IN THE COMMONWEALTH COURT OF PENNSYLVANIA

AMY MCFALLS, JASON CRUNETTI, VINCENT ESPOSITO, GREGORY JACKSON, and BRENDA LACY, on behalf of themselves and all persons similarly situated,	:	No.4 M.D. 2021 Class Action Original Jurisdiction
Petitioners,	:	
v.	:	
38TH JUDICIAL DISTRICT, Hon. CAROLYN T. CARLUCCIO, President Judge (in her official capacity), MICHAEL R. KEHS, Esq. Court Administrator (in his official capacity), and LORI SCHREIBER, Clerk of Courts (in her official capacity),	:	
Respondents.	:	

BRIEF IN SUPPORT OF PETITIONERS' APPLICATION FOR SUMMARY RELIEF

Mary Catherine Roper
John J. Grogan
Kevin Trainer
David Nagdeman
LANGER, GROGAN & DIVER P.C.
1717 Arch St., Ste. 4020
Philadelphia, PA 19103
Tel: (215) 320-5660
Fax: (215) 320-5703

Additional counsel listed on signature page.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

I. INTRODUCTION AND RELIEF SOUGHT

Respondents' policy of duplicating certain court costs in criminal cases in the 38th Judicial District violates statutory and common law. It also violates the Class members' constitutional rights to Equal Protection and Due Process. In this Application, Petitioners request relief declaring the policy and practice of duplicating court costs unlawful and unconstitutional, reserving a determination on other relief for a later date.

Respondents, not the sentencing judge, choose which costs to impose and how many times each cost will be imposed. As this Court explained in denying Respondents' Preliminary Objections, "Petitioners' ultra vires claim is not an attack upon sentencing judges' discretionary authority to assess costs, but rather upon subsequent actions taken by the 38th Judicial District's administrative personnel." *McFalls v. 38th Jud. Dist.*, No. 4 M.D. 2021, 2021 WL 3700604, at *12 (Pa. Cmwlth. Ct. Aug. 6, 2021) (unpublished).

When Respondents impose a cost more than once in a criminal case, they do so pursuant to an administrative policy maintained by the Judicial District Administration and the Clerk of Courts. There is no sentencing order, in any case, that states "impose the Judicial Computer Project cost twice (or three times, or more)." Instead, under Respondents' policy, when the sentencing order directs "costs" on more than one count in the case, Respondents have decided to impose some costs once, on the lead charge, and other costs multiple times.

Respondents' duplication of costs violates the law and severely burdens defendants in criminal cases—the Petitioners and Class members in this litigation—

with hundreds of dollars of illegal debt.[1] The duplication also puts Petitioners and Class members at risk of being held in contempt, having probation revoked, facing arrest warrants for nonpayment, or referral of the matter to collection agencies with a consequent additional assessment on the balance due. Respondents have unlawfully imposed duplicate costs in thousands of criminal cases since at least 2008. As Petitioners demonstrated at the class certification hearing, Respondents continue this practice to this day.

This practice must end, and it is this Court that must end it. In fact, in *Sherwood v. Pennsylvania Department of Corrections*, a panel of this Court noted that these issues have been properly presented in this matter and stayed proceedings in that case pending this Court's resolution of the legality of duplicating these costs.[2] *See Sherwood v. Pennsylvania Dep't of Corr.,* 268 A.3d 528, 554 n.28 (Pa. Cmwlth. Ct. 2021) (noting that "currently before the Court in its original jurisdiction is a challenge to the alleged assessment of duplicative costs by courts of common pleas, including costs arising under the Substance Abuse Education Act. *See McFalls v. 38th Judicial Dist.* (Pa.

---

[1] In the named Petitioners' cases, certain costs were doubled, resulting in hundreds of dollars of overcharges. *See* Petitioners' Application for Summary Relief at ¶¶ 6-10. Other Class members saw their costs multiplied far more. As an example, in *Commonwealth v. Wettlaufer,* CP-46-CR-0000481-2017, the docket of which is submitted as Exhibit 6 to Petitioner's Application for Summary Relief, certain costs were imposed *fifteen* times, resulting in an overcharge of more than $1,400.00. (Exhibit 6).

[2] *Sherwood* was brought by a *pro se* inmate who challenged the imposition of costs not on statutory grounds but instead based on the Double Jeopardy Clause of the Fifth Amendment. At the preliminary objection stage, the *Sherwood* panel held that it was unable to determine whether the Substance Abuse Education cost "is intended to be assessed per violation of the Drug Act charged or per criminal incident." 268 A.3d at 554. The *Sherwood* panel did not engage in statutory construction or reference the relevant case law regarding the strict construction of penal statutes, as those arguments were not advanced by the *pro se* litigant. *See id.*

Cmwlth., 4 M.D. 2021).”). This Court is the proper venue to determine that Respondents cannot lawfully duplicate any costs.

Respondents’ policy of imposing duplicate costs is *ultra vires* because the statutes that authorize these costs do not allow duplication. Respondents’ policy is also unlawful under Pennsylvania common law, which prohibits duplicating costs. And it violates Petitioners’ rights to Equal Protection of the laws because the duplication is applied arbitrarily.

In addition, the Judicial District and the Clerk of Courts impose costs without basic Due Process—notice. Petitioners and the other members of the Class are never informed that they have been subjected to duplicate assessments because Respondents do not provide defendants a bill of costs or other itemization of the costs they assess and are never provide an opportunity to contest those assessments.

Petitioners seek summary relief in the form of a declaration on each of Petitioners’ claims. Counts I, IV, and V of the Petition for Relief challenge the legality of Respondents’ policy of duplicating costs. Counts II and III of the Petition for Relief challenge the assessment of costs without due process. Count VI is Petitioners’ request for declaratory relief.

This case is ripe for summary disposition. There are no genuine issues of material fact concerning Respondents’ liability, and Petitioners’ right to relief is clear as a matter of law. Petitioners respectfully request that the Court issue declaratory relief now on all Counts of the Petition for Review. Additional forms of relief under each claim can be addressed after liability is determined.

II. QUESTIONS PRESENTED

1. Do the statutes that authorize the imposition of costs and the common law permit Respondents' policy of duplicating certain costs by assessing them on each charge, rather than once per case?

2. Do Respondents have a rational basis for their policy of duplicating certain costs but not others by assessing them on each charge, rather than once per case?

3. Does Respondents' failure to provide a bill of costs or other form of notice specifying each of the costs they have imposed satisfy procedural due process requirements?

Suggested Answer as to All: *No.*

III. STATEMENT OF UNCONTESTED FACTS

The facts necessary to determine Respondents' liability are not contested. They have been the subject of stipulations by Respondents, as well as this Court's Findings of Fact on class certification, and discovery has left no doubt as to the operative facts.

A. Respondents' Process for Imposing Costs

1. The Sentencing Hearing

In the 38th Judicial District, when a defendant is sentenced in a criminal case, the sentencing judge determines whether the defendant will serve a period of imprisonment, probation, or other type of supervision. *McFalls v. 38th Jud. Dist.*, No. 4 M.D. 2021, 2023 WL 3513283, Findings of Fact ¶ 2 (Pa. Cmwlth. Ct. Apr. 6, 2023) ("Findings of Fact"); Joint Stipulations of Fact and Law Submitted for the January 25,

2023 Class Certification Hearing ("Joint Stipulation") ¶ 4. (Exhibit 1). The sentencing judge also determines the fine, if any, and the amount of restitution, if any, the defendant will be sentenced to pay. *Id.* When a sentencing judge announces each component of the sentence, that is recorded by a court clerk on a pre-printed form that is later signed by the judge and becomes the sentencing order. Findings of Fact ¶ 7; Joint Stipulation ¶¶ 11, 13–16.

In addition to the sentence imposed by the judge, most defendants are statutorily required to pay certain costs.[3] Those costs apply automatically, whether or not the sentencing judge orders them, unless the judge expressly orders otherwise. Findings of Fact ¶ 3; Joint Stipulation ¶ 5. In the 38th Judicial District, the sentencing judges regularly order defendants to pay "costs," sometimes orally identifying each count for which "costs" must be paid. Findings of Fact ¶ 4; Joint Stipulation ¶¶ 6, 9. That information is recorded on the sentencing order. Joint Stipulation ¶ 13. But the sentencing judges in the 38th Judicial District do not have a policy or practice of specifying which costs a defendant should pay, or the amount owed by the defendant as a result. Findings of Fact ¶ 5; Joint Stipulation ¶ 10.

2. The Sentencing Order

The completed sentencing order does not contain any information regarding the specific statutory costs for which a given defendant is liable, nor does it include the precise dollar amount that is owed as a result. *See* Findings of Fact ¶ 8; Joint

[3] These costs are sometimes labelled "fees" or "surcharges" in the statutes. Because there is no legal distinction between these labels, for consistency, Petitioners refer to all of these statutorily imposed assessments as costs.

Stipulation ¶ 14. These details are supplied *after* the sentencing judge hands down the final sentencing order.

3. The Imposition of Costs Through CPCMS

The costs imposed in a specific case are not actually determined until a Clerk of Courts Office employee, known as a disposition clerk, accesses the Common Pleas Case Management System ("CPCMS") computer system, and, using the sentencing order, manually adds the costs in the electronic case file. Findings of Fact ¶ 13; Joint Stipulation ¶¶ 8, 25–27.

The disposition clerk can and does add or remove costs in CPCMS, regardless of whether the computer system automatically adds those costs. Deposition of Melissa Jenkins-Phongphachone, April 20, 2022, at 72:14-73:1 (stating that it is "correct" that there are circumstances where the Clerk of Courts employees remove costs that are automatically added by CPCMS). (Exhibit 14).

