COMMONWEALTH OF MASSACHUSETTS
The Superior Court

CRIMINAL SENTENCING IN THE SUPERIOR COURT
Best Practices for Individualized Evidence-Based Sentencing

Prepared by
Superior Court Working Group
on Sentencing Best Practices
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Table of Contents

Foreword

In October 2014, Supreme Judicial Court Chief Justice Ralph D. Gants directed the trial court departments with criminal jurisdiction to convene working groups to recommend protocols in their departments that incorporate best practices to ensure individualized, evidence-based sentences.[1] Noting that criminal sentences are intended not only to punish and deter, but also to provide offenders with the supervision and tools needed to maximize the chance of success upon release and minimize the likelihood of recidivism, Chief Justice Gants tasked the departments to become familiar with social science relating to recidivism reduction efforts.

Superior Court Chief Justice Judith Fabricant created a nineteen-member Working Group to consider and formulate best practices. The Working Group included eight Superior Court judges, three prosecutors, three criminal defense attorneys, representatives of the Probation Service, the President of the Massachusetts Bar Association, a police chief, and a criminal law professor. The Working Group began its work in December 2014, and over the course of twelve months, collected and evaluated data and information relating to effective approaches to criminal sentencing. These included numerous research studies and programs aimed at reducing recidivism, including publications from the National Center for State Courts; the Institute for Public Policy Studies at Vanderbilt University; the Pew Center on the States, a division of the Pew Charitable Trusts; the Justice Policy Institute; the Robina Institute of Criminal Law and Criminal Justice at the University of Minnesota Law School; the Congressional Research Service; the National Institute of Corrections (an arm of U.S. Department of Justice); and various scholarly articles from law review journals and correctional agencies. Specific to Massachusetts, the Working Group received presentations from the Massachusetts Sentencing Commission, the Office of the Commissioner of Probation, and the Robina Institute, and reviewed the Report of the Massachusetts Special Commission to Study the Criminal Justice System (January 2015), and the Pew-MacArthur Results First Initiative case study on Massachusetts sentencing and probation practices.

Subcommittees were formed to consider (1) best practice principles relating to the formulation of a Superior Court disposition, including identification of factors relevant to the imposition of a committed sentence, to alternatives to a committed sentence, and to supervision upon release following commitment; (2) best practice principles relating to probation, including use of a risk/assessment tool to determine the level of supervision, and to identify conditions of probation that have been shown to decrease recidivism; and (3) best practice principles relating to probation violations, to ensure that a probationer is held accountable in a timely and proportional manner.

Through the fall of 2015, the Working Group reviewed and considered best practice recommendations from each of its subcommittees and formulated a set of best practice principles. The principles are intended to assist a judge in exercising his or her sentencing

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[1] Ralph D. Gants, Chief Justice of the Mass. Supreme Judicial Court, Annual Address: State of the Judiciary (October 16, 2014) (transcript available at https://www.mass.gov/files/documents/2017/10/10/sjc-chief-justice-gants-state-of-judiciary-speech-2014_0.pdf).

discretion. To exercise that discretion in an appropriate manner, the judge must understand the purposes of sentencing, the empirically-based effect of sentences and probationary terms on recidivism, the types of probationary approaches that have proven successful in reducing recidivism and those shown to have little or no effect, and the value of holding offenders accountable in a timely way for violating probation.

The Working Group's Report on Best Practices sets out seventeen Best Practices Principles. Each principle is accompanied by a commentary section that explains the basis for and reasoning behind the principle, and in some cases, references studies, sources, decisional or statutory law that bears on the recommendation.

This report was updated in October of 2019 to reflect changes in the law brought about by An Act Relative to Criminal Justice Reform, St. 2018, c. 69, and by Massachusetts case-law developments since March of 2016.

Sentencing Best Practices Working Group
[as of March 2016 – updated statuses noted in parentheses]

Hon. Jeffrey A. Locke, Chair

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(May 11, 2019)

Hon. Janet L. Sanders

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Robert Harnais, Esquire
President, Massachusetts Bar Association
(2015–16)

Peter Elikann, Esquire

Larry R. Tipton, Esquire
Committee for Public Counsel Services

Eduardo Masferrer, Esquire

Dean A. Mazzone
Deputy Chief, Criminal Bureau
Office of the Attorney General

Brian S. Glenny
First Assistant District Attorney
Cape & Islands District Attorney's Office

Hon. Kenneth J. Fishman

Hon. John T. Lu

Hon. Kathe M. Tuttman

Hon. James R. Lemire
(Appeals Court, September 21, 2016)

Crispin Birnbaum
General Counsel, Probation Service
(retired, March 31, 2018)

Andrew Peck
Manager, Superior Court Probation Services
(Undersecretary for Criminal Justice,
Executive Office of Public Safety and
Security, February 4, 2019)

David Rossman
Professor of Law
Boston University School of Law

William G. Brooks, III
Chief of Police
Norwood Police Department

Mary-Alice Doyle
Deputy First Assistant District Attorney
Essex County District Attorney's Office

Hon. Judith Fabricant
Chief Justice (ex officio)

Introduction and Overview

Sentencing practices over the last quarter century have led to a dramatic increase in incarceration without reducing recidivism. The Federal government and many states, responding to cycles of violence and the drug epidemic of the last quarter century, enacted mandatory sentencing requirements and enhanced penalties for repeat offenders and those convicted of a broad array of crimes. The constraints of mandatory minimum sentences and concerns about the likelihood of parole often lead a judge to impose a state prison sentence with a one-day range between the minimum and maximum term, resulting in an offender serving the full sentence but then being released without supervision, without drug treatment and, often, without means. It comes as no surprise when the offender is arrested for the same conduct several months later. In fiscal year 2011, for 41.6% of all state prison sentences, including 49.4% of mandatory drug sentences, the difference between the minimum and maximum sentences was one day. MASS. SENTENCING COMM'N, SURVEY OF SENTENCING PRACTICES FY 2011, at 14 (May 2012). In 2012, 46% of prisoners released from the Department of Correction had no post-release supervision, MASS. DEP'T OF CORR., PRISON POPULATION TRENDS 2012, at 38 (May 2013), roughly twice the national average. PEW CHARITABLE TRS., MAX OUT: THE RISE IN PRISON INMATES RELEASED WITHOUT SUPERVISION, at 3 (June 2014).

The prison population in the United States has greatly increased as a result of these and other sentencing practices. In 2010, the number of people serving sentences in federal, state, and local correctional facilities exceeded 2.2 million. L. E. Glaze, *Correctional Populations in the United States, 2010*, BUREAU OF JUST. STAT. BULL. (U.S. Dep't of Justice, Wash., D.C.), December 2011, at 7. Indeed, although the United States accounts for only five percent of the world's population, it is home to 25% of its prisoners. INIMAI CHETTIAR, *Executive Summary* of OLIVER ROEDER ET AL., N.Y. UNIV. SCH. OF LAW, BRENNAN CTR. FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE? at 3 (2015). Nearly one in every hundred American adults was, as of 2015, in jail or prison – a rate nine to ten times that of many European countries. JOSEPH E. STIGLITZ, *Foreword* to OLIVER ROEDER ET AL., N.Y. UNIV. SCH. OF LAW, BRENNAN CTR. FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE? at 1 (2015). More locally, the rate of incarceration in Massachusetts, as of 2018, was 324 inmates in prisons or jails for every 100,000 residents – the lowest incarceration rate of any state. PRISON POLICY INITIATIVE, STATES OF INCARCERATION: THE GLOBAL CONTEXT 2018, https://www.prisonpolicy.org/global/2018.html (last visited Oct. 10, 2019). While Massachusetts incarcerates individuals at a lower rate than any other state, it ranks ninth in the world, incarcerating at a rate more than twice that of the United Kingdom or Portugal, and more than three times that of Canada or France. *Id.*

Concern has been expressed about racial disparity in criminal sentencing — i.e., when the proportion of a racial or ethnic group within the control of the criminal justice system is greater than the proportion of that group in the general population. SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM, at 1 (2008). As of 2010, on a national level, African Americans made up 13% of the population, but constituted 40% of inmates in prisons and jails. LEAH SAKALA, PRISON POLICY INITIATIVE, BREAKING DOWN MASS INCARCERATION IN THE 2010 CENSUS: STATE-BY-STATE INCARCERATION RATES BY RACE/ETHNICITY, May 28, 2014, http://www.prisonpolicy.org/reports/rates.html. Hispanics constituted 16% of the population, but 19% of inmates. *Id.* In Massachusetts, also as of 2010,

African Americans made up 7% of the state's population, but 26% of its inmates. *Id.*, fig. at http://www.prisonpolicy.org/graphs/2010percent/MA_Blacks_2010.html. Hispanics constituted 10% of the state's population, but 24% of its inmates. SAKALA, *supra*, fig. at http://www.prisonpolicy.org/graphs/2010percent/MA_Hispanics_2010.html. While no conclusions may be drawn based simply on these statistics, the disproportionate impact of sentencing policies on minority populations warrants further study.

Nationwide, the cost of incarceration grew over 500% between 1982 and 2007, when it reached $50 billion. Paul L. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 764 n.212 (2013). In Massachusetts, a 2011 study concluded that sentencing practices, if continued at then-current rates, would require an increase of 10,000 additional beds by 2020, with capital costs estimated at $1.3 to $2.3 billion. MASS. DIV. OF CAPITAL ASSET MGMT., THE CORRECTIONS MASTER PLAN: THE FINAL REPORT 31 (December 2011). The annual operational costs will be similarly staggering. *Id.*

Motivated by a concern about the increasing prison population, the escalating costs of incarceration, and the long-term impact of extended jail or prison terms on offenders and their families, a broad cross-section of elected officials, criminal justice professionals and social scientists have asked, "Is this the most effective method of controlling and reducing crime?" Many have answered the question with a resounding "No," based on rates of recidivism that remain high and on a decreased national crime rate that is attributed to factors other than sentencing laws and practices. Studies and research have identified less costly and, in many cases, more effective approaches in reducing crime and recidivism.

Chief Justice Gants's call for the development of best practices is part of a national movement focused on criminal sentencing statutes, policies and practices. The Best Practices Working Group was tasked with looking at current sentencing practices in light of a body of empirically-based research correlating different sentencing alternatives or approaches with rates of recidivism. In part, our mission was to identify, based on research, what works and what has yielded no proven effect on reducing the likelihood that a given offender will commit future crimes. The Working Group did not view its mandate to include recommendations about the wisdom or efficacy of sentencing laws. While important, these issues are more properly considered in the legislative arena.

The data we studied confirmed some generally accepted beliefs and practices but also had some surprises. For instance, the use of incarceration as a means of reducing the overall crime rate is subject to the law of diminishing returns. Various researchers correlated an increase in incarceration in the 1990s to a modest reduction in crime (particularly property crimes), but found that between 2000 and 2013, the additional increase in incarceration rates had a negligible effect on reducing crime, likely resulting from the fact that incarceration was increasingly imposed on low-level offenders. OLIVER ROEDER ET AL., N.Y. UNIV. SCH. OF LAW, BRENNAN CTR. FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE? at 7–9 (2015). Studies show that, rather than reducing crime, subjecting low-level offenders to periods of incarceration may actually lead to an increase in crime based on the prisoner's adoption of criminogenic attitudes and values while incarcerated, and based on the legal barriers and social stigma encountered after release. *Id.* at 25–26, & n.62, citing Cassia Spohn & David Holleran, *The Effect of Imprisonment on*

Recidivism Rates of Felony Offenders: A Focus on Drug Offenders, 40 CRIMINOLOGY 329, 347 fig.1 (2002). There are certainly valid reasons to impose a jail or prison sentence — to reflect societal condemnation based on the nature of the crime or the harm or trauma to a victim, or to incapacitate the truly dangerous individual — but it should be done in a thoughtful and measured way, taking into consideration all of the purposes of sentencing. Given that almost all offenders except those serving a life sentence will be released at some point, either through parole or by completing their committed sentence, it is only logical that efforts be made to address those aspects of the offender's life that increase the likelihood of recidivism.

Probation policies and practices have been the subject of extensive analysis and research, and here too, empirical research has yielded some interesting and surprising conclusions. For instance, studies show that probationers (other than sex offenders) who are inclined to commit further crime usually do so in the first two years of probation, and that after the third year, probation has a minimal effect on recidivism. Some conditions of probation are extremely effective, including GPS monitoring and use of the HOPE/MORR probation model (each reducing recidivism by over 20%), while other conditions have a significantly less, or no, impact on recidivism. PEW CHARITABLE TRS., PEW-MACARTHUR RESULTS FIRST INITIATIVE, MASSACHUSETTS' EVIDENCE-BASED APPROACH TO REDUCING RECIDIVISM, at 3–4 (Dec. 2014).

Studies have shown that the maxim, "less is [sometimes] better" applies to setting conditions of probation. While probation can be beneficial to a defendant if properly structured, it is sometimes structured in a way that becomes so oppressive that the probationer is doomed to fail. For instance, the impoverished, unemployed, or homeless probationer who is required to pay monthly supervision fees, program-participation costs, GPS or other monitoring fees, in addition to statutorily imposed fees (counsel, DNA, drug analysis, victim-witness, brain injury, or similar statutory assessments), begins the probationary term in debt, and generally finds the debt ever-increasing and all-consuming. Similarly, a probationer may face so many special conditions, in addition to the "standard terms and conditions" of probation, that most of his or her time is spent attempting to comply but often falling short. For this reason, the Working Group recommends that a judge limit the number of special conditions to those that are directly related to the criminal conduct at issue and the criminogenic needs of the probationer that have a reasonable prospect of being successfully addressed through probation.

Studies have also shown that probationers are often more likely to complete their probation successfully when their positive performance is acknowledged or rewarded. Positive reinforcement and the use of incentives can motivate a probationer to succeed, as opposed to probation practices that recognize (and sanction) only failure. Thus, it may be appropriate to inform a probationer that successful participation in a program (e.g., a Changing Lives Through Literature curriculum) or successful compliance with a curfew for a period of time, could lead to a relaxation of other conditions later or to an early termination. As is true in life generally, so too in the context of probation: the prospect of a reward for success is sometimes more powerful than the threat of punishment for failure.

The sentencing phase of a criminal trial is considered by many judges the most challenging aspect of the case. A judge is called upon to express society's condemnation of the offense by sanctioning the offender; to incapacitate him or her if necessary to protect the public;

to deter the offender and others from committing like offenses; and to rehabilitate the offender so that the risk of future criminal behavior is reduced. In balancing these competing interests, information about the offender and his or her personal background and circumstances (family, employment, education, mental health history, values and beliefs) is critical, but often critically lacking. Rather, a judge is typically aware only of the facts of the offense (in the case of a guilty plea, only such facts as are recited during the plea colloquy) and the defendant's prior criminal record. During sentencing, defense counsel generally provides some general information about the defendant's background as part of the dispositional argument but it is usually neither complete nor balanced. Armed with scant information, the judge must exercise discretion in meting out a sentence designed to hold the defendant accountable while at the same time rehabilitating the defendant. Judges impose special conditions of probation in the hope that they will both protect the public and motivate the probationer to avoid further criminal activity. Unfortunately, this is often done based on incomplete information, the result being that conditions are imposed that have no demonstrable impact on reducing recidivism or are not the right conditions based on the probationer's actual level of risk or individual needs.

