IN THE
SUPREME COURT OF MISSOURI

SC97604

STATE OF MISSOURI,

Plaintiff-Respondent,

v.

GEORGE RICHEY,

Defendant-Appellant.

Appeal from the Circuit Court of St. Clair County, Missouri
The Honorable Jerry J. Rellihan
Case No. 14SR-CR00320

Brief of American Civil Liberties Union of Missouri as *Amicus Curiae* in Support of Appellant

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Table of Contents

Table of Authorities

Cases

Statutes and Constitutional Provisions

Other Authorities

Jurisdictional Statement

Amicus adopts the jurisdictional statement as set forth in Appellant's Brief filed in SD35495 on June 25, 2018.

Authority to File

This brief is accompanied by a motion for leave to file. Appellant consents to the filing of this brief. Respondent had not responded to a request for consent by the time of filing.

Interest of *Amicus Curiae*

The ACLU of Missouri is an affiliate of the national American Civil Liberties Union (ACLU), a nonprofit, nonpartisan membership organization founded in 1920 to protect and advance civil liberties throughout the United States. The ACLU has more than 1.75 million members nationwide. The ACLU of Missouri has more than 19,000 members in the state. In furtherance of their mission, the ACLU and its state affiliates engage in litigation, by direct representation and as *amicus curiae*, to encourage the protection of rights guaranteed by the federal and state constitutions.

In cases and public-education campaigns across the country, the ACLU and its state affiliates have explained and defended the right not to be jailed for being poor. The United States may have formally abolished debtors' prisons in 1833, but the tradition lives on through court practices that fail to properly account for indigence or alternatives when collecting criminal-justice debt. As a result, some defendants continue to face the threat of incarceration solely because of their poverty. The ACLU and its affiliates routinely represent indigent persons and act as *amicus curiae* in cases involving modern-day debtors' prisons. *See, e.g.*, *State of New Hampshire v. Brawley*, No. 2017-0403 (N.H. 2017); *Brown v. Lexington Cty.*, No. 3:17-CV-01426 (D.S.C. June 1, 2017); *West v. City of Santa Fe*, 16-CV-309 (S.D. Tex. Nov. 3, 2016); *Kennedy v. City of Biloxi*, 1:15-CV-348 (S.D. Miss. Oct. 21, 2015); *Fuentes v. Benton Cty.*, No. 15-2-02976-1 (Wash. Sup. Ct. Oct. 6, 2015). On behalf of its members, the ACLU of Missouri files this brief addressing the statutory and constitutional implications of taxing board bills as court costs against indigent defendants.

Statement of Facts

Amicus adopt the statement of facts as set forth in Appellant's brief filed in SD35495 on June 25, 2018.

Argument

I. At best, the statute ostensibly permitting a county jail "board bill" to be taxed as a court cost against a criminal defendant is ambiguous.

As Appellant points out, cost-taxing statutes have been strictly construed since their advent. *See, e.g.*, *Ring v. Charles Vogel Paint & Glass Co.*, 46 Mo. App. 374, 377 (Mo. App. 1891) ("it may be stated that the entire subject of costs, in both civil and criminal cases, is a matter of statutory enactment; that all such statutes must be strictly construed, and that *the officer or other persons claiming costs, which are contested, must be able to put his finger on the statute authorizing their taxation*" (emphasis added)); *accord Shed v. Kansas City, St. J & CBR Co.*, 67 Mo. 687, 690 (Mo. 1878); *Laclede Land & Impr. Co. v. Morten*, 167 S.W. 658, 658–59 (Mo. App. 1914). Because the common law did not recognize the taxation of costs at all, courts adhere to the strict construction of cost-taxing statutes in all cases, no matter how reasonable an entity's request for remuneration, no matter whether the party to be taxed has a debt duly owed to the party to be awarded, and no matter whether the entity to be awarded will have to absorb the expense absent the taxation.[1]

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[1] *See State v. D.S.*, 606 S.W.2d 653, 654–55 (Mo. banc 1980) (affirming denial of motion to tax as cost against county the expense of juvenile psychiatric examinations even where statute provided that that expense was payable by county but did not explicitly permit its taxation as cost against county); *State v. Green*, 470 S.W.2d 571, 574 (Mo. banc 1971) (reversing taxation of legal-representation expenses as court costs despite recognition that defense attorney deserved recompense); *Ex parte Nelson*, 162 S.W. 167, 167 (Mo. 1913) (reversing taxation of costs against successful habeas petitioner, holding that those costs also could not be taxed against sheriff, recognizing that costs would therefore not be taxed at all, holding that "that [costs] must be taxed against some party follows only if there is a statute authorizing such action, and there is none," and finally commenting that "[i]n the absence of such power [to tax] we cannot

