

STATE OF MICHIGAN
IN THE COURT OF APPEALS

People of the State of Michigan,

Plaintiff-Appellee,

v.

Joseph Bailey,

Defendant-Appellant.

Court of Appeals No. 311682

Lower Court No. 07-406-01

**BRIEF OF AMICI CURIAE THE AMERICAN CIVIL LIBERTIES
UNION FUND OF MICHIGAN, THE MICHIGAN STATE
PLANNING BODY, AND THE BRENNAN CENTER
FOR JUSTICE IN SUPPORT OF JOSEPH BAILEY**

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STATEMENT OF QUESTION PRESENTED

Did the trial court's refusal to correct Joseph Bailey's unconstitutional prison sentence for failure to pay a court-ordered obligation violate his due-process rights under the United States Constitution, where his ability to pay was not considered?

Trial court answered:	No.
Mr. Bailey answered:	Yes.
The People answered:	No.
Amici answer:	Yes.

STATEMENT OF INTEREST OF AMICI CURIAE

The American Civil Liberties Union Fund of Michigan 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 of Michigan 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 of Michigan has led an effort in the state to draw attention to the problem of debtors' prisons. In October 2010, the ACLU published the report *In for a Penny: The Rise of America's New Debtors' Prisons*, containing a detailed section discussing issues in the Michigan courts relating to "pay or stay" sentences.¹ In 2011, the ACLU of Michigan 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.² In 2012 and 2013, the ACLU of Michigan again engaged in court

¹ <<http://www.aclu.org/prisoners-rights-racial-justice/penny-rise-americas-new-debtors-prisons>> (accessed Aug. 20, 2013) (Ex. A).

² See ACLU, *ACLU Challenges Debtors' Prisons Across Michigan* (Aug. 4, 2011) <<http://aclumich.org/issues/poverty/2011-08/1599>> (accessed Aug. 20, 2013) (Ex. B).

watching and found that the practice of imposing so-called “pay or stay” sentences without an indigency hearing remains endemic throughout the state.

The Michigan State Planning Body is an unincorporated association of about forty individuals – drawn 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 Michigan’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 policymakers on issues impacting low-income court users. The MSPB advocates with Michigan policymakers 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, the MSPB’s member 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 dependent family members of defendants.

The MSPB has worked extensively to identify and improve 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 the State Court Administrative Office regarding its collections policies since 2010. In July 2013, the MSPB published a draft proposal to revise Michigan’s court rules in order to require courts to systematically address the ability to pay before incarcerating persons who are subject to court-ordered fees, fines, and costs.³

The Brennan Center for Justice at the New York University School of Law is a nonpartisan public-policy and law institute that focuses on improving the systems of democracy and justice. The Brennan 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 society 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,

³ See *Implementing Crossroads: A Proposal for Evaluating the Ability to Pay Fees, Fines and Costs* (July 2013) <<http://spb.mplp.org:8080/download/attachments/425986/Court-Rule-Proposal-and-Report-7-30-13-for-circulation.pdf?version=1>> (accessed Aug. 20, 2013) (Ex. C).

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.

The Justice Program focuses efforts on 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.⁴ The Brennan Center has also published two reports focusing specifically on the negative impacts of criminal-justice debt in Maryland and Florida and successful reform efforts in several states.⁵ Most recently, in July

⁴ <<http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>> (accessed Aug. 20, 2013) (Ex. D).

⁵ Rebekah Diller, *The Hidden Costs of Florida's Criminal Justice Fees* (2010) <<http://www.brennancenter.org/sites/default/files/legacy/Justice/FloridaF&F.pdf>> (accessed Aug. 20, 2013) (Ex. E); Rebekah Diller, Judith Greene & Michelle Jacobs, *Maryland's Parole Supervision Fee A Barrier to Reentry* (2009) <<http://www.brennancenter.org/sites/default/files/legacy/publications/MD.Fees.Fines.pdf>> (accessed Aug. 20, 2013) (Ex. F).

2012, the Brennan Center published *Criminal Justice Debt: A Toolkit for Action*, which provides concrete strategies for reform.⁶

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

⁶ Roopal Patel & Meghna Philip, *Criminal Justice Debt: A Toolkit for Action* <<http://www.brennancenter.org/sites/default/files/legacy/publications/Criminal%20Justice%20Debt%20Background%20for%20web.pdf>> (accessed July 26, 2013) (Ex. G).

I. INTRODUCTION

Court-imposed financial obligations can legitimately further the purposes of punishment and provide restitution to compensate victims. Nevertheless, “debtors’ prisons” – where individuals are incarcerated because they are too poor to pay court-imposed fees and fines – are still alive and well in courts across Michigan despite the clear constitutional prohibition on such practices. Indeed, inability to pay “legal-financial obligations,” or “LFOs” – which include court-ordered fees, fines, costs, assessments, and restitution – has effectively become a trapdoor into debtors’ prison for indigent defendants. Moreover, it contributes to an exceedingly expensive incarcerated population in the state of Michigan.

