

No. SC97674

In the
Supreme Court of Missouri

STATE EX REL. TRAVIS JONAS,

Petitioner,

v.

DEAN MINOR,

Respondent.

Petition for a Writ of Habeas Corpus

RESPONDENT'S BRIEF

ERIC S. SCHMITT
Attorney General

PATRICK J. LOGAN
Assistant Attorney General

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Fax: (573) 751-3825

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF FACTS	1
ARGUMENT	7
I. The probation court had authority to revoke Jonas’ probation after it received notice of Jonas’ discharge date and suspended the probation term – Responds to Petitioner’s Point I.	7
II. Jonas cannot challenge the calculation of his ECC discharge date in habeas corpus because section 217.703.8 prohibits challenges to the award or rescission of ECCs in any motion for post-conviction relief – Responds to Petitioner’s Point I.	19
CONCLUSION.....	26
CERTIFICATE OF COMPLIANCE AND SERVICE	27

TABLE OF AUTHORITIES

Cases

<i>Aquila Foreign Qualifications Corp. v. Dir. Of Revenue</i> , 362 S.W.3d 1 (Mo. 2012).....	14, 17
<i>Ban v. State</i> , 554 S.W.3d 541 (Mo. App. E.D. 2018)	25
<i>Clay v. Dormire</i> , 37 S.W.3d 214 (Mo. 2000).....	24
<i>Kelsey v. Fitzgerald</i> , 574 F.2d 443 (8th Cir. 1978)	22
<i>McKay v. State</i> , 520 S.W.3d 782 (Mo. 2017).....	23
<i>Middleton v. Missouri Dept. of Corrections</i> , 278 S.W.3d 193 (Mo. 2009).....	17
<i>Pennsylvania v. Finley</i> , 481 U.S. 551 (1987)	22
<i>Price v. State</i> , 422 S.W.3d 292 (Mo. 2014)	22
<i>Reese v. Delo</i> , 94 F.3d 1177 (8th Cir. 1996)	25
<i>Reuscher v. State</i> , 887 S.W.2d 588 (Mo. 1994)	22
<i>Roy v. Missouri Dep’t of Corrections</i> , 23 S.W.3d 738 (Mo. App. W.D. 2000)...	21
<i>Ruiz-Martinez v. Mukasey</i> , 516 F.3d 102 (2d Cir. 2008).....	21
<i>Smith v. State</i> , 887 S.W.2d 601 (Mo. 1994)	22
<i>State ex rel. Amarine v. Parker</i> , 490 S.W.3d 372 (Mo. 2016)	24
<i>State ex rel. Amrine v. Roper</i> , 102 S.W.3d 541 (Mo. 2003)	24
<i>State ex rel. Coleman v. Wexler Horn</i> , 568 S.W.3d 14 (Mo. 2019)	Passim
<i>State ex rel. Culp v. Rolf</i> , 568 S.W.3d 443 (Mo. App. W.D. 2019)	18
<i>State ex rel. Gater v. Burgess</i> , 128 S.W.3d 907 (Mo. App. W.D. 2004)	21

<i>State ex rel. Hawley v. Chapman</i> , 567 S.W.3d 197 (Mo. App. W.D. 2018).....	20
<i>State ex rel. Hillman v. Beger</i> , 566 S.W.3d 600 (Mo. 2019)	Passim
<i>State ex rel. Jones v. Eighmy</i> , 572 S.W.3d 503 (Mo. 2019)	8, 16, 21
<i>State ex rel. Newton v. Johnson</i> , 496 S.W.3d 516 (Mo. App. S.D. 2016) ...	16, 21
<i>State ex rel. Nixon v. Jaynes</i> , 73 S.W.3d 623 (Mo. 2002)	7, 24
<i>State ex rel. Nixon v. Kelly</i> , 58 S.W.3d 513 (Mo. 2001)	7
<i>State ex rel. Nixon v. Sheffield</i> , 272 S.W.3d 277 (Mo. App. S.D. 2008)	24, 25
<i>State ex rel. Sampson v. Hickie</i> , 573 S.W.3d 76 (Mo. 2019).....	21
<i>State ex rel. Schmitt v. Hayes</i> , 583 S.W.3d 73 (Mo. App. W.D. 2019)	20
<i>State ex rel. Simmons v. White</i> , 866 S.W.2d 443 (Mo. 1993)	7
<i>State ex rel. Taylor v. Russell</i> , 449 S.W.3d 380 (Mo. 2014).....	15
<i>State ex rel. Valentine v. Orr</i> , 366 S.W.3d 534 (Mo. 2012).....	12, 14
<i>State v. Morovitz</i> , 867 S.W.2d 506 (Mo. 1993).....	19
<i>State v. Reynolds</i> , 360 S.W.3d 332 (Mo. App. W.D. 2012)	19
<i>Thoung v. United States</i> , 916 F.3d 999 (10th Cir. 2019)	21
<i>Wiglesworth v. Wyrick</i> , 531 S.W.2d 713 (Mo. 1976).....	19, 20, 22

