

IN THE SUPREME COURT OF PENNSYLVANIA

No. 13 MAP 2022

THOMAS WASHINGTON,

Appellant,

v.

PENNSYLVANIA DEPARTMENT OF CORRECTIONS,

Appellee.

BRIEF FOR *AMICI CURIAE*

THE AMERICAN CIVIL LIBERTIES UNION OF
PENNSYLVANIA, JUVENILE LAW CENTER, DR. LISA
SERVON, MOTHERS OF INCARCERATED SONS, AND
PENNSYLVANIA INSTITUTIONAL LAW PROJECT IN
SUPPORT OF APPELLANT THOMAS WASHINGTON

On Appeal From The December 30, 2021 Order of the
Commonwealth Court Sustaining Appellee's Preliminary
Objections and Dismissing Appellant's Petition for Review
in No. 485 M.D. 2020

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INTEREST OF AMICI CURIAE

The **American Civil Liberties Union** (ACLU) is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Pennsylvania is one of the ACLU's state affiliates, whose principal mission is to protect the civil liberties of those who live and work in this Commonwealth. The ACLU of Pennsylvania has particular expertise with respect to the assessment and collection of fines, costs, and restitution in criminal cases and has litigated cases involving these issues in courts across the Commonwealth because of the disproportionate harm that this debt causes low-income and indigent Pennsylvanians.

Juvenile Law Center fights for rights, dignity, equity, and opportunity for youth and works to reduce the harm of the child welfare and justice systems, limit their reach, and ultimately abolish them so all young people can thrive. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center's legal and policy agenda is informed by—and often conducted in collaboration with—youth, family members, and

grassroots partners. Since its founding, Juvenile Law Center has filed influential amicus briefs in state and federal courts across the country to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are consistent with children's unique developmental characteristics and human dignity.

Dr. Lisa Servon is the Kevin and Erica Penn Presidential Professor and Chair of the City and Regional Planning Department at the University of Pennsylvania. Her recent research focuses on financial justice and mass incarceration, including the financial toll of incarceration on individuals and families.

Mothers of Incarcerated Sons (MIS) is a coalition of parents impacted by incarceration. MIS advocates for the rights of incarcerated individuals across Pennsylvania. Members of MIS are directly affected by the financial toll of incarceration, including the strain created by increased deductions.

The **Pennsylvania Institutional Law Project (PILP)** is a civil legal aid organization that aims to advance the constitutional and civil rights of people incarcerated, detained, and institutionalized in prisons, jails, and immigration detention centers located in Pennsylvania. PILP

strives to ensure that the thousands of clients it serves every year are treated with dignity by pursuing humane conditions of confinement, safety from violence, and access to medical and mental health care, to the courts, as well as religious and disability accommodations. PILP has sought equitable treatment relating to incarcerated people's funds and income, and litigated cases compelling prisons to comply with all constitutional and statutory requirements relating to incarcerated people's finances, which are vital to their experience in prison and for successful reentry back into society after release.

The American Civil Liberties Union, Juvenile Law Center, Dr. Lisa Servon, Mothers of Incarcerated Sons, and the Pennsylvania Institutional Law Project state that no other person or entity has paid for the preparation of, or authored, this brief in whole or in part.

SUMMARY OF THE ARGUMENT

As this Court has recognized, “[s]tate prisoners plainly have a property interest in the funds in their . . . accounts” that is protected by due process of law. *Bundy v. Wetzel*, 184 A.3d 551, 556 (Pa. 2018).

Accordingly, as in every other instance in which a constitutionally-

protected property interest is infringed by state action, an incarcerated person must be given notice and an opportunity to contest deductions from the account whenever the amount deducted by the prison increases. On this point, *amici* fully endorse the argument set forth by Mr. Washington.

Amici write separately to emphasize the significant harms that increased deductions may create. First, Pennsylvania's system of automatic deductions from incarcerated individuals' accounts causes significant financial and social harms during incarceration. Because prisons do *not* fully provide for incarcerated individuals' living needs, individuals must rely on their own financial accounts to obtain sufficient nutrition, clean and clothe themselves, access the courts, and communicate with loved ones. However, many individuals who are incarcerated have limited, if any, financial resources, and prison labor wages of between \$0.19 and \$0.42 per hour barely permit them to supplement these low balances. Given the small balances held by many, even a slight increase to the amount deducted from financial accounts can have a dramatic impact on individuals' ability to meet their basic needs.

Second, increased deductions will drain even greater amounts of funds from the families of incarcerated individuals. Many families scrape together and deposit funds into financial accounts to ensure that their incarcerated family members can access basic living necessities. Similarly, families often go into debt to cover the costs of visitation and phone calls with their loved ones, and increased skimming of funds from financial accounts will add further strain on these families' limited assets. Families are already placed under tremendous strain when a family member is incarcerated, and every dollar deducted from financial accounts only increases this pressure.

Finally, draining funds from a financial account during incarceration threatens individuals' ability to successfully re-enter society post-incarceration. Individuals face a litany of expenses during re-entry – from housing costs, to transportation expenses, to parole-related fees, to continual payments on court debt. Covering these costs is already difficult with the limited funds that individuals have upon leaving prison, and the barriers to employment that formerly incarcerated individuals face. Increasing the amount deducted from accounts only further threatens the precarious situation of many

individuals during re-entry, by reducing what little net worth many have.

