

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

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**No. 97 MDA 2021**

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**COMMONWEALTH OF PENNSYLVANIA,**

**Appellee,**

**v.**

**RICK LAVAR CANNON,**

**Appellant.**

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**Application of the American Civil Liberties Union of Pennsylvania to  
Participate as Amicus Curiae in Support of Mr. Cannon's  
Application for Reconsideration**

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Petition for Panel Reconsideration or *En Banc* Review from the August 13, 2021  
Superior Court Order Affirming the January 13, 2021 PCRA Order of the Court of  
Common Pleas of Lebanon County in CP-38-CR-0000559-2014

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Prospective *amicus curiae* the ACLU of Pennsylvania, through counsel and pursuant to Pa.R.A.P. 123 and 531(a)(b)(1)(iii), respectfully requests leave to file a Brief of less than 2,500 words in support of Mr. Cannon's Application of Reconsideration in order to assist the Court in understanding how the trial court acted unlawfully in imposing the \$5,000 fine on Mr. Cannon and the implications of the Court's Memorandum Opinion if Reconsideration is not granted. Rule 531 permits an interested non-party to file in support of non-merits briefs "by leave of court." In support thereof, the ACLU of Pennsylvania avers as follows:

1. The Court's Memorandum Opinion acknowledges only one type of legality-of-the-sentence argument, that to comply with 42 Pa.C.S. § 9726 the record cannot be entirely silent with respect to a defendant's financial circumstances. Yet in so holding, the Memorandum Opinion overlooks two additional types of legality-of-the-sentence arguments that are set out in precedent from this Court and the Supreme Court: the record must reflect that the defendant is able to pay the fine, and the trial court must make specific findings on the record. Absent compliance with these requirements, the sentence is illegal.
2. The attached Brief goes beyond the arguments made by Mr. Cannon and will aid the Court by walking through the six different types of arguments that defendants can raise under Section 9726 and the precedent

interpreting it. Three of these arguments go to the legality of the sentence, and three go to the discretionary aspects of the sentence. This will help the Court better understand how Mr. Cannon's arguments fit into the framework set out by this Court and the Supreme Court, and thus that his arguments can be raised for the first time on appeal without waiver.

3. In addition, the Brief provides a broader context of the public policy goals at issue and why a record that shows only an *inability* to pay a fine is not sufficient to meet those goals or the standards set forth in precedent.
4. The ACLU of Pennsylvania has particular expertise with respect to the law and legal standards governing the imposition and collection of fines, costs, and restitution. It has served as counsel and *amicus curiae* in dozens of appellate cases involving those issues including in *Commonwealth v. Ford*, 217 A.3d 824, 829 (Pa. 2019), *Commonwealth v. Lopez*, 2021 PA Super 51 (Pa. Super. Ct. March 23, 2021) (en banc), and *Commonwealth v. Diaz*, 191 A.3d 850 (Pa. Super. Ct. 2018). In addition, the ACLU of Pennsylvania has studied issues of court debt and issued a report on the inability of most public defender clients to pay fines and costs even 10 years after sentencing. *See* Jeffrey Ward, et al.,

“Imposition and Collection of Fines, Costs, and Restitution in Pennsylvania Criminal Courts: Research in Brief,” ACLU of Pennsylvania (Dec. 18, 2020), [www.aclupa.org/courtdebt](http://www.aclupa.org/courtdebt).

5. The attached Brief is less than 2,500 words.
6. This important matter is worthy of Reconsideration by this Court, and the ACLU of Pennsylvania urges this Court to grant Reconsideration and issue a revised Memorandum Opinion that provides additional clarity to trial courts on how they must comply with the requirements of Section 9726 and the precedential decisions applying it.

WHEREFORE, the ACLU of Pennsylvania respectfully requests that this Court grant leave to file a brief in support of Mr. Cannon’s Application for Reconsideration.

Respectfully Submitted,

*/s/ Andrew Christy*

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Dated: August 26, 2021

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## Statement of Interest of Amicus Curiae

The American Civil Liberties Union of Pennsylvania (“ACLU of Pennsylvania”) is an affiliate of the American Civil Liberties Union, a century-old nationwide, nonprofit, nonpartisan membership organization with over 1.5 million members. The ACLU of Pennsylvania is dedicated to defending and expanding individual rights and personal freedoms throughout the entire Commonwealth. Specifically, the ACLU of Pennsylvania has particular expertise with respect to the assessment and collection of fines, costs, and restitution in criminal cases. The organization provides technical assistance and training on the topic to both lawyers and judges, and it has served as counsel and *amicus curiae* in numerous cases, including in *Commonwealth v. Ford*, 217 A.3d 824, 829 (Pa. 2019).

### Argument

42 Pa.C.S. § 9726 presents a straightforward policy objective: eliminate unaffordable fines. To try to achieve this goal, the legislature has curtailed the authority of trial courts to impose fines and has placed strict requirements on those courts. Absent compliance with those requirements, the court simply lacks the authority to impose a fine. In misinterpreting what Section 9726 requires—and according more discretion to the trial judge than the statute and precedent permit—the current Memorandum Opinion has the effect of undermining these policy goals and opening the door for trial courts to impose unaffordable fines even when the



record contains no evidence that the defendant can afford to pay that fine. To come in line with precedent, this Court should correct this error and issue a revised opinion that spells out precisely what a sentencing court must do to comply with Section 9726.

