IN THE

MISSOURI SUPREME COURT

STATE EX REL. TRAVIS JONES, Relator, vs. THE HONORABLE TONY WILLIAMS, CIRCUIT JUDGE, 46TH JUDICIAL CIRCUIT, Respondent.	)	Cause No. SC97417

ORIGINAL PETITION FOR WRIT OF PROHIBITION IN THE MISSOUR SUPREME COURT FROM THE CIRCUIT COURT OF TANEY COUNTY, MISSOURI
THE HONORABLE TONY WILLIAMS, CIRCUIT JUDGE

RELATOR'S AMENDED STATEMENT, BRIEF, AND ARGUMENT IN SUPPORT OF HIS PERMANENT WRIT OF PROHIBITION

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JURISDICTIONAL STATEMENT

The action is one involving Relator's request for an original writ of prohibition, staying proceedings in the underlying cause, *State v. Travis Jones*, Case No. 12AF-CR02663-01, Circuit Court of Taney County, on the grounds that Respondent does not have the authority to revoke Relator's probation since his probation has expired and neither Respondent or the State made every reasonable effort to hold a probation violation hearing before Relator's probation expired. Therefore, jurisdiction lies with this Court pursuant to Missouri Supreme Court Rules 84.22 and 97.01.

No petition for the relief requested has been made to any higher court.

Relief was sought from, and denied by, the Missouri Court of Appeals, Southern District, in Case No. SD35692, on September 18, 2018.

STATEMENT OF FACTS

On December 11, 2014, Relator pled guilty to the class C felony of felonious restraint and was placed on probation for five years (Exhibit A, p. A2). Pursuant to §217.703 (2013), Relator qualified for Earned Compliance Credits ("ECCs"). [1]A probation violation report was filed in February, 2015 and April, 2015 (Exhibit, A, p. A2; Exhibit B, pp. A6-A8; Exhibit C, pp. A9-A12). No hearing was ever held on these two reports and they both recommended continuance (Exhibit, A, p. A2; Exhibit B, p. A6; Exhibit C, p. A9). On December 7, 2015, a notice of citation was filed with the Court but no hearing was ever held on the report (Exhibit A, p. A2; Exhibit D, p. A13). On June 3, 2016, a violation report was filed with the Court (Exhibit A, p. A2; Exhibit E, pp. A14-A16). A motion to revoke was filed by the State on July 15, 2016 (Exhibit A, p. A2; Exhibit F, pp. A17-A18). On August 1, 2016, a probation violation report was filed (Exhibit A, p. A3; Exhibit G, pp. A19-A21). On August 2, 2016, the State filed another motion to revoke (Exhibit A, p. 3; Exhibit H, pp. A22-A23). Relator was continued on

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1 Section 217.703.1 states specific offenses and circumstances that make an offender ineligible for ECCs. Section 217.703.2 enumerates specific offense that could potentially disqualify an offender from qualifying for ECCs. Neither section disqualifies Relator for ECCs. In 2017, §217.703 was amended but under §217.703.11, Relator still qualifies for ECCs. The Statute was again amended in August, 2018, but since Relator's probation had already expired, the relevant version of the statute is from 2017. All three versions are included in the Appendix as Exhibits W, X, and Y, pp. A84-A98.

probation on September 15, 2016 (Exhibit A, p. 3; Exhibit I, pp. A24-A25; Exhibit J, pp. A26-A27). On June 5, 2017, a probation violation report was filed (Exhibit A, p. 3; Exhibit H, pp. 22-26). No hearing was ever held on this report and it recommended a continuance with an extension (Exhibit A, p. A3; Exhibit L, pp. A31-A34). Probation violation reports were filed on August 1, 2017 and August 21, 2017 (Exhibit A, p. A3; Exhibit M, pp. A35-A37; Exhibit N, pp. A38-A42). The report filed on August 21, 2017 indicated Relator was in the Barry County Jail and had an earned compliance credit discharge date of December 1, 2017, with an optimal discharge date of October 1, 2017 (Exhibit M, p. A41). On August 22, 2017, the State filed a motion to revoke probation (Exhibit A, p. A3; Exhibit O, pp. A43-A44). Relator's probation has never been suspended. On June 14, 2018, Relator wrote a letter to Respondent asking for his probation to be revoked and to be given credit for time served (Exhibit A, p. A4; Exhibit P, pp. A45-A46).