In light of the litany of financial and social harms that increased deductions will cause, the procedural due process protections in place prior to increased deductions are critical. Increased deductions may force individuals to choose between meeting their nutritional needs, calling their family, seeking medical care, or filing post-conviction actions or other papers with a court. This is the type of “serious loss” that is squarely implicated by the constitutional guarantee of due process.

Moreover, both as a matter of practice and of law, no one—not the sentencing judge and not anyone at DOC—is considering an incarcerated individual’s ability to pay before imposing financial obligations and beginning deductions. This Court has previously implied that diminished due process is acceptable because the sentencing court can hear arguments on ability to pay, but existing case law squarely prohibits this for mandatory fines and restitution; whether

court costs fall into that category remains an issue of litigation before this Court.¹

For Mr. Washington – and the 99 percent of individuals entering prison with court debt² – notice and a hearing must be provided before the state increases the deduction amount.

¹ See *Commonwealth v. Lopez*, 27 EAP 2021.

² Jeffrey Ward et al., *Imposition and Collection of Fines, Costs, and Restitution in Pennsylvania Criminal Courts: Research in Brief 4* (2020), https://www.aclupa.org/sites/default/files/field_documents/fines_and_costs_report_updated_march_2021.pdf.

ARGUMENT

- I. **When the amount deducted from financial accounts is raised, individuals in state prisons lose the ability to pay for food and hygiene necessities, medical co-pays, communication with the outside world, and other basic living needs.**

Prisons do not provide incarcerated individuals with all of the necessities they require free of charge. Financial accounts play a significant role in ensuring the necessities of life for those in state prisons, even with the low balances held by many. Studies from prisons across the country consistently show that without sufficient funds in commissary accounts, incarcerated individuals are unable to meet their nutritional needs, pay for medical co-pays, and communicate with family and the courts. A study based on interviews of individuals in New York prisons, for example, estimated that an individual in state prison needs “at least \$175 per month to get by” to cover food, clothes, medicine, and a few phone calls to family each month.³ Data from commissaries at Illinois and Massachusetts state prisons demonstrate that the average incarcerated person in each state spends \$1,121 and

³ Tommaso Bardelli et al., *Blood from a stone: How New York prisons force people to pay for their own incarceration*, Prison Pol’y Initiative (Oct. 27, 2021), https://www.prisonpolicy.org/blog/2021/10/27/ny_costs/.

\$1,207 a year at the commissary, respectively – or about \$100 per month.⁴ This commissary study found that “most of the little money [incarcerated people] have is spent on basic necessities,” with 84 percent of funds spent at the commissary going toward food and hygiene products. *Id.*

In Pennsylvania prisons, the cost of these necessities quickly adds up. As explored in greater detail below, individuals in Pennsylvania prisons need money to cover many different living needs, including (1) food, (2) hygiene products, (3) clothing, (4) communication with family, friends, and the courts, and (5) medical and pharmacy needs, among many others. For all of these necessities, every cent matters; someone paid \$0.19 an hour, a standard prison wage, would have to work for over three *days* to earn enough to pay for a \$3.59 tube of shaving cream.⁵ A five-percent increase in the amount deducted from someone’s financial account is therefore hugely significant, and would force many

⁴ Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, Prison Pol’y Initiative (May 2018), <https://www.prisonpolicy.org/reports/commissary.html>.

⁵ Pa. Dep’t of Corr., Male General Population Commissary List, <https://www.cor.pa.gov/Inmates/Commissary%20Catalogs/Male%20General%20Population.pdf> [hereinafter Male Commissary List]; Pa. Dep’t of Corr., Female General Population Commissary List, <https://www.cor.pa.gov/Inmates/Commissary%20Catalogs/Female%20General%20Population.pdf> [hereinafter Female Commissary List].

individuals to make difficult choices between having enough food to eat, dealing with a pounding migraine, or calling their family.

**Figure 1. Real Cost of Commissary Items,
Based on Hourly Prison Wages**

Item	Commissary Price	Hours Needed to Pay for Item at \$0.19 to \$0.42 per Hour	Real Value of Item (Hours times Federal Minimum Wage)
Menstrual Pads	\$7.17	17 – 38 hours	\$124 – \$274
Tampons	\$4.29	10 – 23 hours	\$74 - \$164
Dandruff Shampoo	\$1.20	3 – 6 hours	\$21 - \$46
Sunscreen	\$2.81	7 – 15 hours	\$49 - \$107
Shaving Cream	\$3.59	9 – 19 hours	\$62 - \$137
Shower Sandals	\$2.26	5 – 12 hours	\$39 – \$86
Sweat Shorts	\$12.18	29 – 64 hours	\$210 - \$465
Aspirin	\$1.51	4 – 8 hours	\$26 - \$58
Antacid	\$3.13	7 – 16 hours	\$54 - \$119
Box of Saltines	\$1.43	3 – 8 hours	\$25 - \$55
Phone Card	\$10.00	24 – 53 hours	\$172 - \$382
Email Credits	\$5.00	12 – 26 hours	\$86 - \$191

A. Food

Food purchases at the commissary comprise a significant proportion of expenses for incarcerated individuals, for one simple reason: prison-provided meals are woefully inadequate. This is hardly surprising, considering that Pennsylvania prisons only spend around \$2.61 per individual per *day* on food (which equals \$0.87 per meal).⁶ At this price, nutritionally adequate meals are difficult to provide - especially for groups like teenagers, young adults, and pregnant individuals, who require more calories per day than the average person.⁷ Even where a meal is nutritionally adequate, individuals at facilities that serve dinner at extremely early hours – such as 3:30 p.m. – will be hungry again by bedtime.⁸

⁶ Impact Justice, *Eating Behind Bars: Ending the Hidden Punishment of Food in Prison* 18-19 (2020), <https://impactjustice.org/wp-content/uploads/IJ-Eating-Behind-Bars-Release4.pdf>. For context on what this price translates into for meals, one study photographed meals at state prisons across the country. See Alysia Santo and Lisa Iaboni, *What's in a Prison Meal?*, The Marshall Project (July 7, 2015 7:15 AM), <https://www.themarshallproject.org/2015/07/07/what-s-in-a-prison-meal>.

