

**Implementing *Crossroads*:**

**A Proposal for Evaluating  
Ability to Pay Fees, Fines and Costs**

A Report Prepared by:

The Michigan State Planning Body  
for the Delivery of Legal Services to the Poor

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## **ENDORSEMENTS**

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## I. INTRODUCTION<sup>1</sup>

In March 2011, the Judicial Crossroads Task Force issued a comprehensive and widely hailed report on delivering justice in the face of diminishing resources.<sup>2</sup> Among the challenges identified in the *Crossroads Report* was the need for statewide standards regarding the imposition of fines, fees and costs. The report explained that while such fees play an important role in assuring accountability, the imposition of fees on individuals who lack the ability to pay

is ultimately counterproductive, creating negative unintended consequences and in the long run undermining the public's faith and confidence in the judicial system. And although the law permits a judge to waive the payment of fines and costs when an individual is indigent, there is no uniform, consistently applied standard for determining indigency, further undermining equal justice and eroding confidence in the courts.<sup>3</sup>

The *Crossroads Report* recommended the creation of clear, statewide standards and rules for assessing ability to pay.<sup>4</sup>

Several Planning Body members participated in the Crossroads Report process and the Planning Body as a whole endorsed the report of the Access to Justice Committee of Crossroads and adopted that report as the Body's workplan. This report takes up the challenge of *Crossroads* and reflects the Planning Body's commitment to implement the Crossroads' recommendations relating to court fees, fines and costs. It sets out the legal framework for and constitutional constraints on collecting fines, fees and costs from indigents, and proposes concrete steps to further *Crossroads*' vision of equal justice for all.

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<sup>1</sup> The Michigan State Planning Body for the Delivery of Legal Services to the Poor is an association made up of about 40 individuals—including leaders from the State Bar, the judiciary, the legal services community, the indigent defense community, and community organizations that advocate for low income persons. The Planning Body acts as a forum for planning and coordination of the state's efforts to deliver civil and criminal legal services to the poor, including efforts to provide access to the judicial system through pro se and pro bono programs.

<sup>2</sup> State Bar of Michigan, Judicial Crossroads Task Force, *Report and Recommendations: Delivering Justice in the Face of Diminishing Resources* 2d. ed. (March 2011) (hereinafter "*Crossroads Report*").

<sup>3</sup> *Id.* at 16.

<sup>4</sup> *Id.* at 17.

## II. SUMMARY OF THE REPORT

In Michigan, indigent people are, in a disturbing number of cases, being incarcerated solely because they are unable to pay court-ordered fees, fines, costs, assessments and/or restitution (together, “legal financial obligations” or “LFOs”). Those affected include not just defendants in criminal cases, but also youth or their parents who are charged with LFOs in juvenile proceedings, people who cannot afford fines for civil infractions, and other court users.<sup>5</sup>

As both the U.S. and Michigan Supreme Courts have recognized, it is unconstitutional to incarcerate indigents based on their failure to pay LFOs. Specifically, to deprive a defendant of his or her freedom “simply because, through no fault of his [or her] own, [the defendant] cannot pay” a legal financial obligation is “contrary to the fundamental fairness required by the Fourteenth Amendment.”<sup>6</sup> Additionally, as a policy matter, this practice entrenches indigency and generates additional costs to the State, and it is thus counterproductive to the State’s interest in collecting legal financial obligations to compensate victims and defray costs.<sup>7</sup>

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<sup>5</sup> For ease of reference, the term “defendant” is used throughout this report, even though the issues discussed impact a much broader spectrum of people than defendants in criminal cases. The recommendations in this report are intended to apply across this spectrum.

<sup>6</sup> *Bearden v Georgia*, 461 US 660, 672-73 (1983); see also *People v Terminelli*, 58 Mich App 635, 637 (1976) (“[T]he revocation of an indigent’s probation for failure to make payments towards costs must be viewed as an impermissible denial of equal protection.”); *People v Jackson*, 483 Mich 271, 295 (2009) (recognizing “the constitutional precept that no indigent defendant must be forced to pay”).

<sup>7</sup> See Section IV.B *infra*; See American Civil Liberties Union, *In For a Penny: The Rise of America’s New Debtors’ Prisons* (Oct 2010), pp 6-9, 29-41, available at: <http://www.aclu.org/prisoners-rights-racial-justice/penny-rise-americas-new-debtors-prisons>, accessed March 29, 2012; Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* (2010), pp 10-11, 25-26, available at [http://brennan.3cdn.net/c610802495d901dac3\\_76m6vqhpy.pdf](http://brennan.3cdn.net/c610802495d901dac3_76m6vqhpy.pdf), accessed March 29, 2012.

To comply with the constitutional dictate that no defendant shall be imprisoned simply because of his or her indigency, courts must inquire into the reasons for a defendant's failure to pay LFOs prior to punishing the defendant for such a failure. Although Michigan's criminal procedure laws contain various provisions reaffirming this constitutional principle, these provisions are scattered throughout the criminal code, and do not clearly articulate a governing principle in the criminal justice system. Due to the lack of such a clear, centralized standard, the existing laws and the constitutional mandates are not uniformly followed.

This report proposes the adoption of several amendments to the Michigan Court Rules to provide clear guidance to courts as to what they must do before incarcerating a defendant for a failure to pay. The proposed amendments (1) prohibit courts from sentencing a defendant to incarceration for failure to comply with a court order to pay a financial obligation unless the court has determined that the defendant is able to comply with the order without manifest hardship and has failed to make a good faith effort to do so; (2) set out the standard to be applied and the factors to be considered in the court's ability-to-pay determination; and (3) require courts to consider payment plans and payment alternatives in cases where the court determines that a defendant is unable to comply with an order to pay without manifest hardship. The proposed amendments draw from, and are fully consistent with, existing Michigan law.

In addition, this report recommends revising and clarifying the collection standards issued by the State Court Administrative Office (SCAO) pursuant to Administrative Order 2010-1.<sup>8</sup> Specifically, the SCAO should use the authority granted under that Administrative Order to (1) ensure that courts follow constitutionally valid collection policies; (2) require reporting on

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<sup>8</sup> Administrative Order 2010-1 (Feb. 2, 2010) (Attachment A).

~~pay or stay~~” issues as part of other collections-related reporting; and (3) develop procedures for implementing the proposed Court Rule changes and train the judiciary on those changes. Again, these recommendations are drawn from, and fully consistent with, existing Michigan law.

The proposed changes to the Michigan Court Rules and to the SCAO’s collections standards are premised on the concept of accountability. As the *Crossroads Report* recognizes, ~~h~~olding court users accountable in part for the costs their conduct has imposed on the system creates incentives for obeying the law.”<sup>9</sup> At the same time, the ~~a~~ppropriate waiver of fees, fines and costs for indigency is also an essential component of a fair and accessible court system, as are alternatives to immediate payment for those unable to do so.”<sup>10</sup> In a system committed to equal justice for all, accountability cannot mean that people of means pay fines, while the poor go to jail. While indigents, like other defendants, must be held accountable, it is both unjust and unconstitutional to punish them more severely than their wealthier counterparts. To ensure accountability for all, while avoiding a two-tier justice system, courts must be able to craft creative and fair sentences. ~~P~~aying” or ~~s~~taying” should not be the only options. Thus, the proposed changes seek to ensure that courts have a range of options, including individually-tailored payment plans or community service, that provide both accountability and equal justice.

For much of the Michigan judiciary, the proposed changes will simply provide clarity and uniformity to a practice that is carried out informally in courtrooms across the state by judges striving to comply with the requirements of the state and federal constitutions. However, for those members of the judiciary who are practicing ~~pay or stay~~” sentencing, the proposed rules

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<sup>9</sup> *Crossroads Report*, at 16.

