May 3, 2019

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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

The American Civil Liberties Union of Pennsylvania ("ACLU-PA") has devoted considerable energy over the past three years to end the practice of so-called "debtor's prisons," which is the jailing of criminal defendants for nonpayment of fines, costs, and restitution (collectively "legal financial obligations" or "LFOs"), when the defendants are clearly indigent or otherwise unable to afford the payment. We thus greatly appreciate the Committee's work to develop new rules to help prevent the thousands of illegal jailings by magisterial district judges ("MDJs") that still occur each year.[1]

While the proposed Rules are an improvement, we still have serious concerns that they do not provide sufficiently specific guidance to end the illegal and unconstitutional jailing of criminal defendants for non-payment of LFO's. The problem is widespread. Indeed, just last week, the Reading Eagle ran a series of stories about the disproportionate—and illegal—jailing of indigent defendants by Berks County MDJs, which appears to jail more people for failure to pay than any other county in the state.[2]

[1] In January 2017, we submitted proposals to this Committee that we hoped would strengthen procedural protections for poor defendants appearing in magisterial district courts and give MDJs concrete guidance in collection matters. And in February 2018, we provided comments—as well as our own drafted set of rules implementing those comments—in response to this Committee's initial proposal. We have not included those draft rules with these comments, but should the Committee or the Court be interested in adopting the reforms we propose, we encourage review of our 2018 draft rules to show concrete examples of how they could be implemented into the Rules.

[2] Ford Turner, "District judges in Berks County jail more people for lack of money than anywhere else in Pa.," Reading Eagle (April 23, 2019), https://www.readingeagle.com/news/article/berks-district-judges-

Systemic inaccuracies in MDJ docket sheets make it impossible to determine exactly how many people are jailed illegally for non-payment of LFO's, but we do know that the number annually is in the *thousands*. For instance, data from the Administrative Office of Pennsylvania Courts shows that over 3,000 individual defendants are jailed each year for "failure to post collateral" alone (described in detail below) in summary cases because they cannot afford the average fee of $200; that courts issue over 600,000 bench warrants for failure to pay each year in summary cases;[3] and that MDJs are still chasing LFOs in over a million cases dating back to the 1970s and 1980s. Last year, the ACLU-PA successfully litigated three debtors' prison cases before the Superior Court: *Commonwealth v. Mauk*, 185 A.3d 406 (Pa. Super. Ct. 2018), *Commonwealth v. Diaz*, 191 A.3d 850 (Pa. Super. Ct. 2018), and *Commonwealth v. Smetana*, 191 A.3d 867 (Pa. Super. Ct. 2018). The courts of common pleas in those cases alone were jailing more than 50 defendants per month for nonpayment. And we have documented that this problem exists in many courts across Pennsylvania.

The three largest bar associations in Pennsylvania have recognized the need for reform. Last year, the Pennsylvania Bar Association, the Allegheny County Bar Association, and the Philadelphia Bar Association passed resolutions asking the Committee and the Supreme Court to change existing practices (these resolutions are attached as Appendices A-C).

The ACLU-PA hopes that these comments, which admittedly are detailed and extensive, will aid the Committee in improving even further the Rules revisions. Our recommendations incorporate the strong procedural reforms enacted in recent years by states like Arizona, Louisiana, Missouri, Michigan, Ohio and others, which took decisive action to put an end to similar practices in their own states.[4] Our comments also reflect best practices from the National Task Force on Fines,

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top-pa-list-of-lockups-over-collateral; Ford Turner, "5 years after a Berks woman died in prison, defendants are still jailed for not having money," Reading Eagle (Apr. 25, 2019), https://www.readingeagle.com/news/article/thats-not-a-justice-system; Ford Turner, "District courts of Xavios, Patton among leaders in no-collateral jailings in Pennsylvania," (Apr. 25, 2019), https://www.readingeagle.com/news/article/district-courts-of-xavios-patton-among-leaders-in-no-collateral-jailings-in-pennsylvania; Ford Turner, "Support grows for reform in district court jailings over collateral," (Apr. 25, 2019), https://www.readingeagle.com/news/article/chorus-grows-for-reform-in-district-court-jailings-over-collateral.

[3] AOPC Caseload Statistics at 195 and 241. This figure comes from adding the total post-disposition warrants issued in traffic and non-traffic cases by the magisterial district courts with those issued by the Philadelphia Municipal Court Traffic Division. In our experience, nearly all of those post-dispositional warrants are issued for failure to pay. At the end of 2017, approximately 1.5 million were pending unserved.

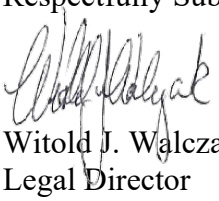
[4] *See*, *e.g.*, Arizona Administrative Order 2017-81 (adopting a bench card for use at sentencing and default) (adopted in 2017), https://www.azcourts.gov/Portals/22/admorder/Orders17/2017-81%20FINAL.pdf; Colo. Rev. Stat. § 18-1.3.702(4) ("In determining whether a defendant is able to comply with 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, 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

Fees, and Bail Practices, a joint effort of the Conference of Chief Justices and the Conference of State Court Administrators. Last year, the Superior Court endorsed the use of a Conference-issued "bench card" that codifies both the clearly-established law and explains *how* trial courts must establish whether a defendant is able to pay (that bench card is attached as Appendix D).[5] We hope that this Committee and the Supreme Court will modify the proposed new Rules to incorporate these best practices.

Pennsylvania was once a leader in prohibiting the incarceration of indigent defendants who are too poor to pay LFOs. Our Supreme Court prohibited such a practice in *Commonwealth ex rel. Parrish v. Cliff*, 304 A.2d 158 (Pa. 1973)—ten years before the United States Supreme Court did so in *Bearden v. Georgia*, 461 U.S. 660 (1983). Mere months after the *Parrish* decision, the Pennsylvania Supreme Court adopted what are today Rules 456 and 706.[6] They were intended to end the problem of imposing unaffordable LFOs and then jailing poor defendants who could not afford to pay them.

The ACLU-PA urges the Committee to consider further changes to the proposed Rules to help Pennsylvania again become a leader in respecting the constitutional rights of poor criminal defendants. But we fear that unless the Rules provide more detail and specific guidance to Pennsylvania judges, the unconstitutional jailings arising from LFO collections across the Commonwealth will continue.

Respectfully Submitted,



Witold J. Walczak
Legal Director

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the National Task Force's recommendations; Supreme Court of Ohio "Collection of Court Costs & Fines in Adult Trial Courts" Bench Card, https://www.supremecourt.ohio.gov/Publications/JCS/finesCourtCosts.pdf; 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).

[5] As the Superior Court explained, "the National Task Force on Fines, Fees and Bail Practices has drafted a useful summary articulating the procedure for collecting court-imposed fines and costs." *Smetana*, 191 A.3d at 873 n.10 (Pa. Super. Ct. 2018). *See also Diaz*, 191 A.3d at 866 n.23 (same).

[6] At the time, then-Rules 65 (today 456) and 1407 (today 706) had nearly identical language.

Executive Summary

Given the length of our Comments, we include this summary of our major points. Detailed comments on each of these points follow.

The ACLU-PA opposes the following proposed change:

- **The Committee's Proposal tries—but fails—to fix the problem of unconstitutional driver's license suspensions, and in so doing puts more defendants at risk by *reducing* the time that defendants have to respond from 25 days to 15 days:** In line with due process requirements, the Proposal prohibits suspending a defendant's driver's license without holding an ability-to-pay hearing. But there is a substantial loophole that eviscerates that protection: if a defendant does not respond to a delinquency notice within 15 days, the MDJ sends notice to PennDOT to suspend the license without any hearing. This does not meet the constitutional standard, as it still deprives a person of his or her property interest in a driver's license without a pre-deprivation hearing. Instead, the Rules should permit suspension only *after* a Rule 456 hearing, in the same way that a defendant cannot be incarcerated without such a hearing. *See* Page 24.

The ACLU-PA supports in part the following proposed changes, but encourages the Committee to modify them:

- **The Rules should eliminate the 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 appears to be one of only a handful of states that requires any type of prepayment before an accused may plead not-guilty or assert innocence. Following exhaustive research, the ACLU-PA believes that this requirement is one of the main reasons MDJs issue pre-disposition warrants in more than 25% of summary cases.[7] *See* Page 28.
- **The Rules should permit indigent defendants to plead guilty and still have MDJs set the total amount of fines and costs based on their financial circumstances:** The Proposal will require that MDJs consider defendants' ability to pay fines and costs only after a trial pursuant to Rule 454. However, case law establishes that 42 Pa.C.S. § 9726, which requires that courts consider ability to pay fines, applies *even if* the defendant pleads guilty. *See*, *e.g.*, *Commonwealth v. Mead*, 446 A.2d 971, 973-74 (Pa. Super. Ct. 1982) (per curiam). Accordingly, the Rules need a procedure to allow a defendant to plead guilty but still have the court consider his or her ability to pay fines and costs. Ideally, the defendant would be able to enter a plea via the mail and check a box asking for a payment determination hearing on the total amount of the fines and costs. *See* Page 26.
- **Setting costs at sentencing based on ability to pay should not be limited to "discretionary" costs, and the Rules should instead adopt the same standard used in**

[7] These figures are discussed *infra*.

