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JURISDICTIONAL STATEMENT

This is an appeal from the Circuit Court of Stoddard County, dismissing and staying a civil action because the Malpractice Suit was not filed by a trustee (L.F. 24). The Circuit Judge ordered briefs on the stay (L.F. 42). Timely objections and pleadings were filed (L.F. 25-26, 10-19, 20-23, 27-47).

The court granted the stay (L.F. 24).

Appellant made a preempt constitutional challenge to Revised Statute of Missouri Chapter 460 (L.F. 27-41). Appellant filed a timely appeal challenging the constitutionality of staying his civil action malpractice action. (L.F. 9).

The Missouri Supreme Court has jurisdiction because appellant is challenging the constitutionality of Revised Statute Chapter 460 as such, jurisdiction lies in the Missouri Supreme Court Article V, Sec. 3, Missouri Constitution.

### STATEMENT OF FACTS

Appellant while serving a life sentence in the Missouri Department of Corrections (L.F. 25-26), filed a Missouri civil action for malpractice (L.F. 56-60). The malpractice petition was supported by a finding in favor of appellant by the Missouri BAR Association's Fee Dispute Committee (L.F. 57). The petition included Jasper N. Edmundson, Jr., the Firm of Edmundson, Summers, Hopkins & Edmundson (L.F. 56-59). A motion to dismiss was filed (L.F. 54), which did not include any challenges to application of RSMo Chapter 460 (L.F. 54).

Appellees filed another motion to dismiss claiming RSMo Chapter 460 was a bar to the petition because no trustee had filed the petition (L.F. 25-26). The first motion to dismiss was filed August 12, 2005 (L.F. 54), the second motion to dismiss was filed December 14, 2006 (L.F. 25-26) more than 90 days apart.

On filing the second motion the judge ordered briefs (L.F. 42). The appellees sought to dismiss the case for want of a trustee (L.F. 25-26), and appellant vehemently opposed staying the case or dismissing it (L.F. 20-22, 27-41) (see also L.F. 10-19).

Judge Ray dismissed the case without prejudice because the petition had not been filed by a trustee (L.F. 24). The appellant forth with filed a Missouri Supreme Court Rule 75.01 petition (L.F. 10-19), and filed Constitutional Notice of Appeal (L.F. 7-9).

POINTS RELIED ON

I. The Estates of Convicts Statute RSMo Chapter 460 as applied in this case is clearly unconstitutional and a violation of the First, Fifth, and Fourteenth Amendments U.S. Constitution and Article 1, Section 2, 10, 14 of the Missouri Bill of Rights.

Caper v. Deland, 851 F Supp. 1506 (D.Utah), rev. on other grounds, 54 F3d 613 (CA10).

Delorme v. Pierce Freightlines, 353 F Supp. 258 (D.OR).

Dilello v. A.J. Eckert, 42 A.D. 243, 346 N.Y.S. 2 (N.Y. App. Div. 3rd Dept.)

Ex parte Hull, 312 U.S. 546, 61 S Ct. 640.

Johnson v. Avery, 393 U.S. 483, 89 S Ct. 747.

Johnson v. Rockefeller, 58 F.R.D. 42 (SDNY).

Lloyd v. Farkash, 476 So. 2d 305 (Fla. 1985).

Lynk v. LaPortee, Superior Court No. 2,789 F2d 554, 566-67 (CA7).

Thompson v. Bond, 421 F. Supp. 878 (WDMo).

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Article 1, Section 10  
Article 1, Section 14

VAMS Chapter 460.

II. The Motion to Stay Civil Action in this case borders on being patently frivolous so that appellant is entitled to sanctions and cost.

Berdella v. Pender, 821 SW2d 846 (Mo.Banc 1992).

Lloyd v. Farkash, 476 So. 2d 305 (Fla. 1985).

Lockhart v. Middleton, 863 SW2d 367 (Mo.App.WD), cert den. 114 S Ct. 2143.

