IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 163 EDA 2021

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

SHANAE BOLDS,

Appellant.

Brief of Amicus Curiae the ACLU of Pennsylvania in Support of Appellant Shanae Bolds

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Appeal from the Judgment of Sentence Entered December 16, 2020 in the Court of Common Pleas of Delaware County CP-23-CR-0004160-2014

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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

A great deal has gone wrong in Ms. Bolds's case over the past seven years. What was originally intended to be a sentence of 477 days of county parole has morphed into a Sisyphean sentence of indefinite parole, where Ms. Bolds—a woman who with her daughter subsists on income below the Federal Poverty Guidelines—must come up with *full payment* of the remaining $9,603 in restitution to ever leave parole.[2] At each of her parole violation hearings in 2016, 2017, 2019,

[1] No other person or entity paid in whole or in part for the preparation of this brief.
[2] The sentencing judge imposed this restitution joint and severally with two other defendants. (N.T. 11/18/2014 at 10).

and 2020, Ms. Bolds suffered unlawful revocations and reinstatement of 477 days of parole on the grounds that she had not paid the restitution in full, without any consideration for her ability to pay and (in 2017 and 2019) without affording her the right to counsel. This Court cannot give Ms. Bolds back the time she has spent on illegal parole, but it can and should put an end to it now. And in so doing, it can ensure that the trial court begins complying with this Court's precedents.

There are two central problems highlighted by the trial court's actions in Ms. Bolds's case. The first is that, even assuming that the trial court ordered that Ms. Bolds pay restitution as a condition of parole, it has repeatedly treated her inability to pay *in full* as a strict liability parole violation. This directly conflicts with at least three published and binding opinions from this Court, as well as two published opinions from the Commonwealth Court. What cases like *Commonwealth ex rel. Powell v. Rosenberry*, 645 A.2d 1328, 1331 (Pa. Super. Ct. 1994), unequivocally instruct is that only the "willful refusal to pay" a financial obligation "may be considered a technical parole violation." As is required under *Rosenberry*, the trial court must make a finding of willfulness to hold Ms. Bolds in violation even though she has not (yet) been incarcerated for nonpayment, and there is no need for her to pay in full before completing parole, as the trial court retains other tools to enforce compliance with an order to pay restitution. *Id.*

Ms. Bolds was never charged with the *willful* failure to pay restitution, nor in any of her four parole revocation proceedings has the trial court ever made any finding that she willfully refused to pay. In each of those hearings, the Commonwealth failed to meet its burden to establish the elements of a violation by proving willfulness, 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 willfulness" of Ms. Bolds'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 those revocations and sentences illegal.

The reason for these legal requirements is straightforward in light of the need for patience and pragmatism when collecting large sums of money from defendants who do not have those funds. Pennsylvania's appellate courts have worked to "eliminate inequities in the criminal process caused by indigency." *Commonwealth ex rel. Parrish v. Cliff*, 304 A.2d 158, 160 (Pa. 1973). One such "inequity" is when a person who can afford to pay restitution in full does so and ends parole, while a person who can afford only a reasonable payment plan still owes a balance after seven years and remains in parole indefinitely. This two-tiered system of justice is prohibited under this Court's precedents. And it is of

substantial importance in a system where AOPC reports that defendants have only paid about 25% of the restitution imposed 10 years ago. Under the approach of the trial court in Ms. Bolds's case, every one of those defendants who has not paid the full balance—even those complying with a payment plan—could be kept on probation or parole for the rest of their lives while they make payments. At the same time, being under court supervision impairs a defendant's ability to obtain steady, full-time employment and thus pay off the debt faster.

