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Supreme Court of Texas.
Walter Earl HARRELL, Petitioner,
v.
The STATE of Texas, Respondent.
No. 07-0806.

November 13, 2008.

Appearances:

James Caleb Scott, Gardere Wynne Sewell LLP, Dallas, Texas, for Petitioner.

Jason Bujnosek, Assistant County Attorney for Terry County, Brownfield, Texas, for Respondent.

Before:

Chief Justice Wallace B. Jefferson; Don R. Willett, Harriet O'Neill, Dale Wainwright, Paul W. Green, Phil Johnson, Nathan L. Hecht, Scott A. Brister, and David M. Medina, Justices.

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JUSTICE: Be seated, please. The Court is now ready to hear argument in 07-0806, Walter E. Harrell v. the state of Texas.

SPEAKER: May it please the Court. Mr. Scott will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF JAMES CALEB SCOTT ON BEHALF OF THE PETITIONER

MR. SCOTT: May it please the Court. This case is a civil law matter that happens incidentally to emanate from a judgment in a criminal case that is not, otherwise, related to criminal law at all.

JUSTICE: Does that give us jurisdiction here?

MR. SCOTT: This is what gives this Court jurisdiction, I believe. This is a -- this is about a separate and independent civil proceeding where the trial court collected on costs and attorney's fees through a postjudgment collection process pursuant to Texas Government Code, Section 501.014(e).

JUSTICE: What preclusive effect are we to give the CCA's opinion two weeks ago in Johnson?

MR. SCOTT: Well, of course, it's -- it's not binding on this Court. But --

JUSTICE: Do you think we're free to disagree with our sister high court across the hall?

MR. SCOTT: I think you can disagree with the court. But I think the court was right. I think what happened here has nothing to do with

the underlying criminal proceeding.

JUSTICE: Well, if we disagree, and conclude it's a criminal matter, then where does that leave us? They say it's civil. We say it's criminal. Then what happens?

MR. SCOTT: In that case, it's maybe up -- left up to the legislature to -- to fix this statute because there -- there's -- there's no guidelines. But I -- I will tell you this statute doesn't apply exclusively to criminal proceedings costs that arise from a criminal case. They also -- the statute applies to costs that arise in civil proceedings, where in [inaudible] costs from a prior civil proceeding. As this Court is aware, Mr. Harrell pled guilty to two separate criminal causes. In both of the judgments, the trial court ordered these costs and attorney's fees. Six years later, the trial court as a judgment creditor at that point, collected on the judgment by ordering the Department of Criminal Justice to withdraw his funds from his inmate trust account.

JUSTICE: Would it have been different if the withdrawal order had occurred during the criminal court's plenary power?

MR. SCOTT: I do not think so, your Honor. I think as long as it was pursuant to this Texas Government Code, it doesn't matter. This Texas Government Code is -- is a -- is like a debt collection. It allows whether the costs emanate from a civil proceeding against an inmate or a criminal proceeding against an inmate, it's this Government Code --

JUSTICE: So what happens if -- if -- if the -- if you're within the criminal court's plenary power, how would you start, initiate a garnishment proceeding? Would the garnishment proceeding be in the criminal court?

MR. SCOTT: Well, the criminal court is, at this point, a judgment creditor. And as long as -- as -- as they're not enforcing that order pursuant to a some criminal Code or criminal statute, which is not what happened here, they're doing it pursuant to this Government Code, they would have to go through some sort of a procedure. We say garnishment. We liken this to a garnishment. I'm not saying that the state has to jump through a bunch of hurdles to get its money paid back. By all means, the state should be paid its -- its fees. And we're not -- Mr. Harrell is not arguing against the assessment of those costs. But there need to be procedures in place, whether it's a garnishment or some other, that they -- gives him a notice and gives him an opportunity to be heard regarding what those funds are in that account.

JUSTICE: But -- I guess that's my point, is if it's -- I'm still confining about the plenary period. If it's when -- if it's within the Court's plenary jurisdiction, then the inmate can challenge it there, if we were to determine that there [inaudible] provisions that apply, then that court itself would -- would hear any sort of challenge to the -- to the award, right?

MR. SCOTT: Right, I guess if it was still in the -- in the -- in that plenary period, yes. But it would still be pursuant to this Government Code, which we're arguing, is a -- is a civil law matter. But --

JUSTICE: I understand. But you're arguing it's civil law because you want notice and opportunity to be heard.

MR. SCOTT: That's -- that's correct.

JUSTICE: And so, if it's within the plenary period, it doesn't really matter what it is 'cause the trial can change to simply an award of costs. And -- and there'd be an option to be heard. So, do we need to -- do we need to break this down and to -- once the plenary

jurisdiction has expired, a different procedure kicks in, 'cause I was thinking this was some seven -- six, seven --

MR. SCOTT: This was six years later.

JUSTICE: Six years.

MR. SCOTT: I mean, I see what you're saying. If it's within that plenary period within 30 days or what have you, they issued this order pursuant to this Government Code to collect their costs. And then, they -- they withdraw that, say, ok, we're gonna give you an opportunity to be heard if the criminal court let --

JUSTICE: And that would satisfy your due process claim?

