

**IN THE MISSOURI COURT OF APPEALS  
SOUTHERN DISTRICT**

NO. SD35495

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STATE OF MISSOURI,

Respondent

v.

GEORGE RICHEY,

Appellant

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Appeal from the Circuit Court of St. Clair County

27<sup>th</sup> Circuit

Hon. Jerry Rellihan

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**APPELLANT'S BRIEF**

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### **JURISDICTIONAL STATEMENT**

This action involves the taxation of jail debt as court costs in criminal cases, the determination of indigence in the taxation of court costs, and the interpretation of Missouri statutes governing the same. The trial court overruled Appellant's Motion to Retax Costs seeking to eliminate the jail debt assessed against Appellant in this case. Notice of appeal was timely filed after the judgment became final, in accordance with Rule 30.01 and Rule 81.04. The appeal of that judgment involves the construction of the statutes, case law, and other laws of this State. Jurisdiction is therefore appropriate in this Court pursuant to Mo. Const. Art V, § 3. Further, "[i]f a party contests a category or specific item of costs, the remedy is by motion to retax in the court of the alleged error. ... If the court denies the party's motion to retax costs, the party can then appeal such denial." *Wiley v. Daley*, 472 S.W.3d 257, 265 (Mo. App. E.D. 2015).



### **STATEMENT OF FACTS**

On April 1, 2015, Appellant pleaded guilty to the misdemeanor offense of Violation of Order of Protection and was sentenced to ninety (90) days in the county jail. (Legal File, D17). The trial court Ordered the “Board Bill of [\$]3150.00 ... to be paid by 12/31/2015.” (Legal File, D17). The circuit clerk thereafter prepared a “fee report” and taxed as costs the jail “Board Bill” in the amount of \$3,150.00. (Legal File, D64, p. 1). An additional “Board Bill” in the amount of \$2,275.00 was later assessed in connection with time spent in custody on a failure to pay warrant resulting from Appellant’s inability to pay the initial “Board Bill.” (Legal File, D64, p. 1). The total amount taxed as costs in this case was \$5,541.50 and is as follows:

1. LET-County \$2.00;
2. Dom Viol-Crim/County Ordinance \$0.00;
3. Inmate Pris Detainee Security \$2.00;
4. Misdemeanor Costs w/ SRF \$102.50;
5. CVC - \$10.00;
6. Board Bill – Deft \$3,150.00; and
7. Board Bill – Deft \$2,275.00

(Legal File, D64, p. 1)

The trial court has scheduled this case for a Payment Review Hearing approximately every month since Appellant was sentenced on April 1, 2015. (Legal File, D1). Appellant spent approximately two months in custody for failing to pay the initial “Board Bill” in this matter and was released on April 6, 2016.

(Legal File, D26). On March 10, 2016, Appellant send to the trial court a letter pleading to be released from custody. (Legal File, D24, p. 1). After being released from custody on April 6, 2016, Appellant has been required to appear in court for Payment Review Hearings approximately once every month. On May 17, 2016, Appellant “phone[d] court [and] is talking to bank about a loan to pay costs.” (Legal File, D1, p. 14). On August 17, 2016, Appellant appeared at the scheduled Payment Review Hearing and requested “smaller payments.” (Legal File, D1, p. 15). On February 21, 2017, a letter was filed with the trial court by the Department of Veterans Affairs indicating that Appellant “is currently under my medical care for treatment of his medical condition.” (Legal File, D42, p. 1). And at no time has the trial court determined whether Appellant was unable to pay the costs.

The circuit clerk has not reported this jail “Board Bill” debt to the Office of State Courts Administrator, nor is there any evidence that the Office of State Courts Administrator has initiated collection efforts with regard to the jail debt in this case by notifying either the Department of Revenue or the State Lottery Commission. Instead, the trial court is attempting to collect this debt directly by scheduling this case (and other similar cases) for Payment Review Hearings and then potentially issuing warrants for the arrest of anyone who fails to pay as scheduled or fails to appear as required. Appellant is indigent and is represented by the Missouri Public Defender. (Legal File, D7).

Appellant contends that this “debt” cannot be collected by the trial court and/or taxed as “costs” against Appellant but must instead be referred to the Office of State Courts Administrator for collection by the circuit clerk. Appellant further contends that he is not responsible for the costs since he is indigent and therefore unable to pay the costs. Appellant ultimately seeks a refund of the amount of court costs which he has overpaid and/or erroneously paid in this case. (Legal File, D64, p 2).

**POINTS RELIED ON**

- I. The Trial Court erred in overruling Appellant's Motion to Retax Costs, because jail debt is not authorized by statute to be taxed as costs, in that the court did not comply with Mo. Rev. Stat. § 221.070.2 & § 488.5028 in referring this debt to the office of state courts administrator for collection**

*State ex rel. Merrell v. Carter*, 518 S.W.3d 798 (Mo. 2017)  
 Mo. Rev. Stat. § 221.070  
 Mo. Rev. Stat. § 488.5028  
 Mo. Const. art. I, § 11

- II. The Trial Court erred in overruling Appellant's Motion to Retax Costs, because Appellant is not responsible for the costs, in that the court did not comply with Mo. Rev. Stat. § 550.030 in determining whether Appellant is unable to pay the costs due to his indigent status**

*Spencer v. Basinger*, 562 S.W.2d 350 (Mo. banc 1978)  
*State ex rel. Coats v. Lewis*, 689 S.W.2d 800 (Mo. App. W.D. 1985)  
 Mo. Rev. Stat. § 550.010  
 Mo. Rev. Stat. § 550.030

**III. The Trial Court erred in overruling Appellant's Motion to Retax Costs, because the jail debt amount was incorrectly calculated, in that Appellant was not found guilty of any offense for the time spent in custody after the sentence and judgment were entered in this case**

Mo. Rev. Stat. § 221.070

Mo. Rev. Stat. § 550.010

## **SUMMARY OF THE ARGUMENT**

The issue presented in this case is whether counties can tax against an indigent defendant the fees for the cost of incarceration at the conclusion of a criminal case.

