CLAIRE GASTAÑAGA
EXECUTIVE DIRECTOR

March 17, 2017

The Honorable Terry McAuliffe
Governor
Commonwealth of Virginia
Third Floor, Patrick Henry Building
1111 E. Broad Street
Richmond, VA 23219

Re: HB1855/SB1284 and HB1856/SB1285 (restitution) and HB2386/SB854 and HB2467 (driver's licenses)

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Dear Governor McAuliffe:

I am writing you on behalf of the over 20,000 members of the ACLU of Virginia regarding two sets of bills now awaiting your action that in different ways have the impact of punishing poverty. One set of bills seeks to address concerns about the collection and payment of court-ordered restitution to victims of crime (including the Commonwealth). The other set of bills addresses issues related to the punitive suspension of driver's licenses for failure to pay restitution, fines, and costs and the codification of standards for installment payments for fines and costs that are now the subject of better Supreme Court Rules.

<u>Restitution Bills:</u> HB1855/SB1284 and HB1856/SB1285
These bills together seek to make substantial modifications to Virginia's statutory scheme for enforcement regarding payment of restitution. The bills have significant problems:

- They do not take ability to pay into account in setting repayment terms and cracking down on nonpayment, omissions which push Virginia further toward punishing poverty and further toward debtors' prisons.

- They decrease the options for Virginia courts in presiding over and managing cases involving restitution and, significantly, *all other types of criminal justice debts such as costs and fines.* They remove the option for courts to impose fines for nonpayment rather than automatically jail someone whose nonpayment is judged to be "willful."

- They require law enforcement entities (courts, probation offices, and Commonwealth's Attorney offices) to spend additional resources in monitoring outstanding restitution, without evidence that that represents a justifiable (or sustainable) approach. This makes no sense at a time when prosecutors and courts are already struggling to keep up with their criminal caseloads, and, where, they have no expertise in civil law generally and debt collection particularly.

In addition to these substantive issues, the process for developing the legislation proposed by the Virginia State Crime Commission was flawed. The legislation does not reflect input from representatives of persons affected by the repayment requirements (including defense counsel, civil rights advocates, or legal services attorneys) or those with expertise in debt collection. Nor does the legislation reflect any serious consideration of whether a punitive approach to collecting restitution will be more successful in getting monies owed back to the Commonwealth or other victims than enhanced reliance on civil collection mechanisms. Nor was there any examination of more creative approaches to protect victims' financial interests in restitution such as expanding the crime victims' fund to establish the fund as a guarantor of any ordered restitution and enhancing the current provisions allowing payment to victims and subrogation of the restitution claims to the Commonwealth for collection by the Attorney General's Office Division of Debt Collection (and, potentially, writing off the bad debt).

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HB1855/SB1284

There are four changes to the Virginia Code proposed in HB1855/SB1284:

1. Courts would be required at sentencing to set stand-alone payment plans for restitution.

2. When (under existing law) a restitution order is docketed as a civil judgment, that decision will not negatively affect other modes of collecting restitution.

3. Courts would be required to provide quarterly reports of cases involving outstanding restitution.

4. Courts would not be allowed to impose a fine for nonpayment of restitution (and other types of court debt), leaving jail time as the only available sanction.

Although the second change proposed by HB1855/SB1824 is acceptable (indeed, it merely codifies existing practice), the other three are not.

- No Standards for Stand-Alone Payment Plans
  The first provision is problematic because it conflicts with other rules (Virginia Supreme Court Rule 1:24 and Va. Code 19.2-354), which both state that restitution should be included in payment plans covering court debt generally, unless courts elect in specific cases to subject restitution to a separate payment plan. Moreover, unlike VSCR 1:24 and Va. Code 19.2-354, HB1855/SB1824 appear not to consider the issue of ability to pay in setting orders, or in amending them. Indeed, it gives no indication that a restitution payment plan, once ordered at sentencing, is subject to amendment, even if the person's ability to pay changes (for example, due to job loss) or other good cause arises.

- Over-Inclusive Reporting
  The third provision is problematic because it expends law enforcement resources in a way that may be unhelpful. As passed, HB1855/SB1824 requires courts to prepare and submit quarterly reports to the respective Commonwealth's Attorney's office, listing cases with outstanding restitution and cases where more than 90 days has passed, since referral to collections, without a restitution payment. These lists are over-inclusive, however, because many people who will appear on those lists may be complying fully with payment plans and/or lack the ability to pay. Thus, the list does not reflect solely cases in willful default (or, indeed, default at all).

