

**THE BOSTON MUNICIPAL COURT
AND
DISTRICT COURT
SENTENCING BENCH BOOK**

March 2016

Table of Contents

Chapter 1: TYPES AND MECHANICS OF DISPOSITIONS	6
1.A. DIVERSION	6
1.A(1) The Court Cannot Dismiss Cases after Diversion over the Commonwealth’s Objection, Absent a Sufficient Legal Basis	6
1.A(2) Drug Diversion	8
1.A(3) Young Adult Diversion	9
1.A(4) Veterans’ Diversion	10
1.A(5) District Attorneys’ Diversion Programs	11
1.B. PRETRIAL PROBATION	12
1.C. CONTINUANCE WITHOUT A FINDING	12
1.C(1) Duquette Alternative Sentence	14
1.D. GUILTY – FILED	14
1.E. STRAIGHT PROBATION	14
1.E(1) Administrative Probation	16
1.E(2) Supervised Probation	16
1.E(3) Probation Supervision Fees	17
1.E(4) Restitution	18
1.E(5) Probation in Crimes Against the Person	19
1.E(6) Transfers of Probation Supervision	19
1.E(7) Modification of Probation Terms	20
1.E(8) Electronic Monitoring	20
1.F. SUSPENDED SENTENCE	21
1.G. SPLIT SENTENCES	22
1.H. COMMITTED	22
1.I. FEES, FINES, AND COURT COSTS	22
1.J. SPECIAL SENTENCES	24
1.K. DECRIMINALIZATION — TREATMENT OF CERTAIN OFFENSES AS CIVIL INFRACTIONS	25
1.L. DISMISSAL WITH ACCORD AND SATISFACTION	25
Chapter 2: SENTENCING MECHANICS	26

2.A	CONCURRENT SENTENCES	26
2.B	CONSECUTIVE SENTENCES	27
2.C	MANDATORY MINIMUM SENTENCES.....	27
2.D	STAY OF EXECUTION OF SENTENCE AND DEFERRED SENTENCING	28
2.D(1)	Stays of Execution Pending Appeal	29
2.E	JAIL CREDITS	30
2.E(1)	Time credited to other sentences	30
2.E(2)	Probation violation sentences (no credit for).....	31
2.E(3)	Dead Time	32
2.E(4)	Banking Time.....	33
2.F	NUNC PRO TUNC SENTENCES.....	33
Chapter 3: PLEAS AND SENTENCING.....		34
3.A	TENDER OF PLEA.....	34
3.A(1)	BINDING AND NON-BINDING PLEAS.....	34
3.A(2)	Written Waiver: The Green Sheet.....	36
3.A(3)	Enforcing Plea Agreements.....	37
3.A(4)	Successive Tenders of Plea.....	38
3.A(5)	Lobby Conferences.....	38
3.B	Plea Colloquies	39
3.B(1)	Required contents of colloquy.....	39
3.B(2)	Alien Warnings	44
3.B(3)	Maximum Sentence.....	45
3.B(4)	Mandatory Minimums.....	46
3.B(5)	Sentencing Consequences.....	46
3.B(6)	Collateral Consequences	48
3.B(7)	Filing.....	49
3.C	ALFORD PLEAS	49
3.C(1)	An <i>Alford</i> plea must be supported by a strong factual basis.....	50
3.C(2)	The judge may refuse to accept an <i>Alford</i> plea.....	50
3.C(3)	<i>Alford</i> Pleas and Mental Illness.....	50
3.C(4)	<i>Alford</i> Pleas and Intoxication	51
3.D	Acceptance or Rejection of Plea Agreement	52

Chapter 4: SENTENCING AFTER VERDICT	52
4.A Speedy Sentencing	52
4.B Bench Trials	52
4.C Jury Trials	52
4.D Allocution	53
4.D(1) Defendant’s Allocution	53
4.D(2) Hearing from the Prosecution	53
4.D(3) Victim’s Rights at Sentencing	53
4.C. SENTENCING AFTER NOT GUILTY BY REASON OF INSANITY	54
Chapter 5: INFORMATION TO CONSIDER IN SENTENCING AND DISPOSITION	56
5.A. Statutory requirements	56
5.B. Permissible factors	57
5.B(1) Criminal record	57
5.B(2) Likelihood of recidivism	57
5.B(3) Immigration consequences	58
5.B(4) Willingness to admit guilt	58
5.C. Impermissible factors	58
5.C(1) Race and other protected categories	58
5.C(2) Decision to go to trial or claim jury trial	59
5.C(3) Uncharged or unconvicted conduct	59
5.C(4) Perjury at trial	59
5.C(5) “Sending a Message” to the community or society	60
5.C(6) Personal and private beliefs or feelings	60
5.D Presentence Investigation Report	60
Chapter 6: SENTENCING AFTER A VIOLATION OF PROBATION.....	61
6.A Rule 8 – Finding and Disposition:	62
6.A(1) Requirement of a prompt finding – Rule 8(a)	62
6.A(2) Finding of No Violation – Rule 8(b)	62
6.A(3) Finding of violation – Rule 8(c)	62
6.A(4) Finding of Violation; Written Findings of Fact	62
6.A(5) The Dispositional Decision (Step 2 of the hearing) – Rule 8(d)	62
6.A(6) Disposition after Finding of Violation	62

6.A(7)	Factors to consider (re: Disposition)	63
6.A(8)	Disposition is strictly a matter of the court’s discretion.	63
6.A(9)	Dispositional Options	64
6.A(10)	Revocation of probation:	64
6.2	Rule 9 – Violation of conditions of a “continuance without a finding”:	65
Chapter 7:	POST CONVICTION	65
7.A.	MOTIONS TO REVISE AND REVOKE	65
7.B.	MOTIONS TO CORRECT UNLAWFUL SENTENCES	66
7.C.	REMAND AFTER APPEAL	66

Chapter 1: TYPES AND MECHANICS OF DISPOSITIONS

General Laws c. 218, § 27 provides the Boston Municipal Court¹ and District Court with the statutory authority to sentence. The Boston Municipal and District Courts may impose the same penalties as the Superior Court for all crimes over which they have jurisdiction, except that the Boston Municipal and District Courts may not impose a sentence to the state prison. G.L. c. 218, § 27. The dispositional choices available to District Court judges are discussed in this section.

1.A. DIVERSION

Diversion refers to procedures by which cases are dismissed prior to arraignment in exchange for the successful completion of treatment or programming. Procedures for criminal case diversion are addressed by statute for the following three categories of adult criminal defendants: young adults, veterans, and drug dependent persons. In addition to statutory diversion, many District Attorney's Offices administer diversion programs that divert youth or drug dependent individuals from the criminal justice system prior to the issuance of a criminal complaint.

1.A(1) The Court Cannot Dismiss Cases after Diversion over the Commonwealth's Objection, Absent a Sufficient Legal Basis

Although the court has the inherent and statutory power to place a qualified defendant in a pretrial diversion program, the court may dismiss a case over prosecution objection only upon a sufficient legal basis. *See Commonwealth v. Cheney*, 440 Mass. 568, 574-75 & n.12 (2003) (court may not dismiss complaint prior to verdict, finding, or plea in "interests of public justice" over prosecutor's objections); *Commonwealth v. Taylor*, 428 Mass. 623, 628-29 (1999) (court dismissal over prosecution objections is violation of separation of powers doctrine of Massachusetts Declaration of Rights art. 30, due to prosecution's executive function); *see also* Kaplan, *Revising Dispositions and Sentencing Advocacy in the Massachusetts District Courts*,

¹ General Laws c. 4, § 7, cl. 56 states, "district court" or "municipal court" shall mean a division of the district court department of the trial court, or a session thereof for holding court, except that when the context means something to the contrary, said words shall include the Boston Municipal Court Department."

92 Mass. L. Rev. 65, 71 n.107 (2009). Any referral to a pretrial diversion program conditioned upon dismissal of charges upon successful completion of such program can occur only with the consent of the Commonwealth.

“Article 30 [of the Massachusetts Declaration of Rights] ‘provides for a separation of powers among the branches of government, essentially giving the prosecutor broad discretion in deciding whether to prosecute a case . . . [and a] decision to enter a nolle prosequi on a criminal charge rests with the executive branch of government and, *absent a legal basis*, cannot be entered over the prosecutor’s objection.’ ” *Commonwealth v. Guzman*, 446 Mass. 344, 346 (2006) (emphasis added) (citing *Commonwealth v. Pyles*, 423 Mass. 717, 719-20 (1996)); *see Cheney*, 440 Mass. at 575 (quoting *Commonwealth v. Gordon*, 410 Mass. 498, 501 (1991)) (judge may not preempt Commonwealth’s authority to decide whether to prosecute a case “without any legal basis”). “However, the ‘Legislature has great latitude in defining criminal conduct and in prescribing penalties to vindicate the legitimate interests of society.’ ” *Guzman*, 446 Mass. at 346 (citing *Pyles*, 423 Mass. at 721).

Although appellate courts have not directly addressed whether G.L. c. 111E or G.L. c. 276A provide a sufficient legal basis to dismiss a criminal case over the Commonwealth’s objection, the *Pyles* Court refers to both statutes as examples of the Legislature’s broad authority to classify criminal conduct, to establish criminal penalties, and to adopt rules of criminal practice and procedure. *Pyles*, 423 Mass. at 722. “The Legislature consistent with its prerogatives described above, has enacted other statutes that either permit or mandate analogous forms of disposition by means of pretrial diversion.” *Pyles*, 423 Mass. at 722-23 (citing G.L. c. 94C, § 34 (dismissal of case mandated for first offense possession of marijuana, or Class E controlled substance, following successful completion of probation); G.L. c. 111E, § 10 (allowing certain drug dependent defendants to have case continued and charges dismissed following successful completion of drug treatment program); G.L. c. 276A, §§ 5 & 7 (allowing certain defendants between ages of seventeen and twenty-one years to have cases continued without a finding and eventually dismissed after completion of pretrial programs; judge need only take into consideration opinion of the prosecutor)).

To determine whether a court has a sufficient legal basis to dismiss a criminal case over the Commonwealth’s objection, the Supreme Judicial Court has reviewed the ability of a judge to implement “unfettered discretion” in dismissing criminal charges, as opposed to whether a

statute exists that “ ‘represents the delineation by the Legislature of a dispositional option,’ well within the Legislature’s ‘broad authority to classify criminal conduct, to establish criminal penalties, and to adopt rules of criminal practice and procedure.’ ” *Guzman*, 446 Mass. at 346-47 (upholding dismissal pursuant to accord and satisfaction under G.L. c. 276, § 55) (citing *Pyles*, 423 Mass. at 722 (upholding a continuation without a finding without Commonwealth consent); *Commonwealth v. Rotonda*, 434 Mass. 211, 218-219 (2001) (rejecting Commonwealth’s argument that judge’s allowing unsupervised probation pursuant to G.L. c. 278, § 18, was equivalent to unconstitutional nolle prosequi)).

1.A(2) Drug Diversion

The provisions of G.L. c. 111E, § 10 outline a procedure whereby defendants charged with certain drug offenses can request a stay of criminal proceedings and be evaluated for drug dependency. If the court finds the defendant drug dependent, the stay may remain in effect while the defendant is assigned to a treatment facility. G.L. c. 111E, § 10, ¶¶ 11, 12. If the defendant successfully completes drug treatment, the charges are dismissed. G.L. c. 111E, § 10, ¶ 22. The law delineates which offenses qualify for this procedure, specifically excludes crimes related to drug distribution and manufacture (G.L. c. 94C, §§ 32-32G are excluded), and allows limited judicial discretion when a defendant is charged with other crimes in addition to a qualifying offense. G.L. c. 111E, §§ 1, 10, 11.

If a qualifying defendant “is charged for the first time with a drug offense not involving the sale or manufacture of dependency related drugs, and there are no continuances outstanding with respect to the defendant pursuant to [G.L. c. 111E, § 10],” assignment to drug treatment is mandatory upon request. G.L. c. 111E, § 10, ¶ 8; see *Mazzone v. Attorney General*, 432 Mass. 515, 521 (2000). If the defendant successfully completes his treatment, the criminal charges must be dismissed. G.L. c. 111E, § 10, ¶ 22; see *Mazzone*, 432 Mass. at 521-22; *Commonwealth v. Perry*, 391 Mass. 808, 809-10 (1984). The court has the discretion to consider the defendant’s cooperation and compliance with the terms of his assignment in determining whether a defendant successfully completed treatment. G.L. c. 111E, § 10, ¶ 22. If the defendant does not complete treatment, the court may consider the treatment report and other relevant reasons, and the court has discretion to take appropriate action, including dismissing the case or revoking the stay. G.L. c. 111E, § 10, ¶ 22.

1.A(3) Young Adult Diversion

General Laws c. 276A, entitled “District Court Pretrial Diversion of Selected Offenders” allows the District Court and Boston Municipal Court to divert certain young adult offenders. General Laws c. 276A, § 2² provides the following specific eligibility requirements: District Court jurisdiction over the charged criminal offense(s), at least eighteen but under twenty-two years of age, no previous adult convictions (except traffic violations that do not carry imprisonment penalties), no outstanding warrants, continuances, appeals, or pending criminal cases, and a recommendation from a qualifying program.

The eligibility requirements, however, are not necessarily dispositive as to whether a defendant may qualify for diversion. General Laws c. 276A, § 3 allows for a judicial override. “The judge may, in his discretion, grant a defendant who is preliminarily determined not to be eligible because of a failure to satisfy all the requirements of [G.L. c. 276A, § 2], a like fourteen-day continuance for assessment. In arriving at such a decision the opinion of the prosecution should be taken into consideration. Such a continuance may be granted upon the judge’s own initiative or upon request by the defendant.”

Certain criminal offenses disqualify a defendant from consideration for diversion. General Law c. 276A, § 4 renders ineligible for diversion defendants charged with second or subsequent violations of crimes against persons sixty or older, including assault and battery on a person over sixty under G.L. c. 265, § 15A(a), assault by means of a dangerous weapon on a

² “The district courts, and in Boston, the municipal court of the city of Boston, shall have jurisdiction to divert to a program, as defined in section one, any person who is charged with an offense or offenses against the commonwealth for which a term of imprisonment may be imposed and over which the district courts may exercise final jurisdiction and who has reached the age of 18 years but has not reached the age of twenty-two, who has not previously been convicted of a violation of any law of the commonwealth or of any other state or of the United States in any criminal court proceeding after having reached the age of 18 years, except for traffic violations for which no term of imprisonment may have been imposed, who does not have any outstanding warrants, continuances, appeals or criminal cases pending before any courts of the commonwealth or any other state or of the United States, and who has received a recommendation from a program that he would, in light of the capacities of and guidelines governing it, benefit from participation in said program.”

person over sixty under G.L. c. 265, § 15B(a), assault with intent to rob a person over sixty under G.L. c. 265, § 18(a), unarmed robbery of a person over sixty under G.L. c. 265, § 19(a); and larceny by stealing from a person over sixty five under G.L. c. 266, § 25(a).

The procedure for screening qualified diversion candidates begins with probation at arraignment intake. G.L. c. 276A, § 3. Then the judge may allow a continuance of the arraignment for further assessment of a defendant's eligibility for diversion. "Any defendant who is qualified for consideration for diversion to a program may, at his arraignment, be afforded a fourteen-day continuance for assessment by the personnel of a program to determine if he would benefit from such program." G.L. c. 276A, § 3.

Prosecutorial input is required by G.L. c. 276A, § 5. "The judge, upon receipt of the report, shall provide an opportunity for a recommendation by the prosecution regarding the diversion of the defendant. After receiving the report and having provided an opportunity for the prosecution to make its recommendation, the judge shall make a final determination as to the eligibility of the defendant for diversion to the program." G.L. c. 276A, § 5. Diversion can be accomplished by either a stay of the proceedings or a continuation without a finding. G.L. c. 276, § 5.

1.A(4) Veterans' Diversion

Effective May 31, 2012, An Act Relative to Veterans' Access, Livelihood, Opportunity, and Resources, also known as "The Valor Act," created pretrial court diversion for qualifying veterans, active service members, or persons with military history who are defendants in criminal cases. G.L. c. 276A, §§ 10, 11.

General Laws c. 276A, § 10 gives the Boston Municipal Court and the District Court jurisdiction to divert to a program any person who is a veteran, as defined by G.L. c. 4, § 7, cl. 43, who is eighteen or older and who is charged with any crime, except traffic violations without the possibility of incarceration. To qualify, the individual must have no outstanding warrants, continuances, appeals, or criminal cases pending before any courts in the country. As in young adult diversion under G.L. c. 276A, §§ 1-7, under G.L. c. 276A, § 10 the receiving program must recommend the defendant.

