



*Via Electronic Mail*

February 23, 2018

Criminal Procedural Rules Committee  
c/o Jeffrey M. Wasileski, Counsel  
Supreme Court of Pennsylvania  
601 Commonwealth Avenue, Suite 6200  
Harrisburg, PA 17106-2635  
e-mail: criminalrules@pacourts.us

**Re: Notice of Proposed Rulemaking  
Proposed Amendment of Pa. Rs. Crim. P. 456 and 470**

Dear Members of the Criminal Procedural Rules Committee:

On behalf of the Southern Poverty Law Center (“SPLC”) and the American Civil Liberties Union Foundation (“ACLU”),<sup>1</sup> we urge the Supreme Court of Pennsylvania’s Criminal Procedural Rules Committee to enact commonsense reforms to Pennsylvania court practice. We applaud the Committee’s attention to how trial courts respond to non-payment of fines and fees<sup>2</sup> but are concerned that the proposed reforms to Rules 456 and 470 do not go far enough to ensure abuses will not occur. This comment recommends three changes to Pennsylvania court rules, which will guard against the creation of a two-tiered justice system—one that permits poor people to be punished for their inability to pay fines and fees with jail or revocation of their driver’s licenses without procedural protections. Such practices exact devastating human and financial costs, particularly upon low-income communities of color. We thus suggest that the Committee:

1. Enact a clear requirement that courts hold ability-to-pay hearings at which judges inquire into defendants’ financial status and make a determination of willful nonpayment prior to imposing actual or suspended incarceration for nonpayment of fines, fees, and/or restitution;
2. Enact a clear and consistent standard for courts to use when determining whether an individual is able to pay fines, fees, and/or restitution; and

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<sup>1</sup> The ACLU, headquartered in New York City, is a separate entity from the ACLU of Pennsylvania, which is submitting separate comments.

<sup>2</sup> The term “fees” includes fees, court costs, state and local assessments, and surcharges imposed for criminal offenses and civil infractions.

3. Enact a clear requirement that courts make a finding of willful failure to pay before reporting any individual to state authorities for suspension of a driver's license for nonpayment of fines and fees pursuant to 75 Pa. Consol. Stat. § 1533.

## I. Background

### 1. The Practices of Jailing or Suspending the Driver's Licenses of Persons who Cannot Pay are Common and Widespread

Since 2009, SPLC, the ACLU and its affiliates, and other advocates across the country have successfully exposed and challenged modern-day debtors' prisons and other unlawful fine and fee collection practices in at least 18 states: Alabama, Arkansas, California, Colorado, Georgia, Louisiana, Maine, Michigan, Mississippi, Missouri, New Hampshire, New Mexico, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, and Texas. Our work has shown that throughout the country, people are being incarcerated because they cannot afford to pay fines and fees owed to courts without being given basic procedural protections required by constitutional guarantees to due process and equal protection of the law.<sup>3</sup> The incarceration of people who cannot afford to pay money owed to courts causes people to lose their jobs, be separated from their children, and face barriers to employment and education. Such fine and fee collection practices disrupt families and undermine community stability.

State statutes and court practices that permit or require the suspension of driver's licenses of people who cannot afford to pay fines and fees have a similar impact. Suspending a driver's license for nonpayment is out of proportion to the purpose of ensuring payment and destructive to that end.<sup>4</sup> An individual who is prohibited from driving often loses the ability to work or attend to other important aspects of life.<sup>5</sup> A New Jersey study found that nearly 45 percent of suspended drivers lost their jobs after their license was suspended, and 45 percent of drivers who lost their jobs could not find

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<sup>3</sup>*Ending Modern-Day Debtors' Prisons*, American Civil Liberties Union, <https://www.aclu.org/issues/criminal-law-reform/sentencing/ending-modern-day-debtors-prisons?redirect=feature/ending-modern-day-debtors-prisons>.

