IN THE MISSOURI SUPREME COURT

NO. SC97604

STATE OF MISSOURI,

Respondent

v.

GEORGE RICHEY,

Appellant

Appeal from the Circuit Court of St. Clair County
27th Judicial Circuit
Hon. Jerry Rellihan

APPELLANT'S REPLY BRIEF

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Respondent accuses Appellant "and assorted *amici curiae*" of inviting this Court to "defeat a *venerable* … means of collecting board bills from convicted offenders" (emphasis added) (page 5).[1] Notably, Respondent does not take issue with the Attorney General's description of these so-called "venerable" means as "Modern-Day Debtor's Prisons."[2] Indeed, Appellant's own experience in this case does not differ all that much from the grim 19th century accounts of erstwhile English debtor's prisons:

> "The procedure was full of abuses and the system in force subjected the debtor to great and manifest hardships without benefitting the creditor or securing him the repayment of his debt. … When the arrest was made, too often arbitrarily, he was hurried off to gaol where he might be kept in durance almost indefinitely with small hope of enlargement. … [I]f the debtor was a poor man … and therefore unable to procure bail, he paid in person and was taken off to prison. Here he might lie almost indefinitely waiting, hopelessly, for money from the skies. … Great numbers of hapless folk in the passing ages were detained … on account of debts … grown out of a first pitifully small sum and largely increased by arbitrary charges for fees and maintenance, which but for unjust arrest and detention would never have existed."[3]

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[1] These page numbers reference Respondent's Brief.

[2] Mo. Att'y Gen., 2019 News Archives, "AG Schmitt Files Amicus Brief Opposing Modern-Day Debtor's Prisons," January 7, 2019.

[3] Major Arthur Griffins, *Non-Criminal Prisons: English Debtor's Prisons and Prisons of War*, Gutenberg ebook.

Appellant, too, has been subjected to great and manifest hardships these last three years by being ordered to appear for "payment review hearings" nearly every month as he struggles to provide for himself and pay off his debt. The Sheriff to this day has not been repaid the majority of this debt (nor is it likely he ever will). In 2016, Appellant was arrested and jailed again, arbitrarily, and was hurried off to jail, where he remained for an additional two months, without any meaningful opportunity for release. As provided in the warrant, Appellant had a financial bond set in the amount of "$3,266.50 CASH ONLY." (Legal File, D20, p. 1). Because Appellant was a poor man, and therefore unable to procure bail, he paid in person, and thus languished in jail waiting, hopelessly, for money from the skies. When Appellant was finally released from this additional period of detention, he was billed an additional $2,275.00 as part of the fees for his incarceration and ordered to continue appearing for monthly hearings. (Legal File, D64, p. 1). Such fees would likely never have existed but for this unjust arrest and detention.

Appellant leaves it to this Court to determine whether such practices by St. Clair County are "venerable" means for the collection of jail board bills.

1. Missouri law requires express statutory authority in taxing costs

Respondent claims that Appellant's liability under Mo. Rev. Stat. § 221.070 is a "miscellaneous charge" under Mo. Rev. Stat. § 488.010 and is therefore a

"court cost" as defined therein (page 4). Specifically, Respondent attempts to establish the liability created under Mo. Rev. Stat. § 221.070 as a "service," which, according to Respondent, therefore makes it a "miscellaneous charge," which also somehow therefore makes it a "court cost." And in support of all of this, Respondent cites to a single case, *In re G.F.*, 276 S.W.3d 327 (Mo. App. E.D. 2009), in concluding that an item can be taxed as a court cost, "regardless of the specific words used," so long as it can somehow be characterized as a "*service* provided by an individual other than the court." (Emphasis added) (page 10).

This proposed test for the determination of whether a particular item may be taxed as a "court cost" stands in stark conflict with a long line of precedent from this Court holding that:

> "At common law costs as such in a criminal case were unknown. As a consequence, it is the rule as well in criminal as in civil cases that the recovery and allowance of costs rests entirely on statutory provisions [and] no right to or liability for costs exists in the absence of statutory authorization. Such statutes are penal in their nature, and are to be strictly construed."

