record made in the court below." *State ex rel. Dotson v. Holden*, 416 S.W.3d 821, 823 (Mo. App. S.D. 2013). Writ relief lies when a "trial court lacks the authority to conduct a probation revocation hearing after the term of probation has expired." *Id.* "Whether a

trial court has exceeded its authority is a question of law, which an appellate court reviews independently of the trial court." *Id.*

Unless terminated as provided in Section 559.036 or modified under Section 217.73, the terms during which "each probation shall remain conditional and subject to revocation are: (1) A term of years not less than one year and not to exceed five years for a felony." Section 559.016.1, RSMo (Supp. 2012). The court "shall designate a specific term of probation at the time of sentencing or at the time of suspension of imposition of sentence." Section 559.016.2, RSMo (Supp. 2012). Here, it is undisputed that the term of probation was designated as five years on each relevant occasion.

B. The "earned compliance credit" statute

"The Board of Probation and Parole awards earned compliance credits (hereinafter, "ECC") to offenders who meet the statutory requirements and who remain in compliance with the terms of their probation." *State ex rel. Amorine v. Parker*, 490 S.W.3d 372, 374 (Mo. banc 2016) (citing Section 217.703). "The award of ECC reduces the probationary term 'by thirty days for each full calendar month of compliance with the terms of supervision." *Id.*; Section 217.703.3. "An offender is deemed to be in compliance when there is 'absence of an initial violation report submitted by a probation or parole officer during a calendar month, or a motion to revoke or motion to suspend

filed by a prosecuting or circuit attorney, against the offender.'" *Id.*, 490 S.W.3d at 374-375 (quoting Section 217.703.4).

Section 217.703.5, RSMo (Supp. 2017) provides in relevant part that:

> Credits shall not accrue during any calendar month in which a violation report has been submitted or a motion to revoke or motion to suspend has been filed, and shall be suspended pending the outcome of a hearing, if a hearing is held.

Id.

Section 217.703.5 further provides that:

> If no hearing is held or the court or board finds that the violation did not occur, then the offender shall be deemed to be in compliance and shall begin earning credits on the first day of the next calendar month following the month in which the report was submitted or the motion was filed.

Id.

However:

> All earned compliance credits shall be rescinded if the court or board revokes the probation or parole or the court places the offender in a department program under subsection 4 of section 559.036.

Id.

Moreover:

> Earned credits shall continue to be suspended for a period of time during which the court of board has suspended the term of probation, parole, or release, and shall begin to accrue on the first day of the next calendar month following the lifting of the suspension.

Id.

"The award or rescission of any credits earned under this section shall not be subject to appeal or any motion for postconviction relief." Section 217.703.8, RSMo (Supp. 2017).

C. All credits prior to November 10, 2015 were rescinded.

Under Section 217.703.5, *supra*, all credits accrued by Defendant during his first and the initial second term of probation were rescinded, as held by Respondent. Defendant does not dispute this.

D. If there was no third term of probation, no additional ECC accrued.

As held by Respondent, Defendant accrued no additional ECC credits if, in fact, the sentencing court's order releasing him to a third term of probation was "void" under *Combs*.

Thus, the court had authority to revoke Defendant's probation at any point up to November 10, 2018, even prior to these proceedings initiated by Defendant.

E. The Board's calculation shows insufficient ECC.

On December 29, 2016, the Board's Case Summary Report noted that Defendant had reported as directed "for the most part" during that period but had incurred violations for intervention fees and court costs in his other case. In the case at issue, he was to submit to a urine sample and had an Earned Discharge Date of "11/15/2019" and an Optimal Discharge Date of "06/01/2018."

On April 13, 2017, Defendant received a Notice of Citation after he admitted using marijuana on March 7, 2017. Defendant was ordered to have an outpatient substance abuse treatment assessment completed on or before April 30, 2017 and to follow any and all recommendations set forth, and to complete a 500-word essay on the importance of remaining clean and sober.