Newsome v. James, 968 F Supp. 1318, 1323 [2](N.D. Ill. 1997).

VAMS 217.825, et seq.

## ARGUMENT

I. The Estate of Convicts Statute RSMo Chapter 460, as applied in this case is clearly Unconstitutional and a violation of the First, Fifth and Fourteenth Amendments of the U.S. Constitution, and Article 1, Section 2,10,14 of the Missouri Bill of Rights.

A. Standard of Review:

The Standard of Review in reviewing the constitutionality of RSMo Chapter 460 Estates of Convicts and its ambiguity is de novo. State v. Graham, 204 SW2d 655 (Mo.Banc 2006), Berdella v. Pender, 821 SW2d 846 (Mo. Banc 1991).

B. Missouri State Statute on Estates of Convicts RSMo Chapter 460 is unconstitutional as applied in this case:

Circuit Court stayed a civil action malpractice petition filed by appellant simply because no trustee filed the suit (L.F. 24), because appellant was a prisoner serving a life sentence when the petition was filed (L.F. 25-26).

Appellant vigorously challenged the constitutionality of invoking Chapter 460 RSMo to hinder his petition (L.F. 27-41, 52-53, 10-19).

Appellant gave notice to the constitutional challenge (L.F. 9)(L.F. 27-41, 52-53, 10-19).

A case directly on point is Lloyd v. Farkash, 476 So. 2d 305 (Fla.1985) reversed a lower court who had

dismissed a prisoners malpractice suit filed against his attorney because of a Civil Death Statute. The Court ruled dismissal of a prisoners malpractice suit was clearly in violation of the constitution. Compare Lloyd v. Farkash, supra to the unlawful identical order issued in appellant's case (L.F. 24), compare also Caper v. Deland, 851, F Supp. 1506 (D.Utah), rev. on other grounds 54 F3d 613 (CA10), Delorme v. Pierce Freightlines, 353 F. Supp. 258 (D.OR), Dilello v. A.J. Eckert, 42 A.D. 243, 346 N.Y.S. 2 (N.Y. App. Div. 3rd Dept.), Johnson v. Rockefeller, 58 F.R.D. 42 (SDNY), Thompson v. Bond, 421 F.Supp.878 (WDMo.), Lynk v. LaPortee, Superior Court No.2, 789 F2d 554,566-67 (CA7).

A prisoner does not lose his right to prompt meaningful access to courts because of his conviction. See Ex parte, Hull, 312 U.S. 546, 61 S Ct. 640, Johnson v. Avery, 393 U.S. 483, 89 S Ct. 747.

Clearly, both Lloyd v. Farkash, supra, and Thompson v. Bond, supra make it clear that RSMo Chapter 460 is unconstitutional as applied to the case herein (L.F. 24).

Appellant relies on the 1st, 5th, 14th Amendments to the U.S. Constitution and Article 1, Section 2,10,14 of the Missouri Bill of Rights.

II. The motion to stay civil action in this case borders on being patently frivolous so that appellant is entitled to sanctions and cost.

A. Standard of Review:

The standard of review is de novo. Berdella v. Pender, 821 SW2d 846 (Mo. Banc).

B. Appellant incorporates argument 1 herein and restates same:

Sanctions are proper as well as cost.

Appellant clearly reads the court decision in Berdella v. Pender, 821 SW2d 846 (Mo. Banc 1992) as having no binding effect on a prisoner filing a civil action for malpractice against his former attorney. Compare, Lloyd v. Farkash, 476 So. 2d 305 (Fla 1985), Lockhart v. Middleton, 863 SW2d 367 (Mo.App.WD), cert den. 114 S Ct. 2143.

Sanctions are proper because appellee simply did not do sufficient research to cause appellant all this hardship and delay. See Newsome v. James, 968 F.Supp. 1318, 1323 [2] (N.D. Ill. 1997)(Sanctions issued for misstating controlling law).

Clearly, appointment of trustee is not jurisdictional. See Lockhart v. Middleton, Supra.

