

**STATE OF MICHIGAN**  
**IN THE COURT OF APPEALS**

**PEOPLE OF THE STATE OF MICHIGAN,**

Plaintiff-Appellee,

**Court of Appeals No. 311682**

-vs-

**Lower Court No. 07-406-01**

**JOSEPH BAILEY,**

Defendant Appellant.

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**MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FUND  
OF MICHIGAN, THE MICHIGAN STATE PLANNING BODY, AND THE BRENNAN  
CENTER FOR JUSTICE TO FILE AN *AMICUS CURIAE* BRIEF**

The American Civil Liberties Union Fund of Michigan, the Michigan State Planning Body, and the Brennan Center for Justice file this motion to file an *amicus curiae* brief for the reasons that follow:

1. The American Civil Liberties Union of Michigan (“ACLU”) is the Michigan affiliate of a nationwide nonpartisan organization consisting of approximately 500,000 members dedicated to protecting rights guaranteed by the United States and Michigan Constitutions. The

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American Civil Liberties Union Fund of Michigan is the legal and educational wing of the Michigan ACLU. Over the last several years, the ACLU has spearheaded an effort in this state to draw attention to the problem of debtors' prisons, including court-watching, litigation, and publication of the report *In for a Penny: The Rise of America's New Debtors' Prisons* (2010). See <<http://www.aclu.org/prisoners-rights-racial-justice/penny-rise-americas-new-debtors-prisons>>.

2. The Michigan State Planning Body ("MSPB") is an unincorporated association of about forty individuals — from the legal services community, the judiciary, the private bar, and community organizations providing services to low-income persons — that acts as a forum for planning and coordination of the State's efforts to deliver civil and criminal legal services to the poor. The MSPB has done extensive work on court practices that have the effect of incarcerating indigent persons who lack the ability to pay court-ordered "fees fines and costs." This includes advocating directly with the State Court Administrative Office regarding its collections policies since 2010, and issuing a draft proposal in April 2012, to revise Michigan's Court Rules in order systematically to address the ability to pay before incarcerating persons subject to court-ordered fees, fines, and costs. See *Implementing Crossroads: A Proposal for Evaluating the Ability to Pay Fees Fines and Costs* (Apr. 2012).

3. The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on improving the systems of democracy and justice. One focal point of the program is stemming the wave of unnecessary incarceration of the

poor for failure to pay criminal justice debt. The Brennan Center has joined the ACLU in leading a movement to draw attention to this problem and enact reforms, and has published numerous reports on this issue. *See, e.g. Criminal Justice Debt: A Barrier to Reentry* (2010) at <[http://brennan.3cdn.net/c610802495d901dac3\\_76m6vqhpy.pdf](http://brennan.3cdn.net/c610802495d901dac3_76m6vqhpy.pdf)> (revealing national scope of the growth of criminal justice debt as well as the negative consequences it has on governments, communities, families, and individuals); *Criminal Justice Debt: A Toolkit for Action* (2012), at <[http://brennan.3cdn.net/4c14b93f5afee89bd5\\_zfsm6v848.pdf](http://brennan.3cdn.net/4c14b93f5afee89bd5_zfsm6v848.pdf)> (providing concrete strategies for reform).

4. This case raises important issues regarding the incarceration of individuals based on their inability to pay criminal justice debt. The ACLU Fund of Michigan, the Michigan State Planning Body, and the Brennan Center for Justice believe that, given their experience and long-term interest in the issues raised by this case, their *amicus curiae* brief will bring additional necessary arguments and perspective to the attention of the Court as the Court considers whether it should grant leave in this case.

5. The proposed brief is being filed at the same time as this motion.

WHEREFORE, for the reasons stated in this Motion, the ACLU Fund of Michigan, the Michigan State Planning Body, and the Brennan Center for Justice respectfully request that this Honorable Court grant this motion to file an *amicus curiae* brief.

