The Pennsylvania Interbranch Commission
for Gender, Racial, and Ethnic Fairness

601 Commonwealth Ave, Suite 6200
P.O. Box 62545
Harrisburg, PA 17106-2545
717.231.3300, ext. 4138
pa-interbranchcommission.com

April 22, 2024

Mr. Joshua M. Yohe, Counsel
Criminal Procedural Rules Committee
Supreme Court of Pennsylvania
Pennsylvania Judicial Center
PO Box 62635
Harrisburg, PA 17106-2635

Re: Comments on the Criminal Procedural Rules Committee's Notice of Proposed Rulemaking in Response to Enactment of Act 163 (2022)

Dear Mr. Yohe,

On behalf of the Pennsylvania Interbranch Commission for Gender, Racial, and Ethnic Fairness ("Interbranch Commission"), we are writing today in response to the request from the Supreme Court Criminal Procedural Rules Committee for stakeholder input on its proposed rules, published to implement the substantive changes effectuated by Act 163 (2022). Our comments are intended to ensure the equitable and streamlined application of the rules, consistent with the requirements of Act 163. Thank you for this opportunity to comment on the proposed rules, which evidence careful deliberation. We believe that the rules, as amended pursuant to our recommendations below, will serve to distinguish poverty from punishment in summary and court cases in Pennsylvania.

Background

The Interbranch Commission was established by the three branches of Pennsylvania government to implement the findings and recommendations of the 2003 Final Report by the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System;[1] investigate new initiatives that may not have been addressed by that Report; suggest ways to reduce bias in all three branches of government and the legal profession; and increase public confidence in Pennsylvania government. Since its inception, the Interbranch Commission has focused on improving access to justice for all Pennsylvanians, regardless of socioeconomic status. To that end, we submitted comments on the Rules Committee's proposals in 2018 and 2019, which aimed to address the incarceration of possibly indigent individuals for failure to pay case assessments in summary cases. Additionally, in January 2023, we submitted a joint letter with

[1] *See* Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, available at https://pa-interbranchcommission.com/wp-content/uploads/2022/01/FinalReport.pdf.

Pennsylvanians for Modern Courts ("PMC") to the Rules Committee, proposing our own amendments to the Criminal Procedural Rules consistent with the aspirations and requirements of Act 163.

Act 163 provides explicit statutory for courts in both summary and criminal cases to reduce or waive all fines and nearly all costs when an individual is unable to afford them. The Act also permits courts to refer cases to the county's collections staff or private debt collection agencies if the court schedules a payment determination hearing and the defendant receives notice for the hearing but fails to appear. In sum, the Act grants courts additional avenues through which they can collect debt from individuals who can pay, while also permitting courts to end costly and ultimately futile collections efforts for those who cannot.

To ensure that the proposed Criminal Procedural Rules improve judicial economy and equitably benefit low-income Pennsylvanians, we offer the following comments. We have divided our comments into four parts, designed to mirror the primary topics covered by the proposed rules: (1) standards for ability to pay in summary and court cases; (2) procedures for default on payment in summary and court cases; (3) imposing fines, costs, and restitution at sentencing in summary and court cases; and (4) case initiation (pleading guilty or not guilty) in summary cases.

1. Standards for Ability to Pay in Summary and Court Cases

a. Rule 456.1: Ability to Pay Determination (Summary Cases)

The Interbranch Commission supports creating a statutory presumption that an individual is unable to pay legal financial obligations ("LFOs") in a single remittance if the individual meets any of the criteria established in subdivisions (c)(1)-(3) of Proposed Rule 456.1. We also recommend the retention of the "substantial financial hardship" standard created by proposed subdivision (e), which applies when an individual does not meet the presumptive criteria established by (c)(1)-(3) but may still be unable to pay LFOs.