MR. SCOTT: That -- that would satisfy the due process argument. And that -- of course, in this situation, if that doesn't happen, then the -- the criminal courts are saying that you can't appeal this because they're -- they're saying it's so closely related to the criminal matter that there's no right to appeal under the criminal law because there's no statute that allows an appeal of this Government Code.

JUSTICE: Mr. Harrell appealed his conviction?

MR. SCOTT: He appealed to the Amarillo Court of Appeals. And the Amarillo Court of Appeals said, we don't have jurisdiction because this is not an appealable order relying -- it's -- it's a criminal law matter.

JUSTICE: I mean, his underlying conviction.

MR. SCOTT: No. No, your Honor. That is not -- that is -- that is not at issue.

JUSTICE: Okay. So, what -- I understand the due process argument. But what possible defense would he have to, you know, the requirement that he pay these costs and fees?

MR. SCOTT: The -- he -- there -- he doesn't have a defense. He's not arguing that he shouldn't pay these fees. His argument is -- is: If you're gonna take my funds out, at least tell me -- let me tell you what's in the -- what those funds are. Are they my Social Security account that my family members put money in there? Is it exempt from execution? We don't know. They never gave him an opportunity to tell the court that. They just took it out.

JUSTICE: What's this -- what's in the inmate trust account?

MR. SCOTT: In -- the inmate trust account is whatever money they have on them when they enter the court -- or the Department of Criminal Justice or what family members' funds they put in there. It could be their wages that they had earned. Or if it's a Social --

JUSTICE: Once -- once you put them into an account, they're not exempt. I mean, my wages can't be garnished except for some circumstances. But once I get my wages and put them in the bank, they're not exempt anymore. The same thing with Social Security and everything else I can think of. Why would they be exempt?

MR. SCOTT: Well, I don't know if they -- if they don't lose their exempt status -- I mean, I would -- I thought that once it's in the account, even if it comes from your Social Security account or your IRA account, you put it in there, it doesn't lose its exempt status. But what also happens here is there are situations where these inmates are being -- they get this withdrawal order. And it's more than what was awarded in the judgment. And they just --

JUSTICE: So they don't --

MR. SCOTT: And they don't --

JUSTICE: -- they don't pay it.

MR. SCOTT: And -- and they don't have enough opportunity --

JUSTICE: So, when they don't pay it, what's the harm?

MR. SCOTT: Well, if -- if -- what happens is the Department of Criminal Justice starts pulling that money out. And they keep pulling it out until it reaches that withdrawal order, which would be more in some cases than what the judgment was originally awarded.

JUSTICE: Is that the case here?

MR. SCOTT: That is not the case here. But that happen -- that happened -- that has happened in some of the cases that happen --

JUSTICE: But also these are very small amounts of money. Are you asking for full hearing, full notice for every prisoner and every withdrawal case?

MR. SCOTT: It is a small amount of money, I mean maybe to you or I. But for some of these inmates, it's -- it's not. And -- and I understand that --

JUSTICE: But in the eyes of TDCJ, it could be -- right. The hassle factor, the headache factor of -- of -- of conducting hearings on every single matter, no matter how small the dollar amount may be -- just outweigh -- the hassle outweighs, you know, the -- the good of getting the money back.

MR. SCOTT: Correct. I mean, it may be burdensome. But -- at -- due process is due process. You still get a notice and a hearing. You know, maybe the hearing shouldn't be a garnishment hearing or what have you.

JUSTICE: Do you get notice before the seizure?

MR. SCOTT: They get the notice at the -- what happened in this case, Mr. Harrell got notice at the same time that the -- the funds were withdrawn. He didn't have notice prior to that.

JUSTICE: Do you think that satisfies the constitutional requirements?

MR. SCOTT: I do not think it does.

JUSTICE: They know that you do. We're entitled to pre-seizure notice once a debt's been adjudicated, okay? We're entitled to a pre-taking notice if the debt has not been adjudicated. But if the debt's been adjudicated, the sheriff can go out and execute. They don't have to --

MR. SCOTT: They can go and execute. All of our civil post-judgment remedies allow you to be heard and replevin that property or to argue about the mechanism, the way it happened. There was no hearing here. But even if --

JUSTICE: But the -- garnishment freezes it.

MR. SCOTT: Correct.

JUSTICE: Problem is: If you get these -- some of these fellows, not necessarily your client -- some of these fellows' notice, we're gonna take your money, the money will be spent or distributed before you can do so. And so, what kind -- kind of -- what more notice other than --

MR. SCOTT: Well, correct.

JUSTICE: -- we -- we're taking your money. And you -- it's too late for you to do anything about it. Would you give them?

MR. SCOTT: Right. I mean, if -- if notice was enough, freeze the assets. But let him have a hearing or an opportunity to be heard. Maybe they're saying -- yes.

JUSTICE: By the -- by the trial -- by the judge that issued the order?

