

An ACLU-PA Guide to the Imposition of Fines, Costs, or Restitution at Sentencing

(updated September 19, 2022)

Individuals convicted of misdemeanors or felonies face not only jail time, but also substantial financial obligations in the form of fines, costs, or restitution. These obligations can follow defendants for years or even decades, long after they have completed their jail sentences and any period of probation. They also face downstream consequences if they do not—or cannot—pay, such as contempt hearings, driver’s license suspension, or jail. We intend this Guide to help attorneys and judges understand the law that governs imposing fines, costs, and restitution in criminal and summary cases.¹

Consult our guide on determining “ability to pay” at www.aclupa.org/finesandcosts to identify the types of information the court should consider at sentencing when it evaluates the defendant’s financial resources.

Fines, costs and restitution: each has separate requirements at sentencing.

Fines: Fines are “direct consequences and, therefore, punishment.”² They are part of the sentence, are intended to be punitive, and might be the only sentence imposed (particularly in a summary case). When a court imposes a fine, it must consider the defendant’s ability to pay if the fine is discretionary:

- 42 Pa.C.S. § 9726(c) prohibits a court from sentencing a defendant to pay a fine “unless it appears of record that: (1) the defendant is or will be able to pay the fine; and (2) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime.”
- 42 Pa.C.S. § 9726(d) requires that, in “determining the amount and method of payment of a fine, the court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose.”
- Article I, Section 13 of the Pennsylvania Constitution prohibits “excessive” fines.

These provisions require that the court:

- 1) consider the defendant’s ability to pay the fine;
- 2) consider the burden that payments will impose;
- 3) only impose a fine that the defendant will be able to pay; and
- 4) ensure that the fine will not prevent the defendant from paying restitution.

To meet these requirements:

¹ How to determine whether the defendant is “able to pay,” as well as specific guides on the financial aspects of contempt and probation/parole, are the subject of separate ACLU-PA Guides.

² *Commonwealth v. Rivera*, 95 A.3d 913, 916 (Pa. Super. Ct. 2014)

- The court must make a finding on the record regarding the defendant’s financial resources and ability to pay a fine.³ The trial court does not necessarily have to hold a hearing, as the information in a pre-sentence investigation or the defendant’s statement that he will be able to pay the fine can be sufficient to determine whether he is able to pay.⁴
 - The record necessary to sustain a fine must have specific information about the defendant’s financial circumstances. For example, merely knowing that a defendant is or will be employed is insufficient to support the imposition of a fine.⁵
 - A court can ask questions about the defendant’s ability to pay and still impose an illegal fine as low as even \$25 if the record does not actually contain evidence the defendant can or will be able to pay it.⁶
- Even if the defendant pleads guilty⁷ or waives a pre-sentence investigation,⁸ the court must still determine whether he can pay a fine before imposing it.
 - However, if the defendant enters into a negotiated guilty plea to pay a specific dollar amount, and the trial court determines that he will be unable to pay that amount, the trial court must reject the plea.⁹ To avoid this problem, negotiated pleas should leave the dollar figure for the fine up to the trial court.
- If the trial court fails to perform this inquiry, it cannot lawfully impose a fine.¹⁰
- Still, a court may impose a fine even if the defendant does not have the *present* ability to pay it, as § 9726 permits a court to impose a fine that the defendant “will” be able to pay.¹¹
 - To determine if a defendant has the “present or future ability to pay,” the court can look at the defendant’s present or expected future income, property,

³ *Commonwealth v. Ford*, 217 A.3d 824, 828-29 (Pa. 2019); *Commonwealth v. Heggenstaller*, 699 A.2d 767, 769 (Pa. Super. Ct. 1997).

⁴ *Ford*, 217 A.3d at 831 and n.14 (“Brief for Commonwealth at 9. Indeed, in many cases the trial court will be able to ascertain the defendant’s ability to pay by asking one simple question: ‘How do you plan to pay your fines?’”).

⁵ Relevant cases are cited in the ACLU of Pennsylvania’s guide regarding “ability to pay,” available at www.aclupa.org/finesandcosts. *Commonwealth v. Beatty*, 1328 MDA 2021, 2022 WL 3582460 (Pa. Super. Ct. Aug. 22, 2022) (unpublished) and cases cited within provides a good example of the type of record necessary. For an example of a case where the record is sufficient, see *Commonwealth v. Horst*, 1527 MDA 2020, 2021 WL 3560197 at *3 (Pa. Super. Ct. Aug. 12, 2021) (unpublished) (record supported imposition of \$100 fine where it showed that the defendant had \$26,000 in savings and earned \$22 per hour). Insufficient records include *Commonwealth v. Hardwick*, 399 WDA 2021, 2022 WL 1819614 at *4 (Pa. Super. Ct. 2022) (unpublished) (prison wages of \$.40/hour and money from family insufficient to support imposition of \$25,000 because there was “no record evidence” of his “ability to pay”).