There is near-universal agreement that the use of a validated assessment instrument to determine the level of risk a probationer presents and the types of treatment programs suitable to the probationer can significantly reduce the risk of reoffending. Indeed, one commentator has opined that the failure to use evidence-based practice principles, including risk/assessment information, could constitute "a kind of sentencing malpractice." Richard E. Redding, *Evidence-Based Sentencing: The Science of Sentencing Policy and Practice*, 1 CHAPMAN J. OF CRIM. JUST. 1, 1 (2009). A description of the risk/needs methodology is found in a report published by the Congressional Research Service. NATHAN JAMES, CONG. RESEARCH SERV., RISK AND NEEDS ASSESSMENT IN THE CRIMINAL JUSTICE SYSTEM, at *Summary* (2018), available at https://fas.org/sgp/crs/misc/R44087.pdf. That description, as relevant to probationers in particular, is as follows.

> Risk and needs assessment instruments typically consist of a series of items used to collect data on offender behaviors and attitudes that research indicates are related to the risk of recidivism. Generally, probationers are classified as being high, moderate, or low risk. Assessment instruments are composed of static and dynamic risk factors. Static risk factors do not change, while dynamic risk factors can either change on their own or be changed through an intervention. In general, research suggests that the most commonly used assessment instruments can, with a moderate level of accuracy, predict who is at risk for violent recidivism. It also suggests that no single instrument is superior to any other when it comes to predictive validity.

The Risk-Needs-Responsivity (RNR) model has become the dominant paradigm in risk and needs assessment. The risk principle states that high-risk offenders need to be placed in programs that provide more intensive treatment and services while low-risk offenders should receive minimal or even no intervention. The need principle states that effective treatment should focus on addressing needs that contribute to criminal behavior. The responsivity principle states that rehabilitative programming should be delivered in a style and mode that is consistent with the ability and learning style of the offender.

Risk/needs assessments are utilized by the Probation Service and the Parole Board. The Probation Service has used the Ohio Risk Assessment System (ORAS) since 2013. ORAS involves a series of structured interviews with a probationer over a period of four to six weeks. It consists of a series of questions focused on static factors (criminal record, gender, education, employment, financial, substance use history, peer associations, family and social support) and dynamic factors (criminal attitudes and behaviors), and involves investigation into collateral sources to verify information. Each category of information is scored, and the total score by range indicates the appropriate level of supervision based on the likelihood of reoffending. The second purpose for a risk/needs assessment is to identify treatment programs that are appropriate to the probationer's needs and that have been empirically shown to reduce recidivism. Research suggests that the most effective programs are based on a cognitive behavioral model, designed to change an offender's way of thinking and general attitude toward others and toward criminal behavior.

The use of risk/needs assessments, while widely endorsed, is not without criticism. First, the model is based on predicting an individual offender's likelihood of reoffending by comparison with a pool of similarly situated offenders who have done so in the past. This determines "risk." Among the factors considered in the assessment are the offender's association with other criminals, whether he lives in a high-crime area, whether drugs are easily available, what attitudes the offender has about crime or victimization, and his educational and employment history. Concerns have been expressed that an assessment based on socioeconomic status might have a racially disparate impact since poorer communities and inner cities have larger minority populations. Another concern is that judges might use the results of a risk/needs assessment in determining whether to incarcerate a defendant and for how long. The assessment instrument requires a probationer to admit candidly things that could be incriminating – for instance, the frequency of illicit drug use or criminal associations. Some have raised legitimate concerns about a defendant's right against self-incrimination, particularly if the assessment is used in determining whether to incarcerate a defendant.

The Working Group believes that the only appropriate use of a risk/needs assessment is in determining appropriate special conditions of probation. Ideally, best practice principles suggest that a comprehensive risk/needs assessment should be completed and available to the judge at the time that the judge formulates conditions of probation. Current sentencing practice in the Superior Court, where the sentence is often imposed immediately after a guilty plea or verdict, make this unrealistic. As noted earlier, the process of completing the ORAS assessment involves a series of meetings over the course of four to six weeks. Unlike the federal system, where sentencing hearings take place 120 days after conviction to permit a comprehensive presentence investigation, the volume of cases in the Superior Court makes delayed sentencing in every case not feasible. Nevertheless, the Probation Service can provide a shortened type of assessment and often is in a position to identify specific conditions or treatment programs that appear suitable to the offender. The Working Group endorses greater access to Probation, and to Probation's exploration of other empirically validated assessment methods, to assist the judge in tailoring special conditions of probation to the specific needs of each defendant.

Best practice principles also apply to probation violation proceedings. Data supports the proposition that holding a probationer accountable for violating the conditions of probation

through swift, certain, and consistent consequences is effective. Best practice literature also endorses the principle that the sanction imposed should be proportionate to the violation itself, and to the probationer's overall performance on probation. Because revoking probation and imposing a committed sentence is the ultimate sanction, it generally should be used as a last resort. The Working Group has incorporated these practices into its recommended Best Practice Principles.

The collection and analysis of empirical data regarding sentencing approaches and their effect on recidivism is an ongoing endeavor at the federal, state, and local level. Governmental and private organizations are engaged in studies aimed at identifying the most cost-effective methods of reducing crime by reducing recidivism. Pilot projects and specialty courts have been implemented in many states and researchers continue to evaluate outcomes. In Massachusetts, the Sentencing Commission, the Department of Corrections, and the Probation Service have obtained, as the result of new and integrated technology, increasingly robust data for identifying what probationary practices are successful. The Working Group recommends that the Trial Court develop a clearinghouse for the collection, review and dissemination of emerging data-based best practices on a continuing basis, and that judges participate in periodic education to study emerging best practices.

Best Practice Principles for Individualized Evidence-Based Sentencing

1. A judge should impose a criminal disposition consistent with the recognized purposes of criminal sentencing. Those purposes include deterrence, public protection, retribution, and rehabilitation.

2. In applying those purposes to a sentencing decision, the judge should:

   (i) impose a sentence that is proportionate to the gravity of the offense or offenses, the harms done to crime victims, and the blameworthiness of offenders;

   (ii) when reasonably feasible, impose a sentence that seeks to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restoration of crime victims and communities, and reintegration of offenders into the law-abiding community, provided these goals are pursued within the boundaries of proportionality in section (i) above; and,

   (iii) render a sentence that is no more severe than necessary to achieve the applicable purposes of sections (i) and (ii) above.

3. In formulating a criminal disposition, a judge should consider the following factors and sources of information: the facts and circumstances of the crime of conviction; a defendant's prior criminal record; the Massachusetts Sentencing Guidelines; victim impact statements; the defendant's background, personal history and circumstances; and the sentencing arguments and memoranda and other materials (if any) submitted by counsel.

4. Where the judge believes that sentencing memoranda by counsel would benefit the judge or the public at large, the judge should encourage their submission and, in appropriate cases, require them, particularly where there is a disparity in the recommendations of the parties.

5. To promote public understanding of the court's sentencing decision, the judge should, as a general matter, state orally or in writing the reasons for imposing a particular sentence.

6. A judge should require that counsel consult with the Probation Service regarding the proposed length of any probationary term and any special conditions to be imposed.

7. In any case where a judge is contemplating a term of probation (as a sole disposition, part of a structured disposition involving a split sentence, or as a term to run from and after a committed sentence), the Probation Service should:

   (i) receive copies of any sentencing memoranda submitted by counsel in advance of sentencing;

(ii) perform an assessment relating to the criminogenic needs to be addressed through probation;

(iii) have a probation officer present at the time of sentencing;

(iv) provide a recommendation to the court as to special terms or conditions of probation, and the length of the probationary term, based on a defendant's criminogenic needs.

The judge should not use the assessment described in 7(ii) to determine the length of any incarcerated portion of the sentence.

8. Special conditions of probation should be narrowly tailored to the criminogenic needs of the defendant/probationer while providing for the protection of the public and any victim. An excessive number of special conditions may increase rather than decrease the likelihood of recidivism.

9. Probationary terms should be no longer than three years, except where the nature of the offense or other circumstances specifically warrant a longer term.

10. At the time of sentencing, a judge should inform the defendant/probationer that, after a period of compliance, the court may look favorably upon a request for early termination of probation or lifting of certain conditions as an incentive to successful performance.

11. A judge should consider the demonstrated negative impact of imposing fees on a probationer and, where consistent with statutory authority, waive such fees where the fee or fees would constitute a substantial financial hardship on the probationer or his or her family.

12. Revocation of probation, by the imposition of a committed sentence, should be used as a last resort and rarely for technical violations or low-level criminal activity.

13. The Probation Service should conduct a risk/needs assessment upon the commencement of a from-and-after term of probation and bring the case before the Court where there is a material change in the criminogenic needs of the probationer. The Court should consider whether materially changed circumstances since the time of sentencing warrant modification of special conditions to reflect the probationer's current criminogenic needs, provided, however, that the Court may not impose any additional punitive condition in the absence of a finding of a violation of any condition of probation.

14. The judge should ensure a timely and proportional response to proven violations of probation. A probationer should be held accountable, through administrative or judicial proceedings, for proven violations of the terms or conditions of probation.

15. The practice of a probation surrender proceeding tracking a new criminal case is discouraged and should occur only where a judge or magistrate finds good cause, stated on the record in open court, for a delay in the proceeding.

16. A judge should have access to empirical data, derived from social science research, the Sentencing Commission, the Probation Service, and other reliable sources, relating to the correlation between sentencing practices and recidivism, to be made available through periodic judicial education programs.

17. Judges should be familiar with best practice principles, including risk/need/responsiveness principles, through judicial training and education programs.

Principles and Commentary

Principle No. 1 ***A judge should impose a criminal disposition consistent with the recognized purposes of criminal sentencing. Those purposes include deterrence, public protection, retribution, and rehabilitation.***

Commentary

The first principle states the obvious: that criminal dispositions are fashioned to achieve one or more of the four fundamental purposes of sentencing: "punishment, deterrence, incapacitation and rehabilitation." *Commonwealth v. Power*, 420 Mass. 410, 414 (1995), cert. denied, 516 U.S. 1042 (1996). Punishment is also referred to in decisional law as "retribution," and incapacitation as "protection of the public." *Commonwealth v. Goodwin*, 414 Mass. 88, 92 (1993). For certain crimes the principal purpose of sentencing has been statutorily determined. For instance, a conviction for murder in the first or second degree results in a mandatory term of life imprisonment (with or without parole), G. L. c. 265, § 2, the sentence reflecting a legislative determination that punishment (retribution) is the only dispositional consideration, notwithstanding the circumstances of the offense and regardless of a defendant's background, criminal history, or the likelihood of reoffense. Similarly, habitual offender and armed career criminal statutes require mandatory terms of imprisonment based primarily on a legislative judgment that society is best protected by incapacitating career criminals for significant periods of time. Likewise, certain mandatory sentences, such as those relating to the unlawful possession of a firearm or for drug trafficking and distribution crimes, reflect a legislative determination that the prospect of a certain prison sentence will not only punish offenders and protect the public but also deter others from engaging in such criminal conduct. A judge is not permitted to depart downward from a mandatory minimum sentence. *Commonwealth v. Laltaprasad*, 475 Mass. 692, 701 (2016) (suggestion in G. L. c. 211E, § 3[e] for departing downward for mitigating circumstances is contingent on Legislature's enacting sentencing guidelines, which it has not yet done). The Working Group did not consider it to be within its mandate to question the wisdom of these legislative determinations.

Where the Legislature has not mandated a sentence, however, a judge may consider a range of sentencing options, including imprisonment, probation, fines or penalties, or a combination of sanctions. In such cases, where a judge exercises discretion in determining the sanction to be imposed, he or she is doing so through a blended consideration of sentencing objectives: to reflect societal condemnation of the criminal conduct; to deter the defendant and others from engaging in like conduct; and, through probationary terms, to protect the public and reduce the likelihood that the defendant will engage in future criminal behavior. It is in these instances that a judge should be cognizant of social science and empirical data showing what sentencing approaches have been demonstrated to have a measurable effect on reducing the likelihood that a defendant will commit a future offense.

Principle No. 2 ***In applying those purposes to a sentencing decision, the judge should:***

(i) impose a sentence that is proportionate to the gravity of the offense or offenses, the harms done to crime victims, and the blameworthiness of offenders;

(ii) when reasonably feasible, impose a sentence that seeks to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restoration of crime victims and communities, and reintegration of offenders into the law-abiding community, provided these goals are pursued within the boundaries of proportionality in section (i) above; and,

(iii) render a sentence that is no more severe than necessary to achieve the applicable purposes of sections (i) and (ii) above.

Commentary

Principle Number Two is adapted from § 1.01(2) of the Model Penal Code. It reflects three governing considerations a judge should follow in imposing a sentence. The first, in subsection (i), expresses the principle that any sentence must be proportionate to the offense and to the offender. Proportionality in this context is not a constitutional issue but one of reasonableness, so that the punishment imposed falls within a range of severity that most would consider appropriate in light of the facts and circumstances of the crime, and the blameworthiness of the defendant. Because sentencing is not a mathematical exercise and involves the exercise of judgment in light of moral sensibilities, the Code speaks of a "range of severity," encompassing those sentences that most would agree are neither too harsh nor too lenient for the particular offense, considering the harm done to victims and the blameworthiness of the offender. Blameworthiness encompasses the level of intentionality related to the criminal conduct (degree of planning, type and degree of force or violence, disregard for foreseeable harm or injury, or taking pleasure in it) and the offender's criminal record. By contrast, the degree of blameworthiness might be reduced based on an offender's sincere expression of remorse or acceptance of responsibility, or facts that explain the criminal conduct even though they do not rise to the level of a legal defense. In determining a sentence that is proportionate, sentencing guidelines can provide some insight into the range of sentences (or intermediate sanctions) that might apply for given crimes and in light of a defendant's criminal record.[2]

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[2] Defendants sentenced to state prison in Massachusetts have a statutory safeguard to ensure that sentences are proportionate. General Laws c. 278, §§ 28A–28D establish an Appellate Sentencing Division, composed of three justices of the Superior Court appointed by the Chief Justice, to consider sentencing appeals based on a claim that the sentence imposed was too severe. The Appellate Division has the power to reduce or increase a sentence.

Subsection (ii) reflects the principle that, subject to the principle of proportionality in (i), the judge should impose a sentence (or disposition) that furthers the other recognized purposes of sentencing (rehabilitation, incapacitation of dangerous offenders, restorative justice principles, and reintegration into society). The limiting phrase, "when reasonably feasible," recognizes that purposes of sentencing are sometimes contradictory to one another. For instance, if there is a reasonable prospect that an offender, with proper probationary guidance and supervision, will likely not engage in future criminal activity and can overcome whatever circumstances led him to engage in criminal activity in the past, then, subject to the principle of proportionality in subsection (i), a term of probation might be all that is necessary to achieve a just disposition. On the other hand, if a judge determines that the public can be protected only by incapacitating an offender for as long as possible, then considerations of rehabilitation or reintegration are not reasonably at play.