MR. SCOTT: Correct. And -- and have an opportunity to be heard.

JUSTICE: It might be as simple as filing the motion saying, rescind this order. It's too much, whatever argument he wants to make. But the judge takes a look at it, says, motion denied.

MR. SCOTT: Correct.

JUSTICE: Right?

MR. SCOTT: And that's what happened in this case. Mr. Harrell filed a motion to rescind. It was just denied.

JUSTICE: Well, we don't expect the TDCJ to hold these hearings.

MR. SCOTT: No.

JUSTICE: It wouldn't be appropriate for them to do it.

MR. SCOTT: No, Sir.

JUSTICE: So, it's just up to the trial judge who issued the order to look at a motion that may -- or some response that says, do something about this withdrawal order. And it might not -- it might be a telephone conference. It might not even be that. It might just be cited on the papers.

MR. SCOTT: Correct. I mean, it might be something simple as that. But it gives the opportunity for these inmates, whether it comes from a criminal proceeding or a civil proceeding to -- to argue or have an opportunity to be heard what's in that account and whether it was more than what was awarded or not.

JUSTICE: You think it matters whether the trial judge sends the original conviction judgment to TDCJ along with the withdrawal order?

MR. SCOTT: If it's pursuant to this Texas Government Code. I don't think it matters. Now, if it was pursuant to some criminal statute or criminal Code, it may be different. And we wouldn't be here. But it's pursuant to this Government Code and granted, the legislature probably didn't see these problems coming. There's no procedural notice or hearing --

JUSTICE: But that's -- I mean, when there's a third party involved, that's right. But I see two distinguishing factors here. First of all under *Fuentes v. Shevin* and other cases, you don't want to take people's consumer goods because they might starve or be left out on the street until you can get a hearing. That's not the problem with these guys. They're not out on the street. They get three meals a day. And so if you take the funds first and then tell them file a motion afterwards, they really haven't lost much, have they? There's not -- there's nothing serious that's gonna happen --

MR. SCOTT: Well, they -- these funds are for the prison commissary. I mean, they pay -- they get --

JUSTICE: Well, what do they -- do some of these prisoners support their families, for example, working in the peddling shop, making crafts, and things like -- they get money that way when people order -- or order whatever they order from the craft shop in the prisons. Don't they put their money in their account and sometimes support their families --

MR. SCOTT: And I'm not sure about that. But that may be right where they could support their families and from that account go to their families. But -- but a lot of what's in this account goes for just hygiene, like toothbrushes, deodorant. And if you don't have the funds in your account, you don't get those things.

JUSTICE: Right. My other question is: Bank offset never gives you prenotice. They just take the money. In other words, if I put money in the bank, and I owe money to the bank, and I don't pay the bank, the bank just takes it. And if I don't like it, then it's up to me to file a notice afterwards that's because the person to whom the money is owed and who holds the money is the same person. Isn't that what this is? The money to whom the state is the state. And the state has the money. Can't they just offset it? They had to give you notice afterwards. And if you want to file a something, complain about it, go ahead. But there's -- in a bank offset, there's no requirement of prenotice for

the very good reason that if you gave somebody prenotice, they would take the money out and you'd be out of luck.

MR. SCOTT: Right. I mean, I see your argument is that -- is that the -- the stay in the subdivision stay in the Department of Criminal justice --

JUSTICE: Same person, so why can't it just --

MR. SCOTT: But it may be one and the same. But -- but -- but still, I mean, whether it's a garnishment or not, whether it's a turnover, it's still collecting on a debt. There's still, at that point a judgment creditor wants the criminal proceeding to --

JUSTICE: It's just the bank is.

MR. SCOTT: Well, it's just -- but you still have an opportunity. And in this case, if we're gonna say it's a criminal law matter, not a civil law matter, they can't appeal it. They may --

JUSTICE: But -- but the bank, you would just file a civil matter. Why couldn't we just do the same thing here? Say, the state just takes it, but file a civil complaint which from what we see is apparently not that hard for a lot of fellows in prison. And so, they file a civil matter saying, you shouldn't have taken my money, or it wasn't my debt, or you got the wrong person, or something like that. And we can hash all that out after the fact.

MR. SCOTT: I think that's an extra burden. I mean, if you're gonna take it out, he should still have a hearing. I mean, it's -- it's -- we throw this due process around and --

JUSTICE: Why don't you hit on that a little bit, due process? What's the harm here for prisoners confined. He's working, gets a little bit of money. Maybe he uses it for personal goods, maybe sends it to his family. What's the harm here? And what's gonna be the effect if you don't prevail?

MR. SCOTT: I think the harm is -- is: This is the inmate's property. I mean, are we going -- going to offer an inmate who is using cocaine less process than an inmate who has -- is liable for fraud and someone's lost money, maybe people's retirement accounts? Well, we're gonna give him all the due process he needs. Go through the garnishment procedures. This other guy though, he's out of luck. I think due process is due process. We -- we throw that term around loosely. But what does it mean? At the -- at the -- at the minimum, you have to give the guy an opportunity to be heard. And that's all that we're asking for.

