Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

ROBIN SWEET
Director and
State Court Administrator

JOHN MCCORMICK
Assistant Court Administrator
Judicial Programs and Services

RICHARD A. STEFANI
Deputy Director
Information Technology

MEETING NOTICE AND AGENDA
Committee to Study Evidence-Based Pretrial Release
VIDEOCONFERENCE

Date and Time of Meeting: Friday, November 18, 2016 @ 3:00 p.m.

Place of Meeting:

Carson City	Las Vegas
Nevada Supreme Court Law Library Room 107 201 S. Carson Street Carson City, Nevada	Regional Justice Center Conference Rooms A & B 200 Lewis Avenue Las Vegas, Nevada
Teleconference Access: 1-877-336-1829, passcode 2469586	

AGENDA

I. Call to Order
   a. Call of Roll
   b. Approval of 7-13-16 and 8-08-16 Meeting Summaries ***(Tab 1)***
   c. Opening Remarks
   d. Public Comment

II. Pilot Site Program Status Updates - *Judge Stephen Bishop, Ms. Heather Condon, Ms. Kowan Connolly, and Ms. Anna Vasquez* ***(Tab 2)***

III. NPRA Preliminary Analysis Results - *Dr. James Austin and Ms. Angela Jackson-Castain* ***(Tab 3)***

IV. NPRA Tool Overrides Discussion

V. COSCA 2015-2016 Policy Paper Discussion ***(Tab 4)***

VI. Status Update on Subcommittee to Study Bail Schedules - *Judge Mason Simons*

VII. Other Items/Discussion

VIII. Next Meeting Date: TBD

IX. Public Comment

X. Adjournment

- Action items are noted by * and typically include review, approval, denial, and/or postponement of specific items. Certain items may be referred to a subcommittee for additional review and action.
- Agenda items may be taken out of order at the discretion of the Chair in order to accommodate persons appearing before the Commission and/or to aid in the time efficiency of the meeting.
- If members of the public participate in the meeting, they must identify themselves when requested. Public comment is welcomed by the Commission but may be limited at the discretion of the Chair.
- The Commission is pleased to provide reasonable accommodations for members of the public who are disabled and wish to attend the meeting. If assistance is required, please notify Commission staff by phone or by email no later than two working days prior to the meeting, as follows: Jamie Gradick, (775) 687-9808 - email: jgradick@nvcourts.nv.gov
- This meeting is exempt from the Nevada Open Meeting Law (NRS 241.030)
- At the discretion of the Chair, topics related to the administration of justice, judicial personnel, and judicial matters that are of a confidential nature may be closed to the public.
- **Notice of this meeting was posted in the following locations**: Nevada Supreme Court website: www.nevadajudiciary.us; Carson City: Supreme Court Building, Administrative Office of the Courts, 201 South Carson Street; Las Vegas: Regional Justice Center, 200 Lewis Avenue, 17th Floor.

TAB 1

Supreme Court of Nevada
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JUDICIAL COUNCIL OF THE STATE OF NEVADA

"To unite and promote Nevada's judiciary as an equal, independent and effective branch of government."

Committee to Study Evidence-Based Pretrial Release

Summary Prepared by Jamie Gradick
July 13, 2016
4:00 p.m. – 5:30 p.m.
Videoconference (Carson City, Las Vegas)

Members Present

Justice James Hardesty, Chair
Judge David Barker
Judge Stephen Bishop
Judge Joe Bonaventure
Jeremy Bosler
Heather Condon
Kowan Connolly
Judge Gene Drakulich
Tad Fletcher
Judge Douglas Herndon
Chris Hicks
Judge Kevin Higgins
Judge Cedric Kerns
Judge Jennifer Klapper
Phil Kohn
Judge Scott Pearson
Judge Thomas Perkins
Judge Melissa Saragosa
Judge Elliot Sattler
Judge Mason Simons
Dagny Stapleton
Judge John Tatro
Judge Alan Tiras
Judge Ryan Toone
Judge Natalie Tyrrell
Anna Vasquez
Jeff Wells
Steven Wolfson
Judge Bita Yeager

Guests

Dr. James Austin
Mike Doan
Dana Hlavac
Angela Jackson-Castain
Kim Kampling
Sandy Molina
Leland Moore

AOC Staff

Jamie Gradick
Hans Jessup
Kandice Townsend

I. Call to Order
- Justice Hardesty called the meeting to order at 4:00 p.m.

II. Call of Roll

- Ms. Gradick called roll; a quorum was present.

III. Approval of Prior Meeting Summary
- The summary of the May 23, 2016 meeting was approved.

IV. Opening Remarks
- Justice Hardesty welcomed attendees and explained that the objectives of this meeting are to review Dr. Austin's NPRA Tool Validation report and to review and approve the NPRA Tool Implementation Plan put forth by the NPRA Implementation Protocol Subcommittee.
- Justice Hardesty informed attendees that NIC, Urban Institute, PJI, and OJP are all working with the Committee to train judges, staff/users, and attorney stakeholders in use of the tool. Much work has taken place over the past several weeks; the go-live date for the pilot site program is September 1, 2016.
- Justice Hardesty explained that the training sessions will be remotely webcast and will be interactive.

V. Public Comment
- There was no public comment in Las Vegas or in Carson City.

VI. NPRA Tool Validation Report
- Dr. James Austin with the JFA Institute, together with Ms. Angela Jackson-Castain with the OJP Diagnostic Center, presented the results of the NPRA Tool Validation Report. *(See meeting materials for copy of report)*
- Dr. Austin explained that the following six recommendations were made to increase predictability of the tool:
  - Added the factor of possession of valid cell phone number (non-cell phone releases had a higher FTA rate);
  - Consolidated the substance abuse factor by only using prior drug/alcohol related arrests (other measures of drug use were not valid);
  - Modified the residence factor by adding whether the person was a resident of Nevada (non--- residents have a higher FTA rate);
  - Consolidated prior misdemeanor arrest score so that 3 or more receive 2 points (no difference in rates by 3-5 and 6 or more categories);
  - Consolidated prior felony/gross misdemeanor arrests score so that 2 or more are scored as 2 points (no difference in rates by other categories); and,
  - Recalibrated the overall scale so that it matches the new scoring process.
- Dr. Austin explained that the tool is "normed" to Nevada's population and meets industry standards in terms of predictability and effectiveness.
- Mr. Jeremy Bosler expressed concern that indigent and minority defendants are arrested at a disproportionately higher rate. Mr. Bosler asked whether the tool measures or addresses this in any way.
  - Discussion was held regarding the use of overrides and judicial discretion to consider these issues; this is something that will need to be addressed in the training and monitored during the pilot site.

- Discussion was held regarding conducting a revalidation of the instrument following the pilot site in order to measure the impact of certain factors such as employment status, residency, and cell phone, etc. These factors were included because there is data to support their impact on predictability and they can be indicators of those offenders who need "extra help."
- Mr. Chris Hicks asked for clarification regarding a disproportionate amount of arrests resulting in a disproportionate amount of convictions as well and how this would skew the tool.
  - Dr. Austin explained that, in general, there isn't a correlation between the two in most jurisdictions.
- Judge Pearson asked for clarification regarding whether the overrides were part of the validation and how to address the override question in the training.
  - Dr. Austin explained that the manual that is being put together operationally defines the factors. The overrides came from the Committee. Additionally, there should be "reliability testing" of the staff as they complete the instrument.
  - Discussion was held regarding the need to address/define the overrides more thoroughly; a suggestion was made that the NPRA Implementation Subcommittee should take this on.
- Justice Hardesty explained that race and poverty data will need to be collected and monitored for impact on predictability throughout the pilot site program.
- Judge Sattler expressed concern regarding the application of the tool to all Cat. A offenses (as an example) across the board and commented that the tool should be applied to certain types of cases and not applied to other types.
  - Discussion was held regarding training the evaluators on "nature of offense". Justice Hardesty commented that users need to be careful of using offenses in order to avoid prejudging guilt; treating it as an override may not be appropriate. The tool is a guide; these "certain case types" are factors that the judge will need to take into consideration as part of judicial discretion.
  - Justice Hardesty commented that releasing everyone in a specific crime type category could result in the release of high risk defendants.
- Mr. Hicks expressed concern regarding pilot site locations operating differently with the same crime types. Justice Hardesty explained that the tool captures risk - that's a different question from the release decision practices that exist in the various jurisdictions of automatically letting staff make release decisions for certain crime types and withholding that discretion for other crime types.
  - Dr. Austin commented that revalidation of the tool could be impacted if differing practices across the sites are resulting in some people not being assessed.

  - Justice Hardesty commented that completing the assessment on everyone regardless of release policies will allow for better tracking.
  - Discussion was held regarding the "misconception" that court services will have discretion to release those people who score low risk on the tool; the judge needs to be making this decision.
  - Justice Hardesty commented that there is value in having the district attorneys and courts look at the release decisions; whether to reconcile or not is something that the Committee may need to address at a later date.
- Discussion was held regarding the assumption that all questions on the tool need to be answered in order for the verification process to be accurate. Dr. Austin confirmed that the tool needs to be completely filled out in order to function as intended.
  - Discussion was held regarding the ability to verify the information and how to handle the process when information (employment, residency) cannot be verified.
  - Dr. Austin explained that, if the information cannot be verified, then the defendant does not get "credit" - for example, until employment is verified, have to assume the defendant is not employed.
- A motion was made to accept the report; the Committee unanimously approved the motion.

VII. Discussion of NPRA Tool Implementation Plan

- Ms. Heather Condon introduced Mr. Leland Moore, a consultant working with the National Institute of Corrections to develop the NPRA Tool Implementation Plan.
- Mr. Moore provided an overview of the plan and explained that it was designed to function as a "road map" to guide the NPRA implementation efforts in the pilot sites.
  - The document functions as a "common document" to avoid "everyone doing their own thing" and allows "best practices to be used" in designing a quality roll-out process.
  - The plan was specifically designed with a pilot program in mind and with an understanding that the various pilot sites have different needs and resources. Thus, the plan has a degree of flexibility built into it (timelines, roles, etc.) that allows it to be updated as implementation efforts progress.
- Mr. Moore commented that the policy section should be completed prior to the pilot site program commence date.
- Discussion was held regarding training logistics.
  - Training dates are August 18 and 19 at the Clark County Commission chambers; training will consist of online, interactive (remote webcast) training by Urban Institute/PJI and onsite training by Dr. Austin. The AOC Judicial Education Dept. will arrange for the sessions to be filmed.

  - Additional training issues/logistics will be addressed as the implementation process progresses.
  - Justice Hardesty explained that there will be 3 groups of professionals, each group attending its own session. Discussion was held regarding scheduling: court staff will be trained during the 8/18 morning session; attorneys will be trained during the 8/18 afternoon session and the 8/19 morning session; and judges will be trained during the 8/19 afternoon session.
  - Justice Hardesty would like to have two brief conference calls tomorrow to discuss training logistics and outreach/communication efforts; one call will be with Washoe and Clark PDs and DAs and another will be with the pilot site judges.
- A motion was made to accept the NPRA Tool Implementation Plan; the Committee unanimously approved the motion.
- Discussion was held regarding "getting the word out" to private contract counsel.
  - Mr. Phil Kohn and Mr. Jeremy Bosler agreed to contact these groups and will confirm with Ms. Gradick once they've done so.
- Justice Hardesty will look into getting CLE credit approval for the training.

VIII. Other Items/Discussion

- Ms. Condon informed attendees that Mr. Joel Bishop's (with Mesa County) has agreed to discuss supervision and risk levels with the Committee at future meeting. It is imperative that consistent supervision requirements are established prior to the pilot site commencement.
  - Supervision should be least restrictive and related to risk as predicted by the tool.

IX. Next Meeting Date

- Justice Hardesty informed attendees that the next meeting would be tentatively set for August 8, 2016 depending upon Mr. Joel Bishop's availability to attend.

X. Additional Public Comment

- There was no additional public comment offered from either Las Vegas or Carson City.

XI. Adjournment

- Justice Hardesty adjourned the meeting at 5:30 p.m.

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Committee to Study Evidence-Based Pretrial Release

Summary Prepared by Jamie Gradick
August 8, 2016
4:00 p.m. – 6:03 p.m.
Videoconference (Carson City, Las Vegas)

Members Present

Justice James Hardesty, Chair
Judge David Barker
Judge Stephen Bishop
Judge Joe Bonaventure
Jeremy Bosler
Heather Condon
Kowan Connolly
Judge Gene Drakulich
Tad Fletcher
Chris Hicks
Judge Kevin Higgins
Judge Cedric Kerns
Phil Kohn
Judge Victor Miller
Judge Michael Montero
Judge Scott Pearson
Judge Thomas Perkins
Judge Elliot Sattler
Judge Mason Simons
Dagny Stapleton
Judge John Tatro
Judge Ryan Toone
Judge Natalie Tyrrell
Anna Vasquez
Steven Wolfson
Judge Bita Yeager

Guests

Michelle Alaire
Joel Bishop
John Boes
Ben Graham
Sandy Molina
George Ross
Laurel Stadler
Ryan Sullivan

AOC Staff

Jamie Gradick
Kandice Townsend

I. Call to Order
- Justice Hardesty called the meeting to order at 4:00 p.m.

II. Call of Roll
- Ms. Gradick called roll; a quorum was present.

III. Opening Remarks

- Justice Hardesty welcomed attendees and provided a brief outline of the goals for the meeting.

IV. Risk Level Supervision Conditions

- Mr. Joel Bishop, with Mesa County's Criminal Justices Services Department, provided a discussion of pretrial policies and supervision guidelines. *(See Tab 2 in meeting materials for presentation handout)*
- Mr. Bishop explained the policy/chart used in Mesa County (page 7 in handout).
  - Preferences for scrutiny regarding crime types can be tailored to the needs of the state/jurisdiction.
  - Presumptions were created based on risk level and crime type, even though crime type was not validated as a predictor of risk.
  - Goal was to reach 80% concurrence in order to allow for "courtroom intangibles" in each case; 100% concurrence would be too limiting on judicial discretion.
  - This page replaced the money bond schedule; the judge can still set bail but it needs to be based upon this chart.
- Mr. Bishop directed Committee members to page 10 of the handout and explained that the correlating supervision guidelines (SMART Praxis) outlines the supervision structure of the pretrial program and how defendants will be supervised within each level.
- Discussion was held regarding outcomes of these guidelines on the jail population within Mesa County. Mr. Bishop explained that jail now houses high-risk defendants who are there for "strategic" reasons, rather than low-risk defendants who are there simply because they are too poor to "buy their way out."
- Justice Hardesty asked whether characterizing this as set of "release guidelines" would be a "fair" characterization; Mr. Bishop agreed that this would be accurate but added that these guidelines also try to articulate the legal reasonable and legal circumstances under which a judge may hold someone.
- Discussion was held regarding Mesa County's decision not to set "uniform" dollar amounts for specific crime types because circumstances vary for each defendant.
- Justice Hardesty asked for clarification regarding how crime types requiring no supervision were determined.
  - Mr. Bishop explained that supervision requirements are based on actual outcome data so the "guesswork" has been taken out of it.
  - This is a "data-driven matrix."
- Justice Hardesty explained that the pilot sites are going through a similar process of identifying crimes in which administrative release would be appropriate versus crimes in which judicial assessment would be required

and asked for clarification regarding whether Mesa County has adopted a series of "supervision levels."
  - Discussion was held regarding the SMART Praxis and levels of supervision; the judges concur with the levels approximately 83% of the time.
- Justice Hardesty asked for advice regarding the process for determining "crime types" to include on the matrix.
  - Discussion was held regarding the subjective nature of this aspect of the process; Mr. Bishop suggested that the focus should be risk level, rather than crime type but acknowledged that this may not always be feasible depending upon the stakeholders involved in the process.
- Justice Hardesty expressed concern regarding limited resources and staff.
  - Mr. Bishop explained that Mesa County saw an increase in pretrial staff workload but were able to offset this by collaborating with Parole and Probation.
  - It's important to monitor the workloads and "system design" - your focus should remain on the people who need to be supervised.
- Ms. Heather Condon asked for clarification regarding Mesa County's decision to move away from fees. Mr. Bishop explained that supervision fees are currently being "phased out" and commented that this requires a "culture" shift.
- Discussion was held regarding impact on jail populations; Mr. Bishop explained that this doesn't necessarily decrease jail population but it changes the population "make-up" by ensuring that those people who are in jail are there for specific, strategic reasons.
- Judge Perkins asked for clarification regarding whether there is an opportunity to post bail prior to assessment; Mr. Bishop explained that defendants remain in jail until they are assessed via universal screening.
  - Key philosophy is that judges, not bail bonds representatives, should be making release decisions.
- Judge Pearson asked for clarification regarding who pays for drug testing fees, SCRAM, etc. Mr. Bishop explained that the county has programs available to subsidize these fees if they cannot be collected from the defendants.
- Judge Sattler inquired about the average time from arrest to judicial assessment on release; Mr. Bishop explained that this "release rate" was a data element that Mesa County was particularly interested in tracking and offered to forward the data to the Committee membership. The average time to see a judge is 1-2 days; pretrial services staff work daily.
- Discussion was held regarding caseloads of pretrial services officers (approximately 100 per officer); there are various ways to break out the caseload (by courtroom, by category of risk, etc.).
- Mr. Bishop cautioned against the use of GPS tracking as a supervision tool; it's not appropriate or effective in many instances and can be detrimental.

