

An Overview of the the Law: Probation and Probation Violations

YOUTH ADVOCACY DIVISION COMMITTEE FOR PUBLIC COUSEL SERVICES¹

I. Purpose of Probation

1. Primary Purpose The principal goals of probation are **rehabilitation** and **public protection**. *Commonwealth v. Pike*, 428 Mass. 393, 403 (1998). Probation is granted “with the hope that the probationer will be able to rehabilitate himself or herself under the supervision of the probation officer.” *Commonwealth v. Sheridan*, 51 Mass. App. Ct. 74, 77 (2001), *citing Commonwealth v. Olsen*, 405 Mass. 491, 493 (1989).
2. Secondary Purpose In addition to rehabilitation and public safety, **punishment**, **deterrence**, and **retribution** are also objectives of probation. *Pike*, 428 Mass. at 403.
3. Statutory Authority for Probation
 - a. Pretrial: G.L. c. 276 § 87
 - b. Post-Adjudication: G.L. c. 276 § 87 & 87A; G.L. c. 119 § 58 & 62; G.L. c. 279 §§ 1-3

II. Conditions of Probation

1. General conditions of probation:
 - 1) Payment of probation fee, G.L. c. 276, § 87A²

If a juvenile is placed on probation **while under the age of 18** “no fee or surcharge... shall be assessed.” If a juvenile is 18 or older when placed on probation a probation fee can be assessed, however the court may waive the fee and/or order community service. .
 - 2) Report to probation officer, as directed;
 - 3) May not leave the state without permission;
 - 4) Pay a victim-witness assessment , G.L. c. 258B, § 8; and
 - 5) Do not commit any new offenses.

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² On July 8, 2016 c. 276 §87A was amended as to its application to persons under the age of 18. As of July 8, 2016, the Juvenile Court was required to revoke any outstanding probation fees on delinquency and youthful offender cases if the juvenile was under age 18 when they were placed on probation.

Superior Court Rule 56 sets forth additional mandatory conditions of probation, which many juvenile courts incorporate into their probation orders. In addition to the conditions stated above, they include: notify probation officer immediately of any change of residence; make reasonable efforts to obtain and keep employment; comply with all orders of the court, including any order for the payment of money; and make reasonable efforts to provide adequate support for all dependent persons. (*Massachusetts Juvenile Court Bench Book*, Blitzman, J., et al, MCLE, 2011, *See also, Commonwealth v. Wilcox*, 446 Mass. 61, 64-66 (2005))

2. Common Special Conditions of Probation:

The court may also impose discretionary conditions of probation and are referred to as special conditions. Special conditions must serve “the ends of justice and in the best interest of both the public and the defendant.” *Buckley v. Quincy District Court*, 395 Mass. 815, 817 (1985). For additional limitations on special conditions of probation, see section 3, below.

Commonly imposed special conditions include one or more of the following:

- a. Curfew
- b. Obey Rules of Home and/or School
- c. Attend School Daily Without Suspension (or Without Incident)
- d. Work or Participate in Activities Deemed Appropriate, G.L. c. 119, § 58
- e. Restitution, G.L. c. 276, § 87A, G.L. c. 119, § 62³
- f. Court Costs G.L. c. 289, § 6
- g. Stay Away Orders/No Contact
- h. Drug Screens

A “stay away” order means that a probationer cannot come within a certain distance of a specified person; however written or oral contact is not prohibited. A “no contact” order means that a probationer cannot communicate by any means with the specified person and must remain physically separated. A no contact order is broader than a stay away order. *Commonwealth v. MacDonald*, 435 Mass. 1005 (2001), *Commonwealth v. Kendrick*, 446 Mass. 72 (2006).

3. Limitations on Conditions of Probation.

- a. Conditions Should be Tailored to the Probationer and the Offense. In order to accomplish the goals of probation, probation conditions should address the particular characteristics of the juvenile and the crime for which they has been placed on probation. *Commonwealth v. Pike*, 428 Mass.393, 403(1998).

³ “If, in adjudging a person a delinquent child, the court finds, as an element of such delinquency, that he has committed an act involving liability in a civil action, and such delinquent child is **placed on probation**, the court may require, as a condition thereof, that he shall make restitution or reparation to the injured person to such an extent and in such sum as the court determines.” G.L. c. 119, § 62 (Emphasis added)

But see Commonwealth v. Williams, 60 Mass. App. Ct. 331 (2004)(special condition not to “consume or possess any alcohol” affirmed even though there was no evidence of alcohol use in connection with the offense). In *Williams*, the defendant was on a CWO for violating the terms of a 209A order and was subsequently arrested for two crimes involving assaultive behavior. In upholding the special probation condition, the Appeals Court reasoned that most trial judges in a district court are familiar with the connection between anger, violence, and alcohol consumption in a person who has a violent disposition. *Id* at 332-33. While alcohol possession and consumption is legal for adults, the court concluded that the condition furthered the goal of helping the defendant change his conduct. *Id*. The Appeals Court emphasized that, “a judge has broad discretion to impose conditions of probation which are reasonably calculated to control the conduct of the defendant.” *Id*. at 332-33. (Emphasis added). See also, *Commonwealth v. Kenney*, 55 Mass. App. Ct. 514 (2002), *fur. app. rev. den.* 437 Mass. 1110 (2002)(probation condition that defendant surrender her driver’s license as a condition of her probation for leaving the scene of the accident was within “great latitude” judges are given in imposing conditions, and complied with principal goals of probation-rehabilitation, protection of the public, as well as punishment, deterrence and retribution).

b. Conditions Must be Set by the Sentencing Judge Terms of probation that are set by the judge and reflected in the docket entry are enforceable as a court order. The condition of probation form is not a court order and where there is a discrepancy between the docket entry and the probation form, the courts look to the docket entry. *Commonwealth v. MacDonald*, 435 Mass. 1005, 1006-1007 (2001). See also, *Commonwealth v. Lally*, 55 Mass. App. Ct. 601 (2002). In *Lally*, after being placed on probation, the defendant underwent a psychological evaluation. It was recommended that he receive random urine screens for drugs and alcohol as part of his probation. This was not a condition imposed by the sentencing judge, and when asked, by the probation officer, to sign a new “contract,” the defendant refused. At the violation hearing, the defendant was found in violation for refusing to sign this condition. While refusing to sign a condition of probation constitutes a violation, it was not a violation because the condition was added by probation and not ordered by the judge. The Commonwealth argued that this condition could have been added at the violation hearing. The court disagreed, stating that the hearing is not the time to add conditions improperly imposed by probation. This would delegate the judges’ authority to probation. Conditions must be set by the sentencing judge. For limitations on Probation Officers’ requests to modify conditions of probation, see Section 4, below.

The Conditions of Probation are Not a Contract. Though the defendant is required to sign them, conditions of probation are not a contract since they are not premised on mutuality of agreement or obligation. *Commonwealth v. MacDonald*, 50 Mass. App. Ct. 220, 223 (2000), *affirmed* 435 Mass. 1005 (2001).

c. Terms Must be Doable. Terms must be doable for a person in probationer's circumstances. *Buckley v. Quincy District Court*, 395 Mass. 815, 817 (1985). Thus, an unemployed, indigent probationer could not be ordered to pay restitution of \$250 and a fine of \$500 by a specified date as a condition of probation. *Beardan v. Georgia*, 461 U.S. 660 (1983). Similarly, a homeless probationer who failed to comply with his probation conditions in regard to GPS monitoring because the shelter where he lived could not accommodate the GPS technology did so through no fault of his own and he could not be violated where there could be no finding of willful noncompliance. *Commonwealth v. Canadyan*, 458 Mass. 574 (2010). *See also, Commonwealth v. Poirer*, 458 Mass. 1014 (2010)(probationer could not be violated for failure to comply with GPS monitoring when the equipment was unavailable). *See also, Commonwealth v. Henry*, 475 Mass. 117, 122 (2016) ("A defendant can be found in violation of a probationary condition only where the violation was willful, and the failure to make a restitution payment that the probationer is unable to pay is not a willful violation of probation"). *But see Commonwealth v. Al Saud*, 459 Mass. 221, (2011)(probationer, who voluntarily departed from the country in lieu of deportation, was found in violation of his probation where the court found that he could have complied with the conditions).