State v. D.S., 606 S.W.2d 653, 654 (Mo. banc 1980) (quoting *Cramer v. Smith*, 168 S.W.2d 1039, 1040 (Mo. banc 1943)). This quoted language suffices to establish a very simple test: "[n]or 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). See also Mo. Const. Art. VI, § 13.

All of this was re-affirmed by this Court's recent decision in *State ex rel. Merrell v. Carter*, 518 S.W.3d 798 (Mo. banc 2017). The particular item in that case – "special master's fees" – is surely a *service* provided by an individual (*viz.* "the special master"), but this Court was nonetheless *emphatic* that "courts have 'no inherent power to award costs, which can only be granted by virtue of express statutory authority.'" *Id*. at 800. Indeed, the lower appellate courts have come to rely on this test, as can be seen in the recent decision in the Southern District in *Heubel v. VSV*, SD35492 (January 15, 2019), which cited to *Merrell* in holding that "the trial court impermissibly imposed the costs of those jury trials upon the litigants without the requisite legal authority to do so." Slip op. at 9. See also *Warren v. Dunlap*, 532 S.W.3d 725, 732 (Mo. App. S.D. 2017), also citing to *Merrell* in holding that "the trial court does not have discretion on what costs may be taxed. The assessment of costs is a ministerial function, and only those costs allowed by statute may be assessed." See also *State v. Anderson*, 758 S.W.2d 500, 502-503 (Mo. App. W.D. 1988), which held that "[a]bsent the legislature's addressing the problem, however, the sheriff's deputies' salaries may not be taxed as costs."

In keeping with this precedent, this Court should hold simply that Respondent has not pointed to any statute authorizing the taxing of the fees of incarceration in a criminal case against the defendant, for the simple reason that there is no such statute. As recognized recently by the Western District in *State v. Wright*, WD81666 (December 11, 2018), "[u]nder the rule of strict construction, applicable 'in both civil and criminal cases,' 'the officer or other persons claiming costs, which are contested, must be able to put his finger on the statute authorizing their taxation." Slip op. at 4-5 (quoting *Ring v. Charles Vogel Paint & Glass Co.*, 46 Mo. App. 374, 377 (1891)). Adopting this precedent, the Western District in *Wright* concluded that "[b]ecause the right to tax items as court costs can be created only by express statutory authorization and because such statutes are strictly construed, we cannot hold that the debt for costs of incarceration established by section 221.070 is taxable as a cost against a criminal defendant where the relevant statutes are at best ambiguous concerning the taxability of such debt as a court cost." Slip op. at 10. This holding in *Wright* was entirely in keeping with this precedent as well as this Court's recent *Merrell* decision.

Adopting Respondent's test, however, would not only have the effect of overruling this long line of precedent (re-affirmed recently by this Court in *Merrell*), but it would also cause this Court to substitute a much more speculative and uncertain test for the determination of costs, which would be whether the

particular item can be characterized as a "service." Such a rule would lead to hopeless confusion, as can be seen by Respondent's own brief, in which he claims ("[a]necdotally") that incarceration can in fact be characterized as a "service" in part because the experience of incarceration helps to impress upon the detainee the error of his ways (page 11). Incidentally, would such logic then also apply to the "care and detention of certain children" under Mo. Rev. Stat. § 211.156? What about the fees and expenses associated with the execution of a defendant sentenced to death under Mo. Rev. Stat. § 565.020? Such a test is simply untenable.

2. The legislature has mandated a specific collection remedy

This question, of course, is complicated slightly by the fact that the issue in this case is not solely whether the liability created under Mo. Rev. Stat. § 221.070 can be taxed as a "court cost." For example, let's just assume *arguendo* that jail board bills can indeed be taxed as a "court cost." Does that end our inquiry in this case? Not at all. Again, as recognized by the Western District in *Wright*, "even if we said that [these sections] provide some limited support for the taxation of costs of incarceration as court costs, sections 221.070, 488.5028, and other provisions of chapter 488, all indicate that the costs of incarceration are recoverable in a different fashion, and *distinguish* the financial liability created by section 221.070 from 'court costs.'" Slip op. at 9-10. (Emphasis in original.)

