No. SC95764

In the Supreme Court of Missouri

STATE EX REL. WILLIAM FLEMING,

Relator,

v.

SCOTT LAWRENCE,

Respondent.

Original Petition for a Writ of Habeas Corpus

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

In 2008, the State charged William Fleming with two counts of second-degree domestic assault, one count of second-degree assault, and one count of unlawful use of a weapon in St. Francois County Circuit Court case no. 08D7-CR00864-01. (Resp. Ex. F).

On July 31, 2008, Fleming pleaded guilty, under a plea agreement with the State, to two counts of second-degree domestic assault. (Resp. Ex. A at 7, 10–11, 11–12, 15–16). The court sentenced Fleming to concurrent terms of seven years' imprisonment on each count of domestic assault, suspended execution of both sentences, and placed Fleming on a term of five-year supervised probation. (Resp. Exs. B, E, G at 3). As a special condition of his probation, Fleming agreed to pay approximately $4,200.00 in court costs during the first three years of his term of supervision. (Resp. Ex. B at 2; Resp. Ex. D). At sentencing, the court told Fleming he needed to start making payments immediately. Fleming replied to the court, "[n]ot a problem." (Resp. Ex. N at 24). But Fleming failed to make an immediate payment and then made no payments in 2008.

In April 2009, Fleming informed his probation officer that he was approved for Supplemental Security Income (SSI) in the amount of

approximately $450.00 per month[1] and would receive an additional $1,500.00 payment from SSI. (Resp. Ex. H). He agreed to pay $118.00 per month towards paying his court costs starting in May 2009, and would pay more than that amount when he received the $1,500.00. (*Id.*). Nine and one-half months after placement on probation, Fleming made his first payment of $118.00 toward his court costs on May 13, 2009. (Resp. Ex. D at 2).

Fleming again failed to make any payments in June 2009, July 2009, and August 2009. (Resp. Ex. D at 2). Fleming's failure to make monthly payments placed him in violation of his special condition of probation, and his probation officer issued a notice of citation dated August 14, 2009. (Resp. Ex. I). Even after the notice was issued, Fleming failed to make any payment in September 2009. (Resp. Ex. D at 2).

Nearly five months after his first payment, in October 2009, Fleming made his second payment toward court costs. (*Id.*). But his payment in October 2009 was just $10.00. (*Id.*). Thereafter, Fleming made payments of $10.00 in November 2009 and December 2009. For the year of 2009, Fleming had paid $148.00 dollars towards his court costs.

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[1]At some time before November 2011, Fleming told his probation officer that he was receiving $674.00 from SSI, but the report does not reflect when he received increased payments. (Resp. Ex. K at 2).

Although Fleming made nine payments in 2010, the payments totaled only $90.00 towards his court costs, and his payments became more sporadic as the year progressed. For example, Fleming made payments of $10.00 each month from January 2010 until May 2010,[2] but made no payment in June 2010. (*Id.* at 2). Thereafter, Fleming made $10.00 payments in July 2010, August 2010, and November 2010, but did not make any payments in September 2010, October 2010, and December 2010. (*Id.* at 2).

Fleming's payments continued to be sporadic in 2011. Fleming made no payments in January and February 2011. However, in March 2011, nearly four months after his last payment in November 2010, Fleming paid $10.00 toward his court costs. (*Id.*). But then he made no payment in April 2011. Fleming paid another $10.00 in May 2011, but then made no payment in June 2011. (*Id.*). Two months after his May payment, as Fleming reached the end of the first three years of his probation term, he was able to make three $10.00 payments within one week - on July 25, July 28, and August 4, 2011. (*Id.* at 2).

In the first 36 months of his probation term, Fleming had paid only $288.00 towards his court costs, less than seven percent of the $4,200.00 he agreed to pay. *See* (Resp. Ex. D). Said another way, while sixty percent of his time on probation had passed, Fleming paid less than seven percent of his

[2] Fleming made two payments of $10.00 in March 2010. (*Id.* at 2).

court costs. Because Fleming had not paid his court costs within the three years as ordered by the court, he was in violation of his conditions of probation, and Fleming's probation officer filed a field violation report on August 12, 2011. (Resp. Ex. C).

