

February 23, 2018

Jeffrey M. Wasileski, Counsel
Supreme Court of Pennsylvania
Criminal Procedural Rules Committee
601 Commonwealth Avenue,
Harrisburg, PA 17106



Re: Comments to Notice of Proposed Rulemaking
Regarding Proposed Amendment of Pa.Rs.Crim.P. 403,
407, 408, 409, 411, 412, 413, 414, 422, 423, 424, 454,
456, and 470

INTRODUCTION

Eastern Region Office
PO Box 60173
Philadelphia, PA 19102
215-592-1513 T
215-592-1343 F

Central Region Office
PO Box 11761
Harrisburg, PA 17108
717-238-2258 T
717-236-6895 F

Western Region Office
PO Box 23058
Pittsburgh, PA 15222
412-681-7736 T
412-681-8707 F

In 2016, the American Civil Liberties Union of Pennsylvania (ACLU-PA) launched its “debtors’ prisons” project in an effort to understand why thousands of Pennsylvanians are jailed each year for failing to pay fines, costs, and restitution (collectively “legal financial obligations” or “LFOs”), especially given that so many are clearly indigent. With support from the Independence Foundation, we have investigated this problem through court observations, interviews with judges, and direct representation of defendants. In January 2017, we submitted a number of proposals to this Committee that we hoped would strengthen procedural protections for poor defendants and give judges concrete guidance in collection matters. We greatly appreciate the Committee’s work on these issues, and the Committee’s proposal for Rules reform. With these comments, we urge the Committee and, of course, the Supreme Court, to do more to reduce the use of imprisonment to collect fines, costs and restitution.

Pennsylvania was once a leader in the movement to ban the incarceration of indigent defendants who are too poor to pay LFOs. Forty-five years ago, in its landmark decision *Commonwealth ex rel. Parrish v. Cliff*, 304 A.2d 158 (Pa. 1973), the Supreme Court of Pennsylvania prohibited the incarceration of defendants who could not afford to pay LFOs in one lump sum and required that defendants have an opportunity to make payments in reasonable installments. Reciting decades of U.S.

Supreme Court decisions, the Court agreed with the appellants that a defendant cannot be jailed for failure to pay fines or costs “where immediate compliance is prevented by indigency.” *Id.* at 160-61. That same year, the Court codified those requirements in what are today Rules 456 (for summary cases) and 706 (for non-summary criminal cases), which specified that a court can impose imprisonment for nonpayment only if the “court finds the defendant is not indigent.” Pa.R.Crim.P. 706. It took ten more years before the United States Supreme Court held that the Equal Protection and Due Process Clauses require that judges take affirmative steps to ensure that they do not jail defendants for failure to pay without ensuring that their failure to pay was willful. *Bearden v. Georgia*, 461 U.S. 660, 672 (1983).

Pennsylvania’s leadership on this issue was not surprising. Our Constitution’s Declaration of Rights has always prohibited debtors’ prisons. *See* Pa. Const. art. 1, § 16. As early as 1787, our legislature extended this provision beyond civil debts and applied it to criminal cases,¹ and such statutory protections remain in effect today.² For centuries, Pennsylvania has taken clear action to protect the rights of indigent defendants.

Today, there is a new effort to reform how courts collect LFOs, which reflects a growing awareness that some judges, faced with massive caseloads, have at best cut corners in protecting defendants’ rights; at worst, they have succumbed to pressure to collect LFOs to pad county and municipal budgets. Both of these issues surfaced in Ferguson, Missouri, prompting the March 2016 Dear Colleague Letter from the United States Department of Justice that triggered this Committee’s review of the Rules governing LFO collections in Pennsylvania magisterial district courts (“MDJs”). The goal of this new reform movement is to give judges clear and specific instructions on how to fulfill their constitutional obligation to evaluate ability to pay when collecting LFOs. In the past two years, courts and legislatures from Arizona, Louisiana, Missouri, Michigan, and others have enacted strong procedural reforms to ensure that their states’ courts do not violate defendants’ rights during collection proceedings.³ Moreover, states

¹ *See* An Act Containing a Supplement to the Acts Made for the Relief of Insolvent Debtors and Also Granting Relief to Felons Unable to Make Restitution of Stolen Goods, Act of February 28, 1787, chapt. 1261, 12 Pa. Stat. L. 353.

² *See, e.g.*, Act of June 4, 1091, P.L. No. 231, 39 P.S. §§ 13 and 14 (allowing the release of defendants with LFOs).

³ *See, e.g.*, Arizona Administrative Order 2017-81 (adopting a bench card for use at sentencing and default) (adopted in 2017); Colo. Rev. Stat. § 18-1.3.702(4) (“In determining whether a defendant is able to comply with an order to pay a monetary amount without undue hardship to the defendant or the defendant's dependents, the court shall consider . . .”) (enacted in 2016); Louisiana Act 260 of 2017 (which goes into effect in August 2018 and is available at <https://www.legis.la.gov/legis/ViewDocument.aspx?d=1051827>); Mich. Court R. 6.425(E)(3) (to determine whether a defendant has a “manifest hardship” that indicates an inability to pay, the court must consider 6 factors) (enacted in 2016); Missouri “Supreme Court Order Dated June 30, 2017 re: Adoption of Lawful Enforcement of Legal Financial Obligations – A Bench Card for Judges,” which incorporates the National Task Force’s recommendations; Washington State’s Supreme Court has explicitly adopted the *in forma pauperis* guidelines into criminal cases as a simple way to assess ability to pay, *see City of Richland v. Wakefield*, 380 P.3d 459, 464 (Wash. 2016).

have also started to adopt best practices from the National Task Force on Fines, Fees, and Bail Practices, a joint effort of the Conference of Chief Justices and the Conference of State Court Administrators, which released a bench card last year to codify both the clearly-established law and explain *how* trial courts establish whether a defendant is able to pay. The bench cards from these jurisdictions are attached as Appendices 4-6.

Through our work across the Commonwealth, ACLU-PA has observed that Pennsylvania judges also need guidance. We have heard judges express their frustration at the lack of standards and guidance in the Rules governing LFOs. The need for guidance is particularly acute in the Commonwealth's 516 MDJ courts, where judges carry vast summary offense and traffic caseloads and therefore impose and collect LFOs in many more cases than the courts of common pleas—all without the assistance of dedicated collections or probation staff to assist them.⁴ Indeed, ACLU-PA's work in this area was inspired by the reported statement of one MDJ that he did not believe he had any alternative to jailing Eileen DiNino, an indigent mother who died in jail after she could not pay the fines and costs resulting from her children's truancy.⁵ Clear and specific rules can help prevent such tragedies.

We appreciate the attention of the Rules Committee to these issues. Unfortunately, we believe that the proposed rules changes fall short of what is needed to provide guidance to MDJs and standardize their practice. In one respect, we are concerned that the proposed rules will actually accelerate, without the required due process, the suspension of defendants' driver's licenses for nonpayment, which is already a systemic and unconstitutional practice.

The chief problem with the current Rules is that Rule 456 and the other Rules that govern LFOs do not incorporate, or even mention, the constitutional standards for evaluating ability to pay set forth by Pennsylvania's appellate courts and the United States Supreme Court, which busy MDJs cannot be expected to find on their own. The proposed changes do not provide the level of detail and specificity given trial courts in other states to help them evaluate whether a defendant is able to pay. The result is that Pennsylvania's MDJs will continue to struggle to determine what it means to be, as a matter of law, able to pay, will continue to make arbitrary decisions about whether someone can pay, and will continue to violate indigent defendants' clearly established rights.

Pennsylvania should not fall behind the wave of reform that is changing court practices across the country. Accordingly, we urge the Committee to reconsider its proposal and issue a Rules revision that provides the guidance that MDJs need. As is noted by the numerous other public comments this Committee has received, this is an issue of great importance that is attracting substantial attention.

⁴ Our comments also apply to the Philadelphia Municipal Court and the Traffic Division thereof.

⁵ Dan Kelly, "Experts Testify That Truant Parents Should Not Be Jailed," Reading Eagle, Sept. 23, 2014, <http://www.readingeagle.com/news/article/experts-testify-that-truant-parents-should-not-be-jailed>.

Executive Summary

Given the length of our Comments, we include this summary of our major points. Detailed comments on each of these points follow beginning on page 10, in the same order as in this Executive Summary (which starts with post-disposition proceedings and works backwards to pre-disposition proceedings). We have drafted revised rules, complete with additions and strikethroughs, that we encourage the Committee to propose and the Supreme Court of Pennsylvania to adopt. Those proposed rules are attached as Appendices A (with annotations) and B (without annotations).

Post-Disposition collection of LFOs:

- **The proposal for Rule 456 does not sufficiently guard against incarceration of indigent defendants – those without the means to pay – for nonpayment of LFOs.**
 - Rule 456 should, as the Committee has proposed, require that MDJs put in writing the reasons why a defendant is able to pay and why imprisonment is appropriate: But that alone is not sufficient to ensure that defendants’ rights are protected, as is demonstrated by how MDJs have responded to a similar requirement instituted in 2015.
 - The Committee’s proposed list of factors for MDJs to consider must be revised: As written, the proposed factors are advisory and not binding, and they still fail to do what the Rules must: they provide no guidance to MDJs on *how* to evaluate a defendant’s financial status. The problem is compounded by the proposed categories that would suggest that MDJs look at gross income rather than net. Is a single parent who earns \$500 per month and lives with her parents able to pay? What about a single person who earns \$985—full-time net minimum wage—and receives food stamps and Medicaid? Nothing in the proposal will address this problem because the proposal does not provide clear guidance. The result is that defendants who cannot presently afford to pay risk being punished despite their indigence. The Rules have to do a better job of creating uniform standards for MDJs, or else they will have no choice but to continue to make arbitrary decisions without any consistency from court to court.
 - Rule 456 must reflect the constitutional requirement that MDJs affirmatively inquire into the reasons for nonpayment: *Bearden v. Georgia*, 461 U.S. 660, 672 (1983), requires that trial courts affirmatively inquire into the reasons for nonpayment of LFOs and impose sanctions only if defendants have willfully failed to pay. Where a defendant’s liberty is at stake, the court cannot wait for the defendant to explain why he or she did not pay, but should instead conduct a rigorous inquiry into the defendant’s financial condition. Rule 456 must unequivocally direct judges to fulfill this constitutional requirement.

- Rule 456 must bar the imprisonment of indigent defendants for nonpayment of LFOs: Pennsylvania law prohibits jailing indigent defendants for nonpayment, and Rule 456 must unequivocally reflect that law.⁶
- Rule 456 must specify in its text that MDJs cannot incarcerate a defendant without providing counsel and must include an explicit reference to Rule 121 for any waiver of counsel: Many MDJs are unaware that the rules require appointment of counsel for those who cannot afford it prior to incarceration for failure to pay LFOs. Rule 456 must explicitly address this in the text by explaining the right to counsel and referencing the affirmative obligation on MDJs to conduct an appropriate waiver colloquy whenever a defendant wishes to waive that right.
- Rule 456 must explicitly incorporate the core legal requirements of civil contempt purge conditions: MDJs imposing jail sentences for nonpayment of LFOs under Rule 456 are using their civil contempt powers. Accordingly, Rule 456 must make clear that any “purge condition” – the mechanism to escape punishment by complying with the court’s order – can be imposed only if the court finds beyond a reasonable doubt that the defendant has the present ability to comply.⁷
- **The proposal does not give MDJs sufficient instruction on how to determine how much a defendant is able to pay:**
 - Binding principles from Pennsylvania’s appellate case law on how to determine whether a defendant is able to pay must be reflected in the Rules: Pennsylvania case law already explains that there is a presumption of indigence and an inability to pay if a defendant receives means-based public assistance or the services of the public defender.⁸ Moreover, the Superior Court has repeatedly explained that trial courts in criminal cases should look to the “established processes for assessing indigency” from the *in forma pauperis* cases when determining whether a defendant is indigent.⁹ Under those cases, a defendant who cannot afford his basic life needs cannot afford to pay, which is also consistent with the jurisprudence on ability-to-pay criminal fines.¹⁰ This dovetails with the Superior Court’s instruction

⁶ See Pa.R.Crim.P. 706(A), (D) (“When there has been default and the court finds the defendant is not indigent, the court may impose imprisonment as provided by law for nonpayment.”); 42 Pa. Cons. Stat. § 9730(b)(2), (3); *Bacik v. Commonwealth*, 434 A.2d 860, 863 (Pa. Commw. Ct. 1981) (then-Rule 65 (today Rule 456) “precludes the possibility of imprisonment ever being imposed upon one whose indigency is established”).

⁷ See *Barrett v. Barrett*, 368 A.2d 616, 621 (Pa. 1977).

⁸ See *Commonwealth v. Eggers*, 742 A.2d 174, 176 n.1 (Pa. Super. Ct. 1999); *Koziatek v. Marquett*, 484 A.2d 806, 808 (Pa. Super. Ct. 1984).

⁹ *Commonwealth v. Cannon*, 954 A.2d 1222, 1226 (Pa. Super. Ct. 2008).

¹⁰ See *Stein Enterprises, Inc. v. Golla*, 426 A.2d 1129, 1132 (Pa. 1981); *Gerlitzki v. Feldser*, 307 A.2d 307, 308 (Pa. Super. Ct. 1973) (en banc). See also *Commonwealth v. Gaskin*, 472 A.2d 1154, 1157-58 (Pa. Super. Ct. 1984) (when a defendant has no “financial assets [or] liabilities”

that there is a “duty of paying costs ‘only against those who actually become able to meet it without hardship.’”¹¹ At a minimum, these principles must be reflected in the Rules.

- The Rules should set forth the presumptions of indigence in Pennsylvania law: Our appellate courts have established factors that demonstrate a rebuttable presumption of indigence. The Committee should incorporate this law in its proposed Rules, and build on it, in line with the reforms adopted by other states. The Rules should provide for a presumption of indigence when:
 - The defendant’s net income (after tax and other non-discretionary automatic deductions) is less than or equal to 125% of the federal poverty level.
 - The defendant receives income-based public assistance, including, but not limited to, Supplemental Nutrition Assistance Program (SNAP), Medicaid, Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), veterans’ disability benefits, or other state-based benefits;
 - The defendant is or has been within the past six months homeless, incarcerated, or residing in a mental health facility
 - The defendant is an unemancipated juvenile; or
 - The defendant is on his or her own unable to meet basic living expenses, including, but not limited to, food, rent/mortgage, utilities, medical expenses, transportation, child support, and dependent care.Such presumptions are not only consistent with existing law, but they will also ease the administrative burden on courts, which have an affirmative obligation to inquire into the defendant’s finances when determining ability to pay—if a defendant falls under one of the presumptions, and no evidence rebuts that presumption, then the court can simply stop its inquiry.
- The Rules should require use of a uniform ability-to-pay form whenever the MDJ must evaluate ability to pay: In instances where the presumptions of indigence do not apply or the MDJ has evidence to rebut them, then the court has an obligation to consider the defendant’s entire financial picture.¹² Using a uniform form, to be completed by the defendant, will ensure that MDJs are consistently evaluating the same evidence, and it is also in line with reforms in other jurisdictions and a practice endorsed by the United States Supreme Court.¹³

and has been “living from hand to mouth,” the court lacks any evidence supporting a finding of ability to pay a fine).

¹¹ *Commonwealth v. Hernandez*, 917 A.2d 332, 337 (Pa. Super. Ct. 2007) (quoting *Fuller v. Oregon*, 417 U.S. 40, 54 (1974)).

¹² *Commonwealth v. Ruiz*, 470 A.2d 1010, 1012 (Pa. Super. Ct. 1984); *Commonwealth ex rel. Bashore v. Leininger*, 2 Pa. D. & C. 3d 523, 528-29 (1977).

¹³ See *Turner v. Rogers*, 564 U.S. 431, 447-48 (2011) (endorsing “the use of a form (or the equivalent) to elicit relevant financial information” at an ability-to-pay hearing).

- **The Rules must reflect that defendants cannot be placed on payment plans they cannot afford:**
 - Nothing in the Rules currently reflects that Pennsylvania law prohibits setting defendants on payment plans that they cannot afford—indeed, the Rules provide no guidance whatsoever on how MDJs should set payment plans.¹⁴ To address this problem and ease the administrative burden on MDJs, the Rules should provide a clear and simple chart that presumptively limits maximum monthly payment plans based on a defendant’s net income. If there is evidence to rebut these presumptive maximums, the MDJ may do so by using an ability-to-pay form and inquiring further into the defendant’s finances.

- **The Rules must be modified to substantially reduce the use of bench warrants for nonpayment, which includes providing clearer notice to defendants who have defaulted:**
 - With 1.5 million bench warrants pending in Pennsylvania at the end of last year because defendants have defaulted on payments of LFOs, the Rules should be revised to substantially reduce that figure.¹⁵ Defendants should have 30 days to cure default before the MDJ issues a warrant, up from the current 10 days. Moreover, the current notice that is sent to defendants, referred to as a “pre-warrant,” is inadequate and does not actually explain that defendants have failed to pay and what their options are to come into compliance. The procedure must be reformed to ensure defendants actually receive notice before a warrant is issued and they are arrested.

- **MDJs need a specific and uniform procedure to administratively terminate uncollectible cases:**
 - MDJs currently lack a procedure to administratively terminate inactive cases that are uncollectible due to a defendant’s persistent indigence. In the absence of such a procedure, MDJs are saddled with over a million cases dating back to the 1970s where defendants are unable to pay. Requiring MDJs continue to pursuing collection in these cases accomplishes nothing but the worsening of judicial backlogs and a waste of judicial resources. This is the issue that sparks the most complaints from MDJs. The Rules should relieve indigent defendants and MDJs

¹⁴ 42 Pa. Cons. Stat. § 9730(b)(3) (courts can set payment plans only after considering the “defendant’s financial resources” and “the nature of the burden the payment will impose” – it would make no sense to consider such information and then disregard it); *Commonwealth v. Hernandez*, 917 A.2d 332, 337 (Pa. Super. Ct. 2007) (there is a “duty of paying costs ‘only against those who actually become able to meet it without hardship.’”) (quoting *Fuller v. Oregon*, 417 U.S. 40, 54 (1974)).

¹⁵ This and other statistics about Pennsylvania cases are cited and explained in detail in our substantive comments below.

alike from the pointless burden of unending and fruitless collections hearings in cases where there is no reason to expect the defendant will be able to pay.

Other Post-Disposition Unconstitutional Practices that Require Reform

- **Driver’s licenses must not be suspended unless there has first been an ability-to-pay hearing:**
 - Under the current procedure in Rule 470, MDJs automatically send notice to the Pennsylvania Department of Transportation 25 days after a defendant fails to make any required payment in traffic cases so that the Department can suspend the defendant’s driver’s license. The result is that tens of thousands of Pennsylvanians have their licenses suspended every year without any court determination of whether they were able to make payment. Recent federal court decisions in other states that, like Pennsylvania, automatically suspend defendants’ driver’s licenses upon default, have found this practice unconstitutional without a pre-deprivation hearing and a finding that the defendant is able to pay.¹⁶ Unfortunately, the Committee’s proposal exacerbates the situation by shortening the notice period to 15 days – thus bypassing not only the ability-to-pay determination, but also the defendants’ right to appeal. The Committee should propose that Rule 470 be modified to specify that MDJs shall send notice to the Department only *after* holding a payment determination hearing under Rule 456 and finding a defendant able to pay, and providing for suspension of that notice where the defendant states his or her intention to file an appeal.

- **The process of jailing defendants while they await a payment determination hearing under Rule 456 is an unconstitutional deprivation of liberty that resulted in the jailing of over 2,000 individuals in 9,000 cases in 2016:**
 - *Bearden* requires that courts hold a pre-deprivation hearing prior to depriving a person of their liberty due to nonpayment of LFOs. Rule 456(C) allows a court to require a defendant in default to post collateral (a form of bail), or be held for up to 72 hours, if for some reason the court cannot immediately hold a payment determination hearing.¹⁷ That is unconstitutional because the defendant is explicitly being jailed *while awaiting* the hearing required by *Bearden*. Data from AOPC shows numerous cases where MDJs have used this procedure to jail defendants who are, for example, homeless or unemployed, which are facts that show the defendant is unable to pay and cannot be lawfully jailed. That same data shows that over 2,000 unique individuals were jailed in 9,000 cases in 2016. However, some counties get by fine without it using this procedure: that year,

¹⁶ See *Robinson v. Purkey*, Civil Action No. 17-1263, 2017 WL 4418134 (M.D. Tenn. Oct. 5, 2017); *Fowler v. Johnson*, Civil Action No. 17-11441, 2017 WL 6379676 (E.D. Mich. Dec. 14, 2017).

¹⁷ This is referred to in the court records and the Magisterial District Court System as incarceration for “failure to post collateral.”

MDJs in Bucks and Montgomery Counties only used the procedure *once*. The procedure must be abolished and defendants must be given timely payment determination hearings.

Sentencing:

- **MDJs must consider whether a defendant is or will be able to pay when imposing fines and costs at sentencing:**
 - An existing statute requires that MDJs consider ability to pay when imposing a fine, and those statutory requirements must be reflected in the Rules for MDJs, as they are in the rules for courts of common pleas: The statutory requirements of 42 Pa. Cons. Stat. § 9726(c) and (d) are binding on all courts, including MDJs, and the Rules must reflect those statutory requirements. Similarly, the key holdings from the body of binding case law interpreting that statute, such as that defendants do not waive this statutory right even if they plead guilty, must be incorporated.¹⁸
 - The Supreme Court of Pennsylvania has the constitutional authority to require that MDJs consider defendants’ ability to pay so-called “mandatory” fines and costs at sentencing: For decades, the position of this Committee and the Supreme Court has been that the Court has broad constitutional authority to promulgate procedural rules to govern the imposition of fines and costs at sentencing. As recently as 2010, the legislature has ratified this understanding by explaining that costs in non-summary cases are automatically imposed unless the court specifies otherwise pursuant to Rule 706(C).¹⁹ The Court should exercise its authority to ensure that ability-to-pay determinations at sentencing apply to all fines and costs.

Case Commencement:

- **The Rules should provide defendants with more than 10 days to respond to a citation or summons:** The ACLU welcomes the Committee’s proposal to increase the time to respond to citations or summonses to 30 days. This change brings Pennsylvania in line with most states and may reduce the extraordinary number of warrants issued at the outset of cases, which currently number over 500,000 each year.
- **The Rules should eliminate the current expectation that a defendant will post collateral to plead “not guilty”:** The Committee’s proposal allows a defendant to avoid the obligation to post collateral by certifying that he or she is unable to do so. While that is preferable to the current system, it would be much more efficient for defendants and MDJs alike to eliminate the request for collateral for *all* defendants. Pennsylvania is one of only 5 states that requires any type of prepayment to contest a charge, and ACLU-PA believes that this requirement is one of the main reasons why MDJs issue hundreds of thousands of pre-disposition warrants in summary cases.

¹⁸ *Commonwealth v. Gaskin*, 472 A.2d 1154, 1157-58 (Pa. Super. Ct. 1984).

¹⁹ See 42 Pa. Const. Stat. §§ 9721(c.1) and 9728(b.2) (imposing costs automatically unless a court determines otherwise pursuant to Rule 706(C)).

ACLU-PA's Comments on the Committee's Proposed Rules Changes

I. Post-Disposition Collection of LFOs

A. The proposal for Rule 456 does not sufficiently guard against incarceration of indigent defendants – those without the means to pay – for nonpayment of LFOs.

The Committee has proposed two changes that are directed toward preventing improper incarceration for failure to pay: the requirement that MDJs make written findings before incarcerating a defendant for failure to pay and some guidance in the comments to relevant rules concerning factors an MDJ should consider in determining ability to pay. While these changes would be some progress from the status quo, ACLU-PA believes that neither change, nor the combination, is sufficient to make MDJs adhere to the standards for LFO collections established by the appellate courts.

1. Requiring that MDJs put in writing the reasons why a defendant is able to pay and why imprisonment is appropriate is necessary, but not sufficient protection. (Rule 456)

Undoubtedly, requiring that MDJs document the facts supporting the determination that a defendant is able to pay and the reasons for imprisonment is fundamental to ensuring transparency and accountability. It will also give a chance for the MDJ to reflect on whether the facts really do justify such action, and ACLU-PA supports this proposal from the Committee. Experience has shown, however, that MDJs need more specific instruction on determining ability to pay. In 2015, the Supreme Court adopted the Committee's recommendation to amend Rule 456(C)(2), which governs whether a defendant in default can be required to post collateral (a form of bail), or be held for up to 72 hours, if for some reason the court cannot immediately hold a payment determination hearing.²⁰ As part of these changes, MDJs must now document: 1) the reasons why collateral is necessary to secure a defendant's appearance (e.g. the defendant has a history of failing to appear); and 2) the facts supporting a finding that the defendant "has the ability to pay monetary collateral."²¹ We know, from the AOPC, that MDJs have received extensive training on this change.

