

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel.)	
TREVOR GRIFFITH,)	
)	
Petitioner,)	
)	
vs.)	No. SC97056
)	
)	
JEFF NORMAN, Warden,)	
South Central Correctional Center,)	
)	
Respondent.)	

ORIGINAL PROCEEDING IN HABEAS CORPUS

PETITIONER'S BRIEF

Jedd C. Schneider, MOBar #67789
Attorney for Petitioner
Woodrail Centre, 1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Telephone (573) 777-9977, ext. 325
FAX (573) 777-9974
Jedd.Schneider@mspd.mo.gov

INDEX

	<u>Page</u>
TABLE OF AUTHORITIES.....	2
JURISDICTIONAL STATEMENT.....	4
STATEMENT OF FACTS.....	5
POINT RELIED ON	
The probation court had no statutory authority to impose a third term of probation and subsequently revoke that term and execute Mr. Griffith's sentence twenty-one months later	7
ARGUMENT	8
CONCLUSION	25
APPENDIX	

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>CASES:</u>	
<i>Lamalfa v. Hearn</i> , 178 A.3d 501 (Md. 2018).....	8
<i>Robinson v. State</i> , 509 S.W.3d 811 (Mo. App. E.D. 2016).....	15
<i>Smith v. Kentucky</i> , 520 S.W.3d 340 (Ky. 2017).....	8
<i>State ex rel. Brown v. Combs</i> , 994 S.W.2d 69 (Mo. App. W.D. 1999).....	<i>passim</i>
<i>State ex rel. Heberlie v. Martinez</i> , 128 S.W.3d 616 (Mo. App. E.D. 2004)	10
<i>State ex rel. Laughlin v. Bowersox</i> , 318 S.W.3d 695 (Mo. banc 2010)	8
<i>State ex rel. Moyer v. Calhoun</i> , 22 S.W.3d 250 (Mo. App. E.D. 2000)	10, 11, 14
<i>State ex rel. Poucher v. Vincent</i> , 258 S.W.3d 62 (Mo. banc 2008).....	16, 19
<i>State ex rel. Strauser v. Martinez</i> , 416 S.W.3d 798 (Mo. banc 2014)	10, 14, 15, 17, 18, 22
<i>State ex rel. Taylor v. Steele</i> , 341 S.W.3d 634 (Mo. banc 2011)	8
<i>State ex rel. Weaver v. Martinez</i> , 481 S.W.3d 127 (Mo. App. E.D. 2016).....	9, 10, 14, 17, 18, 19, 21, 22
<i>State ex rel. Zimmerman v. Dolan</i> , 514 S.W.3d 603 (Mo. banc 2017)	16, 17
<i>State ex rel. Zinna v. Steele</i> , 301 S.W.3d 510 (Mo. banc 2010)	9
<i>Street v. Dir. of Revenue</i> , 361 S.W.3d 355 (Mo. banc 2012).....	16, 17
<i>U.S. v. Steward</i> , 880 F.3d 983 (8th Cir. 2018)	8
 <u>CONSTITUTIONAL PROVISIONS:</u>	
Fourteenth Amendment to the United States Constitution.....	8
Article I, Section 10 of the Missouri Constitution	8
 <u>STATUTES:</u>	
Section 302.500	14
Section 557.011	10
Section 559.016	9, 10, 11, 16, 18

Section 559.036	<i>passim</i>
-----------------------	---------------

OTHER:

Jack Metzler, <i>Cleaning Up Quotations</i> , 18 J. App. Prac. & Process 143 (2017), https://perma_cc/JZR7-P85A	8
<i>Webster's Third New International Dictionary</i> 1944 (2002).....	14

JURISDICTIONAL STATEMENT

Petitioner, Trevor Griffith, seeks a permanent writ of habeas corpus compelling his immediate release from respondent's custody and his return to the Cole County circuit court for discharge from probation. This Court has jurisdiction to issue original writs of habeas corpus pursuant to Article I, Section 12 and Article V, Section 4 of the Missouri Constitution, Section 532.020, *et seq.*,¹ and Rule 91.01(b). This petition is properly before the Court pursuant to Rule 91.02(a) and 84.22(a) because Mr. Griffith previously filed the same petition for writ of habeas corpus successively in the Texas County circuit court and the Missouri Court of Appeals, Southern District.

¹ All statutory citations are to Mo. Rev. Stat. 2000, current through the 2014 Cum. Supp., unless otherwise indicated.

STATEMENT OF FACTS

First term of probation

Petitioner, Trevor Griffith, pleaded guilty to the class B felony of possession of a controlled substance, section 195.211, on December 22, 2010. (Exhibits A, B, and G). On that same date, Mr. Griffith was granted a suspended imposition of sentence and five years' supervised probation. (Exhibit B).

