



RACIAL JUSTICE &
EQUAL ECONOMIC
OPPORTUNITY PROJECT

NATIONAL CONSUMER LAW CENTER

CRIMINAL JUSTICE
POLICY PROGRAM

H A R V A R D L A W S C H O O L

Using Bankruptcy Law to Aid Criminal Justice Debtors

October 17th, 2017

Tara Twomey, National Consumer Law Center and National
Consumer Bankruptcy Rights Center

Alex Kornya, Iowa Legal Aid

With Moderator

Abby Shafroth, National Consumer Law Center

NCLC[®]

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CONSUMER
LAW
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Webinar Tips

- If you joined with a headset or through your computer speakers, please be sure your **device volume settings** are properly adjusted
- If your headset is not working, please try **unplugging and re-plugging** in your device
- Everyone will be muted during this presentation
- This training is being recorded



Webinar Tips

- **Questions?** Type it in the Q&A function and we will relay it to the speaker(s)
- If you are having technical problems, please use the Q&A function for help and I will assist you
- You can access the PPT for this webinar by opening the “materials” drop down. We will also post it on line and will send instructions on how to obtain a certificate of attendance.

Please join us in Washington, DC this November for NCLC's annual Consumer Rights Litigation Conference!

November 16th-19th, 2017
Lobby Day, November 15th

Featuring Plenary Speakers, Sen Elizabeth Warren (D-MA) and Sen. Sherrod Brown (D-OH)!



This will be a particularly special and energizing conference, with more courses offered than ever before, all featuring high-quality and well-known speakers addressing **the 900+ consumer attorneys** expected to attend. We hope you will join us to network, brainstorm, and choose from over **60 breakout sessions** taught by leaders in the field of consumer law, making the CRLC the most **important event of the year** for consumer advocates!

For more details, please visit <https://www.nclc.org/conferences>





Moderator – Abby Shafroth

National Consumer Law Center

Abby Shafroth is a staff attorney at the National Consumer Law Center and focuses on the intersection of criminal and consumer law as well as student loan and for-profit school issues. She is the co-author of two reports in the *Confronting Criminal Justice Debt* series: *The Urgent Need for Reform* and *A Guide for Litigation*. She is also a contributing author of the National Consumer Law Center's *Student Loan Law and Collection Actions* treatises.

Prior to joining NCLC, Abby litigated civil rights and employment class and collective actions at Cohen Milstein Sellers & Toll PLLC in Washington, D.C. She also previously worked as an attorney at the Lawyers' Committee for Civil Rights Under Law and as a law clerk for the Honorable Richard A. Paez of the Ninth Circuit Court of Appeals. Abby is a graduate of Harvard College and Harvard Law School.



Other Webinars in this Series

Upcoming webinars:

- Intro to Harvard Criminal Justice Policy Program's 50-State Criminal Justice Debt Law Web Tool
- Ensuring that People Are Not Jailed Due to Poverty: Reforming Policies and Representing Clients in Criminal Justice Debt "Ability to Pay" Proceedings
- Affirmative Litigation of Criminal Justice Debt Abuses—Theory and Practice

Prior webinars:

- Confronting Criminal Justice Debt: Introduction and Impact on Communities of Color (Oct. 4, recording online now)
- The Advocacy Gap: Meeting the Urgent Need for Counsel to Represent Individuals in Criminal Justice Debt Proceedings (Oct. 10, recording online)

Register for upcoming webinars and download recordings of past webinars at:
<https://www.nclc.org/webinars.html>





Tara Twomey

Of Counsel, National Consumer Law Center

Tara Twomey is currently Of Counsel to the National Consumer Law Center and the Project Director for the National Consumer Bankruptcy Rights Center. She has previously been a Lecturer in Law at Stanford, Harvard and Boston College Law Schools. Tara is a former Clinical Instructor at the Hale and Dorr Legal Services Center of Harvard Law School where her practice focused, in part, on sustainable homeownership for low- and moderate-income homeowners. She is a contributing author of several books published by the National Consumer Law Center, including [*Foreclosures and Mortgage Servicing*](#) and [*Bankruptcy Basics*](#).



