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Jeffrey M. Wasileski, Counsel  
Supreme Court of Pennsylvania  
Criminal Procedural Rules Committee  
601 Commonwealth Avenue, Suite 6200  
Harrisburg, PA 17106-2635  
e-mail: [criminalrules@pacourts.us](mailto:criminalrules@pacourts.us)

*Re: Proposed new Pennsylvania Rules of Criminal Procedure impacting the incarceration of indigents for failure to pay in summary cases – the right to counsel.*

Dear Mr. Wasileski:

For over 45 years, the lawyers in our firm have been deeply involved in the fields of civil rights law and criminal defense. Through our litigation, we seek to protect the constitutional rights of all individuals, including the indigent. Our goals include preventing a person from being jailed simply for failure to pay court fines and costs without a judicial determination, through a hearing with counsel representing the defendant, that the failure to pay was deliberate and not due to the person's inability to pay.

To that end, we previously brought a federal class action lawsuit, *Davis v. City of Philadelphia*, E.D.Pa. No. 03-1400 (filed Mar. 4, 2003), which succeeded in stopping the custom and practice in Philadelphia Traffic Court of incarcerating indigent traffic violators for failure to pay fines without due process and equal protection of the law, including the right to counsel.

We write to support the goals of the proposed new rules and to emphasize the importance of ensuring that the customs and practices in Magisterial District Courts throughout the Commonwealth comport with the Constitution. Enforcing the right of counsel for all defendants at ability-to-pay, or default, hearings is integral to these goals.

Therefore, the Rules Committee should include within the text of the proposed new rules, specifically Rule 456, that a defendant has the right to counsel at any default hearing. The Rule should also state that a sentence of imprisonment may not be imposed unless the defendant has had the opportunity to consult with counsel and was represented by counsel at the hearing. For

those found financially unable to retain counsel, provisions should be made for the appointment of qualified counsel. The right to counsel prior to the imposition of any sentence of imprisonment has long been recognized by the Courts. *See Commonwealth v. Farmer*, 466 A.2d 677 (Pa. Super. 1983), *Commonwealth v. Spontarelli*, 791 A.2d 1254, 1259 (Pa. Cmmw 2002).

We recognize that the newly proposed comments to Rule 456 discuss the right to counsel. However, Magisterial District Justices and their staff may refer only to the text of the rule and may not be aware of the contents of the Committee's comments to the Rules. We have been told that the current custom and practice in many Magisterial District Courts, despite current case law and despite the language in Rule 122, is to not provide the appointment of counsel prior to imprisoning a defendant for defaulting on fines and costs. To counter this practice, the right to counsel should be placed within the text of the rule.

Thank you for your attention to these comments.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Susan M. Lin".

David Rudovsky  
Paul Messing  
Jonathan H. Feinberg  
Susan M. Lin