On August 29, 2018, Relator filed a motion to be discharged from probation and noticed it up for September 5, 2018 (Exhibit A, p. A5; Exhibit Q, pp. A47-A52). On September 5, 2018, a hearing was set for September 12, 2018, (Exhibit A, p. A5). On September 12, 2018, the State filed suggestions in opposition to Relator's motion for discharge (Exhibit A, p. 5; Exhibit M, pp. A53-A65). Relator asked for a continuance and the Court granted one to September 19, 2018 (Exhibit A, p. 5). A probation violation hearing was set for September 19, 2018 at the same time as hearing on Relator's motion to be discharged from probation (Exhibit A, p. A5). On September 17, 2018, Relator filed a petition for a writ of prohibition or in the alternative, mandamus, in case SD35692,

which that Court summarily denied on September 18, 2018. On September 19, 2018, this Court issued a preliminary writ of prohibition. Respondent filed his answer on October 19, 2018 (Exhibit CC, p. A107-A109).

POINT RELIED ON

Relator is entitled to a writ of prohibition to prohibit Respondent, the Honorable Tony Williams, from conducting a probation violation hearing in Relator's Taney County case, because Respondent is without authority to take any further action in Relator's case, in that Relator's probation, which began on December 11, 2014, ended by operation of law no later than March 19, 2018, due to his accrual of earned compliance credits under §217.703 RSMo., and Respondent did not make every reasonable effort to conduct a probation violation hearing before March 19, 2018, and is now required under §217.703 RSMo. and §559.036 RSMo. to discharge him. Allowing Respondent to revoke Relator's probation would deprive him of due process guaranteed by the 14th Amendment to the United States Constitution and Article I, §10 of the Missouri Constitution.

***State v. Avecedo,* 339 S.W.3d 612 (Mo. App. S.D. 2011)**

***State ex rel. Amorine v. Parker,* 490 S.W.3d 372 (Mo. banc 2016)**

***State ex rel. Strauser v. Martinez,* 416 S.W.3d 798, 801 (Mo. banc 2014)**

***State ex rel. Dotson v. Holden,* 416 S.W.3d 821 (Mo. App. S.D. 2013)**

Section 217.703 RSMo. (Cum. Supp. 2017)

Section 559.036 RSMo. (Cum. Supp. 2017)

ARGUMENT

Relator is entitled to a writ of prohibition to prohibit Respondent, the Honorable Tony Williams, from conducting a probation violation hearing in Relator's Taney County case, because Respondent is without authority to take any further action in Relator's case, in that Relator's probation, which began on December 11, 2014, ended by operation of law no later than March 19, 2018, due to his accrual of earned compliance credits under §217.703 RSMo., and Respondent did not make every reasonable effort to conduct a probation violation hearing before March 19, 2018, and is now required under §217.703 RSMo. and §559.036 RSMo. to discharge him. Allowing Respondent to revoke Relator's probation would deprive him of due process guaranteed by the 14th Amendment to the United States Constitution and Article I, §10 of the Missouri Constitution.

"A writ of prohibition is appropriate: (1) to prevent the usurpation of judicial power when a lower 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. Strauser v. Martinez*, 416 S.W.3d 798, 801 (Mo. banc 2014). Further, "[w]rit relief lies when a trial court lacks the authority to conduct a probation revocation hearing after the term of probation has expired." *State ex rel. Amorine v. Parker*, 490

S.W.3d 372, 374 (Mo. banc 2016)(quoting *State ex rel. Dotson v. Holden*, 416 S.W.3d 821, 823 (Mo. App. S.D. 2013)).[2]

In this case, Relator's probation expired no later than February 18, 2018 and neither Respondent nor the State made every reasonable effort to hold a probation violation hearing before this date. Therefore, Respondent has no authority to hold a probation violation hearing and a writ of prohibition is the appropriate remedy.

I. RELATOR'S PROBATION EXPIRED NO LATER THAN MARCH 19, 2018

A. Calculating Relator's Earned Compliance Credits ("ECCs").

It is unclear exactly why Relator's calculations as to his discharge date are different than those of Probation and Parole. Relator includes both but submits that regardless of whose calculations are used, Relator's probation expired *months* before Respondent or the State took any action to conduct a probation violation hearing.

1. Probation and Parole's Calculations

In a Case Summary Report filed May 19, 2017, Respondent was put on notice that Relator had an earned discharge date of January 19, 2018 and an optimal discharge date of September 21, 2017 (Exhibit K, pp. A28-A29). In two violation reports filed by Relator's probation officer in August, 2017, Respondent was put on notice that while Relator's earned discharge date was December 1, 2017, his optimal discharge date was

2 A copy of the *Strauser, Amorine,* and *Dotson* cases are included in Relator's Appendix as Exhibits S,T, and U, pp. A66-A80.