On October 6, 2011, the probation court revoked Mr. Griffith's first term of probation and sentenced him to five years' imprisonment, but retained jurisdiction to place him on probation after successful completion of a 120-day treatment program pursuant to Section 559.115. (Exhibit C).

Second term of probation

On January 20, 2012, the probation court ordered Mr. Griffith released from the Department of Corrections on February 3, 2012, suspended execution of his previously-imposed sentence, and placed him on a second term of probation for five years. (Exhibit D).

On February 20, 2013, the probation court revoked Mr. Griffith's second term of probation and again sentenced him to five years' imprisonment, but suspended execution of his sentence to place him on a third term of five years' probation. (Exhibit E).

Third term of probation

On November 19, 2014, the probation court revoked Mr. Griffith's third term of probation and imposed and executed a five-year prison sentence. (Exhibit F). Mr. Griffith is currently incarcerated in the South Central Correctional Center under inmate registration number 1219823. Respondent, Jeff Norman, warden of the South Central Correctional Center, currently restrains Mr. Griffith's liberty.

Procedural history

Mr. Griffith filed the present petition for a writ of habeas corpus in the Texas County circuit court, cause number 17TE-CC00087, raising the same claim. On January 31, 2018, The Honorable William E. Hickie issued an order denying Mr. Griffith's petition in that circuit court. (Exhibit H).

Mr. Griffith subsequently filed the present petition for a writ of habeas corpus in the Missouri Court of Appeals, Southern District, cause number SD35400, raising the same claim. On March 13, 2018, the Court of Appeals issued an order denying Mr. Griffith's petition. (Exhibit I). Accordingly, this proceeding is Mr. Griffith's sole available means to seek judicial review of his claim that the probation court exceeded its statutory authority to impose a third term of probation and thereafter revoke that probation and execute his sentence.

POINT RELIED ON

Mr. Griffith is entitled to a permanent writ of habeas corpus releasing him from respondent's custody and returning him to the Circuit Court of Cole County for discharge from probation because the probation court exceeded its statutory authority under Section 559.036, by imposing and revoking a third term of probation and executing Mr. Griffith's sentence in derogation of his right to due process of law under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution; moreover, because the probation court was divested of authority to subsequently act after revoking and terminating his second term of probation on February 20, 2013, it could not execute his sentence twenty-one months later.

State ex rel. Brown v. Combs, 994 S.W.2d 69 (Mo. App. W.D. 1999);

State ex rel. Weaver v. Martinez, 481 S.W.3d 127 (Mo. App. E.D. 2016);

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

U.S. Const. amend. XIV;

Mo. Const. art. I, § 10; and

Mo. Rev. Stat. § 559.036.

ARGUMENT

Mr. Griffith is entitled to a permanent writ of habeas corpus releasing him from respondent's custody and returning him to the Circuit Court of Cole County for discharge from probation because the probation court exceeded its statutory authority under Section 559.036, by imposing and revoking a third term of probation and executing Mr. Griffith's sentence in derogation of his right to due process of law under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution; moreover, because the probation court was divested of authority to subsequently act after revoking and terminating his second term of probation on February 20, 2013, it could not execute his sentence twenty-one months later.

Standard of Review

“Habeas corpus is the last judicial inquiry into the validity of a criminal conviction and serves as a bulwark against convictions that violate fundamental fairness.” *State ex rel. Taylor v. Steele*, 341 S.W.3d 634, 639 (Mo. banc 2011) (cleaned up).² “Relief in habeas corpus is available when a person is held in detention in violation of the constitution or laws of the state or federal government.” *State ex rel. Laughlin v. Bowersox*, 318 S.W.3d 695, 701 (Mo. banc 2010) (cleaned up). In determining whether or not to grant habeas relief, this Court is limited to determining the facial validity of confinement, which is based

² 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*, 178 A.3d 501, 514 n.5 (Md. 2018); *U.S. v. Steward*, 880 F.3d 983, 986 n.3 (8th Cir. 2018); *Smith v. Kentucky*, 520 S.W.3d 340, 354 (Ky. 2017); *see also* Jack Metzler, *Cleaning Up Quotations*, 18 J. App. Prac. & Process 143 (2017), https://perma_cc/JZR7-P85A (arguing for use of (cleaned up) as a new parenthetical intended to tell readers the author has removed extraneous material for readability and guarantees that nothing removed was important).

on the record of the proceeding that resulted in the confinement.” *State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 513 (Mo. banc 2010) (cleaned up). “The habeas court may grant relief by ordering the petitioner discharged from unlawful restraint or deny relief by permitting the petitioner to remain in custody.” *Id.* (citing Rules 91.18 and 91.20).

