

**EXHIBIT 2
BENCH CARD**

Biloxi Municipal Court Procedures for Legal Financial Obligations & Community Service

The U.S. Constitution and Mississippi law require safeguards when collecting fines, state assessments, fees, court costs, and restitution (collectively, “legal financial obligations” or “LFOs”).¹ All Biloxi Municipal Court (“BMC”) Judges shall abide by the procedures described below.

RIGHT TO COUNSEL

FIRST APPEARANCE:

When a person is brought before the Biloxi Municipal Court, and charged with a misdemeanor, the Court shall provide the defendant an opportunity to sign an **Affidavit of Indigence** stating that he or she is indigent and unable to employ counsel.²

It is a best practice for the Court to assign a public defender or court staff to help the defendant complete the Affidavit of Indigence.

The court shall use the **Affidavit of Indigence**, and any other relevant factors, to evaluate whether the defendant is entitled to counsel.

The court may appoint counsel to represent an indigent defendant charged with a misdemeanor punishable by confinement.³

When the court determines that representation is required at the plea, trial, sentencing, or post-sentencing stage of the proceedings, it must appoint counsel to represent an indigent defendant, unless there is a knowing, voluntary, and intelligent waiver of the right to counsel.⁴

SENTENCING:

A defendant is entitled to the assistance of counsel *before* being sentenced to incarceration or probation for the collection of a fine, fee, court cost, state assessment, or restitution, unless there is a knowing, voluntary and intelligent waiver of the right to counsel.⁵

If the Court contemplates imposing incarceration or probation on an unrepresented defendant, or wishes to preserve its right to impose a jail sentence or probation in the future, the Court must conduct an indigence determination by using the **Affidavit of Indigence**, and considering any other relevant factors, to evaluate whether the defendant is entitled to court-appointed counsel at no cost.

COMPLIANCE HEARING:

The court must inform every person charged with failure to pay an LFO of:

- (1) all defendants’ right to representation by legal counsel in any proceeding concerning nonpayment;
- (2) indigent defendants’ right to court-appointed representation at no cost when facing possible incarceration for failure to pay LFOs.

The Court must appoint counsel to represent indigent people who face the possibility of incarceration due to nonpayment of an LFO, including in Compliance Hearings and Probation Revocation Hearings, unless there is a knowing, voluntary, and intelligent waiver of that right.

WAIVER OF RIGHT TO COUNSEL:

The Court **may not** accept a written or oral waiver of any right to court-appointed counsel without FIRST informing the defendant of the nature of the charges, of the defendant’s right to be counseled regarding her/his plea, and the range of possible punishments, and ensuring that any waiver is knowing, intelligent, and voluntary.

If a defendant/probationer seeks to waive his or her right to counsel, the court must conduct a colloquy on the right to inform the defendant:

- (1) **that the indigent defendant has a right to a court- appointed attorney or public defender at no cost**;
- (2) **that any fee normally charged for representation by a court-appointed attorney shall be waived** for indigent defendants; and
- (3) the nature of the charges against the defendant, of defendants’ right to be counseled regarding his or her plea, and the range of possible punishments.

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IMPOSITION AND COLLECTION OF LFOs

SENTENCING:

The Court shall assess ability to pay when setting the amount of any fine, fee, court cost, or restitution.⁶ The Court should consider:

- (1) the defendant's financial resources and income;
- (2) the defendant's financial obligations and dependents;
- (3) the defendant's efforts and ability to find and engage in paid work, including any limitations due to disability or residence in a mental health facility;
- (4) outstanding LFO obligations in other cases or to other courts;
- (5) the length of the defendant's probation sentence, if any;
- (6) the goals of deterrence, retribution, and rehabilitation;
- (7) the Affidavit of Indigence; and
- (8) any other factor or evidence that the Court deems appropriate.

The Court shall also consider the ability to perform community service when setting any community service requirements.

Fines, Fees, Court Costs, and Restitution:

If the defendant is unable to pay, the Court should consider:

- (1) Reduction of the amount of fines, fees, court costs, and restitution imposed;
- (2) Waiver or Suspension of the fines, fees, court costs and restitution imposed;
- (3) Community Service credit toward the discharge of fines, fees, court costs, or restitution owed to Biloxi. Biloxi Municipal Court Judges shall not impose a fee for those who participate in community service. Biloxi Municipal Court Judges will attempt to provide sufficient variety of opportunities for community service to accommodate individuals who have physical or mental limitations, who lack private transportation, who are responsible for caring for children or family members, or who are gainfully employed;
- (4) Extension of the amount of time for payment of the fines, restitution, fees, and court costs imposed;
- (5) Completion of approved educational programs, job skills training, counseling and mental health services, and drug treatment programs as an alternative to, or in addition to, community service; and
- (6) Other disposition deemed just and appropriate, in the discretion of the Court, pursuant to applicable law.