October 1, 2017 (Exhibit L, p. A33; Exhibit M, p. A37). The optimal discharge date was based on continued supervision compliance. Relator respectfully submits that Relator was in compliance as defined by §217.703.4 RSMo. (Cum. Supp. 2017), which states:

> For the purposes of this section, the term **"compliance"** shall mean the absence of an initial violation report submitted by a probation or parole officer during a calendar month, or a motion to revoke or motion to suspend filed by a prosecuting or circuit attorney, against the offender.

As the docket entries show, no further violation reports or motions to revoke were filed in the subsequent month of September. Therefore, according to the calculations of Probation and Parole, Relator should have been discharged on October 1, 2017.

In *State ex rel. Amorine v. Parker,* 490 S.W.3d 372 (Mo. banc 2016), this Court did not rely on its own calculations to determine Relator's discharge date. Rather, it followed the calculations used by Probation and Parole. Specifically the Court stated:

> Here, Respondent was notified twice on January 8, 2015, that Amorine had an earned discharge date of July 13, 2015, and with continued supervision compliance, an optimal discharge date of April 1, 2015. Following the reports filed with the trial court on January 8, 2015, no additional violation reports were filed, and the state did not file a motion to revoke or suspend probation. Hence, Amorine complied with his supervision. Amorine should have been discharged from probation on April 1, 2015.

Id. at 375. Unlike the *Amorine* case, the State did file a motion to revoke (Exhibit O, p. A43-A44). However, this report was filed in the same month as the August reports. As the language of §217.703.4 makes clear, compliance is determined by the absence of a report or motion in a particular *month.* Since two violation reports had already been filed in August, 2017, Relator was already not in compliance for that month. The motion filed on August 22, 2017 did not make Relator any less compliant.

Assuming, *arguendo,* that Relator was not entitled to be discharged on his optimal discharge date of October 1, 2017. Probation and Parole's calculations show that he should have been discharged on December 1, 2017 (Exhibit L, p. A33; Exhibit M, p. A37).

2. Relator's Calculations

The relevant statute in this case is § 217.703 RSMo.[3] Section three of § 217.703 states:

> Earned compliance credits shall reduce the term of probation, parole, or conditional release by thirty days for each full calendar month of compliance with the terms of supervision. Credits shall begin to accrue for eligible offenders after the first full calendar month of supervision or on October 1, 2012, if the offender began a term of probation, parole, or conditional release before September 1, 2012.

3 Cum Supp. 2017.

Relator was placed on probation for five years on December 11, 2014 (Exhibit A, p. A2). His probation without any ECCs ends December 10, 2019. Therefore, according to §217.703.3, he began earning ECCs on February 1, 2015. A probation violation report was filed in February, 2015, so Relator did not earn any ECCs for that month (Exhibit A, p. A2; Exhibit B, pp. A6-A8). However, since no hearing was held, Relator earned 30 days of ECCs for the month of March, 2015.[4] Likewise, a probation violation report was filed in April, 2015 so Relator did not earn any ECCs for that month (Exhibit A, p. A2; Exhibit C, pp. A9-A12). However, no hearing was ever held so Relator earned ECCs for the months of May, June, July, August, September, October, and November, 2015. This brings the total of ECCs to 240 days.

A probation violation report was filed on December 7, 2015 (Exhibit A, p. A2; Exhibit D, p. A13)[5], but again no hearing was held, and thus Relator earned ECCs for the

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4 In his answer (Exhibit CC, pp. A107-A109), Respondent denies this assertion arguing that a hearing was in fact held not only on this report but all reports. Relator disputes this and specifically addresses this, *infra.*

5 This report was not an initial violation report but a notice of citation. The amendment to §217.703.5 that went into effect on August 28, 2018 now states that credits shall not accrue in a month that a citation is filed (Exhibit Y, pp. A94-A98). In the version of the statute that is applicable to Relator's case, a citation is not included (Exhibit X, pp. A89-A93). This raises the question of whether a citation in Relator's case made him ineligible for ECCs for the month the citation was filed. On the one hand, the language of

months of January, February, March, April, and May of 2016. This brings the total number of ECC credits to 390.