Analysis

Mr. Griffith’s Continued Incarceration is Illegal

The probation court exceeded its statutory authority when it imposed a third term of probation on February 20, 2013. Section 559.036.3; *State ex rel. Brown v. Combs*, 994 S.W.2d 69, 73 (Mo. App. W.D. 1999). Accordingly, and where it had previously revoked his second term of probation, the probation court thereby had no subsequent authority to either revoke Mr. Griffith’s probation or execute his sentence on November 19, 2014. See *State ex rel. Weaver v. Martinez*, 481 S.W.3d 127, 128 (Mo. App. E.D. 2016).

On March 7, 2018, this Court sustained the petitioner’s application for writ of mandamus and issued a preliminary writ of mandamus with a thirty-day return in *State ex rel. Sampson v. Hickie*, No. SC97002. The facts and circumstances of that petition and the arguments advanced by the parties’ briefs bear uncanny resemblance to those of the case *sub judice* where both the aforementioned petitioner in *Sampson* and Mr. Griffith each allege the probation court exceeded its statutory authority under Section 559.036 by placing their respective probationers on a third term of probation and subsequently seeking to revoke that third term of probation and execute the imposed sentence.

The General Assembly has indicated a term of probation “shall remain conditional and subject to revocation” “[u]nless terminated as provided in section 559.036....” Section 559.016.1.

A probation court “may terminate a period of probation and discharge the defendant at any time before completion of the specific term fixed under section

559.016 if warranted by the conduct of the defendant and the ends of justice.”

Section 559.036.2. Section 559.036.3 only authorizes the probation court to take the following limited actions if a probation violation occurs:

(3) If the defendant violates a condition of probation at any time prior to the expiration or termination of the probation term, the court may continue him on the existing conditions, with or without modifying or enlarging the conditions or extending the term, or, if such continuation, modification, enlargement or extension is not appropriate, may revoke probation and order that any sentence previously imposed be executed. *If imposition of sentence was suspended, the court may revoke probation and impose any sentence available under section 557.011, RSMo.* The court may mitigate any sentence of imprisonment by reducing the prison or jail term by all or part of the time the defendant was on probation. *The court may, upon revocation of probation, place an offender on a second term of probation.* Such probation shall be for a term of probation as provided by section 559.016, notwithstanding any amount of time served by the offender on the first term of probation.

Section 559.036.3 (emphases supplied). “As this provision indicates, the court may take advantage of Section 559.036.3’s permission to revoke and impose a new term of probation only once.” *Brown*, 994 S.W.2d at 71 (citations omitted). “If the court again revokes probation, it has no authority under this or any other statute to impose a third period of probation.” *Id.*

“When a court has no authority to impose a third term of probation, it likewise has no authority to conduct a hearing to adjudicate whether [Mr. Griffith] violated that probation.” *Weaver*, 481 S.W.3d at 128 (citing *State ex rel. Moyer v. Calhoun*, 22 S.W.3d 250, 252 (Mo. App. E.D. 2000)); accord *State ex rel. Heberlie v. Martinez*, 128 S.W.3d 616, 617 (Mo. App. E.D. 2004) (trial court had no authority to adjudicate violation of fourth term of probation). “When the probation term ends, so does the court’s authority to revoke probation.” *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798, 801 (Mo. banc 2014) (citation omitted).

Here, the probation court's order of January 20, 2012, suspending execution of Mr. Griffith's sentence and imposing a five-year term of supervised probation operated as the only additional term of probation (*i.e.*, second term) the court was authorized to impose pursuant to Section 559.036.3. *See State ex rel. Moyer v. Calhoun*, 22 S.W.3d 250, 252 (Mo. App. E.D. 2000). After this point, the probation court did not have the authority to impose a *new* probationary period, but could continue Mr. Griffith on his current term of probation, with or without modification or enlargement of its conditions. *See id.* Alternatively, upon revocation under Section 559.036.3, the circuit court could order execution of the sentence previously imposed or "mitigate any sentence of imprisonment by reducing the prison term by all or part of the time the defendant was on probation." *See id.* (quoting Section 559.036.3).

When the Cole County probation court issued its February 20, 2013 order revoking Mr. Griffith's second term of probation, sentencing him to five years' imprisonment, but entering a suspended execution of sentence with *another* five years' supervised probation, the court impermissibly exceeded its authority by imposing a third period of probation. *See Brown*, 994 S.W.2d at 71. Revoking Mr. Griffith's second term of probation also terminated that probationary period and divested the probation court of further authority to act. *See* Sections 559.016, 559.036. Therefore, while the circuit court could revoke Mr. Griffith's second term of probation, the February 20, 2013 order was void *ab initio* as to imposing a third period of probation and, after revocation, the circuit court could then only order execution of the previously-imposed sentence or "mitigate any sentence of imprisonment by reducing the prison term by all or part of the time the defendant was on probation." *See id.* at 72-73; Section 559.036.3.

