
COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-11965

COMMONWEALTH OF MASSACHUSETTS,
Appellee

v.

KIM HENRY,
Defendant-Appellant

ON APPEAL FROM A RESTITUTION ORDER IN THE
SALEM DISTRICT COURT

**BRIEF FOR *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION
OF MASSACHUSETTS IN SUPPORT OF THE DEFENDANT-APPELLANT**

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ISSUE PRESENTED

Whether a sentencing judge may order an indigent defendant to pay restitution without considering the defendant's ability to pay.

INTERESTS OF THE AMICUS CURIAE

The American Civil Liberties Union of Massachusetts ("ACLUM"), an affiliate of the national ACLU, is a statewide nonprofit membership organization dedicated to defending the principles of liberty and equality embodied in the constitutions and laws of the Commonwealth and the United States. Consistent with this mission, ACLUM is concerned about safeguarding the rights of indigent individuals who interact with the criminal justice system. See, e.g., Commonwealth v. Magadini, SJC-11874 (argued Dec. 7, 2015); Thayer v. City of Worcester, -- F. Supp. 3d -- , No. 13-40057, 2015 WL 6872450 (D. Mass. Nov. 9, 2015) (striking City's anti-begging ordinance as unconstitutional); McLaughlin v. City of Lowell, -- F. Supp. 3d -- , No. 14-10270, 2015 WL 6453144 (D. Mass. Oct. 23, 2015) (same).

BACKGROUND

I. Restitution Under Massachusetts Law

In a criminal case, restitution is money paid by

the defendant "to compensate the injured party for losses incurred as a result of the defendant's criminal conduct." Commonwealth v. Rotonda, 434 Mass. 211, 221 (2001); see also Black's Law Dictionary (10th ed. 2014). "Restitution is limited to economic losses caused by the defendant's conduct and documented by the victim." Commonwealth v. McIntyre, 436 Mass. 829, 834 (2002).

"There is no question that restitution is an appropriate consideration in a criminal sentencing." Commonwealth v. Nawn, 394 Mass. 1, 6 (1985). Yet Massachusetts has no general restitution statute. See McIntyre, 436 Mass. at 832-33; cf. G.L. c. 276, § 92A (defendant convicted of motor vehicle theft or fraudulent claims must pay restitution); G.L. c. 266, § 30(5) (defendant convicted of larceny against elderly or disabled persons may be ordered to pay restitution). Rather, "[t]he judge's power to order restitution in a criminal case, such as this, derives from the judge's power to order conditions of probation." McIntyre, 436 Mass. at 833.

This link between restitution and probation has weighty practical implications. A defendant who fails to pay restitution as required by her probation terms

faces a range of consequences. She must attend a probation violation hearing. See Commonwealth v. Bukin, 467 Mass. 516, 519-20 (2014); District Court Rules for Probation Violation Proceedings, at R. 6. She may be subject to additional probation terms or an extended probationary period. See id. at R. 8(d); Commonwealth v. Goodwin, 458 Mass. 11, 17 (2010) (“Where a defendant has violated a condition of his probation, a judge’s authority to modify or add conditions of probation is nearly unlimited should the judge decide not to imprison the defendant but to return him to probation.”). She may even be incarcerated. See, e.g., District Court Rules for Probation Violation Proceedings, at R. 8(d); Commonwealth v. Pena, 462 Mass. 183, 183 (2012).

II. The Restitution Order in This Case

Appellant Kim Henry worked as a cashier at a Walmart in Salem for twelve years. Tr. 15, 17.¹ On November 7, 2013, she was charged with larceny by single scheme over \$250, in violation of G.L. c. 266, § 30(1), for placing Walmart merchandise into bags for

¹ “Tr.” refers to the transcript of the November 12, 2014, restitution hearing.

customers without scanning the items. R. 1²; Tr. 5. After admitting to facts sufficient for a finding of guilt, R. 2, Ms. Henry agreed to pay restitution to Walmart in the amount of \$5,256.10, Id. at 3. Three weeks later, however, she filed a timely motion to revise and revoke the restitution order. Id.

