Utah Sentencing Commission 2016

SUBCOMMITTEE NOTES & VOTES

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Meetings of the following subcommittees of the USC were held in June, July & August 2016:

- ***June 17 Juv. Justice***
- ***June 21 Anomalies***
- ***June 22 Guidelines***
- ***July 27 Anomalies***
- ***July 28 Guidelines***
- ***Aug 3 Juv. Justice***
- ***Aug 11 Expungemt.***
- ***Aug 31 Expungemt.***

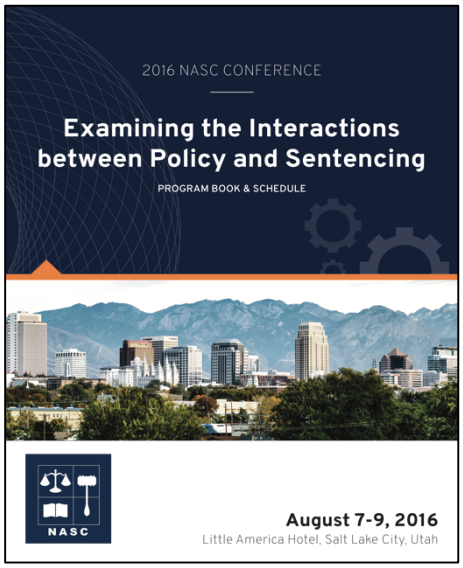
The full USC met on August 3 and remaining 2016 meetings are scheduled for noon on:

- ***September 22***
- ***October 12***
- ***December 7***

The USC also coordinated observation events of two Salt Lake City Justice Court calendars operated by Judge John Baxter:

- ***Homeless Ct June 24***
- ***Veterans Court July 7***

The USC also hosted the National Association of Sentencing Commissions for the first time in 19 years from August 7 – 9. The Conference began at the University of Utah S.J. Quinney College of Law and continued at the Little America Hotel. The complete conference brochure and materials are available by contacting jvalencia@utah.gov or at www.thenasc.org. Sincere thanks are extended to all who attended, participated and contributed to make the conference a huge success!



Members of the USC also attended a tour of 'The Other Side Academy' August 22 & the DOC 'Ascent Re-Entry Event' on August 23.

ANOMALIES SUBCOMMITTEE

The Anomalies Subcommittee approved two significant pieces of legislation which were forwarded to the full Sentencing Commission for consideration on August 3, 2016. The full USC considered and voted on the two proposed pieces of legislation. Rachelle Hill abstained from the vote regarding Unlawful Detention. Voting was otherwise unanimously in support of two pieces of legislation for which legislative sponsorship is sought.

THEFT OFFENSES: The first piece of legislation includes two issues within §76-6-412. The draft bill is attached, which would strike current subsection (1)(a)(iii), eliminating the second degree felony theft enhancement where the actor is carrying a concealed dangerous weapon at the time of the theft. This change would not impact offenses where a dangerous weapon was used or threatened to be used during the course of a theft (which should generally be charged as a robbery or aggravated robbery under §76-6-301).

This revision would impact instances where individuals have been charged with a second degree felony offense under §76-6-412(1)(a)(iii), which is a theft offense with an added weapons enhancement. In these cases, the weapon enhancement was due to the incidental carrying of a lawfully purchased and concealed weapon, which was neither used nor threatened to be used during the commission of the alleged theft. This revision would clarify that the existence of a lawfully purchased concealed weapon carried consistent with a valid permit does not elevate a theft offense to a second degree felony. If a weapon is used or threatened to be used, however, other statutes remain under which an individual can be appropriately charged.

The draft bill would also add to §76-6-412(b)(ii) a minimum threshold amount of $500.00 for charging a 3rd Degree theft offense for repeat offenders (on the third offense within 10 years with one prior Class A). Individuals can currently be charged under §76-6-412(b)(ii) with an enhanced 3rd Degree theft offense where the item(s) stolen were for quite minimal amounts ($1 - $50). The USC considered a number of articles and research relative to recidivism. The USC also considered that an offender sentenced to prison represents a cost of approximately $28,000 per year and offenders sentenced to prison for repeat theft offenses have an average length of stay of 4-6 months.