⁶ *Commonwealth v. Strunk*, 1072 EDA 2020, 2021 WL 1986580 at *2 and n.9 (Pa. Super. Ct. May 18, 2021) (unpublished) (“Because we conclude from our review of the record that there was no evidence presented in the trial court of Strunk’s present or future ability to pay the \$25 fine, we are constrained to reverse and remand for resentencing.”).

⁷ *Ford*, 217 A.3d at 831. *Commonwealth v. Gaskin*, 472 A.2d 1154, 1157 (Pa. Super. Ct. 1984).

⁸ *Commonwealth v. Fusco*, 593 A.2d 373, 375 n.1 (Pa. Super. Ct. 1991).

⁹ *Ford*, 217 A.3d at 831.

¹⁰ *Commonwealth v. Schwartz*, 418 A.2d 637, 638-39 (Pa. Super. Ct. 1980).

¹¹ *Commonwealth v. Thomas*, 879 A.2d 246, 264 (Pa. Super. Ct. 2005) (“Imposition of a fine is not precluded merely because the defendant cannot pay the fine immediately or because he cannot do so without difficulty.”).

education, legal work history, and family situation.¹² This determination “does not require certainty,” but the record must still reflect that “the defendant is or will be able to pay the fine.”¹³

- If a defendant also owes restitution, the court must make a finding that payment of the fine will not “impact the restitution payments to the victim.”¹⁴

The Supreme Court and Superior Court have repeatedly invalidated fines that trial courts imposed without adhering to these requirements.¹⁵

Mandatory fines: The Superior Court has ruled that “mandatory” fines, which are fines where the sentencing statute says the fine “shall” be imposed, are not subject to § 9276(c) and (d).¹⁶ That court has also held that the Excessive Fines Clause does not require an individualized assessment of a person’s financial status prior to imposing a mandatory fine; instead, the question is only whether the fine is “proportional” to the gravity of the offense, regardless of individual circumstances.¹⁷

Appealing the imposition of a fine:

- A defendant can challenge the imposition of a fine for the first time on appeal if the defendant is challenging either a fine that is not authorized by law or the trial court’s failure to consider the defendant’s ability to pay.¹⁸
- By contrast, a challenge to the court’s exercise of its discretion to impose a specific dollar amount based on the defendant’s financial circumstances must be raised either at sentencing or in a post-sentencing motion.¹⁹
- A defendant who is no longer on probation or incarcerated cannot file a PCRA petition to challenge any fines.²⁰
- If a fine is vacated, the question of whether the entire sentence is vacated depends on whether the fine was part of a negotiated plea. If the fine was not part of a plea, then the

¹² *Commonwealth v. Beatty*, 1328 MDA 2021, 2022 WL 3582460 at *5 (Pa. Super. Ct. Aug. 22, 2022) (unpublished).

¹³ *Id.*

¹⁴ *Commonwealth v. White*, 1283 MDA 2020, 2021 WL 2769834 at *4 (Pa. Super. Ct. July 1, 2021) (unpublished).

¹⁵ See, e.g., *Ford*, 217 A.3d at 831. *Thomas*, 879 A.2d at 264 (invalidating \$6,000 fine where court “stated merely that it had ‘all the appropriate information,’ knowing appellant’s history and his recent ten year sentence to federal prison”); *Mead*, 446 at 973-74 (fine improper where sentencing court did not have information about current income, indebtedness, living situation, or ability to pay restitution); *Commonwealth v. Reardon*, 443 A.2d 792, 795 (Pa. Super. Ct. 1981) (court failed to consider the defendant’s financial status and reasons for imposing a fine); *Commonwealth v. Fusco*, 594 A.2d 373, 355-56 (Pa. Super. Ct. 1991) (information that a defendant would be working, without an indication of income, was not sufficient to show he could pay a \$10,000 fine).

¹⁶ *Commonwealth v. May*, 271 A.3d 475 (Pa. Super. Ct. 2022).

¹⁷ *Id.*

¹⁸ *Commonwealth v. Boyd*, 73 A.3d 1269, 1272 (Pa. Super. Ct. 2013) (en banc); *Commonwealth v. Gary-Ravenell*, 2551 EDA 2018, 2020 WL 6257159 at *7 (Pa. Super. Ct. Oct. 23, 2020) (en banc) (unpublished) (“In light of the foregoing discussion, we conclude an allegation that the trial court failed to consider a defendant’s ability to pay before imposing a fine is a challenge to the legality of his sentence, and is not subject to waiver.”).

¹⁹ *Boyd*, 73 A.3d at 1272.

