No. SC97056

In the Supreme Court of Missouri

STATE EX REL. TREVOR GRIFFITH,

Petitioner,

v.

JEFF NORMAN,

Respondent.

Petition for a Writ of Habeas Corpus

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

A Cole County grand jury indicted Petitioner Trevor Griffith for one count of the class B felony of distribution, delivery, or sale of a controlled substance on April 28, 2010. (Pet. App. A-1, A-16). On December 22, 2010, Griffith pleaded guilty. (Pet. App. A-17–A-18). The Circuit Court of Cole County suspended imposition of sentence and placed Griffith on five-years of probation, supervised by the Board of Probation and Parole. *Id.* at A-11. Griffith violated the conditions of his probation, and on October 6, 2011, the circuit court revoked Griffith's first term of probation. *Id.* at A-11. The circuit court sentenced Griffith to five years' imprisonment, but retained jurisdiction under the 120-day institutional treatment program under Section 559.115.[1] *Id.* at A-11.

When Griffith successfully completed the treatment program, the circuit court suspended execution of Griffith's five-year sentence and placed him on a second five-year term of probation, which began February 3, 2012. *Id.* A-11, A-19–A-20. But Griffith again violated the conditions of his probation, and the circuit court issued a warrant. *Id.* at A-20–A-21. After Griffith was arrested, he admitted violating his probation. *Id.* at A-21. The circuit court entered a revocation order on February 20, 2013. *Id.* at A-11, A-21. Instead of executing Griffith's sentence at that time, the circuit court

[1] All statutory citations are to RSMo. (2010) unless otherwise noted.

attempted to place Griffith on a third term of probation. *Id.* at A-13, A-21–A-22. The record does not show, and Griffith does not allege that he objected to the circuit court's order on February 20, 2013. The docket simply notes "Defendant admits probation violation." *Id.* at A-21.[2]

The circuit court continued its efforts to divert Griffith from the Department of Corrections by placing Griffith in an alternative court treatment program. *Id.* at A-23. Nevertheless, Griffith continued to violate the conditions of his probation, and the alternative court treatment program terminated Griffith for teaching others in the program how to beat drug tests and for smoking "K2." (Resp. Ex. 1 at 2). The circuit court, once again, held a revocation hearing on November 19, 2014. (Pet. App. A-22–A-24). At that hearing, Griffith admitted, once again, that he violated the conditions of his probation by not successfully completing the alternative treatment program. (Resp. Ex. 1 at 1). The circuit court found that there were no alternatives to incarceration and ordered Griffith's sentence executed. *Id.* at 3.

Griffith was delivered to the Department of Corrections where he began serving his sentence. More than two years later, on March 14, 2017, he filed a petition for a writ of habeas corpus in the Circuit Court of Texas County. (Resp. App. at A11). The maximum expiration date for Griffith's

[2] Respondent requested a copy of the transcript of the February 20, 2013 hearing, but was informed that the hearing was not recorded.

second term of probation was February 3, 2017. (Pet. App. A-11) (judgment noting that Griffith was released on his second term of probation on February 3, 2012). The habeas court denied Griffith's petition. *Id.* at A-26–A-27. Griffith also filed a petition in the Missouri Court of Appeals for the Southern District of Missouri, and the court of appeals denied that petition. *Id.* at A-28.

ARGUMENT

I. Griffith's claim for relief should be denied because the circuit court had authority to revoke Griffith's second term of probation and execute his sentence within Griffith's second term of probation, and the circuit court did so here. – Responds to Petitioner's Point I.

Griffith argues that he should be released from confinement because the Circuit Court of Cole County erroneously placed him on a third term of probation. (Pet. Br. at 9). But this is not a third term of probation case. Griffith is not entitled to relief because the circuit court clearly had authority to execute Griffith's sentence during his second term of probation, which it did. The parties agree that the circuit court did not have authority to order a third term of probation. (Pet. Br. 12). The parties also agree that the circuit court had the authority to revoke Griffith's probation and execute his sentence during his second term of probation. (Pet. Br. 11). What the parties dispute is whether the circuit court had authority to execute Griffith's sentence *before* the expiration of his second term of probation, but *after* the February 20, 2013 revocation order. This is not a close question. Under Missouri law, the circuit court clearly had authority to execute Griffith's sentence until the final expiration date of Griffith's second term of probation. The petition should be denied.

