

COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court

No. SJC-12279

COMMONWEALTH OF MASSACHUSETTS,
APPELLEE,

v.

JULIE ELDRED,
PETITIONER-APPELLANT.

ON A REPORTED QUESTION AND ON APPEAL FROM A FINDING OF PROBATION
VIOLATION BY THE CONCORD DIVISION OF THE DISTRICT COURT DEPARTMENT

***AMICUS CURIAE* BRIEF OF THE AMERICAN CIVIL LIBERTIES
UNION OF MASSACHUSETTS, INC., THE CENTER FOR PUBLIC
REPRESENTATION, AND PRISONERS' LEGAL SERVICES IN
SUPPORT OF THE PETITIONER**

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INTRODUCTION

The question in this case is whether to allow the judiciary's power over probation to be used to jail addicted individuals on the grounds that they have relapsed. Without any legislative mandate and at the urging of no executive official, a probation officer requested and a judge ordered Julie Eldred to be sent to jail after she tested positive for fentanyl. It is undisputed that Ms. Eldred suffers from substance use disorder. And it is equally undisputed that countless others who suffer from this disease will continue to face the threat of imprisonment if trial courts are permitted to impose a condition of probation that requires them to remain drug free.

For two reasons, this Court should disallow that condition in cases involving addiction. *First*, it is contrary to this Court's precedents, which protect probationers from being saddled with conditions that they cannot reasonably be expected to achieve. This Court held in *Commonwealth v. Henry* that an individual cannot be required to pay a restitution amount that she cannot afford. 475 Mass. 117, 122 (2016). It has also held that a homeless person who lacked access to the necessary electrical outlet could not therefore be found to have violated a condition of his probation requiring electronic monitoring. *Commonwealth v. Canadyan*, 458 Mass. 574, 578-79 (2010).

The reasoning of those cases controls here. Because addicted individuals cannot reasonably be expected to remain drug free, they may not be *required* to do so as a condition of probation.

Second, even if precedent did not resolve this case, this Court should use its superintendence power to prohibit requiring addicted probationers to remain drug free, because imposing that condition is dangerous and unjust. Probation is a judicial function, and this Court may exercise its supervisory power to ensure that it is not used unjustly.

That intervention is warranted here because allowing courts to require that individuals suffering from addiction remain drug free - however well-intentioned - harms both probationers and the integrity of the justice system. It predictably leads to the imprisonment of untold numbers of addicted individuals simply because they stumble on their road to recovery. It interrupts their treatment and imperils lives. It also creates disparate impacts on poor communities and people of color, and contributes to the worst excesses of the ill-fated War on Drugs.

The Commonwealth seeks a contrary result. It argues that courts may require Ms. Eldred and other individuals who suffer from addiction to remain drug free as a condition of their probation, and may revoke their probation and imprison them if they relapse. It

reasons that addiction does not “completely eliminate[]” someone’s ability to choose not to use drugs. Two amicus briefs supporting the Commonwealth’s position also contend that people with addiction retain the ability to make choices, and may be punished with a revocation of probation when they use drugs. Morse Br. at 20-30; NADCP Br. at 17-26. But the existence of some degree of “choice” does not make it just for the courts to create and administer a regime that routinely cages people for failing to resoundingly defeat a disease.

More fundamentally, the metaphysics of the free will and choices made by people suffering from addiction is not the issue here. The primary question here is what choice *this Court* will make about the lives of addicted individuals. It can choose the path that will incarcerate many of them, interrupt their treatment, and endanger their lives. It is the path that compounds inequality and makes probation an instrument of the War on Drugs. Or it can strike a different course, preventing probation from being used to imprison addicted individuals for drug use. That is the path that will prevent injustice and save lives.

ISSUE PRESENTED

Whether this Court should allow Massachusetts judges to require individuals who suffer from addiction to remain drug free as a condition of their probation, thereby permitting revocation of their probation and possible incarceration if they violate that condition.

INTERESTS OF AMICI

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 defendants in the criminal justice system, including in cases involving probation and the War on Drugs. See, e.g., *Bridgeman v. Dist. Attorney for Suffolk Dist.*, 476 Mass. 298 (2017); *Commonwealth v. Laltaprasad*, 475 Mass. 692 (2016); *Commonwealth v. Henry*, 475 Mass. 117 (2016).