The question before the Court is now which issues fall within the legality of the sentence and which issues fall within the discretion of the trial court. This is essentially a question of statutory interpretation because it addresses what limits the legislature has put on the authority of trial courts. In its relevant parts, Section 9726 provides:

**(c) *Exception.*** – The court shall not sentence a defendant to pay a fine unless it appears of record that:

- (1) the defendant is or will be able to pay the fine; and
- (2) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime.

**(d) *Financial resources.*** – In determining the amount and method of payment of a fine, the court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose.

42 Pa.C.S. § 9726. Subsection (c) prohibits imposing *any* fine on a defendant unless the record shows the defendant can afford to pay a fine, and subsection (d) then limits the dollar amount of a fine to what the record shows that the defendant can afford.

Case law establishes that some of the requirements stemming from Section

9726 go to the legality of the sentence and some go to the discretion of the trial judge. For the convenience of the Court, the six requirements and the type of challenge they could engender are set forth here:

**Legality of the Sentence:**

1. The trial court must ensure that the record is not silent regarding the defendant’s ability to pay a fine. *See Commonwealth v. Boyd*, 73 A.3d 1269, 1273-74 (Pa. Super. Ct. 2013) (en banc) (illegal sentence when there is “no record of the defendant’s ability to pay before the sentencing court”).<sup>1</sup>
2. The record must show that the defendant will actually be able to pay the fine. *See Commonwealth v. Ford*, 217 A.3d 824, 829 (Pa. 2019) (illegal sentence when there is no “record evidence that the defendant is or will be able to pay”).
3. The trial court must make specific findings on the record about why it concludes the defendant is able to pay the fine. *See, e.g., Commonwealth v. Thomas*, 879 A.2d 246, 262, 264 (Pa. Super. Ct. 2005) (illegal sentence if the trial court does not “make specific findings of appellant's ability to pay the fine imposed”).

**Discretionary Aspects of the Sentence:**

4. The trial court must consider all of the evidence on the record when imposing a fine. *See Boyd*, 73 A.3d at 1273 (abuse of discretion if “the sentencing court did not consider evidence of record” in setting the fine).
5. The defendant must have an opportunity to provide evidence that she is unable to pay and to rebut the Commonwealth’s evidence. *See Boyd*, 73 A.3d at 1273 (abuse of discretion if “the sentencing court failed to permit the defendant to supplement the record”).<sup>2</sup>
6. If the defendant disagrees with the specific dollar amount of the fine that the trial court imposed based on the court’s evaluation of the evidence under Section 9726(d), the standard is also abuse of discretion. While no decision explicitly makes this point, it is straightforward that if there is merely a

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<sup>1</sup> *Ford* also acknowledges that the record cannot be “silent,” although as is this Brief explains, that was certainly not the *only* type of illegal sentence addressed in *Ford*.

<sup>2</sup> While *Boyd* captured three of these scenarios, it did not entirely catalogue the field, as not all of them were before the Court in that case.

dispute over the specific amount of the fine—and the other requirements set forth above have been met—then only the court’s discretion is at issue.

Even those challenges that would be to the trial court’s discretion still require that the trial court first impose a legal sentence. For example, a defendant could take issue with a \$5,000 fine and potentially challenge the exercise of the judge’s discretion for imposing it without properly weighing all of the evidence on the record. But if that record is deficient—if it violates *Ford* by not reflecting that the defendant is *able* to pay, or if the trial court never made findings on the record—then the fine is also subject to challenge for being an illegal sentence.

Relevant in Mr. Cannon’s case is the distinction between the first two types of arguments listed above. The Memorandum Opinion concludes that by containing a PSI the record is not silent, and therefore any challenge can only be characterized as attacking the trial court’s discretion under arguments four or six (as numbered above). This conclusion misses the other legality-of-the-sentence arguments that Mr. Cannon is actually advancing. The “no record” argument addressed in *Boyd* and reinforced in *Ford* could appear at first glance to be no different from what *Ford* went on to articulate as a *separate type* of illegality of the sentence issue, but they are in fact distinct. After all, the record in *Ford* was not “silent”—the defendant had agreed to pay the fine in that case, which was at least some evidence of his ability to pay. *Ford*, 217 A.3d at 828-29. But as the Supreme Court explained, the point is that even with a record that was not entirely silent

about financial information, “the plain language of the statute is clear: Trial courts are without authority to impose non-mandatory fines absent record evidence that the defendant is or will be able to pay them.” *Id.* at 829. *Ford* thus made explicit that it is not enough for a trial court to ensure that the record has information about the defendant’s finances. Instead, the evidence must show that the defendant really does have the ability to pay the fine. This flows logically from Section 9726(c)’s text that the record must show that the “defendant is or will be able to pay the fine.” If the record were complete but merely showed that the defendant is utterly destitute and impoverished, then in theory the record would comply with *Boyd* because it is not silent—but it would entirely miss the mark of Section 9726. *Ford* clarifies this point.