V. Order of Judicial Review Discussion

- Justice Hardesty explained that the materials provided include administrative orders currently in use in the pilot site jurisdictions.
- The pilot sites have been asked to collaborate and develop a consistent approach to how administrative releases will be handled during the pilot site program.
  - Discussion was held regarding whether all parties have received/reviewed all the approaches.
  - Justice Hardesty asked Judge Barker and Judge Bonaventure to review the approaches being used in the 2nd Judicial District with Mr. Wolfson, Mr. Kohn, and Judge Kerns and then discuss a "uniformed approach."
  - Justice Hardesty suggested the parties set up a conference call before the August 18 and 19 trainings to discuss this.
- Justice Hardesty commented that he would like to start developing the supervision matrix (similar to Mesa County's example) as soon as possible.

VI. Subcommittee to Study Bail Schedules Status Update

- Judge Mason Simons, as chair of the Subcommittee, provided a status update on the Subcommittee's progress.
  - The group has been compiling and comparing the various bail schedules in play throughout the state; the results show that there are significant disparities among jurisdictions.
  - The Subcommittee has extensively discussed the feasibility of mandatory schedule but has concerns regarding push back. Instead, there is a general consensus among the members that a "model bail schedule" would be a more appropriate alternative.
- Mr. Wolfson commented that it may not be appropriate to have statewide consistency given how different the various jurisdictions across the state are.
  - Judge Simons explained that this is something the Subcommittee has considered; it might be worth having a model "rural" schedule and a model "urban" schedule.
- Justice Hardesty commented that judges should have the option of using bail to keep high risk defendant s in jail.
- Discussion was held regarding push back; attempts to develop uniform schedules have been made before but have failed.
- Justice Hardesty commented that there's an equal protection issue at play: bail varies for same offense in different jurisdictions. What does money have to do with a defendant's FTA or danger risk?
  - Judge Perkins commented that judicial discretion during the bail hearing alleviates the equal protection concern.
  - Discussion was held regarding the need for a "base level" to guide new judges and to bring the various "starting points" closer together; inconsistency is "dangerous."

- Judge Perkins made a motion to request that the Subcommittee to Study Bail Schedules develop and present a "Model Bail Schedule" at a future full-Committee meeting.
  - The motion was seconded by Judge Kerns.
  - Mr. Wolfson opposed the motion.
  - Mr. Kohn opposed the motion.
  - The motion passed by majority vote.

VII. Other Items/Discussion

- Justice Hardesty informed attendees that both the Reno Municipal Court and the Sparks Municipal Court have joined the pilot site program.
- Justice Hardesty provided attendees with an overview of the logistics of the upcoming NPRA Tool Training Sessions.
  - Sessions will be recorded and made available through the AOC's Judicial Education website.
  - CLE credit will be available but attendees must sign in at the presentations in order to get credit.
  - Justice Hardesty asked for "facilitators" to handle the sign-in sheets; Mr. Hicks, Mr. Wolfson, Judge Barker, and Judge Sattler were asked to assign someone from their respective teams to handle sign-in sheets.
  - Mr. Hicks suggested Justice Hardesty send a letter of invite to the Reno City Attorney and his team as well.
  - Judge Kerns clarified the alternate judges (pro tems) are welcome to attend the judges' session.
  - Discussion was held regarding known, incoming judges attending as well.
- Justice Hardesty asked attendees for input regarding Kentucky's rule (Miranda Rights issue) and suggested the Committee consider voting on a rule to propose to the Nevada Supreme Court.
  - Mr. Hicks expressed concern regarding the rule. Historically, in Washoe County, these types of questions have been asked of defendants for several years without any problems arising. The Kentucky rule is very "expansive" and could "handcuff" the prosecutor.
  - Mr. Kohn expressed concern with the rule's language regarding its use in sentencing and commented that, while he cannot endorse the Kentucky rule, he is very willing to work with Mr. Hicks, Mr. Wolfson, and Mr. Bosler to develop a more appropriate rule for Nevada.
  - Justice Hardesty tasked Mr. Kohn, Mr. Hicks, Mr. Wolfson, and Mr. Bosler with working together to find a rule for Nevada and report back to the full-Committee at the next meeting.
- Discussion was held regarding the impact of limited staffing/resources on the pilot sites.
  - Justice Hardesty commented that it's still too early to quantify the needs.
  - Mr. Wolfson commented that he has reservations about staffing and lacks the "comfort level" to "sign-off" on anything at this point; he would prefer

to have more dialog with pretrial services and stakeholders in Clark County before moving forward.
  - Justice Hardesty commented that he is willing to meet and discuss this with the Clark County Commission.
  - Heather Condon commented that she also has staffing concerns regarding her team in Washoe County and she is working on "borrowing" some staff to help in the beginning. It's going to be an issue for Washoe but, at this point, there are too many variables to determine what the impact will be at this point.
  - Justice Hardesty would like to find a time during the training sessions to meet with Clark County staff to discuss this. Mr. Wolfson will contact Mr. Wells about this and set up a time to discuss.
- Judge Pearson expressed concern regarding judges "over-ordering" supervision conditions and adversely impacting budgets. Discussion was held regarding the need to "learn as we go" through this process.

VIII. Next Meeting Date
- Justice Hardesty informed attendees that the next meeting will be tentatively set for October 2016.

IX. Additional Public Comment
- There was no additional public comment offered from either Las Vegas or Carson City.

X. Adjournment
- Justice Hardesty adjourned the meeting at 6:03 p.m.

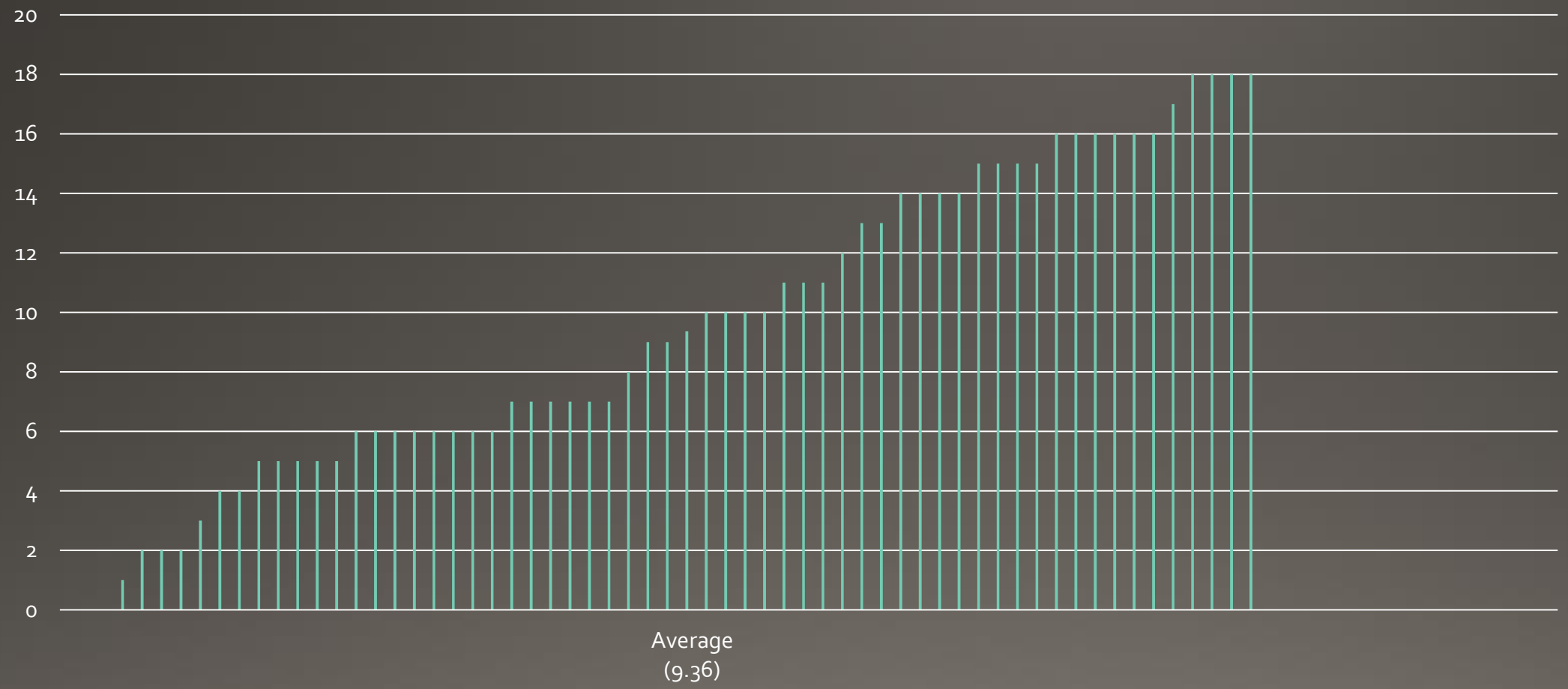
TAB 2

NPRA Results (July 6, 2016 to Nov. 7, 2016)

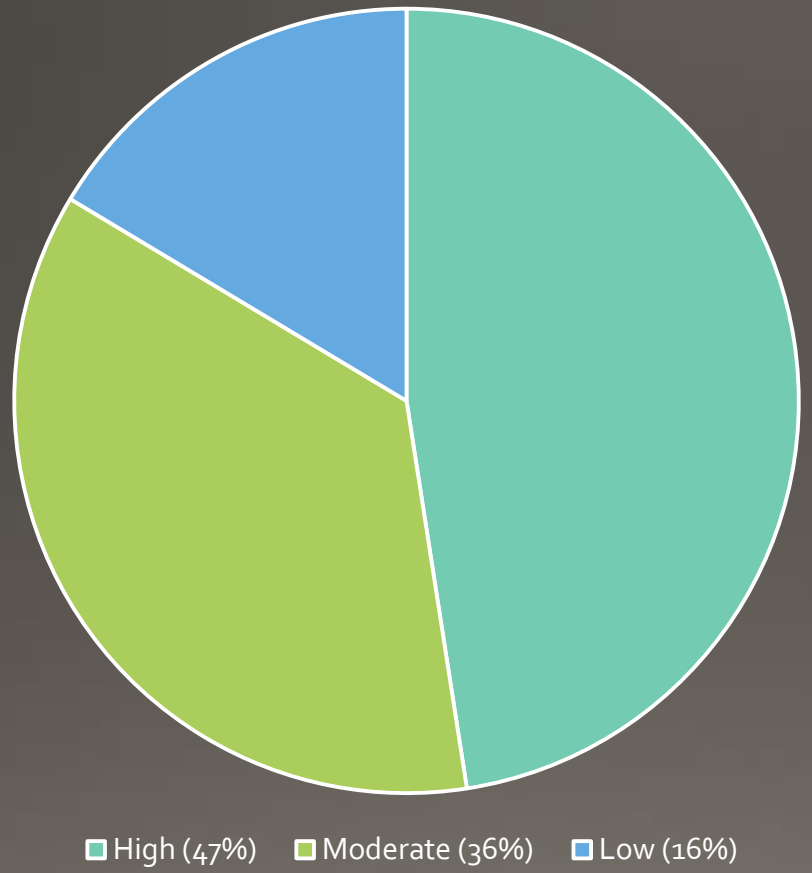
White Pine County

NPRA Scores

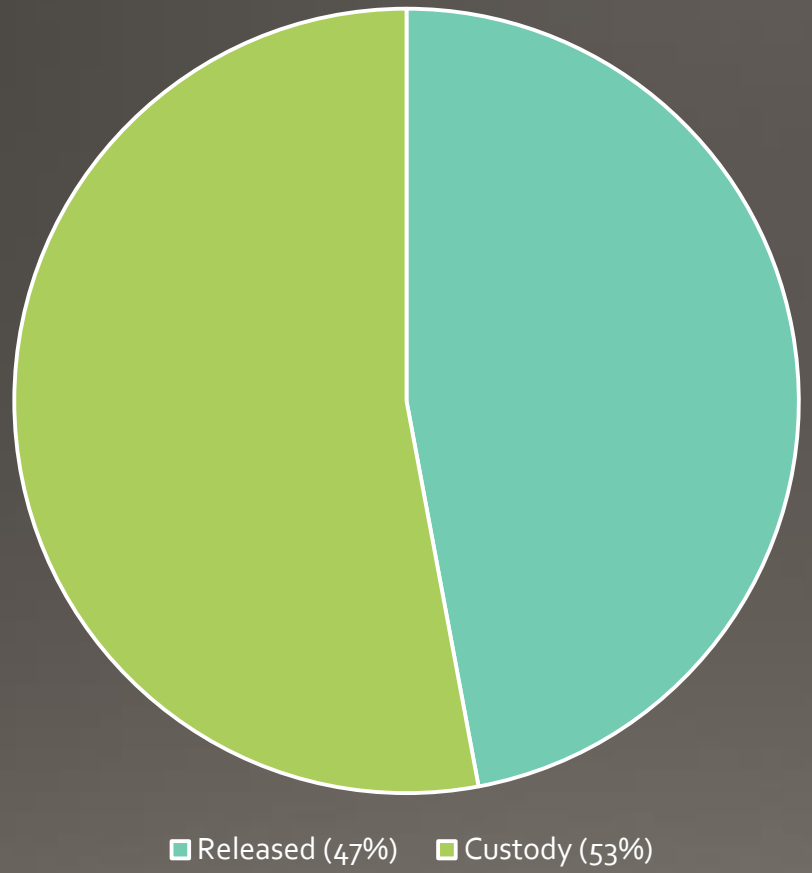
(61 Cases)



