

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

No. 1058 WDA 2019

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

MARCIA DINARDO,

Appellant.

**BRIEF OF AMICI CURIAE
THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA AND
THE PUBLIC DEFENDER ASSOCIATION OF PENNSYLVANIA IN
SUPPORT OF APPELLANT MARCIA DINARDO**

Appeal from the Order of Sentence entered on January 14, 2019, at CP-02-CR-0004090-2018, by the Honorable Alexander Bicket, Court of Common Pleas of the Fifth Judicial District of Pennsylvania

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STATEMENT OF INTEREST OF AMICI CURIAE¹

The **American Civil Liberties Union** (“**ACLU**”) is a nationwide, nonprofit, nonpartisan organization 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 has particular expertise with respect to the law and practice governing assessment and collection of fines, costs, and restitution in criminal cases. When courts impose unaffordable fines on defendants in violation of the law, they impose an ongoing burden that will follow low-income defendants for years and decades past when they have completed all other aspects of their sentences.

The **Public Defender Association of Pennsylvania** is a Pennsylvania nonprofit corporation whose membership is comprised of the Chief Public Defender, or his or her designee, in each of the 67 counties of this Commonwealth. The Executive Committee of the Board of Directors of the Public Defenders Association of Pennsylvania has discussed this case and determined the issue is of such importance to the indigent criminal defense community, the clients whom public defenders represent, and the public at large throughout the Commonwealth, that it should offer its views to the Court for consideration. Fines and costs

¹ No person or entity other than the *amici curiae* or their counsel paid in whole or in part for the preparation of this brief or authored in whole or in part this brief.

disproportionately affect our clients and add an additional burden to the people who can least afford them. The imposition of fines and costs often leads to a cycle of repeated court appearances, additional costs, and incarceration. While defendants with financial means are able to pay their fines and costs and move forward with their lives, indigent persons often struggle for years, under mountains of debt, in an attempt to pay not only the originally imposed fines and costs but also the added costs imposed from additional court appearances and incarcerations.

Amici respectfully submit this brief to aid the Court in understanding what the law requires when courts impose fines on defendants.

SUMMARY OF ARGUMENT

For more than 45 years, Pennsylvania law has clearly and unequivocally prohibited sentencing courts from imposing unaffordable fines. This requirement, codified in 42 Pa.C.S. § 9726 (c) and (d), originates 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. Our Supreme Court has called § 9726 an “unambiguous statutory command requiring record evidence of the defendant’s ability to pay.” *Commonwealth v. Ford*, 217 A.3d 824, 829 (Pa. 2019). Starting with *Commonwealth v. Schwartz*, 418 A.2d 637, 639-40 (Pa.

Super. Ct. 1980) and culminating with *Ford* last year, this Court and the Supreme Court have released more than twenty published opinions admonishing sentencing courts to consider a defendant's ability to pay pursuant to § 9726.²

Unfortunately, as the sentencing court's actions here demonstrate, lower courts continue to misapply these precedents and impose fines on persons who plainly cannot afford them. Ms. Marcia DiNardo's case is illustrative of the problem. The record evidence shows that she is permanently disabled, lives off of Supplemental Security Income ("SSI"), and is unable to pay a fine. Yet in addition to a sentence of more than eight years of probation and \$10,625 in restitution, the sentencing court also imposed a fine of \$10,200. Neither the record nor common sense suggest that she will ever be able to pay that fine.

This Court has recently given trial courts guidance on how to deal with issues involving the *collection* of unpaid fines. *See, e.g., Commonwealth v. Mauk*, 185 A.3d 406 (Pa. Super. Ct. 2018). The current case illustrates the need for specific guidance to sentencing courts regarding how they *impose* fines *in the first*

² *See, e.g., Commonwealth v. Mead*, 446 A.2d 971, 973 (Pa. Super. Ct. 1982) (per curiam); *Commonwealth v. Gaskin*, 472 A.2d 1154, 1157-58 (Pa. Super. Ct. 1984); *Commonwealth v. Fusco*, 594 A.2d 373, 375 (Pa. Super. Ct. 1991); *Commonwealth v. Heggenstaller*, 699 A.2d 767, 769 (Pa. Super. Ct. 1997); *Commonwealth v. Allshouse*, 924 A.2d 1215, 1228 (Pa. Super. Ct. 2007); *Commonwealth v. Boyd*, 73 A.3d 1269, 1272 (Pa. Super. Ct. 2013) (en banc).

place. Amici therefore urge the Court to use this case to instruct trial courts on how to follow § 9726 and existing case law, which requires:

