

IN THE SUPREME COURT OF MISSOURI

Case No. SC88776

**STATE OF MISSOURI, ex rel., JEREMIAH W. NIXON,
Attorney General, State of Missouri,**

Plaintiff / Respondent,

v.

RICHARD D. PETERSON,

Defendant / Appellant.

**On Appeal from the Circuit Court of Cole County, Missouri,
Nineteenth Judicial Circuit, Division 2,
The Honorable Richard G. Callahan, Circuit Judge.**

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Richard Peterson, appeals from the August 28, 2006, final judgment of the Honorable Richard G. Callahan, of the Circuit Court of Cole County, Missouri, awarding summary judgment in favor of the State and against Appellant. (L.P. 173-175). Peterson is challenging the validity of a statute of this State.

Specifically, Peterson claims that Sections 217.825 through 217.841 RSMo, a statutory scheme known as the Missouri Incarceration Reimbursement Act (MIRA), is unconstitutional, in violation of the due process of law afforded by the 5th and 14th Amendments of the United States Constitution and Article I Section 10 of the Missouri Constitution. Peterson further challenge these same MIRA statutes as being unconstitutional as they are applied to him, in that the application of the MIRA statutes as applied in this instance have denied him due process of law, in violation of the 5th and 14th Amendments of the United States Constitution and Article I, Section 10 of the Missouri Constitution.

Peterson timely presented his constitutional challenges in the lower court by raising them in his answer, his response to the show cause order and in his opposition to the State's motion for summary judgment. (L.F. 50-51, 68-72, and 108-115, respectively). When he filed his notice of appeal,

Peterson indicated that he was appealing to the Missouri Supreme Court on the basis of his constitutional challenge. (L.F. 183). Peterson also filed his jurisdictional statement contending that jurisdiction for his appeal was proper with the Missouri Supreme Court. (L.F. 176-181).

Because this appeal concerns the validity of statutes of this State, the exclusive jurisdiction of the Missouri Supreme Court is invoked pursuant to Article V, Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

On February 17, 1995, Richard Peterson was sentenced to 25 years imprisonment for the offense of Robbery in the first degree. (L.F. 14). Peterson was received by the Missouri Department of Corrections (MODC) on February 24, 1995. (L.F. 14). Since his arrival in the MODC Peterson has been continuously incarcerated, up to and including the present. (L.F. 16).

From May 25, 1995 through December 30, 2004, Peterson was confined at Moberly Correctional Center (MCC). (L.F. 16). While at MCC, Peterson had a position in the MCC hobbycraft room from 2002 through 2004. (L.F. 128). While working in the MCC hobbycraft area, Peterson regularly did woodworking projects, such as making jewelry boxes, clocks and plaques. (L.F. 128-130, 156, 159, 162, 165, 171). Peterson would then sell his completed woodcraft projects for profit to other inmates or their families. (L.F. 128-129). On occasion, Peterson would also send completed woodcraft projects out to his friends, Judith Flesher and Lynette Christian, who would subsequently sell the woodcraft projects and then send the profits to Peterson's account. (L.F. 165, 171).

In addition to his woodworking projects, Peterson earns money through "state payroll," which is wages given to every inmate imprisoned in

the MDOC. (L.F. 128-129, 131-144). Between October 1, 1999, and July 2, 2006, Peterson earned \$688.50 from “estate payroll” wages. (L.F. 131-144). Peterson has calculated that between his state payroll and the profits he has made from woodcraft projects, he has earned \$2,875.50 while incarcerated in MDOC between October 1, 1999, through July 2, 2006. (L.F. 128-129).

On May 4, 2006, the Attorney General for the State of Missouri, Jay Nixon, filed a petition against Peterson seeking reimbursement for the State of Missouri under the Missouri Incarceration Reimbursement Act (MIRA), for the costs of Peterson’s incarceration in MDOC. (L.F. 1. 5-9). As good cause for filing a MIRA petition, the Attorney General specifically plead that he “had good cause to believe that he will recover at least not less than either ten percent of the estimated cost of care of the Defendant or ten percent of the costs of care for the Defendant for two years, whichever amount is the lesser.” (L.F. 6). The Attorney General never pled that it was his belief that Peterson had “a stream of income” sufficient to be good cause for filing a MIRA petition against Peterson. (L.F. 5-9).

Peterson initially challenged the circuit court’s jurisdiction over his person through a motion to quash due to insufficiency of process or service of process. (L.F. 38-40). Subsequently, Peterson raised challenges to the unconstitutionality of the MIRA statutes in his answer, his response to the

order to show cause and in his response and suggestions in opposition to the Attorney General's motion for summary judgment. (L.F. 50-51, 68-72, 108-115).

On August 28, 2006, the Honorable Richard G. Callahan, of the Circuit Court of Cole County, Missouri, entered judgment for the State and against Peterson in the amount of \$130,690.66. (L.F. 174). The circuit court incorrectly noted in the judgment that Peterson was incarcerated for first degree murder for life, when in fact Peterson is incarcerated for first degree robbery for twenty-five years. (L.F. 173) The circuit court found that Peterson had received \$1,767.50 in deposits from October 1, 2005, through April 14, 2006, from sources "other than wages and salary." (L.F. 174). Additionally, the judgment ordered Rodney Kueffer, Inmate Treasurer of the Department of Corrections, to immediately pay to the State of Missouri, 90% of all deposits to Peterson's inmate account, excluding wages and bonuses earned while incarcerated. (L.F. 174). Peterson now appeals the circuit court's judgment.

POINT I ON APPEAL

THE COLE COUNTY CIRCUIT COURT ERRED WHEN IT TRANSMITTED PETERSON'S APPEAL TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT, BECAUSE PETERSON IS CHALLENGING THE CONSTITUTIONAL VALIDITY OF THE MISSOURI INCARCERATION REIMBURSEMENT ACT (MIRA), CODIFIED UNDER SECTIONS 217.825 TO 217.741 RSMO, THEREBY REQUIRING THE NOTICE OF APPEAL TO BE TRANSMITTED TO THE MISSOURI SUPREME COURT, IN THAT THE CHALLENGES CONCERNING THE VALIDITY OF THE STATUTES OF THIS STATE FALL WITHIN THE EXCLUSIVE JURISDICTION OF THE MISSOURI SUPREME COURT ACCORDING TO ARTICLE V, SECTION 3 OF THE MISSOURI CONSTITUTION.