d. Terms Must be written. "Every person released upon probation shall be given by the probation officer a written statement of the terms and conditions of the release." G.L. c. 276, § 85.

e. Terms Must be Clear and Understandable. *Commonwealth v. Lally*, 55 Mass. App. Ct. 601 (2002)(condition that the defendant submit to "treatment as deemed necessary" was held to be ambiguous). *Commonwealth v. Riz*, 90 Mass. App. Ct. 10 (2016)(holding the condition that defendant "not 'minimize' his crimes during sex abuse treatment, in contact with church authorities, and in dealing with his probation officer" does not provide reasonable guidance as to what conduct is prohibited). *See Commonwealth v. Power*, 420 Mass. 410, 422 (1995), *cert denied*, 516 U.S. 1042 (1996) (where the Supreme Judicial Court held that the constitutional rule against vague laws applies equally to probation conditions as it does to legislative enactments. *Id. citing Griffin v. Wisconsin*, 483 U.S. 868, 875-76, n.3 (1987)). *Compare, Commonwealth v. Kendrick*, 446 Mass. 72, 76-77 (2006)(probation condition of "no contact with children under the age of 16 years old" provided reasonable guidance that the defendant's presence at a car show that families attended was a violation of his probation). *Commonwealth v. Swanson*, 79 Mass. App. 902 (2011)("no excessive use of alcohol" condition was not too vague to give fair warning of conduct that may result in a violation in the circumstances where the probationer was violated for reporting to probation smelling of alcohol on two occasions). *Commonwealth v. Ruiz*, 453 Mass. 474 (2009)(defendant who received probationary period "from and after" a committed sentence could not be found in violation for conduct committed prior to the start of his probationary period where he did not receive clear notice that the condition of probation prohibiting contact with the victim was in effect while he was incarcerated).

“[W]hen no specific date is established by the sentencing judge by which time a probationer must complete a treatment program, the defendant's obligation is to act with reasonable promptness to comply with the schedule established by his probation officer.” *Commonwealth v. Bynoe*, 85 Mass. App. Ct. 13, 20 (2014)(stating that “if the defendant does not agree with the timetable established by his probation officer, the matter may be reviewed administratively, either by the chief probation officer or his designee, or in accordance with a procedure established by the Commissioner of Probation and if a satisfactory resolution is not achieved, the probationer may file a motion for a judicial review by the sentencing judge”).

f. Terms May Not Unreasonably Restrict a Constitutional Right.

“A probation condition is not necessarily invalid simply because it affects a probationer's ability to exercise constitutionally protected rights.” *Commonwealth v. Pike* 428 Mass. 393 (1998). A probation condition that infringes on constitutional rights must, however, be “reasonably related” to the goals of sentencing and probation. *Id.*, citations omitted. “The propriety of any given probation condition depends heavily on the facts of the case before the court.” *Commonwealth v. LaPointe*, 435 Mass. 455 (2001), quoting [State v. King, 692 A.2d 1384, 1385 \(Me.1997\)](#).

First Amendment

Commonwealth v. Power, 420 Mass. 410 (1995)(upholding the condition of probation that restricted the defendant from profiting from the sale of her story to the news media on the grounds that the defendant’s free speech rights were not violated; she could still tell her story, she just could not profit from it); *Commonwealth v. Obi*, 475 Mass. 541, 547 (2016) (the condition of probation requiring the defendant to disclose in writing to her prospective tenants that she had been convicted of assaulting a tenant in the past and had had harassment prevention orders issued against her advanced the public safety goal of probation, and to the extent that the condition was constitutionally burdensome at all, it was not so burdensome as to be invalid.)

Freedom of Movement/ Travel

Commonwealth v. Pike, 428 Mass. 393, 402-405 (1998)(condition of probation prohibiting the defendant from entering Massachusetts during the probationary period was held to be invalid as it violated the defendant’s fundamental constitutional right of freedom of interstate travel). In *Pike*, the defendant was convicted of unauthorized use of a motor vehicle and assault and battery by means of a dangerous weapon. The incident occurred when the defendant was traveling from New Hampshire into Massachusetts and he got into an altercation with a Massachusetts State trooper. The judge ordered that as a condition of probation the defendant was prohibited from entering Massachusetts during the probationary period. The SJC held the condition to be invalid as it violated the defendant’s fundamental constitutional right of freedom of

interstate travel. While judges are given “great latitude” in setting probation conditions, the SJC noted, when conditions infringe upon constitutional rights they must be “reasonably related to the goals of sentencing and probation.” *Id.* at 403. Conditions should be “tailored to address the particular characteristics of the defendant and the crime,” taking into consideration the special problems of the individual. *Id.* See *United States v. Tonry*, 605 F.2d 144, 148 (5th Cir. 1979). While restrictions against traveling to more narrowly defined geographic areas have been upheld, there was no showing that banishing the defendant from Massachusetts served any rehabilitative purpose; he was not more inclined to commit crimes in Massachusetts.

Freedom to be Free from Unreasonable Searches

In *Commonwealth v. LaFrance*, 402 Mass. 789 (1988), a Superior Court judge imposed as a condition of probation that the defendant submit to a search of herself, her possessions, and any place she may be, with or without a search warrant and at the request of a probation officer. The SJC remanded the case with the revised condition that any search must be based on a “reasonable suspicion” that a search might produce evidence of wrong doing; this would comport with Article 14. The court found that this added requirement would be consistent with the rehabilitative purpose and public protection goals of probation. In addition it would protect the defendant from unwarranted intrusions. This principle was reiterated in *Commonwealth v. Waller*, 90 Mass. App. Ct. 295(2016) where the Appeals Court held that a probation condition that the probationer’s home be open to mandatory random inspection violated the defendant’s constitutional right to be free from unreasonable searches. The Court remanded this case for the probation condition to be modified to “so that the defendant will be subject to searches by the MSPCA (the defendant was convicted of cruelty to animals) and the probation department only upon reasonable suspicion and only pursuant to a warrant or a traditional exception to the warrant requirement.”

4. Modification of Conditions.

a. A probation officer does not have the discretion to alter or modify conditions of probation. *Commonwealth v. MacDonald*, 50 Mass. App. Ct. 223, 224 (2000).

b. Judges have the right to modify conditions of probation. *Commonwealth v. LaPointe*, 435 Mass. 455 (2001). But, in order to do so, there must be a material change in circumstances and the added or modified conditions may not be so punitive as to significantly increase the severity of the original probation. *Buckley v. Quincy District Court*, 395 Mass. 815, 817-819 n.5, 820 (1985) (holding that Quincy District Court could not order defendant to go to an alcohol program as a modified condition of probation because there was no material change in the defendant’s circumstances since the time the original conditions were imposed). See also, *Commonwealth v. Goodwin*, 458 Mass. 11 (2010)(where court found that added condition of GPS monitoring was not based

upon a material change in circumstances and was so punitive to increase significantly the severity of the original probationary terms). *But see, Commonwealth v. Indelicato*, 77 Mass. App. Ct. 182, 183 (2010) (being taken into protective custody for intoxication constituted a material change in circumstances sufficient to support modification of the defendant's probation conditions from requiring the defendant to attend four AA meetings a week to including that the defendant remain alcohol free and submit to random testing).

