APPENDIX A

# In the Supreme Court of Missouri

January Session, 2022

State ex rel. Carlos Johnson,

Petitioner,

No. SC99443 HABEAS CORPUS
Mississippi County Circuit Court No. 20TE-CC00192
Eastern District Court of Appeals No. ED110158

Dan Redington,

Respondent.

*Now at this day, on consideration of the petition for a writ of habeas corpus herein to the said respondent, it is ordered by the Court here that the said petition be, and the same is hereby denied.*

STATE OF MISSOURI-Sct.

*I, BETSY AUBUCHON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 2022, and on the 1st day of March, 2022, in the above-entitled cause.*

*WITNESS my hand and the Seal of the Supreme Court of Missouri, at my office in the City of Jefferson, this 1st day of March, 2022.*

SEAL OF THE SUPREME COURT OF MISSOURI

Betsy AuBuchon, Clerk

Lori S. Knaebel, Deputy Clerk

Supreme Court of Missouri

vs.

**MANDATE**

JUDGMENT

APPENDIX A

APPENDIX B

SCANNED

# In the Missouri Court of Appeals
# Eastern District

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| IN RE CARLOS JOHNSON, PETITIONER, | ) | No. ED110158 |
| | ) | |
| | ) | Writ of Habeas Corpus |
| | ) | |
| vs. | ) | PIKE COUNTY CIRCUIT COURT |
| | ) | |
| DAN REDINGTON, RESPONDENT. | ) | |
| | ) | |
| | ) | |
| | ) | |
| | ) | |

**ORDER**

Petitioner has filed a Petition for Writ of Habeas Corpus along with Suggestions in Support and Exhibits.

Being duly advised in the premises, the Court hereby DENIES Petitioner's Writ of Habeas Corpus.

SO ORDERED.

DATED: December 3, 2021

Lisa P. Page, Presiding Judge
Writ Division I
Missouri Court of Appeals, Eastern District

cc: Daniel Reddington
Kevin Schriener
Patrick Logan

MISSOURI COURT OF APPEALS EASTERN DISTRICT

APPENDIX C



**IN THE CIRCUIT COURT OF MISSISSIPPI COUNTY**
**STATE OF MISSOURI**

| | | |
|---|---|---|
| CARLOS A. JOHNSON, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | Case No. 20MI-CV00439 |
| | ) | |
| BILL STANGE, et al., | ) | |
| | ) | |
| Respondents. | ) | |



**MEMORANDUM, ORDER, AND JUDGMENT**

Before this Court is Petitioner Carlos Johnson's petition for habeas corpus, Respondents Director Anne L. Precythe and Warden Bill Stange's response, Johnson's traverse, all exhibits attached to those filings, and all other documents filed in this case. After consideration, this Court **DENIES** Johnson's petition.

**Introduction**

Petitioner Carlos Johnson is an inmate at the Southeast Correctional Center in Charleston, Missouri. On April 9, 2015, Johnson pled guilty to unlawful possession of a firearm. On June 26, 2015, the Circuit Court of the City of Saint Louis sentenced Johnson as a prior and persistent offender to fifteen years' imprisonment and subsequently suspended the execution of Johnson's sentence for a five-year term of supervised probation. Johnson's probationary term was subsequently revoked and he was delivered to the

Missouri Department of Corrections ("the Department") to serve the previously imposed fifteen-year sentence.

While Johnson filed this suit against Director Precythe and Warden Stange, Respondents correctly assert that Director Precythe is not a proper respondent for Johnson's habeas petition. *See State ex rel. Hawley v. Midkiff*, 543 S.W.3d 604, 607–08 (Mo. banc 2018); *see also* Rule 91.07. However, because this Court is denying Johnson's petition, it will not separately dismiss Director Precythe from Johnson's action.

**Statement of the Case**

Johnson raises three claims in his petition for writ of habeas corpus: (1) that the circuit court's revocation of his probationary term violated his right to a preliminary probation revocation hearing; (2) that the circuit court's revocation of his probationary term violated his right to due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States; and (3) that the revocation was based on unreliable evidence. Respondents argue that Johnson's claims are meritless.

**Analysis**

The writ of habeas corpus is governed by Chapter 532 and Rule 91. *See* § 532.010, RSMo 2016, *et seq.*; *see also* Rule 91. Under Rule 91, "[a]ny person restrained of liberty within this state may petition for a writ of habeas corpus to inquire into the cause of such restraint." Rule 91.01(b). "The decision

whether to grant relief is 'limited to determining the facial validity of confinement, which is based on the record of the proceeding that resulted in the confinement.'" *State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 513 (Mo. banc 2010) (quoting *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214 (Mo. banc 2001)). In most circumstances, a writ of habeas corpus is the proper vehicle to challenge the legality of a court's revocation of a probationary term. *Trams v. State*, 555 S.W.3d 480, 482 (Mo. App. 2018). The petitioner has the burden to demonstrate that he is entitled to habeas relief. *State ex rel. Nixon v. Jaynes*, 73 S.W.3d 623, 624 (Mo. banc 2002).

