Joint Memorandum In Support of Proposed Rule 2.7 Amendments by the ACLU-NH, Professor Albert E. Scherr, and the Circuit Court's Chief and Deputy Administrative Judges

February 25, 2016

I. Introduction

We write in support of the amendment to Circuit Court District Division Rule 2.7. The intention of the amendment, drafted by the authors of this memorandum, is to create a process that makes it clear that before any person can be jailed for nonpayment of a fine, the court must make a specific determination on the record that the individual has the present ability to pay or complete community service and has willfully failed to do so. In addition, and importantly, the amendment also requires the appointment of counsel before any person is jailed for nonpayment. We respectfully submit this memorandum to assist the Committee and the New Hampshire Supreme Court in understanding our rationale and the legal basis for the amendment currently under consideration.

Among the concerns that prompted the proposed amendment is that the current rule does not adequately guide Circuit Court judges with sufficiently detailed mandatory procedures for how to discriminate between those who have an ability to pay from those who do not. The danger, of course, is that the absence of a lawyer to assist individuals and the court to fully understand the facts of the defendant's financial ability to pay dramatically increases the potential for the jailing of individuals who may or may not have the ability to pay the fine without the protection of a lawyer and without any inability-to-pay hearing. We believe that such jailing of individuals without a hearing and without an ability to pay violates our constitution.

While individuals exist who willfully fail to pay fines even though they have the ability to pay—and we do not dispute that jail may be an appropriate remedy in these instances—the current Rule 2.7 has resulted in some instances where, with no lawyer present, the court has been unable to make the critical distinction between willful non-payers and those whose means and living conditions simply prevent them from complying with the court's sentencing order.

We believe the solution is simple and low-cost: amend the rules to (1) provide detailed, mandatory procedures that reduce the number of individuals who ever face the reality of jailing for a failure to pay a fine; and (2) provide counsel to those few individuals who do face incarceration for a failure to pay a fine—a right that is, as explained below, constitutionally enshrined.

Such procedures would offer Circuit Court judges much better guidance on how to discriminate between those who can pay and those who cannot. It would provide practical sentencing alternatives to fines for those who cannot pay. The appointment of counsel in those cases would be infrequent and would assist both the individual and the court in resolving the critical determination of present financial ability to pay.

The Rule 2.7 amendments accomplish these goals. The ACLU-NH and Professor Albert E. Scherr offer these amendments with the support of the Circuit Court's chief and deputy administrative judges. While the ACLU-NH recognizes that the Circuit Court disputes its assessment that this is a systemic problem, the ACLU-NH greatly appreciates their collaboration in seeking to reform Rule 2.7. These amendments are also supported by the NH Bar Association, the NH Public Defender

Program, NH Legal Assistance, and the NH Association of Criminal Defense Lawyers. Further, the executive directors of the Judicial Council and of the NH Public Defender Program have determined that such amendments would have no significant fiscal impact on the indigent defense system in New Hampshire.

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What follows is a more detailed response to the Advisory Committee's questions about the proposed amendments at its December 4, 2015 meeting and to Justice Lynn's suggested changes to the amendments. We will first address the right to counsel issue and then the other, new language in the proposed amendments.

II. The Right-to-Counsel Issue

A right to counsel at ability-to-pay hearings at which jail is a possible outcome (hereinafter a "Rule 2.7 incarceration hearing") belongs in Circuit Court Rule 2.7 for two reasons:

(1) Any solution to the problem of individuals being jailed when they have no ability to pay fines requires a right to counsel as a part of an effective package, be it a constitutionally required or rule-based right; and

(2) It is constitutionally required because (a) an inability-to-pay hearing is a resentencing or alternative sentencing proceeding indistinguishable from a probation violation hearing; or, alternatively, (b) an inability-to-pay hearing, even if a contempt hearing instead of a sentencing one, is a criminal (not civil) contempt hearing, thereby triggering a right to counsel.

A. A Rule-Based Right To Counsel Is A Necessary Part Of Any Scheme Of Pragmatic Solutions To The Operational Deficiencies Of The Current Rule 2.7

The ACLU-NH argues in its Debtors' Prison Report that, in 2013, Circuit Court judges jailed individuals for a failure to pay fines without, as constitutionally required, holding a meaningful inability-to-pay hearing in an estimated 150 cases. It goes on to posit that judges failed to do so even though Rule 2.7 explicitly calls for the court to evaluate the defendant's ability to pay the fine. While the undersigned Administrative Judges disagree with the report's conclusion that this is "systemic," we believe the law and rationale for such hearings is indisputable and that the proposed amendment will greatly enhance the process and assure a more orderly and complete process.

