

February 23, 2018

Via E-Mail to [criminalrules@pacourts.us](mailto:criminalrules@pacourts.us)

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

**Re: Comments to Notice of Proposed Rulemaking**  
Criminal Procedural Rules Committee  
Proposed Amendment of Pa.Rs.Crim.P. 403, 407, 408, 409, 411,  
412, 413, 414, 422, 423, 424, 454, 456, and 470

Dear Mr. Wasileski:

We, the undersigned law professors, are pleased to submit the following comments to the above-referenced Notice of Proposed Rulemaking and proposed amendments to the Pennsylvania Rules of Criminal Procedure. We commend the Criminal Procedural Rules Committee for proposing rule amendments intended to provide greater guidance to courts enforcing legal financial obligations assessed against criminal defendants, especially those without the financial means to pay. We recognize that our criminal justice system relies heavily upon the collection of costs and fines to fund basic court operations and related criminal justice activities. Thus, it is critical that courts actively ensure that indigent defendants are not incarcerated for nonpayment solely because of their poverty, and that their successful reintegration into society is not impaired as a result.

In these comments, we address three main points. First, we describe the high costs of legal financial obligations imposed upon criminal defendants, placing payment beyond the reach of indigent defendants. This results in their illegal incarceration and creates barriers to accessing public benefits, housing, and employment. Second, we review deeply rooted constitutional principles that prohibit incarceration for nonpayment of financial obligations of individuals who are indigent and, through no fault of their own, unable to pay such obligations. Third, we offer comments and recommendations urging the Criminal Procedural Rules Committee to provide greater guidance to courts than what is presently proposed, with respect to eliciting financial information from criminal defendants and applying proper legal standards to determine when defendants lack the financial ability to pay such obligations. Without additional guidance, we are concerned that court determinations imposing incarceration on indigent defendants will remain arbitrary, inconsistent, and violative of basic constitutional mandates.

## I. The High Cost of Legal Financial Obligations

Our criminal justice system, historically funded primarily by tax revenues, has increasingly come to rely on funds generated by the collection of fines and fees (legal financial obligations or LFOs). In some cases, justice systems have become revenue centers that even fund non-justice related government operations.<sup>1</sup> The Justice Department’s investigatory report of the Ferguson, Missouri police department and municipal courts highlighted this problem, serving as a needed catalyst for all states to look closely at the fines and costs they impose and the practices they employ to collect legal financial obligations.<sup>2</sup> As noted by a policy paper of the Conference of Chief Justices and Conference on State Court Administrators, “the imposition of these legal financial obligations (LFOs) too often results in defendants accumulating court debt they cannot pay, landing them in jail at costs to the taxpayers much greater than the money sought to be collected.”<sup>3</sup>

Pennsylvania is one of the leading states in imposing increased legal financial obligations upon criminal defendants to defray court operating costs and related criminal justice services.<sup>4</sup> These costs are a substantial financial burden on low-income defendants who struggle to meet basic needs for themselves and their families. The 2017 report of Pennsylvania’s Interbranch Commission on Gender, Racial and Ethnic Fairness has documented the extremely high cost of LFOs in Pennsylvania.<sup>5</sup> A typical docket sheet of fees assessed against a defendant convicted of a drug offense in Cambria County showed that 26 different state and local fees were assessed totaling \$2,464 in costs, not counting fines and restitution costs.<sup>6</sup> A study of six Pennsylvania counties revealed that the average economic sanctions ordered ranged from \$1305 in Blair County to \$1864 in Lancaster County.<sup>7</sup> In Philadelphia County, a 22 year old public housing resident who was charged with a minor marijuana related offense – the first and only criminal offense this young man has ever been charged with – was assessed standard costs of \$1,365.94.<sup>8</sup> This young man is starting adulthood saddled with criminal debt that threatens his

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<sup>1</sup> U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS DIAGNOSTIC CENTER, RESOURCE GUIDE: REFORMING THE ASSESSMENT AND ENFORCEMENT OF FINES AND FEES 2 (2016), <https://ojp.gov/docs/finesfeesresguide.pdf> [hereinafter DOJ RESOURCE GUIDE]. The Resource Guide was supported by a contract from the Office of Justice Programs, U.S. Department of Justice. The views and opinions expressed are those of the author and do not necessarily represent the official position of the U.S. Department of Justice.

