



TESTIMONY SUBMITTED BY
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THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
TO THE
PENNSYLVANIA COMMISSION ON SENTENCING
PROPOSED 8TH EDITION SENTENCING GUIDELINES

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As the criminal justice and poverty attorney for the ACLU-PA, I am offering a narrowly tailored analysis of the proposed 8th edition sentencing guidelines as it relates to fines, costs, and restitution. In reviewing the proposed guidelines, I wanted to flag a few instances where the guidelines are either incomplete or inconsistent with controlling law and, where possible, offer suggestions for revisions.

Incomplete guidelines

1 | Fines: With respect to fines, the proposed guidelines provide:

(II) A fine, within the limits provided by law, or any amount equal to double the pecuniary gain derived from the offense by the person, or the use of community service as a non-monetary alternative, may be ordered as a restorative sanction without probation or confinement. The fines/community service guidelines, included with each guideline sentence recommendation, provide a range of recommended community service hours; the comparable fine is determined by multiplying the number of hours recommended by the person's hourly wage, or by the current minimum wage.

This language omits the statutory requirement in [42 Pa.C.S. § 9726\(c\) and \(d\)](#) that discretionary fines can only be imposed after the sentencing court considers the defendant's ability to pay that fine. As the Pennsylvania Supreme Court explained under that statute, "a sentence is illegal when the record is silent as to the defendant's ability to pay the fine imposed."¹ In determining an affordable amount, a sentencing court "shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose." [42 Pa.C.S. § 9726\(d\)](#).

Recommendation: The guidelines must reflect this requirement regarding the imposition of discretionary fines to ensure that trial courts do not impose illegal sentences without considering the defendant's ability to pay.

2 | Restitution: With respect to restitution, the proposed guidelines provide:

(III) Restitution as a mandatory requirement. The court is required to order the person to compensate the victim for damage or injury sustained because of the offense. Restitution as a restorative sanction may be ordered without probation or confinement.

¹ *Commonwealth v. Ford*, 217 A.3d 824, 828-29 (Pa. 2019).

This language appropriately addresses restitution imposed as part of the sentence under [18 Pa.C.S. § 1106](#). However, it does not address restitution imposed as a condition of probation, as that form of restitution must be “in an affordable amount and on a schedule that the defendant can afford to pay, for the loss or damage caused by the crime.” [42 Pa.C.S. § 9763\(b\)\(10\)](#). Accordingly, if a court imposes a sentence of probation that includes a requirement to pay restitution, that restitution must be based on the defendant’s ability to pay while on probation. As the Superior Court has explained, “Pennsylvania courts have consistently held that a determination of a defendant’s ability to pay is an integral requirement of imposing restitution as a condition of probation.”²

Recommendation: The guidelines must reflect the requirements regarding the imposition of the payment of restitution as a condition of probation to ensure that trial courts do not impose illegal probationary sentences that involve the payment of restitution without considering the defendant’s ability to pay.

Inconsistent / contradictory guidelines

1 | Court costs: With respect to court costs, the proposed guidelines provide the following requirement:

(IV) Costs as a mandatory requirement. The *court is required to order* the person to pay costs. Costs as a restorative sanction may be ordered without probation or confinement. (emphasis added)

This requirement is a misstatement of the law, which contradicts both the relevant statutes as well as recent decisions from the Superior and Supreme courts.

a | Statutory contradictions:

- While [42 Pa.C.S. § 9721\(c.1\)](#) ordinarily requires the imposition of costs, it also provides that such a requirement does “not alter the court’s discretion under [Pa.R.Crim.P. No. 706\(C\)](#) (relating to fines or costs).”
- Similarly, [42 Pa.C.S. § 9728\(b.2\)](#) states that a defendant “shall” be liable for costs “as provided in section 9721(c.1), unless the court determines otherwise pursuant to [Pa.R.Crim.P. No. 706\(C\)](#) (relating to fines or costs).”
- Rule 706(C), in turn, provides that:

The court, in determining the amount and method of payment of a fine or costs shall, insofar as is just and practicable, consider the burden upon the defendant by reason of the defendant’s financial means, including the defendant’s ability to make restitution or reparations.
- These provisions vest sentencing courts with the authority to reduce or waive costs.

b | Court contradictions:

- As the Superior Court has held, courts have the “discretion to conduct such a hearing at sentencing” to reduce or waive costs. *Commonwealth v. Lopez*, 248 A.3d 589, 595 (Pa. Super. Ct. 2021) (en banc). The Supreme Court affirmed this ruling that permits the reduction or waiver of costs at sentencing, as “its opinion should not be construed to strip the trial court of the discretion to conduct an ability-to-pay hearing at sentencing.” *Commonwealth v. Lopez*, 280 A.3d 887, 893 (Pa. 2022). See also *Commonwealth v. Mulkin*, 228 A.3d 913, 919 (Pa. Super. Ct. 2020) (“The trial court may also provide that a defendant shall not be liable for costs under Rule 706.”).

² *Commonwealth v. Whatley*, 221 A.3d 651, 654 (Pa. Super. Ct. 2019) (citing cases).

The result is that at sentencing, although courts are not **required** to consider a defendant’s ability to pay, they nevertheless have the **option** to waive court costs.

Recommendation: The guidelines must be consistent with these provisions, and it is incorrect to state that judges are “required” to order that defendants pay costs.

Instead, consistent with Rule 706(C) and those binding opinions, an accurate statement would be that the sentencing court “is required to order the person to pay costs unless the court, in its discretion, reduces or waives those costs after considering the burden upon the defendant by reason of the defendant’s financial means.”

2 | Costs as restorative sanctions: The guidelines mischaracterize costs as a “restorative sanction”:

(IV) Costs as a mandatory requirement. The court is required to order the person to pay costs. *Costs as a restorative sanction* may be ordered without probation or confinement. (emphasis added)

Section (IV) of the proposed guidelines contradicts the guidelines’ own definition of restorative sanctions. The definitions section accurately defines “RS-restorative sanctions” as including “determination of guilt without further penalty, fine, community service, and restitution.” Costs are properly not included in the definition, since they are neither sanctions, nor restorative, for two reasons:

a | Costs are not sanctions.

The Supreme Court has repeatedly held that “[t]he imposition of costs in a criminal case is not part of the sentence, but rather is incident to the judgment.”³ Moreover, costs are “not part of any penalty imposed even in those cases where there is a conviction” and “do not form a part of the penalty imposed by statutes providing for the punishment of criminal offenses.”⁴

b | Costs are not rehabilitative or restorative.

Furthermore, costs “are a reimbursement to the government for the expenses associated with the criminal prosecution” and “are akin to collateral consequences.”⁵ As a result, an order to pay costs does “not reasonably relate to the rehabilitation” of a defendant.⁶

Recommendation: In light of the status of court costs under Pennsylvania law, it would be erroneous to describe costs as “restorative sanctions,” as they are neither. Section (IV)—*Costs as a mandatory requirement* in the proposed guidelines should be amended to remove the reference to costs as a restorative sanction.

³ *Lopez*, 280 A.3d at 901 (quoting *Commonwealth v. Nicely*, 638 A.2d 213, 217 (Pa. 1994)).

⁴ *Commonwealth v. Giaccio*, 202 A.2d 55, 58 (Pa. 1964).

⁵ *Commonwealth v. Rivera*, 95 A.3d 913, 916 (Pa. Super. Ct. 2014).

⁶ *Commonwealth v. Hudson*, 231 A.3d 974, 980 (Pa. Super. Ct. 2020).