

**No. SC95132**

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**In the  
Missouri Supreme Court**

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**STATE OF MISSOURI EX REL.  
COLIN M. HENNEN,**

**Relator,**

**v.**

**THE HONORABLE DENNIS ROLF,  
Respondent.**

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**Appeal from County Circuit Court  
Fifteenth Judicial Circuit  
The Honorable Dennis A. Rolf, Judge**

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**RESPONDENT'S BRIEF**

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## STATEMENT OF FACTS

Relator (“Defendant”) pleaded guilty to Possession of a Controlled Substance with Intent to Distribute, Deliver or Sell on May 21, 2012, in the Circuit Court of Lafayette County, Missouri. Relator’s Exh. A, p 4. The imposition of sentence was suspended, and Relator was placed on five years of supervised probation. *Id.*, p. 3-4. A special condition of Relator’s probation was that he complete the Missouri Post Conviction Drug Treatment Program under Section 217.785. *Id.* Since the Missouri Post Conviction Drug Treatment Program was ordered as a special condition, Relator started his term of probation at the time of sentencing, May 21, 2012.

On September 21, 2012, Relator was released from the Missouri Post Conviction Drug Treatment Program and his probation was transferred to the State of Pennsylvania where he resides. Although Relator was sentenced to five years supervised probation, in the 2012 Missouri Legislative Session, Section 217.703 was passed which gave defendants on probation, parole or conditional release for specific offenses the ability to receive earned compliance credits. In essence, a defendant can earn thirty days of credit for each full calendar month they are in compliance as defined under Section 217.703.4. Because Relator was on probation prior to September 1, 2012, under Section 217.703.3, Relator would begin receiving earned compliance credits on October 1, 2012.<sup>1</sup>

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<sup>1</sup> Both parties agree that pursuant to Section 217.703.3, Relator should have began receiving earned compliance credits on October 1, 2012. However, Missouri Probation and Parole’s policy is to start earned compliance credits on September 1, 2012.

On November 20, 2014, the State filed an Application to Revoke Relator's Probation due to his failure to pay restitution as ordered by the Court. Further, Relator failed to provide proof to his probation officer showing the completion of his community service as required. Sealed Exh. C, pp. 6-7; Relator's Exh. A, p. 3. Due to this filing, Relator did not earn any compliance credits for October or November of 2014. After Relator paid restitution and provided proof of his completion of community service, the State withdrew its Application to Revoke Relator's Probation on November 25, 2014. *Id.*

On February 4, 2015, and February 18, 2015, Field Violation Reports were filed by the Missouri Department of Probation and Parole due to Relator being arrested and charged in Pennsylvania with possession with intent to deliver a controlled substance, marijuana, and possession of marijuana. Relator's Sealed Exh. I, J. The State then filed its Application to Revoke Relator's Probation on February 20, 2015, and Respondent issued a warrant for Relator's arrest on that same date. Relator's Exh. A, p. 2. Because of these violations, Relator stopped earning compliance credits in January, 2015.

On February 18, 2015, Relator pleaded guilty to possession of a controlled substance by a person not registered. Relator's Exh. E, p. 30. Relator was then transferred to SCI-Pittsburg on March 31, 2015, where he was held "... on a Pennsylvania State Parole Board Warrant for a violation of his Missouri State Parole." Relator's Exh. E, p. 32.

On April 6, 2015, the Lafayette County Sheriff was first notified that Relator was available to be retaken by Missouri. Exh. A, pp. 1-2; Exh. B, pp. 4-5. On April 7, 2015, Security Transport Services was notified and authorized to transport Relator back to Lafayette County. Exh. A, pp. 1-2. Relator was received back in Missouri by the Lafayette

County Sheriff at the Lafayette County Jail on April 10, 2015. Exh. A, pp. 1-2; Exh. B, pp. 4-5.

On April 20, 2015, the first law day in Lafayette County after Relator's return to Missouri, a hearing was held and Relator was arraigned on the State's Application to Revoke Probation and Relator's Motion to Discharge probation that was filed on April 17, 2015, was considered. After arguments by both sides, the matter was taken under advisement by Respondent and a new court date of May 18, 2015, was given. Relator's Exh. D, pp. 12-25; Relator's Exh. C, pp. 7-11. Respondent also modified Relator's bond from the no bond requirement under the Interstate Commission for Adult Offender Supervision ("ICAOS") to \$15,000.00 cash which Relator posted a few days later. Relator's Exh. D, p. 24

At the May 18, 2015, hearing, Respondent overruled Relator's April 17, 2015, Motion to Discharge Probation and set a new hearing date of July 20, 2015. Respondent set this date after Counsel for Relator told Respondent she was going to seek a writ to prohibit him from holding a probation revocation hearing to allow Relator time to seek appellate review. Relator's Exh. F.