Standard of Review

Under Rule 91, "habeas corpus proceedings are limited to determining the facial validity of confinement on the basis of the entire record of the proceeding in question and to allege entitlement to immediate discharge from current confinement." *State ex rel. Nixon v. Kelly*, 58 S.W.3d 513, 516 (Mo. 2001), *citing State ex rel. Simmons v. White*, 866 S.W.2d 443, 445 (Mo. 1993). The petitioner bears the burden of proving that his confinement is illegal. *Id.* The habeas court may either grant relief and order the petitioner discharged, or deny relief. Rules 91.18, 91.20. A habeas corpus proceeding may be used to challenge a probation revocation. *State ex rel. Nixon v. Jaynes*, 73 S.W.3d 623, 624 (Mo. 2002).

A. Under the plain language of Missouri statutes, the circuit court had authority to execute Griffith's sentence on November 19, 2014.

Griffith contends that the circuit court lost authority to act on his probation immediately after it ordered revocation of his second probation term on February 20, 2013. (Pet. Br. at 9). Griffith's second five-year term of probation began on February 3, 2012, and would have expired by operation of law on February 3, 2017 if the circuit court had not ordered his sentence executed on November 19, 2014. (Pet. App. at A-11). Reading the statutes *in pari materia* reveals the flaw in Griffith's argument. *See State ex rel. Taylor v. Russell*, 449 S.W.3d 380, 382 (Mo. 2014). "The first rule of statutory

construction is to look to the statute's text; if the text yields a definitive answer to the question at hand, no further inquiry is justified or appropriate…" *State ex rel. KCP & L Greater Missouri Operations Co. v. Cook*, 353 S.W.3d 12, 27 (Mo. App. W.D. 2011), *citing Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. 2010). This Court seeks "to give effect to legislative intent as reflected in the plain language of the statute at issue." *Parktown Imports v. Audi of America*, 278 S.W.3d 670, 672 (Mo. 2009).

A circuit court's authority to place persons on probation is controlled by Chapter 559. "A term of probation commences on the day it is imposed." § 559.036.1. The "term" of probation is defined by statute and set by the probation court "at the time of sentencing or at the time of suspension of imposition of sentence." § 559.016.1–.2. For a felony, the term of probation must be "not less than one year and not to exceed five years." § 559.016.1. Section 559.036.3 provides the options available to probation courts when a defendant violates the conditions of their probation:

> 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. 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.

§ 559.036.3. The probation court "may terminate a period of probation and discharge the defendant at any time before completion of the specific term… if warranted by the conduct of the defendant and the ends of justice." § 559.036.2. "Procedures for termination, discharge and extension may be established by rule of court." *Id.* The probation court's power to revoke a probation term "shall extend *for the duration of the term* of probation designated by the court." § 559.036.6 (emphasis added).

Reading these provisions in *pari materia* and giving them their plain meaning leads to the conclusion that the circuit court could not order Griffith to serve a third term of probation. § 559.036.3; *State ex rel. Brown v. Combs*, 994 S.W.2d 69, 72 (Mo. App. W.D. 1999).[3] But that is irrelevant because the circuit court retained authority to revoke Griffith's probation *and* execute his previously imposed sentence for the duration of the valid second probation

[3] *But see Miller v. State*, No. SC96754, 2018 WL 3626508, (Mo. July 31, 2018) (motion for rehearing pending), where this Court recently held that a probation court retained authority over a defendant when that defendant consented to the court's action. Here too, Griffith admitted violating the conditions of his probation and, at least implicitly, consented to being placed on a third term of probation on February 20, 2013. (Pet. App. at A-21–A-22). Griffith cannot agree to the circuit court's order and now claim error. *Miller*, 2018 WL 3626508, at *6, *citing Suber v. State*, 516 S.W.3d 386, 391 (Mo. App. E.D. 2017).

term. § 559.036.6. Griffith assumes the circuit court's revocation order on February 20, 2013 terminated his second probation term. (Pet. Br. at 14–15). But in making this assumption, he conflates the terms "terminate" and "revoke." (*Id.* at 16). A probation court may "terminate a period of probation and discharge the defendant" any time before completion of the term if "warranted by the conduct of the defendant and the ends of justice." § 559.036.2. Or, the probation court may revoke the term of probation when the defendant "violates a condition of probation at any time prior to the expiration or termination of the probation term." § 559.036.3.

Early termination is a benefit that may be granted to the defendant in recognition of his or her compliance with the conditions set by the probation court. *See Norfolk v. State*, 200 S.W.3d 36, 37 (Mo. App. W.D. 2006) (defendant received "early termination" upon full payment of restitution). The probation court is not required to give the defendant prior notice before terminating the probation term. *See* § 559.036.2.