⁷ See generally U.S. Dep't of Agriculture and U.S. Dep't of Health and Human Servs., *Dietary Guidelines for Americans, 2020-2025* (2020), https://www.dietaryguidelines.gov/sites/default/files/2020-12/Dietary_Guidelines_for_Americans_2020-2025.pdf.

⁸ Interview with Valerie Todd-Listman, Member, Incarcerated Women's Working Group (Apr. 28, 2022).

Given this inadequacy, individuals in prison must often supplement their meals with purchases from the commissary. However, prices for snacks at the commissary are extremely expensive for individuals earning pennies per hour – someone earning \$0.19 an hour will have to work nearly a day and a half to earn enough to purchase a pack of saltines.⁹

B. Toiletries and hygiene necessities

Individuals in state prisons must also spend substantial annual sums on hygiene necessities. At the start of incarceration, all individuals are given an extremely limited set of hygiene basics, including a toothbrush, deodorant, and shampoo.¹⁰ Once these supplies run out, however, individuals must purchase all hygiene necessities for the duration of their incarceration. These costs can add up quickly; shampoo ranges from \$1 to over \$5, and someone incarcerated may have to work nearly a *week* to cover these costs using prison wages.¹¹

⁹ See Male Commissary List; Female Commissary List.

¹⁰ DC-ADM 815, Personal Property, State Issued Items, and Commissary/Outside Purchases Policy, at Section 1(A) [hereinafter DC-ADM 815]
<https://www.cor.pa.gov/About%20Us/Documents/DOC%20Policies/815%20Personal%20Property%20State%20Issued%20Items%20and%20Commissary%20-%20Outside%20Purchases.pdf>.

¹¹ See Male Commissary List; Female Commissary List.

Similarly, the cost of menstrual products like tampons and menstrual pads ranges from \$4 to \$7, which is equivalent to nearly *a week and a half* of work at \$0.19 per hour.¹² Individuals are allegedly provided with toilet paper and soap in their housing unit, but official policy does not always capture reality.¹³ As one formerly incarcerated person pointed out, many prisons give just one roll of toilet paper to two cell-mates every two days, and this quickly runs out if someone is menstruating or has a cold.¹⁴ Statistics from other states show that even where soap is available on a regular basis, it may not be enough – in Massachusetts, for instance, individuals in state prisons purchased nearly 245,000 bars of soap in 2016.¹⁵

Individuals classified as “indigent” supposedly receive free replacements of the hygiene set noted above.¹⁶ However, earning this status requires jumping through several hoops. Individuals must have less than \$10 in their financial account at *all* times for at least 30 days

¹² See Male Commissary List; Female Commissary List.

¹³ DC-ADM 815, at Section 1(A).

¹⁴ Interview with Valerie Todd-Listman, Member, Incarcerated Women’s Working Group (Apr. 28, 2022).

¹⁵ See Conor Friedersdorf, *Can’t We at Least Give Prisoners Soap?*, The Atlantic (Apr. 1, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/make-soap-free-prisons/609202/>.

¹⁶ See DC-ADM 815, at Section 1(A)(6).

and subsequently submit a formal request to be classified as indigent – and the request may still be denied due to several loopholes.¹⁷

Moreover, the list of hygiene basics – which includes a razor, shaving cream, a toothbrush, toothpaste, deodorant, and shampoo – does not cover all items necessary for proper hygiene in prison. For example, in a communal shower environment, shower sandals are universally recommended to prevent spread of fungi and related rashes,¹⁸ but indigent individuals are not provided with shower sandals, and instead must purchase them from the commissary for \$2 to \$12.¹⁹

C. Clothing

Individuals also need money in prison to pay for clothing. State correctional policy provides for the issuing of a limited set of clothing upon entry into a facility, including just three pairs of pants, three t-shirts, socks, and underwear.²⁰ If someone finds these clothing items insufficient or extremely uncomfortable, their only option is to purchase additional clothing from the commissary. If someone needs shorts, for

¹⁷ See DC-ADM 815, at Glossary.

¹⁸ Centers for Disease Control and Prevention, “Hygiene-Related Diseases: Athlete’s Foot” (Feb. 6, 2017), https://www.cdc.gov/healthywater/hygiene/disease/athletes_foot.html.

¹⁹ See Male Commissary List; Female Commissary List.

²⁰ See DC-ADM 815, at Section 1(A)(1).

example, the cheapest available option is a two-pack of sweat-shorts for \$12.18 – equivalent to two weeks’ wages for individuals earning \$0.19 per hour.²¹

D. Medical care and medication

While incarcerated, individuals in state prisons also must pay for part of their medical care. All individuals are charged a \$5 co-pay from their financial account for many commonly needed medical services: (1) establishing initial medication prescriptions, (2) any non-emergency medical visit requested by an individual, (3) treatment for sport-related injuries, (4) treatment for self-inflicted injuries, and (5) treatment provided to someone who an individual allegedly injures. 37 Pa. Code § 93.12. While \$5 may seem insignificant, a single co-pay is over *20 percent* of the monthly wages for someone in prison earning \$0.19 per hour. If someone pays multiple co-pays in a month, these fees quickly add up, especially when balanced with the myriad additional financial burdens that incarcerated people face.

