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 REPLY 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

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JURISDICTIONAL STATEMENT

Petitioner, Trevor Griffith, incorporates herein by reference the Jurisdictional Statement from his opening brief as though set out in full, with the following addition:

Mr. Griffith has been released from respondent's confinement and paroled. *See* Exhibit J. Accordingly, Mr. Griffith is currently restrained of his liberty for purposes of seeking habeas relief while on parole. *See State ex rel. Fleming v. Mo. Bd. of Prob. and Parole*, 515 S.W.3d 224, 228 n.6 (Mo. banc 2017).

Mr. Griffith has filed with the Court a pending Motion for Leave to Amend Petition and Substitute Parties, which seeks to substitute new respondents Anne Precythe, Director, Missouri Dept. of Corrections; Julie Kempker, Director, Div. of Prob. and Parole, Missouri Dept. of Corrections; and Kenny Jones, Chairman, Missouri Bd. of Prob. and Parole, for party respondent Jeff Norman.

STATEMENT OF FACTS

Petitioner, Trevor Griffith, incorporates herein by reference the Statement of Facts from his opening brief as though set out in full.

REPLY ARGUMENT

I.

(Probation court had no authority to again revoke Mr. Griffith's second term of probation and impose and execute another sentence on November 19, 2014.)

Mr. Griffith reincorporates and reasserts all argument from his opening brief that because the probation court had terminated and annulled his second term of probation by revocation on February 20, 2013, the court subsequently had no authority to again revoke Mr. Griffith's second probation term and impose and execute another sentence some twenty-one months later.

As an initial matter, respondent concedes the probation court's attempt to place Mr. Griffith on an impermissible third term of probation was a nullity after revoking the second term on February 20, 2013. Resp't's Br. 4. Despite that the probation court's February 20, 2013 revocation extinguished Mr. Griffith's second term of probation and with it all further authority to act under Section 559.036, respondent argues "the circuit court clearly had authority to execute Griffith's sentence until the final expiration date of Griffith's second term of probation." Resp't's Br. 4. In this way, Mr. Griffith agrees with respondent that this is not a classic third term of probation case. *See* Resp't's Br. 4. Rather, the questions presented by the case at bar become:

> 1) At what point following the terminal act of revoking a second term of probation is the probation court divested of authority to further act under the plain language of Section 559.036?
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> 2) Is it a reasonable exercise of authority to revoke a second term of probation and subsequently delay final disposition by sentence execution or mitigation nearly two years later?

Admittedly, respondent's theory is seductive: the probation court always retains authority to continually revoke probation and impose and/or execute additional sentences any number of times before the anticipated expiration of the second probation term. *See* Resp't's Br. 8-15. However, belying its simple veneer, respondent's position both ignores the absurd and unjust results flowing therefrom and the crux of Mr. Griffith's argument that the plain meaning of Section 559.036 and its practical effect make revocation a terminal act.

First, respondent cites no authority to suppose revocation is "a finding that the defendant has violated the conditions of his or her probation and a determination that sanctions must be imposed." Resp't's Br. 8. Because this definition at best more accurately describes a probation extension or continuation, while neutering the ordinary meaning of "revoke," it is a completely strained reading of the plain language of Section 559.036.

The late Justice Antonin Scalia had this to say about the meaning of "revoke":

> As the Court recognizes, the ordinary meaning of "revoke" is "'to annul by recalling or taking back.'" *Ante*, at 1803 (quoting Webster's Third New International Dictionary 1944 (1981)); see also American Heritage Dictionary 1545 (3d 3d. 1992) (defining "revoke" as "[t]o void or annul by recalling, withdrawing, or reversing; cancel; rescind"). Under this reading, the "revoked" term of supervised release is simply canceled; and since there is no authorization for a new term of supervised release to replace the one that has been revoked, additional supervised release is unavailable.
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> Using "terminate" in subsection (e)(1) and "revoke" (in its ordinary sense) in subsection (e)(3) is not only not inexplicable; it reflects an admirably precise use of language. In subsection (e)(1), the term of supervised release is "terminated" ("brought to an end") because termination is warranted "by the conduct of the defendant released and the interest of justice." The supervised release is treated as fulfilled, and the sentence is complete. In subsection (e)(3), by contrast, the supervised release term is not merely brought

> to an end; *it is annulled and treated as though it had never existed*, the defendant receiving no credit for any supervised release served.
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> One can "call or summon back" a person or thing without implication of annulment, but it is quite impossible to "call or summon back" an order or decree without that implication – which is precisely why the primary meaning of revoke has shifted from its root meaning ("call or summon back") to the meaning that it bears in its most common context, *i.e.*, when applied to orders or decrees ("cancel or annul").
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> ***
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> The notion that Congress, by the phrase "revoke a term of supervised release," meant "recall but not cancel a term of supervised release" is both linguistically and conceptually absurd.

