**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**

**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**

**TRIAL DIVISION—CRIMINAL**

**COMMONWEALTH OF PENNSYLVANIA :**

 **:**

 **:**

 **v. : No. CP-51-CR-**

 **:**

 **:**

**JOHN DOE :**

 **:**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_:**

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**

**MOTION TO WAIVE COURT COSTS**

Pursuant to 42 Pa.C.S. §§ 9728(b.2) and Pa.R.Crim.P. 706(C), Defendant John Doe, through counsel, respectfully requests that this Court waive his outstanding court costs due to his indigence and inability to pay said costs.

1. **This Court has continuing jurisdiction over Mr. Doe’s court costs.**

This Court may modify Mr. Doe’s court costs at any time. As the Superior Court has explained, trial courts retain discretion to reduce or waive court costs at any time, whether that is at sentencing or at a later time, such as when a defendant has defaulted on payment and faces punishment. *See Commonwealth v. Lopez*, --A.3d--, 2021 PA Super 51, 2021 WL 1096376 at \*5 (Pa. Super. Ct. March 23, 2021) (en banc).

Moreover, court costs “are not part of the criminal’s sentence but are merely incident to the judgment.” *Commonwealth v. Rivera*, 95 A.3d 913, 916 (Pa. Super. Ct. 2014). *See also Commonwealth v. Nicely*, 638 A.2d 213, 217 (Pa. 1994) (“The imposition of costs in a criminal case is not part of the sentence, but rather is incident to the judgment.”). As a result, the jurisdictional bar that would prevent a court from modifying a defendant’s sentence more than 30 days after sentencing does not apply to waiving that defendant’s court costs, which are not a part of that sentence.

The Commonwealth Court has explained that when a defendant challenges the clerk of court’s imposition of certain costs, “[s]uch a challenge is properly brought in the sentencing court.” *Commonwealth v. Williams*, 909 A.2d 419, 421 (Pa. Commw. Ct. 2006). In *Williams*, the defendant originally brought a challenge to certain costs in the trial court three years after his conviction, and the trial court dismissed for lack of jurisdiction. The Commonwealth Court reversed, ruling that the trial court is the proper forum for such a claim. Similarly, in *Fordyce v. Clerk of Courts*,the Commonwealth Court explained that it had transferred a petition for a writ of mandamus to the trial court because it had “exclusive jurisdiction” over the costs matter even though the time to appeal had already passed; on appeal, the court ultimately invalidated the challenged costs. 869 A.2d 1049, 1050 (Pa. Commw. Ct. 2005).

Because Mr. Doe is not asking the Court to modify any fines or restitution—which are the sentence—there is no jurisdictional hurdle to the relief that he seeks. This Court has ongoing jurisdiction over Mr. Doe’s costs.

1. **This Court has the authority to waive Mr. Doe’s outstanding court costs.**

Because of Mr. Doe’s indigence and disabilities, the Court should waive his outstanding costs. As both the Supreme Court of Pennsylvania and the United States Supreme Court have recognized, the Constitution demands that courts work “to eliminate inequities in the criminal process caused by indigency.” [*Commonwealth ex rel. Parrish v. Cliff,* 304 A.2d 158, 160 (Pa. 1973)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973101045&pubNum=162&originatingDoc=Id7f399f732f611d986b0aa9c82c164c0&refType=RP&fi=co_pp_sp_162_161&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_162_161). To that end, when a defendant is unable to afford to pay financial obligations arising from conviction, the United States Supreme Court has suggested that trial courts consider alternatives, including reducing the total amount that the defendant owes. *Bearden v. Georgia*, 461 U.S. 660, 672 (1983). The Court’s goal was to avoid the needless incarceration of indigent defendants who cannot afford to pay their financial obligations.

Our legislature and Supreme Court have given trial courts the authority to reduce or waive costs based on a defendant’s finances. As the Superior Court has explained, a “trial court may also provide that a defendant shall not be liable for costs under Rule 706.” *Commonwealth v. Mulkin*, 228 A.3d 913 (Pa. Super. Ct. 2020). *See also Lopez*, 2021 WL 1096376 (trial court has “discretion” to reduce or waive costs based on the defendant’s finances). This authority is grounded in 42 Pa.C.S. § 9728(b.2), which provides that defendants are “liable for costs, as provided in section 9721(c.1), unless the court determines otherwise pursuant to Pa.R.Crim.P. No. 706(C).” Rule 706(C), in turn, provides that “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 . . .” [[1]](#footnote-1) The plain language of Rule 706(C)—as interpreted in *Mulkin*—gives courts authority to adjust the total amount of costs based on the defendant’s financial resources.

Permitting courts to reduce or waive costs based on indigence was the explicit intent of the legislature when it enacted § 9728(b.2) in 2010. 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 (emphasis added). Such legislative intent reflects the reality that indigent defendants simply cannot afford to pay anything more than nominal costs, and the legislature does not want them to be burdened for years with unaffordable financial obligations.

