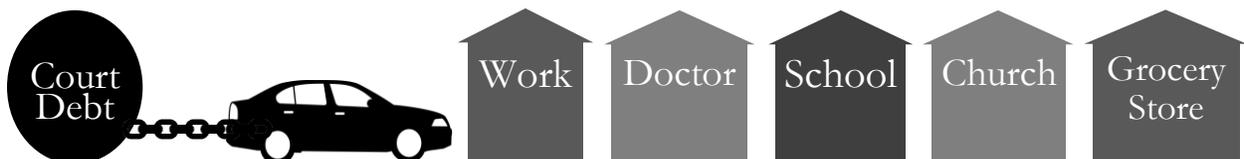


# Driving on Empty: Payment Plan Reforms Don't Fix Virginia's Court Debt Crisis

January 24, 2018



One year later: **1 in 6 Virginia drivers** still has a suspended license due to failure to pay court costs and fines.

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*This report is an update to “Driven Deeper Into Debt: Unrealistic Repayment Options Hurt Low-Income Court Debtors,” which Legal Aid Justice Center published in May 2016, and which evaluated the payment plan policies at that time of Virginia’s General District Courts, available at <https://www.justice4all.org/wp-content/uploads/2016/05/Driven-Deeper-Into-Debt-Payment-Plan-Analysis-Final.pdf>.*

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*This report is meant to be a source of information only. It is not legal advice. Please contact a lawyer if you need legal assistance.*

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## Executive Summary

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In February 2017, the Supreme Court of Virginia implemented significant changes to rules governing payment plans for court debt motivated, in part, by helping people restore their driver's licenses.<sup>1</sup> These changes were later enacted by the Virginia General Assembly. Nearly a year later, one shocking statistic remains essentially unchanged: roughly one in six licensed drivers in Virginia still has their driver's license suspended at least in part due to unpaid court debt.<sup>2</sup>

*“As of December 2017, nearly **one million Virginians** had driver's licenses suspended at least in part due to court debt (974,349), and nearly two-thirds of those (638,003) were suspended solely for that reason.”*

To see why, we reviewed payment plan policies used by 116 general district courts (GDCs) across Virginia. Our review indicates that, even following significant reforms, payment plan policies in place across Virginia are not designed to take into account people's individual financial circumstances, resulting in unrealistic and unaffordable payment plans that often lead to default. Many GDC policies do not mention ability to pay, and many others look at ability to pay only as an exception. Of the 116 policies we examined, not one gives any indication of how it evaluates ability to pay, and correspondingly, the inability to pay. In addition, many courts have no community service provisions (or very restrictive community service provisions), charge arbitrarily high down payments to enter plans, fail to mention the statutory right to seek modification of plans, or restrict access to subsequent payment plans for indebted Virginians who default.

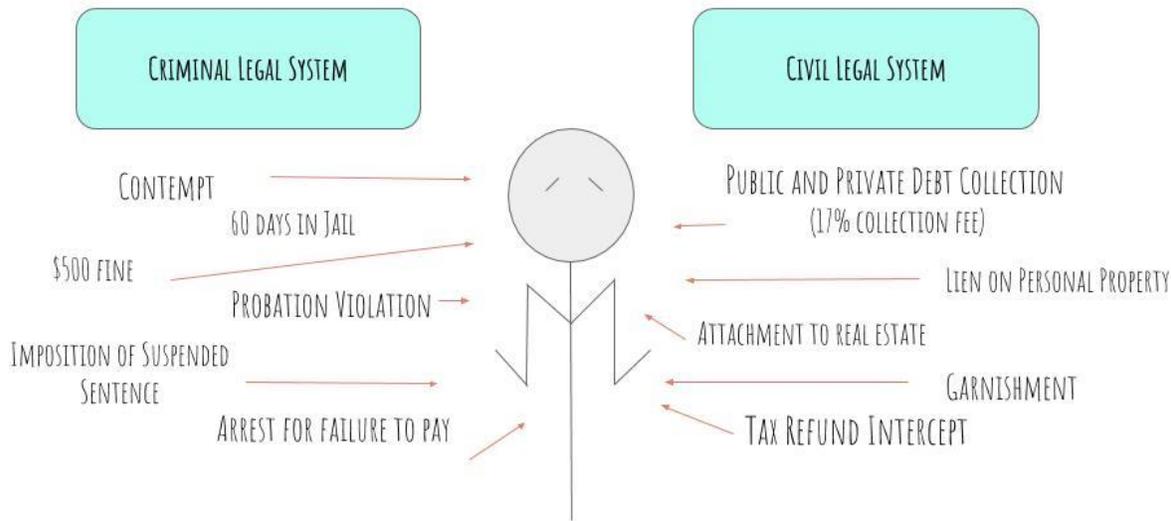
The reality is that many court debtors are indigent or otherwise lack the ability to pay. For them, policies that assume they can pay are effectively useless because they provide no escape from the crushing penalties that defaulting debtors face. These penalties can include revocation of probation or re-imposition of a suspended sentence; intercept of tax refunds; civil collections (with a 17% surcharge); accrued interest; and driver's license suspension, among others. License suspension can, and often does, lead to incarceration for driving on a suspended license. In fact, from 2011-2015, driving-while-license-suspended charges, based on failure to pay alone, led to the sentencing

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<sup>1</sup> Court debt includes not only punitive assessments such as fines, but also reimbursement for “use” of the court system through assessment such as court-appointed counsel fees (for people who cannot afford attorneys) and jury fees (for people who choose to be tried by a jury of their peers).

<sup>2</sup> See *infra* n.4 regarding the number of drivers suspended at least in part due to court debt. Meanwhile, Virginia DMV “serves a customer base of approximately 6.2 million licensed drivers and ID card holders.” See [http://www.dmv.virginia.gov/about/#about\\_dmv.asp](http://www.dmv.virginia.gov/about/#about_dmv.asp).

of approximately 1.74 million jail days—which is an average of more than 348,000 jail days each year.<sup>3</sup>



### DRIVER'S LICENSE SUSPENSION IS JUST ONE OF MANY TOOLS VIRGINIA USES TO COLLECT COURT DEBT

It appears that these reforms have done little, if anything, to stem the breathtaking current of Virginians losing their licenses. As of December 2017, nearly one million Virginians had driver's licenses suspended at least in part due to court debt (974,349), and nearly two-thirds of those (638,003) were suspended solely for that reason.<sup>4</sup> In a recent one-year period (November 2016-October 2017), an average of 835 new court debt suspensions surged each and every day into the system.<sup>5</sup> Indeed, focusing on the first four months of data (July 2017-October 2017) since the

<sup>3</sup> This number does not include any suspended jail sentence. (If that suspended time is included, the figure jumps to 2.5 million days per year). Steven Peterson, Ph.D. and Ben Schoenfeld, Analysis of public Virginia court records compiled by Ben Schoenfeld and available at <http://virginiacourtdata.org/> (January 22, 2018) (written opinion on file with author). Of the 348,000 days of sentenced jail time per year, many were mandatory minimum days (since a third or subsequent conviction for driving on a suspended license within a ten-year period, even when the license was suspended due to unpaid court debt, carries a mandatory minimum of 10 days in jail). Although mandatory minimum days must be fully served timewise, the remainder of sentenced jail days may be subject to “good time” credits (which can reduce such time in jail by up to 50%) pursuant to Va. Code § 53.1-116. Because a sentence may include both a mandatory minimum term of confinement and a term subject to good time credits, it is not possible, using the limited data available publicly, to calculate active time served.

<sup>4</sup> Email from Richard Holcomb, Commissioner, Virginia Department of Motor Vehicles, to Delegate David Toscano, Virginia General Assembly (December 18, 2017) (citing statistics as of December 2, 2017) (on file with authors).

<sup>5</sup> *Id.*

implementation of Va. Code § 19.2-354.1, the figure was an average of 954 suspensions per day.<sup>6</sup> That pace, when annualized, represents over 348,000 suspensions for default on court debt per year.

Driver’s license suspension for unpaid court debt is a blunt instrument. Under Virginia law, the hammer descends automatically whenever a person defaults on court debt, regardless of the reason for such default. Courts effectively assume—without any process or inquiry whatsoever—that individuals are in contempt for failing to pay money that, in reality, they don’t have. Indeed, anyone a few days late or a few dollars short is pushed into suspension. A September 2017 report by the Supreme Court of Virginia acknowledges that “[d]efendants unable to make substantial or meaningful payments constitute the population most likely to undergo license suspension for the failure to pay fines and costs.”<sup>7</sup>

Additionally, and ultimately, driver’s license suspension for unpaid court debt is counterproductive and debilitating. It makes it even less likely that courts will ever be able to collect unpaid court debt by impairing the employment and earnings prospects of suspended drivers. For the same reason, it hurts Virginia families struggling to make ends meet. It also distracts Virginia from a larger (and badly needed) discussion about how to sustainably fund our court systems.

