IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA, CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
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	:	
v.	:	**No. CP-46-CR-**
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Jane Doe	:	
	:	
	:	

MOTION TO COMPEL ADMISSION INTO ARD

Defendant Jane Doe, through counsel, requests that this Court waive the costs and restitution associated with Accelerated Rehabilitative Disposition ("ARD"), which Ms. Doe cannot afford and that will prevent her from completing ARD. Conditioning completion of ARD upon payment of sums the defendant cannot afford violates Pa.R.Crim.P. 316 and the holding in *Commonwealth v. Melnyk*, 548 A.2d 266 (Pa. Super. Ct. 1988). In support of this Motion, Ms. Doe avers:

I. Background

1. Factual background of case.
2. Explain specifically that the District Attorney has conditioned admission into ARD on the payment of costs or restitution, including the dollar amounts thereof – if the defendant pays those amounts, he or she will get into ARD. Include as exhibits anything in writing to this point, whether it is a document specific to the case or even something on the District Attorney's website explaining their general policies.
3. Explain that the defendant lacks the ability to pay, and despite explaining this to the District Attorney, that office will not permit the defendant to enter ARD without

payment.

4. Explain in as much detail as possible why the defendant is unable to afford to pay. What is the defendant's income? Regular living expenses? Does she have children? Do they receive public assistance like food stamps, Medicaid, SSI, etc? If she is working, has she sought more hours or a second job or does she have family obligations that limit the hours she can work?
5. Explain what efforts the defendant has made to earn the money necessary to meet the expenses associated with ARD. Avoid talking about efforts to borrow money – the ability-to-pay determination is limited to the defendant's means, not that of family or friends.
6. Make it clear that the defendant intends to comply with the program – she'll get her evaluations, etc – she just cannot afford to pay for them.
7. If the defendant can afford to pay a lower amount, explain that and set forth an affordable dollar amount. Also suggest possible alternatives that the defendant would be willing to do in place of payment to demonstrate her commitment to rehabilitation, such as: Community service (or additional community service, within reason, if there is already some community service requirement), domestic abuse classes, anger management classes, drug or alcohol abuse treatment, mental health treatment, job skills training, or education courses, such as GED classes. Be careful not to overpromise and only suggest alternatives that the defendant will actually do.

II. Argument

A. This Court has the authority to order Ms. Doe's admission into ARD.

1. The District Attorney has considerable latitude to determine whether an individual defendant is eligible for and should be admitted into ARD. However, that discretion is not absolute.
2. When determining whether a defendant is eligible for ARD the relevant question "is whether he is the type of person who can benefit from the treatment offered by an ARD program." *Commonwealth v. Lutz*, 495 A.2d 928, 934 (Pa. 1985). As a result, the District Attorney cannot condition admission into ARD on factors "wholly, patently and without doubt *unrelated* to the protection of society and/or the likelihood of a person's success in rehabilitation, such as race, religion or other such obviously prohibited considerations." *Id.* at 935 (emphasis in original). This "expressly recognizes" that the District Attorney "is not free to rely on 'prohibited considerations' when deciding whether to submit a case to ARD." *Commonwealth v. Benn*, 675 A.2d 261, 263 (Pa. 1996).
3. When the District Attorney acts in violation of the standards set forth in *Lutz*, that office commits an abuse of discretion, and this Court has the authority to override the District Attorney's determination and order that a defendant be admitted to ARD. *See Benn*, 675 A.2d at 264 (affirming a trial court order to admit a defendant into ARD over the Commonwealth's objection).

B. Indigent defendants cannot be lawfully prevented from entering ARD solely because they lack the ability to pay costs or restitution .

4. Defendants cannot be denied the benefits of ARD simply because they are too poor to costs or restitution. Limiting ARD to those with financial means unjustly punishes indigent defendants for being poor in violation of Pennsylvania law and the Constitution.
5. It also frustrates the "primary purpose" of ARD, which is "the rehabilitation of the offender." Pa.R.Crim.P. Committee Introduction to Chapter 3. As the Superior Court has

explained, requiring a defendant to bear financial consequences "can aid an offender's rehabilitation by strengthening the individual's sense of responsibility," but "conditioning probation on the satisfaction of requirements which are beyond the probationer's control undermines the probationer's sense of responsibility." *Commonwealth v. Fuqua*, 407 A.2d 24, 26 (Pa. Super. Ct. 1979) (quoting *Huggett v. State*, 266 N.W. 2d. 403, 407 (Wis. 1978)).

