IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 27 EAP 2021

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

ALEXIS LOPEZ,

Appellant.

Brief of Amici Curiae the ACLU of Pennsylvania and the Pennsylvania Interbranch Commission for Gender, Racial, and Ethnic Fairness in Support of Appellant Alexis Lopez

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Petition for Allowance of Appeal from the Order of the Superior Court of Pennsylvania at No. 1313 EDA 2018, affirming the Judgment of Sentence Entered at No. CP-51-CR-0004377-2015

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Statement of Interest of Amici 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 has litigated cases involving court debt in trial and appellate courts throughout the Commonwealth.

The **Pennsylvania Interbranch Commission for Gender, Racial, and Ethnic Fairness** ("Interbranch Commission") was established by the Pennsylvania Supreme Court and the other two branches of Pennsylvania government in 2005 to work to eliminate bias or invidious discrimination within the legal profession and all three branches of government. The Interbranch Commission has studied the issue of unaffordable fines, costs, and restitution and issued a 2017 report that recommended changes to end the disproportionate impact of such debts on people of color and low-income Pennsylvanians throughout the Commonwealth.[1]

[1] No other person or entity authored or paid in whole or in part for the preparation of this brief.

Summary of the Argument

Criminal court costs routinely run over $1,000 for indigent defendants represented by the public defender, and it is no surprise that most of those defendants still owe costs ten years after sentencing—long after individuals who could afford private counsel have paid their costs in full. In the meantime, these low-income Pennsylvanians face the constant threat of arrest, incarceration, driver's license suspension, and an inability to clear their records to obtain work that would actually let them pay the costs. This regressive, two-tiered system of justice imposes significant extra punishment on the poorest Pennsylvanians because they are poor, leaving "people in a state where they are always returning from incarceration but never returned."[2]

Decades ago, this Court intended a different outcome and worked to reduce the "inequities in the criminal process caused by indigency." *Commonwealth ex rel. Parrish v. Cliff*, 304 A.2d 158, 160 (Pa. 1973) (Fourteenth Amendment prohibits incarcerating indigent defendants for inability to pay fines or costs at sentencing). Following its landmark decision in *Parrish*, the Court promulgated Rule 706 (then-1407) as a comprehensive provision designed to address

[2] City of Philadelphia Office of Community Empowerment and Opportunity, "The Impact of Criminal Court and Prison Fines and Fees in Philadelphia," at 2 (May 5, 2021), https://www.phila.gov/documents/the-impact-of-criminal-court-and-prison-fines-and-fees-in-philadelphia/ ("CEO Report").

unaffordable fines and costs at all stages of a proceeding. Rather than narrowly codifying constitutional minimums, the Court—looking to the best practices from entities like the American Law Institute and the American Bar Association—created a Rule requiring that all fines and costs be affordable based on the defendant's individual circumstances, permitting the use of payment plans, and flatly banning incarceration of indigent defendants for nonpayment of fines and costs. This approach reflected a forward-thinking Court that recognized the constitutional floor was not sufficient to solve the problem.

The contemporaneous view of Rule 706(C) captured by the *en banc* Superior Court just two years after the Rule's enactment was that the Rule required consideration of the defendant's ability to pay at sentencing, and the failure to do so meant that a trial court "did not comply with provisions of Rule [706]." *Commonwealth v. Martin*, 335 A.2d 424, 425-26 (Pa. Super. Ct. 1975) (en banc). That interpretation of Rule 706(C), which textually applies to both fines *and* costs, prevailed for decades, until a renumbering of the rules and poor advocacy led the Superior Court to unknowingly contradict its precedent. Moreover, courts in other states have also interpreted the same language chosen by this Court in Rule 706(C) as compelling consideration of ability to pay at sentencing.

Applying Rule 706(C) as a protection against the imposition of unaffordable costs not only is historically and textually appropriate, but also would effectuate

the will of the legislature. Through a pair of statutory amendments in 2010, the legislature addressed the problem of unaffordable costs by expressly mandating that costs be imposed "unless the court determines otherwise pursuant to Pa.R.Crim.P. No. 706(C) (relating to fines or costs)." 42 Pa.C.S. § 9728(b.2). This substantive authorization to waive costs following the procedure in Rule 706(C) made plain the intention that no costs be "mandatory" for defendants who cannot afford them, and the legislative history reflects that Rule 706(C) allows a court to "modify or even waive costs" at sentencing.[3]

This Court can and should work to put an end to the unequal treatment of indigent Pennsylvanians in the criminal justice system. By restoring the proper meaning of Rule 706(C) and providing clear and specific guidance to trial courts that they must consider each defendant's financial circumstances, the Court can dramatically improve the lives of tens of thousands of Pennsylvanians every year.

[3] Pa. House of Representatives Judiciary Comm., SB 1169 Bill Analysis (Sept. 15, 2010), PN 2181 (attached as Appendix A).

Argument

A. Rule 706 was intended to be a comprehensive scheme at both sentencing and upon default to end the disproportionate punishment of indigent Pennsylvanians who could not afford to pay fines or costs.

1. The historical record and the sources this Court used as models for Rule 706(C) show that its mandate of considering ability to pay applies when fines and costs are imposed.

When this Court used its King's Bench authority to decided *Parrish* in 1973, it ruled on the narrow issue of whether the Constitution protected defendants from being immediately jailed at sentencing merely because they were unable to pay fines and costs. 304 A.2d at 161. Two months later, the Court adopted Rule 706, which goes much further than that ruling and the baseline requirements of the Constitution.

All of the available historical evidence shows that the intention behind Rule 706(C) was to not impose unaffordable fines and costs in the first instance, with other parts of the Rule intended to address default. Only a few weeks before the *Parrish* decision, Stanford Shmukler, the then-Executive Director and Secretary of this Court's Criminal Procedure Rules Committee, testified to a Senate committee that the Court was preparing to adopt a rule that addressed not only the procedure prior to jailing defendants for nonpayment, but also the "procedure in imposing [a]

fine" in the first place.[4] From the beginning, this was a Rule about both the *imposition* of financial obligations as well as the *collection* thereof.

The language of Rule 706(C) was drawn from three contemporary sources. The first is Section 7.02 of the American Law Institute's 1962 Model Penal Code, titled "Criteria for **Imposing** Fines," which provides:

> 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.

Model Penal Code § 7.02. Rule 706(C) mirrors this language:

> The court, in determining the amount and method of payment of a fine **or costs** shall, insofar as is just and practicable, consider the burden upon the defendant by reason of the defendant's financial means, **including the defendant's ability to make restitution or reparations**.

This Court's Rule does more than the Model Penal Code in two respects, highlighted above. First, this Court explicitly addressed both fines *and* costs, reflecting the Court's recognition in *Parrish* that fines and costs both burden indigent defendants. Second, Rule 706 prioritizes the payment of restitution over fines and costs. It is not surprising that the Court used this influential Code as inspiration: included among the Pennsylvanians who contributed to the Model Rules were two Pennsylvania Supreme Court justices—Curtis Bok and Thomas

[4] Pa. Senate Comm. on Judiciary, Public Hearing on Senate Bill 500, at 67 (April 18, 1973).

McBride—who served on the ALI's criminal law advisory committee. *See* Am. L. Inst., Model Penal Code and Commentaries (1985), at vi.[5]

This provision in the Code was designed to avoid the disproportionate harm that financial penalties cause low-income individuals. The authors recognized that "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. at 240. Accordingly, the Code provides "the court is not permitted to impose a fine on a defendant who is unable to pay it at the time of sentence and who will not be able to pay a deferred fine in installments or a lump sum." *Id*. By barring unaffordable fines, the only cases where fines remain unpaid should be those where "an error as to the application of this criterion has been made (in which case the fine should be set aside) or cases in which the defendant could pay the fine but has refused to do so." *Id*. at 241.

The second source was the 1971 Final Report of the National Commission on Reform of Federal Criminal Laws, which used the same approach of limiting

[5] The relevant excerpt is attached as Appendix B. The Commentary to the 1962 Model Penal Code was revised in 1985.

the amount of financial obligations upfront to avoid needless harm to low-income individuals. Section 3302, titled "Imposition of Fines," provides in relevant part:

> (1) Criteria. In determining the amount and the method of payment of a fine, the court shall, insofar as practicable, proportion the fine to the burden that payment will impose in view of the financial resources of the defendant. The court shall not sentence a defendant to pay a fine in any amount which will prevent him from making restitution or reparation to the victim of the offense, or which the court is not satisfied that the defendant can pay in full within a reasonable time.

Natl. Comm'n on Reform of Fed. Crim. L., Final Report of the National Commission on Reform of Federal Criminal Laws (1971) at 295-96.[6] As with the Model Penal Code, this provision plainly influenced Rule 706(C) with the "practicable" language and the instruction to prioritize victim restitution. The Comment explains that this language "states the basic principle that the fine imposed should be related to the resources of the defendant." *Id*. at 296.

Finally, in 1968 the American Bar Association released Standards Relating to Sentencing Alternatives and Procedures, which took the same basic approach of addressing both sentencing and default. Those authors emphasized that installment payments (*see* Rule 706(B)) are an "important innovation," but "the most important suggestion designed to alleviate the problem [of disproportionate punishment] is that fines be imposed only on those who are likely to be able to pay them." Am. Bar Ass'n, Standards Relating to Sentencing Alternatives and

[6] The relevant excerpt is attached as Appendix C.

Procedures (1968) at 121-22. Because "imprisonment dependent on an offender's financial status is wrong," financial obligations "should be set in light of the offender's ability to pay and this information should specifically appear in the presentence report." *Id*. at 122 (quoting Report of the President's Commission on Crime in the District of Columbia (1966) at 394). In other words, the ABA recognized that payment plans would not solve the problem of indigent defendants facing years of unaffordable debt and the ever-present risk of incarceration—a concern that history has borne out. The only solution was to limit the amount imposed in the first place.