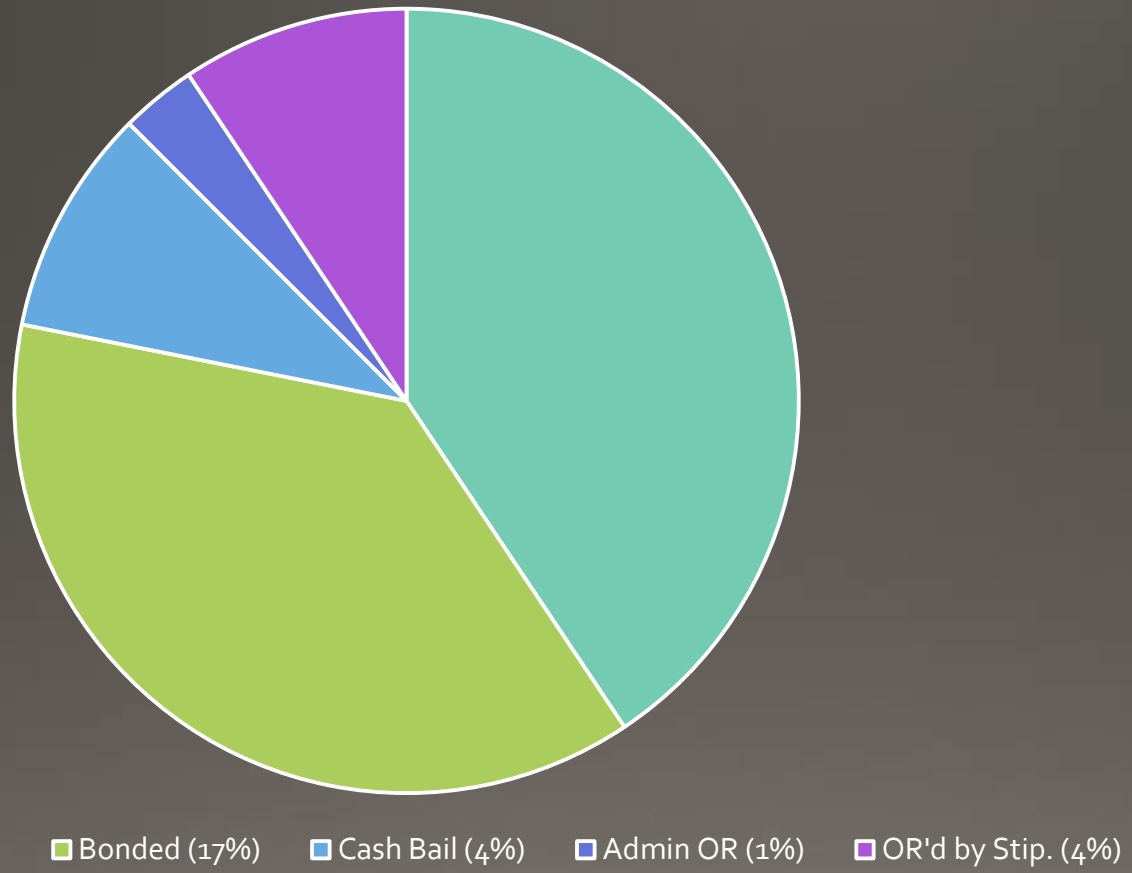
NPRA Category Score



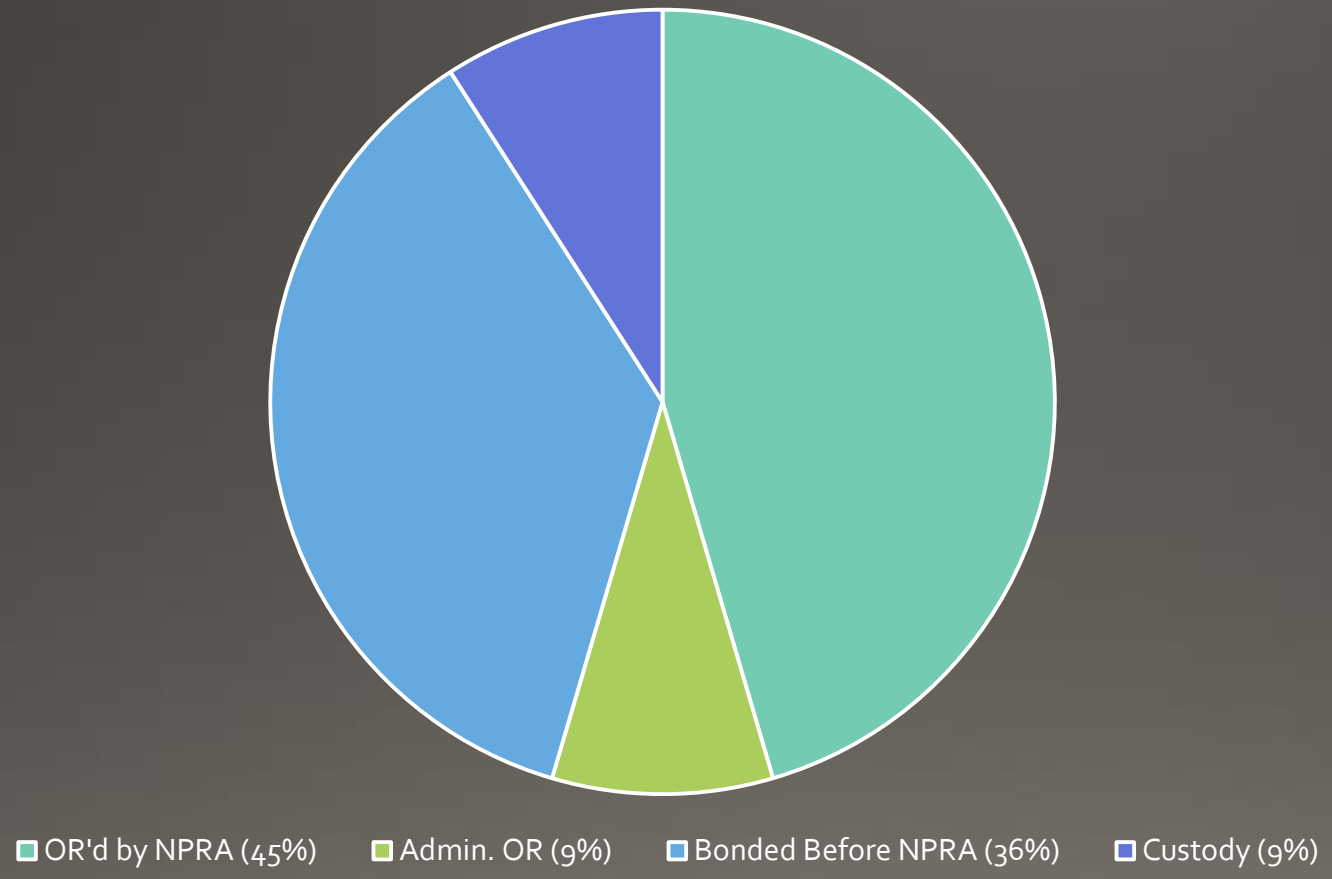
Custody Status in Justice Court



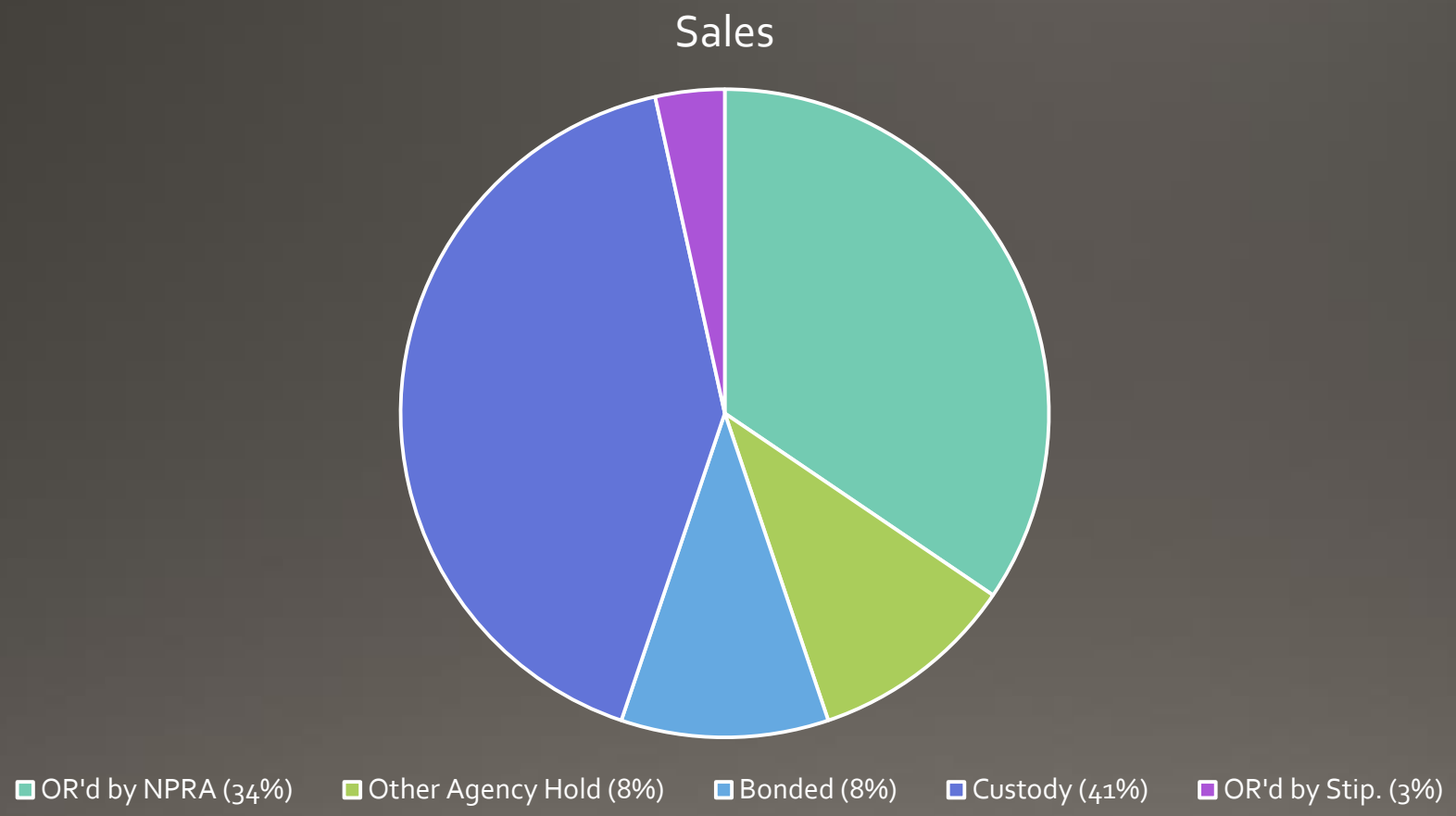
Method of Release in Justice Court



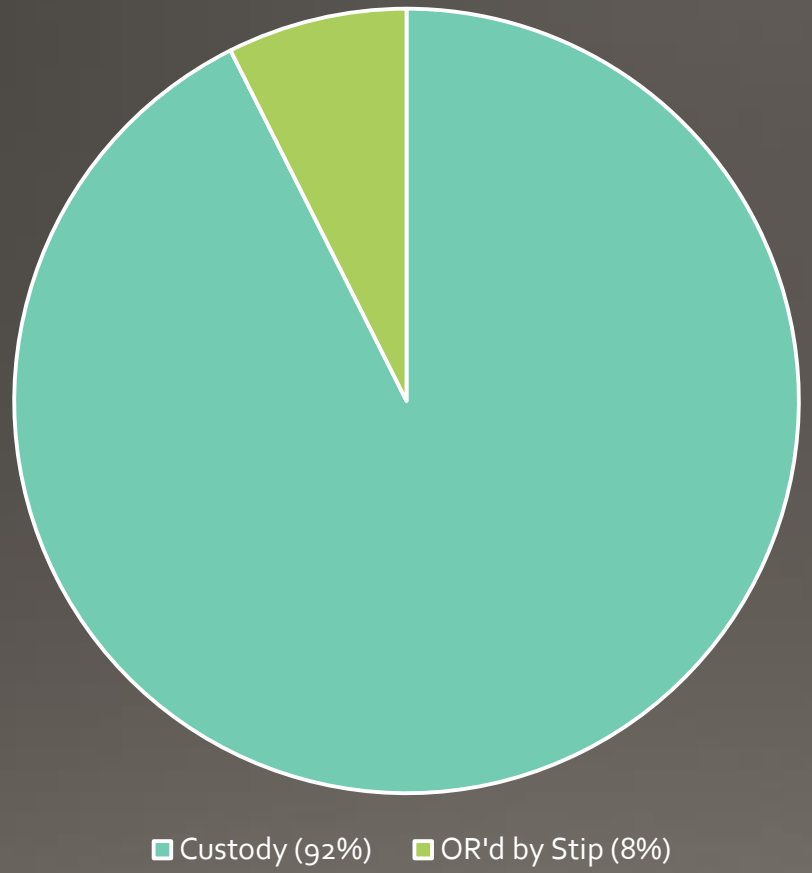
Release Status of Low Scorers



Release Status of Moderate Scorers

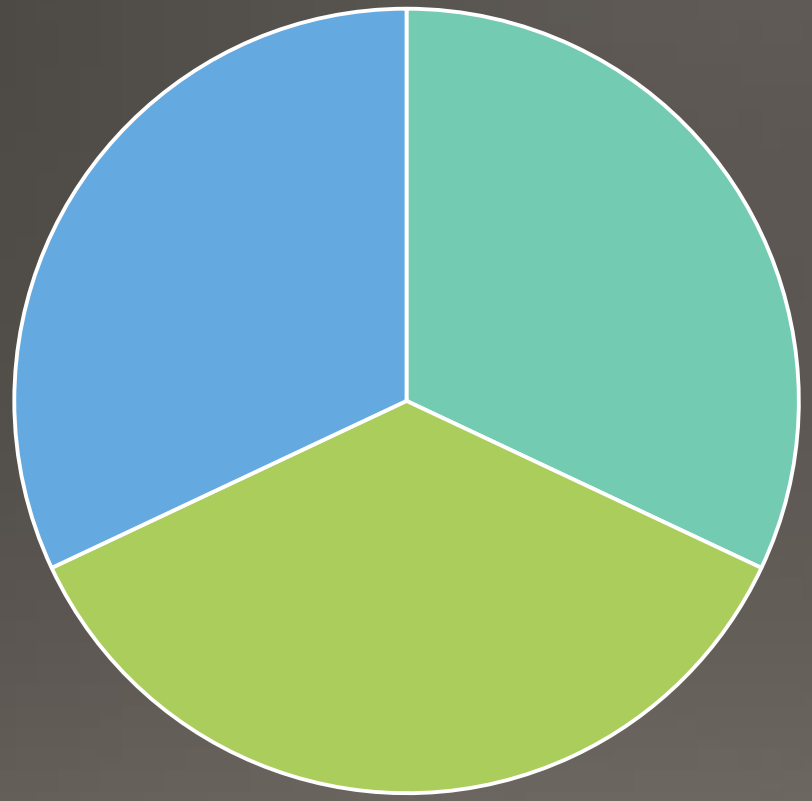


Release Status of High Scorers



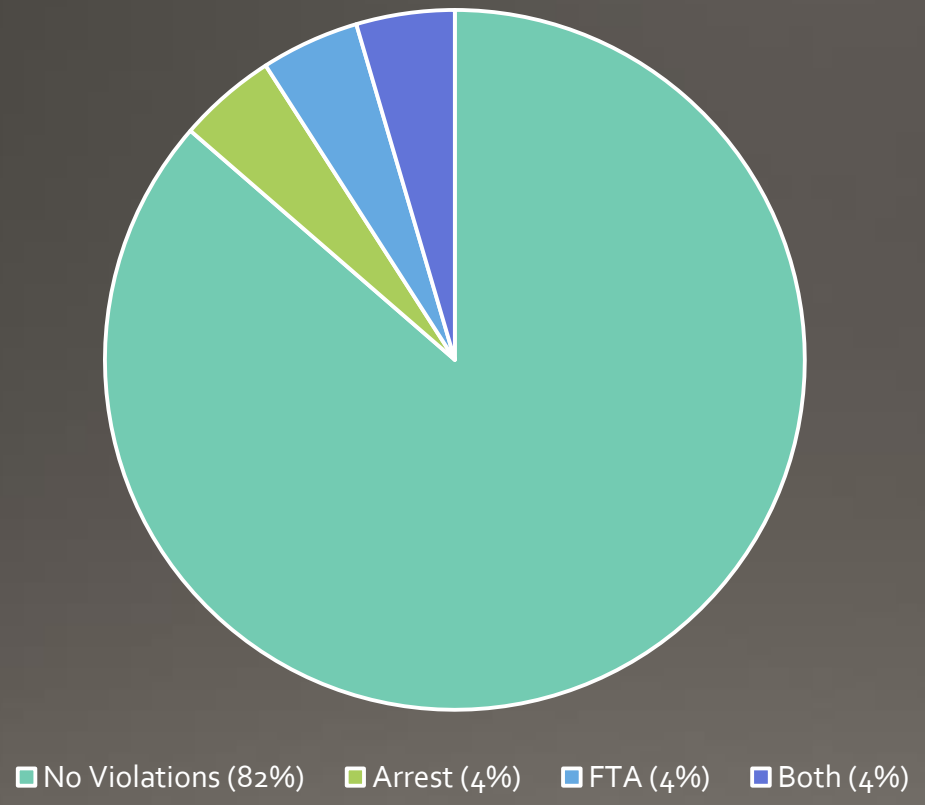
Custody Status in District Court

(25 Cases Total)

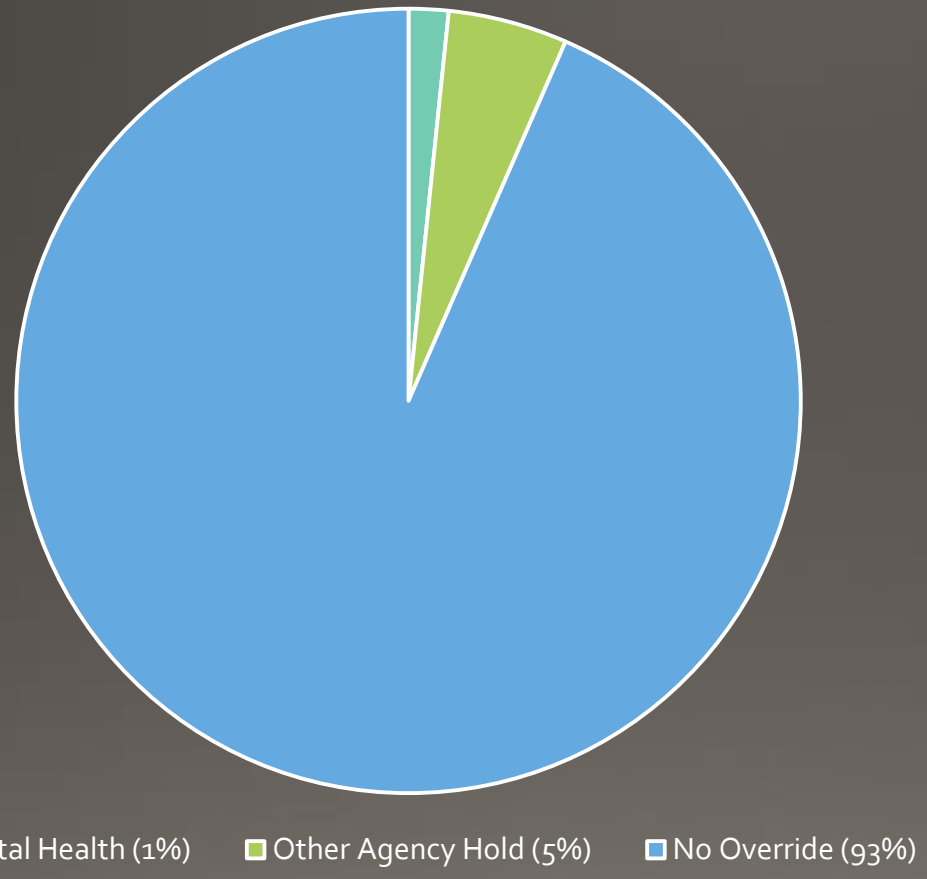


Failures by Def's on OR's from Just. Ct.

