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

**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**

**TRIAL DIVISION—CRIMINAL**

**COMMONWEALTH OF PENNSYLVANIA :**

 **:**

 **:**

 **v. : No.**

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 **:**

**JOHN DOE :**

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**MEMORANDUM OF LAW IN SUPPORT OF PETITION TO PROCEED WITH EXPUNGEMENT PETITION IN FORMA PAUPERIS**

 Defendant John Doe, through counsel, hereby moves this Honorable Court to waive the $132 expungement petition fee under 42 Pa.C.S. § 1725.7 and request an expungement under 18 Pa.C.S. § 9122 based on his inability to pay that fee. Mr. Doe has submitted a Petition to proceed in forma pauperis(“IFP”), and in support of that Petition submits this Memorandum of Law. Pennsylvania common law, as well as the United States and Pennsylvania Constitutions, all require that the Court allow Mr. Doe to proceed IFP in light of his inability to pay the filing fee in this matter.

1. **Pennsylvania common law requires that this Court permit Mr. Doe to proceed in forma pauperis because he cannot afford to pay the filing fee.**

Since Pennsylvania’s founding, the common law has allowed indigent individuals to proceed IFP without paying filing fees or the costs of litigation in both civil and criminal cases. To this day, no statutory scheme has abrogated this common law right. As a result, Mr. Doe is entitled to proceed IFP.

This common law right dates to the Statute of 11 Henry VII, c. 12, which is “a part of the common law of Pennsylvania and applies to relief in forma pauperis on appeal as well as in initial suit[.]”*Mitek v. Stel-Mel Signs, Inc.*, 294 A.2d 814, 814 (Pa. Super. Ct. 1972) (en banc). *See also Thompson v. Garden Court*, 419 A.2d 1238, 1240 (Pa. Super. Ct. 1980) (holding that the plaintiff was entitled to file a trespass and assumpsit complaint IFP pursuant to the Statute of 11 Henry VII); *Madden v. City of New York*, 59 Pa. D. & C.2d 367, 370 (Pa. Ct. Com. Pl. 1972) (Statute of 11 Henry VII, part of the Pennsylvania common law, remains in effect and allows indigent litigants to initiate suit without payment). As the Superior Court has recognized, the common law ensures that an indigent individual “still has the right to prosecute his suit free from costs,” because “no person should have right and justice denied or delayed by reason of poverty.” *Thompson*, 419 A.2d at 1240. *See also Koziatek v. Marquett*, 484 A.2d 806, 808 (Pa. Super. Ct. 1984) (a litigant who “proves that he is indeed in poverty . . . enjoys a common law right to proceed in forma pauperis”). Defendants in criminal cases have the same common law right to proceed IFP to waive “fees and costs in the context of a criminal case.” *Commonwealth v. Lepre*, 18 A.3d 1225, 1226 (Pa. Super. Ct. 2011) (trial court abused discretion by failing to hold ability-to-pay hearing after prima facie showing of poverty); *Commonwealth v. Regan*,359 A.2d 403, 406 (Pa. Super. Ct. 1976) (en banc) (criminal defendant “must be permitted to appeal in forma pauperis if he is in fact indigent”).

Whenever a statute is silent regarding the right to proceed IFP, the common law right applies. *Mitek*, 294 A.2d at 814 (resorting to the common law after determining that the statute in question did not prohibit an appeal IFP). If the legislature intends a different result, it “must affirmatively repeal existing law or specifically preempt accepted common law for prior law to be disregarded.” *Metropolitan Property and Liability Ins. Co. v. Insurance Com’r of Com. of Pa.*, 580 A.2d 300, 302 (Pa. Super. Ct. 1990). Indeed, “statutes are not presumed to make changes in the rules and principles of the common law or prior existing law beyond what is expressly declared in their provisions.” *Commonwealth. v. Miller*, 364 A.2d 886, 887 (Pa. Super. Ct. 1976).

Nothing in either the expungement statute, 18 Pa.C.S. § 9122, nor the statute imposing fees for expungements, 42 Pa.C.S. § 1725.7, addresses IFP eligibility. The statutes do not purport to prevent indigent individuals from filing expungement petitions IFP and without paying the filing fee. As a result, this Court must abide by the Superior Court’s binding interpretation of the common law and permit Mr. Doe to proceed IFP without paying the filing cost.

1. **When a state grants a statutory right to all, the Due Process and Equal Protection Clauses of the Fourteenth Amendment prohibit the state from discriminating on account of poverty.**

In addition to the common law right to proceed IFP, Mr. Doe also has a right under the Fourteenth Amendment to the United States Constitution to have this filing fee waived. In enacting § 9122, Pennsylvania has created a statutory right to an expungement under certain circumstances, and defendants cannot be denied access to that right merely because of their poverty.

In the seminal case *Griffin v. Illinois*, 351 U.S. 12, 18 (1956), the United States Supreme Court invalidated an Illinois practice that required defendants to pay for the costs of producing a transcript in order to pursue an appeal. Although the Court recognized that states do not have to provide an avenue for appeal, when a state creates such a right it cannot do so “in a way that discriminates against some convicted defendants on account of their poverty.” *Id*. Such wealth-based access constitutes “invidious discrimination” in violation of the Due Process and Equal Protection clauses. *Id.* at 18-19.

