

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

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**No. 139 EDA 2021**

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**COMMONWEALTH OF PENNSYLVANIA,**

**Appellee,**

**v.**

**RAHSAAN MAY,**

**Appellant.**

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**Brief of Amicus Curiae the ACLU of Pennsylvania in  
Support of Appellant Rahsaan May**

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Appeal from the Judgment of Sentence Entered November 23, 2020 in the Court of  
Common Pleas of Delaware County CP-23-CR-0004281-2018

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## Statement of Interest of Amicus Curiae

The American Civil Liberties Union of Pennsylvania (“ACLU of Pennsylvania”) is an affiliate of the American Civil Liberties Union, a century-old nationwide, nonprofit, nonpartisan membership organization with over 1.5 million members. The ACLU of Pennsylvania is dedicated to defending and expanding individual rights and personal freedoms throughout the entire Commonwealth and has particular expertise with respect to the assessment and collection of fines, costs, and restitution in criminal cases. We submit this brief in an effort to provide the Court with a more complete picture of why it should instruct the trial court to consider Mr. May’s ability to pay the fine at sentencing.<sup>1</sup>

### Introduction

The trial court imposed a fine of \$1,000, the lowest that was “consistent with the statute,” after hearing that Mr. May, while employed, was nevertheless living with his mother and providing support for a minor child. (N.T. Nov. 23, 2020 at 11). Yet in so doing, it did not comply with the requirements of 42 Pa.C.S. § 9726, which prohibits imposing unaffordable fines. The Supreme Court recently ruled in *Commonwealth v. Ford*, 217 A.3d 824 (Pa. 2019), that Section 9726 requires sentencing courts to consider a defendant’s ability to pay when imposing a “non-mandatory” fine. That decision left unaddressed the important question raised in

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<sup>1</sup> No other person or entity paid in whole or in part for the preparation of this brief.

this case: whether Section 9726 also applies when a sentencing statute sets forth a “mandatory” fine. This is a straightforward question of statutory interpretation, but one that the Supreme Court has never addressed and that this Court has never properly analyzed under the rules of construction.

In imposing the \$1,000 fine, the trial court apparently felt bound by this Court’s holding in *Commonwealth v. Cherpes*, 520 A.2d 439 (Pa. Super. Ct. 1987), that the now-repealed “specific” sentencing provision at issue in that case prevailed over the “general” prohibition against imposing unaffordable fines in Section 9726. *Cherpes*, however, constitutes a misapplication of the rules of construction that this Court should not extend to this sentencing statute, 75 Pa.C.S. § 3804(c)(1). The *Cherpes* panel neglected those rules when it did not harmonize Section 9726 and the language of the sentencing statute by interpreting them *in pari materia*, when it did not find that there was a conflict between the statutes, and when it did not find that the unspecified conflict was “irreconcilable” such that the specific provision must prevail over the general. *See* 1 Pa.C.S. § 1932-1933. In short, *Cherpes* overlooked the statutory interpretation analysis required by law before reaching a conclusion. A proper analysis of the statutes in this case should result in a holding that gives effect to both the sentencing statute and Section 9726, prohibiting the unaffordable fine imposed on Mr. May.

This is an important question of statutory interpretation that this Court should resolve to ensure that thousands of indigent defendants are not punished with unaffordable fines that have lasting repercussions for years and even decades. An analysis of court data from the Administrative Office of Pennsylvania Courts (“AOPC”) shows that most public defender clients still owe such court debt even *ten years* after sentencing, long after most defendants who have employed private counsel (and generally have more means) have paid their debt in full. Indeed, AOPC’s own website shows that only 45% of the nearly \$55 million in fines imposed in 2011 has been collected to date.<sup>2</sup> Collection rates are so low not because most defendants disregard their financial obligations, but because most defendants are low-income or indigent and already struggle to meet their basic life needs, such as housing, food, medical care, transportation, and dependent care. While their fines remain unpaid, those defendants face arrest, incarceration, probation revocation, driver’s license suspension, and the denial of certain forms of public assistance.

