IN THE

MISSOURI SUPREME COURT

STATE EX REL. TRAVIS JONES, Relator, v. THE HONORABLE TONY WILLIAMS, CIRCUIT JUDGE, 46TH JUDICIAL CIRCUIT, Respondent.	)	Cause No. SC97417

RESPONDENT'S BRIEF IN OPPOSITION TO A WRIT OF PROHIBITION

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ARGUMENT

1. Relator is not entitled to an order prohibiting Respondent from conducting a hearing on the State's pending motion to revoke Relator's probation, because Respondent retains statutory authority over Relator's case, in that Relator, whose five-year term of probation began on December 11, 2014, is currently ineligible for discharge from probation through earned compliance credits; all of his credits have been suspended; and thus his probation term has not expired.

(Responds to Point 1 of Relator's Brief.)

Standard of Review

"A writ of prohibition may issue to: (1) prevent the usurpation of judicial power when a lower court lacks authority or jurisdiction; (2) remedy an excess of authority, jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or when (3) a party may suffer irreparable harm if relief is not granted." *State ex rel. Merrell v. Carter*, 518 S.W.3d 798, 799 (Mo. banc 2017) (internal quotation omitted). Writ relief is appropriate if a trial court has lost authority to conduct a probation revocation hearing due to a lack of effort. *State ex rel. Amorine v. Parker,* 490 S.W.3d 372, 376 (Mo. banc 2016). The probationer "bears the burden of demonstrating the circuit court failed to make every reasonable effort to conduct the probation revocation hearing prior to the expiration of the probationary period." *State ex rel. Zimmerman v. Dolan*, 514 S.W.3d 603, 608 (Mo. banc 2017).

Analysis

In 2012, the Missouri legislature instituted a program of "earned compliance credits" (hereafter "ECC") for certain offenders on probation or parole. *See generally* § 217.703, RSMo.[1] The ECC statute allows these offenders to earn credit towards early discharge from probation. *See id*. For every full calendar month in which an offender is compliant with supervision, the offender is awarded thirty days of credit. *See* § 217.703.3. The credit is subtracted on a monthly basis from the supervision term's original expiration date. *See id.*

In light of ECC, three different dates may signal the end of a probation term. The monthly subtraction of earned credit from the original expiration date yields what the Division of Probation & Parole (hereafter "P&P") refers to as an "earned discharge date." (*See, e.g.*, Ex. N, p. A41) (violation report with discharge dates). In addition, P&P also tracks a probationer's "optimal discharge date," which is the earliest date upon which an offender will be discharged if the offender continues to earn the maximum amount of credit during future months of supervision. (*See, e.g.*, Ex. N., p. A41.) A compliant offender will see the gap between earned and optimal discharge dates shrink over time, until the offender reaches the "final discharge" date and is released from probation. *See* § 217.703.7.

[1]Statutory references are to RSMo (2017).

Lastly, as explained in more detail below, the original expiration date of probation term always remains potentially relevant, until the day of final discharge.[2] Under § 217.703.10, an offender is ineligible for discharge through earned compliance credits if the sentencing court has suspended probation or the prosecutor has filed a motion to revoke or suspend prior to the discharge date. Furthermore, under § 217.703.5, if the prosecutor has filed such a motion, all of an offender's credits are suspended, pending the outcome of a hearing. The offender cannot be discharged from probation through earned compliance credits while the motion is pending because all credits are suspended.

Here, the parties agree that Relator was generally eligible for ECC during parts of his probation, and did in fact earn some credit. P&P calculated Relator's earliest "earned discharge date" as December 20, 2017. (Ex. N, p. A41.) As noted in violation reports, Relator's optimal discharge date varied, due to the filing of the reports themselves and motions to revoke. (Ex. B, C, D, E, G, K, L, M, N.) Relator's own calculations identify his earned discharge date as "no later than" March 20, 2018. (*See* Rel. R. 84.20 letter.)

But the precise discharge date is immaterial due to the State's pending motion to revoke probation, filed on August 22, 2017. As Respondent will show in Part (A) of this brief, Relator was not actually eligible for final discharge through ECC on December 20,

[2] In this case, P&P's violation reports reflect this fact. Page one of all the P&P reports in this case consistently indicate that Relator's probation "[e]xpires: 12/10/2019." (Rel. Ex. B, C, D, E, G, K, L, M, N.) The expiration date never changes, even though the earned and optimal discharge dates do.

2017, or March 20, 2018, or any date in between. That is because the State's motion of August 22, 2017, rendered Relator at least temporarily ineligible for ECC discharge, pending a hearing. The State's motion has not yet been heard. Further, Respondent will show in Part (B) that Relator's credits are suspended, pending the outcome of a hearing. Lastly, Respondent will show in Part (C) that Relator's probation has not expired.

A. Relator is currently ineligible for discharge from probation

"Earned compliance credits reduce the term of probation . . . by thirty days for each full calendar month of compliance with the terms of supervision." § 217.703.3. "For the purposes of this section, the term 'compliance' shall mean the absence of an initial violation report submitted by a probation or parole officer during a calendar month, or a motion to revoke or motion to suspend filed by a prosecuting or circuit attorney, against the offender." § 217.703.4. An offender who remains compliant will reap the reward of discharge from probation under § 217.703.7, which states in relevant part:

> [O]nce the combination of time served in custody, if applicable, time served on probation . . . and earned compliance credits satisfy the total term of probation . . . the sentencing court shall order final discharge of the offender, so long as the offender has completed at least two years of his or her probation . . . which shall include any time served in custody under section 217.718 and sections 559.036 and 559.115.

If the statute ended with subsection 7, one might conclude that an earned discharge date is always equivalent to the expiration date of probation, because "[e]arned compliance credits reduce the term of probation," § 217.703.3, and eventually lead to the "final discharge" of the offender from probation. §217.703.7. Indeed, provided that

nothing occurs to trigger other portions of the statute, probation will effectively expire on an offender's earned discharge date. But the statute does not end here.

