

IN THE SUPREME COURT OF PENNSYLVANIA  
EASTERN DISTRICT

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EAP 2021

NO. 27

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COMMONWEALTH OF PENNSYLVANIA

V.

ALEXIS LOPEZ,  
Appellant

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BRIEF FOR APPELLANT

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Appeal From The March 23, 2021 Judgment Of Superior Court (No. 1313 EDA 2018), Affirming The April 27, 2018 Judgment Of Sentence Of Philadelphia County, Trial Division, Criminal Section At Information CP-51-CR-0004377-2015.

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## TABLE OF CONTENTS

	<b>PAGE</b>
STATEMENT OF JURISDICTION	1
ORDER IN QUESTION	1
STATEMENT OF SCOPE AND STANDARD OF REVIEW	1
STATEMENT OF QUESTION INVOLVED	2
STATEMENT OF THE CASE	3-6
SUMMARY OF ARGUMENT	7-10
ARGUMENT	11-52
Pennsylvania Rule Of Criminal Procedure 706(C) Requires A Trial Court To Consider A Defendant's Ability To Pay Prior To Imposing Mandatory Court Costs At Sentencing.	11-52
A. The plain language of Rule 706(C) requires a determination of ability to pay before imposing costs.	12-23
1. Rule 706(C) applies equally to fines and costs.	12-15
2. An ability to pay determination must be made at sentencing when costs are imposed.	15-21
3. The Superior Court's <u>en banc</u> interpretation relies exclusively upon a suspect source.	21-23

B. The terms of Rule 706(C) apply to “mandatory” court costs which the Legislature has also provided are never mandatory in light of Rule 706(C).	23-30
1. The terms of Rule 706(C) do not provide an exception to its application for mandatory costs.	23-25
2. The Legislature has provided that all court costs (mandatory and discretionary) are subject to waiver or modification based on a Rule 706(C) determination of an inability to pay.	25-30
C. Construing Rule 706(C) to mandate consideration of an ability to pay before imposing costs promotes fairness for victims of crime and defendants, and avoids unjustifiable expense and delay.	30-38
1. Rule 706(C) is part of a comprehensive scheme that prioritizes ensuring that money goes to victims when a defendant has a limited ability to pay.	31-33
2. The imposition of costs on defendants who cannot afford to pay them is an unfair burden harmful in many ways for many years.	33-37
3. Imposing court costs on the indigent who have no ability to pay is unsound economic policy.	37-38
D. Rule 706(C) should be interpreted to mandate a consideration of ability to pay before costs are imposed to avoid an unreasonable result and constitutional difficulties.	39-52

1. The Superior Court’s interpretation of Rule 706(C) unreasonably results in the rights of indigent defendants being subject to the judge’s personal choice of whether to consider ability to pay, and is in tension with due process and equal protection rights. 39-45
2. An interpretation of Rule 706(C) that requires a determination of an ability to pay costs before they are imposed avoids serious constitutional concerns presented by the excessive fines clause. 45-48
3. The absence of an ability to pay determination before imposing costs on poor people may violate due process and equal protection rights. 48-52

CONCLUSION 52

## TABLE OF AUTHORITIES

### Federal Cases

<u>Austin v. United States</u> , 509 U.S. 602 (1993) .....	45
<u>Fuller v. Oregon</u> , 417 U.S. 40 (1974).....	49
<u>Griffin v. Illinois</u> , 351 U.S. 12 (1956) .....	51
<u>Johnson v. United States</u> , 576 U.S. 591 (2015) .....	43
<u>Miles v. Apex Marine Corp.</u> , 498 U.S. 19 (1990).....	27
<u>Nelson v. Colorado</u> , 137 S.Ct. 1249 (2017).....	46
<u>Olson v. James</u> , 603 F.2d 150 (10th Cir. 1979).....	50
<u>Osborn v. Bank of United States</u> , 22 U.S. 738 (1824) .....	41
<u>Timbs v. Indiana</u> , 139 S.Ct. 682 (2019).....	45
<u>United States v. Bajakajian</u> , 524 U.S. 321 (1998) .....	45
<u>United States v. Bracewell</u> , 569 F.2d 1194 (2nd Cir. 1978) .....	50
<u>United States v. Fowler</u> , 956 F.3d 431 (6th Cir. 2020).....	30
<u>Village of Willowbrook v. Olech</u> , 528 U.S. 562 (2000) .....	43

### State Cases

<u>Castellani v. Scranton Times, L.P.</u> , 956 A.2d 937 (Pa. 2008).....	24
<u>Chanceford Aviation Props. L.L. P. v. Chanceford Twp. Bd. Of Supervisors</u> , 923 A.2d 1099 (Pa. 2007) .....	12
<u>City of Seattle v. Long</u> , 493 P.3d 94 (Wash. 2021).....	47

<u>Commonwealth ex rel. Maurer v. Witkin</u> , 25 A.2d 317 (Pa. 1942).....	29
<u>Commonwealth ex rel. Parrish v. Cliff</u> , 304 A.2d 158 (Pa. 1973)14, 20, 51	
<u>Commonwealth v. 1997 Chevrolet</u> , 160 A.3d 153 (Pa. 2017) .....	46, 47
<u>Commonwealth v. Adame</u> , 526 A.2d 408 (Pa. Super. 1987) .....	20, 21
<u>Commonwealth v. Bennett</u> , 930 A.2d 1264 (Pa. 2007) .....	43
<u>Commonwealth v. Boyd</u> , 73 A.3d 1269 (Pa. Super. 2013) .....	42, 48
<u>Commonwealth v. Childs</u> , 63 A.3d 323 (Pa. Super. 2013) .....	15
<u>Commonwealth v. Ciptak</u> , 657 A.2d 1296 (Pa. Super. 1995) .....	21, 22
<u>Commonwealth v. Coder</u> , 382 A.2d 131 (Pa. Super. 1977) .....	11
<u>Commonwealth v. Coder</u> , 415 A.2d 406 (Pa. 1980).....	11
<u>Commonwealth v. Ford</u> , 217 A.3d 828 (Pa. 2019).....	18, 22, 23
<u>Commonwealth v. Garzone</u> , 34 A.3d 67 (Pa. 2012).....	11, 29, 30, 46
<u>Commonwealth v. Gerstner</u> , 656 A.2d 108 (Pa. 1995).....	23
<u>Commonwealth v. Guthrie</u> , 749 A.2d 502 (Pa. Super. 2000).....	30
<u>Commonwealth v. Hansley</u> , 47 A.3d 1180 (Pa. 2012).....	27, 29
<u>Commonwealth v. Herman</u> , 161 A.3d 194 (Pa. 2017).....	39
<u>Commonwealth v. Hernandez</u> , 917 A.2d 332 (Pa. Super. 2007).....	15, 48,
.....	49, 50
<u>Commonwealth v. Hill</u> , 238 A.3d 399 (Pa. 2020) .....	48

<u>Commonwealth v. Lehman</u> , 243 A.3d 7 (Pa. 2020).....	1
<u>Commonwealth v. Lopez</u> , 248 A.3d 589 (Pa. Super. 2021) .....	Passim
<u>Commonwealth v. Marconi</u> , 64 A.3d 1036 (Pa. 2013).....	23
<u>Commonwealth v. Martin</u> , 335 A.2d 424 (Pa. Super. 1975) .....	13, 15
<u>Commonwealth v. McClelland</u> , 233 A.3d 717 (Pa. 2020).....	13, 39
<u>Commonwealth v. Mullen</u> , 333 A.2d 755 (Pa. 1975).....	14, 27
<u>Commonwealth v. Parrish</u> , 224 A.3d 682 (Pa. 2020).....	44, 45
<u>Commonwealth v. Pepe</u> , 897 A.2d 463 (Pa. Super. 2006).....	15
<u>Commonwealth v. Ramos</u> , 197 A.3d 766 (Pa. Super. 2018).....	19
<u>Commonwealth v. Sanchez-Rodriguez</u> , 814 A.2d 1234 (Pa. Super. 2003) .....	26
<u>Commonwealth v. Scott</u> , 532 A.2d 426 (Pa. 1987) .....	24
<u>Commonwealth v. Smith</u> , 818 A.2d 494 (Pa. 2003) .....	12
<u>Commonwealth v. Taylor</u> , 104 A.3d 479 (Pa. Super. 2014).....	12
<u>Commonwealth v. Tilghman</u> , 4 Serge & Rawle 127, 1818 WL 2213 (Pa. 1818).....	46
<u>Commonwealth v. Weir</u> , 239 A.3d 25 (2020).....	42
<u>Commonwealth v. Widmer</u> , 744 A.2d 745 (Pa. 2000) .....	41
<u>Department of Transportation, Bureau of Driver Licensing v. Middaugh</u> , 244 A.3d 426 (Pa. 2021) .....	43, 51
<u>In re Adoption of L.B.M.</u> , 161 A.3d 172 (Pa. 2017) .....	12

<u>In re Kling</u> , 249 A.2d 552 (Pa. 1969).....	27
<u>In re L.J.</u> , 79 A.3d 1073 (Pa. 2013).....	23
<u>Lohmiller v. Weidenbaugh</u> , 469 A.2d 578 (Pa. 1983) .....	24
<u>McKelvey v. Pennsylvania Dept. of Health</u> , 255 A.3d 385 (Pa. 2021)....	31
<u>Morrison Informatics v. Members 1st Federal Credit Union</u> , 139 A.3d 1241 (Pa. 2016).....	23
<u>Oliver v. City of Pittsburgh</u> , 11 A.3d 960 (Pa. 2011) .....	23
<u>Opinion of the Justices</u> , 431 A.2d 144 (N.H. 1981).....	51
<u>Raynor v. D'Annunzio</u> , 243 A.3d 41 (Pa. 2020).....	19, 39, 46
<u>Re: Petition for Writ of Prohibition</u> , 489 P.3d 820 (Idaho 2021) .....	34
<u>Roverano v. John Crane, Inc.</u> , 226 A.3d 526 (Pa. 2020) .....	19
<u>Sadler v. Worker's Compensation Appeal Board</u> , 244 A.3d 1208 (Pa. 2021) .....	24
<u>Six L's Packing Co. v. Worker's Compensation Appeal Board</u> , 44 A.3d 1148 (Pa. 2012).....	29
<u>Small v. Horn</u> , 722 A.2d 664 (Pa. 1998).....	43
<u>Woodford v. Insurance Department</u> , 243 A.3d 60 (Pa. 2020) .....	14
<b>State Statutes</b>	
1 Pa.C.S. § 1921 .....	30, 31
1 Pa.C.S. § 1922(i).....	39



1 Pa.C.S. § 1928(b)(1) .....	29
1 Pa.C.S. § 1933 .....	29
1 Pa.C.S. § 1936 .....	29
16 P.S. Section 1403 .....	50
18 P.S. § 11.1102.....	29
18 Pa.C.S. § 1106.....	20, 28, 32
42 Pa.C.S. § 724(a).....	1
42 Pa.C.S. § 1725.1(b).....	27
42 Pa.C.S. § 3575(b).....	27
42 Pa.C.S. § 9721 .....	Passim
42 Pa.C.S. § 9726.....	18, 20, 23, 32, 42
42 Pa.C.S. § 9728.....	9, 25, 26, 27, 28, 33
61 Pa.C.S. § 6308(b)(1) .....	27
71 Pa.C.S. § 611.13(b).....	27
Pa. Stat. Ann. Tit. 1, § 1932 .....	24

**State Rules**

Pa.R.App.P. 1925.....	44
Pa.R.Crim.P. 101(B) .....	30, 37, 38
Pa.R.Crim.P. 101(C) .....	13

Pa.R.Crim.P. 150(A)(5)(b)..... 34

Pa.R.Crim.P. 431(C)(1)(c), (C)(2)..... 34

Pa.R.Crim.P. 706 ..... Passim

Pa.R.Crim.P. 904 ..... 12

Pa.R.Crim.P. 1407 ..... 14, 21

Rule 1925(b)..... 44

**Other Authorities**

AOPC, Collection Rates Over Time ..... 33

Black’s Law Dictionary (Fifth ed.) ..... 27

Model Penal Code of 1962 ..... 20, 32, 33, 36

National Commission On Reform Of Federal Criminal Laws Final  
Report of 1971 ..... 20,36

Pa. Board of Pardons Legal Financial Obligations..... 35

Webster’s Third New International Dictionary (1993) ..... 26

## **STATEMENT OF JURISDICITON**

This Court's jurisdiction to grant an allowance of appeal to review a final order of the Superior Court is established by 42 Pa.C.S. § 724(a).

## **ORDER IN QUESTION**

On April 27, 2018, Philadelphia Common Pleas Court Judge Glenn Bronson sentenced Mr. Lopez to a term of imprisonment, probation, and court costs. He refused to consider a motion to waive the court costs because of an inability to pay. N.T. 4/27/18, 17, 30.

## **STATEMENT OF SCOPE AND STANDARD OF REVIEW**

This appeal presents questions of law concerning the imposition of costs. Therefore, "our scope of review is plenary and we review the lower courts' legal determinations de novo." Commonwealth v. Lehman, 243 A.3d 7, 12 (Pa. 2020).

## **STATEMENT OF THE QUESTION INVOLVED**

The question involved, as rephrased by this Court's order of August 24, 2021 granting an allowance of appeal, is:

Whether Pennsylvania Rule of Criminal Procedure 706(C) requires a trial court to consider a defendant's ability to pay prior to imposing mandatory court costs at sentencing?

## STATEMENT OF THE CASE

### A. Procedural History

This is an appeal by allowance from a divided en banc Superior Court decision in Commonwealth v. Lopez, 248 A.3d 589 (Pa. Super. 2021), attached as Exhibit A.

On June 30, 2015, Mr. Lopez entered a negotiated plea to a Possession With Intent To Deliver (“PWID”) charge in Philadelphia before the Honorable Glenn B. Bronson, who originally sentenced him to 11½ - 23 months incarceration, to be followed by a 3 year period of probation. Mr. Lopez, who struggles with serious mental illness, absconded from supervision three times leading to multiple revocations. On January 18, 2018, Judge Bronson revoked probation and deferred sentencing. Prior to sentencing, on April 20, 2018, Mr. Lopez filed a motion contending that the court must waive costs pursuant to Pa.R.Crim.P. 706 because of Mr. Lopez’s hopeless poverty. See Exhibit B. On April 27, 2018, after imposing a new sentence of 6 to 23 months in prison, and two years of probation, Judge Bronson denied the motion, refusing to consider Mr. Lopez’s inability to pay. He then imposed court costs and probation supervision fees.

Mr. Lopez filed a timely appeal to the Superior Court, and again raised the issue now before the Court in a timely Statement of Errors Complained of On Appeal. On July 16, 2018, Judge Bronson filed an opinion in support of his ruling that is attached as Exhibit C.

On March 23, 2021, a majority of the en banc court, in an opinion by President Judge Jack A. Panella, rejected the costs issue, found a challenge to the supervision fees waived,<sup>1</sup> and affirmed the judgment of sentence. Lopez, 248 A.3d at 590-95. Judge Alice Dubow concurred that the supervision fees question was waived, but dissented from the resolution of the costs issue. She concluded that Mr. Lopez was entitled under Rule 706 to a hearing on his motion, and a waiver of costs if there was an inability to pay. Lopez, 248 A.3d at 596-99.

## **B. Factual History**

Mr. Lopez has been poor for most of his life and has no viable future economic prospects. In support of his motion for a hearing and waiver of costs pursuant to Pa.R.Crim.P. 706(C), he alleged the following:

2. Mr. Lopez was hit by a car sometime during his childhood, he has very little memory of the actual

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<sup>1</sup> The court rejected a separate issue raised with respect to probation supervision fees that asserted that the judge erred by delegating the determination to the Probation Department of whether probation supervision fees should be waived. The court held that this issue was waived, and it is not pursued here.

incident, and sustained a traumatic brain injury which required a steel plate to be put in his head and has caused him to continually suffer from seizures and memory loss. He also has an Axis I diagnosis of Bipolar Disorder and has a 15 year substance addiction. Prior to his incarceration, his sister was attempting to assist Mr. Lopez with filing for SSI.