The policy position of the USC is that the use of prison beds and Board of Pardon & Parole resources are not warranted in instances where the value of the theft is under $500.00. Moreover, prosecution of repeat theft offenses and incarceration in county facilities for up to 6 months for a Class B or up to 1 year for a Class A can still occur. This revision would set a threshold amount after which such offenses would be eligible for a prison commitment or eligible for reimbursement as a felony condition of probation in a county jail. The draft of the proposed bill is attached to this document.

UNLAWFUL DETENTION: The second piece of legislation addresses the anomaly wherein a defendant can currently be convicted of a first degree "Aggravated Kidnapping" (with a presumptive 15 years to life sentence) without having committed the predicate offense of kidnapping. Kidnapping is a 2nd Degree felony which requires that the offender detains or restrains the victim for a '*substantial period of time*.' A 'substantial period of time' is a term of art which is highly fact specific.

However, the statute provides for a 1st Degree felony for *either* the predicate offense of kidnapping *or* unlawful detention. Unlawful Detention is a Class B Misdemeanor, the primary distinction between the two offenses being the amount of time the victim is detained. Unlawful Detention can occur with *any* detention, no matter how brief; whereas Kidnapping requires a "substantial" period of time.

Utilizing the class B misdemeanor of Unlawful Detention as a predicate for a 1st Degree Aggravated Kidnapping creates several problems:

1) It makes Kidnapping superfluous as a predicate offense. As long as Unlawful Detention is permitted as a predicate offense for Aggravated Kidnapping, *substantial* detention is *never* required. *Any* detention will *always* suffice.

2) The aggravating factor appears to elevate a Class B misdemeanor and a 2nd Degree felony to a 1st Degree felony, which appears to be both disproportionate and inconsistent.

The proposed solution from the Anomalies Subcommittee (which was approved by the full USC at the August 3 meeting with one abstention) is to delete the misdemeanor predicate of Unlawful Detention from the Aggravated Kidnapping statute. That would leave only Kidnapping as the logical and reasonable predicate offense for Aggravated Kidnapping.

In addition, the Anomalies Subcommittee proposed creating a new crime of "Aggravated Unlawful Detention" with graduated offenses at the level of 3rd and 2nd Degree felonies, dependent upon the underlying conduct. Drafts of the deleted language in §76-5-302 and the creation of §76-5-304.5 is attached to this document.

JUVENILE JUSTICE SUBCOMMITTEE

The Juvenile Justice Subcommittee has met, received comments, proposals, and concerns from multiple sources and has vetted them. The proposals include consideration of disparate sentencing which may occur due to the delayed reporting or filing of sex offenses; the creation of a more graduated sex offense penalty in statute; and expungements and/or sealing of juvenile records for juvenile offenders.

Although a proposal regarding delayed reporting/filing was supported unanimously by the subcommittee, several concerns were expressed during the full USC meeting on August 3. The subcommittee will convene again to further vet the proposal and address the concerns, date and time to be scheduled. In addition, the subcommittee will continue further development of graduated sex offenses and juvenile expungement of records.

The Sentencing Commission will also continue to collaborate with

the Juvenile Justice Working Group of CCJJ towards shared objectives and proposals.

MISDEMEANOR SUBCOMMITTEE

The Misdemeanor Subcommittee has distributed the most recent draft of the "Criminal Accounts Receivables Recodification" to interested stakeholders. The USC has received and considered concerns from victim advocates which largely focus on the lack of effective restitution collection in our criminal justice system. The draft bill separates criminal restitution from other fines and fees. Criminal restitution should now be more clearly defined and actual restitution owed to a victim should be identified separate from fines, fees, or other criminal accounts receivable.

The USC is also cognizant of the recommendations included in a March 14, 2016 "Dear Colleague" Letter from the Department of Justice reiterating the constitutional concerns inherent in the use of incarceration as a sanction for the collection of fines and fees. A copy of portions of the first two pages of the letter is also attached to this document.

The USC approved the most recent draft on August 3. The current statute, a redline draft, and a clean copy of the proposed recodification were provided to members and are available upon request.

GUIDELINES SUBCOMMITTEE

The Guidelines Subcommittee has met a number of times and discussed a wide variety of issues which have been raised since the effective date of the revised guidelines on October 1, 2015. The unanimous decision of the subcommittee was to prioritize both short and long term objectives for further revisions to the guidelines. Given the lack of data analysis at this time and the continued support for the principles underlying JRI, the USC identified those issues which were seen as "implementation" issues to be addressed in 2016 and those issues to be considered in the year(s) ahead.