The current Rule 2.7 instructs judges to obtain an affidavit of financial resources, and to consider "such factors as the defendant's employment, good faith attempts to seek employment, spousal, family and partner income, savings, property ownership, credit lines and expenses including child support."[1] The ACLU-NH's study found no evidence that either a financial affidavit or information about other factors were even available, let alone considered in the cases sampled.

In subsequent sections, Rule 2.7 provides the court with alternatives to incarceration like community service, a deferred payment, or a periodic payment.[2] The ACLU-NH's study found that in most of the estimated 150 cases, such alternatives were only occasionally considered and rarely used. We agree that the reason for this failure to consider alternatives to detention were often the result of

[1] Rule 2.7 (a)
[2] Rule 2.7 (b) – (d).

unavailable options for such alternatives as community service or incomplete information about a defendant's ability to comply with a community service order.

The proposed amendments offered to the Advisory Committee are designed to insure that constitutionally-mandated inability-to-pay hearings are held; that courts consider that which is essential to a fair determination of ability or inability to pay the fine imposed; and that courts document that determination. The specific provisions of the amendments aim to make as certain as possible that the outcomes are fair and reliable—in particular, that only those who choose not to pay or perform community service when they have the ability to do so are jailed.

The presence of counsel at an inability-to-pay hearing is the single most important mechanism (1) to insure that courts apply Rule 2.7 in a bounded exercise of discretion; and (2) to assist courts in making what in many circumstances will be a difficult determination given the fluid and complicated nature of most indigents' financial circumstances.

The presence of counsel will make it more likely that a robust body of accurate information is before the court when it makes its decision. It will make it more likely that the income exemptions that state and federal law require will be understood and applied by the court. It will also facilitate the court's ability to consider real alternatives to incarceration, including arrangements for plausible payment plans or for community service.

B. A Procedural Due Process Right to Counsel Exists When A Rule 2.7 Hearing May Result In Incarceration

Whatever the wisdom of a rule-based right to counsel under 2.7, the New Hampshire and United States Constitutions entitle an individual faced with

incarceration for failure to pay a fine in a criminal or violation case to court-appointed counsel.

i. Constitutional, Procedural Due Process Basis

In New Hampshire, any sentencing enforcement hearing before a court at which a substantial liberty interest is at stake constitutionally entitles a defendant to counsel. The foundational language in *Stapleford v. Perrin,* a probation violation case, says:

> "[A] significant liberty interest exists which is worthy of due process protection … *when some condition set by the court has not been met and incarceration is the proposed remedy*."

Stapleford v. Perrin, 122 N.H. 1083, 1088 (1982) (emphasis added) (noting that representation by counsel—court-appointed if indigent—is part of that due process protection).[3]

Like a probation violation situation where incarceration is a possible outcome entitling a defendant to procedural due process protections—including counsel—an inability-to-pay hearing where incarceration is a possible outcome similarly entitles a defendant to the same procedural due process protections.[4]

The crux of the analysis is that an inability-to-pay hearing is just as much a part of a criminal case as is a probation violation hearing. One can label the inability-

[3] *State v. Furgal* re-emphasizes that point. In a context in which bail was the issue (but not the specific issue of incarceration in lieu of bail), the Court said in passing: "Because this issue was not sufficiently briefed, we do not decide the specific procedural protections required at a bail hearing … other than to say that at a minimum, the defendant has a right to counsel at such a hearing." *State v. Furgal*, 161 N.H. 206, 218 (2010) (citing *Stapleford*).

[4] A defendant at an inability-to-pay hearing is in the same circumstance as a bail hearing. He is before the court for not meeting a condition of the court's sentence—namely, the payment of their fine. RSA 618:9, of which a defendant is presumed to be aware at sentencing, recognizes that one in default of a fine a court ordered them to pay would serve off the default at $50 per day. As a bail hearing, with incarceration as a possible outcome, entitles a defendant to counsel, so an ability-to-pay hearing, with incarceration a possible outcome, entitles a defendant to counsel.

to-pay hearing as a sentencing violation hearing, a resentencing, an additional sentencing, or an alternative sentencing. Whatever its label, the inability-to-pay hearing is a formal part of the sentencing process in that criminal case. When sentenced, a defendant knows the scheme imposed in Chapter 618 addressing imposition and payment of fines. *See State v. White*, 164 N.H. 418, 424 (2012) (defendants are charged with knowledge of criminal laws). He knows, for example, that if he defaults on the payment of a fine, he may serve a jail sentence at the rate of $50/day. *See* RSA 618:8; RSA 618:9.