The Center for Public Representation (CPR) is a public interest law firm with offices in Massachusetts and Washington, D.C. For more than 40 years, CPR has been dedicated to enforcing and expanding the rights of people with disabilities, including those with substance use disorder. CPR uses legal strategies,

advocacy, and policy to design and implement systemic reform initiatives to promote their integration and full community participation. Its attorneys have represented individuals with substance use disorder in individual cases in Massachusetts and in class actions in State and Federal courts. *Matter of G.P.*, 473 Mass. 112 (2015) (amicus brief); *Does v. Baker*, 1:14-cv-12813 (D. Mass. 2014) (challenging incarceration of civilly committed women with substance use disorder to prison); *Hinckley v. Fair*, C.A. 88-064 (Hampshire Superior Ct. Settlement 1990) (prohibiting incarceration of civilly committed women with substance use problems to prison except in certain circumstances).

Prisoners' Legal Services (PLS) is a not-for-profit legal services corporation, founded in 1972, that provides civil legal assistance to people who are incarcerated in Massachusetts state prisons and in the county jails and houses of correction. PLS engages in administrative advocacy, litigation, and public education on behalf of prisoners and their families. PLS has represented individuals with substance use disorder in individual and class action litigation. See, e.g., *Does v. Baker*, 1:14-cv-12813 (D. Mass. 2014); *Doe, et al. v. Turco*, Suffolk C.A. No. 1784CV02157 (2017).

ARGUMENT

I. A probation condition requiring someone to remain drug free is unlawful if that person suffers from substance use disorder.

This Court's case law prevents conditions of probation that set people up for failure. Julie Eldred has demonstrated that she suffers from substance use disorder, a disease that severely interferes with her ability to exert control over the compulsion to use drugs. Ms. Eldred, as well as others who suffer from this disorder, *may* achieve recovery over time. But they cannot *reasonably* be expected to comply consistently with a condition of probation that requires them to remain drug free. Such a condition is, therefore, unlawful.

A. Courts may not impose probation conditions that an individual cannot reasonably be expected to achieve.

This Court's cases require judges to conduct an individual inquiry to determine whether someone can reasonably be expected to achieve a condition of probation; if she cannot be, then the condition may not be imposed. In *Commonwealth v. Henry*, the Court held that it would be unlawful to impose a restitution amount that a probationer could not afford. 475 Mass. 117, 122 (2016). The Court emphasized that probation conditions are enforced by "threat or imposition of a criminal sanction for violation of a probation

condition." *Id.* at 121; see *Commonwealth v. Goodwin*, 458 Mass. 11, 15 (2010). And requiring someone to pay a restitution that she cannot afford, the Court wrote, would "simply doom[] the defendant to noncompliance." *Henry*, 475 Mass. at 122. To avoid that result, the Court required judges to consider a defendant's ability to pay before requiring restitution. *Id.*

This rule is not limited to conditions requiring the probationer to pay money. In *Commonwealth v. Canadyan*, 458 Mass. 574, 578-79 (2010), the Court vacated a finding that a homeless defendant had violated a condition of his probation requiring electronic monitoring. The reason was simple: the defendant lacked access to an electrical outlet, and thus could not replenish the battery in his ankle monitor. *Id.* Under those circumstances, "a finding of violation of the condition of wearing an operable GPS monitoring device was . . . akin to punishing the defendant for being homeless." *Id.* at 579.

Taken together, this Court's cases require a judge setting a condition of probation to ensure that the defendant can reasonably be expected to achieve it. Not only that, the court must do so when *setting* the condition, instead of imposing the condition and considering the probationer's capacity to satisfy it only after the condition has been violated. See *Henry*, 475 Mass. at 122. As discussed below, these same

obligations should apply when a court requires someone who suffers from addiction to remain symptom free.

B. Individuals with substance use disorder cannot reasonably be expected to remain drug free as a condition of their probation.

People who suffer from substance use disorder, including Ms. Eldred, cannot reasonably be expected to remain drug free at all times during a period of probation. As Ms. Eldred has shown, substance use disorder is an "all-consuming, developmental and chronic brain disease" characterized by "compulsive behavior" consisting of "continued use of a substance despite negative consequences." RA 21 ¶ 8. Recovery, though possible, is very often halting. Relapse is a common symptom of substance use disorder, even when an individual is engaged in treatment and attempting to recover. RA 27 ¶¶ 59, 62.

The Commonwealth's argument – that the ability of an addicted individual to choose to abstain from drugs is not "completely eliminated," Com. Br. at 40 – is beside the point. Because relapse is a common symptom of their disease even when they are engaged in treatment, individuals suffering from substance use disorder cannot reasonably be expected to remain drug free. And they certainly cannot be expected to achieve *immediate and uninterrupted* sobriety starting on the day after a criminal conviction or the end of term of

incarceration, which is when probation typically begins.