<sup>2</sup> U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF FERGUSON POLICE DEP’T (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

<sup>3</sup> Arthur W. Pepin, CONFERENCE OF STATE COURT ADMINISTRATORS, END OF DEBTORS’ PRISONS: EFFECTIVE COURT POLICIES FOR SUCCESSFUL COMPLIANCE WITH LEGAL FINANCIAL OBLIGATIONS (2016), <http://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/End-of-Debtors-Prisons-2016.ashx>.

<sup>4</sup> See PA. INTERBRANCH COMM’N FOR GENDER, RACIAL AND ETHNIC FAIRNESS, ENDING DEBTORS’ PRISONS IN PENNSYLVANIA: CURRENT ISSUES IN BAIL AND LEGAL FINANCIAL OBLIGATION: A PRACTICAL GUIDE FOR REFORM 14 (July 2017), <http://www.pa-interbranchcommission.com/pdfs/Ending-Debtors-Prisons-in-PA-Report.pdf> [hereinafter PA. IBC GUIDE].

<sup>5</sup> See *id.* at 13.

<sup>6</sup> *Id.* at 13 & n.50. According to the IBC Guide, Administrative Office of Pennsylvania Courts (“AOPC”) data shows that court-imposed costs often outweigh other LFOs, as 52% of the LFOs assessed by Magisterial District Courts and 65% of LFOs assessed by Courts of Common Pleas are only costs.

<sup>7</sup> *Id.* at 14 & n.51.

<sup>8</sup> Standard court fees assessed against the son of a client family represented by the Penn Law Civil Practice Clinic.

path to self-sufficiency and independence. Criminal justice debt puts many individuals on the fast track to re-arrest and re-incarceration and tragically serves as a new form of debtors' prison for the poor.<sup>9</sup>

The U.S. Justice Department has cautioned that criminal debt may lead to an insurmountable cycle of debt and punishment, including harsh penalties such as revocation of probation or parole, loss of driving privileges, barriers to employment and housing, and incarceration. "The effect of LFOs on individuals, their families, and our communities can be devastating. In isolation, an individual fine or fee may appear insignificant, but for many people, paying a fine that, together with associated fees and assessments, can easily exceed several hundred dollars can be challenging."<sup>10</sup>

The harm to defendants unable to pay LFOs can be life-altering. The Interbranch Commission's guide found that nonpayment often results in incarceration, in violation of minimal constitutional standards. It may also mean ineligibility for probation, parole, or accelerated rehabilitative disposition, resulting in continued incarceration.<sup>11</sup> And, too often, it prevents low-income Pennsylvanians from accessing public benefits, obtaining pardons or expungements of criminal records, obtaining employment, or retaining driving privileges needed for work and medical appointments. Collectively, these collateral consequences block successful re-entry into society and may lead to a higher rate of recidivism.<sup>12</sup>

Legal scholars have noted that growth in incarceration of individuals for failure to pay LFOs has fallen most heavily on the poor and minorities. Those who can pay criminal debt escape incarceration and harsh collateral consequences, while those too poor to pay are "trapped and face additional charges for late fees, installment plans, and interest."<sup>13</sup>

The U.S. Justice Department report confirms that many court collection practices for LFOs are unwise, harmful, and unconstitutional. In certain jurisdictions, the Justice Department found that courts routinely incarcerated individuals for nonpayment of fines they simply cannot afford, even though the Constitution prohibits it. This imposes significant harm upon low-income individuals, many who are only charged with non-criminal, minor violations.<sup>14</sup> In short, while courts do not enact fines and fees, they are required to order defendants to pay them. The result is

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<sup>9</sup> Alicia Bannon, Mitali Nagrecha, Rebekah Diller, Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* 19 (2010), <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf> [hereinafter *2010 Brennan Center Report*].

<sup>10</sup> DOJ RESOURCE GUIDE, *supra* note 1, at 2.

<sup>11</sup> PA. IBC GUIDE, *supra* note 3, at 14-15 & n. 57.

<sup>12</sup> *Id.* at 15-16 (citing Karin D. Martin, Sandra Susan Smith, and Wendy Still, *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create*, New Thinking in Community Corrections No. 4 (Jan. 2017)). See also Meghna Philip, *New Documentary Tells the Story of Criminal Justice Debt in Philadelphia* (May 21, 2012), <http://www.brennancenter.org/blog/newdocumentary-tells-story-criminal-justice-debt-philadelphia>. ("In a startling number of jurisdictions, we found that individuals can face arrest and incarceration not for any criminal activity, but rather for simply falling behind on debt payments. Our research also uncovered a variety of ways in which criminal justice debt can be the first step toward new offenses and more jail time – all originating from the failure to pay off debt).

