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In The  
**Supreme Court of Pennsylvania**

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**No. 27 EAP 2021**

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COMMONWEALTH OF PENNSYLVANIA,  
*Appellee*

v.

ALEXIS LOPEZ,  
*Appellant,*

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**BRIEF OF *AMICI CURIAE* PENNSYLVANIA COALITION AGAINST  
DOMESTIC VIOLENCE, WOMEN'S LAW PROJECT, AND WOMEN'S  
RESOURCE CENTER IN SUPPORT OF APPELLEE COMMONWEALTH  
OF PENNSYLVANIA**

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On Appeal from the Superior Court's Opinion in No. 1313 EDA 2018 entered March 23, 2021, affirming the Order of the Court of Common Pleas of Philadelphia County in No. CP-51-CR-0004377-2015.

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## STATEMENT OF INTEREST OF *AMICI CURIAE*

The Pennsylvania Coalition Against Domestic Violence is a private nonprofit organization working at the state and national levels to eliminate domestic violence, secure justice for victims, enhance safety for families and communities, and create lasting systems and social change. PCADV was established in 1976 as the nation's first domestic violence coalition and is now 59 funded community-based domestic violence programs across Pennsylvania. These programs provide a range of life-saving services, including shelters, hotlines, counseling programs, safe-home networks, medical advocacy projects, transitional housing, and civil legal services for victims of abuse and their children. Current PCADV initiatives provide training and support to further advocacy on behalf of victims of domestic violence and their children.

Founded in 1974, the Women's Law Project (WLP) is a nonprofit public interest legal organization working to defend and advance the rights of women, girls, and LGBTQ+ people in Pennsylvania and beyond. WLP leverages impact litigation, policy advocacy, public education, and direct assistance and representation to dismantle discriminatory laws, policies, and practices and eradicate institutional biases and unfair treatment based on sex or gender. WLP seeks equitable opportunity in many arenas including healthcare, education, athletics, employment, public benefits, insurance, and family law. WLP also seeks institutional changes with

regard to sexual and domestic violence, which are implicated in many of the areas in which we work. WLP has long worked to improve the responses of the criminal and civil justice systems to domestic and sexual violence to ensure the integrity and fairness of these systems and to make survivors safe and economically secure.

The Women's Resource Center (WRC) is a non-profit organization that provides comprehensive services for survivors of domestic violence, sexual assault, dating violence, and stalking in northeastern Pennsylvania. WRC's services include a crisis hotline, crisis counseling, emergency safe housing, rental and financial assistance, support services, community education, and medical advocacy. WRC also provides holistic civil legal assistance and representation to survivors by attorneys whom base their legal expertise in an extensive understanding of sexual and domestic violence. WRC's mission is to end domestic and sexual violence through advocacy, education, and social change. WRC seeks to make social change by dismantling oppressive structures that allow for gender-based violence, thereby promoting justice and liberation of all people.

## **STATEMENT PURSUANT TO RULE 531(b)(2)**

This Brief of *Amici Curiae* was not written by the counsel of any Party, and neither a Party, a Party's counsel, nor another person other than *Amici Curiae* and their counsel contributed money that was intended to fund preparing or submitting this Brief.

## SUMMARY OF ARGUMENT

*Amici curiae* The Pennsylvania Coalition Against Domestic Violence, the Women’s Law Project, and the Women’s Resource Center agree with the parties that Rule 706(C) requires sentencing courts to consider a defendant’s ability to pay costs before imposing them. We submit this brief to highlight the peril to victim restitution that can result when a court declines to conduct the ability-to-pay analysis required by Rule 706(C).

It is undisputed that restitution is a key component of a criminal sentence, for “[r]estitution is one of the few mechanisms by which the criminal justice system seeks to acknowledge and address the direct impact of crime on victims.”<sup>1</sup> Yet full restitution can be difficult, if not impossible, when a sentencing court imposes additional costs without considering a defendant’s ability to pay those costs. Indeed, because a restitution order is made without regard for ability to pay, it is even more critical for a sentencing court to consider a defendant’s ability to pay costs before imposing them in addition to any restitution amount. Poor defendants have tremendous difficulty paying bills, let alone paying restitution on top of court-imposed costs. The imposition of costs without consideration of ability to pay

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<sup>1</sup> DOUGLAS N. EVANS, *THE DEBT PENALTY: EXPOSING THE FINANCIAL BARRIERS TO OFFENDER REINTEGRATION* 4 (2014), available at <https://www.prisonlegalnews.org/media/publications/The%20Debt%20Penalty%20Financial%20Barriers%20to%20Offender%20Reintegration%20John%20Jay%20College%202014.pdf> (last visited Dec. 19, 2021).

therefore increases the defendant's total financial obligation and results in a corresponding decrease in the likelihood of victim restitution.

