SUPREME COURT OF MISSOURI
MUNICIPAL DIVISION WORK GROUP

Report to the Supreme Court of Missouri
Submitted March 1, 2016.

EXECUTIVE SUMMARY

In response to the charge given by the Supreme Court of Missouri, the Municipal Division Work Group submits its report, addressing potential conflicts of interest regarding judges and attorneys serving in multiple roles in the municipal courts; issues relating to warrants, incarceration, pre-existing warrants, and bonds; issues relating to enforceability of municipal court judgments and remedies for nonpayment of fines; the authority of the Supreme Court of Missouri regarding consolidation of municipal courts and referral of municipal cases to the associate division of the circuit court; and other specific issues relating to the municipal courts. This executive summary is provided for the convenience of the reader. The full report follows.

CONFLICTS OF INTEREST (Part B of this Report, beginning at page 22)

In view of the analysis and conclusions set forth in the full Report, five of the nine members of the Municipal Division Work Group note the following considerations and offer the following recommendations regarding conflicts of interest:

- Is there a conflict when a municipal judge also serves in the role of municipal prosecutor or municipal defense attorney in another municipality within the same county, recognizing that sometimes the municipalities are only a matter of steps apart? After much discussion, the majority of the Work Group came to the conclusion that while there was not a technical conflict of interest under the existing rules, there is, at the very least, a strong appearance of impropriety; and as such, these arrangements may at times violate the spirit of the Code of Judicial Conduct. Moreover, because the opportunity for, and public perception of, influence-peddling and corruption exists when the same attorneys serve in multiple legal roles in different municipal courts within the same county, these practices tend to erode the public's confidence in the municipal divisions as impartial courts of justice.

RECOMMENDATION: That the Supreme Court of Missouri, pursuant to its inherent authority to define the practice of law and the authority of Article V, § 4, of the Missouri Constitution, amend Rule 2, the Code of Judicial Conduct, "Application," Part III, "Part-Time Municipal Judge," to create a new subsection (B)(4), to read: "practice law in any municipal division of the circuit court located within the same county or city not within a county as the municipal division of the circuit court in which that individual serves as a municipal court judge. Further, this prohibition cannot be waived by any party to the proceeding."

- Although not controlling, the Comments to Missouri Supreme Court Rule 4-1.7 suggest a threshold approach similar to that in the Code of Judicial Conduct's section on impropriety,

stating in part, "Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests."[1] An attorney who is serving in multiple roles in municipal courts in the same county at the very least bumps up against this regularly in the course of that practice. These unchecked conflicts negatively impact the administration of justice in municipal courts and the perception of justice in this state. As such, a rule that prohibits readily observable and identifiable conduct, that does not rely on the offenders to self-report, and the alleged violations of which can be reported by third parties and verified by independent investigation, best addresses this practical difficulty. The majority of the Work Group believes the solution is to create a rule limiting an attorney to serving either as defense counsel or as municipal prosecuting attorney, within multiple municipalities located in the same county.

RECOMMENDATION: That the Supreme Court of Missouri, pursuant to its inherent authority to define the practice of law and the authority of Article V, § 4, of the Missouri Constitution, create a new rule within Supreme Court Rule 4, to read: "An attorney shall not serve in more than one of the following capacities within the municipal divisions of the circuit court located within the same county or city not within a county: municipal prosecuting attorney or defense attorney. Further, this prohibition cannot be waived by any party to the proceeding."

Separate opinions as to conflicts of interest were submitted by Ann Covington, Todd Thornhill, and Sly James; and by Edward D. "Chip" Robertson, Jr.

WARRANTS, INCARCERATION, PRE-EXISTING WARRANTS, AND BONDS (Part C of this Report, beginning at Page 34)

A majority of the Municipal Division Work Group suggests that the following distinctions may be drawn between "symptoms" and "root causes" of identified problems, when considering the current issues relating to the use and misuse of warrants and bonds in the municipal courts:

1) To the extent that warrants and cash-only bonds are being improperly used as devices to raise revenue, largely divorced from legitimate considerations of public safety, therefore causing undue numbers of warrants to issue and bonds to be set higher than they ought to be, the root cause of the problem is state law that enables municipalities to profit financially from ordinance enforcement activities.

2) To the extent that excessive numbers of warrants issue and cash-only bonds are set in a facially unreasonable manner in the service of a system in which a proper separation of powers is not maintained between the executive and judicial branches of municipal government, and therefore the municipal judiciary is unduly susceptible to pressures to utilize the mechanisms of judicial process to raise revenue, the root causes are state law that enables municipalities to profit financially from ordinance enforcement activities, and judicial selection and retention procedures that expose

[1] Missouri Supreme Court Rule 4-1.7: Conflict of Interest: Current Clients.

the judges and court personnel to undue and improper pressure from the executive and legislative branches of municipal government.

3) To the extent that people cannot easily resolve their warrants because there exists no good way to find out what warrants exist and because municipal courts hold their sessions at inconvenient times and in places not sufficient to the purpose, the root cause is not a deficiency in state law, but rather a failure of competence and organization of certain courts with regard to record-keeping and in maintaining open records and courts which are genuinely accessible to those they serve.

4) To the extent that municipalities are failing to bring those arrested before a judge promptly in order that individualized consideration of the conditions of release may occur, the root cause is not a deficiency in state law, but rather a failure of the competence and organization of certain law enforcement agencies and municipal courts.

5) To the extent that warrants issue and bonds are calculated in a manner likely to collect excessive amounts of costs, beyond those permitted by law, the root cause is not a deficiency in state law, but rather a failure of competence and honesty in the municipal government and its court in assessing unauthorized costs, a failure of auditors to cite the municipalities for having collected such costs, and a failure of appropriate state officers, principally the attorney general, to take swift and decisive action to force offending municipalities to cease and desist.

6) To the extent that duplicative warrants issue and that cash-only bonds actually posted are not promptly and/or properly transmitted to the appropriate court by law enforcement, with correct identification of the person who posted the bond (and his/her contact information), and are not credited to the right cases by the appropriate courts, the root cause is not a deficiency in state law, but rather a failure of competence and organization of certain courts with regard to record-keeping, and in maintaining open records in order to be accountable to those they serve.

7) To the extent that excessive numbers of warrants issue and cash-only bonds are set in a facially unreasonable manner in the service of a system in which some defendants are able to obtain much more favorable treatment than others (or which at the very least creates an appearance that this is occurring) due to practical conflicts of interest caused by the same attorneys serving in multiple roles (*e.g.*, municipal judge, city attorney, city prosecutor, defense counsel) in the same metropolitan area, the root cause is state law, in the form of the Supreme Court Rules constituting the Code of Judicial Conduct and the Rules of Professional Conduct for attorneys, which permit such practical conflicts of interest to exist.

8) Finally, to the extent that matters pertaining to warrants and bonds in some instances are handled by law enforcement and the courts in a manner that is deliberately discriminatory against African-Americans and members of other minority communities, the root cause may still at times be actual racism which, most regrettably, continues to exist in our world in varying degrees. The complete elimination of actual racism is well beyond the power of legislatures and courts. However, a rigorous and continuing attention to resolving the other root causes of the problems in the municipal courts as identified above, implementation of the recommendations in this Report, and a firm insistence that all judges and court personnel conform their official behavior to the high standards set forth in the Code of Judicial Conduct (Missouri Supreme Court Rule 2), should go far toward minimizing such impacts and assuring that our courts treat all who appear before them with proper respect, courtesy, and fairness.

In view of the analysis and conclusions set forth in the full Report, a majority of the Municipal Division Work Group notes the following considerations and offers the following recommendations regarding warrants:

- Municipal court warrants may be issued pre-disposition, usually following a defendant's failure to appear for court, or post-disposition, for probation violations or failures to comply with payment obligations.

- Concern has been expressed from many places that Missouri's municipal courts have not sufficiently protected the constitutional rights of defendants, and that the use of warrants by the municipal courts has been excessive, and extremely detrimental to many persons, particularly those of limited means. Many of the concerns regarding municipal warrants relate to specific conditions in St. Louis County.

- A number of changes to municipal warrant practices have already occurred, due to the adoption of Missouri Supreme Court Rule 37.65, the passage of Senate Bill 5, and reforms made pursuant to federal court litigation involving specific municipalities or adopted by the municipalities on their own initiative.

RECOMMENDATION: That municipal courts and law enforcement agencies maintain accurate and completely updated records with regard to both outstanding warrants and bonds. We further recommend that one aspect of the supervisory responsibility of the presiding circuit judge of each judicial circuit be periodic monitoring to ensure that these duties are performed properly by municipal court personnel. This recommendation is directed to law enforcement agencies and to the municipal prosecuting attorneys as to their responsibilities, and to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri, as to the responsibilities of the judicial branch.

RECOMMENDATION: Many of the observed problems with warrants in St. Louis County may be improved, should municipalities elect to direct their cases to the associate division of the circuit court, which is open on all business days. This option may be particularly helpful to smaller municipalities with very limited staff. We recommend that those municipalities which elect to continue to run their own freestanding municipal courts develop policies and practices which guarantee the prompt arraignment of those arrested upon warrant. The resources to do so must be provided by the municipality. We further recommend that one aspect of the supervisory responsibility of the presiding circuit judge of each judicial circuit be periodic monitoring to ensure that these duties are performed properly by municipal court personnel. This recommendation is directed to law enforcement agencies and to the municipal prosecuting attorneys as to their responsibilities, and to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri, as to the responsibilities of the judicial branch.

RECOMMENDATION: That municipalities in St. Louis County, and municipalities elsewhere in Missouri in which the revenue limitations of Senate Bill 5 appear to have been exceeded, adopt the following approach to older pre-existing warrants. We recommend that municipal cases filed prior to January 1, 2014, be dismissed by the municipal prosecuting attorney, and outstanding warrants in the dismissed cases immediately recalled and cancelled by the municipal court, except in cases where the municipal prosecuting attorney, upon review of each case file, finds that (1) the case would

remain meritorious and viable for prosecution if the defendant should be taken into custody, and (2) that individualized good cause exists to maintain the prosecution as an open case. We further recommend that one aspect of the supervisory responsibility of the presiding circuit judge of each judicial circuit be periodic monitoring to ensure that these duties are performed properly by municipal court personnel. This recommendation is directed to the municipal prosecuting attorneys as to their responsibilities, and to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri, as to the responsibilities of the judicial branch.

RECOMMENDATION: That all municipal prosecuting attorneys undertake a review of all open case files, for the purpose of dismissing any cases, or any specific charges within cases, that are founded solely upon the basis of "failure to appear" to answer some other charge. We further recommend that when a case is dismissed by the municipal prosecuting attorney, the municipal court immediately recall and cancel any existing warrants in that case. This recommendation is directed to the municipal prosecuting attorneys as to their responsibilities, and to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri, as to the responsibilities of the judicial branch.

RECOMMENDATION: That all municipal prosecuting attorneys undertake a review, on at least an annual basis, of all open case files, for the purpose of determining whether there are cases no longer viable for prosecution that should be dismissed, or that should otherwise be dismissed in the interests of justice. We further recommend that when a case is dismissed by the municipal prosecuting attorney, the municipal court immediately recall and cancel any existing warrants in that case. This recommendation is directed to the municipal prosecuting attorneys as to their responsibilities, and to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri, as to the responsibilities of the judicial branch.

In view of the analysis and conclusions set forth in the full Report, a majority of the Municipal Division Work Group notes the following considerations and offers the following recommendations regarding bonds:

- Cash-only bonds may be used in several situations. Recent concerns relating to alleged misuses of "cash-only" bonds are closely related to the issues raised concerning arrest warrants – particularly those concerns regarding the improper use of the municipal justice system to raise revenues, and the often severe consequences of extended detention for those arrested.

- The appropriate use of cash-only bonds is consistent with the Missouri Constitution. *State v. Jackson*, 384 S.W.3d 208 (Mo. banc 2012).

- Certain municipalities have entered into settlements in federal court litigation which have dramatically limited their ability to issue arrest warrants and to use cash-only bonds to secure pre-disposition appearance in court, to enforce the post-disposition obligations of defendants, or even to hold individuals on warrants issued by other municipalities. The Jennings litigation settlement provides an instructive example.

- While litigation settlements such as Jennings are often said to be justified by the holding of the Supreme Court of the United States in *Bearden v. Georgia*, 461 U.S. 660, 72-73 (1983), the

Jennings settlement appears to go much farther than anything required or contemplated by the Supreme Court in *Bearden*.

- Although cash-only bonds may at times be subject to abuse, when properly used they offer significant benefits for both the court system and individual defendants.

RECOMMENDATION: That municipal courts not be precluded from having the ability to issue "cash-only" bonds, when used consistently with the principles of due process and in conjunction with a system which assures that persons arrested upon warrant are promptly brought before a judge for an individualized determination of ability to post bond and other relevant considerations. This recommendation is directed to the Supreme Court of Missouri and to the Missouri General Assembly.

RECOMMENDATION: That all municipal prosecuting attorneys and municipal courts undertake, in a cooperative fashion, a review of all presently outstanding warrants, for the purpose of confirming that the dollar amounts on all cash and surety bonds as currently set are not excessive, in light of all relevant known circumstances. This recommendation is directed to the municipal prosecuting attorneys as to their responsibilities, and to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri, as to the responsibilities of the judicial branch.

ENFORCEABILITY OF MUNICIPAL COURT JUDGMENTS AND REMEDIES FOR NONPAYMENT OF FINES (Part D of this Report, beginning at Page 59)

In view of the analysis and conclusions set forth in the full Report, a majority of the Municipal Division Work Group notes the following considerations and offers the following recommendation regarding enforceability of municipal court judgments and remedies for nonpayment of fines and court costs:

- Recent legal developments, including litigation settlements such as that in Jennings and the passage of Senate Bill 5, have raised serious concerns relating to the legal authority and the practical capability to enforce municipal ordinances and municipal court judgments and orders.

- In a number of municipalities, including Ferguson, several steps have already been taken to improve court practices in regard to basic fairness and due process of law. Senate Bill 5 seeks to institutionalize better practices through a number of mandates which must be observed by municipal courts statewide.

- Nonetheless, even if beneficial reforms are put in place, some sort of effective enforcement mechanisms must remain, to compel actual compliance with municipal court judgments. To fail to retain effective enforcement mechanisms is to make a mockery of the justice system, and to encourage open defiance of both law enforcement and of the courts. The experience of our courts indicates that simply trying to collect court financial obligations in the same manner as ordinary civil judgments is unlikely to result in consistent collections of amounts due, or to provide a meaningful incentive for offenders to comply with the law.

- The attempt to harmonize two provisions of Senate Bill 5 (L. 2015) and the newly amended Missouri Supreme Court Rule 37.65 (effective date July 1, 2015) has created confusion, inconsistency, and the inability to enforce money judgments in many municipal courts.

RECOMMENDATION: That, in order to provide clarity and guidance to municipal courts regarding enforcement of money judgments, the General Assembly repeal the newly enacted language of subsections 479.353(3) and 479.360.1(3), RSMo, or amend those statutes to provide as follows (proposed new language is underlined):

> Subsection 479.353(3), RSMo: "A person shall not be placed in confinement for failure to pay a fine unless such nonpayment violates terms of probation or unless the due process procedures mandated by Missouri Supreme Court Rule 37.65 or its successor rule are strictly followed by the court;"
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> Subsection 479.360.1(3), RSMo: "Defendants are not detained in order to coerce payment of fines and costs unless found to be in contempt after strict compliance by the court with the due process procedures mandated by Missouri Supreme Court Rule 37.65 or its successor rule;"

AUTHORITY OF THE SUPREME COURT OF MISSOURI (Part E of this Report, beginning at Page 69)

In view of the legal analysis set forth in the full Report, a majority of the Municipal Division Work Group offers the following conclusions regarding the authority of the Supreme Court of Missouri:

- Under the Missouri Constitution, the Supreme Court of Missouri does not possess the authority to mandate consolidation of municipal courts.

- Even if the Supreme Court should determine that the Missouri Constitution grants it the authority to mandate consolidation of municipal courts, there are powerful jurisprudential, political, and practical considerations which would counsel against using such authority.

- For these reasons, a majority of this Work Group concludes that decisions regarding consolidation of municipal courts must remain the responsibility of the Missouri General Assembly, and/or of the municipal governments or the voters of the localities directly involved, rather than being made by the Supreme Court of Missouri.

- Furthermore, the Supreme Court of Missouri does not possess the constitutional authority to order a particular municipality to make the election authorized by Missouri Constitution, Article V, § 23, to have its municipal ordinance violation cases heard by an associate circuit judge.

- However, the Supreme Court of Missouri does have broad authority to temporarily transfer another judge (who may be an appellate judge, a circuit judge, an associate circuit judge, or another municipal judge) to hear a particular case, certain dockets, or all cases pending, in a

specific municipal division, "as the administration of justice requires." This authority affords the Supreme Court of Missouri the ability to supplement or even replace judicial personnel when necessary in specific situations.

- Because all powers of municipal governments are derived from the State, the General Assembly could by statute require municipalities of under 400,000 population to make the election provided in Article V, § 23, to have their cases heard by an associate circuit judge; or the General Assembly could require certain municipalities to make this election if certain objective criteria shall have been met; or the General Assembly could require such an election to be made by all cities, towns, or villages of certain classifications.

- Were the General Assembly to require certain municipalities to make the election, it would appear that the associate circuit judge(s) in the affected circuits would then be required to hear and decide the cases within six months, or sooner if so agreed, pursuant to § 479.040, RSMo.

OTHER ISSUES REGARDING MUNICIPAL COURTS (Part F of this Report, beginning at Page 78)

In view of the analysis and conclusions set forth in the full Report, a majority of the Municipal Division Work Group offers the following recommendations regarding the following issues relating to the municipal courts:

1. Elimination of Perverse Financial Incentives

RECOMMENDATION: That the most sure way to thoroughly and forever eliminate the perverse financial incentives affecting the municipal courts is to direct all fines and forfeitures received on account of municipal ordinance violations to the school funds of the state, as the Missouri Constitution already requires with regard to state law violations. This recommendation is directed to the Missouri General Assembly.

RECOMMENDATION: That court costs, fees, and surcharges be kept at a level sufficient, but no greater than, that required to offset the actual costs of an appropriate proportion of routine court operations, but not the other expenses of municipal government, including without limitation expenses associated with law enforcement and prosecution. This recommendation is directed to the Missouri General Assembly and to the Supreme Court of Missouri.

RECOMMENDATION: That implementing these salutary principles also requires that the General Assembly grant to municipalities sufficient taxing authority to cover the reasonable costs of law enforcement. This recommendation is directed to the Missouri General Assembly.

2. Providing for Adequate Supervision of Municipal Courts in St. Louis County

RECOMMENDATION: That the Circuit Court Budget Committee of the Supreme Court of Missouri authorize, and the General Assembly appropriate funds for, at least two full-time professional staff positions in the Circuit Court of St. Louis County, for the purpose of providing sufficient staff to assist the Presiding Judge of the Twenty-First Judicial Circuit in supervising the

municipal courts in that Circuit. These staff positions would be intended to provide personnel who would be able to make frequent scheduled and unannounced visits to the municipal courts, to review their records and practices with the municipal judges and clerks, to observe the courts in session, to evaluate whether the municipal courts are complying with Missouri statutes and supreme court rules, and to report any observed deficiencies to the Presiding Circuit Judge for individualized attention as required.

3. Elimination of Unauthorized and Unnecessary Costs, Fees, and Surcharges

RECOMMENDATION: That firm and substantial steps, including periodic auditing and consistent municipal judge and municipal clerk education programming, must be implemented to ensure that municipal courts understand and comply with their obligations to collect only those costs, fees, and surcharges which are authorized by law, and that they further understand that the former practice of "dismissal upon payment of costs" is unlawful, and has been so for some time. We further recommend that one aspect of the supervisory responsibility of the presiding circuit judge of each judicial circuit be periodic monitoring to ensure that these duties are performed properly by municipal court personnel. This recommendation is directed to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri.

RECOMMENDATION: That, as the practice of surcharging individual offenders for the opportunity to participate in community service programs is not clearly authorized by state law, this practice be ended immediately. Charging offenders for participation in community service defeats a major purpose of encouraging courts to grant probation with community service in lieu of fines, diminishes the incentive for participation in community service programs, and poses a substantial obstacle to participation in such programs by younger and lower-income persons. We further recommend that one aspect of the supervisory responsibility of the presiding circuit judge of each judicial circuit be periodic monitoring to ensure that these duties are performed properly by municipal court personnel. This recommendation is directed to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri.

SUPPLEMENTAL RECOMMENDATION: That, should the General Assembly in the future choose to authorize the practice of surcharging offenders for participation in community service programs, judges be strongly encouraged to consider exempting offenders from paying all or part of the costs of such community service surcharges in appropriate circumstances, as required by §§ 559.604 or 549.525.2, RSMo, as applicable. We further recommend that, should such community service surcharges be authorized in the future, judges advise offenders of the opportunity to request individualized consideration as to whether they should be exempt from paying all or part of such community service surcharges, based on the factors set forth in §§ 559.604 or 549.525.2, RSMo. This recommendation is directed to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri.

RECOMMENDATION: Probation should not be made conditional upon the payment of money, and no person should be denied probation because of inability to pay authorized probation surcharges. We recommend that where a city has elected to utilize a private probation supervision service as authorized by § 559.607, RSMo, or a supervision and rehabilitation service in the City of Kansas City as authorized by § 549.525, RSMo, and offenders are required to pay for the costs of this supervision, there be no additional surcharge required for participation in community service programs. We further recommend that judges be strongly encouraged to consider exempting

offenders from paying all or part of the costs of private probation supervision in appropriate circumstances, as required by §§ 559.604 or 549.525.2, RSMo, as applicable. We further recommend that judges advise offenders of the opportunity to request individualized consideration as to whether they should be exempt from paying all or part of such probation supervision costs, based on the factors set forth in §§ 559.604 or 549.525.2, RSMo. We further recommend that one aspect of the supervisory responsibility of the presiding circuit judge of each judicial circuit be periodic monitoring to ensure that these duties are performed properly by municipal court personnel. This recommendation is directed to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri.

4. Assuring Open and Orderly Court Proceedings and Court Records

RECOMMENDATION: That municipal courts comply with their obligations regarding complete and accurate record-keeping. We further recommend that municipal judge and municipal clerk educational programs emphasize the obligations of these courts to comply with all Supreme Court operating rules regarding maintenance of and public access to court records, including without limitation those rules regarding maintenance of complete and accurate public and confidential case indices; maintenance of complete and accurate records with regard to outstanding warrants; and maintenance of complete and accurate records with regard to bonds which have been posted in the court. We further recommend that one aspect of the supervisory responsibility of the presiding circuit judge of each judicial circuit be periodic monitoring to ensure that these duties are performed properly by municipal court personnel. This recommendation is directed to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri.

RECOMMENDATION: That municipal courts comply with their obligations under the Missouri Constitution, state law, and Supreme Court rules to provide open records to the public, including members of the news media, upon proper request. We further recommend that municipal judge and municipal clerk educational programs emphasize the obligations of these courts to provide public court records to the public upon request, in accordance with state law and Supreme Court Operating Rules. We further recommend that one aspect of the supervisory responsibility of the presiding circuit judge of each judicial circuit be periodic monitoring to ensure that these duties are performed properly by municipal court personnel. This recommendation is directed to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri.

RECOMMENDATION: That municipal courts comply with their obligations under the Constitution, state law, and Supreme Court rules to maintain open courts. Offices of the clerk of each court must be open during regular business hours, and court proceedings must be conducted in facilities sufficient to accommodate the numbers of persons expected to appear on a typical docket. Moreover, court proceedings must be open to the public. Members of the press and of the public, including children accompanying their caregivers who may have business before the court, must not be excluded from court proceedings except for good cause shown or pursuant to a specific provision of law, as found by the judge in a specific instance. We further recommend that one aspect of the supervisory responsibility of the presiding circuit judge of each judicial circuit be periodic monitoring to ensure that these duties are performed properly by municipal court personnel. We further recommend that municipal judge and municipal clerk educational programs should emphasize the obligations of these courts to comply with all open courts obligations. This recommendation is directed to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri.

RECOMMENDATION: That presiding circuit judges provide sufficient monitoring and supervision of municipal courts to assure compliance with all constitutional, statutory, and Supreme Court rule obligations with regard to open records and open courts, and with regard to complete and accurate court record-keeping obligations. Meaningful disciplinary sanctions must be available and actually enforced, in the cases of judges and courts which do not make reasonable and good-faith efforts to comply with the Missouri Constitution, state laws, and Supreme Court rules with regard to openness of court proceedings and court records. This recommendation is directed to the presiding circuit judges and to the Supreme Court of Missouri.

RECOMMENDATION: That municipal courts must make reasonable efforts to communicate important information to the public, including information about the court's office hours, times and places where court sessions are held, procedures for disposing of citations which can be addressed through a "violations bureau" without appearance in court, the rights of persons appearing in municipal court, and any rules or policies which are specific to an individual court. These communications may take one or more forms, designed in a fashion calculated to be readily accessible to and understandable by the public, including announcements from the bench, information posted in the office of the court and other appropriate places, on-line information at publicly accessible web sites, and brochures and handout information available at the court. We further recommend that one aspect of the supervisory responsibility of the presiding circuit judge of each judicial circuit be periodic monitoring to ensure that these duties are performed properly by municipal court personnel. This recommendation is directed to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri.

RECOMMENDATION: That, in order that critical court information may be more convenient and accessible to the general public and to attorneys, municipal courts be required to actively pursue court automation in accordance with the standards developed by the Missouri Court Automation Committee and the State Judicial Records Committee, leading to the free on-line accessibility of information regarding pending cases, outstanding warrants, and scheduled court dockets. We further recommend that one aspect of the supervisory responsibility of the presiding circuit judge of each judicial circuit be periodic monitoring to ensure that these duties are performed properly by municipal court personnel. This recommendation is directed to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri.

RECOMMENDATION: That, for the convenience of the public and in order to reduce the numbers of persons required to appear at busy and crowded dockets, municipal courts be required to implement court automation strategies which will enable persons with disposed ordinance violation cases to make scheduled payments on-line without personal appearance at the court, through the Supreme Court of Missouri's "Pay By Web" technology or an equivalent functionality. We further recommend that one aspect of the supervisory responsibility of the presiding circuit judge of each judicial circuit be periodic monitoring to ensure that these duties are performed properly by municipal court personnel. This recommendation is directed to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri.

RECOMMENDATION: That, for the convenience of the public and in order to reduce the numbers of persons required to appear at busy and crowded dockets, municipal courts be required to implement court automation strategies which will enable persons with pending ordinance violation cases which may be disposed through a "violations bureau" without personal appearance,

to make payment of the fine and costs due on-line without personal appearance at the court. We further recommend that one aspect of the supervisory responsibility of the presiding circuit judge of each judicial circuit be periodic monitoring to ensure that these duties are performed properly by municipal court personnel. This recommendation is directed to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri.

RECOMMENDATION: That the Supreme Court of Missouri cause further study, including an analysis of the fiscal costs, to be made concerning the policy suggestion that all municipal court proceedings be conducted "on the record," through the utilization of a live court reporter or electronic sound recording, in order to encourage proper behavior by judges, court personnel, attorneys, law enforcement, persons appearing before the court, and the general public in attendance, while also facilitating appropriate discipline should ethics violations occur. This recommendation is directed to the Supreme Court of Missouri.

5. Establishing and Maintaining the Principle of Separation of Powers in Judicial Selection.

FIVE MEMBERS OF THE WORK GROUP JOIN IN THE FOLLOWING RECOMMENDATION: That municipalities in which the Senate Bill 5 revenue limitations and/or the previous revenue limitations under § 302.341.2, RSMo, as it existed prior to the effective date of Senate Bill 5, appear to have been exceeded, or in which other serious concerns have been identified that may substantially undermine public confidence in the independence of the municipal court:

> (1) Appoint their municipal judges under a merit selection system, subject to a retention vote similar to that employed under the Non-Partisan Court Plan in the state courts; or
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> (2) Provide that their municipal judges be subject to periodic direct election, thereby severing the direct connection between the mayor/council and the judge; or
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> (3) If eligible to have their municipal cases heard by an associate circuit judge, elect to utilize that option, thereby guaranteeing that the judge hearing their cases would have the same degree of judicial independence as that possessed by all Article V state court judges.

We further recommend that, in those cities in which revenue limitations set by state law have been exceeded, as determined by the municipality's own reporting or by subsequent audit, the General Assembly consider enacting a requirement that municipal judges be selected pursuant to one of these methods, rather than by appointment and reappointment by the governing body of the municipality. This recommendation is directed to the municipal governments which elect to operate freestanding municipal courts, and to the General Assembly.

THREE MEMBERS OF THE WORK GROUP JOIN IN THE FOLLOWING ALTERNATIVE RECOMMENDATION: That, with regard to all Missouri municipalities which elect to operate a freestanding municipal court, the General Assembly enact a requirement that municipal judges be selected pursuant to one of the following methods, rather than by appointment and reappointment by the governing body of the municipality:

> (1) Appoint their municipal judges under a merit selection system, subject to a retention vote similar to that employed under the Non-Partisan Court Plan in the state courts; or

(2) Provide that their municipal judges be subject to periodic direct election, thereby severing the direct connection between the mayor/council and the judge; or

(3) If eligible to have their municipal cases heard by an associate circuit judge, elect to utilize that option, thereby guaranteeing that the judge hearing their cases would have the same degree of judicial independence as that possessed by all Article V state court judges.