The second central problem in Ms. Bolds's 2017 and 2019 parole revocation was the denial of her right to counsel. 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 what about what constitutes an appropriate colloquy under Rule 121, as opposed to what is "truncated and [falls] well short." At both hearings, the hearing officer merely asked Ms. Bolds if she knew she 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*. Compounding the problem, Rule 121 permits only a *judge* to ascertain the quality of a waiver colloquy, and it offers no allowance for such colloquy by a hearing officer. The violation of Ms. Bolds's fundamental right to counsel itself snowballed into further violations of her rights in successive years, as she lost two opportunities where effective counsel could have ended her parole.

While the trial court's 2020 sentence was plainly illegal for violations of, *inter alia*, *Rosenberry* and *Dorsey*, it was also void *ab initio* because each and every prior parole revocation and resentencing—2016, 2017, and 2018—was also illegal. *See Commonwealth v. Milhomme*, 35 A.3d 1219, 1222 (Pa. Super. Ct. 2011) (prior illegal sentence renders subsequent probation revocation and sentence illegal). The result is that Ms. Bolds has been subjected to illegal parole that, absent intervention from this Court, will this November stretch past even the seven-year statutory maximum sentence for the offense of receiving stolen property for which she was convicted. The ACLU of Pennsylvania urges this Court to vacate Ms. Bolds's sentence and send a clear message to Pennsylvania's trial courts that they cannot simply keep indigent defendants on court supervision indefinitely.

A. Most defendants cannot afford to pay restitution in full, and this Court's precedents prohibit punishing them because they lack financial means.

1. Most defendants cannot afford to pay full restitution, even after a decade.

It is no surprise to anyone involved in Pennsylvania's criminal justice system that most defendants cannot afford to pay thousands of dollars in restitution. Certainly the trial court here recognizes that fact, noting that it was "not surprising[]" that Ms. Bolds's two co-defendants had also not yet paid the roughly $10,000 joint-and-several restitution order in full. (N.T. 12/16/2020 at 14). Courts

can and should enforce their restitution orders, but decisions from this Court and the Commonwealth Court place clear limitations on *how* such orders are enforced to ensure that indigent and impoverished Pennsylvanians are not punished *because* they cannot pay in full. One such limit is that trial courts have to distinguish between those who have the means to pay but refuse, and those who simply cannot.

That limitation is critical in light of the sheer number of cases in which defendants require many years to pay full restitution. According to public figures from AOPC's website, Pennsylvania's courts struggle to collect not only restitution, but also fines and costs. This table shows the financial obligations imposed in 2011 and 2013, and the percentages collected as of 2021:[3]

Year	Fines Imposed	Percent Collected	Costs Imposed	Costs Collected	Restitution Imposed	Restitution Collected
2011	$54 million	45%	$222 million	59%	$123 million	25%
2016	$44 million	38%	$269 million	50%	$106 million	24%

Thus, AOPC's data reinforces what everyone already knows, that even over a ten-year horizon, defendants are able to pay only a small amount of the total restitution.

[3] AOPC, "Collection Rates Over Time," http://www.pacourts.us/news-and-statistics/research-and-statistics/dashboard-table-of-contents/collection-rate-of-payments-ordered-by-common-pleas-courts.

To better understand this and related issues, the ACLU of Pennsylvania recently purchased 10 years' of complete case data from AOPC to dive into the wealth-based inequities attendant to the imposition and collection of fines, costs, and restitution. With help from data scientists at Temple and Rutgers Universities, we compared the payment rates of defendants based on whether they had public defenders or private counsel (a proxy for the defendant's relative wealth).[4] The statistical analysis shows significant disparities in restitution payment rates based on the defendant's financial means. This, of course, is not surprising: low-income defendants have fewer resources to pay restitution than defendants with more financial means. But there are some stark differences. Most defendants represented by private counsel fully pay their restitution within two years—but most defendants represented by public defenders still owe restitution after *ten* years. *Id.* at 5, 7. Tellingly, though, the amount of restitution in most public defender cases is far less than in Ms. Bolds's case, clocking in at a median amount of about $500. *Id.* at 5. It is, therefore, entirely consistent with AOPC's data that she has been unable to pay nearly $10,000 in restitution over the past seven years—the data shows it will likely take her many decades.

