

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,**

**In Opposition to a Petition for a Writ of Prohibition and/or
Mandamus to the Supreme Court of Missouri
From the Circuit Court of Pulaski County, Missouri
25th Judicial Circuit, Kevin Hillman
Prosecuting Attorney**

RESPONDENT'S SUPPLEMENTAL BRIEF

Respectfully submitted,

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STATEMENT OF FACTS

Respondent incorporates the Statement of Facts submitted in the Relator's and Respondent's previous briefs and Realtor's supplemental brief.

POINT RELIED ON-I

I. THE 2018 AMENDMENT TO §217.703 RSMo (2013) IS A SUBSTANTIVE CHANGE AND NOT A PROCEDURAL CHANGE TO THE STATUTE BECAUSE IT ATTACHES A NEW DISABILITY AND PENALTY TO THE SUBSTANTIAL PREJUDICE OF THE DEFENDANT BECAUSE IT CHANGES THE STATUTORY BENEFIT OF EARNED COMPLIANCE CREDITS THAT WAS AVAILABLE TO DEFENDANT PRIOR TO THE AMENDMENT.

- *State v. Thomaston*, 726 S.W.2d 448, 460 (Mo. Ct. App. 1987)

- *State v. Brantley*, 353 S.W.2d 793, 798 (Mo. 1962)

- *State v. Honeycutt*, 421 S.W.3d 410, 417 (Mo. Banc 2013)

- *State ex rel Parrott v. Martinez*, 496 S.W.3d 563 (Mo. Ct. App. 2016).

- Article 1 §13 Missouri State Constitution

- §217.703(7) RSMo (2018).

- §217.703(7) RSMo (2013).

- §559.105 RSMo.

ARGUMENT – I

II. THE 2018 AMENDMENT TO §217.703 RSMo (2013) IS A SUBSTANTIVE CHANGE AND NOT A PROCEDURAL CHANGE TO THE STATUTE BECAUSE IT ATTACHES A NEW DISABILITY AND PENALTY TO THE SUBSTANTIAL PREJUDICE OF THE DEFENDANT BECAUSE IT CHANGES THE STATUTORY BENEFIT OF EARNED COMPLIANCE CREDITS THAT WAS AVAILABLE TO DEFENDANT PRIOR TO THE AMENDMENT.

INTRODUCTION

On August 28th, 2018, §217.703(7) RSMo (2013)¹ was amended by the Missouri General Assembly to include a requirement of completed restitution before a probationer can gain the benefit of discharge from probation through Earned Compliance Credit (ECC). This requirement did not exist in the statute prior to this amendment. Based on the plain and unambiguous language of §217.703 RSMo (2013) prior to the amendment, failure to pay restitution was not a factor that affected the accrual and application of Earned Compliance Credits to a defendant’s probation term and failure to pay restitution in full did not prevent a defendant from the benefit of being statutorily discharged from probation based on Earned Compliance Credits.

¹ Respondent references §217.703 RSMo (2013) and not the 2017 version because the 2013 version was in effect when Defendant was placed on probation in 2014.

A. IN STATE EX. REL. PARROTT V. MARTINEZ, 496 S.W.3D 563 (MO. CT. APP. 2016), THE COURT SPECIFICALLY ADDRESSED RESTITUTION AND FOUND THAT FAILURE TO PAY RESTITUTION IS NOT CONTEMPLATED IN THE DEFINITION OF COMPLIANCE AND DENYING EARNED COMPLIANCE CREDITS FOR FAILURE TO PAY RESTITUTION EFFECTIVELY BARRED INDIGENT DEFENDANTS FROM HAVING THE SAME BENEFIT UNDER THE LAW AS MORE AFFLUENT DEFENDANTS.

“‘The primary rule of statutory interpretation is to effectuate legislative intent through reference to the plain and ordinary meaning of the statutory language.’ ” *State ex rel. Parrott v. Martinez*, 496 S.W.3d 563, 568 (Mo.App. E.D. 2016, (quoting *Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. banc 2013)). The *Parrott* court held a trial/sentencing court could not deny a defendant Earned Compliance Credit because restitution had not been paid based on the plain language of the statute;

"Of particular concern here is Respondent's assertion that a probationer cannot earn compliance credits if she owes outstanding restitution or court costs, regardless of the payment conditions ordered. Respondent's position *effectively bars indigent probationers from obtaining statutory credits available to more affluent probationers*. Respondent's order, as applied to this case, sought to deny Relator earned compliance credits under the statute even though she was ahead in her ordered monthly payments *simply because she was too poor to pay the costs outright*. This position is *inconsistent with*

the plain language of the statute and is impermissible under the law." Id. at 572. (emphasis added).

The amendment of §217.703 RSMo (2013) has in fact, codified the very thing the *Parrott* court identified as impermissible under the law and does not provide equal protection of the law to indigent probationers. Now, pursuant to §217.703 RSMo (2018), a defendant with financial means that is placed on probation has the opportunity to be discharged from probation based on the reduction of the probation term from Earned Compliance Credits because they have the financial means to pay restitution in full.

