



May 3, 2019

Criminal Procedural Rules Committee
Pennsylvania Judicial Center
601 Commonwealth Ave.
Suite 6200
P.O. Box 62635
Harrisburg, PA 17106

Dear Members of the Criminal Procedural Rules Committee,

Since 2009, the Southern Poverty Law Center (“SPLC”), the American Civil Liberties Union (“ACLU”)¹ and its affiliates, and other advocates across the country have successfully exposed and challenged modern-day debtors’ prisons and other unlawful fine and cost collection practices in at least 18 states: Alabama, Arkansas, California, Colorado, Georgia, Louisiana, Maine, Michigan, Missouri, New Hampshire, New Mexico, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, and Washington. Our work has shown that throughout the country, people who cannot afford to pay fines and costs owed to courts experience disproportionate punishments—including incarceration and driver’s license suspension—without basic procedural protections required by due process and equal protection of the law.² The use of incarceration or driver’s license suspension to punish people who cannot afford to pay court fines and costs is frequently unconstitutional and imposes devastating human costs and wastes taxpayer money and resources. The result is a two-tiered system of justice in which those with means are set free or retain their driver’s licenses while destitute people are incarcerated or lose their ability to lawfully drive. People of color are particularly impacted due to stark, documented racial and ethnic disparities in wealth and income and the impact of over policing of communities of color.

The SPLC and the ACLU applaud the Supreme Court of Pennsylvania’s Criminal Procedural Rules Committee for taking steps to address Pennsylvania court practices that wrongfully penalize people for their poverty. We are concerned, however, that the proposed rules do not go far enough to ensure respect for due process and equal protection of the law and to identify people who are too poor to pay fines and costs. We urge you to consider the following recommendations to advance fairness and equal treatment of rich and poor in the Pennsylvania court system:

1. Enact thorough guidelines for ability-to-pay determinations and provide judges the option to waive and reduce all fines, costs, and restitution upon a finding of inability to pay;

¹ The ACLU, headquartered in New York City, is a separate entity from the ACLU of Pennsylvania, which is submitting separate comments.

² American Civil Liberties Union, Debtors’ Prisons, <https://www.aclu.org/issues/racial-justice/race-and-criminal-justice/debtors-prisons> (February 12, 2018).



2. Prohibit incarceration for any period of time prior to finding that an individual has willfully failed to pay; and
3. Prohibit driver's license suspension as a punishment for nonpayment of fines and fees.

Recommendations for Improvement

1. Enact Thorough Guidelines for Ability-to-Pay Determinations and Provide Judges the Option to Waive and Reduce All Fines, Costs, and Restitution Upon a Finding of Inability to Pay.

Courts in Alabama, Georgia, Mississippi, Missouri, Ohio, and Washington have adopted detailed bench cards to properly guide judges on how to avoid punishing people for unpaid fines and costs that they cannot afford. The Committee should adopt similar principles to guide Pennsylvania judges. While the current Pennsylvania rules do require courts to consider ability to pay, curing the constitutional defects in magisterial district courts' debt collection practices requires more than merely requiring ability-to-pay determinations.

The Committee should adopt a rule that provides courts more thorough guidance on how to determine an individual's current ability to pay. Proper guidance should include a presumption of inability to pay that ensures poor and low-income people are not punished more harshly than people with means solely because of their financial limitations. For example, inability to pay should be presumed if: i) the total amount of fines and costs owed by the individual to courts exceeds 10% of the individual's current discretionary income; ii) the individual is a minor or has been homeless, has been incarcerated, or has resided in a physical or mental health treatment program for at least one night at any point in the six months prior to the ability-to-pay hearing; or iii) the individual was found by a court to be unable to pay a fine and/or costs at any point in the previous six months, and the individual attests by affidavit that their circumstances have not changed since that determination in a way that would materially alter their financial circumstances. The rules should require courts to waive or reduce the amount owed, notwithstanding existing mandatory fines, costs, or restitution, for individuals who are determined to be unable to pay. The Committee should also define discretionary income.