\* \* \*

8. . . . Pursuant to his Mental Health Evaluation from January 3, 2018, Mr. Lopez has had multiple inpatient psychiatric hospitalizations. There are no work records for Mr. Lopez and by his own recollection he hasn't worked for over 3 years. Moreover, Mr. Lopez received Medicaid, and he currently receives the services of the public defender.

\* \* \*

Motion, attached at Exhibit B.

After counsel repeated these allegations at argument, contending that Mr. Lopez has never had an ability to pay, and will never have an ability to pay (N.T. 4/20/18, 8-9), the court noted the probation officer's belief that Mr. Lopez was not amenable to supervision. N.T. 4/20/18, 11. The probation officer responded: "Right. He has a lot of mental health issues, Your Honor, and then there is addiction issues." N.T. 4/20/18, 11. The court agreed, acknowledging the "numerous" attempts to enroll Mr. Lopez in treatment because he "does have obviously, mental health and substance abuse problems . . . ." N.T. 4/27/18, 4.

The Commonwealth alerted the court that it did not oppose Mr. Lopez's motion to waive costs. N.T. 4/27/18, 29, and defense counsel then requested a waiver of probation supervision fees as well. N.T. 4/27/18, 30-31. Judge Bronson ruled that it was up to the Probation Department whether to waive probation supervision fees because of an inability to pay. N.T. 4/27/18, 30-31. However, as to mandatory costs a waiver based on an inability to pay was denied "because that's something that is inconsistent with the policy of this Court and is also not required by the current Superior Court law." N.T. 4/27/18, 19. The judge "imposed \$1695.94 in mandatory court costs." Lopez, 248 A.3d at 591.<sup>2</sup>

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<sup>2</sup> See Violation Sentencing Order, 4/27/18, stating (p.1), "Court cost remain," with a total of \$1695.94 (p. 2). The order reflected the court costs imposed at the time of the original sentencing of \$834.00, and accumulated costs since that time up until the April 27, 2018 resentencing. See Neg. Guilty Plea Order Of Sentence, June 30, 2015. The two orders are collectively attached as Exhibit D.



## SUMMARY OF ARGUMENT

It is not disputed that Mr. Lopez's physical, mental, and economic prospects are bleak, and that he is now and will remain unable to pay court costs. Despite these accepted truths, the lower court judge refused to consider Mr. Lopez's ability to pay before imposing court costs at sentencing, stating that it was not his policy to do so. The Superior Court affirmed with a majority holding that Rule 706(C) does not mandate a consideration of ability to pay court costs at the time of imposition. It concluded that only if a defendant later defaults, and is facing potential imprisonment, must a court take the defendant's poverty into account.

This latter situation is, however, already addressed by Section A of Rule 706 and constitutional requirements. The court erred because the obligation is mandatory at sentencing under Rule 706(C), with a poor person's rights not dependent on the arbitrary personal policy of the particular presiding judge.

Rule 706(C) provides as follows:

(C) 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.

The language is plain and unambiguous. This Court imposed a mandatory obligation to consider a defendant's financial means by employing the word "shall." It further provided that this duty is at sentencing when costs are imposed by stating that it must be done "in determining the amount and method of payment." A common sense ordinary interpretation of "determining the amount" necessarily requires deciding how much needs to be paid ("the amount") at the time it's imposed. This phrase "amount and method of payment" has a well understood legal meaning. It appears in model codes before the enactment of Rule 706 to indicate a determination at sentencing, and is utilized the same way now in related Pennsylvania fines and restitution statutes.

In a prior en banc case involving the imposition of a fine at sentencing, the Superior Court had little difficulty concluding that a judge violated the identical predecessor to Rule 706(C) by refusing to consider ability to pay before imposing the fine. The Lopez majority did not overrule that case, it simply held that costs are different from fines. This cannot be right because this Court's Rule treats fines and costs equally. It is well established that limitations or exceptions not contained

in a Rule or statute should not be written into it. Likewise, the Rule does not exclude mandatory fines or costs from its ambit.

Most costs are mandatory in individual statutes. The Legislature, aware of this, in 2010 amended statutes in two significant ways in accord with Rule 706(C). First, it added a provision in 42 Pa.C.S. § 9721 that explicitly requires a court determination of costs at sentencing, with the limitation that “the provisions of this subsection do not alter the court’s discretion under Pa.R.Crim.P. No. 706(C) (relating to fines or costs).” 42 Pa.C.S. § 9721(c.1). Second, it amended 42 Pa.C.S. § 9728, to provide “notwithstanding any provision of law to the contrary”, costs are mandatory “unless the court determines otherwise pursuant to Pa.R.Crim.P. No. 706(C) (relating to fines or costs).” 42 Pa.C.S. § 9728(b.2). The plain language and legislative history of these provisions demonstrate an intent to have all costs subject to modification or waiver pursuant to Rule 706(C).

Rule 706(C)’s mandate to consider ability to pay costs before imposition along with “the defendant’s ability to make restitution,” read in pari materia with the fine and restitution statutes, form a comprehensive scheme. The purpose is to forego the imposition of fines

or costs when necessary for defendants with limited means, so that the money can go towards compensating victims.

If any ambiguity is found in Rule 706(C), this Court should reasonably construe the Rule to avoid burdening poor defendants with debts that they have little realistic chance of paying, and which have serious civil and criminal consequences lasting for many years. Finally, the Rule should be construed to mandate an ability to pay determination at sentencing to avoid serious constitutional concerns under the Excessive Fines Clause, and independently, the guarantees of due process and equal protection under the law.

## ARGUMENT

### **Pennsylvania Rule Of Criminal Procedure 706(C) Requires A Trial Court To Consider A Defendant's Ability To Pay Prior To Imposing Mandatory Court Costs At Sentencing.**

This Court has long been sensitive to the issue of whether costs should be imposed on those who cannot afford them. A defendant “should repay the Commonwealth the necessary costs and expenses of prosecution, if he is found guilty beyond a reasonable doubt, and is financially able to do so.” Commonwealth v. Coder, 415 A.2d 406, 408 (Pa. 1980) (quoting Commonwealth v. Coder, 382 A.2d 131, 137 (Pa. Super. 1977) (Cercone, J., dissenting)). Of course, “the notion that the costs of crime should be shifted from the public fisc onto financially able wrongdoers is a legitimate one.” Commonwealth v. Garzone, 34 A.3d 67, 80 (Pa. 2012).

Although the imposition of costs is generally appropriate, Rule 706(C), adopted by this Court, is specifically designed to prohibit unfairly punishing poor people with unaffordable costs.

**A. The plain language of Rule 706(C) requires a determination of ability to pay before imposing costs.**

**1. Rule 706(C) applies equally to fines and costs.**

This Court's Rule 706 is titled "Fines or Costs." In turn, Rule 706(C) provides as follows:

(C) 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.

The plain reading of this provision, with the word "shall", is that the judge has a mandatory obligation to consider a defendant's ability to pay before imposing a fine or costs. "The word 'shall' by definition is mandatory and it is generally applied as such." In re Adoption of L.B.M., 161 A.3d 172, 179 (Pa. 2017) (quoting Chanceford Aviation Props. L.L. P. v. Chanceford Twp. Bd. Of Supervisors, 923 A.2d 1099, 1104 (Pa. 2007)). See, e.g., Commonwealth v. Smith, 818 A.2d 494, 499 (Pa. 2003) (holding that the word "shall" in Pa.R.Crim.P. 904 requires judges to appoint counsel for indigent defendants in first PCRA proceedings regardless of whether the petition appears meritless); Commonwealth v. Taylor, 104 A.3d 479, 481, 493 (Pa. Super. 2014)

(where statute provided that there “shall” be a drug and alcohol assessment before imposing a DUI sentence a court has no discretion to sentence without it).

The Superior Court en banc in an earlier case had no difficulty applying the plain mandatory language of this provision, reversing a trial court’s decision to impose a fine when failing to consider all information concerning a defendant’s ability to pay. The court held that there was a failure to “comply with provisions of Rule 1407,” the identical predecessor to Rule 706.<sup>3</sup> Commonwealth v. Martin, 335 A.2d 424, 426 (Pa. Super. 1975) (en banc). “In order to impose a fine, a sentencing judge must consider provisions of the Pennsylvania Rules of Criminal Procedure. Rule 1407(C).” Id. at 425.

The Superior Court majority here did not overrule the correctly decided Martin. Instead, by judicial fiat the Superior Court ignored the plain language of this Court’s Rule, and the rules of statutory construction, and limited the scope of Rule 706(C).<sup>4</sup>

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<sup>3</sup> Rule 1407, identical to Rule 706, was renumbered in 2000. Lopez, 248 A.3d at 593 n.1.

<sup>4</sup> Rule 101(C) provides that “[t]o the extent practicable, these rules shall be construed in consonance with the rules of statutory construction.” Pa.R.Crim.P. 101(C). See, e.g., Commonwealth v. McClelland, 233 A.3d 717, 733 (Pa. 2020) (“[W]e

This Court has repeatedly held that “[w]e necessarily begin with the language of the statute, which is the first and best indication of legislative intent.” Woodford v. Insurance Department, 243 A.3d 60, 73 (Pa. 2020). There is an unambiguous equality of treatment for fines and costs under Rule 706. See generally Commonwealth ex rel. Parrish v. Cliff, 304 A.2d 158, 162 (Pa. 1973) (Court notes that “[t]here is no basis in law or logic” to treat defendants differently with respect to payment of fines and costs). Nevertheless, the Superior Court majority here held that its decision in Martin was inapplicable because a defendant is not entitled to a determination of an inability to pay “before a court imposes court costs at sentencing.” Lopez, 248 A.3d at 595.

The Superior Court has no authority to re-write Rule 706 to impose a limitation that “shall” applies to fines only. See, e.g., Commonwealth v. Mullen, 333 A.2d 755 (Pa. 1975) (limitations in the Court’s rules should not be read into them). The lower court erred in declining consideration of Mr. Lopez’s indisputable indigence and lack

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apply the Statutory Construction Act ... when interpreting the Rules of Criminal Procedure.”).



of ability to pay. The error is even more egregious because the declination was arbitrary, based upon the court's personal "policy." The Superior Court violated Rule 706(C) by affirming that ruling, holding that a judge has discretion to consider whether there is an ability to pay before imposing costs. Lopez, 248 A.3d at 595.<sup>5</sup>

**2. An ability to pay determination must be made at sentencing when costs are imposed.**

This Court has placed Rule 706 in Chapter 7, Part A; entitled "Sentencing Procedures." Nevertheless, the Superior Court also ruled inconsistently with Martin, supra, that Rule 706(C) does not concern an ability to pay determination at imposition, but only later if there is a default in payment. Lopez, 248 A.3d at 592-94.

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<sup>5</sup> The en banc court in Lopez relied only on a prior panel decision, Commonwealth v. Childs, 63 A.3d 323, 326 (Pa. Super. 2013), for its holding that there was no obligation to consider ability to pay before imposing costs. Lopez, 248 A.3d at 595 (Exhibit A). Childs followed and relied exclusively on a prior panel decision, Commonwealth v. Hernandez, 917 A.2d 332, 336-37 (Pa. Super. 2007), as required. See, e.g., Commonwealth v. Pepe, 897 A.2d 463, 465 (Pa. Super. 2006) (Superior Court panel must follow prior panel decision).

Even though the defendant in Hernandez raised only a constitutional claim (917 A.2d at 333-35), and his brief did not even mention Rule 706 (2006 WL 4115223), the Hernandez panel held that Rule 706 does not apply at sentencing. There was no analysis of Rule 706, and not even a mention of Section (C) of that Rule. The constitutional claim that Hernandez also decided is discussed infra at 48-52.

The Superior Court majority's interpretation of Rule 706(C) renders that section a mere adjunct to other Rule 706 provisions addressing post-sentencing issues concerning a defendant's struggles to pay. This finds no support in the text of Rule 706 or related statutory provisions, as thoroughly explained in Judge Dubow's dissent on this issue. Lopez, 248 A.3d at 596-98 (Dubow, J., concurring and dissenting).

The imposition of costs is a sentencing matter, as the Legislature has directed that at sentencing "the court shall order the defendant to pay costs." 42 Pa.C.S. §9721(c.1). Further, the Superior Court ignored critical distinctions in language this Court chose to employ in Section C, not present in the other sections of Rule 706.<sup>6</sup>

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<sup>6</sup> Rule 706 in its entirety, provides:

**Rule 706. Fines or Costs**

(A) A court shall not commit the defendant to prison for failure to pay a fine or costs unless it appears after hearing that the defendant is financially able to pay the fine or costs.

(B) When the court determines, after hearing, that the defendant is without the financial means to pay the fine or costs immediately or in a single remittance, the court may provide for payment of the fines or costs in such installments and over such period of time as it deems to be just and practicable, taking into account the financial

Section (A) addresses a post-sentencing default situation and the requirement that there be a hearing and a finding of a willful failure to pay before a defendant may be imprisoned. Section B permits a court where appropriate at any time to order payment of costs in installments, and notably makes no reference to Section(C), only to “paragraph (D) below,” which in turn addresses the situation where a defendant is later in default or in danger of default with payment installments previously ordered.

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resources of the defendant and the nature of the burden its payments will impose, as set forth in paragraph (D) below.

(C) 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.

(D) In cases in which the court has ordered payment of a fine or costs in installments, the defendant may request a rehearing on the payment schedule when the defendant is in default of a payment or when the defendant advises the court that such default is imminent. At such hearing, the burden shall be on the defendant to prove that his or her financial condition has deteriorated to the extent that the defendant is without the means to meet the payment schedule. Thereupon the court may extend or accelerate the payment schedule or leave it unaltered, as the court finds to be just and practicable under the circumstances of record. When there has been default and the court finds the defendant is not indigent, the court may impose imprisonment as provided by law for nonpayment.

The Superior Court lumped all of the sections of Rule 706 together, although they are different in text and purpose. It held that Section (C) requires an ability to pay “hearing” only before incarceration, as the other sections do. See, e.g., Lopez, 248 A.3d at 592, 594. However, unlike the other sections of Rule 706, there is no reference to a hearing in Section C. Rule 706(C) expressly requires a determination of “the amount and method of payment of a fine or costs,” with a requirement that ability to pay be determined at that time. In “determining” whether costs need to be reduced or waived because of an inability to pay, often no hearing will be necessary based on information already available to the sentencing judge and may be uncontested. Accord, Commonwealth v. Ford, 217 A.3d 828, 831 and n.14 (Pa. 2019) (in considering an ability to pay a fine before imposition, as mandated by 42 Pa.C.S. § 9726, no hearing may be necessary).

Significantly, only Section (C) makes any reference to restitution. A court, in setting the amount and method of payment of court costs, is directed to consider “the defendant’s financial means, including the defendant’s ability to make restitution or reparations.” Rule 706(C). The restitution statute in turn requires that “[a]t the time of sentencing the

court shall specify the amount and method of restitution.” 18 Pa.C.S. § 1106(a)(2). See, e.g., Commonwealth v. Ramos, 197 A.3d 766, 770-71 (Pa. Super. 2018) (judge violated statute by postponing at sentencing the determination of restitution to a later date). Both determinations must be made at sentencing.

This Court has repeatedly held that “[i]n ascertaining the plain meaning, we consider the statutory language in context and give words and phrases their ‘common and approved usage.’” Raynor v. D’Annunzio, 243 A.3d 41, 53 (Pa. 2020) (quoting Roverano v. John Crane, Inc., 226 A.3d 526, 535 (Pa. 2020)).