Rule 706(C): Courts of Common Pleas have the authority to reduce or waive even "mandatory" costs pursuant to Rule 706(C). *See Commonwealth v. Burrows*, 88 WDA 2017, 2017 WL 4974752 at *4 (Pa. Super. Ct. Oct. 31, 2017). Although the MDJs had the same authority until 1985, it was removed from the Rules without explanation. The Rules should restore MDJs' authority to reduce or waive all costs at sentencing—as "mandatory" costs are only so *unless* the defendant lacks the ability to pay them. The status quo of permitting waiver of costs in misdemeanor and felonies, but not in less-serious summary offenses, leads to the absurd results of minor offenders being burdened with non-waivable costs. *See* Page 27.

- **The Committee should revise the proposed list of the defendant's financial information for MDJs to consider:** First, the categories of financial information are in the comments and thus not binding, as they would be if placed in the text. Second, they provide no guidance on *how* the MDJ should use the information to determine ability to pay. Is a person who receives $700 each in Supplemental Security Income due to a disability and has no other income "able" to pay? What about an unemployed single mother receiving cash assistance with no other income? Or the underemployed single parent who relies on food stamps to supplement her income from her minimum wage job? The case law answers these questions, and the Rules should, too. The Rules must do a better job creating uniform standards for MDJs, otherwise they will continue making arbitrary decisions without any consistency from court to court.[8] *See* Page 9.
- **The Committee should simplify the new procedure to put cases in an "Administrative Hold" and ensure that MDJs are not penalized for its use:** The Committee's proposed procedure to put cases on hold indefinitely for indigent defendants is a reasonable one, but it should be streamlined in a few ways. First, rather than conducting a separate hearing, the MDJ should have the authority to place the administrative hold after any Rule 456 payment determination in which the court finds no ability to pay. If the court believes it has sufficient evidence that a defendant is unable to pay, the court should have the power to enact this procedure without scheduling a hearing. Second, notice should only go to the District Attorney (and a victim if there is restitution), not to the police officer affiant. Third, the right to counsel, while laudable, seems unnecessary and may overly strain our already burdened public defenders' offices, which in turn could lead to courts putting fewer cases on an administrative hold. Additionally, if a case is put on hold, any driver's license suspension for nonpayment should be canceled. Finally, many MDJs have voiced concern that election opponents will use their uncollected LFOs against them when they run for re-election: AOPC needs to ensure that cases placed on administrative hold are subtracted from any published accounting of an MDJ's uncollected court debt, or this procedure will be underutilized. *See* Page 20.

[8] As is discussed in the full comments below, there also appears to be a drafting error with respect to these categories of information, which must be corrected.

The ACLU-PA fully supports these proposed changes:[9]

- **Defendants will have 30 days, rather than 10, to respond to a citation or summons:** The ACLU-PA 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 number nearly half a million each year and are issued in more than 25% of all cases.[10]
- **Payment plans must be based on the defendant's ability to pay and cannot be arbitrary:** This is a welcome change that is required by existing case law but has not previously been addressed by the Rules. *See Smetana*, 191 A.3d at 873 (vacating $100/month payment plan where the trial court failed to make "findings of fact on Appellant's ability to pay"). However, in order to be effective, the Rules must also provide the MDJs with guidance on *how* to determine what a person can afford to pay.
- **Courts must use a standardized income and expense form:** The use of a standardized form will help promote uniformity. We hope that the AOPC will itself elicit feedback from judges, lawyers, and the community when creating such a form. We encourage the Committee to specify in the Rules that this form should become a part of the case file, subject to the Public Access Policy, which will promote accountability.
- **Defendants cannot be jailed for nonpayment unless represented by a lawyer:** Since *Commonwealth v. Farmer*, 466 A.2d 677, 678 (Pa. Super. Ct. 1983), there has been no doubt that defendants have a right to counsel prior to incarceration for nonpayment of LFOs. *See also Diaz*, 191 A.3d at 862 (finding a constitutional right to counsel whenever there is a likelihood of imprisonment due to nonpayment). We remain concerned about individual MDJ practices that compel defendants to sign waivers of counsel without an appropriate colloquy, and hope that AOPC and the Minor Judiciary Education Board will work to address this problem through appropriate education.
- **An MDJ who puts a defendant in jail for nonpayment must explain in writing the reasons why a defendant is able to pay and why imprisonment is appropriate:** A helpful step, this is similar to what Rule 456 currently requires before defendants are jailed for "failure to post collateral." However, AOPC data shows that in thousands of cases, courts have jailed defendants while writing facially invalid reasons. That experience shows that this reform alone does not solve the problem of jailing indigent defendants—it does nothing to explain to the MDJ *how* to determine whether the defendant is able to pay.

[9] Because the ACLU-PA fully supports these changes, they are discussed only in this Executive Summary. For more detailed explanations, please refer to our February 2018 comments.

[10] In 2017, there were 1,833,042 new summary cases outside Philadelphia. Pre-dispositional warrants were issued in 483,646 summary cases, representing 26% of all such cases. AOPC, "2016 Caseload Statistics of the Unified Judicial System of Pennsylvania," at 177, 186, and 195, http://www.pacourts.us/assets/files/setting-768/file-7040.pdf?cb=0f0e4c (calculated by adding together the total number of new traffic and non-traffic cases, as well as the total number of pre-dispositional warrants issued for each case type).

The ACLU-PA strongly encourages the following additional changes and supplements to the Rules:

- **The Rules must reflect the established body of case law addressing what "ability to pay" means.**
    - **Whether a defendant is able to pay is limited to that defendant's finances:** As the Superior Court explained last year, "our law requires" that a court determine whether the defendant "alone had the financial ability to pay the outstanding fines and costs such that imprisonment was warranted." *Smetana*, 191 A.3d at 873 Courts cannot require that defendants borrow money from friends or family in order to make payments and avoid jail, a practice that happens all too often across the state. This limitation that courts can only consider the defendant's finances must be explicitly stated in the Rules. *See* Page 9.
    - **Pennsylvania law defining 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.[11] 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.[12] 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.[13] This dovetails with the Superior Court's instruction that there is a "duty of paying costs 'only against those who actually become able to meet it without hardship.'"[14] At a minimum, these principles must be reflected in the Rules. *See* Page 9.
    - **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 certain presumptions of indigence (detailed in the comments below), such as based on 125% of the federal poverty level or receiving means-based public assistance such as food stamps. Such presumptions are consistent with existing law and would also ease the courts' administrative burden as courts have an affirmative obligation to inquire into the defendant's finances when determining ability to pay. If a defendant falls under one of the

[11] *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).
[12] *Commonwealth v. Cannon*, 954 A.2d 1222, 1226 (Pa. Super. Ct. 2008).
[13] *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" and has been "living from hand to mouth," the court lacks any evidence supporting a finding of ability to pay a fine).
[14] *Commonwealth v. Hernandez*, 917 A.2d 332, 337 (Pa. Super. Ct. 2007) (quoting *Fuller v. Oregon*, 417 U.S. 40, 54 (1974)).

presumptions, and no evidence rebuts that presumption, then the court need not conduct a full ability to pay hearing. *See* Page 9.

- **Rule 456 must reflect binding precedent about what the law requires when a court holds a payment determination hearing.**
    - **The Constitution prohibits jailing or otherwise punishing a defendant for nonpayment unless a court has found "willful" nonpayment:** Decades of case law from the United States Supreme Court and Pennsylvania's appellate courts make clear that a defendant can be punished for nonpayment only if the defendant has "willfully" failed to pay. *See*, *e.g.*, *Commonwealth v. Mauk*, 185 A.3d 406, 411 (Pa. Super. Ct. 2018). MDJs should not be expected to perform case law research. This clearly-established standard must be in the Rules. *See* Page 14.
    - **The Constitution requires that courts affirmatively inquire into the reasons for nonpayment:** Case law requires that trial courts affirmatively inquire into the reasons for nonpayment of LFOs and allows a court to 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. *See*, *e.g.*, *Mauk*, 185 A.3d at 412. Rule 456 must unequivocally direct judges to fulfill this constitutional requirement. *See* Page 14.
    - **Pennsylvania law prohibits jailing indigent defendants for nonpayment of LFOs:** Pennsylvania law prohibits jailing indigent defendants for nonpayment, for courts of common pleas. Pa.R.Crim.P. 706. Rule 456 must unequivocally reflect that bright-line legal requirement in the same way. *See, e.g.*, *Diaz*, 191 A.3d at 866 n.24 ("A finding of indigency would appear to preclude any determination that Appellant's failure to pay the court-ordered fines and costs was willful."). *See* Page 14.
    - **Civil contempt purge conditions are limited to what the defendant can actually afford to pay:** 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 with the purge condition. *See*, *e.g.*, *Barrett v. Barrett*, 368 A.2d 616, 621 (Pa. 1977). *See* Page 14.
- **Rule 456 should be revised to reduce the astounding number of bench warrants issued each year:** Every year, the minor judiciary issues more than 600,000 warrants for nonpayment of LFOs in summary cases. One reason is that defendants have only 10 days to respond to a notice of default. As the Committee has done elsewhere, the rules should be amended to provide the defendant with 30 days to respond to a notice of default. If the defendant does not appear within that time, the MDJ should schedule a hearing and only issue a warrant if the defendant fails to appear at the scheduled hearing. Revising the existing procedure should increase the number of defendants who engage with the court. *See* Page 15.