Johnson v. U.S., 529 U.S. 694, 717-19 (2000) (Scalia, J. dissenting) (emphases supplied) (discussing the effect of revocation upon the term of supervised release as codified in 18 U.S.C. § 3583(e)). Applying such sound reasoning first resolves the apparent inconsistency between the General Assembly's use of the word "terminate" in Section 559.036.2 and "revoke" in Section 559.036.3. To "terminate" a probation period "if warranted by the conduct of the defendant and the ends of justice[ ]" under Section 559.036.2 means that period "is treated as fulfilled," and the probationer is discharged or otherwise released from the court's grasp. Similarly, but distinctly, "revoke" in Section 559.036.3 most precisely means that the probation term has been cancelled and annulled. Accordingly, rather than adding uncertainty to Section 559.036, the legislature's use of the words "terminate" and "revoke" betrays "an admirably precise use of language." *Johnson*, 529 U.S. at 717.[1]

More critically here, Justice Scalia's exegesis of the ordinary sense of "revoke" means that under Section 559.036.3 revocation would not merely

[1] This same analysis would also account for the appearance of both "revocation" and "terminated" in Section 559.016.1.

extinguish that probation term, but treat the term "as though it had never existed[.]" *Johnson*, 529 U.S. at 717. Section 559.036.3 contemplates that "revocation of probation" is revocation not just of the probationer's right to be on probation, but revocation of the "term of probation" itself.[2] Thus, the plain language of Section 559.036 is incompatible with the notion that the term remains in place or otherwise survives revocation. It follows that just as the second probation term itself evaporates after revocation, so too does the probation court's authority to further act under Section 559.036. This Court should reject respondent's definition and instead embrace Justice Scalia's superior linguistic assessment to find that, in its ordinary meaning, to "revoke" a term of probation under Section 559.036 nullifies that term as if it never happened. *See id.*

What is more, respondent's failure to see probation revocation as anything more than a "finding" and "sanctions" ignores actual practice by trial judges. It is commonplace for a probation court to either make a finding of a probation violation or accept a probationer's admitted violation, but yet continue or extend the proceedings to give the probationer an opportunity to remedy the wrong. *See, e.g.*, Exhibit K.[3] By delaying revocation after finding a violation, the probation court is also making a finding that final disposition is unwarranted. Inasmuch, delayed disposition, *viz.* deferred revocation, permits the probation court to retain its *power* to entertain remedial alternatives for the probationer it would not otherwise have had it revoked.

The terminal effect of revocation becomes even more apparent where, as with Mr. Griffith, the probation court revokes a second term. By nullifying or

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[2] "The court may, upon revocation of probation, place an offender on a second term of probation." Section 559.036.3.

[3] Mr. Griffith's Exhibit K contains docket entries from Shelby County cause number 16SB-CR00109-01, *State v. James F. Johnston*, showing that on August 9, 2018, the defendant admitted to violating the conditions of his probation and the probation court continued "Disposition" to October 11, 2018.

cancelling its second probation order, the probation court is effectively permanently repositioning itself to a point prior to the existence of that order; a point where its only options are to order execution of the sentence originally imposed or as mitigated by time served on probation. *See* Section 559.036.3; *accord State ex rel. Brown v. Combs*, 994 S.W.2d 69, 73 (Mo. App. W.D. 1999) (Stith, J.). Accordingly, revocation is the probation court's acknowledgment it has exhausted all its options. Therefore, even probation courts intuit that the ultimate act of revocation is the most potent arrow in their quiver under the plain language of Section 559.036.

