**IN THE SUPREME COURT OF PENNSYLVANIA**
**EASTERN DISTRICT**

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**No. 27 EAP 2021**

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**COMMONWEALTH OF PENNSYLVANIA,**
**Appellee,**

**v.**

**ALEXIS LOPEZ,**
**Appellant.**

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# BRIEF OF *AMICI CURIAE* PUBLIC DEFENDER ASSOCIATION OF PENNSYLVANIA AND PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT

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Appeal from the Order and Opinion of the Superior Court dated March 23, 2021, in No. 1313 EDA 2018, affirming the April 27, 2018 Judgment of Sentence issued by the Court of Common Pleas of Philadelphia Criminal Division in No. CP-51-CR-0004377-2015

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## STATEMENT OF INTEREST OF *AMICI CURIAE*

The **Public Defender Association of Pennsylvania** (the "Association" or "PDAP") is a Pennsylvania non-profit corporation whose membership is comprised of the approximate six-hundred (600) public defenders employed full- or part- time in the sixty-seven (67) county public defender offices of this Commonwealth. The Association strives to ensure a high standard of representation in courts throughout the Commonwealth and works hard to ensure that the constitutional and legal rights of the citizens of the Commonwealth are respected. The Association was incorporated in 1971.

Public defender clients are, by definition, indigent. They are thus overwhelmingly affected when costs are imposed by sentencing courts without regard for their poverty. As public defenders, our members have great interest in the outcome of this case. The Association has previously participated in numerous cases before this Court.

The **Pennsylvania Association of Criminal Defense Lawyers** ("PACDL") is a professional association of attorneys admitted to practice before the courts of Pennsylvania and actively engaged in

providing criminal defense representation. Founded in 1988, PACDL is the recognized Pennsylvania affiliate of the National Association of Criminal Defense Lawyers. As *amicus curiae*, PACDL presents the perspective of experienced criminal defense attorneys who seek to protect and ensure by rule of law those individual rights guaranteed by the Pennsylvania and United States Constitutions and who work to achieve justice and dignity for defendants. PACDL membership currently includes more than 950 private criminal defense practitioners and public defenders throughout the Commonwealth.

PACDL and its members have a direct interest in the outcome of this case, as PACDL's mission includes ensuring the fairness of the criminal justice system in Pennsylvania and advocating for the rights of persons charged with, and those convicted of and imprisoned for, crimes, including the due process and other rights at issue in this case.[1]

[1] Pursuant to Pa. R.A.P. 531(b)(2), Amici Curiae state that no person or entity other than PDAP, PACDL, and their counsel, paid for or authored this amicus brief in whole or in part.

## SUMMARY OF ARGUMENT

Currently, the practices of Pennsylvania's sentencing courts diverge greatly when it comes to imposing court costs on those who patently cannot afford them. Too frequently, sentencing courts automatically assign court costs to every defendant, regardless of their circumstance. As seen in this case, some courts deny requests to even hear evidence on a defendant's inability to pay costs before imposing hundreds of dollars in court debt. In doing so, these courts either ignore or misconstrue Pennsylvania Rule of Criminal Procedure 706(C).

On its face, Rule 706(C) requires courts to consider the burden of costs on a defendant when determining the amount of costs and manner in which they are to be paid. Courts do this at sentencing. When Rule 706(C) is read in *in pari materia* with statutory provisions authorizing the imposition of costs, Section 9721(c.1) and 9728(b.2) of Act 96 of 2010, it is also clear that the legislature recognized judicial authority to waive costs under a Rule 706(C) analysis.

When courts impose costs at sentencing without consideration of a person's finances it is the poor and most marginalized who are disproportionately affected. These defendants are placed at dire risk of

being punished for their poverty when the consequences of the court's actions at sentencing come to fruition later in the process, by which time access to counsel is often not ensured.

As defense attorneys, we frequently engage with prosecutors and judges to ask them to modify or waive costs for clients who may be any combination of homeless, disabled, unemployed, and reliant on subsistence benefits. We witness the negative effect on our clients and their families when our cost-related arguments and motions are dismissed and declined at the oft-unchecked discretion of decision-makers who fail to implement the mandate of Rule 706(C).

Court costs ranging from hundreds to thousands of dollars can be a substantial burden for any defendant. To the poor, or those on the cusp of poverty, insurmountable court costs are crushing, to both the wallet and the spirit.