- **The Committee should abolish the process of jailing defendants for "failure to post collateral" while they await a payment determination hearing under Rule 456, an unconstitutional deprivation of liberty that resulted in the incarceration of over 2,000 individuals in 2017:**
    - *Bearden* requires that courts hold a hearing *prior* to depriving a person of their liberty due to nonpayment of LFOs. Rule 456(C) allows a court to jail a defendant in default for up to 72 hours if the defendant cannot post collateral and the court cannot immediately hold a payment determination hearing.[15] Under *Bearden*, this is unconstitutional.
    - A recent series of stories in the Reading Eagle and data from AOPC shows numerous cases where MDJs have used this procedure to jail indigent defendants. That same data shows that over 2,000 unique individuals were jailed in 2017. The use of the procedure is not uniform: in 2017, MDJs in Bucks and Montgomery Counties used the procedure only a few times. By contrast, judges in Berks County alone accounted for about 25% of such jailings statewide. The procedure must be abolished and defendants must be given timely payment determination hearings. *See* Page 17.

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

I. Rules changes governing "ability to pay" at all stages of proceedings.

A. The Rules must explain in detail what "ability to pay" means. (Rules 454, 456, and others)

The most important change that the Court can make to the Rules is to provide clear, specific, and binding instruction on what "ability to pay" means. This arises at sentencing, when setting payment plans, when determining whether to jail a defendant for nonpayment, and when determining whether to take away a defendant's driver's license. It is the consistent theme. In so doing, the Rules need not reinvent the wheel. 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. So, too, have court rules and bench cards from other states such as Arizona, Michigan, and Ohio that have tackled this question in recent years.

1. The discussion of "ability to pay" in the Proposal is inadequate.

Unfortunately, the current Proposal falls short of what is necessary to help MDJs do their jobs efficiently and consistently. First, the Proposal contains an apparent drafting error—the categories of information that the 2018 proposal included are still there in full, but additional categories that are both duplicative and contradictory have been added (we presume that the new categories were intended to supplant the original ones). For example, the "old" category 1 cannot be squared with the "new" categories 1-2, as both talk about employment and income but in

[15] Referred to in the court records and the Magisterial District Court System, as incarceration for "failure to post collateral."

different ways. It appears that the "old" categories 1-6 should simply be deleted in favor of the "new" additions 1-4 and their sub-categories.[16]

Second, the categories are non-binding, as they appear only in the *comment* to the Rules, and not the text of the Rules themselves. Ideally, there should simply be a standalone rule (such as what we proposed as "Rule 459," which we previously drafted and included as part of our February 2018 comments), rather than having duplicative information repeated in multiple rules. Finally, even after fixing those errors, the categories of information provide no guidance as to *how* to evaluate ability to pay. They ignore the substantial body of case law that has developed in the past forty years that helps identify who is indigent.

2. A substantial body of case law discusses what "ability to pay" means.

MDJs should not be expected to perform legal research and review case law. To expect otherwise invites error, and it is therefore critical that the Rules are comprehensive. The key takeaway from Pennsylvania's case law, as well as the analogous reforms in other states, is that a person who, despite a bona fide effort, cannot meet his basic life needs without public assistance is unable to afford to pay LFOs. At a minimum, the Rules must reflect this principle.

One initial note: the Superior Court last year explained that ability to pay is a question only of the *defendant's* finances, not whether the defendant can borrow money from friends or family—something that we have seen happen far too often. *See Smetana*, 191 A.3d at 873 ("Although Appellant indicated that he could potentially borrow money from a sibling, the court failed to find—as our law requires—that he alone had the financial ability to pay the outstanding fines and costs such that imprisonment was warranted."). MDJs are unlikely to conduct the legal research necessary to find this point.

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

[16] This is also important because of problems with the "old" category items—such as the misguided focus on gross income rather than net income—which we discussed in our February 2018 comments.

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 our 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").

3. Including presumptions of indigence will accurately reflect case law and ensure consistent application across the state.

Absent clear Rules that reflect the case law, MDJs are left to make arbitrary determinations about ability to pay that are divorced from the law. The Rules must incorporate this case law,[17] 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.[18]
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 such as General Assistance;
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
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.

The Committee expressed some concern that "presumptions of an inability to pay . . . would be arbitrary" in light of the geographic and economic differences around the state, which would "hamper an equitable and individualize [sic] determination of a defendant's ability to pay." Rules Committee Proposal at 71. We strongly disagree. The Superior Court in *Eggers* has already created certain presumptions, and last year the Superior Court in *Smetana* and *Diaz* explicitly endorsed the use of the National Task Force's bench card, which includes precisely such a presumption. *See*, *e.g.*, *Smetana*, 191 A.3d at 873 n.10 ("We note that the National Task Force on Fines, Fees and Bail Practices has drafted a useful summary articulating the procedure for collecting court-imposed fines and costs."). The point of presumptions is that they can be overcome if there is evidence to rebut them. But they will provide clear and specific guidance that the MDJs need when evaluating defendants' finances.

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[17] ACLU-PA in our February 2018 Comments proposed new "Rule 459" as a place to consolidate the standards on determining ability to pay that apply various points in a case. While that would be the more streamlined approach, the Committee could instead incorporate the same standards into the existing Rules that govern sentencing, payments plans, and proceedings on default.

[18] This figure is consistent with both the practices in other states and the National Task Force bench card. 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 of $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.

They also reflect reality. A person who makes under 125% of the federal poverty level, for example, makes less than approximately $15,000 per year. That person is indigent. As is a person who receives Supplemental Security Income due to disability, which is about $790 per month (less than $10,000 per year). Any serious effort to protect the poorest Pennsylvanians from unaffordable payment plans and incarceration in summary cases must reflect this reality.

Indeed, Pennsylvania would be in good company if it did so, as 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. 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).[19] *See also* Mich. Court R. 6.425(E)(3) (to determine whether a defendant has a "manifest hardship," the court must consider 6 factors);[20] Mecklenburg County District Court, North Carolina bench card.[21]

B. Just as the Rules of Civil Procedure contain a formula for determining payment plans in child support cases, these Rules can easily use a simplified formula for payment plans.

The Rules of Civil Procedure contain a formula to make decisions in support cases. *See* Pa.R.C.P. 1910.16-4. While the ACLU-PA does not think such a complicated formula would be appropriate here, a simplified, default payment plan approach could easily be added into the Rules to give MDJs guidance on how much a defendant should pay each month, such as this:

Poverty Level Percentage	Maximum Monthly Payment Plan
Under 125% (but found to not be indigent)	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

We previously submitted in February 2018 a proposed "Rule 459," a standalone rule that would govern "ability to pay." While we will not repeat the text of that proposed rule here, the intention is that such payments would be *presumptive* maximums unless there is evidence that the defendant can afford more. Thus, they would provide guidance to MDJs—and dramatically simplify their workload—while still giving them the flexibility necessary to compel a defendant to pay more if he or she can afford it.

This approach also will work well given the Committee's excellent proposal that payment plans be based on the defendant's ability to pay, something that the ACLU-PA fully supports. Using a

[19] This provision was adopted in 2016.
[20] This provision was adopted in 2016.
[21] Adopted in 2017.

table with a presumptive payment schedule will unquestionably guide the MDJ in determining *how much* the defendant is able to afford to pay.

Finally, it would also be in line with approaches that other states are taking. For example, California 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). Louisiana has codified a requirement that a monthly payment plan cannot exceed one day's income at minimum wage. *See* Louisiana Act 260. Both of those provisions were adopted in 2017. Pennsylvania would be wise to move in the same direction, as affordable payment plans are the foundation of ensuring that defendants are not jailed due to their indigence.

II. Rules changes governing collection of LFOs post-disposition.

A. Rule 456 requires significant revisions to accurately reflect case law and improve the procedures that currently lead to the incarceration of thousands of indigent defendants each year. (Rule 456)

1. Rule 456 must explicitly incorporate the constitutional requirement that MDJs affirmatively inquire into the reasons for the defendant's nonpayment and make a finding of willfulness.

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. Our appellate courts have repeatedly reinforced this principle. *See*, *e.g.*, *Mauk*, 185 A.3d at 412; *Commonwealth v. Dorsey,* 476 A.2d 1308, 1312 (Pa. Super. Ct. 1984). Yet decades later, Rule 456 still does not include that requirement—it does not even include the term "willful" anywhere therein. This is a fundamental oversight, as MDJs cannot and should not be expected to research case law to determine whether a defendant can be jailed.