Taken together, these reports show both the provenance of Rule 706(C) and the reforms that influenced this Court in 1973. Central to those reform efforts was tailoring the amount of financial obligations at the time of sentencing. While the reports focused only on *fines*, the Court was forward-thinking enough—having just decided *Parrish*, a case about both fines and costs—to expand the scope to also cover *costs* in the final version of Rule 706(C).

2. The separate pieces of Rule 706 fit together to provide comprehensive protections for indigent Pennsylvanians.

Consistent with the historical evidence, the structure of Rule 706 confirms this Court's intention to do more than merely codify the constitutional holding in *Parrish*. Each provision governs a distinct phase of the process involving the imposition and collection of fines and costs.

Rule 706(A) sets forth the fundamental principle, applicable at all stages of a case, that no defendant can be imprisoned for failure to pay unless the court holds a hearing, takes evidence, and determines that the defendant is financially able to pay. This can happen *before* sentencing, *at* sentencing, or *post*-sentencing. *See Commonwealth v. Dennis*, 164 A.3d 503, 510 (Pa. Super. Ct. 2017) (Rule 706 applies pre-sentencing if the defendant is at risk of incarceration); *Parrish*, 304 A.2d at 161 (at sentencing); *Commonwealth v. Diaz*, 191 A.3d 850, 866 (Pa. Super. Ct. 2018) (applying 706(A) post-sentencing). This prohibition goes farther than the constitutional floor set forth in both *Parrish* and *Bearden v. Georgia*, 461 U.S. 660, 672 (1983), which direct courts to consider alternatives before incarcerating indigent defendants without entirely foreclosing the possibility. Rule 706(A), in contrast, creates a bright-line rule that only those "financially able to pay" can be imprisoned, with 706(D) further emphasizing that no "indigent" Pennsylvanians may be imprisoned for failure to pay.

In Rule 706(B), this Court permits courts to hold a hearing to set a payment plan if the defendant cannot pay all fines and costs at once. In Rule 706(B), like 706(A), this Court did not speak of any particular stage in a criminal proceeding, and the court can hold such a hearing at any point. Moreover, the defendant does *not* have to default before setting a payment plan, and the defendant need *not* face

incarceration.[7] Pennsylvania courts routinely set payment plans, by consent or after hearings, prior to default or any threat of incarceration. When a payment plan is set following a hearing, the court may allow a defendant to make payments in "such installments" as it deems appropriate, but it must take "into account the financial resources of the defendant and the nature of the burden its payments will impose." Pa.R.Crim.P. 706(B).

In Rule 706(C), unlike (A) or (B), this Court referred to a specific stage in a criminal proceeding: whenever the court "determin[es] the amount" of a fine or costs. Rule 706(C), unlike Rule 706(B), does not refer to installments or the timing of payments. This Court must have intended Rule 706(C), by its text and logically, to mean something distinct from 706(B)'s payment plan provision. It applies at any point that a court "determin[es] the amount and method of payment." As explained below, this is a term of art consistently used for the imposition of court debt.

In Rule 706(D), this Court created a procedure for "cases in which the court has ordered payment of a fine or costs in installments" and the defendant defaults on those payments. The Rule explains that *after* a defendant defaults on a Rule 706(B) payment plan, the court may hold a hearing to determine ability to pay—or

[7] This is one of the errors made below. Under that court's reasoning, Rule 706(B) and the option to impose a payment plan would only be triggered if a defendant faces incarceration—an outcome inconsistent not only with the plain language of the provision, but also practices across the Commonwealth. *Parrish*, in fact, suggests that payment plans should be set at sentencing. *See* 304 A.2d at 161-62.

it may simply do nothing to collect the funds (such as when it knows the person cannot pay).

Each provision uses different language, including Rule 706(C), which sets forth what considerations a court must make when it "determin[es] the amount" of fines and costs that a defendant must pay. It does not address when a defendant can be imprisoned for nonpayment, putting a defendant on a payment plan or the amount of "such installments," or modifying that payment plan after default.

While there may be multiple points at which the court "determin[es] the amount" of fines and costs—either in full or in part— one point is certainly initially at sentencing when the court determines what those fines and costs will be. Therefore, the plain language of 706(C) requires that the court, in "determining the amount … [of] costs," (e.g., at sentencing) "consider the burden upon the defendant by reason of the defendant's financial means, including the defendant's ability to make restitution or reparations." This is the only reasonable reading of Rule 706(C) that does not add or delete any words. Nor, as is discussed below, is this a burden on trial courts, as addressing unaffordable costs at the point of imposition saves judicial resources by forestalling default.

3. When used in other laws, the language from Rule 706(C) applies at imposition.

Looking to other examples from Pennsylvania and across the country shows that the triggering language of Rule 706(C), the phrase "determining the amount

and method of payment," consistently applies to the imposition of financial obligations at sentencing.

In Pennsylvania, the same phrase is found in 42 Pa.C.S. § 9726, which was enacted a year after Rule 706 and is a verbatim adoption of the Model Penal Code:

> (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(d).[8] As a host of Superior Court decisions and this Court's recent decision in *Ford* have held, Section 9726 applies at sentencing when the court determines the amount of a fine. *See*, *e.g.*, *Commonwealth v. Schwartz*, 418 A.2d 637, 640 (Pa. Super. Ct. 1980) (explaining that "it is far more rational to determine the defendant's ability to pay at the time the fine is imposed" rather than waiting for default). The language is also used in the primary restitution statute, 18 Pa.C.S. § 1106(c)(2), whereby the trial court must determine the amount of restitution owed to a victim.

Other states use the same language in the same way, to mandate what must happen at sentencing. For example, the Supreme Court of Kansas addressed a provision that, "[i]n determining the amount and method of payment of such sum, the court shall take account of the financial resources of the defendant and the

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[8] Originally codified at 18 Pa.C.S. § 1326.

nature of the burden that payment of such sum will impose." *State v. Robinson*, 132 P.3d 934, 937 (Kan. 2006). That court concluded:

> The language is mandatory; the legislature stated unequivocally that this "shall" occur, in the same way that it stated unequivocally that the BIDS fees "shall" be taxed against the defendant. Compare K.S.A.2005 Supp. 22–4513(a), (b). The language is in no way conditional. There is no indication that the defendant must first request that the sentencing court consider his or her financial circumstances or that the defendant must first object to the proposed BIDS fees to draw the sentencing court's attention to those circumstances.

Id. at 939. The Supreme Court of Montana reached a similar conclusion about "determining the amount and method of payment" language in its law, concluding that it required "a serious inquiry or separate determination" about the defendant's ability to pay at imposition. *State v. McLeod*, 61 P.3d 126, 131-32 (Mont. 2002). And in Alaska, the Court of Appeals construed the same language as imposing "a mandatory duty to consider a defendant's earning capacity in connection with any imposition" of court debt. *Ashton v. State*, 737 P.2d 1365, 1365-66 (Alaska Ct. App. 1987). *See also*, *e.g.*, *State v. Pendergrapht*, 284 P.3d 573, 576 (Oregon Ct. App. 2012); *State v. Young*, 636 S.W.2d 684, 687 (Mo. App. 1982). This non-exhaustive list shows that this is not a controversial point: whenever the language in Rule 706(C) is used in Pennsylvania or elsewhere, it places a requirement on the trial court at sentencing.

4. Since 2010, the legislature has affirmed trial court authority to reduce or waive costs pursuant to the procedure in Rule 706(C).

To the extent there was any uncertainty about what trial courts must do when they impose court costs, that uncertainty was—or should have been—eliminated in 2010 when the legislature adopted a pair of statutory amendments to explicitly make court costs waivable. In Act 96 of 2010, the legislature amended 42 Pa.C.S. §§ 9721(c.1) and 9728(b.2) so that a defendant is automatically liable for costs upon conviction "**unless the court determines otherwise pursuant to Pa.R.Crim.P. No. 706(C)** (relating to fines or costs)." 42 Pa.C.S. § 9728(b.2) (emphasis added).[9] Both statutes specify that they apply "Notwithstanding any provision of law to the contrary," i.e., the numerous statutes that otherwise impose individual costs. As the legislative history explains, the references to Rule 706(C) were intended to allow the "sentencing court" to "**retain all discretion to modify or even waive costs** in an appropriate case" when a defendant cannot afford to pay those costs.[10]

Neither the plain language of these provisions nor the legislative history leave doubt about the intent of the legislature. Costs are generally automatic, but these 2010 amendments give substantive authority to courts to reduce or waive

[9] *See also* 42 Pa.C.S. § 9721(c.1) ("The provisions of this subsection do not alter the court's discretion under Pa.R.Crim.P. No. 706(C) (relating to fines or costs)").
[10] *See* footnote 3 and Appendix A (emphasis added).

costs when following the procedure in Rule 706(C). As one Superior Court panel reasoned, these provisions mean that "[t]he trial court may also provide that a defendant shall not be liable for costs under Rule 706." *Commonwealth v. Mulkin*, 228 A.3d 913, 919 (Pa. Super. Ct. 2020).

That the legislature intended Sections 9721(c.1) and 9728(b.2) to provide for waiver of costs that would otherwise be "mandatory" for a defendant who could afford them is confirmed by tools of statutory construction, as the briefs of Appellant and Amici Curiae the Public Defender Association of Pennsylvania, et al., correctly explain. This should not be a point of controversy, as even the Superior Court in the opinion below noted that the trial court had imposed "mandatory court costs," yet concluded that the trial court had authority to reduce or waive those otherwise "mandatory" costs if it so chose. *Commonwealth v. Lopez*, 248 A.3d 589, 590-91 (Pa. Super. Ct. 2021) (en banc). Accordingly, giving the proper interpretation to Rule 706(C) also effectuates the will of the legislature that costs are not "mandatory" for those who cannot afford them.