This alternative recommendation is directed to the Missouri General Assembly.[2]

The remaining recommendations in this section represent the opinion of the Municipal Division Work Group:

RECOMMENDATION: That clerks of freestanding municipal courts be subject to appointment, supervision, and discipline either by the municipal judge, or by the Circuit Clerk of the county in which the municipality (or the greater part thereof) is located. We further recommend that, in order to be consistent with the principle of separation of powers, clerks of municipal court not be subject to appointment, supervision, and discipline by officers or employees of the executive branch. This recommendation is directed to the municipal governments which elect to operate freestanding municipal courts, to the General Assembly, and to the Supreme Court of Missouri.

SUPPLEMENTAL RECOMMENDATION: A straightforward way for many smaller municipalities, including those in St. Louis County, to address several of the issues raised throughout this Report, including those relating to the independence of the judiciary, would be to transfer their municipal dockets to the associate circuit judge division of the circuit court, as many cities around the State have already done. This supplemental recommendation is directed to the municipal governments which elect to operate freestanding municipal courts.

6. Improvement of Rules and Procedures Regarding Trial *de Novo*.

RECOMMENDATION: That a set time be given for the municipal division to certify its record to the circuit court, upon the filing of a request for trial *de novo*. The present rule simply provides that the time to transfer a case record is "promptly." A more definite time would be desirable, in order that the matter can be resolved in a timely fashion. A rule requiring the record to be transferred within thirty days may be reasonable. This recommendation is directed to the Supreme Court of Missouri.

RECOMMENDATION: That, when a case record is certified to the circuit court upon filing of a request for trial *de novo*, municipal divisions be required to transfer all funds received in connection with the case, including any bonds, along with the record. This is in accordance with the principle that once a case is transferred for trial *de novo*, it becomes a circuit court case for all purposes, and all matters connected with the case should be sent to the circuit court. This recommendation is directed to the Supreme Court of Missouri.

[2] The Honorable Todd Thornhill abstained from participation in the vote as to the majority recommendation and alternative recommendation.

RECOMMENDATION: Confusion results when more than one court purports to act regarding the same case. We recommend that it be made clear that, once a certification has been filed and the case has been transferred to the circuit court, the municipal court has no further jurisdiction or power to act on that case unless and until the case is remanded back to that municipal court. This recommendation is directed to the Supreme Court of Missouri.

RECOMMENDATION: That municipal judge education programs stress that if an application for trial *de novo* or a jury trial request is made, it cannot be denied or the request be refused, for the reason that the defendant did not post a costs deposit for a jury. The law does not allow a rule that conditions a jury trial request upon the payment of a fee. *See Parrett v. Integon Life Insurance*, 590 S.W.2d 411 (Mo. App. W.D. 1979). Moreover, it should be clear that the municipal court shall accept a request for trial *de novo* and shall transfer the file upon receiving such request. "[T]he question of whether or not petitioner . . . had a right to appeal is one to be decided by the circuit court on appeal. The municipal court has no function in determining this question. The processing of the notice of appeal is a mere ministerial duty and no discretion concerning such appeal is vested in the municipal court or any judge thereof." *State v. Sims*, 654 S.W.2d 325 (Mo. App. W.D. 1983) (*quoting State ex rel. House v. White*, 429 S.W.2d 277, 280-91 (Mo. App. 1968)); *see also State ex rel. Streeter v. Mauer*, 985 S.W.2d 954, 957-58 (Mo. App. W.D. 1999) (earlier payment of costs does not bar trial *de novo* if SIS probation is subsequently revoked). This recommendation is directed to the Supreme Court of Missouri.

RECOMMENDATION: Conditioning the right to trial *de novo* upon the prepayment of a fee of $30.00 runs contrary to the general practice in both criminal and municipal court, in which costs and fees only become payable by the defendant after a finding of guilt. The trial *de novo* fee, currently $30.00, is a fee paid for the "privilege" of having one's case heard in the circuit court – the first "court of record" where the case can be heard – prior to any finding of guilt by that court. Moreover, for persons of limited means, this fee can be an obstacle in the way of obtaining trial *de novo* review. We recommend that the General Assembly consider repeal of the statutory authority for prepayment of a trial *de novo* fee. This fee could remain in place as a court cost which would be assessed by the circuit court, upon a plea of guilty or finding of guilt in that court. *See* section 479.260, RSMo and Supreme Court Operating Rule 21.01(a)(5). This recommendation is directed to the General Assembly.

A separate opinion addressing several of the issues considered throughout this Report was submitted by Kimberly Norwood.

SUPREME COURT OF MISSOURI
MUNICIPAL DIVISION WORK GROUP

Report to the Supreme Court of Missouri
Submitted March 1, 2016.

A. INTRODUCTION

"Most Missourians form their first, and most lasting, impressions of the integrity, fairness, and efficiency of the judicial branch of government by their encounter with a municipal court. If municipal courts are not seen as courts, that is, as institutions committed to justice first and foremost, then the people's willingness to trust the judicial system at every level is diminished, and the judiciary's primary claim to legitimacy – that it seeks justice and fairness with integrity – is weakened."

– Chief Justice Mary Russell

The Work Group that submits this report might not exist but for tragic events in Ferguson, Missouri, surrounding the death of Michael Brown. In the scrutiny of Ferguson's municipal policing and municipal court system that followed, questions arose about the operation of municipal courts generally in St. Louis County. In an effort to consider the steps that were legally available to the Supreme Court of Missouri under current law to address the St. Louis County issues, the Court created the Work Group.

The Supreme Court of Missouri constituted this Work Group, with a charge to "assist the Court by reviewing all matters relevant to practice in the municipal divisions of the circuit court and making recommendations concerning any appropriate changes to court rules or practices that can be implemented by the Court as well as any suggestions that may require legislation or action by other entities." Order of the Supreme Court of Missouri, May 14, 2015.

The analysis and recommendations contained in this Report represent the majority position of the members of the Municipal Division Work Group. On some issues, the Work Group found itself in unanimous agreement. However, it was also understood from the beginning that many of the issues addressed are controversial and complex in nature, and that complete agreement as to all issues was not to be expected. All members of the Work Group have been encouraged to write separately to offer minority or individual opinions, at their discretion. All such written opinions which were submitted are included as appendices to this Report.

Our first step was to assess the accuracy of complaints of a failure of certain municipal courts to perform as independent judicial bodies. This task was made easier by the work of independent groups formed to consider specifically the Ferguson issues, as well as the general operation of the municipal courts in St. Louis County. Further, the press has provided often helpful and continuing scrutiny of the operation of municipal courts in St. Louis County.

The Supreme Court's general superintending power over all courts necessarily made complaints about some municipal courts the reason for concern about all municipal courts. The Court appointed the Work Group to conduct a broad assessment of the operation of municipal courts throughout the state in addition to consideration of issues raised specifically with regard to St. Louis County municipal courts. Indeed, the Court has not only a legal right but also a constitutional duty to demand that courts at every level operate with integrity and with paramount concern both for the enforcement of the rule of law and the interface of that enforcement with the community.

Finally, the Court sought an independent assessment of its authority under current law to address the problems the Work Group and other independent groups had identified. No matter what other groups have determined would improve municipal courts generally, the Supreme Court is not only the arbiter of the meaning of the law, but must itself operate under the controls of the law. The Court has no political agenda. It is agnostic on how local governments are structured. That is a matter for constitutional and legislative attention. The Court's concern is with courts, the operation of courts, and ultimately with assuring all who come before courts that actual justice is the product of the process.

Given the legal limitations placed on the Court, the Supreme Court ultimately limited the review and focus of the Work Group to these four primary areas: (1) the propriety of judges, prosecutors and staff serving in different capacities in multiple municipal divisions; (2) consolidation of municipal divisions, including any authority of the Supreme Court to mandate consolidation; (3) use of warrants, process for setting bonds and time of incarceration; and (4) enforceability of judgments and remedies for nonpayment.

As noted, the Working Group also had access to numerous reports prepared by others (*see* list of Reference Materials, cited at the end of this Report). None of these organizations, whose well-intentioned efforts are not challenged here and whose ideas and observations proved useful, were faced with the need to measure the need for reform against the constitutional constraints that limit the Supreme Court's range of response. Were the Work Group charged with inventing a municipal court system from scratch, and operating in a legal vacuum unencumbered by constitutional provisions and statutory directives, the Work Group might well have developed a different set of recommendations and observations. But the more idealistic and far-reaching of the recommendations of the various citizens' groups that have studied the St. Louis County municipal court situation have generally offered their suggested solutions freed from the limits imposed by existing law. Indeed, many of the solutions these other groups propose are political solutions, not legal ones. And to the extent that their efforts create a political catalyst to alter the current governing legal documents, different alternatives for the Supreme Court may become possible.

But for now: The Missouri Constitution establishes a judiciary as a co-equal branch of government, serving in its limited sphere alongside the legislative and executive branches. MO. CONST., Article II, § 1; Article V, § 23. The Constitution does not create municipal courts. Nor does it demand them. The Constitution certainly does not permit the Supreme Court to establish or abolish municipal courts. Rather, Article V, § 23 permits, but does not require, municipalities to establish municipal courts. Inherent in the authority to create a municipal court is the power to abolish a municipal court. Section 478.155, RSMo. But whether a municipal court is established or abolished, the Supreme Court has no say.

This is not to say that the Supreme Court is without authority over a municipal court, however. Supreme Court Rule 37.04 and § 479.020.5, RSMo, both vest control over the municipal court in the circuit court. "The presiding judge of the circuit shall have general administrative authority over the judges and court personnel of the municipal divisions within the circuit." *Id.* Once the matter comes under the purview of a circuit court, the Supreme Court becomes ultimately responsible. "The supreme court shall have general superintending control over all courts and tribunals." MO. CONST., Art. V, § 4. It is this authority that permits the existence of this Working Group. And it is this authority that validates the Supreme Court's dedication of considerable resources to assess the current state of Missouri's municipal courts and to consider what it is authorized to do under the Constitution.

Much of the current structure of Missouri municipal courts is determined by legislative acts. See, generally Chapter 479, RSMo. In passing laws to govern municipal courts, there were basically two models for municipal courts followed nationally for the General Assembly to emulate. In terms that are more descriptive than legally refined, the first model is the "court of record" model; the second is a "fine collection" model. But whichever model is followed, the court that is established and the procedures that are followed are those of a court – that is, a neutral decisional body performing judicial functions in a manner that seeks justice first.

In some states, municipal courts are courts of record and review of decisions of such municipal courts is by appeal. Missouri municipal courts follow the fine collection only model. A Missouri municipal court is *not* a court of record unless a person accused of violating a municipal ordinance demands a jury trial. Absent a jury trial, the decisions of a Missouri municipal court are theoretically without legal consequence if a person found to have violated a municipal ordinance does not wish to be bound by the municipal court's decision.[3] He or she may seek review of a municipal court decision not by appeal, but by a request for *de novo* review in an associate division of the circuit court. Section 479.200.2, RSMo. *De novo* means just that: beginning anew—starting over from scratch. Thus, when *de novo* review occurs, it is as though the municipal court decision did not exist at all when the circuit court hears the case.

This *de novo* review has a cost, however. There is a filing fee of $30 to access *de novo* review. To an impoverished person this sum can make *de novo* an impossibility. And even where the filing fee is not an issue, travel to a circuit court and the investment of time to have the case decided anew might not be practically possible and/or economically worthwhile. Thus, it is not completely accurate to say that the decision of a municipal court has no consequence. Economic and practical considerations may make the municipal court decision consequential, even if the law contemplates a theoretical lack of consequences if review is sought.

These practical/economic considerations often escape the attention of those who know what the law allows, even if what the law allows is not economically/practically available to a particular litigant. And when a court believes that no legal consequences attach to its decision because of *de novo* review, the potential for two profoundly pernicious actual consequences may arise in a municipal court. First, if a court believes that its decisions do not really matter, it may act as though it is not a court at all. The important courtesies, formalities, and appearances that true courts strive to provide as evidence of a concern for justice, are easily abandoned if legal consequences are

[3] If the municipal judge is not an attorney, even a guilty plea in municipal court can be reviewed through the trial *de novo* process. *See* § 479.200.1, RSMo.

not a product the proceedings. Second, a court that does not see itself as a court providing legal consequences may turn itself into nothing more than a fine collection bureau – and a rude, impersonal and uncaring collection bureau at that.

A court that loses sight of its "court" function and comes to see itself only as a fine collection bureau can easily begin to define its primary purpose as producing revenue for the city. A city that finds itself limited in its ability to tax, failing in its ability to attract businesses to produce revenues, and otherwise seeing its economic fortunes slip away, can demand that its police department enforce the laws in ways that generate revenue. Under these circumstances, the citations written by the police for municipal ordinance violations increase and make their way into a municipal court. The prosecutor appointed and paid by the city may have no incentive to dismiss unfounded, frivolous or other defective citations. The court is run by a judge appointed by the city council, subject to review by a city council that knows that its city needs revenue, and subject to reappointment periodically by the same city council. All of the economic incentives are perversely aligned against a court acting as a court and thus aligned against both integrity and justice when (a) the police department is charged with producing revenue and writes as many citations as it can, (b) the prosecutor has no incentive to act independently, (c) the municipal court judge is measured for continued employment by the revenue actually produced through the imposition of fines in the municipal court, and (d) the municipal court judge fully understands that anyone offended by his/her decisions gets *de novo* review. And these incentives have little counterbalance in areas where the citizenry is itself impoverished, where private lawyers cannot be hired to challenge the system on behalf of their clients, and where outside scrutiny may only occur as a result of terrible tragedy.

Recent news reports indicate that the economic incentives are in fact driving some municipal court systems: With the advent of Senate Bill 5's limitations on revenue generated by traffic tickets, some municipalities have seen dramatic increases in citations for housing violations. One conclusion that can be drawn from this is that certain cities simply cannot afford a loss of the revenue generated by their municipal courts.

Add to this the sheer volume of cases, the lack of full-time accessibility to court administrative personal to pay fines except on court nights, and the need to funnel large numbers of persons through a docket on a single night of the week, and the result is often an objective appearance that what is happening is not justice at all, but something far less honorable.

It is not too much to assert that municipal court is where many Missourians form their first and most lasting impressions of the justice system. Missouri's municipal courts handle a tremendous percentage of the total volume of the State's court cases – 1,628,731 cases out of 2,624,279 cases filed in all levels of the Missouri state judiciary, or over 62% of all cases in fiscal year 2014, and 1,442,089 cases out of 2,370,363 cases filed in all levels of the Missouri state judiciary, or nearly 61% of all cases in fiscal year 2015. They are the places where many people are most likely to interact on a personal level with the judicial branch of government. Those interactions have real and substantial impacts, both upon public safety in our communities and upon the lives of individual citizens.

The Work Group conducted three public hearings across the state, to determine the level of concern with the operation of municipal courts. Neither in Springfield nor in Kansas City did these public hearings produce any evidence of dissatisfaction with the municipal courts or evidence that the municipal courts operating outside St. Louis County had fallen into the revenue-producing mode previously described. Indeed, the lack of expressions of concern of the citizenry, as well as the

Work Group's independent inquiries, showed that most municipal courts in Missouri seek justice first and provide reasonable efficiency in their operations.

The public hearing conducted in St. Louis, however, stood in stark contrast. A much larger crowd included numerous citizens who took time from their daily lives to share their concerns and complaints regarding the functioning of the municipal court system, with a clear focus on problems in St. Louis County. The testimony from this hearing served to reinforce many of the observations and concerns noted in the various reports we have reviewed, cited below in the Reference Materials section. The evidence we have received to date suggests that the most serious concerns, operational deficiencies, and resulting loss of public confidence in Missouri's municipal court system, are largely limited to certain municipal courts in St. Louis County.

The American justice system is based upon the ideal of the rule of law. In order for the American justice system to work as intended, at least two basic preconditions must exist. The people must respect and honor the law, law enforcement, and the courts; and the law itself, law enforcement, and the courts must be genuinely worthy of the people's respect and honor.[4] This is not a chicken-and-egg problem, concerning which one might ask: "So, which of these problems should we address first?" Rather, there exists a continuing and urgent necessity to address both of these preconditions, at all times.

At this time, in much of St. Louis County, it appears that neither of these preconditions exists in sufficient measure for the municipal justice system to fully accomplish its high and honorable purposes, as intended.

Our conclusion that the most serious problems are mostly limited to one local area in no way minimizes the importance of these issues. The St. Louis region is home to roughly one-third of our State's people, and the abuses and poor practices in some of the St. Louis area municipal courts have been well-documented and thoroughly substantiated in many cases. Whether serious deficiencies in the courts are found to be widespread or only isolated, and whether they occur in urban, suburban, or rural communities, justice demands that addressing these concerns must be a high priority for policymakers and for the courts themselves. In addition, correction of the deficiencies in this region may serve as a model in other areas of the state where similar problems are identified.

Each of the four areas of concern the Supreme Court asked the Work Group to address is a manifestation of the potential for economic interests of cities to subvert the justice function of a municipal court. For example, removing judicial officers in St. Louis County from the control of any single city would, by extension, also remove them from the need to respond to a city's revenue needs. Curbing abuses in warrant practice would likewise remove a tool for revenue production by a particular court. Concerns that lawyers serving as municipal judges in one court, prosecutors in another and counsel for defendants in yet another arise from fears that the checks and balances that judges/counsel acting independently for a client or court are lost when these multiple roles decrease independence and/or increase chances for favoritism.

[4] This observation is not intended to disregard the different roles and responsibilities of the courts and law enforcement, or the reality that they may at times find themselves at odds with one another. The observation is intended to relate to public perception, which may not always make such distinctions.

Thus, the major focus of the Work Group has been to consider ways to untangle the misaligned economic incentives that now exist as a result of the controlling law, while remaining within the confines of that controlling law.

In sum, our recommendations proceed from the belief that if the economic incentives for courts to abandon their role as courts are removed, some of the more far-reaching recommendations of the other groups may not be necessary. We have found it appropriate for this Work Group to make recommendations for statutory and court rule changes of statewide applicability in at least two situations: (a) where we identify problem areas, if any, that the municipal courts of the entire state presently need to address; and (b) where we identify issues with statutes and rules of statewide applicability that have led to (or at least permitted) the recognized problems in the St. Louis area, and could still lead to similar problems elsewhere.

Yet we also have learned that, to the extent specific problems with municipal courts in the St. Louis region are recognized to be a result of certain courts in that area failing to comply with existing law, or failing to follow recognized best practices, then these must be considered as problems of supervision and/or governance that should be addressed locally, without the necessity of disturbing municipal courts in other parts of the State where such problems do not now exist. We must take care that, in seeking to fix serious issues which are confined to one or more local areas, we do not bring about new harm via the unintended consequences of causing new problems in other places.

In making our recommendations – some of which are directed to the Supreme Court, some to local circuit courts, some to the municipal courts themselves, some to the General Assembly, and some to local governments – we do not wish in any way to overlook, or to minimize, the urgent necessity for citizens in their own communities to play an active and constant role in paying attention to their own local governments, in working toward improvements of the system, and in demanding that the municipal courts in their communities live up to the highest standards of quality and ideals of justice.

Municipal governments, like all governments in the American constitutional system, ultimately belong to the people, and are subject to the will of the people, from whom all power and authority derive. The Missouri Constitution, Article I, § 1 provides:

> That all political power is vested in and derived from the people; that all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

The will of the people is expressed by and through the voters. Municipalities are operated by the people who are chosen by the people who take the trouble to register to vote and then to vote on a regular and consistent basis.

There are things which the Missouri General Assembly and/or the Supreme Court of Missouri may be able to do to create a municipal court environment less susceptible to corruption and abuse, and hopefully, to help the municipal court system to function better on behalf of those it serves. But the ultimate responsibility for the working policies and day-to-day operational practices adopted by any given municipal court must always remain with the voters of that municipality, who have the power to choose their elected officials, to express their desires to the officials chosen, and

to remove those officials whose performance does not meet their expectations. No one else can do this for the voters, and no one else should have the ability to do so, lest the fundamental principle of self-government be lost. In the long run, the voters cannot, and must not, abdicate their own non-delegable responsibilities for the well-being of their own communities to others.

B. CONFLICTS OF INTEREST

The Supreme Court of Missouri charged this Work Group with providing an analysis of the "[p]ropriety of judges, prosecutors and staff serving in different capacities in multiple municipal divisions." To that end, since receiving the charge, this group has evaluated statutory authority, existing Supreme Court rules, reports from community members and stakeholders, written comments from the public, and testimony gathered at public hearings, to help in formulating recommendations supported by the majority of this Work Group.

This Work Group paid particular attention to the purported conflict of interest that occurs when attorneys wear multiple "hats" in multiple municipal courts located within the same county. This role shifting by attorneys, from municipal court judge to municipal court prosecutor to municipal court defense attorney, has seemed to be a particularly important issue to individuals on all sides of the conversations regarding municipal court reform in Missouri.

As this Work Group read and discussed the many reports provided to us about the St. Louis County municipal court system, the concern about conflicts of interest was a common refrain.[5] The topic also came up in the public hearings, held in Springfield on September 25, 2015, in St. Louis on November 12, 2015, and in Kansas City on December 4, 2015. The St. Louis hearing had the largest number of attendees and the most individuals and stakeholders to comment on conflicts of interest.[6] The matter was put squarely on the podium by the citizens of St. Louis, both by those who felt there was a conflict of interest in attorneys serving in multiple roles and by those who did not.[7]

Testimony related to this issue in both the Springfield and Kansas City hearings was presented by individuals representing the Missouri Association of Prosecuting Attorneys, their position being that municipal court prosecutors should be under a statewide prohibition from serving as municipal judges or as defense attorneys in municipal or state criminal proceedings.[8]

The Work Group was also provided with letters from individuals who serve or have served as municipal court judges, prosecutors, and defense attorneys.[9] These individuals, for the most part, felt that their multiple roles added to the integrity and professionalism of the municipal court

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[5] *See* reports from Better Together St. Louis, The Ferguson Commission, The National Center for State Courts, and the Advisory Committee of the Supreme Court of Missouri, cited in the "Reference Materials" section of this Report.

[6] *See* transcript of testimony of November 12, 2015 St. Louis public hearing.

[7] *Id.*

[8] *See* transcript of testimony of September 25, 2015 Springfield public hearing and December 4, 2015 Kansas City public hearing. This Work Group had the opportunity to tour the Kansas City and Springfield Municipal Courts. Both Judge Todd Thornhill, Chief Judge of the Springfield Municipal Courts and Mayor Sly James, along with the Presiding Judge Anne J. LaBella, opened up the doors of their respective municipal courts to this Work Group. Both of these municipal court systems appear in form and function to more closely resemble the state circuit courts of the Missouri judiciary and appear to provide citizens with what seems to be a more fair and legitimate court experience. In those courts, there are dedicated full-time judges, prosecutors, and defense attorneys. *See* each court's website, found at http://kcmo.gov/court/ and http://www.springfieldmo.gov/312/Municipal-Court .

[9] *See* letters received by the Supreme Court of Missouri in response to a call for public comment on the municipal court system in Missouri.

system, as opposed to detracting from it or creating any impropriety or conflicts of interest.[10] We also saw the topic covered in the news media, for instance, explored in detail by the St. Louis Post-Dispatch in a series of articles by Jennifer S. Mann, Jeremy Kohler, and Stephen Deere. This series focused on attorneys who represent not only municipalities but who also serve as judges, defense attorneys and prosecutors in neighboring municipalities.[11] This Work Group proceeded to address the issue by first looking at judicial officers who serve in multiple roles and then by turning to attorneys who do the same.

Municipal Judges Serving in Multiple Roles

Article V of the Missouri Constitution provides for the selection of municipal court judges.[12] "The selection, tenure and compensation of such judges and such personnel shall be as provided by law, or in cities having a charter form of government as provided by such charter."[13] Further, "[a] municipal judge may be a part-time judge except where prohibited by ordinance or charter of the municipality."[14] A municipal court judge may serve in a judicial capacity in more than one municipality, barring any municipal ordinances against such.[15] And indeed, it is not unusual to find a municipal court judge serving in multiple municipalities.[16]

But the question this Work Group sought to answer was, is there a conflict when that judge also serves in the role of prosecutor or defense attorney in another municipality within the same county, recognizing that sometimes the municipalities are only a matter of steps apart? After much discussion, the majority of the Work Group came to the conclusion that while there was not a technical conflict of interest under the existing rules, there is, at the very least, a strong appearance of impropriety; and as such, these arrangements may at times violate the spirit of the Code of Judicial Conduct. Moreover, because the opportunity for, and public perception of, influence-peddling and corruption exists when the same attorneys serve in multiple legal roles in different municipal courts within the same county, these practices tend to erode the public's confidence in the

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[10] *Id.*

[11] *See* Jennifer S. Mann et al. , "A Web of Lawyers Play Different Roles in Different Courts," ST. LOUIS POST-DISPATCH, March 29, 2015, http://www.stltoday.com/news/local/crime-and-courts/a-web-of-lawyers-play-different-roles-in-different-courts/article_b61728d1-09b0-567f-9ff4-919cf4e34649.html; Jeremy Kohler, "Municipal Mercenaries Often Thrive Off of Contrary Roles," ST. LOUIS POST-DISPATCH, March 28, 2015, http://www.stltoday.com/news/local/crime-and-courts/municipal-mercenaries-often-thrive-off-of-contrary-roles/article_46094377-d311-53ee-9776-7110e98fd03f.html; Jennifer Mann, "Judges And Prosecutors Switch Roles While Also Defending Clients," ST. LOUIS POST-DISPATCH, March 28, 2015, http://www.stltoday.com/news/local/crime-and-courts/judges-and-prosecutors-switch-roles-while-also-defending-clients/article_2ae082e3-64fa-5077-a171-c211ad1c8d85.html.

[12] MO. CONST., Article V, § 23.

[13] *Id.*

[14] *Id.*

[15] *See* § 479.020.2, RSMo.

[16] *See, e.g.,* Better Together St. Louis, *Judges and Prosecutors Report, Appendix Table 12,* http://www.bettertogetherstl.com/wp-content/uploads/2014/11/BT-Judges-and-Prosecutors-Report-FINAL.pdf, where the individual serves as a judge for multiple municipalities.

municipal divisions as impartial courts of justice. The majority of this Work Group came to the conclusion that the solution lay not in the existing rules.

Indeed, the existing rule allows part-time municipal judges to practice law, a practice not allowed to other judges, and merely prohibits the municipal judge from practice in the "municipal division of the circuit court on which the judge serves."[17] Moreover, the rule that would call for the judicial officer to recuse himself or herself in the case of a conflict places the onus on someone who may already be operating to some degree in a "grey area."[18] A more comprehensive solution lies in calling for a new rule that would avoid such arrangements all together.

Judges in the state of Missouri are charged with avoiding impropriety and the appearance of impropriety.[19] Rule 2-1.2 states, "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety *and the appearance of impropriety*."[20] Comments to the Rule suggest an "appearance of impropriety" does not in fact have to compromise the independence, integrity and impartiality of the judiciary.[21] Simply put, the "appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and appropriate temperament is impaired."[22] The simple, yet critical, fact that the public feels that judges who take on multiple roles negatively impacts impartiality and integrity is enough to raise the issue. Based upon the public testimony heard in St. Louis, the letters received from individuals statewide, and the reports reviewed, it is the belief of the majority of this Work Group that this bar has been met. This Work Group, therefore, recommends that a new rule be created under the portion of the "Application" section of the Code of Judicial Conduct, which specifically addresses part-time municipal judges, to bar part-time municipal court judges from serving as municipal prosecutor or as defense attorney in any other municipal court within the same county in which they sit as a judge.

RECOMMENDATION: That the Supreme Court of Missouri, pursuant to its inherent authority to define the practice of law and the authority of Article V, § 4, of the Missouri Constitution, amend Rule 2, the Code of Judicial Conduct, "Application," Part III, "Part-Time Municipal Judge," to create a new subsection (B)(4), to read: "practice law in any municipal division of the circuit court located within the same county or city not within a county as the municipal division of the circuit court in which that individual serves as a municipal court judge. Further, this prohibition cannot be waived by any party to the proceeding."

[17] Missouri Code of Judicial Conduct, Rule 2, Application III (B)(1).

[18] Missouri Supreme Court Rule 2-2.11.

[19] Missouri Code of Judicial Conduct, Canon 2, Rule 2-1.2.

[20] *Id.* (emphasis added).

[21] Missouri Code of Judicial Conduct, Rule 2-1.2, Comment 3.

[22] *Id.*

Attorneys Serving in Multiple Roles in Municipal Court

In addition to judges serving in multiple roles in municipalities located within the same county, attorneys who serve as municipal court prosecutors in one municipality and as defense attorneys in other municipalities within the same county were also of interest to this Work Group. These "role shifting" attorneys, at least in some communities, have created what appeared to be exclusive networks across municipalities, thereby generating at least the opportunity for, and public perception of, influence-peddling and corruption, creating a crisis of public confidence in the municipal courts, particularly in St. Louis County.