The legislature, in other words, has already mandated a specific collection remedy for the liability created by Mo. Rev. Stat. § 221.070, irrespective of whether it is properly taxed as a "court cost," and so even if this Court somehow concludes that this *is* a "court cost," the legislature has still nonetheless already mandated a specific collection remedy as regards this *particular* "court cost."

This Court has long heeded this principle in the area of taxation and revenue: "[t]herefore, if the statutes of this state make special provisions for the collection of taxes … the mode of collection prescribed by statute is exclusive." *State ex rel. Hayes v. Snyder*, 41 S.W. 216, 217 (Mo. 1897). The rationale, of course, is that "[i]t is an impost levied upon the citizen in invitum; and, for coercing its payment, the state is limited to the modes pointed out by statute." *Id*.

This rule was later applied in *State ex rel. George v. Dix*, 141 S.W. 445, 446 (Mo. App. 1911), correctly noting that "[t]he point at issue is whether the remedy provided in the ordinance is exclusive or merely cumulative." *Dix*, of course, followed this Court in *Snyder* in holding that "if the statute names a remedy which may fairly be said to be exclusive, no other can be had." *Id.* at 447.

Like taxes, a court cost "is an impost levied upon the citizen in invitum." *Snyder*, 41 S.W. at 217. Taxes, like court costs, have also been called "penal" in nature, and thus the "remedy given in the ordinance was adequate and therefore

exclusive." *Dix*, 141 S.W. at 447. (Costs, too, have been called "penal" in nature: "[s]uch statutes are penal in their nature, and are to be strictly construed." *Cramer v. Smith*, 168 S.W.2d 1039, 1040 (Mo. banc 1943).)

But this so-called "exclusive remedy" rule is in no way limited to the area of taxation and revenue. In deciding upon this question in a case involving the recovery of the cost of "certain notices of publication," for example, the court held that the "specific provisions" relating to the collection of these costs "supersedes" the more general provisions found elsewhere. *Chilton v. Drainage District*, 63 S.W.2d 421, 423 (Mo. App. 1933). The court went further: "[i]t is a well recognized rule of construction as to statutes that ordinarily where a statute limits a thing to be done in a particular form it includes in itself a negative, namely, that such thing shall not be done in any other manner." *Id.* at 422-23.

This so-called "exclusive remedy" rule has also been applied in MIRA actions under Chapter 217, where it has been held that the exemptions in Chapter 513 do not apply in MIRA actions: "[w]hen the same subject matter is addressed in general terms in one statute and in specific terms in another, the more specific controls over the more general. … MIRA is a more specific statute because it has a more specific purpose." *State ex rel. Nixon v. Overmyer*, 189 S.W.3d 711, 717-18 (Mo. App. W.D. 2006) (quoting *Lane v. Lensmeyer*, 158 S.W.3d 218, 225 (Mo. banc 2005).

Appellant therefore suggests to this Court that the issue in Point I of Appellant's Brief is not *solely* whether the fees for the cost of incarceration can be taxed as a "court cost." The additional and perhaps more dispositive issue is what effect this Court should give to the specific collection procedure – mandated by our legislature – providing for the recovery of jail board debt. For this reason, Respondent is *incorrect* in claiming that "[i]f a board bill is a "court cost" … then the fact that different kinds of court costs are provided with different or additional remedies is irrelevant" (page 8). For this same reason, the Court in *Wright* was *correct* to note: "[t]he fact that the legislature in 2013 added additional language to the statute, creating a similar (but not identical) collection remedy for the liability created by section 221.070, indicates that the legislature did not read the existing language of section 488.5028 as creating a remedy for collection of the debt created under section 221.070." Slip op. at 10, n. 4.