5. For decades, the Superior Court ruled that Rule 706(C) applied at sentencing, until a renumbering of the Rules and poor advocacy apparently confused its meaning.

Against this body of evidence, the Superior Court's recent decisions are outliers. Yet the contemporaneous view of Rule 706(C) captured by the *en banc* Superior Court just two years after its enactment was that the Rule made it

unlawful for a court to impose financial obligations *unless* it considered the defendant's ability to pay: "In order to impose a fine, a sentencing judge must consider provisions of the Pennsylvania Rules of Criminal Procedure. Rule [706](C)." The failure to do so meant that a trial court "did not comply with provisions of Rule [706]."[11] *Commonwealth v. Martin*, 335 A.2d 424, 425-26 (Pa. Super. Ct. 1975) (en banc). The *Martin* decision set the stage for the Rule 1407/706(C) decisions to follow, as its reasoning was followed in at least six published opinions from the Superior Court and the Commonwealth Court.[12]

[11] *Martin* involved fines, but Rule 706(C) of course refers to both "fines or costs." Oddly, in the opinion below, the Superior Court did not overrule *Martin*, instead cabining it to fines, despite the plain language of the Rule and *Martin*'s legal interpretation not resting on any distinction between the two.

[12] *Commonwealth v. Opara*, 362 A.2d 305, 309 (Pa. Super. Ct. 1976) (en banc) (plurality opinion) (overruling trial court's refusal "to accept any evidence of appellant's inability to pay"); *Commonwealth v. Mead*, 446 A.2d 971, 973 (Pa. Super. Ct. 1982) (citing both Rule 1407(C) and Section 9726 where trial court failed to determine, "on the record, whether [defendant] would be able to pay the fine); *Commonwealth v. Adame*, 526 A.2d 408, 409 (Pa. Super. Ct. 1987) (reversing for "procedural irregularities," including "[f]ailure to . . . inquire as to the appellant's financial ability to pay" in violation of Section 9726 and Rule 1407"); *Famiano v. Commonwealth*, 522 A.2d 1205, 1206 (Pa. Commw. Ct. 1987) (Rule 85 (today Rule 456), which had identical language to Rule 706(C), required that magisterial district judges consider the defendant's ability to pay at sentencing); *Knighton v. Commonwealth*, 600 A.2d 266, 267 (Pa. Commw. Ct. 1991) (quoting *Adame* with approval); *Commonwealth v. Genovese*, 675 A.2d 331, 333-34 (Pa. Super. Ct. 1996) (under Rule 1407(C), "before a fine can be imposed, the court must consider what effect the fine will have on the defendant's 'ability to make restitution or reparations.'"). The lone outlier from these consistent opinions is *Commonwealth v. Ciptak*, 657 A.2d 1296 (Pa. Super. Ct. 1995), which this Court unanimously vacated. *See Commonwealth v. Ciptak*, 665 A.2d 1161 (Pa. 1995) (per curiam). The vacated *Ciptak* opinion concluded that Rule 1407/706 applies only after default. It is, simply put, wrong. It acknowledged Martin in a "But see" string citation but made no attempt to discuss or distinguish that binding ruling. *Id*. Under *Ciptak*, Rule 706(C) is a nullity with no meaning, as (C) would simply be duplicative of (B), which governs payment plans. Moreover, *Ciptak* relied, in part, on a novel distinction between fines and costs that predated the 2010 amendments to Title 42, discussed above, which give clear substantive authority to courts to reduce or waive costs.

Martin controlled for decades, until a renumbering of the Rules in 2000 and poor advocacy led to mistaken Superior Court decisions that do not mention earlier, binding cases. Two cases are key to understanding what occurred. In *Commonwealth v. Hernandez*, 917 A.2d 332, 337 (Pa. Super. Ct. 2007), the Superior Court addressed whether the Constitution requires consideration of a defendant's finances at sentencing when a statute does not. The court ruled that there is no such constitutional requirement, noting that Rule 706(D)—without reference to (C)—does not require consideration of a defendant's ability to pay at sentencing, either. Notable is the lack of discussion of *Martin* or other precedent; the parties' briefs did not even address those cases. *See* Brief of Appellant, *Hernandez,* 33 WDA 2006, 2006 WL 4115223; Brief of Appellee, *Hernandez*, 2006 WL 4115222.

Hernandez came years before the 2010 statutory amendments to Title 42 that clarify the substantive authority to waive costs. It was followed in 2013 by *Commonwealth v. Childs*, which correctly recognized that a defendant is liable for costs "unless the trial court determines otherwise pursuant to Pa.R.Crim.P. 706(c). 42 PA. C.S.A. §§ 9728(b.2), 9721(c.1)"—an acknowledgement that all costs are waivable under the Rule and statutes—while concluding that "[g]enerally, a defendant is not entitled to a pre-sentencing hearing on his or her ability to pay

costs." 63 A.3d 323, 326 (Pa. Super. Ct. 2013).[13] Here, too, counsel failed to cite precedent, including *Martin* and its progeny, leaving the court without information critical to properly resolving the issue. *See* Brief of Appellant, *Childs*, 629 WDA 2012, 2012 WL 5061322.

The result, with the panels apparently unaware of that court's binding precedent and long-standing interpretation of Rule 706(C), led to the Superior Court's decision below. Marshalling the available evidence about the meaning of Rule 706(C), as well as the related statutes, this Court should correct this decade-old error and restore the proper meaning of the Rule.

B. There are straightforward and practical approaches to considering the defendant's ability to pay costs at sentencing.

Effectuating the will of the legislature to "modify or even waive costs in an appropriate case" when the defendant cannot afford them can be accomplished in several straightforward ways. Trial courts must already consider a defendant's ability to pay when imposing a *fine*, and the consideration for costs is no different.

Determining whether a person can afford to pay all costs, some costs, or—if the person is indigent and unable to meet his basic life needs—no costs, is not complex and does not necessarily require a hearing. In *Ford*, this Court astutely noted that "in many cases the trial court will be able to ascertain the defendant's

[13] Amici and the parties agree that a "hearing" is not necessary, as there are other means by which a trial court can assess what costs, if any, a defendant is able to pay.

ability to pay by asking one simple question: 'How do you plan to pay your fines?'" *Commonwealth v. Ford*, 217 A.3d 824, 831 (Pa. 2019). When the trial court tells the defendant which costs and in which amounts it will impose, it can take the same approach. That will be the extent of the inquiry for the many, but not all, defendants who agree they can pay.

For those who respond that they cannot pay, adherence to the simple bright-line basic-life-needs standard set forth in case law and described in detail in the brief of Amici Curiae Community Legal Services, et al., will resolve cases for indigent defendants easily and efficiently. In other cases, "a thorough presentence investigation ['PSI'] report detailing a defendant's assets and income" should provide sufficient information for the trial court to "consider the burden upon the defendant by reason of the defendant's financial means," as Rule 706(C) requires. *Ford*, 217 A.3d at 831 n.14. This, too, is not a new idea, as the 1968 ABA recommendations discussed above suggest the same. However, this Court should clarify that it is not the mere presence of a PSI report but instead the contents thereof that are important: to give the trial court sufficient information to comply with Rule 706(C), the report must at a minimum include information about income, expenses, and any means-based public assistance.

Of course, the Court could also provide trial courts with financial guidelines—as this Court addressing for *in forma pauperis* decisions through its

rule-making authority—so that trial courts do not impose costs that require defendants to "forego[] the necessities of life" to pay. *Shore v. Pa. Dep't of Corr.*, 179 A.3d 441, 444 (Pa. 2018) (Wecht, J., concurring). "Clear standards would mitigate the appearance of arbitrariness that the abuse of discretion standard permits." *Id*. at 445-46. For example, prior to sentencing, defendants could complete an ability-to-pay evaluation form, like the one created by the ACLU of Pennsylvania and recommended by the Interbranch Commission in its report on court debt.[14] Pa. Interbranch Comm'n for Gender, Racial, and Ethnic Fairness, Ending Debtors' Prisons in Pennsylvania – Current Issues in Bail and Legal Financial Obligations: A Practical Guide for Reform (July 10, 2017), at 17.[15] Courts in states such as Arizona have promulgated uniform bench cards with sample questions for the judge to ask about how much the defendant can pay, as well as the type of information the court should consider and the circumstances under which it must reduce or waive the financial obligations, another approach endorsed by the Interbranch Commission.[16] Interbranch Report at 20.

However the Court proceeds, addressing this issue at sentencing reduces the burden not only on the defendant but also on the court and law enforcement.

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[14] Attached as Appendix D.
[15] http://www.pa-interbranchcommission.com/_pdfs/Ending-Debtors-Prisons-in-PA-Report.pdf [hereinafter Interbranch Report].
[16] Attached as Appendix E.

Needless and futile *Gagnon* and contempt hearings for nonpayment of unaffordable costs currently clog judicial districts across the state, wasting government time and resources. For example, the Court of Common Pleas in Lebanon County holds monthly contempt hearings for nonpayment, with the calendar on the UJS Web Portal showing 50 such hearings on September 27, 2021 alone and approximately 90 more scheduled for November 8, 2021. Complying with Rule 706(C) when imposing costs streamlines the ability-to-pay consideration to the front end, reducing the need for such proceedings and benefiting everyone involved in the criminal justice system.

C. AOPC data shows that most court costs imposed on indigent defendants are not being collected; yet the existence of those debts creates severe and debilitating consequences for the Pennsylvanians and their families who are too poor to pay them.

