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 REPLY BRIEF

Michael T. George, #51800
James J. Wieczorek, # 53830
The Law Firm of Michael T. George, P.C.
7730 Carondelet Ave., Ste. 303
St. Louis, Missouri 63105
314-721-5757

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Supreme Court Rules:

INTRODUCTION

If this Court adopts the Attorney General's well-written and well-argued substitute brief as the law in Missouri, no prisoner's assets, no matter how little, no matter the source, gifts included, will be allowed the safe harbor of the statutory thresholds. In effect, the Attorney General 'at will' shall be able to proceed in summary fashion to seize Missouri prisoners' assets free from court review, free from affirmative defenses, free from the Attorney General's statutory duty to investigate, free from 'good cause', free from the constraints of fair notice, and free from a meaningful opportunity to be heard. In fact, the Attorney General will be able to act with full immunity like the kings of old. Fortunately, for the poor prisoners in Missouri, the law and the Missouri Supreme Court is a check on the executive branches' thirst for unbridled power over the assets of prisoners in Missouri.

REPLY

A.) MIRA is unconstitutional because the statutory scheme violates due process in part and in whole.

I encourage this Court to read the entire statutory scheme and examine each part and the way it operates as a whole. The Attorney General's argument focuses on parts of the statute and wants this Court to find them benign, while ignoring the net effect the entire statute has on due process.

"Due process contemplates the opportunity to be heard at a *meaningful time* and in a *meaningful manner*." *Moore v. Board of Educ. of Fulton Public Schools,* 836 S.W.2d 943, 947 (Mo. 1992) [Emphasis added].

The Attorney General wants to argue that since Peterson received notice and could write a reply, his due process rights were satisfied. Well, let us examine the notice he received. Peterson's first hint of the fact his money was being seized was a *Show Cause Order* issued ex parte on May 5, 2006, one day after the petition was filed, and received by Peterson six days later on May 11, 2006, which included an already signed Court order putting his funds out of his reach and in the hands of a receiver. (L.F. 30-32, 38-39).

I cannot think of another legal proceeding in which a person's first notice of the commencement of a cause of action to take their money is a show cause order issued ex parte that in effect seizes the very money at issue. This is not *meaningful* notice. It is a burden shifting provision that due process should never allow. The defendant, not the plaintiff, has to prove the case. The suit starts with the prisoner ordered, "to show cause why the prayer of the complainant should not be granted," after the very money at issue has been taken away from his control. RSMo. 217.835.2 What could be fair about that?

Have we forgotten these are prisoners? Slow mail and little to no access to legal counsel. How is a person, let alone a prisoner locked up, with little access to stamps, records, or copies supposed to be able to react fast enough in any meaningful way to defend their rights if their money is already seized and a final order is about to issue? Due process demands better.

B. 1.) The Attorney General wants to ignore the threshold amount of money expected for recovery necessary to trigger the statute being used against a prisoner.

As a condition precedent to filing any suit under MIRA, the statute mandates that, "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 costs 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 of time***, 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." RSMo. 217.831.3 [Emphasis added].

The statute sets forth two paths by which the Attorney General may proceed with a MIRA complaint. The first path is, after completing the mandatory investigation, the Attorney General has to have ***'good cause'*** to believe a prisoner either can pay back, **the lesser of**, ten percent of two years of prison or ten percent of the entire incarceration. In this instance, as in most instances, ten percent of the two years is the lesser number and therefore the applicable measure. Irrelevant to this case because it was never alleged, but worth noting as the alternative not pursued, the Attorney General may also proceed if the prisoner has a "stream of income" capable of paying the "lesser amount" within five years.

Regardless of how the Attorney General wants to slice and dice his money, when you look at Peterson's assets, all he had in the world was $1,770.65 in his prisoner account, far short of the necessary $2,800 required by the statute. (L.F. 23.) It is simple. Peterson did not have enough money to trigger the MIRA statute.

