THE BOSTON MUNICIPAL COURT
AND
DISTRICT COURT
SENTENCING BENCH BOOK

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Table of Contents

CHAPTER 1: TYPES OF DISPOSITIONS

General Laws c. 218, § 27 provides the Boston Municipal Court[1] and District Court with the statutory authority to sentence. The Boston Municipal Court and District Courts may impose the same penalties as the Superior Court for all crimes over which they have jurisdiction, except that the Boston Municipal Court and District Court may not impose a sentence to the state prison. G.L. c. 218, § 27. The crimes over which the Boston Municipal Court and District Court have jurisdiction are set forth in G.L. c. 218, § 26. The dispositional choices available to Boston Municipal and District Court judges are discussed in this section. Section 1.A addresses dispositions that are available after an admission or finding of guilt, and Section 1.B addresses dispositions that provide for resolution without prosecution.

1.A DISPOSITIONS AFTER ADMISSION OR FINDING OF GUILT

The following dispositions are available unless precluded by the Legislature. When a statute prohibits particular dispositions (e.g., G.L. 90, § 24(a)(1)(a) precludes a continuance without a finding except for dispositions under § 24D), the complaint will usually contain this language.

1.A(1) Continuance Without a Finding

The court may continue a case without a finding ("CWOF") upon the defendant's admission to sufficient facts. The defendant is placed on probation for a fixed period of time and, if the defendant satisfies the terms of the continuance without a finding for the designated time period, the case against the defendant is dismissed. If the court finds, after conducting a probation violation hearing pursuant to the Dist./Mun. Cts. R. Prob. Viol., that the defendant has violated the terms of the continuance without a finding, the court may enter a guilty finding and impose a sentence or alter the conditions of probation.

The constitutionality of this practice was upheld by the Supreme Judicial Court in *Commonwealth v. Brandano*, 359 Mass. 332 (1971). The practice has been approved in

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[1] General Laws c. 4, § 78, cl 56 states, "district court" or "municipal court" shall mean a division of the district court department of the trial court, or a session thereof for holding court, except that when the context means something to the contrary, said words shall include the Boston Municipal Court Department."

subsequent case law, and it has been described as a pretrial disposition. *See Commonwealth v. Pyles*, 423 Mass. 717, 723-24 (1996). The practice of "continuing without a finding" in the Boston Municipal Court and the District Court was codified in G.L. c. 278, § 18, in 1992.

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

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

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

A full plea colloquy should be conducted, including a requirement that the defendant admit to the elements of the crime that he acknowledges committing.

1.A(1)(a) *Duquette* Alternative Sentence

If a defendant admits to sufficient facts, a judge may continue a case without a finding, and impose an alternative *Duquette* sentence of committed time should the defendant violate probation. *See Commonwealth v. Waloewandja*, 84 Mass. App. Ct. 1128 (2014) (citing *Commonwealth v. Duquette*, 386 Mass. 834, 843-47 (1982)). A continuation without a finding with a *Duquette* alternative functions as a continuance without a finding with a suspended sentence. In the event, after hearing or admission, a judge finds a violation of the continuance

without a finding occurred, the alternative *Duquette* sentence, although not necessarily binding on the judge who conducts the violation hearing, should be given great deference. As with any continuance without a finding, the defendant must agree to this sentence in accordance with the defendant capped plea procedure of Mass. R. Crim. P. 12.

1.A(2) Guilty – Filed

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

The procedure is set out in Massachusetts Rules of Criminal Procedure 28(e). The judge should specify the length of time the case may remain on file, and the reasons why the case may be taken from the file (usually commission of a new crime). *Commonwealth v. Simmons*, 448 Mass. 687, 692, 699-700 (2007). The tender of plea form includes a section for any count placed on file, noting that any count placed on file may be removed from the file at any time and have a sentence imposed (or be scheduled for trial if no guilty finding has been made: (1) at the defendant's request, or (2) if a related conviction or sentence is reversed or vacated, or (3) if it is shown by a preponderance of the evidence that the defendant committed a new criminal offense, or (4) if it is shown by a preponderance of the evidence that any other condition the judge had imposed was violated.

Once removed from file, "the sentencing judge retains the same discretion in punishment as that afforded the original trial judge." *Id*. at 698-99. "This discretion, however, cannot be exercised in a vacuum. Rather, the sentencing judge must consider the overall-all scheme of punishment employed by the trial judge." *Id*. at 699 (reversing 18-20 year sentence imposed five years after conviction on filed charge where sentencing judge imposed six concurrent terms of 18-20 years; "the discord between the two sentences creates a substantial risk of a miscarriage of justice" and the judge may not punish the defendant for conduct unconnected to the facts of the underlying crime).

Agreement by the parties to place a case on file must be on the record. The best method of accomplishing this goal is to request that the tender of plea form be used.

1.A(3) Straight Probation

General Laws c. 276, § 87 confers broad discretion upon a judge to place a defendant on probation and to impose reasonable conditions to be supervised by a probation officer. *Commonwealth v. Goodwin*, 458 Mass. 11, 16 (2010). "The purpose of probation rather than immediate execution of a term of imprisonment 'in large part is to enable the [convicted] person to get on his feet, to become law abiding and to lead a useful and upright life under the fostering influence of the probation officer.' " *Id*. (quoting *Mariano v. Judge of Dist. Ct. of Cent. Berkshire*, 243 Mass. 90, 93 (1922)). Probation is designed principally to achieve the twin goals of rehabilitation of the offender and protection of the public. *Commonwealth v. Bynoe*, 85 Mass. App. Ct. 13, 19 (2014) (citing *Commonwealth* v. *Pike*, 428 Mass. 393, 403 (1998)).

The conditions of probation must reasonably relate to a probationary goal bearing in mind the circumstances and characteristics of the particular defendant and his offense. *Commonwealth v. Ericson*, 85 Mass. App. 326, 338 (2014); *see Commonwealth v. LaPointe*, 435 Mass. 455, 459-60 (2001). "The goals of probation 'are best served if the conditions of probation are tailored to address the particular characteristics of the defendant and the crime.' " *Commonwealth v. Gomes*, 73 Mass. App. Ct. 857, 859 (2009) (citing *Commonwealth v. Pike*, 428 Mass. 393, 403 (1998)). "The principal goals of probation are rehabilitation of the defendant and protection of the public," with others including "punishment, deterrence, and retribution." *Commonwealth v. Lapointe*, 435 Mass. 455, 459, 759 N.E.2d 294 (2001). Judges should only impose conditions that, if violated, the court reasonably would expect to enforce. The number and types of conditions imposed should correlate with these probationary goals, and judges may consider whether imposing numerous conditions would be more likely to increase rather than decrease the likelihood of achieving these probationary goals. As the availability of resources and programs may differ depending on court location, judges should learn what resources and programs are available to that court, especially when not sitting in a familiar court location.

Although a probationary condition is not necessarily invalid simply because it affects constitutional rights, the condition must be reasonably related to legitimate probationary goals in order to withstand constitutional scrutiny. *Gomes*, 73 Mass. App. Ct. at 859 (citing *Lapointe*, 435 Mass. at 459; *Commonwealth v. Power*, 420 Mass. 410, 416-17 (1995), *cert. denied*, 516 U.S. 1042 (1996) ("As long as the condition meets the 'reasonably related' test, it is not per se unconstitutional even if it restricts a probationer's fundamental rights")). "Ordering a defendant

to submit to random drug or alcohol testing as a condition of probation, therefore, is not permissible unless it is reasonably related to one or more of the goals of probation: punishment, deterrence, retribution, protection of the public, or rehabilitation." *Gomes*, 73 Mass. App. Ct. at 859. "This is a fact-intensive inquiry, dependent on the circumstances and characteristics of the particular defendant and his offenses." *Id*. See *Commonwealth v. Eldred*, 480 Mass. 90, 97 (2018) (upholding conditions prohibiting illegal drugs, ordering random screens and outpatient treatment as they "directly addressed the defendant's personal circumstances and, significantly, her stated motivation for committing the crime – purchasing illegal drugs," furthered the goal of protecting the public where drug use motivated the defendant's crime of larceny, and furthered the rehabilitative goal by facilitating treatment).

It is up to the sentencing judge to set the conditions of probation, including the length of the probationary term. *Commonwealth v. Morales*, 70 Mass. App. 839, 845-46 (2007) (citing *Commonwealth v. Pike*, 428 Mass. 393, 402 (1998)). Whenever a person is placed on probation, the order form outlining the conditions must be completed and signed by the defendant, judge, and an authorized representative from the Probation Department. Only the court, and not a probation officer, may set the terms of probation. "The defendant is in violation of his probation only if he disobeys the conditions of probation imposed by the sentencing judge." *MacDonald*, 435 Mass. at 1007. The conditions must be reasonably specific so as to provide clear guidelines as to what and when actions or omissions will constitute a violation of probation, as any ambiguities are construed in favor of the defendant. *Commonwealth v. King*, 96 Mass. App. Ct. 703, 710 (2019) (violation can only be found for unambiguous conditions of which the defendant has notice). The court should satisfy itself that the defendant understands all the conditions, including monetary obligations which are imposed. The probation order is a court order, and the judge should review all of its terms carefully before signing. *See Commonwealth v. MacDonald*, 435 Mass. 1005, 1006 (2001) (conditions on probation order form, even if signed by the defendant, are not enforceable if they were not imposed by the sentencing judge).

The probationer must also have clear notice of the terms, including when probation is to begin. *See Commonwealth v. Ruiz*, 453 Mass. 474, 479 (2009). See *Commonwealth v. Pacheco*, 96 Mass. App. Ct. 664, 668-69 (2019) (noting that probationary term "to be served from and after release of incarceration" began to run at the completion of the incarcerated sentence, not upon release to the community after civil commitment). In the event that a judge intends to place

a person on probation while incarcerated, there must be evidence that the judge intends to enter that order. *Ruiz*, 453 Mass. at 480. This may include a period of probation which runs concurrently with the defendant's term of incarceration. *Id.* at 482. If intending to impose conditions that will be in effect during a term of incarceration, imposing probation to begin from the date of disposition will best ensure those conditions can be enforced if violated prior to release. If a plea, this should be made clear on the green sheet.

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

1.A(3)(a) Probation in Crimes Against the Person

In the event that a court orders straight probation in the jury of six session for crimes against the person under G.L. c. 265, the judge must specify the reasons for not imposing a sentence of imprisonment. G.L. c. 265, § 41. "[T]he record of reasons is a public record." *Id.* The form "Order and Findings for Not Imposing Imprisonment after Conviction under G.L. c. 265 in the Jury Session" should be used.

1.A(3)(b) Probation Categories

There are standards for probation which have been promulgated by the Massachusetts Probation Service identifying three major categories of probation supervision: Administrative, Risk/Need, and Operating Under the Influence (first and second offenses only). Electronic

monitoring can also be ordered as a condition and is supervised by the Electronic Monitoring Unit (ELMO) of the Probation Service.

1.A(3)(b)(i) Administrative Supervision

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

Administrative probation is often imposed for motor vehicle offenses or payment of restitution. A total of $50.00 per month for probation supervision fees should be imposed unless waived. See 1.E(3) Probation Supervision Fees, *infra*.

1.A(3)(b)(ii) Risk/Need Supervision

Risk/Need probation provides for more intensive probation supervision and will most often be imposed along with specific conditions intended to be monitored. It can be imposed either after a guilty finding or after a continuance without a finding. When a defendant is placed on Risk/Need probation, they will be assessed by the Probation Service using the Ohio Risk Assessment System" (ORAS), which is used by the Probation Service to evaluate a probationer's "risk to re-offend," i.e., to commit a new crime after being placed on probation. It involves assessment by Probation Service personnel of a number of specific factors and produces a numerical score. The evaluation is conducted on all probationers on Risk/Need probation. On the basis of that score, the probationer is then assigned a risk classification. For males, there are four possible classifications: Low, Moderate, High, and Very High. Female probationers may be classified as: Low, Low/Moderate, Moderate, and High. This designation determines the level of supervision as the Probation Service has specific supervisory requirements tailored to each of the ORAS risk classifications; the higher the level of risk to re-offend, the more intensive the probation supervision – in terms of frequency of contact, efforts at behavioral change, rehabilitative program involvement, etc. Probationers are reassessed every six months to ensure the appropriate level of supervision.

Note: This risk assessment does not occur until after the defendant is placed on Risk/Need probation and therefore is not available at the time of disposition. When appropriate,

probation may bring the case forward to adjust conditions as a result of the ORAS assessment. Among the factors considered in the assessment are the frequency of the defendant's illicit drug use and criminal associations, as well as whether they live in a high-crime area, their criminal history, whether drugs are easily available, what attitudes the offender has about crime or victimization and his education and employment history. Concerns have been raised that some of these factors tend to have a disparate impact on poorer communities and cities or towns with large minority populations. If modification of conditions is sought based on the ORAS assessment, the probationer should be notified and be given an opportunity to be represented by counsel. See 1.F(8), Modification of Probation Terms, *infra.*

A total of $65.00 per month for probation supervision fees should be imposed unless waived. See 1.E(3) Probation Supervision Fees, *infra*.

1.A(3)(b)(iii) Operating Under the Influence Supervision

Although most motor vehicle offenses are administratively supervised, probationers on probation for first or second offense of operating under the influence are more intensely supervised than administrative supervision, but not as intensive as Risk/Need supervision. This is done by the Administrative Supervision Unit (ASU) within the Probation Service, which supervises these first and second offense OUI cases. Probationers report by mail or email monthly (not in person), no ORAS is conducted, and the Associate Probation Officer in the ASU verifies compliance with treatment, payments to the court, subsequent criminal activity and any other special condition ordered. If non compliance occurs, the ASU will notify the original court and recommend corrective action be taken. The original court will conduct any violation of probation hearings and address all travel requests and notify the ASU of the outcome. If the original court determines that supervision requiring face to face conduct is to occur the case will not be sent to the Administrative Supervision Unit.

A total of $65.00 per month for probation supervision fees should be imposed unless waived. See 1.A(3)(c) Probation Supervision Fees, *infra*.

1.A(3)(c) Electronic Monitoring

Electronic monitoring provides an extra layer of supervision with the goal of enhancing public safety in the community. Electronic monitoring tools are the Global Positioning System device (G.P.S.) and remote breath alcohol tests.

GPS Monitoring

A Global Positioning System device (G.P.S) may be attached to an individual for the purposes of monitoring the person's location. The system is an alert based system, sending an alert to the probation ELMO unit when the probationer is out of compliance; for this reason, this tool is most effectively used for monitoring exclusion zones (places the probationer is prohibited from going), inclusion zones (places the probationer is permitted to go or required to remain), and/or curfews. Exclusion zones might include a victim's address with a certain geographic perimeter or a particular neighborhood or intersection specified in the order. Inclusion zones might include a school or work address or home confinement. In short, locations and times specific to a court-ordered itinerary can be mandated for the specific probationer. Curfews may be imposed by establishing a schedule. If a probationer has a curfew, the electronic monitoring device must be in range of its beacon during the curfew period or it generates an alert. A probation form exists to facilitate and memorialize these conditions.

The Supreme Judicial Court has held that imposition of a G.P.S. device constitutes a search and therefore requires an individualized determination of reasonableness in order to impose it as a condition of probation. *Commonwealth v. Feliz*, 481 Mass. 689, 700 (2019) (holding that the mandatory, blanket imposition of G.P.S. monitoring on probationers, as required by G.L c. 265, § 47, is unconstitutional under the Massachusetts Declaration of Rights). To determine whether it is a reasonable condition to impose in an individual case, the court must conduct a balancing test that weighs the need to search against the invasion that the search entails. A judge is to consider "the extent to which G.P.S. monitoring of this particular defendant advances the Commonwealth's interests in rehabilitation of the probationer and protection of the public, and the extent of the incremental privacy intrusion occasioned by G.P.S. monitoring on the defendant's diminished, but still extant, expectations of privacy as a probationer." *Feliz*, 481 Mass. at 701. Slip op. at 21. Specifically, "the Commonwealth . . . must establish *how* G.P.S. monitoring, when viewed as a search, furthers its interests." *Id*. at 705, emphasis in original. "Whether the government's interest in imposing G.P.S. monitoring outweighs the privacy intrusion occasioned by G.P.S. monitoring" depends on the totality of the circumstances. *Id*. at 701.

