

Flood of New Court Fees Drown Indigent Defendants

BY DAVID E. CLARK AND KEVIN J. MURTAGH

“Do not accustom yourself to consider debt only as an inconvenience; you will find it a calamity.”—Samuel Johnson¹

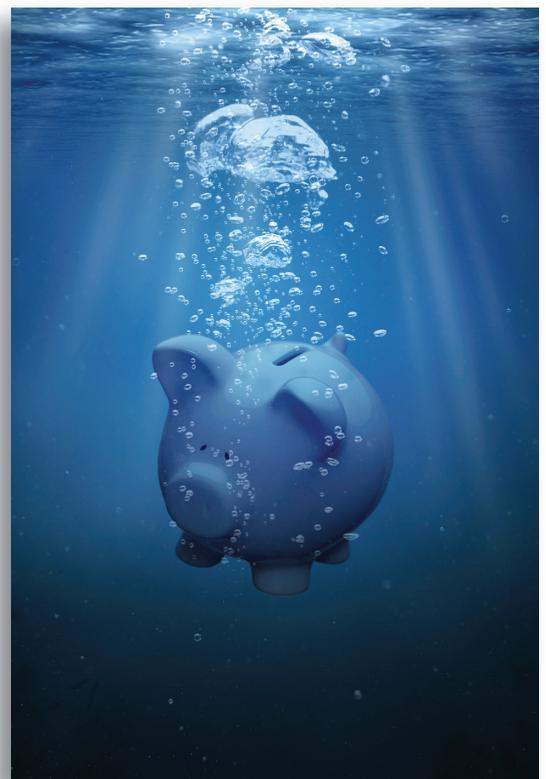
The North Carolina criminal justice system shackles defendants with monetary costs at nearly every stage of the criminal process from arrest² to incarceration.³ Since 2011, the vast majority of these costs apply automatically in every criminal case.⁴ For indigent defendants—those who a court has determined are too poor to contribute to their representation—these court costs quickly turn to state-owed debt. This subjects indigent defendants to arrest and incarceration in modern day debtor’s prisons for failure to pay debts the court has already concluded the defendant cannot afford.⁵ In addition to fines,⁶ interest,⁷ and penalties for not being able to pay immediately,⁸ defendants are required to pay “user fees”⁹ to keep the court system operating.

In North Carolina, criminal court costs and user fees have been steadily rising, far outpacing the rate of inflation,¹⁰ over the past two decades. For example, between 1995 and 2015, criminal court costs rose at approximately five times the rate of inflation.

(Average yearly inflation in the US from 1995-2015 was 2.7%, while the average NC criminal court costs increased in the same period by 15.3%.)

Not only has the monetary cost of these fees increased exponentially, but the number

of fees has grown as well. Upon conviction, criminal defendants—including the indigent—are required to pay a litany of fees to support causes ranging from “supplemental pension benefits of sheriffs”¹¹ to “staffing and operations of the Criminal Justice Education



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and Standards Commission.”¹²

In years past, trial judges were allowed to waive some fees for defendants too poor to pay them if the court found “just cause” and issued a “written order, supported by findings of fact and conclusions of law.”¹³ Starting in 2014, the Administrative Office of the Courts has been statutorily mandated to produce an annual report that aggregates “the waivers by the district in which the waiver or waivers were granted and by the name of each judge granting a waiver or waivers.”¹⁴ Still, judges willing to weather the scrutiny (some may say shaming) engendered by this report could exercise their discretion to waive fees in appropriate cases. However, in June of this year the North Carolina legislature passed a bill aimed at making waiving criminal court fees nearly impossible. The new statute requires that trial judges give 15 days notice via first class mail prior to the hearing date to all “government entities” potentially affected by court fees before they are allowed to waive any court fee.¹⁵ Of course, when court calendars can consist of hundreds of defendants each day in the larger cities, divining whether any particular defendant will ask for a fee waiver and then notifying all interested parties 15 days in advance of that defendant requesting a waiver is impossible. Notifying all interested parties by first class mail for every defendant in every courtroom on every day of court is not only contrary to reason, but also thoroughly impractical in execution. For example, in cases where a defendant requests a fee waiver, the court will have only two bad choices: (1) Summarily deny the defendant’s request without argument, a probable Sixth Amendment violation;¹⁶ or (2) continue the sentencing hearing so the court may notify all affected “government entities,” further straining limited resources and delaying cases in an already overworked court system.

