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JURISDICTIONAL STATEMENT

Article V Sec. 4 of the Missouri Constitution gives this Court jurisdiction to issue remedial writs, *Id.* “Mandamus is a discretionary writ that is appropriate when a court has exceeded its jurisdiction or authority, and where no remedy exists through appeal.” *State ex rel. Kizer v. Mennemeyer*, 421 S.W.3d 558, 559 (Mo. App. E.D. 2014). Relator asserts that respondents Asel and Lombardi exceeded their authority under Sec. 217.362, RSMo, in the following respects, to wit:

Respondent Asel has failed to order the release of relator on probation upon successful completion of long term treatment and a finding that relator is suitable for probation.

Respondent Lombardi has failed to release relator upon relator’s successful completion of long term treatment pursuant to Sec. 217.362, RSMo, finding that relator is suitable for probation and a docket entry from the sentencing court indicating it is not opposed to release of relator subject to Sec. 217.362.

The time normally associated with a direct appeal means that direct appeal does not provide an adequate remedy in that relator is otherwise scheduled for release June 8, 2015.

STATEMENT OF FACTS

On June 24, 2013 relator pleaded guilty pursuant to a plea agreement to the class B felony of Driving While Intoxicated, as a chronic offender. (Ex. 1, p. 8). Respondent Judge Asel sentenced relator to five years in the Department of Corrections and recommended that he be placed in long term treatment pursuant to Chapter 217. (Ex. 1 p. 9). The Judgment specifically directed **“The Defendant is committed the Court Ordered Long Term Substance Abuse Program (Sec. 217.362, RSMo),”** (Ex. p. 2), (*emphasis supplied in original*).

In November 2014, Respondent Lombardi, through the Board of Probation and Parole, informed Respondent Asel in its Court Report Investigation that relator was scheduled to complete long term treatment on December 31, 2014. (Ex. 2 pp. 10-15). The report concluded that: “[Relator] has successfully completed the requirements of the Long Term Drug Treatment Program. [Relator] is sentenced as a chronic offender on Case No. 13BA-CR00008-01, and cannot, by statute, be released to probation until after a period of two years incarceration, which said date is June 8, 2015. Unless otherwise order by the Court, [relator] will be released on his chronic DWI date of 06-08-2015.” (Ex. 2 pp. 14).

On November 13, 2014, respondent Judge Asel issued “RSMo 217.362 ORDERS OF PROBATION,” finding that relator had completed the Long Term Drug Program pursuant to 217.362 and directed that supervised probation begin June 8, 2015. (Ex. 3 p.16). In January 2015, Relator filed a Motion for Release was considered by respondent Asel on March 2, 2015. (Ex. 4 p. 17). The State did not oppose the motion. (Ex. 4 p. 17). Respondent Judge Asel found, “Defendant [relator] having completed long-term treatment program pursuant to 217.362 RSMo, the state is not opposed to Motion for Release. (Ex. 4 p. 17). Respondent Asel noted that relator was sentenced as a chronic offender pursuant to 577.023(4), RSMo. (Id.). Respondent Asel concluded the docket entry with: “Court does not object to release under Chapter 217 if Department of Corrections finds that defendant is eligible for release despite 577.023(4), RSMo.” (Id.) Relator’s Petition for Mandamus before the Western District Court of Appeals was denied on March 18, 2015. (Ex. 5 p. 18). Relator remains incarcerated.

POINTS RELIED ON

POINT I

Sandknop v. Goldman, 499 SW3d at 502.

South Metro. Fire Prot. Dist. v. City of Lee's Summit, 278 S.W.3d 659, 666
(Mo. banc 2009)

State ex rel. Bank v. Davis, 314 Mo. 373, 388-89, 284 SW 464 (1926).
Sec. 217.362, RSMo.

POINT II

Morrow v. City of Kansas City, 788 SW2d 278, 281 (Mo. Banc 2006)

Smith v. Mo. Local Govt. Employees Retirement System, 235 S.W.3d 578,
582 (Mo.App. 2007)

McCoy v. The Hershewe Law Firm, P.C., 366 SW3d at 586,594 (MoApp
2012)

State v. Treadway, 558 SW2d 646, 652-53 (Mo. Banc 1977)

POINT III

Dorris v. State, 360 SW3d 260 (Mo banc 2012).

