

The Excessive Fines Clause: A Tool to Protect Clients Living in Poverty

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Timed Agenda

1:10-1:15

Introduction

1:15-1:25

Fines & Fees Cause Real Harm

1:25-1:30

Importance of EFC and Public

Defenders'

Key Role

1:30-2:00

Excessive Fines Clause Legal

Framework

What is

“excessiveness”?

What is a “fine”?

2:00-2:25

Making the Argument: Strategy &

Practice

2:25-2:30

Resources

2:30-2:40

Q&A

denied healthcare

denied sealing
warrants
license suspensions
denied student loans
snowballing debt
jailed
denied car loans
higher utility bills
pay-only probation
civil judgment
bad credit
denied employment
denied housing
loss of voting rights

Fines & Fees Cause Harm

Alabama survey: People with court debt reported that

- 80% gave up necessities like rent, food, medical bills, and child support to pay down court debt;
- 70% had at some point been declared indigent by a court;
- yet over 70% of all debtors did not know they could ask for payments to be reduced or deferred;
- And almost 50% of the debtors had been jailed for failure to pay.

Source: Alabama Appleseed, “Under Pressure,”
<https://www.alabamaappleseed.org/underpressure/>

Harsher Impact on Indigent Clients

Non-indigent defendant

- Pays \$500 fine at sentencing in cash or credit
- Eligible for sealing
- No extended probation
- No impact to credit
- No more court dates

Indigent defendant

- Cannot afford \$500 fine
- Fees and interest rack up
- Not eligible for sealing
- Stays on probation just for payment
- Credit damaged by civil judgment
- May be arrested and jailed for missing a payment date

Harsher Impact on Black, Brown, & Indigenous Clients

- Fines & fees originated in convict leasing, “Black codes” (see Timbs)
- Black, Brown, & Indigenous clients likely to be more harshly policed, convicted at higher rates due to **systemic racism and individual system actor bias**
- **Racial wealth gap** means the same fine is more likely to burden Black, Brown, & Indigenous clients --and fines & fees perpetuate and widen this gap.

Harsher Impact on Youth Clients

- Fines & fees consistently imposed on youth and parents in juvenile/family court (800,000+ youth annually), adult court, municipal court
- Uniquely harsh impact:
 - Youth barriers to employment, money
 - Financial, emotional strain on families
 - Problems for record-clearing
 - Civil judgment at a critical time of nascent adulthood

Harsher Impact on **Non-Citizen Clients**

- Ask an immigration specialist/Padilla attorney about any specific issues in your case
- However, know that unpaid fines and fees may create a barrier to your client in seeking certain kinds of immigration relief:
 - Pay-only probation or ongoing court dates for payment only
 - Civil judgment
 - May prevent case from sealing