Once probation has confirmed that the defendant is a veteran through the course of gathering information at or prior to arraignment in accordance with G.L. c. 276, § 85, the court

may continue the arraignment for fourteen days to seek an assessment by a state or federal agency with suitable knowledge and experience of veterans' affairs. G.L. c. 276, §§ 10, 11. Prior to offering a continuance, the court must inquire into the nature and circumstances of the charge, and the court must consider the opinion of the prosecution in determining whether to allow the fourteen day arraignment continuance.

The receiving program must perform an assessment of the defendant and provide the court and probation with findings. General Laws c. 276A, §§ 10 and 11 outline the procedure for this initial assessment, including a continuance of the criminal proceedings, but the statute is ultimately silent as to the disposition of the criminal charges upon program completion. Therefore, without a specific statutory provision authorizing dismissal of criminal charges upon the meeting of certain criteria, the court should not dismiss the charges of qualifying defendants over the Commonwealth's objection.

1.A(5) District Attorneys' Diversion Programs

The district attorney has the power and discretion to divert and dismiss adult criminal cases. "In the context of criminal prosecutions, the executive power affords prosecutors wide discretion in deciding whether to prosecute a particular defendant, and that discretion is exclusive to them." *Commonwealth v. Cheney*, 440 Mass. 568, 574 (2003) (citing *Commonwealth v. Taylor*, 428 Mass. 623, 629 (1999); *Commonwealth v. Pellegrini*, 414 Mass. 402, 404-05 (1993); *Shepard v. Attorney Gen.*, 409 Mass. 398, 401 (1991)). Once commenced, "the decision to nol pros a criminal case is within the discretion of the executive branch of government, free from judicial intervention." *Cheney*, 440 Mass. at 574 (citing *Commonwealth v. Gordon*, 410 Mass. 498, 500 (1991); *Commonwealth v. Wheeler*, 2 Mass. 172, 173 (1806)).

"The district attorney is the people's elected advocate for a broad spectrum of societal interests — from ensuring that criminals are punished for wrongdoing, to allocating limited resources to maximize public protection." *Gordon*, 410 Mass. at 500. The authority vested in the district attorney by law to refuse on his own judgment alone to prosecute a complaint or indictment enables him to end any criminal proceeding without appeal and without the approval of another official. *Attorney Gen. v. Tufts*, 239 Mass. 458, 489 (1921).

Many District Attorneys' Offices in the Commonwealth have diversion programs for young adults or drug dependent individuals.

1.B. PRETRIAL PROBATION

The court may place a defendant on pretrial probation as a disposition pursuant to G.L. c. 276, § 87. If a defendant satisfies the terms of pretrial probation, for the designated time period, the case against the defendant will be dismissed. If the court finds that the defendant has violated the terms of pretrial probation, upon request of the Commonwealth, the case may be placed back on the docket for trial.

A person may be placed on pre-trial probation without a change of plea or admission to sufficient facts. The consent of the Commonwealth is required. *Commonwealth v. Millican*, 449 Mass. 278, 304, 305 (2007) (citing *Commonwealth v. Tim T.*, 437 Mass. 592, 597 (2002)).

The terms of probation should be executed in writing and signed by the prosecutor, either on the tender of plea form or in a separate pleading that is signed by the parties and submitted to the court. The defendant should sign a probation order acknowledging the terms. Probation supervision fees and or community service work should be imposed in addition to any other terms which are ordered. *See Commonwealth v. Wilcox*, 446 Mass. 61, 64-65 (2006). The court should conduct a brief colloquy with the defendant and include a warning that failure to comply with the terms of probation will result in the case being returned to the trial list for prosecution. *See Tim T.*, 437 Mass. at 597.

The District/Municipal Courts Rules for Probation Violation Proceedings do not apply when a defendant is placed on pretrial probation. Dist./Mun. Cts. R. Prob. Viol. 1 (“These rules prescribe procedures in the Boston Municipal Court and the District Court to be followed upon the allegation of a violation of an order of probation issued in a criminal case after a finding of guilty or after a continuance without a finding. These rules do not apply to an alleged violation of pretrial probation.”)

1.C. CONTINUANCE WITHOUT A FINDING

The court may continue a case without a finding (“CWOFF”) upon the defendant’s admission to sufficient facts. The defendant is placed on probation for a fixed period of time. If a defendant satisfies the terms of the continuance without a finding, for the designated time period, the case against the defendant is dismissed. If the court finds, after conducting a

probation violation hearing pursuant to the Dist./Mun. Cts. R. Prob. Viol., that the defendant has violated the terms of the continuance without a finding, the court may enter a guilty finding and impose a sentence or alter the conditions of probation.

The constitutionality of this practice was upheld by the Supreme Judicial Court in *Commonwealth v. Brandano*, 359 Mass. 332 (1971). The practice has been approved in subsequent case law, and it has been described as a pretrial disposition. *See Commonwealth v. Pyles*, 423 Mass. 717, 723-24 (1996). The practice of “continuing without a finding” in the Boston Municipal Court and the District Court was codified in G.L. c. 278, § 18, in 1992.

The terms and conditions, including the length of time the defendant will be on probation, should be stated in open court, and the probationer must sign a probation order acknowledging and accepting the terms, including all fees, costs, and fines. The court must also notify the defendant of the consequences of failure to abide by the terms and conditions of the probation including the possible entry of a guilty finding and the maximum penalty that may be imposed.

General Laws c. 278, § 18 specifically permits continuances without a finding even over the objection of the Commonwealth and was a response to the elimination of the de novo system. *Pyles*, 423 Mass. at 720-21.

Continuance without a finding is a procedure which often serves the best interests of both the Commonwealth and the defendant. *Commonwealth v. Powell*, 453 Mass. 320, 327, n.9 (2009). The benefit to a defendant is obvious: he may be able to avoid a trial and “earn” a dismissal of the indictment or complaint, thereby avoiding the consequences of having a criminal conviction on his record. *Id.* These advantages would be especially appealing to a first offender or a defendant whose job security or family situation might be threatened by a conviction. *Id.* The Commonwealth avoids the more time-consuming process of trial and sentencing. *Id.* (citing *Commonwealth v. Duquette*, 386 Mass. 834, 843 (1982)). A continuance without a finding sometimes triggers collateral consequences, such as acting as a predicate conviction for operating under the influence second offense, or potential immigration or deportation repercussions.

Even in these circumstances, in which a case may be continued without a finding, a full plea colloquy should be conducted, including a requirement that the defendant admit to the elements of the crime that he acknowledges committing.

When a statute prohibits a case from being continued without a finding, the complaint will usually contain this language.

1.C(1) *Duquette* Alternative Sentence

A continuance without a finding with a *Duquette* alternative functions as a continuance without a finding with a suspended sentence. If a defendant admits to sufficient facts, a judge may continue a case without a finding, and impose an alternative *Duquette* sentence of committed time should the defendant violate probation. *See Commonwealth v. Waloewandja*, 84 Mass. App. Ct. 1128 (2014) (citing *Commonwealth v. Duquette*, 386 Mass. 834, 843-47 (1982)). As with any continuance without a finding, the defendant must agree to this sentence in accordance with the defendant capped plea procedure of Mass. R. Crim. P. 12.

1.D. GUILTY – FILED

A complaint may be placed on file with or without a plea of guilty. In either case it must be with the consent of the defendant and the Commonwealth.

The procedure is set out in Massachusetts Rules of Criminal Procedure 28(e). The judge should specify the length of time the case may remain on file, the reasons why the case may be taken from the file (usually commission of a new crime), and the sentence the defendant will receive in the event that the prosecutor establishes that the defendant committed the new crime by a preponderance of the evidence. *Commonwealth v. Simmons*, 448 Mass. 687, 699-700 (2007). Agreement by the parties to place a case on file must be on the record. The best method of accomplishing this goal is to request that the tender of plea form be used.

1.E. STRAIGHT PROBATION

Probation is a creature of statute, *see* G.L. c. 276, §§ 87, 87A; G.L. c. 279, §§ 1-3, with deep roots in the Commonwealth. *Commonwealth v. Wilcox*, 446 Mass. 61, 64 (2006) (citing *Buckley v. Quincy Div. of the Dist. Ct. Dep't*, 395 Mass. 815, 817-18 n.2 (1985)). “The purpose of probation rather than immediate execution of a term of imprisonment ‘in large part is to enable the [convicted] person to get on his feet, to become law abiding and to lead a useful and upright life under the fostering influence of the probation officer.’ ” *Id.* (quoting *Mariano v.*

Judge of Dist. Ct. of Cent. Berkshire, 243 Mass. 90, 93 (1922)). Probation is designed principally to achieve the twin goals of rehabilitation of the offender and protection of the public. *Commonwealth v. Bynoe*, 85 Mass. App. Ct. 13, 19 (2014) (citing *Commonwealth v. Pike*, 428 Mass. 393, 403 (1998)).

A judge has great latitude in imposing conditions of probation, and it is up to the sentencing judge to set the conditions of probation, including the length of the probationary term. *Commonwealth v. Morales*, 70 Mass. App. 839, 845-46 (2007) (citing *Commonwealth v. Pike*, 428 Mass. 393, 402 (1998)).

If a defendant is placed on straight probation and a judge thereafter determines that the probationer violated the terms of probation, and decides a sentence to the house of correction is appropriate, the judge may impose any sentence up to the maximum allowed by the statute. *Commonwealth v. Rodriguez*, 52 Mass. App. Ct. 572, 574-80 (2001) (a defendant who pleads to straight probation must be informed on the record, in open court, of the minimum mandatory and maximum sentences he faces upon a violation of the terms of probation). When ordering straight probation, the court must inform the defendant of the maximum penalties that may be imposed in the event that the defendant violates the terms. If a defendant's straight probation is revoked, whether it be on a single charge or on multiple charges, he is subject to sentencing on those charges in essentially the same light that existed at the time straight probation was originally imposed. *Commonwealth v. Bruzzese*, 437 Mass. 606, 617-18 (2002) (citing *Commonwealth v. Goodwin*, 414 Mass. 88, 93 (1993); *Rodriguez*, 52 Mass. App. Ct. at 577 n.8); *see also* G.L. c. 279, § 3. The defendant may receive the maximum sentence on each conviction, and the sentences may be imposed consecutively, just as at the original sentencing. *Bruzzese*, 437 Mass. at 618.

Whenever a person is placed on probation, the order form outlining the conditions must be completed and signed by the defendant, judge, and an authorized representative from the Probation Department. The court should satisfy itself that the defendant understands all the conditions, including monetary obligations which are imposed. The probation order is a court order, and the judge should review all of its terms carefully before signing. *See Commonwealth v. MacDonald*, 435 Mass. 1005, 1006 (2001) (the conditions of probation the sentencing judge imposed, not the conditions probation wrote on the form, were determinative as the conditions of probation signed by the defendant had no viability apart from the court order that created them).

Only the court, and not a probation officer, may set the terms of probation. “The defendant is in violation of his probation only if he disobeys the conditions of probation imposed by the sentencing judge.” *MacDonald*, 435 Mass. at 1007.

The probationer must have clear notice of the terms, including when probation is to begin. *See Commonwealth v. Ruiz*, 453 Mass. 474, 479 (2009). In the event that a judge intends to place a person on probation while incarcerated, there must be evidence that the judge intends to enter that order. *Ruiz*, 453 Mass. at 480. This may include a period of probation which runs concurrently with the defendant’s term of incarceration. *Ruiz*, 453 Mass. at 482.

There are standards for probation which have been promulgated by the Massachusetts Probation Service identifying three major categories of probation: Risk/Need, Operating Under the Influence, and Administrative.

1.E(1) Administrative Probation

“Administrative supervision has long been recognized as a form of probation supervision and is used when the court intends no direct probation officer intervention beyond the collection of monies and the enforcement of any other specific court order.” *Commonwealth v. Rotonda*, 434 Mass. 211, 219 n.12 (2001) (citing Standards for Supervision for Probation Offices § 1:03 (1989)).

Administrative probation would ordinarily not require monitoring or supervision by the probation department. It might include probation for motor vehicle offenses, or payment of restitution. A total of \$50.00 per month for probation supervision fees should be imposed.

The court may waive payment of either supervised or administrative probation fees in whole or in part if the defendant is assessed payment of restitution. G.L. c. 276, § 87A. In such cases, probation fees may be waived only while restitution is paid in an amount equivalent to the fee. *Id.*

1.E(2) Supervised Probation

General Laws c. 276, § 87 confers broad discretion upon a judge to place a defendant on probation and to impose reasonable conditions. *Commonwealth v. Goodwin*, 458 Mass. 11, 16 (2010). The conditions of probation must reasonably relate to a probationary goal bearing in

mind the circumstances and characteristics of the particular defendant and his offense. *Commonwealth v. Ericson*, 85 Mass. App. 326, 338 (2014); see *Commonwealth v. LaPointe*, 435 Mass. 455, 459-60 (2001). “The goals of probation ‘are best served if the conditions of probation are tailored to address the particular characteristics of the defendant and the crime.’ ” *Commonwealth v. Gomes*, 73 Mass. App. Ct. 857, 859 (2009) (citing *Commonwealth v. Pike*, 428 Mass. 393, 403 (1998)).

Although a probationary condition is not necessarily invalid simply because it affects constitutional rights, the condition must be reasonably related to legitimate probationary goals in order to withstand constitutional scrutiny. *Gomes*, 73 Mass. App. Ct. at 859 (citing *Lapointe*, 435 Mass. at 459; *Commonwealth v. Power*, 420 Mass. 410, 416-17 (1995), *cert. denied*, 516 U.S. 1042 (1996) (“As long as the condition meets the ‘reasonably related’ test, it is not per se unconstitutional even if it restricts a probationer’s fundamental rights”). “Ordering a defendant to submit to random drug or alcohol testing as a condition of probation, therefore, is not permissible unless it is reasonably related to one or more of the goals of probation: punishment, deterrence, retribution, protection of the public, or rehabilitation.” *Gomes*, 73 Mass. App. Ct. at 859. “This is a fact-intensive inquiry, dependent on the circumstances and characteristics of the particular defendant and his offenses.” *Id.*

1.E(3) Probation Supervision Fees

Probation terms must include an order to pay a probation fee the total of which is \$65.00 per month for supervised probation (where special terms and conditions are imposed) or \$50.00 for administrative probation. General Laws c. 276, § 87A.

The judge may waive the fee in full if the probationer is making monthly restitution payments that are greater than or equal to the fee. In addition, the judge may waive the fee if the court “determines after a hearing and upon written finding that such payment would constitute an undue hardship on a probationer or his family due to limited income, employment status or any other factor.” If the judge waives the fee, the probationer must be required (if able) to perform unpaid monthly community service throughout probation. The determination whether a probationer must pay the fee or instead perform community service must be made by the judge and may not be delegated to a probation officer. Once a judge has made the required finding of undue hardship, the probationer may, without permission from the court, substitute a cash

payment for his or her community service. Such probationers, however, may not resume community service without a judicial finding of undue hardship. As with any other condition of probation, where the probationer is unable to perform community service, the court may waive the condition and document the finding on the record. *See Commonwealth v. Al Saud*, 459 Mass. 221, 229 (2011); *Commonwealth v. Canadyan*, 458 Mass. 574, 577-79 (2010).

1.E(4) Restitution

The power of a judge to order restitution is unquestionable and derives from the power to order conditions of probation. *Commonwealth vs. Casanova*, 65 Mass. App. Ct. 750, 754 (2006). Restitution is limited to loss or damage which is “causally connected to the offense and bears a significant relationship to the offense.” *Commonwealth v. McIntyre*, 436 Mass. 829, 833 (2002).

The Commonwealth must prove the amount of the loss by a preponderance of the evidence and also prove a causal connection between the defendant’s conduct and the victim’s loss. *Casanova*, 65 Mass. App. Ct. at 755. In determining the proper amount of restitution, fair and reasonable procedures must be followed, including affording the defendant a meaningful opportunity to be heard and the right to cross-examine witnesses regarding the issue of restitution. *Commonwealth v. Amaral*, 78 Mass. App. Ct. 557, 559-60 (2011) (citing *McIntyre*, 436 Mass. at 834). There is, however, “no requirement that strict evidentiary rules apply at restitution hearings.” *Amaral*, 78 Mass. App. Ct. at 560 (citing *Casanova*, 65 Mass. App. Ct. at 755); *see Commonwealth v. Nawn*, 394 Mass. 1, 7 (1985). Rather, “[r]estitution is part of a probationary sentence and, as with probation revocation, a restitution hearing must be flexible in nature and all reliable evidence should be considered. . . . Accordingly, hearsay, if reliable, is admissible to carry the Commonwealth's burden at a restitution hearing.” *Amaral*, 78 Mass. App. Ct. at 560 (quoting *Casanova*, 65 Mass. App. Ct. at 755-56). The hearing need not be elaborate; a forum for both sides to air their views and cross examine is sufficient. *Nawn*, 394 Mass. at 7.