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§217.703.5 is straightforward and thus the plain and ordinary meaning should be controlling. *See State v. Rowe*, 63 S.W.3d 647, 649 (Mo. banc 2002)("When the words are clear, there is nothing to construe beyond applying the plain meaning of the law.") Further, "[w]hen the Legislature amends a statute, it is presumed that its intent was to effect some change in the existing law." *State v. Joos*, 218 S.W.3d 543, 548 (Mo. App. S.D. 2007). Therefore a citation did *not* make Relator ineligible for ECCs for this month. On the other hand, case law that also provides that when the legislature makes a change in the law, its purpose can be to *clarify* the former version of the statute and not change it. *See Mann v. McSwain*, 526 S.W.3d 287, 292 (Mo. App. W.D. 2017)(Legislature's 2003 amendment to §556.061 adding assault on a law enforcement officer to the list of dangerous felonies not a substantive change but rather a clarification). Since a citation is a report from the probation officer that discusses how a probationer is in violation, one could argue that the addition of a citation to §217.703.5 is not really a substantive change but is merely a clarification of the statute in effect for Relator's case. Because Relator's probation had expired *months* before Respondent took *any* action on Relator's case, whether or not Relator should receive ECCs for the month a citation was filed is not dispositive. Therefore, while Relator believes ECCs should be credited to him for this month, to make his argument clearer, Relator will not include this month in his calculations.

A probation violation report was filed on June 3, 2016 and on August 1, 2016 (Exhibit A, pp. A2-A3; Exhibit E, pp. A14-A16; Exhibit G, pp. A19-A21). A motion to revoke probation was filed in July and August, 2016 (Exhibit A, pp. A2-A3; Exhibit F, pp. A17-A19; Exhibit H, pp. A22-A23). Therefore, Relator did not earn any ECCs for those months. Under the statute, it is unclear if Relator should earn ECCs for the month of September, 2016, when a hearing was held on a particular violation (Exhibit A, p. A3; Exhibit I, pp. A24-A25; Exhibit J, pp. A26-A27). Since the ECCs from this month are not dispositive to Relator's case, Relator will not include this month in his calculations. Relator was continued on probation in September, 2016 (Exhibit A, p. 3; Exhibit I, pp. A24A25; Exhibit J, pp. A26-A27). He began to earn ECCs in October, 2016.

Relator earned ECCs for the months of October, November, and December of 2016. He also earned them for January, February, March, April, and May of 2017. This brings the total number of ECCs to 630.

A probation violation report was filed on June 5, 2017 so no ECCs were earned in that month (Exhibit A, p. A3; Exhibit L, pp. A31-A34). However, no hearing was ever held on that violation so Relator did earn ECC for the month of July, 2017.[6] This brings the total number of ECCs to 660.

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6 Unlike the reports from 2015, action by the State and the Court was taken three months after this report was filed. Although this report recommends continuance, it also recommends an extension, which requires court action. Arguably, then, a hearing was pending for this report and Relator would not have been able to earn ECCs for the month

Subtracting 365 days from 12/10/2019 brings the discharge date to 12/10/2018. This leaves 295 days of ECCs left. When these dates are calculated in, this leaves a discharge date of February 18, 2018, or, if Relator was not entitled to ECCs for the month of July, 2017, a discharge date of March 19, 2018. The probation has never been suspended. While Relator has not earned any credits since July, 2017[7], he has already earned enough ECCs to have been discharged.

B. The State Incorrectly States That Relator Was Not Entitled to ECCs In Certain Months.

In its suggestions in opposition filed in circuit court, the State argued that Relator was not entitled to earn ECCs in the months of February, April and December of 2015; May, July, and August of 2016; and, May, July, and August of 2017 (Exhibit R, p. A58). This is not entirely accurate. Further, the State argued that Relator was not entitled to ECCs credits in May, 2016, May, 2017, and July, 2017 (Exhibit R, p. A58). [8] In these three months, the date the reports were drafted and the date these reports were submitted are different. The State appears to believe that the date the report is drafted is dispositive. The plain language of the statute refutes this. Section 217.703.4 states:

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of July, 2017. Assuming, *arguendo,* this is true, then Relator's total number of ECCs would be 630, giving him a discharge date of March 19, 2018, still over three months before the State and Respondent took any action.

7 The reasons for this are discussed, *infra.*

8 Relator discusses why he may not be entitled to ECCs for the month of July, *supra.*

> For the purposes of this section, the term **"compliance"** shall mean the absence of an initial violation report submitted by a probation or parole officer during a calendar month, or a motion to revoke or motion to suspend filed by a prosecuting or circuit attorney, against the offender.

Thus, the issue is when a report is *submitted*. "When the words are clear, there is nothing to construe beyond applying the plain meaning of the law." *State v. Rowe*, 63 S.W.3d 647, 649 (Mo. banc 2002). "In the absence of a statutory definition, words will be given their plain and ordinary meaning as derived from the dictionary." *State v. Oliver*, 293 S.W.3d 437, 446 (Mo. banc 2009). There is no statutory definition for "submit" so it should be given its plain and ordinary meaning as derived from the dictionary. According to the Merriam Webster on-line dictionary, "submit" means "to present or propose to another for review, consideration, or decision…to deliver formally."[9] The manner the reports are presented is by electronic filing. As can be seen, while the reports in question are dated May 10, 2016; May 30, 2017; July 12, 2017; and July 26, 2017, the actual dates they are electronically filed, or submitted, are June 3, 2016; June 5, 2017; August 1, 2017; and August 21, 2017.[10] Further, as can be seen in the docket sheets, the violation reports are filed by Probation and Parole (Exhibit A, pp.

