

# CRIMINAL JUSTICE POLICY PROGRAM

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H A R V A R D   L A W   S C H O O L

May 1, 2019

VIA EMAIL

Jeffrey M. Wasileski, Counsel  
Supreme Court of Pennsylvania  
Criminal Procedure Rules Committee  
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Dear Mr. Wasileski:

We write on behalf of the National Criminal Justice Debt Initiative, a project of the Criminal Justice Policy Program (CJPP) at Harvard Law School, to provide comments on the proposed revisions to the Pennsylvania criminal procedure rules regarding fines and fees. CJPP helps to bring about reforms in the way that states impose and collect court debt. CJPP generates legal and policy analysis and collaborates with government agencies to pilot and implement policy initiatives. For example, in 2016 we released *Confronting Criminal Justice Debt: A Guide to Policy Reform*,<sup>1</sup> which provides general guidance for reforming rules, policies, and practices related to the imposition and collection of criminal justice debt. A follow-up report containing more granular reform recommendations will be published this summer. We also currently provide technical assistance on these topics in several states. In particular, we are actively working with a committee of state court judges in Iowa to develop a revised court rule similar to the rule revisions you are considering in Pennsylvania. Through our work on these issues with lawmakers across the country, we have developed a deep understanding of how harmful current practices can be to low income and indigent individuals, and the reforms necessary to make the imposition and collection of fines and fees more just, proportional, and fair.

To that end, we write to provide general guidance regarding the principles that CJPP believes should be included in your proposed rule change. The current draft is a positive step towards improving Pennsylvania's system of fines and fees. However, the Criminal Procedural Rules revision process represents an important opportunity for the Committee to a) push for even more meaningful reforms, and b) bring the policies of magisterial district judges in line with national best practices. The recommendations contained herein represent what CJPP believes are essential parts of reforming a system of fines and fees. This is not an exhaustive list. Rather, we have tailored our comments to address certain aspects of the Rules as they are currently written and to support parts of the revised Rules that we believe are essential. Adopting these recommendations will help the Committee bring the Magisterial District Judges (MDJs) in line with national best practices. CJPP therefore encourages the Criminal Procedural Rules Committee to ensure that the final revised rule incorporates each of these principles in full:

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<sup>1</sup> Available at <http://cjpp.law.harvard.edu/publications/confrontingcjdebt>.

**1. Ability to pay determinations should be automatic, concrete, and provide sufficient guidance for judges on what to consider**

First, the Rules must make clear that ability to pay determinations should occur in all cases in which court debt is imposed, regardless of whether the defendant affirmatively requests such a determination. In recent years, states and localities across the country passed legislation or adopted court policy changes aimed at improving how and when judges should conduct ability to pay determinations.<sup>2</sup> This trend demonstrates that jurisdictions are beginning to recognize the importance of creating proportionate, fair sentences, with which individuals can reasonably comply; that, in turn, will reduce the court's need to turn to harsh enforcement mechanisms on the back end to collect debt that has gone unpaid. By establishing these determinations as standard practice upfront, judges will be better able to ensure that individuals are treated equally, and judges will have as much relevant information in front of them as possible in order to set proportionate financial penalties.<sup>3</sup>

To ensure that ability to pay determinations are meaningful, the Criminal Procedural Rules should provide concrete guidance on a) what judges must consider, and b) how they should tailor the amounts owed to account for the information they learn about the individual's ability to pay. Concrete guidance will prevent wide variation from judge to judge, and will help protect against explicit and implicit bias from impacting the judge's determination of an appropriate financial sanction. We recommend three components be included in the Rules themselves (rather than the comments): presumptions that, if met, trigger a finding that the individual is unable to pay; concrete factors to use when calculating financial resources and expenses; and numerical thresholds/guidelines for setting payment amounts.

