

**IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT**

Nos. 737 WDA 2018 and 1870 WDA 2018

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

TYNECIA MILTON-BIVINS,

Appellant.

**BRIEF OF AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA**

Appeal from the Order of Sentence entered on November 16, 2017, at CC 8439-2005, by the Honorable Lester G. Nauhaus, Court of Common Pleas of the Fifth Judicial District of Pennsylvania at Appellant's Probation Violation hearing and Appeal from the Order of Sentence entered on April 20, 2018, at CC 2010-7609 and 2015-4177 by the Honorable Beth A. Lazzara, Court of Common Pleas of the Fifth Judicial District of Pennsylvania at Appellant's Probation Violation hearing.

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Statement of Interest of Amicus Curiae

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization of over 1.75 million members. Since its founding in 1920, the ACLU has been dedicated to preserving and defending the principles of individual liberty and equality embodied in the United States Constitution and civil rights laws. The ACLU of Pennsylvania is one of its state affiliates, with over 30,000 members throughout Pennsylvania. The ACLU of Pennsylvania has appeared many times as amicus curiae in federal and state courts at all levels in cases that implicate civil or constitutional rights. The ACLU of Pennsylvania has particular expertise with respect to the assessment and collection of fines, costs, and restitution in criminal cases throughout the state.

The ACLU of Pennsylvania seeks to appear as amicus curiae in this appeal to draw the Court's attention to the all too frequent practice of courts finding that defendants have violated the terms of their probation or parole for not paying fines, costs, or restitution, without making any findings regarding the defendants' ability to pay those financial obligations. We respectfully submit this brief in the hope of persuading the Court to provide greater direction to trial courts in what the law requires prior to finding a defendant in violation of the terms of probation due to nonpayment of fines, costs, and/or restitution.

Summary of the Argument

In 1973, our Supreme Court issued its landmark decision in *Commonwealth ex rel. Parrish v. Cliff*, 304 A.2d 158, 161 (Pa. 1973), prohibiting the incarceration of indigent defendants who are too poor to pay fines, costs, and restitution. The Court, like the United States Supreme Court a decade later in *Bearden v. Georgia*, 461 U.S. 660 (1983), sought to end the counterproductive, destructive, and unconstitutional jailing that turned Pennsylvania’s jails into a form of modern debtors’ prisons.

As a result, a defendant who does not pay fines, costs, or restitution commits a technical violation of her probation only if she has “willfully refused to pay.” *Commonwealth ex rel. Powell v. Rosenberry*, 645 A.2d 1328, 1331 (Pa. Super. Ct. 1994). Without a finding of willful nonpayment, there has been no violation; the defendant simply lacks the ability to comply. To make that finding, the Constitution requires that the trial court affirmatively inquire into the defendant’s financial status and determine whether she is able to pay. *Bearden*, 461 U.S. at 672 (“We hold, therefore, that in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay.”). This is a question of whether the defendant’s finances—not those of any friends or family—permit her to meet her basic life needs, such as housing, food, medical care, transportation, and dependent care, and still have money left to pay the court.

The question is not purely financial, but is also shaped by the law, as an indigent defendant is by definition unable to pay and cannot be punished for nonpayment as long as she is making a good-faith effort to obtain employment or the skills necessary for employment that will allow her to meet those obligations.

Trial courts need clear instruction on these legal requirements because so many criminal defendants struggle to pay even comparatively small amounts of money. The ACLU of Pennsylvania's recent analysis of ten years of common pleas court data shows that defendants represented by the public defender have paid only about half of the court costs imposed in 2008. While there is not yet a similar analysis of restitution, the Administrative Office of Pennsylvania Courts ("AOPC") reports that only 27% of the restitution assessed in 2008 has been collected. Many defendants remain unable to fulfil their financial obligations, which means that trial courts must have clear guidance on how to determine *why* an individual defendant has not paid in full.

While there are statutory and rules-based protections to ensure that indigent defendants are not punished or incarcerated for nonpayment of fines, costs, and/or restitution, such punishment happens all too frequently. Modern debtors' prisons continue to exist in counties across Pennsylvania. For example, just this year this Court has invalidated trial court practices in Cambria and Lebanon Counties that led to the unconstitutional jailing of dozens of defendants merely because they did

not pay fines, costs, and restitution. *Commonwealth v. Mauk*, 185 A.3d 406 (Pa. Super. Ct. 2018); *Commonwealth v. Diaz*, 191 A.3d 850 (Pa. Super. Ct. 2018); *Commonwealth v. Smetana*, 191 A.3d 867 (Pa. Super. Ct. 2018). The takeaway from those three cases is that trial courts are required to investigate the reasons for nonpayment and make findings on the record about whether the defendant had the ability to pay and willfully refused to do so.

Yet in Ms. Bivins's case, both trial courts failed to abide by those principles. Both trial court opinions candidly admit that the courts simply did not hold *any* ability-to-pay hearing. One judge wrote that "there was no hearing held in the instant matter to determine whether Defendant had the ability to pay." CC 8439-2005, Oct. 11, 2018 Op. at 5. The other judge similarly stated that "the court did not hold a separate hearing to determine the Defendant's ability to pay restitution." CC 7609-2010 and 4177-2015, Nov. 1, 2018 Op. at 3. Those admissions require that this Court vacate Ms. Bivins's convictions for violation of the terms of her probation for failure to pay.

By failing to make those inquiries, the trial courts violated 35 years of clearly-established constitutional law, as set down by the United States Supreme Court and as repeatedly interpreted by this Court. The result is that a woman who was receiving Supplemental Security Income from the Social Security Administration due to her disabilities, and who has two minor children, is now

sentenced to seven years in jail because of her poverty. This Court must vacate the convictions and remand for a new *Gagnon II* hearing so that the trial courts can determine whether Ms. Bivins actually had the ability to pay, or if she was indigent and living hand to mouth, unable to make payments towards her fines, costs, and restitution.¹

Argument

A. A decade of AOPC case data shows that indigent defendants cannot afford to pay substantial financial obligations.

Court fines, costs, and restitution each serve a different policy objective. Fines are “direct consequences, and therefore, punishment.” *Commonwealth v. Rivera*, 95 A.3d 913, 916 (Pa. Super. Ct. 2014). Costs are “a reimbursement to the government for the expenses associated with the criminal prosecution” and are “akin to collateral consequences”; they are “not part of the criminal’s sentence but are merely incident to judgment.” *Id.* at 916-17. Restitution “compensates the victim for his loss and rehabilitates the defendant by impressing upon him that his criminal conduct caused the victim's loss and he is responsible to repair that loss.” *Id.* at 916. But in imposing these obligations—and especially in contemplating

¹ In her Brief, Ms. Bivins explains that there is also no lawful basis for a restitution order because the victims in these cases are corporations and the Commonwealth, which were not “victims” under 18 Pa. Cons. Stat. § 1106 at the time she committed the offenses and was sentenced. *See Commonwealth v. Veon*, 150 A.3d 435, 454 (Pa. 2016). Amicus wholly agrees with, but does not repeat, that argument.

punishment when a defendant has failed to make payment—courts must also grapple with the reality that many defendants are poor. None of the objectives of fines, costs, or restitution are furthered when the court punishes a defendant for failing to pay money that she just does not have. *See, e.g., Commonwealth v. Fuqua*, 407 A.2d 24, 26 (Pa. Super. Ct. 1979) (“rehabilitative purpose” of restitution is defeated when the amount exceeds the defendant’s ability to pay and is “a condition he cannot hope to satisfy”).

1. Indigent defendants represented by the public defender can afford to pay only small amounts of money.

Analysis of court data shows that there is a finite—and clear—limit to what poor defendants can pay. The ACLU of Pennsylvania recently completed a preliminary analysis of 10 years of court data from the AOPC to look at how defendants in criminal cases are paying their court costs. Although the ACLU of Pennsylvania has not yet completed a similar study of restitution, the costs data is illuminating and suggests that poor defendants are also not able to pay large sums in restitution. *See* 204 Pa. Code § 29.405(1)(C) (when a defendant makes a payment, it is split between costs and restitution).

Of the 1,429,270 common pleas cases analyzed by the ACLU of Pennsylvania, court costs were assessed in 89% of cases in which the defendant was represented by the public defender, compared to 93% of cases in which private

counsel represented the defendant.² Public defender clients tend to be assessed slightly lower court costs than private clients: among defendants who have court costs imposed, the median amount of costs imposed on public defender clients is \$1,072, compared with \$1,306 for defendants represented by private counsel. *See* ACLU Report at 3. Yet out of all cases filed during this 10-year span, public defender clients have entirely paid their costs in only 24% of cases, compared with 54% of cases with private counsel. *Id.* at 4. The median amount of money that a public defender client still owes is \$441 (having paid only \$631), even though the median owed by defendants with private counsel is \$0—they have entirely paid off their court costs. *Id.*

While only 24% of public defender clients have paid off their court costs in the cases reviewed by the ACLU, that number jumps to 83% for cases in which the assessed costs are \$100 or less. *Id.* at 4. Poor defendants are not willfully ignoring their obligations to the court or refusing to pay anything. Instead, as the data shows, defendants pay what they can, but large assessments simply turn into debt that follows them for years and even decades. Indeed, it is clear from the data that most public defender clients cannot realistically afford to pay more than a few

² *See* Colin Sharpe, et al., “Imposition and Collection of Court Costs in Pennsylvania Criminal Cases: Preliminary Results from an Analysis of 10 Years of Court Data,” ACLU of Pennsylvania, at 3 (Nov. 13, 2018) (hereinafter “ACLU Report”) (appended hereto for the Court’s convenience as Appendix A). The complete analysis, including all underlying data, is available on www.aclupa.org/finesandcosts/research.

hundred dollars; among cases from 2008, only about half of defendants who were assessed costs between \$0-300 had paid them off by 2018. *Id.* at 5. Those who were assessed *more* than \$300 were substantially less likely to pay. *Id.*

Unsurprisingly, poor defendants struggle to pay high amounts of court costs. While defendants with private counsel have paid 75% of the court costs imposed in 2008 cases, the same is true of only 52% of the costs assessed against public defender clients. *See* ACLU Report at 6. The story is likely similar for restitution. In 2008, courts of common pleas assessed a total of \$191,047,186 in court costs alone, and courts have collected only 62% of those funds.³ But even less restitution has been collected: in 2008, courts of common pleas assessed a total of \$107,512,991 in restitution, and courts have collected only 27% of that money.⁴ This is not a consequence of defendants thumbing their noses at the courts and at victims, but instead of the financial realities of being indigent.