Put simply, the fact that the legislature codified a specific collection remedy with respect to the recovery of jail debt means that any collection effort for that debt must be made according to the terms of that specific collection remedy. "[C]ourts cannot rewrite the statutes the legislature in its wisdom has enacted no matter how much such rewriting is desired by a particular group." *Gross v. Merchants–Produce Bank*, 390 S.W.2d 591, 600 (Mo.App. 1965). "We cannot usurp the function of the General Assembly, or by construction, rewrite its acts."

Marshall v. Marshall Farms, Inc., 332 S.W.3d 121, 128 (Mo.App. S.D. 2010). "To substitute for the concept of the general assembly our view of what might be the more salutary public policy would be for us to legislate rather than to adjudge." *Lemasters v. Willman*, 281 S.W.2d 580, 590 (Mo.App. 1955).

Respondent, in any event, claims that "[i]t is the custom and practice in St. Clair County to address board bills in negotiated plea agreements" (page 17). And, more to the point, that this was the "process" that occurred in this case. Appellant wishes merely to point out that "local practice cannot and does not justify the violation of a statute." *In re: R. Scott Gardner*, SC97207 (January 15, 2019) (Powell, J., dissenting), slip op. at 2 (quoting *Rose v. State Bd. of Registration for Healing Arts*, 397 S.W.2d 570 (Mo. 1965)). See also Mo. Rev. Stat. § 550.310.

3. Appellant is indigent such that he is unable to pay the costs in this case

With respect to the issue of inability to pay in the cost assessment context, Respondent claims that the fact that a defendant is indigent as determined by the "Public Defender" does not necessarily mean that the defendant is therefore automatically "unable to pay" assessed costs (page 21).[4] This raises an interesting question for this Court: to what extent is the determination of indigence for

[4] By insisting that the cost of incarceration is a "court cost," Respondent is forced to concede that such costs "shall be assessed to the county if the defendant is 'unable to pay,'" pursuant to Mo. Rev. Stat. § 550.030 (page 5).

purposes of "Public Defender" representation any different from the determination of inability to pay for purposes of cost assessment? In other words, can a person at the same time be determined *indigent* for purposes of representation by the Public Defender but also determined *not-indigent* for purposes of assessing costs? If so, how would this work? What standards do we use and what factors should we consider? Regrettably, Respondent provides no answer to this question.

Fortunately, this question has already been addressed and resolved by this Court in its recent decision in *Fleming v. Missouri Board of Probation and Parole*, 515 S.W.3d 224, 226 (Mo. banc 2017), holding that "[t]he evidence before the sentencing court was sufficient to establish, as a matter of law, that (1) Mr. Fleming was indigent ***such*** that he could not pay his court costs." (Emphasis added.)

Indigency, of course, is a determination made by the Public Defender under Mo. Rev. Stat. § 600.086.3. In *Fleming* this Court found that Mr. Fleming was unable to pay the assessed costs in the case *because* he was indigent. The language "***such***" in this Court's opinion implies causation – *because* Mr. Fleming was indigent, he therefore could not pay the assessed costs in his case.[5]

[5] The *excellent* dissenting opinion by Chief Justice Fischer does not take issue in any way with this part of the Court's holding in *Fleming* and as such this principle (indigent = unable to pay) has already been unanimously established by this Court.

But the facts in Appellant's case, in any event, are so nearly identical to those in *Fleming*, that this Court, in applying *Fleming*, ***must*** find that Mr. Richey is also indigent *such* that he, too, cannot pay the assessed costs in the case. Any other result by this Court would simply be illogical. For example, the facts in *Fleming* show that Mr. Fleming was unemployed and was receiving supplemental security income (SSI) payments in the amount of $674 per month. *Id*. at 227. In addition, the facts in *Fleming* also showed that Mr. Fleming "had paid more than $1,100 but still owed more than $3,000 in court costs." *Id*. And, despite Respondent's claims in this case, this Court in *Fleming* did not consider it material that Mr. Fleming "should have raised his inability to pay prior." *Id*. at 228.

