



CHARLES EPPOLITO, III

May 21, 2018

Hon. Thomas G. Saylor  
Chief Justice  
Supreme Court of Pennsylvania  
Fulton Building  
200 N. 3rd St., Fl. 16  
Harrisburg, PA 17101-1585

Dear Chief Justice Saylor:

The Pennsylvania Bar Association House of Delegates held its semi-annual meeting on Friday, May 11, 2018 in Hershey, PA. During that meeting the House of Delegates, which is the policy-making body of the PBA, approved a recommendation by our Civil & Equal Rights Committee to support the Supreme Court of PA's Criminal Procedural Rules Committee proposed changes to the PA Rules of Criminal Procedure titled, "Incarceration of the Indigent for Failure to Pay in Summary Cases." Furthermore, the House approved support of additional recommendations that would strengthen the Committee's proposal in addressing unconstitutional debtors' prison practices.

I have enclosed for your consideration the final recommendation and report approved by our House of Delegates which explains in further detail the proposed changes. By incorporating these additional recommendations, Pennsylvania will make tremendous strides in correcting the unfair treatment and disparate impact that has resulted from our state's current policies and lack of uniform guidelines on jailing individuals that owe court fines, costs and/or restitution, while giving clearer and more specific instructions to Magistrate District Judges.

If you or any members of the Court have questions regarding these recommendations, please do not hesitate to contact me or our Executive Director, Barry Simpson. As always, the Pennsylvania Bar Association stands ready to assist you and the members of our Supreme Court in any manner necessary.

Sincerely,

A handwritten signature in cursive script that reads "Charles Eppolito, III".

Charles Eppolito, III, Esq.

cc: Lawrence S. Felzer, Esq., Immediate Past Chair, PBA Civil & Equal Rights  
Committee  
Riley H. Ross, III, Esq., Chair, PBA Civil & Equal Rights Committee  
Barry M. Simpson, Esq., PBA Executive Director

Enclosure

**PENNSYLVANIA BAR ASSOCIATION**  
**CIVIL AND EQUAL RIGHTS COMMITTEE**

**RECOMMENDATION**

The Civil and Equal Rights Committee (CERC) recommends that the Pennsylvania Bar Association support the Supreme Court of Pennsylvania's Criminal Procedural Rules Committee proposed changes to the Pennsylvania Rules of Criminal Procedure titled "Incarceration of the Indigent for Failure to Pay in Summary Cases." and further support additional recommendations that would further strengthen the Committee's proposal in addressing unconstitutional debtors' prison practices.

CERC strongly recommends the Pennsylvania Bar Association join the Philadelphia Bar Association and Allegheny County Bar Association in supporting these proposed changes to the PA Rules of Criminal Procedure and authorize the President and legislative department to convey the PBA's support to the Supreme Court of Pennsylvania's Criminal Procedural Committee.

**REPORT**

- A. Criminal Procedural Rules Committee Proposed Changes to Pennsylvania Rules of Criminal Procedure:
- Requiring that magisterial district courts, when incarcerating a defendant for nonpayment of legal financial obligations, put in writing findings demonstrating the defendant's ability to pay the obligations and the reasons why the court has imposed incarceration for nonpayment; and
  - Listing in the Comment to Rule 456 of the Pennsylvania Rules of Criminal Procedure generalized categories of financial information the court should consider when evaluating ability to pay.
- B. We make the following suggested additions to the Committee's proposal to further protect the rights of indigent defendants who lack the ability to pay:
- Specifying, as the United States Supreme Court has, that a court has an affirmative obligation to inquire into the defendant's financial resources when considering ability to pay;
  - Making clear, in line with Rule 706 of the Pennsylvania Rules of Criminal Procedure and Pennsylvania case law, that indigent defendants cannot be jailed for nonpayment of legal financial obligations;
  - Listing specific mandatory financial factors that magisterial district courts must consider when evaluating ability to pay (including the defendant's net income after deducting the defendant's living expenses) to help ensure uniform and accurate evaluations;

- Providing a list of factors that indicate that a defendant is presumptively indigent and at least temporarily unable to pay any amount, including:
  - income below 125% of the federal poverty level,
  - receiving means-based public assistance,
  - receiving the services of the public defender,
  - recent release from jail,
  - and/or inability to meet basic life needs;
- Specifying that courts may set payment plans to help defendants pay their legal financial obligations, but cannot set defendants on payment plans that the evidence shows they cannot afford;
- Setting a specific schedule of presumed maximum monthly payments based on a defendant's net income;
- Providing a uniform process to allow magisterial district courts to administratively close old cases that they determine are uncollectible due to the defendant's indigence;
- Extending the time before a warrant may be issued after a defendant defaults on payments, and improving the notice required to be sent to defendants by explaining the defendants' rights and obligations, to reduce the issuance of bench warrants for failure to pay;
- Removing the unconstitutional procedure in Rule 456 of the Pennsylvania Rules of Criminal Procedure that allows magisterial district courts to jail a defendant for up to 72 hours prior to an ability-to-pay hearing for "failure to post collateral" and instead requiring that, unless the defendant is released on recognizance, such hearing must occur the same day the defendant is brought to court; and
- Extending the period of time between default on legal financial obligations in a traffic case and notice to the Pennsylvania Department of Transportation for that Department to suspend the defendant's license, to avoid interfering with defendants' right to file an appeal within 30 days and to allow the court more time to work with defendants who have missed payments.

