
IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI

Respondent,

vs.

GEORGE RICHEY

Appellant.

Circuit Court of St. Clair County No.
14SR-CR00320

The Honorable Jerry Rellihan, Circuit Judge

**BRIEF OF *AMICI CURIAE* THE INSTITUTE FOR CONSTITUTIONAL
ADVOCACY AND PROTECTION, THE SHOW-ME INSTITUTE, FINES AND
FEES JUSTICE CENTER, THE RODERICK AND SOLANGE MACARTHUR
JUSTICE CENTER, AND FAIR AND JUST PROSECUTION**

Jeffrey J. Simon, #35558
Nicholas B. Kenney, # 68852
Jenna Brofsky, #69667
HUSCH BLACKWELL
4801 Main St
Suite 1000
Kansas City, MO 64112
Phone 816 983 8000
jeff.simon@huschblackwell.com
nicholas.kenney@huschblackwell.com
jenna.brofsky@huschblackwell.com

Robert D. Friedman*
INSTITUTE FOR CONSTITUTIONAL
ADVOCACY AND PROTECTION
GEORGETOWN UNIV. LAW CENTER
600 New Jersey Ave. N.W.
Washington, DC 20001
Phone 202 662 9042
rdf34@georgetown.edu

*Application for admission *pro hac vice*
pending

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... 3

INTEREST OF AMICI CURIAE 7

INTRODUCTION AND SUMMARY OF ARGUMENT 8

ARGUMENT..... 10

 I. Missouri Law Imposes Numerous Fines, Fees, and Other Monetary Assessments
 That Burden Indigent Criminal Defendants—And Jail Debt Is Often the Largest..... 11

 II. Criminal Court Debt Causes Substantial Harm to Indigent Defendants 13

 III. Monthly Show-Cause Hearings Are Unnecessary and Ineffective 17

CONCLUSION 21

CERTIFICATE OF SERVICE AND COMPLIANCE 23

TABLE OF AUTHORITIES

Cases

<i>Bearden v. Georgia</i> , 461 U.S. 660 (1983)	16
<i>Capital One Bank v. Creed</i> , 220 S.W.3d 874 (Mo. Ct. App. 2007)	19
<i>Missouri Board of Probation and Parole</i> , 515 S.W.3d 224 (Mo. Banc 2017)	17
<i>State ex rel. Missouri Pub. Def. Comm’n v. Pratte</i> , 298 S.W.3d 870 (Mo. 2009).....	14
<i>State ex rel. Nixon v. Peterson</i> , 253 S.W.3d 77 (Mo. 2008).....	20

Statutes

§ 217.831, RSMo.....	20
§ 221.070, RSMo.....	19, 21
§ 302.137, RSMo.....	12
§ 304.027, RSMo.....	12
§ 304.028, RSMo.....	12
§ 488.024, RSMo.....	12
§ 488.026, RSMo.....	12
§ 488.4014, RSMo.....	12
§ 488.5017, RSMo.....	11
§ 488.5025, RSMo.....	12
§ 488.5028, RSMo.....	21
§ 488.5336, RSMo.....	12

§ 558.002, RSMo..... 11, 13

§ 558.011, RSMo..... 13

§ 595.045, RSMo..... 12

Annual Update of the HHS Poverty Guidelines, 83 Fed. Reg. 2642-01 13

Mo. Code Regs. tit. 18, § 10-3.010(3)(A) 13

Other Authorities

Alexandra Marinucci, *Achieving Ake: Defendants Deserve the Constitutional Right to Independent Mental Health Professionals*, 79 U. Pitt. L. Rev. 729 (2018)..... 14

Alexis Harris, et al., *Monetary Sanctions in the Criminal Justice System (2017)*, available at <http://www.monetarysanctions.org/wp-content/uploads/2017/04/Monetary-Sanctions-Legal-Review-Final.pdf> 21

Criminal Justice Policy Program, Harvard Law School, *Confronting Criminal Justice Debt: A Guide for Policy Reform (2016)*, available at <http://cjpp.law.harvard.edu/assets/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf> 18

Department of Labor & Industrial Relations, *Minimum Wage*, available at <https://labor.mo.gov/DLS/MinimumWage> 12

Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 Criminology & Pub. Pol. 509 (2011), available at <http://criminology.fsu.edu/wp-content/uploads/volume-10-issue-31.pdf>..... 14, 15

Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, 15 Loy. J. Pub. Int. L 319 (2014)..... 11, 17

M. Eve Hanan, *Remorse Bias*, 83 Mo. L. Rev. 301 (2018)..... 14

Office of Justice Programs, Department of Justice, *Resource Guide: Reforming the Assessment and Enforcement of Fines and Fees*, available at <https://ojp.gov/docs/finesfeesresguide.pdf> 14

Office of the Missouri Attorney General, *2014 Annual Report*, available at <https://archive.org/details/2014AGOAnnualReport/page/n15>..... 20

Sarah Stillman, *Get Out of Jail, Inc.: Does the Alternatives-to-Incarceration Industry Profit from Injustice?*, The New Yorker (Jun. 23, 2014), available at <https://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc> 15

State of Missouri Public Defender Commission, Fiscal Year 2018, Annual Report, available at <https://publicdefender.mo.gov/wp-content/uploads/2018/08/MSPD-2018-Annual-Report.pdf>..... 14

Titus Wu, *In rural Missouri, going to jail isn't free. You pay for it.*, The Missourian, available at https://www.columbiamissourian.com/news/state_news/in-rural-missouri-going-to-jail-isn-t-free-you/article_613b219a-f4d7-11e8-bf90-33125904976d.html (Dec. 19, 2018)..... 9

Tony Messenger, *From Hamilton to homeless; another debtors' prison tale from rural Missouri*, St. Louis Post-Dispatch (Nov. 6, 2018), available at https://www.stltoday.com/news/local/columns/tony-messenger/messenger-from-hamilton-to-homeless-another-debtors-prison-tale-from/article_0e68701e-dc14-58d8-a50f-9936ac4cd0bd.html..... 16

Tony Messenger, *Poor defendants in Dent, Caldwell counties join not-so-exclusive \$10,000 club*, St. Louis Post-Dispatch (Oct. 16, 2018), available at https://www.stltoday.com/news/local/columns/tony-messenger/messenger-poor-defendants-in-dent-caldwell-counties-join-not-so/article_aef8e1bf-96c6-56a5-9c82-10feff656721.html..... 15, 16

Tony Messenger, *St. Charles County points the way as lawmakers seek to end debtors prisons in Missouri*, St. Louis Post-Dispatch (Dec. 9, 2018), available at https://www.stltoday.com/news/local/columns/tony-messenger/messenger-st-charles-county-points-the-way-as-lawmakers-seek/article_337547b9-cca9-5f53-91ec-bd1fe9ae6965.html 19

Tony Messenger, *St. Louis woman did 20 days in jail for speeding; now rural Missouri judge wants her for 6 more months*, St. Louis Post-Dispatch (Nov. 25, 2018), available at https://www.stltoday.com/news/local/columns/tony-messenger/messenger-st-louis-woman-did-days-in-jail-for-speeding/article_3aca26a5-dca7-5103-8b0e-0fd1b6179b82.html 17

Tony Messenger, *St. Louis woman had a bad break up in 2006. Camden County still keeps putting her in jail because of it*, St. Louis Post-Dispatch (Dec. 4, 2018), available at <https://www.stltoday.com/news/local/columns/tony-messenger/messenger-st-louis->

woman-had-a-bad-break-up-in/article_ef846be4-0bb9-5231-b8c9-ee9b9c1afa1b.html
..... 16

INTEREST OF AMICI CURIAE

The Institute for Constitutional Advocacy and Protection is a nonprofit litigation and advocacy organization dedicated to defending constitutional rights and values. A significant part of the Institute's work involves pursuing criminal justice reform, with particular attention to combatting policies in the criminal justice system that disproportionately burden the poor. As part of this effort, the Institute is serving as counsel in a case challenging the manner of collecting criminal court debt in certain Oklahoma counties and has filed multiple amicus briefs challenging the use of money bail to detain indigent defendants pretrial. The Institute therefore has a strong interest in how jail debt is imposed in Missouri and in this case.