Critically for this case, other portions of 217.703 limit subsection 7, when the prosecutor or sentencing court takes specified actions prior to the discharge date. Accordingly, they also limit an offender's eligibility for discharge through earned compliance credits. The primary limitation is in subsection 10:

> No less than sixty days before the date of final discharge, the division shall notify the sentencing court, the board, and, for probation cases, the circuit or prosecuting attorney of the impending discharge. If the sentencing court, the board, or the circuit or prosecuting attorney upon receiving such notice does not take any action under subsection 5 of this section, the offender shall be discharged under subsection 7 of this section.

Subsection 10 cross-references subsections 7 and 5. Subsection 7 is the only portion of § 217.703 that authorizes the discharge of an eligible offender who has accrued sufficient credit. An offender who is ineligible for final discharge under subsection 7 is ineligible for final discharge through earned compliance credits, period.

In turn, subsection 5 describes the precise actions that the sentencing court or prosecutor can take to render an offender ineligible for discharge under subsection 10. For prosecutors, the only action mentioned in subsection 5 is the filing of a "motion to revoke . . . or suspend." Thus, when that action and the language of subsection 7 are inserted into subsection 10, the lattermost reads, "If the . . . prosecuting attorney upon receiving such notice does not [file a 'motion to revoke or motion to suspend'] the offender shall be [entitled to 'final discharge']."

Subsection 10 does not directly indicate what will happen if the prosecutor *does* file a motion to revoke or suspend before what would otherwise be the date of "final discharge." But the inverse of subsection 10 is not difficult to state: "If the . . . prosecuting attorney upon receiving such notice *does* . . . take any action under subsection 5, the offender shall [*not*] be discharged under subsection 7 of this section." (emphases added.) When the language of subsections 5 and 7 are inserted into subsection 10, the inverse of subsection 10 would be: "If the . . . prosecuting attorney upon receiving such notice does [file a 'motion to revoke or motion to suspend'], the offender shall not be [entitled to 'final discharge']."

Although the inverse of a statement is not automatically true, in this case the inverse of subsection 10 effectuates the overall legislative intent of the ECC statute as shown by the statute's plain language, especially when the various subsections of the statute are construed together. "This Court's primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue." *State v. Johnson*, 524 S.W.3d 505, 510 (Mo. banc 2017) (internal quotation omitted). "This Court must presume every word, sentence or clause in a statute has effect, and the legislature did not insert superfluous language." *Id.* "Moreover, statutory provisions are not read in isolation but are construed together, and if reasonably possible, the provisions will be harmonized with each other." *Brinker Missouri, Inc. v. Director of Revenue,* 319 S.W.3d 433, 437 (Mo. banc 2010) (internal quotation omitted).

The only reading of subsection 10 that gives it any meaning is the following: if the prosecutor has filed a motion to revoke probation prior to an offender's ECC discharge

date, the offender is not eligible for—or entitled to—discharge through earned compliance credits on that date, pending a hearing. That interpretation makes sense in light of the statute as a whole, which is intended to reward offenders who remain in compliance, and which treats a motion to revoke as a sign of noncompliance. *See* § 217.703.4 (defining "compliance" as "the absence of an initial violation report submitted by a probation or parole officer during a calendar month, or a motion to revoke or motion to suspend filed by a prosecuting or circuit attorney, against the offender.") Finally, unless Respondent's interpretation is correct, subsection 10's second sentence is superfluous.

Here, the Taney County prosecutor filed a motion to revoke probation on August 22, 2017. That occurred before any of the discharge dates posited by Relator. That motion has not yet been heard. Therefore, under § 217.703.10, Relator is currently ineligible for ECC discharge.

B. All of Relator's credits have been suspended

An additional subsections of § 217.703 further demonstrate that the legislature did not intend for offenders to be awarded ECC discharge while a motion to revoke is pending. Specifically, subsection 5 show that the filing of a motion-to-revoke will suspend an offender's compliance credits, pending the outcome of a hearing on the motion. Quoted in its entirety, subsection 5 states:

> Credits shall not accrue during any calendar month in which a violation report has been submitted or a motion to revoke or motion to suspend has been filed, and shall be suspended pending the outcome of a hearing, if a hearing is held. If no hearing is held or the court or board finds that the violation did not occur, then the offender shall be deemed to be in

> compliance and shall begin earning credits on the first day of the next calendar month following the month in which the report was submitted or the motion was filed. All earned credits shall be rescinded if the court or board revokes the probation or parole or the court places the offender in a department program under subsection 4 of section 559.036. Earned credits shall continue to be suspended for a period of time during which the court or board has suspended the term of probation, parole, or release, and shall begin to accrue on the first day of the next calendar month following the lifting of the suspension.

Setting aside violation reports, the very first sentence of § 217.703.5 states, "Credits shall not accrue during any calendar month in which a . . . motion to revoke . . . has been filed, and shall be suspended pending the outcome of a hearing, if a hearing is held." The subject of this sentence is "credits." Because no adjective modifies "credits" in this sentence, the subject of the sentence is any and all credits. The ECC statute deals with two kinds of credits: those already earned through past compliance and those that can potentially be accrued through future compliance.[3] Hence, all credits shall be suspended pending the outcome of a hearing on a motion to revoke.

Relator attempts to escape this conclusion by drawing a false dichotomy between "credits" and "earned credits." (Rel. Br. at 22-24.) Relator notes that later portions of § 217.703.5 refer to "earned credits" which are suspended if the court suspends the term of probation. Because the legislature used both the term "credits" and the term "earned credits," Relator contends that "credits" in the first sentence of subsection 5 are a wholly separate concept from "earned credits." Further, he argues that "earned credits" are

[3] A probationer's "optimal" discharge date is calculated using the latter. (*See, e.g.*, Ex. N, p. A41) (reporting optimal discharge date).

excluded from the term "credits" in the first sentence of subsection 5. If that were true, "earned" credits would not be suspended when a motion to revoke has been filed. But this argument fails to account for basic rules of grammar, without which the plain language of a statute cannot be discerned.

