

## ACLU-PA Overview of Proposed Rules Governing Incarceration for Failure to Pay in Summary Cases

April 1, 2019

Last year, the Supreme Court of Pennsylvania's Criminal Procedural Rules Committee released draft rules to address the problem of magisterial district judges ("MDJs") unlawfully incarcerating indigent defendants for failure to pay court fines, costs, and/or restitution. After receiving substantial feedback, the Committee has now released a revised set of draft rules.

We are sending this summary of the Proposed Rules, as well as the ACLU-PA's position, in hopes that you will join us in asking the Committee, again, to strengthen the draft. We generally support what the Committee has released, but we will be strongly urging the Committee and the Supreme Court to provide clearer, more specific, and binding instructions to the MDJs in the final rules. **Public comments are due on May 3, 2019.**

### What is new in the 2019 Proposed Rules:

1. Payment plans must be based on the defendant's ability to pay and cannot be arbitrarily based on a court's "minimum" payment plan (Rules 454, 456, and others).
  - ACLU-PA **supports** this change, which reflects existing case law and will protect defendants from unaffordable payment plans.
2. No defendant can be jailed for nonpayment unless represented by a lawyer (Rule 456).
  - ACLU-PA **supports** this change, which has been the law for decades but has never before been explicit in the text of the relevant Rule.
3. In comments to the rules that trigger a need to consider ability to pay, the Proposed Rule lists several items the court should—but does not have to—consider, such as employment status, income, mortgage and other expenses, etc. (Rule 456 and others).
  - ACLU-PA **generally supports** the effort to give MDJs direction. Nevertheless, the proposed instruction falls short because it is: 1) not binding; 2) uses duplicative and confusing categories due to an apparent drafting error; and 3) provides no guidance to the MDJ on how to weigh these factors and how to apply them to decide whether a defendant is able to pay, or how much.
  - At the least, the Rules should state that a defendant who cannot afford to meet his or her basic life needs without public assistance is indigent and presently unable to pay under Pennsylvania law.
  - ACLU-PA also **supports** the effort to have the Administrative Office of Pennsylvania Courts create a standardized income and expense form to ensure that courts are considering uniform information. The forms should be made part of the record.
4. If a defendant still owes fines, costs, or restitution after two years, the court may put an "administrative hold" on the case indefinitely (Rule 456).
  - ACLU-PA **generally supports** this addition, which gives MDJs a much-needed option in cases where the defendant simply cannot afford to pay. As drafted, the

proposed procedure seems needlessly complicated and requires more hearings than are necessary, so the final proposal should streamline the procedure.

- In addition, ACLU-PA will urge the Committee to recognize the distinction between fines and restitution, which are part of the sentence, and court costs, which are not, and permit MDJs to zero out the latter where it is clear the defendant cannot pay. This will assist defendants who may be able to pay something to clear their accounts, which will allow thousands of additional defendants to receive expungements and Clean Slate sealing of their summary convictions.
5. The Proposed Rules purport to protect defendants from unconstitutional driver's license suspensions, but they offer little or no practical protection to indigent defendants. (Rule 470).
- ACLU-PA **opposes** this change as drafted. Currently, MDJs must send notice to PennDOT to suspend a defendant's driver's license if the defendant misses payments and does not either make a new payment or enter into a new payment plan within 25 days of a notice default. The Proposed Rules would give a defendant only 15 days to respond to such a notice, and it would prohibit suspending an indigent defendant's driver's license *only if* the defendant responds within that time. That is no improvement over the current system, which postpones any notice to PennDOT as long as a defendant at least promises to try to pay. Under the Proposed Rules, if the defendant does not respond within 15 days, the defendant's driver's license would *still* be suspended without a hearing or a determination of ability to pay.
  - That procedure still does not meet the necessary Constitutional Due Process requirements. What the Rules should do is permit the MDJ to send notice to PennDOT only after a Rule 456 payment determination hearing at which the defendant is present. If the defendant does not respond to the notice, the answer is for the court to schedule a hearing and potentially issue a warrant if the defendant fails to appear. MDJs cannot constitutionally impose punishment in the form of driver's license suspension without first making a finding regarding ability to pay.