Conversely, an indigent defendant that does not have the financial means to pay restitution in full, will be *required* to remain on probation for the full term of probation because they will not have the benefit of a statutory reduction in their term of probation based on Earned Compliance Credit simply because they are poor. *(emphasis added)*.

The court held the language of §217.703 RSMo (2013) is clear and unambiguous, and does not permit the court or the Board of Probation and Parole to deny Earned Compliance Credits simply because restitution and court costs are owed. It should be noted §559.105 RSMo was amended in 2013, three years prior to the *Parrott* decision. The analysis of §217.703 RSMo (2013) by the court in *Parrott* demonstrates the legislative intent prior to the 2018 amendment of §217.703 RSMo (2013) was not to deny a defendant discharge from probation based solely on the failure to pay restitution in full. The only

requirement for Defendant to have the benefit of Earned Compliance Credit was to complete at least 2 years of the probation term.

If that was, in fact, the legislative intent of the statute, there would be no reason for the legislature to amend the statute to now specifically *add* the requirement to pay restitution in full in addition to completing 2 years of the probation term to §217.703(7) RSMo (2018) to deny Defendant discharge from probation after Earned Compliance Credits would have resulted in the benefit of statutory discharge. Clearly, the 2018 amendment was not a continuation or clarification of an already existing legislative intent.

B. ARTICLE 1 §13 OF THE MISSOURI STATE CONSTITUTION PROHIBITS THE RESPTROSPECTIVE APPLICATION OF LAW TO PROCEEDINGS IN CIVIL CASES.

Article 1, § 13 of the Missouri Constitution provides that “no expo facto law, nor law ... retrospective in its operation ... can be enacted.” “[T]he phrase “law retrospective in its operation,” as used in the bill of rights, has no application to crimes and punishments, or criminal procedure.” *State v. Honeycutt*, 421 S.W.3d 410, 417 (Mo. Banc 2013) (quoting *Ex Parte Bethurum*, 66 Mo. 545, 550 (1877)). “A ‘law retrospective in its operation,’ as the phrase is employed in our bill of rights, is one which relates to civil rights, and proceedings in civil cases.” *Id.* (quoting *Ex Parte Bethurum*, 66 Mo. 550). “[T]he phrase ‘ex post facto law’ applies exclusively to criminal laws and the phrase law ‘retrospective in its operation’ does not apply to criminal laws.” *Id.* at 423. Therefore, an amendment to a statute that affects the conditional liberty of a defendant that is on probation should follow the analysis

of a “law retrospective in its operation” and not an “ex-post facto law” which applies to crimes and criminal procedure because probation is conditional liberty and revocation of probation is not a criminal proceeding.

Here, the issue is rooted in restitution as a requirement of probation and not a new criminal offense. Failure to pay restitution in full did not prohibit the benefit of discharge from probation based on Earned Compliance Credit pursuant to §217.703(7) RSMo (2013). Based on the 2018 amendment, failure to pay restitution in full is a prohibition to discharge from probation based on Earned Compliance Credit.

Therefore, to apply the requirements of §217.703(7) RSMo (2018) to the defendant, who was placed on probation before August 28, 2018, is in violation of Article 1 §13 of the Missouri Constitution because the law would be “retrospective in its operation” because probation revocation proceedings are not criminal proceedings.

C. THE 2018 AMENDMENT TO §217.703(7) RSMo (2013) IS A SUBSTANTIVE CHANGE TO THE STATUTE BECAUSE IT ATTACHES A NEW DISABILITY TO A PAST TRANSACTION AND RETROSPECTIVE APPLICATION IS PROHIBITED

“There is no prohibition against the passage of laws which might be retroactive but not retrospective.” *State v. Thomaston*, 726 S.W.2d 448, 460 (Mo. Ct. App. 1987). “The distinguishing feature, of course, which has been developed in our law is that when a law makes only a procedural change, it is not retrospective and hence can be applied retroactively.” *Id.* “The constitutional inhibition against laws retrospective in operation

does not mean that no statute relating to past transactions can be constitutionally passed, but rather, that none can be allowed to operate retrospectively so as to affect such past transactions to the substantial prejudice of parties interested.” *Id.* (citations omitted). “To state the principle in the present vernacular, a law is retrospective and thus not retroactive if it affects the substantive or vested rights of a party and by contrast if a law is procedural only and does not affect the substantive rights of a party it is retroactive but not retrospective.” *Id.*

Substantive law defines the rights and duties giving rise to the cause of action, while procedural law prescribes the method of enforcing rights and carrying on the suit. *Gershman Inv. Corp. v. Duckett Creek Sewer Dist.*, 851 S.W.2d 765, 767 (Mo. Ct. App. 1993). Substantive laws take away or impair vested rights acquired under existing law, create a new obligation, impose a new duty, or attach a new disability to a past transaction. *Id.*

In this case, the 2018 amendment to §217.703(7) RSMo (2013) attaches a new disability to the substantial prejudice of Defendant because Defendant no longer has the benefit of being discharged from probation based on Earned Compliance Credit unless restitution is paid in full. The amendment allows for the accrual of Earned Compliance Credits, but Defendant now *does not* have the benefit of those Earned Compliance Credits until restitution is paid in full. (*emphasis added*). This is an additional requirement and this disability did not exist when Defendant was placed on probation in 2014 because failing to pay restitution in full *did not* prevent the accrual *and* application of Earned Compliance

Credits to trigger the benefit of statutory discharge from probation. (*emphasis added*). This is a new disability to a past transaction in that the requirement to complete restitution takes away the benefit previously available by the statute prior to the amendment.