Debtors' Prison for Kids

debtorsprison.jlc.org

Fees Established by State Law

TYPE OF FEE ▾

DECISION ▾

0

1

2

3

4

5

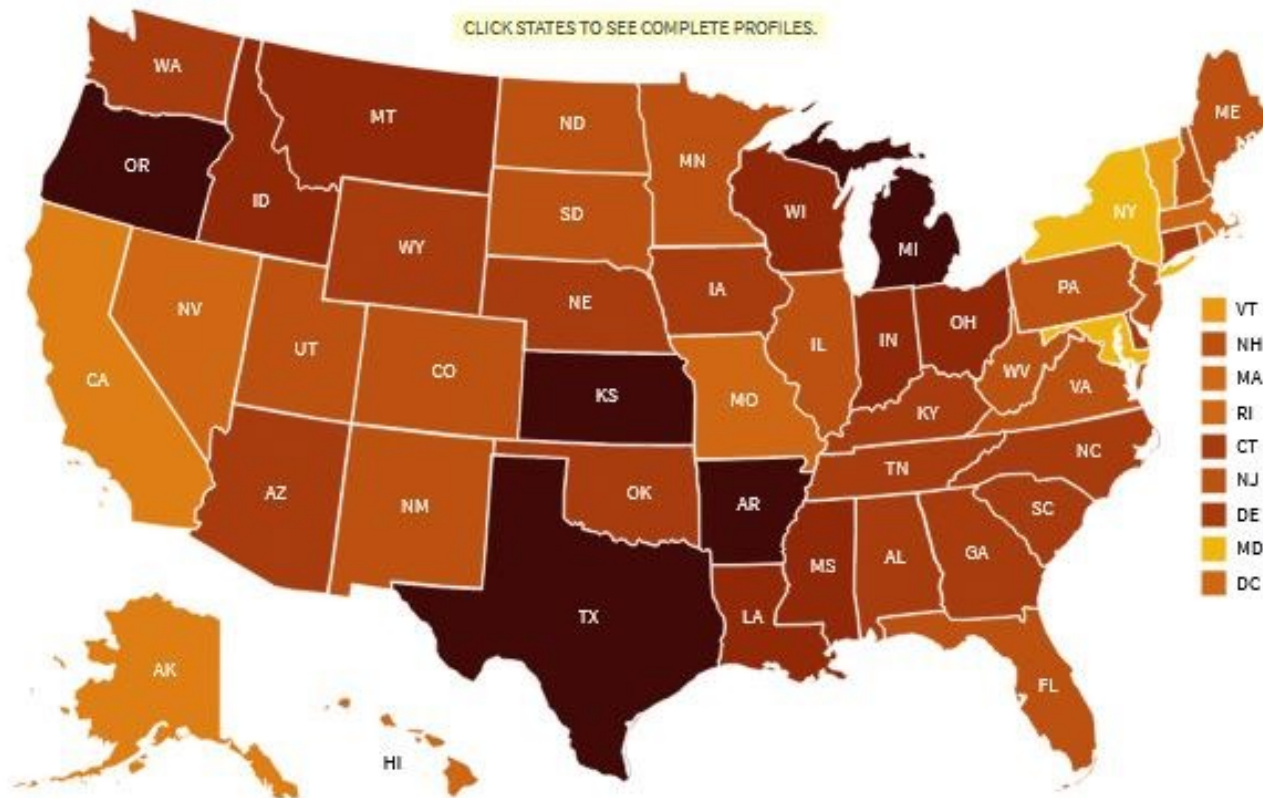
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All fees

CLICK STATES TO SEE COMPLETE PROFILES.



Why do we need to reckon with Fines & Fees?

Apart from immediate harms, fines & fees:

- Were intended to **maintain a system of racial hierarchy**--and continue to do so
- **Entrench carceral systems** as money-makers
- Lead to higher levels of **policing and prosecution**, particularly for Black and Brown clients
(Edwards; Makowsky; DOJ Ferguson Report)
- Expose clients to potentially violent **police encounters**

A Tool in the Toolbox: The Basics

- Eighth Amendment: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”
- Excessive Fines Clause is a tool you can use to reduce or remove fines and fees your client cannot afford to pay—preventing serious harms.
- EFC applies to all states (*Timbs v. Indiana*, 139 S. Ct. 682 (2019)).
- EFC trumps statutory law and is available to you as an argument, even if it has not regularly been invoked in the courts where you practice.

Importance of EFC

- It's a powerful tool to keep fines from being imposed in the first place. This enables your clients to avoid altogether the collateral consequences that flow from debt collection and nonpayment.
- It also ensures that your clients raise this issues with the benefit of your guidance rather than years down the road when they might not have easy access to counsel.
- Courts often don't advertise constitutional and statutory protections in place for people who cannot pay, and unrepresented people generally do not know how best to seek relief.

Basic Framework

No court may impose an **excessive fine**.

- a. **“Excessive”** means disproportionate.
 - i. How severe is the fine?
 - ii. How serious was the offense?