Lastly, if the lower court in this case were correct then the State of Missouri would be in serious trouble under (MIRA) Missouri Inmate Reimbursement Act, cases are filed with no trustees. VAMS 217.825, et seq.

CONCLUSION

Wherefore, Appellant prays this Court grant the challenges herein and remand this case to the Circuit Court of Stoddard County to reinstate the case and for such relief as law and equity allows including sanctions and appellants cost.

Respectfully Submitted



Murlin R. Phillips, 1076701  
Jefferson City Correction Center  
8200 No More Victims Rd.  
Jefferson City, Mo. 65101

CERTIFICATE OF COMPLIANCE WITH RULE 84.06

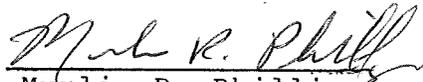
I, Murlin R. Phillips, certify the following:

1. I am a prisoner confined to custody of Jefferson City Correctional Center.

2. I do not have access to a disk or computer, as a prisoner these items are prohibited by prison rules.

3. The State Authorities prohibit any law clerk from assisting any prisoner or using any computer to assist any prisoner.

4. The brief submitted is being submitted in the only manner available and as close to the rules as possible.

  
Murlin R. Phillips

Date: 6-27-07

CERTIFICATE OF SERVICE

I, Murlin R. Phillips, certifies a true copy of this brief was mailed postage prepaid this 27<sup>th</sup> day of June 2007, to:

Curtis O. Poore, Attorney at Law, 2851 Professional Ct.,  
Suite C, Cape Girardeau, Mo. 63703

  
Murlin R. Phillips

IN THE  
MISSOURI STATE SUPREME COURT

Murlin R. Phillips, )  
 )  
 Appellant, )  
 )  
 vs. ) No. SC88442  
 )  
 Jasper N. Edmundson, Jr., )  
 Edmundson, Summers, Hopkins, )  
 and Edmundson, )  
 )  
 Appellees. )

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IN THE CIRCUIT COURT OF STODDARD COUNTY, MISSOURI

MULIN R PHILLIPS,

Plaintiff,

vs.

JASPER N EDMUNDSON JR.

Defendant.

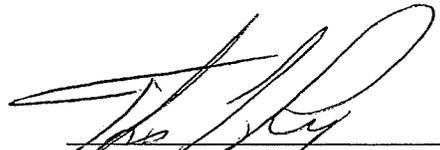
Cause No. 05SD-CC00081

**DISMISSED WITHOUT PREJUDICE**

Comes Now the Court on the 14 day of December, 2006 and Dismisses Plaintiff's Petition Without Prejudice. The Court finds that Plaintiff has not brought this action through a Trustee as provided in Chapter 460.

SO ORDERED!

*cc: Murkin Phillips  
Curtis Poore*

  
Thomas L. Ray, Judge

*APP. A*

*Page 1*

**F I L E D**

DEC 18 2006

SHERRY DISNEY  
CIRCUIT CLERK  
STODDARD COUNTY, MO

I CERTIFY THIS TO BE A TRUE AND CORRECT  
COPY OF THE ORIGINAL DOCUMENT  
SHERRY DISNEY, CIRCUIT CLERK

BY Kurt Sample D.C. DATE 4-26-07



The Missouri Bar  
Fee Dispute Resolution Committee

Scott Orr, Chair  
J. Fred Waltz, Vice-Chair  
Karen Lee Woodall, Ed.D.  
James B. Condry, Esq.  
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Linda Oligschlaeger  
Program Administrator

April 24, 2003

Jasper Edmundson, Jr., Esq.  
Edmundson, Terando, Hopkins & Henson  
P.O. Box 1049  
Poplar Bluff, MO 63902

Re: Fee Dispute - *Murlin R. Phillips vs. Jasper N. Edmundson, Jr., Esq.*

Dear Mr. Edmundson:

For your information, the Fee Dispute Resolution Committee directed that you be sent a copy of the award issued by the arbitrator in the recent *ex parte* arbitration hearing. The arbitration was held without your participation because you did not agree to binding arbitration.