Respondent's assertion that the second probation period may be revoked infinitely any time prior to anticipated expiration also begets something approaching a Schrödinger's cat paradox, since, as respondent would have it, probationers similarly situated to Mr. Griffith would always be simultaneously revoked and not revoked until some indeterminate future event. *See* Resp't's Br. 8-11. This Court should find the General Assembly did not intend this dilemma or the further inference that revocation is a "sanction" or otherwise meaningless exercise. *See* Resp't's Br. 8; *contra State v. Liberty*, 370 S.W.3d 537, 553 (Mo. banc 2012) ("words contained in a statute or ordinance…should be interpreted to avoid absurd results.").

Moreover, Mr. Griffith's contention that revocation cancels the probation term and deprives the probation court of authority to further act would be an interpretation of Section 559.036 that keeps with the public policy goals of probation. The primary consideration for probation is whether that privilege will "subserve the ends of justice and the best interests of both the public and the defendant." *Burns v. U.S.*, 287 U.S. 216, 221 (1932). "Further, public policy demands that a court have the power to terminate probation when, in the exercise of sound judgment, it becomes apparent that a defendant's probation jeopardizes the safety of other citizens." *State v. Palama*, 612 P.2d 1168, 1171 (Haw. 1980) (cleaned up). Confronted with probationers for which extinguishing and annulling

their privilege is the only means of ensuring public safety and justice concerns align, revocation as cancellation of the probation term safeguards those goals.

Furthermore, the probation court's February 20, 2013 revocation order cannot be branded a "suspension" of Mr. Griffith's probation pursuant to Section 559.036.5. This is because this Court has confirmed that, reading Sections 559.036.7 and 559.036.8 in tandem, even a suspension only lasts until the court acts on its imperative to rule on any pending revocation motion. *See State ex rel. Strauser v. Martinez*, 416 S.W.3d 798, 801-802 n.3 (Mo. banc 2014).

There is no Missouri provision mandating "termination" of probation must only be manifest by entry of a specific order of termination. *Cf. State v. Holmberg*, 768 P.2d 1025, 1026-27 (Wash. Ct. App. 1989) (reading Washington revocation statutes *in pari materia* to find "the purpose of the later enactment is to extend the jurisdiction of the court to modify or revoke probation for violations *occurring during the probationary period* until an order terminating probation is entered.") (emphasis in original). Inasmuch, the notion that a court's revocation order not merely terminates, but nullifies and cancels that probation term jibes with Missouri precedent.

More critically, respondent's position that the probation court can indulge in revocation *ad nauseum* throughout the second probationary term sidesteps that nothing in Section 559.036 could be conceivably construed to authorize the probation court to make more than one revocation in a given term. *See* 559.036.8. Rather than reduce revocation to some inconsequential, ceremonial act, what this Court's precedent and common sense more resolutely support is that Section 559.036 divests the probation court of authority to act once the court has chosen to revoke the second term of probation. *See State ex rel. Strauser v. Martinez*, 416 S.W.3d 798, 801 (Mo. banc 2014).

Neither is Mr. Griffith's claim procedurally barred. Respondent hazards that "[b]ecause 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." Resp't's Br. 15 (citing, *inter alia*, *State ex rel. Zinna v. Steele*, 301 S.W.3d 501, 516 (Mo. banc 2010)). However, as respondent necessarily acknowledges, *Zinna* stands for the proposition "that the imposition of a sentence beyond that permitted by the applicable statute or rule may be raised by way of a writ of habeas corpus, as was done here." 301 S.W.3d at 517. This Court very recently again confirmed its preference for deciding challenges to the probation court's revocation authority in the habeas context: "an extraordinary writ is generally the proper avenue for reviewing a probation revocation." *Miller v. State*, No. SC96754, 2018 WL 3626508, at *4 n.4 (Mo. banc July 31, 2018) (citing *State ex rel. Poucher v. Vincent*, 258 S.W.3d 62, 64-65 (Mo. banc 2008)).[4] Accordingly, Mr. Griffith's instant claim that the probation court had no authority to again revoke and execute his sentence in November, 2014 is not procedurally defaulted and respondent's contrary argument fails. *See id.*