<sup>10</sup> *Id.*

and the changes to collections standards will provide much needed guidance on when and how the court should inquire into the defendant's ability to pay, as well as guidance on when a defendant who does not pay may or may not be incarcerated.

### **III. CURRENT SENTENCING PRACTICES**

Currently in Michigan, some defendants convicted of violating a statute that authorizes punishment in the form of fines or imprisonment or both are being sentenced by some judges to what are commonly called “pay or stay” sentences, without any inquiry into their ability to pay the sum of money ordered by the court. Under “pay or stay” sentences, if the defendant can afford to pay the fees, fines, costs, assessments and/or restitution ordered by the court, he or she walks free; if the defendant cannot afford to pay, he or she is jailed. In a variation of this sentencing practice, some defendants ordered to pay certain LFOs by a specified time (typically as a condition of probation) are being sentenced to jail (and/or having their probation revoked) for failing to pay the amount due within the given time, without any inquiry by the court into why the defendant was unable to pay, or whether the defendant made a bona fide effort to find the money required to discharge his or her LFOs. In yet another variation of this sentencing practice, courts are sentencing defendants to jail and conditioning reduction of the jail term upon payment of LFOs.

The existence of the problem, and its devastating impact on indigent defendants, is well documented.<sup>11</sup> The problem is not endemic to all Michigan courts, and research has revealed that there is great variation in the sentencing practices of courts across the state.<sup>12</sup> Some courts,

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<sup>11</sup> See *In for a Penny*, n 6, *supra*, at 29-41; *Criminal Justice Debt*, n 6, *supra* at 10-11, 25-26.

<sup>12</sup> *Id.* at 37.



however, are routinely engaging in pay or stay sentencing. For example, an analysis of sentencing practices in just one district court found that, from January 1, 2008 to May 24, 2011, of 359 defendants convicted of begging, 103 received “pay or stay” sentences.<sup>13</sup> Put differently: in that court, for one particular minor offense, over three and one-half years, “pay or stay” sentences were imposed on nearly one-third of defendants. This figure is striking because it demonstrates that in some courts, “pay or stay” sentences have become a standard practice.

During the summer of 2011, several organizations, including the National ACLU, the ACLU of Michigan, and Cravath, Swaine & Moore LLP, a New York law firm, conducted a state-wide court-watching exercise to further document and call attention to the issue. The ACLU of Michigan intervened in five illustrative cases, filing emergency papers explaining the unconstitutionality of incarcerating indigent defendants who, through no fault of their own, were unable to comply with an order to pay. Each defendant was promptly released.<sup>14</sup> In a

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<sup>13</sup> Verified Complaint ¶¶ 73-95, *Speet v Schuette*, No 11-cv-00972 (WD Mich Sept 13, 2011) (analysis of 61<sup>st</sup> District Court, Kent County).

<sup>14</sup> For detailed accounts of the cases, *see Detroit Free Press*, “ACLU says poor defendants unlawfully jailed for failure to pay fines” (Aug. 4, 2011) (Attachment B). The cases included:

- Kyle Dewitt, 19, was sentenced to three days because he was unable to pay \$215 in fees related to a ticket for catching a fish out of season.
- Kristen Preston, 19, was sentenced to 30 days in jail because she could not afford to pay a \$125 alcohol assessment fee stemming from a minor in possession (MIP) charge.
- Dorian Bellinger, 22, was sentenced to 13 days because he could not afford to pay \$425 in fines and costs related to a misdemeanor marijuana possession charge.
- Dontae Smith, 19, was sentenced to 41 days because he could not afford to pay \$415 in connection to several driving offenses, including driving with a suspended license and impeding traffic.
- David Clark, 30, was sentenced to 90 days because he could not afford to pay \$1,250 in fees and costs related to charges for spanking his girlfriend’s son on the buttock. Clark’s girlfriend was charged with the same misdemeanor offense; however, her parents paid her costs, and she was therefore not jailed.

subsequent editorial, the *Detroit Free Press* called for an end to “pay or stay” sentences because the practice of imposing them “clearly discriminates against the poor and creates a two-tier justice system.”<sup>15</sup>

In sum, although debtors’ prisons were abolished long ago,<sup>16</sup> in practice defendants who could walk free if they were able to pay the amount ordered by the court are frequently incarcerated because they are too poor to pay. This is not supposed to happen in the United States of America.

#### IV. PROBLEMS WITH CURRENT SENTENCING PRACTICES

##### a. “Pay or Stay” Sentencing Is Unconstitutional

It is well established that a sentence that exposes an offender to incarceration unless he pays restitution or some other fine violates the Equal Protection Clauses of the federal and state constitutions because it results in unequal punishments for offenders who have and do not have sufficient money.”<sup>17</sup> “Pay or stay” sentences are unconstitutional because they result in harsher punishment (incarceration) for defendants who lack the ability to pay. As the U.S. Supreme Court has recognized, to deprive a defendant of freedom “simply because, through no fault of his own, he cannot pay [a] fine” is “contrary to the fundamental fairness required by the Fourteenth Amendment.”<sup>18</sup>

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<sup>15</sup> *Detroit Free Press*, “Pay-or-Jail Sentencing an Injustice to the Poor” (Aug. 11, 2011) (Attachment C).

<sup>16</sup> *See Bearden*, 461 US 660 (1983).

<sup>17</sup> *People v Collins*, 239 Mich App 125, 136 (1999); *see also* US Const, Am XIV; Const 1963, art 1, §2.

<sup>18</sup> *Bearden*, 461 US at 672-73.

~~Pay or stay~~ sentences bear the same constitutional defects as other sentencing practices that have been struck down by the U.S. Supreme Court and Michigan state courts alike. *First*, as the Supreme Court held in *Bearden v Georgia*, 461 US 660, 667-668 (1983), a court may not ~~impos[e]~~ a fine as a sentence and then automatically conver[t] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.”<sup>19</sup> *Second*, a court may not revoke probation ~~for~~ failure to pay a fine or restitution [without first] inquir[ing] into the reasons for the failure to pay.”<sup>20</sup> *Third*, a court may not impose a sentence that ~~results~~ in a shorter [jail] term for defendant if he can and does pay [restitution], [and] a longer term if he cannot and does not pay—a result clearly prohibited by the Equal Protection Clause.”<sup>21</sup> ~~Pay or stay~~ sentences violate the constitutional rights of indigent defendants in the same manner as these prohibited sentencing practices because they punish defendants for their indigency.

When sentencing a defendant who is unable to pay a legal financial obligation, the fundamental fairness guaranteed by the U.S. and Michigan constitutions requires that ~~the~~ sentencing court must inquire into the reasons for the failure to pay. If the [defendant] willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may . . . sentence the defendant to imprisonment within the authorized range of his

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<sup>19</sup> Quoting *Tate v Short*, 401 US 395, 398 (1971).

<sup>20</sup> *Bearden*, 461 US at 672; *see also People v Baker*, 120 Mich App 89, 99 (1982) (~~It~~ is well settled in Michigan that probation may not be revoked for failure to make required restitution payments where defendant is financially unable to make the payments.”); *People v Terminelli*, 58 Mich App 635, 637 (1976) (~~T~~he revocation of an indigent’s probation for failure to make payments towards costs must be viewed as an impermissible denial of equal protection.”); *People v Ford*, 410 Mich 902 (1981) (~~P~~robation shall not be revoked for failure to pay child support or court costs absent appropriate findings of fact and conclusions of law on defendant’s claim of indigency.”).