The matter has now been closed within the Fee Dispute Resolution Program. If you have any questions, please do not hesitate to contact me.

Very truly yours,

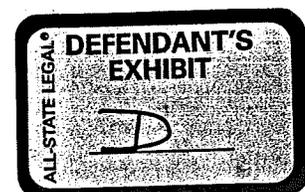
Linda Oligschlaeger  
Program Administrator

LO:KEB

Enclosure

*App C*

*3*



**COPY**

THE MISSOURI BAR  
FEE DISPUTE RESOLUTION PROGRAM

MURLIN R. PHILLIPS  
Complainant

v.

File No. 02.053

JASPER N. EDMUNDSON JR., ESQ.  
Attorney Respondent

**ARBITRATOR'S OATH**

I swear or affirm that I will faithfully and impartially determine the matter submitted to me according to law and the justice and equity of the case, without favor or to either party.

\_\_\_\_\_  
Charles H. Lonardo, Arbitrator

**PRELIMINARY STATEMENT AND FINDINGS**

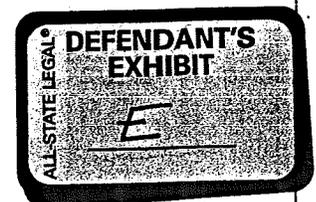
I, arbitrator of the fee dispute between MURLIN R. PHILLIPS, Complainant, and JASPER N. EDMUNDSON JR., Attorney, hereby find and award as follows:

Complainant was charged with First Degree Murder in the death of one Wayne Limbaugh of Sikeston, Missouri. The charges were pending in Wayne County Circuit Court over Case Number 42R100000707-01. Complainant hired Respondent to represent him on February 1, 2001. At all times pertinent to this lawsuit, Complainant was being held in the Wayne County Jail in lieu of \$1.25 million bond. Complainant had already been bound over for trial by the time he hired Respondent. Another attorney represented Complainant up until and including the preliminary hearing of the criminal case.

Complainant and Respondent both knew that the State would seek the death penalty against Complainant. Respondent therefore advised Verlin Phillips, Complainant's brother, that he (Respondent) would charge Complainant \$50,000.00 to represent him. Complainant and/or his family paid Respondent \$42,200.00 thereof.

A review of the Docket Sheet in this file reflects that on September 4, 2001, the State filed notice of intention to seek the death penalty against Complainant. Respondent filed a Motion for Continuance and a notice on September 19, 2001, in an attempt to continue the jury trial that had been set in this case on September 26, 2001 at 9:00 a.m. That trial setting had been in place since February 6, 2001, five days after Complainant's family had hired Respondent. On September 20, 2001, the Court continued the case for trial to April 1, 2, and 3, 2002. This was a number one trial setting. At all times up until and including April 1, 2002, Respondent filed no pre-trial motions, including but not limited to motions to suppress evidence and demands for discovery and inspection.

AMP  
4



The Docket Sheet further reflects that on April 1, 2002, Complainant pleaded guilty to the amended charge of Murder in the Second Degree, a Class A Felony, and the Court accepted his plea of guilty. Complainant testified that Respondent approached him about that plea on Friday, March 29, 2002, exactly three days before the trial was going to begin. Complainant said that Respondent told him that he would be sentenced to life in prison, but would most likely be out of jail by the time he was age 60 because "the judge likes veterans, so he'd go easy on me," and because the cost of keeping Complainant on his prescribed medication was so high as a result of Complainant's numerous medical ailments. It should be noted that the range of punishment on a Class A Felony is 10 to 30 years. Complainant further testified that Respondent gave him until 4:00 p.m. that Friday to accept or reject the Plea Agreement. Complainant obviously accepted the Plea Agreement, as evidenced by the Docket Sheet reflecting that he pleaded guilty and the Court accepted that plea.