At a minimum, the Rules should require that the magisterial district courts consider the nine specified factors identified by the National Task Force on Fines, Fees, and Bail Practices ("NTF") when determining a defendant's current ability to pay.³ The NTF's Bench Card on Lawful Collection of Legal Financial Obligations has been endorsed by the Conference of Chief

³ National Center for State Courts, National Task Force of Judicial Leaders Releases Resources to Aid State Courts, Feb. 3, 2017, <https://www.ncsc.org/Newsroom/News-releases/2017/Fines-Fees-Task-From-Resources.aspx>.



Justices.⁴ The Bench Card recognizes the following factors as material to the ability-to-pay determination:

- (1) income, including income less than 125% of the relevant Federal Poverty Guideline for the defendant's household size;
- (2) whether the defendant receives any form of means-based public assistance;
- (3) the defendant's financial resources, assets, obligations, and dependents;
- (4) whether the defendant is homeless, incarcerated, or resides in a mental health facility;
- (5) the defendant's basic living expenses;
- (6) the defendant's efforts to acquire additional resources;
- (7) the amount owed in fines, costs, and restitution to other courts;
- (8) whether payment of the fines, costs, or restitution at issue would result in manifest hardship to the individual or dependents; and
- (9) any other special circumstances that may bear on the person's ability to pay.⁵

If the Committee does not adopt clear and specific rules for accurately assessing an individual's financial circumstances, the practice on the ground will not guard against the disproportionate punishment of poor and low-income people who are unable to pay. An example from Virginia highlights our concerns. In 2017, the Supreme Court of Virginia enacted rules to reduce the number of wealth-based suspensions and the legislature adopted a law consistent with the rule.⁶ The new law requires that courts, prior to ordering that a person's driver's license be suspended for nonpayment of fines and fees: i) consider a person's financial circumstances, including financial obligations and costs owed to other courts; and ii) provide a payment plan tailored to ability-to-pay for people who are unable to pay their fines and fees in full.⁷ The law also permits courts to require a down payment as a condition of a payment plan and offers suggested limits for the size of down payments relating *only* to the total amount of money owed—not the financial circumstances of the defendant.⁸ The law further indicates that a defendant who defaults on a payment plan can request entry of another payment plan, but that a down payment is required in such circumstances.⁹

Like the current Pennsylvania Rules, however, the Virginia law provided no guidance on *how* to properly assess an individual's current ability to pay. Not only did the law fail to guide judges on how to establish payment plans that people can actually afford based on their current financial circumstances, it also required down payments for any payment plan following an initial default. A year later, the Legal Aid Justice Center ("LAJC") found that roughly one in six licensed drivers in Virginia still had a license suspended at least in part due to unpaid court fines

⁴ Conference of Chief Justices, Resolution 3, Encouraging Education on and Use of the Bench Card on Lawful Collection of Court-Imposed Legal Financial Obligations Prepared by the National Task Force on Fines, Fees, and Bail Practices.

⁵ See Appx. 1.

⁶ Va. Code § 19.2-354.1.

⁷ *Id.* § 19.2-354.1(D).

⁸ *Id.* § 19.2-354.1(E).

⁹ *Id.* § 19.2-354.1(I).



and fees—a statistic that “remain[ed] essentially unchanged” despite passage of the law.¹⁰ The LAJC determined that one reason was the lack of guidance on how to properly conduct individualized ability-to-pay determinations and the resulting “unrealistic and unaffordable payment plans that often lead to default.”¹¹ LAJC thus recommended that the state entirely eliminate license suspensions for nonpayment of fines and fees, regardless of ability to pay.¹² In 2019, Virginia lawmakers voted for a clean repeal of debt-based suspensions and reinstatement of suspensions to nearly 1 million people.¹³

In order to avoid repeating Virginia’s mistake of failing to provide binding guidance on how to hold an ability-to-pay hearing, this, Committee should adopt robust rules with sufficient guidance on how to accurately identify people who cannot afford to pay their fines and fees, and to require waiver and reduction upon a finding of inability to pay.