At Ms. Henry's restitution hearing on November 12, 2014, her counsel raised two challenges to the order: first, that the restitution amount impermissibly exceeded Walmart's economic losses, and second, that Ms. Henry could not afford to pay the amount ordered. Tr. 23-26. In support of her inability to pay, Ms. Henry offered evidence that made the judge "feel terrible." See id. at 27. She testified that she had lost her job a year before the hearing, and had been terminated without severance payment. Id. at 15. She told the court that, although she received unemployment benefits for three months after her termination, she was eventually ruled ineligible and was required to pay back all of the money she had received. Id. at 16. She recounted her efforts to

² "R." refers to the record appendix filed with the defendant's brief.

obtain new employment, all of which had been unsuccessful. Id. at 17. She described the narrow scope of her previous job experience, which was limited to retail -- including her twelve years at Walmart -- and some work in nursing homes. Id. She stated that she had been evicted from her apartment and that she had no income whatsoever. Id. at 19.

The prosecutor did not object to any of this testimony, nor did he question Ms. Henry about her employment prospects or financial situation during his cross-examination. Id. at 19-21. Still, the sentencing judge refused to modify the amount of restitution. Noting the futility of "get[ting] blood out of a stone," he nonetheless ordered Ms. Henry to pay \$5,256.³ Id. at 27. Eighteen months later, having paid less than one percent of this sum, Ms. Henry received a Notice of Probation Violation and Hearing. S.R. 5, 14, 17-18.⁴ She stipulated to a probation violation on July 15, 2015. Id. at 4. The court restored her probation term and conditions and ordered her to pay

³ As the Commonwealth notes, the judge reduced the restitution amount by ten cents without comment. Comm. Br. 4 & n.6.

⁴ "S.R." refers to the supplemental record filed with the Commonwealth's brief.

\$30 a month in restitution, which she has done ever since. Id. at 4, 21-25. At this rate, it will take her more than 14 years to comply with her restitution order, a period nine times as long as her initial probationary term.

SUMMARY OF ARGUMENT

The district court exceeded its authority to set probation conditions by ordering Ms. Henry to pay over \$5,000 in restitution despite uncontroverted evidence that she would not be able to pay it. This order was incorrect as a matter of law.

I. This Court's precedents compel the conclusion that, in ordering restitution, the sentencing court must consider the defendant's ability to pay. This Court has long held that probation conditions must be reasonably related to legitimate sentencing objectives. Commonwealth v. Power, 420 Mass. 410, 413-14 (1995). A restitution order that fails to account for the defendant's financial circumstances cannot satisfy this imperative. By ordering an indigent defendant to pay restitution beyond what she can afford, a sentencing court imposes an impossible and therefore purposeless condition, thereby exceeding the statutory bounds of its

sentencing authority. See infra at 9-13.

A contrary interpretation of the sentencing court's discretion must be rejected because it would raise serious due process and equal protection concerns. This Court has held that considering a defendant's financial situation is a crucial part of a "reasonable and fair" restitution hearing. Nawn, 394 Mass. at 6-7. To comport with due process, a sentencing judge must examine factors like the defendant's "employment history and financial prospects" before ordering restitution. See id. at 8-9; Commonwealth v. Rescia, 44 Mass. App. Ct. 909, 910-11 (1998). Similarly, a defendant cannot be incarcerated for her non-willful failure to pay restitution, nor may she be found in violation of her probation. See Commonwealth v. Canadyan, 458 Mass. 574, 579 (2010); Commonwealth v. Gomes, 407 Mass. 206, 212-13 (1990); see also Bearden v. Georgia, 461 U.S. 660, 665-67 (1983). These principles are incompatible with conditioning a defendant's probation on the payment of a sum she cannot afford, which dooms the defendant to noncompliance, additional punishment, and futile attempts by the court to draw blood from a stone. See infra at 13-19.

At her restitution hearing, Ms. Henry testified that she had no income, no home, and no employment prospects. Despite this uncontroverted evidence, the district ordered Ms. Henry to pay over \$5,000 in restitution within eighteen months. This futile order served no legitimate sentencing purpose and was incorrect as a matter of law. See infra at 20-22.

II. Requiring consideration of the defendant's ability to pay restitution does not unduly impair the Commonwealth's or victim's interests at sentencing. Ordering impoverished probationers to pay restitution they cannot afford violates bedrock constitutional principles in exchange for only a dim hope that victims will eventually be compensated. Furthermore, individuals who are ordered to pay restitution beyond their means remain entangled in the criminal justice system for prolonged periods of time, racking up costs and draining judicial resources. Requiring the court to consider a defendant's financial circumstances when ordering restitution strikes the optimal balance between the interests of indigent individuals, victims, and the Commonwealth. See infra at 23-28.