Unfortunately, neither the requirement of documentation nor the training has stopped MDJs from setting collateral that defendants demonstrably cannot meet, thus condemning them to await their ability-to-pay hearings in jail. We know this because the reasons given by MDJs to explain why

²⁰ The term "collateral" is currently used in the rules to refer to two different procedures by which defendants need to post money. The first type of collateral, under Rule 403 and others, requires that a defendant pay "collateral" in order to enter a plea of not guilty. The second type of collateral, and the one discussed in this section, refers to a form of bail that a defendant must post in order to ensure he or she will appear at a payment determination hearing.

²¹ This second requirement makes "collateral" distinct from bail, as it can be imposed only if the court finds the defendant has the present ability to post the collateral.

they believe the defendant can afford the collateral (and therefore buy his freedom) often demonstrate the opposite. We have collected some of these entries from MDJs across the Commonwealth, entered by MDJs in calendar year 2016, as documented in case files and the computer system managed by AOPC:

Collateral ordered	Facts that support a determination that the defendant has the ability to pay monetary collateral
\$409.65	Mom has money but refuses to pay
\$227.60	not able to pay
\$300.00	defendant was found living in the woods

Fifty additional examples are attached as Appendix 7.

As this prior effort at reform demonstrates, MDJs need more explicit instruction in order to ensure constitutional ability-to-pay determinations.

2. The addition of a Comment listing “[s]ome factors that should be considered” when evaluating ability to pay will not provide the explicit instruction that MDJs need to avoid unconstitutional collections practices. (Rules 454, 456, and new Rule 459)

ACLU-PA appreciates the Committee’s effort to provide examples of information that MDJs need to consider when determining whether someone is able to pay, but we believe that the proposal falls far short of what the law requires and, in some respects, is contrary to the law. First, the examples are simply advisory and not binding—they appear only in the Comments and not in the text of the Rules, and are characterized as “[s]ome factors that *should* be considered” when evaluating ability to pay—not factors that *must* be considered. The Rules should follow the lead of jurisdictions like Colorado, that mandate that courts consider a list of factors when evaluating whether a defendant is able to pay. *See* Colo. Rev. Stat. § 18-1.3.702(4) (“In determining whether a defendant is able to comply with an order to pay a monetary amount without undue hardship to the defendant or the defendant's dependents, the court shall consider . . .”); Mich. Court R. 6.425(E)(3) (to determine whether a defendant has a “manifest hardship” indicating an inability to pay, the court must consider 6 factors).²²

Second, the proposed categories of information still fail to provide any guidance to MDJs on *how* to weigh and evaluate the information they receive. Is a defendant who is a single parent with a child, works part-time earning \$500 per month, and lives with her parents able to pay? What about a single defendant who has no dependents, earns \$985 per month (net full-time minimum-wage pay), pays \$600 in rent and utilities, has a car and other miscellaneous expenses, and receives food stamps and Medicaid? The Rules *have to* provide the answers to these questions, or

²² Both of these provisions were adopted in 2016.

else MDJs will have no choice but to continue to make arbitrary decisions without any consistency from court to court.

Finally, as set forth in more detail below, the factors themselves miss the mark in terms of the applicable law and will lead to MDJs finding that people are able to pay when they in fact—and as a matter of law—are unable to pay.

1. Dependent care: ACLU-PA agrees that courts should consider a defendant’s dependents and the amount of money that it actually takes to care for them.
2. Gross income: Although the Committee proposes looking at gross income, Pennsylvania courts typically look instead at net income. *See, e.g.*, Pa.R.C.P. 1910.16-1 and 1910.16-2 (child support is based on net income). This is also used by courts such as those in Philadelphia and Westmoreland Counties, which already use ability-to-pay forms to evaluate income. *See* Appendices 8-10. Reliance on gross income ignores automatic and non-discretionary deductions, such as taxes and child support, which can leave a defendant unable to pay. It therefore is not an accurate measure of a defendant’s ability to pay and will lead to erroneous judicial decisions. ACLU-PA recommends instead looking at net income.
3. Income from “previous recent years”: The defendant’s prior income may be misleading, particularly if that individual has suffered a job loss or no longer makes that money prior to adjudication of the underlying case. The better way to reach the question of what financial resources the defendant currently has is to ask about investments, bank accounts, and other places where wealth accumulated from prior jobs may be liquid and readily available.
4. Value of real estate (including the defendant’s home): Our Supreme Court has explained that an individual need not liquidate such assets if the person is unable to pay. *See Stein Enterprises*, 426 A.2d at 1132-33 (an automobile is needed for “legitimate, necessary purposes” and need not be sold to pay court costs). Thus, in its current form, this provision suggests that defendants need to sell property that they have no legal obligation to sell in order to try to pay their LFOs.

Instead, we suggest that the Rules be amended to require MDJs to consider the following factors when considering whether a defendant is able to pay:

Monthly Income

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.) ²³	\$
Other Income (e.g. trust fund, estate payments)	\$
TOTAL MONTHLY INCOME	\$

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	\$

Liquid Assets

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

These categories of information will give a more complete picture of a defendant's finances and allow the court to make informed decisions.

²³ The Committee's proposal states this correctly: it is contributions currently made to the defendant's support, not a consideration of what a defendant's friends or relatives might be able to contribute.

B. If they are to protect the rights of indigent defendants, the Rules must: (1) require MDJs to follow constitutionally required procedures; (2) tell MDJs how to conduct ability-to-pay and contempt hearings that meet legal standards; and (3) direct MDJs to provide counsel before incarcerating any defendant who cannot afford counsel. (Rule 456)

1. Rule 456 must explicitly incorporate the constitutional requirement that MDJs affirmatively inquire into the reasons for the defendant's nonpayment.

The United States Supreme Court held in *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) that trial courts must affirmatively inquire into the reasons for nonpayment and find that a defendant has willfully refused to pay prior to imposing any sanction for nonpayment of LFOs. This is also the law in Pennsylvania. See *Commonwealth v. Eggers*, 742 A.2d 174, 176 (Pa. Super. Ct. 1999); *Commonwealth v. Dorsey*, 476 A.2d 1308, 1312 (Pa. Super. Ct. 1984). Yet decades later, Rule 456 still does not include that requirement. As the *Bearden* Court acknowledged, the threat to a defendant's liberty requires that the court not wait for the defendant to raise his or her financial circumstances—instead, the obligation of inquiry is on the MDJ, in the same way that it is prior to waiver of counsel under Rule 121.

2. Rule 456 must unequivocally bar the incarceration of indigent defendants for nonpayment of LFOs, as Pennsylvania law requires.

Pennsylvania law is clear that indigent defendants cannot be incarcerated for nonpayment of LFOs: “[Rule 456] precludes the possibility of imprisonment ever being imposed upon one whose indigency is established.” *Bacik v. Commonwealth*, 434 A.2d 860, 863 (Pa. Commw. Ct. 1981) (addressing then-Rule 65 which today is Rule 456); see also 42 Pa. Cons. Stat. § 9730(b) (permitting incarceration only if a defendant is “financially able to pay”); Rule 706(D) (permitting incarceration for nonpayment “only if the defendant is not indigent”). Today, Rule 456 lacks this bright-line instruction, and it must be clearly stated in the Rule to provide clarity and guidance to MDJs.²⁴

3. Rule 456 must specify in its text that MDJs cannot incarcerate a defendant without providing counsel and must include an explicit reference to Rule 121 for any waiver of counsel.

The law is settled that Rule 122 requires counsel prior to incarceration for failure to pay LFOs. See *Commonwealth v. Farmer*, 466 A.2d 677, 678 (Pa. Super. Ct. 1983). While this is reflected in the Comment to Rule 456—and indeed, the proposed Rules changes would provide additional clarity in the Comment—its absence from the *text* of Rule 456 is the likely reason why some MDJs are unaware that the right to counsel applies to payment determination hearings. What

²⁴ Until 1985, this provision was explicit in the precursor to Rule 456, then Rule 65. That year, Rule 65 was rewritten and became Rule 85. There is certainly no indication in the Committee's Report or anywhere else that the Supreme Court intended that MDJs should have discretion to jail indigent defendants when common pleas judges do not.

ACLU-PA has heard from some MDJs is either a belief that there is no right to counsel, or that counsel need not be provided at the payment determination hearing where the defendant is sent to jail if that defendant had counsel at some prior proceeding, such as at trial or at a prior payment determination hearing. An explicit statement in the text of Rule 456 about the right to counsel at payment determination hearings can solve this problem.

ACLU-PA has also discovered that MDJs permit, or in some cases even encourage, defendants to waive their right to counsel by simply handing them the waiver of counsel form printed from the MDJS computer system, rather than by performing the colloquy required by Rule 121. Several defendants, including a client we represented in Fayette County, signed forms *after their hearings* waiving their right to counsel, and clearly without understanding what they were signing. Rule 121 is intended to prevent this, and Rule 456 should explicitly reference the required colloquy in that Rule. These two changes to Rule 456 will ensure that defendants' fundamental right to counsel is adequately protected.

4. Rule 456 must incorporate the core legal requirements of civil contempt purge conditions.

The procedure outlined in Rule 456 governs the use of the MDJ's civil contempt authority.²⁵ As the goal of Rule 456 is to compel defendants to pay their LFOs, MDJs who imprison defendants usually set a condition to permit those defendants to leave jail if they pay a certain amount of money. That condition is a civil contempt purge condition, and it is governed by the well-established Pennsylvania case law that a purge condition can be imposed only if the court finds “[b]eyond a reasonable doubt, from the totality of the evidence before it,” that the defendant is capable of paying the purge amount at the time that he is found in contempt. *Barrett*, 368 A.2d at 620-21. To do otherwise would be to unlawfully impose a sentence of criminal contempt without the requisite due process protections. *Id.*

This requirement must be included in Rule 456 to ensure that defendants are not imprisoned based on conditions that they cannot possibly pay. That is because the foundation of a civil contempt order is the principle that the defendant holds the key to his own release. When a court imprisons a defendant on the condition that he pays \$500, and he does not have \$500, then that court has violated the law because it is beyond the defendant's power to comply with the order. Rule 456 must make this clear.

C. Determining ability to pay. (Rules 456 and suggested new Rule 459)

1. Pennsylvania's appellate case law already provides presumptions of indigence and an explanation of what it means to be “able to pay,” and the Rules must incorporate these binding interpretations.

²⁵ The Comment to Rule 456 notes that indirect criminal contempt is governed by Rule 140. To the best of our knowledge, in practice, MDJs do not use their indirect criminal contempt powers for nonpayment of LFOs, and instead proceed under Rule 456.

Our Supreme and Superior Courts have provided guidance to Pennsylvania’s trial courts on how to determine whether a defendant is, as a matter of law, able to pay in a number of contexts. The key takeaway from these cases is that an evaluation of ability to pay the court must realistically assess the defendant’s financial situation, and that people who cannot afford to feed or house themselves or consistently pay their bills should not be asked to give the court their last \$5. Yet none of these cases are cited in the Rules, nor are their rulings incorporated therein. This oversight leads to arbitrary and illegal results and the Committee should propose changes to correct that.

Our appellate courts’ rulings reflect a common sense approach to determine whether a person is able to pay. For example, the Superior Court has said that receiving public assistance (*e.g.*, Supplemental Security Income, food stamps, or Medicaid) and the services of the public defender’s office “invite the presumption of indigence.” *Eggers*, 742 A.2d at 176 n.1. *See also Koziatek v. Marquett*, 484 A.2d 806, 808 (Pa. Super. Ct. 1984) (there is a “prima facie case of impoverishment” when the “sole source of support was a monthly disability payment”). That court has also explained that the Rules protect defendants’ constitutional rights by ensuring that there is a “duty of paying costs ‘only against those who actually become able to meet it without hardship.’” *Commonwealth v. Hernandez*, 917 A.2d 332, 337 (Pa. Super. Ct. 2007) (quoting *Fuller v. Oregon*, 417 U.S. 40, 54 (1974)). Otherwise, defendants are being ordered to pay what they cannot afford—and jailed for nonpayment.

What it actually means to suffer a “hardship” and to be indigent, and therefore unable to pay, comes into focus through the civil *in forma pauperis* (“IFP”) cases, which the Superior Court has repeatedly instructed provide the “established processes for assessing indigency” in criminal cases. *Commonwealth v. Cannon*, 954 A.2d 1222, 1226 (Pa. Super. Ct. 2008). This is because of the “dearth of case law” in criminal cases, compared with the “well-established principles governing indigency in civil cases.” *Commonwealth v. Lepre*, 18 A.3d 1225, 1226-27 (Pa. Super. Ct. 2011). *See also Commonwealth v. Reese*, 31 A.3d 708, 718 n.2 (Pa. Super. Ct. 2011) (en banc) (“[W]e can all agree there are circumstances where we must borrow concepts from our civil law because there is a dearth of case law on the topic in the criminal context,” including IFP principles).

When determining indigence in response to IFP petitions, the question is “not whether petitioners are unable to pay the costs but whether they are in poverty. If they are in poverty, it follows that they are unable to pay the costs, and their petition should be granted.” *Gerlitzki v. Feldser*, 307 A.2d 307, 308 (Pa. Super. Ct. 1973) (en banc). Inability to pay costs must be “read not with an accountant’s but a housewife’s eyes,” as poverty is not a question of net worth but instead “whether he is able to obtain the necessities of life.” *Id.* A petitioner with “no income except public assistance benefits” and “minimal” net worth is in poverty and thus eligible to proceed IFP. *Id.* Where the defendant has some income and/or assets, the courts’ review of those resources is specific and grounded in practicality. Thus, in *Gerlitzki*, the petitioners owned assets including a station wagon and a truck and had a small positive net worth, but they could not meet their basic living expenses without public assistance. *Id.* They could have paid court costs—perhaps by selling a car—but as a matter of law, they were indigent and therefore *unable* to pay. *Id.*

This approach has been adopted by the Pennsylvania Supreme Court, which views poverty as “not . . . a mere mathematical exercise” of income versus expenses but instead an analysis of “all the facts and circumstances of the situation, both financial and personal, [which] must be taken into the account.” *Stein Enterprises, Inc. v. Golla*, 426 A.2d 1129, 1132 (Pa. 1981). Accordingly, “if the individual can afford to pay court costs only by sacrificing some of the items and services which are necessary for his day-to-day existence, he may not be forced to prepay costs in order to gain access to the courts, despite the fact that he may have some ‘excess’ income or unencumbered assets.” *Id.* In that case, although the trial court did not view the petitioner’s automobile as a necessity, the Court found that he needed the car for “legitimate, necessary purposes” and was not required to sell it to pay his court costs. *Id.* at 1133. *See also Amrhein v. Amrhein*, 903 A.2d 17, 22 (Pa. Super. Ct. 2006) (a “focus on only gross income ignores the unassailable expenses of life” including “rent, utilities, [and] the costs of health insurance”).

These IFP cases dovetail with the Superior Court’s instruction in *Hernandez*, 917 A.2d at 337, that there is a “duty of paying costs only against those who actually become able to meet it without hardship,” and provide binding guidance to trial courts that is consistent with the case law in criminal cases. *See also Commonwealth v. Gaskin*, 472 A.2d 1154, 1157-58 (Pa. Super. Ct. 1984) (court lacks evidence to support finding of ability to pay a fine when a defendant has no “financial assets [or] liabilities” and has been “living from hand to mouth”).

The Rules must incorporate this case law,²⁶ and should build on it, as other states have, to make clear presumptions of indigence and an inability to pay if:

1. The defendant’s net income (after tax and other non-discretionary automatic deductions) is less than or equal to 125% of the federal poverty level.²⁷
2. The defendant receives income-based public assistance, including, but not limited to, Supplemental Nutrition Assistance Program (SNAP or food stamps), Medicaid, Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), veterans’ disability benefits, or other state-based benefits;
3. The defendant is or has been within the past six months homeless, incarcerated, or residing in a mental health facility;
4. The defendant is an unemancipated juvenile; or

²⁶ ACLU-PA has proposed new Rule 459 as a place to consolidate the standards on determining ability to pay that apply various points in a case. The Committee could instead incorporate the same standards into the existing Rules that govern sentencing, payments plans, and proceedings on default.

²⁷ This figure is consistent with both the practices in other states and the National Task Force bench card. *See Appendix 3.* In addition, it is also consistent with Pennsylvania case law. For example, in *Stein Enterprises*, our Supreme Court granted an IFP petition for an individual whose income \$273 per month (\$13,652 annually today) put him between 100 and 125% of the Federal Poverty Guidelines, and in *Commonwealth v. Lepre*, 18 A.3d 1225 (Pa. Super. Ct. 2011) a defendant made out a prima facie entitlement to IFP because he was caring for a child and had monthly income of \$1,600 (\$21,602 annually today), which was just above 125% of the Federal Poverty Guidelines.

5. The defendant is on his or her own unable to meet basic living expenses, including, but not limited to, food, rent/mortgage, utilities, medical expenses, transportation, and dependent care.

Such an approach is well within the mainstream of reforms undertaken by other states in recent years. For example, Arizona Administrative Order 2017-81 adopted a bench card for use at sentencing and at hearings on default that tracks many of these categories. *See* Appendix 4. Similarly, Colorado defines “undue hardship”—the benchmark used to determine whether a defendant is unable to pay—based on these standards. *See* Colo. Rev. Stat. § 18-1.3.702(4)(a)-(h).²⁸ *See also* Mich. Court R. 6.425(E)(3) (to determine whether a defendant has a “manifest hardship,” the court must consider 6 factors);²⁹ Mecklenburg County District Court, North Carolina bench card, attached as Appendix 6.³⁰

These presumptions of indigence, which is rebuttable based on the evidence before the court, will both protect defendants’ constitutional and statutory rights, and will reduce the administrative burden on MDJs, who will have an easy procedure to establish whether a defendant is indigent. It is unreasonable to expect busy MDJs to conduct their own case law research, which is why it is incumbent on the Committee to recommend Rules that appropriately reflect the existing law.

2. The Rules should require that MDJs use a standardized ability-to-pay form whenever evaluating whether a defendant is able to pay in situations where the presumptions do not apply or the MDJ has evidence to rebut the presumptions.

MDJs need a uniform and standardized system by which to evaluate whether a defendant is able to pay. As discussed above, the proposal from the Committee is unlikely to improve how MDJs evaluate defendants’ finances. The better course is to adopt a uniform Ability-to-Pay Evaluation form to be completed by defendants whenever a defendant avers that he or she is unable to pay. To be clear: we are not proposing that MDJs complete such paperwork *every* time the court sets a payment plan. Many MDJs set defendants on payment plans by simply asking: what can you afford? If the defendant agrees to a payment plan, there is no need to inquire further into that defendant’s financial resources. Using the presumptions set forth above will make that process even easier for low-income defendants.

But if, for example, a defendant says he can only pay \$20 per month, and the MDJ wants him to pay more—or if the MDJ is considering imposing imprisonment for nonpayment—then the MDJ must use the ability-to-pay form. In other words, whenever a defendant avers he or she cannot pay, or when the presumptions do not apply or are contradicted by the evidence before the MDJ, then Pennsylvania’s courts need to use a uniform sheet to evaluate the defendant’s ability to pay. A form similar to that attached as Appendix 14 should be completed by the defendant and evaluated by the MDJ. It is based on a similar form created by the national ACLU and Biloxi,

²⁸ This provision was adopted in 2016.

²⁹ This provision was adopted in 2016.

³⁰ Adopted in 2017.

Mississippi as part of the settlement of a debtors' prison lawsuit.³¹ In Pennsylvania, the courts of common pleas in Armstrong County and Lebanon County already use this exact form when evaluating ability to pay, which they adopted in collaboration with ACLU-PA to ensure that their courts are making appropriate determinations. Moreover, courts including those in Chester County, Montgomery County, Philadelphia County, and Westmoreland County, as well as many individual MDJs, already use similar documents they created on their own. *See* Appendices 8-11.

The United States Supreme Court has explicitly endorsed the use of such forms as a way to avoid incarcerating individuals who are too poor to pay. *See Turner v. Rogers*, 564 U.S. 431, 447-48 (2011) (endorsing “the use of a form (or the equivalent) to elicit relevant financial information” at an ability-to-pay hearing). It is the most straightforward way to ensure that courts are fulfilling their obligation to look at a defendant’s entire financial picture. *See, e.g., Commonwealth v. Ruiz*, 470 A.2d 1010, 1012 (Pa. Super. Ct. 1984) (mere knowledge that a defendant is employed “cannot alone provide a sufficient picture of appellant's finances so that an intelligent finding as to his ability to pay the fines and costs imposed can be made); *Commonwealth ex rel. Bashore v. Leininger*, 2 Pa. D. & C.3d 523, 528-29 (1977) (applying the same principle to incarceration for failure to pay a traffic ticket). Any slight administrative burden will be offset by the certainty and consistency the form will provide MDJs as they try to administer huge collections caseloads without the type of administrative support provided courts of common pleas.

D. The Rules must reflect that defendants cannot be placed on payment plans they cannot afford. (Rules 456 and suggested new Rule 459)

Rule 456 provides absolutely no guidance to MDJs on how to set payment plans. It does not reflect the constitutional requirement that payment plans must be “reasonable,” *Parrish*, 304 A.2d at 161, and it does not reflect the statutory requirement that the MDJ consider “the defendant's financial resources, the defendant's ability to make restitution and reparations and the nature of the burden the payment will impose on the defendant.” 42 Pa. Cons. Stat. § 9730(b)(3).³²

To avoid the risk of unlawful incarceration by setting defendants up for failure, and to encourage them to pay regularly, the Rules must make clear that MDJs cannot set payment plans that the evidence shows defendants cannot afford. After all, a payment plan cannot be “reasonable” or take into account the “burden” on the defendant if it is set higher than the defendant can afford to pay. *Parrish*, 304 A.2d at 161; 42 Pa. Cons. Stat. § 9730(b)(3). ACLU-PA has seen many courts that tell defendants they have default or minimum payment plans such as \$50 per month. Defendants who cannot afford that amount simply do not pay anything until they are hauled into court and threatened with jail. But in courts that ask defendants what they can afford, most defendants make regular payments, without the need for recurring warrants and hearings.

³¹ ACLU, “Kennedy v. City of Biloxi,” <https://www.aclu.org/cases/kennedy-v-city-biloxi>.

³² This language is nearly identical to the language in Rule 706. Until 1997, then-Rule 85 (which is today Rule 456) contained the same language. The Committee Report from that time does not explain why it was changed to provide less guidance to MDJs. *See* 27 Pa.B. 5408.

To address this problem, and provide clear guidance to the MDJs, the best approach is to have a simple table in the Rules that pegs presumed maximum monthly payment amounts to a defendant’s income, such as this table from ACLU-PA’s proposed new Rule 459³³ (attached as Appendices 1 and 2):

Poverty Level Percentage	Maximum Monthly Payment Plan
Under 125% (but not indigent under (A)(2))	1 hour of minimum wage pay
125-149% of Poverty Level	2 hours of minimum wage pay
150-174% of Poverty Level	3 hours of minimum wage pay
175-184% of Poverty Level	4 hours of minimum wage pay
185-200% of Poverty Level	5 hours of minimum wage pay

The Rules of Civil Procedure already contain a formula to make decisions in support cases, so providing such clear guidance in the Rules would be nothing new. *See* Pa.R.C.P. 1910.16-4. Moreover, other states have moved towards this approach. California, for example, caps payments in traffic cases at \$25 for people who are below 125% of the federal poverty guidelines. *See* Cal. Veh. Code § 40220 (cross referencing Cal. Gov’t Code § 68632).³⁴ Louisiana has codified a requirement that a monthly payment plan cannot exceed one day’s income at minimum wage. *See* Louisiana Act 260 of 2017 (which goes into effect in August 2018).³⁵

As is explained in the proposed Rule 459, this table creates a set of presumptions that MDJs can deviate from if the evidence supports deviation. It also makes clear that indigent defendants must have their payments temporarily suspended until they are no longer indigent and are able to afford to pay LFOs. Once again, this approach will both protect defendants’ rights and reduce the administrative burden on MDJs. *See Hernandez*, 917 A.2d at 337 (there is a “duty of paying costs only against those who actually become able to meet it without hardship”) (internal quotation marks omitted).