Where a criminal defendant has been found guilty of more than one count, the disposition clerk must manually deselect some costs that CPCMS automatically adds to the second count in order to avoiding duplicating costs that the Clerk of Courts has determined should only be imposed once. Jenkins-Phongphachone Dep. at 53:21-54:5. For example, the disposition clerk must manually remove the Booking Center cost from any counts other than the lead count because CPCMS automatically adds that cost for each count on which costs are assessed, but the Clerk of Courts believes it should only be imposed once per case. Jenkins-Phongphachone Dep. at 79:16-22.

Pursuant to an interpretive policy of the Clerk of Courts office, if a sentencing order directs imposition of "costs" on multiple counts in a case, then the Clerk of

Courts will impose all "offense related" costs on the defendant for *each* of those counts. Joint Stipulation ¶ 23. The phrase "offense-related costs" refers to a category of assessments in CPCMS. CPCMS has different screens for the imposition of "Offense-Related Assessments" and "Non-Offense-Related Assessments." Jenkins-Phongphachone Dep. 47:3-15. These labels appear only in the CPCMS computer system and the user manual for that system; no statute, court rule, or court opinion uses these terms or draws such a distinction between these costs. *See* Petitioners' Application for Summary Relief at ¶ 40 and footnote 8.

That policy was adopted by the Clerk of Courts Office at the instruction of the 38th Judicial District's leadership in 2015 and has been in place since then. Findings of Fact ¶ 15; Joint Stipulation ¶ 23. The interpretive policy institutionalized the Clerk of Courts' prior practice, which has been consistent when imposing costs on multiple counts since at least 2008 through the present. *See* Declaration of Andrew Christy at ¶ 10 and Exhibit 4.

All relevant Clerk of Courts employees have been trained to interpret sentencing orders and assess the costs in a uniform way. Findings of Fact ¶ 14; Joint Stipulation ¶ 28. "Verifiers" employed by the Clerk of Courts Office check the information the disposition clerks have entered into CPCMS to ensure that costs assessed on each defendant match the information on the relevant sentencing order. Findings of Fact ¶ 16; Joint Stipulation ¶ 23. After a sentencing judge signs a sentencing order, as a matter of policy or practice, the judge does not subsequently verify that the Clerk of Courts imposed costs in the way the judge intended. Jenkins-Phongphachone Dep. at 86-87.

Although most sentencing orders are processed by the Clerk of Courts within a week of the sentencing hearing, some are not processed for up to two weeks after the date of sentencing. Jenkins-Phongphachone Dep. at 83:3-8.

4. The Costs that Respondents do and do not duplicate

In the 38th Judicial District, there are twenty-five statutorily authorized costs that Respondents impose in criminal proceedings as a routine matter—meaning these costs are not reimbursements billed by the prosecutor and are not otherwise unique to the procedure in that case (such as the cost to file an appeal). See Christy Decl. at ¶ 6 and Exhibits 2 (Table of Costs) and 3 (docket sheets with costs highlighted).

Pursuant to their interpretive policy, Respondents never duplicate the following six costs in criminal cases in the Montgomery County Court of Common Pleas, even if the sentencing order calls for costs to be imposed on more than one count (see Christy Decl. at ¶ 8):[4]

[4] In Petitioners' Application and Brief, costs that Respondents do not duplicate appear in tables with blue shading, while costs that Respondents do duplicate appear in tables with orange shading. The full statutory language for each cost appears on the table provided as Exhibit 2.

UNDUPLICATED COSTS[5]	AUTHORIZING LANGUAGE
Clerk of Courts Processing Fee (COC Processing Fee Misd/Fel), 42 P.S. § 21061	imposing a cost "for all proceedings" in misdemeanor and felony cases
Crime Lab User Fee (County Lab Fees), 42 Pa.C.S. § 1725.3(a)	imposing a cost "in every case where laboratory services were required to prosecute the crime or violation," on "a person" who is "convicted of a crime"
Booking Center Fee, 42 Pa.C.S. § 1725.5	imposing a cost on a "person" who is "is convicted of a crime"
DNA Detection Fund, 44 Pa.C.S. § 2322	imposing a cost on "any person convicted" of "a felony sex offense or other specified offense," including any felony or certain misdemeanors
Offender Supervision Program (OSP), 18 P.S. § 11.1102	imposing as a cost of supervision at least $25 "on any offender placed on probation, parole, accelerated rehabilitative disposition, probation without verdict or intermediate punishment"
CAT/MCARE/General Fund, 75 Pa.C.S. § 6506(a)(1)	imposing a "surcharge . . . (1) Upon conviction for any violation" of certain traffic offenses

Pursuant to their interpretive policy, Respondents do duplicate the following nineteen costs in criminal cases in the Montgomery County Court of Common Pleas if the sentencing order calls for costs to be imposed on more than one count (see Christy Decl. at ¶ 9):

[5] In their Argument, Petitioners have used footnotes to provide additional detail, such as when a cost has been repealed, or its application has otherwise been changed. None of those changes affects the Respondents' liability.

DUPLICATED COSTS	AUTHORIZING LANGUAGE
Criminal Justice Enhancement Account (CJEA), 42 Pa.C.S. § 3575(b) **County Court Cost**, 42 Pa.C.S. § 1725.1(b) **State Court Cost**, 42 Pa.C.S. § 1725.1(b)	imposing a cost "in each judicial proceeding" or "in every criminal case"
Automation Fee, 42 Pa.C.S. § 1725.4(b) **Court Child Care**, 42 Pa.C.S. § 3721(c)(2)(iii) **Judicial Computer Project (JCP)**, 42 Pa.C.S. § 3733(a.1)(1)(iii)	imposing a cost "for the initiation" of a criminal case
Access to Justice (ATJ), 42 Pa.C.S. § 3733.1(a)(3) **Criminal Justice Enhancement Surcharge (CJES)**, 72 P.S. § 1795.1-E(c)(3)(ii)) **Judicial Computer Program Surcharge (JCPS)**, 72 P.S. § 1795.1- E(c)(1)(iv) and (d) **Office of Attorney General Judicial Computer Project (OAG-JCP)**, 72 P.S. § 1795.1- E(c)(3)(iii)	imposing a cost "[i]n addition to each fee imposed under section 3733(a.1)"— which is any time JCP cost is triggered; or "in addition to the fees imposed under 42 Pa.C.S. §§ 3733(a.1) and 3733.1" –which is any time JCP and ATJ costs are triggered.
Crime Victims Compensation, 18 P.S. § 11.1101(a)(1) **Victim Witness Service**, 18 P.S. § 11.1101(b)(2) (repealed) **Crime Victim Compensation/Victim Witness Service Variable Amount**, 18 P.S. § 11.1101(a)(1) **Domestic Violence Compensation**, 71 P.S. § 611.13(b) **Firearms and Education Training Fund**, 61 Pa.C.S. § 6308(b)(1) **Substance Abuse Education**, 18 Pa.C.S. § 7508.1	imposing a cost on a "person" or "individual" who is convicted of "a crime," or "any crime," or "a felony or misdemeanor" or "a violation" of certain offenses.
Commonwealth Cost, 42 Pa.C.S. § 3571(c)(2) **Emergency Medical Services**, 75 Pa.C.S. § 3121 **PA Transportation Trust Surcharge**, 75 Pa.C.S. § 6506(a)(2)-(7)	imposing a cost where there is a "conviction," or a "violation" of a type or a statute.

B. Respondents do not provide the defendant with notice of the costs they impose.

In the 38th Judicial District, after a criminal conviction or guilty plea, neither the defendant nor their attorney is provided at sentencing with a list of costs that will be imposed or the specific charges to which those costs apply. Joint Stipulation ¶ 30. The Clerk of Courts office does not automatically or proactively provide defendants or their attorneys an itemized breakdown of assessed costs, but instead only provides that upon request and, in addition, makes a list of the costs assessed available through criminal docket sheets online. Findings of Fact ¶ 14; Joint Stipulation ¶ 31. The public docket sheet accessible online does not correlate a specific cost to a specific count. Jenkins-Phongphachone Dep. at 84:22-24.

The first notice that a defendant may receive from the Clerk of Courts about costs they owe is an "Introduction Letter" sent to defendants who are not incarcerated to notify them of the total costs, fines and restitution assessed in their case and set a payment schedule. This letter is sent approximately two weeks before their first payment is due. Jenkins-Phongphachone Dep. at 81:9-14. That notice only goes to the defendant. *Id.* at 81:15-17. Incarcerated defendants do not receive any correspondence from the Clerk of Courts when costs are entered.

In keeping with existing policies, Respondents did not proactively provide Petitioners with an itemized, per-charge breakdown of the costs that had been assessed against them. Findings of Fact ¶ 32; Joint Stipulation ¶¶ 30–31. And Respondents do not provide defendants with instruction on how to challenge the costs imposed. The Introduction Letter states only how much the person owes in each category of fines,

costs, and restitution, as well as the date the first payment is due. Jenkins-Phongphachone Dep. 78:1-7.

IV. PROCEDURAL HISTORY

Petitioners filed their Class Action Petition for Review Addressed to the Court's Original Jurisdiction in the Commonwealth Court on January 5, 2021. All Respondents filed Preliminary Objections, which the Court denied in most respects in an Opinion and Order dated August 6, 2021. Respondents the 38th Judicial District, the Honorable Thomas M. Del Ricci, and Michael R. Kehs answered Petitioners' Class Action Petition on September 7, 2021, as did Respondent Lori Schreiber. Both sets of Respondents included New Matter in their Answers. Petitioners responded to both sets of Respondents' New Matter on September 22, 2021, closing the pleadings.

The parties then conferred and agreed upon a schedule for discovery to proceed briefing on class certification. Petitioners filed a class certification motion and brief on December 9, 2021, and a hearing was scheduled for July 11, 2022. Pursuant to the Court's Order, the parties submitted Stipulations of Fact prior to the hearing date. Proceedings were later temporarily stayed for settlement negotiations, which were ultimately unsuccessful.