Saxton v. Moore, 598 SW2d 586, 591 (MoApp WD 1980).

Snyder v. State, 334 SW3d 735, 739 (MoApp WD 2011)

ARGUMENT

POINT I

Mandamus should issue as to respondents in that they have exceeded their statutory authority in holding relator in custody pursuant to Sec. 577.023.6(4), RSMo, rather than releasing him pursuant to Sec. 217.362, RSMo, because those statutes cover the same subject matter, chronic offenders, and are to be read in harmony, and because Sec. 217.362 directs that probationary release is the only sentencing option for those chronic offenders who complete long term treatment and are found suitable for probation as opposed to those chronic offenders who do not participate in long term treatment.

STANDARD

Article V Sec. 4 of the Missouri Constitution gives this Court jurisdiction to issue remedial writs, *Id.* “Mandamus is a discretionary writ that is appropriate when a court has exceeded its jurisdiction or authority, and where no remedy exists through appeal.” *State ex rel. Kizer v. Mennemeyer*, 421 S.W.3d 558, 559 (Mo. App. E.D. 2014). “To be entitled to a writ, a litigant asking relief by mandamus must allege and prove that he has a clear, unequivocal, specific right to a thing claimed.” *U.S. Dept. of Veterans Affairs v. Boresi*, 396 S.W.3d 356, 359 (Mo. banc 2013).

“Ordinarily, mandamus is the proper remedy to compel the discharge of ministerial functions, but not to control the exercise of discretionary powers.” *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 538 (Mo. banc 2012). However, “if the respondent’s actions are wrong as a matter of law, then [the respondent] has abused any discretion [the respondent] may have had, and mandamus is appropriate.” *State ex rel. Kizer*, 421 S.W.3d at 559. Whether a circuit court has exceeded its authority is a question of law that is reviewed *de novo*. *State ex rel. Thurman v. Pratte*, 324 S.W.3d 501, 503 (Mo. App. E.D. 2010).

NARRATIVE OF ARGUMENT

Upon successful completion of long term treatment pursuant to Sec. 217.362, RSMo, an offender is to be released on probation unless the sentencing court determines that probation is not appropriate, and no other action is expressly, or impliedly, permitted, *Sandknop v. Goldman*, 450 SW3d 499 (MoApp 2014). When two statutory provisions covering the same subject matter, such as Secs. 217.362 and 577.023.6(4), RSMo, are unambiguous standing separately but are in conflict when examined together, a reviewing court must attempt to harmonize them and give them both effect. *South Metro. Fire Prot. Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. banc 2009). Statutes relating to the same or similar

subject matter, even though enacted at different times and found in different chapters, are *in pari materia* and must be considered together, *ITT Canteen Corp. v. Spradling*, 526 SW2d 11 (Mo. banc 1975).

The specific application of Sec. 217.362, RSMo.

Respondent Asel's judgment and sentence of relator contained the following specific reference: "**The Defendant is committed to the Court Ordered Long Term Substance Abuse Program (Sec. 217.362 RSMo).**" (emphasis supplied by the Court). See Exhibit 1, page 9. Having done so sentenced relator, respondent was bound to follow the mandates of Sec. 217.362.3, RSMo, which the Eastern District has held to mean, "Upon successful completion of the program, an offender will be released on probation unless the court determines that probation is not appropriate," *State ex rel. Salm v. Mennemeyer*, 423 SW3d 319, 321 (MoApp 2014). "Accordingly, upon an offender's successful completion of the long-term treatment program, the trial court must: (1) allow the offender to be released on probation; or (2) determine that probation is not appropriate and order the execution of the offender's sentence," *Id.* at 321.

On November 2014, respondent Asel, determined probation was appropriate for relator in a docket entry entitled, "**RSMo 217.362 ORDERS OF PROBATION,**" (emphasis supplied by the Court), thus limiting the

sentencing court's to one option, the placement of relator on probation. Id. "No other action is expressly, or impliedly, permitted under the statute," *Sandknop v. Goldman*, 499 SW3d at 502.

