No. SC90222

In the
Supreme Court of Missouri

STATE OF MISSOURI *ex rel.* SKYLAR M. MANION,

Relator,

v.

THE HONORABLE R. BRENT ELLIOTT,

Respondent.

Original Proceeding in Prohibition
from Daviess County Circuit Court
Forty-Third Judicial Circuit

RESPONDENT'S BRIEF

CHRIS KOSTER
Attorney General

JAYNE T. WOODS
Assistant Attorney General
Missouri Bar No. 57782

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
jayne.woods@ago.mo.gov

ATTORNEYS FOR RESPONDENT
HONORABLE R. BRENT ELLIOTT

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JURISDICTIONAL STATEMENT

This Court has jurisdiction to issue original remedial writs under Article V, § 4 of the Missouri Constitution.

STATEMENT OF FACTS

On April 4, 2006, Relator pled guilty in Daviess County Circuit Court before Judge Stephen K. Griffin to three counts of second-degree arson, § 569.050, RSMo 2000, and one count of attempted second-degree arson §§ 569.050 and 564.011, RSMo 2000. (Ex. A4).

On October 3, 2006, Judge Griffin suspended the imposition of Relator's sentence and placed him on a five-year probationary term. (Ex. A5). On September 18, 2007, the prosecutor filed a motion to revoke Relator's probation with notice to Relator, and the trial court, Judge Warren L. McElwain presiding, scheduled a probation violation hearing for October 16, 2007. (Ex. A5).

On October 16, 2007, Judge McElwain granted Relator a continuance until November 20, 2007, to obtain counsel. (Ex. A5). On November 20, 2007, a probation violation hearing was held, and Judge McElwain found that Relator violated a condition of his probation, but allowed Relator to continue on probation with an additional condition that Relator serve an additional 35 days of "Shock Probation." (Ex. A6).

On December 5, 2007, the prosecutor filed a second application to revoke Relator's probation, and Judge McElwain scheduled a violation hearing for December 18, 2007. (Ex. A6). Relator obtained a continuance on the hearing until January 22, 2008. (Ex. A6).

On January 22, 2008, Relator obtained a second continuance until March 18, 2008. (Ex. A6). On March 18, 2008, Judge McElwain revoked Relator's probation, following a hearing, and sentenced Relator to five years imprisonment. (Ex. A7). Judge McElwain suspended the execution of that sentence and placed Relator on another five-year probationary term. (Ex. A7).

On April 22, 2008, Judge McElwain held a violation hearing, where Relator admitted violations of the conditions of his probation, but Judge McElwain again continued Relator's probation. (Ex. A8).

On February 1, 2009, Judge Brent Elliott (Respondent) was assigned to Relator's case after Respondent was elected to replace Judge Griffin following Judge Griffin's retirement. (Ex. A8). On March 25, 2009, Respondent issued a warrant for Relator's arrest. (Ex. A8).

A probation violation report was filed on March 30, 2009, and Respondent scheduled a hearing for April 9, 2009. (Ex. A8). The warrant was served on Relator on March 31, 2009, and on April 6, 2009, the prosecutor filed a Third Application to Revoke Probation. (Ex. A8).

On April 9, 2009, Relator obtained a continuance of the hearing until May 7, 2009. (Ex. A8). Another probation violation report was filed on April 23, 2009. (Ex. A9).

On April 27, 2009, counsel for Relator entered his appearance and filed an application for change of judge. (Ex. A9). On May 7, 2009, Respondent denied Relator's application. (Ex. A9). Relator subsequently filed a writ petition in this Court, and this Court issued a preliminary writ of prohibition, prohibiting Respondent from taking further action in this case.

ARGUMENT

Relator is not entitled to an order prohibiting Respondent from taking action in Relator's probation proceedings because Respondent was under no duty to grant Relator's untimely application for an automatice change of judge in that Rule 51.05 does not apply to probation violation proceedings, which are merely ancillary to the underlying criminal conviction, and Relator's motion was seventy-five days late under the rule this Court established in *State ex rel. Horton v. House,* 646 S.W.2d 91 (Mo. banc 1983).