The word "earned" in "earned credits" is an adjective. "An adjective modifies a noun to denote a quality of the thing named, or to indicate its quantity or extent." *Antioch Community Church v. Board of Zoning Adjustments of City of Kansas City*, 543 S.W.3d 28, 36 (Mo banc. 2018) (internal quotation omitted). When the legislature referred to "earned credits" in the latter half of § 217.703.5, it was referring to a quality that *certain* credits possess: they are "earned" when an offender completes a "full calendar month of compliance with the terms of supervision." § 217.703.3. The term "earned credits" is therefore more specific than the unmodified term "credits."

In the first sentence of § 217.703.5, the word "credits" appears in its unmodified form, and it is the subject of the entire sentence. Credits do not accrue in the month during which a motion to revoke is filed, and credits shall be suspended pending the outcome of a hearing on the motion. The absence of an adjective indicates that the legislature is referring to all "credits," including but not limited to those that possess the quality of being "earned." "Credits" and "earned credits" are not mutually exclusive. The latter is a subset of the former. Thus, under the first section of § 217.703.5, all credits—those already earned and those could be acquired in the future—are suspended while a motion to revoke is pending, until a hearing is held. But if the court finds no violation,

then credit from the period in which the motion was pending is restored (except the month that the motion itself was filed). *See* § 217.703.5.

In the latter half of subsection 5, the legislature uses the more specific term "earned credits" when describing the effect of certain court orders. If the sentencing court orders the revocation of probation or the placement of an offender in a prison program under § 559.036, "earned" credits are rescinded. It is logical for the legislature to speak of "earned" credits here because that is the only kind of credit that can be rescinded. A court cannot rescind credit that had never been accrued or earned.

Lastly, if the court orders the suspension of probation, "earned credits" are also suspended for as long as the suspension lasts. Again it is logical for the legislature to speak of "earned" credits, because the suspension of probation itself would automatically bar an offender from accruing more credit during the suspension—an offender cannot be in "compliance with the terms of supervision," § 217.703.3, while the offender is not being supervised due to the suspension of his probation. Therefore, the legislature only needed to address the effect of a suspension on "earned" credit, whose fate would not otherwise be apparent following the entry of a suspension order.

In sum, because the legislature did not use the term "credits" and "earned credits" in a mutually exclusive manner, the Court should reject Relator's binary treatment of these terms. Instead, the plain language of the statute indicates that "earned" credits are merely a subset of "credits." When the legislature chose to speak of "credits" being suspended after the filing of a motion to revoke, the legislature was referring to all types

of credits: those that had been earned, and those that could potentially accrue or be earned during the pendency of the motion.

By contrast, if the legislature had wished to say that only the "ability to earn credits" shall be suspended, it could have done so. Relator urges this Court to read this meaning into the first sentence of § 217.703.5 (Rel. Br. at p. 24) (contending that only Relator's "ability to earn credits was . . . suspended" by § 217.703.5.) But Relator never explains why the legislature did not in fact use this type of language or otherwise specify that only the "ability" to earn credit was suspended.

If it had so desired, the legislature could have easily written the first sentence of subsection 5 to read, as follows: "Credits shall not accrue during any calendar month in which a violation report has been submitted or a motion to revoke or motion to suspend has been filed, and the ability to earn credits shall be suspended pending the outcome of a hearing, if a hearing is held." But the legislature did not choose to write the statute in that way. As a plain consequence of the legislature's actual word choice, "credits" of any type or quality are suspended after the prosecutor files a motion to revoke. The credits remain suspended pending a hearing, at which time the credits may be restored or rescinded.

Here, the State filed a motion to revoke Relator's probation on August 22, 2017. Relator concedes that he was not, at that time, eligible for ECC discharge. (Rel. Br. at p. 25.) His very earliest "earned" discharge date was December 20, 2017, as calculated by P&P. (Ex. N, A41.)

The filing of the motion meant "credits" did not accrue for Relator in the month of August, 2017, under § 217.703.5. But more importantly, Relator's "credits" were also

"suspended pending the outcome of a hearing, if a hearing is [to be] held." Respondent's intent to hold a hearing is not in doubt. (*See* Rel. Br. at 18) (acknowledging Respondent's intent). Thus, by operation of the ECC statute itself, all of Relator's credits have been suspended since August 22, 2017. These credits may be rescinded or restored after a hearing, but Relator is currently ineligible for ECC discharge.

Yet, the analysis of whether Respondent retains authority cannot stop here. To say that Relator is ineligible for ECC discharge is not to say that Respondent automatically retains the authority to conduct a revocation hearing. A term of probation will still expire even if ECC is suspended. But as discussed next, Relator's probation term has not expired. Respondent retains statutory authority over Relator's case.

C. Relator's probation term has not expired

Under Missouri law, a "term of probation commences on the day it is imposed." § 559.036.1. "Unless terminated as provided in section 559.036 or modified under section 217.703, the terms during which each probation shall remain conditional and be subject to revocation are . . . [a] term of years . . . not to exceed five years for a felony . . ." § 559.016.1. "The court shall designate a specific term of probation at the time of sentencing or at the time of suspension of imposition of sentence. Such term may be modified by the division of probation and parole under section 217.703." § 559.016.2.

Here, Respondent's interpretation of § 217.703 does not grant him indefinite authority over Relator's probation. Though Relator is not eligible for ECC discharge and all of Relator's credits are suspended, Relator is still on a finite term of probation. Relator began a five-year term of probation on December 11, 2014. (Ex. A, p. A1.) Under §

559.036.1, Relator's term had been "modified" by § 217.703 before the prosecutor filed a motion to revoke. That is to say, his earned compliance credits "reduce[d] the term of probation . . ." § 217.703.3. And if Relator had remained in "compliance" as defined by § 217.703.4, any distinction between a final discharge date and expiration date would have been academic. His probation would have ended by now.