A. *State ex rel. Brown v. Combs*, 994 S.W.2d 94 (Mo. App. W.D. 1999) (Stith, P.J.).

The facts and law articulated by Judge Stith in her *Brown* opinion are highly relevant to Mr. Griffith's case and he sets them forth as a prelude to further argument.

i. *Brown* facts

After pleading guilty to misdemeanor tampering on January 24, 1996, the imposition of Brown's sentence was suspended and she was placed on two years' probation. *Brown*, 994 S.W.2d at 70.

Prior to the end of that first probationary period, on June 25, 1997, the court ordered imposition of sentence and suspended its execution. *Id.* This order also purported to continue Brown on probation pursuant to all terms of its original order. *Id.*

On October 8, 1997, the court revoked what it believed to be Brown's first probation term and imposed a new two-year term. *Id.*

After a motion to revoke was filed over a year later, the court set the motion for hearing on January 7, 1999. *Id.* Brown filed a motion to dismiss, alleging the imposition of a new term of probation on October 8, 1997 was void as an impermissible third term of probation under Section 559.036. *Id.* at 70-71.

ii. *Brown* law

The appeals court found Brown's initial probationary period "would have ended on January 24, 1998, unless that period of probation was terminated under Section 559.036.3 and a new period of up to two [years'] probation were imposed before the latter date." *Id.* at 71. Although the June 25, 1997 order did not expressly revoke Brown's probation, the probation court changed the disposition to imposition of sentence after finding a violation, implicitly revoking the original probation, because "[i]n order to impose sentence then suspend its execution the court was thus required to first revoke probation[]" under Section 559.036.3. *Id.* at 72.

The *Brown* also court found the October 8, 1997 order was valid as to revoking the second term of probation, but was a nullity as to imposing a new period of probation. *Id.* at 72-73. Because the probation court failed to order execution of Brown's sentence in whole or part, the appeals court was "left with the situation where [Brown's] second term of probation was revoked, but her sentence remained unexecuted and no further action was taken against her for over a year, until a probation violation report was reportedly entered on October 22, 1998." *Id.* at 73. The appeals court found the probation court lost its statutory authority to continue or revoke Brown's probation and ordered her discharged from probation under these circumstances:

The court had given notice of revocation and held a revocation hearing and revoked probation prior to that [January 24, 1998 probation expiry] date, and thus had a reasonable period after January 24, 1998, in which to complete its job by ordering execution of sentence as originally imposed, or as mitigated by time served on probation. However, the court did not complete these acts within a reasonable period, nor did it make a reasonable effort to do so. Rather, due to its void attempt to extend probation for a third two-year term, it took no steps toward execution of sentence for more than a year. During that period, [Brown] was required to continue to comply with the conditions of probation, although her probation in fact should have ended on January 24, 1998.

Id.

In interpreting Section 559.036, the *Brown* court expressly espoused two crucial tenets applicable to Mr. Griffith's case: 1) any attempt to place probationers on a third term of probation is always void; and 2) once the second term of probation is revoked, the court must order execution of the imposed sentence or mitigate within a reasonable period after the probation term's end. *Id.* However, while the appellate court seemingly acknowledged a distinction between revoking and continuing probation in their effect on the probation term, the *Brown* opinion did not harmonize its implied recognition of revocation's terminal effect

with either the length of the remainder of the revoked term or the probation court's authority to act therein, especially as between the first and second probation terms. *See id.* at 71-72. In this way, *Brown* did not explicitly reach one of the fundamental questions posed by Mr. Griffith's case.

B. The probation court had no authority to revoke Mr. Griffith's probation on November 19, 2014.

A significant question presented by Mr. Griffith's case is this: What is the effect of revocation on the second term of probation designated by the probation court and, accordingly, such revocation's effect on the probation court's authority to act for any remainder of the assessed, prospective term of probation? Evaluating the plain language of Chapter 559 and this Court's precedent confirms the act of revocation terminates the term of probation and divests the probation court of authority to act, absent the limitations noted in Sections 559.036.3 and 559.036.6.

