



The Pennsylvania Interbranch Commission
for Gender, Racial and Ethnic Fairness

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**Testimony Before the Pennsylvania Board of Pardons on its Recently
Instituted Policy Requiring the Payment of Outstanding Costs, Fines,
Fees and Restitution
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**Submitted by
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The Pennsylvania Interbranch Commission
For Gender, Racial and Ethnic Fairness**

Good morning. My name is Lisette McCormick, and I am the Executive Director of the Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness (“Interbranch Commission”). Our Interbranch Commission wishes to thank the Board of Pardons (“BOP”) for the opportunity to comment on its recently instituted policy requiring an individual seeking a pardon to satisfy outstanding fines, costs, fees, or restitution before applying for clemency.

By way of background, the Interbranch Commission was established in 2005 by the three branches of Pennsylvania’s government to implement the recommendations from a 2003 Supreme Court of Pennsylvania study on racial and gender bias in the justice system.¹ Among other findings, the study revealed that racial, ethnic, and socioeconomic disparities within the Commonwealth’s justice system operate to the detriment of all citizens, but fall especially hard on indigent individuals. Nowhere is this disparity more apparent than in the context of legal financial obligations (“LFOs”), where individuals otherwise deserving of a second chance remain incarcerated because of the failure of existing procedures to distinguish punishment from poverty.

To combat such disparities, the Interbranch Commission produced a guide in 2017 entitled *Ending Debtors Prisons in Pennsylvania: Current Issues in Bail and Legal Financial Obligations: A Practical Guide for Reform*.² Among other things, the guide details gaps in court procedures that result in the incarceration of low-income Pennsylvanians for strictly financial reasons and recommends evidence-based best practices to address those gaps. In addition, the Commission has distributed to President Judges a set of proposed local rules designed to create a strong presumption

¹ A copy of the Report is available at <http://www.pa-interbranchcommission.com/pdfs/FinalReport.pdf>.

² Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness, *Ending Debtors’ Prisons in Pennsylvania: Current Issues in Bail and Legal Financial Obligations: A Practical Guide to Reform* 1 (2017) [hereinafter *Ending Debtors’ Prisons*].

against cash bail.³ Those localized efforts mirror the Commission's efforts at the state level, where it has worked with the ACLU of Pennsylvania to draft and submit proposed state court rules to strengthen the judicial requirement of conducting a detailed hearing on a defendant's ability to pay LFOs and related expenses.

Constitutional and Other Legal Concerns

With that background information in mind, the Commission would like to express several constitutional concerns related to the Board's newly instituted policy. As you are likely aware, the chief executive officer of Pennsylvania has historically had the power "to remitt, release, pardon and abolish, whether before Judgment or after, all crimes and offences, whatsoever committed within the said Countrey, against the said Lawes . . . and to doe . . . Justice vnto Courts and Tribunalls[.]"⁴ This expansive grant of power was able to be exercised without restriction until 1872, when the Pennsylvania Constitution was amended to include Article IV, § 9.

Section Nine imposed a condition precedent to the Governor's ability to grant clemency: namely, that an applicant must first obtain the recommendation of the Board of Pardons.⁵ Specifically, Section Nine states that "the Governor shall have the power to . . . grant reprieves, commutation of sentences and pardons" *only after* "the recommendation in writing of a majority of the Board of Pardons, and, in the case of a sentence of death or life imprisonment, on the unanimous recommendation in writing of the Board"⁶

Crucially, Section Nine's constraints on executive authority do *not* extend to the Governor's authority to "remit fines and forfeitures."⁷ In other words, while the Pennsylvania Constitution only permits the Governor to grant an individual clemency upon an affirmative vote by the Board of Pardons, no such procedural prerequisite inhibits the Governor's ability to dispatch with the fines and forfeitures otherwise owed by citizens within the Commonwealth.

