NEW YORK STATE MAGISTRATES ASSOCIATION

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April 4, 2019

Deputy Chief Administrative Judge
Honorable Michael V. Coccoma
NYS Office of Court Administration
4 Empire State Plaza, Suite 2001
Albany, New York 12223-1450

Re: The Fund for Modern Courts Report on Fines, Fees and Jail Time

Dear Judge Coccoma:

Pursuant to your request, the original members of our Association that were part of the Focus Group held a conference call to address the Draft Report referenced above. The Focus Group felt that there were several inequities that needed to be addressed prior to the finalization of the Report by The Fund for Modern Courts.

GENERAL CONCERNS

1. The title of the Draft Report on the cover sheet clearly demonstrates the implicit bias of this report throughout the document. The title page includes its erroneous conclusion, "[T]he unseen violation of constitutional and state law," which should be removed to allow the reader to form their own conclusions based upon the poor data samples utilized in preparation of the report.

2. Throughout the Draft Report the author references that arrest warrants are issued for nonpayment when in fact only bench warrants can be issued, if at all. Arrest warrants should be changed to bench warrants throughout the Report.
3. Throughout the Draft Report there is a casual reference to the excessive mandatory fines and mandatory surcharges and fees that a Judge must impose upon conviction as statutorily mandated by the State Legislature and the Governor. In the 2010 New York State Comptroller's Report, reference was included to the excessive and increased gains throughout the years in surcharge amounts, suspension lift fees, DNA databank fees and miscellaneous other fees; a five-time increase with a 91 percent overall gain. If The Fund for Modern Courts is truly concerned with the impact of fines, fees and surcharges upon those who are indigent, it should have presented a clearer statement of mission to address those concerns with the Governor and the New York State Legislature. As is casually referenced in the Draft Report, the Focus Group Judges raised those concerns, but the Draft Report clearly minimizes those concerns.
4. The Draft Report makes only a cursory reference to the several "traffic diversion" programs offered by many prosecutors throughout the State. Many of these programs offer a dismissal of the vehicle and traffic charges in exchange for attendance at a program run by the prosecutor for a fee. Clearly, those able to afford the fee for the program are given a preferential treatment over those who are unable to afford the fee and who are left with proceeding to trial.
5. Under current sentencing protocols, defendants are always given an opportunity to speak prior to sentencing and the majority of Judges throughout the State take into account any concerns raised prior to sentencing, if raised by the defendant. The system being proposed in this Draft Report will result in additional burdens and inconvenience not only upon the Courts, but more importantly upon the defendants themselves, who may be required to make several additional court appearances.
6. Throughout the Draft Report examples and references to New York City Courts and City Courts throughout the State are minimally recognized. Footnote 10 in the Draft Report minimally acknowledges that incarceration for failure to pay is a pervasive issue in New York City Courts as recent as September 27, 2018. If The Fund for Modern Courts is truly concerned about incarceration for nonpayment, why is it focusing this Report only

upon the Town and Village Justice Courts? The Draft Report presents an obviously implicit bias against Town and Village Courts.

INTRODUCTION

1. The first paragraph of the Introduction indicates that Justice Court Judges render decisions. There should be an indication that this is like any other Judge and is not unique to Justice Court Judges.
2. In Paragraph 3 of the Introduction the Report references that Justice Courts are functionally independent from the State Judiciary, relying on comments presented in the original 2006 Action Plan for the Justice Courts; a document which is now 13 years old. Times have now changed and the implementation of the Action Plan has improved the Town and Village Justice Courts, which are significantly different from what they were during the original Report in the Action Plan. In that paragraph there is also an indication that the Office of Court Administration does not have the same direct administrative supervision over Justice Courts as it does over all other Courts. We submit that is no longer the case.
3. In citing *Bearden v Georgia* (461 US 660 [1983]), the Draft Report throughout takes several liberties with the interpretation of that case. While the procedure outlined is functionally correct, the conclusions throughout the Draft Report do not necessarily coincide with the finding in *Bearden*. In *Bearden* (*id*. at 669), the Court states:

   > The State, of course, has a fundamental interest in appropriately punishing persons – rich and poor – who violate its criminal laws. A defendant's poverty in no way immunizes him from punishment.

4. Beginning with the Introduction and throughout, the Draft Report makes references to a Schedule A of survey results which was not provided with the Draft Report. From the context it would appear that Schedule A is a summary of the raw data responses garnered from the Public Defenders throughout the State without any reference to the geographical area of those surveyed and the composition of the questions asked. We note that there does not seem to be any indication that Court Clerks, District Attorneys or Probation Department personnel in the corresponding geographical areas were even contacted for responses. A review of the form of the questions could certainly result in a skewing of the data received. For example, if an inquiry to the Public Defender asked whether they

were aware of any cases involving a defendant being jailed for nonpayment, the answer could have certainly been in the affirmative without any detailing of the circumstances leading to the jailing, including but not limited to whether a willful finding was found by the Court. The Draft Report does not provide any of these supporting details and appears to present data only consistent with the preconceived conclusions of the Draft Report.