By contrast, revocation is a finding that the defendant has violated the conditions of his or her probation and a determination that sanctions must be imposed. Probation courts possess the authority to revoke and execute a previously imposed sentence "any time prior to the expiration *or* termination of the probation term." § 559.036.3 (emphasis added); *see also* § 559.016.1 ("Unless terminated as provided in section 559.036, the terms during which

each probation shall remain conditional *and be subject to revocation* are…") (emphasis added). Before a court may revoke a defendant's probation, it also must give the defendant "notice and an opportunity to be heard." § 559.036.4.

These differences demonstrate that "revocation" is not the same as "termination" of a probation term. A court's decision to revoke is separate and apart from imposing a consequence. For example, following revocation, a probation court may execute the defendant's sentence. § 559.036.3. But the probation court may also decide to place the defendant on a second term of probation. *Id.* If the defendant is already serving a second term, the probation court may choose to execute the previously imposed sentence *or* to mitigate the sentence by "reducing the prison or jail term by all or part of the time the defendant was on probation." *Id.* No statute constricts the probation court's discretion by requiring immediate execution of the defendant's sentence upon revocation. The General Assembly has actually empowered probation courts to assist defendants by permitting probation courts to establish their own rules "for termination, discharge and extension" of probation terms. § 559.036.2.

Because the statutes governing probation plainly provide that probation courts have authority to revoke and order a defendant's previously imposed sentence executed throughout the duration of a valid probation term, Griffith's claim is meritless. § 559.036.6. Here, after revoking Griffith's

probation, the circuit court still had to decide whether to "mitigate any sentence of imprisonment by reducing the prison or jail term by all or part of the time [Griffith] was on probation." § 559.036.3. Under the law, the circuit court had until "the expiration or termination of the probation term" to do so. *Id.* As discussed below, Missouri cases that have addressed similar issues have reached the same conclusion.

B. Missouri case law compels the conclusion that the circuit court had authority to revoke Griffith's probation on November 19, 2014.

Missouri courts have consistently held that a probation court's authority extends throughout the entire duration of the probation term. In *State ex rel. Brown v. Combs*, the Missouri Court of Appeals addressed a fact scenario similar to this case. Brown pleaded guilty to tampering in the second degree and received a suspended imposition of sentence and a two-year term of probation on January 24, 1996. *Brown*, 994 S.W.2d at 70. On June 25, 1997, the probation court imposed and suspended a one-year sentence and ordered Brown's probation to continue with the same terms. *Id.* Though the probation court's June order did not expressly order revocation, because the probation court changed the disposition from a suspended imposition of sentence to a suspended execution of sentence, the June order effectively revoked Brown's first term of probation. *Id.* at 72; *see also* § 559.036.3. When the June order implicitly established a second probation term, it also set the

duration of the second probation term to be the same as the original term, which would end on January 24, 1998. *Brown*, 994 S.W.2d at 72.

Then, on October 8, 1997, the probation court entered an order revoking Brown's probation and attempting to impose a third term of probation. *Brown*, 994 S.W.2d at 70. On October 22, 1998, the prosecutor filed a motion to revoke. *Id.* at 70. When the probation court held a revocation hearing on January 7, 1999, Brown moved to dismiss, arguing that the court's order imposing a third term of probation was void and that the court had no authority to revoke her second term of probation, which should have been completed on January 24, 1998. *Id.*

The court of appeals entered a permanent writ of prohibition and directed the probation court to discharge Brown because she had completed her second term of probation at the time the probation court held the final revocation hearing. *Id.* at 73. In its opinion, the court of appeals held that the probation court's order was not "entirely a nullity." *Id.* at 72. The probation court "clearly had the authority to revoke" Brown's probation on October 8, 1997. *Id.* at 72–73. Therefore, the revocation order was valid; only the part of the order which imposed a third term of probation was void. *Id.* at 73. After revoking Brown's probation, the probation court still had until a reasonable period after the completion of Brown's second term of probation to either

order her sentence executed or mitigate her sentence with time served on probation. *Id.*; § 559.036.6.