Limiting the sentencing court's authority to the express provisions of the sentencing statute is consistent with this Court's holding in *State ex rel. Mertens v. Brown*, 198 SW3d 616 (Mo banc 2006). Once judgment and sentencing occur in a criminal proceeding, a sentencing court exhausts its jurisdiction, *State v. ex rel. Valentine v. Orr*, 366 SW3d 534, 541 (Mo Banc 2012). It can take no further action in that case except when otherwise expressly provided by statute or rule, *State ex rel. Mertens v. Brown*, 198 SW3d at 618.

The relevant statutes are to be applied in harmony.

Respondents' concern that they are constrained by the two year minimum incarceration provision of Sec. 577.023.6(4), fails to recognize that it is to be applied in harmony with Sec. 217.362, RSMo, in that each statute deals with chronic offenders involved with substance abuse. When "two statutory provisions covering the same subject matter are unambiguous standing separately but are in conflict when examined together, a reviewing court must attempt to harmonize them and give them both effect." *South*

Metro. Fire Prot. Dist. v. City of Lee's Summit, 278 S.W.3d 659, 666 (Mo. banc 2009).

To the extent Sec. 217.362, which provides for long term treatment options for chronic offenders, and Sec. 577.023.6(4), which provides a two year minimum term of incarceration for chronic offenders, relate to the same subject matter, that is the sentencing and eligibility for probation for chronic offenders, they must be read *in pari materia*, *Baldwin v. Dir. of Revenue*, 38 SW3d 401 (Mo banc 2001). They must be interpreted harmoniously and consistently with each other, *Id.*

Chronic offenders who complete long term treatment in a statutory program designed to promote recovery from substance abuse can be distinguished from chronic offenders who do not; thus, probationary release pursuant to Sec.217.362, RSMo, does not present an irreconcilable conflict with the minimum sentencing provisions of Sec. 577.023.6(4), RSMo. The application of Sec. 217.362 to a specifically designated class of chronic offenders does not nullify the directives of Sec. 577.023.6(4) as to chronic offenders in general. Those chronic offenders who are not chosen for long term treatment remain subject to the two year minimum incarceration requirement. Likewise, even those chosen for long term treatment who do not successfully complete it, or are otherwise found to unsuitable for

probation, remain subject to the two year minimum set forth in Sec. 577.023.6(4). This statutory plan can be discerned from the language used by the general assembly in its definition of chronic offenders.

In enacting the legislation to provide the long term treatment option to sentencing judges and the accompanying incentives for offenders that qualify, the legislature specifically disqualified only those offenders who had pleaded guilty to or been convicted of a dangerous felony as defined in Sec. 556.061, RSMo., see Sec. 217.362.1, RSMo.

217.362. Program for offenders with substance abuse addiction — eligibility, disposition, placement — completion, effect

1. The department of corrections shall design and implement an intensive long-term program for the treatment of chronic nonviolent offenders with serious substance abuse addictions who have not pleaded guilty to or been convicted of a dangerous felony as defined in section 556.061.

Chronic offenders of driving while intoxicated are not included in that exclusion, *Id.* The express mention of one thing implies the exclusion of another (*expressio unias est exclusion alterius*) and allows the inference that obvious omissions are generally presumed to be intentional exclusions,

Wolff Shoe Co. v. Director of Rev., 762 SW2d 29, 32 (Mo. banc 1988). Therefore, when addressing disqualifications in Sec. 217.362.1, RSMo, the legislature's express inclusion of one thing, dangerous felons, implies that all others, including chronic DWI offenders, are not included in the disqualification, *Id.*

But the statute provides more direct guidance that direct the conclusion that it is to be read in harmony with Sec. 577.023. Sec. 217.362.1 specifically states the long term treatment program is authorized for *chronic* non-violent offenders with serious substance abuse addictions, *Id.*, (emphasis added). This section was amended in 1998 to expand the program from cocaine abusers to all with serious substance abuse addictions, (A.L. 1998 H.B. 1147, et al.). In the general sense the words "chronic, non-violent offenders", certainly include those repeat DWI offenders defined in Sec. 577.023.1(2) and addressed in Sec. 577.023.6(4). Furthermore, the specific term "chronic" is the very term used in Sec. 577.023.6(4). Thus, when addressing treatment and sentencing options for chronic, non-violent offenders in Sec. 217.362, the legislature specifically was creating a modification or amendment of the subject matter of the general sentencing statute at Sec. 577.023.6(4), RSMo.