<sup>13</sup> See Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486, 492 nn.33-36 (2016), <https://scholarship.law.tamu.edu/facscholar/727>.

<sup>14</sup> DOJ RESOURCE GUIDE, *supra* note 1, at 2.

that many defendants accumulate court debt they cannot pay, “landing them in jail at costs to the taxpayers much greater than the money sought to be collected.”<sup>15</sup>

## II.

### Constitutional Limitations on Incarceration for Unpaid LFOs

Although the United States eliminated the imprisonment of debtors under federal law in 1833,<sup>16</sup> the Supreme Court has continued to wrestle with the fact that “providing equal justice for poor and rich, weak and powerful alike is an age-old problem.”<sup>17</sup>

In *Griffin v. Illinois*, the Court reviewed the denial of appeals by criminal defendants who had been unable to pay for trial transcripts and, based upon on due process and equal protection concerns, concluded that “[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.”<sup>18</sup> In *Williams v. Illinois*,<sup>19</sup> the Supreme Court noted that “the greatly increased use of fines as a criminal sanction has made nonpayment a major cause of incarceration in this country.” Unwilling to extend the incarceration of a defendant unable to pay criminal debt beyond the statutory maximum, the Court held that incarceration is appropriate to collect criminal justice debt only when a person has the ability to make payments and is unwilling to do so. Extending a maximum prison term because a person is too poor to pay fines or court costs violates due process of law under the Fourteenth Amendment.<sup>20</sup>

One year after *Williams v. Illinois*, the Supreme Court held in *Tate v. Short* that a Texas court conversion of a fine-only restriction to a prison sentence for an indigent defendant unable to pay the fine violated the Equal Protection Clause.<sup>21</sup>

Perhaps most importantly for these comments, the Supreme Court ruled in *Bearden v. Georgia* in 1983 that the Fourteenth Amendment prohibits courts from revoking probation for a failure to pay a fine without first inquiring into a defendant’s ability to pay and determining the availability of adequate alternatives to imprisonment that would satisfy the state’s interests.<sup>22</sup> In that case, Bearden was assessed a fine and restitution as a condition of probation following a guilty plea to charges of burglary and theft. Thereafter, Bearden lost his job and had no other source of income. Illiterate and not possessing a high school diploma, Bearden was unable to find new employment. When he failed to pay because of indigency, the Georgia court revoked his probation and sent him to jail to complete his probation, effectively turning a fine into a prison sentence.

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<sup>15</sup> PA. IBC GUIDE, *supra* note 3, at 16 & n.46 (citing Pepin, *supra* note 3).

<sup>16</sup> 2010 Brennan Center Report, *supra* note 9, at 19 & n.112 (citing Charles Jordan Tabb, The History of the Bankruptcy Laws in the United States, 3 AM. BANKR. INST. L. REV. 5, 16 (1995)).

<sup>17</sup> *Griffin v. Illinois*, 351 U.S. 12, 16 (1956).

<sup>18</sup> *Id.* at 17.

<sup>19</sup> *Williams v. Illinois*, 399 U.S. 235 (1970).

<sup>20</sup> *Id.* at 235, 240.

<sup>21</sup> *Tate v. Short*, 401 U.S. 395 (1971). In *Tate*, the offense was a traffic violation incurring only a fine. The Supreme Court noted that the imprisonment of an indigent would not “further any penal objective of the State” and instead of generating revenue it would “saddle[] the State with the cost of feeding and housing him for the period of his imprisonment.” *Id.* at 399.

<sup>22</sup> *Bearden v. Georgia*, 461 U.S. 660 (1963).