³ The \$191 million figure and the 62% collections rate is reported by AOPC. “Collection Rates Over Time,” Administrative Office of Pennsylvania Courts, available at <http://www.pacourts.us/news-and-statistics/research-and-statistics/dashboard-table-of-contents/collection-rate-of-payments-ordered-by-common-pleas-courts> (select criminal cases from the drop-down menu).

⁴ The \$107 million figure and the 27% collections rate is reported by AOPC. “Collection Rates Over Time,” Administrative Office of Pennsylvania Courts, available at <http://www.pacourts.us/news-and-statistics/research-and-statistics/dashboard-table-of-contents/collection-rate-of-payments-ordered-by-common-pleas-courts> (select criminal cases from the drop-down menu).

2. Indigent defendants face severe collateral consequences for nonpayment.

What happens when defendants cannot afford to pay their financial obligations? Ms. Bivins owes approximately \$91,000 in fines, costs, and restitution—and she is now serving a seven-year jail sentence for nonpayment. To expect her to make every effort to pay that entire amount is fair. To expect her to accomplish that is simply not realistic. And it is unconstitutional to jail her for not accomplishing the impossible. Yet her case is not unique.

Just this year, this Court issued published opinions in three appeals brought by the ACLU of Pennsylvania, invalidating trial court practices that led to the incarceration of dozens of defendants each month solely for failure to pay court debt. *See Commonwealth v. Mauk*, 185 A.3d 406, (Pa. Super. Ct. 2018); *Commonwealth v. Diaz*, 191 A.3d 850 (Pa. Super. Ct. 2018); *Commonwealth v. Smetana*, 191 A.3d 867 (Pa. Super. Ct. 2018). The defendants in each of those cases owed thousands of dollars that continued to linger because of their lack of financial resources. The result was that years later—seven years for Mr. Mauk, four years for Mr. Diaz, and three years for Mr. Smetana—these defendants each found themselves unlawfully and unconstitutionally incarcerated by courts that aggressively attempted to collect uncollectible funds without regard for the defendants' financial resources.

Mauk, Diaz, and Smetana were all contempt cases, as they had already finished their supervision despite still owing the funds. Indeed, as this Court has recognized, a defendant “need not be on parole to pay his fine, and the Commonwealth need not keep him on parole to insure payment. The Commonwealth could have collected the fine in any manner provided by law, see 42 Pa.C.S. § 9728(a), including holding [the defendant] in contempt for failure to pay his fine.” *Rosenberry*, 645 A.2d at 1331. What the ACLU of Pennsylvania has repeatedly seen—and what public defenders in many counties across the state routinely combat—is that defendants under supervision who cannot afford to pay are either incarcerated or have their supervision extended due to nonpayment.

Unfortunately, this is a problem that cannot be quantified. Nothing on a docket sheet indicates why a defendant’s probation was revoked or extended, let alone whether the reason for that action was nonpayment. But it happens routinely. As the Pennsylvania Interbranch Commission for Gender, Racial, and Ethnic Fairness explained in a report to our Supreme Court last summer, one Cumberland County judge “prefer[ed]” that defendants “appear in court before their probation expires so he can extend their probation,” despite such a practice being unlawful under this Court’s precedents.⁵ The ACLU of Pennsylvania has in the past year

⁵ “Ending Debtors’ Prisons in Pennsylvania: Current Issues in Bail and Legal Financial Obligations: A Practical Guide for Reform,” The Pennsylvania Interbranch Commission for

worked closely with the Public Defender’s office in Montgomery County to address a longstanding problem where, quite literally, thousands of defendants repeatedly had their probation extended solely because they had not paid restitution in full, regardless of their financial circumstances. These practices must stop.

B. Both trial courts violated clearly-established precedent from the United States Supreme Court and our Appellate Courts by failing to consider Ms. Bivins’s ability to pay restitution.

1. This Court has repeatedly instructed that trial courts cannot find that a defendant has violated the terms of probation due to nonpayment without first finding that the defendant has the ability to pay and willfully failed to do so.

In an effort to stop the unconstitutional jailing of indigent individuals who could not pay their fines, costs, and restitution, the United States Supreme Court requires that trial courts “inquire into the reasons for the failure to pay” and make a finding that the defendant “willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay.” *Bearden v. Georgia*, 461 U.S. 660, 672 (1983). Without such a finding, the defendant has not committed a technical violation of probation or parole. *Rosenberry*, 645 A.2d at 1331.

These principles are incorporated into Pennsylvania law, which flatly prohibits jailing any defendant for nonpayment who is indigent or otherwise unable to pay. *See* Pa.R.Crim.P. 706 (fines and costs); Pa.R.Crim.P. 456 (summary cases);

Gender, Racial, and Ethnic Fairness (July 10, 2017), available at http://www.pa-interbranchcommission.com/commit_criminal-justice.php.

42 Pa. Cons. Stat. § 9730 (fines, costs, and restitution); 18 Pa. Cons. Stat. § 1106(c)(2)(iii) (restitution).⁶ This prohibition applies equally to restitution, as § 1106(c)(2)(iii) instructs that a court “Shall not order incarceration of a defendant for failure to pay restitution if the failure results from the offender’s inability to pay.” Indeed, *Bearden* itself was a case about both fines *and* restitution. *See Bearden*, 461 U.S. at 662.

To meet these obligations, this Court has repeatedly and unequivocally ruled that a court holding a revocation hearing must “inquire into the reasons for a defendant’s failure to pay and [] make findings pertaining to the willfulness of the party’s omission.” *Commonwealth v. Eggers*, 742 A.2d 174, 175-76 (Pa. Super. Ct. 1999). A defendant’s inability to pay is not merely an affirmative defense; instead, even when the defendant fails to “offer any evidence concerning his indigency,” a trial court unconstitutionally revokes probation or parole if it does not “inquire into the reasons for appellant’s failure to pay or . . . make any findings pertaining to the willfulness of appellant’s omission as required by *Bearden*.” *Commonwealth v. Dorsey*, 476 A.2d 1308, 1312 (Pa. Super. Ct. 1984). *See also Mauk*, 185 A.3d at 411 (willful nonpayment has a “mens rea element of specifically intending to defy

⁶ While *Bearden* permits courts in certain circumstances to jail defendants even if they are *unable* to pay, Pennsylvania law does not. *See, e.g., Bacik v. Commonwealth*, 434 A.2d 860, 863 (Pa. Commw. Ct. 1981) (the Rules of Criminal Procedure “preclude[] the possibility of imprisonment ever being imposed upon one whose indigency is established”).

the underlying court order”). As a result, *Bearden* places an affirmative obligation on the Court to inquire into the defendant’s financial resources, even when the defendant does not raise inability to pay as a defense.

This Court has explained that trial courts must make these findings at all probation violation hearings based on failure to make payment, as there has been *no violation* of the terms of probation unless the defendant has willfully failed to pay. *Rosenberry*, 645 A.2d at 1331; *see also Commonwealth v. Smalls*, CP-46-CR-0005242-2013, 2018 WL 4112648 (Pa. Montgomery Cty. Com. Pl. Aug. 7, 2018) (Rothstein, J.) (defendant who has failed to pay restitution has not violated terms of parole because he could not meet his basic life needs). This Court’s precedents thus require that the trial courts affirmatively inquire into Ms. Bivins’s financial status and make findings on the record regarding her ability to pay prior to any finding that she violated her probation. *See Diaz*, 191 A.3d at 866 (court must make “findings of fact” regarding the defendant’s ability to pay in proceedings following default). That did not happen here.

2. The admitted failure of the trial courts to inquire into Ms. Bivins’s financial circumstances resulted in an illegal finding that Ms. Bivins violated the terms of her supervision.

This Court’s instruction in *Dorsey* could not be clearer: even if the defendant fails to “offer any evidence concerning his indigency,” a trial court violates the law by failing to “make any findings pertaining to the willfulness of appellant’s

omission as required by *Bearden*.” *Dorsey*, 476 A.2d at 1312. Both trial courts openly admitted in their Rule 1925 opinions that they did not conduct any such inquiry or make any findings. *See* CC 8439-2005, Oct. 11, 2018 Op. at 5 (trial court acknowledged that “there was no hearing held in the instant matter to determine whether Defendant had the ability to pay”); CC 7609-2010 and 4177-2015, Nov. 1, 2018 Op. at 3 (trial court “did not hold a separate hearing to determine the Defendant’s ability to pay restitution”).

The findings that these trial courts made did not substitute for the constitutionally required inquiry into whether Ms. Bivins willfully failed to pay her financial obligations. The fact that Ms. Bivins did not argue her inability to pay in 2015 or in 2017 is irrelevant to the reason for her failure to pay in 2018.⁷ As this Court explained earlier this year, *Bearden* requires that trial courts hold hearings to determine “whether any noncompliance flowed from (a) deliberate disregard of the court’s order or (b) circumstances beyond the defendant’s control. This must be done every time someone appears or reappears for a costs-and-fines proceeding, because the person’s financial situations may have changed since the last time she or he was before the court.” *Mauk*, 185 A.3d at 411. Yet no such hearing happened

⁷ As is explained below, the representations made to the trial court in 2018 in fact indicated that Ms. Bivins had *no ability* to pay.

before the trial courts revoked Ms. Bivins's probation and sentenced her in these two matters

Without an inquiry into Ms. Bivins's financial circumstances, per *Dorsey*, and without making specific findings, per *Diaz* and *Mauk*, the trial courts' conclusions that Ms. Bivins violated the terms of her probation due to nonpayment, and the resulting sentences, were *per se* illegal and must be vacated.

