

# CHAPTER 39

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## *Dispositions and Sentencing Advocacy*

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## PART I: PROCEDURAL STEPS

### § 39.1 PROCEDURAL STEPS FROM VERDICT TO IMPOSITION OF SENTENCE

#### § 39.1A. TIME OF IMPOSITION OF SENTENCE

Following a guilty plea or guilty verdict in the superior or district court, the Commonwealth will move for sentencing. This is a procedural formality, and is done even if the Commonwealth intends to seek a delay in the sentencing hearing. By statute, the district attorney must move for sentencing not later than seven days after a verdict or guilty plea<sup>1</sup> In addition, Mass. R. Crim. P. 28(b) entitles a defendant to be sentenced “without unreasonable delay.” The actual date and time for sentencing is left to the discretion of the Court.<sup>2</sup> Massachusetts courts have typically assumed that the Sixth Amendment right to a speedy trial encompasses a similar right to speedy sentencing,<sup>3</sup> but in those cases where the defendant has objected to a delay, the Court has found no error.<sup>4</sup>

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<sup>1</sup> G.L. C. 279, § 3A. It is doubtful that the statute requires a prosecutor to move for sentencing within seven days of an appellate decision that orders resentencing. Commonwealth v. Bianco, 390 Mass. 254, 257–58 (1983); Commonwealth v. McInerney, 380 Mass. 59, 61–63 (1980).

<sup>2</sup> Commonwealth v. Burkett, 3 Mass. App. Ct. 744 (1975).

<sup>3</sup> See Pollard v. United States, 352 U.S. 354, 361-362 (1957); Commonwealth v. McInerney, 380 Mass. 59, 65-66 (1980); Commonwealth v. Parsons, 52 Mass.App.Ct. 1111 (2001).

<sup>4</sup> Juvenile v. Commonwealth, 392 Mass. 52, 57 (1984) (delay in sentencing until retrial on unresolved companion charge); Commonwealth v. Bianco, 390 Mass. 254, 257–58 (1983); Commonwealth v. McInerney, 380 Mass. 59, 63–69 (1980); Commonwealth v. Lammi, 310 Mass. 159 (1941); Commonwealth v. Simmons, 448 Mass. 687, 691 (2007) (removing

### **§ 39.1B. DECISION TO POSTPONE SENTENCING**

As part of trial preparation, defense counsel should have arguments to support any sentencing recommendation for the court's consideration. However, there may be situations where counsel needs further time to make the most effective sentencing argument, and in that situation, it may be in the defendant's best interest to postpone the sentencing hearing. A delay provides counsel with an opportunity to strengthen the dispositional argument, such as: securing the presence of additional family members and favorable witnesses for disposition; confirming availability of alternative sentences involving drug treatment or mental health counseling; or arranging for a community service placement.

If a sentencing delay is sought, one approach is to request that probation prepare a presentence report pursuant to Mass. R. Crim. P. 28(d)(2). Another basis for delay is a psychiatric or other clinical observation of the defendant pursuant to G.L. c. 123, § 15(e), which may be done at a court clinic or other outpatient facility. The statutory purpose of such examination is explicitly "to aid the court in sentencing."

### **§ 39.1C. BAIL PENDING SENTENCING**

After a verdict or guilty plea, it is within the court's discretion to maintain the same bail, increase it, or revoke it entirely.<sup>5</sup> The terms of the defendant's initial release on bail can apply until sentencing, but a verdict or guilty plea is viewed by many judges to be a changed circumstance justifying a different bail pursuant to the bail statutes.<sup>6</sup> Counsel can argue that the defendant's presence in court, despite anticipation of a guilty finding, mitigates against changing the established bail status. At the very least, counsel should request that bail only be increased as opposed to being revoked entirely, which is the position advocated by most prosecutors. Apart from providing a period of liberty, presentence release allows the defendant to appear more sympathetic when he returns to court knowing a prison sentence is probable.

### **§ 39.1D. PREPARATION OF A PRESENTENCE REPORT BY PROBATION**

Rarely will probation be asked to prepare a presentence report in the district court department. Such reports are more frequently relied upon in the superior court department. The reports are governed by MRCP R 28(d) and defense counsel plays an important role in the presentence report's preparation. A defense attorney has the right to attend presentence investigation interviews with her client.<sup>7</sup> The presence of counsel at the presentence interview ensures that positive information concerning family ties,

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indictment from file for sentencing several years after guilty plea did not violate right to speedy sentencing; by consenting to the filing, the defendant also consented to the delay in sentencing, and he was sentenced less than a month after indictment was removed).

<sup>5</sup> Mass. R. Crim. P. 28(b).

<sup>6</sup> G.L. c. 276, §§ 58, 65.

<sup>7</sup> Commonwealth v. Talbot, 444 Mass. 586 (2005) (case remanded for resentencing where presentence probation report was prepared without defense counsel's presence at defendant's interview, despite counsel's prior request, and where probation obtained confidential psychiatric and psychological records without counsel's knowledge)

employment prospects, mitigating aspects of prior offenses, and alternative sentence options will be included in the report.<sup>8</sup>

Counsel should always read the presentence report prior to sentencing, and if possible review it with the client for accuracy.<sup>9</sup> Under Mass. R. Crim. P. 28(d)(3), the presentence report is available for inspection by prosecution and defense counsel, although after a guilty plea, counsel must make a written motion to secure it.<sup>10</sup> The court may exempt from disclosure any parts of the report that are irrelevant, are based on confidential information, are potentially disruptive to the defendant's rehabilitation, or might lead to harm (of any nature) to any person.<sup>11</sup> This discretion to withhold information should be exercised sparingly, and in any event, the undisclosed portions of the report may not be relied on in determining the sentence.<sup>12</sup>

Although a presentence report is required under Rule 28, it has been held that a failure to order one did not violate due process where the defendant's counsel was given an opportunity to bring mitigating factors to the court's attention.<sup>13</sup>

### § 39.1E. SENTENCING GUIDELINES

In April, 1994, the Massachusetts Sentencing Commission was established to develop sentencing guidelines, uniform sentencing policies, and intermediate sanctions which could be imposed in lieu of incarceration. The Commission issued its report to the Legislature in April 1996 and incorporated its recommendations into its sentencing guidelines in February, 1998. The Sentencing Guidelines employ a grid-type model that considers the seriousness of the present offense and the criminal history of the defendant. The appropriate sentencing range is located on the grid, and the judge selects the maximum sentence that she wishes to impose, with the minimum sentence (i.e., parole eligibility) constituting two-thirds of the maximum sentence. The judge may depart from the Guidelines and impose a sentence above or below the indicated range, but must note in writing the reasons for the sentencing departure.<sup>14</sup>

In the superior court department, a probation officer usually prepares an analysis for the court of the appropriate Guidelines sentence. A computation should be done independently by counsel in every instance. It is not uncommon for a probation

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<sup>8</sup> *Id.* (probation officer who interviewed defendant and prepared presentence report was required to honor defense counsel's request to participate in the presentence investigation).

<sup>9</sup> A sentence must be vacated if the judge relied on inaccurate information. *Townsend v. Burke*, 334 U.S. 736, 741 (1948). *See also* *Commonwealth v. Ferrara*, 31 Mass. App. Ct. 648 (1991) (remanded because judge relied on inaccurate information).

<sup>10</sup> Mass. R. Crim. P. 12(e).

<sup>11</sup> Mass. R. Crim. P. 28(d)(3).

<sup>12</sup> *Commonwealth v. Martin*, 355 Mass. 296, 302–04 (1969); Mass. R. Crim. P. 28(d)(3). *See also* *Satterwhite v. Texas*, 486 U.S. 249 (1988) (placement of state's motions and ex parte court orders to have capital defendant examined as to future dangerousness did not provide notice and violated Sixth Amendment); *United States v. Curran*, 926 F.2d 59 (1st Cir. 1991) (sentencing judge may not rely on information in a victim's letter which was filed with probation office without notice to or awareness of defense counsel).

<sup>13</sup> *Commonwealth v. Rancourt*, 399 Mass. 269, 277–78 (1987); *Commonwealth v. Rosadilla-Gonzalez*, 20 Mass. App. Ct. 407, 414 (1985).

<sup>14</sup> *Commonwealth v. Cabral*, 70 Mass.App.Ct. 1110 (2007) (judge did not err in exceeding the Massachusetts sentencing guidelines by giving added weight to factors already accounted for).

officer to miscalculate the appropriate sentence under the guidelines, and this can significantly prejudice the defendant, especially if an error was made regarding the degree of injury to a victim. In some instances, the guidelines work to the defendant's favor, particularly if he has a limited prior record. A strong disposition argument can be premised on the fact that a seemingly lenient sentence falls squarely within the guidelines for what similarly situated defendants have received. Consideration of the guidelines is critical in a sentence appeal to the appellate division of the superior court.<sup>15</sup>

## § 39.1F. THE SENTENCING HEARING

By tradition, the burden falls on the prosecutor to proceed first in argument on an appropriate sentence. She is not bound by any recommendation made prior to the trial that was conditioned on a guilty plea; however, she may not increase the recommendation as a means of punishing the defendant for going to trial.<sup>16</sup> Consideration at sentencing includes the rights of the victim-witness as well as the rights of the defendant.

### 1. Victim-Witness Rights

Massachusetts legislation provides for victim-witness participation at sentencing. Specifically, c. 258B, § 3 gives victim-witnesses the following rights: the right to confer with the probation officer prior to the filing of the full presentence report;<sup>17</sup> the right to request restitution;<sup>18</sup> and the right to be heard through an oral and written victim impact statement at sentencing or the disposition of the case.<sup>19</sup> Additionally, a felony victim, or any victim where the crime resulted in physical injury, has the right to address the judge orally at sentencing in order to explicate the impact of the crime on the victim and his family.<sup>20</sup> The victim also may offer a sentence recommendation. The district attorney's office must also prepare a "victim impact statement" that includes documentation of the victim's financial loss and an assessment of the crime's psychological effect on the victim and his family. Counsel should anticipate a written statement in every serious case because it usually provides compelling evidence in support of the prosecutor's recommendation. If the court decides to rely on such statements in imposing sentence, the defendant must have an opportunity to rebut them.<sup>21</sup>

### 2. Defendant's Rights

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<sup>15</sup> See *infra* § 45.7.

<sup>16</sup> See *infra* § 39.1G (impermissible factors) and *supra* § 24.2C (selective and vindictive response to asserting trial rights).

<sup>17</sup> G.L. c. 258 B, § 3 (n).

<sup>18</sup> G.L. c. 258B, § 3 (o).

<sup>19</sup> G.L. c. 258B, § 3 (p).

<sup>20</sup> G.L. c. 279, § 4B.

<sup>21</sup> G.L. c. 279, § 4B. *Cf.* Commonwealth v. Martin, 355 Mass. 296, 302–04 (1969).

Before imposition of sentence, the defendant or his counsel must be afforded the right to address the court and present any information in mitigation of the crime.<sup>22</sup> Although the U.S. Supreme Court has noted that “the most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself,” there is no constitutional right of the defendant to allocution.<sup>23</sup> The common law principal of allocution has been interpreted as “the right to present mitigating factors prior to sentencing,” and this is accomplished by permitting the defendant *or* his counsel to speak.<sup>24</sup>

The defendant's right to effective assistance of counsel applies to the sentencing hearing.<sup>25</sup> The Committee for Public Counsel Services has promulgated guidelines for sentencing advocacy that outline defense counsel's duties and obligations at this critical stage of a criminal hearing.<sup>26</sup> The failure of counsel to adhere to these guidelines and failure to bring mitigating factors to the judge's attention has led the court to order the resentencing of a defendant.<sup>27</sup> Moreover, the defendant has the right to have his current

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<sup>22</sup> Mass R. Crim. P. 28(b). If the prosecutor intends to offer prior unconvicted misconduct against the defendant, it must be provided to the defendant sufficiently in advance of sentencing to permit reasonable investigation by counsel. *Commonwealth v. Goodwin*, 414 Mass. 88, 90 n.1 (1993). See *Commonwealth v. Stuckich*, 450 Mass. 449 (2008) (court cannot punish defendant for uncharged conduct, only for conduct of which the defendant had been charged and convicted)

<sup>23</sup> *Green v. United States*, 365 U.S. 301, 304 (1961); *Hill v. United States*, 368 U.S. 424 (1962).

<sup>24</sup> *Commonwealth v. Rancourt*, 399 Mass. 269, 277–78 (1987); *Commonwealth v. Jones*, 14 Mass. App. Ct. 991 (1982) (“a right of allocution at the time of sentencing is not extended to a defendant by Mass. R. Crim. P. 28(b)”). An exercise of discretion in refusing to permit the defendant himself to address the court (as opposed to counsel only) was held not to constitute error in *Commonwealth v. Rosadilla-Gonzalez*, 20 Mass. App. Ct. 407, 415–16 (1985).

<sup>25</sup> *Strickland v. Washington*, 466 U.S. 668, 686 (1984). See also *United States v. Mateo*, 950 F.2d 44, 48–49 (1st Cir. 1991) (sentencing without counsel, after express request, violated Sixth Amendment).

<sup>26</sup> CPCS Guidelines, Standard VII. Sentencing, Sections 7.1-7.6. Section 7.1 sets out specific information that defense counsel needs: CPCS Guidelines, Standard VII. Sentencing, Section 7.1 states that: “Defense counsel should be familiar with and consider: a. the statutory penalties for each possible conviction, including each lesser-included offense and any repeat offender penalties; b. the official version of the client's prior record, if any; c. the position of the probation department with respect to the client; d. the sentencing recommendation and memorandum, if any, of the prosecutor's; e. seeking the assistance of an expert—either through community resources, G.L. c. 261, §§ 27A-G, or the Committee for Public Counsel Services; f. the collateral consequences attaching to any possible sentence, e.g. parole or probation revocation, immigration consequences, later exposure as a repeat offender, possibility of sexually dangerous person proceedings, loss of license, Sex Offender Registration, DNA Seizure, lifetime community parole, or civil forfeiture of property; g. the sentencing practices of the judge, to the extent they may be determined; h. the sentencing guidelines, as they would apply to the case; i. referrals to court clinics or other community agencies, and the possibility of commitment to a mental hospital as an aid to sentencing under G.L. c. 123, § 15(e); j. any victim impact statement to be presented to the court; k. any other report to be presented to the court in aid of sentencing; l. seeking an evidentiary hearing, e.g. restitution amount; m. requesting a continuance for sentencing at a later date; n. any other information that may be helpful to the client.”

<sup>27</sup> *Osborne v. Commonwealth*, 378 Mass. 104 (1979); *Commonwealth v. Quillen*, 33 Mass. App. Ct. 909 (1992) (counsel not ineffective in recommending two consecutive life

court-appointed lawyer argue on his behalf at sentencing, rather than be represented by another attorney from that office.<sup>27.5</sup>

### § 39.1G. FACTORS THAT MAY AND MAY NOT BE CONSIDERED AT SENTENCING

Factors that may be considered at sentencing

A judge is given extremely wide latitude in the factors that she may consider before imposing sentence on the defendant.<sup>28</sup> These include, *inter alia*,

1. The nature and seriousness of the present criminal offenses;<sup>29</sup>
2. Any prior criminal record<sup>30</sup> or juvenile record;<sup>31</sup>

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sentences and a third consecutive sentence of 15–20 years where prosecutor recommended three consecutive life sentences). See also *Commonwealth v. Montanez*, 410 Mass. 290, 298–99 (1991) (failure to present mitigating factors at sentencing constitutes ineffective assistance); *Commonwealth v. Lykus*, 406 Mass. 135, 146 (1989) (failure to bring out mitigating factors, to present witnesses, or to request concurrent sentences); *Commonwealth v. Cameron*, 31 Mass. App. Ct. 928, 930 (1991) (counsel only stated “we place ourselves at the mercy of the court”); *Commonwealth v. Moreau*, 30 Mass. App. Ct. 677 (1991) (defense counsel's failure to inform defendant that he was joining prosecutor's heavy recommendation was ineffective assistance). *Contrast* *Commonwealth v. Mamay*, 407 Mass. 412, 425 (1990) (failure to repeat mitigating factors set forth in motion was not ineffective where sentencing immediately followed denial of motion). *But see* *Commonwealth v. Stewart*, 414 Mass. 1006 (1993) (defendant waived issue of counsel's ineffectiveness where he failed to raise issue for 13 years, during which other issues pressed). *Commonwealth v. Leavey*, 60 Mass.App.Ct. 249, 254 (2004) (if there is no mitigation to be offered, counsel cannot be faulted for having failed to offer it); *Commonwealth v. Fenton F.*, 442 Mass. 31, 34-35 (2004) (defense counsel did not provide ineffective assistance by advising defendant that “as a practical matter,” he was “stuck” with sentence to which he had agreed, even if sentencing judge had misunderstood his discretion to impose less than maximum sentence); *Commonwealth v. Braithwaite-Wornum*, 61 Mass.App.Ct. 1105 (2004); *Commonwealth v. Keon K.*, 70 Mass.App.Ct. 568, 573-574 (2007) (a claim of ineffective assistance of counsel should only be brought on direct appeal when the factual basis of the claim appears indisputably on the trial record); *Commonwealth v. Santiago*, 73 Mass.App.Ct. 1121 (2009) (defense counsel made reasonable strategic decision in recommending longer sentence so as not to lose credibility and diminish his effectiveness at sentencing).

<sup>27.5</sup> *Commonwealth v. Brennick*, 14 Mass. App. Ct. 952 (1982).

<sup>28</sup> *United States v. Tucker*, 404 U.S. 443, 446 (1972). *See also* *Commonwealth v. Ferguson*, 30 Mass. App. Ct. 580, 586 (1991) (judge may take into account hearsay information, and may consider any factors that draw light on defendant's life, health, habits, conduct, and mental and moral propensities; judge's inquiry is largely unlimited as to the kind of information or source of information); Mass. R. Crim. P. 28(d)(2) (presentence investigation shall include “such additional information as may be helpful”).

<sup>29</sup> *But see* *Commonwealth v. Burr*, 33 Mass. App. Ct. 637, 639–43 (1992) (judge could not reduce verdict pursuant to Mass. R. Crim. P. 25(b)(2) to avoid mandatory sentence for trafficking, nor could trial judge consider factors under G.L. c. 278, § 33E).

<sup>30</sup> *Commonwealth v. Sanchez*, 405 Mass. 369, 381 (1989) (judge may consider the defendant's prior offenses in deciding what sentence to impose). ); *Commonwealth v. Barros*, 460 Mass. 1015, 1016-1017 (2011); *Commonwealth v. Medina*, 64 Mass.App.Ct. 708, 722 (2005) (a sentencing judge may consider various factors, including the defendant's record of prior convictions) Convictions obtained unconstitutionally, such as in violation of the right to counsel, may not be considered. *Commonwealth v. Guerro*, 14 Mass. App. Ct. 743, 746 (1982); *United States v. Tucker*, 404 U.S. 443, 449 (1972).

3. The defendant's conduct surrounding commission of the crime, including any use of alcohol, flight from the scene, and violent struggle with police;<sup>32</sup>
4. Subsequent good or bad behavior;<sup>33</sup>
5. Defendant's refusal to refrain from unlawful activities;<sup>34</sup> and
6. Parole consequences of sentence.<sup>35</sup>
7. Defendant's character and his amenability to rehabilitation.<sup>36</sup>
8. Restitution to the victim.<sup>37</sup>
9. Defendant's prior misconduct.<sup>38</sup>
10. The Sentencing Guide published by the Mass. Sentencing Commission.<sup>39</sup>

The judge may gauge the gravity of the offense by accepting the version given by the victim during a trial, and she also may note the physical and psychological difficulties that the victim has suffered as a result of the crime.<sup>40</sup> Another permissible factor is whether the defendant will cooperate with the police in ongoing investigations,

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<sup>31</sup> G.L. c. 119, § 60; *Commonwealth v. Rodriguez*, 376 Mass. 632, 640–41 (1978).

<sup>32</sup> *Commonwealth v. Morse*, 402 Mass. 735, 739–40 (1988). *See also* *Commonwealth v. Derouin*, 31 Mass. App. Ct. 968 (1992).

<sup>33</sup> *Commonwealth v. White*, 436 Mass. 340 (2002)(in a resentencing, the judge may consider the defendant's good conduct while he was incarcerated for three years following his original sentencing); *Osborne v. Commonwealth*, 378 Mass. 104, 115 (1979). Similarly, information unfavorable to a defendant, including conduct subsequent to his original sentencing, may be considered at a resentencing. *Commonwealth v. Hyatt*, 419 Mass. 815, 823 (1969); *North Carolina v. Pearce*, 395 U.S. 711, 723-726 (1969).

<sup>34</sup> *Commonwealth v. Cotter*, 415 Mass. 183, 185–88 (1993) (defendant's refusal to agree to condition of probation that he refrain from unlawful protests at abortion clinics justified incarceration in lieu of probation).

<sup>35</sup> *Commonwealth v. Amirault*, 415 Mass. 112, 113–15 (1993) (although judge properly may consider parole eligibility in fashioning an appropriate sentence, she may not allow a motion to revoke and revise the sentence if parole is not granted at first opportunity).

<sup>36</sup> *Commonwealth v. Goodwin*, 414 Mass. 88, 93 (1993) (uncharged conduct may be considered as bearing on the defendant's character); *Commonwealth v. Medina*, 64 Mass.App.Ct. 708, 722 (2005) (trial judge, in sentencing defendant, is permitted to consider extrinsic facts, such as defendant's background, character, or behavior, as well as defendant's prior offenses and the danger defendant may pose to society).

<sup>37</sup> *Commonwealth v. Rotonda*, 434 Mass. 211, 221 (2001).

<sup>38</sup> While a sentencing judge may not undertake to punish the defendant for any conduct other than that for which the defendant stands convicted, reliable evidence of defendant's prior misconduct is subject to consideration for sentencing purposes. *Commonwealth v. Junta*, 62 Mass.App.Ct. 120,(2004) (unadjudicated domestic abuse complaint submitted by defendant's wife with her petition for protection from domestic abuse was subject to consideration by trial court in determining appropriate sentence for defendant's conviction because it was relevant to show defendant's history of violence); *Commonwealth v. Santiago*, 73 Mass.App.Ct. 1121 (2009) (judge properly considered defendant's prior acts of stalking defendant as a factor in sentencing).

<sup>39</sup> The Sentencing Guidelines do not constitute mandatory sentencing, but they frequently are used by judges for guidance on an appropriate sentencing range for similar cases and defendants. *See, e.g., Commonwealth v. Vega*, 54 Mass. App. Ct. 249, 250 (2002).

<sup>40</sup> *Commonwealth v. Banker*, 21 Mass. App. Ct. 976, 977–79 (1986). *See also* immediately preceding section on victim's rights at sentencing.

unless the defendant's silence is based on an assertion of the privilege against self-incrimination.<sup>41</sup> Hearsay may be considered.<sup>42</sup>

Factors that may *not* be considered at sentencing:

1. *Charges that have resulted in an acquittal:* A statute mandates that the probation record presented to the judge “shall not contain . . . any information of prior criminal prosecutions . . . wherein the defendant was found not guilty.”<sup>43</sup> Moreover, if the judge takes into account a conviction that is later declared invalid, the defendant must be resentenced.<sup>44</sup> Uncounseled convictions also may not be considered.<sup>45</sup> Finally, foreign convictions of dubious offenses, such as political crimes, should not be accorded any weight.<sup>46</sup>

2. *Defendant's assertion of various procedural rights:*<sup>47</sup> It is improper for the court to take into account the defendant's exercise of his right to a trial,<sup>48</sup> right to remain silent,<sup>49</sup> refusal to admit guilt at sentencing after conviction at trial,<sup>39.5</sup> or to

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<sup>41</sup> Commonwealth v. Damiano, 14 Mass. App. Ct. 615, 624–65 (1982).

<sup>42</sup> Commonwealth v. Celeste, 358 Mass. 307, 307–10 (1970).

