

THE PENNSYLVANIA BAR ASSOCIATION  
LEGAL SERVICES TO THE PUBLIC COMMITTEE

**Recommendation**

The Legal Services to the Public Committee (LSP) recommend that the Pennsylvania Bar Association (PBA) urge the Board of Pardons to rescind immediately its newly announced policy deferring the scheduling of Merit Review hearings on applications for clemency where there are unpaid fines, fees, or costs from underlying convictions, in the interest of the preservation of equal access to justice for all applicants regardless of ability to pay, in alignment with the long-established ability to proceed *in forma pauperis* in civil proceedings<sup>1</sup> and the principles of right to counsel for indigent defendants in criminal proceedings.

**A. Specific Action Requested**

This Recommendation seeks withdrawal or amendment of the policy change announced on the Board of Pardons website, which states, “If you presently have any outstanding legal financial obligations, which may include but not be limited to fines, court costs, supervision fees, and restitution, you are strongly encouraged to satisfy these prior to applying for executive clemency. Failure to do so may result in application processing delays or an adverse decision on your application from the Board.”

This Recommendation calls on the Pennsylvania Board of Pardons, the Lieutenant Governor, and the Governor to cease requesting, investigating or considering outstanding fines, court costs, and/or fees in the consideration of an application for executive clemency by individuals without the ability to pay and, in particular, making the full payment thereof a condition precedent to obtaining a Merit Review hearing on such applications.

**Report**

**A. How this Recommendation Advances the Association’s Purposes**

Consistent with the PBA’s Articles of Incorporation this recommendation, if adopted by the PBA, would advance several of the Association’s purposes:

- (1) Advancing the science of jurisprudence, by ensuring that the Board of Pardons, which is a criminal justice agency of the Commonwealth, decides matters entrusted to it consistent with the requirements of the Constitution, and in accordance with the laws guaranteeing equal protection under the law for all citizens of the Commonwealth; and,
- (2) Promoting the administration of justice, by ensuring that the Board of Pardons, as a criminal justice agency, furthers its Constitutional role by utilizing policies and procedures that comport with law and the inalienable rights to due process and to

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<sup>1</sup> The Pennsylvania Supreme Court has noted “the civil character of costs” in criminal cases. *Commonwealth v. Giaccio*, 202 A.2d 55, 415 Pa. 139, 144-145 (1964).

reputation that are guaranteed by the Constitution of Pennsylvania, by recognizing that access to the Governor for clemency as an essential element of our justice system.

- (3) Supporting equal access to a legal remedy (expungement) that is the only remedy for an indirect, collateral consequence of a judicial determination (conviction) , which falls in line with this Association’s duty to uphold the Constitutional right to counsel promised to all defendants involved with the criminal justice system, guaranteeing equal access to justice, clemency being one element of the criminal justice system, allowing that deserving candidates are given the same opportunity to free themselves of that system.

This recommendation is submitted pursuant to the charge given to the Legal Services to the Public Committee, which “provides assistance in the creation of programs designed to provide for the delivery of legal services to indigent Pennsylvanians, [and] monitors and makes recommendations concerning all legislation regarding unmet legal needs and pro bono service,” because there are tens of thousands of low-income Pennsylvanians who have criminal record histories and who are unable to afford an attorney to represent them, and it affects core rights of individuals involved in the criminal justice system and the procedures utilized by the state to consider them for clemency by the Governor, which is an opportunity granted by the Constitution to all without regard to their ability to pay.

This recommendation is consistent with the PBA Resolution eliminating the requirement of disclosure of all “Juvenile Charges, Adjudications of Delinquency and/or Consent Decrees “from the Application for Clemency. (May 2020).

This recommendation is consistent with the PBA Resolution expanding criteria for expungements, which also supported “Clean Slate” legislation, allowing for expungement of criminal history records. (November 2015).

This recommendation is consistent with PBA Resolution supporting the adoption of the American Bar Association’s Ten Principles of a Public Defense Delivery System, including state funding for indigent criminal defense. (May 2012).