## ARGUMENT

### I. Untenable costs harm people.

Appellant Alexis Lopez is not an outlier. Public defenders represent those who lack sufficient funds to defend themselves. Day after day, in county after county, we watch as courts impose "costs of prosecution" on clients who cannot pay the cost of their own defense.

By way of illustration, a public defender in Delaware County recently came across a bill of costs where the court imposed an obligation to pay $4,191.25 against a homeless client. That same week, the same attorney encountered the case of an elderly man with dementia who circulates in and out of jail because he has no home and no assisted living situation. He pled guilty to trespass when he continued to visit a Wawa after being told not to return. The "costs" imposed by the court for that man amounted to $1,978.95. Nothing about those assessments indicate that any decision-maker paused to consider the ability of either homeless person to pay such court costs. Those two examples, picked from just one public defender caseload from one recent week, reflect broader practices found across the state.

Throughout the Commonwealth, defense attorneys can attest that impoverished persons with mental disabilities are charged hundreds of dollars for their own supervision, in addition to a slew of charges such as the cost of psychological and competency evaluations. Homeless individuals are billed for things like bench warrant administration and firearm education. Unemployed parents reliant on food stamps can be saddled with thousands of dollars in court debt to pay "costs" for the publicly-funded District Attorney, court administration, probation, and sheriff. Hundreds to thousands of dollars in court costs are similarly imposed on under-employed individuals who struggle to find just enough transportation money to get to their probation appointments. People reentering the community after incarceration get stuck paying for costs ancillary to their arrest while their only source of income is selling their own plasma just to get by. The disabled and poor use state or federal subsistence benefits to make requisite monthly payments to the court, instead of purchasing basic living necessities. They do this because they are desperate to comply with what the system is demanding of them.

Even in cases where it is readily apparent to all parties that an individual is homeless, unemployed, and unable to meet their own survival needs, prosecutors often seek costs and courts often impose them, notwithstanding the requirements of Rule 706(C). That rule commands that the sentencing "court, in determining *the amount* and method of payment of ... costs *shall*, insofar as is just and practicable, consider *the burden upon the defendant by reason of the defendant's financial means* …." (emphasis added). The record shows that, in the present case and many others, the Rule's command is being routinely neglected. At best, many courts proceed only under Rule 706(B), which permits (but does not require or even prefer) that a payment schedule be established where a defendant is unable to pay costs in full. As the present case illustrates, the stronger and more appropriate remedy authorized by Rule 706(C) – to impose only an affordable amount in the first place – is too often overlooked.

Indeed, according to data compiled by the ACLU, the median assessment of court debt assigned to public defender clients in Delaware County is just one percent (1%) lower than that assigned to

those who can afford private attorneys—$1,847 versus 1,855 in 2013.[2] Yet the income gap between the bulk of public defender clients and the bulk of private counsel clients is substantial. The explanation for this narrow margin is that courts are not distinguishing poor from rich when imposing costs. Clear instructions from this Court explicating and enforcing the Rule are desperately needed.

The failure to take a defendant's ability to pay into account when costs are first determined is damaging. In spite of the law aimed at preventing it, those who are too poor to pay court costs can end up in jail. Rule of Criminal Procedure 706(A) prohibits incarceration for failure to pay absent demonstration of a *willful* failure to pay. The reality on the ground, however, is that often probation officers will allege a violation of probation conditions, or seek to extend a defendant's probationary term by other means, for failure to pay costs where there is little or no indication of willfulness. Sometimes the result is a probation detainer based, in whole or part, on an alleged

[2] See, Jeffrey Ward, et al., "Imposition and Collection of Fines, Costs, and Restitution in Pennsylvania Criminal Courts: Research in Brief," ACLU of Pennsylvania (Dec. 18, 2020), at 9, available at https://aclupa.org/en/publications/imposition-and-collection-fines-costs-and-restitution-pennsylvania-criminal-courts

failure to pay court costs. Individuals are then taken into custody and can sit in jail on account of probation detainers for days or even weeks before anyone reviews the allegations of non-payment to determine if there is a valid basis for detention. Whenever this occurs, the setback for our clients is devastating.

Jail is not the only harmful liability hanging over the heads of impoverished persons with court debt. When costs are first determined (at conviction), a bill of costs is prepared. See Commonwealth v. Coder, 415 A.2d 406, 410 (Pa. 1980) (explaining that a defendant is entitled to a bill of costs). Within what is often a very short timeframe after that, a civil judgment is entered on the record. That civil judgment remains until paid or forgiven. 42 Pa.C.S. 9728(a). Civil judgments for unpaid costs keep our clients and their families in a perpetual economic underclass and prevent them from starting over and getting back on their feet, affecting credit and more.