This distinction is made clear not just in the text of the Constitution itself, but also within relevant case law. In *Commonwealth v. Williams*, the Pennsylvania Supreme Court noted that the power to "remit fines and forfeitures" remains "conspicuously unencumbered," in support of a "broad . . . grant of executive authority."⁸ Therefore, by requiring individuals to satisfy all outstanding legal financial obligations prior to applying for clemency, the Board mistakenly delegates to itself a power exclusively within the Governor's domain. The Constitution only permits the Board to review and recommend pardons and commutations *themselves*. By instituting its new policy, however, the Board conflates that authority with the mistaken assumption that it may *also* require the full payment of "outstanding legal financial obligations" – obligations that only the *Governor* has the unencumbered right to review and remit.⁹

³ See Appendix: *Suggested Local Rules of Criminal Procedure Governing Bail*.

⁴ The text of the March 4, 1681 charter to William Penn from King Charles II can be viewed at the following link: <http://www.phmc.state.pa.us/portal/communities/documents/1681-1776/pennsylvania-charter.html>.

⁵ Pa. Const. art. IV, § 9.

⁶ *Id.*

⁷ *Id.*

⁸ 129 A.3d 1199, 1214 (Pa. 2015).

⁹ The text of the Board of Pardons' "Legal Financial Obligations" page can be viewed at the following link: <https://www.bop.pa.gov/Pages/Fines-and-Costs.aspx>.

Moreover, the Board's policy is at odds with the very nature of "costs" as defined by statute. As you are likely aware, restitution is distinct from costs because it is "the return of the property of the victim or payments in cash or the equivalent thereof" ¹⁰ In other words, restitution is part of the sentence imposed on a defendant by the court. ¹¹ Costs, on the other hand, are *not* part of the sentence. As the Pennsylvania Supreme Court has stated, the "imposition of costs is not part of any penalty imposed even in those cases where there is a conviction." ¹² Accordingly, as an incident of the judgment, costs remain, "even after a pardon by the executive." ¹³

Therefore, in implementing its policy, the Board needlessly tethers the availability of clemency to something entirely removed from the very sentence individuals seek to have reduced or forgiven. If the Board feels obligated to incentivize the collection of unpaid costs and other fees, it must recognize that those fees can still be collected as civil debts even after the Governor has granted an individual a pardon or commutation. What the Board is not empowered to do, however, is categorically deny individuals a second chance merely because their indigence precludes the ability to pay off costs, fines, and fees unrelated in law to the conviction under review. To automatically deny individuals' access to the more merciful avenues of our legal system, for considerations that are by definition tangential to the underlying convictions, satisfies neither law nor logic.

Concerns Regarding Access to Justice

Along with posing several legal problems, the Board's policy is also troubling because of its tendency to degrade, rather than improve, individuals' access to justice. Therefore, along with being out of step with national trends toward making our justice system more accessible, the Board's policy exacerbates the already-substantial burdens borne by individuals owing court costs that they are unable to pay.

In a study published in 2020, the ACLU of Pennsylvania reviewed nearly 37,000,000 LFO records that were nested within 1,866,190 dockets lodged in Pennsylvania from January 1, 2008 through December 31, 2018. ¹⁴ Looking specifically at cases receiving a final disposition in 2008 and 2013 (in other words, cases with a full ten-year and five-year repayment window, respectively), the study's results were sobering: between 2008 and 2018, more than 4.7 *billion* dollars were assessed to defendants in fines, costs, and restitution. ¹⁵ The ACLU's study also found that "when all . . . assessments are considered together . . . the median amount imposed [in 2008] was \$1,233," a figure that grew to \$1,576 in 2018. ¹⁶

¹⁰ 18 Pa. Cons. Stat. § 1106(h) (2018).

¹¹ Philadelphia Lawyers for Social Equity, "Memorandum of Law in Opposition to Board of Pardons' Policy (March 2021) Prohibiting Hearings on Applications for Clemency Where There Are Unpaid Fines, Fees, or Costs From Underlying Convictions" 3 (May 3, 2021) [hereinafter *PLSE Memorandum of Law*].

¹² *Commonwealth v. Giaccio*, 202 A.2d 55, 58 (Pa. 1964), *rev'd on other grounds*, 382 U.S. 399 (1966).

¹³ *Id.*

¹⁴ ACLU of Pennsylvania, "Imposition and Collection of Fines, Costs, and Restitution in Pennsylvania Criminal Courts" 3 (2021).

¹⁵ *Id.*

¹⁶ *Id.* at 15.