It is axiomatic that having revoked Mr. Griffith's second term of probation and purported to place him on a third term of probation on February 20, 2013, without authority to do so, the probation court then had no authority to subsequently "revoke" that probation on November 19, 2014. *See Weaver*, 481 S.W.3d at 128 (citing *Moyer*, 22 S.W.3d at 252). The standard dictionary definition of "revoke" is "to annul by recalling or taking back (as something granted by a special act): rescind, cancel, repeal." *Webster's Third New International Dictionary* 1944 (2002). "When the probation term ends, so does the court's authority to revoke probation." *Strauser v. Martinez*, 416 S.W.3d at 801 (citation omitted). Accordingly, Mr. Griffith's status as probationer was annulled and his second term ended when that probationary period was terminated by formal revocation action of the probation court on February 20, 2013. *Cf.* Section 302.500(5) (in the context of driver's license suspension and revocation, "revocation" is defined as "the termination by formal action of the department of a

person's license."); *see also Brown*, 994 S.W.2d at 73 (upon revocation of second probation term, trial court was "required" to either execute probationer's previously-imposed sentence or mitigate that sentence by reducing its term by all or part of the time probationer was on probation).

The common-sense result that revocation is commensurate with termination of the probation term squares with other contrivances available to the probation court under Section 559.036. Per Section 559.036.5, the probation court can suspend the period of probation upon a motion to revoke, meaning "the running of the probationary period is tolled for however many days the period is suspended[, since to] hold otherwise would render the language giving the court authority to suspend the probationary period under Section 559.036[.5] meaningless." *Robinson v. State*, 509 S.W.3d 811, 814 (Mo. App. E.D. 2016). Accordingly, the mere temporary interruption of the probationary period by suspension prompted by a revocation motion simultaneously means such period is also subject to resumption or reinstatement when the probation court rules on the revocation motion within that period. *See id.*; *accord Strauser*, 416 S.W.3d at 801 n.3.

Section 559.036 also authorizes the probation court to "continue" a person on probation as an alternative to revocation. *See* Section 559.036.3 (Upon violating a probation condition, "the court may continue him on the existing conditions, with or without modifying or enlarging the conditions or extending the term[.]"). Only when "continuation, modification, enlargement or extension is not appropriate" may the court revoke probation and execute or impose sentence or order a second term of probation. Section 559.036.3. This section distinguishes the options of "continuation" from "revocation" by kind, and not merely degree, since while continuing probation always retains that privilege for the grantee, revocation begets sentencing and/or reinstatement of a new privilege, narrowing the court's future options for the defendant. *See* Section 559.036.3. Accordingly, because it suggests revoking a second term of probation will always change the defendant's status from probationer to prisoner, Section 559.036.3 supports Mr.

Griffith's assertion that the February 20, 2013 revocation terminated his second probation term and with it the probation court's authority to further act.³

Respondent will doubtless argue *Brown* stands for the proposition that a probation term does not expire when the probation court orders revocation. Nonetheless, this supposition is belied by this Court's more recent jurisprudence delineating the scope of probation court authority under Section 559.036. "Throughout the duration of a defendant's probation term, the circuit court has the authority to revoke a term of probation if the defendant violates it." *State ex rel. Zimmerman v. Dolan*, 514 S.W.3d 603, 608 (Mo. banc 2017) (citing sections 559.036.3, 559.036.5, and 559.036.8).

Read in tandem, sections 559.016 and 559.036 further compel the ineluctable conclusion that to "revoke" probation is to "terminate" probation. *See* Sections 559.016.1, 559.036.3, 559.036.6. "In ascertaining legislative intent, the statute should be read *in pari materia* with related sections, and the [probation revocation] statutes should be construed in context with each other." *Street v. Dir. of Revenue*, 361 S.W.3d 355, 358 (Mo. banc 2012) (citation omitted). Section 559.016 confirms that a five-year term of felony probation is subject to revocation unless terminated by the operations prescribed in Section 559.036. Section 559.016.1. In addition to early discharge, for reasons articulated, *supra*, section 559.036 also authorizes the probation court to terminate the period of probation by revocation. *See* Section 559.036.3. Thus, *in pari materia* with Section 559.016, Section 559.036 compels a finding that Mr. Griffith's second probation term was

³ That imposing or executing sentence also signifies a change in both the probationer's status and the court's authority in the eyes of the law is also borne out in this Court's precedent. *See, e.g., State ex rel. Poucher v. Vincent*, 258 S.W.3d 62, 65 (Mo. banc 2008) (Because imposition of sentence and its suspended execution constitute a final judgment against probationer, the trial court "had authority only to execute the sentence it previously had imposed, not to impose a new sentence."). Similarly here, having twice revoked his probation after imposing sentence, the probation court only had authority to execute that sentence on February 20, 2013.

terminated when it was revoked on February 20, 2013. *See Street*, 361 S.W.3d at 358.