- First, that no sentencing court impose any fine unless the record shows that the defendant is or will be able to pay the fine. The court must make non-speculative findings as to why it believes the defendant can pay any fine that is imposed. This does not place the burden on the defendant to prove an *inability* to pay, but rather requires that the record reflect an *ability* to pay.
- Second, that an indigent defendant who cannot afford to meet her basic life needs must be found unable to pay (a standard also called for by the Excessive Fines Clause of both the Pennsylvania and United States Constitutions).
- Third, that a person whose sole source of income is SSI, or other means-tested subsistence benefit, is—absent extraordinary circumstances—simply not able to afford to pay a fine.
- Finally, that a court cannot force an indigent defendant to choose between a sentence of imprisonment or a fine. A defendant cannot face imprisonment solely *because* she cannot afford to pay a fine; the court must instead consider other alternative sentencing options such as probation.

This is the right time to provide such guidance. The Supreme Court’s recent decision in *Ford*, coupled with widespread interest on issues involving the imposition of both fines and costs, make it increasingly urgent that this Court provide sentencing courts with practical instruction on how to apply the law. No one is served by sentencing courts violating the mandate of § 9726. This Court should both correct the legal error in this case and explain what the law requires.

ARGUMENT

I. **42 Pa.C.S Mandates that Courts Make Record Findings of the Defendant's Ability to Pay Before Imposing a Fine, and Support Any Fine with Such Findings**

Pennsylvania law prohibits sentencing courts from imposing fines on defendants who cannot afford to pay them. While fines are generally a sentencing option, § 9726 places clear limits on the ability of sentencing courts to impose fines on defendants who cannot afford to pay:

(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.

This statute has two key requirements: subsection (c) prohibits imposing *any* fine on a defendant who cannot afford one, and subsection (d) limits the dollar amount of a fine to what the record shows that the defendant can afford. Contrary to the sentencing court's view in Ms. DiNardo's case, the statute does not place the burden on the defendant to prove that she is and will be *unable* to pay; instead, it is

the sentencing court's obligation to impose a fine *only if* the record supports a finding that she is or will be able to pay the fine.

Multiple opinions from this Court and the Pennsylvania Supreme Court reiterate that a fine is lawful only if the record shows that the defendant is or will be able to pay. Whether a defendant raises concerns about her ability to pay is “wholly irrelevant” to the sentencing court’s obligation. *Ford*, 217 A.3d at 829. “Subsection 9726(c) does not put the burden on defendants to inform the court that they might have trouble paying a fine. Instead, it instructs sentencing courts not to impose a fine absent record evidence of the defendant’s ability to pay.” *Id.*; *see also Commonwealth v. Fusco*, 594 A.2d 373, 375 (Pa. Super. Ct. 1991) (vacating a fine and remanding where the trial court failed to make a record of the defendant’s ability to pay before imposing a fine).

Thus, to comply with § 9726 and the Supreme Court’s instruction in *Ford*, two things must occur at sentencing. First, the record must show that the defendant is or will be able to pay a fine: “Consistent with th[e] unambiguous statutory mandate [of § 9726] . . . a sentence is illegal when the record is silent as to the defendant’s ability to pay the fine imposed.” *Ford*, 217 A.3d at 828; *see Commonwealth v. Allshouse*, 924 A.2d 1215, 1228 (Pa. Super. Ct. 2007) (“[A] trial court must enter specific findings that would allow it to determine whether a defendant could pay a specific amount in fines.”), *aff’d*, 985 A.2d 847 (Pa. 2009),

cert. granted, judgment vacated on other grounds, 562 U.S. 1267 (2011); *Fusco*, 594 A.2d at 375 (vacating fine because “no inquiry was made as to his ability to pay the fine imposed”). As these cases explain, it is the sentencing court’s responsibility to take the steps necessary to create a sufficient record.

Second, based on the evidence before it, the trial court must make findings on the record regarding the financial ability of the defendant to pay—and, if appropriate, the reasonable likelihood that the defendant will be able to pay in the future. *See Commonwealth v. Thomas*, 879 A.2d 246, 264 (Pa. Super. Ct. 2005) (trial court failed to make “specific findings of appellant’s ability to pay the fine imposed,” in violation of § 9726). That requirement bars a court from imposing a fine in the hope that the defendant will obtain an unexpected windfall, as the trial court did here. *See Commonwealth v. Gaddis*, 639 A.2d 462, 470-72 (Pa. Super. Ct. 1994) (vacating an “astronomical fine” where the sentencing judge failed to make a record of the defendant’s ability to pay and instead relied on rumors that the defendant might experience a future windfall). If the law permitted imposing a fine on a defendant based on a supposition that she might “go[] out tomorrow and win[] the lottery,” as the trial court suggested here, then there would be no point whatsoever in considering her ability to pay and § 9726 would be meaningless.