Relator suggests that, pursuant to Rule 51.05, he had 30 days from the time the prosecutor filed the third motion to revoke probation in which to request an automatic change of judge. (Rel. Br. 9-10). Because the third motion to revoke was filed on April 6, 2009, Relator argues that his motion filed on April 27, 2009, was timely and that the trial court was required to sustain it. (Rel. Br. 10). To support his argument, Relator relies on the Western District's opinion in *State ex rel. Cochran v. Andrews*, 799 S.W.2d 919 (Mo. App. W.D. 1990). But because *Cochran* was incorrectly decided and is contrary to statute and more recent case law, this Court should quash the preliminary writ of prohibition ordered in this case.

A. Rule 51.05 is inapplicable to probation violation proceedings because they are merely ancillary to the underlying criminal conviction.

"A violation of the conditions [of probation] is not a criminal offense, and a proceeding to revoke obviously is not a criminal prosecution within the constitutional provisions." *State v. Brantley*, 353 S.W.2d 793, 796 (Mo. 1962). Because a probation violation hearing is not a criminal prosecution, courts have struggled with categorizing probation violation hearings and determining which rules apply when a defendant seeks a change of judge. Citing *Cochran*, Relator argues that Rule 51.05 applies. But, because a violation hearing is merely ancillary to the criminal case, Rule 51.05 is inapplicable.

Rule 51.05 provides, in pertinent part:

> A change of judge shall be ordered in any civil action upon the timely filing of a written application therefor by a party. . . . The application must be filed within 60 days from service of process or 30 days from the designation of the trial judge, whichever time is longer. If the designation of the trial judge occurs less than thirty days before trial, the application must be filed prior to any appearance before the trial judge.

Rule 51.05(a)-(b).

The phrase "civil action" identified in Rule 51.05 refers only to independent, original actions; an automatic change of judge under the rule is not available in proceedings that are merely ancillary to the original action. *Dagley v. Dagley*, 270 S.W.2d 553, 560 (Mo. App. E.D. 1954); *Hayes v. Hayes*, 252 S.W.2d 323, 327 (Mo.

1952). In fact, the rule specifically indicates that "motions to modify child custody, child support, or spousal maintenance filed pursuant to chapter 452, RSMo, are not an independent civil action unless the judge designated to rule on the motion is not the same judge that ruled on the previous independent civil action." Rule 51.05(a). A probation violation hearing, like a motion to modify, is merely ancillary to the criminal conviction and does not constitute a "civil action" as contemplated by the rule simply because it is civil in nature.

This Court has identified several factors for a court to examine in determining whether a proceeding constitutes a "civil action," entitling a party to an automatic change of judge under the applicable rule. *Hayes*, 252 S.W.2d at 327-328. Those factors are: (1) whether the movant bears a new burden of proof; (2) whether new relief is sought; (3) whether new rights based upon new facts are adjudicated; (4) whether a final judgment issues from the proceeding, affording appellate review; and (5) whether a motion for new trial is required to preserve appellate review. *Id.* "[T]he real test is whether it is the kind of independent proceeding which does in fact adjudicate rights of individuals, irrespective of and not conditional upon what is provided in the original decree." *State ex rel. B.C.C. v. Conley*, 568 S.W.2d 605, 608 (Mo. App. K.C.D. 1978). Here, under the factors laid out in *Hayes*, a probation violation hearing does not constitute a "civil action" pursuant to Rule 51.05. Thus, that rule is inapplicable.