²⁰ *Commonwealth v. Fisher*, 703 A.2d 714, 717 (Pa. Super. Ct. 1997) (“Appellant is not entitled to PCRA relief because he had completed serving his sentence of imprisonment at the time he filed his PCRA petition, and the only aspect of his sentence unfulfilled was his payment of a fine.”).

Superior Court can vacate the fine without disturbing the rest of the sentence.²¹ This is true even if the rest of the deal was subject to a plea agreement and the court is merely left with determining the amount of the fine.²²

- An appeal challenging the imposition of an illegal fine is not mooted even if the defendant has paid the fine by the time the appeal is resolved.²³

Costs: Costs “are a reimbursement to the government for the expenses associated with the criminal prosecution.” These are “akin to collateral consequences” and “are not part of the criminal’s sentence but are merely incident to the judgment.”²⁴ Courts have the *discretion* to reduce or waive costs at sentencing, but they are not required to do so.²⁵ The “duty” to consider reducing or waiving costs only comes into play “post-sentence upon the defendant’s default and a finding of his inability to pay.”²⁶

Although there is a common view that costs are “mandatory,” a 2010 statutory amendment gives courts discretion to reduce or waive costs based on the defendant’s financial circumstances. The Superior Court and the Pennsylvania Supreme Court have explained that the relevant rules and statutes permit reduction or waiver of costs if they are unaffordable, regardless of whether those costs are ordinarily “mandatory.”²⁷ Counsel should be sure to request affordable costs at the time of sentencing:

- All costs are waivable: 42 Pa.C.S. § 9728(b.2) makes defendants automatically liable for costs “unless the court determines otherwise pursuant to Pa.R.Crim.P. No. 706(C).”²⁸
 - This provision was adopted in 2010 and applies “[n]otwithstanding any provision of law to the contrary,” meaning that even if it conflicts with any other statutes

²¹ *Commonwealth v. Beatty*, 1328 MDA 2021, 2022 WL 3582460 at *5 (Pa. Super. Ct. Aug. 22, 2022); *Commonwealth v. Snyder*, 251 A.3d 782, 797 (Pa. Super. Ct. 2021).

²² *Commonwealth v. Hall*, 771 MDA 2020, 2021 WL 2071115 at *4 n.8 (Pa. Super. Ct. May 24, 2021) (unpublished).

²³ *Commonwealth v. Pilling*, 2121 EDA 2018, 2021 WL 1968177 (Pa. Super. Ct. May 17, 2021) (unpublished).

²⁴ *Rivera*, 95 A.3d at 916.

²⁵ *Commonwealth v. Lopez*, --A.3d--, 2022 WL 3363051 at *2 (Pa. 2022).

²⁶ *Id.* at *9.

²⁷ The Lopez rulings from both the Supreme Court and Superior Court confirm that trial courts have the authority to reduce or waive even costs that would otherwise be “mandatory.” The Supreme Court explained that only “mandatory court costs” were imposed on the defendant in Lopez, and it went on to repeatedly state that Rule 706(C) allows (and if the defendant has defaulted on payment, requires) that courts make a “post-sentence determination of the amount and method of payment” of costs—including “modification or waiver of costs upon a proper showing of insufficient financial means.” *Lopez*, 2022 WL 3363051 at *5, 7. In other words, the only costs at issue in Lopez were mandatory, and the Court never suggested that the relevant Rule and statutes circumscribe that waiver authority for costs that are otherwise “mandatory.” The Court instead made clear that a court can “modif[y] or waive[.]” those mandatory costs. *Id.* at *7.

²⁸ *Commonwealth v. Childs*, 63 A.3d 323, 326 (Pa. Super. Ct. 2013). *See also Commonwealth v. Burrows*, 88 WDA 2017, 2017 WL 4974752 (Pa. Super. Ct. Oct. 31, 2017) (Rule 706(C) “permits the trial court to consider the burden of the amount of costs in light of a defendant’s financial means”). *See Commonwealth v. Mulkin*, 228 A.3d 913, 919 (Pa. Super. Ct. 2020) (“The trial court may also provide that a defendant shall not be liable for costs under Rule 706.”).

that impost costs, it takes precedence over any older statutes that impose specific costs.²⁹

- The legislative history explains that the amendment was intended to allow the “sentencing court” to “retain all discretion to modify or even waive costs in an appropriate case.”³⁰
- The Supreme Court ruled in *Lopez* that although mandatory costs had been imposed on the defendant, the trial court still retained authority to consider waiving them.³¹
- This follows rulings from the Superior Court that the “trial court may also provide that a defendant shall not be liable for costs under Rule 706,”³² and sentencing courts have “discretion to conduct such a hearing at sentencing” to reduce or waive costs.³³
- Defendants should ask to have the court impose an affordable amount of costs based on their individual financial circumstances.