C. The record does not support a finding that Ms. Bivins had the ability to pay restitution.

The current record, such as it is, is insufficient to properly evaluate whether Ms. Bivins's nonpayment was willful. However, the facts that are available on the record strongly suggest that she lacked the ability to pay as that concept is understood by this Court and our Supreme Court.

1. Without a developed evidentiary record, both trial courts incorrectly concluded that Ms. Bivins willfully failed to pay.

After Ms. Bivins submitted amended Rule 1925 statements, both trial courts issued revised opinions in support of their rulings. One judge concluded that Ms. Bivins's "failure to contribute as little as \$5 a month showed that she was unwilling, **and not unable**, to comply with the terms of her probation." CC 7609-2010 and 4177-2015, Nov. 1, 2018 Op. at 4 (emphasis in original). The other judge assumed that Ms. Bivins "had the funds to make some effort towards restitution"

because she had \$1,000 on her when she was arrested. CC 8439-2005, Oct. 11, 2018 Op. at 6. Both opinions fail to follow Pennsylvania law.

The presumption that Ms. Bivins could have paid at least five dollars a month has no basis in the record or in law. As in the contempt context, nonpayment requires a finding of willfulness, which “has a mens rea element of specifically intending to defy the underlying court order, and impossibility of performance of the court-ordered act is an absolute defense.” *Mauk*, 185 A.3d at 411. Because the proper standard asks whether the defendant can afford to pay the court without hardship, or without sacrificing life’s necessities, there can be no presumption that any defendant can pay without evidence. *See Smetana*, 191 A.3d at 873 (in challenge to incarceration and \$100 per month payment plan as unsupported by the record, “vacat[ing] the payment plan” because trial court “must make the appropriate findings of fact”). However, there is no such evidence on the record because the trial court failed to hold an appropriate hearing.

The conclusion that because Ms. Bivins has *some* money on her person she must have the ability to pay is also legally incorrect in the absence of any record. Once again, the trial court’s failure to develop a record makes it impossible for any court to determine if her nonpayment was willful. For example, there is no indication in the record that the money is hers, as opposed to that of friends or family—money that cannot, as a matter of law, be attributed to Ms. Bivins. *See*

Smetana, 191 A.3d at 873 (“Although Appellant indicated that he could potentially borrow money from a sibling, the court failed to find—as our law requires—that he alone had the financial ability to pay the outstanding fines and costs such that imprisonment was warranted.”). Nor is there any indication what the money was for: did she need it to pay rent or to buy food, for example, to supplement food stamps and social security disability benefits? Nothing in the record provides an explanation.

2. This Court should direct the trial courts to the developed body of Pennsylvania law that explains how to evaluate a defendant’s finances and that prohibits punishing defendants who cannot afford to pay.

There is a substantial body of case law that governs whether, as a matter of law, a defendant is able to pay. The basic question from case law is whether the defendant is able to afford to meet her basic life needs. *See Smalls*, 2018 WL 4112648 (defendant who cannot meet his basic life needs lacks the ability to pay restitution and cannot be found in violation of probation). If the defendant cannot afford those basic life needs, the defendant is indigent—and indigent defendants are, by definition, unable to afford to pay. They cannot be punished for nonpayment. *See Diaz*, 191 A.3d at 866 n.24 (“A finding of indigency would appear to preclude any determination that Appellant’s failure to pay the court-ordered fines and costs was willful.”).

Whenever a court evaluates a defendant's ability to pay fines, costs, and restitution, it must look at the defendant's entire financial picture and "life circumstances," *Mauk*, 185 A.3d at 411, and make findings on the record. *Smetana*, 191 A.3d at 873. In doing so, the court should consider not only all of the defendant's present income and expenses, but "all the facts and circumstances of the situation, both financial and personal." *Stein Enterprises, Inc. v. Golla*, 426 A.2d 1129, 1132 (Pa. 1981). This includes looking at the defendant's day-to-day expenses such as rent, food, utilities, health insurance, and the cost of transportation, as well as any dependent care, debts the defendant owes, and whether the defendant uses assets such as automobiles to meet her basic life needs, such as buying food and obtaining medical care. *See, e.g., Commonwealth ex rel. Bashore v. Leininger*, 2 Pa. D. & C. 3d 523, 528-29 (1977); *Amrhein v. Amrhein*, 903 A.2d 17, 22 (Pa. Super. Ct. 2006); *Crosby Square Apartments v. Henson*, 666 A.2d 737, 738-39 (Pa. Super. Ct. 1995); *Schoepple v. Schoepple*, 361 A.2d 665, 667 (Pa. Super. Ct. 1976) (en banc); *Gerlitzki v. Feldser*, 307 A.2d 307, 308 (Pa. Super. Ct. 1973) (en banc).

Ultimately, Ms. Bivins is likely indigent, and indigence is defined by whether the defendant is able to afford to meet her basic life needs. *See Stein Enterprises*, 426 A.2d at 1132 ("[I]f the individual can afford to pay court costs only by sacrificing some of the items and services which are necessary for his day-

to-day existence, he may not be forced to prepay costs in order to gain access to the courts, despite the fact that he may have some ‘excess’ income or unencumbered assets.”); *Gerlitzki*, 307 A.2d at 308 (whether a person can pay depends on “whether he is able to obtain the necessities of life”). These standards come from the civil *in forma pauperis* case law, which this Court has repeatedly incorporated into the criminal case law as the “established processes for assessing indigency,” *Commonwealth v. Cannon*, 954 A.2d 1222, 1226 (Pa. Super. Ct. 2008), because of the “dearth of case law” in criminal cases, compared with the “well-established principles governing indigency in civil cases.” *Commonwealth v. Lepre*, 18 A.3d 1225, 1226 (Pa. Super. Ct. 2011).

That *in forma pauperis* indigence standard dovetails with standards this Court has set forth in criminal cases. For example, the Court has noted that receiving public assistance (such as food stamps or Medicaid) and the service of the public defender “invite the presumption of indigence” since these are clear indicia that the defendant cannot afford to pay. *Eggers*, 742 A.2d at 176 n.1. When a defendant has no “financial assets [or] liabilities” and has been “living from hand to mouth,” a court cannot impose a fine against her due to her indigence, *Commonwealth v. Gaskin*, 472 A.2d 1154, 1157-58 (Pa. Super. Ct. 1984), and there is similarly a “duty of paying costs ‘only against those who actually become able to meet it without hardship.’” *Commonwealth v. Hernandez*, 917 A.2d 332,

337 (Pa. Super. Ct. 2007) (quoting *Fuller v. Oregon*, 417 U.S. 40, 54 (1974)).

Indeed, with respect to restitution, this Court has explained that the “rehabilitative purpose” of restitution is defeated when the amount exceeds the defendant’s ability to pay and is “a condition he cannot hope to satisfy.” *Fuqua*, 407 A.2d at 26.

In addition, in its recent *Diaz* and *Smetana* opinions, this Court has also endorsed the use of a national bench card that provides “a useful summary articulating the procedure for collecting court-imposed fines and costs,” which pegs ability to pay to 125% of the federal poverty level (in 2018, \$15,175 per year for a family of one and \$25,975 for a family of three), as well as the receipt of means-based public assistance. *Diaz*, 191 A.3d at 866 n.23.⁸

As a result, a proper ability-to-pay evaluation requires that the trial courts consider all of Ms. Bivins’s financial circumstances. They can only find that she is able to pay—and willfully refusing to do so—if she is able to afford to meet her basic life needs and has failed to make a good-faith effort to obtain the employment necessary for her to be able to afford to pay. *See Bearden*, 461 U.S. at 672 (defendant must make “bona fide” effort to acquire resources to pay).

⁸ A copy of this bench card is attached to this *amicus curiae* brief as Appendix B. *See* Nat’l. Task Force on Fines, Fees and Bail Practices, *Lawful Collection of Legal Financial Obligations* (2017), http://www.ncsc.org/~media/Images/Topics/Fines%20Fees/BenchCard_FINAL_Feb2_2017.ashx.

3. The evidence of record raises serious questions about Ms. Bivins’s ability to pay her financial obligations, and this Court should remand with instructions to the trial court to properly evaluate her finances.

As was described above, the trial courts issued illegal sentences by failing to hold the hearings necessary to determine whether Ms. Bivins has the ability to pay restitution. The facts on the record suggest that she is indigent, but it is impossible to draw any conclusions from the current record. For example, Ms. Bivins apparently struggles with mental health disabilities and receives “fixed income” in the form of “social security disability.” Dec. 16, 2016 Transcript at 4.⁹ Those facts are not contested.¹⁰ She also has physical disabilities, and “has pins in her feet and can’t be on her feet.” April 20, 2018 Transcript at 5.

If Ms. Bivins’s only income is \$750 per month from Supplemental Security Income (“SSI”), her total income may be as low as \$9,000 per year—putting her and her family well below the federal poverty guidelines.¹¹

Yet neither trial court made any effort to ask Ms. Bivins about her financial circumstances and whether she could make ends meet. Ms. Bivins had \$1,000 on

⁹ The trial court, upon learning this, asked if she smoked and then opined on the price without asking any relevant questions about how much (if anything) she spends on cigarettes—and without inquiring into what the rest of her financial circumstances look like.

¹⁰ At the same hearing, Tyree Massey from Justice Related Services, a county agency in Allegheny County, confirmed that Ms. Bivins has “PTSD, bipolar and depression” that required treatment. Dec. 16, 2016 Transcript at 7.