#### C. Status of Draft Rules

In response to guidance sent to states by the United States Department of Justice the Supreme Court of Pennsylvania's Criminal Procedural Committee released draft rules on January 8, 2018 to address the problem of magisterial district judges unlawfully incarcerating indigent defendants for failure to pay court costs, fines and/or restitution. Public comments were due February 23. However, the Committee is reconsidering its proposal in light of the comments that it received, and it and the Supreme Court should still consider this Recommendation, particularly since the Philadelphia Bar Association and Allegheny County Bar Association have already publicly announced their support for the suggested additions listed in Section B of this recommendation.

#### D. Analysis

The CERC is in favor of the suggested additions for the following reasons:

The report from the Interbranch Commission for Gender, Racial, and Ethnic Fairness entitled “Ending Debtors’ Prisons in Pennsylvania: Current Issues in Bail and Legal Financial Obligations: A Practical Guide for Reform” explains that thousands of low-income Pennsylvanians are jailed each year by magisterial district courts across Pennsylvania because those individuals are too poor to pay court fines, costs, and/or restitution (collectively “legal financial obligations”);

In light of the growing national attention on the problem of modern debtors’ prisons, states across the country have reformed their court debt collection practices in criminal cases to protect defendants’ constitutional rights;

There are more than one million open cases before Pennsylvania magisterial district courts dating back to the 1970s where defendants still owe legal financial obligations;

Pennsylvania magisterial district courts issue approximately 500,000 bench warrants each year because defendants have defaulted on legal financial obligations;

Court records show that Pennsylvania magisterial district courts have jailed defendants for not paying legal financial obligations while acknowledging that defendants are homeless or unemployed, or otherwise unable to pay;

Pennsylvania and United States Supreme Court case law is clear that a defendant cannot be found in contempt and incarcerated for nonpayment of legal financial obligations unless the court affirmatively inquires into the defendant’s reasons for nonpayment and finds that the defendant is financially able to pay, is not indigent, and is willfully refusing to pay;<sup>1</sup>

The existing procedural standards in the Pennsylvania Rules of Criminal Procedures, which set forth the process by the magisterial district courts are supposed to collect legal financial obligations, are too vague and do not tell a court how to evaluate a defendant’s ability to pay.

#### E. Conclusion

The CERC mission includes “defend(ing) civil rights and responsibilities, fair treatment and equal opportunity for all individuals and the avoidance and elimination of wrongful

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<sup>1</sup> See, e.g., *Bearden v. Georgia*, 461 U.S. 660, 672 (1983); *Commonwealth ex. rel. Parrish v. Cliff*, 304 A.2d 158, 161 (Pa. 1973); *Commonwealth v. Eggers*, 742 A.2d 174, 176 (Pa. Super. Ct. 1999); *Bacik v. Commonwealth*, 434 A.2d 860, 863 (Pa. Commw. Ct. 1981).

discrimination and unfair bias” and we believe the proposed changes correct the unfair treatment and disparate impact that has resulted from Pennsylvania’s current policies and lack of uniform guidelines on jailing individuals that owe court fines, costs and/or restitution. The recommendations provide clearer, more specific instructions for Magistrate District Judges.

Case law establishes the Due Process and Equal Protection clauses of the 14<sup>th</sup> Amendment require that before imposing any sanction, courts must affirmatively inquire into a defendant’s reason for nonpayment, and the courts must also find that a defendant willfully refused to pay. This is not an affirmative defense to be raised by a defendant, the obligation is on the court to look at the defendant’s entire financial picture.

The U.S. Supreme Court held in *Bearden v. Georgia* that judges cannot send people to jail just because they are too poor to pay their court fines. From a taxpayer perspective, it is not a productive use of tax dollars to pay the expense of incarcerating a low income person only because they owe fines or court costs they cannot afford to pay.

Respectfully submitted,

Lawrence Felzer, Esq., Chair  
PBA Civil & Equal Rights Committee  
April 9, 2018

***\*Unanimously approved by the Board of Governors May 9, 2018.***

***\*\*Approved by the House of Delegates May 11, 2018.***