

No. 97171

**IN THE
MISSOURI SUPREME COURT**

**STATE OF MISSOURI EX REL.
KEVIN HILLMAN,
PROSECUTING ATTORNEY OF PULASKI COUNTY,
Relator,
v.
THE HONORABLE JOHN BEGER
CIRCUIT JUDGE OF THE
25TH JUDICIAL CIRCUIT,
Respondent,**

**Petition for Writ of Prohibition and/or Mandamus to the
Supreme Court of Missouri
From the Circuit Court of Pulaski County, Missouri
25th Judicial Circuit, Division II
The Honorable John Beger, Judge**

RELATOR'S STATEMENT, BRIEF, AND ARGUMENT

Respectfully Submitted,

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Jurisdictional Statement

The Defendant, Nettie Pallai (also known as Nettie Pallai-Bowen, Nettie Pallai-Gan or Nettie Gan), pled guilty to the Class C felony of Property Damage in the First Degree on August 13, 2014 in the Circuit Court of Pulaski County, Cause No. 14PU-CR00973-01. The Court sentenced the Defendant to four years in the Department of Corrections, suspended execution of the sentence, and placed the Defendant on probation for five years. As part of the conditions of probation, the Court ordered the Defendant to pay \$5104.00 in restitution.

On January 3, 2018, Relator filed a Motion to Revoke the Defendant's probation for failure to pay restitution. On March 12, 2018, the Defendant filed a Motion to be Discharged from Probation due to Earned Compliance Credit, which was ultimately granted by Respondent April 18, 2018. The Respondent stayed the order until May 23, 2018.

Relator filed a Petition for a Writ of Mandamus or in the Alternative a Writ of Prohibition with the Court of Appeals Southern District, which was denied on May 16, 2018. Relator then filed a Petition for a Writ of Mandamus or in the Alternative a Writ of Prohibition with this Court on May 17, 2018. This Court granted a Preliminary Writ of Prohibition on May 22, 2018. Jurisdiction lies in the Supreme Court of Missouri. Mo. Const., Art. V, Sec. 4; Rule 97.01.

Statement of Facts

Defendant, Nettie Pallai (also known as Nettie Pallai-Bowen, Nettie Pallai-Gan or Nettie Gan), pled guilty as part of negotiated plea of guilty to the Class C felony of Property Damage in the First Degree on August 13, 2014 in Division II of the Pulaski County Circuit Court in case number 14PU-CR00973-01. Her plea of guilty was to the sole count in the Information filed by Relator. (Appendix, p. A7). As part of the negotiated agreement, Relator agreed to recommend a sentence of four years confinement in the Department of Corrections, with the sentence suspended and a term of probation for five years in exchange for a plea of guilty. In addition, the Defendant agreed to pay restitution in the amount of \$5104 in the amount of no less than \$50 per month until paid in full. Related to the restitution condition, the plea agreement provided that the Defendant was to receive “No earned compliance credits until restitution is paid in full.” The docket entry reflecting the agreement was signed by all of the parties, to include the Defendant, and approved and entered onto the record by the Court. (Appendix, p. A9).

As part of the plea agreement, the Relator consulted with the victims in this case, Bruce and Denise Goodrich pursuant to his obligation under the Victims’ Rights Act, Section 595.209 RSMo and Article 1, Section 32(4) of the Missouri Constitution. One of the specific topics that was discussed was the amount and payment of restitution as part of any negotiated plea agreement. The victims were in agreement with the plea offer made in this case based partly on the agreement for the defendant to make restitution. The victims in this case agreed to an amount less than their full and actual damages to allow for a reasonable and realistic amount that could be paid by the

defendant during the term of her probation. (Appendix, p. A11).

The 25th Judicial Circuit has a local court rule, Rule 67.9.5, which states “In all Criminal Cases in this Circuit in which Restitution is due, no Earned Compliance Credit shall be awarded until said Restitution is paid in full.” (Appendix, p. A13).

Defendant made sporadic payments between her plea date until today. In total, she has only paid \$770 toward the original balance of \$5104.00. (Appendix, p. A14). As a result of this and other misconduct, the Relator filed multiple Motions to Revoke the Defendant’s probation during the course of the case. The first one was filed in December 2014, which ultimately resulted in the Defendant being sent to Court Ordered Detention Sanction (CODS) by Respondent on November 2, 2015. (Appendix, p. A15).

The Defendant was released from CODS in March 2016 and continued to make sporadic payments, ultimately resulting in the Relator filing another Motion to Revoke her probation on January 3, 2018. (Appendix, p. A16) On the Field Violation Reports prepared by the Board of Probation and Parole and submitted to Relator and Respondent, the Probation Officer relies on 25th Judicial Circuit Local Court Rule 67.9.5 to calculate Defendant’s discharge date. In one report, the officer noted “Gan has an Original Discharge Date of 08/12/2019. Gan is ineligible for Earned Compliance Credits due to her restitution not being paid in full.” (Appendix, p. A17 and p. A20).¹

On March 12, 2018, the Defendant filed a motion for discharge from probation arguing that due to Earned Compliance Credit, her probation discharge date moved from

¹ Defendant remarried or divorced during her time on probation and the Probation Officer is referencing her new last name in this report.

