

February 14, 2018

The Honorable Brian J. Moran  
Secretary of Public Safety  
Office of the Governor  
3<sup>rd</sup> Floor, Patrick Henry Building  
Richmond, VA 23219

Dear Secretary Moran:

Thank you for asking Nicky Zamostny to reach out to us. We have shared Nicky's comments with the other organizations listed on our release, and this response was drafted with the benefit of their input.

We continue to have concerns with the proposed new scheme to link restitution payments to probation.

As you may remember, the ACLU of Virginia wrote to Governor McAuliffe last year urging his veto of the restitution legislation last year. We were grateful for his positive action. We are aware that the language requiring a judge to keep someone on probation indefinitely until all restitution is paid (to which we objected last year and which was included in HB 484 as introduced) has been stricken from the version of that bill and SB 994 now under consideration. But the new "compromise" legislation still allows judges the discretion to do just that – keep someone on probation indefinitely – by citing to Section 19.2-304, modification of conditions.

The legislation also gives judges the option to revoke a suspended sentence, citing also to Section 19.2-306, if restitution is not paid. These sections of the code are separate from Section 19.2-305.1 for a reason. Restitution repayment is currently incorporated with a larger payment plan or possibility to do community service in lieu of payments. 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), this remedy is only authorized 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.

It is not the practice of judges around the Commonwealth currently to extend probation or revoke a suspended sentence just because a defendant fails to pay restitution. If that were the practice of judges, HB 484/SB 994 would be legislating a moot point. In our experience, judges are concerned, as they should be, with the conditions of probation that concern public safety (thereby invoking Sections 304 and 306). Did the defendant re-offend? Did the defendant test positive for drugs?



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What the proposed legislation does which is new is directly and statutorily connect restitution to probation. It carves out an exception for restitution (beyond other fines and fees) and elevates it to a public safety concern. It mandates that judges must equate nonpayment of restitution to more serious safety-related violations of conditions of probation.

We understand the need to fix our system of collecting and distributing restitution but this proposal is heavy-handed and unjust. Many witnesses testifying on HB 484 admitted that some of our clerks, courts, and prosecutors do not even exercise the power they currently have to collect and distribute restitution. Before we institute a new system that is potentially unjust or unconstitutional, we should work to fix the current system of collections making better use of the existing legal means to collect any judgment. This proposal is not a fix to that system; it creates a new scheme.

This new scheme is not cost effective. If a judge orders someone to pay restitution, the court currently can call upon probation officers to check in on defendants and the balance owed to the victim(s). This is not a costly endeavor compared to creating a new scheme of 10 years of mandated review hearings. Court hearings cost more than a probation officer checking in on defendants. Added to the potential cost of these new hearings is the possibility of 60 days in jail for contempt. Will these defendants be afforded public defenders if they cannot afford an attorney for this hearing? If not, would that be fair or constitutional? If so, this will certainly increase the cost of collecting restitution.

Senate Bill 994 is not substantively different from the House substitute we reviewed before writing our original statement opposing the felony larceny threshold "compromise." The problems we have identified with the terms of the restitution legislation made part of "the deal" to increase the larceny threshold to \$500 remain.

As long as Sections 304 and 306 remain directly tied to the repayment of restitution, judges will have the clear authority, indeed a near mandate, to keep someone on probation indefinitely or revoke a suspended sentence simply for failing to pay restitution, without being required to make a finding regarding the defendant's ability to pay or that the nonpayment was unreasonable.

We look forward to continuing to provide input as the bills work their way through the legislative process. As of now, we cannot support either HB 484 or SB 994 in their current form.

Very truly yours,



Claire Guthrie Gastañaga

Cc:

The Honorable Rob Bell

The Honorable Mark Obenshain

Justice Forward Virginia

Legal Aid Justice Center

Loudoun County Branch of the NAACP

NAKASEC (National Korean American Service & Education Consortium)

Virginia Coalition of Latino Organizations

Virginia Interfaith Center for Public Policy

Virginia Organizing



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