The ACLU reported two other disconcerting conclusions in its study. First, it found that “in most cases, the largest share of . . . debt . . . is from court costs,” which, as noted earlier, do not constitute part of the sentence or serve a penological aim, but rather represent “taxes placed on criminal defendants” that “have a strikingly disproportionate impact on indigent defendants.”¹⁷ Second, the ACLU found that “[a]fter 5 years, the typical public defender client owes \$689 while the typical defendant with private counsel” has paid off “all of the fines, costs, and restitution.”¹⁸ Even after 10 years, most defendants represented by the public defender still owe some combination of legal financial obligations to the court – an outcome hardly surprising, given that the very reason indigent individuals receive such representation in the first place is because they demonstrate financial need. Equally as unsurprising is the ACLU’s finding that, due to the vast number of individuals represented by public defenders within the Commonwealth, the majority of legal financial obligations in Pennsylvania go uncollected.¹⁹

Other recent studies support the sobering findings reported by the ACLU. In its January 2021 report entitled “Costs and Fees Charged to Indigent Criminal Defendants in Philadelphia County,” the Philadelphia Lawyers for Social Equity (“PLSE”) reviewed 1,743 individual dockets, filed in 2013 and earlier and representing 605 PLSE clients. Looking *only* at costs and fees, PLSE found that these clients owed a collective \$1,007,251.27, for an average of \$1,664.88 per client.²⁰ Because all of PLSE’s clients are indigent, the likelihood that these costs will *ever* be paid off is extremely low. This reality is reinforced by PLSE’s finding that even clients who were able to make payments for the first few months eventually ended up defaulting.²¹

Equally troubling disparities were found by the City of Philadelphia’s Office of Community Empowerment and Opportunity (the “Office”). Intending to determine how fines and fees affect those required to pay them, the Office sought feedback over the course of a month in 2020 from currently and formerly incarcerated individuals and their loved ones.²² The Office ultimately received 192 responses, with 97% of them coming from individuals who have experienced incarceration firsthand.²³ Of the 91% of respondents who have had to pay court fines and fees, 45% owe payments in excess of \$3,000.²⁴ This daunting figure makes it all the more difficult for indigent individuals to make ends meet, particularly because over half of the study’s respondents *already* lack access to a bank account and have expenses that exceed their income.²⁵

Predictably, the consequences of owing unpaid legal financial obligations expose existing fault lines in our Commonwealth, both in terms of whom they disproportionately impact and how that impact is felt. As former Pennsylvania Secretary of the Treasury Joe Torsella has noted, “[n]ationally[,] . . . outstanding fines totaling \$50 billion are owed to local governments alone,

¹⁷ *Id.* at 2, 15.

¹⁸ *Id.* at 2.

¹⁹ *Id.*

²⁰ Philadelphia Lawyers for Social Equity, “Costs and Fees Charged to Indigent Criminal Defendants in Philadelphia County” 4 (Jan. 6, 2021).

²¹ *Id.* at 6.

²² Philadelphia Office of Community Empowerment and Opportunity, “The Impact of Criminal Court and Prison Fines and Fees in Philadelphia” 4 (May 5, 2021) [hereinafter *Fines and Fees in Philadelphia*].

²³ *Id.*

²⁴ *Id.* at 5.

²⁵ *Id.*

with 60% of that debt owed by African-American or Latino individuals.”²⁶ Relatedly, of the respondents who participated in the survey conducted by the City of Philadelphia’s Office of Community Empowerment and Opportunity, 63% of individuals who detailed their burdensome experiences with fines and fees were Black.²⁷ Together, the outcomes of these studies illustrate that individuals belonging to racial minorities are more likely to have outstanding fees or costs and thus, to experience the harmful consequences attached to those debts.