5. Adjudications for Sex Offenses.

Adults placed on probation for a "sex offense", a "sex offense involving a child" or a "sexually violent offense", as defined in section 178C of chapter 6, are required to wear a global positioning system device. G.L. c. 265 § 47. The mandatory provision of this statute does **not** apply to juveniles adjudicated delinquent of a sex offense and placed on probation. *Commonwealth v. Hanson H.*, 464 Mass. 807 (2013). In *Hanson H.*, the Court determined that the mandatory requirement to wear a GPS monitoring device would interfere with a juvenile court judge's discretion to determine what conditions of probation would be appropriate for the juvenile and would stigmatize the child as a criminal, possibly interfering with the child's rehabilitation. In *Commonwealth v. Samuel S.*, 476 Mass. 497 (2017), the Court extended the holding in *Hanson H.*, stating that GPS monitoring is not mandatory in sex offense cases where the juveniles are adjudicated youthful offenders. The Court did state in both *Hanson H. and Samuel S.* that a juvenile court judge has discretion, in the appropriate cases, to order GPS monitoring as a condition of probation.

Under G.L.c. 6, § 178E(f) and *Samuel S.*, a judge must make an individualized determination as to whether a juvenile adjudicated delinquent or as a youthful offender must register as a sex offender, even if the juvenile is sentenced to a commitment to DYS. A judge cannot order a person to register with SORB as a condition of their probation. There is nothing in c. 6 § 178E(f) that authorizes a judge to make such an order. *Commonwealth v. Ventura*, 465 Mass. 202 (2013).

6. Restitution

- a. Restitution orders must "bear a relationship to the injury caused by the defendant's criminal conduct"; *Commonwealth v McIntyre*, 436 Mass. 829, 833 n.2 (2002); and is limited to "the amount of the victim's actual economic loss causally connected to the defendant's crime." *Commonwealth v. Henry*, 475 Mass. 117, 121 (2016). See *Commonwealth v. Casanova*, 65 Mass. App. Ct. 750 (2006)(judge's findings did not support a causal connection between the victims injury and the defendant's criminal conduct). *Commonwealth v. Rotunda*, 434 Mass. 211, 222 (2001)(Judge's order that a probationer pay \$5,000 to the complainant as a condition of probation was not lawful where said payment was not characterized as, nor properly documented as, restitution).

- b. A juvenile is entitled to an evidentiary hearing regarding the amount of restitution. The Commonwealth has the burden of proving the amount of the victim's loss by a preponderance of the evidence. *Commonwealth v. Nawn*, 394 Mass. 1, 7-9 (1995). At the hearing the judge must decide whether to order restitution **and** the amount of restitution. *Id.*
- c. Ability to Pay. The juvenile bears the burden of proving an inability to pay the restitution.

In *Commonwealth v. Avram A.*, 83 Mass. App. Ct. 208 (2013), the Judge's order for 12 year old to pay \$1,313 in restitution for spray paint tagging was upheld and the court found it was consistent with G.L. c. 119, §53. The juvenile had the opportunity to challenge the Commonwealth's evidence of the proper amount of restitution as well as to present evidence relevant to his ability to pay. *Commonwealth v. Morris M.*, 70 Mass. App. Ct. 688, 698 (2007).

In *Commonwealth v. Henry* 475 Mass. 117 (2016) the Court articulated for the first time the legal standard for determining ability to pay restitution. A judge "must consider the financial resources of the defendant, including income and net assets, and the defendant's financial obligations, including the amount necessary to meet minimum basic human needs such as food, shelter, and clothing for the defendant and his or her dependents." *Id.* at 126. Restitution should not cause a "substantial financial hardship." Furthermore, the "ability to pay determination should be made only *after* the judge has determined the appropriate length of the probationary period based on the amount of time necessary to serve the twin goals of rehabilitating the defendant and protecting the public. *Id.* at 125.

In *Henry*, the Court outlined that the judge in a restitution hearing must make two findings in a restitution hearing. *Henry*, 475 Mass. at 121. "First, the judge must determine the amount of the victim's actual economic loss causally connected to the defendant's crime." *Id.* at 121. (This is the Commonwealth's burden). "Second, the judge must determine the amount the defendant is able to pay." *Id.* at 121. "Where the defendant claims that he or she is unable to pay the full amount of the victim's economic loss, the defendant bears the burden of proving an inability to pay." *Id.* at 121.

"A defendant can be found in violation of a probationary condition only where the violation was willful, and the failure to make a restitution payment that the probationer is unable to pay is not a willful violation of probation." *Id.* at 122. Imposing restitution when the individual is unable to pay "violates the fundamental principle that a criminal defendant should not face additional punishment solely because of his or her poverty." *Id.*

- d. Right to Confront Witnesses - in "the restitution context a trial judge possesses the discretionary authority not to require a victim ... to appear as a witness, and specifically to preclude the defendant from calling her, if the judge were to find, based on the record before him, that the interest in insulating the victim from further

trauma overcomes the defendant’s presumptive right to call her.” *Commonwealth v. Molina*, 476 Mass. 388, 408 (2017). In *Molina*, the court noted the similarities between an probation violation hearing and a restitution hearing, stating, “[i]f there is ‘good cause’ for the Commonwealth not to call a witness with personal knowledge to testify but to offer instead reliable hearsay or other evidence to establish the basis for its request for restitution, the requirements of due process are likely to be satisfied.” *Id.*

A defendant may be found in violation of his probation and subject to further sanctions for failing to pay restitution even where the victim has received full collateral compensation. *Commonwealth v. Malick*, 86 Mass. App. Ct. 174 (2014)(Restitution supports the four fundamental purposes of sentencing: incapacitation, deterrence, retribution, and rehabilitation. . .and “also serves the ancillary purpose of compensating the victim for economic losses”).

III. Procedural Issues

1. Statutory Authority.

a. G.L. c. 119, § 59 – “If a child has been placed in care of a probation officer, said officer, at any time before the final disposition of the case, may arrest such child without a warrant and take him before the court, or the court may issue a warrant for his arrest. When such child is before the court, it may make any disposition of the case which it might have made before said child was placed on probation, or may continue or extend the period of probation.”

b. G.L. c. 279, § 3 – Probation officer can arrest without a warrant and bring person before the court, or the court may issue a warrant, court can sentence or continue or revoke a sentence which has been suspended.

2. Juvenile Court Standing Order

Probation violation hearings in the Juvenile Court are governed by Juvenile Court Standing Order 1-07: Violation of Probation Proceedings. <http://www.mass.gov/courts/case-legal-res/rules-of-court/juvenile/1-07.html> Unlike the District Court Rules of Probation Proceedings which were compiled to “codify the provisions of applicable case law”, *Commonwealth v. Bulkin*, 467 Mass. 516 (2014), the purpose of the Juvenile Court standing order is “to ensure that judicial proceedings undertaken upon the allegation of a violation of probation are conducted in a manner consistent with the Commonwealth’s policy regarding children as set forth in G.L. c. 119 and in full compliance with all applicable law, promptly and with an appropriate degree of procedural uniformity.”

3. Entitlement to Preliminary Hearing.

a. Required When a Liberty Interest is at Stake. A preliminary hearing is required when probation wants a probationer, who is at liberty, to be held in custody because of the alleged violations. If there is no request for the probationer to be taken into custody, he/she is not entitled to a preliminary hearing. *Fay v. Commonwealth*, 379 Mass. 498, 504 (1980).

b. Juvenile Court Violation of Probation Proceedings Standing Order 1-07⁴. A preliminary hearing shall be held if probation requests to hold the juvenile in custody or requests an order of release on terms. *Standing Order IV.(a)*

c. Not Required When Probationer is Incarcerated. If probationer is incarcerated on other matters at the time of violation proceeding, there is no right to a preliminary hearing. *Commonwealth v. Odoardi*, 397 Mass. 28, 33 (1986). Additionally, if the probationer is in custody awaiting trial on another matter, it follows that a preliminary hearing is not required. *Id.* at 33, n. 5. When there is no deprivation of liberty as a result of the alleged violation, a preliminary hearing is not required.

d. Bail. If probable cause is found in juvenile court, the court can either hold the juvenile in custody, with no entitlement to bail, or the court can release the juvenile with terms with the juvenile's consent. *Standing Order V(c) and (d)*.