July 11, 2019 Tr. at 18:4-5. The fact that this Court has repeatedly ruled that the record must reflect the defendant’s ability to pay further underscores the

prohibition on speculation about future events. For example, in *Fusco*, this Court invalidated a fine where the only evidence in the record was that the defendant was currently unemployed but “would have a job working for his father upon his release from prison.” 594 A.2d at 375. Without a sufficiently detailed record about the defendant’s financial ability to pay—both immediately and in the near future—§ 9726 prohibits imposing a fine.

Such a record can be built in a variety of straightforward ways. “Indeed, in many cases the trial court will be able to ascertain the defendant’s ability to pay by asking . . . ‘How do you plan to pay your fines?’” *Ford*, 217 A.3d at 831. In other cases, the Court might rely in part on comprehensive pre-sentencing reports that include information about a defendant’s income and assets. *Id.* at 831 n.14; *see also Commonwealth v. Gaskin*, 472 A.2d 1154, 1157-58 (Pa. Super. Ct. 1984) (referencing a pre-sentencing report and remarks made on the record as potential sources of information about the defendant’s ability to pay). And, of course, the sentencing court can do what it did here and hold a contested evidentiary hearing at which it considers the defendant’s income and expenses, as well as other liabilities. What the sentencing court cannot do, however, is disregard the evidence on the record and nevertheless impose a plainly unaffordable fine.³

³ Pennsylvania’s courts have never addressed the window of time that a sentencing court can consider when determining whether the defendant “is or will be able” to pay a fine under § 9726(c). It is certainly true that a sentencing court can impose a

II. A Sentencing Court Cannot Impose Any Fine on a Defendant Who Is and Will Remain Unable to Afford to Meet Basic Life Needs.

A. A Defendant Who Struggles to Obtain Basic Life Necessities Is Indigent and Unable To Pay a Fine.

Beyond instructing sentencing courts that they are bound by the evidence in the record when imposing a fine, this Court should provide those courts with clear practical guidance on *how* to determine if a defendant is able to afford to pay a fine. The threshold question of whether a defendant is able to pay any fine is the same question as whether the defendant is indigent: can she afford to meet her basic life needs? If she cannot meet her basic needs, then she cannot afford the

fine even if a “defendant cannot pay the fine immediately.” *Thomas*, 879 A.2d at 264. Yet no decision has suggested that “will be able” to pay authorizes a fine that will burden the defendant for the rest of the defendant’s life. Such an outcome would undermine the intent and purpose of § 9726. At the least, fines should be limited to an amount that the evidence shows the defendant will be able to pay within a foreseeable period of time.

Two approaches make some logical sense. The first is that the period of time is limited to the statutory maximum jail sentence, which is the same time window used to limit the length of a sentence of probation and attendant payment plans. The second approach would be to limit fines to what a defendant will be able to pay while on probation, with the goal of ensuring that fines are paid in full by the time the defendant completes probation. Both approaches find support in this Court’s cases addressing the legal length of probationary sentences. *See Commonwealth v. Karth*, 994 A.2d 606, 610 (Pa. Super. Ct. 2010) (“[T]he trial court exceeded the authority granted by Section 9754 by imposing a condition, i.e. a monthly payment schedule, that extended beyond the term of [the defendant’s] probation and, indeed, the maximum sentence authorized by law for the offense for which he was convicted.”).

added burden of a fine. Therefore, if the record shows that a defendant is indigent, the court is prohibited from imposing any fine on the defendant pursuant to § 9726(c). If the defendant is not indigent, then the sentencing court must tailor the amount of the fine, pursuant to § 9726(d), to ensure that it will not prevent the defendant from meeting her basic life needs.

The indigence standard is best defined in the civil *in forma pauperis* (“IFP”) context. As this Court has repeatedly explained, “trial courts must look to the ‘established processes for assessing indigency’” through the IFP standards when determining a defendant’s financial status. *Commonwealth v. Cannon*, 954 A.2d 1222, 1226 (Pa. Super. Ct. 2008) (addressing costs of the defense). This is because of the comparative “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, 1226-27 (Pa. Super. Ct. 2011) (applying IFP standards to waive appeal costs).⁴ Thus, the IFP cases provide the clearest guidance on *how* to determine whether someone is able to pay.