Griffith argues that the *Brown* court did not decide whether the probation court's authority over Brown continued until the completion of her probation term on January 24, 1998, or ended when the probation court entered its revocation order on October 8, 1997. (Pet. Br. 14–15). But the court of appeals specifically held that the probation court had no authority to execute Brown's sentence because it failed to do so "within a reasonable period *following the end of the probationary period on January 24, 1998*[.]" *Brown*, 994 S.W.3d at 73 (emphasis added). Thus, the *Brown* court unambiguously decided that the probation court's authority to execute the sentence continued at least until the final day of the probation term, January 24, 1998. The probation court "had given notice of revocation and held a revocation hearing *and revoked probation prior to that date*, and thus had a reasonable period *after January 24, 1998*, in which to complete its job…" *Id.* (emphasis added).

Like the probation court in *Brown*, the circuit court here entered an order revoking Griffith's probation and attempted to impose a third term of probation. (Pet. App. at A-11). But unlike the probation court in *Brown*, the circuit court actually completed revocation proceedings well before Griffith's second term of probation was set to end on February 3, 2017. *Id.* at A-12–A-

13 (noting that the final revocation hearing was held November 19, 2014). Because the circuit court gave notice of revocation, held a hearing, and completed execution of Griffith's sentence *within* his second term of probation, not *beyond* the second term, the circuit court still had authority to revoke Griffith's probation. In other words, the *Brown* probation court was empowered to revoke and execute Brown's sentence, but it executed Brown's sentence at the wrong time. Here, the circuit court did something that it was empowered to do, revoke Griffith's probation and execute his sentence, at the right time, during Griffith's second term of probation.

Though this Court has not addressed this specific fact scenario, the Court has similarly held that a probation court's authority to revoke probation and execute sentence extends throughout the entire probation term and for "any further period which is reasonably necessary for the adjudication of matters arising before its expiration." *See State ex rel. Fleming v. Missouri Board of Probation and Parole*, 515 S.W.3d 224, 233 n.8 (Mo. 2017), *citing* § 559.036.8 RSMo. (2008). A probation court's "authority to revoke probation ends when the probationary period *expires*. Once the probationary period *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*.'" *State ex rel. Zimmerman v. Dolan*, 514 S.W.3d 603, 608 (Mo. 2017)

(internal citations omitted) (brackets in original) (emphasis added). "[T]he court's authority [to revoke probation] only extends through *the duration* of the probation term. 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. 2014) (internal citations omitted) (emphasis added).

Griffith relies in part on *Weaver v. Martinez*, 481 S.W.3d 127 (Mo. App. E.D. 2016), but *Weaver* does not support Griffith's position. The probation court in *Weaver* revoked the defendant's second term of probation *and* executed her sentences pursuant to Section 559.115 institutional treatment. *Id.* at 127. After the defendant completed the treatment program, the probation court ordered her released and placed her on a third term of probation. *Id.* The defendant filed a motion for discharge from the third term of probation, and the court of appeals held that the order placing the defendant on a third term of probation after she was released from treatment was void because Missouri law did not authorize the probation court to impose a third term of probation. *Id.* at 127–28.

In both *Weaver* and the present case, the orders imposing a third term of probation were void. However, the *Weaver* court did not hold that the probation court erroneously revoked and executed the defendant's sentences. Instead, *Weaver* only stands for the proposition that a defendant may not be placed on a third term of probation. *Id.* In other words, *Weaver* is inapplicable

to this case because this is not a third term of probation case. The *Weaver* court was not faced with the question presented here: whether a probation court may revoke and execute a defendant's sentence within the second term of probation notwithstanding a void order imposing a third term of probation. Both *Weaver* and *Brown* hold that an order imposing a third term of probation is void, and courts will sever that void portion from the revocation order.

Based on the plain language of the statute and the reasoning in the Missouri Court of Appeals' decision in *Brown*, Griffith's claim is meritless. The Court should deny the petition.[4]

[4] Griffith's claim is also procedurally defaulted. A habeas petitioner "fails to present a cognizable claim" for habeas relief when he or she does not raise their claim during trial. *State ex rel. Strong v. Griffith*, 462 S.W.3d 732, 738 (Mo. 2015). The same is true for claims arising during probation revocation hearings when the defendant does not object to the proceedings. *See Miller*, 2018 WL 3626508, at *6; *see also Strong*, 462 S.W.3d at 738 ("Habeas review of a conviction is not appropriate where a defendant could have raised claims at trial, on direct appeal, or during post-conviction relief…"). Because Griffith failed to object to either the circuit court's order imposing a third term of probation or the order executing his sentence, his claim for relief is barred now. *See State ex rel. Fite v. Johnson*, 530 S.W.3d 508, 510 (Mo. 2017) (claim that "sentence was in excess of the maximum authorized by law" was procedurally defaulted in Rule 29.07(d) proceeding); *but see State ex rel. Zinna v. Steele*, 301 S.W.3d 501, 516 (Mo. 2010) (excusing procedural default of claim that sentence was "beyond that permitted by the applicable statute or rule").