The legislature never intended such an outcome. Section 9726(c) and (d) were adopted wholesale from the 1962 Model Penal Code, the drafters of which wisely cautioned that “a defendant of very limited assets . . . may be devastated by

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<sup>2</sup> Administrative Office of Pennsylvania Courts, “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>.

even a small fine that causes economic hardship both to him and to his family out of proportion to the gravity of the offense.” American Law Institute, “Model Penal Code and Commentaries,” (1985) at 240.<sup>3</sup> The intent and purpose behind the statute is to ensure equal punishment whereby impoverished defendants do not receive the same fine as one who is wealthy, as “to a very large extent the impact” of imposing fines “turns on the means of the defendant.” *Id.*

The ACLU of Pennsylvania urges this Court to decline to extend the error in *Cherpes* and instead restore the sentencing balance intended by the legislature by vacating the fine imposed on Mr. May with instructions for the trial court to impose a new fine only after considering his ability to pay.

**A. Data from AOPC shows that courts are imposing unaffordable fines that undermine the public policy goals behind Section 9726.**

Pennsylvania has had a widespread problem in the past decade of courts imposing unaffordable fines on low-income and indigent defendants. According to data on AOPC’s website, in 2011 courts ordered payment of nearly \$55 million in fines, and as of today only 45% of that amount has been paid.<sup>4</sup> To better understand the dynamics behind this sobering figure, the ACLU of Pennsylvania purchased 10 years’ of data from the AOPC, and with the help of data scientists at

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

<sup>4</sup> Administrative Office of Pennsylvania Courts, “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>.



Temple and Rutgers Universities, conducted a statistical analysis.<sup>5</sup> The data shows that within five years most defendants with private counsel had entirely paid their fines. ACLU Report at 1. But even after *ten years*, most defendants represented by public defenders still had not entirely paid their fines. *Id.* Indeed, for cases adjudicated in 2008, by mid-2019 more than half of public defender cases with fines—57%—still had an outstanding balance. *Id.* at 7.

The misconception that some fines are “mandatory,” even for defendants who cannot afford to pay them, exacerbates this problem. Fines are imposed in less than 40% of cases with public defender clients. *Id.* at 4. The likely reason for this is that in *most* cases the only fines are discretionary, and both *Ford* and this Court’s progenitors have made clear that courts must consider a defendant’s ability to pay at sentencing under Section 9726. The remaining cases in which fines are imposed against public defender clients are likely cases with specific fines, such as here, in which this Court’s prior mistaken interpretation of Section 9726 in *Cherpes* has *prohibited* trial courts from considering ability to pay. When courts do fine defendants with public defenders, the courts, on average, impose smaller fines than they impose on defendants with private counsel: the median amounts are \$300 for

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<sup>5</sup> Jeffrey Ward, et al., “Imposition and Collection of Fines, Costs, and Restitution in Pennsylvania Criminal Courts: Research in Brief,” ACLU of Pennsylvania (Dec. 18, 2020), [www.aclupa.org/courtdebt](http://www.aclupa.org/courtdebt).

public defender clients versus \$700 for defendants with private counsel (well below the \$1,000 fine imposed on Mr. May). *Id.* at 5.

These figures highlight how the criminal justice system is imposing debilitating, decades-long financial burdens on the poorest Pennsylvanians while letting better-resourced people off comparatively lightly. But this analysis also provides critical information about how this Court—by ensuring faithful compliance with Section 9726 at sentencing—can improve the balance and promote fairness for indigent defendants.

That so many defendants are unable to pay the fines they receive reflects the fact that far too many Pennsylvanians are indigent and impoverished. In Delaware County, the U.S. Census Bureau reports that the poverty rate was 9.9% as of 2019—and that was before the COVID-19 pandemic.<sup>6</sup> The real cost of living is typically much higher than the Guidelines. The nonprofit and nonpartisan Economic Policy Institute estimates that an “adequate standard of living” in Delaware County requires \$37,857 for an individual.<sup>7</sup> Individuals who earn less than that struggle to keep up with housing, food, childcare, transportation, and medical care, among other necessities. And even for those who can afford their

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<sup>6</sup> U.S. Census Bureau, “QuickFacts: Delaware County, Pennsylvania,” <https://www.census.gov/quickfacts/delawarecountypennsylvania>.