It is true the *Brown* defendant's second probation period ended on January 24, 1998, but no court action was taken until a revocation hearing was set for January 7, 1999. *See* 994 S.W.2d at 70. However, the maxim from *Strauser* that the probation court's authority to revoke probation ends when the probation term ends would be meaningless unless this Court had also tacitly recognized that to "revoke" is a singular, terminal step from which the probation court's power to subsequently act does not ordinarily survive. *See* 416 S.W.3d at 801; *accord Weaver*, 481 S.W.3d at 128 ("When a court has no authority to impose a third term of probation, it likewise has no authority to conduct a hearing to adjudicate whether [Mr. Griffith] violated that probation."). Thus, to the extent *Brown* can be read to hold that the probation court's authority to revoke probation and/or execute a sentence always survives for the full assessed, anticipated term beyond early termination of that same term by a previous revocation order, it is incorrectly decided. *See Zimmerman*, 514 S.W.3d at 608; *accord Strauser*, 416 S.W.3d at 801; *Weaver*, 418 S.W.3d at 128.

Nonetheless, Mr. Griffith's situation is precisely like that faced by the *Brown* defendant: from February 20, 2013 to November 19, 2014, Mr. Griffith was required to continue to comply with the conditions of probation, although his probation in fact should have ended upon revocation of his second term on February 20, 2013. *Cf. Brown*, 994 S.W.2d at 73 ("During that period [from January 24, 1998 to January 7, 1999], Relator was required to continue to comply with the conditions of probation, although her probation in fact should have ended on January 24, 1998."). Despite the fact that Mr. Griffith did not so comply, like *Brown*, the probation court here erroneously operated under the belief that its authority extended nearly two years beyond the date Mr. Griffith's probation in fact should have ended on February 20, 2013. *See id.* Accordingly, where "revocation" means "termination" of the probation term under the plain language

of Section 559.036, *Brown* stands for the proposition that once a second term of probation is revoked, the probation court thereafter only has a reasonable period of time to complete its job, *viz.* execute the previously-imposed sentence or mitigate by time served on probation. *See id.*

Lastly, it makes little sense that Section 559.036 gives the probation court authority to revoke any term of probation twice. Assuming, *arguendo*, Mr. Griffith's second probation term survived one revocation on February 20, 2013, when the only options then available to the probation court were to execute and/or mitigate his sentence,⁴ it would beget an absurd result for this Court to find the General Assembly intended the probation court to also be able to make a second revocation of the same term and entertain those same options, just some twenty-one months later. Affirmatively terminating Mr. Griffith's second term of probation by formal revocation action on February 20, 2013, divested the probation court of any authority to subsequently institute revocation proceedings, apart from a reasonable period to adjudicate matters arising *before* the second term's termination. *See Strauser*, 416 S.W.3d at 801; Sections 559.016.1, 559.036.6. Therefore, coupled with the fact it had no legal means to place him on and revoke a third term of probation, the probation court could not again "revoke" even Mr. Griffith's second term of probation on November 19, 2014 when it had previously been terminated by formal revocation action on February 20, 2013. *See Strauser*, 416 S.W.3d at 801; *Weaver*, 481 S.W.3d at 128; Sections 559.036.3, 559.036.6.

C. The probation court had no authority to execute Mr. Griffith's sentence 21 months after revoking his probation.

⁴ It is beyond dispute the probation court could not have placed Mr. Griffith on a third term of probation after revoking his second term on February 20, 2013. *See* Section 559.036.3; *Weaver*, 481 S.W.3d at 128; *Brown*, 994 S.W.2d at 71.

The probation court had no authority to place Mr. Griffith on a third term of probation after revoking his second term on February 20, 2013. *See* Section 559.036.3. Because it ordered an unauthorized third probation term on that date, the probation court did not then order execution of its previously-imposed five-year sentence. (Ex. G at 7-8). Rather, this Court is confronted with the situation where Mr. Griffith's second term of probation was revoked and terminated, but his sentence remained unexecuted and no further action was taken against him for nearly two years, when the probation court purportedly "revoked" Mr. Griffith's probation and finally executed his sentence on November 19, 2014.⁵ *See Brown*, 994 S.W.2d at 73.

