IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 611 EDA 2019

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

MAURICE HUDSON,

Appellant.

Brief of Amicus Curiae the American Civil Liberties Union of Pennsylvania in Support of Appellant Maurice Hudson

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Appeal from the Order of Sentence entered on February 12, 2019, at CP-51-CR-0009201-2009

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Statement of Interest of Amicus Curiae

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 is one of its state affiliates and 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 appears 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 to both inform the Court of the current law, and also 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 (Pa. 1973), prohibiting the incarceration of indigent defendants because they 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.

To this end, a defendant who does not pay fines, costs, or restitution commits a technical violation of his probation only if he has "willfully refused to pay." *Commonwealth ex rel. Powell v. Rosenberry*, 645 A.2d 1328, 1331 (Pa. Super. Ct. 1994). To make that finding, the Constitution requires that the trial court affirmatively inquire into the defendant's financial status and determine whether he 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 permit him to meet his basic life needs, such as housing, food, medical care, transportation, and dependent care, and still have money left to pay the court. It requires a detailed examination of the defendant's finances, and in appropriate cases, his efforts to find employment.

Trial courts need clear instruction on these legal requirements because so many criminal defendants struggle to pay even comparatively small amounts of money. 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, last year this Court 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. *See Commonwealth v. Mauk*, 185 A.3d 406 (Pa. Super. Ct. 2018); *Commonwealth v. Diaz*, 191 A.3d 850 (Pa. Super. Ct. 2018); and *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 Mr. Hudson's case, the trial court failed to abide by those principles. The record shows that Mr. Hudson is clearly and unquestionably indigent. However, the trial court did not inquire about Mr. Hudson's efforts to obtain employment, his living expenses, or his efforts to pay child support (instead apparently assuming that he makes no child support payments because he had been incarcerated by the Delaware County domestic relations court).

By failing to properly inquire into the reasons for Mr. Hudson's nonpayment, the trial court 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 clearly indigent man with several young children is sitting in jail for 1 1/2 to 3 years because of his poverty. This Court must vacate the conviction and remand for a new *Gagnon II* hearing so that the trial court can determine whether Mr. Hudson was actually choosing to remain impoverished and destitute, or if he had been unable to find more work despite a bona fide effort.

Argument

A. Indigent defendants who cannot afford to pay substantial financial obligations regularly face unlawful punishment.

The trial court revoked Mr. Hudson's probation, in large part, for "not paying cost [sic] and fines." Trial Ct. Opinion at 1. While judges and lawyers have a tendency to discuss the two as if they are the same type of assessment, fines and costs are separate, with distinct purposes.

Fines are "direct consequences, and therefore, punishment." *Commonwealth v. Rivera*, 95 A.3d 913, 916 (Pa. Super. Ct. 2014). Costs, on the other hand, 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.[1] Thus, for example, *Rivera* forbade imposing a public defender reimbursement "cost" on a defendant as a condition of probation: because costs are merely incident to judgment, they are not "reasonably related to the rehabilitation of the defendant, the *sine qua non* of probationary conditions" under 42 Pa.C.S. § 9754(c)(13).[2]

Rivera was consistent with the longstanding law in Pennsylvania. Our Supreme Court has explained that the imposition "of costs is not part of any penalty imposed," including "the penalty imposed by statutes providing for the punishment of criminal offenses." *Commonwealth v. Giaccio*, 202 A.2d 55, 58 (Pa. 1964), *reversed on other grounds*, 382 U.S. 399.[3] *See also Commonwealth v. Hamel*, 44 Pa. Super. 464, 465-66 (Pa. Super. Ct. 1910) (discussing the legal status

[1] To confuse matters more, the General Assembly and courts sometimes talk about "fees" in place of costs, even though they legally the same. For example, 42 Pa.C.S. § 1725.1(b) requires that courts charge certain "costs" every time a defendant is convicted, while § 1725.3 refers to the costs associated with using a crime lab as a "fee." Other statutes use the two interchangeably, such as 18 P.S. § 11.1102, which is titled "Costs for offender supervision programs" but in the text refers to the cost as a "fee." To the knowledge of the Amicus, no Pennsylvania criminal case has ever suggested that costs and fees are not in the same legal category. *See*, *e.g.*, *In re Kling*, 249 A.2d 552 (Pa. 1969) (discussing costs and fees interchangeably); *Commonwealth v. Gill*, 432 A.2d 1001 (Pa. Super. Ct. 1981) (same). For the sake of clarity, these are all best referred to as "costs."