JUSTICE: I just want to be sure that I understand your position. To be heard after the seizure?

MR. SCOTT: After the seizure.

JUSTICE: Yeah.

MR. SCOTT: You can be heard.

JUSTICE: So, it doesn't have to satisfy the full range of criteria set out in the garnishment provisions?

MR. SCOTT: I -- I don't think so. I mean, like I said, if it's a -- an inmate from a civil proceeding, then the way the -- you know, we have the 63.007 of the -- of the Civil Practice and Remedies Code is that they would have to go through garnishment proceedings. Now I understand, if the state needs to be paid, I don't think they need to jump through all the hoops of a garnishment: filing an affidavit, getting a bond, and -- and -- but there needs to be some sort of mechanism in place where these inmates could be heard so that they can make an argument whether it's -- the judgment or the withdrawal order is more than the judgment or what have you.

JUSTICE: Further questions? Thank you, counsel. The Court is now

ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. Bujnosek will present argument for the respondent.

ORAL ARGUMENT OF JASON BUJNOSEK ON BEHALF OF THE RESPONDENT

JUSTICE: You agree that this Court has jurisdiction to resolve this matter or should it be -- should it go somewhere else?

MR. BUJNOSEK: Your Honor, I do not. It's the position of the state of Texas that this is, in fact, a criminal matter. In --

JUSTICE: The court of appeals disagrees. Isn't a civil matter ancillary to a criminal matter?

MR. BUJNOSEK: You Honor, I do -- I don't believe so. If I may begin, there're actually two cases that we should be addressing here that have been issued since the state of Texas submitted its brief in this cause: one from the Court of Appeals in San Antonio and the other, In re: Johnson, decided two weeks ago by the Court of Criminal Appeals. The Court of Criminal Appeals' decision, I believe, does not preclude this Court from deciding that this is, in fact, a criminal matter. It was described by the Texas lawyer, I believe, as a Punt, essentially deciding that they did not wish to step on the Supreme Court's toes by issuing a decision that -- that withdraws from inmate trust accounts, pursuant to Texas Government Code 501. --

JUSTICE: But in Punt, the Court ruled 6-3 it was a civil matter.

MR. BUJNOSEK: They ruled that it was a civil matter. But that case does not take the same form as this case. This case is a direct appeal from the order. In re: Matt Johnson was a mandamus proceeding following the drafting of money from the inmate's trust account. The cases take different forms. And, therefore, while that mandamus proceeding may, in fact, have been a civil proceeding, that does not preclude this Court from finding that a direct appeal would be a criminal case and that, therefore, this [inaudible]

JUSTICE: Well, let me ask you what I asked opposing counsel. They say civil in nature. If we say -- if we agree with you and say, no, it's criminal in nature, you seem to be kind of lost in this judicial purgatory. And what happens to these cases?

MR. BUJNOSEK: Stating that the case is criminal in nature would only mean that a direct appeal is not the correct procedure to resolve issue with a withdrawal from an inmate trust account. The fact that direct appeal is not available does not mean that there is no remedy available. Mandamus is available. Bill of review is available. There are other avenues for which inmates may pursue to correct any errors that may have been -- that may have been committed in the course of a withdrawal.

JUSTICE: So on the scale of a lot preclusive effect or deference, we owe a sister high court's interpretation two weeks ago, you would say, on the scale of controlling -- controlling on the one edge means nothing on the other, interesting, and between, where do you think it falls?

MR. BUJNOSEK: I believe that it is instructive but not binding.

JUSTICE: We have the ball now. And we don't want to fumble it. So, let's talk about -- in respective of what your position is on that, let's about the due process issue. Why shouldn't these inmates be given some due process here?

MR. BUJNOSEK: Well naturally, inmates should be given due process. However, it is our belief that the due process has already been given to the inmates. They had their opportunity to be heard and to argue against any cost or assessed against them in their original criminal proceeding. I wanted to be clear that if I should say the word "judgment" at any point during this -- during this argument, I'm referring to the actual document that assesses a criminal penalty against a criminal defendant. The petitioner seems to [inaudible] money award.

JUSTICE: But the costs -- but costs that were assessed against the prisoner were not part of this punishment, correct?

MR. BUJNOSEK: The costs of court are assessed pursuant to the Code of Criminal Procedure. They were required to be paid upon a finding of guilt. It is not a civil award of any kind. The state is not making a profit, or being put right, or anything like that. It is -- it is, in a sense, a penalty for having committed a criminal offense.

JUSTICE: And it's in the judgment.

MR. BUJNOSEK: That is correct. It is on the criminal judgments, which I believe, are in the index of the petitioner's brief.

JUSTICE: But the withdrawal order for whatever reason gets the wrong number.

MR. BUJNOSEK: I'm sorry.

JUSTICE: The withdrawal order for whatever reason gets the wrong number. It adds interest. It's -- does a typo, changes the digit, orders the inmate go to argue that he only owes the judge \$200 in the criminal judgment, not \$2,000 as stated in the withdrawal order.