On June 6, 2017, Defendant received a Field Violation Report after being charged with "Stealing – 4 Subsequent Stealing Offense in 10 Years" for an offense which took place on March 18, 2017. Charges were filed on May 31, 2017 and the court issued a warrant on June 2, 2017. The Report itemized 11 prior probation violations between March 2013 and December 2016, and three citations, including the January 2015 violation of reporting directives and the April 13, 2017 violation for drugs.

On June 7, 2017, the Board's Case Summary Report noted that Defendant had violated the laws condition through the pending stealing

charge, and the drugs condition on April 13, 2017 and had "admitted to using marijuana during an office visit on 3/7/2017." Defendant was also in arrears on his intervention fees and owed $6,443.01 in court costs. The Report stated that Defendant had an Earned Discharge Date of "07/18/2019 (RSMO 217.703)" and that continued supervision compliance would result in an optimal discharge date of "07/01/2018."

On October 25, 2017, Defendant was issued yet another Field Violation Report for multiple probation violations. Defendant violated the Laws condition by driving while revoked or suspended, operating a motor vehicle owned by another knowing the vehicle has not maintained financial responsibility, and failing to wear a proper safety belt on July 3, 2017.

Defendant violated the Reporting/Directives provision by failing to report or call for his scheduled appointments on August 7, 2017; September 29, 2017; and October 12, 2017. Defendant was "willfully avoiding his supervision and has refused to report per his supervision."

Defendant had also violated the intervention fees condition of his probation.

A "DOC Warrant" had been issued but the Board recommended that a capias warrant be issued in its place.

On November 1, 2017, Respondent issued a capias warrant for Defendant's arrest. The capias warrant was served on December 12, 2017.

On December 13, 2017, the State filed a Motion to Revoke Probation. (Petition at para. 9; Answer at para. 9; Relator's Ex. A at 7). The State cited six violations, including three violations of the law and three failures to report.

On December 28, 2017, Defendant's probation and parole officer filed a Supplemental Report following an interview with Defendant in which he reported he had been fired from his job after missing work, allegedly because of transportation issues. The Report, which was signed by a unit supervisor on January 2, 2018, and filed on January 4, 2018, concluded that Defendant was in custody and had an earned discharge date of March 20, 2019, and an optimal discharge date of August 1, 2018, under Section 217.703.

Defendant's hearing has been pending since that time and was stalled by Defendant's Motion for Discharge and this writ proceeding. Hence, ECC have been suspended.

Thus, by the Board's controlling calculation, Defendant's last "earned discharge date" was March 20, 2019. Defendant has yet to even reach his "optimal discharge date" of August 1, 2018, despite these intervening proceedings during which time ECC have been suspended by the Motion to Revoke and scheduled hearing.

Defendant has filed neither a writ nor a declaratory judgment action against the Board. Because the Board's calculation is controlling by statute

and has never been challenged in a proceeding in which the Board is a party able to defend itself, Defendant's second point should be rejected. *See*, Section 217.703.8 (Board's award of ECC is not subject to appeal or post-conviction relief).

"A relator must demonstrate" a "clear, unequivocal, specific right to a thing claimed." *State ex rel. Healea v. Tucker*, 545 S.W.3d at 352. Mandamus cannot be used to establish a legal right. *Chassing*, 887 S.W.2d at 576.

Here, the Board's calculation belies Defendant's claim that his right to earlier release based on ECC is either "clear" or "unequivocal." Defendant cannot use a mandamus proceeding against a Respondent other than the Board to establish a "legal right" under Section 217.703. *Id.*

Thus, the Petition for a Writ of Mandamus should be denied and Defendant's second argument under his multifarious Point Relied On should be rejected.

CONCLUSION

The Petition for a Permanent Writ of Mandamus should be denied. The Court's Preliminary Writ of Mandamus should be vacated and the case remanded for either a probation revocation hearing or a *Gagnon* hearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with Rule 84.06(b) and contains 7,339 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word 2010.

/s/ Gregory L. Barnes
GREGORY L. BARNES