[2] While 42 Pa.C.S. § 9754 permits a court to impose payment of a fine or restitution as a condition of probation, it does not list payment of "costs" as a possible condition. *Rivera* left unanswered the question of whether the payment of costs of supervision under 18 P.S. § 11.1102 constitutes a lawful condition of probation. Regardless, in Mr. Hudson's case, he has demonstrated that he lacks the "present []ability to pay" those costs. 18 P.S. § 11.1102(c).

[3] *Giacco*'s discussion of the legal status of court costs is accurate under current law. However, the case does come from another era, one in which costs could be imposed on a defendant even if that defendant was not convicted, something that is of course unconstitutional under our modern jurisprudence. *See*, *e.g.*, *Nelson v. Colorado*, 137 S. Ct. 1249 (2017).

of court costs in criminal cases and explaining that "a direction to pay the costs in a criminal proceeding is not a sentence in the sense of its being a part of the penalty imposed by law").

When imposing these obligations—and especially in contemplating punishment when a defendant has failed to make payment—courts must also grapple with the reality that many defendants are poor. Certainly, the objective of court costs, which is merely to reimburse the government, is not served by revoking a defendant's probation due to an inability to pay. *See*, *e.g.*, *Commonwealth v. Fuqua*, 407 A.2d 24, 26 (Pa. Super. Ct. 1979) (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"). What happens when defendants cannot afford to pay their financial obligations? Mr. Hudson owes approximately $2,000 in costs (twice the median amount assessed against public defender clients),[4] and he is now in jail due to his inability to pay and failure to accomplish the impossible. Yet his case is not unique, as approximately 60% of public defender cases have at least some unpaid court costs 10 years after sentencing.[5]

[4] 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 3-4 (Nov. 13, 2018), www.aclupa.org/finesandcosts/research. The median amount of costs assessed against a public defender client is $1,072.
[5] *Id*. at 13.

Last 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 recent report to our Supreme Court, one Cumberland County judge "prefer[ed]" that defendants "appear in court before their probation expires so he can extend their probation" for nonpayment, despite such a practice being unlawful under this Court's precedents.[6] The ACLU of Pennsylvania has in the past year 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. And in December it submitted another amicus brief in an analogous case, *Commonwealth v. Bivins*, 737 WDA 2018 and 1870 WDA 2018, where the trial court judges

[6] "Ending Debtors' Prisons in Pennsylvania: Current Issues in Bail and Legal Financial Obligations: A Practical Guide for Reform," The Pennsylvania Interbranch Commission for Gender, Racial, and Ethnic Fairness (July 10, 2017), available at http://www.pa-interbranchcommission.com/commit_criminal-justice.php.

admitted that they never inquired into the reasons for nonpayment prior to incarcerating the defendant. These practices must stop.

B. The trial court violated clearly-established precedent from the United States Supreme Court and Pennsylvania's appellate courts by failing to consider Mr. Hudson's ability to pay costs.

1. This Court has explained 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*, 461 U.S. at 672. Without such a finding, the defendant has not committed a technical violation of probation or parole. *Rosenberry*, 645 A.2d at 1331.

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 the underlying court order"). As a result, *Bearden* and this Court's cases interpreting it place 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; s*ee 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). Accordingly, the trial court should have affirmatively inquired into Mr. Hudson's financial status and made findings on the record regarding his ability to pay prior to any finding that he violated the terms of 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, even though this Court has specifically

instructed that it must occur "*every time someone appears* or reappears for a fines-and-costs 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 (emphasis added).

2. The trial court skipped a meaningful inquiry into Mr. Hudson's ability to pay and instead focused solely on whether he had made a bona fide effort to obtain better employment.

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 willfullness of appellant's omission as required by *Bearden*." *Dorsey*, 476 A.2d at 1312. The trial court never did that. And nor could it find that Mr. Hudson had willfully failed to pay based on his current financial status, given the uncontested evidence in the record that he owes $350 per month in child support, despite only making $600 a month, and is rather plainly indigent.