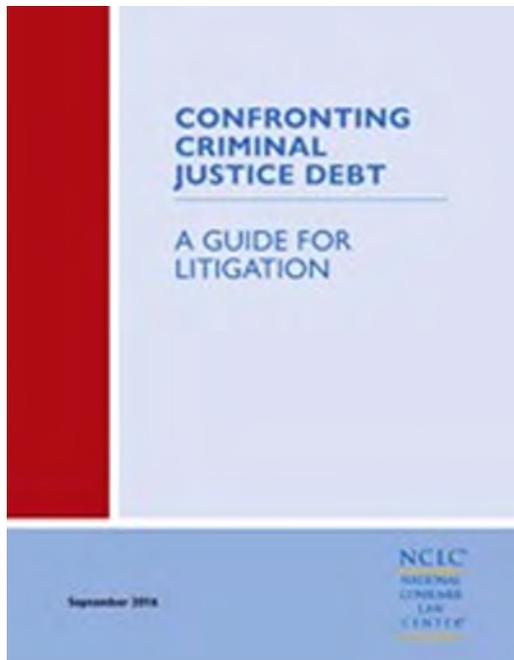
Alex Koryna

Assistant Litigation Director, Iowa Legal Aid

Alex Koryna has been working at Iowa Legal Aid since 2008, and became the assistant litigation director in 2014. As a staff attorney, he had an extensive litigation career with a focus in consumer, housing, and tax. Alex has focused on advocating for low income individuals affected by court debt since 2009, and through systemic advocacy has helped to change policies involving application of debtor's exemptions to court debt collection, reasonable payment plans, and the imposition and collection of indigent defense reimbursement.

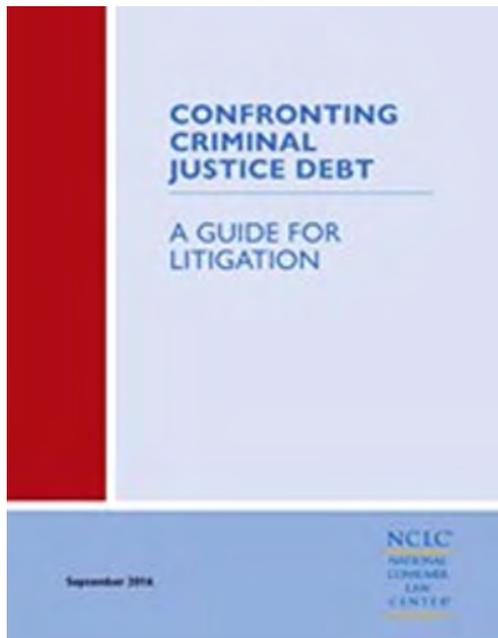
Resources:

Litigation Guide

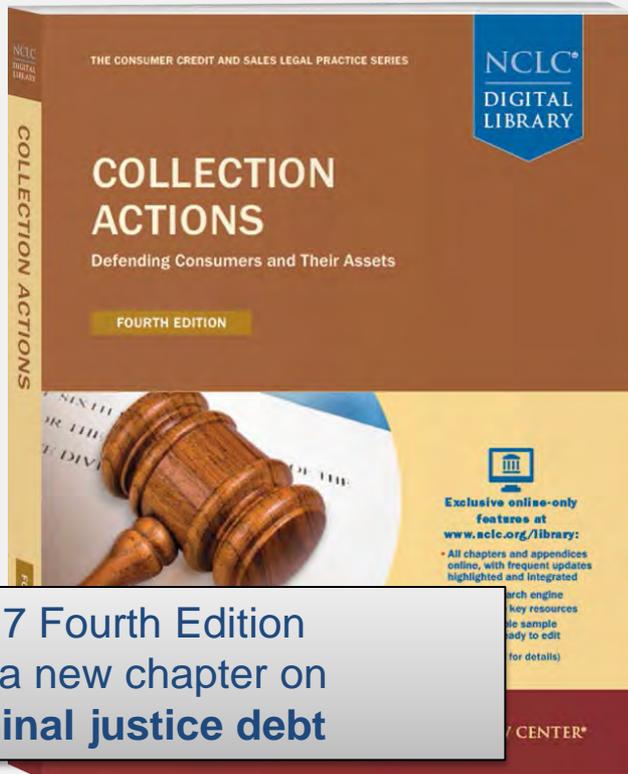


- Aimed at civil and criminal litigators/practitioners
- Primarily focused on individual representation
- Includes practice checklists