The U.S. Supreme Court has unambiguously said that a post-sentencing hearing that enforces an element of the original sentence is inextricably bound to the original sentence. It is a further reflection of the original sentencing goals of the court. *Bearden v. Georgia*, 461 U.S. 660 (1983), exemplifies this proposition. There, Bearden was on probation. He failed to pay his fine, a condition of probation. The trial court revoked his probation and incarcerated Bearden without any showing that he had an ability to pay his fine. In overturning the trial court's decision, the Court found that, "if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it." 461 U.S. at 668.

The *Bearden* Court explicitly identified the subsequent failure-to-pay-a-fine probation violation hearing as a continued exercise of the trial court's <u>*sentencing*</u> function:

> The decision to place the defendant on probation, however, reflects a determination by the sentencing court that the State's penological interests do not require imprisonment. A probationer's failure to make reasonable efforts to repay his debt to society may indicate that this original

> determination needs reevaluation, and imprisonment may now be required to satisfy the State's interests.

461 U.S. at 670 (citations omitted).

The parallel to the post-sentencing, inability-to-pay hearing here is direct and unmistakable. Paraphrasing *Bearden*: the decision to fine the defendant reflects a determination by the sentencing court that the State's penological interests do not require imprisonment. A defendant's failure to make reasonable efforts to repay his debt to society may indicate that this original determination needs reevaluation, and imprisonment may now be required to satisfy the State's interests.

In the inability-to-pay circumstance here, the statutory scheme in RSA 618 governs a defendant's failure to pay a fine and effectively operates as a term of probation. When sentenced to a fine, a defendant knows that RSA 618 empowers the court to jail one who has not paid their fine at the rate of $50 per day.

Because an ability-to-pay hearing with jail on the table is a sentencing event akin to a probation hearing, then it requires a set of constitutional procedural rights like the right to counsel in line with *Stapleford.* But, it is not as if these requirements in any way limit the authority of the sentencing court to craft approaches that meet its original penological goals. In accord with our proposed Rule 2.7 amendments and *Bearden v. Georgia*:

> "[t]he State is not powerless to enforce judgments against those financially unable to pay a fine." (quoting *Williams v. Illinois*, 399 U.S. 235 (1970)) For example, the sentencing court could extend the time for making payments, or reduce the fine, or direct that the probationer perform some form of labor or public service in lieu of the fine. … Indeed, given the general flexibility of tailoring fines to the resources of a defendant, or even permitting the defendant to do specified work to satisfy the fine, a sentencing court can often establish a reduced fine or alternate public service in lieu of a fine that

> adequately serves the State's goals of punishment and deterrence, given the defendant's diminished financial resources.

Id. at 672 (internal citations omitted).

ii. Constitutionally-Based Hearing v. Contempt Proceeding

The above analysis provokes two questions that were discussed during the December 4, 2015 Rules Committee meeting: (1) whether the inability-to-pay hearing instead represents an example of a contempt proceeding; and (2) if so, whether it is a criminal or civil contempt proceeding.

Even if one does not accept the above analysis that an inability-to-pay hearing is a sentencing event governed by the likes of *Stapleford*, such a hearing is still not a contempt hearing, let alone a civil contempt hearing where there is no right to court-appointed counsel. Rather, a post-sentencing Rule 2.7 ability-to-pay hearing is an event governed by statute rather than by common law.

In *State v. Nott,* the New Hampshire Supreme Court characterized contempt: "Contempt is a specific and substantive common law offense that is *separate and distinct from the matter in litigation* out of which the contempt arose." *State v. Nott*, 149 N.H. 280, 281-82 (2003) (emphasis added). A Rule 2.7 inability-to-pay hearing is anything but an offense "separate and distinct from the matter in litigation." As noted above, it is a core part of the sentencing process and the court's penological goals.

In addition, the statutory scheme in RSA 618 governs a defendant's failure to pay a fine rather than common law. It empowers the court to jail one who has not paid his or her fine at the rate of $50 per day.