The court set the matter for a revocation hearing on September 9, 2011, less than a month after the violation report was filed. (Resp. Ex. E). Fleming appeared in court on September 9th with counsel and waived his revocation hearing, admitting that he violated special condition 11, repayment of court costs and the Crime Victims' Compensation Fund. (Resp. Ex. M at 2–3). The court accepted Fleming's admission and found that he had violated his probation. (*Id.* at 4). The court requested the State's recommendation and the following exchange took place:

> MR. KING [the prosecutor]: Judge, I would recommend that you revoke his probation, but I'm not sure why we're bringing it up today, if that's what they expected to have happen or not.
>
> MS. TAYLOR [defense counsel]: That is not. Can – I mean -
>
> MR. KING: Well, what – why did we bring it up then?

MS. TAYLOR: Can we sidebar for just one moment? I spoke to Joe – or I spoke to Mr. Lanter [3] about it.

THE COURT: Do you want to have a sidebar first?

(counsel approached the bench and an off-the-record discussion was held.)

THE COURT: Back on the record. We had a brief sidebar to discuss some issues in this case, and I believe at this time counsel is asking the Court to defer disposition on this matter. The Court has accepted the admissions of Mr. Fleming. The parties are asking the Court to defer disposition for three months; order Mr. Fleming to make a minimum payment of $50 per month; come back in December and see where we're at. Is that correct, Mr. King?

MR. KING: Yes, Your Honor.

THE COURT: Miss Taylor?

MS. TAYLOR: Yes, Your Honor.

(*Id.* at 4–5). Fleming, the State, and the court agreed to continue the case until December 9, 2011, and the court directed Fleming to pay $50.00 per

[3] Mr. Lanter was the assistant prosecuting attorney at the time Fleming was sentenced. (Resp. Ex. E at 5; Resp. Ex. A and N).

month, for a total of $150.00 "at the very least" toward court costs before his next appearance. (*Id.* at 6–7). Although Fleming made no payments in September, he did pay $150.00 on October 4, 2011. (Resp. Ex. D at 3; Resp. Ex. E). Fleming made no other payments before his December 2 appearance.

On December 2, 2011, the parties appeared, the court continued the case again, this time to April 13, 2012, and ordered Fleming to pay $50.00 per month until the next appearance, for a total of $200. (Resp. Ex. E). This was the same rate of payment as the court ordered in September 2011. During the 2011 calendar year, Fleming paid $190.00 in payments and a total of $438.00 over the forty-one months of probation.

Although Fleming agreed to pay $50.00 each month as directed by the court's December 2011 order, he did not do so. Fleming made no payments to the court in January and February 2012. But he did make $50.00 payments in March 2012 and April 2012. (Resp. Ex. D at 3). Fleming made payments to collections which were transferred to the clerk's office on February 24 and March 6, 2012. (*Id.*).

Fleming failed to appear for the April 13, 2012 court date. (Resp. Ex. E at 3). The court continued the case until May 4, 2012, ordered Fleming to appear, and cautioned that his failure to do so may result in a warrant for his arrest. (*Id.*). The court again ordered Fleming to pay $50.00 per month

toward court costs, the same rate that the court originally imposed at the September 2011 hearing. (*Id.*).

On May 4, 2012, Fleming appeared with counsel before the court, but Fleming did not make a $50.00 payment on that date. (*Id.*). By agreement of the parties, the court once again continued the case to September 14, 2012, and again ordered Fleming to make $50.00 payments each month until this date. (*Id.*). But Fleming did not make any payments during May, June, July, and August 2012. (*Id.*; Resp. Ex. D at 3).