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"). Rule 706, governing misdemeanor and criminal cases, makes this clear for the courts of common pleas. But Rule 456 lacks this bright-line instruction, and it must be clearly stated in the Rule to provide clarity and guidance to MDJs—and to also protect indigent defendants from illegal incarceration.[22]

[22] 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 no indication in the Committee's Report or anywhere else

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

In addition to jailing defendants unlawfully, MDJs routinely set purge conditions: pay $500 now to avoid jail, or pay $500 at any time and be released. This is a civil contempt purge condition, as MDJs who proceed under Rule 456 to jail defendants are using their inherent civil contempt authority.[23] Such purge conditions are 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 sums 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: "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."

4. The procedure for issuing bench warrants, and the amount of time that a defendant has to respond, should be revised in Rule 456 to reduce the truly astronomical number of bench warrants issued each year.

Each year, MDJs and the Traffic Division of the Philadelphia Municipal Court issue over 600,000 bench warrants for failure to pay in summary cases.[24] At the end of 2017, approximately 1.5 million warrants were pending unserved, which includes warrants from previous years. That is a truly astounding number of bench warrants. At any given moment, tens—and possibly hundreds—of thousands of Pennsylvanians face arrest solely because they have fallen behind on their payments.

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that the Supreme Court intended that MDJs should have discretion to jail indigent defendants when common pleas judges do not.

[23] 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. In case there is any doubt that proceeding under Rule 456 uses civil contempt authority, the Superior Court's recent decisions in *Mauk*, 185 A.3d at 413, and *Smetana*, 191 A.3d at 873, made it clear that proceedings under Rule 706 are contempt proceedings; Rule 456 is no different in this regard.

[24] AOPC Caseload Statistics at 195 and 241. This figure comes from adding the total post-disposition warrants issued in traffic and non-traffic cases by the magisterial district courts with those issued by the Philadelphia Municipal Court Traffic Division. In our experience, nearly all of those post-dispositional warrants are issued for failure to pay.

a. Defendants should have 30 days to respond to a default notice.

Currently, Rules 430 and 456 permit MDJs to issue bench warrants for failure to pay 10 days after default.[25] 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. As the Committee recognizes, 10 days is simply too short a period of time to respond to a citation—it is no different when responding to a default notice. Defendants need more time to adequately respond to the court.

b. MDJs should not issue bench warrants for nonpayment until after they have first scheduled a court hearing and the defendant has failed to appear.

In our previous comments, the ACLU-PA suggested that the Committee revise the bench warrants procedure so that a capias warrant is issued only *after* a constable serves a notice of default on a defendant in person. The goal of this was to address the many cases where the court does not have a valid address for an indigent defendant, who may have housing instability and no permanent address.

The Committee did not act on this proposal, but something must be done in order to reduce the number of bench warrants. Accordingly, we propose another approach: permit discretionary bench warrants for nonpayment *only if* the MDJ has first scheduled a Rule 456 payment determination hearing, notice has been served on the defendant, and the defendant has failed to appear at that hearing. People are more likely to respond to a letter specifying that they have to be present at a specific date and time, rather than a more open-ended one that tells them to contact the court. This is the approach used by the courts of common pleas with which we are familiar, and while it certainly does not guarantee a 100% response rate, they issue far fewer warrants than the MDJs.

c. The current notice that defendants receive is inadequate and must be revised.

The problem is exacerbated because the current notice defendants receive, form 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. 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:

[25] 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 *other* warrants as required by the rules.

    - 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 hearing to set 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;
- 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; and
    - May offer the court proof of the defendant's income, or why the defendant is without income, and expenses.

Such notice clearly tells a defendant what is required, while also informing the defendant of his or her rights. This should take some of the fear out of the encounter, which will encourage the defendant to respond to the court rather than simply ignoring the letter.

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.

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 2017.

The week prior to the submission of these Comments, the Reading Eagle ran a series of stories about defendants who were unlawfully incarcerated in thousands of cases because they were unable to post collateral.[26] This is a direct result of the current procedures set forth in Rule 456.

In its current form, Rule 456(C) 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)

[26] *See*, *e.g.*, Ford Turner, "District judges in Berks County jail more people for lack of money than anywhere else in Pa.," Reading Eagle (April 23, 2019), https://www.readingeagle.com/news/article/berks-district-judges-top-pa-list-of-lockups-over-collateral.

(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. These defendants, however, are facing jail *only because* they have defaulted on their payments—it is therefore unconstitutional to incarcerate them for that default without first making the necessary findings of willful nonpayment under *Bearden*.

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, because an attorney may be able to help the defendant better understand the legal issue and articulate what his or her financial situation is. *See Diaz*, 191 A.3d at 862 (the Fourteenth Amendment requires that a defendant be afforded the right to counsel prior to incarceration for nonpayment of LFOs).

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).[27] In 2015, the Court tinkered with the procedure by adding these requirements in an effort to end the problem of widespread and illegal jailings.

Those modifications have failed to protect defendants' rights, as too many MDJs still completely disregard their duty under Rule 456, as data from AOPC documents. In 2017, over 2,000 unique individuals were jailed through this process across the state, which shows that it has a widespread and devastating impact. Here are some facially invalid—and illegal—reasons that MDJs have put in writing to explain why they have jailed defendants in 2018 for failure to post collateral (typos are in the original court records):

Reason	Facts
Homeless	Homeless; Did not respond or make any payments; New charges;
Homeless, and alcoholic	won't show for hearing
Total amount of cost and fines- defendant has been in Dauphin County Prison since 6-1-18	Total amount of cost and fines- defendant has been in Dauphin County Prison since 6-1-18

[27] 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.

Able to pay	gets SSID
Judge requiring fines and costs	Judge requiring fines and costs.
Defendant given time to make phone calls. Cant come up with any money at all.	Defendant has a job.
Judge is requesting full amount.	Judge is requesting full amount
deft picked up on numberous warrants	Deft set up on time payments for $25.00 by weekly and hasn't made payment
Defendant transported from Clearfield County Jail to Clarion County Jail. Failure to pay on fines and costs. Total due $1116.29	Defendant's girlfriend to pay $450.00 Judge talked with her on phone.
failed to pay fines and costs	failed to pay fines and costs
Had two criminal cases one is an Extradition to Delaware-Judge committing on scofflaws also.	Unemloyed
In on a Criminal case committed to BCP-Judge requesting $50.00 collateral on the Summary Offense.	On SSD
Defendant cannot pay and is homeless.	Defendant cannot pay and is homeless.
Multiple Courts warrants-owes high total	Unemployed
Fails to pay-old warrants 2010	Unemployed
Commitment for 1 day	Commitment for 1 day
Old warrants , many multiple Courts, fails to pay	Employment unknown
Def could not prove he couldn't pay	Def could not prove he couldn't pay
Defendant has failed to respond and all attempts have been made prior to constable picking defendant up on warrant and bringing forthwith to the District Court. Defendant is a flight risk and will not appear for payment determination hearing. Picked up by the PSP for other incident.	Defendant has family and or friends who can help pay fine/costs and will pay if contacted by the defendant.
Failure to Post	Gets Disabilty
def cannot post collateral and fails to appear for hearings	def cannot post collateral and fails to appear for hearings
Committed ib CR-94-18 from MDJ [redacted] Court	Mental Health Challenges

These are not isolated cases, as the AOPC data is full of similar examples. While there are certainly some where the court has put appropriate reasons in writing, most are like those listed

above—the court fails to articulate valid reasons why a defendant will not appear, and it fails to articulate valid reasons why the defendant is able to pay this collateral. Significantly, all of these thousands of defendants are being jailed *only* because they cannot come up with a few hundred dollars of collateral. Jailing someone *because* that person has "Mental Health Challenges" or is "On SSD" or is "Unemployed" or "Homeless" is facially illegal and unconstitutional. Other jailings, such as those premised on borrowing money from friends or family, are also illegal. *See Smetana*, 191 A.3d at 873 ("Although Appellant indicated that he could potentially borrow money from a sibling, the court failed to find—as our law requires—that he alone had the financial ability to pay the outstanding fines and costs such that imprisonment was warranted."). Such practices would not survive a court challenge.

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. Courts in places like Bucks and Montgomery Counties only jailed defendants for collateral in a handful of cases. On the other hand, a few counties account for nearly all such jailings. Berks, for example, *alone* accounted for 25% of jailings for failure to post collateral across the entire state. Practices and procedures that impact people's liberty should not vary so greatly from county to county. The fact that many MDJs never use the collateral procedure shows 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.

C. The "administrative hold" procedure should be streamlined. (Rule 456)

We appreciate the Committee's willingness to invent a creative solution to give MDJs needed flexibility, while also reducing the burden on defendants. As drafted, we think that the procedure is more complex—and requires more hearings—than is necessary. In addition, because costs are not a part of the sentence, we believe that a procedure to reduce or waive those costs would be consistent with existing law and would provide substantial relief to indigent defendants.

