



The Pennsylvania Interbranch Commission
for Gender, Racial and Ethnic Fairness

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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

Re: Comments to Proposed Changes to the Criminal Procedural Rules Regarding
Incarceration of Indigent Debtors

Dear Mr. Wasileski,

We are writing today in response to the request from the Criminal Procedural Rules Committee ("Committee") for comments on its proposed changes to rules relating to the incarceration of defendants who fail to pay summary fines and other legal financial obligations ("LFOs"). In sum, while we applaud the Committee's efforts to address this critical problem through proposed changes to the existing rules, our research suggests that your recommended amendments do not go far enough to ensure that the unconstitutional practices, by which tens of thousands of indigent individuals have been incarcerated for failure to pay a fine, are eliminated. Indeed, one of the Committee's proposed amendments may even exacerbate the problem.

By way of background, the Pennsylvania Interbranch Commission for Gender, Racial, and Ethnic Fairness ("Commission") was established in 2005 by the three branches of Pennsylvania government to implement the recommendations from a Pennsylvania Supreme Court study on racial and gender bias in the justice system. The final report from the study¹, completed in 2003, addressed fourteen topics, among them, instances of bias in the criminal justice system based upon gender, race, ethnicity, and indigency.

¹ See Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, available at <http://www.pa-interbranchcommission.com>.

A. Commission's Report on Debtors' Prisons

Consistent with our mission, our Commission has grown increasingly concerned with reports of widespread incarceration of low-income Pennsylvanians, many of whom belong to racial and ethnic minorities, for failure to pay LFOs. According to the information we received, judicial officers were routinely failing to conduct hearings on indigent individuals' ability to pay the obligations, or were doing so in a perfunctory manner. As a consequence, the individuals were incarcerated, which resulted in a cascade of disastrous effects on the individuals and their families. For instance, we learned that in 2014, Eileen DiNino died in the Berks County Jail while serving a two-day sentence for failure to pay approximately \$2,000 in LFOs, stemming from truancy issues with her seven children.² Her children not only suffered the devastating loss of their mother, but wound up being relegated to the foster care system, thereby adding to the children's trauma and to the extraordinary cost to the justice system of caring for them until adulthood.

Based upon this information, in 2017, the Commission began an examination of the current state of LFO collection in Pennsylvania, researching not only Pennsylvania data but best practices from other states that have undertaken reform in this area. We worked closely with the American Civil Liberties Union of Pennsylvania ("ACLU-PA") to obtain data from the Administrative Office of the Pennsylvania Courts ("AOPC"). The data, along with the ACLU-PA's experiences from court observation and direct representation, indicated that thousands of defendants continue to be jailed each year in Pennsylvania for failure to pay LFOs.³ This problem is especially pronounced at the MDJ level: in 2016 alone, MDJs issued "482,308 arrest warrants in traffic and non-traffic cases post-disposition, nearly all of which were for defendants who failed to pay their LFOs."⁴

In July of 2017, our Commission completed our study and published a report entitled *Ending Debtors' Prisons in Pennsylvania: Current Issues in Bail and Legal Financial Obligations: A Practical Guide for Reform*. We distributed the guide throughout the Pennsylvania justice system, but in particular, we shared it with the AOPC in response to its concerns with the financial and human costs of the existing practices in Pennsylvania. We have attached that report to this correspondence and urge the Committee to review the section devoted to LFOs.

² Associated Press, "Woman jailed over truancy fines found dead in cell," June 14, 2014, available online at <https://www.cbsnews.com/news/woman-jailed-over-truancy-fines-found-dead-in-cell/>

³ PA Interbranch Commission for Gender, Racial, and Ethnic Fairness, *Ending Debtors' Prisons in Pennsylvania*, p. 14 (2017).

⁴ *Id.* at 16.

Based on our study findings, we made the following four overarching recommendations in our report to help judicial officers address this issue: (1) properly assess offenders' ability to pay; (2) waive or reduce LFOs for those who are truly unable to pay; (3) expand the use of non-financial alternatives to LFOs; and (4) use a bench card to help guide judicial decision-making on imposition and disposition of LFOs. These recommendations are set forth in detail below, along with a comparison to the corresponding rule proposed by the Committee. Unfortunately, not one of these recommendations was adequately addressed in the Committee's proposed amendments to the rules.