⁴ Other States have also linked civil IFP standards and criteria to criminal fines and costs. For example, in *City of Richland v. Wakefield*, 380 P.3d 459, 464 (Wash. 2016) (en banc), the Supreme Court of Washington “reiterate[d]” that “courts can and should use [the civil rule governing IFP eligibility] as a guide for determining whether someone has an ability to pay costs,” and “courts should seriously question that person’s ability to pay” fines and costs if they meet those standards, both at “imposition and enforcement” for nonpayment.

The basic IFP question, whether the person is indigent, is a question of “whether he is able to obtain the necessities of life.” *Gerlitzki v. Feldser*, 307 A.2d 307, 308 (Pa. Super. Ct. 1973) (en banc). A person who cannot obtain those necessities is unable to pay. *Id.* In other words, someone who cannot afford the “items and services which are necessary for his day-to-day existence” is unable to pay, “despite the fact that he may have some ‘excess’ income or unencumbered assets.” *Stein Enters., Inc. v. Golla*, 426 A.2d 1129, 1132 (Pa. 1981). These cases set out the clear test that a person who cannot meet her basic life needs is indigent and unable to pay.

This fundamental question of whether defendants can meet their basic life needs is also used by this Court with respect to fines (and costs) in criminal cases. In *Commonwealth v. Eggers*, 742 A.2d 174, 176 n.1 (Pa. Super. Ct. 1999), this Court explained that it “invite[s] the presumption of indigence” when a defendant receives public assistance and the services of the public defender’s office. Similarly, this Court recently ruled that “[a] finding of indigency would appear to preclude any determination that [a defendant’s] failure to pay the court-ordered fines and costs was willful.” *Commonwealth v. Diaz*, 191 A.3d 850, 866 n.24 (Pa. Super. Ct. 2018); *see also Commonwealth v. Hendrick*, 312 A.2d 402, 404 (Pa. 1973) (reversing a finding of contempt for failure to pay where “the only testimony in the trial court was that [the defendant] was then penniless and unable, through

no fault of his own, to pay any sum on the delinquencies”). The common thread through all of these cases is that persons who are unable to meet their basic life needs are unable to pay a fine to the court.

Finally, the same question has animated this Court’s prior rulings on whether a sentencing court can impose a fine on an indigent defendant. In *Gaskin*, for example, the Court held that evidence on the record was “clearly insufficient” to support imposition of a fine at sentencing, where a defendant was unemployed, had “neither financial assets nor liabilities,” and had been “living from hand to mouth.” 472 A.2d at 1157-58. Similarly, in *Gaddis*, 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.” 639 A.2d at 472.

Thus, this Court need not reinvent the wheel. The body of case law is already there in cases like *Stein Enterprises*, *Gerlitzki*, and *Gaskin*. A defendant who cannot meet her basic life needs is indigent and unable to afford to pay a fine. This test also helps guide courts that impose fines on non-indigent defendants to understand how large the fine can be before it violates § 9726 by impacting those basic needs. Moreover, a test focused on a defendant’s ability to meet her basic life needs reflects the reality of what it means to be poor in Pennsylvania and in the United States. The impact of poverty reverberates throughout multiple spheres of a

person’s life. Having a precarious or insufficient income source may not only place people below the federal poverty line, but also affects their response to emergencies, access to healthcare, and ability to provide a stable living situation for themselves or their families.

Far too many Pennsylvanians are indigent, impoverished, and unable to afford to pay a fine. In Allegheny County, 11.7% of the population lives—like Ms. DiNardo—below the Federal Poverty Guidelines.⁵ The real cost of living is typically much higher than the Guidelines. The nonprofit and nonpartisan Economic Policy Institute estimates that an “adequate standard of living” in Allegheny County requires \$32,839 for an individual.⁶ Necessities such as housing, food, childcare, transportation, and medical care are quite expensive. Individuals who cannot afford these needs have sufficiently low incomes that by no objective measure can they meet the cost of living. Beyond that population,

⁵ U.S. Census Bureau, *QuickFacts: Allegheny County, Pennsylvania*, <https://bit.ly/390tqqb> (last visited Feb. 25, 2020). The 2019 Federal Poverty Guideline for a single-person household is \$12,490 (which would amount to a monthly income of \$1,041). Office of the Asst. Sec’y for Planning & Evaluation, U.S. Dep’t of Health & Human Servs., *2019 Poverty Guidelines* (2019), <https://bit.ly/2TeMVVd>.