4. Probationer's Due Process Rights.

In *Morrisey v. Brewer*, 408 U.S. 471 (1972), the Supreme Court set forth the minimum fourteenth amendment due process requirements for revocation of parole hearings, which were extended to probation revocation hearings in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

Due process rights include:

- i. Written notice
- ii. Disclosure of evidence against probationer
- iii. Opportunity to be heard and present evidence (witnesses and documentary evidence)⁵
- iv. Right to confront witnesses and cross-examination⁶
- v. A "neutral and detached" hearing officer
- vi. Written statement by fact finder as to evidence relied upon and reasons for revocation.

⁴ Herein after called "*Standing Order*"

⁵ *Violation of Probation Proceedings Standing Order* Violation of Probation Proceedings VI (a),

⁶ Unless there is good cause for not allowing confrontation. *Gagnon* at 786, *Commonwealth v. Maggio*, 414 Mass. 193 (1993), see section IV of this outline.

See also, Commonwealth v. Durling, 407 Mass. 108 (1990); *Commonwealth v. Maggio*, 414 Mass. 193, 196 (1993), *citing Morrissey and Gagnon*.

Under the Massachusetts Declaration of Rights, the right of access to material witnesses applies to probation violation proceedings in appropriate cases. This right is encompassed in the right of a probationer to be heard and present evidence. *See Durling, supra*. In *Commonwealth v. Kelsey*, 464 Mass. 315 (2013) the defendant filed a motion for the identity of an informant in a drug transaction. The alleged drug transaction was a reason for the violation, however, the judge denied the motion, believing that such disclosure is never ordered in probation revocation proceedings (the drug case was dismissed but the probation department preceded with the violation.) The SJC held that it was error for the judge to deny the motion on those grounds. The court concluded that the error in denying the motion was not harmless beyond a reasonable doubt and the case was remanded for the judge to assess the relevance of the evidence and whether, in the totality of the circumstances, disclosure is warranted.

Although not addressed in Massachusetts, other states have held that due process requires that a defendant be competent during probation violation proceedings. *See e.g. Donald v. State of Indiana*, 930 N.E.2d 76, 80 (Ind. 2010) (holding right of probationer to be heard and present witness and the right to confront and cross-examine witnesses would be void if the defendant is not competent to understand, participate, and assist counsel in the proceedings). In *Commonwealth v. Gibson*, 474 Mass. 726, 741-2 (2016), the SJC, while not specifically stating the competency is required for probation violation proceedings, stated that the defendant had a right to present evidence of his mental condition both at a probation violation hearing, and at a hearing to determine if he had forfeited his right to counsel.

5. Notice Requirements.

a. Notice must be in Writing and Probationer must be informed of the Alleged Violations. A probationer should receive written notice of the hearing (time, place), what the violations are, and for a preliminary hearing, that the purpose of the hearing is to determine whether probable cause exists. *Morrissey v. Brewer* at 485-489, *Gagnon v. Scarpelli* at 782. In *Commonwealth v. Streeter*, 50 Mass. App. Ct. 128 (2000), the court held that the notice was not adequate where the defendant was found in violation for conduct that was not in the written notice. In *Streeter*, the defendant was given three separate violation notices. At the violation hearing he was found in violation for committing an assault and battery and failing to comply with a special condition of staying away from a particular housing project. None of the violation notices mentioned the assault and battery conviction or the stay away order.

b. Juvenile Court Standing Order – Notice- Charged Criminal Conduct. – Where the reason for the violation is charged criminal conduct, written notice shall be given, at or before the arraignment on the new charge, if the probation and new charge are in the

same division. *Standing Order III(b)(i)*. If the probation and new charge are in different divisions, notice shall be served in hand at the arraignment in the court of the new charge. *Standing Order III(c)(i)*.

- i. The Notice must state the criminal conduct alleged in the new complaint or indictment and “any other specific conditions of the probation order that the Probation Department alleges have been violated with a description of each alleged violation. *Standing Order III (b)(ii) and(c)(ii)*. If the violation is for new criminal conduct in a different division, the *Standing Order* states that the notice only has to include the new criminal conduct alleged to have been committed. *Standing Order III (c)(ii)*. However, the probation department can revise the notice and provide in hand notice of the revisions. Said revisions “shall set forth specific conditions of the probation order alleged to have been violated with a description of each such violation.” *Standing Order III (c)(iii)*.

- c. Juvenile Court Standing Order – Notice- Non-Criminal Conduct. – When the violation does not involve a new criminal or delinquency case, the probation officer “shall decide whether to commence probation violation proceedings.” *Standing Order IV (b)*. The probation officer’s decision must comply with the rules and regulations of the Office of the Commissioner of Probation and a violation proceeding must commence if there is a new complaint or indictment, if the judge placing the juvenile on probation orders the commencement of the proceedings, or there is a statutory mandate. Notice shall be in writing and served in hand or by first-class mail, unless otherwise ordered. The Notice shall include the conditions that are alleged to have been violated and a specific date and time to appear in court. *Standing Order IV(b)*.

- d. Timing of the Hearing. Notice of the hearing must be given sufficiently in advance of the hearing in order to adequately prepare. *Commonwealth v. Odoardi*, 397 Mass. 31, 31-32 (1986). In *Commonwealth v. Morse*, 50 Mass. App. Ct. 582 (2000), four day notice of hearing was adequate under the circumstance of the case. In *Morse*, the defendant stated he wished he had more time to prepare for the violation hearing but the attorney did not move for a continuance or make an offer of proof as to what evidence would be presented if more time was allowed. It was not an abuse of discretion for a judge to give the probation department a four day continuance to attempt to secure the presence and testimony of the complaining witness. *Commonwealth v. Foster*, 77 Mass. App. Ct. 444 (2010). In *Commonwealth v. Joubert*, 38 Mass. App. Ct. 943 (1995) the appeals court held that refusal to allow a continuance was reasonable where the court hearing the probation matter held the case for a 2:00 pm call, allowing defense counsel time to interview witnesses. The probation officer amended the notice four days before the scheduled hearing.

Juvenile Court Standing Order – Timing of Hearing

Charged Criminal Conduct/Same Division – *Standing Order III (b)(iii)* - the hearing “shall” be scheduled on the pre-trial hearing date of the new offense, unless the court orders it to be held earlier. The hearing shall not be held less than seven days after service and shall not be later than fifteen days after service unless the probationer consents. If the probationer is held because of the probation violation the hearing shall not be held later than thirty days after service, except in extraordinary cases. The need for promptness in conducting hearings is expressed in the rules.

Charged Criminal Conduct/Different Division - the same time frames as above apply except the time period begins upon the appearance in the court that issued the probation order. *Standing Order III (c)(iii)*,

Non-Criminal Violation – the same times frames as above apply and the time period begins on the date of the appearance as stated in the notice. *Standing Order IV(d)*.

e. Probation Officer has burden of showing proper service of notice. Adequacy of service of notice is determined on a case-by-case basis, taking into account the information known about the defendant’s address(es). *Commonwealth v. Faulkner*, 418 Mass. 352 (1994). In *Faulkner*, the defendant failed to appear for the originally scheduled violation hearing. There was a conflict as to where the notice of violation was sent. The court records had the defendant’s last known address as “Myrtle Street,” and the transcript of the hearing said the notice was sent to “Merts Street.” There was no evidence that the defendant changed his address and failed to notify probation. Furthermore, there was no evidence that other attempts, such as a phone call or personal service, were made to notify the defendant of the violation. The court held that the probation officer has the burden of showing that “notice was properly sent, in light of the information possessed by the officer.” *Id.* at 364.

When a probationer is represented by counsel and probation violation proceedings have commenced, service of an amended notice of violation on the probationer's attorney satisfies the requirements of due process. *Commonwealth v. Bynoe*, 85 Mass. App.13 (2014).

f. Notice of the alleged violation must be clear See *Fay v. Commonwealth*, 379 Mass. 498, 503 n.5 (1980) (notice must convey the nature of the charges and should be specific).