August 12, 2019 to November 20, 2017. (Appendix, p. A25). On March 14, 2018, the Respondent heard arguments from Relator and the Defendant's attorney in chambers. Relator indicated that he would likely deny Defendant's motion for discharge.

On March 15, 2018, the Defendant filed a motion to reconsider based upon Respondent's statement that he was likely to deny the Defendant's motion. (Appendix, p. A31). On April 14, 2018, the Respondent made a docket entry and announced to the Relator and the Defendant's attorney that he had reconsidered his previous ruling and would now enter an order granting Defendant's motion to reconsider and grant the Defendant's motion for discharge but would stay the order until May 24, 2018 to allow additional arguments and further action as desired by the parties. (Appendix, p. A33). Relator filed a Response to the Motion to Discharge on April 26, 2018. (Appendix, p. A36).

On May 10, 2018, the Respondent held a hearing where both sides presented evidence and argument. After that hearing, Respondent entered formal findings of fact and conclusions of law and granted the Defendant's motion for discharge from probation and entered an order to such effect but stayed action until May 24, 2018. (Appendix, p. A48).

Relator filed a Petition for a Writ of Mandamus or in the Alternative a Writ of Prohibition with the Court of Appeals Southern District, which was denied on May 16, 2018. (Appendix, p. A53). Relator then filed a Petition for a Writ of Mandamus or in the Alternative a Writ of Prohibition with this Court on May 17, 2018. This Court granted a Preliminary Writ of Prohibition on May 22, 2018. The Respondent filed his answer June 15, 2018.

Point Relied on – I

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DISCHARGING AND RELEASING THE DEFENDANT FROM PROBATION BECAUSE RESPONDENT WAS WITHOUT AUTHORITY AND ABUSED HIS DISCRETION TO RELEASE THE DEFENDANT FROM PROBATION WHEN RESTITUTION WAS NOT COMPLETE AS HE WAS PROHIBITED TO DO SO BY SECTION 559.105 RSMO.

- *State ex rel. Strausser v. Martinez*, 416 S.W.3d 798, 805 (Mo banc 2014)
- *Missouri v. Frye*, 566 U.S. 134, 1144. (2012)
- *State ex rel Parrott v. Martinez*, 496 S.W.3d 563 (Mo Ct. App. 2016)
- *State ex rel. Houska v. Dickhaner*, 323 S.W.3d 29, 32 (Mo. banc 2010)
- Section 559.105 RSMo
- Section 217.703 RSMo

Point Relied on – II

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DISCHARGING THE DEFENDANT FROM PROBATION PURSUANT TO SECTION 217.703 RSMO BECAUSE SECTION 217.703 RSMO VIOLATES ARTICLE I, SECTION 32 OF THE MISSOURI CONSTITUTION AS IT DEPRIVES CRIME VICTIMS OF THEIR RIGHT TO RESTITUTION.

- Article I, Section 32 of the Missouri Constitution
- Section 217.703 RSMo
- Section 559.105 RSMo
- Section 595.209 RSMo

Argument – I

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DISCHARGING THE DEFENDANT FROM PROBATION BECAUSE RESPONDENT WAS WITHOUT AUTHORITY AND ABUSED HIS DISCRETION TO RELEASE THE DEFENDANT FROM PROBATION WHEN RESTITUTION WAS NOT COMPLETE AS HE WAS PROHIBITED TO DO SO BY SECTION 559.105 RSMO.

A. Introduction.

Respondent was without authority and abused his discretion when he ignored the plain language of Section 559.105 RSMo and discharged and released the Defendant from probation prior to the end of her term of probation pursuant to Section 217.703 RSMo, even though she had not completed and paid restitution in full.

B. Relator Has Met the Standard for the Issuance of a Permanent Writ of Prohibition.

A writ is appropriate whenever “... the trial court exceeds its jurisdiction or abuses its discretion to such an extent that it lacks the power to act as it did; or ... where there is no adequate remedy by appeal for the party seeking the writ and the ‘aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision [of the lower court].’” *State ex rel. Steeley v. Oswald*, 147 S.W.3d 81 (Mo. 2004) citing *State ex rel. Chasseing v. Mummert*, 887 S.W.2d 573 (Mo. banc 1994). “A writ of prohibition is available: (1) to prevent a usurpation of judicial power when the trial 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. Houska v. Dickhaner*, 323 S.W.3d 29, 32 (Mo. banc 2010).