Respectfully submitted,

/s Elizabeth Geary

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DATED: September 14, 2012

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***AMICUS CURIAE* BRIEF OF  
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN,  
THE MICHIGAN STATE PLANNING BODY, AND  
THE BRENNAN CENTER FOR JUSTICE  
IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL**

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**Statement of Question Presented**

Did the trial court's refusal to correct the unconstitutional prison sentence violate Mr. Bailey's due process rights where his ability to pay was not considered?

Appellant answered: Yes

*Amici* answer: Yes

### Statement of Interest of *Amici Curiae*

The American Civil Liberties Union Fund of Michigan (“ACLU”) is the Michigan affiliate of a nationwide nonpartisan organization of nearly 500,000 members dedicated to protecting the liberties and civil rights guaranteed by the United States Constitution. The ACLU regularly and frequently participates in litigation in state and federal courts seeking to protect the constitutional rights of people in Michigan.

Over the last several years, the ACLU has spearheaded an effort in this state to draw attention to the problem of debtors’ prisons. In 2010, the ACLU published the report *In for a Penny: The Rise of America’s New Debtors’ Prisons*, <<http://www.aclu.org/prisoners-rights-racial-justice/penny-rise-americas-new-debtors-prisons>>. In 2011, the ACLU engaged in court watching around the state, and filed emergency appeals in five district court cases in order to draw attention to the widespread problem of “pay or stay sentences.” *See* ACLU Challenges Debtors’ Prisons Across Michigan, <<http://aclumich.org/issues/poverty/2011-08/1599>>. In 2012, the ACLU again engaged in court watching, and found that the practice of imposing pay or stay sentences without an indigency hearing remains endemic throughout Michigan.

The Michigan State Planning Body (“MSPB”) is an unincorporated association of about forty individuals — from the legal services community, the judiciary, the private bar, and community organizations providing services to low-income persons — that acts as a forum for planning and coordination of the State’s efforts to deliver civil and criminal legal services to the poor. The MSPB is a resource to Michigan’s courts, the Bar, and legislative policy makers on issues impacting low-income court users. The MSPB advocates with Michigan policy makers to point out the impact of the legal system on low-income individuals and their families. MSPB members include representatives of civil legal aid and criminal indigent defense organizations

from across the state. On a daily basis, these organizations work with indigent litigants who face incarceration based on their inability to pay court-ordered fees, fines, and costs. MSPB members see the impact of aggressive and sometimes unconstitutional court collections programs on individual litigants. MSPB members also see how court collection actions often impact innocent family members.

The MSPB has done extensive work on court practices that have the effect of incarcerating indigent persons who lack the ability to pay court-ordered “fees fines and costs,” including advocating directly with SCAO regarding its collections policies since 2010. In April 2012, the MSPB published a draft proposal to revise Michigan’s Court Rules in order to require courts systematically to address the ability to pay before incarcerating persons who are subject to court-ordered fees, fines, and costs. *See Implementing Crossroads: A Proposal for Evaluating the Ability to Pay Fees, Fines and Costs* (Apr. 2012).

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on improving the systems of democracy and justice. The Center’s Justice Program works to secure our nation’s promise of “equal justice for all” by ending unnecessary incarceration and promoting cost-effective investments in communities that will lead us all into a more prosperous future. The Justice Program also works to eradicate racial disparities in the justice system. Its mission is to provide data-driven, innovative, and practical recommendations to support legal reform to create a criminal justice system that is economically, rationally, and morally sound. Specifically, it seeks a system that applies proportional punishment, uses incarceration only when necessary for public safety, provides effective counsel, holds actors in the criminal justice system accountable, and ensures government dollars are spent

wisely. These reforms will improve the lives of those caught in the criminal justice system and of all Americans.

