May 1, 2019

Via e-mail to criminalrules@pacourts.us

Jeffrey M. Wasileski, Counsel
Supreme Court of Pennsylvania
Criminal Procedural Rules Committee
601 Commonwealth Avenue, Suite 6200
Harrisburg, PA 17106-2635

Re: Comments to Notice of Proposed Rulemaking
Supplemental Report Issued March 4, 2019
Proposed Amendment of Pa.Rs.Crim.P. 403, 407, 408, 409, 411, 412, 413, 414, 422, 423, 424, 454, 456, and 470

Dear Mr. Wasileski:

We, the undersigned law professors, submit the following comments to the above-referenced Notice of Proposed Rulemaking. On February 23, 2018, we submitted comments to the Criminal Procedural Rules Committee's proposed amendments to the Pennsylvania Rules of Criminal Procedure published on January 20, 2018. On March 4, 2019, the Committee issued a Supplemental Report proposing revisions to its original package of proposed rule changes and seeking comment on these proposed changes. We now respectfully submit additional comments in response to the Committee's latest request for comment.

We appreciate the latest package of proposed revisions that address in part several concerns we raised in our original comments. We fully support the Committee's goal of providing "a more equitable enforcement of monetary assessments imposed in summary cases on those without the financial ability to pay"[1] and we want to underscore the overriding importance of ensuring that indigent defendants are not incarcerated for nonpayment of legal financial obligations solely because of their poverty.

Consistent with these goals, we support the Committee's proposed amendments to Rules 454, 456, and others, that require that payment plans be based upon a defendant's demonstrated ability to pay and not be arbitrarily subject to minimum payment plans that bear no relationship to a defendant's financial ability to pay. We also appreciate that the proposed rules now explicitly state that a defendant may not be incarcerated for nonpayment unless he or she is represented by a lawyer. We also support the proposed requirement that a court must put in writing its reasons and supporting facts when it finds that incarceration is proper based upon a defendant's ability to pay. These and several other proposed changes respond to concerns we

[1] See Supplemental Report, citing 48 *Pa.B.* 496 (January 20, 2018).

previously raised and help to move the Commonwealth closer to achieving the noble goals voiced by the Committee.

Still, we remain concerned that the proposed amendments in the Supplemental Report do not go far enough toward meeting these goals. Even with these improvements, they continue to lack needed guidance to lower courts that will ensure that the enforcement of legal financial obligations against criminal defendants – especially those with limited or no ability to pay – meet minimum requirements of the Due Process Clause of the Fourteenth Amendment. Without greater guidance, we are concerned that adjudications of unpaid legal financial obligations will be arbitrary and inconsistent across the Commonwealth and will result in the wrongful incarceration of criminal defendants who do not have the ability to pay, at great cost to the individuals and families directly affected and to the Commonwealth as a whole in supporting the successful integration of criminal defendants in society.

Accordingly, in these comments, we reiterate our concerns about the high cost of legal financial obligations and the need for strict adherence to constitutional principles that, if uniformly applied, will prevent the wrongful incarceration of criminal defendants for unpaid legal financial obligations. We then address four specific points upon which we urge the Committee to make further revisions relating to the incarceration of the indigent for failure to pay legal financial obligations. If adopted, we strongly believe that these changes will bring the Commonwealth much closer to achieving the Committee's stated goals in undertaking these revisions of the Criminal Rules.

I.

The High Cost of Legal Financial Obligations (LFOs)

Our criminal justice system, historically funded primarily by tax revenues, increasingly relies upon funds generated by the collection of fines and fees (legal financial obligations or LFOs). In some cases, justice systems have become revenue centers that even fund non-justice related government operations.[2] The Justice Department's investigatory report of the Ferguson, Missouri police department and municipal courts highlighted this problem, serving as a needed catalyst for all states to look closely at the fines and costs they impose and the practices they employ to collect legal financial obligations.[3] As noted by a policy paper of the Conference of Chief Justices and Conference on State Court Administrators, "the imposition of these legal financial obligations (LFOs) too often results in defendants accumulating court debt they cannot