The most natural reading of this sentencing Rule in context is that Section (C)’s requirement of “determining the amount and method of payment of a fine or costs” is that it is initially a determination to be made when sentence is imposed. This would be true in any situation where a provision involved a decision about money. For example, if an individual applied for a bank loan, the bank officer would have to decide whether to issue the loan at all, and if so, the amount and method of payment. If a loan is issued there may be a later adjustment in the

method or amount of payment based on changed circumstances, but an initial decision must be made.

This unambiguous, plain language interpretation of Rule 706(C) is fully supported by an examination of its historical derivation and Pennsylvania’s related statutes that have adopted identical language.

This Court adopted Rule 706 (then numbered 1407) on July 23, 1973. See Pa.R.Crim.P. 706 Credits. Both the Model Penal Code of 1962 (§ 702(4)) and the National Commission On Reform Of Federal Criminal Laws Final Report of 1971 (§ 3302(1)) had provided that at sentencing a court shall consider a defendant’s ability to pay “[i]n determining the amount and the method of a payment of a fine.” Rule 706(C) differs only in that this Court decided to impose this obligation at sentencing for costs as well as fines.<sup>7</sup>

Likewise, the Legislature has employed the same “the amount and method of payment” language when it intends the determination to be made at sentencing when imposing a fine (42 Pa.C.S. § 9726(d)) or restitution (42 Pa.C.S. § 1106(c)(2)). See also, e.g., Commonwealth v.

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<sup>7</sup> The adoption of Rule 706(C) in 1973 was shortly after this Court’s decision in Commonwealth ex rel. Parrish v. Cliff, supra, where it expressed concern for an indigent’s ability to pay fines or costs, and held that they should be treated the same for constitutional purposes.

Adame, 526 A.2d 408, 409 n.2 (Pa. Super. 1987) (“[D]eferral of the determination of the sentence (of fines and costs) was disapproved by this Court. . . .”).

Most importantly, the Legislature has directed that at sentencing “the court shall order the defendant to pay costs.” 42 Pa.C.S. § 9721(c.1). The Legislature further provided that “[t]he provisions of this subsection do not alter the court’s discretion under Pa.R.Crim.P. No. 706(C) (relating to fines and costs).” Thus, as urged here, the Legislature agrees that Rule 706(C) applies to costs, and the determination of ability to pay under Rule 706(C) is to be made at sentencing.

**3. The Superior Court’s en banc interpretation relies exclusively upon a suspect source.**

The Superior Court reached a contrary textual interpretation by relying exclusively on a subsequently vacated opinion which was supported by only one member of the Superior Court. Commonwealth v. Ciptak, 657 A.2d 1296 (Pa. Super. 1995) (two judges concurring in result), reversed by Commonwealth v. Ciptak, 665 A.2d 1161 (Pa. 1995) (per curiam). Judge Hoffman concluded “that Pa.R.Crim.P. 1407 deals in its entirety with a defendant’s default from payment of a fine or the costs of prosecution.” Id. at 1297-98 (quoted and in bold in Lopez, 248

A.3d at 593). In Ciptak, Judge Hoffman rejected as meritless a claim that counsel was ineffective for failing to object at sentencing to the court imposing costs without considering the defendant's ability to pay pursuant to Rule 1407(C). While two other judges joined in the result, they did not join the opinion of the court.

This Court accepted review and unanimously reversed. It explained that counsel on appeal was from the same public defender office as trial counsel, which usually requires a remand for new counsel on an ineffectiveness claim. The Court noted that there is an exception “where it is clear from the record that the ineffectiveness claim is meritless,” Ciptak, 665 at 1162 (citation omitted). This Court nonetheless reversed the order of the Superior Court, appointed new counsel, and remanded the case because “an evidentiary hearing” was necessary to resolve the ineffectiveness claim. Id. at 1162. “Here, trial counsel’s reason for not objecting to the trial court’s imposition of costs of prosecution cannot be gleaned from the record.” Id. at 1162.

In other words, had this Court viewed the Superior Court’s decision as correct – that Rule 706 (C) does not require consideration



of a defendant's ability to pay – it would have affirmed and not remanded for further proceedings.<sup>8</sup>

**B. The terms of Rule 706(C) apply to “mandatory” court costs which the Legislature has also provided are never mandatory in light of Rule 706(C).**

**1. The terms of Rule 706(C) do not provide an exception to its application for mandatory costs.**

The plain, unambiguous language of Rule 706(C) applies to a “fine or costs” without limitation. This Court was undoubtedly aware in promulgating the Rule that fines and costs are both mandatory and non-mandatory, depending on the language of the particular statute. It is well established that limitations should not be read into the Rules (e.g.,

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<sup>8</sup> Relying on a passing reference in dicta in a footnote in Commonwealth v. Ford, 217 A.3d 828 (Pa. 2019), the Lopez majority asserts that “[o]ur Supreme Court, in fact, recently indicated its agreement with Ciptak’s interpretation.” Lopez, 248 A.3d at 593. The only issue before the Court in Ford was a statutory one involving non-mandatory fines and 42 Pa.C.S. § 9726. The Court held that the lower court’s imposition of a non-mandatory fine without determining whether there as an ability to pay violated the statute. The statement relied on by the Superior Court was dicta, made without any discussion of the issue now before this Court or Rule 706(C). Ford, 217 A.3d at 827 n.6.

Dicta are statements about issues that are not essential to the disposition of the case, and are therefore not binding precedent. See, e.g., In re L.J., 79 A.3d 1073, 1081 (Pa. 2013); Commonwealth v. Gerstner, 656 A.2d 108, 111 n.5 (Pa. 1995). This Court has repeatedly held that the holdings of its judicial decisions are limited to the issue decided, and the facts involved in that issue. E.g., Morrison Informatics v. Members 1<sup>st</sup> Federal Credit Union, 139 A.3d 1241, 1247 (Pa. 2016); Commonwealth v. Marconi, 64 A.3d 1036, 1041 n.4 (Pa. 2013); Oliver v. City of Pittsburgh, 11 A.3d 960, 965-966 (Pa. 2011).

Commonwealth v. McMullen, *supra*), and that additional words should not be added to alter unambiguous language. *See, e.g., Sadler v. Worker's Compensation Appeal Board*, 244 A.3d 1208, 1214 (Pa. 2021).

To construe Rule 706(C) to apply to a fine or costs, except mandatory costs, would violate these basic principles of construction. *See, e.g., Castellani v. Scranton Times, L.P.*, 956 A.2d 937, 950 (Pa. 2008) (refusing to engraft upon the Shield Law an exception to protection for reporter sources since it was not authorized by the statutory text); *Commonwealth v. Scott*, 532 A.2d 426, 428 (Pa. 1987) (what exceptions are to be recognized to a statute are matters for the Legislature).

Further, Rule 706(C) should be interpreted consistently with 42 Pa.C.S. §§ 9721 and 9728 which address the same subject matter of imposing costs and inability to pay. *See Lopez*, 248 A.3d at 597-98 (Dubow, J., concurring and dissenting). When a Rule of this Court and a statute “relate to the same subject matter . . . the two provisions must be read in pari materia so that effect can be given to both. Pa. Stat. Ann. Tit. 1, § 1932. . . .” *Lohmiller v. Weidenbaugh*, 469 A.2d 578, 580 (Pa. 1983). Read in pari materia, Sections 9721 and 9728, like Rule 706(C),

provide that all costs, including mandatory ones, can be reduced or waived because of an inability to pay.

**2. The Legislature has provided that all court costs (mandatory and discretionary) are subject to waiver or modification based on a Rule 706(C) determination of an inability to pay.**

In 2010, the Legislature amended two statutes in order to unambiguously provide that all costs could be modified or waived pursuant to this Court's Rule 706(C). 42 Pa.C.S. § 9721 was amended to provide in sub-section (c.1) that at sentencing "the court shall order the defendant to pay costs." The same sub-section states that "the provisions of this subsection do not alter the court's discretion under Pa.R.Crim.P. No. 706(C) (relating to fines or costs)."

At the same time, the Legislature added a subsection to 42 Pa.C.S. § 9728. It provides as follows:

**(b.2) Mandatory payment of costs.** – Notwithstanding any provision of law to the contrary, in the event the court fails to issue an order under subsection (a) imposing costs upon the defendant, the defendant shall nevertheless 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). The absence of a court order shall not affect the applicability of the provisions of this section.

The terms of this statute and the Legislature's intention are unambiguous. First, the Legislature intended that this general statute is to prevail over all individual cost statutes that may be inconsistent with its provisions. The phrase "Notwithstanding any provision of law to the contrary" means "in spite of" any other laws. Webster's Third New International Dictionary, 1545 (1993) ("notwithstanding" definition "in spite of"). Thus, the Superior Court, in construing the reach of a mandatory sentencing statute employing the same phrase as Section 9728(b.2) had little difficulty concluding that the mandatory sentence had to be employed "in spite of" any other sentencing provisions. Commonwealth v. Sanchez-Rodriguez, 814 A.2d 1234, 1238 (Pa. Super. 2003). "We find that the plain meaning of the term 'notwithstanding' is not ambiguous or unclear so as to necessitate a review of legislative history in order to ascertain the intent of the Legislature." Id.

Second, the Legislature has provided that a defendant is liable for all costs whether or not a judge fulfills her duty to impose them at sentencing. Third, and pertinent here, there is an exception provided for the payment of costs for those who have an inability to pay, as determined by a judge pursuant to Rule 706(C). The exception clause unambiguously

states: “unless the court determines otherwise pursuant to Pa.R.Crim.P. No. 706(C) (relating to fines or costs).” See, e.g., Black’s Law Dictionary, 1378 (Fifth ed.) (“unless” definition: “if it be not that”).

The Legislature, in enacting this general provision, like Rule 706(C), did not exclude mandatory costs statutes from its ambit, thus no limitation should be judicially written in. See Mullen, 333 A.2d at 757. It was obviously aware that particular criminal costs statutes are usually stated in mandatory “shall” terms.<sup>9</sup> See generally, e.g., Commonwealth v. Hansley, 47 A.3d 1180, 1190 (Pa. 2012) (in enacting RRRI sentencing statute “[t]he General Assembly obviously was aware of existing mandatory sentences. . . .”). See also, e.g., Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990) (“We assume that Congress is aware of existing law when it passes legislation.”).

If this Court concludes that the language of Section 9728(b.2) is not plain and unambiguous, its legislative history also supports a finding that the Legislature intended all costs to be waivable under Rule 706(C).

This bill would add new subsection (c.1), to § 9721,  
to provide that regardless of whether a sentencing

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<sup>9</sup> See, e.g., 42 Pa.C.S. § 1725.1(b); 42 Pa.C.S. § 3575(b); 61 Pa.C.S. § 6308(b)(1); 71 Pa.C.S. § 611.13(b). Most statutes refer to “costs” that a defendant must pay, while some utilize the term “fees.” We refer to all such financial burdens as “costs.” See, e.g., In re Kling, 249 A.2d 552 (Pa. 1969) (discussing costs and fees interchangeably).

court includes a provision in a sentencing order imposing costs, that costs imposition will be automatic, except that under an amendment passed in committee on March 16, 2010, and which does differentiate this bill from HB2119, a court would retain all discretion to modify or even waive costs in an appropriate case, pursuant to Pa.R.Crim.P. 706(C). (Supreme Court Rule). The addition of new subsection (b.2), to § 9728, accomplishes the same goal as to the statute specifically addressing the imposition of fines, costs, restitution, and other matters collateral to sentencing, with the same exception under criminal rule 706(C), added by the amendment in committee.

House of Representatives Democratic Committee Bill Analysis, Bill No. SB1169, September 15, 2010 (attached in full as Exhibit E).

These amendments to Section 9721 and 9728, applying generally to costs, were enacted in 2010, after the enactment of the particularized cost imposing statutes. See, e.g., note 9, supra. There is no irreconcilable conflict with these particular statutes because they do not prohibit a consideration of a inability to pay. See and compare 18 Pa.C.S. § 1106(c)(1)(i) (barring consideration of a defendant’s “financial resources” before imposing restitution). However, even if such a conflict is found, the general provision controls under such circumstances, where “enacted later and it shall be the manifest intention of the General

Assembly that such general provision shall prevail.” 1 Pa.C.S. § 1933. See, e.g., Hansley, 47 A.3d at 1190 (applying 1 Pa.C.S. § 1933); Commonwealth ex rel. Maurer v. Witkin, 25 A.2d 317, 319 (Pa. 1942) (applying predecessor statute to 1 Pa.C.S. § 1933). Additionally, if there is an “irreconcilable” conflict between statutes, “the statute latest in date of final enactment shall prevail.” 1 Pa.C.S. § 1936. See, e.g., Six L’s Packing Co. v. Worker’s Compensation Appeal Board, 44 A.3d 1148, 1158 (Pa. 2012) (applying 1 Pa.C.S. § 1936).<sup>10</sup>

If there are any lingering doubts about the proper interpretation of Sections 9721 and 9728 this Court should apply the doctrine of strict construction. See 1 Pa.C.S. § 1928(b)(1) (mandating that “penal provisions” be strictly construed). In Commonwealth v. Garzone, 34 A.3d 67 (Pa. 2012), this Court applied the doctrine in interpreting a criminal costs statute because such statutes are “penal in nature.” Id., at 75. After explaining that strict construction requires that the statutory “language should be interpreted in the light most favorable to the accused” (id. at

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<sup>10</sup> Encompassed within the general statutes, Section 9721 and 9728, and entirely consistent with them, is the probation supervision fee statute. 18 P.S. § 11.1102. It provides in Section (c) that the monthly “fee should be reduced, waived or deferred based on the offender’s present inability to pay.”

77), the Court applied the rule and held in favor of the defendant. Id. at 78.

Rule 706(C) alone, and when read together with these statutes, provides that a judge must determine at sentencing whether all costs, including “mandatory” ones, should be waived or reduced because of a defendant’s inability to pay.<sup>11</sup>

**C. Construing Rule 706(C) to mandate consideration of an ability to pay before imposing costs promotes fairness for victims of crime and defendants, and avoids unjustifiable expense and delay.**

This Court has provided that its “rules shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.” Pa.R.Crim.P. 101(B). Adopting Mr. Lopez’s construction of Rule 706(C) furthers all of these goals. It is also consonant with “[t]he object to be attained,”<sup>1</sup> Pa.C.S. § 1921(c)(4), by Rule

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<sup>11</sup> Judge Dubow came to the same conclusion after analyzing Rule 706(C) and the governing statutes. Lopez, 248 A.3d at 596-98 (Dubow, J., concurring and dissenting). However, after acknowledging that the defendant filed a motion to waive costs here (id. at 598), she opined on an issue not presented. Without citation to any authority, her opinion stated that a judge could not rule on whether there is an inability to pay in the absence of a motion, characterizing it as impermissible “sua sponte” action. Id. at 598. This is incorrect. Where a statute or Rule imposes a mandatory obligation that a judge consider a matter before acting, the judge must do so regardless of whether the defendant has filed a motion. See, e.g., Commonwealth v. Ford, supra; Commonwealth v. Taylor, supra; Commonwealth v. Guthrie, 749 A.2d 502, 504 (Pa. Super. 2000); United States v. Fowler, 956 F.3d 431, 439 (6<sup>th</sup> Cir. 2020).



706(C) and best accounts for “[t]he consequences of a particular interpretation.” 1 Pa.C.S. § 1921(c)(6). See, e.g., McKelvey v. Pennsylvania Dept. of Health, 255 A.3d 385, 398 (Pa. 2021) (if the statutory words are not found to be explicit “the legislature’s intent may be determined by considering any of the factors enumerated in Section 1921(c)”).