**Thus, even as further changes can be made to payment plan policies across the state, Virginia’s law stripping driver’s licenses of people who default on court debt needs to be repealed.**

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<sup>6</sup> *Id.*

<sup>7</sup> Report Pursuant to Item 40, Paragraph N, 2017 Appropriation Act, “Community Service Performed in Lieu of Payment of Fines and Costs,” at 2, available at <https://rga.lis.virginia.gov/Published/2017/RD341/PDF>.

## Methodology and Overview of Findings

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The Legal Aid Justice Center has analyzed 116 Virginia general district court payment plan policies, representing policies from approximately 91% of the Virginia GDCs.<sup>8</sup> Virginia courts were first required to commit their payment plan policies to writing, pursuant to an amendment to Va. Code § 19.2-354 that took effect July 1, 2015.<sup>9</sup> Subsequently, Virginia Supreme Court Rule 1:24 and Va. Code § 19.2-354.1 were established and most courts updated their payment policies to account for those changes in the law effective July 1, 2017.

We have compared these GDC policies to Rule 1:24 and Va. Code § 19.2-354.1. The analysis reveals that court payment plan policies diverge widely from each other and often disregard (or fall short of) the standards set forth in Rule 1:24 and Va. Code § 19.2-354.1. Most alarmingly, significant numbers of courts fail to consider debtors' financial situations or provide low-income debtors with alternatives to rigid payment plan terms. The results can be devastating for individuals and their families forced to pay beyond their ability.

The following is a summary of the key findings from the Legal Aid Justice Center analysis:

### Ability (and Inability) to Pay

**Findings:** More than 1/3 of GDC policies do not mention ability to pay at all. Of the courts that do refer to ability to pay, many do so only as an exception to standard payment plan terms. Others have language about repayment timetables that belie any true consideration of ability to pay. Most significantly, none of the GDC policies explain how they assess ability to pay in practice.

Without a clear understanding of debtors' financial situations (or of how to properly respond to them in handling court debt), courts are likely to have little appreciation of the hardships faced by Virginians who may need to decide between paying child support, buying food, or

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<sup>8</sup> Our review included all of the GDC policies that appeared to be current as of September 20, 2017 and were available on the Virginia's Judicial System ("Virginia Courts") website at [http://www.courts.state.va.us/online/ppp\\_fines\\_costs/dc/home.pdf](http://www.courts.state.va.us/online/ppp_fines_costs/dc/home.pdf). We sent a letter to all other general district courts and included in our subsequent review all of the policies we received from the courts. There were eight courts whose policies on the Virginia Courts website appeared to be outdated and that did not reply to our letter (Albemarle, Arlington, Buckingham, Falls Church, Goochland, Shenandoah, Southampton, and Stafford), and three courts whose policies were not on the Virginia Courts website at all (either outdated or otherwise) and did not reply to our letter (Caroline, Fauquier, and Spotsylvania). We did not review the policies of these 11 courts. For a list of the courts reviewed, see Exhibit 1.

<sup>9</sup> See 2015 Va. Acts Ch. 265.

covering court costs, for example. Under such circumstances, a payment plan policy that requires “just” \$50 a month may be out of reach.

## Community Service

**Findings:** Nearly 1/3 of GDC policies either do not mention community service or explicitly disallow it. Of the courts that do allow community service, many make it difficult to access, or have rigid hours requirements. Most courts credit hours worked only at the federal minimum wage rate (\$7.25/hr.).

## Initial Down Payments

**Findings:** Only 10% of GDC policies affirmatively do not require a down payment to establish initial payment plans. Over half do require a down payment and many of them (nearly 1/3 of all of the plans reviewed) require the maximum possible down payment allowed.

## Modification

**Findings:** More than 1/4 of the GDCs make no mention of modification whatsoever. Others treat an extension of time under the terms of a current payment plan as the only type of modification that might be available. Further, over half of the GDC policies that do mention modification provide little or no detail on how to seek it.

## Subsequent Payment Plans

**Findings:** Approximately 1/6 of GDC policies do not mention subsequent payment plans. The rest of the courts do speak to the issue of subsequent payment plans, and all suggest that they are possible at least in some circumstances. Roughly 2/3 of GDC policies suggest that those courts charge a down payment in the maximum possible amount allowed. Over 40% of GDC policies place restrictions on access to subsequent payment plans, either by requiring procedures such as the filing of a petition and hearing, or barring subsequent plans for those who cannot show changed circumstances.

## Transparency and Accessibility

**Findings:** Roughly 1/4 of GDCs either have not published their policies on the Virginia Courts website or have what appear to be out-of-date policies on it. (Some of these courts did provide their policies in response to a letter requesting them, in the process of research for this report.) In addition, many courts have unnecessary in-person requirements to access payment plans, which serve as a barrier to some debtors.

## Background

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Federal caselaw requires courts to assess an individual's ability to pay prior to enforcing the collection of court debt and not to enforce court debt as to indigent people (so long as they remain indigent) and others for whom such enforcement would cause hardship. Despite this, general district courts across Virginia frequently fail to meaningfully incorporate an individual's financial status into the terms of payment plans. This often results in several consequences for the defendant, including financial distress, collections proceedings, and the automatic suspension of driver's licenses. As of December 2017, nearly one million Virginians had driver's licenses suspended at least in part due to court debt (974,349), and nearly two-thirds of those (638,003) were suspended solely for that reason.<sup>10</sup> In a recent one-year period (November 2016-October 2017), an average of 835 new court debt suspensions surged each and every day into the system.<sup>11</sup> Indeed, focusing on the first four months of data (July 2017-October 2017) since the implementation of Va. Code § 19.2-354.1, the figure was an average of 953 suspensions per day.<sup>12</sup>

Court debt disproportionately impacts low-income Virginians who already struggle to meet basic needs. Wealthier drivers have the discretionary income to quickly cover these debts and retain their licenses. By contrast, low-income drivers struggle to meet the minimum down payments or monthly payments required by the courts. These low-income drivers lose their licenses after they fail to either pay in full within 30 days of sentencing or obtain a payment plan within the same time period and maintain it. For many drivers, this means giving up their only legal mode of transportation to work *and* forcing them to choose between losing their jobs or risking incarceration for driving illegally.