¹¹ “Supplemental Security Income (SSI) in Pennsylvania,” Social Security Administration (2018), <https://www.ssa.gov/pubs/EN-05-11150.pdf>.

her person, but the courts asked no question—and there is no indication in the record—about whose money that was or for what purpose she had it. Did she have any other source of income other than SSI?¹² Could she afford to feed herself and her children? How did she afford medication? We do not know—and neither did the trial courts. Without such information, Ms. Bivins could not be incarcerated for nonpayment. This Court must remand for a proper ability-to-pay hearing.

Conclusion

For the foregoing reasons, this Court should vacate the trial courts' judgment of sentence and instruct the trial courts to hold new *Gagnon II* hearings to determine whether Ms. Bivins had the ability to pay restitution in this matter.

Respectfully submitted,

/s/ Andrew Christy

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¹² As courts in other states have recognized, defendants cannot be required to use their SSI money to pay fines, costs, and restitution. *See, e.g., City of Richland v. Wakefield*, 380 P.3d 459, 465 (Wash. 2016) (explaining that the federal Social Security Act prohibits courts from requiring that defendants use their social security benefits to pay fines, costs, and restitution).

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Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify pursuant to Pa.R.A.Ps. 531 and 2135 that this brief does not exceed 7,000 words.

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the parties at the addresses and in the manner listed below:

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Appendix A

Imposition and Collection of Court Costs in Pennsylvania Criminal Cases: Preliminary Results from an Analysis of 10 Years of Court Data

By: Colin Sharpe, Jon Dilks, and Andrew Christy¹
ACLU of Pennsylvania, November 13, 2018

There has not been an empirical study of the fines, costs, and restitution imposed by Pennsylvania courts in criminal cases. Among the seemingly basic questions that have remained unanswered are the average amounts imposed in cases, how long it takes defendants to pay that money, and how long court debt remains uncollected.² This paper is a first attempt to address these questions with respect to court costs, specifically, by looking at ten years of court data from the Common Pleas Case Management System (“CPCMS”) used by Pennsylvania’s courts of common pleas and the Philadelphia Municipal Court.³

I. Data Overview and Methodology

The ACLU of Pennsylvania obtained a table of data from all criminal misdemeanor and felony cases in Pennsylvania courts of common pleas and the Philadelphia Municipal Court between August 17, 2008 and August 16, 2018. The table included the following data from each case:

- Disposition year
- Docket number
- Case Caption
- Representation Type for Defendant (public defender, private, other)
- Race
- Gender
- Amount of outstanding fines (if any)
- Amount of fines assessed (if any)
- Amount of outstanding costs (if any)
- Amount of costs assessed (if any)
- Amount of outstanding restitution (if any)
- Amount of restitution assessed (if any)

¹ Colin Sharpe is an Economics PhD candidate at Vanderbilt University. Jon Dilks is a data analyst and database manager for the ACLU of Pennsylvania. Andrew Christy is an attorney at the ACLU of Pennsylvania whose practice focuses on fines, costs, and restitution.

² Out of the 98,713 public defender cases in our dataset from 2013 that had costs assessed, 70,908 (71.83%) still have costs outstanding as of 2018. Out of 54,647 cases from that year with private representation, 24,701 (45.20%) have costs outstanding as of 2018. Of the 49,602 public defender cases from 2008 with costs assessed, 29,872 (60.22%) still have costs outstanding as of 2018, while of 35,781 private cases from 2008 with costs assessed, 12,256 (34.25%) have costs outstanding as of 2018.

³ Unlike a fine, costs are not intended to be punishment—they are not part of the sentence, and are automatically imposed by statutes unless the court determines otherwise. *Commonwealth v. Rivera*, 95 A.3d 913, 916 (Pa. Super. Ct. 2014) (describing the difference between fines, costs, and restitution); 42 Pa. Cons. Stat. § 9728(b.2). Court costs refer to the costs and fees that are assessed against a defendant. They appear in an itemized list on the last page of the docket sheet with names such as “County Court Cost,” “Commonwealth Cost,” “Judicial Computer Project,” “Substance Abuse Education,” and “Sheriff’s Fee,” among others. A list of common court costs and their statutory authorization is available at www.aclupa.org/finesandcosts under the “Court Costs Statutes” link.

Our analysis was focused on the different financial impact of court costs on defendants with means versus those who are indigent. We used type of counsel—public defender or court appointed equivalent versus private counsel—as a rough proxy for defendants’ financial status.⁴ The dataset included a total of 2,339,847 cases. We excluded cases that lacked vital information from that dataset before running our analysis.⁵ We also excluded 66,197 cases with docket numbers from before 2008 that were unlikely to be comparable to more recent cases,⁶ and 291,877 cases from Philadelphia prior to 2013 that were potentially affected by the city’s write off of outstanding bail judgments.⁷

That left us with 1,429,270 cases, representing \$1,889,517,917 in total assessed costs. We do not know the number of individual defendants, as one person may have multiple criminal cases. Of these cases, the public defender or other court appointed counsel provided representation in 906,952 cases, and private counsel provided representation in 522,318 cases.⁸

There are two caveats with respect to the data. First, because we eliminated certain categories of cases (as described above), cases with private counsel are over-represented.⁹ The overall data set now reflects that 63% of cases were represented by the public defender, even though the reality was likely closer to 80%.¹⁰ This does not impact our analysis, however, because this paper separately analyzes public defender cases and cases with private counsel; one category of

⁴ We hope that in a future analysis, we will be able to cross-reference with defendants’ zip code information to further categorize defendants based on their likely income level.

⁵ 263 cases lacked a disposition year or docket number, and another 4,603 cases had a representation type that made no sense, such as “CYS attorney” or “legal aid”—types of attorneys that do not represent criminal defendants. In addition, 547,894 cases lacked any information about type of representation, so we also omitted those cases from our analysis.

⁶ We excluded these cases from this analysis in part because it was not clear why some cases dating back to as far as the 1950s were adjudicated post-2008, and it was not clear from the data that some of these were not errors. In addition, a random review of six of these cases showed that some cases included the assessment of costs against the defendant even though the charges were dismissed, suggesting a larger problem with this cohort.

⁷ In the available data, it is impossible to distinguish between defendants in Philadelphia during this time period who paid their court costs and defendants whose outstanding bail judgment was written off, as the bail judgments appeared as “costs” on the docket sheet and the CPCMS data. Inclusion of these cases would potentially overstate the extent to which court costs were actually paid, as opposed to forgiven. *See* Dylan Purcell, “Nearly \$1 billion owed by bail jumpers wiped off books,” *Philadelphia Inquirer* (Oct. 11, 2014), http://www.philly.com/philly/news/20141011_Nearly_1billion_owed_by_thousands_of_bail_jumpers_wiped_off_the_books.html. We believe we will be able to accurately account for this problem in the future, but it will require additional information from CPCMS that was unfortunately not part of our data request.

⁸ We included the following types of representation in the “public defender” category: Conflict Counsel, Court Appointed, Court Appointed - Co-Counsel, Court Appointed - Conflicts Counsel, Court Appointed – Pending, Court Appointed – Private, Court Appointed – Public, Court Appointed - Public Defender, Court Appointed – Vendor, Court Appointed/Public Defender, and Public Defender. The CPCMS category “private” was the only category we included for private counsel.

⁹ The main reason for this is that we have excluded a significant number of cases from Philadelphia, and because of the concentrated poverty in Philadelphia, many more defendants in that city are represented by the public defender.

¹⁰ Two studies by the United States Department of Justice suggest that 60-90% of defendants nationwide are represented by public defenders. *See* “Contracting for Indigent Defense Services: A Special Report,” U.S. Dep’t. of Justice Bureau of Justice Assistance (April 2000) at 3, available at <https://www.ncjrs.gov/pdffiles1/bja/181160.pdf>; “Defense Counsel in Criminal Cases,” U.S. Dep’t of Justice Bureau of Justice Statistics (Nov. 2000), available at <https://www.bjs.gov/content/pub/ascii/dccc.txt>.

analysis does not depend on the other. By contrast, had we not eliminated those cases from our dataset, we would have significantly overestimated the amount of money that public defender clients had paid.

Second, in reviewing and thinking through the figures from CPCMS, we realized that the data only tells us the amount of costs assessed at sentencing and how much money is currently owed. That certainly captures money that has been paid. However, it *also* captures debt that is forgiven. For example, some judges will waive court costs after sentencing if the defendant has been unable to afford to pay them off. Waiving \$500 in such a manner would show up in our data as if the defendant had *paid* that money. In a future analysis, with additional CPCMS data, we will be able to account for this. We expect that those results will show that public defender clients are paying even less than our current analysis suggests.

We initially analyzed the data in Microsoft Access by writing a series of queries. We then verified the results in Stata and used that program to examine relationships in the data through linear regression analyses. For the sake of clarity, additional detail is provided in Appendix A.

Performing these analyses showed that the median—rather than average—reflects a more accurate picture of what most defendants experience. The reason for this is that more than 15% of cases have exceedingly high costs assessed: 166,658 cases have costs over \$25,000; 3,059 cases have costs over \$100,000; and 195 cases have costs over \$500,000, including some over \$1 million. We are unsure why some cases have exceptionally high costs assessed. The median costs, which are much less sensitive to outliers, are more representative of what a typical defendant could expect, and so we have based our primary analysis on median figures.¹¹ All averages are reported in Appendix B.

Appendix A contains details on the construction and results of the linear regression. Appendix B contains the complete analysis of data used in this report. Appendix C contains a breakdown per county that shows the percentage of costs paid by public defender clients and defendants with private counsel.

