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April 24, 2024

Joshua M. Yohe, Counsel
Criminal Procedural Rules Committee
Supreme Court of Pennsylvania
Pennsylvania Judicial Center
P.O. Box 62635
Harrisburg, PA 17106-2635
Via e-mail: criminalrules@pacourts.us

Re: Proposed Amendment of Pa.R.Crim.P. 403, 407, 408, 409, 411, 412, 413, 414, 422, 423, 424, 454, 462, 470, 702, 704, 705.1, 706, 1002, and 1030, adoption of Pa.R.Crim.P. 454.1, 456.1, 456.2, 702.1, 705.2, and 706.1, and rescission and replacement of Pa.R.Crim.P. 456

Dear Mr. Yohe:

We write to submit comments on the Supreme Court of Pennsylvania Criminal Procedural Rules Committee's above-referenced proposed amendment to Rule of Criminal Procedure 706.

The Public Interest Law Center is a nonprofit civil rights law firm that works to advance the civil, social, and economic rights of communities in the Philadelphia region facing discrimination, inequality, and poverty. We combine targeted litigation, education, advocacy, and organizing to secure access to fundamental resources and services. As part of our mission, the Law Center works to interrupt the cycle of poverty perpetuated by the criminal legal system by dismantling barriers to employment for people with criminal records. The Law Center urges the Committee to consider amendments to Rule of Criminal Procedure 706 that will help ensure defendants living in poverty are not punished for being poor, in violation of their constitutional rights.

Poverty, inequality, and criminal system involvement are closely intertwined. It is estimated that 80% of incarcerated individuals, the majority of whom are people of color,¹ were low-income before they were convicted.² Upon release from incarceration, people with criminal records face

¹ African Americans and Hispanics represent 56% of the incarcerated population in the US despite being only 32% of the country's population as a whole. See NAACP Criminal Justice Fact Sheet, available at <https://naacp.org/resources/criminal-justice-fact-sheet>; see also E. Ann Carson, "Prisoners in 2022," U.S. Department of Justice Office of Justice Programs, Bureau of Justice Statistics (Nov. 2023) at 13, available at <https://bjs.ojp.gov/document/p22st.pdf> (reporting that in 2022, Black individuals were imprisoned at five times the rate of white individuals).

² Saneta deVuono-powell, Chris Schweidler, Alicia Walters, and Azadeh Zohrabi, "Who Pays? The True Cost of Incarceration on Families," Ella Baker Center (2015) at 9, available at <https://ellabakercenter.org/wp-content/uploads/2022/09/Who-Pays-FINAL.pdf>; see also Bernadette Rabuy and Daniel Kopf, "Prisons of Poverty:

barriers to employment that further reduce their income level, including hiring discrimination, criminal record bans, and occupational licensing bars.³ As a result, nearly 30 percent of formerly incarcerated individuals are unemployed,⁴ with each additional year of imprisonment reducing the likelihood of employment by nearly 4 percent.⁵ The negative effect of incarceration on income is compounded by racism: one study estimated that the impact of incarceration on lowering wages is twice as large for formerly incarcerated Black and Latino individuals than their white counterparts.⁶

In addition to the collateral costs of being convicted of a crime, many convictions carry direct financial burdens. Approximately two-thirds of incarcerated individuals have been assessed court fines and fees,⁷ and almost a quarter of criminal cases include restitution.⁸ As the Pennsylvania Rules of Criminal Procedure make clear, failing to pay court-imposed financial obligations can trigger yet another cascade of legal consequences. Defendants in default for nonpayment can have their probation term extended or revoked, leading to jail time and in some instances, a new criminal case. These new penalties depress earning potential even further, increase the rate of recidivism, and restart a vicious cycle once more.⁹

To help break this cycle, Rule of Criminal Procedure 706, which governs the default of payment of fines, fees, and restitution, should be revised to include affirmative procedural safeguards for criminal defendants who fail to pay their court-ordered financial obligations, and an express prohibition against imprisoning defendants solely because they are unable to pay.