2. Prohibit Incarceration for Any Period of Time Prior to a Finding of Willful Failure to Pay.

The United States Supreme Court made clear in *Bearden v. Georgia*, 461 U.S. 660, 672 (1983), that trial courts “must inquire into the reasons for the failure to pay” before imposing punishment for nonpayment of a fine or fee, including through incarceration or probation revocation. Failure to do so risks “imprisoning a person solely because he lacks funds to pay the fine,” a practice that the Court has repeatedly condemned. *Id.* at 674; *see also Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970).

In its current form, Rule 456 permits magisterial district courts to jail defendants for up to 72 hours for “failure to post collateral,” without any prior finding of willful nonpayment. An individual jailed for “failure to post collateral” under Rule 456 is deprived of his or her liberty *solely* because the person has failed to pay fines and fees, but there is no pre-jailing determination that the person actually *could* afford to pay. The “freedom from bodily restraint, lies at the core of the liberty protected by the Due Process Clause,” and the threat of its loss requires due process protection. *Turner v. Rogers*, 564 U.S. 431, 445 (2011) (internal quotation marks omitted). *Bearden* requires a pre-deprivation hearing on the issue of ability to pay to determine why the defendant did not pay the fines and fees.¹⁴ As the Supreme Court explained, by imprisoning an individual “simply because he could not pay the fine, without considering the reasons for the inability to pay . . . the court automatically turn[s] a fine into a prison sentence.” *Bearden*, 461 U.S. 674.

¹⁰ [2] Legal Aid Justice Center, Driving on Empty: Payment Plan Reforms Don’t Fix Virginia’s Court Debt Crisis (2018), <https://www.justice4all.org/wp-content/uploads/2018/01/Driving-on-Empty-Payment-Plan-Analysis-FINAL.pdf>.

¹¹ *Id.* at 1.

¹² [3] *Id.* at 3.

¹³ Virginia lawmakers vote to scrap license suspensions for unpaid court fees, https://www.richmond.com/news/virginia/government-politics/general-assembly/virginia-lawmakers-vote-to-scrap-license-susensions-for-unpaid-court/article_896edd70-63bb-5e4d-892f-c1e2a9cec0f4.html (April 4, 2019).



Rule 456 contradicts the requirements of *Bearden*. Moreover, facts on the ground demonstrate that numerous courts abuse the procedure laid out in the proposed rule. For example, in *Commonwealth v. Ownings*, the court jailed a defendant in May 2016 because—in the court’s words—she was “homeless living in her car. Can not pay.” *Commonwealth v. Ownings*, MJ-12106-TR-0000526-2009.¹⁵ A recent series of stories from the Reading Eagle highlight that this problem persists and ensnares thousands of Pennsylvanians every year.¹⁶ As those stories explain, while judges in some counties—like Berks—routinely jail indigent defendants, judges in other counties have abandoned such practices and still run functional courts.

The Rules Committee should amend Rule 456 to prevent such unlawful incarceration and to guide lower court judges on how to respect the clear requirements of *Bearden*. The rule should make clear that Pennsylvania courts must, *sua sponte*, consider a person’s ability-to-pay prior to imposing incarceration or suspended incarceration for nonpayment of fines and fees. Other courts have done exactly this:

- The Michigan Supreme Court a rule that prohibits courts from incarcerating an individual for nonpayment of court fines and fees if payment would impose “manifest hardship” on the individual. The rule requires that the court consider, *inter alia*, whether a person who owes fines and fees is able to pay while also meeting basic life needs—including, food, shelter, clothing, necessary medical expenses, or child support. If a person lacks the ability to pay fines or fees, the rule permits the court to waive part or all of what the person owes, or to set up a payment plan.
- Mississippi Court Rule 26.6(d) requires that courts hold ability-to-pay hearings and make factual findings of willfulness before incarcerating anyone for nonpayment of fines and fees. Indications that a defendant cannot pay include income below 125% of the Federal Poverty Guidelines, receipt of means-based public assistance, and struggle to meet basic life needs. The rule also requires courts to ensure that people have actual notice of these hearings, accomplished through personal service, which reduces the risk that defendants will fail to appear and be arrested.

¹⁵ This text appears on the non-public docket transcript and is part of a dataset provided to the ACLU of Pennsylvania from the Administrative Office of Pennsylvania Courts.