Joseph Bailey’s story, as set forth in his brief, clearly illustrates the problems – both legal and practical – with this practice. Like indigent individuals throughout the state, Mr. Bailey was sentenced to a term of incarceration due to his failure to pay court-ordered restitution without any analysis of whether, in fact, he even had the ability to make such payments on the schedule established by the court. Even worse, Mr. Bailey was sent to prison just as he had finally acquired a well-paying job. In one fell swoop, the court deprived Mr. Bailey of gainful employment and the ability to make restitution while returning him to the taxpayers’ care.

As federal and state courts have repeatedly recognized, prison sentences like the one imposed upon Mr. Bailey, applied unevenly and often without any consideration of the indigency or ability to pay of those being incarcerated, present a significant Equal Protection Clause issue under the Fourteenth Amendment to the United States Constitution. The United States government eliminated the practice of imprisoning debtors in 1833,⁷ and the Michigan Constitution contains a specific prohibition on debtors' prisons, albeit in the context of civil debt, Const 1963, art 1, § 21. Moreover, the United States Supreme Court has repeatedly ruled that indigent individuals may not be incarcerated based on their inability to pay criminal-justice-related debt. In 1970, the Court ruled that courts may not extend an individual's prison term because the individual is too poor to pay fines, as such penalty would violate the Equal Protection Clause. *Williams v Illinois*, 399 US 235, 243–45; 90 S Ct 2018, 2023–24; 26 L Ed 2d 586, 594–95 (1970). One year later, the Court held that courts cannot automatically convert an indigent person's unpaid fines into a jail sentence, *Tate v Short*, 401 US 395, 398; 91 S Ct 668, 670-71; 28 L Ed 2d 130, 133 (1971), and, in 1983, the Court held that courts may not revoke probation for an individual's

⁷ See, e.g., Moss, *Debtors' Prisons in Michigan: The ACLU Takes Up the Cause*, Mich Bar J 40, 41 (July 2010) (Ex. H).

failure to pay a fine that he or she is too poor to afford, *Bearden v Georgia*, 461 US 660, 674; 103 S Ct 2064, 2073-74; 76 L Ed 2d 221, 234 (1983).

The Michigan Supreme Court, reflecting this precedent, has stated that “a truly indigent defendant [should] never be required to pay” fees for court-appointed attorneys. *People v Jackson*, 483 Mich 271, 287; 769 NW2d 630, 642 (2009). Indeed, in relation to orders of restitution, Michigan law provides:

[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.

MCL 769.1a(14). Further, the law provides that where a defendant is placed under supervision and fails to pay restitution, in determining “whether to revoke probation or parole or impose imprisonment, the court or parole board shall consider the defendant's employment status, earning ability, and financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.” MCL 769.1a(11).

Moreover, criminal defendants are not the only individuals affected by the courts’ incarceration of individuals without consideration of ability to pay.

Juvenile offenders, their parents, and people who cannot afford fines for civil infractions, among others, also suffer from its impact. This ongoing practice not

only deprives these individuals of their constitutional rights, but also contravenes Michigan's goals in imposing LFOs, and results in additional expense to the state. Amici respectfully urge this Court to take immediate action to improve this situation by providing clear guidance to the lower courts consistent with both well-established constitutional principles and existing laws and procedures.

II. STATEMENT OF PROCEEDINGS AND FACTS

The ACLU of Michigan, the MSPB, and the Brennan Center adopt the jurisdictional and factual statements included in Mr. Bailey's brief. (Bailey's Br iii, 1-3.) As noted therein, Mr. Bailey pled guilty to violation of his probation on October 14, 2008, and he subsequently failed to make sufficient payments towards the \$14,144.33 in restitution owed. (*Id.* at 1.) As of April 1, 2010, Mr. Bailey had paid \$170 in restitution, with some of his payments going towards court fees. (*Id.*) Ultimately, Mr. Bailey was sentenced to a prison term, as the trial court believed that to be its only option since restitution had not been paid and Mr. Bailey was nearing the five-year limit on probation. (*Id.* at 2.) On July 16, 2012, the trial court heard argument on Mr. Bailey's motion to correct his sentence, wherein the court again expressed its belief that the sole remedy available was imprisonment. (July 16, 2012, Post-Conviction Mot Hr'g Tr 6-9.)

On September 14, 2012, amici requested leave to file this brief, which was granted by the Court on March 6, 2013. (Mar. 6, 2013, Order 1.)