But when Relator became (at least temporarily) ineligible for ECC discharge under § 217.703.10 and his credits were suspended under § 217.703.5, they no longer reduced the term of probation, until a hearing on the prosecutor's motion. The unmodified/unreduced term defaulted to its original five-year length and corresponding expiration date. Thus, Relator's probation term expires on December 10, 2019.[4]

Relator would have the Court believe that Relator's earned discharge date was the expiration date of probation, and remained so even after Relator became ineligible for discharge on that date under § 217.703.7. (Rel. Br. at p. 25) (admitting Relator could not be discharged "automatically" under subsection 7). Relator's interpretation would not only nullify key portions of § 217.703, but would also lead to an absurd result: a probationer could still reap the rewards of "compliance" through accelerated expiration of probation, even where (i) the probationer has been convicted of one or more new felonies before his earned discharge date; (ii) the State has filed a motion to revoke

[4]Page one of all the P&P reports consistently indicate that Relator's probation "[e]xpires: 12/10/2019." (Rel. Ex. B, C, D, E, G, K, L, M, N.) This expiration date never changed, even though the "earned" and "optimal" discharge dates did.

probation, also before that date; and (iii) the probationer is ineligible for discharge under § 217.703.7 on that date due to the pending motion.

Respondent anticipates two arguments against his reading of § 217.703. First, Relator would likely contend that subsection 8 of § 559.036 would allow a court to potentially conduct a revocation hearing after the discharge date, thus possibly avoiding the absurd scenario described above. Second, Relator would—and in fact does—argue that this Court rejected Respondent's interpretation of § 217.703 in *State ex rel. Amorine v. Parker*, 490 S.W.3d 372 (Mo banc. 2016). But as explained below, the first of these arguments fails because subsection 8 of § 559.036 has nothing to do with whether or when an earned discharge date remains the expiration date of probation, and it cannot serve as an excuse for robbing § 217.703.5 and .10 of independent meaning. The second claim fails because *Amorine* dealt with facts inapposite to this case.

1. *§ 559.036.8*

Under § 559.036.8, a court may conduct a probation violation hearing after the "expiration" of probation, if certain conditions are met. In its entirely, § 559.036.8 states:

> The power of the court to revoke probation shall extend for the duration of the term of probation designated by the court and for any further period which is reasonably necessary for the adjudication of matters arising before its expiration, provided that some affirmative manifestation of an intent to conduct a revocation hearing occurs prior to the expiration of the period and that every reasonable effort is made to notify the probationer and to conduct the hearing prior to the expiration of the period.

Section 559.036.8 does two things: (i) it states the general rule that a court has the power to revoke probation for the duration of the probationary term; and (ii) it authorizes the extension of that power past the expiration of the probationary term, if certain conditions are met.

Here, Relator concludes that these conditions were not all met—specifically the requirement that Respondent make every reasonable effort to conduct a revocation hearing before the probation term expires. But § 559.036.8 does not address the more fundamental issue here: whether a discharge date is equivalent to the expiration date of probation, in a case where the State filed a timely motion to revoke probation before that discharge date, and the probationer is ineligible for discharge under § 217.703.7

If Relator's probation did not expire on his discharge date because the State took action beforehand, only the general rule from § 559.036.8 is relevant here. The general rule is that a court has the "power to revoke probation for the duration of the probationary term . . ." *Id.* Under § 217.703.5 and .10, Relator's probation has not expired because the credits that modified his term of probation were all suspended before his earliest potential discharge date, and he was not eligible for ECC discharge on that date. His expiration date is December 10, 2019. Thus, Respondent is still acting within the duration of the probationary term. Because Respondent is still acting within the probationary term,

Respondent has the authority to revoke Relator's probation, without any need of an extension and thus without any need for further application of § 559.036.8.[5]

2. *State ex rel. Amorine v. Parker*

In *State ex rel. Amorine v. Parker*, this Court found that a sentencing court had "exceeded [its] authority" in continuing a probation revocation hearing "indefinitely" after the probationer reached his ECC discharge date, and the state had not filed a motion to revoke probation prior to that date. 490 S.W.3d 372, 376 (Mo banc. 2016). The probationer in *Amorine* was placed on a five-year term of supervision on May 4, 2011. *Id.* at 373. He was eligible for earned compliance credits. *See id.* On January 1, 2015, Probation and Parole filed reports, which informed the sentencing court that the probationer had an "earned" discharge date of July 13, 2015. *Id.* The reports also informed the sentencing court that, with continued supervision compliance, the probationer's "optimal" discharge date would be April 1, 2015. *Id.* No further violations were reported. *Id.* at 375.

In between the filing of the reports on January 1, 2015, and the approaching discharge date on April 1, 2015, the prosecutor failed to file a motion to revoke or suspend. *Id.* Likewise, the sentencing court did not suspend probation until after the April 1 discharge date had already passed. *See id.* at 373-74. Instead, on January 26, 2015, the

[5] Respondent will discuss and apply § 559.036.8 further in Point 2, *infra.* But that analysis is in the alternative to Point 1, where Respondent contends he is acting within the term of probation, and thus has no need of an extension under § 559.036.8.

sentencing court began to schedule court dates, the first of which was February 17, 2015, for "case review." *Id.* At this court date, and the next one in March of 2015 for "setting of hearing," the probationer appeared. *See id* at 374.

Yet, the sentencing court did not conduct a probation revocation hearing on either of these dates. *Id.* April 1, 2015, came and went. *See id.* Only after the probationer made seven personal appearances did the state finally file a motion to revoke probation, apparently in response to a motion for discharge made by the probationer's counsel in September of 2015. *Id.* By that time, over five months had passed since the probationer's discharge date of April 1, 2015. *See id.* The sentencing court nonetheless refused to discharge the probationer. *Id.*

After granting a preliminary writ and reviewing these facts, this Court made the writ permanent, because the probationer should have been discharged on April 1, 2015. *Id.* at 375. The Court stated, "A sentencing court or prosecuting attorney must be notified no less than sixty days prior to the date of final discharge, *and if no action is taken,* the offender shall be discharged. *Id.* (emphasis added) (citing § 217.703.10). The Court then immediately applied this rule to the following material facts: (i) the sentencing court had been notified twice that the probationer would be discharged on April 1, 2015, if he remained compliant; (ii) no more violation reports were filed after that notification; and (iii) the state did not file a motion to revoke or suspend probation. *Id.* The absence of a timely motion to revoke or suspend was, therefore, a critical fact. *See id.* Immediately

following this recitation of facts, the Court concluded, "Hence, Amorine complied with his supervision. [He] should have been discharged from probation on April 1, 2015."[6]

Here, the Court should decline to make its writ permanent because, unlike the prosecutor in *Amorine*, the Taney County prosecutor did file a motion to revoke probation before Relator's discharge date. (Ex. O, p. A43.) Relator was placed on probation on December 11, 2014. (Ex. A, p. A1.) Like Amorine, Relator was generally eligible for ECC. And similar to P&P in *Amorine*, P&P here filed violation reports, which noted Relator's earned and optimal discharge dates:

> (i) On June 5, 2017, P&P filed[7] a violation report indicating that Relator's earned discharge date was 01/8/2018; his optimal date was 09/21/2017; and his probation "[e]xpires" 12/10/2019. (Ex. L, pp. A31, A33.)