Because a specific statutory scheme governs the event, the court need not (and should not) rely on its common law contempt power to jail a defendant. As a result, a post-sentencing ability-to-pay hearing is a proceeding entitling a defendant to *Stapleford* protections (including counsel) rather than a common law contempt proceeding.

iii. Criminal v. Civil Contempt

Alternatively, even if this Committee chooses to characterize an inability-to-pay hearing where jail is on the table as a contempt proceeding—which it is not—it is, at most, a criminal, not civil, contempt proceeding. In *State v. Smith*, the New Hampshire Supreme Court said: "... 'Criminal contempt is a sanction imposed by the trial court when a defendant has intentionally failed to comply with a valid order of which the defendant had knowledge.'" *State v. Smith,* 163 N.H. 13, 18-19 (quoting *State v. Hancock,* 156 N.H. 301, 304 (2007)). And, in a criminal contempt situation, court-appointed is required. *Mortgage Specialists, Inc. v. Davey,* 153 N.H. 764, 788 (2006).

A Rule 2.7 inability-to-pay hearing can, at most, be viewed as an indirect criminal contempt proceeding at which "the State must prove the existence of a valid order, the defendant's knowledge of the order, and the defendant's *intentional failure to comply* with the order." *Smith* at 163 N.H. at 19 (emphasis added). *Smith* involved a motion to impose a suspended sentence, one not governed by a statutory structure. Smith had failed to perform some conditions of the suspension, and the court imposed the sentence via its criminal contempt powers.

An ability-to-pay proceeding squarely fits the definition of criminal contempt where the state must establish that (1) a fine was imposed (i.e., a valid court order); (2) the defendant knew of the imposition of that fine; and (3) the defendant intentionally—i.e., willfully—failed to pay the fine in contravention of the order.

New Hampshire case law specifically distinguishes criminal and civil contempt as follows:

> *A civil contempt action arises from a private wrong* in which the defendant causes harm to the plaintiff by his failure to comply with a court order. Its purpose is to use the court's power to impose fines or imprisonment as a method of coercing the defendant into compliance. The defendant is given the choice of either performing the requisite act or paying the penalty. In effect, the defendant carries 'the keys of (his) prison in (his) own pocket. … [citations omitted]. *A criminal contempt action, on the other hand, occurs as a result of a defendant's interference with the court's process or dignity*. This interference is characterized as *a criminal or public wrong*, and the imposition of a fine or imprisonment is punitive, rather than remedial in nature.

Duval v. Duval, 114 N.H. 422, 425 (1974) (emphasis added). In short, a civil contempt action concerns a private wrong that a party has committed to another party arising out of a civil case, whereas a criminal contempt action concerns a public wrong committed by a defendant against the state or the court arising out a criminal case. Under this framework, a post-sentence ability-to-pay hearing is clearly a criminal contempt proceeding given its presence within a criminal case and its focus on the state's penological goals .

Later cases have articulated other versions of this test. For example, in *Town of Nottingham v. Cedar Waters, Inc*., the Court drew this distinction:

> The character and purpose of the punishment distinguishes the two classes of contempt. In civil contempt, the punishment is remedial, coercive, and for the benefit of the complainant. Civil contempt proceedings may result in money fines payable to the complainant or in an indeterminate jail sentence

> until the contemnor complies with the court order. Thus the contemnor is said to carry the "keys to the jail" in his pocket and stands committed until he performs the affirmative act required by the court's order. *The purpose of prosecution for criminal contempt is to protect the authority and vindicate the dignity of the court. The sentence is punitive and determinate, and no amount of repentance will remit it.*

Town of Nottingham v. Cedar Waters, Inc., 118 N.H. 282, 285 (1978) (citations omitted) (emphasis added).

Notably, none of the later cases using this formulation have repudiated *Duval*'s distinction of contempt cases arising in civil (private wrong) cases and in criminal (public wrong) cases. Tellingly, we could not find a single example in New Hampshire case law since *Duval* in which a finding of civil contempt was made against a criminal defendant in a criminal case. A Rule 2.7 inability-to-pay hearing arises out of the violation of a court order and is an interference with the court's process and dignity. It does not arise out of a private wrong. Thus, even if not an inextricable part of the court's sentencing practice, it is a criminal contempt proceeding meriting the appointment of counsel.

Some have argued that Chapter 618 gives a Rule 2.7 inability-to-pay defendant "the keys to his or her jail cell," thereby transforming this post-sentencing ability-to-pay hearing into a civil contempt proceeding. Specifically, the Chapter 618 scheme provides that a defendant may be discharged if he pays the remainder of the fine. Therefore, the argument is that, because "holding the keys" is one explicit feature of civil contempt, then the entire proceeding is thereby defined as a civil contempt proceeding for all purposes.