The prosecutor must assist the victim in documentation of the victim’s loss if the victim requests such assistance. *Nawn*, 394 Mass. at 8 n.5 (citing G.L. c. 258B, § 3(e)). The prosecutor may conclude that expert testimony as to the value of items taken would be more appropriate than the victim or may offer expert testimony as well as that of the victim. *Id.*

The court may waive probation fees if the amount of restitution is equal to or greater than the fees. G.L. c. 276, § 87A.

1.E(5) Probation in Crimes Against the Person

In the event that a court orders straight probation in the jury of six session for crimes against the person under G.L. c. 265, the judge must specify the reasons for not imposing a sentence of imprisonment. G.L. c. 265, § 41.

1.E(6) Transfers of Probation Supervision

The Massachusetts Probation Service Standards include processes for transferring supervision between Massachusetts courts (usually supervision will be in the District Court or Boston Municipal Court division where the probationer resides).

Inter-state transfers are subject to the interstate compact established by the Interstate Commission for Adult Offender Supervision made for certain misdemeanors. Interstate Commission for Adult Offender Supervision, ICAOS Rules, Rule 1.101, at 6 (effective Mar. 1, 2014) (ICAOS Rules), http://www.interstatecompact.org/Portals/0/library/legal/ICAOS_Rules.pdf. Inter-state transfers are made for misdemeanors in which the duration of probation is one year or longer and where the offense involved incurring physical or psychological harm, as well as felonies where probation is three months or longer. The Massachusetts Probation Service has created an eligibility reference guide. Sex offenders are categorized differently and may not go to another state absent that state's consent.

In *Goe v. Comm'r of Probation*, 473 Mass. 815 (2016), the Supreme Judicial Court upheld the Commissioner of Probation's Policy on the Issuance of Travel Permits. The Court also determined that, where a probationer whose supervision was transferred from another State wishes to challenge a condition of probation added by the Probation Service in Massachusetts, the probationer should file a declaratory action. *Goe*, 473 Mass. at 828.

1.E(7) Modification of Probation Terms

Only a judge has the authority to modify or alter the terms of probation. *Commonwealth v. Lally*, 55 Mass. App. Ct. 601 (2002). A judge may modify the terms and conditions of probation to serve the best interests of both the public and the defendant. *Buckley v. Quincy Div. of the Dist. Ct. Dep't*, 395 Mass. 815, 877 (1985), so long as the modification is not so drastic that it amounts to a revision of the sentence. *Commonwealth v. Morales*, 70 Mass. App. Ct. 839, 844 (2007).

“A probationer is entitled to ‘fair warning of conduct’ that may lead to a revocation of probation, *Commonwealth v. Al Saud*, 459 Mass. 221, 232 (2011), quoting from *Commonwealth v. Ruiz*, 453 Mass. 474, 479 (2009), ‘clear guidelines’ as to what actions on his part may result in a violation of probation, *Lally*, 55 Mass. App. Ct. at 603, and ‘a reliable, accurate evaluation’ of whether there has been a violation of the conditions of probation.” *Commonwealth v. Bynoe*, 85 Mass. App. Ct. 13, 19 (2014) (citing *Commonwealth v. Durling*, 407 Mass. 108, 116 (1990)).

“The addition of a sufficiently punitive term to a defendant's initial sentence may constitute multiple punishment if the revision adding a new and harsher penalty occurs after that sentence becomes final.” *Commonwealth v. Selavka*, 469 Mass. 502, 511 (2014). Ordinarily, reasonable additions to the conditions of a defendant’s probation do not constitute the revision or revocation of a sentence under Mass. R. Crim. P. 29(a). *Selvaka*, 469 Mass. at 511 (citing *Commonwealth v. Goodwin*, 458 Mass. 11, 16 (2010) (citing *Buckley*, 395 Mass. at 818-19)). However, certain modifications are “so punitive as to increase significantly the severity of the original probation,” and, by virtue of their harshness, amount to sentence revisions within the meaning of Rule 29(a). *Selvaka*, 469 Mass. at 511 (quoting *Goodwin*, 458 Mass. at 16). Where such punitive amendments are at issue, common-law principles of double jeopardy bar the imposition of “what is essentially a new, harsher sentence” once the Mass. R. Crim. P. 29 period has expired. *Selvaka*, 469 Mass. at 511-12 (quoting *Goodwin*, 458 Mass. at 16).

1.E(8) Electronic Monitoring

A Global Positioning System device (G.P.S) may be attached to an individual for the purposes of monitoring the person’s location. A probation form exists to facilitate and memorialize these conditions. To deploy electronic monitoring effectively, the court has a

number of tools. When ordering an individual to be monitored, the court may order exclusion zones (places the probationer is prohibited from going), inclusion zones (places the probationer is permitted to go), and/or curfews. Exclusion zones might include a victim's address with a certain geographic perimeter or a particular neighborhood or intersection specified in the order. Inclusion zones might include a school address or a work address. In short, locations and times specific to a court-ordered itinerary can be mandated for the specific probationer. Curfews may be imposed by establishing a schedule. If an probationer offender has a curfew, the electronic monitoring device must be in range of its beacon during the curfew period or it generates an alert.

Use of G.P.S. does not require a land line. Although the homeless may be monitored with a G.P.S., homeless defendants may face challenges accessing an outlet to charge the device, and may need to visit the court frequently to recharge. The Supreme Judicial Court has held that probation cannot be revoked for a failure to comply with G.P.S. monitoring if the defendant was unable to do so because of circumstances beyond the defendant's control. *Commonwealth v. Canadyan*, 458 Mass. 574, 578 (2010) (setting aside finding of probation violation where defendant living in a homeless shelter was unable to recharge G.P.S. monitoring device).

A person placed on pretrial probation and subject to home confinement on electronic monitoring for a period of time is not entitled to have that time counted as credit for time served toward any sentence subsequently imposed in that case. *Commonwealth v. Morasse*, 446 Mass. 113, 120 (2006); *Commonwealth v. Cowan*, 422 Mass. 546, 549 (1996). A pretrial detainee classified by the Department of Correction or a sheriff to a pretrial electronic monitoring diversion program may receive credit for time served toward a committed sentence imposed for the case on which the person was detained. G.L. c. 127, § 20B.

1.F. SUSPENDED SENTENCE

The court may suspend part or all of any sentence, and place the person on probation for such time and such terms as the court shall fix. G.L. c. 279, § 1. When a violation of probation is found, and the court decides to impose a term of imprisonment, the original sentence must be imposed. *Commonwealth v. Holmgren*, 421 Mass. 224, 228 (1995).

1.G. SPLIT SENTENCES

The court may “split” a sentence by suspending a portion of the term of imprisonment and placing the defendant on probation for a specific period of time. *See* G.L. c. 279, § 1. The defendant should be informed that, if a violation of probation is found, and the court decides to impose a term of imprisonment, the portion of the sentence which was suspended must be imposed. The maximum penalty that may be imposed is determined by the applicable statute, but the Boston Municipal Court or District Court judge may not impose a sentence of more than two and one-half years. A judge, however, may impose consecutive sentences which total in excess of two and one-half years for separate offenses for which the defendant has been found guilty.

1.H. COMMITTED

The maximum sentence that can be imposed on any single charge in the Boston Municipal Court or District Court, subject to lesser statutory maximum penalties, is two and one-half years in the house of correction. The District Court may not impose a sentence to the state prison. G.L. c. 218, § 27.

1.I. FEES, FINES, AND COURT COSTS

Fines may be imposed pursuant to the confines of the statute which was violated. General Laws c. 297, § 1A permits partial payments, and the date by which full payment shall be made should be set by the court. The court may extend the time for payment if the person is unable to pay. *See also* G.L. c. 280, § 6A (twenty-five percent surfine is required on all fines except for minor motor vehicle offenses).

“A person in collision with the government ought not to be punished for his poverty.” *Commonwealth v. Payne*, 33 Mass. App. Ct. 553, 595 (1992). A sentence for non-payment of fines is limited to defendants who are able to pay a fine but refuse or neglect to pay. A person may not be incarcerated for failure to pay a fine without determining whether the defendant has the ability to pay the fine, and the person may not be incarcerated solely because of inability to pay a fine. *Commonwealth v. Gomes*, 407 Mass. 206, 212 (1990) (quoting *Santiago v. United*

States, 889 F.2d 371, 373 (1st Cir. 1989)). A judge shall discharge a person upon a finding that such person is unable to pay or that it is otherwise expedient. G.L. c. 127, § 145.

The defendant may be incarcerated if the defendant refuses to or neglects to pay a fine, but only after a hearing to determine whether the failure to pay was willful. *Gomes*, 407 Mass. at 213. Prior to incarceration, a judge must inquire into less restrictive alternatives such as a payment schedule or community service. “Before a judge imprisons a defendant for failure to pay a fine, the judge should inquire into the defendant's ability to pay and into ‘reasonable alternatives to incarceration, such as a long-term payment schedule or community service.’ ” *Payne*, 33 Mass. App. Ct. at 595 (quoting *Gomes*, 407 Mass. at 212-13). Persons imprisoned for failure to pay fines shall be given a credit of \$30.00 per day for each day confined. G.L. c. 127, § 144.

A written judicial order must be completed whenever a waiver of probation fees or other waiver occurs, and is to be filed with the case papers. Clerk-Magistrates, Assistant Clerk-Magistrates, and sessions clerks should ensure that any waiver of probation supervision fees are properly docketed (along with any other waiver) and should obtain and include in the case file the judge’s written order whenever a criminal case involves the waiver of any required financial amount.

When a defendant is placed on probation, G.L. c. 276, § 87A requires judges to assess the probationer a \$50 (administrative) or \$65 (supervised) monthly probation fee. The statute allows judges to waive the fee in full if the probationer is making monthly restitution payments that are greater than or equal to the fee. It also requires the judge to waive the fee if the court “determines after a hearing and upon written finding that such payment would constitute an undue hardship on a probationer or his family due to limited income, employment status or any other factor.” If the judge waives the fee, the probationer must be required (if able) to perform unpaid monthly community service throughout probation. To assist and document the process of assessment and waivers of moneys in criminal cases, including probation supervision fees, judges may use the “Assessment or Waiver of Moneys in Criminal Case” form.

Assessment changes were enacted in the domestic violence law, St. 2014, c. 260, §§ 20-22. Specifically, G.L. c. 258B, § 8 now allows the court to create a payment plan for the victim-witness assessment when payment would cause a severe financial hardship. In addition, the law created a new domestic violence prevention assessment of \$50 for convictions of domestic

assault or assault and battery, strangulation, violation of a restraining order, and any act that would constitute abuse under G.L. c. 209A, § 1.

Fifteen hours of community service are necessary to “work off” the counsel fee under G.L. c. 211D, § 2A(g).

A detailed chart of “Potential Money Assessments in Criminal Cases” is also available in the “Forms Available for Download” section of the District Court intranet webpage. The form includes probation fees and all potential assessments of fees in criminal cases. It serves as a reference checklist; it documents that the complex statutory requirements relative to assessments have been complied with; it avoids any omissions or errors in recording what the judge has ordered; and it offers a simple way for the judge to make the above-referenced written finding(s) required when a judge waives the probation supervision fee or surcharge (G.L. c. 276, § 87A) or the victim-witness assessment (G.L. c. 258B, § 8).

1.J. SPECIAL SENTENCES

Pursuant to G.L. c. 279, § 6A, the court may order that a sentence be served in whole or in part on weekends and legal holidays, or in any other periodic interval. These sentences, called “Special Sentences,” or “Weekend Sentences,” are typically served from Friday to Monday, although a court may specify any beginning and ending time for each weekly period of confinement. *See* Lee Gartenberg, *Glossary of Massachusetts Sentencing Terms*, Version 4.15(k) (2015). Such sentencing is permissible only when the defendant is being sentenced for a first offense for a term that does not exceed one year. Additionally, sentencing “on designated weekends, evenings or holidays” is specifically authorized by G.L. c. 90, § 24(1)(a)(3) for a defendant convicted of driving under the influence of intoxicating liquor or drugs. District Court Standards of Judicial Practice, Sentencing and other Dispositions, 7:06 (1984).

The defendant is required to report on his or her own to the correctional facility each week at a time directed by the court. *See* Lee Gartenberg, *Glossary of Massachusetts Sentencing Terms*, Version 4.15(k) (2015). The total time served must be equal to the period of incarceration imposed. The Department of Correction, in calculating the total time served, considers a weekend to consist of four days — Friday, Saturday, Sunday, and Monday — unless Monday is a Holiday, in which case the weekend is counted as five days. The mittimus should

contain the specific dates and times for commitment (i.e. sentence of four months to a house of correction, twenty days to be served on five consecutive weekends, the balance to be suspended).

Although special sentences have the advantage of allowing a defendant to maintain employment during the week while serving a sentence on weekends, weekend sentences invoke safety considerations for the place of incarceration and the safety of the individuals and the public. Weekend sentences provide an inmate with weekly access to both the house of correction population and the public. Defendants serving weekend sentences provide a target for other inmates to transport messages and illegal items.

1.K. DECRIMINALIZATION — TREATMENT OF CERTAIN OFFENSES AS CIVIL INFRACTIONS

General Laws c. 277, § 70C lists the minor criminal offenses which may be treated as civil infractions. If a charge is decriminalized, counsel should not be appointed. The defendant is not entitled to a jury trial.

The Commonwealth or defendant may request, or the court may order, the decriminalization procedure be implemented. The Commonwealth has a right to prevent decriminalization by objection in writing with reasons.

If a person is found responsible, a civil penalty should be imposed. No sentence of incarceration may be imposed. Certain findings of responsibility, however, may result in a license loss or other collateral consequences. An adjudication of responsibility may include an order of restitution. G.L. c. 277, § 70C. Such matters may be placed on file pursuant to G.L. c. 277, § 70B, and fines may be remitted upon the requisite finding and waiver by the court. In the event a defendant fails to pay the money owed, issues of waiver and penalty should be reviewed.

1.L. DISMISSAL WITH ACCORD AND SATISFACTION

General Laws c. 276, § 55 governs dismissal upon acknowledgment of accord and satisfaction. A person charged with assault and battery or other misdemeanor for which he is liable in a civil action may file an accord and satisfaction indicating that the offended party has been satisfied. The person injured must appear before the court and the accord and satisfaction

filing must acknowledge in writing that the person injured has received satisfaction for the injury. G.L. c. 276, § 55. The court then has the discretion to dismiss the complaint, even over the Commonwealth's objection. *Commonwealth v. Guzman*, 446 Mass. 344, 348-49 (2006). The record should show the reasons for the trial court's decision.

General Laws c. 276, § 55 was amended by St. 2014, c. 260, An Act Relative to Domestic Violence, to prohibit accord and satisfaction for any violation of an abuse prevention order, domestic assault or assault and battery under G.L. c. 265, § 13M, strangulation under G.L. c. 265, § 15D, or any act constituting abuse under G.L. c. 209A, § 1.

Chapter 2: SENTENCING MECHANICS

2.A CONCURRENT SENTENCES

Sentences are concurrent when two or more sentences run at the same time. This can apply to sentences on multiple charges or sentences on multiple cases. The Supreme Judicial Court has said of concurrent sentences that, "while [a defendant] is technically serving more than one sentence, as a practical matter he is serving only one. When two or more sentences are to be served concurrently, the shorter ones are considered to be 'absorbed' within the longer sentence." *Commonwealth v. Bruzzese*, 437 Mass. 606, 613 (2002) (quoting *Carlino v. Comm'r of Correction*, 355 Mass. 159, 161 (1969)). "When a judge orders sentences to be served concurrently, his order creates a sentencing scheme that establishes a relationship between, or among, the sentences. The concurrency order thus becomes part of the sentences themselves." *Bruzzese*, 437 Mass. at 613.

There is nothing that prevents the imposition of a house of correction sentence concurrent with a state prison sentence. See *Commonwealth v. Parzyck*, 41 Mass. App. Ct. 195 (1996). Further, there is nothing that prevents imposition of two house of corrections sentences to run concurrent with each other. See *Commonwealth v. Selavka*, 469 Mass. 502, 512 (2014) (citing *Bruzzese*, 437 Mass. at 613).

Because a term of straight probation is not a sentence, concurrent terms of straight probation are not concurrent sentences that have been bundled together under a concurrent sentencing scheme for purposes of double jeopardy. *Bruzzese*, 437 Mass. at 617. The

imposition of concurrent terms of straight probation signals nothing and it creates no reasonable expectation in a defendant as to the type of sentence or sentences he might receive if his probation is revoked. *Id.*

2.B CONSECUTIVE SENTENCES

Consecutive sentences, or “from and after” sentences may be imposed when a defendant is sentenced on more than one criminal charge. If sentences are imposed consecutively, the sentence on one or more charges does not commence until the completion of the first sentence. Consecutive sentences may be ordered on multiple charges on the same criminal case, or on multiple criminal cases. The court must designate which sentences are to run consecutively.