Upon appeal, the Supreme Court stated that “[I]f the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available.”<sup>23</sup> Thus, under *Bearden*, a court cannot revoke probation for failure to pay criminal debt where the defendant is unable to pay through no fault of his own, and the court has failed to explore other means of punishment that serve the state’s interests. Of course, if a defendant is able to pay and refuses to do so, a court may imprison a defendant. But it is not free to do so without considering whether other alternatives are available, such as an affordable payment plan, reducing the fine, or providing an option for community service.<sup>24</sup>

Ten years before *Bearden*, the Pennsylvania Supreme Court held that criminal defendants must be given the opportunity to demonstrate to the court that they are unable to pay fines and costs.<sup>25</sup> When a defendant demonstrates that he is unable to pay such costs, he must be permitted to make reasonable payment installments. Noting that the U.S. Supreme Court has “heightened rather than weakened the attempts to mitigate the disparate treatment of indigents in the criminal process,”<sup>26</sup> and that the Court “has made it plain that a defendant may not be incarcerated merely because he cannot make full payment of a fine,”<sup>27</sup> the Pennsylvania Supreme Court has upheld the constitutional principle that an indigent defendant must be given the opportunity to establish that he is unable to pay the criminal debt and, if so, that reasonable alternatives to incarceration must be considered.<sup>28</sup>

On this constitutional foundation, the Pennsylvania Superior Court has held that the failure to pay costs and fines alone, without an understanding of the reasons for nonpayment and specifically whether nonpayment is willful or rather is due to indigence, will not justify incarceration.<sup>29</sup> And forty years ago, our state Supreme Court announced the requirement that before an individual may be incarcerated for civil contempt, a court must be convinced by a preponderance of the evidence that he *willfully* violated the support order, and that he has the *present* ability to pay his purge amount beyond a reasonable doubt.<sup>30</sup>

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

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<sup>23</sup> *Id.* at 668.

<sup>24</sup> *Id.* at 669.

<sup>25</sup> *Commonwealth ex. Rel. Parrish v. Cliff*, 304 A.2d 158 (Pa. 1973).

<sup>26</sup> *Id.* at 160 (citing *Williams*, 399 U.S. at 241).

<sup>27</sup> *Id.* at 161.

<sup>28</sup> *Id.* at 162.

<sup>29</sup> *See, e.g., Commonwealth v. Eggers*, 742 A.2d 174 (Pa. Super. 1999).

<sup>30</sup> *Barrett v. Barrett*, 368 A.2d 616, 623 (Pa. 1977).

### III.

#### **Specific Recommendations on Eliciting Financial Information and Providing Standards to Determine the Financial Ability to Pay Outstanding LFOs**

##### A.

##### *Eliciting Financial Information*

*Bearden, Parrish* and the long line of court decisions discussed above make clear that courts have an affirmative obligation to inquire into and assess a defendant's ability to pay LFOs before imposing incarceration for nonpayment. ABA Standards for Criminal Justice 18-7.4 and Commentary (2d ed. 1980) provide that "incarceration should be employed only after the court has examined the reasons for nonpayment."<sup>31</sup> Yet AOPC data demonstrates that Pennsylvania courts frequently fail to assess a defendant's ability to pay before imposing incarceration.<sup>32</sup>

The proposed amendments do not go far enough in remedying this problem. They should emphasize courts' affirmative obligation and offer judges a standardized tool to meet this essential requirement. As a result, we offer the following recommendations:

- 1) ***The Criminal Rules should explicitly provide that a court has an affirmative obligation to inquire into a criminal defendant's ability to pay before imposing incarceration for an outstanding legal financial obligation, and to use a statewide standardized form to ensure that the financial information it obtains from a defendant is complete, uniform, and appropriate for determining indigency.***

Due process does not permit a court to sit passively while hearing evidence of nonpayment without affirmatively inquiring into the specific reasons for nonpayment. Without a thorough understanding of a delinquent defendant's financial circumstances, a court may not determine that nonpayment is willful and appropriately enforced through incarceration. Accordingly, a court must inquire into the income and expenses of a defendant and it must be informed of means-tested programs for which the defendant has already been found eligible. A defendant who is determined to be indigent through no fault of his own is, by definition, struggling to meet basic human needs and does not possess excess income with which to pay outstanding legal financial obligations.

The Supreme Court's 2011 decision in *Turner v. Rogers*<sup>33</sup> is particularly instructive. In *Turner*, an indigent child support obligor was incarcerated for civil contempt in failing to pay child support obligations. The trial court incarcerated the defendant without appointing defense counsel, acquiring financial information about his ability to pay his obligation, or even explaining the issues on which the defendant needed to provide evidence to avoid a finding of contempt. On appeal, *Turner* asserted that he had a right to counsel when facing incarceration. The Supreme Court disagreed, holding that the Fourteenth Amendment's Due Process Clause does not automatically require the State to provide counsel in such a proceeding, even if the indigent obligor faces incarceration. Nonetheless, the Court held that *Turner's* due process rights

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<sup>31</sup> *Bearden*, 461 U.S. at 675 n.10.