Other points from case law:

- The payment of costs cannot be a condition of probation: Because costs serve neither a penal nor rehabilitative purpose, a court cannot require that a defendant pay costs as a condition of probation because they are “not reasonably related to the rehabilitation of the defendant” under 42 Pa.C.S. § 9763(b).³⁴ Thus, a defendant who owes only costs, and no fines or restitution, cannot have probation revoked or extended for nonpayment.

²⁹ For a detailed discussion of why all costs are waivable, review the ACLU of Pennsylvania memorandum “Reducing or waiving costs post-sentencing,” which is available on www.aclupa.org/finesandcosts. In short: Statutes dealing with the imposition of costs must be read *in pari materia* and construed “if possible, so that effect may be given to both.” 1 Pa.C.S. § 1933. There is no inherent conflict between individual statutes that impose court costs and § 9728(b.2), as it can easily be interpreted as simply providing a separate procedure if a defendant is too poor to pay costs. After all, none of the individual statutes that impose specific court costs address what happens if the defendant is unable to pay those costs. To the extent there is any conflict, § 1933 explains that specific statutes generally prevail “*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.” (emphasis added). Section 9728(b.2) was enacted long after other statutes that impose costs. Moreover, the General Assembly, in enacting these statutes, has demonstrated its “manifest intention” that they trump older, more specific statutes. When a statute uses the “notwithstanding any other provision of this title or other statute to the contrary,” 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). As a result of these fundamental statutory interpretation rules, all costs are waivable.

³⁰ Pennsylvania House of Representatives Judiciary Committee, SB 1169 Bill Analysis (Sept. 15, 2010) PN 2181.

³¹ *Lopez*, 2022 WL 3363051 at *5, 7.

³² *Commonwealth v. Mulkin*, 228 A.3d 913 (Pa. Super. Ct. 2020).

³³ *Commonwealth v. Lopez*, 248 A.3d 589, 596 (Pa. Super. Ct. 2021) (en banc). While *Lopez* says that a hearing is only *required* prior to incarceration, it explicitly permits courts to do so at sentencing.

³⁴ *Rivera*, 95 A.3d at 916. *See also Commonwealth v. Hudson*, 231 A.3d 974, 980-81 (Pa. Super. Ct. 2020) (“It is clear from our reading of *Rivera* that court costs do not reasonably relate to the rehabilitation that probation is designed to foster, and thus, cannot be subsumed within the catchall provision of Section 9754. . . . Section 9754 does not authorize the imposition of court costs as a condition of probation”). The only possible exception is for probation supervision fees, as the statute that imposes that cost specifically requires that it is a condition of supervision. *See* 18 P.S. § 11.1102. Pennsylvania’s courts have never addressed whether this provision would permit a court to find that a defendant has committed a probation violation for nonpayment. Notably, it is not a condition set forth in 42 Pa.C.S. § 9763 (formerly § 9754).

- Costs can only be imposed if a statute authorizes them and the defendant is convicted of the offense for which the costs are authorized: A defendant can only be required to pay costs that are authorized by statute.³⁵ The Superior Court has invalidated numerous illegal costs that trial courts imposed without statutory authorization.³⁶ Such statutes are penal in nature and must be strictly construed.³⁷
 - If a defendant’s charges are withdrawn through a nolle prosequi, otherwise dismissed, or the defendant is not found guilty, then the defendant cannot be required to pay costs on those counts.³⁸ Doing so is both illegal under state law and unconstitutional.³⁹
 - Costs can only be imposed once per case; if multiple cases are consolidated and handled together, then only one set of costs can be charged.⁴⁰
 - There is nothing inappropriate about the clerk of courts actually calculating the amount of costs, as long as there is a court order or statutory authorization for their imposition.⁴¹
 - If the court generally imposes “costs of prosecution,” such a term broad enough to encompass all authorized court costs.⁴² Such costs can include things like the costs of experts, drug buy money, or (under exceptional circumstances) hiring additional personnel to investigate and prosecute the case.⁴³ It also includes costs associated with sentencing.⁴⁴ Ordinarily, however, salary costs are not recoverable.⁴⁵ The relevant test is whether the costs “fall within the ambit of usual services provided”; if so, they cannot be taxed on the defendant.⁴⁶

³⁵ *Commonwealth v. Coder*, 415 A.2d 406, 410 (Pa. 1980) (“As discussed above, a defendant may be required to only pay costs authorized by statute.”); *Commonwealth v. Gill*, 432 A.2d 1001, 1004 (Pa. Super. Ct. 1981) (“The general propositions of law upon which we base our opinion in this matter are that costs must not be assessed except as authorized by law”).