In addition to the consideration of a more robust set of data than currently exists (the first Annual Report of CCJJ is anticipated in October or November 2016), future revisions should also include testing and analysis of potential impacts.

The proposed draft of the guidelines for 2016 was distributed to USC Members on August 24, 2016 and contains the proposals which have been received from multiple sources. The USC will hold an additional conference call meeting on September 22, 2016 at noon in order to discuss any input received, vote upon any revisions and approve for publication the 2016 Adult Sentencing and Release Guidelines which will be effective October 1, 2016. Anyone who would like a copy for review, contact jvalencia@utah.gov. Public comment can also be emailed to the same address on or before Tuesday September 20, 2016 at 5:00 p.m. Public comments received will be forwarded to the Commission Members for their consideration at the September 22 meeting. USC Members may participate in person or by phone for the September 22 meeting.

EXPUNGEMENTS WORKING GROUP

An Expungements Working Group was created at the August 3 USC meeting. The group has convened for two meetings and has narrowed multiple policy objectives and identified potential code sections impacted. The Working Group has discussed issues in both the juvenile and adult criminal justice systems. Policy objectives include creating a process which is more streamlined and accessible; fundamentally fair and proportionate; and a cost-effective and efficient use of limited resources.

Future meetings are scheduled and a draft of legislation is anticipated to be presented at the October 12 full USC Meeting.

SALT LAKE CITY COURT OBSERVATIONS

The USC coordinated the observation of two separate justice court calendars operated by Salt Lake City Justice Court Judge John Baxter: Homeless Court on June 24 and Veteran's Court on July 7. The group received a warm welcome and were generously accommodated by Judge Baxter and his court staff, who answered any and all questions posed. Observers were impressed by the sheer amount of time and commitment which Judge Baxter personally extends to these "community courts."

The impact of such courts on our communities is difficult to quantify. Funding and staffing for such courts, as well as programming and services in connection with such courts is likely significantly underfunded. The USC commends the work of Judge Baxter, the Veteran's Administration, the community volunteers, and all of the court staff and participants. The USC will further research available grants and programs to connect services with problem-solving courts according to validated risk and need assessments. There is a great need for services and the USC would like to further collaborate with interested stakeholders or community members to make such "community courts" more successful models.

NASC ANNUAL CONFERENCE

Utah hosted the National Association of Sentencing Commission's Annual Conference for the first time in 19 years from August 7-9, 2016. The conference began with a preliminary session on juvenile justice issues held at the S.J. Quinney College of Law. A panel of local and national participants began the discussion of innovative and effective strategies to reverse what has been termed 'The School to Prison Pipeline.' The event included NASC attendees as well as members of the public, all of whom were committed to finding solutions and collaborating beyond the courtroom.

The conference continued with an opening reception Sunday evening and opening remarks Monday morning at the Little America Hotel in downtown Salt Lake by Governor Herbert and Chief Justice Durrant.

Multiple breakouts and plenary sessions included topics relevant to Utah and especially relevant to implementation of the Justice Reinvestment Initiative. The conference presented a unique opportunity for local attendance and participation in panel discussions on a national and even international level. Utah attendees were able to share the wealth of experience and expertise which exists locally and also to learn from other states and governments in a collaborative, professional, proactive forum.

Utah was well-represented at the NASC Conference and now holds the distinction of having the highest number of local attendees ever. In addition, Jennifer Valencia was elected to serve on the National Association of Sentencing Commission's Executive Committee.

Special thanks are extended to all members of the USC, CCJJ, USMHAC (formerly USAAV) for their attendance and participation in the conference. Special thanks are also extended to local attendees who participated in various panels and as moderators.

Sincere thanks are also extended to Governor Gary Herbert and the Governor's General Counsel Jacey Skinner; Supreme Court Chief Justice Matthew Durrant; and the Administrative Office of Courts.