III. ARGUMENT

Mr. Bailey has explained cogently and persuasively why the so-called “pay or stay” sentencing imposed upon him is unconstitutional and contrary to Michigan law. Amici will not belabor that point. Instead, amici focus below on providing the court with (a) details about how pay-or-stay sentencing is practiced in Michigan; (b) policy considerations demonstrating why this unconstitutional practice should be addressed; and (c) information about options for ensuring accountability while protecting constitutional rights, including discussion of procedures used in other states. In addition, amici highlight the areas where guidance from this Court is most critical in terms of bringing the practice of lower courts into compliance with constitutional requirements.

A. “Pay or Stay” Sentences Pose a Serious Equal-Protection Problem in Michigan.

While courts may routinely impose fines, costs, and other legal-financial obligations on defendants, constitutional concerns arise when courts incarcerate impoverished defendants who fail to pay criminal debts without a determination of whether their failure to pay reflects willful noncompliance of a court’s order or, rather, an inability to pay based on poverty. It is unobjectionable to sanction

individuals who are able to pay court-ordered financial obligations but willfully refuse to do so. However, overreliance on incarceration when individuals are unable to pay in full, and indeed may have made good-faith efforts to pay what they can, presents constitutional problems. Under “pay or stay” sentences, individuals who can afford to pay LFOs walk free, while those who cannot afford to pay are jailed.

Debtors’-prison practices can take several forms. In some cases, like this one, 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. And, in a third alternative referenced by the People, indigent defendants may decide that they have no choice but to serve jail time, since they know they will be unable to pay the imposed LFOs. (See People’s Br 5.) Ironically, in these cases, the state forgoes debt revenue and incurs increased costs as a result of unnecessary incarcerations.⁸

⁸ See *Criminal Justice Debt: Barrier*, n 4 *supra* at 23 (Ex. D).

During the last several years, the ACLU of Michigan, the MSPB, and the Brennan Center have all investigated the use of “pay or stay” sentences.”⁹ These investigations included observing court proceedings around Michigan during the summers of 2011, 2012, and 2013; monitoring dockets in particular courts; interviewing defense counsel; and collecting client stories. Additionally, in 2011, the ACLU of Michigan intervened in five illustrative cases to draw attention to the problem.¹⁰ In each case, indigent individuals were sentenced to jail time because they lacked the financial resources to comply with an order to pay criminal-justice debt. *Id.* In each case, the ACLU of Michigan filed emergency papers arguing the unconstitutionality of incarceration under the circumstances, and the individuals were released. *Id.*¹¹

⁹ See *In for a Penny*, n 1 *supra* (Ex. A); *Criminal Justice Debt: Barrier*, n 4 *supra* (Ex. D); *ACLU Challenges Debtors’ Prisons*, n 2 *supra* (Ex. B); *Implementing Crossroads*, n 3 *supra* (Ex. C).

¹⁰ See *ACLU Says Poor Defendants Unlawfully Jailed for Failure To Pay Fines*, Detroit Free Press (Aug. 4, 2011) (Ex. I).

¹¹ 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.

1. Michigan Courts Often Violate the Constitutional Rights of Indigent Defendants by Incarcerating Individuals for Nonwillful Failure To Pay Legal-Financial Obligations

Judges across Michigan routinely jail people for the sole reason that they are unable to pay their LFOs according to schedules imposed by the courts.¹² For example, an analysis of sentencing practices in just one district court found that from January 1, 2008, to May 24, 2011, of 359 defendants convicted of begging (an act since held to be constitutionally protected in its own right),¹³ 103 defendants received “pay or stay” sentences.¹⁴ Put differently: in that court, for one particular minor offense, over three-and-one-half years, “pay or stay” sentences were imposed on nearly one-third of defendants. This figure is striking because it demonstrates that in some courts, “pay or stay” sentences have become a standard practice.

While the exact number of individuals incarcerated based on their inability to pay is unknown, the investigations of amici have shown that a significant number of Michigan courts jail individuals for nonpayment without ever conducting an assessment of the individual’s indigence or ability to pay, see *id.*,

¹² See *In for a Penny*, n 1 *supra* at 29–37 (Ex. A); see also *ACLU Challenges Debtors’ Prisons*, n 2 *supra* (Ex. B).

¹³ *Speet v. Schuette*, ___ F3d ___; 2013 WL 4081907 (CA 6, 2013).

¹⁴ Verified Complaint ¶¶ 73–95, *Speet v Schuette*, No 11-cv-00972 (WD Mich, Sept 13, 2011).

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or make only a cursory inquiry into ability to pay, *Criminal Justice Debt: Barrier*, n 4 *supra* at 21–22 (Ex. D). Despite the breadth of options available,¹⁵ these courts frequently refuse to waive fees, create workable payment plans, or provide meaningful alternative forms of payment like community service. See *Criminal Justice Debt: Barrier*, n 4 *supra* at 21–22 (Ex. D). Moreover, default on payment can result in an additional twenty-percent late fee on top of the outstanding criminal-justice debt, making it even more difficult for an impoverished individual to make full payment of LFOs and avoid incarceration. See *id.* at 17; MCL 600.4803. This has resulted in a system of modern-day debtors’ prisons in the state, despite the United States Supreme Court’s clear rulings proscribing such practices. See *Bearden*, *supra* at 674; *Williams*, *supra* at 243–45.

