An Overview of the Law of Probation Violations[1]
Juvenile Defense Network
Youth Advocacy Project/CPCS

I. Purpose of Probation

1. Primary Purpose The principle 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. 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).

2. Conditions (*Massachusetts Juvenile Court Bench Book,* Blitzman, J., et al, MCLE, 2004, see also *Commonwealth v. Wilcox*, 446 Mass. 61, 64-66 (2005))

   1) Payment of probation fee, G.L. c. 258B §8 (community service for certain juveniles);
   2) Report to probation officer, as directed;
   3) Do not commit any new offenses.

   Additional mandatory conditions include: payment victim witness fee G.L. c. 276 §87A. See also G.L. c. 276 § 87 and G.L. c. 119 § 58 & 62.

   Any person 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, shall be required to wear a global positioning system device. This includes juveniles on probation for a delinquency or youthful offender case. G.L. c. 265 § 47.

   Superior Court Rule 56 sets forth additional mandatory conditions of probation, which many juvenile courts incorporate into their probation agreements. In addition to the three conditions stated above, they include: notify probation officer immediately of any change

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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 dependant persons.

3. Common Special Conditions. The court may also impose discretionary conditions of probation. The only limit on these conditions is that they serve "the ends of justice and be in the best interest of the both the public and the defendant." *Buckley v. Quincy District Court*, 395 Mass. 815, 817 (1985). Additionally, conditions of probation must be reasonably related to sentencing and the goals of probation. *Commonwealth v. Power*, 420 Mass. 410 (1995).

   Commonly imposed special conditions include:
   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 §62
   f. Counsel Assessment Fee, G.L. c. 211D §2A, §2 ½
   g. Court Costs G.L. c. 280 §6
   h. Stay Away Orders/No Contact
   i. Drug Screens

   A "stay away" order means that a probationer can not 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 can not 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)

   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) See *Commonwealth v. Casanova*, 65 Mass. App. Ct. 750 (2006) (judges findings did not support a causal connection between the victims injury and the defendant's criminal conduct.)

   "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

4. 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 he/she has been placed on probation. *Pike,* 428 Mass. at 403.

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 CWOF 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.* at 332-33. 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).

b. Conditions Must be Set by the Sentencing Judge and, for this Reason, Constitute a Court Order. 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. *MacDonald,* 435 Mass. 1006-1007. *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, since the condition was added by probation and not ordered by the judge it was not a violation. 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.

c. Terms must be Doable. Terms must be doable for a person in probationer's circumstances. *Buckley v. Quincy District Court*, 395 Mass. 812, 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).

d. Terms must be written. G.L. c. 276 § 85 provides that conditions of probation must be in writing and given to the probationer.

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). *See Commonwealth v. Power*, 420 Mass. 10 (1995)*, cert denied,* 516 U.S. 1042 (1996)*,* the Supreme Judicial Court held that the constitutional rule against vague laws applies equally to probation conditions as it does to legislative

enactments. 420 Mass. at 421, *citing Griffin v. Wisconsin,* 483 U.S. 868, 875-76, n.3 (1987).

f. Terms May Not Unreasonably Restrict a Constitutional Right *Commonwealth v. Power*, 420 Mass. 10 (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 couldn't profit from it). *See also 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. While judges are given "great latitude" in setting probation conditions, the SJC noted, when conditions violate 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," *Id.,* taking into consideration the special problems of the individual. *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. *See also Commonwealth v. Thad T,* 59 Mass. App. Ct. 497 (2003) (banishing juvenile from the town of Groton could not be imposed by the sentencing judge since juvenile was not placed on probation, he was committed to DYS; but the court stated the judge could make recommendations to DYS about travel restrictions upon release). 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.

5. Modification of Conditions

a. 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. *Buckley v. Quincy District Court*, 395 Mass. 812, 817 (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 by the Dedham District Court).

b. A probation officer does not have the discretion to alter or modify conditions of probation. *Commonwealth v. MacDonald,* 50 Mass. App. Ct. at 224.

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. Entitlement to Preliminary Hearing

   a. Required When a Liberty Interest is at Stake. 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 1-07*[2]. A preliminary hearing shall be held if probation requests to hold the juvenile in custody or request an order of release. *Standing Order* I*V.(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, and with the juveniles consent. *Standing Order V(c) and (d).* If probable cause is found, in district court, the probationer cannot be released on bail and is not entitled to a bail review. *Commonwealth v. Puleio,* 433 Mass. 39 (2000). This case was decided under Rule 8 of the District Court Rules for Probation Violation Proceedings.

[2] Herein after called "*Standing Order*"

3. Probationer's Due Process Rights

   a. Fourteenth Amendment In *Morrisey v. Brewer*, 408 U.S. 471 (1972, the Supreme Court set forth the minimum 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)[3]
      iv. Right to confront witnesses and cross-examination[4]
      v. A "neutral and detached" hearing officer
      vi. Written statement by fact finder as to evidence relied upon and reasons for revocation.