<sup>43</sup> G.L. c. 279, § 4A. *See also* Commonwealth v. Goodwin, 414 Mass. 88 (1993). After a trial, the judge may not give any weight to charges for which the defendant was acquitted. Commonwealth v. McCravy, 430 Mass. 758, 766–768 (2000) (where defendant convicted of negligent operation and acquitted of motor vehicle homicide, but judge appeared to focus on the death caused by the accident, matter would be remanded for resentencing before a different judge). *Cf.* Commonwealth v. O'Connor, 407 Mass. 663, 673–674 (1990) (judge's comment on jury's acquittal of defendant on major charges didn't invalidate maximum sentence on misdemeanor conviction). *But see* Commonwealth v. Vega, 54 Mass. App. Ct. 249, 250-251 (2002)(judge could take into account that a death resulted from an armed robbery, even though the defendant was acquitted as an accessory before the fact to murder); Commonwealth v. Alves, 50 Mass. App. Ct. 796, 810-811 (2001)(judge's exceeding of sentencing guidelines was not based upon disagreement with verdict). *Compare* United States v. Watts, 519 U.S. 148 (1997) (federal sentencing court may consider acquitted conduct, proved by preponderance of evidence, to enhance sentence); Commonwealth v. Keon K., 70 Mass.App.Ct. 568, 572 (2007) (judge was permitted to inquire into, and rely on, a prior nolle prossed sexual assault as part of his sentencing decision).

<sup>44</sup> Commonwealth v. Lovell, 20 Mass. App. Ct. 952 (1985); Burgett v. Texas, 389 U.S. 109, 115 (1967).

<sup>45</sup> Commonwealth v. Guerro, 14 Mass. App. Ct. 743, 746 (1982); United States v. Tucker, 404 U.S. 443, 449 (1972).

<sup>46</sup> Commonwealth v. Rosadilla-Gonzalez, 20 Mass. App. Ct. 407, 415 n.5 (1985).

<sup>47</sup> See also *supra* § 24.2.

<sup>48</sup> Commonwealth v. Tart, 408 Mass. 249, 266–67 (1990) (sentence of incarceration for selling fish without permit not shown to be retaliation for asserting right to jury trial); Commonwealth v. Carney, 31 Mass. App. Ct. 250, 255–56 (1991) (sentence not retaliatory despite judge's comment after first witness that defendant seriously consider a guilty plea); Commonwealth v. Knight, 392 Mass. 192, 196 (1984); Commonwealth v. Joseph, 11 Mass. App. Ct. 879, 880–82 (1981). There is no presumption that a judge punished a defendant for going to trial, even if she told him that a more severe sentence would result than on a guilty plea. Commonwealth v. Ravenell, 415 Mass. 191 (1993). However, the defendant's right to a jury trial was impaired when the judge said she would sentence him more leniently if he were convicted after a jury-waived trial. Commonwealth v. Lebon, 37 Mass. App. Ct. 705 (1994).

<sup>49</sup> Commonwealth v. Mills, 436 Mass. 387 (2011).

<sup>49.5</sup> Commonwealth v. Mills, 436 Mass. 387, 400 (2011), S.C., 51 Mass. App. Ct. 366 (2001).

pursue an appeal.<sup>50</sup> In a similar vein, the court may not consider the emotional impact on the victim of coming to court to testify.<sup>51</sup>

When the defendant has been retried after a successful appeal and there is no post-conviction misconduct, a harsher sentence may be presumed vindictive absent certain circumstances or written reasons that justify it.<sup>52</sup>

A court may not demand that a defendant be required to execute a civil release of the police as a condition of receiving lenient treatment.<sup>53</sup>

3. *Punishment for pending criminal cases*: The law is clear that the defendant may not be *punished* for untried offenses<sup>54</sup> or for charges that could have been brought but were not.<sup>55</sup> This remains true even if the judge has a strong basis for concluding that the defendant is guilty of the pending matters.<sup>56</sup> If it appears based on the judge's comments at sentencing that the defendant has been punished for untried cases, an appellate court can remand the case for resentencing before a different judge.<sup>57</sup> A frequent instance occurs when the judge is convinced that the defendant committed perjury while testifying, but this may not be considered in imposing sentence.<sup>58</sup>

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<sup>50</sup> *North Carolina v. Pearce*, 395 U.S. 711 (1969).

<sup>51</sup> *Commonwealth v. Banker*, 21 Mass. App. Ct. 976, 977–79 (1986). The fact that a rape victim had to testify at a retrial is not a valid sentencing factor. *Commonwealth v. Hyatt*, 419 Mass. 815, 819–24 (1995); If evidence of uncharged conduct is relevant and sufficiently reliable, such information may be considered at sentencing so long as it is used for the proper purposes and not to punish the defendant. *Commonwealth v. Henriquez* 56 Mass. App. Ct. 775 (2002) (judge can't consider factor that D did not plead guilty until trial date, thus compelling child victim to participate in trial preparation)

<sup>52</sup> The S.J.C. has held as a matter of state law that after a successful appeal and retrial that results in a conviction, the second sentencing judge may impose a harsher sentence only if her reasons appear on the record and are based on information that was not before the first sentencing judge. *Commonwealth v. Hyatt*, 419 Mass. 815, 819–24 (1995). *See also* *Commonwealth v. Repoza*, 28 Mass. App. Ct. 321, 329–31 (1990) (after reversal and conviction of lesser charge, it was improper for judge to impose harsher than normal sentence based on defendant's lengthy incarceration prior to the retrial).

<sup>53</sup> *Foley v. Lowell Div. of the Dist. Court Dep't*, 398 Mass. 800, 804–05 (1986).

<sup>54</sup> *Commonwealth v. LeBlanc*, 370 Mass. 217, 222 (1976).

<sup>55</sup> *Commonwealth v. Morse*, 402 Mass. 735, 740 (1988); ); *Commonwealth v. Howze*, 58 Mass.App.Ct. 147, 154 (2003) (“[A] defendant should not be penalized on the basis of considerations not properly part of the record before the judge or not relevant to the crimes charged”).

<sup>56</sup> *Commonwealth v. Sitko*, 372 Mass. 305, 311–14 (1977). *See also* *Commonwealth v. Molino*, 411 Mass. 149, 155–56 (1991) (judge's exceeding of prosecutor's recommendation did not appear to be based upon contempt citations of defendant during trial).

<sup>57</sup> *Commonwealth v. Lewis*, 41 Mass. App. Ct. 910 (1996).

<sup>58</sup> *Commonwealth v. McFadden*, 49 Mass. App. Ct. 441, 443 (2000) (“A trial judge may not consider a defendant’s alleged perjury on the witness stand in determining the punishment to impose for a criminal conviction.”). *See also*, *Commonwealth v. Coleman*, 390 Mass. 797, 812 (1984); *Commonwealth v. Souza*, 390 Mass. 813, 816–818 (1984) (court at sentencing termed the defendant’s denial of guilt during trial a “bold lie”; case remanded for resentencing); *Commonwealth v. Juzba*, 46 Mass. App. Ct. 319, 324–325 (1999). *But see* *Commonwealth v. Baldwin*, 52 Mass. App. Ct. 404, 408-411 (2001). When the prosecutor indicates that one factor on which she was basing her recommendation was that the defendant committed perjury when he testified, and the judge adopts the prosecutor’s recommendation on sentencing, the case will be remanded for resentencing, even if the judge did not expressly state

However, these prohibitions lose some force because the judge is permitted to learn of subsequent misconduct and all pending charges and their underlying facts for the limited purpose of assessing the defendant's "character and propensity for rehabilitation."<sup>59</sup> Similar rationales have been used to uphold a trial court's substitution of an executed sentence for a suspended portion of a sentence where the defendant refused to promise that he would comply with an injunction against unlawful "Operation Rescue" activities;<sup>60</sup> and to justify consideration of charges that have been dismissed, as for example after a continuance without a finding.<sup>61</sup>

If the prosecutor intends to offer evidence of prior unconvicted misconduct at the sentencing hearing, she must notify the defendant sufficiently in advance of the hearing to permit reasonable investigation by defense counsel.<sup>62</sup> The judge may consider reliable allegations that the defendant committed other crimes that did not lead to prosecution or conviction, but the defendant must have an opportunity to rebut this evidence.<sup>63</sup>

Counsel should take an aggressive tack when pending charges are cited by the prosecutor during sentencing, possibly including reference to the presumption of innocence, exculpatory facts, or the fundamental unfairness of having to address evidence not fully familiar to counsel. A useful approach may be to file a motion to revise and revoke following the sentencing hearing so that if the pending matters are favorably resolved, counsel can argue that the adverse inferences concerning the defendant's character have been rebutted and the defendant is entitled to be resentenced.

4. *Inaccurate information*: A sentence based on misleading or inaccurate information must be vacated.<sup>64</sup> Indeed, the Appeals Court has held that "due process is offended by suppression of evidence material to punishment as well as by suppression of information relating to guilt."<sup>65</sup>

5. *General deterrence*: A judge may not base a sentence in part on the general deterrence of other criminals, for example, child molesters. This constitutes punishing the defendant for the conduct of others, or for conduct other than that for which the defendant was convicted.<sup>66</sup> The Sentencing Guide of the Massachusetts Sentencing

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that one of the factors he considered was his belief that the defendant had committed perjury. *Commonwealth v. Monzon*, 51 Mass. App. Ct. 245, 255-256 (2001).

<sup>59</sup> *Commonwealth v. Coleman*, 390 Mass. 797, 805 (1984). *See also* *Osborne v. Commonwealth*, 378 Mass. 104, 115 (1979) (judge may consider subsequent good or bad behavior of the defendant).

<sup>60</sup> *Commonwealth v. Cotter*, 415 Mass. 183 (1993).

<sup>61</sup> *Commonwealth v. Coull*, 20 Mass. App. Ct. 955, 958 (1985).

<sup>62</sup> *Commonwealth v. Goodwin*, 414 Mass. 88, 90 n.1 (1993).

<sup>63</sup> *Commonwealth v. Goodwin*, 414 Mass. 88 (1993).

<sup>64</sup> *Townsend v. Burke*, 334 U.S. 736 (1948); *Commonwealth v. LeBlanc*, 370 Mass. 217 (1976). *See also* *Commonwealth v. Ferrara*, 31 Mass. App. Ct. 648 (1991). *Commonwealth v. Wallace*, 76 Mass. App. Ct. 411 (2010) (although a judge may rely on uncharged conduct as indication of defendant's character or amenability to rehabilitation, judge may not consider such conduct without explaining his reliance on it at sentencing)

<sup>65</sup> *Commonwealth v. Capparelli*, 29 Mass. App. Ct. 926, 929 (1990) (failure to disclose information that supported defendant's contention that he was no longer associated with organized crime required resentencing).

<sup>66</sup> *Commonwealth v. Howard*, 42 Mass. App. Ct. 322, 326-28 (1997) (judge imposed sentence above superior court sentencing guidelines; court notes that even if "target deterrence"

Commission also does not permit a judge to consider general deterrence as an aggravating factor to increase a sentence.<sup>67</sup>

6. *Sentence entrapment*: The Supreme Judicial Court has declined to recognize the defense of “sentence entrapment” in cases where an undercover police officer induces the defendant to sell a greater amount of drugs than he had planned, thereby enhancing the penalty.<sup>68</sup>

7. *Personal feelings*: A judge must not let his personal feelings and private beliefs interfere with his sentencing decision. This includes making reference to his own religious experiences, and his view that the sentencing could have an impact on public perceptions of corruption by Commonwealth employees (when the defendant himself was not a state worker).<sup>69</sup> In addition, a judge’s personal views regarding the wisdom or propriety of a given law are irrelevant.<sup>70</sup> When the record reflects that the judge made reference to these improper factors during sentencing, a remand for resentencing before a different judge may be made.<sup>71</sup>

8. *Immigration consequences*: A judge may not take into consideration the immigration consequences of his decision, even if they would adversely affect the defendant.<sup>72</sup>

9. *Lack of remorse*: A judge must not base his or her decision on the defendant showing a lack of remorse, or interpret defendant’s silence as a lack of remorse, although expressing remorse may act as a mitigating factor in sentencing.<sup>73</sup>

10. *Uncharged conduct*: It is established in the Commonwealth that a judge cannot use uncharged conduct in determining sentencing; a judge may not alter a sentence because he or she thinks the defendant is guilty of uncharged misconduct.<sup>74</sup> A judge may never punish a defendant for conduct other than that which gave rise to the conviction.<sup>75</sup>

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were constitutionally defensible, there was no support on record for judge's view that child molesters were unusually prevalent in town where offense was committed).

<sup>67</sup> Commonwealth v. Howard, 42 Mass. App. Ct. 322, 327, n.2 (1997).

<sup>68</sup> Commonwealth v. Garcia, 421 Mass. 686 (1996), Commonwealth v. Saletino, 449 Mass. 657 (2007).

<sup>69</sup> Commonwealth v. Mills, 436 Mass. 387, 399-403 (2002), S.C., 51 Mass. App. Ct. 366 (2001); Commonwealth v. White, 48 Mass. App. Ct. 658, 665 (2000)(judge’s belief that sentences imposed in prior cases were inadequate).

<sup>70</sup> Commonwealth v. Quispe, 433 Mass. 508, 513 (2001).

<sup>71</sup> Commonwealth v. Mills, 436 Mass. 387, 401-402 (2002), S.C., 51 Mass. App. Ct. 366 (2001); Commonwealth v. Coleman, 390 Mass. 797, 810-811 & n. 15 (1984).

<sup>72</sup> Commonwealth v. Quispe, 433 Mass. 508, 512-513 (2001)(possible deportation is not part of the sentence of the court, but of another agency over which the judge has no control and for which he has no responsibility). *But see* G. L. c. 278, sec. 29D (defendant must be warned of immigration consequences of conviction); Commonwealth v. Villalobos, 437 Mass. 797, 805-806 (2002), S.C., 52 Mass. App. Ct. 903 (2001)(judge should inform the defendant of the possible immigration consequences of an admission to sufficient facts that leads to a continuance without a finding); Commonwealth v. Berthold, 441 Mass. 183 (2004) (judge must give *complete* immigration warnings during plea colloquy).

<sup>73</sup> Commonwealth v. Jones, 71 Mass.App.Ct. 568, 572–573 (2008); Commonwealth v. Pina, 74 Mass.App.Ct. 1117 (2009).

<sup>74</sup> Commonwealth v. Goodwin, 414 Mass. 88, 93, (1993).

<sup>75</sup> Commonwealth v. Shahin, 63 Mass.App.Ct. 1123 (2005).

## § 39.2 STAY OF EXECUTION OF SENTENCE

### § 39.2A. DISPOSITIONS SUBJECT TO A STAY OF EXECUTION

Mass.R. Crim.Pro. Rule 31 governs the process for a stay of execution and outlines the types of sentences that may be stayed. If the defendant is sentenced to a term of imprisonment, she may seek a stay of execution of that sentence, but it remains within the judge's discretion as to whether or not the stay will be granted.<sup>76</sup> The sentencing judge need not give her reasons for denying a stay.<sup>77</sup> If a stay is granted, bail may be required, or the defendant may be placed on temporary probation.<sup>78</sup>

A sentence of probation and/or suspended sentence may also be stayed<sup>79</sup>, although such stays are not often in the best interests of a defendant because she can minimize the probationary time remaining if the appeal is denied by permitting the clock to run pending appeal. It is possible to stay the "automatic" license revocation mandated by G.L. c. 90, § 24(1)(B), pending appeal of a conviction for operating under the influence of alcohol.<sup>80</sup>

If the penalty imposed is a fine, it must be stayed provided the defendant works diligently to perfect the appeal.<sup>81</sup> If the sentence requires imprisonment, a stay is discretionary.<sup>82</sup>

### § 39.2B. CRITERIA FOR A STAY OF IMPRISONMENT

The filing of an appeal does not automatically stay the execution of a sentence; rather, a motion for the stay must first be presented to the trial judge.<sup>83</sup> The motion should focus on two considerations: (1) security issues concerning the defendant, such as the possibility of flight during or after the appeal; and (2) the likelihood of success on the merits of the appeal.<sup>84</sup>

It has been stated that in reviewing the evidence concerning *security*, the trial judge should be guided by the factors enumerated in the bail statute, G.L. c. 276, § 58<sup>85</sup> In addition, the court should consider the potential danger to another person or to the

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<sup>76</sup> Mass. R. Crim. P. 31 (stay); G.L. c. 279, § 4 (sentence to be imposed despite appeal; automatic stay in capital cases). *See also* Standards of Judicial Procedure: Sentencing and Other Dispositions, Standard 7.11 (District Court Administrative Office, 1984) (inherent power to stay).4.

<sup>77</sup> Commonwealth v. Allen, 378 Mass. 489, 493 (1979).

<sup>78</sup> This is authorized by G.L. c. 276, § 87, and Mass. R. Crim. P. 31(a).

<sup>79</sup> Mass. R. Crim. P. 31(d).

<sup>80</sup> 540 C.M.R.4.00 §3 8(e); Commonwealth v. Yameen, 401 Mass. 331 (1987)

<sup>81</sup> Mass. R. Crim. P. 31(c).

<sup>82</sup> Mass. R. Crim. P. 31(a).

<sup>83</sup> Mass. R. App. P. 6(a); Mass. R. Crim. P. 31(a); Commonwealth v. Allen, 378 Mass. 489, 497 (1979).

<sup>84</sup> Commonwealth v. Hodge (No. 1), 380 Mass. 851, 855 (1980).

<sup>85</sup> Commonwealth v. Allen, 378 Mass. 489, 498 (1979). These factors include the nature and circumstances of the offenses for which the defendant was just convicted; the length of incarceration imposed; the defendant's family ties, financial resources, employment record, history of mental illness, reputation, and length of residence in the community; prior record of convictions; any past illegal drug distribution or present drug dependency; any flight to avoid

community and the possibility of further acts of criminality by the defendant during the pendency of the appeal.<sup>86</sup>

In essence the presentation by counsel concerning the security aspects of a stay decision replicates concerns that arise during a typical bail hearing. Defense counsel also may emphasize certain other factors unique to a stay decision, such as the defendant's responsible conduct while released on bail prior to and during the trial. A particularly powerful argument can be built around the defendant's return to court after postponement of his sentencing despite the knowledge that a period of incarceration was likely to be imposed. As with any bail argument, it may help to suggest strict conditions that would apply during his release<sup>87</sup> and have as much family or employer support present and noticed in the courtroom itself.

The second consideration in a motion for a stay of execution relates to the *merits of the appeal*. A judge should require that the appeal include “an issue which is worthy of presentation to an appellate court, one which offers some reasonable possibility of a successful decision in the appeal.”<sup>88</sup> This has been defined as an issue that is not “frivolous,” and there is no requirement that there be a “substantial certainty of success.”<sup>89</sup> When drafting a motion or memorandum on alleged errors related to trial or pretrial issues, counsel should be alert to include as many as possible. It is impossible to predict which particular alleged error might trouble the trial judge, and it permits an argument that the combination of several errors, none individually fatal, would justify reversal on appeal.

## § 39.2C. APPEALING THE DENIAL OF A STAY

### 1. Appeal to Single Justice of the Appeals Court

Mass. R. A. P. 6(b) governs the appellate review for a denied stay of execution of sentence. According to the rule, a defendant begins with a motion to the trial court, pursuant to M.R.C.P. 31. Once denied, the defendant may motion a single justice of the appellate court for relief. A motion entered in the Appeals Court for a stay pending appeal should be accompanied by an affidavit that includes an overview of the case and background facts concerning the defendant, as well as a memorandum addressing the issues that will be presented by the appeal. The motion should include those portions of the trial record that are relevant to the appeal.<sup>90</sup> The Commonwealth also has the

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prosecution; fraudulent use of an alias or false identification; any failure to appear at any court proceeding to answer to an offense; whether the defendant is currently on bail on another charge; whether the defendant is on probation, parole, or other release pending completion of another sentence, and whether he is on release pending sentencing or appeal from any other conviction. *See supra* § 9.5 (pretrial release); Commonwealth v. Cohen, 74 Mass.App.Ct. 1103 (2009) (defendant is entitled to seek clarification from a single justice regarding a security issue in his or her case).

<sup>86</sup> *Commonwealth v. Allen*, 378 Mass. 489 (1979); *Commonwealth v. Aviles*, 422 Mass. 1008, 1009 (1996) (each judge or Justice has the power to consider the matter anew, taking into account facts newly presented, and to exercise his own judgment and discretion).

<sup>87</sup> *See, e.g., Commonwealth v. Beauchemin*, 410 Mass. 181, 185–87 (1991) (sentence for sexual offenses against minor stayed on condition that defendant stay at home during pendency of stay, and that no minor visitors would be allowed).

<sup>88</sup> *Commonwealth v. Allen*, 378 Mass. 489, 498 (1979).

<sup>89</sup> *Commonwealth v. Levin*, 7 Mass. App. Ct. 501, 504 (1979).

<sup>90</sup> Mass R. Crim. P. 31(a) and Mass. R. A.P. 6(b)

opportunity to seek relief from the court that will hear the appeal concerning the trial judge's decision to regarding the stay.<sup>91</sup> The single justice hearing in the Appeals Court does not review the sentencing judge's decision but rather "considers the matter anew, exercising his own judgment and discretion."<sup>92</sup> The same two factors considered in the trial court are the focus: security issues and the merits of the appeal. Frequently, a decision on the stay is forthcoming at the conclusion of the hearing.

## 2. Appeal from Denial by Single Justice

Counsel has one course of action if the motion for a stay is denied by a single justice of the Appeals Court; that is to claim an appeal of this decision to a *panel of the Appeals Court*, where expedited handling of the matter occurs without the necessity of briefs. If denial of the stay by the single justice was based in whole or in part on reasons of security, it will not be overturned unless there has been an abuse of discretion, which the court defines in this context as an action that "no conscientious judge, acting intelligently, could honestly have taken."<sup>93</sup> On the other hand, if denial of the stay were predicated on a conclusion that no meritorious issue of law is present, the Appeals Court panel may reverse the denial of a stay when it has a "clear conviction" that the appeal would present a genuine issue for decision.<sup>94</sup> This decision of the Appeals Court panel is subject to further appellate review by the Supreme Judicial Court pursuant to G.L. c. 211A, § 11. Should that circumstance occur, then a single justice of the Supreme Judicial Court may conduct a de novo review of the defendant's application for a stay.<sup>95</sup>

## 3. Commonwealth Appeal

The Commonwealth is entitled to seek review of the allowance of a stay of execution by applying for a hearing before a single justice of the Appeals Court or the Supreme Judicial Court. In this instance, however, the justice need not engage in an independent exercise of discretion but rather may limit review to whether the trial judge committed an abuse of discretion or an error of law.<sup>96</sup> Great deference is usually accorded the trial judge in this situation because of her familiarity with the case and the absence of prejudice to the defendant by her decision, and so the burden is placed on the Commonwealth to prove error.<sup>97</sup>

A single justice of the Supreme Judicial Court has the authority under G.L. c. 211, § 3, to change the terms of a stay of execution granted by a single justice of the

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<sup>91</sup> Commonwealth v. Aviles, 422 Mass. 1008 (1996); Commonwealth v. Hodge, 380 Mass. 851 (1980)

<sup>92</sup> Commonwealth v. Allen, 378 Mass. 489, 497 (1979); Polk v. Commonwealth, 461 Mass. 251 (2012) (single justice of Supreme Judicial Court has jurisdiction to decide appeal from trial court's denial of motion to stay execution of sentence).

<sup>93</sup> Commonwealth v. Levin, 7 Mass. App. Ct. 501, 505–06 (1979) Denial of motion for stay of execution pending Commonwealth's appeal from grant of new trial is not reversible error, in view of defendant's extensive criminal record. Christian v. Commonwealth, 446 Mass. 1003, 1004 (2006).

<sup>95</sup> Polk v. Commonwealth, 461 Mass. 251 (2012). Commonwealth v. Cohen 456 Mass. 128 (2010)

<sup>96</sup> Commonwealth v. Hodge (No. 1), 380 Mass. 851, 856 (1980).

<sup>97</sup> Commonwealth v. Hodge (No. 1), 380 Mass. 851, 853 (1980).