Granted, certain medical procedures do not require a co-pay, like intake screenings, mental health care, and prenatal care. And if a

²¹ See Male Commissary List; Female Commissary List.

patient lacks sufficient funds to pay the co-pay, they will be seen and asked to pay the medical debt later.²² However, these exceptions should not obscure the simple fact that individuals *do* have to pay a co-pay for many of medical issues. Moreover, if an individual takes on medical co-pay debt while incarcerated, their debt will be recouped from future deposits by collecting up to 50 percent of their account balance, on top of the 25 percent deducted for fines, costs, and restitution, and the DOC can also seek the amount owed for medical fees from a patient after he or she is released through a civil action.²³ Even if the DOC waives the co-pay at the time of treatment, individuals may be extremely hesitant to seek treatment with the threat of future deductions and court action to recoup the debt.

On top of fees for medical co-pays, individuals must use their commissary balance to pay for basic over-the-counter medications. If an individual is dealing with minor headaches or joint pain, or struggling with acid reflux, their only option to treat either may be spending nearly two to three days' wages on aspirin or an antacid at the

²² See DC-ADM 820, Co-Payment for Medical Services Policy, <https://www.cor.pa.gov/About%20Us/Documents/DOC%20Policies/820%20Co-Payment%20for%20Medical%20Services.pdf>.

²³ See *id.*

commissary.²⁴ Raising the amount deducted from a financial account would therefore jeopardize the ability of many individuals to receive adequate medical care and meet their basic medication needs.

E. Communication with family and friends

A substantial percentage of commissary account balances is spent annually on mail, phone calls, and other communication costs with individuals outside of prison. In the study of expenses for those in New York state prisons noted earlier, for example, the average person spent more than *half* of their annual expenses on mail and phone costs.²⁵ The need to communicate with the outside world, however, is much more than a luxury; it is a necessary lifeline with serious consequences both during and after incarceration.²⁶ Research repeatedly finds that email, mail, and phone communication with family during incarceration leads to significantly improved outcomes in terms of recidivism, use of

²⁴ See Male Commissary List; Female Commissary List.

²⁵ Tommaso Bardelli et al., *Blood from a stone: How New York prisons force people to pay for their own incarceration*, Prison Pol’y Initiative (Oct. 27, 2021), https://www.prisonpolicy.org/blog/2021/10/27/ny_costs/.

²⁶ Leah Wang, *The positive impacts of family contact for incarcerated people and their families*, Prison Pol’y Initiative (Dec. 21, 2021), https://www.prisonpolicy.org/blog/2021/12/21/family_contact/.

alcohol, and employment on re-entry.²⁷ One study of formerly incarcerated women found that family phone contact had “the biggest impact on both the occurrence and timing of reincarceration” of any type of contact with family members during incarceration.²⁸ Another study found that video visits with family have a similarly positive impact.²⁹ Family contact is particularly important for teenagers and younger adults incarcerated in state prisons, with research finding that family contact leads to better behavioral outcomes, lower rates of recidivism, and a reduced likelihood that younger siblings will also end up in the criminal system.³⁰

²⁷ See generally Jocelyn Fontaine et al., Urban Inst. and Ill. Crim. Just. Info. Auth., *Families and Reentry: Unpacking How Social Support Matters* (2012); Nancy G. La Vigne et al., Urban Inst., *Chicago Prisoners’ Experiences Returning Home* (2004); Christy Visher et al., Urban Inst., *Returning Home: Understanding the Challenges of Prison Reentry* (2004).

²⁸ Kelle Barrick et al., *Reentering Women: The Impact of Social Ties on Long-Term Recidivism*, *Prison Journal*, Sept. 2014, at 279, 293.

²⁹ See Grant Duwe and Susan McNeeley, *Just as Good as the Real Thing? The Effects of Prison Video Visitation on Recidivism*, *Crime & Delinq.*, July 2020, at 1, 15-17.

³⁰ See Sandra Villalobos Agudelo, Vera Inst. of Just., *The Impact of Family Visitation on Incarcerated Youth’s Behavior and School Performance: Findings from the Families as Partners Project* (2013), <https://www.vera.org/downloads/publications/impact-of-family-visitation-on-incarcerated-youth-brief.pdf>; Susan M. Tarolla et al., *Understanding and Treating Juvenile Offenders: A Review of Current Knowledge and Future Directions*, *Aggression and Violent Behavior*, March 2002, at 125.

Maintaining contact with family and friends outside of prison comes with a cost, however. Writing materials such as pens, paper, envelopes, and cards must all be purchased from the commissary, and the costs can quickly balloon – the New York study noted above found that individuals in prisons there spent nearly \$2,000 annually on mail (and phone) costs, on average.³¹ Each stamped envelope alone costs \$0.62, or nearly three hours of wages at \$0.19 per hour. The price of phone calls – which used to be exorbitant – has declined in recent years, but at \$0.89 for a 15-minute in-state phone call, a single call can still cost some prisoners over four hours of work.³² Additionally, phone calls can only be paid for by purchasing a \$10 phone card at the commissary – which takes two weeks of work to earn at the lowest wage. Emails, too, require individuals to spend significant sums of money if they are going to send electronic messages regularly. In Pennsylvania prisons, individuals must first purchase a tablet for \$147, and then purchase

³¹ Tommaso Bardelli et al., *Blood from a stone: How New York prisons force people to pay for their own incarceration*, Prison Pol’y Initiative (Oct. 27, 2021), https://www.prisonpolicy.org/blog/2021/10/27/ny_costs/.