⁶ Econ. Pol’y Inst., *Family Budget Calculator: Monthly Costs*, <https://www.epi.org/resources/budget/> (Enter “Allegheny County” in field that says “Enter county, state, or metro area” and select for “1 adult” and “no children” in the additional fields.) (last visited Feb. 25, 2020).

which by definition struggles to pay their bills and get by on a daily basis, many more Americans are unprepared for and unable to afford any sudden financial liability. Approximately 40% of adults, for example, would not be able to pay an unexpected \$400 expense out of pocket. Bd. of Governors of the Fed. Reserve Sys., *Report on the Economic Well-Being of U.S. Households in 2018*, at 21 (2019).⁷ The reality is that indigent defendants in the criminal justice system cannot handle even comparatively minor financial emergencies, let alone significant fines.⁸

When properly followed, § 9726 can help avoid exacerbating this problem. Imposing unaffordable fines on indigent individuals and families makes it that much harder for individuals and families who are already struggling to attain basic life necessities like housing and medical care. Section 9726 is intended to avoid that harm, and it reflects the legislative intent to abolish unaffordable fines. Practical instruction from this Court will help ensure that sentencing courts abide by that statutory requirement to ensure that fines are not imposed on individuals

⁷ See <https://bit.ly/3c6SOfD>.

⁸ Amici wish to acknowledge Dr. Lisa Servon at the University of Pennsylvania and her research assistant Gillian Tiley for providing these resources and information.

who cannot meet their basic life needs, or in a way that would impact the defendant's ability to meet those needs.

B. The Constitution's Excessive Fines Clause Helps Inform the Interpretation of § 9726 Since The Clause Necessarily Sets a Floor.

The standard set forth above—that the threshold question of what fine, if any, is appropriate turns on whether it would deprive a defendant of her basic life needs—finds further support in the Excessive Fines Clauses of the U.S. and Pennsylvania Constitutions.⁹ This pronouncement against excessive fines necessarily sets the floor for interpreting § 9726(c)'s requirement that a court “shall not sentence a defendant to pay a fine unless it appears of record that ... the defendant is or will be able to pay the fine.” 42 Pa.C.S. § 9726(c)(1); *see Commonwealth v. Ludwig*, 874 A.2d 623, 628 (Pa. 2005) (providing that courts should “constru[e] statutes in a constitutional manner”).

The relevant question under Excessive Fines Clause jurisprudence—whether a fine is proportional to the gravity of the offense—includes consideration of whether it “would deprive the property owner of his or her livelihood,” *i.e.* “his current or future ability to earn a living.” *Commonwealth v. 1997 Chevrolet &*

⁹ The Eighth Amendment of the U.S. Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed,” U.S. Const. amend VIII, and Article I, Section 13 of the Pennsylvania Constitution uses the identical language.

Contents Seized from Young, 160 A.3d 153, 189 (2017) (citation and internal quotation marks omitted). In concluding that the Clause reflects “hostility to such onerous fines that would **deprive one of his or her means of living**,” the Pennsylvania Supreme Court recently pointed to historical research showing that the clause is tailored to “personal circumstances” including “the **ability to maintain some minimal level of economic subsistence**.” *Id.* at 188-89 (citations omitted) (emphases added). Last year, The United States Supreme Court echoed the same sentiment, noting that historically a fine could not be “so large as to deprive [an offender] of his livelihood” and that fines could not constitute more than a person’s “circumstances or personal estate will bear.” *Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019) (citations and internal quotations marks omitted). In other words, the constitutional floor is such that a fine cannot be so large that it would be ruinous and leave a person impoverished.

1997 Chevrolet and *Timbs* are cases about civil asset forfeiture, which apply the centuries-old principles applicable to fines to a different type of penal sanction.¹⁰ *See Austin v. United States*, 509 U.S. 602, 622 (1993) (holding that the Excessive Fines Clause applies to civil asset forfeiture when it is punitive). But the

¹⁰ The paucity of cases in Pennsylvania about fines—as opposed to forfeited assets—under the Excessive Fines Clause may reflect the existence and application of § 9726.

Excessive Fines Clause and the standards set forth by both Supreme Courts have equal bearing on whether a fine renders a person unable to meet the basic needs of survival. *See, e.g., Commonwealth v. Heggenstaller*, 699 A.2d 767, 769 (Pa. Super. Ct. 1997) (Pennsylvania’s Excessive Fines Clause requires that a court consider “the individual’s ability to pay.”). The problem that the Excessive Fines Clause sought to remedy was fines that were so large that they caused (or perpetuated) poverty while the person struggled to pay them—or landed her in jail if she could not.