6. Right to Counsel.

There is a right to counsel at the probation violation hearing and counsel should be given a reasonable opportunity to prepare and present a defense. *Commonwealth v. Faulkner*, 418 Mass. 352 (1994). In *Faulkner*, while being arraigned on new charges, it was brought to the court’s

attention that the defendant had an outstanding violation probation warrant. The court went forward with the violation hearing on the arraignment date over defense counsel's vigorous objections and request for a continuance in order to prepare. The SJC vacated the defendant's sentence and remanded the case for a hearing on the probation violation. The court stated that at the violation hearing the defendant should have counsel assist him in preparing and presenting his case. *Id.* at 355-358.

Juveniles also have the right to an attorney at a probation violation hearing, and an attorney shall be appointed, if necessary. *Standing Order II and, IV.*

"A probationer is entitled to effective assistance of counsel at a probation violation hearing if his liberty is palpably at risk, or, alternatively, in all District Court cases." *Commonwealth v. Patton*, 458 Mass. 119, 128 (2010). The failure of counsel to file a notice of appeal of the court's finding of violation of probation when specifically instructed to do so by his client deprived the "probationer of an appeal" he was entitled to and thus constituted ineffective assistance of counsel. *Id.* at 129.

In *Commonwealth v. Gibson*, 474 Mass. 726 (2016), the SJC outlined two different procedures in which a defendant could be found to no longer be eligible for appointed counsel.

1. Forfeiture Hearing

As outlined in *Commonwealth v. Means*, 454 Mass. 81 (2009), for a judge to order forfeiture of the right to counsel, "an extreme sanction in response to extreme conduct that imperils the integrity or safety of court proceedings," there must be an evidentiary hearing around a two part test, 454 Mass. 93-95. The two part test is "whether the defendant's conduct is so egregious as to warrant the sanction of forfeiture, and, if so, in view of the totality of the circumstances, whether the sanction of forfeiture is in the interests of justice." *Id.* at 97.

2. Waiver by Conduct

After discussing the procedure of a forfeiture hearing, the SJC also outlined the procedure in which a defendant can lose his right to appointed counsel when a court applies the doctrine of waiver by conduct. *Gibson*, 474 Mass. at 741. The waiver of conduct procedure involves two parts. First, a judge must conduct a colloquy with the defendant "warning the defendant of the consequence that he or she may lose the right to counsel if he or she engages in abusive conduct," *Id.* at 741. If the defendant then continues the conduct he or she was warned about, "the act may be treated as 'an implied request to proceed pro se and, thus, as a waiver of the right to counsel,'" *Id.* at 741, quoting *Means*, 454 Mass. at 91.

7. Findings of Fact.

Findings of Fact Must Be Written or Recorded. In *Fay v. Commonwealth*, 379 Mass. 498, 500 (1980), the lack of written findings were sufficient since judge stated, in open court, his findings and reasons for revocation because the defendant was present at the hearing and she had

knowledge of the evidence upon which the judge relied. Additionally, the hearing was recorded by a stenographer and the defendant obtained a copy of the transcript after the hearing. The SJC found there was no due process violation. See *Standing Order VIII* (“the court shall make written findings of fact...”). Written findings are not an inflexible, mandatory requirement, if it can be satisfied in another way. See *Commonwealth v. Durling*, 407 Mass. 108 (transcript reflected what the judge relied on and reasons for the violation); See also, *Commonwealth v. Morse*, 50 Mass. App. at 592-594; *Commonwealth v. Patton*, 458 Mass. 119, 136 (2010) (judge’s oral dictation into the record, the violation form, and her notes on the probation violation finding and disposition form satisfied written finding requirement).

8. Right to Be Present. A probationer has a due process right to be present at a probation revocation hearing. *Commonwealth v. Harrison*, 429 Mass. 866 (1999).

9. Standards of Proof.

a. Preliminary Hearing - the standard is probable cause to believe the defendant has violated their probation. *Commonwealth v. Odoardi*, 397 Mass. 28, 31-32 (1986), *Standing Order V(a)*.

b. Final Hearing - the standard at the final hearing is preponderance of the evidence. *Commonwealth v. Holmgren*, 421 Mass. 224, 226 (1995); *Commonwealth v. Juzba*, 44 Mass. App. Ct. 457, *rev. denied*, 427 Mass. 1104 (1998). *Commonwealth v. Maggio*, 414 Mass. 193, 198 (1993) (violation of condition of probation must be found “at least to a reasonable degree of certainty”), *Standing Order IV(c)*.

10. Stipulations must be knowing and voluntary - In *Commonwealth v. Sayyid*, 86 Mass. 479 (2014), the Appeals Court held, in a case of first impression, that a stipulation to a violation of probation must be “knowing and voluntary” and such waiver is to be assessed under the totality of the circumstances - no particular colloquy is required.

IV. Evidentiary Issues at the Hearing

1. Strict Rules of Evidence do not apply to Probation Violation Hearings. While a probationer has a liberty interest at stake in a probation revocation hearing, such liberty interest is conditional. *Commonwealth v. Durling*, 407 Mass. 108, 114-118 (1990). In *Durling*, the SJC held that even though standard evidentiary rules do not apply to revocation hearings, the first step in determining whether evidence should be admitted is to decide whether it would be admissible under those rules. *Id.* at 117-18. “If the evidence is admissible under standard evidentiary rules, it is presumptively reliable.” *Id.* at 118. See e.g. *Commonwealth v. Janovich*, 55 Mass. App. Ct. 42 (2002) (prior reported testimony is firmly rooted exception to hearsay rule). If the proffered evidence is not admissible under the rules, the court must then look independently to the reliability of the evidence. *Durling*, at 117-18. The court must then balance the defendant’s right to confrontation against the Commonwealth’s reason for not presenting witnesses. *Id.* at 117-18.

2. Conditional Right to Cross-Examination The probationer has the right to cross-examine witnesses in the final hearing, though the court may limit such cross-examination in certain circumstances. *Commonwealth v. Maggio*, 414 Mass. 193, 196 (1993), *Commonwealth v. Durling*, 407 Mass. 108 (1990). See *Standing Order VI (c)* (“[e]ach party shall be permitted to cross-examine witnesses produced by the opposing party.”)

3. There is no Per Se Prohibition Against the Use of Hearsay In *Commonwealth v. Negron*, 441 Mass. 685, 690 (2004) the SJC stated that “the proper inquiry is whether the hearsay evidence itself had substantial indicia of reliability establishing good cause for overcoming the need for confrontation.” Therefore, if the hearsay is reliable the good cause requirement is satisfied. The *Negron* decision “clarifies” the court’s holding in *Commonwealth v. Durling*, 407 Mass. 108 (1990) where two detailed police reports were held to be admissible at the probation violation hearing because the reports were reliable and there was good cause to deny confrontation. See also, *Commonwealth v. Bukin*, 467 Mass. 516 (2014)(affirming one-pronged approach to admissibility of hearsay). It should be noted that the *Durling* decision states that when hearsay is offered as the only evidence of the alleged violation, the indicia of reliability must be substantial.⁷ *Durling*, 407 Mass. at 118. See also, *Commonwealth v. Foster*, 77 Mass. App. Ct. 444 (2010) (police reports were admissible whether complainant testified or not because they contained reliable hearsay in that the police officer memorialized his observations and, because the complainant testified, the court didn’t need to decide whether the police reports alone would have been enough). Finally, “where a judge relies on hearsay evidence in finding a violation of probation, the judge should set forth in writing or on the record why the judge found the hearsay to be reliable.” *Commonwealth v. Hartfield*, 474 Mass. 474, 476 (2016).

Juvenile Standing Order. Hearsay is admissible at the violation hearing in Juvenile Court under *Standing Order VII (a)*. However, if hearsay is the only evidence the court must find, in writing, that the evidence is “substantially trustworthy and demonstrably reliable” and “if the alleged violation is charged or uncharged criminal behavior” good cause must be shown to proceed without a witness who has personal knowledge. *Standing Order VII (b)*⁸.

a. What is reliable hearsay?