ARGUMENT

I. The restitution order in this case exceeded the district court's statutory authority to set probation conditions because it did not account for the defendant's indigence.

Probation conditions must bear a reasonable relationship to legitimate sentencing goals. A restitution order requiring a probationer to pay more restitution than she can afford is devoid of any logical connection to penal objectives, because it commands the probationer to achieve the impossible. The judge below knew that \$5,256 was an inconceivable sum for Ms. Henry to pay within her probationary period, and yet he refused to modify that amount. This was incorrect as a matter of law.

A. An impossible probation condition, such as a restitution amount that an indigent defendant cannot pay, exceeds the sentencing court's statutory authority because it bears no reasonable connection to sentencing objectives.

"The judge's power to order restitution in a criminal case, such as this, derives from the judge's power to order conditions of probation under G.L. c. 276, §§ 87, 87A, and G.L. c. 279, § 1." McIntyre, 436 Mass. at 833. Therefore, when restitution is ordered as a condition of probation, the sentencing court is constrained by the statutory limitations of its

authority to impose probation conditions. See Power, 420 Mass. at 413 (noting that “judges are permitted great latitude in sentencing as long as the sentence imposed is within the limits provided by the statute under which the defendant is convicted”).

The statutory language conferring judicial power to impose probation conditions is broad, permitting any conditions the sentencing judge “deems proper.” G.L. c. 276, § 87; see also id. § 87A (noting that probation conditions “may include, but shall not be limited to,” participation in community service and rehabilitation programs); G.L. c. 279, § 1 (stating that the court may suspend a prison sentence and order probation “on such terms and conditions as it shall fix”). Nevertheless, this Court has interpreted this language to contain a reasonableness limitation. Specifically, a probation condition is enforceable only if it is “‘reasonably related’ to[] the goals of sentencing and probation.” McIntyre, 436 Mass. at 833 (quoting Power, 420 Mass. at 414). This test requires an analysis of both the legitimate goals of sentencing and what constitutes a reasonable relationship between those goals and the probation condition at issue.

The general objectives of sentencing are

"punishment, deterrence, protection of the public, and rehabilitation." Power, 420 Mass. at 414. As articulated by this Court, the primary goals of probation are "rehabilitation of the probationer and protection of the public," but "[o]ther recognized goals of probation include punishment, deterrence, and retribution." Id. at 414-15; see also Commonwealth v. Pike, 428 Mass. 393, 403 (1998). Particularly pertinent here is the purpose of restitution: "to compensate the injured party for losses incurred as a result of the defendant's criminal conduct." Rotonda, 434 Mass. at 221.

This Court will uphold a probation condition if there exists a logical connection between one of the objectives above, the nature of the probationer's crime, and the effects of the probation condition at issue. See, e.g., Power, 420 Mass. at 415-18 (upholding condition prohibiting defendant, a famous fugitive, from profiting by speaking about her criminal experience, because condition served punitive and deterrent purposes); Commonwealth v. Lapointe, 435 Mass. 455, 460 (2001) (upholding condition prohibiting defendant, who was convicted of abusing his daughter, from residing with any of his minor children, because

condition promoted deterrence, rehabilitation, and safety); cf. Pike, 428 Mass. at 404-05 (rejecting condition banishing defendant from Massachusetts absent any evidence that defendant was more likely to commit future crimes in-state).

"[A] condition so harsh that the probationer is destined for failure serves no purpose." State v. Labure, 427 So. 2d 855, 856-57 (La. 1983); see also State v. Oyler, 436 P.2d 709, 711 (Idaho 1968) ("Imposition of a probation condition which is impossible of fulfillment by a certain probationer would be improper since not reasonably related to the purpose of probation . . ."). In Labure, the Louisiana Supreme Court struck down a probationer's 9:00 p.m. curfew, which the sentencing judge had imposed for a term of five years. 427 So. 2d at 856-57. The court reasoned that the curfew was "an unrealistic condition," and therefore was not likely to serve any purpose, much less a rehabilitative one. Id.

By the same token, requiring an indigent probationer to pay restitution she cannot afford bears no reasonable relationship to any sentencing objective. A defendant ordered to pay restitution

beyond her means is saddled with a Sisyphean task:

[I]f the defendant cannot afford full restitution, then to condition probation upon it, or upon more reparation than the defendant can afford, . . . would pretend to offer probation upon a condition impossible to satisfy.