These principles have their origins in well-settled constitutional law: over 40 years ago, the U.S. Supreme Court in *Bearden v. Georgia* ruled that defendants who fail to pay court-imposed debts cannot be jailed absent a finding that the defendant “has willfully refused to pay the fine or restitution when he has the means to pay” 561 U.S. 660, 668 (1983). The Court held that “[t]o do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.” *Id.* at 672. In the decades since,

Uncovering the Pre-incarceration Incomes of the Imprisoned,” Prison Policy Initiative (July 9, 2015), available at <https://www.prisonpolicy.org/reports/income.html>.

³ See L. Couloute and D. Kopf, “Out of Prison & Out of Work: Unemployment among Formerly Incarcerated People,” Prison Policy Initiative (July 2018), available at <https://www.prisonpolicy.org/reports/outofwork.html>. See also “Legal Rights, Remedies & Limitations: Employment of People with Criminal Records in Pennsylvania,” Community Legal Services of Philadelphia (Jun. 2023), available at <https://clsphila.org/wp-content/uploads/2015/08/WORKING-Legal-Rights-Remedies-and-Limitations-June-2023.pdf>.

⁴ Couloute and Kopf, *supra* n. 3.

⁵ Terry-Ann Craigie, Ames Grawert, and Cameron Kimble, “Conviction, Imprisonment, and Lost Earnings,” Brennan Center for Justice (Sept. 15, 2020) at 13, available at <https://www.brennancenter.org/media/6676/download>.

⁶ deVuono-powell et al., *supra* n. 2 at 21.

⁷ Kiren Jahangeer, “Fees and Fines: The Criminalization of Poverty,” American Bar Association (Dec. 16, 2019), available at https://www.americanbar.org/groups/government_public/publications/public_lawyer_articles/fees-fines/.

⁸ Jeffrey T. Ward et al., “Imposition and Collection of Fines, Fees, and Restitution in Pennsylvania Criminal Courts,” ACLU of Pennsylvania (rev. Mar. 1, 2021) at 4, available at https://www.aclupa.org/sites/default/files/field_documents/fines_and_costs_report_12.18.2020_0.pdf.

⁹ U.S. Department of Justice, Dear Colleague Letter to Courts Regarding Fines and Fees for Youth and Adults (April 20, 2023) at 3, available at <https://www.justice.gov/opa/press-release/file/1580546/download>.

Pennsylvania courts have repeatedly affirmed that “a court may not constitutionally imprison someone for nonpayment of court costs and fines alone,” and that pursuant to the principles enunciated in *Bearden*, specific procedural safeguards must be put in place when a defendant is in default of payment. *See Commonwealth v. Mauk*, 185 A.3d 406, 411 (Pa. Super. 2018).

The Law Center urges the Committee to ensure that these safeguards are more clearly and expressly articulated in Rule 706. First, Rule 706 should explicitly require the court to conduct an inquiry into the reasons for a defendant’s failure to pay in every default hearing, as mandated by the case law. *See, e.g., Commonwealth v. Dorsey*, 476 A.2d 1308, 1312 (Pa. Super. 1984) (reversing the lower court for failing to “inquire into the reasons for appellant’s failure to pay”); *Commonwealth v. Eggers*, 742 A.2d 174, 175-76 (Pa. Super. 1999) (holding that “a proper analysis should include an inquiry into the reasons surrounding the probationer’s failure to pay”); *Commonwealth v. Allshouse*, 969 A.2d 1236, 1242-43 (Pa. Super. 2009) (“the court must inquire into the reasons for a defendant’s failure to pay”) (internal quotation marks and citation omitted); *Commonwealth v. Marshall*, 304 A.3d 739 (Pa. Super. 2023) (reversing the lower court for failing to make the “requisite inquiry . . . into [defendant’s] ability to pay” and instead “impermissibly treat[ing] nonpayment automatically as a technical violation of probation”). The court has an “independent obligation” to conduct an inquiry into the defendant’s ability to pay even if “the defendant for some reason makes no effort to do so.” *Marshall*, 304 A.3d 739 (citing *Ballard*, 814 A.2d at 1247 and *Dorsey*, 476 A.2d at 1312) (internal footnote omitted).

