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The Criminal Defense Attorneys of Michigan (CDAM) offer the following comments in *opposition* to HB 5785 (Rep. John Walsh – R, Livonia):

CDAM wishes to thank the various stakeholders for coming together and trying, on short notice and with very little time, to solve an extremely complex and timely problem: how our courts are funded, especially with regard to the *Cunningham* decision and its effect on court costs. The stakeholders' meetings were inclusive in terms of the groups present. A positive outcome of those sessions is that HB 5785 requires some level of transparency that does not currently exist in courts. This is an important measure not only for our Defendants, who will have a clearer idea of what they owe the court system pertaining to their crime; it is equally important for the legislature and the public at large to have access to this data because it will help establish clarity of what constitutes "costs" court to court across the state. With that data comes an ability to make informed decisions about how to best fund our courts.

However, despite that positive change, there are six key areas where CDAM believes this legislation falls short:

1. *Ability to pay*. There needs to be an assessment as to whether or not a Defendant can pay the costs associated with the court proceedings. A problem that Cunningham exposes is that courts are relying on Defendants to bear the burden of "paying for the system." Certainly, for their part in a crime, if found guilty, a Defendant should have some financial stake in a system that is well-funded and works well; it helps keep the process constitutional for the Defendants as much as it "keeps the public safe." However, costs accrued in this manner are unreliable; it is hard to tell which Defendants can pay, and equally important, how much (if any). (This is especially so since a very high percentage of defendants--frequently estimated at 85% of felony cases or higher--require appointed counsel because they are indigent.) Establishing an ability to pay, including options for payment and reduced payment and even, yes, some caveats for Defendants *unwilling* instead of *unable* will lend much-needed predictability and fairness for all parties to the court funding system.

2. *No incarceration for non-payment*. While punishments for willfully not paying costs should be considered, CDAM has seen many cases where Defendant is given jail time for not paying associated costs *despite the fact that the underlying crime did not require jail time.*

Locking people in jail for inability to pay costs is, as has been put in recent media coverage, a modern-day Debtors Prison. Situations arise in someone's life, especially once they have a criminal record, that make getting or keeping jobs difficult. Like ability to pay, above, these circumstances need to be taken into consideration for a more balanced system.

3. *Costs should reflect the severity of the crime.* Some courts currently do assign higher costs for more serious crimes and lower costs for less serious crimes. However, this is not the norm across the State; nor is it a standard. Besides, again, for overall balance and fairness in the court system, tying costs to the severity of a crime makes the funds derived from these costs to Defendants predictable. Courts will be able to easier predict their budgets, and it will assure that courts don't assess inordinately high costs for less serious crimes simply because there are more of them and they can become a "cash cow." Though CDAM is not sure if this is a current practice, given that there is no transparency with regard to assessment of costs until this legislation passes, a clause like this in the legislation will cement a fair and predictable cost assessment practice.

4. *Cap the costs*. All fees and fines allowed by statute are currently capped. The Cunningham decision established that costs must be statutory as well, but before Cunningham, costs were just something each court imposed. With HB 5785, we collectively are now establishing a *new* cost system to something that before Cunningham did not legally exist. Given that courts will now have a new statutory discretion to levy costs, then like fines and fees, there should be a cap, lest, like the issues above, costs become more about making up for a lackluster court funding system currently in place than about paying for the *actual* cost of a crime moving through the court process. Further, Defendants are largely responsible now for paying for a system that they only hope is a fair system. There is much less burden put on the public at large, which also benefits from a safer, more efficient, more fair court system.

5. *Sunset.* A flood of new data will soon accumulate when and if HB 5785 passes. A sunset, quite simply, assures that the stakeholders will continue to meet on these key issues – and resolve them – as much as it makes certain that a system that is *expedient* – HB 5785 – either is eliminated or amended and replaced by one that is predictable and balanced.

6. *Appropriate definition of reimbursable costs*. Even with a cap, costs should only be for operational items (as opposed to capital expenditures) that are reasonable in scope and reasonably related to what is incurred in connection with the specific prosecution at issue. They should not be assessed for maintenance or operations that the court or county would be required to make regardless of the specific prosecution.

Thank you for your attention to these issues. We hope that the discussion around HB 5785 will be ongoing and include these extremely important changes so that whatever the legislature passes is not simply a quick-fix for a massive court funding problem, but is also a thoughtful fix.