



February 4, 2014

The Honorable Bruce Spanner
Presiding Judge
Benton County Superior Court
7122 W. Okanogan Pl. Bldg A
Kennewick, WA 99336

The Honorable Joseph Burrowes
Presiding Judge
Benton County District Court
7122 W. Okanogan Pl. Bldg A
Kennewick, WA 99336

Re: Legal Financial Obligations (LFO) Report

**AMERICAN CIVIL
LIBERTIES UNION
OF WASHINGTON**

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Dear Judge Spanner and Judge Burrowes,

This summer, the ACLU of Washington and Columbia Legal Services launched an investigation into court processes for collection of Legal Financial Obligations. We observed court calendars, interviewed dozens of individuals who owed LFOs including those who have been incarcerated for non-payment, and reviewed court records. The results of this investigation into Benton and other counties are documented in our report “Modern-Day Debtors’ Prisons: The Ways Court-Imposed Debts Punish People for Being Poor.” The report is enclosed and will be released February 10, 2014.

We have serious concerns that Benton County’s current practices violate the constitution and state law and unnecessarily expend government resources to collect LFOs from those without the ability to pay. Simply put, Benton County appears to routinely impose discretionary LFOs without considering a defendant’s ability to pay, and it appears to use incarceration as a way to collect even discretionary LFOs. Benton County’s rate of incarceration for non-payment far outstrips any of the other counties we investigated, and its practices often fall far short of constitutional and statutory standards. This letter details some of the problems with the current system of LFO imposition and collections in district court and superior court, and offers recommendations to help ensure the county effectively uses its resources and complies with the law. We urge you to take immediate action to address these troubling practices.

A. Imposition of Fines and Monthly Payment Plans

The district and superior courts appear to routinely impose a variety of LFOs, including discretionary costs that are imposed without any consideration of ability to pay, in violation of RCW 10.01.160(3). Many individuals, particularly in district court, are placed on a monthly payment plan at sentencing. These monthly plans are

set based on the total amount owed, without regard for the person's financial circumstances. It appears that the district court has no process for systematically collecting and considering information about individual finances.

There are few options for a person who is unable to comply with the court's payment plan. We spoke with numerous individuals who report being told they could not modify the amount or timing of payment until they were already delinquent and summoned to a hearing for failure to pay. Others told us that the district and superior court clerks had refused to take partial payments. If people cannot modify their payment plans or make partial payments, they face being summoned to court to explain the reason for non-payment.

Recommendations:

- Create written policies requiring courts to consider the ability to pay before imposing discretionary court costs, and setting forth criteria to apply in determining ability to pay.
- Require both district and superior courts to create and use a process to obtain specific information about a defendant's financial circumstances.
- Require the court clerks to accept partial payments.
- Create written policies and procedures allowing defendants to request modification of payment plans or waiver of discretionary LFOs or interest without a court hearing.

B. Warrants

Our review of court records indicates that the district and superior courts issue warrants both for non-payment and for failure to appear at hearings following non-payment. These courts also regularly issue failure to appear warrants for people who are incarcerated on other charges even when the person has attempted to notify the court that he is incarcerated and unable to attend the hearing.

A person with a warrant for non-payment seems to have three choices: 1) Pay a \$100 per case "warrant fee" in order to get on the court's calendar to address the reason for non-payment; (2) Pay the entire amount of fines and fees owing; or (3) Report to custody and spend the night in jail before appearing at the court's review hearing. Thus, those without the resources to pay the warrant fee must be incarcerated in order to have a constitutionally required hearing to determine their ability to pay. We believe this practice violates the constitution and should be eliminated.

Recommendations:

- Eliminate the practice of issuing warrants for non-appearance or non-payment for incarcerated people.
- Create written policies and procedures allowing individuals to quash warrants for non-payment or non-appearance without paying an up-front \$100 warrant fee, particularly if the failure to pay was not willful.

C. Public Benefits

The district and superior court regularly impose discretionary LFOs on people whose only source of income is public benefits, such as social security disability insurance or temporary assistance to needy families. These benefits are intended to provide for basic needs such as food, clothing, and shelter. They cannot be garnished or attached in order to satisfy debts. *See, e.g.*, 42 U.S.C. § 407. In our observation, the district court regularly requires payment of \$25 per month from people whose only income is public benefits, and will incarcerate individuals who do not pay in full every month. We also spoke with several individuals whose only income was public assistance who were ordered to make monthly payments directly from public benefits or pay “purge” amounts to avoid jail time.. The court should not use incarceration to compel payment of LFOs, particularly discretionary court costs, out of public benefits.

Recommendation:

- Establish policies for automatically waiving discretionary court costs and LFOs for individuals whose only income is public assistance
- Eliminate the practice of requiring individuals to pay LFOs, particularly discretionary court costs, from needs-based public assistance.
- Offer appropriate alternatives to incarceration for individuals who receive needs-based public assistance and whose failure to pay is due to poverty.

