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Innocent Until Proven Poor: Fighting The Criminalization Of Poverty

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MATERIALS FOR:

How Public Defenders Can Fight the Criminalization of Poverty

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Declined to Extend by [U.S. v. Bagdy](#), 3rd Cir.(Pa.), August 21, 2014

103 S.Ct. 2064
Supreme Court of the United States

Danny R. BEARDEN, Petitioner

v.

GEORGIA.

No. 81-6633.

|
Argued Jan. 11, 1983.

|
Decided May 24, 1983.

Following revocation of probation by state trial court, probationer appealed. The [Georgia Court of Appeals, 288 S.E.2d 662, 161 Ga.App. 640](#), affirmed. The Supreme Court, Justice O'Connor, held that sentencing court could not properly revoke defendant's probation for failure to pay a fine and make restitution absent evidence and findings that he was somehow responsible for the failure and that alternative forms of punishment would be inadequate to meet the State's interest in punishment and deterrence.

Reversed and remanded.

Justice White concurred in the judgment and filed an opinion in which Chief Justice Burger, Justice Powell, and Justice Rehnquist joined.

660 **2065 Syllabus

Petitioner pleaded guilty in a Georgia trial court to burglary and theft by receiving ****2066** stolen property, but the court, pursuant to the Georgia First Offender's Act, did not enter a judgment of guilt and sentenced petitioner to probation on the condition that he pay a \$500 fine and \$250 in restitution, with \$100 payable that day, \$100 the next day, and the \$550 balance within four months. Petitioner borrowed money and paid the first \$200, but about a month later he was laid off from his job, and, despite repeated efforts, was unable to find other work. Shortly before the \$550 balance became due, he notified the probation office that his payment was going to be late. Thereafter, the State filed a petition to revoke petitioner's probation because he had not paid the balance, and the trial court, after a hearing, revoked probation, entered a conviction, and sentenced petitioner to prison. The record of the hearing disclosed that petitioner had been unable to find employment and had no assets or income. The Georgia Court of Appeals rejected petitioner's claim that imprisoning him for inability to pay the fine and make restitution violated the Equal Protection Clause of the Fourteenth Amendment. The Georgia Supreme Court denied review.

Held: A sentencing court cannot properly revoke a defendant's probation for failure to pay a fine and make restitution, absent evidence and findings that he was somehow responsible for the failure or that alternative forms of punishment were inadequate to meet the State's interest in punishment and deterrence, and hence here the trial court erred in automatically revoking petitioner's probation and turning the fine into a prison sentence without making such a determination. Pp. 2068-2074.

(a) If a State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it. [Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586](#); [Tate v. Short, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130](#). If the probationer has willfully refused to pay the fine or

restitution when he has the resources to pay or has failed to make sufficient bona fide efforts to seek employment or borrow money to pay, the State is justified in using imprisonment as a sanction to enforce collection. But if the probationer has made all reasonable bona fide efforts to pay the fine and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing *661 the probationer are available to meet the State's interest in punishment and deterrence. Pp. 2068-2071.

(b) The State may not use as the sole justification for imprisonment the poverty or inability of the probationer to pay the fine and to make restitution if he has demonstrated sufficient bona fide efforts to do so. Pp. 2071-2072.

(c) Only if alternative measures of punishment are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay the fine. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment. P. 2072.

[161 Ga.App. 640, 288 S.E.2d 662](#), reversed and remanded.

Attorneys and Law Firms

James H. Lohr, by appointment of the Court, [459 U.S. 819](#), argued the cause *pro hac vice* and filed briefs for petitioner.

George M. Weaver, Assistant Attorney General of Georgia, argued the cause for respondent. With him on the brief were *Michael J. Bowers*, Attorney General, *Robert S. Stubbs II*, Executive Assistant Attorney General, and *Marion O. Gordon* and *John C. Walden*, Senior Assistant Attorneys General.

Opinion

Justice O'CONNOR delivered the opinion of the Court.

The question in this case is whether the Fourteenth Amendment prohibits a State from revoking an indigent defendant's probation **2067 for failure to pay a fine and restitution. Its resolution involves a delicate balance between the acceptability, and indeed wisdom, of considering all relevant factors when determining an appropriate sentence for an individual and the impermissibility of imprisoning a defendant solely because of his lack of financial resources. We conclude that the *662 trial court erred in automatically revoking probation because petitioner could not pay his fine, without determining that petitioner had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist. We therefore reverse the judgment of the [Georgia Court of Appeals, 161 Ga.App. 640, 288 S.E.2d 662](#), upholding the revocation of probation, and remand for a new sentencing determination.

I

In September 1980, petitioner was indicted for the felonies of burglary and theft by receiving stolen property. He pleaded guilty, and was sentenced on October 8, 1980. Pursuant to the Georgia First Offender's Act, Ga.Code Ann. §§ 27-2727 *et seq.* (current version at §§ 42-8-60 *et seq.* (1982 Supp.)), the trial court did not enter a judgment of guilt, but deferred further proceedings and sentenced petitioner to three years on probation for the burglary charge and a concurrent one year on probation for the theft charge. As a condition of probation, the trial court ordered petitioner to pay a \$500 fine and \$250 in restitution.¹ Petitioner was to pay \$100 that day, \$100 the next day, and the \$550 balance within four months.

Petitioner borrowed money from his parents and paid the first \$200. About a month later, however, petitioner was laid off from his job. Petitioner, who has only a ninth grade education and cannot read, tried repeatedly to find other *663 work but was unable to do so. The record indicates that petitioner had no income or assets during this period.

Shortly before the balance of the fine and restitution came due in February 1981, petitioner notified the probation office he was going to be late with his payment because he could not find a job. In May 1981, the State filed a petition in the trial court to revoke petitioner's probation because he had not paid the balance.² After an evidentiary hearing, the trial court revoked probation for failure to pay the balance of the fine and restitution,³ entered a conviction and sentenced petitioner to serve the remaining portion of the probationary period in prison.⁴ The Georgia **2068 Court of Appeals, relying on earlier Georgia Supreme Court cases,⁵ rejected petitioner's claim that imprisoning him for inability to pay the fine violated the Equal Protection Clause of the Fourteenth Amendment. The Georgia Supreme Court denied review. Since other courts have held that revoking the probation of indigents for failure to pay fines does violate the Equal Protection *664 Clause,⁶ we granted certiorari to resolve this important issue in the administration of criminal justice. 458 U.S. 1105, 102 S.Ct. 3482, 73 L.Ed.2d 1365 (1981).

II

[1] This Court has long been sensitive to the treatment of indigents in our criminal justice system. Over a quarter-century ago, Justice Black declared that “there can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” *Griffin v. Illinois*, 351 U.S. 12, 19, 76 S.Ct. 585, 591, 100 L.Ed. 891 (1956) (plurality opinion). *Griffin's* principle of “equal justice,” which the Court applied there to strike down a state practice of granting appellate review only to persons able to afford a trial transcript, has been applied in numerous other contexts. See, e.g., *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (indigent entitled to counsel on first direct appeal); *Roberts v. LaVallee*, 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed.2d 41 (1967) (indigent entitled to free transcript of preliminary hearing for use at trial); *Mayer v. Chicago*, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971) (indigent cannot be denied an adequate record to appeal a conviction under a fine-only statute). Most relevant to the issue here is the holding in *Williams v. Illinois*, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970), that a State cannot subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely because they are too poor to pay the fine. *Williams* was followed and extended in *Tate v. Short*, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971), which held that a State cannot convert a fine imposed under a fine-only statute into a jail term solely because the defendant is indigent and cannot immediately pay the fine in full. But the Court has also recognized limits on the principle of protecting indigents in the criminal justice system. For example, in *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974), we held that indigents *665 had no constitutional right to appointed counsel for a discretionary appeal. In *United States v. MacCollum*, 426 U.S. 317, 96 S.Ct. 2086, 48 L.Ed.2d 666 (1976) (plurality opinion), we rejected an equal protection challenge to a federal statute which permits a district court to provide an indigent with a free trial transcript only if the court certifies that the challenge to his conviction is not frivolous and the transcript is necessary to prepare his petition.

Due process and equal protection principles converge in the Court's analysis in these cases. See *Griffin v. Illinois*, *supra*, 351 U.S., at 17, 76 S.Ct., at 589-90. Most decisions in this area have rested on an equal protection framework, although Justice Harlan in particular has insisted that a due process approach more accurately captures the competing concerns. See, e.g., **2069 *Griffin v. Illinois*, 351 U.S., at 29-39, 76 S.Ct., at 595-600 (Harlan, J., dissenting); *Williams v. Illinois*, 399 U.S. 235, 259-266, 90 S.Ct. 2018, 2031-34, 26 L.Ed.2d 586 (1970) (Harlan, J., concurring). As we recognized in *Ross v. Moffitt*, 417 U.S., at 608-609, 94 S.Ct., at 2442-43, we generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause.

The question presented here is whether a sentencing court can revoke a defendant's probation for failure to pay the imposed fine and restitution, absent evidence and findings that the defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate. The parties, following the framework of *Williams* and *Tate*, have argued the question primarily

in terms of equal protection, and debate vigorously whether strict scrutiny or rational basis is the appropriate standard of review. There is no doubt that the State has treated the petitioner differently from a person who did not fail to pay the imposed fine and therefore did not violate probation. To determine whether this differential treatment violates the Equal Protection *666 Clause, one must determine whether, and under what circumstances, a defendant's indigent status may be considered in the decision whether to revoke probation. This is substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine.⁷ Whether analyzed in terms of equal protection or due process,⁸ the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such factors as “the nature of the individual *667 interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose” *Williams v. Illinois, supra*, 399 U.S., at 260, 90 S.Ct., at 2031 (Harlan, J., concurring).

In analyzing this issue, of course, we do not write on a clean slate, for both *Williams* and *Tate* analyzed similar situations. **2070 The reach and limits of their holdings are vital to a proper resolution of the issue here. In *Williams*, a defendant was sentenced to the maximum prison term and fine authorized under the statute. Because of his indigency he could not pay the fine. Pursuant to another statute equating a \$5 fine with a day in jail, the defendant was kept in jail for 101 days beyond the maximum prison sentence to “work out” the fine. The Court struck down the practice, holding that “[o]nce the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency.” 399 U.S., at 241-242, 90 S.Ct., at 2022. In *Tate v. Short*, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971), we faced a similar situation, except that the statutory penalty there permitted only a fine. Quoting from a concurring opinion in *Morris v. Schoonfield*, 399 U.S. 508, 509, 90 S.Ct. 2232, 2233, 26 L.Ed.2d 773 (1970), we reasoned that “the same constitutional defect condemned in *Williams* also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine.” 401 U.S., at 398, 91 S.Ct., at 671.

[2] The rule of *Williams* and *Tate*, then, is that the State cannot “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.” *Tate, supra*, at 398, 91 S.Ct., at 671. In other words, if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because *668 he lacked the resources to pay it. Both *Williams* and *Tate* carefully distinguished this substantive limitation on the imprisonment of indigents from the situation where a defendant was at fault in failing to pay the fine. As the Court made clear in *Williams*, “nothing in our decision today precludes imprisonment for willful refusal to pay a fine or court costs.” 399 U.S., at 242, n. 19, 90 S.Ct., at 2023, n. 19. Likewise in *Tate*, the Court “emphasize[d] that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so.” 401 U.S., at 400, 91 S.Ct., at 672.

[3] [4] This distinction, based on the reasons for non-payment, is of critical importance here. If the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection. See ALI, *Model Penal Code* § 302.2(1) (Proposed Official Draft 1962). Similarly, a probationer's failure to make sufficient bona fide efforts to seek employment or borrow money in order to pay the fine or restitution may reflect an insufficient concern for paying the debt he owes to society for his crime. In such a situation, the State is likewise justified in revoking probation and using imprisonment as an appropriate penalty for the offense. But if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own,⁹ it is fundamentally unfair to revoke **2071 probation automatically *669 without considering whether adequate alternative methods of punishing the defendant are available. This lack of fault provides a “substantial reaso[n] which justify [s] or mitigate[s] the violation and make[s] revocation inappropriate.” *Gagnon v. Scarpelli, supra*, 411 U.S., at 790, 93 S.Ct., at 1764.¹⁰ Cf. *Zablocki v. Redhail*, 434 U.S. 374, 400, 98 S.Ct. 673, 688, 54 L.Ed.2d 618 (1978) (POWELL, J., concurring) (distinguishing, under both due process and equal protection analyses, persons who shirk their moral and legal obligation to pay child support from those wholly unable to pay).

[5] [6] The State, of course, has a fundamental interest in appropriately punishing persons-rich and poor-who violate its criminal laws. A defendant's poverty in no way immunizes him from punishment. Thus, when determining initially *670 whether the State's penological interests require imposition of a term of imprisonment, the sentencing court can consider the entire background of the defendant, including his employment history and financial resources. See *Williams v. New York*, 337 U.S. 247, 250, and n. 15 (1949). As we said in *Williams v. Illinois*, “[a]fter having taken into consideration the wide range of factors underlying the exercise of his sentencing function, nothing we now hold precludes a judge from imposing on an indigent, as on any defendant, the maximum penalty prescribed by law.” 399 U.S., at 243, 90 S.Ct., at 2023.

The decision to place the defendant on probation, however, reflects a determination by the sentencing court that the State's penological interests do not require imprisonment. See *Williams v. Illinois*, 399 U.S., at 264, 90 S.Ct., at 2033 (HARLAN, J., concurring); *Woods v. Georgia*, 450 U.S. 261, 286-287, 101 S.Ct. 1097, 1110-11, 67 L.Ed.2d 220 (WHITE, J., dissenting). A probationer's failure to make reasonable efforts to repay his debt to society may indicate that this original determination needs reevaluation, and imprisonment may now be required to satisfy the State's interests. But a probationer who has made sufficient bona fide efforts to pay his fine and restitution, and who has complied with the other conditions of probation, has demonstrated a willingness to pay his debt to society and an ability to conform his conduct **2072 to social norms. The State nevertheless asserts three reasons why imprisonment is required to further its penal goals.

[7] First, the State argues that revoking probation furthers its interest in ensuring that restitution be paid to the victims of crime. A rule that imprisonment may befall the probationer who fails to make sufficient bona fide efforts to pay restitution may indeed spur probationers to try hard to pay, thereby increasing the number of probationers who make restitution. Such a goal is fully served, however, by revoking probation only for persons who have not made sufficient bona fide efforts to pay. Revoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming. Indeed, *671 such a policy may have the perverse effect of inducing the probationer to use illegal means to acquire funds to pay in order to avoid revocation.

[8] Second, the State asserts that its interest in rehabilitating the probationer and protecting society requires it to remove him from the temptation of committing other crimes. This is no more than a naked assertion that a probationer's poverty by itself indicates he may commit crimes in the future and thus that society needs for him to be incapacitated. We have already indicated that a sentencing court can consider a defendant's employment history and financial resources in setting an initial punishment. Such considerations are a necessary part of evaluating the entire background of the defendant in order to tailor an appropriate sentence for the defendant and crime. But it must be remembered that the State is seeking here to use as the *sole* justification for imprisonment the poverty of a probationer who, by assumption, has demonstrated sufficient bona fide efforts to find a job and pay the fine and whom the State initially thought it unnecessary to imprison. Given the significant interest of the individual in remaining on probation, see *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), the State cannot justify incarcerating a probationer who has demonstrated sufficient bona fide efforts to repay his debt to society, solely by lumping him together with other poor persons and thereby classifying him as dangerous.¹¹ This would be little more than punishing a person for his poverty.

[9] [10] Third, and most plausibly, the State argues that its interests in punishing the lawbreaker and deterring others from criminal behavior require it to revoke probation for failure to pay a fine or restitution. The State clearly has an interest in punishment and deterrence, but this interest can often be *672 served fully by alternative means. As we said in *Williams*, 399 U.S., at 244, 90 S.Ct., at 2023-24, and reiterated in *Tate*, 401 U.S., at 399, 91 S.Ct., at 671, “[t]he State is not powerless to enforce judgments against those financially unable to pay a fine.” For example, the sentencing court could extend the time for making payments, or reduce the fine, or direct that the probationer perform some form of labor or public service in lieu of the fine. Justice Harlan appropriately observed in his concurring opinion in *Williams* that “the deterrent effect of a fine is apt to derive more from its pinch on the purse than the time of payment.” *Ibid.*, 399 U.S., at 265, 90 S.Ct., at 2034. Indeed, given the general flexibility of tailoring fines to the resources of a defendant, or even permitting the defendant to do specified work to satisfy the fine, see *Williams, supra*, at 244, n. 21, 90 S.Ct., at 2024, n. 21, a sentencing court can often establish a reduced

fine or alternate public service in lieu of a fine that adequately serves the State's goals of punishment and deterrence, given the defendant's diminished financial resources. ****2073** Only if the sentencing court determines that alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence may the State imprison a probationer who has made sufficient bona fide efforts to pay.

[11] We hold, therefore, that in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply ***673** because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment. ¹²

III

We return to the facts of this case. At the parole revocation hearing, the petitioner and his wife testified about their lack of income and assets and of his repeated efforts to obtain work. While the sentencing court commented on the availability of odd jobs such as lawn-mowing, it made no finding that the petitioner had not made sufficient bona fide efforts to find work, and the record as it presently stands would not justify such a finding. This lack of findings is understandable, of course, for under the rulings of the Georgia Supreme Court ¹³ such an inquiry would have been irrelevant to the constitutionality of revoking probation. The State argues that the sentencing court determined that the petitioner was no longer a good probation risk. In the absence of a ***674** determination that the petitioner did not make sufficient bona fide efforts to pay or to obtain employment in order to pay, we cannot read the opinion of the sentencing court as reflecting such a finding. Instead, the court curtly rejected counsel's suggestion that the time for making the payments be extended, saying that "the fallacy in that argument" is that the petitioner has long known he had to pay the \$550 and yet did not comply with the court's prior order to pay. App. 45. The court declared that "I don't know any way to enforce the prior orders of the Court but one ****2074** way," which was to sentence him to imprisonment. *Ibid.*

[12] The focus of the court's concern, then, was that the petitioner had disobeyed a prior court order to pay the fine, and for that reason must be imprisoned. But this is no more than imprisoning a person solely because he lacks funds to pay the fine, a practice we condemned in *Williams* and *Tate*. By sentencing petitioner to imprisonment simply because he could not pay the fine, without considering the reasons for the inability to pay or the propriety of reducing the fine or extending the time for payments or making alternative orders, the court automatically turned a fine into a prison sentence.

We do not suggest by our analysis of the present record that the State may not place the petitioner in prison. If, upon remand, the Georgia courts determine that petitioner did not make sufficient bona fide efforts to pay his fine, or determine that alternate punishment is not adequate to meet the State's interests in punishment and deterrence, imprisonment would be a permissible sentence. Unless such determinations are made, however, fundamental fairness requires that the petitioner remain on probation.

IV

The judgment is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

*675 Justice WHITE, with whom The Chief Justice, Justice POWELL, and Justice REHNQUIST join, concurring in the judgment.

We deal here with the recurring situation where a person is convicted under a statute that authorizes fines or imprisonment or both, as well as probation. The defendant is then fined and placed on probation, one of the conditions of which is that he pay the fine and make restitution. In such a situation, the Court takes as a given that the state has decided that imprisonment is inappropriate because it is unnecessary to achieve its penal objectives. But that is true only if the defendant pays the fine and makes restitution and thereby suffers the financial penalty that such payment entails. Had the sentencing judge been quite sure that the defendant could not pay the fine, I cannot believe that the court would not have imposed some jail time or that either the Due Process or Equal Protection Clause of the Constitution would prevent such imposition.

Poverty does not insulate those who break the law from punishment. When probation is revoked for failure to pay a fine, I find nothing in the Constitution to prevent the trial court from revoking probation and imposing a term of imprisonment if revocation does not automatically result in the imposition of a long jail term and if the sentencing court makes a good-faith effort to impose a jail sentence that in terms of the state's sentencing objectives will be roughly equivalent to the fine and restitution that the defendant failed to pay. See *Wood v. Georgia*, 450 U.S. 261, 284-287, 101 S.Ct. 1097, 1109-1111, 67 L.Ed.2d 220 (WHITE, J., dissenting).

The Court holds, however, that if a probationer cannot pay the fine for reasons not of his own fault, the sentencing court must at least consider alternative measures of punishment other than imprisonment, and may imprison the probationer only if the alternative measures are deemed inadequate to meet the State's interests in punishment and deterrence. *676 *Ante*, at 2073. There is no support in our cases or, in my view, the Constitution, for this novel requirement.

The Court suggests, *ante* at 2073 n. 12, that if the sentencing court rejects non-prison alternatives as “inadequate”, it is “impractical” to impose a prison term roughly equivalent to the fine in terms of achieving punishment goals. Hence, I take it, that had the trial court in this case rejected non-prison alternatives, the sentence it imposed would be constitutionally impregnable. Indeed, there would be no **2075 bounds on the length of the imprisonment that could be imposed, other than those imposed by the Eighth Amendment. But *Williams v. Illinois*, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970) and *Tate v. Short*, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971), stand for the proposition that such “automatic” conversion of a fine into a jail term is forbidden by the Equal Protection Clause, and by so holding, the Court in those cases was surely of the view that there is a way of converting a fine into a jail term that is not “automatic”. In building a superstructure of procedural steps that sentencing courts must follow, the Court seems to forget its own concern about imprisoning an indigent person for failure to pay a fine.

In this case, in view of the long prison term imposed, the state court obviously did not find that the sentence was “a rational and necessary trade-off to punish the individual who possessed no accumulated assets”, *Williams v. Illinois, supra*, 399 U.S., at 265, 90 S.Ct., at 2034 (Harlan, J., concurring). Accordingly, I concur in the judgment.

All Citations

461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The trial court ordered a payment of \$200 restitution for the theft by receiving charge; and ordered payment of \$50 in restitution and \$500 fine for the burglary charge.

The other conditions of probation prohibited petitioner from leaving the jurisdiction of the court without permission, from drinking alcoholic beverages, using or possessing narcotics, or visiting places where alcoholic beverages or narcotics are sold, from keeping company with persons of bad reputation, from violating any penal law; and required him to avoid places of disreputable character, to work faithfully at suitable employment insofar as possible, and to report to the probation officer as directed and to permit the probation officer to visit him.

2 The State's petition alleged two grounds for revoking probation: petitioner's failure to pay the fine and restitution, and an alleged burglary he committed on May 10, 1981. The State abandoned the latter ground at the hearing to revoke probation, and counsel has informed us that petitioner was later acquitted of the charge. Brief for Petitioner 4, n. 1.

3 The trial court also found that petitioner violated the conditions of probation by failing to report to his probation officer as directed. Since the trial court was unauthorized under state law to revoke probation on a ground not stated in the petition, *Radcliff v. State*, 134 Ga.App. 244, 214 S.E.2d 179 (1975), the court of appeals upheld the revocation solely on the basis of petitioner's failure to pay the fine and restitution.

4 The trial court first sentenced petitioner to five years in prison, with a concurrent three-year sentence for the theft conviction. Since the record of the initial sentencing hearing failed to reveal that petitioner had been warned that a violation of probation could result in a longer prison term than the original probationary period, as required by *Stephens v. State*, 245 Ga. 835, 268 S.E.2d 330 (1980), the court reduced the prison term to the remainder of the probationary period.

5 *Hunter v. Dean*, 240 Ga. 214, 239 S.E.2d 791 (1977), cert. dismissed, 439 U.S. 281, 99 S.Ct. 712, 58 L.Ed.2d 520 (1978); *Calhoun v. Couch*, 232 Ga. 467, 207 S.E.2d 455 (1974).

6 See, e.g., *Frazier v. Jordan*, 457 F.2d 726 (CA5 1972); *In re Antazo*, 3 Cal.3d 100, 89 Cal.Rptr. 255, 473 P.2d 999 (1970); *State v. Tackett*, 52 Haw. 601, 483 P.2d 191 (1971); *State v. De Bonis*, 58 N.J. 182, 276 A.2d 137 (1971); *State ex rel. Pedersen v. Blessinger*, 56 Wis.2d 286, 201 N.W.2d 778 (1972).

7 We have previously applied considerations of procedural and substantive fairness to probation and parole revocation proceedings. In *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), where we established certain procedural requirements for parole revocation hearings, we recognized that society has an "interest in treating the parolee with basic fairness." *Id.*, at 484, 92 S.Ct., at 2602. We addressed the issue of fundamental fairness more directly in *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1972), where we held that in certain cases "fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees." *Id.*, 411 U.S., at 790, 93 S.Ct., at 1763. Fundamental fairness, we determined, presumptively requires counsel when the probationer claims that "there are substantial reasons which justified or mitigated the violation and make revocation inappropriate." *Ibid.* In *Douglas v. Buder*, 412 U.S. 430, 93 S.Ct. 2199, 37 L.Ed.2d 52 (1973), we found a substantive violation of due process when a state court had revoked probation with no evidence that the probationer had violated probation. Today we address whether a court can revoke probation for failure to pay a fine and restitution when there is no evidence that the petitioner was at fault in his failure to pay or that alternate means of punishment were inadequate.

8 A due process approach has the advantage in this context of directly confronting the intertwined question of the role that a defendant's financial background can play in determining an appropriate sentence. When the court is initially considering what sentence to impose, a defendant's level of financial resources is a point on a spectrum rather than a classification. Since indigency in this context is a relative term rather than a classification, fitting "the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished," *North Carolina v. Pearce*, 395 U.S. 711, 723, 89 S.Ct. 2072, 2079, 23 L.Ed.2d 656 (1969). The more appropriate question is whether consideration of a defendant's financial background in setting or resetting a sentence is so arbitrary or unfair as to be a denial of due process.