[4] Jeffrey T. Ward, et al., *Imposition and Collection of Fines, Costs, and Restitution in Pennsylvania Criminal Courts: Research in Brief*, ACLU of Pennsylvania 2-3 (Dec. 18, 2020), www.aclupa.org/courtdebt.

The reality is that far too many Pennsylvanians are impoverished and unable to afford to pay restitution as quickly as courts, and victims, wish it to be paid. Statewide, 12% of the population lives—like Ms. Bolds—below the Federal Poverty Guidelines,[5] which sets a threshold of $17,420 in annual income for a family of two.[6] Ms. Bolds has a five-year old daughter, and with her $9.75-per-hour 30-hour-a-week job at Burger King, she makes at most $15,210 (before taxes) each year, qualifying her and her daughter for food stamps and Medicaid.[7] Due to her low wages, Ms. Bolds and her daughter cannot afford to live on their own and must stay with Ms. Bolds's father. Compounding the problem is that most people who are involved in the criminal justice system—like other Americans—do not have savings to draw from. The federal government estimates that approximately 40% of American adults, for example, would not be able to pay an unexpected $400 expense out of pocket.[8] Indigent defendants in the criminal justice system

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[5] U.S. Census Bureau, *QuickFacts: Pennsylvania* (July 1, 2019), https://www.census.gov/quickfacts/fact/table/PA/PST045219.

[6] U.S. Dep't of Health & Hum. Servs., *Poverty Guidelines*, (Jan. 15, 2021), https://aspe.hhs.gov/poverty-guidelines.

[7] Pa. Dep't of Hum. Servs., *SNAP Income Limits*, https://www.dhs.pa.gov/Services/Assistance/Pages/SNAP-Income-Limits.aspx; Pa. Dep't of Hum. Servs., *Medical Assistance General Eligibility Requirements*, https://www.dhs.pa.gov/Services/Assistance/Pages/MA-General-Eligibility.aspx.

[8] *See* Bd. of Governors of the Fed. Rsrv. Sys., *Report on the Economic Well-Being of U.S. Households in 2018*, 2 (2019), https://bit.ly/3c6SOfD (noting the severe difficulties that a large share of the adult population would experience if faced with even a "modest" unexpected expense).

cannot afford to pay even comparatively minor financial emergencies, let alone significant restitution obligations.

The answer to this, mandated by Pennsylvania's case law, statutes, and court rules, is patience and pragmatism. Ms. Bolds and her co-defendants are required to pay restitution for the harm caused by their actions, but both the law and common sense lead to the conclusion that punishing her for her life circumstances will not help her to improve them and will not get the debt paid faster. Thus, the payment structure in Pennsylvania mandates that defendants pay what they are *able* to pay and work towards that goal of fulfilling their obligations. *See Parrish*, 304 A.2d at 161 (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 in a lump sum). It is the only approach that is consistent with the reality of impoverished defendants.

2. The trial court has repeatedly and illegally revoked Ms. Bolds's parole and imposed a new period of parole without ever considering her ability to pay or finding that she willfully refused to pay.

The reason that affordable payment plans are critical is that they serve as the benchmark for whether a defendant who does not pay is doing so because of poverty or because of a willful disregard for the court's order. In each of the four revocation proceedings, the trial court acted as if nonpayment is a strict liability

offense that automatically constitutes a technical violation of parole. That, however, is not the law in Pennsylvania as set forth in multiple opinions by both this Court and the Commonwealth Court.

i. The Commonwealth bears the burden to prove that a defendant has willfully refused to pay.

