May 1, 2019

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

Re: Comments to Proposed Changes to the Criminal Procedural Rules Regarding Incarceration of Indigent Debtors

Dear Mr. Wasileski,

We are writing today in response to the March 4, 2019 request from the Criminal Procedural Rules Committee ("Committee") for comments on its proposed changes to rules relating to the incarceration of defendants who fail to pay summary fines and other legal financial obligations ("LFOs"). The Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness ("Commission") submitted comments to an earlier package of proposed rule amendments on February 22, 2018, along with a copy of our report, Ending Debtors’ Prisons in Pennsylvania: Current Issues in Bail and Legal Financial Obligations: A Practical Guide for Reform.\(^1\) While we appreciate the changes the Committee has made in response to the comments it received, we believe that the proposed rule amendments do not go far enough to safeguard the constitutional rights of indigent defendants who are routinely incarcerated across Pennsylvania for failure to pay LFOs.

Recent reporting has confirmed that the findings from the Commission’s 2017 report relating to the incarceration of defendants for failure to pay LFOs persist to this day. For instance, "Berks district judges sent low-level offenders to jail, typically for three days at

---

a time, for failure to post collateral in a total of 4,012 cases in 2017 and 2018. That figure was twice the second-largest county total — York County with 2,026 — and more than 20 times the total in each of 45 other counties. Schuylkill County, for example, had only eight cases, Montgomery, 15, and Lehigh, 38."²

1. Proposed Changes Supported by the Commission

The Commission fully supports two key changes made by the Committee to the proposed rules: (1) proscribing arbitrary minimum monthly payments for payment plans through the addition of paragraph (G)(5) in Rule 454; and (2) clarifying the requirement for counsel for all defendants who may be jailed for non-payment of LFOs, by moving that language from the comment of Rule 456 to the text of that rule. The first amendment will ensure that all defendants have access to payment plans that they can actually afford, regardless of their financial status, which is a key recommendation from the Commission’s 2017 report. The second amendment is consistent with well-established Pennsylvania and federal constitutional law. The Commission commends the Committee for explicitly including this statement of rights in the text of the Rules.

2. The Proposed Changes Fail to Provide Mandatory Guidance on Assessing a Defendant’s Ability to Pay

In our February 22, 2018 comments, the Commission highlighted troubling data obtained directly from written findings made by MDJs when required to show “facts to support a determination that the defendant has the ability to pay monetary collateral.” Included among the facts supporting a finding that the defendant had the ability to pay were entries such as “No money,” “No employment record,” “Defendant is currently homeless.” In other words, the MDJs were using facts that indicated a lack of ability to pay to support a conclusion that the defendant had the ability to pay. We concluded that “[t]his data…suggests that absent clear, mandatory, and standardized guidance, some MDJs are jailing defendants following ability-to-pay hearings, even when the defendant is unable to pay. This is the reason why the rules must mandate the use of specific objective standards to determine an individual’s capacity to pay an LFO.”

While the Committee’s current proposed changes include many general factors that MDJs may consider in determining a defendant’s ability to pay, they are set forth in the Comments only. The proposed changes do not mandate that MDJs inquire into any or all

of these factors when conducting an ability-to-pay hearing. Further, the proposed changes do not give MDJs any guidance on what to do with the information they collect regarding a defendant’s current financial situation, such as how to weigh financial factors, how to determine whether a defendant is able to pay LFOs, and how much of a payment should be assessed as part of a payment plan.

The Commission urges the Committee to adopt a mandatory rule that reflects existing case law in Pennsylvania. For instance, receipt of means-based public assistance (such as SNAP benefits, Medicaid, or SSI) creates a presumption of indigence across the entire Commonwealth, without regard for geographic cost-of-living differences. Such a presumption should be written into the rules. Additionally, the Commission urges the Committee to create a rebuttable presumption of inability-to-pay for defendants whose income is at or below 125% of the Federal Poverty Guidelines. This would create an equitable, statewide standard floor, as that income is so low that any defendant below that floor in any jurisdiction should be presumed unable to pay. Such a presumption could be overcome with defendant-specific factual findings. This recommendation is consistent with best practices developed by the National Task Force on Fines, Fees and Bail Practices. Additionally, these recommendations were supported by the Allegheny County, Philadelphia, and Pennsylvania Bar Associations in their comments to the earlier proposed rule changes. This clearly suggests a consensus in the legal profession across the state for such mandatory guidance.