D. Superior Court Negotiated Agreements

The superior court clerks play an active role in negotiating agreements with defendants who appear at the superior court LFO calendar. In our observation, these agreements are negotiated without defendants being advised by the court of their constitutional rights to counsel or their right not to be incarcerated for non-willful failure to pay. Instead, court clerks approach individuals appearing at the superior court LFO calendar and inform those individuals that they could avoid jail time by signing agreements. It is particularly troubling that these agreements contain purported waivers of defendant’s rights. “Pay or appear” agreements purport to waive a defendant’s right to counsel, and “pay or stay” orders contain a “finding” that defendant’s previous failure to pay was willful. Yet, in entering these orders, the court does not consistently inquire into a defendant’s financial circumstances, the reason for non-payment, or whether a defendant understands the rights he may be waiving.

A defendant cannot waive his or her constitutional rights unless such waiver is knowing, intelligent, and voluntary. The processes for informally negotiating and entering agreed orders at the LFO calendar are insufficient to establish either a waiver of the right to counsel or a waiver of the right to an individualized determination of ability to pay. We believe individuals should be informed that their ability to pay fines is a crucial issue and that they have the right to the assistance of counsel in establishing their ability to pay.

Recommendations

- Fully inform every defendant of his or her right to counsel before entering “pay or appear” or “pay or stay” agreements.
- Create written policies requiring clerks to inquire into present ability to pay before setting the amount owed in a “pay or appear” agreement or “pay or stay” agreement.
- Fully inform every defendant that he or she may be incarcerated for willful failure to pay and that the court may schedule a hearing to determine whether the failure to pay was willful.
- Conduct a meaningful inquiry into ability to pay before entering any negotiated agreement requiring defendant to pay a particular amount.

E. District Court and Ability to Pay Determinations

The Constitution mandates that the court inquire into and make a finding of ability to pay before sanctions are imposed. Still, between May and October 2013, we observed little inquiry into ability to pay at the district court’s failure to pay fine hearings or in-custody hearings. The district court appears to have no form for assessing a defendant’s income and reasonable expenses. In the hearings we witnessed, the court focused instead on payment history – a person who has not previously missed any payment may have such payment reduced, but a person who has previously missed payments will face sanctions. The message is that people are given one or two “restart” opportunities; subsequent failure to pay, regardless of the reason, will result in work crew or jail time. The district court has issued sanctions for non-payment against people with disabilities living on fixed income, single parents supporting children, and unemployed persons seeking work.

Many individuals are left with the impression that their financial circumstances do not matter and that they will be incarcerated whether or not they have the ability to satisfy the debt. Further, no attorney represents the state in district court contempt proceedings, and it appears defendants are not advised that they have the right to speak with counsel until after the court has already determined to issue sanctions.

Recommendations:

- Create a document to be distributed to all defendants who owe fines and costs informing them in clear simple terms of the court’s collection practices and defendants’ rights.
- Require the presence of a prosecuting attorney and defense counsel at failure to pay fine hearings.
- Establish clear written policies for determining ability to pay.
- Establish clear written policies for considering alternatives to incarceration if a defendant is indigent and unable to pay.

F. Work Crew and Alternatives to Incarceration

Benton County's use of a work crew to sanction non-payment of misdemeanor fines and costs appears unique in Washington state. Several features of the program limit its efficacy and raise questions about its lawfulness. First, work crew is a form of custody or incarceration, not a voluntary program. Participants must be ordered to participate by the court, work under the supervision of a community corrections officer and may be charged with escape if they fail to appear. Accordingly, work crew should only be ordered if a person is found to have willfully failed to pay fines, just as incarceration should be ordered only if failure to pay is willful.

Secondly, individuals who participate in work crew are expected to pay \$5 per day in advance to participate. So, a person ordered to work crew for 20 days (to work off \$1600 in fines and costs) would have to pay a total of \$100 to participate. For many, the cost of work crew is prohibitive. The individuals we spoke with informed us that work crew also does not have any accommodations in place for people with disabilities, nor does it take into account an individual's other obligations (such as employment and family responsibilities).

In our observation and review of public records, those who cannot complete work crew are invariably sent to jail to "sit out" the balance of their fines and costs, earning credit of \$50 per day. Several individuals informed us that the court refuses to consider waiving discretionary court costs due to hardship. It also appears not credit individuals for community service, job training, or other productive behaviors. A person ordered to sit out fines may secure his or her freedom only by paying the entire amount ordered by the court, often hundreds or thousands of dollars. All too frequently, individuals spend weeks, even months in jail for non-payment.

Recommendations

- Eliminate the \$5 per day fee for work crew.
- Create policies for accommodating persons with disabilities participating in work crew.
- Offer work crew as a voluntary option, rather than an ordered sanction.
- If work crew is ordered as a sanction, ensure that the court has taken into account a person's ability to pay fines and made a finding that failure to pay is willful.

Conclusion

We would welcome the opportunity to discuss these issues and work with you to ensure that the LFO imposition and collections process in Benton County complies with the law..

Sincerely,



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Nick Allen
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Columbia Legal Services

Enclosure: LFO Report

cc:

Ms. Josie Devlin, Benton County Clerk
Mr. Andrew Miller, Benton County Prosecuting Attorney
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Ms. Lisa Beaton, Kennewick City Attorney
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Mr. Howard Saxton, Prosser City Attorney
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