- a. **“Fine”** means any financial imposition, civil or criminal, with a “partially punitive” purpose.

Excessiveness

United States v. Bajakajian, 524 U.S. 321 (1998), is the only Supreme Court case that discusses what it means for a fine to be excessive

Weird facts: The Supreme Court holds that a forfeiture of \$357,144 was excessive for the federal crime of attempting to leave the United States without reporting cash in excess of \$10,000

Excessiveness

Ultimately, *Bajakajian* holds that a fine “violates the Excessive Fines Clause if it is **grossly disproportional** to the gravity of a defendant’s offense”

Bajakajian says that this “**standard of gross disproportionality**” comes from the Cruel & Unusual Punishments Clause

Excessiveness

Timbs v. Indiana, 139 S. Ct. 682 (2019), holds that the Excessive Fines Clause is incorporated against the states

- Most courts had already held the EFC incorporated
- But reasoning and cited authorities are helpful—*Timbs* recognizes increasing trend toward more fines, anti-Black origins of American criminal fines, and common law protections against unpayable fines

Legal Standard

A fine is excessive if it is **grossly disproportional** to the gravity of a defendant's offense



Legal Standard

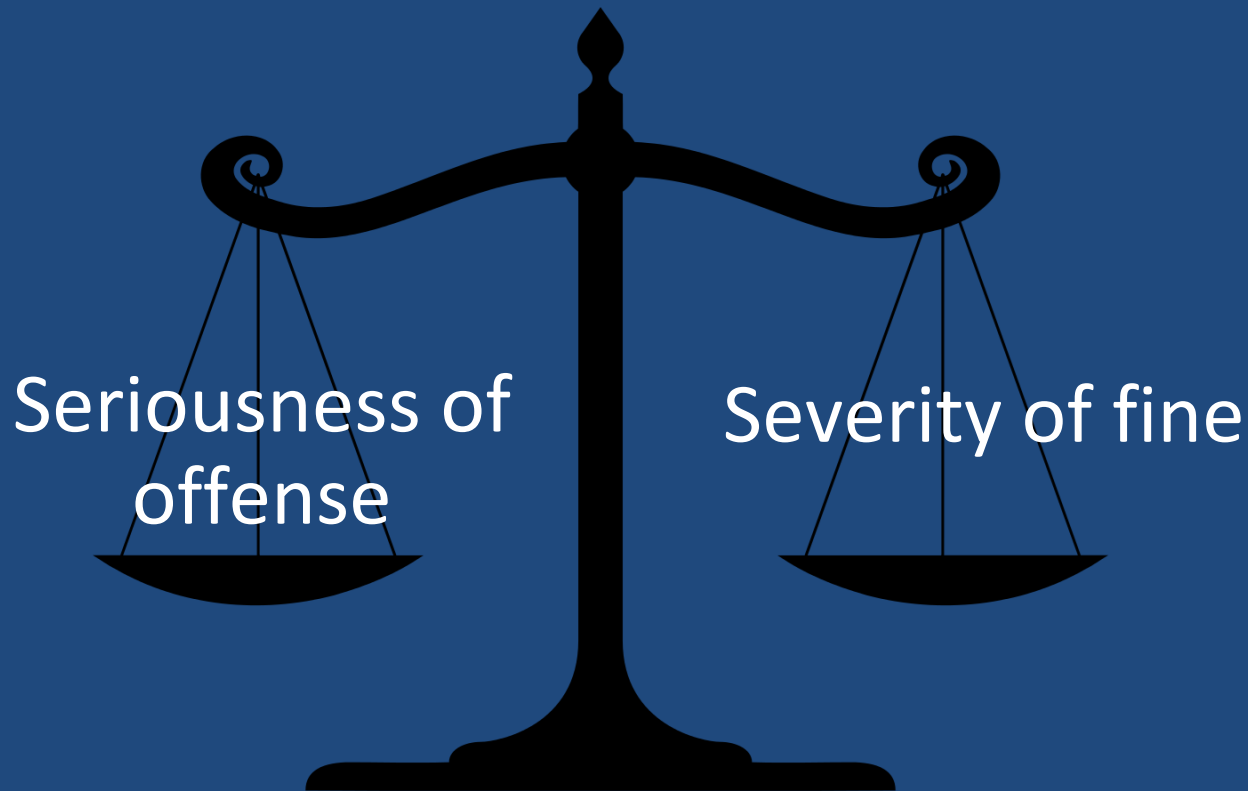
Many courts rely on factors from *Bajakajian*:

1. The **nature and extent** of the crime
2. Whether the violation was **related to other illegal activities**
3. The **other penalties** that may be imposed for the violation
4. The **extent of the harm** caused

Note: These factors relate only to offense seriousness, and don't map on well to every case

Legal Standard

A fine is excessive if it is **grossly disproportional** to the gravity of a defendant's offense



Economic Circumstances

Fines are **regressive**—they punish poor people more than those with money.

So how do you measure **severity of the fine**? Only the dollar amount, or do you account for a defendant's financial circumstances (i.e., ability to pay)?

Economic Circumstances

The U.S. Supreme Court has never expressly held that ability to pay is relevant, but it has strongly hinted that it is

- *Timbs/Bajakajian* note that Magna Carta says a fine can't "deprive a wrongdoer of his livelihood"
- Standard of gross disproportionality in Cruel and Unusual Punishments Clause cases incorporates individual circumstances

Economic Circumstances

State courts throughout the country have held that ability to pay matters for excessiveness:

- California – *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 124 P.3d 408, 420–21 (Cal. 2005)
- Colorado – *Colo. Dep't of Lab. & Emp. v. Dami Hosp., LLC*, 442 P.3d 94, 101 (2019)
- Idaho – *Nez Perce Cnty. Prosecuting Att'y v. Reese*, 136 P.3d 364, 371 (Ct. App. 2006)
- Indiana – *State v. Timbs*, 134 N.E.3d 12, 37 (2019)
- Minnesota – *State v. Rewitzer*, 617 N.W.2d 407, 415 (2000)
- Montana – *State v. Yang*, 452 P.3d 897, 904 (2019)
- North Carolina – *State v. Sanford Video & News, Inc.*, 553 S.E.2d 217, 220 (2001)
- New York – *County of Nassau v. Canavan*, 1 N.Y.3d 134, 139 (2003)
- Oregon – *State v. Goodenow*, 282 P.3d 8, 17 (Ct. App. 2012)
- Pennsylvania – *Commonwealth v. 1997 Chevrolet*, 160 A.3d 153, 188 (2017)
- Tennessee – *State v. Taylor*, 70 S.W.3d 717, 723 (2002)
- Utah – *State v. Real Prop. at 633 E. 640 N., Orem*, 994 P.2d 1254, 1260 (2000)
- Washington – *Tellevik v. Real Property*, 921 P.2d 1088 (1996)

EFC Special Considerations: Youth

- Prong 1: **Gravity of the Offense**
 - Constitutional case law consistently recognizes that youth are **less culpable** than adult:
 - Immaturity/recklessness, susceptibility to outside pressure, capacity for change (Miller v. Alabama, 567 U.S. 460, 465, 471 (2012); J.D.B. v. North Carolina, 564 U.S. 261, 272 (2011))
 - Youth's reduced culpability diminishes the gravity of the offense
 - Not just under 18:
 - Washington Supreme Court considered mitigating quality of youth for 18+ (State v. O'Dell, 358 P.3d 359 (Wash. 2015))

EFC Special Considerations: Youth

- Prong 2: Individual Circumstances
 - Financial penalties are **uniquely harmful to youth**
 - Youth as a class can't pay
 - Fines & fees increase economic stress on families
 - Fines & fees increase system involvement (Piquero)
 - Harms of civil judgment hit young people harder
 - Because of these added harms, **finances & fees are more likely to be disproportionate** to an individual defendant when that defendant is under age 25.