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

2. 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 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. *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).*

[3] *Violation of Probation Proceedings Standing Order* Violation of Probation Proceedings VI (a), District Court Rule 8(c).

[4] 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.

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. *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. 31-32 (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. However, 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.

i. Juvenile Court Violation of Probation Proceedings :

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),*

<u>Non-Criminal Violation</u> – 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. <u>Probation Officer has burden of showing proper service of notice</u>. 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 was 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.

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

3. <u>Right to Counsel</u>

a. 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. *Faulkner*, at 355-358. 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.

b. In *Commonwealth v. Joubert*, 38 Mass. App. Ct. 934 (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.

c. 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.*

4. Findings of Fact

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

   b. 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.

5. 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).

6. Standards of Proof

   a. Preliminary Hearing - probable cause to believe the defendant has violated his/her probation. *Commonwealth v. Odoardi*, 397 Mass. at 31-32, *Standing Order V(a).*

   b. Final Hearing - While the standard for evidence at the preliminary hearing is probable cause; 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. at 198 (violation of condition of probation must be found "at least to a reasonable degree of certainty"), *Standing Order IV (c).*

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 in 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. 407 Mass. at 117-18. If the proffered evidence is not admissible under the rules, the court must then look independently to the reliability of the evidence. *Id*. 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 courts holding *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. *Commonwealth v. Durling*, 407 Mass. 108, 114-118 (1990). 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. *Durling*, 407 Mass. at 118.

   Hearsay is admissible at the violation hearing under the *Juvenile Court Violation of Probation Proceedings 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 shown to proceed without a witness who has personal knowledge. *Standing Order VII (b).*

   a. What is **reliable** hearsay?

      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).

      iii. Hearsay that is Corroborated by other Evidence. *Commonwealth v. Mejias*, 44 Mass. App. Ct. 948 (1998) (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).

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 admissible; there was no indication that the child's statement was trustworthy).

   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 *Commonwealth v. Ivers*, 56 Mass. App. Ct. 444 (2002) (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).

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 surrender 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 surrender hearing is not a "criminal prosecution" and evidence that would not be admissible at trial would be admissible in a surrender 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 surrender 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 surrender but was related to the robbery that was the basis for the surrender). 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. 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. The District Attorney May Represent the Department of Probation at a Violation Hearing So Long as His/Her 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 Violation of Probation Proceedings Standing Order provide for notice of the violation in all cases and are allowed to appear in 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. 427 Mass. at 23. 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.

2. 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).*

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. at 111. 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 *Herrera,* 52 Mass. App. Ct. at 291, the defendant argued that the judge had considered conduct imputed to him that was not mentioned in the probation surrender 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 as a result of a probation violation to those matters, where a judge can exercise discretion in considering such misconduct in sentencing a defendant after a finding of guilt, the court affirmed the judge's order revoking the defendant's probation.

3. Possible Dispositions[5]
   a. Continue of Probation
   b. Termination
   c. Modification
   d. Revocation

[5] Juvenile Court Violation of Probation Proceedings Standing Order VIII

If the probationer was on a suspended sentence or commitment to DYS 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).*

VII. Does Violation have to Occur During Probationary Period?

1. Court had authority to extend probation and revoke probation based on conduct that occurred during the probationary period, yet action by the court was not taken until the term of probation had expired. *Commonwealth v. Sawicki*, 369 Mass. 377 (1975) Here the defendant's probation was scheduled to expire September 4, 1974. During the term of probation he violated three times, however, probation never got notice of this.

2. Probation is terminated when there is an order from the court. *Commonwealth v. Odoardi*, at 35.

3. Delay of five years after the commission of the underlying offense and four years after probation would have expired, was not a violation of the defendant's constitutional rights. *Commonwealth v. Collins,* 31 Mass. App. Ct. 679 (1991). Here the defendant was serving a sentence in another state. The surrender notice was sent to the other state, and when the defendant was released he was brought back to Massachusetts for the probation violation hearing.

4. Probationer can be violated for conduct that occurs before the probation period began. *Commonwealth v. Phillips,* 40 Mass. App. Ct. 801 (1986) Here the defendant was serving a sentence and had a suspended sentence that was imposed but had not commenced. The conduct for which led to the surrender occurred while he was serving the sentence.

VIII. Jail Credit

1. DYS does not, as a rule, give jail credit.

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 surrender. 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 surrender notice withdrawn. While still on probation for the original offense, the defendant was arrested for being a disorderly person. After a probation surrender 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: This is relevant for YO offenses where the defendant has been sentenced to time in an adult facility.

IX. Appeals

1. Direct appeal of a probation revocation. 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).

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