(Would be even better in included Dist.Ct. OR's)



Overrides



Things that Need Addressing

- DUI #3+
  - Low risk on NPRA
  - Prior is DUI death
  - What do we do with those?
- Need to add an Override for other agency hold?
- Courts will need some kind of Court services officer to monitor moderate risk defendants
  - 1/3 of Ely Justice Court's cases are moderate
  - Average defendant is moderate
  - No method to monitor any conditions placed on defendants
  - Could release more people and safer if Court had means to monitor

More Things that Need Addressing

- Timing:
  - People are bonding out before I can review the NPRA
  - As the only judge in the JX, I cannot be available 24/7 all the time to review these and decide on conditions
- Public Outreach:
  - Law Enforcement Complaint: hard to watch someone they arrested just walk out within hours of arrest
  - Public Complaints
    - Risking public safety to OR people
    - People are being released without punishment
  - Explain how process works and remind of presumption of innocence and that punishment follows conviction

Impressions

- Working quite well
- No major problems
  - Have to phone jail occasionally to remind them to provide NPRA
  - DA's have had no complaints
  - PD's have had no complaints
  - Jailers have no complaints with process
- Speeding things up in my court
  - People who are out and more able to meet with attorney's and make decisions
  - We are getting felony cases through Justice Court in less than a week

TAB 3

Table 1. Scoring Results by County

Risk Factor	Pts.	Las Vegas Justice		Washoe		White Pines	
Pending Cases		People	%	People	%	People	%
No	0	1,083	71%	91	71%	23	62%
Yes	2	436	29%	37	29%	14	38%
Age at First Arrest							
20 yrs. and younger	0	91	6%	11	9%	6	16%
21-35 yrs.	1	530	35%	49	38%	13	35%
36 yrs. and above	2	898	59%	68	53%	18	49%
Prior Misd.							
2 or less	0	717	47%	53	41%	21	57%
3 or more	2	802	53%	74	58%	16	43%
Prior Fel/Gross Misd.							
One or less	0	632	42%	64	50%	21	57%
2 or More	2	887	58%	64	50%	16	43%
Prior Violence Arrests							
None	0	760	50%	70	55%	26	70%
One or More	2	759	50%	58	45%	11	30%
Prior FTAs							
None	0	841	55%	79	62%	27	73%
One	1	282	19%	26	20%	4	11%
2 or More	2	396	26%	23	18%	6	16%
Employment Status							
FT/PT Employed	0	400	26%	67	52%	22	59%
Unemployed	2	1,119	74%	61	48%	15	41%
Residential Status							
Nevada - 6 mos.	0	473	31%	48	38%	18	49%
Nevada LT 6 mos.	1	948	62%	32	25%	7	19%
Non- Nevada	2	98	6%	48	38%	12	32%
Substance Abuse							
No Multiple Arrests	0	799	53%	55	43%	20	54%
Multiple Priors	2	720	47%	73	57%	17	46%
Cell Phone							
Verified	0	530	35%	53	41%	19	51%
None Verified	2	989	65%	75	59%	16	49%

Table 2. Total Points by County

Total Points	Las Vegas		Washoe		White Pines	
	Cases	%	Cases	%	Cases	%
0	16	1%	5	4%	1	2%
1	23	2%	3	2%	1	2%
2	31	2%	5	4%	3	5%
3	48	3%	8	6%	1	2%
4	44	3%	7	5%	2	4%
5	67	4%	3	2%	5	9%
6	102	7%	7	5%	7	12%
7	108	7%	6	5%	4	7%
8	94	6%	7	5%	1	2%
9	106	7%	7	5%	3	5%
10	95	6%	4	3%	4	7%
11	104	7%	8	6%	2	4%
12	99	7%	7	5%	3	5%
13	122	8%	11	9%	1	2%
14	109	7%	10	8%	4	7%
15	120	8%	9	7%	4	7%
16	79	5%	10	8%	6	11%
17	73	5%	6	5%	1	2%
18	38	3%	3	2%	4	7%
19	31	2%	0	0%	0	0%
20	3	0%	1	1%	0	0%

Table 3. Risk Levels by County

Risk Level	Las Vegas		Washoe		White Pines	
Low	162	11%	28	22%	8	14%
Moderate	572	38%	34	27%	24	42%
Higher	778	51%	65	51%	25	44%

Table 4. Las Vegas Court Decisions

Decision	Cases	%
Bail Reset	149	11%
HA	18	1%
Bail Stands	593	45%
COR	106	8%
OR	53	4%
Sentence	20	2%
Surety Bond	96	7%
NPR	22	2%
ISU	78	6%
DARF	23	2%
DA Denial	33	3%
Other	129	10%
Total	1320	100%

Table 5. Comparison Between Original Study and Current Cases

Scoring Factor	Points	Las Vegas Justice	
Pending Cases		Test	Current
No	0	82%	71%
Yes	2	18%	29%
Age at First Arrest			
20 yrs. and younger	0	9%	6%
21-35 yrs.	1	35%	35%
36 yrs. and above	2	56%	59%
Prior Misd			
2 or less	0	52%	47%
3 or more	2	49%	53%
Prior Fel/Gross Misd.			
One or less	0	74%	42%
2 or More	2	26%	58%
Prior Violence Arrests			
None	0	79%	50%
One or More	2	21%	50%
Prior FTAs			
None	0	69%	55%
One	1	19%	19%
2 or More	2	13%	26%
Employment Status			
FT/PT Employed	0	77%	26%
Unemployed	2	23%	74%
Residential Status			
Nevada - 6 mos.	0	84%	31%
Nevada LT 6 mos.	1	11%	62%
Non- Nevada	2	5%	6%
Substance Abuse			
No Multiple Arrests	0	68%	53%
Multiple Prior Arrests	2	32%	47%
Cell Phone			
Verified	0	7%	35%
None Verified	2	93%	65%

Clark County Detention Jail Releases
October 2015 vs. 2016

Release Reason	Oct 2015	Oct 2016	Difference
Admin/Intake OR	563	530	-33
Bail Posted	981	808	-173
CCDC OR	36	200	164
CIT OR	233	243	10
CT Order Release	435	384	-51
OR	429	480	51
Total Pretrial Releases	2,677	2,645	-32
DA Release	153	201	48
Detainer Placed	15	63	48
Dismissed/Case Closed	54	77	23
Extradition	92	116	24
No Charges Filed	71	96	25
Released to DOC	328	356	28
Released to Parole/Prob	87	61	-26
Other Release Tos	105	145	40
Time Served	867	1,052	185
Statutory Release	195	158	-37
Will Not Extradite	23	32	9
Total	4,667	5,002	335
Jail Population	3,869	4,151	282

TAB 4

2015-2016 Policy Paper

The End of Debtors' Prisons: Effective Court Policies for Successful Compliance with Legal Financial Obligations

Conference of State Court Administrators

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A special thanks to Steve Canterbury, Administrative Director of the Courts, West Virginia, for editing the paper.

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I. Introduction

The law of unintended consequences states that unwanted outcomes result from actions that logically aim to achieve desired results.[1] This law is at work in the unwanted results of collection of court costs, fines, and fees. State legislatures and county or city governments have enacted fines as punishment and imposed an expansive array of fees intended to defray the costs of operating courts, jails, public defender and prosecutor offices, police agencies, probation services, as well as a variety of government programs unrelated to criminal justice. While courts do not enact the fines and fees, courts are required to order defendants to pay them. The imposition of these legal financial obligations (LFOs)[2] too often results in defendants accumulating court debt they cannot pay, landing them in jail at costs to the taxpayers much greater than the money sought to be collected. Late or missed payment penalties, daily fees for the cost of time in jail, and monthly fees for contract probation supervision are just a few of the add-on costs and fees that escalate the cycle of debt. The consequence is incarceration at public expense for LFOs that can never be paid, trapping many in a modern-day version of debtors' prison.

This paper examines the growth of debt imposed by legislative bodies through courts and the incarceration that results from failure to pay as well as significant collateral consequences incarceration brings to those unable to pay. The paper discusses the issues created by reliance on funding courts through fine and fee revenue and the impact of using private for-profit entities to collect court-related LFOs.

The focus of this paper is a set of recommendations from COSCA regarding specific policies and practices that courts can adopt to minimize the negative impact of LFOs while ensuring accountability for individuals who violate the law.

[1] *See* Robert K. Merton, "The Unanticipated Consequences of Purposive Social Action," *American Sociological Review*, Volume 1, Issue 6 (December 1936), pp. 894-904.

[2] The term "Legal Financial Obligation," or LFO, is generally used to include fines, court costs and fees as well as the many add-on fees that are common such as monthly probation/supervision fees, payment for drug and alcohol testing, interest on the LFO, a fee to implement a payment plan, charges for daily jail costs, a charge for a public defender, fees for missing court, warrant fees, charges for mandatory classes, and many others. The terms "LFOs," "court LFOs," and "court debt" are used in this sense throughout this paper.

II. How Court Legal Financial Obligations Lead to Imprisonment of Defendants

Punishment for wrongdoing that includes some financial penalty is a consequence within the authority of state legislators as well as county commissions, municipal councils, and other elected officials.[3] When fees proliferate and fines are disproportionately high relative to the offense, courts can be placed in the position of becoming a revenue source to fund government operations. This can burden defendants charged with low-level offenses with high-level court debt. Court practices to enforce appropriately scaled fines and fees are an important part of enforcing the consequences of misconduct and may include incarceration after an effective assessment of willful refusal to pay.

In policy papers endorsed by the Conference of Chief Justices, the Conference of State Court Administrators (COSCA) has for a long time advocated reducing or eliminating court funding through fees. In 2003, COSCA warned that "The judiciary must guard against sending the message that courts are somehow responsible for funding themselves and generating revenue to support their own operations."[4] In 2011, COSCA adopted a policy paper entitled "Courts are not Revenue Centers" which advocated as Principle 1 that "Neither courts nor specific court functions should be expected to operate exclusively from proceeds produced by fees and miscellaneous charges."[5] More specifically, COSCA found that "The proliferation of these fees and costs as chargeable fees and costs included in the judgment and sentence issued as part of the legal financial obligation of the defendant has recast the role of the court as a collection agency for executive branch services."[6] In 2014, COSCA adopted the policy that a necessary component of judicial independence for courts of limited jurisdiction is segregation of court funding from fee generation, to avoid the perception of conflict of interest and provide for judicial independence.[7]

This paper reiterates, relies upon, and extends those prior statements of policy in addressing persistent issues resulting from LFOs. Beyond the dangers inherent in funding courts through fees is the practice of using courts to generate revenue for other elements of the justice system and also for activities unrelated to courts. Often judges are given little discretion to modify or waive fees they are required by law to impose. Courts can work toward legislative reform of fines and fees in cooperation with legislative bodies. However, given the reality that legislative bodies have and will continue to require that courts impose fees, COSCA and the courts we serve must adopt appropriate practices in the assessment and collection of fees.

In July 2015, COSCA directed its Policy Committee to develop this policy paper to build on principles long advocated by COSCA and endorsed by the Conference of Chief Justices. On November 23, 2015, the Conference of Chief Justices and COSCA announced the formation of a joint Task Force on Court Fines, Fees and

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[3] Ann Cammett and William S. Boyd, "Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt," 117 *Penn State Law Review* 349, 378-79 (2012).

[4] COSCA Policy Paper, "State Judicial Branch Budgets in Times of Fiscal Crisis," (December 2003), p. 14.

[5] COSCA Policy Paper, "Courts Are Not Revenue Centers," (2011), p. 7, accessed at http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/CourtsAreNotRevenueCenters-Final.ashx

[6] "Courts Are Not Revenue Centers," *supra,* note 5, p. 9.

[7] COSCA Policy Paper, "Four Essential Elements Required to Deliver Justice in Limited Jurisdiction Courts in the 21st Century" (2014), p. 12, note 28, accessed at http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/2013-2014-Policy-Paper-Limited-Jurisdiction-Courts-in-the-21st-Century.ashx

Bail Practices. Since then, the voices of many state and national leaders have joined the growing chorus advocating for best practices in the imposition and collection of LFOs. Contemporaneous with a meeting at the White House in December 2015 on "A Cycle of Incarceration: Prison, Debt, and Bail Practices," the Council of Economic Advisers Issue Brief on Fines, Fees, and Bail surveyed these issues with particular emphasis on the disparate impact on the economically disadvantaged.[8] The United States Department of Justice followed the December 2015 working session convened by DOJ on "Poverty and the Criminal Justice System: The Effect and Fairness of Fees and Fines" with a March 14, 2016, letter to state chief justices and state court administrators further illuminating this area. COSCA seeks to advance this national conversation and highlight practices that will enhance LFO compliance.

In addition to the disparate impact LFOs appear to have on the economically disadvantaged, they also appear to be inefficient as a means of producing revenue. Research in Alabama resulted in advocating for reform of "ever-rising charges, fees and fines" that attempt to shift the cost burden of court funding and "threaten the independence and effective functioning of courts," with the unintended effect of impairing collections; the highest collection rates for court LFOs in Alabama counties is less than 50% and collection rates in the largest counties are about 25%.[9] In Florida, clerk performance standards rely on the assumption that just 9% of fees imposed in felony cases can be expected to be collected.[10] Reports in Virginia show an annual collection rate on LFOs between 2008 and 2015 of between 47% and 58%.[11] Collection data published by the Pennsylvania Supreme Court show that of all LFOs assessed by general jurisdiction courts in 2007, the collections rate to date is 47%.[12]

The low collection rates on LFOs bring into question the viability of fees and cost assessments as a cost recoupment tool. "A true cost-benefit analysis of user fees would reveal that costs imposed on sheriffs' offices, local jails and prisons, prosecutors and defense attorneys, and the courts themselves surpass what the state takes in as revenue."[13] The poor LFO collection rate may be attributable to ineffective collection mechanisms or to courts not accurately determining the ability of defendants to satisfy the LFOs with the frequent consequence that defendants serve jail time for failure to comply with a court order requiring payment. However, incarceration tends to aggravate criminal behavior. A study of more than 2.6 million criminal court records for 1.1 million defendants in Harris County, Texas, that investigated jail data, unemployment insurance claims, wage records, public assistance benefits, and

[8] Council of Economic Advisers Issue Brief, "Fines, Fees, and Bail: Payments in the Criminal Justice System that Disproportionately Impact the Poor" (December 2015).

[9] Public Affairs Research Council of Alabama, "Unified But Not Uniform: Judicial Funding Issues In Alabama," PARCA Court Cost Study (August 2014), pp. 2, 4, accessed at https://www.alabar.org/assets/uploads/2015/03/PARCA-Court-Cost-Study-FINAL-3-5-15.pdf

[10] Rebekah Diller, "The Hidden Costs of Florida's Criminal Justice Fees," Brennan Center for Justice (March 23, 2010) at p. 8, available at https://www.brennancenter.org/sites/default/files/legacy/Justice/FloridaF&F.pdf?nocdn=1

[11] "Commonwealth Court Collections Review," Virginia Auditor of Public Accounts (April 2013), available at https://www.justice4all.org/wp-content/uploads/2014/12/APA-Report-CourtsAccountsReceivableSR2012.pdf; "FY15 Fines and Fees Report," Virginia Compensation Board (December 1, 2015), accessed at http://www.scb.virginia.gov/docs/fy15finesandfeesreport.pdf

[12] Administrative Office of Pennsylvania Courts, *Collection Rate of Payments Ordered by Common Pleas Courts* (2012) available at http://www.pacourts.us/news-and-statistics/research-and-statistics/collection-rate-of-payments-ordered-by-common-pleas-courts

[13] "Shadow Citizens," *supra,* note 3, p. 383.

recidivism after release found, "The empirical results indicate that incarceration generates net increases in the frequency and severity of recidivism, worsens labor market outcomes, and strengthens dependence on public assistance."[14]

The United States Supreme Court has twice addressed jailing individuals for failure to pay LFOs. In 1971, the Supreme Court held in *Tate v. Short* that converting an individual's fine to a jail term solely because the individual is indigent violates the Equal Protection Clause of the United States Constitution.[15] The Court in *Tate* stated that courts may jail an individual when an individual with means to pay refuses to do so.[16] The Supreme Court in *Bearden v. Georgia* ruled in 1983 that courts cannot revoke probation for failure to pay a fine without first making an inquiry into facts that demonstrate the defendant had the ability to pay, willfully refused to pay, and had access to adequate alternatives to jail for non-payment.[17]

Bearden received a suspended sentence of three years' probation as a first offender, as well as a fine of $500 and restitution of $250 for burglary and receiving stolen property. After this illiterate and unemployed defendant notified the court he could not keep up with payments on his court debt, he went to prison in 1981 for the remainder of his sentence, a period of more than two years, due to the $550 he still owed. His incarceration was illegal because the Georgia court had no evidence the failure to pay was willful or that Bearden had failed to make good faith efforts to pay, a practice that "would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment."[18]

In addition to the direct consequences of imposing high fees, there are collateral consequences. Penalties for failure to pay LFOs may include suspensions of drivers' licenses that make it much more difficult for defendants to work, issuance of arrest warrants, extensions of supervision/probation solely to collect debt, and garnishments that can be as high as 65% of wages.[19]

A probation or parole violation resulting from missed or late payments on LFOs disqualifies an individual under federal law from receiving Temporary Assistance to Needy Families (TANF), Food Stamps, low income housing and housing assistance, and Supplemental Security Income (SSI) for the elderly and disabled.[20] State laws may further add to the list of collateral consequences. In Pennsylvania, courts may deny parole to offenders who are unable to pay a $60 fee in anticipation of release, while numerous federal court decisions have upheld the constitutionality of state statutes that payment of LFOs is a prerequisite to restoration of voting rights.[21]

As with other actions that may aid in enforcement of court orders to pay LFOs, suspension of a driver's license may encourage payment by those with an ability to pay.

