ACLU
AMERICAN CIVIL LIBERTIES UNION of MICHIGAN

State Headquarters
2966 Woodward Avenue
Detroit, MI 48201
Phone 313.578.6800
Fax 313.578.6811
Email aclu@aclumich.org
www.aclumich.org

Legislative Office
115 West Allegan Street
Lansing, MI 48933
Phone 517.372.8503
Fax 517.372.5121
Email aclu@aclumich.org
www.aclumich.org

West Michigan Regional Office
1514 Wealthy SE, Suite 242
Grand Rapids, MI 49506
Phone 616.301.0930
Fax 616.301.0640
Email aclu@aclumich.org
www.aclumich.org

February 23, 2016

Office of Administrative Counsel
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

By email and first-class mail

Re: ADM File No. 2015-12 – Proposed Amendments of Rules 3.605, 3.606, 3.928, 3.944, 3.956, 6.001, 6.425, 6.445, 6.610, and 6.933 of the Michigan Court Rules

Dear Counsel,

We write to express our strong support for the proposed rule amendments, listed above. These rules will provide critically needed guidance to the lower courts and are an important first step in addressing the problem of debtors' prisons in Michigan.

The Constitutional Framework

As the U.S. Supreme Court recognized almost three decades ago, to deprive a defendant of freedom "simply because, through no fault of his own, he cannot pay [a] fine" is "contrary to the fundamental fairness required by the Fourteenth Amendment."[1] When sentencing a defendant who is unable to pay a legal financial obligation, the

> sentencing court must inquire into the reasons for the failure to pay. If the [defendant] willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may . . . sentence the defendant to imprisonment within the authorized range of his sentencing authority. If the [defendant] could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment.[2]

The law has thus long been clear that courts must conduct an inquiry into ability to pay before sentencing a defendant to incarceration for nonpayment. While some judges in Michigan abide by this requirement, unfortunately there are still many courts where individuals are sent to jail because they have not paid court-imposed financial obligations without any inquiry into their ability to pay or efforts to secure resources. Some courts routinely impose "pay or stay"

[1] *Bearden v Georgia*, 461 US 660, 672-73 (1983).

[2] *Id.* at 672.

Kary L. Moss, Esq. | Executive Director Loren Khogali, Esq. | President Mark Granzotto, Esq. | General Counsel

sentences, requiring defendants to serve a specified number of days in jail if they are unable to pay a specified fine on sentencing day. Others find defendants in contempt of court or in violation of the conditions of their probation solely based on nonpayment. And in many cases, individuals sent to jail for non-payment are also denied legal counsel, despite the clear constitutional rule that counsel must be provided to indigents facing incarceration.[3] The result is a two-tier system of justice: those too poor to pay are incarcerated, while those who can afford to pay walk free. That is clearly unconstitutional.

Efforts to End Debtors' Prisons in Michigan

The proposed amendments to the Michigan Court Rules were submitted to the Court by the Michigan State Planning Body for Delivery of Legal Services to the Poor. They reflect years of discussion and collaboration among stakeholders in the justice system, including the active involvement of district court judges. Early drafts of the proposed rules were first circulated for input in 2012. In the years since, the proposed rules were repeatedly revised to incorporate feedback from a diverse range of interested parties. The State Court Administrative Office's Ability to Pay Workgroup, which was made up of judges, court administrators, indigent defense experts, and other stakeholders, made further refinements to the proposed language.

The proposed rules now being considered by the Court thus reflect years of conversation and negotiation. Although there are undoubtedly further refinements that could be made,[4] at this time the priority of the American Civil Liberties Union of Michigan (ACLU) is for the proposed rules to be adopted as soon as possible. Once the rules are implemented, we hope the Court will review their effectiveness and consider further amendments as necessary.

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[3] The Sixth Amendment guarantees the right to counsel to defendants who face incarceration. See, e.g., *Gideon v Wainwright*, 372 US 335 (1963); see also State Court Administrative Office Ability to Pay Workgroup, *Tools and Guidance for Determining and Addressing an Obligor's Ability to Pay* (April 20, 2015), p 2 (noting that if court considers incarceration as a penalty for nonpayment it must offer legal representation).

[4] For example, to ensure that the right to counsel is protected for individuals facing incarceration for inability to pay, we encourage the Court to cross-reference MCR 6.005(D) (providing indigents with the right to counsel in circuit court cases) and MCR 6.610(D)(2) (providing indigents with the right to counsel in district court if facing incarceration) in the proposed court rule amendments where appropriate.