This problem is exacerbated by the absence of a uniform rule in this Commonwealth requiring full victim restitution before payment of court-imposed costs. Some counties impose this requirement, while others—including Philadelphia—do not. As a result, the imposition of additional costs on top of restitution can delay victim compensation by months, years, or perhaps indefinitely. This frustrates a fundamental goal of the Commonwealth's criminal justice scheme and does harm to crime victims—many of whom are poor themselves and have been the victims of physical and mental abuse.

Although Ms. Lopez's case does not involve a victim, future cases will; this Court's decision will either help those victims or hurt them. *Amici Curiae* respectfully submit that the Court should choose to help crime victims and reverse the decision of the Superior Court.

## ARGUMENT

In addition to the Parties' clear and compelling arguments that the plain language of Rule 706(C) requires an ability-to-pay determination *before* imposing court costs, the lower Court's interpretation of Rule 706 undermines the Commonwealth's important policy of victim restitution. At a minimum, Rule 706(C) requires sentencing courts to consider a defendant's ability to pay court costs at the time the costs are imposed in all cases where a victim is entitled to restitution or other compensation.

### **I. Restitution for Victims Is a Fundamental Goal of the Criminal Justice System.**

Restitution is a legal principle dating back to ancient times, yet as recently as the nineteenth century, the American criminal justice system largely focused on punishment and ignored the restitution rights of crime victims.<sup>2</sup> After considerable and focused advocacy in the 1970s and 80s, however, victims have finally reclaimed a small portion of those historic rights<sup>3</sup> in the form of restitution orders that require

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<sup>2</sup> Daniel M. Fetsco, *Unpaid Restitution: An Under-Enforced Right of Victims and Suggestions to Improve the Collection of Restitution in Wyoming*, 12 WYO. L. REV. 367, 367, 370–72 (2012) (“Requiring offenders to pay restitution to crime victims has a long history. Roman law, Mosaic Law, and the Code of Hammurabi all featured provisions that required payment of restitution.”); Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 933–34 (1984).

<sup>3</sup> *Id.* at 372.

offenders to repay victims for the harms caused by their crimes. Legislatures across the country have recognized “that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also [e]nsure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being.” S. Rep. No. 97-532, at 30 (1982).

Restitution can “provide financial compensation to victims for loss or damage to their property, lost income due to missing work, direct medical expenses, and psychological services, among other things.”<sup>4</sup> It benefits victims of domestic violence,<sup>5</sup> sex crimes,<sup>6</sup> and child pornography;<sup>7</sup> people harmed by drunk or reckless driving;<sup>8</sup> police officers injured in the line of duty;<sup>9</sup> small businesses whose property has been stolen or destroyed;<sup>10</sup> and countless others. Restitution also benefits offenders and society at large. “Requiring offenders to pay restitution compels them to take responsibility for their offense and to participate actively in compensating

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<sup>4</sup> EVANS, *supra* note 1, at 4.

<sup>5</sup> See, e.g., *United States v. Popson*, 234 F.3d 1263, 2000 WL 1568252 (Table), at \*1 (2d Cir. 2000); *State v. Stutler*, 402 P.3d 1013, 1014–16 (Ariz. Ct. App. 2017).

<sup>6</sup> See, e.g., *United States v. Robinson*, 508 F. App’x 867, 870 (11th Cir. 2013).

<sup>7</sup> See, e.g., *United States v. Church*, 701 F. Supp. 2d 814, 834 (W.D. Va. 2010).

<sup>8</sup> See, e.g., *Commonwealth v. Walker*, 666 A.2d 301, 307–08 (Pa. Super. Ct. 1995); see also *Commonwealth v. Knight*, No. 911 WDA 2013, 2014 WL 10889642, at \*5 (Pa. Super. Ct. Sept. 2, 2014).

<sup>9</sup> See, e.g., *Commonwealth v. Andress*, No. 1147 WDA 2016, 2017 WL 5946533, at \*4 (Pa. Super. Ct. Nov. 28, 2017).