Chromalloy American Corp. v. Elyria Pounding Co., 955 S.W.2d 1 (Mo. banc 1997)

In re Estate of Potashnick, 841 S.W.2d 714 (Mo. App. S.D. 1992)

Kansas City Star Co. v. Shields, 771 S.W.2d 101, 103, (Mo. App. W.D. 1989)

Ussert v. Haynes, 127 S.W.2d 410 (Mo. 1939)

Article V, Section 3 of the Missouri Constitution

Section 217.827 & 217.831.1 RSMo

POINT II ON APPEAL

THE TRIAL COURT ERRED WHEN IT DECLINED TO RULE ON PETERSON'S CONSTITUTIONAL CHALLENGES TO THE MISSOURI INCARCERATION REIMBURSEMENT ACT (MIRA), CODIFIED SECTIONS 217.825 TO 217.841 RSMO, BECAUSE THE TRIAL COURT COULD NOT HAVE PROPERLY DECIDED THE ULTIMATE ISSUE BETWEEN THE PARTIES, THAT IS WHETHER THE STATE WAS ACTUALLY ENTITLED TO A JUDGMENT SEIZING PETERSON'S ASSETS TO REIMBURSE THE STATE FOR THE COSTS OF PETERSON'S INCARCERATION, WITHOUT HAVING FIRST DECIDED AS A NECESSARY STEP THE VALIDITY OF THE MIRA STATUTES, THEREBY COMMITTING REVERSIBLE ERROR, IN THAT IF THE MIRA STATUTES HAD BEEN DETERMINED TO BE UNCONSTITUTIONAL, THE FOUNDATION OF THE TRIAL COURT'S JUDGMENT IN FAVOR OF THE STATE WOULD NOT EXIST.

Barker v. Barker, 98 S.W.3d 532 (Mo. banc 2003)

Estate of McCluney, 871 S.W.2d 657 (Mo. App. W.D. 1994)

ITT Commercial Fin. Corp. v. Mid-Am Marine Supply Co.,
854 S.W. 2d 371 (Mo. banc 1993)

Leiser v. City of Wildwood, 59 S.W.3d 597 (Mo. App. E.D. 2001)

POINT III ON APPEAL

THE TRIAL COURT ERRED IN IMPLICITLY RULING IN FAVOR OF THE CONSTITUTIONALITY OF THE MIRA STATUTES, BECAUSE PETERSON TIMELY RAISED VALID CONSTITUTIONAL CHALLENGES WHICH WERE DECISIVE IN DETERMINING THE ULTIMATE ISSUE OF WHETHER THE STATE WAS ENTITLED TO A JUDGMENT AGAINST PETERSON FOR THE COST OF HIS INCARCERATION, IN THAT PETERSON SHOWED FACTS ESTABLISHING THAT THE MIRA STATUTES WERE UNCONSTITUTIONALLY VAGUE AND UNCERTAIN, AND DENIED PETERSON DUE PROCESS OF LAW, IN VIOLATION OF THE 5TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE V, SECTION 10 OF THE MISSOURI CONSTITUTION.

C.I.R. v. Shapiro, 424 U.S. 614 (1976)

Hollis v. Blevin, 926 S.W.2d 683 (Mo. banc 1996)

State v. Brown, 140 S.W.3d 51 (Mo. banc 2004)

State v. Self, 155 S.W.3d 756 (Mo. banc 2005)

Section 217.827 RSMo

Section 217.831 RSMo

Section 217.835 RSMo

5th Amendment of the United States Constitution

14th Amendment of the United States Constitution

Article I, Section 10 of the Missouri Constitution

POINT IV ON APPEAL

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE STATE AND AGAINST PETERSON. BECAUSE THE ATTORNEY GENERAL FAILED TO SATISFY THE CONDITIONS PRECEDENT OF SECTION 217.831.3 RSMO, THEREBY RENEERING THE MIRA PETITION AND THE SUBSEQUENT JUDGMENT VOID, IN THAT THE “GOOD CAUSE” PROVISION OF SECTION 217.831.3 RSMO IS A LIMITATION ON THE ATTORNEY GENERAL’S DISCRETION TO FILE A MIRA PETITION, AND WITHOUT THIS CONDITION PRECEDENT THE TRIAL COURT LACKED THE NECESSARY PROCEDURAL PREREQUISITE TO THE MAINTENANCE OF THESE PROCEEDINGS AND CONSEQUENLY LACKED JURISDICTION OVER THE SAME CAUSING THE PETITION AND SUBSEQUENT JUDGMENT TO BE VOID.

Orion Security, Inc. v. Board of Police Com'rs of Kansas City,
90 S.W.3d 157 (Mo. App. W.D. 2002)

State Bd. of Nursing v. Berry, 32 S.W.3d 638 (Mo. App. 200)

State ex rel Nixon v. Koonce, 173 S.W.3d 277 (Mo. App. W.D. 2005)

U.S. v. Zucca, 351 U.S. 91 (1956)

Section 217.831.3 RSMo

Supreme Court Rule 74.04(c)(6)

ARGUMENT I ON APPEAL

THE COLE COUNTY CIRCUIT COURT ERRED WHEN IT TRANSMITTED PETERSON'S APPEAL TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT, BECAUSE PETERSON IS CHALLENGING THE CONSTITUTIONAL VALIDITY OF THE MISSOURI INCARCERATION REIMBURSEMENT ACT (MIRA), CODIFIED UNDER SECTIONS 217.825 TO 217.741 RSMO, THEREBY REQUIRING THE NOTICE OF APPEAL TO BE TRANSMITTED TO THE MISSOURI SUPREME COURT, IN THAT THE CHALLENGES CONCERNING THE VALIDITY OF THE STATUTES OF THIS STATE FALL WITHIN THE EXCLUSIVE JURISDICTION OF THE MISSOURI SUPREME COURT ACCORDING TO ARTICLE V, SECTION 3 OF THE MISSOURI CONSTITUTION.

After the Cole County Circuit Court entered judgment against Richard Peterson and in favor of the State, Peterson filed his notice of appeal. Because Peterson had raised challenges to the constitutional validity of the MIRA statutes, Peterson indicated on his Form 8-A that he was appealing to

the Supreme Court of Missouri. (L.F. 183). Peterson also checked the appropriate box indicating that the appeal involved the validity of a statute or provision of the Constitution of Missouri. (L.F. 183).

Peterson further filed with the Cole County Circuit Court his jurisdictional statement pursuant to Rule 88.01(b) contending that the Missouri Supreme Court had exclusive jurisdiction of Peterson's appeal. (L.F. 176-181). However, the Cole County Clerk transmitted the notice of appeal to the clerk of this Court. (L.F. 185).