³² Peter Wagner and Alexi Jones, *State of Phone Justice: Local jails, state prisons and private phone providers*, Prison Pol’y Initiative (Feb. 11, 2019), https://www.prisonpolicy.org/phones/state_of_phone_justice.html.

credits in \$5 increments to cover fees of \$0.25 per email.³³ Collectively, these charges quickly add up – especially for someone earning a fraction of the minimum wage outside of prison.

F. Legal communication costs and access to courts

Individuals can also quickly rack up tens or even hundreds of dollars in expenses for appeals or petitions for post-conviction relief. Communication with the courts requires individuals to procure a litany of writing materials and pay for stamps, the costs of which are noted above. If an individual lacks funds to cover these costs, they will not be able to send legal mail to a court. Indigent individuals may be provided with pens, paper, and up to \$11 a month for copying costs – but “[u]nder no circumstances” can they receive more than this, even if copying costs for necessary documents like transcripts go above that amount.³⁴

Individuals attempting to file a petition under Pennsylvania’s Post-Conviction Relief Act face additional costs including transcript charges, investigator payments, and court filing fees (there is no criminal *in forma pauperis* procedural rule) – in addition to the costs of mail noted

³³ Pa. Dep’t of Corr., “Tablets,” <https://www.cor.pa.gov/Inmates/Pages/Tablets.aspx>.

³⁴ See DC-ADM 803, Inmate Mail and Incoming Publications, at Section 1(L), <https://www.cor.pa.gov/About%20Us/Documents/DOC%20Policies/803%20Inmate%20Mail%20and%20Incoming%20Publications.pdf>.

above. Increased deductions from financial accounts only further exacerbate problems with access to justice.

II. The limited sources of funds in financial accounts – pre-incarceration assets, family support, and money earned through prison labor – exacerbate the struggle to pay for necessities in prison.

Many financial accounts of individuals incarcerated in Pennsylvania prisons hold very little money. Some individuals even have *negative* balances on their financial accounts, with the lowest balance currently at -\$1,897.59.³⁵

The sources of the money in financial accounts include (1) personal deposits upon entering prison, (2) earnings from prison wages, and (3) deposits from family members or friends. Unsurprisingly, many individuals lack sufficient assets to meaningfully contribute to their financial accounts at the start of their incarceration, which reflects the overall rate of indigent defendants in the criminal justice system.³⁶

³⁵ This number is based on internal data from the Department of Corrections, which was produced to *amici* in response to a request for information under the Right to Know Law. A copy is on file with *amici*.

³⁶ See Jeffrey Ward et al., *Imposition and Collection of Fines, Costs, and Restitution in Pennsylvania Criminal Courts: Research in Brief 1* (2020), https://www.aclupa.org/sites/default/files/field_documents/fines_and_costs_report_updated_march_2021.pdf (noting that over 66 percent of Pennsylvania defendants were assigned a public defender or court-appointed counsel).

Research based on data from all federal and state prisons found that only 49 percent of incarcerated men were employed in the three years prior to incarceration, and even those who were employed earned a median income of only \$6,250 per year; just 13 percent earned more than \$15,000 annually.³⁷ Even fewer assets are held by individuals who were sentenced as children in the juvenile justice system and later transferred to adult prisons – or for those between the ages of 14 and 18 sentenced as adults. *See* 42 Pa.C.S. § 6355. Because of their limited work opportunities before incarceration, individuals incarcerated as youth often lack funds to pay for their basic needs in prison.³⁸

For some individuals, low account balances may be supplemented by wages earned through prison labor. However, abysmally low hourly pay and a limited work week make this difficult. Per Department policy, most work assignments are paid between just \$0.19 and \$0.42 per hour.³⁹ Moreover, the standard workday is just six hours a day,

³⁷ Adam Looney and Nicholas Turner, *Work and opportunity before and after incarceration* 1 (2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf.

³⁸ *See* 29 C.F.R. § 570.2; 43 P.S. § 40.3; Jessica Feierman et al., *Juvenile Law Ctr., Debtors' Prison For Kids? The High Cost of Fines and Fees in the Juvenile Justice System* (2016).

³⁹ *See* DC-ADM 816, Inmate Compensation Policy, at Attachment 1-B, <https://www.cor.pa.gov/About%20Us/Documents/DOC%20Policies/816%20Inmate%2>

limiting the amount that individuals may earn on these low wages.⁴⁰ As a result, “full-time” work each week would pay between \$5.70 and \$12.60. With this paltry source of income, individuals with no family support have no choice but to pay for their necessities from these funds.⁴¹ This, of course, assumes that individuals have a job, as termination is common at the slightest infraction, and finding a new job with a termination on one’s record can be extremely difficult.⁴²

Figure 2. Comparison of Federal Minimum Wage and Prison Wages



0Compensation.pdf. A few limited opportunities exist to earn a higher wage, but many of these roles involve workplace safety hazards, such as asbestos.

⁴⁰ See *id.* at Section 1(C).

⁴¹ Interview with Valerie Todd-Listman, Member, Incarcerated Women’s Working Group (Apr. 28, 2022).

⁴² Interview with Sharron Boddy-Adedipe, Founder, Mothers of Incarcerated Sons (April 18, 2022).

