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## NOTE

# Incarcerated for Indigence: Probation Revocation for Inability to Pay Court-Ordered Fines Found to Violate Due Process

*State ex rel. Fleming v. Mo. Bd. of Prob. & Parole*, 515 S.W.3d 224 (Mo. 2017)  
(en banc)

Aaron Wynhausen\*

### I. INTRODUCTION

Currently, in Missouri, if you are an alleged criminal offender unable to afford bail, sitting in county jail waiting for trial, you may be racking up a bill worth thousands of dollars for your “care.” State prosecutors and judges have the discretion to impose this bill upon you, and if you are unable to pay this bill for any reason, then the true cost may well be the incalculable expense of your freedom. The Supreme Court of Missouri recently considered a case that followed this pattern and ultimately released a man who spent three years in state prison for failure to “pay for his stay” while awaiting trial in a county jail.

William Fleming was an indigent resident of Farmington, Missouri, on probation for assault.<sup>1</sup> His five-year probation term was revoked after four years and ten months, and he was then sentenced to a seven-year prison term solely for a failure to pay court-ordered fines in the time allotted by the court.<sup>2</sup> He filed for a writ of habeas corpus with the Supreme Court of Missouri, challenging the sufficiency of his sentence, and he won.<sup>3</sup> The court found his due process rights were violated because the sentencing court failed to follow established judicial procedures for revoking probation when an offender fails to pay legal financial obligations (“LFOs”).<sup>4</sup> His equal protection rights were also violated because the sentencing court neglected to account for his indigence as the impetus for his failure to pay – a condition that offenders with

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1. See Service Information, *State v. William A Fleming*, No. 08D7-CR00864, (Mo. Cir. Ct. St. Francois Cty. May 1, 2008).

2. *State ex rel. Fleming v. Mo. Bd. of Prob. & Parole*, 515 S.W.3d 224, 226, 228 (Mo. 2017) (en banc).

3. *Id.* at 225–26.

4. *Id.* at 234.

financial means would have far less trouble satisfying.<sup>5</sup> Habeas corpus was thus granted despite Fleming's release on parole, a status that could arguably cure the restrictions to his liberty due to a lack of physical imprisonment.<sup>6</sup>

The outcome of this case is important for a few reasons. First, it demonstrates the state judiciary's reluctance to condone imprisonment for a defendant's inability to pay court-ordered fines and costs. This reluctance is underscored by other recent legislative and judicial developments in Missouri that indicate a problem exists and needs to be actively addressed. Defense attorneys, prosecutors, and judges should now be on notice of the required procedure when sentencing an offender to jail for financial shortcomings. Second, it highlights the potential for unjust outcomes in Missouri's current statutory scheme. The vast bulk of the fines imposed on Fleming came from a "pay-to-stay" statute called the Missouri Incarceration Reimbursement Act ("MIRA") that transfers the costs of a prisoner's "care" directly to the prisoner.<sup>7</sup> While such statutes are common throughout the country,<sup>8</sup> their efficacy and actual reduction of financial burdens to taxpayers are dubious. When combined with another Missouri statute that provides state reimbursement to counties based on per diem prisoner population, a potentially perverse incentive for courts to encourage stricter sentencing is created. Third, the court's broad interpretation of Missouri's writ of habeas corpus jurisprudence reaffirms a commitment to liberty for state residents. By not considering the case moot upon Fleming's release to parole, the court acknowledged the common law roots of the doctrine and upheld the right of residents to challenge restrictive government intrusion into their lives. In short, the outcome in this decision was apt and is hopefully indicative of further changes in the way the state legal system treats its poorest residents.

This Note introduces the facts and holding of the case at hand in Part II. Part III then explores the legal background on which the outcome of the case rested. Next, Part IV summarizes the instant decision and holding. Finally, Part V provides commentary on the case and the propriety of its outcome before suggesting further developments to the Missouri criminal justice system.

## II. FACTS AND HOLDING

William Fleming sought a writ of habeas corpus against the Missouri Board of Probation and Parole from the Supreme Court of Missouri.<sup>9</sup> Fleming's ordeal began when he was served with an arrest warrant for domestic

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5. *Id.* at 231, 234. Although this case mentions both due process and equal protection, the bulk of this court's opinion was analyzed on grounds of due process, and this Note follows accordingly.

6. *See id.* at 234.

7. Missouri Incarceration Reimbursement Act, MO. REV. STAT. §§ 217.825–217.841 (2016).

8. *See, e.g.*, The State Correctional Facility Reimbursement Act, MICH. COMP. LAWS ANN. § 800.401 (West 2018).

9. *Fleming*, 515 S.W.3d at 225.

assault on May 1, 2008.<sup>10</sup> On May 6, he was arraigned and received his first hearing.<sup>11</sup> Fleming asserted indigence and submitted an application for public defender assistance, which was granted.<sup>12</sup> On May 27, a bond reduction hearing was held and his bond was set at \$50,000 – an amount Fleming was unable to post.<sup>13</sup> On June 24, the case was moved to the Twenty-Fourth Judicial Circuit, and another arraignment hearing was scheduled for July 11 of that year.<sup>14</sup> At that arraignment, Fleming appeared and pled not guilty to two counts of second-degree domestic assault, one count of second-degree assault, and one count of unlawful use of a weapon.<sup>15</sup> A trial was scheduled for July 31.<sup>16</sup>

Prior to his scheduled trial, Fleming agreed to a plea bargain; thus, the trial instead became a sentencing hearing.<sup>17</sup> Fleming subsequently pleaded guilty to the two counts of second-degree domestic assault, and the State agreed not to prosecute the other charges.<sup>18</sup> He was then sentenced to serve two concurrent seven-year prison terms, the execution of which was suspended and replaced with five years of supervised probation.<sup>19</sup> The terms of Fleming's probation included completion of a domestic abuse or anger management program, a mental health program, and payment of "court costs" within three years.<sup>20</sup> The court costs were calculated to include expenses and fees of \$301.50 for the public defender lien,<sup>21</sup> a ninety-two dollar reimbursement to the Crime Victims' Compensation Fund, and a \$3870 jail "board bill" for the twelve weeks he spent incarcerated while awaiting disposition of his case.<sup>22</sup> Thus, Fleming's total bill was \$4263.50, and his probation was scheduled to end on July 30, 2013.<sup>23</sup>

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10. Since the case was for domestic assault, the details of the original crime are sealed. *See* Warrant Issuance, *State v. Fleming*, No. 08D7-CR00864 (Mo. Cir. Ct. St. Francois Cty. May 1, 2008).

11. Initial Arraignment Hearing, *Fleming*, No. 08D7-CR00864 (May 6, 2008).

12. Indigency Hearing, *Fleming*, No. 08D7-CR00864 (May 6, 2008).

13. *See* Bond Reduction Hearing, *Fleming*, No. 08D7-CR00864-01 (May 27, 2008).

14. Waiver of Preliminary Hearing, *Fleming*, No. 08D7-CR00864-01 (June 23, 2008).

15. Judgment, *Fleming*, No. 08D7-CR00864-01 (July 11, 2008).

16. *Id.*

17. Respondent's Brief at 1, *State ex rel. Fleming v. Mo. Bd. of Prob. & Parole*, 515 S.W.3d 224 (Mo. 2017) (en banc) (No. SC 95764).

18. *Id.*

19. *Fleming*, 515 S.W.3d at 226.

20. *Id.*

21. *See* MO. REV. STAT. § 600.090.2 (2016) (Missouri public defender services are not free to defendants, public defender liens are imposed upon "any and all property" of a defendant receiving assistance in an amount calculated to be the "reasonable value of the services rendered."), *amended by* S.B. No. 735 (2016).

22. *Fleming*, 515 S.W.3d at 226 (If Fleming had been able to post bail, the accrual of this fee amount under MIRA could have been largely avoided.).

23. *Id.*

Fleming's financial means were very limited.<sup>24</sup> He was unemployed and reported to his probation officer that his primary source of income was a monthly Supplemental Security Income ("SSI") disbursement for a physical injury and bipolar disorder that amounted to \$449 per month.<sup>25</sup> In April 2009, he agreed to make monthly payments of \$118 to the court, but he made only one payment of this amount, in May 2009.<sup>26</sup> In August 2009, Fleming's probation officer issued a citation for failure to make the monthly payments and wrote in a case summary that Fleming continued "to have financial difficulties" and failed to receive housing assistance.<sup>27</sup> After the citation, Fleming made semi-regular ten-dollar monthly payments but was able to pay only a total of \$288 by the end of the three-year period set by the sentencing court.<sup>28</sup>

In August 2011, Fleming's probation officer filed a violation report for failure to pay the balance of the court costs within the specified time.<sup>29</sup> The report highlighted Fleming's financial difficulties, noted he would continue to make ten-dollar payments, discussed the possibility of proscribing alternative arrangements to count as credit for the costs, and requested a probation revocation hearing to best determine how to proceed.<sup>30</sup> A hearing was held on September 9, 2011, during which Fleming admitted to violating the payment condition of his probation.<sup>31</sup> The court accepted his admission without making any inquiry into the reasons for his failure to make payment in full.<sup>32</sup> Disposition of the probation revocation was deferred for three months on the condition that \$150 be paid in fifty-dollar monthly installments before a rehearing in December 2011.<sup>33</sup> Fleming did not make the monthly payments but managed to make a lump-sum \$150 payment prior to the deadline.<sup>34</sup>

At the December hearing, Fleming was ordered to continue making fifty-dollar monthly payments, a task at which he achieved partial success, and the formal probation revocation hearing was continued and rescheduled multiple times until April 12, 2013.<sup>35</sup> By the time of the April hearing, with only a couple months left of his probation, Fleming had paid over \$1100 toward his total bill but still owed over \$3000.<sup>36</sup> In the meantime, the balance of the jail boarding bill had been sent to a collection agency, which had begun garnishing his SSI checks to pay off the debt.<sup>37</sup> Fleming argued he had complied with all

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24. *Id.* at 227.

25. *Id.*

26. Respondent's Brief, *supra* note 17, at 1–2.

27. *Fleming*, 515 S.W.3d at 227.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 230.

33. *Id.* at 227.

34. Respondent's Brief, *supra* note 17, at 6.

35. *Fleming*, 515 S.W.3d at 227.