E. Notice upon default and bench warrants. (Rule 456)

Each year, MDJs issue approximately 500,000 post-disposition bench warrants (482,308 in 2016), almost all of which are for failure to pay LFOs.³⁶ At the end of 2016, there were 744,677 post-disposition warrants pending, which includes warrants pending from previous years. This is a truly staggering number of bench warrants for nonpayment of LFOs—and it does not include

³³ As noted above, as an alternative, the provisions in this proposed Rule could be incorporated into the existing Rules.

³⁴ This provision was adopted in 2017.

³⁵ Available at <https://www.legis.la.gov/legis/ViewDocument.aspx?d=1051827>.

³⁶ AOPC, “2016 Caseload Statistics of the Unified Judicial System of Pennsylvania,” <http://www.pacourts.us/assets/files/setting-768/file-6151.pdf?cb=3226c2>. Page 193, adding the total number of traffic and non-traffic warrants issued.

an additional 708,368 warrants from the Philadelphia Municipal Court Traffic Division *alone*.³⁷ These warrants create a significant administrative burden for MDJs, and are terribly disruptive to the lives of defendants, for whom arrest interrupts employment, school, and child care. One of the Committee's priorities should be to significantly reduce the number of bench warrants issued for nonpayment.

Rules 430 and 456 currently permit MDJs to issue bench warrants for failure to pay 10 days after default.³⁸ The first step to ease the burden caused by these warrants is to extend the period of time between default and warrant from 10 to 30 days, in the same way that defendants will now have 30 days to respond to citations and summonses.

ACLU-PA is also concerned that defendants do not actually receive adequate notice about their payment obligations and what to do if they default. Defendants walk out of courts without copies of their payment plans; the Rules should also specify that the defendant must receive a copy of the payment plan in writing.

We suggest a different approach that is more likely to produce evidence that the defendant receives notice and has a realistic chance to pay LFOs or arrange a payment plan before being at risk of arrest. First, the current form sent to defendants upon default, MDJS 418, is woefully inadequate. It tells the defendant that the defendant has *either* pled guilty without submitting enough money *or* been sentenced to pay LFOs and defaulted *or* been tried in absentia and now owes LFOs. *See* Appendix 15. It is unreasonable to think that pro se defendants will understand what they are supposed to do after receiving the notice. It does not even reference Rule 456, let alone inform the defendant of his or her rights and obligations. The 30 day default notice under 456(B) must set forth:

- A statement of the total owed the court, along with the current installment payment amount, if any, and the day of the month when payment is expected
- A statement of the defendant's current payment plan
- That within 30 days, the defendant must:
 - Pay the current amount due on the payment plan, if any OR
 - Notify the court that the defendant has already paid what is owed OR
 - Notify the court that the defendant is unable to pay the amount owed and requests a reduced payment or temporary suspension of payments due to hardship
- That if the defendant does not respond within 30 days, the defendant may be arrested and brought before the court for a hearing. If at that hearing the judge determines that the defendant had the ability to pay but did not, the defendant may be sentenced to jail.

³⁷ AOPC, "2016 Caseload Statistics of the Unified Judicial System of Pennsylvania," <http://www.pacourts.us/assets/files/setting-768/file-6151.pdf?cb=3226c2>. Page 239, the total number of post-disposition warrants pending.

³⁸ Issuing the warrants is discretionary. However, many MDJs seem to believe that the warrants *must* be issued, in part because the computer system used by the MDJs automatically prepares them, and because they are audited by the state Auditor General on whether they issue warrants as required by the rules.

- That the defendant has the right to a court hearing before being jailed for nonpayment. At that hearing the defendant:
 - Must be provided counsel if he cannot afford to hire a lawyer
 - May explain that the court's calculation of what is owed is incorrect
 - May explain why the defendant cannot afford the current payments and ask that payments be reduced or temporarily suspended.
 - May offer the court proof of the defendant's income, or why the defendant is without income, and expenses.

We have drafted such a notice which is attached as Appendix 13.

Second, the automatic issuance of a bench warrant simply because a defendant has failed to respond to first-class mail must stop. There is no way to know whether the address is valid and whether the defendant actually receives the notice. Under ACLU-PA's proposal, if the defendant does not respond to the mailed notice of default, then the court can issue a warrant—not for the defendant's arrest—but for the constable to *serve* a copy of the default notice on the defendant, which would then start the 30-day clock before a bench warrant can be issued. This is a variation on the existing procedure already found in Rule 431(B), which permits constables to execute arrest warrants by collecting a plea and LFOs directly from defendants without arresting the defendant. Here, the constable would serve the notice of default, determine whether the court has the defendant's current mailing address, and potentially—but not necessarily—collect money, all without arresting the defendant. Only if the defendant then fails to respond to the MDJ within 30 days after being served by the constable could the court issue a *capias* bench warrant.

This added level of service would reduce the need for default hearings that result from outdated addresses or unopened mail, while at the same time the appearance of a police officer would make the threat of arrest much more clear than any mailed notice—including the notice currently in use—would. ACLU-PA believes the procedure would reduce the number of arrests that are ultimately necessary, as well as saving busy courts from the need to hold hearings in some cases.

The proposed procedure also reflects the reality that people rely far less on mail than they used to. MDJs must be able to collect and use contact information that reflects how people actually communicate today: telephone numbers and e-mail addresses. We have spoken with MDJs who want to work with their district court administrators to set up automated e-mail and text message reminders for payments, but they lack a uniform system to collect that contact information. The Rules should explicitly require defendants to provide that contact information. While it is not a substitute for the service described above, its use as a supplemental system will help boost response rates and spare MDJs and defendants from needlessly multiplied proceedings that result from lost or unopened mail. Research on court programs that affirmatively contact defendants shows that those friendly nudges have a tremendous impact on failure to appear rates. For example one study in Jefferson County, Colorado found that the percentage of defendants who appeared at court after receiving a phone call reminder increased from 77% to 89%--reducing the

failure-to-appear rate by 52%.³⁹ Similarly, New York City has combined a redesigned summons (which by itself dropped the failure-to-appear rate by 13%) with text message reminders, which reduced the failure-to-appear rate by 36%.⁴⁰ Those same strategies can not only help defendants avoid defaulting in the first place, but they can also serve as a valuable reminder to get in touch with the court before they face consequences for having missed a payment.

These combined changes to Rule 456, should substantially reduce the number of bench warrants that lead to arrest for the purpose of collecting LFOs. This will reduce wasted costs spent on arresting defendants who are unable to pay, and it will also avoid disrupting the lives of low-income Pennsylvanians who risk losing their jobs and leaving their families without needed support when arrested.

F. MDJs need a specific and uniform procedure to administratively close uncollectible cases.

Pennsylvania MDJs face a fundamental problem: they must try to collect LFOs from thousands of indigent defendants every year, but in the absence of an administrative procedure to close old cases where the LFOs are uncollectible, all that the MDJs can do is repeatedly set payment plans that the defendants cannot afford and then issue bench warrants when they inevitably default. This has a devastating impact on tens of thousands of Pennsylvanians every year. As is noted in the previous section, there were nearly 1.5 million warrants outstanding at the end of 2016 for defendants who had failed to pay their LFOs. Data from AOPC further shows that, just for MDJs (not counting Philadelphia courts), there are approximately 1.2 million summary cases dating back to the 1970s in which defendants still owe LFOs.

These figures provide a snapshot into the problems that are caused when courts lack the authority to close uncollectible cases. Every single MDJ we have spoken to about this issue has complained at length about the backlog of cases and wasted resources – including mounting services fees that will never be recouped – spent sending out law enforcement to try to collect money from people who have none. Some places, like Chester County, have taken affirmative steps to curb this problem by explicitly giving their MDJs authority under Rule of Judicial Administration 1901 to administratively close old cases if the MDJ makes a finding that the case is uncollectible due to the defendant’s indigence. Appendix 12. Every MDJ desperately needs that authority.⁴¹

³⁹ Timothy Schnacke, et al., “Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Resulting Court Date Notification

Program,” *Court Review: The Journal of the American Judges Association* (2012) at 92, <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1396&context=ajacourtreview>.

⁴⁰ Ben Paynter, “This Better-Designed Court Summons Is Keeping People Out Of Jail,” *Fast Company* (2018), <https://www.fastcompany.com/40522851/this-better-designed-court-summons-is-keeping-people-out-of-jail>.

⁴¹ As we discuss elsewhere, MDJs can and should suspend payments when it appears that a defendant is temporarily indigent – for instance, when the defendant has just left jail and not yet found employment, or has just lost a job, or needs to stop working temporarily to care for a sick

The lack of this process directly feeds into the systemic debtors' prison problem that plagues Pennsylvania. MDJs have told us that they feel significant pressure to try to collect from indigent defendants, even if it means they have to violate those defendants' rights, in order to try to clear out old cases. In short, it looks bad at election time for MDJs to have thousands of old cases laying around, as their opponents inevitably promise to clear the backlog. These considerations have no place in a judicial system charged with the equitable administration of justice, and they threaten the Due Process rights of thousands of Pennsylvanians every year. They are directly traceable to the MDJs' lack of authority to clear uncollectable cases.

In the absence of that authority, MDJs also seek other avenues to relieve some of the pressure caused by these cases piling up. In some counties, indigent defendants know that they can *ask* to go to jail in exchange for a reduction in their LFOs. As the MDJs in Fayette County explained to us, this is a routine request from some of the poorest people in the entire state, because they and the MDJs know it is the only way to realistically dispose of the cases. As should be obvious, a system that reduces defendants to asking to go to jail is a system in desperate need of reform.

ACLU-PA suggested that the Committee put an end to all of this by proposing a uniform procedure to administratively close the case if the MDJ makes a finding that the case is uncollectible due to the defendant's persistent indigence, in the same way that Chester County has. The Committee's Report explains that they believe this is better left to the legislature. But the legislature does not have the constitutional authority to create a procedure to administratively close inactive and uncollectible cases, only the Supreme Court does. The Court has already exercised that authority in R.J.A. 1901, which counties like Chester and Somerset use to dispose of inactive summary cases, and the Committee can certainly propose a summary-case specific procedure to supplement that provision (in the same way that the civil rules include Pa.R.C.P. 230.2, which provides a procedure to terminate inactive civil cases beyond what R.J.A. 1901 requires).

We therefore recommend that the Committee rectify this problem and provide MDJs with this much-needed discretion by proposing a procedure that allows MDJs to declare a defendant indigent and administratively terminate the case. *See* Proposed Rule 456.1 in Appendices 1 and 2. If the Committee believes this power should be tied to a particular period of time, then cases should be eligible for this treatment after two years, as approximately 90% of all LFOs are collected within 2 years in summary cases, and there are severely diminishing returns after that time.⁴² Particularly given the costs associated with bench warrants—which are initially charged

dependent. But when, over time, it becomes clear that a defendant is unlikely to ever have the resources to pay LFOs, neither the court nor the defendant should be burdened with endless and futile collection proceedings.

⁴² The rate of payments on LFOs assessed by MDJs in 2016 (the last year for which data is available) is currently 74.62%, while payments for LFOs assessed in 2015 are at 88.20%. Past that point, there are only incremental increases: 91.52% for 2014, 93.07% for 2012, and 94.36% for 2012. *See* AOPC, "Collection Rate of Payments Ordered by Magisterial District Courts" (2015), <http://www.pacourts.us/news-and-statistics/research-and-statistics/collection-rate-of-payments-ordered-by-magisterial-district-courts>.

to the defendant but ultimately eaten by the County when the defendant is unable to pay—the only practical course of action is to create a procedure to avoid wasting additional resources.

II. Other Post-Disposition Unconstitutional Practices

A. Driver's licenses must not be suspended unless there has first been an ability-to-pay hearing.

This Committee and the Supreme Court should address another systemic and unconstitutional practice that arises out of indigent defendants' inability to pay LFOs: the automatic suspension of driver's licenses without any pre-deprivation Due Process. Under the current procedure in Rule 470, MDJs automatically send notice to the Pennsylvania Department of Transportation 25 days after a defendant fails to make any required payment in traffic cases, so that the Department can suspend the defendant's driver's license. The result is that tens of thousands of Pennsylvanians have their licenses suspended every year without any court determination of whether they had the ability to make payments.

These suspensions are devastating for poor people who live or work away from easy access to public transportation – which is most of the Commonwealth. Without the ability to drive, most defendants cannot get to work – which means they are even less able to pay their LFOs – cannot get themselves or their children to doctors, and cannot get to grocery stores or access other services. ACLU-PA is working with one woman who spends \$150-\$200 per week for Uber fare to and from her part-time jobs, making it even harder to pay what she owes a court of common pleas. Faced with these consequences, many poor Pennsylvanians feel that they have no choice but to drive despite their license suspensions. If caught, they then face much greater fines and license restoration costs. It is a cycle that drives many ever deeper into poverty.

Unfortunately, the Committee's proposal exacerbates the situation by shortening the notice period to 15 days – thus bypassing not only the ability-to-pay determination, but also the defendants' right to appeal. Rule 460 gives defendants 30 days to appeal, but the Committee's proposal would force them to pay within 15 days or have their licenses suspended.

The bigger problem, however, is that it is unconstitutional to suspend a defendant's driver's license for nonpayment of LFOs without first holding an ability-to-pay hearing and determining that the defendant is able to pay and willfully refusing to do so. The United States Supreme Court has explained that drivers have a property interest in their licenses, which cannot be revoked or suspended “without that procedural due process required by the Fourteenth Amendment.” *Bell v. Burson*, 402 U.S. 535, 539 (1972) (citations omitted). In recent months, two federal district courts have issued preliminary injunctions invalidating practices in Tennessee and Michigan that are nearly identical to Pennsylvania's. *See Robinson v. Purkey*, Civil Action No. 17-1263, 2017 WL 4418134 (M.D. Tenn. Oct. 5, 2017); *Fowler v. Johnson*, Civil Action No. 17-11441, 2017 WL 6379676 (E.D. Mich. Dec. 14, 2017). As the *Robinson* court explained, “the ability to drive is crucial to the debtor's ability to actually establish the economic self-sufficiency that is necessary to be able to pay the relevant obligations,” and there is no rational basis for suspending an individual's license if the person lacks the ability to pay. *Robinson*, 2017 WL 4418134 at *9.

Thus, the Rules must be amended so that MDJs send notice to PennDOT that a defendant has defaulted only *after* the court holds an ability-to-pay hearing and finds that the defendant can pay and is willfully refusing to do so. *See* Statement of Interest of the United States, *Stinnie v. Holcomb*, Civil Action No. 16-044, 2016 WL 6892275 (W.D. Va. filed Nov. 7, 2016) (state’s “practice of automatically suspending the driver’s license of any person who fails to pay outstanding court debt—without inquiring into ability to pay—violates that constitutional principle” outlined in *Bearden* that “prohibits punishing a person for his poverty”) (internal quotation marks omitted).

While 75 Pa. Cons. Stat. § 1533 requires suspension when a defendant has defaulted, it is the job of the courts to ensure constitutionally adequate due process by creating procedures governing how and under what circumstances that notice is sent to PennDOT. For example, Rule 470 already gives 25 days after default before submitting the notice; this Committee and the Court clearly do not view it as an “instant” procedure. Adding the required Due Process protection of an ability-to-pay hearing will eliminate the constitutional infirmity found by courts in other states with schemes similar to Pennsylvania’s, and it will also be consistent with the Court’s goal to “eliminate inequities in the criminal process caused by indigency.” *Parrish*, 304 A.2d at 160.

B. The process of jailing defendants while they await a payment determination hearing under Rule 456 is an unconstitutional deprivation of liberty that resulted in the jailing of over 2,000 individuals in 9,000 cases in 2016.

Rule 456(C) currently provides a procedure that is facially unconstitutional: defendants who have defaulted on payments of LFOs and appear at court for a payment determination hearing may be jailed for up to 72 hours on a form of bail called “collateral” if the MDJ cannot hold the hearing “immediately.” This procedure, referred to in the MDJ computer system as incarceration for “failure to post collateral,” violates *Bearden*’s requirement that there be a pre-deprivation finding of ability to pay prior to restricting a defendant’s liberty. The “freedom from bodily restraint, lies at the core of the liberty protected by the Due Process Clause,” and the threat of its loss requires Due Process protection. *Turner v. Rogers*, 564 U.S. 431, 445 (2011) (internal quotation marks omitted). As the *Bearden* court explained, by sentencing an individual to “imprisonment simply because he could not pay the fine, without considering the reasons for the inability to pay . . . the court automatically turned a fine into a prison sentence,” which violates the Due Process clause. *Bearden*, 461 U.S. 674.

This procedure also violates defendants’ right to counsel by failing to require appointed counsel for indigent defendants *prior* to being incarcerated pending a payment determination hearing. *See* Pa.R.Crim.P. 122(A)(1) (requiring counsel in all summary cases “when there is a likelihood that imprisonment will be imposed”); *Farmer*, 466 A.2d at 678 (Rule 122 (then Rule 316) violated where defendant was imprisoned without being afforded counsel). The lack of a requirement for appointed counsel is not merely a technical problem, as an attorney may be able to help the defendant better understand the legal issue and articulate what his or her financial situation is.

The “failure to post collateral” procedure, as noted above, requires that MDJs document: 1) the reasons why collateral is necessary to secure the defendant’s appearance (*e.g.* the defendant has a history of failing to appear); and 2) the facts supporting a finding that the defendant “has the ability to pay monetary collateral.” Rule 456(C)(2).⁴³ This procedure has failed to protect indigent defendants’ rights, as data from AOPC documents. For example, Appendix 7 includes a list of 50 cases where MDJs gave facially invalid reasons, which indicated that the defendants *did not* have the money to post. In 2016, over 2,000 unique individuals in 9,000 cases were jailed through this process across the state, which shows that it has a widespread and devastating impact.

It is also worth noting that, in the amount of time that it takes to do an appropriate hearing and determine whether collateral is necessary and if the defendant can post that collateral, the court could have held a constitutionally-required ability-to-pay hearing. Many MDJs simply never use this procedure. AOPC data shows that in 2016 it was used only *once* in Bucks County and *once* in Montgomery County. The experience of MDJs in those counties, and others, show that it is certainly possible to hold payment determination hearings and assess defendants’ ability to pay without having to hold them for 72 hours prior to that hearing.

The Committee should ask the Court to abolish this practice, which appears to be unique to Pennsylvania,⁴⁴ because of both the constitutional infirmity and the documented misuse. Instead, Rule 456 should require that the payment determination hearing happen the same day that the defendant appears at or is brought to the MDJ. In the event a defendant is arrested after-hours, there is always a duty MDJ on call in each jurisdiction. *See* Pa.R.Crim.P. 117.

III. At Sentencing

A. MDJs must consider whether a defendant is or will be able to pay when imposing fines and costs at sentencing. (Rules 409, 414, 424, and 454)

ACLU-PA agrees with the Committee’s proposal that, at a minimum, MDJs must consider the defendant’s ability to pay when imposing any discretionary fines or costs. However, the implementation in the Rules must be improved.⁴⁵

⁴³ Even when an MDJ follows the requirements of the rule and finds that a defendant can afford to post the collateral, the constitutional defect of the procedure is not cured. *Bearden* requires that the court evaluate the defendant’s ability to pay the LFOs and the reasons for nonpayment of those LFOs prior to incarceration. Thus, if a defendant is jailed prior to a payment determination hearing, that defendant’s Due Process rights are violated.

⁴⁴ After inquiring with attorneys from around the country, ACLU-PA is unaware of any other state that has a procedure similar to this 72-hour hold prior to a payment determination hearing.

⁴⁵ ACLU-PA recommends that the Committee remove the “discretionary” qualifier, for reasons explained below. At a minimum, however, if the Committee maintains its proposal, it must provide guidance as to what constitutes “discretionary” fines and costs (*e.g.* whenever there is anything other than a fixed amount, or whenever there is a range or an amount up to a certain dollar figure, or whenever the word “may” is used in the statute).

As an initial matter, the Committee’s proposal only amends Rule 454, which addresses trial and sentencing thereafter. The proposal does not include any provision for individuals who wish to *plead* guilty yet may not be able to pay the LFOs. Rules 409, 414, and 424 must specify a procedure whereby defendants who plead guilty may nevertheless appear at court to ask that their LFOs be based on their ability to pay. *See Commonwealth v. Gaskin*, 472 A.2d 1154, 1157-58 (Pa. Super. Ct. 1984) (defendant has right to ability-to-pay hearing even after guilty plea). ACLU-PA’s proposed rules changes address this issue by permitting defendants to plead guilty and still request a sentencing hearing to have their fines and costs set. *See* Appendices 1 and 2.

1. Long-standing law requires that MDJs consider ability to pay when imposing “discretionary” fines, and that authority must be restored to the text of the Rules governing MDJs.

42 Pa. Cons. Stat. § 9726(c) and (d) require courts to consider ability to pay when imposing fines and prohibit courts from imposing fines that defendants cannot or will not be able to pay. These provisions were also originally reflected in the Rules that govern both summary and non-summary criminal cases..

When the Court enacted what are today Rules 456 and 706 in 1973 (then Rules 65 and 1407, respectively), each specified that: “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.” Pa.R.Crim.P. 706(C). The Superior Court has repeatedly explained that this provision applies at sentencing and requires trial courts to consider ability to pay fines and costs at sentencing. *See, e.g., Commonwealth v. Martin*, 335 A.2d 424 (Pa. Super. Ct. 1975) (en banc); *Commonwealth v. Mead*, 446 A.2d 971, 973 (Pa. Super. Ct. 1982); *Commonwealth v. Genovese*, 675 A.2d 331, 333-34 (Pa. Super. Ct. 1996).

In 1985, that ability-to-pay provision was removed from what is today Rule 456,⁴⁶ although the provision still remains in Rule 706. As a result, the Rules have not provided this guidance and instruction to MDJs for three decades, even though the language has persisted in Rule 706 for the courts of common pleas.

The Committee should ask the Court to restore the language that was stripped from Rule 456 in 1985 and confirm the obligation of MDJs to adjust fines and costs at sentencing based on a defendant’s ability to pay. If a court imposes a financial obligation on the defendant that the defendant can actually afford, there will be far less likelihood of default, and thus it will be less likely that the court and defendant will be put through futile collection proceedings, or that the defendant will be incarcerated for mere failure to pay. As the Superior Court has explained, “rather than waiting until the defendant is brought before the court for not paying a fine, it is far more rational to determine the defendant’s ability to pay at the time the fine is imposed.” *Schwartz*, 418 A.2d at 639-40.

Rule 454 should be revised to incorporate the law. It should say:

⁴⁶ At the time, Rule 456 was Rule 65, which was renumbered that year to Rule 85.

- That a court must hold an ability-to-pay hearing at sentencing and affirmatively inquire into the defendant’s financial circumstances when imposing a fine; *Commonwealth v. Schwartz*, 418 A.2d 637, 639-40 (Pa. Super. Ct. 1980);
- That a court cannot impose a fine without that information; *Commonwealth v. Thomas*, 879 A.2d 246, 264 (Pa. Super. Ct. 2005);
- That a defendant maintains his or her right to such a hearing even after a guilty plea; *Commonwealth v. Gaskin*, 472 A.2d 1154, 1157-58 (Pa. Super. Ct. 1984); and
- That in considering ability to pay, the court must at least consider the defendant’s current income, indebtedness, and living situation. *Commonwealth v. Mead*, 446 A.2d 971, 973-74 (Pa. Super. Ct. 1982); *Commonwealth v. Fusco*, 594 A.2d 373, 355-56 (Pa. Super. Ct. 1991).

Failure to explain that information in the Rules will result in MDJs continuing to impose fines that defendants have no ability to pay, which violates the law.⁴⁷

2. The Supreme Court of Pennsylvania can and should require that MDJs consider defendants’ ability to pay so-called “mandatory” fines and costs at sentencing.

The longstanding view of this Committee and our Supreme Court has been that the Court’s authority under Article V, §10(c) of the Pennsylvania Constitution permits it to enact procedural rules to govern the imposition of all fines and costs at sentencing.⁴⁸ And the legislature appears to acknowledge that Pennsylvania’s courts have the inherent authority to reduce at least otherwise mandatory *costs* at sentencing. *See* 42 Pa. Const. Stat. §§ 9721(c.1) and 9728(b.2)

⁴⁷ As a matter of statutory interpretation, the Superior Court has held that “mandatory” fines are not subject to the analysis required by § 9726. *See Commonwealth v. Gipple*, 613 A.2d 600, 601 n.1 (Pa. Super. Ct. 1992) (mandatory fine for drug offense not subject to § 9726(d)); *Commonwealth v. Brown*, 566 A.2d 619, 622 (Pa. Super. Ct. 1989) (when legislature sets minimum sentence, rules of statutory construction apply to invalidate more general and earlier provision). There have been no cases addressing this issue in light of Rule 706(C).