**1. Rule 706(C) is part of a comprehensive scheme that prioritizes ensuring that money goes to victims when a defendant has a limited ability to pay.**

Rule 706(C) provides that in determining the amount of costs, the court, “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.**” Rule 706(C) (emphasis added). This provision evinces a concern for victims, directing that court costs should be adjusted down or waived for defendants with limited financial resources because prosecution and court system expenses are of less importance than the needs of crime victims.

The Court’s Rule, designed to prioritize the needs of victims, has the same goal as the statutes addressing fines and restitution. Section

9726 of Title 42 similarly requires an ability to pay determination (Section (d)), and instructs that a fine should be imposed only if there is an ability to pay “and the fine will not prevent the defendant from making restitution or reparation to the victim of the crime.” 42 Pa.C.S. § 9726(c).

The restitution statute, 18 Pa.C.S. § 1106, in sharp contrast to Rule 726(C) and 42 Pa.C.S. § 9726, expressly forbids consideration of a defendant’s ability to pay when imposing restitution. The statute mandates that “[t]he court shall order full restitution: (i) Regardless of the current financial resources of the defendant, so as to provide the victim with the fullest compensation for the loss.” 18 Pa.C.S. § 1106(c)(1)(i).

Rule 706(C) and these statutes all adopt the view first expressed with respect to fines in the Model Penal Code of 1962.

Subsection (3) also contains a second criterion, namely, that it is inappropriate to sentence a defendant to pay a fine that will prevent him from making restitution or reparation to the victim of his offense. This rests on the simple judgment that the state should not compete with the victim of the crime for what may be the meager assets of the offender. To the extent that the victim would be entitled to civil judgment, or to the extent that restitution or reparation may be required as a condition of a probationary sentence, any impulse of the court to impose a fine that would have

priority in its claims upon the assets of the defendant and diminish the chances of repayment should be resisted.

Model Penal Code of 1962, § 7.02 Comment at 242.

A judge's imposition of costs without any consideration of a defendant's financial resources or the needs of a victim in a case where restitution is warranted is harmful to the victim. Instead of a victim being compensated promptly with whatever limited money a defendant may have, that money will also go toward payment of court costs.<sup>12</sup>

**2. The imposition of costs on defendants who cannot afford to pay them is an unfair burden harmful in many ways for many years.**

Those with means do not suffer when a court imposes costs. The burden falls only upon the poor.<sup>13</sup> There are direct criminal consequences when a defendant is unable to pay court costs, and considerable collateral consequences, all lasting for years.

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<sup>12</sup> By statute, if a defendant is required to make payments towards restitution, costs and fines, only 50% of what is collected is mandated to go towards payment of restitution. 42 Pa.C.S. § 9728(g.1). The collection rate for restitution is exceedingly low. According to data from the Administrative Office of Pennsylvania Courts ("AOPC"), less than 20% of the restitution ordered between 2011 and 2015 has been collected. "Collection Rates Over Time," AOPC, <https://www.pacourts.us/news-and-statistics/research-and-statistics/dashboard-table-of-contents/collection-rate-of-payments-ordered-by-common-pleas-courts> (last visited Oct. 29, 2021).

<sup>13</sup> There is a tension with constitutional rights when costs are imposed without regard to an ability to pay. See infra 45-52.

A defendant who is unable to pay court costs when due faces multiple court hearings to determine his ability to pay, with possible incarceration on a “failure to pay” bench warrant before contempt proceedings. There is no determination of whether the default is willful or because of an inability to pay before the bench warrant is issued. Further, the individual may be held up to 72 hours before the bench warrant hearing is held, with no assurance of release then because of an inability to pay since a judge may lodge a detainer before a contempt hearing is scheduled for failure to pay. See Pa.R.Crim.P. 431(C)(1)(c), (C)(2); Pa.R.Crim.P. 150(A)(5)(b); Pa.R.Crim.P. 706 Comment. Once the contempt hearing is held it is settled law that incarceration is not permissible if it is shown at that time that there is an inability to pay. E.g., Rule 706(A), Commonwealth ex rel. Parrish v. Cliff, supra. However, the unfortunate reality in Pennsylvania is that too frequently incarceration for poor defendants precedes (and sometimes follows) the default hearing. See ACLU Amicus Brief (documenting abuses).<sup>14</sup>

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<sup>14</sup> For those defendants subject to this incarceration before an ability to pay determination, there are significant constitutional concerns that are explored in the amicus brief for the Fines and Fees Justice Center. See Re: Petition for Writ of Prohibition, 489 P.3d 820, 834-36 (Idaho 2021) (holding that pre-hearing incarceration violates Equal Protection rights).

Individuals who are law abiding for many years are sometimes ineligible for expungement because of a statutory prohibition or policies barring consideration because of unpaid costs. Further, the only other avenue of relief, the Pardons Board, will not grant a pardon unless the applicant has paid all court costs and fines. See Pa. Board of Pardons, Legal Financial Obligations, <https://www.bop.pa.gov/Pages/Fines-and-Costs.aspx> (last visited Oct. 29, 2021).

Having a criminal record often significantly interferes with many aspects of life, including obtaining employment, housing, and admission to college. Agencies with substantial experience dealing with poor people detail these severe civil consequences in their joint amicus brief. See Community Legal Services, et al Amicus Brief.

Outstanding fines or costs have other potential severe consequences for an individual, including being disqualified from obtaining needed government family assistance, or having a lien put on the person's house because the court fines and costs have been entered as a civil judgment. See, e.g., ACLU Amicus Brief.

It was long ago recommended that a fine not be imposed on an individual without the financial ability to pay because "it may hurt an

offender's dependents more than the offender himself . . . ." National Commission On Reform Of Federal Criminal Laws, supra, § 3302 Comment at 296.

One of the serious difficulties in the use of fines is that to a very large extent the impact of the sanction turns on the means of the defendant: a defendant of wealth is often unaffected by a fine and may be more than willing to treat the fine as an acceptable cost of engaging in prohibited conduct; a defendant of very limited assets, however, may be devastated by even a small fine that causes economic hardship both to him and to his family out of proportion to the gravity of the offense.

Model Penal Code of 1962, supra, § 7.02 Comment at 240.

The same hardships are of course true with costs. Those living in poverty who are struggling daily to make ends meet by feeding and caring for themselves and their family must choose between immediate family needs and keeping up with payments of court costs. Because of bias in the criminal justice system and throughout society, both conscious and unconscious, this burden, as others, falls unequally on people of color. See, e.g., Community Legal Services, et al Amicus Brief.

Construing Rule 706(C) to require a determination of ability to pay before imposing court costs promotes “fairness in administration”. Pa.R.Crim.P. 101(B).

**3. Imposing court costs on the indigent who have no ability to pay is unsound economic policy.**

Court hearings and administrative collection proceedings are time consuming and expensive. These costs outweigh any possible return when a court imposes court costs on an individual like Mr. Lopez, who has been indigent for a long time and no prospects for improved financial wherewithal. See supra 4-5. The same bad investment occurs when a court refuses to realistically reduce court costs for those with extremely limited resources. Specifically, court proceedings held to determine that such an individual’s failure to pay costs are not willful require administrative expenses, in addition to the incalculable costs of salaries of the court personnel, judges and attorneys involved. Further, efforts made by probation officers or others outside of court to collect money from those who cannot pay further expand the cost. As documented by the amicus briefs for the Office of Controller of Allegheny County, Pennsylvanians For Modern Courts, and the ACLU, the years long

burden on defendants is not worth the effort to collect costs from those who cannot pay.

“While uncollectibility is self-evident and well-documented (for those unable to pay), what is less apparent and not as well documented are the direct burdens that fall on the County in administering the collection of court cost awards. What looks like a revenue source becomes, in practice, a revenue drain.” Office of the Controller of Allegheny County Amicus Brief, 7. Significantly, the fiscal Note (Exhibit F) for the Bill in 2010 that led to the statutes permitting waiver or modification of costs pursuant to Rule 706(C) (supra 25-30), noted that the AOPC concluded that “The provisions . . . are not expected to have an adverse fiscal impact upon the judiciary.”

It is much better to make a determination of an ability to pay when costs are imposed rather than impose unaffordable costs only to attempt to address an avoidable problem later. This construction of Rule 706(C) is most consistent with the goals of this Court’s Rules: “to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.” Rule 101(B).



**D. Rule 706(C) should be interpreted to mandate a consideration of ability to pay before costs are imposed to avoid an unreasonable result and constitutional difficulties.**

The interpretation of Rule 706(C) that we propose is not only right as a matter of text, history, and policy, it should also be adopted because a contrary one is unreasonable and in tension with constitutional rights of the accused. “Under the canon of constitutional avoidance, if a statute is susceptible of two reasonable constructions, one of which would raise constitutional difficulties, and the other of which would not, we adopt the latter construction.” Commonwealth v. Herman, 161 A.3d 194, 212 (Pa. 2017). See, e.g., Commonwealth v. McClelland, 233 A.3d 717, 735 (Pa. 2020) (with two reasonable opposing constructions of a Rule of Criminal Procedure this Court adopts the one that avoids constitutional questions).

**1. The Superior Court’s interpretation of Rule 706(C) unreasonably results in the rights of indigent defendants being subject to the judge’s personal choice of whether to consider ability to pay, and is in tension with due process and equal protection rights.**

The law presumes that an unreasonable result is not intended by a Rule or Statute. 1 Pa.C.S. § 1922(i). See, e.g., Raynor v. D’Annunzio, supra, 243 A.3d at 55. The Superior Court’s construction of Rule 706(C)

unreasonably results in an indigent's rights being dependent on the personal policy preference of each judge. This construction of the Rule also presents a serious question of constitutionality.

The lower court judge did not consider Mr. Lopez's ability to pay before imposing costs "because that's something that is inconsistent with the policy of this Court and is also not required by the current Superior Court law." N.T. 4/27/18, 19. The en banc majority affirmed, stating:

There is no doubt that it is the trial court, and not this Court, which is in the best position to evaluate its own docket and schedule this hearing. We merely hold that nothing in the Rules of Criminal Procedure, the Sentencing Code or established case law takes that discretion away from the trial court unless and until a defendant is in peril of going to prison for failing to pay the costs imposed on him. It is only at that point that the mandate for an ability-to-pay hearing arises.

Lopez, 248 A.3d at 595.

No hearing is required under Rule 706(C) (supra 18), and the determination can be made at the same sentencing hearing where the judge is required to impose costs if the defendant has the ability to pay. 42 Pa.C.S. § 9721(c.1). More fundamentally, administrative convenience for an individual judge or personal policy cannot be the basis for the exercise of discretion in denying relief to a defendant.

“Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect . . . to the will of the law.” Osborn v. Bank of United States, 22 U.S. 738, 866 (1824) (Marshall, C.J.). This principle is reflected in the well established standard for evaluating whether a judge has committed an abuse of discretion in applying a law. “The term ‘discretion’ imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge.” Commonwealth v. Widmer, 744 A.2d 745, 753 (Pa. 2000).

Where, as in Rule 706(C), a defendant has a right to have his financial resources considered in taking an action (supra 11-25), a judge has no discretion to ignore this obligation. The rights of poor people like Mr. Lopez cannot depend on the largesse of individual judges. It would be unthinkable for a court not to appoint counsel where required by the Rules of Criminal Procedure for an indigent defendant, as with Rule 904 PCRA proceedings, because a judge expresses a policy preference not to consider indigency. It should be just as unacceptable here.

What the Superior Court failed to acknowledge, as explained recently in Commonwealth v. Weir, 239 A.3d 25 (2020), is that statutory authority requires a judge to act in a certain way, but that discretion comes into play in applying the law to the individual circumstances of the case. In Weir, the Court noted that sometimes restitution is statutorily required, but evaluating the appropriate amount of restitution in an individual case is a decision entrusted to the discretion of the sentencing judge. Id. at 37-38. So here, discretion is exercised in determining costs **only after** considering ability to pay and the other relevant Rule 706(C) mandated factors. The Superior Court's ruling flips that script here. The judge's refusal to consider Mr. Lopez's dire financial circumstances when he imposed costs was not an exercise of appropriate discretion, but rather a violation of law. See, e.g., Commonwealth v. Boyd, 73 A.3d 1269, 1273-74 (Pa. Super. 2013) (en banc) (judge must consider ability to pay a fine under 42 Pa.C.S. § 9726, but the decision as to amount if any after considering evidence of record is a discretionary one).

Due Process and Equal Protection rights are also implicated by the Superior Court's decision. Due Process guarantees fundamental fairness in all proceedings. See, e.g., Department of Transportation, Bureau of

Driver Licensing v. Middaugh, 244 A.3d 426, 435 (Pa. 2021) (license suspension proceedings); Commonwealth v. Bennett, 930 A.2d 1264, 1267 (Pa. 2007) (PCRA proceedings). A corollary principle is that due process of law is violated when arbitrariness is injected into the law with standardless discretion. See, e.g., Johnson v. United States, 576 U.S. 591, 595 (2015) (sentencing law unconstitutionally vague in part because “so standardless that it invites arbitrary enforcement”).

The Equal Protection Clause provides related protections because standardless discretion leads to similarly situated individuals being treated differently in the execution of the laws for “irrational and wholly arbitrary” reasons. See, e.g., Village of Willowbrook v. Olech, 528 U.S. 562, 565 (2000); Small v. Horn, 722 A.2d 664, 672 (Pa. 1998) (“The Equal Protection Clause . . . assures that all similarly situated persons are treated alike.”)

There is no rational basis for denying the hopelessly poor Mr. Lopez an ability to pay determination that would result in a waiver or very significant reduction of court costs while granting it to others. Some, like the judge here, may prefer to impose the full costs, and do so, while another judge with the same impoverished defendant would determine

whether his poverty warrants a reduction or waiver in the amount of costs. This results in a fundamentally unequal system of justice. It is particularly alarming when it involves the rights of the poor.

In a different context, but with the same concerns for potential arbitrariness, this Court has rejected granting trial courts such unbridled discretion in construing one of its Rules. In a recent unanimous opinion, this Court held that waiver principles had to be applied whenever an issue is inadequately raised in a Rule 1925 (Pa.R.App.P. 1925) statement, rather than have waiver dependent upon whether the particular judge chose to address the issue in the Rule 1925 opinion. The Court held that its ruling was necessary to “avoid such unpredictable and inequitable outcomes.” Commonwealth v. Parrish, 224 A.3d 682, 701 (Pa. 2020).

[E]ach litigant ordered to file such a statement receives the same opportunity for appellate review. In our view, it is untenable, and, indeed, potentially offensive to equal protection principles, for the breadth of appellate review to be based on a trial court’s discretionary decision to speculatively determine which appellate issues are raised in a vague Rule 1925(b) statement. Such an approach would result in a situation where some litigants obtain appellate review if, as here, the trial court elects to address certain appellate issues, whereas other litigants would be denied that opportunity if the trial court declines to do so.

Id.

This Court should construe Rule 706(C) as written (“shall”) to impose an obligation on every judge to consider a defendant’s ability to pay before imposing costs.

**2. An interpretation of Rule 706(C) that requires a determination of an ability to pay costs before they are imposed avoids serious constitutional concerns presented by the excessive fines clause.**

The Excessive Fines Clause of the Eighth Amendment is not limited literally to fines. “The Excessive Fines Clause thus limits the government’s power to extract payments, whether in cash or in kind, as punishment for some offense.” United States v. Bajakajian, 524 U.S. 321, 327-28 (1998); see also Timbs v. Indiana, \_\_ U.S. \_\_, 139 S.Ct. 682 (2019) (incorporating the Excessive Fines Clause as applicable to the states). Any economic sanction imposed “in part to punish” that is paid to the government comes within its protections. Austin v. United States, 509 U.S. 602, 607, 610 (1993) (holding that Excessive Fines Clause can apply to civil forfeiture).