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[6] Before concluding that the sentencing court had lost statutory authority, the Court in *Amorine* applied § 559.036.8 to determine if the sentencing court's authority had been extended past the discharge date. *See id.* at 375-76. But that issue was ripe only because the Court had found Amorine's probation should have ended on April 1, 2015. *See id.* Respondent addresses this scenario in Point 2, *infra*, but maintains that it should be unnecessary in this case because, in contrast to Amorine, Relator is still ineligible for ECC discharge and his probation has not expired, pending a hearing.

[7] Respondent concedes that the date upon which a report is filed with (i.e., "submitted to") the sentencing court is the relevant date under § 217.703.4. (*See* Rel. Br. at p. 17.)

(ii) On August 1, 2017, P&P filed a violation report indicating that Relator's earned discharge date was 12/20/2017; his optimal date was 10/1/2017; and his probation "[e]xpires" 12/10/2019. (Ex. M, pp. A35, A37.)

(iii) On August 21, 2017, P&P filed a report indicating that Relator's earned discharge date was 12/20/2017; his optimal date was 10/1/2017; and his probation "[e]xpires" 12/10/2019. (Ex. N, pp. A38, A41.)

The violation report filed on August 21, 2017, is the last report submitted by P&P.

Here, in vital contrast to the *Amorine* prosecutor, the Taney County prosecutor almost immediately responded to the August 21 report by filing a motion to revoke probation, on August 22, 2017. (Ex. O, p. A43.) That date preceded all of the discharge dates of which Respondent had received notice from P&P (earned, optimal, or otherwise). It also preceded the March 20, 2018, discharge date identified by Relator as the latest expiration date of probation.

A critical fact in the *Amorine* analysis was that no "action [was] taken," under § 217.703.10 prior to Amorine's discharge date. 490 S.W.3d at 375. More specifically, *Amorine* emphasized that "the state did not file a motion to revoke or suspend probation" prior the discharge date. *Id.* The absence of this "action" meant that Amorine should have been discharged on April 1, 2015. But here, because the Taney County prosecutor did file a motion to revoke probation prior to Relator's discharge date, the state did take "action." Unlike Amorine, Relator failed to reach his discharge date prior to the prosecutor's action

of filing a motion to revoke probation. Thus, Relator was ineligible for ECC discharge on any date following August 22, 2017, until the motion is heard.

Perhaps recognizing how distinguishable *Amorine* is from the case at bar, Relator attempts to salvage his analysis with the following claim: *Amorine* supposedly shows that "action" under § 217.703.10 does not suspend a probationer's earned credits and that an earned discharge date is the expiration date of probation despite such "action." (Rel. Br. at pp. 25-26.) Relator points out that the sentencing court in *Amorine* set the file for "case review" and "setting of hearing" (though not an actual hearing) on dates preceding the discharge date of April 1, 2015. *See* 490 S.W.3d at 373-74. Relator characterizes these docket entries as "action" by the sentencing court. He then notes that this "action" did not ultimately preserve the sentencing court's authority or suspend Amorine's earned credits. Hence, Relator reasons, the Taney County prosecutor's "action" here—filing a motion to revoke probation—did not affect the expiration date of probation, which Relator contends was March 20, 2018. But Relator misreads both the facts of *Amorine* and the precise language of subsection 10.

Subsection 10 states:

> If the sentencing court, the board, or the circuit or prosecuting attorney upon receiving such notice does not take any action *under subsection 5* of this section, the offender shall be discharged under subsection 7 of this section. (emphasis added).

A sentencing court or prosecutor must, therefore, take action "under subsection 5" in order to stave off the pending discharge date. Subsection 5 of § 217.703 identifies only a handful of specific "actions" that a prosecutor or court can take:

> Credits shall not accrue during any calendar month in which a violation report has been submitted or a motion to revoke or motion to suspend has been filed, and shall be suspended pending the outcome of a hearing, if a hearing is held. If no hearing is held or the court or board finds that the violation did not occur, then the offender shall be deemed to be in compliance and shall begin earning credits on the first day of the next calendar month following the month in which the report was submitted or the motion was filed. All earned credits shall be rescinded if the court or board revokes the probation or parole or the court places the offender in a department program under subsection 4 of section 559.036. Earned credits shall continue to be suspended for a period of time during which the court or board has suspended the term of probation, parole, or release, and shall begin to accrue on the first day of the next calendar month following the lifting of the suspension.

Subsection 5 describes only the following "actions" by the sentencing court: (i) holding a hearing on the state's motion to revoke or suspend probation, at which the court may find that no violation occurred, or may revoke the offender's probation, or may place the offender in a prison program; and (ii) suspending the term of probation. The only action a prosecutor can take under subsection 5 is filing a motion to revoke or suspend. Nowhere does subsection 5 mention the mere scheduling of a court date for "case review" or for "setting of hearing." These are not "action[s] under subsection 5," and thus they do not disqualify a probationer for final discharge under § 217.703.10.

It is unsurprising, then, that this Court in *Amorine* paid no mind to the sentencing court's scheduling of court dates for "case review" or for "setting of hearing." They are only mentioned in the background section of the opinion, and not in the analysis. *See* 490 S.W.3d at 373-74. The sentencing court in *Amorine* failed to hold a hearing and failed to suspend probation, prior to Amorine's discharge date. Therefore it did not take any "action under subsection 5."