One focal point of the Justice Program is stemming the wave of unnecessary incarceration of the poor for failure to pay criminal justice debt. The Brennan Center has joined the ACLU in leading a movement to draw attention to this problem and enact reforms. In 2010, as a companion report to the ACLU's *In for A Penny*, the Brennan Center published, *Criminal Justice Debt: A Barrier to Reentry*, which revealed the national scope of the growth of criminal justice debt as well as the negative consequences it has on governments, communities, families, and individuals. *Criminal Justice Debt: A Barrier to Reentry* (2010), at [http://brennan.3cdn.net/c610802495d901dac3\\_76m6vqhpy.pdf](http://brennan.3cdn.net/c610802495d901dac3_76m6vqhpy.pdf). The Brennan Center also published two reports focusing specifically on the negative impact of the problem in Maryland and Florida and a follow up report showing successful reform efforts in several states. *The Hidden Costs of Florida's Criminal Justice Fees*, at <http://www.brennancenter.org/page/Justice/Florida/F%26F.pdf?nocdn=1>; *Maryland's Parole Supervision Fee A Barrier to Reentry*, at [http://brennan.3cdn.net/fbee4fbc0086ec8804\\_4tm6bp6oa.pdf](http://brennan.3cdn.net/fbee4fbc0086ec8804_4tm6bp6oa.pdf). Most recently, in July 2012, the Brennan Center published *Criminal Justice Debt: A Toolkit for Action*, which provides concrete strategies for reform. *Criminal Justice Debt: A Toolkit for Action*, at [http://brennan.3cdn.net/4c14b93f5afee89bd5\\_zfsm6v848.pdf](http://brennan.3cdn.net/4c14b93f5afee89bd5_zfsm6v848.pdf).

The ACLU, the MSPB, and the Brennan Center believe that, in light of their experience with the issues raised in this case, they can provide additional perspective and information to the Court.

## I. Introduction

Debtors' prisons have long been illegal in the United States. The United States government eliminated the practice of imprisoning debtors in 1833. See Kary L. Moss, *Debtors' Prisons in Michigan: The ACLU Takes up the Case*, M. Bar J. 40, 41 (Jul. 2010). The Michigan Constitution similarly contains a specific prohibition on debtors' prisons. Mich. Const 1963, art. I, § 21. Moreover, the U.S. Supreme Court has repeatedly ruled that indigent individuals may not be incarcerated based on their inability to pay criminal justice related debt. For example, in 1970, the United States Supreme Court ruled that courts may not extend an individual's prison term because the individual is too poor to pay fines. *Williams v Illinois*, 399 U.S. 235 (1970). The Court later held that courts cannot automatically convert an indigent person's unpaid fines into a jail sentence. *Tate v Short*, 401 U.S. 395 (1971). In 1983, the Supreme Court explained that courts may not revoke probation for an individual's failure to pay a fine that he or she is too poor to afford. *Bearden v Georgia*, 461 U.S. 660 (1983). Unfortunately, despite the clear constitutional prohibition on incarcerating individuals because they are too poor to pay court imposed fees and fines, this practice is still alive and well in courts across Michigan.

Like indigent individuals throughout the state, Joseph Bailey was sentenced to a term of incarceration simply because he was, through no fault of his own, unable to pay court-ordered restitution. The inability to pay court-ordered fees, fines, costs, assessments and/or restitution ("legal financial obligations" or "LFOs") routinely results in the incarceration of indigent individuals across Michigan. Those affected include not just criminal defendants, but also juvenile offenders and their parents, people who cannot afford fines for civil infractions, and other court users. The practice of incarceration not only deprives these individuals of their

constitutional rights, but also contravenes the state's goals in imposing LFOs, and results in additional expense to a cash-strapped state.

## II. Background

The ACLU, the MSPB, and the Brennan Center adopt the Statements of Jurisdiction and Facts included in the Appellant's Brief in Support of the Motion for Delayed Application for Leave to Appeal. Appellant's Br. at iii, 1-3. Appellant's Motion was filed on August 6, 2012. Accordingly, Appellee's brief was due on August 27, 2012 and any *amici* briefs are due September 17, 2012. *See* Mich. Court R. 7.212(A); (H). Thus, this brief is timely filed.