Ten days before his next court appearance, on September 4, 2012, Fleming submitted a payment for $250.00. (*Id.*). Although Fleming failed to appear for the September 4 court appearance, the court continued the case to November 9, 2012 by agreement of the parties. (Resp. Ex. E). Fleming made $50.00 monthly payments for both October and November 2012, so the court continued the case to February 2013. (*Id.*). Fleming made one final payment of $50.00 in December 2012. (Resp. Ex. D). So during the 2012 calendar year, Fleming paid a total of $583.34 towards his court costs.

On February 8, 2013, despite Fleming's failure to make the required payments in January or February 2013, the court continued the case once again, this time to March 8, 2013. (Resp. Ex. E). When Fleming failed to make the required $50.00 payment yet again in March, the court set a revocation hearing for April 12, 2013. (*Id.*). Fleming did make payments to

collections which were transferred to the clerk's office in the amounts of $7.22 and $1.44 on February 13, 2013, $39.61 on February 20, 2013, $41.67 on March 7, 2013, and $41.67 on April, 9, 2013. (Resp. Ex. D at 3). By April 2013, Fleming had paid only $131.61 during the 2013 calendar year.

After hearing argument from both parties' counsel on April 12, 2013, the court found that Fleming had violated the terms of his probation by failing to make a good faith effort to pay court costs within three years of the July 30, 2008 order per the terms of the eleventh condition. (Pet. Ex. 1 at 26–27). The court found that revocation was appropriate because it was Fleming's *failure to make a good faith effort to repay the costs*—not his inability to pay—that resulted in the violation. (*Id.* at 22–25). The court expressly stated that the revocation was not based on Fleming's inability to pay, explaining, ". . . the Court does not believe, obviously, that indigent people should be sent to prison because they can't pay their court costs. I agree a hundred percent. That would be just wrong, and *that is not why the Court is considering this today*." (*Id.* at 23–24). Accordingly, the court revoked Fleming's probation and ordered his sentences executed. (*Id.* at 27).

During the 56 months Fleming was placed on probation, he made only 25 payments, and a handful of payments to collections, which totaled $1.152.95. (Resp. Ex. D). The following table summarizes the payments:

Year	2008	2009	2010	2011	2012	2013
Payments to Court	0	4	9	6	6	0
Total paid	$0.00	$148.00	$90.00	$200.00	$500.00	$0.00
Collections	$0.00	$0.00	$0.00	$0.00	$83.34	$131.61

Subtracting Fleming's payments and the amount the clerk's office received from collections, Fleming still owed $3,110.55 of his court costs at the time of revocation. (Resp. Ex. D).

ARGUMENT

I. The probation court's conclusion that Fleming failed to make a good faith effort to pay the required costs is supported by the record; thus, his revocation does not violate due process.

Fleming argues that his revocation was unconstitutional because the court revoked him solely because he was indigent. As a result, he claims that his revocation violated due process under *Bearden v. Georgia*, 461 U.S. 660 (1983). Because the probation court concluded that Fleming had failed to make a good faith effort to pay the required costs and the record supports this conclusions, his revocation does not violate due process under *Bearden*.

In *Bearden,* the United States Supreme Court held that the constitution prohibits a sentencing court from revoking an indigent defendant's probation based on his failure to pay a fine or make restitution alone—i.e., absent evidence and findings that the defendant was somehow responsible for the failure, or that alternative forms of punishment were inadequate to meet the state's interest in punishment and deterrence. The Supreme Court explained that a revocation under such circumstances is unconstitutional because "a State cannot subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely because they are too poor to pay the fine." *Bearden,* 461 U.S. at 664.

Although revocation based on inability to pay is unconstitutional, the *Bearden* Court explained, "[i]f the probationer *has willfully refused* to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection." *Id.* at 668. (emphasis added, citations omitted). "Similarly, a probationer's *failure to make sufficient bona fide efforts* to seek employment or borrow money in order to pay the fine or restitution may reflect an insufficient concern for paying the debt he owes to society for his crime." *Id.* (emphasis added). "In such a situation, the State is likewise justified in revoking probation and using imprisonment as an appropriate penalty for the offense." *Id.*; *see also Schmeets v. Turner*, 706 S.W.2d 504, 508 (Mo. App. W.D. 1986) ("A probationer's failure to make reasonable efforts to pay restitution may indicate that imprisonment may now be required to satisfy the State's interests.").