The promise of reform put forth by Rule 706(C) nearly 50 years ago flounders today because courts are not limiting costs to what defendants can afford. Put simply, public defender clients are largely unable to afford court costs imposed upon them, and reducing or waiving costs for those individuals will not harm overall collections. Courts of common pleas imposed $179 million in costs on defendants in 2020, and an analysis of AOPC's data shows that most of the costs imposed on public defender clients will never be paid. The practice of imposing uncollectable costs on indigent defendants sets up a cycle of futility that harms defendants and forces courts to waste resources chasing bad debts.

The place to start understanding the problem is with collection rates over the past decade. This table of figures from AOPC's website that combines payments by both public defender clients and by those who had private counsel, shows the financial obligations imposed in 2011 and 2016, and the percentages collected to date:[17]

Year	Fines Imposed	Percent Collected	Costs Imposed	Costs Collected	Restitution Imposed	Restitution Collected
2011	$54 million	45%	$222 million	59%	$123 million	25%
2016	$44 million	38%	$269 million	50%	$106 million	24%

These collection rates, even ten years after sentencing, are abysmal. Most of the money is collected within the first five years of sentencing, and costs only trickle in after that. A decade after sentencing, approximately $213 million in fines, costs, and restitution remains unpaid—with restitution to victims lagging far behind the collection of fines and costs.

The money that is collected is largely paid by defendants with private counsel, as the data shows that Pennsylvanians represented by public defenders are generally unable to pay. The ACLU of Pennsylvania recently purchased 10 years of complete case data from AOPC to dive into the wealth-based inequities attendant to the imposition and collection of court costs. With help from data

[17] AOPC, "Collection Rates Over Time," http://www.pacourts.us/news-and-statistics/research-and-statistics/dashboard-table-of-contents/collection-rate-of-payments-ordered-by-common-pleas-courts.

scientists at Temple and Rutgers Universities, the statistical analysis used representation status—those individuals represented by private counsel as opposed to those represented by public defenders or other court-appointed counsel—as a proxy for the individuals' relative wealth. 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)[18].

The outcomes are stark, with public defender clients owing more money after five and even ten years despite being assessed slightly less at sentencing:

	Private Counsel Clients	Public Defender Clients
Costs assessed in 2013	$1336	$1038
Unpaid 5 years later	$0	$579

	Private Counsel Clients	Public Defender Clients
Costs assessed in 2008	$1048	$818
Unpaid 10 years later	$0	$233

ACLU Report at 6 (reflecting median amounts of costs assessed and still owed). Within five years, most defendants with private counsel have entirely paid their costs. *Id*. at 5-6. But even after *ten years*, most defendants with public defenders still owe costs. *Id*. Indeed, for cases adjudicated in 2008, by mid-2019 more than half of public defender cases with costs—62%—still had an outstanding balance.

[18] www.aclupa.org/courtdebt [hereinafter ACLU Report].

Id. at 7. It is defendants with private counsel who are, by and large, the ones who are making the payments that are ultimately reflected in AOPC's collections statistics, while defendants with public defenders struggle to pay.

What this data shows is that the criminal justice system imposes decades-long financial burdens on the poorest Pennsylvanians while letting better-resourced people off comparatively lightly. It also provides critical information about how this Court—by ensuring compliance with Rule 706(C) at sentencing—can promote fairness for indigent defendants without depriving the Commonwealth of revenue that is not being collected anyway.

Costs are incident to the judgment of the sentence, but they are still "penal" in nature and cause real harm. *Commonwealth v. Lehman*, 243 A.3d 7, 17-18 (Pa. 2020). The consequences of being too poor to pay include:

- Arrest for "failure to pay" bench warrants, even if the defendant has not missed a court hearing;[19]
- Contempt proceedings and incarceration; [20]
- Driver's license suspension;[21]
- Automatic entry of civil judgments at sentencing and subsequent liens on property;[22]

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[19] Pa.R.Crim.P. 706 explanatory cmt.
[20] The Superior Court has repeatedly reversed contempt convictions for failure to pay when the trial court has failed to consider the defendant's ability to pay, yet the practice has yet to be entirely eliminated in Pennsylvania. *See*, *e.g.*, *Commonwealth v. Mauk*, 185 A.3d 406 (Pa. Super. Ct. 2018); *Commonwealth v. Sneeringer*, 1344 MDA 2019, 2020 WL 996900 (Pa. Super. Ct. Mar. 2, 2020) (unpublished).
[21] 75 Pa.C.S. § 1533.
[22] 42 Pa.C.S. § 9728(a)(1) and (d).

- Denial of Temporary Assistance for Needy Families (“TANF”);[23]
- Denial of food stamps through the Supplemental Nutrition Access Program (“SNAP”);[24] and
- Denial of the ability to apply for a pardon.[25]

As is evident, owing costs makes it *far* more difficult for Pennsylvanians to rehabilitate following a conviction. The costs become another form of punishment that follows them for years and decades, trapping them and their families in what the U.S. Department of Justice has described as “cycles of poverty that can be nearly impossible to escape.”[26] They lose their jobs because they are arrested and detained. They cannot get to work because their drivers’ licenses are suspended, something that occurs in tens of thousands of cases every year in Pennsylvania.[27] An open warrant for missing payments means they cannot obtain food stamps to feed themselves and their family members. They are perpetually on probation.

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[23] 62 P.S. § 432(9); Pa. Dep’t of Pub. Welfare, “Criminal History Desk Guide,” http://services.dpw.state.pa.us/oimpolicymanuals/snap/503_General_Information/503_Appendix_B.htm (explaining that a defendant must have paid all fines, costs, or restitution, or be on a court-approved payment plan to receive benefits).
[24] *Id.* (explaining that an open warrant for violating a term of probation, which includes falling behind on payments, prevents eligibility for SNAP).
[25] The Board of Pardons requires that the “full balance” of court costs be paid before any hearing on the pardon application. *See* Pa. Bd. of Pardons, “Legal Financial Obligations,” https://www.bop.pa.gov/Pages/Fines-and-Costs.aspx.
[26] Vanita Gupta and Lisa Foster, U.S. Dep’t of Justice, Dear Colleague Letter: Fines and Fees (March 14, 2016), https://finesandfeesjusticecenter.org/articles/us-doj-dear-colleague-letter/. In 2017, the Attorney General Jeff Sessions officially withdrew the letter.
[27] Joshua Vaughn, “A Trap of Low-Level Drug Arrests and Court Debt in Pittsburgh,” The Appeal (Sept. 18, 2019), https://theappeal.org/allegheny-county-drug-arrests/ (explaining that in 2017, over 120,000 driver’s licenses were suspended for either nonpayment of fines and costs or for failure to respond to a traffic ticket).

Some of these consequences, such as driver's license suspension or denial of access to TANF, should—in theory—never occur because courts are supposed to put defendants on payment plans that they can afford. That, too, remains more of an aspirational goal in many courts; in *Diaz*, for example, the Superior Court invalidated a jail sentence and a $100 per month payment plan that the trial court imposed on a penniless defendant who offered to sell his blood plasma to (unsuccessfully) avoid jail. 191 A.3d at 866. Payment plans of $5—or $0, if the defendant can afford nothing more, at least temporarily—are legally required but rarely permitted by trial courts.

In 2017, the Interbranch Commission reported that many individuals who owe court debt in Pennsylvania are incarcerated, prevented from being eligible for probation or parole, or kept on probation until they pay all of their court costs. Interbranch Report at 15. Such counterproductive approaches only serve to increase the risk of recidivism, as defendants find it more difficult to successfully reenter society if they face barriers to work and housing because they cannot receive pardons or expungements of their records if they owe costs. Interbranch Report at 16. One Cumberland County judge described in the report "prefer[red]" that defendants "appear in court before their probation expires so he can extend their probation" for nonpayment despite such a practice being unlawful. *Id.*

Penalizing probationers because they cannot pay costs in full is unfortunately a problem throughout the state.

The data on the harm to defendants and their families for unpaid court debt continues to accumulate. In 2020, the Philadelphia Office of Community Empowerment and Opportunity, a city agency, surveyed currently and formerly incarcerated Philadelphians and their families to quantify the impact of prisons fees and court fines and costs. 72% of the respondents reported that court debt led to both financial and other consequences. CEO Report at 2. The most common consequences reported were bench warrants, late fees, arrest warrants, and reincarceration. *Id.* at 5. More than half had to borrow money from family or friends, or fell behind on household bills to pay the court, which is unsurprising, given that, of those who reported any income, 64% reported household income of $25,000 a year or less. *Id.* This court debt acutely affects the lives of Pennsylvanians and their families. In the words of one survey participant, "They put a burden on already burdened individuals." *Id.*

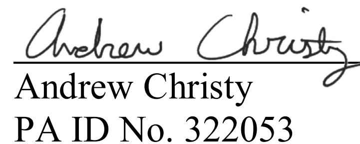
The Superior Court suggested below that there is no need to consider a defendant's ability to pay costs at sentencing because a defendant is entitled to a hearing prior to being incarcerated for nonpayment. Experience has shown, however, that considering the defendant's ability to pay on the "back end" (at default) is not sufficient and that impoverished Pennsylvanians face a host of

harms beyond incarceration. Consistent with guidance from the ABA and ALI dating back to the 1960s, the way to avoid consequences is to not impose unaffordable costs in the first place. Not only is this good public policy, but it is also required by Rule 706(C) and expressly authorized by 42 Pa.C.S. §§ 9721(c.1) and 9728(b.2).

Conclusion

We have a two-tiered criminal justice system in Pennsylvania based on whether a person can pay to end involvement in the criminal justice system. Compliance with Rule 706(C) is a critical step to eliminating that inequity. This Court should reverse the decision of the Superior Court.