The creation of these two statutory pathways to a determination that an individual is unable to pay is a welcome change from the Rules Committee's proposal in 2019. In our comments on the 2019 proposal, we cited our 2017 report, *Ending Debtors' Prisons in Pennsylvania*, which notes that although "[c]ourts are required to assess the ability to pay before incarcerating an individual who has not paid required LFOs," "Pennsylvania . . . has no standardized process to help judges make that determination, which . . . leads to arbitrary decisions about whether a defendant is able to pay[.]"[2] Our comments also cited reports finding that the issues stemming from the lack of a standardized process persist to this day. Specifically, we noted that magisterial district judges ("MDJs") in Berks County were sending low-level offenders to jail for failure to pay LFOs in a total of 4,021 cases in 2017 and 2018, a figure more than two times that of the second-largest county (York) and more than 20 times the total in each of 45 other counties.[3]

This finding constitutes one example of the significant differences that exist among Pennsylvania's judicial districts when it comes to how MDJs determine a defendant's ability to pay. The adoption of Proposed Rule 456.1 would appreciably reduce such variant outcomes, creating greater uniformity and providing guidance to judges across the Commonwealth. The financial considerations contemplated by

---

[2] Pa. Interbranch Comm'n for Gender, Racial, and Ethnic Fairness, *Ending Debtors' Prisons in Pennsylvania: Current Issues in Bail and Legal Financial Obligations: A Practical Guide for Reform* 1, 17 (July 2017), https://pa-interbranchcommission.com/wp-content/uploads/2021/10/Ending-Debtors-Prisons-in-PA-Report.pdf.

[3] Ford Turner, *District judges in Berks County jail more people for lack of money than anywhere else in Pa*, Reading Eagle (Apr. 23, 2019), https://www.readingeagle.com/news/article/berks-district-judgese-top-pa-list-of-of-lockups-over-collateral/.

subdivision (c) and by the Statement of Financial Ability Form in subdivision (f) help to create a sensible analysis of a defendant's financial situation, thus decreasing the likelihood that an individual will be ordered to pay unduly onerous LFOs. As the proposed rule recognizes, if an individual cannot afford to eat without Supplemental Nutrition Assistance Program ("SNAP") benefits, they cannot afford to pay court debts. Similarly, if the imposition of LFOs would cause a defendant "substantial financial hardship" such that they cannot afford housing, utilities, or other "basic human needs or obligations," LFOs should not be imposed.

While we support the adoption of Proposed Rule 456.1, we suggest several amendments. First, the proposed rule creates as one of its presumptions for an inability to pay LFOs "gross income . . . that is 200% or less than the federal poverty guidelines." As part of our comments in 2019, we recommended that the presumption attach when an individual's income is at or below *125%* of those guidelines. This recommendation is consistent with best practices developed by the National Task Force on Fines, Fees, and Bail Practices.[4] Therefore, we suggest that the Rules Committee amend subdivision (c)(2)(i) of Proposed Rule 456.1 by excising "200%" and inserting "125%."

Secondly, although the rule proposes standards to assist judges in assessing an individual's current ability to pay *in a single remittance*, the rule is less clear on the extent to which those standards apply when setting an affordable payment plan. We recommend that the Rules Committee add language applying the proposed standards both to an individual's ability to pay LFOs in full *and* via monthly installments. In extending the proposed standards to payment plans, the rule should explicitly state that an individual who is deemed unable to pay is also temporarily unable to afford installment plan payments. A person who cannot afford food, housing, or other basic needs should not be required to pay court debts unless and until their financial situation improves. For those instances in which that situation *does* improve, the Rules Committee could set a standardized, graduating payment plan schedule based on one's income. For example, if an individual earns income at a rate amounting to slightly more than the 125% cutoff, the rule could cap payments of LFOs at $5.00 per month. This schedule would improve uniformity of outcomes for Pennsylvanians regardless of where they reside in the Commonwealth and would serve as a valuable roadmap for MDJs, who will otherwise lack guidance on what to do with the financial information in front of them.

Next, the proposal published by the Rules Committee in 2019 expressly proscribed "mandatory minimum" installment payments. In our comments on that proposal, we noted that the proposed provision would "ensure that all defendants have access to payment plans that they can actually afford," thus precluding the rote assignment of payments untethered from defendants' socioeconomic status. In our joint letter with PMC in 2023, we presented a model rule proposing the same. We therefore suggest that the relevant language from the rule proposed in 2019 be added back into the current proposal. Mandatory minimum payments are, by definition, not based on an individualized accounting of one's finances. Therefore, they run counter to the purpose of Proposed Rule 456.1, which is designed to require judges to carefully assess an individual's financial situation, subject to certain standards and presumptive parameters. For this reason, mandatory minimum installment payments should be explicitly proscribed by the proposed rules.