Assuming that a court makes payment of restitution a condition of parole (or probation), the threshold question to determine whether there has even been a technical violation due to nonpayment is whether the defendant *willfully* refused to pay. In *Dorsey*, this Court answered the question for the first time of "whether parole or probation may be revoked for less than willful conduct." 476 A.2d at 1311. Looking to the basic framework used by the U.S. Supreme Court in *Bearden v. Georgia*, 461 U.S. 660, 672 (1983), the Court determined that it cannot. Thus, the Court set forth that, as in all other revocation proceedings, the burden is on the Commonwealth to "prove by a preponderance of the evidence a violation of such parole"—and one of the elements that the Commonwealth must prove is that the defendant willfully refused to pay. *Dorsey*, 476 A.2d at 1311. If that decision somehow left any ambiguity, ten years after *Dorsey* this Court again held in *Rosenberry* that only the "willful refusal to pay a fine may be considered a technical parole violation for which a parolee may be re-incarcerated." 645 A.2d at 1331. The defendant in *Rosenberry*, of course, was *not* incarcerated for nonpayment. Instead, as here, that court gave the defendant an additional period of

parole, and he was later incarcerated for an unrelated violation that occurred while he was on that illegal parole. *Id.* at 1329. This Court vacated that additional sentence of parole and "discharged [him] from all obligations arising subsequent to the expiration of his original parole period." *Id.* at 1331.

The takeaway from those cases is that absent a finding of willfulness, a defendant simply has not committed a technical violation due to nonpayment. This places the evidentiary burden on the Commonwealth to prove willfulness, but it also places an obligation on the trial court to avoid erroneous revocation of a defendant who cannot pay. As this Court explained, even when a defendant facing revocation did not "offer any evidence concerning his indigency," the trial court nevertheless has acted unlawfully if it did "not inquire into the reasons for appellant's failure to pay [n]or . . . make any findings pertaining to the willfulness of appellant's omission as required by *Bearden*." *Dorsey*, 476 A.2d at 1312. This Court reiterated the need for such findings fifteen years later, explaining that a "proper analysis should include an inquiry into the reasons surrounding the probationer's failure to pay, followed by a determination of whether the probationer made a willful choice not to pay, as prescribed by *Dorsey*." *Commonwealth v. Eggers*, 742 A.2d 174, 176 (Pa. Super. Ct. 1999).

Using the same analytical framework, the Commonwealth Court has explained that there must be a "showing of fault on the part of the petitioner in a

violation of either probation or parole" in order to find that a technical violation occurred. *Hudak v. Pennsylvania Board of Probation and Parole*, 757 A.2d 439, 441 (Pa. Commw. Ct. 2000). Relying on *Dorsey* and *Eggers*, that court also concluded that the Commonwealth must "meet its burden" to prove a technical violation. *Id.* at 441 and n.3. The Commonwealth Court later applied the same reasoning in holding that only a defendant who is either able to pay, or is unable and has failed to make "sufficient bona fide efforts to acquire or save the necessary resources to pay," is in violation. *Miller v. Pennsylvania Board of Probation and Parole*, 784 A.2d 246, 248 (Pa. Commw. Ct. 2001).[9] Both lines of cases from this Court and the Commonwealth Court are consistent that nonpayment is not a strict liability technical violation; the Commonwealth must provide additional evidence of willful nonpayment to meet its burden.

The concept of "willfulness" is already well-defined by case law. The Pennsylvania Supreme Court explained decades ago that, in the context of nonpayment, willful "means an intentional, designed act and one without justifiable excuse." *Commonwealth ex rel. Wright v. Hendrick*, 312 A.2d 402, 404 (Pa. 1973). Thus, when the only evidence is that a person is "penniless and unable,

[9] There is some tension between *Miller* and this Court's rulings. *Miller* creates a burden-shifting framework where the defendant first has to show an inability to pay, and the Commonwealth then has to show that despite that, the defendant has failed to make a good faith effort to acquire the resources to pay. By contrast, this Court's opinion in *Dorsey* made it the Commonwealth's burden at all stages to prove an *ability* to pay.