Put simply, those consequences are many. As we noted in our *Ending Debtors’ Prisons* guide, failing to satisfy outstanding economic sanctions can not only lead to continued incarceration; it can also “prevent Pennsylvanians from accessing public benefits, such as food stamps, for themselves and their families.”²⁸ In addition, criminal justice debt can “result in the suspension of drivers’ licenses” and can “bar individuals from receiving pardons or expungement of their criminal records, which [pose] a significant barrier to employment” and successful re-integration.²⁹ These barriers are not merely theoretical; they are real scenarios experienced frequently by individuals seeking a second chance in life. In the City of Philadelphia’s study referenced above, 84% of respondents considered court fines, fees, and costs a financial burden, with 55% of respondents reporting that they missed monthly bills to account for their outstanding debts.³⁰ In addition, 72% of respondents reported experiencing penalties for non-payment: 44 individuals were reincarcerated, 64 people had issues clearing their record or completing a diversion program, and 104 respondents were issued either a bench or arrest warrant.³¹

Each of these troubling statistics are part of a larger mosaic of problems that make Pennsylvania one of the most onerous states in the nation for individuals strapped with criminal justice debts. As we noted in our *Ending Debtors’ Prisons* guide, Pennsylvania is one of the leading fifteen states where individuals are incarcerated for failing to pay LFOs, with thousands continuing to be jailed each year for that reason.³² The explanation for the Commonwealth’s high ranking is not difficult to deduce: according to a 2006 report published by the Pennsylvania Commission on Sentencing, there are *at least* “36 different county-level costs and fees, in additions to fines and restitution, which can be imposed against defendants.”³³ Because “nearly every state has . . . added criminal and civil court fees since 2008,” that number is almost certain to have increased.³⁴

In response to the jailing and otherwise unjust treatment of indigent individuals for unpaid debt, many states over the past decade have passed “second chance” laws – laws designed to reflect “the sentiment . . . that everyone deserves a second chance, and many punishments deserve a second

²⁶ Joe Torsella, “Torsella: How Local Governments Raise Money Can Impact Use of Police Force,” The Philadelphia Tribune (Aug. 18, 2020), https://www.phillytrib.com/commentary/torsella-how-local-governments-raise-money-can-impact-use-of-police-force/article_87e352f1-3a79-5022-a05b-27e7c8b3c190.html [hereinafter *Torsella: How Local Governments Raise Money*].

²⁷ *Fines and Fees in Philadelphia*, *supra* note 23, at 5.

²⁸ *Ending Debtors’ Prisons*, *supra* note 2, at 16.

²⁹ *Id.*

³⁰ *Fines and Fees in Philadelphia*, *supra* note 23, at 2.

³¹ *Id.* at 5.

³² *Ending Debtors’ Prisons*, *supra* note 2, at 14.

³³ *Id.* at 13 (citing R. Barry Ruback, Alison C. Cares, and Stacy N. Hoskins, *Evaluation of Best Practices in Restitution and Victim Compensation Orders and Payments*, Pennsylvania Commission on Sentencing (2006)).

³⁴ *Torsella: How Local Governments Raise Money*, *supra* note 27.

look.”³⁵ According to a 2020 law review article entitled “America’s Paper Prisons: The Second Chance Gap,” “all fifty states and the District of Columbia have passed laws to reduce the collateral consequences of criminal records and convictions.”³⁶ In addition, “several federal initiatives including the Fair Sentencing Act Guideline Amendment . . . the Obama Administration Clemency Initiative . . . and the First Step Act of 2019 have offered resentencing options for federal inmates.”³⁷

Within our own Commonwealth, there has been a similar recognition that our laws and procedures ought to be more reconciliatory in nature. In 2018, pursuant to the terms of the Clean Slate Act, the state automatically sealed non-conviction and older conviction records, opening the door to employment, educational, and professional opportunities for more than 1.15 million Pennsylvanians.³⁸ Those efforts were buttressed in October 2020, when Governor Wolf signed into law a bill that eliminated costs and fees as a barrier to the sealing of old criminal records.³⁹

Similar efforts are underway within the judicial branch. In May 2019, the Pennsylvania Supreme Court’s Criminal Procedural Rules Committee sought comment on its proposed changes to the rules governing incarceration of indigent debtors.⁴⁰ In our comments, the Interbranch Commission suggested several amendments, and was pleased to learn that the Committee is seeking to both proscribe arbitrary minimum monthly installments for payment plans and strengthen the requirement that all defendants who may be jailed for non-payment of LFOs receive counsel.⁴¹ These efforts dovetail the changes proposed by the Supreme Court’s Civil Procedural Rules Committee in 2020. Although the Interbranch Commission again recommended several amendments to the proposal,⁴² the Committee’s changes, if implemented, will provide greater clarity on the process for seeking *in forma pauperis* (“IFP”) status and increase the frequency of the automatic granting of that status.⁴³ Overall, in both instances, officials in our Commonwealth have recognized the importance of separating poverty from punishment and ensuring that indigent individuals have meaningful access to the legal remedies provided by law.