The imposition of costs comes within the purview of the Excessive Fines Clause because it has long been recognized in Pennsylvania as

being penal in nature, exacted as a result of misconduct by a defendant. In 1818, in Commonwealth v. Tilghman, 4 Serge & Rawle 127, 1818 WL 2213 (Pa. 1818), this Court acknowledged that “a statute imposing costs is penal in its nature and must be construed strictly.” Id. at 129. The Court held that despite an acquittal, costs could be imposed “[w]hensoever misconduct may be fairly imputed.” Id. at 130.

Costs are even more clearly punitive now because constitutionally they may only be imposed and retained after a valid guilty verdict in a criminal case. E.g., Nelson v. Colorado, \_\_U.S.\_\_, 137 S.Ct. 1249 (2017) (holding that the Due Process Clause mandates return of costs and other financial sanctions if a defendant’s conviction is vacated and he is not re-tried). Costs are imposed at sentencing (42 Pa.C.S. § 9721(c.1)), and statutes imposing costs are unquestionably “penal in nature.” Garzone, 34 A.3d at 75.

In a case involving a civil in rem forfeiture proceeding, this Court explained the factors that must be considered by a court in determining whether an economic sanction should be considered excessive under the Excessive Fines Clause. Commonwealth v. 1997 Chevrolet, 160 A.3d 153 (Pa. 2017). Justice Todd, after a thorough historical analysis,



on behalf of a unanimous court, concluded in essence that ability to pay is one requisite factor. Id. at 188-89. “We find such consideration – whether the forfeiture would deprive the property owner of his or her livelihood, i.e., his current or future ability to earn a living . . . to be entirely appropriate . . . .” Id. at 189.

This year the Washington Supreme Court squarely confronted the issue of whether the Excessive Fines Clause applied to costs, and whether there had to be a consideration of a defendant’s ability to pay. City of Seattle v. Long, 493 P.3d 94 (Wash. 2021). The court conducted a thorough historical analysis, noted a modern trend (id. at 108-114), and held that under the Excessive Fines Clause a court “should also consider a person’s ability to pay” in determining excessiveness. Id. at 114. As to Mr. Long, the Court held that given his dire circumstances, \$547 in vehicle impoundment costs, with a \$50 a month payment plan, were constitutionally excessive. Id. at 114-15.

This issue raises serious constitutional concerns that are much more thoroughly explored in the scholarly amicus brief of Professors Beth A. Colgan and Jean Galbraith. If this Court finds any ambiguity in Rule 706(C), it should apply the doctrine of constitutional avoidance

and conclude that there must be a determination of ability to pay under the Rule before any costs are imposed.

This Court may also consider this claim on the merits because it presents a non-waivable illegal sentencing issue. See, e.g., Commonwealth v. Hill, 238 A.3d 399, 409 (Pa. 2020) (double jeopardy challenge raised for the first time in this Court is a non-waivable illegal sentencing claim); Boyd, 73 A.3d at 1271-74 (claim that judge erred by not considering ability to pay a fine presented a non-waivable illegal sentencing claim).

**3. The absence of an ability to pay determination before imposing costs on poor people may violate due process and equal protection rights.**

The Court should construe Rule 706(C) to provide for an ability to pay hearing before imposing costs to avoid tension with due process and equal protection rights.

In Commonwealth v. Hernandez, 917 A.2d 332 (Pa. Super. 2006), a sentencing judge imposed the costs of prosecution, including an expert's bill for \$7008.50. Id. at 333. Hernandez claimed that he did not have the ability to pay these costs, and that the imposition of costs without

determining whether he had the ability to pay violated his constitutional rights to due process and equal protection. Id. at 333-35.

The constitutional claim mainly relied on Fuller v. Oregon, 417 U.S. 40 (1974), which considered an Oregon statute that did not permit appointed counsel expenses to be imposed “unless he ‘is or will be able to pay them’.” Id. at 45. The Hernandez panel concluded that “[t]he only notable substantive difference is that the statute in Fuller provides for a mandatory hearing at the time of sentencing and Pa.R.Crim.P. 706 does not.” Hernandez, 917 A.2d at 337. The panel, however, reached this conclusion without ever analyzing or interpreting the Rule itself.

The panel also overstates Fuller’s holding. There, the Court held only that the Oregon statute did not violate equal protection as it barred the imposition of costs at sentencing without a determination of an inability to pay, and provided for the later adjustment or waiver of costs at any time if there was an inability to pay, similar to allowances given other kinds of debtors. Fuller, 417 U.S. at 44-48.

The Hernandez panel rejected the constitutional claim, concluding that the difference between Rule 706, which it believed

provided only a pre-commitment protection after a failure to pay, and the “Oregon statute that the Supreme Court upheld in Fuller, is legally insignificant.” Hernandez, at 337. “[B]ecause Pa.R.Crim.P. 706 contains the essential characteristics of the Oregon statute that was upheld in Fuller and ensures that an indigent will not be committed on the basis of his poverty, we conclude that 16 P.S. Section 1403 is constitutional on its face and as applied to the particular facts of this case.” Id.

It is an open constitutional question after Fuller whether a statute or rule that provides for no determination of ability to pay when thousands of dollars of costs are imposed has the “essential characteristics” to comply with constitutional requirements. Hernandez resolved this constitutional issue by referring only to other jurisdictions that agreed with its ruling. Id. at 337. But, others have held that there must be a determination of ability to pay before imposing costs. See, e.g., Olson v. James, 603 F.2d 150 (10<sup>th</sup> Cir. 1979); United States v. Bracewell, 569 F.2d 1194, 1197-99 (2<sup>nd</sup> Cir. 1978)

(construing statute in light of constitutional concerns); Opinion of the Justices, 431 A.2d 144, 150 (N.H. 1981).<sup>15</sup>

This Court has noted that “[a]s early as Griffin v. Illinois, ...the United States Supreme Court indicated its concern with respect to discrimination caused by those unable to meet the expenses of litigation.” Commonwealth ex rel. Parrish v. Cliff, 304 A.2d at 160.

Griffin v. Illinois, 351 U.S. 12 (1956), held that a state had to supply the trial transcript or its equivalent to those who cannot afford the costs of a transcript for an appeal. Id. at 16-19. “Both equal protection and due process emphasize the central aim of our entire judicial system – all people charged with crime must, so far as the law is concerned ‘stand on an equality before the bar of justice in every American court.’” Id. at 17.

Fundamental fairness is guaranteed in all proceedings and Article I, Section I is more protective of due process rights than its federal counterpart. See, e.g., Middaugh, 244 A.3d at 435. Given the very significant burdens placed on defendants who do not have the ability to pay costs that are imposed (supra 33-37), substantial due process and

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<sup>15</sup> Like Fuller, almost all of the cases pro and con have involved appointed counsel expenses, thus implicating Sixth Amendment concerns as well.

equal protection questions are raised if no ability to pay determination is required before those costs are imposed.

## CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be reversed, the lower court order imposing costs should be vacated, and this case should be remanded for a determination of an ability to pay and whether costs should be waived or reduced.

Respectfully submitted,

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**CERTIFICATION OF COMPLIANCE WITH RULE 2135**

I do hereby certify on this 3rd day of November, 2021, that the Brief For Appellant filed in the above captioned case on this day does not exceed 14,000 words. Using the word processor used to prepare this document, the word count is 10,735 as counted by Microsoft Word.

Respectfully submitted,

*/S/*

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**CERTIFICATION OF COMPLIANCE WITH RULE 127, PA.R.A.P.**


I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

*/S/*

\_\_\_\_\_  
LEONARD N. SOSNOV, Assistant Defender  
Attorney Registration No. 21090



# ***EXHIBIT A***

 KeyCite Yellow Flag - Negative Treatment  
Appeal Granted by [Commonwealth v. Lopez](#), Pa., August 24, 2021

248 A.3d 589  
Superior Court of Pennsylvania.

COMMONWEALTH of Pennsylvania

v.

[Alexis LOPEZ](#), Appellant

No. 1313 EDA 2018

Argued June 3, 2020

Filed March 23, 2021

### Synopsis

**Background:** Following revocation of parole, the Court of Common Pleas, Philadelphia County, Criminal Division, No. CP-51-CR-0004377-2015, [Glenn B. Bronson](#), J., imposed sentence that included mandatory court costs. Defendant appealed.

**[Holding:]** The Superior Court, No. 1313 EDA 2018, [Panella](#), President Judge, held that trial court was not required to hold an ability-to-pay hearing before imposing court costs on defendant at sentencing.

Affirmed.

[Stabile](#), [Murray](#), [McLaughlin](#), [King](#), and [McCaffery](#), JJ., joined the opinion.



[Nichols](#), J., concurred in the result.

[Dubow](#), J., filed a concurring and dissenting opinion in which [Kunselman](#), J., joined.


**Procedural Posture(s):** Appellate Review; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (5)

[1] **Costs, Fees, and Sanctions**  [Determination of defendant's ability to pay](#)

Trial court was not required to hold an ability-to-pay hearing before imposing court costs on defendant at sentencing; imposition of court costs upon defendant was mandatory, and defendant had not yet been threatened with incarceration as a result of a default.  [42 Pa. Cons. Stat. Ann. §§ 9721\(c.1\)](#),  [9728\(b.2\)](#); [Pa. R. Crim. P. 706](#).

[41 Cases that cite this headnote](#)



[2] **Costs, Fees, and Sanctions**  [Determination of defendant's ability to pay](#)

**Fines**  [Imposition and liability in general](#)


The rule regarding determining a defendant's financial means to pay fines or costs only requires a court to determine a defendant's ability to pay before incarceration for delinquency, not before the imposition of all financial obligations at sentencing. [Pa. R. Crim. P. 706](#).

[30 Cases that cite this headnote](#)

[3] **Costs, Fees, and Sanctions**  [Amount and Items Taxable Against Defendant](#)

The clear import of the statutes regarding mandatory payment of costs is to make it mandatory for a defendant to pay the costs of prosecution, even in the absence of a court order imposing those costs.  [42 Pa. Cons. Stat. Ann. §§ 9721\(c.1\)](#),  [9728\(b.2\)](#).

[6 Cases that cite this headnote](#)

[4] **Costs, Fees, and Sanctions**  [Determination of defendant's ability to pay](#)

A defendant is not entitled to an ability-to-pay hearing before a court imposes court costs at sentencing, but court may exercise its discretion to conduct such a hearing at sentencing.

[39 Cases that cite this headnote](#)

[5] **Criminal Law**  [Specification of errors](#)

In resentencing hearing, issue of imposition of probation supervision fees was waived, where

defendant did not challenge that imposition in his statement of errors complained of on appeal. [Pa. R. App. P. 1925\(b\)](#).

\*590 Appeal from the Judgment of Sentence April 27, 2018, In the Court of Common Pleas of Philadelphia County, Criminal Division at No(s): CP-51-CR-0004377-2015, [Glenn B. Bronson](#), J.

#### Attorneys and Law Firms

[Leonard Sosnov](#), Philadelphia, for appellant.

[Emily Patricia Daly](#), Philadelphia, for appellee.

BEFORE: [PANELLA](#), P.J., [STABILE](#), J., [DUBOW](#), J., [KUNSELMAN](#), J., [NICHOLS](#), J., [MURRAY](#), J., [McLAUGHLIN](#), J., [KING](#), J., and [McCAFFERY](#), J.

#### Opinion

OPINION BY [PANELLA](#), P.J.:

Appellant, Alexis Lopez, appeals from his April 27, 2018 judgment of sentence, which included the imposition of mandatory court costs. Appellant argues that he was entitled to a hearing under [Pa.R.Crim.P. 706\(C\)](#) to determine his ability to pay those court costs before the court imposed them at sentencing. We disagree. Instead, we hold that while a trial court has the discretion to hold an ability-to-pay hearing at sentencing, [Rule 706\(C\)](#) only requires the court to hold such a hearing when a defendant faces incarceration for failure to pay court costs previously imposed on him. We therefore affirm Appellant's judgment of sentence.

\*591 This appeal implicates the interpretation of the Rules of Criminal Procedure, which presents a question of law. Therefore, our standard of review is *de novo*, and our scope of review is plenary. *See Commonwealth v. Dowling*, 598 Pa. 611, 959 A.2d 910, 913 (2008).

The judgment of sentence underlying this appeal was entered following the revocation of Appellant's probation. Appellant originally pled guilty to one count of possession with intent to deliver a controlled substance. The trial court sentenced Appellant to 11½ to 23 months' incarceration, to be followed by three years of probation. On December 30, 2015, the trial court granted Appellant parole.

Appellant serially violated his parole. At Appellant's last probation and parole violation hearing on January 18, 2018, the court found Appellant in technical violation of his probation and revoked it. The court deferred resentencing and scheduled a resentencing hearing that was eventually held on April 27, 2018.

Prior to that resentencing hearing, Appellant filed a Motion for Ability-to-Pay Hearing at Sentencing to Waive Costs, in which he argued that the trial court was required to hold a hearing on his ability to pay before the court could impose mandatory court costs. Specifically, in the motion, Appellant maintained that [Rule 706\(C\)](#), along with Sections 9721(c.1) and 9728(b.2) of the Sentencing Code, mandated that the court hold an ability-to-pay hearing before imposing court costs at sentencing. *See* Pa.R.A.P. 706(C); [42 Pa.C.S.A. §§ 9721\(c.1\), 9728\(b.2\)](#).

The trial court heard arguments on the legal issues raised by Appellant's Motion for Ability-to-Pay Hearing at the resentencing hearing on April 27, 2018. Following the arguments, the court denied the motion, stating that it was not going to “start a court-wide practice of not imposing costs without having a hearing” when it was not required to do so by “current Superior Court law.” N.T., 4/27/18, at 19. The court also denied the oral request Appellant made at the hearing to waive his probation supervision fees.

The court then resentenced Appellant to six to 23 months' incarceration, with immediate parole, to be followed by two years of probation. It also imposed \$1695.94 in mandatory court costs.

Appellant filed a notice of appeal and subsequently complied with the court's directive to file a [Pa.R.A.P. 1925\(b\)](#) statement of errors complained of on appeal. In response, the court issued a [Pa.R.A.P. 1925\(a\)](#) opinion. In the opinion, the court first explained that it had denied Appellant's Motion for Ability-to-Pay Hearing because it was simply not required to hold such a hearing prior to imposing court costs under the clear dictates of this Court's decision in [Commonwealth v. Childs](#), 63 A.3d 323, 326 (Pa. Super. 2013) (holding that [Rule 706](#) only requires a trial court to hold an ability-to-pay hearing when a defendant risks incarceration for failing to pay court costs). The court also explained that it had denied Appellant's oral motion to waive probation supervision fees because of the Philadelphia Court of Common Pleas' informal policy not

to waive supervision fees unless that waiver was requested by the Probation Department. The court noted that such a policy was also consistent with *Childs*.

[1] In his appeal, Appellant first argues that the court erred by denying his Motion for Ability-to-Pay Hearing because Section C of [Rule 706](#) obliges a sentencing court to conduct an ability-to-pay hearing before imposing court costs on a defendant at sentencing. Specifically, Appellant argues that “[w]hile other sections of [[Rule 706](#)] provide for the procedures in case of \*592 a subsequent default, Section C... unambiguously requires that a court consider a defendant's ability to pay when it imposes costs.” Appellant's Brief at 6, 8 (capitalization of certain words omitted). We do not agree with Appellant that Section C can be read in isolation from the rest of [Rule 706](#). As a result, we conclude that [Rule 706](#) does not impose a requirement that a court hold an ability-to-pay hearing before imposing court costs on the defendant at sentencing.