## **B. The Legal Bases for the Recommendation**

The Constitution of the Commonwealth of Pennsylvania, in Article 4, Section 9, gives to the Governor of the Commonwealth the power to grant pardons for any crimes except impeachment upon the recommendation of the Board of Pardons, to which applications for pardons must be submitted. The Board of Pardons has the discretion to decide the criteria by which to make those recommendations, and the information that must be provided in the application.

As an agency of government, the Board of Pardons must act in compliance with the Constitutions and laws of the Commonwealth. In particular, Pennsylvania’s Constitution has consistently recognized (since 1873) the “inherent and indefeasible rights” that every citizen has in of “acquiring, possessing and protecting property and reputation”. Article 1, Section 1.

Very recently, the Board of Pardons has begun to strongly encourage all applicants for clemency to pay all “outstanding legal financial obligations” related to their underlying convictions,

“which may include but not be limited to **court costs, court-imposed fines, court-ordered supervision fees or restitution**” (emphasis in the original); and has announced: “**the full balance must be paid prior to the scheduling of your Merit Review Hearing**” [emphasis again in the original].<sup>2</sup>

Unlike restitution and fines, **fees and costs are not part of the sentence imposed by a judge**, and unlike civil proceedings where indigent parties are excused from having to pay costs, all defendants in criminal proceedings are assessed fees and costs without regard to their ability to pay, resulting in court dockets indicating that hundreds and occasionally thousands of dollars are “owed” by individuals long even decades after they have completely served their sentences.<sup>3</sup>

As a result of this new policy announced by the Board of Pardons, deserving applicants for clemency will not be able to obtain a Merit Review Hearing, which is a condition precedent to obtaining the public hearing on the merits of their applications that is required by the Constitution, simply because of their poverty.

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; ....<sup>4</sup>

This plenary power to “do[~~e~~] ... 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;

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<sup>2</sup> See attached URL from the Pennsylvania Board of Pardons official website, Legal Financial Obligations, <https://www.bop.pa.gov/Pages/Fines-and-Costs.aspx> (last accessed September 8, 2021).

<sup>3</sup> See accompanying 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 (April 5, 2021).

<sup>4</sup> 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> (spelling and usage retained from original document)

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, Commutations and Fines

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. 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 fines 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 and fees 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 their Merit Review 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 **indigent applicants will never have the public hearing** that is required by the constitution for pardon and commutation requests.

### 4. Access to Justice

Since February 2019, the pardon process in Pennsylvania has been almost completely reformed. Changes in the form and the procedure have made the process far more accessible, and lawyers from around the Commonwealth are now providing pro bono service to help low-income individuals apply for the second chance that only a pardon can provide. Those efforts will be entirely for naught if the Board’s policy remains.

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 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.

- Philadelphia Lawyers for Social Equity (PLSE) provides free legal services to low-income individuals seeking to clean up their criminal records. In late 2020, it conducted a review of all cases in which it had filed expungement petition for clients it had accepted since January 2019, and collected data on all prosecutions against them that had been commenced at least seven years earlier (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/2021/01/PLSE-Costs-and-Fees-Data-Report-Jan-2021.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. 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 Policy Committees of the Pennsylvania Supreme Court are currently considering whether to expand Policy 240 of the Pennsylvania Rules of Civil Procedure (“In Forma Pauperis”), 231 Pa. Code § 240, to criminal proceedings.<sup>5</sup> 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 fines, 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 clemency for those who have clearly demonstrated that they have turned their lives around and deserve a second chance.

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<sup>5</sup> See accompanying Supreme Court of Pennsylvania Civil Procedural Rules Committee, “Notice of Proposed Rulemaking, Proposed Amendment of Pa.R.C.P. No. 240 and Proposed Adoption of Pa.R.J.A. No. 1990.”

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, if not for everyone (as the policy once was), then surely for those without the ability to pay.

Respectfully Submitted,  
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Arlene A. Marshall-Hockensmith, Tri-Chair  
Don Smith, Tri-Chair  
PBA Legal Services to the Public Committee

September 9, 2021

***\*Approved by the House of Delegates on November 19, 2021.***