After a full hearing on January 25, 2023, and post hearing briefing, the Court issued an Opinion and Order certifying the Class on April 6, 2023, and appointing Petitioners as Class Representatives. The Class certified by the Court is defined as:

> All individuals who have appeared or will appear as defendants in criminal cases in the 38th Judicial District and upon whom any duplicated costs were imposed on or after January 1, 2008, or will be imposed in the future, in one criminal case when the charges arise out of

the same occurrence, or in which the charges have been included in one complaint, information, or indictment by the use of different counts.

On April 17, 2023, Petitioners substituted President Judge Carluccio as a party in place of former President Judge DelRicci.

In accordance with Rule 1712, Petitioners submitted a plan of Class notice on August 3, 2023, which the Court approved by Order dated August 24, 2023.

V. STANDARD OF REVIEW

A court should grant summary relief if, when viewing the evidence in the light most favorable to the non-moving party, "there are no genuine issues of material fact" and "the right to relief is clear as a matter of law." *Flagg v. Int'l Union, Sec., Police, Fire Prof'l of Am., Local 506*, 146 A.3d 300, 305 (Pa. Cmwlth. Ct. 2016). A fact is considered material if its resolution could affect the outcome of the case under the governing law. *Hosp. & Healthsystem Ass'n of Pa. v. Com.*, 77 A.3d 587, 602 (Pa. 2013). A party may seek summary relief any time after an original jurisdiction petition for review is filed. Pa.R.A.P.1532(b).

VI. ARGUMENT

Respondents have stipulated that when a sentencing judge orders "costs" on more than one count in a criminal case in the Montgomery County Court of Common Pleas, the sentencing order issued in that case *does not specify* which costs are to be imposed nor whether *any* individual cost is to be imposed more than once. Findings of Fact ¶ 8; Joint Stipulation ¶ 14. The determination of which of the roughly two-dozen statutory costs to impose and how often comes instead from a policy maintained by the Judicial District administration and the Clerk of Courts.

Findings of Fact ¶ 15; Joint Stipulation ¶ 23. As one 38th Judicial District Judge made clear, the sentencing judges rely on the Clerk of Courts to ensure that only legal costs are assessed after sentencing:

> The court did not itemize the costs of prosecution or order Defendant to pay a specific amount. The court is without knowledge whether the clerk of courts imposed illegal costs upon Defendant after he was sentenced.

Com. v. Brinson, Nos. 2124 EDA 2020 and 2135 EDA 2020, 2021 WL 4282677, Appendix (Pa. Super. Ct. Sept. 21, 2021) (January 15, 2021 Opinion of Haaz, J., issued pursuant to Pa.R.Civ.P. 1925 in response to appeal from duplicated costs imposed in the 38th Judicial District).

Respondents—the administrators of the 38th Judicial District and the Clerk of Courts—have decided that when a sentencing order calls for costs on more than one count, they will impose all available costs on the lead count. Then they *re-impose* most of the same costs on any additional count identified in the sentencing order. This results in the duplication of costs that, as shown below, are only authorized to be assessed once per case.

That policy is not dictated by the sentencing order, nor is the duplication of costs justified by any law, statute, or rule of court. When a sentencing order calls for costs on more than one count, Respondents should assess all applicable costs on the lead count in the case, and then add any additional costs that are unique to the second (or third, or fourth) count. This assures that the defendant pays all costs that apply to each of the counts identified in the sentencing order without imposing any of those

individual costs more than once. This is explained in further detail in section A.1.f, below.

Respondents' policy is unlawful for several reasons. First, no statute authorizes the duplication of these costs and thus the assessment of duplicate costs is *ultra vires*. Second, duplication of costs in a single criminal case violates 100 years of Pennsylvania law. Finally, Respondents arbitrarily duplicate some costs but not others in violation of the Equal Protection guarantees of the United States and Pennsylvania Constitutions. For these reasons, summary relief is appropriate on Petitioners' claims challenging the duplication of costs in some criminal cases.

In addition, summary relief is appropriate as to Petitioners' Due Process claims because Respondents impose these costs without notice and an opportunity to contest the legitimacy of the costs.

A. The Duplicate Costs Respondents Have Imposed on Petitioners and the Other Class Members Are Unlawful and Void *Ab Initio*.

"[A] defendant may be required to only pay costs authorized by statute." *Commonwealth v. Coder*, 415 A.2d 406, 410 (Pa. 1980); *see, e.g., Commonwealth v. Houck*, 335 A.2d 389, 391 (Pa. Super. Ct. 1975) (a court's power to place costs upon a defendant "requires statutory authority"); *Commonwealth v. Gill*, 432 A.2d 1001, 1004 (Pa. Super. Ct. 1981) ("[C]osts must not be assessed except as authorized by law') (citing *Houck*, 335 A.2d at 391). And "the burden of justifying, by a preponderance of the evidence, costs imposed upon a defendant rests upon the Commonwealth." *Gill*, 432 A.2d at 1004 (citing *Coder*, 415 A.2d at 410). Costs imposed in derogation of statutory authority are *ultra vires*.

None of the statutes authorizing costs demand or permit their duplication in a single case. Respondents' imposition of *ultra vires* costs is *void ab initio*. *Coder*, 415 A.2d at 410; *Gill*, 432 A.2d at 1009 (ordering refund of cost not authorized by statute). *See Clairton Slag, Inc. v. Dep't of Gen. Servs.*, 2 A.3d 765, 782 (Pa. Cmwlth. Ct. 2010) ("An ultra vires action is one that is performed without authority to act and beyond the scope of legal authorization."). *See also The Borough of Pitcairn v. The Zoning Hearing Bd. of the Borough of Pitcairn & MonJon, LLC Appeal of: MonJon, LLC*, No. 1253 C.D. 2021, 2024 WL 220374, at *3 (Pa. Cmwlth. Ct. Jan. 22, 2024) (government actions taken without authority "may not stand") (unpublished).

Respondents' imposition of duplicative costs is unlawful for the additional reason that Pennsylvania's common law flatly prohibits the duplication of costs, and has for more than a century.

1. There Is No Statutory Authority for Respondents' Duplication of Costs.

In the 38th Judicial District, there are twenty-five statutorily authorized costs that Respondents routinely impose in criminal proceedings—meaning these costs are not reimbursements billed by the prosecutor and are not otherwise unique to the procedure in that case (such as the cost to file an appeal). *See* Christy Decl. at ¶ 6. Each cost is authorized by its own statute. *See* Exhibit 2.

Of those twenty-five statutorily authorized costs, there are six that Respondents *never* impose more than once in a case, regardless of whether the sentencing order directs costs on one count or on more than one count. *See* Christy Decl. at ¶ 8.

The six costs that Respondents, as a matter of policy, *never* duplicate are set forth in this table:

UNDUPLICATED COSTS	AUTHORIZING LANGUAGE
Clerk of Courts Processing Fee (COC Processing Fee Misd/Fel), 42 P.S. § 21061	imposing a cost "for all proceedings" in misdemeanor and felony cases
Crime Lab User Fee (County Lab Fees), 42 Pa.C.S. § 1725.3(a)	imposing a cost "in every case where laboratory services were required to prosecute the crime or violation," on "a person" who is "convicted of a crime"
Booking Center Fee, 42 Pa.C.S. § 1725.5	imposing a cost on a "person" who is "is convicted of a crime"
DNA Detection Fund, 44 Pa.C.S. § 2322	imposing a cost on "any person convicted" of "a felony sex offense or other specified offense," including any felony or certain misdemeanors
Offender Supervision Program (OSP), 18 P.S. § 11.1102	imposing as a cost of supervision at least $25 "on any offender placed on probation, parole, accelerated rehabilitative disposition, probation without verdict or intermediate punishment"
CAT/MCARE/General Fund, 75 Pa.C.S. § 6506(a)(1)	imposing a "surcharge . . . (1) Upon conviction for any violation" of certain traffic offenses

None of the statutes authorizing the imposition of these costs directs that the cost be imposed on each "count" or each "offense" or otherwise authorizes the duplication of costs. Respondents comply with the law with respect to these six costs.

However, there are nineteen other costs that Respondents often—but not always—duplicate in cases in which the sentencing order calls for costs on more than

one count. Christy Decl. at ¶ 9. The statutory language for these nineteen duplicated costs is remarkably similar to the language for the six costs that Respondents never duplicate. Often, the operative language is identical. Whatever the precise language, none of those statutes authorize duplicative imposition of costs nor can any be reasonably construed to permit such duplication.

To aid in this analysis, Petitioners have grouped these statutes according to whether they (a) authorize a cost for each "proceeding" or "case"; (b) authorize a cost for the "initiation" of a "proceeding;" (c) authorize a cost to be imposed on a "person" who is convicted; or (d) authorize a cost or "surcharge" for a "conviction."

a. Respondents Illegally Duplicate Costs Explicitly Imposed for Each "Proceeding" or Each "Case."

Respondents never duplicate two costs whose authorizing statutes require that they be imposed "for all proceedings" or "in every case," even when the sentencing order calls for costs on more than one count: the COC Processing Fee (42 P.S. § 21061) and the Crime Lab Fee (42 Pa.C.S. § 1725.3(a)):

UNDUPLICATED COSTS	AUTHORIZING LANGUAGE
Clerk of Courts Processing Fee (COC Processing Fee Misd/Fel), 42 P.S. § 21061	imposing a cost "for all proceedings" in misdemeanor and felony cases
Crime Lab User Fee (County Lab Fees), 42 Pa.C.S. § 1725.3(a)	imposing a cost "in every case where laboratory services were required to prosecute the crime or violation," on "a person" who is "convicted of a crime"

This is the correct interpretation of those statutes, as courts must apply the plain language of any statute and there is only one "proceeding" or "case" per docket number. 1 Pa. C.S. § 1921(b).

