IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 1966 EDA 2022

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

BRUCE BATES,

Appellant.

Brief of Amicus Curiae the ACLU of Pennsylvania in Support of Appellant Bruce Bates

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Appeal from the Judgment of Sentence Entered June 28, 2022 in the Court of Common Pleas of Delaware County CP-23-CR-0006975-2011

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Statement of Interest of Amicus Curiae

The American Civil Liberties Union of Pennsylvania ("ACLU of Pennsylvania") is an affiliate of the American Civil Liberties Union, a century-old nationwide, nonprofit, nonpartisan membership organization with over 1.5 million members. The ACLU of Pennsylvania is dedicated to defending and expanding individual rights and personal freedoms throughout the entire Commonwealth and has particular expertise with respect to the assessment and collection of fines, costs, and restitution in criminal cases. We submit this brief to provide the Court with a more complete picture of the standards governing parole revocation proceedings and what is required of a trial court before finding that nonpayment constitutes a violation of parole.[1]

Introduction

The central problem in this case is that the trial court has repeatedly treated Mr. Bates's inability to pay restitution *in full* prior to the end of his period of parole as a strict liability parole violation without *any* consideration of his financial resources or the reasons why he has been unable to pay the restitution. The result is that Mr. Bates has spent more than ten years on parole for a crime that has a statutory maximum penalty of only five years.

[1] No other person or entity paid in whole or in part for the preparation of this brief.

The Delaware County Court of Common Pleas appears to have a pattern of unlawfully keeping indigent defendants on probation or parole indefinitely when they are unable to pay. Last year, this Court addressed nearly identical facts from the same common pleas court in *Commonwealth v. Bolds*, No. 163 EDA 2021, 2022 WL 71879, at *1 (Pa. Super. Ct. Jan. 7, 2022) (unpublished) and ruled that the defendant must be discharged from supervision. Just prior to the filing of this brief, the Delaware County Daily Times reported on a woman who had been kept on probation for an extra six years by the same court after she was unable to pay restitution in full, until the celebrity Kim Kardashian and the Reform Alliance paid her restitution to end supervision.[2]

This Court must put an end to these unlawful actions, and it should now do what it did in *Bolds*: end Mr. Bates's *de facto* indefinite parole. In so doing, this Court should also reiterate the key legal principles governing revocation, which are set forth in Mr. Bates's brief. In *all* cases involving alleged technical violations of probation or parole, only willful noncompliance can lead to revocation. At least three published and binding opinions from this Court, as well as two published opinions from the Commonwealth Court, have also expressly made this point in

[2] Alex Rose, *Philly Woman Has Delaware County Restitution Paid by Kim Kardashian and Reform Alliance*, DELAWARE COUNTY DAILY TIMES (June 13, 2023), https://www.delcotimes.com/2023/06/13/philly-woman-has-delaware-county-restitution-paid-by-kim-kardashian-and-reform-alliance-video/.

the context of fines, costs, and restitution. In cases like *Commonwealth ex rel. Powell v. Rosenberry*, this Court has unequivocally instructed that only the "willful refusal to pay" a financial obligation "may be considered a technical parole violation" that can lead to revocation. 645 A.2d 1328, 1331 (Pa. Super. Ct. 1994).[3]

Yet in each of Mr. Bates's revocation hearings, the Commonwealth failed to meet its burden to establish this indispensable element of a violation, and the trial court failed to fulfill its independent obligation to "inquire into the reasons for appellant's failure to pay" and "make any findings pertaining to the willfullness" of Mr. Bates's nonpayment. *Commonwealth v. Dorsey*, 476 A.2d 1308, 1311-12 (Pa. Super. Ct. 1984) (probation or parole cannot "be revoked for less than willful conduct," and the trial court must inquire into the reasons for nonpayment even if not raised by the defendant). Those failures render the resulting revocations and sentences illegal.

The trial court acknowledged during a hearing in this case that Mr. Bates was experiencing a "financial hardship," but its 1925 Opinion shows that it fundamentally misunderstands the legal issues. The 1925 Opinion suggests that Mr. Bates's request to end the repeated cycles of parole revocations would

[3] As here, in *Rosenberry*, the defendant was not sentenced to incarceration for nonpayment; instead, the defendant was given an additional period of parole for nonpayment, which this Court ruled was illegal. The appeal arose when the defendant was later incarcerated for a violation of that (illegal) parole when he had new DUI charges. 645 A.2d at 1329.

somehow remove his obligation to pay restitution. That, of course, is not the law. Regardless of whether Mr. Bates is on parole, the Commonwealth can still choose to collect restitution if the defendant refuses to pay, either through civil means in 42 Pa.C.S. § 9728 or by pursuing contempt of court proceedings in the trial court pursuant to 18 Pa.C.S. § 1106(f).