<sup>21</sup> *People v Collins*, 239 Mich App 125, 136 (1999).

sentencing authority. If the [defendant] could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment.”<sup>22</sup>

b. Incarcerating Indigent Defendants for Failure to Pay Is Counterproductive

The rise of “pay or stay” sentencing reflects a broader shift toward more aggressive collection practices and coincides with the shrinking of local and state budgets.<sup>23</sup> Incarcerating indigent defendants, however, is counterproductive to the State’s interests in collecting restitution for victims and in recouping costs of prosecution. As the U.S. Supreme Court has recognized, incarcerating a defendant “who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming.”<sup>24</sup> In fact, incarceration often causes the defendant to lose current employment or hinders the defendant’s efforts to gain employment, thereby prolonging or entrenching the defendant’s indigency and reducing the likelihood that the defendant will ever be able to pay part or all of his or her LFOs.

Far from operating as a tool for recouping costs, incarceration creates additional costs. In 2008, the average cost of housing an inmate in a Michigan state prison was almost \$90 per day.<sup>25</sup> The average cost of housing an inmate in a Michigan county jail varies from county to county,

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<sup>22</sup> *Bearden*, 461 US at 672.

<sup>23</sup> *See In for a Penny*, n 6 *supra*, at 36.

<sup>24</sup> *Bearden*, 461 US at 670.

<sup>25</sup> Pew Center On the States, *One in 31: The Long Reach of American Corrections: Michigan Fact Sheet* (2009), available at: [http://www.pewcenteronthestates.org/uploadedFiles/wwwpewcenteronthestatesorg/Fact\\_Sheets/PSPP\\_1in31\\_factsheets\\_FINAL\\_WEB.pdf](http://www.pewcenteronthestates.org/uploadedFiles/wwwpewcenteronthestatesorg/Fact_Sheets/PSPP_1in31_factsheets_FINAL_WEB.pdf), accessed August 26, 2011.

but at Wayne County Jail, for instance, the cost of housing an inmate is \$70 per day.<sup>26</sup> At these rates, the cost of incarcerating a defendant—even for a brief period—often surpasses the amount that the State or county is seeking to recover from the incarcerated defendant. In contrast, a realistic payment plan or a sentence of probation coupled with an order to perform community service can actually generate a net benefit, rather than cost, for society.

In addition, collection practices can undermine compliance if they too strongly emphasize immediate payment of the full debt, without informing defendants that ability to pay will be considered and that payment plans or payment alternatives are possible. If indigent individuals who are show-caused for failure to pay believe that they must immediately pay the full amount, they may decide not to appear. The resulting bench warrants, and the incarceration of those picked up on those bench warrants, not only impose significant costs on the judicial system, but also result in individuals serving jail time for failure to appear, even when the underlying offense – which could be a civil infraction or a misdemeanor that does not carry jail time – did not or could not result in incarceration.

In sum, aggressive collection practices that incarcerate defendants for failure to pay LFOs often exacerbate rather than alleviate the fiscal strain on local and state budgets.

## **V. EXISTING LEGAL FRAMEWORK**

### **a. Statutory Framework**

Michigan's criminal code lacks a clear and uniform articulation of the governing constitutional precept that no indigent defendant be forced to pay. Only in the limited contexts

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<sup>26</sup> See Wayne County Sheriff website, <http://waynecountysheriff.com/overview.htm>, accessed September 16, 2011 (relying on a figure of \$70 as the daily cost of housing an inmate at Wayne County Jail).

of probation revocation proceedings<sup>27</sup> and proceedings regarding failure to pay restitution<sup>28</sup> do Michigan's criminal procedure laws explicitly direct courts to make an ability-to-pay determination prior to incarcerating a defendant for failure to pay. The Michigan Supreme Court has, in the context of imposing costs of counsel on defendants, ~~acknowledge[d]~~ that a more formal construct is desirable" for determining when judicial inquiries into a defendant's ability to pay should occur.<sup>29</sup> The court concluded that ~~until~~ a statute or rule is promulgated to give such formal direction, we conclude that the probation code gives adequate guidance in its handling of an analogous situation."<sup>30</sup>

Michigan's probation laws require courts to consider a defendant's ability to pay when imposing costs in connection with a probation sentence or when revoking probation due to a failure to pay costs. As an initial matter, ~~the~~ court shall not require a probationer to pay costs [beyond the mandatory state minimum costs] unless the probationer is or will be able to pay them during the term of probation."<sup>31</sup> ~~In~~ determining the amount and method of payment of [such] costs . . . the court shall take into account the probationer's financial resources and the nature of the burden that payment of costs will impose, with due regard to his or her other obligations."<sup>32</sup> At any stage after the imposition of costs, the probationer, provided that he or she

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<sup>27</sup> MCL 771.3(8); *see also* MCL 769.1a(11) (substantially similar provision relating to revocation of probation for failure to pay restitution).

<sup>28</sup> MCL 769.1a(14), MCL 780.766(14); *see also* MCL 769.1a(11), 780.766(11).

<sup>29</sup> *Jackson*, 483 Mich at 296 n 23.

<sup>30</sup> *Id.*

<sup>31</sup> MCL 771.3(6)(a).

<sup>32</sup> *Id.*

is not in willful default of payment of the court-ordered costs, ~~may~~ petition the sentencing judge or his or her successor at any time for a remission of the payment of any unpaid portion of those costs,” and, ~~if~~ if the court determines that payment of the amount due will impose a manifest hardship on the probationer or his or her immediate family, the court may remit all or part of the amount due in costs or modify the method of payment.”<sup>33</sup> If a probationer fails to comply with an order to pay costs, the court may revoke probation, but only

if the probationer has not made a good faith effort to comply with the order. In determining whether to revoke probation, the court shall consider the probationer’s employment status, earning ability, and financial resources, the willfulness of the probationer’s failure to pay, and any other special circumstances that may have a bearing on the probationer’s ability to pay.<sup>34</sup>

Similarly, Michigan’s restitution laws require courts to consider a defendant’s ability to pay prior to imprisoning a defendant (including, but not limited to, probationers) for failure to pay restitution.<sup>35</sup> Critically, the restitution statutes provide that ~~a~~ defendant shall not be imprisoned, jailed, or incarcerated for a violation of probation or parole or otherwise for failure to pay restitution . . . unless the court or parole board determines that the defendant has the resources to pay the ordered restitution and has not made a good faith effort to do so.”<sup>36</sup>

For courts sentencing indigent defendants in the first instance (*i.e.*, not probationers), or for courts sentencing indigent defendants who have failed to comply with an order to pay money

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<sup>33</sup> MCL 771.3(6)(b).

<sup>34</sup> MCL 771.3(8); *see also* MCL 769.1a(11) (substantially similar provision relating to revocation of probation for failure to pay restitution).

<sup>35</sup> *See People v Baker*, 120 Mich App 89, 99 (1982) (~~It~~ is well settled in Michigan that probation may not be revoked for failure to make required restitution payments where the defendant is financially unable to make the payments.”).

<sup>36</sup> MCL 769.1a(14), MCL 780.766(14); *see also* 769.1a(11), 780.766(11) (specifically addressing revocation of probation for failure to pay restitution).

other than for restitution, Michigan's laws offer little guidance on when to inquire into the defendant's ability to pay.

b. Michigan Court Rules and SCAO Policy

The existing Michigan Court Rules provide instruction on how to conduct an indigency determination, but they do so only in the context of establishing a defendant's eligibility for court-appointed counsel. Pursuant to MCR 6.005, a court is required to conduct an indigency determination when a defendant requests a lawyer and claims financial inability to retain one. MCR 6.005(B) sets forth the relevant factors to be considered by the court in conducting the requisite inquiry:

The determination of indigency must be guided by the following factors:

- (1) present employment, earning capacity and living expenses;
- (2) outstanding debts and liabilities, secured and unsecured;
- (3) whether the defendant has qualified for and is receiving any form of public assistance;
- (4) availability and convertibility, without undue financial hardship to the defendant and the defendant's dependents, of any personal or real property owned; and
- (5) any other circumstances that would impair the ability to pay a lawyer's fee as would ordinarily be required to retain competent counsel.