<sup>4</sup> In *Robinson v. Purkey*, No. 3:17-cv-1263, 2017 WL 4418134, at 9 (M.D. Tenn. Oct. 5, 2017), a federal court found that a license suspension is "not merely out of proportion to the underlying purpose of ensuring payment, but affirmatively destructive of that end." The court held that "taking an individual's driver's license away to try to make her more likely to pay a fine is not using a shotgun to do the job of a rifle: it is using a shotgun to treat a broken arm. There is no rational basis for that." *Id.* On that basis, the court ordered the restoration of driver's licenses for individuals' whose licenses had been suspended for nonpayment. *Id.* at 11.

<sup>5</sup> See *Fowler v. Johnson*, No. 17-11441, 2017 WL 6540926, at 2 (E.D. Mich. Dec. 17, 2017) (finding that "the loss of a driver's license, particularly in a state like Michigan lacking an efficient and extensive public transportation system, hinders a person's ability to travel and earn a living" and preliminarily enjoining Michigan's system for suspending driver's licenses upon non-payment of traffic tickets).

another job while their licenses were suspended.<sup>6</sup> Even when suspended drivers found another job, over 85 percent reported a decrease in income as a result.<sup>7</sup> The American Association of Motor Vehicle Administrators (“AAMVA”) found no evidence that suspending driver’s licenses for social non-conformance reasons, such as unpaid fines and fees, deters crime or improves highway safety.<sup>8</sup> The AAMVA encourages states to repeal state laws requiring or allowing driver’s license suspension for non-highway safety reasons as a matter of best practice in order to reduce the number of suspended drivers by nearly 40 percent.<sup>9</sup>

The practices of jailing and suspending the licenses of poor people who cannot afford to pay court fines and fees are not only unconstitutional, but they also impose devastating human costs and waste taxpayer money and resources. The result is a two-tiered system of justice in which those with means are set free or retain their driver’s licenses while destitute people are incarcerated or lose their ability to lawfully drive. People of color are particularly impacted due to stark, documented racial and ethnic disparities in wealth and income and the impact of over-policing communities of color.

Variations of these alarming practices are prevalent in courts throughout Pennsylvania.<sup>10</sup>

2. States Across the Country are Reforming Rules, Modifying Statutes, and Adopting Guidelines to Advance Fairness and Equal Treatment of Rich and Poor in Fine and Fee Collection

Across the country, court leaders, legislators and state officials have recognized that practices leading to the unlawful incarceration of people too poor to pay court fines and fees, or the suspension of their driver’s licenses, harm the integrity of the justice system as well as individuals and their families and communities. To that end, states have enacted commonsense reforms that promote fairness and equal treatment of rich and poor in the collection of court fines and fees.

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<sup>6</sup> See Jon A. Carnegie et al., N.J. Dep’t of Trans., *Driver’s License Suspensions, Impacts and Fairness Study*, at 56 (2007), available at <http://www.nj.gov/transportation/refdata/research/reports/FHWA-NJ-2007-020-V1.pdf>.

<sup>7</sup> *Id.*

<sup>8</sup> Am. Ass’n of Motor Vehicle Adm’rs, Suspended/Revoked Working Group, *Best Practices Guide to Reducing Suspended Drivers* (2013), at 2-3, 12-15, available at [https://www.aamva.org/workarea/downloadasset.aspx?id=3723&usg=AOvVaw36XJsJA\\_P7\\_CqO0a4t6wg1](https://www.aamva.org/workarea/downloadasset.aspx?id=3723&usg=AOvVaw36XJsJA_P7_CqO0a4t6wg1).

<sup>9</sup> See *id.* at 2-3, 9.

<sup>10</sup> Pa. Interbranch Comm’n for Gender, Racial, and Ethnic Fairness, *Ending Debtors’ Prisons in Pennsylvania: Current Issues in Bail and Legal Financial Obligations: A Practical Guide for Reform* (July 2017), <http://www.pa-interbranchcommission.com/pdfs/Ending-Debtors-Prisons-in-PA-Report.pdf>.