The increasing burden that criminal court fees place on indigent defendants often results in punishment more severe than wealthier defendants, and even incarceration for no reason other than that their poverty prevents payment. Take, for example, two typical high school students—one from an indigent family, the other from a family with resources. Both students are arrested on the same day for possessing an unprescribed Ritalin pill to help them stay awake in class.¹⁷ Neither has a record and both plead guilty. In an attempt to be fair, the State offers both the first offender’s

program.¹⁸ Upon completion of this program, the State will dismiss the defendant’s criminal charge. In Guilford County, the program has a mandatory \$200 admission fee.¹⁹ The student with the means to pay does so and, after completing the program, walks away with no criminal record. The poor student, with no means to pay for the program, is saddled with a conviction and, typically, placed on probation for a year with a 45-day sentence hanging over his head. If he doesn’t find some way to pay all the standard court costs,²⁰ attorney fees,²¹ and probation fees,²² the State may attempt to revoke his probation and send him to jail for the 45-day term.²³ One student can buy his way out of the criminal charge; the other is shackled with a criminal record and possible jail time. The only difference: poverty.

Because the numerous criminal court costs are scattered throughout the General Statutes, the easiest way to see their true scope is to consult the “Court Costs and Fees Chart” from the Administrative Office of the Courts.²⁴ Each defendant who is convicted or pleads guilty is charged a fee that is statutorily mandated to support various entities within the criminal justice system.²⁵ The minimum costs in district court for infractions and misdemeanors are \$178 and \$180, respectively. In superior court, the minimum costs are \$205.²⁶ If a defendant makes a first appearance in district court and the rest of her case is handled in superior court, she may be charged both district and superior court fees, resulting in a total minimum cost of \$352.50. Appealing a district court conviction to superior court for a trial *de novo*²⁷ may result in being double-charged for the minimum court fees. These ever-increasing fees are indicative of the substantial efforts the North Carolina legislature has made to place an increasingly large burden on criminal defendants to fund the day-to-day operation of the court system.

Beyond these charges, which themselves can be highly burdensome to indigent defendants, dozens of other criminal fees can raise a defendant’s debt burden substantially. These include a \$60 non-waivable Appointment of Counsel Fee for Indigent Defendants,²⁸ a Community Service Supervision Fee of \$250,²⁹ and a Probation Supervision Fee of \$40 per month.³⁰ A Crime Lab Fee of \$600 is charged to a defendant who is convicted or pleads guilty when the State Crime Laboratory or another

North Carolina Court Costs

Year	District Court	Superior Court
2015	\$173	\$198
2014	\$173	\$198
2013	\$173	\$198
2012	\$173	\$198
2011	\$173	\$198
2010	\$126	\$146
2009	\$120	\$145
2008	\$116	\$141
2007	\$115	\$140
2006	\$115	\$140
2005	\$105	\$130
2004	\$95	\$120
2003	\$95	\$120
2002	\$95	\$120
2001	\$85	\$110
2000	\$85	\$110
1999	\$81	\$106
1998	\$61	\$68
1997	\$61	\$68
1996	\$46	\$53
1995	\$41	\$48

facility performs forensic testing. If that case goes to trial and the laboratory analyst is called as an expert witness, the defendant is charged an additional \$600 for the witness’ services.³¹

Before the passage of this year’s Appropriations Act, the \$600 fee was limited to “cases in which...the laboratories have performed DNA analysis of the crime, tests of bodily fluids of the defendant for the presence of alcohol or controlled substances, or analysis of any controlled substance possessed by the defendant or the defendant’s agent.”³² However, now a \$600 fee may also be charged in “cases in which...the laboratories have performed digital forensics, including the seizure, forensic imaging, and acquisition and analysis of digital media.”³³ Given the wide scope of the phrase “digital media”—text messages, social media messages, digital photographs, audio and video recordings, to name a few types—this new law has the potential to exponentially increase the number of defendants who have to pay laboratory fees.