Statutes

Missouri Revised Statutes § 217.703 (2013)	Passim
Missouri Revised Statutes § 559.016 (2013)	18
Missouri Revised Statutes § 559.036 (2013)	18, 25
Missouri Revised Statutes § 559.105 (2013)	8

Rules

Missouri Supreme Court Rule 91.18	30
Missouri Supreme Court Rule 91.20	30

Constitutional Provisions

Missouri Constitution Article I § 12	20
--	----

Other Authorities

28 Mo. Criminal Practice Handbook § 36:6.....	23
---	----

STATEMENT OF FACTS

Petitioner Travis Jonas pleaded guilty to identity theft on July 13, 2012. (Resp. Ex. A at 2). Jonas admitted using his brother's date of birth and social security number to open new lines of credit. (Resp. Ex. M at 10–11). The Circuit Court of St. Charles County sentenced Jonas to seven years' incarceration, suspended execution of that sentence, and placed Jonas on a five-year term of probation. (Resp. Ex. A at 2); (Resp. Ex. D at 2). As a condition of Jonas' probation, the court ordered restitution. (Resp. Ex. C).

Jonas received multiple citations¹ and violations during his probation term, and the State filed a motion to suspend² and revoke his probation on May 22, 2013 because Jonas failed to make restitution payments, but withdrew that motion on September 12, 2013. *See* (Resp. Ex. A at 2–3); (Rel. Appx. at A5). Jonas began to accrue earned compliance credits (“ECC”) on October 1, 2012 towards early discharge from his probation term, but he did not accrue any credits during the months of his violations or while the State's motion to revoke was pending. § 217.703.3, .5.³

¹ Under the version of Section 217.703 in effect at the time Jonas was on probation, the notices of citation did not suspend the accrual of ECCs. *State ex rel. Coleman v. Wexler Horn*, 568 S.W.3d 14 (Mo. 2019).

² The probation court did not order Jonas' probation suspended at this time. *See* (Resp. Ex. A at 2–3).

³ All statutory citations are to RSMo. (2013) unless otherwise noted.

By June 8, 2015, Jonas had still not fully repaid his restitution. (Resp. Ex. L at 1). Because Jonas owed restitution, even if he had accrued enough ECCs to be discharged early by this date, he could not be discharged until the restitution was paid in full. *State ex rel. Hillman v. Beger*, 566 S.W.3d 600, 608 (Mo. 2019). In a case summary report filed in the probation court, Jonas' probation officer noted that Jonas still owed restitution and that he would "remain under supervision[.]" (Resp. Ex. L at 2). The report did not provide a possible early discharge date. *Id.* The day after the case summary report was filed, the State filed another motion to suspend and revoke Jonas' probation for failing to pay restitution. (Resp. Ex. A at 3–4); (Rel. Appx. at A14).

The probation court held several status hearings from July, 2015 to November, 2015 to monitor Jonas' restitution payments. (Resp. Ex. A at 4). At the status hearing on November 5, 2015, the State withdrew its motion to revoke Jonas' probation and the probation court entered an "Order to Reinstate Probation." *Id.* at 4; (Rel. Appx. at A15). According to a receipt of payment, Jonas made his last restitution payment on November 2, 2015. (Resp. Ex. K). This receipt was received by the Division of Probation and Parole on November 4, 2015, but it was sent to the wrong office. *Id.* Jonas' probation office received the receipt on November 13, 2015. *Id.* A handwritten note on the receipt indicates that Jonas was wanted for a felony. *Id.*

Jonas' probation officer learned that he was wanted for new offenses: identity theft, passing a bad check, and forgery. (Resp. Ex. M at 21). Police reports explained that in 2014, Jonas forged a power of attorney so that he could open credit accounts in the name of his partner's mother and make himself an authorized user of the accounts. *Id.* at 23–26. Jonas charged over ten thousand dollars on the accounts. *Id.* Police arrested Jonas when he arrived for a visit with his probation officer on December 16, 2015. *Id.* at 26; (Resp. Ex. E at 2). Jonas admitted to police that he forged the power of attorney, but stated it was for his partner's mother's benefit. (Resp. Ex. M at 27). He also placed some of the blame for the fraudulent charges on his partner. *Id.* at 27–28.

Jonas' probation officer prepared a violation report on January 15, 2016 detailing the arrest and Jonas' failure to complete a "REACT evaluation." (Resp. Ex. E). The report was filed with the probation court on January 21, 2016. (Resp. Ex. A at 4–5). In the violation report and an accompanying case summary report filed the same day, Jonas' probation officer calculated Jonas' earned discharge date at March 15, 2016. (Resp. Ex. E at 2); (Resp. Ex. F at 2).