6. In *Commonwealth v. Melnyk*, 548 A.2d 266, 272 (Pa. Super. Ct. 1988), the Superior Court ruled that preventing a defendant from participating in ARD solely because she could not afford to pay restitution would "deprive the petitioner her interest in repaying her debt to society without receiving a criminal record simply because, through no fault of her own, she could not pay restitution. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment." *Id*. To avoid such an unconstitutional outcome, "the district attorney and the court must inquire into the reasons for the petitioner's inability to pay restitution. If the petitioner shows a willingness to make a bona fide effort to pay whole or partial restitution, the State may not deny entrance to the ARD program." *Id*. If the defendant cannot pay, the trial court must instead "consider alternative conditions for admittance to and completion of the ARD program." *Id.*

7. This constitutional requirement is reflected in Rule 316, which governs the conditions of ARD. Rule 316 provides that a condition of ARD "may include the imposition of costs"—such costs are not mandatory. The Comment further explains that: "The practice has been to permit qualified individuals who are indigent to participate in the ARD program *without payment of costs or charges*. The 1983 amendment is not intended to

change this practice; rather, it is intended that such practice will continue." (emphasis added). In adopting the rules governing ARD, the Supreme Court, explicitly provided that costs are optional and should be waived for indigent defendants so that they can participate in ARD. To condition admission based on the defendant's financial resources would violate the principals set forth by the Supreme Court in *Lutz* and Rule 316.

8. The same rule applies to restitution. Rule 316 specifies that conditions of ARD "*may* be imposed with respect to probation after conviction of a crime, including restitution." In other words, restitution is also not mandatory. It is also limited to what the defendant can afford to pay. *See Melnyk*, 548 A.2d at 268 (restitution in ARD may only be imposed in an amount the defendant can afford to pay" pursuant to 42 Pa.C.S. § 9754(c)).[1]

9. In light of *Melnyk* and Rule 316, the District Attorney cannot prevent Ms. Doe from entering ARD merely because she lacks the financial recourse necessary to pay in full. Such a requirement would defeat the rehabilitative purpose of restitution and the payment of costs/restitution certainly has no relationship to either Ms. Doe's rehabilitation or public safety. *See Commonwealth v. Rivera*, 95 A.3d 913, 917 (Pa. Super. 2014) (costs, which are a reimbursement to the government, are not "reasonably related to the rehabilitation of the defendant").[2] Instead, this Court should permit her admission into ARD, conditioned on her making payments in an amount she can afford.

C. Ms. Doe is indigent and lacks the ability to pay the costs or restitution requested by the Commonwealth.

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[1] *Melnyk* is not an outlier. The Superior Court recently explained that it was "disturbed by the Commonwealth's insistence that it could deny Appellant's application based upon a genuine inability to pay restitution," explaining that "a petitioner's bona fide inability to pay the restitution obligation is a factor that is wholly, patently and without doubt unrelated to the protection of society and/or the likelihood of the candidate's success in rehabilitation." *Commonwealth v. Gingrich*, 451 MDA 2017, 2018 WL 1386990 at *6 n.3 (Pa. Super. Ct. March 20, 2018).

[2] ARD, of course, saves the Commonwealth money by avoiding the "need for costly and time-consuming trials or other court proceedings." Pa.R.Crim.P. Chapter 3 Committee Introduction.

10. [Set out whether the defendant will be able to pay something, or if she cannot afford to pay anything].

11. Whether a defendant can afford to pay court costs is defined by whether the defendant is able to afford to meet her 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."); *Gerlitzki v. Feldser*, 307 A.2d 307, 308 (Pa. Super. Ct. 1973) (en banc) (whether a person can pay depends on "whether he is able to obtain the necessities of life").[3] As such, the Court must look at a defendant's entire financial picture and "life circumstances," *Commonwealth v. Mauk*, 185 A.3d 406, 411 (Pa. Super. Ct. 2018), and make findings on the record. *Commonwealth v. Diaz*, 191 A.3d 850, 866 (Pa. Super. Ct. 2018) (setting a payment plan requires making "findings" regarding the defendant's ability to pay). A defendant cannot be required to pay if it constitutes a "hardship." *Commonwealth v. Hernandez*, 917 A.2d 332, 337 (Pa. Super. Ct. 2007) (quoting *Fuller v. Oregon*, 417 U.S. 40, 54 (1974)).

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[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.

12. In making this inquiry, 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. 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.").
13. Defendants like Ms. 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*, 307 A.2d at 308. 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."); *Diaz*, 191 A.3d at 866 n.24 ("A finding of indigency would appear to preclude any determination that Appellant's failure to pay the court-ordered fines and costs was willful.").
14. The only resources that Ms. Doe has come through public assistance because she cannot afford to support herself: SSI, food stamps, and Medicaid. Accordingly, she has no ability to pay the costs or restitution in this matter. [If she is not disabled, explain why she has made "bona fide efforts" to earn money but still cannot afford the costs or restitution, including if her circumstances prevent her from working full time or being able to find full time work because of lack of qualifications/education/transportation.]

WHEREFORE, for the reasons stated above, Ms. Doe respectfully requests that this Court admit Ms. Doe into ARD without the requirement that she pay costs or restitution in an amount that exceeds her means.