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- Reducing Options for Courts and Promoting Debtors' Prisons
  The fourth provision is problematic because it reduces the options courts have in sanctioning nonpayment of court debt generally. HB1855/SB1284 proposes to amend Va. Code 19.2-358, which sets forth permissible sanctions in show cause proceedings for such nonpayment. Under existing law, judges may sanction willful nonpayment by either incarceration up to 60 days or by a fine of up to $500. HB1855/SB1284 disallows judges to use fines as a sanction in such instances, leaving incarceration as the sole available sanction. This makes no sense. Judges are in the best position to determine how to penalize willful nonpayment in overseeing individual cases, and thus reducing their range of options is like taking some tools away from a carpenter before sending him or her off to the jobsite. Moreover, by leaving incarceration as the only sanction, the risk increases that (when a judge errs in determining that a person was willful in his or her nonpayment) a debtor is sent to prison because they lack the ability to pay. While other states are moving away from debtor's prisons, this amendment moves Virginia closer to them. This is unacceptable.

In Appendix A to this letter, we propose amendments to HB1855/SB1284, which, if accepted by the General Assembly, will reduce the harmful effects of this legislation.

In addition to the line amendments set out in the Appendix that would alleviate the concerns outlined above, we encourage you to consider recommending a reenactment clause that would allow additional time to consider alternatives that would better address victims' rights and alternatives to jail time that would enhance collection efforts, including moving the responsibility for such collections out of the Commonwealth's Attorney's offices.

HB1856/SB1285

While HB1855/SB1284 may be redeemable, in whole or in part, by amendment, HB1856/SB1285 cannot be redeemed, and we encourage you to veto both bills.

The concerns HB1855/SB1284 raise about punishing poverty (as described above) are greatly overshadowed by those in HB1856/SB1285. HB1856/SB1285 require courts to put persons ordered to pay restitution on indefinite probation.

This term of probation ends, in most cases, only when payment of restitution has been made in full. This proposal thus codifies wealth-based discrimination in an essential area of criminal justice; whereas people with money can write a check and move on with their lives, indigent people and others who lack the ability to pay have the burdens and risks of probation continually hanging over their head due to their inability to pay.

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As the Virginia Supreme Court recognized in *Cook v. Commonwealth*, 211 Va. 290 (1970), "increasing the period of probation has the effect of extending the restraints on the probationer's liberty which are normally incident to his probation and extends the time period during which revocation may occur." In other words, probation affects liberty interests – and thus increasing probation due to nonpayment is deeply problematic when a person fails to pay because the person lacks the ability to pay. Probation may not be incarceration, but this proposal nonetheless tells poor people that they shall have less liberty because they are poor. For a Commonwealth interested in equal justice, that is deeply troubling.

Although HB1856/SB1285 amend Va. Code 19.2-304 to allow for the possibility of a person being removed from indefinite probation before payment of restitution in full, the proposed language is extremely narrow. It allows a court to dismiss a motion for such removal "summarily without any hearing." Moreover, even if the court elects to grant a hearing on the motion, the moving party must prove that the indefinite probation constitutes a "manifest injustice." The Virginia Supreme Court has defined "manifest injustice" as being 'synonymous with open, clear, visible, unmistakable, indubitable, indisputable, evident, and self-evident. In evidence, that which is clear and requires no proof; that which is notorious.' " Johnson v. Anis, 284 Va. 462, 466, 731 S.E.2d 914, 916 (2012) (emphasis in original) (quoting Black's Law Dictionary 962 (6th ed. 1990)). See also Velazquez v. Commonwealth, 292 Va. 603, 616, 791 S.E.2d 556, 562 (2016). Lastly, even if a defendant can meet this undefined and presumably extremely difficult burden (a previous draft of HB1856/SB1285 set the standard more attainably at "good cause"), the court may elect to accord no relief from the term of indefinite probation. This set of barriers serves to provide a mirage of due process when, in fact, there is little possibility of actual relief for people under indefinite probation who have not paid because they cannot.

In addition, HB1856/SB1285 require probation agencies and courts to undertake additional oversight activities regarding payment of restitution, including scheduling court hearings to review nonpayment and providing reports of unpaid restitution and payment histories. Although potential fiscal impacts of HB1856/SB1285 were reduced by striking the requirement (contained in previous

versions of the bill) that indefinite probation be supervised, even the most recent fiscal impact statement – for the current draft – indicates that there will be additional enforcement costs and that the full scope of costs is difficult to predict.

Ultimately, HB1856/SB1285 represents a significant shift in policy, toward restricting liberty interests (even when nonpayment of restitution is not willful but rather due to inability to pay) and expending law enforcement resources chasing what may be, in at least some cases, bad debt.

