

Task Force Recommendation Proposals

July 24, 2020

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Duty to Intervene

Proposal

The Task Force recommends that all North Carolina law enforcement agencies enact a policy articulating a duty to intervene and report in any case where a law enforcement officer may be a witness to what they know to be an excessive use of force or other abuse of a suspect or arrestee. Law enforcement agencies should consider using the sample policy language below.

Sample Policy Language

DUTY TO INTERVENE

Officers have a sworn duty and obligation to protect members of the public. Consistent with this obligation, officers should take a preventive approach, whenever possible, if observing behavior that suggests that another officer is about to engage in unlawful or inappropriate behavior, as described more fully below.

Officers have an ethical duty to intervene when necessary to prevent or stop another officer from using a level of force that the officer knows, or should reasonably be expected to know, is

excessive or unwarranted under the existing circumstances. Officers shall also intervene in any case where the officer observes another officer treating a member of the public in any manner that is inconsistent with law or policy (i.e. conducting an unlawful detention or making an unlawful arrest). This duty also extends when the [AGENCY NAME] is called to assist, or is assisting, any other law enforcement agency.

Failure to intervene, as required by this policy, may result in disciplinary action up to and including dismissal.

DUTY TO REPORT

[AGENCY NAME] officers shall immediately notify a supervisor after conducting any type of intervention, when safe to do so.

[AGENCY NAME] officers also have a duty to immediately report any conduct inconsistent with law or policy observed or learned about, when safe to do so. Notification shall be made to a supervisor, documented, and submitted through the Chain of Command and or established internal affairs process.

All types of interventions whether physical or verbal shall be documented and submitted through the Chain of Command and or established internal affairs process.

Failure to report, as required by this policy, may result in disciplinary action up to and including dismissal.

Source of Sample Policy Language

- Derived from North Carolina Department of Public Safety (in effect July 1, 2020 at SBI, ALE, and Highway Patrol)

Academic Articles/Background Reading

- "[Guiding Principles On Use of Force](#);" *Police Executive Research Forum*; March 2016; Policy #6, pp. 41-42

Examples

- Las Vegas Metropolitan Police Department: June 5, 2020, "[LVMPD Revised Use of Force Policy Just Weeks Prior to Mass Demonstrations](#)" ("Any officer present and observing another officer using force that is clearly beyond what is objectively reasonable under the circumstances will, when in a safe position to do so, intercede to prevent the use of unreasonable force. The officer will promptly report these observations and the efforts made to intervene to a supervisor. If the observing officer is a supervisor, they will issue a direct order to stop the violation.")
- [New Orleans Police Department Use of Force policy](#) (2018) and [EPIC](#), a peer intervention training program (2016)
- [Phoenix Police Department policy](#) (Sept. 2019) ("All sworn employees will intervene, if a reasonable opportunity exists, when they know or should know another employee is using unreasonable force. All sworn employees will immediately report excessive force verbally to a supervisor.")

Prohibition of Neck Holds

Proposal

The Task Force recommends that all North Carolina law enforcement agencies enact a Use of Force policy that, at a minimum, prohibits neck holds. Law enforcement agencies should consider using the sample policy language below.

Sample Policy Language

“NECK HOLDS PROHIBITED. Law enforcement officers shall not use chokeholds, strangleholds, Lateral Vascular Neck Restraints, Carotid Restraints, chest compressions, or any other tactics that restrict oxygen or blood flow to the head or neck unless necessary to protect the life of the officer.”

Source of Sample Policy Language

Derived from [8 Can't Wait](#), pending adoption by [Raleigh Police Department](#), [Charlotte-Mecklenburg Police Department](#)

Academic Articles/Background Reading

- [“Principles of the Law Policing, Pt. 3, Ch. 5, Use of Force;”](#) *The American Law Institute*; July 30, 2017;
- [“The Lethal Hazard of Prone Restraint: Positional Asphyxiation;”](#) *Disability Rights California*; April 2002

Examples

- [“Executive Order on Safe Policing for Safe Communities;”](#) *White House*; June 16, 2020
- [“New York Criminalizes Use of Chokeholds by Police;”](#) *NPR*; June 12, 2020
- [“H.R. 7120 George Floyd Justice in Policing Act of 2020;”](#) *Congressional Proposal*; June 6, 2020:
 - o Sec. 363 - “Incentivizing Banning of Chokeholds and Carotid Holds” - State or unit of local government may not receive funds under Byrne grant program or COPS if it does not have in effect a law the prohibits officers in the State or unit of government from using a chokehold or carotid hold.
 - o Sec. 364 - change “use of force” standard for federal officers from reasonableness to only when necessary to prevent death or serious bodily injury; requires that deadly force be used only as last resort/de-escalation techniques

North Carolina Supreme Court Rule on Assessment of Ability to Pay Prior to Levying Fines & Fees

Proposal

The Task Force recommends that the North Carolina Supreme Court enact a General Rule of Practice, which would require an assessment of a defendant’s ability to pay prior to the levying of any fines and fees.