⁴⁸ There is no question that this provision was always intended to be an exercise of the Supreme Court’s inherent authority. *See* Pennsylvania Senate Committee on Judiciary, Public Hearing on Senate Bill 500, at 67 (April 18, 1973). In testimony regarding revisions to Pennsylvania’s sentencing code, Stanford Shmukler, the then-Executive Director and Secretary of the Criminal Procedure Rules Committee, explained that the Committee had “worked on the question of a code of sentencing procedure and we have adopted many of the provisions which appear in” the bill under consideration. *Id.* at 55. He went on to say that the then-proposed Rule “will specify the *procedure in imposing fine* and imposing jail sentence for nonpayment of fine” under existing United States Supreme Court precedent, which prohibited incarcerating indigent defendants. *Id.* at 67 (emphasis added). This was the same bill that ultimately added 42 Pa. Cons. Stat. § 9726(d) to Pennsylvania law. Mr. Shmukler testified that some of the “procedural aspects” of the bill—presumably § 9726(d)—would not be suspended as infringing on the Court’s authority only because they ““are not inconsistent with” the new rules. This exchange shows that the intent of the Committee, and the Court, was to make clear that setting fines and cost based on the defendant’s ability-to-pay was in the purview of the Court, not the legislature.

(imposing costs automatically unless a court determines otherwise pursuant to Rule 706(C)). As recently as last October, the Superior Court affirmed that Rule 706(C) provides that authority in light of otherwise mandatory costs. *See also Commonwealth v. Burrows*, 88 WDA 2017, 2017 WL 4974752 at *4 (Pa. Super. Ct. Oct. 31, 2017) (Rule 706(C) does not *require* an ability-to-pay hearing at sentencing, but it does give the trial court authority to reduce or waive otherwise “mandatory” costs).

We do not know why Rule 456’s operative language addressing sentencing was modified in 1985. But the result has been that the MDJs have since operated under a different legal regime from the courts of common pleas. The Rules should correct this error and restore the authority of MDJs to reduce *all* fines and costs at sentencing based on a defendant’s indigence. The enactment of Rules 456 and 706 in 1973, and the case law interpreting Rule 706, show that the intent of those Rules was to adjust how courts imposed fines and costs and to ensure indigent defendants were not saddled with amounts that they could not afford. These Rules reflected the longstanding view of the Supreme Court and this Committee that the procedures surrounding sentencing are the domain of the Court—something with which the legislature appears to agree, pursuant to §§ 9721(c.1) and 9728(b.2). The Court should not cede this authority by permitting courts to waive or reduce only “discretionary” LFOs when defendants lack the ability to pay them.

IV. Case Commencement

A. The Rules should provide defendants with more than 10 days to respond to a citation or summons. (Rules 403, 407, 412, and 422)

The ACLU welcomes the Committee’s proposal to increase the time to respond to citations or summonses to 30 days. This change brings Pennsylvania in line with most states and may reduce the extraordinary number of warrants issued at the outset of cases. In 2016, MDJs outside of Philadelphia issued a total of 503,678 pre-disposition bench and arrest warrants in summary cases⁴⁹ out of a total of 1,760,166 new cases,⁵⁰ which means that warrants were issued in nearly one-third of all summary cases that year. By extending the period of time for defendants to enter pleas, that figure should drop significantly.

B. The Rules should eliminate the current expectation that a defendant will post collateral to plead “not guilty.” (Rules 403, 408, 413, 423, and 430)

We applaud the Committee for proposing a mechanism by which defendants who cannot afford to pay collateral – which is often hundreds of dollars – can plead “not guilty” and certify in

⁴⁹ AOPC, “2016 Caseload Statistics of the Unified Judicial System of Pennsylvania,” <http://www.pacourts.us/assets/files/setting-768/file-6151.pdf?cb=3226c2>. Page 193, adding the “Issued” figures for traffic and non-traffic columns.

⁵⁰ AOPC, “2016 Caseload Statistics of the Unified Judicial System of Pennsylvania,” <http://www.pacourts.us/assets/files/setting-768/file-6151.pdf?cb=3226c2>. Pages 175 and 184, adding the total number of “new cases” filed in both traffic and non-traffic cases.

writing that they cannot afford to post collateral.⁵¹ While that is preferable to the current system, it would be much more efficient for defendants and MDJs alike to eliminate the demand for collateral for *all* defendants.

According to our research, only *four* other states require any form of “collateral” or a deposit in order to enter a not-guilty plea: Massachusetts (which requires a \$25 fee to request a hearing), Nevada, North Dakota, and Oklahoma. Pennsylvania’s continued requirement that hundreds of thousands of Pennsylvanians pay each year in order to exercise their constitutional right to plead not guilty and have a trial is out of step with standards nationwide, and it provides another hurdle to those responding to a citation, which we believe is one of the main reasons driving the astronomical failure-to-respond numbers in summary cases cited above.

The Committee’s Report based its reluctance to abolish collateral on a concern that if a defendant pleads not guilty, does not post the collateral, and is found guilty in absentia (after failing to appear for trial), the court may end up issuing a bench warrant for nonpayment.⁵² But the Committee’s concern is premised on the faulty assumption that the amount written on the citation or summons is what would be assessed upon conviction. In fact, the collateral stated on the front of a citation can range from \$0 to the maximum summary fine. Some MDJs used pre-printed forms, while in other jurisdictions the citing officer inserts a number on the spot. And, of course, the “default” collateral of \$50 is nowhere near sufficient to cover the fines and costs owed in even a simple traffic case.⁵³

There is also an administrative burden on the courts that bears discussion. In 2016, defendants in 85,424 cases were found not guilty after a trial by MDJs,⁵⁴ with another 8,818 found not guilty by the Philadelphia Municipal Court and Traffic Division.⁵⁵ Thus, in nearly 100,000 cases, courts had to return any collateral that the defendants had deposited—which does not even count the thousands of other cases every year where defendants ultimately plead to or are found guilty

⁵¹ This is a different type of “collateral” than that involved in the 72-hour hold while awaiting a payment determination hearing. This type of collateral must be mailed in with a plea on a citation or summons in order to enter a plea of “not guilty” and have a trial.

⁵² Moreover, while we share the Committee’s concern about increasing the number of bench warrants, courts should not be issuing bench warrants for nonpayment without providing better notice and an opportunity to be heard, which is addressed elsewhere in these Comments.

⁵³ Unfortunately, AOPC does not publicly track the number of cases where defendants are found guilty in absentia. The total figure, however, must be somewhat less than the 255,043 cases in which defendants were found guilty after a trial (with or without their presence). AOPC, “2016 Caseload Statistics of the Unified Judicial System of Pennsylvania,”

<http://www.pacourts.us/assets/files/setting-768/file-6151.pdf?cb=3226c2>. Pages 175, 184, and 239 combined the total number of “trial guilty” cases.

⁵⁴ AOPC, “2016 Caseload Statistics of the Unified Judicial System of Pennsylvania,” <http://www.pacourts.us/assets/files/setting-768/file-6151.pdf?cb=3226c2>. Pages 175 and 184, adding the total number of “trial not guilty” cases in both traffic and non-traffic cases.

⁵⁵ AOPC, “2016 Caseload Statistics of the Unified Judicial System of Pennsylvania,” <http://www.pacourts.us/assets/files/setting-768/file-6151.pdf?cb=3226c2>. Pages 239, the number of “trial not guilty” cases.

of lesser charges that carry smaller fines and costs and necessitate additional reimbursement from the MDJ. That creates a tremendous administrative burden on MDJs, which have to mail checks, including to addresses that may no longer be valid. Indeed, we have heard from some MDJs that they waive collateral whenever they can, precisely because of the administrative burden that it poses.

Accordingly, the Court should simply abolish its use.

Appendices

1. ACLU-PA Proposed Rules – Annotated.
2. ACLU-PA Proposed Rules – Clean.
3. Bench card from the National Task Force on Fines, Fees, and Bail Practices.
4. Bench card from the Supreme Court of Arizona.
5. Bench card from the Supreme Court of Missouri.
6. Bench card from the Mecklenburg County District Court in North Carolina.
7. Fifty examples from cases where MDJs put in writing facially invalid reasons why defendant were able to post collateral.
8. Philadelphia Court of Common Pleas Ability-to-Pay Form.
9. Philadelphia Municipal Court Traffic Division Ability-to-Pay Form.
10. Westmoreland County Court of Common Pleas Ability-to-Pay Form.
11. Chester County MDJ Ability-to-Pay Form.
12. Chester County Standing Order to Administrative Close Cases.
13. ACLU-PA Notice of Default.
14. ACLU-PA Ability-to-Pay Evaluation Form.
15. Current MDJ Notice Mailed on Default.

Appendix 1

ACLU-PA Suggested Rules Revisions (Annotated)

Rules affected:

- Rule 403. Contents of Citation.
- Rule 408. Not Guilty Pleas—Notice of Trial. (also Rules 413 and 423)
- Rule 409. Guilty Pleas. (also Rules 414 and 424)
- Rule 430. Issuance of Warrant.
- Rule 431. Procedure When Defendant Arrested With Warrant.
- Rule 452. Collateral.
- Rule 454. Trial in Summary Cases.
- Rule 455. Trial in Defendant's Absence.
- Rule 456. Default Procedures: Restitution, Fines, and Costs.
- Rule 456.1 Termination of Inactive Cases (new)
- Rule 459 Ability to Pay (new)
- Rule 470. Procedures Related to License Suspension After Failure to Respond to Citation or Summons or Failure to Pay Fine and Costs.

Rule 403. Contents of Citation.

...

(B) The copy delivered to the defendant shall also contain a notice to the defendant:

(1) that the original copy of the citation will be filed before the issuing authority of the magisterial district designated in the citation, the address and number of which shall be contained in the citation; and

(2) that the defendant shall, within ~~40~~ **30** days after issuance of the citation:

(a) plead not guilty by:

(i) notifying the proper issuing authority in writing **or in person** of the plea **and providing a current mailing address, telephone number, and e-mail address** ~~and forwarding as collateral for appearance at trial an amount equal to the fine and costs specified in the citation, plus any additional fee required by law. If the amount is not specified, the defendant shall forward the sum of \$50 as collateral for appearance at trial; or~~

~~(ii) appearing before the proper issuing authority, entering the plea, and depositing such collateral for appearance at trial as the issuing authority shall require. If the defendant cannot afford to pay the collateral specified in the citation or the \$50, the defendant must appear before the issuing authority to enter a plea; or~~

(b) plead guilty by:

Commented [AC1]: Committee's proposal.

Commented [AC2]: Combined with the deletion of the next paragraph, this will allow defendants to still plead guilty in person if they choose.

Commented [AC3]: Committee's proposal.

Addition: MDJs have expressed interest in having e-mail addresses, to facilitate sending reminders to defendants.

Commented [AC4]: Committee's proposal.

Commented [AC5]: ACLU-PA recommends abolishing the need to pay any collateral to enter a plea. As a result, this provision is no longer needed (the "in person" language was moved up to the previous paragraph)

Appendix 1

(i) notifying the proper issuing authority in writing of the plea and forwarding an amount equal to the fine and costs when specified in the statute or ordinance, the amount of which shall be set forth in the citation; ~~or~~

(ii) appearing before the proper issuing authority for the entry of the plea and imposition of sentence, when the fine and costs are not specified in the citation, or when a payment plan is necessary, or when required to appear pursuant to Rule 409(B)(3), 414(B)(3), or 424(B)(3); ~~or~~

(iii) notifying the proper issuing authority in writing of the plea with a statement that the defendant is without the financial means to pay the fines and costs listed on the citation and requests a hearing, and providing a current mailing address, telephone number, and e-mail address, in which case the issuing authority shall provide notice pursuant to Rule 451(A) and hold a hearing pursuant to Rule 454(F) to determine the amount of the fines and costs, if any; or

...

Rule 408. Not Guilty Pleas—Notice of Trial.

(A) A defendant may plead not guilty by:

(1) appearing before the issuing authority, entering the plea, and providing a current mailing address, telephone number, and e-mail address, and depositing such collateral for appearance at trial as the issuing authority shall require; or

(2) notifying the issuing authority in writing of the plea and forwarding as collateral for appearance at trial an amount equal to the fine and costs specified in the citation, plus any additional fee required by law. If the fine and costs are not specified, the defendant shall forward the sum of \$50 as collateral for appearance at trial providing a current mailing address, telephone number, and e-mail address.

Rule 409. Guilty Pleas.

(A) A defendant may plead guilty by:

(1) notifying the issuing authority in writing of the plea and forwarding to the issuing authority an amount equal to the fine and costs specified in the citation; ~~or~~

(2) notifying the proper issuing authority in writing of the plea with a statement that the defendant is without the financial means to pay the fines and costs listed on the citation and requests a hearing, and providing a current mailing address, telephone number, and e-mail address, in which case the issuing authority shall provide notice pursuant to Rule 451(A)

Commented [AC6]: Committee's proposal.

Commented [AC7]: This provision will protect defendants' statutory right to an ability-to-pay hearing at sentencing even if they plead guilty. It will also help reduce trips to the court: defendants will enter their plea and receive a date certain for a hearing. Otherwise, they appear at the court without a scheduled hearing, and if the court is busy (as it often is), they have to come back a second time.

By cross-referencing to Rule 454, the MDJ will understand what kind of a hearing it needs to hold, and then it will continue with that Rule and set a payment plan as necessary.

Commented [AC8]: These suggestions also apply to the analogous procedures for citations that are filed and for filed complaints in Rules 413 and 423.

Commented [AC9]: This will ensure that MDJs have appropriate contact information, consistent with the suggestion for Rule 403.

Commented [AC10]: As noted, collateral should be abolished.

Commented [AC11]: As noted, collateral should be abolished.

Commented [AC12]: This will ensure that MDJs have appropriate contact information, consistent with the suggestion for Rule 403.

Commented [AC13]: These suggestions also apply to the analogous procedures for citations that are filed and for filed complaints in Rules 414 and 424.

Appendix 1

and hold a hearing pursuant to Rule 454(F) to determine the amount of the fines and costs, if any; or

(~~2~~) **(3)** appearing before the issuing authority for the entry of the plea and imposition of sentence when the fine and costs are not specified in the citation or after receipt of notice that a guilty plea by mail has not been accepted by the issuing authority pursuant to paragraph (B)(3).

(B) When the defendant pleads guilty pursuant to paragraph (A)(1):

(1) The defendant ~~must~~ **shall** sign the guilty plea acknowledging that the plea is entered voluntarily and understandingly. **The defendant shall provide a current mailing address, telephone number, and e-mail address.**

(2) The issuing authority may issue a warrant for the arrest of the defendant as provided in Rules 430 and 431 if the amount forwarded with the plea is less than the amount of the fine and costs specified in the citation.

(3) Restrictions on the acceptance of guilty plea by mail:

(a) The issuing authority shall not accept a guilty plea that is submitted by mail when the offense carries a mandatory sentence of imprisonment.

(b) In those cases in which the charge carries a possible sentence of imprisonment, the issuing authority may accept a guilty plea submitted by mail.

(c) In any case in which the issuing authority does not accept a guilty plea submitted by mail, the issuing authority shall notify the defendant (1) that the guilty plea has not been accepted, (2) to appear personally before the issuing authority on a date and time certain, and (3) of the right to counsel. Notice of the rejection of the guilty plea by mail also shall be provided to the affiant.

(C) When the defendant is required to personally appear before the issuing authority to plead guilty pursuant to paragraph ~~(A)(2)~~ **(A)(3)**, the issuing authority shall:

(1) advise the defendant of the right to counsel when there is a likelihood of imprisonment and give the defendant, upon request, a reasonable opportunity to secure counsel;

(2) determine by inquiring of the defendant that the plea is voluntarily and understandingly entered;

(3) have the defendant sign the plea form with a representation that the plea is entered voluntarily and understandingly;

(4) impose sentence, or, in cases in which the defendant may be sentenced to intermediate punishment, the issuing authority may delay the proceedings pending confirmation of the defendant's eligibility for intermediate punishment; and

Commented [AC14]: Pursuant to ACLU-PA's suggestion in Rule 403(B)(2)(b)(iii).

Commented [AC15]: Committee's proposal.

Commented [AC16]: Committee's proposal.

Commented [AC17]: Consistent with ACLU-PA suggestion for Rule 403.

Commented [AC18]: To reflect the re-numbering above.

Appendix 1

(5) provide for installment payments when a defendant who is sentenced to pay a fine and costs is without the financial means immediately to pay **the full amount of the fine, and costs, and restitution. The issuing authority may delay imposing sentence pending confirmation of the defendant's ability to pay.**

Commented [AC19]: The Committee's proposal.

The Committee should provide clarification of the term "confirmation." The Committee may want to change this to say "pending the receipt of documentation or other evidence of the defendant's ability to pay."

Rule 430. Issuance of Warrant.

...

Commented [AC20]: The Committee's proposal does not address any changes to Rule 430, which ACLU-PA believes must be changed to reduce the number of bench warrants.

(3) A bench warrant may be issued when:

(a) the defendant has entered a guilty plea by mail and the money forwarded with the plea is less than the amount of the fine and costs specified in the citation or summons **and the defendant has not requested a hearing pursuant to Rule 454(F), or the defendant has entered a guilty plea by mail and failed to appear for a hearing to set the amount of fines, costs, and restitution pursuant to Rule 454(F);** or

Commented [AC21]: This provision will ensure that MDJs do not issue bench warrants for individuals who have not paid in full when mailing a guilty plea if the defendant has requested an ability-to-pay hearing to request that the court set the amount he owes.

(b) the defendant has been sentenced to pay restitution, a fine, or costs and has defaulted on the payment **pursuant to Rule 456(B);** or

Commented [AC22]: This change will specify that, if a defendant pleads guilty but – per a new procedure in Rule 403 and 409 explained above – needs to have a hearing to set the total amount of fines and costs, a warrant can be issued only if the defendant fails to appear for that hearing.

(c) the issuing authority has, in the defendant's absence, tried and sentenced the defendant to pay restitution, and/or to pay a fine and costs and ~~the~~ **any** collateral deposited by the defendant is less than the amount of the fine and costs imposed.

Commented [AC23]: This specifies that such bench warrants can be issued only if the MDJ follows the procedures in Rule 456(B), which ACLU-PA has proposed below.

(4) No warrant shall issue under paragraph (B)(3) unless the defendant has been given notice in person or by first class mail that failure to pay the amount due or to appear for a hearing may result in the issuance of a bench warrant, and the defendant has not responded to this notice within ~~10~~ **30** days. Notice by first class mail shall be considered complete upon mailing to the defendant's last known address.

Commented [AC24]: Consistent with ACLU-PA's suggestions to revise Rule 456. As the Committee acknowledged in proposing changing the time to respond to a citation from 10 to 30 days, 10 days is simply too short a time for many people to adequately respond. Given the constitutional implications of issuing warrants purely for failure to pay, this time must be extended.

Rule 431. Procedure When Defendant Arrested With Warrant.

...

Commented [AC25]: The Committee's proposal made no changes to Rule 431. However, the Rule requires significant modifications.

(B) Arrest Warrants Initiating Proceedings

(1) When an arrest warrant is executed, the police officer shall either:

(a) accept from the defendant a signed guilty plea and the full amount of the fine and costs if stated on the warrant;

Appendix 1

(b) accept from the defendant a signed guilty plea containing a current mailing address, telephone number, and e-mail address, and a statement that the defendant is unable to afford to pay the fines and costs listed on the citation and requests a hearing pursuant to Rule 454(F) at which the issuing authority shall consider the defendant's ability to pay any imposed fines and costs as appropriate;

~~(b)~~ **(c) accept from the defendant a signed not guilty plea and obtain a current mailing address, telephone number, and e-mail address, to be provided to the proper issuing authority** and the full amount of collateral if stated on the warrant; or

(d) if the warrant was issued because the issuing authority has reasonable grounds to believe that the defendant will not obey a summons, cause the defendant to be taken that day before the proper issuing authority.

~~(e) if the defendant is unable to pay, cause the defendant to be taken without unnecessary delay before the proper issuing authority.~~

...

(C) Bench Warrants

(1) When a bench warrant is executed, the police officer shall either:

(a) accept from the defendant a signed guilty plea and the full amount of the fines and costs if stated on the warrant;

(b) accept from the defendant a signed guilty plea containing a current mailing address, telephone number, and e-mail address, and a statement that he or she is unable to afford to pay the fines and costs listed on the citation and requests a hearing pursuant to Rule 454(F) at which the issuing authority shall consider the defendant's ability to pay any imposed fines and costs, as appropriate;

(b) accept from the defendant a signed not guilty plea **and obtain a current mailing address, telephone number, and e-mail address, to be provided to the proper issuing authority** and the full amount of collateral if stated on the warrant;

(c) accept from the defendant the amount of restitution, fine, and costs due as specified in the warrant if the warrant is for collection of restitution, fine, and costs after a guilty plea or conviction; ~~or~~

(d) if the bench warrant was issued pursuant to 456(B)(1) or (2) to provide notice of default to the defendant, provide a copy of that notice; or

~~(e)~~ **(e) if the defendant is unable to pay the amount specified in paragraph (C)(1)(c), promptly take the defendant that day for a hearing on the bench warrant as provided in paragraph (C)(3).**

Commented [AC26]: Consistent with the ACLU-PA proposal in Rule 403, this will allow a defendant to plead guilty and still request an ability-to-pay hearing to set the amount of fines, costs, and restitution.

Commented [AC27]: This will ensure the MDJ has appropriate contact information.

Commented [AC28]: Without the need for collateral, this part can be removed.

Commented [AC29]: This harmonizes the Rule with the existing statement in Rule 430(A)(2). The MDJ should specify on the warrant why it is being issued.

Commented [AC30]: This provision should be removed if collateral is no longer required, as it would serve no purpose – the defendant would either pay or ask for a hearing to set the amount owed. Otherwise, an arrest would be pointless – the defendant won't have any greater ability to access money, and the arrest could be unconstitutional.

Commented [AC31]: Consistent with the ACLU-PA proposal in Rule 403, this will allow a defendant to plead guilty and still request an ability-to-pay hearing to set the amount of fines, costs, and restitution.

Commented [AC32]: This will ensure the MDJ has appropriate contact information.

Commented [AC33]: Without the need for collateral, this part can be removed.

Commented [AC34]: This paragraph implements a new procedure in Rule 456 to ensure that defendants are not arrested due to nonpayment unless they first actually receive the notice required by Rule 456. Look to ACLU-PA's suggestions in Rule 456(B).

Commented [AC35]: In other words, the amount of money specified in the warrant.

Commented [AC36]: As is explained in ACLU-PA's suggested changes to Rule 456, this will ensure defendants are not incarcerated for potentially several days before receiving a payment determination hearing. Rule 117 allows them to be held for up to 72 hours before receiving a hearing, which is unacceptable given the constitutional implications and *Bearden*.

Appendix 1

(2) When the defendant pays the restitution, fine, ~~and or costs, or collateral~~ pursuant to paragraph (C)(1), the police officer shall issue a receipt to the defendant setting forth the amount of restitution, fine, and costs received and return a copy of the receipt, signed by the defendant and the police officer, to the proper issuing authority.

Commented [AC37]: This part is not required if collateral need not be posted to plead.

(3) When the defendant does not pay the restitution, fine, and costs, ~~or collateral~~, the defendant ~~promptly~~ shall be taken before the proper issuing authority ~~that day when available~~ pursuant to Rule ~~417~~ **456, or Rule 117 if the issuing authority is not available**, for a ~~bench warrant~~ **payment determination** hearing **pursuant to Rule 456**. ~~The bench warrant hearing may be conducted using two-way simultaneous audio-visual communication.~~

Commented [AC38]: This part is not required if collateral need not be posted to plead.

Commented [AC39]: This provision will ensure that defendants who are arrested because they have defaulted receive a hearing *that day* rather than being held for multiple days. It is consistent with the ACLU-PA's proposed change to Rule 456. A defendant would be brought before the MDJ to which the defendant owes the money. If that MDJ is unavailable, then the defendant would instead be brought to the duty MDJ per Rule 117. In the same way that the Rule 117 MDJ has authority to conduct trials and other proceedings, that MDJ would be able to hold a payment determination hearing and take appropriate actions.