Only in rural counties is this issue even present. In relatively populous counties this issue is nonexistent. The counties that engage in this practice schedule either “payment review hearings” or “show cause hearings” at the conclusion of a misdemeanor case involving a jail fee.

At many of these hearings, the defendant is arrested and subject to additional imprisonment in the county jail, after which an additional jail fee is assessed. (Appendix, A63-A79). And the trial court never makes a determination as to whether the defendant – most of whom are represented by the Missouri Public Defender – is unable to pay the costs, as required by statute. (Appendix, A50-A79).

This brief submits that this entire practice is unlawful and must cease forthwith by order of this Court.

## **ARGUMENT**

- I. The Trial Court erred in overruling Appellant's Motion to Retax Costs, because jail debt is not authorized by statute to be taxed as costs, in that the court did not comply with Mo. Rev. Stat. § 221.070.2 & § 488.5028 in referring this debt to the office of state courts administrator for collection**

### **Standard of Review**

This case is before this Court on an appeal from the trial court's judgment overruling Appellant's Motion to Retax Costs. Such an appeal is authorized under Mo. Rev. Stat. § 512.020 as a special order after final judgment and is cognizable in criminal cases. *State v. Norman*, 371 S.W.2d 41, 42 (Mo. App. 1963) (vacated on other grounds in *State v. Norman*, 380 S.W.2d 406 (Mo. banc 1964)). See also *State v. Cox*, 639 S.W.2d 425, 427 (Mo. App. W.D. 1982). Further, "the law permits the motion to retax to be filed at any time." *Harrison v. Volkswagen*, ED105516 (February 27, 2018).

Mo. Rev. Stat. § 514.270 states, "Any person aggrieved by the taxation of a bill of costs may, upon application, have the same retaxed by the court in which the action or proceeding was had, and in such retaxation all errors shall be corrected by the court; and if the party aggrieved shall have paid any unlawful charge, by reason of the first taxation, the clerk shall pay the costs of retaxation, and also to the party

aggrieved the amount which he may have paid by reason of the allowing of such unlawful charge.”

“Statutes passed by the legislature are expressions of public policy. The clear intent of the General Assembly expressed in § 514.270 is to enable citizens to challenge unauthorized court costs and obtain a refund.” *Wiley v. Daley*, 472 S.W.3d 257, 263 (Mo. App. E.D. 2015). “In applying § 514.270, Missouri courts have long recognized that where a party complains that the judgment taxing the costs is wrong, for any reason, he must, to obtain relief, lodge his complaint with the court rendering such judgment. If a party contests a category or specific item of costs, the remedy is by motion to retax in the court of the alleged error. ... If the court denies the party’s motion to retax costs, the party can then appeal such denial.” *Id.* at 265. Further, “[p]ayment of costs ... does not signify ... a waiver of the right to appeal.” *In re J.P.*, 947 S.W.2d 442, 445 (Mo. App. W.D. 1997).

The only issues in this case are legal issues, and they involve the interpretation of various statutes related to the collection and enforcement of jail debt incurred pursuant to Mo. Rev. Stat. § 221.070. “Statutory construction ... is an issue of law that we review de novo.” *Investors Alliance, LLC v. Bordeaux*, 428 S.W.3d 693, 695 (Mo. App. E.D. 2014).



### **Analysis**

In its Order and Judgment dated May 2, 2018, the trial court overruled Appellant's Motion to Retax Costs. (Legal File, D58). The Fee Sheet prepared in this case clearly shows that major item left to be paid in court costs is the jail fee in the amount of \$3,931.50. (Legal File, D64, p. 1). The total amount taxed as court costs in this case was \$5,541.50.<sup>1</sup> (Legal File, D64, p. 1). Appellant has made several payments toward the items taxed as costs in this cause over the course of approximately two years. (Legal File, D64, p. 2). These payments were credited to the total amount taxed as costs, and has reduced the total amount to \$3,941.50. (Legal File, D64, p. 1).

#### **A. Costs were not Correctly Assessed**

"Costs are a creature of statute, and courts have no inherent power to award costs, which can only be granted by virtue of express statutory authority." *State ex rel. Merrell v. Carter*, 518 S.W.3d 798, 800 (Mo. banc 2017). Statutes allowing the taxation of costs are strictly construed. *Id.* "If a judgment awards costs ... in a manner that is inconsistent with the law, it is axiomatic that the trial court has

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<sup>1</sup> This amount exceeds the maximum fine allowable for such offense, pursuant to Mo. Rev. Stat. § 558.002.1(2). See, e.g., *Tillman v. Lebanon Cnty. Corr. Facility*, 221 F.3d 410, 420-21 (3d. Cir. 2000).

abused its discretion.” *Riggs v. State Dep’t of Soc. Servs.*, 473 S.W.3d 177, 182 (Mo. App. W.D. 2015).

In this case, the trial court taxed the following items as costs against Appellant:

1. “LET-County”	\$2.00
2. “Dom Viol-Crim/County Ordinance”	\$0.00
3. “Inmate Pris Detainee Security”	\$2.00
4. “Misdemeanor Costs w/SRF”	\$102.50
5. “CVC”	\$10.00
6. “Board Bill – Deft”	\$3,150.00
7. “Board Bill – Deft”	\$2,275.00

The “LET-County” fund is authorized by Mo. Rev. Stat. § 488.5336 (“[a] surcharge of two dollars may be assessed as costs in each criminal case involving ... a violation of any criminal or traffic laws of the state”); misdemeanor costs and the “SRF” fund are authorized by Mo. Rev. Stat. § 488.012 and Mo. Rev. Stat. §488.024 (“there shall be assessed and collected a surcharge of three dollars in all ... criminal cases including violation of any county ordinance or any violation of criminal or traffic laws of this state”); the Crime Victims’ Compensation Fund (CVC) is authorized by Mo. Rev. Stat. § 595.045.1 (“a surcharge ... shall be assessed as costs ... in all criminal cases”); the Inmate Prisoner Detainee Security fund is authorized by Mo. Rev. Stat. § 488.5026 (“a surcharge of two dollars shall be assessed as costs in each court proceeding ... in all criminal cases”); and the

Domestic Violence fund is authorized by Mo. Rev. Stat. § 488.607 (“[t]he governing body of any county ... may, by order or ordinance provide for an additional surcharge in an amount of up to four dollars per case for each criminal case.”) (Legal File, D64).