MR. BUJNOSEK: I'm not sure that such a case could ever be -- could ever arise. For one thing, just to give some perspective here, under the orders that were issued in this case following the percentages, it appears that we're arguing over \$6. I'm not sure that \$2,000 could ever be drafted from an inmate trust account.

JUSTICE: Well, \$6 or whatever much, they can't take more than they're entitled. And where do -- where does he go to say, you're taking more than you should be?

MR. BUJNOSEK: It appears based on the lower court's decision that the correct avenue is either -- is a mandamus proceeding. Filing a writ of mandamus, all of those cases have been turned back and -- and ordered to comply with the due process claim.

JUSTICE: Where do you file it --

MR. BUJNOSEK: I'm sorry?

JUSTICE: -- back where you where you're convicted, or in the local district court, or where?

MR. BUJNOSEK: The ones that I have observed have been filed in the district court, I believe, of the -- in which they were originally convicted.

JUSTICE: Against whom is the mandamus filed?

MR. BUJNOSEK: Ordinarily, it is against the judge of the court who assessed -- who entered the order of withdrawal.

JUSTICE: It could be a writ of mandamus against the judge complaining of the withdrawal order from the Department?

MR. BUJNOSEK: That's correct.

JUSTICE: So, he's asking the judge to mandamus himself to withdraw the order?

MR. BUJNOSEK: That's correct. I believe that's also the form of [inaudible]

JUSTICE: Kind of conflict there, isn't it?

MR. BUJNOSEK: I'm sorry?

JUSTICE: Kind of conflict there, isn't it?

MR. BUJNOSEK: It's -- it's a very interesting procedure. But it's no more -- no more awkward, I believe, than the procedures that are being argued by the petitioner, which is essentially that in order to recover funds from an inmate trust accounts, the state would essentially have to sue itself by -- by the court's suing the Texas Department of Criminal justice, which is the holder of --

JUSTICE: Well, I think -- I think, at least, as I -- as I understand it, the argument is: Dear inmate, in about 10 days, we're gonna withdraw \$15 from your inmate trust account pursuant to the trial court's assessment of cost and then that gives that inmate the opportunity to say, now the order was only for \$5, you can't take 15. Or, maybe, I don't know, maybe there's some exemption that we're not aware of here to withdraw that money. Now --

MR. BUJNOSEK: I think -- I think, as was noted during the petitioner's argument, such -- giving such a notice to an inmate would give the inmate opportunity to empty his inmate trust account and that is really the only avenue that 501.014 allows in order to obtain some funds, to cover the court costs and attorney's fees which were assessed against the defendant.

It has to be noted that this inmate trust accounts are not required by any stretch of the imagination. It consists --

JUSTICE: The petitioner is not asking for pre seizure notice as I understood the position. What's wrong with post seizure notice?

MR. BUJNOSEK: My understanding was that he was complaining about the fact that the only notification that was received was the order itself after the funds had been withdrawn or contemporaneous with funds being withdrawn.

JUSTICE: Well, I asked three times, but I'll ask him again at--or on rebuttal but if it's -- if it's post seizure notice, we have taken \$200 from your account, what's wrong with that?

MR. BUJNOSEK: I don't believe that there is a problem with notice after the seizure has been --

JUSTICE: And is there anything wrong with him going to -- back to the trial court, saying, I only owe 20 not 200.

MR. BUJNOSEK: I don't believe so but I don't believe that this -- that is not the form that this -- this case takes.

JUSTICE: And then one other question is, as a practical matter, this -- if we were inventing the world from scratch, would it make any difference whether review was by appeal or whether it was by a mandamus?

MR. BUJNOSEK: In a criminal context it does make a difference because criminal courts only have appellate jurisdiction where it's expressly granted by statute. And currently, no statute expressly grants -- grants the jurisdiction of appeal and direct appeal in such a case so the criminal courts are essentially hamstrung in this kind of cases which is why mandamus appeals have been successful.

JUSTICE: But as far as calling it a civil case and letting it be appealed as a civil case or calling it a criminal case and reviewing it by a mandamus is one as a practical matter better than the other?

MR. BUJNOSEK: It's hard to say qualitatively better than another. It's really a matter of what is available. As I said appellate review for criminal courts is not available on direct appeal, and therefore mandamus is all that we've got.

JUSTICE: But our rule is always if you're attacking a judgment of whatever court, you've got to attack it in the court that issued the judgment. In this case, that would always be a criminal court. And so

our civil rule would require this to be brought in a criminal court. You're saying they don't do that.

MR. BUJNOSEK: I'm saying it is my understanding only that criminal courts of appeals only have jurisdiction of cases where it's expressly granted by a statute.

Now, in a mandamus proceeding, of course, it can go back to the originally convicting court and request that the judge be ordered to turn the money back over to him. I'm not sure what form such a mandamus application would take but by direct appeal, right now, the mechanism is just isn't there.

