

May 9, 2016

Office of Administrative Counsel  
Michigan Supreme Court  
PO Box 30052  
Lansing, MI 48909

Re: ADM File No. 2015-12

Proposed Amendment of MCR 3.605, 3.606, 3.928, 3.944, 3.956, 6.001, 6.425, 6.610, 6.933

Dear Administrative Counsel:

Please accept this letter in enthusiastic support of ADM File No. 2015-12, proposed amendments to the Michigan Court Rules for establishing procedures for determining ability to pay.

The majority of our practice is centered on securing post-conviction relief for the homeless. In the course of that practice, our observations echo those of our clients, that "pay-or-stay" sentencing is unfortunately far too commonplace. These practices only serve to exacerbate the poverty of the indigent, devastate already vulnerable families and communities, and justify the indigent public's distrust of the judicial process.<sup>1</sup>

The Michigan Court Rules function as the reference of first resort, particularly in district courts, where most criminal practice is conducted orally and where pay-or-stay sentencing is most prevalent. Judges and defense counsel are often rotated between dockets and may not be fully knowledgeable of the constitutional or statutory prohibitions against pay-or-stay sentencing. Codifying these procedural protections into the Rules provides courts and defense counsel the guidance and authority necessary to combat these practices that result in the illegal and improper jailing of indigent people.

We and our homeless clients would welcome adoption of ADM File No. 2015-12 as written, but respectfully offer the following additional comments and amendments for your consideration.

#### Depriving a Person of Freedom Because They Are Unable to Pay Is Unconstitutional

The Supreme Court, in *Bearden v. Georgia*, established that imposing a sentence of incarceration on someone too poor to pay "would be contrary to the fundamental fairness required by the Fourteenth Amendment."<sup>2</sup> In addition to the federal constitutional protections, the Michigan Supreme Court has held that "a truly indigent defendant [should] never be required to pay" a court-ordered obligation.<sup>3</sup>

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<sup>1</sup> See generally Council of Economic Advisers, *Issue Brief, Fines, Fees, and Bail: Payments in the Criminal Justice System that Disproportionately Impact the Poor*, at 1 (Dec. 2015), available at [https://www.whitehouse.gov/sites/default/files/page/files/1215\\_cea\\_fine\\_fee\\_bail\\_issue\\_brief.pdf](https://www.whitehouse.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf)

<sup>2</sup> *Bearden v. Georgia*, 461 US 660, 672-673 (1983). See also ACLU Comment to ADM File No. 2015-12.

<sup>3</sup> *People v. Jackson*, 483 Mich 271, 287 (2009).

### A Court Must Determine Nonpayment Was Willful Before Imposing Sentence of Incarceration

Under Michigan law, before a court impose a sentence of incarceration, it must first determine that the defendant had the resources necessary to pay court-assessed penalties, and, second, that the defendant has not made a good faith effort to do so. This procedural hurdle applies to statutorily-authorized fines and costs,<sup>4</sup> reimbursements,<sup>5</sup> probation fees,<sup>6</sup> and restitution.<sup>7</sup> In other words, the court, without first ascertaining a person's ability to pay court fines and refused to do so, lacks the statutory authority to order imprisonment, jail or incarceration for nonpayment thereof.

### Shifting the Burden of Proof Upon the Defendant Is Unconstitutional and Violative of Michigan Law

We strongly oppose comments that suggest not only shifting the burden of proof onto the defendant, but also imposing a clear-and-convincing standard on such proofs and require defendants to meet that burden on the same day as the trial. The plain language of the above-mentioned Michigan laws all place the burden to establish non-indigence on the state if it wishes to impose a sentence of incarceration. A Michigan judge is required to "state [ ] on the record a *substantial and compelling* reason to sentence the individual to the jurisdiction of the department of corrections."<sup>8</sup> Similarly, the Supreme Court in *Turner v. Rogers* prescribed a simple four-step process culminating in "an express finding by the court that the defendant has the ability to pay."<sup>9</sup> These statutory provisions, court rules, and Supreme Court precedent all place the burden on the state to make an affirmative finding of the defendant's ability to pay and willful refusal to do so before imposing a sentence of incarceration.

### Modify MCR 6.425(E)(3) to Include Rehabilitative Sentencing

Under MCL 771.3(2), judges have the authority to impose a wide variety of alternative sentences in lieu of fines and costs. The Honorable Charles Goedert comment letter suggested modifying the language in 6.425(E)(3)(b) to articulate consideration of community service as an alternative sentence. We agree with that comment but believe that the Rule should be further modified to include the full scope of judicial authority with respect to alternative sentencing. We propose the following modification:

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<sup>4</sup> MCL 769.1k. "(10) A defendant shall not be imprisoned, jailed, or incarcerated for the nonpayment of costs ordered under this section unless the court determines that the defendant has the resources to pay the ordered costs and has not made a good-faith effort to do so."

<sup>5</sup> MCL 769.1f. "(7) Notwithstanding any other provision of this section, a person shall not be imprisoned, jailed, or incarcerated for a violation of parole or probation, or otherwise, for failure to make a reimbursement as ordered under this section unless the court determines that the person has the resources to pay the ordered reimbursement and has not made a good faith effort to do so."

<sup>6</sup> MCL 771.3. "(8) If a probationer is ordered to pay costs as part of a sentence of probation, compliance with that order shall be a condition of probation. The court may revoke probation if the probationer fails to comply with the order and if the probationer has not made a good faith effort to comply with the order. In determining whether to revoke probation, the court shall consider the probationer's employment status, earning ability, and financial resources, the willfulness of the probationer's failure to pay, and any other special circumstances that may have a bearing on the probationer's ability to pay. The proceedings provided for in this subsection are in addition to those provided in section 4 of this chapter."

<sup>7</sup> MCL 769.1a. "(14) Notwithstanding any other provision of this section, a defendant shall not be imprisoned, jailed, or incarcerated for a violation of probation or parole or otherwise for failure to pay restitution as ordered under this section unless the court or parole board determines that the defendant has the resources to pay the ordered restitution and has not made a good faith effort to do so."

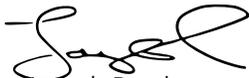
<sup>8</sup> MCL 769.34(4)(a) (emphasis added); see also MCR 6.425(E)(1)(e).

<sup>9</sup> *Turner v Rogers*, 564 US 431; 131 S Ct 2507, 2519 (2011) ("(1) notice to the defendant that his 'ability to pay' is a critical issue...; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status (e.g., those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.").

"If the court finds that the defendant is unable to comply with an order to pay fines, costs, restitution, and other financial obligations without manifest hardship, the court may impose a payment alternative such as a payment plan, modification to any existing payment plan, a rehabilitative sentence, community service, or waiver of pay or all of the amount owed to the extent permitted by law."

We are thankful for the ability to provide these comments and respectfully urge the Supreme Court to adopt the amendments to the Michigan Court Rules as proposed in ADM File No. 2015-12.

Sincerely,

  
Jayesh Patel