In short, Sec. 577.023.6(4) is a general statute that applies to a broad class of chronic DWI offenders. Sec. 217.362 is a specific statute that applies to chronic offenders who have successfully completed long term treatment and otherwise are eligible for probation. While the dichotomy between specific and general laws and the effect of dates of enactment customarily relate to statutes in conflict rather than those *in pari materia*, those considerations significant when considering legislative intent even for statutes *in pari materia*, *In re Matter of State ex rel. Bank v. Davis*, 314 Mo. 373, 388-89, 284 SW 464 (1926).

Statutes *in pari materia* are those which relate to the same person or thing, or to the same class of persons or things. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law. The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the Legislature, or to discover how the policy of the Legislature with reference to the subject-matter has been changed or modified from time to time. With this purpose in view therefore it is

proper to consider, not only acts passed at the same session of the Legislature, but also acts passed at prior and subsequent sessions, and even those which have been repealed. So far as reasonably possible the statutes, although seemingly in conflict with each other, should be harmonized, and force and effect given to each, as it will not be presumed that the Legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in express terms; nor will it be presumed that the Legislature intended to leave on the statute books two contradictory enactments. *Id.*

The provisions of Sec. 217.362 which invite sentencing judges to consider the long term treatment option for chronic offenders reinforce the conclusion that Sec. 217.362 is to be read in harmony with, and not in conflict with, Sec. 577.023. To encourage offenders to be serious in the treatment process, the statute effectively promises release on probation for an offender who completes treatment if he otherwise qualifies for probation. If a court applies Sec. 577.023 to exclude all chronic offenders from the early release rewards of Sec. 217.362, it eliminates from consideration those who are most likely to need treatment, those with substance abuse addictions who also are chronic offenders of non-violent crimes. Such an interpretation

discourages their participation and reduces the effectiveness of the program and the legislation. It would eliminate from consideration a significant number of the chronic offenders defined in Sec. 217.362.1, RSMo. In effect, such an interpretation neuters the broader purpose of Sec. 217.362.

Worse yet, to invite and direct chronic offenders to participate in the program with the expectation of early release, only to deny it to them upon completion, invites the type of resentment that is inconsistent with recovery from addiction. It is logical to conclude that such a denial would invite the type of resentment that is inconsistent with the obvious purpose of the legislation, providing recovery from addiction for those who might otherwise gain it. This defeats the obvious purpose of program, especially since participating in treatment in the prison itself can be especially challenging. Courts are obligated to ascertain the intent of the legislature from the language used and to give effect to that intent without arriving at an absurd result, *David Rankin Jr. Tech. Inst. v. Boykins*, 816 SW2d 189, 192 (Mo. banc 1991).

The reward of early release is a significant part of the statutory purpose. Such a reward serves as consideration for the rigors and challenges presented to one undergoing treatment for addiction in prison. Survival skills normally associated with life in prison, such as keeping to oneself to

avoid conflict, just to name one, often are inconsistent with the sharing that is associated with treatment for alcohol addiction. It would not be unusual for program participants to find themselves in conflict with other inmates in and out of the program simply by virtue of their participation. To breed the resentments that would flow from unfulfilled expectations created by Sec. 217.362 and the holdings of *Salm v. Mennemeyer* and *Sandknob v. Goldman*, rather than achieving the goal of creating the greater sense of serenity associated with treatment for addiction, can hardly be what the legislature had in mind. Furthermore, in instances where an offenders' plea was based upon reasonable expectations of early release, such pleas have been held involuntary in habeas corpus proceedings when those expectations are not met, see *Brown v. Gammon*, 947 SW2d 437 (MoAppWD 1997). The law favors statutory construction that harmonizes with reason and that tends to avoid absurd results. *Rankin v. Boykin, supra*.