Mandatory State Assessments:

If the defendant is unable to pay, the Court should consider:

- (1) extending the defendant's time to pay;
- (2) requiring the defendant to perform community service to satisfy the state assessment fees;
- (3) requiring the completion of approved educational programs, job skills training, counseling and mental health services, and drug treatment programs as an alternative to, or in addition to, community service; and
- (4) imposing any other disposition deemed just and appropriate, in the discretion of the Court, pursuant to applicable law.

The Court may not reduce or suspend any mandatory state assessments, including those imposed under Miss. Code Ann. § 99-19-73.

Jail: The Court's decision to sentence a defendant to jail shall NOT solely be based on any finding that the defendant is unable to pay a fine, state assessment, court costs, fee, or restitution.

After setting the amount of any LFOs, and Community Service, and Program Requirements the Court shall:

- (1) Determine whether the defendant can pay LFOs in full, or needs additional time;
- (2) Set the terms of a Payment Plan by which LFO payments shall be made to the BMC Clerk, if the defendant cannot pay in full on sentencing day;
- (3) Set forth the sentence in a written order indicating the final date for payment of LFOs and performance of community service, any Payment Plan terms and the total amount of (1) fines, (2) restitution, (2) fees and costs, and (3) state assessments, ;
- (4) Provide the defendant the **Advisement of Rights Regarding Payments and Community Service**, and the **Notice of Change of Address** form.

REPORT OF NONPAYMENT:

Warrants: The court shall not issue any warrant directing arrest for alleged LFO nonpayment absent a Compliance Hearing as described below.

The Court shall hold a Compliance Hearing for defendants who are sentenced to LFOs, community service and/or training, treatment, counseling and mental health programs and who are alleged to have failed to meet the requirements of the Court's sentence.

The Court shall provide at least 21-days notice of a Compliance Hearing through use of the **Biloxi Municipal Court Order Setting Compliance Hearing**. The Court shall also provide the **Advisement of Rights Regarding Payments and Community Service**, and the **Notice of Change of Address** form when providing notice of a Compliance Hearing.

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IMPOSITION AND COLLECTION OF LFOs (continued)

COMPLIANCE HEARING:

Compliance Hearings will be audio recorded. In the event audio recording equipment is temporarily not working, the Court shall ensure that the case record includes: 1) the evidence submitted by the defendant, and 2) written documentation of the Court's findings, supporting evidence, and colloquy concerning ability to pay, efforts to secure resources, alternatives to incarceration, and the right to counsel.

Hearing Procedures and Standards

The Court must advise defendants of:

- (1) all defendants' right to an ability-to-pay hearing prior to jailing for nonpayment of fines, fees, state assessments, court costs, or restitution;
- (2) all defendants' right to be represented by legal counsel for defense against possible incarceration for failure to pay LFOs;
- (3) indigent defendants' right to court-appointed counsel at no cost to defend against possible incarceration in proceedings concerning nonpayment of LFOs;
- (4) that ability to pay, efforts to secure resources, and alternatives to incarceration are critical issues in a Compliance Hearing;
- (5) the type of information relevant to determining ability to pay; and
- (6) the potential penalties if a person is found to have willfully failed to pay an LFO.

The Court must provide defendants an opportunity to present evidence that the amount allegedly owed is not accurate or not in fact owed if the defendant believes the amount is not correct.

As part of determining whether the failure to pay was willful and whether incarceration can be imposed, the Court shall:

1. **Inquire into, and make a determination on, ability to pay LFOs**, by considering the totality of the circumstances, including the defendant's income, assets, debts, other LFO obligations, and any other information the Court deems appropriate. The Court shall use the **Affidavit of Indigence** to conduct this inquiry.

The Court shall find that a defendant is unable to pay LFOs when, in consideration of the totality of the circumstances, it finds that the payment of LFOs would impose substantial hardship on the defendant or the defendant's dependents, including children and elderly parents. The Court shall make a rebuttable presumption that a person is unable to pay LFOs when:

- a. the defendant's annual income is at or below 125% of the federal poverty level for his or her household size according to the current Federal Poverty Level ("FPL") chart;
- b. the defendant is homeless;
- c. the defendant is incarcerated; and/or
- d. the defendant resides in a mental health facility.