Examining the cost-taxing statutes that govern in criminal cases (§§ 550.010–.030 and 550.210) together with the statutory board bill collection process (§ 221.070) leads to ambiguity, if not outright doubt, about a court's authority to tax against an indigent defendant the cost of room and board.[2] *See State ex rel. Dir. of Rev. v. Gaertner*, 32 S.W.3d 564, 566 (Mo. banc 2000) (holding that statutes relating to the same subject matter must be considered *in pari materia* even if they are in different chapters and that if the statutes cannot be reconciled, the more specific must prevail over the more general).[3]

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and should not concern ourselves with payments of costs heretofore made by the parties to this proceeding"); *State v. Anderson*, 758 S.W.2d 500, 502–03 (Mo. App. W.D. 1988) (reversing taxation of cost of deputy sheriff salaries from one county to another where there had been change of venue and commenting that "[t]he trial court's concern that the county to which venue is changed may bear an undue financial burden does not go unheeded. Absent the legislature's addressing the problem, however, the sheriff's deputies' salaries may not be taxed as costs to the originating county"); *Dom-Chrysler Plymouth, Inc. v. Roderique*, 487 S.W.2d 48, 49 (Mo. App. 1972) (reversing taxation of juror fees against litigant because, although statute permitted such taxation once jury had "serve[d]," litigant had settled case after jurors had arrived at court but immediately before they had been sworn).

[2] All statutory references are to Missouri Revised Statutes (2000), as updated.

[3] What exact items are included in "the cost of incarceration" has long been a subject of dispute among counties and the state. *See, e.g.*, Mo. Att'y Gen. Op. 177 (Aug. 10, 1977) (discussing how county jail *per diem* costs are determined and allocated between state and counties), https://ago.mo.gov/docs/default-source/opinions/1977/177_1977.pdf?sfvrsn=2; H. Pener, "The Missouri Criminal Costs System Re-Examined," 46 UMKC L. REV. 1, 1 n.2, 4–9 (1977) (commenting, as legal counsel to court administrator office, that "[f]or more than 100 years state and county officials have had to cope with an extremely complex system of cost apportionment in criminal cases," describing history of allocation of costs of representation and incarceration among state, counties, and defendants and "inferring" based on law at the time that incarceration costs were excluded); "Criminal Costs Assessment in Missouri—Without Rhyme or Reason," 1962 WASH. UNIV. L. REV. 076 (1962) (concluding that "as a result of Missouri's accumulation of antiquated, partially revised statutory provisions

The court has no inherent authority to tax a board bill as a court cost; to the contrary, it is doubtful that a criminal defendant's room and board—particularly before trial—is truly a "cost" of a criminal proceeding at all. *See State v. Davis*, 645 S.W.2d 160, 162 (Mo. App. S.D. 1982) (holding that "[c]osts in criminal proceedings are the charges fixed by law necessarily incurred in the *prosecution* of one charged with a public offense as compensation to the officers for their services" and affirming that victim fund contribution was not retroactively taxable as part of criminal judgment (emphasis added)). Construed strictly, as required, and for the reasons Appellant sets out, neither Chapter 550 nor § 221.070 expressly authorizes courts to tax indigent criminal defendants for the cost of their detention—even if that expense is an otherwise-collectible debt. Therefore, because the statutes are at best ambiguous, there can be no specific authorization for the taxation of the board bill as a court cost against a criminal defendant and the denial of Appellant's motion should be reversed. *State v. Wright*, --- S.W.3d ----, 2018 WL 6492719 (Dec. 11, 2018), at *5.

Moreover, reading the cost-taxing statutes to permit an indigent defendant to be indefinitely subject to periodic imprisonment because she cannot scrape together a few thousand dollars poses an unnecessary constitutional problem that this Court has an obligation to avoid. *See Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838–39 (Mo. banc 1991) (holding that interpretative canon of constitutional avoidance applies where one interpretation would be unconstitutional or where it would raise "grave and doubtful

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upon which piecemeal legislation has been heaped, assessments of costs in criminal cases are today almost by their very nature either inequitable or illegal").

constitutional questions"); *see also United States ex rel. Att'y Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909) (holding that courts have a duty to apply canon of constitutional avoidance where applicable).

II. Incarcerating an indigent criminal defendant for failure to pay a county board bill, whether or not "taxed as a cost," violates the state and federal constitutions.

In Missouri, the taxation of court costs in a criminal case is "penal in . . . nature." *Cramer v. Smith*, 168 S.W.2d 1039, 1040 (Mo. banc 1943); *see also Davis*, 645 S.W.2d at 162–63; *State ex rel. Parrott v. Martinez*, 496 S.W.3d 563, 570–71 (Mo. App. E.D. 2016) (characterizing "the collection of court costs . . . as part of the penalty for committing a crime"). To conform to the requirements of due process and equal protection, a penal law must provide fair notice of the penalty to be imposed for the commission of an offense and must not arbitrarily discriminate among persons who commit the same offense. *See, e.g.*, *United States v. Batchelder*, 442 U.S. 114, 123 (1979); *Oyler v. Boles*, 368 U.S. 448, 456 (1962). The practice at issue in this appeal fails to meet these requirements.