Section 9728(b.2) also permits courts to waive even costs that would otherwise be “mandatory” and are automatically imposed. While certain statutes imposing costs require that the defendant “shall” pay such costs, those statutes must be interpreted *in pari materia* with § 9728(b.2), which imposes costs “unless the court determines otherwise.” 1 Pa.C.S. § 1932. There is no irreconcilable conflict between such provisions: a defendant must pay them, unless the court determines he is *unable* to pay. As a result, the court has full authority to waive all of the court costs imposed in this matter. *See Commonwealth v. Childs*, 63 A.3d 323, 326 (Pa. Super. Ct. 2013) (under § 9728(b.2), defendant liable for mandatory costs “unless the trial court determines otherwise pursuant to” Rule 706(C)).[[2]](#footnote-2)

Mr. Doe therefore requests, pursuant to Rule 706(C), that this Court waive his court costs because of the burden that they place upon him in light of his financial means.

1. **Due to his poverty, Mr. Doe** **lacks the ability to pay court costs.**

Whether a defendant can afford to pay court costs is defined by whether that person is able to afford to meet his basic life needs. *See Stein Enterprises, Inc. v. Golla*, 426 A.2d 1129, 1132 (Pa. 1981) (“[I]f the individual can afford to pay court costs only by sacrificing some of the items and services which are necessary for his day-to-day existence, he may not be forced to prepay costs in order to gain access to the courts, despite the fact that he may have some ‘excess’ income or unencumbered assets.”).[[3]](#footnote-3) Individuals like Mr. Doe, who are indigent and impoverished, are by definition unable to pay: if they are “in poverty, it follows that they are unable to pay the costs, and their petition should be granted.” *Gerlitzki v. Feldser*, 307 A.2d 307, 308 (Pa. Super. Ct. 1973) (en banc). In other words, an indigent individual is—as a matter of law—*unable* to pay. *See Schoepple v. Schoepple*, 361 A.2d 665, 667 (Pa. Super Ct. 1976) (en banc) (“[O]ne in poverty will not be able to pay costs.”).

Those *in forma pauperis* indigence standards dovetail with standards the Superior Court has set forth in criminal cases. As that court has explained, the constitution requires that there be 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 required. The purpose of this inquiry is to assure repayment is not required as long as he remains indigent.”

When considering whether a defendant is able to pay, this Court can consider only the defendant’s finances, not those of friends or family, as the obligation to pay is the defendant’s alone. *See Commonwealth v. Smetana*, 191 A.3d 867, 873 (Pa. Super. Ct. June 21, 2018) (“Although Appellant indicated that he could potentially borrow money from a sibling, the court failed to find—as our law requires—that he alone had the financial ability to pay the outstanding fines and costs such that imprisonment was warranted.”).

Given Mr. Doe’s lack of financial resources, he cannot afford to pay without significant hardship. *See Commonwealth v. Gaskin*, 472 A.2d 1154, 1157-58 (Pa. Super. Ct. 1984) (when a defendant has no “financial assets [or] liabilities” and has been “living from hand to mouth,” a court imposing a fine lacks any evidence supporting a finding of ability to pay the fine); *Commonwealth v. Eggers*, 742 A.2d 174, 176 n.1 (Pa. Super. Ct. 1999) (receiving public assistance (such as food stamps or Medicaid) and the service of the public defender “invite the presumption of indigence” since these are clear indicia that the defendant cannot afford to pay). [brief summary of financial hardship] He therefore has no ability to pay the costs in this matter.

**Conclusion**

For the reasons stated above, Mr. Doe respectfully requests that this Court grant his Motion and waive all outstanding court costs.

Respectfully submitted,

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 [Signature block]

1. The phrase “in determining the amount and method of payment of a” fine or cost is a term of art that refers to determining the *total amount* that the defendant owes. The same language is in 42 Pa.C.S. § 9726(d) (addressing fines), and case law is clear that it refers to the total amount that is owed, not the payment plan requiring specific monthly installments. *See*, *e.g.*, *Commonwealth v. Croll*, 480 A.2d 266, 275-76 (Pa. Super. Ct. 1984) (§ 9726(c) and (d) require that a court consider the defendant’s ability to pay the entire fine). By contrast, Rule 706(B) governs payment plans. [↑](#footnote-ref-1)
2. Even if there is some irreconcilable conflict between the statues imposing costs and § 9728(b.2), the specific provision prevails over general provisions “*unless* the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail.” 1 Pa.C.S. § 1933 (emphasis added). Section 9728(b.2), which was adopted in 2010, applies “Notwithstanding any provision of law to the contrary.” When that language is used, as a matter of statutory interpretation, 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 banc). [↑](#footnote-ref-2)
3. These standards come from the civil *in forma pauperis* case law, which the Superior Court has repeatedly incorporated into the criminal case law as the “established processes for assessing indigency,” *Commonwealth v. Cannon*, 954 A.2d 1222, 1226 (Pa. Super. Ct. 2008), 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).

Pennsylvania courts use “poverty” and “indigent” interchangeably, and there is no legal distinction between the two terms. *See*, *e.g.*, *Commonwealth v. Hernandez*, 917 A.2d 332 (Pa. Super. Ct. 2007); *Crosby Square Apartments v. Henson*, 666 A.2d 737 (Pa. Super. Ct. 1995); *Commonwealth v. Regan*, 359 A.2d 403 (Pa. Super. Ct. 1976). Accordingly, cases that set forth standards for determining whether an individual is in poverty are equally applicable to the inquiry under Rule 706 of whether a defendant is indigent. [↑](#footnote-ref-3)