**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 :**

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**MOTION TO WAIVE OUTSTANDING ARD COSTS AND RESTITUTION**

Defendant Jane Doe, through counsel, requests that this Court waive the outstanding costs and restitution associated with Accelerated Rehabilitative Disposition (“ARD”), which Ms. Doe cannot afford and that which are preventing 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). As Ms. Doe has completed all other conditions associated with ARD, she respectfully request that this Court enter an order that Ms. Doe has completed ARD pursuant to Pa.R.Crim.P. 319. In support of this Motion, Ms. Doe avers:

1. **Background**
2. Factual background of case.
3. Explain whether the court ever considered the defendant’s ability to pay costs/restitution
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 the defendant’s efforts 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.
6. Set forth that the defendant has completed all of the other conditions associated with ARD; but for the inability to pay, she would already be finished.
7. Consider the possibility of suggesting something like additional community service as an alternative to payment, depending on the defendant’s ability and willingness to do so, as a way to satisfy the court.
8. **Argument**
9. **Indigent defendants cannot be lawfully removed from ARD or prevented from completing ARD solely because they lack the ability to pay costs or restitution.**

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.

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).

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.*

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.

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]](#footnote-1)

1. In light of *Melnyk* and Rule 316, the Court must allow indigent defendants to complete ARD and receive the benefits thereof even if they cannot afford to pay costs or restitution. Because Ms. Doe cannot afford to pay costs or restitution despite a bona fide effort to do so, the Court must waive her outstanding financial obligations and allow her to complete ARD.
2. **Ms. Doe is indigent and lacks the ability to pay the costs and restitution.**
3. 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”).[[2]](#footnote-2) 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, 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) (explaining that the rules of criminal procedure enforce the constitutional requirement that there is a “duty of paying costs ‘only against those who actually become able to meet it without hardship.’” (quoting *Fuller v. Oregon*, 417 U.S. 40, 54 (1974)).
4. 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.”).
5. 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.”).
6. 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.]
7. **This Court should waive Ms. Doe’s outstanding costs and restitution and issue an order pursuant to Rule 319 that she has completed ARD.**
8. Ms. Doe’s inability to pay is the only reason that she is still on ARD. Accordingly, the Court should enter an order pursuant to Rule 319 and specify that she has successfully completed ARD.[[3]](#footnote-3)
9. In *Melnyk*, the Superior Court ruled that a court may impose non-monetary alternatives to paying *restitution* if the defendant cannot afford to pay that restitution. However, the rationale for imposing alternative conditions is not relevant to Ms. Doe, who only owes costs. Restitution is rehabilitative in nature, and conditions such as community service may serve that rehabilitative goal. However, *costs* are simply a reimbursement to the government and serve no rehabilitative purpose. *See Commonwealth v. Rivera*, 95 A.3d 913, 917 (Pa. Super. 2014) (explaining that, because costs serve no rehabilitative purpose, the payment thereof cannot be a lawful condition of probation). Thus, rather than impose additional community service or some other requirement merely due to her poverty, this Court should simply allow Ms. Doe to complete ARD.
10. 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 either waive her financial obligation outright or consider and impose alternative non-monetary conditions.

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].

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). [↑](#footnote-ref-1)
2. 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-2)
3. Because the expungement required by Rule 320 occurs automatically upon the Court entering an order pursuant to Rule 319, the Court cannot, for example, permit Ms. Doe to complete ARD but nevertheless prevent her from obtaining an expungement until she pays in full. [↑](#footnote-ref-3)