## III. Analysis

### A. Indigent Individuals are Routinely Incarcerated for Non-Willful Failure to Pay LFO's.

Courts routinely impose fines, costs and other legal financial obligations on defendants. That is unobjectionable, and individuals who willfully refuse to pay court-ordered financial obligations can be sanctioned. The constitutional problem arises when individuals who are unable to pay are incarcerated without any determination of whether their failure to pay reflects a willful failure to comply with a court order, or an inability to pay based on poverty. Under "pay or stay" sentences, individuals who can afford to pay LFOs walk free, while those who cannot afford to pay are jailed. In some cases, like the case at bar, criminal defendants ordered to pay LFOs within a certain timeframe are sentenced to jail or have their probation revoked for failing to pay within that time. In another variation of this practice, courts sentence defendants to jail and condition release upon the payment of LFOs.

During the last several years, the ACLU, the MSPB, and the Brennan Center have all investigated the use of "pay or stay sentences." *See* ACLU, *In for a Penny: The Rise of America's New Debtors' Prisons* (2010); Brennan Center, *Criminal Justice Debt: A Barrier to*

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*Reentry* (2010); ACLU Challenges Debtors' Prisons Across Michigan (2011); Michigan State Planning Body, *Implementing Crossroads: A Proposal for Evaluating Ability to Pay Fees, Fines, and Costs* (2012). These investigations included court-watching around the state during the summers of 2011 and 2012; monitoring of dockets in particular courts; interviews with defense counsel; and collection of client stories. In addition, in 2011 the ACLU intervened in five illustrative cases to draw attention to the problem. See *ACLU says poor defendants unlawfully jailed for failure to pay fines*, Detroit Free Press (Aug. 4, 2011). In each case, indigent individuals were sentenced to jail time because, due to their lack of financial resources, they were unable to comply with an order to pay criminal justice debt. *Id.* In each case, the ACLU filed emergency papers arguing the unconstitutionality of incarceration under the circumstances, and the individual was released. *Id.*<sup>1</sup>

**1. "Pay or stay" sentences are routinely imposed throughout the state.**

Judges across the state routinely jail people for the sole reason that they are unable to pay their LFOs according to schedules imposed by the courts. See *In for a Penny: The Rise of America's New Debtors' Prisons*, at 29-37; ACLU Challenges Debtors' Prisons Across Michigan, <<http://aclumich.org/issues/poverty/2011-08/1599>>. In most cases, courts do so without ever conducting an assessment of the individual's indigence or ability to pay, see *id.*, or make only a cursory inquiry into ability to pay. *Criminal Justice Debt: A Barrier to Reentry*, at 21-22. Courts frequently refuse to waive fees, create workable payment plans, or provide meaningful alternatives like community service. See *id.* In fact, the Michigan State Court Administrative Office often requires people to pay a fee before entering into a payment plan, without regard for a person's ability to pay. See SCAO Sample Court Policies

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<sup>1</sup> The ACLU can provide further examples of the use of pay or stay sentences, as well as details about these examples, based upon its court watching upon request of the Court.

<http://courts.michigan.gov/scao/services/collections/Policies/SampleCourtPolicies/DistrictCourtDistrictCourtCol.pdf>>; *Criminal Justice Debt: A Barrier to Reentry* at 14. This has resulted in a system of modern-day debtors' prisons in the state, despite the U.S. Supreme Court's rulings proscribing such practices. *See Bearden v Georgia*, 461 U.S. 660; *Williams v Illinois*, 399 U.S. 235.

While the instant case involves restitution, and the investigation of *amici* has focused on other types of court-ordered legal financial obligations, there is an important similarity between the two: the individuals involved were ordered to pay amounts that they were unable to afford, the courts did not inquire into the individuals' ability to pay these amounts, and the individuals were jailed due to their failure to pay the entirety of the amounts assessed.

Several examples may help clarify how the "pay or stay" system works in practice. For example, one case that was profiled in the *In for a Penny: The Rise of America's New Debtors' Prisons* report involved Kawana Young, a young single mother who acquired several traffic tickets over a several year period. *See id.* at 29-36. Due to her inability to find steady full-time employment, Ms. Young was unable to afford the fines and fees assessed. *Id.* In 2010, Ms. Young was brought before a judge for her failure to pay the LFOs. *Id.* The judge refused her request for a payment plan, and sent her to jail for three days because she could not pay immediately. *Id.* at 29-30. She was subsequently jailed an additional four times for nonpayment of her traffic tickets. *Id.* at 30.