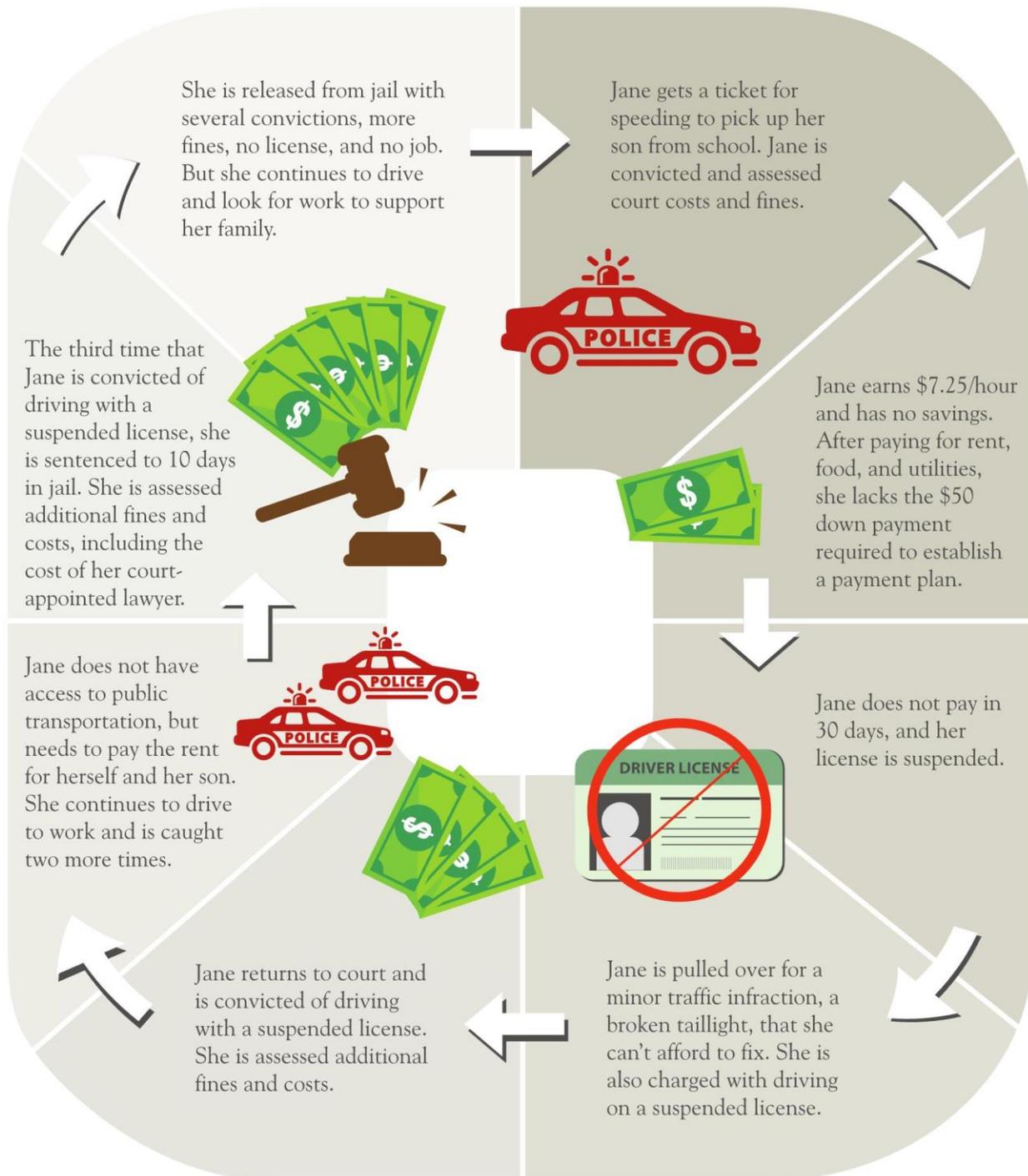
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<sup>10</sup> Email from Richard Holcomb, Commissioner, Virginia Department of Motor Vehicles, to Delegate David Toscano, Virginia General Assembly (December 18, 2017) (citing statistics as of December 2, 2017) (on file with authors).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

## THE VICIOUS COURT DEBT CYCLE



## Virginia's Payment Plan Reforms

Starting in 2015, Virginia's General Assembly took steps intended to provide transparency and consistency to payment policies to guide the payment of court debt. It passed legislation in that year requiring courts to put their payment plan policies in writing. (Most of these policies are available online on the Virginia Courts website.) On May 18, 2015, the Judicial Council, a Virginia judicial policy-making body, endorsed "Recommendations for the Collection of Unpaid Fines and Court Costs."<sup>13</sup> These Recommendations were distributed to Virginia courts prior to July 1, 2015, the date that written policies became required by law.

In 2016, Virginia's General Assembly took a follow-up step, requiring courts across the Commonwealth to ensure that their payment plan policies adhered to the Rules of the Supreme Court of Virginia. In doing so, the General Assembly formalized a request to the Supreme Court of Virginia that it take steps to review existing payment plan policies and establish binding guidelines (in the form of a formal Virginia Supreme Court Rule) for such policies going forward.

In response, Virginia's Supreme Court convened a stakeholder panel and published Virginia Supreme Court Rule 1:24 in November 2016. The rule had an effective date of February 1, 2017, and a revised version went into effect on July 1, 2017. The Rule sets forth numerous standards for payment plan policies, with the stated intention of facilitating payment of court debt and "enabling defendants to restore their driver's licenses."

In 2017, Virginia's General Assembly took the original (and then current) version of Rule 1:24, edited its text at several specific points, and codified it into state statutory law (as Va. Code § 19.2-354.1). The new statute sets forth requirements regarding the establishment of payment plans, including consideration of a debtor's ability to pay, selecting down payments, making modifications, and setting up subsequent plans.

Leading up to the bill's passage, political leaders talked about the unfairness and illogic of suspending driver's licenses as a method of court debt collection, and cited the payment plan bill as a way to assist drivers in trying to avoid such needless suspensions and in trying to reinstate licenses already suspended. Yet, several bills that were designed to eliminate such suspensions or narrow the situations in which they could occur were defeated in the legislative session. Leaders suggested that the payment plan bill would resolve the incidence of court debtors getting stuck without their licenses. This was so, even as internal analysis by the state's Department of Planning and Budget reported that these payment plan standards would likely cause a mere 25% reduction in driver's

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<sup>13</sup> Available at [http://www.courts.state.va.us/courtadmin/judpolicies/2015\\_jcv\\_report.pdf](http://www.courts.state.va.us/courtadmin/judpolicies/2015_jcv_report.pdf).

license suspensions.<sup>14</sup> In either case, even the modest reduction that was anticipated has utterly failed to materialize.<sup>15</sup>

Meanwhile, lawmakers and stakeholders (nationally and across the Commonwealth) have increasingly recognized that even with payment plans, automatic driver's license suspension for an inability to pay court debt violates constitutional standards. Notably, in November 2016, the U.S. Department of Justice wrote:

suspending the driver's licenses of those who fail to pay fines or fees without inquiring into whether that failure to pay was willful or instead the result of an inability to pay may result in penalizing indigent individuals solely because of their poverty, in violation of the due process and equal protection clauses of the Fourteenth Amendment.<sup>16</sup>

In March 2017, U.S. District Judge Moon wrote in a memorandum opinion that Virginia law "automatically suspend[s] a defendant's driver's license for nonpayment of court fees and fines, regardless of his ability to pay. That unflinching command may very well violate Plaintiffs' constitutional rights to due process and equal protection."<sup>17</sup> Likewise, the Chief Justice of the Texas Supreme Court argued in his 2017 State of the Judiciary (Texas) speech:

Judges must determine whether a defendant is actually unable, not just unwilling, to pay a fine.... For the indigent, the fine must be waived and some alternative punishment arranged, such as community service or training. For those who can pay something but only by struggling, adding multiple fees threatens to drown the defendant in debt.... And revoking a defendant's driver's license just keeps him from going to work to earn enough to pay the fines and fees. A parent disciplining a child may say, this hurts me more than it hurts you. When taxpayers have to say to criminal defendants, this hurts us more than it hurts you, something's wrong.<sup>18</sup>

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<sup>14</sup> See, e.g., Department of Planning and Budget, 2017 Fiscal Impact Statement, SB1188 (Jan. 27, 2017), available at <https://lis.virginia.gov/cgi-bin/legp604.exe?171+oth+SB1188F122+PDF>.

<sup>15</sup> In actuality, there were 244,057 new court debt suspensions in the first nine months since the implementation of Rule 1:24 (February 2017 through October 2017). At that pace, there would be over 325,000 new suspensions surging into the system over the course of a year. Similarly, in the first four months since the implementation of Va. Code § 19.2-354.1 (July 2017 through October 2017), there were 116,045 new court debt suspensions. At that pace, there would be over 348,000 new suspensions surging into the system over the course of a year.

<sup>16</sup> Statement of Interest, U.S. Department of Justice, *Stinnie v. Holcomb*, 3:16-cv-00044-NKM (W.D. Va. 2016), filed Nov. 7, 2016.

<sup>17</sup> Memorandum Opinion, *Stinnie v. Holcomb*, 3:16-cv-00044-NKM (W.D. Va. 2016), filed March 13, 2017.

<sup>18</sup> Chief Justice Nathan L. Hecht, The State of the Judiciary in Texas (Feb. 1, 2017), available at <http://www.txcourts.gov/media/1437289/soj-2017.pdf>.

In Virginia’s case, unrealistic payment plan guidelines help to prompt default. This, in turn, destabilizes Virginia families; increases reliance on public assistance; collects less in revenue; spends more on enforcement (including by police, courts, and jails); and produces a court system that places revenue above justice.

## The Road Ahead: Recognizing Inability to Pay is Required by the United States Constitution

Constitutional law permits Virginia localities to impose court debt in state proceedings against defendants who have the foreseeable ability to pay without hardship. Virginia courts, however, routinely try to recover court debt against indigent defendants—beyond their ability to pay—violating the U.S. Constitution, as well as basic notions of fairness.