It is therefore unlawful, in the case of someone suffering from substance use disorder, to impose a drug-free requirement as a condition of probation. Such a condition "simply dooms the defendant to noncompliance," *Henry*, 475 Mass. at 122, despite the hope of an ultimate recovery. It is also unlawful to find an addicted person to be in violation of probation and to imprison her because of a relapse. Doing so is "akin to punishing the defendant for [having a chronic brain disease]." *Canadyan*, 458 Mass. at 579.

II. Threatening addicted probationers with imprisonment if they relapse is also a dangerous and unjust use of the judiciary's probation power.

Requiring addicted probationers to remain drug free or face jail time is not only contrary to existing law; it endangers lives and yields profound injustice. Thus, if this Court does not resolve this case simply by applying *Henry* and *Canadyan*, it should still use its supervisory power to forbid this perilous practice.

A. This Court has the responsibility to prevent probation from being used in ways that compound injustice.

This Court has recognized that it must employ its superintendence power to ensure that probation is not used as an instrument of injustice. *Henry*, 475 Mass. at 124-25. Probation is entirely a judicial function. *Commonwealth v. Boe*, 456 Mass. 337, 341 n.7 (2010). Probation officers are part of the judicial branch and perform duties that are “intimately connected to the existence and function of the judiciary.” *First Justice of Bristol Div. of Juvenile Court Dep’t v. Clerk-Magistrate of Bristol Div. of Juvenile Court Dep’t*, 438 Mass. 387, 399-400 (2003). Judges, in turn, enjoy “great latitude in imposing conditions of probation,” *Commonwealth v. Lapointe*, 435 Mass. 455, 459 (2001) (internal quotations omitted), and “nearly unlimited” discretion to decide what to do in the event of a violation, *Goodwin*, 458 Mass. at 17. Thus, when an individual is placed on probation, members of the judiciary – not legislators or district attorneys – decide what the “laws” are, whether to “prosecute” a violation, and what the outcome will be.

This Court has acknowledged its responsibility to ensure that probation is not used to compound injustice. Although probation operates through the discretion of individual judges, the Court has used

its authority to set rules that limit and guide that discretion to ensure just outcomes.

For example, citing concerns about both double jeopardy and fairness, the Court in *Goodwin* reinforced limits on judges' common law authority to modify the probation conditions of defendants who are not in violation. 458 Mass. at 17-21. In *Henry*, wholly apart from its analysis of the *likelihood* that Ms. Henry could comply with the restitution order, see Part I, *supra*, the Court invoked its superintendence powers to ensure "*equal justice*." 475 Mass. at 122, 124 (emphasis added). Having held that restitution payments must account for ability to pay, the Court barred judges from simply extending probation in order to allow a defendant more time to make payments. *Id.* at 123-24. Such a practice, the Court remarked, would "subject[] the probationer to additional punishment solely because of his or her poverty." *Id.* at 124. Thus, using its superintendence power, the Court not only barred extensions of probation to allow payment, but also required judges to decide the terms of probation before determining ability to pay. *Id.* at 124-25; see also *Commonwealth v. Talbot*, 444 Mass. 586, 595-96 (2005) (using supervisory power to require probation officers conducting pre-sentence interviews to provide opportunity for attorney participation).

B. Requiring individuals suffering from addiction to remain drug free as a condition of their probation compounds injustice and endangers lives.

This Court should use its supervisory power to prevent probationers who suffer from addiction from being subject to a requirement that they remain drug free. Threatening these probationers with imprisonment if they relapse predictably puts scores of addicted people behind bars based on a single failure to overcome addiction; it interrupts treatment; it recklessly endangers lives; and it can disproportionately affect poor people and people of color.

1. Requiring addicted probationers to remain drug free is unjust because it will put many people behind bars for suffering from a disease.

Beyond being unrealistic, see Part I, *supra*, requiring addicted probationers to be drug free is unjust. If this Court does not prevent that practice, many people will end up behind bars for the simple reason that they have not overcome their addiction.