Nevertheless, Respondents do duplicate three costs for which the relevant statutes use the same language—that costs should apply per "proceeding" or per "case":

DUPLICATED COSTS	AUTHORIZING LANGUAGE
Criminal Justice Enhancement Account (CJEA), 42 Pa.C.S. § 3575(b) **County Court Cost**, 42 Pa.C.S. § 1725.1(b) **State Court Cost**, 42 Pa.C.S. § 1725.1(b)[6]	imposing a cost "in each judicial proceeding" or "in every criminal case"

[6] The County Court Cost and State Court Cost are imposed by the same statutory provision, 42 Pa.C.S. § 1725.1(b). It is one assessment that is split between those two funds, the county and state, although that allocation is not set forth in Section 1725.1. Instead, it comes from 42 Pa.C.S. §§ 3571(a) and 3572. These provisions were added as part of Act 53 of 1978 the Judiciary Act Repealer Act ("JARA"). JARA repealed the old Act 204 of 1976, known as the Magisterial District Reform Act ("MDRA"), which in Section 209 split the payment of what is now the Section 1725.1 cost between the state and county. Now that the MDRA has been repealed, Section 3571 provides that costs that "have heretofore been paid" to the state will continue to be, and Section 3572 states that all costs except those otherwise provided for in the subchapter, i.e. Section 3571, are paid to the county. Thus, under JARA, the allocation split between the state and county in the MDRA remains in effect.

In each instance, this statutory language authorizes the imposition of these costs only once per case.

As these statutes have the same language as the COC Processing Fee and Crime Lab statutes, there is no textual justification for interpreting these three other statutes to allow the costs multiple times in the same case. None of these statutes authorize duplication. None are ambiguous. Therefore, Respondents' duplication of these costs is *ultra vires*.

b. Respondents Illegally Duplicate Seven Costs Imposed for the "Initiation" of a "Proceeding."

In some instances, the statute directs that a cost is to be imposed "for the initiation of any action or proceeding." Obviously, there is only one "initiation" of each criminal case, yet Respondents impose these costs more than once per case. The costs with the "initiation" language are:

DUPLICATED COSTS	AUTHORIZING LANGUAGE
Automation Fee, 42 Pa.C.S. § 1725.4(b) **Court Child Care**, 42 Pa.C.S. § 3721(c)(2)(iii) **Judicial Computer Project (JCP)**, 42 Pa.C.S. § 3733(a.1)(1)(iii)	imposing a cost "for the initiation" of a criminal case

Respondents' duplication of these costs is *ultra vires*.

Respondents duplicate four other costs that must be read to apply for the "initiation of an action or proceeding" because they are derivative of the third cost listed above, the Judicial Computer Project cost, or JCP. The four additional costs are:

DUPLICATED COSTS	AUTHORIZING LANGUAGE
Access to Justice (ATJ), 42 Pa.C.S. § 3733.1(a)(3)	Imposed "[i]n addition to each fee imposed under section 3733(a.1)"— which is any time JCP cost is triggered.
Criminal Justice Enhancement Surcharge (CJES), 72 P.S. § 1795.1-E(c)(3)(ii)) **Judicial Computer Program Surcharge (JCPS)**, 72 P.S. § 1795.1- E(c)(1)(iv) and (d)[7] **Office of Attorney General Judicial Computer Project (OAG-JCP)**, 72 P.S. § 1795.1- E(c)(3)(iii)	Imposed "in addition to the fees imposed under 42 Pa.C.S. §§ 3733(a.1) and 3733.1" – which is any time JCP and ATJ costs are triggered.

These four costs should be construed in the same way as the Judicial Computer Project cost because their authorizing statutes are *in pari materia*[8] with—in fact, derivative of—the JCP.

The JCP is authorized by 42 Pa.C.S. § 3733(a.1)(iii) "for the initiation of any criminal proceeding for which a fee, charge or cost is now authorized and a conviction is obtained or guilty plea is entered." After the creation of the JCP in section 3733(a.1), the legislature added section 3733.1(a)(3), the Access to Justice (ATJ) cost, which is assessed "[i]n addition to each fee imposed under section 3733(a.1)"—in other words, it is added whenever the JCP is assessed. 42 Pa.C.S. § 3733.1(a)(3). The legislature linked these costs because each of these statutes

---

[7] This provision expired on July 31, 2023, but was charged in Class members' cases prior to that date.

[8] § 1932. Statutes *in pari materia*

(a) Statutes or parts of statutes are *in pari materia* when they relate to the same persons or things or to the same class of persons or things.

(b) Statutes *in pari materia* shall be construed together, if possible, as one statute.

1 Pa. C.S. § 1932.

designates a portion of the costs imposed for the Access to Justice Fund.[9] The JCP statute and the Access to Justice statute, therefore, relate to the same thing: channeling court costs to the Access to Justice Fund. These statutes are *in pari materia* and should all be read in the same way—to be imposed upon the "initiation" of a criminal proceeding.

The same analysis governs the construction of the three other costs set forth above, which the legislature created after the JCP and Access to Justice costs. Each of the three additional costs is imposed "in addition to the fees imposed under 42 Pa.C.S. §§ 3733(a.1) and 3733.1"—that is, they are added whenever the JCP and Access to Justice costs are assessed. Those costs are all found in the same statute, 72 P.S. § 1795.1-E.

As with the JCP and the Access to Justice costs, each of these statutes designates a portion of the costs imposed to the Access to Justice Fund.[10] These statutes, therefore relate to the same thing as the JCP and the Access to Justice cost statutes: channeling court costs to the Access to Justice Fund. These five statutes—JCP, ATJ, CJES, JCPS, and OAG-JCP—are *in pari materia* and should be read, insofar as possible, as one statute. *See* 1 Pa.C.S. § 1932(b); *see also Ebersole v. Commonwealth*, 303

---

[9] JCP: 42 Pa.C.S. § 3733(a.1)(1)(iii) sets forth a $10 cost, and Section 3733(a.1)(2)(iii) explains that "$8 of each additional fee shall be deposited into the Judicial Computer System Augmentation Account, and $2 of each additional fee shall be deposited into the Access to Justice Account." ATJ: 42 Pa.C.S. § 3733.1(a)(3) sets forth a $2 cost, and Section 3733.1(c)(3) explains that "The fee under subsection (a)(3) shall be deposited into the Access to Justice Account." Thus, a portion of both costs—JCP and Access to Justice—fund the Access to Justice account.

[10] CJES, JCPS, and OAG-JCP: 72 P.S. § 1795.1-E provides that the costs charged therein shall be split among four funds, including in Section (b)(2), which explains that "an additional surcharge of $2 shall be charged and collected by a division of the Unified Judicial System and deposited into the Access to Justice Account."

A.3d 546, 557 (Pa. Cmwlth. Ct. 2023) (construing together provisions from Tax Code and Probate Code concerning living trusts). All of these costs apply only once per case: "for the initiation of any criminal proceeding…." 42 Pa.C.S. § 3733(a.1)(iii).

None of the seven statutes that impose costs for the "initiation" of a criminal "proceeding" authorizes duplication. None are ambiguous. And yet, Respondents duplicate them. Respondents' duplication of these costs is *ultra vires*.

c. Respondents Illegally Duplicate Six Costs the Legislation Imposed on a "Person" Who Is Convicted of a "Crime."

Respondents do not duplicate the Booking Center Fee cost, nor the DNA Detection Fund cost, even when the sentencing order calls for costs on more than one count in the case. The statutes provide that these costs are authorized to be imposed on a "person" who is convicted of a "crime" or other specified offense:

UNDUPLICATED COSTS	AUTHORIZING LANGUAGE
Booking Center Fee, 42 Pa.C.S. § 1725.5	imposing a cost on a "person" who is "is convicted of a crime"
DNA Detection Fund, 44 Pa.C.S. § 2322	imposing a cost on "any person convicted" of "a felony sex offense or other specified offense," including any felony or certain misdemeanors

A "person" is singular; so with respect to these two statutes, Respondents have it right.[11] Nevertheless, Respondents duplicate six other costs that have the *same* language focused on the "person" or "individual" who is convicted of a crime:

[11] Similarly, the Offender Supervision Program cost is imposed on "an offender." As noted above, Respondents do not supplicate that cost, even when the sentencing order calls for costs on

DUPLICATED COSTS	AUTHORIZING LANGUAGE
Crime Victims Compensation, 18 P.S. § 11.1101(a)[12] **Victim Witness Service**, 18 P.S. § 11.1101(b)(2) (repealed)[13] **Crime Victim Compensation/Victim Witness Service Variable Amount**, 18 P.S. § 11.1101(a)[14] **Domestic Violence Compensation**, 71 P.S. § 611.13(b) **Firearms and Education Training Fund**, 61 Pa.C.S. § 6308(b)(1) **Substance Abuse Education**, 18 Pa.C.S. § 7508.1[15]	imposing a cost on a "person" or "individual" who is convicted of "a crime," or "any crime," or "a felony or misdemeanor" or "a violation" of certain offenses.

more than one count in the case. Prior to Act 77 of 2022, this cost appeared twice on the docket because it was split 50/50 between two separate funds. Thus it properly appeared twice on the docket sheet—but if it appeared four or more times, it was unlawfully duplicated. *See Sherwood*, 268 A.3d at 553 ("Because the monthly fee is statutorily authorized to be split evenly between the county fund and the state fund, the 'two' OSP fees . . . were, therefore, properly assessed."). Act 77 of 2022 eliminated the split of the recipient of the costs.