- In 2013, the Chief Justice of the Ohio Supreme Court adopted a bench card that provided guidelines for Ohio judges on the laws and rules to respect when imposing and collecting fines, fees, and restitution.<sup>11</sup>
- In 2016, the Michigan Supreme Court adopted a court rule requiring courts to hold hearings on a person’s ability to pay before jailing the person for non-payment.<sup>12</sup>
- In 2016, the Colorado state legislature passed a law banning automatic warrants for nonpayment and for failure to appear. Instead, judges must schedule a court hearing for contempt for failure to pay the fine. Defendants are entitled to a defense lawyer at the contempt hearing.<sup>13</sup>
- In 2016, the Mississippi Supreme Court adopted Rule 26.6(d) which requires courts to hold ability-to-pay hearings and make factual findings of willfulness before incarcerating anyone for nonpayment of fines and fees.<sup>14</sup>
- In 2017, the Missouri Supreme Court adopted a bench card based on a model promulgated by the National Task Force on Fines, Fees, and Bail Practices that provides guidelines for state and local judges on how to lawfully collect fines and fees.<sup>15</sup>
- In 2017, the Mississippi Department of Public Safety ceased suspending driver’s licenses solely on the basis of nonpayment of court fines and fees and to reinstate licenses that had previously been suspended for this reason.<sup>16</sup>
- The Louisiana state legislature amended state law to require a finding of willful failure to pay before a judge can order the suspension of a driver’s license.<sup>17</sup>

The reforms adopted in Colorado, Ohio, Louisiana, Michigan, Mississippi, and Missouri have proven integral to aiding trial courts’ ability to identify poor people who cannot

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<sup>11</sup> Sup. Ct. of Ohio, *Collection of Court Costs & Fines in Adult Trial Courts* (2014, rev. Feb. 2018), available at <https://www.supremecourt.ohio.gov/publications/jcs/finescourtcosts.pdf>.

<sup>12</sup> Mich. Ct. R. 6.425(E)(3).

<sup>13</sup> Colo. Rev. Stat. § 18-1.3-702(3)(e).

<sup>14</sup> Miss. R. Crim. P. 26.6(d).

<sup>15</sup> Order, Mo. Sup. Ct. (June 30, 2017), available at <https://www.courts.mo.gov/sup/index.nsf/9f4cd5a463e4c22386256ac4004a490f/afb7e8d9e2e4ece186258150000541b4>.

<sup>16</sup> Miss. Dep’t of Pub. Safety, *Policy Change Announcement* (Dec. 19, 2017), attached as Appx. 1. *See also Mississippi to Reinstate Thousands of Driver’s Licenses*, Clarion Ledger (Dec. 20, 2017), <https://www.clarionledger.com/story/news/2017/12/19/mississippi-reinstate-thousands-drivers-licenses/966510001/>.

<sup>17</sup> La. Code Crim. P. Art. 885.1.

afford to pay fines and fees and to protect them from unfair sanctions. These reforms have also helped guard against federal litigation targeting state and local court practices that lead to modern-day debtors' prisons and the unlawful suspension of driver's licenses.

## **II. Recommendations to Ensure Pennsylvania's Criminal Justice System does not Punish the Poor Because of their Poverty**

We are grateful to the Committee for recognizing the need to amend court rules to address unlawful court fine and fee collection in Pennsylvania. We are concerned, however, that the proposed rules do not provide the guidance lower courts need to ensure respect for due process and equal protection of the law and to identify people who are too poor to pay.

We believe the Committee can show leadership in eliminating unlawful court fine and collection from Pennsylvania courts by adopting the following rules.

### **1. Mandatory Ability-to-Pay Hearings and Determination of Willful Nonpayment Prior to Incarceration for Nonpayment of Fines and Fees**

The United States Supreme Court made clear in *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) trial courts “must inquire into the reasons for the failure to pay” whenever a defendant has defaulted on payment of fines and fees. Failure to do so risks “imprisoning a person solely because he lacks funds to pay the fine,” a practice that the Court has repeatedly condemned. *Id.* at 674; *see also Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970).