EFC Special Considerations: Black, Brown, & Indigenous Clients

- Prong 2: Individual Circumstances
 - One-size-fits-all “proportionality” inquiries will result in disproportionate harms to Black, Brown, and Indigenous clients and communities.
 - Why?
 - Historical use of intentionally unaffordable fines to maintain racial oppression.
 - Pervasive, government-facilitated racial wealth gap.

What is a fine?

- To constitute a fine, an economic sanction need only be partially punitive. *Austin v. United States*, 509 U.S. 602 (1993)
- Under this definition, sanctions labeled “fines,” “fees,” “costs,” etc. can all be “fines” under the EFC. *Austin* itself addressed civil *in rem* forfeitures, not criminal fines.
- Sanction is at least partially punitive if:
 1. It’s linked to conduct the government deems culpable. (*E.g.*, *Austin* noted that forfeiture statute focused on property owner’s culpability); OR
 2. It’s associated with other forms of punishment. (*E.g.* *Austin* noted that forfeitures were “listed alongside the other provisions for punishment” in an early American statute, and that forfeiture would supplement statutory fines and imprisonment.)

Limited to sanctions paid directly to the government?

- Supreme Court has found that “the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government.” *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 268 (1989).
- But it has more recently cast doubt on that requirement, noting that restitution paid to a victim rather than the government might trigger the EFC, given that it was imposed by the government and was intended to punish. *Paroline v. United States*, 572 U.S. 434, 456 (2014).
- And there’s a good argument that fees paid to private companies performing traditional government functions are fines under the EFC. *See, e.g., Brown v. Transurban USA, Inc.*, 144 F. Supp. 3d 809, 837-838 (E.D. Va. 2015).

Arguments against the supposed to-the-government requirement

- If a court or prosecutor asserts that only sanctions payable to the government are fines, you can:
 1. Invoke *Paroline* and note that there SCOTUS contemplated the possibility that a sanction payable to an individual violated the EFC.
 1. Note *Bajakian* and *Harmelin's* findings that fines must be carefully scrutinized because they are a source of revenue while other forms of punishment cost the state money. Here, fees payable to private companies are often in effect a source of revenue to the state: (1) the state gets probation, debt collection, etc. services at no cost to itself by imposing fees or surcharges your client pays directly to the company; and (2) the company might in turn generate additional revenue for the government.
 1. If applicable, argue that the private entity involved is a performing a traditional government function and therefore subject to the EFC.
 1. Argue that this can't be reconciled with EFC's focus on proportionality: ignoring some sanctions makes it impossible to faithfully consider the severity of the total in light of the offense.

Is it a fine? Statutory Fines/Surcharges

- Yes. Both satisfy the partially punitive test.
- They are only imposed following a determination that the culpable conduct occurred and they are often also directly associated with another form of punishment (e.g. a term of confinement)
- A prosecutor might argue that certain surcharges are administrative rather than punitive, but this is disproven by the fact they are only imposed upon people adjudicated guilty and that they often have nothing to do with the underlying charge (e.g., a youth court diversion program fee assessed in a DUI case)

Is it a fine? Administrative Fees

- These are at least nominally connected to the recoupment of expenses: e.g., prosecution fees, probation supervision fees, late fees.
- They have some remedial element--cost recoupment. But if they are at least partially punitive, they are fines under *Austin*.
- Any charge imposed only upon conviction can fall into this category. *See, e.g., People v. Cowan*, 47 Cal. App. 5th 32, 45 (2020) (the fees are “conditioned on the commission of a crime” and therefore serve in part to punish).
- As do penalties for nonpayment. E.g. *Wemhoff v. City of Baltimore*, 591 F. Supp. 2d 804, 809 (D. Md. 2008) (\$16/mo late fee on traffic ticket “clearly meant to punish”)
- Be sure to highlight any punitive language in the text authorizing the charge. *See, e.g., Discount Inn, Inc. v. City of Chicago*, 72 F. Supp. 3d 930, 934 (N.D. Ill. 2014) (rejecting defendant’s argument that a charge authorized by an ordinance was remedial because, among other things, the ordinance referred to it as a “penalty”)