As to the burden of proof, it is different in a probation violation proceeding. Although the State still bears the burden of proving that the defendant violated the conditions of his probation, that burden is substantially lower than that in the criminal case. "The degree of proof necessary for parole or probation revocation is less than that required to sustain a criminal conviction." *State v. Wilhite*, 492 S.W.2d 397, 399 (Mo. App. Spr. D. 1973). "The hearing judge need only be reasonably satisfied tha[t] the terms of the parole have been violated[.]" *Id*. Thus, this factor weighs in favor of finding violation proceedings to be a "civil action."

Regarding the relief sought, it remains unchanged from the criminal case, as the State is still seeking to punish the defendant for his violations of the criminal law. Where imposition of the defendant's sentence was previously suspended, the State is, in fact, seeking the exact same relief as sought following the adjudication of guilt – that the defendant be penalized for his crimes. And in cases where the execution of the sentence was suspended, the State is merely asking the court to execute a previously imposed sentence. Consequently, this factor weighs in favor of finding violation proceedings to be ancillary to the criminal case.

As to the rights adjudicated, unlike the underlying criminal proceeding, there are no substantial rights being determined in a probation violation hearing. Contrary to Relator's argument that "substantial rights and liberties are at stake" in this context, (Rel. Br. 6), a probationer "surrenders no vested right, privilege or consideration for

his freedom." *Brantley*, 353 S.W.2d at 796. "His release is a matter of grace, not a right to be demanded." *Id*. The substantial rights present during the criminal proceeding are no longer implicated in the probation violation context, as it is presumed that those rights were already determined in the criminal matter. "When an accused person enters a plea of guilty to a criminal charge and that plea has been accepted by the court . . . , it is to be presumed that he has been accorded all the rights guaranteed him by constitutional provisions of the Federal and State constitutions." *Id*. (internal citations omitted). Therefore, this factor also weighs in favor of finding violation proceedings to be ancillary to the criminal case.

Regarding appellate review, "there is no right to appeal a probation revocation order." *State ex rel. Zahnd v. Shafer*, 276 S.W.3d 368, 369 (Mo. App. W.D. 2009). "[V]alidity of the probation revocation order . . . can only be reviewed through an extraordinary writ." *State ex rel. Poucher v. Vincent*, 258 S.W.3d 62, 64 (Mo. banc 2008). And because there is no right to appeal a probation revocation order, there is no corresponding need to file a motion for new trial following a probation revocation hearing in order to preserve claims for appellate review. *See e.g.* Rules 29.11 and 78.07. Thus, these factors also support a determination that violation proceedings are simply ancillary to the criminal case.

Under the *Hayes* factors, only one – a different burden of proof – weighs in favor of a probation violation proceeding constituting a "civil action" as contemplated

by Rule 51.05. The remaining four factors weigh in favor of finding a violation hearing to be merely ancillary to the underlying criminal case.

In reaching a contrary conclusion, the *Cochran* court implicitly found that a probation violation hearing constituted a "civil action" under Rule 51.05, which was initiated when the prosecutor filed the motion to revoke the defendant's probation. *Cochran*, 799 S.W.2d at 923. But in doing so, the court did not evaluate a probation violation proceeding under the *Hayes* factors. Rather, the court drew a distinction between "judicial" and "ministerial" functions, finding that "[t]he [change of judge] rules contemplate a case or controversy at issue before a judicial officer who will exercise the court's judicial function." *Id*. at 922. The court determined that "[n]either rule applies to a ministerial function[.]" *Id*.

In *Cochran*, the judge that had presided over the probationer's underlying criminal case left office and was succeeded by Judge John Andrews. *Id*. at 920. After Judge Andrews took over, he commanded the probationer to appear before him on September 11, 1989, for a "probation review." *Id*. During the hearing, Judge Andrews questioned the probationer about how her probation was going, and he then concluded the hearing by announcing that she would be "continued on probation." *Id*. at 920-921. On November 1, 1989, the prosecutor filed a motion to revoke the probationer's probation. *Id*. at 921. Eight days later, the probationer filed an application for an automatic change of judge, which Judge Andrews subsequently

denied. *Id*. The probationer filed a writ of prohibition to prevent Judge Andrews from further involvement in the case. *Id*. In response, the State argued that the motion was untimely because the time period for filing an automatic change of judge began to run on September 11, 1989, when the probationer first appeared before Judge Andrews. *Id*. The Court of Appeals determined that the probationer was entitled to an automatic change of judge under Rule 51.05 once the prosecutor filed a motion to revoke the probationer's probation on November 1, 1989. *Id*. at 923.