Another case, which was profiled during the ACLU's 2011 court-watching campaign, was that of Kyle Dewitt. In 2011, when he was 19 years old, Mr. Dewitt was ticketed by the Department of Natural Resources for catching fish out of season. Because Mr. Dewitt was unemployed, he was unable to pay the \$215 ticket immediately in full. He offered to pay \$100

the next day, and the remainder the following month, but the judge refused the offer, and sentenced him to jail for three days. *See* ACLU, Pay or Stay Clients, at <http://aclumich.org/payorstay>.

The imposition of pay or stay sentences results in a two-tiered justice system, under which the poorest individuals are punished more harshly than those of means. Individuals in courts throughout this state often face two options – to “pay” or to “stay.” Individuals with financial resources can pay their LFOs and move on with their lives, while poor individuals remain under court supervision or incarcerated due to their inability to fulfill these obligations. Such a system violates the fundamental fairness guaranteed by the U.S. Equal Protection Clause of the Fourteenth Amendment and the Michigan Constitution.

## **2. Sentencing Practices Vary Across the State.**

Although pay or stay sentences are widely imposed in Michigan, there is a lack of consistency in the imposition of these sentences across the state’s courts. *See In for a Penny: The Rise of America’s New Debtors’ Prisons*, at 37. Thus, an individual’s likelihood of receiving such a sentence may depend on where he is sentenced. Some jurisdictions impose relatively low assessments, because they are more sensitive to the financial circumstances of indigent individuals, while others impose much higher assessments. *See id.* There is a similar lack of consistency across courts in the practice of revoking probation based on a criminal defendant’s inability to pay fees. *Id.* Thus, although the problem is widespread throughout the state, individuals often face far different outcomes depending upon where they face sentencing. This inconsistency raises questions about equal protection under the law and corrodes faith in the justice system.

**B. Incarcerating Individuals Based on Their Failure to Pay Increases Fiscal Costs to States without Holding Individuals Accountable or Benefiting Victims.**

The imposition of LFOs may serve a variety of important policy objectives. Courts may impose fees in order to hold individuals accountable for the costs that their conduct has imposed upon the justice system. Courts often require criminal defendants to pay restitution in an attempt to ensure that the victims of a crime are compensated for a defendant's actions. The incarceration of individuals who cannot, for reasons beyond their control, comply with the strict timelines for payment of LFOs does nothing to further these policy goals. Incarceration of these individuals ensures that they will not be able to defray court costs or compensate victims. On the contrary, incarceration guarantees only that the state will incur additional costs.

The imposition of LFOs without an assessment of a person's ability to pay such costs operates to entrench his or her indigency. By failing to assess ability to pay, or to offer workable payment plans or meaningful alternatives to payment, courts effectively ensure that an individual will never meet his or her obligations in a timely manner. When these individuals are incarcerated for failing to satisfy their LFOs according to the schedules established, any means they have to make payments are eliminated.

The present case exemplifies the illogicality of incarcerating individuals who cannot afford to pay the entirety of their LFOs. During the bulk of his probation, Mr. Bailey was unable to secure permanent, full-time employment. *See* Appellants Br. at 7. One month before his imprisonment, however, Mr. Bailey secured a full-time job earning a higher hourly wage than he had through his previous, temporary employment. This new job would have allowed him the means to make further payments toward the restitution imposed. When he was sentenced to prison, Mr. Bailey was forced to leave his employment, thereby ensuring that he would not have the ability to make payments. *Id.*

Like Mr. Bailey, many others with outstanding LFOs are forced to abandon any means of paying their LFOs when they are incarcerated. Incarceration eliminates any ability to contribute toward the LFOs, and often negatively affects employment opportunities upon release. Even short periods of incarceration often result in job loss. If people were not incarcerated for outstanding debt, they could work to pay off their LFOs. Incarceration makes it much more likely that these individuals will not repay their obligations.