<sup>7</sup> Economic Policy Institute, “Family Budget Calculator: Monthly Costs,” <https://www.epi.org/resources/budget/> (Enter “Delaware County” in field that says “Enter county, state, or metro area” and select for “1 adult” and “no children” in the additional fields.).

basic bills, the unplanned expense of a criminal prosecution is often out of reach. Approximately 40% of adults, for example, would not be able to pay an unexpected \$400 expense out of pocket, an amount well below the fine imposed here.<sup>8</sup> The reality is that indigent defendants in the criminal justice system cannot handle even comparatively minor financial emergencies, let alone significant fines.

And when courts impose unaffordable fines on such low-income individuals, they impose a form of punishment that creates serious downstream consequences. In recent years, this Court has had to repeatedly instruct trial courts to stop incarcerating indigent defendants when they are unable to afford to pay their financial obligations. *See, e.g., Commonwealth v. Dennis*, 164 A.3d 503, 509-10 (Pa. Super. Ct. 2017); *Commonwealth v. Mauk*, 185 A.3d 406, 411-413 (Pa. Super. Ct. 2018); *Commonwealth v. Sneeringer*, 1344 MDA 2019, 2020 WL 996900, at \*3-4 (Pa. Super. Ct. Mar. 2, 2020) (unpublished). Defendants have also had their probation illegally revoked for nonpayment. *See, e.g., Commonwealth v. Hudson*, 231 A.3d 974 (Pa. Super. Ct. 2020); 42 Pa.C.S. § 9763(b)(13) (permitting courts to make payment of a fine a condition of probation).

People who owe fines from criminal cases face other forms of punishment impacting themselves and their families:

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<sup>8</sup> Bd. of Governors of the Fed. Rsrv. Sys., *Report on the Economic Well-Being of U.S. Households in 2018*, at 21 (2019), <https://bit.ly/3c6SOfD>.

- Arrest for “failure to pay” bench warrants, even if the defendant has not missed a court hearing;<sup>9</sup>
- Driver’s license suspension;<sup>10</sup>
- Denial of Temporary Assistance for Needy Families (“TANF”);<sup>11</sup>
- Denial of food stamps through the Supplemental Nutrition Access Program (“SNAP”);<sup>12</sup> and
- Denial of the ability to apply for a pardon.<sup>13</sup>

As is evident from this list, owing fines makes it *far* more difficult for defendants to rehabilitate and become productive members of society. They lose their jobs because they are arrested and detained. They cannot get to work because they do not have a driver’s license, something that occurs in tens of thousands of cases every year in Pennsylvania.<sup>14</sup> An open warrant for missing payments means they cannot obtain food stamps to feed themselves and their family members. They are perpetually on probation. Some of these consequences, such as driver’s license suspension or denial of access to TANF, should—in theory—never occur because

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<sup>9</sup> Pa.R.Crim.P. 706 Explanatory Comment.

<sup>10</sup> 75 Pa.C.S. § 1533.

<sup>11</sup> 62 P.S. § 432(9); Pennsylvania Department of Public Welfare, “Criminal History Desk Guide,”

[http://services.dpw.state.pa.us/oimpolicymanuals/snap/503\\_General\\_Information/503\\_Appendix\\_B.htm](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).

<sup>12</sup> *Id.* (explaining that an open warrant for violating a term of probation, which includes falling behind on payments, prevents eligibility for SNAP).

<sup>13</sup> The Board of Pardons requires that the “full balance” of fines be paid before any hearing on the pardon application. *See* Pennsylvania Board of Pardons, “Legal Financial Obligations,” <https://www.bop.pa.gov/Pages/Fines-and-Costs.aspx>.

<sup>14</sup> 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).

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 *Commonwealth v. Diaz*, 191 A.3d 850, 866 (Pa. Super. Ct. 2018), for example, this Court invalidated a \$100 per month payment plan that the trial court imposed on an indigent defendant without considering the defendant’s ability to pay (that court also illegally jailed the defendant). 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.