III. DESCRIPTION OF THE JUSTICE COURTS

1. Relying upon the 2008 New York State Commission on Judicial Conduct Annual Report, the Draft Report draws the conclusion that "on a day-to-day basis the (Justice Courts) are subject only to supervision and oversight of the Town or Village governments in their locality." One should remind the author that consistent with basic governmental structure the Judiciary is a separate and coequal branch of the Town or Village government and that the day-to-day operation of the Justice Court is under the supervision of the Judge, subject to the statutory oversight by the Chief Administrative Judge of the State of New York relative to such areas like hours of court. Therefore, the statement that supervisory responsibility does not give OCA any direct control over the Justice Courts is untrue. The Draft Report minimizes the resources available to the Town and Village Justices from the Office of Court Administration. In addition to the Office of Justice Court Support, there are Supervising Judges and Special Counsel in each Judicial District in the State who provide additional support and guidance. The Town and Village Courts are also provided with computer hardware, computer software, equipment and JCAP grants through the Office of Court Administration.
2. Relying again on the reports of the New York State Commission on Judicial Conduct the Draft Report "cherry-picks" the data which it chooses to rely upon. While indicating that in 2017 the Commission received 280 complaints against Justice Court Judges, it fails to cite the fact that there were 1,470 complaints regarding state-paid Judges. The Draft Report focuses on the actions against Judges in 37 instances without differentiating the fact that the investigations in that year were 83 against Town and Village Judges versus 65 Judges in the state-paid courts, resulting in ultimately nine state-paid Judges versus 28 Town and Village Judges being disciplined. One should question why the investigations and disciplinary actions are skewed against Town and Village Judges. Could it be that the Town and Village Judges are minimally paid versus the state-paid Judges and are

therefore unable to afford the costs of retaining counsel; ironically a basic right that is always afforded to defendants in criminal actions.

IV. LAWS GOVERNING COLLECTION AND IMPOSITION OF FINES

1. The Draft Report makes the statement that the Courts can also impose mandatory surcharges, when in fact the Judge must do so by law, which is a fact that is drilled into the Judges at all of the training programs for Town and Village Judges. In the same paragraph the Draft Report references that the Judges do not have discretion to determine the amount of the surcharge, without any further comment. The New York State Magistrates Association would welcome the ability to be able to alter the surcharge amounts; especially in those instances when the surcharge is more than the fine maximum that can be imposed. The Association would encourage The Fund for Modern Courts to address this situation with the Governor and the New York State Legislature.

2. In the second paragraph the Draft Report indicates that a defendant can be imprisoned until the fine is collected but we would suggest that a footnote be added indicating that in reality this rarely is imposed.
3. With regard to civil judgements, while there may be some consequences, the civil judgment is clearly the least onerous penalty option conceivable. In many cases a defendant may actually request a civil judgment rather than any of the other options such as community service.

A.1 US SUPREME COURT CONSTITUTIONAL REQUIREMENTS

1. The initial statement that a factual determination as to whether a person has the "ability to pay" is the standard in *Bearden* is simply incorrect. The *Bearden* standard is "reasons for failure to pay" (*id*. at 672), not ability to pay.
2. At the end of the first paragraph a note should be added that *Bearden* (*id*. at 669) states:

> The State, of course, has a fundamental interest in appropriately punishing persons – rich and poor – who violate its criminal laws. A defendant's poverty in no way immunizes him from punishment.

3. In the second paragraph a conclusion is drawn that all trial judges have an affirmative obligation to perform an ability to pay analysis before sentencing for failure to pay a fine. This is true only if a willful finding is not found.
4. Nowhere in the Draft Report is it recognized that several of the negotiated dispositions by prosecutors and defense counsel require payment of agreed upon fines, fees and surcharges prior to sentencing. While these dispositions are agreed upon by the parties, a Judge may be left in the untenable situation of rejecting the plea bargain if the Court determines that the defendant does not actually have the ability to pay.

A.2 NY JURISPRUDENCE

1. At the end of this section reference is made to the perceived similarity of collection versus bail, each which differs substantially in the standards to be applied. Why is this statement even included in the Draft Report?

A.3 NEW YORK CRIMINAL PROCEDURE LAW SECTION 420.10 (5)

1. In referencing the issuance of bench warrants, reference should be made to CPL Section 420.10 (3) which statutorily authorizes the issuance of a bench warrant for failure to pay.

