

COUNTY OF PHILADELPHIA :
: ss.
COMMONWEALTH OF PENNSYLVANIA:

AFFIDAVIT

Tumar Alexander, being first duly sworn according to law, deposes and says as follows.

1. I am the Managing Director for the City of Philadelphia, and I am authorized to make this Affidavit on its behalf. My duties include the oversight of the City's public safety departments which include the Philadelphia Police Department, Department of Prisons, and Philadelphia Fire Department.

2. The City of Philadelphia is very concerned about the imposition and collection of fines, fees and costs (collectively "fines and fees") in criminal proceedings against people without the financial resources to pay them. This includes those whose incomes entitled them to be represented by the Office of the Public Defender at the time of their criminal proceedings ("hereafter, "underlying prosecutions"), and those who would be able to proceed *in forma pauperis* in civil proceedings at the time they are appealing to the court for waiver or expungement of those fines and fees.

3. On May 5, 2021, the City of Philadelphia published its report *The Impact of Criminal Court and Prison Fines and Fees in Philadelphia*, <https://www.phila.gov/documents/the-impact-of-criminal-court-and-prison-fines-and-fees-in-philadelphia/>. That report documents the damage done to Philadelphians, their families and their neighborhoods by fines and fees imposed on people without the ability to pay them, and expresses the City of Philadelphia's opposition to any effort to collect or enforce those fines and fees.

4. As detailed in its report, the City is working to reduce fines and fees in the Department of Prisons and is also working with its judicial partners to reform how Court fines and fees are charged to criminal defendants such that impede re-entry and keep people in the justice system longer.

5. On June 30, 2021, citing our *Fines and Fees* Report among many other reports and data, the Board of Governors of the Philadelphia Bar Association unanimously adopted a Resolution Urging The Board Of Pardons To Rescind Immediately Its Newly-Announced Policy Prohibiting Hearings On Applications For Clemency Where There Are Unpaid Fines, Fees, Or Costs From Underlying Convictions, https://www.philadelphiabar.org/page/ResJune21_1?appNum=4. That Resolution was required because the Pennsylvania Board of Pardons – which must approve applications for clemency before they may be reviewed by the Governor – is refusing to consider any such application unless and until the applicant pays all fines and fees appearing in the underlying prosecutions. The Report for that Resolution is attached hereto as Exhibit A.

6. Philadelphia Lawyers for Social Equity and Community Legal Services, among other organizations serving and providing legal services for free to low-income people, as well as attorneys acting pro bono on behalf of low-income people, have filed and will file motions to waive and/or expunge fines and fees in their clients underlying prosecutions, so that their low-income clients may have their petitions for clemency heard by the Board of Pardons.

7. By this Affidavit, I wish to express the City of Philadelphia's strong support for any and all such motions and petitions, and ask that any Judge hearing such motion grant the relief of waiver and/or expungement of fines and costs in underlying prosecutions, so that low-income people can obtain the second chance at a better life, for themselves and their families, that only a pardon can provide.



Tumar Alexander
Managing Director
City of Philadelphia

Sworn to and subscribed
Before me this 1st day of September, 2021



Notary Public

My commission expires: June 19, 2022

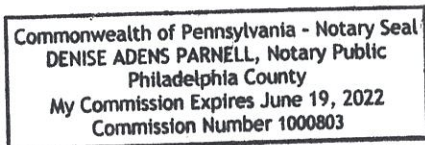


EXHIBIT A

Report in Support of

RESOLUTION URGING THE BOARD OF PARDONS TO RESCIND IMMEDIATELY ITS NEWLY-ANNOUNCED POLICY PROHIBITING HEARINGS ON APPLICATIONS FOR CLEMENCY WHERE THERE ARE UNPAID FINES, FEES, OR COSTS FROM UNDERLYING CONVICTIONS

The chief executive officer of Pennsylvania has always had the power

to remitt, release, pardon and abolish, whether before Judgement or after, all crimes and offences, whatsoever committed within the said Countrey, against the said Lawes, treason and willful and malicious murder onely excepted...[; and to doe all and every other thing and things which vnto the compleate establishment of Justice vnto Courts and Tribunalls, formes of Judicature and manner of proceedings doe belong, altho' in these presents expresse mencon bee not made thereof;¹

This plenary power to “doe ... Justice” was exercised without limitation until 1872, when Article IV (Executive), Section 9 was added to the Constitution of the Commonwealth of Pennsylvania. That amendment imposed a condition precedent to the granting of pardons and commutations: that the applicant must first obtain the recommendation of an independent board. That limitation remains in effect today:

§ 9. Pardoning power; Board of Pardons.