The "cardinal rule" of statutory interpretation is "to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning." *In re Boland*, 155 S.W.3d 65, 67 (Mo. banc 2005). To adopt the respondents' application of the statutes at issue effectively nullifies the purpose behind

Sec. 217.362. To apply the specific treatment and sentencing options of Sec. 217.362 to Sec. 577.023.6(4), merely modifies general sentencing directives.

The fact that the long term treatment option created in the amendment of Sec. 217.362 in 1998, was enacted subsequent to the enactment of Sec. 577.023, RSMo, only serves to reinforce the conclusion that Sec. 217.362 serves to modify or amend the general provisions of Sec. 577.023, RSMo. It is presumed that in amending a statute or enacting a new one on the same subject it is ordinarily the intent of the legislature to effect some change in the existing law. *McCoy v. The Hershewe Law Firm, P.C.*, 366 SW3d 586, 594 (MoApp WD 2012). When statutory construction is required, as when statutes are repugnant in any of their provisions, the later act operates, to the extent of the repugnancy, to repeal the first, *Morrow v. City of Kansas City*, 788 SW2d 278, 281 (Mo banc 1990), (see point II).

Ceding of authority

Finally, respondent Asel's March 2015 ruling deferring judgment to respondent Lombardi likewise is not an option prescribed by Sec. 217.362, RSMo. In placing the decision in the hands of respondent Lombardi, Judge Asel, similar to Judge Goldman in *Sandknop*, attempted to create a third sentencing option not prescribed by the statute and contrary to law. *Sandknop v. Goldman, supra*. Moreover, such a delegation is an improper

ceding of judicial authority. *Pearson v. Koster*, 367 SW3d 36 (Mo banc 2012).

No discretion to hold relator.

As for respondent Lombardi, once the record revealed the relator successfully completed long term treatment pursuant to Sec. 217.362, RSMo, and that the sentencing court found probation to be appropriate, Mr. Lombardi no longer had authority or discretion to hold relator in custody. In spite of the sentencing court's deferral to the Department of Corrections, such discretion is not afforded respondent Lombardi either by Sec. 217.362, RSMo. Therefore, respondent Lombardi has a ministerial duty to release relator.

POINT II

(raised in alternative to the arguments in Point I that the statutes in question are *in pari materia*).

Mandamus should issue as to respondents in that they have exceeded their statutory authority in not releasing relator pursuant to Sec. 217.362, RSMo, because to the extent the minimum sentencing provisions of Sec. 577.023, RSMo, conflict with the release provisions of Sec. 217.362, RSMo, Sec. 217.362 controls in that:

(1) the specific sentencing and release provisions of 217.362 outweigh the general sentencing provisions of 577.023,

(2) by enacting Sec. 217.362 subsequent to the enactment of 577.023, the legislature amended or repealed those provisions of 577.023 that conflict with 217.362, and

(3) penal statutes are to be strictly construed so that in case of doubt concerning the severity of the penalty prescribed, the law favors a milder penalty over a harsher one.

STANDARD

Article V Sec. 4 of the Missouri Constitution gives this Court jurisdiction to issue remedial writs, *Id.* “Mandamus is a discretionary writ that is appropriate when a court has exceeded its jurisdiction or authority,

and where no remedy exists through appeal.” *State ex rel. Kizer v. Mennemeyer*, 421 S.W.3d 558, 559 (Mo. App. E.D. 2014). “To be entitled to a writ, a litigant asking relief by mandamus must allege and prove that he has a clear, unequivocal, specific right to a thing claimed.” *U.S. Dept. of Veterans Affairs v. Boresi*, 396 S.W.3d 356, 359 (Mo. banc 2013). “Ordinarily, mandamus is the proper remedy to compel the discharge of ministerial functions, but not to control the exercise of discretionary powers.” *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 538 (Mo. banc 2012). However, “if the respondent’s actions are wrong as a matter of law, then [the respondent] has abused any discretion [the respondent] may have had, and mandamus is appropriate.” *State ex rel. Kizer*, 421 S.W.3d at 559. Whether a circuit court has exceeded its authority is a question of law that is reviewed *de novo*. *State ex rel. Thurman v. Pratte*, 324 S.W.3d 501, 503 (Mo. App. E.D. 2010).