<sup>10</sup> See, e.g., *Commonwealth v. Singer*, No. 1648 EDA 2017, 2018 WL 5023604, at \*2 (Pa. Super. Ct. Oct. 17, 2018); *Commonwealth v. Kerr*, 444 A.2d 758, 760 (Pa. Super. Ct. 1982).



their victim(s).”<sup>11</sup> “[F]or those who make consistent payments,” “[t]here is an inverse correlation between paying restitution and recidivism, such that offenders who pay a high percentage of their restitution obligations have a lower likelihood of committing a new crime.”<sup>12</sup>

Because victim compensation is now such an important function of the criminal justice system, Pennsylvania’s Sentencing Code requires courts to order offenders to pay restitution to their victims, usually without regard to the offender’s ability to pay. 18 Pa. C.S. § 1106(c)(1)(i), (2). The Code also bars the imposition of a fine at sentencing if it will “prevent the defendant from making restitution or reparation to the victim of the crime,” 42 Pa. C.S. § 9726(c). Finally, Rule 706(C) similarly requires courts to consider “the defendant’s ability to make restitution or reparations” “in determining the amount and method of payment of a fine or costs.” These provisions all “rest[] on the simple judgment that the state should not compete with the victim of the crime for what may be the meager assets of the offender.” ALI, Model Penal Code & Commentaries § 7.02 n. 4 (1962).<sup>13</sup> Yet that is exactly

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<sup>11</sup> EVANS, *supra* note 1, at 4; *accord* Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 938 (1984).

<sup>12</sup> EVANS, *supra* note 1, at 4; *see also* R. BARRY RUBACK, RESTITUTION IN PENNSYLVANIA: A MULTIMETHOD INVESTIGATION 66 (Aug. 2002), available at [https://pacrimstats.info/PCCDReports/EvaluationResearch/Completed%20Research/Victims%20Services/Restitution/Restitution\\_Study\\_Final\\_Report\\_Aug2002.pdf](https://pacrimstats.info/PCCDReports/EvaluationResearch/Completed%20Research/Victims%20Services/Restitution/Restitution_Study_Final_Report_Aug2002.pdf) (last visited Dec. 20, 2021).

<sup>13</sup> For restitution, priority is given to individual victims over government entities such as the court. 18 Pa. C.S. § 1106(c)(1)(ii)(A), (A.1).

the outcome when courts require an indigent offender to pay costs on top of restitution—the victim is far less likely to be fully and timely compensated because the Commonwealth is competing for an offender’s potentially finite resources.

## **II. The Imposition of Costs Exacerbates Existing Obstacles to Restitution.**

Indigent defendants already have difficulty paying restitution by itself. As other *amici* have explained, the financial and emotional strains of living with a criminal conviction are significant.<sup>14</sup>

Individuals with criminal records often have difficulty finding housing. Their outstanding debts (including the court-imposed debts) will negatively impact their credit scores, making it harder to get approval for “public or rental housing where credit scores are often a screening mechanism.”<sup>15</sup>

These individuals also have a hard time getting jobs. Pennsylvania does not prohibit employers from considering applicants’ criminal records, 18 PA. C.S. § 9125(a), making it harder to get hired.<sup>16</sup> Moreover, “[b]ackground checks by

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<sup>14</sup> See, e.g., Br. of ACLU of Pa. & Pa. ICGREF at 22–28.

<sup>15</sup> BANNON ET AL., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY at 27 (2010), available at <https://www.brennancenter.org/our-work/research-reports/criminal-justice-debt-barrier-reentry> (last accessed Dec. 19, 2021).

<sup>16</sup> E.g., Amanda Agan & Sonja Starr, *The Effects of Criminal Records on Access to Employment*, 107(5) AM. ECON. REV. 560 (2017), available at <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2892&context=articles>.

employers increasingly include credit reports, which can be used as a form of ‘character screening’ for job applicants.”<sup>17</sup>

Even if these individuals get housing and a job, they have difficulty keeping them. Individuals on probation frequently must attend probation appointments at inconvenient times and locations that may interfere with their work schedules. They also often rely on public transportation, which can make it difficult to get to work or probation appointments on time. These individuals often are paid low wages,<sup>18</sup> and up to 25% of those wages can be garnished to pay court-imposed financial obligations. 42 Pa. C.S. § 9730(a.1).<sup>19</sup> Unsurprisingly, these individuals have difficulty just paying their bills, let alone their restitution obligations, and frequently must rely on public assistance programs such as SNAP and TANF. Even these benefits can be taken away if the individual fails to pay court-imposed financial obligations.<sup>20</sup> And individuals who miss payments on court-imposed financial obligations can face rearrest or longer periods of probation, 42 Pa. C.S. § 9730(b), further interfering with their ability to work and pay their debts.

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<sup>17</sup> BANNON ET AL., *supra* note 15, at 27.

<sup>18</sup> Wages are especially low for individuals serving a prison term, who are often paid only a fraction of minimum wage. Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State*, PRISONPOLICY.ORG (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/>.