Rule 452. Collateral.

~~(E) To be released on recognizance or to request a lower amount of collateral, the defendant must appear personally before the issuing authority to enter a plea, as provided in Rules 408, 413, and 423.~~

Commented [AC40]: The Committee's proposal made no changes to Rule 452.

Commented [AC41]: By removing the need for collateral when entering a plea, there would be no need for this provision.

Under the Committee's proposal, this provision should also be removed, since defendants will be able to explain that they cannot afford collateral on the citation.

Rule 454. Trial in Summary Cases.

...

~~(F) At the time of sentencing, the issuing authority shall:~~

Commented [AC42]: The Committee's proposal would create a new (E) and specify that the MDJ consider ability to pay pursuant to that provision.

(1) if the defendant's sentence includes restitution, a fine, or costs, ~~state:~~

~~(a) the amount of the fine and the obligation to pay costs;~~

ACLU-PA thinks this issue is better suited for the existing (F), so that the court is dealing with all of the financial procedures in one spot. This also has the benefit of making cross-references from Rule 403 and 409, and others, easier – rather than having to reference two provisions in Rule 454, those rules only need to reference (F).

(a) follow the procedures under Rule 459 to determine whether the defendant is able to pay the fine and costs;

(i) if the defendant is or will be able to pay, and the imposition of fines and costs will not prevent the defendant from paying restitution, if any, the court shall state in writing the amount of the fine and costs; or

Commented [AC43]: This procedure references a proposed new Rule 459, which will be a standalone and dedicated rule that specifically addresses ability to pay. This procedure will explicitly require that the MDJ consider that rule when imposing. As written, this will require that the MDJ consider any presumptions of a defendant's inability to pay and make written findings if the evidence rebuts those presumptions.

(ii) if the defendant is not or will be unable to pay, or the imposition of fines and costs will prevent the defendant from paying restitution, if any, the issuing authority may reduce or waive the fine and costs and shall state in writing any amount of the fine and costs;

In most cases, the MDJ will be able to fulfill this obligation simply by asking the defendant whether he or she can afford to pay the amount of the fines and costs, without the need for a searching inquiry.

(b) **state** the amount of restitution ordered, including

This language tracks that from 42 Pa. Cons. Stat. § 9726(c) and (d). It also makes clear that the ability-to-pay determination applies only to fines and costs, not to restitution, and it will ensure that restitution receives the highest priority.

(i) the identity of the payee(s),

Appendix 1

- (ii) to whom the restitution payment shall be made, and
- (iii) whether any restitution has been paid and in what amount; and
- (c) **state** the date on which payment is due.

If the defendant is without the financial means to pay the amount in a single remittance, the issuing authority ~~may~~ **shall** provide for installment payments **in an amount the defendant is found able to pay, if any, pursuant to Rule 459** and shall state **in writing** the date on which each installment is due. **The issuing authority shall provide a written copy of any payment plan to the defendant at the conclusion of the hearing;**

...

Rule 455. Trial in Defendant's Absence.

...

(D) If the defendant is found guilty, the issuing authority shall impose sentence, and shall give notice by first class mail to the defendant of the conviction and sentence, and of the right to file an appeal within 30 days for a trial de novo. ~~In those cases in which the amount of collateral deposited does not satisfy the fine and costs imposed or the issuing authority imposes a sentence of restitution, The notice shall also state that failure within 10 30 days of the date on the notice to pay the amount due or to appear for a hearing to determine whether the defendant is financially able to pay the amount due may result in the issuance of an arrest warrant. If, at that payment determination hearing, the issuing authority determines that the defendant is unable to pay the full amount of fines and costs, it shall first proceed as under Rule 454(F) before proceeding under Rule 456(D).~~

(E) Any collateral previously deposited shall be forfeited and applied only to the payment of the fine, costs, and restitution. When the amount of collateral deposited is more than the fine, costs and restitution, the balance shall be returned to the defendant.

(F) If the defendant does not respond within ~~10 30~~ days to the notice in paragraph (D), the issuing authority ~~may issue a warrant for the defendant's arrest~~ **shall proceed under Rule 456.**

Rule 456. Default Procedures: Restitution, Fines, and Costs.

(A) When a defendant advises the issuing authority that ~~a default on the defendant is unable to pay~~ a single remittance or installment payment of restitution, fines, or costs ~~is imminent~~, the issuing authority ~~may~~ **shall** schedule a hearing on the defendant's ability to pay. If a new payment schedule is ordered, the order shall state the date on which each payment is due, and the defendant shall be given a copy of the order. **A defendant cannot be in default if the defendant has not been given a written copy of any existing payment plan order.**

Commented [AC44]: This change again cross-references the uniform procedure in Rule 459.

Commented [AC45]: This provision makes explicit that the court not only has to put the payment plan information in writing, but it also has to give a copy to the defendant.

Commented [AC46]: The Committee's proposal does not make any changes to Rule 455.

Commented [AC47]: By entirely removing collateral, this sentence is no longer needed. The risk of increased bench warrants will be offset by better notice to defendants per Rule 456.

Commented [AC48]: To harmonize with ACLU-PA's proposed change to the timeline in Rule 456. This makes particular sense given that the defendant has 30 days to appeal. Issuing a bench warrant for nonpayment after 10 days interferes with that right. It makes more sense to harmonize the 30-day appeal period.

Commented [AC49]: This procedure will ensure that defendants have a mechanism to have the total amount of their fines and costs tailored to their ability to pay, even if they failed to appear at the trial. It advances the same goal as the revisions to Rule 454: ensuring that defendants are not saddled with high fines and costs that they cannot possibly afford.

Commented [AC50]: Again, to harmonize with other changes.

Commented [AC51]: There is no reason to wait until default is imminent. If the defendant knows he or she is not going to be able to pay, the defendant should be able to raise that issue immediately.

Commented [AC52]: The MDJ must hold such a hearing.

Commented [AC53]: The Rules should ensure that defendants actually receive copies of the payment plans before they can be considered in default.

Appendix 1

(B) If a defendant defaults on the payment of fines and costs, or restitution, as ordered, the issuing authority shall notify the defendant in person or by first class mail that, unless within ~~10~~ **30** days of the date on the default notice, the defendant pays the amount due as ordered, ~~or appears before~~ **schedules a payment determination hearing with** the issuing authority to explain why the defendant should not be imprisoned for nonpayment as provided by law, ~~or meets with the issuing authority's court clerk and is placed on a new payment plan,~~ a warrant for the defendant's arrest may be issued. **The issuing authority shall follow the following procedure prior to issuing a bench warrant for the defendant's arrest:**

(1) If the notice issued in paragraph (B) returns as undeliverable, the issuing authority may issue a bench warrant that only authorizes the police officer to serve a copy of that notice on the defendant.

(2) If, after mailing the notice to the defendant in paragraph (B), the defendant does not respond within 30 days, the issuing authority may issue a bench warrant that only authorizes the police officer to serve a copy of that notice on the defendant.

(3) Once a defendant has been served in person, including by a police officer, the issuing authority may, after 30 days, issue a bench warrant for the defendant's arrest if the defendant has not followed the instructions in the notice as in paragraph (B).

The notice provided under this paragraph must set forth:

(4) A statement of the total owed amount of fines, costs, and restitution owed to the court, along with the current installment payment amount, if any, and the date of the month on which payment is expected;

(5) A statement of the defendant's current payment plan, if any;

(6) That within 30 days from the date of service of the notice, the defendant must:

(a) Pay the amount due on the payment plan, if any;

(b) Notify the court that the defendant has already paid what is owed; or

(c) Notify the court that the defendant is unable to pay the amount owed and requests a payment determination hearing;

(7) That if the defendant does not respond within 30 days, the defendant may be arrested and brought before the court for a payment determination hearing. If, at that hearing, the issuing authority determines that the defendant had the ability to pay but willfully refused to pay, the defendant may be sentenced to imprisonment as provided by law;

(8) That the defendant has the right to a payment determination hearing before being jailed for nonpayment. At that hearing, the defendant:

Commented [AC54]: 10 days is simply too short, for the same reason that 10 days is too short a time for a person to respond to a citation. Given that there are more than 500,000 bench warrants issued each year for failure to pay, the time to respond should be extended to try to address the problem.

Commented [AC55]: Once the MDJ schedules a payment determination hearing, the timetable should be stayed until the hearing date.

Commented [AC56]: The standard practice across Pennsylvania is that defendants meet with the MDJ's court clerk at the window and try to work out a payment plan. Only if they cannot agree does the defendant need a hearing. This should be captured in the rules.

Commented [AC57]: These provisions ensure that indigent defendants are not unconstitutionally arrested because of their inability to pay unless they first actually receive notice from the MDJ. First-class mail is simply too unreliable, particularly when individuals move or experience homelessness.

A new procedure is also proposed in Rule 431 to match this.

Appendix 1

(a) Must be provided counsel if he cannot afford to hire a lawyer;

(b) May explain that the court's calculation of what is owed is incorrect;

(c) May explain why the defendant cannot afford the current payments and ask that payments be reduced or temporarily suspended; and

(d) May offer the court proof of the defendant's income, or why the defendant is without income, and expenses.

The issuing authority may at any time supplement written notice to the defendant by means of e-mail, telephone calls, and/or text messages.

(C) If the defendant appears pursuant to the ~~40~~ **30**-day notice in paragraph (B) or following an arrest for failing to respond to the ~~40~~ **30**-day notice in paragraph (B), the issuing authority shall conduct a hearing ~~immediately~~ **that day** to determine whether the defendant is financially able to pay as ordered. **The issuing authority may continue the hearing if it releases the defendant on recognizance. If the defendant has not received the 30-day notice, the defendant shall provide a current mailing address, telephone number, and e-mail address and be released on recognizance; the defendant will then have 30 days to respond as in paragraph (B).**

—(1) If the hearing cannot be held immediately, the issuing authority shall release the defendant on recognizance unless the issuing authority has reasonable grounds to believe that the defendant will not appear, in which case, the issuing authority may set collateral as provided in Rule 523.

—(2) If collateral is set, the issuing authority shall state in writing the reason(s) why any collateral other than release on recognizance has been set and the facts that support a determination that the defendant has the ability to pay monetary collateral.

—(3) If collateral is set and the defendant does not post collateral, the defendant shall not be detained without a hearing longer than 72 hours or the close of the next business day if the 72 hours expires on a non-business day.

(D) When a defendant appears pursuant to the notice in paragraph (B) or pursuant to an arrest warrant issued for failure to respond to the notice as provided in paragraph (C), **the issuing authority shall utilize the procedures under Rule 459 to affirmatively inquire into the reasons for nonpayment and the defendant's present financial status to determine whether the defendant is able to pay and proceed as follows:**

Commented [AC58]: These provisions spell out in greater detail the specific information that should be provided to defendants in the notice they receive from the MDJ upon default.

Commented [AC59]: Courts and pretrial services agencies in other jurisdictions have greatly improve response and appearance rates by using technology to contact defendants, and MDJs should be able to do the same.

Commented [AC60]: As is explained in ACLU-PA's comments, the procedure to hold someone for 72 hours is unconstitutional and is misused. It must be abolished.

Instead, as is explained with respect to the proposed changes to Rule 431, if a defendant has been arrested on a bench warrant and that issuing authority cannot hold the hearing, the defendant can be taken to the duty MDJ as specified by Rule 117.

The constitutional key is to either hold the hearing immediately or release the defendant and schedule the payment determination hearing at a later date.

Commented [AC61]: ACLU-PA proposes a new Rule 459 to unify ability-to-pay determinations in one place for purposes of sentencing and on default. A cross-reference makes clear that that is the appropriate procedure to follow at a payment determination hearing.

The requirement to affirmatively inquire into the reasons for nonpayment and the defendant's finances comes from *Bearden*.

Appendix 1

(1) upon a determination **by a preponderance of the evidence** that the defendant is financially able to pay as ordered **and willfully refusing to pay**, the issuing authority may **order a schedule or reschedule for installment payments pursuant to Rule 459 or** impose any sanction provided by law. **The issuing authority may impose a purge condition, compliance with which will allow the defendant to avoid sanction, only if it finds beyond a reasonable doubt that the defendant has the present ability to comply. No defendant may be sentenced to imprisonment if the right to counsel was not afforded at the payment determination hearing. The defendant may not waive that counsel except through the procedure and colloquy in Rule 121.**

Commented [AC62]: This is the appropriate civil contempt standard.

Commented [AC63]: The willfulness requirement is provided by statute and case law.

Commented [AC64]: As currently written, Rule 456 does not actually specify that the MDJ may set a defendant on a payment plan if he is able to pay. This would correct that oversight.

Commented [AC65]: Again, a cross-reference to Rule 459, which also explains how to set payment plans.

Commented [AC66]: This is the standard from *Barrett*.

Commented [AC67]: The Committee's proposal to clarify the Comment regarding the right to counsel is insufficient given how often defendants are forced to waive their right without appropriate procedural protections.

A cross-reference to Rule 121 is necessary to explain to MDJs that they *have* to perform the waiver-of-counsel colloquy.

(2) Upon a determination that the defendant is financially unable to pay as ordered, the issuing authority may order a schedule or reschedule for installment payments **pursuant to Rule 459, impose a term of community service with the defendant's consent, proceed under Rule 456.1,** or alter or amend the order as otherwise provided by law.

Commented [AC68]: Again, a cross-reference to Rule 459, which also explains how to set payment plans.

Commented [AC69]: This clarifies, per 42 Pa. Cons. Stat. § 9730(b)(3) that community service is an option for defendants who are unable to pay. It also clarifies that community service may be imposed *only if* the defendant consents; otherwise, the defendant would be punished for his or her nonpayment, which would violate both *Bearden* and the 13th Amendment.

Community service can, of course, be imposed as a sanction upon a finding of contempt – but here we are talking about defendants who are not contemptuous because they lack the ability to pay.

Commented [AC70]: This is a new rule that allows courts to administrative close cases if the MDJ determines that the case is uncollectible due to the defendant's indigence.

Commented [AC71]: To ensure that defendants leave the court with something in writing.

Commented [AC72]: Same.

(3) At the conclusion of the hearing, the issuing authority shall:

(a) if the issuing authority has ordered a schedule of installment payments or a new schedule of installment payments, state **in writing and provide to the defendant** the date on which each installment payment is due;

(b) advise the defendant **in writing and provide to the defendant notice** of the right to appeal within 30 days for a hearing *de novo* in the court of common pleas, and that if an appeal is filed:

(i) the execution of the order will be stayed and the issuing authority may set bail or collateral; and

(ii) the defendant must appear for the hearing *de novo* in the court of common pleas or the appeal may be dismissed;

Appendix 1

(c) if a sentence of imprisonment has been imposed, **state in writing the reason(s) why a sentence of imprisonment was deemed appropriate and the facts that support a determination that the defendant has the ability to pay as ordered; that sentence shall not begin until after the 30-day appeal period has passed, and the issuing authority shall** direct the defendant to appear for the execution of sentence on a date certain unless the defendant files a notice of appeal within the 30-day period; and

Commented [AC73]: Committee's proposal.

Commented [AC74]: This provision makes clear that the sentence is automatically stayed, per Rule 461(A), that the sentence of imprisonment is automatically stayed pending appeal.

(d) issue a written order imposing sentence, signed by the issuing authority. The order shall include the information specified in paragraphs (D)(3)(a) through (D)(3)(c), and a copy of the order shall be given to the defendant.

(E) A defendant may appeal an issuing authority's determination pursuant to this rule by filing a notice of appeal within 30 days of the issuing authority's order. The appeal shall proceed as provided in Rules 460, 461, and 462.

Rule 456.1 Termination of Inactive Cases (new rule)

(A) At any time that an issuing authority shall deem it appropriate, either by motion of the defendant, counsel, or the issuing authority on its own, the issuing authority may declare the fines, costs, and/or restitution arising out of summary prosecutions non-collectible because of the indigence of the defendant and thereafter close the case.

Commented [AC75]: This new rule is modeled after that used in Chester County which was adopted by then-President Judge Ott in 2005.

It creates an explicit and uniform procedure to administratively close cases if the MDJ determines that the defendant is indigent, pursuant to Rule 459.

The Rule envisions that no hearing is necessary to make this determination and to close the case. For example, the court may act sua sponte or in response to written correspondence from a defendant (for example, if that person is incarcerated).

(B) In determining whether a defendant is indigent, the issuing authority shall proceed under Rule 459(A).

(C) When using this procedure, the issuing authority shall declare and record in the case file that the case was closed for the reason that the fines, costs, and/or restitution are uncollectible due to the defendant's indigence. The issuing authority shall then perform a case balance adjustment to close the case. **If notice has previously been submitted to the Pennsylvania Department of Transportation pursuant to Rule 470, the issuing authority shall also follow the procedure in Rule 470 to request that it lift the license suspension.**

Commented [AC76]: This provision ensures that any defendant whose driver's license has been suspended due to nonpayment is entitled to have it restored if the case is terminated.

Rule 459 Ability to Pay (new rule)

(A) In assessing a defendant's ability to pay when imposing a sentence, setting a payment plan, or at a payment determination hearing, the issuing authority shall base its determination on the following:

Commented [AC77]: This is a new rule that is intended to create a uniform procedure to determine whether a defendant is "able to pay" and to ensure a uniform schedule of payment plans.

If the Committee prefers, these procedures could be incorporated into Rule 454 and 456.

(1) A defendant is presumed indigent if:

(a) The defendant's net income (after tax and other non-discretionary automatic deductions) is less than or equal to 125% of the Federal Poverty Guidelines. The Administrative Office of the Pennsylvania Courts shall update the issuing

Appendix 1

authority each year with a chart displaying the current Federal Poverty Guidelines by family size and provide the information on its website;

Commented [AC78]: This looks at the defendant's net income. AOPC would be responsible to provide notice to MDJs every year when the Federal Poverty Guidelines have been updated.

(b) The defendant receives income-based public assistance, including, but not limited to, Supplemental Nutrition Assistance Program (SNAP or food stamps), Medicaid, Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), veterans' disability benefits, or other state-based benefits;

Commented [AC79]: This comes from *Eggers*.

(c) The defendant is or has been within the past six months homeless, incarcerated, or residing in a mental health facility;

(f) The defendant is an unemanicapped juvenile; or

(e) The defendant is on his or her own unable to meet basic living expenses, including, but not limited to, food, rent/mortgage, utilities, medical expenses, transportation, and child support.

Commented [AC80]: This comes from *Gerlitzki and Stein Enterprises*.

(2) The presumption of indigence created under this section may be rebutted if the issuing authority finds by a preponderance of the evidence presented at the hearing that the defendant is not indigent and is presently able to pay. The issuing authority shall state such facts in writing.

Commented [AC81]: This provision allows MDJs to deviate from those presumptions if there is evidence in the record to support such a finding. It requires that the MDJ document the findings.

(B) All payment plans for defendants shall be limited to the following:

(1) If the defendant is indigent under section (A)(1), the issuing authority shall suspend the defendant's payments for a period of time that the issuing authority considers reasonable, taking into account the evidence before it, and shall set a payment determination hearing for when the period of suspension ends. At that subsequent payment determination hearing, the issuing authority shall extend the period of suspension of payments if the defendant remains indigent. The defendant shall not be considered in default during this time, including for purposes of Rule 470. If the defendant fails to appear for the payment determination hearing, the issuing authority may proceed under Rule 456.

Commented [AC82]: If a defendant is indigent, the MDJ must suspend that person's payments because that person is experiencing a hardship, per *Hernandez*.

Commented [AC83]: Notice should not be sent to PennDOT since the defendant is not technically in default.

Commented [AC84]: Which is to say that the court may issue a bench warrant.

(2) If the defendant is not indigent under section (A), but claims to be unable to make full payment, the issuing authority shall not require the defendant to make monthly payments greater than the amount listed in the table below for that defendant's net income level, as defined in paragraph (A), except as described in section (B)(3). The issuing authority may set payment amounts that are lower than the amount listed below for that defendant's income level.

Commented [AC85]: If a defendant cannot afford to pay the fines/costs/restitution in full, then the MDJ may set monthly payments at amounts that do not exceed the figures in the table.

Poverty Level Percentage	Maximum Monthly Payment Plan
Under 125% (but not indigent under (A)(2))	1 hour of minimum wage pay
125-149% of Poverty Level	2 hours of minimum wage pay
150-174% of Poverty Level	3 hours of minimum wage pay

Appendix 1

175-184% of Poverty Level	4 hours of minimum wage pay
185-200% of Poverty Level	5 hours of minimum wage pay

(3) The issuing authority may deviate from the Maximum Monthly Payment Plan figures listed above only if it finds by a preponderance of the evidence presented at the hearing that the defendant has the present ability to pay a higher amount per month without experiencing an economic hardship, which includes being unable to meet basic living expenses as described under (A)(1)(d). The issuing authority shall state such facts in writing.

Commented [AC86]: Again, the MDJ may deviate from those presumptions, but only if it makes written findings.

(C) If the defendant's income is more than 125% of the federal poverty level but the issuing authority determines that the defendant is currently experiencing economic hardship that warrants suspension of payments, the issuing authority may proceed as under paragraph (B)(1).

Commented [AC87]: This permits the MDJ to suspend payments even for someone making over 125% of the federal poverty guidelines if the MDJ determines that the person is experiencing economic hardship.

(D) Defendants may pay additional amounts towards their fines, costs, and restitution, beyond what is required in section (B), and the issuing authority shall accept such payments, but the issuing authority shall not require such additional payments.

Commented [AC88]: MDJs may not *require* additional payments, but defendants are free to pay more if they so wish.

(E) Whenever assessing ability to pay, the issuing authority shall use an Ability-to-Pay Evaluation form, which shall be made part of the case file, and which shall contain the following categories of information:

Commented [AC89]: In instances where the MDJ wishes to deviate from the presumptions, the MDJ must use an Ability-to-Pay Evaluation form, which the defendant completes, to determine exactly how much the defendant can afford to pay. This must be made part of the record and case file.

Monthly Income

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	\$

Monthly Expenses

Rent/Mortgage	\$
Utilities (Gas, Electric, Water)	\$
Television/Internet	\$

Appendix 1

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	\$

Liquid Assets

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

(F) Nothing in this Rule prevents the issuing authority from proceeding under Rule 456.1 to terminate inactive cases.

Rule 470. Procedures Related to License Suspension After Failure to Respond to Citation or Summons or Failure to Pay Fine and Costs.

(A) When a defendant fails to comply with the ~~10~~ **30**-day response period set forth in Rules 407, 412, ~~and~~ 422, the issuing authority shall notify the defendant in writing that, pursuant to Section 1533 of the Vehicle Code, the defendant's license will be suspended if the defendant fails to respond to the citation or summons ~~or fails to pay all fines and costs imposed or enter into an agreement to make installment payments for the fines and costs within 15~~ **30** days of the date of the notice. ~~No notice shall be sent to the Pennsylvania Department of Transportation pursuant to this provision if the summons mailed pursuant to Rules 411 and 421 returns as undeliverable after being sent by certified mail, as specified in Rule 451(B).~~

(B) When a defendant defaults on the payment of fines, costs, or restitution as ordered, the issuing authority shall notify the defendant in writing, sent contemporaneous with that under Rule 456(B), that pursuant to Section 1533 of the Vehicle Code, the defendant's license will be suspended if the defendant either fails to pay all fines, costs, and restitution imposed, or fails to enter into an agreement to make installment payments, and the issuing authority finds that the defendant is able to pay and willfully refusing to pay. No notice shall be sent to the Pennsylvania Department of Transportation pursuant to this provision

Commented [AC90]: Committee's proposal.

Commented [AC91]: Better to harmonize with all of the other timetables.

Commented [AC92]: This change cabins paragraph (A) only to defendants who have failed to respond.

Commented [AC93]: If a defendant does not have notice of the violation, then it violates that defendant's Due Process rights to have his or her driver's license suspended. This addition will clarify that no notice shall be sent to PennDOT whenever the defendant does not receive the citation from the officer and it is instead mailed by the MDJ. If the mail is undeliverable, then the defendant does not have notice.

Appendix 1

unless the issuing authority has first held a payment determination hearing pursuant to Rule 456 and determined that the defendant is able to pay and willfully refusing to pay.

~~(B)~~ (C) Service of the notice required in ~~paragraph~~ **paragraphs (A) and (B)** shall be by first class mail, and a copy shall be made part of the record.