Despite efforts at recovery, many probationers will relapse during the course of their probation as a consequence of addiction. R.A. 27 ¶¶ 59, 62. The Commonwealth apparently acknowledges that “the ability to exert control over the impulse to use drugs is severely impaired in addiction.” Com. Br. at 19. As

its amici explain, “[i]n addiction, intense activation of certain systems in the brain makes it challenging,” albeit not “impossible,” for users to quit. Morse Br. at 9.¹

When success is so difficult, *requiring* it cannot be fair. Indeed, this Court has recognized that it is unjust to jail people simply because they did not beat very challenging odds. In *Canadyan*, the Court overturned a district court’s finding that a homeless probationer violated the condition of electronic monitoring even though he did not have access to an electrical outlet; the violation was apparently based on the theory that he could have gotten a job, beat homelessness, and thereby obtained access to an outlet. 458 Mass. at 577-79. This Court rejected that view not because such success is impossible, but because requiring it impermissibly stacks the deck against a defendant. See *id.*; see also *Commonwealth v. Magadini*, 474 Mass. 593, 601-02 (2016) (rejecting Commonwealth’s argument that homeless man who trespassed on a cold night should be denied a

¹ “It’s like entering a boxing ring and facing Mike Tyson,” said one man of his efforts to give up heroin. Nicholas Kristof, *How to Win a War on Drugs: Portugal treats addiction as a disease, not a crime*, N.Y. Times (Sept. 22, 2017), available at www.nytimes.com/2017/09/22/opinion/sunday/portugal-drug-decriminalization.html.

necessity defense because of choices that might have solved his homelessness).

Moreover, when an unjust condition is imposed not just on one probationer but on countless probationers, it creates systemic injustices. That has happened here. The wide-spread use of the drug-free requirement impermissibly stacks the deck against an entire class of addicted individuals, causing many to be locked up.

The Commonwealth goes to great lengths to show that it is *possible* for an addicted person to remain drug free. Com. Br. at 40. It is true - some people will succeed, and they might even be the ones who tried the hardest, see Morse Br. at 28. But that hardly makes it just to lock up those who do not. Probation, after all, is not a game of *Survivor*.

Nor is the drug-free condition rendered just on the grounds that the threat of jail might terrorize some individuals into compliance. See NADCP Br. at 23.² Jailing people who fail to work out seven times a week might also be "an important motivator," *id.*, and might improve the health of those who succeed. But it would hardly represent justice for the many who would wind up behind bars.

² Although the threat of jail might provide *motivation* to comply, NADCP Br. at 23, it can actually hinder an individual's ability to *achieve* that compliance, see RA 19 ¶¶ 12-16, 27-28 ¶¶ 66-68, 59-60.

Threatening imprisonment against probationers who do not overcome the “systems in the brain” that make them want to use drugs, Morse Br. at 9 – like requiring the poor to overcome poverty – is unjust. It will lead to the imprisonment of large numbers of people who simply fail to beat difficult odds.

2. Requiring addicted probationers to remain drug free disrupts treatment.

As a practical matter, a condition requiring probationers suffering from addiction to remain drug free will only impact individuals who relapse despite being in treatment. Probationers can already be compelled to undergo treatment for addiction, see RA 2, and their probation can be revoked if they fail to comply with that condition. Thus, the additional ability to revoke the probation of an addicted individual who relapses is relevant *only* when a probationer who suffers from addiction is engaged in treatment.

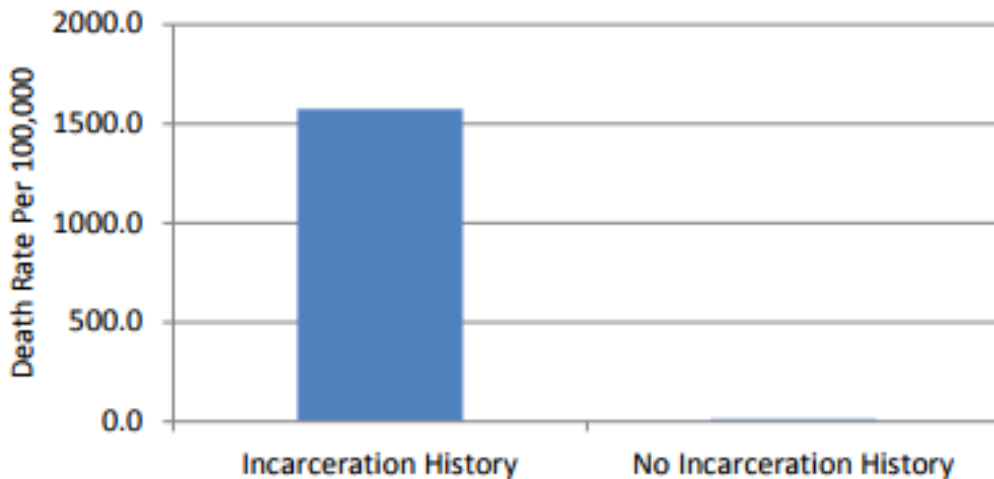
As occurred in this case, see RA 18 ¶ 7, revoking someone’s probation because she did not remain completely drug-free while receiving treatment needlessly interrupts the very treatment that is supposed to make those relapses less likely. In any other context, it would be obvious that a patient should not be punished with the withdrawal of treatment merely for manifesting a symptom of their