Similarly misguided is respondent's argument that Mr. Griffith invited the probation court's unlawful sentence. *See* Resp't's Br. 7 n.3 (citing *Miller*, 2018 WL 3626508, at *6). This Court has continually held probationers need not demonstrate prejudice in the probation revocation authority context. *See, e.g.*, *State ex rel. Zimmerman v. Dolan*, 514 S.W.3d 603, 608 (Mo. banc 2017) ("Zimmerman need not prove he suffered prejudice or an inordinate delay to be afforded relief."); *Strauser*, 416 S.W.3d at 803 n.4 ("Section 559.036 also does not require the Defendants to show prejudice, as the State contends they must."). Section 559.036 delimits the authority of the probation court to act, and it is axiomatic such statutory authority cannot be conferred on the court merely by the probationer's consent. *See State ex rel. Weaver v. Martinez*, 481 S.W.3d 127, 128 (Mo. App. E.D. 2016). Claiming "invited error" is nothing more than invoking prejudice by another name. Accordingly, and where there is nothing in the record

[4] As of the filing of this brief, Case.net docket entries reflect Mr. Miller's motion for rehearing is pending before this Court and that opinion is not yet final.

to show Mr. Griffith sought to continue the revocation proceedings beyond February 20, 2013, he has not invited the probation court's error.

Because it would be contrary to the plain language of Section 559.036, an unjust result, and incommensurate with the goals of probation for the probation court to wait an additional twenty-one months to finally finish a job it purported to do under color of an unauthorized additional probation term, this Court should find the probation court exceeded its authority in executing Mr. Griffith's sentence on November 19, 2014 where it had revoked, *viz.* extinguished and annulled, his second term of probation on February 20, 2013. *See* Section 559.036.3. Mr. Griffith's continued confinement is illegal.

II.

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 one-year statute of limitations for offenders to bring suit against Department of Corrections employees under Section 516.145 cannot operate to suspend the writ of habeas corpus in state court proceedings where Missouri has continually and consistently accorded special status to this highly prerogative writ under Article I, Section 9 of the United States Constitution and Article I, Section 12 of the Missouri Constitution and where applying Section 516.145 to habeas suits violates Missouri's constitutional separation of powers schema; alternatively, in the absence of any Missouri case specifically holding habeas corpus petitions are always subject to a one-year time bar, this Court could only apply such a new procedural rule prospectively. – Responds to respondent's alternative Point II.

"There is no time constraint imposed on the filing of a writ of habeas corpus." *State ex rel. Koster v. Oxenhandler*, 491 S.W.3d 576, 589 at n.21 (Mo. App. W.D. 2016). By its own admission, respondent asks this Court to take the unprecedented step of holding that the one-year statute of limitations for suits against department of corrections employees in Section 516.145 operates to bar Mr. Griffith's petition for habeas relief from his unlawful sentence. *See* Resp't's Br. 17-22. But for this Court to so find would flout *stare decisis*, its prerogative to hear and determine original remedial writs under the Missouri constitution, and common sense.

A. Missouri has never placed a statute of limitations on habeas petitions.

"Inasmuch as habeas corpus jurisdiction springs from the constitution, it may not be eliminated by statute or rule." *White v. State*, 779 S.W.2d 571, 573 (Mo. banc 1989) (citation omitted). That the habeas corpus petition is a civil action "does not undermine the petition's importance of protecting fundamental constitutional rights." *Julian v. State*, 966 P.2d 249, 253 (Utah 1998).

In *Julian v. State*, the Supreme Court of Utah held a catchall, four-year statute of limitations "may not be constitutionally applied to bar a habeas corpus petition." 966 P.2d at 253. This holding was predicated on the Utah Court's recognition that "[a]pplying the catchall statute to bar habeas petitions not only violates the Utah Constitution's open courts provision…, but also violates the separation of powers provision…." *Id.* This is because "quintessentially, the [w]rit belongs to the judicial branch of government and that the writ of habeas corpus is one of the most important of all judicial tools for the protection of individual liberty." *Id.* (emphases supplied) (cleaned up).

Of even greater import here, the *Julian* Court was also asked to decide whether a one-year statute of limitations was an unconstitutional burden to habeas corpus actions. *Id.* at 254. Even where the Utah one-year statute of limitations excused late filings when "the interests of justice require," the Court nonetheless struck it down:

> Under our reasoning in this case, proper consideration of meritorious claims raised in a habeas corpus petition will *always* be in the interests of justice. It necessarily follows that *no* statute of limitations may be constitutionally applied to bar a habeas petition.