Bearden does not identify which party bears the burden of proving or disproving the probationer's ability to pay, but frames the issue as a matter of inquiry for the trial court. *Bearden,* 461 U.S. at 672; *see also Gipson v. State,* 383 S.W.3d 152, 157 (Tex.Crim.App. 2014); *but see Schmeets*, 706 S.W.2d at 507–08 (stating in *dicta* that *Bearden* does not discuss the burden of proof and assumes that the burden rests upon the state). Revocation does not violate due process if the court finds that a probationer willfully refused

to pay when he had the ability to pay or the probationer failed to make sufficient bona fide efforts to acquire the resources to pay the debt. This requirement was met here.

A. Fleming did not comply with this probation condition.

To revoke Fleming's probation, the court must first find that a violation occurred. The standard of proof in revocation proceedings requires only that the hearing judge be reasonably satisfied that the terms of probation have been violated. *Schmeets*, 706 S.W.2d at 508; *Sincup v. Blackwell,* 608 S.W.2d 389, 391–92 (Mo. 1980); *Ewing v. Wyrick*, 535 S.W.2d 442, 444 (Mo. 1976). Here, Fleming admitted to violating his probation condition at the September 2011 hearing and waived his formal revocation hearing. At that same proceeding, an off-the-record discussion occurred about "some issues" in Fleming's case and when the court went back on the record, the court announced that it was agreed that Fleming would make a minimum payment of $50.00 per month and to defer disposition. (Resp. Ex. N at 4–5). Implicit in Fleming's September 2011 admission was that he violated his probation conditions *and* that he did not make bona fide efforts to repay his court costs. In light of Fleming's admissions and his voluntary waiver, no further evidence was required to demonstrate that Fleming violated his probation, and the court could accept Fleming's admissions to conclude that he could, in fact, make payments.

Fleming now faults the probation court for accepting his admissions and argues that the court erred in revoking his probation because he "abided by the terms of his probation." (Brief at 10). His argument is refuted by his own admissions to the contrary and the record in this matter.

Fleming was directed to make payments each month towards repayment of his court costs. He promised to make payments immediately, but he did not. (Resp. Ex. N at 24; Resp. Ex. D). After not making *any* payments during the first nine months of his probation term, in May 2009, Fleming told his probation officer he would make payments of $118.00 each month, but he did not. (Resp. Exs. D, H, and I). In October 2009, Fleming told his probation officer he would make payments of $10.00 each month, but he did not. (Resp. Ex. D, J). In September 2011, Fleming told the court he would make payments of $50.00 each month, but he did not. (Resp. Exs. D, M). Therefore, this Court should reject his belated and meritless argument that he fully complied with his probation terms.

What Fleming is really challenging is the court's discretionary decision to revoke his probation in April 2013, which was done only after the court worked with Fleming for more than nineteen months, allowing Fleming to demonstrate his compliance and willingness to make bona fide efforts to pay his court costs on the renegotiated payment plan after Fleming conceded that he violated his probation. Thus, the relevant question is whether Fleming

made sufficient bona fide efforts to comply with his probation conditions. He did not. Therefore, revocation was appropriate.

B. Fleming failed to make payments even though he had the means to do so and did not make a good faith effort.

Fleming argues that he was unable to pay his court costs, and should not have been required to do so, because he qualified for representation by the Missouri State Public Defender System and qualified for SSI, at some point during his probation term (Brief at 10, 11–12, 17–18). This Court should reject his argument for two reasons. First, Fleming's conclusory assertion that he made good faith effort to pay is not supported by the evidence before the court below or this Court. Second, *Bearden* does not stand for the principle that defendants who qualify for public aid or public defender representation cannot be required to pay the debt he owes for his crime, but instead focuses on the probationer's ability and willingness to pay the debt or bona fide efforts make payments.