## I. The circuit court was not required to hold a preliminary hearing regarding the revocation of a term of probation.

In his first claim, Johnson contends that the circuit court was required to hold a preliminary hearing to determine if there was probable cause to believe he had committed the alleged probation violations. Pet. at 13–14, ¶¶ 26–30. In support of his assertion, Johnson cites Federal Rule of Criminal Procedure 32.1, which generally requires federal district courts to hold preliminary revocation proceedings. *See id.* at 13, ¶ 26.

While it is true that Federal Rule of Criminal Procedure 32.1 does require federal courts to hold preliminary revocation proceedings, *see* Fed. R. Crim. P. 32.1(b)(1)(A), the Federal Rules of Criminal Procedure do not apply to revocation proceedings in state courts arising from convictions based on

violations of state law. *See* Fed. R. Crim. P. 1. Missouri courts, however, have found that, where the revocation hearing is held in a reasonable time, *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973), and *Morrissey v. Brewer*, 408 U.S. 471, 488–89 (1972), do not require a court—unlike an administrative body—to hold both a preliminary and final revocation hearing. *Abel v. Wyrick*, 574 S.W.2d 411, 416–17 (Mo. banc 1978); *Ewing v. Wyrick*, 535 S.W.2d 442, 444 (Mo. banc 1976).

Further, the Supreme Court of the United States, has subsequently stated that Missouri's judicial probation revocation procedure satisfies the requirements of due process. *Black v. Romano*, 471 U.S. 606, 615–16 (1985). And, while the opinion in *Black* was clearly analyzing a challenge unrelated to the necessity of a preliminary hearing, the Court stated, "In conformance with *Gagnon* and *Morrissey*, [Missouri] afforded respondent *a* final revocation hearing[,]" making no mention of the requirement for a preliminary hearing that *Abel* limited to administrative revocation proceedings. *Id.* at 615 (emphasis added).

The crux of Johnson's first claim appears to be two-fold: (1) that the circuit court failed to hold a preliminary hearing necessary to make a finding that it had probable cause to believe he had committed a violation of the conditions of his probationary term, Pet. at 13–14, ¶¶ 28–29; and (2) that the revocation proceeding was not held in a reasonable time, pursuant to Federal

Rule of Criminal Procedure 32.1. Pet. at 13, ¶¶ 26–27. As Respondents correctly indicated, Missouri courts are not required to hold a preliminary probation revocation proceeding if a single hearing is held within a reasonable time. *See Black*, 471 U.S. at 615; *see also Abel*, 574 S.W.2d at 416–17. Therefore, this Court will deny both parts of Johnson's first claim if it determines that a probation revocation hearing was held within a reasonable time. *See id.*

Here, Johnson's probation was suspended and a capias warrant was issued on January 25, 2016, after the entity responsible for supervising Johnson's probation informed the circuit court that it had information that Johnson had violated the first condition of his probation: Laws. Resp. Ex. C at 1. The warrant was never returned as executed and was recalled or withdrawn on February 20, 2018. Resp. Ex. R at 5. It appears that the reason this warrant was never served is because Johnson was already in custody elsewhere to answer two other proceedings—one for possession of a controlled substance and another for the second-degree murder, armed criminal action, and unlawful possession of a firearm charges at issue in his subsequent revocation proceeding. Resp. Ex. C at 1; Resp. Ex. L at 1; Resp. Ex. M at 1–2.[1]

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[1] Respondents requested that this Court take judicial notice of the court file in *State v. Carlos Antonio Johnson*, 15SL-CR07558; *State v. Carlos Antonio Johnson*, 15SL-CR07558-01; *State v. Carlos Antonio Johnson*, 15SL-CR06403; *State v. Carlos Antonio Johnson*, 15SL-CR06403-01; *State v. Carlos Antonio*

On November 3, 2017, the State filed a notice of probation violation, indicating that Johnson had been charged with second-degree murder, armed criminal action, and unlawful possession of a firearm in case number 15SL-CR07558-01. Resp. Ex. D at 1. On November 6, 2017, the circuit court set a probation violation hearing for December 14, 2017, and ordered the Missouri State Public Defender's Office to interview Johnson to determine his eligibility for their representation. Resp. Ex. N at 1. Two days later, the court entered an order finding that Johnson had the right to an attorney, checking the box indicating Johnson had "made a timely and colorable claim that [he] has substantial reasons that justify or mitigate the violation and these reasons are otherwise difficult to develop and present." Resp. Ex. O at 1. An assistant public defender entered his appearance on November 29, 2017. Resp. Ex. R at 4. On December 15, 2017, the State filed a motion to revoke Johnson's probation, in which it alleged that Johnson violated the condition of his probation requiring that he not possess a firearm. Resp. Ex. E at 1. A probation violation hearing was held on February 20, 2018, and the circuit court revoked Johnson's probation on the grounds that he violated both the condition that he

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*Johnson*, 18SL-CR03398; and *State v. Carlos Antonio Johnson*, 18SL-CR03398-01. Respondents contend that these records demonstrate that Johnson's liberty was not impinged as a result of the court's suspension of his probationary term. This Court grants Respondents' request and takes judicial notice of the content of each of those files.

follow all laws and not possess a firearm. Resp. Ex. G at 1.