[12] In the *Sherwood* case, this Court directly addressed whether certain costs can be imposed more than once in the context of a situation where "a defendant pleads guilty or is convicted in **separate criminal cases**" (with separate docket numbers) when "sentenced on the same day by the same judge." *Sherwood*, 268 A.3d at 553 (quoting *Commonwealth v. Klingensmith*, 1611 C.D. 2016, 2017 WL 1382225 (Pa. Cmwlth. Ct. April 17, 2017)) (emphasis in original). In those circumstances, the Crime Victim Compensation and Victim Witness Service costs were appropriately imposed more than once. Yet as that language notes, the Court carefully drew a distinction when the sentencing involved separate criminal cases. Here, all of the costs challenged are, per the Class definition, challenged in the context of a *single* criminal case, circumstances that *Sherwood* and *Klingensmith* forecast as authorizing individual costs to be imposed only once.

[13] Act 77 of 2022 eliminated the Victim Witness Service cost eliminated, and all costs imposed in 18 P.S. § 11.1101 instead go to the Crime Victim Compensation fund, rather than being split.

[14] This is a cost that the judicial district imposes above and beyond the minimum dollar floor set forth by the Crime Victim Compensation and Victim Witness Service costs. *See* 44 Pa.B. 2638 (2014) and 53 Pa.B. 4971 (2023) (Montgomery County orders of the President Judge increasing amount from statutory base of $60 to $100). It properly appears on a docket sheet twice because the Variable Amount is split between those two funds, in the same way that OSP appears twice because it is split between two funds. When it appears *more than twice* on a docket sheet, it has been imposed unlawfully. Now that the Victim Witness Service cost has been eliminated by Act 77 of 2022, the funds are instead split with a local victim services fund. 18 P.S. § 1101(b)(4).

[15] The Substance Abuse Education cost should appear twice on a docket sheet, like OSP probation supervision costs, because it is split between two funds: "Of the amount collected, 50%

These six statutes use the term "*a person*" or "*an individual*"—singular—just like the Booking Cost and the DNA Detection Fund cost. Not one statute includes language directing that the costs should be imposed "per offense" or otherwise indicating a legislative intent to impose the cost multiple times per case. The plain language of these statutes authorizes their imposition only once per case.

Respondents' treatment of the Booking Center cost and the DNA Detection Fund cost reenforces this reading of the statutes. There is no meaningful distinction between the language in the Booking Center Fee and the DNA Detection Fund and the six other costs. Yet Respondents duplicate these six costs but not the Booking Center Fee and the DNA Detection Fund costs. Respondents' decision to treat these costs differently has no basis in the authorizing statutes. None of them may be imposed more than once per case.

d. Respondents Illegally Duplicate Three Costs Imposed for Conviction under Specific Statutes.

The final category of costs are those imposed by the legislature for a "violation" or "conviction." An example of that type of cost is the CAT/MCARE/General Fund cost, which Respondents never duplicate, even when the sentencing order calls for costs on more than one count in the case.

shall remain in that county to be used for substance abuse treatment or prevention programs and the remaining 50% shall be deposited into the Substance Abuse Education and Demand Reduction Fund established under this section." 18 Pa.C.S. § 7508.1(d). If this cost appears more than twice on a docket sheet in a single case, then it has been imposed unlawfully.

UNDUPLICATED COSTS	AUTHORIZING LANGUAGE
CAT/MCARE/General Fund, 75 Pa.C.S. § 6506(a)(1)	imposing a "surcharge . . . (1) Upon conviction for any violation" of certain traffic offenses

As with all of the other cost statutes, 75 Pa.C.S. § 6506 has no language stating that the cost is to be assessed "per offense" or multiple times in a single case. So the CAT/MCARE/General Fund cost is properly imposed only once per case by Respondents.

Yet, Respondents duplicate three other costs that are authorized by statutes with language just like 75 Pa.C.S. § 6506. Those costs are:

DUPLICATED COSTS	AUTHORIZING LANGUAGE
Commonwealth Cost, 42 Pa.C.S. § 3571(c)(2) **Emergency Medical Services**,75 Pa.C.S. § 3121 **PA Transportation Trust Surcharge**,75 Pa.C.S. § 6506(a)(2)-(7)	imposing a cost where there is a "conviction," or a "violation" of a type or a statute.

None of these statutes direct the assessment of their costs and surcharges multiple times in a case. They should be construed and applied in the same way that Respondents construe and apply 75 Pa.C.S. § 6506(a)(1): to impose each cost once per case. The absurdity of any other approach is illustrated by the fact that Respondents choose to duplicate the PA Transportation Trust Surcharge cost but not the CAT/MCARE/General Fund cost, despite the fact that both costs arise from *the same*

statute with the same language (the only difference being the predicate offenses that trigger each).[16]

In sum, none of the nineteen statutes at issue permit the duplication of costs, yet Respondents have decided to impose these costs multiple times in the same case. The duplicated costs are being imposed in derogation of statutory authority and are, therefore, *ultra vires* and void *ab initio*. *Coder*, 415 A.2d at 410.

e. If Any of These Statutes are Ambiguous, the Rules of Statutory Construction Require a Reading That Permits the Imposition of Each Cost Only Once.

None of the statutes authorizing the costs set forth above is ambiguous. None states that any cost should be imposed more than once in a single case, or should be imposed per charge, or should be imposed per count. But to the extent that this Court discerns any ambiguity on this point, settled rules of statutory construction compel the conclusion that each cost can only be imposed once per case. These are penal statutes and any ambiguity must be resolved in favor of the criminal defendants upon whom the costs have been imposed.

This Court has already explained that "costs imposed in the context of sentencing in criminal cases are penal," meaning that "where there is any ambiguity within a statute that authorizes the imposition of costs upon a guilty defendant, that statute must be construed narrowly and in the defendant's favor." *McFalls*, 2021 WL 3700604 at *12; *see also Commonwealth v. Garzone*, 34 A.3d 67, 75 (Pa. 2012) (statutes

[16] 75 Pa.C.S. § 6506(b) explains that a conviction of section (a)(1) results in the funds being put in the CAT/MCARE/General Fund, while a conviction for (a)(2), (3), (4), (5), (6) and (7) is deposited in the Public Transportation Trust Fund.

that authorize court costs in criminal cases are penal in nature for purposes of applying the rules of construction); *Fordyce v. Clerk of Courts*, 869 A.2d 1049, 1053 (Pa. Cmwlth. Ct. 2005) ("statutory provisions governing the imposition of the costs of prosecution must be strictly construed"). When statutes are "strictly construed" because they are penal, then "if an ambiguity exists in the verbiage of a penal statute, such language should be interpreted in the light most favorable to the accused," and "where doubt exists concerning the proper scope of a penal statute, it is the accused who should receive the benefit of such doubt." *Commonwealth v. Brown*, 981 A.2d 893, 898 (Pa. 2009).

To be ambiguous a statute must be subject to "at least two reasonable interpretations of the text." *A.S. v. Pennsylvania State Police*, 143 A.3d 896, 905 (Pa. 2016). For each type of statutory language (other than costs authorized for the "initiation" of a proceeding), there is a cost that Respondents do not duplicate, even when the sentencing order calls for costs on more than one count. Therefore, as to each type of statutory language at issue, Respondents' own actions have shown that at least one reasonable interpretation of the operative language is that the statute only permits the imposition of such costs once per case, even when the sentencing order calls for costs on more than one count.[17]

[17] For the statutes that authorize costs per "proceeding" or per "case," Respondents' decision not to duplicate the Clerk of Courts Processing Fee and the Crime Lab Fee when the sentencing order directs costs on more than one count, demonstrates that it is reasonable to interpret such statutes as imposing the cost only once per case. For the statutes that authorize costs on a "person" or "an individual" who is convicted, Respondents' decision not to duplicate the Booking Center cost and the DNA Detection Fund cost when the sentencing order directs costs on more than one count demonstrates that it is reasonable to interpret such statutes as imposing the cost only once per case. And for the statutes that authorize costs for a "violation" or a "conviction," Respondents' decision

So long as one reasonable reading of a statute is that the costs can only be imposed once, that statute must be construed narrowly and in the defendant's favor. *McFalls*, 2021 WL 3700604 at *12.

f. Respondents Can Comply with a Sentencing Order that Directs "Costs" on more than One Count without Violating the Law.

There is no reason for Respondents to duplicate *any* cost, even when a sentencing order calls for costs on more than one count. The legal way to effectuate such a sentencing order is to impose all of the costs that apply to the offenses identified by the sentencing order without duplicating any of them.

Many of the twenty-five costs routinely assessed in the 38th Judicial District apply only to specific offenses or categories of offenses. For example, the Emergency Medical Services (EMS) cost imposed by 75 Pa.C.S. § 3121 only applies to traffic violations. And the Substance Abuse Education cost imposed by 18 Pa.C.S. § 7508.1 only applies to violations of the Controlled Substance, Drug, Device and Cosmetic Act and to driving under the influence. If the lead count in a case does not trigger the EMS or the Substance Abuse Education cost but the second count in the case does trigger one of those costs, then the Clerk of Courts would need to assess costs on both counts to capture all of the costs applicable to both offenses. Thus, when the sentencing order calls for costs on more than one count, the lawful way to comply

not to duplicate the CAT/MCARE/General Fund cost when the sentencing order directs costs on more than one count demonstrates that it is reasonable to interpret such statutes as imposing the cost only once per case.

with that order is to impose all applicable counts on the lead count and only unique costs on the other counts.

An example highlights what Respondents should be doing. CP-46-CR-0000649-2023 is one of many cases where a defendant is convicted of multiple counts but the court did not impose costs on multiple counts. *See* Christy Decl. at ¶ 12 and Exhibit 5. In that case, the docket shows that the defendant's lead offense was a Title 18 retail theft offense, and the defendant also was convicted of a Title 35 drug possession offense. The Title 35 offense would normally incur a Substance Abuse Education cost. Because there was no court order to impose counts on anything other than the lead count, Respondents did not a Substance Abuse Education cost for the possession offense. Thus, the defendant did not pay the costs associated with the possession conviction, even though the defendant was convicted of drug possession.