Because the imposition and collection of court debt disproportionately punishes indigent defendants, the practice should be understood in the context of U.S. Supreme Court decisions that have long held that punishing individuals because of their poverty is unconstitutional.<sup>19</sup>

*Fuller v. Oregon* and *Alexander v. Johnson* offer specific guidance regarding the constitutional requirements for the imposition and enforcement of court debt.<sup>20</sup> In *Fuller*, the Supreme Court upheld an Oregon court debt recoupment statute as constitutional. The court stressed that because court debt was not imposed under Oregon’s statute unless an individual had the foreseeable ability to pay without “manifest hardship,” the courts were taking into account the financial resources of the defendant and the possible consequences of court debt.<sup>21</sup> Thus, “[d]efendants with no likelihood of having the means to repay [were] not put under even a conditional obligation to do so, and those upon whom a conditional obligation is imposed are not subjected to collection procedures until their indigency has ended and no ‘manifest hardship’ will result.”<sup>22</sup> Ten years later, the U.S. Fourth Circuit Court of Appeals in *Alexander v. Johnson* added that a court, in deciding whether to require repayment of court debt, “must take cognizance of the individual’s resources, the other demands on his own

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<sup>19</sup> First, in *Williams v. Illinois*, the Court held that detaining a defendant beyond his sentence due to an inability to pay a fine constituted impermissible discrimination. 399 U.S. 235 (1970). Then, in *Tate v. Short*, the Court held that a state cannot fine defendants who can afford to pay monetary sanctions and imprison those who cannot. 401 U.S. 395 (1971). Next, in *Bearden v. Georgia*, the Court required inquiries into a defendant’s ability to pay before incarcerating them for failure to pay court-ordered fines and restitution. 461 U.S. 660 (1983).

<sup>20</sup> 417 U.S. 40 (1974); 742 F.2d 117 (4th Cir. 1984).

<sup>21</sup> 417 U.S. at 47-48.

<sup>22</sup> *Id.* at 46 (emphasis added).

and family's finances, and the hardships he or his family will endure if repayment is required. The purpose of this inquiry is to assure repayment is not required as long as he remains indigent."<sup>23</sup>

Reading *Fuller* and *Alexander* together, a court must assess an individual's ability to pay prior to the enforcement of court debt, and must not expect payments against such debt so long as the person remains indigent or cannot otherwise pay without manifest hardship (even if not indigent). Likewise, if the courts (erroneously) expect payment, they cannot condone collateral consequences to befall a debtor who does not pay because he or she cannot do so either at all or without manifest hardship.

Inquiries into a defendant's ability to pay are necessary for the fairness and efficiency of the judicial system. A court adjudicating a federal criminal case explained that requiring repayment in a way

that ignores the realities of a defendant's duties with respect to his family is undesirable. It is as much in the public interest to protect against the possibility that a defendant's dependents will become societal charges as it is to require a financially able defendant... to repay the costs of his defense."<sup>24</sup>

Moreover, spending time and enforcement resources pursuing uncollectible accounts is inefficient. An evaluation of the defendant's financial status prior to collecting court debt, therefore, not only upholds constitutional protections for indigent defendants, but also ensures the effective use of public resources.

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<sup>23</sup> 742 F.2d at 124 (emphasis added).

<sup>24</sup> *U.S. v. Bracemell*, 569 F.2d 1194, 1199-1200 (2d Cir. 1978).

# Payment Plan Policy Analysis

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A significant number of Virginia general district courts have implemented written payment plan policies that contain inadequate detail and fail to account for key provisions of state guidance (including Rule 1:24 and Va. Code § 19.2-354.1). The key areas this report focuses on are: ability to pay, community service, down payments for initial payment plans, modifications, subsequent payment plans, and transparency and accessibility.

The following analysis describes these barriers in greater detail. It should be noted that the payment plan policies are narrative in form; accordingly, our efforts to quantify the number of payment plan policies that have a given feature are, in some cases, an exercise of judgment.

## Ability (and Inability) to Pay

Accurately and realistically evaluating ability to pay—or inability to pay, as the case may be—is the most important area of focus in any given payment plan policy. It is constitutionally necessary. Moreover, for many court debtors at the bottom of the income spectrum, it may mean the difference between remaining in good standing with outstanding court debt and being pushed involuntarily into driver’s license suspension (which, in turn, makes earning money and paying off court debt even less likely and can subject drivers to additional debt and incarceration rooted in poverty) and a range of other possible collateral consequences.<sup>25</sup>

We reviewed each court’s policy to determine whether it mentions ability to pay in setting payment plan terms; whether the court collects individual financial data from all debtors before setting payment plan terms or from only some debtors; and whether there are other features that impact how the court addresses ability to pay in practice.

**Rule 1:24 / Va. Code § 19.2-354.1 Standard: The court “shall take into account the defendant’s financial resources and obligations” before setting the parameters for a deferred or installment payment plan, and “the length of a payment agreement and the amount of the payments shall be reasonable in light of the defendant’s financial resources and obligations....”**

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<sup>25</sup> Even if payment plan policies are improved to meaningfully account for ability to pay, driver’s license suspension to collect court debt remains a counterproductive policy that should be repealed. Additionally, due process demands that any collateral consequences can be imposed only after an inquiry as to whether the default was willful or not.

## Findings

*At least 40 of the 116 general district courts (or 34%) do not mention taking ability to pay into account in setting up an initial payment plan.* A list of these courts is attached as Exhibit 3. (Curiously, several of these courts do mention taking ability to pay into account in other contexts, such as considering modification.)

### EXAMPLES OF POLICIES THAT DON'T MENTION ABILITY TO PAY

#### **Amherst, Bedford, Campbell, Lynchburg, and Nelson:**

- strict timelines for payment in full (up to \$500 paid within six months; more than \$500 paid within one year)

#### **Sixth Circuit (Brunswick, Emporia, Greensville, Hopewell, Prince George, Surry, Sussex):**

- payment plans can be for a maximum of six months

*Other courts have repayment timetables that belie any true consideration of ability to pay.* For example, Amelia County's payment plan policy says that the court evaluates the financial ability of all people. But despite this, it has a range of time periods for payment under initial payment plans based wholly on amount owed, without any indication that there are exceptions based on ability to pay or otherwise. (Strangely, Amelia County's policy does say that for subsequent payment plans, "the Clerk shall set the payment schedule taking into account the defendants' [sic] financial resources.") Courts in Virginia's 27<sup>th</sup> Circuit (Bland, Carroll, Floyd, Galax, Giles, Grayson, Montgomery, Pulaski, Radford, and Wythe) evaluate ability to pay for installment plans (but not for deferred or modified deferred payment plans). And even for installment plans, the time periods for payment (six months for up to \$500; 12 months for up to \$1000; 24 months for \$1000 or more) are based solely on the amount owed.

*Of the courts that state they take a debtor's ability to pay into account (76, or 65%), many (20, or 17% of all plans reviewed) take such ability to pay into account only as an exception to standard payment plan terms, if a debtor affirmatively raises the issue.*

## EXAMPLES OF POLICIES CONSIDERING ABILITY TO PAY ONLY AS AN EXCEPTION

### **Accomack and Northampton:**

- requires payments of \$50 per month, but debtors may be able to secure an exception if they believe “special circumstances” involving their “financial condition” should be considered

### **25<sup>th</sup> Circuit (Alleghany, Augusta, Bath, Botetourt, Buena Vista, Craig, Highland, Lexington/Rockbridge, Staunton, and Waynesboro):**

- monthly payments must be at least \$50, with a debtor being required to petition for other terms

### **Charlotte and Halifax:**

- DC-211 form should be completed, only if the debtor “isn’t able to accomplish the deferred or standard [installment] agreement.”

*Other irregularities in evaluating ability to pay concern the process by which financial information is collected.* The DC-211 form recently created for this purpose by the Office of the Executive Secretary (of the Supreme Court of Virginia) collects a helpful range of information pertinent to a meaningful evaluation of ability to pay. Nonetheless, Va. Code § 19.2-354.1 allows for “oral examination” as an alternative to use of the DC-211. This is troubling because there is no transparency or quality control (other than at the discretion of individual courts and/or clerk’s offices) as to what that oral examination may consist of or how thorough it may (or may not) be. Some courts use this option, either singularly (e.g., Fredericksburg – “the clerk’s office will conduct an oral examination”) or as an alternative to the DC-211. Newport News-Criminal and Newport News-Traffic both indicate that they may use “oral colloquy using the DC-210 form” to determine ability to pay. The DC-210 is an older form with an extremely cursory evaluation of ability to pay.<sup>26</sup> Thus, the continued use of the DC-210 for this purpose is problematic.