Court debt is also often deducted automatically from an incarcerated person's commissary fund each month. See 42 Pa.C.S. §

9728(b)(5).[3] This can mean that when family members send a small amount of money for their loved one to buy hygiene products, a portion of that money is often taken for the courts. That family member may also be struggling with a severe dip in their own income because one household earner or child-support provider is in jail. The best way to prevent any of these outcomes is to address costs at the front end, when a person is before a judge, with their attorney.

The Rules of Criminal Procedure already offer the mechanism to avoid the imposition of untenable costs on those too poor to pay them. Rule 706(C) mandates that courts must take into consideration a person's finances when determining the amount of costs and manner in

[3] In Buck v. Beard, 879 A.2d 157 (Pa. 2005), this Court rejected a prisoner's claim for injunctive relief to prevent such deductions. The petitioner in that case argued, among other things, that taking court debt from their inmate fund without a pre-deprivation hearing violated their due process rights. Rebutting that stance, the Department of Corrections asserted that petitioner had already received all the process due at the sentencing hearing because the Rules provided them an opportunity to present evidence about their ability to pay fines, restitution, *and costs*. Id. at 160. In discussing those arguments, this Court agreed that the sentencing hearing did provide "the required pre-deprivation due process…." Id. at 161. That conclusion would only be accurate for petitioners like Appellant Lopez if sentencing does, in fact, provide persons with the opportunity to present evidence about their ability to pay costs before costs are imposed. It is Rule 706(C) that instructs courts to provide such opportunity at sentencing. It follows that the robust reading of the rule advocated by Appellant (and by *Amici*) is required to ensure that the system complies with constitutional requirements. See 1 Pa.C.S. § 1925 (presumption of constitutionality).

which they should be paid. Courts are directed to make these determinations at sentencing. It is at sentencing that courts instruct whether costs are imposed in part or whole, marking the record accordingly. Courts frequently note on sentencing sheets determinations around the amount and manner in which costs are to be paid, such as ordering a specific amount to be paid each month, or instructing that costs are to be paid only after release from incarceration. The intent and language of Rule 706(C) inform that a person's ability to pay is to be considered at the time of those determinations. Where the burden of costs is too great in light of a person's finances and restitution obligations, the court may and should modify or waive costs.

## II. The only interpretation that gives independent meaning to Rule 706(C) is that it requires courts to consider a defendant's ability to pay costs when imposing them.

Courts make cost determinations at various intervals throughout a case, starting with sentencing. Rule 706 reaches those determinations without limitation. Rule 706(C) is located in the Court Rules' Chapter 7.A., defining "Sentencing Procedures," not the Court's "Post-Sentence Procedures" (Chapter 7.B). The Rule's title, "Fines and Costs," contains

no modifier limiting the application of its provisions to a subset of proceedings that address post-sentence default.

An interpretation that Subsection (C) applies only when a person faces incarceration for defaulting on payment of costs would relegate Subsection (C) to a duplicative nullity. Subsection (A) already mandates that a court must consider the "amount and method of payment" prior to jailing a defendant for default. Subsection (B) already provides that the court consider the "financial resources of the defendant" when it sets installments.

When Subsection (D) and Subsection (B) are read together, those parts perform the function that the Opinion below would wrongly assign to Subsection (C). This is because Subsections (B) and (D) collectively establish procedures for when a defendant needs modification, or defaults, or approaches default under a payment plan. To achieve that goal, Subsection (B) expressly refers to Subsection (D), denoting a clear relationship between those two provisions. In contrast, Subsection (B) makes no reference to Subsection (C). Nor is there any preference for installments (under subsection (B)) over reduction in the principal amount (under subsection (C)). To the contrary, the Rule

provides that the sentencing court "may" exercise its discretion under subsection (B), while it "shall" do so under subsection (C).

Subsection (D) also contains critical limiting language: "In cases in which the court has ordered payment of a fine or costs in installments…." Pa. R. Crim. P. 706 (D). Subsection (C), however, does not limit itself to "cases in which the court has ordered a payment of a fine or costs in installments." This Court should not read such limitation into the subsection where none expressly exists. The only construction that makes sense is that which honors Subsection (C) as the stand-alone provision that it is intended to be.