36. *Id.*

37. Relator's Brief at 12, *Fleming*, 515 S.W.3d 224 (No. SC 95764).

other conditions of his probation, insisted he was indigent, and suggested that his payments of \$1100 were evidence he was making a good-faith effort to complete the probation terms, despite his indigence.<sup>38</sup> The State argued that Fleming's poor payment record indicated he had not made a good-faith effort to pay the costs, despite having the means to do so, and that his admission at the September 2011 hearing precluded any later argument of indigence.<sup>39</sup>

The court agreed with the State, revoked Fleming's probation, and, after nearly five years of probation, ordered execution of the prison sentences solely based upon the admission at the September hearing.<sup>40</sup> Despite a statement by the sentencing judge that people should not "be sent to prison because they can't pay their court costs," the court concluded that the only option was to revoke probation, even though it admitted the availability of other means of punishment.<sup>41</sup> Thus, nearly five years after a guilty plea for domestic assault, the court sent an indigent Missourian – relying on SSI disability for income and represented by a public defender – to a seven-year prison sentence for failing to pay for his three-month stay in county jail, which itself resulted from an inability to post a \$50,000 bond after arrest.<sup>42</sup>

Fleming filed a writ of habeas corpus with the Twenty-Fourth Judicial Circuit in October 2015, which was denied.<sup>43</sup> He then filed a writ of habeas corpus with the Missouri Court of Appeals, Western District, in March 2016, which was also denied.<sup>44</sup> Finally, he filed a writ of habeas corpus with the Supreme Court of Missouri in June 2016, which was ultimately granted after it was amended to reflect his new status as a parolee.<sup>45</sup>

The Supreme Court of Missouri held that when Fleming's probation was revoked for failure to pay assessed court costs, his due process and equal protection rights were violated.<sup>46</sup> This outcome resulted because the sentencing court had not made an inquiry into his ability to pay, determined if he had made bona fide efforts to acquire the resources to pay, nor considered alternative means of punishment – despite ample evidence demonstrating his indigent status.<sup>47</sup> Fleming was discharged from his sentence of imprisonment and parole and restored to his status as a probationer for sixty days, giving the State the option to reinstate revocation proceedings if it could present evidence to defeat the indigence claim.<sup>48</sup>

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38. *See id.* at 15–16.

39. Respondent's Brief, *supra* note 17, at 20.

40. *Fleming*, 515 S.W.3d at 228.

41. *Id.* (Alternative means of punishment could have included imposition of community service, an extension of the time to pay, a reduction of the imposed fees, or credit for successful completion of court-approved programs.).

42. *See id.*

43. Relator's Brief, *supra* note 37, at 7.

44. *Id.*

45. *Fleming*, 515 S.W.3d at 228.

46. *Id.* at 225–26.

47. *Id.*

48. *See id.* at 226.

### III. LEGAL BACKGROUND

The legal theories in this case strike at the following questions: (1) Are the impositions of court costs and hefty jail boarding bills a restriction of liberty to indigent defendants? (2) Should parolees and probationers be afforded the right to challenge the restraint of their “liberty” through extraordinary writs? (3) What procedures should the State pursue to ensure impoverished defendants are not wrung out and then hung out to dry by a complex and expensive legal system? Section A examines the constitutional due process and equal protection requirements that a court make some finding that a probationer *willfully* refused to pay court costs prior to revoking probation for failure to pay. Next, Section B considers the application of Missouri habeas corpus law in circumstances where the petitioner is no longer in physical custody. Finally, Section C highlights the Missouri statutes responsible for the bulk of the LFOs imposed on Fleming, which led to his ultimate incarceration.

#### *A. The Requirement that Courts Find a Means to Pay LFOs Before Revoking Probation*

The constitutional standard for probation revocation when a defendant has failed to make court-ordered restitution payments is relatively straightforward. The Supreme Court of the United States has held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment prohibit a state from revoking a defendant’s probation without first determining his or her ability to pay.<sup>49</sup>

In *Bearden v. Georgia*, the Court resolved a split among state courts about whether automatic revocation for failure to pay court costs violated the Fourteenth Amendment.<sup>50</sup> In doing so, the Court affirmed its “sensitive” treatment of indigents in the criminal justice system.<sup>51</sup> The Court proceeded to outline

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49. See *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983).

50. *Id.* at 663–64.

51. *Id.* at 664 (citing *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (plurality opinion) (Black, J.)) (“[T]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”); *Williams v. Illinois*, 399 U.S. 235, 245 (1970) (holding that a state cannot subject a certain class of convicted defendants to imprisonment beyond a statutory maximum solely because they cannot afford to pay a fine); *Tate v. Short*, 401 U.S. 395, 396–98 (1971) (holding that a state cannot imprison a defendant for failing to pay a fine assessed pursuant to a fine-only statute solely because the defendant was indigent and unable to pay the fine immediately). *But see* *United States v. MacCollum*, 426 U.S. 317, 328 (1976) (plurality opinion) (rejecting an equal protection challenge to federal statute providing indigent defendants with a free trial transcript, but only if the court certifies the challenge is not frivolous).

why due process rights and, secondarily, equal protection rights were implicated in cases regarding a state's treatment of indigent defendants.<sup>52</sup> With regards to due process, the question is “whether and when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine.”<sup>53</sup> The Court also stated that there is “no doubt that the State has treated the petitioner differently from a person who did not fail to pay the imposed fine and therefore did not violate probation.”<sup>54</sup> To decide if this treatment is a violation of equal protection, “one must determine whether, and under what circumstances, a defendant's indigent status may be considered in the decision . . . to revoke probation.”<sup>55</sup>

The Court summarized the rule upon which it would decide *Bearden* by stating “if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it.”<sup>56</sup> However, probationers that had the means to pay and willfully refused or failed to make a bona fide effort to seek employment or borrow money to cover the fine could still face incarceration.<sup>57</sup> Thus, recognizing that the decision to place a defendant on probation reflected the State's determination that its “penological interests do not require imprisonment” and that a probationer who otherwise complied with the terms of probation and made a bona fide effort to pay “demonstrated [his] willingness to pay his debt to society,” the Court concluded that due process requires a sentencing court to first make an inquiry into the reasons why a probationer could not pay before revoking probation.<sup>58</sup>

Georgia argued that retaining the ability to revoke probation for failure to pay acts as a deterrent to keep other probationers from forgoing payment obligations.<sup>59</sup> The Court responded that the State had alternative means to enforce judgments against indigent clients, such as extending the time to make payments, reducing the fine, or assigning the probationer to some form of labor or public service in place of the fine.<sup>60</sup> The Court ultimately held:

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52. *Bearden*, 461 U.S. at 665–68 (citing *Ross v. Moffitt*, 417 U.S. 600 (1974)) (“[W]e generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause.”).

53. *Id.* at 666; *see also* *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) (holding that in certain cases “fundamental fairness – the touchstone of due process – will require that the State provide at its expense counsel for indigent probationers or parolees”).

54. *Bearden*, 461 U.S. at 665.

55. *Id.* at 666.

56. *Id.* at 667–68.

57. *Id.* at 668.

58. *Id.* at 670.

59. *Id.*

60. *Id.* at 672 (quoting Justice Harlan's concurring opinion in *Williams v. Illinois*, observing that “the deterrent effect of a fine is apt to derive more from its pinch on the



[I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. . . . To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine.<sup>61</sup>

Missouri courts have implemented the *Bearden* ruling.<sup>62</sup> In *Schmeets v. Turner*, the Missouri Court of Appeals, Western District, considered a writ of habeas corpus from Edith Schmeets, a woman whose probation was revoked when she failed to make restitution payments after pleading guilty to passing bad checks.<sup>63</sup> Despite evidence of significant financial difficulty,<sup>64</sup> Schmeets had her probation revoked based upon testimony from her probation officer that she “could definitely have had more income if she had tried.”<sup>65</sup> The court noted that under *Bearden*, due process only required a finding that the probationer’s failure to pay was not due to an *inability* to pay.<sup>66</sup> The court went on to observe that *Bearden* did not address the sufficiency of evidence and as long as the judge at the revocation hearing was “reasonably satisfied” with the evidence showing a willful failure to pay restitution, then there was no due process violation.<sup>67</sup> Because there was testamentary evidence suggesting Schmeets *could* have made a greater effort to pay – and no alternative punishment either suggested or available – the *Bearden* standard was met and revocation was appropriate.<sup>68</sup>

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purse than the time of payment” (quoting *Williams v. Illinois*, 399 U.S. 235, 265 (1970) (Harlan, J. concurring))).

61. *Id.* at 672–73.

62. *See* *Schmeets v. Turner*, 706 S.W.2d 504, 508 (Mo. Ct. App. 1986); *Jackson v. Gill*, 711 F. Supp. 1503, 1506–07 (W.D. Mo. 1989); *State ex rel. Nixon v. Campbell*, 906 S.W.2d 369, 371 (Mo. 1995) (en banc) (citing *Bearden* for the proposition that revocation of probation may still be appropriate in special circumstances in which probationer was not at fault for violation but no procedural alternative exists).

63. *Schmeets*, 706 S.W.2d at 505–06.

64. For instance, her primary source of income was only \$200 per month in social security, and she otherwise had only intermittent part-time employment, cared for her two children, did not own a vehicle, reported multiple health issues and hospitalizations, and received food and housing assistance from a charitable assistance group. *Id.*

65. *Id.* at 505 (quotation marks omitted). There was additional testimony from a social worker who had assisted Schmeets during her time on probation and claimed she “would have no difficulty” conducting manual labor type work. *Id.* at 506.

66. *Id.* at 507–08.

67. *Id.* (citing *Sincup v. Blackwell*, 608 S.W.2d 389, 391 (Mo. 1980) (en banc)).

68. *Id.* at 508.

Regarding the sufficiency of evidence in revocation hearings, the Supreme Court of Missouri has previously found that due process requires the factfinder to make, at a minimum, a written statement of the evidence relied upon and the reasons for revoking probation.<sup>69</sup> The other constitutional requirements for a revocation hearing were previously spelled out by the Supreme Court of the United States in *Gagnon v. Scarpelli*<sup>70</sup> and include:

- (a) written notice of the claimed violations of [probation or] parole; (b) disclosure to the [probationer or] parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses . . . (e) a “neutral and detached” hearing body . . . and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation or] parole.<sup>71</sup>

The Supreme Court of Missouri in *Abel v. Wyrick* went on to state that “[t]he judge at a probation revocation hearing must allow a probationer a meaningful opportunity to present his evidence, and must consider that evidence.”<sup>72</sup>

In a case with facts similar to *Fleming*, the United States District Court for the Western District of Missouri examined *Bearden*’s evidentiary hearing requirement.<sup>73</sup> In *Jackson v. Gill*, Debra Mae Jackson was convicted of forging checks and placed on four years of probation, with one of the terms requiring restitution of nearly \$4000.<sup>74</sup> Jackson’s probation was revoked after she failed to make adequate payments towards the debt within the allotted four-year period.<sup>75</sup> The district court, examining the record of the revocation hearing, concluded that insufficient factual inquiry had been made into Jackson’s statement that she “just [had not] been able to work” and that the State failed to introduce any additional evidence.<sup>76</sup> The sentencing judge appeared to rely on a statement by the prosecutor, who said, “I really don’t think that the state is going to get restitution in these cases for these victims, so the penitentiary sentence

69. See *Abel v. Wyrick*, 574 S.W.2d 411, 417 (Mo. 1978) (en banc); see also *Jackson v. Gill*, 711 F. Supp. 1503, 1511–12 (W.D. Mo. 1989) (stating it is of “paramount importance” for revocation court to file a written statement of the evidence upon which probation is revoked).