People v. Lofton, 356 N.Y.S.2d 791, 793 (N.Y. Crim. Ct. 1974); see also Williams v. State, 578 So. 2d 846, 847 (Fla. Dist. Ct. App. 1991) ("When restitution is made a condition of probation that appellant must perform, the trial judge should have some indication that it would not be impossible for appellant to do so.").

Conditioning an indigent defendant's probation on an insurmountable sum of restitution achieves little more than setting the defendant up for failure. Therefore, a restitution order that fails to account for a defendant's financial situation exceeds the sentencing court's statutory authority to set reasonable conditions of probation.

B. To avoid constitutional concerns, the statutory provisions granting judicial authority to set probation conditions must be read to require a sentencing judge to consider a defendant's indigence when ordering restitution.

Not only do this Court's cases defining the scope of valid probation conditions compel the conclusion

that a restitution order cannot exceed a defendant's ability to pay, the canon of constitutional avoidance requires that same result. It is a "maxim of statutory construction" that, "when deciding which of two plausible statutory constructions to adopt, . . . [i]f one of them would raise a multitude of constitutional problems, the other should prevail." Clark v. Martinez, 543 U.S. 371, 380-81 (2005). As discussed above, the provisions authorizing judges to set probation conditions are vague, allowing sentencing judges to impose any terms they consider "proper." See G.L. c. 276, § 87. The Court has already read limitations into this broad language, requiring a reasonable relationship between probation conditions and sentencing goals. McIntyre, 436 Mass. at 833. It must also view these provisions through a constitutional lens, avoiding interpretations that would imperil due process and equal protection.

1. Due process requires a sentencing judge to consider whether a defendant is financially able to pay restitution.

In determining the appropriate amount of restitution, "principles of due process govern." Commonwealth v. Casanova, 65 Mass. App. Ct. 750, 755 (2006). To comport with these principles, the

"procedure used to determine the amount of restitution or reparation must be reasonable and fair." Nawn, 394 Mass. at 6-7.⁵ "The touchstone of due process is protection of the individual against arbitrary action of government." Wolff v. McDonnell, 418 U.S. 539, 558 (1974). Thus, a restitution order based on an arbitrary determination "cannot stand." Nawn, 394 Mass. at 7.

In Nawn, this Court outlined the proper procedure for imposing a restitution scheme. Id. at 7-8. Among other things, it held that a sentencing judge "should . . . consider whether the defendant is financially able to pay the amount ordered." Id. at 7. The Court explained:

The amount of restitution is not merely the measure of the value of the goods and money stolen from the victim by the defendant; in a criminal case, the judge must also decide the amount that the defendant is able to pay and how such payment is to be made.

Id. at 8-9. Since Nawn, the Appeals Court has consistently held that indigence must factor into

⁵ Although Nawn's reliance on due process principles is not explicit, it repeatedly cites due process cases. See Nawn, 394 Mass. at 6-7 (citing Boddie v. Connecticut, 401 U.S. 371, 377 (1971); Morgan v. Wofford, 472 F.2d 822, 827 (5th Cir. 1973); In re D.G.W., 361 A.2d 513 (1976)).

restitution determinations. See, e.g., Commonwealth v. Chase, 70 Mass. App. Ct. 826, 837-38 (2007); Rescia, 44 Mass. App. Ct. at 910-11; Commonwealth v. Giarrusso, 83 Mass. App. Ct. 1118, at *1 (2013) (unpublished); Commonwealth v. Mulhern, 83 Mass. App. Ct. 1117, at *1 (2013) (unpublished); Commonwealth v. Rivera, 82 Mass. App. Ct. 1109, at *1 (2012) (unpublished); Commonwealth v. Desouza, 73 Mass. App. Ct. 1113, at *1-*2 (2009) (unpublished).

In conducting the required examination of a defendant's financial situation, a sentencing judge seeking to craft a fair restitution order may examine the defendant's "employment history and financial prospects." Nawn, 394 Mass. at 9; see also Rescia, 44 Mass. App. Ct. at 910-11. But merely reviewing this evidence is not enough to qualify as "consideration": the judge must actually "decide the amount that the defendant is able to pay," and that amount must impact the terms of the order. See Nawn, 394 Mass. at 8-9; Rescia, 44 Mass. App. Ct. at 910-11.