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9 https://www.merriam-webster.com/dictionary/submit; Exhibit AA, p. A103.

10 *See* Exhibit E, pp. A14-A16; Exhibit L, pp. A31-A34; Exhibit M, pp. A35-A37; Exhibit N, pp. A38-A42).

A2-A3). Finally, this Court has used the date the report was actually filed and not the date on the report. In *Amorine*, this court referred to a report filed on January 8, 2015. *State ex rel. Amorine v. Parker*, 490 S.W.3d at 375. However, as Exhibit BB shows, the date of the report is December 30, 2014.[11]

C. Respondent and the State Did Not Make Every Reasonable Effort to Hold the Probation Violation Hearing Before Relator's Probation Expired.

Section 559.036.8 RSMo. (Cum Supp. 2017)[12] states that:

> The power of the court to revoke probation shall extend for the duration of the term of probation designated by the court and for any further period which is reasonably necessary for the adjudication of matters arising before its expiration, provided that some affirmative manifestation of an intent to conduct a revocation hearing occurs prior to the expiration of the period and that every reasonable effort is made to notify the probationer and to conduct the hearing prior to the expiration of the period.

The State filed a motion to revoke and the Respondent issued a capias warrant. Thus, a manifestation of intent to revoke did occur. Additionally, the probation violation report filed on August 21, 2017, indicates that Relator was interviewed about his alleged

11 Exhibit BB is a copy pages A16-A18 of an Exhibit from the Relator's brief from the *Amorine* case.

12 A copy of this statute is included in Relator's Appendix as Exhibit Z, pp. A99-A102.

violations (Exhibit N, pp. A38-A42). Arguably, then, Relator was given notice about a violation hearing. However, not every reasonable effort was made to conduct a hearing before Relator's probation expired. Both the State and Respondent were notified in both August, 2017 reports that Relator's probation was set to expire in December of 2017, with an optimal discharge date of October 1, 2017 (Exhibit M, p. A37; Exhibit N, p. A41). Additionally, the report filed on August 21, 2017 indicated that Relator was in the Barry County jail and gave the specific case numbers to Relator's cases then pending in Barry County (Exhibit N, pp. A39-A40). Neither the State nor Respondent made any effort to bring Relator to Taney County from the Barry County jail by way of a writ of habeas corpus ad testificandum or ad prosequendum to conduct a probation violation hearing. Further, a simple look at case net and/or communication with the probation officer would have alerted the State that Relator was in in the Department of Corrections. Additionally, the "Track this Case" option as well as the MOVANS notification option also could have been used to assist the State in keeping track of Relator's cases in Barry County (Exhibit DD, pp. A110-A114).[13] The State and Respondent did not have to wait until Relator

13 To use the MOVANS system, a person can click the link at the bottom of a page of docket entries on case net (Exhibit DD, p. A110). A box – Notify Me of Status Changes is available to click on (Exhibit DD, p. A111). Then, a person chooses the manner to be informed (Exhibit DD, p. A112). To use Track This Case, a person clicks on the link on the case header (Exhibit DD, p. A113). The person fills in the relevant information and then clicks on the box that states, "Track This Case" (Exhibit DD, p. A114).

wrote Respondent a letter on June 14, 2018 before bringing him to Taney County (Exhibit A, p. A5; Exhibit P, pp. A45-A46). Further, as previously mentioned, Respondent never suspended Relator's probation Therefore, not only did the State and Respondent fail to make every reasonable effort to hold a probation violation hearing before Relator's probation expired, they failed to make *any* effort to do so. Respondent has no authority to hold a hearing and must discharge Relator from probation.

II. THE STATE AND RESPONDENT FAIL TO ADDRESS RELATOR'S ARGUMENTS

A. No Hearing was Ever Held on the Probation Violation Reports From 2015.

In his answer, Respondent disputes that a hearing was never held on the violation report from February, 2015 and April, 2015. Respondent argues that there was a hearing on these violations in September, 2016 (Exhibit CC, p. A107). This argument fails for two reasons.

First, while there may not be a bright line rule as to how long the State has to file a motion to revoke and/or the Court to take action on a violation report, the record is clear that Judge Johnson did not take any action until immediately after reading the report filed on June 3, 2016 (Exhibit A, p. A2). If Judge Johnson had an interest in violating Relator's probation based on the reports from February and April of 2015, she would not have waited fourteen and sixteen months. Moreover, the docket from June 6, 2016, shows that Judge Johnson's warrant is based on the report filed June 3, 2016, *not* the ones filed in early 2015.