Finally, we recommend that Proposed Rule 456.1 clarify that whenever the court is required to consider an individual's ability to pay, the court must alert the individual of that determination in advance and

[4] Nat'l Task Force on Fines, Fees, and Bail Practices, *Lawful Collection of Legal Financial Obligations: A Bench Card for Judges* 1, 1 (2019), https://www.ncsc.org/__data/assets/pdf_file/0026/17396/benchcard-reformatted-3-13-19.pdf.

provide him or her a copy of the ability-to-pay evaluation form. Ensuring that the individual is aware of the form and its contents before appearing in court will streamline payment determination hearings, promoting judicial economy. Such notice also allows defendants to adequately prepare for a determination hearing likely to have a significant impact on both their case and their future financial status.

b. Rule 702.1: Ability to Pay Determination (Court Cases)

Based on the Interbranch Commission's review, Proposed Rule 702.1 is the analog to Proposed Rule 456.1 for criminal, rather than summary, cases. Because the procedures and determinations in Proposed Rule 702.1 are co-extensive with those proposed in Proposed Rule 456.1, we extend our support to and suggest amendments on the proposed rule consistent with our comments directly above.

2. <u>Procedures for Default on Payment in Summary and Court Cases</u>

a. Rule 456: Default of Payment of Costs, Fines, or Restitution (Summary Cases)

The Interbranch Commission generally supports Proposed Rule 456 but recommends several amendments to improve its implementation. We support the inclusion of language clarifying that "[n]o defendant may be sentenced to imprisonment or probation if the right to counsel was not afforded at the default hearing." However, rather than its inclusion in paragraph eight of the proposed Comment, we recommend that this language be moved to the text of the proposed rule itself. This prohibition was included within the text of the corresponding rule proposed by the Committee in 2019, which we supported in our comments at the time. As courts have observed in the cases cited within the proposed Comment, having counsel present at a hearing which could result in one's imprisonment or assignment to probation is essential to the provision of due process. This right should be made plain in the *text* of the proposed rule, obviating the need to parse the detailed explanatory text of the Comment.

In its present form, subdivision (a)(3) of the proposed rule requires *defendants* to notify the collection entity when they have asked the court for an ability-to-pay hearing due to their delinquent accounts being turned over to that entity. We suggest that the Rules Committee amend this provision by transferring the onus of notifying the collection entity from the defendant to the court. Just as it was the court that sent the case to the collection entity in the first place, so too should the court notify the collector that the defendant has requested an ability-to-pay hearing and that the collector must (at least temporarily) cease attempts to collect from the defendant. Courts are better situated than individual citizens generally – and citizens who may be unable to pay LFOs in particular – to establish contact with collections entities. Moreover, a directive from the court carries with it more authority than does a less formal notice from the defendant and is thus more likely to invite compliance from the outset on the part of the collection entity. Shifting the responsibility to the court on the front end thus avoids unnecessary follow-up from the court in support of the defendant's notice on the back end.

As written, the defendant's liberty may be substantially restricted pursuant to subdivision (c)(2) of the proposed rule. When a defendant appears before the court for a payment determination hearing but that "hearing cannot be held immediately, the [court] shall release the defendant . . . unless [it] has reasonable grounds to believe that the defendant will not appear, in which case, the [court] may set collateral." If collateral is set and the defendant is unable to post it, the court may detain the defendant for up to 72 hours. Under subdivision (c)(2), an individual could be arrested and detained, *even though* that person has voluntarily appeared before the court to request a hearing.

We believe that this provision should be stricken from the proposed rule for two reasons. First, when the individual has already appeared for a determination hearing, it is difficult to imagine that "reasonable

grounds" could nevertheless exist to justify the individual's detention based on a belief that the individual will not appear for the same hearing scheduled on a later date.

Second, as outlined in our February 2022 comments on a separate rule proposal published by this Committee, "although 72 hours appears to be a relatively short amount of time . . . courts have long recognized that . . . confinement in *any* capacity" is a serious matter. Indeed, even a brief stint of detainment can lead to individuals losing their job, housing, or custody of their kid(s).[5] Once exposed to these and other consequences of detention, the likelihood that the defendant can pay the LFOs for which the default hearing was conducted in the first instance decreases. As many of these proposed rules acknowledge, if one loses their job, that individual does not have the means to pay off court debts. Proposed subdivision (c)(2) thus operates counter to Act 163, which, in part, allows courts to end wasteful and fruitless collections efforts for those who cannot pay.

