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February 18, 2020

Hon. Michael S. Stepka
Chief Judge
86th District Court
280 Washington Street
Traverse City, Michigan 49684
mstepka@grandtraverse.org

Sent via U.S. Mail and E-mail

Sheriff Thomas J. Bensley
851 Woodmere Avenue
Traverse City, MI 49686
tbensley@gtsheriff.org

Re: Grand Traverse County Policy of Failing to Return Cash Bail Paid by Third Parties

Dear Chief Judge Stepka and Sheriff Bensley,

I am a senior staff attorney at the ACLU of Michigan, where I work extensively on issues relating to cash bail, including serving as lead counsel in *Ross v. Blount*, a federal class action lawsuit challenging the unconstitutional use of cash bail in Detroit in violation of the equal protection and due process clauses of the United States Constitution. I also testified twice on the legality of current bail practices in Michigan's state courts at the Governor's Joint Task Force on Jail and Pretrial Incarceration.

The ACLU of Michigan is extremely concerned to learn that Grand Traverse County appears to have a policy and practice of failing to return cash bail paid by third parties, even when the defendant in question fully complies with the terms of their bail. Specifically, we have been informed that cash bail paid by a third party on behalf of a defendant is not refunded to the person who paid the bail, but is instead confiscated to pay the defendant's court fees. A sign announcing the policy is prominently displayed at the Grand Traverse County Jail.

We urge you to end this policy immediately. Confiscating an innocent third party's cash bail payments to satisfy a defendant's court debts violates Michigan state law as well as the equal protection, due process, and excessive bail clauses of the U.S. and Michigan Constitutions. Furthermore, this practice completely undermines the purpose of the cash bail system, which is to incentivize individuals to return to court and to limit pretrial detention to only exceptional cases.

I. Retaining third-party cash bail payments is unlawful under both Michigan law and the United States and Michigan Constitutions.

Under Michigan law, courts are permitted to retain bail or bond to pay court fees *only* when the payment was “personally fulfilled” by the individual who stands accused of a crime. M.C.L. § 765.6c. The statute specifically states: “If a defendant for whom bail or bond is required *personally fulfills* that requirement by a cash deposit, the defendant shall be notified that upon the defendant's conviction the cash deposit may be used to collect a fine, costs, restitution, assessment, or other payment pursuant to section 15(2) of this chapter.” MCL § 765.6c (emphasis added). By explicitly authorizing the retention of cash bail that a defendant *personally* fulfills, the statute plainly does not authorize the retention of cash bail that is paid by any other individual. Thus, Michigan law plainly prohibits a court from retaining cash bail payments by third party payors if a defendant does not violate the terms of their release.

Your policy against returning third parties’ cash bail payments is also unconstitutional under the equal protection, due process, and excessive bail clauses of the United States and Michigan Constitutions. For obvious reasons, poorer defendants are more likely than wealthier ones to rely on third parties to pay cash bail on their behalf. Yet your policy of failing to return cash bail payments to the payor creates an obvious disincentive for third parties to make these kinds of payments. This inevitably makes it more likely that poor defendants will remain incarcerated before trial—a time when they are still presumed innocent.

Due process prohibits unjustified deprivations of liberty, thus ensuring that “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” *United States v. Salerno*, 481 US 739 (1987). And in situations where court rules result in the detention of poor defendants while richer defendants are allowed to go free, “due process and equal protection principles converge.” *Bearden v. Georgia*, 461 U.S. 660, 665 (1983). Accordingly, in recent years, federal courts have repeatedly found bail policies that discriminate against poor defendants to be unconstitutional. *See, e.g., Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018); *ODonnell v. Harris Cty.*, 892 F.3d 147 (5th Cir. 2018); *Arevalo v. Hennessy*, 882 F.3d 763 (9th Cir. 2018); *Dixon v. City of St. Louis*, No. 19-0112, 2019 WL 2437026 (E.D. Mo. June 11, 2019), *temporary stay granted*, No. 19-2254 (8th Cir. July 3, 2019); *Parga v. Cty. of Tulsa*, No. 18-CV-0298, 2019 WL 1231675 (N.D. Okla. Mar. 15, 2019); *Caliste v. Cantrell*, No. 17-6197, 2017 WL 3686579 (E.D. La. Aug. 25, 2017); *Little v. Frederick*, No. 17-00724, 2017 WL 8161160 (W.D. La. Dec. 6, 2017), *adopted in relevant part*, 2018 WL 1221119 (Mar. 8, 2018); *Welchen v. Cty. of Sacramento*, No. 16-00185, 2016 WL 5930563 (E.D. Cal. Oct. 11, 2016); *Rodriguez v. Providence Cmty. Corrs., Inc.*, 155 F. Supp. 3d 758 (M.D. Tenn. 2015). Your policy of retaining third-party cash bail payments, which likewise serves to unnecessarily deprive poor individuals of their liberty while allowing wealthier individuals to go free, therefore violates the rights of poorer defendants to equal protection and due process.