Respondents thus have a legal way to effectuate a sentencing order that calls for costs on more than one count. Instead of imposing *duplicate* costs, Respondents need only impose the *unique* costs that arise from the offenses named in the second (or third, or fourth) count without duplicating the costs already imposed. That process would capture all costs that apply to each of the counts identified in the sentencing order without duplicating any costs and violating the statutes that authorize those costs.

Respondents have shown that they can adjust their practices to comply with the law. Prior to 2018, Respondents unlawfully imposed costs on counts that were withdrawn via a nolle prosequi as part of a plea deal. Following a letter from the

ACLU of Pennsylvania informing them that this was unlawful—the same letter that warned Respondents that duplicating costs is also unlawful—Respondents ceased the practice. Jenkins-Phongphachone Dep. 64:12-19. Now, Respondents will not impose costs on those that have been "nolle prossed," even if the sentencing order calls for the defendant to pay costs on the nolle prossed counts. Joint Stipulation ¶ 27; Jenkins-Phongphachone Dep. at 65:2-6.

With respect to the duplicated costs, as is set forth above, Respondents do not have to disregard court orders. Instead, they only need to apply sentencing orders in a lawful way.

2. Respondents' Imposition of Duplicative Costs Is Also Unlawful because Pennsylvania Common Law Prohibits Imposing Costs on Different Counts of a Single Criminal Complaint.

Not only is there no statutory basis for the imposition of duplicate costs, but duplication violates a longstanding prohibition against duplicate costs in Pennsylvania law.

More than a century ago, the Pennsylvania legislature expressed its concern about prosecutors breaking out related criminal charges into multiple cases so as to generate multiple sets of court costs from a single defendant. The legislature acted to ensure that each defendant pay only one set of court costs in each prosecution by

passing Act 17 of March 10, 1905, P.L. 35, which was codified at 19 P.S. § 1294. Act 17 remains binding.[18]

Act 17: (1) explained the problem identified by the legislature; (2) forbade prosecutors from using multiple criminal complaints or indictments where it was "legally" possible to use one; (3) provided that if a prosecutor pursued multiple indictments in contravention of the act, the defendant would still only be liable for a single set of costs; and (4) charged "all public officials" involved in the assessment and collection of criminal court costs with protecting defendants against the multiplication of court costs:

> Whereas, certain practices in the institution, prosecution, and taxation of costs in criminal cases have arisen, which may not be contrary to the letter of the existing laws, yet do offend against their spirit, and impose unjust burdens upon the taxpayers of this commonwealth, therefore:
>
> Section 1. From and after the passage of this act, it shall be unlawful for any person, or officer of any township, ward, borough, city,

---

[18] Act 17 was codified at 19 P.S. § 1294, which was repealed by Act 53 of 1978, the Judiciary Act Repealer Act ("JARA"), along with approximately 1,500 other statutes in part or full, but JARA included a savings clause stating that if there are no Supreme Court rules in effect that govern the same topic as the repealed statute, "the practice and procedure provided in the repealed statute shall continue in full force and effect, as part of the common law of the Commonwealth, until such general rules are promulgated." 42 P.S. § 20003(b). Pennsylvania's appellate courts have repeatedly upheld and applied the savings clause of JARA and its preservation of prior law. *See, e.g.*, *Harnish v. Sch. Dist. of Philadelphia*, 732 A.2d 596, 598 n.1 (Pa. 1999); *Commonwealth v. Larsen*, 682 A.2d 783, 795 (Pa. Super. 1996); *Weaver v. Weaver*, 605 A.2d 410, 412 n.3 (Pa. Super. 1992).

The Superior Court issued a case shortly after the adoption of JARA stating that Section 1294 had been repealed, *see Commonwealth v. Gifford*, 450 A.2d 700, 701 (Pa. Super. 1982), but that ruling contained no analysis of JARA and predated *Harnish* and other authorities holding that the JARA savings clause preserved the prior law in the absence of superseding action by the legislature or the Supreme Court. More recently, the Superior Court relied on pre-*Gifford* case law to invalidate duplicate costs that resulted from the Commonwealth splitting related charges into two dockets, then trying the cases together. *See Brinson*, 2021 WL 4282677 at *5 (citing *Adams* and holding that when "both dockets involved in this case involve the same crimes . . . and the cases were consolidated and tried together, a single set of costs should have been imposed").

> or county, within this commonwealth, in instituting and prosecuting criminal cases, to duplicate any return, complaint, information, indictment, warrant, subpoena, or other writ against any person or persons charged with the commission of any criminal offense or offenses, committed at one and the same time or growing out of one and the same transaction, and when one return, one complaint, one information, one warrant, one subpoena, or one other writ can be legally made to serve and promote the administration of justice.
>
> Section 2. It shall be unlawful, in all criminal prosecutions hereinafter instituted to tax costs in and on more than one return, information, complaint, indictment, warrant, subpoena, or other writ, against the same defendant or defendants, where there has been a severance or duplication of two or more offenses which grew out of the same occurrence, or which might legally have been included in one complaint and in one indictment by the use of different counts.
>
> Section 3. It shall be the duty of all public officials charged with the duty of taxing and issuing certificates and warrants for the payment of, costs in criminal cases, to see that no costs are taxed and paid in violation of the provisions of the first and second sections of this act.

Act 17 of March 10, 1905, P.L. 35 (appended as Exhibit 15).

Through Act 17, the legislature implemented a policy to ensure that criminal defendants pay only a single set of costs when they are accused of multiple crimes that could be charged together. The legislature expressly condemned the prosecutorial dodge of splitting the charges into multiple cases to generate multiple sets of costs, finding that "offend[s] against [the] spirit [of] the law," and "impose[s] unjust burdens on the taxpayers of the Commonwealth." Act 17 of March 10, 1905, P.L. 35. Respondents' policy of imposing duplicate costs contravenes the legislature's express policy.

Pennsylvania's courts have repeatedly explained that "it is very evident that [Act 17's] purpose was to prevent a duplication of costs." *Commonwealth v. Smith*, 62

Pa. Super. 288, 290 (Pa. Super. Ct. 1916); *see also Commonwealth v. Kriesher*, 79 Pa. Super 428, 431 (Pa. Super. Ct. 1922) (explaining that "Section 65 of the Act of 1860 and the Act of 1905 were intended to prevent duplication of costs").[19] Since the passage of Act 17, courts have, time and again, enforced it by voiding costs assessed in two or more cases when those cases could have been brought as one.[20] For example, in *Commonwealth v. Dorsey*, 421 A.2d 777, 777 (Pa. Super. Ct. 1980), the Superior Court confronted a situation where the defendant was convicted of burglary, loitering and prowling, and possessing instruments of crime, in three separate cases—Nos. 1715, 1716, 1717 of 1975. Because the Superior Court concluded that the charges in each of those separate cases "arose out of the same occurrence or transaction . . . only one set of costs should have been assessed," even though the charges for which the defendant was convicted were spread across multiple separate dockets *Id.* at 778.

The most recent application of the Act 17 was in *Commonwealth. v. Brinson*, a case from Montgomery County only three years ago. There, the defendant faced two

---

[19] This Court has explained that although it is not bound by decisions from the Superior Court, older Superior Court decisions that predate the creation of the Commonwealth Court can be "particularly persuasive" when they relate to issues on which the courts share jurisdiction. *Lerch v. Unemployment Comp. Bd. of Review*, 180 A.3d 545, 550 (Pa. Cmwlth. Ct. 2018).

[20] *See Commonwealth v. Adams*, 421 A.2d 778, 779 (Pa. Super. Ct. 1980); *Brinson*, 2021 WL 4282677 at *5 (citing *Adams* and holding that when "both dockets involved in this case involve the same crimes . . . and the cases were consolidated and tried together, a single set of costs should have been imposed"); *Smith*, 62 Pa. Super. at 290; *Commonwealth v. Dorsey*, 421 A.2d 777, 778 (Pa. Super. Ct. 1980); *Commonwealth v. Keinard*, 50 Pa. D. & C. 181, 183 (Pa. Com. Pls. Montgomery Cty. 1944); *Commonwealth v. Potteiger*, 27 Pa. D. 781 (Pa. Com. Pls. Berks Cty. 1918). *See*, *e.g.*, *Commonwealth v. Mirabelli*, 43 Pa. D. & C.2d 554, 556 (Pa. Com. Pls. Carbon Cty. 1968); *Commonwealth v. Fineberg*, 22 PA. D. 17, 17-18 (Pa. Com. Pls. Blair Cty. 1912); *In re Wolf's License*, 16 Pa. D. 751, 752 (Pa. Com. Pls. Columbia Cty. 1906). Courts have even applied this rule to situations "when several prosecutions have been instituted against two or more joint defendants for the same crime or misdemeanor," as then "costs can be recovered in only one of them." *Commonwealth v. Shipley*, 18 Pa. D. 133, 136 (Pa. Com. Pls. Fayette Cty. 1908).

separate cases—with two separate docket numbers — that were consolidated. Without directly citing Act 17, the Superior Court relied on its Act 17 precedent and held that only "a single set of costs" was permissible. *Brinson*, 2021 WL 4282677 at *5 (citing *Adams*, 421 A.2d at 779). Notably, even the Montgomery County District Attorney, which represented the Commonwealth, agreed "that there should only be one set of costs per case, so any duplicative costs should be vacated." *Id.*

Respondents' actions here are far worse than those *Brinson,* which, after all, involved two separate cases. In this case, each Class member pleaded or was convicted of multiple counts in a *single* case. Despite that, Respondents assessed multiple sets of costs in a *single* case. This is entirely inconsistent with the legislature's attempt to stamp out duplicated costs in 1905. It would be absurd to read Act 17 to prohibit multiplying costs across related but separate cases, but allowing what Respondents have done here, which is to multiply the costs in a single criminal case. "[T]he General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." 1 Pa.C.S. § 1922(1). Here, the intent of Act 17 is clear: "to prevent a duplication of costs." *Smith*, 62 Pa. Super. at 290. Respondents are violating that legislative intent.