In Rescia, the Appeals Court reviewed a sentencing order requiring an unemployed high school student to pay \$30,500 in restitution. 44 Mass. App. Ct. at 909-10. The Appeals Court could not determine

from the sentencing record whether the trial court had properly accounted for the defendant's financial situation. See id. at 910. It therefore remanded the case "in the interests of justice and judicial economy." Id. at 910-11; see also Desouza, 73 Mass. App. Ct. 1113, at *2 ("Although the record does not indicate that the defendant is unable to make reasonable payments towards restitution, our cases require that the judge make specific findings on this issue.") (emphasis added).

2. Because a court cannot constitutionally punish an indigent defendant for failing to pay restitution despite good faith efforts, it may not set her up for such a failure.

This Court's jurisprudence regarding the unconstitutionality of punishing poverty confirms that, to avoid raising serious constitutional questions, a court's statutory authority to order restitution cannot encompass restitution exceeding the defendant's ability to pay. This Court has held that "an indigent defendant may not be incarcerated simply because he is unable to pay costs or fines." Gomes, 407 Mass. at 214 ; see also Bearden, 461 U.S. at 667-68 ("[I]f the State determines a fine or restitution to be the appropriate and adequate penalty for the

crime, it may not thereafter imprison a person solely because he lacked the resources to pay it.”).

Moreover, an indigent defendant who is unable to comply with a restitution order has not violated her probation, because “where there [i]s no evidence of wil[l]ful noncompliance, a finding of violation . . . [i]s unwarranted, and is akin to punishing the defendant for being [poor].” Canadyan, 458 Mass. at 579, citing Bearden, 461 U.S. at 669 n.10.⁶

This prohibition against punishing poverty rests on twin constitutional pillars: due process and equal protection. See Bearden, 461 U.S. at 665-67 & n.8. Imposing punishment on an indigent defendant when she has made good-faith, but ultimately unsuccessful, efforts to comply with her legal obligations

⁶ In Canadyan, this Court reviewed a determination that the defendant had violated a condition of his probation requiring him to wear a global positioning system (“GPS”) monitoring device. Id. at 574-75. The defendant was indigent upon his release from prison, and the homeless shelter where he lived could not provide him access to the equipment needed to charge the GPS device. Id. at 575-76. It was “undisputed that he and the probation department both worked diligently and in good faith to explore other housing options and alternative technological solutions to no avail.” Id. at 576. In the face of this uncontroverted evidence of good faith, the Court set aside the finding that the defendant had violated his probation. Id. at 579.

implicates concerns of “basic fairness,” and raises the question whether the state is invidiously denying the defendant legal protection based on her indigent status. See id. at 665-67, 669 n.10.

In light of these constitutional concerns, ordering restitution from someone who lacks the ability to pay it either forces an unconstitutional result or creates no result at all. An indigent defendant whose financial situation is not factored into her restitution order will inevitably fail to comply with her probation terms. But under Canadyan and Bearden, punishing this failure would run afoul of the defendant’s constitutional rights. Thus, the restitution order becomes hollow. See Lau Ow Bew v. United States, 144 U.S. 47, 59 (1892) (“Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.”); McIntyre, 436 Mass. at 834 (“We must seek to penalize offenders in such a way that they understand the reasonableness of the punishment, ‘free of any legitimate hatred for the system that punished [them].’” (alteration in original)).

C. The district court did not adequately account for Ms. Henry's indigence.

Ms. Henry presented uncontroverted evidence of her inability to pay the amount required by her restitution order. Tr. 15-19. The district court made no specific findings that Ms. Henry could afford \$5,256, offering only speculation that "maybe she could get a job at Dunkin Donuts and pay it off that way." Id. at 27. The court did not "decide the amount that the defendant [wa]s able to pay," as required by Nawn, 394 Mass. at 8-9. The court did not, therefore, meaningfully "consider" Ms. Henry's indigence. See Nawn, 394 Mass. at 6-7; Rescia, 44 Mass. App. Ct. at 910-11. The resulting restitution order was divorced from Ms. Henry's financial reality and thus arbitrary, in violation of the district court's statutory authority. See Nawn, 394 Mass. at 7; Wolff, 418 U.S. at 558.