Incarceration not only ensures that LFOs will remain outstanding, but it guarantees that the state will incur further costs in connection with the individuals involved. The state of Michigan does not have any process for measuring the impact of criminal justice debt and related collection practices on former offenders, their families, or their communities. Michigan further does not have a statewide process for tracking the costs of collection. *Criminal Justice Debt: A Barrier to Reentry*, at 10. Arresting and incarcerating people for failure to pay their LFOs imposes significant costs on the courts, sheriffs' offices, and local jails across the state. Furthermore, incarcerating a person who is too poor to pay debt does not increase the safety of communities, but rather disrupts the ability of people to contribute meaningfully to society. Rather than holding individuals accountable for the costs their conduct has imposed upon the justice system, incarceration multiplies costs to the state and increases the chances that debts will not be repaid. In an era where many states are looking to reduce unnecessary incarceration rates and costs due to fiscal unsustainability, incarceration for LFOs is not a cost-effective use of state dollars and serves no viable public safety rationale. See ACLU, *Smart Reform is Possible* (2011), <<http://www.aclu.org/criminal-law-reform/smart-reform-possible-states-reducing-incarceration-rates-and-costs-while>>.

**C. Individuals who Fail to Pay LFO's Because of Poverty Can be Held Accountable Without Incarceration.**

Indigent people with unpaid LFOs may fully intend to fulfill these obligations, but the timelines imposed for payment or the size of the debt may make it impossible for them to remain current or pay off their full obligation in the time allotted. Unfortunately, courts often look only to whether or not the individual can pay the amount owed by a certain date, rather than viewing the situation from a more practical perspective of how and when the individual may be able to satisfy his or her obligations. Trial court judges may impose pay or stay sentences under the erroneous belief that incarceration is the sole mechanism to ensure that these individuals are held accountable. Not only does such a decision mean that these financial obligations will likely never be fulfilled, but it also ignores the other methods by which these individuals may be held accountable for their unpaid obligations. For example, indigent defendants can be ordered to perform community service, or can be given payment plans that reflect their actual ability to pay. The Constitution does not prevent courts from holding indigent individuals accountable for their conduct. But it does prohibit courts from incarcerating them based on their indigency.

Indeed, courts retain several mechanisms to collect outstanding LFOs from individuals even after a defendant's case is closed. A defendant's Judgment of Sentence remains a court order that is enforceable like any other court order. Unpaid restitution may also be collected by those to whom the restitution is owed. The amount owed reverts automatically to a civil judgment, which is valid for ten years, and may be renewed for another ten years. M.C.L. §§ 780.766(13), 600.5809, 600.2903.

Furthermore, Michigan allows people to participate in community service in order to pay some LFOs. *Criminal Justice Debt: A Barrier to Reentry*, at 17. In places where community service is voluntary, of a time-limited duration, and geared toward developing workforce skills,

courts and communities have seen people successfully work off debt and minimize chances for recidivism. *Criminal Justice Debt: A Toolkit for Action*, at 23-24.

Incarcerating those who are unable to pay their LFOs not only violates the Constitution, but also makes it much more likely that they will never fulfill their court-ordered financial obligations. Moreover, courts retain several other tools to ensure that these individuals continue to make steps toward fulfilling these obligations. By utilizing these other tools, courts can ensure that individuals are able to satisfy their obligations in a manner and under a timeframe that is realistic given the financial resources of each individual.

#### **IV. Conclusion**

The prevalence of pay or stay sentences imposed in courts across the state has created a system of modern day debtors' prisons that violates the fundamental fairness guaranteed by the United States and Michigan Constitutions. By failing to inquire into an individual's indigence, courts imposing such sentences leave poor individuals with no real choice other than to "stay," since these individuals simply lack the means to "pay." Not only do these practices violate the individual rights of those sentenced, but they act in direct opposition to the state's goals in imposing LFOs. The imposition of pay or stay sentences upon poor individuals ensures that the costs of using the court system will not be recouped from those incarcerated, and that the state will incur significant additional costs.

The Court should grant leave here, as Mr. Bailey's case raises important issues regarding the incarceration of individuals based on their inability to pay criminal justice debt.

Respectfully submitted,

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