Although prohibition is discretionary, it “may be appropriate to prevent unnecessary, inconvenient, and expensive litigation” *State ex rel. Linthicum v Calvin*, 57 S.W.3d 855, 856-57 (Mo. banc 2001) (citation omitted). A writ of prohibition is also appropriate to determine whether a trial judge has abused his discretion. *State ex rel. Kinder v McShane*, 87 S.W.3d 256, 257-258 (Mo. banc 2002).

The Writ of Prohibition issued in this case should be made permanent because Respondent was without authority and abused his discretion when he ignored the plain language of Section 559.105 RSMo and discharged and released the Defendant from probation prior to the end of her term of probation pursuant to Section 217.703 RSMo, even though she had not completed and paid restitution in full.

C. Section 559.105 Prohibits the Discharge and Release of a Defendant from Probation until Restitution is Complete.

Respondent has exceeded his authority and abused his discretion when he ordered the Defendant discharged from probation early due to Earned Compliance Credit under Section 217.703 RSMo, without regard to Section 559.105 RSMo, which specifically prohibits such an act. Respondent has ordered the Defendant released early from probation despite the fact that she still owes a substantial amount of restitution previously ordered by the Court and her original term of probation does not expire until August 2019. Section 559.105 RSMo. plainly states, “No person ordered

by the Court to pay restitution pursuant to this section shall be released from probation until such restitution is complete.”

The plain language of Section 559.105 RSMo makes clear that no defendant is to be released from probation until their restitution is complete. This statute was amended in 2013 to broaden it so it applied to all offenses, not just stealing and tampering as it was previously worded. Importantly, this amendment was done after the original passage of the Earned Compliance Statute, Section 217.703 RSMo, and done so in response to it. As Chief Justice Fischer noted in one of the seminal cases involving Circuit Courts’ jurisdiction over probation, “Further, the legislature amended Section 559.105, effective August 28, 2013, which will make it **rarer for a similar case regarding failure to satisfy restitution as a condition of probation to result in the loss of legal authority to revoke probation.**” *State ex rel. Strausser v. Martinez*, 416 S.W.3d 798, 805 (Mo banc 2014)(Emphasis added). It is clear from this statement that the Chief Justice believes Section 559.105 RSMo requires restitution be paid in full before a defendant is released from probation.

D. The Court has violated the 25th Judicial Circuit Local Court Rule and the terms of the plea agreement entered into and approved in this case.

The 25th Judicial Circuit has a local court rule, Rule 67.9.5, which states “In all Criminal Cases in this Circuit in which Restitution is due, no Earned Compliance Credit shall be awarded until said Restitution is paid in full.” Both the Relator and the State Board of Probation and Parole relied on this rule when formulating the plea agreement and monitoring the Defendant while on probation. This explains why Probation and Parole never prepared a report or notified the Court or the Prosecuting Attorney of any

earned discharge date as required in Section 217.703.10 RSMo. Parties in cases, such as this one, rely on these local court rules. Respondent has abused his discretion when he arbitrarily declared that he will no longer be bound by local court rules with no legal authority.

In reliance on the local court rule, and in accordance with it, the docket entry reflecting the plea agreement, makes clear that the Defendant was to receive no earned compliance credit until restitution was paid in full. Specifically, the plea agreement as reflected in the Court approved docket entry signed by the Defendant, her attorney, and Relator states, “No earned compliance credits until restitution is paid in full.” Thus, the Defendant was fully aware of this provision of her agreement and it was part of the basis for the plea bargain that was made between the parties.

Defendants waive many rights far more important than earned compliance credits as part of plea agreements all the time. Specifically, defendants waive Constitutional rights in order to get an agreed upon sentence or a reduced charge. To allow a defendant to renegotiate the terms of her plea agreement when he or she decides he or she no longer wishes to comply with the very terms she agreed to, as in this case, undermines the entire plea bargaining process. As the US Supreme Court has noted, “In today’s criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.” *Missouri v. Frye*, 566 U.S. 134, 1144. (2012). Respondent’s decision to now disallow the previously approved plea agreement without legal authority is an abuse of discretion.

E. Respondent's reliance on *State ex rel. Parrott v. Martinez*, is misplaced.

The Respondent cites to *State ex rel Parrott v. Martinez*, 496 S.W.3d 563 (Mo Ct. App. 2016), as binding on the Court and applicable to this case when making his order. However, the facts in the *Parrott* case and the present case are quite distinguishable. In that case, the defendant had made the required restitution payments in a timely fashion. Although she still had a balance, which the Court in *Parrott* excused (presumably because of the death of the victim), much of the issue in that case dealt with court costs owed. In fact, the Court noted in *Parrott* at the end, the trial court's revocation hearing only dealt with unpaid court costs/jail board. In addition, the Court and the State were notified of her earned compliance discharge date by probation and parole. However, both parties continued revocation hearings far past the term of her probation and any allowable extension.