We therefore urge the Rules Committee to strike proposed subdivision (c)(2) *in toto*, save for the following: "If a hearing cannot be held immediately, the issuing authority shall release the defendant on recognizance." If the Rules Committee elects to retain subdivision (c)(2), we suggest that at minimum: (1) collateral should only ever be set for a defendant who has been arrested for failure to appear, and (2) the amount of that collateral should neither exceed the amount of past-due money owed by the defendant nor the defendant's immediate ability to pay.

We also recommend that the Committee update Proposed Rule 456 to clarify the court's options when an individual fails to make payments and is in default. Act 163 permits courts to reduce or waive fines and costs when a person is unable to pay in a single installment or in compliance with an existing payment plan.[6] The proposed rule should clarify that even if a defendant is found *able* to pay, the court still has the authority to place the individual on a new payment plan. This option is missing from proposed subdivision (d)(1). In addition, for individuals found *unable* to pay, subdivision (d)(2) of the proposed rule should provide that the court may waive fines and costs upon a finding that the person cannot pay in a single remittance; the court is not required, in other words, to first attempt placing the defendant on a payment plan.

Lastly, the Comment to Proposed Rule 456 states that juveniles who do not pay fines, costs, or restitution in summary cases within 10 days should be certified delinquent and have their cases proceed pursuant to the Rules of Juvenile Court Procedure and the Juvenile Act rather than these rules of criminal procedure. We recommend that instead of establishing a 10-day window within which a juvenile must pay or be certified delinquent, the proposed rule should limit referral to juvenile court to two instances: (1) when the court schedules a payment determination and finds that the juvenile is able to pay, or (2) when the juvenile fails to appear at that hearing.

By limiting the instances in which juveniles may be certified delinquent in this manner, the Rules Committee avoids needlessly trapping youth in the juvenile justice system due simply to their poverty. Such an outcome contravenes the detailed findings and evidence-based recommendations of the Juvenile Justice Task Force Report published in 2021. In its report, the Task Force found that "[m]ost young people become involved in the juvenile justice system for low-level behavior, with at least two-thirds of

---

[5] Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, Stan. L. Rev. 711, 713 (2017) [hereinafter *Downstream Consequences*], https://review.law.stanford.edu/wp-content/uploads/sites/3/2017/02/69-Stan-L-Rev-711.pdf.

[6] *See* Act 163, § 1 (2022) (Pub. L. No. 2175) (amending 42 Pa.C.S. § 9730(b)(3)(i)).

youth entering the system for . . . failure to pay fines."[7] Based on this finding, the bipartisan Task Force recommended that stakeholders "prevent unnecessary system involvement by eliminating . . . fines and most court fees and costs" for youth.[8] By amending Proposed Rule 456 as outlined in this paragraph, the Rules Committee will reduce system involvement, allowing youth the chance to get their lives back on track.

b. Rule 470: Procedures Related to License Suspension After Failure to Respond to Citation or Summons or Failure to Pay Fines and Costs

The Interbranch Commission generally supports Proposed Rule 470, which appears designed to reduce the instances in which Pennsylvanians have their driver's license suspended for falling behind on LFO payments. Pursuant to that purpose, subdivision (a) would increase the time frame within which a defendant must respond to a citation or summons in a summary case from 10 to 30 days. We support this change. The suspension of one's license is a significant deprivation of liberty. Ensuring that individuals have sufficient time to respond in the manner best tailored to the resolution of their cases is essential to the equitable dispensation of justice.

When one's license is suspended, the individual is at risk of being unable to commute to work. That individual is faced with a difficult choice to either jeopardize one's employment status or drive with a suspended license to retain employment. While the latter choice more directly increases the chances that the individual will be convicted on new charges in the future, so too does the former. When a person loses his or her job, "acquisitive criminal activities such as larceny or robbery might become comparatively more attractive as a means of making up for lost income."[9] In either circumstance, the increased risk of recidivism increases courts' expenditure of resources downstream, a consequence that Act 163 explicitly seeks to avoid. The Committee's proposed amendments to subdivision (a) reduce the likelihood of these unintended consequences, providing individuals more time to respond appropriately to a citation or summons.