Appeals Court. The Court has noted, however, that it may be preferable for a single justice of this court to decline to act on a request for a stay pending appeal, leaving (or perhaps transferring) the issue to the court where the underlying appeal will be heard.<sup>98</sup>

### § 39.3 CHALLENGES TO THE SENTENCE

Several routes exist for challenging the imposed sentence.<sup>99</sup>

*First* the sentence may be reviewed by a motion to revise and revoke.<sup>100</sup> The timely filing of a motion to revise and revoke a sentence, pursuant to Rule 29 of the Massachusetts Rules of Criminal Procedure, provides a further opportunity for the judge to review her own sentencing determination “if it appears that justice may not have been done.”<sup>101</sup> A motion to revise and revoke a sentence addresses the issue of disposition only, and cannot overturn the underlying conviction<sup>102</sup>. The rule, which provides the judge with broad discretion,<sup>103</sup> may be raised by the judge herself,<sup>104</sup> or upon the defendant’s written motion, accompanied by an affidavit setting forth the factual basis for the motion.<sup>105</sup> Rule 29 dictates that the prosecutor must be served with the motion and the affidavit, and he may file and serve affidavits reflecting the district attorney’s position on the sentence review.<sup>106</sup>

The motion to revise and revoke must be filed within 60 days after the imposition of the sentence, or within 60 days after a rescript or other final appellate court order is issued.<sup>107</sup> This motion is addressed *infra* at § 44.3. This time limit cannot be waived or extended, but there is no time requirement for action on the motion.<sup>108</sup> In fact, defense counsel may file the motion, but indicate that she does not wish to have it marked for hearing or further action at the present time. In this way the defendant’s right to have a hearing on the motion is preserved until such time as he can

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<sup>98</sup> Commonwealth v. Aviles, 422 Mass. 1008 (1996).

<sup>99</sup> This section is taken from Wendy J. Kaplan, *Revisiting Dispositions and Sentencing Advocacy in the Massachusetts District Courts*, 92 MASSACHUSETTS LAW REVIEW (2009), and republished here with permission from the Massachusetts Bar Association.

<sup>100</sup> Mass. R. Crim. P. 29(a).

<sup>101</sup> *Id.*

<sup>102</sup> Commonwealth v. McCulloch, 450 Mass. 483 (2008).

<sup>103</sup> Dist. Att’y for N. Dist. v. Super. Ct., 342 Mass. 119 (1961).

<sup>104</sup> *Id.*

<sup>105</sup> Mass. R. Crim. P. 29(b); Commonwealth v. McCulloch, 450 Mass. 483, 487 (2008) (Motion to revise or revoke sentence for negligent operation of motor vehicle should not have been allowed, since defendant did not allege any specific circumstances in existence on date of sentencing that called into question propriety of sentence.)

<sup>106</sup> *Id.*

<sup>107</sup> Mass. R. Crim. P. 29(a).

<sup>108</sup> See Clark, 34 Mass.App.Ct. 191 (1993). The 60-day rule requirement also appears to apply to the sentencing judge’s *sua sponte* Rule 29 motion. See Aldoupolis v. Commonwealth, 386 Mass. 260 (1982), *cert. denied*, 459 U.S. 864 (1982). See also Commonwealth v. McNulty, 42 Mass. App. Ct. 955 (1997) (“Although a judge may act upon his own motion, the action must be taken within sixty days.”); Commonwealth v. Fenton F., 442 Mass. 31, 42 (2004) (a valid ineffective assistance of counsel claim excuses defendant from 60 day time limit to file motion).

present favorable facts to support his request for a revised sentence. Defense counsel should note that the sentencing judge may *increase* a defendant's sentence pursuant to the motion,<sup>109</sup> and that the judge is limited to considering only factors that existed at the time of the original sentencing.<sup>110</sup>

The court may act favorably on a Rule 29 motion based on the papers filed by counsel, or the judge may hold a hearing on the motion. It is usually advisable for counsel to request a hearing. This motion hearing must be heard by the judge who imposed the original sentence, unless that judge is no longer available.<sup>111</sup> In that event, the chief justice of the district court will assign another judge.<sup>112</sup> In practice, most judges will not revise a sentence imposed by another judge, unless there is new and relevant information that was not brought to the court's attention at the original sentencing hearing.

Failure to appeal the denial of a Rule 29 motion does not constitute a waiver of the claim that an illegal sentence has been imposed, and the defendant subsequently may file a motion pursuant to Mass. R. Crim. P. 30(a) to correct it.<sup>113</sup>

*Second*, a defendant who has received an illegal sentence may challenge it by a motion brought pursuant to Mass. R. Crim. P. 30(a), which is preferred over a direct appeal.<sup>114</sup> The motion asserts that the sentence itself is improper because it exceeds the applicable statute or some provision therein. It also is used to pose a double-jeopardy challenge to multiple sentences for what is in essence one criminal act.<sup>115</sup> The Commonwealth may appeal an illegal sentence imposed in the district court by petitioning a single justice pursuant to G.L. c. 211, § 3; in the superior court, the prosecution's appeal is pursuant to G.L. c. 278, § 28E.<sup>116</sup>

*Third*, a defendant may appeal a superior court state prison sentence to the appellate division of the superior court. This appeal is based on the severity, not legality, of the sentence, and is addressed *infra* at § 45.7

*Fourth*, an issue related to an illegality or other impropriety may be raised in the course of the direct appeal of the conviction.<sup>117</sup>

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<sup>109</sup> Commonwealth v. Derry, 26 Mass. App. Ct. 10 (1988).

<sup>110</sup> Commonwealth v. Layne, 386 Mass. 291 (1982), although the ruling here was not extended to apply where the original sentence was vacated and the case remanded for resentencing. Commonwealth v. White, 436 Mass. 340 (2002).

<sup>111</sup> Commonwealth v. Steele, 42 Mass.App.Ct. 319 (1997).

<sup>112</sup> STANDARDS OF JUD. PRACTICE: SENTENCING AND OTHER DISPOSITIONS, Standard 8:02, Motion Procedure (District Court Administrative Office, 1984)

<sup>113</sup> Commonwealth v. Chirillo, 53 Mass. App. Ct. 75, 79-81 (2001), f.a.r. granted, 435 Mass. 1107 (2002).

<sup>114</sup> Commonwealth v. Melvin, 399 Mass. 201, 202 n.2 (1987). *See infra* § 44.3 (re 30(a) motions); § 45.7(A) (re appellate review of sentences).

<sup>115</sup> *See, e.g.*, Commonwealth v. Chirillo, 53 Mass. App. Ct. 75 (2001), f.a.r. granted, 435 Mass. 1107 (2002); Shabazz v. Commonwealth, 387 Mass. 291 (1982). *See supra* §§ 21.2D and 21.7 (double jeopardy); Commonwealth v. Howze, 58 Mass.App.Ct. 147, 150 (2003) (lesser included offense).

<sup>116</sup> Commonwealth v. Cowan, 422 Mass. 546, 547 (1996).

<sup>117</sup> *See, e.g.*, Commonwealth v. Travis, 408 Mass. 1, 16-17 (1990) (where judge indicated that he would impose prosecutor's recommendation, but than actually exceeded it, case remanded for clarification).

The Supreme Judicial Court will not vacate a sentence that is within statutory limits because it appears too lenient or too harsh. The Court may only act when there has been clear legal error in its imposition.<sup>118</sup>

## § 39.4 SEALING AND EXPUNGEMENT OF CRIMINAL RECORDS

### § 39.4A. SEALING

The responsibility of maintaining criminal records belongs to the commissioner of probation.<sup>119</sup> Probation records are not public records although they are accessible to justices, probation officers, law enforcement personnel, other state and local government departments, and educational and charitable corporations and institutions as the commissioner may determine.<sup>120</sup> The sealing of a criminal record by the Commissioner of Probation is controlled by G.L.A. c. 276, § 100A.

A sealed record means that the defendant's court and probation records are segregated from the general records, and only law enforcement agencies and the courts will have access to them.<sup>121</sup> Although a record may be sealed, the criminal history systems board<sup>122</sup> may report the existence of such a record to law enforcement agencies. If an unauthorized person or agency makes a request for information, such a request will elicit a response that no record exists. The sealing of a record, however, does not mean that unauthorized persons will never receive information about a defendant's criminal history. Information in sealed records may leak outside appropriate channels.<sup>123</sup> If a criminal record is "sealed," the commissioner of probation will report that the defendant has "no criminal record" of the offense, and the clerk of court in the jurisdiction involved will remove the applicable docket entries and case files from public scrutiny.<sup>124</sup> In addition, an applicant for employment who has a sealed record may respond that he has "no record" relative to prior arrests or court

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<sup>118</sup> *Commonwealth v. Woodward*, 427 Mass. 659, 683–90 (1998); *Commonwealth v. Chihm*, 447 Mass. 370, 381–384 (2006).

<sup>119</sup> G.L.A. c. 276, § 100.

<sup>120</sup> *Id.*

<sup>121</sup> *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir 1989) (discussing access to public records).

<sup>122</sup> See MASS. GEN. LAWS ch. 6, §§ 167-178B which establish the Criminal History Systems Board, the body which administers and regulates the criminal offender record information system (CORI).

<sup>123</sup> *Commonwealth v. Balboni*, 419 Mass. 42, 45 (1994) makes it clear that there is no statutory provision for the sealing of arrest or police records. *Cf. Police Comm'r of Boston v. Mun. Ct. of Dorchester Dist.*, 374 Mass. 640 (1978) (power of court to expunge juvenile arrest or police records due to unique goals of the juvenile justice system to rehabilitate and treat youthful offenders). This latter case has not been extended to expunging an arrest record where the charge was not further prosecuted (*Commonwealth v. Roberts*, 39 Mass. App. Ct. 355 (1995)), sealing a record after a full pardon (*Commonwealth v. Vickey*, 381 Mass. 762 (1980)), or expunging juvenile probation record where a juvenile was wrongfully accused (*Commonwealth v. Gavin G.*, 437 Mass. 470 (2002)); *Cf. Commonwealth v. Boe*, 73 Mass.App.Ct. 647, 652-653 (2009). (Appeals Court affirmed an expungement order on the ground that defendant mistakenly was identified as the perpetrator of the charged crime)..

<sup>124</sup> G.L. C. 276, §§ 100A, 100C.

appearances.<sup>125</sup> The only entities that have access to the contents of sealed records are law enforcement agencies, any court, and any appointing authority.<sup>126</sup> A sealed record may be considered by a judge when imposing a sentence in subsequent criminal proceedings.<sup>127</sup> A criminal defendant may be able to “pierce” the sealed record of a witness for cross-examination if the underlying conviction might establish the witness's bias.<sup>128</sup> A defendant may be eligible to have his court and probation records “sealed” within a specified time after his court appearance.<sup>129</sup> If, after trial, a defendant is found not guilty, or a no bill is returned by the grand jury, or, after hearing, a finding of “no probable cause” is entered, the defendant is entitled to have his record sealed by the court.<sup>130</sup> Additionally, if a “nolle prosequi” is entered, or a dismissal is entered by the court, and it “appears to the court that substantial justice would best be served, the court shall direct the clerk to seal the records of the proceedings.”<sup>131</sup> Certain Massachusetts statutes contain sentencing provisions that allow for the sealing of records upon successful completion of a probationary period.<sup>132</sup>

A defendant with a record of criminal court appearances and dispositions may petition the commissioner of probation to seal the files, using a form furnished by the commissioner.<sup>133</sup> The commissioner’s power to seal a record is governed by the statute, which sets out the conditions and exceptions for sealing records.<sup>134</sup> Effective May, 2012, criminal misdemeanor convictions may be sealed, provided that five years have passed since his last court appearance, including any period of incarceration or custody, and that there are no further convictions in those five years, except for minor motor vehicle offenses. Similar considerations are involved in a felony but with a ten-year hiatus required since the last court appearance. Sex offenses, as defined by G.L.A. c. 6, § 178C, are not eligible for sealing for fifteen years following disposition, including probation supervision, incarceration, or duty to register as a sex offender. A

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<sup>125</sup> G.L. C. 276, §§ 100A, 100C.

<sup>126</sup> G.L. C. 276, §§ 100A, 100C. *See, e.g.*, *Rzeznik v. Chief of Police*, 374 Mass. 475 (1978) (access permitted when determining whether to issue gun permit). However, if the records have been sealed as a result of a pardon, neither the fact of a prior conviction nor the related police reports may be considered by the firearm licensing authority. G.L. c. 127, 152. *Cf. DeLuca v. Chief of Police*, 415 Mass. 155, 158 (1993).

<sup>127</sup> G.L. c. 276, § IOOA.

<sup>128</sup> *Cf. Commonwealth v. Joyce*, 382 Mass. 222, 231 (1981); *Commonwealth v. Allen*, 29 Mass. App. Ct. 373, 376–79 (1990) (interpreting *Joyce*). Bias might emanate from present probationary status of the witness, some suspicion focusing on the witness for an alleged crime, or a motive or reason to cooperate with the prosecution. *Commonwealth v. Santos*, 376 Mass. 920, 922–26 (1978) (absence of these factors precluded impeachment of rape victim by her sealed juvenile record). *See also Davis v. Alaska*, 415 U.S. 308 (1974) (juvenile record may be used if shows bias); *Commonwealth v. Harris*, 443 Mass. 714, 719–722 (2005) (trial judge had discretion to allow impeachment of sexual assault complainant by prior conviction of sexual offense, despite rape-shield statute).

<sup>129</sup> MASS. GEN. LAWS ch. 276, § 100A.

<sup>130</sup> MASS. GEN. LAWS ch. 276, § 100C.

<sup>131</sup> *Id.*

<sup>132</sup> *E.g.*, MASS. GEN. LAWS ch. 94C, §34 (first offense, possession of marijuana).

<sup>133</sup> MASS. GEN. LAWS ch. 276, § 100A.

<sup>134</sup> *Id.*

defendant classified as a level 2 or level 3 sex offender is not eligible for sealing of sex offenses.<sup>135</sup>

The sealing of delinquency proceedings in the juvenile court is covered by G.L. c. 276, § 100B, and requires a passage of three years before a request may be made.

Under G.L. c. 94C, § 34, a defendant without a prior drug offense or felony who is charged with *possession of a controlled substance* and obtains a continuance without a finding or a conviction with probation may ultimately have the case dismissed and his record sealed. Such a sealed record “shall not be deemed a conviction . . . for any purpose.” A first offender charged with possession of a Class E substance is entitled to a disposition of probation followed by sealing, unless the court submits written reasons for a different disposition.

Under G.L. c. 127, § 152, the granting of a pardon by the governor requires that all records related to the offense be sealed, including all police reports.<sup>136</sup>

### § 39.4B. EXPUNGEMENT

Expungement is based on a judicial order that directs the police department to produce for destruction all records resulting from arrest.<sup>137</sup> These may comprise fingerprint records, including ones sent to other law enforcement agencies; mug shots; and the arrest booking sheet, incident report, and central indexing card. For example, an acquitted defendant with no prior record would have strong interest in retrieving his mug shots from a book that routinely is shown to victims of crime, some of whom may be friends or acquaintances who would be shocked to see his photograph in such a location. An important basis for the court’s permitting expungement of police records is the complete absence of any legislative scheme governing the dissemination of the records in this situation.<sup>138</sup> Expungement is an extraordinary remedy, however, and should not be done merely because a charge was dismissed at the request of the prosecution.<sup>139</sup>

Expungement of all court records relating to an arrest is generally not available because there is a detailed statutory scheme to protect the confidentiality of both adult and juvenile records.<sup>140</sup> Sealing is considered an appropriate vehicle for protection of the defendant’s privacy and is the proper vehicle for a blameless individual whose identity was used by another defendant.<sup>141</sup>

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<sup>135</sup> G.L.A. c. 276, § 100 A; *see also* Wendy J. Kaplan, *Revisiting Dispositions and Sentencing Advocacy in the Massachusetts District Courts*, 92 MASSACHUSETTS LAW REVIEW (2009).

<sup>136</sup> *See, e.g.*, *DeLuca v. Chief of Police*, 415 Mass. 155 (1993).

<sup>137</sup> *Police Comm’r v. Municipal Court of Dorchester Dist.*, 374 Mass. 640 (1978) (juvenile record). According to this case, the authority to order expungement resides in the court’s inherent judicial powers, and it may be ordered after balancing the competing interests of law enforcement in the maintenance of records with the interests of the defendant.

<sup>138</sup> *Commonwealth v. Gavin G.*, 437 Mass. 470, 472-473 (2002); *Commissioner Of Probation v. Adams*, 65 Mass.App.Ct. 725, 735 (2006)

<sup>139</sup> *Commonwealth v. S.M.F.*, 40 Mass. App. Ct. 42 (1996); *Commonwealth v. M.R.*, 72 Mass.App.Ct. 1120 (2008) (trial judge lacked the authority to order expungement of defendants’ records after dismissing a complaint for lack of probable cause)

<sup>140</sup> *Commonwealth v. Gavin G.*, 437 Mass. 470, 472-483 (2002); *Commonwealth v. Balboni*, 419 Mass. 42, 46-47 (1994).

<sup>141</sup> *Commonwealth v. Boe*, 456 Mass. 337 (2010)

## PART II: DISPOSITIONAL OPTIONS IN CRIMINAL CASES

### § 39.5 PRETRIAL AND NONCRIMINAL DISPOSITIONS

#### § 39.5A. NOLLE PROSEQUI

A nolle prosequi is the formal statement by the prosecuting attorney that the complaint or indictment will not be prosecuted further in that court at that time and is being withdrawn.<sup>142</sup> It must be accompanied by a written statement, signed by the prosecuting attorney, setting forth the reasons for the disposition.<sup>143</sup> A nolle prosequi may apply to the whole complaint or indictment or only to a part of it, usually leaving a lesser included offense.<sup>144</sup>

Unlike a dismissal, a nolle prosequi results in the charge being removed from the defendant's probation record,<sup>145</sup> although it is no longer automatically sealed.<sup>146</sup> A nolle prosequi is also considered a termination of criminal proceedings in favor of the defendant for purposes of a subsequent action by him for malicious prosecution, provided that the nolle prosequi was entered for reasons that are consistent with the innocence of the accused and not for a procedural or technical defect in the charge.<sup>147</sup>

Only the prosecuting attorney may enter a nolle prosequi,<sup>148</sup> and she may do so at any time until pronouncement of sentence<sup>149</sup> without the intervention or approval of the court,<sup>150</sup> or the consent of the defendant.<sup>151</sup> Having entered a nolle prosequi, the

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<sup>142</sup> A nolle prosequi is usually referred to as a “nol pros” in the vernacular of the trial court.

<sup>143</sup> Mass. R. Crim. P. 16(a). A failure to include a statement of reasons does not invalidate the nolle prosequi, however, because the requirement of a justification “is designed to protect the public's interest in the integrity of the prosecutor's decision and not to advise the relieved defendant of the reasons for the decision.” *Commonwealth v. Sitko*, 372 Mass. 305, 309 n.2 (1977).

<sup>144</sup> *Commonwealth v. Sitko*, 372 Mass. 305, 308–09 (reduction of B+E/nighttime to B+E/daytime); *Commonwealth v. Massod*, 350 Mass. 745, 748–50 (1966) (nolle prosequi of one of two gambling offenses charged in a single complaint); *Commonwealth v. Harris*, 75 Mass.App.Ct. 696, 702-703 (2009) (entry of nolle prosequi on subsequent offender portion of indictment did not effect an acquittal of the entire indictment).

<sup>145</sup> *Contrast Commonwealth v. Coull*, 20 Mass. App. Ct. 955, 958 (1985) (dismissed case may be considered in sentencing for the limited purpose of assessing the defendant's character and propensity for rehabilitation).

<sup>146</sup> *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989) (G.L. c. 276, § 100C, authorizing automatic sealing after nolle prosequi, is unconstitutional).

<sup>147</sup> *Wynne v. Rosen*, 391 Mass. 797, 800–01 (1984); ); *Cf. Mizhir v. Carbonneau*, 2010 Mass.App.Div. 57 (2010)..

<sup>148</sup> The term *prosecuting attorney* encompasses assistant attorney generals, assistant district attorneys, and in regard to prosecutions under the bylaws or regulations of a city or town, the town counsel or city solicitor. Mass. R. Crim. P. 2(b)(12); G.L. c. 278, § 15; *Town of Burlington v. District Attorney*, 381 Mass. 717 (1980); ); *Commonwealth v. Cheney*, 440 Mass. 568, 574-575 (2003).

<sup>149</sup> *Commonwealth v. Dascalakis*, 246 Mass. 12, 17–20 (1923) (prosecutor could not enter a nolle prosequi as to so much of murder indictment that alleged first degree after the defendant was sentenced to death).

<sup>150</sup> Mass. R. Crim. P. 16(a); *Commonwealth v. Brandano*, 359 Mass. 332, 335 (1971).

prosecutor may not seek to have an indictment reinstated if such action would be prejudicial to the defendant.<sup>152</sup> Entry of a nolle prosequi without the consent of the defendant after jeopardy attaches has the effect of an acquittal.<sup>153</sup> Therefore, a prosecutor who realizes in midtrial that necessary evidence is unavailable cannot end the trial by filing a nolle prosequi and begin again over the objection of the defendant.

A nolle prosequi entered prior to trial is not the equivalent of an acquittal because jeopardy has not attached.<sup>154</sup> The prosecutor's right to enter a nolle prosequi prior to a trial has been described as "without limitation, except possibly in instances of scandalous abuse of his authority."<sup>155</sup> A nolle prosequi frequently is entered in the district court to terminate complaints for which a superseding indictment has issued from the grand jury.<sup>156</sup> A more frustrating situation for the defendant occurs when the prosecutor enters a nolle prosequi in the district court in anticipation of presenting the matter directly to the grand jury. The intent of the prosecutor in taking this action is to deny the defendant the discovery she would obtain from a probable cause hearing. This tactic has been approved by the Court, although not without some criticism toward a prosecutor who is dilatory in notifying the court or the defendant of her intentions.<sup>157</sup>

A defense counsel who anticipates that the prosecutor may enter a nolle prosequi should be prepared to create a record in the district court that would bar recommitment or indictment, or at least provide leverage in future plea bargaining by raising the specter of an appeal on the issue with overtones of prosecutorial misconduct.<sup>158</sup> The defendant's strenuous objection to termination of the proceedings should be noted, as well as counsel's efforts to prepare for the trial or hearing. Speedy-trial objections should be advanced.<sup>159</sup> A prior acquiescence to a continuance may have been premised on the fact that the prosecutor would not present the case to the grand jury in the interim,<sup>160</sup> and the defendant may have a witness present who is prepared to present exculpatory testimony. Alternatively, if the nolle prosequi is part of a plea

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<sup>151</sup> See, e.g., *Commonwealth v. Crowe*, 21 Mass. App. Ct. 456, 470 (1986).

<sup>152</sup> *Commonwealth v. Miranda*, 415 Mass. 1 (1993) (reversible error to allow Commonwealth's motion on trial date to reinstate companion indictment after nolle prosequi had been filed three months earlier).

<sup>153</sup> Mass. R. Crim. P. 16(b); *Commonwealth v. Dietrich*, 381 Mass. 458, 462–63 (1980). As to when the jeopardy attaches, see *supra* § 21.2B.

<sup>154</sup> *Commonwealth v. Rollins*, 354 Mass. 630, 632–33 (1968).

<sup>155</sup> *Commonwealth v. Atkinson*, 15 Mass. App. Ct. 200, 204 (1983).

<sup>156</sup> See, e.g., *Commonwealth v. Burke*, 6 Mass App. Ct. 697, 704 (1978).

<sup>157</sup> *Commonwealth v. Hinterleitner*, 391 Mass. 679 (1984) (nolle prosequi entered on morning of probable cause hearing after continuance request denied); *Commonwealth v. Rapoza*, 386 Mass. 666, 669 n.8 (1982) (court would be critical of prosecutor who waited until date of district court probable-cause hearing to seek indictments).

<sup>158</sup> Under any circumstance, the prosecutor is immune from suit civilly for entry of a nolle prosequi. *Andersen v. Bishop*, 304 Mass. 396 (1939).