First we suggest that the Rules include presumptions regarding inability to pay—i.e., that the court should *presume the individual is unable to pay* if the individual meets any of the following criteria: eligible for appointed counsel; income is at or below 200% of the federal poverty guidelines; full-time student; eligible for means-tested public assistance; or is, or was in the last six months, homeless incarcerated or residing in a mental health facility. These types of presumptions are used

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<sup>2</sup> See, e.g. La. Code of Criminal Procedure § 875.1 (2018); Tex. Code of Crim. P. § 42.15 (2017); Biloxi, Mississippi Municipal Court Procedures, available at <https://www.aclu.org/legal-document/kennedy-v-city-biloxi-exhibit-judicial-procedures>; Arizona Supreme Court, Bench Card for Ability to Pay at Time of Sentencing in Criminal Cases and Civil Traffic Cases (2017), available at <https://www.azcourts.gov/Portals/22/admorder/Orders17/2017-81%20FINAL.pdf>.

<sup>3</sup> Importantly, the different types of criminal justice debt serve different purposes. Fines are considered the “punishment” but fees, costs, and surcharges are imposed as a means of “funding” the system. For that reason, CJPP believes that jurisdictions should abolish fees, costs, and surcharges, and fund the criminal justice system in other ways. However, as long as fees still exist, they should be imposed only to the extent the individual can pay. For that reason, we recommend that courts impose both proportionate fines, and look to minimize and waive fines and fees for individuals who lack the ability to pay.

by courts across the country as a starting point for the ability to pay analysis, and they are an important signaling tool for judges to use in recognizing when ability to pay will likely be an issue.<sup>4</sup>

Additionally, the Rules should provide judges with specific factors they should consider in determining what an individual *can* pay. This includes the individual's wages less a reasonable living standard or specific expenses, such as rent, utilities, childcare expenses, or the like. The current version of the revised Rules includes this in the comments to Rules 414, 454 and 456; we recommend incorporating it into the Rule itself.

Although these factors are helpful in guiding judges on how to figure out net-income, the Rules must also include a numerical guideline/benchmark directing judges on how to *use* that information. CJPP therefore encourages the Committee to incorporate language into the Rules that provides a benchmark for calculating appropriate monthly payments. For example, such a benchmark could require that judges set monthly installments at no more than 10% of the individual's monthly income, minus expenses. This is the approach that judges in Charlotte-Mecklenburg County, North Carolina took when CJPP helped them develop their bench card. Variations on this type of approach are currently in place in other jurisdictions such as Louisiana and Florida. In Louisiana, lawmakers passed legislation setting a benchmark that monthly payment amounts would be set at an individual's income for one eight-hour work day.<sup>5</sup> In Florida, monthly payments may be set at 2% of the individual's monthly net income (without regard for expenses).<sup>6</sup> These types of benchmarks are useful in helping judges calculate both a proportional total financial sanction, and a reasonable monthly payment amount. The Committee could also include language providing that judges will retain the discretion to deviate downward from the benchmark based on other specifically enumerated factors.

Revising the Rules to incorporate these components will provide judges with the specificity they need to make a concrete calculation, while still allowing them to use their equitable powers to evaluate when a lesser total amount or monthly payment amount may be appropriate. Without such concrete guidance, judges will be left to figure out how to do things on their own, which will lead to wide variation from court to court in how ability to pay is actually determined; as currently written, the Rules will not foster uniformity across judges or proportionality in sentencing. If the purpose of these Rules revisions is to meaningfully assist judges in making these complex but vitally important decisions, the Rules should be further revised to incorporate the elements described above.

Finally, two important aspects of ability to pay determinations are either missing or require revision. First, the Rules should make clear that judges should not include the financial resources of family members or friends. Doing so would be unjust; the debt does not belong to the individual's family members, and the court should not assume their ability to contribute towards payments. Second, the Rules should not require that the individual present documents or other evidence to

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<sup>4</sup> See, e.g., Charlotte-Mecklenburg County, North Carolina Bench Card; Alabama Access to Justice Commission, Bench Card, available at <http://nacmconference.org/wp-content/uploads/2014/01/Bench-Card-11-10-15.pdf>; Supreme Court of Ohio, Collection of Court Costs & Fines in Adult Trial Courts, available at <https://www.supremecourt.ohio.gov/Publications/JCS/finesCourtCosts.pdf>. Other states have presumptions built into statute. See, e.g. Wash. Rev. Code Ann. § 9.94A.6333; MO R ORD AND TRAF VIOL App. D).

<sup>5</sup> Louisiana Code of Criminal Procedure § 875.1(E).