Source of Sample Policy Language

See July 17, 2020 Email from Anna Stearns to Jasmine McGhee:

From: "Stearns, Anna" <Anna.Stearns@sc.nccourts.org>

Date: June 22, 2020 at 5:03:33 PM EDT

To: "Stearns, Anna" <Anna.Stearns@sc.nccourts.org>

Subject: Proposed Rule and Form Related to Legal Financial Obligations

The North Carolina Fines and Fees Coalition recently submitted a request to Chief Justice Beasley that the Supreme Court of North Carolina consider adoption of a rule related to ability to pay determinations for defendants in criminal and traffic cases. The documents accompanying that request are attached here and they include: a memo explaining the rationale and purpose, the proposed rule, and two forms (a motion and an order).

You are receiving this email because you serve as either the executive director or president of an organization or chair of a board or commission that may have an interest in the adoption of the proposed rule. It would be helpful to the Court to have your organization's input as to whether such a proposed rule and the accompanying proposed form would be beneficial to the administration of justice.

If you could please let me know by July 6th whether your organization would endorse the proposed rule and form, would like to recommend changes prior to adoption, or would oppose the adoption of such a rule, we will be sure to provide your comments to the Justices as they consider the proposal. If you need additional time to provide feedback, please let me know as well.

Please note that the final draft to be considered by the Court may incorporate changes based upon the recommendation of the Supreme Court's Office of Staff Counsel. The same is true of the proposed form, which may be revised by NCAOC's Office of General Counsel before being finalized.

If you have any questions, please let me know.

Warm regards,

Anna

Sample Rule Language

- "Order for Relief from Fines Fees and Other Monetary Obligations;" *North Carolina Administrative Office of the Courts*; Attachment to Email from Anna Stearns to Jasmine McGhee; July 17, 2020. (*see attachment at end of document*)

Academic Articles/Background Reading

- "[The Explosion of Unpaid Criminal Fines and Fees in North Carolina](#);" *Duke Law Center for Science and Justice Report*; April 22, 2020
- "[The Steep Costs of Criminal Justice Fines & Fees](#);" *Brennan Center for Justice*; November 21, 2019
- "[How Fines and Fees Criminalize Poverty: Explained](#);" *The Appeal*; July 16, 2018
- Memo: "Court Consideration of Ability to Pay in General Rules of Practice for Superior and District Courts;" *NC Fines & Fees Coalition to North Carolina Supreme Court re: Court Consideration of Ability to Pay in General Rules of Practice for Superior and District Courts*; June 11, 2020 (*see attachment at end of document*)

Examples

- [Michigan Court Rule Summary](#); *Fines & Fees Justice Center Summary*; May 25, 2016
 - o [Rule Text](#)
- [Maryland Proposal: HB 1178, Pilot Project for Income-Based Fines \(Fair Fines Act of 2020\)](#); *Fines & Fees Justice Center Summary*; February 7, 2020
 - o [Rule Text](#)

STATE OF NORTH CAROLINA

File No.

County

In The General Court Of Justice
District Superior Court Division

STATE VERSUS

Name Of Defendant

ORDER FOR RELIEF FROM FINES, FEES, AND OTHER MONETARY OBLIGATIONS

WAIVER OF COSTS (INITIAL SENTENCING)

After notice and an opportunity to be heard and make objection by any directly affected government entity, the Court:

- 1. Finds just cause to waive the following costs (NOTE: If any are selected the Court must make findings of fact in No. 3 below.):
All costs, G CJF, Arrest/Process Fee, Lab/Hosp. Fee (Non-Digital Forensics), Facilities Fee, Chapter 20 Fee, Lab Fee (Digital Forensics), Telecom/Data Fee, Improper Equipment Fee, Lab/Hospital Expert Witness Fee, LEO Retirement Fee, Impaired Driving Fee, Installation Setup Fee, LEO Training Fee, Pretrial Jail Fee (\$10/day), Failure to Appear Fee, DNA Fee, Pretrial Release Services Fee, Failure to Comply Fee
2. Finds just cause to reduce the following costs from \$600 to the amount indicated below (NOTE: If any are selected the Court must make findings of fact in No. 3 below.):
State Crime Lab (Non-Dig. Forensics), State Lab Expert Witness, Local Lab (Non-Digital Forensics), Local Lab Expert Witness, Private Hospital Toxicology, Private Hospital Expert Witness
3. In support of the waivers or reductions noted above, the Court finds just cause in that the Defendant:
Has no present ability to pay or afford the monetary obligations indicated above.
Is now, has recently been, or will soon be incarcerated.
Other:
4. The Court waives the FTA fee under G.S. 7A-304(a)(6) upon a showing that the defendant failed to appear because of an error or omission of a judicial official, prosecutor, or law enforcement officer.