In reviewing the various policies regarding ability to pay, most courts cede authority for evaluating ability to pay to the clerk’s offices (as is permitted by Va. Code § 19.2-354), and others leave such evaluation to judges. Notably, Patrick County’s policy (“any hardships will be heard and the clerk will make a decision which may be referred to the Judge for review upon request”) may be helpful, in allowing debtors more consideration and due process as to what plans look like and whether they adequately account for any hardships individuals may have.

*Disappointingly, none of the 116 general district court policies reviewed indicate how they respond to ability to pay information.* In other words, once a court captures a detailed account of financial information (using the DC-211, for example), there is no guidance and no transparency as to what the resulting payment plan will look like or how the individual’s court debt

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<sup>26</sup> The DC-210 form asks only for monthly income, and the name and address of the petitioner’s employer.

will otherwise be handled. ***This is a critical and systemic problem.*** Will a person who would be deemed indigent by Va. Code § 19.2-159 (the statute affixing eligibility for court-appointed counsel), for example, be told to make payments of \$50 per month in one court, or that they can have 60 extra days to pay in full in another court? Will they be told that the debt will remain on the books without expectation of active payments against it, so long as they remain indigent?

Although caselaw requires that inability to pay be recognized in imposing and enforcing court debt, ***courts across the Commonwealth need clear operative guidance that provides a framework for evaluating ability to pay in a way that accords with constitutional requirements and helps court debtors—especially Virginia’s poorest residents—avoid falling involuntarily into default.*** This is particularly so since punitive and counterproductive consequences follow default and hurt families and the courts alike.

## Community Service

Community service is often not a good “solution” for resolving fines and costs. According to Rule 1:24, it can’t even be used against some court debt, including restitution, interest, and collection fees.<sup>27</sup> It may be difficult to find an appropriate and available placement in some areas; transportation may prove difficult (as many areas of Virginia lack public transportation, and debtors may have suspended licenses or lack access to an automobile); and some debtors may be unable to perform community service due to disability, family caregiving obligations, work schedules, or schooling. Nonetheless, community service may be helpful for some debtors in some areas, and thus is an important tool in Virginia’s court debt infrastructure.

**Va. Code § 19.2-354(C) Standard: Each court “shall establish” a community service program to enable debtors to offset their debts.<sup>28</sup> (The Judicial Council’s Recommendations, noting this provision and language in Va. Code § 19.2-354(A), state that “each court should ensure that a viable community service program is available as an option for suitable participants in deferred or installment payment plans.”)**

<sup>27</sup> Strangely, this provision remains in the revised Rule 1:24, despite the fact that Va. Code § 19.2-354.1 (the basis for the issuance of the revised version) contains no such language.

<sup>28</sup> Va. Code § 19.2-354.1(B) states that courts shall give written notice of payment plan options and “*if a community service program has been established*, the availability of earning credit toward discharge of fines and costs through the performance of community service work.” (emphasis added). To the degree this provision impliedly affirms some courts not establishing community service programs, it runs counter both to the statutory mandate in Va. Code § 19.2-354 that they do so and to best practices.

We reviewed each court’s policy to determine whether it mentions and permits community service; whether community service is available to all or only to some debtors; whether it imposes conditions for approval of community service for a particular debtor; and what rate of credit it awards per hour worked against court debt.

## Findings

***At least 35 general district courts (or 30%) make no reference in their policies to community service as a means of offsetting court costs and fines, or explicitly disallow it in all cases*** (in Mecklenburg, Newport News-Criminal, and Newport News-Traffic) ***despite Virginia’s law to the contrary.*** A list of these courts is attached as Exhibit 4.

Of the courts with community service options, 26 (or 22%) guarantee the option to all court debtors who wish to utilize it, whereas 15 (or 12%) guarantee the option only to a subset of persons (such as people who are indigent or otherwise lack the ability to make meaningful financial payments).

### EXAMPLES OF POLICIES WITH RESTRICTIVE COMMUNITY SERVICE PROVISIONS

#### **Accomack and Northampton:**

- “only limited opportunities to perform community service” are available;
- any community service must be performed within 90 days of sentencing;
- a maximum credit of \$174 will be awarded against outstanding court debt (representing 24 hours of work);
- the rate of credit is \$7.25 per hour;
- community service is supervised by a probation officer; and
- failure to present “satisfactory written proof” of community service within the same 90-day period following sentencing results in “no credit...given” and a requirement that “all fines and costs [] be satisfied with money instead of community service.”

#### **Loudoun:**

- a person must file a petition within 30 days of sentencing to be considered for community service; and
- only one opportunity to be approved for community service work will be granted within each one-year period

At the same time, ***40 courts (or 34%) make community service only a conditional opportunity.*** One way in which this happens in practice is by advising debtors that they need to undertake a process to seek approval by a judge. This “process” (often notice and a hearing) may be cumbersome or overwhelming (especially for pro se parties) and may result in a judge declining a

debtor's request. Another way in which this happens is by placing restrictions on community service (such as by indicating that there are limited opportunities to do community service or requiring a minimum number of hours worked per month to avoid default or of being denied credit for any hours actually worked short of the required monthly minimum.)

***Of the courts that do offer community service options, roughly half either fail to specify the rate of credit (37 or 31%), or otherwise credit hours worked only at the federal minimum wage rate of \$7.25 per hour (20 or 17%).*** Twenty-one courts (or 18%) credit community service hours at rates between \$7.26 and \$10 per hour. Disappointingly, only three courts (Culpeper at \$12, Richmond City's two GDCs (John Marshall and Manchester) each at \$15) provide community service work with an hourly credit of more than \$10 against court debt. Crediting hours worked at a meaningful rate—such as a living wage<sup>29</sup> or the average wage rate in the community—would better enable debtors to work off fines and costs and would take time worked seriously.

### **Virginia Supreme Court Report on Community Service<sup>30</sup>**

In September 2017, the Virginia Supreme Court published a report on community service's use to satisfy fines and costs for both circuit court and general district courts. The report found:

- Over 16% of courts say they do not allow community service (despite statutory language requiring such programs);
- Many courts put the burden on a debtor to request community service, rather than offering it at sentencing (only 41% of courts) or post-conviction (only 38% of courts);<sup>31</sup>
- 56% of courts indicated that the hourly rate of credit is \$7.25, and the average hourly rate of credit among courts responding to the survey is \$8.79;
- Most courts (77%) don't let clerks offer community service; debtors have to seek permission from a judge to do community service;
- Community service was used to discharge only 2.29% of the total amount of fines and costs satisfied for half of fiscal year 2017; and
- 81% of courts said there was no noticeable change in the use of community service in the first six months following Rule 1:24's effective date (of February 1, 2017)

<sup>29</sup> MIT has identified living wage rates for each Virginia county and metropolitan statistical area. Living Wage Calculator (2018), available at <http://livingwage.mit.edu/states/51/locations>.

<sup>30</sup> Report Pursuant to Item 40, Paragraph N, 2017 Appropriation Act, "Community Service Performed in Lieu of Payment of Fines and Costs," available at <https://rga.lis.virginia.gov/Published/2017/RD341/PDF>.

<sup>31</sup> As the report indicates, a single court could offer the option at multiple points during the process, and thus clerks were allowed to select both of these in answering the survey.

## Down Payments for Initial Payment Plans

**Rule 1:24 / Va. Code § 19.2-354.1 Standard:** A court “may require” a down payment as a condition of entering an initial payment plan and “any down payment shall be a minimal amount to demonstrate the defendant’s commitment to paying the fines and costs.” If a court chooses to require down payments, requirements “may not exceed” certain prescribed maximums. These maximums are 10% for balances of \$500 or less, and the greater of \$50 or 5% for balances over \$500.

### Findings

Critically, Rule 1:24 and Va. Code § 19.2-354.1 indicate that down payments for initial payment plans are optional and are not required as a function of state law. This matters because down payments can serve as a barrier to court debtors (who are at the bottom of the income spectrum) to being able to access or enter into payment plans. The Judicial Council’s Recommendations, for example, state that no down payments should be required for deferred payment plans and that, “[i]f a down payment is required to enter into an installment plan, it should be a minimal amount calculated to facilitate entry into a plan. This consideration is especially important if the down payment may function to bar access to the installment plan process.”<sup>32</sup>

### EXAMPLES OF POLICIES CONSIDERING ABILITY TO PAY IN DOWN PAYMENTS

#### **Bristol, Smyth, and Washington:**

- a down payment can be set in an amount less than the statutory cap by a judge for “good cause”

#### **Essex, Lancaster, Northumberland, Richmond County, and Westmoreland:**

- “the Clerks in their discretion may waive all or part of the down payment requirement set forth in Paragraph 2 [re initial pay plans] based on their review of the defendant’s financial resources and obligations.”