Johnson alleges that the delay between the court suspending his probation and the State filing a motion to revoke his probation was unreasonable. Pet. at 13, ¶ 27. He does not—and cannot—allege that the revocation hearing was held after his probationary term expired.[2] *See id.* Further, Johnson was already in custody to answer criminal charges in two proceedings—one for possession of a controlled substance and another for the second-degree murder, armed criminal action, and unlawful possession charges at issue in his subsequent revocation proceeding. Resp. Ex. L at 1.

Therefore as Respondents asserted in their response, any delay in the revocation proceeding is attributable to the necessity that Johnson answer and defend two separate felony proceedings. *See State v. Carlos Antonio Johnson*, 15SL-CR07558; *see also State v. Carlos Antonio Johnson*, 15SL-CR07558-01; *State v. Carlos Antonio Johnson*, 15SL-CR06403; *State v. Carlos Antonio Johnson*, 15SL-CR06403-01; *State v. Carlos Antonio Johnson*, 18SL-CR03398; *State v. Carlos Antonio Johnson*, 18SL-CR03398-01. The circuit court held the revocation hearing slightly more than two years after initially suspending

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[2] Johnson was sentenced to a five-year term of probation on June 26, 2015. Resp. Ex. B at 1–3. His probationary term was suspended on January 25, 2016, Resp. Ex. C at 1, and revoked on February 20, 2018. Resp. Ex. G at 1. Therefore, even with the benefit of any Earned Compliance Credit, the probation revocation proceeding occurred within the probationary term.

Johnson's probation. Resp. Ex. C at 1; Resp. Ex. G at 1. While this was an extended period of time, it occurred within Johnson's probationary term and was held while Johnson was contemporaneously defending against several felony charges. Resp. Ex. L at 1. Further, Johnson was not being held in custody as a result of the warrant issued on the probation violation. *Id.*; Resp. Ex. R at 5. Against that factual backdrop, approximately two years is not an unreasonable delay prior to holding a revocation hearing. Therefore, this Court denies Johnson's first claim for relief.

## II. Johnson received the procedural safeguards required in probation revocation proceedings.

In his second claim, Johnson contends that he "was not afforded the minimum due process of law in violation of the Fourteenth Amendment" because the revocation proceedings did not comport with the decisions of the Supreme Court in *Gagnon* and *Morrissey* and the Missouri Supreme Court in *Abel*. Pet. at 15, ¶ 31. In *Gagnon*, the Supreme Court stated that the analysis in *Morrissey* concerning the minimum requirements of due process in parole revocation proceedings also applied to probation revocation hearings. *Gagnon*, 411 U.S. at 782. The *Gagnon* Court stated that these minimum requirements include:

> '(a) written notice of the claimed violations of (probation or) parole; (b) disclosure to the (probationer or) parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-

> examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking (probation or) parole.'

*Id.* at 786. (quoting *Morrissey*, 408 U.S. at 489). As previously discussed, the Supreme Court of Missouri announced that a preliminary revocation hearing was not necessary in Missouri if a revocation hearing was held in a reasonable time. *Abel*, 574 S.W.2d at 416–17. Nevertheless, the *Abel* Court stated that judicial revocation proceedings would be conducted according to the minimum-requirements-of-due-process analysis announced in *Gagnon*. *Id.* at 417–21.

**A. Johnson was given written notice of his probation violations.**

Johnson alleges that there is nothing in the record to demonstrate that he received written notice of the allegations underlying his probation violation. Pet. at 16, ¶ 33. As previously noted, the State, on November 3, 2017, filed a notice of probation violation, indicating that Johnson had been charged with second-degree murder, armed criminal action, and unlawful possession of a firearm in case number 15SL-CR07558-01. Resp. Ex. D at 1. On November 6, 2017, the court set a probation violation hearing for December 14, 2017, and ordered the Missouri State Public Defender's Office to interview Johnson to determine his eligibility for their representation. Resp. Ex. N at 1. On November 29, 2017, an assistant public defender entered his appearance on

behalf of Johnson. Resp. Ex. R at 4. On December 15, 2017, the State filed a motion to revoke Johnson's probation, alleging that Johnson violated the condition of his probation requiring that he not possess a firearm. Resp. Ex. E at 1. A probation violation hearing was held on February 20, 2018, and the circuit court revoked Johnson's probation on the grounds that he violated both the condition that he follow all laws and the condition that he not possess a firearm. Resp. Ex. G at 1.

Johnson nevertheless argues that he was never served the original capias warrant and therefore he was not given written notice of the conduct underlying the revocation. Pet. at 16, ¶ 33. Johnson also appears to argue that he was not made aware of the first notice of probation violation filed by the State. *See id.* at ¶ 34. The record, however, refutes that allegation. On November 8, 2017, the court entered an order finding that Johnson had the right to an attorney. Resp. Ex. O at 1. An assistant public defender entered his appearance on November 29, 2017. Resp. Ex. R at 4.