9 We do not suggest that, in other contexts, the probationer's lack of fault in violating a term of probation would necessarily prevent a court from revoking probation. For instance, it may indeed be reckless for a court to permit a person convicted of driving while intoxicated to remain on probation once it becomes evident that efforts at controlling his chronic drunken driving have failed. Cf. *Powell v. Texas*, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968); *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). Ultimately, it must be remembered that the sentence was not imposed for a circumstance beyond the probationer's control "but because he had committed a crime." *Williams, supra*, 399 U.S., at 242, 90 S.Ct., at 2022. In contrast to a condition like chronic drunken driving, however, the condition at issue here—indigency—is itself no threat to the safety or welfare of society.

10 Numerous decisions by state and federal courts have recognized that basic fairness forbids the revocation of probation when the probationer is without fault in his failure to pay the fine. For example, in *United States v. Boswell*, 605 F.2d 171 (CA5 1979), the court distinguished between revoking probation where the defendant did not have the resources to pay restitution and had no way to acquire them—a revocation the court found improper—from revoking probation where the defendant had the resources to pay or had negligently or deliberately allowed them to be dissipated in a manner that resulted in his inability to pay—an entirely legitimate action by the trial court. Accord, *United States v. Wilson*, 469 F.2d 368 (CA2 1972); *United States v. Taylor*, 321 F.2d 339 (CA4 1963); *In re Antazo*, 3 Cal.3d 100, 115-117, 89 Cal.Rptr. 255, 473 P.2d 999, 1007-1009 (1970); *State v. Huggett*, 55 Haw. 632, 525 P.2d 1119 (1974);

Huggett v. State, 83 Wis.2d 790, 266 N.W.2d 403, 408 (1978). Commentators have similarly distinguished between the permissibility of revoking probation for contumacious failure to pay a fine, and the impermissibility of revoking probation when the probationer made good-faith efforts to pay. See, e.g., ABA Standards for Criminal Justice 18-7.4 and Commentary (2d ed. 1980) (“incarceration should be employed only after the court has examined the reasons for nonpayment”); ALI, *Model Penal Code* § 302.2 (distinguishing “contumacious” failure to pay fine from “good faith effort” to obtain funds); National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* § 5.5 (1973); National Conference of Commissioners on Uniform State Laws, *Model Sentencing and Corrections Act* §§ 3-403, 3-404 (1978). See also *Me.Rev.Stat. Ann.*, Tit. 17-A, § 1304; *Ill.Rev.Stat.*, ch. 38, ¶ 1005-6-4(d).

11 The State emphasizes several empirical studies suggesting a correlation between poverty and crime. E.g., Green, *Race, Social Status, and Criminal Arrest*, 35 *Amer.Soc.Rev.* 476 (1978); M. Wolfgang, R. Figlio, & T. Sellin, *Delinquency in a Birth Cohort* (1972).

12 As our holding makes clear, we agree with Justice WHITE that poverty does not insulate a criminal defendant from punishment or necessarily prevent revocation of his probation for inability to pay a fine. We reject as impractical, however, the approach suggested by Justice WHITE. He would require a “good-faith effort” by the sentencing court to impose a term of imprisonment that is “roughly equivalent” to the fine and restitution that the defendant failed to pay. *Post*, at 2074. Even putting to one side the question of judicial “good faith,” we perceive no meaningful standard by which a sentencing or reviewing court could assess whether a given prison sentence has an equivalent sting to the original fine. Under our holding the sentencing court must focus on criteria typically considered daily by sentencing courts throughout the land in probation revocation hearings: whether the defendant has demonstrated sufficient efforts to comply with the terms of probation and whether non-imprisonment alternatives are adequate to satisfy the State’s interests in punishment and deterrence. Nor is our requirement that the sentencing court consider alternative forms of punishment a “novel” requirement. In both *Williams* and *Tate*, the Court emphasized the availability of alternate forms of punishment in holding that indigents could not be subjected automatically to imprisonment.

13 See cases cited at n. 5, *supra*.

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July 29, 2014

Clerk
Wayne County Circuit Court
Criminal Division
Frank Murphy Hall of Justice
1441 St Antoine
Detroit, MI 48226

Re: People v Kenneth Earl Starkey
Lower Court No. 04-9495

Dear Clerk:

Enclosed please find the original of the following: Praecipe and Notice of Hearing for Thursday August 14th at 9am; Motion to Vacate Probation Violation Plea and Sentence; Motion for Indigency Determination Hearing; Motion to Vacate Restitution; Certificate of Service for filing in your Court.

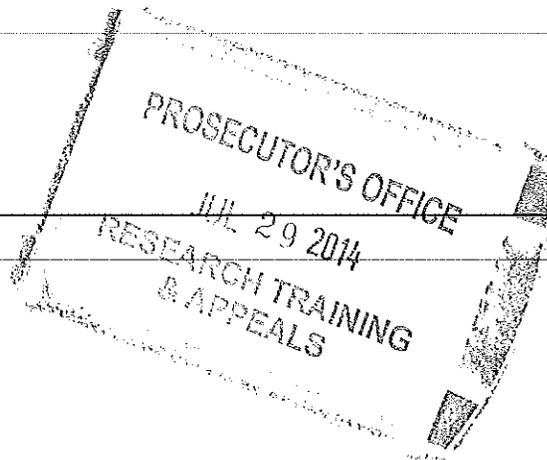
Thank you for your cooperation.

Sincerely,

Marilena David-Martin
Assistant Defender

Enclosure

cc: Wayne County Prosecutor
Hon. James R. Chylinski
Mr. Kenneth Earl Starkey
File



STATE OF MICHIGAN

IN THE WAYNE COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

Lower Court Nos. 04-9495

Honorable James R. Chylinski

-vs-

KENNETH EARL STARKEY

Defendant-Appellant.

TO THE ASSIGNMENT CLERK:

Please place a MOTION TO VACATE PROBATION VIOLATION PLEA AND SENTENCE, MOTION FOR INDIGENCY DETERMINATION HEARING AND MOTION TO VACATE RESTITUTION on the Motion Docket for **Thursday August 14th at 9 am** before Judge James R. Chylinski.

Date: July 29, 2014

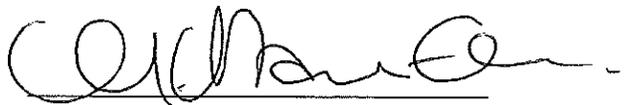
STATE APPELLATE DEFENDER OFFICE
MARILENA DAVID-MARTIN (P73175)
3300 Penobscot Building, 645 Griswold
Detroit, MI 48226
(313) 256-9833

NOTE: SEE RECORDER'S COURT RULE 18

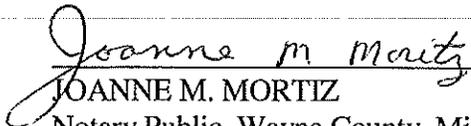
PROOF OF SERVICE

I swear that on July 29, 2014 I served a copy of the attached praecipe upon the Wayne County Prosecutor by: personal service

Subscribed and sworn to before me
July 29, 2014.



Attorney for Defendant



JOANNE M. MORTIZ
Notary Public, Wayne County, Michigan
My commission expires: 9/2/2019

PRAECIPE FOR MOTION
RC Form #1

STATE OF MICHIGAN
IN THE WAYNE COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

Lower Court Nos. 04-9495

Honorable James R. Chylinski

-vs-

KENNETH EARL STARKEY

Defendant-Appellant.

CERTIFICATE OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

MARILENA DAVID-MARTIN, certifies that on July 29, 2014, she hand filed one copy of:

PRAECIPE AND NOTICE OF HEARING

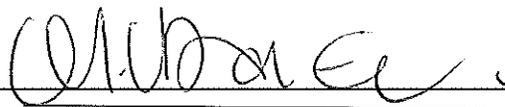
MOTION TO VACATE PROBATION VIOLATION PLEA AND SENTENCE

MOTION FOR INDIGENCY DETERMINATION HEARING

MOTION TO VACATE RESTITUTION

with the circuit court clerk for filing and hand delivered one copy of same to:

WAYNE COUNTY PROSECUTOR
Appellate Division
1100 Frank Murphy Hall of Justice
1441 St Antoine Detroit, MI 48226



MARILENA DAVID-MARTIN (P73175)

STATE OF MICHIGAN
IN THE WAYNE COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

Lower Court Nos. 04-9495

Honorable James R. Chylinski

-vs-

KENNETH EARL STARKEY

Defendant-Appellant.

_____/

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

MARILENA DAVID-MARTIN (P73175)
Attorney for Defendant-Appellant

MOTION TO VACATE PROBATION VIOLATION PLEA AND SENTENCE

MOTION FOR INDIGENCY DETERMINATION HEARING

MOTION TO VACATE RESTITUTION

STATE APPELLATE DEFENDER OFFICE

BY: MARILENA DAVID-MARTIN (P73175)
Assistant Defender
645 Griswold
3300 Penobscot Building
Detroit, Michigan 48226
(313) 256-9833

STATE OF MICHIGAN

IN THE WAYNE COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

KENNETH EARL STARKEY

Defendant-Appellant.

PROSECUTOR'S OFFICE

JUL 29 2014

RESEARCH TRAINING
& APPEALS

Lower Court Nos. 04-9495

Honorable James R. Chylinski

**MOTION TO VACATE PROBATION VIOLATION PLEA AND SENTENCE
MOTION FOR INDIGENCY DETERMINATION HEARING
MOTION TO VACATE RESTITUTION**

NOW COMES Defendant KENNETH EARL STARKEY, by and through his attorney, the STATE APPELLATE DEFENDER OFFICE, by MARILENA DAVID-MARTIN (P73175), and in support of the within motions says as follows:

1. On January 14, 2014, Mr. Starkey appeared before Your Honor for a probation violation for failing to pay restitution stemming from a 2004 plea conviction to attempted breaking and entering a building with intent, MCL 750.110. Mr. Starkey informed the Court that he had no ability to pay the restitution as he was unemployed, addicted to drugs and generally struggling to survive. (1/14/14, 3-4). He did not plead guilty to the violation and did not have a hearing on the violation as required by MCR 6.445.

5. Sentencing took place on January 30, 2014. The Court found that Mr. Starkey either "couldn't or wouldn't pay" restitution over the years that he was on probation and stated that it did not "have anymore time on probation" to give to Mr. Starkey. (1/30/14, 4). Mr. Starkey explained that he had no ability to pay the restitution. Mr. Starkey's son died

unexpectedly, which sent him into a depressed state where he turned to drugs and lost his job. (1/30/14, 3-4). The Court stated that it had no other choice but to sentence Mr. Starkey to prison and to recommend that payment of the \$33,000 restitution be made a condition of parole. (1/30/14, 4). Mr. Starkey was sentenced to 3 months to 5 years imprisonment with 34 days credit.

6. The State Appellate Defender Office was appointed to perfect an appeal and/or pursue post-conviction remedies on March 6, 2014.

8. This motion is properly filed within six months of the sentencing date, which falls on July 30, 2014. MCR 6.310(C); MCR 6.429(B)(3).

9. Mr. Starkey's raises the following issues in this motion and the accompanying brief in support:¹

- a. Mr. Starkey's probation violation plea and sentence must be vacated as none of the required procedures set forth in MCR 6.445 took place at the probation violation hearing.
- b. Mr. Starkey is entitled to an indigency determination hearing before being imprisoned for failure to pay restitution consistent with *Bearden v Georgia*, 461 US 660 (1983).
- c. The restitution in this case must be vacated where it has never been verified despite the Court's order and where the amount extends beyond the offense for

¹ Mr. Starkey has also filed a concurrent Application for Leave to Appeal in the Court of Appeals on the grounds that the sentence imposed on January 30, 2014 was an improper departure sentence. His guideline range was 0 to 9 months, an intermediate sanction cell, which called for a sentence of anything but prison absent substantial and compelling reasons for a departure. MCL 769.34(3) & (4)(a). The Court did not acknowledge that its January 30, 2014 prison sentence was a departure and did not state any reasons on the record for departing. Mr. Starkey has currently served 7 months in the MDOC and has not yet been granted parole because they were not able to fit him into the proper programming before he reached his minimum 3 month sentence. The parole board will not review him again until March of 2015 when he has had an opportunity to complete that programming. (Counsel confirmed this information with the Legislative Ombudsman's Office on June 27, 2014).

which Mr. Starkey was charged and convicted in violation of *People v McKinley*,
__ Mich __ (Decided June 26, 2014).

WHEREFORE, Mr. Starkey respectfully requests that this Honorable Court vacate his probation violation plea and sentence, grant him an indigency determination hearing if the court is inclined to continue his custody for failure to pay, and vacate restitution or alternatively, to set a hearing to verify the amount.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY:



MARILENA DAVID-MARTIN (P73175)

Assistant Defender

645 Griswold

3300 Penobscot Building

Detroit, Michigan 48226

(313) 256-9833

Date: July 29, 2014

STATE OF MICHIGAN
IN THE WAYNE COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

Lower Court Nos. 04-9495

Honorable James R. Chylinski

-vs-

KENNETH EARL STARKEY

Defendant-Appellant.

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

MARILENA DAVID-MARTIN (P73175)
Attorney for Defendant-Appellant

BRIEF IN SUPPORT

STATE APPELLATE DEFENDER OFFICE

BY: MARILENA DAVID-MARTIN (P73175)
Assistant Defender
645 Griswold
3300 Penobscot Building
Detroit, Michigan 48226
(313) 256-9833

STATEMENT OF FACTS

On October 6, 2004, Defendant Kenneth Earl Starkey pled guilty to one count of attempted breaking and entering with intent, MCL 750.110. (Plea 10/6/04, 5, 7-9). The circumstances of the offense involved Mr. Starkey and two other men entering a building that used to be a hospital and being caught by a witness. Police were called and the defendants were arrested on the scene. (10/6/04, 7; See Excerpt of Presentence Report (PSR), Appendix A). On December 3, 2004, the Honorable James R. Chylinski sentenced Mr. Starkey in accordance with the sentence agreement to 4 years probation. (Sentence 12/3/04, 4-5).

In discussing restitution at the time of sentencing, the prosecutor informed the Court that “[t]his was the case where the ceiling was stripped of the copper, and it’s still being determined what the damage was before” and that the estimate from the building owner was a round figure of \$33,000 per defendant. (12/3/04, 4). Defense counsel objected that there was no verification of that amount. (12/3/04, 4). The Court ordered Mr. Starkey to pay \$33,000 in restitution with and ordered “that it should be verified.” (12/3/04, 4). The restitution amount has never been verified.

On February 7, 2007, Mr. Starkey went before the Court for a probation violation for failing to report to probation. Mr. Starkey explained that he stopped reporting to probation because he could not afford to pay probation the seven hundred dollars a month they were requiring because he was unemployed and was in drug rehab. (Probation Violation 2/7/07, 5). He turned himself into the court because he had just gotten off of drugs and was trying to get his life together. (2/7/07, 6). He did not plead guilty to the violation and did not have a hearing on the violation as required by MCR 6.445.

Sentencing took place on April 5, 2007 and Mr. Starkey again explained that he could not afford to comply with probation. (Probation Violation Sentence, 4/5/07, 4). He “stopped goin’ to probation ‘cause I couldn’t afford it, seven hundred and somethin’ dollars a month.” (4/5/07, 4). He was sentenced to a continued two years of probation and the Court indicated it would sentence him to prison if he violated probation again for failing to pay restitution. (4/5/07, 6).

Three months later, in July 2007, probation issued a violation warrant for failure to make restitution payments. (Warrant, Appendix B). Mr. Starkey absconded from probation and was not picked up on the warrant until January 2014 when he was pulled over for a traffic violation. (1/14/14, 4).

On January 14, 2014, Mr. Starkey appeared before Your Honor for the instant probation violation for failing to pay restitution. Trial counsel informed the court that Mr. Starkey had no ability to pay the restitution as he was unemployed and generally struggling to survive. (Probation Violation 1/14/14, 3-4). Mr. Starkey did not plead guilty to the violation and did not have a hearing on the violation as required by MCR 6.445.

Sentencing took place on January 30, 2014. The Court stated that Mr. Starkey either “couldn’t or wouldn’t pay” restitution over the years that he was on probation and stated that it did not “have anymore time on probation” to give to Mr. Starkey. (1/30/14, 4). Mr. Starkey explained that he had no ability to pay the restitution and that his son died unexpectedly, which sent him into a depressed state where he turned back to drugs and lost his job. (1/30/14, 3-4). The Court stated that it had no other choice but to sentence Mr. Starkey to prison and to recommend that payment of the \$33,000 restitution be made a condition of parole. (1/30/14, 4). Mr. Starkey was sentenced to 3 months to 5 years imprisonment with 34 days credit.

Currently incarcerated, Mr. Starkey files the within motion and requests relief.

I. MR. STARKEY'S PROBATION VIOLATION PLEA AND SENTENCE MUST BE VACATED WHERE NO PROBATION VIOLATION HEARING OR PLEA OCCURRED AND WHERE THE COURT DID NOT COMPLY WITH MCR 6.445.

Mr. Starkey's probation violation plea in this case must be vacated as none of the procedures set forth in MCR 6.445 took place at the probation violation hearing on January 14, 2014. Mr. Starkey was not arraigned or advised of his right to contest the charge or advised of his right to an attorney at the hearing. MCR 6.445(B); (1/14/14, 3-6). No hearing was held and there was no subsequent judicial fact finding regarding Mr. Starkey's guilt. MCR 6.445(E); (1/14/14, 3-6). Mr. Starkey did not enter into a plea to the probation violation and certainly was not advised of the rights he waived if he entered a plea or advised of the maximum sentence for the offense. MCR 6.445(F); (1/14/14, 3-6).

Mr. Starkey's conviction of this probation violation must be vacated where no factual determination supported by a preponderance of the evidence that a probation violation took place was made, *People v Buckner*, 103 Mich App 301 (1980); *People v Pillar*, 233 Mich App 267 (1988), and where the Court failed to comply in all respects with MCR 6.445. *People v Burbank*, 461 Mich 870 (1999). *People v Alame*, 129 Mich App 686 (1983).

Just recently, the Court of Appeals vacated the conviction and sentence in *People v Columbus Wayne Thompson*, Docket No. 318143, where similar circumstances presented:

In lieu of granting the delayed application for leave to appeal, the judgment of sentence entered in this case on March 13, 2013 is VACATED and this case is REMANDED to the trial court to conduct a proper probation violation hearing and any other appropriate proceedings. The trial court did not conduct a proper probation violation hearing as required by MCR 6.445(E)(1), and its determination that defendant violated his probation was not supported by proper factual findings under MCR 6.445(E)(2). We note that the contents of the police report relied on by the trial court did not constitute verified facts in the record to support a finding of a probation violation by a preponderance of the

evidence. *People v Pillar*, 233 Mich App 267, 269-270; 590 NW2d 622 (1998). [Order, Appendix C].

Accordingly, Mr. Starkey's conviction and sentence must be vacated and he is entitled to an appropriate probation violation hearing.

II. MR. STARKEY'S PRISON SENTENCE FOR FAILING TO PAY RESTITUTION MUST BE VACATED IN ACCORDANCE WITH *BEARDEN V GEORGIA*, 461 US 660 (1983) WHERE HE WAS IMPROPERLY IMPRISONED WITHOUT AN INDIGENCY DETERMINATION HEARING AND WHERE THE RECORD SUPPORTED HIS INABILITY TO PAY DUE TO INDIGENCY.

The United States Supreme Court has long held that depriving a person of liberty for failure to pay a fine, costs or restitution that he or she cannot afford violates fundamental equal protection and due process principles. *Bearden v Georgia*, 461 US 660, 672-673 (1983). Indeed, the U.S. and Michigan Constitutions, as well as state laws and court rules, require that a sentencing judge conduct an indigency determination for each defendant before jailing him or her for failure to pay costs and fines.

In *Bearden*, the U.S. Supreme Court found that a court, prior to jailing a defendant “for failure to pay a fine or restitution . . . must inquire into the reasons for the failure to pay.” *Bearden*, 461 US at 672. Where an individual willfully refuses to pay or fails to make sufficient bona fide efforts to pay, the court may jail him or her. *Id.* But where an individual “[can]not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measure of punishment other than imprisonment,” such as extending the time for making payments, reducing the fine, or requiring community service. *Id.* “To do otherwise would deprive the [defendant] of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.” *Id.* at 673; *see also Alkire v Irving*, 330 F3d 802, 816 (CA 6, 2003) (imprisonment for failure to pay debt violates both the Thirteenth and Fourteenth Amendments).

Michigan state laws also prohibit jailing individuals who cannot pay certain court obligations because they are too poor. *See* MCL 780.766(14); MCL 769.1f(7); MCL 769.1a(14); MCL 771.3(8); *People v Ford*, 410 Mich 902 (1981) (“Probation shall not be revoked for failure to pay ... court costs absent appropriate findings of fact and conclusions of law on defendant’s claim of indigency.”). Similarly, the Michigan Court Rules permit exceptions to the payment of court fines and costs for good cause. *See* MCR 1.110 (“Fines, 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.”). If “good cause” in MCR 1.110 is interpreted consistently with the U.S. and Michigan Constitutions, it must include an exception for an indigent person who is unable to pay court fines and costs.

Mr. Starkey was consistent at every court appearance that he did not have the funds to pay restitution in this case. In fact, when he was originally sentenced for the underlying offense, probation recommended a one year term of probation, but Mr. Starkey himself expressed concern that he would never be able to pay off that amount in that time:

THE COURT: The thirty-three thousand three hundred restitution.

How long will it take you to pay that, sir, **assuming that’s right?**

[DEFENSE COUNSEL]: We’ve discussed that, Your Honor, and I understand they recommended one year probation.

But he’s indicated to me that there’s no possibility that he can honestly make that within one year.

He thinks he’s going to need five years, in order to, to come up with that amount of restitution.

THE COURT: All right.

Well, let’s, let’s do it this way.

Let’s make it four years. And then if you need an extension, as long as you’re current and everything, you should be okay.

But the four years probation.

Well keep your probationary costs minimal. It will be one sixty—
five a year, plus fifteen dollars a month.

And restitution has to be paid by consistent installments, okay?

DEFENDANT: Okay. [12/3/04, 5 (emphasis added)].

In order to pay off \$33,000 in restitution in four years, Mr. Starkey would have had to pay approximately \$687 per month. And while that time period was Mr. Starkey's suggestion, the impossibility of that payment scheme should have raised red flags for all parties.

In imposing a prison sentence in this case, the Court noted that Mr. Starkey either "couldn't or wouldn't pay" restitution. (1/30/14, 4). It made no inquiry into Mr. Starkey's indigency and made no finding that his nonpayment was willful. Each time Mr. Starkey came before the Court, he expressed that he wanted to make restitution payments but that he simply could not afford it. Over the course of probation in this case, Mr. Starkey did not have consistent employment, was addicted to drugs, got cleaned up, suffered the loss of a son, fell into a depression and back into the drug habit, and lost his job. (PV 2/7/07, 5-6; PV Sentence 4/5/07, 4; PV 1/14/14, 3-4; PV Sentence 1/30/14, 3-4). He was unable to make the near \$700 monthly payment for restitution and the only way he knew to deal with that problem was to quit reporting to probation. (4/5/07, 4).

The Court imposed a prison sentence because it believed that making the payment of the \$33,000 in restitution a condition of parole was the only way it could assure that payment was made. (1/30/14, 4). However, the Court was obligated to do just the opposite. Where an individual "[can]not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measure of punishment other than imprisonment," such as

extending the time for making payments, reducing the fine, or requiring community service.

Bearden, supra at 672.

Mr. Starkey's current prison sentence was imposed without the due process and equal protection clause protections afforded to him under the Constitution, and his sentence must be vacated and an indigency determination hearing must take place if the court is inclined to continue his custody for his failure to pay. *Bearden, supra*.

III. THE \$33,000 RESTITUTION ORDER MUST BE VACATED WHERE THE AMOUNT WAS NEVER VERIFIED AND WHERE THE AMOUNT IS NOT CONSISTENT WITH THE OFFENSE TO WHICH MR. STARKEY WAS CHARGED AND CONVICTED IN VIOLATION OF *PEOPLE V MCKINLEY*, __ MICH __ (2014). ALTERNATIVELY, MR. STARKEY IS ENTITLED TO A RESTITUTION HEARING WHERE THE AMOUNT MUST BE VERIFIED.

Mr. Starkey was originally charged with breaking and entering a building with the intent to commit a larceny for an offense that occurred on September 4, 2004. (Information, Appendix D). He pled guilty to attempted breaking and entering with intent. The building he entered along with two co-defendants was a former hospital. Mr. Starkey and two co-defendants were arrested on the date of the offense while trying to leave the building after police had been called. (See Appendix A, PSR Excerpt).

One of the owners of the building told probation that “the damage done to the building amounts in excess of \$100,000.00” and that “the offenders extensively damage[d] the property in an effort to remove copper piping and tubing.” (See Appendix A, PSR Excerpt). At the time of sentencing, the prosecutor informed the Court that “[t]his was the case where the ceiling was stripped of the copper, and it’s still being determined what the damage was before” and that the building owner estimated the damage of the building to be approximately \$100,000 or \$33,000 per defendant. (12/3/04, 4). Defense counsel objected that there was no verification of that amount. (12/3/04, 4). The Court ordered Mr. Starkey to pay \$33,000 in restitution with “an order that it should be verified.” (12/3/04, 4).