In making this determination, the court relied on *Moore v. Stamps*, 507 S.W.2d 939 (Mo. App. St.L.D. en banc 1974), for the proposition that "[b]efore a court can revoke probation, a motion must be filed to invoke the court's jurisdiction to revoke probationer's probationary status." *Cochran*, 799 S.W.2d at 922. The court then determined that it was only at a violation hearing following a motion to revoke that a court exercises its judicial function, which implicated the automatic change of judge rules. *Id*. But there are two problems with the analysis in *Cochran*: first, it failed to examine the *Hayes* factors in determining whether a probation violation proceeding constituted a "civil action" under Rule 51.05, and second, *Moore v. Stamps* does not stand for the proposition that a court lacks jurisdiction to revoke probation unless and until the prosecutor files a motion to revoke.

In determining whether a revocation hearing is a new "civil action" or merely ancillary to the criminal case, the factor test outlined in *Hayes* is a better approach

than the *Cochran* court's "judicial" versus "ministerial" evaluation. A violation hearing does not determine any new relief, it does not adjudicate any new rights, and the outcome is not subject to appellate review. Thus, inasmuch as the violation hearing only determines whether the underlying criminal judgment will be further postponed, executed, or imposed, it is merely ancillary to the criminal case.

"The purpose of a probation revocation hearing is to decide whether the judiciary should rescind its granting of grace to lessen the impact of a criminal sentence." *State v. Sapp*, 55 S.W.3d 382, 384 (Mo. App. W.D. 2001). "If the judiciary rescinds its grace, the independent criminal judgment is in force." *Id*. "The criminal judgment has been there all along, but its effectiveness has been estopped by the judiciary's intervening act of grace." *Id*. Thus, a probation violation hearing is merely ancillary to the underlying criminal case, and Rule 51.05 has no application in this context.

Even the panel that decided *Cochran* could not come to an agreement on the question of whether violation proceedings were ancillary or a new "civil action." In fact, the dissent argued that probation violation proceedings are *not* a new civil action, subject to the automatic change of judge rules:

> It is already clear that Rule 32.07 governs the change of judge procedure in criminal actions and that Rule 51.05 governs in civil actions. It is also clear that a revocation of probation does not constitute an action separate from the

original trial or plea that culminated in the sentence of probation, but rather extends from that adjudication.

Cochran, 799 S.W.2d at 925 (Shangler, J., dissenting). The dissent went on to note that "A probation [proceeding] is not a civil action, but a civil proceeding incident of a criminal conviction. Nor is a revocation of probation, which may result in a criminal sentence, a civil action." *Id*. at 926 (internal citations omitted). Because a probation violation proceeding is not a "civil action," Rule 51.05 has no application, and Relator was not entitled to an automatic change of judge under that rule.

Additionally, the *Cochran* majority's reliance on *Moore v. Stamps* for the proposition that a trial court does not obtain jurisdiction to revoke probation until the prosecutor files a motion to revoke was misplaced. The *Moore* decision determined what process was due a probationer before his probationary status could be revoked. *Moore*, 507 S.W.2d at 944 ("The issues raised are of first impression in this state and the cause is of extreme importance *as to the procedures and requirements [that] are to be followed in probation revocation*." (emphasis added)). *Moore* made no determinations about the court's jurisdiction to revoke, only the procedures required under the due process clause to do so.