Proposed Rule 470 also largely addresses the concerns we expressed in our comments on the Rules Committee's 2019 proposal. Under the current rules, a defendant effectively has 25 days to either make a payment or agree to a new payment plan before MDJs can send notice to the PA Department of Transportation ("PennDOT") that it may begin the process of suspending the individual's driver's license. As we noted in comments in 2019, "[t]his type of automatic license suspension, without a pre-deprivation [payment determination] hearing, has been deemed an unconstitutional practice when challenged in other states, such as Michigan and Tennessee." At the time, we did not feel that the proposed rules would have resolved this issue, because they would have provided defendants only 15 days to respond to a default notice and would have prohibited the suspension of their drivers' licenses *only if* they responded within that time (e.g., even absent a constitutionally required hearing).

In subdivisions (e) and (f) of the current Proposed Rule 470, if the defendant meets certain criteria, the court is either categorically precluded from notifying PennDOT that license suspension is permissible or may only notify PennDOT if a hearing is first held in which it determines that the defendant is able to pay. We support these proposed provisions, as they comport with considerations of due process. If the

---

[7] Pa. Juvenile Just. Task Force Report: Executive Summary 1, 2 (June 2021), https://www.pacourts.us/Storage/media/pdfs/20210622/152646-pajuvenilejusticetaskforcereportexecutivesummary_final.pdf.

[8] The Pa. Juv. Just. Task Force Report and Recommendations 1, 5 (June 2021), https://www.pacourts.us/Storage/media/pdfs/20210622/152647-pajuvenilejusticetaskforcereportandrecommendations_final.pdf.

[9] *Downstream Consequences*, *supra* note 5 at 760.

defendant does *not* meet those criteria, however, and is instead in default or has failed to respond to the citation or summons within 15 days of the court's notice of potential license suspension, proposed subdivisions (a) and (b) apply. Subdivision (a) provides an explicit avenue through which the defendant's license may be suspended without the required deprivation hearing described above. Subdivision (b) similarly permits that suspension if: (1) the defendant defaults, (2) has not responded within 15 days by paying off the LFOs or entering into a new installment plan agreement, and (3) the court has determined that the individual is able to pay. While criterion (3) *alludes* to a determination via an ability-to-pay hearing, it does not explicitly require one. Therefore, we urge the Rules Committee to amend proposed subdivisions (a) and (b) so that in both instances, one's license is not suspended without a pre-deprivation, ability-to-pay hearing first being held.

Lastly, under Rule 470 as it currently exists, a defendant in default first receives a 10-day notice that a bench warrant will be issued if an individual fails to pay or fails to appear before the court. If the individual has not responded at the expiration of those 10 days, a bench warrant is issued, and the defendant is then sent a second notice advising that the individual's license will be suspended in 15 days if the defendant fails to respond. Proposed Rule 470 would do away with this practice, instead requiring that the notice of an impending license suspension be sent *upon default* rather than at the expiration of the 10-day notice. The proposed rule thus permits simultaneous issuance of the suspension notice and the 10-day notice issued upon default, to create a "stronger incentive," as the Publication Reports notes, for the defendant to respond in a timely manner.

We suggest that the Rules Committee remove this change to existing practice, which, as amended pursuant to our recommendations *supra*, should prove workable and honor one's right to a pre-deprivation hearing. As outlined above, if defendants do not respond within 15 days to the notice that their license may be suspended, the court must schedule a hearing. If defendants fail to appear at that hearing, the court may then issue a warrant. This practice retains the incentive for defendants to respond, precluding their ability to circumvent punishment by simply avoiding the court. It also honors the due process requirements that attach when one may be deprived of his or her liberties.

c. Rule 706: Default of Payment of Costs, Fines, or Restitution (Court Cases)

Based on the Interbranch Commission's review, Proposed Rule 706 is the analog to Proposed Rule 456 for criminal, rather than summary, cases. Because the procedures and determinations in Proposed Rule 706 are largely co-extensive with those proposed in Proposed Rule 456, we extend our support to and suggest amendments on the proposed rule consistent with our comments on Rule 456 above.