Several examples help demonstrate how the “pay or stay” system has worked in practice in Michigan. One case profiled in *In for a Penny* involved Kawana Young, a young single mother who received several traffic tickets over the course of a few years. See *In for a Penny*, n 1 *supra* at 29–30. 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

¹⁵ See, e.g., *Court Collections Program Components and Details* <<http://courts.mi.gov/Administration/SCAO/OfficesPrograms/Documents/collections/CollectionsComponentsAndDetails.pdf>> (accessed Aug. 20, 2013) (Ex. J).

her failure to pay the assessed LFOs. *Id.* The judge refused her request for a payment plan and sent her to jail for three days because she could not pay \$300 immediately. *Id.* She was later jailed again for failure to pay \$400 in relation to a traffic offense, and was ultimately jailed five times for nonpayment of traffic tickets and other associated LFOs. *Id.* at 30.

Another case profiled during the ACLU of Michigan's 2011 court-watching campaign was that of Kyle Dewitt.¹⁶ In 2011, when he was nineteen years old, Mr. Dewitt was ticketed by the Department of Natural Resources for catching fish out of season. *Id.* Because Mr. Dewitt was unemployed, he was unable to pay the \$215 ticket in full immediately. *Id.* 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. *Id.*

While the instant case involves restitution, and the investigation of amici has focused on a broader range of court-ordered LFOs, there are important similarities between the problems faced by defendants owing these types of LFOs: (a) such defendants are often ordered to pay amounts that they are unable to pay within the required time period; (b) the courts generally do not inquire

¹⁶ See ACLU, *Pay or Stay Clients* <<http://aclumich.org/payorstay>> (accessed Aug. 20, 2013) (Ex. K).

into the defendants' ability to pay these amounts; and (c) such defendants are regularly jailed due to their inability to pay.

The imposition of "pay or stay" sentences ultimately results in an unconstitutional two-tiered justice system under which the poorest individuals are punished more harshly than those with means to pay solely because of their lack of financial resources. For many individuals in courts throughout this state, the option either to "pay" or to "stay" is illusory. While defendants with financial resources can pay their LFOs and move on with their lives, poor defendants are incarcerated due to their inability to fulfill these obligations. Such a system inherently violates the fundamental fairness guaranteed by the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and the Michigan Constitution.

2. Varying Sentencing Practices Across Michigan Contribute to the Rise of Debtors'-Prison Practices.

Although pay-or-stay sentences are routine in some courts in Michigan, there is a troubling lack of consistency in the imposition of these sentences. See *In for a Penny*, n 1 *supra* at 37 (detailing issues with arbitrary sentencing in Michigan courts). Thus, the likelihood of an individual defendant receiving such a sentence may depend in large part upon the court that sentences him or her. While some jurisdictions impose relatively low LFO assessments, others impose much higher

assessments, without any meaningful explanation for the disparity. 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, often without consideration of the financial factors identified under Michigan law. *Id.*; see also MCL 769.1a(11), 769.1f(7). This inconsistency raises significant questions about equal protection under the law, corrodes faith in the justice system, and provides unclear (if any) guidance to lower courts.

Indeed, the uncertainty judges face regarding how to deal with the "pay or stay" issue is amply illustrated by what occurred in this case. During the hearing on Mr. Bailey's post-conviction motion to correct his invalid sentence, the trial court repeatedly asked questions such as, "How am I [going to] collect on the debt?"; the court later asked if it would have to "initiate a lawsuit" if it closed out probation without sentencing Mr. Bailey to prison. (July 16, 2012, Post-Conviction Mot Hr'g Tr 7.) Additional guidance from this Court could help to unify sentencing practices across the state and diminish confusion over options available to collect LFOs.

B. Current Practices of Imprisonment Without Consideration of Ability To Pay Increase Costs to Michigan and Ensure LFOs Will Remain Unpaid.

LFOs serve a variety of important policy objectives, including holding individuals accountable for the costs that their conduct has imposed upon

society and the justice system. But the incarceration of individuals who cannot, for reasons beyond their control, comply with strict timelines for payment of LFOs does nothing to further these policy goals. Rather, incarceration ensures that these individuals will not be able to defray court costs or compensate victims while the state incurs additional costs. See, e.g., *Criminal Justice Debt: Toolkit*, n 6 *supra* at 21 (Ex. G) (discussing costs to Florida's justice system following the state's adoption of twenty additional categories of criminal-justice fees and fines).