At the April 2013 hearing, Fleming did not present any additional evidence to the probation court to support his conclusory allegation that he lacked the ability to pay, but asked the court to take judicial notice of its record. (Pet. Ex. 1 at 2–3, 12–13). Here, the record reflects that Fleming, in fact, had the ability to pay towards his court costs for the majority of his

probation term but failed to do so consistently without explanation at that time, and therefore, supports the court's determination that he failed to make bona fide efforts to pay his court costs.

Fleming repeatedly assured the court that he *could* pay his court costs and agreed to make payments each month resolve his debt. At sentencing, the court asked if Fleming could immediately begin making payments and he replied, "Not a problem." (Resp. Ex. N at 24). At the September 2011 proceeding, when the parties renegotiated the payment plan, Fleming agreed that he could pay $50.00 each month. (Resp. Ex. M). Fleming did not tell the court at his numerous court appearances after the September 2011 hearing that he could not pay the $50.00 each month, but instead continued to make assurances that he could and would pay. *See* (Pet. Ex. 1 at 10). Fleming makes no argument that the trial court erred when it took him at his word and this Court should not fault the court for doing so. Fleming's actions are also telling. Fleming was in fact able to make payments during his probation term. But Fleming also failed to make several payments during many months, without explanation, even when Fleming was receiving income. (Resp. Exs. C, D, E, H, I, and J).

Fleming had monthly income during the majority of his probation term. Fleming told his probation officer that he was receiving approximately $450.00 in SSI beginning in April 2009 and was also going to receive an

additional award of $1500.00. (Resp. Ex. H at 2). Fleming agreed to make payments of $118.00 per month, beginning in May 2009, to pay his court costs and said he would be pay more when he received the additional award. (*Id.* at H). But Fleming made only one payment of $118.00 in May 2009 and made no other payment until October 2009, nearly five months later, when he decreased his payments to $10.00. (Resp. Ex. D). Thereafter, Fleming made some payments during his four remaining years of probation; he did so sporadically, missing several payments, although his SSI increased to $674.00 each month at some point after November 2011. (Resp. Ex. D and K). Moreover, when facing the possibility of incarceration, Fleming was in fact able to make much higher payments than those he had submitted prior to the court's admonition. (Resp. Ex. D). This evidence, coupled with Fleming's admissions, supports the probation court's conclusions that Fleming failed to make *sufficient bona fide efforts* to pay his court costs and that revocation was appropriate.

Instead of asserting his current argument at the first available opportunity to the probation court, Fleming waited until the probation court's authority neared expiration, in July 2008, before he raised his argument. Fleming did not object to the court costs at July 2008 sentencing, at the September 2011 proceeding, or in the numerous court appearances thereafter. Instead, the first time Fleming argued that he should not be

required to pay his court costs, based on *Fleming's* belief that he could not pay, was at the court's final disposition hearing on April 13, 2013. (Pet. Ex. 1 at 10, 11–12). Fleming's five-year probation term was set to expire on July 31, 2013. It bears repeating – Fleming waited until the court's authority was scheduled to expire before arguing that he did not have the financial means to pay the court costs, although Fleming's financial situation remained generally unchanged during the five-year probation term and he had repeatedly assured the court that he could in fact make payments. This Court should consider Fleming's belated objection, in light of his numerous statements and actions to the contrary, as additional evidence to support the court's determination that revocation was appropriate under the circumstances. In the alternative, this Court could find that Fleming waived his constitutional claim because he failed to raise it at the "first available opportunity." *See State v. Pierce,* 433 S.W.3d 424, 429 (Mo. 2014) (defendant waived his constitutional claim although he presented it to the trial court, because defendant did not timely raise his argument at the "first available opportunity").