That 9726 is primarily concerned with ensuring a defendant is *able* to pay the fine is evident not only from the text and *Ford*’s interpretation thereof, but also from the policy rationales underlying the provision. Its language comes verbatim from the 1962 Model Penal Code with the reasoning that “a defendant of very limited assets . . . may be devastated by even a small fine that causes economic hardship both to him and to his family out of proportion to the gravity of the offense.” Model Penal Code and Commentaries, American Law Institute (1985) at

240.<sup>3</sup> As those authors recognized, “to a very large extent the impact” of a fine “turns on the means of the defendant”:

a defendant of wealth is often unaffected by a fine and may be more than willing to treat the fine as an acceptable cost of engaging in prohibited conduct; a defendant of very limited assets, however, may be devastated by even a small fine that causes economic hardship both to him and to his family out of proportion to the gravity of the offense.

*Id.* Certainly these public policy goals would be rendered entirely meaningless if courts were free to impose fines on defendants that the record shows they could not afford.

Thus, the illegality of the trial court’s sentence in Mr. Cannon’s case come into focus. If the record contained evidence that Mr. Cannon could pay, and if the trial court articulated specific findings that he could pay, then the trial court would have satisfied *Boyd*, *Ford*, and *Thomas*, and the only issues left would go to the discretionary aspects of the sentence. But that did not happen here. Indeed, the PSI report—which contains *nothing more* than brief information about two prior jobs, confirmation that he has a high school diploma, and establishes that he has multiple minor children—is particularly deficient in light of this Court’s precedents about what an adequate record must contain to sustain a legal fine. For example, in *Commonwealth v. Schwartz*, 418 A.2d 637, 640 (Pa. Super. Ct. 1980),

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<sup>3</sup> The Commentary to the 1962 Model Penal Code was revised in 1985.

this Court held that the record was insufficient for the trial court to impose a fine when all it reflected was that the defendant “sold \$980 worth of drugs to the undercover agents the previous year and was currently working with his father in the construction industry, ‘bringing home approximately \$150 per week.’” As the Court explained, “This was hardly enough information to make an intelligent finding as to appellant's ability to pay the fine.” *Id.* And in *Commonwealth v. Mead*, 446 A.2d 971, 973 (Pa. Super. Ct. 1982), this Court held that a presentence report addressing “sporadic employment history, but [that] does not disclose his current income,” was insufficient, particularly where “there is no indication in the record that the sentencing court considered appellant's indebtedness (as reflected in his petition for appointment of counsel and his in forma pauperis petition), or even that he lived at home, was single, and had no dependents.” *See also Thomas*, 879 A.2d at 264 (invalidating fine where court “stated merely that it had ‘all the appropriate information,’ knowing appellant's history and his recent ten year sentence to federal prison”); *Commonwealth v. Fusco*, 594 A.2d 373, 355-56 (Pa. Super. Ct. 1991) (information that a defendant would be working, without an indication of income, was not sufficient to show he could pay a fine).<sup>4</sup>

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<sup>4</sup> Moreover, even a more detailed record does not necessarily satisfy the requirements of Section 9726. For example, the Court has found a record “clearly insufficient” to support imposition of a fine at sentencing, where a defendant was unemployed, had “neither financial assets nor

The long-established requirement that the trial court make findings based on the record is particularly important for two reasons. First, absent such findings, there has been no real exercise of trial court discretion for this Court to consider; instead, it is just an arbitrary fine imposed by the trial court without justification. This deprives the Court of any record on which to evaluate the trial court's discretion and deprives the defendant of an opportunity to challenge any exercise thereof. Second, making findings forces the trial court to reflect on the defendant's financial circumstances and consider whether the fine really is affordable. Had this trial court done so, perhaps it would have concluded that a \$5,000 fine was too high but that the defendant might be able to pay some lower fine—a conclusion unlikely to find support in the record, but a conclusion that would at least allow review of the court's discretion and reasons for imposing such a fine. Or the court may have concluded that, in fact, no fine was likely to be affordable. In those cases described above, this Court has provided guidance to trial courts on how to conduct this analysis. It should do so again here.

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liabilities,” and had been “living from hand to mouth.” *Commonwealth v. Gaskin*, 472 A.2d 1154, 1157-58 (Pa. Super. Ct. 1984). In another case, this Court vacated a fine where the sentencing court failed to consider the defendant's ability to pay and chose not to remand for resentencing “in light of the length of the term of imprisonment imposed . . . as well as appellant's present indigency.” *Commonwealth v. Gaddis*, 639 A.2d 462, 472 (Pa. Super. Ct. 1994).

## Conclusion

For the reasons explained above, *amicus curiae* the ACLU of Pennsylvania respectfully requests that this Court grant Mr. Cannon's Application for Reconsideration and issue a revised Memorandum Opinion.

Respectfully Submitted,

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Dated: August 26, 2021



## **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 via PACFile

*/s/ Andrew Christy*

Date: August 26, 2021