B.1 DOJ GUIDANCE

1. Reference is made to the DOJ letter, which as noted has been rescinded as of December 21, 2017. So why mention it?

V. HOW NEW YORK JUSTICE COURT JUDGES APPROACH THE FAILURE TO PAY FINES

1. The Draft Report relies upon anecdotal summary data gathered from "experts at organizations that focus on the imposition of fines." It would be nice if the Draft Report could actually reference its data sources as it is quite easy for Public Defenders to complain about a situation when they disagree with a court finding without referencing the underlying facts leading to the decision. Several points in the Draft Report rely upon anecdotal findings rather than specific details.
2. Later in the Draft Report under the Spring Valley analysis the report indicates that "approximately one-fourth of the Public Defenders surveyed said that they are not aware of Justice Courts that have issued bench warrants as a result of unpaid fines." The Draft Report then jumps to an anecdotal conclusion that this represents a minority of those surveyed without indicating whether there was even any investigation of the underlying facts leading to the resultant 75% that have observed the issuances of bench warrants. There is no detail as to the overall sample questions presented in the survey or underlying details. This results in a flawed study.

B. MANY JUSTICE COURTS ARE VIOLATING CONSTITUTIONAL REQUIREMENTS AND CPL 420.10 (5)

1. The introductory paragraph relies on a conclusion that is based upon a 2006 New York Times article which is now 13 years old. In fact, that article relied upon many earlier cases from the 1960's. The data from that article is obsolete and it is interesting to note that The Fund for Modern Courts appears unable to rely on any more recent studies. Procedures have changed substantially since 2006 and the implementation of the Action Plan.

B.2. RECENT INTERVIEWS WITH PUBLIC DEFENDERS CONFIRMED VIOLATIONS

1. It is obvious that this section "cherry-picked" the anecdotal examples it referenced.
2. While referencing the Town of Colonie's Justice Court reports, it fails to mention that this report was prepared to support an increased budget request. Data should have been collected on how many Justice Courts do not actually support their budgets, which is substantial.
3. It is interesting to note that in Footnote 111 the Draft Report relies upon the Vera Institute report referencing examples of a Judge touting the court's revenue generating skills. That report is based upon a City Court rather than a Town or Village Justice Court.

B.3. SANCTIONS ISSUED BY THE JUDICIAL CONDUCT COMMISSION

1. It is interesting to note that the only Judicial Conduct Commission cases cited are a 2002 case (17 years old) and a 2003 case (16 years old). Couldn't The Fund for Modern Courts find any more recent cases? If not, shouldn't the conclusion be that the Town and Village Courts are currently following the correct procedures?

VI. RECOMMENDATIONS

1. In the very first line of this section, a conclusion is drawn that is based upon the skewed data gathered for this Draft Report. This supports our position that the Draft Report is based upon a preconceived implicit bias by The Fund for Modern Courts.
2. The requirements of CPL Section 420.10 (3) and (5) are not inconsistent with the ***Bearden*** decision, which stated:

   > The State, of course, has a fundamental interest in appropriately punishing persons – rich and poor – who violate its criminal laws. A defendant's poverty in no way immunizes him from punishment.

3. The second recommendation as to mandatory fines, surcharges and fees is most appropriately directed to the Governor and the New York State Legislature, who have enacted these mandatory structures. Since these fines, fees and surcharges are mandatory, a Judge has no ability to alter from the statutory dictates. Again, the New York State Magistrates Association would welcome the authority for Judges to modify mandatory fines, fees and surcharges.
4. What is devoid in the Recommendations is a discussion that a hearing presents a clear risk for a Fifth Amendment issue by a defendant. For example, in considering the financial ability to pay, a defendant might easily disclose "under the table" or other illegal funds, which would create the Fifth Amendment issue.
5. In the recommendation about data collection, if implemented, it should include all courts, not just Town and Village Justice Courts. Additionally, the funding for the time, personnel and resources that will be required to implement data collection will be substantial. It would probably be less costly to just use those same funds to just pay the fees, fines and surcharges for indigent defendants.
6. With regard to the recommendation for a Task Force, the New York State Magistrates Association would be opposed to an additional Task Force that it believes is not required. In the event that a Task Force is established, however, the New York State Magistrates Association would suggest that it be truly representative, including all the necessary stakeholders, not just Public Defenders.
7. The New York State Magistrates Association would encourage the creation of a bench card and questions why, in the time expended in preparing this Draft Report, The Fund for Modern Courts did not just create and present a bench card.
8. Lastly, the conclusion paragraph is insulting and completely anecdotal; not supported by a truly in-depth study and investigation. The data collected for the Draft Report is not sufficient to support the conclusions presented.

Again, it would appear that this Draft Report started with a preconceived conclusion rather than representing a truly unbiased study.

Overall, the opinion of the New York State Magistrates Association is that this report is searching for a problem that does not actually exist in the majority of the Town and Village Courts throughout our State.

We thank you for this opportunity to review and address our concerns regarding this report.

Very truly yours,

Tanja Sirago
Executive Director, NYSMA

Cc: Hon. Janet DiFiore
Hon. Lawrence K. Marks
Lucian Chalfen