Furthermore, the *Cochran* majority's (and Relator's) characterization of the trial court's authority to revoke probation as "jurisdictional" is no longer valid in light of this Court's recent opinion in *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249,

253-254 (Mo. banc 2009), where this Court recognized that the Missouri Constitution vests circuit courts with subject matter jurisdiction over "all matters, civil and criminal." *Id*. This Court refused to recognize a concept, such as that posed by the *Cochran* opinion, of "jurisdictional competence," which is really a question of "the court's authority to render a particular judgment in a particular case." *Id*. at 254. Because the *Cochran* majority's holding was essentially a question of the court's authority and not one of jurisdiction, that holding is no longer good law.

Moreover, the *Cochran* opinion's question of the court's authority to revoke probation was at odds with the very statute the court relied on, which indicated that the trial court possessed the authority *at any time* to revoke a probationer's probation upon a violation of the conditions of that probation. *Cochran*, 799 S.W.2d at 921 (citing § 217.765, RSMo 1986, which has since moved to § 559.100, RSMo 2000).

Section 559.100.2, RSMo 2000, provides that "[t]he circuit court shall have the power to revoke the probation or parole previously granted and commit the person to the department of corrections," and that "[t]he probation or parole may be revoked for failure to pay restitution or for failure to conform his behavior to the conditions imposed by the circuit court." Section 559.100.2, RSMo 2000. There is nothing in the statute requiring the prosecutor to file a motion to revoke probation before the court has the power to do so. Thus, even if Rule 51.05 applied to violation proceedings, the timeline would not begin at the filing of a motion to revoke, as one is

not required. As the dissent in *Cochran* recognized, typically, "[a] peremptory disqualification of judge not invoked in the criminal action under Rule 32.07, therefore, is lost to the litigant at the revocation of the probation entered as a sentence in that criminal action." *Cochran*, 799 S.W.2d at 925 (Shangler, J., dissenting).

Because probation revocation proceedings are simply ancillary to the underlying criminal conviction, they do not constitute a new "civil action" for purposes of Rule 51.05's provision for an automatic change of judge. Consequently, Relator was not entitled to a change of judge under this rule, and Respondent acted wholly within his authority to deny Relator's motion.

B. Relator was entitled to a change of judge pursuant to this Court's holding in *State ex rel. Horton v. House*, 646 S.W.2d 91 (Mo. banc 1983), but his motion was still untimely.

The *Cochran* dissent recognized that, pursuant to this Court's opinion in *State ex rel. Horton v. House*, 646 S.W.2d 91 (Mo. banc 1983), the timelines laid out in Rule 32.07 "nevertheless yield[] where the judge who imposes the sentence of probation and the judge who administers the term of probation are not the same." *Cochran*, 799 S.W.2d at 925 (Shangler, J., dissenting). The *Cochran* dissent indicated that in such a situation, a timeline for filing a motion for change of judge must be determined. *Id*. at 926. The dissent determined that Rule 51.05's deadlines applied by analogy and argued that the deadline should be thirty days after the new judge is

designated. *Id*. The dissent was correct that a timeline must be determined for an application for change of judge pursuant to the *Horton* exception, but the applicable time limit in this case is that laid out in Rule 32.07, not 51.05, as the *Cochran* dissent suggested.

In *Horton*, the relator had pled guilty before Judge Crouch in Wright County, and Judge Crouch placed the relator on probation. *Horton*, 646 S.W.2d at 92. At some point, Wright County became part of a new judicial circuit, in which Judge House (the respondent) presided. *Id*. The prosecutor subsequently filed a motion to revoke the relator's probation, which incited a controversy over which judge "properly had jurisdiction over the revocation proceeding." *Id*. The respondent, believing he had jurisdiction, designated himself on March 29, 1982, as judge over the revocation proceedings. *Id*. Two days later, the relator filed a request for change of judge. *Id*. The respondent deferred ruling on the request, so as to allow the relator to file a writ of prohibition, and indicated that he intended to deny the request if no writ issued. *Id*.