- (a) In all criminal cases except impeachment the Governor shall have power to remit fines and forfeitures, to grant reprieves, commutation of sentences and pardons; but no pardon shall be granted, nor sentence commuted, except on 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 of Pardons, after full hearing in open session, upon due public notice. The recommendation, with the reasons therefor at length, shall be delivered to the Governor and a copy thereof shall be kept on file in the office of the Lieutenant Governor in a docket kept for that purpose.

1. Pardons and Commutations

A pardon is the forgiveness of a crime. “It not only exempts him from further punishment but relieves him from all the legal disabilities resulting from his conviction.” *Commonwealth v. Sutley*, 378 A.2d 780, 789 (Pa. 1977). Commutation “on the other hand does not obliterate the crime or forgive the offender.” *Commonwealth ex rel. Banks v. Cain*, 28 A.2d 897, 899 (Pa.

¹ Charter to William Penn from King Charles II, dated March 4, 1681, Section V;
<http://www.phmc.state.pa.us/portal/communities/documents/1681-1776/pennsylvania-charter.html>

Super. 1942). A commutation reduces the sentence – e.g., granting parole to those serving sentences of life without parole, or otherwise shortening the length of the punishment (probation and parole).

By its specific terms, the Constitution only subjects these two acts of clemency - pardons and commutations - to the prior review and recommendation by the Board of Pardons. By contrast, there is no such limit on other acts of clemency, specifically including (but not limited to) the power to “remit fines and forfeitures,” which remains “conspicuously unencumbered,” unconstrained, and without limitation. *Cf. Commonwealth v. Williams*, 129 A.3d 1199 (Pa. 2015)(denying challenge to the validity of a reprieve issued by the governor) (“a review of the evolution of Article IV, Section 9(a) establishes that the broad grant of executive reprieve power has never been constitutionally altered or restricted, while the executive clemency powers of pardon and commutation have been significantly constrained by subsequent constitutional amendments.”)

Accordingly, the Board of Pardons is without authority to impose on applicants for clemency the obligation to fully pay “outstanding legal financial obligations” that the Governor has sole, exclusive and unencumbered right to remit.

2. Costs and Fees.

Restitution is “the return of the property of the victim or payments in cash or the equivalent thereof pursuant to an order of the court.” 18 Pa.C.S. § 1106 (h) (definitions). As such it is part of the sentence imposed on a defendant by the Court.

By contrast, costs are not part of the sentence: “Imposition of costs is not part of any penalty imposed even in those cases where there is a conviction. ‘ . . . [A] direction to pay costs in a criminal proceeding is not part of the sentence, but is an incident of the judgment. Costs do not form a part of the penalty imposed by statutes providing for the punishment of criminal offenses.” *Commonwealth v. Giaccio*, 202 A.2d 55, 58 (Pa. 1964) (citations omitted), *rev’d* on other grounds, 382 U.S. 399 (1966).

Indeed, as the Pennsylvania Supreme Court went on to say in *Giaccio*, “liability for the costs remains even after a pardon by the executive.” *Id.* For this reason, it makes no sense in law or logic to deny someone a hearing on a pardon request because of unpaid costs.

3. Hearings

As noted, the governor can only grant a pardon to someone who has been recommended by the Board of Pardons; and the Board of Pardons can only recommend someone to the Governor “after full hearing in open session, upon due public notice.”

In its regulations, the Board of Pardons has specified that the only people who will be given that constitutionally-required hearing are those who have received an affirmative vote by at least two members of the Board at a Merit Review. The regulations define “merit review” as follows:

Merit review—The process of reviewing an application by the Board to determine if the application has sufficient merit to hold a public hearing on the matter.

37 Pa. Code § 81.202 (Definitions).

For this reason, the policy that “**the full balance** [of outstanding legal financial obligations] **must be paid prior to the scheduling of your Merit Review Hearing**” actually means that applicant will never have the public hearing that is required by the constitution for pardon and commutation requests.

4. Access to Justice

Fines, fees and costs have come under intense scrutiny because they keep an individual confined long after completing the entire judicially-imposed sentence. As a recently-published national study demonstrates, millions of individuals and their families nationwide are hurt the existence and permanence of these “debts” and other records linking them to the criminal justice system. barriers were exposed in the December 2020 University of Michigan Law Review under the title, C. Chien, *America's Paper Prisons: The Second Chance Gap*, Michigan Law Review (Vol. 119 No. 3; Dec. 2020). <http://michiganlawreview.org/americas-paper-prisons-the-second-chance-gap> .