In this case, the record clearly shows, as it did in *Fleming*, that (1) Appellant is unemployed, (2) that he is receiving disability payments in the amount of $630 per month, (3) that he has paid more than $1,100 but still owes more than $3,000 in court costs, and (4) that he, too, did not raise his inability to pay prior. Common sense therefore demands that this Court also find, like it did in *Fleming*, that Mr. Richey is indigent *such* that he cannot pay the costs assessed in this case.[6]

[6] Accordingly, as conceded by Respondent, this would mean that the costs assessed in this case (including the jail debt) "shall be assessed to the county," in accordance with Mo. Rev. Stat. § 550.030 (page 5). Appellant would also therefore be entitled to a refund of any amounts already paid by reason of the unlawful charge resulting from the first taxation. See Mo. Rev. Stat. § 514.270.

Respondent may argue that the automatic equation of indigence with inability to pay is too harsh. While it is true that the Public Defender makes the "initial determination" of whether a person seeking representation is indigent, such determination is always subject to appeal by any of the parties involved in the case. *State ex rel. Gordon v. Copeland*, 803 S.W.2d 153, 156 (Mo. App. S.D. 1991).[7]

Indeed, this holding suggests that it is in fact the responsibility of Respondent to contest the determination of indigency when there is reason to believe that the resources of the defendant are such that the person is ineligible to "receive legal services under the enactment." Further, "[t]he judiciary is to intervene only upon the *appeal* of the public defender's … decision" (emphasis added). *State ex rel. O'Brien v. Ely*, 718 S.W.2d 177, 181 (Mo. App. W.D. 1986).[8]

In this case, because the Public Defender's determination of indigency was never contested or appealed, "[t]he evidence before the sentencing court was sufficient to establish, as a matter of law, that (1) Mr. [Richey] was indigent such that he could not pay his court costs." *Fleming*, 515 S.W.3d at 226. See also *State*

[7] Interestingly, while Mo. Rev. Stat. § 514.040.3 provides statutory authorization for the automatic equation of indigence with inability to pay, it does *not*, like in the case of Mo. Rev. Stat. § 600.086.3, provide any avenue for appeal.

[8] Respondent's suggestion that "it is the defendant's obligation to raise the issue" is therefore mistaken (page 21). The Public Defender has made their determination. The defendant is indigent. Unless that determination is contested, no further action need be taken by the Public Defender. Use of the word "appeal" is instructive: why should the Public Defender ever need to appeal its own determination?

v. Bilyeu, 867 S.W.2d 646, 649 (Mo. App. S.D. 1993), holding that there was no error in the Public Defender determination of indigence since the determination was never contested or made the subject of appeal.

Accordingly, in the absence of an appeal involving the determination of indigence by the Public Defender, Missouri law requires that the *indigent* defendant be exempt from the assessment of costs in the case.[9]

Again, in this case, there is ample evidence supporting the Public Defender's determination of indigence, such that Appellant, as a matter of law, is unable to pay the costs assessed in the case. *Fleming*, 515 S.W.3d at 226.[10]

Appellant was unable to post any of the financial bonds set in this case. When a bond is posted on behalf of the defendant, "a presumption is created that Defendant is not indigent." *State v. Lewis*, 222 S.W.3d 284, 287-88 (Mo. App. E.D. 2007). Moreover, Appellant's reported income is far below the federal poverty guidelines. *Id*. at 287. And, as already mentioned, Appellant is

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[9] "Through all this period of change, … our lawmakers have scrupulously endeavored to ameliorate somewhat the misfortune of poverty." *State v. Hitchcock*, 153 S.W. 546, 552 (Mo. App. 1913). Indeed, this is a "*venerable* as well as *humane* provision of our law" (emphasis added). *Id*. at 550.

[10] This is perhaps why the determination was never challenged or appealed. There are also considerable additional problems with Respondent's claim that it is the obligation of the Public Defender to raise the issue of inability to pay. For example, failure to do so would now form the basis of an ineffective assistance of counsel claim. *Williams v. State*, 254 S.W.3d 70, 77 (Mo. App. W.D. 2008).

unemployed. *Ely*, 718 S.W.2d at 179. Finally, and perhaps most importantly, the trial court has found Appellant indigent for purposes of this very appeal. *State v. Madewell*, 928 S.W.2d 381, 383-84 (Mo. App. S.D. 1996), "[o]nce a determination of indigency has been made for purposes of appeal, it need not be revisited absent a manifestation of some change of an appellant's financial circumstances. To require otherwise would be a duplicitous exercise of form over substance."