JUSTICE: But if his -- if what his real complaint is his, I'm not the -- I'm not that guy. You got the wrong person. You're taking the money from wrong account or my account is exempt, why isn't that a civil complaint like all the other prisoners make against TDCJ. That they just make out in Huntsville at the district court there, saying, you know, they're treating me wrong or they're taking away my stuff, and they've taken away my trust account.

MR. BUJNOSEK: There is nothing that precludes a defendant from filing a civil suit based on these withdrawal orders but that's not what's happened here. These cases were docketed then and perceived under the same style and under the same cause numbers of the original convictions.

There is nothing that prevents an inmate from filing a civil action in order to --

JUSTICE: It could be a takings claim.

MR. BUJNOSEK: Exactly.

JUSTICE: Is a garnishment a criminal matter or a civil matter?

MR. BUJNOSEK: A garnishment is --

JUSTICE: A civil matter, right?

MR. BUJNOSEK: -- is, to my understanding, to my perspective, in any case, a garnishment is simply a proceeding. It's not inherently civil or criminal in itself. It's a method of recovering funds. Now, a garnishment can be applied in a criminal case in order to obtain funds or it can be applied in a civil case in order to obtain fund. But in and of itself, a garnishment is not inherently civil or criminal in nature.

JUSTICE: What about the TDCJ's argument in their amicus brief about how the trial court here issued the withdrawal order long after its plenary jurisdiction has expired?

MR. BUJNOSEK: Were they referring to this case in specific or are they referring to [inaudible].

JUSTICE: I mean here -- no, in this case. I mean in this case the withdrawal order happened on October of '06.

MR. BUJNOSEK: That's correct.

JUSTICE: But the judgment, the original judgment to pay cost and attorney's fees was July of '03. I mean, how does a trial court maintain jurisdiction to, you know, issue this withdrawal order years after the underlying plenary power had expired?

MR. BUJNOSEK: Until the defendant's punishment has been completely satisfied and all appeals have been exhausted, I believe jurisdiction is retained by the trial court. He still owed that money as part of his punishment in the original judgment by which I mean the form in the original criminal case. Because that money remained unpaid the court still had the power to issue the order of withdrawal.

Now, I think it should be noted also that these orders of withdrawal, even though they state within their-- within the four corners of the document that they're issued pursuant to Texas

Government Code 501.014 (e) that that is not the statute that authorizes the issuance of the order.

That statute states within itself that it is required that in order -- reference the statute and that's the reason why the citation is included. But the order -- the authority to issue the order falls under the Code of Criminal Procedure. And the general authority of the court to enforce orders issued by it. The criminal court --

JUSTICE: There's no provision for a order of withdrawal in a criminal Code anywhere.

MR. BUJNOSEK: Not specifically from an order withdrawal but the court does have a general power to enforce --

JUSTICE: Right.

MR. BUJNOSEK: -- orders that it issues.

JUSTICE: But I'm wondering with my bank offset analogy, why do you need an order of withdrawal at all? State says you owed us money. State's got the money in its hand. Why didn't the state just take it and then say, so sue us if we'd mess up. That's what banks do.

MR. BUJNOSEK: I -- I suppose we like to think that we're slightly better than thugs who would simply take their money from them without any kind of documentation or anything else[inaudible].

JUSTICE: Well, I mean, the bank -- the bank sends you something saying they did it but nobody considers them thugs when they all set your account which they do everyday.

JUSTICE: Yeah.

JUSTICE: And they sure don't go to court -- into court to ask for permission.

MR. BUJNOSEK: Well, I suppose the reason why these orders have to be issued is that the mechanism was created by the legislature, permitting it to be done in this fashion. And because it permits an order of withdrawal to be issued and because then the statute authorizes TDCJ --

JUSTICE: Statute says something about orders of withdrawal.

MR. BUJNOSEK: 501.014 says on order of -- upon receiving an order by a court that TDCJ may withdraw funds from the account. The statute basically gives TDCJ the authority to make the withdrawal. And in order to make that withdrawal they need an order.

JUSTICE: But as you say the law, what should an inmate do if the order, the amount to be withdrawn is erroneously higher, it just exceeds what the order should have been, as you kind of view the legal landscape, what should an inmate do?

MR. BUJNOSEK: As I view it the mandamus avenue is available, they can file a mandamus petition or application rather. Furthermore, they can file a civil action to recover money that was unjustly taken from them.

JUSTICE: Why can't they just go back to the same judge if, you know, release an order just a motion to set aside the order and reform the order.

MR. BUJNOSEK: That is available and in fact in this case that did happen. The --

JUSTICE: That's presuming that the order itself was defective as opposed to the withdrawal.

MR. BUJNOSEK: That's correct.

JUSTICE: I mean the withdrawal order --

MR. BUJNOSEK: Yes. Say withdrawal order is correct but they just mistakenly take out too much money.

JUSTICE: If you go back the withdrawal was incorrect. But the order was not in error.

MR. BUJNOSEK: No. The order -- the number in the order was two a penny correct but TDCJ they just, they take out too much mistakenly. What does an inmate do?