On February 1, 2016, the State filed a motion to revoke Jonas' probation based on the violations listed in the January 15 reports. (Rel. Appx. at A16); (Resp. Ex. A at 5). The probation court issued a probation violation warrant and ordered Jonas' probation suspended on February 9, 2016. (Rel. Appx. at

A17); (Resp. Ex. A at 5). Jonas' case remained in warrant status until October 17, 2016, when private counsel entered his appearance for Jonas and filed a motion to recall the warrant. (Resp. Ex. A at 5). The warrant was served, but Jonas bonded out by agreement. *Id.* at 5–6. After some continuances, the probation court held a revocation hearing on May 11, 2017. *Id.* at 7. The probation court determined that Jonas had violated his probation by failing to complete the REACT evaluation and by committing the new laws offenses, revoked Jonas' probation, and executed the previously imposed sentence. (Resp. Ex. M at 50). Jonas did not make any argument regarding his ECCs before the probation court. *See* (Resp. Ex. M).

After his probation revocation, Jonas filed a *pro se* Rule 24.035 motion. Jonas raised three claims, one of which alleged that he was entitled to ECCs. (Pet. Ex. 15 at 70).⁴ The court appointed counsel who filed an amended motion that only alleged the probation court lacked authority to revoke Jonas' probation because Jonas had acquired enough ECCs to be discharged before the February 9, 2016 suspension of probation. *Id.* at 71; (Pet. Ex. 13 at 26–32). The motion court held an evidentiary hearing where the State presented the testimony of Probation and Parole Officer Brian McKay. (Pet. Ex. 15 at 71).

⁴ Respondent cites the PDF page numbers of Jonas' collection of exhibits.

McKay was not Jonas' probation officer, but he reviewed Jonas' file before the evidentiary hearing. (Rel. Appx. at A37–A38). McKay testified that an initial review of the file by the district administrator and another officer determined that Jonas' probation should not have expired before the State filed its last motion to revoke on February 1, 2016. *Id.* at A41–A42. When McKay reviewed the file just before the evidentiary hearing, he concluded that Jonas *could* have been discharged from probation the first week of January, 2016. *Id.* at A43. But this conclusion was based on a hypothetical scenario where the probation court and prosecutor received sixty days' notice of the discharge date on November 5, 2015, and where the probation court took no action after receiving that notice. *Id.* at A44. McKay was clear that Jonas could not have been discharged from probation before the sixty-day notice was issued. *Id.* at A44, A51–A54.

The Rule 24.035 motion court denied Jonas' motion. The motion court noted that arguably Jonas was not entitled to an earlier ECC discharge because the probation court “is entitled to a full 60 day notice, regardless of error.” (Pet. Ex. 15 at 73 n.4). But the motion court ultimately did not reach that question. Instead, it held that Jonas' claim was not cognizable in a Rule 24.035 action because, before the motion court could grant Jonas' claim, it would have to “calculate the proper award of earned compliance credits, something Section 217.703.8 does not allow the court to do in a motion for post-

conviction relief.” *Id.* at 73–74. Though it did not hold that Jonas could not raise his claim in habeas corpus, the motion court did conclude that any challenge to the alleged erroneous ECC determination should have been made by Jonas “*in the probation revocation proceeding.*” *Id.* at 74 (emphasis in original).

Jonas did not appeal the denial of his Rule 24.035 motion. *See* Case Number 1711-CC00772. Instead, he filed a petition for writ of habeas corpus in the Circuit Court of Randolph County raising the same claim that he litigated in his amended Rule 24.035 motion. *See* (Pet. Ex. 16 at 75–83). After response by the Warden, the habeas court denied Jonas’ petition. The habeas court held that the plain and ordinary language of section 217.703.10 makes the sixty-day notice requirement a condition precedent to early ECC discharge. (Pet. Ex. 19 at 106). Therefore, the habeas court concluded that Jonas “was not automatically discharged” before the sixty-day notice was given, noting that “[n]otice and opportunity to be heard are just as import to the victims of crimes represented by the prosecution as well as the defendants[.]” *Id.*

Jonas filed a second habeas petition in the Missouri Court of Appeals, Western District. *See* (Pet. Ex. 20 at 107–18). The court of appeals summarily denied Jonas’ petition. (Pet. Ex. 21 at 119). This petition follows.

ARGUMENT

I. The probation court had authority to revoke Jonas' probation after it received notice of Jonas' discharge date and suspended the probation term – Responds to Petitioner's Point I.

This case turns on the interpretation of section 217.703.10, the sixty-day notice provision of the ECC statute. The plain language of that statute requires sixty days' notice to the probation court and prosecutor before a probation term can be ended through accrual of ECC. Based on that provision, the probation court had the authority to revoke Jonas' probation when it did, and the preliminary habeas writ in this case should be quashed.

Standard of Review

Under Rule 91, “habeas corpus proceedings are limited to determining the facial validity of confinement on the basis of the entire record of the proceeding in question and to allege entitlement to immediate discharge from current confinement.” *State ex rel. Nixon v. Kelly*, 58 S.W.3d 513, 516 (Mo. 2001) (citing *State ex rel. Simmons v. White*, 866 S.W.2d 443, 445 (Mo. 1993)). The petitioner bears the burden of proving that his confinement is illegal. *Id.* The habeas court may either grant relief and order the petitioner discharged, or deny relief. Rules 91.18, 91.20. A habeas corpus proceeding may be used to challenge a probation revocation. *State ex rel. Nixon v. Jaynes*, 73 S.W.3d 623, 624 (Mo. 2002).