In short, Fleming repeatedly broke his promise to the court and failed to comply with the court's order although the record shows he was able. Contrary to Fleming's allegation, Fleming showed his ability by repeatedly informing the court that he could in fact pay, by making payments for several

months and at times making payments as large as $150.00 and $250.00 at one time. He also showed his disinterest by failing to consistently make payments and failing to provide any explanation when he did not pay. Moreover, Fleming provides no good reason why he did not inform the court of his belief that he was unable to pay these costs at the time of sentencing, at the September 2011 revocation hearing, or at the many court appearances before his final disposition hearing.

Furthermore, Fleming's representation by the Missouri State Public Defender System and his qualification for SSI does not act as a per se bar to his revocation. At the April 2013 hearing, Fleming urged the court to find he could not pay court costs because he qualified for representation by the Missouri State Public Defender System and during his probation period he was approved for SSI benefit from the federal government. (Pet. Ex. 1 at 12–13). He reasserts this argument here. This Court should reject this argument.

Bearden does not impose a per se bar that that defendants who qualify for public aid or representation cannot be required to pay the court costs, fines, or restitution he owes for his crime. Instead, *Bearden* illustrates that the ability-to-pay must be made on a case-by-case analysis and revocation should be evaluated on the probationer's ability and willingness to pay the debt, or the probationer's efforts to seek resources even when they had none at the time. *Bearden,* 461 U.S. at 668. Furthermore, "*Bearden* does not

categorically prohibit incarceration of indigent defendants; rather it permits incarceration when 'alternative measures are not adequate to meet the State's interest in punishment and deterrence.'" *Gipson,* 383 S.W.3d at 157 (quoting *Bearden,* 461 U.S. at 668). Thus, the Supreme Court's decision in *Bearden* does not support Fleming's argument.

Fleming's bright-line test is untenable and would have a detrimental impact on defendants, victims, and the state. Concerned that defendants, like Fleming, would make empty promises in exchange for probation and would wait until the court's authority is scheduled to expire before asking to be relieved of those obligations, may force courts not to consider alternatives to incarceration such as probation. Here, Fleming was in the position to know the nature and extent of his finances and to evaluate his ability to pay his court cost obligation. During those five years on probation, Fleming did not voice any opposition to the conditions he accepted to be placed on probation and was able to, in fact, make significant payments when he feared the consequence of failure would be incarceration.

Fleming also argues that the probation court's decision is contrary to *Hendrix v. Lark,* 482 S.W.2d 427 (Mo. 1972). But his reliance on *Hendrix* is misplaced. In *Hendrix,* this Court struck down a St. Louis City charter provision that required offenders to "work off" their debt by ordering their confinement in the city jail if they failed to make immediate payment of the

fines and costs. 482 S.W.2d at 428 n. 1. The Court found that the offender's incarceration under this provision was unlawful because the St. Louis City court "fail[ed] to give her an alternative of paying by installments." *Id.* at 428. However, like the Supreme Court in *Bearden,* the Court recognized that imprisonment is lawful if an offender fails to make a good faith effort to pay costs and fines in reasonable installments fixed by the court after consideration of the offender's ability to pay. *Id.* at 431.[4]

Here, the probation court complied with *Hendrix's* requirements. Instead of immediately revoking Fleming's probation on September 9, 2011, after Fleming admitted to his willful violation of his probation conditions, the probation court provided Fleming with multiple opportunities to pay the costs in reasonable installments based on Fleming's uncontested ability to pay. Fleming requested this opportunity informing the court that he could pay

[4] The Court in *Hendrix* also agreed with the Supreme Court in *Bearden* when it explained that an installment plan was an appropriate method for the State to use to enforce the collection of fines that, at the same time, promotes the state's interest in rehabilitating the offender and making the offender aware of his responsibility for his criminal conduct and to encourage him to become a law-abiding citizen. *Id.* at 430, 431 n. 5.

$50.00 per month, and made some payments under the court's renegotiated payment plan demonstrating his ability to pay, but Fleming failed to consistently make those payments despite the fact that he had the means to do so.