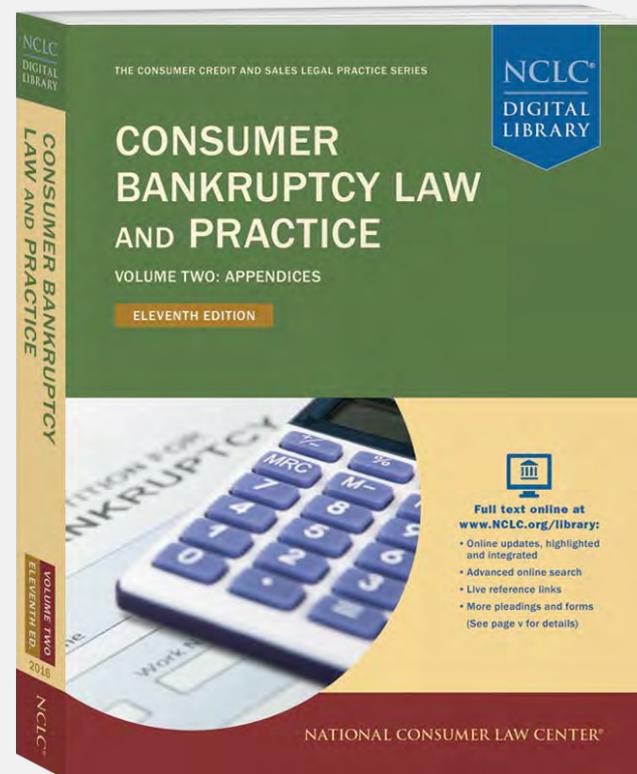
Topics in Litigation Guide



- Constitutional backdrop
- Defending against imposition of fines and fees
- Seeking modification of debt after imposition
- Defending against collection
- **Bankruptcy**
- Protections against garnishment
- Affirmative claims



2017 Fourth Edition
with a new chapter on
criminal justice debt



Learn more about NCLC treatises
&
read the first chapter of each title at no cost
www.nclc.org/library

Other Resources

50 State Web Tool for Criminal Justice Debt

Criminal Justice Policy Program at Harvard Law School [Log in](#)
50-State Criminal Justice Debt Reform Builder ^{beta}

[Home](#) [National Comparison](#) [State Analysis](#) [Law Explorer](#) [Reform Builder](#) [Contact Us](#)

Hover over a state on the map to see key criminal justice debt metrics. Currently the map is color-coded by the number of fees and surcharges. Click to navigate to a state summary page with additional statistics, queries in to the full law database, and details about our methodology.

North Carolina
66 total fees & surcharges
Mandatory driver's license renewal?
Yes
Has any mandatory fees or surcharges?
Yes
Has required fee for parole or probation?
No

Arizona

[§ See all AZ provisions](#)
[Change state](#)

- [§ Relevant Provisions](#)
- [✔ Policy Recommendations](#)
- [+ Add to board](#)

[Methodology](#)

Arizona Fees and Fines State Summary

Across the country, onerous fines and fees pose a fundamental challenge to a fair and effective criminal justice system.

- [✔ Additional policy background](#)

Explore the law in Arizona

- [§ Data of all fees and surcharges](#)
- [§ Data of all fines for misdemeanors and felonies](#)
- [§ See all financial penalties in Arizona](#)

Arizona snapshot

Arizona has 25 fees and surcharges

- [✔ See policy recommendations](#)
- [§ Explore the data](#)

Arizona has a required charge for parole or probation

- [§ Explore the law in Arizona](#)

Arizona Poverty Penalties and Poverty Traps

Poverty traps such as incarceration and driver's license revocation constrain an individual's ability to earn a living and pay court costs. Poverty penalties attach cascading costs and penalties to the collection practices.