#### **Richmond City’s two GDCs (John Marshall and Manchester):**

- normally require a down payment, belatedly, if court debt is not paid in full within six months, but allow that “a defendant may request a variance from the required down-payment by submitting a request in writing, filing a sworn financial affidavit, and providing supporting documentation of income and expenses with the Clerk of Court. A hearing may be required.”

*Only 12 courts (or 10%) indicate that they do not require a down payment to establish an initial payment plan.* Other courts have policies that are silent or ambiguous on this issue. At

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<sup>32</sup> See *supra* n.13.

least 64 courts (or 55%) do require a down payment. Of these, some do have provisions that appear to consider ability to pay, or otherwise permit discretion, in setting the amount.

***Many of the courts (at least 36, or 31% of the policies reviewed) that do require down payments appear to require the maximum possible down payment allowed.<sup>33</sup>***

Some courts penalize longer payment plans (such as those that might be given to debtors with less ability to pay) or longer periods in which outstanding court debt remains, by charging down payments in those instances. For example, Amelia County and Franklin City charge a down payment when payment in full is not completed within 90 days of sentencing (and as noted above, Richmond City does so when payment is not completed within six months, except when a debtor petitions successfully for a variance). Orange County requires a down payment when the defendant requests a plan over six months in length.<sup>34</sup>

## Modification

The ability of debtors to petition for modification of existing payment plans is an essential aspect of a lawful payment plan policy.

**Rule 1:24 / Va. Code § 19.2-354.1 Standard: “At any time during the duration of a payment agreement, the defendant may request a modification of the agreement in writing on a form provided by the Executive Secretary of the Supreme Court, and the court may grant such modification based on a good faith showing of need.”**

## Findings

***The payment plan policies of at least 30 general district courts (or 25%) make no mention of modification whatsoever.*** This, of course, is problematic, because it may lead to the faulty assumption on the part of debtors—and/or an understanding on the part of court personnel—that modification is not available. A list of these courts is attached as Exhibit 5.

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<sup>33</sup> Va. Code § 19.2-354.1(E) says that a down payment for entry into an installment plan “may not exceed (i) if the fines and costs owed are \$500 or less, 10 percent of such amount or (ii) if the fines and costs owed are more than \$500, five percent of such amount or \$50, whichever is greater.”

<sup>34</sup> In addition, at least one court whose payment plan is statedly current has down payments that exceed the legal maximums, at least in some situations. Clarke County continues to use a policy written in 2015, which has a 10% down payment requirement (regardless of the amount of court debt owed) when the case has been referred to collections. But when the court debt is more than \$500, a 10% down payment requirement effectively results in creating a down payment that is in excess of legal maximums.

***Sixty-five courts (or 56%) mention modification but give little or no detail on how to seek modification.***

Some courts treat extension of time as the only type of modification that might be available. Typically, these courts fail to mention not only that modification can be requested at any time but that changes other than an extension of time, such as changes in the amount of any expected periodic payment, can be considered as well. One example of this is the provision appearing in the policies of Bristol, Smyth, and Washington: “If all fines and costs are not paid in full by the due date, defendant will be required to reappear prior to the expiration of the extension to request additional time which request will be considered at the discretion of the judge.” This language permits only an extension of time.

Somewhat differently, some courts treat requests for an extension as amounting to requests for a subsequent payment plan rather than (or instead of) a modification. Nottoway, Powhatan, and Dinwiddie, for example, refer to a defendant who is unable to pay as being able to come into the clerk’s office prior to the due date under the current plan; this is treated as a request for “another time to pay agreement” subject to an additional down payment requirement. Likewise, Fairfax City and Fairfax County indicate that modification requests are limited to requests for an additional 60 days to pay, which require a down payment at the statutory maximums, and that “any additional extensions will be at the court’s discretion and will require another payment of 10% of the outstanding balance.”<sup>35</sup>

Courts vary widely in how they describe the conditions that may justify a modification. The courts in the 27<sup>th</sup> Circuit (Bland, Carroll, Floyd, Galax, Giles, Grayson, Montgomery, Pulaski, Radford, and Wythe) suggest that a court “will review any plan upon request of a defendant.” Some courts track the statutory language in Va. Code § 19.2-354.1(H), which states that a payment plan may be requested “at any time” and that the court may grant a payment plan modification, including for a “good faith showing of need.” (This includes situations where a debtor’s financial circumstances have not changed but simply are insufficient to enable the debtor to remain in good standing with the payment plan previously given to him or her.) Suffolk helpfully indicates that a modification will be granted for “good cause shown, including but not limited to, a good faith showing of need.”

Some courts take a narrower view: that the debtor needs to articulate some sort of changed circumstance. Accomack and Northampton, for example, say that a modification may be available

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<sup>35</sup> To the degree this 10% payment is viewed as a down payment, it is more than Va. Code § 19.2-354.1 permits as to court debt balances above \$500.

“if your circumstances change.” Chesterfield and Colonial Heights state that a “good faith showing of need” requires that “the individual’s financial position has worsened.”

Other courts require a debtor who needs a modification (including one who is suffering financial hardship) to show—paradoxically—that they have made consistent payments, as a prerequisite for being considered for an extension. Amelia and Greene are two such courts.

Va. Code § 19.2-354.1(H) indicates that requests for modification can be made using “a form provided by the Executive Secretary of the Supreme Court” (which, in practice, is the DC-211 form). However, only 20 courts (or 17%) make reference to the DC-211 form, either by name or descriptively, in discussing modification.

## Subsequent Payment Plans

For many Virginians who have defaulted on a prior payment plan, a subsequent payment plan may be the only realistic way to get their driver’s licenses back after being suspended for unpaid court debt.<sup>36</sup> Thus, it is critical that courts have policies as liberal as possible.

**Rule 1:24 / Va. Code § 19.2-354.1 Standard: “A court shall consider a request by a defendant who has defaulted on a payment agreement to enter into a subsequent payment agreement. In determining whether to approve the request for a subsequent payment agreement, the court shall consider any change in the defendant’s circumstances. A court shall require a down payment to enter into a subsequent payment agreement, provided that the down payment required to enter into a subsequent payment agreement shall not exceed (i) if the fines and costs owed are \$500 or less, 10 percent of such amount or (ii) if the fines and costs owed are more than \$500, five percent of such amount or \$50, whichever is greater.”**

### Findings

*At least 17 courts (or 14%) make no mention of subsequent payment plans.* A list of these courts is attached as Exhibit 6. The rest of the courts do speak to the issue of subsequent payment plans and all suggest that they are possible, at least in some circumstances.

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<sup>36</sup> The only other ways to remove the suspension of a driver’s license for court debt are: (a) to pay in full, or (b) to wait out the statute of limitations period for court debt collections (10 years in general district court, 20 years in circuit court). For many people, especially those of limited means, these options are unrealistic, and crushingly punitive, respectively.

Although statutory law requires at least some down payment for subsequent payment plans, many courts are unclear as to what the down payment will be.

***The majority of courts (70, or 60%) indicate that they will charge a down payment in the maximum possible amount allowed, or (in the case of Clarke,<sup>37</sup> and additionally Fairfax City and Fairfax County,<sup>38</sup> more than the maximum amount allowed). Nonetheless, it is important to note that although some down payment is required, the amounts cited in Va. Code § 19.2-354.1(H) (pertaining to subsequent payment plans) are statutory ceilings rather than statutorily required amounts. This is because, as the Judicial Council noted in its Recommendations as to initial payment plans, down payments “may function to bar access to the installment plan process.” This is equally true of accessing subsequent payment plans. Only four courts (or 3%) indicate they would consider a down payment in an amount less than the statutory caps for a subsequent payment plan.***

***A significant percentage of the courts (49, or 42%) place various restrictions on access to subsequent payment plans, either by requiring procedures such as the filing of a petition and hearing, or barring subsequent plans for those who cannot show changed circumstances.***

#### EXAMPLES OF POLICIES WITH PROCEDURAL RESTRICTIONS FOR ACCESSING SUBSEQUENT PAYMENT PLANS

##### **25<sup>th</sup> Circuit (Alleghany, Augusta, Bath, Botetourt, Buena Vista, Craig, Highland, Lexington/Rockbridge, Staunton, and Waynesboro):**

- a mandatory 90-day waiting period before being able to apply for a subsequent plan (waivable for good cause shown)

##### **Ninth Circuit (Charles City, Gloucester, King William, King and Queen, Mathews, Middlesex, New Kent, Williamsburg/James City County, and York); Bristol, Smyth, and Washington:**

- a requirement to file a motion or petition, and/or to make an appearance before a judge, on a request for a subsequent payment plan

##### **Danville; Norfolk; Richmond City’s two GDCs (John Marshall and Manchester):**

- a requirement to solicit a subsequent payment plan from a third-party collections agency rather than the court itself<sup>39</sup>

<sup>37</sup> “If little or no payments have been made since the date of the original agreement, a down payment of a minimum of Ten Percent (10%) of the total balance due is required to enter into a new, second time to pay agreement.”