Subsection (iii) incorporates the principle of "parsimony" in punishment: the ultimate disposition that is fashioned, after consideration of the various purposes of sentencing, should be no more severe than necessary to achieve these purposes. This applies not only to the length of a committed sentence but also to the length of any period of probation and the conditions that are imposed. The length or term of probation relates to the period of time necessary to ensure that the public is protected. Certain conditions of probation, such as electronic monitoring, curfews, drug testing, or compliance with mental health treatment may also serve as protective measures. Other conditions may be intended to address the probationer's criminogenic needs and motivate the probationer away from future criminal activity. As reflected in the principle of proportionality here (and in other Best Practice Principles), conditions of probation should be no more strict than necessary to ensure public safety and rehabilitation.

Principle No. 3 ***In formulating a criminal disposition, a judge should consider the following factors and sources of information: the facts and circumstances of the crime of conviction; a defendant's prior criminal record; the Massachusetts Sentencing Guidelines; victim impact statements; the defendant's background, personal history and circumstances; and the sentencing arguments and memoranda and other materials (if any) submitted by counsel.***

Commentary

A judge has "discretion to consider a variety of factors and has wide latitude within the boundaries of the applicable penal statutes. The judge may take into account hearsay information regarding the defendant's behavior, family life, employment and various other factors." *Commonwealth v. Ferguson*, 30 Mass. App. Ct. 580, 586 (1991) (internal citations omitted). *See also Commonwealth v. Celeste*, 358 Mass. 307, 309–310 (1970). Typically, a starting point is to consider the nature and circumstances of the offense(s) for which the defendant has been convicted. This includes consideration of aggravating and mitigating factors and circumstances.

Upon a defendant's conviction of any felony or a crime against a person, an identified victim or victim's representative has a statutory right to make an oral or written impact statement, subject to the defendant's right to rebut the statement if the court intends to rely upon it in imposing a sentence. G. L. c. 279, § 4B. Rule 28(d)(1) of the Massachusetts Rules of Criminal Procedure requires the Probation Service to provide the judge and counsel with the defendant's prior criminal record.

A defendant is to be punished only for those crimes for which he has been convicted. *Commonwealth v. White*, 48 Mass. App. Ct. 658, 664–665 (2000), citing *Commonwealth v. LeBlanc*, 370 Mass. 217, 224 (1976). Thus, "[A] defendant cannot be punished for uncharged misconduct . . . because such information is not 'tested by the indictment and trial process.'" *Commonwealth v. Stuckich*, 450 Mass. 449, 461 (2008), quoting *Commonwealth v. Henriquez*, 56 Mass. App. Ct. 775, 779 (2002). Nonetheless, a judge may consider reliable evidence of uncharged misconduct or untried criminal cases as bearing on issues of a defendant's "character and amenability to treatment," provided sufficient notice is given to the defendant. *Commonwealth v. Goodwin*, 414 Mass. 88, 93–94 (1993). The distinction between use of reliable evidence of uncharged misconduct for the impermissible purpose of increasing a sentence, and the permissible purpose of determining whether to impose a suspended sentence or probation, is a fine one requiring care in articulating the reasons such information in considered at sentencing. Although federal courts permit consideration in sentencing of acquitted crimes when proved by a preponderance of evidence, *United States v. Watts*, 519 U.S. 148 (1997), Massachusetts law prohibits consideration of charged crimes that resulted in acquittals. Similarly, a judge may not impose a punishment to express a personal philosophical message, or to penalize a defendant for the exercise of a constitutional right (for example, proceeding to trial or exercising the right not to testify). *Commonwealth v. Mills*, 436 Mass. 387, 400 (2002) (collecting cases). Also, a judge may not increase a sentence based on a belief that the defendant committed perjury at trial. *Commonwealth v. McFadden*, 49 Mass. App. Ct. 441, 443 (2000).

The Massachusetts Sentencing Guidelines provide a useful comparative measurement, establishing a sentencing range for like offenses based on a defendant's criminal history (in five categories ranging from no or a minor record to a serious violent record). Sentencing guidelines were first established in 1994, were revised in 2017, and are advisory. In the view of the Working Group Subcommittee on Best Practices in Formulating a Sentence, formula-based sentencing brings about some uniformity in judicial sentencing practice but has the potential to do so at the expense of flexibility to balance the various goals of sentencing in an individual case. The guidelines should nevertheless be considered in any case where the punishment is not mandated by statute.

In formulating a criminal disposition based on the established purposes of sentencing, a judge should be aware of the social science studies bearing on recidivism. As noted earlier, certain crimes, and certain offenders, warrant a sentence intended (by statute or by the Court) to punish or incapacitate. Similarly, the facts of a case may warrant a proportionate period of incarceration to reflect society's condemnation of the criminal conduct or to incapacitate the defendant for public protection. In these instances, social science may play a lesser role since the principal purpose of sentencing does not include efforts at rehabilitation. In a large percentage of sentencing decisions, however, a judge is seeking not only to punish a defendant but also to

protect the public by reducing the likelihood that the defendant will commit future crimes. In this regard, a defendant's age, family, educational and employment background, substance use history, criminal associations, and attitudes are relevant in determining whether to incarcerate an offender or place him or her on a term of probation with tailored conditions. Unless a sentence of incarceration is required by law, the judge "may," upon conviction, and by motion of the defendant supported by an affidavit, consider the defendant's status as a primary caretaker of a dependent child before imposing a sentence. G. L. c. 279, § 6B. If such a motion and affidavit are filed, the judge "shall make written findings" concerning the defendant's status as a primary caretaker of a dependent child and alternatives to incarceration. *Id.* The judge "shall not impose a sentence of incarceration without first making such written findings." *Id.*

Another potentially valuable source of information at sentencing is a presentence investigation report. A judge may order a presentence investigation and report from the Probation Service pursuant to Mass. R. Crim. P. 28(d)(2). By rule, the report shall contain a record of the defendant's prior criminal convictions or delinquency findings and "such other available information as may be helpful to the court in the disposition of the case." Rule 28(d)(2). If a presentence report is ordered, the judge should consider the scope of the investigation and inform the probation officer as to particular areas of interest. A presentence investigation often requires several weeks to a month. Although by statute the district attorney must move for sentencing within seven days of a verdict or guilty plea, G. L. c. 279, § 3(a), the date and time of sentencing is within the discretion of the Court, *Commonwealth v. Burkett*, 3 Mass. App. Ct. 744 (1975), subject only to the requirement that the defendant be sentenced "without unreasonable delay." Mass. R. Crim. P. 28(b). Moreover, where a presentence report is prepared, counsel and the prosecutor are permitted to inspect (but not copy) it prior to the sentencing hearing. If the probation officer seeks to interview the defendant as part of the presentence investigation, the defendant has the right to have counsel present during the interview. *Commonwealth v. Talbot*, 444 Mass. 586, 596 (2005). Any presentence report should include recommendations for special conditions of probation based on the probation officer's identification of criminogenic needs as a result of his or her investigation. This will insure that any probation conditions that are imposed are consistent with Best Practice Principle No. 8, *supra.*

On occasion, an appellate court may remand a case for resentencing. Unlike consideration of a motion to revise and revoke under Mass. R. Crim. P. 29, a judge may consider the defendant's conduct subsequent to the original sentencing, "subject to limitations safeguarding against retaliatory vindictiveness." *Commonwealth v. White*, 436 Mass. 340, 344 (2002); *Commonwealth v. Hyatt*, 419 Mass. 815, 823 (1995) (announcing common-law principle that when a defendant is convicted after retrial, the sentencing judge may impose a harsher sentence only if the reasons for doing so are stated on the record and based on information that was not before the original sentencing judge). This may include evidence unfavorable to the defendant or, by contrast, evidence of the defendant's good conduct, participation in treatment or programming or the like, for the purpose of individualizing the sentence to the offender and the offense.

Principle No. 4 ***Where the judge believes that sentencing memoranda by counsel would benefit the judge or the public at large, the judge should encourage their submission and, in appropriate cases, require them, particularly where there is a disparity in the recommendations of the parties.***

Commentary

In formulating a disposition individualized to the offense committed and to the offender, the sentencing judge considers a variety of factors, seeking the "fullest possible picture of the defendant." *Commonwealth v. Settipane*, 5 Mass. App. Ct. 648, 654 (1977). To that end, sentencing memoranda can be invaluable to a judge at sentencing, particularly in fashioning probationary terms and conditions tailored to a defendant's particular circumstances and needs.

All too often in criminal cases, the judge knows little about the defendant beyond his role in the crime and information from a Court Activity Record Index (CARI). The information available to the judge is a far cry from the "fullest possible picture" of the defendant. As advocates, prosecutors and defense attorneys are persuasive in pre-trial and trial phases of the case but often are less persuasive during the sentencing phase of a case. Advocacy at that stage should be at its zenith. *See Commonwealth v. Montanez*, 410 Mass. 290, 298–299 (1991) (counsel provided ineffective assistance in failing to present mitigating circumstances or advocating for concurrent sentences).

The Working Group endorses greater use of sentencing memoranda in criminal cases. Submission of a written memorandum has several benefits: (1) it provides a vehicle for counsel to provide the judge with pertinent background and personal information; (2) it permits a judge to review and consider sentencing information in advance of the sentencing hearing; (3) as a public court document, it memorializes the sentencing recommendations of the parties and the reasons; and (4) the simple process of preparing a written memorandum helps counsel focus their thoughts and sharpen their presentations in court.

The Working Group recognizes that sentencing memoranda are not necessary in all cases. For instance, where the judge has no discretion in sentencing, as with mandatory sentences, or where the offense is minor and the parties have jointly recommended a particular disposition, a sentencing memorandum is probably not necessary. By contrast, in cases where the judge must determine whether to impose a committed sentence (and for how long), a probationary term, or some combination of both, a sentencing memorandum from the prosecutor and from defense counsel can substantially assist the judge in exercising the judge's sentencing discretion. A sentencing memorandum can provide information about the crime itself and its impact on victims and the public at large, information about the public purposes of sentencing, and information about the defendant's background and character. The more information a judge is provided, the more individualized will be the resulting sentence.

Principle No. 5 ***To promote public understanding of the court's sentencing decision, the judge should, as a general matter, state orally or in writing the reasons for imposing a particular sentence.***

Commentary

"[I]t is equally important that the public's understanding of and confidence in the judiciary be facilitated by knowing the basis on which a judge acted in a particular case." *Boston Herald, Inc. v. Sharpe*, 432 Mass. 593, 607 (2000). No part of a criminal case engenders more public interest, and occasional criticism, than a judge's sentencing decision. In formulating a disposition, a judge must balance a variety of factors and, at times, competing sentencing goals. The need for punishment may arise from the facts of a particular case: the harm or injury to victims or their particular susceptibility for abuse; the level of planning and manipulation involved; or the societal harm caused by the defendant. These facts must be weighed against the defendant's personal background and circumstances which may explain (not justify or excuse) the criminal behavior. As well, there is often a predictive aspect to sentencing: the judge seeks to structure a sentence that will hold the defendant accountable for the crime and deter him or her from engaging in criminal activity in the future. As noted in other sections of this report, best practices focus on probation conditions that have demonstrated success in reducing recidivism by changing attitudes and behaviors.

An explanation of the rationale for a disposition memorializes on the record or in a written decision the careful and thoughtful consideration of these sentencing factors. "Such exposition serves not only to assist judges and attorneys in fulfilling their responsibilities, but also may be of value in addressing issues of sentencing disparity." *Commonwealth v. White*, 48 Mass. App. Ct. 658, 664 (2000). Where the sentence results from a joint recommendation, a simple statement that the sentencing recommendation reflects the interests of justice may suffice. Where the parties make significantly disparate recommendations, or where the sentence imposed has various components (e.g., a committed term with from-and-after probation, or a split sentence with conditions of probation), an explanation for the sentence may be particularly beneficial.

On some occasions, a case may be of such notoriety or public interest that a written sentencing memorandum may be appropriate to educate the parties and the public as to the reasons for the sentence imposed.

Principle No. 6 ***A judge should require that counsel consult with the Probation Service regarding the proposed length of any probationary term and any special conditions to be imposed.***

Commentary

The overwhelming majority of criminal cases in the Superior Court are resolved as the result of a plea agreement between the prosecutor and the defendant. All too often, sentencing recommendations (joint or disparate) are made without any input from or consultation with the Probation Service. This practice sometimes results in recommendations as to the terms and conditions of probation that in reality have no demonstrated effect on public protection or reducing the risk of reoffense. Where the sentencing recommendations include a period of probation with conditions, it is important that a probation officer be included in discussions since the probation officer has greater familiarity with the types of treatment programs that are available, the quality of such programs, and their effectiveness in reducing recidivism. The probation officer may be more familiar with empirical data relating to the level of risk posed by a defendant and the degree of supervision that will be required. Further, the probation officer is in a far better position than counsel to assess the enforceability of probationary conditions and to determine the extent to which they accomplish the goals of probation, which are not only to protect the public but to promote positive change in the offender so that he or she does not reoffend. Accordingly, before counsel bring their respective recommendations to the court, the probation officer should be given an opportunity to have some input and to shape those recommendations, particularly since it is the probation officer who will ultimately be responsible for supervising the offender in the community.

In January 2015, the SJC revised Mass. R. Crim. P. 12, governing pleas. Under Rule 12(b)(5)(A), the defendant may enter into a plea agreement with the prosecutor as to a specific sentence including the length of any term of probation. The rule is silent as to whether the parties can bind a judge as to the conditions of probation, although the language and structure of the rule suggest that a judge is not bound by recommended conditions. Rule 12(c)(6)(A) (plea agreement without a sentencing agreement or charge concession), and 12(d)(6) (plea agreement with specific sentence and charge concession), provide that the conditions of probation are imposed *after* acceptance of the plea, and that a judge, "with the assistance of probation where appropriate and after considering the recommendations of the parties, shall impose appropriate conditions of probation." *See also* Reporter's Notes—January 2015, to Rule 12(d)(6) ("To the extent that the plea agreement contains agreed-upon recommended conditions of probation, they are not binding on the judge; rather, they are to be considered as joint recommendations for the judge to consider, and neither party has the right to withdraw the plea or from the agreement if the judge declines to follow such recommendations."). Read as a whole, the revised language of Rule 12 suggests that a judge is not bound by any agreement between the parties as to the imposition of special conditions of probation.

Principle No. 7 ***In any case where a judge is contemplating a term of probation (as a sole disposition, part of a structured disposition involving a split sentence, or a term to run from and after a committed sentence), the Probation Service should:***

(i) receive copies of any sentencing memoranda submitted by counsel in advance of sentencing;

(ii) perform an assessment relating to the criminogenic needs to be addressed through probation;

(iii) have a probation officer present at the time of sentencing;

(iv) provide a recommendation to the court as to special terms or conditions of probation and the length of the probationary term based on a defendant's criminogenic needs.

The judge should not use the assessment described in 7(ii) to determine the length of any incarcerated portion of the sentence.

Commentary

This principle articulates a more active and participatory role by the Probation Service in cases where the judge may impose a term of probation. It contemplates that a probation officer will be familiar with the circumstances surrounding the crime and with the offender's criminal history and particular characteristics and needs. Therefore, where either the prosecutor or defense attorney intends to recommend a term of probation upon conviction or following a guilty plea, or where the judge is considering imposing a term of probation (either as the sole disposition or as part of a structured sentence), the judge should request that a probation officer evaluate the case and the offender prior to the sentencing hearing.