Respectfully submitted,



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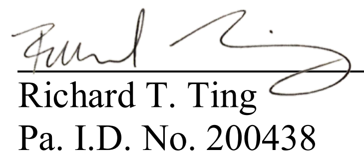

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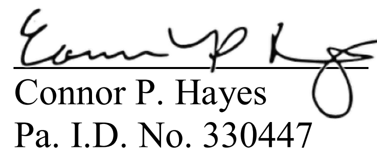

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/s/ *Andrew Christy*

Dated: November 3, 2021 Andrew Christy

HOUSE OF REPRESENTATIVES
DEMOCRATIC COMMITTEE

BILL ANALYSIS

BILL NO: **SB1169** PN2181 SPONSOR: Sen. Waugh
COMMITTEE: Judiciary
DATE: September 15, 2010

PROPOSAL/EXECUTIVE SUMMARY: An act to amend title 42, (Judiciary Code), to further provide for the imposition of costs at sentencing in criminal matters, and for periodic increases.

EXISTING LAW: While this bill would amend 42 Pa. CSA §§9721, & 9728, it would do so by adding new subsections. The first statute addresses sentencing generally, and the latter addresses the specific topic of fines, costs, restitution, and other matters. This bill is in response to a specific court case. Amended on the floor on July 1, 2010, 42 Pa. CSA §§1725.1 and 3571 were amended, as explained below.

ANALYSIS: This bill is the senate version of HB2119, as it appeared in its final form, (PN3033). Thus, and because it is a mirror image of that bill, the analysis of HB2119, shall appear here in modified form. This bill is the senate version of the legislative response to an unusual case from the commonwealth court decided in May, 2009. In that case, ***Spotz v Commonwealth, et al.***, 972 A2d. 125, (Pa. Cmwlth. 2009), a defendant, (a man under a sentence of death from Cumberland County), sued to stop the small but automatic deductions from his prison account of money applied to court costs, after his criminal conviction, on the grounds that the sentencing court had failed to include standard 'costs payment language' in the official sentencing order. Spotz was successful in his suit, and the DOC, was enjoined from making these deductions. (On behalf of the county official who had requested it) This bill would add new subsection (c.1), to §9721, to provide that regardless of whether a sentencing court includes a provision in a sentencing order imposing costs, that costs imposition will be automatic, except that under an amendment passed in committee on March 16, 2010, and which does differentiate this bill from HB2119, a court would retain all discretion to modify or even waive costs in an appropriate case, pursuant to Pa.R.Crim. P. 706(C). (Supreme Court Rule) The addition of new subsection (b.2), to §9728, accomplishes the same goal as to the statute specifically addressing the imposition of fines, costs, restitution, and other matters collateral to sentencing, with the same exception under criminal rule 706(C), added by the amendment in committee.

Addressing a flaw that was uncovered in two costs statutes of title 42, Pa. CSA §§1725.1 and 3571(c)(4), which provide for periodic costs increases tied to the consumer price index, and which sunset on January 1, 2010, an amendment was adopted on July 1, 2010. The amendment extended the sunset dates as to each statute to January 1, 2025. Amended again on the floor on September 14, 2010, the amendment amends 42 Pa. CSA §6327, by adding new subsection (c.1), to further provide that if a minor is facing one of several charges, murder, voluntary manslaughter, aggravated assault, robbery, rape, aggravated and common indecent assault, kidnapping, or conspiracy attempt or solicitation of any such offense, has not been released on bail, and is moving to transfer their case to the juvenile system, they may, with the consent of

the commonwealth attorney and a court order authorizing it, be housed in a secure detention facility approved by the department of public welfare until such time as the motion for transfer is denied, or they turn 18, in which event, the minor shall be transferred to the county jail, provided they have not posted bail.

EFFECTIVE DATE: 60 days from date of enactment. Moreover, the bill would only affect a sentencing taking place after the effective date. No retroactive application. The provisions which are the subject of the amendment of September 14, 2010, shall be effective immediately upon enactment. (Addition of new 42 Pa. CSA §6327(c.1))

PREPARED BY: David M. McGlaughlin 787-3525

Appendix B

MODEL PENAL CODE

AND

COMMENTARIES

(Official Draft and Revised Comments)

With text of Model Penal Code as adopted
at the 1962 Annual Meeting of
The American Law Institute
at Washington, D.C., May 24, 1962

PART I

GENERAL PROVISIONS
§§ 6.01 to 7.09

PHILADELPHIA, PA.
THE AMERICAN LAW INSTITUTE
1985

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traditional language of the Model Code is employed, or the newer terminology of conditional discharge is substituted.[36]

Section 7.02. Criteria for Imposing Fines.*

(1) The Court shall not sentence a defendant only to pay a fine, when any other disposition is authorized by law, unless having regard to the nature and circumstances of the crime and to the history and character of the defendant, it is of the opinion that the fine alone suffices for protection of the public.

(2) The Court shall not sentence a defendant to pay a fine in addition to a sentence of imprisonment or probation unless:

(a) the defendant has derived a pecuniary gain from the crime; or

(b) the Court is of opinion that a fine is specially adapted to deterrence of the crime involved or to the correction of the offender.

(3) The Court shall not sentence a defendant to pay a fine unless:

(a) the defendant is or will be able to pay the fine; and

(b) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime.

(4) 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.

Explanatory Note

Subsection (1) proceeds on the premise that a fine alone should be a sanction to which the court turns only for affirmative reasons,

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[36] *See* Conn. § 53a–29 (supervision if probation, no supervision if conditional discharge; discretionary conditions in both cases); Ky. §§ 533.020, .030 (supervision for probation only; discretionary conditions for both except for requirement of no criminal conduct); N.H. §§ 651:2, :20 (& Supp. 1977) (supervision for probation only; conditions discretionary in all cases; court may require defendant sentenced to suspended sentence to report to prison facility); N.Y. §§ 65.00, .05, .10 (& Supp. 1979) (supervision for probation only; conditions discretionary except for probation requirement of reporting to officer); Md. (p) §§ 65.00, .05, .10 (supervision for probation only; conditions discretionary for both); Mass. (p) ch. 264, §§ 20, 21 (supervision for probation only; conditions discretionary for both); Mich. (2d p) 1979 Final Draft §§ 1305, 1315, 1320 (supervision for probation only; conditions discretionary except for requirements of no violation of criminal law, staying within jurisdiction of state, and report to probation supervisor).

* *History*. Presented in Tentative Draft No. 2 to the Institute at the May 1954 meeting. Reprinted in Tentative Draft No. 4. Presented again to the Institute in Proposed Final Draft No. 1 and approved at the May 1961 meeting. *See* ALI Pro-

that generally other sanctions are likely to be more effective. It accordingly provides that a fine alone should be employed only when it alone will suffice for protection of the public. Subsection (1) does not apply to violations, nor to offenses where a corporation is the defendant.

Subsection (2) articulates criteria for those occasions when the court is considering a fine in addition to a sentence of imprisonment or probation. The premise again is that the routine imposition of fines is to be discouraged, and that affirmative reasons should underlie the imposition of fines in this context.

Subsection (3) provides that a fine shall not be imposed unless the defendant is adjudged capable of paying it, either at once or in the future. Article 302 elaborates on methods of payment and the problem of nonpayment, Section 302.2 providing in particular that nonpayment can result in a jail sentence only when, in effect, the defendant is in contempt of the court order, i.e., only when he could have paid the fine but did not.

Subsection (3)(b) states a second criterion for the imposition of fines, namely that a fine should not be employed when it would interfere with the defendant's opportunity to make restitution or reparation to the victim of the crime.

Subsection (4) directs the court to consider the defendant's resources and ability to pay in determining the amount and method of payment of a fine.

Comment†

1. *Purpose.* This section articulates the policy of the Model Code to discourage use of fines as a routine or even frequent punishment for the commission of crime. Under the classification of offenses set out in Section 1.04 any offense that is punishable *only* by a fine is declared to be a noncriminal violation, since it dilutes the moral blameworthiness that ought to be associated with the concept of crime to apply the concept to behavior for which society is willing only to exact a monetary penalty. Whether or not the imposition of another penalty is permitted, the promiscuous use of fines rests on largely untested assumptions about the deterrent efficacy of sentences requiring only the

ceedings 349–52 (1961). Reprinted with verbal changes in the Proposed Official Draft and approved at the May 1962 meeting. *See* ALI Proceedings 226–27 (1962). For original Comment, *see* T.D. 2 at 36 (1954).

† With a few exceptions, research ended Oct. 1, 1979. For the key to abbreviated citations used for enacted and proposed penal codes throughout footnotes, see p. xxxi *supra*.

payment of a fine.[1] The use of a fine also has distinctly negative value for the administration of penal law when its real rationale is the financial advantage of the agency levying the fine.

This section approaches the use of fines by declaring that they may not be imposed unless the court is satisfied that specifically enumerated conditions have been met. These conditions differ depending on whether the fine is the only penalty imposed or accompanies an imprisonment or probation sentence. Both cases are governed, however, by the limitations in Subsection (3) concerning the impact a fine would have on the defendant's financial circumstances.

2. *Fine as the Only Penalty.* Subsection (1) supports a restricted role for fines by requiring that a court, before imposing a fine as the only sanction for an offense,[2] must satisfy itself that, considering the characteristics of the offense and of the offender, such a disposition will suffice for public protection. In the absence of an opinion, a fine may not be the only sanction employed by the court. Criminal offenses, which are ostensibly to be taken seriously by the general population, should not be routinely met by the imposition of fines as the sole sanction.

However, this section must not be taken to foster the notion that imprisonment should presumptively be the disposition in lieu of a fine. Section 7.01 clearly states that this is not the intention. The two sections together require that the court accord priority to probation or a suspension of sentence, moving from this as a

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[1] "Though studies have shown the threat of small fines to be effective in reducing the frequency of some types of behavior, the studies to date have dealt with relatively minor offenses that are not strongly motivated, and there is no reason to suppose that economic threats are of any unique efficacy." F. Zimring & G. Hawkins, Deterrence 178 (1973). Nigel Walker interprets studies showing a low reconviction rate for offenders who have been fined to indicate

> that the sort of man whom courts think they can correct by means of a fine is in the nature of things more likely to go straight whatever is done to him. This is not at all unlikely. The man who is regarded by sensible courts as worth fining is the man with a steady job, good wages and a fixed address: a better prospect than the intermittently employed man with 'no fixed abode'. The very nature of a fine makes it *less* likely to be applied to the men who are *most* likely to be reconvicted.