<sup>38</sup> See *supra* n.40 and accompanying text.

<sup>39</sup> These provisions run counter to the Judicial Council’s Recommendations, which state that “[a] defendant whose fines and costs have been referred to the collection process under Virginia Code § 19.2-349 shall nevertheless be eligible to enter into an initial or subsequent payment plan with the court.”

In addition, courts vary on what standard they apply in finding a debtor qualified for a subsequent payment plan. Va. Code § 19.2-354.1 states that “the court shall consider any change in the defendant’s circumstances” in determining whether or not to approve a subsequent plan. This language suggests that courts that are not otherwise inclined to grant subsequent plans must consider (at least) changed circumstances, rather than that courts that want to be more flexible with subsequent plans are limited to approving them only when there are changed circumstances. In other words, the statutory language establishes a floor to protect debtors, rather than a limitation on what courts can choose to consider in granting subsequent plans.

Some courts take a helpfully accessible approach, by suggesting that subsequent payment plans are routinely granted (*e.g.*, Accomack/Northumberland: “Even after a default, the Court will grant a new payment plan to help you pay off your fines and costs.”) or by listing a wider standard than just “a change in circumstances” (*e.g.*, Suffolk: “the court shall consider any change in the defendant’s circumstances *and other good cause as determined by the court*” (emphasis added)).

Other courts take a narrower approach. Chesterfield and Colonial Heights state that “the Court should not approve any subsequent payment plan unless that person establishes such a change in circumstances,” and require a down payment if a debtor “is seeking approval for a subsequent payment agreement” (which suggests that the payment is required even to petition for a subsequent payment plan, rather than only upon entry into a subsequent plan).

## Transparency and Accessibility

Courts across Virginia should make their payment plan policies as transparent and accessible as possible by publishing their plans (and making them as clear as possible) and by avoiding (to every degree possible) a requirement that defendants physically appear to manage transactions concerning court debt. Physical appearance requirements make payment plans inaccessible to debtors who cannot travel to the court (due to reasons such as lack of transportation or suspended licenses, distance from the court, physical disabilities, or conflicting work or caregiving schedules).

**Statutory Standard:** In 2015, Va. Code § 19.2-354(A) was amended to require courts, for the first time, to publish their payment plan policies by posting them in the clerk’s office and publishing them on the court’s website.<sup>40</sup> Since that time, the Virginia’s Judicial System (“Virginia Courts”) website has added a webpage for courts where it collects and publishes all available payment plan policies provided to the Office of the Executive Secretary by courts across the state.

## Findings

*As of early December 2017, at least 27 general district courts (or 23%) either have not published their policies on the Virginia Courts website, or have what appear to be old policies (e.g., not reflective of Va. Code § 19.2-354.1 and the current [July 1, 2017] version of Rule 1:24) on the website.* A list of these courts is attached as Exhibit 7. (Some of these courts did provide their policies in response to a letter requesting them, in the process of research for this report.)

## EXAMPLES OF POLICIES WITH IN-PERSON APPEARANCE TO ESTABLISH PLANS

### Isle of Wight:

- all payment plans must be made in person between 8 AM and 2 PM on Mondays and Tuesdays

### Suffolk:

- “[r]equests via mail and/or phone will NOT be considered. The defendant must appear in person and file a petition for a payment agreement... for his/her petition to be considered and approved.”

### Danville:

- “[a]ll requests for extensions must be made in person and prior to the current due date.”

### Fluvanna:

- persons requesting extensions of time to pay must file a petition and attend a hearing, which occur Tuesdays at 9 AM

### Hanover, Henrico:

- in-person requirements waivable only for people over 50 miles away

### Lunenburg:

- “ALL TIME TO PAY ARRANGEMENTS MUST BE MADE IN PERSON, NO EXCEPTIONS.”

<sup>40</sup> In 2016, Va. Code §19.2-354 was amended to require that the Rules of the Supreme Court concerning payment plans be subject to posting and publication, and, in 2017, it was further amended to require that Va. Code 19.2-354.1’s provisions be posted and subject to publication. The obvious theme throughout these various amendments is that guidance regarding payment plans need to be accessible to the public.

*Also, many courts require debtors to physically appear to manage transactions concerning court debt, when that is not actually necessary and will serve as a barrier for some debtors.*

Some courts provide a more user-friendly approach. Powhatan’s policy, for example, contains helpful information about how to access the DC-211 form in advance of requesting a plan, provides detailed information about accepted forms of payment, and says that “[d]efendants can request time to pay agreements in the Clerk’s Office, over the telephone, by fax, or by mail.” Other courts merely indicate that debtors *may* come to the clerk’s office; debtors (such as those for whom distance, transportation challenges, scheduling conflicts, or other limitations make going to the clerk’s office difficult or impossible) are allowed to access and manage payment plans via other means.

## Recommendations for Payment Plans

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Virginia's payment plan policies should be improved in the following ways:

**Ability to Pay:** Payment plan policies should guarantee that the terms of an individual's payment plan are meaningfully tailored based on the individual's financial circumstances, to avoid causing manifest hardship.

**Community Service:** Community service is not a solution for all debtors, as discussed above, but it still may serve as a viable alternative in some cases. Every court should have a community service program available to people who wish to participate in it. Seeking community service should be as user-friendly as possible. All hours worked should be credited, and at a living wage or other rate that rewards work and incentivizes debtors (for whom community service may be viable) to work off their hours.

**Initial Down Payments:** Courts should affirmatively indicate that they do not require a down payment to establish initial payment plans. As the Judicial Council and Rule 1:24 have noted, down payments can serve as a barrier and prevent some people from accessing payment plans. This barrier should be eliminated.

**Modification:** Courts should describe their policies on modification, which should include as options both extension of time under the existing payment plan and/or changes to other plan terms (such as the amount of periodic installment payments). Courts should affirmatively reference the DC-211 form and give additional details on the process for seeking modification.

**Subsequent Payment Plans:** Courts should make access to subsequent payment plans as user-friendly as possible. They should utilize their ability under state law to charge de minimis down payments, particularly when a higher down payment would serve to bar someone from accessing a subsequent payment plan. Courts should view the dictate to consider changed circumstances as a statutory minimum rather than as a limitation.

**Transparency and Accessibility:** Courts should make their payment plan policies as transparent and accessible as possible. Every court across the state should publish up-to-date policies on the Virginia Courts website. Additionally, courts should make payment plans as easy to access logistically as possible, such as by allowing the entry of initial and subsequent plans, and requests for modification, to be done via a range of modes of communication (e.g., in-person contact, or by phone, mail, fax, email, or web-based form).

## Conclusion

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As the foregoing analysis reveals, Virginia’s general district courts have written payment plan policies that diverge widely from each other and in many critical ways disregard, and fall far short of, state guidelines and the U.S. Constitution. Widespread problems include policies that fail to consider and incorporate the specific financial conditions of debtors; ignore the requirement to have community service programs; fail to mention modification; require unnecessary down payments; and/or put up barriers to entry into subsequent payment plans. Additionally, many policies are not published, and/or require persons to travel physically to courthouses to access plans, even though this can serve as an unnecessary barrier to accessing them.

The Judicial Council of Virginia, the Supreme Court of Virginia, and General Assembly have all played a role at the statewide level in advancing transparency and reform of payment plan policies in recent years. Nonetheless, this analysis should not be read to suggest that these standards themselves – or the payment plan policies across the state – adequately address the challenging issue of court debt. Indeed, Virginia must confront the fact that its court debt collection system punishes people for their poverty (by suspending their licenses for nonpayment when they don’t pay because they don’t have the money to do so, for instance).