[2] U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS DIAGNOSTIC CENTER, RESOURCE GUIDE: REFORMING THE ASSESSMENT AND ENFORCEMENT OF FINES AND FEES 2 (2016), https://ojp.gov/docs/finesfeesresguide.pdf [hereinafter DOJ RESOURCE GUIDE]. The Resource Guide was supported by a contract from the Office of Justice Programs, U.S. Department of Justice. The views and opinions expressed are those of the author and do not necessarily represent the official position of the U.S. Department of Justice.

[3] U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF FERGUSON POLICE DEP'T (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

pay, landing them in jail at costs to the taxpayers much greater than the money sought to be collected."[4]

Pennsylvania is one of the leading states in imposing increased legal financial obligations upon criminal defendants to defray court operating costs and related criminal justice services.[5] These costs are a substantial financial burden on low-income defendants who struggle to meet basic needs for themselves and their families. The 2017 report of Pennsylvania's Interbranch Commission on Gender, Racial and Ethnic Fairness has documented the extremely high cost of LFOs in Pennsylvania.[6] A typical docket sheet of fees assessed against a defendant convicted of a drug offense in Cambria County showed that 26 different state and local fees were assessed totaling $2,464 in costs, not counting fines and restitution costs.[7] A study of six Pennsylvania counties revealed that the average economic sanctions ordered ranged from $1305 in Blair County to $1864 in Lancaster County.[8] In Philadelphia County, a 22 year old public housing resident who was charged with a minor marijuana related offense – the first and only criminal offense this young man has ever been charged with – was assessed standard costs of $1,365.94.[9] This young man is starting adulthood saddled with criminal debt that threatens his path to self-sufficiency and independence. Criminal justice debt puts many individuals on the fast track to re-arrest and re-incarceration and tragically serves as a new form of debtors' prison for the poor.[10]

The U.S. Justice Department has cautioned that criminal debt may lead to an insurmountable cycle of debt and punishment, including harsh penalties such as revocation of probation or parole, loss of driving privileges, barriers to employment and housing, and incarceration. "The effect of LFOs on individuals, their families, and our communities can be devastating. In isolation, an individual fine or fee may appear insignificant, but for many people, paying a fine that, together with associated fees and assessments, can easily exceed several hundred dollars can be challenging."[11]

The harm to defendants unable to pay LFOs can be life-altering. The Interbranch Commission's guide found that nonpayment often results in incarceration, in violation of minimal constitutional standards. It may also may mean ineligibility for probation, parole, or

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[4] Arthur W. Pepin, CONFERENCE OF STATE COURT ADMINISTRATORS, END OF DEBTORS' PRISONS: EFFECTIVE COURT POLICIES FOR SUCCESSFUL COMPLIANCE WITH LEGAL FINANCIAL OBLIGATIONS (2016), http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/End-of-Debtors-Prisons-2016.ashx).

[5] *See* PA. INTERBRANCH COMM'N FOR GENDER, RACIAL AND ETHNIC FAIRNESS, ENDING DEBTORS' PRISONS IN PENNSYLVANIA: CURRENT ISSUES IN BAIL AND LEGAL FINANCIAL OBLIGATION: A PRACTICAL GUIDE FOR REFORM 14 (July 2017), http://www.pa-interbranchcommission.com/_pdfs/Ending-Debtors-Prisons-in-PA-Report.pdf [hereinafter PA. IBC GUIDE].

[6] *See id.* at 13.

[7] *Id.* at 13 & n.50. According to the IBC Guide, Administrative Office of Pennsylvania Courts ("AOPC") data shows that court-imposed costs often outweigh other LFOs, as 52% of the LFOs assessed by Magisterial District Courts and 65% of LFOs assessed by Courts of Common Pleas are only costs.

[8] *Id.* at 14 & n.51.

[9] Standard court fees assessed against the son of a client family represented by the Penn Law Civil Practice Clinic.