Id. (emphases in original).

Similarly here, wholesale application of the one-year statute of limitations in Section 516.145 cannot be constitutionally applied to bar state habeas corpus petitions, generally, and Mr. Griffith's instant petition, specifically. As it stands, and as respondent seeks to apply it here, Section 516.145 would remove "flexibility and discretion from state judicial procedure, thereby diminishing the

[C]ourt's ability to guarantee fairness and equity in particular cases." *Julian*, 966 P.2d at 253. Therefore, where habeas is within the exclusive province of the judiciary, and where, as here, habeas is frequently the sole remedy available to persons imprisoned without due process of law, applying Section 516.145 as a one-year catchall statute of limitations to bar habeas petitions would seemingly violate not only the Missouri Constitution's open courts provision of Article I, Section 14, but certainly the separation of powers provision of Article II, Section 1. *See id.*

Moreover, where there is no absolute procedural bar to successive habeas corpus petitions, *ipso facto* there cannot be a one-year time bar to Mr. Griffith's petition. *See, e.g.*, *Ex parte Clark*, 106 S.W. 990, 996 (Mo. banc 1907) (holding that "one restrained of his liberty may in succession apply to every court or officer authorized to issue the [habeas] writ, notwithstanding another court or officer having jurisdiction may have refused to issue it or to discharge him from such restraint[.]"); *accord State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 217 (Mo. banc 2001) ("Successive *habeas corpus* petitions are…not barred.").

"Cases interpreting statutes carry the legislature's approval when it does not take action to overrule them, and the legislature ratifies them by allowing them to stand while enacting particular legislation on the same subject matter." *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371, 388 (Mo. banc 2014) (citing *California v. F.E.R.C.*, 495 U.S. 490, 499-500 (1990)). "To overrule a legislative ratification of this Court's prior statutory interpretations is to encroach on the function of the legislature." *Id.* In light of decades of Missouri court opinions reaffirming the inapplicability of a statute of limitations to habeas actions, these cases have implicitly interpreted Section 516.145 as similarly so inapposite. *See, generally*, *Wiglesworth v. Wyrick*, 531 S.W.2d 713, 716-18 (Mo. banc 1976); *State ex rel. Laughlin v. Bowersox*, 318 S.W.3d 695, 701-703 (Mo. banc 2010); *accord Koster*, 491 S.W.3d at 589 at n.21. Had it wanted to apply a statute of limitations to habeas corpus petitions, the General Assembly could have

amended Section 516.145 to reflect this position. However, because the legislature has failed to amend Section 516.145 or taken other action to overrule extant cases, the legislature has ratified their position that Missouri applies no statute of limitation to habeas petitions. *See Templemire*, 433 S.W.3d at 388.

Then, too, the legislature's ratification of case law declining to impose a statute of limitations on habeas petitions is congruent with the notion that habeas is in the exclusive ambit of the judiciary. For just as this Court cannot encroach on the function of the General Assembly by overruling its ratification of case law declining to interpret Section 516.145 as a statute of limitations to habeas petitions, neither can the General Assembly infringe this Court's constitutional prerogative to curate the habeas privilege. *See* Mo. Const. art. V, § 4. Accordingly, respondent's contention that Section 516.145 time-bars Mr. Griffith's claim adds needless discord to an otherwise historically harmonious separation of powers. Therefore, and because the constitutional importance of this "high prerogative writ[ ]"[5] has long rendered it exceptional to many of the procedural idiosyncrasies of ordinary civil actions, this Court should reject respondent's argument and find Mr. Griffith's habeas petition is not barred by Section 516.145.

B. Applying Section 516.145 as a statute of limitations to habeas actions is an unconstitutional violation of Missouri's separation of powers doctrine.

Respondent's assertion that Section 516.145 operates as a one-year statute of limitations barring Mr. Griffith's habeas petition threatens usurpation of the Missouri judiciary's singular constitutional power to issue and determine original remedial writs. Article V of the Missouri Constitution enumerates the powers conferred to the judicial branch. In addition to vesting this Court with supervisory

[5] *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (Marshall, C.J.).

authority over all courts, Article V, § 4 further mandates "[t]he supreme court and districts of the court of appeals may issue and determine original remedial writs."