Use of G.P.S. does not require a land line. Although the homeless may be monitored with a G.P.S., homeless defendants may face challenges accessing an outlet to charge the device,

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

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

Remote Breath Alcohol Tests

Those supervised by Probation can be ordered to submit to remote alcohol testing. The method for testing is with the SCRAM. The SCRAM is a handheld, wireless, portable breath alcohol device with an automated facial recognition feature, which verifies that the person taking each test is the individual that was originally enrolled on the device by Probation. Judges have the ability to order that testing be done on a random basis or that it be done during regularly scheduled times, typically 3-4 times per day. The judicial order can also specify the number of tests that are required to be administered daily.

A breath alcohol reading (BAC) of 0.02 or above will result in an alert being generated and responded to by the Electronic Monitoring (ELMO) Center. During court hours the supervising court is required to respond once the ELMO Center calls about an alert. The supervising probation officer may, after consulting with a supervisor, bring the case before a judge and request that a warrant be issued. Violations that take place after court hours will be reviewed by the Probation Warrant Unit and a determination will be made as to the appropriate corrective action taken. This corrective action may result in an after-hours warrant being issued.

1.A(3)(d) Probation Supervision Fees

Probation terms must include an order to pay a probation supervision fee and victim services surcharge, the total of which is $65.00 per month for Risk/Need and OUI probation or $50.00 per month for Administrative probation. G.L. c. 276, § 87A. The fees, however, shall

not be assessed for the first six months when a person is "placed on probation after release from prison or a house of correction." *Id.* Thereafter, the fees shall be assessed unless waived. When possible, a defendant's eligibility for this six-month waiver should be addressed at the time of sentencing.

Making monthly restitution payments that are greater than or equal to the fee also authorizes a judge to waive the fee in full, but only while restitution is paid in an amount equivalent to the fee. G.L. c. 276, § 87A. In addition, the judge may waive the probation supervision fee 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." *Id*. "Following the hearing and upon a finding of hardship, the court may require [the probationer] to perform unpaid community service work at a public or nonprofit agency or facility, monitored by the probation department, for not more than 4 hours per month in lieu of payment of a probation fee." *Id*. The determination whether a probationer must pay the fee or instead perform community service must be made by the judge and may not be delegated to a probation officer. Once converted, the requirement cannot be changed unless ordered by the judge. In other words, a judge must approve switching back to paying money instead of performing community service, or vice versa. As with any other condition of probation, where the probationer is unable to perform community service, the court may waive the condition and document the finding on the record. *See Commonwealth v. Al Saud*, 459 Mass. 221, 229 (2011); *Commonwealth v. Canadyan*, 458 Mass. 574, 577-79 (2010).

The form "Assessment or Waiver of Moneys in Criminal Cases" should be used.

1.A(3)(e) Restitution

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

The Commonwealth must prove the amount of the loss by a preponderance of the evidence and also prove a causal connection between the defendant's conduct and the victim's loss. *Casanova*, 65 Mass. App. Ct. at 755. In determining the proper amount of restitution, fair and reasonable procedures must be followed, including affording the defendant a meaningful opportunity to be heard and the right to cross-examine witnesses regarding the issue of

restitution. *Commonwealth v. Amaral*, 78 Mass. App. Ct. 557, 559-60 (2011) (citing *McIntyre*, 436 Mass. at 834). There is, however, "no requirement that strict evidentiary rules apply at restitution hearings." *Amaral*, 78 Mass. App. Ct. at 560 (citing *Casanova,* 65 Mass. App. Ct. at 755); *see Commonwealth v. Nawn*, 394 Mass. 1, 7 (1985). Rather, "[r]estitution is part of a probationary sentence and, as with probation revocation, a restitution hearing must be flexible in nature and all reliable evidence should be considered. . . . Accordingly, hearsay, if reliable, is admissible to carry the Commonwealth's burden at a restitution hearing." *Amaral*, 78 Mass. App. Ct. at 560 (quoting *Casanova*, 65 Mass. App. Ct. at 755-56). The hearing need not be elaborate; a forum for both sides to air their views and cross examine is sufficient. *Nawn*, 394 Mass. at 7.

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

Once the judge determines the amount of restitution, the judge must then determine the defendant's ability to pay. A judge is not required to look behind a defendant's representation and agreement to pay a specified amount. *Commonwealth v. Pereira*, 93 Mass. App. Ct. 146, 150-51 (2018). Where a defendant claims that he or she is unable to pay the full amount of the victim's economic loss, the defendant bears the burden of proving, by a preponderance of the evidence, an inability to pay. *Commonwealth v. Henry*, 475 Mass 117, 121 (2016). However, before determining the defendant's ability to pay, the judge must first determine the appropriate probationary term because "equal justice means that the length of probation supervision imposed at the time of sentence should not be affected by the financial means of the defendant . . . ., the ability to pay determination should be made only *after* the judge has determined the appropriate length of the probationary period based on the amount of time necessary to serve the twin goals of rehabilitating the defendant and protecting the public." *Commonwealth v. Henry*, 475 Mass 117, 124-25 (2016) (emphasis in original). Once the judge has determined the appropriate length of the probationary period, restitution may be a condition of probation for the length of that period at the maximum monthly amount that the defendant is able to pay, provided the total amount does not exceed the actual loss. The amount of restitution ordered should not exceed this monthly amount multiplied by the months of probation, even if that amount is less than the

amount of financial loss sustained by the victim. *Id*. at 125. The restitution order should be fashioned to require monthly payments and not set the due date for the date probation is to be terminated. If "there is no reason to impose probation other than to collect restitution, a judge may impose a brief period of probation (e.g., thirty or sixty days)." *Id.* at 125 n.7.

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

1.A(3)(f) Transfers of Probation Supervision

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

Inter-state transfers are subject to the interstate compact established by the Interstate Commission for Adult Offender Supervision made for certain misdemeanors. Interstate Commission for Adult Offender Supervision, ICAOS Rules, Rule 1.101, at 6 (effective Mar. 1, 2014) (ICAOS Rules), http://www.interstatecompact.org/Portals/0/library/legal/ICAOS_Rules.pdf. Transfer of probation supervision cannot be ordered by the judge without first going through this process, which may take a period of time during which the probationer would remain in Massachusetts. Inter-state transfers may be made for misdemeanors in which the duration of probation is one year or longer and where the offense involved incurring physical or psychological harm, as well as felonies where probation is three months or longer. The Massachusetts Probation Service has created an eligibility reference guide. Sex offenders are categorized differently and may not go to another state absent that state's consent.

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

1.A(3)(g) Modification of Probation Terms

Only a judge has the authority to modify or alter the terms of probation. *Commonwealth v. Lally*, 55 Mass. App. Ct. 601 (2002). A judge may modify the terms and conditions of probation to serve the best interests of both the public and the defendant. *Buckley v. Quincy Div.*

of the Dist. Ct. Dep't, 395 Mass. 815, 877 (1985), so long as the modification is not so drastic that it amounts to a revision of the sentence. *Commonwealth v. Morales*, 70 Mass. App. Ct. 839, 844 (2007).

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

While the court has declined to decide whether notice and a hearing are constitutionally required prior to modifying conditions of probation, *Buckley*, 395 Mass. at 817 n.1, if considering a motion to modify conditions of probation, the probationer should be notified and have the opportunity to be represented by counsel.

1.A(4) Suspended Sentence

The court may suspend part or all of any sentence, and place the person on probation for such time and such terms as the court shall fix. G.L. c. 279, § 1. When a violation of probation is found, and the court decides to impose a term of imprisonment, the original sentence *must* be imposed. *Commonwealth v. Holmgren*, 421 Mass. 224, 228 (1995). As such, a suspended sentence "limits the judge's options should there be a violation of probation after a suspended sentence has been imposed. *Commonwealth v. Eldred*, 480 Mass. 90, 102 n.8 (2018).

Where there is no expressed intent by the plea judge that multiple suspended sentences be served concurrently, a sentencing judge upon revoking probation has discretion to impose the suspended sentences either concurrently or consecutively. *Commonwealth v. Williams*, 96 Mass. App. Ct. 610, 615 (2019). Imposing straight probation on some counts rather than a suspended sentence on all counts would give a probation violation judge, upon finding a violation of

probation, the most discretion. Note that the tender of plea form explicitly provides that suspended sentences may be imposed from and after upon a probation violation unless otherwise noted.

1.A(5) Split Sentence

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

When a defendant is committed on multiple split sentences, the sentences must remain concurrent; a judge cannot revoke probation and impose the remaining sentence on one charge and extend probation on the remaining. *Commonwealth v. Bruzzese*, 53 Mass. App. Ct. 152, 155 (2001).

1.A(6) Committed Sentence

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

Unless a sentence is required by law, a defendant may request consideration of the defendant's status as a primary caretaker of a dependent child before imposing a sentence of incarceration. A primary caretaker is defined as a parent with whom a child under the age of 18 has a primary residence. Such request must be made within 10 days after the entry of judgment by means of a motion supported by an affidavit. If such motion is filed, the court must make written findings concerning the defendant's status as a primary caretaker of a dependent child and alternatives to incarceration. If such a motion has been filed, the court shall not impose a sentence of incarceration without first making such written findings. G.L. c. 279, § 6B.

1.A(7) Fees, Fines, and Court Costs

Fines may be imposed pursuant to the confines of the statute which was violated. General Laws c. 297, § 1A permits partial payments, and the date by which full payment shall be made should be set by the court. *See also* G.L. c. 280, § 6A (twenty-five percent surfine is required on all fines except for minor motor vehicle offenses). A detailed chart of "Potential Money Assessments in Criminal Cases" is available for use and sets forth the complex statutory requirements relative to assessments. The "Assessment or Waiver of Moneys in Criminal Case" form includes probation fees and all potential assessments of fees in criminal cases. It serves as a reference checklist, avoids any omissions or errors in recording what the judge has ordered, and offers a simple way for the judge to make the necessary finding(s) required when a judge authorizes a waiver.

There is now a uniform waiver standard: waiver is authorized upon a finding of "substantial financial hardship to the individual, the individual's immediate family or the individual's dependents." The "Assessment or Waiver of Moneys in Criminal Case" form reflects the changed waiver standard language and can be used to assist and document the process of assessment and waivers of moneys in criminal cases, including probation supervision fees. Note, however, that the OUI Victim Assessment and OUI Head Injury Assessment or Operating to Endanger Head Injury Assessment fees remain unwaivable. If payment, however, would cause a substantial financial hardship to the person or the person's immediate family or dependents, imprisonment to earn credit for failure to pay is not available, see G.L. c. 127, § 145, and probation cannot be extended due solely to an inability to pay, see *Commonwealth v. Henry*, 475 Mass. 117, 124 (2016). Similarly, SJC Rule 3:10, § 11, expressly prohibits incarceration for the failure to pay an indigent counsel fee or contribution fee (or as a basis to withhold or revoke appointed counsel). "A person in collision with the government ought not to be punished for his poverty." *Commonwealth v. Payne*, 33 Mass. App. Ct. 553, 595 (1992). A sentence for non-payment of fines is limited to defendants who are able to pay a fine but refuse or neglect to pay. A person may not be incarcerated for failure to pay a fine without determining whether the defendant has the ability to pay the fine, and the person may not be incarcerated solely because of inability to pay a fine. *Commonwealth v. Gomes*, 407 Mass. 206, 212 (1990) (quoting *Santiago v. United States*, 889 F.2d 371, 373 (1st Cir. 1989)). A judge shall discharge a person

upon a finding that such person is unable to pay or that it is otherwise expedient. G.L. c. 127, § 145.

The defendant may be incarcerated if the defendant refuses to or neglects to pay a fine, but only after a hearing to determine whether the failure to pay was willful. *Gomes*, 407 Mass. at 213. Before committing a defendant solely for non-payment of money pursuant to G.L. c. 127, § 145, the judge must hold a hearing at which the defendant has the right to be represented by counsel (and, if indigent, no counsel fee shall be assessed), to consider the person's employment status, income, financial resources, living expenses, number of dependents, and any special circumstances that may affect a person's ability to pay. If the defendant establishes, by a preponderance of the evidence, an inability to pay the fine without causing substantial financial hardship to the person or their immediate family or dependents, the judge is prohibited from committing the person. The court may instead impose an alternative to the fine "including, without limitation, community service." *Id*. Persons imprisoned for failure to pay fines shall be given a credit of $90.00 per day for each day confined. G.L. c. 127, § 144.

When a person is sentenced to pay a fine of any amount or is assessed fines, fees, costs, civil penalties or other expenses at disposition of a case, "the court shall inform that person that: (i) nonpayment of the fines, fees, costs, civil penalties or expenses may result in commitment to a correctional facility; (ii) payment must be made by a date certain; (iii) failure to appear at such date certain or failure to make the payment may result in the issuance of a default; and (iv) if an inability to pay exists as the result of a change in financial circumstances or for any other reason, the person has a right to address the court if the person alleges that such assessed fines, fees, costs, civil penalties or other expenses would cause a substantial financial hardship to the person, the person's immediate family or the person's dependents." G.L. c. 279, § 1. These advisements are contained on the back of the probation order form.

1.A(8) Special Sentences

Pursuant to G.L. c. 279, § 6A, the court may order that a sentence be served in whole or in part on weekends and legal holidays, or in any other periodic interval. These sentences, called "Special Sentences," or "Weekend Sentences," are typically served from Friday to Monday, although a court may specify any beginning and ending time for each weekly period of confinement. Such sentencing is permissible only when the defendant is being sentenced for a first offense to a term that does not exceed one year. Additionally, sentencing "on designated

weekends, evenings or holidays" is specifically authorized by G.L. c. 90, § 24(1)(a)(3) for a defendant convicted of driving under the influence of intoxicating liquor or drugs. District Court Standards of Judicial Practice, Sentencing and other Dispositions, 7:06 (1984).

The defendant is required to report on his or her own to the correctional facility each week at a time directed by the court. The total time served must be equal to the period of incarceration imposed. The Department of Correction, in calculating the total time served, considers a weekend to consist of four days — Friday, Saturday, Sunday, and Monday — unless Monday is a Holiday, in which case the weekend is counted as five days. The mittimus should contain the specific dates and times for commitment (i.e. sentence of four months to a house of correction, twenty days to be served on five consecutive weekends, the balance to be suspended).

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

1.B RESOLUTIONS WITHOUT PROSECUTION

1.B(1) Diversion

Diversion refers to procedures by which cases are dismissed prior to trial (or, in some cases, arraignment) or continued without a finding in exchange for the successful completion of treatment or programming. Procedures for criminal case diversion are established by G.L. c. 276A, §§ 1-7 (adult diversion); G.L. c. 276A, §§ 1-11 (diversion of military service members and veterans); and G.L. c. 111E (drug dependent persons). In addition to statutory diversion, many District Attorney's Offices administer diversion programs that divert adult offenders or drug dependent individuals from the criminal justice system prior to the issuance of a criminal complaint or trial.