³⁶ *See, e.g., Commonwealth v. Garzone*, 34 A.3d 67, 80 (Pa. 2012) (order to pay the prosecutors’ salaries not a proper cost); *Rivera*, 95 A.3d at 916 (Pa. Super. Ct. 2014) (repaying public defender not a proper cost); *Gill*, 432 A.2d at 1009 (various Allegheny costs, including \$60 flat fee for certain hearings, a witness fee, costs on withdrawn/dismissed charges, a fee for processing payments to witnesses, and a fee for service of process were illegal).

³⁷ *Commonwealth v. Garzone*, 34 A.3d 67, 75 (Pa. 2012); *Commonwealth v. Gaddis*, 639 A.2d 462, 472 (Pa. Super. Ct. 1994).

³⁸ *Gill*, 432 A.2d at 1009. The ACLU of Pennsylvania has a separate memorandum on this topic titled Legal Memorandum On Imposing Costs on Charges That Are Dismissed or Withdrawn Through a Nolle Prosequi at www.aclupa.org/finesandcosts.

³⁹ The memorandum mentioned in the preceding footnote addresses this in more detail. *See generally Commonwealth v. Baizar*, 449 WDA 2020, 2021 WL 1716967 (Pa. Super. Ct. April 30, 2021) (unpublished) (discussing *Colorado v. Nelson*, 137 S.Ct. 1249 (2017)).

⁴⁰ *Commonwealth v. Brinson*, 2124 EDA 2020, 2021 WL 4282677 at *5 (Pa. Super. Ct. Sept. 21, 2021) (cases that are consolidated together can only have one set of costs imposed).

⁴¹ *Richardson v. Pennsylvania Dep’t of Corrections*, 991 A.2d 394, 397 (Pa. Commw. Ct. 2010).

⁴² *Commonwealth v. Cutillo*, 440 A.2d 607, 609 (Pa. Super. Ct. 1982); *Commonwealth v. Mazer*, 24 A.3d 481, 484 (Pa. Commw. Ct. 2011).

⁴³ *Commonwealth v. Garzone*, 993 A.2d 1245, 1258-59 (Pa. Super. Ct. 2010), affirmed 34 A.3d 67.

⁴⁴ *Commonwealth v. Lehman*, 243 A.3d 7, 16 (Pa. 2020) (reasoning that 16 P.S. § 1403 “authorizes trial courts to impose costs associated with sentencing upon criminal defendants generally, because those expenses were incurred ‘in connection with such prosecution.’”).

⁴⁵ *Garzone*, 34 A.3d at 75.

⁴⁶ *Cutillo*, 440 A.2d at 609 (authorizing costs associated with guarding a defendant in a hospital).

- The defendant can only be billed for costs associated with charges on which he was convicted.⁴⁷
- Costs set forth in 42 Pa.C.S. § 9728 only cover costs associated with collecting fines, costs, or restitution; it is not a provision that applies at sentencing.⁴⁸
- A defendant who is resentenced for reasons that are not his fault—such as “juvenile lifers” whose sentences were declared unconstitutional—cannot be billed for costs associated with their resentencing.⁴⁹
- The defendant has a right to object to the imposition of individual costs: At sentencing, a defendant must receive a bill of costs, to which he can file objections.⁵⁰
 - A defendant can raise a challenge to the imposition of court costs for the first time on appeal without waiving it.⁵¹
- Costs cannot be applied retroactively: The Constitution’s Ex Post Facto clause applies to court costs.⁵²
- A defendant cannot be kept incarcerated due to an inability to pay pre-sentencing costs.⁵³

Restitution: Restitution “compensates the victim for his loss and rehabilitates the defendant by impressing upon him that his criminal conduct caused the victim's loss and he is responsible to

⁴⁷ *Commonwealth v. Moran*, 675 A.2d 1269, 1272-73 (Pa. Super. Ct. 1996). *See also Commonwealth v. Flemings*, 1321 WDA 2019, 2020 WL 5548326 at *3 (Pa. Super. Ct. Sept. 16, 2020) (unpublished) (“Here, Flemings was convicted of conspiracy to commit PWID of marijuana and receiving stolen property. The remaining drug charges were nolle prossed. Therefore the court should have required that he pay only the lab fees associated with the marijuana charge.”).