The prosecution has not supported the \$33,000 restitution amount by a preponderance of evidence as required by MCL 780.767(4). To counsel’s knowledge, the restitution amount has never been verified. There is no record evidence to support the fact that Mr. Starkey committed

any damage to the property or that he stole anything of value from the property and the restitution order cannot be sustained.

Further, the Michigan Supreme Court's recent decision in *People v McKinley*, ___ Mich ___ (Decided June 26, 2014) requires that the restitution amount be vacated. In *McKinley*, the Michigan Supreme Court held that an order of restitution for uncharged conduct was not authorized by statute and would not be upheld. In *McKinley*, the defendant was convicted by a jury of malicious destruction of property exceeding \$20,000. The trial court imposed a restitution order in the amount of \$158,180.44, which covered restitution for the victims of the offenses of which the defendant was convicted and restitution for the victims of offenses that the defendant was not charged with or convicted. Slip op. at 2. The Court vacated the \$158,180.44 restitution order and ordered that the trial court assess restitution only as it related to the charged conduct. *Id.* at 13.

The *McKinley* Court held that "any course of conduct that does not give rise to a conviction may not be relied on as a basis for assessing restitution against a defendant." *Id.* at 8. The Court clarified this point by pointing out that a plain reading of MCL 780.767 required this result:

MCL 780.767, for example, sets forth the factors for consideration and the burden of proof in setting the amount of restitution. MCL 780.767(1) provides that "[i]n determining the amount of restitution to order under [MCL 780.766], the court shall consider the amount of the loss sustained by any victim *as a result of the offense.*" (Emphasis added). Similarly, MCL 780.767(4) provides that "[t]he burden of demonstrating the amount of the loss sustained by a victim *as a result of the offense* shall be on the prosecuting attorney." (Emphasis added). "[T]he offense" in MCL 780.767 can only refer to the offense of which the defendant was convicted, because it is that "offense" that makes him subject to being ordered to pay restitution in the first place. **Thus, these provisions further reinforce our conclusion that MCL 780.766(2) requires a direct, causal relationship between the**

conduct underlying the convicted offense and the amount of restitution to be awarded. See, e.g., *Paroline v United States*, 572 US ___, ___; 134 S Ct 1710, 1720; 188 L Ed 2d 714 (2014) (“The words ‘as a result of’ plainly suggest causation.”). [*Id.* at 9-10 (emphasis in original) (emphasis added)].

Here, the presentence report indicates that there was an allegation by a witness that on **August 28, 2004**, Mr. Starkey and his co-defendants were seen leaving the same building with copper pipes and wires. (PSR Excerpt, Appendix A). However, Mr. Starkey was never charged with such an offense. He was never charged with malicious destruction of property or with larceny or with any other offense related to the removal or damage of property or any other offenses. The only offense for which he was charged was the **September 4, 2004** breaking and entering a building with intent and he ultimately pled to attempt of that offense. (Information, Appendix D). “[C]onduct for which a defendant is *not* criminally charged and convicted is necessarily *not* part of a course of conduct that gives rise to the conviction” and is not properly the basis for a restitution order. *Id.* (emphasis in original).

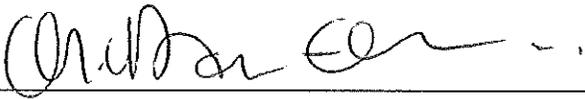
Finally, there is no question of retroactivity here. The *McKinley* decision was released during the direct appeal period. Criminal cases become final once the direct appeal period has expired. *People v Gomez*, 295 Mich App 411, 414 (2012). This case is on direct appeal as the time for filing an application for leave to appeal or timely post-conviction motion has not expired. See MCL 7.205(G)(3); MCR 6.429(B)(3). Judicial decisions are generally given full retroactive effect. *Lincoln v General Motors Corp.*, 461 Mich 483, 491 (2000).

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant Kenneth Starkey asks that this Honorable Court to vacate his probation violation plea and sentence, grant him an indigency determination hearing if the Court is inclined to continue custody for failure to pay, and vacate restitution or alternatively, to set a hearing to verify the amount.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: 

MARILENA DAVID-MARTIN (P73175)

Assistant Defender

3300 Penobscot Building

645 Griswold

Detroit, Michigan 48226

(313) 256-9833

Dated: July 29, 2014

IN THE ORLEANS PARISH CRIMINAL DISTRICT COURT

STATE OF LOUISIANA

STATE OF LOUISIANA)
))
v.)
))
MEGAN HOWARD,)
))
DEFENDANT)
_____)

Docket No. 485-515
Section F
Judge Pittman

FILED: _____

DEPUTY CLERK: _____

MOTION FOR RELEASE PURSUANT TO BEARDEN V. GEORGIA

Comes now Defendant, Megan Howard, through undersigned counsel, pursuant to Article 881.1 of the Louisiana Code of Criminal Procedure and Bearden v. Georgia, 461 U.S. 660 (1983), and its progeny, and respectfully moves this Honorable Court for an order of release. In the alternative, defendant requests this honorable court conduct a hearing and investigation into the ability of Defendant to pay the previously assessed fine. As grounds therefore, the Defendant states the following:

1. On May 13, 2009, Ms. Howard was convicted on a plea of guilty in this Court. She was ordered to pay \$348.00 in fines, fees, and court costs.
2. On July 5, 2011, Ms. Howard was arrested on a capias for failure to pay her fines and fees.
3. Per the July 6, 2011, minute entry entered by the Court in this matter, "The Court will release the defendant once payment is made." A status on payments was set for July 20, 2011.
4. Ms. Howard is unable to make payments. The only money she receives is a Social Security check. She takes care of her mother and two daughters on that fixed income. Her daughter Shannon also has medical needs includes tubes in her ears and frequent fevers.
5. Because the Defendant is indigent and unable to make any payments on the assessed fines and fees, per Bearden v. Georgia, her incarceration, solely on the basis of her indigency, is unconstitutional. 461 U.S. 660, 672 (1983). She therefore moves this Court

for an order of release.

6. In the alternative, Defendant requests that this Honorable Court conduct an investigation into the financial standing of Defendant and hold a hearing that would comply with the requirements set forth by the United States Supreme Court in Bearden v. Georgia, 461 U.S. 660 (1983). In Bearden, the Supreme Court held that “in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority.” Id. at 673.
7. The law is clear; a term of imprisonment because of the inability to pay a fine is a violation of the equal protection and due process clauses of the United States and Louisiana constitutions. See Bearden; Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 (U.S. 235 (1970)). In Tate, the Supreme Court held that imprisoning a defendant who was unable to pay a fine violated the equal protection clause of the Fourteenth Amendment. The Court applied Tate to a conviction from Georgia in Bearden, and held that to “deprive a probationer of his conditional freedom simply because, through no fault of his own he cannot pay a fine . . . would be contrary to the fundamental fairness required by the Fourteenth Amendment.” 461 U.S. at 672-673. The Court provided possible alternatives to imprisonment that included extending the time for making payments, reducing the fine, or directing public service work in place of the assessed fine or restitution.
8. In State v. Sampson, 2007-0894 (La. App. 4 Cir. 9/4/2007), the Fourth Circuit Court of Appeal for the State of Louisiana reversed a judgment of a magistrate commissioner who denied a motion to reconsider sentence and revoked the defendant, Sheryl Sampson, without first conducting a hearing into the ability of her to pay the assessed fines and fees. The Fourth Circuit held that the magistrate could not properly revoke the defendant for a failure to pay fines and fees without first determining if the defendant was indigent.
9. Similarly, in State v. Barnes, 495 So.2d 310 (La. App. 4 Cir. 1986), the Fourth Circuit clearly held that “imposing a fine in default of which an indigent would serve an additional prison term . . . is a violation of the defendant’s right to due process and equal

protection under the law.” Id. at 311. The court further held that “sentencing an indigent to jail for non-payment of a fine is excessive punishment.” Id. The court noted that this logic applies equally to fines and fees and to costs.

CONCLUSION

WHEREFORE, undersigned counsel moves this honorable Court to grant defense's motion for release in compliance with the mandates of Bearden v. Georgia and its progeny.

Respectfully Submitted,

Colin Reingold
Louisiana Bar # 33252
Orleans Public Defenders
2601 Tulane Avenue, Suite 700
New Orleans, LA 70119
(504) 827-8220
creingold@opdla.org

Certificate of Service

I hereby certify that I have caused to be served by mail or hand delivery in open court a copy of the foregoing document upon the prosecution on the day of filing.

IN THE ORLEANS PARISH CRIMINAL DISTRICT COURT
STATE OF LOUISIANA

STATE OF LOUISIANA)
)
)
v.) Docket No. 485-515
)
MEGAN HOWARD) Judge Pittman
)
)
)
_____, DEFENDANT)
_____))
)
FILED: _____ DEPUTY CLERK: _____

ORDER

Premises considered, it is HEREBY ORDERED that Defendant's motion for release be
and is granted.s

The Honorable Robin Pittman
Judge, Section F
Orleans Parish Municipal Court

Dated: _____

DONE THIS ___ DAY OF _____, 2011.

IN THE APPELLATE DIVISION OF CRIMINAL DISTRICT COURT FOR ORLEANS
PARISH

STATE OF LOUISIANA

No. _____

CITY OF NEW ORLEANS

v.

KRISTIE HINES

PETITION FOR SUPERVISORY WRIT FROM THE MUNICIPAL COURT FOR THE
PARISH OF ORLEANS, CASE NO. 1044932 SECTION "D," THE HONORABLE MARK
SHEA JR., JUDGE PRESIDING

BRIEF ON BEHALF OF PETITIONER

****EXPEDITED CONSIDERATION REQUESTED****

Colin Reingold
La. Bar No. 33252
Orleans Public Defenders
2601 Tulane Avenue, Seventh Floor
New Orleans, LA 70119
(504) 827-8220 (office)
(504) 821-5285 (fax)
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LAW AND ARGUMENT.....8
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Exhibits

- A. Municipal Court Chronology
- B. Transcript of May 6, 2015 Proceedings
- C. Notice of Intent to Seek Supervisory Writs
- D. Court File in Case 1044932

JURISDICTION

This matter is appropriate before this Court pursuant to Chapter 17 of the Louisiana Rules of Court: Appeals From Courts Of Limited Jurisdiction To District Court.

REQUEST FOR EXPEDITED CONSIDERATION

Ms. Hines's ninety day suspended sentence on her 2008 municipal ordinance charge was made executory on May 6, 2015, and she was sentenced to serve the entire ninety days in jail without notice, proper process, or an opportunity for her to contest the allegations against her. She is currently imprisoned in the Orleans Parish Prison. Expedited consideration is requested to ensure that this violation of her constitutional and statutory rights can be remedied forthwith.

STATEMENT OF THE CASE

On July 14, 2008, Kristie Hines received a summons which alleged a municipal offense, a violation of Municipal Code 54-526, "relative to domestic violence to wit disturbing the peace." Ms. Hines appeared in Section D of Orleans Parish Municipal Court on July 17, 2008, for her arraignment and pled guilty to one count of M.C.S. 54-526. The Honorable Paul Sens sentenced Ms. Hines to a ninety-day suspended sentence and placed her under a peace bond and stay away order. Judge Sens further ordered her to attend domestic violence classes. The Court did not impose any fines or costs on Ms. Hines. Ms. Hines appeared in Section D thirty days later for a status hearing on August 18, 2008, and was given notice to return on September 17, 2008. An attachment was issued when Ms. Hines did not appear on September 17. However, the attachment was recalled the following day when Ms. Hines checked in with the Court and provided a letter from the Volunteers of America of Greater New Orleans verifying her participation in classes.

On October 30, 2008, Ms. Hines's mother passed away following a protracted struggle with cancer. Ms. Hines had been taking care of her mother in Oklahoma for several weeks prior to her death. Ms. Hines did not appear at her next status hearing on October 21, 2008, and the Court issued an attachment.

Ms. Hines was detained in Orleans Parish Prison on January 27, 2010, upon discovery of the outstanding attachment from October 21, 2008. The Honorable Joseph Landry released Ms. Hines on January 28, 2010, and ordered her to return March 16, 2010. Judge Landry further required her continued participation in a GED program that Ms. Hines had already enrolled herself in.

Ms. Hines subsequently appeared in Section D for status hearings on March 16, 2010, and May 19, 2010. At the hearings, she provided documentation of her participation in the GED program and with the Family Service of Greater New Orleans Women for Nonviolence Program. Ms. Hines began working with the program on April 29, 2010. Ms. Hines returned to Section D on May 6, 2015, for a hearing on an attachment issued July 22, 2010.

After calling Ms. Hines's case, the Honorable Mark Shea stated: "Ms. Hines, since you really haven't done what the Court ordered you to do you got 90 days made executory. Have a seat. You got 90 days which is the original sentence. Credit for any time served. Have a seat." Tr. at 1:4-7.

Ms. Hines's case was recalled later that day, at which time Judge Shea informed counsel

Nia Weeks:

Let the record reflect that this is a matter that your client pled guilty to on July 17, 2008. At that particular time she was given 90 days suspended. She was set for payment of fines and costs¹ and was given other conditions of probation. I'm not going to read each and every page but she had not attended the classes obviously. She was arrested on a second attachment and was given a last chance. She signed that on 8-8-09 to do what she was suppose [sic] to do. On 3-15-10 she came in and produced some documents saying she was still in the GED program. On May 19, 2010 she started the DV program and missed on July 22, 2010 and was at large until we just picked her up. So I am making the 90 day original sentence given back in 2008 and making it executory. I will note your objection for the record.

Tr. at 1:12-25 -2:1. Counsel for Ms. Hines subsequently noticed intent to seek writs and sought a return date. This writ now timely follows.

¹ Ms. Hines was not assessed fines or costs.

ASSIGNMENT OF ERRORS

- I. The Trial Court erred where it revoked probation for an alleged violation without affording the defendant a probation revocation hearing, pursuant La. C. Cr. P. 899-901 and *Morrissey v. Brewer*, 408 U.S. 471 (1972).
- II. The Trial Court Erred when it revoked the probation of a defendant who was uncounseled when she entered her guilty plea. *Alabama v. Shelton*, 535 U.S. 654 (2002).

LAW AND ARGUMENT

I. THE TRIAL COURT ERRED WHERE IT REVOKED PROBATION FOR AN ALLEGED VIOLATION WITHOUT AFFORDING THE DEFENDANT A PROBATION REVOCATION HEARING AND THE ASSOCIATED REQUIRED DUE PROCESS OF LAW.

A person being revoked on probation, and thereby sentenced to a jail term, is entitled to a number of procedural protections. Pursuant La. C. Cr. P. arts. 899.1, 900, and 901, a defendant is entitled to a probation revocation hearing after the allegation of a probation violation. Once a violation of probation is alleged, Art. 899.1 requires the court implement, “[p]rocedures to provide a probationer with written notice of the right to a probation violation hearing to determine whether the probationer violated the conditions of probation alleged in the violation report and the right to be represented by counsel at state expense at that hearing if financially eligible.” La. C.Cr.P. Art. 899.1.

Art. 900 similarly provides that:

After an arrest pursuant to Article 899, the court shall cause a defendant who continues to be held in custody to be brought before it within thirty days for a hearing. If a summons is issued pursuant to Article 899, or if the defendant has been admitted to bail, the court shall set the matter for a violation hearing within a reasonable time. The hearing may be informal or summary.

La. C.Cr.P. Art. 900. Only then does the statute provide that probation may be revoked at discretion of the court. *Id.*

Although Art. 899.1 allows for “informal or summary” hearings, Louisiana courts concurrently recognize that “although a probation revocation hearing is different from a trial, its result may be the same -- the imprisonment of the defendant.” *State v. Harris*, 312 So. 2d 643, 644 (La. 1975). Therefore, the defendant, while not entitled to the full panoply of rights due a defendant in a criminal prosecution, is entitled to certain minimal procedural protections. *State v. Ussin*, 485 So. 2d 534, 535 (La.App. 5 Cir. 1986). In *Ussin*, the court affirms that, “[t]he Louisiana Supreme Court has required strict compliance with the due process standards set by the United States Supreme Court in the case of *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), and *Morrissey v. Brewer*, 408 U.S. 471 (1972), before a defendant's probation may be revoked.” *Id.* In *Morrissey*, the United States Supreme Court found the minimum requirements of due process for parole revocation to include:

(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer

specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

408 U.S. at 48. Probation revocation was found to be indistinguishable from a parole revocation in its practical effect, and these procedural requirements were applied subsequently to probation revocation in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Following these controlling cases, Louisiana courts have reversed and set aside the revocation of probation where there is a finding of a “total lack of compliance with LSA-C.Cr.P. arts. 899, 900 and 901, that is, lack of notice, written charges and a revocation hearing.” See *State v. Lavigne*, 623 So. 2d 1343 (La. 1993).

In the present case, Ms. Kristie Hines was denied her entitled right to a probation revocation hearing pursuant La. C. Cr. P. art 899.1, 900, and 901. At her May 6th appearance, the trial court revoked Ms. Hines’s probation because she purportedly failed to comply with the terms of her plea. The court should have afforded Ms. Hines the opportunity to schedule a probation revocation hearing within 30 days, or within a “reasonable time” if Ms. Hines were admitted to bail, pursuant La. C. Cr. P. art 900. The Court should have provided written reasons regarding the evidence relied upon and reasons for revocation. Instead, Ms. Hines had her probation summarily revoked without the opportunity to adequately consult with her attorney and without the opportunity to discuss mitigating circumstances or adequately prepare for the possibility of incarceration. Had Ms. Hines been given proper notice of the alleged violation, adequate time to consult with her attorney, and a proper probation revocation hearing, the merits of Ms. Hines’s case could have been properly argued. Instead, the trial court did not comply with even the minimum standards defined by *Morrissey* and *Gagnon*, and affirmed in *Ussin*. This is in direct contradiction with both the statutorily imposed requirements of the Louisiana Code of Criminal Procedure, and with the United States Supreme Court’s recognition in *Morrissey* that defendants are entitled to due process rights at probation revocation hearings.

This Court has recently reversed a sentence in similar circumstances. On January 21, 2015, Appellate Division III reversed a probation revocation in *State v. Destiny Johnson*, 520-374, finding that there was “no evidence to support the mandates contained within LA. R.S. art. 900” were followed by the municipal court judge. *Id.* at 2. The *Johnson* court reversed and remanded for a proper hearing. This Court should do the same.

II. Ms. Hines's sentence cannot be legally revoked because she lacked counsel at her plea.

The United States Supreme Court has unambiguously held that uncounseled convictions with suspended sentences cannot later result in revocation:

A suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense. The uncounseled conviction at that point "results in imprisonment," Nichols, 511 U.S., at 746; it "ends up in the actual deprivation of a person's liberty," Argersinger, 407 U.S., at 40. This is precisely what the Sixth Amendment, as interpreted in Argersinger and Scott, does not allow.

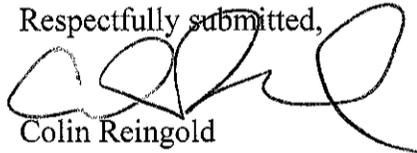
Alabama v. Shelton, 535 U.S. 654, 662, (2002).

Ms. Hines had no counsel at the time of her plea in 2008. She cannot now be revoked on that underlying offense.

CONCLUSION

WHEREFORE, for all the reasons given above, and for any other reasons that may occur to this Honorable Court, appellant respectfully asks this Honorable Court to vacate Ms. Hines's conviction.

Respectfully submitted,



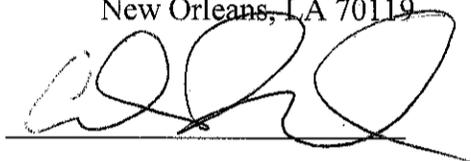
Colin Reingold
La. Bar No. 33252
Orleans Public Defenders
2601 Tulane Avenue, Seventh Floor
New Orleans, LA 70119
(504) 827-8220 (office)
(504) 821-5285 (fax)

VERIFICATION AND CERTIFICATION

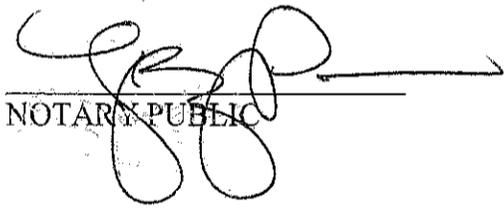
COMES NOW Colin Reingold, being duly sworn, and deposes and states that he has reviewed the forgoing petition; that all the facts therein are true and accurate to the best of his information and belief; that he has notified or will immediately notify the parties listed below that this petition has been filed; and that he has caused, or will immediately cause, a true and accurate copy of this petition to be served forthwith on the parties listed below:

Hon. Mark Shea, Jr.
727 S. Broad St.
2700 Tulane Avenue
New Orleans, LA 70119

ADA Donna Andrieu
Orleans Parish District Attorney's Office
619 S. White St.
New Orleans, LA 70119



SWORN AND SUBSCRIBED TO BEFORE ME THIS 1 Day of June, in the year 2015.


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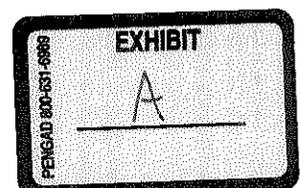
NEW ORLEANS MUNICIPAL COURT
CASE CHRONOLOGY REPORT

Defendant: HINES, KRISTE

Case Number: 1044932

Item Number: G1828608

7/16/2008 Charge of 54-526 - ACTS OF DOMESTIC VIOLENCE PROH filed With Court
7/16/2008 Event of ARRAIGNMENT scheduled for 7/17/2008 at 3:00 PM in division D
7/17/2008 Defendant pled guilty to 54-526
7/17/2008 Defendant sentenced to NINETY days for 54-526 (NINETY DAYS SUSPENDED)
7/17/2008 Event of STATUS HEARING scheduled for 8/18/2008 at 3:00 PM in division D
7/17/2008 Defendant placed under Peace Bond and Stay Away Order
7/17/2008 DEFENDANT IS ORDERD TO ATTEND NO ABUSE CLASSES
8/18/2008 Event of STATUS HEARING scheduled for 9/17/2008 at 3:00 PM in division D
9/17/2008 Instanta Attachment issued on defendant on September 17, 2008, surety appearance bond of \$2,500.00 required or cash bond of 2,500.00
9/18/2008 Attachments Recalled by Judge PAUL N. SENS
9/18/2008 Event of STATUS HEARING scheduled for 10/20/2008 at 3:00 PM in division D
10/21/2008 No service record was found in database. User indicated record was found in case jacket. Attachment Issued. UserID: KMB
10/21/2008 Instanta Attachment issued on defendant on October 21, 2008, surety appearance bond of \$2,500.00 required or cash bond of 2,500.00
1/28/2010 Event of ATTACHMENT HEARING scheduled for 1/28/2010 at 3:00 PM in division D
1/28/2010 Attachments Recalled by Judge JOSEPH B. LANDRY
1/28/2010 Event of STATUS HEARING scheduled for 3/16/2010 at 3:00 PM in division D
1/28/2010 Defendant ordered released / / By Judge JOSEPH B. LANDRY
3/16/2010 Event of STATUS HEARING scheduled for 5/19/2010 at 3:00 PM in division D
5/19/2010 Event of STATUS HEARING scheduled for 7/22/2010 at 3:00 PM in division D
7/22/2010 Instanta Attachment issued on defendant on July 22, 2010, surety appearance bond of \$5,000.00 required or cash bond of 5,000.00
5/06/2015 Event of ATTACHMENT HEARING scheduled for 5/06/2015 at 3:00 PM in division D
5/06/2015 Attachments Recalled by Judge MARK SHEA
5/06/2015 Defendant ordered committed to jail on contempt of Court 5/06/2015 By Judge MARK SHEA -- Executory Sentence
5/06/2015 Charge of 54-526 status was changed to CLOSED



MUNICIPAL COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

CITY OF NEW ORLEANS
VERSUS
KRISTE HINES

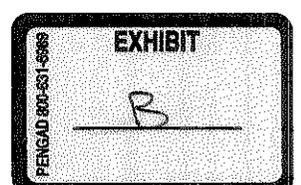
CASE NO. 1044932
SECTION "L"

Transcript of the PROCEEDINGS before the Honorable
Mark Shea, Judge Presiding, Section "D" Municipal Court,
Parish of Orleans, State of Louisiana, on Wednesday, May 6,
2015, in New Orleans, Louisiana.

APPEARANCES:

NIA WEEKS, ESQUIRE
ATTORNEY FOR THE DEFENDANT, HINES

REPORTED BY:
Dawn Plaisance,
Certified Court Reporter



1 MINUTE CLERK:

2 This is case number 1044932, Kriste Hines.

3 THE COURT:

4 Ms. Hines, since you really haven't done what the
5 Court ordered you to do you got 90 days made executory. Have
6 a seat. You got 90 days which is the original sentence.
7 Credit for any time served. Have a seat.

8 (Court continued on and then the following took place.)

9 MS. WEEKS:

10 Nia Weeks on behalf of Ms. Hines, Judge.

11 THE COURT:

12 Let the record reflect that this is a matter that
13 your client pled guilty to on July 17, 2008. At that
14 particular time she was given 90 days suspended. She was set
15 for payment of fines and costs and was given other conditions
16 of probation. I'm not going to read each and every page but
17 she had not attended the classes obviously. She was arrested
18 on a second attachment and was given a last chance. She
19 signed that on 8-8-09 to do what she was suppose to do. On
20 3-15-10 she came in and produced some documents saying she
21 was still in the GED program. On May 19, 2010 she started
22 the DV program and missed on July 22, 2010 and was at large
23 until we just picked her up.