70. *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973).

71. See *Abel*, 574 S.W.2d at 417 (quoting *Gagnon*, 411 U.S. at 786).

72. *Id.* at 419.

73. *Jackson*, 711 F. Supp. at 1503 (The facts in both cases involve a successful petition for a writ of habeas corpus after an indigent offender’s probation was revoked for failure to pay full restitution to the court within the probationary period.).

74. *Id.* at 1508.

75. *Id.* at 1511. At a hearing two years prior, the court had ordered Jackson to pay twenty percent of her future earnings towards the restitution. *Id.* at 1510. At her revocation hearing her attorney argued that her earnings had been very limited in the two-year period because she had been unable to work due to numerous health problems. *Id.* at 1511. The court concluded that she had paid only \$375 prior to revocation. *Id.*

76. *Id.*

seems to be the thing to do.”<sup>77</sup> The court order revoking her probation stated that it was made “after evidence being heard,” but the district court concluded that no *actual* evidence had been adduced at the hearing.<sup>78</sup> Additionally, and “[o]f paramount importance,” the trial court “never filed a written statement of the evidence or the reasons upon which it relied when petitioner’s probation was revoked.”<sup>79</sup> Jackson’s writ of habeas corpus was granted based on a violation of the due process requirements articulated in *Bearden* and *Abel*.<sup>80</sup> The *Jackson* court distinguished the outcome in *Schmeets* by noting that the evidentiary hearing in *Schmeets* included testimony and recommendations from the defendant’s probation officer and other witnesses.<sup>81</sup>

Case law from Missouri, a federal district court considering Missouri law, and the Supreme Court of the United States clearly establishes that to satisfy due process, probation revocation hearings for failure to pay court-ordered restitution require some sort of inquiry into the defendant’s ability to pay. This is a non-controversial requirement with such a low burden of production that, at least in Missouri, testimony that the probationer *could try harder* to pay the debt appears sufficient to meet the burden.<sup>82</sup> The absence of additional testimony or fact finding or a naked admission by the defendant acknowledging a failure to pay at an earlier revocation hearing appears to be insufficient.<sup>83</sup>

The outcome in *Fleming* prompted the issuance of a “bench card”<sup>84</sup> to all Missouri lower court judges outlining the correct procedure for the “Lawful Enforcement of Legal Financial Obligations.”<sup>85</sup> Evidentiary factors the bench card suggests courts consider when determining if a defendant willfully failed to pay include: whether income is below the poverty line, the receipt of means-tested public assistance, financial resources, housing status, basic living expenses, defendant’s efforts to acquire more financial resources, other court fees currently owed, and whether the imposed fees would result in a “manifest hardship” to the defendant or his or her family.<sup>86</sup>

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77. *Id.*

78. *Id.* at 1511–12.

79. *Id.*

80. *Id.* at 1505–06, 1512.

81. *Id.* at 1506.

82. See *Schmeets v. Turner*, 706 S.W.2d 504, 508 (Mo. Ct. App. 1986).

83. See *Jackson*, 711 F. Supp. at 1509, 1511–12; State *ex rel.* Fleming v. Mo. Bd. of Prob. & Parole, 515 S.W.3d 224, 225–26 (Mo. 2017) (en banc).

84. See MO. SUP. CT. R. 37.04 app. D. A bench card is a tool provided to judges to help provide reference and summarize relevant rules in an area of law. Torie Atkinson, Note, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors’ Prisons*, 51 HARV. C.R.-C.L. L. REV. 189, 233 (2016). In this case, the bench card issued by Chief Justice Breckenridge is appending Missouri Supreme Court Rule 37. See MO. SUP. CT. R. 37.04 app. D.

85. MO. SUP. CT. R. 37.04 app. D.

86. *Id.*

### B. Missouri's Habeas Corpus Standard

The second point at issue in *Fleming*, to which Judge Zel M. Fischer devoted the bulk of his dissent, was whether granting a writ of habeas corpus to a defendant who had already been released on parole was appropriate or whether, instead, his release rendered the action moot. Article I, section 12 of the Missouri Constitution states: “the privilege of the writ of habeas corpus shall never be suspended.”<sup>87</sup> The constitution further grants the Supreme Court of Missouri the authority to “issue and determine original remedial writs,” including habeas corpus.<sup>88</sup> The Missouri legislature codified what habeas corpus means in Missouri Revised Statutes section 532, which states that “[e]very person committed, detained, confined or *restrained of his liberty*, within this state, for any criminal or supposed criminal matter, or under any pretense whatsoever . . . may prosecute a writ of habeas corpus.”<sup>89</sup> Missouri Supreme Court Rule 91 governs habeas corpus procedure for the state courts. Rule 91.01 states that “[a]ny person *restrained of liberty* within this state may petition for a writ of habeas corpus to inquire into the cause of such restraint.”<sup>90</sup> Habeas corpus proceedings are limited to determining the facial validity of confinement and “are properly invoked to challenge an improper probation revocation.”<sup>91</sup>

Missouri case law states that “a writ of habeas corpus may be issued when a person is restrained of his or her liberty in violation of the constitution or laws of the state or federal government.”<sup>92</sup> Chief Justice Patricia Breckenridge, writing for the majority, stated that the “[c]ourt has never interpreted the ‘restrained of his liberty’ language,” but the issue has been considered by other state courts.<sup>93</sup> In *Hyde v. Nelson*, the court stated that “any restraint which precludes freedom of action is sufficient, and actual confinement in jail is not necessary.”<sup>94</sup> Two other Supreme Court of Missouri cases have cited the language in *Hyde*, albeit in the context of determining whether a movant was in custody while seeking post-conviction relief, rather than considering a request for a writ of habeas corpus.<sup>95</sup>

The Missouri Court of Appeals, Eastern District, upheld a writ requested by a parolee because he was “restrained of his liberty within this state and was

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87. MO. CONST. art. I, § 12.

88. *Id.* art. V, § 4.

89. MO. REV. STAT. § 532.010 (2016) (emphasis added).

90. MO. SUP. CT. R. 91.01(b) (emphasis added).

91. *State ex rel. Nixon v. Jaynes*, 73 S.W.3d 623, 624 (Mo. 2002) (en banc) (per curiam).

92. *State ex rel. Amrine v. Roper*, 102 S.W. 3d 541, 545–46 (Mo. 2003) (en banc) (citing *Jaynes*, 63 S.W.3d at 214).

93. *State ex rel. Fleming v. Mo. Bd. of Prob. & Parole*, 515 S.W.3d 224, 228 n.6 (Mo. 2017) (en banc).

94. *Hyde v. Nelson*, 229 S.W. 200, 202 (Mo. 1921).

95. *Nicholson v. State*, 524 S.W.2d 106, 109 (Mo. 1975) (en banc); *State v. Gray*, 406 S.W.2d 580, 582 (Mo. 1966).

inquiring into the cause of his restraint.”<sup>96</sup> The Supreme Court of the United States, in considering the restraint of liberty placed upon a parolee, has stated that while “parole releases [a prisoner] from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the ‘custody’ of the . . . [parole board] within the meaning of the habeas corpus statute.”<sup>97</sup> A Missouri statute states that “[e]very offender while on parole shall remain in the legal custody of the department [of corrections] but shall be subject to the orders of the board.”<sup>98</sup>

Judge Fischer’s dissent in *Fleming* argued that status as a parolee renders a request for a writ of habeas corpus moot.<sup>99</sup> In *State ex rel. Aziz v. McCondichie*, Aziz was granted release on parole after his petition for a writ was accepted and under consideration by the Supreme Court of Missouri.<sup>100</sup> In oral arguments, Aziz claimed that despite his newfound parolee status, the conditions placed upon him by the board were a significant enough due process violation to deprive him of his liberty under state statutes.<sup>101</sup> The court held that because the petition was sought to earn release from prison, which happened through parole, the case was moot.<sup>102</sup>

The Supreme Court of the United States approached this issue in *Jones v. Cunningham*<sup>103</sup> and *Carafas v. LaVallee* and held that a federal habeas corpus petitioner’s cause is not moot just because of an unconditional release in state court.<sup>104</sup> However, in the instant case, Judge Fischer suggested that federal habeas cases involve interpretation of federal statutes, which have little bearing on interpretation of state statutes.<sup>105</sup> Judge Fischer’s conclusion was based on principles of federalism, namely that each state has the right to an independent interpretation of its habeas corpus statutes.<sup>106</sup>

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96. See *State ex rel. Nixon v. Dierker*, 22 S.W.3d 787, 789 (Mo. Ct. App. 2000).

97. *Jones v. Cunningham*, 371 U.S. 236, 242–43 (1963).

98. MO. REV. STAT. § 217.690.2 (2016).

99. *State ex rel. Fleming v. Mo. Bd. of Prob. & Parole*, 515 S.W.3d 224, 234 (en banc) (Fischer, J., dissenting).

100. *State ex rel. Aziz v. McCondichie*, 132 S.W.3d 238, 239 (Mo. 2004) (en banc) (per curiam).

101. *Id.* Conditions included electronic monitoring and required residence in a half-way house. *Id.*

102. *Id.* at 241.

103. *Jones v. Cunningham*, 371 U.S. 236 (1963).

104. See *Carafas v. LaVallee*, 391 U.S. 234, 236–38 (1968) (overruling *Parker v. Ellis*, 362 U.S. 574 (1960)) (finding that petitioner was released from both prison and parole by the time the Court took up the case).

105. *State ex rel. Fleming v. Missouri Bd. of Prob. & Parole*, 515 S.W.3d 224, 237 (Mo. 2017) (en banc) (Fischer, J., dissenting).

106. *Id.*

*C. Missouri Statutes Responsible for Imposition of Court Costs in Fleming*

Fleming's briefs placed a heavy emphasis on the source of the costs imposed upon him and suggested that, absent the "board bill," he would have successfully completed the imposed restitution.<sup>107</sup> Fleming's court costs were divided as follows: \$92 to the Crime Victim's Compensation Program, \$301.50 for a public defender lien, and \$3870 for his jail board bill.<sup>108</sup>

The Crime Victim's Compensation Program is designed to provide financial assistance to people who have physical or psychological injuries as a result of violent crimes.<sup>109</sup> The program is governed by Missouri Revised Statutes chapter 595 and helps cover items such as lost wages, medical expenses, funeral expenses, and counseling expenses.<sup>110</sup>

Missouri Public Defender services are not offered free of charge, even to the temporarily indigent.<sup>111</sup> A person is considered eligible to receive representation from the service only if a determination is made that the person is indigent.<sup>112</sup> Missouri law further states that "if the state provides [a public defender], the client may be liable to the state for the cost of the services and expenses of the lawyer . . . if [the client] is or will be able to pay all or any part of such costs."<sup>113</sup> The chapter further states that it is up to the court to determine the defendant's ability to pay, the reasonable value of the services, and whether to impose the costs upon the defendant.<sup>114</sup>

The jail boarding costs were implemented through MIRA, which allows the state to collect up to ninety percent of an inmate's assets in order to pay for the costs of imprisonment.<sup>115</sup> When an offender<sup>116</sup> is sentenced to imprison-

107. Relator's Brief, *supra* note 37, at 15–16.

108. *Fleming*, 515 S.W.3d at 226.