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[14] Michael Mueller Smith, "The Criminal and Labor Market Impacts of Incarceration," Columbia University Job Market Paper abstract (November 14, 2014), p. 1 accessed at http://www.columbia.edu/~mgm2146/incar.pdf

[15] *Tate v. Short*, 401 U.S. 395, 398 (1971).

[16] *Tate*, 401 U.S. at 400.

[17] *Bearden v. Georgia,* 461 U.S. 660, 662-63 (1983).

[18] *Bearden,* 461 U.S. at 672-73.

[19] Mitali Nagrecha and Mary Fainsod Katzenstein with Estelle Davis, *When All Else Fails, Fining the Family: First Person Accounts of Criminal Justice Debt*, Center for Community Alternatives (2013), p. 6.

[20] Alicia Bannon, Mitali Nagrecha and Rebekah Diller, *Criminal Justice Debt: A Barrier to Reentry*, Brennan Center for Justice (2010), p. 28, citing: 42 U.S.C. section 608(a)(9)(A); 7 U.S.C. section 2015(k)(1); 42 U.S.C. section 1437d(l)(9); and 42 U.S.C. section 1382E(4)(A)(ii).

[21] "Shadow Citizens," *supra,* note 3 at p. 390, n. 235.

However, automatic license suspension for failure to pay LFOs without the option of a license to permit a defendant to work greatly reduces an offender's ability to work or creates the risk of further criminal involvement if the offender continues to drive in an effort to satisfy court LFOs. Virginia is among the many jurisdictions that suspend an offender's driver's license until all court debt is satisfied. As a result, a 2015 snapshot showed more than 2.6 million orders suspending the drivers' licenses of 914,450 individual Virginians due to unpaid court LFOs.[22] According to the Legal Aid Society report, "Approximately 1 in 6 Virginia drivers has had their license suspended for non-payment of court costs or fines and, therefore, cannot drive to work, medical appointments, the grocery store, church, of their children's schools."[23] [24]

A study of New Jersey drivers found that 42% of suspended drivers lost their jobs and 45% remained unemployed throughout the period of suspension even though less than 6% of the suspensions were tied directly to driving offenses.[25] In 2004 in New Jersey, 105,971 drivers had their licenses suspended for failure to appear in court, comprising 41% of all active suspensions.[26] As the Brennan Center for Justice found,

> License suspension also increases the risk that people will be re-arrested (and incur new fees) for driving with a suspended license. Unable to legally drive to work, people face a choice between losing a job and suffering increased penalties for nonpayment. One study found that failure to pay fines was the leading cause of license suspensions. The same study found that 80 percent of participants were disqualified from employment opportunities because their license was suspended. In states where licenses may be suspended without an adequate determination of a person's ability to pay the underlying fees, poor people are disproportionately affected by suspensions and suspension-related unemployment. Because of the detrimental effects suspensions have on the employment prospects of indigent people and because debt-related suspensions have no relation to driver safety, the practice of suspending licenses for failure to pay fees is completely lacking in rehabilitative or deterrent value.[27]

In August 2016 the Arizona Task Force on Fair Justice for All issued a comprehensive report with 65 recommendations to improve court practices on court-ordered fines, penalties, fees, and pretrial release that included the recommendations that a driver's license suspension be "a last resort, not a first step" and that a first offense for driving on a suspended

[22] Angela Ciolfi, Pat Levy-Lavelle, and Mario Salas, "Driven Deeper Into Debt: Unrealistic Repayment Options Hurt Low-Income Court Debtors," Legal Aid Justice Center (5/4/2016), p. 7.

[23] *Id.* It should be noted that Virginians with licenses suspended for these reasons can petition for and receive a restricted license allowing them to drive to work, school, church, etc., legally.

[24] The Legal Aid Justice Center recently filed a class action challenging the constitutionality of automatic suspension of a driver's license for failure to pay court LFOs. *Stinnie v. Holcomb,* No. 3:2016cv00044 (W.D.Va. July 6, 2016).

[25] *N.J. Motor Vehicles Affordability and Fairness Task Force, Final Report* (2006), pp.12, 38, accessed at http://www.state.nj.us/mvc/pdf/About/AFTF_final_02.pdf.

[26] *Id.* at p.32.

[27] *Criminal Justice Debt*, *supra,* n.20 at 19, citing Rebekah Diller, Brennan Cntr. For Justice, *The Hidden Costs of Florida's Criminal Justice Fees* (2010), pp. 20-21, accessed at http://www.brennancenter.org/page/-/Justice/FloridaF%26F.pdf?nocdn=1

license be a civil violation rather than a criminal offense.[28]

Recognition of the collateral consequences of LFOs, such as automatic suspension of a driver's license, along with isolated but spectacular examples of abusive courts motivated to maximize revenue, as well as abuses by for-profit private probation services, have generated significant attention in the press.[29]

The increased public attention to incarceration as a consequence of inability to pay court LFOs amplifies what the United States Supreme Court found several decades ago in *Bearden*: jail should be for those able but unwilling to pay and not for those unable to pay.

Today an estimated 10 million people owe more than $50 billion in LFOs.[30] COSCA urges its members and other state court system leaders to work to ensure that incarceration for that debt follows only upon a finding of willful failure to pay and after reasonable alternatives are offered to satisfy court obligations imposed by the law. A discussion of how we arrived at this point is followed by recommendations for how COSCA members can work to move court practices even closer to the letter and spirit of *Bearden*.

A. State and Local Legislative Bodies Have Multiplied Fees as a Substitute for Adequately Funding Courts, Other Justice Entities, and Non-Judicial Government Activities

In almost all cases, court fines and fees are set by state and local legislative bodies and not by the courts. Many jurisdictions now have an array of fees that courts are required to impose and collect for criminal justice activities as well as government programs unrelated to courts.

- A Texas Office of Court Administration study listing the various criminal court costs and fees, excluding fines, found 143 separate costs and fees that can be assessed against defendants and found that "1) some fees and costs have no stated statutory purpose; 2) court fees and costs collected from users of the court system are oftentimes used to fund programs outside of and unrelated to the judiciary; and 3) many court fees and

[28] Report and Recommendations of the Task Force on *Fair Justice for All: Court-Ordered Fines, Penalties, and Pretrial Release Policies*, Supreme Court of Arizona (August 12, 2016), recommendations 26 and 27, p. 22.

[29] See, *e.g.*, "The Town that Turned Poverty into a Prison Sentence" (how the Harpersville, Alabama, court became a "judicially sanctioned extortion racket" ensnaring the poor), Hannah Rappleye and Lisa Riordan Sevelle, *The Nation*, March 14, 2014; "Get Out of Jail, Inc.: Does the Alternatives-to-Incarceration Industry Profit from Injustice?" (describes judicially-approved abuses of those unable to pay court debt by private probation corporations, including Judicial Correction Services and Sentinel, among others); "For Offenders Who Can't Pay, It's a Pint of Blood or Jail Time" (reports of an Alabama judge threatening jail for those unable to pay fines and fees, but offering $100 credit and no jail for those who donate blood), Campbell Robertson, *New York Times* (10/19/2015); "Jail Fail: How Not Paying Your Fines Could Land You Behind Bars," (surveying a litany of practices and examples of court debt leading to "debtors' prisons"*)* Olivia C. Jerjian, *American Criminal Law Review Online* (4/27/2015), accessed at http://www.americancriminallawreview.com/aclr-online/jail-fail-how-not-paying-your-fines-could-land-you-behind-bars/; "Municipal Violations," *Last Week Tonight with John Oliver*, HBO (18-minute broadcast story of excessive fines, fees, and incarceration for municipal violations broadcast March 22, 2015), accessed on YouTube at https://www.youtube.com/watch?v=0UjpmT5noto

[30] Douglas N. Evans, "The Debt Penalty, Exposing the Financial Barriers to Offender Reintegration," John Jay College of Criminal Justice (August 2014), p. 7, accessed at http://justicefellowship.org/sites/default/files/The%20Debt%20Penalty_John%20Jay_August%202014.pdf, citing Alexes Harris, Heather Evans, and Katherine Beckett, "Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary Untied States," *American Journal of Sociology*, Volume 115, number 6 (2010), pp. 1753-1799.

costs are collected for a purpose but not dedicated or restricted to be used exclusively for that intended purpose." [31]

- A Brennan Center report on fees assessed in Florida courts includes a seven-page appendix listing more than 60 statutory fees that apply in different types of cases and circumstances.[32]

- A Brennan Center study of 15 states that together account for more than 60% of all criminal filings found fees that range from the pre-adjudication phase, such as an application fee for a public defender and a jail fee for pretrial incarceration, to sentencing fees for court costs, fees to fund court and non-court programs, and reimbursement fees to the public defender and prosecution. Post-adjudication-added fees included jail costs, probation supervision, drug testing, and mandatory classes, followed by the imposition of interest, late fees, payment plan fees, and collection fees on the accumulated court debt.[33]

- A Pennsylvania docket sheet that illustrates the impact of legislatively-required LFOs shows that a woman convicted of a drug crime received, in addition to a sentence of between 3 and 23 months imprisonment, a $500 fine and $325 restitution, plus 26 different fees totaling $2,464.[34]

- An Alabama study found that for a defendant arrested for possession of one ounce of marijuana in Shelby County "[a] conservative estimate of the court costs, fees and fines on this single charge would be $2,611" followed by post-adjudication probation fees at $40 per month plus drug testing and counseling fees as well as a six-month suspension of the driver's license with a $300 reinstatement fee.[35] The same study found that "59% of responding attorneys in Alabama reported they had a client who was jailed for non-payment of heavy court costs, fees and fines. In most cases it was failure to pay a monthly probation supervision fee ($40) that led to the jailing."[36]

- In Washington 28 separate fines and fees can be assessed and the State imposes a 12% interest penalty on unpaid LFOs from the date they are assessed.[37]

- Florida law allows private debt collection agencies to add a 40% surcharge to collection of court debt.[38]

- North Carolina charges a $25 late payment fee and a $20 charge for making installment payments on court debt.[39]

A series aired by National Public Radio reported that an NPR survey of states found that laws permit charges in at least 43 states and the District of Columbia for a public defender; at least 41 states allow charges to inmates for room

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[31] *Study of the Necessity of Certain Court Costs and Fees in Texas,* Office of Court Administration (September 2014), accessed at http://www.txcourts.gov/media/495634/SB1908-Report-FINAL.pdf.

[32] Rebekah Diller, *The Hidden Costs of Florida's Criminal Justice Fees*, Brennan Center for Justice (2010), pp. 27-33.

[33] *Criminal Justice Debt, supra*, note 20, pp. 7-10 and notes 18-20 (listing statutes and fee amounts).

[34] *Criminal Justice Debt, supra,* note 20, p.9.

[35] PARCA *Court Cost Study, supra ,* note 9, pp. 17-18.

[36] PARCA Court Cost Study, *supra,* note 9, p. 19.

[37] "In for a Penny, The Rise of America's New Debtors' Prisons," *American Civil Liberties Union* (October 2010), p. 65.

[38] *Criminal Justice Debt, supra,* note 20, p. 17.

[39] "The Debt Penalty," *supra,* note 30, p.3.

and board for jail and prison stays; at least 44 states allow charges to offenders for their own probation and parole supervision; in all states except Hawaii and the District of Columbia a fee can be imposed for electronic monitoring devices courts order defendants to wear, and it is common for laws to provide for defendants to "pay for their own arrest warrants, their court-ordered drug and alcohol-abuse treatment and to have their DNA samples collected."[40] A study published by the University of Washington in May 2010 found

> [M]onetary sanctions are now imposed by the courts on a substantial majority of the millions of U.S. residents convicted of felony and misdemeanor crimes each year. We also present evidence that legal debt is substantial relative to expected earnings and usually long term. Interviews with legal debtors suggest that this indebtedness contributes to the accumulation of disadvantage in three ways: by reducing family income; by limiting access to opportunities and resources such as housing, credit, transportation, and employment; and by increasing the likelihood of ongoing criminal justice involvement. . . Our findings indicate that penal institutions are increasingly imposing a particularly burdensome and consequential form of debt on a significant and growing share of the poor.[41]

In addition to statutory and ordinance requirements to impose fees, the extent to which judges may consider a defendant's ability to pay and exercise discretion in determining whether to impose LFOs varies from jurisdiction to jurisdiction. Whether a judge has this discretion often depends on the type of LFO and whether the ability to pay is considered at the time of sentencing or at a post-sentencing hearing.

B. Limited Jurisdiction Courts Are Especially Vulnerable to *Bearden* Violations in the Assessment and Collection of LFOs

A few appalling examples illustrate the worst outcome when the collection of fees becomes the focus of court operations, resulting in improper zealotry to collect at the cost of basic fairness. These examples have arisen most recently in limited jurisdiction courts that are largely funded by fees created by the municipality or county.

A disheartening example is found in the town court of Harpersville, Alabama. Before being sanctioned and eventually closed after a superior court found it was a "judicially sanctioned extortion racket," the town court generated revenue from fines and fees three times greater than the town received from sales taxes.[42] The court worked in partnership with Judicial Correction Services, a private, for-profit probation services company. JCS charged those owing LFOs a monthly fee between $35 and $45, with additional charges for court-mandated classes and electronic monitoring. When a probationer failed to pay, JCS would send a letter demanding immediate payment under the threat of jail time, which the court would order following issuance of an arrest warrant. Those arrested were charged $31 per day to offset jail costs, adding to a spiraling cycle of mounting court LFOs and incarceration in jail.[43] There

[40] Joseph Shapiro, "As Court Fees Rise, The Poor Are Paying The Price," *All Things Considered* , National Public Radio (May 19, 2014), print version at http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor

[41] Alexes Harris, Heather Evans and Katherine Beckett, "Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary Untied States," *American Journal of Sociology*, Volume 115, Number 6 (2010), p. 1756.

[42] Hannah Rappleye and Lisa Riordan Sevelle, "The Town That Turned Poverty Into A Prison Sentence," *The Nation*, March 14, 2014.

[43] "The Town that Turned Poverty into a Prison Sentence," *supra,* note 42, p. 4.

was no record showing the court ever considered a defendant's ability to pay court LFOs.

In Ferguson, Missouri, the United States Department of Justice found unlawful enforcement practices by the police that disproportionately harmed minority community members and eroded the trust in the police and courts. At the center of these practices, DOJ found a municipal court exploiting unlawful police conduct to maximize court revenue: "The municipal court does not act as a neutral arbiter of law or a check on unlawful police conduct. Instead, the court primarily uses its judicial authority as the means to compel the payment of fines and fees that advance the City's financial interests."[44]

The actions of the Harpersville and Ferguson courts are extreme examples. However, as COSCA recognized in 2014, "funding courts through fines and fees that flow to the local town or county that pays court staff and judges creates at least the perception that judicial independence is diminished."[45] The persistence of such challenges is exemplified by a class action complaint filed by the Southern Poverty Law Center in June 2016 alleging that Judge Robert J. Black and the Bogulasa, Louisiana, City Court "operate a modern-day debtor's prison, jailing the poor for their failure to pay" motivated at least in part by a "conflict of interest" funding structure that "creates an incentive for Defendant Black to find individuals guilty and to coerce payment through the threat of jail" because "[w]ithout this money, the City Court could not function."[46]

A similar class action lawsuit charges that municipalities in Arkansas "have turned to creating a system of debtors' prisons to fuel the demand for increased public revenue from the pockets of their poorest and most vulnerable citizens" by having local and municipal courts use "the threat and reality of incarceration to trap their poorest citizens in a never-ending spiral of repetitive court proceedings and ever-increasing debt."[47] The validity of these allegations remains to be determined but the claims and their causes echo proven misconduct in the limited jurisdiction courts in Harpersville and Ferguson.

COSCA condemns the isolated instances in Harpersville and Ferguson as gross distortions that result from the combination of fee funding and willful misconduct by those who fail in their duty to seek justice. It would be unfair and unsupported to view such instances as representative of the great majority of local and municipal courts. However, as discussed in the 2014 COSCA policy paper, fee funding is among the several practices that require reform to foster judicial independence in limited jurisdiction courts.

C. Contracts with Private For-Profit Corporations to Manage Probation to Collect Court LFOs Can Be Susceptible to Abuse of Those Unable to Pay

Courts may have little ability to influence the fines and fees they must impose through statutes and ordinances passed by legislative bodies, but often courts can directly affect the way fines and fees are collected. One practice that requires careful consideration is collection of LFOs

[44] "Investigation of the Ferguson Police Department," United States Department of Justice Civil Rights Division, March 4, 2015, p. 7.

[45] "Courts are not Revenue Centers," *supra,* note 5, p. 12.

[46] *Roberts v. Black,* No. 2:16-cv-11024, filed June 21, 2016, US District Court for the Eastern district of Louisiana, accessed at https://www.splcenter.org/sites/default/files/bogalusa-splc-filing-debtorsprison.pdf

[47] *Dade et al. v City of Sherwood*, Arkansas, *et al*., No. 4.16cv602-JM (E.D.Arkansas), filed August 23, 2016, paragraph 2, p. 1.

through contracts with for-profit private collection agencies monthly charges of which aggravate the financial burdens on those already struggling to pay.