In addition to recommending generally that the Rules Committee incorporate our proposed changes to Rule 456 into Rule 706, we also suggest one change specific to Rule 706. The current version of the Rule provides a bright-line bar on committing the defendant to prison for failure to pay fines or costs unless the court has first held a hearing in which it determines the individual is financially able to pay those LFOs.[10] This explicit prohibition is removed from the proposed rule and is not clearly re-asserted in its new provisions. It is important that the rules for both summary and criminal cases expressly place judges on notice that it is unlawful to jail a person for non-payment unless the court first makes a finding that the individual can pay. The proposed rules should also require that this finding be in writing. This requirement was set forth in the Rules Committee's prior proposals and should be included in the current one. Written findings provide key insights into why the court has found that the individual is able to pay

[10] *See* Pa.R.Crim.P. 706(a) (2006) (providing that "[a] court shall not commit the defendant to prison for failure to pay a fine or costs unless it appears after hearing that the defendant is financially able to pay the fine or costs").

and has ordered his or her incarceration. They also improve transparency, thus encouraging equal application of the law.

3. <u>Imposing Fines, Costs, and Restitution at Sentencing in Summary and Court Cases</u>

a. Rule 702: Aids in Imposing Sentence

The Interbranch Commission supports Proposed Rule 702, save for one suggestion. The proposed Comment provides in paragraph five that "[u]nless it appears of record that the defendant 'is or will be able to pay the fine and the fine will not prevent the defendant from making restitution or reparations to the victim,' the judge shall not impose a fine.'" We recommend that this proscription be removed from the Comment and inserted into the text of the proposed rule itself. Rule 706 is entitled "Aids in Imposing Sentence." Rather than existing as a useful instruction obscured within a somewhat lengthy Comment, this provision provides helpful guidance to judges, furthering the purpose after which the rule is named. It would be better served as a component part of the rule itself rather than as a directive in the Comment.

b. Rule 705.2: Fines – Sentencing

The Interbranch Commission agrees with and recommends the retention of Proposed Rule 705.2. Subdivision (b) of the proposed rule states that a judge may not order the defendant to pay a fine until the judge reviews his or her ability to pay pursuant to Rule 702 and conducts a colloquy on the record in which the judge determines that the defendant can pay and that payment of the fine will not prevent the defendant from making restitution. We welcome a rule that requires an on-the-record accounting of the defendant's ability to pay. This best practice encourages judges to "show their work" in a manner designed to solemnize the determination and to assign payment only when appropriate, based on the evidence presented.

4. <u>Case Initiation (Pleading Guilty or Not Guilty) in Summary Cases</u>

a. Rules 403 (Contents of Citation), 407 (Pleas in Response to Citation), 412 (Pleas in Response to Summons), and 422 (Pleas in Response to Summons)

Consistent with our comments above, we support the proposed increase in time from 10 to 30 days for defendants to respond and enter a plea for a summary citation. Under the current rules, any person charged with a summary traffic or criminal offense has only 10 days to respond to that citation by pleading guilty or not guilty. If an individual misses that deadline, serious consequences attach: the court will issue an arrest warrant, and if it is a traffic case, the court may ask PennDOT to suspend the individual's driver's license. Providing individuals an extra 20 days affords them a fairer opportunity to determine the best course of action to pursue, which may involve consulting a lawyer or contacting the court. By facilitating individuals' ability to make well-informed decisions regarding their cases, the proposed rules will likely reduce the number of people who face arrest warrants and license suspensions, preserving both courts' finite resources and Pennsylvanians' liberties.

b. Rules 403, 408 (Not Guilty Pleas – Notice of Trial), 412, and 423 (Not Guilty Pleas – Notice of Trial)

The Interbranch Commission strongly supports the proposed rules' elimination of the monetary "collateral" otherwise required to plead not guilty to a summary offense. Under the existing rules, an individual charged with a minor summary traffic or criminal offense who wishes to plead not guilty must first pay *the entire amount* of fines or costs that would be imposed *if* the person were convicted. The only exception to this requirement exists when the person physically appears at the courthouse to ask the judge to reduce that amount.[11]

[11] *See, e.g.,* Pa.R.Crim.P. 403(B)(2)(a)(ii) (2018).