MCR 6.005 thus offers clear direction on how to conduct an indigency determination, but it requires courts only to conduct such a determination when faced with a request for court-appointed counsel. As set forth above, Michigan's criminal procedure laws and both the state and federal constitutions compel Michigan courts to consider a defendant's indigency in a much broader range of contexts than simply when determining whether the defendant is entitled to appointed counsel. Accordingly, there is a need for a rule that clearly applies at the time of sentencing, as well as in other proceedings where individuals face incarceration for nonpayment of LFOs.



At a more general level, the existing Michigan Court Rules recognize a need for flexibility in collecting LFOs. Pursuant to MCR 1.110, “~~f~~ines, costs, and other financial obligations imposed by the court must be paid at the time of assessment, except when the court allows otherwise, for good cause shown.” This language gives courts broad authority to modify financial obligations where warranted. However, in practice, administrative guidelines recently propounded by the State Court Administrative Office (~~S~~CAO”) have limited the options of courts striving for constitutional sentencing of indigent defendants.

In 2010, the SCAO was charged by the Michigan Supreme Court under Administrative Order 2010-1 with establishing a Court Collections Program to ~~i~~“improve the enforcement and collection of court-ordered financial sanctions.”<sup>37</sup> In addition, the SCAO was ordered to establish reporting requirements to allow for monitoring the effect of the Court Collections Program. Accordingly, the SCAO developed ~~C~~“ourt Collection Program Requirements,” which mandate that courts meet specified program components, and provide for periodic audits, as well as corrective actions plans for courts found out of compliance.<sup>38</sup>

The SCAO’s implementing document, ~~C~~“ourt Collections Program Components and Details,” emphasizes collections requiring, for example, that judges inform litigants that payment is due upon the day of assessment, that even indigent litigants must make some payment on the day of assessment, and that late penalties should be imposed.<sup>39</sup> While the Program Components

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<sup>37</sup> See Attachment A. The Order requires all circuit and districts courts to comply with the Court Collections Program.

<sup>38</sup> State Court Administrative Office, ~~C~~“ourt Collection Program Requirements” (Attachment D).

<sup>39</sup> State Court Administrative Office, *Court Collections Program Components and Details* (Attachment E).

document provides that “[p]ayment alternatives such as community service are available for those who do not have an ability to pay,” the SCAO has limited use of payment alternatives to situations where a defendant ~~is~~ in jeopardy of failing to comply with the court order and has demonstrated that he or she has exercised due diligence in attempting to comply.”<sup>40</sup> Moreover, the Court Collections Program prohibits courts from allowing defendants to use payment alternatives to satisfy certain assessments.<sup>41</sup> There is obvious tension between the Court Collections Program’s focus on immediate payment and the ~~well~~ settled” principle of Michigan law that a defendant may not be deprived of his or her liberty for failure to pay where the defendant ~~is~~ financially unable to make the payments.”<sup>42</sup>

In sum, there is a need for clearer direction in the Michigan Court Rules on constitutional sentencing of indigent defendants who are unable to pay an LFO. In addition, there is a need to review the current Court Collections Program as it impacts indigent defendants.

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<sup>40</sup> *Id.* at Component 5.

<sup>41</sup> Specifically, the SCAO prohibits use of payment alternatives for restitution, crime victim’s rights assessment, minimum state cost, and the like. *See id.* While, as a matter of constitutional law, courts must have the ability to modify or waive LFOs in order to avoid the unconstitutional incarceration of people who do not have the ability to pay, the statutory framework for judicial waiver and modification is confusing, leaving judges uncertain about what LFOs they may modify or waive. *Compare* MCL 769.1j(5) (allowing for waiver of fines if costs, other than minimum state cost, are waived); MCL 771.3(6)-(7) (providing that court shall not impose costs on probationers unless able to pay, and providing that probationers may petition for remission of costs); MCL 712A.18(19) (allowing juveniles to petition for remission of minimum state cost); MCL 780.766(12)-(13) (providing that payment terms for restitution may be modified, but restitution order remains in effect until paid and constitutes a civil judgment which can be enforced in the same manner as other civil judgments).

<sup>42</sup> *Collins*, 239 Mich App at 99 (restitution); *see also People v Ford*, 410 Mich 902, 902 (1981) (court costs).

## **VI. RECOMMENDATIONS REGARDING COURT RULES**

### **a. Proposed Amendments**

We recommend that the following amendment be added to MCR 6.425(E), which governs sentencing in circuit court proceedings:

**(3) Incarceration. The court shall not sentence a defendant to a term of incarceration, nor revoke probation, for failure to comply with an order to pay money unless the court determines, on the record, that the defendant is able to comply with the order without manifest hardship to the defendant or the defendant's dependents, and that the defendant has not made a good faith effort to comply with the order.**

#### **(a) Ability to Pay.**

- (i) In determining whether the defendant is able to comply with an order to pay money without manifest hardship to the defendant or the defendant's dependents, the court shall consider:**
  - (A) defendant's present employment, earning capacity, unearned income and living expenses;**
  - (B) defendant's outstanding debts and liabilities, secured and unsecured;**
  - (C) whether the defendant has qualified for and is receiving any form of public assistance;**
  - (D) availability and convertibility, without undue financial hardship to the defendant or the defendant's dependents, of any personal or real property owned; and**
  - (E) any other circumstances that would impair the defendant's ability to pay.**
- (ii) There shall be a rebuttable presumption of manifest hardship if the defendant:**
  - (A) receives public assistance, defined as Food Stamps, Temporary Assistance for Needy Families, Medicaid, Supplemental Security Income (SSI) benefits, or resides in public housing; or**
  - (B) earns less than 200 percent of the applicable Federal Poverty Guideline.**

**(b) Payment Alternatives.** Where, at the time of sentencing or prior to incarceration if a defendant is facing incarceration for the failure to pay money previously ordered, the court determines that a defendant is unable to comply with an order to pay money without manifest hardship to the defendant or the defendant's dependents, the court shall determine, on the record, whether it is appropriate to impose a payment plan, modify any existing payment plan, or waive part or all of the amount of money owed to the extent permitted by law. The court may order payment alternatives, including community service. If the court determines that a payment plan is appropriate, the court shall consider the factors set out in subsection (3)(a)(i) in determining the schedule and amount of payments due under the payment plan.

We also propose the addition of a formal comment to proposed MCR 6.425(E) as follows:

**Comment:** A defendant and a defendant's dependents should be considered to suffer manifest hardship if they would be deprived of funds needed for basic living necessities such as food, shelter, clothing, necessary medical expenses, or child support.

The United States Supreme Court has set out a simple framework for assessing ability to pay, albeit in the context of contempt proceedings. *See Turner v. Rogers*, 131 S.Ct. 2507, 2519 (2011). That framework requires: "(1) notice to the defendant that his 'ability to pay' is a critical issue...; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (e.g., those triggered by responses on the form); and (4) an express finding by the court that the defendant has the ability to pay." In implementing this Rule, courts shall ensure that the *Turner* standards are met.

To give effect to the proposed amendments in the context of probation revocation hearings, we also recommend that MCR 6.445(G), which governs sentencing in the context of a probation revocation hearing and refers back to MCR 6.425(E), be amended as follows:

**(G) Sentencing.** If the court finds that the probationer has violated a condition of probation, or if the probationer pleads guilty to a violation, the court may continue probation, modify the conditions of probation, extend the probation period, or revoke probation and impose a sentence of incarceration. The court may not sentence the probationer to prison without having considered a current presentence report. The court may not sentence the probationer to prison or jail without having complied with the provisions set forth in MCR 6.425(B) and (E). [Amendment underlined.]