N. Walker, Sentencing in a Rational Society 95 (1969).

[2] Subsection (1) is not intended to apply to cases where a corporation is the defendant or where the conviction is for a violation. In both instances, the only alternatives open to the court are a fine and a suspension of the sentence. *See* Sections 6.02(4) and 6.04(1). Since a suspension of the imposition of sentence is not a sentence but the withholding of sentence, it should not be considered another "disposition" within the language of Section 7.02(1). On the other hand, selection between the alternatives set forth in Section 6.02(3) will be governed by the criterion of 7.02(1). Subsections (3) and (4) of Section 7.02 apply fully to corporations and to convictions for violations, as well as to the cases covered by Section 6.02(3).

starting point to a fine alone or to imprisonment only if the factors specified by the Model Code as sufficient to support these alternatives affirmatively emerge.

The judgment that fines are of sufficiently doubtful correctional and deterrent utility to warrant treating the question in this manner has been accepted in several recently revised codes and proposals.[3]

3. *Fine with Other Sanctions.* Subsection (2) addresses the question of when fines should be employed in addition to other sanctions.[4] Again, the major thrust of the proposal is aimed at discouraging the routine use of fines. The question is properly put as whether, given the decision to impose some other sanction, the addition of a fine to the sentence is likely to contribute significantly to achievement of the objectives of the sentencing law. Here, it is possible to state the criteria for use of fines more narrowly than in the case of the use of fines alone, since these are viewed as ancillary to sanctions that offer a greater potential in most instances for satisfying the purposes of the law.

The first criterion, permitting the use of a fine when the defendant derived pecuniary benefit from the offense, suggests that

[3] *See* Haw. § 706-641(1); Iowa § 909.1; Kan. § 21-4607(1); Mass. (p) ch. 264, § 16(b); Tenn. (p) § 39-821(a)(5); Vt. (p) § 3.50.2. The 1970 Study Draft of a New Federal Criminal Code contained such a provision but it was omitted without comment from the 1971 Final Report. *Compare* Brown Comm'n Final Report § 3302 *with* Brown Comm'n Study Draft § 3302(2). There was, however, general agreement of the Commission with the point that the routine imposition of fines should be discouraged. Criteria were stated in § 3302(1) of the Brown Comm'n Final Report which were designed, like Section 7.02(1) and (2) of the Model Penal Code, to retard the routine imposition of a fine: "Because fines do not have affirmative rehabilitative value and because the impact of the imposition of a fine is uncertain, e.g., it may hurt an offender's dependents more than the offender himself, fines are discouraged . . . unless some affirmative reason indicates that a fine is peculiarly appropriate." Brown Comm'n Final Report § 3302 Comment. A 1979 proposed Federal Criminal Code made reference to justifying criteria for *all* sentences. *See* U.S. (p) S. 1722 §§ 2003, 2202 (Sept. 1979). The National Advisory Comm'n on Criminal Justice Standards and Goals, Corrections, Standard 5.5 (1973) is an almost verbatim endorsement of Section 7.02.

[4] *See* Section 6.02(3). *See also* note 2 *supra*. As observed in Comment 5 to Section 7.01, the Model Code proceeds within the tradition of providing for a suspension of the imposition of a sentence rather than a conditional discharge. Although no provision is expressly made in Section 301.1 for the imposition of a fine in cases where sentence is suspended and the defendant is released upon conditions, this might be done under the general terms of Section 301.1(2)(*l*). Codes that employ the device of conditional discharge as a form of sentence often accomplish this possibility more directly by permitting a release upon conditions accompanied by a fine. *See* Ill. ch. 38, §§ 1005-5-3(b), -9-1(b)(& Cum. Supp. 1979); Ky. § 532.040; N.H. § 651:2(IV); N.Y. §§ 60.01(2)(c), 65.05(2); Md. (p) § 75.00(1). When the supervision aspects of probation are appropriate, Section 6.02(3)(d) permits a fine to be joined to the probation order.

There is one code that uses conditional discharge as a sentencing alternative but does not permit a fine to be imposed at the same time. It does, on the other hand, permit a fine and probation. Conn. § 53a-28.

fines are most justified when the offender acted from economic incentives. The idea is not only that he should be deprived of profit from the offense, but also that those who act in response to economic motives are more inclined than not to respond to the economic disincentives contained in the law. A number of recently revised codes and proposals have adopted something like this first criterion.[5]

There were thought to be some other special cases as well for which use of a fine might be appropriate. Some acts of vandalism, for example, though too serious in certain contexts to warrant a fine alone, may warrant imposition of a fine as an addition to probation or a short prison term, in order to contribute to deterrence of the offender or of other potential offenders.[6] Thus, Subsection (2)(b) puts the obligation on the court to arrive at the conclusion that the fine is "specially adapted"—is uniquely useful in the particular context—to deterrence of the crime involved or to the correction of the offender. Several recent revisions contain similar language.[7]

4. *General Limiting Criteria.* Both Subsections (1) and (2) deal with the issue of when a fine should be used in relation to the other sanctions that are availahle for crime. Subsection (3) shifts the focus to factors about the defendant that indicate, in spite of conclusions that might be justified in their absence, that a fine is not appropriate.

One of the serious difficulties in the use of fines is that to a very large extent the impact of the sanction 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.

It can, of course, be said that all criminal sanctions have disparate impacts and that taking such disparity into consideration is one of the important ingredients of the sound exercise of sen-

[5] *See* Haw. § 706-641(2)(a); Kan. § 21-4607(2)(a); Ky. § 534.030(2)(d); N.J. § 2C:44-2(a)(1); N.D. § 12.1-32-05(1)(b) (whether defendant gained as result of crime is one factor to be considered in determining whether to impose fine); Mass. (p) ch. 264, § 16(b); Tenn. (p) § 821. *See also* 3 ABA Standards for Criminal Justice 18-2.7(a) Commentary (2d ed. 1980).

[6] Some provisions permit the court to fix the amount of the fine at twice the gross loss that the defendant's damage to property caused. *See, e.g.*, Ala. §§ 13A-5-11(a)(4), -5-12(c); Fla. § 775.083(f).

[7] *E.g.*, Haw. § 706-641(2)(b); Kan. § 21-4607(2)(b); N.J. § 2C:44-2(a)(2).

tencing discretion by the courts. But the problem is of a very different character when a defendant is actually unable to pay a fine. The traditional response to this situation was to require, as a substitute, service of a jail term fixed according to a variety of criteria but usually based on a ratio of dollars to days.[8] The irony of this practice was that in most cases jail would already have been considered in fixing the sentence and the fine chosen in the belief that no productive purpose would be accomplished by a jail sentence. The defendant in this position was thus required to serve a jail sentence that had previously heen determined not to be necessary for preventive, deterrent or other correctional purposes.

It was for these reasons that the Model Code reformulated the law on this issue, even prior to the Supreme Court's decision in *Tate v. Short*, which adopted the view that " 'the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.' "[9]

Under Subsection (3), the court is not permitted to impose a fine on a defendant who is unable to pay it at the time of sentence and who will not be able to pay a deferred fine in installments or a lump sum. Cases in which a fine is imposed and not paid, therefore, will ordinarily either be instances in which an error as to the application of this criterion has been made (in which case the fine should be set aside) or cases in which the defendant could pay the fine but has refused to do so. Under Section 302.2 a defendant may be imprisoned if he wilfully refuses to pay a fine ordered by the court.

It may be argued against this scheme that the indigent escapes fines completely while others have to pay and that a jail sentence may still have to be imposed in order to prevent the indigent from escaping criminal punishment altogether. By di couraging widespread use of fines in Subsections (1) and (2), the Model Code blunts the force of this point. Moreover, the phrase "is or will be able to pay" allows the imposition of fines for some defendants presently unable to pay, although the sentencing court should

[8] A collection of the laws of each state on this point is reproduced as an Appendix to the opinion of the Court in Williams v. Illinois, 399 U.S. 235, 246 (1970), which held that a state may not, under the equal protection clause, subject convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency. *See also* ABA Standards, Sentencing Alternatives and Procedures § 6.5 Commentary at 285–93 (Approved Draft 1968).

[9] 401 U.S. 395, 398 (1971) (quoting from Morris v. Schoonfield, 399 U.S. 508, 509 (1970)).

consider whether the defendant has other financial obligations that should take precedence over satisfaction of a fine.[10]

In regard to defendants for whom a fine would be the appropriate sanction but who are unable to pay, the court must consider which of the remaining sanctions can most usefully be employed. There are numerous ways, for example, in which a sentence of probation can be employed, or in which a conditional release in the form of a suspension of the sentence can be used. If a jail sentence is necessary in some of these cases in order to vindicate the authority of the law, at least the term can be set in an individualized manner that reflects its being an undesirable but required result.

The judgment that fines should not be imposed on those who are or will be unable to pay them, together with the sanction of contempt or a close analogy in the event of nonpayment, has found acceptance in a number of recently revised codes and proposals.[11]

Subsection (3) also contains a second criterion, namely, that it is inappropriate to sentence a defendant to pay a fine that will prevent him from making restitution or reparation to the victim of his offense. This rests on the simple judgment that the state should not compete with the victim of the crime for what may be the meager assets of the offender. To the extent that the victim would be entitled to a civil judgment, or to the extent that restitution or reparation may be required as a condition of a probationary sentence, any impulse of the court to impose a fine that would have priority in its claims upon the assets of the defendant and diminish the chances of repayment should be resisted. Several recently enacted and proposed revisions have somewhat similar provisions.[12]

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[10] *Compare* ABA Standards, Sentencing Alternatives and Procedures § 2.7(c) (Approved Draft 1968); 3 ABA Standards for Criminal Justice 18-2.7(c) (2d ed. 1980).

