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

**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**

**TRIAL DIVISION—CRIMINAL**

**COMMONWEALTH OF PENNSYLVANIA :**

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 **:**

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

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**JOHN DOE :**

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**POST-SENTENCE MOTION TO WAIVE COURT COSTS**

 Defendant John Doe, through counsel, hereby moves this Honorable Court to waive all court costs pursuant to Pa.R.Crim.P. 706(C) and as grounds thereof avers as follows:

1. **Background**
2. [Background on case and details of sentence]
3. [Background on defendant’s financial situation]

**Defendant Doe is entitled to a waiver of his court costs based on his inability to pay.**

Pennsylvania statutes and the Rules of Criminal Procedure require that this Court consider Mr. Doe’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.

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).[[1]](#footnote-1)

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. Doe’s ability to pay when imposing costs in this matter.[[2]](#footnote-2)

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 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.[[3]](#footnote-3)

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. Doe’s costs.

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

1. As described above—and as will be presented at a hearing on this Motion—Mr. Doe is indigent and will remain unable to pay after serving his sentence. Mr. Doe [facts about receiving SSI, has not been able to afford to live on his own, etc; recite some of the key facts to show that even before this case he couldn’t afford to live on his own. Moreover, Mr. Doe received food stamps and Medicaid, and he currently receives the services of the public defender, facts that “invite the 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. Doe 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.”).[[4]](#footnote-4)
2. 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 required. The purpose of this inquiry is to assure repayment is not required as long as he remains indigent.”

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

WHEREFORE, Defendant Doe requests that this Court waive all court costs in this matter due to his indigence.

 [SIGNATURE BLOCK]

1. 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”). [↑](#footnote-ref-1)
2. 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. [↑](#footnote-ref-2)
3. 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. [↑](#footnote-ref-3)
4. 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. [↑](#footnote-ref-4)