<sup>19</sup> *See also* EVANS, *supra* note 1, at 9 (“[E]x-offenders owe as much as 60 percent of their income to criminal debts.”).

<sup>20</sup> BANNON ET AL., *supra* note 15, at 28.

In short, offenders “may confront escalating debt; face repeated, unnecessary incarceration for nonpayment despite posing no danger to the community; lose their jobs; and become trapped in cycles of poverty that can be nearly impossible to escape.”<sup>21</sup>

These hardships add up to less compensation for victims: individuals with no financial or housing security will almost always struggle to pay their court debts. And although these hardships make it more difficult to pay any type of court debt, data from the Administrative Office of Pennsylvania Courts shows that restitution consistently takes a backseat to costs and fines. Of all the restitution imposed in Pennsylvania in 2011, only 25.9% had been collected by 2019, compared to 59.6% of costs and 45.7% of fines.<sup>22</sup> “Behind these numbers are real crime victims in need—individuals trying to recover from financial losses related to the crime they experienced.”<sup>23</sup>

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<sup>21</sup> Letter from Vanita Gupta & Lisa Foster to Colleagues at Department of Justice (Mar. 14, 2016), available at <https://www.courts.wa.gov/subsite/mjc/docs/DOJDearColleague.pdf> (last accessed Dec. 20, 2021).

<sup>22</sup> AOPC, *Collection Rates Over Time*, PACOURTS.US, <https://www.pacourts.us/news-and-statistics/research-and-statistics/dashboard-table-of-contents/collection-rate-of-payments-ordered-by-common-pleas-courts> (last accessed Dec. 10, 2021).

<sup>23</sup> NAT’L CENTER FOR VICTIMS OF CRIME, MAKING RESTITUTION REAL: FIVE CASE STUDIES ON IMPROVING RESTITUTION COLLECTION at 3.

When court costs are imposed on top of restitution, satisfying those restitution obligations becomes even harder and crime victims are far less likely to receive any compensation. With each increase in the total amount owed by a defendant comes greater harm to her credit, earning capacity, and morale. Although no additional debt is insignificant for indigent defendants struggling to pay restitution, court costs are substantial: In 2013, the median amount of restitution assessed in a criminal case was \$640, whereas the median amount of costs was more than twice that amount—\$1,336.<sup>24</sup> Moreover, when a court imposes financial obligations without considering ability to pay, the individual is less likely to make any payments at all, even if she would otherwise be able to make some payments.<sup>25</sup> The weight of owing an amount that you do not think you can ever realistically pay back is crushing, and many individuals just give up. When a court adds unaffordable costs on top of restitution, the likelihood of meaningful victim restitution significantly decreases.

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<sup>24</sup> See Ward *et al.*, *Imposition and Collection of Fines, Costs, and Restitution in Pennsylvania Criminal Court* at 5 (Dec. 18, 2020) (finding that when greater obligations are imposed, payment takes longer).

<sup>25</sup> R. Barry Ruback, *The Benefits & Costs of Economic Sanctions: Considering the Victim, the Offender, & Society*, 99 MINN. L. REV. 1779, 1806 (2015).

### **III. The Lack of Appropriate Payment Allocation Measures Further Delays Victim Compensation and Exacerbates the Harm to Victims' Rights That Can Result when a Sentencing Court Fails to Consider Ability to Pay Before Imposing Court Costs.**

Even where this myriad of hardships does not prevent an individual from paying their financial obligations altogether, the imposition of costs on top of restitution can significantly delay victims' compensation.

The Pennsylvania Code provides that costs and restitution will be reduced to a single judgment. 42 Pa. C.S. § 9728(a)(1) (“[R]estitution, reparation, fees, costs, fines or penalties shall . . . be a judgment in favor of the probation department.”). Individuals who cannot pay the full judgment right away often end up on a payment plan. Unsurprisingly, where the total financial obligation imposed on an individual is greater, either the amount of each payment must be higher—often in amounts that indigent persons cannot afford—or the payments must be spread out over a longer period of time.<sup>26</sup>

The Code, however, does not require the restitution portion of the judgment to be paid first. Instead, it provides that as little as 50% of each payment will go to restitution. 42 PA. C.S. § 9728(g.1); 204 PA. CODE § 29.405(1)(i). Thus, even for individuals who can pay costs and restitution over time, the imposition of court costs delays full compensation for the victim by allowing probation departments to

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<sup>26</sup> Ward *et al.*, *supra* note 24, at 8.

allocate only a portion of each payment to restitution. Indeed, “payment on restitution orders typically follows other financial obligations,” including costs and fines.<sup>27</sup>