1. Because costs are not a part of the sentence, the Rules can permit their waiver while still allowing the "administrative hold" procedure to be used on fines and restitution.

Even if the Committee feels that it cannot allow the waiver of fines or restitution in light of the jurisdictional limit in 42 Pa.C.S. § 5505, it can allow the waiver of *costs* because costs "are not part of the criminal's sentence but are merely incident to the judgment." *Commonwealth v. Rivera*, 95 A.3d 913, 916 (Pa. Super. Ct. 2014). Unlike a fine, costs are not punishment and are more "akin to collateral consequences." *Id*. *See also Commonwealth v. Giaccio*, 202 A.2d 55, 58 (Pa. 1964) ("Costs do not form a part of the penalty imposed by statutes providing for the punishment of criminal offenders," as a "direction to pay costs in a criminal proceeding is not part of the sentence, but is an incident of the judgment."). As a result, costs, not subject to the limitation on final orders in § 5505, may be waived at any time.

This approach is consistent with the Pennsylvania appellate case law that has permitted challenges to court costs well after sentencing. The Commonwealth Court has explained that

when a defendant challenges the clerk of court's imposition of certain costs, "[s]uch a challenge is properly brought in the sentencing court." *Commonwealth v. Williams*, 909 A.2d 419, 421 (Pa. Commw. Ct. 2006). In Williams, the defendant originally brought a challenge to certain costs in the trial court three years after his conviction, and the trial court dismissed for lack of jurisdiction. The Commonwealth Court reversed, ruling that the trial court is the proper forum for such a claim. Similarly, in *Fordyce v. Clerk of Courts*, the Commonwealth Court explained that it had transferred a petition for a writ of mandamus to the trial court because it had "exclusive jurisdiction" over the costs matter even though the time to appeal had already passed; on appeal, the court ultimately invalidated the challenged costs. 869 A.2d 1049, 1050 (Pa. Commw. Ct. 2005). The Superior Court has also suggested that the unique status of court costs would permit a court to modify them well after sentencing—if there is a procedure in place to allow such modification. *See Commonwealth v. Soudani*, 165 A.2d 709 (Pa. Super. Ct. 1960) (distinguishing between fines, which cannot be modified after the sentence is final, and costs, which "do not form a part of the penalty").

As a result, the Rules could easily contain a provision that allows a court to waive costs, while still utilizing an administrative hold for fines and restitution, like this:

(Proposed) Rule 456 (F) Uncollectable Restitution, Fine, and Costs

> **(1) Costs – At any time, if the issuing authority determines that the defendant does not have the ability to pay, the issuing authority may declare the costs arising out of summary prosecutions non-collectible because of the indigence of the defendant and reduce or waive any outstanding balance thereof.**
>
> > **(a) When using this procedure, the issuing authority shall declare and record in the case file that the reason the costs were modified is because they are uncollectible due to the defendant's indigence. The issuing authority shall then perform a case balance adjustment to remove the costs.**
> >
> > **(b) If the case balance adjustment of costs results in the overall case balance being reduced to zero, the issuing authority shall close the case and recall any active warrants that were issued due to nonpayment. 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.**
>
> **(2) Fines and Restitution [administrative hold procedure]**

The benefit of such a procedure is that indigent defendants owing only costs would be able to have them waived and thus be eligible for Clean Slate sealing of their cases. *See* 18 Pa.C.S. § 9122.2(a)(3). After all, most fines in non-traffic summary cases are discretionary and should not be imposed in the first place for indigent defendants. Assuming that MDJs conduct an appropriate ability-to-pay inquiry regarding fines at sentencing, as is required by 42 Pa.C.S. § 9726, then the defendant would likely *only* owe costs (restitution constitutes only 10% of the

LFOs assessed in non-traffic summary cases, so only a small minority of cases have that).[28] This would allow potentially thousands of defendants to receive the benefits of Clean Slate, even if they are otherwise too poor to pay court costs.

2. The "administrative hold" for fines and restitution should be streamlined.

We have several suggestions on how to better use an administrative hold that reduces the burden on both the MDJ and the defendant, while still giving the Commonwealth and any victim (should there be one) an opportunity to object. First, the MDJ should be able to make a determination about whether a defendant is able to pay without holding any hearing, let alone a separate hearing under this procedure. If the MDJ has just held a Rule 456 payment determination hearing, that should be sufficient. Similarly, if the MDJ has other information—such as that the defendant has been incarcerated or is now disabled—the MDJ should be able to make a financial ability-to-pay determination without holding any hearing.

Second, notice should go only to the District Attorney and any victim—but only if the defendant owes restitution to that victim, as the person otherwise has no interest in the proceeding. It does not make sense to include the "affiant"—a police officer. The District Attorney, not the police, represents the Commonwealth. It would be odd for a police officer to object about putting collections on hold when the officer has no interest in the money and no legal standing to contest the hold. *See Commonwealth v. Jury*, 636 A.2d 164, 171 (Pa. Super. Ct. 1993) ("The Commonwealth is the party plaintiff in a criminal prosecution," and the "district attorney's function is to represent the Commonwealth in these proceedings."). There is also not necessarily a need for any notice to the Commonwealth or a victim prior to such a hearing, as the only question is what, if anything, the defendant is able to pay.

As written, the notice provision causes the need for potentially duplicative hearings. If a defendant appears before the court for a Rule 456 hearing after default, the Proposal would require that the court hold the hearing to determine whether the defendant is able to pay. If the court determines the defendant *cannot* pay, then it must send the defendant away, send notice to parties who could potentially object, and then hold a new hearing. To streamline the process, the court should be able to resolve this all at one Rule 456 hearing and permit objections only after determining that the defendant's case should be put on hold. Objections contesting the defendant's financial status seem unlikely, so this would be the most efficient way to avoid extra court hearings in the majority of cases.

Third, there is no need for counsel. While it is admirable that the Committee wants to ensure adequate representation, the requirement of counsel in this proceeding is likely to have a negative effect because it will further burden public defender's offices and thus limit the ability for defendants to seek relief.

[28] "Collection Rates Over Time," AOPC, http://www.pacourts.us/news-and-statistics/research-and-statistics/dashboard-table-of-contents/collection-rate-of-payments-ordered-by-common-pleas-courts (select Magisterial District Courts and case type non-traffic).

Finally, we see no reason why the MDJ would be limited to resorting to this procedure after two years of failed efforts. Why waste resources trying to collect money from indigent defendants?

Accordingly, we propose the following revised language:

(Proposed) Rule 456(F) Uncollectable Restitution, Fine, and Costs

> **(1) At any time, if the issuing authority determines that the defendant does not have the ability to pay, the issuing authority may issue an order declaring payments uncollectable due to the defendant's inability to pay.**
>
> **(2) A copy of the order shall be made a part of the case file and served by first class mail on the defendant, the attorney for the Commonwealth, and any victim to whom restitution is owed in the case, who shall have 30 days to object on the basis that the defendant is able to afford to pay.**
>
> (3) When an order has been issued pursuant to paragraph (F)(1), no further action shall be taken to collect the amount owed by the defendant, including:
>
> > (a) the scheduling of a default hearing pursuant to paragraph (A);
> > (b) the issuance of the notice pursuant to paragraph (B);
> > (c) issuance of a bench warrant for the defendant's arrest;
> > (d) referral of the case to a collections agency;
> > (e) contempt proceedings for failure to pay;
> > (f) issuance of a notice of default to the Pennsylvania Department of Transportation pursuant to Rule 470. **In the event that notice of default has already been provided to the Pennsylvania Department of Transportation, the issuing authority shall notify the Pennsylvania Department of Transportation and request the withdrawal of the defendant's license suspension.**
>
> (4) If the defendant later becomes able pay, the issuing authority, **after notice to the defendant, the attorney for the Commonwealth, and any victim to which restitution is owed in the case, and an opportunity for the defendant to be heard pursuant to Rule 456(D)**, may rescind the order and proceed with efforts to obtain payment from the defendant on the money owed.

A final note: many MDJs have told us that they feel political pressure to collect LFOs because of the realities of running in contested elections. If this administrative procedure is to help relieve that pressure, AOPC must ensure that cases on hold do not count as active cases and that the amount of money outstanding in these cases is counted separately from the other LFOs that MDJs are trying to collect.

D. As drafted, the Committee's Proposal to fix the issue of unconstitutional driver's license suspensions is unlikely to have any effect. (Rule 470)

The Committee clearly recognizes that the existing process by which driver's licenses are automatically suspended if a defendant has missed payments is unconstitutional and must be corrected. Several federal courts have reached the same conclusion in recent years. *See*, *e.g.*, *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).