A. Standard of Review

The first question to be decided by any court in any case is whether or not it has jurisdiction in point of fact. *Ussery v. Haynes*, 127 S.W.2d 410, 417 (Mo. 1939). The court has a duty to determine its jurisdiction sua sponte. *Chromalloy American Corp. v. Elyria Foundry Co.*, 955 S.W.2d 1, 3 (Mo. banc 1997).

The Supreme Court of Missouri has exclusive jurisdiction in all cases involving the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any State office and in all cases where

the punishment imposed is death. Article V, Section 3 of the Missouri Constitution.

B. Argument

In order for the review of a constitutional challenge to fall within the exclusive jurisdiction of the Missouri Supreme Court, any such claims must be substantial and not be merely colorable. *In re Estate of Potashnick*, 841 S.W.2d 714, 718 (Mo. S.D. 1992). A claim is substantial when upon preliminary inquiry, the contention discloses a contested matter of right involving some fair doubt and reasonable room for controversy but, if such preliminary inquiry discloses the contention is so obviously unsubstantial and inefficient, either in fact or law as to be plainly without merit and mere pretense, the claim may deemed merely colorable. *Potashnick*, 841 S.W.2d at 718 citing, *Kansas City Star Co. v. Shields*, 771 S.W.2d 101, 103 (Mo. App. W.D. 1989)

Peterson's case involves two substantial questions of constitutional import; (1) whether the term "assets" as used in the MIRA statutes, Section 217.825 through 217.841 RSMo, is unconstitutionally vague and uncertain, in that it was unclear to Peterson, a person of ordinary intelligence, whether the funds that he earned while incarcerated and saved in his inmate account from state payroll and from doing woodcraft projects in the Moberly

Correctional Center hobbycraft area where exempt from reimbursement under MIRA statutes; and (2) whether the MIRA statutes failed to afford Peterson with due process of law, in that they contain no provision for Peterson to have put forward a challenge that the Attorney General did not have the required good cause which is a condition precedent to the Attorney General having the discretion to file a MIRA petition.

I.

The first constitutional challenge Peterson presented to the trial court was that the MIRA statutes are unconstitutionally vague and uncertain, in violation of the 5th and 14th Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the term “assets” as set forth in Section 217.827 RSMo, and used throughout the MIRA statutes is uncertain and fails to make clear to a person or ordinary intelligence what actually constitutes “assets.”

Because of this uncertainty, it was unclear whether Peterson had sufficient “assets” to (1) make the Director of the Department of Corrections forward to the Attorney General a report on Peterson with information regarding his available assets along with an estimate of the total cost of care for Peterson, pursuant to Section 217.831.1 RSMo; (2) empower the Attorney General to exercise his discretion to ignore the report or trigger his

duty to investigate or cause Peterson to be investigated pursuant to Section 217.831.1 RSMo; (3) give the Attorney General the good cause which is a condition precedent to having the discretion to file a petition seeking reimbursement for Peterson's incarceration costs; and (4) allow the trial court to determine if Peterson had "assets" which should be appropriated and applied toward reimbursement to the State for Peterson's costs of incarceration.

Under the facts in Peterson's case, the Attorney General alleged that Peterson had assets in his inmate account. (L.F. 7). The Attorney General did show that Peterson had funds totaling \$1,770.65 in his inmate account. (L.F. 23). However, Peterson showed that these funds included money earned by Peterson through state payroll and profits from woodcraft projects he sold while incarcerated at Moberly Correctional Center. (L.F. 128-130, 165, 171). The MIRA statutes are unconstitutionally vague because Peterson reasonably believed that these funds were not assets for the purposes of the MIRA reimbursement criteria.

A statute is unconstitutionally vague if it does not give a person of ordinary intelligence sufficient warning as to the prohibited behavior. *State v. Self*, 155 S.W.3d 756, 760 (Mo. Banc 2005). Peterson, a person of ordinary intelligence, reasonably believed the provision of Section

217.827.(1)(b) stating that assets, “shall not include ... money saved by the offender from wages and bonuses up to two thousand five hundred dollars paid the offender while he or she was confined to a state correctional center.” As such, the MIRA statutes are vague because the language therein fails to convey to a person of ordinary intelligence a sufficiently definite warning as to the true meaning of the term “assets” when measured by common understanding and practices. *State v. Brown*, 140 S.W.3d 51, 54 (Mo. Banc 2004).

II.

Peterson’s second constitutional challenge to the trial court was that the MIRA statutes unconstitutionally denied Peterson due process of law, in violation of the 5th and 14th Amendments of the United States Constitution and Article I, Section 10 of the Missouri Constitution.

Specifically, the MIRA statutes do not require, nor did the trial court afford Peterson, a pre or post-deprivation hearing concerning the freezing and seizure of Peterson’s assets where Peterson could raise a challenge that the Attorney General did not have the required “good cause” which is a condition precedent to the Attorney General having the discretion to file a MIRA petition against Peterson and which is a procedural prerequisite to the trial court having jurisdiction over the MIRA proceedings.

It has long been established that the due process protections of the United States Constitution require that the party whose property is taken must be given a pre-deprivation or prompt post-deprivation hearing. *C.I.R. v. Shapiro*, 424 U.S. 614 (1976). The Constitution of Missouri provides similar due process protection. *Jarvis v. Director of Revenue*, 804 S.W.2d 22 (Mo. Banc 1991).

In Peterson's case, the Attorney General claimed that the State had incurred approximately \$127,567.94 incarcerating Peterson and the cost of incarcerating Peterson for each year was \$14,000. (L.F. 6). The Attorney General also pled that he had good cause to believe that he would recover at least ten percent of the estimated total costs of care of Peterson or ten percent of the costs of care of Peterson for two years, respectively \$12,756.80 or \$2,800.00. (L.F. 6-7). Notably, the Attorney General never pled that it was his belief that Peterson had "a stream of income" which would constitute good cause for giving the Attorney General cause to file a MIRA petition against Peterson. (L.F.5-9).

The MIRA petition that was filed against Peterson showed that the Attorney General believed that Peterson had only \$1,770.65. (L.F. 23). However, by the Attorney General's own calculations, Peterson did not have sufficient assets under any of the grounds pled by the Attorney General to

establish the required good cause that was a condition precedent for the Attorney General to exercise his discretion after completing the mandatory investigation to even file a MIRA petition against Peterson. *State ex rel. Nixon v. Koonce* , 173 S.W.3d 277, 283-284 (Mo. App. W.D. 2005).

Likewise, without the procedural prerequisite good cause, the trial court did not have jurisdiction to maintain the proceedings against Peterson. *U.S. v. Zucca*, 351 U.S. 91 (1956).

III.

Peterson raised two substantial constitutional claims before the trial court. This appeal therefore falls within the exclusive jurisdiction of the Missouri Supreme Court. Article V, Section 3 of the Missouri Constitution.