And as discussed above, the prosecutor in *Amorine* likewise failed to take any action under subsection 5, i.e., filing a motion to revoke or suspend probation. This Court's analysis in *Amorine* focused on this fact, and the Court never stated or implied that probation would expire on a discharge date despite timely "action under subsection 5." *See* § 217.703.10. *Amorine* provides no support for Relator's claim that a discharge date still signals the expiration of probation, where the probationer is statutorily ineligible for discharge on that date due to a pending motion to revoke.

In summary, the Court should decline to make its writ permanent because Relator is not entitled to an order prohibiting Respondent from conducting a hearing on the State's pending motion to revoke. Relator, whose five-year term of probation began on December 11, 2014, is currently ineligible for ECC discharge due to the state's timely motion to revoke probation. All of his credits have been suspended, and his original probation term has not expired. Respondent retains statutory authority over Relator's case. Thus, the Court should decline to make its preliminary writ permanent.

2. Relator is not entitled to an order prohibiting Respondent from conducting a hearing on the State's pending motion to revoke Relator's probation, because Respondent retains statutory authority over Relator's case even if Relator's probation has expired, in that Respondent manifested an intent to conduct a revocation hearing prior to the expiration of probation and made every reasonable effort to notify Relator and conduct a hearing prior to the expiration of probation. (Responds to Point 1 of Relator's Brief.)

Relator's request for writ relief is built on the premise that Relator's probation expired "no later than" March 20, 2018. (Rel. R. 84.20 letter.) Point 1 of Respondent's brief disputes this premise. But even if this Court finds that Relator's probation expired before Respondent scheduled the case for probation violation hearing on September 5, 2018, Respondent still retained authority over Relator under § 559.036.8, which states:

> The power of the court to revoke probation shall extend for the duration of the term of probation designated by the court and for any further period which is reasonably necessary for the adjudication of matters arising before its expiration, provided that some affirmative manifestation of an intent to conduct a revocation hearing occurs prior to the expiration of the period and that every reasonable effort is made to notify the probationer and to conduct the hearing prior to the expiration of the period.

"Section 559.036.8 recognizes that not all probation-related matters can be resolved during the probationary period." *Zimmerman,* 514 S.W.3d at 608. "[S]ection 559.036.8 provides that the trial court's authority may extend beyond the probationary term when two conditions are met. First, the court must have manifested its intent to conduct a revocation hearing during the probation term. Second, it must make every

reasonable effort to notify the probationer and hold the hearing before the term ends." *Amorine*, 490 S.W.3d at 375 (internal quotation omitted).

Because Respondent issued a capias warrant and the State filed a motion to revoke in August of 2017, Respondent timely manifested his intent to conduct a revocation hearing, as Relator concedes. (Rel. Br. at p. 18) Relator also appears to concede that he was put on notice of Respondent's intent. (Rel. Br. at pp. 18-19); *see also* (Rel. Ex. O, p. A44) (containing a copy of the certificate of service in the State's motion to revoke).

Given that Respondent manifested a timely intent and fulfilled the notice requirement, the remaining issue is whether Respondent made every reasonable effort to conduct a hearing before the probation term expired. For this analysis, it is immaterial whether that expiration date was March 20, 2018, as calculated by Relator, or December 20, 2017, which is the earliest "earned" discharge date identified by P&P. (Ex. N.)[8]

"[Relator] bears the burden of demonstrating the circuit court failed to make every reasonable effort to conduct the probation revocation hearing prior to the expiration of the probationary period." *Zimmerman*, 514 S.W.3d at 608. The probationer does not have to prove he was prejudiced by the delay. *Id.* Likewise, the length of delay between the expiration of probation and the hearing is not, by itself, the issue. *See id.* (internal citation omitted). The issue is reasonable effort. *See* § 559.036.8.

[8] P&P never asserted that Relator's probation actually expired on the earned discharge date of December 20, 2017. Page one of all the P&P reports consistently indicate that Relator's probation "[e]xpires: 12/10/2019." (Rel. Ex. B, C, D, E, G, K, L, M, N.)

In some cases this Court has found no "reasonable effort" because the sentencing courts repeatedly squandered opportunities to hold hearings despite the appearance of the probationer at multiple court dates. *See, e.g., State ex rel. Strauser v. Martinez,* 416 S.W.3d 798, 802 (Mo. banc 2014) ("Instead of ruling on the motion [to revoke] . . . the trial court continued the hearing 37 times . . ."); *Amorine*, 490 S.W.3d at 376. Somewhat similarly, in a case involving a probationer imprisoned on other charges, the sentencing court had actual knowledge of the probationer's whereabouts, but ignored his repeated requests for a disposition and for the appointment of counsel. *See Zimmerman*, 514 S.W.3d at 611-12.

In *Amorine*, which Relator discussed in Part 1, this Court also applied § 559.036.8, with a focus on the issue of reasonable effort. 490 S.W.3d at 376. The probationer there had appeared in front of the sentencing court twice, before his probation term ended on April 1, 2015. *Id.* at 374. Without any explanation, the sentencing court failed to schedule, much less conduct, a revocation hearing before that date. *See id.* At the second appearance, the case was set for revocation hearing, but not until May 19, which was past the end of the probation term on April 1, 2015. *See id.*

After the probation term ended, the sentencing court "passed on holding a revocation hearing six additional times." *Id.* at 376. "For each time [the court] passed on the trial setting, the state and Amorine appeared in person. Further, there was no explanation as to any reason [the court] continued to pass the matter indefinitely, which might have shown every reasonable effort was made. [The court] had *multiple opportunities* to conduct a probation revocation hearing, yet failed to do so." *Id.*

(emphasis added). This Court held that the sentencing court had exceeded its authority by "continuing Amorine's probation revocation hearing indefinitely after [he] should have been discharged." *Id.*