<sup>32</sup> PA. IBC GUIDE, *supra* note 3, at 14.

<sup>33</sup> *Turner v. Rogers*, 564 U.S. 431 (2011)

were violated because he neither received counsel nor alternative protections that would satisfy due process concerns. In particular, the trial court did not provide Turner with notice that his ability to pay was the critical issue in determining whether he would be incarcerated. It also failed to acquire necessary financial information, using a form or its equivalent, to elicit this information. And, it did not make a finding as to whether Turner had the ability to pay his obligation before holding him in civil contempt and ordering his incarceration.

Significantly, the Supreme Court discussed the use of alternatives to the appointment of counsel, including a form that would elicit financial information the court needs to make a proper assessment before deciding that the defendant willfully violated his support order.<sup>34</sup> A determination of financial ability to pay lends itself to use of a standardized form that ensures complete and uniform acquisition of information, thereby promoting equal treatment and reviewability on appeal. A standardized form also saves time and resources for busy courts, as such information can be completed under oath in advance or at the start of a court proceeding. Pennsylvania courts already use standardized forms in determining *in forma pauperis* status<sup>35</sup> and child support obligations<sup>36</sup> that appear in published court rules. They could easily be adapted for use in obtaining financial information when enforcing criminal debt.<sup>37</sup>

- 2) ***The Criminal Rules should explicitly provide that a court has an affirmative obligation to state that the defendant's financial ability to pay is the critical issue before it and upon which the defendant has a right to be heard before imposing incarceration for willful nonpayment of a legal financial obligation.***

The Supreme Court's decision in *Turner* clearly instructs that due process requires a court to provide clear notice to a defendant of the critical issue before the court and what is needed to address that issue before imposing incarceration for willful failure to satisfy an outstanding obligation. The proposed amendments should include this basic due process requirement.

- 3) ***The Criminal Rules should instruct in the text of the rule, and not just in the comment, that a court must appoint counsel at the default hearing where there is a likelihood of incarceration and the defendant is indigent and unable to afford a lawyer.***

The comment to Rule 456 acknowledges that “no defendant may be sentenced to imprisonment or probation if the right to counsel was not afforded at the default hearing.” It

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<sup>34</sup> See also Sobol, *supra* note 13, at 536 (“To help streamline and standardize the process, specific guidelines and forms should be developed to allow courts to address the inability-to-pay issue properly”).

<sup>35</sup> See PA. R. CIV. P. 240 (*in forma pauperis* form).

<sup>36</sup> See PA. R. CIV. P. 1910.27 (income and expense statement form).

<sup>37</sup> Rhode Island has adopted a model form for streamlining judges' assessment of individuals' ability to pay. This model “requires that ability to pay be determined by use of standardized procedures including a financial assessment instrument completed under oath in person with the offender and based upon sound and generally accepted accounting principles.” Arthur W. Pepin, Conference of State Court Administrators, *The End of Debtors' Prisons: Effective Court Policies for Successful Compliance with Legal Financial Obligations* 11 (2015-16), <http://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/End-of-Debtors-Prisons-2016.ashx>. See also 2007-S0701Aaa, Jan. Sess. (R.I. 2007), <http://webserver.rilin.state.ri.us/BillText/BillText07/SenateText07/S0701Aaa.pdf>.

further cites Rule 122(A)(1) requiring that counsel be appointed in all summary cases where the defendant is indigent and incarceration is likely. This fundamental right, codified in the rules and grounded in constitutional principles announced in *Commonwealth v. Farmer*, 466 A.2d 677 (Pa. Super. 1983) and *Commonwealth v. Spontarelli*, 791 A.2d 1254 (Pa. Cmmw. 2002),<sup>38</sup> is too important to be left to a comment. With a loss of liberty at stake in the enforcement of legal financial obligations by the government, the Criminal Rules should specifically instruct courts in the text of their absolute obligation to provide a right to counsel to criminal defendants who cannot afford a lawyer.