- [✔ Additional policy background](#)
- [✔ See all poverty penalty and poverty traps](#)

Arizona Ability to Pay

Sound policy considerations counsel in favor of robust procedures for conducting ability to pay determinations not only at the enforcement stage but also when financial obligations are imposed.

- [✔ Additional policy background](#)
- [✔ See all ability to pay policy recommendations in CJPP's Policy Guide](#)

by Criminal Justice Policy Program at Harvard Law School
available at cjdebtreform.org

Other Resources

- NLADA Court Debt Listserv
- DOJ Fines and Fees Resource Guide
<https://ojp.gov/docs/finesfeesresguide.pdf>
- National Center for State Courts, National Task Force on Fines, Fees and Bail Practices Resource Center:
<http://www.ncsc.org/Topics/Financial/Fines-Costs-and-Fees/Fines-and-Fees-Resource-Guide.aspx>

Criminal Justice Debt & Bankruptcy



Alex Kornya – Iowa Legal Aid

Tara Twomey – National Consumer Law Center

Criminal Justice Debt

Pre-conviction

- Application Fee to obtain public defender
- Jail fee for pre-trial incarceration
- Court administrative fees
- Bail bonds



Sentencing

- Fines, with accompanying surcharges
- Restitution
- Court administrative fees
- Fees for designated funds (e.g., libraries, prison construction)
- Public defender reimbursement fees
- Prosecution reimbursement fees

Incarceration

- Pay-to Stay Fees
- Other??



Post-Release

- Probation and parole supervision fees
- Drug testing fees
- Vehicle interlock device fees (DUIs)
- Mandatory treatment, therapy, class fees

Poverty Penalties

- Interest
- Late Fees
- Payment plan fees
- Collection Fees



...to what end?

- Avoidance of garnishment
- Avoidance of offset of benefits or tax refunds
- Removing holds on professional licensure, driver's license, vehicle registration
- Opening up restoration of rights, expungement, drug court or other specialized court participation, etc...
- Avoidance of incarceration for FTAs / contempt (although stay protection is limited)

Bankruptcy – Chapter 7

11 U.S.C. § 523(a)(7)

“A discharge under section 727...does not discharge an individual debtor from any debt—

(7) to the extent such a debt is for a fine, penalty, or forfeiture payable to and for the benefit of a government unit, and is not compensation for actual pecuniary loss, other than a tax penalty...

Bankruptcy – Chapter 7

“to the extent such a debt is for a fine, penalty, or forfeiture payable to and for the benefit of a government unit, and is not compensation for actual pecuniary loss, other than a tax penalty...”

Elements to establish non-dischargeability

- 1) Fine, penalty or forfeiture
- 2) Payable to the government
- 3) Payable for the benefit of the government
- 4) Not compensation for pecuniary loss (except certain tax penalties)

Bankruptcy – Chapter 13

11 U.S.C. § 1328(a)(3)

“[C]ourt shall grant the debtor a discharge of all debts provided for by the plan...except any debt—
(3) for **restitution, or a criminal fine, included in a sentence on the debtor’s conviction of a crime...**”

Kelly v. Robsinson

479 U.S. 36 (1986)

- Debtor convicted of welfare fraud and ordered to pay restitution as condition of probation
- Debtor filed proceeding to have restitution held dischargeable because it was compensation for monetary loss
- Supreme Court reversed because
 - Obligation had purpose of punishing debtor
 - Section 523(a)(7) not intended to interfere with criminal courts' penal and rehabilitative acts
 - Also looked to pre-Code law that criminal restitution not a claim, and did not want to change that result, although court declined to rule on whether it is a claim under the Code.