<sup>159</sup> In *Commonwealth v. Thomas*, 353 Mass. 429 (1967), a nolle prosequi was entered in order to deny the defendant his right to a speedy trial after the district court judge had refused the prosecutor's request to continue the case for 30 days. The S.J.C. considered this to be an "act of effrontery" to the judge, and affirmed the dismissal of subsequent indictments for denial of the defendant's right to a speedy trial. See also *supra* ch. 23 (speedy trial).

<sup>160</sup> Cf. *Commonwealth v. Spann*, 383 Mass. 142, 145 (1981) (if the defendant agreed to a continuance in return for a promise by the prosecutor not to seek an indictment before the probable cause hearing, the court would enforce that promise).

agreement, rights to nonprosecution vest in the defendant and the agreement should be noted on the record.<sup>161</sup>

### § 39.5B. DISMISSAL

Dismissal of the criminal complaint is probably the most frequently employed pre-trial disposition. Requests for dismissal based on legal grounds are made by defense counsel in writing, stating the grounds for the motion, and are accompanied by an affidavit signed by a person with personal knowledge of the factual basis for the motion.<sup>162</sup> Other requests for dismissal are made orally, with or without the assent of the Commonwealth.

Dismissal is also available, of course, as part of a plea arrangement on other charges or as the final disposition of a continuance without a finding. When the prosecution itself moves for dismissal, the court may deny the motion and force the Commonwealth to rely on its power to file a nolle prosequi.

A charge that results in a dismissal is not available to impeach a witness's or a defendant's credibility pursuant to G.L. c. 233, § 21, which by its terms requires a criminal conviction. The dismissal does, however, remain on the defendant's probation record and may be considered in a limited way by a judge sentencing the defendant on companion charges or for a future offense.<sup>163</sup> For this reason, counsel should always endeavor to have the court enter a “not guilty” finding if the prosecutor is unable to go forward because of insufficient evidence.

Common grounds for dismissal include:<sup>164</sup>

- a. **Lack of speedy trial.** The right to a speedy trial is governed by the United States Constitution,<sup>165</sup> the Massachusetts Constitution, part 1, article 11, and Rule 36 of the Massachusetts Rules of Criminal Procedure. A motion to dismiss under Rule 36(b) because of prosecutorial delay does not require

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<sup>161</sup> If a nolle prosequi was entered pursuant to a plea bargain and the defendant fulfilled his end of the agreement, subsequent indictments based on the same criminal episode will be dismissed. *Commonwealth v. Benton*, 356 Mass. 447 (1969). A different situation is presented when the defendant is allowed to withdraw his guilty plea at a later time, as this permits the prosecutor to revoke the nolle prosequi. *Commonwealth v. Rollins*, 354 Mass. 630, 632–33 (1968) (after defendant withdrew guilty plea to second-degree murder, nolle prosequi of so much of indictment as alleged first-degree murder could be revoked).

<sup>162</sup> MASS. R. CRIM. P. 13 sets forth the requirements for pretrial motions in the district court. General requirements are that the motion be in writing, signed by the party making the motion, and filed in a timely manner.

<sup>163</sup> *Commonwealth v. Coull*, 20 Mass. App. Ct. 955, 958 (1985) (the judge could take into account a prior charge dismissed after a continuance without a finding in assessing the defendant's “character and propensity for rehabilitation”). Additionally, the drunk driving statute treats an alcohol program disposition which resulted in dismissal as a prior offense. G.L. c. 90, § 24(1)(a)(1); *Commonwealth v. Murphy*, 389 Mass. 316 (1983); *Commonwealth v. Murphy*, 61 Mass.App.Ct. 1113 (2004).

<sup>164</sup> This section is taken from Wendy J. Kaplan, *Revisiting Dispositions and Sentencing Advocacy in the Massachusetts District Courts*, 92 MASSACHUSETTS LAW REVIEW (2009), and republished here with permission from the Massachusetts Bar Association.

<sup>165</sup> U.S. CONST., amend. VI, *see, generally*, *Barker v. Wingo*, 407 U.S. 514 (1972).

- a showing of prejudice.<sup>166</sup> A dismissal on speedy trial grounds is a bar to further prosecution for the same or any related offense.<sup>167</sup>
- b. **Lack of jurisdiction.** The court may not have subject matter jurisdiction or territorial jurisdiction over the defendant. Examples of this may be that the defendant is charged erroneously as an adult when she is actually a juvenile, or that the alleged incident took place outside of the territorial jurisdiction of the court.
  - c. **Lack of prosecution.** If the commonwealth is unable to proceed due to a missing witness or missing evidence, the defense attorney may move for dismissal based on lack of prosecution.<sup>168</sup> The commonwealth may move for a continuance of the case, rather than agree to a dismissal. Under such circumstances, the commonwealth will need to explain the delay in prosecution and convince the judge that the prosecution will be ready if the continuance is allowed. Defense counsel, in opposing a motion for a continuance, needs to emphasize the prejudice to the defendant in order to prevail on a motion to dismiss on this basis. A dismissal for lack of prosecution, granted prior to trial, does not, as a rule, act as a bar to future prosecution.
  - d. **Double jeopardy.** In a motion to dismiss premised on double jeopardy grounds, the defendant must demonstrate that she has been prosecuted previously for the same offense, based upon the same facts, and that further prosecution is barred by the earlier resolution of criminal charges. The “same offense” for double jeopardy purposes is defined by whether the offense for which the defendant was previously prosecuted contains the “same elements” as the offense for which the commonwealth now wishes to prosecute.<sup>169</sup> In order for a double jeopardy claim to prevail, the defendant must demonstrate that jeopardy has “attached.” Jeopardy attaches in a bench trial when the court begins to hear evidence;<sup>170</sup> and in a

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<sup>166</sup> *Barry v. Commonwealth*, 390 Mass. 285, 291 (1983); *Commonwealth v. Edge*, 26 Mass.App.Ct. 976, 977 (1988). *See also* *Commonwealth v. Wysocki*, 28 Mass.App.Ct. 45 (1989). *Contrast to* *Commonwealth v. Bourdon*, 71 Mass.App.Ct. 420, 425 (2008) (period of 219 days that passed after defendant failed to object to, and acquiesced in continuance of trial date was excluded from speedy trial period).

<sup>167</sup> *Commonwealth v. Balliro*, 385 Mass. 618, 624 (1982).

<sup>168</sup> *See, e.g., Commonwealth v. Joseph*, 27 Mass.App.Ct. 516 (1989) (case dismissed without prejudice on the fourth continuance date); *contrast Commonwealth v. Clegg*, 61 Mass.App.Ct. 197, 202 (2004) (case was dismissed in error where police officer was sole witness for the Commonwealth, officer was not present for “personal reasons,” and trial judge did not inquire about why officer was not in court prior to determining that officer lacked good cause for not being in court).

<sup>169</sup> *See United States v. Dixon*, 113 S.Ct. 2849 (1993); *Blockburger v. United States*, 284 U.S. 299 (1932); *Morey v. Commonwealth*, 108 Mass. 433 (1871); *Commonwealth v. Porro*, 458 Mass. 526, 531-533 (2010) (where each of two offenses requires proof of an additional element that the other does not, neither crime is a lesser-included offense of the other for purposes of the prohibition on double jeopardy).

<sup>170</sup> *Commonwealth v. Ludwig*, 370 Mass. 31, 33 (1976); *Commonwealth v. DeFuria*, 400 Mass. 485, 487 (1987) (jeopardy attaches at the time the witness is sworn).

jury trial when the jury is sworn;<sup>171</sup> or when the court accepts the defendant's guilty plea or admission to sufficient facts.<sup>172</sup>

- e. **Failure to state a crime.** Practically speaking, if the defendant moves to dismiss a criminal complaint based on failure to state a crime, the commonwealth, having been alerted to the defect in the complaint, will move to amend the complaint, or acquiesce in its dismissal and seek a new complaint. However, a conviction on a complaint that fails to state an essential element of the crime will not be valid and will be subject to challenge on appeal.<sup>173</sup>
- f. **Dismissal based upon the filing of an accord and satisfaction.** Section 55 of chapter 276 of the General Laws of Massachusetts provides for the dismissal of certain misdemeanors<sup>174</sup> upon the filing of a written agreement between the two parties (the "accord and satisfaction"). The Supreme Judicial Court stated in *Commonwealth v. Guzman*<sup>175</sup> that (b)esides requiring that the injured party appear before the court and acknowledge, in writing, that he or she has been satisfied, the statute requires, among other things, that the defendant be accused of a misdemeanor for which he could be liable in a civil action, and that the crime was not committed against a law enforcement officer or with intent to commit a felony.<sup>176</sup> The court also noted that the "satisfaction itself need not be monetary and may be *de minimis*."<sup>177</sup> Typically, this agreement is viewed as a form of dispute resolution that provides limited court oversight without recourse to conviction in the criminal justice system. An accord and satisfaction agreement is subject to the court's approval and is not considered a private payment.<sup>178</sup> Acceptance of an accord and satisfaction is a bar to further civil action.

Counsel should always be cautious in attempting to reach an accord and satisfaction on behalf of a client. The S.J.C. Disciplinary Rules state that "[a] lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the outcome of the case."<sup>179</sup> Moreover, G.L. c. 268, § 13B, makes it a felony to willfully endeavor, either directly or indirectly, to influence a witness by means of a gift, offer, or promise of anything of value.<sup>180</sup> The safest approach would be to use

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<sup>171</sup> *Commonwealth v. Dascalakis*, 246 Mass.12, 18 (1923).

<sup>172</sup> *See Commonwealth v. Aldrich*, 21 Mass.App.Ct. 221, 224-25 (1985). Note that jeopardy does not attach when the court accepts a defendant's guilty plea to a lesser included offense over the prosecution's objection. *See Commonwealth v. Gordon*, 410 Mass. 498 (1991).

<sup>173</sup> *Commonwealth v. Anolik*, 27 Mass.App.Ct. 701, 710 & n.11 (1989).

<sup>174</sup> E.g., assault and battery or other misdemeanor for which the defendant is liable in a civil action.

<sup>175</sup> 446 Mass. 344 (2006).

<sup>176</sup> *Commonwealth v. Guzman*, 446 Mass. 344, 348 (2006).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*, at 349.

<sup>179</sup> S.J.C. Rule 3:07, DR 7-109.

<sup>180</sup> An expansive view of the term *endeavor* was taken in *Commonwealth v. Rondeau*, 27 Mass. App. Ct. 55, 61 (1989), which held that an endeavor "connotes a somewhat lower threshold of purposeful activity than 'attempt'." The court expressly declined to reach the issue

the prosecutor as an intermediary in broaching the subject. If counsel does contact the alleged victim directly, any overture should be directed toward determining whether there is an amount of compensation that would fully satisfy the victim and then taking the proposal to the prosecutor and ultimately the court. It is also advisable that counsel speaking to a witness directly state that he is in fact trying to reach an accord and satisfaction, using that phrase in his discussion.

- g. **Dismissal upon the request of the complainant, with the defendant not objecting.** Although the commonwealth is the complainant in all criminal matters, if a crucial civilian witness does not wish to testify (perhaps due to Fifth Amendment considerations), and the commonwealth cannot proceed without this witness, the prosecutor may have to request dismissal of the case. The prosecution may also request a dismissal as part of a negotiated plea bargain with the defendant. This situation is not uncommon where the defendant is charged with multiple complaints and has agreed to plead guilty on some of them in return for dismissal on the remaining complaints.
- h. **Dismissal of complaint as sanction against the commonwealth.** The court may grant a motion to dismiss as a result of some prosecutorial misconduct or failure to comply with a court order.<sup>181</sup> Should the commonwealth fail to be ready for trial on the appointed date, the defense may move for dismissal. Unless the complaint is dismissed with prejudice, the commonwealth may seek a new complaint at a later date.<sup>182</sup>

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of a possible conflict with the accord and satisfaction statute because of deficiencies in the record. *Rondeau*, 27 Mass. App. Ct. at 62–63.

<sup>181</sup> For example, MASS. R. CRIM. P. 14 (c) Sanctions for Noncompliance, (1) Relief for Nondisclosure states “(f)or failure to comply with any discovery order issued or imposed pursuant to this rule, the court may make a further order for discovery, grant a continuance, or enter such other order as it deems just under the circumstances.”

<sup>182</sup> *Commonwealth v. Joseph*, 27 Mass. App. Ct. 516, 519 (1989). As this case indicates, the commonwealth is likely to appeal any dismissal made with prejudice. *See also Commonwealth v. Connelly*, 418 Mass. 37 (1994) (dismissal with prejudice has to be supported by *egregious* misconduct); *Commonwealth v. Clegg*, 61 Mass. App. Ct. 197 (2004) (judge’s refusal to grant continuance where commonwealth’s police officer witness didn’t appear was tantamount to dismissal with prejudice; this effective dismissal would leave the prosecution with a non-existent case and no further options, which the appeals court thought was too drastic a sanction). Consider also *Commonwealth v. DeJesus*, 53 Mass. App. Ct. 1115 (2002); *Commonwealth v. Rodriques*, 71 Mass.App.Ct. 1119 (2008) (prosecutor’s failure to appear for trial was not egregious misconduct warranting dismissal of the charges with prejudice); *Commonwealth v. Sanford*, 460 Mass. 441 (2011); *Cf. Commonwealth v. Merry*, 453 Mass. 653, 666 (2009) (dismissal of a complaint must be due to prosecutorial misconduct so egregious that dismissal is warranted to deter similar future misconduct).. The district court judge dismissed for “lack of prosecution” related to violation of a pretrial conference report, but made no written findings. The record did not indicate whether the dismissal was with or without prejudice, but the Commonwealth must have assumed it was with prejudice, since it appealed. The case was then remanded to the district court to determine whether there was irreparable prejudice to the defendant. The case includes this line in footnote 1: “If the dismissal was without prejudice, the Commonwealth would be free to seek a new complaint and recommence prosecution of the defendant.”

The dismissal of a criminal complaint may carry with it the imposition of court costs which are defined as the “reasonable and actual expenses” of the prosecution.<sup>183</sup> The order to pay court costs may be agreed upon by the parties or imposed by the court. Witness fees, witness travel and parking expenses, stenographer fees, and overtime pay to police officers are all examples of expenses the court may order the defendant to pay. Court costs may be substituted by community service with permission of the court.

### § 39.5C. MEDIATION

Alternative dispute resolution, through referral to a court-approved mediation program, is another means of resolving a case without having a trial or plea. All district courts have mediation programs where willing parties can be directed to work out solutions to the issues which have led them to the court. It is important to note that both parties to the criminal complaint, the defendant and the prosecution (speaking on behalf of the police or civilian interests involved) must be amenable to mediation. The nature of the alleged offense is also a consideration, since serious felonies are normally excluded from mediation. This approach to criminal matters is typically employed in cases where the parties have an ongoing relationship (e.g. neighbors, employers/employees, mutual acquaintances, patrons at the same business establishment, etc.) and it is deemed in the best interest of both to work out their grievances in a non-criminal setting.

Once the parties have agreed to mediation, the court mediation program is contacted and meetings are arranged between the parties, usually without counsel present.<sup>184</sup> When the court is informed that a case is referred to mediation, the criminal matter may be continued for a period of time to allow formulation of an agreement.<sup>185</sup> Once reached, the written agreement is signed by the parties (defendant and complaining witness), presented to the court, and incorporated in the court documents. The criminal case is then dismissed outright on that court date, or continued to a further date by which certain conditions of the agreement are to be fulfilled. If such conditions are not fulfilled, the court may either reinstate the case on the trial docket, or allow additional time to meet conditions. After a case is dismissed, the court no longer has the power or authority to impose conditions upon the defendant.

### § 39.5D. PRETRIAL DIVERSION

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<sup>183</sup> MASS. GEN. LAWS. ch 280, § 6, and MASS. GEN. LAWS ch. 275, § 6. *See* Commonwealth v. Scagliotti, 373 Mass. 626 (1977), and Commonwealth v. Casserly, 23 Mass. App. Ct. 947 (1986) (costs may be imposed as a condition of probation). *See also* Commonwealth v. Zawatsky, 41 Mass. App. Ct. 392 (1996), which includes the following language: “Under G.L. c.280, s. 6, there is a general prohibition against the imposition of costs as a penalty for a crime [cites to *Scagliotti* and *Casserly* omitted].” And then in footnote 7: “...the statute does permit a court to order a defendant to pay the reasonable expenses of a prosecution as a condition of the dismissal...”

<sup>184</sup> Counsel needs to exercise discretion in advising a client facing criminal charges to enter into uncounseled discussions with a complainant.

<sup>185</sup> The decision to refer a case to mediation may be made at any time during the criminal process, although it usually occurs at either arraignment, pre-trial conference or pre-trial hearing dates.

A defendant may resolve his criminal matter by participating in a pre-trial diversion program. Generally, pre-trial diversions programs vary among the district courts, although they may include participation in anger management or counseling programs. Several statutes provide for this type of case resolution. Massachusetts General Laws chapter 276A applies to adult defendants between the ages of 17 and 21 who have no prior convictions, traffic offenses excluded.<sup>186</sup> At arraignment, the case may be continued for 14 days in order to give the probation department time to screen the defendant's suitability for the pre-trial diversion program.<sup>187</sup> Once a defendant is accepted into the diversion program, which may vary among the different district court probation offices as to prerequisites and operation, the criminal matter is stayed for 90 days.<sup>188</sup> If the defendant successfully completes the diversion program conditions, the case is then dismissed, with the prosecutor's consent, after the 90-day period.<sup>189</sup> Defense counsel must make sure that her client understands the conditions of the pre-trial diversion program in order to insure compliance with the program. In the event that the client does not complete the program conditions, the case will be returned to the trial docket and proceed to either trial or plea.

### § 39.5E. PRETRIAL PROBATION

Pre-trial probation<sup>190</sup> is a more formal arrangement than diversion under which the defendant agrees to probationary-like terms, which may include regular supervision by a probation officer, participation in a substance abuse program, obtaining counseling at the court clinic, or finding a steady job. Two statutes, Massachusetts General Laws chapter 276, section 42A, and Massachusetts General Laws chapter 276, section 87, authorize pre-trial probation. Section 42A is targeted at charges arising out of troubled family situations. Section 87 is more general in its reach as it applies to "(a)ny person before the court charged with an offense or a crime" providing that the defendant satisfies the other requirements of the statute and consents to the pre-trial probation.<sup>191</sup>

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<sup>186</sup> MASS. GEN. LAWS ch. 276A.

<sup>187</sup> MASS. GEN. LAWS ch. 276A, § 2 states that a defendant is eligible for pre-trial diversion if the offense is one "for which a term of imprisonment may be imposed and over which the district courts may exercise final jurisdiction" providing that the defendant does not have, in addition to previous convictions, any outstanding warrants, continuances, appeals or criminal cases pending before any state or federal court. MASS. GEN. LAWS ch. 276A, § 4, however, excludes defendants who are charged with offenses against victims over 60 years of age. MASS. GEN. LAWS ch. 276A, § 3 notes that when a judge considers whether to grant a defendant the 14-day continuance for program suitability assessment, "the opinion of the prosecution should be taken into consideration."

<sup>188</sup> MASS. GEN. LAWS ch. 276A, § 5.

<sup>189</sup> Although the court has the power to place a qualified defendant in a pre-trial diversion program, the court lacks authority to dismiss the case over prosecution objection, due to the principal of separation of powers. *See* Commonwealth v. Taylor, 428 Mass. 623 (1999) (court dismissal over prosecution objections is violation of the separation of powers doctrine of Massachusetts Declaration of Rights, Article 30, due to prosecution's executive function); Commonwealth v. Cheney, 440 Mass. 568 (2003) (the court may not dismiss a complaint prior to verdict, finding, or plea, in the "interests of public justice" over the prosecutor's objections). *See* discussion of Commonwealth v. Brandano, *infra* p. 16.

<sup>190</sup> *See* MASS. GEN. LAWS ch. 276, §§ 42A, 87.

<sup>191</sup> Defendants with prior convictions for certain sexual assaults on children, if the act was committed after the defendant reached the age of 18, are ineligible for pre-trial probation

As in the pre-trial diversion program, failure to comply with pre-trial probation conditions will lead to reinstatement of the criminal case on the trial docket. If the defendant successfully completes the established pre-trial probationary period, then the criminal case will be dismissed as long as the prosecutor consents to the dismissal.<sup>192</sup>

This disposition is a useful mechanism for a charge that is much more serious than the underlying facts warrant and the defendant is a first offender or someone unlikely to appear again before the court. It may not be used if the legislature has precluded that disposition by statute.<sup>193</sup> It is frequently applied to persons planning to enter the military service or to return to another state after a college semester, but also may be used in a case where the Commonwealth is not enthusiastic about the prosecution and the defendant cannot or will not admit to lesser charges in return for a lenient disposition.

This disposition is only available if the Commonwealth assents to it.<sup>194</sup> If the Commonwealth objects, the defendant may offer a guilty plea and request that the court continue the matter without a finding pursuant to G.L. c. 278, § 18, with a dismissal to be entered at the end of the probationary period.<sup>195</sup>

### **§ 39.5F. STATUTORY PRETRIAL DIVERSION (DRUG ACT)**

A defendant charged with a drug offense, defined as “an act or omission relating to a dependency related drug which constitutes an offense pursuant to section twenty-one or subdivision (1) or section twenty-four of chapter ninety, section eight of chapter ninety B, chapter ninety-four C or section sixty-two of chapter one hundred and thirty-one”,<sup>196</sup> or a defendant whom counsel knows has a drug addiction problem, is entitled to evaluation for drug dependency.<sup>197</sup> Section 10 of chapter 111E of the General Laws permits a stay of criminal proceedings if the defendant is drug dependent and willing to accept assignment to a drug rehabilitation facility, defined in section 1 of chapter 111E as

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under MASS. GEN. LAWS ch. 276, § 87. *See* MASS. GEN. LAWS ch. 265, §§ 22A (forcible rape of a child), 24B (assault with intent to rape a child); MASS. GEN. LAWS ch. 272, § 35A (unnatural acts with a child).

<sup>192</sup> *See* Commonwealth v. Cheney, 440 Mass. 568 (2003) (court, citing Article 30 of the Massachusetts Constitution’s Declaration of Rights, ruled that a judge, prior to verdict, finding, or plea, is precluded from dismissing a “legally adequate criminal indictment in the ‘interests of public justice’ over the commonwealth’s objection.” The ruling is based on the principle of separation of powers.) *See* discussion of ‘continuance without a finding’ *infra*.

<sup>193</sup> *See, e.g.,* Commonwealth v. Quispe, 433 Mass. 508, 512-513 (2001)(operating under the influence).

<sup>194</sup> Commonwealth v. Tim T., 437 Mass. 592, 595-597 (2002); ); Commonwealth v. Sebastian S., 444 Mass. 306 (2005); *Cf.* Commonwealth v. Powell, 453 Mass. 320, 327 (2009).

<sup>195</sup> Commonwealth v. Tim T., a juvenile, 437 Mass. 592, 596-597 (2002). *See* §39.6A , *infra*.

<sup>196</sup> MASS. GEN. LAWS ch. 111E, § 1.