ARGUMENT II ON APPEAL

THE TRIAL COURT ERRED WHEN IT DECLINED TO EXPLICITLY RULE ON PETERSON'S CONSTITUTIONAL CHALLENGES TO THE MISSOURI INCARCERATION REIMBURSEMENT ACT (MIRA), CODIFIED SECTIONS 217.825 TO 217.841 RSMO, BECAUSE THE TRIAL COURT COULD NOT HAVE PROPERLY DECIDED THE ULTIMATE ISSUE BETWEEN THE PARTIES, THAT IS WHETHER THE STATE WAS ACTUALLY

ENTITLED TO A JUDGMENT APPROPRIATING AND APPLYING PETERSON'S ASSETS TO REIMBURSE THE STATE FOR THE COSTS OF PETERSON'S INCARCERATION, WITHOUT HAVING FIRST DECIDED AS A NECESSARY STEP THE VALIDITY OF THE MIRA STATUTES, THEREBY COMMITTING REVERSIBLE ERROR, IN THAT IF THE MIRA STATUTES HAD BEEN DETERMINED TO BE UNCONSTITUTIONAL, THE FOUNDATION OF THE TRIAL COURT'S JUDGMENT IN FAVOR OF THE STATE WOULD COLLAPSE AS THE STATE WOULD NOT BE ENTITLED TO REIMBURSEMENT COSTS.

Attorney General Jay Nixon filed a petition for incarceration reimbursement under the MIRA against Richard Peterson. Peterson challenged the validity of the MIRA statutes in his answer and in his response to the circuit court's order to show cause. In his pleadings, Peterson claimed that the MIRA statutes were unconstitutionally vague as to what constituted "assets" and that the MIRA statutes operated to deny him due process of law, both in violation of the United States and Missouri Constitutions.

The Attorney General then moved for summary judgment. Peterson again raised his constitutional challenges to the validity of the MIRA statutes

in his response and suggestions in opposition to the Attorney General's motion for summary judgment. The Honorable Richard G. Callahan subsequently entered judgment in favor of the plaintiff and against Peterson without ruling on Peterson's constitutional challenges.

A. Standard of Review

Appellate review of a grant of summary judgment is de novo. *ITT Commercial Fin. Corp. v. Mid-Am Marine Supply Co.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment will be upheld on appeal as a matter of law when no genuine issue of material fact exists. *Id.* At 377; Rule 74.04(c) (6).

A genuine issue of material fact exists where there is evidence of two plausible, but contradictory accounts of the essential facts. *ITT*, 854 S.W.2d at 382. The record is reviewed in the light most favorable to the party against whom judgment was entered, according that party all reasonable inferences that may be drawn from the record. *Id.* at 376.

Similarly, an appellate court's standard of review for constitutional challenges to a statute is also de novo. *Barker v. Barker*, 98 S.W.3d 532, 534 (Mo. banc 2003).

**B. The Trial Court Failed In Its Duty To Rule
On Peterson's Constitutional Challenges**

The Attorney General filed a MIRA petition against Peterson.

Peterson timely raised challenges to the constitutional validity of the MIRA statutes. The Attorney General moved for summary judgment.

A challenge of the unconstitutionality of a statute is an affirmative defense. *Leiser v. City of Wildwood*, 59 S.W.3d 597, 605 (Mo. App. E.D. 2001). However, an affirmative defense must be properly pled. *Id.* Specifically, an affirmative defense must be plead in the answer to a suit, otherwise it is waived. *Mobley v. Baker*, 72 S.W.3d 251, 257-258 (Mo. App. W.D. 2002). Further, the appropriate time to raise a constitutional issue is in the answer to a petition. *Hollis v. Blevins*, 926 S.W.2d 683, 684 (Mo. banc 1996).

Peterson did raise his constitutional challenges in his answer to the Attorney General's petition. He further preserved these challenges to the validity of the MIRA statutes in his response to the court's order to show cause and in his response and suggestions in opposition to the motion for summary judgment.

Where a non-movant has raised an affirmative defense, a claimant's right to summary judgment depends just as much on the non-viability of that

affirmative defense as it does on the viability of the claimant's claim.

Leiser, 59 S.W.3d at 605; citing *ITT*, 854 S.W.2d at 381. As such, when a constitutional challenge is made to a statute which, if valid, is applicable and decisive, as in Peterson's case, the trial court cannot decline to decide the issues of validity. *McCluney*, 871 S.W.2d at 659. The trial court cannot decide the ultimate issue between the parties without having determined, as a necessary step, the challenged validity of the pivotal statute. *Id.* However, this is exactly what the trial court did in Peterson's case.

In Peterson's case, if the MIRA statutes were determined to be unconstitutional, the foundation of the trial court's decision granting judgment against Peterson and in favor of the State would collapse. *Id.* The trial court in Peterson's case erred because it should not have avoided explicitly deciding the constitutional validity of the MIRA statutes. *Id.*

The trial court's declination to rule upon the constitutionality of the MIRA statutes was error, and the judgment of the trial court should be reversed and remanded for further proceedings.

ARGUMENT III ON APPEAL

THE TRIAL COURT ERRED IN IMPLICITLY RULING IN FAVOR OF THE CONSTITUTIONALITY OF THE MIRA STATUTES,

BECAUSE PETERSON TIMELY RAISED VALID CONSTITUTIONAL CHALLENGES WHICH WERE DECISIVE IN DETERMINING THE ULTIMATE ISSUE OF WHETHER THE STATE WAS ENTITLED TO A JUDGMENT AGAINST PETERSON FOR THE COST OF HIS INCARCERATION, IN THAT PETERSON SHOWED FACTS ESTABLISHING THAT THE MIRA STATUTES WERE UNCONSTITUTIONALLY VAGUE AND UNCERTAIN, AND DENIED PETERSON DUE PROCESS OF LAW, IN VIOLATION OF THE 5TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE V, SECTION 10 OF THE MISSOURI CONSTITUTION.

After filing a MIRA petition against Peterson, the Attorney General moved for summary judgment. Peterson timely raised challenges to the validity of the MIRA statutes in his answer and in his response to the trial court's order to show cause. Peterson again raised his claims regarding the validity of the MIRA statutes in his response and suggestions in opposition to the motion for summary judgment. However, the trial court rendered judgment in favor of the State and against Peterson without ever having explicitly ruled on Peterson's constitutional claims.

A. Standard of Review

Peterson hereby incorporates by reference as though fully set out herein in Argument III, the standard of review set forth under Argument II of this brief.