Again the Work Group turned to the work of several groups that have also studied the Missouri municipal court system.[23] Some of these reports have been generated as the result of action requested by the Supreme Court, such as the study conducted by the National Center for State Courts, completed in November 2015.[24] And some have been as the result of the attention brought to the municipal court system in Missouri after August 2014.[25] Whether requested or unsolicited, the conclusion of many of these reports has been a continued call for a rule prohibiting any one attorney from holding multiple roles within one county. [26]

However, one investigation and report requested by the Supreme Court, that of the Advisory Committee on Municipal Courts & the Missouri Rules of Professional Conduct, came to a different conclusion. [27] While recognizing the lack of public confidence in the municipal courts, the committee's detailed analysis and subsequent report found no actual "conflict of interest" for the attorneys under the current rules. And it is true that many municipal court attorneys have engaged in practice in good-faith reliance upon those rules and have done so without issue. But in the face of the crisis in public confidence in the municipal court system that spurred the Legislature into bi-partisan action with the passage of Senate Bill 5, the Supreme Court need not wait for a violation to occur to address a matter directly related to the integrity of the judiciary. Indeed, as noted previously, the Supreme Court has the ultimate responsibility and oversight for every municipal court in this state and has the responsibility to act when it sees a system that has such obvious deficiencies.

While recognizing that there are currently rules in place to address conflicts of interest, the majority of this Work Group has concluded that the current rules were not sufficient to address this

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[23] *See* note 5, *supra*, as well as Arch City Defenders, "Municipal Courts White Paper," found at http://www.archcitydefenders.org/wp-content/uploads/2014/11/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf.

[24] National Center for State Courts, "Missouri Municipal Courts: Best Practice Recommendations," November 2015, found at https://www.courts.mo.gov/file.jsp?id=95287 .

[25] *See* note 5, *supra*.

[26] *See, e.g.,* National Center for State Courts, "Missouri Municipal Courts: Best Practices Recommendations, Final Report," November 2015, p. 15: "In the interest of independent, impartial courts and the importance of preserving the public's confidence in them, the Supreme Court should consider a rule that prohibits lawyers who serve as municipal judges from simultaneously working as municipal prosecutors."

[27] *See* Advisory Committee of the Supreme Court of Missouri, Final Report and Recommendation on Municipal Courts & the Missouri Rules of Professional Conduct, June 22, 2015.

appearance of impropriety.[28] Moreover, given the potential benefits of "role shifting" to specific attorneys and their clients, when actual ethics violations may occur as the result of the same attorneys serving in multiple roles, it is highly unlikely that such violations will ever be reported or that discipline will result. The only people with firsthand knowledge of the violations are likely to be those who have also benefited from them.

Although not controlling, the Comments to Missouri Supreme Court Rule 4-1.7 suggest a threshold approach similar to that in the Code of Judicial Conduct's section on impropriety, stating in part, "Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests."[29] An attorney who is serving in multiple roles in municipal courts in the same county at the very least bumps up against this regularly in the course of that practice. These unchecked conflicts negatively impact the administration of justice in municipal courts and the perception of justice in this state. As such, a rule that prohibits readily observable and identifiable conduct, that does not rely on the offenders to self-report, and the alleged violations of which can be reported by third parties and verified by independent investigation, best addresses this practical difficulty. The majority of the Work Group believes the solution is to create a rule limiting an attorney to serving either as defense counsel, or as municipal prosecuting attorney, or as judge within multiple municipalities located in the same county.

A majority of this Work Group recognizes that the principles involved in these practical conflicts of interest do not apply solely within the boundaries of a single county. However, there are countervailing considerations that counsel against a rule of statewide applicability, which would prohibit a single individual from serving in more than one of the three roles – municipal judge, municipal prosecuting attorney, or municipal defense counsel – anywhere in Missouri. Such a rule, as a practical matter, would have economic consequences that would strongly discourage many capable attorneys from engaging in any sort of municipal court practice, at all. Moreover, particularly in rural areas in which there are a limited number of practicing attorneys, such a rule would tend to unreasonably restrict the choices of available counsel, both for individual defendants and for the municipalities themselves. The recommendations proposed by a majority of this Work Group are intended as a reasonable compromise, providing adequate safeguards for the legitimate interests involved in the vast majority of real-world situations.[30]

RECOMMENDATION: That the Supreme Court of Missouri, pursuant to its inherent authority to define the practice of law and the authority of Article V, § 4, of the Missouri Constitution, create a new rule within Supreme Court Rule 4, to read: "An attorney shall not

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[28] *See* Missouri Supreme Court Rules 4-1.7-4.1.11.

[29] Missouri Supreme Court Rule 4-1.7: Conflict of Interest: Current Clients.

[30] There is at least some precedent for such a geographic limitations on these types of practical conflicts of interest. *See* Advisory Committee of the Supreme Court of Missouri, Final Report and Recommendation on Municipal Courts & the Missouri Rules of Professional Conduct, June 22, 2015, p. 10 (citing New York Code of Judicial Conduct, New York State Court Rules, §100.6(B)(2), prohibiting a part-time judge from "practic[ing] law in the court on which the judge serves, or in any other court in the ***county*** in which his or her court is located, before a judge who is permitted to practice law, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.").

serve in more than one of the following capacities within the municipal divisions of the circuit court located within the same county or city not within a county: municipal prosecuting attorney or defense attorney. Further, this prohibition cannot be waived by any party to the proceeding."

The following separate opinion as to conflicts of interest was submitted by Ann Covington, Todd Thornhill, and Sly James:

One's view of the operation of the Court's Rules may be formed in part through the prisms of geography and experience. Some who are not St. Louis residents and have practiced law and appeared in many courts throughout the State of Missouri bring differing experiences and perspectives. We do not suggest that there is a purely "correct" or "incorrect" view, nor do we suggest that each of us in the Working Group has not listened carefully to our colleagues. Although we do not agree with the majority, we are not unmindful of problems within parts of St. Louis County. Our group's work would be much easier had the Court charged us to consider parts of St Louis County alone.

In this context, we offer the following dissent.

Rule 4

The majority's recommendation to amend Rule 4 to prohibit attorneys from assuming more than one role in any municipal division of the circuit court within the same county requires in its effect and by implication, through its reliance on a comment to Rule 4-1.7, that the Court amend Rule 4 to require an attorney to avoid not only impropriety but, also, the appearance of impropriety. As the majority acknowledges, its recommendation flies in the face of this Court's Advisory Committee's recommendation not to change Rule 4 as a means to address concerns about negative perceptions. We agree with the Advisory Committee's analysis. Rather than reciting the opinion's reasoning in its entirety here, we incorporate it by reference. It is, of course, the Court's right to reject the Advisory Committee's position. To do so, however, we respectfully suggest, requires the Court to add language to Rule 4 applicable to the entirety of the rule itself, language that closely mirrors that of the Code of Judicial Conduct with regard to avoiding impropriety and the appearance of it, after considering why that language is not now in the rule.

The majority's recommendation to amend Rule 4 includes both an assumption and a presumption. The majority assumes that all municipal courts in the State of Missouri are in need of reform. To the contrary, absent good evidence, the operating assumption must be that most are not in need of reform. In many less populous areas of Missouri, attorneys serve municipal courts within a county in more roles than one. The conduct of efficient judicial process in municipal courts within a county may in some areas of our state actually require lawyers to serve as defense counsel and as prosecutors. If a circumstance arises on occasion which presents a question of conflict, express safeguards against conflicts are in place. Nothing supports the presumption of the majority that those safeguards do not generally serve the purposes for which they are intended. For those exceptions that may arise from time to time, the remedy is to enforce the rules. Those who practice or have practiced law in our courts throughout Missouri have observed that Rule 4 generally works as intended. Conflict possibilities are among the very first factors a lawyer examines and addresses when he or she is asked to accept an engagement.

Amending Rule 4 as the majority proposes evokes for us a well-worn phrase—"Don't throw the baby out with the bath water." It has not generally been the Supreme Court of Missouri's practice to ignore its rules or even to change them on account of an injustice to one or a few. True, hard cases are and have always been those few in which an individual does suffer some injustice on account of a rule that stands to regulate process and further overall the administration of justice. Application of time limitations in the rules of procedure and statutes or other rules of limitation are examples of rules which are occasionally harsh in application but honored nonetheless because they serve well to regulate the conduct of the courts for the people and the conduct of those who seek justice there. Unless the Court amends its rule to apply only to parts of St. Louis County, which is neither analytically nor practically defensible, we submit that appearances of possible violations and some injustices do not require a rule change and will, in effect, throw the baby out with the bath water.

Rule 2

After evaluating statewide input, the central focus of this group's deliberations has been St. Louis County. Even there, there is no showing that every municipal court fails to serve just ends in a just manner. There exists in some of the municipalities, however, as is now well acknowledged, an APPEARANCE that too many of the same lawyers are undertaking too many multiple roles.

Emphasis on "appearance" legitimately leads to consideration of the Code of Judicial Conduct, which, unlike Rule 4, expressly recognizes a need for a judge to recuse himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. Canon 2, Rule 2-2.11(A). It is analytically defensible and even appropriate to look to the Judicial Code, the purpose of which is to ensure public confidence in a fair and impartial judiciary. Rule 2-Preamble, § [2].

It is not unreasonable to hold a judge, even a part-time judge, to the higher standard. In practice, one can postulate examples of why the court may consider an amendment to the Code of Judicial Conduct. Consider the following two hypotheticals.

1. On night 1, defense-lawyer "A" negotiates with prosecutor "B" in Judge Z's court. On night 2, defense-lawyer "A" becomes Judge "A" in City "A," while prosecutor "B" becomes defense-lawyer "B" in front of Judge "A." Might Judge A's impartiality reasonably be questioned since he was negotiating 24 hours ago with lawyer "B" who in now trying to persuade Judge "A?" That is not to say that Judge "A" feels he can, or that Judge "A" can in fact, be impartial. But the judge's perception is not the test. The test is whether Judge A's "impartiality might reasonably be questioned." In other words, is there an appearance that prosecutor B might want to keep Judge A happy in Judge Z's court in exchange for Judge A keeping now-defense lawyer B happy in Judge A's court.

2. Judge A (serving as defense counsel) appears in front of Judge B on night one in Judge B's court, and Judge B (now serving as defense counsel) appears in front of Judge A in Judge A's court the next night. Again, the test is not whether the respective judges feel they can be impartial moving between these two roles, because they both might reasonably and even correctly feel they can, but rather whether their impartiality might reasonably be questioned.

To address circumstances such as these, we propose an addition to Canon 2, Rule 2-2.11(A) of the Code of Judicial Conduct to add the following as section (6). The rule would read:

> 2-2.11
> (A) A judge shall recuse himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
>
> . . .
>
> (6) The part-time judge serves, or may reasonably be expected to serve, as counsel in another court, when officers of the other court, whether acting as counsel or as judge, appear in the part-time judge's court.

The rule recommended by the majority of the Work Group on this issue is that a part-time judge may not practice law in the county where his/her municipal court is located. The Advisory Committee (p. 10) and the majority (p. 26, n.30) point out that this is the rule in the state of New York. While this rule is "bright line," simple in application, and will address many of the "appearance of impropriety" problems that exist in the St. Louis area and elsewhere in the state, it endorses what the suggested rule above would prohibit. Since the canons prescribe that an appearance of impropriety is to be avoided, a new rule should extend beyond county boundaries.

We conclude by emphasizing that this was, and is, a difficult issue, and all members of the Group have been careful and respectful listeners and writers. The majority's Rule 2 analysis tracks our own in many respects, but we come to different conclusions. We sacrifice bright lines for a more case-by-case, but boundary-less, approach. Further guidance in the form of an amendment to the canons of ethics to clarify that specific situations are unethical *per se* will, in our opinion, be followed, and will also be a long-term solution of benefit to all who practice and appear in Missouri's municipal courts.

The following separate opinion as to conflicts of interest was submitted by Edward D. "Chip" Robertson, Jr.:

I concur fully in the dissent filed by Judges Covington and Thornhill and Mayor James regarding the conflicts issue. I add these thoughts, which are my own, because I find the majority's recommendation on the conflicts issue unsupportable either in law or in logic.

The Court's charge to the Working Group is a limited one. It asks a simple question: under the current state of the law, what is the Court empowered or allowed to do? This is, of course, a first step in what should be a multi-step process – a process that the Court might be able to encourage but can neither initiate nor control. It cannot initiate the process because the fundamental changes required to address the issues that caused the formation of the Working Group require the involvement of the executive and legislative branches of government and ultimately, perhaps, the people of Missouri if constitutional amendments are necessary. It cannot

control the process because the process depends on political solutions – a sphere that is off-limits to the Court under settled separation of powers doctrine.

As the introduction to the report properly notes, the root of municipal court dysfunction is economic. It is unfortunate that these problems have taken on racial undertones. Very little has been said, however, concerning the fact that some (though certainly not all) of these dysfunctional municipal courts exist in African-American controlled cities. And in nearly every city where the dysfunction exists, the burden of abuse has fallen on a largely African-American citizenry. But race, while an easy identifier, is a misleading one in this case. The existence of perverse economic incentives is the foundational culprit. Economically challenged cities need revenue and a municipal court is one way to generate revenue. Until the operation of a city's court system is delinked from the revenue needs of a city, the use of the municipal courts as a tool of abuse/revenue generation is not only a possible, but a foreseeable consequence.

The majority's recommended solution to the conflicts issues is too broad, too reactive, and fails to focus on the meaningful reforms within the Court's present authority.

First, county lines are artificial and, for purposes of legal ethics, meaningless. That there is textual support for the Rule 2 amendment that Judge Covington, Judge Thornhill, Mayor James, and I support means that there is at least some law to support our recommendation. The majority has not such basis. Indeed, the Advisory Committee of the Court has considered the issue and offers no support for the majority's recommendation as Judges Covington and Thornhill show in their dissent. The Advisory Committee's opinion alone ought to have been sufficient for the majority to have chosen against its empty solution – a solution made more empty by the fact that ethical rules simply have no geographic limitation. What is wrong in one place cannot be right in another. To base ethical rules on artificial geographic boundaries is simply wrong.

Secondly, no rule of professional conduct requires a lawyer to avoid the appearance of impropriety. Only the code of judicial conduct contains that prohibition. But undaunted, the majority's recommendation relies on no more than appearance to suggest that the Court adopt a rule that supposedly permits the appearance of impropriety to disappear if some county line is crossed. One need only look at Jackson County to see how this rule is meaningless. Grandview, Missouri is in Jackson County; Belton, Missouri is in Cass County. They touch each other, separated only by the county line that no one can see except on a map. Tickets are written in both cities to citizens of each. Is it any less an appearance of impropriety for a judge in Belton to act as the prosecutor in Grandview, than it is for the prosecutor in Grandview to act as the judge in Raytown?

Worse, the majority's recommendation will make no difference in the measure of justice available to the citizens of municipal courts most in need of reform. This is because the most economically ill-equipped citizens of these cities are not and cannot afford to be represented by counsel. They will still come to court, still find that the prosecutor and some lawyer have reached a plea bargain that generally requires the client to pay a higher fine, and will not know what deal if any they missed out on by not having a lawyer. Changing the players will not change the game. And if, as the majority appears willing to assume, some tickets are simply dismissed as part of a network based upon pre-existing relationships, three observations seem noteworthy: First, these kinds of things are apparently exceedingly rare as there was no direct evidence of that happening. The argument that a lawyer would not self-report an ethical violation is no substitute for evidence. And, lawyers who can get such deals are usually not shy about advertising their influence in the

community; it would be good for business. Second, the economic incentives that permit a prosecutor to keep a job in a money-hungry city militate against a wholesale practice of the sort that the majority is willing to assume occurs. And third, these supposed deals are not available to people without lawyers – and the victims of the ticket-happy cities cannot afford lawyers. The majority's solution does nothing to curb the abuse of the victims of municipal greed who cannot get a lawyer – whether that lawyer is a judge somewhere else or not. The majority's recommended solution is thus a poorly aimed haymaker that serves no purpose if remedying the failures of the municipality court system (or at least one of those failures) is the object of the exercise. The majority's recommendation is worse than an unfounded factual assumption based on a non-existent rule against the appearance of impropriety for lawyers. It is impropriety itself to offer such a false solution.

Finally as to my claim that the solution is too broad, a countywide rule that finds its supposed justification in St. Louis County assumes that all of the courts in St. Louis County are in need of some repair. Just as we heard no complaints about municipal courts in any other part of the state, we heard no complaints about municipal courts in most of St. Louis County. No one suggested that the abuses about which so many have heard in Ferguson or Pine Lawn existed in Town and Country or Ladue. This is but further evidence that the issue here is economic and therefore requires an economic solution. Those who cannot afford the protections lawyers give them are no less deserving of the protections the courts should give them. Breaking the link between municipal revenue needs and municipal courts is the proper answer, not some all-but-meaningless change in the ethics rules related to lawyers.

Second, the recommendation is over-reactive. We were frequently provided news stories on the issues we were considering. There is a reason that news articles and editorials are not admitted as evidence in court – there is no assurance that what gets printed is accurate. For example, the *Post-Dispatch* recently opined that changes in the ethical rules were necessary because one law firm served in multiple cities as either the municipal court prosecutor and/or the city attorney. Not even the majority's rule would alter that practice, precisely because there is no conflict in the two positions – each represents the city on city-specific issues either in court or as counsel to the city. Perhaps pressured by the media and some community groups, some members of the Working Group may have felt the need to "do something," perhaps to placate the media or interest groups that had contacted them. If something is done, it ought really to be something. Using a Band-Aid to treat cancer merely serves to make the disease worse, because there is the appearance of doing something to help, while actually doing nothing. And that is what the majority's ethics rule recommendation accomplishes, virtually nothing. As to the community group/lawyer group testimony, it provided no hard evidence of actual conflicts or events that would take things beyond a claimed appearance of impropriety. But these groups did, however, identify a number of concerns that the majority's recommended rule would not begin to remedy.

Third, meaningful reform requires more than the majority recommends – much more. There is indeed a cancer in some parts of the municipal court system – and that cancer is the perverse alignment of the economic incentives to which the introduction refers. In some cities the cancer is metastatic. In others, the courts are healthy, though the cancer is latent, but always a possibility. Obviously, the Court's charge to the Working Group is more narrow than what follows. Given Professor Norwood's dissent, however, I believe an alternative view cognizant of the current state of the law and the Court's authority to act is appropriate in response. What follows are

recommended interim steps that are both consistent with the law and might lead to the systemic changes that are necessary in St. Louis County.

The Court has supervisory power over municipal courts. It cannot order consolidation of the municipal courts. It can, however, in my view, create an *uber* municipal court that has supervisory authority over municipal courts in counties where problems exist and there are multiple courts. To that court would come all cases in which someone recused a municipal judge. As part of the supervisory power, I believe the Court could order all controversies involving warrants, excessive fines, etc., to be heard. The municipalities would be required to fund the *uber* court, as the constitution currently requires cities to fund matters related to the courts they have chosen to create and maintain. One of the sitting municipal judges chosen from all such judges in the County (or a retired judge or a sitting associate circuit judge) would preside. There would be one prosecutor, again perhaps chosen by the other city prosecutors, to handle the cases. Staffing would be full-time, that is, available during normal working hours. The cities or the Court would need to adopt and impose a range of punishment/fines for ordinance violations that the *uber* court would follow. The city whose ordinances are violated would still get the fines. Prosecutors would still maintain discretion to enter into pleas or recommend fines within the range permitted, but neither the judge nor the prosecutor would be beholden to any particular city. Anyone wishing to plead guilty or seek additional time to pay a fine (upon pleading guilty) could avoid the crowds at each city on the weeknights to achieve that end by using the *uber* court. Only persons who had not gone to the *uber* court in advance of their court date in a city or who wished to contest the charges against them would be required to go to the city-specific court on the appointed night. This is, of course, an idea that needs further fleshing out – but computers make all manner of efficiencies and information sharing easy these days. And, if implemented, this supervisory court would go a long way toward meaningful reform.

But this is an interim solution that speaks both to the concerns raised in our hearings and to the Court's current authority. It begins to realign the economic incentives. It provides neutral checks against too zealous police ticketing.

As the introduction points out, Missouri's municipal court system is founded on an unacceptable premise – that a city court is not necessary but if a city creates one, it is of no legal significance unless a person charged wants it to have a consequence. *De novo* appeal invites the first court to doubt its own importance, to discount the necessity of acting like a court, and to think that it can serve its economic master – a city – because if someone is unhappy, a "real" court will fix things. That is simply not the case where the most ticketed are the least economically able to fight. Fortunately, the overwhelming majority of our city courts do not operate so nihilistically. But we now know that some do – and the judicial system cannot and should not tolerate even one. There needs to be a three-branch commission established to consider redesigning the entire system. And then there needs to be the political will to effect the change.

It may be that those who authored the amendments to the judicial article in 1978 were worried about municipal courts (perhaps foreseeing the current issues) but doubted the willingness of the people to make a necessary change on the whole of the judiciary if the cities rose up against a proposed constitutional amendment. Not wanting to doom broader reform, the proposed judicial article spoke the language of concern subtly. Indeed the language is too subtle to constitute a mandate. But had it been written as such, it would have broken the perverse economic incentives.

The unambiguous constitutional directive is that "the clear proceeds of all penalties, forfeitures and fines collected hereafter for any breach of the penal laws of the state … shall be distributed annually to the schools of the several counties according to law." MO. CONST., Art. IX, § 7. Penal laws "of the state" do not include ordinance violations. But the Constitution also says:

> A municipal corporation with a population of under four hundred thousand shall have the right to enforce its ordinances and to conduct prosecutions before an associate circuit judge in the absence of a municipal judge and in appellate courts under the process authorized or provided by this article and shall receive and retain any fines to which it may be entitled.

MO. CONST., Art. V, § 27(16). The unspoken and thus the unenforceable inference here is that cities that do create a municipal court cannot keep the fines imposed. Section 27 did not amend Article IX, § 7. Perhaps it should have.

There is much work that lies ahead if branches of the government other than the Court are serious about reform. Indeed, the burden of real reform rests on the political branches. It would be compounding the tragedy that began this inquiry if real reform does not follow.

C. WARRANTS, INCARCERATION, PRE-EXISTING WARRANTS, AND BONDS

The Supreme Court of Missouri, in Chief Justice Breckenridge's letter dated September 22, 2015, asked this Work Group to provide an analysis regarding "use of warrants, process for setting bonds, and time of incarceration," and "enforceability of judgments and remedies for nonpayment." These issues go to the heart of many of the most serious concerns which have been raised regarding the municipal divisions of the circuit courts, especially in the St. Louis region. Moreover, these issues are closely interrelated and cannot be properly examined without reference to each other.

The complexity of addressing problems relating to improper uses of warrants and cash-only bonds is that they involve both statewide and merely local considerations, arising from both the structure of our laws and rules and from the failure to comply with existing laws and rules. Nonetheless, a strong argument can be made that the improper uses of warrants and cash bonds in the St. Louis area municipal courts are not a root cause of the problems there.

A potential result of the current attention to the municipal courts is to completely or substantially deprive all the municipal courts of the state – and potentially, by implication of the legal principles relied upon, the state courts as well – tools which courts have always found necessary to maintain respect for and compliance with the law. The unintended consequences of such a move would be very great. Imposing substantial new restrictions on the use of warrants and cash-only bonds may lead to serious statewide problems with the enforceability of judgments and court orders. This, in turn, must necessarily lead to a significantly diminished capacity on the part of the State and its municipalities to perform some of their core functions – indeed, some of their most fundamental reasons for existing at all: protecting the citizenry against unlawful activity, and keeping our communities peaceful and productive.

If, however, we are able to understand the improper uses of warrants and bonds as largely being <u>symptoms</u> of other, more significant structural problems in our laws and/or practices in some of the St. Louis area municipal courts, then we may be able to contribute to the much more useful result of minimizing the improper uses of warrants and bonds, without requiring law enforcement and judges in every community to perform their necessary and proper work "with both hands tied behind their backs."

Distinguishing Between Symptoms and Root Causes

The following distinctions between "symptoms" and "root causes" may be suggested:

1) To the extent that warrants and cash-only bonds are being **improperly used as devices to raise revenue**, largely divorced from legitimate considerations of public safety, therefore causing undue numbers of warrants to issue and bonds to be set higher than they ought to be, **the root cause of the problem is state law that enables municipalities to profit financially from ordinance enforcement activities.** *See also* the discussion and recommendations set forth at Part F1 of this Report.

2) To the extent that excessive numbers of warrants issue and cash-only bonds are set in a facially unreasonable manner in the service of **a system in which a proper separation of powers is not maintained** between the executive and judicial branches of municipal government, and therefore the municipal judiciary is unduly susceptible to pressures to utilize the mechanisms of

judicial process to raise revenue, **the root causes are state law that enables municipalities to profit financially from ordinance enforcement activities, and judicial selection and retention procedures that expose the judges and court personnel to undue and improper pressure from the executive and legislative branches of municipal government.** *See also* the discussion and recommendations set forth at Parts F1 and F5 of this Report.

3) To the extent that **people cannot easily resolve their warrants** because there exists no good way to find out what warrants exist and because municipal courts hold their sessions at inconvenient times and in places not sufficient to the purpose, **the root cause is not a deficiency in state law, but rather a failure of competence and organization of certain courts with regard to record-keeping and in maintaining open records and courts which are genuinely accessible to those they serve.** *See* § 479.360.1(7), (9), RSMo. *See also* the discussion and recommendations set forth at Part F4 of this Report.

4) To the extent that **municipalities are failing to bring those arrested before a judge promptly** in order that individualized consideration of the conditions of release may occur, **the root cause is not a deficiency in state law, but rather a failure of the competence and organization of certain law enforcement agencies and municipal courts.** *See* § 479.360.1(1), (2), (4), RSMo. *See also* the discussion and recommendations set forth at Part F2 of this Report.

5) To the extent that warrants issue and bonds are calculated in a manner likely to collect **excessive amounts of costs, beyond those permitted by law, the root cause is not a deficiency in state law, but rather a failure of competence and honesty in the municipal government and its court in assessing unauthorized costs, a failure of auditors to cite the municipalities for having collected such costs, and a failure of appropriate state officers, principally the attorney general, to take swift and decisive action to force offending municipalities to cease and desist.** *See* § 479.360.1(5). *See also* the discussion and recommendations set forth at Part F3 of this Report.

6) To the extent that **duplicative warrants** issue and that **cash-only bonds actually posted are not promptly and/or properly transmitted to the appropriate court** by law enforcement, with correct identification of the person who posted the bond (and his/her contact information), and are **not credited to the right cases** by the appropriate courts, **the root cause is not a deficiency in state law, but rather a failure of competence and organization of certain courts with regard to record-keeping, and in maintaining open records in order to be accountable to those they serve.** *See also* the discussion and recommendations set forth at Part F2 and Part F4 of this Report.

7) To the extent that excessive numbers of warrants issue and cash-only bonds are set in a facially unreasonable manner in the service of **a system in which some defendants are able to obtain much more favorable treatment than others** (or which at the very least creates an appearance that this is occurring) due to practical conflicts of interest caused by the same attorneys serving in multiple roles (*e.g.*, municipal judge, city attorney, city prosecutor, defense counsel) in the same metropolitan area, **the root cause is state law, in the form of the Supreme Court Rules constituting the Code of Judicial Conduct and the Rules of Professional Conduct for attorneys, which permit such practical conflicts of interest to exist.** *See* Senate Bill 5, § 479.155.3, RSMo; Public Comment Letters from Hon. Vernon Scoville to Hon Mary R. Russell,

dated March 11 and March 22, 2015. *See also* the recommendations set forth at Part B of this Report.

8) Finally, to the extent that matters pertaining to warrants and bonds in some instances are handled by law enforcement and the courts in a manner that is **deliberately discriminatory** against African-Americans and members of other minority communities, the **root cause may still at times be actual racism** which, most regrettably, continues to exist in our world in varying degrees. The complete elimination of actual racism is well beyond the power of legislatures and courts. However, **a rigorous and continuing attention to resolving the other root causes of the problems in the municipal courts as identified above, implementation of the recommendations in this Report, and a firm insistence that all judges and court personnel conform their official behavior to the high standards set forth in the Code of Judicial Conduct (Missouri Supreme Court Rule 2)**, should go far toward minimizing such impacts and assuring that our courts treat all who appear before them with proper respect, courtesy, and fairness. As Chief Justice Breckenridge stated in her address to the Missouri Bar on October 8, 2015, in announcing the formation of a new Commission on Racial and Ethnic Fairness, "We *all* need to do everything we can to ensure that *every* individual in *every* case in our system of justice is treated with respect and has his or her case adjudicated fairly and impartially according to the law. Until that is true in 100 percent of our courts, we cannot rest. Even a perception of justice denied anywhere should concern us *all*, no matter who or where we are."

Warrants (Including Pre-Existing Warrants)

With the foregoing distinctions in mind, we offer the following additional observations and recommendations regarding the use of warrants in the municipal courts.

- **Municipal court warrants may be issued pre-disposition, usually following a defendant's failure to appear for court, or post-disposition, for probation violations or failures to comply with payment obligations.**

Municipal arrests and warrants are likely to arise in several situations: (1) arrest prior to issuance of a warrant, by an arresting officer responding to an alleged violation; (2) arrest pursuant to a warrant issued at the request of the city, immediately after the filing of a charge, where the court finds based upon the probable cause statement that the defendant is unlikely to appear upon a summons; (3) arrest upon a warrant issued for failure to appear upon a summons for an initial appearance, or for any subsequently required court appearance, prior to the disposition of the case; (4) arrest upon a warrant issued post-disposition, for failure to appear upon a motion for revocation of probation, or upon some other probation-related court order; and (5) arrest upon a warrant issued post-disposition, for failure to appear or make a payment on fines and/or costs due pursuant to a payment plan, or failure to appear pursuant to an order to show cause issued due to nonpayment/nonappearance with regard to such a payment plan.