Unlike *Parrott*, this case has nothing to do with court costs and everything to do with restitution owed to a living victim. The defendant in the present case has failed to make the required minimum payment of \$50 for the vast majority of her probation. She has been sent to CODS as a result of her non-compliance. There has been no attempt by the Realtor or the Court to collect court costs as part of the revocation hearings. The defendant's original term of probation is not complete. The Board of Probation and Parole has consistently informed the State and the Court that her discharge date is August 2019. Respondent seeks to allow the defendant in this case to be discharged early, prior to even the end of her original term of probation, without regard to restitution. Thus, the facts of this case and the *Parrott* case are not analogous and *Parrott* has no bearing on the present one.

Argument-II

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DISCHARGING THE DEFENDANT FROM PROBATION PURSUANT TO SECTION 217.703 RSMO BECAUSE SECTION 217.703 RSMO VIOLATES ARTICLE I, SECTION 32 OF THE MISSOURI CONSTITUTION AS IT DEPRIVES CRIME VICTIMS OF THEIR RIGHT TO RESTITUTION.

A. Introduction

Crime victims have a right to restitution as guaranteed by Article I, Section 32 of the Missouri Constitution. Respondent's order, discharging and releasing the Defendant from probation early for Earned Compliance Credit pursuant to Section 217.703 RSMo, abused his discretion as it violated the victims in this case, Bruce and Denise Goodrich's, Constitutional right to restitution. In addition, if he was correct in his interpretation of Section 217.703 RSMo, then the statute itself is unconstitutional as it violated Article I, Section 32 of the Missouri Constitution as it deprives crime victims of their Constitutional Right to restitution.

B. Section 217.703 RSMo Violates Article I, Section 32 of the Missouri Constitution as it Deprives Crime Victims of the Right to Restitution.

Crime victims have a right, as guaranteed by the Missouri Constitution in Article I, Section 32, to restitution from the offender. This right is further codified in Section 595.209 RSMo. The Earned Compliance Credit statute, Section 217.703 RSMo, makes no provision for this right, instead granting compliance credit even if a defendant is not making any effort to comply with an order of restitution. Compliance for Earned Compliance Credit purposes, defined in Section 217.703 RSMo, does not take into

account whether the defendant is complying with any restitution order, completely ignoring this right of a victim. In addition, Section 217.703 RSMo presumably requires a Court to discharge a defendant from probation without even notifying the victim or inquiring about restitution, as Respondent has done in this case. This clearly violates the rights of the victim as guaranteed by the Missouri Constitution.

Respondent's order accepts the defendant's argument that neither Section 559.105 RSMo or Local Court Rule 67.9.5 apply or are simply overruled by a superior Section 217.703 RSMo, causing the victim's rights to be completely trampled upon. This order is an abuse of Respondent's discretion. However, if Section 217.703 RSMo is read to be limited and modified by Section 559.105 RSMo and local court rule 67.9.5, as it should be, then they operate logically to ensure the Constitutional rights of victims. This was the proper interpretation the Respondent should have made. The right to restitution is not unlimited and it is understood that a defendant cannot remain on probation forever, as the trial courts attempted to do in the *Strausser* and *Parrott* cases. However, releasing a defendant early, prior to the end of the original term of probation, when little to no effort has been made to comply with an order of Restitution by a defendant, is an absurd result and tramples on the rights of victims enshrined in our state Constitution. It is a clear abuse of discretion and should not be allowed to stand.

Conclusion

WHEREFORE, based on the arguments in Point I and Point II of Relator's brief, Relator requests that this Court make the Writ of Prohibition in this case permanent, as the Respondent has clearly abused his discretion. In ordering the defendant to be released from probation early prior to the end of her term of probation, without restitution being complete, violates Section 559.105 RSMo, Article I, Section 32 of the Missouri Constitution, and 25th Judicial Circuit Court Rule 67.9.5 and is an abuse of discretion. Thus, Respondent should be permanently prohibited from enforcing his order of April 14, 2018 and May 10, 2018 and from writing such orders in the future.

Respectfully submitted:

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06, I hereby certify that on This 9th day of July 2018, a true and correct copy of the foregoing brief and the attached appendix were served via the efilng system and by e-mail to Mr. Tom Moser, Assistant Public Defender, attorney for Respondent, at Tom.Moser@mspd.mo.gov and the Honorable John Beger at John.Beger@courts.mo.gov. In addition, pursuant to Missouri Supreme Court Rule 84.06, I hereby certify that this brief includes the information required by Rule 55.03. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font and does not exceed 31,000 words. The word processing software identified that this brief contains 3847 words. Finally, I hereby certify that the electronic copies of this brief have been scanned for viruses and found virus-free.

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