In conclusion, the record supports the probation court's finding that Fleming failed to make a good faith effort to pay his court costs as required under the reasonable and negotiated payment plan with the court. The court showed great flexibility and made substantial efforts time after time to structure a payment schedule that would work with Fleming's budget when, time after time, he failed to make the monthly payments per the court's orders. (Pet. Ex. 1 at 22–28). Because the court expressly stated that Fleming's revocation was not based on his inability to pay, but instead on his failure to make a good faith effort to pay, and the evidence in the record supports the court's conclusion his claim is refuted by the record and should be denied.

Alternatively, if this Court were to determine that the probation court erred in revoking the probation without conducting a further inquiry at the April 2013 hearing, then an order directing Fleming to be returned to the probation court to allow such inquiry to occur would be the proper remedy not complete discharge from his sentence.

II. The probation court's efforts to work with Fleming from September 9, 2011, until April 12, 2013, pursuant to his request, did not violate his due process.

Fleming also complains that his due process rights were violated because of the so-called "delay" between Fleming's admission that he violated the terms of his probation on September 9, 2011, and the disposition hearing on April 12, 2013. (Brief at 17, 18). In so arguing, Fleming faults the probation court for placing him on a payment plan and extensively working with him to find an alternative to revocation. Fleming's claim for habeas relief on this basis fails because he is unable to show a due process violation by the court in this case.

The basic constitutional requirements for probation revocation hearing were set out by the United States Supreme Court in *Gagnon v. Scarpelli,* 411 U.S. 778 (1973), which applies the standards for parole revocation hearing set forth in *Morrissey v. Brewer,* 408 U.S 471 (1972). This Court adopted these standards with the modification that, one hearing rather than both a preliminary and a final revocation hearing may be held if the hearing occurs within a reasonable time and contains all the due process requirements for a final hearing. *Abel v. Wyrick,* 574 S.W.2d 411, 416–17 (Mo. 1978) (citing to *Ewing v. Wyrick,* 535 S.W.2d 442, 444 (Mo. 1976)).

The minimum due process requirements that apply to probation revocation proceedings in Missouri, are: (a) written notice of the claimed violations; (b) disclosure of evidence against him; (c) opportunity to be heard and to present evidence; (d) the right to confront and cross-examine adverse witnesses, unless good cause is found for not allowing confrontation; (e) a 'neutral and detached' hearing body; and (f) a written statement as to the evidence relied on and reasons for revoking probation. *Abel,* 574 S.W.2d at 417. But Fleming does not plead that he did not receive these requirements. Instead, he argues only that his due process was because of the delay between September 2011, when he waived his revocation hearing and admitted his violation, and April 2013, when the court ultimately revoked his probation. (Brief at 17–18).

This Court in *Ewing v. Wyrick,* and the Supreme Court in *Morrissey* recognized that revocation hearings should be held within a reasonable time after a parolee or probationer is taken into custody following the issuance of an arrest warrant as a result of the violation. *See Ewing v. Wyrick,* 535 S.W.2d at 446 (revocation hearing should be held within a reasonable time after arrest for a probation or parole violation); *Morrissey,* 408 U.S. at 488 (the final revocation hearing "must be tendered within a reasonable time after the parolee is taken into custody."). However, in *Moody v. Daggett,* 429 U.S. 78, 87–88 (1976), the Supreme Court held that due process does not

mandate that revocation proceedings be held until the loss of liberty results directly from the revocation proceedings. In *Moody,* a federal parolee was imprisoned for a crime committed while on parole. A violation warrant was issued and lodged with the prison, but not executed. The Supreme Court held that due process did not require an immediate hearing because the offender had not suffered a loss of liberty, i.e., the arrest warrant was not executed. *Moody,* 429 U.S. at 86–87.