1.B(1)(a) The Court has the Authority to Dismiss Cases After Diversion Over the Commonwealth's Objection

Although the decision whether to prosecute a criminal case rests exclusively with the executive branch and, in the absence of a legal basis to do so, a judge may not dismiss a valid

complaint over the Commonwealth's objection, where the Legislature has granted the authority to dismiss a case or to continue it without a finding, a judge may exercise that authority without offending the separation of powers. *Commonwealth v. Morgan*, 476 Mass. 768, 780 (2017). The diversion schemes established by G.L. c. 276A and G.L. c. 111E represent such a Legislative grant of authority to dismiss a case or continue it without a finding over the Commonwealth's objection. *Id.*

1.B(1)(b) Diversion Pre and Post Arraignment

A judge may not divert a case prior to arraignment pursuant to G.L. c. 276A over the Commonwealth's objection, as the language in G.L. c. 276A, §§ 3 & 11 provides that the assessment for eligibility for pretrial diversion begins "at arraignment." *Commonwealth v. Newberry*, 483 Mass. 186, 195-96 (2019). If the Commonwealth chooses not to pursue formal arraignment, however, the Court retains the discretion to divert an eligible defendant pursuant to G.L. c. 276A prior to arraignment. *Id.* at 196-97.

The Court has not, as of the drafting of this section, determined whether diverting a defendant pursuant to G.L. c. 111E, § 10 prior to arraignment over the Commonwealth's objection would run contrary to statutory or constitutional parameters. *See Newberry*, 483 Mass. at 192 n.7 (having determined that the language G.L. c. 276A permits the Commonwealth to move for arraignment of a defendant being diverted pursuant, Court declined to reach question whether court's refusing to arraign a defendant over the Commonwealth's objection would constitute a violation of the separation of powers). In dicta in *Newberry*, however, the Court distinguished the language in G.L. c. 276A, which provides that the assessment for diversion begins "at arraignment," from that in G.L. c. 111E, § 10, which does not contain reference to arraignment and instead provides only that a defendant charged with a drug offense be informed of entitlement to drug evaluation "upon being brought before the court on such charge." 483 Mass. at 193 n.9.

1.B(1)(c) Drug Diversion

The provisions of G.L. c. 111E, § 10 outline a procedure whereby defendants charged with certain drug offenses can request a stay of criminal proceedings and be evaluated for drug dependency. The court is required to inform any defendant charged with a drug offense, upon being brought before the court on such charge, that he or she is entitled to request an examination

to determine whether he or she is a drug dependent person who would benefit from treatment. G.L. c. 111E, § 10, ¶ 1.

If the court determines that the defendant is drug dependent, the court may order a further stay of the proceedings and assign him or her to a drug treatment facility. G.L. c. 111E, § 10, ¶¶ 1, 6. If the defendant successfully completes drug treatment, the charges are dismissed. G.L. c. 111E, § 10, ¶ 22. The law delineates which offenses qualify for this procedure, specifically excludes crimes related to drug distribution and manufacture (G.L. c. 94C, §§ 32-32G are excluded), and allows limited judicial discretion when a defendant is charged with other crimes in addition to a qualifying offense. G.L. c. 111E, §§ 1, 10, 11.

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

If the defendant does not complete treatment, the court may consider the treatment report and other relevant reasons, and the court has discretion to take appropriate action, including dismissing the case or revoking the stay. G.L. c. 111E, § 10, ¶ 22.

"Each finding, determination and order required to be made by any court pursuant to this chapter, and the reasons therefor, shall be in writing and entered in the record of the proceeding." G.L. c. 111E, § 14.

1.B(1)(d) Adult Diversion

General Laws c. 276A, §§ 1-7, allows the District Court and Boston Municipal Court to divert eligible adult defendants[2] to a program and, if the defendant successfully completes that

[2] The diversion statute, G.L. c. 276A, was amended as part of the 2018 Criminal Justice Reform Act. *See* st. 2018, c. 69, §§ 196-201. Prior to the effective date of that act, April 13, 2018, c.

program, dismiss the criminal charges. To be entitled to consideration for diversion, the defendant must meet the following criteria:

- The offense(s) are ones for which a term of imprisonment may be imposed;
- The District Court has jurisdiction over the charged criminal offense(s);
- The defendant has no previous adult convictions (except traffic violations that do not carry imprisonment penalties);
- The defendant has no outstanding warrants, continuances, appeals, or pending criminal cases;
- The defendant receives a recommendation from a program that the defendant would, in light of the capacities of and guidelines governing it, benefit from participation in said program.

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

The crimes charged must also be eligible for diversion. The following offenses are ineligible for diversion:

- Any offense in c. 265, except assault and battery pursuant to G.L. c. 265, § 13A(a)
- Any offense in c. 119 or c. 268A
- Any offense for which a penalty of incarceration greater than five years may be imposed
- Any offense for which there is a minimum term penalty of incarceration or which may not be continued without a finding or placed on file
- Any offense which is ineligible for decriminalization pursuant to G.L. c. 277, § 70C, except for assault and battery in violation of G.L. c. 265, § 13A(a), picketing a court,

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276A diversion was only available to person between the ages of 18 -22, however § 3 provided a judge with discretion to "override" this eligibility requirement.

judge or juror in violation of G.L. c. 268, § 13C, and disrupting a court proceeding in violation of G.L. c. 268, § 13C.

G.L. c. 276A, § 4.[3] Unlike the judicial override for eligibility criteria provided in G.L. c. 276A, § 3, a judge does not have the discretion to divert a defendant who has been charged with an ineligible crime. G.L. c. 276A, § 5. See Offenses Ineligible at Appendix A, page 80.

The procedure for screening qualified diversion candidates begins with probation officers who, when gathering information in accordance with G.L. c. 276, § 85, shall screen each defendant for the purpose of enabling the judge at arraignment to consider the eligibility of a defendant for diversion. G.L. c. 276A, § 3. If a defendant is eligible for diversion he or she may, at arraignment, be "afforded a fourteen-day continuance for assessment by the personnel of a program to determine if he [or she] would benefit from such program." G.L. c. 276A, § 3.

At the expiration of the fourteen-day continuance, the program must submit a report to the court containing a recommendation whether the defendant would benefit from diversion to the program. G.L. c. 276A, § 5. Upon receipt of the report, the judge must provide an opportunity for a recommendation by the prosecution and any victims, as defined in G.L. c. 258B, § 1, regarding diversion. G.L. c. 276A, § 5. If the judge determines to divert an eligible defendant, the judge may either stay the proceedings for ninety days or take an admission to sufficient facts and continue the matter without a finding for ninety days. G.L. c. 276, § 5. A defendant's case may not be diverted unless he or she consents in writing to the terms and conditions of the stay of proceedings and knowingly executes a waiver of his right to speedy trial. G.L. c. 276, § 5.

If a defendant violates the conditions of the program or commits a new crime while his or her case is diverted, a judge may issue process necessary to bring the defendant before the court

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[3] Prior to the effective date of the 2018 Criminal Justice Reform Bill, April 13, 2018, the only crimes that were ineligible for diversion were G.L. c. 265, §§ 15A(a), 15B(a), 18(a), 19(a), and G.L. c. 266, §§ 25(a), subsequent offense. The 2018 Criminal Justice Reform Bill, discussed *supra*, n.1 increased the number of crimes that are ineligible for diversion. The current list of crimes that are ineligible for diversion apply only to offenses that were committed on or after April 13, 2018; for offenses that were committed prior to that date, the list of crimes that were ineligible for diversion in effect at that time would govern. There is no "judicial override" for this eligibility requirement.

and order the stay terminated and that the Commonwealth proceed on the original charges. G.L. c. 276A, § 6.

If the defendant successfully completes the program, the judge may dismiss the charges. G.L. c. 276A, § 7. At the expiration of the ninety-day stay or continuance without a finding, the program may submit a report and request for an additional extension of ninety days so that the defendant may complete the program successfully; upon receiving such a report, a court may "take such action as he [or she] deems appropriate, including dismissal of the charges, the granting of an extension of the stay of proceedings or a continuance without a finding, or the resumption of criminal proceedings." G.L. c. 276A, § 7.

1.B(1)(e) Diversion of Military Service Members and Veterans

General laws c. 276A, §§ 1-11 also contain provisions that permit the court to divert qualifying veterans, active service members, or persons with military history who are defendants in criminal cases to a program and, if the defendant successfully completes the program, to dismiss the criminal charges. These provisions are commonly known as the "VALOR Act" (as amended by the "BRAVE Act"). Eligibility for VALOR Act diversion is the same as adult diversion pursuant to G.L. c. 27A, §§ 1-7, with the added requirement that the defendant must be a veteran or on active military service as defined by G.L. c. 4, § 7, cl. 43. G.L. c. 276A, § 10. As with adult diversion under G.L. c. 276A, §§ 1-7, for VALOR Act diversion, the receiving program must recommend that the defendant would benefit from participation in the program. G.L. c. 276A, § 10.

The list of crimes that are ineligible for adult diversion as set out in G.L. c. 276A, § 4 apply equally to VALOR Act diversion, with one exception: unlike adult diversion, qualifying veteran-defendants may have a first offense of operating under the influence in violation of G.L. c. 90, § 24(1)(a)(1) diverted.[4] In order for a veteran-defendant to be eligible for diversion for a

[4] Prior to the effective date of the 2018 Criminal Justice Reform Act, April 13, 2018, G.L. c. 276A did not make certain crimes ineligible for VALOR Act diversion. When the Legislature amended the VALOR Act in the Criminal Justice Reform Act, it made the list of crimes ineligible for diversion in G.L. c. 276A, § 4, applicable to the VALOR Act. On November 8, 2018, the Legislature enacted the BRAVE Act, St. 2018, c. 218, which made further amendments to the VALOR Act, including making a qualifying first offense of operating under the influence eligible for VALOR Act diversion. Thus, for those offenses committed prior to April 13, 2018,

first offense OUI, the defendant must: 1) not have previously been arrested for, or been charged with, operating under the influence; and 2) must be "clinically diagnosed with a traumatic brain injury, substance abuse disorder, or serious mental illness in connection with the veteran's military service or the person's active duty." General laws c. 276A, § 4, defines "serious mental illness" as "a current or recent diagnosis by a qualified mental health professional" of one of several enumerated disorders described by the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders. The requirement of a connection between traumatic brain injury, substance use disorder, or mental illness and a veteran-defendant's military service appears to apply only to diversion for a first offense OUI; there does not appear to be such a requirement for other offenses eligible for diversion, such as drug offenses.

Once probation has confirmed that the defendant is a veteran through the course of gathering information at or prior to arraignment in accordance with G.L. c. 276, § 85, and the court determines that the defendant is eligible for diversion, the court may continue the arraignment for thirty days (as compared to fourteen days for adult diversion) to seek an assessment by the United States Department of Veteran's Affairs or another state or federal agency with suitable knowledge and experience of veterans' affairs to determine if the veteran or person on active service would benefit from such program. G.L. c. 276, § 3. Prior to offering a continuance, the court must inquire into the nature and circumstances of the charge, and the court must consider the opinion of the prosecution in determining whether to allow the continuance for assessment. G.L. c. 276, § 11.

Once a court has received a report from a program that a veteran-defendant would benefit from participation in the program, the same statutory provisions that establish the processes, procedures, and timelines for adult diversion, G.L. c. 276A, §§ 3-7, apply to VALOR Act diversion. *Commonwealth v. Morgan*, 476 Mass. 768, 773-75 (2017) (applying process, procedure, and timelines in G.L. c. 276A, §§1-7, to VALOR Act).

G.L. c. 276A did not make any crimes ineligible for VALOR Act diversion; for offenses committed between April 13 – November 8, 2018, those crimes in G.L. c. 276A, § 4, were ineligible for VALOR Act diversion; and for offenses committed after November 8, 2018, those crimes in G.L. c. 265A, § 4, with the exception of a qualifying first offense of operating under the influence, are ineligible for VALOR Act diversion.

1.B(1)(f) District Attorneys' Diversion Programs

Pursuant to G.L. c. 12, § 34, the District Attorneys are required to establish "a pre-arraignment diversion program which may be used to divert a veteran or person who is in active service in the armed forces, a person with a substance use disorder or a person with mental illness if such veteran or person is charged with an offense or offenses against the commonwealth."

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

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

Many of the District Attorneys' offices across the state have indicated that their offices have established pretrial diversion programs for adult defendants. *See Commonwealth v. Newton N.*, 478 Mass. 747, 758 n.6 (2018). Moreover, the 2018 Criminal Justice Reform Bill added a new chapter to the General Laws, G.L. c. 276B, providing for the diversion of a defendant to a community-based restorative justice program pre-arraignment or at any stage of a case with the consent of the defendant, district attorney and the victim. Restorative justice, however, is not available pre-disposition where the defendant is charged with a sexual offense as defined in G.L. c. 123A, § 1, an offense against a family or household member as defined in G.L. c. 265, § 13M, or an offense resulting in serious bodily injury or death.

1.B(2) Decriminalization — Treatment of Certain Offenses as Civil Infractions

General Laws c. 277, § 70C lists the minor criminal offenses which may be treated as civil infractions. See Offenses Ineligible for Decriminalization under G.L. c. 277, § 70C, at Appendix A, page 80. If a charge is decriminalized, counsel should not be appointed. The defendant is not entitled to a jury trial.

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

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

1.B(3) Dismissal With Accord and Satisfaction

General Laws c. 276, § 55 governs dismissal upon acknowledgment of accord and satisfaction. A person charged with assault and battery or other misdemeanor for which he is liable in a civil action may file an accord and satisfaction indicating that the offended party has been satisfied. The person injured must appear before the court and the accord and satisfaction filing must acknowledge in writing that the person injured has received satisfaction for the injury. G.L. c. 276, § 55. The court then has the discretion to dismiss the complaint, even over the Commonwealth's objection. *Commonwealth v. Guzman*, 446 Mass. 344, 348-49 (2006). The record should show the reasons for the trial court's decision.

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

CHAPTER 2: SENTENCING MECHANICS

2.A ALLOCUTION

2.A(1) Defendant's Allocution

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

2.A(2) Hearing from the Prosecution

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

2.A(3) Victim's Rights at Sentencing

General Laws c. 258B, § 3 and G.L. c. 279, § 4B establish the right for victims to be heard at sentencing or the disposition of the case about the effects of the crime on the victim and as to a recommended sentence through an oral and/or written victim impact statement. The court is required, before sentencing a defendant, to allow a victim who wishes to make an oral statement the opportunity to do so in the presence of the defendant. G.L. c. 258B, § 3. If the victim prefers to make a written statement, the district attorney must file it with the court. If the victim is unable to make such a statement because of age or other incapacity, notice and the opportunity for allocution must be given to the victim's attorney or a designated family member.

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

If the victim is not present at sentencing or disposition, the judge should inquire of the prosecutor whether the victim has been notified. If the victim has not been notified, attempts should be made to contact the victim and the case should be held for a further call. If the victim does wish to be present, the disposition should be continued. G.L. c. 258B, § 3(b) (right to be present at all court proceedings related to the offense); § 3(p) (right to be heard through an oral and written impact statement at sentencing or the disposition of the case about the effects of the crime and recommended sentence).

2.B CONCURRENT SENTENCES

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

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

Because a term of straight probation is not a sentence (in contrast to a suspended or split sentence), concurrent terms of straight probation are not concurrent sentences that have been bundled together under a concurrent sentencing scheme for purposes of double jeopardy. *Bruzzese*, 437 Mass. at 617. The imposition of concurrent terms of straight probation signals

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

2.C CONSECUTIVE SENTENCES

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

2.D MANDATORY MINIMUM SENTENCES

Mandatory minimum sentences are sentences that, by statute, require the defendant to serve a minimum term of incarceration before becoming eligible for release to probation, parole, or work release, and before becoming eligible for deductions in sentence for good conduct.