Determining Dischargeability

- For non-dischargeability based on sections 523(a)(7) or 1328(a)(3) the creditor does not need to bring a complaint to determine dischargeability.
- Usually the debtor will file the adversary proceeding.
- Exceptions to discharge are construed narrowly, and objecting party bears the burden to prove each element of an exception to discharge.

Criminal Justice Debt

**Get Out
of Jail**

PAY

\$2500



COURT OF COMMON PLEAS OF CAMBRIA COUNTY

DOCKET



Docket Number: [REDACTED]

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
[REDACTED]

Page 7 of 8

CASE FINANCIAL INFORMATION

Last Payment Date:

Total of Last Payment: \$0.00

Defendant	<u>Assessment</u>	<u>Payments</u>	<u>Adjustments</u>	<u>Non Monetary Payments</u>	<u>Total</u>
Costs/Fees					
Automation Fee (Cambria)	\$5.00	\$0.00	\$0.00	\$0.00	\$5.00
Sheriff Costs (Cambria)	\$50.00	\$0.00	\$0.00	\$0.00	\$50.00
Postage Fee (Cambria)	\$8.00	\$0.00	\$0.00	\$0.00	\$8.00
Police Transport (Cambria)	\$100.00	\$0.00	\$0.00	\$0.00	\$100.00
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ATJ	\$2.00	\$0.00	\$0.00	\$0.00	\$2.00
Police Drug Fee (Cambria)	\$150.00	\$0.00	\$0.00	\$0.00	\$150.00
DNA Detection Fund (Act 185-2004)	\$250.00	\$0.00	\$0.00	\$0.00	\$250.00
Certification (Cambria)	\$20.20	\$0.00	\$0.00	\$0.00	\$20.20

Types of Debt Matters

- Terminology such as “fines” and “fees” is carelessly used, not just by laypeople, but also by lawyers, policymakers, and judges.
- The type and purpose of debt is extremely important to determine whether the debt is dischargeable.
 - NATURE OF CASE: Civil v. criminal v. juvenile
 - PURPOSE: Fines (punitive) v. restitution (punitive-compensatory) v. indigent defense fees (compensatory) v. collection fees (??)
 - INCLUDED IN SENTENCING ORDER
 - PAYABLE TO WHOM
 - PAYABLE FOR THE BENEFIT OF WHOM

EQUAL PROTECTION

- ***Tate v. Short***, 401 U.S. 395 (1971). Automatic conversion of fines to prison time for those unable to pay EP violation.
- ***James v. Strange***, 407 U.S. 128 (1972). Indigent defense recoupment statute failing to accord same protections given to civil judgment debtors void on EP grounds.
- ***Fuller v. Oregon***, 417 U.S. 40 (1974). Statute with certain protections offering rough parity with civil judgment debtors upheld. In many states, interpreted to require reasonable ability to pay analysis before imposition and / or collection attempts.

EQUAL PROTECTION

- JURY FEES. State v. Rideau, 943 So. 2d 559 (La. Ct. App. 2006)
- INVESTIGATOR FEES. Martin v. State, 405 S.W.3d 944, 948 (Tex. App. 2013)
- INTERPRETER FEES. State v. Diaz-Farias, 362 P.3d 322 (Wash. Ct. App. 2015).
- Two bases of arguments
 - Fee attached to the exercise of a constitutional right
 - Fee is only charged to a class of people irrespective of comparative culpability