[10] Alicia Bannon, Mitali Nagrecha, Rebekah Diller, Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* 19 (2010), http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf [hereinafter *2010 Brennan Center Report*].

[11] DOJ RESOURCE GUIDE, *supra* note 2, at 2.

accelerated rehabilitative disposition, resulting in continued incarceration.[12] And, too often, it prevents low-income Pennsylvanians from accessing public benefits, obtaining pardons or expungements of criminal records, obtaining employment, or retaining driving privileges needed for work and medical appointments. Collectively, these collateral consequences block successful re-entry into society and may lead to a higher rate of recidivism.[13]

Legal scholars have noted that growth in incarceration of individuals for failure to pay LFOs has fallen most heavily on the poor and minorities. Those who can pay criminal debt escape incarceration and harsh collateral consequences, while those too poor to pay are "trapped and face additional charges for late fees, installment plans, and interest."[14]

The U.S. Justice Department report confirms that many court collection practices for LFOs are unwise, harmful, and unconstitutional. In certain jurisdictions, the Justice Department found that courts routinely incarcerated individuals for nonpayment of fines they simply cannot afford, even though the Constitution prohibits it. This imposes significant harm upon low-income individuals, many who are only charged with non-criminal, minor violations.[15] In short, while courts do not enact fines and fees, they are required to order defendants to pay them. The result is that many defendants accumulate court debt they cannot pay, "landing them in jail at costs to the taxpayers much greater than the money sought to be collected."[16]

II.

Constitutional Limitations on Incarceration for Unpaid LFOs

Although the United States eliminated the imprisonment of debtors under federal law in 1833,[17] the Supreme Court has continued to wrestle with the fact that "providing equal justice for poor and rich, weak and powerful alike is an age-old problem."[18]

In *Griffin v. Illinois*, the Court reviewed the denial of appeals by criminal defendants who had been unable to pay for trial transcripts and, based upon on due process and equal protection concerns, concluded that "[i]n criminal trials a State can no more discriminate on account of

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[12] PA. IBC GUIDE, *supra* note 5, at 14-15 & n. 57.
[13] *Id.* at 15-16 (citing Karin D. Martin, Sandra Susan Smith, and Wendy Still, *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create,* New Thinking in Community Corrections No. 4 (Jan. 2017)). *See also* Meghna Philip, *New Documentary Tells the Story of Criminal Justice Debt in Philadelphia* (May 21, 2012), http://www.brennancenter.org/blog/newdocumentary-tells-story-criminal-justice-debt-philadelphia. ("In a startling number of jurisdictions, we found that individuals can face arrest and incarceration not for any criminal activity, but rather for simply falling behind on debt payments. Our research also uncovered a variety of ways in which criminal justice debt can be the first step toward new offenses and more jail time – all originating from the failure to pay off debt).
[14] *See* Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486, 492 nn.33-36 (2016), https://scholarship.law.tamu.edu/facscholar/727.
[15] DOJ RESOURCE GUIDE, *supra* note 2, at 2.
[16] PA. IBC GUIDE, *supra* note 5, at 16 & n.46 (citing Pepin, *supra* note 4).
[17] 2010 Brennan Center Report, *supra* note 10, at 19 & n.112 (citing Charles Jordan Tabb, The History of the Bankruptcy Laws in the United States, 3 AM. BANKR. INST. L. REV. 5, 16 (1995)).
[18] *Griffin v. Illinois*, 351 U.S. 12, 16 (1956).

poverty than on account of religion, race, or color."[19] In *Williams v. Illinois*,[20] the Supreme Court noted that "the greatly increased use of fines as a criminal sanction has made nonpayment a major cause of incarceration in this country." Unwilling to extend the incarceration of a defendant unable to pay criminal debt beyond the statutory maximum, the Court held that incarceration is appropriate to collect criminal justice debt only when a person has the ability to make payments and is unwilling to do so. Extending a maximum prison term because a person is too poor to pay fines or court costs violates due process of law under the Fourteenth Amendment.[21]