⁷ Massachusetts District/Municipal Court Rules for Probation Violation Proceedings R. 7(b), effective September 8, 2015 provide that: “The court may rely on hearsay as evidence of a probation violation only if the court finds in writing that the hearsay is substantially reliable. This provision applies to any hearsay evidence not just when the only evidence at the hearing is hearsay. See Commentary to Rule 7. The Superior Court Guidelines for Probation Violations Proceedings, effective February 1, 2016, state in Section 6 B that hearsay is admissible at the final hearing as permitted under sections 802 and 804 of the Massachusetts Guide to Evidence or if a judge determines it to be substantially reliable.

⁸ The Juvenile Court *Standing Order* was promulgated after the *Negron* decision and still contains the “good cause” requirement. Accordingly, the inquiry regarding the admissibility of hearsay in the juvenile court, where the sole evidence regarding the violation is hearsay, still requires both that the hearsay is “**substantially trustworthy and demonstrably reliable**” and that there is “**good cause**” to deny confrontation.(Emphasis added)

- i. Hearsay that is Factually Detailed and Based on Personal Observations. In *Durling*, statements contained in two detailed police reports, which included observations personally made by the officers writing the reports, were held to be reliable; the SJC noted that factual detail is itself an indicia of reliability. Also critical to the SJC's decision in *Durling* was the fact that the police officer witnesses were located in Bristol County and the hearing took place in Norfolk County. *Id.* at 114-18. The inherent reliability of the reports, coupled with the officers' distance from the proceedings, gave the court "good cause" to deny confrontation. *Id.* at 114-18.

- ii. Hearsay that is provided under Circumstances Supporting Veracity. In addition to live witness testimony, affidavits and depositions from people with personal knowledge are generally deemed reliable. *Commonwealth v. Calvo*, 41 Mass. App. Ct. 903 (1996) (two police reports containing sworn statements of two assault victims constituted reliable hearsay); *Commonwealth v. Hill*, 52 Mass. App. Ct. 147 (2001) (sworn detailed grand jury testimony of young victim that was corroborated by "fresh complaint" to police was sufficiently reliable); *Commonwealth v. Henderson*, 82 Mass. App. Ct. 674 (2012)(factually detailed 209A affidavit describing an assault and police report wherein officer describes complainant as having a bloody lip). In *Commonwealth v. Thissell*, 457 Mass. 191 (2010) the Supreme Judicial Court held that GPS records, consisting of maps superimposed with the defendant's location on certain times and dates, and activity reports documenting both Thissell's location at various times and other significant communications between the defendant and the GPS staff or between the GPS staff and probation officers, were sufficiently reliable to serve as the basis of the defendant's revocation.. The Court considered the following factors in coming to this conclusion: the GPS records were "factually detailed and made close in time to the events" by persons reporting to the probation department and responsible for monitoring and communicating with the defendant; the GPS technology is widely used and acknowledged as a reliable relator of time and location data; and the chief probation officer, through whom the records were admitted, was extensively cross-examined with regard to the records and their use by the probation department. *Id.* at 196-198. The Court, citing Mass. R. Civ. P. 44(a), did note that it strongly recommended that, in the future, the copies of the GPS records be properly attested and certified by an appropriate custodial officer. *Id.* Furthermore, a SAIN interview of purported child sexual assault victim was found to be "substantially trustworthy and reliable" under *Durling*. *Commonwealth v. Patton* 458 Mass. 119, 134 (2010). The Court based its reasoning on the following: It contained specific factual details of what occurred and was neither general nor conclusory; the videotaped statement was based on the child's personal knowledge and she had repeated its details with consistency several times over four days; the statement was corroborated, in part, by the probationer's own statement; the statement was made in circumstances that supported the child's credibility (including the

promptness of the child's complaint, her repetition of the details at least three times over four days, the fact that the SAIN interview was conducted by a forensic child interviewer) and the judge was able to view the child's demeanor. *Id.* at 134.

- iii. Hearsay that is corroborated by other Evidence. In *Commonwealth v. Mejias*, 44 Mass. App. Ct. 948 (1998) the court considered three police reports based on three arrests. The first report contained statements of witness and was sufficiently corroborated by a police officer's personal observations. The second report was based on information obtained from the defendant's girlfriend that she had seen the defendant smoking cocaine and was generally unreliable. The third was the police officer's observations of the defendant smoking crack cocaine and was reliable. *But see Commonwealth v. Joubert*, 38 Mass. App. Ct. 943, 944-945 (1995) (aunt's testimony that niece told her that "daddy touched my peepee" not substantially reliable and the reliability was not bolstered by independent medical evidence that the daughter had bruising in the perineal area lateral to her vulva where the doctor could not testify to the significance of the bruise)
- b. What is unreliable hearsay?
- i. Oral Testimony Based on Uncorroborated/Unreliable Hearsay. *Commonwealth v. Podoprigora*, 48 Mass. App. Ct. 136 (1999) (testimony of police officer regarding twelve year old child's statement that her father called the house in violation of a court order was not sufficiently reliable to deny confrontation). The *Podoprigora* case provides a good overview of cases in which hearsay was not admissible. *Commonwealth v. Joubert*, 38 Mass. App. Ct. 943 (1995) (child's hearsay statement to her aunt that her father touched her was not reliable). *Commonwealth v. Delaney*, 36 Mass. App. Ct. 930 (1994) (child's statement to mother that she was with the defendant/father in violation of his probation condition should not have been admitted; there was no indication that the child's statement was trustworthy). *See also, Commonwealth v. King*, 71 Mass. App. Ct. 737 (2008) (court reversed finding of violation where only evidence was police officers' testimony as to what victim told him, police officer's observation that victim did not appear to have suffered an emotional impact, and police officer's observation of broken door frame and molding); *Commonwealth v. Ortiz*, 58 Mass. 904, 906 (2003) (reversing finding of violation where police officer merely testified to what complainant told him and his own observations of two dents on the complainant's car).
 - ii. The Fact of an Indictment. *Commonwealth v. Maggio*, 414 Mass. 193, 198-199 (1993) (the fact of an indictment alone is not reliable proof that the defendant committed a new offense);

- iii. Conclusory Statements. *Commonwealth v. Emmanuel E*, 52 Mass. App. Ct. 451 (2001) (testimony from a police officer, referring to his notes, that upon responding to a breaking and entering in progress, he spoke to two witnesses who identified the defendant as one of two suspects who entered and left a multi-unit dwelling, was not reliable because it was “fatally devoid of factual detail or corroborating personal observations” and was based on the officers conclusory belief).
 - iv. Vague Statements. In *Commonwealth v. Ivers*, 56 Mass. App. Ct. 444 (2002) the court held that testimony from a Chelsea probation officer that defendant’s probation officer in East Boston said she had not seen the defendant for quite some time and he was not in compliance with one of the terms of his probation, was insufficient and did not comply with the District Court Rule 6 (b). While it was a practical accommodation of reality and reliability to permit the Chelsea officer to testify about what the East Boston officer had reported on the basis of direct knowledge, in this case, the testimony was vague; just because the probation officer had not seen the defendant in a while does not support a finding that the defendant failed to report. *See also, Commonwealth v. Michaels*, 39 Mass. App. Ct. 646, 648 (1996) (Cambridge court could not base revocation merely upon the fact that Somerville revoked the defendant’s probation – “[t]hat another court had revoked probation for unknown violations on unknown dates, which might have occurred prior to the sentencing in this case, did not provide reliable evidence upon which the judge could have made a “principled decision” determining that the defendant violated his Cambridge probation”).
- c. *Crawford v. Washington* does not apply to probation violation hearings. In *Crawford*, 541 U.S. 124 (2004), the US Supreme Court held that the admission of statements at trial made by the defendant’s wife, who did not testify at trial, violated the defendant’s 6th Amendment right to confrontation. The Court held that, when dealing with the admissibility of testimonial evidence of a witness who will not be testifying at trial, there must be a showing of unavailability and a prior opportunity to cross examination that witness.