In March 2015 in Alabama, the Southern Poverty Law Center (SPLC) sued Judicial Corrections Services (JCS), which charged those who were too poor to pay their initial court LFOs a start-up fee of $10 and a $35 monthly fee that is paid first from any payment made by the debtors. SPLC alleged racketeering, extortion, and abuse of process due to excessive incarceration of indigent defendants for failure to pay private probation costs.[48] According to the SPLC lawsuit, this practice left thousands of marginally employed defendants to accumulate greater and greater court debt even when they made regular payments, because payments that might only satisfy the JCS monthly fee did nothing to satisfy the LFOs and resulted in a slow decline into mounting LFO debt fueled by late fees and missed payment penalties.

In June 2015, SPLC settled with the city of Clanton, Alabama, which terminated its JCS contract and directed the city court to supervise those on probation for payment of fines and fees.[49] As reported by SPLC, 72 of 100 Alabama cities with a JCS contract have cancelled the contracts as have eight cities with contracts with other private probation corporations.[50] The litigation continues against JCS, which SPLC says it seeks to prohibit from operating "a racketeering enterprise that is extorting money from impoverished individuals under threat of jail and from using the criminal justice system and probation process for profit."[51]

The real-life impact of outsourcing to a for-profit corporation the collection of LFOs is well illustrated by a simple example. "An offender who requires 24 months on probation to pay off a $1,200 fine, with a $35 monthly supervision fee, would be financially better off taking out a $1,200, 24-month loan with an APR of 50 percent. She would also not have to face the direct threat of incarceration over missed payments, as she would while on probation." The authors note that the two-year interest at 50% would be $721 instead of the two-year probation costs of $840.[52]

A for-profit corporation may use the threat of incarceration that is cost-free to the corporation as pressure to coerce payment of the corporation's $40 monthly supervision fee upon threat of going to jail for non-payment. This amounts, in the assessment of Human Rights Watch, to "a discriminatory tax that many offenders are required to pay precisely because they cannot afford to pay their court-ordered fines, with all of the revenues going directly to private companies instead of public treasuries ."[53]

[48] *Roxanne Reynolds, et al. v. Judicial Corrections Services, Inc., et al.*, USDC Middle District of Alabama No. 2:15-cv-00161-MHT-CSC (March 12, 2015).

[49] *Reynolds v. JCS*, *supra*, note 48, Settlement Agreement filed June 16, 2015.

[50] "Private Probation Company's Decision to Leave Alabama is Welcome News for Indigent," *SPLC News*, (10/19/2015) accessed at https://www.splcenter.org/news/2015/10/19/splc-private-probation-company%E2%80%99s-decision-leave-alabama-welcome-news-indigent

[51] *Reynolds v. JCS, supra,* note 48.

[52] "Profiting from Probation: America's 'Offender-Funded' Probation Industry," *Human Rights Watch Report* (2/5/2015), p. 23.

[53] "Profiting from Probation," p. 22.

III. COSCA Recommends Practices that Make *Bearden* Effective and Minimize Imprisonment for Court Debt

As the earlier review of policy papers from 2003 through 2014 demonstrates, COSCA and the Conference of Chief Justices have long advocated for reducing or eliminating court funding through fees. Examples of the impact of excessive LFOs on vulnerable populations also argue for reform and reduction of fees that use courts in an effort to raise revenue for a variety of government activities. These reforms can be accomplished only through legislation. COSCA recognizes there are significant challenges to statutory reform of fee-generating legislation. Given the reality that courts are required to impose LFOs, COSCA advocates for state court systems to emphasize practices that maximize LFO compliance while reserving jail for those who willfully refuse to pay despite alternative non-monetary methods for satisfying court obligations.

A. Streamline and Strengthen the Ability of Courts to Assess Ability to Pay

COSCA fully supports the *Bearden* requirement for all courts to assess ability to pay before imposing incarceration for failure to pay. However, many courts face a blank canvass when making such an assessment. Lacking information about a defendant's financial circumstances, courts may be tempted to determine that failure to pay is willful because the defendant smokes cigarettes, is wearing an expensive-looking pair of shoes, or drove a car to court. It is incumbent on court administrators to establish ways for courts to assess the ability to pay accurately rather than leaving judges to such haphazard indications of means.

Some states have tried to codify the assessment of ability to pay LFOs. The 2014 session of the Colorado Assembly passed a bill that permits jail for willful failure to pay but requires procedural protections, including the requirement of findings on the record after notice and a hearing, and specifically prohibiting an arrest warrant for failure to pay as well as revocation of probation and incarceration if the offender made a good faith effort to pay.[54]

Rhode Island by statute requires ability to pay be considered by a court in remitting fines and fees and also requires that ability to pay be determined by use "of standardized procedures including a financial assessment instrument" completed under oath in person with the offender and "based upon sound and generally accepted accounting principles."[55] In addition, "the following conditions shall be prima facie evidence of the defendant's indigency and limited ability to pay," including receipt of TANF, SSI or state supplemental income payments, public assistance, disability insurance, or food stamps.[56]

In June 2014, the Michigan Supreme Court convened the Michigan Ability to Pay Workgroup through the State Court Administrative Office to develop guidelines for judges addressing how to determine ability to pay. On April 20, 2015, the Workgroup published its results recommending use of payment plan calculators, suggesting language to inform litigants of their entitlement to an ability-to-pay assessment, and recommending reference to federal poverty guidelines when

[54] HB14-1061, Colorado General Assembly, signed into law June 10, 2014.

[55] R.I.G.L., Section 12-21-20 (2013).

[56] R.I.G.L., Sections 12-20-10 (2012).

determining ability to pay.[57] The Guidelines and appendices provide practical, step-by-step examples of forms and procedures that any court can adopt to inform ability-to-pay determinations and what type of payment plan should result.

In many courts the majority of criminal defendants will apply and qualify for indigent public defense services, providing some disclosure of income and assets in order to qualify. California has an "Information Sheet on Waiver of Superior Court Fees and Costs" as well as forms to request waiver of court fees based in part on receipt of food stamps, SSI, TANF, and various other means-tested state public benefits programs.[58] The Arizona Supreme Court's recent "Fair Justice for All" report recommends adoption of automated tools to assist in determination of ability to pay; creation of a statewide, simplified payment ability form; and reference to qualification for means-tested public assistance as evidence of limited ability to pay.[59]

Non-court entities may also provide assistance, such as the *Interest Waiver Guide* published by the ACLU of Washington to provide information and forms for obtaining a court order to waive or reduce the 12% interest required by statute for court LFOs in Washington.[60]

B. Adopt Evidence-Based Practices that Reduce Failure to Appear and that Improve Compliance with Court Orders, Including Orders Imposing Fines and Fees

The fact that courts usually do not control the amount or kinds of LFOs creates a challenge when courts assess whether LFOs are reasonable or excessive and whether a court debtor can afford to pay. If courts do not have statutory authority to reduce or eliminate fees, courts should advocate for judicial discretion to mitigate fines and fees based on a defendant's ability to pay. (This issue is discussed further in section D.) In addition, courts should adopt evidence-based practices that improve opportunities for compliance by those whose ability to pay is limited.

Courts recognize and embrace the need to collect fees both to ensure compliance with court orders and to execute their responsibility to enforce fees the law imposes. The Conference of Chief Justices in January 2003 adopted a resolution "that allowing court-ordered penalties, fees and restitution surcharges to be willfully ignored diminishes public respect for the rule of law, and recognizes that it is in the interest of the courts that their orders be honored."[61] Updating an original guide published in 1994, a second edition guide published by the National Center for State Courts in 2009 provides detailed examples of best practices in collecting court debt that

[57] Chief Judge John A Hallacy, Chair, Ability to Pay Workgroup, *Tools and Guidance for Determining and Addressing an Obligor's Ability to Pay* (April 20, 2015), appendices A, E, F and G, accessed at http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Reports/AbilityToPay.pdf

[58] "Information Sheet on Wavier of Superior Court Fees and Costs," Judicial Council of California, FW-001-INFO (revised July 1, 2015), accessed at http://www.ventura.courts.ca.gov/form_packets/fee_waiver.pdf

[59] *Fair Justice for All*, *supra,* note 28, recommendations 2, 3, and 4, pp. 14-15.

[60] *Interest Wavier Guide: A Guide on How to Obtain a Court Order Waiving or Reducing Interest on Legal Financial Obligations*, ACLU of Washington (January 2012), accessed at

https://www.acluwa.org/sites/default/files/attachments/LFO%20Interest%20Waiver%20Guide%20%28January%202012%29.pdf

[61] *Tax Refund Intercept Proposal to Further Compliance with Court Orders,* Proposal of the Public Trust and Confidence Committee, Conference of Chief Justices, Resolution 15 (January 30, 2003).

include the requirement of alternatives for those unable to pay such as community service as a way for "defendants to accept and pay for their mistakes in a manner appropriate to their means" that "goes to the heart of maintaining the credibility of the justice system and ensuring that justice is fairly and evenly administered."[62]

State courts have established guides and handbooks for courts to maximize collection of court debt within a context that accounts for ability to pay and provides alternatives such as community service and payment over time. Examples can be found in Michigan,[63] Texas,[64] California,[65] and Virginia.[66]

In assessing and collecting fines and fees, courts can adopt the following practices that strengthen compliance with *Bearden*, improve compliance with court orders, and reserve jail for those able but unwilling to satisfy LFOs.

1. Simplify and clarify court LFOs and their application

Courts can clarify and simplify court debt and its consequences. The National Center for State Courts included among its recommendations made after studying the Missouri courts in 2015, "Fees and miscellaneous charges should be simple and easy to understand with fee schedules based on fixed or flat rates, and should be codified in one place to facilitate transparency and ease of comprehension."[67]

Confusion about what fees apply is not a recent phenomenon. A 2006 report found, "California now has dedicated funding streams for over 269 separate court fines, fees, forfeitures, surcharges, and penalty assessments that may be levied on offenders and violators. These fines, fees, forfeitures (bail defaults or judgments and damages), surcharges, and penalties appear in statutes in 16 different government codes and are in addition to the many fees, fines, and special penalties that local governments may impose on most offenses."[68]

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[62] Editor Charles F. Campbell, *et al, Current Practices in Collecting Fines and Fees in State Courts: A Handbook of Collection Issues and Solutions, Second Edition*, National Center for State Courts (2009), p. 20.

[63] Michigan Supreme Court State Court Administrative Office Collections Work Group, *Trial Court Collections Standards & Guidelines* (July 2007), p. 6 ("Financial penalties should be assessed based on the litigant's financial situation and ability to pay").

[64] Carl Reynolds, Mary Cowherd, Andy Barbee, Tony Fabelo, Ted Wood, and Jamie Yoon, *A Framework to Improve How Fines, Fees, Restitution, and Child Support are Assessed and Collected from People Convicted of Crimes*, Council of State Governments Justice Center, Texas Office of Court Administration (2009), pp. 9-12) ("Court officials should consider the defendant's financial situation when assessing court costs, fines, fees, probation supervision fees, and restitution" and urging automation of forms to assess ability to pay uniformly).

[65] Jessica Sonora, *California's Enhanced Collections Unit, Judicial Council of California, Administrative Office of the Courts* (2008), p.125 (listing among best practices, "Include financial screening to assess the ability to pay prior to processing installment payment plans and receivables").

[66] *Commonwealth Court Collections Review*, Auditor of Public Accounts, Commonwealth of Virginia (April 2013) pp. 8, 11 ("A financial evaluation should be a mandatory process throughout the court system and a payment plan established if fines and costs are not paid upon disposition" and establishing best practices for community service programs and their accountability within the court system).

[67] Gordon Griller, Yolande E. Williams, and Russell R. Brown, *Missouri Municipal Courts: Best Practice Recommendations,* National Center for State Courts (November 2015), p.27.

[68] Marcus Nieto, *Who Pays for Penalty Assessment Programs in California?,* California Research Bureau (February 2006), at p. 1, citing California State Controllers' Office, Manual of Accounting and Audit Guidelines for Trial Courts-Revision 16, Appendix C, California Codes. The State Controller's January 2004.

The Ohio Supreme Court brought clarity to the confusion over LFOs and their consequences in February 2014, when it issued an annotated, two-page bench card summarizing a defendant's obligations and rights regarding LFOs, including the right not to be jailed except for willful failure to pay, limiting use of contempt to failure to appear but not to collect LFOs, and defining credit for community service and limits on hours per month.[69] The bench card includes the admonition that among the methods of collection that are not permitted is to find a violation of parole or extend parole for non-payment. The Alabama Supreme Court adopted a similar bench card in November 2015.[70]

The Municipal Court of Biloxi, Mississippi, also adopted a bench card setting forth the procedures for collecting LFOs and community service options as part of a settlement of federal litigation.[71] In another case settlement, the City of Montgomery, Alabama, agreed to provide each defendant with "Form One" that explains court processes, including

> If you indicate that you are unable to pay your fines and costs, the Court will order you to complete an Affidavit of Substantial Hardship and other forms as deemed necessary, and may inquire about your finances, to include but not be limited to: income, expenses (i.e. rent, childcare, utilities, food, clothing, medical condition/bills, transportation, etc.), bank accounts, and other assets. In some circumstances, the Court may also inquire about your efforts to obtain the money to pay, including your job skills and efforts to apply for jobs. You should present any documents that you have to the Court during this inquiry. If you cannot afford an attorney, the Court will provide a Public Defender to represent you.[72]

Rather than awaiting the outcome of litigation based at least in part on confusion engendered by multiple statutes and ordinances imposing court fees, courts should actively "clarify and consolidate the spreading variety of state and local fees and costs into a comprehensible package."[73]

When the Washington Supreme Court ruled in 2015 in *State v. Blazina* that state courts must consider a defendant's ability to pay when imposing LFOs, the court also described ways to determine a defendant's inability to pay:

> [T]he court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry,

[69] Supreme Court of Ohio, Office of Judicial Services, *Collection of Fines and Court Costs* (February 2014).

[70] Bench card issued by the Supreme Court of Alabama, "Collections of Fines and Court Costs, Developed for Alabama Judges by the Alabama Access to Justice Commission," accessed at http://nacmconference.org/wp-content/uploads/2014/01/Bench-Card-11-10-15.pdf

[71] Bench card, "Biloxi Municipal Court Procedures for Legal Financial Obligations & Community Service, "provided by the ACLU as Exhibit B in settlement of Kennedy*, et al.* v. City of Biloxi, CIV 1:15-cv-00348-HSO-JCG, on March 15, 2016, resolving allegations challenging the jailing of poor people in Biloxi without a hearing or representation by counsel, accessed at https://www.aclu.org/sites/default/files/field_document/exhibit_b_biloxi_municipal_court_bench_card_03152016.pdf

[72] Settlement Agreement, *Cleveland v. Montgomery*, Case 2:13-cv-00732-MHT-TFM, Document 56-1 (filed 9/12/2014), p. 8, accessed at https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/case/exhibit_a_to_joint_settlement_agreement_-_judicial_procedures-_140912.pdf

[73] Carl Reynolds, *et al.*, *A Framework to Improve How Fines, Fees, Restitution, and Child Support are Assessed and Collected from People Convicted of Crimes,* Council of State Governments Justice Center, Texas Office of Court Administration (March 2, 2009) p. 25.

> the court must also consider important factors, as amici suggest, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.
>
> Courts should also look to the comment in court rule GR 34 for guidance. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. Id. (comment listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. Id. Although the ways to establish indigent status remain nonexhaustive, see id., if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.[74]

Following *Blazina*, the Washington Supreme Court Minority and Justice Commission published updated reference guides for all levels of trial courts to use in determining indigence, and, thus, grounds for finding inability to pay.[75] The guides identify mandatory and discretionary LFOs, and re-state the *Blazina* finding that a court should seriously question ability to pay if an offender is indigent, as indicated by receipt of means-tested public benefits; an income below 125% of the federal poverty level (FPL) (identifying the FPL income for 2015 for an individual and for a family of 2, 3, 4, 5 or 6); an income above the FPL but basic living expenses that render the defendant unable to pay, including shelter, food, utilities, health care, transportation, clothing, loan payments, support payments, and court imposed obligations; or other compelling circumstances that include incarceration or other LFOs such as restitution.[76] "The court may presume indigence if a person has been screened and found eligible for court-appointed counsel."[77]

The Texas Judicial Council recently adopted a series of proposed amendments to the Collection Improvement Program (CIP), where "[t]he primary goal of the proposed amendments is to provide procedures that will help defendants comply with court ordered costs, fines and fees without imposing undue hardship on defendants and defendants' dependents."[78] The CIP requires each court to have a local collection improvement program with at least one staff person to monitor defendants' compliance with court LFOs and payment plans.[79] The amendments add requirements for staff to obtain a statement with information about a defendant's ability to pay, report to a judge when it appears that compliance may impose undue hardship on the defendant or the defendant's dependents, and require that before referring a non-compliant defendant to a judge staff must make efforts to contact a defendant and explain steps to take if

[74] *State v. Blazina*, 182 Wn.2d 827, 839 (2015) (*en banc*).

[75] Washington State Minority and Justice Commission, *Updated Reference Guides* (2015), accessed at https://www.courts.wa.gov/content/manuals/Superior%20Court%20LFOs.pdf for superior court, https://www.courts.wa.gov/content/manuals/Juvenile%20LFOs.pdf for juvenile court, and https://www.courts.wa.gov/content/manuals/CLJ%20LFOs.pdf for courts of limited jurisdiction.