⁴⁸ *Gaddis*, 639 A.2d at 472 (explaining that “the separate reference to ‘costs’ in subsection (g) provides for the collection of costs associated with obtaining a money judgment against the defendant, and does not provide for the imposition of the costs of prosecution itself”). The Superior Court later held that amendments to § 9728 effectively overruled *Gaddis* as of 2006. *See Commonwealth v. Allshouse*, 924 A.2d 1215, 1230 (Pa. Super. Ct. 2007), *vacated on other grounds*, 562 U.S. 1267 (2011). That appears to be wrong, and the opinion does not offer any analysis of the rather plain language in § 9728, which is titled “*Collection of restitution, reparation, fees, costs, fines and penalties*” (emphasis added). As a result, § 9728(g) seems to only authorize costs associated with collecting funds, such as costs associated with probation violation hearings for nonpayment or contempt hearings for nonpayment. Moreover, *Allshouse* itself was later reversed on other grounds by the United States Supreme Court. *Gaddis* is the correct interpretation of the law and, *Allshouse* notwithstanding, remains in effect.

⁴⁹ *Lehman*, 243 A.3d at 18 (“In direct contrast, however, their resentencing hearings were not necessitated by appellees’ own actions, but by a change in the law: the resentencing was necessary only because the original proceedings took place pursuant to unconstitutional legislation.”).

⁵⁰ *Coder*, 415 A.2d at 410; *Gill*, 432 A.2d at 1003 (defendant can appeal a denial of his objections).

⁵¹ *Commonwealth v. Lehman*, 201 A.3d 1279, 1283 (Pa. Super. Ct. 2019) (“Because Appellant challenges the trial court's authority to impose costs as part of its resentencing order, we conclude that the Appellant's claim implicates the legality of his sentence.”). *See also Allshouse*, 924 A.2d at 1229 n.28. Thus, a challenge to the imposition of court costs is subject to the same framework as fines: if the court imposes costs illegally, or without considering ability to pay at all, it is a challenge to the legality of the sentence; but a challenge to the specific dollar amount, where the court has considered ability to pay, is a challenge to the discretionary aspects of the sentence. *See Boyd*, 73 A.3d at 1272.

⁵² *Allshouse*, 924 A.2d at 1230 (explaining that statutes imposing court costs “attach[] greater punishment to all crimes governed by the provision by allowing a court to expand the definition of ‘costs’ that can be imposed”).

⁵³ *Commonwealth v. Dennis*, 164 A.3d 503, 509-10 (Pa. Super. Ct. 2017) (Rule 706 prohibits keeping a defendant incarcerated pre-sentencing for an inability to pay financial obligations).

repair that loss.”⁵⁴ It is not considered punishment.⁵⁵ A defendant can also be required to pay restitution to an entity that has already compensated a victim, including government agencies.⁵⁶

Whether the court must consider a defendant’s ability to pay restitution at sentencing depends on whether the restitution is a part of the sentence or a condition of probation. Counsel should ask the court to clarify what type of restitution the court is imposing.

- Restitution that is part of sentence must be imposed without considering the defendant’s ability to pay.⁵⁷
- Restitution that is a condition of probation under 42 Pa.C.S. § 9763 can be imposed *only if* it is in an amount the defendant “can afford to pay.”⁵⁸
- If restitution is solely a condition of probation, then the obligation to pay it “expires upon the end of the term of probation, even if the amount of restitution ordered has not been paid.”⁵⁹ By contrast, restitution that is ordered as part of the sentence under 18 Pa.C.S. § 1106(a) is part of the sentence and does not expire at the end of the defendant’s probation.⁶⁰
- The case law is not entirely clear on whether a court has a choice between imposing restitution under § 1106 or § 9763, but the Superior Court has suggested that whenever a victim, as defined by § 1106, has suffered injury to person or property, full restitution must be imposed under § 1106.⁶¹ Similarly, the Supreme Court has ruled that restitution is mandatory under § 1106 “where the property of a victim has been stolen, converted or otherwise unlawfully obtained or its value has been substantially decreased as a direct

⁵⁴ *Rivera*, 95 A.3d at 916.

⁵⁵ *Id.*

⁵⁶ *Commonwealth v. Booze*, 1039 WDA 2020, 2021 WL 4452917 at *4 (Pa. Super. Ct. Sept. 29, 2021) (unpublished) (“Section 1106 makes clear that the legislature intended for a criminal offender to not only be required to provide restitution to the victim directly, but also to government agencies which provide reimbursement to the victim.”).

⁵⁷ 18 Pa.C.S. § 1106(c)(1)(i).

⁵⁸ 42 Pa.C.S. § 9763(c)(10) (formerly § 9754). *See Commonwealth v. Melnyk*, 548 A.2d 266, 268 (Pa. Super. Ct. 1988) (“However, the court may only order restitution ‘in an amount [defendant] can afford to pay’.” *Id.* § 9754(c). It is incumbent upon the court to determine the defendant’s ability to make restitution and to order restitution which serves the dual purpose of achieving rehabilitation of the defendant as well as providing the complainant with some measure of redress.”); *Commonwealth v. Holmes*, 155 A.3d 69, 86 (Pa. Super. Ct. 2017) (en banc) (opinion of four judges) (The “trial court erred in ordering restitution as a condition of probation under Section 9754 without first determining Appellant's ability to pay the restitution.”); *Commonwealth v. Whatley*, 2019 PA Super 317 (Pa. Super. Ct. 2019) (“Pennsylvania courts have consistently held that a determination of a defendant's ability to pay is an integral requirement of imposing restitution as a condition of probation.”); *Commonwealth v. Hart*, 1260 EDA 2019, 2021 WL 4520331 (Pa. Super. Ct. Oct. 4, 2021) (unpublished) (relying on *Whatley* to invalidate and remand for resentencing when restitution was imposed as a condition of probation without considering ability to pay).