Here, unlike the court in *Amorine*, Respondent did not squander multiple opportunities to hold a hearing after Relator appeared before him, and the record justifies what little delay occurred after Relator's first appearance. When Relator filed a *pro se* motion for revocation of his probation on June 14, 2018, Respondent promptly issued a writ of habeas corpus and had Relator brought before Respondent, with counsel, on July 19, 2018. (Ex. A, p. A4). That was Relator's first appearance before Respondent since the filing of the last violation report and motion to revoke in August of 2017. Although Respondent then set the case for "plea" on July 31 rather than revocation hearing, the record in this case provides an explanation for this short delay, unlike the record in *Amorine.*

"Plea" in this context referred to an admission of probation violation, which was a reasonable setting given Relator's previously-filed *pro se* request for Respondent to revoke Relator's probation. (Rel. Ex. P, p. A45.) It was also reasonable for Respondent to schedule the "plea" rather than immediately revoking Relator's probation at his first appearance. Relator had been represented by counsel since September of 2017, but counsel had taken no action after filing his entry. Relator's request for revocation in June of 2018 was a *pro se* filing. It would have been inappropriate and unethical for Respondent to rule on the *pro se* motion filed by Relator, without affirmative announcement by Relator's counsel. Relator's counsel appeared with Relator on July 19,

2018. But so far as the record reveals, counsel for Relator did not provide Respondent with any clarification or make any announcement on July 19, 2018.

In the face of these equivocal facts, Respondent struck a prudent balance when he continued Relator's case less than two weeks out for "plea." It meant Relator's request for revocation would be addressed with reasonable promptness, but Relator would have time to consult with counsel before the next court date of July 31, 2018.

At that appearance on July 31, when Relator failed to actually admit a violation, Respondent set the case for a probation violation hearing on September 5, 2018. But before that date, Relator's counsel filed his motion for discharge, and the state filed a motion for continuance due to the unavailability of a witness. On September 5, Respondent continued the revocation hearing one week, to September 12, and also set a hearing on Relator's motion. The record therefore provides an explanation for this delay, and in any event, it was obviously not the basis of Relator's motion. Lastly, on September 12, the record indicates that Relator's counsel requested a continuance, which Respondent granted.[9] Before the next court date of September 19, 2018, this Court's preliminary writ was issued.

Compared to the silent record of *Amorine*, the record here provides an intelligible outline of Respondent's efforts and reasons for any delay once Relator appeared before Respondent. First, unlike the sentencing court in *Amorine*, Respondent set the case for a

[9] Portions of delay affirmatively requested by the probationer are unlikely to deprive the sentencing court of authority. *See Miller v. State*, 558 S.W.3d 15, 22 (Mo. banc 2018).

violation hearing at Relator's second appearance on the parties' motions to revoke. Respondent did not squander two personal appearances by the probationer prior to the expiration of probation, or six personal appearances after, in contrast to the *Amorine* sentencing court. Even more importantly, the record here provides a reasonable explanation for the minimal delay in conducting a hearing once Relator arrived. Unlike *Amorine*, the Court here should find that Respondent made every reasonable effort to hold a timely hearing once Relator was before him.

That being said, *Amorine* does not address an earlier portion of delay that occurred in this case: the time that elapsed between the (purported) expiration of probation and Relator's first appearance before Respondent on July 19, 2018. Relator was incarcerated during this period, first in the Barry County Jail starting in August of, 2017, and then in prison until his *pro se* motion was filed. Though *Amorine* did not deal with an incarcerated probationer, the Court took it up in *State ex rel. Zimmerman v. Dolan*.

In *Zimmerman,* this Court focused on the question of reasonable effort under § 559.036.8, where the probationer was imprisoned on a new offense and repeatedly requested a disposition of his probation case. 514 S.W.3d at 608. After being placed on a term of probation in Missouri on September 8, 2000, Zimmerman was convicted of a new offense in Indiana and sent to prison there in September, 2003. *Id.* at 605. Also in 2003, the Missouri circuit court issued a capias warrant at the request of P&P, and in response to the Indiana charges. *Id.*

Beginning in 2005 and continuing into 2011, the imprisoned probationer submitted four *pro se* motions with the circuit court, which informed the court of the

probationer's location and desire for a hearing on the probation violation. *Id.* at 605-06. In the first and third of these motions, the probationer also clearly requested counsel be appointed to assist him, and implicitly reiterated his request in his second motion. *Id.* at 606, 612 n.2 (noting that Zimmerman "clearly" requested counsel in two motions and "arguably" in a third.)

Although the circuit court eventually suspended the probation term, it took no action in response to the first three requests for a disposition or counsel. *Id.* Only after the fourth request did the circuit court direct the prosecutor to prepare a writ to bring the probationer to court, and the sheriff's department to make the capias warrant extraditable. *Id.* at 606. This occurred in 2011. *Id.* But the circuit court never followed up when its directives were disregarded, and in any event, the probation term had long since expired. *See id.* Nonetheless, when the probationer was finally paroled from Indiana in 2016, the Missouri circuit court set the matter for revocation hearing. *Id.* at 606-07. This Court issued a preliminary writ. *Id.* at 607.

After review of these facts, this Court made its writ permanent because the circuit court had lost its authority to conduct a revocation hearing. *Id.* at 612. The Court focused on two sets of facts. First, the circuit court had actual knowledge of Zimmerman's location, his desire for a disposition, and his requests for counsel because Zimmerman directly and repeatedly communicated this information to the court. *Id.* at 609 ("Zimmerman made his whereabouts known early and often . . . in an effort to . . . resolve the probation violation").

Second, the circuit court had the means to grant Zimmerman's requests. *Id.* at 610-11 (describing evidence that Indiana would have transferred the probationer to Missouri custody if the circuit court had issued a writ of habeas corpus.); *see also* 612 & n.2 (noting that the circuit court could have appointed counsel for Zimmerman under § 559.036.6, but did not do so until 2016).

Together these facts showed that the circuit court had both actual knowledge of Zimmerman's location and requests because Zimmerman communicated that information to the court repeatedly, and the circuit court had the means to grant one or both of Zimmerman's request, but for the most part it chose not to do so. *Id.* at 610-12. Although the circuit court eventually directed the prosecutor to prepare a writ after Zimmerman's fourth *pro se* motion, the court failed to enforce that order after the prosecutor omitted to file the paperwork. *Id.* at 612.