109. *Crime Victims' Compensation Program*, MO. DEP'T PUB. SAFETY, <http://dps.mo.gov/dir/programs/cvc/> (last visited June 1, 2018).

110. *Id.*

111. *Public Defender Fees*, MO. ST. PUB. DEFENDER, [http://www.publicdefender.mo.gov/contracts/Client\\_Fee\\_Information\\_Sheet.pdf](http://www.publicdefender.mo.gov/contracts/Client_Fee_Information_Sheet.pdf) (last visited June 1, 2018). It is common for state public defender services to have an associated fee; in fact, one study found that forty-three states and the District of Columbia apply some sort of charge for access to a public defender's services. See Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

112. See MO. REV. STAT. § 600.086 (2016).

113. MO. REV. STAT. § 600.048.1(3) (2016).

114. See MO. REV. STAT. § 600.090 (2016), *amended by* S.B. No. 735 (2016).

115. See Missouri Incarceration Reimbursement Act, MO. REV. STAT. §§ 217.825–217.841 (2016).

116. Defined as "any person who is under the jurisdiction of the department and is confined in any state correctional center or is under the continuing jurisdiction of the department." *Id.* § 217.827.5.

ment, he or she is given a form on which to provide the Department of Corrections with information regarding assets.<sup>117</sup> The attorney general has discretion to file a complaint in state circuit courts – which have exclusive jurisdiction over MIRA claims – if he or she “has good cause to believe” that the offender has sufficient assets to cover the costs of “care” for the offender’s time incarcerated.<sup>118</sup> “Sufficient assets” is considered to be the lesser of at least “ten percent of the estimated cost of care of the offender” or ten percent of the cost of care for two years.<sup>119</sup> Notice of the complaint is served to the offender, and a hearing is held to determine if the listed assets should be applied to the claim from the State.<sup>120</sup> The court has discretion to determine whether the offender’s assets are to be applied upon those costs.<sup>121</sup> The State has broad powers to investigate the breadth of an offender’s assets and may enforce payment over all other debts or encumbrances.<sup>122</sup> Offenders may be subjected to wage garnishments or payments from any source for up to five years after their release from custody.<sup>123</sup> Laws such as MIRA, sometimes referred to as “pay-to-stay” laws, are also common in the United States; at least forty-one states allow for inmates to be charged for their room and board while incarcerated.<sup>124</sup>

Fleming’s brief argued that jail board bills are tallied as a separate entity from the other assessed costs at the time probation is granted and should not be considered in the same light as other failures to pay restitution.<sup>125</sup> At least one Missouri court has noticed a discrepancy and suggested defendants should not be expected to know that their board bills will be included with the remainder of their court costs.<sup>126</sup> That court observed:

Again, the orders of probation do not state Relator was responsible for paying board fees. Nothing in the record before this Court suggests Relator knew prior to entry of her guilty plea that she would be charged

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117. *Id.* § 217.829.

118. *Id.* §§ 217.831, 217.835.

119. For example, if the offender is sentenced to ten years of incarceration at an estimated cost of \$1000 per month, then to trigger liability under MIRA the prisoner would only need assets totaling an amount equal to ten percent of two years’ worth of care, or \$2400 (\$1000 x 24 months x 10%). *Id.* § 217.831.3.

120. *Id.* § 217.835.

121. *Id.*

122. *Id.* § 217.837.

123. *Id.* §§ 217.829.5, 217.831.3 (this includes pensions, payments into a bank or jail account, or essentially any other “asset”); *see, e.g.*, *State ex rel. Nixon v. Peterson*, 253 S.W.3d 77, 81–82 (Mo. 2008) (en banc) (finding that payments to prisoner for woodcrafts he produced and sold while incarcerated could be considered “assets”).

124. Shapiro, *supra* note 111.

125. Relator’s Brief, *supra* note 37, at 16–17.

126. *State ex rel. Parrott v. Martinez*, 496 S.W.3d 563, 571 & n.12 (Mo. Ct. App. 2016).

a board fee or that any such fee would be more than 1.5 times the combined total of the restitution and court costs delineated in the orders of probation.<sup>127</sup>

The *Fleming* court did not address this issue, but the “fundamental fairness” aspect of due process seems to be implicated.

#### IV. INSTANT DECISION

The Supreme Court of Missouri considered a writ of habeas corpus requested because of a claimed due process violation in a state probation revocation procedure.<sup>128</sup> The primary issue in the majority opinion concerned the insufficiency of judicial process in a probation revocation proceeding. The dissent focused on the appropriateness of issuing a writ of habeas corpus to a defendant already released on parole and the curious procedural outcome of this particular case.

##### A. Majority Opinion

Chief Justice Breckenridge, writing for the majority, held that Fleming’s probation was improperly revoked and his due process and equal protection rights were violated.<sup>129</sup> Further, the court found that it had the authority to issue a writ of habeas corpus to a petitioner released on parole based upon its authority under the Missouri Constitution and Missouri Revised Statutes section 532.010.<sup>130</sup>

The court determined that because the sentencing court merely accepted Fleming’s admission at the 2011 hearing and made no determination at the 2013 hearing as to whether he (1) had the ability to pay court costs, (2) had failed to make bona fide efforts to acquire the resources to pay, or (3) had considered alternative forms of punishment, Fleming’s due process rights had been violated.<sup>131</sup> Additionally, because there appeared to be ample evidence of Fleming’s indigence on the record before the sentencing court,<sup>132</sup> and the probation officer assigned to the case had made a recommendation for the court to consider “alternative arrangements,” the failure to inquire was a violation of the *Bearden* rule.<sup>133</sup> Finally, since the admission from Fleming that he had

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127. *Id.* at 571 n.12.

128. *State ex rel. Fleming v. Mo. Bd. of Prob. & Parole*, 515 S.W.3d 224, 225–26 (Mo. 2017) (en banc).

129. *Id.* at 225.

130. *Id.* at 228–29.

131. *Id.* at 230.

132. The probation violation report contained references to Fleming’s “financial struggles,” mentioned that he had agreed that he could only pay ten dollars per month towards the fine, and stated that he had received a fee waiver for domestic assault classes he was obligated to take as part of the probation arrangement. *Id.* at 227, 230–31.

133. *Id.* at 231.



violated the probation terms came more than a year and a half before the ultimate revocation and he had continued to make payments in the interim, the court determined that he had made “significant, genuine efforts” to pay his court costs.<sup>134</sup> Thus, because the only unsatisfied condition of probation was the failure to pay in full and the sentencing court neglected to determine any reason for that failure, probation was improperly revoked.<sup>135</sup>

Because the court determined the impropriety of the imprisonment, the remaining task was to resolve the writ of habeas corpus. The court stated that “the only options for the sentencing court are either to discharge Mr. Fleming or to reinstate revocation proceedings.”<sup>136</sup> The majority granted the writ and held that Fleming should be “discharged from his sentence of imprisonment and subsequent parole and restored to his status as a probationer.”<sup>137</sup> In a footnote, Chief Justice Breckenridge rebutted Judge Fischer’s dissenting arguments about statutory construction by noting that his interpretation of the statute would render the “restrained of his liberty” language superfluous, which is an undesirable outcome of statutory interpretation.<sup>138</sup> The sentencing court was then instructed to hold a hearing within sixty days to determine whether Fleming was indigent and unable to pay the court fees due to his indigence, as well as determine if the State’s interests could be satisfied by instituting an alternative measure of punishment.<sup>139</sup> If the sentencing court found that the *Bearden* requirements were met,<sup>140</sup> it could once again revoke probation and execute the sentence.<sup>141</sup> If such a finding were not made, or the State elected not to hold a hearing, Fleming would be discharged from his probation.<sup>142</sup>

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134. *Id.*

135. *Id.* at 232.

136. *Id.* at 233 & n.8 (citing State *ex rel.* Strauser v. Martinez, 416 S.W.3d 798, 801 (Mo. 2014) (en banc), for the proposition that normally “when a probation term ends, so does the court’s authority to revoke probation” (quotation marks omitted)). However, a court has “the power. . . to revoke probation . . . for any further period which is reasonably necessary for the adjudication of matters arising before its expiration.” MO. REV. STAT. § 559.036.8 (Cum. Supp. 2017).

137. *Fleming*, 515 S.W.3d at 232.

138. *Id.* at 238 n.6 (“This Court must presume every word, sentence or clause in a statute has effect, and the legislature did not insert superfluous language.” (quoting *Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. 2013) (en banc))).

139. *Id.* at 234.

140. These requirements include a refusal to pay court costs despite the ability to do so, the failure to make bona fide efforts to acquire the resources to pay, and the consideration of alternative measures of punishment. *Id.* at 230.

141. *Id.* at 234.

142. *Id.*

*B. Dissenting Opinions*

Judge Fischer and Judge Paul C. Wilson both dissented. Neither disagreed with the majority's application of *Bearden*. Judge Fischer wrote separately to critique the granting of a writ of habeas corpus to a defendant released on parole as well as to question the propriety of the outcome for Fleming, noting that the reinstatement of probation may have left him in a worse position than his status as a parolee.<sup>143</sup> Judge Wilson, writing separately, stated he would quash the writ based solely on the potential for a more harmful outcome for Fleming.<sup>144</sup>

Judge Fischer's primary argument was that the writ became moot once Fleming was released on parole.<sup>145</sup> He argued that the statutory and constitutional language granting Missouri courts the habeas power did not support such a broad application of the writ.<sup>146</sup> To support this argument, he relied upon two maxims of statutory interpretation: *noscitur a sociis*<sup>147</sup> and *in pari materia*.<sup>148</sup> The only language that the majority could rely upon to grant the writ was the phrase "restrained of his liberty,"<sup>149</sup> and Judge Fischer argued that those words must be read in conjunction with the surrounding language and harmonized with other references to the writ within state law.<sup>150</sup> He suggested that because the phrase appears with language referring exclusively to physical confinement, being "restrained of liberty" should be interpreted the same.<sup>151</sup> Further, he pointed out that in Missouri Revised Statutes chapter 532,<sup>152</sup> the petitioner for the writ is frequently referred to as a "prisoner," bolstering his argument that the intention of the writ is to provide a means to release those

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143. *Id.* at 234–38 (Fischer, J., dissenting).