disease. A probationer with schizophrenia who is required to take medications as a condition of probation would presumably not, while taking those medications, have their probation revoked for exhibiting signs of paranoia. Yet that is essentially what the Commonwealth proposes for Ms. Eldred and many others like her.

3. Imprisoning probationers who suffer from addiction for relapse endangers lives.

However well-intended, using probation to cycle individuals in and out of jail is downright dangerous. In Massachusetts, individuals who have been recently released from incarceration are 120 times more likely to die of an overdose than the rest of the adult

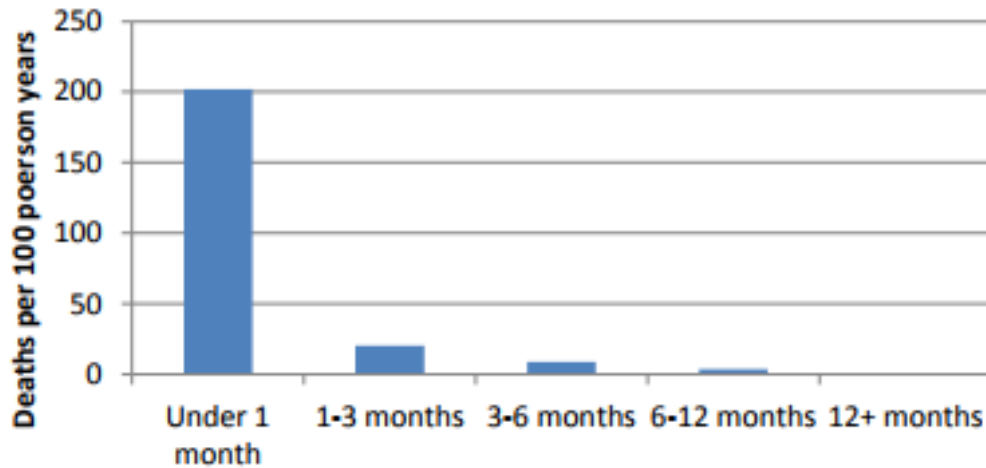
Opioid Death Rate 120 Times Higher for Individuals with Histories of Incarceration



population.³ That risk of death is especially acute in the first month after release (see chart below).⁴

National studies also show the severely elevated risk of overdose deaths in those recently released

Opioid-Related Death Rates for Former Inmates are Higher in the Month of Release than Later



from incarceration. MMS Amicus at 40-42.⁵ And the risk is even more elevated when the release is from custody for a violation of probation or parole.⁶

³ Mass. Dep't of Public Health, *An Assessment of Fatal and Nonfatal Opioid Overdoses in Massachusetts (2011-2015)* at 50 (Aug. 2017), available at www.mass.gov/eohhs/docs/dph/stop-addiction/legislative-report-chapter-55-aug-2017.pdf.

⁴ *Id.* at 52.

⁵ See Ingrid A. Binswanger et al., *Mortality After Prison Release: Opioid Overdose and Other Causes of Death, Risk Factors, and Time Trends From 1999 to 2009*, 159 *Ann. Intern. Med.* 592 (Nov. 2013), author manuscript available at www.ncbi.nlm.nih.gov/pmc/articles/PMC5242316/.

⁶ *Id.*

The Commonwealth contends that notwithstanding the ability to require treatment and to conduct drug tests, incarcerating people who relapse is the only way to ensure that addicted defendants “remain engaged in treatment.” Com. Br. at 15-16. That view overlooks that incarcerating people for that reason interrupts the very treatment they want to preserve, and the ways that the resulting stigma interferes with the achievement of treatment objectives, see MMS Amicus at 42-47. And for some probationers, it may be a death sentence.