One year after *Williams v. Illinois*, the Supreme Court held in *Tate v. Short* that a Texas court conversion of a fine-only restriction to a prison sentence for an indigent defendant unable to pay the fine violated the Equal Protection Clause.[22]

Perhaps most importantly for these comments, the Supreme Court ruled in *Bearden v. Georgia* in 1983 that the Fourteenth Amendment prohibits courts from revoking probation for a failure to pay a fine without first inquiring into a defendant's ability to pay and determining the availability of adequate alternatives to imprisonment that would satisfy the state's interests.[23] In that case, Bearden was assessed a fine and restitution as a condition of probation following a guilty plea to charges of burglary and theft. Thereafter, Bearden lost his job and had no other source of income. Illiterate and not possessing a high school diploma, Bearden was unable to find new employment. When he failed to pay because of indigency, the Georgia court revoked his probation and sent him to jail to complete his probation, effectively turning a fine into a prison sentence.

Upon appeal, the Supreme Court stated that "[I]f the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available." [24] Thus, under *Bearden*, a court cannot revoke probation for failure to pay criminal debt where the defendant is unable to pay through no fault of his own, and the court has failed to explore other means of punishment that serve the state's interests. Of course, if a defendant is able to pay and refuses to do so, a court may imprison a defendant. But it is not free to do so without considering whether other alternatives are available, such as an affordable payment plan, reducing the fine, or providing an option for community service.[25]

Ten years before *Bearden*, the Pennsylvania Supreme Court held that criminal defendants must be given the opportunity to demonstrate to the court that they are unable to pay fines and costs in a lump sum.[26] When a defendant demonstrates that he is unable to pay such financial

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[19] *Id. at 17.*
[20] *Williams v. Illinois*, 399 U.S. 235 (1970).
[21] *Id. at* 235, 240.
[22] *Tate v. Short,* 401 U.S. 395 (1971). In *Tate*, the offense was a traffic violation incurring only a fine. The Supreme Court noted that the imprisonment of an indigent would not "further any penal objective of the State" and instead of generating revenue it would "saddle[] the State with the cost of feeding and housing him for the period of his imprisonment." *Id.* at 399.
[23] *Bearden v. Georgia*, 461 U.S. 660 (1963).
[24] *Id.* at 668.
[25] *Id.* at 669.
[26] *Commonwealth ex. Rel. Parrish v. Cliff*, 304 A.2d 158 (Pa. 1973).

obligations, he must be permitted to make reasonable payment installments. Noting that the U.S. Supreme Court has "heightened rather than weakened the attempts to mitigate the disparate treatment of indigents in the criminal process,"[27] and that the Court "has made it plain that a defendant may not be incarcerated merely because he cannot make full payment of a fine,"[28] the Pennsylvania Supreme Court has upheld the constitutional principle that an indigent defendant must be given the opportunity to establish that he is unable to pay the criminal debt and, if so, that reasonable alternatives to incarceration must be considered.[29]

On this constitutional foundation, the Pennsylvania Superior Court has held that the failure to pay costs and fines alone, without an understanding of the reasons for nonpayment and specifically whether nonpayment is willful or rather is due to indigence, will not justify incarceration.[30] And forty years ago, our state Supreme Court announced the requirement that before an individual may be incarcerated for civil contempt, a court must be convinced by a preponderance of the evidence that he *willfully* violated the support order, and that he has the *present* ability to pay his purge amount beyond a reasonable doubt.[31]

To satisfy these constitutional concerns, a court must affirmatively inquire into the financial ability of a defendant to pay costs and fines and apply appropriate standards to determine the ability to pay before imposing incarceration for outstanding obligations. The proposed amendments to the Rules of Criminal Procedure should be bolstered to give judges specific guidance on meeting this mandate.

III.