NARRATIVE OF ARGUMENT

Upon successful completion of long term treatment pursuant to Sec. 217.362, RSMo, an offender is to be released on probation unless the sentencing court determines that probation is not appropriate, and no other action is expressly, or impliedly, permitted, *Sandknop v. Goldman*, 450 SW3d 499 (MoApp 2014). To the extent the minimum sentencing

provisions of Sec. 577.023, RSMo, conflict with Sec. 217.362, RSMo, Sec. 217.362 controls in that: (1) the specific release provisions of 217.362 outweigh the general sentencing provisions of 577.023, *Earth Island Inst. v. Union Electric Company*, SC 93944 (Mo. Banc Feb. 10, 2015), (2) by enacting Sec. 217.362 subsequent to the enactment of Sec. 577.023, the legislature amended or repealed those provisions of Sec. 577.023 that conflict with Sec. 217.362, *Morrow v. City of Kansas City*, 788 SW2d 278, 281 (Mo. Banc 2006), and (3) penal statutes are to be strictly construed so that in case of doubt concerning the severity of the penalty prescribed, the law favors a milder penalty over a harsher one, *State v. Treadway*, 558 SW2d 646, 652-53 (Mo. Banc 1977).

If harmonization between conflicting statutes is impossible, "a chronologically later statute, which functions in a particular way will prevail over an earlier statute of a more general nature, and the latter statute will be regarded as an exception to or qualification of the earlier general statute." *Smith v. Mo. Local Govt. Employees Retirement System*, 235 S.W.3d 578, 582 (Mo.App. 2007). Even in the absence of a specific repealing clause, the later act operates to the extent of the repugnancy to repeal the first, *Morrow v. City of Kansas City*, 788 SW2d at 281. As cited in Point I, it is presumed that in amending a statute or enacting a new one on the same subject it is

ordinarily the intent of the legislature to effect some change in the existing law, *McCoy v. The Hershewe Law Firm, P.C.*, 366 SW3d at 586,594 (MoApp 2012)

Sec. 217.362, RSMo was amended in 1998 to expand the treatment options for chronic offenders with cocaine addictions to include chronic offenders with serious substance abuse addictions of all stripes. (A.L. 1998 H.B. 1147, et al.). Sec. 577.023 was first enacted in 1982, (L. 1982 S.B. 513). No subsequent revision or reenactment of Sec. 577.023 has included the phrase, “Notwithstanding the provisions of Sec. 217.362.”

As argued in Point I, both statutes deal with sentencing of “chronic” offenders. Those specifically excluded from the treatment options under Sec. 217.362 are those defined as dangerous felons under Sec. 556.061, RSMo, see Sec. 217.362.1, RSMo. The express mention of one thing implies the exclusion of another, *Wolff Shoe Co. v. Director of Rev.*, 762 SW2d at 32. Thus, when addressing disqualifications in Sec. 217.362.1, RSMo, the legislature’s express mention of one thing, dangerous felons, implies that all others, including DWI offenders, are not included in the disqualification, *Id.*

Moreover, Sec. 217.362 provides specific sentencing options for a specific class of chronic offenders that merely alter or amend or nullify the