The Show-Me Institute is a 501(c)(3) research and educational organization dedicated to improving the quality of life for all citizens of Missouri by advancing sensible, well-researched solutions to state and local policy issues. The work of the Institute is rooted in the American tradition of free markets and individual liberty. The Institute's scholars offer private-sector solutions to the state's social and economic challenges, presenting policies that respect the rights of the individual, encourage creativity and hard work, and nurture independence and social cooperation. The Show-Me Institute has published numerous commentaries highlighting the importance of safeguarding the constitutional rights of Missourians. In particular, the Institute has published commentaries regarding the burdens political subdivisions within Missouri impose on the poor by the use of fines and fees to generate revenue. Because this case involves important liberty interests, this case is of significant interest to the Institute.

The Fines & Fees Justice Center (“FFJC”) is a national center for advocacy, information, and collaboration on effective solutions to the unjust and harmful imposition and enforcement of fines and fees in state and local courts. FFJC’s mission is to create a justice system that treats individuals fairly, ensures public safety, and is funded equitably.

The Roderick and Solange MacArthur Justice Center (“RSMJC”) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices in Illinois, Missouri, Mississippi, Louisiana, and Washington, D.C. RSMJC attorneys have led civil rights battles addressing issues including police and official misconduct, inhumane prison and jail conditions, and wrongful incarcerations based on race, poverty, and the work of dishonest prosecutors.

Fair and Just Prosecution (“FJP”) is a national network of elected prosecutors working towards common-sense criminal justice reforms. FJP is committed to promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility.

INTRODUCTION AND SUMMARY OF ARGUMENT

Indigent defendants sentenced to a jail term in Missouri are, in effect, punished with two separate sentences. First, they serve the court-ordered jail time. Second, once the jail time is completed, they must pay for the expense of each day of their incarceration, a debt that often amounts to hundreds or even thousands of dollars. This debt—frequently referred to as a “jail board bill”—is often insurmountable for indigent individuals, causes incalculable harm, and follows them for years. Even worse, numerous courts across Missouri require individuals laboring under the cloud of jail debt

to report to court for monthly show-cause hearings—on the legally unsupportable theory that the jail debt can be taxed as “court costs”—to either make a payment or explain why they cannot. These monthly hearings perpetuate and exacerbate the harms the debt already causes and increase the risk of re-incarceration—condemning indigent defendants to a cycle of poverty and punishment few can ever escape.

Appellant George Richey’s case illustrates this troubling practice. In 2015, Mr. Richey, whose sole source of income is a \$600 monthly disability payment,¹ was sentenced to 90 days in the county jail for violating a protective order and assessed \$116.50 in court costs.² He was also ordered to pay \$3,150 in jail debt, a rate of \$35 per day for his 90-day sentence. Since his release from jail, he has been ordered to attend a “payment review hearing” nearly every month as he struggles to provide for himself and pay off his debt. In 2016, Mr. Richey was jailed again, this time for failing to pay down his debt. Without any determination that he had the ability to pay and was willfully refusing to do so, he spent two months in jail before being released with an additional \$2,275 in jail board bills and an order to continue appearing for monthly hearings.

This case presents an important opportunity for the Court to end these onerous practices. In this brief, *amici* offer three reasons beyond the persuasive statutory interpretation arguments made by Mr. Richey and the Missouri Attorney General why the

¹ Titus Wu, *In rural Missouri, going to jail isn’t free. You pay for it.*, The Missourian (Dec. 19, 2018), available at https://www.columbiamissourian.com/news/state_news/in-rural-missouri-going-to-jail-isn-t-free-you/article_613b219a-f4d7-11e8-bf90-33125904976d.html.