The legislature, however, has not provided specific statutory authority allowing recovery of the jail debt as costs in a criminal case against the defendant. Mo. Rev. Stat. § 221.070 states that a person is liable for the cost of his imprisonment, but there is no authority in this statute for the assessment of costs. Rather, the “circuit clerk shall report to the office of state courts administrator ... the amount the debtor owes to the county jail.” Mo. Rev. Stat. § 221.070.2. This “debt” is then collected by the office of state courts administrator (OSCA), pursuant to the procedures established in Mo. Rev. Stat. § 488.5028.

The absence of any language in Mo. Rev. Stat. § 221.070 permitting the taxation of costs is important and central to the issues in this case. See, e.g., *State v. D.S.*, 606 S.W.2d 653, 654-55 (Mo. banc 1980), distinguishing between Mo. Rev. Stat. § 552.080, which “expressly provides for the court to ‘tax as costs’ the expenses ... of psychiatric examinations,” and Mo. Rev. Stat. § 211.161, which “does not provide for the expenses to be taxed as costs,” even though provision for liability is made.

Another example can be found in *State v. Green*, 470 S.W.2d 571 (Mo. banc 1971), in which the Court held that the expenses of state public defenders cannot be taxed as criminal costs, even though the defendant is liable for such services in accordance with Mo. Rev. Stat. § 600.090.2.

A final example can be found in Mo. Rev. Stat. § 221.120.1, which states in pertinent part that “[t]he costs of such medicine, dental care, or medical attention shall be paid by the prisoner through any health insurance policy. ... If the prisoner is not eligible for such health insurance benefits then the prisoner shall be liable for the payment of such medical attention, dental care, or medicine, and the assets of such prisoner may be subject to levy and execution under court order to satisfy such expenses in accordance with the provisions of section 221.070, and any other applicable law.” Importantly, although the defendant is liable for the cost of “medical attention” while in jail, there is no provision in this statute for the taxation of costs, and in fact reference is made to “section 221.070” with regard to enforcement of this liability, which further supports Appellant’s claim in this case that the jail debt incurred pursuant to Mo. Rev. Stat. § 221.070 also cannot be taxed as costs.<sup>2</sup>

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<sup>2</sup> Another important point is that Mo. Rev. Stat. § 221.122 explicitly permits making the repayment of medical care a condition of “probation, parole or conditional release,” while no similar provision is made with regard to the repayment of the jail debt under Mo. Rev. Stat. § 221.070.

It is important to note also that Mo. Rev. Stat. § 221.120 previously provided for the taxation of costs of medical attention in stating that “necessary medicine or medical attention, shall be taxed and paid as other costs in criminal cases.” Mo. Rev. Stat. § 221.120 (1949). This statute, of course, has since been amended, and eliminated the language providing for the taxation of costs of “necessary ... medical attention.”

“[N]o item is taxable as costs unless specifically so provided by statute.” *McClue v. Epstein*, 492 S.W.2d 97, 98 (Mo. App. 1973). It is clear from the language of Mo. Rev. Stat. § 221.070.2, that no provision is made allowing for jail debt to be taxed as costs, but rather provides that such “debt” is to be sent to the office of state courts administrator (OSCA) for collection. The “provisions of the written law relating to costs must be strictly construed – i.e., by their letter. They cannot be aided by liberal construction or helped by equitable intendments or implications. Strict construction recognizes nothing that is not expressed.” *McClue*, 492, S.W.2d at 98. “Nor is there any power to tax unless a finger can be put upon a statute permitting it.” *Jacoby v. Missouri Valley Drain Dist.*, 163 S.W.2d 930, 931 (Mo. banc 1942). And since these statutes are “penal in their nature,” and must therefore be strictly construed against assessment, the taxation of costs in close cases must be found not to exist. *Cramer v. Smith*, 168 S.W.2d 1039, 1040 (Mo. banc 1943).

**B. Debt is treated differently from Costs, Fines, Fees, or other Sums**

Mo. Rev. Stat. § 221.070 clearly refers to this as a “debt” rather than a fine, fee, or other sum ordered by the court. Indeed, the section heading of this statute makes clear that this debt is something for which the person is “liable” -- **“221.070. Prisoners liable for cost of imprisonment — certification of outstanding debt.”** The legislature is presumed to be “obviously aware” of the terms it uses in statutes. *State ex rel. Judges for 22<sup>nd</sup> Judicial Circuit of State v. City of St. Louis*, 619 S.W.2d 330, 332 (Mo. App. E.D. 1981).

“Under the common meaning of debt, when someone owes money to another person or entity, it is understood that the person owes a debt to that person or entity.” *In re Estate of Downs*, 300 S.W.3d 242, 246 (Mo. App. W.D. 2009). “[D]ebt: 1. Liability on a claim; a specific sum of money due by agreement or otherwise.” *Black’s Law Dictionary* (West Group 1999). In this case, Appellant owes a debt to the sheriff of the county jail, pursuant to Mo. Rev. Stat. § 221.070.

Liability for a “debt” (and collection efforts in connection with that debt) is separate and distinct from the imposition of a “fine” or “fee” (and the enforcement of that fine or fee by the court). For example, while Courts are authorized to collect and enforce the imposition of fines, fees, and costs, there is no authority that enables courts to collect “debt” directly on behalf of creditors.

Moreover, since this is clearly designated as a “debt” by statute, rather than a “fine” or “fee,” any attempt at collection of this debt by reference to the contempt power and/or arrest would violate Mo. Const. Art I, § 11. By its very terms, this is not true with respect to the enforcement of a fine or fee, which provides “[t]hat no person shall be imprisoned for debt, except for nonpayment of fines and penalties imposed by law.”

In this case, Appellant was arrested and jailed on February 2, 2016, in connection with a scheduled “Payment Review Hearing” for the payment of the jail debt taxed as costs in this cause. (Legal File, D20). Appellant spent approximately two months in jail in connection with this failure to pay warrant, after which he was assessed an additional jail fee for the time spent in custody on this warrant, despite never being found guilty of any new offense. (Legal File, D64).

