February 27, 2018

The Hon. Ralph Northam
Governor of Virginia
Office of the Governor
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Dear Governor Northam:

I write to you today on behalf of the ACLU of Virginia and its more than 42,000 members from across the Commonwealth regarding the reported "deal" you struck with the House of Delegates' leadership regarding raising the felony larceny threshold and collecting restitution for crime victims.

These are two separate and independent measures. Only the "deal" connects them in concept or legislatively. Accordingly, I have addressed the two proposals separately below.

Felony Larceny Threshold

We agree that the $200 threshold for felony larceny, set in 1980, should be raised. We don't agree, however, that an increase to $500 will address the underlying and historical inequity of current law. For starters, the increase to $500 included in the "compromise" you struck with House Republicans wouldn't even keep up with the past 38 years of inflation. $500 in 1980 dollars is $168 dollars so we're actually going backward from the 1980 $200 threshold rather than forward. Moreover, $500 is well below the threshold in our neighboring jurisdictions of Maryland, West Virginia, North Carolina and D.C., all of which have thresholds of $1,000.

The low threshold needlessly felonizes countless Virginians each year, and has a disproportionate impact on women and people of color. It is urgent that the threshold be raised. Nonetheless, because it could theoretically be another 38 years before our leaders get serious about addressing this problem again, a baby step that actually is a step backward does almost nothing to address this problem.

We urge you to hold to your campaign promise and recommend to the legislature an amendment to House Bill 1550 and Senate Bill 105 once enacted that would raise the felony larceny threshold to a minimum of $1,000. We will join you in working for adoption of such an amendment by the House and Senate.

Restitution

We do agree that crime victims should be made whole, but not by applying additional penalties, including extended probation under threat of contempt of court charges and jail time, only to those who are unable to pay, or by turning probation officers into collection agents for civil debt. Despite assurances from your administration, House Bill 484 and Senate Bill 994 regarding repayment of restitution to crime victims will do both.

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Last year, Governor McAuliffe vetoed a similar restitution bill because it required that an individual who owes restitution be placed on an indefinite period of probation, until all restitution was paid. We know that the language of this year's bills is different from the exact language of last year's proposal. Nonetheless, what hasn't changed is that the new proposed scheme, like last year's bill, still allows the court the discretion to impose prolonged, indefinite probation for nonpayment of restitution. In addition, it allows courts to modify sentences previously suspended and invoke contempt charges repeatedly over a 10 year period to put people in jail for 60 days. Finally, it ties restitution explicitly to probation and engages probation officers in monitoring restitution payments.

Our concerns about this year's restitution proposal is grounded in the language included in both bills that that pulls Sections 19.2-304 and 19.2-306 into the code section on paying restitution, Section 19.2-305.1. Sections 304 and 306 are separate from Section 305.1 for a reason. Restitution repayment currently is incorporated in a more comprehensive payment plan including the possibility to do community service in lieu of payments. We do not agree with your staff's argument that current law allows judges to revoke probation (or extend it) SOLELY based on nonpayment of restitution. Sec 19.2-305.1, specifically sets out parameters for paying restitution and allows for a defendant to do community service to offset lack of ability to pay. While it is true that judges could extend probation or revoke a suspended

sentence under current law (Paragraph F of Section 19.2-305.1), it is only for unreasonable failure to execute the entire court plan, which often includes community service or other forms of restitution if the defendant is unable to pay monetary restitution.

By pulling in Section 19.2-304 and 19.2-306, the legislature is green-lighting judges to prolong probation or revoke suspended sentences based solely on nonpayment of restitution, without guaranteeing the defendant can demonstrate a good faith effort to make payments (as is the protection under the new proposed language of Sec 19.2-358). Sections 19.2-304 and 19.2-306 do not have the same protective language as the proposed language of Sec 19.2-358. While your administration has focused on this new language of 19.2-358 as a protection for indigent clients, there is no similar language being added to 304 and 306. There is no direction to judges to use the contempt hearing in Sec 19.2-358 and it is a fallacy to assume they will use this section, rather than look to 304 and 306 to punish indigent defendants that cannot pay. Why would a judge choose the convoluted scheme of 19.2-358, when they could just extend probation (19.2-304) or revoke some or all of a suspended sentence (19.2-306) without affording the indigent defendant the presumptions that are written into 19.2-358?

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The reality is that judges will look to this new law as new authority to prolong probation indefinitely simply because someone cannot pay restitution. For these reasons we ask that you amend HB484/SB994 to address these concerns or veto the bill as your predecessor did. Our proposed amendments are below.

Needed amendments to HB484/SB994:

- Lines 122-124, strike (b) and (c) of the new paragraph F and make (d) a (b).
- Line 135, change "the court may" to "the court shall," strike the rest of (i) and (ii) up to "proceed" - so the new language of this Sub-paragraph 2 would be "the court shall proceed in accordance with the provisions of subsection E of Sec 19.2-358." Judges should not be revoking probation solely based on non-payment of restitution without the protected language of the new Sect 19.2-358 that makes it a contempt proceeding.

- Lines 147 and 148, same, change "the court may" to "the court shall" and strike the rest of (i) and (ii) up to "proceed." This still provides for the 10 years of hearings in the current draft, punishes people who willfully refuse to pay, and allows for indigent defendants to show cause as to why they can't pay.
- Paragraph G needs to be clarified or stricken. A judge may use the vagueness of the paragraph to continue to revoke probation based solely on failure to pay restitution. Line 166 change "shall" to "may." Line 168 strike "of this Code relating to revocation of probation or imposition of a suspended sentence" and replace it with "of Section 19.2-358."

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Thank you for your prompt attention to these matters. Because the restitution bill is likely to come to you as a seven day bill, this is of the highest urgency. Please let me know if you need more information or would like to discuss any of this.

Very truly yours,

Claire Guthrie Gastañaga

cc: The Honorable Mark Herring, Attorney General of Virginia