2.C MANDATORY MINIMUM SENTENCES

Mandatory minimum sentences are sentences that, by statute, require the defendant to serve a minimum term of incarceration before becoming eligible for release to probation, parole, or work release, and before becoming eligible for deductions in sentence for good conduct. Examples of minimum mandatory sentences include certain drug offenses under G.L. c. 94C (*Commonwealth v. Didas*, 471 Mass. 1 (2015) (trafficking cocaine pursuant to G.L. c. 94C, § 32A(d)); *Commonwealth v. Galvin*, 466 Mass. 286 (2013) (mandatory minimum drug crimes pursuant to G.L. c. 94C, § 32A(d)); *Commonwealth v. Bradley*, 466 Mass. 551 (2013) (school zone radius reduction pursuant to G.L. c. 94C, § 32J)), and operating under the influence of liquor subsequent offenses under G.L. c. 90, § 24.

Some mandatory minimum sentences are created statutorily to provide no alternative disposition to incarceration upon conviction. *See, e.g.*, G.L. c. 269, § 10(a) (carrying a firearm “shall be punished by imprisonment . . . for not less than 18 months nor more than two and one-half years in a jail or house of correction. The sentence imposed on such person shall not be reduced to less than 18 months”). Other mandatory minimum sentences take effect only upon a sentence of incarceration. *See* G.L. c. 265, § 13D (assault and battery upon a public employee “shall be punished by imprisonment for not less than ninety days”); *see also* G.L. c. 90, § 24V (operating under the influence and child endangerment “shall be punished . . . by imprisonment in the house of correction for not less than 90 days nor more than 2½ years”). Additionally,

some minimum mandatory sentences must run consecutively from a companion statute. *See* G.L. c. 269, § 10(a) and § 10(n) (requiring minimum mandatory for carrying a loaded firearm to run from and after sentence for carrying a firearm); G.L. c. 94C, § 32J (requiring minimum mandatory for school zone to run from and after the underlying drug offense).

Finally, some mandatory minimums allow for release prior to the minimum time period. *See* G.L. c. 94C, § 32J (“No sentence imposed under the provision of this section shall be for less than a mandatory minimum term of imprisonment of two years. . . . Any person serving a mandatory minimum sentence for violating this section shall be eligible for parole after serving one-half of the maximum term of the sentence if the sentence is to the house of correction [excepting aggravating circumstances]”); *see also* G.L. c. 90, § 24, ¶ 5 (operating under the influence third offense “shall be punished by . . . imprisonment for not less than one hundred and eighty days nor more than two and one-half years . . . provided, however, that the sentence imposed upon such person shall not be reduced to less than one hundred and fifty days”).

2.D STAY OF EXECUTION OF SENTENCE AND DEFERRED SENTENCING

“A stay of execution of sentence should be distinguished from deferred sentencing. In a stay of execution of sentence, the judge imposes a sentence of incarceration and stays the execution thereof in order to permit the defendant to attend to personal concerns, such as a family, employment or financial matters. In deferred sentencing, the judge enters a finding of guilty and defers imposition of sentence, usually to obtain further information, such as a presentence report.” *Standards of Judicial Practice, Sentencing and other Dispositions* § 7:11 (Sept. 1984).

“No statute prohibits a judge from deferring the imposition of a sentence or staying the execution of a sentence. The inherent powers of the court appear to support these procedures. A defendant who requests the court to stay the execution of the sentence should be required to demonstrate that immediate incarceration would work an undue hardship on the defendant or his or her family.” *Id.* § 7:11 commentary.

The practice of taking a plea or verdict, and then postponing sentencing is generally discouraged. If the defendant will be in custody for the duration of time between adjudication and sentencing, the risk is mitigated. “The Judge should consider the inherent danger of flight in deciding whether to allow a deferred sentence or a stay of execution of sentence. The Judge also

should consider imposing conditions, including appropriate recognizance, that will reduce the danger of flight. A defendant who fails ‘without sufficient excuse’ to appear in court at the specified time may be punished for a separate offense under G.L. c. 276, § 82A.” *Id.* § 7:11 commentary (citing *Sclamo v. Commonwealth*, 352 Mass. 576 (1967)).

2.D(1) Stays of Execution Pending Appeal

“The rule governing stays of execution of sentences of imprisonment is Mass. R. Crim. P. 31 (a), 378 Mass. 902 (effective July 1, 1979), which reads in pertinent part as follows: ‘If a sentence of imprisonment is imposed upon conviction of a crime, the entry of an appeal shall not stay the execution of the sentence unless the judge imposing it or a judge of the Supreme Judicial Court or the Appeals Court determines in his discretion that execution of said sentence shall be stayed pending the final determination of the appeal.’ ” *Commonwealth v. Hodge*, 380 Mass. 851, 853 (1980). The first factor to evaluate in considering whether to allow a defendant’s motion for stay of execution of his sentence is whether the defendant’s motion for a new trial presents an issue that “offers some reasonable possibility of a successful decision.” *Commonwealth v. Charles*, 466 Mass. 63, 77 (2014) (citing *Commonwealth v. Allen*, 378 Mass. 489, 498 (1979) (quoting *Commonwealth v. Levin*, 7 Mass. App. Ct. 501, 504 (1979))). The second factor is whether the defendant’s release poses a security risk. *Id.* “Significant considerations include the defendant’s ‘familial status, roots in the community, employment, prior criminal record, and general attitude and demeanor.’ ” *Id.*; see *Levin*, 7 Mass. App. Ct. at 505. “These considerations, in turn, will inform the calculus regarding the possibility of the defendant’s flight to avoid punishment, the potential danger posed by the defendant to any person or to the community, and the likelihood that the defendant will commit additional criminal acts while awaiting a decision on his new trial motion.” *Charles*, 466 Mass. at 77 (citing *Polk v. Commonwealth*, 461 Mass. 251, 253 (2012) (citing *Hodge*, 380 Mass at 855)).

The procedure for seeking a stay of execution of a sentence pending appeal is governed by Mass. R. Crim. P. 31 and Mass R. App. P. 6. *Polk*, 461 Mass. at 252. Rule 31(a) of the Massachusetts Rules of Criminal Procedure provides that an appeal “shall not stay the execution of the sentence unless the judge imposing it or, pursuant to Mass. R. A. P. 6, a single justice of the court that will hear the appeal, determines in the exercise of discretion that execution of said sentence shall be stayed pending the determination of the appeal.” *Polk*, 461 Mass. at 252.

2.E JAIL CREDITS

Jail credit is time credited toward a sentence for pretrial confinement. Lee Gartenberg, *Glossary of Massachusetts Sentencing Terms*, Version 4.15(k) (2015). Courts are required to award jail credits pursuant to G.L. c. 279, § 33A, and if they have not, they may be credited by correctional facilities. G.L. c. 127, § 129B. “Defendants have a right to have their sentences reduced by the amount of time they spend in custody awaiting trial.” *Commonwealth v. Harvey*, 66 Mass. App. Ct. 297, 299-300 (2006) (citing G.L. c. 279, § 33A). “[A] prisoner is to receive credit for all jail time — neither more nor less — served before sentencing which relates to the criminal episode for which the prisoner is sentenced, but does not receive credit greater than the number of days of his presentencing confinement.” *Commonwealth v. Carter*, 10 Mass. App. Ct. 618, 620-21 (1980).

It was previously assumed that the defendant was required to be held on the exact case for which he or she was awaiting trial. The case law now requires that judges not be overly technical in the awarding of jail credits and base the determination on fairness. *Carter*, 10 Mass. App. Ct. at 620. At the margins, the calculation of jail credit can be complicated. *See Commonwealth v. Morasse*, 446 Mass. 113, 119-21 (2006) (no credit for time in home confinement; credit for time committed to Bridgewater State Hospital); *Commonwealth v. McLaughlin*, 431 Mass. 506, 514-15 (2000) (credit for time committed to Bridgewater State Hospital); *Commonwealth v. Melo*, 65 Mass. App. Ct. 674, 677 (2006) (no adjustment for leap years); *Commonwealth v. Maldonado*, 64 Mass. App. Ct. 250, 252 (2005) (credit for time between imposition of sentence and its execution); *Commonwealth v. Speight*, 59 Mass. App. Ct. 28, 32 (2003) (no credit for time in an inpatient drug treatment program); *Commonwealth v. Frias*, 53 Mass. App. Ct. 488, 489 (2002) (in an extradition case, credit begins to accrue upon the signing of extradition waiver). It is important to calculate the proper jail credits at the time of sentencing and to require the parties to argue any complexities that may arise in a particular case.

2.E(1) Time credited to other sentences

Except where “dead time” is involved, a defendant is entitled to credit only for pre-sentence confinement “which relates to the criminal episode for which the prisoner is sentenced.”

Commonwealth v. Carter, 10 Mass. App. Ct. 618, 620 (1980); accord *Commonwealth v. Clark*, 20 Mass. App. Ct. 962, 964 (1985) (defendant in custody for an offence is not permitted to deduct that time against another, wholly unrelated offense); see also *Commonwealth v. Milton*, 427 Mass. 18, 24 (1998) (“time spent in custody awaiting trial for one crime generally may not be credited against a sentence for an unrelated crime”). A defendant should not ordinarily receive jail credit for time that has already been credited to other sentences, or that was served on other sentences. Thus, a defendant who sought jail credits on a subsequently imposed concurrent sentence, where the credits were already awarded on the previously imposed sentence, was not entitled to credit on the second sentence. *Commonwealth v. Ridge*, 470 Mass. 1024, 1025 (2015); accord *Commonwealth v. Barton*, 74 Mass. App. Ct. 912, 913 (2009) (no credit for time already credited to another sentence, even if the instant sentence is concurrent to that sentence). The same rule applies for consecutive sentences. *Commonwealth v. Harvey*, 66 Mass. App. Ct. 297, 300-01, rev. denied, 447 Mass. 1105 (2006).

Where, on the other hand, the defendant has been held on multiple cases, the first judge to sentence should credit the defendant with all time served. See *Commonwealth v. Murphy*, 63 Mass. App. Ct. 753, 757 (2005). The judge should not assume that the defendant will be convicted and sentenced to time on other charges, but rather should ensure that all time already served on the instant case is credited to that case.

2.E(2) Probation violation sentences (no credit for)

“If a defendant’s straight probation is revoked, whether it be on a single charge or on multiple charges, he is subject to sentencing on those charges in essentially the same light that existed at the time straight probation was originally imposed.” *Commonwealth v. Bruzzese*, 437 Mass. 606, 617-18 (2002) (citing *Commonwealth v. Goodwin*, 414 Mass. 88, 93 (1993)); *Commonwealth v. Rodriguez*, 52 Mass. App. Ct. at 577 n.8; see also G.L. c. 279, § 3. The defendant may receive the maximum sentence on each conviction, and the sentences may be imposed consecutively, just as at the original sentencing. *Id.* The defendant is entitled to credit for all the time the defendant served awaiting this or earlier probation violation hearings in this case, unless that time has already been credited to other sentences.

If a defendant whose probation was revoked for a new crime is later convicted of the new crime, the defendant is not entitled to any jail credit for the time served on the probation

revocation. *Commonwealth v. Ledbetter*, 456 Mass. 1007, 1009 (2010); *Commonwealth v. Murphy*, 63 Mass. App. Ct. 753, 754 (2005); *Commonwealth v. Foley*, 15 Mass. App. Ct. 965, 966 (1983). Because the probation revocation sentence is punishment for the original crime, that is “time he was serving a sentence on an unrelated matter,” and thus no credit may be given. *Murphy*, 63 Mass. App. Ct. at 754.

2.E(3) Dead Time

Dead Time is time served awaiting disposition or interstate rendition which ultimately is not applied to a sentence. Lee Gartenberg, *Glossary of Massachusetts Sentencing Terms*, Version 4.15(k) (2015) (citing *Williams v. Superintendent, Mass. Treatment Ctr.*, 463 Mass. 627, 630 n.6 (2012), *Commonwealth v. Milton*, 427 Mass. 18, 21 n.4 (1998)). In the case of pretrial confinement, sentencing judges are advised to avoid the occurrence of “dead time,” *Commonwealth v. Foley*, 17 Mass. App. Ct. 238, 244 (1983), unless the defendant would be “banking” the time (see below) toward a future sentence. *Id.* (citing *Milton*, 427 Mass. at 21 n.4). To avoid “dead time,” a judge may give a defendant credit for time served awaiting trial on an unrelated case, if that case ended in dismissal or acquittal. *Commonwealth v. Holmes*, 469 Mass. 1010, 1011 (2014).

In the case of interstate rendition, if the defendant causes a delay in the rendition process, the time awaiting rendition would not be awarded toward a future sentence in that case and would effectively be “dead time,” but that is permissible because the defendant caused the delay in the rendition process. *Beauchamp v. Murphy*, 37 F.3d 700, 705 (1st Cir. 1994); *Commonwealth v. Barriere*, 46 Mass. App. Ct. 286 (1999); *Gardner v. Comm’r of Correction*, 56 Mass. App. Ct. 31 (2001).

Defendants should not be given extra credit for time served by applying jail credits to multiple sentences. Lee Gartenberg, *Glossary of Massachusetts Sentencing Terms*, Version 4.15(k) (2015); see *Commonwealth v. Carter*, 10 Mass. App. Ct. 618, 620-21 (1980) (defendant not entitled to double-count pre-sentence credit against each of his consecutive sentences); *Commonwealth v. Blaikie*, 21 Mass. App. Ct. 956, 957 (1986) (credits may not be applied twice where “the sentences against which the prisoner seeks to apply jail credit are longer than the sentences with which they are to be served concurrently”); *Commonwealth v. Harvey*, 66 Mass.

App. Ct. 297 (2006) (“Because the defendant had already received credit for the time he spent in jail awaiting trial, the judge did not err in denying the defendant’s request to receive credit for the same period of time on the second set of charges and thus to effectively reduce his sentence”); *Commonwealth v. Ridge*, 470 Mass. 1024 (2015) (“Where, as here, the time previously credited to the defendant is ‘wholly inclusive of the period the defendant claims as credit on’ a later-imposed sentence, ‘there is no special consideration of fairness that supports the credit that the defendant seeks.’ ”); *Milton v. Comm’r of Correction*, 67 Mass. App. Ct. 253, 257-58 (2006) (no credit for dead time if the sentence had been served at the time of the new crime, but credit awarded for dead time for sentences still being served at the time of the new crime, provided that there was no expectation that the sentence would be vacated at the time of the new crime).

2.E(4) Banking Time

Banking time is where a defendant seeks to have time spent awaiting disposition in custody for a charge for which he or she did not receive committed time applied toward a sentence for a subsequently committed offense. Lee Gartenberg, *Glossary of Massachusetts Sentencing Terms*, Version 4.15(k) (2015). These credits would otherwise be “dead time.” This practice is prohibited because it could possibly make a defendant immune from a future sentence if these “banked” credits were applied. *Id.*(citing *Commonwealth v. Milton*, 427 Mass. 18, 24 (1998)). “In weighing these equitable considerations, the banking prohibition outweighs any concern about dead time: [T]he need to prevent criminal defendants from banking time for use against future sentences outweighs any fairness issues normally applicable in [dead time] situations.” *Holmes*, 469 Mass. at 1011 (quoting *Milton*, 427 Mass. at 25) (internal quotations marks omitted, alterations in the original).

2.F NUNC PRO TUNC SENTENCES

Nunc pro tunc is a Latin expression that means, “now for then.” In general, a court ruling *nunc pro tunc* applies retroactively to correct an earlier ruling. One example is when a sentence is imposed after the defendant has been confined pretrial continuously on the same case, then the sentence may be imposed *nunc pro tunc* from the first date of confinement.

Chapter 3: PLEAS AND SENTENCING

The procedure for tendering a guilty plea and sentencing a defendant who has pleaded guilty in the Boston Municipal Court or District Court is governed by Mass. R. Crim. P. 12 and G.L. c. 278, § 18. *Commonwealth v. Dean-Ganek*, 461 Mass. 305, 308 (2012).

3.A TENDER OF PLEA

3.A(1) BINDING AND NON-BINDING PLEAS

Pursuant to Mass. R. Crim. P. 12(b)(5), there are two types of plea agreements: binding and nonbinding. Certain plea agreements under Rule 12(b)(5)(A) are binding on the court if accepted. Such plea agreements must include an agreement to a specific sentence or length of probation and a government charge concession, and apply to both a reduction in the charges or an agreement not to seek an indictment or to bring other charges. All other plea agreements are governed by Rule 12(b)(5)(B) and are not binding on the court. The procedures for nonbinding plea agreements are in Rule 12(c), and the procedures for binding plea agreements are in Rule 12(d). They are substantially identical, except for subsections (4) and (6) (sentencing). For binding plea agreements, Rule 12(d)(4) requires the court to accept or reject the plea agreement before accepting the guilty plea. The judge may not accept an agreement “without considering whether the proposed disposition is just.” For nonbinding plea agreements, Rule 12(c)(4) preserves a defendant’s right to tender a defendant-capped plea.