The doctrine of separation of powers is long recognized in this state and constitutionally founded. Article II of the Missouri Constitution provides:

> The powers of government shall be divided into three distinct departments – the legislative, executive and judicial – each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

Mo. Const. art. II, § 1. Each of these three branches of government serve as a check upon the others "as a safeguard to the people" against "encroachments" by the other branches. *Rhodes v. Bell*, 130 S.W. 465, 467 (Mo. 1910). "While it was not the purpose of the Constitution to make a total separation of these three powers, each branch of government ought to be kept as separate from and independent from each other as the nature of free government will admit." *Weinstock v. Holden*, 995 S.W.2d 408, 411 (Mo. banc 1999) (citing *Rhodes*, 130 S.W. at 468). Separation of powers is violated when one branch impermissibly interferes with another's performance of its constitutionally assigned powers, or when one branch assumes powers more properly entrusted to another branch. *State Auditor v. Joint Comm. on Legislative Research*, 965 S.W.2d 228, 231 (Mo. banc 1997) (citing *I.N.S. v. Chadha*, 462 U.S. 919, 963 (1983) (Powell, J. concurring)).

In *Jones v. Florida Parole Comm'n*, the Supreme Court of Florida held a one-year statute of limitations on petitions for extraordinary writs in state courts violated the doctrine of separation of powers. 48 So.3d 704, 707 (Fla. 2010). Specifically unpersuasive was the government's attempt to "advance the federal system's acceptance of a legislatively created statute of limitation on habeas corpus actions as justification for denying relief" on a state habeas claim:

> The State asserts that if Congress has the authority to set a statute of limitations in this area, then the Florida Legislature should also have that authority. *This argument, however, is not persuasive, as there are significant distinctions between the balance of power in the federal system and the balance of power in this state*. Although the federal constitution grants the United States Supreme Court limited original jurisdiction, article III, section 2 provides that the appellate jurisdiction of the United States Supreme Court is derived from the authority of Congress. In contrast, the original and appellate jurisdiction of the court of Florida is derived entirely from article V of the Florida Constitution[….] Further, the United States Supreme Court has recognized that "the power to award the writ [of habeas corpus] by any of the courts of the United States, must be given by written law" and "judgments about the proper scope of the writ are normally for Congress to make." *Felker v. Turpin*, 518 U.S. 651, 664 (1996)[.]
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> Consequently, the separation of powers argument raised in the present case would never be an issue in the federal system. Unlike the Florida Constitution, the federal constitution does not expressly grant the United States Supreme Court the power to adopt rules of procedure. In fact, it appears that the two branches work together in formulating procedural rules in the federal system. *Hence, the State's reliance on the [federal statute of limitations] is without merit*.

48 So.3d 704, 709 (Fla. 2010) (emphases in original) (quoting *Allen v. Butterworth*, 756 So.2d 52, 62-64 (Fla. 2000)).

If the government's argument from *Jones* sounds familiar, it is. Respondent makes the same claim analogizing Section 516.145 to the federal habeas statute of limitations here. *See* Resp't's Br. 19-20. Where Missouri, too, has fixed the power to hear and determine habeas petitions exclusively with the judicial branch under article V, § 4 of our constitution, the same result from *Jones* should follow: the inherent differences between Missouri and federal constitutional power assignations mean applying Section 516.145 as a one-year statute of limitations to habeas petitions would be an unconstitutional encroachment on the power of the judicial branch. *See* 48 So.3d at 711.

Interestingly, the *Jones* Court further found that even could the state statute of limitations be constitutionally applied to habeas petitions,[6] "a new cause of action would accrue *each day* that a defendant is detained." *Id.* at 710 (emphasis in original). "If a petitioner alleges he is unlawfully detained, his claim is necessarily filed within the one-year time limitation established by the statute." *Id.* at 710-11 (cleaned up). This Court should also adopt the sound reasoning of its foreign brethren to find that, as a current detainee, Mr. Griffith accrues a new cause of action daily and thus his petition could never be barred by Section 516.145. *See id.* This Court should continue to reserve plenary habeas power exclusively for itself and the judicial branch and find Section 516.145 cannot be constitutionally applied as a statute of limitations to habeas petitions.