"The evidence before the sentencing court was [therefore] sufficient to establish, as a matter of law, that (1) Mr. [Richey] was indigent ***such*** that he could not pay his court costs." (Emphasis added.) *Fleming*, 515 S.W.3d at 226.

4. Summary: an illustration

Respondent believes that Mo. Rev. Stat. § 3.150 "constitutes the express designation that Appellant claims is required" with respect the rule that no items is taxable as a court cost unless specifically authorized by statute (page 13). The statute provides in relevant part: "[t]he revisor shall recodify those sections or portions of sections of existing law which impose court costs, including, but not limited to, sections … 221.070."

First, nothing in this statute authorizes taxing the fees of incarceration as a court cost. Instead, reference is merely made to "section 221.070" and nothing in section 221.070 provides that the jail board bill may be "assessed as costs."

Wright, WD81666, slip op. at 5. Thus, even if we said that this statute – § 3.150 – provides "some limited support for the taxation of costs of incarceration as court costs, … [b]ecause the right to tax items as court costs can be created only by statutory authorization and because such statutes are strictly construed, we cannot hold that the debt for costs of incarceration … is taxable as a cost against a criminal defendant where the relevant statute [section 3.150] [is] at best ambiguous concerning the taxability of such debt as a court cost." Slip op. at 9-10.

Secondly, the legislature ***has*** re-codified "section 221.070" subsequently to the enactment of Mo. Rev. Stat. § 3.150, which now provides that "the costs of incarceration are recoverable in a different fashion, and *distinguish*[*es*] the financial liability created by section 221.070 from 'court costs.'" Slip op. at 9-10 (quoting *State v. Liberty*, 370 S.W.3d 537, 561 (Mo. banc 2012)) ("When the legislature amends a statute, it is presumed that the legislature intended to effect some change in the existing law.") Slip op. at 10, n. 4.

And finally, as conceded by Respondent, the principal effect of labeling the liability created by Mo. Rev. Stat. § 221.070 as a "court cost" is, consistent with Mo. Rev. Stat. § 550.030, to exempt *indigent* defendants from liability altogether.

Respondent must realize that objecting to the specific relief claimed by Appellant in Point I (referral of the debt to OSCA) only makes it all the more

likely that Appellant must then be given the relief claimed in Point II (exemption from payment altogether due to inability to pay). This would effectively eliminate any collection efforts by OSCA as regards *indigent* defendants. This is a not insubstantial sum in the aggregate. (See Appellant's Reply Brief Appendix, A2) Surely, this was not the intent of the legislature in mandating the specific collection remedy as regards jail board bills in Mo. Rev. Stat. § 221.070 & § 488.5028.

Consequently, Appellant requests that this Court hold, as did the Western District in *Wright*, that the trial court erred in adopting a procedure for the collection of jail board bills which lacked statutory authorization. For this reason, this Court should grant Point I and reverse the trial court's ruling on the motion to retax. This would obviate the need to decide Point II. *Wright*, slip op. at 11.

In closing, Appellant wishes to point out that "[w]e are not unaware that [this Court's] holding may place a further burden on [counties] in administering criminal justice. Perhaps a fairer and more accurate statement would be that new cases expose old infirmities which apathy or absence of challenge has permitted to stand. But the constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo." *Williams v. Illinois*, 399 U.S. 235, 245 (1970). And "[t]his Court has long been sensitive to the treatment of *indigents* in our criminal justice system." *Bearden v. Georgia*, 461 US. 660, 663 (1983). (Emphasis added.)

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, and/or alternatively, to Order the trial court to determine that Appellant is unable to pay the costs, to Order that the costs shall be assessed to St. Clair County, and to refund Appellant all monies erroneously paid to the court as costs.

Respectfully submitted,

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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 5,284 words in the brief as determined by the word count of the word-processing system used to prepare the brief.

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