II. Results and Discussion

A. Complete Results from 2008 – 2018

The courts in our survey assessed costs in 89% of cases with public defender (“PD”) representation, compared to 93% of cases with private counsel. Costs assessed against PD clients also tend to be lower. In cases where costs were assessed, the median amount assessed is \$1,072 for PD cases versus \$1,306 for private counsel cases. These figures suggest that some judges are

¹¹ The skewness of the observed distribution of assessed costs for public defender cases is 103. For reference, if costs were distributed evenly around the average the skewness would be 0, and a skewness of 1 is often sufficiently high to reject the assumption the data are normally distributed. What this means in practice is that the average will incorporate more information from outlying cases and less from more common cases. While not a problem in and of itself, in the present study we are primarily interested in how costs affect the typical defendant, and lack sufficient information to properly contextualize extreme outlying observations.

considering defendants’ ability to pay at sentencing and are either reducing or eliminating court costs for poorer defendants.¹²

Our analysis shows that defendants in PD cases are paying significantly less toward the costs they owe than defendants with private counsel. For all cases over the ten-year span, the median PD client has paid only \$441 and still owes \$631, whereas the median defendant with private counsel has paid \$1,306 and owes \$0, having completely paid their balances. This is a significant distinction.

Across the state, collections rates for court costs are rather low. According to AOPC, in 2008 the courts of common pleas¹³ in criminal cases assessed \$191,047,186 in court costs alone. Ten years later, they have collected only 62% of that money.¹⁴ That is not to say that defendants are not making an effort to pay their court costs. Our analysis shows that across our ten-year data set, 24% of PD cases are paid in full, as are 54% of cases with private counsel. How does that square with the data above? Almost all defendants who receive smaller amounts of court costs pay them in full. As the table below shows, the percentage of defendants—particularly PD clients—who have paid their court costs drops dramatically as the amount of the costs increases:

Costs imposed ¹⁵	\$0-99.99	\$100-199.99	\$200-299.99	\$300-399.99	\$400-499.99	\$500-599.99	\$600-699.99	\$700-799.99	\$800-899.99	\$900-999.99	\$1000-1099.99
PD cases paid in full	83.51%	73.00%	70.51%	53.62%	50.56%	32.77%	33.30%	36.53%	33.74%	37.07%	37.90%
Private cases paid in full	90.41%	83.65%	80.83%	73.37%	68.20%	60.24%	60.09%	62.87%	59.43%	64.35%	65.74%

What these figures suggest is that defendants of all types are far more likely to pay off their court costs if the amounts are tailored to their financial ability to pay. PD clients in particular face significant hurdles to pay if the amount they owe exceeds \$300. A linear regression, a statistical technique designed to quantify relationships between variables, provides more evidence for the extra burden that higher costs impose on PD clients. On average, a \$100 increase in costs imposed is associated with a \$28 increase in unpaid costs for defendants with private counsel, and a \$47 increase in unpaid costs for PD clients. In other words, nearly 50% of every dollar in costs assessed on a PD client has not been paid.

¹² For example, in Philadelphia it is routine for judges to waive supervision fees at sentencing for PD clients because of their poverty.

¹³ AOPC includes Philadelphia Municipal Court non-summary cases in this tabulation, as does our data.

¹⁴ The \$191 million figure and the 62% collections rate is reported by AOPC. “Collection Rates Over Time,” Administrative Office of Pennsylvania Courts, available at <http://www.pacourts.us/news-and-statistics/research-and-statistics/dashboard-table-of-contents/collection-rate-of-payments-ordered-by-common-pleas-courts> (select criminal cases from the drop-down menu). Because we have removed what appears to be unreliable data, the total 2008 assessment figure for our data set is only \$118,217,724.

¹⁵ Note that this group does not include cases in which no costs were assessed.

During this ten-year time period, PD clients paid a total of \$419,782,733 in court costs, compared to \$494,629,922 by private counsel. Thus, defendants with private counsel paid more overall despite there being twice as many PD cases as private counsel cases in our data (approximately 900,000 PD cases versus 500,000 private counsel cases). Also, when compared against the total amount of money that was assessed at sentencing—\$1,109,292,186 for PD cases and \$780,225,731 for private cases—it is clear that the average PD client could have his costs reduced by more than 50% without any impact on overall revenue collection.

B. Results from 2013

While the above figures are all aggregates from 2008 – 2018, drilling down on 2013 data (which gives five years of collections) is illuminating. In 2013, courts of common pleas imposed \$250,680,544 in court costs, and they have collected only 49% of those costs.¹⁶ Our data analyzed 98,713 PD cases and 54,647 cases with private counsel that year:

Median Amounts

	PD Cases	Private Cases
Median assessed	\$1,013	\$1,273
Median paid	\$418	\$1,273
Median outstanding	\$595	\$0

The typical PD client is paying a significantly smaller portion of their assessed costs than those who are represented by private counsel, and are left with much higher outstanding costs after five years. Once again, defendants represented by private counsel are more likely than not to have paid off all of their court costs.

Costs imposed ¹⁷	\$0-99.99	\$100-199.99	\$200-299.99	\$300-399.99	\$400-499.99	\$500-599.99	\$600-699.99	\$700-799.99	\$800-899.99	\$900-999.99	\$1000-1099.99
PD cases paid in full	92.14%	79.02%	55.42%	55.33%	45.82%	27.10%	25.42%	36.87%	28.81%	35.12%	40.33%
Private cases paid in full	94.52%	85.55%	83.43%	77.40%	70.33%	54.06%	53.60%	65.27%	50.51%	58.62%	66.33%

Defendants represented by the PD who owe only a small amount of court costs are far more likely to pay it off than those who owe a large amount, over \$200. What this shows is that, by imposing large amounts of court costs, courts make it unlikely that an indigent defendant will be able to pay that amount off within five years. Indeed, keeping the figure to under \$200 will allow three out of four defendants to pay in full and satisfy their obligations to the court.

¹⁶ “Collection Rates Over Time,” Administrative Office of Pennsylvania Courts, available at <http://www.pacourts.us/news-and-statistics/research-and-statistics/dashboard-table-of-contents/collection-rate-of-payments-ordered-by-common-pleas-courts>.

¹⁷ Note that this group does not include cases in which no costs were assessed.

Here, too, we see that PD clients could have their costs reduced by over 50% without any impact on the overall revenue brought in by courts. PD clients were assessed \$134,790,816 yet only paid 40%, compared with \$87,692,981 assessed against clients with private counsel, who have paid 65%. Significantly reducing the amount defendants owe should not have any impact on the amount actually collected by courts.

C. Results from 2008

Analysis of data from 2008—which allows us to check on defendants’ progress now that 10 years have passed—presents a similar picture. The total amount of costs imposed by courts of common pleas in the 88,606 cases we analyzed for that year was \$118,217,715. These cases comprise 51,659 PD cases and 36,947 private cases. As was noted above, AOPC reports that the overall collection rate for costs imposed in 2008 is 62%.

Median Amounts

	PD Cases	Private Cases
Median assessed	\$960	\$1,123
Median paid	\$744	\$1,123
Median outstanding	\$216	\$0

Both types of defendants are more likely to have paid off more of their court costs over a 10-year period than the 5-year period reflected by the 2013 data. But more than half of PD clients still owe court costs 10 years later. While the median amount they owe has dropped from \$595 to \$216, it is evident that their situation has not significantly changed.

In total, 2008 private cases have paid 75.12% of their \$53,504,044 in total costs, while 2008 PD cases have paid only 52.31% of their \$64,713,695 in total costs assessed. This debt continues to follow PD clients into at least a second decade.

Costs imposed ¹⁸	\$0-99.99	\$100-199.99	\$200-299.99	\$300-399.99	\$400-499.99	\$500-599.99	\$600-699.99	\$700-799.99	\$800-899.99	\$900-999.99	\$1000-1099.99
PD cases paid in full	74.27%	59.38%	56.37%	44.54%	47.45%	42.40%	37.23%	41.66%	38.07%	39.22%	36.42%
Private cases paid in full	80.83%	76.44%	72.63%	67.21%	62.80%	61.09%	60.79%	63.75%	63.93%	68.40%	67.58%

As with data for other date ranges, the gap between payment rates in private and PD cases rises with the amount owed; fewer than half of PD defendants were able to pay off costs higher than \$300, even after 10 years. This is additional evidence that even over the span of a decade, indigent defendants do not have the resources to pay significant court costs.

¹⁸ Note that this group does not include cases in which no costs were assessed.

III. Conclusion

As we have found, over 90% of individuals convicted of felonies and misdemeanors are assessed some amount of court costs, yet court costs—and court debt more broadly—remains an understudied aspect of our criminal justice system. Most defendants represented by the PD, who are by definition indigent, are assessed over \$1,000 in court costs alone. Given that the Federal Reserve estimates that 40% of Americans have insufficient savings to cover a \$400 emergency, it is no surprise that defendants struggle to pay court costs that routinely exceed that amount.¹⁹

However, the data also shows that defendants can and will pay off smaller amounts of money: nearly 90% of defendants pay off \$100 or less, and 75% pay off \$200 or less. The consequence of higher amounts is that indigent defendants lack the ability to pay it, and it follows them for years or decades. We know from looking at other data from the court system that courts are still trying to collect debt that is decades old. Even in summary cases handled by the magisterial district courts, data we received from a separate AOPC dataset shows that there are outstanding fines and costs dating back to the 1970s in more than 1 million cases. The data analyzed for this report shows that 38% of the costs assessed in 2008 remains unpaid a decade later.

Do courts and the legislature intend for defendants to pay court costs for 5, 10, 20+ years? The answer is likely no: no actor has thought about the burden that these costs impose and the length of time that they will follow defendants. Nor have the courts or legislature considered the burden imposed on judicial resources attempting to collect this money into perpetuity. The better approach is to tailor costs to the defendant's financial ability at sentencing. Particularly for defendants who are represented by the PD, the court should either eliminate the costs altogether or identify the amount of costs that the defendant can reasonably pay in the near future.

As our analysis shows, this tailored approach is unlikely to have any impact on courts' fiscal bottom line. PD clients could have their costs reduced by 50% and courts will still bring in as much money as they have been for the past decade. The consistent experience of lawyers serving low-income clients, including attorneys at the ACLU, is that individuals who balk at large amounts of money that they cannot hope to afford to pay are nevertheless perfectly able and willing to pay down smaller amounts of debt. Thus, reducing court costs from over \$1,000 to \$500 (or less, in individual cases) may actually encourage more defendants to pay, without any risk of a drop in revenue.