These facts indicate the 2018 amendment to §217.703(7) RSMo (2013) was a substantive change and not a procedural change to the statute because it attaches a new disability to the substantial prejudice of Defendant because Defendant no longer has the benefit to be discharged from probation based on Earned Compliance Credit unless restitution is paid in full. Although restitution was ordered and was a condition of probation, the statute prior to the 2018 amendment did not prohibit the earning and application of Earned Compliance Credits to allow for the benefit of statutory discharge from a term of probation. The only requirement was Defendant complete at least 2 years of the probation term.

Therefore, to allow §217.703 RSMo (2018) to operate retrospectively would create a new disability to the substantial prejudice to Defendant because it prevents the benefit of Earned Compliance Credits that was available to Defendant prior to the amendment.

D. §1.160 RSMo (2005) PROHIBITS THE RETROSPECTIVE APPLICATION OF AN AMENDMENT TO ANY STATUTORY PROVISION.

§1.160 RSMo (2005) states, “No offense committed and no fine, penalty or forfeiture incurred, or prosecution commenced or pending previous to or at the time when any statutory provision is repealed or amended, shall be affected by the repeal or amendment, but the trial and punishment of all such offenses, and the recovery of the fines,

penalties or forfeitures shall be had, in all respects, as if the provision had not been repealed or amended, except that all such proceedings shall be conducted according to existing procedural laws.”

In this case, §1.160 RSMo (2005) is applicable because the statute in question, §217.703 RSMo (2018) was amended. Here, the issue is the payment of restitution in full before Earned Compliance Credit can allow Defendant the benefit of being statutorily discharged from probation. This amendment changes the benefit of Earned Compliance Credit and therefore changes the penalty of failing to pay restitution in full because indigent defendants will be required to remain on probation for the full term of probation because they will not have the benefit of the statutory reduction in their term of probation based on Earned Compliance Credit simply because they are poor.

§1.160 RSMo (2005) requires, “...the recovery of the fines, penalties or forfeitures shall be had, in all respects, as if the provision had not been repealed or amended...” Prior to the 2018 amendment of §217.703 RSMo (2013), there was no statutory requirement for restitution to be paid in full before the defendant had the benefit of being discharged from probation based on Earned Compliance Credit. The retrospective application of the amendment is prohibited by §1.160 RSMo (2005) because it changes the penalty for failing to pay restitution in full by taking away the statutory benefit of Earned Compliance Credits.

CONCLUSION

§217.703(7) RSMO (2018) is not dispositive in this case. The *Parrott* court held the language of §217.703(4) RSMo (2013) is clear and unambiguous, and does not permit the court or the Board of Probation and Parole to deny the benefit of Earned Compliance Credits simply because restitution is not paid in full. Clearly, the 2018 amendment was not a continuation or clarification of an already existing legislative intent.

Additionally, to apply the requirements of §217.703 RSMo (2018) to Defendant who was placed on probation before August 28, 2018 is in violation of Article 1 §13 of the Missouri Constitution because the law would be “retrospective in its operation”.

Further, these facts indicate the 2018 amendment to §217.703 RSMo (2013) was a substantive change and not a procedural change to the statute because it attaches a new disability and penalty to the substantial prejudice of Defendant because Defendant no longer has the benefit of being statutorily discharged from probation based on Earned Compliance Credit unless restitution is paid in full.

Finally, retrospective application of the amendment is prohibited by §1.160 RSMo (2005) because it changes the penalty for failing to pay restitution in full by taking away the statutory benefit of Earned Compliance Credits.

Therefore, Respondent respectfully request that a permanent Writ of Prohibition be denied and Respondent’s order of May 10, 2018, discharging Defendant from probation

effective May 23, 2018, in cause No. 14PU-CR00973-01, entitled State of Missouri,
Plaintiff, vs. Nettie Pallai, Defendant, be executed.

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 28th day of September 2018, a true and correct copy of the foregoing supplemental brief was served via the e-filing system and by e-mail to Mr. Kevin Hillman, Relator, at Kevin.Hillman@prosecutors.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 supplemental 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 7,500 words. The word processing software identified this brief contains 2,812 words. Finally, I hereby certify that the electronic copies of this supplemental brief have been scanned for viruses and found virus-free.

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