On July 9, 2015, Relator filed his Petition for writ of Mandamus or Prohibition, in the Missouri Court of Appeals, Western District. Relator's Exh. H. On July 10, 2015, the Court denied Relator's Petition. *Id.*

On July 10, 2015, Relator filed his Petition for writ of Mandamus or Prohibition in this Court. On July 16, 2015, Respondent filed Suggestions in Opposition. On July 20, 2015, this Court issued its Preliminary Writ of Prohibition and an Amended

Preliminary Writ of Prohibition. On August 19, 2015, Respondent filed his Return and Answer to Writ of Prohibition.



**POINT RELIED ON**

**Relator is not entitled to an order prohibiting Respondent from holding a probation violation hearing on July 20, 2015, because Respondent has the statutory authority to hold a probation violation hearing and potentially revoke Relator's probation, in that the matter giving rise to the probation violation occurred prior to the expiration of Relator's probation, prior to the expiration of the term of Relator's Probation an affirmative manifestation occurred to conduct the revocation hearing, and prior to Relator's probation term expiring every reasonable effort was made to notify Relator and conduct the hearing.**

*Stelljes v. State*, 72 S.W.3d 196 (Mo. App. W.D. 2002)

*State ex rel. Strauser v. Martinez*, 416 S.W.3d 798 (Mo. banc 2014).

Missouri Revised Statute Section 559.036

## ARGUMENT

**Relator is not entitled to an order prohibiting Respondent from holding a probation violation hearing on July 20, 2015, because Respondent has the statutory authority to hold a probation violation hearing and potentially revoke Relator's probation, in that the matter giving rise to the probation violation occurred prior to the expiration of Relator's probation, prior to the expiration of the term of Relator's Probation an affirmative manifestation occurred to conduct the revocation hearing, and prior to Relator's probation term expiring every reasonable effort was made to notify Relator and conduct the hearing.**

### **A. Writ Standards**

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

A writ of prohibition is appropriate: (1) to prevent the usurpation of judicial power when a lower court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted.

*State ex rel. Strauser v. Martinez*, 416 S.W.3d 798, 801 (Mo. banc 2014). However, prohibition is a discretionary writ with no right to have one issued. *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 587 (Mo. banc 2001).

“In a prohibition proceeding the burden is on the petitioning party to show that the trial court exceeded its jurisdiction, and that burden includes overcoming the presumption

of right action in favor of the trial court's ruling.” *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 69 (Mo. App. S.D. 1997).

“Mandamus is a discretionary writ, not a writ of right.” *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 576 (Mo. banc 1994). A writ of mandamus is used not to adjudicate, but to enforce a right. *State ex rel. Kiely v. Schmidli*, 583 S.W.2d 236, 237 (Mo. App. 1979).

## **B. Probation in Missouri**

In Missouri, the power to grant probation and the power that comes from it is a creature of state statute. *State ex rel. Hughes v. Kramer*, 702 S.W.2d 517, 519 (Mo. App. E.D. 1985). In general, the statutory authority for probation is contained under Section 559 and Section 559.012 sets forth when a person is eligible for probation. A term of probation starts the day it is imposed pursuant to Section 559.036.1. Therefore, in this case, Relator’s probation term started on May 21, 2012. Relator’s Exh. A, pp. 3-4.

Normally, the term of probation would be the full term imposed by the Court under Section 559.016. However, in 2012, the Legislature passed Section 217.703 which gave defendants on probation, parole or conditional release for specific offenses the ability to receive earned compliance credits. In essence, a defendant can earn thirty days of credit for each full calendar month they are in compliance. Compliance is defined under Section 217.703.4. Further, the ability of a defendant to receive credit if they are not in compliance is listed in Section 217.703.5.