- **Concern has been expressed from many places that Missouri's municipal courts have not sufficiently protected the constitutional rights of defendants, and that the use of warrants by the municipal courts has been excessive, and extremely detrimental to many persons, particularly those of limited means. Many of the concerns regarding municipal warrants relate to specific conditions in St. Louis County.**

Concern has been expressed from many places – both prior to and since the events of August 2014 – that Missouri's municipal courts have not sufficiently protected the constitutional rights of defendants, and that the use of warrants by the municipal courts has been excessive, and extremely detrimental to many persons, particular those of limited means. Related complaints have been made and substantiated that persons arrested on municipal warrants have been detained for unreasonable periods of time without being brought to the court or courts for which they were being held, and often in substandard jail facilities. *See, e.g.*, The Ferguson Commission, Forward Through Ferguson—A Path Toward Racial Equity: A Printed Companion to ForwardThroughFerguson.org, pp. 29-32, 80-81, 86-88, 91-93; United States Department of Justice Civil Rights Division, "Investigation of the Ferguson Police Department," pp. 15-50; Arch City Defenders, "It's Not Just Ferguson: Missouri Supreme Court Should Consolidate the Municipal Court System," August 14, 2015; Jennifer S. Mann & Jeremy Kohler, "Municipal Courts: Progress Report on Reforms," ST. LOUIS POST-DISPATCH, June 20, 2015 (available on-line at: http://graphics.stltoday.com/apps/muni-courts); Better Together, "Public Safety—Municipal Courts," October 2014, Report, pp. 14-16.

- **A number of changes to municipal warrant practices have already occurred, due to the adoption of Missouri Supreme Court Rule 37.65, the passage of Senate Bill 5, and reforms made pursuant to federal court litigation involving specific municipalities or adopted by the municipalities on their own initiative.**

Many of the concerns regarding municipal warrants relate to specific conditions in St. Louis County. In the materials just cited and others that have been provided to our Work Group, some of the principal concerns have been that individuals cannot even find out what warrants may exist in the various municipal courts; that some courts meet only once or twice a month, at inconvenient times and in court facilities insufficient for those with business before the court; that warrants are issued for many offenses which are viewed in some quarters as trifling and insignificant; that court appearances are required for many code violations that should be capable of resolution through payment by mail, on line, or at the clerk's office without appearance before a judge, if the defendant is not contesting the ticket (an issue specifically highlighted by Chief Justice Breckenridge in her address to the Missouri Bar in St. Louis, October 8, 2015); that warrants are issued for the improper purpose of raising revenue; that one individual may be cited in multiple jurisdictions for essentially the same offense (such as a vehicle equipment violation), resulting in multiple cases and warrants for the same conduct; that additional warrants have been issued on separate and duplicative charges for "failure to appear;" and that the use of warrants to enforce payment of fines and costs results in a type of "debtor's prison."

The Department of Justice Report, the Ferguson Commission Report, and many accounts in the news media have stressed the need to assure that improper and unnecessary arrests upon municipal warrants are avoided entirely, and that persons arrested on warrants are promptly brought before the court.

These widely publicized and recognized concerns about warrants and related matters have already resulted in many practical changes, with an emphasis on reducing the numbers of outstanding, pre-existing warrants, which may have been improvidently or unnecessarily issued.

Chief Justice Patricia Breckenridge, in her State of the Judiciary address, January 27, 2016, noted that "thousands of [municipal] warrants have been recalled and cancelled."

In view of the concerns that many outstanding warrants were improperly or unnecessarily issued, numerous St. Louis area municipalities have voluntarily recalled some or all of their warrants and/or offered various types of "amnesty" opportunities to defendants. *See, e.g.*, "Amid Reforms, Municipal Court Traffic Cases and Revenue Plummet in St. Louis County," ST. LOUIS POST-DISPATCH, October 11, 2015 (available on-line at: http://m.stltoday.com/news/local/crime-and-courts/amid-reforms-municipal-court-traffic-cases-and-revenue-plummet/article_ff05a899-1964-5396-a7e6-346fdec118a7.html?utm_medium=twitter&utm_source=twitterfeed&mobile_touch=true); "Ahead of New Law, Ferguson Municipal Court Announces Major Changes," ST. LOUIS POST-DISPATCH, August 24, 2015 (available on-line at: http://www.stltoday.com/news/local/metro/ahead-of-new-law-ferguson-municipal-court-announces-major-changes/article_8f48b96b-225d-590c-883f-48b832e313c6.html); Jennifer S. Mann & Jeremy Kohler, "Municipal Courts: Progress Report on Reforms," ST. LOUIS POST-DISPATCH, June 20, 2015 (available on-line at: http://graphics.stltoday.com/apps/muni-courts).

In addition, certain St. Louis County municipalities, facing federal court litigation, have entered into settlement agreements requiring them to substantially restrict their use of warrants in most municipal cases. *See, e.g.*, *Jenkins et al. v. The City of Jennings*, Case No. 4:15-cv-252-CEJ, Joint Motion for Entry of Final Declaratory and Injunctive Relief and Joint Stipulation for Dismissal (UnitedStates District Court for the Eastern District of Missouri, August 26, 2015), and related attached documents. This settlement is discussed in much greater detail below, in relation to the question of cash bonds.

A proposed consent decree between the United States Department of Justice and the City of Ferguson has recently been made public. *See, e.g.*, Stephen Deere, "Ferguson Consent Decree May Be Derailed Because of Cost," ST. LOUIS POST-DISPATCH (February 7, 2016) (http://www.stltoday.com/news/local/ferguson-consent-decree-may-be-derailed-because-of-cost/article_5ca413ad-91d1-5874-ab74-e595bd0205ce.html). Whether or not this proposed consent decree is ultimately adopted and implemented in Ferguson, it may provide a strong indication of the direction in which the United States Department of Justice may intend to "steer" those municipal governments, including their municipal courts, against which it brings litigation or other enforcement efforts. This proposed consent decree, if adopted, would require the City of Ferguson, as part of a "Comprehensive Amnesty Program," to "decline" prosecution in all undisposed cases initiated prior to January 1, 2014, and eliminate all warrants issued in connection with those cases, "except where the City may continue to prosecute the case and maintain the municipal arrest warrant consistent with the terms of this Agreement." Proposed Ferguson Consent Decree, Part XVIII, § 326a.

Taking action to recall unnecessary and inappropriate warrants, and to ensure that bond amounts are set at an appropriate level, requires action by the municipal prosecuting attorney, law enforcement agencies, and the municipal court, each acting independently in its proper role, but in a cooperative fashion with one another. Decisions to dismiss pending cases can only be made by the prosecuting attorney; the court has no authority to dismiss pending cases, or specific charges, upon its own motion. *State v. Smith*, 907 S.W.2d 301 (Mo. App. W.D. 1995) (collecting cases on this point). However, once a case has been dismissed, the court has an affirmative duty to ensure that all

outstanding warrants are immediately recalled and cancelled by giving notice to law enforcement in writing or via electronic transmission, if available; that function cannot be performed by the prosecutor. The court is also required to take appropriate record-keeping measures, to ensure that the case is maintained from that point on as a confidential file. Section 610.105, RSMo.

Although only the court has the authority to revise the cash bond and/or surety bond amounts set on pre-existing warrants, the court will likely give great weight to recommendations of the prosecuting attorney with regard to the amount of bond that may be appropriate. *See* Supreme Court Rules 33.06(a), 37.19(a). Law enforcement agencies play a significant role in this process, providing the prosecuting attorney with relevant information regarding the continuing viability of pending cases and circumstances that may bear upon recommendations for appropriate bond amounts, and performing the essential work of removing warrants from local and statewide databases once they have been recalled by the court.[31]

The Supreme Court of Missouri has already taken a substantial step toward addressing the issue of improper and unnecessary arrests in relation to the enforcement of fines, in its revision to Rule 37.65, order dated December 23, 2014, effective July 1, 2015:

> **37.65 Fines, Installment or Delayed Payments – Response to Nonpayment**
>
> (a) When a fine is assessed and it appears to the judge that the defendant does not have at that time the present means to pay the fine, the judge shall order a stay of execution on the payment of the fine and:
>
> (1) Grant the defendant a specified period of time within which to pay the fine in full, or
>
> (2) Provide for the payment of the fine on an installment basis under such terms and conditions as the judge may deem appropriate.
>
> (b) The judge may issue an order to show cause, consistent with Rule 36.01(b), for the defendant to appear in court at a future date in the event the fine is not paid in the time specified by the judge. In the event the defendant fails to appear at that future date, the court may issue a warrant to secure the defendant's appearance for a hearing on the order to show cause.
>
> (c) If a defendant defaults in the payment of the fine or any

[31] This Work Group recognizes that most Missouri municipal courts are of limited staff and resources. In St. Louis County, alone, in some instances there is no prosecuting attorney, there is one prosecuting attorney that is shared by multiple cities, and only in rare instances does a city have more than one prosecuting attorney. Undoubtedly, performing the work to remove a warrant or to otherwise review case files may present a difficult task and further strain the resources of municipal courts in cities where short staffing and financial constraints are contributing factors to the other challenges addressed in this report. However, a review of case files, particularly those that are older and/or no longer actionable, would be prudent to lessen the likelihood that individuals of low to moderate means are no longer shackled by outstanding and pervasive warrants.

> installment thereof, the judge may issue an order to show cause why the defendant should not be held in contempt of court. The judge shall issue a summons for the defendant's appearance on the order to show cause unless the defendant was ordered to appear at a future date as provided in Rule 37.65(b). If the defendant fails to appear on the summons, the court may then issue a warrant to secure the defendant's appearance for a hearing on the order to show cause. The summons may be served by the clerk mailing it to the defendant's last known address by first class mail.
>
> (d) If following the show cause hearing the judge finds the defendant intentionally refused to obey the sentence of the court or to have made a good faith effort to obtain the necessary funds for payment, the judge may confine the defendant for a term not to exceed thirty days for contempt of court. If the judge finds that the failure to pay the fine is excusable, the judge shall enter an order allowing the defendant additional time for payment, or may modify the method of payment or waive the collection of all or part of any unpaid portion of the fine.
>
> (e) Upon default in the payment of a fine or any installment thereof, the fine may be collected by any means authorized by law for the enforcement of money judgments.

In passing Senate Bill 5, the General Assembly has sought to impose certain performance standards on all municipal courts of the State. As alluded to elsewhere in this Paper, the municipal judges of all municipal courts must now make the following certifications, each year, as required by § 479.360.1, RSMo:

> Every county, city, town, and village shall file with the state auditor, together with its report due under section 105.145, its certification of its substantial compliance signed by its municipal judge with the municipal court procedures set forth in this subsection during the preceding fiscal year. The procedures to be adopted and certified include the following:
>
> (1) Defendants in custody pursuant to an initial arrest warrant issued by a municipal court have an opportunity to be heard by a judge in person, by telephone, or video conferencing as soon as practicable and not later than forty-eight hours on minor traffic violations and not later than seventy-two hours on other violations and, if not given that opportunity, are released;
>
> (2) Defendants in municipal custody shall not be held more than twenty-four hours without a warrant after arrest;
>
> (3) Defendants are not detained in order to coerce payment of fines and costs;

> (4) The municipal court has established procedures to allow indigent defendants to present evidence of their financial condition and takes such evidence into account if determining fines and costs and establishing related payment requirements;
>
> (5) The municipal court only assesses fines and costs as authorized by law;
>
> (6) No additional charge shall be issued for the failure to appear for a minor traffic violation;
>
> (7) The municipal court conducts proceedings in a courtroom that is open to the public and large enough to reasonably accommodate the public, parties, and attorneys;
>
> (8) The municipal court makes use of alternative payment plans and community service alternatives; and
>
> (9) The municipal court has adopted an electronic payment system or payment by mail for the payment of minor traffic violations.

To the extent these certifications are made, and represent the true situation in each court, it would appear that many of the concerns regarding the uses (and abuses) of warrants and cash-only bonds will have been alleviated. To the extent such representations are made and shown to be false, the municipalities may be subject to penalties created elsewhere in Senate Bill 5, and any judges making false certifications may be subject to judicial discipline.

There is already evidence that municipal court reform efforts in St. Louis County – whether resulting from Senate Bill 5, from media attention, from federal and state pressure, from local municipal reform initiatives such as the St. Louis County Municipal Court Improvement Committee, or from a combination of all these things – are beginning to bear fruit. *See, e.g.*, Jeremy Kohler and Jennifer S. Mann, "Amid Reforms, Municipal Court Traffic Cases and Revenue Plummet in St. Louis County," ST. LOUIS POST-DISPATCH, October 11, 2015. However, it also appears that some municipalities have responded simply by increasing the numbers of citations they issue for other, non-traffic types of violations, not subject to the Senate Bill 5 revenue limitations. *See, e.g.*, Alex Stuckey, "Lawmakers Hear Testimony on Bill Further Limiting Municipal Court Revenue," ST. LOUIS POST-DISPATCH, January 14, 2016.

In those cases in which warrants are properly issued, those arrested have a right to be – and urgently need to be – brought before a judge at the earliest possible time, in order that release on bail, bond amounts, and bond conditions may be promptly reviewed. An obvious pre-condition for this to occur, is that courts and law enforcement agencies must maintain accurate and completely updated records with regard to both outstanding warrants and bonds, and they must communicate with one another promptly and effectively when an individual is arrested upon warrant. *See* Judge Richter's Report Concerning Ongoing Efforts to Improve the State's Municipal Divisions dated May 11, 2015, pp. 12-13, and references to the Department of Justice Report noted there.

One potential response to these issues is for municipalities to direct their cases to the associate division of the circuit court, which is open on all business days. This should make it much simpler, in practice, for defendants arrested upon warrant to be seen promptly by a judge, and should also improve communication where warrants from multiple jurisdictions are involved. Those municipalities which elect to continue to run their own freestanding municipal courts must develop policies and practices which guarantee the prompt arraignment of those arrested upon warrant. In the 2015 legislation, Senate Bill 5, § 479.360.1(1) & (2) RSMo, the General Assembly has demanded no less of the municipal courts.

RECOMMENDATION: That municipal courts and law enforcement agencies maintain accurate and completely updated records with regard to both outstanding warrants and bonds. We further recommend that one aspect of the supervisory responsibility of the presiding circuit judge of each judicial circuit be periodic monitoring to ensure that these duties are performed properly by municipal court personnel. This recommendation is directed to law enforcement agencies and to the municipal prosecuting attorneys as to their responsibilities, and to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri, as to the responsibilities of the judicial branch.

RECOMMENDATION: Many of the observed problems with warrants in St. Louis County may be improved, should municipalities elect to direct their cases to the associate division of the circuit court, which is open on all business days. This option may be particularly helpful to smaller municipalities with very limited staff. We recommend that those municipalities which elect to continue to run their own freestanding municipal courts develop policies and practices which guarantee the prompt arraignment of those arrested upon warrant. The resources to do so must be provided by the municipality. We further recommend that one aspect of the supervisory responsibility of the presiding circuit judge of each judicial circuit be periodic monitoring to ensure that these duties are performed properly by municipal court personnel. This recommendation is directed to law enforcement agencies and to the municipal prosecuting attorneys as to their responsibilities, and to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri, as to the responsibilities of the judicial branch.

RECOMMENDATION: That municipalities in St. Louis County, and municipalities elsewhere in Missouri in which the revenue limitations of Senate Bill 5 appear to have been exceeded, adopt the following approach to older pre-existing warrants. We recommend that municipal cases filed prior to January 1, 2014, be dismissed by the municipal prosecuting attorney, and outstanding warrants in the dismissed cases immediately recalled and cancelled by the municipal court, except in cases where the municipal prosecuting attorney, upon review of each case file, finds that (1) the case would remain meritorious and viable for prosecution if the defendant should be taken into custody, and (2) that individualized good cause exists to maintain the prosecution as an open case. We further recommend that one aspect of the supervisory responsibility of the presiding circuit judge of each judicial circuit be periodic monitoring to ensure that these duties are performed properly by municipal court personnel. This recommendation is directed to the municipal prosecuting attorneys as to their responsibilities, and to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri, as to the responsibilities of the judicial branch.

RECOMMENDATION: That all municipal prosecuting attorneys undertake a review of all open case files, for the purpose of dismissing any cases, or any specific charges within cases, that are founded solely upon the basis of "failure to appear" to answer some other charge. We further recommend that when a case is dismissed by the municipal prosecuting attorney, the municipal court immediately recall and cancel any existing warrants in that case. This recommendation is directed to the municipal prosecuting attorneys as to their responsibilities, and to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri, as to the responsibilities of the judicial branch.

RECOMMENDATION: That all municipal prosecuting attorneys undertake a review, on at least an annual basis, of all open case files, for the purpose of determining whether there are cases no longer viable for prosecution that should be dismissed, or that should otherwise be dismissed in the interests of justice. We further recommend that when a case is dismissed by the municipal prosecuting attorney, the municipal court immediately recall and cancel any existing warrants in that case. This recommendation is directed to the municipal prosecuting attorneys as to their responsibilities, and to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri, as to the responsibilities of the judicial branch.

Cash-Only Bonds

In addition, we would offer the following observations and recommendations regarding the use of bonds, and specifically with regard to "cash-only" bonds in the municipal courts.

- **Cash-only bonds may be used in several situations. Recent concerns relating to alleged misuses of "cash-only" bonds are closely related to the issues raised concerning arrest warrants – particularly those concerns regarding the improper use of the municipal justice system to raise revenues, and the often severe consequences of extended detention for those arrested.**

A "cash-only" bond is one for which the issuing court has directed that the only sufficient surety is the deposit of a set sum of money in return for the release of the defendant. Other forms of bonds include personal recognizance bonds (release without payment of funds in return for a promise to appear); surety bonds (bond posted by a bail bonds company which "guarantees" the Defendant's appearance in court); ten per cent bonds (similar to the cash-only bond, but in which only ten per cent of the set bond amount is deposited with the court, the guarantor exposing himself/herself to civil liability for the remaining amount should the defendant fail to appear; and property bonds (pledge of property in lieu of deposit of cash; a form of lien against the property, if properly executed).

Cash-only bonds generally may occur in four basic types of situations: (1) prior to the filing of a charging document, at the time of citation or arrest, usually based upon a "bond schedule" established by law enforcement (sometimes referred to as a "Sheriff's bond"); (2) after the filing of charges but before disposition of the case, either upon warrant issued upon request of the state/city at the time of case filing or as the result of a failure to appear in court; (3) after disposition of the case, as a result of an alleged probation violation (depending on the circumstances, the warrant may be issued immediately or after failure to appear upon a notice of probation violation hearing); (4)

after disposition of the case, to enforce payment of amounts owed by the defendant (fines and costs).

Recent concerns relating to alleged misuses of "cash-only" bonds are closely related to the issues raised concerning arrest warrants – particularly those concerns regarding the improper use of the municipal justice system to raise revenues, and the often severe consequences of extended detention for those arrested. Some writers have taken the position that the use of cash-only bonds is always unconstitutional or, at least, unconstitutional as applied in certain circumstances involving the indigent. *See, e.g.*, "Statement of Interest of the United States," *Varden v. City of Clanton*, Case No. 2:15-cv-34-MHT-WC (M.D. Ala. 2015), filed as an attachment to the documents in the Jennings litigation settlement; Public Comment Letter from Janene McCabe and Justine M. Luongo, National Association for Public Defense, to Mr. Bill Thompson, October 10, 2014; Public Comment Letter from Cherise Fanno Burdeen and Penny Stinson, Pretrial Justice Institute, to the Supreme Court of Missouri, dated April 30, 2015. This position also appears to have been adopted as an editorial position of the St. Louis Post-Dispatch newspaper. *See* "Editorial: For Real Court Reform, Look to Jennings, Not Ferguson," ST. LOUIS POST-DISPATCH, August 28, 2015.

The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Missouri Constitution also guarantees the following, in Article I (Missouri's Bill of Rights):

> Section 11. That no person shall be imprisoned for debt, except for nonpayment of fines and penalties imposed by law.
>
> Section 20. That all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.
>
> Section 21. That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.
>
> Section 32. … 2. Notwithstanding section 20 of article I of this Constitution, upon a showing that the defendant poses a danger to a crime victim, the community, or any other person, the court may deny bail or may impose special conditions which the defendant and surety must guarantee.

A fairly comprehensive review of the law regarding bail and bonds is provided in the presentation to the 2014 Missouri Judicial Trial Colleges, "Bail/Bonds," by Judges Jeffrey Bushur and Alan Blankenship. The law regarding bail in municipal court does not differ in substance from that which applies in the state courts. Sec 544.455.8, RSMo, provides: "Persons charged with violations of municipal ordinances may be released by a municipal judge or other judge who hears and determines municipal ordinance violation cases of the municipality involved under the same conditions and in the same manner as provided in this section for release by an associate circuit

judge." As discussed in the Bushur and Blankenship materials, the procedural court rules applicable to bail are found in Missouri Supreme Court Rule 33.

- **The appropriate use of cash-only bonds is consistent with the Missouri Constitution. *State v. Jackson*, 384 S.W.3d 208 (Mo. banc 2012).**

The Supreme Court of Missouri recently addressed the constitutionality of "cash-only" bonds, in *State v. Jackson*, 384 S.W.3d 208 (Mo. banc 2012). The Court there undertook a substantial constitutional and historical analysis of cash-only bonds. Upholding the constitutionality of orders for cash-only bonds over against the contention that the defendant had a constitutional right to utilize surety bonds posted by commercial bondsmen, the Supreme Court held:

> The constitutional directive that persons be bailable by sufficient sureties does not require that only commercial bondsmen can stand as sureties. Historically, and today, other third parties and a reasonable cash bond required of defendant have been permitted to stand as surety so long as the bail requirement is used to serve the purpose of securing the defendant's appearance at trial rather than for preventing pretrial release or for other disallowed purposes. Moreover, under article I, section 32 of Missouri's Constitution adopted in 1992, courts can deny bail or impose special conditions on bail if necessary to protect the victim or the community. For all of these reasons, the trial court did not err in exercising its discretion to require a cash-only bond.

348 S.W.3d at 209.

In *Jackson*, the Supreme Court also provided an extended discussion of the appropriate uses of cash-only bonds, noting that they may not be used to keep an individual in jail if there is no constitutionally permissible purpose served by so doing. This section of the opinion is quoted here at length, due to its immediate relevance to the discussion at hand:

> Mr. Jackson also raises the argument that allowing the use of cash-only bail creates the risk of misuse of bail as a means of keeping defendants in jail by setting the amount of bail so high that a defendant has no realistic opportunity to post bail. The cases from other jurisdictions rejecting the use of cash-only bail also cite this concern as well as the concern that the purpose of bail is to protect the defendant, not the public.
>
> This Court shares the concern expressed by these cases and by Mr. Jackson that cash-only bail should not be used to keep a defendant in jail unnecessarily pending trial. Missouri law is clear that the purpose of bail is to secure the defendant's appearance. Indeed, the transcripts of the 1875 Missouri constitutional debates show that the fundamental purpose of including the "sufficient sureties" provision in the 1875 constitution was "to secure the attendance of

the accused for trial and if that object is attained, all is." Debates of the Missouri Constitutional Convention of 1875, pg. 444.

The current constitutional provision is worded identically to the provision in the 1875 provision and repeatedly has been interpreted by Missouri courts to mean that "the only purpose of bond is to secure the appearance of the defendant at the trial." *State ex rel. Corella v. Miles*, 303 Mo. 648, 262 S.W. 364, 365 (Mo. banc 1924). *Accord, Ex parte Chandler*, 297 S.W.2d 616 (Mo. App. 1957)("The purpose of bail is ... to secure ... appearance at the trial"). *See also Reynolds v. United States*, 80 S. Ct. 30, 32, 4 L. Ed. 2d 46 (1959)("The purpose of bail is to insure the defendant's appearance and submission to the judgment of the court"). Consistent with this purpose, Missouri law and this Court's rules provide that the purpose of bail is to "reasonably assure the appearance of the accused." Section 544.455, RSMo Supp. 2011; Rule 33.01.

While in 1992 the people of Missouri expanded the purpose of bail to include protection of crime victims by adopting article I, section 32(2), they did not thereby permit use of bail to keep a defendant from being released. Rather, section 32 provides only that bail may be denied or special conditions imposed notwithstanding the right to bail with sufficient sureties under *article I, section 20* "upon a showing that the defendant poses a danger to a crime victim, the community, or any other person." Mo. Const. art. I, § 32(2). Pursuant to this provision, as well as under this Court's Rule 33.01, Missouri courts can impose conditions on bail to protect others as well as to secure defendant's return or even deny bail if the State shows that the defendant poses a danger to the victim or public.[7]

7 To the extent that the cases cited by Mr. Jackson hold that cash-only bail is not permissible because the purpose of bail is to secure the defendant's rights rather than those of the public or court, they are inconsistent with article I, section 32 and with the purposes of bail under article I, section 20 of Missouri's constitution.

These provisions give the trial judge broad discretion in setting bail amounts and allow the judge to decide whether and how to set bail on a case-by-case basis following careful consideration of relevant factors. *See Chandler*, 297 S.W.2d at 617 ("[A]n accused might more easily succumb to the temptation to flee from some charges and under some circumstances than others").

None of Missouri's constitutional provisions, statutes or rules, however, permits the use of bail to keep a defendant in jail if the purpose of so doing is not to secure the defendant's appearance or to protect the victim, the community, or any other person. Use of cash-only bail or of any conditions for bail for this purpose is not

permitted by Missouri law. But cash-only bail does not inherently preclude a defendant's release. Indeed, it allows the defendant and his or her family to avoid the 10-percent or higher nonrefundable charge usually made by commercial bondsmen to cover their risk in becoming surety for the defendant's appearance at trial. Furthermore, the cash posted can be used to provide restitution to the victim under the Crime Victims' Compensation Fund. *See* section 595.045, RSMo Supp. 2011.

The problems identified by Mr. Jackson and the cases he cites are not with the use of cash-only bail per se but with abuse of cash-only bail provisions so as to set bail at an amount that the defendant cannot secure. In other words, it is a concern with the *amount* of bail, not with the *form* of bail permitted.

Concerns about the misuse of cash-only bail to keep a defendant in jail are not addressed by article I, section 20's provision that a person shall be bailable by "sufficient sureties," however, but rather by the provision in article I, section 21 of the Missouri Constitution providing that "excessive bail shall not be required."

"Since the only purpose of bond is to secure the appearance of the defendant at the trial, any bail fixed at more than is necessary to secure that appearance is excessive." *State ex rel. Corella v. Miles*, 303 Mo. 648, 651, 262 S.W. 364, 365 (Mo. banc 1924). Bail is not to be used as a means of punishment. *Chandler*, 297 S.W.2d at 616.

If bail is set higher than necessary to secure the defendant's appearance or to protect the public, it constitutes an impermissible punishment, contrary to the venerable presumption that a defendant is innocent until proven guilty. Rule 33.01 addresses these concerns by stating:

> In determining which conditions of release will reasonably assure appearance, the court shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character, mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings.

The trial judge is required, therefore, to consider defendant's financial resources in setting bail as well as other relevant conditions, and, of course, article I, section 32 of Missouri's constitution also requires consideration of the safety of the victim and the community. "Bail is not excessive merely because a defendant is unable to secure it." *Dabbs v. State*, 489 S.W.2d 745, 748 (Mo. App. 1972). But cash-

> only bail, like the setting of the amount of bail that may be secured through use of a commercial surety, must be used only for these permitted purposes, not to prevent a defendant's release when not necessary to secure the safety of the victim or the community or to secure the defendant's appearance at trial.

348 S.W.3d at 215-17.

- **Certain municipalities have entered into settlements in federal court litigation which have dramatically limited their ability to issue arrest warrants and to use cash-only bonds to secure pre-disposition appearance in court, to enforce the post-disposition obligations of defendants, or even to hold individuals on warrants issued by other municipalities. The Jennings litigation settlement provides an instructive example.**

Jackson does not appear to have made new law in Missouri; it merely restated law that has long existed. However, the use of cash bonds, and related common practices pertaining to bail and to the collection of court debt in Missouri courts, are facing new and more serious challenges, in federal court litigation involving the St. Louis County municipal divisions. The legal principles invoked in this litigation may have significant statewide implications, not only for the municipal divisions across Missouri, but also for the divisions of the state circuit courts handling state law offenses, as many of the legal principles involved are equally applicable in either setting. *See, e.g.*, "Velda City Sued in Federal Court Over Bail Amounts," ST. LOUIS POST-DISPATCH, April 8, 2015; "St. Ann Municipal Court Violates Rights of Poor, Class-Action Lawsuit Says," ST. LOUIS POST-DISPATCH, May 27, 2015; "Editorial: For Real Reform, Look to Jennings, Not Ferguson," ST. LOUIS POST-DISPATCH, August 28, 2015. The likelihood of additional federal litigation of this nature appears very great. *See, e.g.*, Paul Kiel and Annie Waldman, "The Color of Debt: How Collection Suits Squeeze Black Neighborhoods," ProPublica, October 8, 2015, available on-line at: https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods; Alysia Santo, "How to Fight Modern-Day Debtors' Prisons? Sue the Courts.", The Marshall Project, October 1, 2015, available on-line at: https://www.themarshallproject.org/2015/10/01/how-to-fight-modern-day-debtors-prisons-sue-the-courts.

This Report will focus on the Jennings litigation settlement, as an example of these sorts of proceedings.[32] The Jennings settlement receives substantial attention in this paper, due to the potential for litigation of this type to dramatically change the way cases are handled in the municipal courts, and perhaps also in the state courts.