² Unless otherwise noted, all facts in this brief concerning Mr. Richey are taken from his brief on appeal.

current scheme is both counterproductive and inconsistent with Missouri law and the United States Constitution. First, this brief explains how jail debt fits within a larger system of monetary assessments and punishments imposed on criminal defendants in Missouri. Doing so illustrates that the sheer size of jail debt is often disproportionate to the penalty authorized for the underlying crime, serving in effect as a separate punishment. Second, this brief shows how jail debt inflicts substantial ongoing harms on indigent individuals when enforced by monthly show-cause hearings, including forcing debtors to forgo basic necessities, compromising their ability to hold a job, and creating an unreasonable risk of additional incarceration. Third, this brief establishes that the current method of collection is neither authorized by Missouri law nor effective as a means of collecting jail debt; it is also unnecessary. Missouri law provides other tools to recoup jail debt from those who can actually afford to pay through civil legal proceedings that are less draconian than the current system. In light of all this, there is no valid reason for this Court to stretch Missouri law beyond its plain meaning to hold that jail debt can be taxed as a “cost.” Indeed, although permitted by statute and beyond the scope of this appeal, the imposition of jail board bills on indigent defendants is, in the view of *amici*, excessive, plainly counterproductive, and likely unconstitutional.³

ARGUMENT

³ See generally Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, 15 Loy. J. Pub. Int. L. 319 (2014).

I. Missouri Law Imposes Numerous Fines, Fees, and Other Monetary Assessments That Burden Indigent Criminal Defendants—And Jail Debt Is Often the Largest

The jail debt that individuals owe upon completion of their sentences often presents the most daunting burden they face as they seek to move on with their lives and reintegrate into society. But jail debt is just one component of an array of financial penalties imposed on defendants. Placing jail debt in context illuminates just how oversized jail board bills are and why those forced to pay it commonly have the debt follow them for years.

A defendant who pleads guilty or is convicted is potentially subject to fines, court costs, and jail debt. The schedule of maximum fines in the Revised Statutes ranges from \$400 for an infraction, to \$500 to \$2,000 for a class A through D misdemeanor, to \$10,000 for a class C, D, or E felony. *See* § 558.002.1, RSMo. On top of a fine, a defendant is also assessed a variety of court costs that cover not only expenses actually associated with litigating a case, *see, e.g.*, § 488.5017, RSMo (fee of \$1 for filing of new case), but also general charges designed to fund unrelated operations, such as the sheriffs' retirement fund, *see* § 488.024, RSMo (fee of \$3), the prosecuting attorneys and circuit attorneys' retirement fund, *see* § 488.026, RSMo (fee of \$4), and a "motorcycle safety trust fund," *see* § 302.137.2, RSMo (fee of \$1), to name just a few. These court costs imposed at the close of every case (absent the court waiving them) total at least \$45 for

misdemeanors and more for felony cases.⁴ Often, however, courts impose higher costs, as in Mr. Richey's case, where court costs totaled \$116.50. For Mr. Richey, these costs alone are burdensome, representing over one-sixth of his monthly income. For a minimum wage worker in Missouri, they would comprise almost half of a week's wages.⁵ Coupled with whatever fines may also be imposed, the resulting court debt is onerous. *See infra* Section II. And when such individuals need to make installment payments over time because they cannot afford to pay all at once, a one-time \$25 fee may be added to their bill, increasing the cost for those least able to afford it. *See* § 488.5025, RSMo.

Still, court costs and most fines typically pale in comparison to the jail debt imposed on defendants. Mr. Richey's case is, again, illustrative. His original jail board bill of \$3,150 is 2,700 percent of his \$116.50 in court costs. And although that jail board bill covers only the 90-day sentence he served in 2016, it continues to burden Mr. Richey and compromise his liberty three years and eight months later. This is hardly surprising given that the jail debt amounts to more than five months of income for Mr. Richey, which he must use to cover housing, food, transportation, and other necessities. For a minimum wage worker in Missouri, \$3,150 in jail debt is more than nine weeks of pay.

Further demonstrating the outsized severity of jail debt, a defendant who serves a one-year jail term—a potential sentence for as minor an offense as a class A misdemeanor, *see* § 558.011.1(6), RSMo—at a rate of \$35 per day (the same as Mr.

⁴ *See also* § 595.045.1, RSMo; § 488.5336.1, RSMo; § 304.027, RSMo; § 304.028, RSMo; § 488.4014, RSMo.

⁵ Department of Labor & Industrial Relations, Minimum Wage, *available at* <https://labor.mo.gov/DLS/MinimumWage>.