B. Argument

A challenge of the unconstitutionality of a statute is an affirmative defense. *Leiser v. City of Wildwood*, 59 S.W.3d 597, 605 (Mo. App. E.D. 2001). However, such affirmative defense must be pled in the answer to the suit, otherwise it is waived. *Mobley v. Baker*, 72 S.W.3d 251, 257-258 (Mo. App. W. D. 2002). Moreover, the appropriate time to raise a constitutional issue is in the answer to a petition. *Hollis v. Blevin*, 926 S.W.2d 683, 684 (Mo. banc 1996).

Peterson raised his constitutional challenges in his answer, in his response to the trial court's order to show cause and in his response to the Attorney General's motion for summary judgment.(L.F. 50-51, 68-72, and 108-115, respectively). Even though Peterson timely raised valid constitutional challenges to the MIRA statutes, the trial court entered summary judgment in favor of the State and against Peterson. (L.F. 173-175). A ruling in favor of the constitutionality of the MIRA statutes was necessarily implicit in the court's order granting the Attorney General's

motion for summary judgment. *Champlin Petroleum Co. v. Brashears*, 592 S.W.2d 545, 547 (Mo. App. W.D. 1979); relying on *State ex rel. State Highway Commission v. Wiggins*, 454 S.W.2d 899 (Mo. banc 1970).

1. The MIRA Statutes Are Unconstitutionally Vague And Uncertain

Sections 217.825 through 217.841 RSMo, otherwise known as the Missouri Incarceration Reimbursement Act (MIRA), are unconstitutionally vague and uncertain, as applied to the facts of this case, violating Peterson's rights under the 5th and 14th Amendments of the United States Constitution, as well as Article I, Section 10 of the Missouri Constitution.

Specifically, the term "assets," as set forth in Section 217.827, and used through the MIRA statutes, is vague, uncertain and fails to make clear what actually constitutes "assets" as to:

- (1) cause the Director of the Department of Correction to be forward to the attorney general a report on an offender with information regarding the valuable assets of the offender and an estimate of the total cost of care for that offender, pursuant to Section 217.831.1 RSMo;
- (2) give the attorney general the discretion to investigate or cause to be investigated all reports furnished, pursuant to Section 217.831.1 RSMo;
- (3) give the attorney general good cause to seek to secure reimbursement for the expense to the State of Missouri for the cost of care of the offender, pursuant to Sections 217.831.3 and 217.835.1 RSMo; and
- (4) allow the trial court to determine whether the person has any assets which ought to be subjected to the MIRA claim of the State, thereby requiring the court to issue an order requiring any person, corporation, or other legal entity possessed or having

custody of such assets, to appropriate and apply such assets or a portion thereof to satisfy such claim, pursuant to Section 217.835.3 RSMo.

A vagueness challenge is applicable only to the facts at hand. *State v. Brown*, 140 S.W.3d 51, 55 (Mo. banc 2004). Under the facts in Peterson’s case, it is unclear whether Peterson had “assets” so as to be subject to MIRA proceedings. The Attorney General alleged in the MIRA petition that Peterson had “assets” as would be subject to MIRA. (L.F.7). In support of this contention, the Attorney General provided a copy of Peterson’s inmate account statement showing that he had a closing balance of \$1,770.65 at the time of the Attorney General’s good cause determination.

However, Peterson showed that these “assets” included funds not spent from savings that he earned while incarcerated in a state correctional facility. (L.F. 109). Specifically, Peterson provided exhibits and affidavits showing that between 2000 and 2005, such earning totaled \$2,875.50. (L.F. 109-110, 138-144).

As Peterson has contended, these funds earned while he was incarcerated should not be considered “assets” for the purpose of MIRA. Section 217.827 (1) (b) RSMo provides:

- (b) “Assets” shall not include:
 - a. The homestead of the offender up to fifty thousand dollars in value;

- b. Money saved by the offender from wages and bonuses up to two thousand five hundred dollars paid the offender while he or she was confined to a state correctional center.

Had the funds Peterson earned while he was incarcerated not been deemed assets, the Attorney General would not have found good cause to seek to secure reimbursement, nor would the trial court have found that Peterson had assets which should have been subjected to the MIRA claim of the State. (Sections 217.831.3, 217.835.1 RSMo).

A statute is unconstitutionally vague if it does not give a person of ordinary intelligence sufficient warning as to the prohibited behavior. The vagueness is designed to help protect against arbitrary and discriminatory application of laws. *State v. Self*, 155 S.W.3d 756.760 (Mo. banc 2005). The test for vagueness is whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice. *State v. Brown*, 140 S.W.3d 51, 54 (Mo. banc 2004).

Peterson, who is a person of ordinary intelligence, did not receive a sufficiently definite warning that the terms and words, “Assets shall not include ... money saved by the offender from wages and bonuses up to two thousand five hundred dollars paid the offender while he or she was confined to a state correctional center” did not exempt the funds he saved in

his inmate account from state payroll and money earned doing hobby-craft projects for other offenders and their families. The Attorney General obviously differed with Peterson as to the meaning of the term “assets.” Because the term “assets” is unconstitutionally vague and uncertain, the trial court should have ruled the MIRA statutes invalid and entered judgment in favor of Peterson.

2. The MIRA Statutes Denied Peterson Due Process

Sections 217.825 through 217.841 RSMo, otherwise known as MIRA, as applied to the facts of this case, have denied Peterson his rights to due process, thereby violating his rights under the 5th and 14th Amendments of the United States Constitution, as well as Article I, Section 10 of the Missouri Constitution.

Specifically, the MIRA statutes do not require, nor did the trial court afford Peterson a pre- or post-deprivation hearing upon the trial court ordering the freezing and seizure of Peterson’s “assets.” Defendant should have been afforded such a hearing in order to show the Attorney General did not establish the “good cause” belief, a condition precedent to the Attorney General exercising his discretion in filing the MIRA petition against Peterson.

The United States Supreme Court has repeatedly held that, at least where irreparable injury may result from a deprivation of property pending final adjudication of the rights of the parties, the Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of pre-deprivation or prompt post-deprivation hearing at which some showing of the probable validity of the deprivation must be made. *C.I.R. v. Shapiro*, 96 S. Ct. 1062, 1072; 424 U.S. 614 (1976). The Missouri Constitution provides similar due process protections. *See: Jarvis v. Director of Revenue*, 804 S.W.2d 22 (Mo. banc 1991).

According to the facts set forth in this case, the Attorney General showed that the State has incurred costs of incarcerating Peterson in the approximate amount of \$127,567.94 (L.F. 6). The Attorney General also showed that the cost of incarcerating Peterson for each year was \$14,000.