~~(C)~~ (D) If the defendant does not respond by the ~~fifteenth~~ **thirtieth** day **as required under paragraph (A), or if the defendant is in default on payments of fines, costs, or restitution and the issuing authority has determined after a hearing that the defendant is able to pay and willfully refusing to pay as required under paragraph (B)**, the issuing authority shall so notify the Pennsylvania Department of Transportation. The notice shall be sent by electronic transmission in the form prescribed by the Pennsylvania Department of Transportation. The issuing authority shall print out and sign a copy of the notice, which shall include the date and time of the transmission, and the signed copy shall be made part of the record.

~~(D)~~ (E) If the defendant responds to the citation or summons, ~~or~~ pays all fines and costs imposed, ~~or~~ enters into an agreement to make installment payments for the fines and costs imposed after notice has been sent pursuant to paragraph (C), **or has the case terminated as set forth in Rule 456.1**, the issuing authority shall so notify the Pennsylvania Department of Transportation and request the withdrawal of the defendant's license suspension. The notice and request shall be sent by electronic transmission. The issuing authority shall print out and sign a copy of the notice and request, which shall include the date and time of the transmission, and the signed copy shall be made part of the record.

~~(E)~~ (F) Upon request of the defendant, the attorney for the Commonwealth, or any other government agency, the issuing authority's office shall provide a certified copy of any notices or any request form required by this rule.

Commented [AC94]: This provision solves the *Bearden* problem with the existing license suspension scheme by ensuring that there are no suspensions unless the court has first held an ability-to-pay hearing and found the defendant able to pay. To simplify this process, it cross-references with Rule 456.

Commented [AC95]: These simply clarify that the MDJ shall not send notice to PennDOT unless it has followed the procedures outlined in A and B.

Commented [AC96]: A technical fix to ensure that defendants can have their licenses restored if their cases are terminated.

Appendix 2

ACLU-PA Suggested Rules Revisions

Rules affected:

Rule 403. Contents of Citation.

Rule 408. Not Guilty Pleas—Notice of Trial. (also Rules 413 and 423)

Rule 409. Guilty Pleas. (also Rules 414 and 424)

Rule 430. Issuance of Warrant.

Rule 431. Procedure When Defendant Arrested With Warrant.

Rule 452. Collateral.

Rule 454. Trial in Summary Cases.

Rule 455. Trial in Defendant's Absence.

Rule 456. Default Procedures: Restitution, Fines, and Costs.

Rule 456.1 Termination of Inactive Cases (new)

Rule 459 Ability to Pay (new)

Rule 470. Procedures Related to License Suspension After Failure to Respond to Citation or Summons or Failure to Pay Fine and Costs.

Rule 403. Contents of Citation.

...

(B) The copy delivered to the defendant shall also contain a notice to the defendant:

(1) that the original copy of the citation will be filed before the issuing authority of the magisterial district designated in the citation, the address and number of which shall be contained in the citation; and

(2) that the defendant shall, within ~~10~~ **30** days after issuance of the citation:

(a) plead not guilty by:

(i) notifying the proper issuing authority in writing **or in person** of the plea **and providing a current mailing address, telephone number, and e-mail address** and forwarding as collateral for appearance at trial an amount equal to the fine and costs specified in the citation, plus any additional fee required by law. If the amount is not specified, the defendant shall forward the sum of \$50 as collateral for appearance at trial; or

~~—(ii) appearing before the proper issuing authority, entering the plea, and depositing such collateral for appearance at trial as the issuing authority shall require. If the defendant cannot afford to pay the collateral specified in the citation or the \$50, the defendant must appear before the issuing authority to enter a plea; or~~

(b) plead guilty by:

Appendix 2

(i) notifying the proper issuing authority in writing of the plea and forwarding an amount equal to the fine and costs when specified in the statute or ordinance, the amount of which shall be set forth in the citation; ~~or~~

(ii) appearing before the proper issuing authority for the entry of the plea and imposition of sentence, when the fine and costs are not specified in the citation, **or when a payment plan is necessary**, or when required to appear pursuant to Rule 409(B)(3), 414(B)(3), or 424(B)(3); ~~or~~

(iii) notifying the proper issuing authority in writing of the plea with a statement that the defendant is without the financial means to pay the fines and costs listed on the citation and requests a hearing, and providing a current mailing address, telephone number, and e-mail address, in which case the issuing authority shall provide notice pursuant to Rule 451(A) and hold a hearing pursuant to Rule 454(F) to determine the amount of the fines and costs, if any; or

...

Rule 408. Not Guilty Pleas—Notice of Trial.

(A) A defendant may plead not guilty by:

(1) appearing before the issuing authority, entering the plea, **and providing a current mailing address, telephone number, and e-mail address**, ~~and depositing such collateral for appearance at trial as the issuing authority shall require; or~~

(2) notifying the issuing authority in writing of the plea and ~~forwarding as collateral for appearance at trial an amount equal to the fine and costs specified in the citation, plus any additional fee required by law. If the fine and costs are not specified, the defendant shall forward the sum of \$50 as collateral for appearance at trial~~ **providing a current mailing address, telephone number, and e-mail address.**

Rule 409. Guilty Pleas.

(A) A defendant may plead guilty by:

(1) notifying the issuing authority in writing of the plea and forwarding to the issuing authority an amount equal to the fine and costs specified in the citation; ~~or~~

(2) **notifying the proper issuing authority in writing of the plea with a statement that the defendant is without the financial means to pay the fines and costs listed on the citation and requests a hearing, and providing a current mailing address, telephone number, and e-mail address, in which case the issuing authority shall provide notice pursuant to Rule 451(A)**

Appendix 2

and hold a hearing pursuant to Rule 454(F) to determine the amount of the fines and costs, if any; or

~~(2)~~ **(3)** appearing before the issuing authority for the entry of the plea and imposition of sentence when the fine and costs are not specified in the citation or after receipt of notice that a guilty plea by mail has not been accepted by the issuing authority pursuant to paragraph (B)(3).

(B) When the defendant pleads guilty pursuant to paragraph (A)(1):

(1) The defendant ~~must~~ **shall** sign the guilty plea acknowledging that the plea is entered voluntarily and understandingly. **The defendant shall provide a current mailing address, telephone number, and e-mail address.**

(2) The issuing authority may issue a warrant for the arrest of the defendant as provided in Rules 430 and 431 if the amount forwarded with the plea is less than the amount of the fine and costs specified in the citation.

(3) Restrictions on the acceptance of guilty plea by mail:

(a) The issuing authority shall not accept a guilty plea that is submitted by mail when the offense carries a mandatory sentence of imprisonment.

(b) In those cases in which the charge carries a possible sentence of imprisonment, the issuing authority may accept a guilty plea submitted by mail.

(c) In any case in which the issuing authority does not accept a guilty plea submitted by mail, the issuing authority shall notify the defendant (1) that the guilty plea has not been accepted, (2) to appear personally before the issuing authority on a date and time certain, and (3) of the right to counsel. Notice of the rejection of the guilty plea by mail also shall be provided to the affiant.

(C) When the defendant is required to personally appear before the issuing authority to plead guilty pursuant to paragraph ~~(A)(2)~~ **(A)(3)**, the issuing authority shall:

(1) advise the defendant of the right to counsel when there is a likelihood of imprisonment and give the defendant, upon request, a reasonable opportunity to secure counsel;

(2) determine by inquiring of the defendant that the plea is voluntarily and understandingly entered;

(3) have the defendant sign the plea form with a representation that the plea is entered voluntarily and understandingly;

(4) impose sentence, or, in cases in which the defendant may be sentenced to intermediate punishment, the issuing authority may delay the proceedings pending confirmation of the defendant's eligibility for intermediate punishment; and

Appendix 2

(5) provide for installment payments when a defendant who is sentenced to pay a fine and costs is without the financial means immediately to pay **the full amount of the fine, and costs, and restitution. The issuing authority may delay imposing sentence pending confirmation of the defendant's ability to pay.**

Rule 430. Issuance of Warrant.

...

(3) A bench warrant may be issued when:

(a) the defendant has entered a guilty plea by mail and the money forwarded with the plea is less than the amount of the fine and costs specified in the citation or summons **and the defendant has not requested a hearing pursuant to Rule 454(F), or the defendant has entered a guilty plea by mail and failed to appear for a hearing to set the amount of fines, costs, and restitution pursuant to Rule 454(F);** or

(b) the defendant has been sentenced to pay restitution, a fine, or costs and has defaulted on the payment **pursuant to Rule 456(B);** or

(c) the issuing authority has, in the defendant's absence, tried and sentenced the defendant to pay restitution, and/or to pay a fine and costs and ~~the~~ **any** collateral deposited by the defendant is less than the amount of the fine and costs imposed.

(4) No warrant shall issue under paragraph (B)(3) unless the defendant has been given notice in person or by first class mail that failure to pay the amount due or to appear for a hearing may result in the issuance of a bench warrant, and the defendant has not responded to this notice within ~~10~~ **30** days. Notice by first class mail shall be considered complete upon mailing to the defendant's last known address.

Rule 431. Procedure When Defendant Arrested With Warrant.

...

(B) *Arrest Warrants Initiating Proceedings*

(1) When an arrest warrant is executed, the police officer shall either:

(a) accept from the defendant a signed guilty plea and the full amount of the fine and costs if stated on the warrant;

Appendix 2

(b) accept from the defendant a signed guilty plea containing a current mailing address, telephone number, and e-mail address, and a statement that the defendant is unable to afford to pay the fines and costs listed on the citation and requests a hearing pursuant to Rule 454(F) at which the issuing authority shall consider the defendant's ability to pay any imposed fines and costs as appropriate;

~~(b)~~ **(c) accept from the defendant a signed not guilty plea and obtain a current mailing address, telephone number, and e-mail address, to be provided to the proper issuing authority and the full amount of collateral if stated on the warrant; or**

(d) if the warrant was issued because the issuing authority has reasonable grounds to believe that the defendant will not obey a summons, cause the defendant to be taken that day before the proper issuing authority.

~~—(e) if the defendant is unable to pay, cause the defendant to be taken without unnecessary delay before the proper issuing authority.~~

...

(C) Bench Warrants

(1) When a bench warrant is executed, the police officer shall either:

(a) accept from the defendant a signed guilty plea and the full amount of the fines and costs if stated on the warrant;

(b) accept from the defendant a signed guilty plea containing a current mailing address, telephone number, and e-mail address, and a statement that he or she is unable to afford to pay the fines and costs listed on the citation and requests a hearing pursuant to Rule 454(F) at which the issuing authority shall consider the defendant's ability to pay any imposed fines and costs, as appropriate;

(b) accept from the defendant a signed not guilty plea **and obtain a current mailing address, telephone number, and e-mail address, to be provided to the proper issuing authority** and the full amount of collateral if stated on the warrant;

(c) accept from the defendant the amount of restitution, fine, and costs due as specified in the warrant if the warrant is for collection of restitution, fine, and costs after a guilty plea or conviction; ~~or~~

(d) if the bench warrant was issued pursuant to 456(B)(1) or (2) to provide notice of default to the defendant, provide a copy of that notice; or

~~(d)~~ (e) if the defendant is unable to pay **the amount specified in paragraph (C)(1)(c)**, promptly take the defendant **that day** for a hearing on the bench warrant as provided in paragraph (C)(3).

Appendix 2

(2) When the defendant pays the restitution, fine, ~~and or~~ costs, ~~or collateral~~ pursuant to paragraph (C)(1), the police officer shall issue a receipt to the defendant setting forth the amount of restitution, fine, and costs received and return a copy of the receipt, signed by the defendant and the police officer, to the proper issuing authority.

(3) When the defendant does not pay the restitution, fine, and costs, ~~or collateral~~, the defendant ~~promptly~~ shall be taken before the proper issuing authority **that day when available** pursuant to Rule ~~117~~ **456, or Rule 117 if the issuing authority is not available**, for a bench warrant **payment determination** hearing **pursuant to Rule 456**. ~~The bench warrant hearing may be conducted using two-way simultaneous audio-visual communication.~~

Rule 452. Collateral.

~~(E) To be released on recognizance or to request a lower amount of collateral, the defendant must appear personally before the issuing authority to enter a plea, as provided in Rules 408, 413, and 423.~~

Rule 454. Trial in Summary Cases.

...

(F) At the time of sentencing, the issuing authority shall:

(1) if the defendant's sentence includes restitution, a fine, or costs, ~~state~~:

~~(a) the amount of the fine and the obligation to pay costs;~~

(a) follow the procedures under Rule 459 to determine whether the defendant is able to pay the fine and costs;

(i) if the defendant is or will be able to pay, and the imposition of fines and costs will not prevent the defendant from paying restitution, if any, the court shall state in writing the amount of the fine and costs; or

(ii) if the defendant is not or will be unable to pay, or the imposition of fines and costs will prevent the defendant from paying restitution, if any, the issuing authority may reduce or waive the fine and costs and shall state in writing any amount of the fine and costs;

(b) **state** the amount of restitution ordered, including

(i) the identity of the payee(s),

Appendix 2

- (ii) to whom the restitution payment shall be made, and
 - (iii) whether any restitution has been paid and in what amount; and
- (c) **state** the date on which payment is due.

If the defendant is without the financial means to pay the amount in a single remittance, the issuing authority ~~may~~ **shall** provide for installment payments **in an amount the defendant is found able to pay, if any, pursuant to Rule 459** and shall state **in writing** the date on which each installment is due. **The issuing authority shall provide a written copy of any payment plan to the defendant at the conclusion of the hearing;**

...

Rule 455. Trial in Defendant's Absence.

...

(D) If the defendant is found guilty, the issuing authority shall impose sentence, and shall give notice by first class mail to the defendant of the conviction and sentence, and of the right to file an appeal within 30 days for a trial de novo. ~~In those cases in which the amount of collateral deposited does not satisfy the fine and costs imposed or the issuing authority imposes a sentence of restitution,~~ **The notice shall also state that failure within ~~10~~ 30 days of the date on the notice to pay the amount due or to appear for a hearing to determine whether the defendant is financially able to pay the amount due may result in the issuance of an arrest warrant. If, at that payment determination hearing, the issuing authority determines that the defendant is unable to pay the full amount of fines and costs, it shall first proceed as under Rule 454(F) before proceeding under Rule 456(D).**

(E) Any collateral previously deposited shall be forfeited and applied only to the payment of the fine, costs, and restitution. When the amount of collateral deposited is more than the fine, costs and restitution, the balance shall be returned to the defendant.

(F) If the defendant does not respond within ~~10~~ **30** days to the notice in paragraph (D), the issuing authority ~~may issue a warrant for the defendant's arrest~~ **shall proceed under Rule 456.**

Rule 456. Default Procedures: Restitution, Fines, and Costs.

(A) When a defendant advises the issuing authority that ~~a default on~~ **the defendant is unable to pay** a single remittance or installment payment of restitution, fines, or costs ~~is imminent~~, the issuing authority ~~may~~ **shall** schedule a hearing on the defendant's ability to pay. If a new payment schedule is ordered, the order shall state the date on which each payment is due, and the defendant shall be given a copy of the order. **A defendant cannot be in default if the defendant has not been given a written copy of any existing payment plan order.**

Appendix 2

(B) If a defendant defaults on the payment of fines and costs, or restitution, as ordered, the issuing authority shall notify the defendant in person or by first class mail that, unless within ~~10~~ **30** days of the date on the default notice, the defendant pays the amount due as ordered, or ~~appears before~~ **schedules a payment determination hearing with** the issuing authority to explain why the defendant should not be imprisoned for nonpayment as provided by law, **or meets with the issuing authority's court clerk and is placed on a new payment plan,** a warrant for the defendant's arrest may be issued. **The issuing authority shall follow the following procedure prior to issuing a bench warrant for the defendant's arrest:**

(1) If the notice issued in paragraph (B) returns as undeliverable, the issuing authority may issue a bench warrant that only authorizes the police officer to serve a copy of that notice on the defendant.

(2) If, after mailing the notice to the defendant in paragraph (B), the defendant does not respond within 30 days, the issuing authority may issue a bench warrant that only authorizes the police officer to serve a copy of that notice on the defendant.

(3) Once a defendant has been served in person, including by a police officer, the issuing authority may, after 30 days, issue a bench warrant for the defendant's arrest if the defendant has not followed the instructions in the notice as in paragraph (B).

The notice provided under this paragraph must set forth:

(4) A statement of the total owed amount of fines, costs, and restitution owed to the court, along with the current installment payment amount, if any, and the date of the month on which payment is expected;

(5) A statement of the defendant's current payment plan, if any;

(6) That within 30 days from the date of service of the notice, the defendant must:

(a) Pay the amount due on the payment plan, if any;

(b) Notify the court that the defendant has already paid what is owed; or

(c) Notify the court that the defendant is unable to pay the amount owed and requests a payment determination hearing;

(7) That if the defendant does not respond within 30 days, the defendant may be arrested and brought before the court for a payment determination hearing. If, at that hearing, the issuing authority determines that the defendant had the ability to pay but willfully refused to pay, the defendant may be sentenced to imprisonment as provided by law;

(8) That the defendant has the right to a payment determination hearing before being jailed for nonpayment. At that hearing, the defendant:

Appendix 2

(a) Must be provided counsel if he cannot afford to hire a lawyer;

(b) May explain that the court's calculation of what is owed is incorrect;

(c) May explain why the defendant cannot afford the current payments and ask that payments be reduced or temporarily suspended; and

(d) May offer the court proof of the defendant's income, or why the defendant is without income, and expenses.

The issuing authority may at any time supplement written notice to the defendant by means of e-mail, telephone calls, and/or text messages.

(C) If the defendant appears pursuant to the ~~40~~ **30**-day notice in paragraph (B) or following an arrest for failing to respond to the ~~40~~ **30**-day notice in paragraph (B), the issuing authority shall conduct a hearing ~~immediately~~ **that day** to determine whether the defendant is financially able to pay as ordered. **The issuing authority may continue the hearing if it releases the defendant on recognizance. If the defendant has not received the 30-day notice, the defendant shall provide a current mailing address, telephone number, and e-mail address and be released on recognizance; the defendant will then have 30 days to respond as in paragraph (B).**

~~—(1) If the hearing cannot be held immediately, the issuing authority shall release the defendant on recognizance unless the issuing authority has reasonable grounds to believe that the defendant will not appear, in which case, the issuing authority may set collateral as provided in Rule 523.~~

~~—(2) If collateral is set, the issuing authority shall state in writing the reason(s) why any collateral other than release on recognizance has been set and the facts that support a determination that the defendant has the ability to pay monetary collateral.~~

~~—(3) If collateral is set and the defendant does not post collateral, the defendant shall not be detained without a hearing longer than 72 hours or the close of the next business day if the 72 hours expires on a non-business day.~~

(D) When a defendant appears pursuant to the notice in paragraph (B) or pursuant to an arrest warrant issued for failure to respond to the notice as provided in paragraph (C), **the issuing authority shall utilize the procedures under Rule 459 to affirmatively inquire into the reasons for nonpayment and the defendant's present financial status to determine whether the defendant is able to pay and proceed as follows:**

(1) upon a determination **by a preponderance of the evidence** that the defendant is financially able to pay as ordered **and willfully refusing to pay**, the issuing authority may **order a schedule or reschedule for installment payments pursuant to Rule 459 or** impose any sanction provided by law. **The issuing authority may impose a purge condition, compliance with which will allow the defendant to avoid sanction, only if it finds beyond a reasonable doubt that the defendant has the present ability to comply. No defendant may be sentenced to imprisonment if the right to counsel was not afforded at the payment determination**

Appendix 2

hearing. The defendant may not waive that counsel except through the procedure and colloquy in Rule 121.

(2) Upon a determination that the defendant is financially unable to pay as ordered, the issuing authority may order a schedule or reschedule for installment payments **pursuant to Rule 459, impose a term of community service with the defendant's consent, proceed under Rule 456.1,** or alter or amend the order as otherwise provided by law.

(3) At the conclusion of the hearing, the issuing authority shall:

(a) if the issuing authority has ordered a schedule of installment payments or a new schedule of installment payments, state **in writing and provide to the defendant** the date on which each installment payment is due;

(b) advise the defendant **in writing and provide to the defendant notice** of the right to appeal within 30 days for a hearing *de novo* in the court of common pleas, and that if an appeal is filed:

(i) the execution of the order will be stayed and the issuing authority may set bail or collateral; and

(ii) the defendant must appear for the hearing *de novo* in the court of common pleas or the appeal may be dismissed;

(c) if a sentence of imprisonment has been imposed, **state in writing the reason(s) why a sentence of imprisonment was deemed appropriate and the facts that support a determination that the defendant has the ability to pay as ordered; that sentence shall not begin until after the 30-day appeal period has passed, and the issuing authority shall** direct the defendant to appear for the execution of sentence on a date certain unless the defendant files a notice of appeal within the 30-day period; and

(d) issue a written order imposing sentence, signed by the issuing authority. The order shall include the information specified in paragraphs (D)(3)(a) through (D)(3)(c), and a copy of the order shall be given to the defendant.

(E) A defendant may appeal an issuing authority's determination pursuant to this rule by filing a notice of appeal within 30 days of the issuing authority's order. The appeal shall proceed as provided in Rules 460, 461, and 462.

Rule 456.1 Termination of Inactive Cases (new rule)

(A) At any time that an issuing authority shall deem it appropriate, either by motion of the defendant, counsel, or the issuing authority on its own, the issuing authority may declare the fines, costs, and/or restitution arising out of summary prosecutions non-collectible because of the indigence of the defendant and thereafter close the case.

Appendix 2

(B) In determining whether a defendant is indigent, the issuing authority shall proceed under Rule 459(A).

(C) When using this procedure, the issuing authority shall declare and record in the case file that the case was closed for the reason that the fines, costs, and/or restitution are uncollectible due to the defendant's indigence. The issuing authority shall then perform a case balance adjustment to close the case. If notice has previously been submitted to the Pennsylvania Department of Transportation pursuant to Rule 470, the issuing authority shall also follow the procedure in Rule 470 to request that it lift the license suspension.

Rule 459 Ability to Pay (new rule)

(A) In assessing a defendant's ability to pay when imposing a sentence, setting a payment plan, or at a payment determination hearing, the issuing authority shall base its determination on the following:

(1) A defendant is presumed indigent if:

(a) The defendant's net income (after tax and other non-discretionary automatic deductions) is less than or equal to 125% of the Federal Poverty Guidelines. The Administrative Office of the Pennsylvania Courts shall update the issuing authority each year with a chart displaying the current Federal Poverty Guidelines by family size and provide the information on its website;

(b) The defendant receives income-based public assistance, including, but not limited to, Supplemental Nutrition Assistance Program (SNAP or food stamps), Medicaid, Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), veterans' disability benefits, or other state-based benefits;

(c) The defendant is or has been within the past six months homeless, incarcerated, or residing in a mental health facility;

(f) The defendant is an unemancipated juvenile; or

(e) The defendant is on his or her own unable to meet basic living expenses, including, but not limited to, food, rent/mortgage, utilities, medical expenses, transportation, and child support.

(2) The presumption of indigence created under this section may be rebutted if the issuing authority finds by a preponderance of the evidence presented at the hearing that the defendant is not indigent and is presently able to pay. The issuing authority shall state such facts in writing.

Appendix 2

(B) All payment plans for defendants shall be limited to the following:

(1) If the defendant is indigent under section (A)(1), the issuing authority shall suspend the defendant's payments for a period of time that the issuing authority considers reasonable, taking into account the evidence before it, and shall set a payment determination hearing for when the period of suspension ends. At that subsequent payment determination hearing, the issuing authority shall extend the period of suspension of payments if the defendant remains indigent. The defendant shall not be considered in default during this time, including for purposes of Rule 470. If the defendant fails to appear for the payment determination hearing, the issuing authority may proceed under Rule 456.

(2) If the defendant is not indigent under section (A), but claims to be unable to make full payment, the issuing authority shall not require the defendant to make monthly payments greater than the amount listed in the table below for that defendant's net income level, as defined in paragraph (A), except as described in section (B)(3). The issuing authority may set payment amounts that are lower than the amount listed below for that defendant's income level.

Poverty Level Percentage	Maximum Monthly Payment Plan
Under 125% (but not indigent under (A)(2))	1 hour of minimum wage pay
125-149% of Poverty Level	2 hours of minimum wage pay
150-174% of Poverty Level	3 hours of minimum wage pay
175-184% of Poverty Level	4 hours of minimum wage pay
185-200% of Poverty Level	5 hours of minimum wage pay

(3) The issuing authority may deviate from the Maximum Monthly Payment Plan figures listed above only if it finds by a preponderance of the evidence presented at the hearing that the defendant has the present ability to pay a higher amount per month without experiencing an economic hardship, which includes being unable to meet basic living expenses as described under (A)(1)(d). The issuing authority shall state such facts in writing.

