

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 SUPPLEMENTAL BRIEF

Respectfully Submitted,

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Statement of Facts

The General Assembly passed Section 217.703 RSMo, which established Earned Compliance credits, in 2012 as part of House Bill 1525 and it went into effect on August 28, 2012. The General Assembly then amended Section 559.105 RSMo in 2013, which deals with restitution, by broadening the statute to include all crimes, not just stealing and tampering. Section 559.105 RSMo includes the language, “No person ordered by the court to pay restitution pursuant to this section shall be released from probation until such restitution is complete.”

The Defendant, Nettie Pallai (also known as Nettie Pallai-Bowen, Nettie Pallai-Gan or Nettie Gan), pled guilty as part of a negotiated plea of guilty to the Class C felony of Property Damage in the First Degree on August 13, 2014 in the Pulaski County Circuit Court, case number 14PU-CR00973-01. As part of her plea agreement, the Defendant agreed to pay restitution in the amount of \$5104 at no less than \$50 per month until paid in full. (Relator’s Appendix, p. A9)

The Relator filed a Motion to Revoke the Defendant’s probation on January 3, 2018, for failure to pay restitution. (Relator’s Appendix, p. A16). 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 August 12, 2019 to November 20, 2017. (Relator’s Appendix, p. A25) On March 14, 2018, the Respondent heard arguments from Relator and the Defendant’s attorney in chambers. Respondent indicated that he would likely deny Defendant’s motion for discharge.

On April 14, 2018, the Respondent made a docket entry and announced to Relator and 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. The order was entered on May 10, 2018, but stayed until May 24, 2018 to allow additional arguments and further action as desired by the parties.

(Relator's Appendix, p. A36 and A48)

Relator 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.

During the time this case was pending before this Court, the General Assembly amended Section 217.703.7 RSMo, which become effective on August 28, 2018. The amended statute now includes the language, "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 in custody under section 217.718 and sections 559.036 and 559.115." (Emphasis added).

On August 30, 2018, Relator requested leave to file a supplemental brief regarding the applicability of the statutory amendment to this case. The Court granted leave to file on September 6, 2018 and ordered briefs to be filed on or before October 1, 2018.

Point Relied on – I

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DISCHARGING AND RELEASING THE DEFENDANT FROM PROBATION BECAUSE THE RECENT AMENDMENT TO SECTION 217.703 RSMO PROHIBITING DISCHARGE FROM PROBATION WHEN RESTITUTION IS NOT COMPLETE SHOULD BE APPLIED TO THIS CASE

- *Bell v. State*, 996 S.W.2d 739 (Mo. App. S.D. 1999)
- *Carlyle v. Missouri Department of Corrections*, 184 S.W.3d 76 (Mo. App. W.D. 2005)
- *State ex. rel. Nixon v. Russell*, 129 S.W.3d 867 (Mo banc. 2004)
- *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 AND RELEASING THE DEFENDANT FROM PROBATION PURSUANT TO SECTION 217.703 RSMO BECAUSE THE LEGISLATIVE INTENT TO PROHIBIT DISCHARGE FROM PROBATION WHEN RESTITUTION IS NOT COMPLETE IS CLEAR FROM THE RECENT AMENDMENT TO SECTION 217.703 RSMO

- *Missouri Hospital Association v. Air Conservation Commission*, 874 S.W.2d 380 (Mo App. W.D. 1994)
- Section 1.160 RSMo

- Section 217.703 RSMo
- Section 559.105 RSMo
- Section 595.209 RSMo

Argument – I

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DISCHARGING AND RELEASING THE DEFENDANT FROM PROBATION BECAUSE THE RECENT AMENDMENT TO SECTION 217.703 RSMO PROHIBITING DISCHARGE FROM PROBATION WHEN RESTITUTION IS NOT COMPLETE SHOULD BE APPLIED TO THIS CASE

A. Introduction.

During the pendency of this case, the General Assembly has acted to address the conflict between Sections 217.703 RSMo and 559.105 RSMo by amending Section 217.703 to require restitution be complete prior to discharge from probation. This procedural change should be applied to this case and Respondent should be prohibited from discharging the Defendant from probation.

B. The Amendment to Section 217.703 RSMo is procedural, not substantive, and should be applied to this case.

The General Assembly has now addressed the conflict between Section 217.703 RSMo and Section 559.105 RSMo by amending Section 217.703 RSMo to be consistent with Section 559.105 RSMo's prohibition against discharge from probation until restitution is complete. In fact, the language now used in the two statutes is almost identical. That amendment became effective on August 28, 2018,

while this case was pending. The conflict between the two statutes is the major issue in this case. Thus, if this Court would find that the change should be applied to this case now, the issue must be decided in favor of Relator. As discussed below, the Court should apply the amended statute to this case now.