Under Sections 559.036.3 and 559.036.5, if a defendant violates the terms of their probation, the court may revoke it. Normally, the court’s power to revoke probation only

extends until the probation expires. *State ex rel. Stimel v. White*, 373 S.W.3d 481, 484 (Mo. App. S.D. 2012). However, under Section 559.036.8, the court may still revoke a defendant's probation if: (1) the matter arose before the expiration of the probation; (2) prior to the expiration of the term of probation, an affirmative manifestation occurs to conduct the revocation hearing; and (3) prior to the expiration of the probation term, every reasonable effort is made to notify the defendant and to conduct the hearing.

### **C. Relator's Probation**

As applicable to this case, Relator was placed on a five-year term of probation. Relator's Exh. A, pp. 3-4. Since Section 217.703 was not in effect at that time, Relator's probation would expire on May 21, 2017. However, on August 28, 2012, Section 217.703 became effective and under Section 217.703.3 Relator begins to accrue earned compliance credits on October 1, 2012.<sup>2</sup> According to Probation and Parole, Relator did not earn any compliance credits for October or November of 2014 due to a previous violation report, and since December of 2014 due to these violations. Therefore, based upon the earned compliance credit start date (as calculated by Probation and Parole starting September, 2012) and the time he was not in compliance under Section 217.703.5, again as calculated by Probation and Parole, Relator's earned discharge date was April 1, 2015.<sup>3</sup> The April 1,

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<sup>2</sup> As previously noted in footnote 1, the Missouri Department of Probation and Parole's policy is to start earned compliance credits on September 1, 2012, not October 1, 2012.

<sup>3</sup> Both Respondent and Relator disagree with this date but pursuant to Section 217.703.8, the award or recession of credits is not subject to appeal.

2015, discharge date is the date that Relator's probation was set to expire based upon his probation start date of May 21, 2012, and compliance credits he earned under Section 217.703.

**C. Respondent made every reasonable effort to conduct a probation revocation hearing on the pending application to revoke probation prior to the expiration of Relator's probation.**

**1. Relator was still on probation when the matter giving rise to the probation violation occurred.**

There is no doubt in this case that the law and drug violations alleged by the State in the February 20, 2015, Application to Revoke Probation occurred prior to Relator's probation expiring. As calculated by the Missouri Department of Probation and Parole, Relator's probation was set to expire on April 1, 2015. The laws and drug violations occurred on or about December 29, 2014. Relator's Sealed Exh. J, p. 63. These violations occurred around 3 months prior to Relator's probation expiration date.

**2. Prior to the expiration of Relator's probation, Respondent affirmatively manifested his intention to hold a probation revocation hearing.**

Again, under this condition, there is no doubt that prior to the expiration of Relator's probation, Respondent manifested his intention to hold a probation revocation hearing. After the State filed its Application to Revoke Relator's probation, Respondent immediately issued a warrant for Relator's arrest on February 20, 2015. Relator's Exh. A, p. 2; Relator's Exh. E, p. 31. The fact that a warrant was issued prior to Relator's probation expiring showed Respondent affirmatively manifested his intention to hold a probation

revocation hearing. *Williams v. State*, 927 S.W.2d 903, 907 (Mo. App. S.D. 1996). Notifying Relator of the hearing other than by the warrant when he is not within the jurisdiction is not possible until he is taken into custody. *Id* at 906.

As in *Stelljes v. State*, 72 S.W.3d 196 (Mo. App. W.D. 2002), Relator moved to another state, committed new crimes, and was convicted and sentenced in that state. The court issued a warrant, but it was not served until after his probation expired. "... [I]ssuance of a capias warrant and suspension of probation are affirmative manifestations of an intent to conduct a probation revocation hearing." *Id* at 202.

**3. Respondent made every reasonable effort to notify Relator and conduct a hearing on the pending Application to Revoke Probation prior to the expiration of Relator's term of probation.**

Relator contends that Respondent did not make every reasonable effort to notify Relator and conduct a hearing on the pending probation violation matters prior to the expiration of Relator's term of probation. There is no disagreement that a detainer was placed on Relator when Respondent issued a warrant on February 20, 2015. Further, the record shows that Relator had an attorney in Pennsylvania who was talking to the State of Missouri at the same time he was working on Relator's new charges in Pennsylvania. These factors clearly demonstrate that Respondent made every reasonable effort to notify Relator of the intent to revoke his probation. *Id*.

The real issue is, did Respondent make every reasonable effort under Section 559.036.8 to conduct a hearing on the pending probation violation prior to the expiration of Relator's probation. Relator relies extensively on *Strauser* and the language used by

this Court in that decision. However, this case is factually different from *Strauser* in two ways.