3.A(1)(a) *BINDING PLEAS AND CHARGE CONCESSIONS*

Commonwealth must inform the court of charge concession. If the Commonwealth’s agreement to reduce a charge has been made contingent on the judge’s sentencing the defendant to the agreed recommendation, the prosecutor is required to inform the judge of this provision of the agreement before the tender of the plea. *Commonwealth v. Dean-Ganek*, 461 Mass. 305, 311 n.9 (2012).

Parties must inform the judge of the substance of the agreement. In all criminal cases where the Commonwealth and the defendant have entered into a plea agreement, the judge must be

informed of the substance of the agreement that is contingent on the plea. *Dean-Ganek*, 461 Mass. at 308 (citing Mass. R. Crim. P. 12(b)(2)).

3.A(1)(b) NON-BINDING PLEAS AND DEFENDANT-CAPPED PLEA STRUCTURE

3.A(1)(b)(i) Defendant may withdraw plea if judge would exceed defendant's recommendation.

In all District, Municipal, and Juvenile courts, a defense-capped plea structure applies. G. L. c. 119, § 55B, Mass. R. Crim. P. 12(c)(2)(B). “In a District Court, if the plea is not conditioned on a sentence recommendation by the prosecutor, the defendant may request that the judge dispose of the case on any terms within the court's jurisdiction. The judge shall inform the defendant that the court will not impose a disposition that exceeds the terms of the defendant's request without first giving the defendant the right to withdraw the plea.” Mass. R. Crim. P. 12(c)(2)(B). Where a plea agreement includes a sentence recommendation, whether it be a recommendation by the prosecutor that the defendant is free to oppose or an agreed recommendation made jointly by the prosecutor and defendant, a judge is required to inform the defendant that the judge “will not impose a sentence that exceeds the terms of the recommendation without first giving the defendant the right to withdraw the plea.” *Commonwealth v. Dean-Ganek*, 461 Mass. 305, 308 (2012) (citing Mass. R. Crim. P. 12(c)(2)(A)).

Under Mass. R. Crim. P. 12 (c)(2)(A), the judge may inform the defendant that the court is disposed to accept the sentence recommendation, pending the outcome of the hearing required by subdivision (c)(5), and that the judge will not exceed that recommendation without giving the defendant an opportunity to withdraw the plea.

3.A(1)(b)(ii) Sentences that unintentionally exceed the defendant's recommendation.

Judges should pay careful attention to dispositions involving probationary terms or a suspended sentence to ensure that they conform to the legitimate sentence expectation of the defendant. *See, e.g., Commonwealth v. Glines*, 40 Mass. App. Ct. 95, 99-100 (1996) (where District Court judge imposed a sentence of probation with a suspended term of five years, it was more severe than the defendant's request for probation with 2½ years suspended); *Commonwealth v. Barber*, 37 Mass. App. Ct. 599 (1994) (where pursuant to a plea agreement, prosecutor recommended the defendant receive a 12-15 year sentence concurrent with other

sentences the defendant received, and the judge imposed a suspended sentence of 12-15 years, consecutive to the other sentences the defendant received, and placed the defendant on probation for two years, the judge exceeded the terms of the prosecutor's recommendation).

3.A(1)(b)(iii) Continuance without a Finding over Commonwealth Objection.

A District, Boston Municipal, or Juvenile Court judge has the power to accept a proposed disposition under the continuance without a finding procedure even if it entails continuing the case without a finding over the objection of the prosecutor. Although ordinarily the separation of powers doctrine prevents a judge from foreclosing the prosecution's effort to conclude a case with either a conviction or acquittal on the original charge, the legislature's specific sanction of the continuance without a finding option in the defense capped plea procedure legitimates it. Mass. R. Crim. P. 12 Reporter's Notes (2004) (comparing *Commonwealth v. Pyles*, 423 Mass. 717 (1996) (grant of authority by G.L. c. 278, § 18 specifically gives District Court judges authority to continue a case without a finding over the objection of the prosecutor), with *Commonwealth v. Cheney*, 440 Mass. 568 (2003) (Superior Court judge lacks power to dismiss case in the interest of justice over the objection of the prosecutor as this procedure is only available under G.L. c. 278, § 18 which applies only to District and Juvenile Courts); *Commonwealth v. Tim T.*, 437 Mass. 592 (2002) (without statutory authority akin to G.L. c. 278, § 18, Juvenile Court judge lacks power to place defendant on pretrial probation over the objection of the prosecutor). However, if a judge does accept the defendant's proposal to continue a case without a finding over the prosecutor's objection, the record should reflect the reasons for the conclusion that this action is in the best interests of justice. *See Pyles*, 423 Mass. at 723.

3.A(2) Written Waiver: The Green Sheet.

The District Court uses a two-sided tender of plea form, usually printed on green paper, and therefore often referred to in practice as "the green sheet." The green sheet provides spaces for the defendant and prosecutor to write their respective sentencing recommendations or plea agreements. The green sheet also provides warnings to the defendant, and requires the defendant's signature acknowledging the defendant's sentencing recommendation and acknowledging understanding of the various warnings. Defendant's counsel is also required to

sign the green sheet. Probation should be consulted on the disposition pursuant to Dist./Mun. Cts. R. Crim. P. 4(c) before the green sheet is submitted to the Court. The third column of the green sheet provides space for the judge to memorialize the court's proposed disposition upon the rejection of a binding plea, or when offering a non-binding plea disposition. Finally, the green sheet contains space for the court to record the sentencing recommendation that will be adopted, and the judge is required to sign the green sheet if a tender of plea is accepted.

The use of a written waiver form alone is not a substitute for an adequate plea colloquy, and the defendant's signature on such a form "is one of several facts that 'bespeak the defendant's intention to consummate the plea bargain.'" *Commonwealth v. Furr*, 454 Mass. 101, 111 (2009) (citing *Commonwealth v. Colon*, 439 Mass. 519, 529 n.14 (2003) (quoting *Commonwealth v. Grant*, 426 Mass. 667, 672 (1998))). The information about the consequences of a conviction should be part of the oral dialogue between the judge and the defendant. It is not sufficient for a judge to rely on the defendant's acknowledgment of this information on a written form. *See Commonwealth v. Rodriguez*, 52 Mass. App. Ct. 572, 575 (2001); *Commonwealth v. Hilaire*, 51 Mass. App. Ct. 818, 823 (2001) ("During a colloquy, the judge has the opportunity to observe and interact with the defendant and can communicate the warnings to the . . . defendant with greater assurance than can be supplied by the preprinted . . . form").

3.A(3) Enforcing Plea Agreements.

If the court determines that a plea agreement existed, and that the defendant has fulfilled his or her part of the bargain, the defendant is entitled to the benefit of the prosecutor's performance of the countervailing promise. If the Commonwealth seeks to avoid performance on the ground that the defendant has not lived up to the terms of the agreement, then the prosecutor bears the burden of proof on this issue. *See Doe v. District Attorney for Plymouth Dist.*, 29 Mass. App. Ct. 671, 677 n.6 (1991). In the usual course of events, all the defendant need do to fulfill his or her obligation under a plea agreement is to offer a guilty plea. However, the right to enforce a plea agreement may arise beforehand, if the defendant has relied to his or her detriment on a prosecutor's promise. *See id.* at 674 ("concerns about fairness which underlie the requirement that the government abide by its agreements are solidly engaged once an accused person has relied to his detriment upon a plea agreement, even if that occurs before entry of a guilty plea"); *cf. Blaikie v. Dist. Att'y for Suffolk County*, 375 Mass. 613, 618 (1978) (specific

performance is in no sense mandated where no guilty plea has been entered, and the defendant's position has not been adversely affected).

3.A(4) Successive Tenders of Plea.

Neither Rule 12 nor G.L. c. 278, § 18 establish how many times a defendant may tender a defense capped plea. As the Supreme Judicial Court held in *Charbonneau v. Presiding Justice of the Holyoke Dist. Ct.*, “a defendant’s right to tender a defendant-capped plea at trial is an essential part of the fairness calculus in the guilty plea process.” 473 Mass. 515, 521-22 (2016). An individual judge’s discretion to accept or reject a plea is not the same as the court’s exercise of its discretion to establish trial management policies that impair a defendant’s statutory rights. *Id.* at 522. Both G.L. c. 278, § 18, ¶ 1 and Mass. R. Crim. P. 12(c)(4)(A) allow a defendant-capped plea without any restriction on timing. *Charbonneau*, 473 Mass. at 519. The Legislature created this procedure at the same time it eliminated the two-tier trial system as an “appropriate counterbalance” to the elimination of a risk-free first trial. *Id.* at 520.

3.A(5) Lobby Conferences.

“Lobby conference” is the term used when counsel meets with the judge, usually to discuss possible plea disposition of the case. Rule 12 indicates that the judge may participate in plea discussions at the request of one or both of the parties. Mass. R. Crim. P. 12(b)(2).

Rule 12 requires that lobby conferences be held on the record. Mass. R. Crim. P. 12(b)(2). Even prior to the amendment of Rule 12 in May 2015 including this provision, the Supreme Judicial Court had repeatedly emphasized the importance of holding lobby conferences on the record. *Murphy v. Boston Herald, Inc.*, 449 Mass. 42, 57, n. 15 (2007) (recording lobby conferences prevents unnecessary problems and unfortunate consequences); *Commonwealth v. Serino*, 436 Mass. 408, 412, n. 2 (2002) (recommending that unrecorded lobby conferences be avoided); *Commonwealth v. Fanelli*, 412 Mass. 497, 501 (1992) (the better practice is to record lobby conferences, and provide a copy of the recording to the defendant on request, so that the defendant may know what was said). It is most practical to hold lobby conferences at sidebar to ensure recording.

3.B Plea Colloquies

The judge shall not accept a plea of guilty or nolo contendere or admission to sufficient facts without first determining that it is made voluntarily with an understanding of the nature of the charge and the consequences of the plea or admission. Mass. R. Crim. P. 12(a)(3).

The responsibility for conducting a meaningful colloquy with the defendant lies with the judge. This requires “a continuing effort on the part of trial judges, with the help of counsel, so to direct their questions *as to make them a real probe of the defendant's mind*. . . . It is not to become a ‘litany’ but is to attempt a live evaluation of whether the plea has been sufficiently meditated by the defendant with guidance of counsel, and whether it is not being extracted from the defendant under undue pressure.” *Commonwealth v. Fernandes*, 390 Mass. 714, 716 (1984) (quoting *Commonwealth v. Foster*, 368 Mass. 100, 107 (1975)) (emphasis added). The colloquy should include an inquiry into any mental illness from which the defendant may be suffering, and whether the defendant is under the influence of alcohol or drugs. *See Commonwealth v. Correa*, 43 Mass. App. Ct. 714, 717-18 (1997).

Due process requires that a plea of guilty be accepted only where “the contemporaneous record contains an affirmative showing that the defendant's plea was intelligently and voluntarily made.” *Commonwealth v. Scott*, 467 Mass. 336, 345 (2014) (citing *Commonwealth v. Furr*, 454 Mass. 101, 106 (2009) (citing *Boykin v. Alabama*, 395 U.S. 238 (1969); *Foster*, 368 Mass. at 102)).

“[W]hat is wanted from [a plea] colloquy is the basic assurances that the defendant, represented by counsel, with whom he has consulted, is free of coercion or the like, understands the nature of the crime charged, knows the extent of his guilt, recognizes the basic penal consequences involved, and is aware that he can have a trial if he wants one.” *Commonwealth v. Charles*, 466 Mass. 63, 90 (2013) (citing *Commonwealth v. Nolan*, 19 Mass. App. Ct. 491, 498-99 (1985)) (footnotes omitted).

3.B(1) Required contents of colloquy

An adequate plea colloquy must determine that the plea is both intelligently and voluntarily made. For the plea to be *intelligent*, (1) the defendant must know the elements of the offense or admit to facts constituting that offense (this may be done in one of three ways — by

the judge explaining to the defendant the elements of the offense, by counsel's representation that he or she has done so, or by the defendant's stated admission to facts recited during the colloquy which constitute the unexplained elements); and (2) the defendant must understand the three constitutional rights that are being waived — the right to jury or bench trial, the right to confront one's accusers, and the privilege against self-incrimination. In determining whether a plea is *voluntary*, the judge should determine whether it is being extracted from the defendant under undue pressure from threats or inducements, whether the defendant is being treated for or is aware of any mental illness, and whether the defendant is under the influence of alcohol or drugs. *Commonwealth v. Correa*, 43 Mass. App. Ct. 714, 717-18 (1997).

3.B(1)(a) Intelligent Waiver

A guilty plea is intelligent if it is tendered with knowledge of the elements of the charges against the defendant and the procedural protections waived by entry of a guilty plea. *Commonwealth v. Scott*, 467 Mass. 336, 345 (2014) (citing *Commonwealth v. Duest*, 30 Mass. App. Ct. 623, 630-31 (1991)).

3B(1)(a)(1) Elements of the Crime(s)

The requirement that the defendant's plea be made intelligently may be met "(1) by the judge explaining to the defendant the elements of the crime; (2) by counsel's representation that [he] has explained to the defendant the elements he admits by his plea; or (3) by the defendant's stated admission to facts recited during the colloquy which constitute the unexplained elements." *Commonwealth v. Furr*, 454 Mass. 101, 107 (2009) (citing *Commonwealth v. Correa*, 43 Mass. App. Ct. 714, 717 (1997)); see *Henderson v. Morgan*, 426 U.S. 637, 646-47 (1976); *Commonwealth v. Colantoni*, 396 Mass. 672, 679 (1986).

The failure of the defendant to acknowledge all of the elements of the factual basis shall not preclude a judge from accepting a guilty plea. Mass. R. Crim. P. 12(c)(5).

3B(1)(a)(2) Sufficient Facts

A judge shall not accept a plea of guilty unless the judge is satisfied that there is a factual basis for the charge. Mass. R. Crim. P. 12(c)(5). A plea does not relieve the Commonwealth of its burden of proof, and if there is no factual basis for the crime charged, a fortiori, there can be

no valid plea. *Commonwealth v. Loring*, 463 Mass. 1012, 1013 (2012) (citing *Commonwealth v. DelVerde*, 398 Mass. 288, 297 (1986)); *see also Commonwealth v. Morrow*, 363 Mass. 601, 607-08 (1973) (a “plea of guilty is an admission of the facts charged”).

“The gravamen of a claim under *Henderson* is that the defendant was unaware of the facts he was impliedly admitting by his plea and that he did not intend to admit those facts. A showing that the defendant admitted the facts constituting the crime negates his claim, even if he is not aware that the facts he admitted are the elements of the crime.” *Commonwealth v. Furr*, 454 Mass. 101, 107 (2009) (citing *Henderson v. Morgan*, 426 U.S. 637, 680 (1976) (citing *Commonwealth v. McGuirk*, 376 Mass. 338, 347 (1978), *cert. denied*, 439 U.S. 1120 (1979))).

Upon a showing of cause the tender of the guilty plea and the acknowledgment of the factual basis of the charge may be made on the record at the bench. Mass. R. Crim. P. 12(c)(5)(A).

3.B(1)(a)(2)(a) Guilty plea based on joint venture

When a defendant pleads guilty based on a joint venture theory, a mere recitation of the facts of the crime is often insufficient to inform the defendant that an essential element of a joint venture is that “the defendant shared the principal’s intent to commit the crime or . . . had reached agreement with the principal to aid in its commission.” A guilty plea from a joint venturer cannot stand unless (1) the judge explains the requisite intent in the colloquy; or (2) counsel represents that he or she has done so; or (3) the defendant admits to facts that “necessarily demonstrate” the requisite intent; or (4) the requisite intent is self-evident from the title of the offense to which the defendant pleads (e.g., assault with intent to kill). *Commonwealth v. Argueta*, 73 Mass. App. Ct. 564 (2009).

3.B(1)(b) Voluntary Waiver

“A plea is voluntary if entered without coercion, duress, or improper inducements.” *Commonwealth v. Sherman*, 451 Mass. 332, 338 (2008) (citing *Commonwealth v. Berrios*, 447 Mass. 701, 708 (2006), *cert. denied*, 550 U.S. 907 (2007)). In a guilty plea colloquy, a judge must conduct “a real probe of the defendant's mind” to determine that the plea “is not being extracted from the defendant under undue pressure.” *Commonwealth v. Sherman*, 451 Mass.

332, 338 (2008) (citing *Commonwealth v. Foster*, 368 Mass. 100, 107 (1975); *Commonwealth v. Fernandes*, 390 Mass. 714, 719 (1984)).

“The question whether a defendant was subject to undue pressure to plead guilty must be considered in some manner on the record,” but “[n]o particular form of words need be used in the required inquiry of a defendant,” and the issue need not be raised directly. *Commonwealth v. Furr*, 454 Mass. 101, 110 (2009) (citing *Commonwealth v. Quinones*, 414 Mass. 423, 434 (1993)) (citations omitted). The judge should inquire specifically whether the defendant’s plea is the result of threats, coercion, or improper inducements. *Furr*, 454 Mass. at 110 (citing *Foster*, 368 Mass. at 107).