As illustrated, these costs can result in substantial burdens on indigent defendants that go beyond the obvious effects of taking money out of the hands of people who are

already struggling to make ends meet. On top of the prospect of getting a criminal record or being incarcerated for failure to pay court debts, North Carolina allows some criminal justice debt to be collected in the same manner as civil judgments.³⁴ This results in the debt being filed with the county clerk and becoming available to credit reporting agencies,³⁵ which can result in substantial damage to credit scores, thereby minimizing prospects to obtain housing and employment.³⁶

Even after a defendant's court date, the State continues to exact payments from poor

individuals found guilty. Payment of these court costs is a regular condition of probation.³⁷ Defendants who are found to have willfully failed to pay are subject to incarceration. Under federal law, those who violate a term of their probation become ineligible for Temporary Assistance to Needy Families, Supplemental Nutrition Assistance Program benefits (formerly known as Food Stamps), low-income housing and housing assistance, and Supplemental Security Income for the Aged, Blind, and Disabled (Social Security).³⁸ While many states allow individuals with criminal justice debt to work it off

through community service, North Carolina does not present this as an option.³⁹ This leaves indigent defendants—many of whom have mental and/or physical impairments, limited education, and no significant job skills—with almost no way to get out from under these court debts and the threat of incarceration.

In examining the issue of criminal court costs and fees in North Carolina, it is instructive to keep in mind the national and international context, as well as the staggering financial costs of mass incarceration. The United States has less than 5% of the world's population, but almost 25% of the world's prisoners.⁴⁰ Per capita, this imprisonment rate is about six times higher than Canada and three times higher than Mexico.⁴¹ About one in every 120, or 54,300 individuals,⁴² are incarcerated at any given time in North Carolina.⁴³ 53% of them are incarcerated for non-violent offenses like drug possession or fraud.⁴⁴

NC Office of State Budget and Management

The cost to incarcerate these individuals in the state's prisons varies between \$64 and \$94 per day and averages \$29,965 a year per inmate.⁴⁵ All told, North Carolina spends more than \$1.2 billion dollars each year, or about 6% of the entire state budget,⁴⁶ operating the prison system.⁴⁷ Another \$463.8 million is spent to operate the judicial system.⁴⁸ An additional \$125 million is dedicated to Indigent Defense Services, whose main mission is providing constitutionally mandated legal services to impoverished defendants.⁴⁹

In North Carolina, the General Assembly funds the court system, known as the General Court of Justice. Historically, funding was provided by taxes collected from all North Carolinians. Over the last several decades, however, the legislature has made a determined effort to shift the cost of running the judicial system from taxpayers in general to court system users.

This shifting of costs in criminal court, charged in large part to indigent criminal defendants with almost no ability to pay,⁵⁰ has the effect of criminalizing poverty. It also makes a mockery of North Carolina's guarantee of Equal Protection of the Laws⁵¹ and does almost nothing to pay for "a fair, independent, and accessible forum for the just, timely, and economical resolution of their

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legal affairs.”⁵²

In 2014, 55% of all criminal defendants in North Carolina were determined, after an in-court indigency hearing, to be too impoverished to contribute to their representation.⁵³ 71% of the criminal cases handled in superior court involved indigent defendants.⁵⁴ Notwithstanding their destitute circumstances, judges often issue court fee judgments against indigent individuals imposing debts that can run into the thousands of dollars.⁵⁵

The legislative theory hinges on the notion that all this money will eventually be funneled back “[f]or support of the General Court of Justice.”⁵⁶ In the real world, however, the cost of collecting outstanding fees from indigent defendants is often greater than the amount of money collected. For example, in 2009 Mecklenburg County found itself with a significant budget deficit. A decision was made to aggressively attempt to collect outstanding court debt. 564 individuals who had fallen behind on their court debt were arrested, and 246 people who couldn’t pay in full right away were incarcerated. They were told that they would be released from jail if they paid the full amount of their debt. If they couldn’t pay the full debt, they would have to remain in jail until a judge decided whether to release them. The 246 people who couldn’t pay were held in jail for an average of four days before seeing a judge. These detentions cost the county in excess of \$40,000. Meanwhile, the county managed to collect a little more than \$33,000 from all the individuals who were arrested, resulting in a loss to the county of about \$7,000.⁵⁷