Incarceration Required

Some mandatory minimum sentences are created statutorily to provide no alternative disposition to incarceration upon conviction. *See, e.g.*, G.L. c. 269, § 10(a) (carrying a firearm "shall be punished by imprisonment . . . for not less than 18 months nor more than two and one-half years in a jail or house of correction. The sentence imposed on such person shall not be reduced to less than 18 months, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 18 months of such sentence . . . and shall neither be continued without a finding or placed on file"). Other examples of mandatory minimum sentences that require incarceration are drug trafficking offenses under G.L. c. 94C (none of which have final jurisdiction in the District or Boston Municipal Court), violations of the controlled substance laws in or near a school or park (G.L. c. 94C, § 32J), and operating under the influence of liquor subsequent offenses under G.L. c. 90, § 24. Additionally, some sentences are mandated to run consecutively from a companion statute. *See* G.L. c. 269, § 10(a) and § 10(n) (requiring sentence for carrying a loaded firearm to run from and after minimum mandatory sentence for carrying a firearm); G.L. c. 94C, § 32J (requiring minimum mandatory for school zone to run from and after the underlying drug offense).

While some statutes provide for eligibility for credit or parole before completing the minimum sentence, a judge is still required to sentence the defendant to the minimum sentence. For example, operating under the influence third offense "shall be punished by . . . imprisonment for not less than one hundred and eighty days nor more than two and one-half years . . . provided, however, that the sentence imposed upon such person shall not be reduced to less than one hundred and fifty days." G.L. c. 90, § 24, ¶ 5. This language requires the judge to sentence the defendant to at least 180 days, even though the sheriff may release at 150 days.

Incarceration Discretionary

Other mandatory minimum sentences take effect only upon a sentence of incarceration; in other words, a term of probation can be imposed, but if a committed sentence is imposed, it must be for at least the minimum sentence set by statute. See *Commonwealth v. Zapata*, 455 Mass. 530, 534 (2009) ("when the Legislature intends to bar probation, it knows how to say so explicitly"). *See* e.g., G.L. c. 265, § 13D (assault and battery upon a public employee "shall be punished by imprisonment for not less than ninety days"); see also G.L. c. 90, § 24V (operating under the influence and child endangerment "shall be punished. . . by imprisonment in the house of correction for not less than 90 days nor more than 2½ years"). In these two examples, a judge is not required to impose a committed sentence, but if a committed sentence is imposed, it must be for a minimum of 90 days.

2.E STAY OF EXECUTION OF SENTENCE AND DEFERRED SENTENCING

A stay of execution of sentence should be distinguished from deferred sentencing. In a stay of execution of sentence, the judge imposes a sentence of incarceration and stays the execution thereof in order to permit the defendant to attend to personal concerns, such as a family, employment or financial matters. In deferred sentencing, the judge enters a finding of guilty and defers imposition of sentence, usually to obtain further information, such as a presentence report.

2.E.(1) Speedy Sentencing

It is generally assumed there is a constitutional right to speedy sentencing under either the Sixth Amendment or the Due Process Clause of the United States Constitution and under Article 11 of the Massachusetts Declaration of Rights. See *Pollard v. United States*, 352 U.S. 354, 361-

62 (1957); *Commonwealth v. McInerney*, 380 Mass. 59, 63-66 (1980); *Katz v. Commonwealth*, 378 Mass. 305, 314-15 (1979)). After a verdict, "the defendant shall have the right to be sentenced without unreasonable delay." Mass. R. Crim. P. 28(b). Because a judge sitting without a jury is permitted to "deliberate" during the course of the trial, the judge may immediately announce his or her finding at the end of the trial without recessing to "consider" the evidence. District Court Department of the Trial Court, *Jury Trial Manual for Criminal Offenses Tried in the District Court* § 2.86 (1987) (citing *United States v. Systems Architects*, 757 F.2d 373, 376 (1st Cir.), *cert. denied*, 474 U.S. 847 (1985)). In a jury trial, the judge should ensure the verdict is recorded and discharge the jury prior to sentencing the defendant.

Pending sentence, the court may commit the defendant or continue or alter the bail as provided by law. Mass. R. Crim. P. 28(b). The prosecutor is required to move for sentencing within seven days after the verdict. G.L. c. 279, § 3A.

The practice of taking a plea or verdict, and then postponing sentencing is generally discouraged. If the defendant will be in custody for the duration of time between adjudication and sentencing, the risk is mitigated. "The Judge should consider the inherent danger of flight in deciding whether to allow a deferred sentence or a stay of execution of sentence. The Judge also should consider imposing conditions, including appropriate recognizance, that will reduce the danger of flight. A defendant who fails 'without sufficient excuse' to appear in court at the specified time may be punished for a separate offense under G.L. c. 276, § 82A." *Id*. § 7:11 commentary (citing *Sclamo v. Commonwealth*, 352 Mass. 576 (1967)).

2.E(2) Stays of Execution Pending Appeal

"The rule governing stays of execution of sentences of imprisonment is Mass. R. Crim. P. 31 (a), which reads in pertinent part as follows: 'If a sentence of imprisonment is imposed upon conviction of a crime, the entry of an appeal shall not stay the execution of the sentence unless the judge imposing it or a judge of the Supreme Judicial Court or the Appeals Court determines in his discretion that execution of said sentence shall be stayed pending the final determination of the appeal.' " *Commonwealth v. Hodge*, 380 Mass. 851, 853 (1980). Similarly, an order placing a defendant on probation or suspending a sentence may be stayed if an appeal is taken. Mass. R. Crim. P. 31(d). A sentence to pay a fine or costs, however, "shall be stayed by the judge imposing it or by a single justice of the court that will hear the appeal if there is a diligent perfection of appeal." Mass. R. Crim. P. 31(b).

The first factor to evaluate in considering whether to allow a defendant's motion to stay execution of a sentence (other than a fine or costs) is whether the defendant's appeal presents an issue that "offers some reasonable possibility of a successful decision." *Commonwealth v. Charles*, 466 Mass. 63, 77 (2014) (citing *Commonwealth v. Allen*, 378 Mass. 489, 498 (1979), quoting *Commonwealth v. Levin*, 7 Mass. App. Ct. 501, 504 (1979)). The second factor is whether the defendant's release poses a security risk. *Id*. "Significant considerations include the defendant's 'familial status, roots in the community, employment, prior criminal record, and general attitude and demeanor.'" *Id*.; *see Levin*, 7 Mass. App. Ct. at 505. "These considerations, in turn, will inform the calculus regarding the possibility of the defendant's flight to avoid punishment, the potential danger posed by the defendant to any person or to the community, and the likelihood that the defendant will commit additional criminal acts while awaiting a decision on his new trial motion." *Charles*, 466 Mass. at 77 (citing *Polk v. Commonwealth*, 461 Mass. 251, 253 (2012) (citing *Hodge*, 380 Mass at 855)).

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

2.F JAIL CREDITS

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

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

2.F(1) Time Credited to Other Sentences

Except where "dead time" is involved, a defendant is entitled to credit only for pre-sentence confinement "which relates to the criminal episode for which the prisoner is sentenced." *Commonwealth v. Carter*, 10 Mass. App. Ct. 618, 620 (1980); *accord Commonwealth v. Clark*, 20 Mass. App. Ct. 962, 964 (1985) (defendant in custody for an offence is not permitted to deduct that time against another, wholly unrelated offense); *see also Commonwealth v. Milton,* 427 Mass. 18, 24 (1998) ("time spent in custody awaiting trial for one crime generally may not be credited against a sentence for an unrelated crime"). A defendant should not ordinarily receive jail credit for time that has already been credited to other sentences, or that was served on other sentences. Thus, a defendant who sought jail credits on a subsequently imposed concurrent sentence, where the credits were already awarded on the previously imposed sentence, was not entitled to credit on the second sentence. *Commonwealth v. Ridge*, 470 Mass. 1024, 1025 (2015); *accord Commonwealth v. Barton*, 74 Mass. App. Ct. 912, 913 (2009) (no credit for time already credited to another sentence, even if the instant sentence is concurrent to that sentence).

The same rule applies for consecutive sentences. *Commonwealth v. Harvey*, 66 Mass. App. Ct. 297, 300-01, *rev. denied*, 447 Mass. 1105 (2006).

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

2.F(2) Probation Violation Sentences (no credit for)

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

If a defendant whose probation was revoked for a new crime is later convicted of the new crime, the defendant is not entitled to any jail credit for the time served on the probation revocation. *Commonwealth v. Ledbetter*, 456 Mass. 1007, 1009 (2010); *Commonwealth v. Murphy*, 63 Mass. App. Ct. 753, 754 (2005); *Commonwealth v. Foley*, 15 Mass. App. Ct. 965, 966 (1983). Because the probation revocation sentence is punishment for the original crime, that is "time he was serving a sentence on an unrelated matter," and thus no credit may be given. *Murphy*, 63 Mass. App. Ct. at 754.

2.F(3) Dead Time

Dead time is time served awaiting disposition or interstate rendition which ultimately is not applied to a sentence. *Williams v. Superintendent, Mass. Treatment Ctr.*, 463 Mass. 627, 630 n.6 (2012), *Commonwealth v. Milton*, 427 Mass. 18, 21 n.4 (1998)). In the case of pretrial confinement, sentencing judges are advised to avoid the occurrence of "dead time," *Commonwealth v. Foley*, 17 Mass. App. Ct. 238, 244 (1983), unless the defendant would be

"banking" the time (see below) toward a future sentence. *Id*. (citing *Milton*, 427 Mass. at 21 n.4). To avoid "dead time," a judge may give a defendant credit for time served awaiting trial on an unrelated case, if that case ended in dismissal or acquittal. *Commonwealth v. Holmes*, 469 Mass. 1010, 1011 (2014).

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

Defendants should not be given extra credit for time served by applying jail credits to multiple sentences. *see Commonwealth v. Carter*, 10 Mass. App. Ct. 618, 620-21 (1980) (defendant not entitled to double-count pre-sentence credit against each of his consecutive sentences); *Commonwealth v. Blaikie*, 21 Mass. App. Ct. 956, 957 (1986) (credits may not be applied twice where "the sentences against which the prisoner seeks to apply jail credit are longer than the sentences with which they are to be served concurrently"); *Commonwealth v. Harvey*, 66 Mass. App. Ct. 297 (2006) ("Because the defendant had already received credit for the time he spent in jail awaiting trial, the judge did not err in denying the defendant's request to receive credit for the same period of time on the second set of charges and thus to effectively reduce his sentence"); *Commonwealth v. Ridge*, 470 Mass. 1024 (2015) ("Where, as here, the time previously credited to the defendant is 'wholly inclusive of the period the defendant claims as credit on' a later-imposed sentence, 'there is no special consideration of fairness that supports the credit that the defendant seeks.' "); *Milton v. Comm'r of Correction*, 67 Mass. App. Ct. 253, 257-58 (2006) (no credit for dead time if the sentence had been served at the time of the new crime, but credit awarded for dead time for sentences still being served at the time of the new crime, provided that there was no expectation that the sentence would be vacated at the time of the new crime).

2.F(4) Banking Time

Banking time is where a defendant seeks to have time spent awaiting disposition in custody for a charge for which he or she did not receive committed time applied toward a sentence for a subsequently committed offense. These credits would otherwise be "dead time."

This practice is prohibited because it could possibly make a defendant immune from a future sentence if these "banked" credits were applied. *Id*.(citing *Commonwealth v. Milton,* 427 Mass. 18, 24 (1998)). "In weighing these equitable considerations, the banking prohibition outweighs any concern about dead time: the need to prevent criminal defendants from banking time for use against future sentences outweighs any fairness issues normally applicable in [dead time] situations." *Holmes*, 469 Mass. at 1011 (quoting *Milton*, 427 Mass. at 25) (internal quotations marks omitted, alterations in the original).

2.G PROBATION COMPLIANCE CREDITS

Eligible offenders can earn probation compliance credits that operate to reduce the length of post-disposition probation supervision. An "eligible offender" is defined as "an offender whose sentence includes incarceration followed by a term of probation supervision who has been released to probation after serving the incarcerated portion of the sentence, excluding any person who is under post-disposition supervision for a sex offense as defined in section 178C of chapter 6." G.L. c. 276, § 87B. Eligible offenders shall begin to accrue compliance credits following one year of supervision on probation; thereafter, up to the completion of two years of supervision on probation, an eligible offender shall earn 5 days of compliance credit on the first day of each month if the offender was in compliance for the prior calendar month. After two years of supervision, an eligible offender shall earn 10 days of compliance credit on the first day of each month if the eligible offender was in compliance for the prior calendar month.

Compliance credits will not accrue for any month in which a violation of probation is pending; if, after a probation violation hearing, no violation is found, compliance credits shall be awarded retroactively. If the court finds a violation, then no credits shall be awarded for the time in which the violation was pending, and the court may revoke any earned credits. If the court places the offender in a correctional institution upon revocation, any prior compliance credits previously earned shall be revoked.

At sentencing, the court is required to notify an eligible offender that compliance with post-disposition supervision conditions shall result in earning compliance credits. This notification can be found on the back of the probation order form.

2.H NUNC PRO TUNC SENTENCES

Nunc pro tunc is a Latin expression that means, "now for then" and can be used to impose a sentence to begin retroactively to a certain date. Unless a sentence is ordered *nunc pro tunc* or to run consecutively, it is presumed to begin on the date it was imposed. A probationary term, however cannot be imposed *nunc pro tunc* where doing so results in the probationer being discharged from probation without ever having been placed on probation. *Commonwealth v. Asase*, 93 Mass. App. Ct. 356, 356-57 (2018) (pretrial release subject to conditions is not the equivalent of probation).

CHAPTER 3: PLEAS

3.A TENDER OF PLEA (the Green Sheet)

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

Whenever a defendant wishes to tender a plea, it should be done on the tender of plea form. The District Court uses a two-sided tender of plea form, usually printed on green paper, and therefore often referred to in practice as "the Green Sheet." The Green Sheet provides spaces for the defendant and prosecutor to write their respective sentencing recommendations or plea agreements. The Green Sheet also provides warnings to the defendant, and requires the defendant's signature acknowledging the defendant's sentencing recommendation and acknowledging understanding of the various warnings. Defendant's counsel is also required to sign the Green Sheet. Probation should be consulted on the disposition pursuant to Dist./Mun. Cts. R. Crim. P. 4(c) before the Green Sheet is submitted to the Court. The third column of the Green Sheet provides space for the judge to memorialize the court's proposed disposition upon the rejection of a binding plea, or when offering a non-binding plea disposition. Finally, the Green Sheet contains space for the court to record the sentencing recommendation that will be adopted, and the judge is required to sign the green sheet if a tender of plea is accepted.

The use of a written waiver form alone is not a substitute for an adequate plea colloquy, and the defendant's signature on such a form "is one of several facts that 'bespeak the

defendant's intention to consummate the plea bargain.' " *Commonwealth v. Furr*, 454 Mass. 101, 111 (2009) (citing *Commonwealth v. Colon*, 439 Mass. 519, 529 n.14 (2003) (quoting *Commonwealth v. Grant*, 426 Mass. 667, 672 (1998)). The information about the consequences of a conviction must be part of the oral dialogue between the judge and the defendant. See § 3.C, Plea Colloquies. It is not sufficient for a judge to rely on the defendant's acknowledgment of this information on a written form. *See Commonwealth v. Rodriguez*, 52 Mass. App. Ct. 572, 575 (2001); *Commonwealth v. Hilaire*, 51 Mass. App. Ct. 818 , 823 (2001) ("During a colloquy, the judge has the opportunity to observe and interact with the defendant and can communicate the warnings to the . . . defendant with greater assurance than can be supplied by the preprinted . . . form").