The denial of Mr. Bates's right to counsel compounds the problems in this case. Both Pa.R.Crim.P. 121 and this Court's precedents, most recently *Commonwealth v. Murphy*, 214 A.3d 675, 679 (Pa. Super. Ct. 2019), are crystal clear about what constitutes an appropriate colloquy under Rule 121, as opposed to what is "truncated and [falls] well short." At a 2019 parole revocation hearing, a hearing officer merely asked Mr. Bates if he knew he had a right to counsel and wanted to proceed without—deficiencies that are identical to those that the Court found "fell well short" in *Murphy*. *Id.* The violation of Mr. Bates's fundamental right to counsel itself snowballed into further violations of his rights in successive years, leading to the present sentence. *See Commonwealth v. Milhomme*, 35 A.3d 1219, 1222 (Pa. Super. Ct. 2011) (prior illegal sentence renders subsequent probation revocation and sentence illegal).

The legal issues in this case are straightforward based on precedent from this Court and Pennsylvania's other appellate courts. No person can have parole (or probation) revoked for nonpayment of fines, costs, or restitution without a court

first considering the defendant's financial resources and making a finding on the record of willful nonpayment. Nor can any person suffer an uncounseled revocation of court supervision without strict adherence to the Rule 121 colloquy. In light of the trial court's failure on both marks, the ACLU of Pennsylvania urges this Court to vacate Mr. Bates' sentence and reinforce the governing law—particularly since this same court of common pleas has a pattern of acting in the same unlawful manner. *See Bolds*, 2022 WL 71879, at *1.

Discussion

A. Effective and lawful collections require pragmatic approaches based on reasonable payment plans rather than reflexive punishment in the form of indefinite parole or probation.

Across Pennsylvania, trial courts face the reality that few defendants can quickly pay restitution to crime victims. According to public figures from AOPC's website, Pennsylvania courts struggle to collect restitution (and fines and costs). This table shows the financial obligations imposed in 2012 and 2017, and the percentages collected as of December 2022:[4]

Year	Fines Imposed	Percent Collected	Costs Imposed	Costs Collected	Restitution Imposed	Restitution Collected
2012	$56 million	45%	$238 million	58%	$133 million	26%
2017	$42 million	38%	$263 million	51%	$104 million	24%

[4] AOPC, *Collection Rate of Payments Ordered by Common Pleas Courts* http://www.pacourts.us/news-and-statistics/research-and-statistics/dashboard-table-of-contents/collection-rate-of-payments-ordered-by-common-pleas-courts.

The data reinforces what everyone involved in the criminal justice system already knows: defendants struggle to pay even comparatively small amounts of restitution. The median amount of restitution that defendants must pay following sentencing is about $500, yet most public defender clients have been unable to pay it in full after ten years.[5] Mr. Bates has paid several hundred dollars—although the clerk's office allocated the payments to costs, rather than restitution—but it is no surprise that he has so far been unable to pay the $5,600 in full restitution.

This leaves courts with the question of what to do at the end of probation when defendants, despite good-faith efforts, prove unable to pay the entire balance. This is a particularly critical issue given that one third of Americans cannot readily afford an unexpected expense of even $400.[6] The approach taken by the trial court here would see thousands of Pennsylvanians, who AOPC data show have been unable to pay restitution (and fines and costs), automatically violated and re-sentenced to longer terms of probation or parole without consideration of their financial ability or good-faith effort to pay in full.

Fortunately, controlling Pennsylvania case law, statutes, and court rules compel a better approach reflecting patience and pragmatism. Defendants like Mr.

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[5] Jeffrey T. Ward, et al., *Imposition and Collection of Fines, Costs, and Restitution in Pennsylvania Criminal Courts: Research in Brief*, American Civil Liberties Union of Pennsylvania at 5 (2020), www.aclupa.org/courtdebt.

[6] Board of Governors of the Federal Reserve, *Economic Well-Being of U.S. Households in 2021* (2022), https://www.federalreserve.gov/publications/2022-economic-well-being-of-us-households-in-2021-dealing-with-unexpected-expenses.htm.