through no fault of his own, to pay any sum on the delinquencies," he has not willfully failed to pay. *Id. See also Commonwealth v. Diaz*, 191 A.3d 850, 866 n.24 (Pa. Super. Ct. 2018) ("A finding of indigency would appear to preclude any determination that Appellant's failure to pay . . . was willful."). That is not to say that an indigent defendant is automatically insulated from a finding of willful nonpayment, as a person who "refused to work, and, thus through his own fault was rendered incapable of making payments on the outstanding support orders" might be in willful noncompliance. *Hendrick*, 312 A.2d at 404. The bottom line is that a court must "examine the totality of the defendant's life circumstances. If one's effort to secure the funds owed was made in good faith, any nonpayment is excused," but "[i]ntent to defy an order may be inferred from a defendant's unreasonable inaction." *Commonwealth v. Mauk*, 185 A.3d 406, 411 (Pa. Super. Ct. 2018).

Applying those standards shows that Ms. Bold's violation hearings roundly disregarded and violated all five appellate decisions, from *Dorsey* to *Miller*. The errors were fatal from the start because, as the transcripts show, there was *never* any allegation that Ms. Bolds's nonpayment was willful.[10] Then, the hearing

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[10] Moreover, if the sentencing court never specifically ordered that payment of restitution is a condition of parole, then nonpayment can *never* constitute a violation of parole. *See Commonwealth v. Foster*, 214 A.3d 1240, 1250 (Pa. 2019) (a trial court cannot revoke probation for conditions that it does not specify in the probation order). That said, if a trial court instead proceeded under its contempt authority to enforce payment under 18 Pa.C.S. § 1106(f), the question in contempt proceedings, too, is whether the defendant willfully refused to pay. *See*,

officers in the 2016, 2017, and 2019 proceedings never heard any evidence about Ms. Bolds's reasons for nonpayment and her financial circumstances.[11] It is true that Ms. Bolds did not argue that her poverty prevented her from paying—particularly unsurprising given that she was unrepresented for two of those three hearings—but *Dorsey* and *Eggers* are clear that it is the court's affirmative obligation to inquire into the reasons for nonpayment and make findings on the record. That did not happen before the hearing officers, and it still did not happen before the actual judge in the 2020 proceeding. The only evidence that the judge heard was that she has a five-year-old daughter, has income that puts her below the Federal Poverty Guidelines, and thus has to live with her father. Despite that, she pays what she can when she is able, a fact her probation officer agreed with when he testified that she had been making "payments towards restitution." (N.T. 12/16/2020 at 5-7). On this record, there was no finding of willful nonpayment by the court, nor could there have been under *Hendrick* and this court's decisions in *Mauk* and *Diaz*.

Looking back, Ms. Bolds could have avoided all of these illegal parole revocation proceedings if the original sentencing court had complied with Section

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e.g., *Mauk*, 185 A.3d at 411 (explaining the requirement to ascertain intent when determining contempt).

[11] Although the cover pages for the transcripts of those proceedings suggest that a judge presided, the transcripts reveal that each of them was actually adjudicated by a hearing officer instead.

1106. Section 1106(c)(2) is clear that, "[a]t the time of sentencing the court shall specify the amount and method of restitution." Yet it does not appear that the sentencing judge—or any of the hearing officers when they resentenced Ms. Bolds—ever actually specified the "method" of payment, i.e. a payment plan. *See also* Pa.R.Crim.P. 705.1(B)(2) (requiring that the sentencing order include "the details of a payment plan, if any, including when payment is to begin"). As is noted above, a "just" payment plan for defendants who, like Ms. Bolds, cannot afford to pay the restitution in a lump sum is typically by "monthly installments" in an amount she can afford 18 Pa.C.S. § 1106(c)(2)(ii). Had the trial court complied with these requirements and set an affordable payment plan, all of the subsequent parole revocation proceedings could have been avoided by her compliance with that plan.[12] Each of the subsequent revocations and resentencings in 2016, 2017, 2019, and 2020 repeated this error. For example, in 2020, the judge instructed Ms. Bolds to "make monthly payments towards restitution," but the court still failed to specify how much she should pay each month.