## B.

### *Standards to Determine Financial Ability to Pay*

Before a court may incarcerate a defendant for nonpayment of criminal debt, it must determine whether an individual has the financial ability to pay. After acquiring necessary financial information, a court must assess the information to determine whether a defendant is unable to pay. Without published standards, judicial determinations on ability to pay will be inconsistent, arbitrary, unpredictable, and difficult to review. The proposed amendments should provide needed standards to guide trial courts in this essential function.

#### **4) *The Criminal Rules should provide clear standards to guide courts in determining whether a defendant has the financial ability to pay an outstanding legal financial obligation.***

In providing needed guidance, the Rules Committee should look first to our jurisprudence on *in forma pauperis* status (IFP) for court filings. A litigant who is indigent has a constitutional right to have court costs waived so that he or she may access the courts.<sup>39</sup> A litigant who cannot afford basic life needs is entitled to proceed IFP. *Commonwealth v. Cannon*, 954 A.2d 1222, 1226 (Pa. Super. Ct. 2008). Pennsylvania courts look to well-established principles governing indigency in civil cases when determining indigence in criminal cases. See *Commonwealth v. Lepre*, 18 A.3d 1225 (Pa. Super. 2011).

In the civil arena, Pennsylvania courts presumptively grant *in forma pauperis* status to individuals whose income is at or below 125 percent of the federal poverty level as determined annually by the federal government. The poverty guidelines are issued each year in the Federal Register by the Department of Health and Human Services (HHS). This threshold of 125% of poverty is the basic eligibility standard to qualify for free legal services from local legal aid

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<sup>38</sup> In *Commonwealth v. Farmer*, the Superior Court noted that the U.S. Supreme Court held in *Scott v. Illinois*, 440 U.S. 367 (1979) that the 6th and 14th Amendments require that no indigent criminal defendant be sentenced to a term of imprisonment unless the State afforded him the right to assistance of appointed counsel in his defense. 466 A.2d 677, 678-79 (Pa. Super. 1983).

<sup>39</sup> See *Boddie v. Connecticut*, 401 U.S. 371 (1971) (due process prohibits a State from denying access to its courts to indigents seeking dissolution of their marriage, solely because of inability to pay court fees and costs); *Griffin v. Illinois*, 351 U.S. 12 (1956) (a criminal defendant may not be denied the right to appeal because of inability to pay for a trial transcript).

programs that receive federal funding from the Legal Services Corporation (LSC).<sup>40</sup> Notably, LSC regulations also permit local programs to adopt policies that establish financial eligibility by reference to an applicant's receipt of benefits from a governmental program for low-income individuals or families. In other words, eligibility for similar means-tested government programs with comparable standards may also be used to determine eligibility for free legal services.

The Legal Services Corporation also recognizes that 125% of poverty guidelines may be too low for individuals or families who are seeking government benefits or have considerable debt or other fixed obligations that do not permit them to expend monies to obtain legal help. As a result, LSC regulations permit local legal aid programs to use 200% of poverty guidelines as their eligibility standard when individuals are seeking to obtain or retain government benefits, or when the cost of unreimbursed medical expenses, fixed debts and obligations, and employment-related expenses do not financially permit the engagement of private counsel.<sup>41</sup>

It is significant to note that in 2001 the Pennsylvania Supreme Court amended its In Forma Pauperis rule (Rule 240) to no longer require the filing of an affidavit of indigency containing detailed financial information from the litigant, if a lawyer instead certifies to the court that he or she is providing free legal services to the party and believes that the party is unable to pay the costs. Upon filing such a certification, Rule 240(d)(1) instructs that the prothonotary "shall allow the party to proceed in forma pauperis." For more than fifteen years, legal aid and pro bono lawyers have effectively used this amended rule with great benefit to all concerned. This streamlined, presumptive rule serves the Commonwealth well by promoting uniformity and accuracy throughout the state and promoting constitutional access to the courts by indigent litigants, while also reducing unnecessary burdens on the scarce resources of courts and legal aid organizations. A presumptive indigency rule tied to income, or to certifications from means-tested programs,<sup>42</sup> or to lawyer certifications when free counsel are involved, should be part of published standards for courts determining a criminal defendant's ability to pay legal financial obligations.<sup>43</sup>

***5) The Criminal Rules should require that courts make findings of fact in writing regarding ability to pay whenever it imposes a sanction for nonpayment, as well as to consider and state potential alternatives to incarceration where appropriate.***

The Supreme Court's decision in *Turner* instructs that courts can reduce the risk of erroneous deprivation of liberty by taking a variety of important steps, including entering a specific finding that the defendant has the ability to pay (along with the basis for that finding). Where a court finds that a defendant does not have the ability to pay, it should consider alternatives to incarceration that satisfy the state's interests. In *Bearden*, the Supreme Court suggested that courts consider alternatives for indigents who cannot pay. In this regard, courts

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<sup>40</sup> See 45 C.F.R. § 1611.