Costs and fees have also been the subject of rising concern and opposition in Pennsylvania. In particular:

- In July 2017, the Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness published “Ending Debtors’ Prisons: A Practical Guide for Reform.” The guide was designed to highlight policies and procedures that have led to systemic, data-supported reform in pre-trial systems throughout the country. Along with cash bail, the Interbranch Commission examined the use of economic sanctions against criminal defendants, including the imposition of fines, fees and restitution (also referred to as LFOs). The Commission found that Pennsylvania is one of the leading fifteen states where individuals are incarcerated for failing to pay such fees, and that thousands of Pennsylvanians continue to be jailed for failure to pay LFOs each year. In fact, the Pennsylvania Sentencing Commission has identified at least 36 different county-level costs and fees, in addition to fines and restitution, which can be imposed against defendants in Pennsylvania. “The consequences of failure to pay LFOs can be severe,” noted the Guide. In addition to incarceration, “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 [pose] a significant barrier to employment.”
- In October 2020, the General Assembly adopted a law that eliminated costs and fees as a barrier to the sealing of old criminal records under the Commonwealth’s “Clean Slate” law. Act No. 83 of 2020.

- In October and November 2020, the Office of Community Empowerment and Opportunity of the City of Philadelphia conducted a survey of currently and formerly incarcerated people, and found that the median amount owed by the respondents in criminal court fines and fees was \$2,500; and that 45% of respondents reported criminal court fines and fees in excess of \$3,000. <https://www.plsephilly.org/city-of-phila-oceo-fines-fees-hearing-12-18-2021/>
- In November 2020, Philadelphia Lawyers for Social Equity (PLSE) conducted a review of all cases in which it had filed expungement petitions for clients it had accepted in and after January 2019, and collected data on all prosecutions against them that had been commenced at least seven years before (2013 or earlier). It reports: “In the course of this study, 1,743 individual dockets were reviewed involving 605 PLSE clients. For them, the total amount claimed due and owing is \$1,007,251.27 – an average of \$1,664.88 per client. Because every one of PLSE’s clients is indigent, there is no possibility that such a sum could ever be paid – often, in large part due to the fact that that same criminal conviction is keeping the client from obtaining a better-paying job.” The average amount “owed” per case, seven or more years later, was \$577.55. T. Kose and I. Falzone, *Costs and Fees Charged To Indigent Criminal Defendants In Philadelphia County* (January 6, 2021). <https://www.plsephilly.org/wp-content/uploads/2021/04/City-of-Phila-OCEO-Fines-Fees-Hearing-12-18-2020.pdf>
- In December 2020, The American Civil Liberties Union of Pennsylvania published the first-ever empirical study of the fines, costs, and restitution imposed and collected by Pennsylvania courts in criminal cases. Looking at cases disposed in 2008 and 2013 (i.e., cases with a full ten-year and five-year repayment window, respectively), the study noted that costs were imposed in over 99% of all cases, fines in 37-39% of all cases in which the defendant was represented by a public defender, and restitution in 21-23% of such cases. It also found that, for cases where the defendant was represented by a public defender in Philadelphia County, the average fine remaining unpaid was \$1000 per case (*not* per client) for both years; plus average costs of \$638 for cases disposed in 2013 and \$216 for cases disposed in 2018. By contrast, the average amount of restitution remaining unpaid was \$500, after both five and ten years. J. Ward, N. Link, and A. Christy, *Imposition and Collection of Fines, Costs, and Restitution in Pennsylvania Criminal Courts: Research in Brief*, <https://aclupa.org/en/publications/imposition-and-collection-fines-costs-and-restitution-pennsylvania-criminal-courts>
- In January 2021, the Treasurer of the Commonwealth of Pennsylvania published letters he had written to the leading government bond rating agencies, challenging them to rethink how they regarded unpaid fees and costs, not as an asset but as an indication of problems and racial prejudice in the criminal justice system. <https://www.plsephilly.org/wp-content/uploads/2021/01/RLS-Fines-and-Fees-Letter-FINAL-FINAL-1.14.2021.pdf>

Indeed, the Civil and Criminal Procedural Rules Committees of the Pennsylvania Supreme Court are currently considering whether to expand Rule 240 of the Pennsylvania Rules of Civil Procedure (“In Forma Pauperis”), 231 Pa. Code § 240, to criminal proceedings. Doing so would

eliminate the taxation of costs and fees in future criminal actions, mooted the Board of Pardon's new policy for future indigent applicants for clemency.

The decision of the Board of Pardons to use fees and costs as a complete bar to the hearings necessary for clemency considerations stands in direct opposition to all of these efforts to separate poverty from punishment, and to all other actions of the Board of Pardons to accelerate pardons for those who have clearly demonstrated that they have turned their lives around and deserve a second chance.

For all of these reasons, the Pennsylvania Board of Pardons must immediately rescind the policy that prohibits hearings on applications for clemency where there are unpaid fines, fees, or costs remaining from underlying convictions.

April 22, 2021