On the writ proceedings, this Court discussed both the civil and criminal change of judge rules, but made no determination as to which was applicable to the case before it. *Id*. Instead, this Court determined that the relator was entitled to a change of judge based upon the circumstances, for if the relator was not "given an opportunity to peremptorily challenge respondent [at that time], that mean[t] he [would] never

have had any opportunity to disqualify a judge who [would] pass upon whether relator should be imprisoned." *Id.* at 93.

In reaching this conclusion, this Court relied upon a California case, *People v. Smith*, 196 Cal. App. 2d 854 (1962), wherein the defendant filed for a change of judge under the applicable statute after a new judge took over his probation violation proceedings. *Horton*, 646 S.W.2d at 93. The trial court had originally denied the application, finding that it was untimely because the trial had already been concluded, and the modification and revocation of probation proceedings "were all continuations of the original trial and not a separate proceeding or hearing within the meaning of the statute." *Id.* The California court, on appeal, held that legislative intent dictated that

> where a litigant has not previously exercised his privilege under [the statute] he may do so in a proceeding supplemental to the original action as to a judge other than any judge who has previously heard any phase of the matter, provided that he does so before the commencement of the hearing of the supplemental proceedings by such judge and within the time limitations specified in the section.

Id. (quoting *Smith*, 196 Cal. App. 2d at 859). This Court determined that "[t]he same result must be adopted here." *Id.*

While this Court made no explicit determination as to which change of judge rule applied, in adopting the California court's holding, this Court implicitly agreed

that probation violation proceedings are simply "supplemental to the original action." This means that rule 51.05, which is applicable only to new "civil actions" and not those proceedings that are merely ancillary, is inapplicable to probation revocation proceedings. Thus, Relator's motion was governed by Rule 32.07. But because Respondent was not the judge that granted Relator probation, the rule in *Horton* dictates that Relator was entitled to move for a change of judge. Yet his motion was still untimely, and, thus, properly denied by Respondent.

In *Horton*, once this Court determined that the relator was entitled to a change of judge, there was no question but that his request was timely, considering it was filed two days after the new judge was designated. *Id*. Thus, this Court was not faced with the question posed by Relator's position in this case: what time limits apply to a motion for change of judge once a new judge is designated in the probation revocation proceedings?

The *Cochran* dissent contemplated this very situation and determined that Rule 51.05's time limits applied by analogy and argued that the deadline should be thirty days after the new judge is designated. *Cochran*, 799 S.W.2d at 926 (Shangler, J., dissenting). And as the California court determined, a change of judge motion, to be timely following the designation of a new judge, must be "within the time limitations specified in the section." *Horton*, 646 S.W.2d at 93 (quoting *Smith*, 196 Cal. App. 2d at 859). While the *Cochran* dissent was correct in determining that the timeline under

the change of judge rule must be applied to the *Horton* exception, it identified the incorrect rule.

Because probation revocation proceedings are ancillary to the original criminal proceedings, Rule 32.07 should be applicable throughout. Thus, the timeline identified in that rule is also applicable to the *Horton* exception. Rule 32.07 mandates that "[i]f the designation of the trial judge occurs more than ten days after the initial plea is entered, the application shall be filed within ten days of the designation of the trial judge or prior to any commencement of any proceeding on the record, whichever is earlier." Rule 32.07(b).

Here, Respondent became the designated trial judge on February 1, 2009. (Ex. A8). Thus, Relator's application for change of judge, pursuant to *Horton*, was due no later than February 11, 2009. But Relator did not file his application until April 27, 2009, seventy-five days after it was due. Consequently it was untimely and properly denied by Respondent.