Analysis

A. Jonas did not meet the conditions for early discharge.

Probation is entirely a statutory creation, codified by the General Assembly in Chapter 559 of the Missouri Revised Statutes. Through the years, other provisions of Missouri law have been enacted that affect probation. Section 217.703, which “provides the ECC framework,” is one such provision. *Hillman*, 566 S.W.3d at 603.

Section 217.703 generally provides that a probation term will be reduced by thirty days for each full month the probationer complies with the conditions of probation. § 217.703.7. The calculation of a probationer’s ECCs is an administrative function of the Division of Probation and Parole. § 217.703.9; *see also State ex rel. Coleman v. Wexler Horn*, 568 S.W.3d 14, 19 (Mo. 2019) (“[T]he division, and not the circuit court, [has] the duty to calculate and award [] ECCs.”). The Division’s calculation is controlling. § 217.703.9; *State ex rel. Jones v. Eighmy*, 572 S.W.3d 503, 506 n.3 (Mo. 2019). If a probationer still owes restitution as a condition of probation by the time that he or she has earned enough ECCs to reach final discharge, the probationer cannot be discharged until all restitution is paid in full. *Hillman*, 566 S.W.3d at 608; § 559.105.2.

Once all other conditions are met, section 217.703 also requires sixty days’ notice to the probation court and prosecuting attorney before a probationer is discharged early by ECCs:

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.

§ 217.703.10 (emphasis added). Thus, only after the probation court and prosecuting attorney have had notice and opportunity to act is a probationer discharged from probation through ECCs.

In sum, there are five conditions to early discharge through section 217.703: 1) the probationer complies with the conditions of probation in order to earn ECCs; 2) the probationer pays any outstanding restitution balance; 3) the Division calculates the probationer's total ECCs and discharge date; 4) the Division gives notice to the probation court and prosecutor of the probationer's ECC discharge date; and 5) the probation court and prosecutor take no action to suspend or revoke the probation during the sixty-day notice period. Until all five conditions are met, the probationer cannot be discharged early through ECCs.

In Jonas' probation case, not all of the conditions necessary for early ECC discharge occurred; specifically, condition number five. First, Jonas began earning ECCs on October 1, 2012, but he did not accrue any credits during the months he violated his probation or when the State filed a motion to revoke probation. § 217.703.3, .5. Jonas argues that he had earned enough ECCs to be

entitled to discharge in April of 2015. (Pet. Brief at 10–11). But again, the Division’s calculation of ECCs is controlling, and the Division did not calculate Jonas’ discharge date as being in April of 2015 because other conditions for discharge were not met. *See* (Resp. Ex. L).

Second, Jonas did not fully pay his restitution obligation until November 2, 2015. (Resp. Ex. K). While Jonas argues that he had enough earned credits to be discharged in May of 2015, he recognizes that he could not be discharged from probation until the restitution in his case was paid in full. (Pet. Brief at 11).⁵

Third, the Division calculated Jonas’ ECCs. On June 8, 2015, Jonas’ probation officer filed a case summary report with the probation court. (Resp. Ex. L). By this point, Jonas’ had served at least two years on probation. *See* § 217.703.7 (noting that the probationer must serve at least two years on probation before ECC discharge). But the report noted that Jonas still owed restitution. *Id.* at 1. As a result, Jonas’ probation officer wrote that he would “remain under supervision[.]” *Id.* at 2. After Jonas paid all of his restitution,

⁵ Jonas states that the Division “received proof on November 4, 2015” that Jonas’ restitution was paid. (Pet. Brief at 5). While it is true that a probation a parole office received the receipt of Jonas’ final payment on November 4, for reasons unknown to Respondent the receipt was not delivered specifically to Jonas’ probation office. There are two received stamps on the receipt; one for November 4, 2015, and one for November 13, 2015. (Resp. Ex. K). On information and belief, Jonas’ specific probation office actually received the receipt on November 13.

the Division recalculated Jonas' ECC discharge date to include the sixty days' notice required by section 217.703.10. (Resp. Exs. E, F).

Fourth, the Division gave the probation court and prosecutor notice of Jonas' ECC discharge date on January 21, 2016. *See* (Resp. Ex. A at 4–5); (Resp. Exs. E, F). At the end of a case summary report and field violation report that were both written on January 15 but filed with the probation court on January 21, Jonas' probation officer noted that “as Jonas has paid restitution in full, he has an earned and optimal discharge date of 3-15-2016.” (Resp. Ex. F at 2); (Resp. Ex. E at 2). The March 15, 2016 discharge date that is stated in the reports may be based on the date that the reports were completed. Although the Division's calculation is controlling, under section 217.703.10 the probation court and prosecutor would have had sixty days from the date of actual notice, and they did not have notice until the reports were filed on January 21, 2016. Therefore, they should have had until March 21 to act on Jonas' probation. But this fact is immaterial here because the probation court and prosecutor acted to suspend and revoked Jonas' probation well before March 15.