In addition, since 1945 “county officers [including the sheriff] involved in the criminal process [have been] prohibited from being compensated on the basis of fees collected and [are] required to be paid for services rendered only by salaries,” pursuant to Mo. Const. Art. VI, § 13. Pener, *The Missouri Criminal Costs System Re-Examined*, 46 UMKC L. Rev. 1, 2, n. 2 (1977). The services of various officers (including the sheriff) used to be paid by the fees assessed in criminal cases. This was changed with the passage of Mo. Const. Art. VI, § 13.

Finally, although not at issue in this case, Mo. Rev. Stat. § 221.070 permits collection of this debt by execution (in addition to certification of the debt to the “clerk of the court in which the case was determined”). A common remedy to enforce a judgment “ordering a person to pay its *debt* is by execution” (emphasis added). *In Re Estate of Downs*, 300 S.W.3d at 246.

In the event the debt is certified to the “clerk of the court in which the case was determined,” which is the case here, rather than enforced by execution, Mo. Rev. Stat. § 488.5028.1 specifically and exclusively provides for the collection of this debt, which states that “[t]he office of state courts administrator also *shall* seek a setoff of any income tax refund and lottery prize payouts made to a person whose name has been reported to the office as being *delinquent* pursuant to section 221.070” (emphasis added).

Delinquency is determined by whether the person “has not paid all money owed to the county jail upon release from custody and has failed to enter into or honor an *agreement with the sheriff* to make payments toward such debt according to a repayment plan” (emphasis added). Mo. Rev. Stat. § 221.070.2. For example, “[i]f the person subsequently satisfies the debt to the county jail or begins making regular payments in accordance with an agreement entered into with the sheriff, the sheriff shall notify the circuit clerk who then shall notify the state courts



administrator that the person shall no longer be considered delinquent.” Mo. Rev. Stat. § 221.070.2.

Appellant has not entered into any agreement with the sheriff. He is therefore delinquent, pursuant to Mo. Rev. Stat. § 221.070. This *requires* referral by the circuit clerk to OSCA of the amount the debtor owes to the county jail, which then triggers OSCA’s obligation to initiate collection efforts according to the procedures under Mo. Rev. Stat. § 488.5028. The provisions of Mo. Rev. Stat. § 221.070 therefore make clear that the costs of imprisonment incurred under this statute are deemed a personal debt against the sheriff and the sheriff in the first instance enforces this debt either by execution or by certification to the circuit clerk.

Importantly, this is contrasted with an earlier provision in Mo. Rev. Stat. § 488.5028.1, which states that “[i]f a person fails to pay court costs, fines, fees, or other sums ordered by a court, ... a court *may* report any such delinquencies in excess of twenty-five dollars to the office of state courts administrator and request that the state courts administrator seek a setoff of an income tax refund” (emphasis added). Mo. Rev. Stat. § 488.5028.1.

This distinction between debt incurred “pursuant to section 221.070,” on the one hand, and all other “court costs, fines, fees, or other sums,” on the other, is significant and must be given meaning.

“Every word, clause, sentence and section of a statute should be given meaning, and under the rules of statutory construction statutes should not be interpreted in a way that would render some of their phrases to be mere surplusage.” *State v. Graham*, 149 S.W.3d 465, 467 (Mo. App. E.D. 2004). Further, “[n]o portion of a statute is read in isolation, but rather is read in context to the entire statute, harmonizing all provisions.” *Utility Serv. Co., Inc. v. Dep’t of Labor and Indus. Relations*, 331 S.W.3d 654, 658 (Mo. banc 2011).

Accordingly, these two provisions, when read together, clearly indicate that debt incurred “pursuant to section 221.070” *shall* be collected only by seeking “a setoff of any income tax refund and lottery prize payouts made to a person whose name has been reported to the office as being delinquent pursuant to section 221.070.” In the case of all other “court costs, fines, fees, or other sums ordered by a court,” Mo. Rev. Stat. § 488.5028 provides for the option that the court *may* (but need not) report any such delinquencies to the office of state courts administrator for the purpose of seeking a setoff of an income tax refund. With regard to jail debt pursuant to section 221.070, however, this is not optional, but *mandatory*, provided that the “debtor” is considered “delinquent.”

In *Collier v. Roth*, 468 S.W.2d 57, 59 (Mo. App. 1971), the Court observed, in referring to a statute that contained the words ‘may’ and ‘shall,’ that such a statute “brings to mind the statutory construction rule that if both permissive and mandatory verbs are used in the same statute, it is a fair inference that the legislature realized the difference in meaning, and intended that the verbs used should carry with them their ordinary meanings” (internal quotations omitted).

Mo. Rev. Stat. § 488.5028.1 is therefore best read as follows:

“[1] **If a person fails to pay court costs, fines, fees, or other sums ordered by a court, to be paid to the state or political subdivision, a court may report any such delinquencies in excess of twenty-five dollars to the office of state courts administrator and request that the state courts administrator seek a setoff of an income tax refund.**

The state courts administrator shall set guidelines necessary to effectuate the purpose of the offset program. [OR 2] **The office of state courts administrator also shall seek a setoff of any income tax refund and lottery prize payouts made to a person whose name has**

**been reported to the office as being delinquent pursuant to section 221.070.”<sup>3</sup>**

In order for the office of state courts administrator to be able to seek a setoff of any income tax refund and lottery prize payouts made to a person whose name has been reported to the office as being delinquent pursuant to section 221.070, that debt must first be reported to the office of state courts administrator by the circuit clerk of the county in which the criminal cause was determined. Mo. Rev. Stat. § 221.070.2. That was not done in this case. Instead, the trial court has for the last three years attempted to collect the debt incurred “pursuant to section 221.070” directly by scheduling payment review hearings for the Appellant. This is in violation of Mo. Rev. Stat. § 221.070.2, which requires that the “circuit clerk *shall* report to the office of state courts administrator ... the amount the debtor owes to the county jail” (emphasis added).