[Rule 706](#), as with all Rules of Criminal Procedure, is to be construed in accordance with the rules of statutory construction to the extent possible. *See* [Pa.R.Crim.P. 101\(c\)](#). Our Supreme Court has made clear that all sections of a statute must be read together and in conjunction with each other and must be construed with reference to the entire statute. *See* [Trust Under Agreement of Taylor](#), 640 Pa. 629, 164 A.3d 1147, 1155 (2017). As this mandate applies equally to [Rule 706](#), and all of its sections, it is critical to look at the Rule in its entirety. To that end, [Rule 706](#) provides:

(A) A court shall not commit the defendant to prison for failure to pay a fine or costs unless it appears after hearing that the defendant is financially able to pay the fine or costs.

(B) When the court determines, after hearing, that the defendant is without the financial means to pay the fine or costs immediately or in a single remittance, the court may provide for payment of the fines or costs in such installments and over such period of time as it deems to be just and practicable, taking into account the financial resources of the defendant and the nature of the burdens its payments will impose, as set forth in paragraph (D) below.

(C) 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.

(D) In cases in which the court has ordered payment of a fine or costs in installments, the defendant may request a rehearing on the payment schedule when the defendant is in default of a payment or when the defendant advises the court that such default is imminent. At such hearing, the burden shall be on the defendant to prove that his or her financial condition has deteriorated to the extent that the defendant is without the means to meet the payment schedule. Thereupon the court may extend or accelerate the payment schedule or leave it unaltered, as the court finds to be just and practicable under the circumstances of record. When there has been default and the court finds the defendant is not indigent, the court may impose imprisonment as provided by law for nonpayment.



[Pa.R.Crim.P. 706](#).


[2] When the sections of [Rule 706](#) are read sequentially and as a whole, as the rules of statutory construction direct, it becomes clear that Section C only requires a trial court to determine a defendant's ability to pay at a hearing that occurs prior to incarceration, as referenced in Sections A and B. To be sure, this Court reached this very conclusion in [Commonwealth v. Ciptak](#), 441 Pa.Super. 534, 657 A.2d 1296 (1995), *reversed on other grounds*, 542 Pa. 112, 665 A.2d 1161 (1995). There, in rejecting the defendant's claim that Pa.R.Crim.P. 1407(c), the predecessor to \*593 [Rule 706](#),<sup>1</sup> required the sentencing court to determine his ability to pay prior to imposing costs at sentencing, our Court explained:


**[T]he rules of statutory construction indicate that Pa.R.Crim.P. 1407 deals in its entirety with a defendant's default from payment of a fine or the costs of prosecution.** Rule 1407(a) ... precludes a court from imprisoning a defendant for failure to pay a fine or costs unless, following a hearing, the court determines that the defendant is capable of paying the sums due. In part (b), the [Rule] goes on to outline the forms of relief that the court may provide where it determines that the defendant lacks the financial means to pay the sums due, immediately or in a single remittance. The final provision of the [Rule], part (d), outlines the steps to be taken after the court has granted the defendant relief in the form of an installment payment plan if the defendant finds himself again in default or believes that default is imminent.

As the provisions of the [Rule] which precede and follow Pa.R.Crim.P. 1407(c) set forth [the] procedure regarding




default on payment of costs or fines, we can only conclude that Pa.R.Crim.P. 1407(c) addresses the standard which the court must use in reviewing the defendant's default.

 [Id.](#) at 1297-98 (emphasis added). As the  [Ciptak](#) Court made clear, Section C, when read in context with its surrounding sections, only requires a court to determine a defendant's ability to pay before incarceration for delinquency, not before the imposition of all financial obligations at sentencing.

Appellant asserts that our Supreme Court overruled our Court's interpretation of Rule 1407 in  [Ciptak](#) on appeal.

However, the defendant in  [Ciptak](#) raised two related, but distinct arguments. Like here, he first argued that the trial court erred by imposing costs on him without first holding a presentence ability-to-pay hearing. Importantly, though, he also argued that trial counsel had been ineffective for failing to object and preserve that issue. In a *per curiam* order reversing this Court's order, the Supreme Court first held that appellate counsel was improperly alleging what was in effect his own ineffectiveness because he and trial counsel were from the same public defender's office. *See Ciptak*, 665 A.2d at 1161-62.


In determining whether the appointment of new counsel was necessary, the Court observed that the record did not reveal trial counsel's thought processes on the issue of costs. As a result, the Court remanded for an evidentiary hearing to resolve the ineffectiveness claim. *See id.* at 1162. The Court did not, contrary to Appellant's claim, overrule this Court's interpretation of Rule 1407.



We also note that the Supreme Court had the opportunity to explicitly repudiate the interpretation of Rule 1407 by our Court in  [Ciptak](#) when renumbering Rule 1407 as [Rule 706](#) and it did not do so. Instead, it left the Rule materially unchanged without any reference to the issue raised in  [Ciptak](#). Our Supreme Court, in fact, recently indicated its *agreement* with  [Ciptak](#)'s interpretation:




Although a *presentence* ability-to-pay hearing is not required when costs alone are imposed, our Rules of Criminal Procedure provide that a defendant cannot be committed to

prison for failure to pay a fine or costs unless the court first \*594 determines that he or she has the financial means to pay.

[Commonwealth v. Ford](#), — Pa. —, 217 A.3d 824, 827 n. 6 (2019) (emphasis in original).

In support of his argument advocating for the exact opposite conclusion here, Appellant also points to Sections 9721(c.1) and 9728(b.2) of the Sentencing Code.  [Section 9721\(c.1\)](#) provides:

**(c.1) Mandatory Payment of Costs.--** Notwithstanding the provisions of  [Section 9728](#) (relating to collection of restitution, reparation, fees, costs, fines and penalties) or any provision of the law to the contrary, in addition to the alternatives set forth in subsection (a), the court shall order the defendant to pay costs. In the event the court fails to issue an order for costs pursuant to  [section 9728](#), costs shall be imposed upon the defendant under this section. No court order shall be necessary for the defendant to incur liability for costs under this section. The provisions of this subsection do not alter the court's discretion under Pa.R.Crim.P. No. 706(C) (relating to fines or costs).

 [42 Pa.C.S.A. § 9721\(c.1\)](#).  [Section 9728\(b.2\)](#), which not only shares the same title as  [Section 9721\(c.1\)](#) but specifically references that Section, provides:

**(b.2) Mandatory Payment of Costs.--** Notwithstanding any provision of law to the contrary, in the event the court fails to issue an order under subsection(a) imposing costs

upon the defendant, the defendant shall nevertheless 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). The absence of a court order shall not affect the applicability of the provisions of this section.

[42 Pa.C.S.A. § 9728\(b.2\)](#).

[3] The clear import of both of these statutes is to make it mandatory for a defendant to pay the costs of prosecution, even in the absence of a court order imposing those costs. While Appellant is correct that both statutes reference [Rule 706\(C\)](#), such a reference in no way places an affirmative duty on a sentencing court to hold an ability-to-pay hearing prior to imposing mandatory costs upon a defendant. Rather, when read in the context of the mandate to impose costs, those references merely make it clear that even though the imposition of court costs upon a defendant is mandatory, the defendant remains entitled to an ability-to-pay hearing before being imprisoned for defaulting on those mandatory costs.

This interpretation, as well as the reading of [Rule 706](#) to only require an ability-to-pay hearing when a defendant faces imprisonment for failure to pay costs, most closely aligns with the case that is cited by the Comment to [Rule 706](#) as a general reference point for the Rule. In that case, [Commonwealth ex. rel. Benedict v. Cliff](#), 451 Pa. 427, 304 A.2d 158 (1973), our Supreme Court held that a defendant has the constitutional right to an opportunity to show that he cannot afford the fine or costs that have been imposed on him prior to being incarcerated for failure to pay the fine or costs. *See id.* at 161. The Court then held that if the defendant establishes that he is financially unable to pay the fine or costs, he should be allowed to make payments in reasonable installments. *See id.* In response to [Benedict](#), our Supreme Court adopted former Rule 1407, now [Rule 706](#), to provide the procedure for the ability-to-pay hearing the [Benedict](#) Court held a defendant was constitutionally entitled to \*595 have before being imprisoned for failure to meet his financial obligations.

Based on all of the above, we conclude that the trial court properly found that it was not required to hold an ability-to-

pay hearing on the basis of this Court's decision in [Childs](#), which held that:

While [Rule 706](#) ‘permits a defendant to demonstrate financial inability either after a default hearing or when costs are initially ordered to be paid in installments,’ the Rule only **requires** such a hearing prior to any order directing incarceration for failure to pay the ordered costs.

[Childs](#), 63 A.3d at 326 (emphasis in original) (citation omitted).

[4] Appellant argues that this reliance on [Childs](#) is improper because it is inconsistent with this Court's *en banc* decision in [Commonwealth v. Martin](#), 233 Pa.Super. 231, 335 A.2d 424 (1975) (*en banc*). In rejecting this claim below, the trial court stated:

[I]n [Martin](#), the Superior Court addressed the sole issue of whether the trial court could impose a *fine* without considering ability to pay. There were no issues before the court regarding the legality of imposing mandatory costs ... without an ability-to-pay hearing. Accordingly, the holding of the Superior Court in [Childs](#) is not inconsistent with the *en banc* decision in [Martin](#).

Trial Court Opinion, 7/16/18, at 3 (emphasis in original). We agree, and therefore reaffirm [Childs](#)' holding that a defendant is not entitled to an ability-to-pay hearing before a court imposes court costs at sentencing.

To be clear, nothing in this opinion is meant to strip the trial court of its ability to exercise its discretion to conduct such a hearing at sentencing. There is no doubt that it is the trial court, and not this Court, which is in the best position to evaluate its own docket and schedule this hearing. We merely hold that nothing in the Rules of Criminal Procedure, the Sentencing Code or established case law takes that discretion away from the trial court unless and until a defendant is in peril of going to prison for failing to pay the costs imposed on him. It is only at that point that the mandate for an ability-to-pay hearing arises. Because Appellant had not yet been

threatened with incarceration as a result of a default, we hold that the trial court did not err by imposing mandatory court costs upon Appellant without first holding an ability-to-pay hearing.

[5] In his second issue, Appellant maintains that the sentencing court erred by refusing to waive his probation supervision fees based on a “policy of the Chief Judge of the Criminal Division of Philadelphia County” not to waive supervision fees unless such a waiver is requested by the Probation Department. Appellant's Brief at 20. However, as indicated by the trial court's [Pa.R.A.P. 1925\(a\)](#) opinion and our own review of the record, the trial court's reliance on this local court policy related only to the court's decision not to waive probation supervision fees, not court costs. *See* Trial Court Opinion, 7/16/18, at 2; N.T., 4/24/18, at 18-19, 30-31. However, Appellant did not challenge the imposition of probation supervision fees in his [Pa.R.A.P. 1925\(b\)](#) statement.

As such, that issue is waived. *See* [Commonwealth v. Lord](#), 553 Pa. 415, 719 A.2d 306, 309 (1998) (holding that issues not raised in a [Pa.R.A.P. 1925\(b\)](#) statement are waived).

In sum, then, we conclude that the trial court did not err in denying Appellant's Motion for Ability-to-Pay Hearing. Although the court had the discretion to consider that motion at sentencing, it was not required to do so by [Rule 706](#) because Appellant had not yet been threatened \*596 with incarceration as a result of a default. Should that occur, Appellant will be entitled to an ability-to-pay hearing pursuant to [Rule 706](#) at that time.

Judgment of Sentence affirmed.

Judges [Stabile](#), [Murray](#), [Mclaughlin](#), [King](#), and [McCaffery](#) join the opinion.

Judge [Nichols](#) concurs in the result.

Judge [Dubow](#) files a concurring and dissenting opinion in which Judge [Kunselman](#) joins.

CONCURRING/DISSENTING OPINION BY [DUBOW](#), J.: The Majority Opinion in this case holds that the provisions of the Sentencing Code do not require the trial court at sentencing to “hold a hearing” to consider Appellant's Motion to Waive Costs; rather the trial court has the discretion to decide whether to “hold a hearing.” Maj. Op. at 591. The

Majority affirms the trial court's decision to deny the Motion to Waive Costs without holding a hearing because “Appellant had not yet been threatened with incarceration as a result of a default [from failing to pay court costs]. Maj. Op. at 595.

Implicit in the Majority's finding—that the trial court has discretion to decide whether to “hold a hearing” when a defendant at sentencing files a Motion to Waive Costs—is the determination that the trial court has the authority to consider a Motion to Waive Court Costs at sentencing. I agree with this conclusion. I disagree, however, with the holding that if at sentencing a defendant files a Motion to Waive Costs, the trial court has the discretion to decide whether it will hear evidence in support of and opposition to the motion. <sup>1</sup>

It is undisputed that if a defendant is at risk of being incarcerated for failing to pay court costs, [Pa.R.Crim.P. 706](#) requires, and thus implicitly authorizes, the trial court to determine a defendant's ability to pay those costs before the trial court may incarcerate the defendant. The Rule also provides the trial court with the authority to modify the amount of those costs to reflect a defendant's ability to pay those costs and set a new amount and payment schedule that is “fair and practicable.” [Pa.R.Crim.P. 706\(C\)](#).

In [Commonwealth v. Childs](#), 63 A.3d 323 (Pa. Super. 2013), the Superior Court dealt with the same timing issue that is before us, *i.e.*, whether the trial court could consider a Motion to Waive Costs at sentencing. In [Childs](#), the defendant at sentencing filed a Motion to Waive Costs. The court concluded that the Sentencing Code and applicable Rule of Criminal Procedure did not permit the trial court to consider a Motion to Waive Costs at sentencing. Rather, the trial court could only modify costs when the defendant was at risk of being incarcerated for failing to pay costs. [63 A.3d at 326](#).

I disagree with the statutory analysis in [Childs](#) because it reads into the relevant provisions of the Sentencing Code a subsection of [Pa.R.Crim.P. 706](#) to which the \*597 legislature did not refer. The statutory analysis regarding whether the trial court has the authority to consider a Motion to Waive Costs at sentencing begins with [42 Pa.C.S. §§ 9721\(c.1\)](#) and [9728\(b.2\)](#). Specifically, Section 9721(c.1) of the Sentencing Code requires the trial court to, *inter alia*, impose court costs upon a defendant at sentencing. “The court shall order the defendant to pay costs.” [42 Pa.C.S. § 9721\(c.1\)](#). In this same section, however, the Legislature provides an exception to the mandatory imposition of costs by referring

to the trial court's discretion to modify the amount of costs according to the procedure set forth in [Pa.R.Crim.P. 706\(C\)](#).

Relevantly, [Section 9721\(c.1\)](#) provides:

In the event the court fails to issue an order for costs pursuant to [section 9728](#), costs shall be imposed upon the defendant under this section. No court order shall be necessary for the defendant to incur liability for costs under this section. **The provisions of this subsection do not alter the court's discretion under Pa.R.Crim.P. No. 706(C) (relating to fines or costs).**

*Id.* (emphasis added).

[Section 9728\(b.2\)](#) also authorizes the trial court to modify the amount of costs when imposing them and directs the trial court to the procedure it should follow when deciding whether to modify costs. This section first provides that, “[n]otwithstanding any provision of law to the contrary ... the defendant shall [ ] be liable for costs ... **unless the court determines otherwise** pursuant to Pa.R.Crim.P. [ ] 706(C).”

[42 Pa.C.S. § 9728\(b.2\)](#) (emphasis added). In other words, the Legislature, by stating that the defendant shall be liable for costs “unless the court determines otherwise,” provides the trial court with the authority to determine whether a defendant should pay costs.