⁵⁹ *Commonwealth v. Karth*, 994 A.2d 606, 610 (Pa. Super. Ct. 2010); *Holmes*, 155 A.3d at 86-87.

⁶⁰ *Commonwealth v. Griffiths*, 15 A.3d 73, 78 (Pa. Super. Ct. 2010); *Holmes*, 155 A.3d at 86-87. Note that until 1998, 18 Pa.C.S. § 1106 prohibited a court from collecting restitution past the maximum period of time for which the defendant *could have* been sentenced for the offense (e.g. if a defendant was given a sentence of 5 years in jail but could have received a sentence of 10 years, he could only be forced to pay restitution for 10 years). *See Karth*, 994 A.2d at 610. Act 121 of 1998 removed that time limit, so there is no time limit on collecting restitution from defendants who were sentenced after December 3, 1998.

⁶¹ *Commonwealth v. Lock*, 233 A.3d 888, 891 (Pa. Super. Ct. 2020). *But see Commonwealth v. Roebuck*, 1416 MDA 2020, 2021 WL 3733209 at *5 (Pa. Super. Ct. Aug. 24, 2021) (“As noted previously, courts may impose restitution as a direct sentence or as a condition of probation.”).

consequence of the crime, 18 Pa.C.S. § 1106(a)(1), or where the victim, if an individual, suffered personal injury resulting from the crime, 18 Pa.C.S. § 1106(a)(2).”⁶²

There are limits on when restitution can be imposed.

- Restitution can only be imposed for charges on which the defendant was convicted.⁶³
- Like with costs or a fine, restitution can only be imposed if it is authorized by statute.⁶⁴
 - Restitution as part of the sentence under 18 Pa.C.S. § 1106:
 - The evidence must show a “direct nexus between the crime” and the loss of value to any property.⁶⁵
 - Restitution is limited to any property that has been stolen, converted, unlawfully obtained, or had its “value substantially decreased” as a “direct result of the crime.”⁶⁶
 - § 1106 also allows restitution for “personal injury” suffered by the victim.⁶⁷
 - However, for offenses that occurred prior to October 24, 2018, restitution is not owed to any government,⁶⁸ corporation, or non-profit because they were not “victims” under the former version of § 1106.⁶⁹ Nor did that version of § 1106 allow restitution for property crimes.⁷⁰
 - Courts have more discretion to impose restitution under § 9763 as a condition of probation, and the “nexus” between the “damage and the offense is relaxed.”⁷¹
 - As penal statutes, these restitution provisions must be interpreted “in the light most favorable” to the defendant.⁷²

⁶² *Commonwealth v. Weir*, 239 A.3d 25, 37 (Pa. 2020).

⁶³ *Commonwealth v. Muhammed*, 2019 PA Super 294 (Pa. Super. Ct. 2019) (defendant who was convicted only of criminal trespass could not be compelled to pay restitution associated with charges of theft on which he was not convicted).

⁶⁴ *Commonwealth v. Harner*, 617 A.2d 702, 704 (Pa. 1992); *Commonwealth v. Barger*, 956 A.2d 458, 464 (Pa. Super. Ct. 2008) (en banc) (“The Supreme Court has instructed that a sentence of restitution must be based upon statutory authority.”).

⁶⁵ *Barger*, 956 A.2d at 465.

⁶⁶ 18 Pa.C.S. § 1106(a).

⁶⁷ 18 Pa.C.S. § 1106(a).

⁶⁸ Note, however, that this sentence does not apply to restitution where there is a specific statutory requirement of restitution separate from § 1106. For example, the welfare fraud statute 62 P.S. § 481(c) provides an independent source of authority for restitution in those types of cases. *Veon* and *Hunt*, which interpret § 1106, thus have no impact on welfare fraud restitution.