[12] While this Court has afforded trial courts the flexibility to delay setting a payment plan until after a defendant is released from incarceration—a pragmatic approach that ensures the trial court has some information about what a defendant will *actually* be able to pay rather than making unfounded assumptions—it has never suggested that courts can decline to set a payment plan for a defendant who is not incarcerated. *See Commonwealth v. Griffiths*, 15 A.3d 73, 80 (Pa. Super. Ct. 2010). The plain text of Section 1106(c)(2), by contrast, is explicit that a court "shall" determine the method of payment at sentencing.

What happened here is precisely what cannot, which is court-imposed punishment of a defendant because she is too poor to pay restitution in full. The Pennsylvania Supreme Court recently reiterated this obvious point, as it explained that the structure of Section 1106 is such that the legislature did not "seek to punish a defendant for his or her inability to comply. The Legislature simply placed the consideration of a defendant's ability to pay at the more pertinent stage, when a sentencing court must assess a defendant's compliance with the order." *Commonwealth v. Petrick*, 217 A.3d 1217, 1225 (Pa. 2019). Yet for the past seven years, the trial court has missed that message and disregarded the fundamental legal requirements with which it needed to comply.

Despite the substantial errors by the trial court in Ms. Bolds's case, other trial courts are of course perfectly capable of faithfully applying this Court's precedents. *See Commonwealth v. Smalls*, CP-46-CR-0005242-2013, 2018 WL 4112648, at *2 (Pa. Comm. Pl. Aug. 7, 2018) ("Considering the Defendant's failure to pay was not willful, he cannot be found to be in violation of his parole. Defendant's willfulness does not simply implicate the question of his sentencing for a parole violation, but instead is the critical question as to whether a violation occurred in the first place."). This Court should ensure that the trial court in Ms. Bolds's case does the same.

ii. The constitutional limitations on unconstitutional punishment of indigent defendants also prohibit additional periods of parole.

It bears discussing that these cases set forth a divide between the substantive law of what constitutes a parole violation versus the constitutional limitations on punishment. Both this Court and the Commonwealth Court adopted the principles from the U.S. Supreme Court's decision in *Bearden* into Pennsylvania's substantive law governing probation or parole revocations by explaining that a finding of willfulness is required for finding a technical violation and revoking parole in the first place—substantive questions of our state's own common law jurisprudence. The constitutional limits on punishment espoused in the line of cases culminating with *Bearden*, including the Pennsylvania Supreme Court's decision in *Parrish*, are by contrast largely concerned with the *punishment* imposed; that is a question that is related to, but ultimately distinct from whether a parole violation has occurred.

This Court need not reach any constitutional issue to conclude that the trial court acted unlawfully. However, if it does, then it must reject the view implicitly suggested by the trial court's actions, that the Fourteenth Amendment only prohibits *incarceration* of indigent defendants. The U.S. Supreme Court rejected that limitation in a case where a defendant faced only a *fine*, not incarceration, explaining that the "invidiousness of the discrimination that exists when criminal

procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed." *Mayer v. City of Chicago*, 404 U.S. 189, 197 (1971) (requiring that the defendant be provided a free transcript for appeal even when not facing incarceration). This Court, too, has rejected the position that the *Bearden* line of cases applies only to incarceration, as the Court ruled in *Commonwealth v. Melnyk*, 548 A.2d 266, 272 (Pa. Super. Ct. 1988) that indigent defendants who cannot afford to pay must still be admitted into accelerated rehabilitative disposition—a situation where the court was not unwinding an unconstitutional jail sentence:

> If the petitioner has no ability to make restitution despite sufficient bona fide efforts to do so, the State must consider alternative conditions for admittance to and completion of the ARD program. To do otherwise would deprive the petitioner her interest in repaying her debt to society without receiving a criminal record simply because, through no fault of her own, she could not pay restitution. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.