Brown is highly instructive to Mr. Griffith's situation. There, the circuit court ordered Brown's second term of probation revoked, but did not order execution of her previously-imposed sentence and instead attempted to place her on a third term of probation. *Brown*, 994 S.W.2d at 72. Because the circuit court had authority to revoke Brown's probation, but not the authority to impose a third term of probation, the imposition of a new term of probation was void and "upon revocation, under Section 559.036.3, [the circuit court] was required to order execution of the one-year sentence previously imposed, or [it] could 'mitigate any sentence of imprisonment by reducing the prison or jail term by all or part of the time the defendant was on probation.'" *Id.* at 72-73 (quoting Section 559.036.3).⁶

⁵ The probation court's docket entries and judgment for November 19, 2014 recite that it also imposed another five-year sentence after "revoking" Mr. Griffith's third term of probation. (*See* Exs. F, G at 10). For the same reason it had no authority to revoke an invalid third term of probation, the probation court could not also impose any new sentence on November 19, 2014. *See Weaver*, 481 S.W.3d at 128; *see also Poucher*, 258 S.W.3d at 65 (Probation court "had authority only to execute the sentence if previously had imposed, not to impose a new sentence.").

⁶ Section 559.036.3 as in effect at the time of the *Brown* decision has been recodified under Section 559.036.5 (2013 Cum. Supp.), which was applicable to Mr. Griffith at all relevant times.

Accordingly, the *Brown* court was “left with the situation where [Brown’s] second term of probation was revoked, but her sentence remained unexecuted and no further action was taken against her for over one year, until a probation violation report was reportedly entered on October 22, 1998.” *Id.* at 73.

Ultimately, the Court of Appeals held Brown should be discharged from probation, because the circuit court had lost authority to execute her sentence under Sections 559.036.5 and 559.036.8. *Id.* Per Section 559.036.8, the circuit court had a “reasonable period after [probation termination] to complete its job by ordering execution of sentence as originally imposed, or as mitigated by time served on probation.” *Id.* Crucial to Mr. Griffith here, the *Brown* court found “the court did not complete these acts within a reasonable period, nor did it make a reasonable effort to do so[]” where “it took no steps toward execution of sentence for more than one year.” *Id.* (emphasis supplied).

i. The probation court had no authority to execute Mr. Griffith’s sentence on November 19, 2014 where his probation was revoked on February 20, 2013

Under the plain language of Section 559.036.3, at the time it revoked and terminated Mr. Griffith’s second term of probation on February 20, 2013, the probation court had only two options: 1) order execution of the five-year sentence it previously imposed on October 6, 2011, or 2) mitigate this sentence by reducing its term by all or part of the time Mr. Griffith was on probation. *See Brown*, 994 S.W.2d at 73. Instead, as in *Brown*, the probation court exceeded its authority to place Mr. Griffith on a void third term of probation. (Ex. E). Having ended Mr. Griffith’s probation via revocation on February 20, 2013, the probation court then had a reasonable period thereafter “to complete its job” by ordering execution of the five-year sentence previously imposed or mitigate that sentence by Mr. Griffith’s time served on probation. *Brown*, 994 S.W.2d at 73. Nevertheless, the probation court failed to order execution of Mr. Griffith’s sentence until November 19, 2014. (Ex. F). Accordingly, because twenty-one months elapsed

before the probation court completed what it left undone after nullifying Mr. Griffith's second term, the probation court failed to complete probation revocation proceedings within a reasonable period following the termination of the probationary period February 20, 2013. *See id.*; *see* Section 559.036.6.

It is true a probation violation report was filed on September 11, 2013. (Ex. G at 8). It is further true the Board of Probation and Parole issued another violation report on April 7, 2014 and the probation court ordered a warrant on April 14, 2014. (Ex. G at 8).

Nevertheless, the probation court expressly declined to take action on the September, 2013 violation report. (*See* Ex. G at 8). Moreover, the April 2014 violation and warrant issued well beyond a year after Mr. Griffith's second term of probation ended on February 20, 2013. Inasmuch, even were this Court to view the April 2014 violation as "some affirmative manifestation of an intent" to execute Mr. Griffith's sentence, it was not within a reasonable period beyond the term of probation. Section 559.036.8; *Brown*, 994 S.W.2d at 73.⁷ Accordingly, even with these ensuing violations, the probation court did not make every reasonable effort to hold revocation proceedings following the end of Mr. Griffith's second probationary period on February 20, 2013, and had no authority to execute Mr. Griffith's sentence on November 19, 2014.