Four Specific Recommendations in Response to Supplemental Report

1. The Rules should explicitly provide that where a defendant has defaulted on payment of fines, costs, or restitution, it is the court's affirmative obligation to inquire into the defendant's ability to pay and to refrain from imposing incarceration if, in fact, the defendant lacks an ability to pay.

a. Court's obligation. Paragraphs (C) and (D) of Rule 456 set out the court's obligation to "determine," in the case of a defendant who fails to pay required fines, costs, or restitution, "whether the defendant is financially able to pay as ordered." However, the Rule fails to address the crucial point that it is the court's obligation to inquire into the defendant's financial capacity to satisfy itself that that the ability to pay exists – rather than the defendant's obligation to raise the issue or prove an inability to pay. *See, e.g., Turner v. Rogers,* 564 U.S. 431 (2011); *Commonwealth v. Mauk,* 185 A.3d 406, 411 (Pa. Super. 2018).

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[27] *Id.* at 160 (citing *Williams*, 399 U.S. at 241).
[28] *Id.* at 161.
[29] *Id.* at 162.
[30] *See*, *e.g.*, *Commonwealth v. Eggers*, 742 A.2d 174 (Pa. Super. 1999).
[31] *Barrett v. Barrett*, 368 A.2d 616, 623 (Pa. 1977).

Bearden, *Parrish* and the long line of court decisions discussed earlier in these comments make clear that courts have an affirmative obligation to inquire into and assess a defendant's ability to pay LFOs before imposing incarceration for nonpayment. ABA Standards for Criminal Justice 18-7.4 and Commentary (2d ed. 1980) provide that "incarceration should be employed only after the court has examined the reasons for nonpayment."[32] AOPC data reveals that Pennsylvania courts frequently fail to assess a defendant's ability to pay before imposing incarceration.[33]

The Supreme Court's 2011 decision in *Turner v. Rogers*[34] is particularly instructive. In *Turner*, an indigent child support obligor was incarcerated for civil contempt in failing to pay child support obligations. The trial court incarcerated the defendant without appointing defense counsel, acquiring financial information about his ability to pay his obligation, or even explaining the issues on which the defendant needed to provide evidence to avoid a finding of contempt. The trial court placed the entire burden upon the defendant to raise his inability to pay, without any instructions or guidance, and failed entirely to inquire into the defendant's present ability to pay. On appeal, the Supreme Court held that Turner's due process rights were violated because he neither received counsel nor alternative protections that would satisfy due process concerns. In particular, the trial court did not provide Turner with notice that his ability to pay was the critical issue in determining whether he would be incarcerated. It also failed to elicit financial information or make a finding on whether Turner had the present ability to pay his obligation before holding him in civil contempt and ordering his incarceration.

This affirmative obligation on the court is critical because low-income defendants, who may lack education, training, or language access, will often fail to bring up, or clearly explain, the various income and expense factors relevant to a determination of financial ability. They are unlikely to understand the factors that a court should examine in making a proper determination. Unless the rules make clear a court's affirmative obligation of inquiry and a court's inability to impose incarceration without proper written findings following such an inquiry, experience shows that some courts will fail to do so and adjudications across the Commonwealth will be inconsistent and arbitrary.

b. Effect of determination of inability to pay. The Rules should also make explicit the constitutional principle that imprisonment is prohibited if the court's inquiry reveals that, in fact, the defendant lacks the present ability to pay. *See Mauk*, 185 A.3d at 411 (courts must "ascertain whether any noncompliance flowed from (a) deliberate disregard of the court's order or (b) circumstances beyond the defendant's control. This must be done every time someone appears or reappears for a costs-and-fines proceeding, because the person's financial situations may have changed since the last time she or he was before the court."). *See also Bearden*, which has repeatedly been interpreted as prohibiting incarceration for indigent defendants who are unable to pay, as well as *Commonwealth ex rel. Parrish v. Cliff,* 304 A.2d 158 (Pa. 1973), *George v. Beard,* 824 A.2d 393 (Pa. Commw. 2003), *aff'd mem.,* 831 A.2d 597 (Pa. 2003), and other Pennsylvania appellate decisions. Moreover, the Pennsylvania Supreme Court has instructed lower courts that they may not impose incarceration for civil contempt unless they find beyond a

[32] *Bearden*, 461 U.S. at 675 n.10.
[33] PA. IBC GUIDE, *supra* note 5, at 14.
[34] *Turner v. Rogers*, 564 U.S. 431 (2011).

reasonable doubt that a defendant has the present ability to pay.[35] This basic principle has stood for more than forty years. Rule 706(A), Pa. R. Crim. P., sets forth this principle in non-summary cases, and these proposed rules should do the same.