Fleming has not shown a due process violation under *Moody* because he did not suffer a loss of liberty as a result of the filing of the violation report; no arrest warrant was issued or executed. *See Moody,* 429 U.S. at 87 ("we established execution of warrant and custody under that warrant as the operative event triggering any loss of liberty attendant upon parole revocation."). But even if due process required prompt resolution of his violation, Fleming received just that. Here, the court scheduled a revocation hearing on September 9, 2011, less than a month after the violation report was filed on August 11, 2011. (Resp. Ex. E). At the September 9 appearance, Fleming waived his formal revocation hearing and admitted to the violation. Fleming does not complain that his September 9 hearing was delayed. Instead, he complains that the length of time between September 2011 and April 2013 was too long, although it was done at Fleming's request and for Fleming's benefit. Fleming's second chance did not violate due process.

Decisions since *Moody* suggest that even if due process requires a prompt hearing, no violation will be found unless the defendant can demonstrate that the delay actually prejudiced the defendant. *See United States v. Sanchez,* 225 F.3d. 172, 175–77 (2d Cir. 2000) (delay alone does not establish due process violation and probationer did not demonstrate he was prejudiced by the more than four year delay between the violation and the issuance of the summons charging the violation); *United States v. Tippens*, 39 F.3d 88 (5th Cir. 1994) (probationer did not demonstrate that 30 month delay between issuance of warrant and execution of that warrant prejudiced his ability to contest revocation); *United State v. Chaklader,* 987 F.2d 75 (1st Cir. 1983) (probationer unable to prove 21 month delay between detainer and probation revocation caused prejudice in ability to contest revocation). This same principle was recognized by this Court in *Ewing* and the United States Court of Appeals for Eighth Circuit in *Kartman v. Parratt,* both cases which were decided before *Moody*. *See Ewing,* 535 S.W.2d at 446 (petitioner is not entitled to relief unless he can demonstrate that he was actually prejudiced by any delay); *Kartman v. Parratt,* 535 F.2d 450, 455 (8th Cir. 1976) (probationer failed to demonstrate specific prejudice resulting from delay).

Here, Fleming has not alleged that he was prejudiced by the delay; much less demonstrated that he was actually prejudiced. During this time period, Fleming had with multiple opportunities to comply with his

conditions to avoid revocation and he agreed to this opportunity. The second chance offered by the probation court does not establish prejudice. *See Kartman,* 535 F.2d at 455 (recognizing that the delay was done to allow probationer another "chance" and was therefore not unreasonable). To hold otherwise would be disadvantageous to defendants generally.

As the Eighth Circuit recognized in *Kartman,* without this discretion the probation process "may become less flexible and ultimately 'the hearing body may be(come) less tolerant of marginal deviant behavior and feel more pressure to reincarnate than to continue nonpunitive rehabilitation." *Id.* This is particularly true when the violation itself was uncontradicted, like in Fleming's case, because the additional time only serves to help the defendant acquire additional *mitigating* evidence which helps, not hurts, the defendant. *See Carchman v. Nash*, 473 U.S. 716, 733 (1985) (applying *Moody* in the probation violation context noting that it may be desirable to delay rather than expedite a probation revocation proceeding when the offender is serving a sentence for the offenses that was the source of the violation); *Moody,* 429 U.S. at 89 (holding a revocation hearing immediately would deprive the decision maker of one of significant sources of information that may offer mitigating evidence, i.e., the offender's prison record on his new sentence, and would foreordain revocation as the most significant new information would be the parolee's new crimes).

Fleming's claim that he lacked notice that his board bill was included in his court costs is also unpersuasive. (Brief at 16). There is nothing in the record that supports a finding that Fleming was unaware that he owed $4,217 court costs which included the board bill.

In short, Fleming does not allege, nor does the record show, that he objected to the multiple opportunities he was provided between September 2011 and April 2013 to comply with his probation conditions and to avoid incarceration. He has not shown that he suffered any due process violation, and even if such right existed he has not shown prejudice. Thus, this Court should deny his argument.

CONCLUSION

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

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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 6,519 words, excluding the cover and certification, as determined by Microsoft Word 2010 software, and that a copy of this brief was sent through the electronic filing system on September 19, 2016 to:

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