general sentencing provisions of Sec. 577.023, RSMo. Sec. 217.362 does not nullify the purpose behind Sec. 577.023. Chronic offenders in general are still bound to suffer minimum incarceration of two years, *Id.* And Sec. 577.023 also applies to those chronic offenders who, after being sentenced pursuant to Sec. 217.362, fail to successfully complete the program or otherwise are not suitable for probation. In short, Sec. 217.362 does not neuter the purpose of Sec. 577.023 to provide minimum punishment to those offenders who have shown no inclination to reform their ways. To reverse the application, so as to apply the broad prohibition for probation of Sec. 577.023 to all chronic offenders, including those specifically identified by sentencing judges as good candidates for reform through treatment, effectively nullifies the purpose behind Sec. 217.362, RSMo. That application, which is the one chosen by respondents, violates the cardinal rule of statutory interpretation: to ascertain the intent of the legislature from the language used and to give effect to that intent. *In re Boland*, 155 SW3d at 67. The fact that Sec. 217.362 was enacted subsequent to the enactment of Sec. 577.023 supports the conclusion that the position taken by respondents does not serve the purpose of the legislation or the intent of the legislature, *Smith v. Mo. Local Govt. Employees Ret. Syst.*, *supra*. The fact that Sec. 217.362 provides a specific sentencing plan to a specific class of

chronic offenders supports the conclusion that it was meant to modify or amend the general provisions of Sec. 577.023, Id.

Penal Statutes to be Strictly Construed

Any doubt about which provision prevails is resolved by the rule that when such doubt arises, the law favors a milder penalty over a harsher one, *State v. Treadway*, 558 SW2d at 652-53.

It is an ancient rule of statutory construction and an oft-repeated one that penal statutes should be strictly construed against the government or parties seeking to exact statutory penalties and in favor of persons on whom such penalties are sought to be imposed. When the law imposes a punishment which acts upon the offender alone, and it is not a reparation to the party injured, and the punishment is entirely within the discretion of the law giver, it will not be presumed that the legislature intended the punishment to extend farther than is expressly stated.

* * * * *

And as a corollary of the rule, in case of doubt

concerning the severity of the penalty prescribed by a statute construction will favor a milder penalty over a harsher one." *Id.* citing 3 Sutherland, Statutory Construction § 59.03 (4th ed. 1974).

Respondent Asel indeed has expressed her doubt as to which provision applies. (See March 2015 docket entry. Exhibit 4). Inasmuch both respondents have resolved such doubts by imposing the harsher of the two available penalties, a writ of mandamus is in order to correct the error and secure the rights to which relator is entitled.

Respondents have not complied with Sec. 217.362

Because respondent Asel specifically sentenced relator pursuant to Sec. 217.362, RSMo, she was bound to release relator on probation once he successfully completed long term treatment and it was determined relator was suitable for probation, *State ex rel. Salm v. Mennemeyer*, 423 SW3d 319 (MoApp ED 2014). "No other action is expressly, or impliedly, permitted under the statute *Sandknop v. Goldman*, 499 SW3d 499, 502 (MoApp ED 2014). (At this point relator adopts and incorporates by reference his argument in Point I that respondent Asel did not comply with Sec. 217.362 and had no authority to act outside the scope and directives of Sec. 217.362

and that, because relator qualified for probation pursuant to Sec. 217.362, respondent Lombardi has no authority to continue to hold him in custody.)

For the foregoing reasons, this Court should issue its Writ of Mandamus directing the probationary release of relator.

POINT III

Mandamus should issue as to respondents in that they have exceeded their statutory authority in not releasing relator pursuant to Sec. 217.362, RSMo, (Supp. 2004) in that the state has waived objection to such release, because: (1) it raised no objection to the sentencing of relator to the long term treatment plan, (2) it permitted relator into the long term treatment program knowing that he would complete it prior to serving two years of incarceration and (3) because following relator's successful completion of long term treatment, the state did not object to relator's Motion for Release before the sentencing court.

STANDARD

Article V Sec. 4 of the Missouri Constitution gives this Court jurisdiction to issue remedial writs, *Id.* "Mandamus is a discretionary writ that is appropriate when a court has exceeded its jurisdiction or authority, and where no remedy exists through appeal." *State ex rel. Kizer v. Mennemeyer*, 421 S.W.3d 558, 559 (Mo. App. E.D. 2014). "To be entitled to a writ, a litigant asking relief by mandamus must allege and prove that he has a clear, unequivocal, specific right to a thing claimed." *U.S. Dept. of Veterans Affairs v. Boresi*, 396 S.W.3d 356, 359 (Mo. banc 2013). "Ordinarily, mandamus is the proper remedy to compel the discharge of

ministerial functions, but not to control the exercise of discretionary powers.” *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 538 (Mo. banc 2012). However, “if the respondent’s actions are wrong as a matter of law, then [the respondent] has abused any discretion [the respondent] may have had, and mandamus is appropriate.” *State ex rel. Kizer*, 421 S.W.3d at 559. Whether a circuit court has exceeded its authority is a question of law that is reviewed *de novo*. *State ex rel. Thurman v. Pratte*, 324 S.W.3d 501, 503 (Mo. App. E.D. 2010).