In criminal court, all court fee judgments carry the threat of incarceration. In theory, this isn’t an equal protection issue: pay the fee and no jail time for failure to pay. But in reality, it often works out as a prime example of treating one group completely differently than another. Take the case of community service: according to the statute, community service is available to anyone ordered to participate and who has the \$250 admission fee.⁵⁸ So when two individuals from opposite ends of the income spectrum are negotiating plea bargain terms, community service instead of jail as a punishment is only realistically available to the person with the money to pay for admission. With no money to purchase the community service option, the indigent person often winds up losing her freedom by doing a short active sentence, like

weekends in the local jail, which is seen as equalizing the punishments.⁵⁹ Even judges who recognize the futility of issuing monetary judgments against people with no ability to pay are stymied by fees, like the community service fee, which the North Carolina statute makes unwaivable.⁶⁰

In the past few decades, there has been a dramatic increase in criminal court costs and fees in North Carolina. Because most criminal defendants in North Carolina are indigent, they are often unable to pay these costs and fees, which then turn into state-owned debt. The recent changes to the law that introduced the notice provision for waivers and expand lab fees to cover “digital forensics” promise to substantially increase the debt burden on indigent defendants. While people of different political viewpoints may have diverging views on the fairness of increasing criminal court costs and fees, trapping defendants in a perpetual cycle of debt is unwise if we wish to reduce crime. When people are drowning in debt and unable to keep their heads above water, it should be no surprise that their prospects for reintegration decrease and their prospects for recidivism increase. Rolling back the recent increases in criminal court costs and fees is a cause that should have wide appeal. ■

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Endnotes

1. James Boswell, *The Life of Samuel Johnson, LLD*, 1185 (1791). Johnson knew about the evils of state power to enforce debt first hand. He was arrested multiple times for failure to pay very small debts, and in 1743 he watched his friend, fellow poet Richard Savage, die in a debtor’s prison for failure to pay a debt of £8.
2. See N.C. Gen. Stat. § 7A-304(a)(1), imposing a \$5 “service fee” for each arrest.



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3. See N.C. Gen. Stat. § 7A-313 & 128-49, imposing a \$10 fee for each day in jail pre-trial and \$40 post trial.
4. N.C. Gen. Stat. § 7A-304(a)(1), “In every criminal case in the superior or district court, wherein the defendant is convicted, or enters a plea of guilty or *nolo contendere*, or when costs are assessed against the prosecuting witness, the following costs *shall be assessed and collected*” (emphasis added).
5. Before criminal defendants may be represented by a public defender in North Carolina, they must fill out AOC form CR-226, an “Affidavit of Indigency,” in which they swear, “under penalty of perjury,” that they have no, or extremely limited, resources.
6. For example, North Carolina imposes a \$25.50 fine for every front-seat seat belt violation. See N.C. Gen. Stat. § 20-135.2A.
7. See N.C. Gen. Stat. § 24-1, imposing 8% interest rate on civil debt owed to the state.
8. See N.C. Gen. Stat. § 7A-304(f)
9. See N.C. Gen. Stat. § 7A-304.