Criminal Justice Debt



FINES

Criminal Justice Debt



RESTITUTION

Criminal Justice Debt



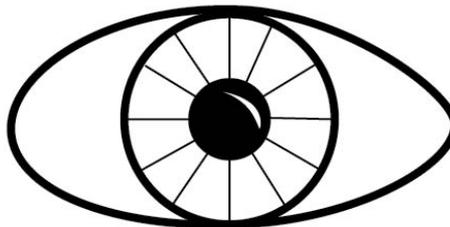
**COURT
COSTS**

Criminal Justice Debt



BAIL BONDS

Criminal Justice Debt



**Post-Release
SUPERVISION**

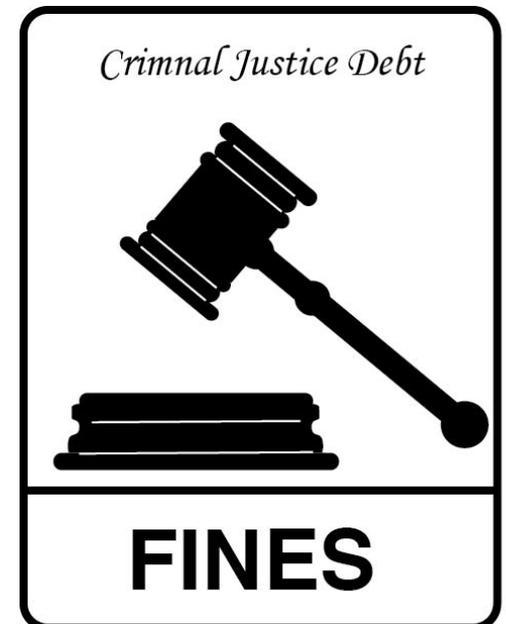
Criminal Justice Debt



COLLECTION

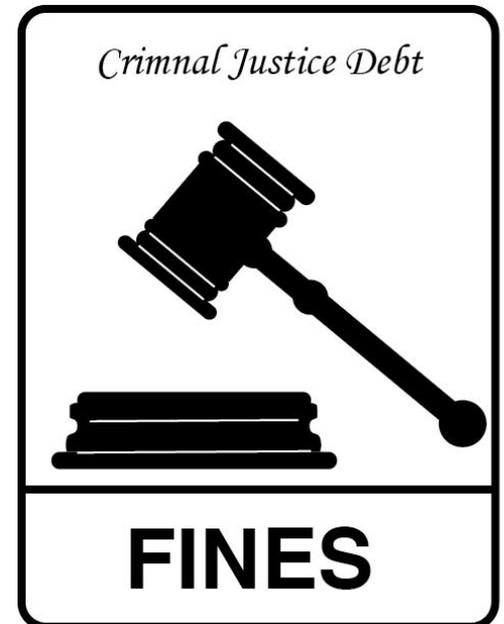
Criminal Fines

- Criminal fines are typically imposed by the sentencing order. They ostensibly serve a wholly punitive function.
- This includes traffic and parking fines.
- They are non-dischargeable in chapter 7 and chapter 13.



Civil Penalties

- Generally courts have held penalties arising out of civil or administrative proceedings are nondischargeable.
 - E.g., penalties arising from violations of environmental protection statutes, SEC enforcement actions, Medicaid fraud, unemployment benefits fraud
 - Consumer fraud fines



Victim Restitution

- Misleading use of term “restitution”
- Victim restitution
 - Mechanism to make victim whole
 - Directly related to criminal culpability
- If included in sentencing order likely to be nondischargeable based on *Kelly*
 - Even if state collects money solely for distribution to victim
 - Payable to the victim directly – may be subject to challenge



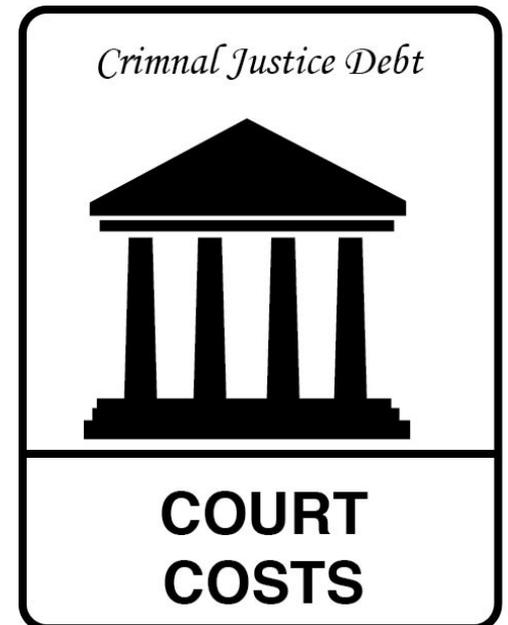
Juvenile Restitution

- Owed by parents based on conduct of minor child
- Generally held to be dischargeable
 - Non penal nature of the debt
 - Parents are not culpable actors
 - *See also* Rivera v. Orange Co. Probation Dept., 832 F.3d 1103 (9th Cir. 2016) (juvenile pay-to-stay fees did not qualify as a domestic support obligation excepted from discharge under § 523(a)(5)).