(L.F. 6). The Attorney General pled that he had “good cause to believe that he will recover not less than ten percent of the estimated cost of care of the Defendant or ten percent of the costs of care of the offender for two years, whichever amount is less, through this action.” (L.F. 6).

As such, in order to reasonably believe he had good cause to file a MIRA petition, the Attorney General would have had to believe that he would recover the less of \$12,756.80 or \$2,800.00. However, the Attorney

General put forth facts showing that Peterson only had funds totaling \$1,770.65. (L.F. 7, 23). It is apparent then, from the Attorney General's own calculation, that Peterson did not have sufficient assets upon which the Attorney General could have formed a reasonable belief that "good cause" existed to file a MIRA petition against Peterson, falling some \$1,029.35 short of even the lesser amount set forth by the Attorney General.

Without valid good cause the Attorney General had no authority or discretion with which to file the MIRA petition. However, the trial court erred when it failed to afford any pre- or post-deprivation hearing to challenge this lack of good cause. The judgment against Peterson should be reversed.

ARGUMENT IV ON APPEAL

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE STATE AND AGAINST PETERSON, BECAUSE THE ATTORNEY GENERAL FAILED TO SATISFY THE CONDITIONS PRECEDENT OF SECTION 217.831.3 RSMO, THEREBY RENDERING THE MIRA PETITION AND THE SUBSEQUENT JUDGMENT VOID, IN THAT THE "GOOD CAUSE" PROVISION OF SECTION 217.831.3 RSMO IS A LIMITATION ON THE ATTORNEY GENERAL'S DISCRETION TO

FILE A MIRA PETITION, AND WITHOUT THIS CONDITION PRECEDENT THE TRIAL COURT LACKED THE NECESSARY PROCEDURAL PREREQUISITE TO THE MAINTENANCE OF THESE PROCEEDINGS AND CONSEQUENTLY LACKED JURISDICTION OVER THE SAME CAUSING THE PETITION AND SUBSEQUENT JUDGMENT TO BE VOID.

The MIRA petition filed by the State was invalid and void because the Attorney General lacked good cause to file the MIRA petition in the first place. Without this condition precedent, which is a limitation on the Attorney General's discretion to file MIRA petition, the trial court lacked jurisdiction over the MIRA proceedings against Peterson because valid "good cause" is a procedural prerequisite to the maintenance of the MIRA proceedings. As such, the petition and subsequent judgment that was entered in favor of the State and against Peterson are void, and the trial court should have dismissed the State's MIRA petition.

A. Standard of Review

Appellate review of a grant of summary judgment is de novo. *ITT Commercial Fin. Corp. v. Mid-Am Marine Supply Co.*, 854 S.W.2d 371, 376 (Mo banc. 1993). Summary judgment will be upheld on appeal where the

movant is entitled to judgment as a matter of law and no issue of material fact exist. *Id.* at 377; Rule 74.04 (c) (6).

A genuine issue of material fact exists where there is evidence of the plausible, but contradictory accounts of the essential facts. *ITT*, 854 S.W.2d at 382. The record is reviewed in the light most favorable to the party against whom judgment was entered, according that party all reasonable inferences that may be drawn from the record. *Id.* at 376.

In reviewing the Attorney General's determination that the "good cause" condition precedent of Section 217.831.3 for filing a MIRA petition was satisfied, the Court should only consider whether the Attorney General's findings were supported by competent and substantial evidence on the record as a whole. *Orion Security, Inc. v. Board of Police Com'rs of Kansas City*, 90 S.W.3d 157, 163 (Mo. App. W.D. 2002). Further, the Court may not substitute its judgment on the evidence for that of the Attorney General, and it must defer to his determination on the weight of the evidence and the credibility of witnesses. *Id.*

The Attorney General was bound by the statute to fully investigate the facts to decide if he had the prerequisite "good cause" necessary to file a MIRA petition against Peterson. If this Court determines that the Attorney General's good cause determination is not supported by competent and

substantial evidence on the whole record, or is arbitrary or capricious, or if the decision constitutes an abuse of discretion or is unauthorized by law, it must reverse the Attorney General's determination. *Orion*, at 163.

B. The Conditions Precedent Were Not Satisfied

The trial court erred in entering judgment in favor of the State and against Peterson because the Attorney General failed to satisfy the good cause condition precedent to filing a MIRA petition. Section 217.831 RSMo provides:

If the Attorney General upon completing the investigation under subsection 2 of this section has good cause to believe that an offender or former offender has sufficient assets to recover not less than ten percent of the estimated cost of care of the offender or ten percent of the estimated cost of care of the offender for two years, whichever is less, or has a stream of income sufficient to pay such amounts within a five year period, the attorney general may seek to secure reimbursement for the expense of the State of Missouri for the cost of care of such offender or former offender.

The "if" in Section 217.831.3 indicates that the Attorney General's discretion in seeking MIRA reimbursement is predicated on his having completed an investigation of the facts and forming independently a good faith belief that the requisite enumerated conditions of the statute have been met, i.e., "good cause." *State ex rel. Nixon v. Koonce*, 173 S.W.3d 277, 283

(Mo. App. W.D. 2005); citing *Baxley v. Jarred*, 91 S.W.3d 192, 198 (Mo. App. 2002) (stating that the term “if” signifies a condition precedent).

In other words, the legislature intended that the Attorney General’s discretion would not vest unless and until the conditions precedent of the statute were met (i.e. an investigation and good cause belief.) *Koonce*, 173 S.W.3d at 283. By setting forth the conditions under which the Attorney General has discretion to file a MIRA petition, the legislature intended that unless both of these conditions were met, he has no authority to act. *Id.*, citing *Pous v. Dir. of Revenue*, 998 S.W.2d 129, 131-132 (Mo. App. 1999) (interpreting the phrase “good cause to believe” as being a reasonable belief that one should exercise the discretion granted to them under a statute). Therefore, the Attorney General has no authority or discretion to file a MIRA petition. *Koonce*, at 283-284.

In Peterson’s case, the Attorney General stated that his determination that good cause existed to file a MIRA petition was based on his belief that he would “recover not less than ten percent of the estimated cost of care of [Peterson] or ten percent of the estimated cost of care of [Peterson] for two years, whichever amount is lesser, through this action.” (L.F. 6). The Attorney General chose not to base his belief that good cause existed to file a MIRA petition against Peterson on the third potential prong of Section

217.831.3, that Peterson had a stream of income. (L.F. 5-9, petition generally).

