

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

COMMONWEALTH OF PENNSYLVANIA

v.

Jane Doe

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No. **CP-46-CR-**

MOTION TO WAIVE/REDUCE ARD COSTS AND RESTITUTION

Defendant **Jane Doe**, through counsel, requests that this Court waive the costs and restitution associated with 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 whether the court ever considered the defendant’s ability to pay costs/restitution
3. 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?
4. Explain what efforts the defendant has made to make 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.

5. 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.
6. If the defendant can afford to pay a lower amount, explain that. 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), 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. **Indigent** defendants cannot be lawfully removed from ARD or prevented from completing ARD solely because they lack the ability to pay the **costs or restitution** associated with it.

1. Defendants such as Ms. **Doe**, who cannot afford to pay the **costs or restitution** associated with ARD, nevertheless cannot be denied the benefits of the program simply because they are too poor to pay. Such a result limits ARD solely to those with financial means and unjustly punishes indigent defendants for being poor. That is unconstitutional and violates Pennsylvania law.
2. 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 (in that context,

restitution) “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).

3. 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.* (“[W]e hold that in ARD determinations, 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.”). Instead, as the court explained, a trial court must “consider alternative conditions for admittance to *and completion of the ARD program*” if the defendant “has no ability to pay” despite bona fide efforts to do so. *Id.* (emphasis added).
4. 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. And 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 other words, it is the explicit intent of the Supreme Court, in adopting the rules governing ARD, that costs are optional and should be waived for indigent defendants so that they can participate in ARD.

5. **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. Even if restitution is imposed, it can only be imposed in an amount the defendant can actually afford because such restitution may be only imposed as “with respect to probation after conviction of a crime”—and the payment of restitution that is a condition of probation is limited to the defendant’s ability 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)).
6. **In light of** *Melnyk* and Rule 316, the Court cannot expel a defendant from ARD because of her inability to pay costs or restitution. While the Court is free to substitute reasonable non-monetary conditions related to the defendant’s rehabilitation, such as community service or **[insert other appropriate ideas]**, **Ms. Doe** cannot be prohibited from completing ARD solely because of her limited financial resources. Instead, the Court must waive or reduce the financial obligations of ARD.
7. **In light of** *Melnyk* and Rule 316, the Court cannot prevent a defendant from completing ARD and receiving the benefits thereof simply because she cannot afford to pay costs or restitution. **Because** **Ms. Doe** cannot afford to pay costs or restitution, the Court must waive or reduce her financial obligations, to allow her to complete ARD.

B. Ms. Doe is indigent and lacks the ability to pay these costs.

8. 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”).¹ This requires looking at 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, (Pa. Super. Ct. 2018) (setting a payment plan requires making “findings” regarding the defendant’s ability to pay).

9. 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.”).

¹ 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.

10. 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.”).

11. 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 can’t afford the costs, 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 **waive Ms. Doe’s costs and restitution and permit her to complete ARD].**