To give effect to the proposed amendments in district court proceedings, we recommend that existing MCR 6.610(F)(2) and MCR 6.610(F)(3) be renumbered as MCR 6.610(F)(3) and MCR 6.110(F)(4) respectively, with the following language added as new MCR 6.610(F)(2):

**The court shall not sentence the defendant to a term of incarceration unless the court has complied with the provisions of MCR 6.425(E)(3).**

To give effect to the proposed amendments in contempt proceedings, except for such proceedings to which the Child Support and Parenting Time Enforcement Act applies, we recommend that the following language be added as subsection (F) to MCR 3.606, which governs contempt proceedings:

**The court shall not sentence the accused person to a term of incarceration unless the court has complied with the provisions of MCR 6.425(E)(3). Proceedings to which the Child Support and Parenting Time Enforcement Act, MCL 552.602 et. seq. applies are subject to the requirements of that Act.**

We also recommend that the following language be added to subsection (B) of MCR 6.001:

**Misdemeanor Cases. MCR 6.001-6.004, 6.005(B) and (C), 6.006, 6.102(D) and (F), 6.106, 6.125, 6.425(E)(3), 6.427, 6.445(A)-(G), and the rules in subchapters 6.600-6.800 govern matters of procedure in criminal cases cognizable in the district courts. [Amendment underlined.]**

b. The Proposed Amendments Are Consistent with Existing Michigan Law

The proposed amendments give effect to the United States Supreme Court directive in *Bearden* that, in proceedings where the defendant's liberty is at stake for a failure to pay, ~~a~~ sentencing court must inquire into the reasons for a failure to pay".<sup>43</sup> The ~~—good faith effort [to pay]~~" test in proposed 6.425(E)(3) parallels the existing test for when probation may be revoked

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<sup>43</sup> *Bearden*, 461 US at 672.

for failure to pay restitution or costs,<sup>44</sup> and the existing test for when a defendant may be incarcerated for failure to pay restitution.<sup>45</sup> The broad application of the proposed amendments to *all* defendants who have failed to comply with orders to pay will ensure that courts hearing cases that do not implicate Michigan’s probation or restitution laws are nonetheless provided with the guidance currently provided in those laws.

The proposed amendments are also sensitive to the Michigan Supreme Court’s observation that the “~~constitutional requirement~~” that “~~an~~ indigent defendant never be required to pay” does not “~~mandate~~ that [an] indigency analysis take place before *imposing* the fee.”<sup>46</sup> The proposed amendments do not require courts to undertake an ability-to-pay analysis at the time of imposing an obligation to pay; rather, they require courts to undertake an ability-to-pay analysis prior to imposing a term of incarceration, *i.e.*, at the time of, or at any time prior to, enforcing an obligation to pay. By so doing, the proposed amendments do not “~~force~~ [courts] to make a forever-binding presentence guess whether a particular defendant will ever gain the ability to pay.”<sup>47</sup>

Proposed MCR 6.425(E)(3)(a) sets forth the applicable standard in an ability-to-pay determination: “~~manifest hardship~~.” This reflects the holding of the Michigan Supreme Court that “~~once~~ an ability to pay assessment is triggered, the court must consider . . . whether repayment would cause manifest hardship.”<sup>48</sup> The Court noted that “~~t~~he operative question for

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<sup>44</sup> See MCL 769.1a(11), MCL 771.3(8), and MCL 780.766(11).

<sup>45</sup> See MCL 769.1a(14), MCL 780.766(14).

<sup>46</sup> *Jackson*, 483 Mich at 287 (emphasis in original).

<sup>47</sup> *Id.* at 290.

<sup>48</sup> *Id.* at 274.

any . . . [ability to pay] evaluation will be whether a defendant is indigent and unable to pay at that time or whether forced payment would work a manifest hardship on the defendant at that time.”<sup>49</sup> The ~~–~~manifest hardship” standard is also consistent with the existing standard in MCL 771.3(6)(b), which addresses remitting or modifying payment of costs by a probationer, and MCL 769.1a(12), which addresses remitting or modifying payment of restitution by a defendant. No Michigan court has provided a general definition of ~~–~~manifest hardship,” and a long-standing deficiency in the Michigan Court Rules is the lack of a uniform standard of indigency. We suggest, in a comment to the proposed amendment, that a defendant or a defendant’s dependents should be considered to suffer manifest hardship if they would be deprived of funds needed for basic living necessities such as food, shelter, clothing, necessary medical expenses, or child support.

Proposed MCR 6.425(E)(3)(a)(i) sets forth the factors to be considered in an ability-to-pay determination. These factors are drawn from and consistent with the existing guidance in MCR 6.005(B), which governs indigency determinations made in connection with appointing counsel.

Proposed MCR 6.425(E)(3)(a)(ii) recognizes the need for consistency and efficiency in ability-to-pay determinations by introducing a rebuttable presumption of manifest hardship where the defendant receives public assistance or earns less than 200 percent of the applicable

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<sup>49</sup> *Id.* at 293 (emphasis omitted).

Federal Poverty Guideline.<sup>50</sup> This presumption is consistent with existing MCR 2.002(C), which provides for suspension of fees and costs for defendants ~~receiving~~ any form of public assistance.” This proposed amendment recognizes that where a government agency whose duty is to review in detail a household’s income and assets has determined that the household lacks resources and requires public assistance to meet its basic needs, such as food, shelter and medical care, it is both appropriate and efficient for courts to defer to these more formal assessments of need. Proposed 6.425(E)(3)(a)(ii) sets a uniform, objective, ~~baseline~~” standard for assessing manifest hardship, ensuring consistency amongst courts, and consistency between courts and government agencies, in assessments of indigency.

Proposed MCR 6.425(E)(3)(b), which requires courts to consider payment plans and payment alternatives, is consistent with the authority vested in the courts pursuant to MCL 769.1a(12) and MCL 780.766(12) ~~to~~ modify the method of payment” of restitution where ~~the~~ court determines that payment under the order will impose a manifest hardship on the defendant

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<sup>50</sup> See Annual Update of the Health and Human Services Poverty Guidelines, 76 Fed Reg 3,637-38 (Jan 20, 2011). The 2011 Federal Poverty Guidelines (~~FPG~~) for the 48 contiguous states and the District of Columbia, and the thresholds that would be applicable under proposed MCR 6.425(E) for the same year, are as follows:

Persons in family	2011 Federal Poverty Guideline (annual income)	2011 Proposed Threshold (200% of FPG)
1	\$10,890	\$21,960
2	\$14,710	\$29,420
3	\$18,530	\$37,060
4	\$22,350	\$44,700
5	\$26,170	\$52,340
6	\$29,990	\$59,980
7	\$33,810	\$67,620
8	\$37,630	\$75,260



or his or her immediate family.” This subsection is also consistent with the U.S. Supreme Court’s guidance in *Bearden* that “[t]he State’s interest] in punishment and deterrence can often be served fully by alternative means” to imprisonment, such as by “extend[ing] the time for making payments, or reduc[ing] the fine, or direct[ing] that the probationer perform some form of labor or public service in lieu of the fine.”<sup>51</sup>

Nothing in the proposed amendments prevents a court from imprisoning a defendant who willfully refuses to comply with an order to pay fines, fees, costs, restitution, assessments or any other legal financial obligation. Nor do the proposed amendments, which expressly acknowledge payment alternatives, render courts powerless to enforce judgments against indigent defendants. The purpose and effect of the proposed amendments is simply to ensure that courts do not violate the constitutional rights of indigent defendants by jailing them for failing to make payments they are unable to afford.