Johnson's counsel would have had access to the court file, which included the capias warrant and the first notice of probation violation. *See* Resp. Ex. R at 3. Further, Johnson's counsel was served a copy of the motion to revoke Johnson's probation filed on December 15, 2017. Resp. Ex. E at 2. Particularly damaging to Johnson's claim is the fact that his counsel filed a motion to compel the State's production of discovery, indicating that he was aware of both

the initial notice of probation violation and the motion to revoke. Resp. Ex. Q at 1, ¶ 2. Additionally, Johnson's counsel did not express any confusion during the hearing about the grounds upon which the State sought revocation. Resp. Ex. P at 3, 19–27. Johnson was therefore aware of the specific allegations prior to the revocation hearing, satisfying the written notice requirement announced in *Gagnon*. *See Abel*, 574 S.W.2d at 420–21. Consequently, this Court denies Johnson relief on this ground.

### B. The State disclosed the evidence supporting its allegation that Johnson violated the terms of his probation.

Johnson further alleges that the State did not disclose the evidence that would be presented against him. Pet. at 18–19, ¶¶ 38–39. The record refutes this claim. On December 19, 2017, Johnson's counsel filed a motion for discovery. Resp. Ex. R at 4. On January 9, 2018, Johnson's counsel filed a motion to compel discovery, Resp. Ex. Q at 1–2, and the motion was scheduled for a hearing. Resp. Ex. R at 4. The hearing was subsequently canceled, without an explanation being recorded in the docket. *See id.* at 5.

Nevertheless, on the day of his probation revocation, Johnson's counsel filed a memorandum in support of his objection to admission of the State's evidence, which clearly indicated that Johnson and his counsel had been made aware of the evidence the State sought to admit prior to the hearing. *See* Resp. Ex. F at 1–6. Indeed, Johnson's counsel provided arguments against both the

deposition of witness William Newsome and the jailhouse telephone calls. *Id.* Particularly indicative of the fact that Johnson was aware of the evidence against him are the arguments contained in the memorandum involving the jailhouse telephone calls, in which Johnson's counsel claimed, *inter alia*, that the content of the telephone calls rendered each irrelevant and therefore inadmissible in the revocation proceeding. *Id.* at 5–6, ¶¶ 17–19.

Further, during the revocation hearing, Johnson's counsel argued that he disagreed with the State's interpretation of the jailhouse telephone calls. Resp. Ex. P at 14. It would have been impossible for counsel to make these arguments without first hearing the evidence against Johnson. Moreover, during the revocation hearing, Johnson's counsel affirmatively stated that he had "heard" the DVD containing Newsome's deposition. *Id.* at 9. For all of these reasons, this Court finds that Johnson's claim that he did not receive the evidence against him is completely unsupported by the record. Relief on this ground is denied.

### C. Johnson was given the opportunity to present evidence in his defense and to cross-examine the State's witness.

Johnson makes the perfunctory allegation that he was not given the opportunity to present evidence in his defense or to cross-examine the State's witnesses. Pet. at 18. The record refutes each claim. In regards to the presentation of evidence claim, the circuit court gave Johnson the chance to

present evidence in his defense. Resp. Ex. P at 16. Indeed, after the State rested, the circuit court specifically inquired about Johnson presenting evidence. *Id.* Johnson's counsel affirmatively stated, "No evidence, Your Honor." *Id.* This Court can only speculate why Johnson chose not to present evidence but, whatever the reason, the failure to present evidence is attributable to Johnson and not the circuit court. *See id.*

Johnson's claim that he was prevented from cross-examining the witnesses against him is also not supported by the record. The State called only one witness for live testimony. *See id.* at 4–15. Johnson was permitted to cross-examine that witness but, nevertheless, chose not to ask a single question. *Id.* at 13. Indeed, when the circuit court indicated that Johnson could begin cross-examination, his counsel stated, "I don't have any questions for this witness, Judge. Thank you." *Id.* While this Court understands this argument to also cross-reference Johnson's third claim regarding his right to confrontation, it will address that allegation in response to Johnson's third point. However, the Court notes that Johnson also had the opportunity to cross-examine Newsome during the deposition that was ultimately admitted as an exhibit in his probation revocation proceeding. *Id.* at 17. Accordingly, Johnson has not demonstrated entitlement to relief on this ground.