The settlement of the Jennings litigation specifically restricts the use of cash bonds on a "bond schedule" immediately following arrest. The "Joint Motion for Entry of Final Declaratory and Injunctive Relief and Joint Stipulation of Dismissal" ("Joint Motion") provides:

> The use of a secured bail schedule to set the conditions of release of a person in custody after arrest for an offense that may be prosecuted by the City of Jennings implicates the protections of the Equal

[32] Some similar provisions with regard to bonds may also be found in the Proposed Ferguson Consent Decree, Part XVIII, §§ 349-350.

> Protection Clause when such a schedule is applied to the indigent.[33] No person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond. If the government generally offers prompt release from custody after arrest upon posting a bond pursuant to a bond schedule, it cannot deny a prompt release from custody to a person because the person is financially incapable of posting such a bond.

Joint Motion, p. 2.

The Jennings settlement also provides that "**if the individual tells the Court that he or she is unable to pay** on the same day" (emphasis added), the individual will be granted the option to enter into a payment plan, and "in no event will a person be charged extra fees for participation in a payment plan."[34] The individual may also complete a financial hardship form and receive an alternative disposition if an indigency standard is met. Joint Motion, pp. 2-3.

Under the terms of the Jennings settlement, it would appear that the municipal court gives up any claim to having the authority to issue warrants in the event of nonpayment and nonappearance as required by the payment plan.

> **All forms created for individuals requesting payment on a certain date and a payment plan to pay the fines and costs within six months of the court date will confirm to the individuals that the failure to pay the fines and costs as agreed will result in the City of Jennings referring the collection of the fines and costs to a civil debt collector for collection.** The form will also confirm that the performance of community service and/or the certified completion of an approved social program will result in the full payment of the fines and costs. Moreover, if an individual accepts the option of performing community service or to attend an approved social program to pay the fines and costs, **the form will also confirm that the failure to perform the community service or complete the approved social program as agreed will result in the fines and costs being reinstated and turned over to a civil debt collector for collection. The individual will be given credit for the community service performed when the fines and costs**

[33] Fixed bond schedules are criticized severely as an equal protection violation, and also as bad policy, in the "Statement of Interest of the United States," *Varden v. City of Clanton*, Case No. 2:15-cv-34-MHT-WC (M.D. Ala. 2015), a document filed as an attachment to the documents in the Jennings litigation settlement. This document discusses standards for setting bail in federal courts established under the federal Bail Reform Act of 1966, Pub. L. No. 89-465, § 2, 80 Stat. 214 (1966) (18 U.S.C. § 3142).

[34] Were this principle to be applied to the state court divisions, it would effectively invalidate Missouri Supreme Court Operating Rule 21.13, "Time Payment Fee," which provides: "All divisions of the circuit court, except municipal divisions, shall assess a $25 time payment fee on all cases not paid in full within 30 days of disposition." The "time payment fee" is authorized by § 488.5025, RSMo.

> **are reinstated for the failure to perform an amount of community service to pay the entire fine and costs.**

Joint Motion, p. 3 (emphasis added).

The settlement further eliminates the payment docket – the "pay or appear" docket which is a staple of fine and cost collection practice in virtually every Missouri court with which this author is familiar. The settlement provides:

> **The City of Jennings will eliminate the payment docket.** All debts for fines and costs will be collected in a manner consistent with the enforcement of **civil monetary judgments** under Missouri law. **If fines and costs are not paid or resolved by community service or waived within six months from the date assessed and/or approved, the City of Jennings will refer the debt to a civil debt collector and take no further action in the municipal court.** As stated above, this process will be communicated to every individual when the fines and costs are assessed through the use of court forms. **In no event will a civil collector be permitted to charge debtors additional fees in addition to the total amount of court debts owed**, and the City agrees not to contract with any debt collector who threatens debtors with prosecution or incarceration for non-payment.

Joint Motion, p. 4 (emphasis added).

The Jennings settlement further provides that "[t]he City of Jennings . . . **will not utilize secured money bail for persons in the custody of the City on arrest, either without a warrant or on the initial warrant issued**, for any violation that may be prosecuted by the City." Joint Motion, p. 4 (emphasis added). With very time-limited exceptions for assault-related cases and individuals who appear intoxicated at the time of arrest – but with no exception for individuals with a history of failure to appear – everybody gets a recognizance release, even upon service of the "initial" warrant for failure to appear. Joint Motion, pp. 4-5.

Missing the first court date must result in issuance of a second summons via regular mail; only upon missing a second court date will a warrant issue. That warrant must be recalled "if the individual chooses to appear in person at the Jennings Municipal Court Clerk's Office to schedule a new court date." Joint Motion, p. 5. If the person then misses the next court date (which he/she helped schedule), or is arrested on the "initial" warrant, granted a recognizance release, and then misses the next court date, the following must occur:

> If the individual then fails to appear on this new court date after procuring a new court date from the Municipal Clerk or service of the first warrant, then the Jennings Municipal Court will issue a new warrant **with an unsecured bond**. If the individual is arrested on this warrant, the individual will sign a form that will confirm a new court date and that the unsecured bond will be forfeited and converted to a judgment against the individual upon the individual's

> subsequent failure to appear at the new court date. The form will also confirm that if the individual does not appear on the new court date and the unsecured bond is converted to a judgment, that the City of Jennings will refer the collection of the debt for the unsecured bond to a civil debt collector if the debt is not paid by the individual within six months of the date the judgment is entered. …

Joint Motion, p. 6.

The defendant having now missed at least three appearances, the city may try again, and this time, there is a possibility of a cash bond, or some other sort of bond with conditions, being ordered:

> If the person fails to appear at the subsequent proceeding, the City's Municipal Court may, in its discretion, issue a new warrant and the City may arrest the person. Upon arrest, the City may detain the person in custody without bond for up to 48 hours so that the person may be brought before a judge for the consideration of the underlying case and, if further proceedings are necessary, for individualized consideration of detention or conditions of release provided that no person will be denied pretrial release because of their individual inability to make a monetary payment.

Joint Motion, p. 6.

The net result of the Jennings settlement is that a defendant may have three or four missed appearances on charges arising in Jennings, before the municipal court may even consider setting a cash or commercial surety bond. While it is not wholly clear from the terms of the settlement, if the rule from page 2 of the Joint Motion applies that no cash bond will be set if the individual tells the court that he/she cannot post a bond that day, the result may be yet another recognizance release, and the setting of a new court date. Reading the settlement in its entirety, it is far from clear whether a defendant found to be indigent, or perhaps even one falsely claiming to be indigent, could ever actually be compelled to appear for his/her own trial on a Jennings municipal ordinance violation.

In addition to these provisions, the Jennings settlement requires the City of Jennings to release all persons arrested on warrants issued by all other municipalities, if the warrant involves a monetary bond. Moreover, Jennings may not hold any defendant arrested on any type of warrant issued by another municipality for over 24 hours, unless that other municipality will bring the individual before a court within 48 hours. In this provision of the settlement, no distinctions are made regarding the individual's history of failure to appear in court, the individual's potential dangerousness to the community or a victim, or the nature of the charged offense.

- **While litigation settlements such as Jennings are often said to be justified by the holding of the Supreme Court of the United States in *Bearden v. Georgia*, 461 U.S. 660, 72-73 (1983), the Jennings settlement appears to go much farther than anything required or contemplated by the Supreme Court in *Bearden*.**

In justifying these arrangements, the Jennings settlement relies heavily on *Bearden v. Georgia*, 461 U.S. 660, 72-73 (1983), where, as noted in the Joint Memorandum of Law filed with the Joint Motion,

> . . . the Supreme Court explained that to "deprive a probationer of his conditional freedom simply because, through no fault of his own he cannot pay a fine … would be contrary to the fundamental fairness required by the Fourteenth Amendment." As a result, *Bearden* held that a court must engage in a meaningful inquiry whether any failure to pay was "willful." *Id.* At 672.

Joint Memorandum of Law, p. 2. However, by effectively outlawing all cash-only bonds in the City of Jennings, and by effectively making the Court's determination of indigency dependent solely on the defendant's word without a "meaningful inquiry" by the court, the Jennings settlement goes much farther than did the United States Supreme Court in *Bearden.* This is made clear by reading a more extended excerpt from the *Bearden* opinion:

> II
>
> This Court has long been sensitive to the treatment of indigents in our criminal justice system. Over a quarter-century ago, Justice Black declared that **"[there] can be no equal justice where the kind of trial a man gets depends on the amount of money he has."** *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (plurality opinion). *Griffin*'s principle of "equal justice," which the Court applied there to strike down a state practice of granting appellate review only to persons able to afford a trial transcript, has been applied in numerous other contexts. See, *e. g., Douglas v. California*, 372 U.S. 353 (1963) (indigent entitled to counsel on first direct appeal); *Roberts v. LaVallee*, 389 U.S. 40 (1967) (indigent entitled to free transcript of preliminary hearing for use at trial); *Mayer v. Chicago*, 404 U.S. 189 (1971) (indigent cannot be denied an adequate record to appeal a conviction under a fine-only statute). Most relevant to the issue here is the holding in *Williams v. Illinois*, 399 U.S. 235 (1970), that **a State cannot subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely because they are too poor to pay the fine**. *Williams* was followed and extended in *Tate v. Short,* 401 U.S. 395 (1971), which held that a State cannot convert a fine imposed under a fine-only statute into a jail term solely because the defendant is indigent and cannot immediately pay the fine in full. But **the Court has also recognized limits on the principle of protecting indigents in the criminal justice system**. For example, in *Ross v. Moffitt*, 417 U.S. 600 (1974), we held that indigents had no constitutional right to appointed counsel for a discretionary appeal. In *United States v. MacCollum*, 426 U.S. 317 (1976) (plurality opinion), we rejected an equal protection challenge to a federal statute which permits a district court to provide an indigent with a free trial transcript only if the court certifies that the

challenge to his conviction is not frivolous and the transcript is necessary to prepare his petition.

Due process and equal protection principles converge in the Court's analysis in these cases. See *Griffin v. Illinois, supra*, at 17. Most decisions in this area have rested on an equal protection framework, although Justice Harlan in particular has insisted that a due process approach more accurately captures the competing concerns. See, *e.g., Griffin v. Illinois, supra*, at 29-39 (Harlan, J., dissenting); *Williams v. Illinois, supra*, at 259-266 (Harlan, J., concurring). As we recognized in *Ross v. Moffitt, supra*, at 608-609, we generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause.

The question presented here is whether a sentencing court can revoke a defendant's probation for failure to pay the imposed fine and restitution, absent evidence and findings that the defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate. The parties, following the framework of *Williams* and *Tate*, have argued the question primarily in terms of equal protection, and debate vigorously whether strict scrutiny or rational basis is the appropriate standard of review. There is no doubt that the State has treated the petitioner differently from a person who did not fail to pay the imposed fine and therefore did not violate probation. To determine whether this differential treatment violates the Equal Protection Clause, one must determine whether, and under what circumstances, a defendant's indigent status may be considered in the decision whether to revoke probation. This is substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine. [7] Whether analyzed in terms of equal protection or due process, [8] the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such factors as "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose . . . ." *Williams v. Illinois, supra*, at 260 (Harlan, J., concurring).

In analyzing this issue, of course, we do not write on a clean slate, for both *Williams* and *Tate* analyzed similar situations. The reach and limits of their holdings are vital to a proper resolution of the issue here. In *Williams*, a defendant was sentenced to the maximum prison term and fine authorized under the statute. Because of his indigency

he could not pay the fine. Pursuant to another statute equating a $ 5 fine with a day in jail, the defendant was kept in jail for 101 days beyond the maximum prison sentence to "work out" the fine. The Court struck down the practice, holding that "[once] the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency." 399 U.S., at 241-242. In *Tate v. Short*, 401 U.S. 395 (1971), we faced a similar situation, except that the statutory penalty there permitted only a fine. Quoting from a concurring opinion in *Morris v. Schoonfield*, 399 U.S. 508, 509 (1970), we reasoned that "'the same constitutional defect condemned in *Williams* also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine.'" 401 U.S., at 398.

The rule of *Williams* and *Tate*, then, is that the State cannot "'[impose] a fine as a sentence and then automatically [convert] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.'" *Tate, supra*, at 398. In other words, if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it. Both *Williams* and *Tate* carefully distinguished this substantive limitation on the imprisonment of indigents from the situation where a defendant was at fault in failing to pay the fine. **As the Court made clear in *Williams*, "nothing in our decision today precludes imprisonment for willful refusal to pay a fine or court costs."** 399 U.S., at 242, n. 19. **Likewise in *Tate*, the Court "[emphasized] that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so."** 401 U.S., at 400.

This distinction, based on the reasons for nonpayment, is of critical importance here. If the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection. See ALI, Model Penal Code § 302.2(1) (Prop. Off. Draft 1962). Similarly, **a probationer's failure to make sufficient bona fide efforts to seek employment or borrow money in order to pay the fine or restitution may reflect an insufficient concern for paying the debt he owes to society for his crime.** In such a situation, the State is likewise justified in revoking probation and using imprisonment as an appropriate

penalty for the offense. **But if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, [9] it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available.** This lack of fault provides a "substantial [reason] which [justifies] or [mitigates] the violation and [makes] revocation inappropriate." *Gagnon v. Scarpelli,* 411 U.S. 778, 790 (1973). *Cf. Zablocki v. Redhail*, 434 U.S. 374, 400 (1978) (POWELL, J., concurring) (distinguishing, under both due process and equal protection analyses, persons who shirk their moral and legal obligation to pay child support from those wholly unable to pay).

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. Thus, when determining initially whether the State's penological interests require imposition of a term of imprisonment, the sentencing court can consider the entire background of the defendant, including his employment history and financial resources. See *Williams v. New York*, 337 U.S. 241, 250, and n. 15 (1949). As we said in *Williams* v. *Illinois*, "[after] having taken into consideration the wide range of factors underlying the exercise of his sentencing function, nothing we now hold precludes a judge from imposing on an indigent, as on any defendant, the maximum penalty prescribed by law." 399 U.S., at 243.

The decision to place the defendant on probation, however, reflects a determination by the sentencing court that the State's penological interests do not require imprisonment. See *Williams v. Illinois, supra*, at 264 (Harlan, J., concurring); *Wood v. Georgia*, 450 U.S. 261, 286-287 (1981) (WHITE, J., dissenting). A probationer's failure to make reasonable efforts to repay his debt to society may indicate that this original determination needs reevaluation, and imprisonment may now be required to satisfy the State's interests. But a probationer who has made sufficient bona fide efforts to pay his fine and restitution, and who has complied with the other conditions of probation, has demonstrated a willingness to pay his debt to society and an ability to conform his conduct to social norms. The State nevertheless asserts three reasons why imprisonment is required to further its penal goals.

First, the State argues that revoking probation furthers its interest in ensuring that restitution be paid to the victims of crime. A rule that imprisonment may befall the probationer who fails to make sufficient bona fide efforts to pay restitution may indeed spur probationers to try hard to pay, thereby increasing the number of probationers who make restitution. Such a goal is fully served,

however, by revoking probation only for persons who have not made sufficient bona fide efforts to pay. Revoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming. Indeed, such a policy may have the perverse effect of inducing the probationer to use illegal means to acquire funds to pay in order to avoid revocation.

Second, the State asserts that its interest in rehabilitating the probationer and protecting society requires it to remove him from the temptation of committing other crimes. This is no more than a naked assertion that a probationer's poverty by itself indicates he may commit crimes in the future and thus that society needs for him to be incapacitated. We have already indicated that a sentencing court can consider a defendant's employment history and financial resources in setting an initial punishment. Such considerations are a necessary part of evaluating the entire background of the defendant in order to tailor an appropriate sentence for the defendant and crime. But it must be remembered that the State is seeking here to use as the *sole* justification for imprisonment the poverty of a probationer who, by assumption, has demonstrated sufficient bona fide efforts to find a job and pay the fine and whom the State initially thought it unnecessary to imprison. Given the significant interest of the individual in remaining on probation, see *Gagnon v. Scarpelli, supra; Morrissey v. Brewer*, 408 U.S. 471 (1972*)*, the State cannot justify incarcerating a probationer who has demonstrated sufficient bona fide efforts to repay his debt to society, solely by lumping him together with other poor persons and thereby classifying him as dangerous. This would be little more than punishing a person for his poverty.

Third, and most plausibly, the State argues that its interests in punishing the lawbreaker and deterring others from criminal behavior require it to revoke probation for failure to pay a fine or restitution. The State clearly has an interest in punishment and deterrence, but this interest can often be served fully by alternative means. As we said in *Williams*, 399 U.S., at 244, and reiterated in *Tate*, 401 U.S., at 399, "[the] State is not powerless to enforce judgments against those financially unable to pay a fine." For example, the sentencing court could extend the time for making payments, or reduce the fine, or direct that the probationer perform some form of labor or public service in lieu of the fine. Justice Harlan appropriately observed in his concurring opinion in *Williams* that "the deterrent effect of a fine is apt to derive more from its pinch on the purse than the time of payment." 399 U.S., at 265. Indeed, given the general flexibility of tailoring fines to the resources of a defendant, or even permitting the defendant to do specified work to satisfy the fine, see *Williams, supra*, at 244, n. 21, a sentencing court can often establish a reduced fine or

> alternative public service in lieu of a fine that adequately serves the State's goals of punishment and deterrence, given the defendant's diminished financial resources. Only if the sentencing court determines that alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence may the State imprison a probationer who has made sufficient bona fide efforts to pay.
>
> We hold, therefore, that in revocation proceedings for failure to pay a fine or restitution, **a sentencing court must inquire into the reasons for the failure to pay**. **If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment** within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment. Only if alternative measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.

Bearden v. Georgia, 461 U.S. 660, 664-73, 103 S. Ct. 2064, 2068-73, 76 L. Ed. 2d 221, 227-33 (1983) (emphasis added, footnotes omitted).

A thorough review and briefing of the many cases in the progeny of *Bearden v. Georgia* is beyond the scope of this Report. Nonetheless, a review of the complete quotation from *Bearden*, set forth above, strongly suggests at least the tentative conclusion that, in precluding the municipal court of Jennings from setting facially reasonable cash bonds and then undertaking the required individualized inquiry, rather than by inviting it to do so, the terms of the Jennings settlement may have gone much farther than the United States Supreme Court itself would have been inclined to go, had the case been fully litigated.

- **Although cash-only bonds may at times be subject to abuse, when properly used they offer significant benefits for both the court system and individual defendants.**

Before moving on from the subject of cash-only bonds, it bears noting that while cash-only bonds may at times impose a burden upon defendants, they also have significant benefits, particularly as compared to commercial surety bonds. Occasional legislative proposals in Missouri to eliminate cash-only bonds have been routinely opposed by law enforcement and the judiciary alike. While in a perfect world, all criminal and municipal defendants would always faithfully appear in court based upon their personal recognizance, experience teaches that, all too frequently, this will not occur.

Cash-only bonds do not involve a commercial bail bondsman. While some bail bondsmen are ethical businesspeople, it must also be recognized that there is sometimes an unsavory aspect to this line of business; and, as noted in the *Jackson* case quoted above, any money paid over to a commercial bail bondsman to secure one's liberty is lost to the defendant forever. Moreover, not all commercial sureties are effective in actually bringing the defendant back before the court in the event of non-appearance. By contrast, money paid into the court as a cash-only bond remains the property of the defendant. If the defendant is acquitted or the case is dismissed, the money can be returned to the defendant (or to the third person who posted the funds on his/her behalf). The money on deposit with the court may also provide a source of funds for the defendant to retain private counsel in the case, as nearly all judges will approve a bond assignment for this purpose; and to the extent this occurs, the strain on the already overburdened public defender system is somewhat reduced.

Having a cash-only bond in the registry of the court creates the strongest possible incentive for the defendant to make all required court appearances, because his/her own money, or money belonging to someone very close to the defendant, is at stake. In cases where the defendant pleads guilty or is found guilty, money posted as a cash-only bond is available to satisfy (or at least partially satisfy) restitution to victims of crime, fines, and court costs, thereby improving the chances that the defendant's punishment for violations of the law will actually be carried out, and his/her "debt to society" repaid.

Therefore, although some advocates for low-income persons will likely always oppose the use of cash-only bonds, such bonds are not necessarily problematic. Rather, when properly used, they can offer many advantages both to defendants (including low-income persons) and to the administration of justice. The constitutional problems tend to arise when courts issue warrants with cash-only bonds for people who have not been given adequate notice of their obligation to appear in court; where courts create unnecessary barriers to understanding and participating in the proceedings; when the bond amounts are not facially reasonable; when persons arrested are incarcerated in substandard jail conditions; and when people arrested on such bonds are not promptly brought before a judge for an individualized evaluation of the conditions of release. Because these detestable conditions have often prevailed in some of the St. Louis County municipal courts, the practice of ordering cash-only bonds is now subject to unusually severe criticism.

RECOMMENDATION: That municipal courts not be precluded from having the ability to issue "cash-only" bonds, when used consistently with the principles of due process and in conjunction with a system which assures that persons arrested upon warrant are promptly brought before a judge for an individualized determination of ability to post bond and other relevant considerations. This recommendation is directed to the Supreme Court of Missouri and to the Missouri General Assembly.

RECOMMENDATION: That all municipal prosecuting attorneys and municipal courts undertake, in a cooperative fashion, a review of all presently outstanding warrants, for the purpose of confirming that the dollar amounts on all cash and surety bonds as currently set are not excessive, in light of all relevant known circumstances. This recommendation is directed to the municipal prosecuting attorneys as to their responsibilities, and to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri, as to the responsibilities of the judicial branch.

D. ENFORCEABILITY OF MUNICIPAL COURT JUDGMENTS AND REMEDIES FOR NONPAYMENT OF FINES

The Supreme Court of Missouri, in Chief Justice Breckenridge's letter dated September 22, 2015, specifically asked this Work Group to provide an analysis regarding "enforceability of judgments and remedies for nonpayment." As noted above, this issue is inextricably related to those previously addressed, involving the use of warrants and bonds.

Enforceability of Municipal Court Judgments

- **Recent legal developments, including litigation settlements such as that in Jennings and the passage of Senate Bill 5, have raised serious concerns relating to the legal authority and the practical capability to enforce municipal ordinances and municipal court judgments and orders.**

Serious concerns have also been raised by judges, and by others, that along with the need to assure due process and fundamental fairness for indigent and low-income persons and others appearing before the court, there also exists a critical need to have the legal authority and the practical capability to enforce municipal ordinances and municipal court judgments and orders.

Judge Patricia Riehl of the Circuit Court of Jefferson County raised these issues, in e-mail correspondence directed to this Work Group, dated July 14, 2015:

> I have read with a heavy heart the recommendations of the Ferguson Commission Call to Action and the resulting Senate Bill 5. I began my judicial career as a municipal judge in Jefferson County for two municipalities. I served over 16 years in that capacity and was proud to represent my community and court before taking the state bench in 2003. I have no doubt that some reforms are needed but no one seems to be focusing on the cost of those reforms nor does there seem to be any middle ground. . . . I cannot imagine not being able to issue warrants to summon defendants that simply will not appear. As a cost of these requested reforms I suspect that municipal police departments will file all charges with the county thus increasing the cost to the state for more judges and prosecutors to handle municipal cases. There is no doubt that there is room for improvement; and I support a reasoned response to the abuses that have occurred in a small percentage of the cities. Painting all municipalities with the same brush is not reasoned nor responsive.

See also Public Comment Letter from Hon. W. Laird Hetlage, Municipal Judge in Sunset Hills, Mo., to Supreme Court of Missouri, dated May 1, 2015 [provided to the Work Group in our materials] ("It is my impression that some people fail to appear because they forgot or had a conflict, but a significant number of people, who fail to appear, in my opinion do so deliberately in an attempt to avoid answering the charges.").

It should be noted that the municipal courts do, at present, retain the authority to issue warrants for those who fail to appear prior to disposition of the case. *See* Supreme Court Rules 37.43, 37.45, 37.46, 37.47, and § 479.100, RSMo. However, the ability to compel the attendance of a reluctant defendant in a meaningful way is likely very substantially reduced, in municipalities which have entered into settlements along the lines of the one involving the City of Jennings (see discussion above).

- **In a number of municipalities, including Ferguson, several steps have already been taken to improve court practices in regard to basic fairness and due process of law. Senate Bill 5 seeks to institutionalize better practices through a number of mandates which must be observed by municipal courts statewide.**

Judge Richter's earlier report noted that several steps have already been taken in the Ferguson Municipal Court, to improve court practices in regard to basic fairness and due process, including making fines more reasonable in relation to those fines charged elsewhere in St. Louis County and around the State; repeal by the City of Ferguson of a number of additional fees and the separate charge of "failure to appear"; implementation of new Supreme Court Rule 37.65 ("requir[ing] a judge, in a municipal division case in which a fine has been assessed but it appears the defendant lacks the means to pay the fine, to grant the defendant time in which to pay the fine, permit the defendant to make installment payments, modify the method of payment, or waive collection of part or all of any unpaid portion of the fine"); additional measures designed to permit persons of limited means to work with the court, including community service alternatives to monetary payments; measures to ensure that people may make their installment payments during regular business hours; and issuance of warrants only as a last resort to compel compliance. Judge Richter's Report Concerning Ongoing Efforts to Improve the State's Municipal Divisions dated May 11, 2015, pp. 2-7.

Senate Bill 5, § 479.360 RSMo, seeks to institutionalize these sorts of practices, requiring, among other things, that the municipal judge of every municipal court must annually certify:

> (4) The municipal court has established procedures to allow indigent defendants to present evidence of their financial condition and takes such evidence into account if determining fines and costs and establishing related payment requirements;
>
> . . .
>
> (8) The municipal court makes use of alternative payment plans and community service alternatives; and
>
> (9) The municipal court has adopted an electronic payment system or payment by mail for the payment of minor traffic violations.

Senate Bill 5, § 479.353(4) also provides, "Court costs that apply shall be assessed against the defendant unless the court finds that the defendant is indigent based on standards set forth in determining such by the presiding judge of the circuit. Such standards shall reflect model rules and requirements to be developed by the supreme court; . . .".

A number of issues will need to be given serious consideration, going forward. The practices adopted by Judge Richter – practices which already prevail in most courts around the state, and now for the most part specifically required by the express terms of Senate Bill 5 – ought to be adopted in all municipal courts. However, the harsh reality will remain, that if there is no actual punishment for violations of the law, there will be no effective deterrent to law violations.

Alternative dispositions are available to judges to work with people of limited means. Payment schedules may be stretched out over a period of time, and persons found guilty may be granted probation with an opportunity to perform community service in lieu of fines and other payments (*see, e.g.,* The Ferguson Commission, Forward Through Ferguson—A Path Toward Racial Equity: A Printed Companion to ForwardThroughFerguson.org, pp. 30, 99-100, "Create Community Justice Centers")[35]; Proposed Ferguson Consent Decree, Part XVIII, §§ 340-346. Municipal courts possessed such authority long before the passage of Senate Bill 5.

- **Nonetheless, even if beneficial reforms are put in place, some sort of effective enforcement mechanisms must remain, to compel actual compliance with municipal court judgments. To fail to retain effective enforcement mechanisms is to make a mockery of the justice system, and to encourage open defiance of both law enforcement and of the courts. The experience of our courts indicates that simply trying to collect court financial obligations in the same manner as ordinary civil judgments is unlikely to result in consistent collections of amounts due, or to provide a meaningful incentive for offenders to comply with the law.**

Nonetheless, some sort of effective enforcement mechanisms must remain, to compel actual compliance with these alternatives. In her State of the Judiciary address on January 22, 2015, Chief Justice Russell reminded the General Assembly that "[m]unicipal divisions play an important role in enforcing local laws" – but this cannot be true if all practical enforcement ability is taken from them. If persons granted payment plans fail to make payments or to appear in court, or if persons granted probation with community service conditions fail to complete the community service, there must be some effective means of (1) bringing that individual back into court and (2) imposing a meaningful punishment for those who will not comply. To do otherwise is to make a mockery of the justice system, and to encourage open defiance of both law enforcement and of the courts.

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[35] It must be noted, however, that no defendant can be compelled to perform community service, due to the constitutional prohibition on involuntary servitude. U.S. CONST, Amendment XIII. The defendant must be given the alternative to reject community service as a required condition of probation, and to receive instead a sentence to serve jail time and/or pay a fine. *See* § 559.021.3, RSMo: "The defendant may refuse probation conditioned on the performance of free work. If he does so, the court shall decide the extent or duration of sentence or other disposition to be imposed and render judgment accordingly. Any county, city, person, organization, or agency, or employee of a county, city, organization or agency charged with the supervision of such free work or who benefits from its performance shall be immune from any suit by the defendant or any person deriving a cause of action from him if such cause of action arises from such supervision of performance, except for an intentional tort or gross negligence. The services performed by the defendant shall not be deemed employment within the meaning of the provisions of chapter 288. A defendant performing services pursuant to this section shall not be deemed an employee within the meaning of the provisions of chapter 287."

There is also the practical consideration that some people suffer from physical or mental conditions, or have criminal histories, which may make most ordinary forms of community service impracticable or undesirable as a realistic option.

Failure to retain effective methods of enforcing compliance with judgments will simply encourage scofflaws, while discouraging those who faithfully obey the law and those who faithfully perform their court obligations.[36] If jail time is "off the table" for most offenses, and the courts possess no real authority to enforce collection of monetary obligations, then perhaps the only significant incentive which remains for compliance with the law is the conscience of the individual citizen. History does not suggest that this will always be sufficient.