## **VII. RECOMMENDATIONS REGARDING THE COURT COLLECTIONS PROGRAM**

As discussed above, in recent years the State Court Administrative Office has worked to promote efficient court collection practices. Administrative Order 2010-1 required the SCAO to establish Court Collection Program Requirements, enforce those requirements, and assist courts with collections. That Order, along with the Court Collection Program Requirements developed by the SCAO, provides a useful framework in which the SCAO can work to ensure that collection processes not only are efficient, but also constitutionally sound.

In order to implement its charge to ensure efficient collections, the SCAO has established ten required components for court collections programs, which are detailed in —Court Collections

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<sup>51</sup> *Bearden*, 461 US at 672.

Program Components and Details.”<sup>52</sup> It is recommended that these components be reviewed and revised to ensure that courts do not, in their efforts to promote collection, violate the rights of people who do not have the ability to pay. Specifically, the existing Program Components could be revised to ensure that courts follow constitutionally valid collection policies, as well as to require reporting on “pay or stay” issues as part of other collections-related reporting. In addition, it is recommended that the SCAO develop procedures for implementing the proposed Court Rule changes and that the SCAO train the judiciary on those changes.

Specifically, the following actions are recommended:

1. Addition of an 11<sup>th</sup> Component to the Court Collections Program Components

This component, which could track the language proposed above for MCR 6.425(E), would spell out that a court shall not sentence a defendant to a term of incarceration, nor revoke probation, for failure to comply with an order to pay money unless the court determines on the record, that the defendant is able to comply with the order without manifest hardship to the defendant or the defendant’s dependents, and that the defendant has not made a good faith effort to comply with the order. In addition, this component would provide guidance on the factors courts should consider in determining ability to pay.

2. Revision of Remaining Components to Reflect Constitutional Constraints on Collection

As currently drafted, the original ten components emphasize efficient collections, rather than protection of the rights of persons who do not have the ability to pay. It is recommended that the ten components be revised to address both objectives. For example, the existing

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<sup>52</sup> State Court Administrative Office, “Court Collections Program Components and Details” (Attachment E).

components seek to communicate the expectation of payment to litigants, the legal community, and the public. However, it is equally important to educate litigants, the legal community, and the public that indigent individuals cannot be incarcerated for a failure to pay.

The State Court Administrative Office has indicated that it is in the process of revising the collections program, and is seeking input from stakeholders. It is recommended that each of the existing ten components be reviewed and modified as necessary to meet constitutional standards.

### 3. Reporting to the SCAO on “Pay or Stay” Issues

As the SCAO has recognized in the context of promoting efficient collections, regular reporting and monitoring is necessary to ensure that courts are aware of and comply with the Court Collections Program. Such reporting and monitoring is also necessary to ensure that local court collection programs meet constitutional standards for the treatment of indigents. It is recommended that the SCAO require reporting, and engage in monitoring or audits, on such issues such as the financial capacity of defendants, the use of payment plans, and the use of payment alternatives.

### 4. Implementation of the Proposed Court Rule Changes

If the proposed Court Rule changes are adopted, the SCAO should adopt procedures and forms to assist courts in complying with those changes. For example, existing court forms could be revised to ensure both that indigents are aware that ability to pay will be considered and that indigents bring any necessary financial documentation with them to relevant court proceedings. A simple form for assessing ability to pay (which could be similar to that used for appointment of counsel) could also be developed. In addition, it is recommended that the SCAO work through

the Michigan Judicial Institute and other entities to train judges and court staff on conducting indigency assessments, developing payments plans, and utilizing payment alternatives.

## **CONCLUSION**

Both the U.S. and Michigan Constitutions require that no indigent defendant be punished solely for his indigency. In the wake of the financial crisis, from which countless Michiganders are still trying to recover, this constitutional guarantee is more important than ever. At present, Michigan courts lack clear and centralized guidance on when and how to consider a defendant's indigency in sentencing and enforcement proceedings. As a result, some courts are engaging in constitutionally defective sentencing practices that discriminate against indigent defendants, hinder collection of LFOs, and unnecessarily burden local and state correctional facilities.

The proposed court rule amendments consolidate existing statutory and judicial guidance into a cohesive, step-by-step guide for courts conducting criminal proceedings in which defendants face incarceration for failure to comply with an order to pay. The proposed administrative changes will likewise provide guidance, while also ensuring that mechanisms for public education, monitoring and compliance are in place. We believe that implementation of these recommendations is a timely and necessary step toward establishing a balanced court collections program—one that implements effective and efficient collection practices without violating the constitutional rights of the indigent.

## **ATTACHMENT A**

# Order

Michigan Supreme Court  
Lansing, Michigan

February 2, 2010

Marilyn Kelly,  
Chief Justice

ADM File No. 2005-13

Michael F. Cavanagh  
Elizabeth A. Weaver  
Maura D. Corrigan  
Robert P. Young, Jr.  
Stephen J. Markman  
Diane M. Hathaway,  
Justices

Administrative Order No. 2010-1

Adoption of Administrative Order to  
Establish and Require Compliance with  
Court Collections Program and  
Reporting Requirements

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On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following administrative order is adopted, effective May 1, 2010.

Enforcing court orders, including financial sanctions, is a responsibility of the courts that, if done effectively, enhances the courts' integrity and credibility while providing funds to assure victims are made whole and support law enforcement, libraries, the crime victim's rights fund, and local governments. In order to improve the enforcement and collection of court-ordered financial sanctions, it is ordered that the State Court Administrator establish court collections program requirements and that all circuit courts, circuit court family divisions, district courts, and municipal courts comply with those requirements. The State Court Administrative Office shall enforce the requirements and assist courts in adopting practices in compliance with those requirements.

In order to effectively monitor and measure the effect of collections programs, it is ordered that the State Court Administrator establish reporting requirements regarding outstanding receivables and collections efforts undertaken by courts, including establishment of the reporting format, method, and due dates. It is further ordered that all circuit courts, circuit court family divisions, district courts, and municipal courts comply with those requirements. The State Court Administrative Office shall facilitate compliance with and enforce the requirements.



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 2, 2010

*Corbin R. Davis*

Clerk

**ATTACHMENT B**

www.freep.com

August 4, 2011

## ACLU says poor defendants unlawfully jailed for failure to pay fines

*BY DAVID ASHENFELTER*

*DETROIT FREE PRESS STAFF WRITER*

The ACLU of Michigan announced today that it's challenging the sentences of five Michigan residents who were locked up by judges because they were too poor to pay their misdemeanor tickets.

In each case, the ACLU said, the judges failed to give the defendants the option of paying their fines in installments or being sentenced to perform community service.

"Long thought to be a relic of the 19th Century, debtors' prisons are still alive and well in Michigan," Michigan ACLU director Kary Moss said in announcing the legal challenges. "Jailing our clients because they are poor is not only unconstitutional, it's unconscionable and a shameful waste of resources."

The ACLU said today's announcement resulted from a two-year investigation of the so-called "pay or stay" sentencing practice of Michigan courts. During the past two weeks, the group said, its representatives watched district and circuit court judges issue such sentences in Macomb, Oakland, Wayne, Montcalm, Muskegon, Kent and Ionia counties.