In order to determine whether an amended statute should apply to a case such as the present one, the first issue to determine is whether Section 1.160 RSMo applies. Section 1.160 RSMo 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 determining whether Section 1.160 RSMo bars retroactive application of an existing statute, courts use a two prong inquiry. First, the court must determine whether the existing statute is a new provision or if it repealed or amended a previously existing provision. *State ex. rel. Nixon v. Russell*, 129 S.W.3d 867, 870 (Mo banc. 2004); *State v. Sumlin*, 820 S.W.2d 487, 490 (Mo banc. 1991). If the existing statute is a new provision, then it is outside the scope of Section 1.160 RSMo, and retroactive application is not barred by Section 1.160. *Russell*, 129 S.W.3d at 870. But, if the existing statute repealed or amended a previously existing provision, then we must determine whether the repealed or amended provision affects the prosecution, penalty, or punishment of the offense at issue. *Id.* at 870-71. If the

repealed or amended provision does not affect the prosecution, penalty, or punishment, then it again falls outside the scope of Section 1.160. *Id.* at 871. If, on the other hand, the repealed or amended provision does affect the prosecution, penalty, or punishment of the offense at issue, then it is within Section 1.160's bar on retroactive application and cannot be applied retroactively unless it is merely procedural. *See Prapotnik v. Crowe*, 55 S.W.3d 914, 918 (Mo. App. W.D. 2001); *See also Fields v. Missouri Board of Probation and Parole*, --S.W.3d-- (Mo. App. W.D. 2018), 2018 WL 4079423.¹

Under this two prong test, it must be first determined whether the changes to Section 217.703 RSMo passed by the General Assembly in 2018 repealed or amended an existing statute. As Relator has previously argued, there is no change in law by this amendment. The change to Section 217.703 RSMo merely makes it consistent with the existing requirements of Section 559.105 RSMo where it previously conflicted. Thus, the changes merely reflected an acknowledgment of the previously existing duty to complete restitution prior to being discharged from probation.

Assuming *arguendo*, that the change to Section 217.703 RSMo did amend the statute, then it requires the second prong of the analysis. Thus, the Court must determine whether the repealed or amended provision affects the prosecution, penalty, or punishment of the offense at issue. *Russell*, 129 S.W.3d at 870-71.

¹ This case was decided on August 28, 2018, and has not been released for publication in the permanent law reports as of date of filing of this brief.

The answer to that analysis is simply no, because the change did not affect the prosecution, penalty, or punishment of the offense at issue. First, the prosecution was not affected because Relator relied on the Section 559.105 RSMo prohibition against discharge from probation until restitution is complete during the plea agreement. In fact, the application of the amended Section 217.703 RSMo to the present case would be consistent with Relator's understanding of the law when the case was prosecuted and the plea agreement entered into by the parties.

Thus, the analysis must be whether this affects the penalty or punishment of the offense of the Defendant. A situation similar to the one in the present case was decided in *Bell v. State*, 996 S.W.2d 739 (Mo. App. S.D. 1999). In the *Bell* case, the length of time a probationer could be on probation was amended during the Appellant's probation term to extend the possible length of probation. The defendant argued that Section 1.160 RSMo prohibited the use of the amended statute to his case. The Court disagreed, stating "Probation is not a sentence nor could the conditions of probation be a sentence." *Id.* at 743, citing *McCulley v. State*, 486 S.W.2d 419, 423 (Mo. 1972). It went on to state, "It is clear that the sentence is the penalty-the confinement for a period of time or the fine-and does not include as part of its definition such conditional orders as the court makes for the amelioration of the punishment-probation. Probation lessens the impact of the sentence on the defendant; but probation does not, per se, shorten or lengthen the sentence" *Id.* The Court concluded, "probation is not a penalty of punishment and section 1.160 does not apply to prevent application of the current version of sections 559.036 and 559.016." *Id.*

As in that case, the application of a newly amended Section 217.703 RSMo merely affects a condition of probation, namely the payment of restitution. The Defendant's sentence in this case is set and is unchanged by the application of the newly amended Section 217.703 RSMo. As "probation is not a penalty or punishment" Section 1.160 RSMo does not prevent application of the current version of Section 217.703 RSMo. *Bell*, 996 S.W.2d at 743.

c. The application of the amendment to Section 217.703 RSMo to the present case does not violate the *ex post facto* prohibition.