The fifth and final condition for early discharge was not met here because after receiving the sixty-day notice, the probation court and prosecutor *did* act to suspend and revoke Jonas' probation. On February 1, 2016, the prosecutor filed a motion to suspend and revoke Jonas' probation based on the violations

outlined in the January 21 violation report; including being arrested for felony identity theft, passing a bad check, and forgery. (Rel. Appx. at A16); (Resp. Ex. E at 2). Then on February 9, 2016, the probation court suspended Jonas' probation and issued a probation violation warrant. (Resp. Ex. A at 5). Because the probation court and prosecutor acted before the sixty-day notice period expired, Jonas could not be discharged early through ECCs.

B. Jonas' reading of the ECC statute is not supported by law.

Jonas argues that he should have been discharged from probation on November 5, 2015, immediately after he had paid his restitution and the State withdrew its motion to revoke his probation. (Pet. Brief at 13). While he acknowledges the sixty-day notice provision in section 217.703.10, his argument is that notice is not required before early discharge can occur. *Id.* at 13–14. But Jonas' argument is against the plain language of the statute and would make section 217.703.10 meaningless.

“The primary rule of statutory interpretation is to effectuate the legislative intent through reference to the plain and ordinary meaning of the statutory language.” *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 540 (Mo. 2012). “If the language of a statute is plain and unambiguous, this Court is bound to apply that language as written and may not resort to canons of construction to arrive at a different result.” *Hillman*, 566 S.W.3d at 605. Section 217.703.10 is clear and unambiguous. The sixty-day notice “shall” be

given in every case. § 217.703.10. “*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...” *Id.* Logically, the reverse must be that if the court or prosecutor *does take any action* listed under subsection 5, then the offender *shall not* be discharged. “[A]ny action under subsection 5” would include a motion to revoke or suspend probation or an order revoking or suspending probation. *See* § 217.703.5. Here, the prosecutor’s motion to suspend and revoke Jonas’ probation and the probation court’s order suspending Jonas’ probation satisfy these requirements.

Despite the clear and unambiguous language of section 217.703.10, Jonas claims that the sixty-day notice provision did not apply in his case. Jonas’ argument appears to be that section 217.703.7 required his discharge on November 5, 2015 regardless of section 217.703.10. Subsection 7 states that:

Notwithstanding subsection 2 of section 217.730⁶ 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 at least two years of his or her probation or parole, which shall include any time served in custody under section 217.718 and sections 559.036 and 559.115.

⁶ Section 217.730 governs discharge from parole or conditional release, so it is inapplicable to Jonas’ probation case.

§ 217.703.7. Jonas contends that based on this language, once he paid his restitution, he should have automatically been discharged from probation. (Pet. Brief at 13). But Jonas' reading of section 217.703 only embraces subsection .7 while neglecting the conditions for early release established in other subsections of the statute. This is contrary to the plain and ordinary meaning of subsection .10.

If a statute is plain and unambiguous, there is no need to look to other canons of statutory construction. *Valentine*, 366 S.W.3d at 540. But even if section 217.703.10 were ambiguous, Jonas' argument is counter to this Court's canons of statutory interpretation. This Court interprets statutory language in the context of the statute as a whole in order to harmonize all parts of the statute. "[N]o portion of a statute is read in isolation, but rather is read in context to the entire statute, harmonizing all provisions." *Aquila Foreign Qualifications Corp. v. Dir. Of Revenue*, 362 S.W.3d 1, 4 (Mo. 2012). Jonas reads subsection .7 in isolation to support his argument, but this Court must consider all of section 217.703. *Id.* Jonas argues that if the General Assembly had intended to make the sixty-day notice provision a requirement before discharge, then they would have included that language in subsection .7. (Pet. at 13). But the General Assembly instead chose to reference subsection .7 within subsection .10. Subsection .10 states that if the probation court or prosecutor take no action after receiving the sixty-day notice, "the offender

shall be discharged under subsection 7 of this section.” § 217.703.10. Reading the statute as a whole, subsection .10 is a condition precedent to early discharge under subsection .7.

Additionally, “where one statute deals with the subject in general terms and the other deals in a specific way, to the extent they conflict, the specific statute prevails over the general statute.” *State ex rel. Taylor v. Russell*, 449 S.W.3d 380, 382 (Mo. 2014); *see also Hillman*, 566 S.W.3d at 606. Section 217.703.10 specifically addresses the restrictions placed on early release procedures, while section 217.703.7 only generally describes early ECC discharge. Subsection .10 imposes the specific restriction that early discharge cannot occur until the sixty-day notice has been issued. Only if the notice is issued and the probation court or prosecutor do “not take any action under subsection 5 of this section,” then the probationer “shall be discharged under subsection 7 of this section.” § 217.703.10. Because subsection .10 deals with ECC discharge more specifically, it controls.