Richey) would rack up \$12,775 in jail debt. That amount exceeds the maximum available fine for a class C felony, which is punishable by three to seven years in prison. *See* §§ 558.011.1(3), 558.002.1, RSMo. The sheer size of jail board bills is excessive and suggests that defendants are being punished more for the cost to the county jail than for the crimes they committed.

II. Criminal Court Debt Causes Substantial Harm to Indigent Defendants

The excessive jail debt facing individuals at the close of a criminal case most commonly falls on the poor. Although the precise number of criminal defendants in Missouri who live in poverty is unknown, there is no doubt that it is high, as shown by the number of defendants represented by public defenders. To qualify for a public defender in Missouri, a defendant must fall below the Federal Poverty Guidelines, meaning he or she must make less than \$12,140 a year for a household of one—less than a single year’s worth of jail debt, \$12,775, at a rate of \$35 per day—or \$16,460 for a household of two. *See* Mo. Code Regs. tit. 18, § 10-3.010(3)(A); Annual Update of the HHS Poverty Guidelines, 83 Fed. Reg. 2642-01. In a 2009 case addressing resources for indigent defendants, this Court found that the public defender provides representation in approximately 80 percent of cases that carry the potential for incarceration.⁶ *See State ex rel. Missouri Pub. Def. Comm’n v. Pratte*, 298 S.W.3d 870, 877 (Mo. 2009). In that year,

⁶ This figure is consistent with estimates for other jurisdictions. *See, e.g.,* M. Eve Hanan, *Remorse Bias*, 83 Mo. L. Rev. 301, 357 (2018); Alexandra Marinucci, *Achieving Ake: Defendants Deserve the Constitutional Right to Independent Mental Health Professionals*, 79 U. Pitt. L. Rev. 729, 751 n. 132 (2018).

the public defender’s office opened 83,082 cases.⁷ The public defender’s office opened a similar number of new cases, 75,419, in 2018.⁸

Jail debt, on its own, presents a significant burden on these indigent defendants. “Even ‘small’ payments of, for example, \$50 a month can consume a significant share of defendants’ monthly income.” Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 *Criminology & Pub. Pol.* 509, 516 (2011) [hereinafter, “*On Cash and Conviction*”].⁹ Monthly payments owed for jail debt thus force indigent individuals to choose between either foregoing basic necessities, such as food, shelter, or medicine, or breaching their payment plans. *Id.*¹⁰ This is not a short-term problem. At the commonly employed payment rate of \$50 per month, jail debt can take years to pay off. *See, e.g.*, Tony Messenger, *Poor defendants in Dent, Caldwell counties join not-so-exclusive \$10,000 club*, *St. Louis Post-Dispatch* (Oct. 16,

⁷ State of Missouri Public Defender Commission, Fiscal Year 2018, Annual Report, at 5, available at <https://publicdefender.mo.gov/wp-content/uploads/2018/08/MSPD-2018-Annual-Report.pdf>.

⁸ *Id.*; see also Tony Messenger, *St. Charles County points the way as lawmakers seek to end debtors prisons in Missouri*, *St. Louis Post-Dispatch* (Dec. 9, 2018), available at https://www.stltoday.com/news/local/columns/tony-messenger/messenger-st-charles-county-points-the-way-as-lawmakers-seek/article_337547b9-cca9-5f53-91ec-bd1fe9ae6965.html (stating that 80 percent of defendants in St. Charles County are indigent).

⁹ This paper is available at <http://criminology.fsu.edu/wp-content/uploads/volume-10-issue-31.pdf>. See also, e.g., Office of Justice Programs, Department of Justice, Resource Guide: Reforming the Assessment and Enforcement of Fines and Fees, at 3, available at <https://ojp.gov/docs/finesfeesresguide.pdf>.

¹⁰ See also, e.g., Sarah Stillman, *Get Out of Jail, Inc.: Does the Alternatives-to-Incarceration Industry Profit from Injustice?*, *The New Yorker* (Jun. 23, 2014), available at <https://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc> (discussing a survey finding that the “vast majority” of respondents owing criminal debt had “forgone rent, groceries, medicine, or all three to pay fees to private-probation firms”).