Although probation violation proceedings do not constitute a new "civil action" for purposes of Rule 51.05, they are nonetheless civil in nature. It appears that this is what the *Cochran* dissent relied upon in its argument to import the timeline from Rule 51.05. *Cochran*, 799 S.W.2d at 926-927 (Shangler, J., dissenting). Rule 51.05 mandates that an application for an automatic change of judge "must be filed within 60 days from service of process or 30 days from the designation of the trial judge,

whichever time is longer." Relator argues that the 30-day time limit is applicable to his case, but disputes when that 30-day time limit began.

Even if the time limit of Rule 51.05, which plainly refers to the date the trial judge is designated, were imported to the *Horton* exception, Relator's motion was still untimely, as it would have been due no later than March 3, 2009, thirty days after Respondent was designated on February 1, 2009. But Relator did not file his motion until April 27, 2009, fifty-five days after the timeline laid out in Rule 51.05. Consequently, even if the timeline of Rule 51.05 were imported to the *Horton* exception, Relator's motion was untimely and properly denied by Respondent.

To the extent that the *Cochran* majority held the timeline began running when the motion to revoke was filed, rather than when the trial judge was designated, it is contrary to the plain language of both of the change of judge rules, and it appears to have been overruled by the Western District's subsequent opinion in *State ex rel. Hertzog v. Young*, 937 S.W.2d 416 (Mo. App. W.D. 1997).

In *Hertzog*, as in *Cochran* and this case, the presiding judge in a child custody proceeding had been replaced by a new judge, following his retirement. *Hertzog*, 937 S.W.2d at 418. The Western District determined that, on the day the new judge replaced the former judge, the new judge became the designated trial judge. *Id*. at 419. And that same date was the date the deadline for filing an application for change of judge pursuant to Rule 51.05 began to run. *Id*. Because the relators in *Hertzog* had

not filed their motion within thirty days of the new judge taking office, their motion was untimely. *Id*.

Here, Relator did not file his motion within ten, or even thirty, days of Respondent taking office and being assigned to this case; thus Relator's motion was untimely under both rules and properly denied by Respondent.

Because probation violation proceedings are merely ancillary to the underlying criminal conviction, Rule 51.05 is inapplicable to probation violation proceedings. The applicable rule is 32.07, mandating that an application for an automatic change of judge be filed "not later than ten days after the initial plea is entered." But where the judge granting probation is replaced by a new judge, a probationer accrues a new right to apply for an automatic change of judge pursuant to this Court's ruling in *Horton*. And the timeline for filing such an application, imported from Rule 32.07, requires the application to be filed within ten days of the designation of the new judge.

Here, because Respondent was a new judge in the case, Relator accrued a new right to apply for an automatic change of judge, but he had to do so within ten days of the designation. Because he failed to abide by this time limit, his application was properly denied by Respondent. The preliminary writ of prohibition issued in this case should be quashed.

CONCLUSION

Respondent properly denied Relator's untimely application for change of judge. Consequently, Respondent maintains the authority to continue presiding over Relator's probation violation proceedings, and this Court's preliminary writ prohibiting Respondent from further action in this case should be quashed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

_____

JAYNE T. WOODS
Assistant Attorney General
Missouri Bar No. 57782

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-332l
Fax: (573) 751-5391
jayne.woods@ago.mo.gov

ATTORNEYS FOR RESPONDENT
HONORABLE R. BRENT ELLIOTT

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 5,148 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this _____ day of October, 2009, to:

Robert E. Sundell
Anderson & Sundell, P.C.
Northside Mall, 115 E. 4th St
Maryville, MO 64468
(660) 582-6633
Attorney for Relator

The Honorable R. Brent Elliott
Circuit Judge, 43rd Judicial Circuit
P.O. Box 275
Plattsburg, MO 64477

Andrea Gibson
Prosecuting Attorney, Daviess County
102 N. Main
Gallatin, MO 64640

CHRIS KOSTER

JAYNE T. WOODS
Assistant Attorney General
Missouri Bar No. 57782

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Fax (573) 751-5391

ATTORNEYS FOR RESPONDENT
HONORABLE R. BRENT ELLIOTT