The probation officer should be given copies of any pertinent information (police reports, impact statements, sentencing memoranda) and should access the defendant's CARI record. As detailed in the Introduction and Overview, best practice research recommends the use of a risk/needs assessment in determining the level of supervision and types of special conditions that will most effectively protect the public and rehabilitate the offender. At present, the Probation Service utilizes the ORAS assessment instrument, which involves a structured set of interviews over a four-to-six-week time period. Although a complete ORAS assessment may be appropriate in some cases (an issue the judge should discuss with the probation officer), it is likely neither feasible nor necessary that a comprehensive assessment occur in every case. Nevertheless, a probation officer can conduct a more limited assessment, based on the defendant's criminal record; prior performance on probation; prior participation in treatment programs, where

applicable; and the facts and circumstances of the crime itself (which may show criminogenic factors such as alcohol or drug abuse, criminal associations, mental health history, etc.). Armed with this information, the probation officer can provide valuable information to the sentencing judge regarding (1) the defendant's suitability for probation; (2) the level of supervision necessary to ensure the safety of the public; (3) the appropriate term of probation; and (4) recommended special conditions of probation based on the defendant's criminogenic needs. The probation officer will be in the best position to know the availability and quality of treatment programs in the area, and can make recommendations accordingly.

In the event a judge determines that a comprehensive risk/needs assessment (using ORAS or a similar validated assessment instrument) should be conducted prior to sentencing, the judge should not use the results of that assessment in determining whether to impose a term of incarceration. As noted in the Introduction and Overview, most risk/needs assessment instruments are interactive between a probation officer and the offender and include questions that could elicit admissions about criminal conduct, associations, or attitudes. This information is necessary to identify an offender's criminogenic needs that could benefit from treatment on probation. Fifth Amendment concerns have been raised about compelling a defendant to participate in an assessment that could be used against him at sentencing. This concern is ameliorated if a judge makes clear that the results of an assessment will not be considered in determining whether to impose a committed sentence or the length of any sentence, but will be used only in determining the terms and conditions of probation.

Principle No. 8 ***Special conditions of probation should be narrowly tailored to the criminogenic needs of the defendant/probationer while providing for the protection of the public and any victim. An excessive number of special conditions may increase rather than decrease the likelihood of recidivism.***

Commentary

Generally, "judges are permitted 'great latitude' in imposing conditions of probation." *Commonwealth v. LaPointe*, 435 Mass. 455, 459 (2001), quoting *Commonwealth v. Pike*, 428 Mass. 393, 402 (1998). A condition is enforceable, even if it infringes on a protected right, so long as it is reasonably related to the goals of sentencing and probation. *Commonwealth v. Power*, 420 Mass. 410, 414–415 (1995), cert. denied, 516 U.S. 1042 (1996) (upholding restriction against defendant's profiting by selling her story where condition promoted valid sentencing objectives). That said, studies show that judges often impose too many conditions on a probationer and, at the same time, do not give enough thought to tailoring the conditions they do impose to the particular characteristics of the defendant and the crime. The result is that community supervision becomes less an alternative to imprisonment and more a delayed form of it.

Probation has a twofold purpose: to protect the public and to rehabilitate the defendant. A judge should set conditions with those purposes in mind. What this means is that only those

conditions that are strictly tailored to the dynamic risk factors that led to the defendant's criminal activity should be imposed. Conditions intended merely to better the life prospects of a person under supervision, while benevolent in their intention, should not be made a condition of probation. Cecelia Klingele, *Rethinking the Use of Community Supervision,* 103 J. OF CRIM. L. AND CRIMINOLOGY 1015, 1061 (2013). "By eliminating conditions that do not bear on an offender's criminal rehabilitation and risk of harm to the community, courts and correctional agents prevent minor, unimportant conditions from serving as grounds for later revocation." *Id.*

Examples of conditions that may be unnecessary (unless related to the underlying crime) include restrictions on travel, abstention from alcohol, or requirements that the offender not be permitted to change jobs or residences without the probation officer's approval. While these restrictions may be relevant to public safety concerns in some cases, in many other cases they may bear no connection to the behavior that led to criminal activity. *Id.* at 1060–1061. Some treatment approaches, particularly those with a punitive component, have been shown to be ineffective in preventing recidivism. An example would be boot camps or intensive supervision programs that do not directly address the offender's criminogenic needs. On a related note, a judge may consider forgoing imposing conditions requiring the offender to participate in programs such as those for drug or mental health treatment if the offender has already successfully participated in such programs at an earlier stage of the case.

In addition to exercising care as to the type of conditions, a judge should not impose too many of them. "While often reasonable when considered individually, in the aggregate, the sheer number of requirements imposes a nearly impossible burden on many offenders." *Id.*, at 1035. This is particularly true when one considers that those involved in the criminal justice system are often susceptible to failure based on drug addiction or socioeconomic circumstances, or are physically or mentally disabled, and thus may have many other obstacles to overcome beyond compliance with probationary terms. If probation is to be an alternative to incarceration, then the focus should be on assisting the offender in successfully completing the term of supervision while simultaneously protecting the public from the person's reoffending. Ronald P. Corbett, Jr., *The Burdens of Leniency: The Changing Face of Probation*, 99 MINN. L. REV. 1697, 1729 (2015) (special conditions should be few, and be such that probationer has real chance of succeeding).

Because conditions of probation are part of the sentence, they must be imposed by the sentencing judge and cannot be delegated to a probation officer. *Commonwealth v. Lally*, 55 Mass. App. Ct. 601, 603–604 (2002) (condition that defendant participate in "treatment as deemed necessary" by probation officer an improper delegation of judicial authority); *Commonwealth v. MacDonald*, 50 Mass. App. Ct. 220, 224 (2000). The probation officer can nevertheless provide valuable input as to what conditions make sense for a particular offender, what treatment programs are available, and which conditions may be difficult to enforce. As noted in Best Practice Principle No. 7(iii), the probation officer should conduct some assessment of the defendant's criminogenic needs before the judge determines what special conditions to impose.

Due process requires that a condition be reasonably clear, *Power*, 420 Mass. at 420 ("constitutional rule against vague laws applies as equally to probation conditions as it does to legislative enactments"), so that the defendant has "a reasonable opportunity to know what the order prohibited, so that he might act accordingly." *Commonwealth v. Delaney*, 425 Mass. 587, 592 (1997), cert. denied, 522 U.S. 1058 (1998). Conditions should be clearly stated and capable of enforcement, since accountability for noncompliance is important. A judge has the discretion to order a defendant to remain drug free, as a condition of probation, so long as the condition is "reasonably related to legitimate probationary goals." *Commonwealth v. Eldred*, 480 Mass. 90, 96 (2018), citing *Commonwealth v. Gomes*, 73 Mass. App. Ct. 857, 859 (2009) (ordering random drug or alcohol testing not permissible unless reasonably related to punishment, deterrence, retribution, protection of the public, or rehabilitation; where defendant's convictions of firearm offenses did not involve drugs or alcohol, and where there was no evidence defendant had ever used drugs or alcohol, condition requiring random testing was not reasonably related to any recognized probationary goal).

Principle No. 9 ***Probationary terms should be no longer than three years, except where the nature of the offense or other circumstances specifically warrant a longer term.***

Commentary

Just as conditions of probation should be imposed sparingly, probationary terms should generally be limited in duration, extending only long enough to facilitate a period of structured reintegration into the community. A longer period of supervision will not necessarily result in greater protection of the public. At the same time, it may actually make it more difficult for the probationer to become a functioning member of society. Where a judge has discretion concerning the length of the probationary term, the judge may consider to what extent the offender has participated in programs, such as those for drug or mental health treatment, at an earlier stage of the case.

One of the standard conditions of probation is that the offender not commit any new crime. Most serious offenses will be (and are) detected through ordinary police activity, however, so that extending probation simply for this reason is not an effective use of correctional or judicial resources. Even more important, studies show that most probation violations involving the commission of a new offense occur within the first two years of a probationary period. After that, the number of violations drops off sharply. The offender nevertheless remains subject to supervision, the payment of monthly supervision fees (and even greater costs if use of a GPS or ELMO device is required), and the risk of revocation and incarceration even as he or she becomes more established in a community setting. Shortening terms of probation and post-release supervision keeps the focus on reducing the risk of reoffense during that period of time in which reoffending is most likely to occur.

Restitution is a legitimate and recognized sentencing objective, *Commonwealth v. Nawn*, 394 Mass. 1, 6 (1985); G. L. c. 258B, § 3(o), and may instill a sense of responsibility in an

offender. *Commonwealth v. Malick*, 86 Mass. App. Ct. 174, 182 (2014) (citations omitted). When ordering restitution, a judge must consider a defendant's ability to pay. *Commonwealth v. Henry*, 475 Mass. 117, 120–121 (2016). Ability to pay is essential because only a *willful* failure to pay — i.e., a failure to pay for a reason other than lack of money — can be a reason to sanction a defendant for violating a restitution condition of probation. *Id.* at 121–122. In addition, a judge cannot extend a defendant's period of probation to ensure payment of restitution because doing so would constitute an impermissible additional punishment. *Id.* 123–124. Instead, a judge must determine a defendant's ability to pay only after setting the length of probation. *Id.* at 124–125. The judge must determine the amount of restitution to be paid each month, and, though the task of determining restitution may not be delegated to the Probation Service, the judge may be aided by guidance from Probation. *Id.* at 125.

This principle does recognize that there are certain crimes or other special circumstances that warrant a term of probation longer than three years. One such exception is predatory sex offenses or those involving children. These offenses may require an extended term of probation and long-term supervision and monitoring to protect the public.

Another exception may arise where the judge wants to make sure that a defendant has no contact with a particular victim even when the defendant is incarcerated. To accomplish this purpose, the judge must have the probationary term commence immediately and run concurrent with any term of imprisonment. *See Commonwealth v. Ruiz*, 453 Mass. 474, 480 (2009).

Principle No. 10 ***At the time of sentencing, a judge should inform the defendant/probationer that, after a period of compliance, the court may look favorably upon a request for early termination of probation or lifting of certain conditions as an incentive to successful performance.***

Commentary

The use of positive incentives to promote and reinforce compliance among probationers is one of two key strategies that research shows can reduce violations of probation and reduce recidivism. AM. PROB. AND PAROLE ASS'N & NAT'L CTR. FOR STATE COURTS, EFFECTIVE RESPONSES TO OFFENDER BEHAVIOR: LESSONS LEARNED FOR PROBATION AND PAROLE SUPERVISION (2013). Premised on B. F. Skinner's operant learning theory, which posits that individuals will engage in behaviors that are pleasurable and avoid or discontinue behaviors that have a negative effect on them, probation strategies that reward good behavior and sanction bad behavior have proven successful in reducing recidivism. Eric J. Wodahl et al., *Utilizing Behavioral Interventions to Improve Supervision Outcomes*, 38 CRIM. JUST. AND BEHAVIOR 386 (2011).

Incentives can include verbal praise and reinforcement; tokens of appreciation, such as a certificate of achievement or completion; a relaxation of, or reduction in, drug testing or mandatory reporting; the elimination of certain monetary assessments; or reducing the length of a probationary term. In Massachusetts, certain courts have offered a Changing Lives Through

Literature curriculum that combines positive reinforcement (a graduation ceremony at the end of the course) with incentives (a reduction of six months from the term of probation), and is widely regarded as a successful, and in some cases transformative, experience. Incentives may be offered administratively (by the probation officer or as part of an administrative review) or through the court (a judge revising the conditions of probation or shortening the length of probation). If a judge sentences a defendant to a term of probation to follow a term of incarceration (except for sex offenses under G. L. c. 6, § 178C), the judge must inform the defendant that complying with the terms of probation will earn the defendant compliance credits that will shorten the probation supervision termination date. G. L. c. 276, § 87B(f).

In imposing a term of probation and announcing the conditions, a judge should inform a defendant that successful performance may be recognized and rewarded at some time in the future. For instance, where a defendant is placed on probation for several years, with conditions of a curfew or GPS monitoring combined with other requirements (e.g., obtain a G.E.D., complete a life-skills program, obtain and maintain employment), advising the defendant that the court would vacate the curfew or GPS requirement if he/she successfully performs on probation would motivate the defendant to succeed.

Principle No. 11 ***A judge should consider the demonstrated negative impact of imposing fees on a probationer and, where consistent with statutory authority, waive such fees where the fee or fees would constitute a substantial financial hardship on the probationer or his or her family.***

Commentary

Massachusetts law requires that the court assess a variety of fees and costs on a criminal defendant or probationer. These include, where applicable, an indigent counsel fee of $150, G. L. c. 211D, § 2A; a DNA collection fee, G. L. c. 22E, § 4(b); a drug analysis fee of between $150 and $500, G. L. c. 280, § 6B; a GPS fee, G. L. c. 265, § 47, if the judge finds the Commonwealth's need to impose GPS monitoring outweighs the resulting invasion of privacy; a victim-witness fee (and/or domestic violence prevention assessment), G. L. c. 258B, § 8; and a monthly probation supervision fee, G. L. c. 276, § 87A. In addition to these costs, a probationer is responsible for paying the cost of programs ordered as special conditions of probation, some of which may qualify for payment through MassHealth or private insurance. If not, the probationer must pay the costs, typically due at the beginning of each session.

While each fee may be reasonable standing alone, when aggregated over the term of probation, the total financial obligation imposed on the probationer may become unreasonable. For example, a defendant placed on probation for three years with special conditions of GPS monitoring and participation in an anger management program, will be obligated to pay approximately $8,000 in costs and statutory assessments over the term of his or her probation.

Criminal justice researchers and social scientists have studied the debilitating effect that high fees have on those without a source of income or those already living on the edge. One

study concluded that court-imposed debt can be both a "cause and a consequence of poverty" and that penal institutions are "an important source of a particularly deleterious form of debt." Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. OF SOC. 1753, 1762 (2010). A probationer's obligation to pay court-assessed fees necessarily reduces family income and limits "access to opportunities and resources such as housing, credit, transportation, and employment," *id.* at 1756, and to the probationer, "can seem quite onerous and create a sense of hopelessness." Corbett, *supra*, at 1712. This is even more so for those living essentially a hand-to-mouth existence. Behavioral scientists have identified a phenomenon suggesting that concern about simply getting by financially day to day creates a sense of "tunnel vision" on survival such that the individual is mentally unable to focus on other demands, including those of authority figures. *See* SENDHIL MULLAINATHAN & ELDAR SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH 29 (2013). As well, judges all too often see probationers who in good faith are attempting to overcome an addiction, are struggling with mental health issues, or are successfully participating in continuing court-ordered treatment — or all of the above — but who become anxious and overwhelmed by their obligation (and often, inability) to pay mandatory fees and assessments.

Typically, payment of statutory fees and assessments constitutes a standard condition of probation, and in too many instances probation officers serve as glorified collection agents. The probationer's failure to make payments often leads to a violation proceeding, at which the Probation Service must prove that money was not paid, and then the burden shifts to the probationer to demonstrate an inability to pay. *See Commonwealth v. Canadyan*, 458 Mass. 474, 578 (2010) (probationer bears burden of demonstrating that failure to comply with condition was through no fault of his own); *see also Bearden v. Georgia*, 461 U.S. 660, 669 n.10 (1983) ("basic fairness forbids the revocation of probation when the probationer is without fault in his failure to [comply]"). Surrender proceedings (carrying additional costs to the probationer for appointment of counsel, and costs to the taxpayers for repeated court appearances) based on repeated failures to pay fees waste court resources where the probationer is truly unable to pay. Such proceedings similarly consume a probation officer's time and attention, which could be better spent on addressing criminogenic needs.