Jonas’ argument also fails to reconcile that ECC is not automatically applied, but is awarded by the Division. § 217.703.1 (“The division of probation and parole shall award earned compliance credits...”); .9 (“At least twice a year, the division shall calculate the number of months the offender has remaining... taking into consideration any earned compliance credits[.]”). This Court has recognized that the Division’s calculation of ECCs controls the discharge date.

Jones, 572 S.W.3d at 506 n.3. And section 217.703.8 limits challenges to the Division’s calculation of ECCs, a limitation which is superfluous if the Division’s calculation is unimportant. This distinction’s consequence is apparent here, where Jonas’ ECC discharge was delayed because he had not fully paid restitution. Jonas claims that the “date of final discharge” language in section 217.703.10 must mean that there is a single, immovable discharge date which the probation term cannot go beyond. (Pet. Brief at 14). But Jonas’ “date of final discharge” was unknown until he paid his restitution. His probation officer could not have known the date that Jonas would actually pay all of his restitution—the Division is not clairvoyant. Therefore, the sixty-day notice could not possibly have been given in this case until Jonas had actually paid his restitution.

While not critical to his analysis, underlying Jonas’ argument is his claim that the Division was dilatory in providing the sixty-day notice. (Pet. Brief at 13–14). But this case is not about whether the Division performed a duty, it is about whether the conditions for early ECC discharge were met in Jonas’ case before the probation court suspended his probation on February 9, 2016. *See State ex rel. Newton v. Johnson*, 496 S.W.3d 516, 521 n.9 (Mo. App. S.D. 2016) (noting that offenders should raise challenges to the Department of Corrections’ actions in an action against the Department, not the trial court). As discussed above, one of the conditions for ECC discharge is the sixty-day

notice required under section 217.703.10; the probation court does not lose authority over the probationer until this condition is met. Jonas could have argued that the Division was not promptly giving the sixty-day notice while he was on probation, but he did not.

Finally, Jonas' reading of section 217.703 would render subsection .10 meaningless. Courts "should not interpret a statute so as to render some phrases mere surplusage." *Middleton v. Missouri Dept. of Corrections*, 278 S.W.3d 193, 196 (Mo. 2009). And "the construction of a statutory scheme 'should avoid unreasonable or absurd results.'" *Hillman*, 566 S.W.3d at 608 (quoting *Aquila*, 362 S.W.3d at 4). As discussed above, if, as Jonas argues, he was discharged from probation on November 5, 2015, then it would have been impossible for the Division to comply with the sixty-day notice requirement in subsection .10. But the statute provides the probation court and prosecutor an opportunity to act within the sixty-day notice period by conditioning early discharge on their decision not to act under subsection .5. § 217.703.10. If Jonas' argument is followed, then subsection .10 has no effect. It would be an absurd result if the General Assembly intended to give probation courts and prosecutors notice and an opportunity to act through subsection .10, but also require early discharge before that notice could be given.

In conclusion, because the plain and ordinary meaning of section 217.703.10 makes sixty days' notice to the probation court and prosecutor a

condition precedent to early ECC discharge, the probation court had authority to suspend Jonas' probation on February 9, 2016 and ultimately revoke his probation on May 11, 2017. The probation court's suspension order would have also suspended Jonas' ECCs, so he would not have been entitled to early release while the State's motion to revoke was pending. *State ex rel. Culp v. Rolf*, 568 S.W.3d 443, 448 (Mo. App. W.D. 2019); § 217.703.5 ("Earned credits shall continue to be suspended for a period of time during which the court or board has suspended the term of probation..."). The probation court revoked Jonas' probation without lifting the suspension and within the original five-year probation term. *See* (Resp. Ex. A at 7); §§ 559.016; 559.036. Because the probation court had authority to revoke Jonas' probation, the preliminary writ should be quashed.

II. Jonas cannot challenge the calculation of his ECC discharge date in habeas corpus because section 217.703.8 prohibits challenges to the award or rescission of ECCs in any motion for post-conviction relief – Responds to Petitioner’s Point I.

The Division’s last ECC calculation placed Jonas’ earned and optimal discharge date at March 15, 2016. (Resp. Ex. E at 2); (Resp. Ex. F at 2). Jonas disagrees with this calculation, arguing that he should have been discharged on November 5, 2015. (Pet. Brief at 13). As discussed under Point I, the probation court had authority to suspend and revoke Jonas’ probation. But because Jonas’ claim relies on a different ECC discharge date than the date calculated by the Division, under section 217.703.8, Jonas cannot raise his claim in any post-conviction action. Instead, he should have raised the claim while he was still on probation.

Analysis

Section 217.703.8 provides that “[t]he award or rescission of any credits earned under this section shall not be subject to appeal or *any* motion for postconviction relief” (emphasis added). This Court has explained that habeas corpus is part of Missouri’s unitary post-conviction process. *Wiglesworth v. Wyrick*, 531 S.W.2d 713, 719–20 (Mo. 1976); *see also State v. Reynolds*, 360 S.W.3d 332, 336 (Mo. App. W.D. 2012) (holding that habeas, not Rule 24.035, is the procedure for claiming ineffective assistance of counsel after a misdemeanor conviction) (citing *State v. Morovitz*, 867 S.W.2d 506, 510 (Mo.