144. *Id.* at 238 (Wilson, J., dissenting).

145. *Id.* at 234 (Fischer, J., dissenting).

146. *Id.* at 235.

147. Defined here as "a word [or phrase] is known by the company it keeps." *Id.* (alteration in original).

148. Generally defined as statutes concerning the same subject matter. Matthew Davis, Note, *Statutory Interpretation in Missouri*, 81 MO. L. REV. 1127, 1139 (2016). Judge Fischer cited *State ex rel. Evans v. Brown Builders Elec. Co.*, 254 S.W.2d 31, 35 (Mo. 2008) (en banc), to demonstrate that "[t]he provisions of a legislative act are not read in isolation but construed together, and if reasonably possible, the provisions will be harmonized with each another." *Fleming*, 515 S.W.3d at 235 (Fischer, J., dissenting).

149. MO. REV. STAT. § 532.010 (2016) ("Every person committed, detained, confined or *restrained of his liberty*, within this state, for any criminal or supposed criminal matter, or under any pretense whatsoever, except when, according to the provisions of this chapter, such person can be neither discharged nor bailed, or otherwise relieved, may prosecute a writ of habeas corpus as herein provided, to inquire into the cause of such confinement or restraint" (emphasis added)).

150. *Fleming*, 515 S.W.3d at 235 (Fischer, J., dissenting).

151. *Id.*

152. The chapter of Missouri Code that deals exclusively with habeas corpus. *See generally* MO. REV. STAT. §§ 532.010–532.710 (2016).

*physically* held in custody.<sup>153</sup> Finally, he cited previous Missouri cases that have similarly interpreted the writ as only applying to physical confinement.<sup>154</sup>

Both dissenting judges argued that because Fleming received parole while the writ was under consideration by the court, granting the writ could hurt Fleming by returning him to probation and opening the door for a second probation revocation hearing, which could cause him to be returned to prison should the findings at the new hearing go against him.<sup>155</sup> However, since his term of probation had expired in 2013, alternative measures of punishment could not be imposed by the sentencing court because the statute bars the court from changing a person's probation terms after that probation has already expired.<sup>156</sup> Thus, if the sentencing court chose not to discharge Fleming, the only legal means to continue probation would be to revoke his temporary, sixty-day status and place him on another five-year probationary term.<sup>157</sup> Because five years of probation would be longer than his remaining time on parole,<sup>158</sup> either of these outcomes would place Fleming in a worse position than if the writ had not been granted.<sup>159</sup> Judge Fischer suggested that the adverse outcomes would be avoided if the court merely followed its holding in *Aziz* and mooted the writ.<sup>160</sup>

## V. COMMENT

This Part first analyzes the propriety and potential impact of the instant decision in *Fleming*. It then discusses the implication of court fees based upon MIRA and the results when defendants fail to pay. Further, this Part provides a snapshot of where Missouri stands today on these issues and aims to provide context for practitioners engaged in the defense of indigent clients.

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153. *Fleming*, 515 S.W.3d at 235–36 (Fischer, J., dissenting).

154. *Id.* at 236 (citing *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214 (Mo. 2014) (en banc) (“[T]he writ merely allows a prisoner to inquire into the cause of his confinement. A petition for *habeas corpus* relief under Missouri law is said to be limited to determining the facial validity of confinement.” (citation omitted)); *State ex rel. Aziz v. McCondichie*, 132 S.W.3d 238, 239, 241 (Mo. 2004) (en banc) (per curiam) (holding that while parole conditions “restrict a parolee’s activities” a petition for a writ of *habeas corpus* is moot once a prisoner is released on parole since there is no longer any physical custody)).

155. *Fleming*, 515 S.W.3d at 237 (Fischer, J., dissenting); *id.* at 238. (Wilson, J., dissenting).

156. *Id.* at 237 (Fischer, J., dissenting) (pointing to MO. REV. STAT. § 559.021.7 (Cum. Supp. 2017), which states that “[t]he court may modify or enlarge the conditions of probation at any time *prior to the expiration or termination of the probation term*” (emphasis added)).

157. This would be allowed under MO. REV. STAT. § 559.036.5 (Cum. Supp. 2017). *Id.*

158. Fleming was eligible for discharge from parole on January 9, 2020. *Id.* at 237 n.6.

159. *Id.* at 237–38.

160. *Id.* at 237.

The procedural error and unjust result for Fleming in his revocation proceedings were so great that the Supreme Court of Missouri had to issue an extraordinary writ just to rectify the wrong. Indeed, the Supreme Court of Missouri sent a clear message to lower courts that there had better be a very compelling reason to consider incarceration if a defendant's sole failure is the payment of court-ordered LFOs.<sup>161</sup> This message was transmitted through the repeated reminders in the majority opinion that the *Bearden* principles must be followed and through the subsequent issuance of the judicial bench card appending Missouri Supreme Court Rule 37.04.<sup>162</sup> The decision will notify defense attorneys that any decision to jail a defendant solely for failing to pay a debt will be subject to greater scrutiny and that sentencing judges should be on notice to consider alternatives when LFOs are left unpaid. This is also an implicit recognition that Missouri courts' use of the threat of incarceration to collect LFOs from clearly indigent defendants will no longer be tolerated to the same degree.<sup>163</sup> With approximately eighty percent of criminal defendants in the United States qualifying as indigent and unlikely to afford private legal representation,<sup>164</sup> as well as a notoriously overburdened Missouri public defender system unable to effectively represent all qualifying defendants,<sup>165</sup> it should come as no surprise that state judges are being called to task on this issue. In 2015, Missouri passed Senate Bill 5, limiting the percentage of revenue a municipality could raise from fees and fines, indicating that the legislature is also aware of the detrimental effect court fees have on poor communities within the state.<sup>166</sup>

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161. Court-ordered LFOs include "all discretionary and mandatory fines, costs, fees, state assessments, and/or restitution in civil and criminal cases." MO. SUP. CT. R. 37.04 app. D.

162. *Id.*

163. While a court cannot completely remove from its quiver one of its most effective arrows for securing the payment of imposed fines, judges and prosecutors should be encouraged to express greater sensitivity when dealing with indigent defendants. The court's consideration of this issue makes sense in the context of other developments in Missouri. See CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 55–58 (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) (finding that municipality used arrests and threat of incarceration primarily to secure payment for municipal fines, a practice that disproportionately harmed indigent residents and members of racial minorities).

164. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 84 (2010).

165. See, e.g., Dan Margolies, *Many Missouri Public Defenders Decline New Cases After State Supreme Court Disciplines Lawyer*, KCUR 89.3 (Oct. 6, 2017) <http://kcur.org/post/many-missouri-public-defenders-decline-new-cases-after-state-supreme-court-disciplines-lawyer>; see also Hinkebein, *Karl William – Suspension Stayed with Probation*, MO. COURTS (Sept. 12, 2017), <https://www.courts.mo.gov/page.jsp?id=117575>.

166. See MO. REV. STAT. § 302.341 (2016); MO. REV. STAT. §§ 479.350–479.375 (Cum. Supp. 2017).

While the majority's conclusion that Fleming's due process rights were violated was uncontroversial, Judge Fischer's dissent highlighted other curious legal implications. First, whether the majority expanded habeas corpus rights in Missouri by granting a writ to a parolee or if, instead, the case was rendered moot once parole was granted. Second, whether the nature of the relief granted left Fleming in a potentially worse position than had the petition been dismissed as moot. These two issues are examined in more depth in the following two Sections. The final Section of this Part discusses the propriety of the Missouri statutes responsible for trapping Fleming, and many other defendants, in legal jeopardy for financial deficiencies.

#### A. *The Propriety of Issuing a Writ of Habeas Corpus to a Parolee*

Fleming had initially filed his writ of habeas corpus with the court while in his third year of incarceration after probation revocation;<sup>167</sup> however, parole was granted in between his initial filing and the court's decision to consider the writ.<sup>168</sup> It appears that the release on parole was due to a standard, independent determination by the parole board and unrelated to the court's acceptance of the writ. Fleming then filed an amended petition against the Missouri Board of Probation and Parole, asserting that his "liberties [were] still unlawfully restrained" because of the improper revocation of his probation.<sup>169</sup> Judge Fischer argued that canons of statutory interpretation and prior Missouri case law rendered the petition moot upon the granting of parole.<sup>170</sup> He also suggested that it was inappropriate to rely on authority from the Supreme Court of the United States applying the writ based on interpretation of federal statutes and that instead state supreme courts should rely upon state authority for guidance.<sup>171</sup> While Judge Fischer's sentiment for federalist principles and narrow interpretation of the state habeas corpus jurisprudence is logical, his analysis omits consideration of other common law uses for the "great writ" that support the broader interpretation employed by the majority in this case.

It does not appear that by granting a writ of habeas corpus to a parolee the court expanded the limits of habeas corpus beyond established law in either Missouri or the United States. Because Fleming amended his petition to include the Board of Probation and Parole, a division of the Department of Corrections that maintained "legal custody,"<sup>172</sup> his case was comparable to *Jones*.<sup>173</sup> Finding for the parolee in *Jones*, the Supreme Court of the United States examined numerous common law interpretations of habeas corpus in

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167. *State ex rel. Fleming v. Mo. Bd. of Prob. & Parole*, 515 S.W.3d 224, 231 (Mo. 2017) (en banc).

168. *Id.* at 228.

169. *Id.*

170. *Id.* at 235–36 (Fischer, J., dissenting).

171. *Id.* at 237.

172. MO. REV. STAT. § 217.690.2 (2016).

173. *Jones v. Cunningham*, 371 U.S. 236, 243 (1963).

both England and the United States and determined that restraint of liberty, independent of physical incarceration, was sufficient to invoke the writ.<sup>174</sup> The *Jones* Court went on to say that the writ “is not now and never has been a static, narrow, formalistic remedy” but instead has a “grand purpose – the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.”<sup>175</sup> The Court concluded that while “parole releases [Jones] from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom . . . within the meaning of the habeas corpus statute; *if he can prove his allegations this custody is in violation of the Constitution . . .* it was therefore error for the Court of Appeals to dismiss his case as moot.”<sup>176</sup>

Although the *Jones* Court considered a writ requested under federal statute,<sup>177</sup> the circumstances of *Fleming* are similar and on point.<sup>178</sup> The Supreme Court of Missouri determined that Fleming’s detention was unconstitutional for failures of due process and equal protection and that his status as a parolee “restrained his liberty” within the meaning of the state’s statutes and constitution.<sup>179</sup> The broad interpretation of habeas corpus suggested in *Jones*, buttressed by centuries of common law jurisprudence, appears to have sufficient

174. *Id.* at 238–40 (At common law, “restraints on a man’s liberty. . . not shared by the public generally” have been held to invoke the writ, including: the restraint of a woman by her relatives against her will, by an alien held after seeking entry into the United States, by conscripts questioning involuntary enlistment into military service, and by parents disputing custody of a child.).