For these reasons, it is extremely disappointing that the Virginia State Crime Commission – in reviewing the restitution issue[1] – failed to consult, amongst the many stakeholders it did include, anyone representing the interests of people who owe restitution or criminal defendants more generally (much less stakeholders as public defender's office or the VIDC focused on indigent defendants). Additionally, although the SCC's report notes that some other states have similar provisions to what HB1856/SB1285 propose, the report fails to include any cost-benefit analysis of indefinite probation for restitution versus other collection methodologies (which presumably could be gleaned from the experiences of those other states).

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In short, HB1856/SB1285 (and the change that they would bring) could do extreme damage to equal justice (by punishing poverty) and the justice system (by expending resources chasing bad debt). At minimum, this proposal, like those incorporated in HB 1855/SB1284 has not been sufficiently vetted.

We respectfully ask you to veto HB1856/SB1285, or, at a minimum, propose a reenactment clause that would offer additional time for more thoughtful consideration and the inclusion of additional stakeholders in the evaluation process.

Driver's License Bills: HB2386/SB854 and HB2467

SB 854 and HB 2386 codify elements of the Supreme Court's new Rule 1:24 regarding deferred and installment plans for payment of fines, costs, and restitution. The intent of the bill was to make it easier for people to get on payment plans and, theoretically, to reduce the number of people subject to automatic license suspension for failure to make required payment. Amendments made during the legislative process, however, will actually make it harder—compared to Rule 1:24—for people to get payment plans in the following ways:

- The proposed statutory language requires the debtor, who is likely to be unrepresented at that time, to move the court and prevail in a hearing when

[1] See Virginia State Crime Commission, "Restitution: Collection Practices and Extension of Probation," November 10, 2016, available at http://vscc.virginia.gov/Restitution%20Presentation%20Version%2010.pdf.

requesting a modification of an existing payment plan (instead of just informally walking in and talking to the court);
- The proposed statutory language does not allow clerks to grant modifications pursuant to court policy;
- The proposed statutory language allows courts to deny modifications to a payment plan even when the debtor makes a good faith showing of need; and
- The proposed statutory language requires courts to require a down payment of up to 20% when a debtor who has defaulted requests a subsequent payment plan.

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SB 854 and HB 2386 also increase the number of days for entry into a payment plan from **30 to 90 days** (a very good thing), but the bills not amend 46.2-395, which currently requires a license to be suspended for nonpayment automatically in **30 days**. Thus, if you wait until the 31st day to get on a plan, your license will already be suspended.

Therefore, we ask you to amend SB 854 and HB 2386 in the ways outlined in Appendix B to this letter. We also ask you to consider amending HB 2467 simply to correct the inconsistency created by HB 2386 and SB 854, or more dramatically, by recommending an amendment to repeal automatic license suspension altogether by striking 46.2-395 and references thereto entirely. At a minimum, we believe it would be good to offer a technical amendment to 46.2-395(C) to change 30 days to 90 days to bring the automatic suspension date in line with SB 854/HB2386's amendments to 19.2-354.

I would welcome the opportunity to discuss these bills further with you or your staff. I can be reached at 804-523-2146.

In the meantime, I thank you kindly for your consideration of these comments and your attention to these important issues.

Very truly yours,

Claire Guthrie Gastañaga

AMENDMENTS TO HB1855/SB1284

Amendments to 19.2-305.1

Line 62 – after "defendant" strike "," and insert ". The court shall either elect to include restitution within a payment agreement issued pursuant to § 19.2-354, or otherwise enter"

RATIONALE: This amendment intends to synchronize § 19.2-305.1 with § 19.2-354 and VSCR 1:24, which indicate that restitution presumptively will be included in payment plans addressing court debt generally, unless the court decides otherwise in a particular case.

Line 62 – after "paid" strike ","

Line 64 – after "If the" insert "court chooses to manage restitution separately, pursuant to this latter option, and if the"

Line 66 – after "defendant" insert ", the date by which all restitution is to be paid,"

RATIONALE: This amendment is intended to clarify that the date by which all restitution is to be paid is a matter to be determined by the court, rather than as listed by the attorney for the Commonwealth or his/her designee.

Line 71 – after "charge[.]" insert "In all cases the defendant shall be able to request modification of the date by which all restitution is to be repaid and the terms and conditions of such repayment, pursuant to the procedure set forth in § 19.2-354 et seq."

RATIONALE: This amendment is intended to clarify that terms of repayment of restitution can be subject to modification on request of the defendant. Without this amendment, it appears that sentencing is the only opportunity for a court to establish such terms. Financial capacity often changes over time, and defendants must have opportunities to petition the court to recognize these changes so that they can (hopefully) avoid default. To the degree that a court permits restitution to be included in a payment plan addressing court debt generally, this provision synchronizes this subsection with § 19.2-354.