<sup>41</sup> See 45 C.F.R. § 1611.5 (providing that expenses such as dependent care, transportation, clothing and equipment expenses necessary for employment, job training, or educational activities in preparation for employment are permitted to be taken into account when examining the financial situation of an applicant for free legal services).

<sup>42</sup> See PA. IBC GUIDE, *supra* note 3, at 17.

<sup>43</sup> The receipt of TANF (cash welfare assistance), Medicaid, Supplemental Security Income (SSI), and other means-tested government programs should create a presumption of indigency. See *Eggers*, 742 A.2d at 176 n.1 (receiving public assistance invites the presumption of indigence).

might reduce the total costs for indigent defendants, permit affordable payment plans, or require community service that hopefully includes programs aimed at improving their education or work-related skills in partnership with local non-profit organizations that have strong track records of success.

***6) The Criminal Rules should require that courts notify the Department of Transportation to suspend driving privileges only after holding a hearing and finding that a defendant has the ability to pay and has willfully refused to pay outstanding LFOs.***

A driver's license is a protected interest that cannot be suspended or revoked without procedural due process required by the Fourteenth Amendment. *Bell v. Burson*, 402 U.S. 535 (1972). In *Bell*, the Supreme Court held that due process requires that a driver be provided with a meaningful opportunity to be heard before a license suspension occurs.<sup>44</sup> An automatic suspension of an indigent driver's license for nonpayment of a legal financial obligation, without first determining whether a driver is able to pay, is tantamount to "punishing a person for his poverty" in violation of the Fourteenth Amendment.<sup>45</sup>

In Pennsylvania, driving privileges are essential for getting to work, maintaining family income, and accessing medical appointments, especially in large rural areas of the state where there is limited public transportation. Clearly, a driver's license is a significant interest which, if suspended, can result in substantial harm to the driver and innocent members of the driver's family. Accordingly, driving privileges should be suspended only as a last resort when a defendant willfully refuses to pay an outstanding legal financial obligation.

The Rules should instruct courts not to provide a notice of default to the Department of Transportation unless and until they hold a hearing and determine that the defendant has the ability to pay and has willfully failed to pay. A notice of default to suspend driving privileges should not be transmitted before such a hearing is held, and an indigent defendant who lacks the ability to pay should not face suspension of driving privileges. Alternatives previously discussed should be considered in lieu of suspending driving privileges of indigent defendants.

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<sup>44</sup> *Bell v. Burson*, 402 U.S. 535 (1972) (overturning the suspension of a driver's license of an uninsured driver who failed to post security after an accident, without first giving the driver a meaningful opportunity to be heard and determine whether the driver was at fault for the accident).

<sup>45</sup> *Bearden*, 461 U.S. at 671. See also *Robinson v. Purkey*, No. 17-1263, 2017 WL 4418134 (M.D. Tenn. Oct. 5, 2017) (temporary restraining order granted restoring driving licenses that were suspended for unpaid traffic debt without accommodation for the fact that the drivers lacked the financial ability to pay). See also *Fowler v. Johnson*, No. 17-11441, 2017 WL 6379676 (E.D. Mich. Dec. 14, 2017) (preliminary injunction issued to enjoin the suspension of driver's licenses of people unable to pay their traffic debt).

## Conclusion

In 2015, former Attorney General Loretta Lynch cautioned that “in so many instances an individual’s access to justice has become predicated on their ability to literally pay for it.” She questioned, “What is the price of justice?”<sup>46</sup> The proposed amendments to the Criminal Rules should provide greater guidance to trial courts to ensure that no Pennsylvanians are incarcerated for nonpayment of LFOs when, through no fault of their own, they are indigent and lack the ability to pay. To succeed in this critical objective, the proposed amendments must provide increased specificity in ways suggested in these comments. We appreciate the Rules Committee’s consideration and urge the adoption of these recommendations.

Respectfully submitted,

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<sup>46</sup> DOJ RESOURCE GUIDE, *supra* note 1, at 2.

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