The imposition of LFOs or incarceration for failure to pay without an assessment of a person's ability to pay such costs serves to further entrench his or her indigency. By failing to (a) determine ability to pay, or (b) offer workable payment plans or meaningful alternatives to payment, courts inadvertently raise the chances that an indigent individual will be unable to meet his or her LFO obligations in a timely manner. When these individuals are incarcerated for failing to satisfy their LFOs, any potential means they have to make payments are eliminated.

Mr. Bailey's case exemplifies how wasteful and illogical incarcerating individuals who cannot afford to pay the entirety of their LFOs can be. During the bulk of his probation, Mr. Bailey was unable to secure permanent, full-time employment. (See Bailey's Br 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. (*Id.*) This new job would have finally provided him the ability to make further payments toward the restitution imposed. (*Id.*) The lower court ignored all of this, and thereby ignored the factors listed in MCL 769.1a(11), when it sentenced Mr. Bailey to prison for his prior failure to pay. (See Sept. 1, 2011, Hr'g Tr 4-5.) 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. (See Bailey's Br 7.)

Like Mr. Bailey, many others with outstanding LFOs are forced to abandon any means of payment when they are incarcerated, and then face significantly diminished employment opportunities upon release. Indeed, even short periods of incarceration often result in severe employment consequences, as well as additional LFOs since defendants may incur additional charges for the costs of their own incarceration. See 1984 PA 118, MCL 801.81-.93 (establishing costs to be reimbursed by prisoners). If such defendants were not incarcerated for outstanding debt, they could work or perform community service to pay back their LFOs. Ultimately, incarceration makes it much more likely that these individuals will not repay their obligations.

Compounding the damage caused by this practice, not only does incarceration ensure that LFOs will remain outstanding, but it also guarantees

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that the state will incur further costs in connection with the individuals imprisoned. Michigan does not have a method or process for measuring the impact of criminal-justice debt and related collection practices on former offenders, their families, or their communities. Nor does Michigan have a statewide process for tracking the costs of collection and incarceration of indigents for failure to pay LFOs. *Criminal Justice Debt: Barrier*, n 4 *supra* at 10 (Ex. D). There can be no doubt, however, that arresting and incarcerating people for failure to pay their LFOs imposes significant costs on the courts, sheriffs' offices, the Michigan Department of Corrections, and local jails across the state. The average cost of housing an inmate in a Michigan state prison was almost \$90 per day as of 2009,¹⁷ and the average cost of housing an inmate in a Michigan county jail is approximately \$70 per day.¹⁸ These figures do not include costs to

¹⁷ Pew Center on the States, *One in 31: The Long Reach of American Corrections: Michigan Fact Sheet* (2009) <http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/PSPP_1in31_factsheet_MI.pdf> (accessed Aug. 20, 2013) (Ex. L).

¹⁸ See Allegan County, *Regional Jail Feasibility Study – Allegan, Kalamazoo and Kent Counties, Michigan*, at 223 <http://www.allegancounty.org/attachments/calendar2009/board/boc/02-03-09_special_meeting/RegionalJailFeasibilityStudy.pdf> (accessed Aug. 20, 2013) (Ex. M) (showing Allegan County at \$77.81 per day, Kalamazoo County at \$63.11 per day, Kent County at \$84.73 per day, and the average total cost per day of seven county jails as \$68.08 per day).

the court system, or collateral costs incurred when defendants lose employment or housing as a result of incarceration.

While there are no comparable studies for Michigan, Florida conducted a cost-benefit analysis and found that incarceration of indigent defendants for nonpayment of criminal debt required a “tremendous burden” on the court system and law-enforcement manpower, which diverted resources from more serious violent offenders, for only a minimal net gain. *Criminal Justice Debt: Toolkit*, n 6 *supra* at 21 (Ex. G). By way of further example, in Georgia, Ora Lee Hurley’s inability to pay a \$705 fine forced her to remain in a diversion center for *eight months* past her original sentence. *Id.* at 56. At the center, Ms. Hurley participated in a work-release program and worked as a full-time waitress, giving her monthly paycheck to the Department of Corrections as the program required. In return, she received back only a fraction of her earnings to cover both necessities and her fine. *Id.* Ms. Hurley owed the state \$705, but the annualized cost to the taxpayers of keeping her in the center was \$15,000. *Id.*

Rather than holding individuals accountable for the costs their conduct imposed upon society and the justice system, systematic incarceration multiplies costs to the state and increases the chances that debts will not be repaid. In an era

of tight budgets and economic turmoil, incarceration for LFOs is not a cost-effective use of state dollars.¹⁹

C. Michigan Trial Courts Can Hold Indigent Individuals Accountable While Protecting Their Constitutional Rights.

Indigent people with unpaid LFOs may fully intend to fulfill these obligations, but often the timelines imposed for payment or the size of the debt make it effectively impossible to keep up with scheduled payment obligations. Given the lack of guidance, trial courts may – as happened here – 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 do such decisions likely result in numerous LFOs never being repaid, but they also overlook other methods by which these individuals may be held accountable.