[76] *Id.*

[77] *Id.*

[78] Memorandum from Texas Administrative Director David Slayton, "Analysis of Proposed Amendments to Texas Administrative Code, Chapter 175, Collections Improvement Program" (May 27, 2016), p. 1.

[79] Texas Administrative Code, Title 1, Part 8, Chapter 175.3.

the defendant is unable to pay.[80] A proposed amendment to the compliance review standards makes it clear that the purpose of the CIP is not to measure performance based on how much money a court collects, but instead to "confirm that the county or municipality is conforming with requirements relating to the CIP" including the amendments' emphases on assessment and consideration of ability to pay.[81]

The Washington reference guides, as well as the bench cards in Ohio and Alabama, efforts in Texas, and other court initiatives provide templates to consolidate and explain mandatory and discretionary court LFOs while giving to courts the tools and resources needed to guide decisions about scaling court LFOs to a defendant's ability to pay.

2. Adopt practices that minimize failure to appear and failure to pay

For low-level offenders, there are two paths to almost certain imprisonment related to court debt. The first is to fail to appear in court, resulting in an arrest warrant and added fees. The second is to fail to pay immediately upon conviction, resulting in a payment plan that may include added fees and a greater risk of non-compliance that can also lead to an arrest warrant. The most direct step to mitigate the impact of court LFOs that is within the ability of courts may be to minimize the incidence of failure to appear or failure to pay. Evidence-based practices can significantly mitigate both. There is an abundance of useful information about the successful reduction of failure-to-appear rates through reminders. In 2004, 33% of the Jefferson County, Colorado, jail inmate population consisted of defendants who failed to comply with court orders such as failure to appear, failure to pay, or failure to comply with a condition of release, an increase from 8% in 1995. Of this population, 75% were arrested on failure to appear warrants for misdemeanor, traffic, or municipal offenses.[82]

The County's Criminal Justice Coordinating Committee implemented a pilot project to call offenders seven days before a scheduled court appearance. The success of the pilot program resulted in a funded permanent program including two permanent staff at the Jefferson County Sheriff's Office, with "exceptional" results:

> The successful-contact rate has risen from an initial rate of 60% in the Pilot Project to 74% in 2010 for the Duty Division, and from 78% in 2009 to 80% in 2010 for Division T. In 2007, the court-appearance rate for defendants who were successfully contacted was 91%, compared to an appearance rate of 71% for those who were not. In 2010, combining all statistics from both Duty Division and Division T, the court-appearance rate for defendants who were successfully contacted was 92%, compared to an appearance rate of 73% for those who were not. These increases have significantly reduced the costs of FTAs, including the somewhat intangible costs to victims and society in general. Moreover, although not empirically tested, these numbers indicate that the use of a live caller appears to have permitted experimentation and "tweaking" of the process, which has, in turn, fostered steady improvement.[83]

[80] Memorandum, *supra,* note 78, pp. 2-4.

[81] *Id.* at 4; proposed amendment to Chapter 175.5(d).

[82] Timothy R. Schake, Michael R. Jones, and Dorian M. Wilderman, "Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Reminder: The Jefferson County, Colorado, FTA pilot Project and Resulting Court Date Notification Program," Court Review Volume 48 Issue 3 (2012), at p. 86.

[83] "Increasing Court-Appearance Rates," *supra,* note 82, at p. 92.

When Coconino County, Arizona, officials discovered that 22.9% of the jail population consisted of those arrested for failure to appear, including 33.6% of the misdemeanor population, the Flagstaff Justice Court instituted a pilot project to make phone calls to remind defendants of upcoming court dates. The result was a failure to appear rate for the control group (not called) of 25.4% but just 12.9% for the called group, including just 5.9% for those personally contacted.[84] A study of the Flagstaff project found

> The problem of non-compliance with court orders, including failing to appear for court hearings, is endemic across the country. Failure to appear for court causes increased workloads for court staff, issuance of misdemeanor arrest warrants, incarceration on minor offenses for the non-compliant defendant, and longer jail stays for those defendants in connection with the present offense or future offenses. One of the factors considered by the courts in determining conditions of release is a defendant's past history of failing to appear. Failure to appear on misdemeanor cases also results in the loss of revenues from unpaid fines and fees.[85]

When the Los Angeles Superior Court instituted the Court Appearance Reminder System (CARS) to make automated calls for the 9,000 monthly scheduled court appearances for traffic cases, the court realized a 22% decrease in traffic failures to appear, an increase in revenue, and avoided costs associated with reduced clerk time required for these cases.[86] One-time start-up costs for the program were between $29,000 and $30,000 in each court, with an average monthly cost of approximately $1,200, while the annual cost saving from reduced failures to appear alone was more than $30,000, resulting after payment of start-up costs in cost-neutral enhancement of public service and better outcomes for offenders.[87]

Similarly, a pilot program costing $40,000 in 2005 for automated phone reminders to defendants in Multnomah County Circuit Court in Portland, Oregon, reduced failures to appear by almost one-half, leading to full funding of phone reminders for all 72,000 people charged with a crime in the county and an expected savings in staff time and resources of up to $6.4 million annually.[88]

An effective alternative to phone reminders can be written postcard reminders. A study of more than 7,000 misdemeanor defendants in 14 Nebraska counties for cases from March 2009 to May 2010 demonstrated that the risk of failure to appear is reduced with a postcard reminder system and that including written information about possible sanctions for FTA makes the reminders more effective than just a reminder.[89]

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[84] Wendy F. White, Criminal Justice Coordinating Council, and Flagstaff Justice Court, Coconino County, "Court Hearing Call Notification Project" (May 17, 2006), p. 1.

[85] *Id.*, p.4.

[86] Judicial Council of California Report, *Court Appearance Reminder System (CARS), Los Angeles Superior Court* (2010), p.2 accessed at http://www.courts.ca.gov/27771.htm

[87] *Id.*, pp. 3-4.

[88] Aimee Green, "Your Court Date Is Nearing, Automated Reminder Warns," Newhouse News Service (October 1, 2007), accessed at http://www.chron.com/news/nation-world/article/Your-court-date-is-nearing-automated-reminder-1612333.php

[89] Brian H. Bornstein, Alan J. Tomkins, Elizabeth M. Neely, Mitchel N. Heian, and Joseph A. Hamm, "Reducing Courts' Failure-to-Appear Rate by Written Reminders," *Psychology, Public Policy, and Law* 19:1 (2013), pp. 70-80, at p. 2 78-79, accessed at http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1601&context=psychfacpub

In addition, the study demonstrated that defendants who appeared in court had more confidence in the courts and a greater sense of procedural justice than those who did not appear.

In an effort to reduce FTA rates, New York City worked with ideas42, a non-profit behavioral design lab, to redesign the city's summons to make the information regarding the court date easier to understand. In 2016 New York City began testing a reminder system that uses automated telephone calls and text messages to remind defendants about court dates and improve appearance rates.[90]

Failures to appear might also be caused by a lack of knowledge by individuals charged with offenses who believe that the only option is to pay the fines or fees for the offense or go to jail. Courts can explain the available options for defendants to encourage their appearance. This information could be provided in written citations or summonses, on the court's website, and in personal communication with defendants in court.

A sense of personal responsibility should encourage those accused of an offense to mind their court dates and appear to resolve the charges. The high rates of failure to appear indicate that this idea is not acted upon by many offenders. Courts can adopt cost-effective reminder practices and information-sharing practices that substantially increase attendance in court, save staff time, reduce added fees for non-appearance, and increase revenue collected. Achieving these goals should not be inhibited by the reasonable, but unsupported, notion that people should be responsible enough to get themselves to court.

3. Eliminate additional fees for collections-related supervision/probation and cease extensions of supervision/probation solely to achieve payment of fines and fees or the equivalent in community service

The for-profit supervision industry has become embedded in a number of court systems as a way to achieve payment of LFOs that is "free" to taxpayers. However, touting this process as "free" is misleading because the arrangement masks costs to the taxpayer. When the private contractor's fees are unpaid, the defendant can be incarcerated at taxpayer expense. When supervision fees are added to the LFOs of those who need time to pay court-imposed debt, the risk of jail becomes greater. It can be dangerous to create a profit motive for lengthening the period and cost of supervision. Even without abuses, it is contradictory to impose supervision fees of $40 per month on defendants who are unable immediately to pay as little as a few hundred dollars in LFOs.

An in-depth examination of data on LFOs concludes, "If the policy goal is to improve the lives of victims, recoup state expenditures, and reduce crime, our findings suggest that the imposition of monetary sanctions is very likely a policy failure" in large part due to the increasing imposition of the costs of incarceration and supervision on offenders.[91] Whether from a private company or to reimburse the state, imposition of incarceration and supervision costs on those already struggling to satisfy court debt increases the likelihood of continued failure by offenders at unnecessary cost to the courts and jails.

The risks of abuse when a court delegates to a private corporation the supervision of an offender for a monthly fee collected by the company are discussed at Section 2C above. This practice provides a financial incentive for

[90] Mayor's Office of Criminal Justice, *Streamlining the Summons Process*, accessed at http://www1.nyc.gov/site/criminaljustice/work/summons_reform.page

[91] "Drawing Blood from Stones," *supra,* note 41, p.1792.

the company to keep those with LFOs under the company's supervision. Combined with the dedication of the debtor's very scarce resources not to pay the court, but to pay the supervising company, the cycle of never-ending LFOs traps those least able to pay, often leading to intermittent jail terms. At the very least, close monitoring of private companies tasked with supervision and collection of LFOs for profit is needed. At best, courts can scale court LFOs to levels that allow payment with minimal court supervision, provide alternatives to payment such as community service, and take the profit motive out of supervision for court debt.

In some jurisdictions, courts do not directly supervise collections and these contracts are entered into by the county or municipality. It is important for courts to be aware of such contracts and their consequences to ensure enforcement of court-ordered LFOs is lawful. Judges may be subject to judicial sanctions for abusive enforcement practices by contract LFO collectors because the judge is ultimately responsible for the practices adopted by these companies, even when the judge is a part-time municipal judge with limited administrative authority.[92]

Faced with concerns about reports of abuses, courts have taken steps to manage practices relating to collecting LFOs. After the New Jersey Assembly passed a statute authorizing municipalities and counties to enter into contracts with private collection firms for municipal LFOs, the New Jersey Supreme Court adopted procedures requiring all payment amounts to be remitted to courts which would then pay the contractor's fees as limited by statute, with documentation and oversight by the Administrative Director of the Courts.[93] In 2015 the Virginia Supreme Court re-issued Master Guidelines for agreements with entities, including private collections agencies, for collection of unpaid fines, court costs, forfeitures, penalties, statutory interest, restitution, and restitution interest, with explicit guidance on the maximum amount payable to such contractors and describing the processes for oversight by the Commonwealth's Attorney and courts.[94] As provided by statute, low risk offenders in Colorado may be supervised by use of contract probation services within restrictions established by Chief Justice Directive 16-01.[95]

At least 13 states have a statute that permits extending probation for failure to pay court debt, which "creates a system where people who have met the other terms of their sentence, satisfied the conditions of probation, and paid their debt to society remain under supervision by criminal justice authorities because of a monetary violation. Extending the supervision of people for criminal justice debt creates an unnecessary financial burden on states and actually reduces public safety."[96] Both Ohio (by rule) and Virginia (by statute) prohibit keeping offenders on extended supervision for failure to pay court debt.[97] The Brennan Center suggests model language to require an end to supervision based

[92] Alabama Judicial Inquiry Commission, Advisory Opinion 14-926 (March 4, 2014) (Part-time judge with no ability to hire or fire city clerk and with no involvement in the selection of a private probation company has "ethical accountability" for the actions of the company if the judge should have known "company employees were failing to perform their duties in a manner consistent with the high standards required of judges and the court").

[93] New Jersey Supreme Court Procedures Governing the Private Collection of Municipal Court Debt Under L. 2009, C. 233 (March 31, 2011), p. 3.

[94] Virginia Supreme Court, *Master Guidelines Governing Collection of Unpaid Delinquent Court-Ordered Fines and Costs Pursuant to Virginia Code §19.2-349* (July 1, 2015).

[95] Colorado Supreme Court Chief Justice Directive 16-01, effective January 1, 2016, accessed at https://www.courts.state.co.us/Courts/Supreme_Court/Directives/16-01%20Initial%20Web.pdf

[96] *Criminal Justice Debt*, *supra*, note 20, p. 20, citing *Barrier to Reentry supra,* note 7 at p.7.

[97] Ohio Admin. Code, section 5120:1-1-02(K); Va. Code Annot., section 19.2-305 (2012).

solely on failure to pay court debt.[98] Along with a creative approach to alternatives to payment, an end to supervision when the only remaining debt a defendant has is court LFOs would be an important step toward divorcing court LFOs from unnecessary and counterproductive incarceration.

C. Expand and Improve Access to Alternatives to Satisfy Court LFOs

The drumbeat of studies and reports about debtors' prisons for those too poor to pay court LFOs makes it unnecessary to linger over the need for alternatives to a post-adjudication "pay or go to jail" approach. Recent examples include a 2015 report by the ACLU on "Debtors' Prisons in New Hampshire" and a 2016 report by the Legal Aid Justice Center, "Driven Deeper into Debt: Unrealistic Repayment Options Hurt Low-Income Court Debtors."[99] When considering court LFOs, it is important to focus on the goal of offender compliance, especially when the offense is minor and the offender has limited financial means. To this end, courts should establish an alternative to the cycle of offender-funded supervision and its threat of continuing and growing debt by providing community service and other options through which the offender can earn credit at a reasonable rate against LFOs.

1. Community Service

As long ago as 1991, the National Center for State Courts endorsed community service after verification of indigence as a necessary alternative to criminal fines.[100] Community service options seem to be mandated by the requirement in *Bearden* to consider reasonable alternatives to payment for those unable to pay court LFOs. For this reason many states have statutes such as that in New Mexico:

> The person may also be required to serve time in labor to be known as "community service" in lieu of all or part of the fine. If unable to pay the fees or costs, he may be granted permission to perform community service in lieu of them as well. The labor shall be meaningful, shall not be suspended or deferred, and shall be of a type that benefits the public at large or any public, charitable or educational entity or institution and is consistent with Article 9, Section 14 of the constitution of New Mexico [anti-donation clause]. . . [A] person who performs community service shall receive credit toward the fine, fees or costs at the rate of the prevailing federal hourly minimum wage.[101]

There is an administrative burden to the verification and tabulation of community service credits against LFOs. However, many communities have non-profit organizations eager to provide work opportunities in return for tracking the hours provided by community

[98] *Criminal Justice Debt*, *supra*, note 20, p. 21.

[99] American Civil Liberties Union of New Hampshire, *Debtors' Prisons in New Hampshire* (9/23/2015), accessed at http://aclu-nh.org/wp-content/uploads/2015/09/Final-ACLU-Debtors-Prisons-Report-9.23.15.pdf; Angela Ciolfi, Pat Levy-Lavelle, and Mario Salas, "Driven Deeper into Debt: Unrealistic Repayment Options Hurt Low-Income Court Debtors," Legal Aid and Justice Center (5/4/2016), accessed at https://www.justice4all.org/wp-content/uploads/2016/05/Driven-Deeper-Into-Debt-Payment-Plan-Analysis-Final.pdf

[100] Brian Lynch, William H. Rousseau, George F. Cole, and Thomas A Henderson, "Compliance with Judicial Orders: Methods of Collecting and Enforcing Monetary Sanctions," Project Monograph (December 31, 1991), p.8.

[101] NMSA 1978, Section 31-12-3 (1993).

service workers at no cost to the organization. Instead of tracking jail time served for non-payment of LFOs, clerks can enter data reported by service organizations that benefit from community service. An example is found in the ReFinement Program in Penobscot County, Maine, where the non-profit Volunteers for America tracks, monitors, and supervises offenders in community projects with credit against LFOs at a rate of $10 per hour.[102] In a number of states the rate of credit toward LFOs for community service is specified by statute. Georgia, New Mexico, and Washington specify minimum wage credit.[103] Some states provide, as does Iowa, instead of a flat rate of credit, the court has discretion to establish a number of community service hours required to satisfy LFOs.[104] There is support for the view that courts should be authorized to take into account an offender's employment status and other factors in setting a requirement for community service that will satisfy LFOs:

> The design of community service programs also matters. For example, defenders in Illinois observed that when community service is imposed on individuals who are otherwise employed, it can be difficult for them to complete the necessary hours. For this reason, community service should only be imposed at the defendant's request, or when an unemployed defendant has been unable to make payments. Similarly, judges should have discretion as to how many hours of community service should be required to pay off criminal justice debt, rather than mandating by statute a fixed dollar value per hour. If a person faces thousands of dollars of debt, a fixed dollar equivalent of service hours may not be realistic.[105]

When NCSC recommended that Missouri municipal courts expand and coordinate community service opportunities in lieu of LFOs, it also recognized that many courts lack resources to track community service and so recommended that the Office of the State Court Administrator "pinpoint close geographic clusters of municipal courts regardless of their jurisdictions that could benefit from working together to access local diversion and community service programs, and provide such information to the affected presiding judges of the circuit courts and municipal judges for further action."[106] Such a creative approach may be necessary and may require dedication of state and local resources to implement community service effectively as a means to satisfy LFOs that is more productive than jail for non-payment.