JUSTICE: If -- if an inmate's money were taken in excess of what's permitted by the order, I don't think the defendant's complaint would be with the order but with TDCJ and they would have to follow suit against TDCJ in order to recover their funds. I don't see where that -- that that would be a problem in line with what's going on in this case at all. It's, I mean that's an entirely separate suit.

JUSTICE: And if the -- say, the trial -- the original trial court judgment had X amount to be withdrawn and then the later order mistakenly had another amount to be withdrawn that was higher, the remedy then would be what?

MR. BUJNOSEK: As in this case the first thing that the defendant did was submit I believe he labeled it as a motion to rescind orders and submitted to the trial court. The trial court reviewed it and rejected his claim now finding there was no merit. Now, if there were some merit to the claim then the court would most likely have to hold hearing to determine whether the order should be rescinded or not.

One recent case that was decided by the San Antonio Court of Appeals Reed that was turned back for further proceedings strictly because the order -- the defendant's motion to review the order -- I'm sorry. let me see what he labeled it precisely.

Pro se motion objection to the court's order for the court to withdraw the order in the alternative for an order to be stayed during pendency of appeal had not been reviewed by the trial court at the time that the appeal went through. And therefore his claim had not been heard by any court.

JUSTICE: But Reed also didn't get any notice of that, correct?

MR. BUJNOSEK: Of the Reedcase?

JUSTICE: Right.

MR. BUJNOSEK: Reedwas --

JUSTICE: That's one of the reasons why it was sent back.

MR. BUJNOSEK: Well, Reedwas decided two days after the state's brief was submitted in this case so it's -- I don't believe there's even a citation on record.

JUSTICE: If we do this in criminal court, does the guy have a right to appointed counsel?

MR. BUJNOSEK: If -- we're going back to the example of the order -

JUSTICE: We're going back to criminal court top fight over whether he should be -- they should be allowed to withdraw these costs or not. Does he have a right to appointed counsel?

MR. BUJNOSEK: Assuming that it is a criminal matter which I believe it is, then I believe he would have -- he would be entitled to appointed counsel.

JUSTICE: Take his property for criminal court. And if you go back to criminal court and do that do you have to bench warrant him back to wherever this was so he can --

MR. BUJNOSEK: It would be a pretty onerous procedure if we have to do that every time that funds were withdrawn from an inmate's account especially in the case of \$6 having to --

JUSTICE: I'm confused by your telling me that you have to have an order from the court to TDCJ. As I read section (e) it just says on notification by a court. The department shall withdraw from inmate's account. Can't that just be a letter from the court? Why do we need a court order?

MR. BUJNOSEK: [inaudible] Statute begins on notification by a court. The department shall withdraw from an inmate's account any amount the inmate is ordered to pay by order of the court under this subsection. I believe that the latter sentence requires that the court issue an order and not simply a notification --

JUSTICE: Well, but the order of the let's see, the department shall withdraw from an inmate's account any amount that inmate is ordered to pay by order of the court. That was the original judgment, ordered him to pay. Why isn't this just a certified copy of the court judgment?

MR. BUJNOSEK: In the form that these have taken I believe that the reason that new orders are being issued --

JUSTICE: I know you're winging it because we don't know what to do, the legislature didn't say. But we're trying to figure out what's the most efficient way to do this without opening up a whole other -- making the process more expensive than a few hundred dollars we're ordinarily dealing with. I mean, these are almost all less than a thousand dollars, right?

MR. BUJNOSEK: Absolutely. Currently, the practice --

JUSTICE: Small amounts of money and if we have to appoint attorneys and bench warrant people and do all of the step, there's no point in it at all.

MR. BUJNOSEK: Currently, the practice which should have been the practice all along is to admonish defendants upon conviction that money may be withdrawn from the inmate trust account in order to pay for the court costs and that eliminates the need for these later orders and for these later appeals.

Unfortunately, in the first years following the passage of 501.014, that was not done. And that's what brings us here today.

JUSTICE: Are there any more questions? Thank you, Counsel.

REBUTTAL ARGUMENT OF JAMES CALEB SCOTT ON BEHALF OF THE PETITIONER

MR. SCOTT: The state issued this order pursuant to the government Code to collect on these costs that were assessed in the judgment. We're not attacking -- Mr. Harrell is not attacking the judgment -- the assessment of the cost. He knew he had to pay these fees but he didn't know they would come out of his trust account -- his inmate account how he would have to pay those fees.

JUSTICE: But where would they come from if he's in prison and can't earn any money other than what he earns. They're doing some work.

MR. SCOTT: Well, if he had, I mean --

JUSTICE: [inaudible] make deposits on those account, right [inaudible].

MR. SCOTT: He may have a bank account that they could go after or any, you know, some other type of account.

JUSTICE: If he had that, why could he just voluntarily pay them. I mean, the order says you got to pay them.