On February 9, 2006, the Supreme Judicial Court held that *Crawford* does not apply in probation violation hearings. *Commonwealth v. Wilcox*, 446 Mass. 61 (2006), *Commonwealth v. Nunez*, 446 Mass. 54 (2006). In *Wilcox*, the SJC held that the standard articulated in *Durling* controls. *Wilcox* at 62. The court reasoned that a probation violation hearing is not a “criminal prosecution” and evidence that would not be admissible at trial would be admissible in a violation hearing. Hence the 6th Amendment right of confrontation does not apply in the same way. The court also found that Article 12 of the Massachusetts Declaration of Rights does not afford more protections here. Only reliable hearsay is admissible at the violation hearing. “If reliable hearsay is presented, the good cause requirement is satisfied, and a probationer may be denied the

right to confront and cross-examine witnesses at a probation hearing.” *Nunez* at 58-58, quoting *Commonwealth v. Negron*, 441 Mass. at 691. In *Nunez*, the police officer’s testimony consisted of statements from a witness regarding an attempted robbery (this charge was not the basis of the violation but was related to the robbery that was the basis for the violation). The Court found the hearsay to be detailed, based on personal knowledge and direct observations, made soon after the incident, and corroborated by observations of the officer who testified. Hence the hearsay was reliable and admissible.

d. A Probationer has a Constitutional Right to Present a Defense.

In *Commonwealth v. Hartfield*, 474 Mass. 474, 475 (2016), a judge in a violation of probation hearing allowed the introduction of hearsay statements of the alleged victim regarding the new crime that was the basis of the probation violation. The judge then denied the defendant’s attempt to call the alleged victim as a defense witness in the violation of probation hearing because “one of the overriding principles is that she shouldn’t have to go through recounting this event several times.” *Id.* at 478. The SJC held that the judge did not apply the proper analysis in not allowing the witness, and remanded the case for a new hearing. In doing so, the Court noted

“[w]e conclude that this [analysis] is best accomplished by recognizing that a probationer has a presumptive due process right to call witnesses in her or her defense, but that the presumption may be overcome by countervailing interests, generally that the proposed testimony is unnecessary to a fair adjudication of the alleged violation or unduly burdensome to the witness or the resources of the court.”

Hartfield, 474 Mass. at 481. The SJC reaffirmed *Commonwealth v. Kelsey*, 464 Mass. 315, 327 (2013), stating “[t]he right to confront adverse witnesses and the right to present a defense are distinct due process rights separately guaranteed to probationers’ and should not be conflated.” *Id.* at 479.

e. Illegally Obtained Evidence is Usually Admissible.

i. Statements obtained in violation of *Miranda* are admissible

Commonwealth v. Vincente, 405 Mass. 278 (1989) (holding that, because application of the exclusory rule at a probation revocation hearing would only have a marginal effect on deterring police misconduct, statements obtained in violation of *Miranda* were properly admitted).

ii. Evidence seized unlawfully is admissible

Commonwealth v. Olsen, 405 Mass. 491 (1989) (evidence that drugs and paraphernalia were seized from a defendant, which was suppressed prior to trial, was properly admitted in the revocation hearing).

V. Other Issues at the Hearing

1. A judge, at a probation violation hearing, cannot revoke a prior grant of relief from the sex offender registry. In *Commonwealth v. Ventura, supra*, a defendant was placed on three years' probation for possession of child pornography. At that time, he also was relieved of his obligation to register as a sex offender pursuant to G.L. c. 6, § 178E (f). Two and a half years later, the defendant was found in violation of his probation, by a different judge, who ordered the defendant to register as a sex offender as a condition of his probation. The SJC struck down this new condition concluding that the subsequent judge did not have the statutory authority to order the registration as a condition of probation nor did the judge have authority to revoke such a previously-granted order of relief.

2. The District Attorney May Represent the Department of Probation at a Violation Hearing So Long as Their Activities Do Not Intrude upon the Internal Functioning of the Court.

If the underlying crime is a felony, probation is to give the district attorney a duplicate copy of the notice of violation, and district attorney has an opportunity to be heard and present evidence at the hearing. G.L. c. 279 §3. However, the Juvenile Court *Standing Order* provides for notice of the violation to the District Attorney in all cases and they are allowed to appear at all hearings.

See Commonwealth v Milton, 427 Mass. 18 (1998), *citing Commonwealth v. Tate*, 34 Mass. App. Ct. 446, 447-48 (1993) for the rule that the voluntary coordination of activities between branches of government does not violate the separation of powers clause of the Massachusetts Declaration of Rights as long as the activities do not intrude into the internal functioning of either branch. In *Milton*, the defendant argued that, by briefly addressing the court with respect to the defendant's motion to dismiss and request for jail credit, the degree of participation by the assistant district attorney in a revocation hearing interfered with the internal functioning of the probation officer. The SJC concluded that, because the assistant district attorney's participation in the hearing was merely to provide legal assistance and to aid the probation officer in arguing the substantive legal issues, it did not interfere with the functioning of the probation officer and therefore constitute a violation of the separation of powers clause. *Id. See also, Commonwealth v. Negron* at 686-687.

3. Tracking. If the violation is based on a pending delinquency, youthful offender or criminal charge, a judge can continue the probation violation hearing if she determines that the interests of justice would be served by said continuance. *Standing Order VI (e)*.

4. Not Guilty on New Charges. A defendant may still be found in violation of probation for a new charge even if he has been found not guilty on the new charge. *Commonwealth v. Holmgren*, 421 Mass. 224, 226-228 (1995).

5. Collateral Estoppel. The principles of collateral estoppel bar a second probation revocation proceeding on the same charged misconduct that was litigated in an earlier probation revocation proceeding in a different county. *Kimbroughtillery v. Commonwealth* 471 Mass. 507 (2015).

VI. Dispositions if Probationer is Found in Violation of Probation

1. If a Violation is Found, a Disposition must be Determined. A judge, after finding a defendant in violation of the conditions of his probation, must determine whether to “revoke the probation and sentence the defendant or, if appropriate, modify the terms of his probation.” *Commonwealth v. Durling*, 407 Mass. 108, 111 (1990). A judge may also simply continue probation. “How best to deal with the probationer is within the judge’s discretion.” *Id.* at 112.

2. Reliable but Uncharged Evidence of Misconduct May Be Considered. In *Commonwealth v. Herrera*, 52 Mass. App. Ct. 294, 291 (2001), the defendant argued that the judge had considered conduct imputed to him that was not mentioned in the probation violation notice; in particular, that the judge reviewed a police report and restraining order detailing an incident in which the defendant allegedly slashed the tires on his former girlfriend's car. On appeal, the court found that the defendant received proper notice and that the judge did not consider the tire-slashing incident until after he had found the defendant had violated his probation and was considering disposition. Likening the use of evidence of misconduct in the judge's discretionary determination of the disposition to the discretion exercised by a sentencing judge after a finding of guilty, the court affirmed the judge's order revoking the defendant's probation. *Id.* at 295. However, a court may not consider the defendant’s post-probationary term conduct in the determination of whether to revoke probation or in the determination of what sentence to impose. *Commonwealth v. Arroyo*, 451 Mass. 1010, 1011 (2008).

3. Possible Dispositions⁹

- a. Continue Probation
- b. Termination
- c. Modification
- d. Revocation

If the probationer was on a suspended sentence or commitment to DYS that was suspended and revocation of probation is ordered, the suspended sentence shall be executed. *Standing Order VIII (e.)* If the probationer did not previously have a sentence of a commitment to the Department of Youth Services and the disposition of the violation hearing is revocation, a “sentence or commitment as provided by law” shall be imposed. *Standing Order VIII (f)*.

⁹ Standing Order VIII.

See also, *Commonwealth v. Malick*, 86 Mass. 174 (2014)(A judge has expansive discretion, he is able to, but not required to, revoke probation and impose a suspended sentence, he may take no action, or he may reprobate the defendant and order new conditions, or he may terminate probation).