Perversely, the richer a person is, the lower her board bill will be. If she has enough assets to pay her bail immediately, she will owe nothing because she will spend no time in jail awaiting trial.[4] The longer it takes her to scrape together funds to bond out,

[4] Illogically, if a person is convicted of a serious offense and sentenced to time in *state* prison, she may owe money to the state for her room and board, but she is not threatened with loss of liberty when she fails to pay. *See* J. Mann, "A hidden punishment for Missouri prison inmates of means: room and board," ST. LOUIS POST-DISP. (Apr. 30, 2016), https://www.stltoday.com/news/local/crime-and-courts/a-hidden-punishment-for-missouri-prison-inmates-of-means-room/article_f6bd3c52-8260-59bd-aaa2-

the more she will ultimately owe. If she never secures enough money to pay her bond, she will remain in jail until her conviction, either by plea or trial. In fact, if the defendant avails herself of her right to a jury trial, she may be detained in a county jail for many months, which could cost her as much as $10,000. *See Parrott*, 496 S.W.3d at 565. If the defendant happens to live in a county where the public defender office is waitlisting indigent clients[5] or where the attorneys request multiple continuances, her board bill will increase, though she has no control over those situations. Conditioning a penalty on an offender's economic status and enhancing a penalty in response to situations outside the offender's control violates the Due Process and Equal Protection Clauses. *See Griffin v. Illinois*, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."); *Bearden v. Georgia*, 461 U.S. 660, 674 (1983) (holding that imprisoning an indigent defendant because he has disobeyed a court order to pay a fine is "no more than imprisoning a person solely because he lacks funds to pay the fine"); *Spencer v. Basinger*, 562 S.W.2d 350, 353 (Mo. banc 1978); *Hendrix v. Lark*, 482 S.W.2d 427, 429–30 (Mo. banc 1972).

2e456d34bcb9.html (describing state statute governing reimbursement of cost of incarceration to state and including comment disapproving the program as contrary to rehabilitation by then-U.S. Attorney Richard Callahan, a former Cole County Circuit Judge). *See also State ex rel. Koster v. Cowin*, 390 S.W.3d 239, 244 (Mo. App. W.D. 2013) (strictly interpreting statute permitting state to seek reimbursement for incarceration expenses from criminal defendants and holding that state could seek recompense only from assets identified at time of judgment, not future assets).

[5] *See* J. Yang & F. Carlson, "Missouri public defenders are overloaded with hundreds of cases while defendants wait in jail," PBS NEWSHOUR (May 2, 2018), https://www.pbs.org/newshour/show/missouri-public-defenders-are-overloaded-with-hundreds-of-cases-while-defendants-wait-in-jail.

Richey's situation exemplifies how a defendant's indigence can lead to re-incarceration and just how long it can prolong his supervision by the courts. Richey pled guilty to a Class A misdemeanor in April 2015. Although there is no indication on the record that an ability-to-pay assessment was conducted, he was ordered to pay $3150 by the end of the year. Richey—who had qualified for public defender representation—failed to pay the full amount by December 31, 2015, so a bench warrant was issued. On February 1, 2016, Richey was rearrested and reconfined. He appeared in custody at two court appearances that month, but although the court noted that he was "still unable to pay agreed to amount of costs," Richey remained incarcerated. At a third appearance on March 2, the court set "a trial regarding issue of payment of costs" for March 18. Richey then submitted a letter detailing his monthly income and expenses. The court canceled the March 18 setting and instead set a hearing for April 6. By that time, Richey had spent more than two months in jail.

At that hearing, he was released, ordered to pay $750 immediately, and put on a payment plan of $250 per month, just under 40% of his monthly income and more than 100% of what he had told the court remained after his rent and utility payments. Richey struggled to comply with the court's order. He made some payments, totaling about $500, and appeared in person as ordered to plead his lack of funds in May, June, July, August, September, October, November, and December. He was back in custody in December but released again and ordered to make payments of $350 per month. After some hiccups in February 2017—a brief hospital stay and a miscalculated court date—Richey has appeared for every "payment review hearing" scheduled since: March, April, May, June,

July, twice in September, and October 2017; a hearing pushed from February to March 2018 after proof of a doctor appointment; and finally in June, August, September, and October 2018. Richey continues to make partial payments and has another payment review hearing next month. The board bill from the two months he was detained in 2016 has nearly doubled his debt. If he fails to appear at a monthly "payment review hearing," or if the court deems his partial payment insufficient, he could (again) face jail time that a wealthy defendant would not.