While this information will be set forth in more detail below, in essence, a judge is required to ensure that the defendant understands:

1. the elements of the offenses to which he/she is pleading guilty/admitting sufficient facts;
2. the maximum penalties for each offense, including any minimum sentence that must be imposed upon the revocation of probation;
3. that all burdens are on the Commonwealth and he/she is presumed innocent;
4. that by entering into the plea, the defendant has waived his/her right to a jury trial, to confront and cross-examine all witnesses and to challenge all evidence, and to be protected against self-incrimination;
5. both non-citizen warnings;

3.A(1) Successive Tenders of Plea

Neither Rule 12 nor G.L. c. 278, § 18 establish how many times a defendant may tender a defendant capped plea. See § 3.B(2), Non-Binding Pleas and Defendant-Capped Plea Structure. As the Supreme Judicial Court held in *Charbonneau v. Presiding Justice of the Holyoke Dist. Ct.*, "a defendant's right to tender a defendant-capped plea at trial is an essential part of the fairness calculus in the guilty plea process." 473 Mass. 515, 521-22 (2016). An individual judge's discretion to accept or reject a plea is not the same as the court's exercise of its discretion to establish trial management policies that impair a defendant's statutory rights. *Id*. at 522. Both G.L. c. 278, § 18, ¶ 1 and Mass. R. Crim. P. 12(c)(4)(A) allow a defendant-capped plea without any restriction on timing. *Charbonneau*, 473 Mass. at 519. The Legislature created this

procedure at the same time it eliminated the two-tier trial system as an "appropriate counterbalance" to the elimination of a risk-free first trial. *Id*. at 520. For this reason, if a tender of plea is rejected or withdrawn, the Green Sheet should be retained in the Court's file so that a judge has the opportunity to see what has happened with the case in the past.

3.A(2) Plea Discussions with a Judge

Rule 12 indicates that the judge may participate in plea discussions at the request of one or both of the parties. Mass. R. Crim. P. 12(b)(2). This has sometimes been referred to as a "lobby conference", however such plea discussions should not be held in the judge's lobby.

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

3.B BINDING AND NON-BINDING PLEAS

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

whether the proposed disposition is just." For nonbinding plea agreements, Rule 12(c)(4) preserves a defendant's right to tender a defendant-capped plea.

3.B(1) Binding Pleas and Charge Concessions

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

Parties must inform the judge of the substance of the agreement. In all criminal cases where the Commonwealth and the defendant have entered into a plea agreement, the judge must be informed of the substance of the agreement that is contingent on the plea. *Dean-Ganek*, 461 Mass. at 308. See Mass. R. Crim. P. 12(d)(1)).

3.B(2) Non-Binding Pleas and Defendant-Capped Plea Structure

All pleas in the district court, except binding pleas, are "defendant capped pleas." Once tendered, the Green Sheet is part of the Court's file. If the plea is rejected either by the court or by the defendant, the judge should indicate that the plea has been rejected. The judge may also wish to indicate why the plea was rejected (e.g., the defendant refused to admit to the essential facts to permit the plea). In all cases, the Green Sheet should remain in the file and not returned to the defendant or counsel.

3.B(2)(a) Defendant May Withdraw Plea if Judge Would Exceed Defendant's Recommendation

In all District, Municipal, and Juvenile courts, a defense-capped plea structure applies. G.L. c. 119, § 55B, Mass. R. Crim. P. 12(c)(4)(A). "In a District Court, if the plea is not conditioned on a sentence recommendation by the prosecutor, the defendant may request that the judge dispose of the case on any terms within the court's jurisdiction. The judge shall inform the defendant that the court will not impose a disposition that exceeds the terms of the defendant's request without first giving the defendant the right to withdraw the plea." Mass. R. Crim. P. 12(c)(4)(A). Where a plea agreement includes a sentence recommendation, whether it be a recommendation by the prosecutor that the defendant is free to oppose or an agreed

recommendation made jointly by the prosecutor and defendant, a judge is required to inform the defendant that the judge "will not impose a sentence that exceeds the terms of the recommendation without first giving the defendant the right to withdraw the plea." *Commonwealth v. Dean-Ganek*, 461 Mass. 305, 308 (2012). See Mass. R. Crim. P. 12(c)(4).

Additionally, the court cannot prohibit a defendant capped plea on the date of trial. *Charbonneau v. Presiding Justice of Holyoke Div. of Dist. Court Dept.,* 473 Mass. 515, 519 (2016).

3.B(2)(b) Sentences that Unintentionally Exceed the Defendant's Recommendation

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

3.B(2)(c) Continuance Without a Finding Over Commonwealth Objection

The judge has the power to accept a proposed disposition under the continuance without a finding procedure even if it entails continuing the case without a finding over the objection of the prosecutor. Although ordinarily the separation of powers doctrine prevents a judge from foreclosing the prosecution's effort to conclude a case with either a conviction or acquittal on the original charge, the Legislature's specific sanction of the continuance without a finding option in the defense capped plea procedure legitimates this procedure. Mass. R. Crim. P. 12 Reporter's Notes (2004) (citing *Commonwealth v. Pyles*, 423 Mass. 717 (1996) (grant of authority by G.L. c. 278, § 18 specifically gives District Court judges authority to continue a case without a finding over the objection of the prosecutor) However, if a judge does accept the defendant's proposal to continue a case without a finding over the prosecutor's objection, the record should reflect the

reasons for the conclusion that this action is in the best interests of justice. *See Pyles*, 423 Mass. at 723.

3.B(3) Conditional Pleas

In response to *Commonwealth v. Gomez*, 480 Mass. 240 (2018), Rule 12(b)(6) was added to the Massachusetts Rules of Criminal Procedure providing for conditional pleas. In *Gomez*, the Court held that a guilty plea conditioned on the right to appeal a pre-plea ruling is permissible if it is entered with the consent of the court and the Commonwealth and identifies the specific ruling from which the defendant intends to appeal.

The provisions of Rule 12(b)(6) provide:

- The defendant may, with the written agreement of the prosecutor, tender a plea of guilty or admission to sufficient facts while reserving the right to appeal any ruling or rulings that would, if reversed, render the Commonwealth's case not viable on one or more charges. Mass. R. Crim. P. 12(b)(6).

  "While most conditional pleas involve legally dispositive rulings, even certain non-dispositive rulings can be subject to conditional pleas . . . The rule thus extends to situations in which, should the reserved ruling be reversed, the Commonwealth would choose not to proceed because the case would no longer be viable for prosecution." Reporter's Notes to Mass. R. Crim. P. 12(b)(6).

- The written agreement must specify the ruling or rulings that may be appealed, and must state that reversal of the rulings or rulings would render the Commonwealth's case no longer be viable on one or more specified charges. Mass. R. Crim. P. 12(b)(6).

  "This rule requires the parties to specify, by written agreement, the rulings or rulings reserved for appeal, and the charge or charges that would presumptively be dismissed if the defendant prevails on appeal and chooses to withdraw the guilty plea or admission to sufficient facts. The ruling or rulings should be identified by stating the name of the motion or pleading ruled upon, the date of the ruling or rulings, and the judge who issued the ruling. The charge or charges should be identified by reference to the complaint and offense or count of the indictment." Reporter's Notes to Mass. R. Crim. P. 12(b)(6).

- The plea judge has the discretion to refuse to accept a plea of guilty or admission to sufficient facts that reserves the right to appeal. Mass. R. Crim. P. 12(b)(6).
  "In all respects other than reserving the right to appeal, this subdivision works no change in existing rules governing pleas, sentencing, or appeal." Reporter's Notes to Mass. R. Crim. P. 12(b)(6).
- If the conditional plea is accepted and the defendant prevails in whole or in part, the defendant may withdraw the guilty plea or admission to sufficient facts on any of the charges specified in the written agreement. Mass. R. Crim. P. 12(b)(6).
- If the defendant prevails and withdraws the guilty plea or admission to sufficient facts, the judge shall dismiss the complaint on those charges, unless the prosecutor shows good cause to do otherwise. Mass. R. Crim. P. 12(b)(6).
  "If the defendant elects to withdraw the plea or admission, dismissal of the specified charge or charges, which the Commonwealth previously agreed would not be viable should the defendant prevail on appeal, is presumptively appropriate. In cases in which, for example, the defendant prevails on appeal in part (e.g., the appellate court suppresses some but not all the evidence which the defendant sought to exclude), the Commonwealth has an opportunity to show good cause that the court should not dismiss the charge or charges. If the judge does not intend to dismiss the specified charge or charges, the judge should indicate that intention to the defendant before the defendant withdraws the guilty plea or admission to sufficient facts." Reporter's Notes to Mass. R. Crim. P. 12(b)(6).
- The appeal of a conditional guilty plea or admission is governed by the Massachusetts Rules of Appellate Procedure. Mass. R. Crim. P. 12(b)(6).
  Bear in mind that, pursuant to Mass. R. App. P. 23, an appellate court's decision is not immediately effective. Rather, an appellate court's order to the lower court issues 28 days after the appellate court releases its decision unless a litigant files a motion for reconsideration of the appellate court's decision or for further appellate review; in such case the appellate court's order will issue after disposition of any motion for reconsideration or denial of any application for further appellate review. Mass. R. App. P. 23(a)-(c).

3.B(4) Enforcing Plea Agreements

If the court determines that a plea agreement existed, and that the defendant has fulfilled his or her part of the bargain, the defendant is entitled to the benefit of the prosecutor's performance of the countervailing promise. If the Commonwealth seeks to avoid performance on the ground that the defendant has not lived up to the terms of the agreement, then the prosecutor bears the burden of proof on this issue. *See Doe v. District Attorney for Plymouth Dist.*, 29 Mass. App. Ct. 671, 677 n.6 (1991). In the usual course of events, all the defendant need do to fulfill his or her obligation under a plea agreement is to offer a guilty plea. However, the right to enforce a plea agreement may arise beforehand, if the defendant has relied to his or her detriment on a prosecutor's promise. *See id*. at 674 ("concerns about fairness which underlie the requirement that the government abide by its agreements are solidly engaged once an accused person has relied to his detriment upon a plea agreement, even if that occurs before entry of a guilty plea"); *cf. Blaikie v. Dist. Att'y for Suffolk County*, 375 Mass. 613, 618 (1978) (specific performance is in no sense mandated where no guilty plea has been entered, and the defendant's position has not been adversely affected).

In addition, a change in the Commonwealth's attorney should not be the sole basis for a change in the Commonwealth's recommendation. If an offer has been made on a previous date by a different ADA, that offer should be binding on the Commonwealth and the Commonwealth should be required to honor the prior recommendation unless good cause or a change in circumstances can be shown.

3.C PLEA COLLOQUIES

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

Plea colloquies are required in all tenders of plea. **An adequate plea colloquy must determine that the plea is both intelligently and voluntarily made.**

A guilty plea is *intelligent* if it is tendered with knowledge of the elements of the charges against the defendant and the procedural protections waived by entry of a guilty plea. *Commonwealth v. Scott*, 467 Mass. 336, 345 (2014) (citing *Commonwealth v. Duest*, 30 Mass. App. Ct. 623, 630-31 (1991)). Specifically, the defendant must (1) know the elements of the

offense or admit to facts constituting that offense (this may be done in one of three ways — by the judge explaining to the defendant the elements of the offense, by counsel's representation that he or she has done so, or by the defendant's stated admission to facts recited during the colloquy which constitute the unexplained elements); (2) know the maximum penalties for each offense charged and what the defendant's exposure is upon a violation of probation; (3) understand the three constitutional rights that are being waived — the right to jury or bench trial, the right to confront one's accusers, and the privilege against self-incrimination; and (4) understand the non-citizen immigration warning.

In determining whether a plea is *voluntary,* the judge should determine whether it is being extracted from the defendant under undue pressure from threats or inducements, whether the defendant is being treated for or is aware of any mental illness, and whether the defendant is under the influence of alcohol or drugs. *Commonwealth v. Correa,* 43 Mass. App. Ct. 714, 717-18 (1997). This requires "a continuing effort on the part of trial judges, with the help of counsel, so to direct their questions *as to make them a real probe of the defendant's mind*. . . . It is not to become a 'litany' but is to attempt a live evaluation of whether the plea has been sufficiently meditated by the defendant with guidance of counsel, and whether it is not being extracted from the defendant under undue pressure." *Commonwealth v. Fernandes*, 390 Mass. 714, 716 (1984) (quoting *Commonwealth v. Foster*, 368 Mass. 100, 107 (1975)) (emphasis added). "[W]hat is wanted from [a plea] colloquy is the basic assurances that the defendant, represented by counsel, with whom he has consulted, is free of coercion or the like, understands the nature of the crime charged, knows the extent of his guilt, recognizes the basic penal consequences involved, and is aware that he can have a trial if he wants one." *Commonwealth v. Charles*, 466 Mass. 63, 90 (2013) (citing *Commonwealth v. Nolan*, 19 Mass. App. Ct. 491, 498-99 (1985)) (footnotes omitted). "The question whether a defendant was subject to undue pressure to plead guilty must be considered in some manner on the record," but "[n]o particular form of words need be used in the required inquiry of a defendant," and the issue need not be raised directly. *Commonwealth v. Furr*, 454 Mass. 101, 110 (2009) (citing *Commonwealth v. Quinones*, 414 Mass. 423, 434 (1993)) (citations omitted). The judge should inquire specifically whether the defendant's plea is the result of threats, coercion, or improper inducements. *Furr*, 454 Mass. at 110 (citing *Foster*, 368 Mass. at 107).

The responsibility for conducting a meaningful colloquy with the defendant lies with the judge. Failure to ensure the plea is both intelligent and voluntary during the course of a colloquy is reversible error. *Commonwealth v. Scott*, 467 Mass. 336, 345 (2014) (citing *Commonwealth* v. *Furr*, 454 Mass. 101, 106 (2009) (citing *Boykin* v. *Alabama*, 395 U.S. 238 (1969); *Foster*, 368 Mass. at 102)) (Due process requires that a plea of guilty be accepted only where "the contemporaneous record contains an affirmative showing that the defendant's plea was intelligently and voluntarily made."). Most cases in which a defendant seeks to vacate a guilty plea start with these principles and allege a facial defect in the plea procedure itself. *See, e.g.*, *Furr,* 454 Mass. at 107, 110. However, a defendant's guilty plea also may be vacated as involuntary because of external circumstances or information that later comes to light. *See, e.g.*, *Commonwealth* v. *Conaghan*, 433 Mass. 105, 110 (2000) (new evidence raising question as to defendant's mental competence at time of guilty plea was relevant to voluntariness of plea).

Note: it is a recommended practice to ask the defendant whether he/she has had sufficient time to discuss the case with counsel and whether he/she believes that counsel is acting in the defendant's best interest. It is always best to use plain language in discussing the waiver of rights with the defendant.

3.C(1) Elements of the Crime(s); Subsequent Offenses

The requirement that the defendant's plea be made intelligently may be met "(1) by the judge explaining to the defendant the elements of the crime; (2) by counsel's representation that [he] has explained to the defendant the elements he admits by his plea; or (3) by the defendant's stated admission to facts recited during the colloquy which constitute the unexplained elements." *Commonwealth v. Furr*, 454 Mass. 101, 107 (2009) (citing *Commonwealth v. Correa*, 43 Mass. App. Ct. 714, 717 (1997)); *see Henderson v. Morgan,* 426 U.S. 637, 646-47 (1976); *Commonwealth v. Colantoni*, 396 Mass. 672, 679 (1986). If the Commonwealth has proceeded on a theory of either joint venture or constructive possession, the judge should inquire of counsel whether this has been discussed with the defendant. If, however, the defendant is *pro se*, the judge **must** review the elements of the offense(s) with the defendant. Failure to acknowledge all of the facts as set forth by the Commonwealth shall not preclude a judge from accepting a guilty plea. Mass. R. Crim. P. 12(c)(5) & 12(d)(5). However, in order for the plea to be accepted, the defendant must acknowledge all of the elements of the crime. In an *Alford* plea, see § 3.D, *Alford*

Pleas, or when a case is to be continued without a finding (CWOF), at a minimum, a defendant must admit that the facts are sufficient to find the defendant guilty.

