

# Jail as penalty in court default called illegal

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By Elaine McArdle  
Standard-Times staff writer

NEW BEDFORD — Last year, Kevin Gomes was arrested by city police for holding an open container of alcohol in a public place.

The maximum penalty for violation of the city ordinance is a fine. But a month later, Kevin Gomes found himself in the county jail for nine days.

Mr. Gomes went to jail because he did not show up in 3rd District Court to pay the \$140 fine. He was found in default of court, and ordered to pay an additional \$50 as default costs.

Mr. Gomes came to court later that month on an unrelated matter. And because he did not have money to pay the default costs, he was shipped off to the Bristol County House of Correction until he came up with the \$50. He sat in jail for nine days — at a cost to the county of \$270 — before he was released.

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With Mr. Gomes as a test case, a group of public defenders has challenged the legality of fining defendants \$50 for defaulting and sending them to jail if they can't pay the fine (or default cost, as the court prefers to call it).

The Bristol County Bar Advocates and the local Committee for Public Counsel Services claim that the procedure is illegal because:

- The \$50 amount does not reflect the direct cost to the court system of a defendant's default. Under state law, such fines must be used to compensate the court, not punish the defendants, they say.
- Defendants aren't given a hearing to explain their reasons for nonpayment of the default costs, a violation of federal and state law.
- Defendants should be provided with a lawyer, if they cannot afford to hire one, when there is a chance they will be sent to jail.

On a more practical level, they argue that the default judgments don't make economic sense.

“We have overcrowded jails, space at a premium, and these people are being held because they can't come up with \$50. It doesn't make sense,” said Louis D. Coffin, former president of the local Bar Advocates and now a lawyer with the Committee for Public Counsel

(See DEFAULTS, Page C2)

## ■ Defaults

(Continued from Page C1)

Services. Both groups provide legal services to clients who can't afford to hire a lawyer.

Judge John A. Markey, chief judge at 3rd District Court, defends the practice — instituted about five years ago when he was appointed to the bench — as essential to forcing defendants to come to court.

"Why should anyone show up for court if there is no penalty for not doing so?" asked Judge Markey.

James B. Sheerin, assistant clerk-magistrate, estimated that 25 percent of defendants default. With about 200 cases a day scheduled, that means 50 defendants aren't bothering to come to court.

Defaults are "a chronic problem," he said. Most defaulting defendants aren't a few minutes late; they simply don't show up at all. Imposing a default cost, Mr. Sheerin said, is one way to encourage them to show up.

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The state Supreme Judicial Court will hear oral arguments on the public defenders' case early next year, a court spokesperson said.

Until then, Judge Markey continues to impose \$50 default costs on defendants who don't come to court when they should.

According to local lawyers, a defendant who defaults in 3rd District Court almost always is hit with the \$50 default cost. Even defendants who are only five minutes late for court — which begins at 9 a.m. — are fined. Defendants are rarely given an opportunity to explain their absence, and it takes exceptional circumstances to be excused from the fine, they say.

One lawyer said his client was minutes late to court because he was elderly and on crutches. It was only after the man's infirmities were pointed out that the default cost was waived. Other lawyers tell about clients who don't speak English or can't locate the correct courtroom in the busy court building and are "fined" for being late.

Sometimes a person who has missed a court date will avoid returning to court because he can't pay the fee and doesn't want to go to jail, lawyers said.

"My experience is that a lot of these people do want to straighten it out, but are afraid to because the court will send them to jail if they don't have the \$50," Mr. Coffin said.

Assistant clerk-magistrate Sheerin said defendants are not charged the \$50 if they have "an appropriate reason for being late. I like to think that common sense prevails, that we try to be as fair as possible within the boundaries we have."

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## The debate ov

3rd District Court Judge John A. Markey, left, routinely slaps a \$50 "default costs" charge on any defendant who skips a court date or shows up late.

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Men who can't pay the fine are shipped off to the overcrowded Bristol County House of Correction, where it costs the county \$30 a day to keep them, said Bristol County Sheriff David A. Nelson.

Women go to the State Prison for Women in Framingham. It costs the county about \$105 to take a female prisoner to Framingham (\$210 roundtrip), and costs the state about \$50 a day to house her, estimated Sheriff Nelson.

No statistics are kept on how many default cases result in someone being sent to jail. No court official was even willing to hazard a guess at that number. But they are significant enough to anger Sheriff Nelson.

He points out that the county gets no funds from the court to incarcerate these defendants, while the court gets the monies from defendants who do pay the default fine.

"We get nothing. All we get is aggravation and grief," said Sheriff Nelson.

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Despite the cost to taxpayers of incarcerating defendants who can't pay, Judge Markey says the default cost system is necessary.

Defaults "are extremely costly to the court system," he said, costly to the clerks who pull the files out and type up the day's list, costly to the probation department, costly to the assistant district attorney's office. All must prepare for a particular defendant whether or not he appears.

"I think \$50 is minimal," he said, in terms of covering those court costs.

The public defenders argue that the court should only hit defendants for direct costs incurred due to the default.

"Our position is, if there really is a cost — for police officers or other witnesses — we don't argue with that," said Mr. Coffin.

But when a defendant fails to show for a pretrial conference, at which no witnesses are present, the costs to the system are



ry photo by Jack Iddon

Standard-Times library photo by Ron Rolo

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Attorney Louis D. Coffin, right, and a group of other lawyers argue that the way defaults are handled in 3rd District Court is unconstitutional.

indirect.

"The counter-argument is that it costs the court system money to have to bring a defendant's file into court, to have to call out their name. Our position is, that's a normal function of the court. There's no dollar amount they can pin to that, that it costs them \$6.30 to shuffle every file," Mr. Coffin said.

Some lawyers see the fines as a pure revenue-raising procedure — especially since the court does not incur the costs of incarcerating defendants who can't pay.

Mr. Sheerin said he cannot estimate how much money the court gets each year from defendants who pay default costs, although he suggested multiplying the number of defaults in the court times \$50.

If 50 defendants default each day and are assessed court costs of \$50, as Mr. Sheerin suggested, that represents \$12,500 per week in potential revenues to the court.

In other area courts such as Taunton, Wareham and Fall River, judges usually do not imposed costs on defendants for defaults unless witnesses were present, court clerks said. Instead, the courts issue a default warrant for the defendant, ordering that he be arrested and brought to court.

But Judge Markey says warrants are even more expensive to the criminal justice system, in terms of police time and other costs.

But, even at 3rd District Court, not every judge imposes the default fine. Judge James Quinn did not return a reporter's phone call for this story, but he does occupy a unique position in the default debate.

Appointed to the bench this summer, Judge Quinn was chief public defender for the local Committee for Pubic Counsel Services when it filed the Gomes appeal challenging Judge Markey's practice.