<sup>6</sup> Florida Statute 28.246(d)(4).

verify their income. Many individuals who lack the financial means to pay their criminal justice debts may experience barriers to providing documentary evidence of their income or expenses, such as periods of homelessness or residential transiency. A sworn affidavit regarding financial circumstances should be sufficient. This aspect of the Rules should be revised.

## **2. *Payment plan amounts and duration must be reasonable***

CJPP also encourages the Criminal Procedural Rules Committee to provide specific guidance for how to set payment plan amounts and length based on the information provided during the ability to pay determination. Although the current revised Rule includes an important provision that there shall be no mandatory minimum payment amount, the Rule should go further. The Rules should include provisions, such as those described in the preceding section, regarding how to set an appropriate monthly installment amount tailored to ability to pay, which will help keep in check the total amount of debt imposed.

The Rules should also contain limits for the maximum duration of time individuals should be expected to make payments, tied to the severity of the offense. Caps on the length of payment plans are essential to ensuring that extending repayment into perpetuity does not create a back-door for unreasonable and disproportionately high debt amounts. Otherwise, individuals owing high amounts of debt will be under the weight of payment plans for years, even if they are making timely payments. Following our work with judges in Charlotte-Mecklenburg, judges decided to restrict payment plan length to the maximum amount of time an individual could be sentenced to prison or probation for the offense. If, after that time, the individual still owed debt, the judges would consider remission or waiver of the remainder. Louisiana likewise provides a cap on the length of payment plans: individuals are considered to have satisfied their payment obligations if they make consistent monthly payments of either twelve months or half of their term of supervision, whichever is longer.<sup>7</sup> These types of limits make sense; charging high amounts of fines and fees to individuals who cannot afford to pay will only result in those debts going uncollected.<sup>8</sup>

These elements together—tying the monthly payment amount to ability to pay, and limiting how long the individual must make payments based on the severity of the offense—will prevent courts from imposing arbitrary repayment terms that are either impossible to comply with or that keep individuals involved in the system for longer than necessary.

The current version of the revised Rules includes provisions related to uncollectable restitution, fine, and costs, and notes that after two years of missed payments, if the court determines the individual lacked ability to pay, the court may declare the debt uncollectable. This is an important back-end protection that we encourage the Criminal Rules Committee to retain.

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<sup>7</sup> La. Code of Crim. P. § 875.1(E).

<sup>8</sup> See, e.g., The Financial Justice Project, Office of the Treasurer & Tax Collector, City and County of San Francisco, *Criminal Justice Administrative Fees: High Pain for People, Low Gain for Government* at 4, available at [https://sftreasurer.org/sites/default/files/Hig%20Pain%20Low%20Gain%20FINAL\\_04-24-2019.pdf](https://sftreasurer.org/sites/default/files/Hig%20Pain%20Low%20Gain%20FINAL_04-24-2019.pdf) (noting that “the vast majority of [administrative] fees are never collected, and instead hang over individuals and their families as debt.”); See also “Iowa court debt approaches \$732 million”, *The Gazette* (Feb. 25, 2018), available at <https://www.thegazette.com/subject/news/government/iowa-court-debt-approaches-732-million-20180225> (noting that at the end of fiscal year 2017, outstanding court debt in Iowa totaled \$731.9 million, and debt 10 years or older accounted for 248.3 million, or 34% of the total outstanding debt. As noted by Steve Davis, spokesman for the Iowa Judicial Branch, “the older the debt becomes, the less likely it is that the outstanding amount will be collected.”).

However, it is not a substitute for including guidance for judges on how to set appropriate caps on payment plan lengths at the outset.