The final issue to determine whether the new version of Section 217.703 RSMo should be applied to the present case is whether its application would violate the prohibition against *ex post facto* laws. A law falls within the *ex post facto* prohibition if it is retrospectively applied to the disadvantage of an offender by altering "substantial personal rights." *Carlyle v. Missouri Department of Corrections*, 184 S.W.3d 76, 79 (Mo. App. W.D. 2005), quoting *State v. Lawhorn*, 762 S.W.2d 820, 824 (Mo. Banc 1988). No *ex post facto* violation occurs if a change does not alter substantial personal rights, but merely changes the modes of procedure which do not affect matters of substance. *Id.*

In the present case, application of the amended Section 217.703 RSMo merely changes the procedure and does not affect a matter of substance. It does not change the sentence imposed, nor does it affect the definition of the crime for which the Defendant pled guilty. It merely reiterates the previously existing requirement of Section 559.105 RSMo as well as the orders of the Court at the time of the Defendant's sentencing, namely that she pay restitution and not be discharged until it

is paid, or she serves the maximum time on probation. Thus, it is simply a procedural change and the prohibition against *ex post facto* laws is not applicable.

Based upon all of the factors cited above, it is clear that the amended version of Section 217.703 RSMo should be applied to the Defendant's case. As such, the Court should enter an order prohibiting Respondent from discharging the Defendant in this case until her restitution is complete.

Argument-II

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DISCHARGING THE DEFENDANT AND RELEASING THE DEFENDANT FROM PROBATION PURSUANT TO SECTION 217.703 RSMO BECAUSE THE LEGISLATIVE INTENT TO PROHIBIT DISCHARGE FROM PROBATION WHEN RESTITUTION IS NOT COMPLETE IS CLEAR FROM THE RECENT AMENDMENT TO SECTION 217.703 RSMO

A. Introduction

The recent amendment to Section 217.703.7 RSMo, which added the requirement that a defendant may be discharged from probation for Earned Compliance Credit only "so long as the offender has completed restitution" clearly shows that the Legislature intended for Section 559.105 RSMo's similar limitation on discharge when restitution was not complete to apply to cases such as the present one.

B. The amendment to Section 217.703 RSMo makes clear the Legislature's intent that Defendants are not to be discharged from probation until their restitution is complete.

The Legislature's amendment to Section 217.703 RSMo now makes it consistent with Section 559.105 RSMo in that probationers are not to be discharged from probation until they have completed payment of restitution or they reach the maximum term of their probation. There can be no doubt as to the legislative intent of Section 559.105 RSMo as it has now been expressly stated and added to Section 217.703 RSMo.

Statutory amendments may be used to clarify or restate legislative intent. *Missouri Hospital Association v. Air Conservation Commission*, 874 S.W.2d 380, 398 (Mo App. W.D. 1994) citing *State ex rel. McCulloch v. Schiff*, 852 S.W.2d 392, 395 (Mo App. E.D. 1993). Subsequent statutes may be considered in construing previously enacted statutes in order to ascertain the uniform and consistent purpose of the legislature. *Missouri Hospital Association*, 874 S.W.2d at 398 citing *State v. Thomas*, 174 S.W.2d 337, 340 (Mo banc. 1943).

In the present case, the uniform and consistent purpose of the newly amended Section 217.703 RSMo and the still existing Section 559.105 RSMo is to require probationers to pay all of their restitution prior to being discharged under Earned Compliance Credit. With the recent amendment, there can be no other reasonable reading of the legislative intent in both statutes. To allow the Defendant in this case to be discharged from probation prior to the end of the maximum term, as the Respondent intended to do, when she has not paid her restitution, is a clear disregard

of the legislative intent to prohibit courts from doing so under Section 559.105 RSMo and now reiterated in Section 217.703 RSMo. It is clear that Respondent abused his discretion when he ordered the Defendant's discharge. Thus, an order prohibiting the Respondent from doing so is necessary in this case.

Conclusion

WHEREFORE, based on the arguments in Point I and Point II of Relator's supplemental 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, violates the newly amended Section 217.703 RSMo, the existing Section 559.105 RSMo, 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(g), I hereby certify that on This 28th day of September 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 Relator, 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(c), 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 the greater of 7500 words. The word processing software identified that this brief contains 3214 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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