Courts have many options other than incarceration in situations where defendants are unable to pay their LFOs due to indigency. For example, courts can extend the due date for payment or establish installment-payment plans which can be modified as needed to adjust to the defendant’s changing circumstances. Wage assignments can facilitate collections, as can garnishment of

¹⁹ See ACLU, *Smart Reform Is Possible* (2011) <<http://www.aclu.org/criminal-law-reform/smart-reform-possible-states-reducing-incarceration-rates-and-costs-while>> (accessed Aug. 20, 2013) (Ex. N).

tax refunds. Courts can also order defendants to participate in community service in order to pay certain LFOs. *Criminal Justice Debt: Barrier*, n 4 *supra* at 17 (Ex. D). In states 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: Toolkit*, n 6 *supra* at 23–24 (Ex. G) (discussing successes with community services and workforce development programs in Washington and Massachusetts). Finally, in appropriate cases courts can waive some LFOs to reduce the debt to an amount that – in light of the defendant’s circumstances – constitutes adequate but not undue punishment.

Even after a defendant’s case is closed, courts retain several mechanisms to collect outstanding LFOs. A “judgment of sentence” remains an enforceable court order. Unpaid restitution may also be collected by individuals to whom the restitution is owed, as the amount owed reverts automatically to a civil judgment that is valid for ten years, and may be renewed for another ten. MCL 600.2903, 600.5809(3), 769.1a(13), 780.766(13).

D. Under the People’s Argument, the Constitutional Requirement To Assess Ability To Pay Prior to Incarceration for Nonpayment Would Become Meaningless.

The People attempt to rebut Mr. Bailey’s arguments by arguing that a plea deal is a voluntary “bargain,” thereby overriding the constitutional requirement of equal protection. This argument fails as a matter of fact and law.

First, it is critical to note that our justice system is “a system of pleas, not a system of trials,” with pleas accounting for approximately ninety-five percent of all criminal convictions under our justice system. *Missouri v Frye*, ___ US ___; 132 S Ct 1399, 1407; 182 L Ed 2d 379, 390 (2012); see also *Padilla v Kentucky*, 559 US 356, ___; 130 S Ct 1473, 1485; 176 L Ed 2d 284, 298 (2010). Courts sentencing defendants who have accepted plea deals still have a constitutional duty to assess indigency to ensure equal protection, regardless of the “voluntary” nature of the bargain entered into. Indeed, *Bearden*, *supra* at 662, the Supreme Court’s seminal case holding that indigents cannot be incarcerated for inability to pay, involved a conviction by plea. Yet, under the approach proposed by the People, the Supreme Court’s holding in *Bearden* would be effectively rendered meaningless, as the “voluntary” nature of plea deals (including, presumably, the plea deal of Mr. Bearden himself) would remove the right to equal protection under the Constitution. (See People’s Br 5–6.)

Second, many of the LFOs imposed on defendants are mandatory and cannot be bargained with by defendants. Restitution is mandatory in Michigan, MCL 780.766(2), and thus repayment of such an LFO is not voluntary, regardless of whether ordered pursuant to a conviction by plea or a conviction after trial. A consideration of indigency remains required under either scenario.

Finally, unnoted by the People is the fact that prosecutors, defendants, and courts often all agree that a sentence other than incarceration is appropriate. This shared understanding that the circumstances of the offense or the offender do not merit incarceration is then reflected in the plea agreement providing (as here) for probation or some other alternative to incarceration. Where nonpayment results from indigency, rather than a willful refusal to pay, there is no basis to void the parties' prior assessment that incarceration is inappropriate. Thus, when nonpayment occurs an assessment of indigency is required to determine whether nonpayment was willful, thereby avoiding the debtors'-prison practice of incarceration based upon poverty.

E. Other States Have Minimized the Occurrence of Debtors'-Prison Practices Through Pragmatic Measures.

The imposition of LFOs on individuals unable to satisfy these debts is not a problem unique to Michigan: every state grapples with this issue. Indeed, several

states have adopted pragmatic measures that could serve as models for Michigan to supplement its approach to this problem.

First, some other states already have adopted objective criteria to determine an individual's ability to pay LFOs. For example, Rhode Island has identified some examples of prima facie evidence of indigency in relation to court costs, including the qualification for programs such as temporary assistance to needy families, social security, disability insurance, or food stamps. RI Gen Laws Ann 12-20-10(b).