The ACLU clients include:

- Kyle Dewitt, 19, of Ionia, who was sentenced Tuesday to three days in jail by Ionia District Judge Raymond Voet because he couldn't pay a \$215 ticket for catching a fish out of season. He was released from jail Wednesday after the ACLU intervened.
- Kristen Preston, 19, of Ionia, whom Voet sentenced to 30 days in jail on Monday because she couldn't pay a \$125 alcohol assessment fee resulting from a minor in possession of alcohol charge. She, too, was released from jail Wednesday after the ACLU intervened on her behalf. She is awaiting sentencing for the minor in possession charge.
- Dorian Bellinger, 22, Detroit, who was sentenced Tuesday to 13 days in jail by Livonia District Judge Robert Brzezinski because he couldn't pay a \$425 ticket for marijuana possession. He is serving his time in Isabella County Jail.
- Dontae Smith, 19, Detroit, who was sentenced Tuesday to 41 days in jail by Ferndale District Judge Joseph Longo because he couldn't afford to pay \$415 in fees and costs for several driving offenses, including driving on a suspended license and impeding traffic.
- David Clark, 30, of Wyandotte, who was sentenced Tuesday, to 90 days in jail by Wyandotte District Judge Randy Kalmbach when he couldn't pay \$1,250 in fees and costs resulting from spanking his girlfriend's son. Her girlfriend was charged with the same misdemeanor, but her parents paid her costs and she wasn't jail, the ACLU said.

The ACLU filed an appeal in Bellinger's case and motions for bond pending appeal in the other cases.

ACLU staff lawyer Elora Mukherjee said that in lean economic times, states are aggressively targeting poor people and minorities.

"These modern-day debtors' prisons impose devastating human costs, waste taxpayer money and create a two-tiered justice system," she said.



The ACLU said that while many judges view the collection of fines and costs as a revenue stream, jailing defendants winds up costing taxpayers more money than the actual fines.

Contact David Ashenfelter: [dashenfelter@freepress.com](mailto:dashenfelter@freepress.com)

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## **ATTACHMENT C**

# Editorial: Pay-or-jail sentencing an injustice to poor

BY STAFF WRITER

AUGUST 11, 2011 ET

The American Civil Liberties Union has challenged the constitutionality of "pay-or-stay" practices used by some judges to lock up misdemeanor defendants who can't afford to pay their fines.

There are clear legal precedents established by the U.S. Supreme Court to support the ACLU. But whether or not this sordid practice violates the Equal Protection Clause of the 14th Amendment, it clearly discriminates against the poor and creates a two-tier justice system. For that reason alone, sentencing judges should scorn it.

In appeals filed on behalf of five Michiganders who were jailed because they were too poor to pay court fines, the ACLU and ACLU of Michigan argued that judges failed to hold hearings to determine defendants' ability to pay -- or even give them the option of a payment plan or community service.

## **Unfair and wasteful**

Pay-or-stay sentences recall 19th Century debtors' prisons. They are not only inhumane and probably illegal but also wasteful.

Dontae Smith, 19, of Detroit, for example, was ordered to spend 41 days in Oakland County Jail because he could not pay \$415 in costs and fines -- far less than the thousands of dollars it costs the county to incarcerate someone for nearly six weeks. Unemployed, Smith pleaded guilty on Aug. 2 to driving on a suspended license and impeding traffic.

In an even more disturbing case, Kyle Dewitt, 19, of Ionia, was ordered to pay \$215 in fees or face three days in jail after he was ticketed by the Department of Natural Resources for catching a small-mouth bass out of season. Dewitt, who lost his job last year, offered to pay \$100 the next day and the rest the following month, but Judge Raymond Voet of the 64A District Court in Ionia refused the offer. Dewitt went to jail for nearly two days before the ACLU successfully argued for his release.

## **Consider ability to pay**

ACLU attorneys report district and circuit court judges doling out pay-or-stay sentences in Wayne, Oakland, Macomb, Montcalm, Muskegon, Kent and Ionia Counties. And Michigan is not the only state to essentially jail people because they're poor. In a report released last October, "In For a Penny: The Rise of America's New Debtors' Prisons," the ACLU found poor defendants jailed at growing and alarming rates for failing to pay legal debts they can't afford.

The growth of pay-or-stay practices -- possibly to ease growing budget deficits -- is especially disturbing nearly 30 years after the U.S. Supreme Court declared, in *Bearden v. Georgia*, that sentencing courts must inquire into a defendant's ability to pay a fine or restitution before sending him to prison. In that case, a probationer was jailed who could not, despite his best efforts, pay his fines and restitution.

The ruling suggests current pay-or-stay practices in Michigan and elsewhere violate the U.S. Constitution. They certainly make a mockery of the ideal of equal protection and a justice system that works for the poor and affluent alike.

**ATTACHMENT D**

## **Court Collections Program Requirements**

- Each court must implement or have a collections program in place that conforms to a model developed by the SCAO and is designed to improve collections through application of best practices.
- Each court will submit to the SCAO an initial collections program survey with information regarding their court's program. Courts will update information regarding collections programs when requested by the SCAO.
- Courts that do not meet the minimum requirements for an adequate collections program will prepare an action plan to implement program components, with a timetable for intermediate and full implementation, which should not exceed one year. Action plans will be submitted with the collections program survey to the SCAO for approval by the state court administrator. The court will provide a progress report to the SCAO one month after implementation. The Collections Advisory Committee has found that compliance with these requirements should not require additional staff or resources. The SCAO will assist courts in meeting the program requirements in the most effective and efficient manner.
- Information and records collected for purposes of collection activity shall be considered confidential, shall be maintained in a separate file marked confidential, and shall not be accessible to the general public. Judges and collections staff shall have access to all collections information and records of their court. Judges or collections staff shall permit designated representatives of a third-party vendor that provides collections services to the court to have access to the records pertaining to litigants whose debts have been assigned to the third-party collector. Courts shall ensure that vendors are subject to the same confidentiality rules as the courts. Auditors must be given access to records required to perform their audit functions.
- The SCAO shall provide for periodic audits of the courts to verify information reported and confirm that the court is complying with their reported program components. Compliance audit standards include:
  - To be in substantial compliance with program components, the requirement must be met for at least 80 percent of the cases at that stage of collection.
  - To be in partial compliance with program components, the requirement must be met for at least 50 percent of the cases at that stage of collection.
  - To be in compliance with the reported program, a court cannot be in less than partial compliance with any required component, may be in partial compliance with maximum of one required component, and must be in substantial compliance with all other required components. If an audit reveals that a court is not in compliance with a collections program, the court must submit a corrective action plan to implement program components, with a timetable for intermediate and full implementation, which should not exceed one year. Corrective action plans will be submitted to the SCAO for approval by the state court administrator. A

follow-up compliance audit will be performed within a year of implementation.

- The SCAO shall:
  - Make available on its collections website collections program requirements and best practices.
  - Assist courts in implementing a program by providing training, consultation, and technical assistance.
  - Provide courts with current collections data, which includes collections rates and collections programs implemented by the courts.
  - Ensure that appropriate training programs are in place to educate all stakeholders.

## **ATTACHMENT E**

## **Court Collections Program Components and Details**

**Component 1:** Staff or staff time is dedicated exclusively to collections activities.

### Details for Component 1:

- a. Staff devoted to collections activities may include court employees, funding unit employees, or contractual employees.
- b. Staff or staff time is dedicated to performing some or all of the following functions:
  - i. Respond to all collections-related phone calls and written correspondence.
  - ii. Ensure that financial assessments are properly entered into the automated system.
  - iii. Ensure that payments and adjustments are properly entered into the automated system.
  - iv. Ensure proper removal of discharged debts from the system.
  - v. Use available resources to locate litigants.
  - vi. Review dockets for all judges, magistrates, and referees to determine if an individual who is delinquent will be present for a court proceeding for any reason.
  - vii. Obtain jail release dates from the sheriff and make payment arrangements with litigants prior to release.
  - viii. Make payment arrangements with litigants as they leave the courtroom.
  - ix. Review and verify all financial statements to determine a litigant's ability to pay.
  - x. Establish and monitor all installment payment plans.
  - xi. Generate default judgments.
  - xii. Ensure costs to compel appearance are properly assessed pursuant to statute.
  - xiii. Generate 14-day notices and noncompliance notices.
  - xiv. Notify Secretary of State to suspend drivers' licenses.
  - xv. Ensure 20 percent late penalty is properly assessed pursuant to MCL 600.4803.
  - xvi. Prepare orders to remit prisoner funds (SCAO-approved form MC 288) pursuant to MCL 769.11.
  - xvii. Prepare wage assignments.
  - xviii. Issue delinquency notices.
  - xix. Prepare orders to show cause.
  - xx. Prepare bench warrants.
  - xxi. Prepare state income tax garnishments/intercepts.
  - xxii. Prepare cases for referral to outside agency for collections.