We also draw the Court's attention to an issue raised by the State Court Administrative Office Ability to Pay Workgroup, namely that public assistance or exempt income should not be considered in determining ability to pay, as payments from these limited resources are strictly voluntary. See State Court Administrative Office Ability to Pay Workgroup, *Tools and Guidance for Determining and Addressing an Obligor's Ability to Pay* (April 20, 2015), p 3. We encourage the Court to include language on that point in MCR 6.425(E)(3)(c)(iv), as in our experience courts are often unaware that such income cannot be considered.

The work by stakeholders to build consensus around the proposed Court Rules reflects an increasing recognition in Michigan and nationally that using incarceration as a debt collection tool against the poor is both unjust and illegal. The United States Department of Justice highlighted the issue in its *Investigation of the Ferguson Police Department*, which found that the practice of arresting and jailing individuals who cannot pay fines and costs "is directly at odds with well-established law that prohibits 'punishing a person for his poverty.'"[5] Meanwhile, national and local media have sharply criticized Michigan's "pay or stay" sentencing practices.[6]

In addition to building consensus around adoption of the proposed Court Rules, advocates have initiated numerous other efforts to combat debtors' prisons in Michigan. Concerned judges have led efforts to educate their colleagues by, for example, organizing trainings through the Michigan District Judges Association. The State Court Administrative Office's Ability to Pay Workgroup has developed extensive resource materials to assist local courts in conducting ability-to-pay hearings. A superintending control action, currently pending in Macomb County, was filed by the ACLU when the 38th District Court maintained a standard practice of imposing "pay or stay" sentences without regard to defendants' ability to pay even after the circuit court ruled in a direct appeal that such sentences are illegal.[7] The ACLU also requested a federal investigation into debtors' prisons in Michigan following the death of David Stojcevski, a man who was incarcerated in the Macomb County Jail because he was too poor to pay $772 in fines, and who died after being denied needed medication.[8]

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[5] United States Department of Justice, *Investigation of the Ferguson Police Department* (March 4, 2015), pp 57-58 (citing *Bearden*, 461 US at 671).

[6] See, e.g., Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, National Public Radio (May 21, 2014); Cweiek, *In Macomb County Man's Jail Death, a Horrifying Intersection of Big Issues*, Michigan Radio (September 24, 2015); White, *Timeout Ordered for Poor Woman Who Fears Jail in Dog Case*, Associated Press (July 22, 2015).

[7] *In re Donna Elaine Anderson*, Macomb Circuit Court (Docket No. 15-2380-AS) (pending); White, *Timeout Ordered for Poor Woman Who Fears Jail in Dog Case*, Associated Press (July 22, 2015).

[8] See *Stojcevski v County of Macomb*, Eastern District of Michigan (Docket No. 4:15-cv-11019) (pending); Ehrenfreund, *Jail Video Footage Showed an Inmate Dying in Agony. Now There's a Lawsuit*, Washington Post (October 6, 2015); Cweiek, *In Macomb County Man's Jail Death, a Horrifying Intersection of Big Issues*, Michigan Radio (September 24, 2015); Hall, *Jail Death Lawsuit: He Was Naked, Hurting, No One Aided*, Detroit Free Press (September 24, 2015); Smith et al., *Family of David Stojcevski Files Lawsuit Over Death in Macomb Jail*, NBC News (September 25, 2015). To view portions of the harrowing videotape of Mr. Stojcevski's death, see Dietz, *Man Jailed for Ticket Dies in Custody*, Click on Detroit (September 25, 2015), at www.clickondetroit.com/news/man-jailed-for-ticket-dies-in-custody/35452790.

The Scope of the Problem

The ACLU, other legal organizations, and the media have been documenting "pay or stay" sentencing in Michigan for years.[9] Recent representative cases include:

- Stephane Milton, who was sentenced to 30 days in the Macomb County Jail because he could not afford to pay $334 in fees and costs related to a jaywalking ticket.[10]

- Ryan Rockett, who was sentenced to 93 days in the Macomb County Jail because he could not afford to pay $1,500 in fees and costs related to operating a vehicle without insurance and driving while his license was suspended.[11]

- Stephen Papa, who was sentenced to 22 days in the Kent County Jail because he was unable to pay $2,600 in fines and costs related to destruction of property and resisting arrest after he got drunk with friends.[12]

- Kyle Dewitt, who was sentenced to 3 days in the Ionia County Jail because he was unable to pay $215 in fees related to a ticket for catching a fish out of season.[13]

- Kristen Preston, who was sentenced to 30 days in the Ionia County Jail because she could not afford to pay a $125 alcohol assessment fee stemming from a minor in possession (MIP) charge.[14]

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[9] See, e.g., American Civil Liberties Union, *In For a Penny: The Rise of America's New Debtors' Prisons* (October 2010), pp 6-9, 29-41, at http://www.aclu.org/prisoners-rights-racial-justice/penny-rise-americas-new-debtors-prisons; Michigan State Planning Body, *Implementing Crossroads: A Proposal for Evaluating Fees, Fines and Costs* (May 2015), at http://spb.mplp.org:8080/download/attachments/425986/SPB-Implementing-Crossroads-Final-Report-5-19-15.pdf.