Some Pennsylvania counties, such as Allegheny County, have tried to address this allocation problem by requiring that 100% of payments be allocated to the victim until the restitution is paid in full.<sup>28</sup> Philadelphia County, however, does not do this. Neither victim compensation nor offenders’ financial welfare should vary so substantially based solely on which county’s probation department handles their case. Moreover, because owing a larger total amount may cause an offender to default on his payments altogether—either by increasing the amount of each payment or by making the prospect of full repayment so hopelessly daunting that the individual gives up—Allegheny County’s solution of allocating 100% of payments to restitution until fully paid does not fix the problems caused by the systemic obstacles discussed above. Accordingly, courts should refrain from imposing unpayable costs on top of indigent offenders’ restitution obligations. To safeguard against such an imposition of unpayable costs, courts must first consider ability to pay costs in all cases involving restitution.

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<sup>27</sup> R. Barry Ruback, *The Imposition of Economic Sanctions in Philadelphia: Costs, Fines, and Restitution*, 68:1 FED. PROBATION 21 (2004).

<sup>28</sup> *Fines and Costs*, ALLEGHENYCOUNTY.US, <https://www.alleghenycounty.us/court-records/criminal/collection-of-fines-and-costs.aspx> (last accessed Dec. 10, 2021).

Finally, when an offender defaults on her payment obligations, the account—including restitution, costs, and fines—can be assigned to a private collection agency that ultimately siphons even more money away from the victim. 42 Pa. C.S. § 9730.1(a). Such agencies can charge the defaulting offender up to 25% of the account total as a collection fee, further increasing her indebtedness and reducing the likelihood that the victim will timely or fully compensated. Worse, 100% of each payment is allocated to the agency’s fee until it is paid in full, giving it priority over everything else, including victim restitution. 42 Pa. C.S. § 9730.1(b)(3). And the Code does not address whether these collection agencies can negotiate lower total payment amounts with the defaulting offender (as agencies often do in more traditional debt collection scenarios), driving down further the amount received by victims. The risk that a restitution account will be sent to such an agency in the first place can be reduced if courts simply consider the person’s ability to pay before imposing unmanageable court costs on top of restitution obligations.<sup>29</sup>

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<sup>29</sup> Although courts are supposed to consider ability to pay and adjust the payment schedule (rather than sending the account to collections) if the offender is unable to make a payment, *id.* § 9730(b)(1), (3), there are three reasons that this procedure is not an adequate substitute for considering ability to pay before imposing costs. First, the offender is not entitled to counsel to assist with the subsequent ability-to-pay determination unless “the court finds there is a likelihood of imprisonment.” *Commonwealth v. Diaz*, 191 A.3d 850, 862 (Pa. Super. Ct. 2018). Without clear guidance from this Court, the lower courts will be left to grapple with the unanswered question of whether a determination that results in sending an account to collections also increases the likelihood of imprisonment. Second, if the offender defaults on a payment a second time, the offender has the burden to show that an



## CONCLUSION

In sum, the Court should reverse the decision of the Superior Court and hold that the Court of Common Pleas must consider ability to pay before imposing costs in all cases. At the very least, the Court should indicate that the Court of Common Pleas must consider ability to pay before imposing costs in all cases involving restitution.

DATED January 7, 2022

*/s/ Benjamin R. Barnett*

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adjusted payment schedule is needed based on “changes of financial condition.” 42 Pa. C.S. § 9730 (b)(3); *see also* PA. R. CRIM. P. 706(D). Third, there is no right to consideration of ability to pay in cases where a currently incarcerated person has failed to pay court-imposed costs and/or restitution. *See Wojnarowski v. Wetzel*, No. 440 M.D. 2020, 2021 WL 5764304, at \*4 (Pa. Super. Ct. Dec. 6, 2021).

**CERTIFICATES OF COMPLIANCE**

I, Justin M. Kadoura, hereby certify that this Brief complies with the requirements of Sections 7.0 and 8.0 of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania*.

I, Justin M. Kadoura, hereby certify that this Brief does not exceed 7,000 words.

DATED     January 7, 2022

/s/ Justin M. Kadoura  
Justin M. Kadoura

**CERTIFICATE OF SERVICE**

I, Justin M. Kadoura, hereby certify that I am this day serving the foregoing document upon all Parties via PACFile and served the Pennsylvania Legal Aid Network via email at their email addresses listed on PACFile.

DATED     January 7, 2022

*/s/ Justin M. Kadoura* \_\_\_\_\_  
Justin M. Kadoura