If the offense is charged as a subsequent offense, the defendant must acknowledge that he/she is the person who was previously convicted (and the colloquy must make clear to the defendant that in pleading guilty they are giving up their right to a separate trial on the subsequent offense charge). In certain instances, e.g., a case involving a disparate plea, a judge may require the defendant to admit to the facts set forth by the Commonwealth if the judge is relying on those facts to sentence the defendant.

3.C(1)(a) Sufficiency of the Evidence

A judge shall not accept a plea of guilty unless the judge is satisfied that there is a factual basis for the charge. Mass. R. Crim. P. 12(c)(3)(b) & 12(d)(3)(B). A plea does not relieve the Commonwealth of its burden of proof, and if there is no factual basis for the crime charged, *a fortiori*, there can be no valid plea. *Commonwealth v. Loring*, 463 Mass. 1012, 1013 (2012) (citing *Commonwealth v. DelVerde*, 398 Mass. 288, 297 (1986)); *see also Commonwealth v. Morrow*, 363 Mass. 601, 607-08 (1973) (a "plea of guilty is an admission of the facts charged").

If the plea involves a continuance without a finding (CWOF), a judge may require a defendant to admit to the elements of the offense(s) or, at a minimum, the defendant must admit that there is enough evidence, if believed by a judge or jury, to find him/her guilty.

The acknowledgment of the factual basis of the charge(s) should be made on the record. Mass. R. Crim. P. 12(c)(5) & 12(d)(5). This is generally done following the plea colloquy and prior to sentencing.

3.C(1)(b) Guilty Plea Based on Joint Venture

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

Commonwealth v. Argueta, 73 Mass. App. Ct. 564 (2009). A defendant who is pleading guilty under a theory of joint venture must understand that this is the basis of the plea.

3.C(2) Right to Jury or Bench Trial

Massachusetts Rule of Criminal Procedure 12(c)(3)(A)(i) and 12(d)(3)(A)(i) requires the judge to inform the defendant on the record, in open court, that by a plea of guilty or nolo contendere, or an admission to sufficient facts, the defendant waives the right to trial with or without a jury. It is also recommended that a judge inform the defendant that, if tried by a jury, all jurors must be in agreement with respect to the verdict. If the offense is charged as a subsequent offense, the colloquy must make clear to the defendant that in pleading guilty they are giving up their right to a separate trial on the subsequent offense charge.

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

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

3.C(3) Right to Confront Witnesses

Massachusetts Rule of Criminal Procedure 12(c)(3)(A) requires the judge to inform the defendant on the record, in open court, that part of the trial rights being waived by the plea is the right to confront witnesses. **Note**: It is best to further explain that by pleading guilty, the defendant is giving up the right to be in court and watch and listen to each witness testify, to have counsel question the witnesses, and to challenge all evidence offered by the Commonwealth.

3.C(4) Right to be Presumed Innocent

Massachusetts Rule of Criminal Procedure 12(c)(3)(A) requires the judge to inform the defendant on the record of the right to be presumed innocent until proved guilty beyond a reasonable doubt. In 2004, Mass. R. Crim. P. 12(c)(3)(A) was amended to require an additional warning of rights be given to the defendant, concerning the right to be presumed innocent until proved guilty beyond a reasonable doubt. Although not constitutionally required, it is sound practice to include it. The Supreme Judicial Court has recommended its use in cases where the defendant is willing to plead guilty but does not acknowledge all of the elements of the factual basis. *See Commonwealth v. Earl*, 393 Mass. 738**,** 742 (1985) ("when a judge concludes that he is satisfied that there is a factual basis for a charge to which a defendant is willing to plead guilty, but the defendant does not acknowledge all the elements of the factual basis, it would be better practice for the plea judge to advise the defendant that his guilty plea waives his right to be presumed innocent until proved guilty beyond a reasonable doubt").

3.C(5) Privilege Against Self Incrimination

Massachusetts Rule of Criminal Procedure 12(c)(3)(A) requires the judge to inform the defendant on the record of the privilege against self-incrimination. **Note**: A judge may wish to further inform the defendant that he/she has an absolute right against self-incrimination, but by pleading guilty and acknowledging either the truth of the allegations made by the Commonwealth or that there are sufficient facts to prove the defendant's guilt, that he/she is waiving the privilege against self-incrimination.

3.C(6) Non-Citizen Warning

3.C(6)(a) Non-Citizen Warning Pursuant to G.L. c. 278, § 29D

Pursuant to G.L. c. 278, § 29D, the court shall not accept a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts from any defendant in a criminal proceeding unless the court advises the defendant of three potential consequences for non-citizens, preferably by directly quoting the following statutory language: **"If you are not a citizen of the United States, you are hereby advised that the acceptance by this court of your plea of guilty, plea of nolo contendere, or admission to sufficient facts may have consequences of deportation, exclusion from admission to the United States, or denial of naturalization,**

pursuant to the laws of the United States." G.L. c. 278, § 29D. This warning should be read verbatim as the statute is not satisfied by a warning of generic potential naturalization consequences. *Commonwealth v. Petit-Homme*, 482 Mass. 775, 783-84 (2019); *Commonwealth v. Soto,* 431 Mass. 340 (2000). Judges should also ensure that the green sheet has been provided to the interpreter to be signed when translating the language in the form to the defendant, but **the warning should be included in the oral colloquy given in open court as the obligation is not satisfied by the written information on the tender of plea form**. *Commonwealth v. Hilaire,* 437 Mass. 809, 815, 818 (2002) (reliance on written warning insufficient, even if coupled with a general reference to them in an oral colloquy).

If the court fails to provide this non-citizen warning, and the defendant later shows that "(1) that the noncitizen defendant 'actually faces the prospect of [an immigration consequence enumerated in the statute] occurring' as a result of the challenged plea . . . and (2) that the defendant was not verbally warned about that particular adverse consequence during the colloquy as required by statute," the defendant is entitled to have the judgement vacated. *Petit-Homme*, 482 Mass. at 784 (quoting *Commonwealth v. Berthold*, 441 Mass. 183, 185 (2004); G.L. c. 278, §29D. This warning must be given to all defendants as a judge may not ask the defendant about the defendant's immigration or citizenship status. *Id*.

3.C(6)(b) Non-Citizen Warning Pursuant to Rule 12

Massachusetts Rule of Criminal Procedure 12(c)(3)(A)(iii)(b) and 12(d)(3)(A)(iii)(b) was amended in 2020 such that a judge is no longer required to give the additional warning, that "it is practically inevitable" that an admission or guilty plea to a crime that presumptively mandates removal, and removal is sought, will result in deportation, exclusion from admission, or denial of naturalization. Mass. R. Crim. P. 12 12(c)(3)(A)(iii)(b) and 12(d)(3)(A)(iii)(b) (2015). Effective September 1, 2020, the rule now tracks only the language of G.L. c. 278, § 29D, reinforcing the requirement to provide the statutory warning as described in Section 3.C(6)(a). See Mass. R. Crim. P. 12 (2020), as amended after *Commonwealth v. Petit-Homme*, 482 Mass. 775, 783-84 (2019).

The additional warning previously required by Rule 12 was intended to give a heightened alert to defendants over the general statutory advisory, but did not provide for specific relief in the event a judge does not give this warning. *Petit-Homme*, 482 Mass. at 782. In *Petit-Homme*, in addressing a challenge where a judge only gave the Rule 12 warning, the Court determined

that the additional warning required by the rule given as a stand-alone warning is "too technical, legalistic, and complex in its application to be particularly informative," and was no substitute for the statutory warning. 482 Mass. at 786. The Court directed the rules committee to considering whether the additional warning required by the rule "may not appropriately or at least fully take into account the complexities of Federal immigration law, and not serve its intended purposes, even when combined with the more general warning." *Petit-Homme*, 482 Mass. 787. The resulting amendment was to eliminate this additional warning and require a plea colloquy to include only the warning required by G.L. c. 278, § 29D. 12(c)(3)(A)(iii)(b) and 12(d)(3)(A)(iii)(b) (2020).

3.C(6)(c) Non-Citizen Warning and Advice of Counsel

The non-citizen warning "in no way reduces counsel's obligation to assess the potential collateral consequences for a non-citizen defendant of a guilty plea, plea of nolo contendere or admission to sufficient facts. Mass. R. Crim. P. 12(c)(3)(A)(iii) Reporter's Notes (2020), citing *Padilla v. Kentucky*, 559 U.S. 356, 363-364 (2010); *Commonwealth v. DeJesus*, 468 Mass. 174, 182 (2014); *Commonwealth v. Clarke*, 460 Mass. 30, 48 n. 20 (2011), partially abrogated on other grounds by, *Chaidez v. United States*, 568 U.S. 342 (2013) ("receipt of such warnings is not an adequate substitute for defense counsel's professional obligation to advise her client of the likelihood of specific and dire immigration consequences that might arise from such a plea").

3.C(7) Maximum Sentence

Pursuant to Mass. R. Crim. P. 12(c)(3)(A)(ii) and 12(d)(3)(A)(ii), the defendant is to be informed of the maximum possible sentence on the charge. The judge should inform the defendant of the maximum sentence of each offense to which the defendant is offering a plea or admission. In some circumstances, the maximum sentence will depend on whether the defendant has previously been convicted.

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

employee (G.L. c. 265, § 13D) would require notifying the defendant that, should a sentence be imposed, it would be for a minimum of ninety days and a maximum of 2½ years.

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

3.C(8) Mandatory Minimums

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

3.C(9) Sentencing Consequences

The failure to inform the defendant of the sentencing consequences of a plea may result in the conviction being set aside because the plea was not knowing and intelligent. *E.g.*, *Commonwealth v. Rodriguez*, 52 Mass. App. Ct. 572 (2001) (failure to inform the defendant of the maximum sentence and mandatory minimum sentence upon revocation of probation). However, "not every omission of a particular from the protocol of the rule . . . entitles a defendant at some later stage to negate his plea and claim a trial." *Commonwealth v. Nolan*, 19 Mass. App. Ct. 491, 494 (1984); *see, e.g.*, *Commonwealth v. Cavanaugh*, 12 Mass. App. Ct. 543, 545-46 (1981) (where defendant received the sentence recommended by the prosecutor, the judge's failure to inform him of the maximum possible sentence was harmless beyond a reasonable doubt).

3.C(9)(a) Warnings on Sex Offender Registration Statute Required

General Laws c. 6, § 178E(d) provides that any court which accepts a plea for a sex offense shall inform the sex offender prior to acceptance and require the sex offender to acknowledge in writing that such plea may result in such sex offender being subject to the provisions of the sex offender registration statute. The statute also provides that any "failure to so inform the sex offender shall not be grounds to vacate or invalidate the plea." A 2004 amendment incorporated into Mass. R. Crim. P. 12(c)(3)(A)(ii)(b) & 12(d)(3)(A)(ii)(b) this requirement of G.L. c. 6, § 178E(d).

3.C(9)(b) Sexually Dangerous Persons

If the defendant is subject to commitment as a sexually dangerous person, *see* G.L. c. 123A, the judge must include notice of that possibility prior to accepting the plea or admission. Mass. R. Crim. P. 12(c)(3)(A)(ii)(b) & 12(d)(3)(A)(ii)(b). Since a 2004 amendment to G.L. c. 123A, § 12 makes a defendant subject to commitment as a sexually dangerous person despite the nature of the offense to which the defendant is pleading guilty, so long as the defendant has been convicted any time in the past of a designated sex offense, a warning of the possibility of commitment under c. 123A should be included as a matter of routine unless it is clear from the defendant's prior record that it is not relevant.

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

3.C(9)(c) Habitual Offender Warning

The habitual offender law (G.L. c. 279, § 25) provides for enhanced penalties on a third or subsequent offense of specifically enumerated offenses, and requires notifying a defendant, prior to accepting a plea of guilty for an offense that implicates the habitual offender statute, of

the consequences of committing a further violation.[5] Specifically, the defendant is to be advised that, "upon conviction or plea of guilty for the third or subsequent of said offenses: (1) the defendant may be imprisoned in the state prison for the maximum term provided by law for such third or subsequent offense; (2) no sentence may be reduced or suspended; and (3) the defendant may be ineligible for probation, parole, work release or furlough, or to receive any deduction in sentence for good conduct." G.L. c. 279, § 25(d). The failure to provide this warning, however, does not provide a basis to invalidate an otherwise valid plea. *Id*.

3.C(10) Collateral Consequences

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

While there are consequences beyond those enumerated in Mass. R. Crim. P. 12(c)(3)(A) that might influence a defendant's decision to plead guilty, if they are collateral, in the sense of being contingent upon some future event or subject to discretion or under the control of the

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[5] The offenses that are within the final jurisdiction of the district court for which this warning must be given are:

- motor vehicle homicide (G.L. c. 265, § 13½);
- assault and battery causing serious bodily injury (G.L. c. 265, § 13A(b)(i));
- indecent assault and battery on a child under 14 (G.L. c. 265, § 13B);
- assault and battery on a child causing bodily injury (G.L. c. 265, § 13J(b));
- assault and battery with a dangerous weapon causing serious bodily injury on an elder (G.L. c. 265, § 15A(c)(i));
- kidnapping (G.L. c. 265, § 26);
- child enticement (G.L. c. 265, § 26C),
- assault and battery with intent to intimidate causing bodily injury (G.L. c. 265, § 39(b));
- possession of child pornography (G.L. c. 272, § 29C);
- unnatural and lascivious acts on a child under 16 (G.L. c. 272, § 35A); and
- paying for sexual conduct (G.L. c. 272, § 53A(b)).

federal government or that of another state or state agency, they need not be incorporated into the plea colloquy. For example, ordinary parole consequences need not be part of the judge's warnings, *see Commonwealth v. Santiago*, 394 Mass. 25, 30 (1985), nor is ineligibility to receive good time deductions from a sentence being served after conviction of certain crimes, *see Commonwealth v. Brown*, 6 Mass. App. Ct. 844 (1978) (rescript). Similarly, the requirement to submit a DNA sample upon conviction of a felony is not one of the consequences of which a defendant must be expressly warned. G.L. c. 22E, § 3.

3.C(11) Filing

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

3.D *ALFORD* PLEAS

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

North Carolina v. Alford, 400 U.S. 25 (1970), establishes that the United States Constitution does not prohibit the court from accepting a guilty plea from a defendant who nevertheless asserts his or her innocence or claims an inability to recall the events for which he/she is charged. Under *Alford*, a defendant need not admit his guilt to make a valid guilty plea.

Commonwealth v. Nikas, 431 Mass. 453, 455 (2000). "An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *Nikas*, 431 Mass. at 455 (citing *Alford*, 400 U.S. at 37); *see Huot v. Commonwealth*, 363 Mass. 91, 95 n.4 (1973) (quoting *Alford*, 400 U.S. at 37).

3.D(1) An *Alford* Plea Must be Supported by a Strong Factual Basis

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

3.D(2) The Judge may Refuse to Accept an *Alford* Plea

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

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

circumstances wherein a defendant wishes to admit sufficient facts but refuses to admit certain facts that may be essential in the court's determination of an appropriate sentence.

3.D(3) *Alford* Pleas – Intoxication and Mental Illness

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

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

The record should establish that the defendant understands the consequences and ramification of his plea, and has had the opportunity to consult with his lawyer. *See Commonwealth v. Claudio*, 83 Mass. App. Ct. 1108 (2013). Representations by the defendant

and defendant's attorney on the record regarding current medication of a mental condition can assist in demonstrating that the defendant understands the consequences of the plea. *Id*.

