

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 REPLY BRIEF

Respectfully Submitted,

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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.

- *Earth Island Institute v. Union Electric Co.*, 456 S.W.3d 27 (Mo banc 2015)
- *Stiers v. Director of Revenue*, 477 S.W.3d 611 (Mo banc 2016)
- 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

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

The Respondent, in his brief, fails to address or acknowledge the key issue of this case. That issue is that the plain language of Section 559.105 RSMo prohibits the Respondent from releasing the Defendant from probation until her restitution is complete and paid in full. He simply ignores the mandate given to him by the Legislature not to release defendants, such as the one in the present case, who have not paid his or her Court ordered restitution to a crime victim.

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.” (Emphasis added). It goes on to state, “If full restitution is not made within the original term of probation, the court **shall** order the maximum term of probation allowed for such offense.” (Emphasis added).

The Legislature’s clear intent here was to specifically limit the release of probationers who have not paid restitution. The word “shall” “unambiguously indicates

a command or mandate.” *Stiers v. Director of Revenue*, 477 S.W.3d 611, 617 (Mo banc 2016) quoting *Frye v. Levy*, 440 S.W.3d 405, 408 (Mo banc 2014). “To suggest any other meaning is to ignore the plain language of the statute.” *Id.* The Respondent, both in his actions in ordering the Defendant to be released from probation and in his brief to this Court, ignores the plain language of the statute, which prohibits the Defendant from being released from probation until she has paid the Court ordered restitution to the victims in this case, or she has reached the maximum term of her probation. By ignoring the plain language of the statute, the Respondent has abused of his discretion.

B. Section 559.105 RSMo Was Amended in 2013 After Section 217.703 RSMo was Enacted in 2012 and Therefore Controls.

The Respondent argues that Section 559.105 RSMo merely limits and restricts the authority of a trial court to require restitution only from the victim’s losses and is superseded by Section 217.703 RSMo. He simply dismisses Section 559.105 RSMo as being an irrelevant statute and does not address which statute should control in situations such as this. In doing so, the Respondent ignores the plain language of the statute and he ignores the legislative history of the two statutes.

The General Assembly enacted Section 217.703 RSMo from House Bill 1525 during its 2012 session and it was effective August 28, 2012. (Reply Brief Appendix A1). This statute created Earned Compliance Credit for persons on probation and parole. In 2013, the General Assembly greatly modified and expanded Section 559.105 RSMo, presumably in response to Section 217.703 RSMo’s failure to address restitution issues and how they relate to Earned Compliance Credit. (Reply Brief Appendix A5). The modifications included expanding the section to include all criminal offenses, not just the

two previously covered, and allowing for the collection of restitution while a defendant is on parole. This amended section became effective on August 28, 2013.

This modification places Section 217.703 RSMo and Section 559.105 RSMo in conflict, specifically over the issue of restitution. Section 217.703 RSMo does not consider restitution when it defines compliance and directs the release of a defendant from probation, even if restitution is not complete. Section 559.105 RSMo specifically prohibits the release from probation of a defendant until restitution is complete and paid in full.

On their face, the statutes appear to be inconsistent. “When two statutes are repugnant in any of their provisions, the later act, even without a specific repealing clause, operates to the extent of the repugnancy to repeal the first.” *Earth Island Institute v. Union Electric Co.*, 456 S.W.3d 27, 37 (Mo banc 2015) quoting *County of Jefferson v. Quiktrip Corp.*, 912 S.W.2d 487, 490 (Mo banc 1995). Further, “[a] change in a statute is intended to have some effect, and the legislature will not be charged with having done a meaningless act. [W]hat the legislature intended is to be concluded from the language which it used.” *Stiers*, 477 S.W.3d at 617, quoting *State v. Swoboda*, 658 S.W.2d 24, 26 (Mo banc 1983).

In this case, Section 559.105 RSMo is the later act, having been greatly expanded in 2013 to cover restitution in all criminal cases. Thus, in all cases where restitution is court ordered, defendants are not to be released from probation until restitution is complete. It is clear from the plain language that the Legislature intended this to prohibit defendants, such as the one in the present case, from being released from probation either by a Court, or by operation of Earned Compliance Credit, until they have paid

their restitution or reached the maximum allowable term of probation. This is why the Legislature used the command “shall” to emphasize the point.

In addition, there is a logical way to “harmonize” the statutes. *Earth Island Institute*, 456 S.W.3d at 33. Defendants can earn Earned Compliance Credit, but they cannot be released from probation until they have paid their restitution. Once paid, they can then gain the benefit of Earned Compliance Credit they have accrued. However, if they do not, they must serve the maximum term of probation. In this case, the maximum allowable term would be five years, with an additional one-year extension possible. Thus, Respondent’s interpretation that Section 217.703 RSMo requires him to release the defendant from probation is incorrect, prohibited by Section 559.105 RSMo, and is an abuse of discretion.

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. 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 to be guaranteed by all of the State’s actors, including Missouri’s Prosecutors as well as the Judiciary. In Respondent’s brief, he attempts to shift the burden to the Relator, the Prosecutor, and abdicates his

responsibilities to protect the rights of this State's citizens who are victims of crime by arguing that somehow the Relator should have known when the Defendant's probation expired due to Earned Compliance Credit and should have filed a motion to revoke earlier.

However, Relator reasonably relied on the following to calculate that the Defendant was nowhere near the end of her term of probation:

1. The plea agreement approved by the Court.
2. The plain language of 559.105 RSMo.
3. 25th Judicial Circuit Court rule 67.9.5.
4. The reports of Probation and Parole which consistently stated that the Defendant was not accruing Earned Compliance Credit.
5. The requirements of Section 217.703.10 RSMo to notify the Prosecutor not less than sixty days prior to any discharge date under Earned Compliance Credit.

Even the Defendant failed to argue she was not on probation until after the State sought to enforce the orders of the Court. Only then did the Respondent seek to retroactively discharge the Defendant, without notice or regard to the Victims' rights to restitution.

Under Respondent's argument, he would require every Prosecutor in this State to independently calculate the complex and difficult formula for each and every probationer's Earned Compliance Credits monthly to try and preserve the ability of a crime victim to collect restitution. The calculation of Earned Compliance Credits is the duty of Division of Probation and Parole, not the Prosecuting Attorney under Section 217.703 RSMo. He would also require that the Prosecutor file a motion to revoke each and every month a probationer fails to make the required payments, clogging dockets

with these motions. Respondent's own arguments highlight how Respondent's interpretation of Section 217.703 RSMo unconstitutionally shifts the burden of enforcing a Constitutional right of crime victims to the victims and the State's Prosecutors due to Earned Compliance Credits statutorily granted in Section 217.703 RSMo.

The Respondent's own arguments reflect that as he has interpreted it, Section 217.703 RSMo makes no provisions for the right of a crime victim to Restitution as guaranteed by Article I, Section 32 of the Missouri Constitution. Thus, as he has applied it and as he has argued it in his brief, Section 217.703 RSMo and Respondent's actions in interpreting that statute are unconstitutional and are an abuse of discretion.

Conclusion

WHEREFORE, based on the arguments in Point I and Point II of Relator's brief and Relator's Reply 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 prior to the end of her term of probation, without restitution being complete, Respondent violates Section 559.105 RSMo, Article I, Section 32 of the Missouri Constitution, 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 20th day of July 2018, a true and correct copy of the foregoing brief and the attached appendix were served via the e-filing 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 7,750 words. The word processing software identified that this brief contains 2,227 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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