24 So I am making the 90 day original sentence given
25 back in 2008 and making it executory.

1 I will note your objection for the record.

2 MS. WEEKS:

3 Thank you, Judge.

4

5 WHEREUPON THE MATTER WAS CONCLUDED

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1 CERTIFICATE

2
3 This certificate is valid only for a
4 transcript accompanied by my original signature and original
5 required seal on this page.
6

7 I, DAWN PLAISANCE, Certified Court Reporter in
8 and for the State of Louisiana, employed as an certified
9 court reporter for the State of Louisiana, as the officer
10 before whom this testimony was taken, do hereby certify that
11 this testimony was reported by in the stenotype reporting
12 method, was prepared and transcribed by me or under my
13 direction and supervision, and is a true and correct
14 transcript to the best of my ability and understanding; that
15 the transcript has been prepared in compliance with
16 transcript formal guidelines required by statute or by rules
17 of the board or by the Supreme Court of Louisiana, and that I
18 am not related to counsel or to the parties herein nor am I
19 otherwise interested in the outcome of this matter.
20

21
22 

23 DAWN PLAISANCE, C.C.R.
24 License No. 89005
25 Certified Court Reporter
May 17, 2015

CITY OF NEW ORLEANS
MUNICIPAL COURT

FILED

IN THE MUNICIPAL COURT FOR THE PARISH OF ORLEANS

CITY OF NEW ORLEANS 2015 MAY 15 PM 3 36

CITY OF NEW ORLEANS)
)
v.)
)
KRISTIE HINES)
_____)

The Honorable Mark Shea
Division D
Case No. 1044932

FILED: _____

DEPUTY CLERK: _____

NOTICE OF INTENTION TO APPLY FOR SUPERVISORY WRITS

TO: The Honorable Judge Mark Shea
City Attorney Peter Hamilton

PLEASE TAKE NOTICE of the intention of Kristie Hines to apply to the ORLEANS PARISH CRIMINAL DISTRICT COURT for supervisory writs. The Accused will ask the appellate court to review and annul the action and order of the Honorable Mark Shea, Municipal Court, Orleans Parish, taken on May 6, 2015, when the Honorable Judge entered a ninety day contempt sentence against the defendant.

Notice is given today, May 15, 2015, at Orleans Parish, Louisiana.

The Accused moves this Honorable Court to set a return date within which the Accused may file his application with the Orleans Parish Criminal District Court.

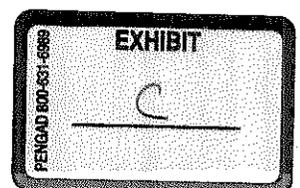
Respectfully Submitted,



Jack Muse
Bar No. 36237
Orleans Public Defenders
2601 Tulane Avenue, Suite 700
New Orleans, LA 70119
Office: (504) 571-8922

Certificate of Service

I hereby certify that I have caused to be served by hand delivery in open court a copy of the foregoing document upon the prosecution on this the day of filing.



CITY OF NEW ORLEANS
MUNICIPAL COURT
FILED

IN THE MUNICIPAL COURT FOR THE PARISH OF ORLEANS

CITY OF NEW ORLEANS 2015 MAY 15 PM 3 37

CITY OF NEW ORLEANS

v.

KRISTIE HINES

)
)
)
)
)
)
)

The Honorable Mark Shea
Division D
Case No. 1044932

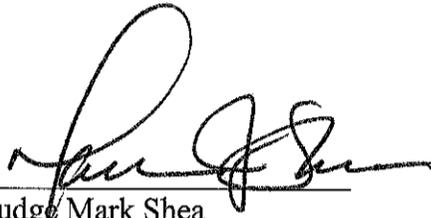
FILED: _____

DEPUTY CLERK: _____

ORDER

A return date for the application for a supervisory writ is set for the 19th day of

May, 2015.



Judge Mark Shea
Orleans Parish Municipal Court, Section D

2015 MAY 29 PM 2 02
IN THE ORLEANS PARISH MUNICIPAL COURT
CITY OF NEW ORLEANS

CITY OF NEW ORLEANS)
)
v.)
)
KRISTIE HINES)
Defendant.)
_____)

Case No. 1044932
Section D
The Honorable Mark Shea

FILED: _____

DEPUTY CLERK: MS.

MOTION FOR EXTENSION OF TIME TO SEEK SUPERVISORY WRITS

Kristie Hines respectfully requests that this Court permit her additional time to seek supervisory writs. In support, counsel states:

1. On May 15, 2015, Ms. Hines filed notice of intent to seek supervisory writs challenging this Court's imposition of a ninety day sentence made executory.
2. At counsel's request, a return date of May 19, 2015, was granted by this Court.
3. Counsel subsequently asked to receive the full thirty days to seek supervisory writs.
4. This Court granted petitioner's motion on the record without opposition from the City.
5. Counsel requests that this Court permit him to file Ms. Hines application for supervisory writs by June 14, 2015.

CONCLUSION

WHEREFORE, for all the reasons given above, and for any other reasons that may occur to this Honorable Court, Ms. Hines respectfully asks this Court to grant her motion for an extension of time to apply for supervisory writs with a return date of June 14, 2015.

Respectfully submitted,



Jack Muse
La. Bar No. 36237
Orleans Public Defenders
2601 Tulane Avenue, Seventh Floor
New Orleans, LA 70119
(504) 527-8922 (office)
(504) 821-5285 (fax)
jmuse@opdla.org

Orleans Parish Criminal Sheriff

Arrest Register

Municipal Court Copy

DU

Arrested Person Information

Folder No. 2235771	Arrest No. 11924686	Item No. A3315010	B of I No.	Motion No. 11534134	Soc Sec No. ***-**-2035	SID Number	FBI Number 2490168	324268NC1	
Arrested Person INES, KRISTIE J			Race/Sex W F	DOB Date 2/16/1989	Height 504	Weight 220	Hair BRO	Eyes BLU	Skin RUD
Address 05 MILAN ST S		Occupation		Marital Status Single		Birth State LA	Nationality USA		
City EW ORLEANS	State LA	Employer ITAL PIE	License No. 008647534		State LA	Year			
Alias Name(s)			Scars	Marks	Tattoos	Fingerprint Classification			

Health Information

						Drug Addict	Drug Type		
Vehicle License	State	Year	Vehicle Year	Make	Model	Type	Color	Vehicle ID Number	Disposition

Arrest Information

Location of Arrest 348 RICHLAND RD	Dist/Zone 4	Arrest Date / Time 1/27/2010 8:21 AM		Booking Date / Time 1/27/2010 9:42 AM		Arrest Credit 04	Expedited NO
Arresting Officer Name O MORRIS		Badge 01240	Unit 1348	Transporting Officer Name		Badge 00000	Unit 0000

Charge Information

Ordinance/Statute No. TTACH MUN	LibsCd	Affidavit No. 1044932	ATN Number/Seq 360071004167	Relative To 1 ATTACHMENT-MUNICIPAL
------------------------------------	--------	--------------------------	--------------------------------	---------------------------------------

Court Information

Trial Court / Section UN D	Trial Date / Time 1/28/2010 3:00 PM	Bond Amount \$2,500.00
-------------------------------	--	---------------------------

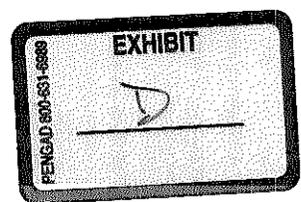
Offense Information

Location of Offense 348 RICHLAND RD	Offense Day / Date / Time 1/27/2010 8:21 AM	Weapon
Witness 1 Name ITY OF NEW ORLEANS	Race/Sex DOB Date Phone No.	Witness 2 Name Race/Sex DOB Date Phone No.

Remarks

IST: NO GIST
ere you physically abused by the arresting officer? N
nown enemies in jail?
SSIGNED TO RECEIVING

Doorman BASTILLES	Time 08:34 AM	Booker Clements, Chevelle
----------------------	------------------	------------------------------



Orleans Parish Sheriff

Arrest Register

Municipal Court Copy

Arrested Person Information

Folder No.	Arrest No.	Item No.	B of I No.	Motion No.	Soc Sec No.	SID Number	FBI Number		
2412743	12236473	E0648815		11534134	***-**-2035		2490168 324288NC1		
Arrested Person			Race/Sex	DOB Date	Height	Weight	Hair	Eyes	Skin
HINES, KRISTIE J			W F	2/16/1989	504	220	BRO	BLU	RUD
Address		Occupation		Marital Status	Birth State	Nationality			
500 ROYAL ST S		Other		Single	LA	USA			
City	State	Employer	License No.		State	Year			
METAIRIE	LA	APPLE BEES	008647534		LA				
Alias Name(s)			Scars	Marks	Tattoos	Fingerprint Classification			

Health Information

Vehicle License	State	Year	Vehicle Year	Make	Model	Type	Color	Vehicle ID Number	Disposition

Arrest Information

Location of Arrest	Dist/Zone	Arrest Date / Time		Booking Date / Time		Arrest Credit	Expedited
2405 SANCTUARY DR	4	5/06/2015	3:30 AM	5/06/2015	5:17 AM	04	NO
Arresting Officer Name		Badge	Unit	Transporting Officer Name		Badge	Unit
P/O FOURNIER		02029	0421			00000	0000

Charge Information

Ordinance/Statute No.	LibrsCd	Affidavit No.	ATN Number/Seq	Relative To
ATTACHMENT	MUN	1044932	360071511452	1 ATTACHMENT-MUNICIPAL C/B \$5000

Court Information

Trial Court / Section	Trial Date / Time	Bond Amount
MUN D	5/06/2015 3:00 PM	\$5,000.00

Offense Information

Location of Offense	Offense Day / Date / Time	Weapon					
727 S BROAD ST	7/22/2010 3:00 PM						
Witness 1 Name	Race/Sex	DOB Date	Phone No.	Witness 2 Name	Race/Sex	DOB Date	Phone No.
CITY OF NEW ORLEANS							

Remarks

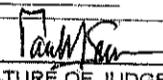
GIST:
Were you physically abused by the arresting officer? N
Known enemies in jail? NONE

Doorman	Time	Booker
GOUDYK	04:45 AM	Crawford, Yamise R



002412743

- 4. YOU ARE ORDERED NOT TO go to the residence or household of the alleged victim, the alleged victim's school, or the alleged victim's place of employment.
- 5. THE COURT WILL allow _____ to return to the residence at a date and time to be determined by the alleged victim and law enforcement agency to recover his/her personal clothing and necessities, provide that he/she is accompanied by a law enforcement officer to insure the protection and safety of the parties.
- 6. THE COURT ORDERS a representative of _____ (law enforcement agency) to accompany _____ to the residence located at _____ to recover _____ personal clothing and necessities.
- 7. YOU ARE ORDERED TO pay the sum of 0.00 to the _____ (Family Violence Program) no later than 11
- 8. YOU ARE ORDERED TO submit to a court-approved course of counseling or therapy related to family violence for _____ and YOU ARE ORDERED TO complete successfully said counseling or therapy no later than 11
- 9. YOU ARE ORDERED TO provide restitution to the victim of this crime for the pecuniary loss to said victim and/or for the costs incurred by the victim in connection with the criminal prosecution in the amount of 0.00 no later than 11
- 10. Other: _____
- 11. YOU ARE HEREBY PLACED UNDER A PEACE BOND IN THE AMOUNT OF **TWO THOUSAND FIVE HUNDRED & 00/100 (\$2,500.00) DOLLARS** FOR THE PERIOD OF ONE YEAR OR UNTIL TRIAL. VIOLATION MAY RESULT YOUR BEING HELD IN CONTEMPT OF COURT ALONG WITH THE OBLIGATION TO PAY THE BOND TO CITY OF NEW ORLEANS AND/OR 6 MONTHS IN JAIL.
- 12. THE DEFENDANT IS ORDERED TO RETURN TO COURT ON THE _____

Date of Order <u>7/17/2008</u> mo./day/yr.	Expiration Date of Order <u>7/18/2009</u> mo./day/yr.	 SIGNATURE OF JUDGE /s/ PAUL N. SENS PRINT OR STAMP JUDGE'S NAME
--	---	---

NOTICE TO DEFENDANT:

VIOLATION OF THIS ORDER MAY RESULT IN FORFEITURE OF BOND, REVOCATION OF PROBATION; A FINE OF UP TO \$500 AND/OR 6 MONTHS IMPRISONMENT.

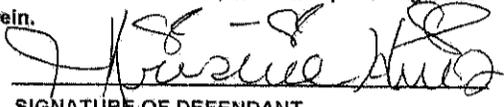
FURTHER, PERSONS VIOLATING THIS ORDER MAY BE IMMEDIATELY ARRESTED, JAILED, AND PROSECUTED PUSUANT TO LA. R.S. 14:79. DEPENDING ON WHETHER THE VIOLATION IS A FIRST OR SUBSEQUENT OFFENSE AND DEPENDING ON WHETHER THE VIOLATION INCLUDES A BATTERY, A PERSON WHO VIOLATES THIS ORDER MAY BE FINED UP TO \$2,000.00 AND MPRISONED WITH OR WITHOUT HARD LABOR FOR UP TO FIVE YEARS. A PERSON WHO VIOLATES THIS ORDER MAY BE FURTHER PUNISHED UNDER OTHER CRIMINAL LAWS OF THE STATE OF LOUISIANA.

PURSUANT TO 18 U.S.C. SECTION 922 (G)(9) AFTER NOTICE AND OPPORTUNITY FOR A HEARING, A PERSON WHO IS SUBJECT TO AN ORDER THAT EITHER INCLUDES A FINDING FINDING BY THE JUDGE OR BY ITS TERMS EXPLICITLY PROHIBITS CERTAIN BEHAVIOR, OR WHO HAS BEEN CONVICTED OF A MISDEMEANOR CRIME OF DOMESTIC VIOLENCE, IS IS PROHIBITED FROM RECEIVING, POSSESSING, OR TRANSPORTING FIREARMS OR AMMUNITION.

I have read and fully understand all conditions of the above orders, and I accept and agree to comply with all conditions and penalties herein.

7/17/2008

DATE



SIGNATURE OF DEFENDANT

FULL FAITH AND CREDIT pursuant to 18 U.S.C. Section 2265

The issuing court certifies that it had jurisdiction over the parties and the subject matter under the laws of the State of Louisiana, and the defendant was given reasonable notice and opportunity to be heard sufficient to protect the defendant's right to due process before this order was issued; o if the order was issued *ex parte* the court ordered the the defendant be given reasonable notice and opportunity to be heard within the time required by the laws of the State of Louisiana.

THIS ORDER SHALL BE PRESUMED TO BE VALID AND ENFORCEABLE IN ALL 50 STATES, THE DISTRICT OF COLUMBIA, TRIBAL LANDS, U.S. TERRITORIES, AND COMMONWEALTHS.



SIGNATURE OF JUDGE

NOTICE TO LAW ENFORCEMENT

It has been determined by a court of competent jurisdiction that the subject of this order poses a threat of danger to the protected party. Therefore, if the defendant is found in the presence of, in th immediate vicinity of, or you as a law enforcement official have probable cause to believe that the defendant has been in the presence of or in the immediate vicinity of the protected party, you are directed to remand the defendant into custody and hold the defendant without bond pending a hearing before the issuing court.

SIGNATURE OF JUDGE

Copies to: 1) Court file 2) Alleged Victim 3) Defendant 4) Reporting/Investigating Law Enforcement Agency 5) Prosecuting Agency 6) Louisiana Protective Order Registry

FAXED MAILED ELECTRONICALLY TRANSMITTED HAND DELIVERED TO LA. PROTECTIVE ORDER REGISTRY

DATE: _____ CLERK _____

FAMILY SERVICE

OF GREATER NEW ORLEANS

NEW ORLEANS
2515 Canal Street #201
New Orleans, LA 70119
504-822-0800
FAX: 504-822-0831
family@fgno.org
www.fgno.org
EAST JEFFERSON
504-733-4031
WEST BANK
504-361-0926
ST. BERNARD
504-371-3781

Board of Directors
Joan Coulier
Chair
Hattie Broussard
1st Vice Chair
Elizabeth Rybo
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Randall Darenburg
C. Allen Fayot
Dr. Peter Galvan
Alex Gershank
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Clarence Kirkland
Skye McLeod
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Bridget Bories
Robert Brown
Angela Hill
Gloria Norman
Joyce Pultzer
Robert Quintana
Jeyon Williams
Sally Wolfe
Donald Zorunjan

DATE: May 17, 2010

RE: Kristie Harris

Please use this letter as verification that the above-mentioned individual is enrolled in the Family Service of Greater New Orleans Women for Nonviolence Program.

Date Enrolled April 29, 2010

As of this date, the client has attended 1 sessions.

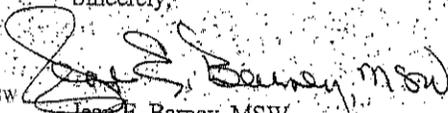
As of this date, the client has missed 1 sessions.

This client's participation in the program has been:

- Excellent
- Satisfactory
- Minimal
- Unacceptable

Thank you and if more information is required, please fax a completed authorization to release information to 504-822-0831.

Sincerely,


Jean E. Barney, MSW
Domestic Violence Group Facilitator

7B



STRENGTHENING FAMILY AND COMMUNITY FOR OVER 100 YEARS

City of New Orleans vs KRISTE HINES

To: MAURICIO GOMEZ
2115 IBERVILLE NEW ORLEANS, LA 70112

You are hereby commanded to appear in the Municipal Court
for the City of New Orleans for

STATUS HEARING
On WEDNESDAY, September 17, 2008 at 3:00 PM
in Section 'D' at Municipal Court
819 South Broad Street

DO NOT FAIL TO APPEAR UNDER PENALTY OF LAW

No beepers, no cell phones, no electronic equipment. Proper attire required.
By Order of the Court Clerk of Municipal Court

Municipal Court
City of New Orleans
727 South Broad St
New Orleans, LA 70119

MAURICIO GOMEZ
2115 IBERVILLE
NEW ORLEANS, LA 70112

City of New Orleans vs KRISTE HINES

Signed _____
MAURICIO GOMEZ
2115 IBERVILLE
NEW ORLEANS, LA 70112

App Date: 9/17/2008
Case: 1044-932 /D
Document No.: 1706783
Printed Date: 8/20/2008

- | | | |
|---|--|--|
| <input type="checkbox"/> 1. Personal Service
 | <input checked="" type="checkbox"/> 5. Subject Moved
 | <input type="checkbox"/> 8. Unknown at Address
 |
| <input type="checkbox"/> 2. Domiciliary Service
 | <input type="checkbox"/> 6. Bad Address
 | <input type="checkbox"/> 9. No Service, Other
 |
| <input type="checkbox"/> 3. Service, Other
 | <input type="checkbox"/> 7. Incomplete Address
 | |

Comments:

O.P.C.S.O.
R. SMITH
EMP. # 102086

8/19/2008	<i>S. H. 04</i>			
Date Entered	Date Served	Served By	Employee No.	Document No.

State Of Louisiana, Parish Of Orleans

Municipal Court

Case # 1044932

THE CITY OF NEW ORLEANS
NOTICE OF COURT DATE

DEFENDANT NAME		TO ADDRESSEE: YOU ARE HEREBY NOTIFIED OF A COURT DATE BEFORE THE: MUNICIPAL COURT 727 SOUTH BROAD STREET NEW ORLEANS, LOUISIANA 70119
HINES, KRISTE		
TO: (NAME & ADDRESS) KRISTE HINES 2115 IBERVILLE NEW ORLEANS LA		
DATE & TIME TO APPEAR		AT THE TIME AND DATE INDICATED UNDER PENALTY AS PROVIDED BY LAW
9/17/2008 3:00 PM	DIVISION D	Event Scheduled: STATUS HEARING
Charges: 54-526 ACTS OF DOMESTIC VIOLENCE PROH		

DATE ISSUED	DEPUTY CLERK - BY ORDER OF THE COURT	DEFENDANT OR WITNESS SIGNATURE	DATE RECEIVED
8/18/2008	KMB	<i>[Signature]</i>	
TYPE OF SERVICE		DEFENDANT PHONE NO	
<input type="checkbox"/> PERSONAL SERVICE	<input type="checkbox"/> UNABLE TO SERVE	(504) 210-0355	
<input type="checkbox"/> DOMICILIARY SERVICE	<input type="checkbox"/> SUBJECT MOVED		
<input type="checkbox"/> SERVED OTHER	<input type="checkbox"/> BAD ADDRESS(NO SUCH NO. OR ST.)		
<input type="checkbox"/> MAILED	<input type="checkbox"/> INCOMPLETE ADDRESS		
	<input type="checkbox"/> SUBJECT UNKNOWN AT ADDRESS		
	<input type="checkbox"/> OTHER		
NOTE OF DOMICILIARY SERVICE: SINCE ADDRESSEE COULD NOT BE LOCATED, A COPY OF THIS ORDER WAS LEFT WITH THE BELOW NAMED PERSON, OVER THE AGE OF 16 YEARS, AT THE ADDRESS INDICATED.			
NAME & RELATIONSHIP (PRINT)		ADDRESS	

NAME OF OFFICER MAKING SERVICE	EMPLOYEE NO.
--------------------------------	--------------

State Of Louisiana, Parish Of Orleans

Municipal Court

Case # 1044932

THE CITY OF NEW ORLEANS
NOTICE OF COURT DATE

DEFENDANT NAME		TO ADDRESSEE: YOU ARE HEREBY NOTIFIED OF A COURT DATE BEFORE THE: MUNICIPAL COURT 727 SOUTH BROAD STREET NEW ORLEANS, LOUISIANA 70119 AT THE TIME AND DATE INDICATED UNDER PENALTY AS PROVIDED BY LAW Event Scheduled: STATUS HEARING
HINES, KRISTE		
TO: (NAME & ADDRESS) KRISTE HINES 2115 IBERVILLE NEW ORLEANS LA		
DATE & TIME TO APPEAR	DIVISION	
10/20/2008 3:00 PM	D	
Charges:		

54-526 ACTS OF DOMESTIC VIOLENCE PROH

DATE ISSUED	DEPUTY CLERK - BY ORDER OF THE COURT	DEFENDANT OR WITNESS SIGNATURE	DATE RECEIVED
9/18/2008	KMB	<i>Kriste Hines</i>	
TYPE OF SERVICE		DEFENDANT PHONE NO.	
<input type="checkbox"/> PERSONAL SERVICE	<input type="checkbox"/> UNABLE TO SERVE		
<input type="checkbox"/> DOMICILIARY SERVICE	<input type="checkbox"/> SUBJECT MOVED		
<input type="checkbox"/> SERVED OTHER	<input type="checkbox"/> BAD ADDRESS (NO SUCH NO. OR ST.)		
<input type="checkbox"/> MAILED	<input type="checkbox"/> INCOMPLETE ADDRESS		
	<input type="checkbox"/> SUBJECT UNKNOWN AT ADDRESS		
	<input type="checkbox"/> OTHER		
NOTE OF DOMICILIARY SERVICE: SINCE ADDRESSEE COULD NOT BE LOCATED, A COPY OF THIS ORDER WAS LEFT WITH THE BELOW NAMED PERSON, OVER THE AGE OF 16 YEARS, AT THE ADDRESS INDICATED.			
NAME & RELATIONSHIP (PRINT)		ADDRESS	

NAME OF OFFICER MAKING SERVICE	EMPLOYEE NO.



GREATER NEW ORLEANS
Touching Lives. Building Community

Leonard D. Simmons, Jr.
Chair

James M. LeBlanc
President/CEO

Board of Directors
Patricia Brister
Karin Dunas
Matthew S. French, M.D.
Frank A. Glaviano
Thomas J. Grace
Arthur C. Harris, Sr.
Alex Lewis, III
Kurt Maloney
Michelle Kehoe Ogden
Robert C. Rhoden, Jr.
Alexis B. Robinson

September 16, 2008

To Whom It May Concern:

Volunteers of America
of Greater New Orleans
is accredited by CARF



This is to inform you that Kristie Hines has attended two sessions of Anger Management Individual Therapy at Volunteers of America of Greater New Orleans. For further information please call the phone number below.

