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**POINT RELED ON**

**RESPONDENT DOES NOT HAVE THE AUTHORITY TO DISCHARGE RELATOR FROM PROBATION PRIOR TO THE MAXIMUM TERM ALLOWED UNDER LAW UNTIL CRIME VICTIM RESTITUTION IS PAID. (Responding to Points I and II of Relator's Brief).**

Section 559.105, RSMo

Section 559.016, RSMo

Section 217.703, RSMo

Mo. Const. Art. I, Sec 32

## ARGUMENT

### **RESPONDENT DOES NOT HAVE THE AUTHORITY TO DISCHARGE RELATOR FROM PROBATION PRIOR TO THE MAXIMUM TERM ALLOWED UNDER LAW UNTIL CRIME VICTIM RESTITUTION IS PAID.**

Probation is not a right, but rather a privilege. *See State v. Austin*, 620 S.W.2d 42, 43 (Mo. App. 1981). Relator is not eligible for early discharge from probation (with or without earned compliance credits) until she completes the crime victim restitution. Section 559.105.2<sup>1</sup> states:

No person ordered by the court to pay restitution pursuant to this section shall be released from probation until such restitution is complete. 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*).

This statute clearly mandates that restitution must be paid before a defendant may be discharged early from probation on an original term of probation. This statute also requires a court to order the maximum term of probation allowed if restitution is not completed within the original term. In the instant case, this means that Respondent must maintain Relator on probation for a total of five years pursuant to Section 559.016, which would be until September 15, 2019. Respondent may also extend Relator's probation an additional year, for a total of six years under Section 559.016.

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<sup>1</sup> All statutory citations are to RSMo, 2000 unless otherwise noted.

While Section 559.016 clearly sets out these requirements, it is true that Section 217.703 did not reference crime victim restitution at the time this case originated. Nevertheless, the two statutes should have been read in harmony with each other and with Article I, Section 32 of the Missouri Constitution which sets forth a crime victim's right to restitution, thereby requiring that Relator remain on probation for the maximum term.<sup>2</sup>

Earlier this year Section 217.703.7 was amended and now reads, in pertinent part:

Notwithstanding subsection 2 of section 217.730 to the contrary, once the combination of time served in custody, if applicable, time served on probation, parole, or conditional release, and earned compliance credits satisfy the total term of probation, parole, or conditional release, the board or sentencing court shall order final discharge of the offender, *so long as the offender has completed restitution* and at least two years of his or her probation, parole, or conditional release, which shall include any time served

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<sup>2</sup> Assuming *arguendo* that the previous version of Section 217.703 would not harmonize with Section 559.105, it is irrelevant as Article I, Section 32 of the Missouri Constitution and the guarantee of restitution to crime victims would trump any statute to the contrary. Respondent adopts and incorporates by reference as if more fully set forth herein the brief and argument of the State as Relator in *State ex rel. Kevin Hillman v. The Honorable John D. Beger* (SC97171), which is currently pending in this Court.

in custody under section 217.718 and section 559.036 and 559.115.

*(emphasis added)*.

The amendment to the statute makes is clear that defendants, including Relator, shall not be discharged from probation early unless crime victim restitution has been completed.<sup>3</sup>

Relator relies on *State ex rel. Amorine v. Parker*, 490 S.W.3d 372 (Mo. 2016) and the previous version of Section 217.703 for the argument that failure to complete crime victim restitution is not included in the definition of “compliance.” However, Relator’s reliance on *Amorine* is misplaced. The fact that crime victim restitution is not included in the statutory definition of “compliance” is irrelevant to the question before the Court because of the reference to restitution in both Section 559.105 and Article I, Section 32 of the Missouri Constitution, and now in the current version of Section 217.703.

Relator also relies on *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798 (Mo. 2014) for the argument that the trial court lacks authority to revoke Relator’s probation for failure to make reasonable efforts to do so. There is no dispute to the general proposition of *Strauser* (in the instant case, Respondent has granted Relator a continuance on probation and multiple opportunities to secure counsel in an attempt to hold a probation revocation hearing) but because of the statutory and constitutional prohibitions against Relator being

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<sup>3</sup> Assuming *arguendo* that the statutory amendment is found to be more than clarifying, then it is procedural in nature, as it merely changes the rules of probation, and therefore applies retroactively to the entirety of Relator’s term of probation. *See generally Cooper v. Holden*, 189 S.W.3d 614 (Mo. App. 2006).

discharged from probation prior to payment of crime victim restitution, the principle of *Strauser* is not applicable to the case at bar.

Relator cites *State ex rel. Parrott v. Martinez*, 496 SW3d 563 (Mo. App. 2016) as support for her argument that a court cannot unilaterally halt the accrual of Earned Compliance Credits.<sup>4</sup> However, this argument and the holding of *Parrott* conflate the distinction between the *earning* of credits and the *application* of credits. Moreover, the *Parrott* Court failed to acknowledge or analyze crime victims' rights to restitution under Article I, Section 32 of the Missouri Constitution and Section 559.105.2. As discussed above, when all provisions of law, including the current version of Section 217.703.7 are applied, it is clear that Realtor cannot be discharged earlier than the maximum term allowed under law under crime victim restitution is completed. This does not mean that she cannot

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<sup>4</sup> Section 217.703.2 indicates that “the sentencing court may, upon its own motion or a motion of the prosecuting or circuit attorney, make a finding that the offender is ineligible to earn compliance credits because the nature and circumstance of the offense or the history and character of the offender indicate that a longer term of probation, parole, or conditional release is necessary for the protection of the public or the guidance of the offender.” In the instant case, Respondent conducted a hearing after a violation report was filed. While he continued Relator on probation, he was well within his authority to make a finding that Relator was ineligible for earned compliance credits. However, because of the prohibition of discharging Relator from probation until crime victim restitution is completed, this issue is irrelevant.



continue to earn compliance credits. However, it does mean that those credits cannot be applied – and result in early discharge – until crime victim restitution is completed.

## CONCLUSION

Relator was granted the privilege of probation as the disposition in her case. Missouri law does not allow Respondent to discharge Relator from probation earlier than the maximum term allowed under law unless crime victim restitution is completed. This was the case prior to August 28, 2018 of this year when the statutes and Constitution are read in harmony, and it is clearly the case after the statutory amendment to Section 217.703. The writ of prohibition should be quashed and Relator should be continued on probation until the maximum time allowed under law, or until she completes crime victim restitution and is otherwise eligible for discharge.

Respectfully submitted,

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## CERTIFICATE OF SERVICE AND COMPLIANCE

I, the undersigned, hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 1839 words, excluding the cover, certification and appendix, as determined by Microsoft Office 365 Word 2016, and;
2. That the electronic file has been scanned and found to be virus-free; and
3. That a true and correct copy of the foregoing was sent through the e-filing system this 27<sup>th</sup> day of September, 2018 to all counsel of record.

Respectfully submitted,

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