In its current form, Rule 456 of the Pennsylvania Rules of Criminal Procedure fails to explain to magisterial district courts this obligation to affirmatively inquire into the reasons for nonpayment in order to determine whether an individual's nonpayment of money owed to a court was willful before imposing incarceration. Courts violate *Bearden* if they fail to consistently afford such hearings and fail to provide notice that ability-to-pay is a critical issue in these hearings; courts also offend *Bearden* if, during such hearings, they fail to ask about defendants' finances and efforts to pay or obtain employment. *See Bearden*, 461 U.S. at 674.

Rule 456 is also deeply problematic because it permits magisterial district courts to jail defendants for up to 72 hours “if . . . the defendant does not post collateral” without any prior finding of willful nonpayment of the underlying fines and costs. This explicitly violates the holding of *Bearden*: each of the individuals jailed through this process is deprived of his or her liberty *solely* because the person has failed to pay fines and fees, but there is no determination that the person actually *can* afford to pay those assessments. The “freedom from bodily restraint, lies at the core of the liberty protected by the Due Process Clause,” and the threat of its loss requires due process protection. *Turner v. Rogers*, 564 U.S. 431, 445 (2011) (internal quotation marks omitted). *Bearden* requires a pre-deprivation hearing on the issue of ability-to-pay to determine why the

defendant did not pay the fines and fees. As the Supreme Court explained, by imprisoning an individual “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.” *Bearden*, 461 U.S. at 674.

Rule 456 contradicts the requirements of *Bearden*. Moreover, facts on the ground demonstrate that numerous courts abuse the procedure laid out in the rule. For example, in *Commonwealth v. Ownings*, the court jailed a defendant in May 2016 because—in the court’s words—she was “homeless living in her car. Can not pay.” *Commonwealth v. Ownings*, MJ-12106-TR-0000526-2009.<sup>18</sup>

The Rules Committee should amend Rule 456 to prevent such unlawful incarceration and to guide lower court judges on how to respect the clear requirements of *Bearden*. The rule should make clear that Pennsylvania courts must, *sua sponte*, consider a person’s ability-to-pay prior to imposing incarceration or suspended incarceration for nonpayment of fines and fees. Other courts have done exactly this:

- The Michigan Supreme Court amended a series of rules to prohibit courts from incarcerating an individual for nonpayment of court fines and fees if payment would impose “manifest hardship” on the individual. Rule 6.425(E)(3) requires that the court consider, *inter alia*, whether a person who owes fines and fees is able to pay while also meeting basic life needs—including food, shelter, clothing, necessary medical expenses, or child support. If a person lacks the ability to pay fines or fees, the court can waive part or all of what the person owes, or to set up a payment plan.<sup>19</sup>
- Rule 26.6(d) of the Mississippi Rules of Criminal Procedure requires that courts hold ability-to-pay hearings and make factual findings of willfulness before incarcerating anyone for nonpayment of fines and fees. Indications that a defendant cannot pay include if that defendant’s income is below 125% of the Federal Poverty Guidelines, receives means-based public assistance, or struggles to meet basic life needs. The rule also requires courts to ensure that people have actual notice of these hearings, accomplished through personal service, which reduces the risk that defendants will fail to appear and be arrested.<sup>20</sup>

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<sup>18</sup> This text appears on the non-public docket transcript and is part of a spreadsheet provided to the ACLU of Pennsylvania from the Administrative Office of Pennsylvania Courts in response to a public records request.

<sup>19</sup> *Supra* note 12.

<sup>20</sup> *Supra* note 14.

- The Missouri Supreme Court adopted the bench card proposed by the National Task Force on Fines and Fees in its entirety, which includes guidance on conducting robust ability-to-pay determinations and consideration of alternative sanctions for people who are unable to pay.<sup>21</sup>

The Committee should follow the example set by these jurisdictions and mandate all Pennsylvania courts to comport with constitutionally required ability-to-pay determinations.