Is it a fine? Restitution

- Supreme Court noted in dicta that it would likely determine restitution is a fine under the EFC. *Paroline*, 572 U.S. 434, 456 (2014).
- Several lower courts have reached the same conclusion. *United States v. Dubose*, 146 F.3d 1141, 1144 (9th Cir. 1998); *State v. Izzolena*, 609 N.W.2d 541, 548 (Iowa 2000). And many courts have discussed restitution as being an element of criminal punishment, tied to the state's penal interest, and so forth.
- Other courts have focused on the remedial component of restitution and held it's not a fine. Typically they ignore the fact that punitive and remedial goals are not mutually exclusive. And they often have failed to implement *Austin's* partially punitive standard, sometimes instead borrowing from Double Jeopardy and Ex Post Facto clause case law, which is inapplicable.

Is it a fine? Costs of Confinement or Probation Fees

- Only imposed on people adjudicated guilty.
- Collection of these sanctions often involves mechanisms that are unavailable to civil debt, suggesting that the debt has a punitive component tied to the culpability of the defendant.
- Especially where the payment goes to a private company, the money is not just to recoup costs, but rather to enable the company to turn a profit, often a substantial one. Subjecting your clients to this has a punitive component--the goal is not just to remedy the company or state.

Other Protections

State constitutions

- Many state courts have held that their constitutions are more protective of punishment than Eighth Amendment

State statutes

- Many states have statutes that require courts to consider ability to pay before imposing a fine

Making the Argument

- Gathering the facts
- Plea-bargaining considerations
- Approaching the court
- Counterarguments and responses

Gathering the Facts

The proportionality inquiry is “factually intensive and dependent on the totality of the circumstances.”

State v. Timbs, No. 20S-MI-289, 2021 WL 2373817, at *2 (Ind. June 10, 2021)