C. Other reasons militate against applying Section 516.145 to habeas claims.

Beyond all that, respondent's position begets other irrational results. As respondent would have it, were Mr. Griffith to file a petition against he who currently restrains his liberty, *viz.* the named respondent in the case at bar, such a petition would be time-barred by Section 516.145. Yet were Mr. Griffith to file a petition instead naming as respondent the trial court judge who exceeded her statutory authority to place him on a third term of probation, revoke that probation, and execute his sentence, such a petition could go forward. *See* Resp't's Br. 17-19.[7] The plain language of this Court's Rule cannot mean the sacrosanct privilege of habeas corpus should be subject to these mere pleading vagaries for petitioners

[6] It could not. *Jones*, 48 So.3d at 710.

[7] Respondent also contends "Rule 91 requires petitioners to bring their cases against the Warden – an employee of the Department [of Corrections]." Resp't's Br. 18 (citing Rule 91.01(c)). Although it is customary that prisoners petition against institutional officials, there is nothing in the text of Rule 91.01(c) limiting the warden as the sole respondent against whom habeas petitioners may seek relief.

seeking this writ in Missouri courts. *See* Rule 91.01(c) ("A habeas corpus proceeding shall be a civil proceeding in which the person seeking relief is petitioner and the person against whom such relief is sought is respondent."). Accordingly, the Court should reject respondent's invocation of Section 516.145 and instead reaffirm that habeas petitions know no time limitation in Missouri.

"[T]he privilege of the writ of habeas corpus shall never be suspended." Mo. Const. art. I, § 12. Accepting respondents' argument would have the further absurd effect of suspending habeas corpus for any incarcerated person who failed to file such a petition within one year of "when he was ordered delivered to the Department of Corrections to serve his sentence." *See* Resp't's Br. 18-19. The folly of respondent's position is compounded by its intractability with his argument on the merits of Mr. Griffith's claim.

As respondent notes, "the one-year statute of limitations begins when the damage resulting from an alleged wrong is capable of ascertainment." Resp't's Br. 18 (citing Section 516.100). Respondent's belief is that the probation court retained authority to hold further revocation proceedings and execute Mr. Griffith's sentence anytime throughout the entirety of the anticipated second probation term, the February 20, 2013 revocation notwithstanding. Thus, while respondent is certainly correct that the November 19, 2014 date on which Mr. Griffith's sentence was executed could have begun the running of this statute, respondent could also plausibly argue that a cause of action accrued on February 20, 2013, as the point from which Mr. Griffith should have always been subject to delivery to the Department of Corrections, but for the probation court's erroneous delay. Therefore, it is disingenuous for respondent to argue for the suspension of habeas corpus by operation of Section 516.145.

Respondent further supposes since Mr. Griffith did not object to the probation court's unauthorized revocation and imposition of sentence on November 19, 2014 and "waited for over two years after his sentence was executed before he filed a petition for a writ of habeas corpus" in circuit court, his

petition should be "denied." Resp't's Br. 16. Inasmuch, respondent is not only seeking the unprecedented imposition of a one-year time bar to Missouri prisoners' habeas claims, but is in essence arguing that Mr. Griffith should be estopped from bringing his habeas petition on equitable grounds. [8] Respondent asks this Court to eschew even traditional, equitable habeas claim preclusion considerations, such as the affirmative defense of laches.

Respondent's desire to evade the actual prejudice analysis for affirmative equitable defenses by instead invoking Section 516.145 is understandable. Respondent offers no argument that he was injured by Mr. Griffith's supposed "delayed filing," nor can he, for there are no facts respondent could adduce to show his reliance to his detriment on Mr. Griffith's filing the instant habeas petition within one year. *See Brown*, 776 S.W.2d at 388. Moreover, whether the probation court had authority to twice revoke Mr. Griffith's second probationary period and execute his sentence on November 19, 2014 is purely a question of law on which no further factual findings rest. The mere passage of time neither confers the probation court with authority it never had when it finally executed

[8] Respondent's attempts to assert the equitable doctrines of laches or estoppel here would also fail. First, "[t]his is an action at law, and strictly speaking the doctrine of laches is not applicable." *UAW-CIO Local No. 31 Credit Union v. Royal Ins. Co, Ltd.*, 594 S.W.2d 276, 281 (Mo. banc 1980). Thus, where "[e]quitable estoppel is available in an action at law[,]" only that doctrine could conceivably apply here. *Id.*