[Section 9728\(b.2\)](#) further provides the procedure that the trial court should follow to determine whether the trial court should modify the amount of costs: “the defendant shall [ ] be liable for costs ... unless the court determines otherwise pursuant to Pa.R.Crim.P. [ ] 706(C).” [42 Pa.C.S. § 9728\(b.2\)](#) (emphasis added). In other words, the trial court, in determining whether a defendant shall be liable for costs, should follow the procedure set forth in [Pa.R.Crim.P. 706\(C\)](#).

[Pa.R.Crim.P. 706\(C\)](#) provides that “[t]he 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 reasons of the defendant's financial means[.]” [Pa.R.Crim.P. 706\(C\)](#) (emphasis added).

This interpretation is consistent with the legislative history from 2010 when the Legislature added [Section 9721\(c.1\)](#) to the Sentencing Code. After amending this section to make the imposition of costs automatic even if the trial court fails to include the costs in its sentencing order, the Legislature emphasized that “a court would retain all discretion to modify or even waive costs in an appropriate case, pursuant to [Pa.R.Crim.P. 706\(C\)](#).” House of Representatives Democratic Committee Analysis, Bill No. SB1169, September 15, 2010. The legislative history also showed that the new [Section 9728](#) “accomplishes the same goal as to the statute specifically addressing the imposition of costs, restitution and other matters collateral to sentencing.” Once again, the Legislature made clear that it was inserting the “same exception under criminal [rule 706\(C\)](#).” *Id.*

Thus, when read together, these sections provide the trial court with the authority to consider a Motion to Waive Court Costs at sentencing and provide the procedure the trial court must follow to determine an amount that is “just and practicable.”

\*598 The three judge panel in [Childs](#), however, misread these statutory provisions when it concluded that the trial court may only consider a Motion to Waive Costs when the defendant is at risk of being incarcerated for failing to pay the court costs imposed at sentencing. Although the Legislature only referred to [Pa.R.Crim.P. 706\(C\)](#) for setting forth the procedure for considering a Motion to Modify Costs, the [Childs](#) court incorporated [706\(A\)](#) into its analysis. It is [Rule 706\(A\)](#) that limits the trial court's authority to determine a Motion to Waive Costs to those situations in which the defendant is at risk of being incarcerated for failing to pay costs. “A court shall not commit the defendant to prison for failure to pay a fine or costs unless it appears after hearing that the defendant is financially able to pay the fine or cost.” [Pa.R.Crim.P. 706\(A\)](#). Since the Legislature did not refer to [Rule 706\(A\)](#), but only to [Rule 706\(C\)](#), the Legislature did not intend to limit the trial court's authority to those instances when the defendant is at risk of incarceration for failing to pay court costs.

Additionally, the three-judge panel in [Childs](#) mistakenly relied on *dicta* in [Commonwealth v. Hernandez](#), 917 A.2d 332 (Pa. Super. 2007), and on [Hernandez's](#) interpretation



of [42 Pa.C.S. §§ 9721](#) and [9728](#)—an interpretation that preceded the Legislature's 2010 amendments to those provisions that, as discussed above, did not place a limitation on the proceeding at which the trial court can consider a Motion to Waive Costs. Thus, I would expressly overrule [Childs](#).

Turning to the Majority Opinion, I disagree with the Majority's decision to affirm the trial court's denial of the Motion to Modify Costs. The Majority holds that “a trial court has the discretion to hold an ability to pay hearing at sentencing.” Maj. Op. at 590. The Majority concludes that in this case, the trial court was not required to “hold a hearing” because “Appellant had not yet been threatened with incarceration as a result of a default.” Maj. Op. at 595.

However, since Appellant filed a Motion to Waive Costs at sentencing and the Sentencing Code authorizes the trial court to decide a Motion to Waive Costs at sentencing and requires the trial court to follow the procedure set forth in [Pa.R.Crim.P. 706\(C\)](#), the trial court must hold a hearing. [Pa.R.Crim.P. 706\(C\)](#) requires the trial court to consider “the burden upon the defendant by reason of the defendant's financial means” to determine the “manner and method of the payment of a fine or cost” and set an amount that is “just and practicable.” The defendant's financial means is a factual question and the trial court must hold a hearing to receive this evidence. Without evidence of the defendant's financial means, the trial

court cannot determine whether it is appropriate to modify the amount of court costs and decide the Motion to Waive Costs.

Finally, I disagree with the manner in which Appellant framed the issue. Appellant argues that the Sentencing Code requires the trial court to consider a defendant's ability to pay costs before the trial court imposes costs, irrespective of whether a defendant has filed a Motion to Waive Costs. Appellant is, in essence, arguing that the trial court has the authority to *sua sponte* waive costs at sentencing. I agree that when a defendant files a motion, the Sentencing Code authorizes the trial court to decide the issue. Appellant, however, has failed to provide us with any legal support, and we have found none, to support the proposition that this is one of the limited situations in which the trial court may raise an issue *sua sponte*. Without such legal support, the trial court lacks the authority to raise the issue *sua sponte*.

\*599 In sum, I would vacate Appellant's Judgment of Sentence and remand for hearing pursuant [Pa.R.Crim.P. 706\(C\)](#).<sup>2</sup>

Judge [Kunselman](#) joins the concurring and dissenting opinion.

#### All Citations

248 A.3d 589, 2021 PA Super 51

### Footnotes

<sup>1</sup> Pa.R.Crim.P. 1407 was renumbered as [Pa.R.Crim.P. 706](#) in 2000. Former Rule 1407 was identical to current [Rule 706](#) in all material respects. See [Commonwealth v. Rosser](#), 268 Pa.Super. 116, 407 A.2d 857, 859 n.6 (1979) (quoting former Rule 1407).

<sup>1</sup> One of the difficulties in this case is the different ways in which the issue is framed. Appellant frames the issue as whether the Sentencing Code mandates that the trial court, when imposing court costs, determine a defendant's ability to pay costs. Appellant's Brief at 14. The Majority frames the issue as whether the trial court at sentencing must “hold a hearing” before waiving costs. Maj. Op. at p. 591. The three judge panel in [Commonwealth v. Childs](#) frames the issue in three different ways; whether the trial court has the authority to modify costs at sentencing, whether the trial court is required to hold a hearing, and whether a defendant is entitled to a hearing. [63 A.3d at 325-326](#). Underlying all of these issues, however, is the threshold issue of whether the Legislature has authorized the trial court to decide a Motion to Waive Costs at sentencing.

<sup>2</sup> We likewise concur with the Majority's conclusion that Appellant waived his second issue pertaining to the sentencing court's imposition of probation supervision fees.

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# ***EXHIBIT B***

IN THE COURT OF COMMON PLEAS PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

TRIAL DIVISION—CRIMINAL

COMMONWEALTH OF PENNSYLVANIA :  
 :  
 :  
 v. : No. CP-51-CR-0004377-2015  
 :  
 :  
 ALEXIS LOPEZ :  
 PP#739683 :  
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MOTION FOR ABILITY-TO-PAY HEARING AT SENTENCING TO WAIVE COSTS

Defendant, Alexis Lopez, through his counsel, Alison M. Lipsky, Assistant Defender, hereby moves this Honorable Court to hold an ability-to-pay hearing at sentencing pursuant to Pa.R.Crim.P. 706(C) and to waive all court costs, and as grounds thereof avers as follows:

**I. Background**

1. On June 30, 2015, Mr. Lopez entered a negotiated guilty plea to Possession With Intent to deliver and received a sentence of 11 ½ months to 23 months incarceration with a consecutive 3 years of reporting probation. On September 2, 2016, Mr. Lopez was found in violation of his parole and probation and was resentenced to 11 ½ months to 23 months incarceration with a consecutive 3 years of reporting probation. On July 14, 2017, Mr. Lopez was found in violation of his parole and probation and was resentenced to 11 ½ months to 23 months incarceration with a consecutive 3 years of reporting probation. On January 18, 2018, Your Honor found Mr. Lopez in technical violation of Your parole and probation and the case is now scheduled for sentencing on April 27, 2018.
2. Mr. Lopez was hit by a car sometime during his childhood, he has very little memory of

the actual incident, and sustained a traumatic brain injury which required a steel plate to be put in his head and has caused him to continually suffer from seizures and memory loss. He also has an Axis I diagnosis of Bipolar Disorder and has a 15 year substance addiction. Prior to his incarceration, his sister was attempting to assist Mr. Lopez with filing for SSI.

**II. Defendant Lopez is entitled to an ability-to-pay hearing at sentencing to waive his court costs.**

3. Pennsylvania statutes and the Rules of Criminal Procedure require that this Court consider Mr. Lopez's ability to pay and waive court costs due to his indigence and the burden the costs would impose on him. The legislature has explicitly mandated that costs should be imposed only if the defendant is financially able to pay. *See* 42. Pa. Cons. Stat. §§ 9721(c.1) and § 9728(b.2) (costs are imposed automatically "unless the court determines otherwise pursuant to Pa.R.Crim.P. No. 706(C) (relating to fines or costs)"). As the legislative history explains, those statutes were intended to allow the "sentencing court" to "retain all discretion to modify or even waive costs in an appropriate case." Pennsylvania House of Representatives Judiciary Committee, SB 1169 Bill Analysis (Sept. 15, 2010) PN 2181. In other words, the statute reflected the legislature's understanding that trial courts already had the discretion under Rule 706(C) to reduce or waive costs at sentencing.
4. Rule 706(C) 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." Pa.R.Crim.P. 706(C) (emphasis added). This provision applies at sentencing. *See, e.g., Commonwealth v. Martin*, 335 A.2d 424 (Pa. Super. Ct. 1975) (en banc) (invalidating the imposition of a fine where the

trial court did not determine ability to pay under Rule 706 (then Rule 1407));

*Commonwealth v. Mead*, 446 A.2d 971, 973 (Pa. Super. Ct. 1982) (Rule 706 (then Rule 1407) requires considering a defendant's ability to pay at sentencing).<sup>1</sup>

5. Although more recent Superior Court cases have suggested that an ability-to-pay hearing at sentencing is not required, *see Commonwealth v. Childs*, 63 A.3d 323, 326 (Pa. Super. Ct. 2013), *Martin* remains binding as it is an en banc opinion. *See In the Interest of A.A.*, 149 A.3d 354, 361 n.4 (Pa. Super. Ct. 2016) (court must ignore three-judge panel opinion that conflicts with prior binding en banc opinion); Pa.R.A.P. 3103(b) (an "opinion of the court en banc is binding on any subsequent panel of the appellate court in which the decision was rendered"). Accordingly, this Court must consider Mr. Lopez's ability to pay when imposing costs in this matter.<sup>2</sup>
6. The ability-to-pay inquiry and waiver of costs applies even to "mandatory" costs imposed by statute. Sections 9721(c.1) and 9728(b.2) explicitly permit a court to waive otherwise mandatory costs if the Court determines per Rule 706(C) that a defendant cannot pay. To the extent that these provisions conflict with any other statute imposing costs, they apply "Notwithstanding any provision of law to the contrary." 42. Pa. Cons. Stat. § 9728(b.2). Such language "clearly indicates that the legislature intended to limit the application of prior" statutes. *Commonwealth v. Smith*, 544 A.2d 991, 998 (Pa. Super. Ct. 1988) (en

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<sup>1</sup> That Rule 706(C) applies at sentencing is evident when compared with the statutory language that requires that courts consider ability to pay a fine at sentencing, which is nearly identical. *See* 42 Pa. Cons. Stat. § 9726(d) ("Financial resources.--In determining the amount and method of payment of a fine, the court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose."). *See also Commonwealth v. Gaskin*, 472 A.2d 1154, 1157 (Pa. Super. Ct. 1984) (sentencing court violates § 9726 when "no inquiry was made as to his ability to pay the fine imposed").

<sup>2</sup> Even if the *Childs* court was correct that an ability-to-pay hearing is not *required* at sentencing, there is no authority prohibiting this Court from holding such a hearing, and it should do so given Mr. Doe's indigence.

banc). Thus, under the rules of statutory construction in 1 Pa. Cons. Stat. § 1933, the use of that language in §§ 9721(c.1) and 9728(b.2) means that they prevail, and all costs can be waived.<sup>3</sup>

7. Indeed, the Superior Court acknowledged in *Childs* that although the defendant is ordinarily liable for the mandatory costs of prosecution, the trial court can “determine[] otherwise pursuant to” Rule 706(C). *Childs*, 63 A.3d at 326. Such a conclusion is the only reasonable reading of §§ 9721(c.1) and 9728(b.2) and Rule 706(C). This Court should act accordingly and waive Mr. Lopez’s costs.

**III. This Court can and should waive all of Mr. Lopez’s court costs due to his indigence.**

8. As described above—and as will be presented at a hearing on this Motion—Mr. Lopez is indigent and will remain unable to pay after serving his sentence. Mr. Lopez had a Pre-Sentence Investigation/Report in 2017, where he spoke of being employed at Sneaker Villa from 2000 until 2007. However, there was no supporting documentation provided by the Pre-Sentence Investigator such as IRS or Social Security records to support Mr. Lopez’s statements. Discrepancies in the report are likely caused by Mr. Lopez’s significant brain damage, memory issues, and mental health issues. Pursuant to his Mental Health Evaluation from January 3, 2018, Mr. Lopez has had multiple inpatient psychiatric hospitalizations. There are no work records for Mr. Lopez and by his own recollection he hasn’t worked for over 3 years. Moreover, Mr. Lopez received Medicaid, and he currently receives the services of the public defender, facts that “invite the

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<sup>3</sup> There is also not necessarily a conflict between §§ 9721(c.1) and 9728(b.2) and other statutes that impose costs. Statutes addressing costs must be read *in pari materia*, and all provisions must be “construed, if possible, so that effect may be given to both.” 1 Pa. Cons. Stat. §§ 1932-33. The way to give effect to other “mandatory” costs statutes and §§ 9721(c.1) and 9728(b.2) is to interpret that the latter provide the Court with discretion to waive costs if the defendant is indigent; they must be imposed only if the defendant is able to pay them.

presumption of indigence.” *Commonwealth v. Eggers*, 742 A.2d 174, 176 n.1 (Pa. Super. Ct. 1999). No facts rebut this presumption—and indeed the facts show that Mr. Lopez is and will be unable to afford to pay court costs. *Commonwealth v. Gaskin*, 472 A.2d 1154, 1157–58 (Pa. Super. Ct. 1984) (finding no evidence of a defendant’s ability to pay a fine where defendant has no “financial assets [or] liabilities” and has been “living from hand to mouth”); *Gerlitzki v. Feldser*, 307 A.2d 307, 308 (Pa. Super. Ct. 1973) (en banc) (dispositive question is whether a person “is in poverty. If they are in poverty, it follows that they are unable to pay the costs, and their petition should be granted.”); *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.”).<sup>4</sup>

9. Our Superior Court has held that Rule 706 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 [the defendant’s] own and family’s finances, and the hardships he or his family will endure if repayment is

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<sup>4</sup> While *Gerlitzki* and *Schoepple* are *in forma pauperis* case, the The Superior Court has instructed that trial courts should look to the “established processes for assessing indigency” through the *in forma pauperis* (“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.

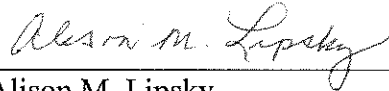


required. The purpose of this inquiry is to assure repayment is not required as long as he remains indigent.”

10. In light of his indigence and inability to pay, this Court should waive all of Mr. Lopez’s costs in this case. As is described in the previous section, Rule 706(C) requires that this Court tailor Mr. Lopez’s court costs based on his ability to pay.

WHEREFORE, Defendant Lopez requests that this Court hold an ability-to-pay hearing at sentencing and waive all court costs in this matter due to his indigence.

Respectfully,



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Alison M. Lipsky,  
Assistant Defender, and with her,  
Keir Bradford-Grey,  
Defender

# ***EXHIBIT C***



sentence. In addition, during that same resentencing hearing, defense counsel made an oral request for the Court to waive probation supervision fees. The Court denied defendant's request, citing a policy of the Court not to waive supervision fees unless requested by the Probation Department.