II. In the alternative, Griffith's suit is barred by the statute of limitations because Section 516.145 provides a one-year limitations period for offenders to sue any employee or entity of the Department of Corrections and Griffith waited over two years to file his petition. – Responds to Petitioner's Point I.

Griffith did not object to the probation court's authority to revoke his probation during the revocation hearing on November 19, 2014. (Resp. Ex. 1) (transcript of revocation hearing). And, he waited over two years after his sentence was executed before he filed a petition for a writ of habeas corpus in the Circuit Court of Texas County. (Resp. App. at A11). Under Missouri law, Griffith had one year to file his petition against Warden Norman. Because Griffith delayed filing his petition until well after the one-year period, the petition should be denied.

Standard of Review

Habeas corpus is a civil action which "shall be governed by and conform to the rules of civil procedure and the existing rules of general law upon the subject." Rule 91.01(a), (c). Under Rule 91, "habeas corpus proceedings are limited to determining the facial validity of confinement on the basis of the entire record of the proceeding in question and to allege entitlement to immediate discharge from current confinement." *Kelly*, 58 S.W.3d at 516, *citing Simmons*, 866 S.W.2d at 445. The petitioner bears the burden of proving that his confinement is illegal. *Kelly*, 58 S.W.3d at 516. The habeas court may either grant relief and order the petitioner discharged, or deny

relief. Rules 91.18, 91.20. A habeas corpus proceeding may be used to challenge a probation revocation. *Jaynes*, 73 S.W.3d at 624.

A. Griffith's petition should be denied because it is barred by the one-year statute of limitations for suits against an employee or entity of the Department of Corrections.

Missouri law provides a one-year limitations period for offenders to sue any employee or entity of the Department of Corrections. § 516.145 RSMo. (2018). The applicable statute reads:

> Within one year: all actions brought by an offender, as defined in section 217.010, against the department of corrections or any entity or division thereof, or any employee or former employee for an act in an official capacity, or by the omission of an official duty.

Id. The one-year statute of limitations applies to "all actions" brought by "an offender." *Kinder v. Missouri Dep't. of Corrections*, 43 S.W.3d 369, 373 (Mo. App. W.D. 2001). Although this Court has not yet interpreted the scope of Section 516.145, the Missouri Court of Appeals has explained that "[t]he word 'all' prefacing the word 'actions' indicates that the legislature did not intend for there to be any type of claim that an offender could bring that would be an exception to the one-year time limit in § 516.145." *Id.* This Court has explained that the one-year statute of limitations withstands constitutional scrutiny. *Cooper v. Minor*, 16 S.W.3d 578, 582 (Mo. 2000).

The one-year statute of limitations applies to, and prohibits, this writ petition. Under the plain and ordinary language of the statutes and Rule 91,

this is a civil case brought by an offender against an employee of the Department. "A habeas corpus proceeding shall be a civil action in which the person seeking relief is petitioner and the person against whom such relief is sought is respondent." Rule 91.01(c). Griffith is "an offender" under Missouri law. § 217.010.12 RSMo. (2018). And Rule 91 requires petitioners to bring their cases against the Warden—an employee of the Department. Rule 91.01(c). This Court must give effect to the plain and ordinary meaning of the language of a statute. *State v. Bazell*, 497 S.W.3d 263, 266 (Mo. 2016). "If the words are clear, the Court must apply the plain meaning of the law." *Id.* Here, the language of Section 516.145 clearly states that the one-year statute of limitations applies to Griffith's habeas case.

Under Missouri law, the one-year statute of limitation begins when the damage resulting from an alleged wrong is capable of ascertainment. § 516.100 RSMo. (2018). In this context, ascertainment does not require actual knowledge, but merely that a reasonable person would have been put on notice that an injury and substantial damages may have occurred…." *Powel v. Chaminade College Preparatory, Inc.*, 197 S.W.3d 576, 584 (Mo. 2006). In short, as this Court has explained: "the cause of action accrues" when "the right to sue accrues…." *State ex rel. Beisly v. Perigo*, 469 S.W.3d 434, 437 (Mo. 2015). Accordingly, Griffith's claim began on November 19, 2014, when he was ordered delivered to the Department of Corrections to serve his

sentence. (Pet. App. at A-24). The one-year window expired 365 days later on November 19, 2015.