## III. In the context of Rule 706(C), all costs are discretionary.

Consideration of a person's ability to pay when imposing costs is mandatory. The imposition of costs is not.

In granting Allowance of Appeal, this Court rephrased the question presented by changing the term "costs" to the term "mandatory costs." By this, we understand the Court to be referring to the fact that court costs are generally created by statute, and those statutes often employ seemingly mandatory terminology. Rule 706(C), however, makes no distinction between "mandatory" and discretionary costs. In

the context of Rule 706(C), adopted by this Court under its constitutional authority (Pa. Const., art. V, § 10(c)), *any* court cost can be waived or reduced at the sentencing court's discretion. To the extent that any question of interbranch authority might appear to exist, that doubt was removed by the enactment in 2010 of 42 Pa.C.S. § 9728(b.2), which preserves judicial discretion under Rule 706(C) "[n]otwithstanding any provision of law to the contrary."

Courts assign costs when authorized to do so by statute. Some statutory provisions authorizing costs state that such costs "shall" be imposed, while others do not. The legislature made clear, however, that the automatic assignment of costs at sentencing does not interfere with this Court's Rule 706(C) that courts "shall" consider a person's ability to pay when imposing costs. Act 96 of 2010 specifically instructs that costs are automatically imposed at conviction "**unless the court determines otherwise** pursuant to Pa. R. Crim. P. No. 706(C)." Section 9728(b.2). *See also* 42 Pa.C.S. § 9721(c.1) ("The provisions of this subsection do not alter the court's discretion under Pa. R. Crim. P. No. 706(C) (relating to fines or costs)." In amending 42 Pa.C.S. §§ 9721(c.1) and 9728(b.2) in 2010 with that language, the legislature

acknowledged the primacy of this Court's mandate to consider ability to pay when imposing costs.

As both the legislative committee report and Fiscal Note explain, the references to Rule 706(C) were intended to allow the "sentencing court" to "**retain <u>all discretion</u> to modify or even waive costs** in an appropriate case."[4] The legislature does not intend for statutory language that automatically imposes costs to limit the scope of the Courts' ability-to-pay determinations under Rule 706(C).

A concrete example of the interplay between Sections 9721 and 9728 and Rule 706(C) can be found through exploration of one of the costs imposed on Appellant Lopez, a $95.94 Civil Judgment/Lien cost authorized by 42 Pa.C.S. § 9728(g). Section 9728(g) is one of over 30 statutes identified by the ACLU as authorizing specific costs. That provision, contained in the statute "Collection of restitution, reparation, fees, costs, fines, and penalties," provides:

> (g) Costs, etc.--Any sheriff's costs, filing fees and costs of the county probation department, clerk of courts or other appropriate governmental agency, including, but not limited

[4] Pennsylvania House of Representatives Judiciary Committee, SB 1169 Bill Analysis (Sept. 15, 2010), PN 2181; Pennsylvania House of Representative Committee on Appropriations, Fiscal Note (July 1, 2010), PN 1775 (emphasis added).

> to, any reasonable administrative costs associated with the collection of restitution, transportation costs and other costs associated with the prosecution, shall be borne by the defendant and shall be collected by the county probation department or other appropriate governmental agency along with the total amount of the judgment and remitted to the appropriate agencies at the time of or prior to satisfaction of judgment.

This statute authorizes the imposition of costs associated with collecting fines costs, and restitution. In Appellant Lopez' case, this statute relates to the cost of recording and indexing a civil judgment.

This statute authorizing the costs for recording and indexing a civil judgment must then be read together with the provisions in Section 9721(c.1) and 9728(b.2) (allowing courts to waive costs) and Rule 706(C), as if in a single statutory scheme. These statutes and Rule 706(C) all "relate to the same class of persons or things" so they "shall be construed together, if possible, as one statute." 1 Pa.C.S. § 1932); see also Commonwealth v. Mazzetti, 44 A.3d 58, 65 (Pa. 2012) (reading sentencing provisions *in pari materia*).[5] 1 Pa.C.S. § 1933 further requires that the statutes, "if possible, be

[5] The Rules of Construction also apply when construing court rules with statutes. See Lohmiller v. Weidebaugh, 469 A.2d 578, 581 (Pa. 1983) (statute and court procedural rule that "relate to the same subject matter . . . must be read *in pari materia* so that effect can be given to both" pursuant to 1 Pa.C.S. § 1932).

construed so that effect can be given to both." Commonwealth v. Warner, 476 A.2d 341, 343 (Pa. 1984).