### ***3. Include clear limits on the use of harsh enforcement mechanisms as a response to non-payment***

Finally, the Rules should be further revised to include express prohibitions on the types of enforcement mechanisms courts may utilize when an individual does not make their payment(s) on time.<sup>9</sup> In particular, the Rules should not permit judges to issue arrest warrants for individuals who have failed to pay. Non-payment of debt may be due to a variety of factors, none of which reflect the individual's willingness to pay or otherwise obey the court's orders. Warrants can and often do result in incarceration, and even short periods in jail pending adjudication of the warrant can have devastating and long-lasting effects on individuals. No part of the Rules should assume willfulness in non-payment; rather, the rule should provide that judges will use reminders, summonses, orders to show causes, or other less harmful attempts to contact individuals who miss payments, and not use warrants. Jurisdictions across the country have adopted this principle and now require that judges issue orders to show cause or pursue other available alternatives prior to using warrants to compel appearance or payment.<sup>10</sup> The Rules should also require judges to reconsider the amount of debt that remains if an individual defaults, prior to issuing a warrant, and determine whether the judge can and should remit or waive the remaining debt due to the individual's inability to pay. Judges in Charlotte-Mecklenburg County are now doing this, following CJPP's work there.

Importantly, to comport with *Bearden v. Georgia*, the Rules must specify that individuals have a right to a hearing regarding the ability to pay before imposing incarceration for nonpayment. For the low-level offenses that Magistrate District Judges handle, which do not carry any risk of jail time, incarceration for non-payment is a particularly punitive and disproportionate response. At a bare minimum, the Rules should state that the court will consider alternatives to incarceration, even for willful nonpayment, that individuals will be afforded a hearing prior to any incarceration for nonpayment, and that these hearings will include all the requisite procedural protections, such as notice, an opportunity to be heard, and the provision of counsel. The Rule should also specify what information may be considered during the ability to pay hearing, similar to the information provided under Section 1, above.

Rule 470 related to suspension of drivers licenses should make clear that prior to providing notice to the Pennsylvania Department of Transportation that an individual is delinquent on their debt, the court will conduct an ability to pay determination. The current version of the revised Rule

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<sup>9</sup> For example, Charlotte-Mecklenburg's Bench Card requires judges to take alternative steps to incarcerating individuals for non-payment, including remitting debts owed, converting debts to a civil lien, allowing for additional time, or allowing for community service in lieu of payment. Likewise, Arizona's Bench Card instructs judges to "consider alternative sanctions for both those who have been found willful and not willful of nonpayment" pursuant to state law, including ordering community restitution or garnishment. *See* Bench Card for ARS § 13-810 Order to Show Cause Hearings (OSC), Lawful Collection of Legal Financial Obligations, available at <https://s3.amazonaws.com/dntstatic//b3e6b051-4452-40d3-6876-b41909aacc5a>.

<sup>10</sup> *See, e.g.* Colo. H.B. 13-11 (2016), available at [https://leg.colorado.gov/sites/default/files/documents/2016a/bills/2016A\\_1311\\_signed.pdf](https://leg.colorado.gov/sites/default/files/documents/2016a/bills/2016A_1311_signed.pdf); Mo. Sup. Ct. R. 37.65; Bench Card, *Kennedy et al. v. City of Biloxi*, Civ. Action No. 15-348, available at <https://www.biloxi.ms.us/wp-content/uploads/2016/03/BenchCard.pdf>.

470, as written requires individuals to respond within 15 days to be afforded an ability to pay hearing. This is a limitation that swallows the rule and such an important Constitutional right should not be conditioned on this requirement. The Rule should be amended to afford all individuals with a meaningful ability to pay hearing before suspension. CJPP does, however, support the explicit language contained in Rule 470 that the court shall not send notice to the DOT until after an ability to pay hearing is conducted and the court finds that the individual had the ability to pay. Drivers' license suspension schemes such as the one currently in place in Pennsylvania are constitutionally problematic and can create significant hardship for individuals who rely on their license for important daily travel, such as work, medical appointments, or childcare responsibilities. License suspension should not be an available consequence for non-payment of court fines and fees. Although it is beyond the purview of these Rules to eliminate the scheme altogether, the Rules can certainly create more robust procedural protections. CJPP strongly supports any aspects of this rule that would prevent or limit such schemes' arbitrary and pernicious impact.

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CJPP commends the Criminal Procedural Rules Committee for its efforts to improve the court rules for magisterial district judges (MDJs) in Pennsylvania. We are grateful for the opportunity to respond and provide the above comments. During the next round of revisions, we encourage the Committee to ensure that the above principles are fully incorporated and that the guidance provided to the MDJs is as specific and concrete as possible.

Respectfully,

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