Only once this is done can the office of state courts administrator then comply with their statutory obligation in attempting to collect this debt according

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<sup>3</sup> “Where the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea.” A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* (2012), p. 170. Further, “[i]f a provision is susceptible of (1) a meaning that gives it an effect already achieved by another provision, or that deprives another provision of all independent effect, and (2) another meaning that leaves both provisions with some independent operation, the latter should be preferred.” *Id.* at 176.

to the procedures in Mo. Rev. Stat. § 488.5028. Much like in the case of revoking driving privileges when the accumulation of points meets the statutory amount, the statute in this case gives the clerk “no discretion” in reporting this debt to the office of state courts administrator upon certification of the debt by the sheriff. See, e.g., *Brown v. Dir. of Revenue*, 97 S.W.3d 82, 84 (Mo. App. S.D. 2002).

Another important distinction between the collection of jail debt “pursuant to section 221.070,” on the one hand, and the collection of “court costs, fines, fees, or other sums,” on the other, can be found in Mo. Rev. Stat. § 488.5029, which provides for the suspension of “hunting and fishing licenses” only with regard to delinquent debt “in the payment of money to a county jail under section 221.070.” By its very terms, this section does *not* apply to all other “court costs, fines, fees, or other sums.”

Again, however, for this section actually to be utilized by the office of state courts administrator, the clerk must first report this debt as required by Mo. Rev. Stat. § 221.070.2.

This Court must reverse the trial court’s judgment with instructions for the circuit clerk to report this debt to the office of state courts administrator and to refund Appellant all monies erroneously paid to the court.

**II. The trial court erred in overruling Appellant’s Motion to Retax Costs, because Appellant is not responsible for the costs, in that the court did not comply with Mo. Rev. Stat. § 550.030 in Determining whether Appellant is unable to pay the costs due to his indigent status**

**Standard of Review**

In determining whether a person is unable to pay the costs, the trial court must adopt a procedure that is “fair” and “permits the judge to make a determination based upon material in the record and subject to review.” *State ex rel. Coats v. Lewis*, 689 S.W.2d 800, 807 (Mo. App. W.D. 1985).

Further, the record must reflect such an inquiry by the court before costs can be assessed against an accused, and difficulty will arise where the trial judge, as in this case, summarily assesses costs against an accused despite the perfectly adequate record of indigent status by virtue of representation by the Missouri Public Defender. *Id.*

A prima facie showing of inability to pay costs has been made if the defendant is unable to retain counsel and has been permitted to proceed in forma pauperis. *Spencer v. Basinger*, 562 S.W.2d 350, 353 (Mo. banc 1978).

### Analysis

Missouri law sets out a process that courts must follow before a criminal defendant is assessed costs in the case. This process includes a judicial determination regarding ability to pay *at the time of sentencing*. The trial court in this case did not follow the procedure mandated by the General Assembly in Mo. Rev. Stat. § 550.030.

Mo. Rev. Stat. § 550.030 plainly states that all “costs” of the criminal case, except those incurred on the part of the defendant, *shall be taxed against the county*, provided that the defendant (1) is “sentenced to imprisonment in the county jail” and (2) “is unable to pay the costs.” If these two things are true, then the county “shall pay the costs, except such as were incurred on the part of the defendant.”<sup>4</sup>

(1) Appellant in this case was sentenced to imprisonment in the county jail to a term of ninety days. (Legal File, D17). To be sure, there are some cases where the defendant is *not* sentenced to imprisonment in the county jail, in which case Mo. Rev. Stat. § 550.030 would not apply. One such example can be found in

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<sup>4</sup> A similar rule is provided in municipal ordinance violation cases and states: “[i]n the event a defendant pleads guilty or is found guilty, the judge shall assess costs against the defendant except in those cases where the defendant is found by the judge to be indigent and unable to pay the costs.” Mo. Rev. Stat. § 479.260.2.

*State v. Cox*, 639 S.W.2d 425, 430 n. 2 (Mo. App. W.D. 1982), in which the court observed that “on a careful reading of these statutory sections ... it is clear that neither section is applicable in this case. Section 550.020 applies only to capital cases and to all cases where the defendant is sentenced to imprisonment in the penitentiary. Section 550.030 applies only where the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both. Neither circumstance is present here, where defendant was charged only with a misdemeanor and was neither sentenced nor fined.”

However, since in this case Appellant was sentenced to imprisonment in the county jail, then the county must pay the costs, except those incurred on the part of the defendant, provided the defendant “is unable to pay the costs.” This takes us to the second step of the inquiry.

(2) Although the trial court did not specifically find that the defendant “is unable to pay the costs,” as provided in Mo. Rev. Stat. § 550.030, it has been held previously that this is established “on conviction of an *indigent* defendant.” *Cramer v. Smith*, 168 S.W.2d 1039, 1040 (Mo. banc 1943) (emphasis added). See also *Spencer v. Basinger*, 562 S.W.2d 350, 353 (Mo. banc 1978), holding that “a prima facie showing of indigency [with regard to costs] has been made ... [since defendant] was unable to retain counsel and has been allowed to proceed before



this court in forma pauperis.” See also *State ex rel. Simms v. Carpenter*, 51 Mo. 555 (Mo. 1873), assessing costs against the county *because* the defendant was “insolvent” or otherwise unable to pay the costs. “The burden of costs may fall upon either the state or the county when a party unable himself to pay the costs is convicted.” *Criminal Costs Assessment in Missouri – Without Rhyme or Reason*, 1962 WASH. UNIV. L. REV. 076, 82 (1962).

Appellant in this case is indigent and is represented by the Missouri Public Defender. (Legal File, D7). Further, this Court has permitted this appeal to proceed in forma pauperis. (Legal File, D60).