**D. The circuit court was a neutral, detached hearing body.**

Johnson alleges that the circuit court was not a neutral, detached

hearing body because "a probation officer did not file the violations that he was revoked for." Pet. at 20, ¶ 41. Johnson states that, instead, the court itself filed the charge for which his probation was later revoked. *Id.* The record refutes this claim. First, the initial allegation that Johnson violated a condition of his probation was brought to the circuit court by Eastern Missouri Alternative Sentencing Services, Inc. ("EMASS"), a private supervision entity. Resp. Ex. C at 1. Second, the State subsequently filed a notice of probation violation and a motion to revoke Johnson's probation. Resp. Ex. D at 1; Resp. Ex. E at 1. Neither the State nor EMASS ultimately revoked Johnson probation. *See* Resp. Ex. G. at 1. Instead, Johnson's probation was revoked by a neutral third-party—the Circuit Court of the City of St. Louis—after he had notice and an opportunity to be heard. *See id.* Therefore, this Court denies Johnson's claim that his probation revocation hearing was not held by a neutral and detached body because it is meritless. *See Moore v. Stamps*, 507 S.W.2d 939, 948 (Mo. App. 1974) ("We therefore hold that the court which granted probation may revoke it and that the judge is a neutral and detached officer for such purpose.").

### E. Johnson was given a written explanation of the court's reasoning for revoking his probationary term.

Johnson alleges that the circuit court failed to provide him a written statement sufficient to explain the court's reasons for revoking his

probationary term. Pet. at 20–24, ¶¶ 42–51. The record refutes his claim.

The circuit court entered an order revoking Johnson's probationary term. Resp. Ex. G at 1. The order stated, "The court finds the Defendant in violation of the following conditions of probation: #1, #7." *Id.* These numbers correspond to numbered conditions of Johnson's probation, or more precisely: Condition #1: Laws and Condition #7: Firearms. *See* Resp. Ex. P at 19. Johnson claims that the use of "#1, #7[,]" Resp. Ex. G at 1, was an insufficient explanation of the court's reasons for revoking his probationary term under *Gagnon*. *See* Pet. at 20–24, ¶¶ 42–51.

The Missouri Court of Appeals, however, has previously refuted the argument that a reviewing court must fragment the circuit court's on-the-record explanation of its reasons, as contained in the transcript, from the written order. *See Ryan v. Wyrick*, 518 S.W.2d 89, 93–94 (Mo. App. 1974). Indeed, the Missouri Court of Appeals recognized that: "There is no constitutional impediment, however, to a separate statement of reasons and reference to the evidence." *Id.* at 94. This, the court indicated, is because the "purpose of the stricture" requiring a written statement of the reasons and evidence for revocation "is to preserve a record for the probationer and for the court of review, neither of whom should be remitted to assumptions as to the basis for the order of revocation." *Id.*

Here, the circuit court made an on-the-record statement of the reasons

and evidence supporting revocation. Resp. Ex. P at 16–27. Indeed, the circuit court first discussed—and overruled—Johnson's objection to the State's evidence. *Id.* at 16–18. The court then made a determination that Johnson had violated the terms of his probation:

> THE COURT: And first of all the Court, based upon [the evidence as discussed in relation to Johnson's objection], does find that the defendant has violated the conditions of his probation, in particular condition number one, laws; and condition number – the weapons. Is that six?
>
> THE CLERK: Seven.
>
> THE COURT: Seven; weapons. And the Court finds that the defendant has violated those conditions of his probation and hereby revokes his probation. And this Court has considered alternatives, and the Court finds that as the defendant has its pending murder, armed criminal action, unlawful possession of a firearm, which is what he's on probation with this Court for, that the only reasonable alternative is the execution of the sentence previously imposed.

*Id.* at 19.

After an extended discussion between Johnson's counsel and the circuit court concerning the court's willingness to reconsider or to delay its determination until after Johnson's trial on the criminal charges underlying the revocation hearing, this exchange occurred:

> THE COURT: Well, I mean, are you suggesting I guess that if he would not be found guilty of the murder, and therefore, armed criminal action, so then the other -- these alternatives might be more reasonable?
>
> DEFENSE COUNSEL: I do believe that, Judge. And I believe that

in that situation, I believe that the 15 years that he would have by that point already received here would be a bit harsh. In the alternative, if I am wrong and if Mr. Johnson is wrong and he is found guilty there, he will be going away for quite some time, you know, regardless of what would happen here today.

So I do believe we're covered in the – what I'll call the downside scenario, but I do believe there is a significant chance he'll prevail at trial. I, of course, could be wrong.

THE COURT: Do you represent him at trial?

DEFENSE COUNSEL: I do not. Megan Beesley represents him at trial. That is in St. Louis County and not here in the city.

THE COURT: I don't want to get into the specifics of that case, but generally is there a defense?

DEFENSE COUNSEL: I want to be careful with getting into –

THE COURT: I don't want the details.

DEFENSE COUNSEL: Yes.

THE COURT: Is it alibi? Is it mistaken ID? *I am just trying -- from what I have seen, it seems pretty clear, but I don't know.* I don't know all the ins and outs of that case.

DEFENSE COUNSEL: And I have discussed it with Ms. Beesley. I do want to be careful given it hasn't happened yet. There is a defense. I will note for the record it is not I do not anticipate it will be self-defense, which I know may be of concern to the Court given the weapons condition. It will essentially be mistaken or incorrect testimony on the account of Mr. Newsome. That is based on the evidence as I have reviewed it, but also his attorney there as well, Ms. Beesley.