On May 3, 2002, the Court reviewed the Pre-Sentence Investigation that the Department of Probation and Parole had completed on Complainant, and heard testimony and received statements from the victim's family and friends. The Court also heard a statement regarding leniency from Respondent. The Court sentenced Complainant to 25 years in the custody of the Department of Corrections (DOC). When Complainant arrived in the custody of DOC, he learned that he would not be eligible for parole for another 13 years.

Complainant further testified that "I was misled by him [Respondent]. He told me I wouldn't be in [prison] more than three years. He said he was close with the judge."

As part of Complainant's sentencing, the Court found that there was no grounds for ineffective assistance of counsel. This was based on Complainant having testified at his sentencing that he was satisfied with Respondent's services. At hearing on this Fee Dispute, Complainant testified "I found nothing wrong then [when he was sentenced] until I looked at the records after I got to jail." Complainant then called Respondent by telephone and confronted him with the discrepancies he had found. Complainant testified that Respondent then told him, "we've got two different memories" and then hung up on him.

On May 17, 2002, Respondent filed a Motion to Withdraw Guilty Plea and For New Trial. On June 26, 2002, Respondent filed a Motion to Withdraw. On July 12, 2002, the Court sustained Respondent's Motion to Withdraw. Complainant's criminal case is now on appeal.

Respondent declined to participate in this Arbitration.

Capital cases require more preparation and cause more stress than any type of case that any lawyer can handle. This is for obvious reason: the client runs the risk of the death penalty if he is convicted. Running hand in glove with the weight of this responsibility is the additional responsibility of having to investigate all facts and allegations made by all parties to the case, including the lawyer's own client. It also entails, at the bare minimum, the filing of pre-trial motions, such as motions to suppress and demands for discovery and inspection. A review of the file in this case indicates that Respondent filed no pleadings whatsoever on behalf of Complainant except to continue the jury trial, and that motion occurred about a week or two before trial after the State had filed notice to seek the death penalty against Complainant.

Complainant further testified that Respondent "never investigated anything". Among other things, Complainant said that Mr. Limbaugh, the deceased, had been a bully all his life and had been barred from a bar for starting fights. Respondent said that he would have a private investigator look into this allegation, but there is nothing in the records I have received to suggest that he did. Complainant also noted after reviewing the prosecutor's file, which Complainant now has in his possession in connection with the appeal of his sentence and which he introduced as an exhibit at my request, that a witness named Joan Burton had made three conflicting statements with the Missouri State Highway Patrol. Complainant stated that he had received those statements on January 31, 2003, when I heard this case.

It is unclear whether Respondent investigated these allegations, or did any other work behind the scenes, as Respondent refused to participate in this Arbitration. It appears to me, however, that Respondent must have done some work behind the scenes, because he managed to get the State to take the death penalty off the table and reduce the charge to Second Degree Murder.

Despite all of this, the absence of simple pre-trial motions which any criminal defense attorney would customarily file in any type of criminal case, much less a capital murder case, disturbs me. It appears to me that Respondent's work behind the scenes justifies some type of a fee, but not the \$42,200.00 that Complainant and/or his family has paid Respondent to date. Complainant has asked for all of his money back. While I believe that Complainant is not entitled to all of his money back, I do believe that he is entitled to something because, simply put, there is nothing in the records of this case as provided by Complainant and as reflected in the Docket Sheet of the underlying court case to reflect that Respondent did anything other than broker a deal between the State and his client.

Accordingly, I hereby rule that Respondent must disgorge to Complainant the sum of TWENTY FIVE THOUSAND DOLLARS (\$25,000) in what I deem to be unearned legal fees as and for his services to Complainant.

DATED Joplin, Missouri, this 28<sup>th</sup> day of February, 2003.

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CHARLES H. LONARDO #34166  
Commerce Executive Center  
211 Main, Suite 320  
Joplin, Missouri 64801  
Phone 417-782-5299  
Fax 417-782-7461

ARBITRATOR