Indeed, Pennsylvania’s own commitment to the principle of avoiding unaffordable fines has roots that pre-date the federal Constitution. As far back as 1682, William Penn required that “all fines shall be moderate, and saving men’s contentments, merchandise, or wainage,”¹¹ and in 1700 the Pennsylvania legislature further clarified that this protected a person’s “means of livelihood.”¹² Thus, when this Court considers whether the \$10,200 fine imposed on Ms. DiNardo is appropriate in light of § 9726, it should view the question of whether

¹¹ Yale Law School, *Frame of the Government of Pennsylvania* (May 5, 1682), <https://bit.ly/2Vsxwn7>.

¹² Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 *Hastings Const. L.Q.* 833, 866 n.128 (2013), <https://bit.ly/2HWKIs9> (quoting *An Act To Prevent Immoderate Fines, reprinted in The Statutes at Large of Pennsylvania from 1682 to 1801*, at 44 (1896), <https://bit.ly/37X3fPU>).

she is able to pay that fine consistent with the principle that the Excessive Fines Clause protects: ensuring that the fine does not deprive her of her ability to meet her basic life needs.

III. This Court Should Specify That Defendants Relying on Supplemental Security Income (“SSI”) or Other Subsistence Benefits Must Be Presumed Unable to Afford Fines.

Given that the governing legal standard is whether a defendant can afford to meet basic life needs, this Court should make explicit that a person whose sole source of income is SSI or another subsistence benefit is necessarily indigent and thus presumed unable to pay in the absence of specific evidence to the contrary.¹³ This easily-administered rule is called for by the case law discussed above and is consistent with the prohibition in § 9726(c) that a sentencing court cannot impose a fine on a person who cannot afford it. *See Gerlitzki*, 307 A.2d at 308 (person with “no income except public assistance benefits” and limited assets is in poverty); *Koziatek v. Marquett*, 484 A.2d 806, 808 (Pa. Super. Ct. 1984) (when the “sole source of support was a monthly disability payment” the person has set forth a “prima facie case of impoverishment”); *see also Washington v. Blazina*, 344 P.3d

¹³ The question of whether a defendant is “able to pay” is a question only of the defendant’s finances, not those of friends or family or whether the defendant can borrow money. *Commonwealth v. Smetana*, 191 A.3d 867, 873 (Pa. Super. Ct. 2018).

680, 685 (Wash. 2015) (en banc) (if a person receives “means-tested assistance program, such as Social Security . . . courts should seriously question that person’s ability to pay” fines or costs at sentencing). Thus, a firm rule that, absent extraordinary circumstances, defendants who rely on SSI are presumed unable to pay will provide much needed guidance to lower courts so that they do not unlawfully impose fines on individuals with significant disabilities who cannot and will not be able to work.

SSI is a means-tested form of Social Security for individuals with significant disabilities that prevent them from working. The entire purpose of SSI is to provide them with a minimum set of funds on which to subsist.¹⁴ SSI pays only \$783 per month and a \$22 state supplement (whether that is all SSI or a combination of SSI and Social Security benefits).¹⁵ By definition, persons relying

¹⁴ SSI is a federal income supplement program designed “[t]o assist those who cannot work because of age, blindness, or disability,” by providing them with the financial resources they need to obtain the basic necessities of life. 92nd Congress, Senate Report No. 92–1230, at 4, 12 (1972); 20 C.F.R. § 416.110 (1992). Those on SSI have “little to no income” and need assistance to “meet basic needs for food, clothing, and shelter.” See Social Sec. Admin., *Supplemental Security Income Homepage* (2019), <https://www.ssa.gov/ssi/>; see also 20 C.F.R. § 416.1102 (2005) (defining “income” as “anything you receive in cash or in kind that you can use to meet your needs for food and shelter”).