Such harms have been well documented by, for example, the Pennsylvania Interbranch Commission for Gender, Racial, and Ethnic Fairness.<sup>15</sup> In 2020, the Philadelphia Office of Community Empowerment and Opportunity, a city agency, surveyed currently and formerly incarcerated Philadelphians and their family members to quantify the impact of prisons fees and courts fines and fees.<sup>16</sup> 72% of the respondents reported that this 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

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<sup>15</sup> Pennsylvania Interbranch Commission 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), [http://www.pa-interbranchcommission.com/\\_pdfs/Ending-Debtors-Prisons-in-PA-Report.pdf](http://www.pa-interbranchcommission.com/_pdfs/Ending-Debtors-Prisons-in-PA-Report.pdf).

<sup>16</sup> Philadelphia Office of Community Empowerment and Opportunity, “The Impact of Criminal Court and Prison Fines and Fees in Philadelphia,” <https://www.phila.gov/media/20210505004207/FinesandFees-final.pdf>

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 criminal court debt acutely affects the lives of defendants and their families. In the words of one survey participant, “They put a burden on already burdened individuals.” *Id.*

Yet all of these harms can be avoided if courts do not impose unaffordable fines in the first place and, instead, comply with the mandate of Section 9726 by always considering a defendant’s ability to pay at sentencing. While there is no direct legislative history addressing Section 9726(c) and (d), Pennsylvania’s legislature adopted it verbatim from Section 7.02 of the 1962 Model Penal Code.<sup>17</sup> The Commentary to the Code thus provides valuable insight into the central role that Section 9726 plays in protecting indigent defendants from unaffordable fines and ensuring equal justice regardless of wealth. The American Law Institute noted that “to a very large extent the impact” of using fines “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.

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<sup>17</sup> At the time, this provision was found in 18 Pa.C.S. § 1326, as it was enacted in Act 346 of 1974. *See Commonwealth v. Schwartz*, 418 A.2d 637, 639 (Pa. Super. Ct. 1980).

Model Penal Code and Commentaries at 240. Accordingly “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.* at 241. By barring unaffordable fines, the only cases where fines are 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.* This Court should consider these historical antecedents and instruct trial courts to never impose unaffordable fines on low-income and indigent defendants.

**B. The imposition of unaffordable “mandatory” fines disregards the rules of construction, which require sentencing courts to consider a defendant’s ability to pay under Section 9726 even when a sentencing statute sets forth an otherwise minimum fine.**

Despite the inability of most defendants to pay large fines like the one imposed in this case, and despite the harm that such fines cause, the trial court nevertheless imposed the \$1,000 fine without any evidence that Mr. May could afford to pay it. The fine was the lowest “consistent with the statute” as set forth in 75 Pa.C.S. § 3804(c)(1), but the court was constrained by its view of this Court’s prior decisions interpreting Section 9726. (N.T. Nov. 23, 2020 at 11). This constituted an illegal sentence. While this Court has previously held that certain specific fines are “mandatory” and must be imposed regardless of the sentencing

requirements in Section 9726(c) and (d) and the defendant's ability to pay those fines, those cases were wrongly decided because the Court did not properly consider the rules of construction. While this panel cannot overrule prior precedential panel decisions, it should instead construe them narrowly to the specific sentencing statutes at issue. In so doing, it must apply the rules of construction to determine whether there is an "irreconcilable" conflict between Sections 9726 and 3804.

Proper application of the rules of construction shows that there is, in fact, no conflict, let alone one that cannot be reconciled based on the plain language of the statutes. The sentencing provision in Mr. May's case, 75 Pa.C.S. § 3804(c)(1), provides in relevant part that a defendant convicted of DUI with a controlled substance "shall be sentenced . . . to . . . pay a fine of not less than \$1,000 nor more than \$5,000." But that sentencing provision does not operate in a vacuum. 42 Pa.C.S. § 9726 requires that courts consider whether a defendant is able to afford to pay a fine:

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

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

(d) Financial resources.--In determining the amount and method of payment of a fine, the court shall take into account the financial



resources of the defendant and the nature of the burden that its payment will impose.