Additional thanks are extended to members of the Utah Judiciary; the University of Utah; the S.J. Quinney College of Law at the University of Utah; the Criminal Justice Center at the College of Social Work at the University of Utah; Stirba P.C. Law Office; the Commission on Criminal and Juvenile Justice; and the NASC/USC Local Planning Committee which included: Ron Gordon, Jacey Skinner, Appellate Court Judge Michele Christiansen, Juvenile Court Judge Julie Lund, Pam Vickrey, and Peter Stirba.

The conference was by all measures a huge success. Representatives from the countries of England, Scotland, South Korea, twenty different U.S. states and the federal government participated in the conference. Conference evaluations included written comments that the conference was "informative;" "well-organized;" "friendly; "best conference in years;" "great topics and breakouts;" "facility was great;" "hotel beautiful;" "food of higher quality than common;" "conference was good length;" "wonderful host state;" "conference was done well;" "thank you to the State of Utah and the Utah Sentencing Commission and staff for hosting the Conference."

Presentations and links to additional information can be located at www.thenasc.org.

Additional resources are also in the process of development through NASC.

Recommendations were also received suggesting that Utah should host an Annual Utah State Sentencing Summit in the month following the Annual NASC Conference. It was suggested that such a summit could be held either at the State Capitol or in coordination with other universities across the State. Hosting an annual conference was suggested would provide for a more consistent dissemination of relevant sentencing case law, research, and best practices amongst all criminal justice system stakeholders.

If interested in the further development and coordination of an Annual Sentencing Summit, (anticipated to be in September or October annually) please contact jvalencia@utah.gov. Please also contact with suggestions of other locations and/or institutions which may be interested in hosting in coordination with the USC. The intention would be to provide a forum for as many stakeholders as possible statewide to attend at the lowest cost.

2016 SENTENCING COMMISSION SUBCOMMITTEES

*designates USC Member, other attendees by invitation

JUVENILE JUSTICE
*Chair – Pam Vickrey
*Judge Andrus
*Susan Burke
Debbie Whitlock
*Judge Lund
*Al Emery
*Darin Carver
*Christina Zidow
*Representative Roberts
Dawn Marie Rubio, JAOC
Krista Airam, JAOC
Antonette Gray, DMC
Cuong Nguyen, UBJJ
Steve Beck, UJDA

ANOMALIES
Co Chairs – *Paul Boyden & *Patrick Anderson
*Peter Stirba
*Rollin Cook
Mike Haddon
*Judge Trease
*Judge Christiansen
*Representative King
*Rich Mauro
*Pam Vickrey
James Swink, Cache County Atty
Susan Allred, LRGC

MISDEMEANORS
Co-Chairs – Judge McCullagh, West Valley Just Ct Judge & *Senator Thatcher
*Rich Mauro
*Peter Stirba
*Pam Vickrey
*Rachelle Hill
Judge Marx, Logan Justice Ct Judge
Judge Renstrom, Chair, Bd of Just Ct Judges
Ed Montgomery, South Salt Lake Pros.
Lacey Singleton, Salt Lake Legal Def.
David Walsh, Salt Lake County DA
Kelly Lundgren, U of U
Santiago Cortez, Clinical Consultants
MaryLou Emerson, USMHAC
Ned Searle, DVPAC
Brent Kelsey, DHS
Larry Haefeli, Salt Lake County CJS
Judge Fuchs, Retired 3rd District Ct Judge
Rick Schwermer, AOC

GUIDELINES
*Chair - Chyleen Arbon
*Peter Stirba
*Pam Vickrey
*Ron Gordon
*Rollin Cook (Mike Haddon)
*Rich Mauro
*Christina Zidow
*Rachelle Hill
*Craig Barlow
*Judge Trease
James Hudspeth, AP&P Director
Dan Blanchard, AP&P Deputy Director
Larry Haefeli, Salt Lake County CJS
Raechel Lizon, BOPP Researcher
Doreen Weyland, JRI ITF
Ben Peterson, CCJJ Researcher
Rick Schwermer, AOC
Debra Moore, AOC

EXPUNGEMENTS WORKING GROUP
*Chair – Pam Vickrey
*Vice Chair – Chyleen Arbon
*Paul Boyden
*Judge Low
*Craig Barlow
*Ron Gordon
*Representative King
*Rich Mauro
Mike Haddon, UDC
Julie Christensen, UDC
Raechel Lizon, BOPP
Denise Porter, BOPP
Nichole Borgeson, BCI/DPS
Kim Gibb, DLD Bureau Chief
Alice Erickson, BCI/DPS
Representative Brian Greene
Judge McCullagh, West Valley Just Ct Judge
Susan Allred, LRGC
Esther-Chelsea McCarthy, LRGC
Rick Schwermer, AOC
Senator Lyle Hillyard
Representative Eric Hutchings