First, unlike in *Strauser*, Relator was not in front of the court. There was no way for Respondent to hold a hearing on the pending probation violations until after Relator was back in his jurisdiction. The record clearly shows that Relator was not back in the jurisdiction of Respondent until April 10, 2015, when he was received back in Missouri at the Lafayette County Jail. Relator's Exh. A, p. 2; Exh. A, p. 2; Exh. B, p. 4. Relator's first appearance and hearing before Respondent was on April 20, 2015, the first law day in Lafayette County after the warrant was executed on Relator. Relator's Exh. A, p. 2; Exh. A, p. 2; Exh. B, p. 4.

Secondly, unlike in *Strauser*, Relator did not sit idly by waiting for Respondent to take action on the case. Relator actively tried to prevent Respondent from holding a probation revocation hearing. Respondent is aware that a defendant need not prove they are ready to proceed on the violations. *Strauser* at 803. However, since the very first hearing on April 20, 2015, Relator was trying to prevent a hearing from even occurring. At the April 20, 2015, hearing, Relator's Motion to Discharge was taken up and taken under advisement by Respondent. Respondent set the case over to May 18, 2015, to rule on the motion. Relator's Exh. A, p. 2. When Respondent overruled Relator's Motion to Discharge on May 18, 2015, Relator then told the Court he was going to seek a writ to prevent Respondent from holding a hearing. Relator's Exh. F, p. 50. Based upon this assertion by Relator, Respondent then set another hearing on June 20, 2015, 63 days out, in order to give Relator enough time to file the writ and have a determination of the issue

by the appellate courts. *Id.* On July 9, 2015, 52 days after the last hearing and only 11 days until the next hearing, Relator filed his Petition for Writ of Mandamus or Prohibition in the Court of Appeals for the Western District. Relator's Exh. H.

Relator now comes into this Court and asks it to issue a discretionary writ when the record clearly shows that he contributed to the delay in holding a hearing. Should Respondent have conducted the hearing with the affirmation from counsel that they were seeking a writ to prevent the hearing?

In addition to the statutory language that Respondent must make every reasonable effort to conduct a hearing, Relator also claims that the State did not make every reasonable effort to bring Relator back from the State of Pennsylvania in a timely fashion. After Relator was released from the Missouri Post Conviction Drug Treatment Program on September 21, 2012, he decided to move back to Pennsylvania and requested that his probation be transferred. Based upon the Interstate Commission for Adult Offender Supervision ("ICAOS"), his probation was transferred to Pennsylvania where he was assigned a probation officer. Relator was then arrested in Pennsylvania around December 29, 2014, when his probation officer conducted a home visit and found a large amount of marijuana. Relator's Sealed Exh. J, p. 63. Relator was then arrested and confined in the Allegheny County, Pennsylvania Jail for possession with intent to deliver a controlled substance, marijuana and possession of marijuana. Relator's Sealed Exh. I, J.

On February 18, 2015, Defendant pleaded guilty to possession of a controlled substance by a person not registered. Relator's Exh. E, p. 30. Defendant was then transferred to SCI-Pittsburg on March 31, 2015, where he was held "... on a Pennsylvania



State Parole Board Warrant for a violation of his Missouri State Parole.” Relator’s Exh. E, p. 32. On April 6, 2015, the Lafayette County Sheriff was first notified that Relator was available to be retaken by Missouri. Exh. A, pp. 1-2; Exh. B, pp. 4-5. On April 7, 2015, Security Transport Services was notified and authorized to transport Relator back to Lafayette County. Exh. A, pp. 1-2. Relator was received back in Missouri by the Lafayette County Sheriff at the Lafayette County Jail on April 10, 2015. Exh. A, pp. 1-2; Exh. B, pp. 4-5.