To properly analyze the interplay between these statutes, this Court must first read the statutes *in pari materia* because statutes that govern the imposition of fines relate “to the same class of persons or things.” 1 Pa.C.S. § 1932. As a result, both statutes “shall be construed together, if possible, as one statute.” *Id.* See *Commonwealth v. Mazzetti*, 44 A.3d 58, 65 (Pa. 2012) (reading sentencing provisions *in pari materia*). In addition, 1 Pa.C.S. § 1933 requires that both statutes, “if possible, be construed so that effect can be given to both.” *Commonwealth v. Warner*, 476 A.2d 341, 343 (1984).

Following these instructions and construing Sections 3804 and 9726 together, literally, yields the following:

[A defendant convicted of DUI with a controlled substance] shall be sentenced . . . to . . . pay a fine of not less than \$1,000 nor more than \$5,000. The court shall not sentence a defendant to pay a fine unless it appears of record that: (1) the defendant is or will be able to pay the fine; and (2) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime. 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.

This is the proper reading with Section 9726 modifying Section 3804. If, instead, we read Section 3804 after Section 9726, as an exception to the requirement that the court consider the defendant’s financial means before imposing a fine, then Section 3804 would cancel out Section 9726, rendering Section 9726 a nullity. But

read the above way, effect is given to all provisions. The judge must consider whether Mr. May can afford to pay a fine in the \$1,000-5000 range. If he cannot, then the court must impose a lower amount—including, potentially, no fine at all. Thus, Section 9726 sets forth an exception: do not impose the \$1,000 fine *unless* the defendant can afford to pay it. The fine is mandatory only for those who can afford it and is otherwise tailored to the defendant’s financial resources.

Statutory interpretation does not require—or even permit—that a statute setting forth a specific fine automatically prevails over a general provision like Section 9726. Instead, a specific statutory instruction controls over a general *only if* the general provision is “in conflict with a special provision” *and* “the conflict between the two provisions is irreconcilable.” 1 Pa.C.S. § 1933. These are strict requirements. The Supreme Court has repeatedly directed that “[o]nly if the conflict between the general and specific provisions is irreconcilable does the special provision prevail and act as an exception to the general provision under 1 Pa.C.S. § 1933.” *Commonwealth v. Karetny*, 880 A.2d 505, 520 (Pa. 2005).

In *Karetny*, the Supreme Court addressed whether there was an “irreconcilable conflict” between two provisions in the Crimes Code that set forth separate offenses for the same conduct. 880 A.2d at 518. This Court had concluded that a general provision supersedes a specific provision, per Section 1933, without actually analyzing whether the conflict was irreconcilable. *Id.* Even though the

same underlying conduct could lead to prosecution under both provisions, the Supreme Court reasoned that merely because two provisions overlap does not mean that they “should be said to be in facial, irreconcilable conflict with each other” such that only one statute should prevail. *Id.* at 522. *Karetny* thus reaffirms the maxim that § 1933 first requires courts to ascertain the existence of an irreconcilable conflict *before* concluding that one provision prevails over another.

Applying this analysis shows that there is no actual conflict between Sections 9726 and 3804, let alone one that is irreconcilable. The natural reading of the statutes—and the one that gives effect to all provisions—is that the trial court must impose a fine of between \$1,000-5000 *unless* the evidence shows that the defendant cannot afford to pay it. Even if this does somehow constitute a conflict between the statutes, it is not irreconcilable. To be irreconcilable means that “simultaneous compliance” with both provisions “is impossible.” *See Hoffman Mining Co., Inc. v. Zoning Hearing Bd. of Adam Tp.*, 32 A.3d 587, 594 (Pa. 2011) (addressing the analogous context of conflict between statute and ordinance). That would require that Section 3804 say something like, “the court must impose this fine *even if the defendant cannot afford to pay it.*” Absent clear and explicit statutory language to that effect, Section 9726 applies to fines imposed under Section 3804 and other mandatory fines statutes.