2018) (describing a Missouri defendant for whom the agreed-to monthly payment of \$50 would result in over 18 years of payments)¹¹; *On Cash and Conviction* at 517 (explaining that a “typical” Washington State legal debt takes ten years to pay down at \$100 per month). That extended period of indebtedness, of course, damages the individual’s credit.¹² And, this loss of limited available income and worsened credit is compounded by the reduced employment options and earning potential of individuals with criminal records. *See On Cash and Conviction* at 516.

Being forced to attend monthly show-cause hearings—regardless of whether a payment is made—only exacerbates these harms. To attend, an individual will likely be forced to miss work, compromising already difficult-to-secure employment opportunities. And a lost day of work means lost wages—making it that much more difficult to provide for oneself and one’s family and to pay their court debt. Lost wages—or even lost jobs due to repeated absences—deprive these individuals of the ability to earn enough money to make payments in the future, demonstrating just how counterproductive the system is. And regardless of whether the individual has to miss work, attending court on a monthly basis can be costly, including paying for transportation and obtaining child care or assistance in caring for an elderly family member, among other things.

¹¹ Available at https://www.stltoday.com/news/local/columns/tony-messenger/messenger-poor-defendants-in-dent-caldwell-counties-join-not-so/article_aef8e1bf-96c6-56a5-9c82-10feff656721.html.

¹² *See* Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* (2012), at 27.

The show-cause hearings also invite unconstitutional jailing. Many Missourians, including Mr. Richey, have been jailed simply because they have not paid their jail debt.¹³ Because this incarceration takes place regardless of the individual's ability to pay, it violates the constitutional principles that prohibit jailing someone solely because of their poverty, as articulated by the United States Supreme Court in *Bearden v. Georgia*, 461 U.S. 660 (1983), and reaffirmed by this Court in *Missouri Board of Probation and Parole*, 515 S.W.3d 224 (Mo. Banc 2017). The violation of these settled principles is unsurprising given that those appearing at show-cause hearings are almost always unrepresented by counsel. Even those who are not jailed for nonpayment remain at risk of being jailed for being late to court or missing a show-cause hearing.¹⁴ With additional jail time, no matter its cause, comes additional jail debt, and the cycle begins anew.

¹³ See, e.g., Tony Messenger, *Poor defendants in Dent, Caldwell counties join not-so-exclusive \$10,000 club*, St. Louis Post-Dispatch (Oct. 16, 2018), available at https://www.stltoday.com/news/local/columns/tony-messenger/messenger-poor-defendants-in-dent-caldwell-counties-join-not-so/article_aef8e1bf-96c6-56a5-9c82-10feff656721.html; Tony Messenger, *St. Louis woman had a bad break up in 2006. Camden County still keeps putting her in jail because of it*, St. Louis Post-Dispatch (Dec. 4, 2018), available at https://www.stltoday.com/news/local/columns/tony-messenger/messenger-st-louis-woman-had-a-bad-break-up-in/article_ef846be4-0bb9-5231-b8c9-ee9b9c1afa1b.html; Tony Messenger, *From Hamilton to homeless; another debtors' prison tale from rural Missouri*, St. Louis Post-Dispatch (Nov. 6, 2018), available at https://www.stltoday.com/news/local/columns/tony-messenger/messenger-from-hamilton-to-homeless-another-debtors-prison-tale-from/article_0e68701e-dc14-58d8-a50f-9936ac4cd0bd.html.

¹⁴ Tony Messenger, *St. Louis woman did 20 days in jail for speeding; now rural Missouri judge wants her for 6 more months*, St. Louis Post-Dispatch (Nov. 25, 2018), available at https://www.stltoday.com/news/local/columns/tony-messenger/messenger-st-louis-woman-did-days-in-jail-for-speeding/article_3aca26a5-dca7-5103-8b0e-0fd1b6179b82.html.