Balancing the rights and needs of persons of limited means with the necessity of retaining the ability to impose punishment – which by its very nature and purpose, is both unpleasant and inconvenient – on those who refuse to comply, is one of the most significant challenges facing all judges at all times. *See, e.g.*, Sheila Dewan, "Court Conundrum: Offenders Who Can't Pay, Or Won't," NEW YORK TIMES, September 26, 2015 (available on-line at: http://www.nytimes.com/2015/09/27/us/court-conundrum-offenders-who-cant-pay-or-wont.html?_r=0). With regard to procedures and constitutional issues involved in fine and cost collection, *see generally* Judge Todd Thornhill's chapter on "Collection of Fines and Costs," from the Municipal Judge Bench Book, at pp. 4-5.

Even when hearings are held in accordance with the constitutional requirements outlined in Judge Thornhill's chapter and with Senate Bill 5, § 479.353(4), regarding ability to pay fines and costs, judges know and understand from long experience that – just as many people are not completely honest on their income taxes, child support calculations, etc. – many defendants will not be forthright with the court. Income and available resources will often be concealed, at times making it very difficult for the judge to reach an accurate determination of who is truly indigent, and who simply would rather keep their money for something else instead of paying fines and costs. Nonetheless, our system of justice routinely trusts judges to make difficult credibility evaluations in all types of cases, and such responsibility and trust should extend to this instance, as well.

There is a necessary role for judicial discretion, for judges to assess the credibility of those appearing before them – as they do in all cases – about matters of ability to pay. If the defendant's word is necessarily the last word on the matter of indigency, then the defendant has become the judge in his/her own case!

An apparent omission from the analysis in both the Department of Justice Report and in the Ferguson Commission Report lies in the failure to suggest what ought to happen, in cases where an individual simply refuses to comply with his/her court obligations, to the extent of his/her ability, after having been given a reasonable opportunity to do so. To those with experience in the court

[36] In using the term "scofflaw" here, the intent is to draw a clear distinction between those who deliberately and repeatedly ignore the requirements of the law and who often refuse to honor their court obligations, and the vast majority of citizens who conscientiously attempt to be law-abiding and to take care of court obligations, to the best of their ability, when they do have them. There is no intention to imply that the misconduct of certain municipal court officials and others in positions of authority, who at certain times and places have disregarded their obligations and failed to comply with legal requirements, is any less culpable. The reverse is true – those who occupy positions of public trust must be held to the highest standards, and those who knowingly betray that trust properly should be considered "scofflaws," as well. The recommendations set forth in this Report are offered in the hope of improving the legal compliance and the overall performance of the municipal courts, in their service to the people of Missouri. While the issues which must be addressed in this Report are often difficult and controversial, there is no intention to give offense to any person or group of people.

system, implementation of the recommendation of the Ferguson Commission – that municipal court debts should simply be collected in the manner of ordinary civil debts[37] – would amount in substance to an admission that such debts might never be collected at all. As a practical matter, the cost in time and personnel of attempting to collect such debts through the civil garnishment process may exceed the amounts owed, in many and perhaps even most cases, particularly in view of the relatively low probability of success in any given case. The actual experience of the actively serving judges in this Work Group has been that referral of court debts to a debt collection program operated by a private contractor have resulted in very little, if any, of the outstanding debt actually being collected.

There is simply no reason to believe that the mere possibility of a civil judgment for a relatively small amount of money, which nobody will likely ever make a real effort to collect anyway, is going to motivate many people to appear in court or to take care of their court financial obligations resulting from municipal ordinance or state criminal violations. Moreover, the arguments of those who contend that a judgment for fines and costs arising from a law or ordinance violation should be collected only in the manner of an ordinary civil debt fail to sufficiently recognize that the larger society has a far greater and more compelling interest in the enforcement of its own laws and ordinances enacted to protect public peace and safety, than it does in the resolution of purely private monetary disputes.

A related concern with the analysis of the Ferguson Commission Report, and other documents recommending a similar approach, lies in the apparent suggestion that people simply ought not to be arrested, at all, for failure to appear on "nonviolent" offenses. *See* The Ferguson Commission, Forward Through Ferguson—A Path Toward Racial Equity: A Printed Companion to ForwardThroughFerguson.org, pp. 29-30, 91-92. Their concerns with the unfortunate consequences of arrest for nonviolent offenders are well taken, and to a great degree justified. But again, the Ferguson Commission and those of like mind fail to suggest any meaningful alternative to the issuance of warrants – the standard court response to nonappearance since time immemorial. If attendance in court cannot be compelled by warrant, then a summons to appear upon a charge is not truly a summons at all, but only an invitation, which the defendant is free to ignore for a time or to disregard completely, as he/she may please.

Moreover, as a general principle, "nonviolent" offenses ought not to be considered as "unimportant" offenses, although this usually unspoken assumption now seems commonplace in many discussions of the justice system, in the news media and at all levels of government. Such a cavalier attitude ignores the reality that offenses commonly designated as "nonviolent" often have significant effects upon the public peace and safety, and upon the overall quality of life in the places where they occur.

During the course of this debate, it must be remembered that local governments do have a real and wholly legitimate interest in enforcing their own ordinances, as well as state laws, within their territory. *See, e.g.*, *Bearden v. Georgia*, *supra*, 461 U.S. at 669-70. Deciding what conduct shall be unlawful, and determining the appropriate ranges of punishment, is not a matter for the courts.

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[37] The Ferguson Commission, Forward Through Ferguson—A Path Toward Racial Equity: A Printed Companion to ForwardThroughFerguson.org, pp. 30, 92; *see also* "Statement of Interest of the United States," *Varden v. City of Clanton*, Case No. 2:15-cv-34-MHT-WC (M.D. Ala. 2015), a document filed as an attachment to the documents in the Jennings litigation settlement.

These are political questions of public policy, committed by our Constitution to legislative bodies – the General Assembly at the state level, and city councils at the municipal level. Perhaps there are existing criminal laws and municipal ordinances, and the punishments relating to them, which should be revisited and reconsidered; but this is not within the constitutional province of the courts.

These are exceedingly difficult issues, but they cannot be ignored. Part of the answer must lie in reasonable law enforcement practices that are in fact directed toward public safety and public peace, rather than toward revenue generation; and part of the answer must lie in reasonable sentencing practices and modifications to court operating procedures, as the Ferguson Commission and others have proposed. *See, e.g.*, "Redefining the Municipal Court Response to Nonviolent Offenses," with "Calls to Action," The Ferguson Commission, Forward Through Ferguson—A Path Toward Racial Equity: A Printed Companion to ForwardThroughFerguson.org, pp. 91-92, 99-100; Proposed Ferguson Consent Decree, Part XVIII, §§ 340-346.

Yet even if all these things shall be done, the unpleasant fact is that there will still be those individuals who will not voluntarily appear in court, or voluntarily comply with their probation conditions or payment obligations. There will still be individuals who will deliberately mislead the court regarding their ability to pay. There will still be those who repeatedly and willfully choose not to conform their conduct to the obligations shared by all citizens under the law.

Unless courts have both the authority and the will to respond in a timely fashion and to impose meaningful consequences for such misconduct – and the community is generally aware of this – the unintended result of reform will be the encouragement of both lawless behavior and disrespect for law enforcement and the courts. While focusing on improving substantive and procedural fairness for those appearing before the municipal courts, this Work Group must also remain mindful of the potential impacts of proposed policy recommendations on all the residents, businesses, and visitors in the communities involved. Because principles of law have statewide application, every community in the State of Missouri will be affected by the decisions made in this regard.

Remedies for Nonpayment of Fines and Costs

- **One very specific issue, brought to the attention of this Work Group through its own research and in the public hearing testimony received in Kansas City, is worth noting. The attempt to harmonize two provisions of Senate Bill 5 (L. 2015) and the newly amended Missouri Supreme Court Rule 37.65 (effective date July 1, 2015) has created confusion, inconsistency, and the inability to enforce money judgments in many municipal courts.**

Shortly before Senate Bill 5's effective date of August 28, 2015, new Rule 37.65 went into effect on July 1, 2015. As noted above in the discussion related to warrants, this rule includes a procedure allowing the court to order a defendant to show cause why the defendant should not be held in contempt for failure to pay a fine. Further, the rule provides that if the defendant should fail to appear, the court may issue a warrant for the defendant's arrest "to secure the defendant's appearance for a hearing on the order to show cause." Rule 37.65(b), (c).

Finally, this rule provides that if a show-cause hearing is held and "the judge finds the defendant intentionally refused to obey the sentence of the court or to have made a good faith effort to obtain the necessary funds for payment, the judge may confine the defendant for a term not to exceed thirty days for contempt of court." Rule 37.65(d).

Senate Bill 5 defines certain ordinances as "minor traffic violations," § 479.350(3), and sets significant limits with regard to sentencing on these violations. Total fines and costs are limited to not more than three hundred dollars, and jail sentences are prohibited, except for "violations involving alcohol or controlled substances, violations endangering the health or welfare of others, and eluding or giving false information to a law enforcement officer." One of the more curious aspects of Senate Bill 5 is found at § 479.353(3), which provides that with regard to "minor traffic violations," "A person shall not be placed in confinement for failure to pay a fine unless such nonpayment violates terms of probation."

The question arises, how failure to pay a fine could actually violate "terms of probation." Like a jail sentence to be served, a fine is a sentence which has been ordered imposed and executed. *See* § 479.080, 479.240, 560.016, RSMo. If a suspended execution of sentence has been granted as to the fine, and the defendant granted probation, then payment of the fine logically cannot be a condition of probation – because the fine is not then due![38] The conditions of probation may

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[38] *See* § 566.026.5, RSMo: "When an offender is sentenced to pay a fine, the court shall not impose at the same time an alternative sentence to be served in the event that the fine is not paid. The response of the court to nonpayment shall be determined only after the fine has not been paid, as provided in section 560.031." The Jennings federal court settlement, discussed *supra*, appears to disregard the principle of this subsection, in permitting the use of community service, not as a condition of probation, but as an alternative sentence to a fine. Jennings Settlement, Joint Motion, pp. 2-3.

Sec. 560.031, RSMo provides:

1. When an offender sentenced to pay a fine defaults in the payment of the fine or in any installment, the court upon motion of the prosecuting attorney or upon its own motion may require him to show cause why he should not be imprisoned for nonpayment. The court may issue a warrant of arrest or a summons for his appearance.
2. Following an order to show cause under subsection 1, unless the offender shows that his default was not attributable to an intentional refusal to obey the sentence of the court, or not attributable to a failure on his part to make a good faith effort to obtain the necessary funds for payment, the court may order the defendant imprisoned for a term not to exceed one hundred eighty days if the fine was imposed for conviction of a felony or thirty days if the fine was imposed for conviction of a misdemeanor or infraction. The court may provide in its order that payment or satisfaction of the fine at any time will entitle the offender to his release from such imprisonment or, after entering the order, may at any time reduce the sentence for good cause shown, including payment or satisfaction of the fine.
3. If it appears that the default in the payment of a fine is excusable under the standards set forth in subsection 2, the court may enter an order allowing the offender additional time for payment, reducing the amount of the fine or of each installment, or revoking the fine or the unpaid portion in whole or in part.
4. When a fine is imposed on a corporation it is the duty of the person or persons authorized to make disbursement of the assets of the corporation and their superiors to pay the fine from the assets of the corporation. The failure of such persons to do so shall render them subject to imprisonment under subsections 1 and 2.
5. Upon default in the payment of a fine or any installment thereof, the fine may be collected by any means authorized for the enforcement of money judgments.

Sec. 560.036, RSMo, provides: "A defendant who has been sentenced to pay a fine may at any time petition the sentencing court for a revocation of a fine or any unpaid portion thereof. If it appears to the satisfaction of the court that the circumstances which warranted the imposition of the fine no longer exist or that it would otherwise be unjust to require payment of the fine, the court may revoke the fine or the unpaid portion in whole or in part or may modify the method of payment."

include performance of community service, payment of restitution to victims, payment of other court costs, and other appropriate conditions. *See* § 479.190, 559.021, 559.100, RSMo. If the defendant fails to comply with the conditions of probation, and a motion for revocation of probation is granted, at that time the fine may be ordered executed and imposed – but then it is no longer a condition of probation. The only immediately apparent circumstance in which failure to pay a fine in one case could constitute a probation violation would be where payment of that fine had been made a condition of the defendant's probation in another, separate case.

In view of this analysis, pending a definitive ruling from an appellate court, many prudent judges may reasonably conclude that one net effect of Senate Bill 5, §§ 479.350 and 479.353, is that the municipal court no longer has the authority to issue a warrant for failure to appear at a show-cause hearing to explain nonpayment of a fine ordered on a "minor traffic violation." If this were all that Senate Bill 5 had done, then warrant authority would presumably remain with regard to show-cause hearings for other court costs and to fines for other types of offenses, provided all other procedures had been properly followed, if the Defendant failed to appear or make a payment as required by a court-approved installment payment plan. *See* § 479.240, RSMo[39] and Supreme Court Rule 37.65(c).[40]

However, Section 479.360.1 of Senate Bill 5 further requires that every municipal judge must annually certify that certain procedures have been followed, including in subdivision (3), that "Defendants are not detained in order to coerce payment of fines and costs." Even if § 479.240, RSMo and Supreme Court Rule 37.65(c) are held to provide authority to issue a warrant for an individual who has failed to pay fines and costs and ignored a show cause order, § 479.360.1(3) appears to withdraw that authority by requiring the municipal judge to certify that such authority will not be used. Even if the technical legal theory behind the warrant is that the defendant failed to appear upon the order to show cause, a reasonable and necessary extrapolation is that the order to show cause was only issued to enforce payment of fines and costs. To the extent that substance should triumph over form, § 479.360.1(3) appears to dictate that no municipal judge may issue a warrant for any reason when payment of fines and costs is involved, even if required by an approved installment plan or ordered as a condition of probation, and even if the defendant has ignored an order to show cause with regard to the amounts due.[41]

These sections apply to state law offenses, but they also may be fairly considered as setting the minimum standards which must be applied to the same situations before a municipal court. Section 560.031, RSMo, is referenced in support of the Jennings litigation settlement.

[39] Section 479.240, RSMo provides: "When a fine is assessed for violation of an ordinance, it shall be within the discretion of the judge assessing the fine to provide for the payment of the fine on an installment basis under such terms and conditions as he may deem appropriate."

[40] Further complicating the issue is that Supreme Court Rule 37.65(c), by its own terms, applies only to fines, and does not address whether authority is granted to enforce the collection of other court costs as well. The law is much less clear on this point than many judges would find desirable.

[41] In the "Municipal Legislative Update: Frequently Asked Questions," distributed by OSCA, the distinction is made, at least with regard to a "non-minor traffic violation" that "Rule 37.65 provides that an order to show cause can be served at the defendant's last known address by first class mail for defendant's default on payment. The judge may issue a warrant if the defendant fails to appear. After arrest, the judge shall make a determination of bond within 48 hours for a minor traffic violation. In this instance, the warrant is issued for failing to abide by the judge's order (contempt), not to coerce payment of fines and costs." Municipal Legislative Update, page 11 of 19. While the distinction is logically comprehensible, and the state circuit courts routinely rely on it with regard to state law criminal violations, there now

Moreover, § 479.360.1(3) is not limited to "minor traffic violations" as defined in section 479.350. The net effect, should this interpretation of the statute be correct, is that the municipal court cannot enforce payment of fines and costs as to any of its municipal ordinances. The judge's order and sentence for payment of fines and costs may be regarded by the defendant as merely a polite suggestion; and this is now true statewide, in all municipal courts. For most "minor traffic violations," jail is unavailable as sentence, and a fine is the only option; and even the fine is unenforceable. The judge could, of course, place the defendant on probation, order community service, etc. However, if the probation conditions were subsequently violated, the court's only remedy would be to order a completely unenforceable fine.

Thus, municipal judges are faced with an apparent inconsistency in the law and no clear guidance. While the two new statutory provisions seem to prohibit jailing a defendant for failing to pay fines, Rule 37.65 seems to sanction incarceration for contempt if certain findings are made. Some courts have taken the position to not implement the show-cause procedures authorized by Rule 37.65 because the issuance of an arrest warrant for failing to appear at the show-cause hearing, and the inevitable resulting arrest and detention, might be construed as "confinement for failure to pay a fine" or "det[ention] in order to coerce payment of fines and costs." Other courts, in spite of these new statutes, are issuing show-cause orders and summonses, and then arrest warrants for those who fail to appear in response thereto.

Additionally, even though a contumacious defendant may be confined for up to 30 days under Rule 37.65(d), there is an obvious reluctance to do so based on the prohibitions of these two statutes. It is not currently known whether any courts have incarcerated a defendant for contempt pursuant to the rule.

Another unresolved piece of this analytical puzzle is the attempt to harmonize the rule and the statutory provisions in light of Rule 37.02 ("Rule 37 … supersedes all statutes … inconsistent therewith") and its constitutional authorization at Article V, § 5 of the Missouri Constitution: "The supreme court may establish rules relating to practice, procedure and pleading … [but] shall not change substantive rights . . .".

In short, the attempts of individual judges to understand, harmonize, and apply these various statutory, rule, and constitutional provisions have resulted in confusion and inconsistent practice. Some jurisdictions are declining to act to enforce their judgments for fines and costs, perhaps unnecessarily. However, a worse consequence is that other jurisdictions – despite having made a good faith attempt to follow the law – are acting in a manner which may be held to constitute the unlawful jailing of offenders, thereby violating constitutional rights and potentially exposing city governments to liability risk. This situation will persist until the statutes discussed here are repealed or amended by the General Assembly to provide greater clarity, or until definitive interpretive guidance shall have been obtained from the appellate courts.

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exists a great doubt whether this distinction remains tenable with regard to municipal ordinance violations, in view of the broad language of §479.360.1(3). Yes, the contempt is a violation of the judge's order to appear; but what purpose did the judge's order serve, other than to coerce payment of the amounts due? Until definitive guidance shall have been obtained, prudent judges may wish to be very cautious in this regard.

Where does this situation leave those municipal courts which decide to act in a prudent and cautious fashion? For more serious municipal offenses, a jail term would remain a possibility; but this requires the municipality to provide access to a public defender for those defendants deemed indigent. The practical reality is that, at least in many smaller municipalities, it is not financially feasible for the city to provide a public defender. For this reason, many municipalities elect to write all charges for which jail time is contemplated as a possible outcome, as state charges to be filed in the associate division of the circuit court (where the State provides a public defender), rather than as municipal ordinance violations. (Local practice in this regard varies widely across the state.) Moreover, as to the "minor traffic violations," even the threat of suspension of driving privileges for nonpayment – formerly a major motivator for traffic defendants to take care of their cases, sooner or later – has now been eliminated, due to the Senate Bill 5 amendment to § 302.341, RSMo.

To the extent the foregoing analysis is substantially correct, there now exists no reason why any rational police officer would write any charge as a municipal ordinance violation, if a corresponding state law charge is also available. To the extent officers change their practices in this way, defendants may be significantly harmed – for the court costs, criminal penalties, driver's licensing consequences, and other potential collateral consequences of conviction are often far greater on state law charges than would be true had the case been brought in the municipal division as an ordinance violation.

Moreover, as an awareness of these realities penetrates the defense bar and the general public, it will also become increasingly true that the people most likely actually to pay the court-ordered financial consequences of municipal law violations will be the people least in need of punishment by the justice system, those most likely to be self-correcting in their own behavior. Meanwhile, the scofflaws will be able to offend, and re-offend, without suffering any meaningful consequences.

If this is truly what the General Assembly intended, so be it; but the question may be fairly raised, whether perhaps this may have been an unintended consequence, contrary to the best intentions of the legislature.

RECOMMENDATION: That, in order to provide clarity and guidance to municipal courts regarding enforcement of money judgments, the General Assembly repeal the newly enacted language of subsections 479.353(3) and 479.360.1(3), RSMo, or amend those statutes to provide as follows (proposed new language is <u>underlined</u>):

> **Subsection 479.353(3), RSMo: "A person shall not be placed in confinement for failure to pay a fine unless such nonpayment violates terms of probation <u>or unless the due process procedures mandated by Missouri Supreme Court Rule 37.65 or its successor rule are strictly followed by the court</u>;"**
>
> **Subsection 479.360.1(3), RSMo: "Defendants are not detained in order to coerce payment of fines and costs <u>unless found to be in contempt after strict compliance by the court with the due process procedures mandated by Missouri Supreme Court Rule 37.65 or its successor rule</u>;"**

E. AUTHORITY OF THE SUPREME COURT OF MISSOURI

The Supreme Court of Missouri, in Chief Justice Breckenridge's letter dated September 22, 2015, asked this Work Group to provide an analysis regarding "consolidation of municipal divisions, including any authority of the Supreme Court to mandate consolidation." An eight-to-one majority of the Municipal Division Work Group has reached the following conclusions, in regard to these questions.

Consolidation of Municipal Courts

- **Under the Missouri Constitution, the Supreme Court of Missouri does not possess the authority to mandate consolidation of municipal courts.**

Some influential voices are now arguing, with great force and vigor, that the Supreme Court of Missouri, acting *sua sponte* and solely on its own authority under Article V of the Missouri Constitution, should order consolidation of the municipal courts of St. Louis County, and determine the structure of a new system that would replace them. *See, e.g.*, The Ferguson Commission, Forward Through Ferguson—A Path Toward Racial Equity: A Printed Companion to ForwardThroughFerguson.org, pp. 34, 76-77, in which the Ferguson Commission issues a "Signature Call to Action" recommending that "[t]he Missouri Supreme Court shall take direct jurisdiction of municipal court functions through the associate circuit court and consolidate into an appropriate number the municipal courts for the purpose of the efficient administration of justice."; Arch City Defenders, "It's Not Just Ferguson: Missouri Supreme Court Should Consolidate the Municipal Court System," August 14, 2015. Yet those who advance this position are not relying on any specific language in Article V – for indeed they cannot.

At least since the middle 1700s, the importance of the principle of separation of powers between the legislative, executive, and judicial branches has been well-recognized as a most salutary check upon tyranny, and a necessary structural measure to limit opportunities for corruption and the undue influence of any one branch of the government upon the others. *See generally* Montesquieu, THE SPIRIT OF THE LAWS (first published 1748) (Thomas Nugent trans., New York: Hafner Publ. Co. 1949), Book XI, § 6; *see also* THE FEDERALIST Nos. 47 (Madison), 51 (Madison), 78 (Hamilton), 79 (Hamilton). This principle is clearly reflected in the Constitution of the United States, and is specifically declared in the Missouri Constitution, Art. II, § 1:

> The powers of government shall be divided into three distinct departments—the legislative, executive, and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

Article V, § 1 of the Missouri Constitution provides, "The judicial power of the state shall be vested in a supreme court, a court of appeals consisting of districts as prescribed by law, and circuit courts." The "judicial power," in itself, does not extend to determining which particular courts shall or shall not exist. *See, e.g.*, *Johnson v. Wabash R. Co.*, 259 Mo. 534, 544, 168 S.W. 713, 715 (1915)

("the judicial power referred to in the constitutional provision, supra, has reference to the actual and real trial and determination of 'matters of law and equity' ..."). In contrast to this, the power to reorganize municipal governments – which by definition include their court systems – is legislative in nature:

> In *State ex rel. and to Use of Behrens v. Crismon*, 354 Mo. 174, 188 S.W. 2d 937, it is said, 'The power to create or establish municipal corporations, or to enlarge or diminish their area, to reorganize their governments, or to dissolve or abolish them altogether is a political function which rests solely in the legislative branch of the government, and in the absence of constitutional restrictions, the power is practically unlimited.' 37 AM. JUR., Municipal Corporations, Sec. 7, p. 626. In that connection this court has said: 'It has long been the rule in this state, and generally throughout the country, that the power of the legislature in the creation of public corporations - - - is absolute except where limited by the constitution. The legislature may also change, divide, consolidate and abolish them as the public welfare demands.' *State ex rel. Consolidated School District No. 8 of Pemiscot County et al. v. Smith, State Auditor*, 343 Mo. 288, 121 S.W. 2d 160, 162, and cases therein cited." A municipal corporation when once incorporated can only become disincorporated by resorting to the proceedings pointed out by statute. *State ex rel. and to Use of Behrens v. Crismon*, supra; *State ex rel. Hambleton v. Town of Dexter*, 89 Mo. 188, 1 S.W. 234.

In re Disincorporation of Kinloch, 362 Mo. 434, 439, 242 S.W.2d 59, 62 (1951).

The Missouri Constitution, Article V, § 4, subsection 1, provides, "The supreme court shall have general superintending control over all courts and tribunals." This section refers to the power of the Supreme Court to supervise the lower courts, issue remedial writs, etc. The phrase "general superintending authority," indicates the nature of the power of the Supreme Court. The phrase "over all courts and tribunals" indicates that to which this power applies, but also suggests that the existence of "all courts and tribunals" is to be determined by reference to other law, and not by the Supreme Court itself.

That subsection 1 of Article V, § 4, does not imply a power to create or destroy the lower courts themselves becomes even more readily apparent, from a reading of Article V in its entirety. *See, e.g.*, Article V, § 5 (Supreme Court to have authority to establish rules of practice and procedure); Article V, § 6 (Supreme Court may temporarily transfer judges from one court to another "as the administration of justice requires"); Article V, § 13 (specifying that there shall be three districts of the court of appeals); Article V, § 15 (specifying that "the state shall be divided into convenient circuits of contiguous counties," a power that has always been deemed to reside in the legislative branch); Article V, § 16 (specifying that the number of associate circuit judges in each county shall be "as provided by law" (an expression used throughout the Constitution to refer to statutory law enacted by the legislative branch), subject to the limitations set forth in this section of the Constitution); Article V, § 23 ("Each circuit may have such municipal judges as provided by law" – again, by the legislative authorities in the first instance, and by the municipal authorities under their

powers delegated by the legislature); Article V, § 27, subsection 9a (municipal judges and their courts shall continue to exist until otherwise provided by law).

Reading all these provisions together, and reading them in light of the overarching principle of separation of powers as declared in Article II, § 1, it is not plausible to conclude that the Supreme Court possesses the constitutional authority to order consolidation of the municipal divisions.

- **Even if the Supreme Court should determine that the Missouri Constitution grants it the authority to mandate consolidation of municipal courts, there are powerful jurisprudential, political, and practical considerations which would counsel against using such authority.**

The foregoing analysis indicates that the Supreme Court of Missouri does not have the constitutional authority to do that which the Ferguson Commission and others have suggested. Yet ultimately, the majority opinion of this Work Group – or any other private opinion – as to whether the Supreme Court of Missouri could, on its own initiative, consolidate or otherwise reorganize the municipal divisions of St. Louis County, is of little consequence. But even should a majority of that Court believe itself to be vested with such prerogatives, the basic jurisprudential question would still remain – should this thing be done, in this way? Strong and cogent reasons would still remain as to why the Supreme Court should leave these matters to the political branches of government.

It is the "governed" – in this instance, the residents of the municipalities of St. Louis County – who must live with the consequences of any restructuring of their local governments and courts. If these citizens do not have a meaningful opportunity to participate in the decision making process, and if they do not take ownership of the decisions that finally are made, it is difficult to see how their local government could enjoy widespread popular support and succeed over the long term. Moreover, the political blame for any shortcomings or outright failures of the new system would rightly fall back upon the Supreme Court, which would have imposed the new regime but which – due to its inherent limitations as a court – lacks the actual capability to make local governmental units function properly on a continuing basis.

More importantly, from a long-term perspective, there would likely be a negative impact on the perception of the role of the judicial branch. To the extent the Supreme Court would elect to abandon the judicial role and become a political actor, this would also substantially undercut the strongest arguments in favor of the adoption and continuation of the Missouri Non-Partisan Court Plan. The compelling justification for the Missouri Plan has always been, and remains today, that judges on our appellate courts and in our larger trial court jurisdictions should be selected based on merit and retained in a manner that minimizes their exposure to the rough-and-tumble world of politics and the sorts of hard-nosed, sometimes vicious, and often prohibitively expensive campaigns for office that characterize most elections for positions in the executive and legislative branches. In this fashion, the public may be assured that it has judges who are both willing and able to hear and decide their cases on the merits, according to the law, and as nearly independent of political influences and other sources of corruption as may be achieved in an imperfect world.

The most basic rationale for the Missouri Plan quickly loses both its force and its appeal, if the courts claim for themselves the authority to make decisions which are inherently political in nature. It would not take long for both friends and enemies of the judiciary to recognize that such

matters should be decided by officials chosen by the voters through competitive elections, where opportunities exist for candidates to declare where they stand, for issues to be openly debated, and for citizens to have at least some degree of input regarding policy choices and approaches to governance.

There has been much political agitation, in the press and elsewhere, in favor of consolidation of municipal governments and/or their courts, or simply the complete elimination of some municipal governments, in St. Louis County. These advocates focus upon functional deficiencies, excessive costs, and lack of coordination in the existing system. Very serious allegations of misuse of power by municipal law enforcement and courts in the St. Louis area have been raised and, in many instances, substantiated. On the other hand, there have also been voices raised in defense of maintaining the current governmental structure, pointing out the benefits and advantages of smaller governments which can be closer and more accountable to those they serve. Among these advantages, in the particular circumstances of north St. Louis County, is the reality that smaller municipal governments provide many more citizens, including specifically many African-Americans, with opportunities to serve in responsible community leadership positions – opportunities that would become both much more scarce and much more difficult to attain, should the municipalities be consolidated into larger entities. Both of these basic points of view, along with all the many variants thereof, are political positions. While it is appropriate for courts to have very substantial control over their own procedures and supervision over their own personnel, it is not for the judicial branch to decide the political question as to whether any particular courts, or any particular units of government, shall or shall not continue to exist.