Accordingly, if this Court were to resolve this case under the Fourteenth Amendment and the U.S. Supreme Court's decisions, there is no question that repeatedly revoking Ms. Bolds's parole and resentencing her to additional parole for an indefinite period of time—at first for just over a year, but now for more than seven years and counting—violates her right to fundamental fairness in light of her poverty just as much as if the trial court had incarcerated her.

3. It is both unnecessary and counterproductive to keep a defendant on court supervision in order to enforce payment of restitution.

Courts can comply with the law by not keeping defendants like Ms. Bolds on probation or parole indefinitely, while still ensuring compliance with a restitution order. This Court put it succinctly in *Rosenberry* when it invalidated precisely the same sort of action that occurred in Ms. Bolds's case:

> 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 for why a trial court must disregard this court's precedents in order to collect restitution. The two are not mutually exclusive.

Like every court in Pennsylvania, the Delaware County Court of Common Pleas has a dedicated office, there called Court Financial Services, with staff whose entire job is to collect fines, costs, and restitution from defendants.[13] This "effectively and selectively cross-trained" staff specializes in efforts to "maximize collections" through a variety of methods to both work with defendants to set

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[13] Delaware County, *Court Financial Services*, https://www.delcopa.gov/courts/financialservices/index.html.

payment plans and collect money from those who do not cooperate. *Id.* Accordingly, it is certainly not the case that the end of probation or parole also yields the end of collecting payments of restitution.

It is also not the case that the end of probation or parole ends the court's authority to *enforce* compliance with its restitution order. As this Court has repeatedly explained, the obligation to pay restitution imposed under Section 1106 does not expire with the end of supervision and instead remains owed until 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 farther 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. As the statute sets forth, the court's collections staff—here Court Financial Services—"shall notify the court within 20 days of such failure" to pay restitution, i.e. when the defendant falls behind on a payment plan. 18 Pa.C.S. § 1106(f). Upon that notification, "the court shall order a hearing to determine if the offender is in contempt of court *or* has violated his probation or parole." *Id.* (emphasis added)[14]

[14] To avoid any confusion, it is worth noting that the reference to magisterial district judges 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.

Courts do, of course, routinely use their contempt powers to enforce payment of restitution, although in contempt proceedings, too, they must determine whether the nonpayment has been willful. *See*, *e.g.*, *Mauk*, 185 A.3d at 411 (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).

Moreover, it is actually counterproductive to try to maximize payments to a victim while keeping a defendant on court supervision. It is well documented that employment opportunities for a person currently on probation or parole are significantly limited, and the result is that it is even harder for a person on supervision to earn the money necessary to repay restitution. Even if employers are willing to hire someone who is under active court supervision, the demands of supervision themselves 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."[15] 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 the probation officers: "Hourly workers lose income and salaried employees might be required to take unpaid leave, and they may also risk

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

losing their job for repeated requests for time off—making it harder for those who are already struggling with financial sanctions to make payments."[16] This also limits work opportunities for individuals on supervision, who "report that it is hard to find a job that will 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.

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. This is a win-win scenario for the defendant, the victim, *and* the court. The defendant can pursue better work opportunities free of court supervision, the significant restrictions that are attendant to it, and the ever-present threat of arrest and re-incarceration due to an alleged violation, even if only a technical violation. 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 parole, not because of any risk to the public or need for further rehabilitation, but

[16] 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.

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 to let them collect the money and inform the court of any failure to comply with a payment plan.

B. The trial court denied Ms. Bolds her right to counsel at the 2017 and 2019 revocation hearings, rendering those sentences illegal.