Second, some states specify circumstances under which LFOs should not be imposed. For example, in Ohio, once an individual files an affidavit asserting his or her indigency and the court determines that an individual is indigent, state law prohibits the imposition of a mandatory fine. Ohio Rev Code Ann 2929.18(b1). In Maryland, the Division of Probation and Parole must inform parolees of the availability of certain exemptions from parolee supervision fees verbally and in writing. Md Code Ann Corr. Servs 7-702(j). Students and disabled individuals in Maryland may obtain a whole or partial exemption from such fees. Md Code Ann Corr. Servs. 7-702. Maryland specifically amended its laws to require these notifications upon determining that many qualified individuals did not request exemptions, in part, because they were unaware of their existence and availability. See Vallas & Patel, *Sentenced to a Life of Criminal*

Debt: A Barrier to Reentry and Climbing Out of Poverty, 46 Clearinghouse Rev 131, 138-39 (2012). In Hawaii, state laws explicitly exempt indigent individuals from mandatory fines. Haw Rev Stat 706-605(6), 706-648.

F. This Court Should Provide Guidance to the Lower Courts.

Amici recognize the challenges Michigan courts face in handling large volumes of cases every day while simultaneously attempting to collect appropriate fees and penalties. This case presents an important opportunity for this Court to provide guidance to the lower courts, thereby significantly impacting both the protection of indigent defendants' constitutional rights and, potentially, the state's finances. Amici set out below specific points that this Court should highlight in ruling on Mr. Bailey's case to ensure that the lower courts protect defendants' constitutional rights while efficiently collecting LFOs.

1. This Court Should Clarify That a Hearing on Ability To Pay Is Required Before Incarceration for Nonpayment.

Initially, this Court should clarify that a hearing on ability to pay is required prior to incarcerating an individual for nonpayment of LFOs, and it should also provide objective guidelines to lower courts directing how they should make this assessment. Incarcerating defendants for outstanding debts violates their constitutional rights if their failure to pay is not willful and, as a

result, courts must afford defendants hearings to assess ability to pay before sentencing them to a term of incarceration. See, e.g., *Tate, supra* at 398.

Addressing an analogous issue, the Michigan legislature recently passed a new law – the Michigan Indigent Defense Commission Act – which requires that, in relation to the availability of indigent-criminal-defense services, a “preliminary inquiry regarding, and the determination of, the indigency of any defendant shall be made by the court not later than at the defendant’s first appearance in court.” MCL 780.991(3)(a). Demonstrating the importance of this issue is the fact that the new law was the result of a bipartisan effort in the Michigan legislature.²⁰ While this law is focused on the question of whether an individual is entitled to a court-appointed attorney, it provides useful guidance in the LFO context.

2. This Court Should Set Clear, Objective Criteria for Determining Ability To Pay.

The Michigan Supreme Court has said that “once an ability-to-pay assessment is triggered, the court must consider whether the defendant remains indigent and whether repayment would cause manifest hardship.” *Jackson, supra*

²⁰ Tanya Greene, *Victory! Michigan Turns the Corner on Public Defense Reform* (July 1, 2013) <<http://www.aclu.org/blog/criminal-law-reform/victory-michigan-turns-corner-public-defense-reform>> (accessed July 29, 2013) (Ex. O).

at 275; see also MCL 771.3(6)(b) (in considering petition for remission of costs, court should consider whether “payment of the amount due will impose a manifest hardship on the probationer or his or her immediate family”); MCL 780.766(12) (in considering modifying the method of restitution payment, court should consider whether payment “will impose a manifest hardship on the defendant or his or her immediate family”). Meaningful assessments of an individual’s ability to pay need not be onerous or burdensome for the lower courts. By providing clear guidance on the criteria to consider, this Court can reduce the occurrence of debtors’-prison practices in Michigan consistent with previous rulings.

Several statutes and court rules are relevant here. For example, MCL 771.3(6)(a) provides that in determining the amount and method of paying costs, courts “shall take into account the probationer’s financial resources and the nature of the burden that payment of costs will impose, with due regard to his or her other obligations.” Similarly, in the context of revoking probation for failure to pay, courts “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.” MCL 771.3(8); see also MCL 769.1a(11) (substantially similar provision regarding restitution).

A useful model can be found in the objective criteria that Michigan already employs to assess a defendant's indigency in relation to the right to the assistance of appointed counsel. This Court could direct the lower courts to apply these same or similar criteria to determine ability to pay LFOs. For example, the Court could require the presentation of evidence regarding:

- (1) employment, earning capacity and living expenses;
- (2) outstanding debts and liabilities, secured and unsecured;
- (3) qualification for, or receipt of, any form of public assistance;
- (4) availability and convertibility, without undue financial hardship to the defendant and the defendant's dependents, of any personal or real property owned; and
- (5) any other circumstances that would impair the ability to pay a legal-financial obligation.