Sincerely,

Gina Greco, LPC

Gina Greco, LPC
Clinical Therapist
Volunteers of America of Greater New Orleans
504-485-0147

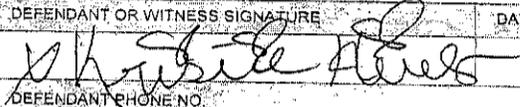
127 South Solomon Street, New Orleans, Louisiana 70119, Tel: 504-485-0147, Fax: 504-483-3559
www.voagno.org
A United Way Agency

State Of Louisiana, Parish Of Orleans
Municipal Court

Case # 1044932

THE CITY OF NEW ORLEANS
NOTICE OF COURT DATE

DEFENDANT NAME HINES, KRISTE		TO ADDRESSEE: YOU ARE HEREBY NOTIFIED OF A COURT DATE BEFORE THE: MUNICIPAL COURT 727 SOUTH BROAD STREET NEW ORLEANS, LOUISIANA 70119 AT THE TIME AND DATE INDICATED UNDER PENALTY AS PROVIDED BY LAW Event Scheduled: STATUS HEARING
TO: (NAME & ADDRESS) KRISTE HINES 2115 IBERVILLE NEW ORLEANS LA		
DATE & TIME TO APPEAR 8/18/2008 3:00 PM	DIVISION D	
Charges: 54-526 ACTS OF DOMESTIC VIOLENCE PROH		

DATE ISSUED 7/17/2008	DEPUTY CLERK - BY ORDER OF THE COURT KMB	DEFENDANT OR WITNESS SIGNATURE 	DATE RECEIVED
TYPE OF SERVICE		UNABLE TO SERVE	DEFENDANT PHONE NO.
<input type="checkbox"/> PERSONAL SERVICE	<input type="checkbox"/> SUBJECT MOVED		
<input type="checkbox"/> DOMICILIARY SERVICE	<input type="checkbox"/> BAD ADDRESS(NO SUCH NO. OR ST.)		
<input type="checkbox"/> SERVED OTHER	<input type="checkbox"/> INCOMPLETE ADDRESS		
<input type="checkbox"/> MAILED	<input type="checkbox"/> SUBJECT UNKNOWN AT ADDRESS		
	<input type="checkbox"/> OTHER		
NOTE OF DOMICILIARY SERVICE: SINCE ADDRESSEE COULD NOT BE LOCATED, A COPY OF THIS ORDER WAS LEFT WITH THE BELOW NAMED PERSON, OVER THE AGE OF 16 YEARS, AT THE ADDRESS INDICATED.			
NAME & RELATIONSHIP (PRINT)		ADDRESS	

NAME OF OFFICER MAKING SERVICE	EMPLOYEE NO.
--------------------------------	--------------

STATE OF LOUISIANA, PARISH OF ORLEANS

MUNICIPAL COURT

Case # 1044932

THE CITY OF NEW ORLEANS
COURT RELEASE

To the Keeper of the HOUSE OF DETENTION, Greetings,

You are hereby commanded to release on the above case KRISTE HINES
committed on / / in default of
Original Booking - Ordered Released

Given Under My Hand At The City of New Orleans

and in the Municipal Court thereof, this

28th day of January, 2010

JOSEPH B. LANDRY /S/

JUDGE, SECTION D, MUNICIPAL COURT

If this release is not in accordance with the commitment it is to be considered null and void.

Received By _____

STATE OF LOUISIANA, PARISH OF ORLEANS

MUNICIPAL COURT

Case # 1044932 *f*

THE CITY OF NEW ORLEANS

NOTICE OF COURT DATE

DEFENDANT NAME HINES, KRISTE		TO ADDRESSEE: YOU ARE HEREBY NOTIFIED OF A COURT DATE BEFORE THE: MUNICIPAL COURT 727 SOUTH BROAD STREET NEW ORLEANS, LOUISIANA 70119 AT THE TIME AND DATE INDICATED UNDER PENALTY AS PROVIDED BY LAW Event Scheduled: STATUS HEARING No cell phones allowed in Court No children allowed in Court
TO (NAME & ADDRESS) KRISTE HINES 2115 IBERVILLE NEW ORLEANS LA		
DATE & TIME TO APPEAR	DIVISION	
3/16/2010 3:00 PM	D	
Charges: 54-526 ACTS OF DOMESTIC VIOLENCE PROH		

DATE ISSUED	DEPUTY CLERK - BY ORDER OF THE COURT	DEFENDANT OR WITNESS SIGNATURE	DATE RECEIVED
1/28/2010	DMC	<i>[Signature]</i>	
		DEFENDANT PHONE NO	
TYPE OF SERVICE <input type="checkbox"/> PERSONAL SERVICE <input type="checkbox"/> DOMICILIARY SERVICE <input type="checkbox"/> SERVED OTHER <input type="checkbox"/> MAILED		UNABLE TO SERVE <input type="checkbox"/> SUBJECT MOVED <input type="checkbox"/> BAD ADDRESS(NO SUCH NO. OR ST.) <input type="checkbox"/> INCOMPLETE ADDRESS <input type="checkbox"/> SUBJECT UNKNOWN AT ADDRESS <input type="checkbox"/> OTHER	
NOTE OF DOMICILIARY SERVICE: SINCE ADDRESSEE COULD NOT BE LOCATED, A COPY OF THIS ORDER WAS LEFT WITH THE BELOW NAMED PERSON, OVER THE AGE OF 16 YEARS, AT THE ADDRESS INDICATED.			
NAME & RELATIONSHIP (PRINT)		ADDRESS	

NAME OF OFFICER MAKING SERVICE	EMPLOYEE NO.

STATE OF LOUISIANA, PARISH OF ORLEANS

MUNICIPAL COURT

Case # 1044932

THE CITY OF NEW ORLEANS

NOTICE OF COURT DATE

DEFENDANT NAME		TO ADDRESSEE:	
HINES, KRISTE		YOU ARE HEREBY NOTIFIED OF A COURT DATE BEFORE THE: MUNICIPAL COURT 727 SOUTH BROAD STREET NEW ORLEANS, LOUISIANA 70119	
TO: (NAME & ADDRESS)		AT THE TIME AND DATE INDICATED UNDER PENALTY AS PROVIDED BY LAW	
KRISTE HINES 2115 IBERVILLE NEW ORLEANS LA		Event Scheduled: STATUS HEARING	
DATE & TIME TO APPEAR	DIVISION	No cell phones allowed in Court No children allowed in Court	
5/19/2010 3:00 PM	D		
Charges:			
54-526 ACTS OF DOMESTIC VIOLENCE PROH			

DATE ISSUED	DEPUTY CLERK	BY ORDER OF THE COURT	DEFENDANT OR WITNESS SIGNATURE	DATE RECEIVED
3/16/2010	CAL		<i>Kriste Hines</i>	
DEFENDANT PHONE NO				
TYPE OF SERVICE		UNABLE TO SERVE		
<input type="checkbox"/> PERSONAL SERVICE	<input type="checkbox"/> SUBJECT MOVED	504-274-7462		
<input type="checkbox"/> DOMICILIARY SERVICE	<input type="checkbox"/> BAD ADDRESS(NO SUCH NO. OR ST.)			
<input type="checkbox"/> SERVED OTHER	<input type="checkbox"/> INCOMPLETE ADDRESS			
<input type="checkbox"/> MAILED	<input type="checkbox"/> SUBJECT UNKNOWN AT ADDRESS			
	<input type="checkbox"/> OTHER			
NOTE OF DOMICILIARY SERVICE: SINCE ADDRESSEE COULD NOT BE LOCATED, A COPY OF THIS ORDER WAS LEFT WITH THE BELOW NAMED PERSON, OVER THE AGE OF 18 YEARS, AT THE ADDRESS INDICATED.				
NAME & RELATIONSHIP (PRINT)		ADDRESS		

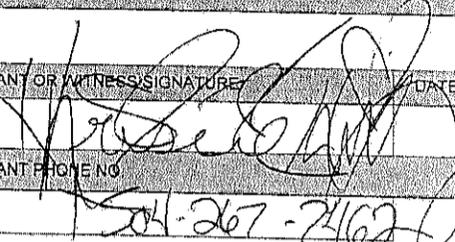
NAME OF OFFICER MAKING SERVICE	EMPLOYEE NO.
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State Of Louisiana, Parish Of Orleans
Municipal Court

Case # 1044932

THE CITY OF NEW ORLEANS
NOTICE OF COURT DATE

DEFENDANT NAME HINES, KRISTE		TO ADDRESSEE: YOU ARE HEREBY NOTIFIED OF A COURT DATE BEFORE THE: MUNICIPAL COURT 727 SOUTH BROAD STREET NEW ORLEANS, LOUISIANA 70119	
TO: (NAME & ADDRESS) KRISTE HINES 2115 IBERVILLE NEW ORLEANS LA		AT THE TIME AND DATE INDICATED UNDER PENALTY AS PROVIDED BY LAW Event Scheduled: STATUS HEARING	
DATE & TIME TO APPEAR 7/22/2010 3:00 PM	DIVISION D	No cell phones allowed in Court No children allowed in Court	
Charges: 54-526 ACTS OF DOMESTIC VIOLENCE PROH			

DATE ISSUED 5/19/2010	DEPUTY CLERK - BY ORDER OF THE COURT MSS	DEFENDANT OR WITNESS SIGNATURE 	DATE RECEIVED
TYPE OF SERVICE		DEFENDANT PHONE NO. 504-267-7462	
<input type="checkbox"/> PERSONAL SERVICE	<input type="checkbox"/> UNABLE TO SERVE		
<input type="checkbox"/> DOMICILIARY SERVICE	<input type="checkbox"/> SUBJECT MOVED		
<input type="checkbox"/> SERVED OTHER	<input type="checkbox"/> BAD ADDRESS(NO SUCH NO. OR ST.)		
<input type="checkbox"/> MAILED	<input type="checkbox"/> INCOMPLETE ADDRESS		
	<input type="checkbox"/> SUBJECT UNKNOWN AT ADDRESS		
	<input type="checkbox"/> OTHER		
NOTE OF DOMICILIARY SERVICE: SINCE ADDRESSEE COULD NOT BE LOCATED, A COPY OF THIS ORDER WAS LEFT WITH THE BELOW NAMED PERSON, OVER THE AGE OF 16 YEARS, AT THE ADDRESS INDICATED.			
NAME & RELATIONSHIP (PRINT)		ADDRESS	

NAME OF OFFICER MAKING SERVICE	EMPLOYEE NO.
--------------------------------	--------------

IN THE MUNICIPAL COURT
CITY OF NEW ORLEANS

State of LA

Parish of Orleans

ADDENDUM

Case No. 1044932

Section D

CITY OF NEW ORLEANS

VERSUS

Kristie Hayes

JAN 28 2010 RECALL ATTACHMENT

2nd attachment

A arrested on this
attachment when arrested
on shoplifting charge -
traffic charge in
affidavit present

8631 So Claiborne Ave
to enroll in GED
DV classes

DEFER CONTEMPT

RELEASE

[Signature]

RESET STATUS 45 DAYS

[Signature]

LAST CHANCE
X V. S. & W. A.

IN THE MUNICIPAL COURT
CITY OF NEW ORLEANS
ADDENDUM
Case No. 104432

Parish of Orleans
Section D

IN THE MUNICIPAL COURT
CITY OF NEW ORLEANS
ADDENDUM
Case No. 104492

Parish of Orleans
Section D

CITY OF NEW ORLEANS
VERSUS
Kristie Hines
MAY - 6 2015
RECALL ATTACHMENT

CITY OF NEW ORLEANS
VERSUS
Kristie Hines
9-17-08

3rd attachment
the case

Altha
Instanta
Attachment & 2500
Cash Bond
No Parole
No Out-of-State Release
No P.O.R. Release

Contempt previously
defused

90 DAYS CONTEMPT, IN LIEU OF
INCARCERATION DEFENDANT MAY
PAY _____ CONTEMPT FINE

SEP 18 2008
RECALL ATTACHMENT
Δ was attended & cleared

Subjects
MS

RESET STATUS 35 DAYS

FINISHED

10/20/08
INSTANTA
ATTACHMENT \$ 2500 CASH BOND
NO PAROLE - NO CINTAP RELEASE
NO P.C.R. RELEASE

IN THE MUNICIPAL COURT
Parish of Orleans CITY OF NEW ORLEANS State of La.

ADDENDUM
Case No. 1944 932 Section D

CITY OF NEW ORLEANS
VERSUS
Kirste HINS
JUL 17 2008

Guilty, Waiver of Constitutional Rights.

I certify that I have been informed and understand the charge to which I am pleading guilty. I also have been informed and understand the following constitutional rights:

- 1. a right to a trial by the judge, and if convicted a right to an appeal;
- 2. a right to confront my accusers;
- 3. a right to have the court subpoena witnesses to testify on my behalf;
- 4. a right to cross-examine all witnesses;
- 5. a right against self-incrimination;
- 6. a right to remain silent.
- 7. a right to be represented by an attorney of my own choice and if I cannot afford an attorney the court will appoint an attorney to represent me, at no cost to me.

By entering a plea of guilty, I am waiving all of the above rights, including the right to have an attorney represent me, and I am incriminating myself. No one has made any promises or inducements in order to make me plead guilty. No one has forced me to plead guilty.

I certify that the judge has addressed me personally as to all these matters, and has given me the opportunity to make any statements I desire.

Kirste HINS
DEFENDANT

IN THE MUNICIPAL COURT
Parish of Orleans CITY OF NEW ORLEANS State of La.

ADDENDUM
Case No. 1044932 Section D

CITY OF NEW ORLEANS
VERSUS
Kirste HINS
JUL 17 2008

90 GUILTY days Suspended condition
\$ 00 M.C.O.F.
Reset for pay 30 days.
\$ 00 JDE

SAE #1 PB
No Abuse

8/18/08

#1 (Cumulation)
Must 30 days

n.l.-h.e. nll ad

COMMITMENT

STATE OF LOUISIANA, PARISH OF ORLEANS, CITY OF NEW ORLEANS
MUNICIPAL COURT

THE CITY OF NEW ORLEANS

Case # 1044932

Section D

EXECUTORY SENTENCE

To the Keeper of the HOUSE OF DETENTION---Greeting:

WHEREAS, KRISTE HINES

who was heretofore charged before me on complaint duly made on oath, with having violated the provisions of City Ordinance No. CONTEMPT OF COURT

Relative to _____

Defendant to be committed for 90 days in the House of Detention in lieu of fine and cost.

Commencing: May 6, 2015

Now, therefore, you the said Keeper of the HOUSE OF DETENTION, are hereby commanded to carry into execution every part of the sentence, and for so doing this shall be your sufficient warrant and authority.

Given Under My Hand at the City of New Orleans, and in the
Municipal Court thereof, this 6th
Day of May, 2015

MARK SHEA/S/

JUDGE, SECTION D, MUNICIPAL COURT



**American Civil
Liberties Union of
Michigan**

**American Civil
Liberties Union
Fund of Michigan**

State Headquarters
2966 Woodward Avenue
Detroit, MI 48201
Phone 313.578.6800
Fax 313.578.6811
E-mail: aclu@aclumich.org
www.aclumich.org

**Lansing Branch/
Legislative Office**
P.O. Box 18022
Lansing, MI 48901-8022
Phone 517.372.8503
Fax 517.372.5121

Western Regional Office
1514 Wealthy SE, Ste. 242
Grand Rapids, MI 49506
616-301-0930

Honorable David B. Herrington
Huron County Courthouse
250 E. Huron Ave, Room 105
Bad Axe, MI 48413

March 17, 2014

Re: Indigency Determination For David Ledger

Dear Judge Herrington:

This letter is in response to a hand written letter from you to Mr. Ledger dated October 25, 2013. Your letter was forwarded to our offices by Mr. Ledger's attorney, Marilena David-Martin, at the State Appellate Defender Office (SADO). Ms. David-Martin forwarded us your letter because she was familiar with the work that the ACLU had done to address "pay or stay" sentences.

Mr. Ledger wrote the Huron County Courthouse because he was informed that you had issued a bench warrant for his arrest for failure to pay \$480 in attorney fees (for his Court appointed attorney) and court costs. In your response you stated, "This matter cannot be resolved by a plea by mail. The \$480 must be paid, or you can serve time in the Huron County jail at a rate of \$30/day." Mr. Ledger is currently incarcerated and indigent. He has no source of income and is unable to pay \$480, and will be unable to pay \$480 when he is released. While Mr. Ledger will certainly seek employment upon release, it is unlikely that he will be able to secure a job while still in prison. After reading your letter, he fears that upon completing his current sentence, he will again be incarcerated at a rate of \$30 a day simply because he is too poor to pay the \$480. We share Mr. Ledger's concern.

Sentences referred to as "pay or stay" or "fine or time" sentences occur when a judge orders a defendant to either pay costs and fines or go to jail. While there is nothing unconstitutional about "pay or stay" sentences when the defendant has the means to pay but willfully refuses to do so, the U.S. Supreme Court has long held that depriving a person of liberty for failure to pay a fine he or she cannot afford violates fundamental equal protection and due process principles. See, e.g., *Bearden v Georgia*, 461 US 660, 672-673 (1983). Indeed, the U.S. and Michigan Constitutions, as well as state laws and court rules, require that a sentencing judge conduct an indigency determination for each defendant before jailing him or her for failure to pay costs and fines.

In *Bearden*, the U. S. Supreme court found that a court, prior to jailing a defendant "for failure to pay a fine or restitution . . . must inquire into the reasons for the failure to pay." *Bearden*, 461 US at 672. Where an individual willfully refuses to pay or fails to make sufficient bona fide efforts to pay, the court may jail him or her. *Id.* But where an individual "[can]not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measure of punishment other than

imprisonment,” such as extending the time for making payments, reducing the fine, or requiring community service. *Id.* “To do otherwise would deprive the [defendant] of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.” *Id.* at 673; *see also Alkire v Irving*, 330 F3d 802, 816 (CA 6, 2003) (imprisonment for failure to pay debt violates both the Thirteenth and Fourteenth Amendments).

Michigan state laws also prohibit jailing individuals who cannot pay certain court obligations because they are too poor. See MCL 780.766(14); MCL 769.1f(7); MCL 769.1a(14); MCL 771.3(8). “Probation shall not be revoked for failure to pay ... court costs absent appropriate findings of fact and conclusions of law on defendant’s claim of indigency.” *People v. Ford*, 410 Mich. 902, 831. Similarly, Michigan court rules permit exceptions to the payment of court fines and costs for good cause. See MCR 1.110 (“Fines, 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.”). If “good cause” in MCR 1.110 is interpreted consistently with the U.S. and Michigan Constitutions, it must include an exception for an indigent person who is unable to pay court fines and costs.

We write to ensure that, before imposing any jail sentence on Mr. Ledger, he be given an indigency hearing. We also seek your assistance in ensuring that indigency determinations are consistently taking place in Huron County before defendants are jailed for nonpayment, and that indigent defendants who cannot pay their fines and costs are offered alternatives to incarceration, such as payment plans or community service.

Please do not hesitate to contact me if you wish to discuss this matter.

Sincerely,



Sofia Nelson
Reentry Project: Skadden Fellow
ACLU of Michigan
2966 Woodward Ave.
Detroit, MI 48201
313.578.6806
snelson@aclumich.org

25 Windsor Y.B. Access to Just. 223

Windsor Yearbook of Access to Justice

2007

Article

Economic Incarceration

Bridget McCormack^{al}

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The adjudication of minor crimes has long proven onerous for defendants. Recently, however, many American jurisdictions have supplemented the “process” burdens associated with minor crimes. They have done so by requiring misdemeanor defendants to pay much of the significant economic costs associated with the adjudication process, in addition to significant fines. These include, for example, the costs associated with electronic tethers, “reimbursement” fees to police and prosecutors, and participation in court-ordered programs, among others. Assessed in so many different forms, such costs are not fully appreciated by misdemeanor defendants until they face the burden of trying to pay them. Unfortunately, courts have not made any attempt to accommodate defendants' ability to pay, instead often requiring a defendant immediately to pay a sum that is simply impossible given the defendant's income. These burdens are being borne by a segment of the population least likely to be able to bear them, as a majority of the misdemeanants are indigent.

There are significant social costs associated with this new trend in minor crime adjudication. First, there are social-welfare losses resulting from lost wages and income tax revenues, the increased costs of new prosecutions and jail sentences imposed when costs, fees, and other economic sanctions are not paid, and indirectly the increased costs of public assistance for low-income defendants who lose their jobs as a result of contempt orders for their failure to pay on time. These costs have to be measured against any increase in county revenues from economic sanctions. But there is a larger problem as well: Courts' recent willingness to impose greater process-oriented economic sanctions for minor crimes cannot be easily justified by any of the traditional theories of criminal punishment. That difficulty, coupled with the questionable social balance sheet resulting from the increased sanctions, casts serious doubt on this emergent trend.

***224 I. INTRODUCTION**

The topic of criminal punishment has been thoroughly investigated. The literature on this subject is robust, and the topic is still alive in the academies. Law students encounter it during their first weeks of criminal law, as the justifications for punishment are the background against which the rest of the material is evaluated.¹ Scholars grapple with its modern implications.² And it continues to animate policy debates as well, most recently in the context of *225 drug sentencing³ and, most animatedly perhaps, the death penalty.⁴

Yet one aspect of the subject - the punishment of minor crimes - remains understudied. That is, the examination of punishment for minor crimes has been considered largely only by implication, as if the general analysis might apply, on some smaller scale. But any such implication is misguided, or so this essay will argue, for the punishment of minor crimes can be qualitatively as well as quantitatively different. At the least, as legislatures and courts show new readiness to increase the penalties for minor crimes, often with little regard for the defendant's ability to bear them, the ramifications of the practice require more attention.

This topic has not been forever overlooked. In 1979, Malcolm Feeley published his classic study of the lower criminal courts, *The Process Is the Punishment*.⁵ Although undertaken by a non-lawyer and limited to New Haven, Connecticut, this book remains the most thorough study available on the topic of punishment for minor crimes. Feeley exposed one central truth pertaining to the vast majority of people prosecuted for minor crimes: regardless of the circumstances of the particular case, most of the punishment received by most criminal defendants was administered *before* their case was resolved. That is to say, punishment in the majority of cases came in the form of burdens incident to repeated court appearances, as opposed to *ex post* sentences. As Feeley's tide suggests, for most people on the misdemeanor docket a quarter century ago, the process itself was the punishment.

And so it is today. The very process of criminal adjudication continues to be onerous in minor crime prosecutions, especially but not only in jurisdictions encompassing large cities. It is often still true, for example, that the night spent in jail before a defendant's arraignment will likely be the only jail time resulting from the case. In large urban jurisdictions, it is also still true that because a great number of misdemeanor cases are eventually dismissed or resolved without formal sanction, defendants' repeated court appearances will likely be their only contact with the court.⁶ As Feeley demonstrated, *226 however, those repeated court appearances often result in heavy burdens in the form of lost wages, hardship and expense in finding childcare, and termination from a job.

Of course, if legislatures and courts intend a system in which the very process of adjudication constituted the punishment for some categories of minor crime, such a result might be understandable and even justifiable. In fact, some data suggests that almost all the crime control benefits in the enforcement of minor crimes come from the arrest, and that subsequent sanctions flowing from conviction add very little.⁷ Thus, in today's legal system, where even minor convictions carry serious collateral consequences,⁸ legislatures and courts might welcome practices for which the process was the punishment, at least so long as sufficient safeguards ensured that those never convicted did not lose their jobs, subsidized housing, or immigration status. Yet no legislature or court has explicitly espoused such a policy, nor has there been any serious analysis of the question.

There is reason to worry. For one thing, in practice, punishment exacted through the process often proves extremely onerous and can therefore seem highly illegitimate to defendants ensnared in misdemeanor adjudication, especially but by no means only to those never convicted. The burdens incurred during frequent trips to court before the resolution of a case, especially given the inflexibility of courts in scheduling matters, certainly constitute grossly disproportionate process-punishment relative to non-minor charges. The night a defendant spends in jail awaiting arraignment, for instance, when a summons to appear could have just as easily been issued, might well be viewed as excessive punishment for many offenses on the misdemeanor docket.

But observers, not only participants, should reasonably question recent practices. Today, a trend in minor crime adjudication towards steeper process-oriented penalties calls for renewed evaluation of the emergent practice of imposing significant economic punishment for minor crime convictions. Punishment-through-process and the burdens incident to repeated court appearances still plague defendants on misdemeanor dockets. But courts are now supplementing the pure process burdens with economic sanctions tied to the process, insisting that misdemeanor defendants pay much of the costs associated with the adjudication process plus hefty fines. Such process-oriented economic sanctions include, just for example, probation oversight fees, tether fees, drug testing costs, police and prosecutor reimbursements, and many other costs and fines, as explained in detail below. This trend is most remarkable in jurisdictions outside of big cities where conviction rates are higher, and especially with respect to certain minor charges.

*227 In fact, in recent years, the increasing fines, costs, and other fees assessed in misdemeanor adjudication have become staggering. The total amounts assessed per conviction, often not obvious because assessed and accounted for in so many different forms, are out of reach for many of the defendants against whom they are assessed. That is, although each newly imposed fee is often viewed as a solitary cost, the cumulative impact of all of the economic obligations creates a significant problem for most defendants. Moreover, the ad hoc fashion with which these sanctions have developed has also stymied any comprehensive evaluation of the issue.

Meanwhile, courts have demonstrated an almost total disregard for the ability of the defendants to afford the amounts assessed, regularly requiring a defendant to pay immediately a sum that is simply impossible given the defendant's income. Yet these burdens are being borne by a segment of the population least likely to be able to bear them, as a majority of the misdemeanants are indigent. To make matters worse, criminal convictions, including misdemeanor convictions, necessarily diminish one's earning capacity and employment prospects, as well as one's eligibility for other social goods, such as professional licenses, some public and subsidized housing, and other public benefits.⁹

The precise costs of this development are hard to quantify with specificity, but they are likely significant. For starters, social welfare losses resulting from lost wages and income tax revenues, combined with the increased costs of new prosecutions when economic fines and other sanctions are not paid and the increased costs of public assistance for low-income defendants who lose their jobs, all have to be measured against the short-term increase in county revenues collected from economic sanctions. There is a larger problem as well: the courts' recent willingness to impose greater process-oriented economic sanctions for minor crimes cannot be easily justified by any of the traditionally understood theories of criminal punishment. That difficulty, coupled with the questionable social balance sheet resulting from the increased sanctions, casts serious doubts on this new practice.

II. THE PRACTICE EXPLAINED

“Punishment for minor crimes” does not mean “minor punishment.” Though the latter is a less unwieldy term, it begs a central question--whether punishment for minor crimes is indeed minor punishment. To address that question, this Essay focuses on *misdemeanors* for which the punishment administered is *economic in nature*. Economic punishment in American jurisdictions is always discretionary. Judges levy fines and costs pursuant to statute, but the authorizing statutes provide few guidelines and enormous *228 discretion. The scope of discretion produces a wide variance in the norms applied by different jurisdictions, and even by different judges within the same jurisdiction. Even so, there is plainly an overall trend toward increasing the number and size of economic sanctions in misdemeanor punishment. Today, economic sanctions are used in all American jurisdictions: large and small, urban and rural.