In *State ex re. Nixon v. Koonce*, the Court argued that the threshold provision was meant to be a "cost effective limitation on the Attorney Generals' authority" and not "a protection to the offender by limiting the extent to which the State could deplete his assets …" See *State ex re. Nixon v. Koonce*, 173 S.W.3d 277, 285 (Mo. App. W.D. 2005). That is a

distinction without a difference, much like arguing whether a fence keeps people in or out. It does both. It is the same with this $2,800 or ten percent of two years incarceration limit, it keeps the Attorney General from wasting expensive state resources on admittedly small recoveries, and keeps the prisoner from being impoverished by losing the small, but only, money he has to the state. The point is the fence is $2,800 tall and the Attorney General cannot hurdle it in this case. Consequently, Peterson is afforded the protective harbor the legislature carved out for him in the statute.

B. 2.) The Attorney General wants to ignore 'good cause' and proceed 'at will'.

If there is one point this Court needs to make crystal clear to the Attorney General in its forthcoming opinion, it is the meaning, standard, and nuances of 'good cause'. Maybe sincere, but nonetheless mistaken, the Attorney General in his application of the MIRA statute has mistakenly rendered 'good cause' meaningless by claiming it is not a precedent to filing, is not subject to court review, is not an affirmative defense, and may only be questioned if at all pursuant to administrative procedures under § 536.150. If that is all true, then why in the world did not the legislature use the words 'at will' instead of 'good cause'?

'Good Cause' has to mean something, and I submit it absolutely is a condition precedent to filing suit. The 'good cause' determination of § 217.831.3 is a condition precedent to the Attorney General's authority to file a MIRA suit. "[I]f the conditions precedent are not satisfied, the Attorney General has no authority or discretion to file a MIRA petition." *State ex rel. Nixon v. Koonce*, 173 S.W.3d 277, 283 (Mo. App. W.D. 2005). While the State may be technically correct that the MIRA statute itself contains no explicit provision to challenge the Attorney General's good cause determination, Missouri law is long settled regarding the enforcement of conditions precedent. A party burdened with a condition precedent "must allege and prove performance of all conditions precedent, or he must allege and prove an excuse for their nonperformance." *Hastings & Chivetta Architects v. Burch*, 794 S.W.2d 294, 296 (Mo. Ct. App. 1990).

Furthermore, the Attorney General is correct that *Koonce* and *Watson* make it clear that 'good cause' is not a proof element of the State's prima facie case under MIRA. But, what needs to be even clearer is that *Koonce* and *Watson* failed not because the Attorney General did not have to meet the condition precedent of 'good cause', just that *Koonce* and *Watson* failed to attack it in their initial response to the Show Cause Order. "As in *Koonce*, the appellant here [*Watson*] **does not attack** the validity of the State's

MIRA petition, seeking to void it, but simply claims that the trial court erred … because the State failed to establish, as a prerequisite to recovery, **as opposed to a condition precedent of the filing of the petition**, that the "good cause" requirement of § 217.831.3 was satisfied." *State ex rel. Nixon v. Watson*, 204 S.W.3d 716, (Mo. App. W.D 2006). [Emphasis added].

Peterson properly attacked the Attorney General's 'good cause' determination in his response. (L.F. 51.) *Koonce* and *Watson* absolutely allow for that. *State ex rel. Nixon v. Watson*, 204 S.W.3d 716, (Mo. App. W.D 2006).

B. 3.) The Attorney General wants to ignore his statutory duty to investigate before reaching 'good cause' to file a MIRA petition.

The Attorney General claims on page 17 of Respondent's Substitute Brief, that, "Under MIRA, the process of incarceration reimbursement begins with the Attorney General making a determination, followed by his filing a petition." No, it does not. Section 217.837. 2 states, **"**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 …"*** RSMo. § 217.837. 2 [Emphasis added]. The Attorney General is misreading the word "may" in subsection 2 as making the

investigation set forth in subsection 3 optional instead of mandatory. To fully understand the statute's meaning you have to start at the beginning of section 217.831.1, "**Director to report to attorney general on offender's assets and cost of care – attorney general's power to investigate and seek reimbursement, when. –** 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." RSMo. § 217.831.1. This provision sets up the first link in the chain, the director informs the Attorney General about every prisoner's assets and costs of incarceration.

After the information is passed to the Attorney General, "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." RSMo. § 217.831.2. Then, the Attorney General has a choice to

make, he may investigate or he may ignore the report concerning that offender. But if the Attorney General does proceed, then he must meet the criteria in subsection 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 …"*** RSMo. § 217.837. 2 [Emphasis added].