In the coming months, as we obtain new data from CPCMS that can address some of the problems with the dataset, as described in the methodology section of this report, we will update and revise the report accordingly. All findings will be posted on www.aclupa.org/finesandcosts/research.

¹⁹ Nicole Pesce, "Why 4 in 10 adults can't cover a \$400 emergency expense," MarketWatch (May 22, 2018), available at <https://www.marketwatch.com/story/why-4-in-10-adults-cant-cover-a-400-emergency-expense-2018-05-22>.

Appendix A: Linear Regression Model

The purpose of the linear regression discussed in the paper is to assess the effect of changes in assessed costs on costs outstanding, and to describe any differences in this effect between public defender cases and cases where the defendant has private representation. Formally, we estimate the following equation by ordinary least squares (OLS):

$$1. \quad C_i = \alpha + \delta P_i + \beta_1 A_i + \beta_2 P_i A_i + e_i$$

Where C_i is the cost outstanding in case i , A_i is the cost assessed in case i , P_i is an indicator for whether case i has a public defender (i.e., $P_i=1$ if the case has a public defender and 0 otherwise), and e_i is a random error term.

The advantage to this construction is it allows for cost assessed to have a different effect depending on whether a case has public or private representation. To see this, note that if the case has private representation, then $P_i=0$, and the equation is reduced to:

$$2. \quad C_i = \alpha + \beta_1 A_i + e_i$$

Here, an increase of cost assessed increases cost outstanding by β_1 . If the case has private representation, then $P_i=1$, and the equation is reduced to:

$$3. \quad C_i = (\alpha + \delta) + (\beta_1 + \beta_2) A_i + e_i$$

Here, an increase of cost assessed increases cost outstanding by $\beta_1 + \beta_2$. By estimating Equation 1, we can get approximations of β_1 and β_2 , and thus reconstruct the effect that cost assessed has on cost outstanding. Note that additional assumptions are required for these approximations to have a causal interpretation. Instead the results presented should be considered evidence of a correlation.

We estimate Equation 1 in two ways. First, our preferred specification, presented in the primary text, adds to Equation 1 variables indicating the county and year in which the case took place. This lessens the possibility that any correlation documented between costs outstanding and costs assessed is the spurious result of other unobserved demographic trends. The results of this estimation are presented in Table A1.

Table A1	
VARIABLES	(1) amountcostsoutstanding
amountcostsassessed	0.281*** (0.0458)
public	66.27 (63.46)

Public*costassess	0.193*** (0.0493)
Constant	-91.45 (61.29)
Observations	1,429,270
R-squared	0.408

Estimation includes county and year fixed effects.
Standard errors clustered at the county level in parentheses.
*** p<0.01, ** p<0.05, * p<0.1

Based on the results of this regression, our estimate for β_1 is 0.281, while our estimate for β_2 is 0.193. This indicates that the estimated effect of an increase of \$1 in the cost assessed is correlated with an increase of \$0.28 in cases with private representation, and with an increase of \$0.47 (0.281+0.193=0.474) in cases with public representation. Multiplying these numbers by 100 to estimate the effect of a \$100 increase in costs assessed yield the numbers reported in the paper.

Our second approach was to estimate Equation 1 directly, without accounting for county and year effects. This specification is potentially less robust, but in this instance the results are remarkably similar, and yield virtually identical interpretations, suggesting that the relationship is not especially sensitive to particular modeling choices. These results are presented in Table A2.

Table A2

VARIABLES	(1) amountcostsoutstanding
amountcostsassessed	0.287*** (0.000564)
public	46.64*** (2.025)
Public*costassess	0.200*** (0.000849)
Constant	118.7*** (1.574)
Observations	1,429,270
R-squared	0.376

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Appendix B: Raw Data

There are a negligible number of records (263) for which there is no data for Year or Docket Number. Without the Docket information, county is undefined. These records are excluded from all analysis.

The data regarding Representation Type is inconsistent. 547,894 specify no form of representation at all. Of the remaining 1,791,953, some of the categories appear to be garbage data; we are omitting others (“CYS Attorney,” “Legal Aide” and so on) because they do not appear relevant. There are 1787350 records with relevant Type specified, 6 of which have no Year or Docket Number specified.

Of the remaining 1,787,344 records, 66,197 have docket numbers dated from before 2008. An additional 291,877 records are from Philadelphia between the years 2008 and 2012. Each of these groups is omitted, due to our concern that these records are not comparable to the rest of the data without further information. This leaves 1,429,270 records analyzed.

We considering the following Representation Type categories to constitute the public defender:

- Conflict Counsel
- Court Appointed
- Court Appointed - Co-Counsel
- Court Appointed - Conflicts Counsel
- Court Appointed - Pending
- Court Appointed - Private
- Court Appointed - Public
- Court Appointed - Public Defender
- Court Appointed - Vendor
- Court Appointed/Public Defender
- Public Defender

We consider Representation Type “Private” to be the only category that denotes private counsel.

Analysis of full data set (1,429,270 records):

- 906,952 Public Defender cases
- 522,318 Private Defender cases

- 1,242,062 CP cases
 - 764,332 Public
 - 477,730 Private
- 187,208 MC cases
 - 142,620 Public
 - 44,588 Private

COSTS ANALYSIS

1293641 instances of costs assessed
807398 Public
486243 Private

\$1460.62 average costs assessed / \$1156.68 median
\$1373.91 average for Public / \$1072.44 median
\$1604.60 average for Private / \$1305.50 median

\$753.76 average costs still owed (\$706.86 paid) / \$445.50 median
\$853.99 average for Public (\$519.92 paid) / \$630.99 median
\$587.35 average for Private (\$1017.25 paid) / \$0 median

\$1,889,517,917.42 total costs assessed (\$975,094,840.16 outstanding: 48.39% paid)
\$1,109,292,186.18 total for Public: 58.71% (\$689,509,818.02 outstanding: 37.84% paid)
\$780,225,731.24 total for Private: 41.29% (\$285,585,022.14 outstanding: 64.40% paid)

Analysis of 2013 data set (153360 records):

98713 Public Defender cases
54647 Private Defender cases

129619 CP cases
81247 Public
48372 Private

23741 MC cases
17466 Public
6275 Private

2013 COSTS

153360 instances of costs assessed (95609 outstanding: 62.34%)
98713 Public (70908 outstanding: 71.83%)
54647 Private (24701 outstanding: 45.20%)

\$1450.72 costs assessed / \$1095.05 median
\$1365.48 average for Public / \$1013.23 median
\$1604.72 average for Private / \$1273.50 median

\$723.20 average costs still owed (\$727.52 paid) / \$433.50 median (\$842 where > \$0)
\$817.64 average for Public (\$547.84 paid) / \$595.37 median (\$834 where > \$0)
\$552.60 average for Private (\$1052.12 paid) / \$0 median (\$859.94 where > \$0)

\$222,483,798.36 total costs assessed (110,910,667.79 outstanding: 50.15% paid)
\$134,790,816.67 total for Public: 60.58% (\$80,712,223.74 outstanding: 40.12% paid)

\$87,692,981.69 total for Private: 39.42% (\$30,198,444.05 outstanding: 65.56% paid)

Analysis of 2008 data set (88,606 records):

51,659 Public Defender cases
36,947 Private Defender cases

Note – as explained in the Methodology section, data from this year excludes cases from Philadelphia.

2008 COSTS

85,383 instances of costs assessed (42,128 outstanding: 49.34%)
49,602 Public (29,872 outstanding: 60.22%)
35,781 Private (12,256 outstanding: 34.25%)

\$1334.20 costs assessed / \$1095.05 median
\$1252.71 average for Public / \$960.10 median
\$1448.13 average for Private / \$1123 median

\$498.51 average costs still owed (\$835.69 paid) / \$433.50 median
\$597.38 average for Public (\$655.33 paid) / \$215.99 median
\$360.26 average for Private (\$1087.87 paid) / \$0 median

\$118,217,715.71 total costs assessed (44,170,709.25 outstanding: 62.64% paid)
\$64,713,695.72 total for Public: 54.74% (\$30,860,152.15 outstanding: 52.31% paid)
\$53,504,044.92 total for Private: 45.26% (\$13,310,560.62 outstanding: 75.12% paid)

Appendix C: County Level Cost Data

County	Number of Records			Number of Records (Cost >\$0)		
	Total	Public	Private	Total	Public	Private
Adams	9724	5818	3906	9631	5764	3867
Allegheny	121525	75098	46427	119230	73693	45537
Armstrong	5184	2326	2858	4214	2349	1865
Beaver	21853	14317	7536	21273	13906	7367
Bedford	5595	3674	1921	5455	3581	1874
Berks	42810	29906	12904	42795	29895	12900
Blair	21551	15512	6039	21009	15143	5866
Bradford	7110	4055	3055	6706	3774	2932
Bucks	59816	30034	29782	58258	29067	29191
Butler	17905	12623	5282	17699	12494	5205
Cambria	20152	14856	5296	20139	14852	5287
Cameron	599	458	141	525	408	117
Carbon	6376	4052	2324	5206	3388	1818
Centre	14209	7842	6367	13677	7467	6210
Chester	41116	22212	18904	39704	21348	18356
Clarion	4816	3117	1699	4469	2868	1601
Clearfield	7276	4695	2581	7065	4586	2479
Clinton	4610	3424	1186	4426	3264	1162
Columbia	7182	4761	2421	6382	4167	2215
Crawford	8666	5691	2975	8439	5525	2914
Cumberland	24676	17291	7385	23939	16706	7233
Dauphin	48138	33812	14326	45481	31791	13690
Delaware	71765	37564	34201	70861	37120	33741
Elk	3471	2558	913	3182	2347	835
Erie	26849	17956	8893	25357	16933	8424
Fayette	19367	12505	6862	18348	11920	6428
Forest	534	336	198	488	301	187
Franklin	19989	14808	5181	19417	14389	5028