Bates are required to pay restitution for the harm they have caused, but both the law and common sense lead to the conclusion that punishing them for their life circumstances will not result in the faster repayment of their debt. To the contrary, this Court has explained that if someone faces punishment because "the amount of restitution imposed exceeds the defendant's ability to pay, the rehabilitative purpose of the order is disserved." *Commonwealth v. Fuqua*, 407 A.2d 24, 26 (Pa. Super. Ct. 1979). Thus, the payment structure in Pennsylvania mandates that defendants not be punished for paying what they are *able* to pay while working towards that goal of fulfilling their obligations. *See Commonwealth ex rel. Parrish v. Cliff*, 304 A.2d 158, 161 (Pa. 1973) (requiring that defendants be permitted to pay in "reasonable installments" rather than punishing them for an inability to pay in full); 18 Pa.C.S. § 1106(c)(2)(ii) (authorizing courts to set payment plans when a defendant cannot pay restitution in a lump sum). This is the only approach that is consistent with the reality of impoverished and low-income defendants.

Courts can comply with the law by not keeping defendants like Mr. Bates on probation or parole indefinitely, while still ensuring compliance with a restitution order. In *Rosenberry*, this Court expressly rejected the proposition that courts should keep defendants on parole to ensure payment:

> Powell need not be on parole to pay his fine, and the Commonwealth need not keep him on parole to insure payment. The Commonwealth could have collected the fine in any manner provided by law, *see* 42 Pa.C.S. § 9728(a), including holding Powell in contempt for failure to

> pay his fine. *See Commonwealth v. Rosser*, 268 Pa.Super. 116, 407 A.2d 857 (1979). While it may be convenient to threaten Powell with re-incarceration should he not pay, it is hardly necessary. And if maintaining that leverage means modifying Powell's sentence two years after it was originally imposed, it is illegal as well.

645 A.2d at 1331. The same holds true today, and there is simply no reason why a trial court must disregard this Court's precedents in service of increasing perceived leverage over a defendant to collect restitution he is unable to pay.

Following the reasoning from *Rosenberry*, this Court held last year that the same Court of Common Pleas of Delaware County at issue here could not revoke and impose a new period of parole in a case where restitution had previously been reduced to a civil judgment. *See Bolds*, 2022 WL 71879, at *1 (discharging defendant from parole for nonpayment of restitution where the restitution had already been reduced to a civil judgment). The record here shows that Mr. Bates's restitution, too, was reduced to a civil judgment in 2014 and again in 2022, as was required by law. *See* 42 Pa.C.S. § 9728(b)(1) (requiring orders to pay more than $1,000 to be entered as civil judgments).

In these circumstances, where restitution has been imposed as a part of the sentence under Section 1106, courts retain ongoing authority to *enforce* compliance with restitution orders, even after supervision ends; the obligation to pay restitution imposed under Section 1106 does not expire with the end of supervision and instead remains owed until fully paid. *See, e.g.*, *Commonwealth v.*

Holmes, 155 A.3d 69, 87 (Pa. Super. Ct. 2017) (en banc) (opinion of four judges) ("Restitution as a part of a sentence is not satisfied until paid in full," even past the end of probation.). And a court need look no further than Section 1106 itself to see that it can continue to use its contempt authority to punish a defendant who willfully refuses to pay restitution. *See* 18 Pa.C.S. § 1106(f). As the statute sets forth, the court's collections staff—in Delaware County, the office is Court Financial Services—is charged with notifying the court when default has occurred, so the court can take appropriate action.[7] Accordingly, there is no need for perpetual probation as an additional lever to compel payment from those who are simply unable to pay.

While courts routinely use their contempt powers to enforce payment of restitution, they must still determine in the context of contempt proceedings whether the nonpayment has been willful. *See, e.g.*, *Commonwealth v. Mauk*, 185 A.3d 406, 411 (Pa. Super. Ct. 2018) (invalidating finding of contempt where the trial court did not inquire into the reasons for nonpayment and did not make findings on the record regarding willfulness).

[7] To avoid any confusion, it is worth noting that the reference to magisterial district judges ("MDJ") in Section 1106(f) is a reference to the procedures that occur when an MDJ imposes restitution, as set forth in Section 1106(e). It is not the case that nonpayment of restitution imposed by a common pleas judge is handled by first sending it to the MDJ for adjudication.