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10. In 1995 the "General Court of Justice" fee, N.C. Gen. Stat. § 7A-304(4), was \$41; 20 years later it was \$147.50. This is an increase of 260%, or almost five times the rate of inflation in the United States, which rose 54% during the same period.
11. N.C. Gen. Stat. § 7A-304(3a).
12. N.C. Gen. Stat. § 7A-304(3b).
13. See N.C. Gen. Stat. § 7A-304.
14. N.C. Gen. Stat. § 7A-350. The 2017 Report on Criminal Costs Waivers can be found here: unc.live/2zdXUmX.
15. Appropriations Act of 2017, N.C. Sess. Laws 2017-57, § 18B.6. Under this act, N.C. Gen. Stat. § 7A-304 is amended to read: "[n]o court may waive or remit all or part of any court fines or costs without providing notice and opportunity to be heard by all government entities directly affected."
16. Although this specific issue has not been addressed in North Carolina courts, other states have concluded that not holding an "ability to pay" hearing before imposing criminal court fees is unconstitutional. See, *State v. Morgan*, 173 Vt. 533, 536, 789 A.2d 928, 931 (Vt. 2001) ("[W]e hold that, under the Sixth Amendment to the United States Constitution, before imposing an obligation to reimburse the state, the court must make a finding that the defendant is or will be able to pay the reimbursement amount ordered...."); C.f., *State v. Blazina*, 344 P.3d 680, 685 (Wash. 2015) The sentencing judge must make "an individualized inquiry into the defendant's current and future ability to pay before the court imposes [criminal court debt]."
17. This is a class one misdemeanor in North Carolina. N.C. Gen. Stat. § 90-95.
18. N.C. Gen. Stat. § 15A-1341(a4).
19. Outer Limits (outerlimitsprogram.org), the deferral program approved by the district attorney of Guilford County, sets the rate for admission at \$200.
20. \$180 in district court in 2017. See "Court Costs and Fees Chart," Administrative Office of the Courts, available at bit.ly/2yDamjk.
21. \$55 per hour for a public defender in district court. See Memorandum, "IDS Policies Governing Attorney Fee and Expense Applications in Non-Capital Criminal and Non-Criminal Cases at the Trial Level," available at bit.ly/2yDN8JG.
22. \$40 per month. N.C. Gen. Stat. § 15A-1343.
23. If the probation was violated and the suspended sentence activated, the student would be charged a "jail fee" for her own incarceration of \$40 per day. See N.C. Gen. Stat. §§ 7A-313 and 148-29.
24. "Court Costs and Fees Chart," *supra* note 21.
25. *Id.* In addition to the General Court of Justice fee, defendants are charged a Facilities fee, Telecommunications and Data Connectivity fee, Law Enforcement Officer Retirement/Insurance and Training and Certification fees, Service of Criminal Process fee, and, for misdemeanor and felony defendants, a DNA fee.
26. *Id.* See "Appendix – Criminal Costs Summary."
27. In North Carolina, misdemeanors are first tried before a judge in district court. If the defendant is acquitted, the case is over. If the defendant is convicted, he/she may appeal to superior court for a trial *de novo*, with a jury as fact-finder. See N.C. Const. art. I, § 24, Right of jury trial in criminal cases "...The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial *de novo*."
28. N.C. Gen. Stat. § 7A-455.1.
29. N.C. Gen. Stat. § 143B-708.
30. N.C. Gen. Stat. § 15A-1343.
31. N.C. Gen. Stat. § 7A-304.
32. N.C. Gen. Stat. § 7A-304(7).
33. Appropriations Act of 2017, NC Sess. Laws 2017-57, § 18B.5(a).
34. See N.C. Gen. Stat. § 15A-1365. "When a defendant has defaulted in payment of a fine or costs, the judge may order that the judgment be docketed. Upon being docketed, the judgment becomes a lien on the real estate of the defendant in the same manner as do judgments in civil actions." See also N.C. Gen. Stat. § 24-1, imposing a mandatory 8% interest rate on civil debt owed to the state.
35. Alicia Bannon et al., Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* 27 (2010), available at bit.ly/2yezrlr.
36. *Id.*
37. N.C. Gen. Stat. § 15A-1343.
38. Bannon et al., *supra* note 36, at 28.
39. *Id.* at 15.
40. Summary, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 2 (Jeremy Travis & Bruce Western eds.) (2014), bit.ly/2fnuGtS.