The trial court's other major error that this Court should correct is the denial of Ms. Bolds's fundamental right to counsel in the 2017 and 2019 parole revocation hearings, where hearing officers allowed her 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 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 officers, they did not comply with Rule 121. All they asked was whether Ms. Bolds understood she had the right to be represented, if she understood she could be resentenced, and if she wanted to proceed without counsel. (N.T. 8/18/2017 at 3); (N.T. 1/11/2019 at 3-4). These questions do not suffice to cover even *one single* requirement under Rule 121. The hearing officer did not: (a) ask whether Ms. Bolds knew she had the right "to have free counsel appointed"; (b) explain "the nature of the charges" and the elements thereof; (c) describe the possible sentence she faced; (d) warn that she was bound by "all the normal rules of procedure"; (e) ask that she knew the "possible defenses to these charges"; and (f) caution that she could lose her 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 Ms. Bolds's case and her life. 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, Ms. Bolds would have been told that the Commonwealth would have to prove that she had the ability to pay and was willfully refusing to pay full restitution. It is not an exaggeration to say that Ms. Bolds may have literally never thought that she *had* any defense to the revocation proceeding because of her poverty. After all, nothing in the record suggests that anyone ever asked her about her ability to pay or suggested that she only needed to pay what she was able to afford. Her 2016 counsel apparently failed to also realize that she had such defenses, but the appointment of counsel in 2017 or 2019 may well have ended this unnecessary, harmful, and indefinite parole years ago. Moreover, when Ms. Bolds did attempt to question certain accounting discrepancies, the hearing officer simply disregarded what she said, going so far as to say she should *speak to her counsel* about it. (N.T. 8/18/2017 at 5) ("You might want to raise that question with her.").

The trial court's fundamental violation of Ms. Bolds'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. *Commonwealth v.*

Murphy, 214 A.3d 675, 679 (Pa. Super. Ct. 2019). 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).

Of course, the record here is silent about *why* Ms. Bolds did not have counsel in 2017 and 2019, although the experience of the ACLU of Pennsylvania is that often in these circumstances the defendant's probation officer will assure the defendant that there is no *need* for a lawyer. Probation officers routinely advise defendants that it is *easier* to stipulate to a violation and they will get out of there more quickly without an attorney to make things more complicated. 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.

Finally, there is another fundamental error with the proceedings before the trial court. Rule 121 permits only two types of judicial officers to accept a waiver of counsel: a "judge" and an "issuing authority." Certainly this case was well past the stage where an issuing authority, i.e. magisterial district judge, would have been involved—and a hearing officer is not a "judge." Indeed, there appears to be no legal authority for anyone other than an actual judge to accept a waiver of counsel, and the case law places the obligation to evaluate a waiver squarely on the judge: "The trial judge need not literally be the one to pose the questions to the defendant, but the text of Rule 121(c) requires the judge to ascertain the quality of the defendant's waiver." *Commonwealth v. Houtz*, 856 A.2d 119, 123-24 (Pa. Super. Ct. 2004).

Unless the Supreme Court amends Rule 121 to allow hearing officers to accept waiver-of-counsel colloquies (if such an amendment were constitutional), a hearing officer simply cannot do so. If the trial court wishes to allow unrepresented defendants to proceed before hearing officers, then either a judge must first colloquy the defendant before sending the defendant to the hearing officer, or all such defendants must have their hearings before an actual judge. In this case, such a practice would have avoided the violation of Ms. Bolds's constitutional right to counsel and perhaps would have even led to a prompt disposition of her case years earlier. Either way, the 2017 and 2019 proceedings were unlawful because of the

violation of Rule 121, and under *Commonwealth v. Milhomme*, 35 A.3d 1219, 1222 (Pa. Super. Ct. 2011) that rendered the 2020 revocation proceedings void *ab initio*.

Conclusion

For the foregoing reasons, *Amicus Curiae* the ACLU of Pennsylvania urges this Court to find that Ms. Bolds has been subjected to an unlawful revocation and resentencing of parole.

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.

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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.

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

/s/ *Andrew Christy*
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Dated: April 20, 2021