For these reasons, the Working Group endorses as a best practice principle that judges consider whether imposing *all* fees — either at the time of sentencing or during the course of probation — constitutes a financial hardship and, if so, consider waiving one or more of the fees. By statute, if a defendant is released on probation after serving a period of incarceration, no probation supervision fee or administrative probation supervision fee is assessed for the person's first six months of release. G. L. c. 276, § 87A, ¶ 3. As for whether probation fees should be waived, under G. L. c. 276, § 87A, ¶ 4, the judge may waive the monthly supervision or administrative fee (or both) if the court "determines after a hearing that such payment would impose a substantial financial hardship on the person, the person's immediate family or dependents." The waiver "shall be in effect only during the period of time that a person is unable to pay the monthly probation fee." *Id.* If the judge waives the fee, the judge has the discretion — but is not required — to order community service in lieu of payment. If community service is ordered, it cannot exceed four hours per month. *Id.*

A probationer's inability to perform the type of community service available through the Probation Service (for example, because of a physical or mental disability or participation in treatment programs) may constitute a defense to a probation surrender, even if the probationer might be capable of some other form of community service. *See Commonwealth v. Al Saud*, 459 Mass. 221, 229 (2011); *Canadyan*, 458 Mass. at 579.

Principle No. 12 ***Revocation of probation, by the imposition of a committed sentence, should be used as a last resort and rarely for technical violations or low-level criminal activity.***

Commentary

The cost of incarceration is fifteen times higher than the cost of community supervision, and yet community supervision has become less of an alternative to incarceration and more of a deferred form of it. Richard E. Redding, *Evidence-Based Sentencing: The Science of Sentencing Policy and Practice*, 1 CHAPMAN J. OF CRIM. JUST. 1, 1 (2009). Estimates suggest that a substantial percentage of individuals in the nation's jails and prisons are incarcerated as a result of revocation of probation or parole. Driven by a concern over costs and prison overcrowding, some states have actually taken steps legislatively to limit judges in revoking probation. While proponents of evidence-based practices do not condemn high revocation rates per se, most agree that a significant number of revocations, particularly for purely technical violations, are unnecessary and could be avoided by more thoughtful decision-making and through more strategic supervision practices. Cecelia Klingele, *Rethinking the Use of Community Supervision,* 103 J. OF CRIM. L. AND CRIMINOLOGY 1015, 1044 (2013).

As a general rule, technical violations not involving new criminal conduct should not result in revocation or removal from the community if it can be avoided. PEW CHARITABLE TRS., PEW CTR. ON THE STATES, ARMING THE COURTS WITH RESEARCH: 10 EVIDENCE-BASED SENTENCING INITIATIVES TO CONTROL CRIME AND REDUCE COSTS (2009). Not only is a high revocation rate costly, but by removing the offender from his or her positive community connections, revocation of probation often does not dissuade an offender from reoffending after he or she is released. Indeed, imprisonment may actually increase recidivism by weakening the offender's social bonds, causing him to lose a job or cutting him off from family, for example. Mark W. Lipsey & Francis T. Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 ANN. REV. OF L. AND SOC. SCI. 297 (2007). This is particularly true for low-level offenders or those with a minimal record; research shows that incarceration can actually increase recidivism. In contrast, community-based supervision focused on rehabilitation has been shown by research to be more effective in reducing recidivism, provided the offender receives treatment tailored to his or her specific criminogenic needs. *Id.*

The sanction for a violation of probation obviously varies depending on the severity of the violation, the probationer's level of risk in light of the infraction, and the extent to which the probationer has been successful (or not) in complying with other terms. In determining whether to revoke probation, a judge should make a thoughtful assessment not only as to the seriousness

of the violation but also as to the likelihood that the probationer can be successfully managed in the community without reoffending. In the case of multiple and repeated violations of probation, even though of a technical nature, revocation may be appropriate, particularly if the violations demonstrate an escalation of the behavior that led to the underlying offense.

A judge has the discretion to order a defendant to remain drug free, as a condition of probation, so long as the condition is "reasonably related to legitimate probationary goals." *Commonwealth v. Eldred*, 480 Mass. 90, 96 (2018), citing *Commonwealth v. Gomes*, 73 Mass. App. Ct. 857, 859 (2009). Even if the defendant is addicted to drugs, the defendant may be subject to probation violation proceedings for violating the drug-free condition of probation by subsequently testing positive for an illegal drug. *Id.* at 104–105. Depending on the evidence, there may be a question whether the defendant could control his or her drug use, and thus whether a violation of probation based on drug use was willful. *Id.* at 104. Even if the violation was willful, when determining the appropriate disposition in light of such factors as public safety, the circumstances of the crime for which the defendant was serving probation and the crime's impact on any person or the community, and any previous probation violations, the judge "should act with flexibility, sensitivity, and compassion when dealing with people who suffer from drug addiction." *Id.* at 95.

Principle No. 13 ***The Probation Service should conduct a risk/needs assessment upon the commencement of a from-and-after term of probation and bring the case before the Court where there is a material change in the criminogenic needs of the probationer. The Court should consider whether materially changed circumstances since the time of sentencing warrant modification of special conditions to reflect the probationer's current criminogenic needs, provided, however, that the Court may not impose any additional punitive condition in the absence of a finding of a violation of any condition of probation.***

Commentary

A risk/needs assessment evaluates certain static and dynamic factors to determine the level of probation supervision (based on a risk score) and the type of treatment or program approaches (based on a needs assessment), aimed at reducing the likelihood that the probationer will engage in future criminal activity. A risk/needs assessment is valuable only to the extent that it reflects a probationer's current status. Consequently, when probation commences after a defendant has served a (sometimes substantial) committed sentence, best practice dictates that the Probation Service conduct a risk/needs assessment at the commencement of the probationary term.

Ordinarily probation conditions are imposed at the time of sentencing, giving a defendant notice of what is required and "'fair warning of conduct' that may lead to a revocation of

probation." *Commonwealth v. Bynoe*, 85 Mass. App. Ct. 13, 19 (2014), quoting *Commonwealth v. Al Saud*, 459 Mass. 221, 232 (2011). However, probation is not a fixed agreement or contract between the court and probationer. *Id.* at 20, citing *Commonwealth v. McGovern*, 183 Mass. 238, 240 (1903). A judge may alter or revise conditions of probation that increase the scope of the original conditions when there has been a "material change in circumstances since the time that the terms were originally imposed [provided] the added or modified conditions are not so punitive as to increase the severity of the original probation." *Buckley v. Quincy Division of the Dist. Ct. Dep't.*, 395 Mass. 818, 819 n.5 (1985). *See also Commonwealth v. Morales*, 70 Mass. App. Ct. 839 (2007) (comprehensive analysis of law relating to modification principles).

Where a probation officer determines, based on an updated risk/needs assessment, that conditions that were part of the original probationary order are no longer necessary, or that different conditions may be necessary, the case should be brought before a judge who will determine whether there is a "material change in circumstances" that warrants a change in conditions.[3] For instance, an original probation order might have included conditions that were fulfilled during the period of incarceration (e.g., obtaining a G.E.D., completing an anger management course or participating in cognitive behavioral treatment) and might appropriately be vacated. Similarly, a probationer's criminogenic needs (antisocial peers; criminal thinking; antisocial attitudes, values and beliefs) might be significantly different after a period of incarceration such that different treatment requirements are necessary.

Principle No. 14 ***The judge should ensure a timely and proportional response to proven violations of probation. A probationer should be held accountable, through administrative or judicial proceedings, for proven violations of the terms or conditions of probation.***

Commentary

There is broad consensus (if not universal agreement) among social scientists and criminal justice experts that systemic responses to probation violations should be swift, certain, and consistent.[4] A swift and certain response to violations of probation is one of ten best practice

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[3] It does not appear that the original sentencing judge must conduct the hearing. Although "it is desirable that probation revocation hearings be heard by the judge who placed the defendant on probation in the first instance," *Commonwealth v. Christian*, 46 Mass. App. Ct. 477, 482 n.5 (1999), there is "no hard and fast rule, and there are circumstances which may make this practice infeasible." *Bynoe*, 85 Mass. App. Ct. at 22 n.11.

[4] AM. PROB. AND PAROLE ASS'N & NAT'L CTR. FOR STATE COURTS, EFFECTIVE RESPONSES TO OFFENDER BEHAVIOR: LESSONS LEARNED FOR PROBATION AND PAROLE SUPERVISION (2013); PEW CHARITABLE TRS., PEW CTR. ON THE STATES, ARMING THE COURTS WITH RESEARCH: 10 EVIDENCE-BASED SENTENCING INITIATIVES TO CONTROL CRIME AND REDUCE COSTS (2009); ANGELA HAWKEN & MARK KLEIMAN, MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS: EVALUATING HAWAII'S HOPE (report

principles developed by the National Center for State Courts. It is also a bedrock principle of the Massachusetts HOPE/MORR model of probation supervision.

A timely response to a probation violation not only ensures accountability but also reinforces to a probationer that the sanction flows from the probationer's misconduct (a cause and effect relationship). Sanctions may be judicially or administratively imposed. When a judicial sanction is sought, through a violation proceeding, due process requires notice, appointment of counsel, and an opportunity to prepare a defense. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Commonwealth v. Durling*, 407 Mass. 108 (1990). Although there is some delay before a final adjudication of a violation based on due process considerations, the Probation Service can minimize the time involved by immediately filing a notice of surrender to initiate violation proceedings.

Best practice research also supports the principle that the sanction for a violation of probation should be proportional to the violation and reflect the probationer's overall performance while on probation. As reflected in Best Practice Principle No. 12, *supra*, revocation of probation and the imposition of a committed sentence should be used sparingly insofar as there is generally no positive impact on reducing recidivism by incarceration. Although sanctions should be proportional to the violation and revocation should be considered as a last resort, the Working Group recognizes that probationers who repeatedly violate the terms and conditions of probation will appropriately be sanctioned more severely than will a first-time violator. Repeated violations reflect a lack of rehabilitation on the probationer's part and "pose an obvious threat to the public welfare." *Durling*, 407 Mass. at 115. The sanction for a violation lies in the sound discretion of the judge and may range from restoring the defendant to probation with a verbal warning, the addition of conditions or restrictions, extending the probationary term, placing the probationer in a higher form of monitoring such as community corrections, or some combination of intermediate sanctions. Revoking probation and imposing a committed sentence, particularly for an offense requiring a mandatory minimum term, may be disproportional to the nature of the violation itself (e.g., imposing a twenty-year sentence for armed home invasion based on a single positive drug test) and should therefore be viewed as a last resort.

A defendant who is ordered to remain drug free, as a condition of probation, may be found in violation of probation for using illegal drugs, even if the defendant is addicted to drugs. *Commonwealth v. Eldred*, 480 Mass. 90, 104–105 (2018). That said, depending on the evidence, there may be a question whether the defendant could control his or her drug use, and thus whether the violation of probation was willful. *Id.* at 104. Even if the violation was willful, when determining the appropriate disposition in light of such factors as public safety, the circumstances of the crime for which the defendant was serving probation and the crime's impact on any person or the community, and any previous probation violations, the judge "should act

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funded by U.S. Dep't of Justice, December 2009), https://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf; Amy Solomon, *Does Parole Supervision Work?* 30 PERSPECTIVES: J. OF THE AM. PROB. AND PAROLE ASS'N 26 (2006); Raymond Paternoster, *Decisions to Participate in and Desist from Four Types of Common Delinquency: Deterrence and the Rational Choice Perspective,* 23 L. & SOC'Y REV. 7 (1989).

with flexibility, sensitivity, and compassion when dealing with people who suffer from drug addiction." *Id.* at 95.

Principle No. 15 ***The practice of a probation surrender proceeding tracking a new criminal case is discouraged and should occur only where a judge or magistrate finds good cause, stated on the record in open court, for a delay in the proceeding.***

Commentary

As noted in the preceding commentary, a swift response to a violation of probation ensures accountability and reinforces the seriousness of probation. By contrast, delaying a systemic response erodes the cause-and-effect connection between the misconduct and the sanction, leading to a belief that misconduct carries no consequence. Consistent with § 6(A) of the Guidelines for Probation Violation Proceedings in the Superior Court, the practice of "tracking" is expressly discouraged as contrary to best practice principles. Tracking occurs where the violation is based on the commission of a new criminal offense and the violation hearing is continued to permit resolution of the new criminal case.

Consistent with § 6(A) of the Guidelines, the Working Group recognizes that in individual cases there may be valid reasons justifying a delay in proceeding on a claimed violation and that a judge may find good cause for not holding a prompt violation hearing. For example, where the new criminal case is particularly complex or sensitive such that providing discovery or presenting evidence at a final hearing could compromise the integrity of the new case, a judge may determine that a delay in conducting a final hearing based on the new offense constitutes good cause. Similarly, where the Commonwealth's case as to the new offense rests largely on the credibility of a particular witness, a judge may conclude that it would be in the interests of justice to have a full trial on the new offense first, particularly if that witness is unavailable to testify at a surrender hearing.

Principle No. 16 ***A judge should have access to empirical data, derived from social science research, the Sentencing Commission, the Probation Service, and other reliable sources, relating to the correlation between sentencing practices and recidivism, to be made available through periodic judicial education programs.***

Commentary

Few topics in criminal justice have received as much attention and research as sentencing practices. Criminologists and researchers have studied and continue to study ways to reduce crime in a cost-effective manner. They have classified offenders by the types of crimes committed and offender characteristics, and sought to identify those approaches that seem successful in reducing an offender's likelihood of engaging in further criminal activity. In

Massachusetts, for example, studies have shown that use of the ORAS assessment led to a 21.2% reduction in crime among probationers, use of GPS and ELMO technology led to a 23.3% reduction, and following the pilot HOPE/MORR probation practices led to a 22.8% reduction. PEW CHARITABLE TRS., PEW-MACARTHUR RESULTS FIRST INITIATIVE, MASSACHUSETTS' EVIDENCE-BASED APPROACH TO REDUCING RECIDIVISM, at 4 (2014). Similarly, national research has shown that the majority of those placed on probation who reoffend by committing a new crime do so in the first two years of probation, suggesting that placing a defendant on probation for extended terms (more than three years) has marginal value.

The Working Group believes that judicial access to empirical data reflecting what is (and is not) effective in reducing recidivism is essential to sentencing best practices. The Trial Court should develop a clearinghouse for best practices research, with responsibility for collecting and validating information, and publishing and disseminating statistical information on probation practices and conditions, and their actual impact on recidivism.

Principle No. 17 ***Judges should be familiar with best practice principles, including risk/need/responsiveness principles, through judicial training and education programs.***

Commentary

The Superior Court, in conjunction with the Trial Court, should conduct educational programs for the dissemination and discussion of best-practice data among judges and other participants. These could include periodic sentencing educational conferences, Flaschner programs, county-based sentencing circles, periodic "brown-bag" luncheons, or similar programs.