CCJJ STUDY GROUP: DEATH PENALTY
USC Representative:
*Rich Mauro

CCJJ WORKING GROUP: JUVENILE JUSTICE
USC Representatives:
*Darin Carver
*Pam Vickrey
*Susan Burke

§ 76-5-302 Aggravated Kidnapping

(1) An actor commits aggravated kidnapping if the actor, in the course of committing ~~unlawful detention or~~ kidnapping:
(a) possesses, uses, or threatens to use a dangerous weapon as defined in Section 76-1-601; or
(b) acts with intent:
(i) to hold the victim for ransom or reward, or as a shield or hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct;
(ii) to facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony;
(iii) to hinder or delay the discovery of or reporting of a felony;
(iv) to inflict bodily injury on or to terrorize the victim or another;
(v) to interfere with the performance of any governmental or political function; or
(vi) to commit a sexual offense as described in Title 76, Chapter 5, Part 4, Sexual Offenses.
(2) As used in this section, "in the course of committing ~~unlawful detention or~~ kidnapping" means in the course of committing, attempting to commit, or in the immediate flight after the attempt or commission of a violation of~~:~~
~~(a)~~ Section 76-5-301, kidnapping~~.; or~~
~~(b) Section 76-5-304, unlawful detention.~~
(3) Aggravated kidnapping is a first degree felony punishable by a term of imprisonment of:
(a) except as provided in Subsection (3)(b), (3)(c), or (4), not less than 15 years and which may be for life;
(b) except as provided in Subsection (3)(c) or (4), life without parole, if the trier of fact finds that during the course of the commission of the aggravated kidnapping the defendant caused serious bodily injury to another; or
(c) life without parole, if the trier of fact finds that at the time of the commission of the aggravated kidnapping, the defendant was previously convicted of a grievous sexual offense.
(4) If, when imposing a sentence under Subsection (3)(a) or (b), a court finds that a lesser term than the term described in Subsection (3)(a) or (b) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than:
(a) for purposes of Subsection (3)(b), 15 years and which may be for life; or
(b) for purposes of Subsection (3)(a) or (b):
(i) 10 years and which may be for life; or
(ii) six years and which may be for life.
(5) The provisions of Subsection (4) do not apply when a person is sentenced under Subsection (3)(c).
(6) Subsections (3)(b) and (3)(c) do not apply if the defendant was younger than 18 years of age at the time of the offense.
(7) Imprisonment under this section is mandatory in accordance with Section 76-3-406.

§ 76-5-304.5 Aggravated Unlawful Detention

(1) An actor commits aggravated unlawful detention if the actor, in the course of committing unlawful detention:
(a) possesses, uses, or threatens to use a dangerous weapon as defined in Section 76-1-601; or
(b) acts with intent:
(i) to hold the victim for ransom or reward, or as a shield or hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct;
(ii) to facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony;
(iii) to hinder or delay the discovery of or reporting of a felony;
(iv) to inflict bodily injury on or to terrorize the victim or another; or
(v) to commit a sexual offense as described in Title 76, Chapter 5, Part 4, Sexual Offenses.
(2) As used in this section, "in the course of committing unlawful detention means in the course of committing, attempting to commit, or in the immediate flight after the attempt or commission of a violation of:
(a) Section 76-5-304, Unlawful detention
(3) Penalty
(a) Except as stated in part (3)(b) and (3)(c), aggravated unlawful detention is a second degree felony.
(b) Under part (1)(a), if the actor merely possesses a dangerous weapon and does not use it or threaten to use it, aggravated unlawful detention is a third degree felony.
(c) Under subsection 1(b)(ii), 1(b)(iii), 1(b)(iv) and 1(b)(v), Aggravated Unlawful Detention is a third degree felony.