However, the Attorney General's determination that good cause existed to file a MIRA petition against Peterson was not supported by competent and substantial evidence on the record, and was arbitrary and capricious, thereby constituting an abuse of discretion and being unauthorized by law. Specifically, the Attorney General determined that the State had incurred costs of incarcerating Peterson in the approximate amount of \$127,567.94. The Attorney General also found that the approximate annual cost of incarcerating Peterson for each year was \$14,000. (L.F. 6).

Pursuant to Section 217.831.1, the Attorney General would therefore have to reasonably believe that Peterson had assets totaling the lesser of either \$12,756.80 or \$2,800, in order to have the discretion or authority to file a MIRA petition.

However, the evidence the Attorney General put forth showed that Peterson only had \$1,770.65 in "assets." (L.F. 7, 23). By the Attorney General's own calculations, Peterson did not have sufficient assets for the Attorney General to have a reasonable belief that good cause existed to file a MIRA petition, falling some \$1,029.35 short of even the lesser amount. Without this condition precedent, the Attorney General had no authority or

discretion with which to file the MIRA petition against Peterson. As such, the MIRA petition and the subsequent judgment was void, and the trial court's grant of summary judgment and the Attorney General's finding of good cause should be reversed.

C. Lack Of Jurisdiction To Maintain The Proceedings

Because the condition precedent to filing a MIRA petition against Peterson did not exist, the trial court lacked jurisdiction to maintain such proceedings. Consequently, the judgment rendered against Peterson is void.

A finding of good cause is a condition precedent to the Attorney General having the authority or discretion to file a MIRA petition. *Koonce*, at 283-284. Therefore, a valid good cause determination is a procedural prerequisite to the trial court maintaining the MIRA proceedings. Where a prerequisite to the initiation of such proceedings is a showing of good cause, the trial court should dismiss the proceedings where the Attorney General fails to file the required showing of good cause. *U.S. v. Zucca*, 76 S. Ct. 671, 676-677; 351 U.S. 91 (1956).

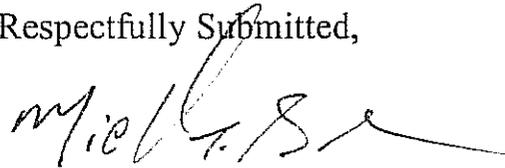
The Attorney General failed to satisfy the good cause condition precedent of Section 217.831.3 which was a procedural prerequisite to the trial court's maintenance of the MIRA proceedings against Peterson.

Therefore, the petition and the subsequent judgment against Peterson are void and the trial court should have dismissed the action.

CONCLUSION

Wherefore, for the foregoing reasons, Appellant Richard Peterson, prays this honorable Court reverse the judgment of the Circuit Court, and for any further relief this honorable Court deems just and proper in the premises.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December, 2007 two (2) copies of the Appellant's Substitute Brief, and an e-mail copy of the same, was sent via Federal Express to:

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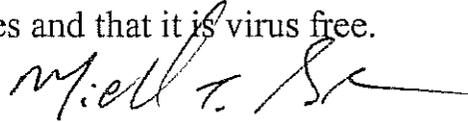


Michael T. George

RULE 84.06(c) CERTIFICATION

I certify to the best of my knowledge, information and belief, that this brief:

1. Included the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 7,813 words, according to Microsoft Word 2000, which is the word processing system used to prepare this brief; and
4. That the disk has been scanned for viruses and that it is virus free.



Michael T. George

APPENDIX

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IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

STATE OF MISSOURI, ex. rel.,)
JEREMIAH W. NIXON, Attorney General,)
State of Missouri,)
)
Plaintiff,)
)
v.)
)
RICHARD PETERSON,)
Reg. No. 512808,)
)
Defendant.)

Case No. 06AC-CC00324

JUDGMENT

This matter is before the court on petition by the State of Missouri, at the relation of Jeremiah W. Nixon, Attorney General, for reimbursement under the Missouri Incarceration Reimbursement Act (MIRA), §§ 217.825 through 217.841, RSMo. After consideration of the documents filed in the Plaintiff's summary judgment motion, the Court finds that the Plaintiff is entitled to summary judgment as a matter of law.

The Court makes the following findings of uncontroverted facts:

1. Richard Peterson was sentenced to confinement in a State correctional facility for life for his conviction of murder in the first degree.
2. Defendant Richard Peterson is an "offender" under § 217.827(5), RSMo, because he is under the continuing jurisdiction of the Missouri Department of Corrections, and is confined in a state correctional facility.
3. The State has expended funds for the costs of care of Richard Peterson in the amount of \$130,690.66, as of July 24, 2006.

4. Richard Peterson has money in his inmate account and receives regular deposits into that account such that he received \$1,767.5 in deposits from October 1, 2005, through April 14, 2006, from sources other than wages and salary.

IT IS THEREFORE ORDERED THAT:

1. Judgment and Order in the above-captioned cause shall be entered in favor of the State and against Defendant Richard Peterson, in the amount of \$130,690.66, as reimbursement for the cost of his care and custody while incarcerated in a state correctional facility through July 24, 2006.

2. Judgment is also entered in favor of the State for the cost of care of Richard Peterson occurring after July 24, 2006. A certified statement from the treasurer shall evidence this amount.

3. Rodney Kueffer, Inmate Treasurer of the Department of Corrections shall immediately pay to Plaintiff State of Missouri, Inmate Incarceration Reimbursement Act Revolving Fund, P.O. Box 899, Jefferson City, Missouri, 65102, 90% of the balance of Richard Peterson's inmate account.

4. Rodney Kueffer, Inmate Treasurer of the Department of Corrections shall immediately pay to plaintiff State of Missouri, Inmate Incarceration Reimbursement Act Revolving Fund, P.O. Box 899, Jefferson City, Missouri, 65102, 90% of all deposits to Richard Peterson's inmate account, excluding wages and bonuses earned while incarcerated.

5. Richard Peterson is prohibited from using or making deposits into any account other than the inmate account until Richard Peterson is released from the custody of the Department of Corrections.

6. Rodney Kueffer continues as receiver for any and all funds held on behalf of Richard Peterson.

7. The order authorizing and directing the receiver to allow Richard Peterson to expend from the regular inmate account the sum of only \$7.50 per month shall be and is hereby vacated. All holds on the accounts of Richard Peterson shall be released.

8. This Court will retain jurisdiction over this action for the purpose of determining future reimbursement account amounts to be applied to Richard Peterson's obligation to reimburse the State of Missouri for the cost of care while incarcerated.

SO ORDERED,


JUDGE

Aug 28, 2006
DATE

STATE OF MISSOURI }
COUNTY OF COLE } SS

I, BRENDA A. UMSTATTD, Clerk of the Circuit Court of Cole County, Missouri, hereby certify that the above and foregoing is a full true and correct copy of

Judgment
and that the same remains of record in my said office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of my said office this 28 day of Sept 2006.