Fulton	1865	1282	583	1805	1241	564
Greene	3825	2547	1278	3730	2472	1258
Huntingdon	6326	4523	1803	5904	4206	1698
Indiana	9789	6773	3016	9661	6687	2974
Jefferson	3006	1544	1462	2872	1479	1393
Juniata	2107	1471	636	2066	1440	626
Lackawanna	19387	11133	8254	17984	10245	7739
Lancaster	46583	25977	20606	45136	25065	20071
Lawrence	10692	7686	3006	9742	6949	2793
Lebanon	16083	10569	5514	15509	10147	5362
Lehigh	33273	17485	15788	32775	17183	15592
Luzerne	30950	16948	14002	29380	15990	13390
Lycoming	17141	12013	5128	16732	11759	4973
McKean	3276	2199	1077	2997	2009	988
Mercer	11983	7854	4129	10822	6808	4014
Mifflin	6294	4801	1493	6115	4676	1439
Monroe	18930	10759	8171	18144	10243	7901
Montgomery	77829	38868	38961	74661	36787	37874
Montour	1041	712	329	968	662	306
Northampton	19297	10633	8664	18478	10204	8274
Northumberland	9498	6675	2823	9194	6525	2669
Perry	4849	3212	1637	4753	3142	1611
Philadelphia	252527	187115	65412	158407	114847	43560
Pike	5007	2690	2317	4720	2493	2227
Potter	2088	1403	685	1954	1304	650
Schuylkill	18177	13406	4771	17914	13162	4752
Snyder	3496	2020	1476	3365	1939	1426
Somerset	7229	4677	2552	6639	4241	2398
Sullivan	579	331	248	550	310	240
Susquehanna	3453	2007	1446	3364	1954	1410
Tioga	3589	1920	1669	3165	1681	1484
Union	2975	1952	1023	2819	1839	980
Venango	4380	2231	2149	4267	2170	2097

Warren	3983	2976	1007	3782	2836	946
Washington	20555	11461	9094	20125	11262	8863
Wayne	3980	2461	1519	3648	2237	1411
Westmoreland	34291	20215	14076	31614	18540	13074
Wyoming	3811	2294	1517	3657	2198	1459
York	62262	40296	21966	60484	39420	21064

County	Average Assessed Cost (> \$0)			Total Assessed Cost		
	Total	Public	Private	Total	Public	Private
Adams	1904.9	1925.06	1874.85	18346091.9	11096045.84	7250046.06
Allegheny	1555.75	1480.35	1677.77	185492072.5	109091432.6	76400639.95
Armstrong	936.86	892.35	992.92	3947928.04	2096130.15	1851797.89
Beaver	2036.56	1926.5	2244.31	43323740.88	26789909	16533831.88
Bedford	1488.27	1470.68	1521.88	8118512.85	5266505.08	2852007.77
Berks	1939.5	1855.06	2135.18	83000902.5	55457018.7	27543883.8
Blair	1240.65	1218.59	1297.60	26064815.85	18453108.37	7611707.48
Bradford	1658.02	1686.06	1621.93	11118682.12	6363190.44	4755491.68
Bucks	1250.16	1283.07	1217.39	72831821.28	37294995.69	35536825.59
Butler	1024.38	910.87	1296.85	18130501.62	11380409.78	6750091.84
Cambria	1763.41	1678.44	2002.10	35513313.99	24928190.88	10585123.11
Cameron	1023.6	1020.27	1035.21	537390	416270.16	121119.84
Carbon	1324.45	1284.85	1398.25	6895086.7	4353071.8	2542014.9
Centre	1617.17	1483.94	1777.37	22118034.09	11080579.98	11037454.11
Chester	1471.22	1525.89	1407.64	58413318.88	32574699.72	25838619.16
Clarion	1166.68	1162.19	1174.72	5213892.92	3333160.92	1880732
Clearfield	1196.99	1074.46	1423.66	8456734.35	4927473.56	3529260.79
Clinton	1735.23	1697.67	1840.73	7680127.98	5541194.88	2138933.1
Columbia	842.96	838.04	852.22	5379770.72	3492112.68	1887658.04
Crawford	1343.28	1297.22	1430.61	11335939.92	7167140.5	4168799.42
Cumberland	1374.69	1258.61	1642.80	32908703.91	21026338.66	11882365.25
Dauphin	1268.07	1156.03	1528.25	57673091.67	36751349.73	20921741.94
Delaware	1874.55	1856.8	1894.08	132832487.6	68924416	63908071.55

Elk	1059.98	1013.41	1190.88	3372856.36	2378473.27	994383.09
Erie	1391.57	1284.51	1606.77	35286040.49	21750607.83	13535432.66
Fayette	1511.57	1450.51	1624.80	27734286.36	17290079.2	10444207.16
Forest	1372.91	1292.92	1501.66	669980.08	389168.92	280811.16
Franklin	1228.67	1193.56	1329.15	23857085.39	17174134.84	6682950.55
Fulton	911.38	879.33	981.90	1645040.9	1091248.53	553792.37
Greene	1582	1484.8	1773.00	5900860	3670425.6	2230434.4
Huntingdon	1201.97	1205.07	1194.29	7096430.88	5068524.42	2027906.46
Indiana	759.11	738.33	805.83	7333761.71	4937212.71	2396549
Jefferson	1549.56	1573.68	1523.95	4450336.32	2327472.72	2122863.6
Juniata	1150.37	1121.76	1216.18	2376664.42	1615334.4	761330.02
Lackawanna	1603.46	1505.56	1733.06	28836624.64	15424462.2	13412162.44
Lancaster	1994.71	1847.46	2178.60	90033230.56	46306584.9	43726645.66
Lawrence	1601.9	1557.95	1711.25	15605709.8	10826194.55	4779515.25
Lebanon	1861.62	1701.61	2164.42	28871864.58	17266236.67	11605627.91
Lehigh	2041.87	1937.77	2156.59	66922289.25	33296701.91	33625587.34
Luzerne	1087.92	1030.06	1157.01	31963089.6	16470659.4	15492430.2
Lycoming	1395.83	1352.59	1498.07	23355027.56	15905105.81	7449921.75
McKean	965.19	907.81	1081.87	2892674.43	1823790.29	1068884.14
Mercer	970.02	882.75	1118.04	10497556.44	6009762	4487794.44
Mifflin	1266.75	1208.62	1455.64	7746176.25	5651507.12	2094669.13
Monroe	1038.35	994.94	1094.63	18839822.4	10191170.42	8648651.98
Montgomery	1982.01	1831.56	2128.14	147978848.6	67377597.72	80601250.89
Montour	1147.28	1044.63	1369.35	1110567.04	691545.06	419021.98
Northampton	1367.79	1233.73	1533.12	25274023.62	12588980.92	12685042.7
Northumberland	1320.71	1244.12	1507.95	12142607.74	8117883	4024724.74
Perry	938.15	900.68	1011.23	4459026.95	2829936.56	1629090.39
Philadelphia	892.04	862.75	969.26	141305380.3	99084249.25	42221131.03
Pike	1555.5	1552.09	1559.32	7341960	3869360.37	3472599.63
Potter	1102.53	1062.58	1182.68	2154343.62	1385604.32	768739.3
Schuylkill	1127.46	1083.41	1249.47	20197318.44	14259842.42	5937476.02
Snyder	1761.4	1789.04	1723.82	5927111	3468948.56	2458162.44
Somerset	996.52	923.19	1126.21	6615896.28	3915248.79	2700647.49

Sullivan	953.41	816.4	1130.38	524375.5	253084	271291.5
Susquehanna	1072.2	1032.7	1126.94	3606880.8	2017895.8	1588985
Tioga	1642.87	1577.95	1716.41	5199683.55	2652533.95	2547149.6
Union	1722.6	1642.27	1873.34	4856009.4	3020134.53	1835874.87
Venango	1335.9	1383.46	1286.68	5700285.3	3002108.2	2698177.1
Warren	1913.35	1882.91	2004.61	7236289.7	5339932.76	1896356.94
Washington	1653.69	1592.96	1730.86	33280511.25	17939915.52	15340595.73
Wayne	1145.38	1092.05	1229.93	4178346.24	2442915.85	1735430.39
Westmoreland	1466.27	1260.65	1757.86	46354659.78	23372451	22982208.78
Wyoming	1332.78	1140.93	1621.80	4873976.46	2507764.14	2366212.32
York	1620.13	1635.65	1591.09	97991942.92	64477323	33514619.92

County	Average Costs Outstanding			Total Costs Outstanding		
	Total	Public	Private	Total	Public	Private
Adams	822.77	969.11	604.64	7924097.87	5585950.04	2338147.83
Allegheny	1043.11	1097.73	954.72	124370005.3	80895016.89	43474988.41
Armstrong	521.27	573.68	455.26	2196631.78	1347574.32	849057.46
Beaver	1105.19	1216.15	895.74	23510706.87	16911781.9	6598924.97
Bedford	649.68	768.01	423.56	3544004.4	2750243.81	793760.59
Berks	1244.11	1352	994.08	53241687.45	40418040	12823647.45
Blair	665.35	749.93	447.01	13978338.15	11356189.99	2622148.16
Bradford	924.37	1171.35	606.46	6198825.22	4420674.9	1778150.32
Bucks	688.84	935.31	443.42	40130440.72	27186655.77	12943784.95
Butler	294.62	324.76	222.27	5214479.38	4057551.44	1156927.94
Cambria	737.5	851.85	416.27	14852512.5	12651676.2	2200836.3
Cameron	545.54	596.57	367.59	286408.5	243400.56	43007.94
Carbon	677.95	834.43	386.34	3529407.7	2827048.84	702358.86
Centre	543.97	694.57	362.89	7439877.69	5186354.19	2253523.5
Chester	608.03	855.04	320.76	24141223.12	18253393.92	5887829.2
Clarion	417.75	499.57	271.18	1866924.75	1432766.76	434157.99
Clearfield	536.49	599.41	420.09	3790301.85	2748894.26	1041407.59
Clinton	547.26	625.99	326.11	2422172.76	2043231.36	378941.4