The Missouri Supreme Court also recently approved Model Local Rule 69.01 for determining indigent status in municipal division cases. Under this rule, a person is presumed indigent if the person “[h]as unencumbered assets totaling under \$500, and ... [h]as total household monthly income below 125% of Federal Poverty Guidelines.”<sup>5</sup>

Missouri is not the only state in which a defendant is determined to be unable to pay the costs by virtue of his indigent status. In Alabama, for example, there is also a “presumption of indigence” for defendants whose income is at or

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<sup>5</sup> The Federal Poverty Guidelines for a one person household’s monthly income is currently \$1,237.00.

below 125 percent of the federal poverty level. And states like Colorado and Rhode Island require ability-to-pay hearings *at the time of sentencing* with “pre-established standards” to determine indigence. See Alexandra Bastien, *Ending the Debt Trap: Strategies to Stop the Abuse of Court-Imposed Fines and Fees*, pp. 8, 10, Policy Link (March 2017). See also, e.g., RI Gen. L § 12-21-20(d) (2013). Ms. Bastien writes that “[t]his policy was designed to make clear that unpaid debt from impoverished individuals is not the same as ‘willful’ nonpayment worthy of punishment.” *Id.*

The evidence before this Court, therefore, is sufficient to establish, as a matter of law, that Appellant is indigent such that she is unable to pay the costs in this matter, pursuant to Mo. Rev. Stat. § 550.030.<sup>6</sup>

Alternatively, and in lieu of a “presumption of indigence,” Missouri courts have also held that “[i]n passing on the ability to pay costs ... and the right of a party to be exempted therefrom, the court must look to the facts as a whole in the light of the objects intended to be accomplished.” *In re Adoption of J.P.S. and M.E.S. v. J.E.S.*, 876 S.W.2d 762, 769 (Mo. App. S.D. 1994) (internal quotations omitted). For example, “if a laborer was barely earning the necessities of life for

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<sup>6</sup> In his article entitled, *The Missouri Criminal Costs System Re-Examined*, 46 UMKC L. Rev. 1, 4-5 (1977), Harry Pender deliberately uses the phrase “unable to pay the costs” synonymously with “indigent.”

himself and family, ordinarily he should not be required to mortgage his hand tools or household furniture to raise funds to pay the court costs. On the other hand, if a party ... is earning a substantial income, although he is expending it as rapidly as it comes in, or if he owns ... valuable property ... which he could mortgage or otherwise dispose of and thereby secure the necessary funds without depriving himself and his family of the necessities of life, he should be required to pay the costs..." *Id.* at 769-770.

In this case, Appellant completed an Application and Affidavit for Public Defender Services and qualified as indigent for purposes of representation by the Missouri Public Defender. (Appendix, A48-A49). Appellant in his Application reports that he is not employed, that his total monthly income is "[§]630.00/mo.," and that he has \$50.00 in his savings account. This information is consistent with his statements in a letter filed with the trial court on March 10, 2016. (Legal File, D24, p. 1). This information is also consistent with another Application and Affidavit for Public Defender Services that was filed with the court in response to the failure to pay warrant served on Appellant on February 2, 2016. (Legal File, D25). Further, at no time did the trial court find that the defendant is *not* indigent, pursuant to Mo. Rev. Stat. § 600.086.3.

It was therefore uncontested that Appellant was indigent at the time costs were assessed in this case. Appellant also meets the criteria for indigence under

the Guidelines for the Determination of Indigence as promulgated by the Public Defender Commission, pursuant to 18 CSR 10-3.010(3)(A).

The trial court therefore clearly erred in this case in ordering Appellant to pay the costs without first determining whether Appellant (an indigent defendant) is unable to pay the costs, pursuant to Mo. Rev. Stat. § 550.030. This action by the trial court is inconsistent with the plain language of the statute and is impermissible under the law.

Further, any such procedure for making this determination must permit the “making of [a] complete record in an orderly fashion as suggested by the federal decisions.” *State ex rel. Coats v. Lewis*, 689 S.W.2d 800, 806 (Mo. App. W.D. 1985). The trial court has the authority and discretion to hold an evidentiary hearing to determine an individual’s status as an indigent. *Id.* The trial court can also base its determination on the Application and Affidavit for Public Defender Services. *Id.* at 807.

Accordingly, Appellant submits that this case must be remanded for reconsideration of Appellant’s financial condition in determining whether Appellant should be ordered to pay the costs, pursuant to Mo. Rev. Stat. § 550.030.

The only exception to this rule requiring the county to pay the costs is when costs are “incurred on part of the defendant.” Mo. Rev. Stat. § 550.030. This

provision “has long been a part of our statutory law, [and] it constitutes a clear injunction that no costs incurred on behalf of a defendant, indigent or not, are to be paid by the county.” *State v. Aubuchon*, 381 S.W.2d 807, 812 (Mo. 1964). A good example of such costs is the taking of depositions by the defendant. *Id.*

As the record in this case demonstrates, no costs were incurred on behalf of Appellant in this case, except fees for the cost of incarceration, which in this case are properly chargeable to the county, pursuant to Mo. Rev. Stat. § 550.010, and which provides that “[w]henver any person shall be convicted of any crime or misdemeanor he shall be adjudged to pay the costs, and no costs incurred on his part, *except fees for the cost of incarceration*, including a reasonable sum to cover occupancy costs, shall be paid by the state or county” (emphasis added).<sup>7</sup>

In other words, the “fees for the cost of incarceration” of an indigent defendant are paid by either the state or county, depending on whether the person “shall be sentenced to imprisonment in the penitentiary.” Mo. Rev. Stat. § 550.020. Since Appellant was convicted and sentenced to imprisonment in the

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<sup>7</sup> Harry Pender writes that “the only cost incurred on behalf of a convicted defendant which either the county or state can be required to pay, is the cost of board.” Pender, *The Missouri Criminal Costs System Re-Examined*, 46 UMKC L. Rev. 1, 52 (1977).

county jail, rather than imprisonment in the penitentiary, the county must pay the “fees for the cost of incarceration,” pursuant to Mo. Rev. Stat. § 550.030.<sup>8</sup>

The fact that this is not the practice or custom of St. Clair County is not a basis for violation of Mo. Rev. Stat. Chapter 550.030. “Where established customs and practices are challenged and found to run counter to plain and unambiguous language of controlling regulatory statutes such customs and practices must give way to the law, which this Court must declare as it is and not as some would prefer that it had been written.” *State ex inf. Ashcroft v. Riley*, 590 S.W.2d 903, 907 (Mo. banc 1980). For example, the trial court does not routinely hold hearings or make judicial determinations regarding a defendant’s ability to pay court costs, in violation of Mo. Rev. Stat. § 550.030. (Appendix, A50-A62). Rather, the trial court’s focus appears to be on extracting the most money possible from criminal defendants. Moreover, the trial court’s practice of assessing additional jail fees for time spent in jail on failure to pay warrants helps to ensure that there is effectively no end to these judicial proceedings for indigent defendants. There is thus a

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<sup>8</sup> See also Mo. Rev. Stat. § 205.580, which provides, “**205.580. County to support poor.** — Poor persons shall be *relieved*, maintained and supported by the county of which they are inhabitants” (emphasis added). At the time this case was pending, Appellant resided in Appleton City, Missouri, which is in St. Clair County. (Legal File, D25).

disconnect between the requirements of state law and the actual practice of the St. Clair County circuit court when it comes to assessing costs in criminal cases.