This is incorrect for several reasons. By the language of Chapter 618, an individual's jailing is *in lieu of paying his fine*; that is, jailing occurs instead of paying

the fine. Thus, as described in *Bearden*, it is an alternative sentence to his original determinate sentence designed to reflect the State's penological interests. *See Bearden*, 461 U.S. at 670. Put another way, if a defendant owes a $350 fine, that sentence remains determinate regardless of whether the defendant pays that fine or serves it off by spending seven days in jail. Though the method of satisfaction may differ, the sentence itself remains fixed. It is a determinate sentence that fits perfectly the definition of criminal contempt. By contrast, one incarcerated for civil contempt has an indeterminate sentence until he pays that which he has failed to pay or he engages in the desired conduct. For example, a reporter may sit in jail for an indeterminate period of time until he complies with a court order to testify.

In addition, the *only* goal of a civil contempt incarceration is to coerce the individual into performance of a responsibility—testifying before a grand jury, etc. But this is not the case when a person is jailed for nonpayment of a fine. Here, the purpose of the jailing is to satisfy a punishment, not coerce the defendant into paying the fine. As *Bearden* effectively indicates, the Rule 2.7 inability-to-pay hearing has at its core the penological interests of the State—namely, a defendant being punished for his criminal conduct. If that goal cannot be met through a fine as originally intended because the defendant willfully failed to pay, then it will be met alternatively though jail. That a defendant can retroactively meet the original penological goal by paying the fine just before (or while) being jailed does not change that the goal of the incarceration was punishment, thereby triggering a right to counsel under *Bearden*.

More broadly, the definition of civil contempt includes more than simply "holding the keys to the jail cell." Its goal is to coerce performance, not to punish. It does so through an indeterminate sentence, not a determinate one. At best, civil contempt only shares a single feature with criminal contempt—that the defendant "holds the keys" to how many days he stays in jail. But none of the criminal contempt case law excludes the possibility that one convicted of criminal contempt may be released from jail if he submits to the original sentence. So, more accurately, in many circumstances "holding the keys" is a common feature of both criminal and civil contempt. Aside from this similarity, civil contempt and criminal contempt are, as explained above, fundamentally different. With criminal contempt, the "holding the keys" practice implements the goal of punishing the defendant, either through the re-activated original sentence or through jail. With civil contempt, the "holding the keys" practice implements the goal of coercing the individual to pay, testify or otherwise perform in order to right a private wrong.

This difference is of significant constitutional importance. If a post-sentencing ability-to-pay hearing constitutes criminal contempt—which it does to the extent this proceeding can be viewed as contempt at all—the state must provide court-appointed counsel as a matter of procedural due process.

C. The Judicial Branch Has The Power Under Part I, Article 73-A Of The New Hampshire Constitution To Create A Rule-Based Right To Counsel

Even assuming that the right to counsel at a Rule 2.7 incarceration hearing is not constitutionally-mandated (which it is), the judicial branch has the power to create a limited such right under Part I, Article 73-A of the New Hampshire

Constitution. That constitutional provision vests the authority to create rules for the courts in the New Hampshire Supreme Court.

Thus, it is not exclusively within the purview of the legislature to create a rules-based right to counsel at Rule 2.7 incarceration hearings. The Supreme Court has the authority to do so and, effectively, has done so in the past. In the early part of this century, the court created the 3JX appellate system and, as a part of that system, it passed a rule that gave those directly appealing a criminal conviction a mandatory right to appeal, at least to a 3JX panel.

Because it established a mandatory appeal, that new rule effectively gave indigent appellants a right to counsel. Under *Evitts v. Lucey*,[5] an indigent appellant is entitled to appointed counsel on appeal whenever a right to appeal exists. By creating an expanded entitlement to appeal and to counsel, the 3JX rules increased the caseload of the judicial branch and of the appellate defender's office. Notably, the Supreme Court's power to do so through rulemaking was not contested.

So, here, even assuming the proposed amendments here do not reflect a constitutional right to counsel, they would create an "entitlement" just as was created with the 3JX rule changes. It would be squarely within the court's power to do so.