¹⁵ Social Sec. Admin., *SSI Federal Payment Amounts for 2020*, [ssa.gov/oact/cola/SSI.html](https://www.ssa.gov/oact/cola/SSI.html); Pa. Dep’t of Human Servs., *Supplemental Handbook* (Feb. 3, 2020), <https://bit.ly/38X2N5u>. When a person who is already receiving SSI then claims Social Security due to old age, any Social Security benefits will be

on SSI to meet such basic needs are indigent. *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987) (explaining that only individuals who are indigent are eligible to receive SSI). There are strict asset limitations: only individuals with assets less than a *total* of \$2,000—an incredibly low amount in today’s society—are eligible. 20 C.F.R. § 416.1205. In addition, a person must have a disability that either can “be expected to result in death” or is “expected to last for a continuous period of not less than twelve months.” *See* 42 U.S.C. § 1382c(a)(3)(A); *Barnhart v. Thomas*, 540 U.S. 20, 21-22 (2003) (“[H]is physical or mental impairment or impairments are of such severity that *he is not only unable to do his previous work but cannot . . . engage in any other kind of substantial gainful work which exists in the national economy.*”). It is a program that provides the bare minimum amount of money to protect the poorest and most vulnerable among us.

Ms. DiNardo’s case is illustrative. Her SSI benefits provide her with less than \$10,000 per year. July 11, 2016 Tr. at 11:5. This is below the Federal Poverty Guidelines and *less than a third* of what it takes to have an “adequate standard of living” in Allegheny County.¹⁶ Ms. DiNardo cannot realistically afford

reduced to offset the SSI. *See* Social Sec. Admin., *SSI Spotlight on Windfall Offset* (2019), <https://bit.ly/2utHEke>.

¹⁶ *See supra* notes 5, 6 (identifying the Federal Poverty Guideline and the Economic Policy Institute’s calculation for an adequate living in Allegheny County).

to pay any fine, let alone \$10,200.¹⁷ Nor is it likely that she will ever be able to do so, given her significant disabilities, which create overwhelming impediments to upward financial mobility. Like other individuals who receive SSI, these impediments are precisely why she qualifies for the benefit.¹⁸

A person who receives SSI has already been determined by the federal government to be unable to work and to be indigent. Absent some extraordinary circumstances—which must appear on the record—a person on SSI should be considered categorically unable to pay a fine. By stating this as a presumptive rule, this Court would provide clear guidance to lower courts that SSI recipients fall squarely within the class of persons protected by § 9726.

¹⁷ In addition, where a defendant is living on SSI and would face serious hardship in making any payments at all to the court, imposition of a fine will necessarily interfere with any mandated restitution in violation of § 9726(c). Ms. DiNardo’s case again proves illustrative. The restitution alone in Ms. DiNardo’s case totaled \$10,625 to be paid to the Humane Animal Rescue. In other words, restitution already eclipses Ms. DiNardo’s entire annual income. If the additional fine of \$10,200 were upheld, only 50% of any small payment she is able to make to the court moving forward would be channeled toward restitution, because the other 50% would go toward payment of the fine. July 11, 2019 Tr. at 15:21-24.

¹⁸ Nationally, “about 2 percent of all disability beneficiaries participate in the federal workforce reentry program. . . . The participation rate is so low that some experts say Ticket to Work . . . beyond repair.” Terrence McCoy, *‘I am a hard worker’: Lisa Daunhauer wanted to be one of the few to get off disability. But first she had to succeed at Walmart*, Wash. Post (Aug. 27, 2017), <https://wapo.st/392FsPC>.

IV. The Sentencing Court Erred By Suggesting That It Must Either Impose a Fine or Send Ms. DiNardo to Jail.

At a hearing in this case, the sentencing judge stated that “the statute is not going to allow you to get rid of the fines without there being incarceration.” June 3, 2019 Tr. at 23: 9-12. The judge reasoned that if he did not sentence Ms. DiNardo to incarceration, then § 5511(m.1)¹⁹ required a fine regardless of her financial means.²⁰ *See* 18 Pa.C.S. § 5511(m.1). Thus, by asking to have the illegal fine waived, the sentencing court reasoned that Ms. DiNardo would instead have to

¹⁹ The statutory provision of which Ms. DiNardo was convicted of violating was § 5511(m.1). Since the time of the events underlying Ms. DiNardo’s case, the Pennsylvania legislature has reordered sections 5511(m.1) to 5550 and made some changes to its wording. This brief focuses only on the operative provision, 18 Pa.C.S. § 5511(m.1).