Moreover, the trial court's approach here—trying to maximize payments to a victim while keeping a defendant on court supervision—is actually counter-productive to the stated goal. Employment opportunities for a person currently on probation or parole are significantly limited, making it even harder for a person on supervision to earn the money necessary to pay restitution. Even if employers are willing to hire an individual who is under active court supervision, the demands of supervision make it harder to maintain employment. Supervision conditions "often conflict" with a person's ability to work if a person is required "to attend frequent meetings and treatment programs—typically held during standard work hours."[8] As a recent report from the Harvard Law School Criminal Justice Policy Program explained, individuals on supervision "must take time off work" to check in with probation officers: "Hourly workers lose income and salaried employees might be required to take unpaid leave, and they may also risk losing their job for repeated requests for time off—making it harder for those who are already struggling with financial sanctions to make payments."[9] This also limits work opportunities for individuals on supervision, who "report that it is hard to find a job that will

[8] Allison Frankel, *Revoked: How Probation and Parole Feed Mass Incarceration in the United States*, Hum. Rts. Watch (2020), https://www.hrw.org/report/2020/07/31/revoked/how-probation-and-parole-feed-mass-incarceration-united-states.

[9] Sharon Brett, Neda Khoshkhoo, & Mitali Nagrecha, *Paying on Probation: How Financial Sanctions Intersect with Probation to Target, Trap, and Punish People Who Cannot Pay*, Harv. L. Sch. Crim. Just. Pol'y Program 16 (June 2020), https://mcusercontent.com/f65678cd73457d0cbde864d05/files/f05e951e-60a9-404e-b5cc-13c065b2a630/Paying_on_Probation_report_FINAL.pdf.

accommodate their probation reporting schedules." *Id.* at 16-17. When a defendant owes restitution, what is bad for the defendant's ability to obtain employment is also bad for the victim and the court.

If the trial court's goal is to ensure maximum repayment to a victim in the shortest period of time—which certainly should be the goal—then there is no point in keeping a defendant on supervision solely to extract payments. Instead, allowing the defendant to complete probation is a win-win scenario for the defendant, the victim, *and* the court. The defendant can pursue better work opportunities while being free of court supervision, the significant restrictions that are attendant to it, and the ever-present threat of arrest and re-incarceration due to minor technical violations. The victim receives restitution payments faster because the defendant has better and higher-paying work opportunities. And the court saves time and resources by not having its probation officers waste their limited capacity on defendants who remain on probation or parole, not because of any risk to the public or need for further rehabilitation, but only because they are slowly paying off restitution. Instead, collections can be turned over to the court's dedicated collections staff in Court Financial Services—and private debt collection

agencies—to let them collect the money and inform the court of any failure to pay.[10]

B. The trial court denied Mr. Bates his right to counsel at the 2019 revocation hearing, rendering that and subsequent sentences illegal.

The trial court's other major error that this Court should correct is the denial of Mr. Bates's fundamental right to counsel in the 2019 parole revocation hearing, where a hearing officer allowed him to proceed without counsel in violation of Pa.R.Crim.P. 121. That Rule sets forth strict requirements for courts to follow, and in order to accept that a defendant's waiver of counsel is "knowing, voluntary, and intelligent, the judge or issuing authority, *at a minimum*, shall elicit the following information from the defendant:"

> (a) that the defendant understands that he or she has the right to be represented by counsel, and the right to have free counsel appointed if the defendant is indigent;
> (b) that the defendant understands the nature of the charges against the defendant and the elements of each of those charges;
> (c) that the defendant is aware of the permissible range of sentences and/or fines for the offenses charged;
> (d) that the defendant understands that if he or she waives the right to counsel, the defendant will still be bound by all the normal rules of procedure and that counsel would be familiar with these rules;
> (e) that the defendant understands that there are possible defenses to these charges that counsel might be aware of, and if these defenses are not raised at trial, they may be lost permanently; and
> (f) that the defendant understands that, in addition to defenses, the defendant has many rights that, if not timely asserted, may be lost permanently; and that if errors occur and are not timely objected to, or

[10] Every court must have either dedicated staff to collect fines, costs, and restitution or must have a contract with a private debt collection agency to do so. *See* 42 Pa.C.S. § 9728(a)(2).

> otherwise timely raised by the defendant, these errors may be lost permanently.

Id. (emphasis added). In proceedings before the court of common pleas, "the judge shall ascertain from the defendant, on the record, whether this is a knowing, voluntary, and intelligent waiver of counsel." Pa.R.Crim.P. 121(C).