Just as it is critical that the judicial branch should remain free of improper interference from the executive and legislative branches when working on matters properly committed to its own domain, it is equally important that the judicial branch should not seek to interfere in political matters committed by the Constitution to the other coordinate branches of government. Decisions with regard to consolidation of municipal divisions of the circuit court must be made by the Missouri General Assembly, and/or by the municipal governments or the voters of the localities directly involved, rather than by the Supreme Court of Missouri.

- **For these reasons, a majority of this Work Group concludes that decisions regarding consolidation of municipal courts must remain the responsibility of the Missouri General Assembly, and/or of the municipal governments or the voters of the localities directly involved, rather than being made by the Supreme Court of Missouri.**

Referral of Municipal Cases to the Associate Division of the Circuit Court

- **The Supreme Court of Missouri does not possess the constitutional authority to order a particular municipality to make the election authorized by Missouri Constitution, Article V, § 23, to have its municipal ordinance violation cases heard by an associate circuit judge.**

- **However, the Supreme Court of Missouri does have broad authority to temporarily transfer another judge (who may be an appellate judge, a circuit judge, an associate circuit judge, or another municipal judge) to hear a particular case, certain dockets,**

or all cases pending, in a specific municipal division, "as the administration of justice requires." This authority affords the Supreme Court of Missouri the ability to supplement or even replace judicial personnel when necessary in specific situations.

At the public hearing conducted by this Work Group in Springfield, Missouri, on September 25, 2015, there was some discussion of the related question of whether the Supreme Court has the authority to require cities to have their municipal ordinance cases, or at least certain classes of cases, heard in the associate divisions of the circuit court. The potential advantages of this arrangement are substantial: reduced costs to municipalities, in that there is no longer a need hire a municipal judge or clerks of court; the ability to have a municipal court in even the smallest cities, which is open on all business days to hear cases, see defendants who have been arrested on warrant, set appropriate bonds, and receive payments on cases; elimination of the need to maintain the complex bookkeeping and recordkeeping systems required by operation of a separate court; and the ability to have cases heard and decided by an Article V state judge, who is "on call" at all times and not subject to the internal political pressures of municipal government and has no incentive to use the mechanisms of municipal court as a means to raise revenue. These numerous advantages have already led nearly all smaller municipalities in northern Missouri, and many elsewhere in the State, to refer their municipal cases to the associate division.

It is true that, in some instances, the state courts may require additional resources to handle the municipal caseload. Nonetheless, the argument that this arrangement would place too great a burden on the state courts is refuted by the fact that the people of the State, in their Constitution, have given their approval in advance to such arrangements (see discussion below).

Some have suggested that the "general superintending control over all courts and tribunals" granted to the Supreme Court in the Missouri Constitution, Article V, § 4, subsection 1, provides authority for the Supreme Court to direct that specific municipalities make the election authorized by Article V, § 23, to have their municipal ordinances cases heard by an associate circuit judge. A majority of this Work Group concludes that this view is not correct.

The authority of the Supreme Court to transfer a judge from one court to another, as the interests of justice may require, is beyond dispute. The Missouri Constitution, Article V, § 6 provides:

> The supreme court may make temporary transfers of judicial personnel from one court or district to another as the administration of justice requires, and may establish rules with respect thereto. Any judge shall be eligible to sit temporarily on any court upon assignment by the supreme court or pursuant to supreme court rule.

The recent temporary transfer of Judge Roy Richter of the Court of Appeals to the Ferguson Municipal Division is an example of the use of this authority.[42] However, temporarily transferring a

[42] As a technical matter, the Supreme Court exercised its authority under Article V, § 6 to transfer Judge Richter to the St. Louis County circuit court. The presiding judge then used Court Operating Rule 14.01 to assign Judge Richter to the Ferguson cases. Because of this arrangement, Judge Richter served as the municipal judge of Ferguson and heard those cases as a municipal judge. Judicial transfers to the municipal divisions of the circuit court are governed by Court Operating Rule 14.01 and §§ 479.230 and 479.270, RSMo.

judge from one court to another is not the same as permanently transferring entire classes of cases from one court to another. It is not clear that transferring all cases, or certain classes of cases, from a municipal division to the associate division of the same circuit court, is something the Supreme Court is authorized to do, either through its own rulemaking authority, MO. CONST., Art V., § 5, and § 477.010, RSMo, or through the subordinate authority of the individual circuit courts to "make rules for the circuit not inconsistent with the rules of the supreme court," MO. CONST., Art. V, § 15, and § 478.245.3, RSMo.

The Supreme Court "has the power to make procedural rules governing all legal matters subject only to the limitations of federal law and the Missouri Constitution." *Berdella v. Pender*, 821 S.W.2d 846, 850 (Mo. banc 1991). With regard to jurisdiction over municipal ordinance violation cases, such a constitutional limitation exists. Original jurisdiction over municipal cases is granted to the municipal divisions by the Constitution itself. MO. CONST., Art. V, § 23:

> Each circuit may have such municipal judges as provided by law and the necessary non-judicial personnel assisting them. The selection, tenure and compensation of such judges and such personnel shall be as provided by law, or in cities having a charter form of government as provided by such charter. A municipal judge may be a part-time judge except where prohibited by ordinance or charter of the municipality. A municipal judge shall hear and determine violations of municipal ordinances in one or more municipalities. Until otherwise provided by law, or supreme court rule, the practice, procedure, right to and method of appeal before and from municipal judges shall be as heretofore provided with respect to municipal courts.

See also MO. CONST., Art. V, § 27, subsection 9a. This jurisdiction conferred in Article V, § 23 been codified at § 479.010, RSMo:

> Violations of municipal ordinances shall be heard and determined only before divisions of the circuit court as hereinafter provided in this chapter. "Heard and determined", for purposes of this chapter, shall mean any process under which the court in question retains the final authority to make factual determinations pertaining to allegations of a municipal ordinance violation, including, but not limited to, the use of a system of administrative adjudication as provided in section 479.011, preliminary to a determination by appeal to the court in question.

Section 478.230, RSMo, also provides, with regard to the assignment of judges to municipal ordinance violation cases:

> A municipal judge may hear and determine municipal ordinance violation cases of the municipality or municipalities making provision for the particular municipal judge. The provisions of this section authorizing the hearing and determination of particular cases or classes of cases by municipal judges shall be subject to the transfer,

> assignment, and disqualification provisions contained in article V of the constitution, in provisions of law, or in court rules which are authorized by the constitution or by law.

The "transfer, assignment, and disqualification" provisions referred to in this statute would be the provisions regarding transfer, etc., of particular judges; they do not refer to transferring specific cases or entire classes of cases to a different division of the court.

Article V, § 23 of the Constitution also establishes and delineates the authority of associate circuit judges, with regard to original jurisdiction over municipal ordinance cases:

> Associate circuit judges shall hear and determine violations of municipal ordinances in any municipality with a population of under four hundred thousand within the circuit for which a municipal judge is not provided, or upon request of the governing body of any municipality with a population of under four hundred thousand within the circuit.

The details of how such an election may be made by a municipality and implement are codified at § 479.040, RSMo:

> 1. (1) Any city, town or village with a population of less than four hundred thousand may elect to have the violations of its municipal ordinances heard and determined by an associate circuit judge of the circuit in which the city, town or village, or the major geographical portion thereof, is located; provided, however, if such election is made, all violations of that municipality's ordinances shall be heard and determined before an associate circuit judge or judges. If a municipality has elected to have the violations of its municipal ordinances heard and determined by an associate circuit judge, the municipality may thereafter elect to provide for a municipal judge or judges to hear such cases; provided, however, if such later election is made, all violations of that municipality's ordinances shall be heard and determined before a municipal judge. Nothing in this subsection shall preclude the transfer or assignment of another judge to hear and determine a case or class of cases when otherwise authorized by provisions of the constitution, law, or court rule. Nothing in this section shall preclude an election made under the provisions of subsection 4 of this section.
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> (2) In lieu of electing to have all violations of municipal ordinances heard and determined before an associate circuit court or a county municipal court, a city, town, or village may, under subdivision (1) of this subsection, elect to have such court only hear and determine those violations of its municipal ordinances as may be designated on the information by the prosecutor as involving an accused with special needs due to mental disorder or mental illness, as defined by section 630.005, or whose special needs, circumstances, and charges

> cannot be adequately accommodated by the municipal court of the city, town, or village, provided that the associate circuit court or county municipal court has established specialized dockets or courts to provide such adequate accommodations and resources for specifically handling such matters, such as a mental health court, housing court, domestic violence court, family court, or DWI court, and such associate circuit court or county municipal court accepts such election by consent of the presiding judge or by county contract, as applicable, and further provided that upon a determination by the court that the accused does not have such special needs, the matter shall be transferred back to the municipal court.
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> 2. If, after January 1, 1980, a municipality elects to have the violations of its municipal ordinances heard and determined by an associate circuit judge, the associate circuit judge or judges shall commence hearing and determining such violations six months after the municipality notifies the presiding judge of the circuit of its election. With the consent of the presiding judge, the associate circuit judge or judges may commence hearing such violations at an earlier date.
>
> 3. Associate circuit judges of the circuit in which the municipality, or major geographical portion thereof, is located shall hear and determine violations of municipal ordinances of any municipality with a population of under four hundred thousand for which a municipal judge is not provided.
>
> 4. Any city, town or village with a population of less than four hundred thousand located in a county which has created a county municipal court under the provisions of section 66.010 may elect to enter into a contract with the county to have violations of municipal ordinances prosecuted, heard, and determined in the county municipal court. If a contract is entered into under the provisions of this subsection, all violations of that municipality's ordinances shall be heard and determined in the county municipal court. The contract may provide for a transition period after an election is made under the provisions of this subsection.

See also § 479.200, RSMo, regarding appeals procedures; § 479.260.3, RSMo, providing that municipalities shall not be required to pay a fee for cases filed before an associate circuit judge.

Nothing in either Article V, § 23 or in § 479.040, RSMo, appears to grant the associate circuit judge authority to decline to hear and determine municipal ordinance violation cases, once such an election has been properly made. It is also a mandatory duty of the associate circuit judge(s) of that circuit, where no municipal judge has been "provided" by the municipality. However, it also is clear from both the constitutional provision and the statute that the election to have cases heard by the associate circuit judge belongs to the municipality.

- **Because all powers of municipal governments are derived from the State, the General Assembly could by statute require municipalities of under 400,000 population to make the election provided in Article V, § 23, to have their cases heard by an associate circuit judge; or the General Assembly could require certain municipalities to make this election if certain objective criteria shall have been met; or the General Assembly could require such an election to be made by all cities, towns, or villages of certain classifications.**

In this regard, consider Article VI, § 15 of the Constitution:

> Section 15. The general assembly shall provide by general laws for the organization and classification of cities and towns. The number of such classes shall not exceed four; and the powers of each class shall be defined by general laws so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. The general assembly shall also make provisions, by general law, whereby any city, town or village, existing by virtue of any special or local law, may elect to become subject to, and be governed by, the general laws relating to such corporations.

- **Were the General Assembly to require certain municipalities to make the election, it would appear that the associate circuit judge(s) in the affected circuits would then be required to hear and decide the cases within six months, or sooner if so agreed, pursuant to § 479.040, RSMo** (quoted above).

F. OTHER ISSUES REGARDING MUNICIPAL COURTS

As noted above, in constituting this Work Group, the Supreme Court gave it the charge to "assist the Court by reviewing all matters relevant to practice in the municipal divisions of the circuit court and making recommendations concerning any appropriate changes to court rules or practices that can be implemented by the Court as well as any suggestions that may require legislation or action by other entities." Order of the Supreme Court of Missouri, May 14, 2015. With this in mind, we would offer the following additional observations and recommendations.

1. Elimination of Perverse Financial Incentives

"Courts should primarily exist to help people resolve their legal disputes. If they serve, instead, as revenue generators for the municipality that selects and pays the court staff and judges – this creates at least a perception, if not a reality, of diminished judicial impartiality."

"It is important to ensure that municipal divisions throughout the state are driven not by economics, but by notions of fairness under the rule of law."

– Chief Justice Mary R. Russell, State of the Judiciary Address, January 22, 2015.

In order for both law enforcement and courts to fulfill their solemn obligations while earning and retaining the trust and confidence of the public, it is necessary that neither law enforcement nor the judiciary be subject to improper influences, or be able to derive financial gain as a direct result of the work of enforcing the law and administering justice. Yet the Supreme Court of Missouri, by virtue of its proper role within the constitution system, is severely limited in its ability to bring about reforms in this area. The General Assembly has far greater discretion.

Municipal courts will always be susceptible to corruption and abuse, so long as they remain part of a system with built-in incentives which can reward corruption and abuse. So long as municipal governments may reap a direct financial reward from law enforcement activities, there will remain a strong incentive to direct law enforcement efforts to those activities which are most immediately profitable. *See, e.g.*, §§ 479.050, 479.080, RSMo (municipal fines retained by the municipalities); §479.210, RSMo (municipal forfeitures retained by the municipalities); Judge Richter's Report Concerning Ongoing Efforts to Improve the State's Municipal Divisions dated May 11, 2015, pp. 2-8, section entitled "Municipal court divisions should focus on fairness and the rule of law, not on maximizing revenue."; Better Together, "Public Safety—Municipal Courts," October 2014, Executive Summary, pp. 2-4; Report, pp. 7-12; United States Department of Justice, "Investigation of the Ferguson Police Department," March 4, 2015, pp. 55-58.

Incentives matter, and perverse incentives tend to breed abhorrent results. Law enforcement (and those who control it) will always be susceptible to perverse monetary incentives, which often lead to abuse and corruption, so long as law enforcement and municipal government can reap a direct financial benefit from certain law enforcement activities. For this reason, law enforcement should always be a general revenue expense. When this principle is observed, law enforcement is freed from all improper financial considerations, and is able to focus its energies on those matters most critical to preserving the public safety and the public peace.

The most sure way to thoroughly and forever eliminate these perverse incentives is to direct all fines and forfeitures received on account of municipal ordinance violations to the school funds of the state, as the Missouri Constitution already requires with regard to state law violations. MO. CONST., Art. IX, § 7. *See also* § 166.131, RSMo. Court costs should be kept at a level sufficient, but no greater than, that required to offset an appropriate proportion of the actual costs of routine court operations. Under the basic principle of separation of powers – and pursuant to the Missouri Constitution, Art. I, § 14; *Harrison v. Monroe County*, 716 S.W.2d 263, 267-68 (Mo. banc 1986) – this amount cannot include the costs of paying law enforcement officers, municipal prosecutors, or other miscellaneous municipal personnel or expenses.

This is not a new thought. Many have made this observation over the years – including very recently, State Representative Jay Barnes of Jefferson City, in his JEFFERSON CITY NEWS-TRIBUNE columns published on May 19, 2015 and July 12, 2015. However, political inertia, and the perceived dependence of municipalities upon the existing fine-based revenue stream, have thus far prevented comprehensive reform in this area. Once corruption and dependence on an ethically questionable funding source take root within a system, it is extraordinarily difficult to eliminate them.[43]

Many specific complaints have been made about police practices and the operation of the municipal courts, particularly in St. Louis County and the St. Louis metropolitan area. These have included the excessive numbers of tickets, municipal cases, and outstanding warrants in relation to the actual population, as compared to the practice elsewhere in Missouri; writing excessive numbers of citations to a single defendant arising from a single incident; a single individual receiving citations in multiple municipalities for the same violation (e.g., vehicle equipment violations); fines set at amounts unreasonably high in relation to the charged conduct, resulting in higher bond amounts in cases of failure to appear; reluctance of some municipal courts to grant probation with community service in lieu of fines; and reluctance of some municipal courts to allow payment plans on fines and costs. The resulting burdens of all these practices fall most heavily on persons of limited income and limited means.

It is the belief of this Work Group that all of these concerns could be alleviated to a significant degree, if the economic incentives which encourage certain municipalities to engage in these practices would be eliminated.

Moreover, eliminating the financial incentives which enable local governments to earn revenue from law enforcement activities may tend to reveal whether there are municipal governments which exist solely for the improper purposes of collecting such revenue, rather than

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[43] In this regard, *see also* Ad Hoc Committee to Study Court Costs, Report to the Supreme Court submitted December 16, 2013, at pp. 6-7, discussing *Tumey v. State of Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 2d 749 (1927), and holding "that to subject a defendant in a criminal case involving his liberty or property before a judge having a direct, personal and substantial interest in convicting him is a denial of due process of law. It is also a violation of the Fourteenth Amendment for the state to vest judicial power in an individual who has both interests, both as an individual and as chief executive of the village, in the outcome of the trial of a defendant." Report, p. 7. Note also, at p. 13 of that Report, that between 2008 and 2012, disbursements of fines by municipal divisions increased from $85,836,640 to $108,360, 347. During the same period, all disbursements from municipal divisions increased from $117,250,069 to $145,521,359.

See also, by way of comparative law on this point, the collection of articles in "How to Fix Ukraine's Broken Legal System," KYIV POST LEGAL QUARTERLY, Vol. 2, Issue 2 (June 26, 2015), available on-line at: http://www.kyivpost.com/media/pdf/LQ6.pdf .

because their residents truly desire to maintain a smaller local government entity that may be more responsive and accountable to local concerns and the desires of local citizens. If indeed there are municipal governments that exist solely or primarily for the purpose of collecting fines from their own citizens and hapless passers-by, the elimination of the ability of the municipal governments to profit from these activities may lead naturally and inevitably toward consolidation of those entities that no longer serve their legitimately intended purposes.

Fines represent a significant portion of court-related revenues; the remainder is derived from court costs, fees, and surcharges. Establishing the appropriate level of court costs is, in the first instance, the responsibility of the General Assembly. The General Assembly has, however, directed that the Supreme Court may make "adjustment" of certain court costs and fees, § 488.012.3, RSMo, "at levels to produce revenue which shall not substantially exceed the total of the proportion of the costs associated with the administration of judicial system defrayed by fees, miscellaneous charges, and surcharges," §488.012.2, RSMo; *see also* Supreme Court Operating Rule 21.01. Court costs cannot cover more than a fraction of the cost of court operations, without imposing an undue burden on litigants. While it was never intended that court costs and fees should be sufficient to defray the entire cost of court operations and facilities, the General Assembly and the Supreme Court have a continuing responsibility to review these charges to ensure that court costs and fees are set at an appropriate level sufficient to accomplish their necessary purpose.

Costs also must not be established in excessive amounts calculated to produce revenues to support other non-court municipal government operations or personnel. Law enforcement and municipal prosecuting attorneys are executive branch officials whose operations may not be funded through court costs and surcharges. MO. CONST., Art. I, § 14; *Harrison v. Monroe County*, 716 S.W.2d 263, 267-68 (Mo. banc 1986).

This Work Group recognizes that the General Assembly has recently taken steps to limit the percentage of total revenue municipalities may derive from minor traffic-related municipal ordinance violations, and to improve enforcement of such limitations. Senate Bill 5 (L. 2015), §§ 479.350, 479.359, 479.360, 479.362, 479.368, RSMo. The State Auditor is increasing enforcement activities with regard to these revenue limits. Office of the Missouri State Auditor, "Municipal Court Reform," http://auditor.mo.gov/auditinfo/municipalcourtreform; *see also* Mark Schlinkmann, "State Auditor Says Winfield Exceeded State Cap on Traffic Ticket Revenue," ST. LOUIS POST-DISPATCH, January 14, 2016. Consideration is already being given to extending these new limitations to non-traffic related ordinance violations. *See, e.g.*, Senate Bill 572 (2016 regular session). Moreover, the United States Department of Justice has indicated an interest in enforcing compliance with the Senate Bill 5 revenue limitations. *See* Proposed Ferguson Consent Decree, Part XVIII, § 324. Such legislative and executive branch actions and federal compliance pressure represent substantial progress in the direction suggested here.

Fully implementing these salutary principles also requires that the General Assembly grant to municipalities sufficient taxing authority to cover the reasonable costs of law enforcement. Municipal governments may then take propositions for taxes for general revenue, or specifically for law enforcement, to the voters themselves, who should have the authority to approve the level of taxation required to support the law enforcement presence they deem necessary and desirable in their own communities. Establishment of a stable general revenue funding mechanism will be necessary, if municipal courts are to make a successful transition from court dispositions which raise

money to dispositions which will not generate revenue and which may cost additional money to administer.[44]

RECOMMENDATION: That the most sure way to thoroughly and forever eliminate the perverse financial incentives affecting the municipal courts is to direct all fines and forfeitures received on account of municipal ordinance violations to the school funds of the state, as the Missouri Constitution already requires with regard to state law violations. This recommendation is directed to the Missouri General Assembly.

RECOMMENDATION: That court costs, fees, and surcharges be kept at a level sufficient, but no greater than, that required to offset the actual costs of an appropriate proportion of routine court operations, but not the other expenses of municipal government, including without limitation expenses associated with law enforcement and prosecution. This recommendation is directed to the Missouri General Assembly and to the Supreme Court of Missouri.

RECOMMENDATION: That implementing these salutary principles also requires that the General Assembly grant to municipalities sufficient taxing authority to cover the reasonable costs of law enforcement. This recommendation is directed to the Missouri General Assembly.

2. Providing for Adequate Supervision of Municipal Courts in St. Louis County

As noted elsewhere in this Report, many of the most vocal complaints which have been received regarding the municipal courts relate to some of those which operate in St. Louis County. To the extent that specific problems identified in some municipal courts in the St. Louis region are recognized to be a result of courts in that area failing to comply with existing law, or failing to follow recognized best practices, then these may be seen as problems of supervision and/or governance that should be addressed locally, without the necessity of disturbing municipal courts in other parts of the State where such problems do not now exist to such a significant degree.

St. Louis County presents unique circumstances, and unique difficulties for supervision of the municipal courts by the presiding circuit judge of the 21st Judicial Circuit, given the large number of municipal courts operating in that Circuit, and the numerous other judicial and administrative duties of the presiding circuit judge. Providing sufficient professional support staff, who would have the ability to make scheduled and unannounced on-site visits to the individual municipal courts and to stay in communication with municipal judges and clerks, may improve the practical capacity of the presiding circuit judge to provide needed supervision, particularly in those municipal courts where serious deficiencies have been identified.

RECOMMENDATION: That the Circuit Court Budget Committee of the Supreme Court of Missouri authorize, and the General Assembly appropriate funds for, at least two full-time professional staff positions in the Circuit Court of St. Louis County, for the purpose of

[44] Recognizing that this is a political issue, and therefore a recommendation to the Missouri General Assembly, members of this Work Group realize these suggestions implicate the Hancock Amendment, could lead to "redirection" of funds, and require the conveyance of legislative authority for municipalities to effectuate the recommendations of this section.

providing sufficient staff to assist the Presiding Judge of the Twenty-First Judicial Circuit in supervising the municipal courts in that Circuit. These staff positions would be intended to provide personnel who would be able to make frequent scheduled and unannounced visits to the municipal courts, to review their records and practices with the municipal judges and clerks, to observe the courts in session, to evaluate whether the municipal courts are complying with Missouri statutes and supreme court rules, and to report any observed deficiencies to the Presiding Circuit Judge for individualized attention as required.

3. Elimination of Unauthorized and Unnecessary Costs, Fees, and Surcharges

Much of the evidence and documentation received by this Work Group, including more recent reports of the State Auditor, indicates that many municipal courts have been, and may continue to, collect unauthorized costs, fees, and surcharges. These practices are unlawful and place an extraordinary burden upon low-income and indigent persons and youthful offenders.

Firm and substantial steps must be taken to ensure that municipal courts understand their obligations with regard to collecting only those costs, fees, and surcharges which are authorized by law, and that they further understand that the former practice of "dismissal upon payment of costs" is unlawful, and has been so for some time. As noted above, the obligations of municipalities in this regard have recently been clarified by Senate Bill 5, §§ 479.353(5) and 479.360.1(5) & (6) RSMo. *See also* Judge Richter's Report Concerning Ongoing Efforts to Improve the State's Municipal Divisions dated May 11, 2015, p. 4, discussing need for elimination of unauthorized fees & costs.

There have been many indications that several municipal courts have continued to engage in "dismissal upon payment of costs," and to believe that they are authorized to do so, notwithstanding the clear direction of the law. *See, e.g.,* David Naumann, "Senate Bill 5: Knee-jerk reaction or well-ordered plan of action," in the section entitled "Limitations on fines and confinement, ¶ 5," MISSOURI LAWYERS WEEKLY, June 8, 2015, p. 8; and Public Comment letters received from Mr. Ken Bush and Mr. Robert F. Pieper. The prohibition in "dismissal upon payment of costs," contrary to Attorney Naumann's assertion in that article, is not something new in Senate Bill 5.

Section 488.015, RSMo, provides in relevant part, "The court shall not increase the amount of miscellaneous charges or surcharges allowed by law."

Supreme Court Operating Rule 21.01(c) clearly provides, "[applicable court costs having been defined earlier in the Rule] however, none of the above fees shall be collected in any proceeding involving a violation of an ordinance or state law when a criminal proceeding or defendant has been dismissed by the court or when costs are waived or are to be paid by the state, county, or municipality." Section 479.260, RSMo, regarding costs in municipal court, does not authorize the assessment of costs against a defendant in a dismissed case; this section also requires the costs which are collected to be in accordance with those authorized by state law. See also section 488.026, RSMo, with regard to a particular surcharge, provides in relevant part, "no such surcharge shall be assessed when the costs are waived or are to be paid by the state, county, or municipality or when a criminal proceeding or the defendant has been dismissed by the court." *See also* §§ 488.027, 488.031.2, 488.426.1, 488.445.1, 488.607, 488.2206, 488.2230, 488.2275, 488.2300, 488.4014, 488.5026, RSMo, and other similar sections; and the Ad Hoc Committee to Study Court Costs, Report to the Supreme Court of Missouri, submitted December 16, 2013.

In addition, testimony received at the St. Louis public hearing brought to the attention of this Work Group, the practice in some municipal courts of charging offenders additional money for their participation in community service programs. *See, e.g.*, Jacob Blanton, "Courts Must Stop Charging for Being Poor," ST. LOUIS AMERICAN, January 13, 2016.

It should be noted that progress also is being made in this area, as many municipal courts are presently reviewing their practices to ensure that all unauthorized fees and costs are eliminated. *See, e.g.*, "Council Could Ax Municipal Court Fees," ST. JOSEPH NEWS-PRESS, August 15, 2015 (available on-line at: http://www.newspressnow.com/news/local_news/article_eb23f43a-3e93-5ea6-9a7d-c58d8a2e354c.html).

RECOMMENDATION: That firm and substantial steps, including periodic auditing and consistent municipal judge and municipal clerk education programming, must be implemented to ensure that municipal courts understand and comply with their obligations to collect only those costs, fees, and surcharges which are authorized by law, and that they further understand that the former practice of "dismissal upon payment of costs" is unlawful, and has been so for some time. We further recommend that one aspect of the supervisory responsibility of the presiding circuit judge of each judicial circuit be periodic monitoring to ensure that these duties are performed properly by municipal court personnel. This recommendation is directed to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri.

RECOMMENDATION: That, as the practice of surcharging individual offenders for the opportunity to participate in community service programs is not clearly authorized by state law, this practice be ended immediately. Charging offenders for participation in community service defeats a major purpose of encouraging courts to grant probation with community service in lieu of fines, diminishes the incentive for participation in community service programs, and poses a substantial obstacle to participation in such programs by younger and lower-income persons. We further recommend that one aspect of the supervisory responsibility of the presiding circuit judge of each judicial circuit be periodic monitoring to ensure that these duties are performed properly by municipal court personnel. This recommendation is directed to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri.[45]

SUPPLEMENTAL RECOMMENDATION: That, should the General Assembly in the future choose to authorize the practice of surcharging offenders for participation in community service programs, judges be strongly encouraged to consider exempting offenders from paying all or part of the costs of such community service surcharges in appropriate circumstances, as required by §§ 559.604 or 549.525.2, RSMo, as applicable. We

[45] While this is a recommendation of the majority of the Work Group, Mayor James and Judge Thornhill dissent on the basis that some Missouri municipal courts contract with third party agencies to administer community service. These agencies charge a fee to cover normal business-type expenses including indemnity insurance and fees for background checks. These fees are not transferred to the court; they are assessed, collected, retained, and in some instances waived by the agency. Thus, the fees are not charged by the court and are not a source of court revenue. Judge Thornhill further expresses the view that a reasonable fee associated with community service as a condition of probation (as opposed to community service ordered in lieu of payment of fines) is not inherently improper.

further recommend that, should such community service surcharges be authorized in the future, judges advise offenders of the opportunity to request individualized consideration as to whether they should be exempt from paying all or part of such community service surcharges, based on the factors set forth in §§ 559.604 or 549.525.2, RSMo. This recommendation is directed to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri.

RECOMMENDATION: Probation should not be made conditional upon the payment of money, and no person should be denied probation because of inability to pay authorized probation surcharges. We recommend that where a city has elected to utilize a private probation supervision service as authorized by § 559.607, RSMo, or a supervision and rehabilitation service in the City of Kansas City as authorized by § 549.525, RSMo, and offenders are required to pay for the costs of this supervision, there be no additional surcharge required for participation in community service programs. We further recommend that judges be strongly encouraged to consider exempting offenders from paying all or part of the costs of private probation supervision in appropriate circumstances, as required by §§ 559.604 or 549.525.2, RSMo, as applicable. We further recommend that judges advise offenders of the opportunity to request individualized consideration as to whether they should be exempt from paying all or part of such probation supervision costs, based on the factors set forth in §§ 559.604 or 549.525.2, RSMo. We further recommend that one aspect of the supervisory responsibility of the presiding circuit judge of each judicial circuit be periodic monitoring to ensure that these duties are performed properly by municipal court personnel. This recommendation is directed to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri.