According to the record, Ms. Henry is currently making payments of \$30 per month in compliance with a court order resulting from her probation violation. S.R. 4, 21-25. Far from contradicting Ms. Henry's inability to pay, this rate underscores it. The court sentenced Ms. Henry to 18 months of probation. Id. at

8. At \$30 per month, an 18-month probationary period works out to \$540, a miniscule fraction of the \$5,256 ordered. Thus, even if evidence of Ms. Henry's ability to pay \$30 per month had been before the court at sentencing -- though it was not -- that evidence would not have supported a finding that she could pay anywhere near \$5,256 in restitution.

The Commonwealth argues that Ms. Henry can simply pay restitution over time on a "long-term payment schedule," by which it presumably means indefinite extension of her probationary period. Comm. Br. 39-41. But in the absence of a probation violation, a judge may increase the scope of a probationer's terms only where: (1) there has been a material change in the probationer's circumstances since sentencing, and (2) "the added or modified conditions are not so punitive as to significantly increase the severity of the original probation." Goodwin, 458 Mass. at 18.⁷ Ms. Henry's probationary period would need to be extended to 14 years, more than nine times as long as her

⁷This requirement ensures that a defendant will not be punished twice for the same crime in contravention of the constitutional prohibition against double jeopardy. Id. at 19-20.

initial sentence, to allow her to pay off the full amount of restitution. This exponential increase of Ms. Henry's sentence would "essentially [be] a new, harsher sentence." Id. at 19.

Because the restitution order in this case is not reasonably related to the purposes of sentencing, and because this kind of order raises constitutional concerns under cases like Nawn and Canadyan, it cannot stand. The district court exceeded its sentencing authority by ordering restitution without accounting for Ms. Henry's dire financial circumstances.

II. Requiring sentencing judges to account for indigence when ordering restitution does not unduly detract from the interests of victims and the Commonwealth.

The rights of indigent defendants are not the only interests at stake in the context of restitution. But a system in which indigence is a mandatory factor when ordering restitution maximizes the interests of the Commonwealth and its citizens, including victims of crime.

A. Accounting for a defendant's financial situation at sentencing is consistent with the goal of restoring the victim.

The purpose of restitution "is to compensate the injured party for losses incurred as a result of the defendant's criminal conduct." Rotonda, 434 Mass. at 221. A restitution order divorced from the defendant's financial reality cannot further this purpose. As the Bearden Court recognized, punishing an indigent defendant for her failure to pay restitution is not only unconstitutional, but an exercise in futility:

A rule that imprisonment may befall the probationer who fails to make sufficient bona fide efforts to pay restitution may indeed spur probationers to try hard to pay, thereby increasing the number of probationers who make restitution. Such a goal is fully served, however, by revoking probation only for persons who have not made sufficient bona fide efforts to pay. Revoking the probation of someone who

through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming.

461 U.S. at 670.

Ordering Ms. Henry to pay an untenable amount of restitution virtually ensured that she would fail to comply, and did nothing to secure Walmart's rights to compensation. Had the judge below crafted a restitution order based on specific findings about Ms. Henry's financial situation and employment prospects, it is unlikely that the restitution amount would have equaled Walmart's losses, but at least it would have covered some of them. Between a diminished but enforceable restitution order and a comprehensive but futile one, the choice is obvious.

Requiring sentencing judges to consider defendants' ability to pay restitution does not make partial restitution inevitable in every case. Trial judges are well equipped to tackle fact-intensive inquiries, see Mass. R. Civ. P. 52 (granting deference to judicial factual determinations), and thus are capable of determining the extent to which defendants can afford restitution. Furthermore, a judge confronted with an indigent defendant has penal tools at her disposal beyond restitution, and the

flexibility to implement those tools to best serve justice. See McIntyre, 436 Mass. at 833 (observing that “judges are permitted great latitude in sentencing as long as the sentence imposed is within the limits provided by the statute under which the defendant is convicted.”), quoting Power, 420 Mass. at 413-14. Knowing upfront that a defendant will be unable to afford restitution enables a judge to craft a fairer, more effective sentence.

B. Out-of-state studies demonstrate that efforts to “draw blood from stones” are ineffective and costly.

Forcing indigent defendants into court-imposed debt “push[es them] deeper into poverty and prolong[s] their involvement in the criminal justice system.” ACLU of Washington & Columbia Legal Services, Modern-Day Debtors’ Prisons: The Ways Court-Imposed Debts Punish People for Being Poor 3 (2014) (“ACLU-WA Report”). Such a system poses severe ramifications, both for defendants and the government.