Where permitted by statutes and ordinances that otherwise mandate LFOs, a Community Court may provide an alternative to incarceration designed to intervene in a defendant's cycle of criminal conduct.[107] Community Courts are an effort to substitute restorative justice alternatives, such as removal of graffiti, cleaning neighborhood parks, and helping maintain public spaces while also linking offenders to drug treatment, mental health services, job training, and other services.[108] One example can

[102] Volunteers for America, *ReFinement Program Model* Requirements, accessed at http://www.mainecounties.org/uploads/1/8/8/6/18869398/penobscot_refinement_program_model.pdf

[103] Ga. Code Annot., Section 17-10-1(d); NMSA 1978, Section 31-12-3 (1993); Wash. Rev. Code Section 10.01.160 (2015).

[104] Iowa Stat. Section 910.2.

[105] *Criminal Justice Debt, supra,* note 20, p. 15.

[106] *Missouri Municipal Courts: Best Practice Recommendations, supra,* note 67, pp.28-29.

[107] *Id.*

[108] Center for Court Innovation, (2016), accessed at http://www.courtinnovation.org/mentor-community-courts

be found in the Atlanta Municipal Court.[109] Another is San Francisco's Community Justice Center[110] Where permitted as an alternative to LFOs, a Community Court may provide a cost-effective alternative to incarceration for low-level offenders who otherwise might not be able to satisfy LFOs.

2. Day Fine

One alternative approach that could reduce incarceration for LFOs, but is not now widely used in United States courts, is the day fine. A "day fine" sets the fine based on an offender's daily income and the gravity of the offense. "Once these two factors have been determined, the officer calculates the amount of fine imposed by multiplying the fine units an offender receives by his or her daily income (adjusted for family and housing obligations)."[111] In advocating for consideration of day fines as an alternative to high LFOs, the Council of Economic Advisers in December 2015 stated, "Evaluation research has shown that 'day' fine systems without statutory maximums have the additional potential to increase collection rates, as all defendants should be capable of paying proportional fines, to increase total fine revenue collected, and to reduce arrest warrants for outstanding debt."[112]

Pilot efforts to use day fines in the late 1980s in cities in New York, Iowa, and Connecticut reported promise but did not develop ongoing momentum. Analysis of these efforts by the Bureau of Justice Assistance in 1996 found that, for successful day fine programs, "a great deal of up-front policy formulation and program planning is necessary. Time must be spent on education and training, both before implementation and on a continuing basis." A court willing to undertake these challenges might find day fines a useful tool in enforcement of LFOs.

3. Non-Financial Compliance to Satisfy LFOs

Another option would be to focus non-monetary compliance options on efforts that would improve the defendant's financial situation. A court could provide credit for GED preparation classes, work-skills training, or other non-traditional types of options to ensure compliance with LFOs while providing defendants with viable options to improve their future prospects.

The Michigan Workgroup report discussed with regard to assessing ability to pay also provides examples of approaches to reduce court LFOs when they are overly burdensome given an individual's circumstances. The report provides examples of payment alternatives, including community service that targets having offenders provide services tied to an ability or interest of the offender, attendance in school, or completion of classes or education requirements, with program materials and data on cost savings from saved jail use totaling $749,160 in the 61st district court in fiscal year 2013-2014.[113] There are documents from the Third Circuit Court Family Division program for negotiating reduction and waiver of non-mandatory fees after a good faith effort to pay as well as model policy on debt inactivation for court LFOs.[114]

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[109] Atlanta Municipal Court Community Court Office of Court Programs, accessed at http://restorativejusticecenter.org/RTF1.cfm?pagename=Leadership

[110] Beau Kilmer and Jesse Russell, *Does San Francisco's Community Justice Center Reduce Criminal Recidivism?* Rand Corporation (2014), p. 7.

[111] Edwin W. Zedlewski, "Alternatives to Custodial Supervision: the Day Fine," National Institute of Justice Discussion Paper (April 2010), p. 2, accessed at https://www.ncjrs.gov/pdffiles1/nij/grants/230401.pdf

[112] Issue Brief, *supra,* note 8, p. 5.

[113] *Michigan Ability to Pay Workgroup, supr,* note 57, Appendix I.

[114] *Id.*, Appendices J and K.

In addition to other provisions in the Biloxi, Mississippi, Municipal Court Bench Card, judges are required to consider "completion of approved educational programs, job skills training, counseling and mental health services, and drug treatment programs as an alternative to, or in addition to, community service."[115] The San Diego, California, Homeless Court Program provides credit in place of fines for the completion of various activities including life skills training, chemical dependency/AA meetings, computer and literacy classes, employment training, and counseling.[116]

When courts assess an offender's ability to pay and determine that something less than payment of 100% of otherwise applicable LFOs is appropriate, judges need to have the authority to provide at least limited relief from the consequences that actually impair the goals of the criminal justice system, including a meaningful opportunity to avoid future criminal sanctions. The Uniform Collateral Consequences of Conviction Act provides an "order of limited relief" when the individual establishes that granting the relief will assist the individual in obtaining or keeping employment, education, housing, public benefits, or occupational licensing; the individual has a substantial need for the relief in order to live a law-abiding life; and granting the relief will not pose an unreasonable risk to the safety of the public or any individual.[117]

Leadership is required to shift from a collections focus to permit satisfaction of court LFOs through alternative opportunities for those with limited ability to pay. An editorial by Collee Station, Texas, Municipal Judge Ed Spillane described the difficulties of assessing an individual's economic hardship, but also the ways community service and alternative sanctions benefit the individual and community much more than jail for non-payment. His alternatives include payment plans with regular, very small payments, attendance at parenting and child safety classes in return for debt waiver, assignment to DWI impact panels, anger management training, and warrant amnesty programs for those who agree to resolve outstanding LFOs without arrest.[118] Especially for low-level offenders, an approach that emphasizes a consequence related to the offense and that is within the offender's means adheres to the requirement to assess willfulness and ability to pay and more probably deters criminal behavior than hundreds or thousands of dollars in court LFOs.

Some recent legislative activity recognizes the need for courts to have the authority to mitigate LFOs and their consequences. For example, in Oklahoma where court LFOs can require $3,000 to reinstate a driver's license, a statute adopted in 2013 allows those with suspended or revoked licenses to get a provisional license for $25 per month that allows the person to drive to a place of employment, religious service, court-ordered treatment, or other limited locations while the $25 monthly fee is applied toward outstanding costs owed by the offender.[119]

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[115] Biloxi Municipal Court Bench Card, *supra*, note 71, p. 3.

[116] Homeless Court 2016 program description, accessed at http://www.homelesscourtprogram.com/

[117] See American Bar Association resolution, February 9, 2010, adopting Uniform Collateral Consequences of Conviction Act, accessed at http://www.uniformlaws.org/Shared/Docs/ABA%20Approval%205-11-2010.pdf

[118] Ed Spillane, "Why I Refuse to Send People to Jail for Failure to Pay," *Washington Post* (April 8, 2016).

[119] Clifton Adcock, *Ex-Offenders Face Steep Price to Reinstate Driver's License* (2/24/2015), Oklahoma Cure accessed at http://nationinside.org/campaign/oklahoma-cure/posts/ex-offenders-face-steep-price-to-reinstate-drivers-licenses/

The Washington Supreme Court held that due process is violated by an automatic suspension of a driver's license without providing an opportunity to be heard at an administrative hearing.[120] In Maryland, an administrative hearing at which a driver can establish inability to pay in order to avoid suspension is required by statute.[121] An option provided in Indiana permits a restricted license for work, church, or participation in court-ordered activities.[122]

D. Ensure Judges Have the Authority to Modify, Mitigate, or Waive Fees for Those Unable to Pay Despite Good Faith Efforts

Many states have mandatory LFOs that a judge is required to impose on the defendant, regardless of ability to pay. [123] For example, in New York, judges are required by statute to impose a sex offender registration fee, DNA databank fee, and crime victim assistance fee on defendants who are convicted of particular types of offenses.[124] Judges are not permitted to waive or mitigate these fees, at sentencing or any other time, because of the defendant's inability to pay.[125] Similarly, in California, judges are only permitted to consider a defendant's ability to pay when determining whether certain fines should be imposed in excess of a statutory minimum: "The court must impose the minimum fine even when the defendant is unable to pay it."[126] Judges may waive fines only if there are compelling and extraordinary reasons, and "inability to pay is not an adequate reason for waiving the fine."[127] Mississippi is another state that prohibits judges from reducing or suspending mandatory fines.[128]

Other states require mandatory LFOs to be imposed, but allow them to be reduced or waived at a post-sentencing hearing upon a showing of inability to pay. In Washington State, judges are required to impose crime-specific mandatory LFOs such as victim penalty assessments, DNA collection fees, felony restitution, and others.[129] Although these crime-specific LFOs are mandatory at the time of sentencing, judges have discretion to waive, in whole or in part, many of these LFOs at a post-sentencing hearing.[130]

In *Bearden* the United States Supreme Court held that it is unconstitutional to put a person in jail who, despite good faith efforts, is unable to

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[120] *City of Redmond v. Moore*, 151 Wash.2d 664, 667 (Wash. 2004).

[121] Md. Code Annot., section 12-202.

[122] Ind. Code, section 9-24-15-6.7 (2012).

[123] A study of fifteen states by the Brennan Center for Justice concluded that at least one mandatory LFO existed in fourteen of the fifteen states. Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* (2010). Many, if not most, states allow judges to waive or reduce discretionary LFOs, although judges may decline to exercise their authority to waive discretionary LFOs. *Id* at 13-14. *See also* Shalia Dewan, "Driver's License Suspensions Create a Cycle of Debt," *NewYork Times* (April 14, 2015), accessed at http://www.nytimes.com/2015/04/15/us/with-drivers-license-suspensions-a-cycle-of-debt.html?_r=0 ("In Tennessee, judges have the discretion to waive court fees and fines for indigent defendants, but they do not have to, and some routinely refuse.")

[124] N.Y. Crim. Proc. Law § 420.35(2). The court may waive the crime victim assistance fee, but not the other fees, only if the defendant is an eligible youth and the fee would constitute an unreasonable hardship.

[125] *Id.*

[126] California Administrative Office of the Courts, Benchguide 83 § 83.16 (2014), available at http://victimsofcrime.org/docs/default-source/restitution-toolkit/benchguide2014.pdf?sfvrsn=2 (citing Cal. Penal Code § 1202.4(c)).

[127] *Id.* at § 83.21.

[128] See Biloxi Municipal Court, LFO, and Community Service Benchcard (2016), available at http://www.biloxi.ms.us/wp-content/uploads/2016/03/BenchCard.pdf ("The Court may not reduce or suspend any mandatory state assessments, including those imposed under Miss. Code Ann. § 99-19-73").

[129] See Wash. Rev. Code § 7.68.035; WASH REV. CODE § 43.43.7541; Wash. Rev. Code § 9.94A.753(5).

[130] Wash. Rev. Code § 9.94A.6333.

pay LFOs. As discussed in section C.3 above, there are ways for judges to create alternatives to financial payment that can satisfy LFOs. Where legislation or local ordinances disavow the authority of judges to exercise such discretion, it is important to reform the law. Not only is it important in order for the statute or ordinance to be consistent with *Bearden*; judges are in the best position to determine if an alternative to payment or waver of part of the LFOs following a good faith effort to pay is appropriate when the goal is compliance and not fundraising upon threat of incarceration. Legislation has created this myriad of fees, and legislation will be required to reduce or properly scale them to an offender's misconduct. In 2016, Maine passed Senate Paper 666, which authorizes judges to suspend or reduce LFOs, including mandatory LFOs, and in doing so to consider various factors including "reliable evidence of financial hardship."[131]

COSCA members and other state court leaders should work with legislative bodies to recognize and encourage judicial discretion to allow judges to tailor LFOs to an offense and mitigate or waive LFOs when there has been a good faith effort to pay or otherwise comply, and the defendant is unable to pay.

E. Impose Jail Time for Willful Refusal to Pay, and Provide Credit at a Rate that Results in Reasonable Satisfaction of Court Obligations

Despite the best efforts of courts to assess ability to pay fairly and provide alternatives to court debt that accommodate an individual's circumstances, there will remain those who willfully refuse to pay. A court may reasonably conclude that these individuals have earned the consequence of incarceration. Even at this stage, however, the result of an offender's loss of liberty should be satisfaction of the offender's obligations to the court and not additional punishment through the accumulation of additional LFOs. A range of offenses result in unpaid LFOs, but the focus in obtaining satisfaction of LFOs in each case is compliance with the law and not justice-for-profit.

One of the ironies of court LFOs is observed when a court debtor "volunteers" to serve jail time as the best option to satisfy court debts. When faced with court LFOs totaling thousands of dollars compounded by late fees, Homer Stephens asked a judge in the Oklahoma City Municipal Court to send him to the jail where he eliminated the debt after 17 days.[132] In many jurisdictions, offenders who spend time in jail earn credit against court LFOs, such as $50 per day in Montgomery, Alabama, that increases to $75 per day if the offender works while in jail or $50 to $100 per day in Texas counties.[133] The status of such "volunteers" may merit closer scrutiny if a statute could be interpreted to give judges the authority to apply jail time as credit toward LFOs without a *Bearden* hearing.[134]

Confronted by an offender who has the ability to pay but has not done so, courts may consider a process of graduated sanctions short of jail since incarceration will likely frustrate the offender's ability to pay while adding to the cost to taxpayer-funded jails. The range of sanctions can include mandatory budget classes; mandatory service in the community or at a restitution center; special appearances before a

[131] S.P. 666, section 13, 127th Leg., Reg. Sess. (Me. 2016), amending 17-A MRSA section 1300(3), accessed at http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=SP0666&item=1&snum=127.

[132] Clifton Adcock, "*Offender's Story: Untying the Bonds of Court Debt,"* Prisoners of Debt Series, *Oklahoma Watch* (February 26, 2015), accessed at http://oklahomawatch.org/series/prisoners-of-debt/

[133] Andrea Marsh and Emily Gerrick, "Why Motive Matters: Designing Effective Policy Responses to Modern Debtors' Prisons," 34 *Yale Law and Policy Review* 93, p. 103 (Fall 2015).

[134] *See* Missouri Code: Mo. Rev. Stat. § 543.270.1.

judge; revocation of driving, hunting, and fishing licenses with exceptions to maintain employment; and restricted liberty without full incarceration, such as curfews or electronic monitoring.[135] The Adult Probation Department in Maricopa County, Arizona, has a Financial Compliance Program with a graduated list of responses to nonpayment of Court LFOs depending on the number of days delinquent, including a written reminder at 15 days, a 7-page Payment Ability Evaluation at 30 days, mandatory 5-week budgeting class at 60 days, referral to a collection agency at 90 days, and probation revocation at 180 days.[136] Probation officers report "that the use of incentives and sanctions of personal importance to the individual has been a particularly effective enforcement strategy."[137]

When jail, where the loss of freedom is aggravated by the risks of lost employment and housing, is the best option for satisfying court LFOs, it is time to reexamine the fees, late penalties, and add-on costs that make other options unattractive. Nonetheless, when a court finds an individual has the means to pay and refuses to do so, and the court has exhausted reasonable alternatives that include community service, incarceration remains the court's consequence of last resort. With reasonable credit against court debt for time served, incarceration is the ultimate tool available to judges for satisfaction of LFOs.

[135] Rachel L. McLean and Michael D. Thompson, *Repaying Debts,* Council of State Governments (2007), pp. 2 35-36.

[136] *Id.* at p. 36.

[137] *Id.*

IV. Conclusion

Three decades ago, the United States Supreme Court in *Bearden* held it is unlawful to incarcerate an offender for court debt absent proof of willful failure to pay. Today the members of COSCA dedicate our efforts to assisting the judges and court staff we support to achieve routinely what is stated in *Bearden.* This paper cites many examples of state and local court efforts to assess ability to pay, scale consequences to the offender and the offense, and break the cycle of court LFOs leading to a debtors' prison. Consistent with the practices advocated in this paper, the members of COSCA will work to achieve the promise of *Bearden* more closely and reserve jail for those who willfully fail to pay court LFOs.

In summary those practices are

A. Streamline and Strengthen the Ability of Courts to Assess Ability to Pay

B. Adopt Evidence-Based Practices that Reduce Failure to Appear and that Improve Compliance with Court Orders, Including Orders Imposing Fines and Fees
    1. Simplify and clarify court LFOs and their application
    2. Adopt practices that minimize failure to appear and failure to pay.
    3. Eliminate additional fees for collections-related supervision/probation and cease extensions of supervision/probation solely to achieve payment of fines and fees or the equivalent in community service.

C. Expand and Improve Alternatives to Satisfy Court LFOs
    1. Community Service
    2. Day Fine
    3. Non-Financial Compliance to Satisfy LFOs

D. Ensure Judges Have the Authority to Modify, Mitigate, or Waive Fees for Those Unable to Pay Despite Good Faith Efforts

E. Impose Jail Time for Willful Refusal to Pay, and Provide Credit at a Rate that Results in Reasonable Satisfaction of Court Obligations