A guilty plea is voluntary so long as it is tendered free from coercion, duress, or improper inducements. *Commonwealth v. Scott*, 467 Mass. 336, 345 (2014) (citing *Commonwealth v. Duest*, 30 Mass. App. Ct. 623, 631 (1991)). Most cases in which a defendant seeks to vacate a guilty plea start with these principles and allege a facial defect in the plea procedure itself. *See, e.g., Furr*, 454 Mass. at 107, 110. However, a defendant’s guilty plea also may be vacated as involuntary because of external circumstances or information that later comes to light. *See, e.g., Commonwealth v. Conaghan*, 433 Mass. 105, 110 (2000) (new evidence raising question as to defendant’s mental competence at time of guilty plea was relevant to voluntariness of plea).

3.B(1)(b)(1) Right to Confront Witnesses

Massachusetts Rule of Criminal Procedure 12(c)(3)(A) requires the judge to inform the defendant on the record, in open court, of the right to confrontation of witnesses.

3.B(1)(b)(2) Right to be Presumed Innocent

Massachusetts Rule of Criminal Procedure 12(c)(3)(A) requires the judge to inform the defendant on the record of the right to be presumed innocent until proved guilty beyond a reasonable doubt. In 2004, Mass. R. Crim. P. 12(c)(3)(A) was amended to require an additional warning of rights be given to the defendant, concerning the right to be presumed innocent until proved guilty beyond a reasonable doubt. Although not constitutionally required, it is sound practice to include it. The Supreme Judicial Court has recommended its use in cases where the

defendant is willing to plead guilty but does not acknowledge all of the elements of the factual basis. See *Commonwealth v. Earl*, 393 Mass. 738, 742 (1985) (“when a judge concludes that he is satisfied that there is a factual basis for a charge to which a defendant is willing to plead guilty, but the defendant does not acknowledge all the elements of the factual basis, it would be better practice for the plea judge to advise the defendant that his guilty plea waives his right to be presumed innocent until proved guilty beyond a reasonable doubt”).

3.B(1)(b)(3) Privilege against Self Incrimination

Massachusetts Rule of Criminal Procedure 12(c)(3)(A) requires the judge to inform the defendant on the record of the privilege against self-incrimination.

3.B(1)(b)(4) Right to Jury or Bench Trial

Massachusetts Rule of Criminal Procedure 12(c)(3)(A)(i) and 12(d)(3)(A)(i) requires the judge to inform the defendant on the record, in open court, that by a plea of guilty or nolo contendere, or an admission to sufficient facts, the defendant waives the right to trial with or without a jury.

It has been recommended that the proper formulation for advising a defendant as to his waiver of a jury trial is that “by pleading guilty he [gives] up his right to a ‘trial with or without a jury.’ ” *Commonwealth v. Hamilton*, 3 Mass. App. Ct. 554, 557 n.4 (1975). This instruction will serve to emphasize that, upon acceptance of a guilty plea, no trial will be held and all that remains is the imposition of sentence.

The judge, however, is not required to include information about the difference between a jury trial and a bench trial. See *Commonwealth v. Gonsalves*, 57 Mass. App. Ct. 925 (2003). Nor must the colloquy include information about the loss of the opportunity to appeal issues, such as the court’s action in denying a suppression motion. See *Commonwealth v. Quinones*, 414 Mass. 423, 435 (1993); *Commonwealth v. Hamilton*, 3 Mass. App. Ct. 554, 558 n.6 (1975).

When a judge accepts the filing of a written jury waiver, that same judge should also conduct the required colloquy at the same time. Both the written waiver and the giving of the colloquy should be docketed to avoid later uncertainty. The better practice is for the trial judge to conduct a jury waiver colloquy even if it is duplicative of action taken at the pretrial hearing.

3.B(2) Alien Warnings

3.B(2)(a) Alien Warning pursuant to G.L. c. 278, § 29D

The court shall not accept a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts from any defendant in a criminal proceeding unless the court advises the defendant of three potential consequences for non-citizens. “If you are not a citizen of the United States, you are hereby advised that the acceptance by this court of your plea of guilty, plea of nolo contendere, or admission to sufficient facts may have consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.” G.L. c. 278, § 29D, and Mass. R. Crim.P. 12(c)(3)(A)(iii)(a) & 12(d)(3)(A)(iii)(a). The statute is not satisfied by a warning of generic potential naturalization consequences. *Commonwealth v. Soto*, 431 Mass. 340 (2000).

If the court fails to provide this alien warning, and the defendant later shows that his plea may have or has had one of the enumerated consequences, upon the defendant’s motion the court shall vacate the judgment and permit the defendant to withdraw his plea. G.L. c. 278, §29D. The judge may not ask the defendant about the defendant’s immigration or citizenship status. *Id.*

3.B(2)(b) Alien Warning Pursuant to Rule 12

Massachusetts Rule of Criminal Procedure 12(c)(3)(A)(iii)(b) and 12(d)(3)(A)(iii)(b) was amended in 2015 to include the requirement of a second alien warning. The court must also advise the defendant “that, if the offense to which the defendant is pleading guilty or admitting to sufficient facts is under federal law one that presumptively mandates removal from the United States and federal officials decide to seek removal, it is practically inevitable that this conviction would result in deportation, exclusion from admission, or denial of naturalization under the laws of the United States.”

“This additional warning recognizes that under federal immigration law there are a substantial number of crimes — including ‘all controlled substances convictions except for the most trivial of marijuana possession offenses,’ — the conviction for which make ‘deportation practically inevitable’ if federal officials seek the defendant’s removal.’ ” Mass. R. Crim. P. 12(c)(3)(A)(iii) Reporter’s Notes (2015) (citing *Padilla v. Kentucky*, 559 U.S. 365, 368 (2010); 8

U.S.C. § 1227(a)(2)(B)(i)); *see Commonwealth v. DeJesus*, 468 Mass. 174, 181 & n.5 (2014); *see also Moncrieffe v. Holder*, 133 S. Ct. 1678, 1682 (2013).

3.B(2)(c) Required colloquy and alien warnings cannot be done in writing.

The required elements of a colloquy, including alien warnings, must be done orally in open court. This obligation is not satisfied by the written information on the “Tender of Plea” form, coupled with a general reference to them in an oral colloquy. *Commonwealth v. Hilaire*, 437 Mass. 809 (2002).

3.B(2)(d) Alien warnings and advice of counsel

“This non citizen warning is not meant to displace the critical role of counsel in providing more particular advice concerning the immigration consequences of a particular plea.” Mass. R. Crim. P. 12(c)(3)(A)(iii) Reporter’s Notes (2015). “Quite the contrary, the warning is meant to trigger that advice if, under circumstances best known by counsel, a defendant is risking serious immigration consequences by pleading guilty or admitting to sufficient facts.” *Id.* (citing *Padilla v. Kentucky*, 559 U.S. 365, 368-69 (2010); *Commonwealth v. Clarke*, 460 Mass. 30, 45-46, 48-49 & n.20 (2011), *partially abrogated on other grounds*, *Chaidez v. United States*, 133 S. Ct. 1103 (2013); *Commonwealth v. DeJesus*, 468 Mass. 174, 182 (2010)).

3.B(3) Maximum Sentence.

Pursuant to Mass. R. Crim. P. 12(c)(3)(A)(ii) and 12(d)(3)(A)(ii), the defendant is to be informed of the sentencing consequences of a conviction based upon the tender of a plea or admission. Rule 12(c)(3)(A)(ii) and 12(d)(3)(A)(ii) require the judge to inform the defendant of the maximum possible sentence on the charge. The judge should inform the defendant of the maximum sentence of each offense to which the defendant is offering a plea or admission. In some circumstances, the maximum sentence will depend on whether the defendant has previously been convicted. The judge must take this possibility into account. Mass. R. Crim. P. 12(c)(3)(A)(ii)(a). General Laws c. 279, § 25, which mandates the maximum sentence for a felony defendant who has been previously convicted of two felonies and sentenced to more than

three years on each, is an example of that type of provision contemplated by the “second offense” language of Rule 12(c)(3)(B).

Colloquy must explain maximum sentence where straight probation imposed. A plea colloquy that will result in a sentence of straight probation must include notice to the defendant of the maximum sentence (and any minimum mandatory sentence) for which the defendant is at risk if he or she violates the terms of the straight probation. *Commonwealth v. Rodriguez*, 52 Mass. App. Ct. 572, 576-78 (2001).

If the judge imposes a sentence of straight probation (one without a concomitant suspended term), the judge must inform the defendant of the maximum term, and any mandatory minimum term, that could be imposed if probation is revoked. *See Commonwealth v. Rodriguez*, 52 Mass. App. Ct. 572 (2001). In 2004, this subsection was amended to eliminate the requirement that the judge inform the defendant of the maximum sentence possible if the defendant received consecutive sentences. *See United States v. Kikuyama*, 109 F.3d 536 (9th Cir. 1997) (where it is not mandatory to impose consecutive sentences, defendant need not be informed of that possibility in order to enter a knowing and intelligent guilty plea); *United States v. Hamilton*, 568 F.2d 1302 (9th Cir.) (the possibility of consecutive sentences was implicit in the separate explanation of the possible sentence on each charge), *cert. denied*, 436 U.S. 934 (1978).

3.B(4) Mandatory Minimums.

Massachusetts Rule of Criminal Procedure 12(c)(3)(B) requires that the judge inform the defendant on the record, in open court, of the mandatory minimum sentence, if any, on the charge.

3.B(5) Sentencing Consequences.

The failure to inform the defendant of the sentencing consequences of a plea may result in the conviction being set aside because the plea was not a knowing and intelligent waiver. *E.g., Commonwealth v. Rodriguez*, 52 Mass. App. Ct. 572 (2001) (failure to inform the defendant of the maximum sentence and mandatory minimum sentence upon revocation of probation).

However, “not every omission of a particular from the protocol of the rule . . . entitles a defendant at some later stage to negate his plea and claim a trial.” *Commonwealth v. Nolan*, 19 Mass. App. Ct. 491, 494 (1984); *see, e.g., Commonwealth v. Cavanaugh*, 12 Mass. App. Ct. 543, 545-46 (1981) (where defendant received the sentence recommended by the prosecutor, the judge’s failure to inform him of the maximum possible sentence was harmless beyond a reasonable doubt).

Warnings on Sex Offender Registration statute required. General Laws c. 6, § 178E(d) provides that any court which accepts a plea for a sex offense shall inform the sex offender prior to acceptance and require the sex offender to acknowledge in writing that such plea may result in such sex offender being subject to the provisions of the sex offender registration statute. The statute also provides that any “failure to so inform the sex offender shall not be grounds to vacate or invalidate the plea.”

A 2004 amendment incorporated into Mass. R. Crim. P. 12(c)(3)(B) the requirement of G.L. c. 6, § 178E(d), that a court accepting a plea for a sex offense inform the defendant that the plea may result in the defendant's being subject to the provisions of the sex offender registration statute. The statute states that failure to provide this information shall not be grounds to vacate or invalidate the plea, and the inclusion of this requirement in Rule 12(c)(3)(B) does not enlarge the grounds on which a defendant can invalidate a plea after the fact.

3.B(5)(1) Sexually Dangerous Persons

If the defendant is subject to commitment as a sexually dangerous person, *see* G.L. c. 123A, the judge must include notice of that possibility prior to accepting the plea or admission. Since a 2004 amendment to G.L. c. 123A, § 12 makes a defendant subject to commitment as a sexually dangerous person despite the nature of the offense to which the defendant is pleading guilty, so long as the defendant has been convicted any time in the past of a designated sex offense, a warning of the possibility of commitment under c. 123A should be included as a matter of routine unless it is clear from the defendant's prior record that it is not relevant.

Defendant subject to commitment as a sexually dangerous person regardless of nature of offense to which defendant is pleading guilty. Regardless of the current nature of the offense

to which the defendant is entering a plea, a prior conviction (or adjudication as a juvenile or youthful offender) for a sexual offense will trigger the statute and require a warning. G.L. c. 123A, § 2. The statute anticipates that a petition for classification as a sexually dangerous person will originate while the person is incarcerated. G.L. c. 123A, § 12(a). If no incarceration is anticipated, the statute generally will not be implicated. An exception is if a defendant is placed on probation, and then found in violation and resentenced to the house of correction, then the defendant is subject to the petition.

Massachusetts Rule of Criminal Procedure 12(c)(3)(B) requires that the judge inform the defendant on the record, in open court where appropriate, of any different or additional punishment based upon subsequent offense or sexually dangerous persons provisions of the General Laws, if applicable.

3.B(6) Collateral Consequences

Colloquy need not warn of collateral consequences. Absent a statute or rule, a plea colloquy need not warn the defendant of collateral consequences, including effects on parole, immigration (apart from the alien warnings required by G.L. c. 278, § 29D, and Mass. R. Crim P. 12, future sentencing enhancements, driver's license, firearms license, sex offender registration, or civil litigation. *See, e.g., Rodriguez*, 52 Mass. App. Ct. at 578. This is true even if the consequence is inevitable. *Commonwealth v. Fraire*, 55 Mass. App. Ct. 916, 918 (2002) (consequence is collateral not because it is indeterminate but because it is “handed down by a body entirely separate” from sentencing court).

While there are consequences beyond those enumerated in Mass. R. Crim. P. 12(c)(3)(B) that might influence a defendant's decision to plead guilty, if they are collateral, in the sense of being contingent upon some future event or subject to discretion or under the control of the federal government or that of another state or state agency, they need not be incorporated into the plea colloquy. For example, ordinary parole consequences need not be part of the judge's warnings, *see Commonwealth v. Santiago*, 394 Mass. 25, 30 (1985), nor is ineligibility to receive good time deductions from a sentence being served after conviction of certain crimes, *see Commonwealth v. Brown*, 6 Mass. App. Ct. 844 (1978) (rescript).

3.B(7) Filing

If one or more charges are to be filed after a guilty finding, Mass. R. Crim. P. 28(e) requires that additional information be given to the defendant. The court must give the defendant, on the record in open court, three advisories: (i) that the defendant has a right to request sentencing on any or all filed cases at any time; (ii) that subject to the imposed time limit the prosecutor may request that the case be removed from the file and sentence imposed if a related conviction or sentence is reversed or vacated or upon the establishment by a preponderance of the evidenced either that the defendant committed a new criminal offense or that an event occurred on which the continued filing of the case was expressly made contingent by the court; and (iii) that if the case is removed from the file the defendant may be sentenced on the case. Mass. R. Crim. P. 28(e).

3.C ALFORD PLEAS

There are two constitutionally permissible ways to establish a defendant's guilt without a trial. *Commonwealth v. Nikas*, 431 Mass. 453, 455 (2000) (citing *Commonwealth v. McGuirk*, 376 Mass. 338, 343 (1978), *cert. denied*, 439 U.S. 1120 (1999)). A defendant may admit his "guilt in open court." *Id.* (citing *Commonwealth v. Robbins*, 431 Mass. 442 (2000)). Alternatively, a defendant may make a plea of guilty accompanied by a claim of innocence in accordance with the standards of *North Carolina v. Alford*, 400 U.S. 25 (1970). *Id.* (citing *McGuirk*, 376 Mass. at 343).

North Carolina v. Alford, 400 U.S. 25 (1970), establishes that the United States Constitution does not prohibit the court from accepting a guilty plea from a defendant who nevertheless asserts his or her innocence. Under *Alford*, a defendant need not admit his guilt to make a valid guilty plea. *Commonwealth v. Nikas*, 431 Mass. 453, 455 (2000). "An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *Nikas*, 431 Mass. at 455 (citing *Alford*, 400 U.S. at 37); *see Huot v. Commonwealth*, 363 Mass. 91, 95 n.4 (1973) (quoting *Alford*, 400 U.S. at 37).

3.C(1) An *Alford* plea must be supported by a strong factual basis.

“Under *Alford*, a defendant who professes innocence may nevertheless plead guilty and ‘voluntarily, knowingly and understandingly consent to the imposition of a prison sentence,’ if the State can demonstrate a ‘strong factual basis’ for the plea.” *Commonwealth v. Gendraw*, 55 Mass. App. Ct. 677, 684 (2002) (citing *Commonwealth v. DelVerde*, 398 Mass 288, 297(1986) (quoting *North Carolina v. Alford*, 400 U.S. 25, 38 (1970))). If a factual basis for such a plea exists, it is only fair to allow a defendant who is aware of the law, the facts, and the consequences of his plea, to attempt to reduce the severity of his or her punishment by pleading guilty. See *Commonwealth v. Hubbard*, 371 Mass 160, 171 (1976). The defendant is free to weigh the strength of the Commonwealth's evidence and on this basis to waive the right to trial. If the waiver is voluntary and intelligent it should be upheld.