1993)). Rules 24.035 and 29.15, which provide the “exclusive procedure” for seeking post-conviction relief, are carve-outs of the authority of habeas courts. *See Wiglesworth*, 531 S.W.2d at 719–20. (discussion in context of Rule 27.26, the precursor to Rules 24.035 and 29.15). When the General Assembly prohibited challenges to the calculation of ECC in “any motion for postconviction relief[,]” this prohibition must have necessarily included habeas corpus. § 217.703.8.

Contrary to this Court’s precedent, the Missouri Court of Appeals has held that section 217.703.8’s prohibition does not apply to habeas corpus “because the General Assembly has no power to restrict habeas relief.” *State ex rel. Hawley v. Chapman*, 567 S.W.3d 197, 205–06 (Mo. App. W.D. 2018) (citing Mo. Const. Art. I § 12); *see also State ex rel. Schmitt v. Hayes*, 583 S.W.3d 73, 83–84 (Mo. App. W.D. 2019). But this Court should overrule *Chapman* because section 217.703.8’s application to habeas would not suspend the writ. A prohibited suspension of the writ of habeas corpus only “relates to denial of the substantive right to have judicial inquiry into the cause of and justification for allegedly illegal detention, not to the form and procedure utilized in such proceeding.” *Wiglesworth*, 531 S.W.2d at 717. Jonas was not denied the right to bring his claim because he could have raised the issue of his ECC calculation while he was on probation. Federal courts have held that the writ of habeas corpus is not suspended where there is a substitution of a different remedy.

See Thoung v. United States, 916 F.3d 999, 1001–02 (10th Cir. 2019); *Ruiz-Martinez v. Mukasey*, 516 F.3d 102, 114 (2d Cir. 2008). Here, through section 217.703.8, the General Assembly has chosen to require pre-revocation challenges to ECC calculation.

The calculation of ECC is an administrative function of the Division. *See* § 217.703.9; *Jones*, 572 S.W.3d at 506 n.3. Like a challenge to time credit awarded by the Department of Corrections, Jonas could have filed an action against the Division challenging its calculation of his ECC while he was on probation. *See, e.g., State ex rel. Gater v. Burgess*, 128 S.W.3d 907, 909 (Mo. App. W.D. 2004); *Roy v. Missouri Dep’t of Corrections*, 23 S.W.3d 738, 743–44 (Mo. App. W.D. 2000); *see also Newton*, 496 S.W.3d at 521 n.9. Or he could have brought the ECC issue to the probation court’s attention. But he did not. The past ECC challenges that have come before this Court have been brought while the petitioner was still on probation, and the Court has always deferred to the Division’s calculation. *See Jones*, 572 S.W.3d at 506 n.3; *Coleman*, 568 S.W.3d at 19–20; *Hillman*, 566 S.W.3d at 602–03; *State ex rel. Sampson v. Hickie*, 573 S.W.3d 76, 80 n.3 (Mo. 2019). Moreover, section 217.703.8’s application to habeas corpus makes sense in light of section 217.703.10’s sixty-day notice requirement, which would be immaterial if offenders can bring post-revocation actions challenging ECC calculation.

Jonas argues that the language “any motion for postconviction relief” must refer only to Rule 24.035 and Rule 29.15 proceedings. He first claims that Missouri law treats these as “distinct remedies” because the right to habeas corpus is established in the Missouri Constitution, but courts “frequently hold ‘[t]here is no constitutional right to a state post-conviction proceeding.’” (Pet. Brief at 15) (quoting *Reuscher v. State*, 887 S.W.2d 588, 590 (Mo. 1994)). But what this Court has actually held is that there is no *federal* constitutional right to a state post-conviction proceeding. *Reuscher*, 887 S.W.2d at 590; *see Smith v. State*, 887 S.W.2d 601, 602 (Mo. 1994) (“Smith has no federal constitutional right to a state post-conviction proceeding[.]”); *Price v. State*, 422 S.W.3d 292, 298 (Mo. 2014) (“[T]he several states have ‘substantial discretion’ to determine what post-conviction procedures (if any) each will provide.”) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987)). Indeed, the federal constitution does not require state writs of habeas corpus. *See Kelsey v. Fitzgerald*, 574 F.2d 443, 444 (8th Cir. 1978). But Missouri has chosen to offer post-conviction relief in the form of habeas corpus, and Rules 24.035 and 29.15 are part of that “unitary post-conviction procedure[.]” *Wiglesworth*, 531 S.W.2d at 720.