(C) If the defendant's income is more than 125% of the federal poverty level but the issuing authority determines that the defendant is currently experiencing economic hardship that warrants suspension of payments, the issuing authority may proceed as under paragraph (B)(1).

(D) Defendants may pay additional amounts towards their fines, costs, and restitution, beyond what is required in section (B), and the issuing authority shall accept such payments, but the issuing authority shall not require such additional payments.

(E) Whenever assessing ability to pay, the issuing authority shall use an Ability-to-Pay Evaluation form, which shall be made part of the case file, and which shall contain the following categories of information:

Monthly Income

Appendix 2

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	\$

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	\$

Liquid Assets

Cash on Hand	\$
Money in Bank Accounts (checking and savings)	\$
Certificates of Deposit	\$

Appendix 2

Stocks, Bonds, and Mutual Funds	§
---------------------------------	---

(F) Nothing in this Rule prevents the issuing authority from proceeding under Rule 456.1 to terminate inactive cases.

Rule 470. Procedures Related to License Suspension After Failure to Respond to Citation or Summons or Failure to Pay Fine and Costs.

(A) When a defendant fails to comply with the ~~40~~ **30**-day response period set forth in Rules 407, 412, **and** 422, the issuing authority shall notify the defendant in writing that, pursuant to Section 1533 of the Vehicle Code, the defendant's license will be suspended if the defendant fails to respond to the citation or summons ~~or fails to pay all fines and costs imposed or enter into an agreement to make installment payments for the fines and costs within 15~~ **30** days of the date of the notice. **No notice shall be sent to the Pennsylvania Department of Transportation pursuant to this provision if the summons mailed pursuant to Rules 411 and 421 returns as undeliverable after being sent by certified mail, as specified in Rule 451(B).**

(B) When a defendant defaults on the payment of fines, costs, or restitution as ordered, the issuing authority shall notify the defendant in writing, sent contemporaneous with that under Rule 456(B), that pursuant to Section 1533 of the Vehicle Code, the defendant's license will be suspended if the defendant either fails to pay all fines, costs, and restitution imposed, or fails to enter into an agreement to make installment payments, and the issuing authority finds that the defendant is able to pay and willfully refusing to pay. No notice shall be sent to the Pennsylvania Department of Transportation pursuant to this provision unless the issuing authority has first held a payment determination hearing pursuant to Rule 456 and determined that the defendant is able to pay and willfully refusing to pay.

~~(B)~~ (C) Service of the notice required in ~~paragraph~~ **paragraphs (A) and (B)** shall be by first class mail, and a copy shall be made part of the record.

~~(C)~~ (D) If the defendant does not respond by the ~~fifteenth~~ **thirtieth** day **as required under paragraph (A), or if the defendant is in default on payments of fines, costs, or restitution and the issuing authority has determined after a hearing that the defendant is able to pay and willfully refusing to pay as required under paragraph (B),** the issuing authority shall so notify the Pennsylvania Department of Transportation. The notice shall be sent by electronic transmission in the form prescribed by the Pennsylvania Department of Transportation. The issuing authority shall print out and sign a copy of the notice, which shall include the date and time of the transmission, and the signed copy shall be made part of the record.

~~(D)~~ (E) If the defendant responds to the citation or summons, ~~or~~ pays all fines and costs imposed, ~~or~~ enters into an agreement to make installment payments for the fines and costs imposed after notice has been sent pursuant to paragraph (C), **or has the case terminated as set forth in Rule 456.1,** the issuing authority shall so notify the Pennsylvania Department of Transportation and request the withdrawal of the defendant's license suspension. The notice and request shall be sent by electronic transmission. The issuing authority shall print out and sign a

Appendix 2

copy of the notice and request, which shall include the date and time of the transmission, and the signed copy shall be made part of the record.

~~(E)~~ (F) Upon request of the defendant, the attorney for the Commonwealth, or any other government agency, the issuing authority's office shall provide a certified copy of any notices or any request form required by this rule.

Appendix 3

NATIONAL TASK FORCE ON FINES, FEES AND BAIL PRACTICES

LAWFUL COLLECTION OF LEGAL FINANCIAL OBLIGATIONS

A BENCH CARD FOR JUDGES

Courts may not incarcerate a defendant/respondent, or revoke probation, for nonpayment of a court-ordered legal financial obligation unless the court holds a hearing and makes one of the following findings:

1. The failure to pay was not due to an inability to pay but was willful or due to failure to make bona fide efforts to pay; or
2. The failure to pay was not the fault of the defendant/respondent and alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence.

If a defendant/respondent fails to pay a court-ordered legal financial obligation but the court, after opportunity for a hearing, finds that the failure to pay was not due to the fault of the defendant/respondent but to lack of financial resources, the court should consider alternative measures of punishment other than incarceration. *Bearden v. Georgia*, 461 U.S. 660, 667-669 (1983). Punishment and deterrence can often be served fully by alternative means to incarceration, including an extension of time to pay or reduction of the amount owed. *Id.* at 671.

Court-ordered legal financial obligations (LFOs) include all discretionary and mandatory fines, costs, fees, state assessments, and/or restitution in civil and criminal cases.

1. Adequate Notice of the Hearing to Determine Ability to Pay

Notice should include the following information:

- a. Hearing date and time;
- b. Total amount claimed due;
- c. That the court will evaluate the person's ability to pay at the hearing;
- d. That the person should bring any documentation or information the court should consider in determining ability to pay;
- e. That incarceration may result only if alternate measures are not adequate to meet the state's interests in punishment and deterrence or the court finds that the person had the ability to pay and willfully refused;
- f. Right to counsel*; and
- g. That a person unable to pay can request payment alternatives, including, but not limited to, community service and/or a reduction of the amount owed.

2. Meaningful Opportunity to Explain at the Hearing

The person must have an opportunity to explain:

- a. Whether the amount charged as due is incorrect; and
- b. The reason(s) for any nonpayment (e.g., inability to pay).

3. Factors the Court Should Consider to Determine Willfulness¹

- a. Income, including whether income is at or below 125% of the Federal Poverty Guidelines (FPG);²

For 2016, 125% of FPG is:

\$14,850 for an individual;	\$30,375 for a family of 4;
\$20,025 for a family of 2;	\$35,550 for a family of 5;
\$25,200 for a family of 3;	\$40,725 for a family of 6.

- b. Receipt of needs-based, means-tested public assistance, including, but not limited to, Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), or veterans' disability benefits (Such benefits are not subject to attachment, garnishment, execution, levy, or other legal process);

¹ See *Bearden v. Georgia*, 461 U.S. 660 (1983)

² U.S. Dep't of Health & Human Servs., Poverty Guidelines, Jan. 26, 2016, <https://aspe.hhs.gov/poverty-guidelines>

Appendix 3

- c. Financial resources, assets, financial obligations, and dependents;
- d. Whether the person 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 person'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 LFO payment would result in manifest hardship to the person or his/her dependents; and
- i. Any other special circumstances that may bear on the person's ability to pay.

4. Findings by the Court

The court should find, on the record, that the person was provided prior adequate notice of:

- a. Hearing date/time;
- b. Failure to pay an LFO is at issue;
- c. The right to counsel*;
- d. The defense of inability to pay;
- e. The opportunity to bring any documents or other evidence of inability to pay; and
- f. The opportunity to request an alternative sanction to payment or incarceration.

After the ability to pay hearing, the court should also find on the record that the person was given a meaningful opportunity to explain the failure to pay.

If the Court determines that incarceration must be imposed, the Court should make findings about:

- 1. The financial resources relied upon to conclude that nonpayment was willful; or
- 2. If the defendant/respondent was not at fault for nonpayment, why alternate measures are not adequate, in the particular case, to meet the state's interest in punishment and deterrence.

Alternative Sanctions to Imprisonment That Courts Should Consider When There Is an Inability to Pay

- a. Reduction of the amount due;
- b. Extension of time to pay;
- c. A reasonable payment plan or modification of an existing payment plan;
- d. Credit for community service (*Caution:* Hours ordered should be proportionate to the violation and take into consideration any disabilities, driving restrictions, transportation limitations, and caregiving and employment responsibilities of the individual);
- e. Credit for completion of a relevant, court-approved program (e.g., education, job skills, mental health or drug treatment); or
- f. Waiver or suspension of the amount due.

*Case law establishes that the U.S. Constitution affords indigent persons a right to court-appointed counsel in most post-conviction proceedings in which the individual faces actual incarceration for nonpayment of a legal financial obligation, or a suspended sentence of incarceration that would be carried out in the event of future nonpayment, even if the original sanction was only for fines and fees. See *Best Practices for Determining the Right to Counsel in Legal Financial Obligation Cases*.

This bench card was produced by the National Task Force on Fines, Fees and Bail Practices. The Task Force is a joint effort of the Conference of Chief Justices and the Conference of State Court Administrators, sponsored by the State Justice Institute and the Bureau of Justice Assistance, coordinated by the National Center for State Courts.



Appendix 4

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:)
)
BENCH CARDS FOR:) Administrative Order
) No. 2017 - 81
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)
_____)

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

Appendix 4

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 Mitigation¹

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% and 130% 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.

Appendix 4

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.

Appendix 4

BENCH CARD FOR ARS §13-810 ORDER TO SHOW CAUSE HEARINGS (OSC), LAWFUL COLLECTION OF LEGAL FINANCIAL OBLIGATIONS

Court-ordered legal financial obligations (LFOs) include all local or State, discretionary and mandatory fines, costs, fees, surcharges, assessments, restitution and other court ordered financial sanctions in criminal cases. Willful failure to comply with court-ordered LFOs may result in incarceration, except in civil traffic cases.¹

A court may not incarcerate a defendant for nonpayment of a court-ordered legal financial obligation unless the court holds a hearing and makes one of the following findings:

1. The failure to pay was willful and not due to an inability to pay; or
2. The failure to pay was due to an intentional failure to make bona fide efforts to pay.

To make the determination of willfulness, the court should:

1. Confirm that adequate notice of the hearing to determine ability to pay was provided.

Notice should include the following information:

- a. Hearing date and time;
- b. Total amount claimed due;
- c. That the court will evaluate the defendant's ability to pay at the hearing;
- d. That the defendant should bring any documentation or information the court should consider in determining ability to pay;
- e. That incarceration may result if the court finds that the defendant had the ability to pay and willfully refused; and
- f. That a defendant unable to pay can request payment alternatives, including, but not limited to, community restitution or a time payment plan.

2. Provide meaningful opportunity to explain at the hearing.

The defendant must have an opportunity to explain:

- a. Whether the amount due is incorrect; and
- b. The reason(s) for any nonpayment (e.g., inability to pay).

3. The following are factors the court should consider to determine willfulness:

- a. Whether defendant is receiving 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% of the Federal Poverty Level (FPL)²;
- c. Financial resources, assets, financial obligations, and 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 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.

2017 FPL Income Based on Family Size

<i>Family Size</i>	<i>130% of FPL</i>	<i>Family Size</i>	<i>130% of FPL</i>
<i>Individual</i>	<i>\$15,678</i>	<i>Household of 4</i>	<i>\$31,980</i>
<i>Household of 2</i>	<i>\$21,112</i>	<i>Household of 5</i>	<i>\$37,414</i>
<i>Household of 3</i>	<i>\$26,546</i>	<i>Household of 6</i>	<i>\$42,848</i>

¹ Order to Show Cause hearings under ARS §13-810 are not used in civil traffic cases.

² U.S. Dep't of Health & Human Servs., Poverty Guidelines, Jan. 26, 2017, <https://aspe.hhs.gov/poverty-guidelines>

Appendix 4

BENCH CARD FOR ARS §13-810 ORDER TO SHOW CAUSE HEARINGS (OSC), LAWFUL COLLECTION OF LEGAL FINANCIAL OBLIGATIONS

4. At the hearing, the court should find on the record:

- a. A determination of willfulness or intentional failure to make bona fide efforts to pay.
- b. Any fine payment alternatives imposed in 5 below.

5. Consider alternative sanctions for both those who have been found willful and not willful of nonpayment pursuant to ARS §13-810(D)&(E).

The options for those defendants who willfully failed to pay, or intentionally failed to make a good faith effort to pay, after a finding of contempt include:

- a. Order the defendant to perform community restitution;
- b. Enter a criminal restitution order pursuant to ARS §13-805;
- c. Enter a writ of criminal garnishment pursuant to ARS §13-812. This does not discharge a defendant who is incarcerated for nonpayment until the amount owed or a portion of the amount owed is paid;
- d. Order defendant incarcerated in the county jail until the LFO or a specified portion of it is paid.
- e. Refer for probation revocation conducted under Rule 27 of the Rules of Criminal Procedure. Probation revocation cannot be determined at a §13-810 OSC hearing.

The options for those defendants who were not willful in nonpayment, or have made a good faith effort to pay include:

- a. Re-establish any original agreement regarding the payment of the LFO;
- b. Modify the manner in which the amount owed is to be paid. This may include an extension of time to pay, the establishment or the modification of a time payment plan, ordering community restitution or allowing credit for community restitution when permitted by ARS §13-824;
- c. Enter a criminal restitution order pursuant to ARS §13-805;
- d. Enter a writ of criminal garnishment pursuant to ARS §13-812. This does not discharge a defendant who is incarcerated for nonpayment until the amount owed or a portion of the amount owed is paid.

Courts 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.

Appendix 5



LAWFUL ENFORCEMENT OF LEGAL FINANCIAL OBLIGATIONS A BENCH CARD FOR JUDGES

Courts may not incarcerate a defendant/respondent, or revoke probation, for nonpayment of a court-ordered legal financial obligation unless the court holds a hearing and makes one of the following findings:

1. The failure to pay was not due to an inability to pay, but was willful or due to failure to make bona fide efforts to pay; or
2. The failure to pay was not the fault of the defendant/respondent and alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence.

If a defendant/respondent fails to pay a court-ordered legal financial obligation but the court, after opportunity for a hearing, finds that the failure to pay was not due to the fault of the defendant/respondent, but rather due to lack of financial resources, the court should consider alternative measures of punishment rather than incarceration. *Bearden v. Georgia*, 461 U.S. 660, 667-669 (1983); *State ex rel. Fleming v. Mo. Bd. of Prob. & Parole*, 515 S.W.3d 224 (Mo. banc 2017). Punishment and deterrence can often be served fully by alternative means to incarceration, including an extension of time to pay, reduction of the amount owed, or community service. *Bearden*, 461 U.S. at 671.

Court-ordered legal financial obligations (LFOs) include all discretionary and mandatory fines, costs, fees, state assessments, and/or restitution in civil and criminal cases.

1. Adequate Notice of the Hearing to Determine Ability to Pay¹

Notice should include the following information:

- a. Hearing date and time;
- b. Total amount claimed due;
- c. That the court will evaluate the person's ability to pay at the hearing;
- d. That the person should bring any documentation or information the court should consider in determining ability to pay;
- e. That incarceration may result only if alternate measures are not adequate to meet the State's interests in punishment and deterrence or the court finds that the person had the ability to pay and willfully refused;
- f. Right to counsel*; and
- g. That a person unable to pay can request payment alternatives, including, but not limited to, community service and/or a reduction of the amount owed.

2. Meaningful Opportunity to Explain at the Hearing²

The person must have an opportunity to explain:

- a. Whether the amount charged as due is incorrect; and
- b. The reason(s) for any nonpayment (e.g., inability to pay).

3. Factors the Court Should Consider to Determine Willfulness³

- a. Income, including whether income is at or below 125% of the Federal Poverty Guidelines (FPG)⁴

For 2016, 125% of FPG is:	
\$14,850 for an individual;	\$30,375 for a family of 4;
\$20,025 for a family of 2;	\$35,550 for a family of 5;
\$25,200 for a family of 3;	\$40,725 for a family of 6.

- b. Receipt of needs-based, means-tested public assistance, including, but not limited to, Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), or veterans' disability benefits (Such benefits are not subject to attachment, garnishment, execution, levy, or other legal process);

¹ Rule 37.65(b)(c); Rule 36.01(b); section 558.006 RSMo (formerly section 560.031 RSMo).

² Section 479.360.1(4); Rule 37.04, Appendix "A," Minimum Operating Standard #2.

³ See *Bearden v. Georgia*, 461 U.S. 660 (1983); *State ex rel. Fleming v. Mo. Bd. of Prob. & Parole*, 515 S.W.3d 224 (Mo. banc 2017).

⁴ U.S. Dep't of Health & Human Servs., Poverty Guidelines, Jan. 26, 2016, (<https://aspe.hhs.gov/poverty-guidelines>).

Appendix 5

- c. Financial resources, assets, financial obligations, and dependents;
- d. Whether the person 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 person'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 LFO payment would result in manifest hardship to the person or his/her dependents; and
- i. Any other special circumstances that may bear on the person's ability to pay.

4. Findings by the Court

The court should find, on the record and/or by docket entry, that the person was provided prior adequate notice of:

- a. Hearing date/time;
- b. Failure to pay an LFO is at issue;
- c. The right to counsel*;
- d. The defense of inability to pay;
- e. The opportunity to bring any documents or other evidence of inability to pay; and
- f. The opportunity to request an alternative sanction to payment or incarceration.

After the ability to pay hearing, the court should also find on the record that the person was given a meaningful opportunity to explain the failure to pay.

If the Court determines that incarceration must be imposed, the Court should make findings about:

1. The financial resources relied upon to conclude that nonpayment was willful;⁵ or
2. If the defendant/respondent was not at fault for nonpayment, why alternate measures are not adequate, in the particular case, to meet the State's interest in punishment and deterrence.⁶

Alternative Sanctions to Imprisonment That Courts Should Consider When There is an Inability to Pay⁷

- a. Reduction of the amount due;
- b. Extension of time to pay;
- c. A reasonable payment plan or modification of an existing payment plan;
- d. Credit for community service (*Caution*: Hours ordered should be proportionate to the violation and take into consideration any disabilities, driving restrictions, transportation limitations, and caregiving and employment responsibilities of the individual);
- e. Credit for completion of a relevant, court-approved program (e.g., education, job skills, mental health or drug treatment); or
- f. Waiver or suspension of the amount due.

*Case law establishes that the U.S. Constitution affords indigent persons a right to court-appointed counsel in most post-conviction proceedings in which the individual faces actual incarceration for nonpayment of a legal financial obligation, or a suspended sentence of incarceration that would be carried out in the event of future nonpayment, even if the original sanction was only for fines and fees. *See Best Practices for Determining the Right to Counsel in Legal Financial Obligation Cases.*

⁵ See, for example, *State v. Jackson*, 610 S.W.2d 420 (Mo. App. 1980).

⁶ *Bearden*, 461 U.S. at 672, *Fleming*, 515 S.W.3d at 232.

⁷ Section 479.360.1 (8)(9) RSMo; Rule 37.04, Appendix "A," Minimum Operating Standard #2, #4; section 558.006 RSMo (formerly section 560.031 RSMo).



Appendix 6

Mecklenburg County District Court

Bench Card: Non-payment of Fines, Costs, Fees, and Restitution

Guiding Principles

Based on the U.S. Constitution and North Carolina law, the Mecklenburg County District Court has adopted the following guidelines to respond to non-payment of fines, costs, fees, and restitution (“legal financial obligations” or LFOs). Mecklenburg aims to eliminate the use of warrants and incarceration for non-payment and reduce orders to show cause.

The Supreme Court held in **Bearden v. Georgia**, 461 U.S. 660, 673-74 (1983), an individual who has “made sufficient bona fide efforts to pay” shall not be incarcerated for nonpayment unless alternate measures are not adequate. Society’s interest in punishment and deterrence “can often be served fully by alternative means” to incarceration. *Id.* at 671-72.

Responses to missed payment

Individuals paying to Clerk’s office:

1. If an individual fails to pay by the required date, the Court shall consider ability to pay and may:
 - Send reminders (at least 3 recommended before requiring a hearing);
 - Remit (N.C.G.S. § 15A-1363;¹ N.C.G.S. § 15A-1364(c));²
 - Convert to civil lien (N.C.G.S. § 15A-1365;³ N.C.G.S. § 15A-1340.38);⁴
 - Issue an order to show cause (N.C.G.S. § 15A-1364);
 - The Court cannot issue an order for arrest for non-payment (N.C.G.S. § 15A-1364(a)).
2. If the individual is ordered to show cause and appears, the Court shall conduct an ability-to-pay hearing.
3. If the individual fails to appear, the Court shall review the individual’s ability to pay and may:
 - Send reminders or order to show cause;
 - Remit (N.C.G.S. § 15A-1363; N.C.G.S. § 15A-1364(c));
 - Convert to civil lien (N.C.G.S. § 15A-1365; N.C.G.S. § 15A-1340.38);
 - Issue an order for arrest (N.C.G.S. § 15A-1364(a)). The Court cannot issue an order for arrest if the person was not served an order to show cause.

Individuals paying to Fines and Collections:

1. Fines and Collections sends reminders.
2. If LFOs remain unpaid, Court may review case. The Court shall consider ability-to-pay and may:
 - Remit (N.C.G.S. § 15A-1363; N.C.G.S. § 15A-1364(c));
 - Convert to civil lien (N.C.G.S. § 15A-1365; N.C.G.S. § 15A-1340.38);
 - Issue an order to show cause (N.C.G.S. § 15A-1364) or a notice of violation of unsupervised probation;
 - The Court cannot issue an order for arrest for non-payment (N.C.G.S. § 15A-1364).
3. If the individual is ordered to show cause and appears, the Court shall conduct an ability-to-pay hearing.
4. If the individual fails to appear, the Court can:
 - Remit (N.C.G.S. § 15A-1363; N.C.G.S. § 15A-1364(c));
 - Convert to civil lien (N.C.G.S. § 15A-1365; N.C.G.S. § 15A-1340.38).

Notes

1. Civil liens have serious consequences: they carry an 8% interest rate⁵ and are reported to credit agencies.
2. Orders to show cause and orders for arrest must be reviewed and signed by a judge.
3. Mecklenburg is trying to eliminate the use of orders for arrest.
4. If an individual is arrested for failure to pay or failure to appear on an order to show cause for non-payment, the Court shall conduct an ability-to-pay hearing before setting a bond. The presumption is that the individual will be released on an unsecured bond pending appearance.
5. Note that according to 2017 N.C. Sess. Laws 2017-57, § 18B, N.C.G.S. § 7A-304 is amended to read: “[n]o court may waive or remit all or part of any court fines or costs without providing notice and opportunity to be heard by all government entities directly affected.” Mecklenburg County is waiting for further clarification from the North Carolina Administrative Office of the Courts about implementation and will update this bench card accordingly.

1 The court may remit or revoke LFOs when “it appears to the satisfaction of the court that the circumstances which warranted the imposition of the fine or costs no longer exist, that it would otherwise be unjust to require payment, or that the proper administration of justice requires resolution of the case.”

2 “Modification of Fine or Costs. If it appears that the default in the payment of a fine or costs is not attributable to failure on the defendant’s part to make a good faith effort to obtain the necessary funds for payment, the court may enter an order: (1) Allowing the defendant additional time for payment; or (2) Reducing the amount of the fine or costs or of each installment; or (3) Revoking the fine or costs or the unpaid portion in whole or in part.”

3 “When a defendant has defaulted in payment of a fine or costs, the judge may order that the judgment be docketed. Upon being docketed, the judgment becomes a lien on the real estate of the defendant in the same manner as do judgments in civil actions.”

4 When an order of restitution under the Crime Victims’ Rights Act, N.C.G.S. § 15A-830(a)(7), requires payment above \$250, “the order may be enforced in the same manner as a civil judgment.” If restitution is a condition of probation, it cannot be collected as a civil lien until the entry of an order “terminating or revoking probation and finding the amount remaining due and payable.” N.C.G.S. § 15A-1340.38(c).

5 N.C.G.S. §24-1. This applies to restitution only. N.C.G.S. § 15A-1340.38.

Appendix 6

Ability-to-Pay Hearing

These steps apply to any hearing at which non-payment is at issue (order to show cause, probation violation,⁶ contempt, failure to appear on non-payment). The Court shall inquire into ability to pay to determine an individual's good faith effort to obtain the necessary funds for payment. (N.C.G.S. § 15A-1364(a); N.C.G.S. § 15A-1363). Further, an individual can present evidence that the amount allegedly owed is not accurate or is not in fact owed if the defendant believes the amount is not correct.

Step 1: Access to Counsel: Indigent defendants who request counsel and who face incarceration, including at a hearing for revocation of probation, must be appointed counsel. N.C.G.S. § 7A-451(a)(1), (4).