As is evident from comparing the six questions in Rule 121 with the paltry questioning from the hearing officer, the hearing officer did not comply with Rule 121. All he asked was whether Mr. Bates understood he had the right to be represented, if he understood he could be resentenced, and if he wanted to proceed without counsel. (N.T. 1/29/2019 at 3). These questions do not suffice to cover even *one single* requirement under Rule 121. The hearing officer did not: (a) ask whether Mr. Bates knew he had the right "to have free counsel appointed"; (b) explain "the nature of the charges" and the elements thereof; (c) describe the possible sentence he faced; (d) warn that he was bound by "all the normal rules of procedure"; (e) ask that he knew the "possible defenses to these charges"; and (f) caution that he could lose his rights if "not timely asserted." Pa.R.Crim.P. 121(A)(2).

These requirements exist for a reason and may have had a significant impact on Mr. Bates's case and his life in the years since. As this Court has explained, it is "incumbent on the court to fully advise the accused [of the nature and elements of the crime] before accepting waiver of counsel." *Commonwealth v. Phillips*, 93

A.3d 847, 853 (Pa. Super. Ct. 2014) (additions in original). Had that happened here, Mr. Bates would have been told that part of the revocation proceedings would involve consideration of his ability to pay. It is not an exaggeration to say that Mr. Bates may have literally never thought that he *had* any defense to the revocation proceeding because of his poverty. After all, nothing in the record suggests that anyone ever asked him about his ability to pay or suggested that he only needed to pay what he was able to afford. Moreover, when Mr. Bates attempted to explain that he was making payments towards the probation supervision fees in York County (as supervision was transferred from Delaware to York) and could not pay both counties, the hearing officer was unmoved, instead only suggesting creating a second payment plan in Delaware County. (N.T. 1/29/2019 at 4-5). Nor did the hearing officer give any consideration to the fact that additional supervision meant additional supervision fees, which further reduced the ability to pay restitution. (N.T. 1/29/2019 at 6-7).

The trial court's fundamental violation of Mr. Bates's right to counsel with this inadequate colloquy is on all fours with this Court's decision in *Murphy*. There, the court also only asked whether the defendant was aware he had "a right to have an attorney with you at these proceedings" and confirmed that the defendant did not retain counsel from the public defender. *Murphy*, 214 A.3d at 679. This Court found that inadequate:

> The above exchange between the trial court and Murphy was insufficient to constitute an adequate waiver of counsel. Stated differently, the on-the-record discussion on Murphy's right to counsel was truncated and fell well short of a colloquy memorializing a knowing and voluntarily waiver of counsel pursuant to *Commonwealth v. Grazier*, 552 Pa. 9, 713 A.2d 81 (1998) and Pa.R.Crim.P. 121.

Id. As in *Murphy*, without the Rule 121 colloquy "the court cannot ascertain that the defendant fully understands the ramifications of a decision to proceed pro se and the pitfalls associated with his lack of legal training," and thus there is no knowing, voluntary, and intelligent waiver of counsel. *Commonwealth v. Robinson*, 970 A.2d 455, 460 (Pa. Super. Ct. 2009) (en banc) (emphasis omitted).

Of course, the record here is silent about *why* Mr. Bates did not have counsel in 2019, although the experience of the ACLU of Pennsylvania is that probation officers often assure defendants in these circumstances that there is no *need* for a lawyer. Probation officers routinely advise defendants that it is *easier* to stipulate to a violation, and that the process will end more quickly without an attorney to complicate things. Too many defendants naively follow this advice to their detriment; the colloquy is designed to ensure that a defendant is fully aware of the right to counsel and has an opportunity to reflect before making such a choice.

Whatever the reason for Mr. Bates proceeding without counsel, the record is clear that he never received the legally-mandated colloquy. The 2019 proceeding was therefore unlawful because of the violation of Rule 121, and under *Milhomme*,

35 A.3d at 1222, that rendered the subsequent revocation proceedings and sentences void *ab initio*.

Conclusion

For the foregoing reasons, *Amicus Curiae* the ACLU of Pennsylvania urges this Court to not only find that Mr. Bates has been subjected to an unlawful revocation and sentence, but to also provide clear and specific guidance to the trial court to put an end to these unlawful sentences of *de facto* indefinite supervision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

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

CERTIFICATE OF COMPLIANCE

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.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the parties via PACFile.

/s/ *Andrew Christy*
Andrew Christy

Dated: June 16, 2023