Instead, the trial court decided that Mr. Hudson was not making a bona fide effort to obtain better employment, yet did not ask him about his efforts to obtain additional employment. Nor did the court consider the difficulty Mr. Hudson has had in maintaining employment due to his repeated incarcerations by *both* the

Delaware County domestic relations unit for failure to keep up with his child support obligations *and* the trial court for nonpayment of costs.[7]

Certainly the fact that a defendant is indigent, a fact that prevents any risk of incarceration due to nonpayment under Pennsylvania law,[8] can be subject to an examination of whether that defendant has made a bona fide effort to obtain the resources necessary to pay. The core question remains willfulness, which our Supreme Court has defined as "an intentional, designed act and one without justifiable excuse." *Commonwealth ex rel. Wright v. Hendrick*, 312 A.2d 402, 404 (Pa. 1973). As this Court noted in *Mauk*, the "[i]ntent to defy an order may be inferred from a defendant's unreasonable inaction." *Mauk*, 185 A.3d at 411. Nevertheless, that does not obviate the need for the trial court to establish a factual record and make findings based on that record.[9]

Hendrick is instructive. The defendant was obviously impoverished. He was imprisoned for two years and then unemployed for at least another year after that, leading to the trial court's contempt proceeding. *Hendrick*, 312 A.2d at 403. The trial court reasoned that because he "was young and in good health, his continued

[7] Instead, the Court assumed – without evidence – that Mr. Hudson has made no payments towards his child support obligations

[8] *See*, *e.g.*, Pa.R.Crim.P. 706(A) and (D).

[9] Under Pennsylvania law, a defendant cannot be required to borrow money to make payments. *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.").

unemployment, coupled with his chronic failure to make contributions towards the support of the children, constituted a willful disregard of the court's orders." *Id*. at 404. The Supreme Court unanimously rejected this contention: "To this, we cannot subscribe." *Id.* The problem with the trial court's determination—in that case and in this one—was that the record simply did not warrant the conclusion that the defendant "refused to work, and, thus through his own fault was rendered incapable of making payments on the outstanding support orders." *Id*.

The record here is similarly deficient. It reflects that Mr. Hudson is working part time. He has no high school diploma. He has been repeatedly jailed in the past few years by both this trial court and also another court for nonpayment of child support. He also, of course, has a felony conviction *for robbery*, which combined with periodic phases of incarceration necessarily makes it infinitely more difficult to find employment. In order to find that he has willfully refused to make a bona fide effort to obtain better work, the trial court must at a minimum identify: 1) Why the defendant is not working additional shifts (e.g. does he have to care for children? Is he still working towards his GED?)? 2) Has he been applying for other work? 3) How often does he send in job applications, and to what types of jobs? 4) What response has he received to his job applications? 5) Has he been offered any work and declined it? Why? The trial court needs some basis grounded in the evidence before concluding that the defendant has willfully remained indigent.

Absent those types of considerations, the trial court has simply failed to develop the type of record necessary to show that Mr. Hudson has willfully failed to pay. *See*, *e.g.*, *Hendrick*, 312 A.2d at 404; *Diaz*, 191 A.3d at 866 (court must make findings on the record pertaining to the defendant's willful nonpayment).

C. This Court should direct the trial court 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 that 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 and cannot be found in violation of supervision order). 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 his 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 (Pa. Northumberland Cty. Com. Pl. 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). It is simply insufficient to look only at the defendant's income. *See Dauphin County Public Defender's Office v. Court of Common Pleas of Dauphin County*, 849 A.2d 1145, 1159 n.4 (Pa. 2004) (criticizing a trial court's reliance solely on income to determine ability to afford to hire counsel, as it ignores "other factors" including the defendant's financial liabilities).

Ultimately, Mr. Hudson is indigent because he cannot meet his basic life needs, the test set forth by our appellate courts. *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 means-based public assistance 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)).

In addition, in its recent *Diaz* and *Smetana* opinions, this Court 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.[10]

As a result, a proper ability-to-pay evaluation requires that the trial courts consider all of Mr. Hudson's financial circumstances. It can only find that he is able to pay—and willfully refusing to do so—if he is able to afford to meet his basic life needs and has failed to make a good-faith effort to obtain the employment necessary for him to be able to meet those needs. *See Mauk*, 185 A.3d at 411 (defendant must make "bona fide" effort to acquire resources to pay).

[10] *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.

Conclusion

For the foregoing reasons, this Court should vacate the trial court's judgment of sentence and instruct it to hold a new *Gagnon II* hearing to determine whether Mr. Hudson had the ability to pay costs in this matter.

Respectfully submitted,

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

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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.

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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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Dated: August 12, 2019