NARRATIVE OF ARGUMENT

Waiver has been defined as the voluntary relinquishment or abandonment, express or implied, of a known right, *Dorris v. State*, 360 SW3d 260 (Mo banc 2012). The doctrine of waiver applies to the state when it tacitly consents to, or fails to object to, propositions made before the trial court, *State ex rel. Saxton v. Moore*, 598 SW2d 586, 591 (MoApp WD 1980).

The Judgment and Sentence and related docket entries reveal no objection by the state to the sentencing of relator to long term treatment pursuant to Sec. 217.362, RSMo. (See Exhibit 1). Likewise, the Court Report Investigation submitted respondent Lombardi and the Department of Corrections reveals the state allowed relator to participate in a 12 month

program pursuant to Sec. 217.362 with the knowledge that he would not complete two years of incarceration upon completion. (See Exhibit 2). The March 2, 2015 docket entry reveals that the state did not object to relator's specific Motion for Release filed pursuant to Sec. 217.362 and the decision in *Sandknop v. Goldman, supra*. (See Exhibit 4).

In reliance upon early release, relator participated in and successfully completed the long term treatment program provided pursuant to the statute and sentence. While relator is grateful for the opportunity to participate in the recovery program, such participation involves some effort and consideration by a participant in reliance upon the rewards that are included in the legislation. (See Point II). In light of relator's successful completion of the program, the state, with knowledge that relator specifically sought release prior to the time when his two years of incarceration would be completed, made no objection. (See Exhibit 4).

When the state fails to make timely objection to an offender's motion, it can constitute waiver, such as in cases involving interstate detainers, *Saxton v. Moore, supra*. Other examples of waiver by the state include a waiver of the death penalty, *State v. Martin*, SD32983 (MoApp March 23, 2015) and a waiver an offender's tardiness in filing an amended post conviction relief motion, *Snyder v. State*, 334 SW3d 735, 739 (MoApp WD

2011) *Moore v. State*, SC94277 (Mo banc April 14, 2015), dissenting opinion, and defendant's failure to raise an issue of mental responsibility, *State v. Sears*, 501 SW2d 491 (Mo App KC 1973).

In the instant case, the first time the state raised objections to probationary release was when relator sought mandamus relief in the appellate courts. This is a reversal of the position taken by the state when the Motion for Release was argued to the sentencing court. By choosing not to object throughout the proceedings in the sentencing court, the state has relinquished its right to do so now.

For the foregoing reason, this Court should issue its Writ of Mandamus directing the probationary release of relator.

Conclusion

While it may be asked why relator is pursuing mandamus when he is scheduled for release on June 8, 2015, that question generally is asked by those who do not reside in a prison cell. Each day that passes with relator in custody represents a violation of the statutory scheme set forth in Sec. 217.362, RSMo. For the reasons set forth herein, this Court should issue its Writ of Mandamus directing the probationary release of relator.

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CERTIFICATION OF COMPLIANCE

I hereby certify that, as required by Rule 84.06 (c), this brief complies with the word of line limits of Rule 84.06 (b), and has a word count of 6,213 words.

The undersigned relied on the word count feature on his form's word processing system to arrive at that number. The original of this brief has been signed and maintained by filer pursuant to Rule 55.03.

CERTIFICATE OF SERVICE

Relator hereby certifies that he served a copy Relator's Supplemental Suggestions in Support of Mandamus, by placing the same in the United States Mail, first class, postage prepaid, on this 30th day of April, 2015, to:

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