THE COURT: Well, you know, that's -- I will let that take its course, but I'm not willing under the circumstances here to defer sentencing.

*Id.* at 21–22 (emphasis added).

The court then asked Johnson if he had anything say prior to it pronouncing sentence. *Id.* at 23. Johnson stated that he hoped the court would wait until after his trial because he believed he would be acquitted of the charges. *Id.* The court attempted to explain that a probation revocation proceeding was distinct from the trial on the criminal charges. *Id.* In so doing, the court stated:

> Let it take its course. But, also, the standards of probation are a little different than the standards of guilt and proof beyond a reasonable doubt, which I understand. But probation, you know, you're not supposed to be doing certain things. One of the main things is a weapon and that is really concerning to me.
>
> Now, I could even take your word or version or whatever. I'm unsure what that is. But let's say you're not guilty of the offenses but you had a weapon, which you know, I'm not passing judgment on whether or not you did the murder. That's really not my -- not my function or duty here.
>
> But my biggest concern is that you're around guns. Bad things happen. Bad things happened here. Maybe you didn't do it. Maybe you're not good for it. But it seemed pretty clear to me that there's a weapon and you're around a weapon and that's not a good thing. And I can't just let that go.

*Id.* at 23–24. In an attempt to topple the circuit court's ruling, Johnson seizes on two paragraphs from this explanation. *See* Pet. at 20–24, ¶¶ 42–51.

First, Johnson asserts that the second paragraph demonstrates that the circuit court was not reasonably satisfied that he had violated the terms of his probation. *See* Pet. at 22–24, ¶¶ 46–47, 50. To revoke a probationer's

probationary term, a court must be reasonably satisfied that the terms of the probation had been violated. *Moore*, 507 S.W.2d at 949. Here, the record demonstrates that any ambivalence expressed by the circuit court in the second paragraph above, was merely an attempt to explain the difference between the standard for criminal conviction and probation revocation. *See* Resp. Ex. P at 23–24. Indeed, the court previously expressed its unambiguous belief that Johnson had violated the terms of his probation. *Id.* at 21–22. Further, in response to Johnson's later allegation that the State's evidence might be weaker in the criminal trial than it appeared, the court stated:

> THE COURT: Well, you know, I accept that, but you know -- and I might have under a different scenario, but you know, there was no discussion along this line and, you know, the State had to bring in this prosecutor and had to present this through a hearing and I -- you know, I heard it and I have seen it. And so I -- you know, you can have your day in court, but I am not convinced and I'm not comfortable with someone on probation to me and these kind of things going on.
>
> And, you know, I hope you're right that, you know, you're not good for it. *But, you know, from what I see at this time and in this context, I can't see any other choice.*

*Id.* at 25 (emphasis added). The record therefore unequivocally demonstrates that the court was reasonably satisfied that Johnson had violated the terms of his probation.

Second, Johnson asserts that the third paragraph regarding him being "around a weapon" was not sufficiently specific to demonstrate a violation of

any condition. *See* Pet. at 23, ¶¶ 48–49. This argument misstates the nature of the on-the-record statement made by the circuit court. *See* Resp. Ex. P at 16–25. The court entertained Johnson's objections and arguments concerning the evidence and then thoroughly explained the reasons for revoking his probationary term. *See id.* The circuit court, therefore, provided a statement concerning the reasons and evidence supporting revocation as required by *Gagnon* and Johnson's claim is meritless. *See id.*; *see also* Resp. Ex. G at 1.

For all of the reasons discussed above, Johnson was afforded more than the minimum requirements of due process as announced by *Gagnon*, and this Court denies Johnson's second claim because it is meritless.

## III. Johnson's confrontation rights were not violated by the admission of Newsome's deposition or the jailhouse phone calls.

In his third claim, Johnson argues that the court violated his right to confront the witnesses against him by admitting the deposition testimony of Newsome and recorded jailhouse phone calls. Pet. at 24–42, ¶¶ 52–87.

In *Crawford v. Washington*, 541 U.S. 36, 42 (2004), the Supreme Court of the United States expressed: "The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Id.* (alteration in original). The Confrontation Clause of the Sixth Amendment, therefore, does not operate in probation revocation hearings, which are civil in nature. *State*

*ex rel. Manion v. Elliot*, 305 S.W.3d 462, 464 (Mo. banc 2010). Johnson concedes as much in his petition. Pet. at 25, ¶ 54. There is, however, a due process right to confrontation that is conditional. *See Gagnon*, 411 U.S. at 786. Indeed, this right is not all-encompassing and the *Gagnon* Court stated that *Morrissey* did not "intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence." *Id.* at 782 n.5.