Jonas also notes that Rule 24.035 and 29.15 motions are controlled by different rules and statutes than habeas corpus, so the General Assembly must have been referring *only* to Rules 24.035 and 29.15 when it wrote “any motion

for postconviction relief.” (Pet. Brief at 15). But the language of section 217.703.8 actually suggests the opposite intent. The General Assembly purposely broadened the language to prohibit any “appeal or any motion for postconviction relief.” § 217.703.8. Jonas then claims that because the General Assembly also listed “appeals” in subsection .8, the term “postconviction relief” must not refer to habeas. (Pet. Brief at 15). But an appeal from a conviction is a distinct stage in the criminal justice system from the post-conviction relief phase, which is a collateral attack on a judgment. *See* 28 Mo. Prac. § 36:6.1(a) (“A postconviction proceeding is a collateral attack on a final judgment.”); *McKay v. State*, 520 S.W.3d 782, 784 (Mo. 2017) (“Therefore, to file a motion for post-conviction relief, there must be a final judgment subject to collateral attack.”). Thus, the General Assembly’s distinction between appeal and post-conviction relief in subsection .8 is both important and necessary.

Jonas briefly claims that if section 217.703.8 precludes raising challenges to the calculation of ECCs in habeas corpus, then this would prohibit habeas petitions from offenders who are on probation for low-level felonies, but not prohibit petitions from offenders who were on probation for more severe felonies. (Pet. Brief at 15–16). This argument is incorrect because Jonas could still file a habeas petition challenging the validity of his confinement based on a different alleged error. But Jonas’ present claim relies on his dispute with the Division’s calculation of his ECC discharge date. Thus,

Jonas' claim relies on a challenge to an administrative function of the Division, which he cannot bring after the fact of his revocation under section 217.703.8. *See* § 217.703.9; *State ex rel. Amrine v. Parker*, 490 S.W.3d 372, 374 (Mo. 2016) ("The Board of Probation and Parole awards earned compliance credits..."). All that section 217.703.8 bars Jonas from raising is his challenge to the Division's ECC calculation.

This is not to say that any claims Jonas may have regarding his confinement would not be barred for a different reason. For example, if this Court found that Jonas' claim was not actually a challenge to the award or rescission of his ECCs, then Jonas' claim would be barred under the doctrine of procedural default because challenges to a probation court's authority to revoke probation are cognizable in Rule 24.035 motions. *See State ex rel. Nixon v. Sheffield*, 272 S.W.3d 277, 283–84 (Mo. App. S.D. 2008). Jonas filed a Rule 24.035 motion in this case, but instead of appealing the denial of that motion, he filed this petition for writ of habeas corpus. Habeas relief is an extraordinary remedy that should not issue when "the petitioner raises procedurally barred claims that could have been raised at an earlier stage or if other adequate remedies are available." *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 546 (Mo. 2003); *see also Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. 2000). Therefore, Jonas' decision not to appeal the denial of his Rule 24.035 would constitute a default. *See Jaynes*, 63 S.W.3d at 215 (adopting the federal

cause and prejudice standard); *Reese v. Delo*, 94 F.3d 1177, 1181 (8th Cir. 1996) (failing to raise a claim in a post-conviction appeal is abandonment of a claim under federal habeas corpus law); *Sheffield*, 272 S.W.3d at 283–84 (discussing default in the context of inadvertent filing of Rule 29.15 motion out-of-time).

But Jonas’ claim must challenge the award or rescission of his ECCs because he relies on a different discharge date than the date calculated by the Division. The Missouri Court of Appeals has recognized that challenges to ECC calculation are different from challenges to a court’s authority to revoke probation. Offenders can bring claims in post-conviction motions challenging the probation court’s *application* of ECC that was awarded by the division. *Ban v. State*, 554 S.W.3d 541, 546 (Mo. App. E.D. 2018). In other words, offenders can bring claims that the probation court lost authority when it did not adhere to the Division’s calculation of ECC. *Id.* But where a claim relies on a calculation of an ECC discharge date that is *different* from the date reached by the Division, such as Jonas’ claim, that claim is a challenge to the administrative function of the Division and not simply a challenge to the probation court’s authority. The probation court’s authority is limited by the probation term, and the probation term is modified by the Division’s calculation of ECCs. § 559.036.8; § 217.703.3.

In sum, Jonas’ challenge to the ECC discharge date calculated by the Division should be barred. Probationers can challenge the Division’s ECC

calculation while on probation, but Jonas did not do so. Insofar as Jonas' claim relies on a different calculation of his ECC discharge date from the date calculated by the Division, his claim is barred under section 217.703.8.

CONCLUSION

The Court should quash the preliminary writ and deny the petition for a writ of habeas corpus.

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

/s/ Patrick Logan
PATRICK J. LOGAN
Assistant Attorney General
Missouri Bar No. 68213
P.O. Box 899
Jefferson City, MO 65102
(573) 751-1508
(573) 751-3825 fax
Patrick.Logan@ago.mo.gov

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 6,744 words, excluding the cover and certification, as determined by Microsoft Word 2016 software, and that a copy of this brief was sent through the electronic filing system on January 17, 2020 to:

Kevin Blain Gau
1010 Market Street, Suite 1100
St. Louis, MO 63101
Attorney for Petitioner

/s/ Patrick Logan
PATRICK J. LOGAN
Assistant Attorney General