§76-6-412 Theft -- Classification of offenses

(1) Theft of property and services as provided in this chapter is punishable:

(a) as a second degree felony if the:

(i) value of the property or services is or exceeds $5,000;

(ii) property stolen is a firearm or an operable motor vehicle;

~~**(iii) actor is armed with a dangerous weapon, as defined in Section 76-1-601, at the time of the theft**~~**;** or

(iii) ~~**(iv)**~~ property is stolen from the person of another;

(b) as a third degree felony if:

(i) the value of the property or services is or exceeds $1,500 but is less than $5,000;

(ii) **the value of the property or services is or exceeds $500 and** the actor has been twice before convicted of any of the offenses listed in Subsections (1)(b)(ii)(A) through (1)(b)(ii)(C), if each prior offense was committed within 10 years of the date of the current conviction or the date of the offense upon which the current conviction is based and at least one of those convictions is for a class A misdemeanor:

(A) any theft, any robbery, or any burglary with intent to commit theft;

(B) any offense under Title 76, Chapter 6, Part 5, Fraud; or

(C) any attempt to commit any offense under Subsection (1)(b)(ii)(A) or (B);

(iii) in a case not amounting to a second degree felony, the property taken is a stallion, mare, colt, gelding, cow, heifer, steer, ox, bull, calf, sheep, goat, mule, jack, jenny, swine, poultry, or a fur-bearing animal raised for commercial purposes; or

(iv)

(A) the value of property or services is or exceeds $500 but is less than $1,500;

(B) the theft occurs on a property where the offender has committed any theft within the past five years; and

(C) the offender has received written notice from the merchant prohibiting the offender from entering the property pursuant to Section 78B-3-108;

(v) the actor has been twice before convicted of any of the offenses listed in Subsections (1)(b) (ii)(A) through (1)(b)(ii)(C), if each prior offense was committed within 10 years of the date of the current conviction or the date of the offense upon which the current conviction is based and the value of the property stolen is or exceeds $500 but is less than $1,500; or

(vi) the actor has been previously convicted of a felony violation of any of the offenses listed in Subsections (1)(b)(ii)(A) through (1)(b)(ii)(C);

(c) as a class A misdemeanor if:

(i) the value of the property stolen is or exceeds $500 but is less than $1,500;

(ii)

(A) the value of property or services is less than $500;

(B) the theft occurs on a property where the offender has committed any theft within the past five years; and

(C) the offender has received written notice from the merchant prohibiting the offender from entering the property pursuant to Section 78B-3-108; or

(iii) the actor has been twice before convicted of any of the offenses listed in Subsections (1)(b)(ii)(A) through (1)(b)(ii)(C), if each prior offense was committed within 10 years of the date of the current conviction or the date of the offense upon which the current conviction is based; or

(d) as a class B misdemeanor if the value of the property stolen is less than $500 and the theft is not an offense under Subsection (1)(c).

(2) Any individual who violates Subsection 76-6-408(1) or Section 76-6-413, or commits theft of property described in Subsection 76-6-412(1)(b)(iii), is civilly liable for three times the amount of actual damages, if any sustained by the plaintiff, and for costs of suit and reasonable attorney fees.

U.S. Department of Justice

Civil Rights Division

Office for Access to Justice

Washington, D.C. 20530

March 14, 2016

Dear Colleague:

To help judicial actors protect individuals' rights and avoid unnecessary harm, we discuss below a set of basic constitutional principles relevant to the enforcement of fines and fees. These principles, grounded in the rights to due process and equal protection, require the following:

(1) Courts must not incarcerate a person for nonpayment of fines or fees without first conducting an indigency determination and establishing that the failure to pay was willful;

(2) Courts must consider alternatives to incarceration for indigent defendants unable to pay fines and fees;

(3) Courts must not condition access to a judicial hearing on the prepayment of fines or fees;

(4) Courts must provide meaningful notice and, in appropriate cases, counsel, when enforcing fines and fees;

(5) Courts must not use arrest warrants or license suspensions as a means of coercing the payment of court debt when individuals have not been afforded constitutionally adequate procedural protections;

(6) Courts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release; and

(7) Courts must safeguard against unconstitutional practices by court staff and private contractors.

In court systems receiving federal funds, these practices may also violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, when they unnecessarily impose disparate harm on the basis of race or national origin.

A complete copy of letter can be located at https://www.justice.gov/crt/file/832461/download