In 2014, Columbia Legal Services (“CLS”) and the ACLU of Washington investigated the imposition and effects of legal financial obligations, including restitution, in four Washington counties. Id. at 5. They found that a system of punishing indigent people

for their inability to pay court-imposed costs like restitution is “costly[] both for the government and individuals.” Id. at 10. Faced with the threat of sanctions and jail time, individuals prioritize paying the courts over buying basic necessities, “to the detriment of their families or their own well-being.” Id. at 7. Those who failed to pay became further entangled in the criminal justice system, racking up costs for the government including incarceration expenses and judicial resources. Id. at 10.

One individual, Angela Albers, owed \$2,949 in fines and court costs. Id. at 16. She managed to pay the court \$1,490, but the city spent over \$1,700 on collection efforts. Id. Meanwhile, Ms. Albers lost her home because she could not afford rent. Id. She had no choice but to move out of state, away from her children. Id.

The Washington State Minority and Justice Commission conducted a similar study in 2008, which resulted in comparable findings. See generally Katherine A. Beckett et al., Wash. State Minority & Justice Comm’n, The Assessment and Consequences of Legal Financial Obligations in Washington State (2008). The Commission’s report notes that many of the

problems faced by individuals struggling to pay off their court-imposed debt -- social stigma, difficulty finding employment, lack of housing opportunities, the threat of arrest and incarceration -- are associated with recidivism. *Id.* at 68-69.

Requiring sentencing judges to consider defendants' financial circumstances avoids many of these pitfalls: indeed, such a requirement is the first recommendation proffered by CLS and the ACLU of Washington.⁸ ACLU-WA Report at 19. A restitution order

⁸ Statutes requiring judges to account for indigence when ordering restitution are on the books in nearly half the states. See, e.g., N.D. Cent. Code § 12.1-32-08(1)(c) (the restitution amount "may not exceed an amount the defendant can or will be able to pay"); Conn. Gen. Stat. § 53a-28 ("In determining the appropriate terms of financial restitution, the court shall consider . . . [t]he financial resources of the offender and the burden restitution will place on other obligations of the offender"). See also Ark. Code Ann. § 5-4-205(e); D.C. Code § 16-711(b); Ga. Code Ann. § 17-14-10; Idaho Code Ann. § 19-5304(7); Ind. Code § 35-38-2-2.3; Me. Rev. Stat. Ann. tit. 17-A, § 1325; Minn. Stat. § 611A.045; Miss. Code Ann. § 99-37-3(2); N.C. Gen. Stat. § 15A-1340.36; N.J. Stat. Ann. § 2C:44-2(c)(2); N.M. Stat. § 31-17-1(E); Neb. Rev. Stat. § 29-2281; N.Y. Penal Law § 65.10(2)(g) (McKinney); S.D. Codified Laws § 23A-28-5; Tenn. Code Ann. § 40-35-304(d); Utah Code Ann. § 77-38a-302(5)(c)(ii); V.T. Stat. Ann. tit. 13, § 7043; Wash. Rev. Code § 9.94A.753; Wyo. Stat. Ann. § 7-9-102.

Federal legislation also includes this requirement. 18 U.S.C § 3663(a)(1)(B)(i)(II) (requiring a judge ordering discretionary restitution to consider "the

that is appropriately tailored to a defendant's economic means conserves judicial resources down the road and enables the defendant to extricate herself from the criminal justice system when her probation ends.

CONCLUSION

Amicus respectfully urges this Court to vacate Ms. Henry's restitution order and remand this case for further proceedings.

Respectfully submitted,

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financial resources of the defendant" and "the financial needs and earning ability of the defendant and the defendant's dependents").

CERTIFICATE OF COMPLIANCE

Pursuant to Massachusetts Rule of Appellate Procedure 16(k), I hereby certify that the foregoing brief complies in all material respects with the Massachusetts Rules of Appellate Procedure pertaining to briefs.

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January 25, 2016

CERTIFICATE OF SERVICE

I, Matthew R. Segal, hereby certify that on this day I caused two true and correct copies of the foregoing brief to be served on counsel of record for each party represented in this matter by sending such copies via first class mail to:

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January 25, 2016

SJC-11965

COMMONWEALTH OF MASSACHUSETTS,
Appellee

v.

KIM HENRY,
Defendant-Appellant

BRIEF FOR *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION
OF
MASSACHUSETTS IN SUPPORT OF THE DEFENDANT-APPELLANT