Further, the Missouri Supreme Court has stated "that the due process right to confrontation at a parole revocation hearing is less stringent than the confrontation guarantee in a criminal trial." *State ex rel. Aziz v. McCondichie*, 132 S.W.3d 238, 240 (Mo. banc 2004). "Evidence that would violate the Sixth Amendment or would be inadmissible hearsay if presented at a criminal trial may, in proper circumstances, be considered at a parole or probation revocation hearing without violating the due process right to confrontation." *State ex rel. Mack v. Purkett*, 825 S.W.2d 851, 855 (Mo. banc 1992). Specifically, *Gagnon* stated that a defendant has the right to confront adverse witnesses, unless good cause is found for not allowing confrontation. 411 U.S. at 786.

Here, the circuit court heard testimony that, after Johnson requested his fourth continuance in the criminal trial for the charges underlying the probation revocation, the State moved for permission to depose Newsome to preserve his testimony because he was set to be sentenced to the Bureau of

Prisons for a federal charge. Resp. Ex. P. at 8. The State became concerned that Newsome, once sentenced to federal custody, would be beyond state subpoena power. *Id.* The court granted the motion and Newsome was deposed. *Id.* Importantly, Johnson was *present and represented by counsel* at this deposition and was given *the opportunity to cross-examine* Newsome. *Id.*

Under Missouri law, this deposition was therefore admissible as evidence against Johnson in the civil probation revocation proceeding. *See* Rule 57.07(a). "Any part of a deposition that is admissible under the rules of evidence applied as though the deponent were testifying in court may be used against any party who was present or represented at the taking of the deposition or who had proper notice thereof." *Id.* Further "[d]epositions may be used in court for any purpose." *Id.*

It does stand to reason, however, that this rule is limited by the conditional due process confrontation right announced in *Gagnon*. 411 U.S. at 786. Johnson asserts that the motion court was required to engage in a "balancing process" before admitting the deposition testimony of Newsome. Pet. at 25–26, ¶¶ 55–56. First, it is not clear if the balancing test announced in *Mack* applies in revocation proceedings held outside the confines of an administrative body. *See Moore*, 507 S.W.2d at 951 (expressing that *Gagnon* operates differently upon courts). Indeed, the balancing test announced in *Mack* was expressed in the context of an administrative revocation, and the

Missouri Court of Appeals has recognized that courts, as the "repository" of due process, are not affected in the same degree by *Gagnon*. *See id.*

Even if the *Mack* test governs, however, the circuit court did not err in allowing the State to admit Newsome's deposition testimony. In *Mack*, the court stated that, in allowing for "dispensing with confrontation[,]" the court should consider: (1) the reason "why confrontation is undesirable or impractical;" (2) whether the hearsay evidence for which admission is sought "bears substantial indicia of reliability;" and (3) whether the defendant "challenges the accuracy of the hearsay evidence during the course" of the proceeding. 825 S.W.2d at 855–56.

As discussed briefly above, the State's witness testified that, when the deposition was taken, she had been informed that Newsome was eminently going to be placed outside the subpoena power of the State. Resp. Ex. P at 8. In objecting to the admission of the taped deposition, Johnson's counsel stated that Newsome was not in federal custody but, rather, in custody of the Department in Boonville, Missouri. *Id.* at 10. The witness stated she did not know for certain where Newsome was at the moment, but it could very well be possible that he was out of federal custody. *Id.* at 11. Johnson did not present any evidence regarding Newsome's whereabouts—only this objection. *See id.* at 1–28. As the court recognized, if Johnson was correct about Newsome's location, he could have called Newsome as a witness to defeat the State's claim

of unavailability. *Id.* at 18. Further, even if Newsome was not unavailable, that fact would not be fatal under *Mack*'s balancing test. *See* 825 S.W.2d at 855.

Indeed, in discussing the reasons worthy of dispensing of confrontation in probation proceedings, the Missouri Court of Appeals indicated that something as simple as difficulty or expense related to travel "militates in favor of not requiring attendance of the witnesses." *Id.* Unlike the cases cited by Johnson, *see e.g.*, Pet. at 31–32, ¶ 66, lack of unavailability does not defeat the admissibility of this deposition, *see Mack*, 825 S.W.2d at 855; because, importantly, the right to confrontation in probation revocation hearings is not governed by the inflexible Confrontation Clause of the Sixth Amendment. *See Gagnon*, 411 U.S. at 782 n.5.

As for the second factor—if the hearsay evidence sought to be admitted bears substantial indicia of reliability—the record clearly demonstrates that, in regards to the deposition, Johnson was present, represented by counsel, and able to cross-examine Newsome. Resp. Ex. P. at 8, 17–18. These facts alone demonstrate substantial indicia of reliability. Indeed, the Supreme Court has recognized cross-examination is "the greatest legal engine ever invented for discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970) (quotations omitted). At the hearing, Johnson did not challenge the assertion that he was previously able to cross-examine Newsome. Resp. Ex. P. at 8, 17–18. Instead, he merely stated that he might be better equipped to do it during the hearing.

*Id.* at 23. This belief was not supported by any evidence—documentary or otherwise. *See id.* at 1–28. Further, Johnson's suggestions in opposition merely stated, "Mr. Johnson and counsel also believe that Mr. Newsome's testimony is inaccurate." Resp. Ex. F at 3.