[11] *See* Ill. ch. 38, §§ 1005-9-1(c)(1), -9-3(a); Iowa § 909.5; Kan. § 21-4607(3) (although courts must consider ability to pay, the statute does not provide for a sanction of contempt for those who can afford to pay the fine but fail to do so); Ky. §§ 534.030(2), .060(1); Me. tit. 17-A, §§ 1302, 1304; N.J. § 2C:44-2(b) to (d); N.D. § 12.1-32-05(1)(a), (3); Ohio § 2947.14; Ore. § 161.685; Pa. R. Crim. P. 1407 (1979); Cal. (p) S.B. 27 § 1304(e) ("A person may not be sentenced to a term of imprisonment for failing to pay a fine which he is financially unable to pay."); Md. (p) § 75.00; Mass. (p) ch. 264, §§ 16(c), 18; Mich. (2d p) 1979 Final Draft § 1515; Tenn. (p) § 821(a) (does not provide for sanction of contempt); Vt. (p) §§ 3.50.2(1)(c), .50.4. *See also* ABA Standards, Sentencing Alternatives and Procedures § 6.5 (Approved Draft 1968). The Kentucky and New Jersey revisions, *supra*, also borrow a related idea from the ABA Standards by explicitly precluding the imposition of a jail alternative at the time of sentencing.

[12] *See* Haw. § 706-641(3)(b); Ill. ch. 38, § 1005-9-1(c)(2); Ky. § 534.030(2)(c); N.J. § 2C:44-2(b); N.D. § 12.1-32-05(1)(c); Wash. § 9A.20.030 (court can order restitu-

5. *Amount and Payment Method.* Subsection (4) states the related additional point that, since even among defendants "able" to pay there are vast differences in resources, the court should always consider in fixing the amount of a fine and the method of payment the financial resources of the defendant and the burdens upon him that payment will impose.

Section 7.03. Criteria for Sentence of Extended Term of Imprisonment; Felonies.*

The Court may sentence a person who has been convicted of a felony to an extended term of imprisonment if it finds one or more of the grounds specified in this Section. The finding of the Court shall be incorporated in the record.

(1) The defendant is a persistent offender whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant is over twenty-one years of age and has previously been convicted of two felonies or of one felony and two misdemeanors, committed at different times when he was over [insert Juvenile Court age] years of age.

(2) The defendant is a professional criminal whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant is over twenty-one years of age and:

(a) the circumstances of the crime show that the defendant has knowingly devoted himself to criminal activity as a major source of livelihood; or

(b) the defendant has substantial income or resources not explained to be derived from a source other than criminal activity.

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tion in lieu of fine); U.S. (p) S. 1722 § 2202(a)(3) (Sept. 1979) (requiring the court to consider "any obligation imposed upon the defendant to make . . . restitution or reparation to the victim of the offense"); Mich. (2d p) 1979 Final Draft § 1515; Tenn. (p) § 821(a)(4); Vt. (p) § 3.50.2(1)(c)(3); ABA Standards, Sentencing Alternatives and Procedures § 2.7(c)(iii) (Approved Draft 1968); 3 ABA Standards for Criminal Justice 18-2.7(c)(iii) (2d ed. 1980).

* *History.* Presented to the Institute in Tentative Draft No. 2 and considered at the May 1954 meeting. *See* ALI Proceedings 81-87 (1954). Reprinted in Tentative Draft No. 4. Resubmitted, with verbal changes in Subsection (4)(c), to the Institute in Proposed Final Draft No. 1 and approved at the May 1961 meeting. *See* ALI Proceedings 349-52 (1961). Reprinted in the Proposed Official Draft approved at the May 1962 meeting. *See* ALI Proceedings 226-27 (1962). For original Comment, *see* T.D. 2 at 38 (1954).

Appendix C

FINAL REPORT

OF THE

NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS

A PROPOSED NEW FEDERAL CRIMINAL CODE (Title 18, United States Code)

U.S. GOVERNMENT PRINTING OFFICE
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THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS

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U.S. Circuit Judge James M. Carter of California and Congressman Don Edwards of California served as members of the Commission from its inception until December 1967 and October 1969, respectively.

Chapter 33. Fines

§ 3301. Authorized Fines.

(1) Dollar Limits. Except as otherwise provided for an offense defined outside this Code, a person who has been convicted of an offense may be sentenced to pay a fine which does not exceed:

(a) for a Class A or a Class B felony, $10,000;

(b) for a Class C felony, $5,000;

(c) for a Class A misdemeanor, $1,000;

(d) for a Class B misdemeanor or an infraction, $500.

(2) Alternative Measure. In lieu of a fine imposed under subsection (1), a person who has been convicted of an offense through which he derived pecuniary gain or by which he caused personal injury or property damage or loss may be sentenced to a fine which does not exceed twice the gain so derived or twice the loss caused to the victim.

Comment

Existing federal law contains inconsistencies with respect to fines as well as to imprisonment; there are 14 different fine levels in Title 18 with little correlation in amounts authorized for offenses which are similar in nature or seriousness.

The amounts stated in subsection (1) are intended as maximum limits for cases in which economic gain or loss was not involved or is not easily measured. Subsection (2) is particularly useful for the offenses for which fines are most apt to be utilized—economic offenses. For counterparts in existing federal law, see 18 U.S.C. §§ 201(e) and 645.

Note that offenses outside Title 18 may have fines which exceed the limits imposed in this section. See § 3006 and comment thereto, *supra.* Because the number of sanctions which can be used against a convicted organization is limited, it might be desirable to set a separate and higher fine limit for such offenders, for use when subsection (2) is unsatisfactory.

See Working Papers, pp. 192–93, 1262–64, 1300, 1325–26.

§ 3302. Imposition of Fines.

(1) Criteria. In determining the amount and the method of payment of a fine, the court shall, insofar as practicable, proportion the fine to the burden that payment will impose in view of the financial resources of the defendant. The court shall not sentence a defendant to pay a fine in any amount which will prevent him from making restitution or reparation to the victim of

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the offense, or which the court is not satisfied that the defendant can pay in full within a reasonable time. The court shall not sentence the defendant to pay a fine unless:

(a) he has derived a pecuniary gain from the offense;

(b) he has caused an economic loss to the victim; or

(c) the court is of the opinion that a fine is uniquely adapted to deterrence of the type of offense involved or to the correction of the defendant.

(2) Installment or Delayed Payments. When a defendant is sentenced to pay a fine, the court may provide for the payment to be made within a specified period of time or in specified installments. If no such provision is made a part of the sentence, the fine shall be payable forthwith.

(3) Nonpayment. When a defendant is sentenced to pay a fine, the court shall not impose at the same time an alternative sentence to be served in the event that the fine is not paid. The response of the court to nonpayment shall be determined only after the fine has not been paid, as provided in section 3304.

Comment

Existing federal law does not establish by statute general rules for the imposition of fines. Subsection (1) states the basic principle that the fine imposed should be related to the resources of the defendant. The court is also prohibited from setting a fine which will so deplete a defendant's resources that he cannot compensate the victim of his crime. Because fines do not have affirmative rehabilitative value and because the impact of the imposition of a fine is uncertain, *e.g.*, it may hurt an offender's dependents more than the offender himself, fines are discouraged in subsection (1) unless some affirmative reason indicates that a fine is peculiarly appropriate.

Subsection (3) is analogous to the prohibition against deciding at sentencing the sanction for violation of probation (§ 3103). In neither situation can the reason for noncompliance be foreseen.

See Working Papers, pp. 1262–64, 1285–86, 1301, 1326–27.

§ 3303. Remission of Fine.

A defendant who has been sentenced to pay a fine and who has paid any part thereof may at any time petition the sentencing court for a remission of the unpaid portion. If it appears to the satisfaction of the court that the circumstances which warranted the imposition of the fine in the amount imposed no longer exist or that it would otherwise be unjust to require payment of the fine in full, the court may remit the unpaid portion in whole or in part or may modify the method of payment.

Comment

There is no counterpart to this section in existing federal law. The prohibition in § 3304 against the use of coercive measures against the defendant who is unable to pay makes it reasonable to permit adjustment of a fine to fit altered conditions. The statute provides for remission of part of a fine rather than revocation of the entire fine because arguably revocation by the court is unconstitutional in that only the President has the power to pardon and reprieve. However, remission can take place after any payment, no matter how small. See Working Papers, pp. 1286, 1326.

§ 3304. Response to Nonpayment.

(1) Response to Default. When an individual sentenced to pay a fine defaults in the payment of the fine or in any installment, the court upon the motion of the United States Attorney or upon its own motion may require him to show cause why he should not be imprisoned for nonpayment. The court may issue a warrant of arrest or a summons for his appearance.

(2) Imprisonment; Criteria. Following an order to show cause under subsection (1), unless the defendant shows that his default was not attributable to an intentional refusal to obey the sentence of the court, or not attributable to a failure on his part to make a good faith effort to obtain the necessary funds for payment, the court may order the defendant imprisoned for a term not to exceed six months if the fine was imposed for conviction of a felony or 30 days if the fine was imposed for conviction of a misdemeanor or an infraction. The court may provide in its order that payment or satisfaction of the fine at any time will entitle the defendant to his release from such imprisonment or, after entering the order, may at any time reduce the sentence for good cause shown, including payment or satisfaction of the fine.

(3) Modification of Sentence. If it appears that the default in the payment of a fine is excusable under the standards set forth in subsection (2), the court may enter an order allowing the defendant additional time for payment, reducing the amount of the fine or of each installment, or remitting the unpaid portion in whole or in part.