The same is true for the State. It too, took no action whatsoever on the reports filed in 2015 and only filed a motion to revoke probation after Relator was taken into custody on the warrant Judge Johnson issued on June 6, 2016 (Exhibit A, p. A2; Exhibit F, pp. A17-A18). By not filing a motion to revoke based on the reports filed in 2015, both of which recommended a continuance, the State tacitly agreed with the probation officer's report. It cannot take action on a particular report and retroactively include violations from reports from over a year ago.

Second, assuming, *arguendo*, that the State and/or Respondent can do this, the argument still fails as no hearing was ever held on those violation reports. The docket sheet clearly shows that the only violation that was found was that Relator was terminated from the Batterers Intervention Program ("BIP") (Exhibit I, pp. A24-A25). No other findings were made about the violations from the other reports. At the hearing, Relator simply admitted one violation from the reports filed in May and August, 2017 (Exhibit J, pp. A26-A27). *Nothing* was said about the alleged violations from the other reports. Relator did not admit to the violations and the State did not ask for any type of admission. Simply referencing those reports in its motion to revoke does not mean a hearing was actually held on those alleged violations from those reports. Therefore, no hearing was ever held on those reports and Relator should be deemed in compliance for the months after those violation reports.

B. Nothing in §217.703 Prevents Relator From Being Discharged From Probation.

The State also argued that §217.703.5 and §217.703.10 prevent Relator from being discharged early due to ECCs (Exhibit R, pp. A56-A60). The language of these sections, as well as recent case law on this issue, demonstrates why these arguments fail.

1. Section 217.703.5

The state argued that the filing of the report and its motion to revoke suspended the operation of ECCs, including credits already earned, until a hearing is held under §217.703.5 (Exhibit R, p. A59). The State based its argument on the language that, "[c]redits…shall be suspended pending the outcome of a hearing, if a hearing is held…" This argument has no support in the statute.

Section 217.703.5 states:

> Credits shall not accrue during any calendar month in which a violation report has been submitted or a motion to revoke or motion to suspend has been filed, and shall be suspended pending the outcome of a hearing, if a hearing is held. If no hearing is held or the court or board finds that the violation did not occur, then the offender shall be deemed to be in compliance and shall begin earning credits on the first day of the next calendar month following the month in which the report was submitted or the motion was filed. All earned credits shall be rescinded if the court or board revokes the probation or parole or the court places the

> offender in a department program under subsection 4 of section 559.036. Earned credits shall continue to be suspended for a period of time during which the court or board has suspended the term of probation, parole, or release, and shall begin to accrue on the first day of the next calendar month following the lifting of the suspension.

There are four sentences in section five. The first two sentences mention credits and the second two mention *earned credits*. Missouri case law is clear that in construing statutes, "'[e]very word, clause, sentence and section of a statute should be given meaning, and under the rules of statutory construction statutes should not be interpreted in a way that would render some of their phrases to be mere surplusage.'" *State v. Avecedo,* 339 S.W.3d 612, 618 (Mo. App. S.D. 2011)(internal citation and quotation omitted).

From this rule of statutory construction, "Credits" in the first two sentences has a different meaning than "Earned Credits" has in sentences three and four. Otherwise, the word, "earned" is mere surplusage. Thus, the “credits” from the first two sentences that are suspended are different than the “earned credits” from the second two sentences that are suspended. The plain language of the phrase “earned credits” shows that these are the credits a defendant has *already* earned. The statute is clear that the credits already earned are suspended when the probation is suspended. This has not happened in Relator’s case. Therefore, the credits that Relator has earned are *not* suspended and *can* be considered in determining whether he should be discharged from probation.

This raises the question as to what credits are being suspended in the first two sentences of §217.703. Once again, the rules of statutory construction provide the answer. "A court, therefore, looks at the context in which a term is used to determine its meaning." *Circuit City Stores, Inc. v. Director of Revenue*, 438 S.W.3d 397, 401 (Mo. banc 2014). The context of the first sentence shows that the credits that are suspended are those in the months between the filing of the violation report is and when the hearing is actually held. These are the months that a hearing is pending. When the probation violation reports from 2015 were initially filed, Realtor's ability to earn credits in the subsequent months was suspended until it became clear that no hearing was going to be held. When a probation violation and motion to revoke were filed in August, 2017, a warrant was issued and Relator's ability *to earn* credits was again suspended pending a hearing. However, as Relator has shown, the fact that Relator's ability to earn credits had been suspended did not mean that the credits he had already earned were also suspended. Those credits have not been suspended because Relator's probation was not suspended.