If the investigation were not a required duty, then why would the legislature go on to provide the Attorney General with all the extraordinary super snoop powers it does under § 217.839? Oddly enough, even the sentencing judge is statutorily bound to respond to the investigating Attorney General. And why would there be a 20% cost recovery provision for the Attorney General? "The costs of any investigation shall be paid from the reimbursements secured pursuant to the provisions of sections 217.825 to 217.841. The investigative costs shall be presumed to be twenty percent of the reimbursements recovered, unless the attorney general shall demonstrate to the court otherwise." RSMo. § 217.841.1

Clearly, the legislature intended that if the Attorney General decided to act on the director's information, then the Attorney General was to investigate to make his 'good cause' determination that a prisoner had enough assets to recover the minimum statutory amount.

B.4.) The Attorney General wants to ignore the hearing on the complaint and order that the statute provides prisoners.

The Attorney General argues in pages 9 through 11 of Respondent's Substitute Brief that Summary Judgment is the proper procedural mechanism for the Court to dispose of this case for various reasons. I am not convinced that is so.

First of all, the statute guarantees a hearing to the prisoner. In fact three specific references are made to the "hearing on the complaint and order." One, "The complaint and order shall be served upon the person personally … **at least thirty days before the date of hearing on the complaint and order."** RSMo. § 217.835.2. Two, **"At the time of the hearing on the complaint and order …"** RSMo. § 217.841.3. Three, **"At the hearing on the complaint and order and <u>before</u> 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 dependants and any moral obligation to support dependants to whom the defendant is providing or has in fact provided support." RSMo. § 217.841.4. [Emphasis added]. Surely "other dependants" and "dependants" would include the prisoner himself.

The legislature through this provision in the statute granted every prisoner facing a MIRA taking the right to a hearing before a Judge to explain why his/her money should not be taken away. The statute calls for a "hearing on the complaint and order" to the exclusion of summary judgment.[1] This mandate by the legislature, that every prisoner facing a MIRA taking be allowed a hearing in front of a Judge ***before*** any order issues taking his/her money, comports with the due process requirements that a meaningful opportunity to be heard be allowed before a taking occurs.

C.) The Western District just handed down an opinion in a MIRA case excluding gifts from a prisoner's stream of income.

---

[1] Worth noting is that the Attorney General filed a *Petition for Incarceration Reimbursement* (L.F. 5) when the statute clearly directs the Attorney General to file a "complaint". Since a complaint does not exist in Missouri, and petitions do (See Rule 55.01), one has to wonder if the legislature was trying to create a special judicial process unto itself and not governed by the rules of civil procedure. Surely, the legislature was well aware that all civil actions start with a petition. It could just be a matter of semantics or it could be a substantive issue. I will leave it to this Court for investigation and determination.

While not at issue in this case because the Attorney General never pled that Peterson meet the threshold amount of money that triggers 'good cause' by the 'stream of income' test, I feel it is nevertheless important to point out to this Court that the Western District handed down on January 15, 2008 in the case of *State ex rel. Nixon v. Ruby Worthy*, WD68152 an opinion that successfully challenged the Attorney General's good cause determination for the inclusion of gifts as a condition precedent to filing the MIRA petition.

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,

_____
Michael T. George, #51800
James J. Wieczorek, #53830
The Law Firm of
Michael T. George P.C.
7730 Carondelet Ave., Ste 303
St. Louis, MO 63105
Telephone 314-721-5757
Facsimile 314-721-5763
michaelgeorge@goinet.com
jimw@goinet.com
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 2008 two (2) copies of the Appellant's Substitute Brief, and an e-mail copy of the same, was sent via United States mail to:

Mr. Paul Harper
Attorney General's Office
207 W. High St.
P.O.Box 899
Jefferson City, MO 65102
Paul.Harper@ago.mo.gov

_____
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 2,929 words, according to Microsoft Word 2000, which is the word processing system used to prepare this brief and it is in Times New Roman 14 point font;
4. That the disk has been scanned for viruses and that it is virus free.

_____
Michael T. George