(4) Organizations. When a fine is imposed on an organization, it is the duty of the person or persons authorized to make disbursement of the assets of the organization, and their superiors, to pay the fine from assets of the organization. The failure of such persons to do so shall render them subject to imprisonment under subsections (1) and (2).

(5) Civil Process. Nothing in this section shall be deemed to alter or interfere with employment for collection of fines of any means authorized for the enforcement of money judgments rendered in favor of the United States.

Comment

This section replaces 18 U.S.C. §§ 3565 and 3569, which deal in arbitrary terms with nonpayment of fines. Those sections permit a judgment providing for imprisonment until a fine is paid, and allow release after 30 days upon a finding of the prisoner's inability to pay and execution of a pauper's oath. The proposed approach, on the other hand, is to require a separate proceeding to determine whether there was such culpability for the nonpayment as to warrant a prison sanction in the first place, and to grant such powers to the court as to permit flexibility in treatment of the nonpayer, *i.e.*, give him the "keys to the jail," hold out the possibility of his release to induce payment, or to "taste jail" regardless of payment as a sanction for his contumacy. Payment of the fine can also be made a condition of probation, under § 3103(2)(f). Additional flexibility to modify the fine or method of payment is provided in subsection (3). See Working Papers, pp. 1286, 1300–01, 1328–29.

Appendix D

Pennsylvania Ability-to-Pay Evaluation

Commonwealth of Pennsylvania
v. Docket No.: ___________________________
_____________________, Defendant Balance Due:

Section I: Other Case Information

Other case docket numbers where the defendant owes money, if any:

Section II: Identification and Employment

Name – Last, First, Middle	Date of Birth	Spouse Full Name (if married)	
Home Address	City	State	Zip
Telephone Number	Number of People in House/ Number Working		
Employer	Occupation / Date Hired	Supervisor Name and Telephone Number	
Employer Address	City	State	Zip

If unemployed: Are you actively searching for employment? YES / NO
Do you have a disability preventing employment? YES / NO
If yes, please provide a doctor's note explaining the work restriction. Date expected to be able to return to work: __________

Section III: Monthly Income

Receives: Food stamps ____ Medicaid ____ Social Security ____ Cash Assistance ____

Monthly Income (take-home income)	$
Dates of Last Employment if Unemployed	
Legal Spouse's Income	$
Interest/Dividends	$
Pension/Annuity	$
Social Security Benefits	$
Disability Benefits	$
Unemployment Compensation	$
Welfare/TANF/V.A. Benefits	$
Worker's Compensation	$
Other Retirement Income	$

Support from Other People (parents, children, etc.)	$
Other Income (e.g. trust fund, estate payments)	$
TOTAL MONTHLY INCOME	$

Section IV: Monthly Expenses

Rent/Mortgage	$
Utilities (Gas, Electric, Water)	$
Television/Internet	$
Food (amount beyond what food stamps cover)	$
Clothing	$
Telephone	$
Healthcare	$
Other Loan Payments	$
Credit Card Payments	$
Education Tuition	$
Transportation Expenses (car payment, insurance, transit pass, etc.)	$
Payments to courts/probation/parole	$
Number of Dependents (e.g. children)	
Dependent Care (including child support)	$
Other Expenses (explain)	$
TOTAL MONTHLY EXPENSES	$

Section V: Liquid Assets

Cash on Hand	$
Money in Bank Accounts (checking and savings)	$
Certificates of Deposit	$
Stocks, Bonds, and Mutual Funds	$

MONTHLY INCOME: $___________

MONTHLY EXPENSES: $___________

DISPOSABLE INCOME: $___________
(Income left over after expenses each month)

Signature: ________________________Date: _______________

125%[1] of the 2018
Federal Poverty Guidelines:

Individual: $15,175
Family of 2: $20,575
Family of 3: $25,975
Family of 4: $31,375
Family of 5: $36,775
Family of 6: $42,175
Family of 7: $47,575
Family of 8: $52,975

[1] Recommended by the National Task Force on Fines, Fees and Bail Practices, a joint task force of the Conference of Chief Justices and the Conference of State Court Administrators, coordinated by the National Center for State Courts. *See* National Task Force on Fines, Fees and Bail Practices, "Lawful Collection of Legal Financial Obligations: A Bench Card for Judges," http://www.ncsc.org/~/media/Images/Topics/Fines%20Fees/BenchCard_FINAL_Feb2_2017.ashx.

Appendix E

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of: BENCH CARDS FOR: ABILITY TO PAY AT SENTENCING IN CRIMINAL AND CIVIL TRAFFIC CASES AND A.R.S. § 13-810 ORDER TO SHOW CAUSE HEARING (OSC), LAWFUL COLLECTION OF LEGAL FINANCIAL OBLIGATIONS	Administrative Order No. 2017 - 81

The Fair Justice for All Task Force was established by Administrative Order No. 2016-16. On October 17, 2016, the Arizona Judicial Council supported all of the recommendations of the Fair Justice for All Task Force, including the publication of a Bench Card for Ability to Pay at Time of Sentencing in Criminal and Civil Traffic Cases and a Bench Card for ARS § 13-810 Order to Show Cause Hearings (OSC), Lawful Collection of Legal Financial Obligations.

Therefore, pursuant to Article VI, Section 3, of the Arizona Constitution,

IT IS ORDERED that the attached Bench Card for Ability to Pay at Time of Sentencing in Criminal Cases and Civil Traffic Cases and a Bench Card for ARS § 13-810 Order to Show Cause Hearings (OSC), Lawful Collection of Legal Financial Obligations are approved for use in Arizona courts.

IT IS FURTHER ORDERED that the Administrative Director of the Administrative Office of the Courts shall have the authority to issue Administrative Directives as necessary to amend the attached bench cards.

Dated this 5th day of July, 2017.

SCOTT BALES
Chief Justice

Bench Card for Ability to Pay at Time of Sentencing in Criminal Cases and Civil Traffic Cases

Court-ordered legal financial obligations (LFOs) include all local or state, discretionary or mandatory fines, penalties, costs, fees, surcharges, assessments, restitution and other court ordered financial sanctions. These sanctions may be ordered in criminal cases and civil traffic cases.

Assessment of a defendant's ability to pay may be conducted by court personnel, performing verification through appropriate tools or by the judicial officer posing questions to the defendant.

In criminal cases, a court must impose "the full amount of the economic loss to the victim as determined by the court and in the manner as determined by the court or the court's designee," as required by ARS §§13-603(C), and 13-804(C)(&(E). Restitution is exempt from any payment alternatives imposed for other types of financial obligations, but may be the subject of a time payment plan.

Step 1 – Application of Credits

A. Apply Credit for Time Served if applicable. (§31-145).
B. Apply Credit for Community Restitution if applicable and when allowed. (§13-824)

Step 2 – Defendant Self-Declaration

A. "Can you pay this in full today?"
B. "How much can you pay today?"

Step 3 – Determination of Eligibility for Fine Reduction

A. Affidavit by defendant to claim a hardship.
B. Confirmation of hardship by:
   1. Proof that defendant receives income-based public assistance
   2. DES eligibility check
   3. Automated income check
   4. Defendant's affidavit or response to questions under oath

Step 4 – Granting a Hardship Mitigation[1]

At sentencing, the judge may impose a fine amount that is less than the court's presumptive fine amount, when the judge deems it to be appropriate and as allowed by law. Consider income as a percentage of the Federal Poverty Level (FPL) based on household size. Consider:

A. At least 25% mitigation if the household income is between 200% and130% of FPL;
B. At least 50% mitigation if the household income is less than 130% of FPL, or receipt of income-based public assistance.

Step 5 – Payment

A. Initial payment (what can be paid today)
B. Establishment of payment plan for the balance owed
C. Community restitution in lieu of monetary payment, if permitted by ARS §13-824

2017 Federal Poverty Level (FPL) Income Based on Family Size

Family Size	*130% of FPL*	*200% of FPL*	*Family Size*	*130% of FPL*	*200% of FPL*
Individual	*$15,678*	*$24,120*	*Household of 4*	*$31,980*	*$49,200*
Household of 2	*$21,112*	*$32,480*	*Household of 5*	*$37,414*	*$57,560*
Household of 3	*$26,546*	*$40,840*	*Household of 6*	*$42,848*	*$65,920*

[1] The fine and surcharges should be reduced proportionately unless a mandatory fine or sanction is included, then the amount may not be reduced to an amount less than the mandatory fine or sanction. Additional restrictions on surcharges may apply, see the *Penalty Assessment and Surcharge Guide*. http://www.azcourts.gov/Portals/27/SurchrgGuide012015.pdf

The Operating Under the Influence statutes of A.R.S. §§ 5-395.01,28-1389 and 28-8292 **prohibit** the waiving of a fine or assessment pursuant to those articles or a surcharge imposed pursuant to section 12-116.01 or 12-116.02.

Adopted by Administrative Order 2017-__ Effective July __, 2017

Bench Card for Ability to Pay at Time of Sentencing in Criminal Cases and Civil Traffic Cases

The court may examine the following factors to help determine ability to pay:

a. Whether the defendant receives income-based public assistance, including, but not limited to, Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), veterans' disability benefits, or other state-based benefits provided through the Arizona DES. (All such benefits are not subject to attachment, garnishment, execution, levy, or other legal process);

b. Income, including whether income is at or below 130% or between 130% and 200% of the Federal Poverty Level (FPL) (current guidelines available at https://aspe.hhs.gov/poverty-guidelines);

c. Financial resources, assets, financial obligations, and number of dependents;

d. Whether the defendant 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 defendant'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 a LFO payment would result in hardship to the defendant or his/her dependents; and

i. Any other special circumstances that may bear on the defendant's ability to pay.