BRENDA A. UMSTATTD, Clerk

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Clerk of Cole County, Missouri

Missouri Revised Statutes

Chapter 217 **Department of Corrections** **Section 217.827**

August 28, 2007

Definitions.

217.827. As used in sections 217.825 to 217.841, the following terms shall mean:

(1) (a) "Assets", property, tangible or intangible, real or personal, belonging to or due an offender or a former offender, including income or payments to such offender from Social Security, workers' compensation, veterans' compensation, pension benefits, previously earned salary or wages, bonuses, annuities, retirement benefits, or from any other source whatsoever, including any of the following:

a. Money or other tangible assets received by the offender as a result of a settlement of a claim against the state, any agency thereof, or any claim against an employee or independent contractor arising from and in the scope of said employee's or contractor's official duties on behalf of the state or any agency thereof;

b. A money judgment received by the offender from the state as a result of a civil action in which the state, an agency thereof or any state employee or independent contractor where such judgment arose from a claim arising from the conduct of official duties on behalf of the state by said employee or subcontractor or for any agency of the state;

c. A current stream of income from any source whatsoever, including a salary, wages, disability, retirement, pension, insurance or annuity benefits or similar payments;

(b) "Assets" shall not include:

a. The homestead of the offender up to fifty thousand dollars in value;

b. Money saved by the offender from wages and bonuses up to two thousand five hundred dollars paid the offender while he or she was confined to a state correctional center;

(2) "Cost of care", the cost to the department of corrections for providing transportation, room, board, clothing, security, medical, and other normal living expenses of offenders under the jurisdiction of the department, as determined by the director of the department;

(3) "Department", the department of corrections of this state;

(4) "Director", the director of the department;

(5) "Offender", any person who is under the jurisdiction of the department and is confined in any state

correctional center or is under the continuing jurisdiction of the department;

(6) "State correctional center", a facility or institution which houses an offender population under the jurisdiction of the department. State correctional center includes a correctional camp, community correction center, honor center, or state prison.

(L. 1988 H.B. 1340 & 1348 § 2, A.L. 1990 H.B. 974, A.L. 1995 H.B. 424)

(1998) Prisoner's federal civil service pension was exempt under federal law. State ex rel. Nixon v. McClure, 969 S.W.2d 801 (W.D.Mo.).

(2003) Assets available for reimbursement to state do not include portion of judgment equal to attorney fees and expenses incurred in securing judgment. State ex rel. Nixon v. Karpierz, 105 S.W.3d 487 (Mo.banc).

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Missouri General Assembly

Missouri Revised Statutes

Chapter 217 Department of Corrections Section 217.831

August 28, 2007

Director to report to attorney general on offender's assets and cost of care--attorney general's power to investigate and seek reimbursement, when.

217.831. 1. The director shall forward to the attorney general a report on each offender containing a completed form pursuant to the provisions of section 217.829 together with all other information available on the assets of the offender and an estimate of the total cost of care for that offender.

2. The attorney general may investigate or cause to be investigated all reports furnished pursuant to the provisions of subsection 1 of this section. This investigation may include seeking information from any source that may have relevant information concerning an offender's assets. The director shall provide all information possessed by the department and its divisions and agencies, upon request of the attorney general, in order to assist the attorney general in completing his duties pursuant to sections 217.825 to 217.841.

3. If the attorney general upon completing the investigation under subsection 2 of this section has good cause to believe that an offender or former offender has sufficient assets to recover not less than ten percent of the estimated cost of care of the offender or ten percent of the estimated cost of care of the offender for two years, whichever is less, or has a stream of income sufficient to pay such amounts within a five-year period, the attorney general may seek to secure reimbursement for the expense of the state of Missouri for the cost of care of such offender or former offender.

4. The attorney general, or any prosecuting attorney on behalf of the attorney general, shall not bring an action pursuant to this section against an offender or former offender after the expiration of five years after his release from the jurisdiction of the department.

(L. 1988 H.B. 1340 & 1348 §§ 4, 5 subsecs. 1, 2, A.L. 1995 H.B. 424)

(2005) Ten percent threshold requirement in subsection 3 is a condition precedent to the discretionary filing of a petition by the Attorney General, and not a condition precedent to an actual reimbursement. *State ex rel. Nixon v. Koonce*, 163 S.W.3d 603 (Mo.App. W.D.).

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Missouri General Assembly

A8

Missouri Revised Statutes

Chapter 217 Department of Corrections Section 217.835

August 28, 2007

Jurisdiction, certain circuit courts--service--hearing--support obligations of offender to be considered--court order to reimburse, when.

217.835. 1. The circuit court shall have exclusive jurisdiction over all proceedings seeking reimbursement from offenders pursuant to the provisions of sections 217.825 to 217.841. The attorney general may file a complaint in the circuit court for the county or city from which a prisoner was sentenced or in the circuit court in the county or city of the office of the director of the department, against any person under the jurisdiction of the department stating that the person is or has been an offender in a state correctional center, that there is good cause to believe that the person has assets, and praying that the assets be used to reimburse the state for the expenses incurred or to be incurred, or both, by the state for the cost of care of the person as an offender.

2. Upon the filing of the complaint under subsection 1 of this section, the court shall issue an order to show cause why the prayer of the complainant should not be granted. The complaint and order shall be served upon the person personally, or, if the person is confined in a state correctional center, by registered mail addressed to the person in care of the chief administrator of the state correctional center where the person is housed, at least thirty days before the date of hearing on the complaint and order.

3. At the time of the hearing on the complaint and order, if it appears that the person has any assets which ought to be subjected to the claim of the state pursuant to the provisions of sections 217.825 to 217.841, the court shall issue an order requiring any person, corporation, or other legal entity possessed or having custody of such assets, to appropriate and apply such assets or a portion thereof to satisfy such claim.

4. At the hearing on the complaint and order and before entering any order on behalf of the state against the defendant, the court shall take into consideration any legal obligation of the defendant to support a spouse, minor children, or other dependents and any moral obligation to support dependents to whom the defendant is providing or has in fact provided support.

5. If the person, corporation, or other legal entity shall neglect or refuse to comply with an order issued pursuant to subsection 3 of this section, the court shall order the person, corporation, or other legal entity to appear before the court at such time as the court may direct and to show cause why the person, corporation, or other legal entity should not be considered in contempt of court.

6. If, in the opinion of the court, the assets of the prisoner are sufficient to pay the cost of the proceedings undertaken pursuant to the provisions of sections 217.825 to 217.841, the prisoner shall be liable for those costs upon order of the court.