ACLU-PA Overview of Draft Rules Governing
Incarceration for Failure to Pay in Summary Cases

In response to guidance sent to states by the United States Department of Justice and suggestions from the ACLU of Pennsylvania ("ACLU-PA"), the Supreme Court of Pennsylvania's Criminal Procedural Rules Committee has released draft rules to address the problem of magisterial district judges ("MDJs") unlawfully incarcerating indigent defendants for failure to pay court fines, costs, and/or restitution (collectively "legal financial obligations," or "LFOs"). ACLU-PA generally supports these recommendations but will be strongly urging the Committee and the Supreme Court to provide clearer, more specific, and binding instructions to the MDJs. This document provides an overview of the proposed Draft from the Committee, as well as ACLU-PA's positions. All of the proposals in the Draft affect only summary (traffic and non-traffic criminal) cases handled by the MDJs. Public comments are due February 23.

What is new in the Draft:

1. The time to respond to a citation (e.g. a traffic ticket) is increased from 10 to 30 days (Rule 403 and others).
   - ACLU-PA **supports** this change, which is consistent with the practices in other states and should lead to fewer pre-disposition arrest warrants for failure to respond in time.

2. Currently, to plead not-guilty to a summary offense, defendants must pay the total amount of the fines and costs as "collateral." The Draft allows defendants to certify in writing that they cannot afford the collateral, relieving them of that obligation (Rule 403 and others).
   - ACLU-PA **supports** this change. However, Pennsylvania is one of only a handful of states that require that defendants pay "collateral" to plead not guilty, and we urge that the Committee abolish its use altogether.

3. Courts must consider defendants' ability to pay before imposing any discretionary fines and costs at sentencing (Rule 454).
   - ACLU-PA **supports** this change, which reflects an existing statutory requirement regarding fines and will help limit the amount of LFOs assessed in cases such as truancy, where all fines are discretionary. The proposal should, however, go further to harmonize with Rule 706, which governs criminal cases and permits a sentencing court to reduce even "mandatory" costs based on a defendant's financial resources. MDJs should have the same authority.

4. If a court is going to incarcerate a defendant for nonpayment, it must put in writing the reasons why imprisonment is appropriate and "the facts that support" its finding that the defendant is able to pay (Rule 456).
   - ACLU-PA **supports** this change. It is a helpful step. Unfortunately, it is the primary change in the Draft aimed at directly addressing why MDJs incarcerate defendants for failure to pay LFOs, and it is not specific enough: it does not tell the court *how* to assess the evidence to determine whether a defendant is able to pay. As is discussed below in more detail, additional guidance is badly needed to address this problem.

5. In comments to the rules that trigger a need to consider ability to pay, the Draft lists several items the court should—but does not have to—consider, such as employment status, income, mortgage and other expenses, etc. (Rule 456 and others).
    - ACLU-PA **supports** the effort to give MDJs direction, but believes that the instruction should be in the text of the rules, mandatory, and more specific. Case law already requires that courts look at a defendant's entire financial picture, although that does not happen in practice. The categories presented in the Draft are too vague and are not sufficiently comprehensive. The focus should be on net income, as gross income will not adequately reflect mandatory deductions such as taxes and garnishments for LFOs and child support. And because the Draft uses "should," rather than "shall," and puts this all in the comment to a rule rather than the text of a rule, it is not binding.
    - The rules should require courts to have defendants complete a standardized income and expense form, like that used in the child support and *in forma pauperis* context. Courts across Pennsylvania use such forms when collecting LFOs—some at the suggestion of ACLU-PA, and some on their own. This is the easiest way to ensure that courts are considering uniform information, and the forms should be made part of the record.

6. The time between defaulting on LFO payments in a traffic case and the automatic suspension of the defendant's license is shortened from 25 days to 15 days (Rule 470).
    - ACLU-PA **strongly opposes** this change. In recent months, federal district courts in Michigan and Tennessee have found license suspension for nonpayment of LFOs unconstitutional if there is not a pre-deprivation hearing. The Draft makes the problem *worse* in Pennsylvania by shortening the time until suspension, and it will also interfere with the 30-day appeal period. To remedy the constitutional violation in the existing rules, Rule 470 should specify that MDJs can send notice to the Pennsylvania Department of Transportation to suspend a defendant's driver's license for nonpayment only *after* holding an ability-to-pay hearing pursuant to Rule 456 and only if the MDJ finds that the defendant is able to pay and willfully refusing to do so.