Furthermore, any argument the revocation of Mr. Griffith's "third" term of probation and execution of his sentence on November 19, 2014 took place within the bounds of a presumably-still-intact second probationary period suggests that

⁷ Even framing the April 2014 violation report and warrant as manifesting intent to execute a sentence would not comport with the plain language of Section 559.036.6, where the stated purpose of such a manifestation is "to conduct a *revocation hearing*." (emphasis supplied). Because it had no authority to grant a third term of probation beginning February 20, 2013 after revoking Mr. Griffith's second term, the probation court likewise had no authority to revoke that void third term or even again revoke the second term. *See Weaver*, 481 S.W.3d at 128.

any error in revoking this “third” term was harmless.⁸ This Court has roundly rejected the notion that Mr. Griffith need demonstrate prejudice by the probation court’s arrogation of authority to act under Section 559.036.6. *See, e.g., Strauser*, 416 S.W.3d at 803 n.4 (“Section 559.036.8 also does not require the Defendants to show prejudice....”). That the probation court here exceeded its authority to illegally execute Mr. Griffith’s sentence nearly two years after terminating his second term of probation does not turn on the presence or absence of prejudice. *See id.*

Viewed through the prism of this Court’s more recent cases delineating the scope of circuit court authority to revoke probation, and harmonized with the plain language of Section 559.036, the *Brown* opinion compels the conclusion that, having no authority to impose and/or revoke a third term of probation, the probation court here only had a “reasonable period” of time after revoking and affirmatively terminating Mr. Griffith’s second period of probation on February 20, 2013 in which to execute and/or mitigate his previously-imposed five-year sentence. *See* 994 S.W.2d at 73; *cf. Weaver*, 481 S.W.3d at 128 (no authority to revoke third term of probation that the court had no authority to impose in first instance). Stated another way, Missouri’s appellate courts have consistently interpreted Section 559.036 to deprive probation courts of authority to hold probationers within their thrall when those courts are dilatory actors. Accordingly, because the probation court waited until November 19, 2014, to finish the job it began on February 20, 2013, when it revoked Mr. Griffith’s second term of probation, the probation court failed to act within a reasonable time from his probation’s end, nor did it make a reasonable effort to do so. *See Brown*, 994 S.W.2d at 73. Therefore, because the probation court had no authority to execute

⁸ Mr. Griffith does not waive any argument from section A, *supra*, that his second probation term ended upon its revocation on February 20, 2013, and the probation court had no authority to again revoke his probation on November 19, 2014.

his sentence on November 19, 2014, Mr. Griffith must be discharged from respondents' custody.

- ii. **Alternatively, the probation court had no authority to execute Mr. Griffith's sentence on November 19, 2014 if his probation was continued to February 19, 2014.**

Furthermore, the probation court's February 20, 2013 order cannot be branded a one-year extension of Mr. Griffith's second term of probation under Section 559.036.2. Again, in *Brown*, the Western District declined to treat the circuit court's order purporting to place Brown on a third term of probation "as merely an extension of the new term of probation" it ordered several months before, because, *inter alia*, the later order "expressly states that the probation previously ordered is revoked[.]" 994 S.W.2d at 72.

Here, although the probation court could have extended Mr. Griffith's second probation term, the record confirms it did not. The docket entry accompanying the probation court's February 20, 2013 order erroneously placing Mr. Griffith on a third term of probation plainly states "Defendant's probation revoked." (Ex. G at 7-8). Given this explicit affirmation of the probation court's annulment of the second term of Mr. Griffith's probation, this Court cannot view the probation court's February 20, 2013 order as a mere extension of his probation. *See Brown*, 994 S.W.2d at 72.

Even were the Court to find the February 20, 2013 order operated as a one-year extension of Mr. Griffith's second probationary period, the probation court would still have had no authority to execute Mr. Griffith's sentence on November 19, 2014, nine months after any supposed extension had expired. *See Brown*, 994 S.W.2d at 73; *see* Section 559.036.8.

After affirmatively revoking Mr. Griffith's second term of probation on February 20, 2013, but failing to then execute or mitigate his sentence, Section 559.036 did not authorize the probation court to finally execute his sentence twenty-one months hence on November 19, 2014. In light of the probation court's

error, Mr. Griffith's continued incarceration is illegal, and the Court should order his immediate release from respondent's custody.

CONCLUSION

For the foregoing reasons, because the trial court exceeded its authority to place him on a third term of probation, subsequently revoke that term of probation, and execute his sentence, Mr. Griffith respectfully requests this Court issue a permanent writ of habeas corpus ordering his immediate release from respondent's confinement and returning him to the Cole County circuit court for discharge from probation.

Respectfully submitted,

/s/ Jedd C. Schneider

Jedd C. Schneider, MO Bar No. 67789
Attorney for Petitioner
Woodrail Centre
1000 W. Nifong, Building 7, Suite 100
Columbia, MO 65203
(573) 777-9977 Ext. 325
Fax (573) 777-9974
Jedd.Schneider@mspd.mo.gov

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 6,425 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 20th day of July, 2018, electronic copies of Petitioner's Brief and Petitioner's Brief Appendix were placed for delivery through the Missouri e-Filing System to Patrick J. Logan, Assistant Attorney General, at Patrick.Logan@ago.mo.gov.

/s/ Jedd C. Schneider

Jedd C. Schneider

