



115 State Street
Harrisburg, PA 17101

717-234-7403
717-234-7462 (Fax)

pacdl@pacdl.org
www.pacdl.org

August 23, 2019

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

Re: Proposed Amendment to Pennsylvania Rules of Criminal Procedure Rule 117 - Availability and Payment Determination Hearings

Dear Attorney Wasileski:

The Pennsylvania Association of Criminal Defense Lawyers (PACDL) is a professional association of attorneys admitted to practice before the Supreme Court of Pennsylvania and who are actively engaged in providing criminal defense representation. As such, PACDL presents the perspective of experienced criminal defense attorneys who aim to protect and ensure by rule of law those individual rights guaranteed by the Pennsylvania and United States Constitutions, and work to achieve justice and dignity for defendants. PACDL's membership includes more than 950 private criminal defense practitioners and public defenders throughout the Commonwealth.

PACDL supports the goal of the proposed amendment to clarify that each judicial district must provide continuous coverage to address defendants arrested on warrants for failure to pay fines, costs, or restitution. However, we have significant concerns about what the practical outcome will be if the on-call judge is prohibited from holding a payment determination hearing and setting the defendant on a new payment plan. If the on-call judge is required to either release the defendant or set collateral and incarcerate the defendant, we are concerned that some judges will routinely choose the latter.

We echo the concerns raised by the ACLU of Pennsylvania in its comments. Based on the data that the ACLU of Pennsylvania has obtained from the Administrative Office of Pennsylvania Courts, there appears to be a substantial problem in certain counties and with certain judges who jail defendants for "failure to post collateral." The sheer number of defendants jailed each year under these circumstances is alarming and warrants immediate attention from this Committee and the Supreme Court.

One of the major problems is that counsel is rarely, if ever, involved in these proceedings. As a result, our members have little first-hand experience with how magisterial district judges handle fines and costs collections, and the "failure to post collateral" procedure is unique to those courts. We are unaware of any magisterial district judge who has ever appointed counsel for an indigent defendant who faces three days of incarceration for failure to post collateral.

This is a significant problem, and the Committee should revise the Rules to more clearly require the right to counsel at any proceeding where a court sets "collateral" and then incarcerates the defendant who is unable to pay

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it. Not only will this promote transparency and accountability, it is also required by the law. Rule 122 already requires that a court in a summary case appoint counsel whenever “there is a likelihood that imprisonment will be imposed,” and the Superior Court ruled decades ago that this Rule prohibits a court from incarcerating a person for nonpayment of fines or costs without appointing counsel. *See Commonwealth v. Farmer*, 466 A.2d 677, 678 (Pa. Super. Ct. 1983). Last year, the Superior Court also found such a right to counsel grounded in the Fourteenth Amendment. *See Commonwealth v. Diaz*, 91 A.3d 850, 862 (Pa. Super. Ct. 2018) (explaining that “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”) (emphasis added). We believe that these principles apply equally whenever a court incarcerates a defendant for “failure to post collateral.”

In conclusion, PACDL urges the Committee to not make any recommendations that will lead to even more indigent people being unlawfully and unconstitutionally jailed. Rather, the Committee should recommend changes to the Rules that will put an end to this type of incarceration, particularly when the defendant has been denied the right to counsel. These summary offenses are by definition minor. We should not tolerate courts imprisoning indigent Pennsylvanians, and the Rules should not encourage that practice.

Sincerely,

A handwritten signature in black ink, appearing to read "Bradley Winnick", enclosed in a thin black rectangular border.

Bradley Winnick
President