**IN THE COURT OF COMMON PLEAS**

**FOR COUNTY NAME**

**CRIMINAL DIVISION**

**COMMONWEALTH OF PENNSYLVANIA )**

**)**

**v. ) Case No. #############**

**)**

**JOHN DOE )**

**)**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_)**

**MOTION FOR DECLARATION OF DEFENDANT’S INABILITY TO PAY FOR REQUIRED COUNSELING PURSUANT TO 42 PA.C.S. § 9799.36.**

Defendant JOHN DOE hereby moves that this Honorable Court declare that he is unable to pay the costs of counseling, including polygraph costs, and order the [county name] County Probation Department to cover these costs. JOHN DOE avers as follows in support of this motion:

1. [Insert details about the conviction and sentence, including what specific treatment is required, such as counseling and polygraphs. How much does that cost? Who provides those services? How much do they cost? What happens if you do not pay them (i.e. will get thrown out of those programs and face new criminal sanctions)?
2. [Insert details about financial circumstances. Any receipt of disability benefits, food stamps, etc., as well as details about work, pay, and major living expenses.]
3. This Court has clear authority to waive JOHN DOE’s obligation to pay the costs associated with his treatment and order the Probation Department to cover the costs. Although pursuant to 42. Pa.C.S. § 9799.36, JOHN DOE must ordinarily pay “all fees assessed from the counseling sessions,” Pennsylvania law provides that if a sex offender under a treatment obligation “can prove to the satisfaction of the court” that he “cannot afford to pay for the counseling sessions”, he shall nonetheless attend the counseling sessions, and **the parole office shall pay the requisite fees**.” 42 Pa.C.S. § 9799.36(a) (emphasis added). *See also Commonwealth v. Lee*, 935 A.2d 865, 80 n.17 (Pa. 2007) (under prior version of the same statute, 42 Pa.C.S. § 9799.4, a sexually violent predator must pay for counseling “at their own expense, absent a showing of inability to pay, in which case the responsible parole office shall pay”).
4. There is no question that JOHN DOE “cannot afford to pay for the counseling sessions.” He has no financial resources, whatsoever. When a defendant has no “financial assets [or] liabilities” and has been “living from hand to mouth,” he is, by definition, unable to pay. *Commonwealth v. Gaskin*, 472 A.2d 1154, 1157-58 (Pa. Super. Ct. 1984). Indeed, the threshold test is whether the defendant is able to afford to meet his basic life needs; if not, he is unable to pay. *See Stein Enterprises, Inc. v. Golla*, 426 A.2d 1129, 1132 (Pa. 1981). *See also 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.”). Here, JOHN DOE cannot meet his basic life needs [provide details].[[1]](#footnote-1)
5. The statutory mandate in 42 Pa.C.S. § 9799.36(a) that requires that this Court relieve JOHN DOE of the obligation to pay for treatment services also has a constitutional underpinning because it ensures that indigent defendants are not deprived of their right to “fundamental fairness” guaranteed by the Fourteenth Amendment. *See Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983) (revoking probation based solely on indigence “would be contrary to the fundamental fairness required by the Fourteenth Amendment”); *Commonwealth v. Melnyk*, 548 A.2d 266, 272 (Pa. Super. Ct. 1988) (prohibiting a defendant from participating in accelerated rehabilitation disposition because the defendant is too poor to pay restitution violates Bearden). See also *Commonwealth ex rel. Parrish v. Cliff*, 304 A.2d 158, 162 (1973) (“Recent decisions of the Supreme Court have unquestionably demonstrated that the desire to eliminate inequities in the criminal process caused by indigency has if anything heightened rather than diminished.”). It would certainly be unconstitutional to punish JOHN DOE if he is expelled from treatment simply because he lacks the ability to pay that entity.
6. JOHN DOE is not attempting to avoid his counseling obligations or avoid taking the polygraph that this Court requires. He simply cannot afford to pay it. Accordingly, this Court should exercise the authority set forth in 42 Pa.C.S. § 9799.36(a) and require that the agency that supervises JOHN DOE pay the requisite fees.[[2]](#footnote-2)

WHEREFORE, JOHN DOE respectfully requests that this Court grant his Motion, declare that he is unable to pay the counseling fees and order the [County name] County Probation Department to pay such fees.

Respectfully submitted,

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Date: [signature block]

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**O R D E R**

AND NOW, this day of , 2019, upon consideration of Defendant’s Motion for Declaration Of Defendant’s Inability To Pay For Required Counseling Pursuant To 42 Pa.C.S. § 9799.36, it is hereby ORDERED that the Defendant is hereby declared indigent and unable to pay the counseling fees and/or polygraph fees. It is ORDERED that the [County name] County Probation Department shall pay any such outstanding fees still owed to the counseling and/or polygraph service providers on behalf of the Defendant.

By the Court,

Judge, Court of Common Pleas

1. In addition, the only relevant question is JOHN DOE’s finances, not those of any third parties, as Pennsylvania law prohibits courts from considering whether a defendant can borrow money. *See Commonwealth v. Smetana*, 191 A.3d 867, 873 (Pa. Super. Ct. 2018) (explaining that a court must consider only the defendant’s finances). [↑](#footnote-ref-1)
2. Should his financial circumstances change in the future, it would of course be appropriate to revisit such an order. [↑](#footnote-ref-2)