There are two main problems with the Proposal. First, it will *reduce* the amount of time that a defendant has to catch up on payments from 25 days down to 15 days. This timing makes no sense. A defendant who is convicted would have 30 days to file an appeal, per Rule 460, but his license would be suspended after just 15 days if he had not made payments, which would clearly interfere with the constitutional right to appeal. Moreover, the Committee also recognizes that defendants should have 30 days, not 10 days, to respond to a citation. If 30 days is needed to respond to a citation, it would be illogical to turn around and say that a defendant's driver's license can be suspended after only 15 days. Instead, to harmonize all of the time windows, 30 days should be the standardized response period across the Rules.

Second, the Committee's Proposal will not actually solve the problem of defendants' driver's licenses being suspended without pre-deprivation due process. *See Bell v. Burson*, 402 U.S. 535, 539 (1972) (drivers have a property interest in their licenses, which cannot be revoked or suspended "without that procedural due process required by the Fourteenth Amendment"). The loophole that the Proposal introduces is that a defendant's driver's license will still be suspended *without a hearing* if the defendant does not respond to a mailed notice within 15 days. This offers inadequate due process protections. A court certainly could not order a defendant jailed automatically if he failed to respond to a notice, as that would violate *Bearden*. So, too, does depriving a person of his driver's license merely for failing to respond to a notice violate *Bearden*. *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). A federal court that examines Pennsylvania's current procedures would likely come to the same conclusion.

The other, practical issue, is that defendants' driver's licenses are only currently suspended if they fail to respond. Under 75 Pa.C.S. § 1533, suspension occurs if the defendant misses payments, but the suspension is lifted if the defendant agrees to a new payment plan. Thus, if a defendant responds and appears for a Rule 456 hearing, the defendant is not going to have his license suspended, because inevitably he will be placed on a new payment plan. The only defendants who would have their licenses suspended at that point would be those who tell the court they refuse to pay—something that rarely, if ever, happens in practice. Thus, it really is only those defendants who do not respond within 15 days, either because they never receive the notice or because they are unable to respond, who require a revised Rule 470.

With that in mind, what should happen is this: if a defendant fails to respond to the notice within the time period, the MDJ should schedule a payment determination hearing under Rule 456 and sent notice of that hearing to the defendant. If the defendant fails to appear, the court could consider issuing a bench warrant. But just as the MDJ cannot jail a defendant who misses a Rule 456 hearing, the MDJ also cannot have the defendant's driver's license revoked.

Finally, we wish to point out that the draft of Rule 470 in the Proposal seems to suggest that a hearing *other than* a payment determination hearing under Rule 456 is required. That is likely not intentional, as it would be a duplicative and unnecessary hearing. Instead, the Rule should simply refer to Rule 456. By clarifying that, and making (A) a little shorter, the intent of the Rule will be clearer.

We suggest the following structure, where (A) only deals with failure to respond to a citation, (B) addresses failure to pay LFOs, and (B) and (D) permit suspension for nonpayment only if the MDJ has first held a hearing:

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 ~~456~~, 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 days of the date of the notice.~~

B) When a defendant defaults on the payment of fines, costs, or restitution as ordered, 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 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. This notice shall be sent contemporaneously with that required by Rule 456(B). 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 (D) ~~(C)~~, 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.

III. Rules changes governing imposition of LFOs 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. We encourage the Committee to remove the "discretionary" qualifier, and instead the Rules should provide a mechanism for the MDJ to determine *which* fines and costs are "discretionary" without having to do independent legal research.

In addition, the current Proposal only requires that MDJs consider ability to pay after trial in Rule 454. It does not address the many defendants who plead guilty, either in person or by mail. Those rules governing guilty pleas must have the same requirement, as the statutory prohibition on unaffordable fines in 42 Pa.C.S. 9726(c) and (d) applies equally to defendant who plead guilty. *See*, *e.g.*, *Commonwealth v. Gaskin*, 472 A.2d 1154, 1157-58 (Pa. Super. Ct. 1984) (court must determine the defendant's ability to pay a fine even after a guilty plea).

The binding case law also provides the following standards, which at a minimum should be incorporated into the Rules:

- 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);
- A court cannot impose a fine without that information; *Commonwealth v. Thomas*, 879 A.2d 246, 264 (Pa. Super. Ct. 2005);
- 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

- 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.

B. The Rules should restore the power of MDJs to waive or reduce *all* costs at sentencing, as the status quo has created an unnecessary inconsistency between summary cases and misdemeanor and felony cases.

Finally, we wonder why since 1985 the Rules in summary cases have diverged from Rule 706(C), which governs the imposition of fines and costs at sentencing in more serious misdemeanor and felony cases. Rule 706(C) requires that courts consider ability to pay fines and costs at sentencing, even for costs that would otherwise be "mandatory." As recently as 2010, the legislature recognized that costs are imposed only if the court does not "determine otherwise" pursuant to Rule 706(C). 42 Pa.C.S. § 9728(b.2). *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).[29] The legislative history of 42 Pa.C.S. § 9728(b.2) explains that the General Assembly viewed that statutory amendment as ensuring that the sentencing court "retain all discretion to modify or even waive costs in an appropriate case." Pennsylvania House of Representatives Judiciary Committee, SB 1169 Bill Analysis (Sept. 15, 2010) PN 2181. In other words, this was authority that the courts *already had* from the Rules.

There is no reason that this authority should be limited to misdemeanor and felony cases. Indeed, it makes no rational sense for defendants to be saddled with unaffordable costs in minor summary offenses, even while a felon can have those costs waived. It was not always like this. As we described in more detail in our February 2018 Comments, the language presently found in Rule 706(C) used to also be in Rule 65 (renumbered to Rule 85 in 1985, which is today Rule 456). There is no barrier to the Committee and the Court restoring this authority in summary cases, so that indigent defendants are not saddled with unaffordable court costs.

Perhaps the easiest way to restore this balance is for Rule 454 and others to simply cross-reference Rule 706(C), in the same way that 42 Pa.C.S. § 9728(b.2) does. It would make clear that MDJs are supposed to follow the same procedures and engage in the same practice regarding costs (and fines) in summary cases that the courts of common pleas must. And it would provide important clarification regarding the authority of MDJs to reduce or waive those costs.

[29] Contrast *Burrows*, which holds that courts have the authority to consider ability to pay costs, with cases such as *Commonwealth v. Martin*, 335 A.2d 424, 425-26 (Pa. Super. Ct. 1975) (en banc), which are explicit that Rule 706(C) (then Rule 1407) *requires* that courts consider ability to pay at sentencing.

IV. Rules changes governing collateral to plead "not guilty."

A. 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 writing that they cannot afford to post collateral.[30] 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 *three* 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, and North Dakota.[31] 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 if the defendant has not already paid collateral that can be put towards the fines and costs. [32] This assumption operates on at least two faulty premises. First, the police officer writes an amount on the citation—that number generally does not take into account the total fines and costs, which means the defendant will *still* owe money even after posting collateral. Second, if a defendant is convicted in absentia, the court will send notice to the defendant of that fact and the amount the defendant owes, which will give the defendant an opportunity to pay without a warrant. Indeed, as we discuss elsewhere, the best practice that the Rules should adopt is that the court should schedule a payment determination hearing *before* issuing a warrant—which will eliminate the risk of unnecessary arrest.[33]

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[30] This is a different type of "collateral" than that involved in the 72-hour hold while awaiting a payment determination hearing in Rule 456. 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.

[31] Mass. Gen. Laws ch. 90C, § 3(A)(4) (2017); Nevada (according to state court websites); N.D. Cent. Code Ann. § 39-06.1-02.

[32] 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.

[33] 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

The unnecessary collateral requirement imposes a heavy administrative burden on the courts that bears discussion. In 2016, defendants in 85,424 cases were found not guilty after a trial by MDJs,[34] with another 8,818 found not guilty by the Philadelphia Municipal Court and Traffic Division.[35] 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 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.

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.

[34] 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.

[35] 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.

Appendix A

OFFICE
OF THE
PRESIDENT

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CHARLES EPPOLITO, III

May 21, 2018

Hon. Thomas G. Saylor
Chief Justice
Supreme Court of Pennsylvania
Fulton Building
200 N. 3rd St., Fl. 16
Harrisburg, PA 17101-1585

Dear Chief Justice Saylor:

The Pennsylvania Bar Association House of Delegates held its semi-annual meeting on Friday, May 11, 2018 in Hershey, PA. During that meeting the House of Delegates, which is the policy-making body of the PBA, approved a recommendation by our Civil & Equal Rights Committee to support the Supreme Court of PA's Criminal Procedural Rules Committee proposed changes to the PA Rules of Criminal Procedure titled, "Incarceration of the Indigent for Failure to Pay in Summary Cases." Furthermore, the House approved support of additional recommendations that would strengthen the Committee's proposal in addressing unconstitutional debtors' prison practices.

I have enclosed for your consideration the final recommendation and report approved by our House of Delegates which explains in further detail the proposed changes. By incorporating these additional recommendations, Pennsylvania will make tremendous strides in correcting the unfair treatment and disparate impact that has resulted from our state's current policies and lack of uniform guidelines on jailing individuals that owe court fines, costs and/or restitution, while giving clearer and more specific instructions to Magistrate District Judges.

