**IN THE [COURT AND COUNTY NAME]**

**COMMONWEALTH OF PENNSYLVANIA )**

 **)**

 **v. ) No. [Case Number]**

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**[John Doe] )**

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO SUSPEND PAYMENTS AND/OR IMPOSE A SENTENCE OF COMMUNITY SERVICE**

Defendant [John Doe], through counsel, hereby submits this Memorandum of Points and Authorities in support of his Motion to Suspend Payments and/or Impose a Sentence of Community Service pursuant to Pa.R.Crim.P. 456 and 42 Pa. Cons. Stat. § 9730 and as grounds thereof avers as follows:

1. As will be established through his testimony, [Mr. Doe] has defaulted on his payment plan in these matters because he lacks the present ability to pay his fines and costs as a result of his indigence. *See Commonwealth v. Eggers*, 742 A.2d 174, 176 n.1 (Pa. Super. Ct. 1999) (receiving public assistance (e.g., food stamps or Medicaid) and the services of the public defender’s office “invite the presumption of indigence”).
2. When a defendant like [Mr. Doe] is in default, Pa.R.Crim.P. 456(D)(2) requires that this Court either set a new payment plan or otherwise amend the order, including by imposing a sentence of community service. In setting a payment plan, the Court must “consider the defendant's financial resources” and “the nature of the burden the payment will impose on the defendant.” 42 Pa. Cons. Stat. § 9730(b)(3). Such a payment plan must permit the defendant to “make payments in reasonable installments.” [*Commonwealth ex rel. Parrish v. Cliff,* 304 A.2d 158, 161 (1973)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973101045&pubNum=162&originatingDoc=Id7f399f732f611d986b0aa9c82c164c0&refType=RP&fi=co_pp_sp_162_161&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_162_161).
3. In these circumstances, the only reasonable payment plan is one that is temporarily suspended until [Mr. Doe’s] financial situation improves and he is no longer indigent. The Superior Court has held that Pa.R.Crim.P. 706—the functional equivalent to Rule 456 in criminal cases[[1]](#footnote-1)—enforces the constitutional requirement that there is a “duty of paying costs ‘only against those who actually become able to meet it without hardship.’” *Commonwealth v. Hernandez*, 917 A.2d 332, 337 (Pa. Super. Ct. 2007) (quoting *Fuller v. Oregon*, 417 U.S. 40, 54 (1974)). In making this ruling, the *Hernandez* court cited with approval *Alexander v. Johnson*, 742 F.2d 117, 124 (4th Cir. 1984), which held that a court must consider “the other demands on [Mr.Doe] own 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.”
4. That [Mr. Doe] is employed [type of employment] and makes some money does not, as a matter of law, confer on him the financial ability to pay his court fines and costs. If a defendant has no “financial assets [or] liabilities” and has been “living from hand to mouth,” a court imposing a fine lacks any evidence supporting a finding of ability to pay the fine. *Commonwealth v. Gaskin*, 472 A.2d 1154, 1157-58 (Pa. Super. Ct. 1984). In the *in forma pauperis* (“IFP”) context,[[2]](#footnote-2) the Superior Court has explained that the dispositive question is not whether a defendant is “unable to pay the costs but whether they are in poverty. If they are in poverty, it follows that they are unable to pay the costs, and their petition should be granted.” *Gerlitzki v. Feldser*, 307 A.2d 307, 308 (Pa. Super. Ct. 1973) (en banc). In other words, an indigent individual is—as a matter of law—*unable* to pay. *See Schoepple v. Schoepple*, 361 A.2d 665, 667 (Pa. Super Ct. 1976) (en banc) (“[O]ne in poverty will not be able to pay costs.”).
5. The Supreme Court of Pennsylvania has adopted this approach to evaluating IFP status, explaining that a person is unable to pay costs if he could afford to do so “only by sacrificing some of the items and services which are necessary for his day-to-day existence . . . despite the fact that he may have some ‘excess’ income or unencumbered assets.” *Stein Enterprises, Inc. v. Golla*, 426 A.2d 1129, 1132 (Pa. 1981). [Mr. Doe’s] income falls far below the Federal Poverty Guidelines, and there can be no question that he lacks the ability to meet his basic life needs because of his indigence.
6. As an alternative, [Mr. Doe] requests that he be permitted to perform a reasonable sentence of community service in lieu of paying his fines and costs in these matters. This Court has explicit statutory authorization to sentence [Mr. Doe] to a period of community service that is “just and practicable under the circumstances” because he is unable to pay his fines and costs. 42 Pa. Cons. Stat. § 9730(b)(3). *See Commonwealth v. Church*, 522 A.2d 30, 32-33 (Pa. 1987) (provisions in Title 42 apply to offenses under Title 75).

WHEREFORE, [Mr. Doe] respectfully requests that this Honorable Court grant his Motion and suspend his payments in this matter.

 Respectfully submitted,

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[signature block]

[Date]

1. Rule 706 applies to misdemeanor and felony criminal cases, while Rule 456 applies to summary cases. Both provisions require that a court consider a defendant’s ability to pay when imposing an appropriate payment plan, and 42 Pa. Cons. Stat. § 9730—which unquestionably applies to summary cases—contains nearly identical language to Rule 706. *Compare* Pa.R.Crim.P. 706(B) (court must take “into account the financial resources of the defendant and the nature of the burden its payments will impose”) *with* 42 Pa. Cons. Stat. § 9730(b)(3) (court must “consider the defendant's financial resources, the defendant's ability to make restitution and reparations and the nature of the burden the payment will impose on the defendant”). Accordingly, the case law interpreting ability to pay under Rule 706 applies equally to summary offenses. [↑](#footnote-ref-1)
2. The Superior Court has instructed that trial courts should look to the “established processes for assessing indigency” through the IFP standards when determining whether certain costs should be waived in criminal cases. *Commonwealth v. Cannon*, 954 A.2d 1222, 1226 (Pa. Super. Ct. 2008) (using the IFP standards and the appointment of counsel standards to determine whether to waive the cost of an expert in a criminal case, although the defendant failed to provide evidence of indigency)*; see also Commonwealth v. Mead*, 446 A.2d 971, 974 (Pa. Super. Ct. 1982) (reviewing IFP application and petition for appointment of counsel to help determine financial status when setting a fine). This is because of the “dearth of case law” in criminal cases, compared with the “well-established principles governing indigency in civil cases.” *Commonwealth v. Lepre*, 18 A.3d 1225, 1226 (Pa. Super. Ct. 2011) (applying IFP standards to waive appeal costs). These same principles should be used to determine whether a defendant is able to pay under Rule 706, as indigence is indigence.

Pennsylvania courts use “poverty” and “indigent” interchangeably, and there is no legal distinction between the two terms. *See*, *e.g.*, *Commonwealth v. Hernandez*, 917 A.2d 332 (Pa. Super. Ct. 2007); *Crosby Square Apartments v. Henson*, 666 A.2d 737 (Pa. Super. Ct. 1995); *Commonwealth v. Regan*, 359 A.2d 403 (Pa. Super. Ct. 1976). Accordingly, cases that set forth standards for determining whether an individual is in poverty are equally applicable to the inquiry under Rule 706 of whether a defendant is indigent. [↑](#footnote-ref-2)