2. The Rules should explain *how* courts are to conduct an inquiry into financial ability.

While clarifying that the court's obligation to make an ability-to-pay inquiry is vital, the rules must do more. To ensure that decisions are not inconsistent and arbitrary, the rules should provide guidance on *how* the inquiry should be made. Without such guidance, determination of ability to pay can easily become highly subjective, falling below constitutionally required standards.

We appreciate that in the "Comments" to proposed Rules 456 and 470, the Committee has provided a list of "factors that should be considered" in determining a defendant's ability to pay (although there appears to be a drafting error; it appears that the first grouping of categories 1-6, which was a hold-over from the previous draft, should be deleted and only the second grouping of categories 1-5 should remain). But while the inclusion of these "factors" is helpful, the Rules provide no information on how they are to be evaluated.

Here again, however, Pennsylvania appellate courts have established important principles, including the following:

- The essential issue is whether the defendant is "able to meet [the financial obligation] without hardship." *Commonwealth v. Hernandez,* 917 A.2d 332, 337 (Pa. Super. 2007).
- Receipt of services such as public defense and public assistance "invite the presumption of indigence." *Commonwealth v. Eggers,* 742 A.2d 174, 176 n.1 (Pa. Super. 1999).
- A defendant cannot be found to have the ability to pay if he would have to borrow money from others in order to do so. *Commonwealth v. Smetana,* 191 A.3d 867. 873 (Pa. Super. 2018).

The Rules should articulate these principles and expand upon them to include uniformly accepted guidelines on indigency as they relate to *in forma pauperis* status for litigants.

A litigant who is indigent has a constitutional right to have court costs waived so that he or she may access the courts.[36] A litigant who cannot afford basic life needs is entitled to proceed IFP. *Commonwealth v. Cannon*, 954 A.2d 1222, 1226 (Pa. Super. Ct. 2008). Pennsylvania courts look to well-established principles governing indigency in civil cases when determining indigence in criminal cases. See *Commonwealth v. Lepre*, 18 A.3d 1225 (Pa. Super. 2011).

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[35] *Barrett v. Barrett*, 368 A.2d 616, 623 (Pa. 1977).

[36] *See Boddie v. Connecticut*, 401 U.S. 371 (1971) (due process prohibits a State from denying access to its courts to indigents seeking dissolution of their marriage, solely because of inability to pay court fees and costs); *Griffin v. Illinois,* 351 U.S. 12 (1956) (a criminal defendant may not be denied the right to appeal because of inability to pay for a trial transcript).

In the civil arena, Pennsylvania courts presumptively grant *in forma pauperis* status to individuals whose income is at or below 125 percent of the federal poverty level as determined annually by the federal government. The poverty guidelines are issued each year in the Federal Register by the Department of Health and Human Services (HHS). This threshold of 125% of poverty is the basic eligibility standard to qualify for free legal services from local legal aid programs that receive federal funding from the Legal Services Corporation (LSC).[37] Notably, LSC regulations also permit local programs to adopt policies that establish financial eligibility by reference to an applicant's receipt of benefits from a governmental program for low-income individuals or families. In other words, eligibility for similar means-tested government programs with comparable standards may also be used to determine eligibility for free legal services.