<sup>197</sup> MASS. GEN. LAWS ch. 111E, § 10 specifically excludes defendants charged with violations of MASS. GEN. LAWS ch. 94C, §§ 32-32G (drug offenses involving the sale, manufacture, distribution of dependency-related drugs). *See also* Commonwealth v. Vagara, No. 2000-10130 (001-005), 2004 WL 414071 (Mass. Super. Feb. 12, 2004) (defendant charged with violation of MASS. GEN. LAWS ch. 94C, § 32J is excluded from the treatment provisions in MASS. GEN. LAWS ch. 111E, § 10 since the criminal charge under § 32J is predicated upon a violation of MASS. GEN. LAWS ch. 94C, §§ 32, 32A-G.)

any public or private place, or portion thereof, which is not part of or located at a penal institution and which is not operated by the federal government, providing services especially designed for the treatment of drug dependent persons or persons in need of immediate assistance due to the use of a dependency related drug.<sup>198</sup>

Time committed to the treatment facility may be as long as the maximum term of imprisonment that the defendant could receive for the charged offense, but may not exceed 18 months.<sup>199</sup> If the defendant successfully completes the program, the charges against him shall be dismissed.<sup>200</sup>

If the initial drug dependency assessment is that the defendant was not drug dependent or would not benefit from treatment, the court must, on motion of the defendant, appoint an independent physician to examine the defendant, and also afford the defendant a hearing on the issue of his eligibility for a drug treatment program.<sup>201</sup>

The massive overcrowding of the country correctional facilities may make in-patient drug treatment a viable alternative for many judges. For many offenders, a diversion program provides an opportunity to both receive treatment and avoid a criminal conviction.<sup>202</sup> This disposition may also be possible outside ch. 111E, by arranging drug treatment immediately following court-ordered detox.<sup>203</sup>

### § 39.5G. MENTAL HEALTH COMMITMENT

Commitment to a mental health facility for evaluation is another means of resolving certain cases on a pre-trial basis. At any stage of representation, it may become apparent that the defendant is acting in a manner which causes concern for his competency to stand trial.<sup>204</sup> Counsel may request a court-ordered evaluation by the court clinic professional,<sup>205</sup> and the defendant may be committed to an in-patient, locked mental health facility for further evaluation both for competency to stand trial and criminal responsibility.<sup>206</sup> A commitment order is initially for 20 days, but may be

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<sup>198</sup> MASS. GEN. LAWS ch. 111E, § 1 (2006).

<sup>199</sup> MASS. GEN. LAWS ch. 111E, § 10.

<sup>200</sup> *Id.*

<sup>201</sup> G.L. c. 111E, § 10.

<sup>202</sup> *See* ABA Standards for Criminal Justice: Sentencing Alternatives and Appellate Review of Sentences, 52 *Crim. L. Rep.* 2353 (March 17, 1993).

<sup>203</sup> *See supra* § 7.7E.

<sup>204</sup> Arresting officers, court officers, probation officers, prosecutors, or defense counsel may bring concerns about a defendant's competency to the court's attention. For a discussion of ethical considerations for defense counsel regarding a client's competency, *see* SUP. JUD. CT. RULES OF PROF'L RESPONSIBILITY 1.14, which is under consideration for revision.

<sup>205</sup> The defendant has the right to have an independent psychiatric evaluation, and, if indigent, defense counsel may petition the court for funds for such an independent evaluation. *See* MASS. GEN. LAWS ch. 261, §§ 27B-27D. In determining whether or not the funds are needed for an indigent's defense, "the test is whether the item is reasonably necessary to prevent the party from being subjected to a disadvantage in preparing or presenting his case adequately, in comparison with one who could afford to pay for the preparation which the case reasonably requires." *Commonwealth v. Lockley*, 381 Mass. 156, 160-61 (1980). *See also* *Commonwealth v. King*, No. 1607M, 2005 WL 477846 (Mass. App. Div. Feb. 23, 2005).

<sup>206</sup> MASS. GEN. LAWS ch. 123, §§ 15-16.

extended for an additional 20 days upon motion of the mental health facility.<sup>207</sup> If the defendant is found to be incompetent, the psychiatric report will be sent to the court, the criminal case may be dismissed, and, if the defendant presents a danger to herself or others, a civil commitment will be sought.<sup>208</sup> Alternatively, the defendant may be held and the case continued until such time as the defendant becomes competent.<sup>209</sup>

### **§ 39.5H. FILE WITHOUT A CHANGE OF PLEA**

The district court has the authority to place a case on file prior to conducting a hearing or making a finding, provided that the court has final jurisdiction over the offense.<sup>210</sup> This course of action essentially suspends any active criminal prosecution<sup>211</sup> although the court or the prosecutor may bring a filed case forward upon motion,<sup>212</sup> affording the defendant the right to claim a trial or to tender a plea at that time. A defendant, since he has the right to be adjudicated and, upon a guilty finding, to be sentenced, must consent to the pre-trial placing of his case on file.<sup>213</sup> Since the commonwealth has the right to move for trial, it is unlikely that the court would file a case before trial or plea against the commonwealth's objection.<sup>214</sup> Although not a common pre-trial disposition, the court may invoke this procedure when the defendant has a number of criminal complaints pending and the court has imposed a sentence on more serious, and often unrelated, matters. Rather than compel the defendant to undergo a plea colloquy or trial on the less serious matters, the court, with the defendant's consent may place these matters on file without a change of plea.

### **§ 39.5I. TREATMENT OF A VIOLATION OF MUNICIPAL ORDINANCE OR BY-LAW, OR MISDEMEANOR, AS A CIVIL INFRACTION**

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<sup>207</sup> MASS. GEN. LAWS ch. 123, § 15.

<sup>208</sup> MASS. GEN. LAWS ch. 123, § 16.

<sup>209</sup> *Id.* MASS. GEN. LAWS ch. 123, § 16 governs the hospitalization and commitment of persons determined to be incompetent to stand trial.

<sup>210</sup> MASS. GEN. LAWS ch. 218, § 38. If the complaint charges a felony, or the defendant has either a prior felony conviction or felony placed on file, the court is prohibited from placing the complaint on file.

<sup>211</sup> *See* White v. I.N.S., 17 F.3d 475 (1994), which states, in the context of discussing whether a filed charge should be construed as a conviction for immigration purposes, "Under Massachusetts law the "filing" of a charge at any stage completely suspends the adjudicative process..."

<sup>212</sup> Commonwealth v. Brandano, 359 Mass. 332, 333-34 (1971). *See also* Commonwealth v. Tim T., 437 Mass. 592, 593-94 (2002); Commonwealth v. Cheney, 440 Mass. 568, 569 (2003). Both are examples of the Commonwealth moving for trial.

<sup>213</sup> *See* Commonwealth v. Delgado, 367 Mass. 432, 438 (1975). *See also* discussion of post-adjudication filing of complaint, *infra*.

<sup>214</sup> Some cases that address the separation between executive and judicial powers include: Commonwealth v. Cheney, 400 Mass. 568 (2003) (holding that "a judge (prior to verdict, finding, or plea)" may not "dismiss a legally adequate criminal indictment in the 'interests of public justice' over the Commonwealth's objection"); cf. Commonwealth v. Pyles, 423 Mass. 717 (1996) (affirming the legislative authority behind MASS. GEN LAWS ch. 278, § 18, and the judicial authority to enter CWOV over the commonwealth's objection).

Massachusetts General Law chapter 277, section 70C allows the court, upon its own motion at any time, and upon motion by the commonwealth or the defendant at arraignment or pretrial conference, to treat a violation of a municipal ordinance or by-law, or misdemeanor, as a civil infraction. The statute provides for the imposition of a civil fine, not to exceed \$5,000, as a possible penalty. It is important to note that the statute exempts a number of offenses from this potential conversion from a criminal to a civil action.<sup>215</sup>

### **§ 39.5J. COMMITMENT TO THE DEPARTMENT OF YOUTH SERVICES**

The disposition options for juveniles adjudicated delinquent or as youthful offenders are treated *infra* in ch. 49. The Youthful Offender Act<sup>216</sup> gives juvenile court judges the power to sentence those deemed “youthful offenders” to the Department of Youth Services until age 21, and also gives those judges the power to impose adult criminal sentences to youthful offenders.

## **§ 39.6 CRIMINAL DISPOSITIONS WITHOUT INCARCERATION**

### **§ 39.6A. CONTINUANCE WITHOUT A FINDING**

Defendants, particularly those without criminal records, may be given an opportunity to avoid a criminal conviction and the negative collateral consequences that frequently result from such a conviction, by admitting to the facts of the charges and accepting a disposition called a continuance without a finding.<sup>217</sup> This continuance, without a finding of guilty entered on the defendant’s record, exemplifies the rehabilitative theory of sentencing. The rationale for such a disposition is founded on the principle that eventual dismissal of the case is in the best interests of public justice.<sup>218</sup>

When this CWOFF disposition is sought, the judge must conduct a plea colloquy with the defendant, pursuant to Rule 12(c) of the Massachusetts Rules of Criminal Procedure. The plea colloquy, conducted once the defendant submits a signed plea tender form, insures that the defendant understands, and knowingly waives, all of his trial rights. In this manner, the procedure resembles a guilty plea, however, unlike a guilty plea, it does not result in a criminal conviction. The defendant’s probation record (formally referred to as the “CORI”- criminal offender record information) will

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<sup>215</sup> MASS. GEN. LAWS ch. 277, § 70C is not applicable to the following offenses: c.90, §§ 22F, 24, 24D, 24G, 24L and 24N; c. 90B, §§ 8, 8A, and 8B; c. 119; c. 119A; c. 209; c. 209A; c. 265, c. 268, §§ 1, 2, 3, 6, 6A, 6B, 8B, 13, 13A, 13B, 13C, 14, 14B, 15, 15A, 16, 17, 18, 19, 20, 23, 28, 31, and 36; c. 268A; c. 269, §§ 10, 10A, 10C, 10D, 10E, 11B, 11C, 11E, 12, 12A, 12B, 12D, and 12E; c. 272, §§ 1, 2, 3, 4, 4A, 4B, 6, 7, 8, 12, 13, 16, 28, 29A and 29B.

<sup>216</sup> MASS. GEN. LAWS ch. 119, § 58.

<sup>217</sup> The continuance without a finding (CWOFF) disposition derives authority from Mass. Gen. Laws ch. 278, § 18. The CWOFF disposition is allowed, following a tender of plea of guilty with a “request for a specific disposition...including, unless otherwise prohibited by law, a dispositional request that a guilty finding not be entered, but rather the case be continued without a finding to a specific date thereupon to be dismissed, such continuance conditioned upon compliance with specific terms and conditions.”

<sup>218</sup> See *Commonwealth v. Brandano*, 359 Mass. 332 (1971). See also *Commonwealth v. Rotondo* 434 Mass. 211 (2001); *Commonwealth v. Sebastian S.*, 444 Mass. 306 (2005); *Commonwealth v. Pyles*, 423 Mass. 717, 722 (1996); *Commonwealth v. Powell*, 453 Mass. 320, 327 (2009)

show that the case was continued without a finding for a period of time and dismissed, if there are no further contacts with the criminal justice system. Despite the fact that a guilty finding is not recorded, the CWOFF is considered a final adjudication.<sup>219</sup> When the CWOFF is imposed, the court has the additional option of imposing an alternative sentence, referred to as the “*Duquette*” alternative.<sup>220</sup> The alternative sentence is enumerated on a court form that the defendant assents to and signs. Should the defendant fail to comply with any conditions of the CWOFF, the court, after a hearing, may impose the alternative sentence. (This process is akin to a probation revocation hearing.<sup>221</sup>)

Some of the conditions accompanying a CWOFF disposition may include the payment of court costs,<sup>222</sup> restitution to the victim,<sup>223</sup> participation in drug or alcohol rehabilitation, psychiatric counseling, completion of a batterer’s program, completion of community service hours, compliance with specific ‘stay away’ orders, and regular reporting to the probation department.<sup>224</sup> As noted earlier, a subsequent showing of the defendant’s failure to comply with CWOFF conditions may result in the imposition of the alternative sentence.

Additionally, a CWOFF disposition allows the court to collect certain court-related fees from the defendant. Such fees may include: a victim-witness fee (\$50 for a misdemeanor offense, \$90 for a felony offense),<sup>225</sup> an appointed counsel fee;<sup>226</sup> a drug analysis fee (in the case of controlled substance offense);<sup>227</sup> a head injury fee (motor vehicle accident cases)<sup>228</sup>; and a probation supervision fee.<sup>229</sup> The money collected from these fees is paid into statewide funds which compensate victims of criminal offenses, help finance the court-appointed counsel system, offset costs of drug

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<sup>219</sup> See *Commonwealth v. Duquette*, 386 Mass. 834 (1982). The Supreme Judicial Court has not, subsequent to the elimination of trial de novo, changed its position with respect to CWOFF being a final adjudication. *Commonwealth v. Manning*, 75 Mass.App.Ct. 829, 833 (2009). (statute allowing a defendant to tender a plea of guilty with request for specific “disposition” does not entitle defendant to request that continuance without a finding be imposed on a different criminal charge, such as a lesser included offense, over objection of Commonwealth);

<sup>220</sup> *Commonwealth v. Duquette*, 386 Mass. 834 (1982).

<sup>221</sup> See Mass. Dist. Ct. R. for Probation Violation Proc. 9.

<sup>222</sup> Court costs comprise “the reasonable and actual expenses of the prosecution.” MASS. GEN. LAWS ch. 280, § 6.

<sup>223</sup> Restitution is defined by MASS. GEN. LAWS ch. 258B, § 1 as “money or services which a court orders a defendant to pay or render to a victim as part of the disposition.” Restitution may be required to reimburse the victim for lost earnings, for out of pocket expenses, for replacement costs, and for insurance deductibles. In cases involving multiple defendants, the court may order each defendant jointly and severally liable for restitution. The defendant is entitled to a separate hearing to determine the amount of victim restitution ordered. *Commonwealth v. Nawn*, 394 Mass. 1 (1985). *Commonwealth v. McIntyre*, 436 Mass. 829, 834 (2002) (“[R]estitution must bear a causal connection to the defendant’s crime.”).

<sup>224</sup> This is not an exhaustive list. Counsel and the court may present other conditions as may be appropriate under the facts of the case and the circumstances of the defendant.

<sup>225</sup> MASS. GEN. LAWS ch. 258B, § 8 (Victim-witness statute).

<sup>226</sup> MASS. GEN. LAWS ch. 211D § 2A.

<sup>227</sup> MASS. GEN. LAWS ch. 280, §§ 6B, 6C.

<sup>228</sup> MASS. GEN. LAWS ch. 90, §§ 20, 24.

<sup>229</sup> MASS. GEN. LAWS ch. 276, § 87A.

laboratories, compensate brain-injured victims of crimes, and help defray the costs of probation supervision.<sup>230</sup>

The CWOFF is not an available disposition following a bench or jury trial,<sup>231</sup> and there are certain offenses which mandate a guilty finding and specifically prohibit the imposition of a CWOFF.<sup>232</sup>

A continuance without a finding is not without pitfalls, although it is almost always a desirable disposition for a defendant. The difficulty with this disposition arises at the conclusion of the CWOFF period when the expectation is a dismissal of the case. If the commonwealth objects to a dismissal, the defendant, and the court, must follow precepts established in *Commonwealth v. Brandano*<sup>233</sup> in order to avoid the constitutional issue of separation of powers (judicial vs. executive powers). If the dismissal is in dispute, the defendant may file a motion to dismiss, with supporting affidavit, which the commonwealth may contest with its own motion and affidavit.<sup>234</sup> After a hearing, if the judge concludes that the “interests of public justice”<sup>235</sup> warrant the dismissal, the judge must record the findings of fact and the reasons for the decision.<sup>236</sup> The commonwealth has the right to appeal the decision under Massachusetts General Laws chapter 278, section 28E.

*Brandano* has been limited in subsequent rulings that are careful to draw the distinction between a CWOFF and a pre-trial probation. *Commonwealth v. Sebastian*

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<sup>230</sup> The Massachusetts Budget is available at [www.mass.gov/bb](http://www.mass.gov/bb); see also Head Injury Fund, MASS. GEN. LAWS. ch. 10, § 59.

<sup>231</sup> *Commonwealth v. Gomes*, 419 Mass. 630, 632-633 (1995); *Commonwealth v. Norrell*, 423 Mass. 725, 728 (1996). However, a CWOFF is available in juvenile court after a jury trial finding of delinquency. See *Commonwealth v. Magnus M.*, 461 Mass. 459, 461-465 (2012) (a judge has discretion to continue a juvenile's case without a finding and place the juvenile on probation, notwithstanding a jury verdict of delinquency).

<sup>232</sup> *Sebastian S.*, 444 Mass. at 312 n.9, lists the mandatory offenses for which a CWOFF disposition is not available (some of which are not within the jurisdiction of the district court): MASS. GEN. LAWS ch. 6, § 178H (failure to register as sex offender); MASS. GEN. LAWS ch. 90, §§ 23 (operating vehicle after suspension or revocation of license), 24G (causing homicide by driving while under influence of liquor or drugs), 24L (causing serious bodily injury by driving while under influence of liquor or drugs); MASS. GEN. LAWS ch. 90B, §§ 8 (operating vessel while under influence of liquor or drugs), 8A (causing serious bodily injury by operating vessel while under influence of liquor or drugs), 8B (causing homicide by operating vessel while under influence of liquor or drugs); MASS. GEN. LAWS ch. 90C, § 3 (motor vehicle infractions); MASS. GEN. LAWS ch. 94C, § 32H (second and subsequent drug offenses); MASS. GEN. LAWS ch. 265, §§ 13B (indecent assault and battery on child under fourteen years), 18B (committing offense while using firearm), 22A (rape of child under sixteen years by force), 23 (rape of child), 43 (stalking); MASS. GEN. LAWS ch. 266, §§ 27A (concealing motor vehicles to defraud insurers), 28 (theft of motor vehicles); MASS. GEN. LAWS ch. 268, § 39 (false statements alleging G.L. theft of motor vehicle); MASS. GEN. LAWS ch. 269, §§ 10 (unlawful carrying of dangerous weapon), 10E (unlawful sale of quantity of firearms), 10F (illegal sale of large capacity weapons), 10G (multiple violations); MASS. GEN. LAWS ch. 272, §§ 4A (promoting child prostitution), 4B (deriving support from child prostitution), 6 (maintaining house of prostitution), 7 (deriving support from prostitution), 28 (matter harmful to minors), 29 (obscene matter), 29C (child pornography).

<sup>233</sup> 359 Mass. 332 (1971).

<sup>234</sup> *Id.* at 337.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

S.<sup>237</sup> upheld the validity of the CWOFF disposition, but made clear that its statutory underpinning, Massachusetts General Laws chapter 278, section 18, cannot be the basis for a pre-trial probation disposition. The Supreme Judicial Court held that a pre-trial probation is not a lawful disposition if it is pursuant to an admission to sufficient facts. *Commonwealth v. Powell* further qualified the use of CWOFF dispositions by requiring them to be used sparingly in cases pending before the Superior Court (which disposes of the most serious criminal matters), and in such cases, the judge's reasons should be fully explained.<sup>238</sup>

### § 39.6B. FILING AFTER A CONVICTION

A complaint may be filed after a finding or verdict of guilty is entered, “if the public justice does not require an immediate sentence.”<sup>239</sup> This disposition may be employed where the defendant has multiple complaints before the court and sentences are imposed on the major charges. The minor accompanying charges may be filed as a matter of expediency by the court,<sup>240</sup> or as part of a plea bargain.

This particular disposition may present future problems for a defendant who has acquiesced to the filing of a case after completing a plea colloquy, as described in a recent case, *Commonwealth v. Simmons*.<sup>241</sup> In this case, it appears the defendant had an expectation that the filed matters would never be revived. However, according to the *Simmons* decision “the [trial] court retains the ability, at any time, to remove the indictment from the file.”<sup>242</sup> The Supreme Judicial Court, following the *Simmons* decision, referred the matter to its Standing Advisory Committee on the Rules of Criminal Procedure. That committee has issued a proposed amendment to Rule 28 of the Massachusetts Rules of Criminal Procedure.<sup>243</sup>

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<sup>237</sup> 444 Mass. 306 (2005).

<sup>238</sup> *Commonwealth v. Powell*, 453 Mass. 320, 327 (2009).

<sup>239</sup> *Commonwealth v. Dowdican's Bail*, 115 Mass. 133, 136 (1874).

<sup>240</sup> For example, filing of the minor offenses will enable the clerk's office to avoid the *mittimus* paperwork required on the major complaints upon which the defendant has received incarceration sentences.

<sup>241</sup> *Commonwealth v. Simmons*, 448 Mass. 687 (2007).

<sup>242</sup> *Id.* at 695. The court noted that the common law practice of placing cases on file was a long-established one, acknowledged by the Massachusetts legislature. The defendant's consent to the filing of a case indicates his consent to any delay in sentencing, and thus is not a violation of the right to speedy sentencing. The case history in *Simmons* involved a defendant who pled guilty to thirteen indictments. He was sentenced on six of the charges to a concurrent 8-12 year prison sentence. The remaining indictments were placed on file with the defendant's consent. Five years later the defendant was rearrested for a new crime. The prosecution moved for sentencing on one of the previously-filed indictments and the sentencing judge, not the original judge, imposed an 18-20 year sentence on the previously-filed indictment. The *Simmons* court reversed and remanded the case for resentencing, explaining that the “discord between the two sentences (the original 8-12 year sentence vs. the new 18-20 year sentence) creates a substantial risk of a miscarriage of justice.” See Roger Michel, Comment, Criminal Law – Placing Criminal Convictions on File, 91 Mass. L. REV. 39 (2007).

<sup>243</sup> The proposed Rule 28(e) reads:

(e) Filing. The court may file a case after a guilty verdict or finding without imposing a sentence if the defendant and the Commonwealth both consent. With the consent of both parties, the judge may specify a time limit beyond which the case may

### § 39.6C. FINES

A fine is “a pecuniary criminal punishment or civil penalty payable to the public treasury.”<sup>244</sup> Unlike court costs, a fine is considered a sentence and can be imposed only upon conviction.<sup>245</sup> In Massachusetts, fines are authorized and limited by criminal statute.<sup>246</sup> Money collected as fines by the court is paid to the state, through the court clerk’s office, and not to any individual.<sup>247</sup>

The court may suspend payment of a fine for a set period of time if the defendant is indigent or unable to pay the entire amount at once.<sup>248</sup> Nonpayment of the fine within the prescribed time frame will result in the court conducting a hearing to determine whether the defendant should be jailed for the nonpayment.<sup>249</sup> The court must examine any good faith efforts made by the defendant to pay, and must look to alternatives to incarceration if the defendant’s failure to pay is not willful.<sup>250</sup> If the crime charged does not provide for a sentence of imprisonment, the defendant may not be jailed unless the court has already attempted alternative means to obtain payment.<sup>251</sup> If failure to pay is deemed willful by the court, the defendant can be imprisoned in the county jail or house of correction to “work off” the fine at the current statutory rate of

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not be removed from the file, and any events that may cause the case to be removed from the file. The defendant shall file a written consent with the court. Prior to accepting the defendant’s consent, the court shall inform the defendant on the record in open court: (i) that the defendant has the right to request sentencing on any or all filed case(s) at any time; (ii) that subject to any time limit imposed by the court, 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 prosecutor’s establishing by a preponderance 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 receive additional punishment. In sentencing the defendant after the removal of a case from the file, the court shall consider the over-all scheme of punishment employed by the original sentencing judge.

<sup>244</sup> BLACK’S LAW DICTIONARY 664.

<sup>245</sup> Mass. Gen. Laws ch. 279, § 1.

<sup>246</sup> Many statutes provide that punishment shall be “a fine or sentence of imprisonment or both.” If a statute does not provide for a fine as punishment, a fine may be imposed in accordance with “custom and usage.” MASS. GEN. LAWS ch. 279, § 5. Defense counsel is appointed for indigent defendants only in cases where the defendant faces the possibility of imprisonment. MASS. GEN. LAWS ch. 211D, § 2A.

<sup>247</sup> Mass. Gen. Laws ch.258, § 8.

<sup>248</sup> *Bearden v. Georgia*, 461 U.S. 660 (1983); *Tate v. Short*, 401 U.S. 395, 400 (1971).

<sup>249</sup> MASS. GEN. LAWS ch. 279, §§ 1, 1A.

<sup>250</sup> *Bearden*, 461 U.S. 660 (1983); *Commonwealth v. Gomes*, 407 Mass. 206 (1990); *Commonwealth v. Elder*, No. 04-P-1769, 2005 WL 3357960 (Mass. App. Ct. Dec. 9, 2005) (defendant’s failure to pay was indeed willful, and therefore the holding of *Bearden* did not apply).

<sup>251</sup> Mass. Gen. Laws ch. 279, § 10. *See also* Joseph R. Nolan & Laurie J. Sartorio, *Criminal Law* 130 n.7 (2001).