D. The Narrow Scope of a Rule-Based Right to Counsel In This Criminal Case

If the Constitution entitles a defendant to counsel at inability-to-pay hearings where jail is a possibility—which it does for the reasons explained above—or if the Committee elects to create such a right through its Article 73-A rulemaking power,

[5] *Evitts v. Lucey*, 469 U.S. 387 (1985).

the scope of that right is narrowly drawn to that specific circumstance. A right to counsel, whether by constitutional mandate or by rule, is a creature of the proceeding that brings it into existence. As such, this right does not create a broad, ungrounded entitlement that would serve as a troubling step onto a slippery slope.

The proposed amendments are *only* intended to provide counsel for those defendants confronting an inability-to-pay hearing arising out of a sentence in a criminal or violation-level case in which incarceration is possible. It would also include those circumstances in which the sentence in a criminal or violation-level case was community service and the defendant had willfully failed to complete that service. The Rule 2.7 right to counsel would *not* apply in any civil context by its very language.

This narrowly tailored right to counsel would not open the door to a right to counsel in child support payment cases or other such circumstances in the civil context. Such circumstances differ dramatically from the Rule 2.7 inability-to-pay circumstance occurring in the context of a criminal case where (1) punishment is the goal, (2) jailing can, at best, be characterized as criminal contempt, and (3) there is an insignificant fiscal impact.

E. The Cost of a Rule-Based Right to Counsel To The Overall Delivery Of Indigent Defense Services Is Insignificant

If the right to counsel in the proposed amendments is constitutionally-based, then whether its existence increases the fiscal burden on the state is irrelevant. The State has an obligation to fund that constitutional entitlement. If the right to counsel at Rule 2.7 incarceration hearing is rule-based, then one concern is the fiscal impact of that entitlement. But the fiscal impact of a rules-based right to counsel (or, for

that matter, a constitutionally-based right to counsel) in this limited circumstance is insignificant.

First, the proposed amendments are specifically designed to dramatically reduce the number of cases that ever get to a point at which an inability-to-pay hearing with the possibility of jail is required. The amendments, as well as the training anticipated for Circuit Court judges and clerks, will create a "funnel" in which clerks and judges filter out over time those cases in which a closer evaluation of actual available resources reveals that time payments, reduced/suspended fines, or community service are more appropriate. Such cases would thus "fall out" of the funnel through conversations or *non-incarceration* inability-to-pay hearings with clerks or judges. Again, the right to counsel described in the proposed amendments *only* applies at inability-to-pay hearings in which jail is a possible outcome.

Thus, the amendments will dramatically reduce those cases needing a Rule 2.7 incarceration hearing in circuit courts.[6] The ACLU-NH estimated that 150 individuals were incarcerated in Circuit Courts in 2013 for failure to pay a fine but without a meaningful ability-to-pay hearing. That estimate would have amounted to approximately 4 to 5 cases per year in each circuit court.[7] With the proposed amendments, the anticipated "funnel" effect would dramatically reduce that number because many would do community service, have fines reduced or suspended, or not even be fined in the first instance due to an inability-to-pay. The result would be

[6] Under the current system in Superior Court, it appears that Superior Court judges see most of failure-to-pay fine cases at the earlier, wider end of the funnel, a point at which incarceration is far less frequently on the table, if at all. Note also that the ACLU-NH found no cases in which an individual was incarcerated for a failure to pay a fine out of a superior court.

[7] Of course, the 150 cases would not likely have been distributed proportionately across every circuit court.

significantly fewer cases that even reach the end-game Rule 2.7 incarceration hearing.

Second, the two leaders of the entities that administer the provision of counsel to indigent defendants in criminal cases both agree that the proposed amendments would not increase costs significantly, primarily because of the low number of cases anticipated to require Rule 2.7 incarceration counsel. These leaders are keenly aware of the costs of providing counsel. The executive director of the New Hampshire Judicial Council, the multi-branch entity in charge of the state's indigent defense system, believes that the proposed amendments would have no significant fiscal impact on the indigent defense system. The Judicial Council, a creation of the legislature with legislators amongst its members, has also voted unanimously to support our proposed Rule 2.7amendments. The executive director of the New Hampshire Public Defender Program also believes that the proposed amendments would have no significant fiscal impact on that program.

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In conclusion, the Rule 2.7 incarceration hearing is an alternative sentencing hearing or, at most, an indirect criminal contempt. In either circumstance, the defendant in the hearing is constitutionally entitled to court-appointed counsel.