While Johnson undoubtedly believed that Newsome's testimony was inaccurate, he gave the circuit court no reason to believe so. Resp. Ex. P. at 1–28. And, again, while this Court can merely speculate as to why Johnson made such a choice, it was his choice to make. In support of his motion, Johnson alleged that he has evidence that Newsome lied and that the State pressured him to lie. Pet. at 35–39, ¶¶ 74–83. This evidence should have been presented at the revocation hearing—Johnson chose, instead, not to present a single piece of evidence in his defense. Resp. Ex. P. at 16. Johnson does not explain why this Court should allow him to now present evidence that he chose not to present in the proper first instance. Indeed, Johnson's claim that he did not have the evidence at the hearing is refuted by his own on-the-record statements expressing that he wanted Newsome to testify in person because he had new evidence to better challenge his testimony. *See id.* at 23 ("At the moment when we did the deposition we didn't have the evidence that we have to cross-examine . . . I have a whole different attorney and we have other evidence, too[.]"). Perhaps the failure to present any evidence was strategic, perhaps it was something else, but the circuit court considered the reliability

of the deposition and decided it was worthy of admission absent confrontation. *Id.* at 17–18. This act of consideration is sufficient under *Mack*. *See* 825 S.W.2d at 856.

Finally, the Missouri Supreme Court stated in *Mack* that the court should consider whether the probationer "challenges the accuracy of the hearsay evidence *during the course* of the proceeding." *Id.* (emphasis added). As discussed above, Johnson made the conclusory assertion that the evidence was unreliable in his suggestions in opposition to the admission of the deposition. Resp. Ex. F at 3. This assertion, however, expressed only that, "Mr. Johnson and counsel also believe that Mr. Newsome's testimony is inaccurate." *Id.* This assertion did not say how the testimony was inaccurate. *Id.* Johnson, at no point during the hearing, presented any of the evidence he now wishes to present. Resp. Ex. P at 16. Nevertheless, the circuit court was sensitive to the nature of the deposition testimony stating that perhaps in a "different scenario" it might have entertained Johnson's arguments that the allegations were incorrect, but there "was no discussion along this line." *Id.* at 25. While he may now wish to seriously contest Newsome's testimony with evidence, Johnson failed to do so when it was material. *See id.* at 25. The record reflects that the circuit court, under the circumstances before it, considered the nature of the evidence and the importance of confrontation before determining that the deposition should be admitted in the absence of confrontation. *See id.* at

17–18.

In regards to the admission of the jailhouse phone calls, many of the arguments discussed above in regard to the deposition testimony apply equally to the tapes. If *Mack* applies, then the same result necessary in regards to the deposition testimony must occur in regards to the court's admission of the recorded calls.

As a prefatory matter, however, this Court notes that is unnecessary to consider confrontation issues in regards to Johnson's own statements included on the tapes. He can surely confront himself. As for the hearsay objections, the court determined Johnson's statements were proper as admissions. Resp. Ex. P at 17. This was an accurate statement of the law. *See State v. Simmons*, 233 S.W.3d 235, 237 (Mo. App. 2007) (discussing the admissibility of admissions made by a party opponent). It is clear from the record that the statement at issue in the admissibility of the recorded phone calls, was Johnson's alleged admission that he was attempting to get "rid of a gun." Resp. Ex. P at 14. This statement, made by Johnson, is outside any due process confrontation concerns.

Putting aside the fact that the statements at issue on the tapes were his own, and therefore not subject to the *Mack* test, Johnson's assertion that the admission of any third-party statement would violate *Mack* is meritless. First, testimony was adduced demonstrating that the prosecution had completed a

relatively substantial investigation to identify the third-party caller as Johnson's girlfriend. *Id.* at 6–7. Second, the third-party statements were interspersed with Johnson's own statements, which by the nature of the law regarding admissions, are considered reliable. *See Simmons*, 233 S.W.3d at 237. With that conversational proximity, it would be peculiar to consider his statements reliable but her statements unreliable. Third, Johnson did not contest the accuracy of the hearsay statements during the hearing, Resp. Ex. P at 14, or in his suggestions in opposition, Resp. Ex. F at 5–6; instead, focusing on his belief that the calls were benign—merely expressing attempts to acquire bail assistance or other non-criminal endeavors. Resp. Ex. P at 14; Resp. Ex. F at 5–6. The circuit court considered these arguments and, to the extent it was necessary, made a finding that confrontation was not required. Resp. Ex. P at 17. Johnson has not demonstrated otherwise and this Court denies Johnson relief on both subordinate parts of his third claim.

**Therefore**, it is ordered that Johnson's petition for writ of habeas corpus is **DENIED**.

**Further**, it is ordered that any pending motion not specifically addressed by this Court is **DENIED**.

3-17-2021
Date

CIRCUIT COURT SEAL MISSISSIPPI COUNTY, MO

Presiding Circuit Judge David A. Dolan



FILED
MAR 17 2021
CIRCUIT COURT
MISSISSIPPI COUNTY