175. *Id.* at 243.

176. *Id.* (emphasis added).

177. It is important to note that the very language the dissent in *Fleming* claims narrows the Missouri statute to apply only to those held under physical restraint – specifically “custody” – is the *only* language found in the federal statute, which the *Jones* court grants a broad interpretation. *See generally* 28 U.S.C. § 2241(c) (2012).

178. In *Jones*, the defendant filed for a writ of habeas corpus in a district court based upon an unconstitutional conviction and was paroled shortly after he filed. *Jones*, 371 U.S. at 236–37. The named respondent in the case was the superintendent of the Virginia state penitentiary, who moved to declare the petition moot upon the granting of parole. *Id.* at 237. Jones moved to amend his petition to include members of the Virginia parole board. *Id.* The Fourth Circuit declined the amendment and dismissed the case as moot since the parole board did not have “physical custody” of Jones. *Id.* at 238. The Supreme Court of the United States found that the parole board’s “significant restraints on petitioner’s liberty” were enough to render him within custody of the board. *Id.* at 242–43.

179. *State ex rel. Fleming v. Mo. Bd. of Prob. & Parole*, 515 S.W.3d 224, 234 (Mo. 2017) (en banc). Parolees in Missouri have a number of restrictive requirements they must satisfy in order to remain on conditional release from prison. Most of the requirements could be considered a “restraint of liberty” for the parolee as it “restricts the actions” a person may take. First, parolees must obey all federal, state, and municipal laws and county ordinances, and any citation or arrest must be reported to their parole officer within forty-eight hours. MO. DEP’T OF CORR., RULES AND REGULATIONS GOVERNING THE CONDITION OF PROBATION, PAROLE, AND CONDITIONAL RELEASE 2

armor to parry Judge Fischer’s feint of interpretive maxims.<sup>180</sup> If the writers of Missouri’s constitution and habeas statutes had intended a narrow interpretation – more akin to direct physical confinement – then the repeated references to “restraint of liberty,” which suggest an inherently broad and contextual determination, would be rendered meaningless. The interpretation suggested by the dissent would confine the power of the writ to a “static” and “formalistic” remedy and would erode the rights of citizens to be free from “restraints upon their [liberty].”<sup>181</sup>

Missouri courts have also interpreted the “restraint of liberty” language in a broad manner. In 1921, the Supreme Court of Missouri stated in dicta that “[a]n actual restraint is necessary to warrant interference by habeas corpus; but any restraint which precludes freedom of action is sufficient, and actual confinement in jail is not necessary.”<sup>182</sup> As the majority in *Fleming* noted, this language has been echoed by the Supreme Court of Missouri at least twice since.<sup>183</sup> There can be little doubt that the restrictions imposed upon an individual’s freedom by a parole board fall within the “restraint” contemplated by the court in those cases. Examples of such restraint could include: restrictions on travel, restrictions on moving residences, the requirement to maintain employment without the freedom to quit, restrictions on freedom to associate with

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(Aug. 2017), <https://doc.mo.gov/sites/doc/files/2018-01/White-Book.pdf>. Second, parolees are restricted from travel outside the state unless approved in advance by a parole officer and contingent upon receipt of a permit. *Id.* at 3. Third, parolees must register the location of their intended residence and cannot live anywhere without express permission from a parole officer. *Id.* Fourth, parolees must maintain some sort of employment and cannot change employment without advance permission from a parole officer. *Id.* at 4. Fifth, parolees are restricted from associating with any other persons convicted of a prior felony or misdemeanor, even if this person is a family member, unless authorized by a parole officer. *Id.* at 5. Sixth, parolees are subjected to regular drug tests and any failed test or failure to take a test may result in revocation of parole. *Id.* at 6. Seventh, parolees are not allowed to possess, purchase, receive, sell, or transport any firearm or dangerous weapon. *Id.* Eighth, parolees must make regular reports to their parole officers; failure to report is considered a violation and may result in revocation. *Id.* at 7. Finally, parolees must pay an “intervention fee” for the duration of the parole period; this fee is set by statute, and failure to pay is considered a violation. *Id.* at 8. Special conditions setting out certain restrictions based on the facts of each parolee may also be imposed. *Id.* at 8–9.

180. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950) (noting that whenever a legal practitioner “thrusts” with a maxim of statutory interpretation to convince another practitioner of the *true* intent or purpose of a statute, there typically exists an equally appropriate maxim to “parry” an interpretation in favor of the opposing side).

181. See *Jones*, 371 U.S. at 243.

182. *Hyde v. Nelson*, 229 S.W. 200, 202 (Mo. 1921).

183. *Fleming*, 515 S.W.3d at 228 n.6 (citing *Nicholson v. State*, 524 S.W.2d 106, 109 (Mo. 1975) (en banc); *State v. Gray*, 406 S.W.2d 580, 582 (Mo. 1966)).

friends or family members, the requirement of regular reporting to a parole officer, or location monitoring using radio-frequency devices.<sup>184</sup>

The dissent points to *Aziz* as precedent for declaring a parolee's petition for a writ moot;<sup>185</sup> however, the case is distinguishable in one vitally important way. *Aziz*'s parole had been revoked and he was returned to prison, which was the catalyst for the filing of his writ, but he was again granted parole under stricter conditions while the matter was pending.<sup>186</sup> *Aziz*'s petition challenged only the *original* revocation of parole, not the additional terms imposed upon his second release.<sup>187</sup> If *Aziz* had amended his petition to challenge the propriety of the stricter parole conditions as a "restraint of liberty," and included the Missouri Board of Probation and Parole as an adverse party, then the case would not likely have been found moot because it would have been properly pled. Fleming amended his pleading to overcome the procedural mootness that sunk the petition in *Aziz*, and the court appropriately considered the due process violations that led to Fleming's incarceration in the first place.<sup>188</sup> The broad interpretation of the language by the court in *Fleming* is a welcome reinforcement of the right to challenge government restrictions to individual liberty in Missouri, particularly in cases where the defendant experiences a constitutional due process or equal protection violation. Ideally, this sets a strong precedent for future decisions regarding the "restraint of liberty" language in Missouri habeas corpus jurisprudence.

### B. *The Nature of Relief Granted by the Court*

The second curious aspect of *Fleming* was the nature of relief granted by the Supreme Court of Missouri. Fleming was discharged from his sentence of imprisonment and parole but then returned to his probationary status until the sentencing court conducted a *Bearden*-style evidentiary finding.<sup>189</sup> This probationary status was decreed to be temporary and required the production of evidence – within sixty days – that Fleming's failure to pay was willful or that he failed to make bona fide efforts to earn income to pay.<sup>190</sup> If such evidence was not produced, then it was ordered Fleming be discharged from probation.<sup>191</sup> As the dissents pointed out, if this finding were to come back against Fleming, his probation could be revoked once again and he would be returned to prison instead of being released on parole<sup>192</sup> – an outcome that would render

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184. See MO. DEP'T OF CORR., *supra* note 179, at 2–8.

185. *Fleming*, 515 S.W.3d at 236 (Fischer, J., dissenting).

186. *State ex rel. Aziz v. McCondichie*, 132 S.W.3d 238, 238–39 (Mo. 2004) (en banc) (per curiam).

187. *Id.*

188. *Fleming*, 515 S.W.3d at 228.

189. *Id.* at 230–34.

190. *Id.* at 234.

191. *Id.*

192. *Id.* at 237 (Fischer, J., dissenting).



the granting of his writ of habeas corpus deeply ironic. Further, because his probationary term had expired, if the State wished to impose alternative measures of restitution, such as community service, it would be up to the discretion of the court to re-impose a new term of probation of up to five years.<sup>193</sup>

Fleming had already completed five years of probation, and although he had failed to complete his restitution payments within the prescribed time, he had abided by all other terms.<sup>194</sup> His original revocation and reason for incarceration were determined to be unconstitutional,<sup>195</sup> and yet he was sent back to the mercy of the court that had imposed a seven-year prison term upon him just one month before his five-year probationary term was set to end. It is difficult to see how justice is served when indigent citizens are jailed for the better part of a decade for their failures to pay a fine. The fact that Fleming then served three and a half years in prison before any court recognized the problem and considered his writ of habeas corpus is a different failure altogether. A simpler remedy would have been for the Supreme Court of Missouri to recognize that the due process violation was an injustice and discharge the remainder of Fleming's parole sentence. This solution would have allowed for some firm measure of justice at the end of an unjust process, reduced a burden on the court system, and avoided a potentially absurd result. Other decisions from the Supreme Court of Missouri have demonstrated increased scrutiny of the probation revocation process,<sup>196</sup> yet it seems that the "remedy" offered to Fleming moves in the opposite direction. On May 25, 2017, a probation and parole information report and final case summary were filed with the Twenty-Fourth Judicial Circuit.<sup>197</sup> No further hearings were held, and apparently no additional evidence was produced. According to the clerk of the circuit court, the final disposition for Fleming's case is sealed, which is an indication his probation was successfully completed.

However, as discussed in Section C, the incentive for the sentencing court to return Fleming to an extended probation may have ended with his incarceration in state prison. Indeed, there is a perverse financial incentive for lower courts in Missouri to string along probationers who owe restitution for as long as possible and then ultimately revoke the probation and impose a jail sentence if they fail to pay.

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193. *Id.*

194. *See id.* at 226–27 (majority opinion).

195. *Id.* at 225.

196. *See, e.g., State ex rel. Strauser v. Martinez*, 416 S.W.3d 798, 804 (Mo. 2014) (en banc) (holding that a court does not have authority to continue probation beyond the statutory maximum in order to ensure complete restitution payments); *State ex rel. Zimmerman v. Dolan*, 514 S.W.3d 603, 612 (Mo. 2017) (en banc) (holding that circuit court had not "ma[d]e every reasonable effort" to conduct a probation revocation hearing prior to the end of the probationary period and therefore could not extend probation beyond statutory term).

197. Probation and Parole Information Report, *State v. William A. Fleming*, No. 08D7-CR00864-01 (Mo. Cir. Ct. St. Francois Cty. May 25, 2017).