The Commonwealth’s view also betrays a profound lack of imagination. Incarcerating individuals struggling with addiction is a symptom of the United States’ War on Drugs, which for the past half century has dramatically skewed the nation’s anti-drug efforts towards law enforcement and incarceration, not treatment.⁷ As a consequence of this approach, more Black men are now under correctional supervision than were enslaved in 1850.⁸

⁷ See Christopher J. Coyne & Abigail R. Hall, *Four Decades and Counting: The Continued Failure of the War on Drugs*, CATO Institute (Apr. 12, 2017), available at www.cato.org/publications/policy-analysis/four-decades-counting-continued-failure-war-drugs.

⁸ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* at 180 (The New Press, 2012). It is now no secret that the War on Drugs was fueled partly by a desire on the part of

Meanwhile, in Portugal, drug use is decriminalized and addiction is addressed through public health interventions.⁹ Portugal's approach has dramatically slashed drug use and yielded the lowest rate of drug-related deaths in Western Europe – just six per million people.¹⁰ The United States' approach has produced a death rate *fifty-two times* higher.¹¹

some of its proponents to put Black people in their place after the civil rights movement. See *id.* at 45-56. Author Dan Baum reported in 2016 that John Ehrlichman, chief domestic advisor to President Richard Nixon, stated in a 1994 interview:

The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. . . . We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.

Dan Baum, *Legalize It All: How to win the war on drugs*, Harper's Magazine (Apr. 2016).

⁹ Kristof, *How to Win a War on Drugs*, *supra* n.1.

¹⁰ *Id.*

¹¹ *Id.*

4. Requiring probationers who suffer from addiction to remain drug free adds entry points into incarceration for the poor and people of color.

This court should be especially wary of adopting rules that create additional opportunities for probationers to end up in prison because probationers are disproportionately poor and people of color. Approximately 70,000 people are on probation in Massachusetts.¹² But they are not evenly distributed. Rather, courts serving the poorest communities in Massachusetts have probation rates that are 88% higher than those serving the wealthiest.¹³

Probation systems also tend to reflect the racial biases of the criminal justice system as a whole. For example, while Black people constitute 13% of the United States population, they make up 30% of probationers.¹⁴ What is more, studies have found that

¹² Danielle Kaeble & Thomas P. Bonczar, *Probation and Parole in the United States, 2015* at 16, U.S. Dep't of Justice, Bureau of Justice Statistics (Dec. 2016), available at www.bjs.gov/content/pub/pdf/ppus15.pdf.

¹³ Wendy Sawyer, *Punishing Poverty: The High Cost of Probation Fees in Massachusetts*, Prison Policy Initiative (Dec. 8, 2016) available at www.prisonpolicy.org/probation/ma_report.html.

¹⁴ Jesse Janetta, et al., *Examining Racial and Ethnic Disparities in Probation Revocation: Summary Findings and Implications from a Multisite Study* at 1, The Urban Institute (April 2014), available at www.urban.org/sites/default/files/publication/22746/413174-Examining-Racial-and-Ethnic-Disparities-in-Probation-Revocation.PDF.

Black people are more likely to have their probation revoked than similarly situated white people.¹⁵

Being overrepresented on probation means that poor people and people of color are disproportionately subject to an additional entry point into incarceration. If an individual on probation commits a new crime, for example, she is subject to punishment both for the crime and for a violation of probation. See *Henry*, 475 Mass. at 123-24. Probation can also increase the chance of arrest for new crimes by bringing individuals under closer scrutiny than other civilians.¹⁶ And if probationers who suffer from addiction are required to remain drug free, many of those probationers will be subject to incarceration for violating that condition, and poor people and people of color will be especially harmed.

We will one day look back on the War on Drugs, and its caging of our society's most vulnerable people, as a shameful chapter in American history. This Court has the opportunity, in one discrete but

¹⁵ *Id.* at 3-10.

¹⁶ See also Vincent Schiraldi & Michael P. Jacobson, *When Less is More: How putting fewer people on probation and parole can reduce prison populations, save money and keep us safer*, The Marshall Project (Aug. 28, 2017) (noting "if you watch almost anyone more closely, you can find excuses to re-arrest them"), available at www.themarshallproject.org/2017/08/28/when-less-is-more.

important area, to chart a different course. It should stop the misuse of probation to incarcerate individuals who do not immediately overcome drug addiction.

CONCLUSION

Amici respectfully request that this Court prohibit Massachusetts trial courts from requiring probationers who suffer from substance use disorder to remain drug free as a condition of their probation.

Respectfully submitted,



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September 25, 2017

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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September 25, 2017

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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***AMICUS CURIAE* BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF
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AND PRISONERS' LEGAL SERVICES IN SUPPORT OF THE PETITIONER**