¹⁶ See Ford Turner, “5 years after a Berks woman died in prison, defendants are still jailed for not having money,” Reading Eagle (Apr. 25, 2019), <https://www.readingeagle.com/news/article/thats-not-a-justice-system>; Ford Turner, “District judges in Berks County jail more people for lack of money than anywhere else in Pa.” (Apr. 25, 2019), <https://www.readingeagle.com/news/article/berks-district-judges-top-pa-list-of-lockups-over-collateral>; Ford Turner, “District courts of Xavios, Patton among leaders in no-collateral jailings in Pennsylvania,” (Apr. 25, 2019), <https://www.readingeagle.com/news/article/district-courts-of-xavios-patton-among-leaders-in-no-collateral-jailings-in-pennsylvania>; Ford Turner, “Support grows for reform in district court jailings over collateral,” (Apr. 25, 2019), <https://www.readingeagle.com/news/article/chorus-grows-for-reform-in-district-court-jailings-over-collateral>.



- The Missouri Supreme Court adopted the Bench Card proposed by the National Task Force on Fines and Fees in its entirety, which includes guidance on how to conduct robust ability-to-pay determinations and consider alternative sanctions for people who are unable to pay.

The Committee should follow the example set by these jurisdictions and mandate all Pennsylvania courts to comport with constitutionally required ability-to-pay determinations prior to any period of incarceration.

3. Prohibit Driver's License Suspension as a Punishment for Nonpayment of Fines and Fees.

Rule 470 requires magisterial district courts to send notice to the Pennsylvania Department of Transportation of defendants in default on required payments toward court fines and fees so the Department may suspend their driver's licenses. The rule does not, however, require the court to first determine whether nonpayment was willful. We believe that suspension of a driver's license should never be used a punishment for something unrelated to dangerous driving, including failure to pay. In addition to being poor public policy, the procedure for automatically reporting nonpayment to state authorities without any judicial process whatsoever, let alone a determination of whether a defendant is able to pay, with the result that license suspension will eventually result, is contrary to basic principles of due process and equal protection of the law.

The United States Supreme Court has explained that a driver's license cannot be revoked or suspended "without that procedural due process required by the Fourteenth Amendment." *Bell v. Burson*, 402 U.S. 535, 539 (1972) (citations omitted). Without providing notice and an opportunity to be heard to ensure that only individuals who are able to pay and willfully refuse to do so have their licenses suspended by the Department, Rule 470 permits unconstitutional suspensions. Three federal court decisions have adopted such reasoning in issuing preliminary injunctions against statutes that require states to suspend driver's licenses for nonpayment of fines and fees without a predeprivation determination that failure to pay was willful.¹⁷

To ensure constitutional compliance and sound public policy, we urge the Committee to adopt the best practices recommended by the AAMV with respect to ending the use of driver's

¹⁷ *Robinson v. Purkey*, No. 3:17-CV-1263, 2017 WL 4418134 (M.D. Tenn. Oct. 5, 2017), *appeal docketed*, No. 18-1621 (6th Cir. Oct. 24, 2018) (granting TRO reinstating licenses suspended for non-payment of traffic tickets, pending ruling on preliminary injunction); *Thomas v. Haslam*, No. 3:17-CV-5, 2018 WL 3301648 (M.D. Tenn. July 2, 2018), *appeal docketed*, No. 18-5766 (6th Cir. July 27, 2018) (granting summary judgment and enjoining revocation of licenses for failure to pay non-traffic court debt); *Fowler v. Johnson*, No. 4:17-cv-11441, 2017 WL 6379676 (E.D. Mich. Dec. 14, 2017) (enjoining suspension of licenses for nonpayment), *appeal docketed*, No. 17-2504 (6th Cir. Apr. 18, 2018).



license suspensions as a penal sanction for nonpayment of fines and fees.¹⁸ At a minimum, the Committee should amend Rule 470 to create a procedure that ensures magisterial district courts conduct a pre-deprivation ability-to-pay hearing to determine why the defendant has failed to pay, and that the courts only refer people to the Department for license suspension following a judicial determination that the individual is currently able to pay and willfully refuses to do so.