#### **What is the same from the 2018 Draft:**

1. If a court is going to incarcerate a defendant for nonpayment, it must put in writing the reasons why imprisonment is appropriate and "the facts that support" its finding that the defendant is able to pay (Rule 456).
  - ACLU-PA **supports** this change. It is a helpful step. Unfortunately, it remains the primary change in the Proposed Rules aimed at directly addressing why MDJs incarcerate defendants for failure to pay, and it is not specific enough: it does not tell the court *how* to assess the evidence to determine whether a defendant is able to pay. As is discussed below in more detail, additional guidance is badly needed to address this problem.
2. Courts must consider defendants' ability to pay before imposing any discretionary fines and costs at sentencing (Rule 454).
  - ACLU-PA **supports** this change, which reflects an existing statutory requirement regarding fines and will help limit the amount assessed in cases such as truancy,

where all fines are discretionary. The proposal should, however, go further to harmonize with Rule 706, which governs court of common pleas cases and permits a sentencing court to reduce even “mandatory” costs based on a defendant’s financial resources. MDJs should have the same authority.

3. The time to respond to a citation (e.g. a traffic ticket) is increased from 10 to 30 days (Rule 403 and others).
  - ACLU-PA **supports** this change, which is consistent with the practices in other states and should lead to fewer pre-disposition arrest warrants for failure to respond in time.
4. Currently, to plead not-guilty to a summary offense, defendants must pre-pay the total amount of the fines and costs as “collateral.” The Draft allows defendants to certify in writing that they cannot afford the collateral, relieving them of that obligation (Rule 403 and others).
  - ACLU-PA **supports** this change. However, Pennsylvania is one of only a handful of states that require that defendants pay “collateral” to plead not guilty, and we urge that the Committee abolish its use altogether.

#### **How the Proposed Rules need to change:**

1. The rules should clarify that the Court that has an obligation to affirmatively inquire into a defendant’s ability to pay prior to imposing imprisonment and that indigent defendants cannot be imprisoned (Rule 456).

Case law establishes that 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 reasons for nonpayment, and courts must also find that a defendant willfully refused to pay. *Bearden v. Georgia*, 461 U.S. 660, 672 (1983). This is not an affirmative defense to be raised by a defendant; instead, the obligation is on the court to look at the defendant’s entire financial picture. The Superior Court reaffirmed this last year in the debtors’ prison case *Commonwealth v. Mauk*, 185 A.3d 406, 411 (Pa. Super. Ct. 2018), and it also explained in *Commonwealth v. Diaz*, 191 A.3d 850, 866 n.24 (Pa. Super. Ct. 2018) that a defendant who is indigent is by definition not willfully failing to pay. The rules should make these requirements clear, and they should also make explicit that Pennsylvania law prohibits incarcerating indigent defendants for nonpayment. MDJs should have all of this binding law clearly set out for them in the Rules.

2. The rules should provide clear—and mandatory—guidance to MDJs whenever evaluating a defendant’s ability to pay (Rules 454, 456, 470 and others).

MDJs should not be left to guess about how to evaluate a defendant’s finances and ability to pay, and they should not be required to do case law research. The Rules must provide clear and specific guidance, which already exists in case law. For example, binding case law already says that receiving the services of the public defender or means-based public assistance (e.g. Medicaid, food stamps, Supplemental Security Income) creates a presumption of indigence, and a court cannot compel a defendant to pay if that defendant would suffer hardship. *Commonwealth v. Eggers*, 742 A.2d 174, 176 n.1 (Pa. Super. Ct. 1999); *Commonwealth v.*

*Hernandez*, 917 A.2d 332, 337 (Pa. Super. Ct. 2007). The appropriate way to determine hardship is to look at whether a defendant can afford to meet his or her basic life needs—the test used by the civil *in forma pauperis* line of cases and incorporated into criminal law through case law as the “established process[] for assessing indigency.” *Commonwealth v. Cannon*, 954 A.2d 1222, 1226 (Pa. Super. Ct. 2008). Moreover, last year the Superior Court explained that defendants cannot be required to borrow money from friends or families to make payments—which represents a fundamental shift in how some MDJs expect defendants to pay. *See Commonwealth v. Smetana*, 191 A.3d 867, 873 (Pa. Super. Ct. 2018). At a minimum, the rules should reflect these precedents; to do otherwise is to invite error.

The rules should go further and delineate clear presumptions based on the federal poverty level—a person who makes 125% of the federal poverty level generally cannot afford to make ends meet. Although, as with every presumption, the court can overcome it by making findings on the record based on the evidence before it.

3. The rules should reflect the requirements from the civil contempt case law (Rule 456).

Courts almost always use their civil contempt authority when they imprison a defendant and set a purge condition (criminal contempt is governed by separate rules). Accordingly, the body of civil contempt case law directly applies to this type of imprisonment, including the requirement that a court can impose a purge condition only if it finds *beyond a reasonable doubt* that the defendant is *presently* able to comply with the condition (e.g. that a defendant who has been put in jail with a purge of \$500 has the present ability to pay that money). The rules should clarify this important principle for the MDJs.