Pennsylvania courts have applied the principle from *Griffin* to state-created right in the Commonwealth. For example, with our Supreme Court has ruled that “where a State provides appellate review of criminal convictions as of right, it may not afford such review to indigents on terms less favorable than those afforded nonindigents.” *Commonwealth ex rel. Robinson v. Myers*, 215 A.2d 637, 639 (1966) (citing *Griffin*). Following that reasoning, the Superior Court invalidated a local court practice that required that defendants pay fines and costs prior to appeal as “an unconstitutional denial of due process and equal protection.” *Regan*,359 A.2d at 406. As the en banc court explained, decisions from both the United States and Pennsylvania Supreme Courts prohibit the Commonwealth from preconditioning access to the courts on payments that poor individuals cannot afford. To do otherwise would deny “the rights of the indigent to due process and equal access to the courts.” *Id*.

The Superior Court has extended the *Griffin* line of cases to another state-created right: Accelerated Rehabilitative Disposition (“ARD”). As that court has explained, the Fourteenth Amendment requires that a trial court “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. *Commonwealth v. Melnyk*, 548 A.2d 266, 272 (Pa. Super. Ct. 1988). To do otherwise 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*. These constitutional provisions require that the court waive otherwise “mandatory” costs associated with ARD, such as the Judicial Computer Project fee (42 Pa.C.S. § 3733(a.1)) and the Firearms and Education Training Fund (61 Pa.C.S. § 6308(b)(1)), even though those statutes do not themselves contain an indigence exception.

As with ARD, § 9122 creates a right to be free from a criminal record. If this state-created right were reserved only for those who could pay the $132 filing fee, it would deny indigent individuals access to that right, which would violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Because statutes are presumed constitutional and courts have a “duty … in construing [a] statute to give it, if possible, an interpretation which will prevent any conflict with the Constitution,” *Hotel Casey Co. v. Ross*, 23 A.2d 737, 740 (Pa. 1942), this Court must construe 18 Pa.C.S. § 9122 and 42 Pa.C.S. § 1725.7as allowing Mr. Doe to seek IFP status as he could in any other case. A “construction which is clearly constitutional is to be preferred to one that raises grave constitutional questions.” *Regan*, 359 A.2d at 406.

1. **The Pennsylvania Constitution separately requires that courts be accessible to all, including Mr. Doe, who cannot afford to pay filing fees.**

The Pennsylvania Constitution requires that our courts be accessible to all, including the indigent. Article 1, Section 11 of the Constitution states that “all courts shall be open” and that every person “shall have a remedy by due course of law, and right and justice administered without sale, denial or delay.” This right of individuals to make use of the judicial process and avail themselves of their legal remedies is fundamental and “should not be infringed upon, unless no other course is reasonably possible.” *Kelly v. Brenner*, 175 A. 845, 847 (Pa. 1934).

This provision protects the right to proceed IFP. *See*, *e.g.*, *Cunha v. Cunha*, 44 Pa. D. & C.2d 230, 231 (Pa. Ct. Com. Pl 1968). As the *Cunha* court explained, Pennsylvania’s trial courts have granted “leave to a plaintiff to proceed in forma pauperis, regardless of whether such action is within the precise meaning of the constitutional provision.” *Id*. This applies even if the “right” at issue—in *Cunha* the right to secure a divorce—appears “at first blush” to be “a luxury which should not be permitted without the payment of all the costs,” as “[i]f our courts are to be open to all people regardless of their means, then the form of action should not be inquired into.” *Id.*

Pennsylvania courts violate the “open courts” provision of the Constitution if they do not waive filing fees for indigent persons. In *Schade v. Luppert*, the trial court found that requiring an insolvent plaintiff to give security for costs violated Article I, Section 11 of the Pennsylvania Constitution because “[t]o him the courts of justice are not open . . . the court has seen fit, by virtue of its ruling, to require of him something impossible for him to perform.” 17 Pa. C. C. 460, 462 (Pa. Ct. Com. Pl. 1896). Such a requirement would “render[] nugatory” the Declaration of Rights. *Id*. *See also Lutz v. Heasley*, 12 Pa. D. 139, 139 (Pa. Ct. Com. Pl. 1902) (invalidating a similar rule requiring plaintiffs to give security for costs); *Willis v. Willis*, 20 Pa. D. 720, 720 (Pa. Ct. Com. Pl. 1911) (holding that plaintiff cannot be denied access to the courts because of his inability to pay, and that “such person, when a resident, may prosecute a suit in this state in forma pauperis”).

This Court cannot interpret § 9122 to require the payment of a filing fee even for individuals who cannot afford it. To do otherwise would violate Article 1, Section 11 of our Constitution.

1. **Mr. Doe has a right to a hearing on his IFP petition prior to dismissal.**

If a trial court believes the averments the petitioner has submitted in his IFP petition, then the court may grant him IFP status without holding a hearing. *In re Adoption of B.G.S.*, 614 A.2d 1161, 1170 (Pa. Super. Ct. 1992). However, “[i]f the trial court disbelieves the petitioner’s averments it is incumbent upon [it] to hold an evidentiary hearing,” because “to deny the petition summarily, without a hearing, would be improper.” *B.G.S.*, 614 A.2d at 1170; *Thompson*, 419 A.2d at 1240. *See also Amrhein v.* *Amrhein*, 903 A.2d 17 (Pa. Super. Ct. 2006) (directing the trial court to hold a hearing if it rejects the petitioner’s averments in her IFP application); *Lepre*, 18 A.3d at 1128 (holding that the trial court abused its discretion by not holding a hearing before rejecting the defendant’s averred inability to pay). Accordingly, if this Court is considering denying Mr. Doe’s petition, he is first entitled to a hearing.