In addition, retaining cash bail payments made by third parties violates constitutional prohibitions on the imposition of excessive bail. U.S. Const., amend. VIII; Mich. Const., art. I, § 16. The prohibition on excessive bail requires that “the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of the defendant.” *Stack v. Boyle*, 342 U.S. 1, 4 (1951). When bail is instead used for the purpose of

obtaining prepayment of potential fines or fees, this “ma[kes] the bail required excessive.” *Cohen v. United States*, 82 S. Ct. 526, 528 (1962) (Douglas, J., in chambers). “The purpose of bail is to secure the presence of the defendant, . . . not to enrich the government” *United States v. Rose*, 791 F.2d 1477, 1480 (11th Cir. 1986); see *Fields v. Henry Cty., Tenn.*, 701 F.3d 180, 184 (6th Cir. 2012) (relevant Eighth Amendment inquiry is whether bail conditions are “aimed at assuring the presence of the defendant”); *United States v. Powell*, 639 F.2d 224, 225 (5th Cir. 1981). The only conceivable purpose served by retaining cash bail paid by a third party to cover an individual defendant’s court costs, fines, or fees is revenue generation. Yet retaining cash bail paid by third parties will obviously disincentivize third parties from posting bail as discussed below, thus assuring that more (and poorer) defendants will remain incarcerated while awaiting trial. Accordingly, your policy of retaining third-party bail violates state and federal constitutional prohibitions against the imposition of excessive bail.

Finally, this policy and practice also implicates the constitutional rights of the third-party payors. By failing to return cash bail payments to third parties, the County is confiscating property to which it has no right or title without any legislative authorization and without any legal standard, and thus without due process of law and in violation of the due process and takings clauses of the United States and Michigan Constitutions. See, e.g., *Lee v. Osceola & Little River Road Improvement Dist. No. 1*, 268 U.S. 643, 646 (1925) (imposition of a tax without lawful authority constitutes an “exaction [that] is a taking of property without due process of law”).

For all these reasons, your policy and practice of failing to return cash bail payments to third party payors is unlawful and should be terminated immediately.

II. Retaining third-party cash bail payments undermines the purpose of cash bail.

In addition to being unlawful, your policy of failing to return third parties’ bail payments undermines the very purpose of the cash bail system, which is to limit pretrial detention and preserve the presumption of innocence before trial. See *Stack v. Boyle*, 342 US 1 (1951) (“Unless the right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”). Failing to return cash bail to a third-party payor, even when the defendant complies with all release conditions, disincentivizes third party assistance. This will make it less likely that a third party will be willing to post cash bail for a friend or family member in need, resulting in the unnecessary incarceration of poor defendants. This undermines the core purpose of bail, i.e., to ensure that defendants are free while awaiting trial whenever possible.

Critically, the bail system is also meant to incentivize a person to return to court. When an individual knows that a third-party payor posted cash bail on their behalf, the individual may be encouraged to appear at their scheduled court dates so that the court will return the bail payment to the defendant’s friend or family. Similarly, the third-party payor has an incentive to keep in close touch with the person whose bail they paid in order to protect their bail payment. However, that incentive structure weakens considerably if the Court will keep significant portions of the third-party payor’s money to pay court fees, even if the defendant complies with their release conditions. Thus, your practice of failing to return cash bail payments to third parties defeats a core purported purpose of the cash bail system—incentivizing individuals to

appear at their court dates. And, by undermining the purpose of the cash bail system, your policies further call into question whether there is any lawful basis at all for the use of cash bail as a condition of pretrial release.

Conclusion

In sum, we strongly urge you to immediately rescind your policy of failing to return third-party cash bail payments. This practice is prohibited by Michigan law and by the equal protection, due process, and excessive bail clauses of the U.S. Constitution. The policy also undermines the primary purposes of the cash bail system.

I look forward to hearing from you soon as to what actions your offices intend to take to correct these current policies. I would welcome the opportunity to provide any additional information or background that you might require in addressing this matter. I thank you for your attention to these vital issues.

Sincerely,



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cc: Michigan Joint Task Force on Jail and Pretrial Incarceration,
Milton L. Mack, Jr., State Court Administrator (SCAO)
Dawn McCarty, Director, Michigan Judicial Institute