41. See Roy Walmsley, Institute for Criminal Policy Research, World Prison Population List 5 (11th ed. 2015), bit.ly/2ye7CHs.
42. About 40,200 of these individuals are in Department of Adult Corrections facilities. See Vera Institute for Justice, *The Price of Prisons: North Carolina* (2012), bit.ly/2g0woRx. The remainder are in local facilities.
43. Danielle Kaeble et al., Bureau of Justice Statistics, *US Department of Justice, Correctional Populations in the United States*, 2014 (revised 2016), bit.ly/2i2L32J.
44. North Carolina Department of Public Safety, research bulletin, February 2017, bit.ly/2gth68D.
45. See *The Price of Prisons*, *supra* note 43. Costs for inmates on death row are two to three times higher. See Ed Barnes, *Just or Not, Cost of Death Penalty Is a Killer for State Budgets*, Fox News, March 27, 2010, <http://fxn.ws/2hzRxm9> ("just keeping prisoners on death row costs \$90,000 more per prisoner per year than regular confinement, because the inmates are housed in single rooms and the prisons are staffed with extra guards"), and Maurice Chamamah, *Six Reasons the Death Penalty is Becoming More Expensive, The Marshall Project*, Dec. 17, 2014, bit.ly/2yeAfo7 ("A 2014 study out of Kansas reported that a death row prisoner costs \$49,380 to house per year, whereas a general population prisoner costs \$24,690.").
46. \$1.2 billion is 5.7% of the \$21-billion state budget. See Annual Report of the North Carolina Judicial Branch: July 1, 2014-June 30, 2015, 11, bit.ly/2gytPH.
47. See *The Price of Prisons*, *supra* note 43.
48. Annual Report, *supra* note 47, at 11.
49. William Childs, Fiscal Research Division, North Carolina General Assembly, The Office of Indigent Defense Services 2 (2015), bit.ly/2xw3Omn. Additional expenditures are statutorily mandated to be paid by counties and municipalities for physical facilities occupied by judicial personnel and for law enforcement personnel, equipment, and facilities. See, e.g., N.C. Gen. Stat. § 7A-302.
50. Beth A. Wood, Office of the State Auditor, Performance Audit: Judicial Department – Court-Ordered Fines, Fees, and Restitution 20 (2011), bit.ly/2g1qSOK (stating that criminal defendants come "from a population often representing the very poorest and most destitute in the state").
51. N.C. Const. art. I, § 19: "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin."
52. See Annual Report, *supra* note 47 (quotation from the mission statement of the North Carolina Judicial Branch).
53. See North Carolina Office of Indigent Defense Services, *Indigency Screening and Recoupment* (2016), bit.ly/2xxNc8N. See also North Carolina Office of Indigent Defense Services, *North Carolina's Criminal Justice System: A Comparison of Prosecution and Indigent Defense Resources* (2011), bit.ly/2wLwa7J.
54. N.C.'s *Criminal Justice System*, *supra* note 55, at 2.
55. See "Court Costs and Fees Chart," *supra* note 21.
56. N.C. Gen. Stat. § 7A-304(a)(4).
57. Bannon et al., *supra* note 36, at 26. See also Council of Economic Advisers, *Executive Office of the President, Fines, Fees, and Bail* 4 (2015), bit.ly/1NwFTyE ("[G]rowing evaluation evidence suggests that a policy that funds government through criminal justice fees and fines is often ineffective. State and local governments are likely to collect fines and fees at low rates, in large part because of low incomes among many offenders, making them unable to pay court debts assigned without consideration for ability to pay.").
58. Normally this fee is required to be paid "in full" before participating in the community service program, but under some circumstances the trial judge may allow the fee to be paid after the defendant has begun the program. James Markham, *Waiving Community Service Fees*, NC Criminal Law (Jan. 15, 2014), unc.live/2yeDb4o.
59. Post-conviction time spent in the local jail is billed back to the defendant at a rate of \$40 per day. See Jamie Markham, *Jail Fees*, North Carolina Criminal Law Blog (Jan. 4, 2012), unc.live/2yWuij.
60. N.C. Gen. Stat. § 143B-708(c). (The \$250 community service fee "shall be paid by all persons who participate in the program or receive services from the program staff."). See also Markham, *supra* note 60.