This Court has not, however, ever engaged in the statutory analysis required to reconcile Section 9726 and other statutes imposing mandatory fines. For example, in this Court’s recent non-precedential decision in *Kress*, the panel did not attempt to read Sections 9726 and the sentencing statute at issue (there 75 Pa.C.S. § 1543) *in pari materia*. Instead, relying on a prior panel decision, it concluded “that as a general provision, Section 9726(c) cannot prevail over a specific penalty provision.” *Commonwealth v. Kress*, 532 MDA 2020, 2020 WL 6778992 at \*4 (Pa. Super. Ct. Nov. 18, 2020) (unpublished). Yet that panel decision, *Commonwealth v. Cherpes*, 520 A.2d. 439, 449 (1987), also never attempted to read these provisions together—it simply concluded without complying with the analysis required by the rules of construction that a specific statute always controls over a general statute.<sup>18</sup> In doing so, it disregarded the other requirements of Section 1933, which lay out the prerequisites for a general statute prevailing over a specific one—namely, that the provisions be in conflict and that the conflict be irreconcilable. As a result, the panel decision in *Cherpes* stands on faulty and incomplete reasoning, which violates Section 1933 and should not be extended to apply to Sections 9726 and 3804.

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<sup>18</sup> *Cherpes* considered now-repealed Section 409(c) of Title 65, “which requires a penalty equal to three times the amount gained through violation of the State Ethics Act.” See *Cherpes*, 520 A.2d at 449.

Finally, we must address the scope of the Supreme Court’s recent decision in *Ford*, which the non-precedential panel decision in *Kress* incorrectly relied upon. *Ford* addressed only “non-mandatory” fines. 217 A.3d at 827. While both mandatory and discretionary fines were at issue in the Superior Court’s decision, the Commonwealth sought allowance of appeal *only* on the issue of discretionary fines after losing on that issue before the Superior Court; the defendant did not seek a cross-appeal on the imposition of mandatory fines after this Court ruled those fines were not subject to Section 9726. *Id.* at 828. Accordingly, in the opinion’s procedural background section, the Supreme Court merely recounted the panel’s reasoning and reliance on *Commonwealth v. Gipple*, 613 A.2d 600, 601 n. 1 (Pa Super. Ct. 1992),<sup>19</sup> in explaining how the panel adjudicated the mandatory fines. *Id.* at 827. The mandatory-fines issue was simply not before the Supreme Court, and recounting the procedural history—including this Court’s disposition of the mandatory fines—did not constitute a holding by the Court.<sup>20</sup> Subsequently, in *Kress* this Court incorrectly relied on *Ford* in representing that it resolved the interplay between mandatory fines and Section 9726. The result is that this important issue remains unaddressed by the Supreme Court—and is in urgent need

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<sup>19</sup> *Gipple* involved a constitutional challenge to the imposition of a fine and did not consider application of Section 9726. *See* 613 A.2d at n.1 (“Appellant does not argue that a failure to examine one’s ability to pay is violative of any legislative act.”). The lack of any analysis on an issue raised *sua sponte* without the benefit of briefing by the parties renders *Gipple* irrelevant.

<sup>20</sup> The ACLU of Pennsylvania was *amicus curiae* to the Supreme Court in *Ford*.

of clarification to ensure that trial courts comply with the law and do not impose unlawful sentences.

### **Conclusion**

For the foregoing reasons, *Amicus Curiae* the ACLU of Pennsylvania urges this Court to hold that the rules of construction require that the sentencing court apply both Sections 9726 and 3804, vacate the fine, and remand with instructions to impose only a fine that Mr. May can afford.

Respectfully submitted,

/s/ Andrew Christy

Andrew Christy

Pa. I.D. No. 322053

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**CERTIFICATE OF COMPLIANCE WITH WORD LIMIT**

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

**CERTIFICATE OF COMPLIANCE**

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

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was served upon the parties via PACFile.

Date: June 23, 2021

/s/ Andrew Christy  
Andrew Christy