This practice is especially important considering that the misdemeanor docket makes up a huge portion of the overall criminal docket in America. For instance, in 2004, the State of Michigan prosecuted roughly 66,000 felonies,¹⁰ as against 825,000 misdemeanors.¹¹ Misdemeanors thus accounted for about 82 percent of Michigan's total criminal docket in that representative year. Michigan is by no means an outlier.

The kinds of cases prosecuted on the misdemeanor docket are unsurprising: assaults without weapons or injuries, shoplifting, possession of marijuana, driving while intoxicated or with a suspended license, public disorder offenses, and an increasing number of traffic offenses. While most misdemeanors are punishable by some amount of jail time, that amount is generally small.¹² That said, jail is not generally imposed, even when it is an available sentence.¹³

The misdemeanor docket is often described as largely a “poverty docket.”¹⁴ All of the available data suggests that people in the criminal justice system have limited education,¹⁵ and limited employment histories and opportunities.¹⁶ Approximately 75% of defendants charged with misdemeanors are indigent and therefore entitled to court-appointed counsel.¹⁷ And the quality of representation provided by court-appointed counsel in most misdemeanor courts is typically very low.¹⁸ This is largely true for the felony docket as well, *229 but on the misdemeanor docket, people are charged with crimes for doing things such as stealing food or diapers or driving to work when they have not yet been able to pay an outstanding speeding ticket. In addition, like the rest of the criminal docket, minorities are disproportionately represented on the misdemeanor docket.¹⁹ Men are twice as likely to be charged as women.²⁰

For defendants convicted of misdemeanors, economic sanctions come in many forms. Some of these sanctions, such as fines and costs, have a long history in criminal punishment, but many others are more recent innovations in fee collection. Courts now impose probation oversight fees,²¹ drug testing fees,²² tether fees in driving and sometimes also in non-driving drug or alcohol cases,²³ recovery costs to the prosecutor,²⁴ public defender,²⁵ and police,²⁶ in some jurisdictions application fees to be assigned a public defender,²⁷ as well as the costs of various court-ordered programs.²⁸ While most of these fees *230 are imposed on the defendant as conditions of his or her sentence, some are imposed as conditions of his or her bond while the case is pending and are not refunded to defendants who are acquitted of their underlying charge.²⁹ All of the economic sanctions in misdemeanor cases are for fixed amounts. To most of the individuals against whom they are assessed, the amounts are very significant, whether measured as a percentage of their weekly or monthly income, or by a broader look at their ability to pay, or by any other reasonable measure.

The increasing criminalization of traffic offenses accounts for part of the expansion in the misdemeanor docket and constitutes one important case study on the topic of economic sanctions. That is, most states have begun to impose onerous restrictions on driving privileges for the failure to pay traffic tickets. In Michigan, for example, a driver who fails to pay a speeding ticket on time will have his or her license administratively suspended. Drivers must then pay a fee of \$125 to \$250 to reinstate the license.³⁰ This fee is of course added to the amount already due on the speeding ticket, plus any surcharge for late payment.

When a license is administratively suspended, a notice of the suspension is sent to the address on the driver's license which, especially for the transient population living in or at the margins of poverty, is often no longer correct. If the driver does not receive the notice, or receives it but does not respond, a court will issue a bench warrant. That bench warrant will require the driver's personal appearance in court and payment of the "bench warrant fee" in order to have the warrant vacated.³¹ In the meantime, if the driver is pulled over by the police for any reason, legal or illegal, and shows them his or her license, he or she will be charged with the crime of driving with a suspended license ("DWLS").³² This charge is a misdemeanor, and carries an authorized sentence of up to \$500 and/or 93 days in jail for a first offense, and up to \$1000 and one year in jail for a second offense.³³

As will be shown below, however, the authorized fine is only one of a number of economic obligations a defendant convicted of this offense will owe the court. This new misdemeanor is a strict liability statute, which means the prosecution will not have to prove any intent or knowledge on the part of the driver to convict him or her. This new criminal charge will require its own new round of court appearances, with corresponding fines, costs and other economic sanctions that also must be paid before the license can be reinstated. Once convicted, the state agency which issues (and suspends) *231 licenses imposes another fee, the "Driver Responsibility Fee" which requires that the defendant pay the agency \$500 a year for two years.³⁴ The DWLS charge is the fastest growing charge on many state misdemeanor dockets.³⁵

Defendants convicted of misdemeanors are often surprised by the sum total of the economic obligations imposed against them. There is nothing about the process that forewarns of the totality of the large penalties assessed, and it is not clear that even lawyers fully appreciate the entire range of economic sanctions imposed on their clients.³⁶ Specific examples of the problem illustrate this best.

III. ILLUSTRATION OF THE PROBLEM

Consider the following sets of economic sanctions for three typical misdemeanor cases on one district court docket in Washtenaw County, Michigan, in 2006.³⁷ By way of background, Washtenaw County is in relevant ways a typical American county with a typical misdemeanor docket.³⁸ The defendants charged on the docket are representative of those charged in similar counties across the country, in the ways noted above.

For the purposes of this study, the sentences imposed on all of the cases sentenced by this court from November 30th through December 13th, 2006 were recorded. So were all on-the-record interactions between defendants and the court about defendants' abilities to make payments on the economic sanctions imposed. When interactions between defendants and their counsel were conducted out in the open, those were recorded as well. The specific misdemeanors described below were selected because they are representative with respect to economic sanctions imposed.

A. Examples: Three Common Misdemeanors

Defendants convicted of driving under the influence of alcohol (drunk driving)³⁹ on this docket, for example, were required to pay several fees, with only minor variations from case to case. The largest fee was \$1040 in fines and court costs, and this fee was assessed against all defendants. They were also often assessed a \$100 "recovery fee" for the Michigan State Police and a \$100 "recovery fee" for the Washtenaw County Prosecutor, both intended to offset *232 the county costs of policing and prosecuting their crimes. All defendants convicted of this crime also had to pay the costs of their alcohol "tether." This sanction is required as a condition of bond and costs \$100 to enroll in the program and either \$10 or \$15 per day⁴⁰ for the entire period of pre-trial release, and sometimes through part or all of a defendant's sentence.

The alcohol tether was used in every drunk driving case recorded. The county's corrections department administers the tether service for the courts. The service permits the agency to read the defendant's breath alcohol content any number of times a day by requiring the defendants to record this content via a device attached to a land phone line. The land phone line requirement is an added financial burden to many of the defendants who rely on calling card and pay phones for phone services and are required to install a land-line to comply with this bond condition.

There were additional costs as well. Defendants convicted of drunk driving were also required to complete a court-sponsored alcohol program, which cost another \$250 - \$300.⁴¹ In addition, they were ordered to contribute to the cost of their own probation supervision at a rate of \$20 per month.⁴² And, like many other probationers, they were required to pay the cost of random drug and alcohol screens.⁴³ The total court-bill for the misdemeanor conviction of driving under the influence of alcohol, then, assuming the defendant paid all ordered costs in full on time, and thus did not incur any additional fines or fees for late or non-payment, was approximately \$3000.

But the court bill is not the only bill offenders convicted of this charge will face. Once convicted of drunk driving, the state agency which issues licenses suspends the offender's license for six months, and it will cost the driver \$125 - \$250 to reinstate it.⁴⁴ In addition, the agency will impose a "Driver's Responsibility Fee" on the offender which will cost the driver another \$1000 a year for two years.⁴⁵ All told, in order for the defendant to complete payments to the court and to the agency for his drunk driving conviction would cost over \$5000.⁴⁶

*233 Defendants convicted of driving with a suspended license⁴⁷ were treated uniformly as well, again with only minor variations. These defendants were sentenced to pay \$710 fines and costs. Some were also required to pay \$75 to serve in the "jail-work program." In the county's jail-work program offenders report to the county jail in the morning and are "admitted" for the day during which they perform work projects for the county, under the supervision of jail employees. At the end of the day they are "released," to return the next day if sentenced to more than a single day in the program. On top of that, some DWLS offenders were required to complete a "traffic safety program."⁴⁸ A defendant facing this conviction would need approximately \$1000 before he or she could satisfy her court-ordered economic obligations. In these cases, the fines and fees imposed directly by the court were only part of the economic sanction, however. As explained earlier, these defendants also faced a separate set of costs assessed by the state agency which issues drivers' licenses to restore a license, including a reinstatement fee, which runs from \$125 - \$250⁴⁹, and a "Driver's Responsibility Fee," which will cost another \$1000 total.⁵⁰ All told, to comply with court and agency economic obligations, the defendant would owe at least \$2000 as a result of this charge.

Defendants convicted of shoplifting⁵¹ on this docket faced a similar set of economic sanctions. These defendants were generally sentenced to pay \$765 in fines and court costs. They were required to complete a theft offender treatment program which cost \$100.⁵² Like many of the other defendants, shoplifters were also sentenced to pay for their probationary supervision at a cost of \$20 per month and they were required to pay the costs of random drug screens, at the cost of approximately \$20 to \$25 per test. They were also required to complete 50 hours community service. A defendant convicted of this charge was facing a total of approximately \$1500, again assuming all obligations were paid in a timely way.

But the total size of the economic sanction imposed for each crime was not, itself, the most difficult aspect of the sanction for the defendants in question. The bigger problem was time. These economic sanctions are imposed essentially on a “pay or stay” basis. That is, the defendants convicted on this docket were given from (in most cases) a couple days to pay the fines and costs associated with each sentence to (in a few cases) a few weeks. For those failing to pay on time, which formally constituted a part of their sentences, the court issued a bench warrant. The bench warrant required defendants in violation of their economic sentences to appear in court and pay a “bench warrant fee” in order to have that warrant vacated and to be sentenced anew on the violation of the sentence or condition of probation. Here is the rub: These violation sentences almost always include more fines (and sometimes jail).

*234 Table 1 summarizes the costs and fines assessed against misdemeanants for the mentioned crimes:

Table 1.

	Drunk Driving	DLWS	Retail Fraud
Fines and Costs	\$1040	\$710	\$765
Recovery Costs to police, prosecutor, public defender	\$100 - \$300	N/A	N/A
Tether fees	\$100 + \$10- \$15/ day	N/A	N/A
Treatment Programs	\$250-\$500	N/A	\$100
Probation Fees	\$20/mo.	N/A	\$20-50/ mo.
Drug Screening	\$25/ wk.	N/A	\$25/ wk
Traffic Safety Program	\$100 - \$300	\$100 - \$300	N/A
Driver's License Reinstatement Fee	\$125-250	\$125-250	N/A
Driver's Responsibility Fee	\$2000	\$1000	
Alcoholics Anonymous Meetings	\$20/ per (between 2 and 20 given)	N/A	N/A
Jail Work Program	\$75/day	\$75/ day	N/A
Community Service	N/A	N/A	Up to 50 hours
POSSIBLE TOTAL	@\$5500	@ \$2200	@\$1615

B. Individual Consequences

Two things happen to those who cannot pay on time. More fines are assessed for their failure to pay, or for paying late, and, if misdemeanants still cannot find a way to pay, eventually they are incarcerated. In response to such consequences, it is not

uncommon for defendants to promise the court their student loan money,⁵³ their grandmother's Supplemental Security Income [SSI] check⁵⁴, or their father's minimum wage paycheck,⁵⁵ all of which the court accepted.

This plays out in one of three general ways in the courtroom, on the occasion of defendants reporting to the court for their misdemeanor sentencing. One group of defendants runs.” That is, some defendants show *235 up in court for their sentencing only to be informed by their attorneys, often public defenders, that they will have to find a considerable sum of money to pay that day. Hoping to avoid the unavoidable, they simply leave the building before their case is called. There were a number of examples in the studied cases of defendants choosing this response. For example, Mr. Jermaine Moore,⁵⁶ a black man who appeared to be in his twenties and qualified to be represented by the public defender, was present in the courthouse on the morning of his sentencing. But when he was told by his public defender that he needed more money or the judge would put him in jail, he disappeared. His public defender reported these facts to the court when his case was called, and as the judge issued a bench warrant for his arrest, he joked that he's probably out dealing drugs in the parking lot”⁵⁷

A second group of defendants tries to reason with the judge about their ability to pay, and ultimately succumb to the judge's bullying in the face of all reason based on the financial evidence they presented. For example, Mr. Jon Tate,⁵⁸ also a black male who appeared to be in his twenties and who was unrepresented by counsel, was being sentenced on his conviction for drunk driving. Mr. Tate showed up with \$162 and hoped to make arrangements to pay the balance. Mr. Tate owed a total of \$1040 in fines and court costs, \$200 in back probation fees, and \$162 arrearages on his tether. The tether would continue for another month, probation for another 12 months, and he still had to attend two Alcoholics Anonymous meetings a week, a limited outpatient program, and random alcohol screens at his expense. Tate asked for three weeks to pay the remainder of the fines and costs which were due. The judge took him into custody, and ordered him to find anyone” who could get him all the money that day. Tate made some calls, and after remaining in custody for two hours reported that he had found someone who would pay all the money that day. The judge warned, if it isn't paid today, I am issuing a bench warrant for your arrest.”⁵⁹

Another example was Ms. Amy Butler,⁶⁰ a white woman who appeared to be in her twenties and who qualified for court-appointed counsel, who was sentenced for her conviction for failing to report an accident Ms. Butler owed \$595 in fines and costs and was \$56 in arrears on her tether. She started by asking for 60 days to pay, and then quickly moved to 30 days to try to counter to the judge's negative response. The judge ordered her to borrow the money and pay it all that day. She agreed, but there was no evidence that would lead any reasonable observer to believe she would be able to manage same-day payment.

Yet another example was Ms. Margaret Emerick,⁶¹ a white woman who appeared to be in her forties and who qualified for court-appointed counsel, who was being sentenced for her conviction for larceny. She owed \$1420 in fines and costs and \$982 in restitution. She still had to complete a theft *236 offender program, which would cost her another \$100. Ms. Emerick showed up to court with \$710, and informed the judge that she had arranged with the prosecutor to pay the rest in monthly installments, who agreed. The judge refused to honor the agreement and ordered the whole amount due within two days.

Yet a third group of defendants makes a good faith effort to pay, but is taken into custody anyway. For example, Ms. Lisa Sorrell,⁶² a white woman in her twenties who qualified for court-appointed counsel, was sentenced for receiving and concealing stolen property. Ms. Sorrell owed a total of \$1420 in fines and court costs. She informed the judge that she was a single mother living with her own parents and not working because she had just gotten over a disabling injury. She arrived at court with \$25, and asked for a payment plan to pay off the balance. After a lengthy speech about personal responsibility, the judge took her into custody and told her that she had to find someone from whom she could borrow the whole amount if she wanted to be released. Hours later her father showed up and told the court that he could give the court his entire \$250 paycheck when he received it the next morning. The judge accepted this offer, and required the payment of the balance within one month.

Ms. Holly Lamon also fell into this category.⁶³ Ms. Lamon, a white woman in her twenties, was sentenced for her conviction for drunk driving. Ms. Lamon owed \$1040 in fines and court costs, and \$209 in recovery costs to the police department and

prosecutor. She had yet to complete the county's alcohol awareness program, which would cost another \$250 - \$300, or to attend six Alcoholics Anonymous meetings. She came to court with \$600 and asked to pay the balance within two weeks due to other financial obligations. The judge responded that her immediate payment was a “matter of priorities” and, considering hers not to be in order, took her into custody.

These examples illustrate pleas that make it into the court record. It is not difficult to imagine similar stories that do not get aired in open court. Not every offender has funds within his or her reach to misallocate--a father with a minimum wage paycheck coming tomorrow, or a grandmother with an SSI check coming Friday, or a Pell grant expected next week -and some are forced instead to participate in the illegal economy to meet the terms of their economic sentence or to fail to meet them.

Almost certainly all of these examples are generalizable. For a number of reasons, pay-or-stay economic sanctions are on the rise in jurisdictions across the country.⁶⁴ Often the driving impetus for increased economic sanctions is as simple as counties' needs for revenue. Relatedly, jail overcrowding (and counties' reluctance to pay for more jails) is another part of the likely explanation. Add to these explanations a growing national stomach for stricter sentencing and, on top of that, changed views over the past decade towards the poor generally. In post-welfare America, the division of the “deserving” and the “undeserving” poor, also known as the “working” and the “non-working” poor, has become a comfortable and palatable basis for making *237 policy distinctions.⁶⁵ This is an intelligible, if unfortunate, line for policymakers to draw.

But the larger social consequences of this phenomenon warrant more investigation. On the one hand, it is worth considering with an open mind possible justifications for this type of punishment. That is, as the state moves from spending money on criminal punishment to collecting money from criminal punishment, one might hope or expect that the practice finds justification in some more general theory of criminal punishment.⁶⁶ Even if revenue-collection, rather than some more general theory of punishment, motivates the practice, at least some theory might justify it nevertheless. At the same time, any adverse and especially unintended social consequences of greater economic sanctions also warrant careful analysis too, in order to understand just how much weight any justification of the practice must carry.

IV. PURPOSES OF CRIMINAL PUNISHMENT

Utilitarian and retributive justifications animate criminal punishment. And indeed, criminal punishment often is thought to be justified in part by both.⁶⁷ Retribution is straightforward: If the defendant deserves to be punished, we have a duty to punish him. His moral desert is a sufficient reason for punishing him. No additional reason for punishing the defendant does any work for a retributivist. To a retributivist, other positive effects of punishment--safety for a community, deterrence for individuals or society--are irrelevant to *the justification* for punishment. These benefits might be considered fortunate side-effects, but that is all they are. While retributivists are not committed to any particular punishment system, they are committed to the idea that the punishment must “fit” the crime. And while retributivists might not all agree that an eye be paid for an eye, they would agree with the more general proposition that punishment be measured to match desert.⁶⁸

Utilitarian theorists bundle various benefits of punishment in arguing that punishment is generally justified. Among the benefits most emphasized by utilitarian punishment theorists are specific deterrence, general deterrence, incapacitation and rehabilitation.⁶⁹ Each of these does some positive social work justifying criminal punishment, and utilitarian theorists differ as to the *238 value of each. Utilitarian theories of punishment have driven most American punishment policy and American jurisprudence for decades.

Many theorists, as well as most policy-makers, are compelled by both utilitarian and retributive theories of punishment, hoping to achieve both retributive and deterrent goals in fashioning criminal punishments. Having said that, in the context of minor crimes, deterrence and reform are featured above incapacitation, itself a familiar and central goal of criminal punishment. This is true because minor crimes by their nature are not those for which incapacitating wrongdoers is thought to be appropriate. First,

and almost tautologically, minor offenses do not injure society enough to warrant divesting those convicted of their liberty, or taking them out of productive society. Second, the substantial costs of incapacitation are not thought to be worth it for those convicted of only minor crimes.

Whatever the specific purposes and justifications of criminal punishment, there is also general consensus that specific forms of punishment must be fairly applied. That is, sentences must be perceived as fair and proportionate to the wrong done. Punishments administered must also be broadly applicable and enforceable. In other words, punishment must not only advance theoretically justified goals, but it must be practically administered in a way that preserves rather than jeopardizes its justification. Thus the Federal and State Constitutions require that punishment be proportional, and not cruel and unusual.⁷⁰ While these constitutional limits leave room for many different sentencing options, they constitutionalize norms of proportionality and evenhandedness.

While much commentary considers the application of traditional theories of punishment to major penalties, especially in the context of the death penalty and long-term incarceration,⁷¹ these theories have not been explored in connection with economic sanctions for minor crime. Thus, policy discussion surrounding sanctions for minor crime tend to focus solely on state and county revenue collection, not on theories of punishment,⁷² and they leave open important questions about the fit between such theories and the emergent sanctioning practice described.

It is not difficult to imagine what connections policy-makers might make, if required to do so. At first glance, substantial economic sanctions arguably further both retributive and utilitarian goals. Retribution is served by any system of punishment, including economic sanctions. Further, economic sanctions are directly compensatory: The offender pays his debt to society not metaphorically but literally. Similarly, economic sanctions appear to serve utilitarian goals of general and specific deterrence, discouraging similar conduct by (again literally) raising the costs of breaking the law. In other words, the deterrent effects of charging money for breaking the law could certainly be argued by policy-makers interested in raising the cost of crime to offenders.

***239** Incapacitation, on the other hand, seems not well served by economic sanctions, again at least at first glance. By fining someone instead of jailing them, you are not incapacitating them in the traditional understanding of that term. But only at first glance: In practical terms, economic sanctions can in fact render someone incapacitated. While perhaps not exactly incapable of (re)committing the crime, many convicted misdemeanants become incapacitated in the sense that they are no longer able to function as productive members of society as a result of the fines and fees they owe to the court. They are “removed” from society in the sense that the impossible is asked of them, and then they are punished again when they cannot deliver the impossible.

This is so because of the haphazard way in which economic sanctions have evolved. New costs for the various parts of a defendant's sentence are added without any clear view of the sum total the defendant ends up owing with each conviction nor of the realistic probability that he or she can pay this obligation. Without any comprehensive understanding of the various fees, fines, and other costs imposed on a criminal defendant, then, the criminal justice system's ability to serve traditional goals of punishment is lost in the application. The following section explains.

V. THE ADVERSE SOCIAL CONSEQUENCES OF ECONOMIC INCARCERATION

None of the traditional theories of punishment easily vindicates increased reliance on economic sanctions for minor crimes when the phenomenon is considered on the ground. As noted, the economic punishments assessed are often too severe for most defendants to be appealing to most retributivists. Because they are not well calibrated, it is hard to imagine that most retributivists would find them satisfying. Again, retribution works as a justification for punishment only to the extent that punishments are proportional to desert. The moral culpability of the offender requires that he or she be punished, but only as far as is deserved. With the sanctions described above, most people pay a lot more than an eye for the eye. Misdemeanor sanctions often instead resemble an ad hoc occasion for excessive county taxation.

Deterrence is more complicated. To the extent the new system deters, which to some extent it must, it may be justified on that ground. Once it is understood that minor crimes bring substantial penalties, presumably those who understand as much will be less likely to engage in criminal behavior. One can reasonably quarrel with the size of any such deterrent effect, especially given the socio-economic class of many misdemeanants and their likely awareness of and response to the magnitude of sanctions. But the effect is probably not zero.

At the same time, however, pay-or-stay economic sanctions can lead to some perverse deterrence results by encouraging new illicit behavior. That is, in contrast to spending excessive time in jail--where it is difficult to repeat a crime--too much *economic* punishment can directly inspire wrongdoing among convicted misdemeanants struggling to comply with their out-of-reach economic obligations. By setting people up to fail to meet these court- *240 ordered economic obligations, the system is asking them to do whatever it takes, even if whatever it takes is selling drugs in the parking lot. To the extent this happens, any limited deterrence value gained from punishing minor crimes severely may be undermined by encouraging the commission of other crimes or undesirable behavior. To put it one way, the ex ante deterrence benefits of expanded economic sanctions have to be balanced against the ex post deterrence costs.

The regress that many poor defendants experience upon being convicted of driving with a suspended license is an acute example. Once a defendant loses her valid license and is facing literally over two thousand dollars in court and administrative costs to get it reinstated, it is nearly impossible not to reoffend. In Michigan (home of the automobile), public transportation simply will not get most people to most jobs, the place where they can legally earn the income to attempt to get their licenses back. Poor people who end up convicted of this charge re-offend over and over again, and these people are sometimes caught. Each time they are caught, the fines and costs mushroom.⁷³

In addition, the lack of any predictable link between the sanctions applied and the behavior to be deterred in this context may also undermine the deterrence yields of economic sanctions. Finding family members who will turn over their minimum wage paychecks, making whatever sacrifices that entails, to satisfy one's court-ordered economic obligations is not obviously linked to the nature of any particular offense. Rather, the punishment seems incidental and almost accidental. Put differently, increased economic sanctions may accomplish some specific deterrence, but little general deterrence. In any event, whatever deterrence benefits there are must be weighed against the shortcomings of this practice. Again, it is not a justification to be able to point to benefits alone. The policy question concerns the net consequences of the practice.

There are reasons to doubt that there are *net* benefits. For starters, there is no question that there are more cases on courts' dockets as a result of defendants failing to pay their economic penalties on time. These inflated prosecution costs parallel the increasing costs of the process for the defendants, both in terms of additional dollars in the new fines and fees and of lost time. Increased process for defendants has been shown to have real economic costs, most commonly in the form of lost wages and jobs.⁷⁴ Lost jobs lead, of course, to increased public assistance costs and reduced revenue collection in the form of income taxes. And, as previously shown, the class of people paying these collateral costs are the least able to do so. Already struggling with the effects of the criminal conviction itself on employment prospects, defendants also quickly learn that the inability to satisfy court-ordered financial obligations is recorded on a credit report,⁷⁵ making economic progress nearly impossible. In a growing number of states, an unpaid court-ordered economic obligation will also prevent the defendant from voting.⁷⁶

In addition, there is no question that this practice results in the *241 misallocation of other sources of government money and family money for some defendants to pay their economic sanctions. In just a few examples from one courthouse on just a few dockets, defendants were applying student loan grants, relatives' social security checks, and a father's minimum wage paycheck to satisfy their judgments. All of this undermines the integrity of the criminal justice system.