**Component 2:** Enforcement of the requirements of MCR 1.110 and communication of the expectation of payment.

Details for Component 2:

- a. All correspondence and contact with the litigant refer to MCR 1.110, which states that payment is due at the time of assessment. In addition, an estimated amount that the litigant will be expected to pay is included in all correspondence. The court:
  - i. Informs litigants from the bench at the initial hearing or pretrial that payment is due upon assessment and provides an estimated amount due.
  - ii. Prints the text of MCR 1.110 on all notices to appear.
  - iii. Advises litigants at the probation screening of the date payment is due and the amount of the expected payment.
- b. The court educates the local legal community as well as the general public that payment is required at the time of assessment.

**Component 3:** Payment requirement on the day of assessment.

Details for Component 3:

- a. Litigants unable to pay in full on the day of sentencing or disposition are expected to make a payment on the day of assessment. In addition, they are required to complete an application/financial statement for either an extension of time to pay or installment payments.
- b. Discussions that relate to requests for additional time to pay, installment payment plans, or wage assignments do not occur in the courtroom. The litigant is directed by the court to discuss payment options with an individual who has been given the responsibility to set up payment plans.

**Component 4:** Application/financial statement information is verified and evaluated to establish an appropriate payment plan.

Details for Component 4:

- a. Litigants are not automatically given time to pay. Before granting additional time to pay or approval for participation in an installment payment plan, the litigant is required to submit proof that he or she needs more time to pay. The litigant is required to complete an application or financial statement that the court analyzes to determine if extra time to pay or an installment payment plan is justified.
- b. Payment plans require the highest payment amounts in the shortest period of time that the litigant can successfully make, considering the amount owed and the litigant's ability to pay.

- c. If the court determines that an installment payment plan is warranted, the litigant is required to sign an installment payment agreement. This document states that the litigant agrees to make payments of the court-ordered assessments, and includes the following information:
  - i. Total amount owed.
  - ii. Amount of installment payment.
  - iii. Payment intervals (weekly/biweekly/monthly).
  - iv. Specific due dates of each payment.
  - v. Date the balance should be paid in full.
  - vi. Statement detailing any sanctions that will be imposed if the litigant fails to comply with the agreement.
  - vii. Litigant's signature signifying his or her understanding of the agreement.
- d. For prisoners, the court submits an order to remit prisoner funds (SCAO-approved form MC 288) to the MDOC for the collection of fines, costs, fees, and assessments pursuant to MCL 769.11. Pursuant to MCL 791.220h, the MDOC collects restitution based on the judgment of sentence or other restitution order. If the defendant is sentenced to prison by your court, it is not necessary to attach the judgment of sentence to the order to remit prisoner funds. If the defendant is sentenced to prison by another court and owes your court restitution, then your court attaches the judgment of sentence or other restitution order to the order to remit prisoner funds.

**Component 5:** Payment alternatives such as community service are available for those who do not have an ability to pay.

Details for Component 5:

- a. Payment alternatives such as community service are not considered unless the litigant is in jeopardy of failing to comply with the court order and has demonstrated that he or she has exercised due diligence in attempting to comply.
- b. Payment alternatives may not be used to satisfy certain required assessments such as restitution, crime victim's rights assessment, minimum state cost, and the like.

**Component 6:** Litigants are closely monitored for compliance, and actions such as delinquency notices, costs to compel appearance, and wage assignments are taken promptly for noncompliance.

Details for Component 6:

- a. The court has established a consistent time standard for initiating enforcement action when a debt becomes past due. This time standard is not so lengthy as to diminish the effectiveness of enforcement.

- b. The court promptly notifies the litigant of delinquency.
- c. The court promptly enters default judgments as required by statute.
- d. The court promptly issues 14-day notices and notices of noncompliance as required by statute.
- e. The court promptly notifies the Secretary of State to suspend drivers' licenses as required by statute.
- f. The court assesses costs to compel appearance.
- g. The court requires a wage assignment for all litigants who are employed and who are granted an installment payment plan; or when an installment payment plan is granted to a litigant, he or she is required to complete a wage assignment with the understanding that if a payment is missed, the court will immediately send the wage assignment to the employer.

**Component 7:** Submit required receivables and collections reports to the SCAO annually.

Details for Component 7:

- a. The SCAO has established deadlines and standards applicable to the reports required from all circuit courts, circuit court family divisions, district courts, and municipal courts.
- b. The court reviews and utilizes these reports to monitor court collections.

**Component 8:** Promptly and consistently use statutorily permitted graduated sanctions such as 20 percent late penalty, costs to compel appearance, show cause hearings, bench warrants, and/or state income tax garnishment/intercept.

Details for Component 8:

- a. The 20 percent late penalty is assessed as required by MCL 600.4803. In addition, the court informs the litigant of the penalty.
- b. Costs to compel appearance are assessed as allowed by statute.
- c. If a litigant fails to respond to initial collections efforts, the court sends an order to show cause that requires the litigant to come into court to explain why he or she has not paid the court-ordered assessments. If the litigant fails to appear as ordered, then a warrant for failure to appear is issued for the person's arrest.
- d. The court garnishes or intercepts state income tax refunds.

**Component 9:** Use of locator services.

Details for Component 9:

- a. A litigant's personal contact information (home phone number, cell phone number, address, etc.) is verified every time a contact is made with the court.

- b. A litigant's financial and employment information is verified every time a collections and/or probation contact is made with the court.
- c. The court uses a locator service(s) to help maintain accurate contact information. While the SCAO does not recommend, endorse, or certify any specific locator service, there are several that have been used by courts. Some will be at a cost, and others will not. These services include:
  - i. [www accurint.com](http://www accurint.com)
  - ii. [www.choicepoint.com](http://www.choicepoint.com)
  - iii. [www.switchboard.com](http://www.switchboard.com)
  - iv. [www.yellowpages.com](http://www.yellowpages.com)
  - v. [www.daplus.us](http://www.daplus.us)
  - vi. [www.zabasearch.com](http://www.zabasearch.com)
  - vii. [www.whitepages.com](http://www.whitepages.com)
  - viii. Judicial Data Warehouse [www.scao.us](http://www.scao.us)
  - ix. Michigan Department of Corrections Offender Tracking Information System (OTIS) [www.michigan.gov/corrections](http://www.michigan.gov/corrections)
  - x. For company information:
    - 1. [www.michigan.gov/corporations](http://www.michigan.gov/corporations)
    - 2. [www.bbb.com](http://www.bbb.com)

**Component 10:** Referral to outside agency for collections after all in-house collections efforts are exhausted.

Details for Component 10:

- a. The determination to use a third party for collections should be made on a court-by-court basis. A court must determine at what point in the collections process the court has little hope of collecting the obligation and when the expense of using a third-party collector is justified. For more complex collections cases, the costs of a third-party collector may not be a factor, because after the court's internal collections efforts have failed and the court has deemed the debt to be uncollectible, any money that a third party collects is money that would not have been collected otherwise.