If you or any members of the Court have questions regarding these recommendations, please do not hesitate to contact me or our Executive Director, Barry Simpson. As always, the Pennsylvania Bar Association stands ready to assist you and the members of our Supreme Court in any manner necessary.

Sincerely,

Charles Eppolito III

Charles Eppolito, III, Esq.

cc: Lawrence S. Felzer, Esq., Immediate Past Chair, PBA Civil & Equal Rights Committee
Riley H. Ross, III, Esq., Chair, PBA Civil & Equal Rights Committee
Barry M. Simpson, Esq., PBA Executive Director

Enclosure

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PENNSYLVANIA BAR ASSOCATION

CIVIL AND EQUAL RIGHTS COMMITTEE

RECOMMENDATION

The Civil and Equal Rights Committee (CERC) recommends that the Pennsylvania Bar Association support the Supreme Court of Pennsylvania's Criminal Procedural Rules Committee proposed changes to the Pennsylvania Rules of Criminal Procedure titled "Incarceration of the Indigent for Failure to Pay in Summary Cases." and further support additional recommendations that would further strengthen the Committee's proposal in addressing unconstitutional debtors' prison practices.

CERC strongly recommends the Pennsylvania Bar Association join the Philadelphia Bar Association and Allegheny County Bar Association in supporting these proposed changes to the PA Rules of Criminal Procedure and authorize the President and legislative department to convey the PBA's support to the Supreme Court of Pennsylvania's Criminal Procedural Committee.

REPORT

A. Criminal Procedural Rules Committee Proposed Changes to Pennsylvania Rules of Criminal Procedure:

- Requiring that magisterial district courts, when incarcerating a defendant for nonpayment of legal financial obligations, put in writing findings demonstrating the defendant's ability to pay the obligations and the reasons why the court has imposed incarceration for nonpayment; and

- Listing in the Comment to Rule 456 of the Pennsylvania Rules of Criminal Procedure generalized categories of financial information the court should consider when evaluating ability to pay.

B. We make the following suggested additions to the Committee's proposal to further protect the rights of indigent defendants who lack the ability to pay:

- Specifying, as the United States Supreme Court has, that a court has an affirmative obligation to inquire into the defendant's financial resources when considering ability to pay;
- Making clear, in line with Rule 706 of the Pennsylvania Rules of Criminal Procedure and Pennsylvania case law, that indigent defendants cannot be jailed for nonpayment of legal financial obligations;
- Listing specific mandatory financial factors that magisterial district courts must consider when evaluating ability to pay (including the defendant's net income after deducting the defendant's living expenses) to help ensure uniform and accurate evaluations;

- Providing a list of factors that indicate that a defendant is presumptively indigent and at least temporarily unable to pay any amount, including:
    - income below 125% of the federal poverty level,
    - receiving means-based public assistance,
    - receiving the services of the public defender,
    - recent release from jail,
    - and/or inability to meet basic life needs;
- Specifying that courts may set payment plans to help defendants pay their legal financial obligations, but cannot set defendants on payment plans that that the evidence shows they cannot afford;
- Setting a specific schedule of presumed maximum monthly payments based on a defendant's net income;
- Providing a uniform process to allow magisterial district courts to administratively close old cases that they determine are uncollectible due to the defendant's indigence;
- Extending the time before a warrant may be issued after a defendant defaults on payments, and improving the notice required to be sent to defendants by explaining the defendants' rights and obligations, to reduce the issuance of bench warrants for failure to pay;
- Removing the unconstitutional procedure in Rule 456 of the Pennsylvania Rules of Criminal Procedure that allows magisterial district courts to jail a defendant for up to 72 hours prior to an ability-to-pay hearing for "failure to post collateral" and instead requiring that, unless the defendant is released on recognizance, such hearing must occur the same day the defendant is brought to court; and
- Extending the period of time between default on legal financial obligations in a traffic case and notice to the Pennsylvania Department of Transportation for that Department to suspend the defendant's license, to avoid interfering with defendants' right to file an appeal within 30 days and to allow the court more time to work with defendants who have missed payments.

C. Status of Draft Rules

In response to guidance sent to states by the United States Department of Justice the Supreme Court of Pennsylvania's Criminal Procedural Committee released draft rules on January 8, 2018 to address the problem of magisterial district judges unlawfully incarcerating indigent defendants for failure to pay court costs, fines and/or restitution. Public comments were due February 23. However, the Committee is reconsidering its proposal in light of the comments that it received, and it and the Supreme Court should still consider this Recommendation, particularly since the Philadelphia Bar Association and Allegheny County Bar Association have already publicly announced their support for the suggested additions listed in Section B of this recommendation.

D. Analysis

The CERC is in favor of the suggested additions for the following reasons:

The report from the Interbranch Commission for Gender, Racial, and Ethnic Fairness entitled "Ending Debtors' Prisons in Pennsylvania: Current Issues in Bail and Legal Financial Obligations: A Practical Guide for Reform" explains that thousands of low-income Pennsylvanians are jailed each year by magisterial district courts across Pennsylvania because those individuals are too poor to pay court fines, costs, and/or restitution (collectively "legal financial obligations");

In light of the growing national attention on the problem of modern debtors' prisons, states across the country have reformed their court debt collection practices in criminal cases to protect defendants' constitutional rights;

There are more than one million open cases before Pennsylvania magisterial district courts dating back to the 1970s where defendants still owe legal financial obligations;

Pennsylvania magisterial district courts issue approximately 500,000 bench warrants each year because defendants have defaulted on legal financial obligations;

Court records show that Pennsylvania magisterial district courts have jailed defendants for not paying legal financial obligations while acknowledging that defendants are homeless or unemployed, or otherwise unable to pay;

Pennsylvania and United States Supreme Court case law is clear that a defendant cannot be found in contempt and incarcerated for nonpayment of legal financial obligations unless the court affirmatively inquiries into the defendant's reasons for nonpayment and finds that the defendant is financially able to pay, is not indigent, and is willfully refusing to pay;[1]

The existing procedural standards in the Pennsylvania Rules of Criminal Procedures, which set forth the process by the magisterial district courts are supposed to collect legal financial obligations, are too vague and do not tell a court how to evaluate a defendant's ability to pay.

E. Conclusion

The CERC mission includes "defend(ing) civil rights and responsibilities, fair treatment and equal opportunity for all individuals and the avoidance and elimination of wrongful

[1] *See, e.g., Bearden v. Georgia*, 461 U.S. 660, 672 (1983); *Commonwealth ex. rel. Parrish v. Cliff*, 304 A.2d 158, 161 (Pa. 1973); *Commonwealth v. Eggers*, 742 A.2d 174, 176 (Pa. Super. Ct. 1999); *Bacik v. Commonwealth*, 434 A.2d 860, 863 (Pa. Commw. Ct. 1981).

discrimination and unfair bias" and we believe the proposed changes correct the unfair treatment and disparate impact that has resulted from Pennsylvania's current policies and lack of uniform guidelines on jailing individuals that owe court fines, costs and/or restitution. The recommendations provide clearer, more specific instructions for Magistrate District Judges.

Case law establishes 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 reason for nonpayment, and the courts must also find that a defendant willfully refused to pay. This is not an affirmative defense to be raised by a defendant, the obligation is on the court to look at the defendant's entire financial picture.

The U.S. Supreme Court held in Bearden v. Georgia that judges cannot send people to jail just because they are too poor to pay their court fines. From a taxpayer perspective, it is not a productive use of tax dollars to pay the expense of incarcerating a low income person only because they owe fines or court costs they cannot afford to pay.

Respectfully submitted,

Lawrence Felzer, Esq., Chair
PBA Civil & Equal Rights Committee
April 9, 2018

Unanimousoly approved by the Board of Governors May 9, 2018.
****Approved by the House of Delegates May 11, 2018.***

Appendix B

Allegheny County Bar Association

Raising the Bar on Legal and Community Service

400 Koppers Building, 436 Seventh Avenue, Pittsburgh, PA 15219 • 412-261-6161 • 412-261-3622 (Fax) • *www.acba.org*

February 22, 2018

VIA EMAIL AND FIRST-CLASS MAIL
Email: criminalrules@pacourts.us
Jeffrey M. Wasileski, Counsel
Supreme Court of Pennsylvania
Criminal Procedural Rules Committee
601 Commonwealth Avenue, Ste 6200
Harrisburg PA 17106-2635

Re: Amending Pa. Criminal Procedural Rules to Protect the Rights of Indigent Defendants Who Lack the Ability to Pay Legal Financial Obligations in Summary Cases

Dear Mr. Wasileski:

The Allegheny County Bar Association urges the Supreme Court of Pennsylvania Criminal Procedural Rules Committee to adopt amendments to Rules 403, 407, 408, 409, 411, 412, 413, 414, 422, 423, 424, 454,456, and 470 that will eliminate incarcerating indigent defendants who lack the ability to pay legal financial obligations in summary cases. The proposed rules will provide much needed guidance to magisterial district courts that handle these summary cases.