III. The Other Proposed Amendments

The proposed amendments offered to the Advisory Committee will ensure that Circuit Courts apply Rule 2.7 in a bounded exercise of discretion. In particular, they are designed to ensure (1) that constitutionally mandated inability-to-pay hearings are held; (2) that courts consider that which is essential to a fair

determination of ability or inability to pay the fine imposed; and (3) that courts document that determination.

The specific provisions of the amendments aim to make as certain as possible that the outcomes are fair and reliable—in particular, that only those who choose not to pay when they have the ability to pay are jailed. Broadly, the proposed amendments provide Circuit Courts with substantially more guidance in working with those defendants at sentencing or when they have initially failed to pay their fine. In the end, the goal is to provide Circuit Court judges with a clearer and more explicit set of tools to achieve the courts' penological goals and to provide indigent defendants realistic opportunities to meet these goals

A. Rule 2.7(a)

The changes in (a) move the issues surrounding the initial determination of ability to pay to (b). While it is preferable to have the court determine ability to pay at the moment it is considering imposing a fine, we wanted to leave flexibility in the rule to accommodate this question being addressed at sentencing or at a later hearing. Indeed, at arraignment sessions in larger-volume courts, case flow issues suggest that moving ability-to-pay considerations to the end of the docket or empowering the clerk to make them makes some sense.

B. Rule 2.7(b)

These changes take some of the language formerly in (a) and create a paragraph which contains what information a judge can consider at an ability-to-pay hearing. Some of the changes more accurately reflect the language from RSA 604-A:2-c, which describes what the court should look at in terms of the decision as

to qualifying for appointed counsel. We took that language and replaced the words relating to "counsel" with those relating to "fine" to make the considerations easier for courts to understand and apply. We also added more clarity as recommended by NH Legal Assistance, which works frequently with such qualification issues in a variety of contexts. The overarching idea is to make more explicit what courts can and cannot consider, thereby regularizing outcomes.

Lynn Amendments: Justice Lynn's proposed amendments to our proposals complicate the court's determination of ability to pay, and undermine the goals of our amendments. The (1) proposal, if applied fairly, would effectively require the court to do an ability-to-pay determination for spouses, partners or family who are offered up as a potential source of money. That approach would add significant difficulty to a situation that, to date, has yet to be handled well.

The (2) proposal encourages a similar complication in that the determination required, if done fairly, requires the court to engage in a significant and detailed inquiry about an individual's credit. The ACLU-NH's reading of transcripts suggests that this language, which exists in the current Rule 2.7, allows judges to make a vague, non-specific finding that the defendant can pay based on statements such as, "I can ask my mother; she might be able to help." More broadly, the (1) and (2) proposals place a burden on non-dependent or non-supporting partners (an ill-defined term) and family to assume the individual's obligations, whatever their own financial status or actual relationship to the defendant.

The (3) proposal is both appropriate and more manageable *if it were to be accompanied by a set of standards as to what constitutes "diligence."* The ACLU-NH's

concern, which is reflected in a few transcripts, is that judges will make a non-specific determination akin to, "I think you can get a job." In fact, in one transcript, one judge jailed an individual who said he had a job interview coming up and was waiting to hear as to the results of another interview.

C. Rule 2.7(c)

This paragraph seeks to build on what the current (c) offers and to make more explicit the variety of options courts have in handling an inability-to-pay circumstance at any point in the history of the case from initial sentencing to a Rule 2.7 incarceration hearing. We thought long and hard about eliminating the $25 fee, as the implementing statute can be read to make it mandatory or to make it at the court's discretion. Though it seems inconsistent to increase the fine if they have some form of an inability to pay (which is effectively the way this language operates), we chose to keep it in. We did increase the amount at which an indigent individual works off his or her fine through community service. On the advice of NH Legal Assistance, we added the last sentence, as those circumstances can have a very real effect on one's ability to participate in community service. Though under current practice it is uncommon for individuals to fail to submit realistic community service plans, the ACLU-NH did see some anecdotal evidence in some transcripts that explanations for a failure to complete community service due to, e.g., child care or health issues, tended to fall on deaf ears. Thus, we endeavored to create more clarity.

D. Rule 2.7(d)

One change to (d) makes explicit that the only type of contempt at issue here is criminal contempt (see the right-to-counsel section above for a lengthier discussion). The other change makes explicit what the definition of "willful failure to pay" is. It is the ACLU-NH's observation after reading over 30 transcripts that different judges have different understandings of what that term means, including a belief that an individual has willfully failed to pay simply by having had a period of time to pay during which they have not paid, effectively equating temporal opportunity to pay with a positive ability to pay.