3.C(2) The judge may refuse to accept an *Alford* plea.

Despite the fact that there is a constitutional right simultaneously to plead guilty and to protest innocence, “there is no constitutional right to have the plea accepted.” *Commonwealth v. Gendraw*, 55 Mass. App. Ct. 677, 684 (2002) (citing *Commonwealth v. Lawrence*, 404 Mass. 378, 389 (1989) (quoting *Commonwealth v. Dilone*, 385 Mass. 281, 285 (1982))). A judge is afforded wide discretion in determining whether to accept a guilty plea. *Commonwealth v. Watson*, 393 Mass. 297, 301 (1984). “The fact that [a] judge has a practice of not accepting an *Alford* plea . . . , while other judges might have accepted such a plea, provides the defendant with no appellate issue.” *Gendraw*, 55 Mass. App. Ct. at 684 (citing *Dilone*, 385 Mass. at 285); see *Lawrence*, 404 Mass. at 389.

Rule 12 codifies the judicial discretion that exists at common law to decide whether to accept an *Alford* Plea. “A defendant may plead not guilty, or guilty, *or with the consent of the judge, nolo contendere*, to any crime with which the defendant has been charged and over which the court has jurisdiction.” Mass. R. Crim. P. 12(a)(1) (emphasis added).

3.C(3) *Alford* Pleas and Mental Illness

Alford Pleas can arise in the context of a defendant who claims to have been suffering from mental illness at the time of the alleged crime. The defendant may wish to plead guilty rather than elect a trial and assert a defense of not guilty by reason of mental disease or defect.

In order to enter a valid guilty plea, the defendant must be competent. *See Commonwealth v. Robbins*, 431 Mass. 442 (2000) (discussing standard for determining competency to offer plea or to stand trial); *Commonwealth v. Hubbard*, 371 Mass. 160, 170-72 (1976) (defendant's claim of amnesia did not render him incompetent to tender an *Alford* plea); *Commonwealth v. Vailes*, 360 Mass. 522 (1971) (setting the standard for the determination of competency to stand trial). Under both the federal and state constitutions, the test of competence to plead is the same as that for standing trial. *See Godinez v. Moran*, 509 US 389 (1993); *Commonwealth v. Blackstone*, 19 Mass. App. Ct. 209 (1985). The standard for determining competency to stand trial is “whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceedings against him.” *Commonwealth v. Russin*, 420 Mass. 309, 317 (1995) (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)). The substituted judgment doctrine, by which the court appoints a guardian to act, is not an appropriate vehicle for an incompetent defendant who offers to plead guilty. *See Commonwealth v. Del Verde*, 398 Mass 288 (1986).

The record should establish that the defendant understands the consequences and ramification of his plea, and has had the opportunity to consult with his lawyer. *See Commonwealth v. Claudio*, 83 Mass. App. Ct. 1108 (2013). Representations by the defendant and defendant's attorney on the record regarding current medication of a mental condition can assist in demonstrating that the defendant understands the consequences of the plea. *Id.*

3.C(4) Alford Pleas and Intoxication

Alford pleas may also arise when a defendant claims intoxication at the time of the alleged criminal offense. “A defendant's mental condition and any effects of the consumption of drugs, including alcohol, may be considered whenever the Commonwealth has the burden of proving the defendant's intent or the defendant's knowledge.” *Commonwealth v. Sires*, 413 Mass. 292, 299 (1992) (citing *Commonwealth v. Sama*, 411 Mass. 293, 297 (1991)). The defendant offering an *Alford* plea may admit a strong factual basis for the crime, and choose to plead, without admitting to facts he does not recall due to intoxication.

3.D Acceptance or Rejection of Plea Agreement

Rule 12(d)(4) requires that the judge accept or reject a plea agreement prior to accepting a guilty plea. If the judge accepts the plea or admission, the judge then imposes sentence under Rule 12(c)(6) or 12(d)(6). After acceptance of a plea of guilty or nolo contendere or an admission, the judge may proceed with sentencing. Mass. R. Crim. P. 12 (c)(5)(c).

Chapter 4: SENTENCING AFTER VERDICT

4.A Speedy Sentencing

After a verdict, the defendant shall have the right to be sentenced without unreasonable delay. Mass. R. Crim. P. 28(b). Pending sentence, the court may commit the defendant or continue or alter the bail as provided by law. *Id.* The prosecutor is required to move for sentencing within seven days after the verdict. G.L. c. 279, § 3A. It is generally assumed there is a constitutional right to speedy sentencing under either the Sixth Amendment or the Due Process Clause of the United States Constitution and under Article 11 of the Massachusetts Declaration of Rights. District Court Department of the Trial Court, *Jury Trial Manual for Criminal Offenses Tried in the District Court* § 2.90 (1987) (citing *Pollard v. United States*, 352 U.S. 354, 361-62 (1957); *Commonwealth v. McInerney*, 380 Mass. 59, 63-66 (1980); *Katz v. Commonwealth*, 378 Mass. 305, 314-15 (1979)).

4.B Bench Trials

Because a judge sitting jury-waived is permitted to “deliberate” during the course of the trial, the judge may immediately announce his or her finding at the end of the trial without recessing to “consider” the evidence. District Court Department of the Trial Court, *Jury Trial Manual for Criminal Offenses Tried in the District Court* § 2.86 (1987) (citing *United States v. Systems Architects*, 757 F.2d 373, 376 (1st Cir.), *cert. denied*, 474 U.S. 847 (1985)).

4.C Jury Trials

The Court should ensure the verdict is recorded and discharge the jury prior to sentencing the defendant.

4.D Allocution

4.D(1) Defendant's Allocution

Before imposing sentence the court shall afford the defendant or his counsel an opportunity to speak on behalf of the defendant and to present any information in mitigation of punishment. Although there is no constitutional or other right to allocution, this opportunity has traditionally been afforded the defendant at common law and may have therapeutic value for the defendant as well as potential for mitigation. See Mass. R. Crim. P. 28(b) Reporter's Notes (citing *Commonwealth v. Curry*, 6 Mass. App. Ct. 928, 977 (1978); *Jeffries v. Commonwealth*, 94 Mass. 145, 153 (1866); 8A J. Moore, Federal Practice ¶ 32.05 (1978 rev.). "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." See *Green v. United States*, 365 U.S. 301, 304 (1961). The court is only required to afford either the defendant or defense counsel an opportunity to speak at sentencing. Mass. R. Crim. P. 28(b).

4.D(2) Hearing from the Prosecution

The prosecutor should also have an opportunity to address the court and to offer a sentencing recommendation. District Court Department of the Trial Court, *Jury Trial Manual for Criminal Offenses Tried in the District Court* § 2.90 (1987) (citing *ABA Standards for Criminal Justice, Sentencing Alternatives and Procedures* § 18-6.3(c) (2d ed. 1980)).

4.D(3) Victim's Rights at Sentencing

General Laws c. 258B and G.L. c. 279, § 4B establish specified rights for victims of crimes. The court is required, before sentencing a defendant, to allow a victim who wishes to make an oral statement the opportunity to do so in the presence of the defendant. G.L. c. 258B. If the victim prefers to make a written statement, the district attorney must file it with the court. If the victim is unable to make such a statement because of age or other incapacity, notice and the opportunity for allocution must be given the victim's attorney or a designated family member.

The defendant may inspect any written statement and, if the court relies on the victim's oral or written statement in sentencing, be afforded an opportunity for rebuttal. G.L. c. 279, § 4B.

4.C. SENTENCING AFTER NOT GUILTY BY REASON OF INSANITY

In *Commonwealth v. Blaisdell*, 372 Mass. 753 (1977), the Supreme Judicial Court outlines the procedure for the insanity defense in Massachusetts, and the *Blaisdell* opinion has been codified as Mass. R. Crim. P. 14. In *Commonwealth v. McHoul*, 352 Mass. 544 (1967), the Supreme Judicial Court sets the standard for the insanity defense in Massachusetts.

The requirements for commitment to any facility (including Bridgewater State Hospital) are that the Commonwealth show beyond a reasonable doubt the following:

1. Mental Illness

As required by G.L. c. 123, § 2, the Department of Mental Health has defined mental illness for the purpose of involuntary commitment as a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life, but shall not include alcoholism as defined in G.L. c. 123, § 35. 104 C.M.R. 27.05.

2. Likelihood of Serious Harm

a. A substantial risk of physical harm to the person himself as manifested by evidence of, threats of, or attempts at, suicide or serious bodily harm; **or**

b. A substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them; **or**

c. A very substantial risk of physical impairment or injury to the person himself as manifested by evidence that such person's judgment is so affected that he is unable to protect himself in the community and that reasonable provision for his protection is not available in the community

3. No Less Restrictive Alternative to Hospitalization

By its terms, G.L. c. 123, § 1 requires proof that there is no less restrictive alternative to hospitalization in the third subsection of the definition of likelihood of serious harm. However, the Supreme Judicial Court made this a requirement regardless of what category of serious harm

upon which the Commonwealth relies. *Commonwealth v. Nassar*, 380 Mass. 908, 917-918 (1988).

The additional requirements for commitment to Bridgewater State Hospital are that the petitioner must show beyond a reasonable doubt that:

1. The person is male and is not a proper subject for a commitment to a Department of Mental Health facility.
2. Failure to hospitalize the person in strict security would create a likelihood of serious harm.

The commitment hearing must commence within 14 days after the petition is filed or the patient must be discharged. G.L. c. 123, § 7(c); *Hashimi v. Kalil*, 388 Mass. 607, 609 (1983). The judge's decision on commitment must be rendered within ten days. G.L. c. 123, § 8(c). The burden of proof for commitment to any facility is beyond a reasonable doubt. *Worcester State Hosp. v. Hagberg*, 374 Mass. 271, 276 (1978); contrast *In re G.P.*, 473 Mass. 112, 118-120 (2015) (standard for civil commitment for alcohol or substance use disorder is clear and convincing evidence). The first order of commitment of a person under this section shall be valid for six months and all subsequent commitments shall be valid for a period of one year.

“If a person is found incompetent to stand trial, the court shall send notice to the department of correction which shall compute the date of the expiration of the period of time equal to the time of imprisonment which the person would have had to serve prior to becoming eligible for parole *if he had been convicted of the most serious crime with which he was charged in court and sentenced to the maximum sentence he could have received, if so convicted.*” *Commonwealth v. Foss*, 437 Mass. 584, 586-87 (2002) (emphasis added). When the words “the most serious” are given their ordinary meaning and are used to modify the singular word “crime,” their import is clear. Furthermore, when the word “maximum” is used to modify the singular word “sentence,” the same result adheres. *Id.* The ordinary meaning of the words is that the Department of Correction must compute the period of time with reference to the single most serious crime charged, and the single maximum sentence allowable for that crime. *Id.* When assigned their ordinary meaning, the words “the most serious crime” and “the maximum sentence” yield a logical and workable result. *Id.*

A finding of not guilty by reason of insanity on some counts and guilty on other counts is not necessarily inconsistent; the court has no inherent authority to stay the execution of a

defendant's sentence until after the defendant is discharged from a mental hospital.

Commonwealth v. McLaughlin, 431 Mass. 506, 519 (2000).

A defendant who has been advised of and is found to understand the consequences of the refusal to pursue a lack of responsibility defense may not be required to assert that defense.

Commonwealth v. Federici, 427 Mass. 740, 744-45 (1998). Ineffective assistance of counsel has been found, however, based on a failure to pursue a defense of lack of criminal responsibility for reason of insanity. *Commonwealth v. Milton*, 49 Mass. App. 552, 560 (2000).

Chapter 5: INFORMATION TO CONSIDER IN SENTENCING AND DISPOSITION

“A sentencing judge is given great discretion in determining a proper sentence.”

Commonwealth v. Rodriguez, 461 Mass. 256, 259 (2012) (citing *Commonwealth v. Lykus*, 406 Mass. 135, 145 (1989)). In exercising this discretion to determine a just sentence, a judge must weigh various, often competing, considerations, including, but not limited to, the severity of the crime, the circumstances of the crime, the role of the defendant in the crime, the need for general deterrence (detering others from committing comparable crimes) and specific deterrence (detering the defendant from committing future crimes), the defendant's prior criminal record, the protection of the victim, the defendant's risk of recidivism, any mitigating factors, and the extent to which a particular sentence will increase or diminish the risk of recidivism. *Rodriguez*, 461 Mass. at 259 (citing *Commonwealth v. Donohue*, 452 Mass. 256, 264 (2008)).

Therefore, to impose a just sentence, a judge requires not only sound judgment, but information concerning the crimes of which the defendant stands convicted, the defendant's criminal and personal history, and the impact of the crimes on the victims. *Rodriguez*, 461 Mass. at 259.

5.A. Statutory requirements

Preliminarily, the judge should consider the minimum and maximum sentences permitted by statute. The standard complaint language should provide the range of sentences permissible for the crime. With the special and very rare exception of common-law crimes, such as

obstruction of justice, *see Commonwealth v. Triplett*, 426 Mass. 26, 28 (1997), and contempt of court, Mass. R. Crim. P. 43 & 44, the statute creating the crime will provide the maximum sentence. Many statutes also provide a minimum sentence. *See, e.g.*, G.L. c. 269, § 10(a) (minimum sentence of 18 months for unlawfully carrying a firearm). Some statutes have restrictions on probation or suspended sentences. *See, e.g.*, G.L. c. 90, § 24(1)(a)(1)(¶ 4) (for OUI-second, minimum sentence is 60 days; no probation or suspended sentence unless 30 days are served). It is vital that any sentence imposed be within the statutory confine. *See Commonwealth v. Selavka*, 469 Mass. 502, 508 (2014) (Commonwealth may change an illegal sentence).

5.B. Permissible factors

A trial judge “ ‘is permitted great latitude in sentencing, provided the sentence does not exceed statutory limits.’ ” *Commonwealth v. O’Connor*, 407 Mass. 663, 674 (1990) (quoting *Commonwealth v. Burke*, 392 Mass. 688, 694 (1984)). The law, therefore, vests tremendous discretion in the trial judge in setting a sentence. Even within that discretion, however, there are favored factors, permissible factors, and forbidden factors.

5.B(1) Criminal record

The defendant’s criminal record is a permissible sentencing consideration. *Commonwealth v. Molino*, 411 Mass. 149, 156 (1991); *Commonwealth v. Garofalo*, 46 Mass. App. Ct. 191, 194 (1999). Indeed, the extent of the defendant’s criminal record is generally recognized as the most important sentencing factor after the nature of the crime. A defendant without a criminal record may require less incapacitation and retribution and is therefore expected to be easier to deter and rehabilitate. By contrast, a defendant with an extensive criminal record may require more incapacitation and retribution and is harder to deter and rehabilitate. It is important to consider the similarity of prior criminal conduct to the instant crime and also to consider any trends shown by the criminal record.

5.B(2) Likelihood of recidivism

The defendant’s likelihood of recidivism is a classic sentencing consideration. *Commonwealth v. Cotter*, 415 Mass. 183, 187-88 (1993); *Commonwealth v. Coleman*, 390 Mass.

797, 805 (1984). Many factors go into a determination of the likelihood of recidivism, on a range from prior criminal behavior to current expressions of remorse.

5.B(3) Immigration consequences

Historically, a trial judge could not base a sentence on collateral consequences, such as immigration consequences. *Commonwealth v. Quispe*, 433 Mass. 508, 513 (2001). In 2013, the Supreme Judicial Court overruled that precedent and determined that a trial judge could consider immigration consequences in setting a sentence. *Commonwealth v. Marinho*, 464 Mass. 115, 128 n. 19 (2013). (The Court implied that other collateral consequences could not be considered. *Id.* Because immigration consequences are complex, however, a trial judge should not alter a sentence based on immigration consequences without fully understanding how those consequences work, both in law and in practice. Defense counsel should correctly advise a client of the immigration consequences of a criminal disposition. *Padilla v. Kentucky*, 559 U.S. 356 (2010).

5.B(4) Willingness to admit guilt

A trial judge “may not punish a defendant for the exercise of his constitutional right to have his guilt decided after a trial by jury.” *Commonwealth v. Banker*, 21 Mass. App. Ct. 976, 978 (1986); accord *Commonwealth v. Joseph*, 11 Mass. App. Ct. 879, 881, *rev. denied*, 384 Mass. 816 (1981). Similarly, “a judge may not punish a defendant for refusing to confess before sentencing.” *Commonwealth v. Mills*, 436 mass. 387, 400 (2002).

On the other hand, the judge may reduce the sentence because of the defendant’s contrition or willingness to accept responsibility. “The willingness of the defendant to admit guilt, for example, is a permissible sentencing consideration.” *Commonwealth v. Johnson*, 27 Mass. App. Ct. 746, 750-51, *rev. denied*, 406 Mass. 1101 (1989).