National attention is focusing increasingly on court debt and the ways in which imposition of court debt and enforcement systems do—or do not—give adequate attention to indigence and inability to pay.<sup>41</sup> For example, a recent federal court in Tennessee granted an order suggesting that driver’s license suspension cannot be used to enforce court debt against indigent licensees:

[A]n individual who cannot drive is at an extraordinary disadvantage in both earning and maintaining material resources. Suspending a driver’s license is therefore not merely out of proportion to the underlying purpose of ensuring payment, but affirmatively destructive of that end.... Taking an individual’s driver’s license away to try to make her more likely to pay a fine is not using a shotgun to do the job of a rifle: it is using a shotgun to treat a broken arm. There is no rational basis for that.<sup>42</sup>

A similar case in Michigan resulted in a preliminary injunction first issued in December 2017. The decision held that suspending a driver’s license without due process to consider the licensee’s ability to pay was likely unconstitutional. It enjoined the state “from suspending any further driver’s

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<sup>41</sup> See, e.g., “Dear Colleague” Letter, Office for Access to Justice, Civil Rights Division, U.S. Department of Justice, March 14, 2016 (listing “legal obligations with respect to fines and fees and [] shar[ing] best practices”). Although Attorney General Jeff Sessions announced in December 2017 that the Department was “rescinding” the letter, the letter itself still exists, and reflects constitutional requirements and the movement across the country toward reform.

<sup>42</sup> Temporary Restraining Order, *Robinson v. Purkey*, Case No. 3:17-cv-1263 (M.D. Tenn. 2017), filed October 5, 2017.

licenses of individuals because of their inability to pay their traffic debt until the State... provides drivers a hearing where they have the opportunity to demonstrate their inability to pay” and satisfies additional conditions.<sup>43</sup> And a Louisiana case held that a criminal justice system that relies upon “user fees” (in which sentencing judges generate revenue needed for the court system by charging criminal defendants) creates a conflict of interest that distorts justice.<sup>44</sup>

Ultimately, Virginia needs to look more comprehensively at the role of court debt in its criminal and traffic justice systems. Ability to pay should be taken into account at sentencing, to avoid saddling Virginians with unnecessary debt (such as non-punitive financial charges generally, i.e. court-appointed attorney fees and jury fees), and Virginia should consider the use of income/asset-calibrated financial penalties (“day fines”) when financial penalties are deemed necessary. Moreover, Virginia should explore the role that non-traditional (e.g., not jailing or fining) sentencing – such as crediting completion of educational programs or job skills training – may play in giving judges a wider set of tools to use that avoid the risk of punishing Virginians for their poverty and can encourage rehabilitation.<sup>45</sup> Lastly, Virginia must face head-on the constitutional imperative that inability to pay must be taken seriously, especially prior to imposing collateral consequences. Repealing driver’s license suspension for unpaid court debt is an important stop on that road.

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<sup>43</sup> Order to Appear, *Fowler v. Johnson*, Case No. 4:17-cv-11441-LVP-MKM (E.D. Mich. 2017), filed January 5, 2018 (on remand from the Sixth Circuit, clarifying the “type of process required” to satisfy the court’s December 2017 decision).

<sup>44</sup> Such systems raise a “conflict of interest” that “exists by no fault of the Judges themselves. It is the unfortunate result of the financing structure, established by governing law, that forces the Judges to generate revenue from the criminal defendants they sentence.” *Cain v. City of New Orleans*, --- F.Supp.3d ---, 2017 WL 6372836, at \*26 (E.D. La. 2017).

<sup>45</sup> See, e.g., Conference of State Court Administrators, “The End of Debtor’s Prisons: Effective Court Policies for Successful Compliance with Legal Financial Obligations,” 22-23 (September 26, 2016), available at <http://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/End-of-Debtors-Prisons-2016.ashx> (discussing examples of “non-monetary compliance options” used in various states).

## Exhibit 1: GDC Policies Reviewed

Accomack	Galax	Page
Alexandria	Giles	Patrick
Alleghany	Gloucester	Petersburg
Amelia	Grayson	Pittsylvania
Amherst	Greene	Portsmouth
Appomattox	Greensville	Powhatan
Augusta	Halifax	Prince Edward
Bath	Hampton	Prince George
Bedford	Hanover	Prince William
Bland	Harrisonburg/Rockingham	Pulaski
Botetourt	Henrico	Radford
Bristol	Henry	Rappahannock
Brunswick	Highland	Richmond County
Buchanan	Hopewell	Richmond - John Marshall
Buena Vista	Isle of Wight	Crim/Traf
Campbell	King and Queen	Richmond - Marsh
Carroll	King George	Crim/Traf Manchester
Charles City	King William	Roanoke City
Charlotte	Lancaster	Roanoke County
Charlottesville	Lee	Russell
Chesapeake	Lexington/Rockbridge	Salem
Chesterfield	Loudoun	Scott
Clarke	Louisa	Smyth
Colonial Heights	Lunenburg	Staunton
Craig	Lynchburg	Suffolk
Culpeper	Madison	Surry
Cumberland	Martinsville	Sussex
Danville	Mathews	Tazewell
Dickenson	Mecklenburg	Virginia Beach
Dinwiddie	Middlesex	Warren
Emporia	Montgomery	Washington
Essex	Nelson	Waynesboro
Fairfax City	New Kent	Westmoreland
Fairfax County	Newport News - Criminal	Williamsburg/James City
Floyd	Newport News-Traffic	County
Fluvanna	Norfolk	Winchester/Frederick
Franklin City	Northampton	Wise/Norton
Franklin County	Northumberland	Wythe
Frederick/Winchester	Nottoway	York
Fredericksburg	Orange	

## Exhibit 2: GDC Policies Not Reviewed

Albemarle  
Arlington  
Buckingham  
Caroline  
Falls Church  
Fauquier  
Goochland  
Shenandoah  
Southampton  
Spotsylvania  
Stafford

### Exhibit 3: Policies that Do Not Mention Ability to Pay for Initial Pay Plans

Amherst  
Bedford  
Bristol  
Brunswick  
Buchanan  
Campbell  
Danville  
Dickenson  
Emporia  
Fairfax City  
Fairfax County  
Franklin County  
Greene  
Greensville  
Hanover  
Harrisonburg/Rockingham  
Henry  
Hopewell  
Lee  
Louisa  
Lynchburg  
Madison  
Martinsville  
Mecklenburg  
Nelson  
Norfolk  
Pittsylvania  
Portsmouth  
Prince George  
Prince William  
Richmond - John Marshall Crim/Traf  
Richmond - Marsh Crim/Traf Manchester  
Russell  
Scott  
Smyth  
Surry  
Sussex  
Tazewell  
Virginia Beach  
Washington

## Exhibit 4: Policies that Do Not Mention, or Reject, Community Service

Amelia  
Amherst  
Bedford  
Brunswick  
Campbell  
Charlottesville  
Clarke  
Dinwiddie  
Emporia  
Fairfax City  
Fairfax County  
Franklin City  
Frederick/Winchester  
Greensville  
Hampton  
Henry  
Hopewell  
Isle of Wight  
Lunenburg  
Lynchburg  
Martinsville  
Mecklenburg  
Nelson  
Newport News - Criminal  
Newport News - Traffic  
Norfolk  
Nottoway  
Orange  
Patrick  
Portsmouth  
Powhatan  
Prince George  
Surry  
Sussex  
Winchester/Frederick

## Exhibit 5: Policies that Do Not Mention Modification

Amelia  
Brunswick  
Charlotte  
Clarke  
Dinwiddie  
Emporia  
Franklin County  
Frederick/Winchester  
Fredericksburg  
Greensville  
Halifax  
Hampton  
Henrico  
Hopewell  
Louisa  
Norfolk  
Nottoway  
Page  
Patrick  
Petersburg  
Pittsylvania  
Powhatan  
Prince George  
Rappahannock  
Russell  
Surry  
Sussex  
Tazewell  
Virginia Beach  
Winchester/Frederick

## Exhibit 6: Policies that Do Not Mention Subsequent Payment Plans

Amherst  
Appomattox  
Bedford  
Buchanan  
Campbell  
Culpeper  
Danville  
Fluvanna  
Fredericksburg  
Henrico  
Isle of Wight  
Lynchburg  
Nelson  
Page  
Prince Edward  
Tazewell  
Warren

**Exhibit 7: Policies Missing or Not Current on Virginia Courts Website  
(as of December 2, 2017)**

Albemarle  
Arlington  
Brunswick  
Buckingham  
Caroline  
Chesterfield  
Clarke  
Colonial Heights  
Cumberland  
Dickenson  
Emporia  
Fairfax City  
Falls Church  
Fauquier  
Fluvanna  
Goochland  
Greensville  
Hopewell  
Lunenburg  
Norfolk  
Prince George  
Shenandoah  
Spotsylvania  
Stafford  
Surry  
Sussex  
Wise/Norton