3.E ACCEPTANCE OR REJECTION OF PLEA AGREEMENT

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

CHAPTER 4: INFORMATION TO CONSIDER IN SENTENCING AND DISPOSITION

"A sentencing judge is given great discretion in determining a proper sentence." *Commonwealth v. Rodriguez*, 461 Mass. 256, 259 (2012) (citing *Commonwealth v. Lykus*, 406 Mass. 135, 145 (1989)). This task requires "diligence and professionalism to take account of the human existence of the offender and the just demands of a wronged society. *Commonwealth v. Rodriguez*, 461 Mass. 256, 259 (2012), citing *Graham v. Florida*, 560 U.S. 48, 77 (2010). The sentence should reflect "the judge's careful assessment of several goals: punishment, deterrence, protection of the public, and rehabilitation." *Commonwealth v. Plasse*, 481 Mass. 199, 205 (2019). In exercising this discretion, judges should refer to the Boston Municipal Court and District Court Sentencing Best Practices Principles, at Appendix B, page 83. To determine a just sentence, a judge must weigh various, often competing, considerations, including, but not limited to, the severity of the crime, the circumstances of the crime, the role of the defendant in the crime, the need for general deterrence (deterring others from committing comparable crimes) and specific deterrence (deterring the defendant from committing future crimes), the defendant's prior criminal record, the protection of the victim, the defendant's risk of recidivism, any mitigating factors, and the extent to which a particular sentence will increase or diminish the risk of recidivism. *Rodriguez*, 461 Mass. at 259 (citing *Commonwealth v. Donohue*, 452 Mass. 256, 264 (2008)). Prior to sentencing, a judge is required to afford the defendant or his counsel to present any information in mitigation of punishment, the prosecutor an opportunity to address the court and offer a sentencing recommendation, and the victim an opportunity to be heard through

an oral or written statement on the effects of the crime on the victim and as to any recommended sentence. See § 2.B. Allocution, *supra*.

To assist in determining a sentence, the court may request that the Probation Department conduct a presentence investigation and present a report to the court prior to sentencing. Mass. R. Crim. P. 12(e), Mass. R. Crim. P. 28(d)(1). The report must contain the defendant's prior criminal and juvenile record of prosecution, excluding any cases in which the defendant was found not guilty. Mass. R. Crim. P. 28(d)(2). In addition the report shall include such other available information as may be helpful to the court in the disposition of the case. *Id.* Prior to the disposition the presentence report shall be made available to the parties, although the judge may, in extraordinary cases, redact certain portions of the report from disclosure. Mass. R. Crim. P. 28(d)(3). Therefore, to impose a just sentence, a judge requires not only sound judgment, but information concerning the crimes of which the defendant stands convicted, the defendant's criminal and personal history, and the impact of the crimes on the victims. *Rodriguez*, 461 Mass. at 259.

Where mental health issues are a consideration, after a finding of guilty on a criminal charge, the court may order a psychiatric or other clinical examination to aid in sentencing pursuant to G.L. c. 123, § 15(e). The screening is conducted by the court clinician. After the screening, the court clinician will make a recommendation regarding the need for further evaluation and, if so, where such evaluation should be conducted. The evaluation can be done outpatient, in the jail, or the court may order a period of observation in a facility, or at Bridgewater State Hospital if strict security is required, for the purpose of aiding the court in sentencing. *Id*. If the evaluation is conducted at a facility, or Bridgewater, the superintendent or medical director may petition the court for commitment of the defendant. After sentencing, the court may hear the petition and if the court makes the necessary findings as set forth G.L. c. 123, § 8, may commit the person to a facility, or Bridgewater for six months, and that time shall be credited against the sentence imposed as provided in section eighteen. G.L. c. 123, § 15(e).

4.A SENTENCING RANGE

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

obstruction of justice, *see Commonwealth v. Triplett*, 426 Mass. 26, 28 (1997), and contempt of court, Mass. R. Crim. P. 43 & 44, the statute creating the crime will provide the maximum sentence. "If no punishment for a crime is provided by statute, the court shall impose such sentence, according to the nature of the crime, as conforms to the common usage and practice in the commonwealth." G.L. c. 279, § 5.

Some statutes require a mandatory minimum sentence to be imposed. *See, e.g.*, G.L. c. 269, § 10(a) (minimum sentence of 18 months for unlawfully carrying a firearm). Some statutes have restrictions on probation or suspended sentences. *See, e.g.*, G.L. c. 90, § 24(1)(a)(1)(¶ 4) (for OUI-second, minimum sentence is 60 days; no probation or suspended sentence unless 30 days are served). See 2.E., Mandatory Minimum Sentences. It is vital that any sentence imposed be within the statutory confine. *See Commonwealth v. Selavka*, 469 Mass. 502, 508 (2014) (Commonwealth may move, within sixty days of imposition of a sentence, to correct an illegal sentence). See also Mass. R. Crim. P. 29(a)(1).

4.B PERMISSIBLE FACTORS

A trial judge " 'is permitted great latitude in sentencing, provided the sentence does not exceed statutory limits.' " *Commonwealth v. O'Connor*, 407 Mass. 663, 674 (1990) (quoting *Commonwealth v. Burke*, 392 Mass. 688, 694 (1984)). The law, therefore, vests tremendous discretion in the trial judge in setting a disposition. In formulating a disposition, a judge should consider a number of factors and sources of information including the facts and circumstances of the crime, a defendant's prior criminal history or lack thereof, the victim impact statement, the defendant's background, personal history and circumstances, sentencing arguments and memoranda and other materials (if any) submitted by either counsel.

4.B(1) Nature of the Crime

One of the most significant factors in determining a disposition is the facts and circumstances of the offense or offenses for which the defendant has either been convicted, or offered a change of plea, including the nature and seriousness of the crime and the harm inflicted, either to a victim or society. A judge should impose a sentence that is proportionate to the gravity of the offense(s), the harm to the victim(s), and the blameworthiness of the offender.

4.B(2) Criminal Record

The defendant's criminal record is a permissible sentencing consideration. *Commonwealth v. Molino*, 411 Mass. 149, 156 (1991); *Commonwealth v. Garofalo*, 46 Mass. App. Ct. 191, 194 (1999). In reviewing a defendant's criminal history, the court may take into consideration such factors as a history of similar charges, the number of criminal convictions, the length of time since a defendant has been charged with a crime, and a defendant's prior success or failure on probation.

Generally, a defendant can only be sentenced based upon charges resulting in conviction (including CWOFs). A defendant cannot be punished for uncharged conduct, because such information is not "tested by the indictment and trial process. Punishment is appropriate only for conduct of which the defendant has been charged and convicted." *Commonwealth v. Stuckich*, 450 Mass. 449, 461 (2008). "However, if the uncharged conduct is relevant and the report of it 'sufficiently reliable,' the conduct may be considered at sentencing." *Id*., citing *Commonwealth v. Goodwin*, 414 Mass. 88, 94 (1993). In other words, uncharged conduct may be used to determine the type of punishment that should be imposed for the offense of which the defendant has been convicted. *Id.* at 462, n.12. Acquittals, however, may not be considered at all. *Commonwealth v. Lender*, 66 Mass. App. Ct. 303, 307 (2006), citing G.L. c. 276, § 85.

A judge's comments that suggest that the sentence imposed, as opposed to the type of sentence imposed, may have been based on uncharged crimes will ordinarily result in resentencing before a different judge. *Commonwealth v. Henriquez*, 440 Mass. 1015, 1015-16 (2003).

4.B(3) Likelihood of Recidivism

The defendant's likelihood of recidivism is a classic sentencing consideration. *Commonwealth v. Cotter*, 415 Mass. 183, 187-88 (1993); *Commonwealth v. Coleman*, 390 Mass. 797, 805 (1984). Many factors go into a determination of the likelihood of recidivism, on a range from prior criminal behavior to current expressions of remorse.

4.B(4) Immigration Consequences

Historically, a trial judge could not base a sentence on immigration consequences. *Commonwealth v. Quispe*, 433 Mass. 508, 513 (2001). In 2013, the Supreme Judicial Court overruled that precedent and determined that a trial judge could consider, on a defendant's

request, immigration consequences in setting a sentence. *Commonwealth v. Marinho*, 464 Mass. 115, 128 n. 19 (2013). Because immigration consequences are complex, however, a trial judge should not alter a sentence based on immigration consequences without fully understanding how those consequences work, both in law and in practice. Defense counsel should correctly advise a client of the immigration consequences of a criminal disposition. *Padilla v. Kentucky*, 559 U.S. 356 (2010).

4.B(5) Willingness to Admit Guilt

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

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

4.C IMPERMISSIBLE FACTORS

4.C(1) Race and Other Protected Categories

It should be evident that no sentence may be based, either in aggravation or mitigation, on a defendant's membership in a protected class, whether racial, sexual, religious, sexual orientation, or otherwise. A trial judge should refrain from making any statement that could be interpreted as relying on such membership.

4.C(2) Decision to go to Trial or Claim Jury Trial

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

4.C(3) Perjury at Trial

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

4.C(4) "Sending a Message" to the Community or Society

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

4.C(5) Personal and Private Beliefs or Feelings

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

CHAPTER 5: SENTENCING AFTER A VIOLATION OF PROBATION

After a finding of a violation (see District/Municipal Court Rules for Probation Violation Proceedings), the court may revoke a probationer's probation and impose a sentence, modify the terms of the probationer's conditions of probation, re-probate the probationer to the same terms and conditions of probation that had originally been imposed, or terminate probation. Dist./Mun. Cts. R. Prob. Viol. P. 8(d) and 9(b). In determining the appropriate disposition, the court shall consider "such factors as public safety; the circumstances of any crime for which the probationer was placed on probation; the nature of the probation violation; the occurrence of any previous violations; and the impact of the underlying crime on any person or community, as well as mitigating factors." Dist./Mun. Cts. R. Prob. Viol. P. 8(d).

"In appropriate circumstances, a judge may order a defendant who is addicted to drugs to remain drug free as a condition of probation, and . . . a defendant may be found to be in violation of his or her probation by subsequently testing positive for an illegal drug." *Commonwealth v. Eldred* 480 Mass. 90, 91 (2019). In determining the appropriate disposition for a violation of probation, "judges should act with flexibility, sensitivity, and compassion when dealing with people who suffer from drug addiction." *Id*. at 95. The defendant's punishment must be based on the original conviction, not the conduct that resulted in the violation of probation, but the nature of the violation can be taken into consideration when determining the type of disposition. *Id*. at 102-103. Where probation is modified, the defendant is essentially being resentenced on his or her underlying conviction, and the judge may impose any conditions of probation that could have been imposed at the original sentencing. *Id*. at 103, citing *Commonwealth v. Goodwin*, 458 Mass. 11, 17 (2010).

5.A RULE 8 – FINDING AND DISPOSITION

5.A(1) Requirement of a Prompt Finding – Rule 8(a)

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

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

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

5.A(3) Finding of Violation – Rule 8(c)

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

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

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

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

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

5.A(6) Disposition After Finding of Violation

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

5.A(7) Factors to Consider (re: Disposition)

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

- the recommendation of the Probation Department, including any Risk / Need assessment prepared by the Probation Department
- the recommendation of the probationer
- the recommendation of the District Attorney
- As well as the following factors:
- public safety
- the seriousness of the crime of which the probationer was placed on probation
- the nature of the violation
- the occurrence of any previous violations
- the impact of the underlying crime on any person or community
- as well as any mitigating factors. Rule 8(d)

5.A(8) Disposition is Strictly a Matter of the Court's Discretion

Regarding the choice of disposition, two factors are essential: (1) disposition is a matter of the court's discretion. *McHoul v. Commonwealth*, 365 Mass. 465, 469-70 (1974); *Commonwealth v. Durling*, 407 Mass. 108, 111 (1990); and (2) disposition is not a punishment for the new crime, but rather relates to the underlying offense. *Commonwealth v. Odoardi*, 397 Mass. 28, 30 (1986). See Commentary to Rule 8.

5.A(9) Dispositional Options

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

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

5.A(10) Revocation of Probation

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

- *If the court orders revocation*, it must state the reasons for revocation in writing. Rule 8(d)(iv)
- Upon revocation of a probation order, "any sentence that was imposed for the crime involved, the execution of which was suspended [*i.e., a suspended sentence*], shall be ordered executed forthwith . . ."
- In circumstances where *no sentence was imposed* (or suspended) following a conviction [*i.e.,* "straight" probation], the probationer is subject to any sentence for the underlying crime that is provided by law. Rule 8(f).
- If there are multiple charges, see 2.A, Concurrent Sentences, *infra*, and 2.B Consecutive Sentences.
- There is limited availability for a "stay of execution" in Rule 8(e) (pending an appeal or to attend to "personal matters"). *Commonwealth v. Holmgren,* 421 Mass. 224 (1995).

5.B RULE 9 – VIOLATION OF CONDITIONS OF A "CONTINUANCE WITHOUT A FINDING"

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

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

5.B(1) Dispositional Options – Rule 9(b)

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

- termination of probation and dismissal of the underlying criminal case
- continuation of continuance without a finding

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

CHAPTER 6: POST CONVICTION

6.A MOTIONS TO REVISE AND REVOKE

A defendant may move to revise and revoke a sentence within sixty days of sentencing or within sixty days of receipt of the rescript of an appellate court affirming the judgment. Mass. R. Crim. P. 29(a). Such a motion must be accompanied by an affidavit and a statement of records, or it is null and has no effect. *Commonwealth v. DeJesus*, 440 Mass. 147, 152 (2003). The court may also *sua sponte* initiate reconsideration of a sentence, provided that the judge does so within this time period. Mass. R. Crim. P. 29(a). These time limits are strictly applied, and the court lacks jurisdiction if they are not met. *DeJesus*, 440 Mass. at 150-51; *Commonwealth v. Callahan*, 419 Mass. 306, 308 (1995).

Revision and revocation must be based on facts that existed at the time of sentencing. "[A] judge may not take into account conduct of the defendant that occurs subsequent to the original sentencing." *Commonwealth v. Barclay*, 424 Mass. 377, 380 (1997); *accord DeJesus*, 440 Mass. at 152. However, in *Commonwealth v. Tejeda*, 481 Mass. 794 (2019), the Supreme Judicial Court recognized an exception to this requirement: a judge may consider a disparate sentence of a coventurer, tried separate and subsequently, who was convicted of the same crime where, at the time of sentencing, it is reasonably apparent that the defendant was less culpable than or equally culpable to his or her yet untried coventurer.

Prompt action on a motion to revise or revoke is important. A judge must "consider the motion to revise or revoke the sentence within a reasonable time after the motion is filed." *DeJesus*, 440 Mass. at 151 n.7; *accord Barclay*, 424 Mass. at 380-81. Delay increases the chance that the court will inadvertently consider post-sentencing information. *Commonwealth v.*

Layne, 386 Mass. 291, 295-96 (1982). Furthermore, a properly filed but unacted-upon Rule 29 motion will indefinitely stay the statute of limitations for federal habeas review. *Holmes v. Spencer*, 685 F.3d 51, 60 (1st Cir. 2012).

6.B MOTIONS TO CORRECT UNLAWFUL SENTENCES

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

6.C REMAND AFTER APPEAL

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

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

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

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

CHAPTER 7: DISPOSITIVE MENTAL HEALTH DISPOSITIONS

There are mechanisms which control the disposition of cases in which the defendant has been found incompetent to stand trial or to lack criminal responsibility.

7.A INCOMPETENT TO STAND TRIAL AND G.L. c. 123, § 16(F) CONSIDERATIONS

As discussed previously, a court should not accept a guilty plea when the defendant is incompetent to stand trial. The standard for a knowing plea is the same as when a person has been found incompetent to stand trial. There are times when a judge will be faced with a defendant who has been previously found incompetent to stand trial. In such circumstances, the person may or may not have been committed to a hospital (including Bridgewater State Hospital).