To date, Appellant has paid \$1,600.00 toward costs in this matter over the course of approximately two (2) years. (Legal File, D64, p. 2). Subtracting the jail fee from the amount of costs assessed in this matter leaves the total amount at \$116.50. Therefore, Appellant is entitled to receive at least \$1,483.50 as a refund in this matter from the St. Clair County circuit clerk, pursuant to Mo. Rev. Stat. § 514.270, since there is no express statutory provision permitting the jail fee to be taxed as costs against an accused. Further, if this Court finds that Mo. Rev. Stat. § 550.030 also applies, such that Appellant is unable to pay the costs due to his indigent status, then Appellant should be refunded the entire \$1,600.00.

Additionally, the trial court should cease scheduling this matter (and other similar cases) for payment review hearings in cases that involve jail debt. The St. Clair County Circuit Court must comply with Mo. Rev. Stat. § 221.070.2 and Mo. Rev. Stat. § 488.5028, and refer these cases to the office of state courts administrator, in attempting to collect the debt incurred pursuant to Mo. Rev. Stat. § 221.070.

Respondent may argue that this result is unfair – that St. Clair County, like many other counties, is “strapped for money to meet their obligations,” which was

something observed by Judge Wolff in his concurring opinion in *Missouri Prosecuting Attorneys v. Barton County*, 311 S.W.3d 737, 748 (Mo. banc 2010). However, the issue of whether the county should be required to pay the fees for the cost of incarceration of an indigent defendant “is one of policy that has been determined by the legislature.” *Hagan v. Director of Revenue*, 968 S.W.2d 704, 706 (Mo. banc 1998).

Missouri courts have long and consistently recognized that questions regarding the wisdom or propriety of certain legislation are matters for the legislature alone, and that a legislative act should not be held invalid merely because of the possible harshness of some of its provisions in some circumstances. *Spitcaufsky v. Hatten*, 182 S.W.2d 86 (Mo. 1944). It is axiomatic that the courts are “obligated to enforce the law as duly enacted by the legislature.” *State ex rel. Koster v. Cowin*, 390 S.W.3d 239, 245 (Mo. App. W.D. 2013). Further, “[w]here the statutory language is clear, the matter of reasonableness is for the legislature.” *Messer v. King*, 698 S.W.2d 324, 325 (Mo. banc 1985). Here, the language is clear.

Accordingly, this Court must reverse the trial court’s judgment with instructions for the trial court to make a judicial determination regarding Appellant’s present ability to pay the costs in this matter, pursuant to Mo. Rev. Stat. § 550.030.



**III. The Trial Court erred in overruling Appellant's Motion to Retax Costs, because the jail debt amount was incorrectly calculated, in that Appellant was not found guilty of any offense for the time spent in custody after the sentence and judgment were entered in this case**

**Standard of Review**

This case is before this Court on an appeal from the trial court's judgment overruling Appellant's Motion to Retax Costs. Such an appeal is authorized under Mo. Rev. Stat. § 512.020 as a special order after final judgment and is cognizable in criminal cases. *State v. Norman*, 371 S.W.2d 41, 42 (Mo. App. 1963) (vacated on other grounds in *State v. Norman*, 380 S.W.2d 406 (Mo. banc 1964)). See also *State v. Cox*, 639 S.W.2d 425, 427 (Mo. App. W.D. 1982). Further, "the law permits the motion to retax to be filed at any time." *Harrison v. Volkswagen*, ED105516 (February 27, 2018).

Mo. Rev. Stat. § 514.270 states, "Any person aggrieved by the taxation of a bill of costs may, upon application, have the same retaxed by the court in which the action or proceeding was had, and in such retaxation all errors shall be corrected by the court; and if the party aggrieved shall have paid any unlawful charge, by reason

of the first taxation, the clerk shall pay the costs of retaxation, and also to the party aggrieved the amount which he may have paid by reason of the allowing of such unlawful charge.”

“Statutes passed by the legislature are expressions of public policy. The clear intent of the General Assembly expressed in § 514.270 is to enable citizens to challenge unauthorized court costs and obtain a refund.” *Wiley v. Daley*, 472 S.W.3d 257, 263 (Mo. App. E.D. 2015). “In applying § 514.270, Missouri courts have long recognized that where a party complains that the judgment taxing the costs is wrong, for any reason, he must, to obtain relief, lodge his complaint with the court rendering such judgment. If a party contests a category or specific item of costs, the remedy is by motion to retax in the court of the alleged error. ... If the court denies the party’s motion to retax costs, the party can then appeal such denial.” *Id.* at 265. Further, “[p]ayment of costs ... does not signify ... a waiver of the right to appeal.” *In re J.P.*, 947 S.W.2d 442, 445 (Mo. App. W.D. 1997).

The only issues in this case are legal issues, and they involve the interpretation of various statutes related to the collection and enforcement of jail debt incurred pursuant to Mo. Rev. Stat. § 221.070. “Statutory construction ... is an issue of law that we review de novo.” *Investors Alliance, LLC v. Bordeaux*, 428 S.W.3d 693, 695 (Mo. App. E.D. 2014).