RELIEF FROM OTHER FEES

- 1. For good cause and upon motion of the defendant, the defendant is exempted from:
a. Probation supervision fees under G.S. 15A-1343(c1).
b. Electronic monitoring device fees under G.S. 15A-1343(c2).
c. Satellite-based monitoring fees under G.S. 14-208.45.
2. The Court waives/remits community service fees applicable under G.S. 143B-708.
3. The Court does not assess attorney fees, as provided on the Trial Level Fee Application (AOC-CR-225). remits attorney fees.

REMISSION OF COSTS AND FINES (SUBSEQUENT ACTION)

Upon petition of the defendant/prosecutor, it appearing to the satisfaction of the sentencing Court under G.S. 15A-1363 that the circumstances which warranted the imposition of the fine or costs no longer exist, that it would otherwise be unjust to require payment, or that the proper administration of justice requires resolution of the case, and after notice and an opportunity to be heard and make objection by any directly affected government entity, the Court:

- 1. Remits or reduces the following costs:
All costs, G CJF, Facilities Fee, Telecom/Data Fee, LEO Retirement Fee, LEO Training Fee, DNA Fee, Arrest/Process Fee, Chapter 20 Fee, Improper Equip. Fee, Impaired Driving Fee, Pretrial Jail Fee (\$10/day), Probation Jail Fee (\$40/day), Pretrial Release Fee, Lab/Hospital Fee, Lab Fee (Digital Forensics), Lab/Hosp. Expert Witn. Fee, Installment Setup Fee, Failure to Appear Fee, Failure to Comply Fee, Witness Fees

- 2. Remits the fine imposed in this case.
3. Reduces the fine imposed in this case to \$
4. Modifies the defendant's method of payment of costs and fines as follows:

REMISSION OF RESTITUTION

- 1. After notice and an opportunity to be heard to the district attorney and the victim, victim's estate, and any other entity to which restitution was to be paid, the Court finds under G.S. 15A-1340.39 that remission of restitution is warranted and serves the interests of justice and remits restitution as provided in the attached Restitution Update Worksheet (AOC-CR-612).

MODIFICATION OF COSTS AND FINES UPON DEFAULT

1. The Court finds that the defendant has defaulted in the payment of costs. fines.

It appearing that the default was not attributable to a failure on the defendant's part to make a good faith effort to obtain the necessary funds for payment, the Court orders under G.S. 15A-1364(c) that:

2. The defendant is allowed additional time to pay **costs** and **fin**es as follows: Payment is due on _____(date).

3. The defendant's **costs** are reduced in whole. in part as follows: _____.

4. The defendant's **fine** is reduced in whole. in part as follows: _____.

MOTOR VEHICLE OFFENSES

The defendant has demonstrated to the Court under G.S. 20-24.1(b) that:

1. His or her failure to pay a penalty, fine, or costs was not willful and that he or she is making a good faith effort to pay.

2. The penalty, fine, or costs should be remitted.

SIGNATURE OF JUDGE

| | | |
|-------------|--|-------------------------------------|
| <i>Date</i> | <i>Name Of Presiding Judge (Type Or Print)</i> | <i>Signature Of Presiding Judge</i> |
|-------------|--|-------------------------------------|

To: The North Carolina Supreme Court

From: The North Carolina Fines and Fees Coalition

Re: **Court Consideration of Ability to Pay in General Rules of Practice for Superior and District Courts**

Date: June 11, 2020

I. The Need for an Ability to Pay Rule is Urgent

Every weekday, in every corner of North Carolina, judges impose fines, fees and other financial obligations on people for criminal and traffic offenses without any inquiry into the person's ability to pay. Since the people entangled in our criminal justice system, at every level, are overwhelmingly poor and disproportionately people of color, this places an unbearable burden on those least able to afford it, and the disastrous consequences for these communities have now been well documented.¹ Some defendants, or their families, forego basic human needs such as medication or rent payments in order to meet their court imposed obligations. Others, unable to pay, lose their driver's license, and then are forced to choose between foregoing employment opportunities or driving illegally, which subjects them to arrest and additional penalties, and thrusts them further into a vicious cycle of increasing debt and criminalization. Still others have their probation prolonged (again, increasing their debt obligation), or their wages garnished. And some, despite constitutional and statutory prohibitions, are imprisoned without a meaningful inquiry into their ability to pay. On the other side, the state of North Carolina gains little from all of this, as every year much of the debt is uncollectible, despite the resources spent in the effort.