2. Section 217.703.10

The second argument the State made is that since a motion to revoke was filed by the State, action was taken and under section 217.703.10, Relator cannot be discharged (Exhibit R, p. A59). This argument also fails.

The relevant language of §217.703.7 states:

> 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 at least two years of his or her probation or parole….

Section 217.703.10 states:

> No less than sixty days before the date of final discharge, the division shall notify the sentencing court, the board, and, for probation cases, the circuit or prosecuting attorney of the impending discharge. If the sentencing court, the board, or the circuit or prosecuting attorney upon receiving such notice does not take any action under subsection 5 of this section, the offender shall be discharged under subsection 7 of this section.

Section 217.703.7 allows a defendant to be discharged automatically when the probation expires. When the probation expires automatically pursuant to §217.703.7, the Court is not required to give any notice to the prosecutor. Since the State has taken some action and manifested intent to revoke, Respondent may not discharge Relator automatically. However, this does not relieve the State or Respondent of their burden to take every reasonable step to hold a probation revocation hearing before Relator's discharge date of February 18, 2018. As explained, *supra*, neither the State nor Respondent did this and Relator's probation has expired.

Moreover, the case of *State ex rel. Amorine v. Parker,* 490 S.W.3d 372 (Mo. banc 2016) demonstrates further how this argument fails. In *Amorine,* the probation officer filed a case summary report and a violation report on January 8, 2015. *Id.* at 373. The

case summary report indicated that Amorine was going to be discharged on July 13, 2015 and possibly on April 1, 2015 with continued compliance. *Id.* The violation report recommended revoking his probation and placing him on a new term of probation. *Id.* The plain language of section 217.703.10 indicates that this section becomes applicable if the prosecutor *or* the sentencing court takes any action. The trial court *did* take action by initially setting the case for a violation hearing on February 17, 2015 and then resetting it to March 17, 2015. *Id.* at 376. When the Court in the *Amorine* took action, it made §217.703.10 applicable to Amorine's case. Despite taking action under §217.703.10, the *Amorine* court still had a duty to make every reasonable effort to hold a hearing before the defendant's probation expired. *Id.* As *Amorine* demonstrates, the fact that action is taken under section 217.703.10 does not mean the clock stops and does not relieve the State and Respondent from making every reasonable effort to hold a hearing before Relator's probation expires. As in *Amorine,* Respondent failed to do this and Relator's probation has expired.

C. Neither Relator Nor His Counsel Have an Obligation to Assist Respondent or the State in Revoking Relator's Probation.

The State argued that neither Relator nor his counsel gave the State or Court any notice that Relator was in Barry County and then in the Department of Corrections and that Relator's counsel "was in the best position to keep the both the Court and the State apprised of his client's whereabouts given his representation of the defendant on the pending motion to revoke probation." (Exhibit R, pp. A62-A64). Therefore, the State was attempting to claim the delay was attributable to Relator and his counsel. This

argument fails for the simple reason that it is neither a defendant's nor his counsel's duty to assist the State in revoking his probation.

A similar argument was made, in *State ex rel. Dotson v. Holden*, 416 S.W.3d 821 (Mo. App. S.D. 2013). In *Dotson*, the defendant was placed on probation for five years on second degree robbery on January 5, 2007. *Id.* at 822. On March 21, 2011, the trial court became aware that the defendant was in the Department of Corrections ("DOC") on another case. *Id.* A probation violation report was filed recommending revocation. *Id.* The trial court knew that the defendant was in DOC but took no action other than to issue a capias warrant. *Id.* Eighteen months later, the defendant was brought before the trial court and a probation violation hearing was scheduled for December 20, 2012. *Id.* Dotson's counsel filed a motion to have Dotson discharged from probation. *Id.* The trial court denied the motion, noting that while defendant had a right to have his disposed of in a reasonable amount of time; he was not prejudiced because he could have filed a request to dispose of the warrant. *Id.* at 822-23.

While not doing so expressly, the Court of Appeals rejected the trial court's reasoning noting that:

> [T]he record does not reflect any apparent effort to conduct a hearing during the nine months prior to the expiration of Dotson's probation. As noted above, Respondent and the State had knowledge that Dotson was in the custody of the Missouri Department of Corrections. Therefore, Respondent could have set a probation revocation hearing in this matter and, by means of a

> writ of habeas corpus ad testificandum or ad prosequendum, could have secured Dotson's presence for such a hearing.

Id. at 825-26.