B. Report's Recommendations

1. Properly Assess a Defendant's Ability to Pay

The Committee's proposed change to Rule 456, requiring that MDJs "state in writing the reason(s) why a sentence of imprisonment was deemed appropriate and the facts that support a determination that the defendant has the ability to pay as ordered," is a welcome change that, in theory, should help to safeguard the rights of indigent Pennsylvanians. However, it does not provide any practical guidance for *how* an MDJ would actually determine that a defendant has the ability to pay. Without a standardized process that includes a full financial assessment (such as those used for *in forma pauperis* determinations), judges are free to make arbitrary decisions based on whatever evidence they choose, such as the type of clothing a defendant wears or what kind of cell phone a defendant uses, which is rarely related to a defendant's actual means.

The Committee's proposed rule change seeks to avoid these types of inappropriate determinations by including, *in a comment*, a list of items that MDJs "should" consider when assessing a defendant's ability to pay, such as income, debts, and support obligations. However, it is insufficient to make these considerations suggestive rather than mandatory. The reason for this is clearly demonstrated by a review of written findings MDJs have recorded in support of setting monetary collateral in ability-to-pay hearings.

When a defendant who has failed to pay an LFO appears in court, the MDJ must conduct an ability-to-pay hearing immediately. If the hearing cannot take place at that time, the MDJ can set "collateral" - a form of bail - and jail the defendant if he or she does not "post" that collateral, a procedure known as jailing for "failure to post collateral." As a result of the 2015 rules change, Rule 456 requires that MDJs put in writing 1) the reason why collateral is necessary to ensure appearance at the ability-to-pay hearing; and 2) the facts showing that the defendant can afford to pay the collateral.

When reviewing the written findings that MDJs recorded in these cases, however, the Commission discovered that many MDJs cited the defendant's poverty as the reason for setting collateral, and failed to include any findings relating to the defendant's ability to pay such collateral. The chart below was collected from data submitted to the AOPC by MDJs to show the "facts to support a determination that the defendant has the ability to pay monetary collateral."

Docket Number	MJ-23305-TR-0002612-2015
Collateral amount	\$50
Reasons for setting collateral	Sheriff's Dept. Central Processing sent to BCP on Bnch warrant Judge told them commit on all scofflaws.
Facts supporting finding that Defendant can afford to post collateral	No employment record.

Docket Number	MJ-14203-NT-0000971-2015
Collateral amount	\$523.90
Reasons for setting collateral	Failed to abide by payment plan
Facts supporting finding that Defendant can afford to post collateral	No money

Docket Number	MJ-23102-NT-0000936-2015
Collateral amount	\$650
Reasons for setting collateral	Defendant has a history of failing to appear; and is currently homeless, and unemployed.
Facts supporting finding that Defendant can afford to post collateral	Defendant has a history of failing to appear; and is currently homeless, and unemployed.

Docket Number	MJ-40201-NT-0000596-2015
Collateral amount	\$569.40
Reasons for setting collateral	Def is unable to make total payment due.
Facts supporting finding that Defendant can afford to post collateral	Def came into office numerous times to request extensions on total due

This data is highly concerning. It suggests that absent clear, mandatory, and standardized guidance, some MDJs are jailing defendants following ability-to-pay hearings, even when the defendant is unable to pay. This is the reason why the rules must mandate the use of specific objective standards to determine an individual's capacity to pay an LFO. If someone is "currently homeless and unemployed," that person *cannot* pay. The rules must make this abundantly clear.

There are standardized instruments that other states, such as Rhode Island, use to assess the defendant's entire financial picture. They are completed by the defendant under oath, are uniform across the state, and are part of the court's record.⁵ Our Commission's guide on debtors' prisons also includes work sheets for conducting these assessments. Any of these sources could be incorporated into or referenced in the rules.