But Griffith did not file his petition in the Circuit Court of Texas County until March 14, 2017. By that time, two years, three months, and twenty-three days passed since his sentence was executed and Griffith was well outside the one-year statute of limitation created by Section 516.145. Because Griffith's petition was time-barred in the circuit court, it is likewise time-barred here, where Griffith filed his petition on March 30, 2018. This Court has held that other limitations placed on the filing of habeas petitions are constitutional under the Missouri Constitution. *See Bromwell v. Nixon*, 361 S.W.3d 393, 399 (Mo. 2012) (holding that the filing fee requirement does not suspend the writ of habeas corpus), *citing State v. Buckner*, 234 S.W. 651, 652 (Mo. Div. 2 1921) (holding that the writ of habeas corpus is "subject to the reasonable regulations of the Legislature so long as its efficiency is not impaired.").

Like the General Assembly, Congress has created a one-year statute of limitations for filing a federal habeas petition. 28 U.S.C. § 2244(d). Federal courts have held that the statute of limitations is not a suspension of the writ of habeas corpus. *See, e.g.*, *Wyzykowski v. Department of Corrections*, 226 F.3d 1213, 1217 (11th Cir. 2000); *Hill v. Dailey*, 557 F.3d 437, 438 (6th Cir. 2009). Offenders who are in custody under the judgment of a state court *must* file an

application for federal habeas relief within one year of the conclusion of direct review, the date which an impediment to filing an application is removed, the date on which the United States Supreme Court announces a new constitutional right that is made retroactive, or the date that the factual predicate for the claim could have been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1)–(2). This one-year window is strictly enforced. *See, e.g., Christeson v. Griffith*, 860 F.3d 585, 589 (8th Cir. 2017) (holding that attorney negligence of the statute of limitations was an insufficient reason to warrant equitable tolling of the statute of limitations in a capital case); *see also Kreutzer v. Bowersox*, 231 F.3d 460, 461–62 (8th Cir. 2000) (dismissing capital offender's habeas petition because it was filed two weeks out-of-time).

Here, Griffith sat on his argument for years. Rather than give the circuit court an opportunity to consider his claim in the first instance, Griffith admitted violating his probation, accepted the court's decision, and served his sentence while the remainder of his second term of probation was exhausted. Almost immediately after Griffith's second term of probation would have expired on February 3, 2017, he filed his habeas petition in the Circuit Court of Texas County in an attempt to capitalize on a court error which he believes should result in his early release from prison. *See* (Resp. App. at A11) (Showing Griffith's initial habeas petition was filed on March 14, 2017).

Though Griffith's claim is plainly meritless, if this Court were to find reversible error, then the circuit court could be left without authority to act on Griffith's probation because his second term of probation has expired. Thus, Griffith's delay could have provided him with a substantial tactical advantage. This litigation strategy is contrary to the one-year statute of limitations and principles of procedural default and self-invited error. *See Miller*, 2018 WL 3626508, at *6.

"Statutes of limitation … represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified time and that the 'right to be free of stale claims in time comes to prevail over the right to prosecute them." *Magee v. Blue Ridge Professional Bldg. Co.,* 821 S.W.2d 839, 845 (Mo. 1991), *quoting United States v. Kubrick*, 444 U.S. 111, 117 (1979). Litigants should not be encouraged to execute a strategy of delay to gain a tactical advantage. *See Middleton v. Russell*, 435 S.W.3d 83, 86 n.1 (Mo. 2014). The clear language of the one-year statute of limitations demonstrates the General Assembly's recognition of this policy, which should not be countermanded by this Court. *See Boland v. Saint Luke's Health System, Inc.*, 471 S.W.3d 703, 712 (Mo. 2015) (holding that the General Assembly is in the best position to create exceptions to the statute of limitations because "this Court's role is to interpret the law, not rewrite it.").

The Court should give meaning to the General Assembly's policy decisions by enforcing the one-year statute of limitations and denying Griffith's petition.

CONCLUSION

The Court should deny the petition for a writ of habeas corpus.

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CERTIFICATE OF COMPLIANCE AND SERVICE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 5,720 words, excluding the cover and certification, as determined by Microsoft Word 2016 software, and that a copy of this brief was sent through the electronic filing system on August 23, 2018 to:

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