Many families try to supplement these financial accounts by scraping together money to support their loved ones.⁴³ Pennsylvania policies that charge incarcerated individuals for things like medical co-payments, commissary purchases, and telephone calls make individuals dependent on their families for regular gifts in order to meet their needs.⁴⁴ Given the financial toll borne by families of incarcerated individuals, one impacted mother referred to families as the “invisible prisoners” of the system, and pointed out that “even if you’re not low-income, lots of folks just can’t afford the financial drain of having a loved one who is incarcerated.”⁴⁵ Even when families find the funds to pay for these necessities, a sizable portion of their deposits will not even make it to their loved one’s financial account. Both methods to send money, electronic payments and in-person kiosks at prisons, involve significant processing fees which can swallow nearly 20 percent of the remittance.⁴⁶

⁴³ One formerly incarcerated person interviewed by the Pennsylvania Institutional Law Project stated that his family typically sent him \$175 a month, or \$2,100 a year.

⁴⁴ Mary Fainsod Katzenstein and Maureen R. Walle, *Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources*, Persps. on Pol., Sept. 2015, at 638, 639, https://nationinside.org/wp-content/uploads/2016/04/Taxing_the_Poor-_Incarceration__Poverty.pdf.

⁴⁵ Interview with Sharron Boddy-Adedipe, Founder, Mothers of Incarcerated Sons (April 18, 2022).

⁴⁶ See Pa. Dep’t of Corr., “How to Send Money,” <https://www.cor.pa.gov/family-and-friends/Pages/How%20to%20Send%20an%20Inmate%20Money.aspx>.

These fees, together with heightened deductions for court costs, may make families hesitant to deposit *any* funds in their loved ones' accounts.

III. When account deductions are increased, the families of individuals in state prisons are also harmed.

Incarcerated individuals are not the only ones harmed by increased deductions from their financial accounts. When funds are subject to deductions, the ripple effect impacts their families as well – the “invisible prisoners” of the state prison system, as one mother mentioned. In effect, the payment of fines, costs, and restitution shifts from the convicted individual to their family, whose gifts are subject to the deductions and who must then give that much *more* money to make up for the deductions. This ripple effect functions in three critical ways, by (1) draining additional funds from family members who want to ensure their loved ones have access to basic necessities, (2) increasing the amount of money that family members spend on communication with incarcerated loved ones, and (3) exacerbating the long-term harms of incarceration on individuals' immediate families.

As noted in Part II, many families send funds to support their loved ones who are incarcerated. Given the many food, hygiene, and

medical necessities that individuals must spend money on in prison, the desire of family members to ensure their loved ones have sufficient funds in their financial accounts is unsurprising. However, these payments are a massive financial burden for many families, not least because of the significant fees (up to 20 percent) that private companies charge to handle these money transfers.⁴⁷ Forcing innocent third parties – family members – to pay court debts in this way should give the Court pause, especially considering the family tensions and stress that arise from such financial obligations.⁴⁸

Higher deductions from commissary accounts also place heightened burdens on families trying to remain in contact with their incarcerated loved ones. As noted earlier, phone calls, emails, and mail all cost a significant amount of money. If their loved ones can no longer afford these expenses, families may be required to spend additional funds on costly in-person visits to rural prisons. One study of families of incarcerated individuals across the country found that *one-third* of

⁴⁷ Stephen Raher, *The multi-million dollar market of sending money to an incarcerated loved one*, Prison Pol’y Initiative (Jan. 18, 2017), <https://www.prisonpolicy.org/blog/2017/01/18/money-transfer/>.

⁴⁸ Jessica Feierman et al., Juvenile Law Ctr., *Debtors’ Prison for Kids? The High Cost of Fines and Fees in the Juvenile Justice System* 6-7 (2016).

families surveyed went into debt to pay for visitation costs or phone calls.⁴⁹ Indeed, a mother of someone currently incarcerated in a Pennsylvania prison noted that she has paid almost all of her son's email costs, to ensure that they can stay in contact.⁵⁰

Finally, deducting additional funds from commissary accounts will compound the financial strain caused by the incarceration of a family member. For many families, someone going to prison means losing a breadwinner and enduring severe financial difficulties.⁵¹ One report from the Ella Baker Center estimated that nearly 65 percent of families lose the ability to pay for basic necessities like food and housing when a family member goes to prison, and the vast majority of these families are caring for children.⁵² Because of the significant decline in household income – coupled with increased money transfers to support the family member in prison – studies have shown that households affected by incarceration are more reliant on welfare, more likely to have unstable

⁴⁹ Ella Baker Ctr., *Who Pays? The True Cost of Incarceration on Families* 9 (2015), <http://whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf> [hereinafter Ella Baker Ctr. Report].

⁵⁰ Interview with Sharron Boddy-Adedipe, Founder, Mothers of Incarcerated Sons (April 18, 2022).

⁵¹ See Alana Semuels, *What Incarceration Costs American Families*, The Atlantic (Sept. 15, 2015), <https://www.theatlantic.com/business/archive/2015/09/the-true-costs-of-mass-incarceration/405412/>.

⁵² See Ella Baker Ctr. Report at 7-8.

housing, and more likely to face material hardship than adults in households that are not affected by incarceration.⁵³ These financial strains also contribute to long-term health consequences.⁵⁴ For example: after one woman’s partner was incarcerated, she was forced to move into public housing “caked with mildew,” and subsequently enrolled her daughter in a new school where she was “the only second-grader in the class who knew how to read.”⁵⁵ The long-term effects of incarceration on the immediate families of incarcerated individuals are already serious, and forcibly taking even more money out of financial accounts in prison will only further exacerbate these impacts.