To recast the critique in more general terms, the practice of imposing economic sanctions at a level impossible for most defendants to succeed is not a defensible way to run a legal system. The practice is not based on clear rules, given the haphazard way in which the various fines and costs have evolved, and given the fact that the various costs are not generally understood by

the participants going into sentencing. At the same time, there is no overall accounting done by any of the players in the system which puts defendants on notice of the sum total they will likely owe. Because not all lawyers fully anticipate the many pieces of these punishments, they do not do a very good job advising their clients about them. Defendants certainly are often surprised at the time of their sentence when the court reads off the panoply of costs they owe almost immediately.⁷⁷

Because there is no obvious link between the crime and the economic punishment, the practice is, for that separate reason, not fair. A criminal defendant should have the potential to complete his sentence. But the system described above keeps individuals ensnared in it. The practice therefore undermines one aspiration of the legal system, which is an independent strike against it. If it served some instrumental purpose well, that might redeem the practice somewhat, but it does not. So there are many reasons to worry.

Another perverse result of this system--a very common yet underappreciated result--is that convicted offenders often prefer incarceration over economic sanctions. This stands the usual or assumed hierarchy of criminal punishment on its head. The non-poor consider jail time to be worse than fines or fees. But because incarceration is not a pure impossibility, as finding thousands of dollars may be, many indigent defendants do not share this view.

For example, in one recent case students of the University of Michigan Clinical Law Program represented a young woman on a shoplifting charge.⁷⁸ She was nine months pregnant at the time of sentencing, and had a two year old and a three year old. She received social security disability (SSD) payments each month for her psychological disabilities. She had no other income, and there were no other adults in her household. She was accused of, and pled guilty to, stealing diapers from a Target store. Her fines and costs were the standard amount, totaling approximately \$1000. Paying these would consume two months of her SSD income leaving her with nothing left for food, rent or other basic needs.

This client told her student attorneys explicitly that she wanted to go to jail instead of pay the fines. She rightly assumed that she would be sentenced to *242 no more than 30 days.⁷⁹ For her, this choice was entirely rational. She believed she could do the time, even if it meant having her next baby in jail, but she knew she could not pay the fine. It was an “unserveable” sentence for her.⁸⁰ Compare this to the typical white collar criminal, eager to pay any amount to stay out of jail. If you have the means, paying is easy, and the stigma of jail is great. Economic sanctions are different than jail in this important way; any defendant can do time, but only some defendants can pay to avoid it.

In this light, high economic sanctions for minor crimes more clearly resemble incapacitation. The economic sanctions described above often do “incapacitate,” just not in the way that term is commonly used in criminal punishment. They do not incapacitate offenders from committing additional criminal acts. In fact, the very opposite might be true, as just observed. But economic sanctions incapacitate not just people who struggle to pay them illegally, but also people who struggle to pay them legally, and with lots of collateral costs. In fact they often incapacitate entire families.

These ironies and defects notwithstanding, the problem with excessive reliance on economic sanctions for misdemeanors is not one susceptible to any easy constitutional fix. Eighth amendment jurisprudence will not reach economic sanctions. While it is clear that the disparate punitive impact of the fixed sum sanctions among offender groups distorts the principle of proportionality in sentencing, all of the proportionality doctrine concerns long prison sentences for seemingly minor crime, and even then it is generally not held to prohibit those long sentences.⁸¹ Equal protection arguments might be the most likely to succeed. There is authority for the proposition that a court cannot incarcerate someone who cannot pay.⁸² But there is no authority yet for the proposition that a court cannot coerce people to make their grandmothers or parents give up their monthly fixed income, or worse-- functionally requiring them to participate in the illegal economy--to satisfy the court's sanctions.

VI. THREE OBJECTIONS (AND REPLIES)

One fair response to the above critique invokes the potential upside in *243 revenue collection and the expense saved by avoiding jail overcrowding and incarceration. That is, it could well be argued that the financial benefits to the state or county through increase in revenues, together with the avoided costs of operating local jails, justifies broader and deeper economic sanctions as punishment for minor crimes. While increasing revenues and avoided expenditures might well be justifiable *goals*, neither is a *justification* for punishing someone in the first instance. To the extent they are justifiable goals, these goals are realized, if at all, only if the increased revenues exceed the sum total of the increased costs generated by more prosecution, the costs of more public assistance, and the reduction in tax collection. The question of how these varying social costs net out does not have an obvious answer, but since many of these defendants end up in jail when they ultimately cannot pay, economic sanctions might well create rather than save costs.

Part of the trouble here is that the revenues from higher economic sanctions flow only to the county, whereas the costs created by the same system are borne by the county (as a result of increased prosecutions), by the state government (as a result of increased social welfare expenditures), and also by the federal government (as a result of increased social welfare expenditures and decreased tax revenues from misdemeanants who lose their jobs). Because counties do not bear the full costs of their decisions to rely on economic sanctions, as they externalize some of those costs on higher levels of government, there is no reason to believe that counties make socially appropriate decisions.

An alternative defense of the system of increased economic sanctions is that there is some social value in requiring that transgressors contribute to the cost of processing their transgressions. Insofar as economic sanctions are meant to cover the costs of running the criminal justice system, those who require the operation of the system should bear some of its costs, even if this entails some undesirable side-effects. This defense has some merit, but it certainly does not end debate. While there may be some benefit to having transgressors contribute to the costs of operating a criminal justice system, that is true only to the extent that the assessment of those costs is calibrated to take into account both the actual costs of operating the criminal justice system and the misdemeanants' ability to pay those costs. Whether evaluated relative to the seriousness of their crimes, the costs of prosecuting their crimes, or their ability to pay, misdemeanor defendants are punished disproportionately relative to other criminal defendants. This observation argues not for scrapping economic sanctions all together, but for finding a way to make them rational. This concept raises a final anticipated objection.

It would also be reasonable to argue that the above critique has not shown that the system is wholly flawed, just that it is too crude. Economic punishments could be recalibrated to fit the crime and the criminal, and then the objections raised here would be mooted. Relatedly, in the absence of an alternative proposal for improving the current system of economic punishment, any critique of the status quo is weak. For any punishment scheme must be judged against its alternatives, and critiques that do not *244 take into account any comparative analysis are not very powerful.⁸³ Certainly economic punishment should not be categorically excluded from the menu of available punishment choices. There are examples both from history and from other cultures which show this to be correct, as follows.

VII. ALTERNATIVES: RATIONAL MINOR CRIME PUNISHMENT

In the late 1980s the borough of Staten Island in New York City piloted a project based on what is known as the "European day-fine." In Northern Europe, the fine is the primary non-custodial penalty in criminal cases, not only for misdemeanors but also low-level felonies. The day-fine systematically links the fine imposed to the offender's ability to pay. Staten Island used the West German and Swedish day-fine procedures to model its pilot project. It met with success.⁸⁴

The system for administering this rational economic sanction was not complicated: Each offense was assigned a number of day-fine "units," ranging from a low of five units for the most minor offenses to a high of 120 units for the most severe.⁸⁵ In addition, each offense was assigned both a "discount" and a "premium" number of units to give the court additional flexibility and to encourage judicial discretion in accounting for the mitigating and aggravating circumstances of individual cases. The value of the day-fine unit was then set in direct relation to the offender's economic means. The specific value of the day-fine

unit for an offender was her daily net income, adjusted as necessary for basic personal needs and family responsibilities.⁸⁶ Because this information was regularly collected at the arraignment stage for purposes of assigning counsel and making bail determinations, there was no additional burden placed on the court to arrive at a fair day-fine unit. In addition to particularized information about the day-fine unit value assigned to each person, the court also instituted particularized, and realistic, payment plans. The installment plans had short time frames and were set in relation to the offenders' payment patterns (their payments were due the first work-day after payday, for example). For low-income defendants, or those on public assistance, the formula mimicked that used by public assistance agencies when recouping overpayments made to clients. In New York City, the rate for withholding in welfare overpayment cases was ten percent of the public assistance grant, and therefore that was percentage used to calculate the ***245** amount of monthly fine payment for low-income offenders.⁸⁷

Published reports indicate that the program was a success. Apparently judges found it easy enough to administer, as it was used in 73% of all fine cases during the first year of the pilot. It was clear, too, that judges used the program properly to differentiate among offenders of different means, as there was great dispersion of fine amounts within the ranges permitted for each offense. Perhaps most importantly, the high number of offenders who completed their payments is the greatest measure of the program's success.⁸⁸

If it worked in Staten Island, with its busy urban docket, it seems transferable to just about any jurisdiction. A jurisdiction interested in adopting a day-fine system would be able to do so without adding significant infrastructure, if any at all. Courts in every American jurisdiction already collect enough basic economic information from the defendants who qualify for court appointed counsel, and some collect this information from every defendant, at arraignment or shortly thereafter. Most jurisdictions have an agency or service which conducts this process. Depending on the specific information collected, the jurisdiction might already have the basis for determining the day-fine amount for each offender if convicted. Assigning units to offenses is a one-time, very short-term project.

However, this program assumes that economic sanctions are appropriate in the first instance, and this might not be a correct assumption for some of the cases on the misdemeanor docket. For example, the bootstrapping practice of criminalizing driving with a suspended license when the reason for the suspension was a failure to pay a ticket, and then fining again for the new criminal charge seems counterproductive. This particular charge should not carry an economic sanction at all. If much of the crime control benefits from policing misdemeanors are achieved from the initial arrest and the ensuing significant burdens of appearing in court on this crime (as Feeley showed), a fine at the end of the case accomplishes little. This fact, together with the risk for economic costs to the state when defendants find themselves unable to climb out of a financial hole such as this one, argues for non-economic sanctions for this particular offense.

In addition to calibrating fines to match the individual offenders, sanctions should be calibrated to match the individual charge for which they are imposed. Sometimes little or no sanction, apart from the stigma of a criminal conviction and the considerable resulting collateral consequences of that--lost employment opportunities, immigration status, public housing and licensing opportunities--should be imposed. In fact carrots, rather than sticks, might better serve the goals of punishment for some offenses, as in the case of DWLS. Courts could cleverly but realistically incentivize the possibility of coming out of the case without a conviction: If the defendant comes back to court with proof that his license has been reinstated by the agency within some reasonable period of time, the court would dismiss the DWLS charge. If the goal of criminalizing DWLS is to be certain to get the attention of the offender who is driving without the state's authority, this ***246** approach would be well served by such a system. The court's jurisdiction, and threat of punishment, would serve the attention-getting goal. The chance for the defendant to avoid a criminal conviction and its costs, as well as to avoid paying an insurmountable sum to the court and the state agency, would underscore that goal and promote socially desirable behavior.

Additionally, particularized sentencing in the context of economic sanctions will better serve traditional punishment goals. Asking people to repay their debt at a level determined to be difficult but, crucially, not impossible will square with traditional understandings of retribution. When economic sanctions are not achievable--when in practice they amount to a form of economic incarceration--it is impossible for people to take them seriously, and therefore to be appropriately deterred by them. Sanctions

which people can pay, even with difficulty, will better advance deterrence goals. Finally, squaring economic sanctions with the general goals of punishment will also improve the legitimacy of the criminal justice system generally, and not just for those directly involved.

VIII. CONCLUSION

The current American practice of assessing fixed-sum fines, fees, and program and supervision costs in punishing minor crime is bad policy and undermines the integrity of the criminal justice system. Economic sanctions are not like other sanctions; they are potentially more disproportionate than any other sanction and therefore should be used carefully. Moreover, the group of offenders burdened with them is exactly that least capable of bearing the burden, an important fact against which reliance on economic sanctions should be evaluated. The increasing criminalization of “status offenses” as in the case of the failure to pay a speeding ticket, one of the associated costs of driving, should inspire even more caution towards economic penalties, as should the often hollow promise of the right to counsel in misdemeanor prosecutions. As American jurisdictions seem increasingly quick to embrace economic sanctions for misdemeanants, with an apparent single-minded focus on revenue collection, scholars and policy-makers should encourage more careful consideration.

Footnotes

- ^{a1} Associate Dean for Clinical Affairs and Clinical Professor of Law, University of Michigan Law School. This paper was presented at the University of Windsor Law Faculty in the 2006-07 Distinguished Access to Justice Lecture. I would like to thank the participants for their helpful questions and comments, and Professor William Conklin in particular for inviting me to participate. I would also like to thank Dan Clark for his excellent research assistance, and Kim Thomas, Juliet Brodie, Paul Reingold and especially Steven Croley for their helpful comments and ideas.
- ¹ See e.g., Joshua Dressier, *Cases and Materials on Criminal Law*, 3d.ed (West Publishing Company, 2003) at 30-62.
- ² The contemporary debate is most robust in the death penalty context. Indeed, Cass R. Sunstein and Adrian Vermeule have recently enlivened the deterrence debate surrounding capital punishment, arguing that in some regions capital punishment might deter eighteen murders for every single execution. See “Is Capital Punishment Morally Required? Acts, Omission, and Life-life Tradeoffs” (2005) 58 *Stan. L. Rev.* 703. Other scholars disagree with Sunstein and Vermeule's conclusions. See e.g. John Donohue and Justin Wolfers, “Uses and Abuses of Empirical Evidence in the Death Penalty Debate” (2006) 58 *Stan. L. Rev.* 791 at 794; Jeffrey Fagan *et al.*, “Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty” (2006) 84 *Tex. L. Rev.* 1803 at 1806.
- ³ See e.g. the Drug Policy Alliance's website capturing the debate, online: Drug Policy Alliance <<http://www.drugpolicy.org/drugwar/mandatorymin/>>; *Real Time with Bill Maber* on the “Stupid” Drug War, online: YouTube <<http://www.youtube.com/watch?v=RGyq8FwV6a0>>; Derrick Z. Jackson, “The Politics of Drug Sentencing” *The Boston Globe* (28 February 2007).
- ⁴ The American Civil Liberties Union's Capital Punishment Project reports that “seven states--Colorado, Connecticut, Maryland, Montana, Nebraska, New Jersey and New Mexico have dealt with or will deal with the death penalty debate” in the first quarter of 2007. According to the ACLU “many of these decisions were lost by one vote. Just one vote in these forums would have advanced the demise of the death penalty not only in those states but in the country”, online: American Civil Liberties Union <<http://www.aclu.org/capital/29191res20070326.html>>. See also “Prosecutors and the Death Penalty” *The Nation* (29 March 2007).
- ⁵ Malcolm M. Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court*, (New York: Russell Sage Foundation, 1979).
- ⁶ *Ibid.* By way of example, in 2006 in New York County, New York, 63,860 misdemeanors were arraigned. Of those, 13,312, or 20.8%, were dismissed, and 11,434, or 17.9%, were adjourned in contemplation of dismissal, which meant they were dismissed after some waiting period. The citywide dismissal rate was slightly lower: in 2006 throughout the City of New York, 238,665 misdemeanors were arraigned. Of those, 29,735, or 12.5%, were dismissed, and 48,931, or 20.5%, were adjourned in contemplation of dismissal. March 28, 2007 interview of Judge Robert Mandelbaum of the New York County Criminal Court, interview notes on file with author.

- 7 See Bernard Harcourt, *Illusion of Order* (Cambridge: Harvard University Press, 2001). In his important critique of “broken windows” or order maintenance policing, Harcourt argues that the benefits of these law enforcement strategies come from the increased surveillance offered by aggressive misdemeanor arrests and aggressive stop-and-frisk policies rather than from “norm-changing.” Harcourt at 10-11. See also Ian Weinstein, “The Adjudication of Minor Offenses in New York City” (2004) 31 *Fordham Urb. L.J.* 1157 at 1175 -1176.
- 8 A criminal conviction can lead to deportation, the forfeiture of public or subsidized housing, the inability to get certain licenses and public contracts, and even the loss of the right to vote. See Margaret Colgate Love, “The Debt That Can Never Be Paid” (2006) 21 *Fall Crim. Just.* 16.
- 9 Love, *ibid.* A recent study found that 60% of employers were unwilling to hire an applicant with a criminal record. See Alan Rosenthal and Marsha Weissman, “Sentencing for Dollars: The Financial Consequences of a Criminal Conviction” [working paper, February, 2007], Center for Community Alternatives, Justice Strategies. Ten states explicitly condition the right to vote on the full payment of the costs associated with a conviction. See Brennan Center for Justice, policy brief, “Restoring Voting Rights to People with Criminal Convictions,” online: Brennan Center for Justice <[http:// www.brennancenter.org/dynamic/subpages/download_file_38482.p df](http://www.brennancenter.org/dynamic/subpages/download_file_38482.p df)>.
- 10 U.S., National Center for State Courts, *Examining the Work of State Courts, 2005* (2006); U.S., National Center for State Courts, *State Court Caseload Statistics, 2005* (2006).
- 11 *Ibid.*
- 12 In Michigan, for example, most misdemeanors are punishable by 93 days or fewer. There is a small set of misdemeanors which are punishable by up to one year.
- 13 For example, in three weeks of sentences imposed on one docket in Washtenaw County, Michigan, see section III, *infra*, a defendant was sentenced to jail only once, and in that case the jail sentence was coupled with economic sanctions. On the other hand, a number of cases on the docket concerned defendants who had been ordered to appear because they had failed to meet their economic sentence obligations, and in a handful of these cases, jail was imposed together with new economic sanctions.
- 14 Mandelbaum, *supra* note 6.
- 15 Rosenthal and Weissman, “Sentencing” *supra* note 9; see also New York State Dep’t of Correctional Services, “Hub System: Profile of Inmate Population Under Custody on January 1, 2003.”
- 16 Rosenthal and Weissman, *supra* note 9 at 6.
- 17 The U.S. Bureau of Justice Statistics reports that 80% of all felony-charged defendants are represented by assigned counsel. Caroline Wolf Harlow, “Defense Counsel in Criminal Cases,” (2000) Bureau of Justice Statistics, Wash. D.C. And the percentage of black and Hispanic defendants with court-appointed counsel is higher than white defendants. According to the BJS website: “While 69% of white State prison inmates reported they had lawyers appointed by the court, 77% of blacks and 73% of Hispanics had publicly financed attorneys.” Some studies put this number higher. See Peter Joy and Kevin McMunigal, “Client Autonomy and Choice of Counsel” (2006) 21 *Fall Crim. Just.* 57.
- 18 See Mary Sue Backus and Paul Marcus, “The Right to Counsel in Criminal Cases: A National Crisis” (2006) 57 *Hastings Law J.* 1031 at 1034-1037. Much of the quality issues can be accounted for by the lack of funding which results in excessive caseloads for court-appointed counsel in many jurisdictions. See Norma Lefstein and Georia Vagenas, “Restraining Excessive Defender Caseloads: The ABA Ethics Committee Requires Action” *Champion* (30 December 2006) at 10.
- 19 See Kathleen Daly and Michael Tonry, “Gender, Race and Sentencing” (1997) 22 *Crime & Just* 201 at 201-203; Jerome G. Miller, “From Social Safety Net to Dragnet: African American Males in the Criminal Justice System” (1994) 51 *Wash. & Lee L. Rev.* 479 at 483 (arrests for minor crimes disproportionately impact young African American men). In California, for example, misdemeanants are 39.8% white, 60.2% minority, online: Office of Attorney General <[http:// ag.ca.gov/cjsc/publications/candd/cd05/tabs/2005Table31.pdf](http://ag.ca.gov/cjsc/publications/candd/cd05/tabs/2005Table31.pdf)>.
- 20 Daly and Tonry, *ibid.* at 201 - 203. Again, in California, misdemeanants are 78.2% male, and 21.8% female. *Ibid.*

- 21 Probation oversight fees are either charged in monthly installments or as a lump-sum amount. In Washtenaw County, Michigan, monthly fees are \$20, and misdemeanor probation generally lasts from six months to a year. In other nearby counties they are significantly higher. For example, in Oakland County, Michigan, monthly fees are \$50. Notes of Interview with Anne Savickas, Probation Supervisor, Washtenaw County (April 2, 2007).
- 22 Defendants are often sentenced to consent to random drug and/or alcohol testing for which they pay the costs. In Washtenaw County oral and urine tests are charged at a rate of \$20--\$25 per test They can be required as often as daily. If the defendant requests a confirmation of positive urine test results, that costs \$50. online: Washtenaw County Trial Court <[http:// washtenawtrialcourt.org/ community_corrections/program_fees](http://washtenawtrialcourt.org/community_corrections/program_fees)>.
- 23 The county's corrections department administers the "alcohol tether" service for the courts. The service permits the agency to read the defendant's breath alcohol content any number of times a day, by requiring the defendants to record this content via a device attached to a land phone line. It is expensive. There is a \$100 enrollment fee and then a daily fee of either \$10 or \$15 dollars, and defendants must have a dedicated phone line for the tether online: Washtenaw County Trial Court <[http://washtenawtrialcourt.org/ community_corrections/program_fees](http://washtenawtrialcourt.org/community_corrections/program_fees)>. The tether can and usually is ordered for the entire time the defendant's case is pending, and often is continued through some or all of his or her sentence, which means that defendants pay these fees for many months.
- 24 Recovery costs to the county prosecutor are designed to offset the costs of prosecuting the case. In Washtenaw County the amount assessed is usually \$100.
- 25 Recovery costs to the public defender are assessed to offset its costs in representing the defendant.
- 26 Recovery costs to the police are assessed to offset costs arresting and charging the defendant.
- 27 Ronald F. Wright and Wayne A. Logan, "The Political Economy of Application Fees for Indigent Criminal Defense" (2006) 47 Wm. & Mary L. Rev. 2045.
- 28 In alcohol and drug cases defendants are often sentenced to complete outpatient recovery programs, in domestic violence cases defendants are sentenced to complete anger management programs and in shoplifting cases, defendants are sentenced to complete theft offender programs. The costs of these vary but the range in Washtenaw County is from \$100-500 for alcohol and theft offender programs. Interview with Anne Savickas, Probation Supervisor, Washtenaw County, *supra* note 21. The domestic violence programs are more expensive.
- 29 For example, many defendants are required to pay the costs of an alcohol tether while their case is pending. See *supra* note 23. And many jurisdictions, including Washtenaw and Wayne counties in Michigan, also require defendants released on bond in domestic violence cases to participate in a pre-trial supervision program. These programs, generally run by the probation department, mirror post-conviction supervision, including home visits and drug and alcohol testing The defendants pay for these services just as they would post-sentence.
- 30 The charge for general reinstatement is \$125, for reinstatement for a drug crime the charge is \$250 and for reinstatement for minor in possession the charge is \$250; online: The Unofficial Guide to the DMV <[http:// www.dmv.org/mi-michigan/suspended-license.php](http://www.dmv.org/mi-michigan/suspended-license.php)>.
- 31 In Washtenaw County the "bench warrant fee" is usually \$50.
- 32 [Mich.Comp.Laws.Ann§257.904 \(West Supp.2006\)](#).
- 33 *Ibid.*
- 34 Online: State of Michigan <[http:// www.michigan.gov/driverresponsibility](http://www.michigan.gov/driverresponsibility)>.
- 35 In the State of Washington DWLS cases fill approximately one-third of the misdemeanor court dockets. John B. Mitchell and Kelly Kunsch, "Of Driver's licenses and Debtor's Prison" (2005) 4 Seattle J. for Soc. Just. 439 at 443.
- 36 Rosenthal & Weissman, "Sentencing", *supra* note 9 at 14.

- 37 The cases described in this section are all taken from the sentencing dockets of the 14th District Court on November 30th, December 6th, or December 13th, 2007. The sentences imposed on these dates were consistent with sentences imposed by the same court months earlier and later.
- 38 Washtenaw County is located in southeast Michigan, covering an area of 720 square miles. Its 27 cities, villages and townships are home to about 325,000 citizens in urban, suburban, and rural settings. Online: <http://www.ewashtenaw.org/ab0ut/index_html#basic_s>. According to the county's website, 11.4% of families with children under 18 were living below the poverty line in the last 12 months, and 35.8% of families with children under 18 were headed by a female alone, with no husband present *Ibid*.
- 39 *Supra* note 32 at §257.625.
- 40 See *supra* note 23.
- 41 In Washtenaw County there are two choices, a ten week program which costs 25 dollars a week or an intensive weekend-long program which costs 300 dollars. Savickas, *supra* note 21.
- 42 Washtenaw County is not alone in charging defendants for their probation. In fact, jurisdictions across the country do this for probation and for parole supervision as well. For example, in 2002 the Suffolk County Probation Department, in Suffolk County, New York, collected \$1,165,242.71 in administrative fees from probationers. Of that, \$981,722.71 was for "supervision" fees, and \$59,999 was from drug testing fees, and \$123,530.00 was from fees charged for preparing presentence investigation reports. Rosenthal and Weissman, "Sentencing", *supra* note 9.
- 43 Charging defendants for their drug and alcohol screens is not a Washtenaw County innovation alone. See *supra* note 42. In Washtenaw County this cost the defendant \$20-\$25 per test. See *supra* note 22.
- 44 See *supra* note 30.
- 45 See *supra* note 34.
- 46 Obviously driving under the influence is a serious crime, which should be punished. And while it might be the case that some of the offender charged with drunk driving were barely over the legal limit, there are still strong arguments which support harshly punishing them. The relevant question in this example is *how* to administer that punishment, not *whether* to administer it
- 47 *Supra* note 32.
- 48 The cost of this program was not obvious from the sentencing docket, but is likely comparable to the theft offender and alcohol programs, which cost anywhere from \$100 to \$300.
- 49 See *supra* note 30.
- 50 See *supra* note 34.
- 51 *Supra* note 32 at §750.356(c)-(d) Shoplifting is otherwise known as "retail fraud."
- 52 See *supra* note 48.
- 53 *People v. Tirenda Mitchell-Mcgaughy*, 2001 14th Dist Ct. 05-0319. This case is from the same court but was adjudicated a year prior and handled by students at the University of Michigan's Clinical Law Program.
- 54 *People v. Ronald Vanderkooy*, 2006 14th Dist. Ct. 06-358.
- 55 *People v. Lisa Sorrell*, 2006 14th Dist. Ct. 06-2870.
- 56 *People v. Jermaine Moore*, 2007 14th Dist Ct. 06-379.
- 57 *Ibid*.