²⁰ The trial court apparently viewed the statutory fine here as “mandatory.” Amici do not believe that *Commonwealth v. Cherpes*, 520 A.2d 439 (Pa. Super. Ct. 1987) requires this conclusion. *Cherpes* involved a different statutory provision (since repealed) and offered scant reasoning. It ignored the dictate of 1 Pa.C.S. §§ 1932-33 that statutes and procedural rules that relate to the same class of persons or subject matter are *in pari materia* and should be construed together as one statute or so that effect may be given to both. *See Commonwealth v. Hansley*, 47 A.3d 1180, 1186 (Pa. 2012). While the special provision shall prevail over the more general provision if the two cannot be reconciled, there is no conflict between the statutes in the case at hand. *Id.* (quoting 1 Pa.C.S. § 1933). Section 5511(m.1) does not explicitly state that a defendant must pay the fine that she cannot afford and therefore can be read as consistent with § 9726. Furthermore, *Cherpes*, which considerably predated our Supreme Court’s decision in *1997 Chevrolet*, did not consider the underlying constitutional concern with unaffordable fines and therefore did not interpret the statute before it in light of those constitutional concerns.

be jailed. This “choice”—incarceration or an illegal fine—is itself unlawful and has no basis in Pennsylvania law. The result would be the incarceration of indigent defendants *because* of their poverty, in violation of both Pennsylvania sentencing law and the state and federal Constitutions. This Court should make expressly clear that such a result would be utterly impermissible.

In 1973, our Supreme Court prohibited jailing indigent defendants who are too poor to pay fines and costs out of a “desire to eliminate inequities in the criminal process caused by indigency.” *Commonwealth ex rel. Parrish v. Cliff*, 304 A.2d 158, 160 (Pa. 1973). A decade later, the U.S. Supreme Court similarly held that sentencing a poor defendant to incarceration because of indigence is unconstitutional. *See Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983) (holding that a court cannot automatically revoke a defendant’s probation due to nonpayment of fines and restitution because such a deprivation of liberty “would be contrary to the fundamental fairness required by the Fourteenth Amendment”). Although the procedural posture of Ms. DiNardo’s case is different than in *Bearden*, the same constitutional requirements apply. As *Bearden* explains, whether jail is appropriate turns on the State’s interest; the State must first determine “whether the State’s penological interests require the imposition of a term of imprisonment.” *Id.* at 669-70.

Pennsylvania has no penological interest in incarcerating poor people because of their poverty. As this Court has said, “in Pennsylvania, we do not imprison the poor solely for their inability to pay fines.” *Eggers*, 742 A.2d at 176 (citing Rule 1407 (today Rule 706)). Section 9726 does *not* say that if a trial court finds that a defendant cannot afford to pay a fine, that the court can instead impose a jail sentence. Instead, it simply prohibits imposing that fine. Moreover, if a sentencing court can only impose a sentence of total confinement under § 9725 after considering the relevant factors therein. In other words, the court must first determine whether the state’s penological interest can be met without the need for incarceration. Once a court rejects the need for total confinement, it may not, consistent with the sentencing code and constitution, impose a prison sentence merely because the defendant is indigent and protected by § 9726.

Ms. DiNardo’s case highlights why there is absolutely no need to jail indigent defendants due to their poverty; they can be held accountable through alternate means. The trial court imposed a sentence of over *eight years* of probation and of \$10,625 in restitution—more money than she receives in SSI benefits annually. She is certainly not escaping punishment.

Finally, it bears emphasizing that there is no state interest in taking money from the impoverished, who are already struggling to maintain a basic livelihood. Seeking to extract fines from persons who are struggling to feed and clothe

themselves contravenes the governmental interest in recognizing and alleviating the impact of poverty that is evident in public benefits programs such as SSI. As the Pennsylvania Supreme Court has recognized, constitutional protections against excessive fines exist precisely to prevent the state from adding on to harms and indignities of that come with lack of means. *See 1997 Chevrolet*, 160 A.3d at 188.

CONCLUSION

For the foregoing reasons, amici urge this Court to vacate the fine in this matter and provide sentencing courts with clear guidance about *how* to impose fines on defendants, whether they are indigent, low-income, or individuals with means. By setting forth a presumptive rule that individuals who receive SSI are unable to pay fines, the Court will ensure that the most vulnerable Pennsylvanians are not put in the same position that Ms. DiNardo was here. Sentencing courts should never impose fines on individuals who are unable to meet their basic life needs, nor incarcerate them for their poverty.²¹

²¹ Nina Kalandadze, Jesse McGleughlin, and Haley Pritchard, law students at the University of Pennsylvania Carey Law School, provided substantial assistance in the preparation of this brief.

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CERTIFICATES 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.

I also certify pursuant to Pa.R.A.P. 2135, that this brief does not exceed 7000 words.

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2020, pursuant to Pa. R. App. P. 2185 and 2187, I filed the foregoing brief with the Prothonotary for the Pennsylvania Supreme Court by the Court's PACFile system upon the following:

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