Gathering the Facts

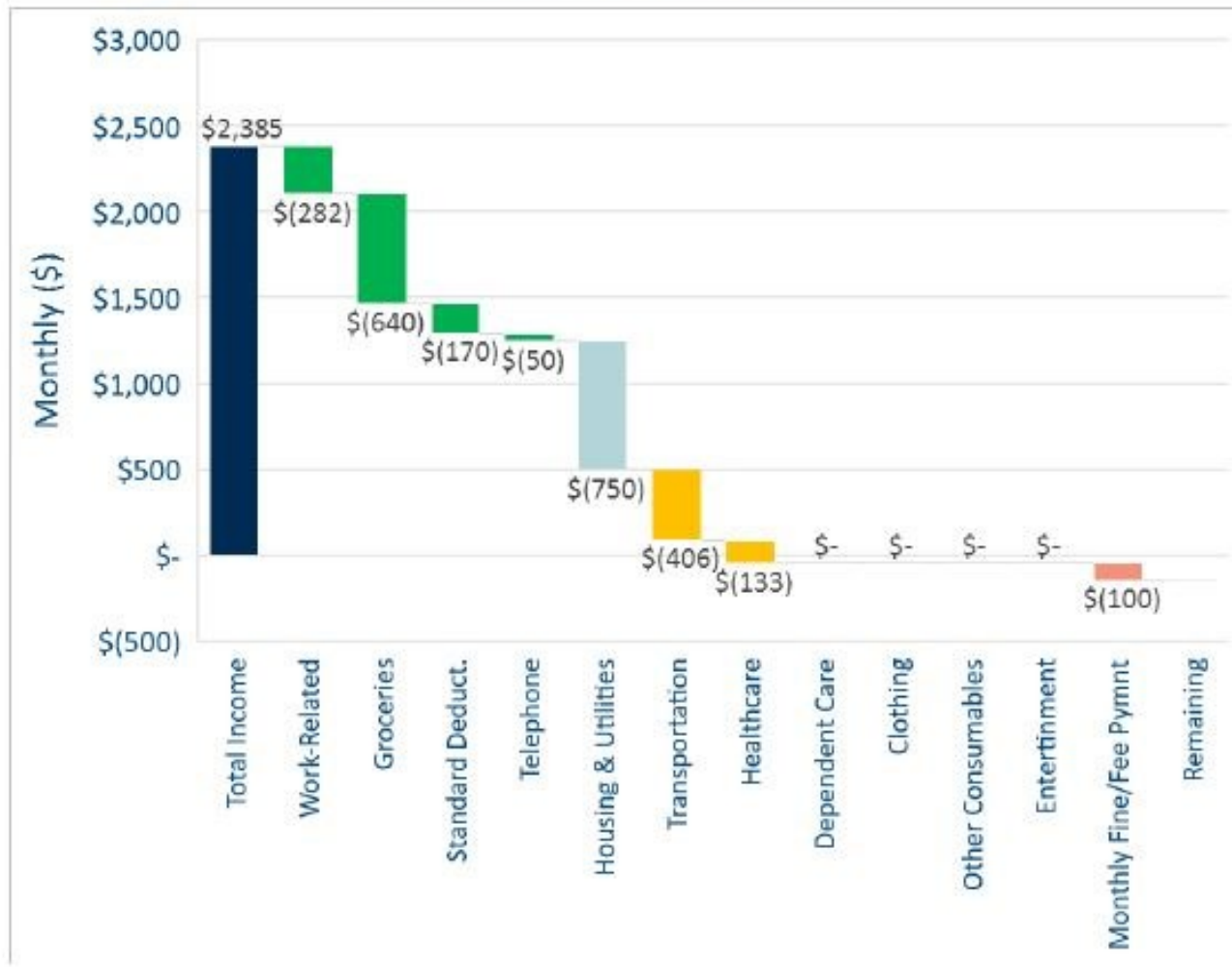
- Gravity of the offense
 - **Crime of poverty** means any financial penalty is likely disproportional
 - No impact on **victim** (e.g., drug charges, status offense)
 - Whether fine is the **maximum** permitted
 - Whether the act is at the lower end of **culpability** for acts resulting in the same charge
 - Whether defendant is **age 24 or under** (neuroscience shows lessened culpability)
 - **State law** may outline specific factors, so argue to the standard

Gathering the Facts

- Individual financial circumstances
 - **Income** and regularity of work
 - **Government assistance**
 - Be broad in your questions: Section 8/voucher, SNAP/food stamps/EBT
 - Note if sole source of income is federal benefits--SS, SSI, and VA benefits cannot be collected by the state to satisfy court debt
 - **Housing** instability
 - Support of **dependents**, including child support
 - **Disability/illness** of client or family
 - Impact of fine on **ability to earn a living** (e.g., if unpaid fine leads to license suspension, does your client need a car to get to work?)
 - **Debt**

Gathering the Facts: Illustrating Affordability

Figure 9: Monthly Income and Expenditure for Family of Four with \$23k Pre-Tax Income (\$29k Post-Tax Income)



Gathering the Facts

Affordability in Context

- Compare client's finances to federal poverty line or Self-Sufficiency Standard (U. Wash. researchers, varies by county, <http://www.selfsufficiencystandard.org/>)
- Means-tested benefits →
 - “The government has already conducted an in-depth investigation into my client's finances and concluded he cannot meet his basic subsistence needs. I ask the Court to defer to the government's factual findings on this matter.”