Court Costs and Fees

- Costs of Prosecution
- Indigent Defense Fees
- Costs of Incarceration
 - (aka Pay-to-Stay)
 - *In re Milan* (8th Cir. BAP)
- Deferred Judgment
- Special Fund Fees



COURT OF COMMON PLEAS OF CAMBRIA COUNTY

DOCKET



Docket Number: [REDACTED]

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
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Page 7 of 8

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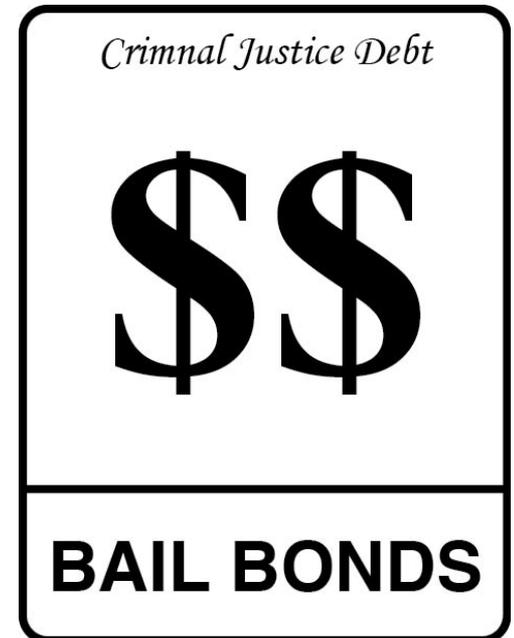
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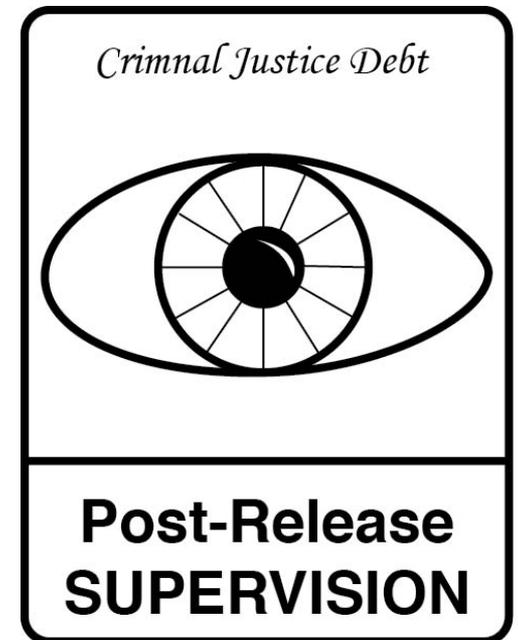
Bail Bonds

- Payment of money for pre-trial release.
- Upfront fee of 10-15% of bond amount from bondsman (plus sometimes guarantor)
- Who owes the debt to whom?
 - State based on direct forfeiture probably not dischargeable
 - Debt to a private bondsman typically dischargeable (but would affect any security interest)



Post-Release Fees & Costs

- Fee to enter parole program
- Supervision fees
- Electronic monitoring fees
- Vehicle interlock device fees
 - Installment and maintenance
- Mandatory drug or alcohol treatment
- Drug testing



Collection Fees & Costs

- Interest
 - Dischargeable to the extent the underlying debt is dischargeable.
- Late fees or surcharges
- Payment Plan Fees
- Debt collector costs
 - Fees imposed by private debt colle can be as high as 40% of the total amount owed.
 - Usually these costs are dischargeable.



Questions?



Just a Reminder

- Tomorrow you will receive an email with:
 - The recording and materials for this webinar
 - A survey
 - Instructions for receiving a certificate of attendance.
- Thank you to our speaker!