IV. Deductions from financial accounts during incarceration exacerbate the financial difficulties that individuals face during re-entry.

Additional deductions also reduce the amount individuals will have on hand to cover their basic living costs upon re-entry, which threatens their ability to find stability after incarceration. Re-entry is

⁵³ See generally Christopher Wildeman et al., *Health Consequences of Family Member Incarceration for Adults in the Household*, Pub. Health Rep., May 2019, at 15S. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6505314>.

⁵⁴ See *id.*

⁵⁵ Alana Semuels, *What Incarceration Costs American Families*, The Atlantic (Sept. 15, 2015), <https://www.theatlantic.com/business/archive/2015/09/the-true-costs-of-mass-incarceration/405412/>.

an extremely difficult and tumultuous period for many, even for those with significant support from family and friends; in the words of one formerly incarcerated woman, re-entry “is like going from the frying pan to the deep fryer.”⁵⁶ Most of these difficulties are due to the precarious financial situation of individuals when they leave prison, because “for people without a car, house, and a full bank account, everything is going to be difficult.”⁵⁷ Formerly incarcerated people face extraordinary obstacles in finding employment, so the significant financial burdens during re-entry – including housing costs, support for family members, parole-related fees, and continual payments on court debt – place a substantial strain on their ability to find stability after release.⁵⁸ For those whose financial accounts have been drained by deductions and the cost of basic necessities during incarceration, covering these costs is even more difficult.

⁵⁶ Interview with Valerie Todd-Listman, Member, Incarcerated Women’s Working Group (Apr. 28, 2022).

⁵⁷ *Id.*

⁵⁸ Mia Armstrong and Nicole Lewis, *What Gate Money Can (and Cannot) Buy*, The Marshall Project (Sept. 10, 2019 6:00 AM), <https://www.themarshallproject.org/2019/09/10/what-gate-money-can-and-cannot-buy>.

In Pennsylvania, individuals leaving state prison are completely on their own from the moment they leave custody of the Department of Corrections, as “the DOC does not provide gate money or a free ride home.”⁵⁹ The state fails to provide any initial financial support for re-entry even though the first 72 hours post-release are critical for preventing recidivism.⁶⁰ As a result, the only support that individuals can rely on is their financial account, any funds left in checking or savings accounts, and financial support from family and friends. Beyond these first few days and weeks, the financial picture remains bleak, as formerly incarcerated individuals often struggle to find employment income. One study estimates that 27 percent of formerly incarcerated individuals are unemployed, five times higher than the general U.S. unemployment rate.⁶¹

⁵⁹ Pa. Dep’t of Corr., *Inmate Handbook* (2017), <https://www.cor.pa.gov/About%20Us/Documents/DOC%20Policies/2017%20DOC%20Inmate%20Handbook.pdf>.

⁶⁰ See generally Ji Hyun Rhim, *Left at the Gate: How Gate Money Could Help Prisoners Reintegrate Upon Release*, 106 Cornell L. Rev. 783, 785 (2021); Mia Armstrong and Nicole Lewis, *What Gate Money Can (and Cannot) Buy*, The Marshall Project (Sept. 10, 2019 6:00 AM), <https://www.themarshallproject.org/2019/09/10/what-gate-money-can-and-cannot-buy>.

⁶¹ Lucius Couloute and Daniel Kopf, *Out of Prison & Out of Work: Unemployment among formerly incarcerated people*, Prison Pol’y Initiative (2018), <https://www.prisonpolicy.org/reports/outofwork.html>.

With minimal cash on hand, covering even basic living costs like housing during re-entry can become impossible. Finding housing is extremely difficult without funds to cover fees like security deposits and apartment application fees, to say nothing of housing discrimination against formerly incarcerated people.⁶² Without housing secured, a person will not be paroled.⁶³ Some may be able to temporarily rely on family members or friends for housing during the initial stages of reentry, but this can be difficult if an individual was unable to pay for the cost of communication with the outside world during incarceration.⁶⁴ The consequences of this difficult housing situation can be severe: formerly incarcerated individuals are 10 times more likely to be homeless than others, and one study estimates that nearly 10 percent of all parolees nationwide are unsheltered.⁶⁵

⁶² Caterina Gouvis Roman and Jeremy Travis, *Taking Stock: Housing, Homelessness, and Prisoner Reentry 2* (2004), <https://www.urban.org/sites/default/files/publication/58121/411096-Taking-Stock.pdf>; Jaboa Lake, *Preventing and Removing Barriers to Housing Security for People With Criminal Convictions*, Ctr. for Am. Progress (Apr. 14, 2021), <https://www.americanprogress.org/article/preventing-removing-barriers-housing-security-people-criminal-convictions/>.

⁶³ Pa. Dep't of Corr, "Home Plan Status," <https://www.cor.pa.gov/parole-supervision/Pages/Home-Plan-Status.aspx>.

⁶⁴ See Ella Baker Ctr. Report at 29-31.

⁶⁵ See Lucious Couloute, *Nowhere to Go: Homelessness among formerly incarcerated people*, Prison Pol'y Initiative (2018),

On top of covering basic costs of living, individuals must also handle multiple fees and costs from the criminal system on release. Individuals on parole must pay monthly supervision fees, which can be as high as \$45 per month. *See* 42 Pa.B. 3437.⁶⁶ And despite deductions by the state during incarceration, the vast majority of individuals returning from prison still owe court debt.⁶⁷ Without sufficient funds to get back on their feet, individuals quickly find it extremely difficult, if not impossible, to keep up with court payments – and the consequences of nonpayment can be dire. *See, e.g. Commonwealth v. Diaz*, 191 A.3d 850, 866 (Pa. Super. Ct. 2018) (indigent defendant jailed for 30 days for nonpayment of fines and costs after offering to sell his blood plasma to avoid jail).