Resources

Am. Prob. and Parole Ass'n & Nat'l Ctr. for State Courts,
EFFECTIVE RESPONSES TO OFFENDER BEHAVIOR: LESSONS LEARNED FOR PROBATION AND PAROLE SUPERVISION (2013)

Barry-Jester, A.M., et al.,
The New Science of Sentencing: Should Prison Sentences be Based on Crimes that Haven't Been Committed Yet? MARSHALL PROJECT (Aug. 4, 2015), https://www.themarshallproject.org/2015/08/04/the-new-science-of-sentencing#.I7Tmx28Wt

Berman, D.A.,
SENTENCING LAW AND POLICY: AN AFFILIATE OF THE LAW PROFESSOR BLOGS NETWORK http://sentencing.typepad.com/ (last visited Oct. 17, 2019)

Bonta, J. & D.A. Andrews,
RISK-NEED-RESPONSIVITY MODEL FOR OFFENDER ASSESSMENT AND REHABILITATION (2007)

Byrne, J. & S. Turner,
Reforming Federal Sentencing Guidelines: A Modest Proposal, 5 VICTIMS & OFFENDERS: AN INT'L J. OF EVIDENCE-BASED RES., POL'Y, AND PRAC. 220 (2010)

Carter, M.M., Nat'l Inst. of Corr.,
BEHAVIOR MANAGEMENT OF JUSTICE-INVOLVED INDIVIDUALS: CONTEMPORARY RESEARCH AND STATE-OF-THE-ART POLICY AND PRACTICE (2015)

Casey, P.M., et al., Nat'l Ctr. for State Courts,
OFFENDER RISK & NEEDS ASSESSMENT INSTRUMENTS: A PRIMER FOR COURTS (2014)

Casey, P.M., et al., Nat'l Ctr. for State Courts,
USING OFFENDER RISK AND NEEDS ASSESSMENT INFORMATION AT SENTENCING: GUIDANCE FOR COURTS FROM A NATIONAL WORKING GROUP (2011)

Clear, T.R. & N. Frost,
THE PUNISHMENT IMPERATIVE: THE RISE AND FAILURE OF MASS INCARCERATION IN AMERICA (2013)

Coates, T.,
The Black Family in the Age of Mass Incarceration, ATLANTIC, Oct. 2015

Commonwealth of Mass.,
REPORT OF THE SPECIAL COMMISSION TO STUDY THE CRIMINAL JUSTICE SYSTEM (2015)

Corbett, R.P.,
Fixing Broken Lenses: Toward Humanistic Practice in Probation, 36 PERSPECTIVES: J. OF THE AM. PROB. AND PAROLE ASS'N 68 (2012)

Corbett, R.P.,
The Burdens of Leniency: The Changing Face of Probation, 99 MINN. L. REV. 1697 (2015)

Corbett, R.P. & A. Pattavina,
Syncing GPS with New Directions in Managing Offender Change: Behavioral Economics and the Promise of Evidence-Based Technology (EBT), EXECUTIVE EXCHANGE: NAT'L ASS'N OF PROB. EXECUTIVES, spring 2015, at 3

Corbett, R.P. & K.R. Reitz, Univ. of Minn. Law Sch., Robina Inst. of Criminal Law and Criminal Justice,
PROFILES IN PROBATION REVOCATION: EXAMINING THE LEGAL FRAMEWORK IN 21 STATES (2014)

Cullen, F.T. et al.,
Before Adopting Project Hope, Read the Warning Label, 78 FED. PROB. 12 (2014)

Elek J.K., et al., Nat'l Ctr. for State Courts,
USING RISK AND NEEDS ASSESSMENT INFORMATION AT SENTENCING: OBSERVATIONS FROM TEN JURISDICTIONS (2015)

Harris, A., et al.,
Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States, 115 AM. J. OF SOC. 1753 (2010)

Inst. for Behavior and Health, Inc.,
STATE OF THE ART OF HOPE PROBATION (2015)

James, N., Cong. Research Serv.,
RISK AND NEEDS ASSESSMENT IN THE CRIMINAL JUSTICE SYSTEM (2015)

Jones, J. & B. Forman, Mass. Inst. for a New Commonwealth,
REDUCING RECIDIVISM IN MASSACHUSETTS WITH A COMPREHENSIVE REENTRY STRATEGY (2016)

Justice Policy Inst.,
FINDING DIRECTION: EXPANDING CRIMINAL JUSTICE OPTIONS BY CONSIDERING POLICIES OF OTHER NATIONS (2011)

Kauder, N.B. & B.J. Ostrom, Nat'l Ctr. for State Courts,
STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM (2008)

Klingele, C.,
Rethinking the Use of Community Supervision, 103 J. OF CRIM. L. AND CRIMINOLOGY 1015 (2013)

Kleiman, M., et al.,
DRUGS AND DRUG POLICY: WHAT EVERYONE NEEDS TO KNOW (2011)

Kleiman, M.,
WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT (2009)

Lipsey, M.W. & F.T. Cullen,
The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews, 3 ANN. REV. OF L. AND SOC. SCI. 297 (2007)

Mass. Exec. Office of Pub. Safety and Sec.,
Dep't of Corr., *Reports, Research and Statistics*,
https://www.mass.gov/inmate-and-prison-research-statistics

Mass. Exec. Office of Pub. Safety and Sec.,
Parole Board, *Annual Reports*,
https://www.mass.gov/public-records-and-reports-for-parole-board

Mass. Trial Court, Office of Cmty. Corr.,
UTILIZATION OF COMMUNITY CORRECTIONS CENTERS STATISTICS REPORT, FY 2014 (2015)

MODEL PENAL CODE: SENTENCING § 1.02(2)
(AM. LAW INST., TD No. 1, approved at 2007 annual meeting)

Mullainathan, S. & E. Shafir,
SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH (2013)

Nat'l Research Council,
THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES (Jeremy Travis et al. eds., 2014)

Pew Charitable Trs., Pew Ctr. on the States,
ARMING THE COURTS WITH RESEARCH: 10 EVIDENCE-BASED SENTENCING INITIATIVES TO CONTROL CRIME AND REDUCE COSTS (2009)

Pew Charitable Trs., Pew-MacArthur Results First Initiative,
MASSACHUSETTS' EVIDENCE-BASED APPROACH TO REDUCING RECIDIVISM (2014)

Pew Charitable Trs., Pew-MacArthur Results First Initiative,
RESULTS FIRST CLEARINGHOUSE DATABASE: USER GUIDE (2015)

Roeder, O., et al., N.Y. Univ. Sch. of Law, Brennan Ctr. for Justice,
WHAT CAUSED THE CRIME DECLINE? (2015)

Solomon, A.,
Does Parole Supervision Work? 30 PERSPECTIVES: J. OF THE AM. PROB. AND PAROLE ASS'N 26 (2006)

Subramanian, R., et al., Vera Inst. of Justice, Ctr. on Sentencing and Corr.,
RECALIBRATING JUSTICE: A REVIEW OF 2013 STATE SENTENCING AND CORRECTIONS TRENDS (2014)

Trotter, J.,
Reducing Recidivism Through Probation Supervision: What We Know and Don't Know from Four Decades of Research, 77 FED. PROB. 43 (2013)

Urban Inst.,
TRANSFORMING PRISONS, RESTORING LIVES: FINAL RECOMMENDATIONS OF THE CHARLES COLSON TASK FORCE ON FEDERAL CORRECTIONS (2016)

Walker, A., et al., Mass. Prob. Serv., Office of Cmty. Corr.,
COMMUNITY CORRECTIONS CENTER RECIDIVISM (2015)

Warren, R.K., Crime and Justice Inst. and Nat'l Inst. of Corr.,
EVIDENCE-BASED PRACTICE TO REDUCE RECIDIVISM: IMPLICATIONS FOR STATE JUDICIARIES (2007)

Western, B.,
The Impact of Incarceration on Wage Mobility and Inequality, 67 AM. SOC. REV. 526 (2002)

Wodahl, E.J., et al.,
Responding to Probation and Parole Violations: Are Jail Sanctions More Effective Than Community-Based Graduated Sanctions? 43 J. OF CRIM. JUST. 242 (2015)

Selected Sentencing Statutes

A. Mandatory Sentencing Provisions

1. Drug penalties: G. L. c. 94C, §§ 32, 32A, 32E, & 32J
(see Drug Sentences under the 2012 "Three Strikes" Act, attached [A:1])

2. Firearms penalties: G. L. c. 269, § 10

    - Armed career criminal penalties: G. L. c. 269, § 10G

3. Aggravated indecent assault and battery on a child under 14: G. L. c. 265, § 13B½

4. Indecent assault and battery on a child, subsequent offense: G. L. c. 265, § 13B¾

5. Masked armed robbery: G. L. c. 265, § 17

    - Subsequent offense, not less than 10 years
    - Use of a firearm, rifle, or shotgun, not less than 5 years
    - Subsequent offense, not less than 15 years

6. Armed assault with intent to rob or murder: G. L. c. 265, § 18(a)

    - Victim over 60, not more than 20 years
    - Use of firearm, rifle, or shotgun, not less than 10 years
    - Subsequent offense, not less than 20 years

7. Armed assault in a dwelling: G. L. c. 265, § 18A

    - Not less than 10 years

8. Home invasion: G. L. c. 266, § 14

    - With dangerous weapon, not less than 10 years
    - With firearm, rifle, or shotgun, not less than 15 years
    - Subsequence offense, not less than 20 years

9. Habitual offender statute: G. L. c. 279, § 25

B. Murder Sentences

1. Life imprisonment: G. L. c. 265, § 2

2. Parole eligibility: G. L. c. 279, § 24

- Life imprisonment for crime other than first-degree murder, minimum not less than 15 to 25 years

- Juvenile offender convicted of first-degree murder:

  - In the case of a sentence of life imprisonment for murder in the first degree committed by a person on or after the person's fourteenth birthday and before the person's eighteenth birthday, the court shall fix a minimum term of not less than 20 years nor more than 30 years; provided, however, that in the case of a sentence of life imprisonment for murder in the first degree with extreme atrocity or cruelty committed by a person on or after the person's fourteenth birthday and before the person's eighteenth birthday, the court shall fix a minimum term of 30 years; and provided further, that in the case of a sentence of life imprisonment for murder in the first degree with deliberately premeditated malice aforethought committed by a person on or after the person's fourteenth birthday and before the person's eighteenth birthday, the court shall fix a minimum term of not less than 25 years nor more than 30 years.

C. Requirement for indeterminate sentence: G. L. c. 279, § 24

- Except for habitual criminals, court shall set a range, the maximum not to exceed the longest term set by statute

D. Prohibition against suspending state prison sentences: G. L. c. 127, § 133

- "Sentences of imprisonment in the state prison shall not be suspended in whole or in part"

E. Appellate sentencing division: G. L. c. 278, §§ 28A–28D

- Three-judge panel of the Superior Court hears appeals of defendants sentenced to state prison terms, with jurisdiction to amend the judgment by decreasing, altering, or increasing the committed sentence. Decisions of appellate division are final

Drug Sentences Under the 2012 "3 Strikes" Act: Minimum, Maximum, and Mandatory Minimum Sentences with Parole Eligibility

Updated April 2018 to reflect changes under An Act Relative to Criminal Justice Reform, St. 2018, c. 69

(Original: Judge Charles Hely, January 4, 2013; Updated: Apr. 13, 2018 by Alex Philipson)

Charge (references to G. L. c. 94C)	Not Less Than	Not More Than	Minimum Mandatory[1]
Class A Controlled Substances - § 32			
Distribution or Possession w/ Intent - § 32(a)		10 - SP or 2.5 - HC	
w/ a Prior Conviction - § 32(b)	3.5 - SP	15 - SP	3.5 – SP
Violation in a School Zone[3,4] (Separate Offense) - § 32J	2.5 - SP or 2 - HC	15 - SP or 2.5 HC	2 - SP or 2 – HC[2]
Trafficking - (Heroin, Morphine, Opium[5]) - § 32E(c)			
18-36 grams - § 32E(c)(1)	3.5 - SP	30 - SP	3.5 – SP
36-100 grams - § 32E(c)(2)	5 - SP	30 - SP	5 – SP
100-200 grams - § 32E(c)(3)	8 - SP	30 - SP	8 – SP
200< grams - § 32E(c)(4)	12 - SP	30 - SP	12 – SP
≥ 10 grams fentanyl or derivative or mixture – § 32E(c½)	3.5 - SP	20 - SP	3.5 – SP
carfentanil or derivative or mixture – § 32E(c¾)	3.5 - SP	20 - SP	3.5 – SP
Class B Controlled Substances - § 32A			
Distribution or Possession w/ Intent - § 32A(a)		10 - SP or 2.5 - HC	
w/ a Prior Conviction - § 32A(b)		10 - SP	
Escalator for Cocaine, Phencyclidine, and Methamphetamine - § 32A(c)[6]		10 - SP or 2.5 - HC	
Escalator w/ a Prior Conviction - § 32A(d)[6]		15 - SP	
Violation in a School Zone[3,4] (Separate Offense) - § 32J	2.5 - SP or 2 - HC	15 - SP or 2.5 HC	2 – SP or 2 – HC[2]
Trafficking - (Cocaine, Methamphetamine, Phenmetrazine) - § 32E(b)			
18-36 grams § 32E(b)(1)	2 - SP	15 - SP	2 – SP
36-100 grams § 32E(b)(2)	3.5 - SP	20 - SP	3.5 – SP
100-200 grams § 32E(b)(3)	8 - SP	20 - SP	8 – SP
200< grams § 32E(b)(4)	12 - SP	20 - SP	12 – SP

Other Charges

Trafficking - Marijuana - § 32E(a)			
50-100 lbs - § 32E(a)(1)	2.5 - SP or 1 - HC	15 - SP or 2.5 - HC	1 - SP or 1 – HC[2]
100-2,000 lbs - § 32E(a)(2)	2 - SP	15 - SP	2 – SP
2,000-10,000 lbs - § 32E(a)(3)	3.5 - SP	15 - SP	3.5 – SP
10,000< lbs - § 32E(a)(4)	8 - SP	15 - SP	8 - SP

Notes

This memorandum does not address any retroactivity issues.

SP – State Prison

HC – House of Correction

[1] Minimum mandatory sentences to state prison are not eligible for parole or good conduct credit for the specified minimum mandatory period, under § 32H.

[2] Minimum mandatory sentences to a house of correction are eligible for parole after serving one-half of the maximum term of the sentence so long as no aggravating factor as outlined in § 32E(d) or § 32J applies.

[3] School zone is defined as a violation between 5 a.m. and midnight within 300 feet of a school, or within 100 feet of a public park or playground. Under the 2018 Criminal Justice Reform Act, the Commonwealth must also prove at least one of the three circumstances that, under the pre-2018 version of § 32J, were considered only "aggravating circumstances" for making a defendant ineligible for parole after serving one-half of a maximum sentence to a house of correction.

[4] School zone sentences begin from and after the expiration of the sentence for the original violation of § 32 or § 32A (or other offense referred to in § 32J).

[5] Opium is normally a Class B substance but is grouped with Class A Heroin and Morphine for trafficking charges, under § 32E.

[6] Note that cocaine is a coca leaves derivative under § 31, Class B (a)(4). A cocaine offense is therefore subject to the escalators in § 32A(c) and (d) if it is properly pleaded in the indictment.