MR. SCOTT: Right. In this case, he said he was an indigent and didn't have enough money to pay. I mean he had, I think he had like \$30 in his inmate trust fund account. But that account was collected. I mean, if an inmate in a civil proceeding is gonna go to this government Code and the civil courts are gonna issue this order and say take it out, well, they're gonna jump through this garnishment procedures and--

and all these other procedures to allow him this notice and this opportunity to be heard but the criminal court, just because he's an inmate in a criminal proceeding, he doesn't get any due process. He doesn't have an opportunity to be heard of what's coming out of that account.

JUSTICE: I want to be heard clear. It is notice after the money is taken. That's what you're asking for not notice before the money is taken?

MR. SCOTT: Well, in this case, it happened contemporaneously, the notes.

JUSTICE: I'm just wondering what your argument is about what it should be under the law. In other words, what does due process require? Notice before or notice after?

MR. SCOTT: I understand, the notice issue is tough and certain garnishment or turnover orders -- they freeze the account then they get the notice. But I think the bigger issue is this opportunity to be heard.

JUSTICE: I understand that, but I'm asking you, what is your position on notice -- what does due process require with respect to notice -- before or after the taking?

MR. SCOTT: That's a good question. That's a tough question. If we're -- if we're arguing this is a civil matter, the civil proceeding was done as soon they issued that order withdrawing those funds pursuant to government Code, this became a collection proceeding and therefore civil in nature. If we're gonna say that and there's certain turnover orders that allow notice afterwards then by all means notice can be afterwards. But we're asking that the guy have an opportunity to be heard regarding what's in that account.

JUSTICE: And again, that's after too, right?

MR. SCOTT: And that's after as well.

JUSTICE: Yeah.

JUSTICE: Did he have that? Did he --

MR. SCOTT: He didn't have an -- there was no hearing.

JUSTICE: He filed a motion to rescind?

MR. SCOTT: He filed a motion to rescind and it was just denied but there was no hearing, there was no record [inaudible].

JUSTICE: Well, why isn't that enough?

MR. SCOTT: I don't think that's enough because in this case and I don't know what Mr. Harrell was trying to get but I think he might have been trying to argue about the assessment of the cost and has turned into now about the collection of the costs. Now --

JUSTICE: There are many decisions without hearing by -- by trial judge, by many courts. The [inaudible] per curiams are decided without oral argument. Where's the due process violation there?

MR. SCOTT: Well, I mean, when it comes to someone's, I think I believe when it comes to someone's property that the Fourteenth Amendment of the Constitution gives you, at a minimum, and it's what this Court has said. At a minimum, you have an opportunity to be heard.

JUSTICE: Right, but that's often on paper. You didn't have a summary judgment where you lose millions of dollars. On paper, you never get to see the judge.

MR. SCOTT: Right. And --

JUSTICE: As long as it's civil. If it's criminal, that might be a little -- bigger problem.

MR. SCOTT: Correct. And they denied that. He doesn't have an opportunity to appeal. What does he have to do? He has to mandamus.

JUSTICE: Maybe he'd raise a back issue, maybe there didn't need to

be a -- if the motion to rescind, he just says, I just want you to set aside the order 'cause I didn't have here the notice beforehand, but didn't explain why it was wrong to grant the relief anyway. He just said, well, you know, you have the wrong guy or it's not my money or it's exempted [inaudible]. But they didn't put that in the motion perhaps that might have raised an issue for a hearing. But if it's not in there, why couldn't the judges say, well, you know, I looked at the order and looked at the amount that's in your account. Done.

MR. SCOTT: Correct. And I understand that. And if this, but if this is not a civil matter, he has to mandamus and that's a higher burden for him. It has to be on undisputed facts. I mean, he doesn't get a due process that we all get and now, granted, I understand they guy's smoking crack or what have you, but due process is due process. I think it applies to everybody. And he should have that right to an appeal and the power of burden through a mandamus even if it was denied, his motion.

JUSTICE: Do you know if this issue is pending under the federal constitution in federal court anywhere?

MR. SCOTT: No, sir, your Honor. I -- I do not know that.

JUSTICE: And do you know a rehearing has been filed in Johnson in the court of criminal appeal?

MR. SCOTT: I do not know about the rehearing.

JUSTICE: Opposing counsel calls that case instructive but not binding, would you have a different characterization?

MR. SCOTT: I think it -- of course, it's not binding on -- on this Court, but I think it is very persuasive but they're saying this is not a criminal matter. We're not destroying a criminal statute. This is a government Code for collection of these cost. We're gonna give this to the Texas Supreme Court, you know, and hope that you would make a decision so that these inmates have notice and all of us of what's gonna --

JUSTICE: And is it true that that this problem has been taken care of for all future cases? We're just talking about the ones, counsel said, now we're telling everybody when their convictions end we may take it out of your trust account. Is this -- is this problem only a retrospective one?

MR. SCOTT: Well, I mean, it's retrospective here. I think it would apply in future cases. I mean, if they say --

JUSTICE: Do you know what they're doing in criminal court?

MR. SCOTT: I don't know what they're doing there.

JUSTICE: Any further questions? Thank you, Counsel. The cause is submitted and the Court will take another brief recess.

SPEAKER: All rise.

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