The Respondents' policies and practices of assessing the same costs multiple times in a single criminal case violate the law as articulated in Act 17. Respondents' duplication of costs in a single criminal proceeding is, for this additional reason, unlawful.

B. Respondents Impose Duplicative Costs in an Arbitrary and Irrational Matter and Thus Violate Petitioners' Right to Equal Protection of the Law.

Petitioners are also entitled to a declaration that Respondents have violated their constitutional right to equal protection of the laws by arbitrarily imposing some costs multiple times per case, while imposing other costs only once. The analysis above as to Petitioners' *ultra vires* claim also establishes Petitioners' equal protection claim. As Petitioners have demonstrated, Respondents' choices about which costs they duplicate and which costs they assess only once has no basis in the statutes that authorize those costs. Respondents' policy decision to assess costs with identical statutory language differently can have no rational basis.

This Court's prior opinion recites the standard applicable to Petitioners' Equal Protection claims:

> 'In analyzing [an] equal protection challenge to [a statute], we must first determine the appropriate level of judicial scrutiny to be applied.' *Zauflik v. Pennsbury Sch. Dist.*, 72 A.3d 773, 790 (Pa. Cmwlth. 2013) … '[I]f the classification does not involve either fundamental rights, suspect classes, or sensitive or important government interests, it will be upheld if there is any rational basis for the classification.' Petitioners do not dispute that rational basis is the proper level of scrutiny in this instance. Rather, they argue that Respondents randomly assess duplicative costs across criminal cases in the 38th Judicial District, in an arbitrary way that is not governed by any articulable standards. Therefore, Petitioners have stated equal protection claims that, even when apply a rational basis standard, are sufficient to survive past the preliminary objections stage.

McFalls, 2021 WL 3700604, at *11 (internal citations omitted). Petitioners have asserted equal protection violations under both the United States and Pennsylvania Constitutions.[21] The same standard applies to both claims. *Id.*

Although Equal Protection is often thought of as a prohibition on discrimination on the basis of membership in a group, it also protects against Respondents' singling out of Petitioners and Class members for arbitrary government action. *Downingtown Area Sch. Dist. v. Chester Cnty. Bd. of Assessment Appeals*, 913 A.2d 194, 201 (Pa. 2006) ("[I]t is well settled that the federal equal protection concept proscribing purposeful and/or systemic discrimination—again, the floor for Pennsylvania uniformity jurisprudence—pertains even to a class of one."); *see also Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *Uniontown Newspapers, Inc. v. Roberts*, 839 A.2d 185, 197-98 (Pa. 2003).

As demonstrated above, Respondents' choices about which costs are duplicated and which costs are assessed once has no basis in the statutes that authorize those costs. Petitioners and the other Class members have therefore been subjected to costs without any statutory authority or rational basis. Equal Protection demands that to the extent distinctions are made in imposing costs, those distinctions "must rest upon some ground of difference which justifies the classification and has a fair and substantial relationship to the object of the legislation." *Curtis v. Kline*, 666 A.2d 265, 268 (Pa. 1995); *see also Mixon v. Commonwealth*, 759 A.2d 442, 451 (Pa.

[21] The equal protection claim brought under state law, Count IV of the Petition for Review, is brought against all Respondents. That brought under federal law, Count V of the Petition for Review, is only brought against Respondents Carluccio, Kehs, and Schreiber.

Cmwlth. 2000) (voter registration status of individuals prior to incarceration could not be used to restrict post-incarceration franchise); *Haveman v. Bureau of Prof'l & Occupational Affairs*, 238 A.3d 567, 577 (Pa. Cmwlth. 2020) ("good moral character" requirement of cosmetology licensing violated equal protection rights of Pennsylvania Constitution where such requirement lacking for barber licenses).

In other words, Respondents' policy choices about which costs to impose must have a rational basis. Plainly, they do not. Respondents duplicate ten costs that the legislature specifically stated apply per "case" or "proceeding," while not duplicating other costs that have the same statutory language. Respondents similarly accord different treatment to costs that the legislature called for imposing on a "person" who pleads guilty or is convicted—duplicating some, but not others.

Respondents have no justification whatsoever for imposing costs in this arbitrary manner. These are not random errors—instead, Respondents have a policy and practice of duplicating costs in cases involving nineteen of twenty-five common costs when the sentencing judge orders "costs" on more than one count. It is Respondents, not the sentencing judge, who have decided that they will duplicate costs—but only some costs—in these cases, rather than simply applying the costs specifically triggered by each count identified by the sentencing judge. Moreover, "all of the disposition clerks in the Clerk of Courts office have been trained in a uniform way regarding how to interpret Disposition Sheets and assess the costs that have been imposed upon defendants." Findings of Fact ¶ 14.

None of Respondents' distinctions between costs they impose once and costs they impose more than once has a statutory basis. And Respondents have offered no

other justification, let alone a rational basis, for the distinctions they make.[22] Respondents' decision to duplicate some costs, but not others in an individual case is arbitrary.

C. Respondents' Imposition of Costs Without Notice and an Opportunity to Challenge Them Violates Procedural Due Process Guarantees and those Costs are Void *Ab Initio*.[23]

Petitioners and the Class Members are also entitled to a declaration that Respondents have violated their constitutional due process rights by imposing these illegal costs without providing notice or an opportunity to challenge them. This fundamental violation of due process renders the imposition of those costs void *ab initio*.

There is no factual dispute concerning Petitioners' procedural due process claims. Respondents admit that:

- Criminal court defendants in the 38th Judicial District do not receive notice at sentencing, before costs are assessed, of the costs that will be imposed on them.
- It is the Clerk of Courts that assesses court costs, up to two weeks after sentencing.
- Criminal court defendants in the 38th Judicial District do not receive any itemization from the Clerk of Courts, after costs are assessed in the case,

---

[22] To the extent that Respondents ground their choices in whether a cost appears on the "Offense-Related" screen or on the "Non-Offense-Related" screen of the CPCMS program, that is not a rational basis for their disparate treatment of costs with identical statutory authorization.

[23] The due process claim brought under state law, Count II of the Petition, are brought against all Respondents. That brought under federal law, Count III of the Petition, is only brought against Respondents Carluccio, Kehs, and Schreiber.

of the costs imposed on them. At best, defendants who are not incarcerated will receive an "Introduction Letter" from the Clerk of Courts with the total that they owe in costs, fines, and restitution about a month after costs are assessed—and defendants who are incarcerated do not even receive that information from Respondents.

- After costs are assessed by the Clerk of Courts, they appear as a list on the public docket sheet for the case, but that list does not reveal which costs relate to which counts in the case.
- A defendant could request a bill of costs, which would be provided, but defendants are not given any document that explains that option.
- Neither the Introduction Letter that some defendants receive nor any other communication from Respondents tells defendants how they can challenge the legality of the costs imposed on them.
- None of the Petitioners nor other Class members have ever received a statement from Respondents setting forth the costs assessed in their cases.

Thus, Respondents do not provide notice of the costs to be assessed either pre-deprivation (before costs are imposed) or post-deprivation (after costs are imposed. Nor are defendants proved an opportunity to challenge the costs that Respondents impose.

The assessment of court costs is plainly a deprivation of Petitioners' property and triggers the requirements of due process. *See Nelson v. Colorado*, 581 U.S. 128, 136 (2017); *Buck v. Beard*, 879 A.2d 157, 160 (Pa. 2005). The irreducible minimum of due

process is "notice and an opportunity to be heard." *McFalls*, 2021 WL 3700604 at *12 (quoting *Bundy v. Wetzel*, 184 A.3d 551, 557 (Pa. 2018)). *See also Pa. Bankers Ass'n v. Pa. Dep't of Banking*, 956 A.2d 956, 965 (Pa. 2008) (When protected property interests are at stake, the state must provide notice and an opportunity to be heard, before depriving an individual of their property.); *In re Y.W.-B.*, 265 A.3d 602, 628 (Pa. 2021) (parents in dependency proceedings "are entitled, at a minimum, to the basic tenets of due process, which include, fundamentally, the key principles underpinning due process — notice and an opportunity to be heard."); *In re Fortieth Statewide Investigating Grand Jury*, 190 A.3d 560, 578 (Pa. 2018) ("Due process is measured in terms of a meaningful opportunity to be heard, encompassing participation at a time when it will be meaningful.").

As our Supreme Court has recently emphasized, the question of what process the government owes before taking a person's property is independent from the question whether the property owner would prevail in a challenge to the deprivation. *Washington v. PA Dep't of Corr.*, 306 A.3d 263, 296 (Pa. 2023) ("'[T]he controlling inquiry in procedural due process claims is not whether some form of concrete relief will manifest at the end of the process that the Constitution requires; rather … 'whether the state is in a position to provide for pre-deprivation process.'") (quoting *Bundy*, 184 A.3d at 557).

The "default" rule is that the government should provide notice and a hearing *before* depriving someone of their property "regardless of 'the adequacy of a post[-]deprivation tort remedy to compensate for the taking.'" *Montañez v. Secretary Pennsylvania Department of Corrections*, 773 F.3d 472, 483 (3d Cir. 2014) (quoting *Zinermon*

v. Burch, 494 U.S. 113, 132 (1990)). The courts have recognized that there are situations in which pre-deprivation process is not feasible, or where pre-deprivation hearings are "impractical or would be meaningless." *Montañez.* at 483-84. *See Washington,* 306 A.3d at 288. But even when the "default" of a pre-deprivation hearing is not afforded, the right to procedural due process remains "absolute." *Washington*, 306 A.3d at 295.

There is no reason to believe that adequate due process is either impractical or meaningless. As in *Washington*, "the potential for errors is not negligible, much less zero." And even if there were compelling reasons to allow variance from the "default" of pre-deprivation process, the basic requirement of notice remains.