2. **Inquire into, and make a determination on, the reasonableness of a defendant's efforts to acquire resources to pay LFOs**.

The Court shall take into account efforts to earn money, secure employment and borrow money, as well as any limitations on the defendant's ability to engage in such efforts due to homelessness, health and mental health issues, temporary and permanent disabilities, limited access to public transportation, limitations on driving privileges, and other relevant factors.

3. If the Court determines that a defendant is unable to pay, **the Court will consider and make a determination on the adequacy of alternatives to incarceration for nonpayment of fines or restitution**, including:

- a. Reduction of the amount of fines, fees, court costs, and restitution imposed;
- b. Waiver or Suspension of the fines, restitution, fees, and court costs imposed;
- c. Community Service credit toward the discharge of fines, fees, state assessments, court costs, or restitution owed to Biloxi. Biloxi Municipal Court Judges shall not impose a fee for those who participate in community service. Biloxi Municipal Court Judges will attempt to provide sufficient variety of opportunities for community service to accommodate individuals who have physical or mental limitations, who lack private transportation, who are responsible for caring for children or family members, or who are gainfully employed;
- d. Extension of the amount of time for payment of the fines, restitution, fees, state assessments, and court costs imposed;
- e. Completion of approved educational programs, job skills training, counseling and mental health services, and drug treatment programs as an alternative to, or in addition to, community service; and
- f. Imposing other disposition deemed just and appropriate, in the discretion of the Court, pursuant to applicable law.

Judges shall be guided by the Supreme Court's recognition that the government's "interest in punishment and deterrence can often be served fully by alternative means"⁷ to incarceration.

The Court will document its actions and findings and evidence in the record supporting its findings.

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IMPOSITION AND COLLECTION OF LFOs (continued)

IMPOSING JAIL FOR FAILURE TO PAY

The Court may impose incarceration following a Compliance Hearing if it makes one of the following findings, supported by evidence:

- (1) a defendant has willfully refused to pay the fine, fee, court cost, state assessment, or restitution when she/he has the means to pay;
- (2) a defendant has failed to make sufficient bona fide efforts to seek employment, borrow money, or otherwise secure resources in order to pay the fine; or
- (3) the defendant is unable to pay, despite making sufficient efforts to acquire the resources to pay, and alternative methods for achieving punishment or deterrence are not adequate.⁸

THIRD PARTY COLLECTIONS

The Court may send a case to collections by a third-party contractor if a defendant has failed to make LFO payments in accordance with a Payment Plan and the Court has determined, after holding a Compliance Hearing in accordance with the procedures described herein, that:

- (1) the defendant has the ability to pay, but has refused to pay the LFO(s) owed; or
- (2) the defendant is unable to pay the LFO, but has failed to make sufficient bona fide efforts to seek employment, borrow money, or otherwise secure the resources in order to pay a fine, fee, court cost, state assessment, or restitution.

In any civil execution, attachment, and/or wage garnishment proceeding to collect unpaid LFOs, the defendant is entitled to the exemptions and exclusions found in Miss. Code Ann. § 85-3-1.

Collecting Fines, Fees, State Assessments, Court Costs, and Restitution

Permitted Methods of Collection

- Voluntary Payment
- Payment Plan Administered by Court
- Community Service (except restitution owed to a party other than Biloxi)
- Execution of Civil Judgment
- Collection by Third Party Contractors following Compliance Hearing and Court determination as described above.

Impermissible Methods of Collection

- Imposing Jail at Sentencing
- Issuance of Failure-to-Pay Warrants Upon Report of Nonpayment
- Forfeiture of Confiscated Money
- Imposing “pay or stay” sentence

¹ *Bearden v. Georgia*, 461 U.S. 670, 672 (1983) (“If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court *must* consider alternative measures to punishment other than imprisonment.”) (*Emphasis added*); Miss. Code Ann. §§ 21-23-7; 25-32-9; 63-1-53; 99-15-26; 99-37-11.

² Miss. Code Ann. § 25-32-9.

³ Miss. Code Ann. §§ 21-23-7; 25-32-9

⁴ Miss. Code Ann. § 25-32-9.

⁵ *Alabama v. Shelton*, 535 U.S. 654, 658 (2002).

⁶ *Bearden v. Georgia*, 461 U.S. 660, 669–70 (1983) (“[W]hen 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.”).

⁷ *Bearden v. Georgia*, 461 U.S. 670, 671–72 (1983).

⁸ *Id.* at 668–69