These proposed rule changes aim to protect the constitutionally guaranteed rights of indigent Pennsylvanians. Accordingly, the Commission urges the Committee to adopt *mandatory*, uniform standards that provide the necessary guidance to MDJs to conduct a fair and valid assessment of whether an individual who appears before them truly has the ability to pay their fines or costs.

2. Waive or Reduce LFOs for Those Truly Unable to Pay

In its seminal case dealing with incarceration for failure to pay LFOs, *Bearden v. Georgia*, the United States Supreme Court explicitly stated that courts may reduce the amount owed on LFOs for indigent defendants who default on these obligations.⁶ The proposed amendment to Rule 454, which would require an MDJ to consider a defendant's ability to pay before imposing *discretionary* fines and costs, begins to codify this precedent. It also expands it by encouraging MDJs to consider a defendant's indigency at all stages of a proceeding, not only in the event of default. However, the proposed rule change would not apply to *mandatory* LFOs, despite legal precedent permitting such application. While

⁵ *Id.* at 17.

⁶ See *Bearden v. Georgia*, 461 U.S. 660 (1983).

our state legislature and local governments may designate LFOs as “mandatory,” this cannot override the constitutional protections enshrined in *Bearden* and its Pennsylvania analogue, *Commonwealth ex rel. Benedict v. Cliff*,⁷ which do not distinguish between mandatory and discretionary fines. Consequently, the Commission urges the Committee to amend the rules to give MDJs the explicit authority to waive or reduce *all* LFOs based upon a showing of indigency.

3. Expand the Use of Non-Financial Alternatives to LFOs and Abolish the Practice of Automatically Suspending Drivers’ Licenses Without Pre-Deprivation Hearings

Not only do the proposed rule changes fail to address this recommendation, they actually may hamper the use of non-financial alternatives by shortening the time period between when a defendant defaults on LFO payments and the sending of a notice to PennDOT, triggering an automatic driver’s license suspension. Automatic license suspension, without a hearing, has been deemed an unconstitutional practice when challenged in other states, such as Michigan and Tennessee. Additionally, it unfairly penalizes poor Pennsylvanians who rely on a driver’s license for employment, dependent care, and other basic life necessities. Finally, non-financial alternatives to LFOs, such as community service, continuing education, or mental health services, often require a defendant to be able to drive to different locations. Automatic suspension of defendants’ driver’s licenses undercuts their ability to pay the very LFOs that trigger such a suspension. The Commission urges the Committee to alter this process, which is enshrined in these proposed amendments to the rules, to require a pre-deprivation hearing prior to the sending of a default notice to PennDOT and the triggering of an automatic license suspension.

4. Use a Bench Card to Guide Judicial Decision-Making

In our guide, our Commission provides examples of judicial bench cards from the Supreme Court of Alabama; the city of Biloxi, Mississippi; and the National Task Force on Fines, Fees, and Bail Practices.⁸ Each of these bench cards provide clear, mandatory guidance for fact finders on methods of properly notifying defendants of a default on LFOs, assessing defendants’ ability to pay, and adjusting LFOs to avoid unconstitutionally incarcerating the poor. The Commission recommends that the Committee require the use of a similar bench card by all Pennsylvania’s MDJs.

⁷ See *Commonwealth ex rel. Benedict v. Cliff*, 451 Pa. 427 (1973).


⁸ See *Ending Debtors’ Prisons in Pennsylvania*, Appendices C-E.

5. Concurrence with ACLU-PA Comments

In addition to our own comments set forth above, the Commission concurs with the comments submitted to the Committee by the ACLU-PA and strongly urges the Committee to amend the proposed changes in the rules consistent with those comments.


In conclusion, the Commission thanks the Committee for their time and attention to this important matter. The assessment and collection of LFOs is critically important to notions of fairness and the functioning of our judiciary; however, constitutional protections for the indigent must always remain at the forefront of any discussion about LFOs. By codifying these protections into the rules in standardized, *mandatory* procedures, we can ensure that Pennsylvanians are not incarcerated solely due to their economic status.

Sincerely,


Nora Winkelman
Co-Chair


Rhonda Hill Wilson
Co-Chair


Lisette McCormick
Executive Director


Khadija T. Diggs
Chair, Criminal Justice Committee