An equitable estoppel claim requires "(1) an admission, statement or act inconsistent with the claim afterwards asserted and sued upon, (2) action by the other party on the faith of such admission, statement or act, and (3) injury to such other party, resulting from allowing the first party to contradict or repudiate the admission, statement, or act." *Brown v. State Farm Mut. Auto. Ins. Co.*, 776 S.W.2d 384, 388 (Mo. banc 1989) (citation omitted). Assuming, *arguendo*, Mr. Griffith's "delay" in filing the instant habeas action was an "act" inconsistent with his claims, respondent offers this Court little argument and no facts to show how he acted on the faith of Mr. Griffith's alleged "act" or how he was injured thereby. Accordingly, respondent could not meet his burden to show Mr. Griffith should be estopped from bringing his claim. *See id.*

Mr. Griffith's sentence nor does it hamper respondent's ability to make its legal argument.[9] Accordingly, coupled with his argument on Mr. Griffith's principal claim, respondent wants Mr. Griffith to demonstrate prejudice by the probation court's exceeding its authority under Section 559.036, but also demurs that he himself need not show prejudice by invoking the statute of limitation in Section 516.145. Respondent cannot have his cake and eat it too.

D. Alternatively, should the Court find Section 516.145 applicable to Missouri habeas claims, this new procedural rule cannot bar Mr. Griffith's suit.

Lastly, if the Court decides habeas petitions can be time-barred by Section 516.145, then this would create a new rule of law that only applies prospectively. The Missouri constitution prohibits the enactment of any law that is "retrospective in operation." Mo. Const. art. I, § 13. "This Court has the authority to determine whether a decision changing a rule of law is to be applied retrospectively or prospectively." *State v. Walker*, 616 S.W.2d 48, 48 (Mo. banc 1981) (citation omitted). "If the new rule is procedural, it is given prospective application only." *Id.* at 49 (citation omitted).

Here, should the Court take the extraordinary step of applying Section 516.145 as a time-bar to habeas petitions, then this would be a new procedural rule of law. This Court has long held that statutes of limitation are inherently

[9] Respondent hazards Mr. Griffith's "delay could have provided him with a tactical advantage[ ]" if the Court finds for him on the merits because "then the circuit court could be left without authority to act on Griffith's probation because his second term of probation had expired." Resp't's Br. 21. Accepting respondent's argument would endow Mr. Griffith with a power he will never possess, *i.e.* the ability to bestow statutory authority on the probation court to act, simply by virtue of filing his petition before February 3, 2017. Because the probation court had no authority to execute Mr. Griffith's sentence on November 19, 2014, there was nothing Mr. Griffith (or respondent) could do at any time thereafter to re-confer to the probation court power to act on his probation. *See* Section 559.036.3.

procedural. *See Wentz v. Price Candy Co.*, 175 S.W.2d 852, 857 (Mo. 1943); *accord Goodman v. St. Louis Children's Hosp.*, 687 S.W.2d 889, 891 (Mo. banc 1985). Accordingly, were the Court to hold for the first time Section 516.145 creates a one-year statute of limitations for Missouri prisoners' habeas claims, this would be a new rule of procedure. *See id.* at 891-92. Therefore, such a new procedural rule must be given prospective application only and would not affect the Court's ability to reach the merits of Mr. Griffith's claim here. *See Walker*, 616 S.W.2d at 49. This Court should exercise its constitutional prerogative to hear Mr. Griffith's claim and determine his current restraint of liberty is illegal.

CONCLUSION

For the foregoing and those reasons articulated in his opening brief, because the trial court exceeded its authority to place him on a third term of probation, and subsequently revoke that probation and execute his sentence twenty-one months later, 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.

Respectfully submitted,

/s/ Jedd C. Schneider

Jedd C. Schneider, MO Bar No. 67789
Attorney for Appellant
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 6,677 words, which does not exceed the 7,750 words allowed for a petitioner's reply brief.

On this 17th day of September, 2018, an electronic copy of Petitioner's Reply Brief was 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

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Jedd C. Schneider