[10] *People of the City of Easpointe v Stephane Milton*, 38th District Court (Docket No. 14EA06438) (2014); White, *Timeout Ordered for Poor Woman Who Fears Jail in Dog Case*, Associated Press (July 22, 2015).

[11] *People of the City of Eastpointe v Ryan Rockett,* 38th District Court (Docket Nos. 14EA05894B-OI, 14EA05894C-OT) (2014); White, *Timeout Ordered for Poor Woman Who Fears Jail in Dog Case*, Associated Press (July 22, 2015).

[12] *People v Stephen Papa*, 61st District Court (Docket No. 2013-FY-0001413); Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, National Public Radio (May 19, 2014).

[13] *People of the City of Ionia v Kyle Dewitt*, 64-A District Court (Docket No. C607947M) (2011).

- Dorian Bellinger, who was sentenced to 13 days in the Isabella County Jail because he could not afford to pay $425 in fines and costs related to a misdemeanor marijuana possession charge.[15]

- Dontae Smith, who was sentenced to 41 days in the Oakland County Jail because he could not afford to pay $415 in connection to several driving offenses, including driving with a suspended license and impeding traffic.[16]

- David Clark, who was sentenced to 90 days in the Wayne County Jail because he could not afford to pay $1,250 in fees and costs related to charges for spanking his girlfriend's son. Clark's girlfriend was convicted of the same misdemeanor offense and also fined $1,250, but her parents paid the court, and she was therefore not jailed.[17]

Although there is no comprehensive data on how many individuals are illegally jailed based on inability to pay, it is clear that "pay or stay" sentencing is common. For example, in 2012 the ACLU analyzed online court records for the 61st District Court and found 244 "pay or stay" sentences listed over a six-month period.[18] More recently, court watchers in the 38th District Court reported that "pay or stay" sentences are routinely imposed there. As a result, the ACLU filed the above-mentioned superintending control action on behalf Donna Anderson, who was advised by her court-appointed attorney that she would be sent to jail unless she could pay $455 in fines and costs related to dog license violations.[19]

Even a short period of incarceration on a "pay or stay" sentence can have terrible consequences, resulting in the loss of employment or housing and separation from children or family, not to mention the suffering inherent in imprisonment itself. At least two individuals serving "pay or stay" sentences have died, both in the Macomb County Jail: David Stojevski, whose case is

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[14] *People of the City of Ionia v Kristen Preston*, 64-A District Court (Docket No. 11926-1IMA) (2011).

[15] *People of the City of Livonia v Dorian Bellinger*, 16th District Court (Docket No. 10L04634-OM) (2011).

[16] *People of the City of Ferndale v Dontae Smith*, 43d District Court (Docket Nos. 11FE07370A, 11FE07370B) (2011).

[17] *People v David Clark*, 27th District Court (Docket No. 11-1729).

[18] This analysis is available upon request.

[19] *In re Donna Elaine Anderson*, Macomb Circuit Court (Docket No. 15-2380-AS) (pending); White, *Timeout Ordered for Poor Woman Who Fears Jail in Dog Case*, Associated Press (July 22, 2015). The complaint in Ms. Anderson's case lists eleven additional cases in the 38th District Court where individuals were sentenced to "Money or Jail."

discussed above, and Christopher Drewek, who committed suicide after being sent to the jail on a "pay or stay" sentence in 2010.[20]

Conclusion

As should be clear from the discussion above, reform is urgently needed to fix a two-tier system of justice in which countless Michigan citizens are being illegally incarcerated because they are too poor to pay court-imposed fines and costs. The ACLU believes that the adoption of the proposed Court Rules is one the most critical steps towards ending debtors' prisons in our state. The Court Rules are a guidebook for judges, lawyers, and litigants alike. We are hopeful that adoption of Court Rules that clearly spell out the requirement to hold ability-to-pay hearings will bring significant improvement to the day-to-day administration of justice throughout Michigan.

We commend the Court for acting to end debtors' prisons in Michigan, and urge the adoption of the proposed Court Rules.

Sincerely,

Michael Steinberg (MSA)
Michael J. Steinberg
Legal Director

Dan Korobkin (MSA)
Dan Korobkin
Deputy Legal Director

Miriam Aukerman
Miriam Aukerman
Staff Attorney

[20] Miller, *Debtors Pay... Or Stay in Jail*, Michigan Radio (November 22, 2011); *Inmate Commits Suicide*, Macomb Daily News (August 27, 2010).