This criminalization of poverty is not new in North Carolina, but it has grown exponentially in the last two decades. Since 1999, the number of criminal court fees has increased from 4 to 45 and the base cost for use of court has increased from \$61 to \$173.² Any inclination judges might have to regularly inquire into ability to pay and to waive payment has been explicitly discouraged by the legislature, which has, among other efforts, recently required reporting on fee waivers by individual judges. Not surprisingly, after the North Carolina General Assembly began tracking which judges were waiving fees, the number of waivers granted fell by

¹ See generally *At All Costs: The Consequences of Rising Court Fines and Fees in North Carolina* (Apr. 9, 2019), <https://www.acluofnorthcarolina.org/en/AtAllCosts> ("ACLU Report"); see also Heather Hunt & Gene Nichol, *Court Fines and Fees: Criminalizing Poverty in North Carolina* (Winter 2017), http://law.unc.edu/documents/poverty/publications/court_fines_and_fees.pdf.

² ACLU Report at 10-11 (2019).

nearly half, from 87,006 in 2016 to 45,882 in 2017.³ In the following year, the number of fee waivers again fell by nearly half, to 28,036 in 2018.⁴

This practice of extracting what little wealth there is from the poorest segment of our population is clearly contrary to the spirit and letter of the North Carolina Constitution. See, e.g., North Carolina Constitution Art. 1, Sec. 19 (guaranteeing equal protection of the law); North Carolina Constitution Art. 1, Sec. 27 (prohibiting excessive fines); North Carolina Constitution Art. 1, Sec. 28 (prohibiting imprisonment for debt). While the legislature has not dealt universally with this question, any rule requiring an ability to pay inquiry would be consistent with a number of statutes which address the necessity of an ability to pay inquiry. See, e.g., N.C.G.S. § 15A-1362(a) (court must consider resources of defendant when imposing a fine); N.C.G.S. § 15A-1363 (allowing a court to remit fines and costs); N.C.G.S. § 15A-1364 (allowing a good faith defense before imprisonment for nonpayment and providing for alternative sanctions); N.C.G.S. § 15A-1340.36 (requiring inquiry into resources of defendant in determining amount of restitution).

Of particular relevance to the advisability of adopting a rule requiring an ability to pay inquiry is Formal Opinion 490 of the American Bar Association Standing Committee on Ethics and Professional Responsibility, “Ethical Obligations of Judges in Collecting Legal Financial Obligations and Other Debts,” issued on March 24, 2020. While dealing with the narrower question of whether a judge violates his or her ethical obligation by imprisoning someone for nonpayment of financial obligations absent a meaningful inquiry into the defendant’s ability to pay -- and finding that it is a violation -- the Opinion makes it clear that courts ethically and legally have an obligation to make an inquiry into ability to pay in a wide variety of situations.

The Opinion first notes the increasing use of fines, fees, and other financial obligations throughout the country, both to fund the courts and for other purposes, and concludes that “the effect is that a person can incur substantial legal financial obligations for conviction of a petty or juvenile offense or even a non-criminal code violation.” Further, the Opinion states that “[t]he traditional view that judicial independence and impartiality demand restraint in the collection of legal financial obligations gave way over the last three decades to more vigorous collection

³ Compare N.C. Admin. Office of the Courts, *2017 Report on Criminal Cost Waivers* [G.S. 7A-350], Table 1 (Feb. 1, 2017),

https://ncleg.gov/documents/sites/committees/JLOCJPS/Reports/FY%202016-17/AOC_Report_on_Criminal_Cost_Waivers_2017-01-31.pdf with N.C. Admin. Office of the Courts, *2018 Report on Criminal Cost Waivers* [G.G. 7A-350], Table 1 (Feb. 1, 2018), <https://nccriminallaw.sog.unc.edu/wp-content/uploads/2018/02/20180201-NCAOC-Report-on-Criminal-Cost-Waivers.z.pdf>