How the Draft needs to change:

1. The rules should clarify that the Court that has an obligation to affirmatively inquire into a defendant's ability to pay prior to imposing imprisonment and that indigent defendants cannot be imprisoned.

Case law establishes that the Due Process and Equal Protection clauses of the 14th Amendment require that before imposing any sanction, courts must affirmatively inquire into a defendant's reasons for nonpayment, and courts must also find that a defendant willfully refused to pay. *Bearden v. Georgia*, 461 U.S. 660, 672 (1983). This is not an affirmative defense to be raised by a defendant; instead, the obligation is on the court to look at the defendant's entire financial picture. The rules should make this requirement clear, and they should also make explicit that Pennsylvania law prohibits incarcerating indigent defendants for nonpayment.

2. The rules should provide clear—and mandatory—guidance to MDJs whenever evaluating a defendant's ability to pay.

In addition to expanding the list of financial information to consider, and mandating that the court consider all factors, as described above, the rules should reflect and build upon the presumptions that are in the case law. Pennsylvania's case law already says that receiving the services of the public defender or means-based public assistance (e.g. Medicaid, food stamps, Supplemental Security Income) creates a presumption of indigence, and a court cannot compel a defendant to pay if that defendant would suffer hardship. *Commonwealth v. Eggers*, 742 A.2d 174, 176 n.1 (Pa. Super. Ct. 1999); *Commonwealth v. Hernandez*, 917 A.2d 332, 337 (Pa. Super. Ct. 2007). The appropriate way to determine hardship is to look at whether a defendant can afford to meet his or her basic life needs—the test used by the civil *in forma pauperis* line of cases and incorporated into criminal law through case law as the "established process[] for assessing indigency." *Commonwealth v. Cannon*, 954 A.2d 1222, 1226 (Pa. Super. Ct. 2008). At a minimum, the rules should reflect these precedents; to do otherwise is to invite error.

The rules should go further and delineate clear presumptions based on the federal poverty level—a person who makes 125% of the federal poverty level generally cannot afford to make ends meet. Although, as with every presumption, the court can overcome it by making findings on the record based on the evidence before it.

3. The rules should provide clear standards on setting affordable payment plans.

ACLU-PA has repeatedly seen courts that have default payment plans of $50 or $100 per month and judges that are reticent to go below $25 under any circumstances. Some courts even seem to require down payments in order to get on a payment plan. Such practices are illegal when they interfere with a defendant's right to an affordable payment plan. To change these practices, the rules should provide a table that ties a defendant's income level to a maximum monthly payment amount (a simplified version of the more complex child support formula). Linking payments to a multiple of the local minimum wage is the one straightforward way to accomplish this. As with the presumptions of an inability to pay, courts would be able to overcome a presumption created by the table if the evidence on the record supports such a finding.

4. The rules should provide a much-needed a mechanism to administratively close old cases that are uncollectible due to the defendant's indigence.

Defendants in more than a million summary cases owe balances dating back to the 1970s. Every MDJ deals with cases where the defendant cannot pay, but the only option is to keep hauling the defendant into court, interrupting the defendant's life and wasting the resources of the court and law enforcement. Some courts have adopted explicit mechanisms to administratively close these inactive cases if the court determines the defendant will not be able to pay. The rules should provide a uniform and statewide policy to dispose of such cases.

5. The rules should reflect the requirements from the civil contempt case law.

Courts almost always use their civil contempt authority when they imprison a defendant and set a purge condition (criminal contempt is governed by separate rules). Accordingly, the body of civil contempt case law directly applies to this type of imprisonment, including the requirement that a court can impose a purge condition only if it finds *beyond a reasonable doubt* that the defendant is *presently* able to comply with the condition (e.g. that a defendant who has been put in jail with a purge of $500 has the present ability to pay that money). The rules should clarify this important principle for the MDJs.