Such "collateral" is intended to ensure the court has possession of a certain amount of the individual's money if that individual fails to appear for court or is eventually convicted. However, as the Rules Committee notes in its Publication Report, this practice is "fundamentally unfair" for two reasons. First, it is arguably unfair to order an individual who has not yet been (and may never be) convicted to preemptively pay off LFOs that would otherwise apply only if that individual has in fact been found legally culpable. Second, while this requirement may be waived if the person appears in court to ask for a payment reduction, this procedure places the burden on low-income individuals, who are less likely to have the funds to own a car, access public transit, or otherwise find travel to the courthouse to request a reduction. The proposed rules' elimination of collateral in these instances facilitates equal access to justice for all Pennsylvanians.

c. Rules 409 (Guilty Pleas), 414 (Guilty Pleas), and 424 (Guilty Pleas)

Although the proposed rules would extricate low-income individuals from needing to appear in court to request an alteration in payment pursuant to a *not guilty* plea, they do not similarly remove that requirement in the context of a *guilty* plea. Pursuant to Rules 409, 414, and 424, if a person wishes to plead guilty but is without the financial means to pay, that person must appear before the court to seek an installment plan. As above, the people who are most likely to require an affordable payment plan are precisely the individuals least likely to be able to afford traveling to the court to request one. We therefore recommend that the relevant rules set forth a mechanism by which a person may plead guilty by mail or electronically. Upon entering that guilty plea, the defendant could have a time frame, such as 30 days, within which the individual must contact the court to set up a payment plan with court staff. As amended, this practice would both lighten the burden borne by low-income individuals and provide greater consistency with the procedures proposed for not guilty pleas in Rules 403, 408, 412, and 423.

d. Rules 403, 408, 409, 412, 413 (Not Guilty Pleas – Notice of Trial), 414, 423, 424, 456, 470, and 706

If adopted, the proposed rules would require defendants to provide updated telephone numbers and mailing addresses to the court so that court personnel may contact them as needed. We recommend that the Rules Committee update the relevant rules to also empower courts to collect defendants' email addresses and, if they are so equipped, to provide notice to defendants of hearings and payment due dates via text message or email. In the same way that automated reminders help individuals pay their phone bills, student loans, or electricity bills, so too would reminders encourage individuals to appear for court or tender payments of their LFOs in a timely manner.

As we noted in a separate set of comments to the Allegheny County Bar Association ("ACBA"), text message reminders about upcoming court dates and similar obligations are a low-cost, low-tech best practice proven to improve failure to appear ("FTA") rates. The benefit of this best practice lies in recognizing that most individuals do not miss court appointments because of a calculated decision to abscond from the jurisdiction; rather, they fail to appear because of mere forgetfulness or a genuine lack of knowledge.[12] Research demonstrates that simple reminders to defendants have a considerable impact. Live-caller reminders in Jefferson County, Colorado, postcard reminders in fourteen of Nebraska's counties, and SMS text messages in New York City all helped to reduce FTAs by statistically significant proportions.[13] As we observed in our comments to the ACBA, "[a] low cost [practice] that has been

[12] John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 Wash. L. Rev. 1725, 1725 (2018), https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=4079&context=wlr.
[13] *Id.* at 1766.

shown to increase attendance at court appointments . . . gives accused individuals the chance to . . . succeed[.] By all accounts, that is the measure of a justice system that works for everyone."

5. Conclusion

Thank you for the opportunity to provide comments on the Committee's proposed changes to the Pennsylvania Rules of Criminal Procedure. If you have any questions or concerns regarding our input, please do not hesitate to contact us by phone, at (717) 998-1297, or by email, at maraleen.shields@pacourts.us or brendan.bertig@pacourts.us. We look forward to continuing to work with you to draft and implement state rules that advance the equitable administration of justice in our Commonwealth.

Sincerely,

Carlos Graupera
Chair, Criminal Justice Committee

Maraleen Shields, Esq.
Executive Director

Brendan Bertig, Esq.
Staff Attorney

cc: Interbranch Commission Members
Interbranch Commission's Criminal Justice Committee Members
Andrew Christy, Esq., Criminal Justice and Poverty Attorney, ACLU-PA
Deborah Gross, Esq., President and CEO, Pennsylvanians for Modern Courts