Importantly, these are necessary changes for which the Board of Pardons *itself* advocates. In the document entitled “Pennsylvania Guide to Pardons” on the Board’s website, Lieutenant Governor

³⁵ Colleen Chien, *America’s Paper Prisons: The Second Chance Gap*, 119 Mich. L. Rev. 519, 525 (2020).

³⁶ *Id.* at 532.

³⁷ *Id.*

³⁸ Sharon Dietrich, “As Covid-19 Continues, Expanding Clean Slate Legislation Will Help People in Need,” *The Philadelphia Inquirer* (July 1, 2020), <https://www.inquirer.com/opinion/commentary/clean-slate-legislation-records-sealed-pennsylvania-covid-19-recovery-20200701.html>.

³⁹ *PLSE Memorandum of Law*, *supra* note 12, at 4.

⁴⁰ The Supreme Court of Pennsylvania’s Criminal Procedural Rules Committee’s Notice of Proposed Rulemaking is available at: <https://www.pacourts.us/storage/rules/Publication%20Supplemental%20Report%20Indigent%20Incarceration%20in%20Summaries%20-%200007611.pdf>.

⁴¹ See Appendix: *Comments to Proposed Changes to the Criminal Procedural Rules Regarding Incarceration of Indigent Debtors*.

⁴² See Appendix: *Comments on Proposed Amendment of Pa.R.C.P. No. 240 and Adoption of Pa.R.J.A. No. 1990*

⁴³ The Supreme Court of Pennsylvania’s Civil Procedural Rules Committee’s Notice of Proposed Rulemaking is available at:

<https://www.pacourts.us/storage/rules/Rec%20281%20Proposed%20Amendment%20of%20PaRCP%20No%20240%20and%20Proposed%20Adoption%20of%20PaRJA%20No%201990%20-%200009735.pdf>.

Fetterman states that, to allow individuals the chance to “participate more fully” in and “contribute to society,” the Board has “eliminated the application fees *so that financial obligations are no longer a constraint*.”⁴⁴ Mr. Fetterman also states that the Board has “cut the red tape” to “ensure an open and transparent pardons process that’s as accessible as possible.”⁴⁵ In short, the Board has eliminated clemency application fees due to its recognition that such obligations preclude access to justice. The elimination of those fees offers minimal relief, however, to those individuals who, a few steps further into the process, will be prohibited from submitting an application due to their inability to pay off outstanding fines, fees, and costs.

Conclusion

For these reasons, and consistent with the Recommendation recently passed by the Pennsylvania Bar Association’s House of Delegates, the Interbranch Commission urges the Board of Pardons to cease requiring, investigating, or considering whether an individual has satisfied their outstanding legal financial obligations when applying for clemency. Along with raising several legal concerns, this policy steers our Commonwealth off-track as it reckons with national calls to make justice accessible for everyone. By making the commitment to allow applicants to have their cases decided based on the enhancement of their character rather than the depth of their wallets, the Board combats systemic problems that operate to the disadvantage of our Commonwealth’s most vulnerable citizens.

Thank you for taking the time to consider our Commission’s comments, and please do not hesitate to let us know if you have any questions or concerns regarding our remarks.

Sincerely,

A handwritten signature in black ink, reading "Lisette McCormick". The signature is fluid and cursive, with a long horizontal stroke at the end.

Lisette McCormick, Esq.
Executive Director

⁴⁴ Pa. Bd. of Pardons, *Pennsylvania Guide to Pardons* 3 (Dec. 4, 2019), <https://www.bop.pa.gov/Documents/P2P%20Pardon%20Booklet-Finalized%20Version-12-4-19.pdf> [emphasis added].

⁴⁵ *Id.*