3. The Proposal for an Administrative Hold is Helpful, but Needs Improvements

The Commission generally supports the creation of a process to stop collection of LFOs for defendants who have demonstrated, for at least two years, that they are unable to pay. The Commission previously noted the many collateral consequences of LFOs: “Outstanding criminal justice debt can prevent Pennsylvanians from accessing public benefits such as food stamps, for themselves and their families. It can result in the suspension of drivers’ licenses, and can also bar individuals from receiving pardons or expungements of their criminal records, which is a significant barrier to employment. Housing and employment are key parts of a successful re-entry for formerly incarcerated Pennsylvanians, and LFOs can jeopardize both, leading to a higher chance of

---

4 See PA Interbranch Commission, Ending Debtors’ Prisons in Pennsylvania, Appendix E. The Task Force is a joint effort of the Conference of Chief Justices, the Conference of State Court Administrators, and the National Center for State Courts.
recidivism. Thus, any proposal that limits these consequences is a welcome improvement to the current system.

However, the proposed changes create an administrative hold process that is unduly complex. First, it would require notice to the victim, affiant (often a police officer), and the attorney for the Commonwealth. This is untenable, as none of these individuals would be able to provide any evidence about the defendant’s ability to pay, which is what an administrative hold hearing should be designed to determine. Notice to the victim may be appropriate in cases in which restitution is owed, but requiring notice to victims, affiants, and Commonwealth’s Attorneys in all cases will only delay and convolute this important process.

Additionally, the proposal would require that an attorney be present at an administrative hold hearing. If the only possible outcomes of the hearing are to continue to attempt collection of LFOs or to place an administrative hold on the collection process, it is unclear why counsel is necessary, as the defendant faces no threat of incarceration or additional punishment. Public defenders already have very large caseloads, and requiring them to represent indigent defendants in this type of hearing will likely only contribute to cost and delay. Requiring counsel at these hearings would therefore have the perverse and unintended result of making it more difficult for defendants to receive the very relief that such a hold is designed to provide.

4. The Proposed Rule Changes Relating to Drivers’ License Suspensions Will Violate the Constitutional Rights of Indigent Defendants

Under the current rules, if defendants default on their LFOs, they have 25 days to make a payment or enter into a new payment plan before MDJs send notice to PennDOT to begin the drivers’ license suspension process. This type of automatic license suspension, without a pre-deprivation hearing, has been deemed an unconstitutional practice when challenged in other states, such as Michigan and Tennessee. The proposed rule changes would give defendants only 15 days to respond to a default notice, and would prohibit the suspension of their drivers’ licenses only if they respond within that time. Thus, if an indigent defendant does not respond within 15 days, his or her license would still be suspended without the constitutionally required pre-deprivation hearing.

The Commission urges the Committee to adjust this process. The rules should permit the MDJ to send notice to PennDOT only after a Rule 456 payment-determination hearing takes place, at which the defendant is present. If the defendant does not respond to the notice, the court must schedule a hearing and potentially issue a warrant if the defendant


\[^{5}\] Id. at 16.
fails to appear at such a hearing. This would ensure that defendants do not avoid punishment merely by avoiding court, while also meeting Due Process requirements. MDJs cannot constitutionally impose punishment in the form of driver’s license suspension without first making a finding regarding ability to pay.

5. Conclusion

Thank you for this opportunity to comment on the proposed changes to the Rules of Criminal Procedure. We appreciate the work of the Criminal Procedural Rules Committee to address this important issue, and commend the Committee for the improvements relating to the right to counsel and access to payment plans contained within these new proposed changes. We urge the Committee to prevent the unconstitutional incarceration of indigent defendants by mandating the use of specific, standardized indices of poverty in ability-to-pay hearings. Further, the processes contained within the proposed rule changes, as they relate to administrative holds and drivers’ license suspensions, must be improved to provide meaningful protections to all Pennsylvanians, regardless of their socio-economic status.

Sincerely,

Nora Winkelman
Co-Chair

Lisette McCormick
Executive Director

Rhonda Hill Wilson
Co-Chair

Khadija T. Diggs
Chair, Criminal Justice Committee