Defendant has now appealed from the judgment of sentence on the grounds that: 1) the Court erred by imposing court costs without making a mandated determination of whether defendant had the ability to pay the costs; and 2) the Court erred by relying on an informal court policy in its decision to not conduct an ability-to-pay hearing regarding probation supervision fees.<sup>1</sup> Statement of Errors Complained of on Appeal ("Statement of Errors") at ¶¶ 1-2. For the reasons set forth below, defendant's claims are without merit and the judgment of sentence should be affirmed.

## II. DISCUSSION

### A. *Failure to Conduct an Ability-to-Pay Hearing Prior to Imposing Costs*

Defendant first claims that the Court erred "by imposing costs without making a mandated determination under Pa.R.Crim.P. 706 (c) and 42 Pa.C.S. §9728 (b.2) of whether this long time indigent defendant had the ability to pay court costs." Statement of Errors at ¶ 1. Defendant's claim is refuted by established law. *See Commonwealth v. Childs*, 63 A.3d 323, 325-26 (Pa. Super. 2013).

In *Childs*, defendant made precisely the same claim now asserted in the case at bar, that is, that the trial court erred in imposing mandatory court costs and probation supervision fees

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<sup>1</sup> As to the second claim of error, the Statement of Errors does not specify that defendant's claim regarding the Court's allegedly improper reliance on an informal policy pertains to probation supervision fees. Because the only informal policy relied upon by the Court pertained to probation supervision fees, the Court assumes that the claim refers to such fees.

without considering defendant's ability to pay. 63 A.3d at 325. Our Superior Court rejected that claim and affirmed the judgment of sentence, stating as follows:

Generally, a defendant is not entitled to a pre-sentencing hearing on his or her ability to pay costs. While Rule 706 **permits** a defendant to demonstrate financial inability either after a default hearing or when costs are initially ordered to be paid in installments, the Rule only **requires** such a hearing prior to any order directing incarceration for failure to pay the ordered costs.

*Childs*, 63 A.3d at 326 (internal citations and quotations omitted; emphasis in original).

In his motion, defendant argued that this Court should not follow the holding in *Childs* because the panel decision in that case was inconsistent with the Superior Court's prior *en banc* decision in *Commonwealth v. Martin*, 335 A.2d 424 (Pa. Super. 1975). However, in *Martin*, the Superior Court addressed the sole issue of whether the trial court could impose a *fine* without considering ability to pay. There were no issues before the court regarding the legality of imposing mandatory costs or supervision fees without an ability-to-pay hearing. *Martin*, 335 A.2d at 424-26. Accordingly, the holding of the Superior Court in *Childs* is not inconsistent with the *en banc* decision in *Martin*, and therefore, this trial court is bound by the Superior Court's decision in *Childs*. No relief is due.

*B. Court Policy Not to Waive Supervision Fees*

Defendant next claims that the Court "erred in its refusal to hold [an] ability to pay hearing...relying on an invalid local informal court policy that is inconsistent with state law. This invalid policy impermissibly requires judicial abdication by barring judges from waiving costs where appropriate for an indigent defendant unless a waiver is first requested by the Probation Department." Statement of Errors at ¶ 2. This claim is without merit.

It is true that at sentencing, the Court denied defendant's request to waive probation supervision fees in reliance on a long-standing policy of the Court not to waive supervision fees

unless requested by the Probation Department. N.T. 4/27/18 at 18-19. However, as discussed above in section A, under the Superior Court's decision in *Childs*, a trial court need not conduct any inquiry into ability to pay before imposing probation supervision fees. Therefore, the Court's policy to impose such fees without an ability-to-pay hearing, and to only waive them if requested by the Probation Department, is completely consistent with state law. *Childs*, 63 A.3d at 325. Of course, nothing in the Court's policy would permit any sanction of any kind to be imposed on a defendant for failing to pay such fees, or for failing to comply with any financial obligations imposed by the Court, without first conducting an ability-to-pay hearing. No relief is due.

#### IV. CONCLUSION

For all of the foregoing reasons, the Court's judgment of sentence should be affirmed.

BY THE COURT:



GLENN B. BRONSON, J

**PROOF OF SERVICE**

I hereby certify that I am this day serving the foregoing Court Order upon the person(s), and in the manner indicated below, which service satisfies the requirements of Pa.R.Crim.P.114:

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Chief, Appeals Division  
Defender Association of Philadelphia  
1441 Samson Street  
Philadelphia, PA 19102

Type of Service:     Personal  First Class Mail  Other, please specify:

**District Attorney:**

Lawrence Goode, Esquire  
Interim Supervisor, Appeals Unit  
Office of the District Attorney  
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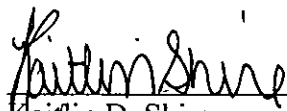
Type of Service     Personal  First Class Mail  Other, please specify: *Interoffice Mail*

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Joseph D. Seletyn, Esquire  
Prothonotary  
Office of the Prothonotary – Superior Court  
530 Walnut Street, Suite 315  
Philadelphia, PA 19106

Type of Service:     Personal  First Class Mail  Other, please specify:

**Dated: July 16, 2018**



Kaitlin D. Shire  
Law Clerk to Hon. Glenn B. Bronson

# ***EXHIBIT D***



15  
Commonwealth of Pennsylvania  
v.  
Alexis Lopez

IN THE COURT OF COMMON PLEAS OF  
PHILADELPHIA COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

DOCKET NO: CP-51-CR-0004377-2015  
DATE OF ARREST: 04/10/2015  
OTN: N 958378-1  
SID: 232-15-81-1  
DOB: 09/03/1977  
PID: 0739683

## NEG GUILTY PLEA ORDER OF SENTENCE

AND NOW, this 30th day of June, 2015, the defendant having been convicted in the above-captioned case is hereby sentenced by this Court as follows:

**Count 1 - 35 § 780-113 §§ A30 - Manufacture, Delivery, or Possession With Intent to Manufacture or Deliver (F)**

To be confined for a minimum period of 11 Month(s) 15 Day(s) and a maximum period of 23 Month(s) at County Prison.

The following conditions are imposed:

Re-Entry Plan - Eligible - Re-Entry Plan: The defendant is eligible for a re-entry plan.

This sentence shall commence on 06/30/2015.

To be placed on Probation - County Regular Probation - for a maximum period of 3 Year(s) to be supervised by APPD.

The following conditions are imposed:

Drug screens: To submit to random drug screens.

Mandatory Court Costs - Court Costs: Defendant is to pay imposed mandatory court costs.

Other: DETERMINED BY PROBATION DEPARTMENT ON DEFENDANT'S PHYSICAL AND MENTAL HEALTH, DEFENDANT IS TO SEEK/MAINTAIN EMPLOYMENT or SCHOOLING.

### LINKED SENTENCES:

#### Link 1

CP-51-CR-0004377-2015 - Seq. No. 1 (35§ 780-113 §§ A30) - Probation is Consecutive to  
CP-51-CR-0004377-2015 - Seq. No. 1 (35§ 780-113 §§ A30) - Confinement

The defendant shall pay the following:

	Fines	Costs	Restitution	Crime Victim's Compensation Fund - Victim / Witness Services Fund	Total Due
Amount:	\$0.00	\$774.00	\$0.00	\$60.00	\$834.00
Balance Due:	\$0.00	\$774.00	\$0.00	\$60.00	\$834.00

REMAINING CHARGES ARE NOLLE PROSSED

CP-51-CR-0004377-2015 Comm. v. Lopez, Alexis  
Order - Sentence/Penalty Imposed



7313740531

BY THE COURT:

Judge Glenn B. Bronson

Commonwealth of Pennsylvania

v.

Alexis Lopez

CP-51-CR-0004377-2015 Comm. v. Lopez, Alexis  
Violation Penalties Imposed



8101729181

IN THE COURT OF COMMON PLEAS OF  
PHILADELPHIA COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

DOCKET NO: CP-51-CR-0004377-2015  
DATE OF ARREST: 04/10/2015  
OTN: N 958378-1  
SID: 232-15-81-1  
DOB: 09/03/1977  
PID: 0739683

### Violation Sentencing Order

AND NOW, this 27th day of April, 2018, the defendant having been previously convicted in the above captioned case, and the defendant's original probation/parole on this case having been revoked, a new sentence is imposed. The defendant is to pay all applicable violation fees and costs unless otherwise noted below. A new sentence is hereby imposed by this Court as follows:

**Count 1 - 35 § 780-113 §§ A30 - Manufacture, Delivery, or Possession With Intent to Manufacture or Deliver (F)**

To be confined for a minimum period of 6 Month(s) and a maximum period of 23 Month(s) at County Prison.

This sentence shall commence on 04/27/2018.

To be placed on Probation - County Regular Probation - for a maximum period of 2 Year(s) to be supervised by the Mental Health Unit of Parole/Probation.

**LINKED SENTENCES:**

Link 1

CP-51-CR-0004377-2015 - Seq. No. 1 (35§ 780-113 §§ A30) - Probation is Consecutive to  
CP-51-CR-0004377-2015 - Seq. No. 1 (35§ 780-113 §§ A30) - Confinement

The following Judge Ordered Conditions are imposed:

**Condition**

**Start Date**

**End Date**

**Condition Text**

Other

Court cost remain

Immediate Parole

Defendant paroled immediately.

Credit for time served

Credit to be calculated by the Phila. Prison System

Eligible - Re-Entry Plan

The defendant is eligible for a re-entry plan.

Other

Supervision to be monitored by the Mental Health Unit of Probation.

Other

Comply with all treatment recommendations of the Probation Department and Programs that are set up by the Defenders Association.

Drug and Alcohol Program

v.  
Alexis Lopez

Docket No: CP-51-CR-0004377-2015

To participate in drug or alcohol treatment program.

Drug screens

To submit to random drug screens.

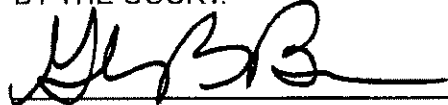
Detainer Lifted

Detainer Lifted

	Fines	Costs	Restitution	Crime Victim's Compensation Fund - Victim / Witness Services Fund	Total Due
Amount:	\$0.00	\$1,695.94	\$0.00	\$0.00	\$1,695.94
Balance Due:	\$0.00	\$1,695.94	\$0.00	\$0.00	\$1,695.94

Defense Motion to waive supervision fees is DENIED./ ADA: Joseph McCool/ PD: Alison Lipsky/ Steno: Tiffany Monastra/  
Clk: C. Mitchell

BY THE COURT:



Judge Glenn B. Bronson

# ***EXHIBIT E***

HOUSE OF REPRESENTATIVES  
DEMOCRATIC COMMITTEE

BILL ANALYSIS

BILL NO: **SB1169** PN2181  
COMMITTEE: Judiciary  
DATE: September 15, 2010

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SPONSOR: Sen. Waugh

PROPOSAL/EXECUTIVE SUMMARY: An act to amend title 42, (Judiciary Code), to further provide for the imposition of costs at sentencing in criminal matters, and for periodic increases.

EXISTING LAW: While this bill would amend 42 Pa. CSA §§9721, & 9728, it would do so by adding new subsections. The first statute addresses sentencing generally, and the latter addresses the specific topic of fines, costs, restitution, and other matters. This bill is in response to a specific court case. Amended on the floor on July 1, 2010, 42 Pa. CSA §§1725.1 and 3571 were amended, as explained below.

ANALYSIS: This bill is the senate version of HB2119, as it appeared in its final form, (PN3033). Thus, and because it is a mirror image of that bill, the analysis of HB2119, shall appear here in modified form. This bill is the senate version of the legislative response to an unusual case from the commonwealth court decided in May, 2009. In that case, Spotz v Commonwealth, et al., 972 A2d. 125, (Pa. Cmwlth. 2009), a defendant, (a man under a sentence of death from Cumberland County), sued to stop the small but automatic deductions from his prison account of money applied to court costs, after his criminal conviction, on the grounds that the sentencing court had failed to include standard 'costs payment language' in the official sentencing order. Spotz was successful in his suit, and the DOC, was enjoined from making these deductions. (On behalf of the county official who had requested it) This bill would add new subsection (c.1), to §9721, to provide that regardless of whether a sentencing court includes a provision in a sentencing order imposing costs, that costs imposition will be automatic, except that under an amendment passed in committee on March 16, 2010, and which does differentiate this bill from HB2119, a court would retain all discretion to modify or even waive costs in an appropriate case, pursuant to Pa. R.Crim. P. 706(C). (Supreme Court Rule) The addition of new subsection (b.2), to §9728, accomplishes the same goal as to the statute specifically addressing the imposition of fines, costs, restitution, and other matters collateral to sentencing, with the same exception under criminal rule 706(C), added by the amendment in committee.

Addressing a flaw that was uncovered in two costs statutes of title 42, Pa. CSA §§1725.1 and 3571(c)(4), which provide for periodic costs increases tied to the consumer price index, and which sunset on January 1, 2010, an amendment was adopted on July 1, 2010. The amendment extended the sunset dates as to each statute to January 1, 2025. Amended again on the floor on September 14, 2010, the amendment amends 42 Pa. CSA §6327, by adding new subsection (c.1), to further provide that if a minor is facing one of several charges, murder, voluntary manslaughter, aggravated assault, robbery, rape, aggravated and common indecent assault, kidnapping, or conspiracy attempt or solicitation of any such offense, has not been released on bail, and is moving to transfer their case to the juvenile system, they may, with the consent of

the commonwealth attorney and a court order authorizing it, be housed in a secure detention facility approved by the department of public welfare until such time as the motion for transfer is denied, or they turn 18, in which event, the minor shall be transferred to the county jail, provided they have not posted bail.

EFFECTIVE DATE: 60 days from date of enactment. Moreover, the bill would only affect a sentencing taking place after the effective date. No retroactive application. The provisions which are the subject of the amendment of September 14, 2010, shall be effective immediately upon enactment. (Addition of new 42 Pa. CSA §6327(c.1))

PREPARED BY: David M. McGlaughlin 787-3525

# ***EXHIBIT F***



HOUSE COMMITTEE ON APPROPRIATIONS  
2009-10 Legislative Session

**FISCAL NOTE**

SENATE BILL: 1169

PRINTER'S NO: 1775

PRIME SPONSOR: Waugh

FISCAL IMPACT SUMMARY	FY 2010/11	FY 2011/12
<b>Expenditure Increase/(Decrease):</b>		
General Fund	\$0	\$0

**OVERVIEW:**

Senate Bill 1169 amends §9721 (Sentencing generally) of Title 42 (Crimes and Offenses) providing that regardless of whether a sentencing court includes a provision in a sentencing order imposing costs, that imposition will be automatic. No court order is necessary to impose liability for costs. Also, a court would retain all discretion to modify or even waive costs in appropriate cases.

This bill also amends §9728 (Collection of restitution, reparation, fees, costs, fines and penalties) by providing that this section also applies in the case of costs imposed under §9721 (c) (relating to sentencing generally).

This act shall apply to costs imposed on or after the effective date of this act and this act shall take effect in 60 days.

**ANALYSIS:**

According to the Administrative Office of Pennsylvania Courts, the provisions of in Senate Bill 1169 are not expected to have an adverse fiscal impact upon the Judiciary.

**PREPARED BY:** Rayko Pacana, Budget Analyst  
House Appropriations Committee, (D)

**DATE:** July 1, 2010

**General Note and Disclaimer:** *This Fiscal Note was prepared pursuant to House Rule 19(a), and the elements considered and reported above are required by Section 5 of the rule. Estimates are calculated using the best information available. Actual costs and revenue impact incurred may vary from estimates.*