This system harms not only the individuals subjected to these oppressive collection methods, but also the justice system as a whole. Monthly hearings put a strain on the court system's limited resources and divert the attention of judges away from legal matters to issues of debt collection. In fact, "it often costs more to administrate the fees than counties are generating in revenue."¹⁵ Additionally, when courts are viewed as debt collectors for the jail system, regardless of ability to pay, communities lose faith in the fairness of the justice system, leading to negative impacts on public safety. *See* United States Department of Justice, Civil Rights Division, Investigation of the Ferguson Police Department (2015), at 79 ("A growing body of research [has found that] . . . when police and courts treat people unfairly, unlawfully, or disrespectfully, law enforcement loses legitimacy in the eyes of those who have experienced, or even observed, the unjust conduct. . . . Further, this loss of legitimacy makes individuals more likely to resist enforcement efforts and less likely to cooperate with law enforcement efforts to prevent and investigate crime.").¹⁶

III. Monthly Show-Cause Hearings Are Unnecessary and Ineffective

Monthly show-cause hearings are not simply harmful; they are also ineffective and unnecessary. Requiring indigent defendants to appear in-person every month does

¹⁵ Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, 15 *Loy. J. Pub. Int. L* 319, 330 (2014).

¹⁶ The Ferguson Report is available at justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf; *see also, e.g.*, Criminal Justice Policy Program, Harvard Law School, *Confronting Criminal Justice Debt: A Guide for Policy Reform* (2016), at 1, 38, *available at* <http://cjpp.law.harvard.edu/assets/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf>.

nothing to change the reality of their financial circumstances—that is, that they cannot afford to pay—and so the hearing serves no purpose in cases where indigent defendants owe money. Moreover, these hearings are unnecessary because, for those who can afford to pay, there are multiple other effective mechanisms available to recoup debt that do not impose the burdens of monthly hearings and risk the unconstitutional jailing of poor debtors. Notably, urban jurisdictions, which carry the largest jail populations, do not require defendants to appear at monthly show-cause hearings and some jurisdictions do not charge jail board bills at all.¹⁷

Two available collection mechanisms involve civil proceedings in court. First, for defendants who have the ability to pay and own property, that property may, through the initiation of civil proceedings, be “levied on and sold.” *See* § 221.070.1, RSMo. The authority to levy the defendant’s property is vested in the sheriff with oversight of the relevant jail “from the time of [the defendant’s] commitment.” *Id.* This is a powerful tool to recover assets from individuals who actually have them. Second, the sheriff has authority to enter into a payment plan with a defendant who cannot pay all jail debt prior to his release. *Id.* § 221.070.2. If the defendant then misses a payment, the sheriff can attempt to sue for breach of contract and collect the debt as a civil judgment. *Cf., e.g.,*

¹⁷ Tony Messenger, *St. Charles County points the way as lawmakers seek to end debtors prisons in Missouri*, St. Louis Post-Dispatch (Dec. 9, 2018), available at https://www.stltoday.com/news/local/columns/tony-messenger/messenger-st-charles-county-points-the-way-as-lawmakers-seek/article_337547b9-cca9-5f53-91ec-bd1fe9ae6965.html.

Capital One Bank v. Creed, 220 S.W.3d 874, 879 (Mo. Ct. App. 2007) (suit concerning breach of a credit card payment plan).

These mechanisms for collecting jail debt by their very nature ensure that sheriffs focus on collecting jail debt from those who are actually able to afford making payments. The sheriff will have little reason to initiate civil proceedings against an individual who has no assets to satisfy his jail debt. Thus, such individuals are more likely to be spared—appropriately—additional court proceedings as they seek to reintegrate into society. This contrasts sharply with monthly show-cause hearings, which burden those who owe jail debt without regard to the realities of their financial circumstances and ability to pay. Further, placing the responsibility for collecting jail debt on the sheriff means the court is left free to fulfill its proper role as a neutral arbiter of legal issues.