STATUTORY FEE ASSESSMENTS IN CRIMINAL CASES

TYPE OF ASSESSMENT	DESCRIPTION	WAIVABLE?
Victim-Witness Assessment G. L. c. 258B, § 8 By statute, this assessment has ***FIRST PRIORITY*** (with DV Prevention fee below) among all "fines, assessments or other payments."	**MANDATORY** (in addition to DV Prevention fee below) upon conviction or finding of sufficient facts of a person 17 or older (if 17 years old, as a youthful offender) • **Felony: ≥ (not less than) $90 assessment** • **Misdemeanor: $50 assessment**	**WAIVER REQUIRES WRITTEN FINDINGS** • Court may waive fee or structure payment plan only **upon a written finding of fact** that payment "would cause a substantial financial hardship to the person against whom the assessment is imposed or the person's immediate family or the person's dependents." • Unpaid amount must be noted on mittimus if defendant is sentenced to a correctional facility.
Domestic Violence Prevention and Victim Assistance Fee G. L. c. 258B, § 8 By statute, this assessment has ***FIRST PRIORITY*** (with VW fee above) among all "fines, assessments or other payments."	**MANDATORY** (in addition to VW fee above) for: (i) violation of G. L. c. 209A order (+ other related statutes) (ii) conviction of, or adjudication for, an act of abuse, as defined in G. L. c. 209A, § 1; or (iii) violation of G. L. c. 265, § 13M (domestic assault or A&B) or § 15D (strangulation). • **$50 assessment**	**WAIVER REQUIRES WRITTEN FINDINGS; COMMUNITY SERVICE TO SATISFY FEE** • Court may waive fee or structure payment plan only **upon a written finding of fact** that payment "would cause a substantial financial hardship to the person against whom the assessment is imposed or the person's immediate family or the person's dependents." • Court may order completion of at least 8 hours of community service to satisfy assessment if structured payment would "continue to impose a severe financial hardship." • Unpaid amount must be noted on mittimus if defendant is sentenced to a correctional facility.
Probation Supervision Fee & Surcharge G. L. c. 276, § 87A	**MANDATORY** – if on supervised probation • **$65 per month** ($60 probation fee + $5 victim services surcharge), **but** if defendant is released on probation after a period of incarceration, no fee for the first 6 months of probation • Exception: No fees if defendant convicted/accused of violating G. L. c. 273, §§ 1 or 15, where support payments are a condition of probation.	**WAIVER REQUIRES FINDING; COMMUNITY SERVICE IN LIEU OF FEE** • Court may waive fee only after a hearing and upon a finding that payment "would impose a substantial financial hardship on the person, the person's immediate family or dependents" (and only while the hardship continues). • Court may, in its discretion, order community service in lieu of payment for **not more than** 4 hours per month. • May be waived or reduced to the extent the person pays equivalent restitution.
Administrative Probation Supervision Fee & Surcharge G. L. c. 276, § 87A	**MANDATORY** – if on administrative supervised probation • **$50 per month** ($45 administrative probation fee + $5 administrative victim services surcharge), **but** if defendant is released on probation after a period of incarceration, no fee for the first 6 months of probation • Exception: No fees if defendant convicted/accused of violating G. L. c. 273, §§ 1 or 15, where support payments are a condition of probation.	
Drug Analysis Assessment G. L. c. 280, § 6B	**MANDATORY** upon conviction or finding of sufficient facts: **$150 – $500** for felony under G. L. c. 94C: § 32 Poss. w/ intent or distributes Class A Drug § 32A Poss. w/ intent or distributes Class B Drug § 32B Poss. w/ intent or distributes Class C Drug § 32E Trafficking § 32F Poss. w/ intent or distributes Class A, B, or C to a minor § 34 Possession of controlled substance **$35 – $100** for misdemeanor under G. L. c. 94C, person 18 or older: § 32C Poss. w/ intent or distributes Class D Drug § 32D Poss. w/ intent or distributes Class E Drug § 32G Poss. w/ intent or distributes counterfeit drug § 35 Being present where heroin is kept **$500:** maximum aggregate for multiple offenses from a single incident.	• Court may waive or reduce fee if it "would cause a substantial financial hardship to the person, the person's immediate family or the person's dependents."
GPS Fee G. L. c. 265, § 47 Discretionary GPS monitoring and fee	**MANDATORY– $5.95/day fee:** anyone on probation for a qualifying sex offense defined in G. L. c. 6, § 178C, committed after Dec. 20, 2006, *Comm. v. Cory*, 454 Mass. 559, 560 (2009), must pay for installing, maintaining, and operating a GPS/comparable device, **IF** judge finds Commonwealth's need to impose GPS monitoring outweighs resulting invasion of privacy. *Comm. v. Feliz*, 481 Mass. 690 (2019). • If the case does not involve a sex offense governed by § 47, and if the judge orders GPS monitoring as a matter of discretion, no statute or other law requires the defendant to pay the daily GPS monitoring fee.	• Court may waive fee, under § 47, if payment "would cause a substantial financial hardship to the offender or the person's immediate family or the person's dependents." • In deciding whether to order a defendant to pay the GPS fee, where GPS monitoring is ordered in the court's discretion rather than under § 47, the court should consider whether the defendant is indigent for purposes of receiving appointed counsel.

TYPE OF ASSESSMENT	DESCRIPTION	WAIVABLE?
Batterers' Treatment Program Fee G. L. c. 209A, § 10	**MANDATORY – $350:** when person has been referred to a batterers' treatment program as a condition of probation (in addition to cost of program).	• Court may waive or reduce fee if person is indigent or payment "would cause a substantial financial hardship to the person or the person's immediate family or the person's dependents."
Indigent Counsel Fee G. L. c. 211D, § 2A(e), (f), & (g); S.J.C. Rule 3:10, Section 10(a)	**MANDATORY – $150:** when counsel appointed, unless person is under 18 years old (no counsel fee for person under 18). • Counsel fee under § 2A(f) is in addition to counsel "contribution" fee (see below) under S.J.C. Rule 3:10, Section 10(b). • Court proceeding shall not be terminated, person shall not be discharged, and bail shall not be returned if fee is owed. § 2A(g). • If person materially misrepresented or omitted information for purposes of determining indigency, court shall terminate appointment of counsel and assess costs of not less than $1,000. § 2A(e).	• Court may waive fee only upon a determination that person is unable without substantial financial hardship to pay fee within 180 days. § 2A(f); Rule 3:10, Section 10(a). • Court may revoke waiver and reimpose fee if, upon biannual reassessment, court concludes person is able to pay. § 2A(f). • Court may authorize community service in lieu of payment of fee: 10 hours for each $100 owed. § 2A(g).
Counsel Contribution Fee G. L. c. 211D, § 2; S.J.C. Rule 3:10, Sections 1(d) & 10(b)	**MANDATORY**– imposed on a person who is "indigent but able to contribute," in addition to the indigent counsel fee (see above), "based on the financial circumstances of the party, provided that the amount of the contribution fee shall not cause substantial financial hardship." S.J.C. Rule 3:10, Section 10(b).	
Default Warrant Recall Fee G. L. c. 276, § 30, ¶ 1; § 31 & § 32	**MANDATORY– $50** • when default warrant is recalled (§ 30, ¶ 1) • when default warrant issued for failure to pay (§§ 31 and 32)	• Court may waive upon finding of good cause or if the fee "would cause a substantial financial hardship to the person, the person's immediate family or the person's dependents."
Default Warrant Arrest Fee G. L. c. 276, § 30, ¶ 2	**MANDATORY– $75** • upon arrest on warrant issued because of forfeited/defaulted bail bond or recognizance, or upon surrender by probation officer.	**WAIVER REQUIRES COMMUNITY SERVICE** • Court may waive if person is indigent or if the fee "would cause a substantial financial hardship to the person, the person's immediate family or the person's dependents"; person must perform 1 day of community service unless physically or mentally unable.

OTHER ASSESSMENTS AND FEES

Costs of Prosecution **G. L. c. 280, § 6**	**DISCRETIONARY** – "reasonable and actual expenses" of the prosecution as a condition of dismissal, placing complaint or indictment on file, or as a term of probation; "reasonable costs" resulting from defendant's default that was "intentional or negligent and without good cause."
Costs upon Continuances **Mass. R. Crim. P. 10(b)**	**DISCRETIONARY** – when continuance is granted upon motion of either party without adequate notice to adverse party, court may assess costs for "unnecessary expenses" incurred by non-moving party.
Costs upon Default **Mass. R. Crim. P. 6(d)(1)**	**DISCRETIONARY** – court may assess as costs against defendant those expenses which result from defendant's ***willful*** default and as to costs which ***directly*** result therefrom.
Criminal Cases – Special Cost Assessment **G. L. c. 280, § 6A**	**MANDATORY – 25% of fine or forfeiture** imposed as punishment (except for juveniles or for convictions of motor vehicle offenses not punishable by incarceration); court may waive all or part of assessement if payment "would cause a substantial financial hardship to the person, the person's immediate family or the person's dependents."
Diversity Awareness Education Trust Fund (For Hate Crimes) – G. L. c. 265, § 39	**MANDATORY – $100 surcharge on fine** assessed against defendant convicted of violating statute; assessed for each "conviction," where multiple convictions
Head Injury Assessment – OUI or Operating Negligently **G. L. c. 90, §§24(1)(a)(1) ¶ 2 and (2)(a) ¶ 2;** **G. L. c. 90B, §§ 8(a)(4) and 34 ¶ 2**	**MANDATORY – $250 assessment** upon conviction, probation, CWOF, guilty plea, or admission to sufficient facts of operating a motor vehicle, vessel, or snow/recreation vehicle while under the influence (OUI), or of operating a motor vehicle negligently; **may not be reduced or waived for any reason**.
Head Injury Surcharge on Fine – Speeding **G. L. c. 90, §20, ¶ 4**	**MANDATORY – $50 surcharge on fine** assessed against person convicted or found responsible of violating section 17 (speeding) or a special regulation made under authority of section 18 (as to speed and use of MV).
OUI Fee **G. L. c. 90, § 24D, ¶¶ 9-10**	**MANDATORY – $250** when person is placed in a driver alcohol or drug-abuse education program; may be waived if payment would cause a "substantial financial hardship to the individual, the individual's immediate family or the individual's dependents"; ***court must enter written findings***; in lieu of waiver of entire amount, court may order partial or installment payments "when appropriate."
Victims of Drunk Driving Trust Fund **G. L. c. 90, § 24(1)(a)(1), ¶ 3**	**MANDATORY – $50 assessment** upon conviction, probation, CWOF, guilty plea, or admission to sufficient facts of OUI, vehicular homicide, or serious injury involving OUI; **not subject to waiver for any reason**; unpaid amount must be noted on mittimus if sentenced to correctional facility.
209A Violation - G. L. c. 209A, §7, ¶ 5	**MANDATORY – $25 fine** upon conviction for violation of restraining order; this is in addition to any other penalty, sentence, fee, or assessment imposed.

ORDER OF STATUTORY FEES	DOCKET NUMBER	TRIAL COURT OF MASSACHUSETTS SUPERIOR COURT DEPARTMENT
CASE NAME:		COURT NAME & ADDRESS

The court hereby enters the following ORDER with respect to statutory fees and costs in this case:

Probation Supervision Fee & Surcharge (G. L. c. 276, §87A)

☐ Fee imposed: **$ 65/month**, but for a defendant who begins probation after release from incarceration, no fee for the first 6 months of probation

Probation Administrative Fee & Surcharge (G. L. c. 276, §87A)

☐ Fee imposed: **$ 50/month**, but for a defendant who begins probation after release from incarceration, no fee for the first 6 months of probation

☐ **Waived** because the Court finds that payment of the fee would impose a substantial financial hardship on the person, the person's immediate family, or the person's dependents.

☐ In its discretion, the Court orders, in lieu of payment, **unpaid community work service** of not more than 4 hours/month.

☐ **Waived/** ☐ **Reduced to** _____ only to the extent and during the period that restitution is paid.

Victim-Witness Fee (G. L. c. 258B, §8) (not less than $ 90 for a felony; $ 50 for a misdemeanor; $ 45 for a delinquency)

☐ Fee imposed: $ 90 (felony) ☐ Fee imposed: $ 50 (misdemeanor) ☐ Fee imposed: $ 45 (delinquency)

☐ The Court finds that payment of the fee would cause a substantial financial hardship to the person, the person's immediate family, or the person's dependents. Accordingly, the Court orders:

☐ **Fee waived**
☐ **Structured payment plan of** _____.

Drug Analysis Fee (G. L. c. 280, § 6B) ($ 150–$ 500 for felony; $ 35–$ 100 for misdemeanor; $ 500 max. aggregate for multiple offenses from single incident)

☐ Fee imposed: $ _____ ☐ **Fee waived** / ☐ **Fee reduced to $** _____ because the Court finds that payment would cause a substantial financial hardship to the person, the person's immediate family, or the person's dependents.

Indigent Counsel Fee (G. L. c. 211D, §§ 2A(f) & (g); SJC Rule 3:10, Sections 1(j) and 10(a))

☐ Fee imposed: **$ 150**

☐ **Fee waived** because the Court finds that the defendant is unable without substantial financial hardship to pay the fee within 180 days.

☐ **Fee not waived/community service in lieu of payment.** The defendant is authorized to perform **community service** in lieu of payment of the indigent counsel fee: **15 hours** (10 hours for each $ 100).

Contribution Fee (G. L. c. 211D, § 2; SJC Rule 3:10, Sections 1(d) and 10(b))
(This fee is in addition to Indigent Counsel Fee.)

☐ The Court finds that the defendant is **indigent but able to contribute** (as defined under SJC Rule 3:10, Section 1(i)). The defendant is therefore **ordered** to pay a **contribution fee** of $ _____, an amount that the Court finds will not cause the defendant substantial financial hardship.

GPS Fee (G.L. c. 265, § 47, for a qualifying sex offense defined in G. L. c. 6, § 178C, **IF** the court finds the Commonwealth's need to impose GPS monitoring outweighs the resulting invasion of privacy.)

☐ Fee imposed: **$ 5.95/day** ☐ **Fee waived** because the Court finds that payment would cause a substantial financial hardship to the offender, the offender's immediate family, or the offender's dependents.

Domestic Violence Prevention and Victim Assistance Fee (G.L. c. 258B, § 8)

☐ Fee imposed: **$ 50**

☐ The Court finds that payment of the fee would cause a substantial financial hardship to the person, the person's immediate family, or the person's dependents. Accordingly, the Court orders:
☐ **Fee waived**
☐ **Structured payment plan of** _____.

☐ **Community service of** _____ hrs. (at least 8 hrs.) because the Court finds that a structured payment would continue to impose a severe financial hardship on the defendant.

Default Warrant Recall Fee (G.L. c. 276, § 30, ¶1; and §§ 31 & 32)

☐ Fee imposed: **$ 50** ☐ **Fee waived** because the Court finds the following ☐ good cause to **waive** the fee: _____, or ☐ that payment would cause a substantial financial hardship to the person, the person's immediate family, or the person's dependents.