Columbia	366.41	456.89	196.19	2338428.62	1903860.63	434567.99
Crawford	381.75	466.9	220.30	3221588.25	2579622.5	641965.75
Cumberland	594.34	657.23	449.08	14227905.26	10979684.38	3248220.88
Dauphin	574.01	646.21	406.35	26106548.81	20543662.11	5562886.7
Delaware	1254.48	1494.21	990.74	88893707.28	55465075.2	33428632.08
Elk	419.38	485.75	232.83	1334467.16	1140055.25	194411.91
Erie	726.41	778.74	621.22	18419578.37	13186404.42	5233173.95
Fayette	996.3	1093.73	815.63	18280112.4	13037261.6	5242850.8
Forest	590.78	670.86	461.88	288300.64	201928.86	86371.78
Franklin	507.11	577.05	306.96	9846554.87	8303172.45	1543382.42
Fulton	362.47	421.7	232.14	654258.35	523329.7	130928.65
Greene	613.18	744.98	354.19	2287161.4	1841590.56	445570.84
Huntingdon	472.86	593.23	174.70	2791765.44	2495125.38	296640.06
Indiana	388.37	463.49	219.46	3752042.57	3099357.63	652684.94
Jefferson	729.78	1019.68	421.98	2095928.16	1508106.72	587821.44
Juniata	395.33	433.31	307.96	816751.78	623966.4	192785.38
Lackawanna	693.93	811.54	538.24	12479637.12	8314227.3	4165409.82
Lancaster	1062.78	1257.21	819.97	47969638.08	31511968.65	16457669.43
Lawrence	737.46	843.83	472.81	7184335.32	5863774.67	1320560.65
Lebanon	649.71	746.8	465.98	10076352.39	7577779.6	2498572.79
Lehigh	851.42	1096.04	581.84	27905290.5	18833255.32	9072035.18
Luzerne	590.23	717.73	437.97	17340957.4	11476502.7	5864454.7
Lycoming	681.99	759.25	499.30	11411056.68	8928020.75	2483035.93
McKean	355.02	434.89	192.61	1063994.94	873694.01	190300.93
Mercer	346.38	403.32	249.81	3748524.36	2745802.56	1002721.8
Mifflin	504.29	547.6	363.56	3083733.35	2560577.6	523155.75
Monroe	386.39	463.36	286.60	7010660.16	4746196.48	2264463.68
Montgomery	812.17	989.09	640.33	60637424.37	36385653.83	24251770.54
Montour	358.27	418.04	228.96	346805.36	276742.48	70062.88
Northampton	653.9	800.16	473.52	12082764.2	8164832.64	3917931.56
Northumberland	611.44	700.19	394.47	5621579.36	4568739.75	1052839.61
Perry	276.61	337.56	157.74	1314727.33	1060613.52	254113.81
Philadelphia	571.21	608.86	471.94	90483662.47	69925744.42	20557918.05

Pike	477.92	657.44	276.96	2255782.4	1638997.92	616784.48
Potter	357.16	401.26	268.69	697890.64	523243.04	174647.6
Schuylkill	575.88	646.46	380.39	10316314.32	8508706.52	1807607.8
Snyder	519.68	681.98	298.99	1748723.2	1322359.22	426363.98
Somerset	355.12	428.64	225.10	2357641.68	1817862.24	539779.44
Sullivan	198.01	257.37	121.34	108905.5	79784.7	29120.8
Susquehanna	404.65	513.91	253.24	1361242.6	1004180.14	357062.46
Tioga	503.5	571.5	426.47	1593577.5	960691.5	632886
Union	619.03	763.11	348.66	1745045.57	1403359.29	341686.28
Venango	557.11	654.94	455.87	2377188.37	1421219.8	955968.57
Warren	582.53	666.98	329.36	2203128.46	1891555.28	311573.18
Washington	839.19	1019	610.71	16888698.75	11475978	5412720.75
Wayne	347.92	415.14	241.35	1269212.16	928668.18	340543.98
Westmoreland	844.79	908.16	754.93	26707191.06	16837286.4	9869904.66
Wyoming	360.2	393.1	310.64	1317251.4	864033.8	453217.6
York	814.63	945.44	569.83	49272080.92	37269244.8	12002836.12

Appendix B

NATIONAL TASK FORCE ON FINES, FEES AND BAIL PRACTICES

LAWFUL COLLECTION OF LEGAL FINANCIAL OBLIGATIONS

A BENCH CARD FOR JUDGES

Courts may not incarcerate a defendant/respondent, or revoke probation, for nonpayment of a court-ordered legal financial obligation unless the court holds a hearing and makes one of the following findings:

1. The failure to pay was not due to an inability to pay but was willful or due to failure to make bona fide efforts to pay; or
2. The failure to pay was not the fault of the defendant/respondent and alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence.

If a defendant/respondent fails to pay a court-ordered legal financial obligation but the court, after opportunity for a hearing, finds that the failure to pay was not due to the fault of the defendant/respondent but to lack of financial resources, the court should consider alternative measures of punishment other than incarceration. *Bearden v. Georgia*, 461 U.S. 660, 667-669 (1983). Punishment and deterrence can often be served fully by alternative means to incarceration, including an extension of time to pay or reduction of the amount owed. *Id.* at 671.

Court-ordered legal financial obligations (LFOs) include all discretionary and mandatory fines, costs, fees, state assessments, and/or restitution in civil and criminal cases.

1. Adequate Notice of the Hearing to Determine Ability to Pay

Notice should include the following information:

- a. Hearing date and time;
- b. Total amount claimed due;
- c. That the court will evaluate the person's ability to pay at the hearing;
- d. That the person should bring any documentation or information the court should consider in determining ability to pay;
- e. That incarceration may result only if alternate measures are not adequate to meet the state's interests in punishment and deterrence or the court finds that the person had the ability to pay and willfully refused;
- f. Right to counsel*; and
- g. That a person unable to pay can request payment alternatives, including, but not limited to, community service and/or a reduction of the amount owed.

2. Meaningful Opportunity to Explain at the Hearing

The person must have an opportunity to explain:

- a. Whether the amount charged as due is incorrect; and
- b. The reason(s) for any nonpayment (e.g., inability to pay).

3. Factors the Court Should Consider to Determine Willfulness¹

- a. Income, including whether income is at or below 125% of the Federal Poverty Guidelines (FPG);²

For 2016, 125% of FPG is:

\$14,850 for an individual;	\$30,375 for a family of 4;
\$20,025 for a family of 2;	\$35,550 for a family of 5;
\$25,200 for a family of 3;	\$40,725 for a family of 6.

- b. Receipt of needs-based, means-tested public assistance, including, but not limited to, Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), or veterans' disability benefits (Such benefits are not subject to attachment, garnishment, execution, levy, or other legal process);

¹ See *Bearden v. Georgia*, 461 U.S. 660 (1983)

² U.S. Dep't of Health & Human Servs., Poverty Guidelines, Jan. 26, 2016, <https://aspe.hhs.gov/poverty-guidelines>

- c. Financial resources, assets, financial obligations, and dependents;
- d. Whether the person is homeless, incarcerated, or resides in a mental health facility;
- e. Basic living expenses, including, but not limited to, food, rent/mortgage, utilities, medical expenses, transportation, and child support;
- f. The person's efforts to acquire additional resources, including any permanent or temporary limitations to secure paid work due to disability, mental or physical health, homelessness, incarceration, lack of transportation, or driving privileges;
- g. Other LFOs owed to the court or other courts;
- h. Whether LFO payment would result in manifest hardship to the person or his/her dependents; and
- i. Any other special circumstances that may bear on the person's ability to pay.

4. Findings by the Court

The court should find, on the record, that the person was provided prior adequate notice of:

- a. Hearing date/time;
- b. Failure to pay an LFO is at issue;
- c. The right to counsel*;
- d. The defense of inability to pay;
- e. The opportunity to bring any documents or other evidence of inability to pay; and
- f. The opportunity to request an alternative sanction to payment or incarceration.

After the ability to pay hearing, the court should also find on the record that the person was given a meaningful opportunity to explain the failure to pay.

If the Court determines that incarceration must be imposed, the Court should make findings about:

1. The financial resources relied upon to conclude that nonpayment was willful; or
2. If the defendant/respondent was not at fault for nonpayment, why alternate measures are not adequate, in the particular case, to meet the state's interest in punishment and deterrence.

Alternative Sanctions to Imprisonment That Courts Should Consider When There Is an Inability to Pay

- a. Reduction of the amount due;
- b. Extension of time to pay;
- c. A reasonable payment plan or modification of an existing payment plan;
- d. Credit for community service (*Caution:* Hours ordered should be proportionate to the violation and take into consideration any disabilities, driving restrictions, transportation limitations, and caregiving and employment responsibilities of the individual);
- e. Credit for completion of a relevant, court-approved program (e.g., education, job skills, mental health or drug treatment); or
- f. Waiver or suspension of the amount due.

*Case law establishes that the U.S. Constitution affords indigent persons a right to court-appointed counsel in most post-conviction proceedings in which the individual faces actual incarceration for nonpayment of a legal financial obligation, or a suspended sentence of incarceration that would be carried out in the event of future nonpayment, even if the original sanction was only for fines and fees. See *Best Practices for Determining the Right to Counsel in Legal Financial Obligation Cases*.

This bench card was produced by the National Task Force on Fines, Fees and Bail Practices. The Task Force is a joint effort of the Conference of Chief Justices and the Conference of State Court Administrators, sponsored by the State Justice Institute and the Bureau of Justice Assistance, coordinated by the National Center for State Courts.