⁴ Jamie Markham, *2019 Cost Waiver Report Available*, N. CAROLINA CRIMINAL LAW: A UNC SCH. OF GOV’T BLOG (Feb. 7, 2019, 6:45 PM), <https://nccriminallaw.sog.unc.edu/2019-cost-waiver-report-available/>.

policies adopted on the view that prompt collection is necessary to “encourage[] personal responsibility by those assessed,” to “maintain [the] credibility” and “authority” of courts in the eyes of the public and litigants, and to “increase[] revenue” in the face of “[t]ight operating budgets. **These are important state interests as long as the person who faces legal financial obligations is not indigent or otherwise unable to pay.**”⁵ The solution, the Opinion concludes, is that “courts should adopt policies, practices, and procedures to efficiently and accurately determine a litigant’s ability to pay, to divide administrative tasks to guard against even the appearance of impropriety in the setting and enforcement of legal financial obligations, and to provide training to judges, court staff, prosecutors, and defense attorneys.”⁶

That is what we are asking the Supreme Court of North Carolina to do. Now more than ever with the economic weight of the coronavirus pandemic falling most heavily on the same communities who are most harmed by the excessive imposition and aggressive collection measures of court costs, fines, and fees, North Carolina Courts must implement policies to protect the poorest of our communities as we weather this economic recession. We must ensure that unaffordable court costs, fines, and fees do not serve as an additional obstacle to North Carolinians meeting their basic needs throughout this pandemic and beyond.

II. Overview/Key Provisions of Proposed Rule and Accompanying AOC Form

The only way to guarantee that a deserving defendant would receive an ability to pay inquiry would be to require such an inquiry in every criminal and traffic case before the imposition of any fine, fee, cost, or any other financial obligation. We considered asking for this blanket rule but decided not to, since such a requirement would be impracticable, especially in the high-volume traffic and misdemeanor courts. Instead, the proposed rule contains a number of requirements which can be easily implemented, especially with the use of AOC approved forms, and which could provide a meaningful and necessary ability to pay inquiry for a significant number of defendants who are entitled to one.

Section (a)1 requires a judge to announce the availability of an ability to pay inquiry upon opening a session of court in which financial obligations may be imposed. The burden is then shifted to defendants to fill out a form outlining their financial situations and to submit that form to the court. Section (a)2 requires an ability to pay inquiry in three situations: when the defendant has already been determined indigent, when the defendant claims an inability to pay (for instance, by filling out the AOC form referred to in (a)1 or by making an oral claim), or “when the defendant’s indigency is otherwise evident.” The latter provision would include, for instance, cases in which the judge learns that the defendant is homeless, or is disabled and unable

⁵ American Bar Ass’n Standing Comm. on Ethics and Prof’l Responsibility, Op. 490 at 4-5 (2020) (footnotes omitted and emphasis added).

⁶ Id. at 10.

to work. Following the inquiry, a judge who finds that a defendant can pay all or part of the imposed financial obligations is required to support this finding with findings of fact on an AOC approved form. Subsection (b) requires a court to provide a hearing for a defendant who finds him or herself unable to pay a previously imposed obligation in two circumstances: when there has not been a previous inquiry into ability to pay, and when there has been a change in the defendant's circumstances. It is consistent with, but more specific than, *NCGS § 15A-1363*. Subsection (c) provides that there be no punishment of any kind for a defendant who is unable to pay previously imposed obligations because of a lack of financial means. This provision is needed to prevent the practice of extending probation, or otherwise punishing, defendants who do not have, and have no hope of having, the means to meet their financial obligations, a practice which punishes a defendant for something beyond the defendant's control, and which often ends with the defendant owing even more money than was owed at the time probation was extended.

III. Conclusion

Unfortunately, in part under pressure from the North Carolina General Assembly, too many of the trial courts of North Carolina have developed a culture in which it is acceptable, and even desirable, to use coercive means to try to extract funds from those among us who are least able to pay. We recognize that it might take some time, and a number of different steps by different actors, to change this culture. But we also believe that now is the time to start requiring the use of a fair process for assessing ability to pay court fines and fees. It is now more urgent than ever that North Carolina leaders take the necessary steps to ensure that fines and fees are not a barrier to people's basic needs, particularly as North Carolinians recover from the worst economic crisis in our lifetimes. Our coalition believes that no one should be trapped in the criminal justice system because they can't afford to pay courts costs, fines, and fees. These financial obligations devastate the lives of thousands of North Carolinians. Implementing an ability to pay rule is a necessary measure to address the criminalization of poverty in our state.