4. Assuring Open and Orderly Court Proceedings and Court Records

"From a local municipal division to the state Supreme Court, Missouri's courts should be open and accessible to all."

– Chief Justice Mary R. Russell, State of the Judiciary Address, January 22, 2015.

There has been extensive discussion in the news media, in the Department of Justice Report on the Ferguson Police Department, and elsewhere, regarding the lack of openness in many St. Louis County municipal courts. There have been numerous reports of courts with insufficient courtroom facilities to accommodate the number of persons expected to attend; courts that have excluded members of the public, including children and family members of persons appearing in court, from court proceedings; failure to make public very basic information regarding court hours, local rules, and local operating procedures; failure to make public court records accessible to the press and the public; and a basic failure to maintain adequate records regarding outstanding arrest warrants and bonds posted. *See, e.g.*, The Ferguson Commission, Forward Through Ferguson—A Path Toward Racial Equity: A Printed Companion to ForwardThroughFerguson.org, pp. 70-71, "Encouraging Efficiency and Transparency Through Robust Administrative Standards and Record Keeping."

Openness of public court proceedings and court records is one of the most sure and certain safeguards against abuse, oppression, corruption, and preferential treatment. The Bill of Rights in the Missouri Constitution guarantees

> That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial, or delay.

MO. CONST., Art. I, § 14; *see also State ex rel. Pulitzer, Inc. v. Autrey*, 19 S.W.3d 710 (Mo. App. E.D. 2000). Section 476.170, RSMo, provides that "[t]he sitting of every court shall be public and every person may freely attend the same." Offices of clerks are deemed "always open" for the purpose of making court filings, and court offices are to be actually open during regular business hours. Supreme Court Rules 20.02, 37.10, 46.01, and §§ 506.080, 506.090, RSMo. Missouri has made a strong public policy statement in this regard in relation to public governmental bodies in general, § 610.011, RSMo (part of the "Sunshine Law, Chapter 610 RSMo). While the Sunshine Law does not apply to most court proceedings and records, the Supreme Court of Missouri has also adopted rules with a strong preference for the openness of the records of court proceedings. Supreme Court Operating Rule 2.02.

Certain steps have been taken since August 2014 to improve the overall situation in this regard. Under Judge Richter's leadership, the Ferguson municipal court has sought to make improvements with regard to open hearings and to communication of the court's policies, procedures, and hours, and of the rights and obligations of persons appearing before the court. Judge Richter's Report Concerning Ongoing Efforts to Improve the State's Municipal Divisions dated May 11, 2015, pp. 8-11, 14-15. Similar steps ought to be taken in all municipal courts, to the extent this has not already been accomplished.

On April 17, 2015 the State Judicial Records Committee (SJRC) directed a number of municipal courts in St. Louis County and Jefferson County to disclose public records of case dispositions to the press, and to maintain public and confidential case indices as required by Supreme Court Operating Rules. The SJRC further directed the Office of State Courts Administrator (OSCA) to issue a letter reminding all municipal courts and presiding circuit judges of their obligations with regard to maintenance of case indices. *See* April 16, 2015, memorandum to the State Judicial Records Committee from Judge Karl DeMarce, containing the text of the motions adopted on April 17, 2015, by the SJRC.

The records request which led to this action, and the information received by the SJRC in relation to this request, raise serious questions not only about openness of municipal court records, but also the closely related issue of the proper maintenance of municipal court records by those charged with these responsibilities. *See also* Judge Richter's Report Concerning Ongoing Efforts to Improve the State's Municipal Divisions dated May 11, 2015, pp. 14-15, section entitled "The Ferguson court is open and accessible to defendants and the public," and at pp. 15-17, "Additional recommendations should improve the Ferguson court's ability to function fairly and impartially and improve the integrity of its records" (raising questions about the records management practices and case management system employed in the City of Ferguson); Better Together, "Public Safety—Municipal Courts," October 2014, Report, pp. 13-14; United States Department of Justice, "Investigation of the Ferguson Police Department," March 4, 2015, pp. 42-50.

At the July 17, 2015 meeting of the State Judicial Records Committee, representatives of several St. Louis area municipal courts appeared and advised the SJRC that they are actively working

to develop improved electronic access for the public to municipal court records, information about pending warrants, court hours and times of court sessions, etc. The progress of this ongoing effort should be monitored and encouraged.[46]

Addressing these issues would appear to be, at least for the most part, a matter of re-affirming the importance of following existing law; educating municipal judges and court personnel with regard to their obligations; and ensuring that meaningful disciplinary sanctions are available and actually enforced, in the cases of judges and courts which do not follow the Constitution, laws, and Supreme Court rules with regard to openness of court proceedings and court records.[47]

Judges, clerks, and courtroom facilities are, of course, scarce resources, in and of themselves. However, the burdens upon these resources, and the difficulty citizens experience in resolving their cases before the court, may both be lessened to the extent municipal court defendants are able to resolve undisputed cases without personal appearance. Providing citizens with clear guidance as to which cases may be disposed of in advance by prompt payment or by making arrangements for installment payments, and providing convenient services such as payment by mail, payment by telephone, and on-line payment may go a long way toward reducing lengthy court dockets, long lines, and overcrowded courtrooms. In order for these services to work most effectively, the public must also have clear and understandable information about how to use them, and how to contact the court in the case of questions.

It is apparent that the United States Department of Justice has also taken an interest in these types of issues. The Proposed Ferguson Consent Decree, Part XVIII, §§ 329-339, if put in force, would place the following requirements upon the City of Ferguson, many of which simply reflect "best practices" which all municipal courts should implement regardless of outside pressure:

1. Increasing Transparency of Court Operations

> 329. The City agrees to make public through a variety of means—including prominent display on City website—a clear and accurate description of the municipal court payment process, including information regarding: any pre-established fines and fees; a person's court obligation once they are charged with a municipal ordinance violation; a person rights and responsibilities for challenging a charge; payment and community service options; how to seek an ability-to-pay determination; and the potential consequences for non-payment or missed court dates.

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[46] Recent information indicates that St. Louis area municipal courts which use the REJIS case management system are in the process of piloting an on-line database which will allow the public to find information concerning municipal cases in several municipalities. *See* Jennifer S. Mann, "In Shift Toward Transparency, Municipal Court Records Go Online Next Week," ST. LOUIS POST-DISPATCH, February 25, 2016 (available on-line at: http://www.stltoday.com/news/local/crime-and-courts/in-shift-toward-transparency-municipal-courts-records-go-online-next/article_ad1ca11c-4867-57f3-8437-e11a66f159d4.html).

[47] Discipline of judges, in the first instance, is the province of the Commission on Retirement, Removal and Discipline. *See* MO. CONST., Art. V, § 24 and Supreme Court Rule 12.

330. The City will develop and implement a plan for a public education campaign aimed at providing members of the broader Ferguson community with accurate and complete information regarding the operations of the Ferguson Municipal Court. The public education campaign will include specific measures to inform the public that appearing in court without being able to pay pending fines or fees will not result in arrest or jail time.

331. The City agrees to make information broadly available, including on the City's website, regarding cost-free legal assistance that may be available to individuals with pending municipal charges.

2. Ensuring Adequate Notice

332. The City agrees to provide all individuals charged with a violation of Ferguson Municipal Code with adequate and reliable information regarding the charges brought against them, the options and requirements for resolving the charges, and the consequences for failing to resolve the charges in a timely manner.

333. The City will ensure that all citations, summonses, arrest notification forms, and other charging documents used by FPD contain (or at a minimum are contemporaneously supplemented with a separate document that contains) clear and detailed information regarding the recipients rights and responsibilities. Such information will include:

a. The specific municipal violation charged;
b. The recipient's options for addressing the charge, including whether in-person appearance is required or if alternative methods, including on-line payment, are available;
c. Information regarding all pending deadlines;
d. A clear statement notifying the recipient of the right to challenge the charge in court and instructions regarding how to do so;
e. The exact date, time, and location of the court session at which the recipient must or may appear;
f. Information regarding how to seek a continuance for a court date;
g. The specific fine imposed, if the charged offense has a preset fine;
h. A clear statement that the recipient is entitled to have the amount of the imposed fine proportioned to the recipient's ability to pay;
i. The range of possible penalties for failing to meet court requirements; and
j. Clear instructions regarding how to acquire information regarding a pending charge, including how to contact a clerk of the Ferguson Municipal Court by phone or in person.

334. Within 60 days of the Effective Date, the City will develop and implement a plan to regularly, and at least on a monthly basis, audit citations, arrest notification forms, and other notices of violations

used by officers to ensure that such documents are completed properly and in a manner that provides individuals with thorough and accurate information as required by this Agreement. The City will develop this plan in consolidation with the Monitor and submit it to DOJ for approval.

335. The City agrees to maintain up-to-date contact information for individuals with cases pending in the Ferguson Municipal Court, including ensuring that court staff request updated address and other contact information each time a defendant appears in court or otherwise communicates with court staff and ensuring that any updated information received is maintained in the defendant's municipal court file.

3. Online Payment System

336. Within 60 days of the Effective Date, the City will revise its online payment system to allow late payments, payment plan installments, and all other court payments to be made online except where prohibited by law.

337. Within 60 days of the Effective Date, the City agrees to contract with the provider of its current online payment system, or another qualified provider, to establish an online system by which a person charged with a violation can access specific details about a case, including pending charges, court dates, deadlines, owed fines and fees, and payments already made. This system will be developed in consultation with the Monitor and submitted to DOJ for approval.

338. The City agrees to ensure that all online court systems include the privacy protections necessary to protect a defendant's personal information.

4. Eliminating Unnecessary Barriers to Resolving Cases

339. Within 60 days of the Effective Date, the City will develop and implement a plan to identify and eliminate unnecessary barriers to resolving municipal cases. As part of this plan, the City agrees to:
a. Ensure that nothing in any City ordinance or any other City directive requires that an in-person court appearance be made for any offense beyond those offenses listed in Missouri Supreme Court Rule 37.49 as requiring an in-court appearance;
b. Implement a process for requesting a continuance of a required court appearance, including by phone, fax, or in-person, whether or not represented by counsel. Requests shall be considered in good faith and granted upon a showing of good cause for the continuance;
c. Ensure that the City website provides accurate information regarding the hours and location of the Ferguson Municipal Court

> and Ferguson Municipal Court Clerk's Office. The City will ensure that the Court and Court Clerk's office are consistently staffed during posted business hours;
> d. Accept partial payments pursuant to criteria established by the Municipal Judge and not reject any payment an individual wishes to make against any court fine, fee, or outstanding debt;
> e. At a minimum, the court will accept payments for all court-related fines and fees in the form of credit card payments, money orders, and cash.

See also Proposed Ferguson Consent Decree, Part XVIII, §§ 354-356 (setting forth requirements for an electronic court records management system).

RECOMMENDATION: That municipal courts comply with their obligations regarding complete and accurate record-keeping. We further recommend that municipal judge and municipal clerk educational programs emphasize the obligations of these courts to comply with all Supreme Court operating rules regarding maintenance of and public access to court records, including without limitation those rules regarding maintenance of complete and accurate public and confidential case indices; maintenance of complete and accurate records with regard to outstanding warrants; and maintenance of complete and accurate records with regard to bonds which have been posted in the court. We further recommend that one aspect of the supervisory responsibility of the presiding circuit judge of each judicial circuit be periodic monitoring to ensure that these duties are performed properly by municipal court personnel. This recommendation is directed to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri.

RECOMMENDATION: That municipal courts comply with their obligations under the Missouri Constitution, state law, and Supreme Court rules to provide open records to the public, including members of the news media, upon proper request. We further recommend that municipal judge and municipal clerk educational programs emphasize the obligations of these courts to provide public court records to the public upon request, in accordance with state law and Supreme Court Operating Rules. We further recommend that one aspect of the supervisory responsibility of the presiding circuit judge of each judicial circuit be periodic monitoring to ensure that these duties are performed properly by municipal court personnel. This recommendation is directed to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri.

RECOMMENDATION: That municipal courts comply with their obligations under the Constitution, state law, and Supreme Court rules to maintain open courts. Offices of the clerk of each court must be open during regular business hours, and court proceedings must be conducted in facilities sufficient to accommodate the numbers of persons expected to appear on a typical docket. Moreover, court proceedings must be open to the public. Members of the press and of the public, including children accompanying their caregivers who may have business before the court, must not be excluded from court proceedings except for good cause shown or pursuant to a specific provision of law, as found by the judge in a specific instance. We further recommend that one aspect of the supervisory responsibility of the presiding circuit judge of each judicial circuit be periodic monitoring to ensure that these duties are performed properly by municipal court personnel. We further

recommend that municipal judge and municipal clerk educational programs should emphasize the obligations of these courts to comply with all open courts obligations. This recommendation is directed to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri.

RECOMMENDATION: That presiding circuit judges provide sufficient monitoring and supervision of municipal courts to assure compliance with all constitutional, statutory, and Supreme Court rule obligations with regard to open records and open courts, and with regard to complete and accurate court record-keeping obligations. Meaningful disciplinary sanctions must be available and actually enforced, in the cases of judges and courts which do not make reasonable and good-faith efforts to comply with the Missouri Constitution, state laws, and Supreme Court rules with regard to openness of court proceedings and court records. This recommendation is directed to the presiding circuit judges and to the Supreme Court of Missouri.

RECOMMENDATION: That municipal courts must make reasonable efforts to communicate important information to the public, including information about the court's office hours, times and places where court sessions are held, procedures for disposing of citations which can be addressed through a "violations bureau" without appearance in court, the rights of persons appearing in municipal court, and any rules or policies which are specific to an individual court. These communications may take one or more forms, designed in a fashion calculated to be readily accessible to and understandable by the public, including announcements from the bench, information posted in the office of the court and other appropriate places, on-line information at publicly accessible web sites, and brochures and handout information available at the court. We further recommend that one aspect of the supervisory responsibility of the presiding circuit judge of each judicial circuit be periodic monitoring to ensure that these duties are performed properly by municipal court personnel. This recommendation is directed to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri.

RECOMMENDATION: That, in order that critical court information may be more convenient and accessible to the general public and to attorneys, municipal courts be required to actively pursue court automation in accordance with the standards developed by the Missouri Court Automation Committee and the State Judicial Records Committee, leading to the free on-line accessibility of information regarding pending cases, outstanding warrants, and scheduled court dockets. We further recommend that one aspect of the supervisory responsibility of the presiding circuit judge of each judicial circuit be periodic monitoring to ensure that these duties are performed properly by municipal court personnel. This recommendation is directed to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri.

RECOMMENDATION: That, for the convenience of the public and in order to reduce the numbers of persons required to appear at busy and crowded dockets, municipal courts be required to implement court automation strategies which will enable persons with disposed ordinance violation cases to make scheduled payments on-line without personal appearance at the court, through the Supreme Court of Missouri's "Pay By Web" technology or an equivalent functionality. We further recommend that one aspect of the supervisory responsibility of the presiding circuit judge of each judicial circuit be periodic monitoring to

ensure that these duties are performed properly by municipal court personnel. This recommendation is directed to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri.

RECOMMENDATION: That, for the convenience of the public and in order to reduce the numbers of persons required to appear at busy and crowded dockets, municipal courts be required to implement court automation strategies which will enable persons with pending ordinance violation cases which may be disposed through a "violations bureau" without personal appearance, to make payment of the fine and costs due on-line without personal appearance at the court. We further recommend that one aspect of the supervisory responsibility of the presiding circuit judge of each judicial circuit be periodic monitoring to ensure that these duties are performed properly by municipal court personnel. This recommendation is directed to the municipal courts, to the presiding circuit judges, and to the Supreme Court of Missouri.

RECOMMENDATION: That the Supreme Court of Missouri cause further study, including an analysis of the fiscal costs, to be made concerning the policy suggestion that all municipal court proceedings be conducted "on the record," through the utilization of a live court reporter or electronic sound recording, in order to encourage proper behavior by judges, court personnel, attorneys, law enforcement, persons appearing before the court, and the general public in attendance, while also facilitating appropriate discipline should ethics violations occur. This recommendation is directed to the Supreme Court of Missouri.

5. Establishing and Maintaining the Principle of Separation of Powers in Judicial Selection.

The perception, and at times the reality, of improper influence upon municipal divisions may also result from the manner of judicial selection and retention. As noted elsewhere in this Report, at least since the middle 1700s, the importance of the principle of separation of powers between the legislative, executive, and judicial branches has been well-recognized as a most salutary check upon tyranny, and a necessary structural measure to limit opportunities for corruption and the undue influence of any one branch of the government upon the others. *See generally* Montesquieu, THE SPIRIT OF THE LAWS (first published 1748) (Thomas Nugent trans., New York: Hafner Publ. Co. 1949), Book XI, § 6; *see also* THE FEDERALIST Nos. 47 (Madison), 51 (Madison), 78 (Hamilton), 79 (Hamilton); Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence*, 35 LAW AND CONTEMPORARY PROBLEMS 108-127 (Winter 1970) (available on-line at: http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3279&context=lcp).

This principle is clearly reflected in the Constitution of the United States, and is specifically enshrined in the Missouri Constitution:

> The powers of government shall be divided into three distinct departments—the legislative, executive, and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power

> properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

MO. CONST., Art. II, § 1.

Functional judicial independence from the executive and legislative branches is an essential component of this principle. In the words of Montesquieu:

> Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence or oppression.

Montesquieu, THE SPIRIT OF THE LAWS, *supra*, Book XI, § 6, p. 152.

Despite the nearly universal acceptance of this principle in the United States, it is almost wholly disregarded in the design and function of Missouri's freestanding municipal courts. This is true despite the applicability of the vast majority of Supreme Court Rule 2, Code of Judicial Conduct, to part-time municipal judges. *See* Rule 2, Application III, Part-Time Municipal Judges. Notwithstanding the principles set forth in the Code of Judicial Conduct, most municipal judges are appointed by mayors and/or city councils; and their reappointment to office is subject to the whims of those same officials.[48]

The Supreme Court of Missouri has previously held that such arrangements are not, as a legal matter, a violation of Article II, § 1, the separation of powers provision of the Missouri Constitution. *Edwards v. Schoemehl*, 765 S.W.2d 607, 608 (Mo. banc 1989) (considering municipal court judge hiring provisions in the City of St. Louis). Nonetheless, for all intents and purposes, many municipal courts and their judges are too much the creatures of what is already a combined legislative/executive power. The potential, and often real, consequences of this pattern of appointment and re-appointment, are well documented in the Department of Justice report on Ferguson. *See also* Judge Richter's Report Concerning Ongoing Efforts to Improve the State's Municipal Divisions dated May 11, 2015, pp. 15-17; and the National Center for State Courts, Final Ferguson Municipal Court Report, pp. 4-6, which stated:

> Courts at all jurisdictional levels are required by federal and state constitutions, laws, and rules to render fair, impartial, and independent judgment over disputes between individuals and the government, and in so doing, to avoid any impropriety or appearance

[48] Article V, § 23 of the Missouri Constitution simply provides that "[t]he selection, tenure, and compensation of such judges and such personnel shall be as provided by law, or in cities having a charter form of government as provided by such charter." Section 479.020.1, RSMo, provides, "Any city, town or village, including those operating under a constitutional or special charter, may, and cities with a population of four hundred thousand or more shall, provide by ordinance or charter for the selection, tenure and compensation of a municipal judge or judges consistent with the provisions of this chapter who shall have original jurisdiction to hear and determine all violations against the ordinances of the municipality. The method of selection of municipal judges shall be provided by charter or ordinance. Each municipal judge shall be selected for a term of not less than two years as provided by charter or ordinance."

> of impropriety in that role. The [Ferguson] Court's entangled and convoluted organization and management attachment to city executive officials causes it to struggle to remain free of undue influence by the city. The staff is supervised by a city executive, work is performed for police and prosecutors that confuse and compromise roles, and the presiding judge functions as a contractor appointed by the city with little responsibility or time to manage the day-to-day work of the Court.

At least three potential solutions to this issue would seem to offer themselves:

(1) Municipalities could appoint their municipal judges, subject to a retention vote similar to that employed under the Non-Partisan Court Plan in the state courts. Ideally, the appointment would be based on a selection process similar to that in the Non-Partisan Plan, with a panel selecting a small number of qualified nominees, from which the municipal government would choose one. This option would seem particularly well-suited for larger municipalities, based upon historical experience with the Non-Partisan Plan in the state courts.

(2) Municipalities could provide that their municipal judges be subject to periodic direct election, thereby severing the connection between the mayor/council and the judge. This is already the case in some municipal governments and reflects the prevailing Article V judicial selection method for state court trial judges in the non-urban counties of the state. This option would seem better-suited to smaller municipalities, in which voters would have a better opportunity to become acquainted with candidates for office, and in which the financial costs of running for election are more manageable.

(3) Municipalities which are eligible to have their cases heard by an associate circuit judge could elect to utilize that option, thereby guaranteeing that the judge hearing their cases would have the same degree of judicial independence as that possessed by all Article V state court judges. (This procedure also gives the incidental advantages of eliminating many of the costs of maintaining a freestanding municipal court, and, as noted above, of expediting the time in which persons arrested on municipal warrants may be brought before a judge for initial appearance, as the state courts are open on all business days.)

While these general principles regarding judicial independence may be applied to all municipal courts, we also recognize that the vast majority of Missouri's municipal courts are already performing their duties in a satisfactory manner – professionally, efficiently, and with no public appearance of impropriety – under their current arrangements. There may be no urgent or compelling reasons to change long-standing judicial selection protocols, where no immediate cause for concern exists. In view of these considerations, a majority of this Work Group favors limiting our recommendations in this regard, to those courts where the most serious concerns have already been identified.[49] However, a substantial minority of this Work Group favors a recommendation that the judicial selection methods discussed above be implemented in all Missouri municipal courts.

[49] *See*, in this regard, Proposed Ferguson Consent Decree, Part XVIII, § 357 (provisions to ensure the independence of the municipal court from the city prosecutor) and § 358 (provisions to ensure the impartiality of the municipal judge).

As in the case of municipal judges, municipal court clerks are usually employees of the municipal executive, and their duties may include those of both an executive and a judicial nature. If the municipality elects to retain a freestanding municipal court, the clerks of that court should be subject to appointment, supervision, and discipline either by the municipal judge, or by the Circuit Clerk of the county in which the municipality (or the greater part thereof) is located. In order to be consistent with the principle of separation of powers, employees serving the judicial branch of government should not be subject to appointment, supervision, and discipline by officers or employees of the executive branch.

It should be noted that it is entirely appropriate for municipal governments to appoint (or provide for the direct election of) their own prosecutors and chief law enforcement officials. The persons serving in those offices are officers of the executive branch of government.

FIVE MEMBERS OF THE WORK GROUP JOIN IN THE FOLLOWING RECOMMENDATION: That municipalities in which the Senate Bill 5 revenue limitations and/or the previous revenue limitations under § 302.341.2, RSMo, as it existed prior to the effective date of Senate Bill 5, appear to have been exceeded, or in which other serious concerns have been identified that may substantially undermine public confidence in the independence of the municipal court:

> **(1) Appoint their municipal judges under a merit selection system, subject to a retention vote similar to that employed under the Non-Partisan Court Plan in the state courts; or**
>
> **(2) Provide that their municipal judges be subject to periodic direct election, thereby severing the direct connection between the mayor/council and the judge; or**
>
> **(3) If eligible to have their municipal cases heard by an associate circuit judge, elect to utilize that option, thereby guaranteeing that the judge hearing their cases would have the same degree of judicial independence as that possessed by all Article V state court judges.**

We further recommend that, in those cities in which revenue limitations set by state law have been exceeded, as determined by the municipality's own reporting or by subsequent audit, the General Assembly consider enacting a requirement that municipal judges be selected pursuant to one of these methods, rather than by appointment and reappointment by the governing body of the municipality. This recommendation is directed to the municipal governments which elect to operate freestanding municipal courts, and to the General Assembly.

THREE MEMBERS OF THE WORK GROUP JOIN IN THE FOLLOWING ALTERNATIVE RECOMMENDATION: That, with regard to all Missouri municipalities which elect to operate a freestanding municipal court, the General Assembly enact a requirement that municipal judges be selected pursuant to one of the following methods, rather than by appointment and reappointment by the governing body of the municipality:

(1) Appoint their municipal judges under a merit selection system, subject to a retention vote similar to that employed under the Non-Partisan Court Plan in the state courts; or

(2) Provide that their municipal judges be subject to periodic direct election, thereby severing the direct connection between the mayor/council and the judge; or

(3) If eligible to have their municipal cases heard by an associate circuit judge, elect to utilize that option, thereby guaranteeing that the judge hearing their cases would have the same degree of judicial independence as that possessed by all Article V state court judges.

This alternative recommendation is directed to the Missouri General Assembly.[50]

The remaining recommendations in this section represent the opinion of the Municipal Division Work Group:

RECOMMENDATION: That clerks of freestanding municipal courts be subject to appointment, supervision, and discipline either by the municipal judge, or by the Circuit Clerk of the county in which the municipality (or the greater part thereof) is located. We further recommend that, in order to be consistent with the principle of separation of powers, clerks of municipal court not be subject to appointment, supervision, and discipline by officers or employees of the executive branch. This recommendation is directed to the municipal governments which elect to operate freestanding municipal courts, to the General Assembly, and to the Supreme Court of Missouri.

SUPPLEMENTAL RECOMMENDATION: A straightforward way for many smaller municipalities, including those in St. Louis County, to address several of the issues raised throughout this Report, including those relating to the independence of the judiciary, would be to transfer their municipal dockets to the associate circuit judge division of the circuit court, as many cities around the State have already done. This supplemental recommendation is directed to the municipal governments which elect to operate freestanding municipal courts.

6. Improvement of Rules and Procedures Regarding Trial *de Novo*.

In order to improve and clarify the procedures regarding trial *de novo*, which is the direct appeal from a bench-tried case in the municipal division, we offer the following recommendations:

RECOMMENDATION: That a set time be given for the municipal division to certify its record to the circuit court, upon the filing of a request for trial *de novo*. The present rule simply provides that the time to transfer a case record is "promptly." A more definite time would be desirable, in order that the matter can be resolved in a timely fashion. A rule

[50] The Honorable Todd Thornhill abstained from participation in the vote as to the majority recommendation and alternative recommendation.

requiring the record to be transferred within thirty days may be reasonable. This recommendation is directed to the Supreme Court of Missouri.

RECOMMENDATION: That, when a case record is certified to the circuit court upon filing of a request for trial *de novo*, municipal divisions be required to transfer all funds received in connection with the case, including any bonds, along with the record. This is in accordance with the principle that once a case is transferred for trial *de novo*, it becomes a circuit court case for all purposes, and all matters connected with the case should be sent to the circuit court. This recommendation is directed to the Supreme Court of Missouri.

RECOMMENDATION: Confusion results when more than one court purports to act regarding the same case. We recommend that it be made clear that, once a certification has been filed and the case has been transferred to the circuit court, the municipal court has no further jurisdiction or power to act on that case unless and until the case is remanded back to that municipal court. This recommendation is directed to the Supreme Court of Missouri.

RECOMMENDATION: That municipal judge education programs stress that if an application for trial *de novo* or a jury trial request is made, it cannot be denied or the request be refused, for the reason that the defendant did not post a costs deposit for a jury. The law does not allow a rule that conditions a jury trial request upon the payment of a fee. *See Parrett v. Integon Life Insurance*, 590 S.W.2d 411 (Mo. App. W.D. 1979). Moreover, it should be clear that the municipal court shall accept a request for trial *de novo* and shall transfer the file upon receiving such request. "[T]he question of whether or not petitioner . . . had a right to appeal is one to be decided by the circuit court on appeal. The municipal court has no function in determining this question. The processing of the notice of appeal is a mere ministerial duty and no discretion concerning such appeal is vested in the municipal court or any judge thereof." *State v. Sims*, 654 S.W.2d 325 (Mo. App. W.D. 1983) (*quoting State ex rel. House v. White*, 429 S.W.2d 277, 280-91 (Mo. App. 1968)); *see also State ex rel. Streeter v. Mauer*, 985 S.W.2d 954, 957-58 (Mo. App. W.D. 1999) (earlier payment of costs does not bar trial *de novo* if SIS probation is subsequently revoked). This recommendation is directed to the Supreme Court of Missouri.

RECOMMENDATION: Conditioning the right to trial *de novo* upon the prepayment of a fee of $30.00 runs contrary to the general practice in both criminal and municipal court, in which costs and fees only become payable by the defendant after a finding of guilt. The trial *de novo* fee, currently $30.00, is a fee paid for the "privilege" of having one's case heard in the circuit court – the first "court of record" where the case can be heard – prior to any finding of guilt by that court. Moreover, for persons of limited means, this fee can be an obstacle in the way of obtaining trial *de novo* review. We recommend that the General Assembly consider repeal of the statutory authority for prepayment of a trial *de novo* fee. This fee could remain in place as a court cost which would be assessed by the circuit court, upon a plea of guilty or finding of guilt in that court. *See* section 479.260, RSMo and Supreme Court Operating Rule 21.01(a)(5). This recommendation is directed to the General Assembly.

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19 MISSOURI PRACTICE, CRIMINAL PRACTICE & PROCEDURE, § 2.11, "Jurisdiction of Courts—Municipal Divisions & Municipal Judges".

24 MISSOURI PRACTICE, APPELLATE PRACTICE, § 13.5, "Misdemeanors, Infractions, and County & Municipal Ordinance Violations"; § 13.6, "Municipal and County Municipal Court Divisions".

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