



## The Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness

200 First Avenue, Fourth Floor  
Pittsburgh, PA 15222  
412.697.1311  
pa-interbranchcommission.com

April 18, 2023

Joshua M. Yohe, Counsel  
Criminal Procedural Rules Committee  
Supreme Court of Pennsylvania  
Pennsylvania Judicial Center  
PO Box 62635  
Harrisburg, PA 17106-2635

Re: Comments on Proposed Adoption of Pa.R.Crim.P. 124, *In Forma Pauperis* Process in Criminal Cases

Dear Mr. Yohe:

On behalf of the Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness (“Commission”), we are writing today in response to the March 2023 request from the Criminal Procedural Rules Committee for comments on its proposed adoption of Pa.R.Crim.P. 124, which sets forth individuals’ ability to proceed *in forma pauperis* (“IFP”) in criminal cases. The Commission commends the Committee for its responsiveness to stakeholders’ suggestions in June 2022 that the Committee craft a generally applicable *IFP* rule that grants indigent individuals access to the Pennsylvania courts in a streamlined, comprehensive manner. While many of the amendments previously suggested by the Commission are addressed by the Committee’s proposal, we believe that the few remaining changes contained in this letter will render even more accessible the *IFP* process in criminal cases for indigent individuals and their counsel.

As you know, the Commission was established in 2005 to implement the recommendations proposed in the Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System. Pursuant to that Report’s findings, the Commission has focused on promoting the equal application of the law for all Pennsylvanians, including those who lack the financial resources to have meaningful access to the courts. It is in furtherance of that mission that the Commission offers the following comments, which are informed by our own extensive understanding of court practices impacting the indigent.

## Proposed Modifications to Rule

**1. The Proposed Rule should clarify that it does not preclude defendants' ability to have court costs waived under other authority.**

In its proposal, the Rules Committee makes clear that Proposed Rule 124 would permit defendants to obtain waiver of any fees or costs through the *IFP* process except those imposed “as a result of conviction.” As the Committee is likely aware, defendants are typically assessed more than a dozen court costs, in addition to fines and restitution, as a result of a conviction. Courts are separately authorized by statute to waive such legal financial obligations (“LFOs”) for indigent defendants. We acknowledge that the Rules Committee has likely excluded this category of LFOs from Proposed Rule 124 because the *IFP* process is intended to address costs and fees similar to those assessed pursuant to typical *civil* litigation processes. As the Rules Committee notes, it is contemplating separate rulemaking to address the payment of LFOs levied as a result of conviction, in response to the legislature’s broad authorization of the waiver of such obligations via P.L. 163 (2022).

Although the Rules Committee’s decision to draw this distinction is sensible, we recommend that it clarify its proposal to note that Proposed Rule 124 does *not* signify that LFOs imposed as a result of conviction cannot be waived through other processes. As described above, Act 163 recently authorized in 42 Pa.C.S. § 9730(b)(3) the waiver of virtually all fines and costs assessed as a result of conviction if a person is unable to pay them. Consequently, Proposed Rule 124 should specifically set forth that it is not intended to, and may not be used to, limit this or other sources of post-conviction waiver authority. We recommend that the Rules Committee offer this clarification in the form of a Comment to Rule 124 that states:

Fees, costs, or any other financial assessments imposed as a result of conviction may be reduced or waived pursuant to 42 Pa.C.S. § 9730, 42 Pa.C.S. § 9721, Rule 706, or other authority. Nothing in the Rule is intended to supersede such authority or processes set forth in other rules, statutes, or case law.

This Comment will both clarify the intended scope of Proposed Rule 124 and permit indigent defendants to have their unaffordable LFOs waived pursuant to other laws that have already been passed or will be enacted in the future.