## 2. Enact a Clear and Consistent Standard for Proper Ability-to-Pay Determinations

Curing the constitutional defects in magisterial district courts' debt collection practices requires more than merely making the changes outlined above. Courts require explicit instruction about what it means to be able to pay. As other states have recognized in their recent reforms on this issue, the Rules should at a minimum require that the magisterial district courts consider the factors set forth by the National Task Force on Fines, Fees, and Bail Practices. These factors include whether the defendant's income is below 125% of the Federal Poverty Guidelines, whether the defendant receives means-based public assistance, and the defendant's financial obligations and dependents.<sup>22</sup>

In February 2014, the Ohio Supreme Court issued an annotated, two-page bench card summarizing a defendant's obligations and rights regarding fines and fees, including the right not to be jailed except following a court finding of willful failure to pay.<sup>23</sup> The card explains that a court may consider the following factors when determining whether person is able to pay: (1) income, specifically whether annual income is at or below 125% of the Federal Poverty Guidelines; (2) whether the person receives means-tested, needs-based public assistance; (3) where the person resides, including whether the person is homeless or institutionalized; (4) basic living expenses; and (5) the person's efforts to acquire additional resources, including any limitations to the person's ability to secure paid work due to disability, homelessness, institutionalization, and lack of transportation or driving privileges.

Michigan adopted similar, concrete guidelines for judges. Michigan Court Rule 6.425(E)(3) requires courts to determine whether a defendant is unable to pay without "manifest hardship" before imposing jail as a consequence for nonpayment. It mandates that courts consider the following factors when determining whether payment will result in "manifest hardship": (i) the defendant's employment status and history; (ii) the defendant's employability and earning ability; (iii) the willfulness of the defendant's failure to pay; (iv) the defendant's financial resources; (v) the defendant's basic living

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<sup>21</sup> See *supra* note 15 and accompanying text.

<sup>22</sup> Attached as Appx. 2. Also available at [http://www.ncsc.org/~media/Images/Topics/Fines%20Fees/BenchCard\\_FINAL\\_Feb2\\_2017.ashx](http://www.ncsc.org/~media/Images/Topics/Fines%20Fees/BenchCard_FINAL_Feb2_2017.ashx).

<sup>23</sup> *Supra* note 11.

expenses including but not limited to food, shelter, clothing, necessary medical expenses, or child support; and (vi) any other special circumstances that may have bearing on the defendant's ability to pay.<sup>24</sup>

The models from Ohio, Michigan, and the National Task Force on Fines, Fees, and Bail Practices all identify concrete issues for judges to consider when determining whether a person is able to pay fines and fees. The specificity of these guidelines helps frontline judges handling large dockets and limited resources to make focused inquiries that will elicit information material to the question of an individual's ability to pay. The Committee should adopt similar principles to guide Pennsylvania judges.

3. Elimination of Driver's License Suspension as a Punishment for Nonpayment of Fines and Fees

Rule 470 requires magisterial district courts to send notice to the Pennsylvania Department of Transportation that a defendant is in default on required payments toward court fines and fees so that the Department may suspend the individual's driver's license. The rule does not, however, require the court to first determine whether nonpayment was willful. This procedure for automatically reporting nonpayment to state authorities with the result of eventual license suspension—without any judicial process whatsoever, let alone a determination that a defendant willfully failed to pay and is able to pay—is contrary to basic principles of due process and equal protection of the law.

The United States Supreme Court has explained that a driver's license cannot be revoked or suspended “without that procedural due process required by the Fourteenth Amendment.” *Bell v. Burson*, 402 U.S. 535, 539 (1972) (citations omitted). Without providing notice and an opportunity to be heard to ensure that only individuals who are able to pay and willfully refuse to do so have their licenses suspended by the Department, Rule 470 permits unconstitutional suspensions. Two federal courts have adopted such reasoning in decisions issued in lawsuits challenging statutes that permit or require states to suspend driver's licenses for nonpayment without any finding of willful failure to pay.<sup>25</sup> The State of Mississippi has also ceased enforcing its statute that similarly permitted automatic suspension for non-payment without any hearing or proof of willfulness.<sup>26</sup>

To ensure constitutional compliance and sound public policy, we urge the Committee to adopt the best practices recommended by the AAMVA with respect to ending the use of driver's license suspensions as a penal sanction for nonpayment of fines and fees.<sup>27</sup> At a minimum, the Committee should create a procedure in Rule 470 to

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<sup>24</sup> *Supra* note 12.