Relator relies extensively on the Rules of the ICAOS to attempt to show the State somehow failed to retake Relator in a timely fashion. Respondent concedes there was no way for Relator to extradite himself from Pennsylvania. However, by the same token, there was no way for the State of Missouri to retake Relator from a sovereign state except to wait for the custody state to release him from their charges and warrants. Probation violations are civil proceedings in Missouri. *State ex rel. Manion v. Elliott*, 305 S.W.3d 462, 464 (Mo. banc 2010). The Interstate Agreement on Detainers does not apply to probation revocation cases. *Carchman v. Nash*, 473 U.S. 716 (1985). Missouri cannot just go to a custody state and retake one of their prisoners in a probation violation case. Once the Lafayette County Sheriff was first given notice by the custody state that Relator was available to be retaken, he was back in Missouri within four days. Exh. A; Exh. B. Further, as stated in ICAOS Rule 5.101-1, the sending state cannot just retake an offender from the custody state:

Notwithstanding any other rule, if an offender is charged with a subsequent felony or violent crime, the offender shall not be retaken or ordered to return until criminal

charges have been dismissed, sentence has been satisfied, or the offender has been released to supervision for the subsequent offense, unless the sending and receiving states mutually agree to the retaking or return.

Relator wants this Court to question the validity of Exhibits A and B because he claims they only confuse the issue. The Affidavit of Lt. Luehrman clearly states when the Lafayette County Sheriff's Department, **the only entity responsible for Relator's return to Missouri**, received the first notice from the State of Pennsylvania. The Affidavit further states when the Lafayette County Sheriff transported Relator from Pennsylvania to Missouri and when Relator was received back into the jurisdiction of Respondent.

Relator also wants this Court to question the teletypes contained in Exhibit A. How do we know that this was the first communication concerning Relator from Pennsylvania? It clearly states in the teletype from SCI – Pittsburgh "FIRST NOTICE". Exh. B, p. 5. Relator also wants this Court to believe that the State could just do nothing and Pennsylvania would hold Relator. Again, this is shown to not be true by the teletype. The teletype received at 09:02:09 on 04-06-15 states "RESPOND WITHIN 10 MINUTES" and the State responded confirming the warrant and that Relator will be extradited to Missouri at 09:07:42 on 04-06-15.

Relator further questions these documents by asserting that the State failed in its discovery requirements. "Absent a statutory provision or rule of court, discovery is not a matter of right." *State v. Engel*, 859 S.W.2d 822, 829 (Mo. App. W.D. 1993). No discovery request was ever filed under Rule 25.03 by Relator's trial counsel. Relator's Exh. A. Even if Relator's probation violation counsel filed for discovery under Rule 25.03, she in effect

realizes that the material she is requesting is not covered under Rule 25.03 when she instead filed for discovery under Rule 25.04 on June 25, 2015. A motion filed under Rule 25.04 requires a court order and a showing of good cause by the movant. Probation violation counsel for Relator did not file a notice of hearing until July 7, 2015, with a hearing date of July 20, 2015, the same date this court granted a preliminary writ so the hearing on the discovery request never occurred. *Id.* How can the State fail in a discovery requirement when the motion was not taken up by the court? There is no reason the State would withhold these documents from Relator when they obviously show the State made every reasonable effort to return Relator back to Missouri to hold a hearing before Respondent.

Relator then provides to this Court, on two different occasions now, the emails between the Prosecutor and Mr. Gillette in another attempt to show some discovery violation. All they show is an attorney who was not entered in a case, who is not in the same firm as the attorney who is entered on the case, trying to obtain documents on a motion that had not even been filed, that another attorney "... is going to file sometime this week". Further, the potential motion is one that is subject to good cause by movant and a court order that had not been ruled on by the court and not even noticed up for hearing (because it had not been filed).

Like most prosecutor offices in Missouri, the Lafayette County Missouri Prosecutor maintains an open file policy on all criminal and probation violation cases when it comes to discovery to defense counsel. The State's file was available to defense counsel once she entered in this probation violation case and is still available to her and to Relator's attorney since he has entered in this ancillary case.

## **CONCLUSION**

Respondent complied with Section 559.036.8 by making every reasonable effort to conduct a hearing prior to the expiration of Relator's probation. Therefore, Respondent is within his authority to hold the probation revocation hearing originally scheduled for July 20, 2015, to determine if Relator has indeed violated the terms of his probation and if so, proceed to adjudicate this probation violation.

Respectfully Submitted,

/s/ Scott Ison

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**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 4,162 words, excluding the cover page, signature block, this certification and appendix, as determined by Microsoft Word 2013 software; and

2. That a true and correct copy of the attached brief were submitted for delivery and notice through Missouri e-filing system on this 5<sup>th</sup> day of October, to:

Clayton E. Gillette  
*Attorney for Appellant*

/s/ Scott Ison  
Scott A. Ison  
Assistant Prosecuting Attorney  
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ATTORNEY FOR RESPONDENT