Step 2: Presumptions of Indigence. Individuals meeting the following criteria are **presumed unable to pay** or unable to pay in full.

- Eligibility for **appointed counsel**; or
- Income at or below **200% of the poverty guidelines**;^{*} or
- Full-time **student**; or
- Whether individual is, or within the past six months has been, **homeless, incarcerated**, or residing in a **mental health or other treatment program**; or
- Receiving means-tested **public assistance**.⁷

Step 3: Ability to Pay Factors (N.C.G.S. § 15A-1340.36(a)).⁸

Please also refer to Bench card: *Imposition of Fines, Costs, Fees, and Restitution*, incorporated by reference, for additional details about ability to pay.

- **Resources of defendant.** LFOs should be set at an amount proportionate to ability to pay and level of offense, e.g. 10% of **net** monthly income **after** basic living expenses.⁹ Also consider debts (including other LFOs) and assets that can be liquidated without harm to individual or dependents.
- **Ability to Earn.** Consider employment history and educational attainment; discrimination, including because of criminal justice history; homelessness, health, or mental health issues including disability; and limited access to public transportation or limitations on driving privileges.
- **Obligation to support dependents.** Include child support obligations and support of elderly dependents.
- **Any other** matters that pertain to the defendant's ability to make payment.
- **Payment plan length:** Individuals should be required to pay over a reasonable time frame based on the severity of the offense. For example, the Court may set payment plans to last no longer than the maximum sentence length for the offense. See *State v. Smith*, 90 N.C. App. 161, 168 (1998) (taking into account how much individual could reasonably pay over probation term).

*Number of people in household	Monthly gross income at 200% of poverty guidelines
1	\$2,010
2	\$2,707
3	\$3,403
4	\$4,100
5	\$4,797
6	\$5,493
7	\$6,190
8	\$6,887

Step 4: Based on the ability-to-pay inquiry, the Court may:

- **Remit (waive or reduce) non-punitive costs and fees.** N.C.G.S. § 15A-1363;¹⁰ LFO Schedule; *Bearden*, 461 U.S. at 672.
- **Remit (waive or reduce) all LFOs.** N.C.G.S. §15A-1563; N.C.G.S. § 15A-1364(c); N.C.G.S. § 15A-1340.36(a); N.C.G.S. §7A-304(a); LFO Schedule; *Bearden*, 461 U.S. at 672.
- **Convert to civil lien.**¹¹ Civil liens have serious consequences: they carry an 8% interest rate¹² and are reported to credit agencies.
- **Allow the defendant additional time.** N.C.G.S. § 15A-1364(c)(1); N.C.G.S. § 15A-1340.36(b). The court should consider the proportionality guidelines¹³ before extending payment plan and/or supervised or unsupervised probation. Court may remit or revoke fines or costs when "the proper administration of justice requires resolution of the case." N.C.G.S. §15A-1363.
- **Provide for a community service or program alternative sentence.** (e.g. mental health or drug treatment, education) ("Community Service"). Community Service hours should be proportionate to offense fine and the individual's circumstances.

Notes: Under state law, the Court cannot revoke probation for non-payment,¹⁴ and may incarcerate only for willful nonpayment.¹⁵ Mecklenburg County seeks to eliminate the use of incarceration and probation violations for non-payment and therefore the Court shall not use these options.

⁶ N.C.G.S. § 15A-1345 (probation violations for non-payment follow procedures of N.C.G.S. §15A-1364.)

⁷ Means-tested benefits include SNAP, TANF, SSI, Medicaid, and housing subsidies. For TANF, SSI, SSDI, and veteran's disability benefits, according to 42 U.S.C § 407(a), "The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the money paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law."

⁸ Consideration of these factors is required for restitution and recommended for other LFOs.

⁹ See Bench card: *Imposition of Fines, Costs, Fees, and Restitution* for IRS guidelines for basic living expenses.

¹⁰ The court may remit or revoke LFOs when "it appears to the satisfaction of the court that the circumstances which warranted the imposition of the fine or costs no longer exist, that it would otherwise be unjust to require payment, or that the proper administration of justice requires resolution of the case."

¹¹ N.C.G.S. § 15A-1365 ("When a defendant has defaulted in payment of a fine or costs, the judge may order that the judgment be docketed."); N.C.G.S. § 15A-1340.38(a) (setting out that an order of restitution, under the CVRA, above \$250 "may be enforced in the same manner as a civil judgment."); N.C.G.S. § 15A-1340.38(c) (if restitution is a condition of probation it cannot be collected as civil lien until the entry of an order "terminating or revoking probation and finding the amount remaining due and payable").

¹² N.C.G.S. §24.1 (applies to restitution).

¹³ See Bench card: *Imposition of Fines, Costs, Fees, and Restitution*.

¹⁴ An individual cannot be incarcerated for violation of a payment related condition for probation. The court may only revoke probation for a violation of N.C.G.S. § 15A-1343(b)(1) (committing a crime) or N.C.G.S. § 15A-1343(b)(3a) (willfully fleeing), except as provided in N.C.G.S. § 15A-1344(d2). N.C.G.S. § 15A-1344(a).

¹⁵ For willful non-payment, "The court may order the suspended sentence, if any, activated, or, if the law provides no term of imprisonment for the offense for which the defendant was convicted or if no suspended sentence was imposed, the court may order the defendant imprisoned for a term not to exceed 30 days. The court, before activating a sentence of imprisonment, may reduce the sentence. The court may provide in its order that payment or satisfaction at any time of the fine and costs imposed by the court will entitle the defendant to his release from the imprisonment or, after entering the order, may at any time reduce the sentence for good cause shown, including payment or satisfaction of the fine." N.C.G.S. §15A-1364(b); see also *Bearden*, 461 U.S. at 668.

Appendix 7

Collateral ordered	Facts that support a determination that the defendant has the ability to pay monetary collateral
\$500.00	Defendant has no income and is being committed on child support
\$300.00	Unemployed
\$300.00	Homeless and unemployed
\$50.00	Unemployed
	Defendant has a history of failing to appear; and is currently homeless, and
\$650.00	unemployed.
\$732.00	Unemployed
\$289.50	Unemployed
\$158.00	Unemployed
\$471.50	Not employed
\$50.00	Defendant homeless
\$107.50	DEFENDANT IS HOMELESS
\$288.50	Unemployed
\$195.50	Employed
\$430.00	Unemployed
\$40.00	Unemployed
\$182.75	LAID OFF
\$100.00	Defendant is Homeless
\$100.00	Parents have a business.
\$87.00	Unemployed
\$50.00	Unemployed
\$50.00	Receives Assistance
\$50.00	On SSI
\$100.00	On SSI
\$679.39	Relative able to pay for his collateral
\$115.50	none
\$200.00	On disability
\$128.50	Defendant receives Disability Income
\$50.00	Disabled
\$300.00	SSI "0" payments to court
	Last payment received from defendant was April 7, 2014. Defendant has
\$298.50	SSI monthly income.
\$136.50	Def gets SSI
\$179.00	same
\$200.00	Welfare
\$94.44	welfare
\$100.00	welfare
\$283.00	Her mother is sending money to pay in the morning.
\$396.50	Defendant said she has a friend that can pay the money for her.
\$121.60	Defendant's father could pay.
\$344.50	HIGHLY INTOXICATED
\$300.00	Homeless and unemployed
	Committed Defendant has multiple public drunk fine, homeless. Def said he
\$100.00	lives on the street mutual agreement
\$132.00	Unemployed

Appendix 7

\$200.00	made phone call to sister- payee
\$500.00	receives \$ SSD and cash assistance.
\$409.65	Mom has money but refuses to pay
\$138.89	Defendant is on public Assistance.
\$313.00	Defendant has no money and is now incarcerated.
\$131.50	Defendant does have friends and family.
\$454.50	Too intoxicated
\$150.00	SSI

Note: Each of these entries represents a unique defendant.



Commonwealth of Pennsylvania

Appendix 8
First Judicial District of Pennsylvania
FINANCIAL INFORMATION FORM
OCC - Payment Plan

For Official Use Only - Bar Code

vs. Bring to hearing or conference together with Tax Return, W-2s, current pay-stubs, SSI letter, bank statements etc.

Date: Time: No.

First Name Middle Last Name PP#:

ADDRESS City State Zip

Date of Birth: Home Phone No. Cell Phone No.

ARE YOU EMPLOYED? Name of Employer Position:

Address of Employer City State Zip

ARE YOU: Single or Married. If married, Name of Husband/Wife:

YOUR NET INCOME: (Attach Pay-Stub)

Weekly \$ Bi-Weekly \$ Monthly \$ Hourly \$

I/WE HAVE NO INCOME. LOST CASH ASSISTANCE CASH INCOME:

NET INCOME RECEIVED BY YOUR HUSBAND/WIFE: (Attach Pay-Stub)

Weekly \$ Bi-Weekly \$ Monthly \$ Hourly \$ No Income

LIST BENEFITS YOU AND YOUR SPOUSE, IF MARRIED, RECEIVE:

Table with 3 columns: TYPE OF BENEFIT, YOU, YOUR HUSBAND/WIFE. Rows include Unemployment, Workers' Compensation, Social Security, SSI, Food Stamps, General Assistance, Cash Assistance, Pension, Bank Accounts, Home (Value), Other Assets.

YOUR MONTHLY EXPENSES (If married you must include your spouse's expenses):

RENT: CAR PAYMENT: CABLE: CELL PHONE: CHILD SUPPORT:

FOOD: UTILITIES:

OTHER:

DO YOU HAVE ANY OTHER COURT-ORDERED PAYMENT PLAN(S)?

No Yes:

Case Number(s) and/or Payment Plan Number(s) and Monthly Payment Amount

I verify that the information given above is true and correct. I understand that false statements herein are subject to the penalties of the Pennsylvania Crimes Code, 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities.

Signature:

Date:

Appendix 9



FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

Philadelphia Municipal Court
 Traffic Division
 800 Spring Garden Street
 Philadelphia, PA 19123
 (215) 686-1675

Website: courts.phila.gov/traffic

PHILADELPHIA MUNICIPAL COURT, TRAFFIC DIVISION

Financial Information Needed for Entry of Installment Order Pursuant to Rule 456

NAME _____ DRIVER'S LICENSE No. _____
First Middle Last

ADDRESS _____ DATE OF BIRTH _____
City State Zip

HOME PHONE No. _____ CELL PHONE No. _____

ARE YOU EMPLOYED: YES NO

NAME OF EMPLOYER _____ WORK PHONE No. _____

ADDRESS OF EMPLOYER _____
City State Zip

ARE YOU: Single or Married Name of Spouse _____

YOUR NET INCOME:

Weekly \$ _____ Bi-weekly \$ _____ Monthly \$ _____ Hourly \$ _____
 NO INCOME

SPOUSE NET INCOME:

Weekly \$ _____ Bi-weekly \$ _____ Monthly \$ _____ Hourly \$ _____
 NO INCOME

NUMBER OF DEPENDENTS (under 18 years of age) _____

LIST BENEFITS YOU AND/OR YOUR SPOUSE RECEIVE:

TYPE OF BENEFIT	YOU	SPOUSE
Unemployment	\$ _____	\$ _____
Workers' Compensation	\$ _____	\$ _____
Social Security	\$ _____	\$ _____
SSI (Supplemental Security Income)	\$ _____	\$ _____
SSD (Social Security Disability)	\$ _____	\$ _____
Food Stamps	\$ _____	\$ _____
Cash Assistance	\$ _____	\$ _____
Pension	\$ _____	\$ _____
Other	\$ _____	\$ _____

MONTHLY EXPENSES:

MORTGAGE/RENT: _____ CAR PAYMENT: _____ CELL PHONE: _____

SPOUSAL/CHILD SUPPORT: _____ CABLE: _____ UTILITIES: _____

FOOD: _____ OTHER: _____

I verify that the information given above is true and correct. I understand that false statements herein are subject to the penalties of the Pennsylvania Crimes Code, 18 Pa. C.S. §4904, relating to unsworn falsification to authorities.

Signature: _____ Date: _____

Appendix 10

Westmoreland County Clerk of Courts

Complete this form and
bring it to the Cost Hearing

ID # _____

Photo ID: Yes No

Please fill out this form completely and neatly.

Name: _____ Social Security#: _____

Address: _____ City/State: _____

Phone#: _____ Date of Birth: _____

Who do you reside with? _____

Please provide a name and phone number of a contact person you DO NOT live with.

Name: _____ Telephone: _____

INCOME

Do you work?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Self-Employed?	Yes <input type="checkbox"/> No <input type="checkbox"/>
Employer Name:	_____		
Employer Address:	_____		
Telephone Number:	_____		
Take Home Salary/Wages/Tips:	\$ _____	Weekly <input type="checkbox"/>	Bi-Weekly <input type="checkbox"/> Monthly <input type="checkbox"/>

LIVING EXPENSES

Expenses	Yes/No	How Much?	Expenses	Yes/No	How Much?
Rent or Mortgage	<input type="checkbox"/> <input type="checkbox"/>	\$ _____	Telephone or Cell Phone	<input type="checkbox"/> <input type="checkbox"/>	\$ _____
Electric	<input type="checkbox"/> <input type="checkbox"/>	\$ _____	Gas/Oil/Coal/Wood	<input type="checkbox"/> <input type="checkbox"/>	\$ _____
Cable	<input type="checkbox"/> <input type="checkbox"/>	\$ _____	Do you pay Child Support?	<input type="checkbox"/> <input type="checkbox"/>	\$ _____

ADDITIONAL INCOME

Sources of Income	Yes/No	Self	Yes/No	Spouse/Children/Other
Unemployment Compensation?	<input type="checkbox"/> <input type="checkbox"/>	\$ _____	<input type="checkbox"/> <input type="checkbox"/>	\$ _____
Supplemental Security Income? (SSD)	<input type="checkbox"/> <input type="checkbox"/>	\$ _____	<input type="checkbox"/> <input type="checkbox"/>	\$ _____
Social Security Disability? (SSD)	<input type="checkbox"/> <input type="checkbox"/>	\$ _____	<input type="checkbox"/> <input type="checkbox"/>	\$ _____
Social Security Survivors Benefits?	<input type="checkbox"/> <input type="checkbox"/>	\$ _____	<input type="checkbox"/> <input type="checkbox"/>	\$ _____
Cash Assistance? (Welfare)	<input type="checkbox"/> <input type="checkbox"/>	\$ _____	<input type="checkbox"/> <input type="checkbox"/>	\$ _____
Food Stamp Benefits?	<input type="checkbox"/> <input type="checkbox"/>	\$ _____	<input type="checkbox"/> <input type="checkbox"/>	\$ _____
Housing Assistance? (HUD)	<input type="checkbox"/> <input type="checkbox"/>	\$ _____	<input type="checkbox"/> <input type="checkbox"/>	\$ _____
Worker's Compensation?	<input type="checkbox"/> <input type="checkbox"/>	\$ _____	<input type="checkbox"/> <input type="checkbox"/>	\$ _____
Retirement Pension or VA Income?	<input type="checkbox"/> <input type="checkbox"/>	\$ _____	<input type="checkbox"/> <input type="checkbox"/>	\$ _____
Court Ordered Child Support Income?	<input type="checkbox"/> <input type="checkbox"/>	\$ _____	<input type="checkbox"/> <input type="checkbox"/>	\$ _____
Voluntary Child Support Income?	<input type="checkbox"/> <input type="checkbox"/>	\$ _____	<input type="checkbox"/> <input type="checkbox"/>	\$ _____
Spousal Support?	<input type="checkbox"/> <input type="checkbox"/>	\$ _____	<input type="checkbox"/> <input type="checkbox"/>	\$ _____
Scholarships/Grants/Loans?	<input type="checkbox"/> <input type="checkbox"/>	\$ _____	<input type="checkbox"/> <input type="checkbox"/>	\$ _____
Other?	<input type="checkbox"/> <input type="checkbox"/>	\$ _____	<input type="checkbox"/> <input type="checkbox"/>	\$ _____

WHAT AMOUNT ARE YOU ABLE TO PAY TODAY? \$ _____

I VERIFY THAT THE ABOVE INFORMATION IS TRUE AND CORRECT. I UNDERSTAND THAT FALSE STATEMENTS HERE IN ARE MADE SUBJECT TO PENALTIES OF 18 Pa.C.S. 4904 RELATING TO UNSWORN FALSIFICATION TO AUTHORITIES.

CLIENT SIGNATURE: _____ DATE: _____

Appendix 11
COMMONWEALTH OF PENNSYLVANIA



COUNTY OF CHESTER

Highlands Corporate Center
615 Sands Court
Coatesville, PA 19320-1893

GROVER E. KOON
Magisterial District Judge
Magisterial District 15-1-05

OFFICE:
Telephone: 610 380-3325
Facsimile: 610 380-4774

INDIGENCY HEARING

Pursuant to Pa. R. Crim. P. No. 456

Date of Hearing: _____ Docket No.: _____

Name of Defendant: _____

Address of Defendant: _____

Income

Employment: No Yes _____

Welfare/Disability: No Yes _____

Dependants: _____

Other: No Yes _____

Debts or Other Claims: _____

Assets:

Real Estate: No Yes _____

Vehicle: No Yes _____

Money in Bank/S&L/Credit Union: No Yes _____

Stocks & Bonds: No Yes _____

Furniture/Appliances: No Yes _____

Pensions/IRA's/Cash Value Insurance: No Yes _____

Cash on Hand: No Yes _____

Other: _____

After hearing and upon the basis of sworn testimony of the defendant, I find that the defendant (has) (does not have) the financial means to pay the fines and costs for which he/she has defaulted in payments.

Defendant's Signature

District Judge Grover E. Koon

Pursuant to Chester County Administration Regulation No. 104-19, I hereby declare fines, cost and restitution arising out of this summary prosecution non-collectible because of the indigence of the defendant. **THE FILE SHALL BE CLOSED.**

Appendix 12

IN RE: MAGISTERIAL DISTRICT JUDGE'S ABILITY TO
DECLARE FINES NON-COLLECTABLE (UNABLE TO PAY)
AND CLOSE CASES

DISTRICT COURT OPERATIONAL REGULATION 2 - 2005

It is hereby ORDERED and DECREED that OPERATIONAL
REGULATION NO. 20 - 1993 is replaced by OPERATION REGULATION
2-2005.

At any time a Magisterial District Judge sitting in Chester County shall
deem it appropriate, he or she may, on motion of counsel or upon his or her own
motion, declare fines, costs and restitution arising out of summary prosecutions
non-collectable because of the indigence of the defendant and thereafter closed
the case.

The District Judge shall make note upon the file that the case was closed
for the reason that the fines, costs and/or restitution are uncollectible due to the
defendant's indigence.

DATE

March 22, 2005

PRESIDENT JUDGE

Paul J. Marshall

Appendix 13

COURT NAME AND ADDRESS

NOTICE OF DEFAULT

DATE OF NOTICE: _____

CASE NUMBER:

DEFENDANT NAME:

TOTAL BALANCE DUE:

AMOUNT PAST DUE:

Monthly Payment Amount Is _____ Due On The _____ Day Of Each Month

You are receiving this notice because you have failed to pay money that you owe the court. You must contact the court listed above within 30 days of the date at the top of this Notice or you may be arrested.

If you have already paid, you must contact the court listed above to confirm your payment. If you fail to contact the court, you will be considered in default.

If you can afford to pay the AMOUNT PAST DUE, you must do so within 30 days of the date at the top of this Notice.

If you cannot afford to pay the AMOUNT PAST DUE, you must contact the court listed above within 30 days of the date at the top of this Notice to request a reduced payment or temporary suspension of your payments due to hardship. You will have to explain why you cannot afford your payments and may be required to come to court to explain your situation to the judge.

- You can explain that you already paid.
- You can explain that you owe less than the amount the Court says you owe.
- You can explain that you cannot afford your payments and ask to be temporarily excused from payments.
- You can ask the Court to make you pay less.
- You can ask the Court to let you pay the money later.
- You can tell the Court how much money you have.
- You can tell the Court how much you pay for rent, food, or other important things.
- You can bring paperwork to show what you earn and your monthly expenses.
- If you are ordered to pay an amount that you cannot afford, you have the right to appeal. You do not have to make payments until your appeal is decided.

If you do not contact the court within 30 days of the date at the top of this Notice, you may be arrested and brought before the court for a hearing. At that hearing, the judge may sentence you to jail.

Appendix 13

1) You have the right to a court hearing before being jailed for nonpayment.

- You can explain that you already paid.
- You can explain that you owe less than the amount the Court says you owe.
- You can explain that you cannot afford your payments and ask to be temporarily excused from payments.
- You can ask the Court to make you pay less.
- You can ask the Court to let you pay the money later.
- You can tell the Court how much money you have.
- You can tell the Court how much you pay for rent, food, or other important things.

2) You have the right to have a lawyer help you at the hearing.

- A lawyer can help you avoid jail.
- A lawyer can help you explain that you do not have money to pay.

3) You have the right to ask the Judge to appoint a lawyer to help you at the hearing if you cannot afford your own lawyer.

- The Judge will decide whether to appoint a lawyer for you.
- You can ask the Judge to make you pay nothing for the lawyer appointed to help you.

4) Do you want a lawyer? When you arrive in Court, ask the Judge to appoint a lawyer to help you.

5) At the court hearing:

- The Judge will decide whether you can pay.
- The Judge will decide whether you tried to earn the money to pay.
- The Judge will decide whether you could not earn money because you do not have transportation, need to care for your kids, or are disabled.

If you cannot pay, the Judge will decide whether you can pay less or nothing at all, can pay later, or can do work to help the community instead of paying.

**The Judge may decide that you did not pay even though you had the money.
Only then, may the Judge sentence you to jail.**

Because you owe money to the Court, you also have the following obligations:

- 1) **You must contact the Court upon receiving this notice to explain your financial situation.**
- 2) **You must inform the Court of your current address.**

You must continue to try to make payments or find employment so you can make payments to the Court.

YOU MUST NOTIFY IMMEDIATELY THE COURT OF ANY CHANGE IN YOUR ADDRESS.

Appendix 14

Pennsylvania Ability-to-Pay Evaluation

Commonwealth of Pennsylvania

v.

_____, Defendant

Docket No.: ____-____-____-____

Balance Due:

Section I: Other Case Information

Other case docket numbers where the defendant owes money, if any:
Active payment plan number(s), if known:

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

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	\$

Appendix 14

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 2017 Federal Poverty Guidelines: Individual: \$15,075 Family of 2: \$20,300 Family of 3: \$25,525 Family of 4: \$30,750 Family of 5: \$35,975 Family of 6: \$41,200 Family of 7: \$46,425 Family of 8: \$51,650

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 15

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF ALLEGHENY



Notice of Impending Bench Warrant

Commonwealth of Pennsylvania

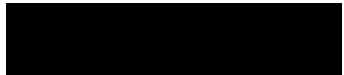
v.



Mag. Dist. No:	MDJ-05-0-03
MDJ Name:	Honorable Pres. Judge Donna Jo McDaniel
Address:	Pittsburgh Municipal Court 660 First Avenue Pittsburgh, PA 15219
Telephone:	412-350-6715

File Copy

Docket No:
Case Filed:



18 § 5503 §§ A (Lead)	<u>Charge(s)</u>
	DISORDERLY CONDUCT - SUMMARY

TO THE DEFENDANT:

You have:

- entered a guilty plea by mail and the money forwarded with the plea is less than the amount of fine and costs specified in the citation or summons;

OR

- been sentenced to pay restitution, a fine, or costs and have defaulted on the payment;

OR

- in your absence, been tried and sentenced to pay a fine and costs, and the collateral deposited by you is less than the amount of fine and costs imposed, or the issuing authority imposes a sentence of restitution.

Fines:	\$125.00
Costs:	\$136.00
Other:	\$50.00
Restitution:	\$0.00
Total:	<u>\$311.00</u>
Paid to Date:	\$0.00
Adjustments to Date:	<u>\$0.00</u>
Case Balance:	\$311.00

In accordance with Pa.R.Crim.P.430 and 455, you are hereby being notified that failure to pay the full amount due or to appear for a payment determination hearing within 10 days of this notice may result in the issuance of a bench warrant for your arrest.

If you have any questions, please call this office immediately.

Make check payable to Magisterial District Court MDJ-05-0-03. You can make case payments online through Pennsylvania's Unified Judicial System web portal. Visit the portal at <http://ujportal.pacourts.us> to make a payment.

July 02, 2013

Date

President Judge Pres. Judge Donna Jo McDaniel