\$30 per day.<sup>252</sup> If the failure to pay is found to be not willful, the court has the authority to remit, or remove the obligation, to pay the fine.<sup>253</sup>

The imposition of a fine for any crime other than a juvenile offense or act of delinquency, or a minor motor vehicle offense,<sup>254</sup> carries with it an additional 25 percent surfine.<sup>255</sup> The surfine payment, along with that of the fine, may be suspended to a specific later date. Failure to pay the surfine incurs the same penalties as failure to pay a fine. Payment, usually in the form of cash, credit card, or a money order, is made to the court clerk's office.

### **§ 39.6D. PROBATION/SUSPENDED SENTENCE WITH PROBATION**

Probation has been defined as a “formal legal relationship between the defendant and the court through the probation office.”<sup>256</sup> This legal relationship is a period of court supervision under conditions which may be extended beyond the set time period.<sup>257</sup> The probationary status may also be revoked and sentence imposed for failure to comply with the conditions of probation, as set out in the probation contract. Accepting a sentence of “straight” probation requires a certain degree of confidence in the defendant's ability to comply with the conditions of probation since it exposes her to the maximum penalty for the offense if there is a subsequent violation of probation. Many defense lawyers prefer to request a specific suspended sentence of less than the maximum statutory penalty to accompany the probationary period. There are no statutory restrictions on the length of the probationary period.<sup>258</sup>

Although a sentence of probation may be imposed as the sole disposition in a criminal case,<sup>259</sup> where it is referred to as “straight probation,” it may also be imposed in conjunction with a suspended sentence.<sup>260</sup> A suspended sentence is a period of incarceration imposed by the court, with the understanding that the actual serving of the sentence will be suspended during the period of probation. Successful completion of

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<sup>252</sup> MASS. GEN. LAWS ch. 127, § 144.

<sup>253</sup> Commonwealth v. Pena, No. 99-P-1638, 2001 WL 695107 (Mass. App. Ct. June 20, 2001); Labor Relations Comm'n v. Chelsea Teachers' Union, 400 Mass. 120 (1987).

<sup>254</sup> A “minor motor vehicle offense” is defined as one not punishable by incarceration. MASS.GEN.LAWS, ch. 280, § 6A.

<sup>255</sup> *Id.*

<sup>256</sup> STANDARDS OF JUD. PRACTICE: SENTENCING AND OTHER DISPOSITIONS, Commentary to Standard 4:00 (Dist. Ct. Dep't of Trial Ct., Sept. 1984).

<sup>257</sup> The basis for an extension of the probation period is usually a failure to fulfill an imposed condition of the probation contract (e.g., failure to: perform community service; pay restitution to the victim; or pay imposed fines). *See* Commonwealth v. Sawicki, 369 Mass. 377, 380-83 (1975); Commonwealth v. Ward, 15 Mass. App. Ct. 388, 391 (1983); Commonwealth v. Aquino, 445 Mass. 446 (2005).

<sup>258</sup> St. 1986, c. 310, § 23, repealed the limitation of probation to six years for cases of desertion and non-support under former MASS. GEN. LAWS ch. 273, § 5. MASS. GEN. LAWS ch. 90, § 24D (driving under the influence) and MASS. GEN. LAWS ch. 90B, § 8 (operating a water vessel under the influence) specify that probation is “for not more than two years.”

<sup>259</sup> Mass. Gen. Laws ch.276, § 87.

<sup>260</sup> MASS. GEN. LAWS ch. 279, §1 reads, in part, “When a person convicted before a court is sentenced to imprisonment, the court may direct that the execution of the sentence, or any part thereof, be suspended and that he be placed on probation for such time and on such terms and conditions as it shall fix.”

probation means that the suspended sentence will not be imposed. Violation of probation may lead to the imposition of the suspended sentence. Absent a statutory bar,<sup>261</sup> the combination of a suspended sentence and probation is available in the district court as a disposition.<sup>262</sup>

When imposing a suspended sentence and probation, the court sets two distinct time periods. The first is the length of the suspended sentence itself which is the actual imprisonment to be imposed if probationary conditions are violated. That sentence may not exceed the maximum sentence of imprisonment under the relevant criminal statute. The second period is the length of time the defendant is subject to probation supervision. These two time periods do not have to be identical. A typical suspended sentence might be, for example, six months in the house of correction, suspended for two years, with the defendant under probation supervision for two years and subject to imprisonment for six months if she is found to have violated the terms of her probation.

Probation is accompanied by general, and sometimes special, written conditions of probation which must be agreed to by the defendant at the time of sentencing.<sup>263</sup> Conditions of probation are set by the sentencing judge and any ambiguity in the conditions must be construed in favor of the defendant.<sup>264</sup> Defense counsel should consult with the defendant, the probation office, and the court, to set probation conditions which the defendant can realistically meet.

A defendant placed on probation will be assessed a monthly probation supervision fee of \$60.<sup>265</sup> A court may determine that the defendant requires only an administrative probation supervision, which calls for an administrative probation supervision fee of only \$20 per month.<sup>266</sup> If the defendant is indigent, community service will be required in lieu of any probation supervision fee.<sup>267</sup>

Special terms of probation may depend on the nature of the case and the defendant's personal situation. These terms may include, for example, an order of restitution to the victim of the crime, participation in drug or alcohol rehabilitation or some other behavior modification program such as a batterers' treatment program,

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<sup>261</sup> The sentencing provisions for certain offenses specifically bar the suspension of sentences, for example, MASS. GEN. LAWS ch. 90, § 24(1)(a)(1) prohibits the suspension of a sentence imposed on a person convicted of a second offense operating under the influence.

<sup>262</sup> MASS. GEN. LAWS ch. 279, § 1: "The provisions of this section shall not permit the suspension of the execution of the sentence of a person convicted of a crime punishable by death or imprisonment for life."

<sup>263</sup> Typically, the standard district court probation contract terms are: obey all local, state or federal laws and court orders; report to the assigned probation officer at such time and place as required; notify probation immediately of a change of residence or employment; allow the probation officer to visit the residence; do not leave the Commonwealth without written permission of the probation department; and report to probation within 48 hours of release from any arrest or incarceration. See *Commonwealth v. Felt*, 71 Mass.App.Ct. 1111 (2008).

<sup>264</sup> *Commonwealth v. Lally*, 55 Mass. App. Ct. 601 (2002). *Contrast to Commonwealth v. Pearlstein*, 66 Mass.App.Ct. 1109 (2006) (sentencing judge's order leaving administrative duties, identification of a program, and monitoring of participation to the probation officer did not constitute ambiguity); *Commonwealth v. Goodwin*, 458 Mass. 11, (2010) (where a defendant has violated a condition of his probation, a judge's authority to modify or add conditions of probation is nearly unlimited should the judge decide not to imprison the defendant but to return him to probation).

<sup>265</sup> MASS. GEN. LAWS ch. 276, § 87A.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

psychiatric counseling, an order to stay away from a particular person or place, or performance of community service. Conditions can also include GPS monitoring.<sup>268</sup> A defendant may be ordered to report to one of the Office of Community Corrections centers for participation in a program based there.<sup>269</sup> Compliance with the conditions of probation will result in the termination of probation at the conclusion of the established time period, and the defendant will be discharged from court supervision.<sup>270</sup>

Non-compliance with probation conditions, however, will result in a surrender proceeding for violation of probation.<sup>271</sup> These proceedings are governed by the District Court Rules for Probation Violation Proceedings, adopted in 2000. The defendant is entitled to notice of surrender for a probation violation, the grounds for the surrender, appointment of counsel, if indigent, a preview of the evidence against him, and a hearing.<sup>272</sup> A defendant is also entitled to present witnesses on his behalf and to cross-examine the witnesses against him.<sup>273</sup> The most frequent causes for surrender are arrest or conviction on new charges, failure to attend a program or counseling, or simply failure to report as required to one's probation officer. A probation revocation finding cannot be based on unreliable hearsay.<sup>274</sup>

If the court finds that a defendant has violated probation conditions, the judge may either: (1) continue the period of probation;<sup>275</sup> (2) modify the conditions of probation;<sup>276</sup> (3) terminate the probation;<sup>277</sup> or (4) revoke the probation.<sup>278</sup> If the probation is revoked, the judge may impose a sentence of incarceration not to exceed the statutory maximum<sup>279</sup> or, in the case of a suspended sentence, not to exceed that suspended sentence.<sup>280</sup>

## § 39.7 CRIMINAL DISPOSITIONS ENTAILING INCARCERATION

### § 39.7A. WEEKEND SENTENCES

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<sup>268</sup> Commonwealth v. Goodwin, 458 Mass. 11 (2010) (request for GPS monitoring as additional probation condition for sex offender with no probation violation was properly denied).

<sup>269</sup> MASS. GEN. LAWS ch. 211F established the Office of Community Corrections which is under the supervision of the Commissioner of Probation's office.

<sup>270</sup> See also Commonwealth v. Cotter, 415 Mass. 183 (1993), where the defendant refused to accept the conditions of probation (forbidding him from engaging in illegal activity) and instead was sentenced to the house of correction.

<sup>271</sup> Violation of probation proceedings are governed by the Massachusetts District Court Rules for Probation Violation I (effective Jan. 3, 2000).

<sup>272</sup> *Id.* R. 3, 4, 5.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* R. 6(b); Commonwealth v. Emmanuel E., 52 Mass.App.Ct. 451 (2001); Commonwealth v. Ortiz, 58 Mass.App.Ct. 904 (2003); Commonwealth v. Bristol, 78 Mass.App.Ct. 1114 (2010).

<sup>275</sup> Mass. Dist. Ct. R. for Probation Violation Proc. 7(d)(i).

<sup>276</sup> *Id.* R. 7(d)(iii).

<sup>277</sup> *Id.* R. 7(d)(ii).

<sup>278</sup> *Id.* R. 7(d)(iv).

<sup>279</sup> *Id.* R. 7(f).

<sup>280</sup> *Id.* R. 7(e).

Pursuant to G.L. c. 279, § 6A, the court may order a sentence of incarceration to be served in whole or in part on weekends “or such other periodic interval” as the court deems appropriate, provided: (1) the conviction is the defendant's first offense or an OUI conviction;<sup>281</sup> (2) incarceration is in a jail or house of correction; and (3) the sentence imposed does not exceed one year. The usual time period, noted in the statute itself, runs from 6:00 P.M. on Friday to 7:00 A.M. on the following Monday, and the defendant is credited with serving four full days of his sentence for each Friday through Monday period that he is incarcerated..<sup>282</sup>

This disposition, technically known as “a special sentence of imprisonment,” is extremely advantageous to certain defendants. It is particularly suitable to a first-time offender who has steady employment and a family relying upon her income. There may be other extenuating circumstances in a defendant’s background which persuade the court to consider and balance societal interests with those of incarceration

Some defendants may prefer to serve the entire sentence at once, especially since there is enormous pressure put on “weekend” defendants by other inmates to smuggle drugs and other contraband into the prison. This fact leads to humiliating body cavity searches of the defendant on every weekend entry to the prison facility. The statute permits a defendant to petition the sentencing judge at any time for a modification that results in the balance of the sentence being served consecutively rather than on weekends.<sup>283</sup>

A special sentence of incarceration must be rescinded and changed to a regular sentence of imprisonment if the defendant is convicted of a crime while serving the special sentence.<sup>284</sup> Although not explicit, the statute's use of the phrase “subsequent crime” would appear to apply only to an offense committed after the defendant began serving the special sentence.

### **§ 39.7B. SPLIT SENTENCES**

“Split sentencing” is the imposition of a term of incarceration that includes a portion to serve, and a balance to be suspended, in conjunction with a probationary period.<sup>285</sup> This type of sentence allows the district court to give the defendant a “taste” of incarceration in the hopes that he will be motivated to do well under probation supervision and thus avoid further incarceration.<sup>286</sup> A subsequent violation of

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<sup>281</sup> The one exception to the provision that requires the crime to be a first offense applies to the charge of operating under the influence of alcohol. The court in this instance may sentence the defendant to serve all or part of a committed sentence on weekends provided that the defendant's criminal record does not include a prior OUI conviction or a prior assignment to an alcohol education program within the 10 years preceding the date of the new offense. G.L. c. 90, § 24(1)(a)(3). It should also be noted that the authorizing statute concerning OUI sentences specifically refers to the defendant's incarceration ‘on designated . . . evenings’ as well as on weekends and holidays. *Id.*

<sup>282</sup> If Monday falls on a holiday, the defendant is not released until 7:00 A.M. Tuesday. G.L. C. 279, § 6A.

<sup>283</sup> G.L. c. 279, § 6A. The Department of Correction and the superintendent of the prison may also petition the court to rescind the original order.

<sup>284</sup> G.L. c. 279, § 6A.

<sup>285</sup> MASS. GEN. LAWS ch. 279, § 1.

<sup>286</sup> An example of a split sentence would be one year house of correction, 30 days to serve, balance suspended for eighteen months of probation supervision. Note that the period of

probation, however, can result in commitment for the portion of the sentence that was suspended.<sup>287</sup>

The split sentence may not be imposed for certain offenses having statutory mandatory minimum sentences,<sup>288</sup> nor is it available to a defendant previously convicted of a felony or any offense involving being armed with a dangerous weapon.<sup>289</sup> On a house of correction sentence, which is expressed as a specific term of months or years, parole eligibility occurs after one-half of the sentence has been served. When the defendant receives a split sentence, the parole eligibility date is based solely on the incarcerated portion of the disposition.<sup>290</sup> For example, if the defendant receives a sentence of one year in the house of correction, six months to be served and the balance suspended, he is eligible for parole after three months. His case must be reviewed by the parole board, however, and it is certainly possible that parole will be denied and he will have to serve the full six months before he is released. The “Truth in Sentencing” statute, enacted in 1994, provides in part that “[s]entences of imprisonment in the state prison shall not be suspended in whole or in part.” [G.L. c. 127, § 133](#), inserted by St.1993, c. 432, § 11. This language “eliminated suspended and so-called split State prison sentences.”<sup>291</sup>

### § 39.7C. CONCURRENT SENTENCING

“Concurrent sentencing” is the imposition of two or more sentences of incarceration to be served simultaneously.<sup>292</sup> A sentence imposed by a district court can be served concurrently with an already existing state prison sentence.<sup>293</sup> Defense counsel should know that any sentence imposed after a defendant has begun serving a first committed sentence will not be concurrent retroactively unless the court so specifies. The period of concurrency begins on the date the second sentence was imposed, unless the court specifically orders that a new sentence not take effect until after the sentence being served is completed.<sup>294</sup> A district court may impose the second

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probation may exceed the term of the imposed sentence. *King v. Commonwealth*, 246 Mass. 57, 60 (1923).

<sup>287</sup> MASS. GEN. LAWS ch. 279, § 3. *See also Commonwealth v. Holmgren*, 421 Mass. 224, 228 (1995).

<sup>288</sup> *See, e.g., MASS. GEN. LAWS ch. 90, § 24(1)(a)(1)* (second and subsequent convictions for operating under the influence). There are mandatory minimums in this statute which must be served, but then the remainder of the sentence may be suspended. For a second OUI offense, the defendant must be imprisoned for at least 30 days; for a third offense, at least 150 days; for a fourth offense, at least 12 months; for a fifth (or more) offense, at least 24 months.

<sup>289</sup> MASS. GEN. LAWS ch. 279, § 1A.

<sup>290</sup> *See infra* § 40.9.

<sup>291</sup> *Commonwealth v. Russo*, 421 Mass. 317, 319 (1995).

<sup>292</sup> MASS. GEN. LAWS ch. 279, § 8.

<sup>293</sup> *Commonwealth v. Parzyck*, 41 Mass.App.Ct. 195 (1996).

<sup>294</sup> *Chalifoux v. Comm’r of Corr.*, 375 Mass. 424, 427-29 (1978).

sentence “nunc pro tunc,”<sup>295</sup> making the second sentence retroactively concurrent with a sentence already being served.<sup>296</sup>

#### § 39.7D. CONSECUTIVE SENTENCING

“Consecutive” or “from and after” sentencing is a sentence of incarceration which is to be served after a prior sentence of incarceration is completed.<sup>297</sup> The sentence ordered “to take effect from and after the expiration of a sentence then being served” goes into effect when the prior sentence or sentences have ended.<sup>298</sup> The order of sentences on the defendant’s mittimus<sup>299</sup> determines the order in which the sentences are to be served. A consecutive sentence will only be “from and after” the sentence or sentences specifically identified on the mittimus. A presumption exists that a sentence will be concurrent, however, with any other sentences that a defendant might be serving at the time of sentence imposition.<sup>300</sup> A consecutive sentence is mandated when the defendant commits a crime while released on personal recognizance for a prior offense.<sup>301</sup>

#### § 39.7E. FORTHWITH SENTENCES

An order imposing a sentence to the state prison “forthwith” eliminates any remaining portion of a sentence to a house of correction or to MCI-Concord on which the defendant is currently incarcerated.<sup>302</sup> If a judge orders a sentence to take effect forthwith notwithstanding a former sentence, the sentence then being served in the house of correction is terminated and the prisoner is ‘discharged at the expiration of his [State prison] sentence.’<sup>303</sup> Judges may take prior unrelated charges into account when deciding a forthwith sentence.<sup>304</sup>

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<sup>295</sup> “Nunc pro tunc,” translated means “now for then.” BLACK’S LAW DICTIONARY 1100.

<sup>296</sup> See *Delisle v. Commonwealth*, 416 Mass. 359 (1993); *Commonwealth v. Fitch*, 62 Mass.App.Ct. 1122 (2005)..

<sup>297</sup> MASS. GEN. LAWS ch. 279, § 8A.

<sup>298</sup> STANDARDS OF JUD. PRACTICE: SENTENCING AND OTHER DISPOSITIONS, Standard 7:04, “From and After” Sentencing (District Court Administrative Office, 1984).

<sup>299</sup> The warrant for the commitment of a defendant sentenced by the court is called a “mittimus.” It is the official record of the defendant’s confinement order. See MASS. GEN. LAWS ch. 279, § 37, which states that the mittimus should contain: (1) the statutory name of the crime of which the defendant was convicted; (2) a citation of the statute under which the complaint was drawn; (3) the duration of the sentence of incarceration; and (4) the place of confinement.

<sup>300</sup> *Henschel v. Comm’r of Corr.* 368 Mass. 130 (1975); *Baranow v. Comm’r of Corr.*, 1 Mass.App.Ct. 831 (1975). Contrast *Babcock v. Pepe*, 767 F.Supp.2d 234, D.Mass (2011).

<sup>301</sup> MASS. GEN. LAWS ch. 279, § 8B reads, “If a defendant on release subject to the provisions of section fifty-eight of chapter two hundred and seventy-six, commits a crime, the sentence imposed for such a crime shall run consecutively to the earlier sentence for the crime for which he was on release.”

<sup>302</sup> G.L. c. 279, §§ 27–28.

<sup>303</sup> *Dale v. Commissioner of Correction*, 17 Mass.App.Ct. 247, 249 (1983).

<sup>304</sup> *Commonwealth v. Kopyscinski*, 68 Mass.App.Ct. 1115 (2007) (Because the judge explicitly took into consideration the defendant's sentence on the prior unrelated charge in

Defense counsel would be well advised to contact a member of the parole board's legal staff to determine the precise impact of a concurrent, consecutive, or forthwith sentence on the defendant's parole eligibility. Although a misapprehension of the parole consequences of a sentence is not an adequate ground to vacate a guilty plea,<sup>305</sup> a defendant has the right to expect that his counsel will seek the best available opinion on the consequences of an additional sentence to be served, particularly if it is pursuant to a plea negotiation.

### § 39.7F. CONDITIONAL SENTENCING

A “conditional sentence”<sup>306</sup> is an imposition of a fine in conjunction with a term of imprisonment that is to be served only if the fine is not paid within a specified period of time. The conditional sentence is imposed after the court makes a finding that the defendant is capable of paying the fine. Conditional sentencing is deemed not to involve a suspension of a sentence of imprisonment or probation during the period allowed for the payment of the fine.<sup>307</sup> It differs from the imposition of a straight fine, which, if not paid, leaves open the possibility of a hearing regarding the failure to pay and subsequent incarceration until the fine is paid. The conditional sentence is rarely used.

### § 39.7G. MANDATORY SENTENCING

A “mandatory sentence” is a sentence of incarceration which must be imposed if the defendant is found guilty of the crime charged.<sup>308</sup> A mandatory sentencing statute specifically prohibits the imposition of a suspended sentence, a filing of the case, or a continuance without a finding.<sup>309</sup> The court has limited discretion in this sentencing scenario as it must impose at least the minimum mandatory sentence set forth in the statute. In superior court, a defendant who is sentenced to life imprisonment for first-degree murder is not eligible for parole<sup>310</sup> unless the sentence is commuted by the governor and executive council.<sup>312</sup> Some drug offenders serving a mandatory minimum sentence are eligible for parole after serving one-half of the maximum term of the sentence if the sentence is to the house of correction, with certain conditions.<sup>313</sup>

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ordering a “forthwith” sentence for the instant case, the defendant not entitled to a second credit for the 185 days he was incarcerated awaiting trial on the prior charge).

<sup>305</sup> Commonwealth v. Santiago, 394 Mass. 25, 28–30 (1985).

<sup>306</sup> MASS. GEN. LAWS ch. 279, § 10.

<sup>307</sup> STANDARDS OF JUD. PRACTICE: SENTENCING AND OTHER DISPOSITIONS, Commentary to Standard 7:09, Conditional Sentencing, (District Court Administrative Office, 1984).

<sup>308</sup> STANDARDS OF JUD. PRACTICE: SENTENCING AND OTHER DISPOSITIONS, Standard 7:10, Mandatory Sentencing (District Court Administrative Office, 1984).

<sup>309</sup> It is important to check the precise limitations on sentencing imposed by the particular statute under which the defendant is charged.

<sup>310</sup> Commonwealth v. Forde, 392 Mass. 453, 458–59 (1984); G.L. c. 279, § 1.

<sup>312</sup> G.L. c. 265, § 2; Commonwealth v. Therrien, 359 Mass. 500 (1971).

<sup>313</sup> St.2010, c.256, s.67-72. This rule does not apply in aggravating circumstances where the defendant used violence or directed the activities of another who committed a drug felony.

In all other situations, the defendant is eligible for parole in approximately fifteen years.<sup>314</sup>

Mandatory sentencing provisions are found in the statutes setting the penalties for firearm offenses;<sup>315</sup> motor vehicle fraud;<sup>316</sup> motor vehicle theft;<sup>317</sup> operating under the influence of intoxicating liquor or drugs and related operation offenses;<sup>318</sup> and a variety of other offenses which may or may not be within the final jurisdiction of the district court.<sup>319</sup> Other statutes call for mandatory sentencing if the defendant is a recidivist, or repeat offender. Second and subsequent penalties for violation of drug laws,<sup>320</sup> or for driving under the influence of intoxicating liquor or drugs,<sup>321</sup> are commonly encountered examples of enhanced punishment statutes with mandatory sentences. In order for this particular penalty provision to be imposed as an “enhanced” sentence, the prosecution must allege in the complaint that the defendant is a second or subsequent offender, and then prove this aspect of the complaint at trial. The prosecutor can meet this burden of proof by providing the court with a certified copy of the defendant’s previous court conviction, along with a certified copy of appearance of counsel or the defendant’s waiver of counsel for that prior offense.<sup>322</sup>

### § 39.7H. CUSTOM AND USAGE SENTENCING

When a criminal statute fails to provide a penalty, a sentence which conforms to the “common usage and practice in the Commonwealth”<sup>323</sup> may be imposed. For example, the common law misdemeanor offense of participating in an affray<sup>324</sup> is punishable by a fine or sentence for a similar crime such as disorderly conduct or simple assault. These are crimes that are similar and that contain statutory penalties.

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<sup>314</sup> See *infra* § 40.9.

<sup>315</sup> MASS. GEN. LAWS ch. 269, §§ 10 (unlawful carrying of dangerous weapon), 10E (unlawful sale of quantity of firearms), 10F (illegal sale of large capacity weapons).