### C. Perverse Incentives of Jail Boarding Fees Under MIRA

An important fact, which is largely ignored in the court's opinion, is that the bulk of fines and fees assessed on Fleming came from the three months he spent in a county jail before pleading guilty. His bond was set at a staggering \$50,000<sup>198</sup> – a sum higher than the median annual household income for Missouri residents<sup>199</sup> or an amount equivalent to over nine years of Fleming's reported SSI income.<sup>200</sup> This bond amount was set despite his application for and receipt of public defender assistance – a service that, by law, is available only to defendants who are determined by the court to be indigent.<sup>201</sup> Both the Missouri and United States Constitutions prohibit the imposition of excessive bail, but such excessiveness has rarely been found.<sup>202</sup> While it is true that Fleming faced multiple domestic assault charges and society has an interest in mitigating potentially harmful encounters by keeping violent offenders away from their victims, the ultimate plea bargain resulted in his release on probation and only a ninety-two dollar obligation to the Victim's Compensation Fund.<sup>203</sup> The purpose of bail is to secure an eventual court appearance from the accused; therefore, if Fleming had been considered too dangerous to return to civil society, then no bail should have been set at all. Thus, it appears that neither concern for the victim nor Fleming's continued danger to society was the motivating factor for imposing such a large bail. Meanwhile, because of his inability to post bail, his three months in county jail yielded a bill of \$3870 – an amount which totaled approximately forty dollars per day, or \$1300 per month.<sup>204</sup> To put it another way, for the privilege of a couple of daily meals

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198. Relator's Reply Brief at 8, *Fleming*, 515 S.W.3d 224 (No. SC 95764).

199. *Median Household Income Data Series*, MO. ECON. RES. & INFO. CTR., [https://www.missourieconomy.org/indicators/income/mhi\\_11.stm](https://www.missourieconomy.org/indicators/income/mhi_11.stm) (last visited June 3, 2018).

200. At the time of sentencing, Fleming received \$449 per month for a back injury and bipolar disorder. Relator's Brief, *supra* note 37, at 5, 10.

201. Eligibility requires a finding by a circumstantial court that the defendant does not have the "means at his disposal or available" to obtain counsel. *See* MO. REV. STAT. § 600.086.1 (2016).

202. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed . . ."); MO. CONST. art. I, § 21 (same); *see also* State v. Jackson, 384 S.W.3d 208, 216–17 (Mo. 2012) (en banc) (affirming that purpose of bail is simply to secure appearance of defendant and that any amount set higher is considered excessive; however, court also recognized that "[b]ail is not excessive merely because a defendant is unable to secure it" (quoting *Dabbs v. State*, 489 S.W.2d 745, 748 (Mo. Ct. App. 1972))); *see generally* Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment's Right to Bail*, 32 N. KY. L. REV. 1 (2005) (demonstrating the difficulty of proving excessive bail).

203. *Fleming*, 515 S.W.3d at 226.

204. *Id.* at 226–27.

and a cot in county lockup, he was charged the equivalent monthly rent of a two-bedroom luxury loft overlooking downtown Saint Louis.<sup>205</sup>

As mentioned above,<sup>206</sup> MIRA<sup>207</sup> is a powerful state law that permits the State to seize up to ninety percent of a current or former inmate's assets<sup>208</sup> to reimburse the State for the cost of the inmate's "care."<sup>209</sup> The determination of whether an inmate is held liable under the statute is a combination of prosecutorial discretion and a mathematical formula.<sup>210</sup> Once that determination has been made, the State has authority to seize nearly everything a prisoner owns or may earn in the future, short of his or her home. The law has been subject to numerous legal challenges<sup>211</sup> and public criticism from prison reform groups and journalists,<sup>212</sup> yet it still remains in force.

205. *St. Louis MO Apartments*, ZILLOW, <https://www.zillow.com> (last visited June 3, 2018) (search "St. Louis, MO").

206. *See supra* Part III.C.

207. Missouri Incarceration Reimbursement Act, MO. REV. STAT. §§ 217.825–217.841 (2016).

208. *Id.* § 217.833. The definition of "[a]ssets" for purposes of the statute is very broad. They are defined as: "tangible or intangible, real or personal, [property] belonging to or due an offender or a former offender, including income . . . from *any source whatsoever*." *Id.* § 217.827(1)(a) (emphasis added). Assets do not include a homestead with value up to fifty thousand dollars, or up to \$2500 dollars of wages earned by the offender during confinement. *Id.* § 217.827(1)(b).

209. Cost of care includes: "transportation, room, board, clothing, security, medical [care], and other normal living expenses of offenders under the jurisdiction of the [Department of Corrections]." *Id.* § 217.827(2). MIRA is an example of what are commonly referred to as "pay-to-stay" laws. *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, 324–28 (2014) (describing various types of "pay-to-stay" laws).

210. § 217.831.3 (If the attorney general has good cause to believe offender or former offender has sufficient assets to cover the lower of ten percent of the total cost of care, or ten percent of the cost of care for a two-year period, then the attorney general may seek reimbursement under the statute.)

211. *See, e.g.*, *Hankins v. Finnel*, 964 F.2d 853, 861 (8th Cir. 1992) (federal anti-discrimination laws preempt MIRA claim against federal civil rights judgment); *State ex rel. Koster v. Cowin*, 390 S.W.3d 239, 243 (Mo. Ct. App. 2013) (state cannot collect assets from inmate which were unidentified and unknown at the time of the MIRA hearing); *State ex rel. Nixon v. Worthy*, 247 S.W.3d 8, 14–15 (Mo. Ct. App. 2008) (gifts to inmate do not qualify as "stream of income" under MIRA); *State ex rel. Nixon v. Watson*, 204 S.W.3d 716, 720 (Mo. Ct. App. 2006) (attorney general must have "good cause" to believe that offender has sufficient assets as a condition precedent to filing a MIRA action); *State ex rel. Nixon v. Jones*, 108 S.W.3d 187, 193 (Mo. Ct. App. 2003) (res judicata bars state from pursuing claim under MIRA for future costs since state had already pursued the claim once); *State ex rel. Nixon v. McClure*, 969 S.W.2d 801, 802, 808 (Mo. Ct. App. 1998) (federal retirement benefits cannot be taken to reimburse state MIRA claim).

212. *See, e.g.*, Jennifer S. Mann, *A Hidden Punishment for Missouri Prison Inmates of Means: Room and Board*, ST. LOUIS POST-DISPATCH (April 30, 2016),

The financial benefit of the law is dubious, at best. In 2015, the State seized less than \$600,000 under the law; forty-two percent of that amount – \$267,413 – came from just two inmates.<sup>213</sup> The collections under MIRA amounted to less than one percent of the Department of Correction’s \$710 million budget.<sup>214</sup> With the average annual cost per inmate calculated at nearly \$21,000 per year,<sup>215</sup> the amount collected would only cover “care” for approximately thirty of Missouri’s 32,500<sup>216</sup> inmates. There are also costs associated with enforcing the law in the state; for instance, the personnel costs to the office of the attorney general to prosecute MIRA cases,<sup>217</sup> the cost in time and resources of the judiciary, and the hidden economic cost from loss of the prisoner’s productivity while incarcerated. Meanwhile, current and former prisoners who are forced to pay the fee not only lose nearly everything to their name but are subjected to collections and paycheck garnishments for years after release.<sup>218</sup> The difficulties former prisoners face when attempting to return to the labor market after release are well documented,<sup>219</sup> and subjecting them to wage garnishments in order to “pay for their stay” acts as a serious disincentive for them to seek income by legal, “above the table” means. Indeed, it could

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[http://www.stltoday.com/news/local/crime-and-courts/a-hidden-punishment-for-missouri-prison-inmates-of-means-room/article\\_f6bd3c52-8260-59bd-aaa2-2e456d34bcb9.html](http://www.stltoday.com/news/local/crime-and-courts/a-hidden-punishment-for-missouri-prison-inmates-of-means-room/article_f6bd3c52-8260-59bd-aaa2-2e456d34bcb9.html); Emily Coleman, *Paying Back Society: Prison Sentence Plus Room and Board*, COLUMBIA MISSOURIAN (May 19, 2010), [https://www.columbiaindian.com/news/paying-back-society-prison-sentence-plus-room-and-board/article\\_77867e12-8b79-5fc1-97fa-14ca1a992b03.html](https://www.columbiaindian.com/news/paying-back-society-prison-sentence-plus-room-and-board/article_77867e12-8b79-5fc1-97fa-14ca1a992b03.html); Kelly Wiese, *When Does a Prisoner’s Debt to Society End?*, MO. LAW. WKLY. (May 21, 2009), <http://molawyersmedia.com/2009/05/21/when-does-a-prisoner%E2%80%99s-debt-to-society-end/>.

213. Mann, *supra* note 212.

214. *Id.*

215. *Id.*

216. MO. DEP’T OF CORR., ANNUAL REPORT 5 (2016) (on file with author).

217. The statute considers the attorney costs and states that they shall be paid from reimbursements under the act. *See* MO. REV. STAT. § 217.841 (2016).

218. This is explicitly authorized by the statute, and any lien under MIRA takes precedence over any other outstanding debts owed by the offender. MO. REV. STAT. § 217.829.5 (2016) (allowing garnishment of wages for up to five years after release).

219. For example, there are numerous laws, rules, and regulations that discriminate against ex-offenders and effectively prevent successful reintegration into mainstream society. Examples include restrictions on voting, jury duty, eligibility for federally-funded health and welfare benefits, driving, eligibility for professional licenses, ownership of a firearm, and many other restrictions. *See generally* ALEXANDER, *supra* note 164, at 140–60. Socially, former felons can be legally discriminated against when they seek employment or housing, can be ostracized from family or community support networks, and have little or no financial means to restart life outside of a cell. *See id.* at 94.

potentially serve as an incentive for former convicts to eschew traditional employment and return to criminal means to earn a living, potentially exacerbating the recidivism rate.<sup>220</sup>

For prosecutors and counties, however, there is an added incentive to revoke probation for failure to pay assessed fines under MIRA. Missouri has a complicated system of paying for the boarding of prisoners in county jails, in which the State reimburses counties for the time a prisoner spends in local lockup before transfer to a state facility.<sup>221</sup> In fact, it appears that Missouri is the only state in the nation that has a reimbursement system set up in this manner.<sup>222</sup> The county receives prisoners' cost reimbursement from the State *only if* the defendant enters the state penal system.<sup>223</sup> A probationer who fails to pay the assessed board fee in time can be subject to revocation, at which point the sentencing court can impose a second probation term in an attempt to collect the remaining fee or impose the jail sentence in order to trigger reimbursement from the State. There is clearly a perverse financial incentive for circuit courts to revoke probation for poor defendants who fail to timely pay board fees in order to collect the outstanding bill from a more solvent source. Keeping the lights on in county lockup should not depend on cycling impoverished citizens through the criminal justice system at the expense of their freedom.