The Legal Services Corporation also recognizes that 125% of poverty guidelines may be too low for individuals or families who are seeking government benefits or have considerable debt or other fixed obligations that do not permit them to expend monies to obtain legal help. As a result, LSC regulations permit local legal aid programs to use 200% of poverty guidelines as their eligibility standard when individuals are seeking to obtain or retain government benefits, or when the cost of unreimbursed medical expenses, fixed debts and obligations, and employment-related expenses do not financially permit the engagement of private counsel.[38]

It is significant to note that in 2001 the Pennsylvania Supreme Court amended the *in forma pauperis* rule in the Pennsylvania Rules of Civil Procedure (Rule 240) to no longer require the filing of an affidavit of indigency containing detailed financial information from the litigant if a lawyer representing the individual certifies to the court that he or she is providing free legal services to the party and believes that the party is unable to pay the costs. Upon filing such a certification, Rule 240(d)(1) instructs that the prothonotary "shall allow the party to proceed in forma pauperis." Legal aid and pro bono lawyers have effectively used this amended rule with great benefit to all concerned. This streamlined, presumptive rule serves the Commonwealth well by promoting uniformity and accuracy throughout the state and promoting constitutional access to the courts by indigent litigants, while also reducing unnecessary burdens on the scarce resources of courts and legal aid organizations.

A presumptive indigency rule that is tied to income or to certifications from means-tested programs,[39] or to lawyer certifications when free legal assistance is provided, should be part of published standards to guide courts when determining a criminal defendant's ability to pay legal financial obligations.[40] Of course, such a presumption can be rebutted based upon sound evidence to the contrary, but a presumptive rule will promote uniformity and fairness, simplify an otherwise time-consuming and error-prone process, and help to ensure that constitutional standards are met.

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[37] *See* 45 C.F.R. § 1611.

[38] *See* 45 C.F.R. § 1611.5 (providing that expenses such as dependent care, transportation, clothing and equipment expenses necessary for employment, job training, or educational activities in preparation for employment are permitted to be taken into account when examining the financial situation of an applicant for free legal services).

[39] *See* PA. IBC GUIDE, *supra* note 5, at 17.

[40] The receipt of TANF (cash welfare assistance), Medicaid, Supplemental Security Income (SSI), and other means-tested government programs should create a presumption of indigency. *See Eggers*, 742 A.2d at 176 n.1 (receiving public assistance invites the presumption of indigence).

3. The Rules should set out the legal requirements that govern "purge conditions" when a court imposes incarceration.

Magisterial District Justices often impose "purge conditions" when incarcerating defendants for failure to pay a legal financial obligation. A purge condition is, of course, an amount that the defendant must pay to avoid incarceration or secure release from imprisonment.

Purge conditions are governed by the law of civil contempt. Before setting a purge amount, a court must find *beyond a reasonable doubt* that the defendant has the *present* ability to pay the intended purge amount. *Hyle v. Hyle,* 868 A.2d 601, 605 (Pa. Super. 2005), *appeal denied,* 586 Pa. 727 (Pa. 2005); *Barrett v. Barrett,* 368 A.2d 616, 621 (Pa. 1977). Moreover, a court may not require a defendant to borrow money from friends or family to make payments upon a delinquent obligation.[41]

Rule 456 is currently silent on the issuance of lawful purge conditions. As this area of court decision-making has proven to be particularly prone to errors and abuse, we urge the Committee to amend the rules to include explicit requirements on purge requirements consistent with governing law.

4. The Rules should provide stronger protections to ensure that driving privileges are not suspended for unpaid legal financial obligations where there is no present ability to pay.