The final straw for this Court was the absence of any explanation for why the circuit failed to act despite its knowledge and ability. *See id.* This Court stated:

> At no point in these proceedings [did] the circuit court ever set forth a single reason or explanation as to why it had authority to hold the hearing despite the almost eleven-year delay between the expiration of Zimmerman's probationary period and his revocation hearing.

Id. Therefore, the Court made its writ permanent and ordered the probationer to be discharged. *Id.*

Here, unlike the court in *Zimmerman*, Respondent promptly reacted to Relator's request for disposition. Relator filed his *pro se* motion to revoke probation on June 14, 2018. This motion notified Respondent of Relator's whereabouts in the Department of

Corrections and desire to dispose of his probation violation, like the first *pro se* pleading in *Zimmerman.* But unlike Zimmerman, Relator only had to file one such pleading, and he only had to wait two weeks for a response. Unlike the prosecutor's office in *Zimmerman*, which ignored a court order, the Taney County prosecutor filed a motion for a writ of habeas corpus only two weeks after Relator filed his motion. Unlike the *Zimmerman* court, which dallied for eleven years, Respondent promptly sustained the prosecutor's motion and had Relator brought before Respondent on July 19, 2018, less than five weeks after the receipt of Relator's motion.

Moreover, unlike Zimmerman, Relator had the benefit of counsel almost from the beginning of this process. The State's motion to revoke was filed on August 22, 2017, the same day that Respondent issued a capias warrant for Relator. Appointed counsel entered his appearance for Relator on September 7, 2017. Unlike Zimmerman, Relator had representation from virtually the outset of the probation proceeding. That is not to say that the mere presence of counsel creates an unwritten exception to § 559.036.8 or relieves the sentencing court of all responsibility. But the entry of appointed counsel should have been one reasonable step towards a timely disposition. Counsel's subsequent inaction is, at least, not attributable to Respondent.

Overall, Respondent's behavior stands in stark contrast to the judicial dawdling or indifference that led this Court to find a lack of reasonable effort by sentencing courts in

Amorine, *Zimmerman*, and similar cases.[10] Respondent's efforts to conduct a timely revocation hearing were reasonable, and satisfy § 559.036.8. Respondent's statutory authority over Relator is intact, and this Court should decline to make its writ permanent.

Or instead the Court can interpret § 559.036.8's "reasonable effort" prong as Relator would prefer: by requiring circuit courts to continuously monitor their probationers jailed in other jurisdictions on new, still-pending charges. (Rel. Br. at p. 19) (suggesting that Respondent and/or the State track probationers through the "MOVANS" system or "Track this Case" feature on casenet.) With one eye glued to MOVANS and the other on an uncertain expiration-*cum*-discharge date, the circuit courts still have one more task, in Relator's vision of § 559.036.8. The circuit courts must also periodically pillage each others' jails via uninvited writs of habeas corpus, even if a probationer's charges are still pending and the probationer has expressed no desire whatsoever to be whisked away before an approaching court date. This scenario serves as a useful reminder that § 559.036.8 does not require "every effort" but rather "every *reasonable* effort." (emphasis added.)

[10] Relator mentions *State ex re. Dotson v. Holden*, 416 S.W.3d 821 (Mo. App. S.D. 2013). There the Southern District found that a sentencing court failed to comply with § 559.036.8, because the court *knew* the probationer was in prison and did nothing for nineteen months. *Id.* at 824. Unlike the *Dotson* court, Respondent issued a writ and had Relator transported from prison, to appear before Respondent with counsel, within five weeks after Respondent learned Relator was in prison.

Apart from the effect on sentencing courts, Relator's newfound interpretation of § 559.036.8 would also work to the disadvantage of both prosecutors and probationers. When a probationer is in another jurisdiction's jail on a new charge, both the probationer and that jurisdiction's prosecutor often have a similar interest in efficiently moving the case towards a disposition of the new charge first. For some probationers, that disposition may be a dismissal or acquittal on the new charge: a result that any probationer would desire before appearing in front of the judge who had previously placed that person on probation. For a probationer who pleads guilty or is found guilty, a disposition of the new charge (before the probation violation) may often still be advantageous, because the sentencing court on the "new" charge will determine whether its sentence will run concurrently or consecutively to the older sentence(s) that may have been suspended by the court that first placed the defendant on probation.

Under any realistic and fair interpretation of "reasonable effort," Respondent retains statutory authority over Relator's case. Respondent acted as soon as he discovered that Relator had disposed of his Barry County charges and wanted a disposition of his probation case. Relator was never ignored, denied counsel, or reset without reason. On these facts, Relator has failed to meet his "burden of demonstrating the circuit court failed to make every reasonable effort to conduct the probation revocation hearing prior to the expiration of the probationary period." *Zimmerman*, 514 S.W.3d at 608. This Court should decline to make its writ permanent.

CONCLUSION

Relator has not met his burden of showing that he is entitled to a permanent writ of prohibition, for two independent reasons. One is that, under § 217.703, Relator's probation has not expired. The other is that Respondent has, in any event, satisfied the requirements of § 559.036.8 In so doing, Respondent retains his statutory authority over Relator notwithstanding the passage of any putative expiration date. The Court should decline to make its writ permanent.

THEREFORE, Respondent prays this Court will enter an order quashing its preliminary writ of prohibition.

Respectfully submitted:

/s/ Thomas Kondro

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CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify that on this 7th day of January, 2019, true and correct copies of the foregoing brief were delivered to Respondent and James Egan, attorney for Relator, through the Missouri eFile system.

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CERTIFICATE OF COMPLIANCE

I, the undersigned counsel, hereby certify that attached brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using Microsoft Word, Office, in Times New Roman size 13 point font. Excluding the cover page, signature block, this certification, and the certificate of service, this brief contains 10, 230 words, which does not exceed the 27,900 words allowed for a Respondent's brief.

/s/ Thomas Kondro

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