Plea Bargaining Considerations

- Use your judgment as to the risks of asking for a lower or no fine
- Advise your client of the downsides of an unaffordable fine, even if the plea is the best option
- If prosecutor is offering a fine-only plea, argue this shows low culpability and no reason your client should be punished more harshly for poverty
- Explain collateral impacts of unaffordable fine
- Get creative--can you use time served or community service as an alternative?
- Make a record if you can without undermining the plea

Approaching the Court

- Acknowledge that argument is novel
- Consider a sidebar, bench memo, or previewing written motion
- Be persistent--it can take time to shift attitudes and practice
- In the long term, saves court resources from endless ability-to-pay hearings

Approaching the Court

- Argue **need for judicial scrutiny**
 - Judicial scrutiny is critical because “the State stands to benefit” from imposing more and higher fines and fees, even if totally disproportionate. Harmelin v. Michigan, 501 U.S. 957, 978 n.9 (1991). “There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence.”

Approaching the Court

- Argue **inherent judicial authority** to conform a sentence to constitutional requirements.
 - Article III or state constitution equivalent establishes court's unique constitutional role
 - E.g., United States v. Booker, 543 U.S. 220, 234, 245 (2005) (invalidating federal sentencing guidelines that prohibited judges from tailoring individualized sentences)

Counter-Arguments & Responses

Question for attendees:

What counter-arguments or practical obstacles do you anticipate?

Counter-Arguments & Responses

Counter-argument

- Court does not have the authority to reduce or waive a mandatory statutory fine.
- Your client's personal circumstances are irrelevant.
- The court should be guided by the elected legislature's determination of what a fair fine is.

Response

- Statutes that do not adhere to the EFC are unconstitutional. And statutes must be interpreted in a way that adheres to the Constitution (constitutional avoidance argument)
- *Timbs* references to people's ability to keep their livelihood, *Timbs* on remand, other authority discussed above.
- *Harmelin*: judicial scrutiny in fine cases is critical because the state itself stands to benefit, giving it the incentive to impose fines out of accord with legitimate penal goals.

Preserving the Argument for Appeal

“Your Honor, the [total dollar amount] that [client name] is required to pay violates the prohibition against excessive fines under the Eighth Amendment of the U.S. Constitution and [section] of the [state] Constitution. The Excessive Fines Clauses of both the federal and [state] Constitutions prohibit imposing a fine that a person cannot pay. Further, [statute] requires consideration of my client’s ability to pay before imposing a fine”

Then, outline why your client can’t pay the fine, in addition to any other relevant considerations

Preserving the Argument for Appeal

Use your judgment! Certain judges may have a problem with this and not accept a plea you are challenging as unconstitutional

If you are not comfortable stating a constitutional or statutory objection, it will still be helpful on appeal to make a record of your client's financial situation.

Preserving the Argument for Appeal

Know your jurisdiction! It's possible some places will require more to preserve argument

Conversely, in some jurisdictions, preservation isn't strictly necessary

- Some states have post-sentencing motions for sentence modification (including fines)
- Some states consider an unconstitutional sentence to be always appealable

Preserving the Argument for Appeal

File a timely notice of appeal! Your client may lose their right to challenge a fine in the future unless there is a timely notice of appeal from the original conviction/sentence.

For example, in New York, fines and fees are not due until months after sentencing. If your client isn't able to pay and wants to challenge the fine at that time, they've already missed their window to file a notice of appeal.

Collaboration

We are working with public defenders, legal aid attorneys, and other advocates to:

- **partner** on cases or appeals
- draft template **motions** or jurisdiction-specific educational materials
- provide **research assistance**
- file **amicus briefs**

Contact

- Youth cases (juvenile/family court, young adults up to age 24, municipal court):
Lindsey E. Smith, Juvenile Law Center,
lsmith@jlc.org
- All cases:
Brian Hardingham and John He, Debtors' Prison Project,
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- Case Related to Right to Counsel:
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