### **Analysis**

On April 1, 2015, the circuit clerk assessed a jail “Board Bill” fee in the amount of \$3,150.00 to coincide with the ninety jail sentence which was ordered upon Appellant’s plea of guilty to the misdemeanor offense of Violation of Order of Protection. (Legal File, D64, p. 1). This amount was taxed as costs rather than reported to OSCA for collection. (Legal File, D64, p. 1).

Additionally, on April 7, 2016, approximately one year after being found guilty of the offense for which Appellant was convicted in this cause, the circuit clerk assessed an additional jail “Board Bill” fee in the amount of \$2,275.00 for time spent in custody between “2/1/16 – 4/6/2016” on a failure to pay warrant which was issued in response to Appellant’s inability to pay the initial jail “Board Bill” fee assessed on April 1, 2015. (Legal File, D64, p. 1). This amount was also taxed as costs rather than reported to OSCA for collection. (Legal File, D64, p. 1).

Appellant was not charged with any offense during the time he spent in custody between “2/1/16 – 4/6/2016.” Nor was Appellant ever found guilty of any offense during the time spent in custody on this failure to pay warrant. Rather, Appellant was arrested for failing to pay the initial jail “Board Bill” fee assessed in this case. (Legal File, D1, p. 11). This Warrant for Arrest set bond at \$3,266.50

“CASH ONLY.” (Legal File, D19). This amount represented the total amount taxed as costs up to that point. (Legal File, D64, p. 1).<sup>9</sup>

On April 6, 2016, Appellant was released from custody on this failure to pay warrant upon the condition that he “pay \$750.00.” (Legal File, D26). Appellant made this \$750.00 payment in order to secure his release from custody and this payment was credited toward the outstanding balance of costs on April 6, 2016. (Legal File, D64, p. 2). However, on April 7, 2016, the circuit clerk taxed an additional \$2,275.00 as costs for the time spent in custody on this failure to pay warrant. (Legal File, D64, p. 1).

The language of Mo. Rev. Stat. § 221.070.1 is plain and unambiguous: “Every person who shall be committed to the common jail ... for any offense or misdemeanor, *upon a plea of guilty or a finding of guilt for such offense*, shall bear the expense of carrying him or her to said jail, and also his or her support while in jail” (emphasis added). Hence, under Mo. Rev. Stat. § 221.070.1, a person is liable for “such expenses” only “upon a plea of guilty or a finding of guilty for such offense.” As regards the dates “2/1/16 – 4/6/16,” since Appellant was never found

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<sup>9</sup> The Western District Court of Appeals recently held that “[a] non refundable bail toward an arrearages violates the principle that the only legal purpose of bail is to assure the attendance of an accused.” *D.R.P. v. M.P.P.*, 484 S.W.3d 822, 830 n. 2 (Mo. App. W.D. 2016).

guilty of any offense in connection with these dates, he should not be ordered to bear these expenses. (See Legal File, D64, p. 1).

Moreover, the liability for jail debt created under Mo. Rev. Stat. § 221.070 is notably different from the liability for costs created under Mo. Rev. Stat. § 550.010, which further supports the argument made earlier in this brief that the debt incurred “pursuant to section 221.070” is separate and distinct from the imposition of “court costs, fines, fees, or other sums,” as provided in Mo. Rev. Stat. § 488.5028.1.

Under the plain language of Mo. Rev. Stat. § 221.070, a person is liable for jail debt “upon a finding of guilt for such offense.” A person therefore does not need to be convicted in order to be liable for the debt incurred “pursuant to section 221.070.” With regard to the taxation of costs, however, Mo. Rev. Stat. § 550.010 plainly states that a person is responsible for costs only “whenever any person shall be *convicted* of any crime or misdemeanor” (emphasis added).<sup>10</sup> Hence, it is possible for a person to be liable for jail debt under Mo. Rev. Stat. § 221.070, but not responsible for court costs under Mo. Rev. Stat. § 550.010, such as in the case

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<sup>10</sup> Subject, of course, to the exception of insolvency and inability to pay as provided in Mo. Rev. Stat. § 550.020 and Mo. Rev. Stat. § 550.030.

of a Suspended Imposition of Sentence, under the authority of Mo. Rev. Stat. § 557.011.2(3).<sup>11</sup>

Accordingly, this Court must reverse the trial court's judgment with instructions for the trial court to eliminate the \$2,275.00 assessed as costs in this cause on April 7, 2016. (Legal File, D64, p. 1).<sup>12</sup> Further, in the event this Court also orders the circuit clerk to report the jail debt to OSCA, as required by Mo. Rev. Stat. § 221.070.2, this Court should also instruct the trial court not to include this amount as part of the debt owed.

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<sup>11</sup> There are many other examples relating to the legal distinction between “*the fact of a guilty plea*” and “*the fact of conviction*.” See, e.g., *Fay v. Stevenson & The Hon. Scot Othic*, WD81645, (June 12, 2018) (emphasis in original).

<sup>12</sup> This practice by the trial court of assessing additional jail fees for time spent in custody on failure to pay warrants after the defendant has been found guilty of the underlying offense also contravenes the provisions of several other statutes under Missouri Criminal Procedure. For example, under Mo. Rev. Stat. § 543.270.1, the trial court has the power to commute “any fine and costs ... to imprisonment in the county jail, which shall be credited at the rate of ten dollars ... for each day's imprisonment.” The objective of this statute would obviously be frustrated if at the same time the St. Clair County Sheriff's Office could charge a daily jail board rate.

## **CONCLUSION**

WHEREFORE, based on the foregoing reasons, Appellant prays that this Court reverse the trial court judgment overruling Appellant's Motion to Retax Costs, and further to eliminate the jail debt as an item that was taxed as costs against Appellant in this case, to Order the circuit clerk to refer this debt to the office of state courts administrator, to Order the trial court to determine whether Appellant is unable to pay the costs, and to refund Appellant all monies erroneously paid to the court as costs.

Respectfully submitted,

/s/ Matthew Mueller

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## **CERTIFICATION**

I hereby certify that this brief complies with the information required by Rule 55.03, that it complies with the limitations contained in Rule 84.06(b), and that it contains 9,799 words in the brief as determined by the word count of the word-processing system used to prepare the brief.

Respectfully submitted,

/s/ Matthew Mueller

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