Second, Rule 706 should affirmatively state that the court may only commit a defendant to prison for failure to pay if the court makes a “specific determination and findings” that the defendant “willfully refused to pay.” *Dorsey*, 476 A.3d at 1312. As the Superior Court in *Mauk* laid out:

To decide if a refusal to pay is willful, the finder of fact must examine the totality of the defendant’s life circumstances. If one’s effort to secure the funds owed was made in good faith, any nonpayment is excused. In other words, contempt has a *mens rea* element of specifically intending to defy the underlying court order, and impossibility of performance of the court-ordered act is an absolute defense.

Commonwealth v. Mauk, 185 A.3d 406, 411 (Pa. Super. 2018) (applying the reasoning of *Bearden* to contempt proceedings). Whether a defendant’s default is considered in the context of a revocation hearing or a contempt proceeding, the burden is on the state “to prove that the [defendant] was somewhat at fault by failing to take sufficient bona fide efforts to acquire or save the necessary resources to pay for treatment.” *Miller v. Pennsylvania Board of Probation and Parole*, 784 A.2d 246, 248 (Pa. Cmwlth. 2001). If the Commonwealth cannot establish willful refusal to pay, the court must consider alternatives to imprisonment. *See, e.g., Eggers*, 742 A.3d at 176.

Finally, Rule 706 should incorporate into the text of the rule the constitutional requirement that a defendant in default must be afforded counsel before being sentenced to imprisonment or

probation. *See Mauk*, 185 A.3d at 412; *Commonwealth v. Diaz*, 191 A.3d 850, 862 (Pa. Super. 2018). As the Superior Court explained in *Diaz*:

an indigent defendant's right to court-appointed counsel is triggered in any proceeding in which the court finds there is a likelihood of imprisonment. Thus, we hold that upon the trial court's determination at the civil contempt hearing that there is a likelihood of imprisonment for contempt and that the defendant is indigent, the court must appoint counsel and permit counsel to confer with and advocate on behalf of the defendant at a subsequent hearing.

Diaz, 191 A.3d at 862; *accord Alabama v. Shelton*, 535 U.S. 654 (2002) (holding that the right to counsel also extends to indigent defendants sentenced to probation).

As currently drafted, the text of Proposed Rule 706 does not comprehensively and clearly incorporate the forgoing case law. And as that case law reflects, judges are not always aware of the legal safeguards that are required when a defendant is in default. To prevent defendants from being unconstitutionally jailed for inability to pay, we propose specifically revising Rule 706 as follows:

- Amend Rule 706(a) to expressly state that it is unlawful for the court to commit a defendant to prison unless the court makes a specific determination and findings that the Commonwealth has proven the defendant willfully refused to pay:

A court shall not commit the defendant to prison for failure to pay a fine or costs unless ~~it appears~~ **the court determines** after a hearing that the **Commonwealth has established the** defendant is ~~financially able~~ **willfully refused** to pay the fine or costs.

- Amend Rule 706(c) to make clear that the judge's obligation to determine a defendant's ability to pay includes an independent, meaningful inquiry into the reasons for a defendant's failure to pay:

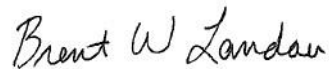
Determination. The judge shall determine a defendant's ability to pay pursuant to Rule 702.1. **As part of this determination, the judge shall inquire into the reasons for a defendant's failure to pay, examining the totality of the defendant's life circumstances and taking into account good faith efforts to secure the funds owed.**

- Add a provision to Rule 706 codifying the right to court-appointed counsel prior to being sentenced to imprisonment or probation for nonpayment:

The court must appoint counsel and permit counsel to confer with and advocate on behalf of a defendant before the court can impose a sentence of imprisonment or probation.

We thank the Committee for its commitment and dedication to revising the Pennsylvania Rules of Criminal Procedure, and to ensuring that the provisions governing the collection of fines, costs, and restitution are just. We hope that the Committee will consider the proposed revisions to Rule 706 to safeguard important constitutional rights of low-income defendants, and to help “remind the lower court[s] that in Pennsylvania, we do not imprison the poor solely for their inability to pay fines.” *Eggers*, 742 A.2d at 176.

Respectfully submitted,



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