A driver's license is a protected interest that cannot be suspended or revoked without procedural due process required by the Fourteenth Amendment. *Bell v. Burson*, 402 U.S. 535 (1972). In *Bell*, the Supreme Court held that due process requires that a driver be provided with a meaningful opportunity to be heard before a license suspension occurs.[42] An automatic suspension of an indigent driver's license for nonpayment of a legal financial obligation, without first determining whether a driver is able to pay, is tantamount to "punishing a person for his poverty" in violation of the Fourteenth Amendment.[43]

In Pennsylvania, driving privileges are essential for getting to work, maintaining family income, attending school or training, and accessing medical appointments, especially in large rural areas of the state where there is limited public transportation. Without question, a driver's license is a significant interest which, if suspended, can result in substantial harm to the driver

[41] *See Commonwealth v. Smetana*, 191 A.3d 867, 873 (Pa. Super. 2018).
[42] *Bell v. Burson*, 402 U.S. 535 (1972) (overturning the suspension of a driver's license of an uninsured driver who failed to post security after an accident, without first giving the driver a meaningful opportunity to be heard and determine whether the driver was at fault for the accident).
[43] *Bearden*, 461 U.S. at 671. *See also Robinson v. Purkey*, No. 17-1263, 2017 WL 4418134 (M.D. Tenn. Oct. 5, 2017) (temporary restraining order granted restoring driving licenses that were suspended for unpaid traffic debt without accommodation for the fact that the drivers lacked the financial ability to pay). *See also Fowler v. Johnson*, No. 17-11441, 2017 WL 6379676 (E.D. Mich. Dec. 14, 2017) (preliminary injunction issued to enjoin the suspension of driver's licenses of people unable to pay their traffic debt).

and to innocent members of the driver's family. Accordingly, driving privileges should be suspended only as a last resort when a defendant willfully refuses to pay an outstanding legal financial obligation despite the financial ability to do so.

The proposed amendments to Rule 470 reduce the time in which a defendant is required to respond to a notice of suspension for missed payments from 25 days to only 15 days. We oppose the shortening of this time period.

Under the proposed rule, if a defendant does not respond within 15 days, driving privileges may be suspended without conducting an inquiry into financial status or holding a hearing to determine present ability to pay. If a defendant fails to respond within the required time period (which we believe should remain 25 days), the rules should *still* require a court to hold a hearing at which the defendant may appear and at which the court should conduct a full hearing to determine whether the defendant has the ability to pay. Driving privileges should only be suspended after such a hearing is held and the court finds on evidence presented that the defendant has willfully refused to pay. Should a defendant not appear at a scheduled hearing, the court could compel attendance, through the issuance of a bench warrant or other means, and thereby make a proper finding on the evidence whether driving privileges should be suspended. Such an important determination should not be made in the absence of the defendant. Moreover, at such a hearing, a court should also be encouraged by the rules to consider alternatives other than the suspension of driving privileges, whenever possible, to satisfy financial obligations. The serious harm to families caused by the suspension of driving privileges demands alternatives in many cases.

In short, the rules should provide explicit guidance to courts that they may not notify the Department of Transportation to suspend driving privileges for unpaid legal financial obligations unless and until they have provided adequate notice and have conducted a hearing o determine whether there is a present ability to pay. Alternatives to suspension of driving privileges should be seriously considered whenever possible.

Conclusion

The importance of providing needed guidance to Pennsylvania courts when enforcing unpaid legal financial obligations cannot be overstated. We know too well that "[l]egal financial obligations 'reinforce poverty, destabilize community reentry, and relegate impoverished debtors to a lifetime of punishment because their poverty leaves them unable to fulfill expectations of accountability.'"[44]

The undersigned law professors commend the Criminal Procedural Rules Committee for its diligent work in reviewing state criminal rules that directly impact the enforcement of unpaid legal financial obligations imposed in summary cases. The Commonwealth's best interests, as well as minimum constitutional requirements, are only met when we ensure that indigent

[44] Alana Semuels, *The Fines and Fees that Keep Former Prisoners Poor*, THE ATLANTIC, (July 5, 2016) available at https://www.theatlantic.com/business/archive/2016/07/the-cost-of-monetary-sanctions-for-prisoners/489026/.

defendants are not incarcerated for nonpayment of legal financial obligations solely because of their poverty. The proposed rule amendments outlined in the Supplemental Report take several important steps toward this vital goal but should go further in specific ways we have suggested in these comments. We urge the adoption of our recommendations.

Respectfully submitted,

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