Amendments to 19.2-349

Line 119 – "after city" strike ":" and insert "a list of all cases with an outstanding balance of restitution that has been in default of a payment agreement or the terms and conditions for repayment for more than 90 days."

Strike lines 120-126

RATIONALE: These amendments are intended to limit the contemplated list to cases wherein a person is in default for more than 90 days on restitution. The current language in HB1855 contemplates a list that is over-inclusive, and may include people who still owe some balance of restitution but nonetheless are fully in compliance with the terms of a payment plan or with the terms and conditions of repayment.

Amendments to 19.2-358

Line 233 – Strike "show cause why he should not be confined in jail or fined for" and insert "appear for adjudication of whether nor not such"

Line 233 – After "nonpayment" insert "was willful"

Line 236 – Strike "show cause" and insert "appear"

Line 237 – Strike "unless the defendant" and insert "if the moving party"

Line 238 – Strike "his" and insert "the defendant's"

Line 238 – Strike "not"

Lines 238-9 – Strike "or not attributable to a failure on his part to make a good faith effort to obtain the necessary fund for payment,"

Line 240 – Strike "unless the defendant"

Line 240 – Strike "not"

Line 242 – After "60 days" insert "," and strike "or" and restore the phrase "impose a fine not to exceed $500"

Line 242 – After "$500" strike "." and insert ", or modify the terms and conditions of repayment. If the defendant is not proven to have the ability to pay, or payment otherwise would cause hardship, the court shall not impose such sanctions."

Line 246 – After "that" insert "modification is warranted in light of the defendant's financial position and his or her ability to pay or"

Line 246 – After "hereof," insert "or it appears that the default was not willful,"

Line 247 – Strike "may" and insert "shall"

Line 248 – After "part." Insert "In no case shall the court require repayment during such time as the defendant remains indigent or repayment would otherwise cause hardship to the defendant. Any default during such periods shall not be deemed willful under this subsection, and shall not constitute failure under subsections B and C of § 46.2-395."

RATIONALE: These amendments to § 19.2-358 accomplish several things:

1) They are intended to return § 19.2-358 to the language therein under current law, where courts have fines available as a potential sanction for willful nonpayment of court debt. Courts are in the best position to determine what sanction is appropriate under the circumstances of an individual case, and thus removing fines as an option is nonsensical. Moreover, by leaving only incarceration, the risk increases that (when a judge errs in determining that a person was willful in his or her nonpayment) a debtor is sent to prison because he or she lacks the ability to pay. Adding modification of payment plans (for example, increasing the amount of expected installments) as an available sanction in subsection (B) expands options available to courts in managing cases.

2) They change the burden of proof from the defendant (to show lack of willfulness) to the moving party (to show willfulness) in default.
3) They incorporate the importance of evaluating ability to pay in determining willfulness or lack thereof.
4) They indicate that the court shall provide relief if the default was not willful.
5) They set forth a definition for ability to pay, and indicate that lack of such ability to pay will not constitute willful default or trigger license suspension under § 46.2-395.

AMENDMENTS TO HB2386/SB854

Amendments to 19.2-354

1. Publication

Line 78, after "19.2-354.1" insert ", and the court's policies implementing 19.2-354.1,"

RATIONALE: Courts should have to publish their actual payment plan policies, and not just the statutory text, so that debtors will understand what their obligations are, and what their rights are. It will also enable us to evaluate what courts are actually doing. This publication requirement was put into law in 2015, but was (inadvertently) changed in 2016 with passage of HB572, which required the Supreme Court rule to be publicized, as opposed to the actual local policy.

Amendments to 19.2-354.1

1. Community Service

Line 134-35, strike "if a community service program has been established"

RATIONALE: This phrase is directly contradictory with existing law. Va. Code 19.2-354(C) says that "The court shall establish a program . . . for the performance of community service work before or after imprisonment."

2. Modifications to Payment Plans

Line 172, strike "by motion"
Line 172, strike "may" and insert "shall"
Line 172, strike "after a hearing"
So that (H) reads: H. At any time during the duration of a payment agreement, the debtor may request a modification of the agreement, and the court shall grant such modification based on a good faith showing of need.

RATIONALE: Subsection H should be returned to the language of Rule 1:24, which did not require a motion or hearing, and required judges or clerks to grant modifications upon a good faith showing of need. The conference report does not permit clerks to grant modifications and permits judges to deny them even after a good faith showing of need is made. Under the conference report, defendants will have to make a motion and hearing without the assistance of an attorney.

3. Subsequent Payment Plans

Line 177, strike "shall" and insert "may"

RATIONALE: Many courts do not require down payments for entry into a subsequent payment plan, and they should not be forced to require one. Requiring a down payment may be unconstitutional when a debtor cannot afford to make a down payment.