We appreciate that the Committee has suggested revisions to improve Rule 470, but the existing proposal is inadequate. It is insufficient, from a constitutional perspective, to permit courts to bypass the ability-to-pay requirement if the defendant fails to respond to a mailed letter within 15 days, as the proposed rule allows. A defendant simply cannot be deprived of his or her driver's license without first holding a hearing and determining the defendant's current ability to pay. To do otherwise would perpetuate the existing unconstitutional policy.

* * *

The three recommendations set forth in this letter are more than just recommendations to adopt best practices. The rule amendments proposed present a way for the Committee and the Supreme Court of Pennsylvania to show leadership in ensuring that magisterial district courts will respect existing constitutional guarantees of due process and equal protection of the law when collecting court fines and fees. We would be happy to discuss these proposals, provide additional information, and to answer any questions the Committee may have. You may reach us at the telephone numbers and email addresses listed below. We thank you for your time and we look forward to working with the Committee in the future.

Sincerely,

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¹⁸ American Association of Motor Vehicle Administrators Suspended/Revoked Working Group, Best Practices Guide at: <https://www.aamva.org/Suspended-and-Revoked-Drivers-Working-Group/>



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Appendix One



NATIONAL TASK FORCE ON FINES, FEES AND BAIL PRACTICES

LAWFUL COLLECTION OF LEGAL FINANCIAL OBLIGATIONS
A BENCH CARD FOR JUDGES

Courts may not incarcerate a defendant/respondent, or revoke probation, for nonpayment of a court-ordered legal financial obligation unless the court holds a hearing and makes one of the following findings:

1. The failure to pay was not due to an inability to pay but was willful or due to failure to make bona fide efforts to pay; or
2. The failure to pay was not the fault of the defendant/respondent and alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence.

If a defendant/respondent fails to pay a court-ordered legal financial obligation but the court, after opportunity for a hearing, finds that the failure to pay was not due to the fault of the defendant/respondent but to lack of financial resources, the court should consider alternative measures of punishment other than incarceration. *Bearden v. Georgia*, 461 U.S. 660, 667-669 (1983). Punishment and deterrence can often be served fully by alternative means to incarceration, including an extension of time to pay or reduction of the amount owed. *Id.* at 671.

Court-ordered legal financial obligations (LFOs) include all discretionary and mandatory fines, costs, fees, state assessments, and/or restitution in civil and criminal cases.

1. Adequate Notice of the Hearing to Determine Ability to Pay

Notice should include the following information:

- a. Hearing date and time;
- b. Total amount claimed due;
- c. That the court will evaluate the person's ability to pay at the hearing;
- d. That the person should bring any documentation or information the court should consider in determining ability to pay;
- e. That incarceration may result only if alternate measures are not adequate to meet the state's interests in punishment and deterrence or the court finds that the person had the ability to pay and willfully refused;
- f. Right to counsel*; and
- g. That a person unable to pay can request payment alternatives, including, but not limited to, community service and/or a reduction of the amount owed.

2. Meaningful Opportunity to Explain at the Hearing

The person must have an opportunity to explain:

- a. Whether the amount charged as due is incorrect; and
- b. The reason(s) for any nonpayment (e.g., inability to pay).

3. Factors the Court Should Consider to Determine Willfulness¹

- a. Income, including whether income is at or below 125% of the Federal Poverty Guidelines (FPG).²

For 2016, 125% of FPG is:

\$14,850 for an individual;	\$30,375 for a family of 4;
\$20,025 for a family of 2;	\$35,550 for a family of 5;
\$25,200 for a family of 3;	\$40,725 for a family of 6.

- b. Receipt of needs-based, means-tested public assistance, including, but not limited to, Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), or veterans' disability benefits (Such benefits are not subject to attachment, garnishment, execution, levy, or other legal process);

¹ See *Bearden v. Georgia*, 461 U.S. 660 (1983)

² U.S. Dep't of Health & Human Servs., Poverty Guidelines, Jan. 26, 2016, <https://aspe.hhs.gov/poverty-guidelines>