4. Court May Not Impose Higher Sentence than Originally Ordered. *Commonwealth v. Bruzzese*, 437 Mass. 606 (2011) (where defendant originally received concurrent suspended sentences on various charges that constituted a “sentencing scheme” the violating judge could not impose three of the suspended sentences and then, later, impose the other sentence on after an additional violation- but concurrent sentences of straight probation did not create such a sentencing scheme).

5. Can Probation be Extended Beyond Age 18? The SJC has not answered this question, however in *Commonwealth v. Zollie Z.*, Mass. App. Ct. Docket No. 10-P-597 (unpublished opinion 2011)¹⁰, the court held that the juvenile court still had jurisdiction over the a probation violation hearing after the juveniles 18th birthday if the proceeding commenced during the term of probation and prior to his 18th birthday. The court reasoned that G.L. c. 119, §72(a) expressly provides the juvenile court with continuing jurisdiction over children who have attained the age of eighteen pending final adjudication of their cases commenced in that court. *Id.* The court held further that it was immaterial whether the probation violation hearing constituted a “continuance” or “probation” as there was no doubt that the hearing constituted a proceeding arising out of the case. The Court rejected the juvenile’s contention that G.L. c. 119, § 58 (which provides as follows “[i]f a child is adjudicated a delinquent child on a complaint, the court may place the case on file or may place the child in the care of a probation officer for such time and on such conditions as it deems appropriate . . . but the probationary or commitment period shall not be for a period longer than until such child attains the age of eighteen, or nineteen in the case of a child whose case is disposed of after he has attained his eighteenth birthday) changes the equation.

VII. Does Violation have to Occur During Probationary Period?

1. The conduct upon which a violation may be based must have occurred within the probationary period. *Commonwealth v. Smith*, 38 Mass. App. Ct. 324, 326 (1995)(offenses committed after expiration of probation period could not provide basis for violation); *Commonwealth v. Bunting*, 458 Mass. 569 (2010) (the fact that the alleged violation was criminal conduct did not change the necessity or clear notice that the probation conditions took effect while the defendant was incarcerated). *Compare Commonwealth v. Phillips*, 40 Mass. App. Ct. 801 (1986)(defendant was serving sentence prior to the imposition of an on an after probationary sentence and was found in violation of probation conditions while he was serving the first sentence). However, courts have the authority to extend

¹⁰ *Zollie Z* is an unpublished decision; as such, it is not binding precedent but may be relied upon as persuasive authority. *Chace v. Curran*, 71 Mass. App. 258 (2008).

probation and revoke probation based on conduct that occurred during the probationary period, even when notice was given after the term of probation had expired. *Commonwealth v. Sawicki*, 369 Mass. 377, 384-385 (1975) (notice was given two months after the probationary term was scheduled to terminate).

2. Probation does not automatically terminate on its end date; an order from the court is required. *Commonwealth v. Odoardi*, 397 Mass. 28, 35 (1986).

3. Courts “must decide the question of extension or revocation of probation within a reasonable time.” *Commonwealth v. Aquino*, 445 Mass. 4456 (2005), quoting *Commonwealth v. Sawicki*, supra at 384-385. But see *Commonwealth v. Odoardi*, 397 Mass. 28, 35-37 (1986) (where probation revoked twenty-two months after indictments on new charges, seven months after date of convictions, and nearly six months after date probation due to expire and court held that the delay was not shown to be unreasonable where record did not indicate either that Commonwealth failed to act diligently or that defendant was prejudiced); *Commonwealth v. Collins*, 31 Mass. App. Ct. 679, 681-684 (1991) (where probation revocation proceeding was commenced more than five years after commission of offenses on which revocation was based and almost four years after defendant's probation would have expired the court held that the delay was not unreasonable and did not constitute due process violation).

VIII. Jail Credit

1. A juvenile is not entitled to jail credit for time spent in DYS prior to adjudication in delinquency cases.

2. A Probationer Is Generally Not Entitled To Credit For Time Served While Incarcerated On An Unrelated Offense. In *Commonwealth v. Milton*, 427 Mass. 18 (1998), the defendant was placed on two years' probation in November 1993 after being convicted of multiple assault and battery-related offenses. A few months later he was arrested and charged with armed robbery. The following day he was served with a notice of probation violation. Two weeks later he was indicted for the armed robbery. At the defendant's request, the probation revocation hearing was postponed until after his disposition on the armed robbery charges. Fifteen months later, the armed robbery charge was dismissed and the violation notice withdrawn. While still on probation for the original offense, the defendant was arrested for being a disorderly person. After a probation violation hearing, the court found the defendant in violation of his probation and imposed the previously suspended sentence of two concurrent one-year terms and one six-month term of probation stemming from the 1993 charges. In doing so, the court specifically rejected the defendant's argument that he should be given 410 days credit for the 15 months he spent awaiting trial on the armed robbery charge. The SJC upheld the trial court's order, holding that time spent in custody awaiting trial for one crime may generally not be credited against a sentence on an unrelated offense.

Manning v. Superintendent, Mass. Correctional Institute, Norfolk, 372 Mass. 387, 395 (1977) (allowing defendant to credit time served on a first sentence, which was vacated on appeal, against a second sentence for an unrelated offense, because it was necessary to remedy the injustice of his serving dead time; it was critical to the court's decision that the defendant was convicted of the second crime before being discharged on the first).

Note: Because a juvenile is entitled to credit for time spent at DYS awaiting the hearing against any adult sentence he serves, this is relevant for YO offenses where the defendant has been sentenced to time in an adult facility.

IX. Appeals

1. For a direct appeal of a probation revocation order, the Notice of Appeal must be filed within 30 days of imposition of sentence. *Commonwealth v. Christian*, 429 Mass 1022 (1999).
2. If appealing the **sentence** imposed due to the revocation hearing, the appeal would be pursuant to Rule 30 (a). *Id.*
3. The Commonwealth can appeal the finding of a probation revocation proceeding, when the Commonwealth participates in the revocation proceeding. *Commonwealth v. Negron*, 441 Mass. 685, 88 (2004).
4. Probation conditions can be appealed prior to a violation hearing. *Commonwealth v. LaFrance*, 402 Mass. 789, 791 n.3 (1988), See also, *Commonwealth v. Power*, 420 Mass. 10 (1995).
5. An appeal from a finding that the defendant violated probation is moot where the defendant has served the sentence imposed prior to the filing the appeals brief. *Commonwealth v. Fallon*, 53 Mass. App. Ct. 473 (2001). In *Fallon*, the sentence on the probation violation was imposed after the defendants plead guilty to the charges which were the basis for the violation. The court stated “[t]he convictions establish, as matter of record, based on the higher, beyond a reasonable doubt standard of proof ... that the defendant, while on probation, violated the conditions of his freedom by committing new criminal offenses. That fact submerges any residual negative consequences of the probation revocation, so that questions concerning the validity of the revocation are now purely academic.” *Id.* at 475.
6. An appeal from the finding of a violation of probation based upon a subsequent offense is rendered moot, in certain circumstance, if the defendant later pleads guilty to that offense. *Commonwealth v. Milot*, 462 Mass. 197 (2012). In *Milot*, the defendant raised on appeal that the evidence the judge relied upon at the violation hearing, was unreliable hearsay. The SJC found the appeal moot because “[t]he subsequent pleas of guilty to the offenses that formed the basis of the judge's factual finding of a violation of probation renders moot the claim that the hearsay was unreliable.” *Id.* at 201. However, a subsequent plea or conviction does not

render an appeal from a finding of a probation violation moot where “some aspect of the proceeding violated the probationer’s constitutional rights, potentially impacting the second phase of the judge’s probation determination, that pertaining to the disposition of the matter.” *Commonwealth v. Pena*, 462 Mass. 183,188 (2012) (defendant claimed that he was denied the assistance of counsel and that this prevented him an opportunity to persuade the judge to order a different disposition).

7. The standard of review for preserved constitutional claims is whether the error was “harmless beyond a reasonable doubt.” *Commonwealth v. Kelsey, supra*.