**2. The Proposed Rule should distinguish between fees and costs that *arise* post-conviction and those that are imposed by the court *as a result of* conviction and clarify that it authorizes the *IFP* process for the former.**

As the Rules Committee is likely aware, a defendant may encounter various fees and costs that arise post-sentencing and impact a defendant’s access to the court. Such fees and costs attach, for instance, if a defendant appeals from a conviction, files an expungement petition, or schedules a Court Reporting Network (“CRN”) evaluation following a DUI. Although these LFOs are issued after conviction, their issuance is a matter of chronology rather than causality: they arise, in other



words, subsequent to an individual's conviction, but they are not assessed *upon* or *as a result of* that conviction. Based on this distinction, we recommend that the Rules Committee include a Comment to Proposed Rule 124 specifying that, even for a defendant convicted of an offense, these types of costs and fees are covered by the Rule and may be waived through the *IFP* process. By including this Comment, the Rules Committee has the opportunity to parse fees or costs that are imposed *as a result of* conviction, which the Rule excludes, from those that may simply *arise* post-conviction, which the Rule should embrace.

**3. The Proposed Rule should indicate that its intended scope includes access to court programs, including Accelerated Rehabilitative Disposition (“ARD”) and other diversionary or specialty court programs.**

In its Publication Report, the Rules Committee ponders whether Proposed Rule 124 should apply to financial obligations imposed as a condition of an ARD program or issued by specialty courts. As a part of this consideration, the Rules Committee favorably cites *Commonwealth v. Melnyk*, in which the Pennsylvania Superior Court found that a defendant's indigency cannot preclude his or her entry into an ARD program and that alternative conditions must be considered when the defendant is unable to satisfy such financial obligations.<sup>1</sup>

The Superior Court in *Melnyk* captured the core purpose of *IFP* procedures: to ensure equal access to the courts, regardless of wealth. It is therefore imperative that no *IFP* rule restricts an individual's access to court programs based on their ability to pay costs or fees. Because the financial obligations levied pursuant to ARD are among such fees and costs, the procedures set forth in Proposed Rule 124 should apply. These same principles apply to other diversionary, specialty, and problem-solving court programs that require payment as a precondition of participation or successful completion.

Rather than considering an alternative or supplemental proposal for the application of *IFP* procedures in such circumstances, we recommend that the Rules Committee clarify Proposed Rule 124's application by simply including a Comment to the Proposed Rule stating the following:

The procedure set forth in this Rule permits the waiver of all fees and costs associated with accelerated rehabilitative disposition (“ARD”) and other diversionary or specialty court programs that require payment as a condition of participation in or successful completion of the program.

This simplified approach will streamline the *IFP* process by ensuring that individuals have equal access to the courts regardless of whether they are seeking waiver of LFOs assessed pursuant to filing an expungement petition or to entering into an ARD program. Such an approach would still draw an important distinction between costs and fees that must be paid to participate in court programs and those that are issued upon or as a result of conviction, which, as the Rules Committee mentions, it is preparing to address through separate rulemaking.

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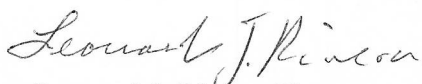
<sup>1</sup> 548 A.2d 266 (Pa. Super. 1988).

## Conclusion

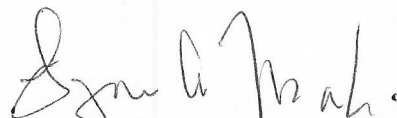
Having carefully reviewed the Rules Committee's proposal, we believe that Proposed Rule 124 creates an *IFP* scheme that wisely applies to all relevant fees and costs and is broad enough to ensure that any new types of fees or costs levied in the future are also covered by its procedures. Its implementation, along with that of the few proposed modifications contained in this letter, will meaningfully ensure greater access to the courts for everyone regardless of their socioeconomic status.

We wish to thank you for your continued efforts to improve the rules of court governing indigent individuals' ability to access justice. If you have any questions regarding our comments, we would be happy to discuss them with you at your convenience.

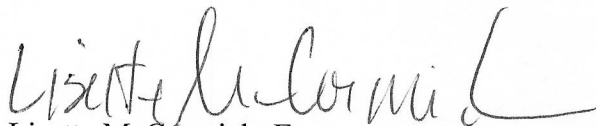
Respectfully,



Leonard J. Rivera, Esq.  
Chair



Lynn A. Marks, Esq.  
Vice Chair



Lisette McCormick, Esq.  
Executive Director

cc: Interbranch Commission Members  
Interbranch Commission's Equal Opportunity and Diversity Committee Members