> [W]hen pre-deprivation process could be effective in preventing errors, that process is required. When deductions from inmate accounts involve "routine matters of accounting" based on fixed fees or where temporal exigencies require immediate action, pre-deprivation hearings are not required**. In either event, however, inmates are entitled to some pre-deprivation notice of the prison's deduction policy.**
> *Montañez*, 773 F.3d at 484 (internal citations omitted).

Washington, 306 A.3d at 288.

It is well established that a deprivation of property without due process is void *ab intio. See. e.g. In re Sale of Real Est. by Lackawanna Cnty. Tax Claim Bureau*, 255 A.3d 619, 631–32 (Pa. Cmwlth. Ct. 2021) (holding that tax sale concluded without proper notice was void); *In re Sale of Tax Delinq. Prop. on Oct. 19, 2020*, No. 49 C.D. 2021, 2024 WL 39928, at *6 (Pa. Cmwlth. Ct. Jan. 4, 2024) (same); *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988) (judgment entered without notice and an opportunity to

contest the debt void, regardless whether the defendant had a good defense to the action).

Our courts have, for decades, presumed that criminal defendants are provided a bill of costs and an opportunity to contest costs in connection with their sentencing. For instance, in *Buck v. Beard*, the Supreme Court held that deductions from inmate accounts to pay court costs satisfied due process because the inmates received "notice and an opportunity to be heard at [their] sentencing hearing[s]" on what they owe. 879 A.2d at 160. *See also Coder*, 415 A.2d at 410 (explaining that a defendant is entitled to a bill of costs on which she can file objections); *Commonwealth v. Allshouse*, 924 A.2d 1215 (Pa. 2007), *vacated sub nom Allshouse v. Pennsylvania*, 562 U.S. 1267 (2011)[24] (it is "well-settled" that a defendant must receive a bill of costs); *Gill*, 432 A.2d at 1004 (noting that defendants received bills of costs from which they filed objections). *See Commonwealth v. Hower*, 406 A.2d 754, 755 (Pa. Super. Ct. 1979) (describing the bill of costs presented by the clerk of courts, from which the defendant successfully had several items stricken).

Respondents, however, do not provide the bill of costs required by law, nor do they provide any notice of the costs assessed to defendants, or any opportunity to object to those costs. A complete lack of notice before a deprivation can never satisfy due process. *Commonwealth v. All That Certain Lot*, 104 A.3d 411, 427 n.17 (Pa. 2014).

[24] The judgment in this case was vacated by *Allshouse v. Pennsylvania*, 562 U.S. 1267 (2011), because of the Supreme Court's decision in *Michigan v. Bryant*, 562 U.S. 355 (2011), concerning the Confrontation Clause. This subsequent history does not disturb the separate holding on costs.

"Certainly, here, no notice is not 'reasonable' notice." *In re Change of Location & Lines of Highway Known as State Highway Route 222, in Stonycreek Twp., Cambria Cty.*, 161 A.2d 380, 384 (Pa. 1960).

Respondents have argued that the Class members could have asked the Clerk of Courts for an itemization of the costs assessed in their cases. That argument turns the constitutional notice requirement on its head. Due process requires *the government* to provide notice that a person will be or has been deprived of property and an opportunity to contest the deprivation; it is not satisfied if the government begrudgingly produces the same information only when someone requests it.

Judge McCullough rejected a similar argument in her dissent in *Beavers v. Pennsylvania Department of Corrections* (which the *Washington* majority cited extensively with approval). Responding to the argument that the petitioner did not need notice of the increased rate of deductions from his inmate account because he was already aware of the change, Judge McCollough wrote:

> [T]his rationale flips the due process burden on its head. It is the Department's obligation to provide notice of a property deprivation; it is not an inmate's burden to invite the Department to meet its *Bundy* obligations. *See Mathews*, 424 U.S. at 348-49 ("The essence of due process is the requirement that 'a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.'") (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)); *see also Commonwealth v. Hamlett*, 234 A.3d 486, 515 (Pa. 2020) (Wecht, J., dissenting) ("[D]ue process jurisprudence has never placed the onus upon the individual subject to the deprivation to anticipate such deprivation and launch a prophylactic challenge thereto. To the contrary, it is inherent in the concept of 'notice' that the individual is to be provided with notice of adverse action; he is not expected to divine and preempt it.") (emphasis in original) (citing *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950) ("An

> elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.")).

Beavers v. Pennsylvania Dep't of Corr., 271 A.3d 535 (Pa. Cmwlth. Ct. 2021) (McCullough, J., dissenting), *abrogated by Washington*, 306 A.3d at 294-95.

Respondents have also argued that the Class members could have determined at least the names and amounts of the costs imposed by checking the public docket sheets after they were sentenced. But Respondents do not even bother to direct criminal court defendants to the public docket sheets available online. And of course, even that would not help a defendant who is incarcerated or without Internet access for other reasons.[25] Moreover, in other contexts, our courts have rejected the argument that due process is satisfied by a notation on the public docket. For example, in *Commonwealth v. Hess*, 810 A.2d 1249, 1253–54 (Pa. 2002), the Supreme Court ruled that a defendant did not waive his appellate rights for failure to file a Pa.R.A.P. 1925 statement when the requirement to do so appeared only on the docket sheet and he was not served with an order telling him to do so. In *Commonwealth v. Parks*, 768 A.2d 1168, 1171 (Pa. Super. Ct. 2001), the Superior Court held that the appellant's "fundamental due process right to notice of the date of his rescheduled trial de novo was abridged, since it is quite clear that Appellant was not provided with a copy of the rescheduling order," even though the relevant order appeared on the docket sheet. *Accord Commonwealth v. Baker*, 690 A.2d 164, 165 (Pa. 1997) (declining to

[25] And the electronic dockets did not, for instance, reveal the impropriety at issue in this case, since the electronic docket sheets do not correlate any specific costs with specific counts.

reach due process claim after finding that the clerk of courts unlawfully failed to provide notice of a change of hearing date). The availability of a list of costs on the public docket sheet at some indeterminate time after sentencing does not substitute for constitutionally mandated notice.

Respondents have also argued that the Class members may have heard their sentencings judges impose "costs," and were therefore on notice, or that they were offered a copy of their sentencing order at the time of their sentencing. Of course, neither the judge's utterance of the word "costs" nor a sentencing order with cryptic markings concerning costs tells a criminal court defendant which costs will be assessed in their case, or how many times each will be assessed. In fact, as the trial court wrote in *Brinson*, trial judges in the 38th Judicial District are themselves apparently unaware of which costs are being imposed or why. *Brinson*, 2021 WL 4282677 Appendix at 5. The costs are only imposed by the Clerk of Courts well *after* sentencing.

In the absence of genuine notice, no other element of due process can be constitutionally sufficient. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."); *see also Kowenhoven v. County of Allegheny*, 901 A.2d 1003, 1009 (2006); *Fiore v. Bd. of Fin. & Revenue*, 633 A.2d 1111, 1115 (1993).

In addition to the failure to provide even basic notice, Respondents compound the due process violation by failing to provide criminal court defendants with any means to challenge the costs in their cases. Costs may not be assessed until more than

two weeks after sentencing, rendering any use of post-sentencing procedures to challenge costs untimely. *See McFalls*, 2021 WL 3700604 at *10 ("Additionally, since Petitioners typically receive notice well after the sentencing appeal deadlines, their requests for relief from the sentencing judges would most likely be denied as untimely."); Pa.R.Crim.P. 720(A)(1) (requiring that post-sentencing motions be filed within 10 days of sentencing).

The Clerk of Courts' acknowledgement that it can provide an "itemized list of assessments" if requested is important for a different reason. Due process requires that the question of what process is due include consideration of the burdens additional procedural safeguards would impose on the government. *See, e.g., Washington*, 306 A.3d at 285. The Clerk of Courts' admission demonstrates that that there is no technical barrier to providing this information; it is just a choice made by the Clerk of Courts to not provide it.

Respondents have offered no justification for their failure to provide any notice or any opportunity to challenge the costs they impose. If there are reasons why Respondents cannot provide pre-deprivation notice and an opportunity to contest costs, that can be addressed during the remedy phase of this litigation. But there can be no question that Petitioners are entitled to some measure of due process with regard to the imposition of costs. That "right to relief is clear as a matter of law" and justifies a declaration that Respondents' failure to provide any process violates Petitioners' rights. *See Flagg*, 146 A.3d at 305.

VII. CONCLUSION

Wherefore, Petitioners respectfully request that this Court issue a declaratory judgment that Respondents have imposed duplicated costs in Petitioners' criminal cases in a manner that is ultra vires and void, that Respondents have violated Petitioners' right to equal protection under the U.S. and Pennsylvania constitutions by imposing duplicated costs in their criminal cases without a rational basis, and that Respondents have violated Petitioners' right to procedural due process under the U.S. and Pennsylvania constitutions by failing to provide notice of Respondents of the costs they have imposed.

Respectfully submitted,

Date: March 1, 2024

/s/*Mary Catherine Roper*

Andrew C. Christy
ACLU OF PENNSYLVANIA
P.O. Box 60173
Philadelphia, PA 19102
Tel: (215) 592-1513 x138
Fax: (215) 592-1343
achristy@aclupa.org

Mary Catherine Roper
John J. Grogan
Kevin Trainer
David A. Nagdeman
LANGER, GROGAN & DIVER P.C.
1717 Arch St., Ste 4020
Philadelphia, PA 19103
Tel: (215) 320-5660
mroper@langergrogan.com
jgrogan@langergrogan.com

Seth Kreimer
3501 Sansom Street
Philadelphia, PA 19104
(215) 898-7447
skreimer@law.upenn.edu

Counsel for the Petitioners

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Mary Catherine Roper
Mary Catherine Roper