Specifically, the Allegheny County Bar Association supports the resolution passed by the Philadelphia Bar Association dated February 15, 2018, in which the Philadelphia Bar Association provided further recommendations for strengthening the proposed amendments to said Rules.

The report from the Supreme Court Interbranch Commission for Gender, Racial, and Ethnic Fairness entitled "Ending Debtors" Prisons in Pennsylvania: Current Issues in Bail and Legal Financial Obligations: A Practical Guide for Reform" provides clear evidence that thousands of low-income individuals are jailed each year by magisterial district courts across the Commonwealth of Pennsylvania because these individuals are too poor to pay court fines, costs, and/or restitution.

In addition, we believe that the proposed rules will help to reduce the population in county jails across the Commonwealth. The reduced inmate population will decrease the operational costs of booking, transporting, feeding, and housing inmates who are incarcerated as a result of their failure to pay in summary cases.

As leaders of our judicial system, we have an opportunity to eliminate unfair rules that negatively impact those members of society that can least afford to pay their court fines and costs.

Thank you for your consideration.

Respectfully,

Hal D. Coffey
President
Allegheny County Bar Association

HDC/jmd

cc: Mary F. Platt, Esq., Chancellor of the Philadelphia Bar Association
Sharon R. López, Esq., President of the Pennsylvania Bar Association

PHILADELPHIA BAR ASSOCIATION

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February 22, 2018

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

Brian W. Perry, Esquire
Perry Shore Weisenberger & Zemlock
2411 N. Front Street
Harrisburg, PA 17110-1160

Re: Proposed Amendments to Pennsylvania Rules of Criminal Procedure 403 *et seq*.

Dear Mr. Wasileski, Chair Perry and Members of the Criminal Procedural Rules Committee:

On behalf of the 12,000 members of the Philadelphia Bar Association, I am writing regarding the proposed amendments to the Rules of Criminal Procedure that will provide guidance to magisterial district courts when evaluating a defendant's ability to pay fines, fees and restitution.

The Philadelphia Bar Association supports the Criminal Procedural Rules Committee's goal of reducing unnecessary incarceration of indigent defendants in non-felony matters. The proposed rule changes are a major step in the right direction. We believe, however, that the proposed rule changes can be improved significantly through amendments that are set forth in the attached resolution passed by our Board of Governors on February 15, 2018.

Thank you for the opportunity to provide comments on the proposed amendments to Pennsylvania Rules of Criminal Procedure 403 *et seq*.

Respectfully,

Mary F. Platt
Chancellor, Philadelphia Bar Association

Enclosure

PHILADELPHIA BAR ASSOCIATION RESOLUTION REGARDING PROPOSED RULE CHANGES WITH RESPECT TO INCARCERATION OF THE INDIGENT FOR FAILURE TO PAY IN SUMMARY CASES

WHEREAS, the Philadelphia Bar Association has a long-standing commitment to fairness and equality in the criminal justice system, and to ensuring that outcomes in that system do not depend on an individual's financial means;

WHEREAS, the report from the Interbranch Commission for Gender, Racial, and Ethnic Fairness entitled "Ending Debtors' Prisons in Pennsylvania: Current Issues in Bail and Legal Financial Obligations: A Practical Guide for Reform" explains that thousands of low-income individuals are jailed each year by magisterial district courts across Pennsylvania because those individuals are too poor to pay court fines, costs, and/or restitution (collectively "legal financial obligations");

WHEREAS, in light of the growing national attention on the problem of modern debtors' prisons, states across the country have reformed their court debt collection practices in criminal cases to protect defendants' constitutional rights;

WHEREAS, there are more than one million open cases before Pennsylvania magisterial district courts dating back to the 1970s in which defendants still owe legal financial obligations;

WHEREAS, Pennsylvania magisterial district courts issue over 500,000 bench warrants each year because defendants have defaulted on legal financial obligations;

WHEREAS, court records show that Pennsylvania magisterial district courts have jailed defendants for not paying legal financial obligations while acknowledging that defendants are homeless or unemployed, or otherwise unable to pay;

WHEREAS, Pennsylvania and United States Supreme Court case law is clear that a defendant cannot be incarcerated for nonpayment of legal financial obligations unless the court affirmatively inquires into the defendant's reasons for nonpayment and finds that the defendant is financially able to pay, is not indigent, and is willfully refusing to pay;[1]

WHEREAS, the existing procedural standards in the Pennsylvania Rules of Criminal Procedure, which set forth the process by which the magisterial district courts are supposed to collect legal financial obligations, are too vague and do not instruct courts how to evaluate a defendant's ability to pay;

WHEREAS, the Supreme Court of Pennsylvania's Criminal Procedural Rules Committee has submitted for public comment a set of proposed changes to the Pennsylvania Rules of Criminal

[1] *See, e.g.*, *Bearden v. Georgia*, 461 U.S. 660, 672 (1983); *Commonwealth ex. rel. Parrish v. Cliff*, 304 A.2d 158, 161 (Pa. 1973); *Commonwealth v. Eggers*, 742 A.2d 174, 176 (Pa. Super. Ct. 1999); *Bacik v. Commonwealth*, 434 A.2d 860, 863 (Pa. Commw. Ct. 1981).

Procedure, along with a report titled "Incarceration of the Indigent for Failure to Pay in Summary Cases," that attempts to address these unconstitutional debtors' prison practices by changing the way that magisterial district courts and the Philadelphia Municipal Court (including the Traffic Division) operate by:

- Requiring that magisterial district courts, when incarcerating a defendant for nonpayment of legal financial obligations, put in writing findings demonstrating the defendant's ability to pay the obligations and the reasons why the court has imposed incarceration for nonpayment; and
- Listing in the Comment to Rule 456 of the Pennsylvania Rules of Criminal Procedure generalized categories of financial information the court should consider when evaluating ability to pay;

WHEREAS, the proposal from the Pennsylvania Criminal Procedural Rules Committee could be further strengthened by:

- Specifying, as the United States Supreme Court has, that a court has an affirmative obligation to inquire into the defendant's financial resources when considering ability to pay;
- Making clear, in line with Rule 706 of the Pennsylvania Rules of Criminal Procedure and Pennsylvania case law, that indigent defendants cannot be jailed for nonpayment of legal financial obligations;
- Listing specific mandatory financial factors that magisterial district courts must consider when evaluating ability to pay (including the defendant's net income after deducting the defendant's living expenses) to help ensure uniform and accurate evaluations;
- Providing a list of factors that indicate that a defendant is presumptively indigent and at least temporarily unable to pay any amount, including:
    - income below 125% of the federal poverty level,
    - receiving means-based public assistance,
    - receiving the services of the public defender,
    - recent release from jail,
    - and/or inability to meet basic life needs;
- Specifying that courts may set payment plans to help defendants pay their legal financial obligations, but cannot set defendants on payment plans that the evidence shows they cannot afford;
- Providing a specific schedule of presumed maximum monthly payments based on a defendant's net income;
- Providing a uniform process to allow magisterial district courts to administratively close old cases that they determine are uncollectible due to the defendant's indigence;
- Extending the time before a warrant may be issued after a defendant defaults on payments, and improving the notice required to be sent to defendants by explaining the defendants' rights and obligations, to reduce the issuance of bench warrants for failure to pay;
- Removing the unconstitutional procedure in Rule 456 of the Pennsylvania Rules of Criminal Procedure that allows magisterial district courts to jail a defendant for up to 72 hours prior to an ability-to-pay hearing for "failure to post collateral" and instead

requiring that, unless the defendant is released on recognizance, such hearing must occur the same day the defendant is brought to court; and

- Extending the period of time between default on legal financial obligations in a traffic case and notice to the Pennsylvania Department of Transportation for that Department to suspend the defendant's license, to avoid interfering with defendants' right to file an appeal within 30 days and to allow the court more time to work with defendants who have missed payments;

NOW, THEREFORE, BE IT RESOLVED, that the Philadelphia Bar Association urges the Pennsylvania Criminal Procedural Rules Committee to protect the rights of indigent defendants who lack the ability to pay legal financial obligations in summary cases by incorporating improvements recommended in this resolution into proposed amendments to the Rules of Criminal Procedure that will provide guidance to magisterial district courts when evaluating a defendant's ability to pay;

BE IT FURTHER RESOLVED, that the Philadelphia Bar Association urges the Honorable Justices of the Supreme Court of Pennsylvania to adopt the proposed rules changes as amended consistent with this resolution; and

BE IT FURTHER RESOLVED, that the Chancellor and/or the Chancellor's designee(s) shall communicate the Philadelphia Bar Association's position on the proposed rules or any revised or similar proposal to the Supreme Court of Pennsylvania, the members of the Pennsylvania Criminal Procedural Rules Committee, the legal profession, the media, and the public, and to take such other action as necessary to effectuate this resolution.

PHILADELPHIA BAR ASSOCIATION
BOARD OF GOVERNORS
ADOPTED: February 15, 2018

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 Willfulness[1]

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

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.