Default Warrant Arrest Fee (G.L. c. 276, § 30, ¶2)

☐ Fee imposed: **$ 75**

☐ **Fee waived/community service ordered** because the Court finds that the defendant is ☐ indigent, **or** ☐ that payment would cause a substantial financial hardship to the person, the person's immediate family, or the person's dependents. The defendant is required to perform **one day** of community service.

☐ **Fee and community service waived** because the Court finds that the defendant is ☐ indigent **or** ☐ that payment would cause a substantial financial hardship, **and** that the defendant is physically or mentally unable to perform such service.

OTHER FEES: _____

☐ **AMOUNT IMPOSED:** _____ ☐ **WAIVED / ☐ REDUCED to $** _____

REASON FOR WAIVER OR REDUCTION – the Court finds:

ADDITIONAL FINDINGS:

DATE:	**So ORDERED:** **(Associate Justice)**

GUIDELINES FOR PROBATION VIOLATION PROCEEDINGS IN THE SUPERIOR COURT EFFECTIVE FEBRUARY 1, 2016

Section One: Scope and Purpose

These guidelines prescribe procedures in the Superior Court to be followed upon the allegation of a violation of an order or condition of probation imposed in a criminal case after a finding of guilty or after a continuance without a finding. These guidelines do not apply to an alleged violation of pretrial probation or other conditions of pretrial release.

The purpose of the guidelines is to ensure that judicial proceedings undertaken on an allegation of a violation of probation are conducted in accordance with applicable law, and in a prompt, uniform and consistent manner.

Section Two: Definitions

In construing these guidelines, the following terms shall have the following meanings:

"Continuance without a finding" means the order of a court, following a formal submission and acceptance of a plea of guilty upon the defendant's agreement to the Commonwealth's evidence or a finding of sufficient facts, whereby a criminal case is continued to a date certain without formal entry of a guilty finding.[1] A court, in imposing a continuance without a finding, may include a term of probation with conditions, the violation of which may result in a revocation of the continuance and the entry of a finding of guilty and imposition of sentence.

"District Attorney" means the criminal prosecuting authority responsible for the criminal case in which a term of probation was imposed, to include the Attorney General.

"General conditions of probation" means those conditions of probation that are imposed as a matter of course in every probation order, as set forth in the official form promulgated for such orders.

"Notice of Surrender" means the written form issued by the Probation Department alleging a violation of probation and setting forth the precise grounds for a violation proceeding.

"Probation order" means the formal, written court order whereby a defendant is placed on probation and which expressly sets forth general and/or special conditions of probation.

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[1] *Commonwealth v. Powell*, 453 Mass. 320 (2009); G.L. c. 278, § 18.

"Pretrial Probation" means the probationary status of a defendant pursuant to a probation order issued prior to an adjudication of a criminal case.

"Revocation of probation" means the revocation of a probation order by a judge following an adjudication of a violation of a probation order.

"Special condition of probation" means any condition of probation imposed by a judge as part of a probation order in addition to general conditions of probation.

"Stipulation to violation" means a knowing and voluntary admission by a probationer that he/she has violated the probation order as alleged in the Notice of Surrender.

"Surrender" means the procedure, consistent with the instant Guidelines, by which a probation officer requires a probationer to appear before the court on an allegation of probation violation.

Section Three: Commencement of Violation Proceedings

A. Procedure

Violation Proceedings shall commence upon the filing, by a probation officer, of a written Notice of Surrender.[2] A Notice of Surrender shall be prepared in advance of Violation Proceedings except where the probationer has been arrested by the probation officer in accordance with G. L. c. 279, § 3, in which case the Notice of Surrender shall be prepared, filed with the court, and served on the probationer when the probationer first appears before the court. The Notice of Surrender shall be in a form promulgated by the Probation Department and shall identify the probationer by name, the offense or offenses for which the probationer was placed on probation, and the court and county where the offense was adjudicated and probation imposed. It shall specifically describe the basis for an alleged violation, shall include all alleged violations of the probation order known to the probation officer, and shall notify the probationer of the date and time of the Initial Hearing in the probation court.

B. Mandatory Commencement of Violation Proceedings

The probation officer shall issue a Notice of Surrender (1) when a probationer has been charged with a new criminal offense by way of complaint or indictment; (2) where the judge issuing the probation order directed that a Notice of Surrender is to issue upon any alleged violation of one or more conditions of probation; or (3) when the commencement of such

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[2] *Commonwealth v. Wilcox*, 446 Mass. 61, 66 (2006); *Commonwealth v. Durling*, 407 Mass. 108, 111 (1990)("When a violation is alleged, the probation officer "surrenders" the defendant to the court, subjecting the defendant to possible revocation of his probation.")

proceedings is required by statute.

C. Discretionary Commencement of Violation Proceedings

Except as set forth above, the probation officer may issue a Notice of Surrender for an alleged violation of a general and/or special condition of probation if, in the discretion of the Probation Department, the alleged violation is unlikely to be successfully resolved through an administrative hearing or other intermediate interventions.

D. Amendment and Withdrawal

A Notice of Surrender may be amended at any reasonable time before a final surrender hearing, provided service is made in accordance with these guidelines. A Notice of Surrender may be withdrawn only with leave of court, provided, however, that a judge or magistrate may order the termination of the proceedings at any time in the exercise of discretion, after giving the Probation Department an opportunity to be heard.

Section Four: Service of a Notice of Surrender

A Notice of Surrender shall be served on the probationer by in-hand service or by first-class mail to the last known residential address that the probationer has provided to his probation officer. When a probationer is brought before the court where the probationer is under supervision as the result of his arrest by the probation officer pursuant to G. L. c. 279, § 3, or is in custody as the result of a separate criminal case, service shall be made in-hand and an initial hearing conducted. The manner of service of the Notice of Surrender shall be noted in the court docket. Out-of-court service other than by first-class mail shall require a written return of service. Where a probationer appears on a new criminal offense in a court other than the court that imposed or is supervising the probationer, the issuance and service of a Notice of Surrender shall be governed by Section Seven, Special Provisions For Commencement of Violation Proceedings based on a New Criminal Offense.

Section Five: Initial Violation Hearing

Except for good cause, an Initial Violation Hearing shall be scheduled not later than fourteen days after the issuance of a Notice of Surrender. Upon the probationer's initial appearance before the probation court based on the issuance of a Notice of Surrender, a judge or magistrate shall confirm that the probationer has received the written Notice of Surrender, shall appoint counsel in the event the probationer is indigent and the offense for which probation was imposed has a potential penalty of incarceration, shall schedule a date and time for a final Violation Hearing, and shall determine whether the probationer should be detained pending a final hearing, or whether bail or release on personal recognizance (with or without conditions)

should be imposed.[3] The probationer shall have the right to counsel at the time any detention, bail or release determination is made. Nothing herein shall preclude a court, utilizing a HOPE/MORR model of probation supervision, from detaining a probationer for a discrete period of time in accordance with that model.

A probationer shall not be detained pending a final Violation Hearing unless a judge or magistrate finds probable cause to believe that the probationer has violated a condition of his probation.[4] A probationer shall be entitled upon request to a preliminary violation hearing, to be held not more than seven days after the initial appearance, unless the probationer consents to a later date. The issues to be determined at such hearing are whether probable cause exists to believe that the probationer has violated a condition of the probation order, and if so, whether the probationer should continue to be held on bail or without right to bail. Where the violation is based on the issuance of an indictment for a new criminal offense, the indictment shall constitute proof of probable cause.[5] The hearing shall be conducted by a judge or magistrate in open court and shall be recorded. At such hearing the probation officer shall present evidence to support a finding of probable cause, and the probationer or his counsel shall be entitled to be heard in opposition. The District Attorney may, upon request of the probation officer, assist the probation officer in the presentation of evidence. If probable cause is found, a final violation hearing shall be scheduled by the court and the probationer shall be given notice in open court of the final hearing date. If probable cause is not found, the judge or magistrate may terminate the proceedings or may schedule a final hearing, but the probationer shall not be held in custody pending the final hearing.

Section Six: Final Violation Hearing

A. Scheduling the Hearing

A final Violation Hearing shall be scheduled not earlier than seven days after the Initial Violation Hearing unless the probationer assents to an earlier hearing, and not later than thirty days thereafter unless good cause is shown. Where the probation surrender involves an alleged commission of a new criminal offense, a continuance to permit resolution of the case involving

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[3] No authority explicitly establishes that bail either may or may not be set in probation violation proceedings. But see *Commonwealth v. Ward*, 15 Mass. App. Ct. 388, 393 (1983); *Rubera v. Commonwealth*, 371 Mass. 177, 184 n.3 (1976) (both suggesting that the setting of bail is appropriate).

[4] *Fay v. Commonwealth*, 379 Mass. 498, 504 (1980)(right to a hearing before detention pending a final hearing is ordered); *Commonwealth v. Odoardi*, 397 Mass. 28, 33 (1986).

[5] *Stefanik v. State Board of Parole*, 372 Mass. 726 (1977).

such new offense shall not ordinarily constitute good cause.[6]

B. Adjudicatory Determination

A final violation hearing shall consist of two parts: (1) an evidentiary hearing to adjudicate whether the alleged violation has occurred; and (2) upon a finding of violation, a dispositional hearing. The probationer shall be entitled to the assistance of counsel, but may waive counsel upon a determination by the court that such waiver is made knowingly and voluntarily.

The probation officer shall have the burden of proving that a probationer has violated one or more conditions of probation by a preponderance of evidence. At the request of a probation officer, or when required by G. L. c. 279, § 3, the District Attorney may participate in the presentation of evidence or examination of witnesses. Hearsay evidence shall be admissible at a Violation Hearing as permitted under Sections 802 through 804 of the Massachusetts Guide to Evidence, or when determined by the judge to be substantially reliable.[7] The probationer shall have the right to cross examine any witnesses called by the probation officer, including the probation officer; the right to call witnesses; the right to present evidence favorable to the probationer; the right to testify; and the right to make closing argument on the issue of whether a violation has been proved by a preponderance of evidence.

The court may accept a probationer's stipulation to a violation of probation as alleged in the Notice of Surrender if the judge finds after colloquy that the probationer is tendering a knowing and voluntary stipulation. However, the court shall not be bound by any agreement between the probationer and probation officer or District Attorney regarding the disposition to be imposed. A probationer shall not be entitled, as a matter of right, to withdraw a stipulation after it has been accepted by the court.

Upon the completion of the evidence and closing arguments, the court shall promptly determine whether a violation of probation has been proved by a preponderance of evidence. If the court finds that no violation has been proved, the probationer shall be restored to probation according to the terms and conditions previously imposed. If the court finds that a violation has been proved the judge shall make findings on the record as to the condition or conditions that

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[6] The practice of a probation surrender proceeding "tracking" a new criminal case is discouraged by these guidelines. However, a judge or magistrate may decide that good cause exists to permit tracking, for example, when the new criminal case is particularly complex or sensitive, such that providing discovery or presenting evidence at a final hearing could compromise the integrity of the new case. Such a determination shall be made in open court and entered on the record.

[7] *Commonwealth v. Durling*, 407 Mass. 108, 114-118 (1990); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.5 (1973).

have been violated and the facts found in making the determination.[8]

C. Dispositional Determination

Upon a finding that the probationer has violated one or more conditions of probation, the judge shall permit the probation officer and probationer, and where required by statute, the District Attorney, to make a recommendation regarding the appropriate sanction to be imposed by the court. Thereafter, the court shall impose a disposition based on the circumstances of the crime for which the probationer was placed on probation and its impact on any person or on the community, the occurrence of any prior violations of probation, the probationer's overall performance while on probation, the public safety, the effect of a sentence on the probationer's chances for rehabilitation, and any other mitigating or aggravating facts or circumstances. The court may consider information that was available to the judge who issued the probation order as well as information that has become available since the order was issued. The court, however, may not punish the probationer for criminal conduct which forms the basis of the violation.[9] The court may: (1) restore the probationer to his existing probationary term with such admonition or instruction as it may deem appropriate; (2) terminate the probation order and discharge the probationer; (3) extend the term of probation and modify the terms or conditions of probation; or (4) revoke probation in whole or in part.[10] Where probation is revoked on an offense for which a sentence had been imposed, the execution of which was suspended, the original sentence shall be ordered executed forthwith,[11] subject to a stay granted pending an appeal in accordance with Mass. R. Crim. P. 31, or at the court's discretion upon a probationer's request for a brief period of time to attend to personal affairs prior to the commencement of a sentence of incarceration. In the event probation is revoked on an offense for which no suspended sentence had previously

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[8] *Fay v. Commonwealth*, 379 Mass. 498, 504-505 (1980)(findings of fact not required to be in writing provided that they are made and announced on the record in the probationer's presence).

[9] *Commonwealth v. Doucette*, 81 Mass. App. Ct. 740, 745 (2012); *Commonwealth v. Rodriguez*, 52 Mass. App. Ct. 572, 577 n.8 (2001).

[10] A partial revocation of probation occurs where the probationer has been placed on probation on multiple offenses and the court revokes probation and imposes a sentence as to one or more offenses, and continues probation as to other offenses, typically to run from and after the committed sentence.

[11] *Commonwealth v. Holmgren*, 421 Mass. 224 (1995); see also, *Commonwealth v. Bruzzese*, 437 Mass. 606 (2002)(where defendant was subject to multiple suspended sentences as part of a single sentencing structure, revoking probation on less than all charges violates double jeopardy principles)

been imposed, the court shall impose a sentence or other disposition as provided by law.[12]

Upon a finding of a violation of a probation order resulting from a continuance without a finding, the judge may terminate the probation order and the continuance without a finding and enter a dismissal on the underlying case, return the probationer to the same terms and conditions of probation with such admonitions or instructions as the judge deems appropriate, modify the continuance without a finding and modify the conditions of probation including the duration of the continuance, or terminate the continuance without a finding and enter a guilty finding and impose a sentence or other disposition as provided by law.

Section Seven: **Special Provisions For Commencement of Violation Proceedings based on a New Criminal Offense.**

Whenever a person on probation is charged with a new criminal offense, the probation officer in the criminal court where the new offense is pending ("criminal court") shall immediately notify the Probation Department in the court where the person is subject to probation supervision ("probation court"). Said notification shall be made in accordance with policies of the Commissioner of Probation, or any policy, administrative order or standing order of the Chief Justice of the Trial Court. In order to comply with the mandatory provisions of Section 3(B), the chief probation officer or his designee in the probation court may order the issuance of a Notice of Surrender in the form set forth herein, to be served on the probationer by a probation officer in the criminal court, ordering the probationer to appear for an Initial Violation Hearing in the probation court at a fixed date and time.

Alternatively, the chief probation officer or his designee in the probation court may also seek the issuance of a warrant from the probation court pursuant to G.L. c. 279, § 3. In the event a warrant issued by the probation court is lodged at the criminal court or, where the probationer has been held in detention or in lieu of posted bail at a jail or house of correction, the clerk of the probation court shall, upon request, promptly issue process to bring the probationer before the probation court for an Initial Violation Hearing.

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[12] A sentence imposed upon the finding of a violation shall not be imposed as punishment for any new crime, but rather as punishment for the offense(s) on which probation was imposed. *Commonwealth v. Odoardi*, 397 Mass. 28, 30 (1986). However, a judge may consider the conduct alleged in the new offense on the issue of the probationer's capacity for rehabilitation.