Following the Rules of Construction to interpret these statutes together yields the following:

> (**g**) Any sheriff's costs, filing fees and costs of the county probation department, clerk of courts or other appropriate governmental agency, including, but not limited to, any reasonable administrative costs associated with the collection of restitution, transportation costs and other costs associated with the prosecution, shall be borne by the defendant and shall be collected by the county probation department or other appropriate governmental agency along with the total amount of the judgment and remitted to the appropriate agencies at the time of or prior to satisfaction of judgment.
>
> (**b.2**) Notwithstanding any provision of law to the contrary, in the event the court fails to issue an order under subsection (a) imposing costs upon the defendant, the defendant shall nevertheless be liable for costs, as provided in section 9721(c.1), unless the court determines otherwise pursuant to Pa. R. Crim. P. No. 706(C) (relating to fines or costs). The absence of a court order shall not affect the applicability of the provisions of this section.
>
> (**C**) The court, in determining the amount and method of payment of a fine or costs shall, insofar as is just and practicable, consider the burden upon the defendant by reason of the defendant's financial means, including the defendant's ability to make restitution or reparations.

This is the proper reading, with Section 9728(b.2) modifying (g) to make costs automatic, but still subject to the court's power to waive costs after considering the defendant's financial means, as Rule 706(C) requires.

If, instead, Section 9728(g) were to be read *after* Section 9728(b.2) as an *exception* to the court's power to waive costs after considering the defendant's financial means, then both Section 9728(b.2) and Rule 706(C) would be dead letter. The first reading gives "effect" to all of the statutory provisions; the second reading gives "effect" to only one of them, which would violate Section 1933 of the Rules of Construction.

Here, there is no actual conflict between a statute that imposes court costs and Sections 9728(b.1) (read in conjunction with Rule 706(C)), let alone one that is "irreconcilable" under a Section 1933 analysis.[6] The natural reading of the statutes and the Rule—and the

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[6] Section 1933 provides that if there is an "irreconcilable" conflict the specific provision may prevail over the general—"unless the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail." 1 Pa.C.S. §1933 (emphasis added). To be irreconcilable means that "simultaneous compliance" with both provisions "is impossible." See Hoffman Mining Co., Inc. v. Zoning Hearing Bd. of Adam Tp., 32 A.3d 587, 594 (Pa. 2011). The mere overlapping of two provisions does not mean that they "should be said to be in facial, irreconcilable conflict with each other" such that only one statute should prevail. Commonwealth v. Karetny, 880 A.2d 505, 522 (Pa. 2005).

Even if there were an "irreconcilable conflict," the discretion afforded to trial courts in Sections 9721(c.1) and 9728(b.2) would prevail. Sections 9721(c.1) and 9728(b.2) were both enacted in 2010, years after (g) and other cost statutes were

reading that gives effect to all provisions—is that the trial court must impose the cost *unless* the trial court waives it after considering the defendant's financial means.

As applied to the cost of recording and indexing a civil judgment in Appellant Lopez' case, and taking into account the above Rules of Construction, the interplay between the relevant statutes and Rule 706(C) is as follows: the civil judgment cost is to be borne by Appellant Lopez, but the court has procedural mandate to "consider the burden upon [Appellant Lopez] by reason of [his] financial means, including [his] ability to make restitution or reparations," and, in the context of that determination, the court retains authority to waive the cost.

## CONCLUSION

Amici Curiae respectfully request that this Court reverse the decision of the Superior Court, vacate the order of the Court of Common

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enacted (subsection (g) was last modified in 2006). With the inclusion of the phrase "[n]otwithstanding any provision of law to the contrary," the General Assembly demonstrated its "manifest intention" that the 2010 amendments trump older, more specific statutes. The Superior Court has ruled that when a statute uses such language it "clearly indicates that the legislature intended to limit the application of prior" statutes. Commonwealth v. Smith, 544 A.2d 991, 998 (Pa. Super. Ct. 1988) (en banc).

Pleas imposing costs, and remand for a determination of Appellant Lopez's ability to pay costs.

Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE**
**WITH PA. R.A.P. 532 and 2135**

I hereby certify, pursuant to Pa. R.A.P. 531 and 2135, that this brief does not exceed 7,000 words.

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## CERTIFICATE OF PUBLIC ACCESS COMPLIANCE

I certify, pursuant to Pa. R.A.P. 127, 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.

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## CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2021, this brief was served on all parties, including the following, by PACFile:

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