See MCR 6.005(B) (defining the qualifications to obtain indigent counsel). Further guidance is provided by the Michigan Indigent Defense Commission Act of 2013, wherein Michigan determined that a defendant should be considered indigent if "he or she is unable, without substantial financial hardship to himself or herself or to his or her dependents, to obtain competent, qualified legal representation on his or her own." MCL 780.991(3)(a). Under the law, the following conditions establish a rebuttable presumption of financial hardship: "if the defendant receives personal public assistance, including under the food assistance program,

temporary assistance for needy families, Medicaid, or disability insurance, resides in public housing, or earns an income less than 140% of the federal poverty guideline.” MCL 780.991(3)(b). These guidelines could also reasonably and easily be applied to determinations of ability to pay in the context of LFOs.²¹

3. This Court Should Provide Guidance on Alternatives to Incarceration.

This Court should also remind lower courts that if it is determined that a defendant does not have the ability to pay LFOs in full, the court should determine a fair and reasonable alternative to immediate payment, which could include: (i) an extension of the payment date, (ii) setting up an installment plan or automatic wage garnishment, or (iii) a sentence to participate in a well-designed community-service program to pay off debts.²² While at first blush they

²¹ The issues addressed in this brief relating to assessment of indigency and “pay or stay” sentences raise questions regarding implications of the right to counsel under *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963), which are beyond the scope of this brief. The investigations of amici have revealed that in many cases, defendants do not have attorneys when facing incarceration for the nonpayment of LFOs, either because they are being sentenced on a misdemeanor offense that would not normally result in jail time, or because they are appearing post-conviction on a show-cause or bench warrant for failure to pay. Defendants unrepresented by counsel are at a distinct disadvantage and are particularly likely to be jailed for nonpayment, as they may not even know that ability to pay is a factor in their sentencing. Amici respectfully request that this Court also clarify that the right to counsel attaches to indigent defendants facing incarceration in relation to nonpayment of LFOs.

²² See *Criminal Justice Debt: Toolkit*, n 6 *supra* at 23–24 (Ex. G).

may appear to be “light” sentences, community-service sentences can be a significant imposition on a defendant with limited resources who may lack readily accessible transportation or a flexible schedule. See MCL 771.3 (advising courts that community service may be a component of defendant’s probation).

Similarly, lower courts should be reminded that before sentencing a defendant to incarceration for failure to comply with an order to pay, the court should make a determination on the record that that the defendant is able to comply with the order without manifest hardship to the defendant or his or her dependents, and that the defendant has not made a good-faith effort to comply.²³ Alternatively, courts may find on the record that the defendant has failed to appear in court on an order to show cause to request an extension and explain his or her circumstances.

Finally, the Court could direct lower courts to set a review or status check to ensure that defendants are released from jail when payment in full is made or sufficient “credit” has been earned. If a defendant is spending a long period in

²³ See, e.g., *Bearden, supra* at 672 (“[The] sentencing court must inquire into the reasons for failure to pay 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”); MCL 771.3(8) (court may revoke order of probation for nonpayment only if probationer has not made a good faith effort to pay, and court must consider employment, earning ability, and financial resources); MCL 769.1a(14).

jail for nonpayment of a LFO, it may be that such defendant is truly unable to pay and the court could bring the person back to court to consider alternative means of payment.

IV. CONCLUSION

Defendants should be held accountable for their actions. If, however, incarceration is not the appropriate sentence for a defendant's infraction at the outset, it does not become the appropriate sentence simply because the defendant is poor. While courts can punish willful nonpayment with incarceration, they cannot sentence indigent individuals to incarceration without first determining that the individual in fact had the ability to pay. Unfortunately, Mr. Bailey's case is representative of a widespread practice in the lower courts of incarcerating the poor based on nonpayment of LFOs, without any inquiry into ability to pay.

Amici respectfully ask the Court to address not just Mr. Bailey's case, but also to provide much-needed guidance to the lower courts in order to: (a) clarify that a hearing on ability to pay is required before a defendant is incarcerated for nonpayment of LFOs; (b) set out clear, objective criteria for determining ability to pay; and (c) provide guidance on alternatives to incarceration.

Such guidance is critically important to ensure that Michigan's legitimate goals in collecting LFOs do not result in the unconstitutional entrenchment of debtors' prisons in Michigan.

Date: August 23, 2013

Respectfully submitted,

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STATE OF MICHIGAN
IN THE COURT OF APPEALS

People of the State of Michigan,

Plaintiff-Appellee,

v.

Joseph Bailey,

Defendant-Appellant.

Court of Appeals No. 311682

Lower Court No. 07-406-01

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2013, I electronically filed the **Brief of Amici Curiae the American Civil Liberties Union Fund of Michigan, the Michigan State Planning Body, and the Brennan Center for Justice in Support of Joseph Bailey** with the Clerk of the Court using the Odyssey File and Serve system, and that the following counsel of record were served by electronic mail and through the Court's electronic-filing system:

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