- 58 *People v. John Tate*, 2006 14th Dist. Ct. 06-2652
- 59 *Ibid.*
- 60 *People v. Amy Butler*, 2006 14th Dist Ct. 06-2418.
- 61 *People v. Margaret Emerick*, case 2006 14th Dist. Ct. 06-2222.
- 62 *People v. Lisa Sorrell*, *supra* note 55.
- 63 *People v. Holly Lamon*, case 2006 14th Dist. T. 06-2648.
- 64 See Rosenthal & Weissman, “Sentencing”, *supra* note 9 at 13; Ronald F. Wright and Wayne A. Logan, *supra* note 27 at 2046; John B. Mitchell and Kelly Kunsch, *supra* note 35.
- 65 See Juliet Brodie, “Post-Welfare Lawyering Clinical Education and a New Poverty Law Agenda” (2006) 20 Wash. U.J. of L. and Policy 201 at 219.
- 66 Justice Scalia has expressed this concern: “Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit” *Marmelin v. Michigan*, 501 U.S. 957 at 979 (n.9 1991).
- 67 See generally Kenworthy Bilz & John M. Darley, “What’s wrong with the Harmless Theories of Punishment,” (2004) 79 Chi.-Kent L. Rev. 1215 (discussing consequentialism versus retributivism).
- 68 Michael S. Moore, “The Moral Worth of Retribution,” in Ferdinand Schoeman, ed., *Responsibility, Character, and the Emotions: New Essays in Moral Psychology* (Cambridge: Cambridge University Press, 1987) at 179-182.
- 69 Rehabilitation was a very low priority, of a priority at all, among policy-makers and theorists in the final decades of the last century, but has come back into favor in recent years. See generally, Edward L. Rubin, (2001) 19 Law & Ineq. 343.
- 70 See *infra* note 81.
- 71 Sunstein and Vermeule, *supra* note 2.
- 72 See e.g. “Jail Savings Shouldn’t Trump Public Safety Yet Cumberland County Ought to Look for Ways to Cut the Cost of Handling Minor Crimes” *Portland Press Herald* (9 February 2007).
- 73 See Mitchell and Kunsch, *supra* note 35.
- 74 Feeley, *supra* note 5.
- 75 Rosenthal and Weissman, *supra* note 9 at 8.
- 76 Brennan Center policy brief, *supra* note 9.
- 77 Of course, for DWLS in particular it can also often be shown that the defendant was also not aware that he or she was committing a crime.
- 78 I supervised them on the case.
- 79 This was a great teaching opportunity and one of the clear benefits of clinical legal education. For the well-educated, well-off law students, this “choice” was incomprehensible. They worried she must be unfit to care for her kids if she was willing to leave them to go to jail and to give birth in jail.
- 80 *People v. Tirenda Mitchell-McGaughy*, *supra* note 53.
- 81 See e.g., *Ening v. California*, 538 U.S. 11 (2003), in which the Supreme Court held that California’s “three-strikes law,” under which Gary Ewing was sentenced to 25 years to life for stealing golf clubs did not violate the Eighth Amendment principle of proportionality.

But see *Solem v. Helm*, 463 U.S. 277, 279 (1983), in which the Court held that the Eighth Amendment prohibited the sentence of life without the possibility of parole for writing a bad check.

82 In *Tate v. Short*, 401 U.S. 395, 399 (1971), the Supreme Court held that imprisoning an indigent solely because he is unable to pay a fine contravenes the equal protection clause by discriminating based upon economic status. In *Akridge v. Crow*, 903 So.2d 346 (2005) the Florida Court of Appeals held that a county program that incarcerated indigent defendants for failure to pay fines and costs violated equal protection. Even so, this happens all the time in the lower criminal courts, usually because most defendants are not represented by counsel at hearings on violations of probation or sentence violations.

83 See Dan Kahan, “What do Alternative Sanctions Mean” (1996) 63 U. Chi. L. Rev. 591. Arguing in favor of shaming punishments, Kahan asserts that the value of shaming must be compared with the punishment that it is replacing; criticizing shaming punishments in a vacuum of no punishment is empty. Incidentally, in 1996 when Kahan published this piece, he criticized fines as legitimate punishment because, he said, society doesn’t accept them as true punishment because offenders are viewed as “paying their way out” of punishment. *Ibid* at 620-623.

84 Judith Greene, *The Staten Island Day-Fine Experiment* (1990) [Unpublished, archived at Vera Institute of Justice]. See also U.S. Bureau of Justice Assistance, *How to Use Structured Fines (Day-Fines) as an Intermediate Sanction* (1996).

85 *Ibid.*

86 *Ibid*

87 *Ibid.*

88 *Ibid.*

Chapter 5: Expert and Investigative Assistance

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5-1 Expert Witness Assistance

A defendant is entitled to the appointment of an expert witness at the state's expense if he cannot otherwise proceed safely to trial without that expert. M.C.L. 775.15; *People v. Leonard*, 224 Mich. App. 569; 569 N.W. 2d 663 (1997). To make this showing, counsel appointed by the court to represent an indigent criminal defendant must establish a "nexus between the facts of the case and the need for an expert." *People v. Jacobsen*, 448 Mich. 639, 641; 532 N.W. 2d 838 (1995); see also M.R.E. 706; M.C.L. 775.13a. The mere possibility that an expert might provide some unidentified assistance to the defense does not satisfy this burden. *People v. Tanner*, 469 Mich. 437; 671 N.W. 2d 728 (2003).

If you plan to raise an insanity defense, you are required to reveal that fact to the court at least 30 days before trial so it can appoint a psychiatric expert. M.C.L. 768.20a. However, you may not need to file a written notice of intent to assert the insanity defense if the purpose of the proposed psychological evaluation is to determine the reasonability or viability of the insanity defense. *People v. Shahideh*, 277 Mich. App. 111; 743 N.W. 2d 233 (2007), *rev'd on other grounds*, 482 Mich. 1156; 758 N.W. 2d 536 (2008), cert den ___ U.S. ___, 129 S Ct 2404 (2009).

Whenever you do consult an expert and that expert produces a report, the report will be discoverable by the prosecution. Mich. Ct. R. 6.201(A)(3). If, however, you merely consult with an expert but that expert does not produce a report and will not testify at trial, you are not required to produce anything in connection with that expert. *People v. Phillips*, 468 Mich. 583; 663 N.W. 2d 463 (2003).

In *People v. Leonard*, 224 Mich. App. 569, 580-581; 569 N.W. 2d 663 (1997), the Michigan Court of Appeals summarized a defendant's due process right to the appointment of a defense expert:

Under the Due Process Clause, states may not condition the exercise of basic trial and appeal rights on a defendant's ability to pay for such rights. *Ake v. Oklahoma*, 470 U.S. 68; 105 S. Ct. 1087; 84 L. Ed. 2d 53 (1985); *Britt v. North Carolina*, 404 U.S. 226, 227; 92 S. Ct. 431; 30 L. Ed. 2d 400 (1971); *Griffin v. Illinois*, 351 U.S. 12, 17-19; 76 S. Ct. 585; 100 LEd 891 (1956). Indigent defendants, however, need not be provided with *all* the assistance that wealthier defendants might buy, but fundamental fairness requires that the state not deny them “an adequate opportunity to present their claims fairly within the adversary system.” *Moore v. Kemp*, 809 F2d 702, 709 (11th Cir. 1987), *cert den* 481 U.S. 1054 (1987), quoting *Ross v. Moffitt*, 417 U.S. 600, 612; 94 S. Ct. 2437; 41 L. Ed. 2d 341 (1974) (emphasis in original).

If a fee cap exists for hiring the expert, counsel should consider whether it effectively precludes access. In *People v. Davis*, 480 Mich. 963 (2007), the defendant appealed the trial court’s limit on the fees it would pay experts and demonstrated that the same expert was customarily paid more than double the capped hourly fee by the prosecution. The trial court, on remand, raised the cap.

When you ask the trial court to pay for an expert your motion should state specifically the reasons why the expert’s testimony will be helpful to the defense. Absent such a showing, a court’s decision to deny your request will likely be upheld on appeal. *People v. Jacobson*, 448 Mich. 639, 641 (1995).

Whenever the prosecution engages an expert, the defendant has a good basis for requesting that the court appoint and pay for the equivalent expert for the defense.

The following are some examples of expert witnesses who may be helpful in your case and retained at public expense:

Psychiatric Experts. Where the insanity defense is raised, an indigent is entitled to appointment of a clinician of his or her choice for an independent psychiatric evaluation. M.C.L. 768.20a(3); *Ake v. Oklahoma*, 470 U.S. 68, 83; 105 S Ct 1087; 84 L. Ed. 2d 53 (1985); *People v. Dumont*, 97 Mich. App. 50 (1980).

DNA Experts. The court must provide access to a DNA expert if the defense establishes a nexus between the facts of the case and the need for a DNA expert. *People v. Tanner*, 469 Mich. 437 (2003). In *Tanner*, the court denied the defendant’s request for a DNA expert because the prosecutor stipulated at trial that the blood found at the scene was neither the defendant’s nor the victim’s, but left open the possibility that a defendant could establish a nexus in a stronger case. *Id.* Accordingly, one strategy for obtaining a DNA expert is to

explain why the circumstances of your case more clearly warrant a DNA expert when compared to those in *Tanner*. You might also want to cite examples of cases in which courts have ruled that defendants were entitled to a DNA expert. See *Ex Parte Alabama*, 662 So.2d 1189, 1192-94 (Ala. 1995) (concluding that “the principles enunciated in *Ake*, and grounded in the due process guarantee of fundamental fairness, apply in the case of nonpsychiatric expert assistance when an indigent defendant makes a proper showing that the requested assistance is needed for him to have a fair opportunity to present his defense”) (citations and quotations omitted); *Little v. Armontrout*, 835 F2d 1240, 1243 (8th Cir. 1987) (“The question in each case must be not what field of science or expert knowledge is involved, but rather how important the scientific issue is in each case, and how much help a defense expert could have given.”)

Accident-Reconstruction Experts. Where necessary for his or her defense, a defendant is entitled to payment for an accident-reconstruction expert. *In Re Klevorn*, 185 Mich. App. 672 (1990) (finding an accident-reconstruction expert necessary because the defense planned to argue that the tests, procedures, and conclusions of the prosecution were faulty).

Breathalyzer Experts. A defendant must provide specific evidence calling into question the results of a breathalyzer test in order to have an breathalyzer expert appointed. *People v. Jacobsen*, 448 Mich. 639 (1995).

Identification Experts. The defendant will likely have a more difficult time establishing that he cannot proceed to safely trial without an identification expert. See *People v. Carson*, 217 Mich. App. 801; 553 N.W. 2d 1, Special Panel convened on *different issue*, 220 Mich. App. 662; 560 N.W. 2d 657 (1996) (finding that the lack of an identification expert did not prevent defendant from proceeding safely to trial because he presented alibi witnesses who, if believed, would have called the witness’s identification of the defendant into question). Nevertheless, if you think an identification expert might be of use to your client, your best option is to provide case-specific reasons why such an expert is particularly vital, given the circumstances of the case.

The CDRC has resources available for web subscribers that can help in locating expert witnesses that have been previously consulted by Michigan defense attorneys. See www.sado.org for information. This collection also includes the names of labs that perform DNA analyses,

transcripts of expert testimony, and resources useful in litigating access to experts, including the pleadings and orders in *People v. Davis*, 480 Mich. 963; 741 N.W. 2d 513 (2007), discussed above.

5-2 Investigative Assistance

Since the effective assistance of counsel requires careful and competent investigation, you should request that the courts pay for the costs of investigations associated with your cases. See M.C.L. 775.15; see also *People v. Davis*, 199 Mich. App. 502; 503 N.W. 2d 457 (1993) (recognizing that an indigent defendant is entitled to waiver of costs for fees, transcripts, and expert witness services reasonably necessary for his defense). But see *People v. Browning*, 106 Mich. App. 516; 308 N.W. 2d 264 (1981) (ruling that the indigent defendant was not entitled to an investigator in part because he was given a sufficient opportunity to examine the qualifications of the prosecution's witnesses and the bases for their testimony). While some counties have procedures in place for paying investigative costs, you should not let the type or amount of authorized investigations limit you. When you decide investigation is needed that is not customarily paid for by your county, consider filing a motion requesting additional assistance. It is usually wise to include a reasonable fee cap in your request.

A wealth of online databases can help you conduct cost-effective investigations. For an excellent compendium of web resources, check out www.craigball.com. His white paper titled "Cybersleuthing for People Who Can't Set the Clock on their VCR" is particularly helpful for novice researchers. www.craigball.com/seminar/Cybersleuthing.pdf.

Accurint (www.accurint.com) and ChoicePoint (www.choicepoint.com) are two of several good sites containing information about people (such as addresses and phone numbers), though both are fee-based.¹ Online criminal records remain largely unavailable to defense attorneys, at least in the absence of a court order, but some states are making data available on a fee basis. See, e.g., apps.michigan.gov/ichat/home.aspx.

At a minimum, investigation in most cases should include an examination of criminal history records for both the defendant and any potential witnesses. Two databases are helpful for Michigan practitioners. The Law Enforcement Information Network (LEIN) contains nationwide

¹ Both Accurint and Choice Point are both now owned by LexisNexis Group, so you might be able to access these sites with your Lexis login and password, depending on your type of subscription.

data about arrests and convictions, including charges and dismissals. Defense attorneys should file a motion for access to LEIN information. The Criminal History Check (CCH) maintained by the Michigan State Police is a more limited database, as it lacks nationwide data, but it is more accessible. Counsel can simply order a file by mailing \$10 to Michigan State Police, Identification Unit, 7150 Harris Drive, Lansing, MI 48913.

LEIN information may be provided to the defendant, pursuant to a court order, e.g., *People v. Elkhoja*, 251 Mich. App. 417; 651 N.W. 2d 408 (2002), *vac'd* 467 Mich. 916; 655 N.W. 2d 559 (2003), and statute, M.C.L. 28.214 (allowing information about defendant to be disclosed either to defendant or the defendant's lawyer). In *Elkhoja* the court approved use of the prosecution as the conduit for getting criminal history information to the defendant. The court added that a trial court may order the LEIN information be given to the prosecutor, who then provides any exculpatory or impeachment information to the defendant. The Supreme Court ordered the Court of Appeals' decision depublished when the case became moot for unrelated reasons. However, counsel can argue the proposition. In most jurisdictions, a motion will result in access to the entire LEIN file.

In addition, the defendant should request the disclosure of criminal histories of all witnesses, pursuant to Mich. Ct. R. 6.201(A)(4),(5). For additional information, see **Chapter 7: Discovery**.

5-3 *Ex parte* Requests

Under federal law, an indigent defendant has a statutory right to make *ex parte* requests for investigative, expert, or other services necessary for adequate representation. 18 U.S.C. §3006A(e)(1). There is no statute or case law in Michigan providing a similar right, nor is there a statute preventing it. Nevertheless, you should point out that the obvious reasons for the federal rule are just as compelling in state prosecutions.

The following sample motions include both *ex parte* requests for appointment of investigators and experts and traditional motions for the same. As for other motions which may be considered out of the ordinary in your jurisdiction, we recommend that you include a memorandum of law.

5.1.a Motion For Appointment of Rape Trauma Syndrome Expert Witness

STATE OF MICHIGAN
IN THE **DISTRICT OR CIRCUIT** COURT FOR THE COUNTY OF **NAME OF COUNTY**

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff,

vs

No. **docket number**
Hon. **judge's name**

DEFENDANT'S NAME,

Defendant.

_____/

MOTION FOR APPOINTMENT OF RAPE TRAUMA EXPERT WITNESS

Defendant's name, by **his or her** attorney, and pursuant to M.C.L. 775.13a, M.R.E. 706, and the due process clauses of the state and federal constitutions, moves for appointment of an expert in the area of CSAAS (Child Sexual Assault Accommodation Syndrome), Rape Trauma Syndrome and "repressed memory," stating:

1. **Defendant's name** is charged, in a single count information, with **offense(s)**, which the government claims occurred "between **dates**."
2. The complainant, **complainant's name**, is **defendant's name** **relationship**, who is now **age** years old.
3. **Complainant's name** has been examined at the request of the prosecution by **prosecution witness's name**, and **prosecution witness's name**, who are endorsed as expert prosecution witnesses.
4. The prosecution intends to call **prosecution witness's name** as a so-called profile witness in its case in chief, and **he or she** will seek to offer testimony that the complainant suffers from "Post Traumatic Stress Disorder consistent with a history of sexual abuse victimization."
5. The prosecutor intends to call **prosecution witness's name** as a so-called profile witness in its case in chief, and **he or she** will seek to offer testimony that the complainant suffers from "depression due to a history of sexual abuse."
6. **Defendant's name** defense in this case is that the complainant's "repressed memories" are neither credible nor reliable, that her current psychological conditions are not consistent with a history of sexual abuse, and that **defendant's name** did not commit the acts charged.

7. In the professional judgment of defense counsel, expert testimony is necessary to rebut the testimony to be offered by the expert witnesses endorsed by the prosecution.

8. Defendant's name is indigent and cannot pay the costs of retaining an expert witness for that purpose.

For these reasons, the Defendant asks that this Court appoint expert witness's name as an expert in CSAAS, Rape Trauma Syndrome and "repressed memory," at state expense, to assist defense counsel in preparing for trial and in seeking to rebut expert testimony to be offered by the prosecution.

Respectfully submitted,

By: _____
Defense attorney's name (bar number)
Attorney for Defendant
Address
Address
Telephone

Date: filing date

5.1.b Memorandum in Support of Motion For Appointment of Rape Trauma Syndrome Expert Witness

STATE OF MICHIGAN
IN THE **DISTRICT OR CIRCUIT** COURT FOR THE COUNTY OF **NAME OF COUNTY**

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff,

vs

No. **docket number**
Hon. **judge's name**

DEFENDANT'S NAME,

Defendant.

MEMORANDUM IN SUPPORT OF
MOTION FOR APPOINTMENT OF RAPE TRAUMA SYNDROME EXPERT

DEFENDANT'S NAME IS ENTITLED TO APPOINTMENT OF AN EXPERT WITNESS WHERE THE PROSECUTION HAS ENDORSED AND WILL CALL EXPERT WITNESSES ON THE ISSUE OF RAPE TRAUMA SYNDROME.

Under the due process clauses of the federal and state constitutions, states may not condition the exercise of basic trial and appeal rights on a defendant's ability to pay for such rights. *Ake v. Oklahoma*, 470 U.S. 68 (1985); *People v. Leonard*, 224 Mich. App. 569 (1997). Because the prosecution has chosen to endorse and call expert witnesses on the issues of CSAAS, RTS and "repressed memory," **defendant's name** is constitutionally entitled to appointment of an expert to assist him in rebutting that evidence. *Ake*, 470 U.S. at 83a; *Ex Parte Alabama*, 662 So 2nd 1189, 1192-94 (opinion attached as Exhibit A).

An expert witness may testify that the behavior of the child victim is consistent with that of child sexual abuse victims generally. *People v. Beckley*, 434 Mich. 691 (1990); *People v. Christel*, 449 Mich. 578, 591 (1995). The prosecution intends to offer expert testimony on that issue against **defendant's name**, and **defendant's name** incurs an unreasonable risk of conviction should he fail to effectively prepare for cross-examination of the prosecution's expert witnesses, and rebut the testimony of those witnesses.

M.C.L. 775.13a authorizes payment of the fees for an expert witness on a showing by the accused "that there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to trial." See *People v. Jacobsen*, 448 Mich. 639, 641 (1995). The statute applies to both expert and lay witnesses and provides for payment by the state of expert witness fees.

Leonard, 224 Mich. App. at 585. A defendant must demonstrate a nexus between the facts of the case and the need for an expert. *Jacobsen*, 448 Mich. at 640. The *Jacobsen* court concluded that for the motion to be granted there must be some showing that the expert testimony would “likely benefit the defense.” *Id.*

In this case, this court must necessarily recognize that evidence relating to CSAAS, Rape Trauma Syndrome and repressed memory *requires* expert testimony, and must necessarily conclude that there is a connection between the facts of the case and the defense need for an expert, where the prosecution will call such experts. A contrary conclusion would require that the Court bar the testimony of the prosecution’s expert witnesses as having no “connection with the facts of the case.” The fact that the prosecution intends to call expert witnesses conclusively demonstrates such a connection. Refusal to appoint an expert in this case will prevent defendant’s name from proceeding safely to trial, because without expert witness assistance, defendant’s name will be denied the right to meaningful and informed cross-examination of the prosecution’s expert witnesses, and the right to call witnesses in his own behalf.

Respectfully submitted,

By: _____
Defense attorney’s name (bar number)
Attorney for Defendant
Address
Address
Telephone

Date: filing date

5.2 Motion for Appointment of Investigator

STATE OF MICHIGAN
IN THE **DISTRICT OR CIRCUIT** COURT FOR THE COUNTY OF **NAME OF COUNTY**

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff,

vs

No. **docket number**
Hon. **judge's name**

DEFENDANT'S NAME,

Defendant.

_____/

MOTION FOR APPOINTMENT OF INVESTIGATOR

Defendant's name, by **his or her** attorney, moves this Court for the appointment of an investigator for the reasons stated in this motion and the accompanying memorandum of law. **Defendant's name** specifically requests the appointment of **name of the investigator or investigation firm** for this purpose. In support of this motion, counsel states the following:

1. Both the federal and state constitutions guarantee criminal defendants the effective assistance of counsel. U.S. Const. Amend VI; Mich. Const. art 1, § 20. Effective assistance of counsel, in turn, requires competent investigation. *Cf. People v. Davis*, 199 Mich. App. 502 (1993).

A. Where a criminal defendant is indigent, courts are obligated to pay the costs of adequate investigation. *Davis, supra*, 199 Mich. App. at 518.

B. **Defendant's name** is indigent and cannot afford to pay the costs of conducting an investigation.

2. **State why you need an investigator. Be as specific as possible without signaling either what your defense is likely to be, or what it is you suspect is wrong with the prosecution's case.**

3. **Describe the experience and qualifications of this investigator or firm. If there is some special area of expertise that the investigator or firm has, describe it. Attach a resume or other document which would show your choice's qualifications.**

4. **Indicate that the firm or investigator is licensed and by whom. Attach a copy of that license as an exhibit.**

For these reasons, **defendant's name** asks that this Court appoint **name of investigator**, at state expense, to assist counsel in preparing for trial, including a retainer in the amount of **dollar amount**, as well as provisions for interim billing.

Respectfully submitted,

By: _____
Defense attorney's name (bar number)
Attorney for Defendant
Address
Address
Telephone

Date: **filing date**

5.3 *Ex Parte* Motion for Appointment of Eyewitness Identification Expert

STATE OF MICHIGAN
IN THE **DISTRICT OR CIRCUIT** COURT FOR THE COUNTY OF **NAME OF COUNTY**

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff,

vs

No. **docket number**
Hon. **judge's name**

DEFENDANT'S NAME,

Defendant.

_____/

**EX PARTE MOTION FOR APPOINTMENT
OF EYEWITNESS IDENTIFICATION EXPERT**

Defendant's name, by **his or her** attorney, and pursuant to M.C.L. 775.13a and M.R.E. 706, moves this Court for the appointment of an expert in the area of eyewitness identification, for the reasons stated in this motion and in the accompanying memorandum of law. **Defendant's name** specifically requests the appointment of **name of expert** for this purpose. Appointment of **name of expert** is requested for the following reasons:

1. **State why you need an expert on eyewitness identification in as specific terms as possible.**
2. The possibilities of mistaken identification and a wrongful conviction are ones that this Court should seek to avoid, and an informed trier of fact regarding the problems with eyewitness identification testimony will help to guard against that danger.
3. Due process and fundamental fairness require the assistance of an expert in eyewitness identification. *People v. Hill*, 84 Mich. App. 90 (1978).
4. **Describe the experience and qualifications of this particular expert. Attach a resume or curriculum vitae that shows your expert's qualifications.**
5. **Defendant's name** has requested this relief *ex parte* because his due process rights, supported by analogy to federal law, permit him to keep his defense strategy confidential. 18 U.S.C. 3006A(e)(1).

For these reasons, **defendant's name** asks that this Court appoint **name of expert**, an eyewitness identification expert, at state expense to assist counsel in preparing for trial, including a retainer in the amount of **dollar amount**, as well as provisions for interim billing.

Respectfully submitted,

By: _____
Defense attorney's name (bar number)
Attorney for Defendant
Address
Address
Telephone

Date: **filing date**

How Public Defenders Can Fight the Criminalization of Poverty

Colin Reingold and Marilena David-Martin

Additional Resources

ACLU of Michigan Pay or Stay Media Coverage:

<http://www.aclumich.org/media?combine=pay+or+stay&issue=All&tid=All&=Go>

ACLU Debtors' Prison Coverage:

https://www.aclu.org/search/%20?f%5B0%5D=field_issues%3A246

Appointed Counsel Trial Level Fees by Circuit:

http://www.sado.org/fees/10281_2014-Fee-Schedule.pdf

SADO's Re-Entry Services Database:

<http://www.sado.org/locate/reentry>