Lynn Amendments: Justice Lynn's proposal to characterize the Rule 2.7 incarceration hearing as a civil contempt proceeding is addressed directly in the right-to-counsel section above. We feel that this characterization is legally inaccurate.

Additionally, his proposal shifts the burden of proof to the defendant upon a showing of non-payment. However, the placement of this burden on the defendant too easily enables the court to make a finding of willfulness on an empty record. The unbounded ease of making such a finding is one of the core problems identified in the transcripts the ACLU-NH read. The administrative pressure to resolve cases with unpaid fines on the part of the judge, the vagueness of the applicable standards, the inarticulateness of many economically disadvantaged defendants about their financial circumstances, and the defendants' lack of understanding of the legal process have made it too easy for the courts to draw quick conclusions that,

according to the ACLU-NH's report, caused approximately 150 individuals to be jailed without any meaningful ability-to-pay hearing.

Placing the burden on the defendant to show non-willfulness creates circumstances much like the ones described in the ACLU-NH's report by encouraging a finding of willfulness on an empty record. By contrast, placing the burden on the state puts an appropriate premium on the state and/or court to collect useful data to draw or not draw a willfulness conclusion. The court or clerk can request an updated financial affidavit, as well ask for rent receipts, utilities bills, and proof of other financial obligations as well as income. While it is possible that a defendant might come to a Rule 2.7 incarceration hearing prepared to make such a showing, it is unlikely based on the ACLU-NH's reading of hearing transcripts.

At its core, the question is: when confronted with non-payment and an otherwise empty record, we want the presumption to be against incarceration. Accordingly, we recommend that the burden be placed on the state following the completion of a financial affidavit.

E. Rule 2.7(e)

The addition of this paragraph makes explicit our understanding that an individual facing a Rule 2.7 incarceration hearing has a right to counsel for that hearing. We addressed this issue substantively at some length above. Notably, this provision effectively only requires counsel when incarceration may be an outcome of the hearing. Following the creation of thorough court protocols and training, we expect that clerks and/or judges will hold formal or informal hearings with individuals who have not yet paid their fine in order to find mechanisms short of

incarceration to address the penological interests of the court and the financial status of the individual.

Lynn Amendments: See the right-to-counsel section above.

F. Rule 2.7(f)

This is a new paragraph that addresses two issues. First, it makes explicit what is implicit in (c)—namely, that even at an endgame Rule 2.7 incarceration hearing, a judge can still entertain options other than incarceration when confronted by a possible inability to pay. One possible outcome of this explicit language is that individuals who previously would have been incarcerated and no fine collected would now more likely pay at least a portion of the fine or provide valuable work to a non-profit or social service agency.

The second sentence in the proposed (f) requires a judge to explain in writing the basis for the finding of willful failure to pay. This requirement will encourage judges to treat such a finding thoughtfully and seriously and provide the most accurate, full, and accessible record of that which they concluded. According to the ACLU-NH, the transcripts it reviewed in its study show that virtually no judge even mentioned the concept of ability or inability to pay before summarily jailing an individual. The expectation is that this requirement will help judges evolve into a more serious consideration of the inability to pay issue.

Lynn Amendments: The requirement of a written record better ensures accurate, full and accessible record than does Justice Lynn's inclusion of the oral-statement-on-the-record option. A statement by the court on the record requires one seeking to appeal to acquire a transcript at some cost. The act of reducing the

findings to a writing also encourages the court to engage in a more thorough and thoughtful analysis beyond, "I find that the defendant willfully failed to pay his fine."

G. Rule 2.7(g)

We concluded that it was illogical to seek to collect counsel fees via the Office of Cost Containment (OCC) for someone for whom the court has already made the finding of inability to pay a fine. As noted in the right-to-counsel section above, it is very unlikely that the right-to-counsel requirement will have any significant fiscal impact on the indigent defense system at all given the low number of cases that will reach the Rule 2.7 incarceration hearing. Chris Keating, the current executive director of the Judicial Council (and soon-to-be head of the Administrative Office of the Courts) offered this particular language. In his opinion, this language is in accord with the OCC statute and regulations.

Lynn Amendments: The argument above captures the reasons why it is important to include this new language, and to reject Justice Lynn's amendments.

Thank you for your time and consideration.

Judge Edwin Kelly
N.H. Circuit Court Administrative Judge

Judge David King
N.H. Circuit Court Deputy Administrative Judge

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