As the *Dotson* case demonstrates, the fact that a defendant could have taken action to have his case moved quicker is irrelevant. The trial court in *Dotson* knew where Dotson was and could have brought him to court through a writ. Likewise, the State and/or Respondent knew Relator was in the Barry County Jail when the probation violation report was filed on August 21, 2017, and could have brought him to Taney County through a writ. Even if the writ had not been successful, the State and Respondent would have been able to claim they *did* make efforts to have the hearing before his probation expired. Both Respondent and the State knew Relator's probation was going to possibly end in less than two months. They chose not to do anything, *including suspending Relator's probation,* which as discussed, *supra,* would have prevented Relator from being able to use his ECCs already earned to be discharged from probation. Moreover, they chose not to do any follow up to Relator's case, despite the fact that it was *their* responsibility to do so, not Relator's or his counsel's. *See State ex rel. Strauser v. Martinez,* 416 S.W.3d 798, 803 (Mo. banc 2014)(Not the duty of the defendant or the attorney to "ensure the trial court ruled on the pending revocation motions").

D. Relator Did Not Have to Show He Was Ready to Proceed.

The State argued the case of *Petree v. State*, 190 S.W.3d 641(Mo. App. W.D. 2006)[14], supports its argument that before Relator can be granted relief, he must show he was ready to proceed. The State's reliance on this case is misplaced.

In *Petree*, the defendant was placed on five years of probation beginning May 28, 1997. *Id.* at 642. On March 29, 2002, the probation officer recommended revocation and the defendant appeared before the court on May 6, 2002. *Id.* On that date, the defendant asked for a continuance so he could obtain counsel. *Id.* Counsel appeared with the defendant on November 4, 2002 and his probation was revoked. *Id.* The defendant filed for post-conviction relief alleging that the Court had exceeded its authority. *Id.* The court denied relief and the defendant appealed. *Id.* The Court of Appeals held that the defendant was not entitled to relief because he had asked for a continuance to obtain an attorney and the attorney did not enter his appearance until the day of the probation violation hearing. *Id.* at 643.

Relator's case is not analogous. He was never brought before Respondent before March 19, 2018. Indeed, he was not brought before Respondent until July 19, 2018, four months after his probation expired. Moreover, the record clearly indicates that the only reason Relator was writted to Taney County was because Relator asked to be. While the State is correct that the case was reset on July 19, 2018, and July 31, 2018, the record is not clear as to who requested the continuances. *See State ex rel. Strauser v. Martinez,* 416 S.W.3d at 803(Court distinguishes the situation of the defendants in that case from

14 A copy of this case is included in Relator's Appendix as Exhibit V, pp. A81-A83.

the defendant in *Petree* on the fact that the record is not clear that they requested the continuances). Even if it was Relator who requested the continuances, it is still irrelevant. By July 19, 2018, Respondent had no statutory authority to do anything. *Petree* does not help the State.

The law is clear that neither Relator nor his counsel had the responsibility to ensure the probation violation hearings take place. Therefore the State's argument that the doctrine of unclean hands prevents Relator from being discharged from probation has no merit (Exhibit R, pp. A63-A64).

CONCLUSION

Section 217.703 states the procedure for a defendant to be released from probation early through Earned Compliance Credits. The evidence overwhelmingly shows that Relator's probation expired at least ten month ago and perhaps over a year ago. Therefore, Respondent no longer has authority over Relator's case. Sections 217.703 and 559.036 require that Relator be discharged. Allowing Respondent to take any further action in Relator's case will violate his right to due process guaranteed by the 14th Amendment to the United States Constitution and Article I, §10 of the Missouri Constitution. A writ of prohibition is the appropriate remedy and Relator requests that this Court make its preliminary writ permanent.

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/s/ James Egan

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CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify, that on this 3rd day of December, 2018, true and correct copies of the foregoing brief and appendix were emailed to the Hon. Tony Williams, Circuit Judge, 46th Judicial Circuit, Taney County Judicial Center, 266 Main Street, Forsyth, Missouri 65653; Phone: 417-546-7230; Fax: 417-546-6133; E-Mail: Tony.Williams@courts.mo.gov; and, Mr. Thomas Kondro at the Taney County Prosecutor's Office, Taney County Judicial Center, 266 Main Street, Forsyth, Missouri 65653; Phone: 417-546-7260: Fax: 417-546-2376; E-mail: ThomasK@co.taney.mo.us.

/s/ James Egan

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James Egan

CERTIFICATE OF COMPLIANCE

I, James Egan, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, signature block, this certification, and the certificate of service, this brief contains 6,154 words, which does not exceed the 31,000 words allowed for a Relator's brief.

/s/ James Egan

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James Egan