5.C. Impermissible factors

5.C(1) Race and other protected categories

It should be evident that no sentence may be based, either in aggravation or mitigation, on a defendant’s membership in a protected class, whether racial, sexual, religious, sexual

orientation, or otherwise. Even membership in non-protected classes (neighborhood, wealth, social status) should not be used except in extraordinary circumstances. A trial judge should refrain from making any statement that could be interpreted as relying on such membership.

5.C(2) Decision to go to trial or claim jury trial

As stated above, a trial judge “may not punish a defendant for the exercise of his constitutional right to have his guilt decided after a trial by jury.” *Commonwealth v. Banker*, 21 Mass. App. Ct. 976, 978 (1986); *accord Commonwealth v. Joseph*, 11 Mass. App. Ct. 879, 881, *rev. denied*, 384 Mass. 816 (1981).

5.C(3) Uncharged or unconvicted conduct

“A defendant cannot be punished for uncharged conduct, because such information is not ‘tested by the indictment and trial process.’ ” *Commonwealth v. Stickich*, 450 Mass. 449, 461 (2008) (quoting *Commonwealth v. Henriquez*, 56 Mass. App. Ct. 775, 779 (2002), *aff’d*, 440 Mass. 1015 (2003)); *accord Commonwealth v. Oquendo*, 83 Mass. App. Ct. 190, 196 (2013). A judge’s comments that suggest that a sentence may have been based on uncharged crimes will ordinarily result in resentencing before a different judge. *Commonwealth v. Henriquez*, 440 Mass. 1015, 1015-16 (2003).

The Supreme Judicial Court has stated, on occasion, that “if the uncharged conduct is relevant and the report of it ‘sufficiently reliable,’ the conduct may be considered at sentencing” to the extent it “bear[s] on ‘the defendant’s character and his amenability to rehabilitation.’ ” *Stickich*, 450 Mass. at 461-62 (quoting *Commonwealth v. Goodwin*, 414 Mass. 88, 93-94 (1993)).

5.C(4) Perjury at trial

Unlike in the federal system, a sentence in Massachusetts state court cannot be based on the judge’s belief that the defendant committed perjury. *Commonwealth v. McFadden*, 49 Mass. App. Ct. 441, 442 (2000); *Commonwealth v. Juzba*, 46 Mass. App. Ct. 319, 325 (judge said, “I just want to tell you why I’m imposing this sentence. . . . I found his testimony to be absolutely preposterous”), *rev. denied*, 429 Mass. 1105, *and rev. denied*, 430 Mass. 1104 (1999).

5.C(5) “Sending a Message” to the community or society

“A sentencing judge may not undertake to punish [a] defendant for any conduct other than that for which [he] stands convicted in the particular case.” *Commonwealth v. Howard*, 42 Mass. App. Ct. 322, 328 (1997) (citing *Commonwealth v. LeBlanc*, 370 Mass. 217, 221 (1976)). Criminal sentencing is not the proper venue for messages to the community or society at large. *See Commonwealth v. Howard*, 42 Mass. App. Ct. 322, 328 n.3 (1997) (citing *Beno v. State*, 581 N.E.2d 922, 924 (Ind. 1991) (where judge aggravated sentence to make an example of defendant to other drug dealers, court stated, “We do not believe . . . that a trial judge should be allowed to use the sentencing process as a method of sending a personal philosophical or political message. A trial judge’s desire to send a message is not a proper reason to aggravate a sentence”).

5.C(6) Personal and private beliefs or feelings

“A trial judge must be ever vigilant to make certain that his personal and private beliefs do not interfere with his judicial role and transform it from that of impartial arbiter.” *Commonwealth v. Mills*, 436 Mass. 387, 399-401 (2002) (citing *Commonwealth v. Haley*, 363 Mass. 513, 518 (1973)) (“an overspeaking judge is no well-tuned cymbal”); *Commonwealth v. White*, 48 Mass. App. Ct. 658, 663-64 (2000); *Commonwealth v. Lebron*, 23 Mass. App. Ct. 970, 972 (1987).

5.D Presentence Investigation Report

The court may request that the Probation Department conduct a presentence investigation and present a report to the court prior to sentencing. Mass. R. Crim. P. 12(e), Mass. R. Crim. P. 28(d)(1). The report must contain the defendant’s prior criminal and juvenile record of prosecution, excluding any cases in which the defendant was found not guilty. Mass. R. Crim. P. 28(d)(2). In addition the report shall include such other available information as may be helpful to the court in the disposition of the case. *Id.* Prior to the disposition the presentence report shall be made available to the parties, although the judge may, in extraordinary cases, redact certain portions of the report from disclosure. Mass. R. Crim. P. 28(d)(3).

Chapter 6: SENTENCING AFTER A VIOLATION OF PROBATION

A probationer has only a conditional liberty interest. *Commonwealth v. Wilcox*, 446 Mass. 61, 64 (2006) (citing *Commonwealth v. Olsen*, 405 Mass. 491, 493 (1989); G. L. c. 279, § 3). He or she must comply with “such conditions” as the sentencing judge “deems proper,” G.L. c. 276, § 7, regularly report to a probation officer or otherwise submit to court supervision, *see Commonwealth v. Taylor*, 428 Mass. 623, 626 (1999), and pay a monthly “probation fee,” G.L. c. 276, § 87A. *Wilcox*, 446 Mass at 64-65. A breach of a condition of probation constitutes a violation. *Id.* (citing *Rubera v. Commonwealth*, 371 Mass. 177, 180-81 (1976)).

If the probation officer receives information tending to show that the probationer has breached, the officer may “surrender” the probationer to the court. *Wilcox*, 446 Mass. at 65 (citing *Commonwealth v. Durling*, 407 Mass. 108, 111 (1990)). Inherent in a court’s power to grant probation is the power to revoke it. *Id.* (citing *Jake J. v. Commonwealth*, 433 Mass. 70, 77-78 (2000)). The judge determines whether a violation in fact occurred and, in the court’s discretion, whether the probationer’s conduct warrants imposition of the original suspended sentence, *see Commonwealth v. Holmgren*, 421 Mass. 224, 226, 228 (1995); *Commonwealth v. McGovern*, 183 Mass. 238, 240-41 (1903), or in the case of straight probation, imposition of a sentence. *Id.*

The probation violation proceeding is not a new criminal prosecution. *Wilcox*, 446 Mass. at 65 (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973); *Commonwealth v. Olsen*, 405 Mass. at 493). The Commonwealth has already met its burden of proving beyond a reasonable doubt the person's guilt on the underlying crime. *Id.* (citing *Holmgren*, 421 Mass. at 225-26). The probationer escaped total loss of liberty only as a result of the trial judge’s exercise of discretion. *Id.* (citing *Commonwealth v. Durling*, 407 Mass. 108, 115 (1990)).

At a probation violation proceeding, “a probationer need not be provided with the full panoply of constitutional protections applicable at a criminal trial.” *Wilcox*, 446 Mass. at 65 (citing *Durling*, 407 Mass. at 112). The finding of a violation is not by a jury but by a judge, and is based only on a preponderance of the evidence, not proof beyond a reasonable doubt. *Id.* at 65-66 (citing *Holmgren*, 421 Mass. at 226; *McGovern*, 183 Mass. at 240 (it is a “question of fact for the court . . . to determine . . . whether the [defendant] had violated” probation)).

6.A Rule 8 – Finding and Disposition:

6.A(1) Requirement of a prompt finding – Rule 8(a)

Upon completion of the presentation of evidence and closing arguments, Dist./Mun. Cts. R. Prob. Viol. 8(a) requires the court to *promptly* adjudicate the factual issue of whether a violation has occurred.

6.A(2) Finding of No Violation – Rule 8(b)

“If the court determines that probation has failed to prove that the probationer violated his/her conditions of probation, (as alleged in the Notice of Violation), the court shall expressly so find and the finding [of no violation] shall be entered on the record.”

6.A(3) Finding of violation – Rule 8(c)

If the court determines that probation has proved a violation OR if the probationer waives the hearing and admits to a violation and the court accepts the admission in accordance with Rule 6(g) the court shall expressly so find, and such finding of violation shall be entered on the record.

6.A(4) Finding of Violation; Written Findings of Fact

Please note: written findings stating the evidence relied upon are only required after a finding of violation in a contested proceeding. They are not required when a violation enters following an admission by the probationer.

6.A(5) The Dispositional Decision (Step 2 of the hearing) – Rule 8(d)

If the court finds that the probationer has violated one or more conditions of probation as alleged, the probation officer shall recommend to the court a disposition consistent with the dispositional options set forth in Rule 8(d). The probationer shall be permitted to present argument and evidence relevant to disposition and to propose dispositional terms. Rule 6(d).

6.A(6) Disposition after Finding of Violation

After the court has entered a finding that a violation of probation has occurred, the court may order any of the dispositions delineated in Rule 8(d), “as it deems appropriate.” The

language of Rule 8(d) has been constructed to reflect the mandate that “[t]he court shall proceed to determine disposition promptly following the entry of a finding of violation.” Continuances for disposition may be granted only for “good cause.” The practice of granting “continuances for disposition” is prohibited without good cause, and expressly delaying to await the outcome of an underlying new criminal charge (so-called “dispositional tracking”) does not constitute such good cause. Additionally, “general continuances” are expressly prohibited as a dispositional option by the terms of 8(d) (*i.e.*, we find a violation but take no action on disposition).

6.A(7) Factors to consider (re: Disposition)

In fashioning a disposition, following the entry of a finding of violation, the court “shall give appropriate weight” to the following:

- the recommendation of the Probation Department, including any Risk / Need assessment prepared by the Probation Department
- the recommendation of the probationer
- the recommendation of the District Attorney

As well as the following factors:

- public safety
- the seriousness of the crime of which the probationer was placed on probation
- the nature of the violation
- the occurrence of any previous violations
- the impact of the underlying crime on any person or community
- as well as any mitigating factors. Rule 8(d)

6.A(8) Disposition is strictly a matter of the court’s discretion.

Regarding the choice of disposition, two factors are essential: (1) disposition is a matter of the court’s discretion. *McHoul v. Commonwealth*, 365 Mass. 465, 469-70 (1974); *Commonwealth v. Durling*, 407 Mass. 108, 111 (1990); and (2) disposition is not a punishment

for the new crime, but rather relates to the underlying offense. *Commonwealth v. Odoardi*, 397 Mass. 28, 30 (1986). See Commentary to Rule 8.

6.A(9) Dispositional Options

Pursuant to Rule 8(d), there are four “exclusive” dispositional options available to the court:

1. Continuation of probation (same terms/same end date)
(Probationer “admonished” as the court may deem appropriate)
2. Termination of probation order
3. Modification of probationary conditions (modification may include the addition of “reasonable conditions and the extension of the duration of the probation order”; and
4. Revocation of probation.

6.A(10) Revocation of probation:

If the court determines that Option4/revocation is the appropriate disposition (after a finding of violation), there are several requirements to keep in mind.

- *If the court orders revocation*, it must state the reasons for revocation in writing. Rule 8(d)(iv)
- Upon revocation of a probation order, “any sentence that was imposed for the crime involved, the execution of which was suspended [*i.e.*, *a suspended sentence*], shall be ordered executed forthwith . . .”
- In circumstances where *no sentence was imposed* (and suspended) following a conviction [*i.e.*, “straight” probation], the probationer is subject to any sentence for the underlying crime that is provided by law. Rule 8(f)
- There is limited availability for a “stay of execution” in Rule 8(e) (pending an appeal or to attend to “personal matters”). *Commonwealth v. Holmgren*, 421 Mass. 224 (1995).

6.2 Rule 9 – Violation of conditions of a “continuance without a finding”:

The Rules also apply to those circumstances where the Probation Service alleges a violation of probationary conditions that were imposed together with a “continuance without a finding.” Rule 9(a).

Rule 9 makes clear that the violation procedures in cases involving continuances without a finding accompanied by probation conditions are the same as those in cases where a finding of guilty has been entered following a plea, admission, or trial.

6.2(A) Dispositional Options – Rule 9(b)

There are five dispositional options available following a finding of violation of probation conditions that were imposed together with a continuance without a finding:

- termination of probation and dismissal of the underlying criminal case
- continuation of continuance without a finding
- continuation of continuance without a finding with modification of conditions
- termination of continuance without a finding and — if a finding of sufficient facts was entered at the time the continuance without a finding was ordered — entry of a guilty finding
- termination of continuance without a finding; entry of guilty finding [if a finding of sufficient facts was entered at the time the continuance without a finding was ordered] and imposition of a sentence or other disposition as provided by law.

Chapter 7: POST CONVICTION

7.A. MOTIONS TO REVISE AND REVOKE

A defendant may move to revise and revoke a sentence within sixty days of sentencing or within sixty days of receipt of the rescript of an appellate court affirming the judgment. Mass. R. Crim. P. 29(a). Such a motion must be accompanied by an affidavit and a statement of records, or it is null and has no effect. *Commonwealth v. DeJesus*, 440 Mass. 147, 152 (2003). The court may also *sua sponte* initiate reconsideration of a sentence, provided that the judge does so within this time period. Mass. R. Crim. P. 29(a). These time limits are strictly applied, and the court

lacks jurisdiction if they are not met. *DeJesus*, 440 Mass. at 150-51; *Commonwealth v. Callahan*, 419 Mass. 306, 308 (1995).

Revision and revocation must be based on facts that existed at the time of sentencing. “[A] judge may not take into account conduct of the defendant that occurs subsequent to the original sentencing.” *Commonwealth v. Barclay*, 424 Mass. 377, 380 (1997); *accord DeJesus*, 440 Mass. at 152.

Prompt action on a motion to revise or revoke is important. A judge must “consider the motion to revise or revoke the sentence within a reasonable time after the motion is filed.” *DeJesus*, 440 Mass. at 151 n.7; *accord Barclay*, 424 Mass. at 380-81. Delay increases the chance that the court will inadvertently consider post-sentencing information. *Commonwealth v. Layne*, 386 Mass. 291, 295-96 (1982). Furthermore, a properly filed but unacted-upon Rule 29 motion will indefinitely stay the statute of limitations for federal habeas review. *Holmes v. Spencer*, 685 F.3d 51, 60 (1st Cir. 2012).

7.B. MOTIONS TO CORRECT UNLAWFUL SENTENCES

Under Mass. R. Crim. P. 30(a), a defendant may move to correct an illegal sentence at any time. The Commonwealth, on other hand, may move to correct an illegal sentence only within sixty days of sentencing. *Commonwealth v. Selavka*, 469 Mass. 502, 508 (2014). After sixty days, an illegal sentence is “final” under double jeopardy principles and may be disturbed only upon the motion of the defendant. *Id.* at 514. After that time period has passed, the sentence may not be increased, either on the motion of the Commonwealth or the court’s own motion, without the defendant’s permission.

7.C. REMAND AFTER APPEAL

Where a conviction or sentence has been vacated, resentencing is permitted to allow the sentencing judge to retain an appropriate sentencing scheme in light of the new set of convictions and sentencing choices. *See Commonwealth v. Kruah*, 47 Mass. App. Ct. 341, 348 (1999); *Commonwealth v. Clermy*, 37 Mass. App. Ct. 774, 779, *aff’d*, 421 Mass. 325 (1995); *cf. Commonwealth v. Simmons*, 448 Mass. 687, 699 (2007) (in sentencing on a previously filed conviction, the sentencing judge erred in failing to consider the original sentencing scheme”).

Resentencing, however, is restricted by double jeopardy. Any resentencing “would violate principles of double jeopardy [if it] increase[ed] the ‘aggregate punishment’ imposed under the original sentence.” *Commonwealth v. Cole*, 468 Mass. 294, 311 (2014). Where a defendant has already served both his committed sentences and probationary term, any resentencing would increase the aggregate punishment and thus is prohibited. *Gangi v. Mass. Parole Bd.*, 468 Mass. 323, 326 (2014); *Cole*, 468 Mass. at 311.

By contrast, resentencing is permissible where the defendant still has unserved sentences, whether committed or suspended, or an uncompleted term of probation. Although a judge may convert a committed sentence to a probationary term, *Commonwealth v. Cumming*, 466 Mass. 467, 473 (2013), a judge may not do so if the particular committed sentence has already been fully served. *Commonwealth v. Parrillo*, 468 Mass. 318, 321 (2014). The judge may also resentence to a probationary term or a suspended sentence. *Parrillo*, 468 Mass. at 321.

Although resentencing may not increase the aggregate punishment imposed at the original sentencing, the judge has the discretion to consider both favorable and unfavorable information about the defendant after the original sentencing. *Commonwealth v. White*, 436 Mass. 340, 343-45 (2002). “At resentencing, the judge may consider any information concerning the defendant’s conduct, good and bad, during the intervening time.” *Commonwealth v. Renderos*, 440 Mass. 422, 435 (2003). This is in sharp contrast to the procedures under Mass. R. Crim. P. 29.