"If a person is found incompetent to stand trial ("IST"), the court shall send notice to the department of correction which shall compute the date of the expiration of the period of time equal to the time of imprisonment which the person would have had to serve prior to becoming eligible for parole *if he had been convicted of the most serious crime with which he was charged in court and sentenced to the maximum sentence he could have received, if so convicted.*" *Commonwealth v. Foss*, 437 Mass. 584, 586-87 (2002) (emphasis added). When the words "the most serious" are given their ordinary meaning and are used to modify the singular word "crime," their import is clear. The maximum sentence does <u>not</u> refer to the maximum sentence a district court judge may impose, it refers to the maximum sentence (including state prison sentence) permitted by law. A defendant is entitled to have the complaint dismissed once this date is reached. The time begins to run once the defendant is found IST and ends at the half-time

of the sentence for the most serious offense. The form "Request to Compute Parole Eligibility of Defendant Found Incompetent to Stand Trial" should be used and submitted to DOC who this calculation and, again, the defendant is entitled to dismissal of the complaint if still IST when that date occurs. Even though DOC calculates the date, the person need not be committed or held in custody for the time to run.

A judge may also entertain a motion to dismiss even if the full time has not run if the court finds that it is unlikely that the defendant will be restored to competency and it is in the interest of justice that the complaint be dismissed. See G.L. c. 123, §16(f). See *Commonwealth v. Calvaire*, 476 Mass. 242, 247-48 (2017).

An incompetent defendant also has the right to request an opportunity to offer a defense (other than lack of criminal responsibility) to pending charges and if, after a hearing, the court finds a lack of substantial evidence to support a conviction, the court may dismiss the charges. *Commonwealth v. Hatch*, 438 Mass. 618, 622 (2003), citing G.L. c. 123, § 17(b).

7.B NOT GUILTY BY REASONS OF INSANITY/LACK OF CRIMINAL RESPONSIBILITY

In *Commonwealth v. Blaisdell*, 372 Mass. 753 (1977), the Supreme Judicial Court outlines the procedure for the insanity defense in Massachusetts, and the *Blaisdell* opinion has been codified as Mass. R. Crim. P. 14. In *Commonwealth v. McHoul*, 352 Mass. 544 (1967), the Supreme Judicial Court sets the standard for the insanity defense in Massachusetts. In essence, a person is lacking in criminal responsibility if they have a mental disease or defect, and as a result of that mental disease or defect either they are substantially unable to appreciate the wrongfulness of their conduct, or they are substantially unable to conform their conduct to the requirements of the law. A defendant's mental condition must have been such that they were unable to realize that their behavior was wrong or was unable to make themselves behave as the law requires. See *Model Jury Instructions 9.200*.

A defendant who has been advised of and is found to understand the consequences of the refusal to pursue a lack of responsibility defense may not be required to assert that defense. *Commonwealth v. Federici*, 427 Mass. 740, 744-45 (1998). Ineffective assistance of counsel has been found, however, based on a failure to pursue a defense of lack of criminal responsibility for reason of insanity. *Commonwealth v. Milton*, 49 Mass. App. 552, 560 (2000).

7.B(1) Trials

A defendant may be found NGRI following either a jury or jury-waived trial. It is not uncommon for these trials to be based on stipulated evidence. If proceeding in this fashion, a defendant must be advised of the rights he/she is waiving by stipulating to the evidence. *Commonwealth v. Castillo*, 66 Mass. App. Ct. 34 (2006). The colloquy is essentially that of a guilty plea without the admission of guilt. *Id*. at 36. Further, there must be an agreement as to the exhibits accepted by the court and the evidence submitted. This agreement must be in writing and signed by the parties, including the defendant and counsel.

If a defendant has been found NGRI, a petition may be filed pursuant to G.L. c. 123, § 16(b) may be filed by the Commonwealth requiring the defendant be hospitalized for a period of observation and examination. This observation period shall not to exceed 40 days.

7.B(2) G.L. c. 123, § 16 and Requirements for Commitment to a Facility Following NGRI

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

1. Mental Illness

As required by G.L. c. 123, § 2, the Department of Mental Health has defined mental illness for the purpose of involuntary commitment as:

> a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life, but shall not include intellectual or developmental disabilities, autism spectrum disorder, traumatic brain injury or psychiatric or behavioral disorders or symptoms due to another medical condition as provided in the [DSM], 5th edition, or except as provided in 104 CMR 27.18, alcohol and substance use disorders; provided however, that the presence of such conditions co-occurring with a mental illness shall not disqualify a person who otherwise meets the criteria for admission to a mental health facility.

104 CMR 27.05, eff. 2/23/18.

2. Likelihood of Serious Harm

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

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

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

3. No Less Restrictive Alternative to Hospitalization

By its terms, G.L. c. 123, § 1 requires proof that there is no less restrictive alternative to hospitalization in the third subsection of the definition of likelihood of serious harm. However, the Supreme Judicial Court made this a requirement regardless of what category of serious harm upon which the Commonwealth relies. *Commonwealth v. Nassar*, 380 Mass. 908, 917-918 (1988).

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

1. The person is male and is not a proper subject for a commitment to a Department of Mental Health facility; and

2. Failure to hospitalize the person in strict security would create a likelihood of serious harm.

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

Typically, once a §16(b) petition has been filed, it will be heard at the hospital where the defendant was committed for the period of observation/examination. A hospital may also file its own petition under the statute. If after completion of the observation/examination the hospital

does not believe the defendant meets commitment criteria, the Commonwealth still has the right under the statute to pursue its petition. See, c. 123, §16(b) & (d).

A finding of not guilty by reason of insanity on some counts and guilty on other counts is not necessarily inconsistent; the court has no inherent authority to stay the execution of a defendant's sentence until after the defendant is discharged from a mental hospital. *Commonwealth v. McLaughlin*, 431 Mass. 506, 519 (2000).

Appendix A

Offenses Ineligible for Decriminalization under G.L. c. 277, § 70C[1]

"Upon oral motion by the commonwealth or the defendant at arraignment or pretrial conference, or upon the court's own motion at any time, the court may, unless the commonwealth objects in writing, stating the reasons for such objection, treat a violation of a **municipal ordinance**, or **by-law** or a **misdemeanor** offense as a civil infraction," **EXCEPT** for the following offenses:

G.L. c.90, § 24	OUI-Liquor or .08% Blood Alcohol OUI-Drugs Leaving the Scene of Personal Injury or Property Damage Racing a Motor Vehicle Negligent or Reckless Operation Use of a Motor Vehicle Without Authority False Statement in Application for License or Registration
G.L. c.90, § 24G	Motor Vehicle Homicide
G.L. c.90, § 24L	OUI with Serious Injury
G.L. c.90B, § 8	OUI Boat Negligent/Night Use of Water Skis/Surfboard Leaving the Scene of Motorboat Accident Leaving the Scene of Personal Injury or Property Damage by Boat Unsafe Operation of Boat Use Boat Without Authority
G.L. c.90B, § 8A	OUI Boat with Serious Injury
G.L. c.90B, § 8B	Homicide by Boat
*G.L. c. 119, § 34	Transportation of Children in Patrol Wagons
*G.L. c. 119, § 36	Import Child Without DCF Permit
*G.L. c. 119, § 39	Abandonment of Infant Under Age of 10
*G.L. c. 119, § 51A	Mandated Reporter Failure to Report Child Abuse / Frivolous Report of Child Abuse
*G.L. c. 119, § 51E	Unlawful Disclosure of Child Abuse Report
*G.L. c. 119, § 51F	Unlawful Disclosure of Child Abuse Registry Information
*G.L. c. 119, § 55	Failure to Appear Parent of Delinquent Child
*G.L. c. 119, § 63	Contributing to the Delinquency of a Minor
*G.L. c. 119, § 63A	Aid Child to Violate Juvenile Court Order
G.L. c. 119A	Child Support Enforcement
G.L. c. 209	(there are currently no criminal offenses in this chapter)
G.L. c.209A	Violation of Abuse Restraining Order
G.L. c.265	Crimes against the Person
**G.L. c. 266, § 25	Larceny from a Person
G.L. c. 268, § 1-3	Perjury Offenses
G.L. c. 268, § 6	False Statement to Specified State Agencies
G.L. c. 268, § 6A	False Report by Public Employee
G.L. c. 268, § 6B	False Return by Process Server
G.L. c. 268, § 8B	Compel Person to Decline Civil Service Appointment
G.L. c. 268, § 13	Bribing Juror, Master or Arbitrator
G.L. c. 268, § 13A	Picketing Court, Judge or Juror
G.L. c. 268, § 13B	Intimidating or Harassing Witness, Juror, Court Official, Prosecutor or Police
G.L. c. 268, § 13C	Disrupting Court Proceedings

[1] These offenses are also ineligible for adult diversion pursuant to G.L. c. 276A, except for: assault and battery in violation of G.L. c. 265, § 13A(a); picketing a court, judge or juror in violation of G.L. c. 268, § 13C; and disrupting a court proceeding in violation of G.L. c. 268, § 13C. G.L. c. 276A, § 4.

* The prohibition on decriminalizing c. 119 offenses applies to offenses committed prior to April 13, 2018 and after October 23, 2018. See St. 2018, c. 69, § 203 and St. 2018, c. 273, § 24.

** The prohibition on decriminalizing larceny from a person (G.L. c. 266, § 25) only applies to offenses committed after April 13, 2018. See St. 2018, c. 69, § 204.

Of course, even if eligible, it remains in the judge's discretion whether to decriminalize an offense.

G.L. c. 268, § 14	Juror, Master or Arbitrator Accept Bribe
G.L. c. 268, § 14B	Employer Discharge Witness
G.L. c. 268, § 15	Aiding Felon or Convict to Escape
G.L. c. 268, § 15A	Escape from Municipal Lockup
G.L. c. 268, § 16	Escape from Penal Institution or Court
G.L. c. 268, § 17	Aiding Escape from Officer
G.L. c. 268, § 18	Permit Prisoner to Escape
G.L. c. 268, § 19	Permit Escape from Penal Institution
G.L. c. 268, § 20	Negligently Permit Prisoner to Escape
G.L. c. 268, § 23	Fail or Delay Service of Warrant
G.L. c. 268, § 28, 31	Deliver Contraband to Prisoner
G.L. c. 268, § 36	Compound or Conceal Felony
G.L. c. 268A	State Ethics Act offenses
G.L. c. 269, § 10	Firearms & Dangerous Weapons violations
G.L. c. 269, § 10A	Sell, Use or Possess a Silencer
G.L. c. 269, § 10C	Use Tear Gas or Mace in Crime
G.L. c. 269, § 10D	Use Body Armor in Felony
G.L. c. 269, § 10E	Trafficking in Firearms
G.L. c. 269, § 11B	Possess Firearm with Defaced Serial No. during Felony
G.L. c. 269, § 11C	Deface Firearm Serial No. Receive Firearm with Defaced Serial No.
G.L. c. 269, § 11E	Manufacturer Firearm Serial No. Violation
G.L. c. 269, § 12	Make or Sell Certain Dangerous Weapons
G.L. c. 269, § 12A	Sell or Give a BB Gun or Air Rifle to Minor
G.L. c. 269, § 12B	Discharge BB Gun or Air Rifle on Way Minor Discharge BB Gun or Air Rifle
G.L. c. 269, § 12D	Carry Rifle or Shotgun on Way
G.L. c. 269, § 12E	Discharge Firearm within 500 ft. of Building
G.L. c. 272, § 1	Abduct Person under 16 for Marriage
G.L. c. 272, § 2	Abduct Person for Prostitution
G.L. c. 272, § 3	Drug for Sexual Intercourse
G.L. c. 272, § 4	Induce Chaste Minor to Sexual Intercourse
G.L. c. 272, § 4A	Induce Minor to Prostitution
G.L. c. 272, § 4B	Derive Support from Minor Prostitute
G.L. c. 272, § 6	Maintain House of Prostitution
G.L. c. 272, § 7	Derive Support from Prostitute
G.L. c. 272, § 8	Solicit for Prostitution
G.L. c. 272, § 12	Procure for Prostitution
G.L. c. 272, § 13	Detain or Drug Person in Brothel
G.L. c. 272, § 16	Open and Gross Lewdness
G.L. c. 272, § 28	Obscene Matter to Minor
G.L. c. 272, § 29A	Pose or Exhibit Child in Nude or Sexual Act
G.L. c. 272, § 29B	Distribute Material of Child in Nude or Sexual Act

Appendix B

Boston Municipal Court and District Court
Sentencing Best Practice Principles

Few, perhaps no, judicial responsibilities are more difficult and significant than sentencing. "The task is usually undertaken by trial judges who seek with diligence and professionalism to take account of the human existence of the offender and the just demands of a wronged society." *Commonwealth v. Rodriguez*, 461 Mass. 256, 259 (2012), citing *Graham v. Florida*, 560 U.S. 48, 77 (2010).

Each judge is called to fulfill his or her commission and oath to advance the fair administration of justice by considering the relevant facts and applicable law of each case. The principles outlined herein[1] are intended to assist judges in formulating dispositions that address the legally recognized purposes of sentencing and to build judicial knowledge of evidence-based sentencing practices. The essential judicial exercise of discretion in sentencing remains a matter of each judge's assessment of the various needs of public safety, retribution, deterrence, and rehabilitation. That assessment, however, now may be informed by a wide array of evidence-based sentencing alternatives available to the judge. The statements that follow below provide a set of general principles a judge may consider in the formulation of a criminal sentence. This is not an exhaustive list, but instead these principles are meant to assist the judge in the assessment of each case on an individual basis.[2] Nothing contained herein is intended to impinge upon judicial independence and discretion.

1. A judge should impose a criminal disposition consistent with the recognized purposes of criminal sentencing. Those purposes include deterrence, public safety, retribution, and rehabilitation.
2. In applying those principles to a sentencing decision, the judge should:
    a. Impose a sentence that is proportionate to the gravity of the offense or offenses, the harm done to the victims, and the culpability of the offenders;
    b. When reasonably feasible, impose a sentence that seeks to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders,

[1] The District Court and Boston Municipal Court Sentencing Best Practice Principles are based on the Superior Court Sentencing Best Practice Principles, with modifications specific to District and Boston Municipal sentencing considerations.

[2] It is recognized that all of the principles herein may not be applicable to specialty courts or HOPE/MORR sessions.

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 (1) above and;

c. Render a sentence that is no more severe than necessary to achieve the applicable purposes of section (a) and (b) above.

3. In formulating a criminal disposition a judge may consider the following factors and sources of information: the facts and circumstances of the crime of conviction, the defendant's prior criminal record, victim impact statements, the defendant's background, personal circumstances, the sentencing arguments and memoranda, if any, and any relevant and permissible information requested by the court, or provided by probation or the parties, prior to sentencing.
4. In circumstances deemed appropriate by the judge and consistent with applicable legal authority, the judge may state in open court, or in writing, the reasons for imposing a particular sentence.
5. Conditions of probation should be tailored to address the particular characteristics of the defendant and the crime, while providing for the protection of the public and any victim. Each condition must be reasonably related to legitimate probationary goals. Judges may consider whether imposing numerous conditions may increase rather than decrease the likelihood of recidivism.
6. The duration of probation should be tailored to address the particular characteristics of the defendant and the circumstances of the crime.
7. At the time of sentencing, a judge may incorporate a written provision, as part of the sentence, informing the defendant / probationer that, after a period of successful compliance, the court may consider, after a hearing, a request from the parties or probation for early termination of probation or vacating certain conditions of probation as an incentive. Nothing in this principle is intended to abrogate the legal authority governing the revision or revocation of a sentence pursuant to Mass. R. Crim. P. 29.
8. The judge should impose all statutorily mandated assessments, but may waive such assessments, consistent with statutory authority. Consistent with the prevailing law, a

judge may impose community service as an alternative to statutorily mandated assessments.

9. Disposition, following a finding of violation of probation, shall be imposed in accordance with the Dist./Mun. Cts. R. Prob. Viol. P. rules and consistent with the applicable aforementioned principles.