Where a state has legislated that a criminal penalty will be limited to a payment of money, it cannot "consistently with the Equal Protection Clause, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine." *Tate v. Short*, 401 U.S. 395, 399 (1971). Yet that is precisely what the state does when it taxes a board bill against an indigent defendant. Because the amount owed is arbitrary, rather than determined by the type or severity of the crime, the board bill does not serve a penological goal but rather a remunerative one. *See id*. That goal may be legitimate—which is perhaps why the Missouri General Assembly has enacted a collections process—but it cannot constitutionally justify indefinite periodic incarceration. *See, e.g., Williams v. Illinois*, 399 U.S. 235, 241 (1970) ("By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment."); *see also Hendrix*, 482 S.W.2d at 430 ("We perceive no substantial

difference between imprisonment of an indigent because of an inability to make an immediate payment of fines and costs, and imprisonment of an indigent because of the involuntary failure to make installment payments when permitted the opportunity to do so. Both deny the indigent equal protection of the law."); *James v. Strange*, 407 U.S. 128, 137 (1972) (holding that state's attempts to collect debt from criminal defendant for public defense services could "take precedence, under appropriate circumstances, over the claims of private creditors," that "[t]his does not mean, however, that a State may impose unduly harsh or discriminatory terms merely because the obligation is to the public treasury rather than to a private creditor," and state law exempting public-defense costs from debtor protections violated Equal Protection Clause).

A board bill also bears little relationship to the severity of the defendant's offense. *Compare, e.g.*, *State v. Hurst*, 12CL-CR00321 (convicted of Class D felony and initial board bill taxed at $450), *with State v. Harris*, 16LF-CR00054 (convicted of Class B misdemeanor and initial board bill taxed at $2,058). Misdemeanant Richey has been charged—and indeed, re-incarcerated—as a result of board bills totaling more than $5,000. Indeed, because of the disproportionate and variable nature of a board bill, a defendant has no notice whatsoever about how much he might end up owing or how long her outstanding debt might subject her to court supervision and periodic re-incarceration. *See Parrott*, 496 S.W.3d at 565 (noting that defendant's guilty plea did not include amount to be paid as board bill). This lack of notice violates the Due Process Clause as applied to *any* criminal defendant, not just those who are indigent. *Batchelder*, 442 U.S. at 123 (holding that "vague sentencing provisions may pose constitutional questions if

they do not state with sufficient clarity the consequences of violating a given criminal statute").

Richey is not alone. Every time a defendant is re-incarcerated for failing to pay his board bill, he receives a new board bill, which—in addition to being supported only by dubious statutory authority—exacerbates the distinction the court practice makes between rich and poor offenders. *See, e.g.*, *State v. Banderman*, 16DE-CR00002; *State v. Hurst*, 12CL-CR00321; *State v. Cashatt*, 13CL-CR00384 (all assessing additional board bills of hundreds of dollars); *see also Tate*, 401 U.S. at 399 (commenting that imprisoning a defendant who cannot pay a fine is a penalty "imposed to augment the State's revenues but obviously does not serve that purpose; the defendant cannot pay because he is indigent and his imprisonment, rather than aiding collection of the revenue, saddles the State with the cost of feeding and housing him for the period of his imprisonment."); *Hendrix*, 482 S.W.2d at 430 (holding that where indigent defendant was imprisoned because she failed to keep up with installment payments owed, "the end result [was] that she is incarcerated because she [was] poor" and "the intervening grace period does not change this"). Taxing additional costs of confinement against a criminal defendant already unable to pay the initial board bill is itself separately constitutionally suspect. *See Parrott*, 496 S.W.3d at 571 (holding that, where poor defendant "could be placed on a never ending merry-go-round of having her probation revoked and being placed on a new term of probation until these amounts are paid," that would "not [be] permitted by Missouri law"); Mo. CONST. art. 1, § 11 (prohibiting imprisonment for debt except for "fines and penalties imposed by law").

Conclusion

Because permitting the taxation of the board bill as a court cost against a criminal defendant implicates grave questions about the constitutionality of cost-taxing statutes, the Court should reverse the denial of Appellant's motion to re-tax costs in this case.

Respectfully submitted,

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Certificate of Service and Compliance

The undersigned hereby certifies that on January 3, 2019, the foregoing *amicus* brief was filed electronically and served automatically on the counsel for all parties.

The undersigned further certifies that pursuant to Rules 30.06(a) and 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06 and the Local Rules; (3) contains 3,788 words. Finally, the undersigned certifies that this electronically filed brief was scanned and found to be virus-free.

/s/ Anthony E. Rothert