<sup>316</sup> MASS. GEN. LAWS ch. 266, § 27A.

<sup>317</sup> MASS. GEN. LAWS ch. 266, § 28(a).

<sup>318</sup> MASS. GEN. LAWS ch. 90, §§ 24 (operating vehicle while under influence of liquor or drugs), 24G (causing homicide by driving while under influence of liquor or drugs), 24L (causing serious bodily injury by driving while under influence of liquor or drugs); MASS. GEN. LAWS ch. 90B, §§ 8 (operating vessel while under influence of liquor or drugs), 8A (causing serious bodily injury by operating vessel while under influence of liquor or drugs), 8B (causing homicide by operating vessel while under influence of liquor or drugs).

<sup>319</sup> Other mandatory minimum statutes for district court: See MASS. GEN. LAWS ch. 6, § 178H (failure to register as sex offender); MASS. GEN. LAWS ch. 90, § 23 (operating vehicle after suspension or revocation of license), MASS. GEN. LAWS ch. 94C, §§ 32-32D (distribution or possession with intent to distribute), 32J (drug violation near a school or park); MASS. GEN. LAWS ch. 265, §§ 13B (indecent assault and battery on child under fourteen years), 43(b) (stalking in violation of a restraining order); MASS. GEN. LAWS ch. 268, § 39 (false statements alleging theft of motor vehicle); MASS. GEN. LAWS ch. 272, §§ 4A (promoting child prostitution), 6 (maintaining house of prostitution), 7 (deriving support from prostitution).

<sup>320</sup> MASS. GEN. LAWS ch. 94C, §§ 32 *et seq.*

<sup>321</sup> MASS. GEN. LAWS ch. 90, § 24.

<sup>322</sup> See *Commonwealth v. Maloney*, 447 Mass. 577 (2006) (acceptable documentation of second or subsequent offense).

<sup>323</sup> MASS. GEN. LAWS ch. 279, § 5.

<sup>324</sup> MASS. GEN. LAWS ch. 277, § 39.

## § 39.7I. PENAL INSTITUTION OPTIONS

### 1. Generally

There are four possible institutions to which defendants may be sentenced after conviction: the State Prison (MCI-Walpole/Cedar Junction),<sup>325</sup> the House of Correction (county facility), MCI-Framingham (for women), and the Department of Youth Services (for juveniles and certain youthful offenders). Women serve state prison time at MCI-Framingham. They may be held there on bail as well. Females serve house of correction sentences in county facilities, unless there are no female facilities in the sentencing district court's county. If there are no county female facilities, then the female serves her time at MCI-Framingham.

Although there are numerous other penal institutions in the Commonwealth, such as MCI-Norfolk, MCI-Gardner, MCI-Old Colony, SECC, NECC, and MCI-Bridgewater (the state hospital), defendants are not sentenced directly to these facilities. The Department of Correction has nearly complete discretion to move an inmate from one institution to another within the "state" system,<sup>326</sup> as does the Department of Youth Services within the juvenile facilities. However, persons sent to a county house of correction generally serve their entire sentence at that institution.

There are two considerations that control the institution options for the court. The first is the statute that the defendant has violated, which almost always specifies the institutions to which the defendant may be sentenced.<sup>327</sup> In many instances, the statute authorizes a sentence both to the state prison and to a house of correction. The second consideration relates to the limited jurisdiction of the district court. Unlike the superior court, in which a defendant can be sentenced to a term in any institution authorized by the statute, a district court judge cannot sentence to the state prison under any circumstance.<sup>328</sup> The judge's only option is a term in a house of correction.

### 2. State Prison

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<sup>325</sup> To placate residents of the town of Walpole from the stigma of having the Commonwealth's maximum security prison in their town, the prison's "location" was changed to MCI-Cedar Junction, although the name has yet to replace Walpole in the vernacular. *See* G.L. c. 125, § 1.

<sup>326</sup> The major restriction is that defendants who have been sentenced in the district court to a house of correction may not be transferred to the state prison at Walpole. *Brown v. Commissioner of Correction*, 394 Mass. 89 (1985).

<sup>327</sup> There are exceptions to this general rule. For example, although a statute only contains a reference to the state prison (i.e., Walpole), a court also may impose a sentence to a house of correction. *Commonwealth v. Lightfoot*, 391 Mass. 718, 722 (1984); *Commonwealth v. Graham*, 388 Mass. 115 (1983). In another instance, the penalty for conspiracy to violate the Controlled Substance Act is determined by the maximum punishment for the offense that was the object of the conspiracy. G.L. c. 94C, § 40. Finally, if no punishment is provided in a statute, the court shall impose a sentence that "conforms to the common usage and practice in the Commonwealth." G.L. c. 279, § 5.

<sup>328</sup> G.L. c. 218, § 27 (the district court "may not impose sentence to the state prison").

Only the superior court may sentence someone to the state prison because a prerequisite is that the defendant was indicted or waived indictment on the offense.<sup>329</sup> Sentences to the state prison must be indeterminate which means that there must be a minimum and a maximum to the sentence — such as six to ten years.<sup>330</sup> However, the Court has upheld sentences of nineteen and a half to twenty years and nine to ten years as comporting with the statute, even though because of statutory deductions the effect is to have the defendant serve the entire sentence before he actually reaches his parole eligibility date.<sup>331</sup>

### 3. MCI-Concord

The institution at Concord is known as the state reformatory in recognition of the fact that at one time it primarily held the younger and less violent adult offenders. Parole eligibility was dramatically earlier than on a state prison sentence. The extreme overcrowding of prisons in Massachusetts has eliminated the distinctive nature of MCI-Concord. In addition to serving currently as a regular prison facility, it is the facility to which inmates are sent for “classification” on entry into the correctional system.

Pursuant to the “truth in sentencing” law, a sentence to MCI-Concord is unavailable for crimes committed after April 12, 1994.<sup>332</sup>

### 4. House of Correction

The maximum permissible sentence to a house of correction for each offense is two and one-half years,<sup>333</sup> although particular penalty provisions may be much less. The judge has the authority to order the defendant incarcerated in the house of correction of any county.<sup>334</sup> Generally, the defendant is eligible for parole on a “house” sentence after he has served one half of it.<sup>335</sup>

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<sup>329</sup> *Brown v. Commissioner of Correction*, 394 Mass. 89 (1985); *Jones v. Robbins*, 8 Gray 329 (1857).

<sup>330</sup> G.L. c. 279, § 24. *Cf. Commonwealth v. Marrone*, 387 Mass. 702 (1982) (provision in trafficking statute that mandated a 15-year term stricken because in violation of G.L. c. 279, § 24; penalty range of 5–15 years substituted); *Commonwealth v. Hines*, 449 Mass. 183 (2007).

<sup>331</sup> *Commonwealth v. Foley*, 402 Mass. 703, 706 (1988) (19.5–20 years); *Commonwealth v. Hogan*, 17 Mass. App. Ct. 186, 187–90 (1983) (9–10 years).

<sup>332</sup> Chapter 432 of the Acts of 1993, “An Act to Promote the Effective Management of the Criminal Justice System through Truth-In Sentencing,” established the Massachusetts Sentencing Commission and introduced the first phase of truth-in-sentencing reform in Massachusetts. The objective of the sentencing reform initiative was to establish a more truthful relationship between the sentence imposed and the time served by incarcerated offenders

<sup>333</sup> G.L. 279, § 23.

<sup>334</sup> G.L. c. 279, § 15. *County Comm'rs of Franklin v. County Comm'rs of Worcester*, 383 Mass. 323 (1981) (jail or house of correction must accept a prisoner regardless of county in which sentence was imposed). A defendant may be unwilling to plead guilty unless assured that he will serve his sentence in a specific institution. To persuade the court to go along, it may be helpful to check before hand with the desired institution to ensure that they have room and will cooperate. Also, counsel must ensure that the form mittimus is modified to specify the right county.

<sup>335</sup> However, he must serve the entire sentence if it is under 60 days in length. *See infra* § 40.9.

## 5. Framingham<sup>336</sup>

Women sentenced to state prison are incarcerated at MCI-Framingham.<sup>337</sup> Identical parole statutes apply to women and men, with the sentence expressed in terms of the years and institution but the actual incarceration at MCI-Framingham.<sup>338</sup> The prison houses both state and county offenders, as well as those awaiting sentencing.

### § 39.8 COURT COSTS AND FEES

#### § 39.8A. COURT COSTS

“Court costs” are defined as the “reasonable and actual expenses” related to the prosecution of a case. They may be assessed against a defendant as a condition of a dismissal or filing of a complaint or indictment, or as a term of a continuance without a finding or probation.<sup>339</sup> Costs may not be assessed in connection with any other disposition,<sup>340</sup> nor may they be imposed as a penalty or part penalty for a crime.<sup>341</sup> In addition, costs may not be assessed against a defendant who has been acquitted or against whom a charge has been dismissed for want of prosecution.<sup>342</sup> It is appropriate, however, for the court to impose costs on a defendant who receives a continuance on an on-going matter without having given the prosecutor adequate notice of his request.<sup>343</sup> The assessment of court costs against a defendant must follow the procedures set forth in *Commonwealth v. Gomes*.<sup>344</sup> Costs may only be assessed for actual court expenses, and not simply for “the waste of the court’s time.”<sup>345</sup> Finally, an indigent person may

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<sup>336</sup> Several counties have their own women’s facilities: Bristol County Sheriff’s Office Women’s Center at Dartmouth Community Corrections Center, Women in Transition facility in Essex County, Western Massachusetts Regional Women’s Correctional Center in Hampden County, South Middlesex Correctional Center in Middlesex County and South Bay House of Corrections in Suffolk County. As of 2005, five counties housed some or all of their inmates at MCI-Framingham. These are Essex County, Middlesex County, Norfolk County, Plymouth County, and Worcester County. As of 2005, 13 female pre-trial detainees were held at Hampshire County jail, 6 detainees were held at Franklin County jail, and 184 females were held in Hampden County of which 55 were pre-trial, 78 were sentenced in medium security, 26 were in the pre-release facility, 13 at the Western Mass. Correctional Alcohol Center, and 7 in the community on the day reporting program.

<sup>337</sup> G.L. c. 279, §§ 16–20.

<sup>338</sup> For example, a female defendant could be sentenced to “six to ten years at the state prison, said sentence to be served at MCI-Framingham.”

<sup>339</sup> G.L. c. 280, § 6.

<sup>340</sup> *Cf.* *Commonwealth v. Eaton*, 11 Mass. App. Ct. 732, 735 (1981) (“doubtful” whether basis exists for assessing costs when case continued without a finding, although court may do so as condition of dismissal).

<sup>341</sup> G.L. c. 280, § 6. *Compare* *Commonwealth v. Scagliotti*, 373 Mass. 626, 629 (1977) (\$500 in court costs constituted an improper penalty) *with* *Commonwealth v. Casserly*, 23 Mass. App. Ct. 947 (1986) (\$500 in court costs properly imposed as a term of probation).

<sup>342</sup> G.L. c. 278, § 14.

<sup>343</sup> Mass. R. Crim. P. 10.

<sup>344</sup> 407 Mass. 206 (1990).

not be incarcerated for her failure to pay appropriate court costs until other options are explored, such as community service.<sup>346</sup>

Before a judge may impose costs for a default by the defendant, such as for failure to pay a fine in timely fashion, there must be a finding that the default was willful.<sup>347</sup> In addition, the defendant has a right to be represented by counsel at the hearing if incarceration is a possibility.<sup>348</sup>

### **§ 39.8B. VICTIM/WITNESS FEE**

A conviction or a finding of sufficient facts will trigger the imposition of a victim/witness assessment.<sup>349</sup> According to the statute, the victim/witness assessment fee “shall be the defendant’s first obligation,”<sup>350</sup> meaning that this payment takes precedence over other court assessments, such as probation supervision fees, fines, and other assessments. In 2002, the victim/witness assessment fee was increased to \$90 for a felony and \$50 for a misdemeanor.<sup>351</sup> The victim/witness assessment may not be reduced or waived without the court making a written finding that the imposition of the assessment would cause severe financial hardship. If the convicted defendant is incarcerated within the commonwealth, the superintendent or sheriff of the correctional facility is directed to deduct from monies earned or received by the inmate in order to satisfy this particular assessment.<sup>352</sup>

### **§ 39.8C. APPOINTMENT OF COUNSEL FEE**

An indigent defendant to whom appointed counsel is assigned is required to pay a \$150 counsel fee, which may be waived upon the court’s determination that the defendant is unable to pay.<sup>353</sup>

### **§ 39.8D. PROBATION FEE**

Probation supervision fees were raised by statute in 2003.<sup>354</sup> Defendants placed on supervised probation must pay a monthly fee of \$60 plus a \$5 “victim

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<sup>345</sup> Commonwealth v. Gomes, 407 Mass. 206, 209–10 (1990). See also Leavitt v. McLean Hospital Corp., 28 Mass. App. Ct. 598 (1990) (Commonwealth not obligated to pay for involuntary commitment to private hospital, even if concomitant with court-ordered evaluation pursuant to G.L. c. 123, § 15(e)).

<sup>346</sup> Commonwealth v. Gomes, 407 Mass. 206, 212–14 (1990). A defendant who is jailed for the failure to pay court costs receives a credit of \$30 per day of incarceration. *Gomes, supra*, 407 Mass. at 214; G.L. c. 127, § 144; Commonwealth v. Baldassari, 61 Mass.App.Ct. 1102 (2004).

<sup>347</sup> Commonwealth v. Gomes, 407 Mass. 206, 210 (1990).

<sup>348</sup> Commonwealth v. Gomes, 407 Mass. 206, 211–12 (1990).

<sup>349</sup> MASS. GEN. LAWS ch. 258B, § 8.

<sup>350</sup> *Id.*

<sup>351</sup> St. 2002, c.184, §§ 125-126.

<sup>352</sup> *Id.*

<sup>353</sup> MASS. GEN. LAWS ch. 211D, § 2A.

<sup>354</sup> St. 2003, c.26, § 510.

services surcharge”<sup>355</sup> in addition to the victim-witness assessment fee.<sup>356</sup> Defendants placed on administrative supervised probation must pay a monthly fee of \$20 and a \$1 victim services surcharge.<sup>357</sup> These fees may be waived by the court, after hearing and in writing, if their imposition would constitute an undue hardship on the defendant or his family “due to limited income, employment status or any other factor.”<sup>358</sup> In lieu of payment of the probation supervision fee, the court may order the defendant to perform community work service, one day a month in lieu of the \$60 fee, and four hours a month in lieu of the \$20 fee.<sup>359</sup>

#### **§ 39.8E. DRUG OFFENSE FEE**

An adult defendant who is convicted of certain drug offenses must be assessed certain fees by the court.<sup>360</sup> She must pay between \$35 and \$100 for each misdemeanor and between \$150 and \$500 for each felony, with the total assessment not to exceed between \$150 and \$500 when there are multiple criminal offenses arising out of a single incident.<sup>361</sup> This fee, which underwrites the drug analysis laboratory of the Department of Public Health,<sup>362</sup> may be reduced or waived in the discretion of the court.<sup>363</sup>

#### **§ 39.8F. DOMESTIC BATTERER'S TREATMENT FEE**

Any person referred to a certified batterer's intervention program assessment fee, in addition to the cost of the program and any other fines and costs. This fee may be reduced or waived if the court finds that the defendant is indigent or the fee would cause the defendant or his dependents severe financial hardship.<sup>364</sup>

#### **§ 39.8G. DEFAULT REMOVAL FEE**

Courts will impose a \$50 fee for a defendant who returns to court to remove a previous court default.<sup>365</sup>

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<sup>355</sup> MASS. GEN. LAWS ch. 276, § 87A.

<sup>356</sup> MASS.GEN.LAWS ch. 258B, § 8.

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> G.L. c. 280, § 6B. This statute also applies to a defendant “against whom a finding of sufficient facts for a conviction is made.”

<sup>361</sup> G.L. c. 280, § 6B.

<sup>362</sup> G.L. c. 280, § 6C.

<sup>363</sup> This is the clear import of the last sentence of the first paragraph of G.L. c. 280, § 6B, although the sentence as written in unintelligible.

<sup>364</sup> G.L. c. 209A, § 10.

<sup>365</sup> Mass.R.Crim.P. 6(d); G.L. c. 280, § 6.

## § 39.8H. OUI-RELATED FEES

When a defendant is either convicted or a finding of sufficient facts is entered for an OUI-related offense, certain mandatory fees are assessed. They include a fee for placement in a driver alcohol education program,<sup>366</sup> an OUI victim assessment fee,<sup>367</sup> and a head injury assessment fee.<sup>368</sup>

## § 39.9 RESTITUTION

Restitution, which is defined as “money or services which a court orders a defendant to pay or render to a victim as part of the disposition,” has been held to be an appropriate consideration in criminal sentencing.<sup>369</sup> The proceeding to determine restitution may be held immediately following the trial, plea, or admission, although it may be continued to another date. The defendant is entitled to: (1) challenge the victim's claim through cross-examination of witnesses and presentation of evidence, including expert testimony; (2) court consideration of the defendant's financial ability to pay and how such payment shall be made; and (3) the burden being placed on the Commonwealth to prove by a preponderance of the evidence the amount of the victim's losses.<sup>370</sup> The amount often will be set by a probation officer after consultation with the prosecutor or victim, but disputes must be resolved by the judge.<sup>371</sup> If the amount of restitution is to be set at a later date, the defendant retains his right to appeal when the figure is established.<sup>372</sup>

Restitution applies only to the actual losses suffered by the victim and does not extend to traditional tort considerations of “pain and suffering.”<sup>373</sup> Moreover, it is not meant to reward or create an incentive for the alleged victim to agree to a dismissal of

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<sup>366</sup> MASS. GEN. LAWS ch. 90, § 24D.

<sup>367</sup> MASS. GEN. LAWS ch. 90, § 24(1)(a)(1).

<sup>368</sup> MASS. GEN. LAWS ch. 90, §§ 24(1)(a)(1), 24(2)(a).

<sup>369</sup> G.L. c. 258B, § 1; *Commonwealth v. Nawn*, 394 Mass. 1, 6 (1985).

<sup>370</sup> *Commonwealth v. Nawn*, 394 Mass. 1, 7–8 (1985). *See also infra* § 41.3F(4) (restitution and probation revocation). *See also Commonwealth v. Rescia*, 44 Mass. App. Ct. 909 (1998). Cross-examination during trial may not be a substitute for cross-examination at a post-trial restitution hearing. *Commonwealth v. Yeshulas*, 51 Mass. App. Ct. 486, 493 (2001); *Commonwealth v. Casanova*, 65 Mass.App.Ct. 750, 755 (2006) (Commonwealth also bears the burden of proving a causal connection between the defendant's action and the victim's losses or damage); *Commonwealth v. Desouza*, 73 Mass.App.Ct. 1113 (2009).

<sup>371</sup> *Commonwealth v. Nawn*, 394 Mass. 1, 6 (1985).

<sup>372</sup> *Roullett v. Quincy Div. of the Dist. Court Dep't*, 395 Mass. 1008 (1985).

<sup>373</sup> District Court Standards for Sentencing and Disposition § 9:04 (Sept. 1984). It is designed to reimburse the victim for any economic loss caused by the defendant's actions, and may include “such items as medical expenses, court-related travel expenses, property loss and damage, lost pay, or even lost paid vacation days required to be used to attend court proceedings.” *Commonwealth v. Rotonda*, 434 Mass. 211, 221 (2001). Determination of the restitution amount may be based upon a witness who has no stake in the amount, and the process used is acceptable as long as it is not fundamentally unfair. *Commonwealth v. Yeshulas*, 51 Mass. App. Ct. 486, 492-493 (2001)(firefighter estimated property loss).

the case.<sup>374</sup> A relationship between the crime and the victim's injury or loss must be demonstrated.<sup>375</sup>

Restitution must be ordered in dispositions involving motor vehicle theft and motor vehicle insurance fraud except in an "extraordinary case such as indigency," where the court shall make specific written findings concerning why the interests of the victim and justice would not be served by ordering restitution.<sup>376</sup> Finally, restitution of up to \$500 may be ordered to be paid by the parents of an unemancipated child who is under eighteen years of age for willful injury to persons or property,<sup>377</sup> or for damage to property of a merchant due to larceny, attempted larceny, or shoplifting.<sup>378</sup> 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; but, there is no requirement that strict evidentiary rules apply at restitution hearings.<sup>379</sup>

If the defendant receives a sentence that is suspended based on the condition that he pay restitution within a set period, his failure to do so may be a basis for a probation revocation. However, the defendant may raise the ability to pay restitution at that probation revocation hearing.<sup>380</sup> permits the judge to impose the sentence of incarceration

## § 39.10 RECIDIVIST SENTENCING STATUTES

There are various statutes in Massachusetts that have the effect of enhancing the punishment of a defendant convicted of certain crimes, usually because of the nature of the crime or the defendant's prior criminal record.

### § 39.10A. HABITUAL CRIMINAL

Perhaps the most threatening penalty statute for the repeat offender is G.L. c. 279, § 25, which governs the punishment imposed on "habitual criminals." This law applies to a defendant who has previously been convicted of two crimes and committed to prison on each for terms of not less than three years. The two prior convictions must have occurred in Massachusetts or another state; a prior Federal conviction does not count under this statute.<sup>381</sup> On conviction of a third felony, he may be designated an habitual criminal and shall be sentenced to the maximum punishment available for that

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<sup>374</sup> Commonwealth v. Rotonda, 434 Mass. 211, 221 (2001).

<sup>375</sup> Commonwealth v. McIntyre, 436 Mass. 820 (2002); Commonwealth v. Casanova, 65 Mass. App.Ct. 750 (2006).

<sup>376</sup> G.L. c. 276, § 92A.

<sup>377</sup> G.L. c. 231, § 85G.

<sup>378</sup> G.L. c. 231, § 85R½.

<sup>379</sup> Commonwealth v. Casanova, 65 Mass.App.Ct. 750, 755 (2006) (restitution 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, including hearsay).

<sup>380</sup> Commonwealth v. Chase, 70 Mass. App. Ct. 828 (2007).

<sup>381</sup> Commonwealth v. Smith, 58 Mass.App.Ct. 166, 172 (2003) ("Like offense," in state statute allowing punishment for fourth-offense unlawful possession of firearm, based on a new offense of unlawful possession of firearm after commission of three like offenses, may include federal convictions for unlawful possession of firearm.)

felony.<sup>382</sup> Although the maximum term is imposed, the defendant remains eligible for parole after serving one-half of the sentence.<sup>383</sup>

It is important to note that the defendant need not actually have been incarcerated for a full three years on each of the two previous offenses, as long as the executed sentences were for at least three years.<sup>384</sup> A sentence to Concord for three years or more qualifies as a predicate offense even though a defendant is eligible for parole on a Concord sentence after serving as little as six months of it.<sup>385</sup> The issue has not been resolved as to whether two convictions arising out of unrelated incidents and disposed of on the same date with identical concurrent sentences can serve as the statutory prerequisite of two prior commitments.<sup>386</sup>

To be sentenced as an habitual offender, the defendant must be charged in a separate indictment that alleges that fact.<sup>387</sup> However, the indictment itself need not specify the two prior convictions, as the defendant may be apprised of them through a bill of particulars.<sup>388</sup> He receives a trial on this charge following his conviction of the third felony, and this second proceeding may be conducted before the same jury or judge who found the defendant guilty of the third felony.<sup>389</sup> The Commonwealth must prove beyond a reasonable doubt that the defendant has two prior convictions on which he received committed sentences of not less than three years each.<sup>390</sup>

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<sup>382</sup> *See, e.g.,* Commonwealth v. Hall, 397 Mass. 466 (1986) (defendant who had previously received sentences to Walpole of three to five years and five to seven years received a 20-year sentence to Walpole after a third conviction for B&E). This penalty does not constitute cruel or unusual punishment, nor does its mandatory nature violate the separation of powers. Commonwealth v. Tuitt, 393 Mass. 801, 813–14 (1985); Commonwealth v. Murphy, 63 Mass.App.Ct. 753, 756-757 (2005) (that the sheriff's record did not reflect that the defendant was being held pursuant to two separate mittimus issued by two different counties was not dispositive of his entitlement to jail credit in either county): Commonwealth v. Perry, 65 Mass.App.Ct. 624, 631–633 (2006)

<sup>383</sup> G.L. c. 127, § 133B.