The most direct solution to this problem would be to decouple state reimbursements for inmate costs to the county jails from a calculation of a county's per diem inmate population. The current structure encourages counties to keep offenders who may be liable for MIRA costs incarcerated in order to receive the maximum reimbursement in the event of a transfer to state prison. Prosecutors and judges have discretion to seek these costs from defendants, and the

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220. See ALICIA BANNON ET AL., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 27 (2010), <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>; RACHEL L. MCLEAN & MICHAEL D. THOMPSON, REPAYING DEBTS 2 (2007), [https://csgjusticecenter.org/wp-content/uploads/2012/12/repaying\\_debts\\_summary.pdf](https://csgjusticecenter.org/wp-content/uploads/2012/12/repaying_debts_summary.pdf).

221. See MO. REV. STAT. § 221.105.3 (2016) (county authorities calculate per diem costs for boarding prisoners in jails and then bill those costs to the state at a rate not greater than \$37.50 per day); MO. REV. STAT. § 221.160 (2016) (allowing for expenses for imprisonment of any prisoner prior to, and post, conviction to be paid as directed by law); MO. REV. STAT. § 550.020 (2016) (stating that the state shall pay the costs in all cases in which a defendant is sentenced to imprisonment in a penitentiary).

222. Benjamin Peters, *Commissioners Say Missouri Is Falling Behind in Reimbursing Counties for Jail Per Diems*, MO. TIMES (Sept. 20, 2017), <https://themissouritimes.com/44227/commissioners-say-missouri-falling-behind-reimbursing-counties-jail-per-diems/>.

223. See § 221.105.2 (“When the final determination of any criminal prosecution shall be such as to render the state liable for costs under existing laws . . . .” (emphasis added)); § 550.020.1 (“[I]n all cases in which the defendant shall be sentenced to imprisonment in the penitentiary . . . the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant.”).

threshold for defendant liability for the costs under the act is quite low.<sup>224</sup> Additionally, the State is currently behind in these payments to the counties,<sup>225</sup> leading to diminished quality of care for inmates<sup>226</sup> and uncertainty in budgeting and planning.<sup>227</sup> By disbursing funds to county penal systems based on a different metric – such as crime rate, population, or a variety of other non-per diem factors – the incentive for counties to keep jail beds full to receive the greatest marginal benefits from reimbursement would be diminished. The current structure has been in place since 1976<sup>228</sup> and reflects a solution for a period of time when there were six times fewer inmates in state custody.<sup>229</sup> A new approach should reflect the current conditions and population in state and county jails and provide a stable budgetary framework that counties can rely upon without the uncertainty of shifting the responsibility to the State when offenders are sent to the next level of lockup.

Another potential solution would be to adjust the State’s approach to setting cash bail bonds to allow offenders more opportunity to get out of detention while awaiting trial. Fleming’s \$50,000 bond was an amount that most residents of Missouri would struggle to raise.<sup>230</sup> Even paying a bondsman the typical ten percent fee (\$5000) would have been an insurmountable price for Fleming, who struggled to pay off a smaller amount over his five-year probation term. In fact, the rate of accused persons incarcerated and awaiting trial, often

224. See *supra* notes 113–14.

225. Peters, *supra* note 222.

226. Alisa Nelson, *State Owes Counties \$19 Million in Jail Payments; Missouri Sheriff Feels the Pain*, MISSOURINET (Sept. 25, 2017), <http://www.missourinet.com/2017/09/25/video-state-owes-counties-19-million-in-jail-payments-missouri-sheriff-feels-the-pain/>.

227. Alisa Nelson, *Legislator Thinks Missouri Should Overhaul County Jail Payment System*, MISSOURINET (Oct. 9, 2017), <http://www.missourinet.com/2017/10/09/legislator-thinks-missouri-should-overhaul-county-jail-payment-system/>.

228. § 221.105 (originally enacted in 1976).

229. Statistics come from the Bureau of Justice Statistics Correctional Statistical Analysis Tool (CSAT). In 1978, there were reported 5637 offenders in custody within the state; by 2013 the number had grown to 32,330. *Corrections Statistical Analysis Tool (CSAT) – Prisoners*, BUREAU JUST. STAT., <https://www.bjs.gov/index.cfm?ty=nps> (To view the annually reported population, use the tool to create a “custom table” using the Jurisdiction of “Missouri,” “All” years, “Yearend Population,” and “Total Jurisdiction Population” as the first variable.). In 1978, there were reported 5637 offenders in custody within the state; by 2016 the number had grown to 32,461. *Id.*; see also Joshua Aiken, *Missouri’s Prison and Jail Populations*, PRISON POLICY INITIATIVE (May 2017), [https://www.prisonpolicy.org/graphs/MO\\_Prison\\_Jail\\_Population\\_1978-2015.html](https://www.prisonpolicy.org/graphs/MO_Prison_Jail_Population_1978-2015.html).

230. In fact, a 2014 study estimated that sixty-two percent of Americans struggle with “financial fragility” and could not even pay \$1000 in the case of an emergency and would have to either borrow or sell property to cover an unexpected expense. See Neal Gabler, *The Secret Shame of Middle-Class Americans*, ATLANTIC (May 2016), <https://www.theatlantic.com/magazine/archive/2016/05/my-secret-shame/476415/>.

because of an inability to post bail, has grown at a faster rate than the oft-lamented and ballooning American prison population.<sup>231</sup> Bail reform is a widely debated topic in the United States,<sup>232</sup> and many jurisdictions have made changes in recent years to soften the impact high bail has on low-income offenders.<sup>233</sup> Modern technologies have made it harder for accused offenders awaiting trial to simply disappear,<sup>234</sup> and the risk of flight can, in many cases, be determined by statistical inference.<sup>235</sup> Reducing cash-bond amounts, or eliminating them altogether for cases without a high risk of flight or continued threat of violence to victims or other residents, would reduce the strain on local jurisdictions and allow offenders to keep their lives on track and adequately prepare their legal defenses while still “presumed innocent.”

In Fleming’s case, his SSI disability payments were already subject to a garnishment to collect the boarding fees.<sup>236</sup> In a stroke of bitter irony, once his probation was revoked and the seven-year sentence was imposed, his SSI payments were terminated and the State could no longer receive its garnishment.<sup>237</sup>

231. COUNCIL OF ECON. ADVISERS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 7 (Dec. 2015), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215\\_cea\\_fine\\_fee\\_bail\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf).

232. See generally CRIMINAL JUSTICE POLICY PROGRAM, MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM (Oct. 2016), <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>.

233. These changes have been seen at the state, county, and municipal level. One highly publicized statewide change occurred in New Jersey at the start of 2017, which has embraced a formula known as a “risk assessment pool,” which relies on empirical data to determine an offender’s flight risk. For a description of the changes generally, see Dorothy Harbeck, *A New Calculus for the Measure of Mercy: Does the New Jersey Bail Reform Affect the Immigration Court Bond Hearings?*, 44 RUTGERS L. REC. 106, 107–11 (2016–2017). At least five counties in Missouri have changed pre-trial detention policies based on “risk assessment pools” and guidance provided by a non-profit organization called The Laura and John Arnold Foundation. Jasper County is one example and has implemented such a policy change due to overcrowding in county jails. See Koby Levin, *New Jasper County Pre-Trial Release Program Answers Plight of Poor*, JOPLIN GLOBE (June 10, 2017), [http://www.joplinglobe.com/news/local\\_news/new-jasper-county-pre-trial-release-program-answers-plight-of/article\\_508a9ff8-f22f-5898-8822-20a69b61b932.html](http://www.joplinglobe.com/news/local_news/new-jasper-county-pre-trial-release-program-answers-plight-of/article_508a9ff8-f22f-5898-8822-20a69b61b932.html); see also Jon Schuppe, *Post Bail*, NBC NEWS (Aug. 22, 2017), <https://www.nbcnews.com/specials/bail-reform> (presenting a national perspective).

234. See Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1364–72 (2014) (examining the implementation, effectiveness, and costs of electronic monitoring technologies used for pretrial detention scenarios).

235. See, e.g., Shaila Dewan, *Judges Replacing Conjecture with Formula for Bail*, N.Y. TIMES (June 26, 2015), <https://www.nytimes.com/2015/06/27/us/turning-the-granting-of-bail-into-a-science.html>.

236. Relator’s Brief, *supra* note 37, at 12–13.

237. *Id.*; see also SOC. SEC. ADMIN., WHAT PRISONERS NEED TO KNOW 1 (July 2017), <https://www.ssa.gov/pubs/EN-05-10133.pdf> (“No benefits are payable for any month in which you are in jail, prison, or certain other public institutions.”).

Thus, the sentencing court's discretionary choice to send Fleming to prison had little to do with removing a violent felon from society or ensuring a convicted criminal paid the "full price" for his actions. Instead, by enforcing the law, the court was effectively acting as a collection agent for the county jail – ensuring that the bill for Fleming's three-month confinement prior to trial could be sent to the state for a full refund. Debtor's prisons have been held to be unconstitutional.<sup>238</sup> Incarcerating probationers for a failure to pay pre-trial detention costs to trigger a collection from the state should be, as a matter of policy, ceased as well.

## VI. CONCLUSION

The Supreme Court of Missouri recognized the legal wrong that led to Fleming's incarceration and took the necessary steps to fix it; however, the larger problem his case presented is far from solved. In holding that sentencing courts are required to make a finding about a probationer's ability to pay LFOs before revoking probation solely for a failure to pay, the court reaffirmed existing Missouri law, backed by precedent from the Supreme Court of the United States. By issuing this ruling, the court notified lower courts, prosecutors, and defense attorneys that there will be additional scrutiny upon any decision to imprison Missourians solely for a failure to pay debts. The due process violation Fleming experienced caused him to slip through the cracks of the legal system, which to remedy required a broad interpretation of an extraordinary writ. As a result, he spent three years in state prison, at the incalculable expense of his freedom, while accruing a costly financial burden to state taxpayers for his incarceration and time spent navigating the justice system. Without the issuance of the writ of habeas corpus and written opinion in this case, Fleming would have evolved from a criminal offender to another unknown victim of a flawed justice system. At what point do the costs of maintaining Missouri's current criminal justice system outweigh the societal benefits of punishing offenders?

The recent policy changes within the state regarding the imposition and management of LFOs indicate a trend that appears to favor reducing legal costs for state residents. The result in this case is a prime example. However, until the disproportionate imposition of boarding fees under MIRA are addressed and county courts and jails no longer have the incentive to keep criminal defendants incarcerated pre-trial to receive greater reimbursement from the State, defendants like Fleming will continue to be jailed for failure to "pay for the

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238. *See, e.g.*, *Tate v. Short*, 401 U.S. 395, 398 (1971) (unconstitutional to impose a fine and then automatically "convert[] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full" (quoting *Morris v. Schoonfield*, 399 U.S. 508, 509 (1970))); *Williams v. Illinois*, 399 U.S. 235, 243 (1970) (extending prison sentences past fixed statutory limits because defendant's inability to pay a fine violates equal protection).



stay.” The Missouri legislature and judiciary must continue to reform the administration of criminal justice, particularly with regard to the financial implications for low income residents.