V. Due process entitles incarcerated individuals to notice and a hearing before increased deductions from financial accounts can continue, given the serious consequences that result from the rate increase.

<https://www.prisonpolicy.org/reports/housing.html>; Little Hoover Comm'n, *Back to the Community: Safe & Sound Parole Policies* 39 (2003).

⁶⁶ Per the Pennsylvania Bulletin citation, Allegheny County charges a \$20.00 monthly administration fee to all supervisees, on top of the standard \$25.00 monthly parole fee.

⁶⁷ Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying The Price*, NPR (May 19, 2014 4:02 PM), <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

Because incarcerated individuals retain a property interest in their financial accounts, any dispossession of that interest may only occur in conjunction with due process of law. *See Bundy*, 184 A.3d at 556. When weighing the process required before such dispossession occurs, courts consider the severity of the deprivation at stake, and more process is required where the private interest implicated is more serious. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). At base, however, a pre-deprivation hearing is “the root requirement of the Due Process Clause.” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (citation omitted). “[A]voiding erroneous deprivations before they occur is an important concern under the Due Process Clause,” and “[t]here is thus a general preference that procedural safeguards apply in the pre-deprivation timeframe.” *Bundy*, 184 A.3d at 557.

The harsh, cascading impacts of an increased deduction are apparent from the myriad effects noted above. Even a five percent increase threatens individuals’ ability to receive adequate nutrition and medical services, send and receive legal mail, purchase necessary hygiene products, and communicate with their families. The ripple effects of a deduction increase will quickly be felt by incarcerated

individuals' friends and families, who will be forced to pull together even more funds to deposit into their loved ones' financial accounts, and will be felt long-term when individuals are released without sufficient funds to cope with the realities of life during re-entry. Collectively, these harms demonstrate the serious private interest at stake for incarcerated individuals and their families.

Given these impacts, due process of law requires notice and a hearing to contest the increased deduction amount. Even if a statute instructs the Department to deduct a minimum of 25 percent, it still has a "constitutional obligation" to provide individuals with sufficient process to dispute the deduction amount, as Judge McCullough rightly noted in her *Beavers* dissent. *Beavers v. Pa. Dep't of Corr.*, No. 486 M.D. 2020, 2021 WL 5832128, at *8 (Pa. Commw. Ct. Dec. 9, 2021) (McCullough, J., dissenting).

VI. This Court's cases governing the deduction of funds from financial accounts rests on the incorrect premise that sentencing courts consider the defendant's ability to pay.

When this Court has allowed for the deduction of funds from financial accounts, it has suggested that due process may not require an ability-to-pay determination because "[a]t his sentencing hearing, he

had the opportunity to present evidence to persuade the court not to impose fines, costs, and restitution.” *Buck v. Beard*, 879 A.2d 157, 160 (Pa. 2005). In *Johnson v. Wetzel*, the Court noted the Commonwealth Court only required consideration of ability to pay “where a material change in circumstances occurs between sentencing and the first Act 84 deduction.” 238 A.3d 1172, 1183 (Pa. 2020). This, of course, presupposes some due process at the time of sentencing, with notice of the amount imposed and an opportunity to contest it.

In reality, almost all court debt is imposed without regard to the defendant’s ability to pay. While discretionary fines can only be imposed based on a defendant’s ability to pay per *Commonwealth v. Ford*, 217 A.3d 824 (Pa. 2019), current Superior Court case law says that so-called “mandatory” fines must be imposed regardless of ability to pay. *See, e.g., Commonwealth v. May*, 271 A.3d 475 (Pa. Super. Ct. 2022), *petition for allowance of appeal filed* 129 MAL 2022.⁶⁸ Restitution must also be imposed without any consideration of the defendant’s finances. *See* 18 Pa.C.S. § 1106(c). And the issue of what courts must do at sentencing

⁶⁸ This Court has never addressed the issue of whether certain fines are mandatory even if the defendant cannot afford to pay them.

regarding costs, which as noted are imposed in 99 percent of cases, is currently pending before this Court in *Commonwealth v. Lopez*.

The exact process that incarcerated individuals must have before they face deductions from their accounts (and increases thereof) may be a matter of debate, but their right to some form of process should not be. Indeed, if he were not incarcerated, Mr. Washington would be entitled to a payment plan for his fines and fees, based on his ability to pay. *See* Pa.R.Crim.P. 706(B). Mr. Washington, and other incarcerated individuals, have never had anyone consider whether they can pay these fines, costs, or restitution, let alone whether they can afford the 25 percent deductions now imposed. That is insufficient to meet constitutional due process requirements.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the Commonwealth Court's erroneous order and hold that incarcerated individuals are entitled to notice and a hearing before the Department of Corrections raises the amount deducted from their financial accounts.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH RULE 531

I certify that the Brief for *Amici Curiae* filed in the above captioned case does not exceed 7,000 words. Using the word processor used to prepare this document, the word count is 6,905 as counted by Microsoft Word.

CERTIFICATION OF COMPLIANCE WITH PUBLIC ACCESS

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

CERTIFICATION OF SERVICE

I certify that the foregoing document was served on the parties via PACFile.

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