The experience of the Missouri Attorney General in collecting expenses from defendants incarcerated in prisons supervised by the Department of Corrections provides strong evidence that civil proceedings present an effective means of recouping jail debt from those who can actually afford to pay it. Under the Missouri Incarceration Reimbursement Act (“MIRA”), the Attorney General has authority to file petitions for reimbursement from defendants to recover the estimated cost of housing them in prison.¹⁸

See § 217.831.3, RSMo. But the Attorney General is statutorily limited to seeking reimbursement only from individuals who will be able to pay a minimum of 10 percent of

¹⁸ “The procedure in the MIRA for reimbursement is similar to an attachment proceeding,” *State ex rel. Nixon v. Peterson*, 253 S.W.3d 77, 82 (Mo. 2008), and therefore is not meaningfully any different from the procedure available to sheriffs under Section 221.070 of the Revised Statutes.

the expense of incarcerating them. *Id.* Therefore, the MIRA ensures the Attorney General's recoupment authority will not be used against those who cannot pay, and importantly, it does so without sacrificing its efficacy in recovering from those who can pay. In 2014, for example, the Attorney General used this statutory mechanism to collect \$620,552.60 through just 103 petitions.¹⁹

In addition to the initiation of civil proceedings, there is a third collection mechanism available to sheriffs when an individual owing jail debt does not enter into a repayment plan. In that circumstance, the sheriff may certify the amount owed to the Office of State Courts Administrator, who will intercept any tax refunds or lottery winnings owed to the debtor. *See* §§ 221.070.2, 488.5028, RSMo. This, too, can be an effective tool for recouping jail debt from those who are able to pay. In fact, a study of two Missouri counties that used both tax offsets and professional debt collectors (the role courts have unlawfully occupied in cases like that of Mr. Richey) found that, in Fiscal Year 2015, the counties collected \$81,324 through tax offsets but only \$30,647 through debt collectors.²⁰

Given that these alternative collections methods exist to recover jail debt from those who can afford to pay it, there is no reason to violate the plain language of Missouri statutes to construe jail debt as "costs" and allow courts to collect them through regular

¹⁹ Office of the Missouri Attorney General, 2014 Annual Report, at 16, *available at* <https://archive.org/details/2014AGOAnnualReport/page/n15>. 2014 is the most recent year for which *amici* could locate data on recovery under MIRA.

²⁰ *See* Alexis Harris, et al., Monetary Sanctions in the Criminal Justice System (2017) at 130, *available at* <http://www.monetarysanctions.org/wp-content/uploads/2017/04/Monetary-Sanctions-Legal-Review-Final.pdf>.

show-cause hearings that carry the negative consequences described above. Of course, limiting recovery to these alternative mechanisms—as Missouri law requires—will not remove all of the burdens that follow from the very fact these indigent individuals owe excessive jail debt. And these alternative collection mechanisms can, themselves, cause substantial harm to the poor, depriving them of property or a tax refund that would otherwise be used to obtain basic necessities,²¹ and alternative methods should therefore only be employed after a determination that a debtor can afford to pay. Still, limiting collection methods consistent with Missouri law will eliminate the increased harms from monthly show-cause hearings and the substantial risk of re-incarceration attendant thereto.

CONCLUSION

Jail debt, when imposed on indigent individuals like Mr. Richey, is irrational, unjust, counterproductive, and likely unconstitutional. This Court should reverse the trial court's denial of Mr. Richey's motion to retax costs.

January 22, 2019

Respectfully submitted,

/s/ Nicholas B. Kenney
Jeffrey J. Simon, #35558
Nicholas B. Kenney, #68852
Jenna Brofsky, #69667
HUSCH BLACKWELL

²¹ For this reason, much like the imposition of jail debt in the first instance, the use of these alternative collection methods against the poor is deeply problematic.

4801 Main St
Suite 1000
Kansas City, MO 64112
Phone 816 983 8000
jeff.simon@huschblackwell.com
nicholas.kenney@huschblackwell.com
jenna.brofsky@huschblackwell.com

Robert D. Friedman
INSTITUTE FOR CONSTITUTIONAL
ADVOCACY AND PROTECTION
GEORGETOWN UNIV. LAW CENTER
600 New Jersey Ave. N.W.
Washington, DC 20001
Phone 202 662 9042
rdf34@georgetown.edu

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed and served electronically via Missouri CaseNet on January 22, 2019, to all counsel of record. The undersigned further certifies that the foregoing brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and that the brief contains 4,884 words.

/s/ Nicholas B. Kenney