⁶⁹ *Commonwealth v. Veon*, 150 A.3d 435, 454 (Pa. 2016) (version of § 1106 in effect at the time required that a victim be a “human being”); *Commonwealth v. Hunt*, 220 A.3d 582 (Pa. Super. Ct. 2019) (applying *Veon* to corporations). Act 145 of 2018 amended § 1106 so that it applies to the government and corporations moving forward, but *Hunt* explains that the amendments do not apply retroactively. In *Hunt*, the Superior Court suggested that courts could still impose pre-2018 restitution in cases with corporate victims if the court imposes it not under § 1106, but instead as a condition of probation under 42 Pa.C.S. § 9754 (now § 9763). See *Hunt*, 220 A.3d at 591 at n. 9.

⁷⁰ *Hunt*, 220 A.3d at 591 at n.7.

⁷¹ *Commonwealth v. Hall*, 80 A.3d 1204, 1215 (Pa. 2013).

⁷² *Id.* at 1212; *Hunt*, 2019 PA Super 296 (“Finally, where restitution is imposed in addition to a statutory punishment, such as imprisonment, the order must be strictly scrutinized since its purpose is primarily punitive.”) (internal quotation marks omitted).

- The burden is on the Commonwealth to show entitlement to restitution and establish the amount the defendant owes.⁷³
 - When setting restitution, the court must hold an adversarial evidentiary hearing and make findings on the record regarding the appropriate amount of restitution.⁷⁴
 - The amount of restitution cannot be “speculative or excessive” and must be supported by the record.⁷⁵ But it need not necessarily be current market value of damaged or stolen property, and is instead based on the loss that the victim sustained.⁷⁶
 - The court must determine the amount of restitution owed and cannot delegate this decision-making to an agency such as the probation department.⁷⁷ Instead, the amount must be set at the sentencing hearing by the court,⁷⁸ unless the defendant consents to holding a separate hearing post-sentencing to set the amount of restitution.⁷⁹
- An obligation to pay restitution cannot be discharged in bankruptcy prior to initiation of the criminal charges.⁸⁰
- If an order of restitution is later overturned on appeal, the trial court must order the victim to repay the restitution to the defendant.⁸¹
- A defendant who is no longer on probation or incarcerated cannot file a PCRA petition to challenge restitution.⁸²

Appeals from the imposition of restitution can attack either the legality of the imposition of restitution or the discretionary aspects of the restitution.

- Challenges to the court’s authority to order restitution raise a “non-waivable legality of sentencing issue.”⁸³ A defendant who challenges restitution as being “unsupported by the record challenges the legality, rather than the discretionary aspects of sentencing,” so that challenge can be raised for the first time on appeal.⁸⁴ That is because “if the statutory circumstances are not established” to authorize the restitution, then the restitution is illegal.⁸⁵

⁷³ *Commonwealth v. Atanasio*, 997 A.2d 1181, 1183 (Pa. Super. Ct. 2010).

⁷⁴ *Id.* (the amount of restitution must be determined under the adversarial system with due process).

⁷⁵ *Commonwealth v. Dohner*, 725 A.2d 822, 824 (Pa. Super. Ct. 1999); *Commonwealth v. Roebuck*, 1416 MDA 2020, 2021 WL 3733209 at *6 (Pa. Super. Ct. Aug. 24, 2021) (unpublished) (finding testimony about stolen phones insufficient to support restitution award amount).

⁷⁶ *Commonwealth v. Solomon*, 247 A.3d 1163, 1173 (Pa. Super. Ct. 2021) (en banc) (“In light of our legislature's demand for restitution to constitute the fullest compensation for a victim's loss, and the sentencing court's freedom to consider any matters it deems appropriate in determining the proper amount, we cannot agree with Appellant that the value of the coin collection at the time he wrongfully acquired it was necessarily the proper measure.”).

⁷⁷ *Commonwealth v. Deshong*, 850 A.2d 712, 715-16 (Pa. Super. Ct. 2004).

⁷⁸ *Commonwealth v. Mariani*, 869 A.2d 484, 486 (Pa. Super. Ct. 2005).

⁷⁹ *Commonwealth v. Cochran*, 244 A.3d 413 (Pa. 2021).

⁸⁰ *Commonwealth v. Petrick*, 217 A.3d 1217 (Pa. 2019).

⁸¹ *Commonwealth v. McKee*, 38 A.3d 879, 881 (Pa. Super. Ct. 2012).

⁸² *Commonwealth v. James*, 771 A.2d 33, 36 (Pa. Super. Ct. 2001) (“However, the monitoring of appellant's restitution payments does not make him eligible for relief under the PCRA.”).

⁸³ *Commonwealth v. Weir*, 239 A.3d 25, 37 (Pa. 2020).

⁸⁴ *McKee*, 38 A.3d at 881.

⁸⁵ *Weir*, 239 A.3d at 37-38.

- Once those statutory factors are established, however, a challenge to the amount of restitution goes to the discretionary aspects of the sentence and have to be properly preserved for appeal.⁸⁶

⁸⁶ *Weir*, 238 A.3d at 38.