<sup>25</sup> *Robinson v. Purkey*, No. 3:17-cv-1263, 2017 WL 4418134, at 7 (M.D. Tenn. Oct. 5, 2017); *Fowler v. Johnson*, No. 17-11441, 2017 WL 6540926, at 2 (E.D. Mich. Dec. 17, 2017).

<sup>26</sup> *See supra* note 16.

<sup>27</sup> *See supra* note 8.

ensure that magisterial district courts conduct a pre-deprivation ability-to-pay hearing to determine why the defendant has failed to pay, and to only refer an individual to the Department for license suspension if the court finds the defendant is able to pay and willfully refusing to do so.

\* \* \*

The three recommendations set forth in this letter are more than just recommendations to adopt best practices. These proposals present a way for the Committee and the Supreme Court of Pennsylvania to show leadership in ensuring that magisterial district courts will respect existing constitutional guarantees of due process and equal protection of the law when collecting court fines and fees. We would be happy to discuss these proposals, provide additional information, and to answer any questions the Committee may have. You may reach us at the telephone numbers and email addresses listed below. We thank you for your time and we look forward to working with the Committee in the future.

Sincerely,



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## Appendix One

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**Sent:** Tuesday, December 19, 2017 12:20 PM

**To:** rgpierce

**Cc:** [charlton@olemiss.edu](mailto:charlton@olemiss.edu); Cliff Johnson; Anthony Schmidt ([ASchmidt@dps.ms.gov](mailto:ASchmidt@dps.ms.gov))

**Subject:** DPS statement regarding license suspensions

Randy,

Thank you again for your assistance in this matter. Attached in PDF format is a statement from the Department of Public Safety regarding a recent change in policy governing driver's license suspensions. Thank you for distributing this statement to judges.

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**DEPARTMENT OF PUBLIC SAFETY – POLICY CHANGE ANNOUNCEMENT**

The Mississippi Department of Public Safety (“DPS”) has changed its policy regarding the suspension of driver’s licenses for unpaid fines, fees, or assessments under Mississippi Code § 63-1-53(1) and (2)(h). DPS has discontinued the suspension of driver’s licenses solely upon notice of unpaid fines, fees, and assessments under those statutory provisions. This official policy will remain in place unless and until future significant developments occur, such as a statutory change.

Driver’s licenses will continue to be suspended for all of the reasons permissible under Mississippi law, including but not limited to Mississippi Code Section 63-1-51(f) that provides for a one-year suspension of licenses upon a court order finding a driver in contempt for failure to pay a fine or fee or failure to respond to a traffic summons or citation.

DPS will reinstate licenses previously suspended solely for nonpayment of fines, fees, or assessments under section 63-1-53(1) and 2(h), and the reinstatement fees for such licenses will be waived. DPS will provide written notice to those affected by this decision. For drivers whose license privileges have been suspended for multiple reasons, including grounds other than non-payment of court assessed fines and fees pursuant to Mississippi Code § 63-1-53(1) and (2)(h), DPS will remove the non-payment basis for suspension, but the driver’s license suspension will continue until the other reasons for suspension have been cleared. DPS will provide written notice to those affected by this decision.

The reinstatement of these licenses will **not** relieve the drivers of the legal obligation to pay the fines, fees, or assessments.

## Appendix Two



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<sup>1</sup>

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

**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);

<sup>1</sup> See *Bearden v. Georgia*, 461 U.S. 660 (1983)

<sup>2</sup> 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.