<sup>384</sup> Commonwealth v. Tuitt, 393 Mass. 801, 812 n.11 (1985). *See also* Commonwealth v. Youngworth, 48 Mass. App. Ct. 249 (1999) (quantum of evidence required for return of an indictment is less than that needed for conviction at a trial).

<sup>385</sup> *Cf.* Commonwealth v. Allen, 22 Mass. App. Ct. 413, 425 (1986).

<sup>386</sup> Commonwealth v. Hall, 397 Mass. 466, 469 n.4 (1986). *But see* S.C. 19 Mass. App. Ct. 1004 (1985) (the Appeals Court had concluded that two concurrent sentences on unrelated charges would constitute two prior commitments under the statute; the S.J.C. found it unnecessary to reach the issue). *Compare* Deal v. United States, 508 U.S. 129 (1993) (convictions at single trial of six unrelated robberies on different dates permitted sentencing for second through sixth convictions as “second or subsequent convictions” for purpose of federal recidivist statute).

<sup>387</sup> *See, e.g.,* Commonwealth v. Hall, 397 Mass. 466 (1986) (separate indictment).

<sup>388</sup> Commonwealth v. Hill, 20 Mass. App. Ct. 130, 133 (1985).

<sup>389</sup> *See, e.g.,* Commonwealth v. Thompson, 427 Mass. 729, 736–738 (1998); Commonwealth v. Hall, 397 Mass. 466 (1986).

<sup>390</sup> Evidence may include certified copies of the prior convictions and testimony that the defendant was the person involved in those proceedings. *See, e.g.,* Commonwealth v. Allen, 22 Mass. App. Ct. 413, 424 (1986) (a police officer testified that he knew the defendant from the prior case). It is unnecessary to introduce the mittimus to prove that the sentences were executed (*Allen, supra*), and the fact finder may infer a committed sentence from the absence of a notation on the certified copies that the sentence was suspended or that the defendant was placed on probation. Commonwealth v. Hall, 20 Mass. App. Ct. 130 (1985).

### § 39.10B. COMMON THIEF OR COMMON RECEIVER OF STOLEN GOODS

Two statutes provide an enhanced punishment for a defendant who is convicted of three distinct instances of larceny or receiving stolen property at the same sitting of the court.<sup>391</sup> The first, G.L. c. 266, § 40, provides that a defendant convicted of three distinct larcenies “shall be adjudged a common and notorious thief,” and shall be imprisoned for not more than twenty years in the state prison or in the house of correction for two and one half years. The second statute, G.L. c. 266, § 62, mandates that a defendant who is convicted of three instances of receiving stolen property “shall be adjudged a common receiver of stolen or embezzled goods” and shall be imprisoned for not more than ten years in the state prison. These penalties are in contrast to the five-year maximum for a single larceny or receipt of stolen goods where the values are in excess of \$250.<sup>392</sup>

An indictment need not provide notice of this penalty provision to the defendant.<sup>393</sup> In addition, he need not be informed of it prior to beginning a jury or jury-waived trial, although he must be alerted to it during an offer to plead guilty to the underlying crimes.<sup>394</sup>

Unlike a second offense allegation or prosecution as an habitual criminal, the Commonwealth does not have to prove any elements beyond the three district crimes at the sitting of the court.<sup>395</sup> At sentencing, the defendant receives a single consolidated sentence for the three offenses.<sup>396</sup>

### § 39.10C. SEXUALLY DANGEROUS PERSON

Pursuant to G.L. c. 123A, sec. 1, a person is designated a Sexually Dangerous Person if he or she has been convicted of a sexual offense and suffers from a mental abnormality or personality disorder which makes the person likely to engage in sexual

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<sup>391</sup> It is also possible under both statutes for the defendant to receive the enhanced penalty when he has been convicted of a prior larceny or receiving, respectively, but the more common use of these penalties is for three distinct crimes for which there are convictions at the same proceeding. A prior conviction is not required in the latter instance, *Commonwealth v. McGann*, 20 Mass. App. Ct. 59, 68 (1985).

<sup>392</sup> G.L. c. 266, § 40 (larceny); G.L. c. 266, § 60 (receiving stolen property).

<sup>393</sup> *Commonwealth v. Crocker*, 384 Mass. 353, 355–56 (1981).

<sup>394</sup> *Commonwealth v. Crocker*, 384 Mass. 353, 356 n.3 (1981); *Mass. R. Crim. P. 12(c)(3)(B)*.

<sup>395</sup> As to what constitutes “distinct” larcenies, see sections 20.4D (duplicitious offenses) and 21.2D (“same offense” for double jeopardy purposes). *See also Commonwealth v. Lane*, 25 Mass. App. Ct. 1002, 1003–04 (1988); *Commonwealth v. Murray*, 401 Mass. 771, 774 (1988) (“successive takings of property actuated by a single, continuing criminal impulse or intent or pursuant to a general larcenous scheme may, but need not, be charged as one crime”). *Contrast Commonwealth v. Donovan*, 395 Mass. 20 (1985); *Commonwealth v. Mahoney*, 68 Mass.App.Ct. 561 (2007).

<sup>396</sup> *See, e.g., Commonwealth v. Clark*, 53 Mass. App. Ct. 342 (2001); *Commonwealth v. Santucci*, 13 Mass. App. Ct. 933, 934–35 (1982); *Commonwealth v. Ryan*, 79 Mass.App.Ct. 179, 180–181 (2011) (single charge of larceny was contemplated despite allegation that defendant stole city's property on divers dates).

offenses if not confined to a secure facility.<sup>397</sup> The process is begun by the filing of a petition by the District Attorney or the Attorney General, in the county where the offense occurred, alleging that the individual is a sexually dangerous person.<sup>398</sup> The petition may be based on a criminal conviction for a sexual offense that occurred before the effective date of the statute<sup>399</sup> but it cannot be based solely on the fact of a prior conviction for a sexual offense.<sup>400</sup> Moreover, the defendant must be serving a sentence at that time for one of the enumerated sexual offenses because the statute does not apply to an incarcerated defendant who has served and completed a prior sentence for a sexual offense.<sup>401</sup>

The Court will schedule a preliminary hearing to determine whether there is sufficient evidence to believe that the individual is a sexually dangerous person.<sup>402</sup> This is referred to as the “probable cause hearing.” If the defendant is scheduled for release from prison prior to the probable cause hearing, he may be temporarily committed pending disposition of the petition.<sup>403</sup> In order to temporarily commit the defendant, the court must find that there is probable cause to believe that the defendant is a sexually dangerous person.<sup>404</sup> The Commonwealth is required to present expert evidence that the defendant suffers from a mental abnormality or personality defect, as well as a prediction that as a result of this condition, the defendant will likely commit a sexual offense.<sup>405</sup> Absent unusual circumstances, the defendant may be temporarily committed only for a maximum of ten business days before the probable cause hearing must be conducted.<sup>406</sup> In the absence of expert testimony, the defendant may be temporarily committed for only twenty-four hours, but only if there is a showing of probable cause that he is sexually dangerous that is comparable to probable cause to arrest.<sup>407</sup>

The defendant is entitled to appointed counsel at the probable cause hearing if he is indigent. In addition, he may present and cross-examine witnesses, and obtain a

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<sup>397</sup> Dutil, petitioner, 437 Mass. 9, 16 (2002); *Kansas v. Hendricks*, 521 U.S. 346 (1997). *See also* *Kansas v. Crane*, 354 U.S. 407 (2002). The definition of a sexually dangerous person also applies to juveniles, persons found incompetent to stand trial for a sexual offense, and persons previously found to be sexually dangerous who have a lack of power to control sexual impulses. G.L. c. 123A, § 1.

<sup>398</sup> G.L. c. 123A, § 12.

<sup>399</sup> *Commonwealth v. Bruno*, 432 Mass. 489, 497-502 (2000)(statute focuses on the present mental state of the defendant, and thus does not act retroactively and is not an ex post facto law); *Commonwealth v. Chapman*, 444 Mass. 15, 22 (2005) (state's petition for sex offender's commitment as sexually dangerous person contained sufficient new information to support allegation of present sexual dangerousness, based upon conduct occurring both before and after grant of offender's prior petition for release from commitment).

<sup>400</sup> *Commonwealth v. Bruno*, 432 Mass. 489, 502-504 (2000).

<sup>401</sup> *Commonwealth v. McLeod*, 437 Mass. 286 (2002).

<sup>402</sup> G.L. c. 123A, § 12(c).

<sup>403</sup> G.L. c. 123A, § 12(e).

<sup>404</sup> *Commonwealth v. Bruno*, 432 Mass. 489, 507-510 (2000)(rejecting reasonable suspicion standard). This standard is the equivalent of a judicial determination of probable cause to arrest. *Id.* at 508.

<sup>405</sup> *Commonwealth v. Bruno*, 432 Mass. 489, 510-511 (2000)(the expert evidence required for a temporary commitment need not be in the form of live testimony, and need not be extensive, but it must establish probable cause as to those elements of proof).

<sup>406</sup> *Commonwealth v. Bruno*, 432 Mass. 489, 511-513 (2000).

<sup>407</sup> *Commonwealth v. Bruno*, 432 Mass. 489, 511-512 (2000).

copy of all reports in the court's file.<sup>408</sup> The burden of proof on the Commonwealth at the probable cause hearing is the equivalent of that used at a probable cause (also known as a bind-over) hearing in the District Court; this is referred to as the "directed verdict" standard.<sup>409</sup> Expert testimony is required to be presented by the Commonwealth.<sup>410</sup> If the court concludes at the probable cause hearing that the defendant is sexually dangerous, he may be committed for up to sixty days for examination by two qualified examiners, who must file their reports within forty-five days. The failure of the qualified examiners to file their reports within forty-five days shall result in the dismissal of the petition.<sup>411</sup> The defendant may retain his own expert at Commonwealth expense if he is indigent.<sup>412</sup>

Within fourteen days of the filing of the qualified examiners' reports, the prosecutor may petition the court for a trial, which must commence within sixty days unless good cause or the interests of justice support a continuance. If the defendant intends to rely on an expert, he must provide a copy of the report to the prosecutor no later than ten days before the trial.<sup>413</sup> The defendant need not be segregated from persons previously adjudged to be sexually dangerous, and he does not need to receive treatment while awaiting the trial.<sup>414</sup> If the jury concludes beyond a reasonable doubt that the defendant is a sexually dangerous person, he is committed for a period of one day to life.<sup>415</sup> The Commonwealth may appeal errors of law in the proceeding, but it must obtain necessary transcripts in an expedited fashion or risk dismissal.<sup>416</sup> Moreover, the court should consider whether the defendant should be released from custody during the pendency of the appeal.<sup>417</sup>

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<sup>408</sup> G.L. c. 123A, § 12(c), (d).

<sup>409</sup> *Commonwealth v. Bruno*, 432 Mass. 489, 509-510 (2000). See *Myers v. Commonwealth*, 363 Mass. 843, 850 (1973) ("The minimum quantum of evidence required by this bind-over standard is more than that for probable cause for arrest but less than would prove the defendant's guilt beyond a reasonable doubt."). Unlike the directed verdict standard at trial, the judge at the probable cause hearing can weigh the credibility of witnesses, rather than simply looking at the evidence in the light most favorable to the Commonwealth, to determine if the evidence is of sufficient quality to allow the case to proceed further. *Commonwealth v. Blanchette*, 54 Mass. App. Ct. 165, 173-175 (2002); *Commonwealth v. Reese*, 438 Mass. 519, 523 (2003) (bind-over directed verdict standard, utilized in hearings regarding petitions for classification as sexually dangerous person, requires some assessment of credibility).

<sup>410</sup> *Commonwealth v. Bruno*, 432 Mass. 489, 513 (2000).

<sup>411</sup> *Commonwealth v. Kennedy*, 435 Mass. 527 (2001); *Commonwealth v. Parra*, 445 Mass. 262, 263-266 (2005) (Commonwealth's violation of statute providing for maximum 60-day confinement of sex offender for purpose of examination and diagnosis requires dismissal of Commonwealth's petition for civil commitment); Cf. *Commonwealth v. DeBella*, 442 Mass. 683, (2004) (no dismissal required if Commonwealth can show "good cause" for hearing delay that did not substantially prejudice sex offender); *Commonwealth v. Sanchez*, 74 Mass.App.Ct. 31, 34 (2009) (if there is uncontradicted evidence that an individual who is the subject of a petition for commitment as a sexually dangerous person acquiesced in a delay of trial past statutory 60-day time limit, the Commonwealth has shown good cause for exceeding the limit, at least in the absence of prejudice to the individual).

<sup>412</sup> G.L. c. 123A, § 12 (d).

<sup>413</sup> G.L. c. 123A, § 14(b).

<sup>414</sup> *Commonwealth v. Bruno*, 432 Mass. 489, 513-514 (2000).

<sup>415</sup> G.L. c. 123A, § 14(d).

<sup>416</sup> *Commonwealth v. Blanchette*, 54 Mass. App. Ct. 165, 167 n.4 (2002).

<sup>417</sup> *Commonwealth v. Blanchette*, 54 Mass. App. Ct. 165, 167 n.4 (2002).

A defendant committed as a sexually dangerous person may file a petition for discharge once every twelve months.<sup>418</sup> Either the Commonwealth or the defendant may request a jury trial, and the defendant is entitled to have counsel appointed if he is indigent.<sup>419</sup> The defendant shall be examined by two qualified examiners, and if he refuses to be interviewed “without good cause,” he is deemed to have waived his right to a hearing and the petition may be dismissed.<sup>420</sup> If a hearing goes forward, the defendant must be discharged unless the fact finder concludes that the defendant remains a sexually dangerous person.<sup>421</sup> A subsequent petition may be brought if it is based upon conduct which postdates the earlier proceedings.<sup>422</sup>

### **§ 39.10D. CRIME COMMITTED WHILE ON PRETRIAL RELEASE**

If the defendant was convicted of a crime committed while on pretrial release for another offense, there is a statutory “presumption” that commitment on the second charge be punished “from and after” the first.<sup>423</sup> Because the presumption is not mandatory, concurrent sentences are still possible. This is especially true where the first sentencing judge took the pendency of the second case into account in determining the first sentence. Moreover, if the second charge is tried first the statute cannot apply.<sup>424</sup>

### **§ 39.10E. SECOND-OFFENSE PROSECUTIONS**

A repeat offender provision is a sentencing enhancement that calls for a longer sentence upon the conviction for the underlying offense; it does not state a separate offense, and the defendant cannot be indicted at a later time if the sentence has already been imposed on the underlying conviction.<sup>425</sup> A second offense prosecution for drug distribution permits the first conviction to relate to distribution of drugs of any type, and not simply the class of drugs involved in the second conviction.<sup>426</sup> “The better practice is for the repeat offender portion of an indictment to specify at least the date of

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<sup>418</sup> G.L. c. 123A, § 9. *See Santos*, petitioner, 461 Mass. 565 (2012) (at trial, psychiatric reports generated by petitioner’s experts should be admitted into evidence on the same basis as the Commonwealth’s qualified experts and community access board report).

<sup>419</sup> G.L. c. 123A, § 9.

<sup>420</sup> G.L. c. 123A, § 9.

<sup>421</sup> G.L. c. 123A, § 9. The statute does not provide for less restrictive alternatives, such as post-release supervision or a halfway house. *Commonwealth v. Bruno*, 432 Mass. 489, 502 (2000), *In re Johnstone*, 453 Mass. 544 (2009).

<sup>422</sup> *Commonwealth v. Bruno*, 432 Mass. 489, 504-506 (2000). *Cf. Commonwealth v. Travis*, 372 Mass. 238, 249 (1977)(finding that a person is not sexually dangerous must be as immune from subsequent or collateral attack as a criminal judgment of acquittal); *Kansas v. Hendricks*, 521 U.S. 346 (1997)(involuntary commitment of sexually dangerous persons on basis of “mental abnormality” does not violate double jeopardy, substantive due process, or ex post facto clauses).

<sup>423</sup> G.L. c. 279, § 8B.

<sup>424</sup> *Commonwealth v. Hickey*, 429 Mass. 1027 (1999).

<sup>425</sup> *Bynum v. Commonwealth*, 429 Mass. 705 (1999); *Commonwealth v. Miranda*, 59 Mass.App.Ct. 378, 382-383 (2003); *Commonwealth v. Pagan*, 445 Mass. 161, 168 (2005) (modern cases no longer treat prior convictions used to enhance penalties as an element of the underlying crime)

<sup>426</sup> *Commonwealth v. Chavis*, 415 Mass. 703, 705–09 (1993).

the prior offense and the date of the conviction and the court in which such a conviction was obtained.”<sup>427</sup> The Commonwealth must prove that the defendant is the same individual who was previously convicted of the same offense.<sup>428</sup> It may be prejudicial error for the Court to permit the Commonwealth to reopen its case to prove this fact if it has already rested and the defendant moved for a required finding of not guilty.<sup>429</sup>

A number of Massachusetts statutes provide for the application of enhanced sentencing provisions for repeat offenders. The operating under the influence statute,<sup>430</sup> operating after suspension of license statute,<sup>431</sup> certain drug offenses,<sup>432</sup> and a variety of other criminal offenses<sup>433</sup> are all examples of legislation mandating harsher punishment for second or subsequent offenses.

Massachusetts state convictions have federal repercussions as well. They serve to enhance a federal defendant’s criminal sentence by contributing to the calculations of that defendant’s criminal history category.<sup>434</sup> A Massachusetts disposition of a continuance without a finding may be considered a prior sentence by the federal court and thus included in the defendant’s criminal history calculation.<sup>435</sup>

### § 39.11 CRUEL OR UNUSUAL PUNISHMENT

The Eighth Amendment to the U.S. Constitution prohibits the imposition of “cruel *and* unusual punishments,” and article 26 of the Massachusetts Constitution Declaration of Rights bars “cruel *or* unusual punishments.” Although the difference in phrasing has drawn comment, the Supreme Judicial Court has not adopted the position that the Massachusetts constitution affords greater protection to a defendant in this area.<sup>436</sup>

The Legislature has broad discretion to determine the punishment that may be imposed for a given offense, with the burden placed on the defendant to prove that the

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<sup>427</sup> Commonwealth v. Fernandes, 430 Mass. 517, S.C., 46 Mass. App. Ct. 455 (1999).

<sup>428</sup> Commonwealth v. Koney, 421 Mass. 295, 301-302 (1995). *See, e.g.*, Commonwealth v. Maldonado, 55 Mass. App. Ct. 450, 458-460 (2002); *Cf.* Commonwealth v. Maloney, 447 Mass. 577, 582-585 (2006) (expanded types of official documentary evidence that can be used as prima facie evidence of prior convictions for operating under influence for purposes of enhancing subsequent offense).

<sup>429</sup> Commonwealth v. Zavala, 52 Mass. App. Ct. 770, 778-779 (2001); *Cf.* Commonwealth v. Davis, 78 Mass.App.Ct. 1119 (2011).

<sup>430</sup> MASS. GEN. LAWS ch. 90, § 24.

<sup>431</sup> Mass. Gen. Laws ch. 90, § 23.

<sup>432</sup> E.g., MASS. GEN. LAWS ch. 94C, §§ 32 (Class A), 32A (Class B), 32C (Class D), 32D (Class E)(possession of a controlled substance with intent to distribute).

<sup>433</sup> Other offenses with enhanced punishments for multiple convictions include illegal possession of a firearm, knife, machine gun, or sawed-off shotgun (MASS. GEN. LAWS ch. 269, § 10); receiving stolen property (MASS. GEN. LAWS ch. 266, § 60).

<sup>434</sup> *See generally* 28 U.S.C. § 994(a); U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (2004).

<sup>435</sup> *See e.g.*, U.S. v. Morillo, 178 F.3d 18 (1st Cir. 1999).

<sup>436</sup> Commonwealth v. Diatchenko, 387 Mass. 718, 722 n.2 (1982); Cepulonis v. Commonwealth, 384 Mass. 495, 496 n.2 (1981). *Compare* District Attorney for the Suffolk Dist. v. Watson, 381 Mass. 648, 676 (1980) (Liacos, J. concurring).

penalty is unconstitutionally disproportionate to the crime.<sup>437</sup> Analysis of whether a sentence is cruel or unusual has proceeded under a tripartite test first enunciated by the Supreme Judicial Court in 1976<sup>438</sup> and later adopted by the U.S. Supreme Court in 1983.<sup>439</sup> The three considerations are: (1) the nature of the offense and the offender in light of the degree of harm to society; (2) a comparison of the challenged punishment with other punishments imposed within Massachusetts; and (3) a comparison of the challenged punishment with punishments imposed for comparable crimes in other jurisdictions.<sup>440</sup> “To reach the level of cruel and unusual, the punishment must be so disproportionate to the crime that it ‘shocks the conscience and offends fundamental notions of human dignity.’”<sup>441</sup> In addition, to violate due process, the penalty must not bear a reasonable relation to one of the interests that may be served by punishment for a crime, which are deterrence, incapacitation, retribution, and reformation.<sup>442</sup>

In challenging certain punishments as cruel or unusual, defendants have asserted claims based on the length of the sentence, the mandatory nature of its imposition, the type of penalty, and the conduct or status that has been punished. The United States Supreme Court has addressed the issue of cruel and unusual punishment in the context of juvenile offenders. In two recent matters, the Court has struck down the death penalty for juveniles<sup>443</sup> and the imposition of life without parole for juveniles convicted of non-homicide offenses.<sup>444</sup>

Prisoners held in custody awaiting trial are entitled to greater protections than convicted individuals. Unlike persons serving a sentence, who may be punished in any manner that is not cruel or unusual,<sup>301.5</sup> pretrial detainees may not be punished, and due process considerations will apply to the nature of their confinement.<sup>445</sup>

### § 39.11A. LENGTH OF THE SENTENCE

Although the Supreme Judicial Court has acknowledged that “it is possible that imprisonment for a long term of years might be so disproportionate to the offense as to constitute cruel and unusual punishment,”<sup>446</sup> it has never invalidated a sentence on this

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<sup>437</sup> Commonwealth v. Sanchez, 405 Mass. 369, 379–80 (1989).

<sup>438</sup> Commonwealth v. Jackson, 369 Mass. 904, 910–13 (1976).

<sup>439</sup> Solem v. Helm, 463 U.S. 277, 292 (1983). *But see* Harmelin v. Michigan, 501 U.S. 957 (1991) (Justices Scalia and Rehnquist would overrule *Solem*; Justices Kennedy, O'Connor, and Souter would narrow the tripartite test).

<sup>440</sup> Commonwealth v. Therriault, 401 Mass. 237, 239–40 (1987).

<sup>441</sup> Cepulonis v. Commonwealth, 384 Mass. 495, 497 (1981) (quoting Commonwealth v. Jackson, 369 Mass. 904, 910 (1976), quoting *In re Lynch*, 8 Cal. 3d. 410, 424 (1972)).

<sup>442</sup> Commonwealth v. Diatchenko, 387 Mass. 718, 726–27 (1982).

<sup>443</sup> Roper v. Simmons, 543 U.S. 551 (2005).

<sup>444</sup> Graham v. Florida, 130 S. Ct. 2011 (2010).

<sup>301.5</sup> *See, e.g.,* Torres v. Commissioner of Correction, 427 Mass. 611, 613–616 (1998) (the conditions at the Department Disciplinary Unit (D.D.U.) of the Department of Correction do not violate the State or Federal Constitutions).

<sup>445</sup> Richardson v. Sheriff of Middlesex County, 407 Mass. 455 (1990) (it was a violation of due process for pretrial detainees to be held in facility with inadequate beds and toilet facilities). *See also* *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676 (D. Mass. 1973).

<sup>446</sup> Commonwealth v. Sanchez, 405 Mass. 369, 379 (1989).

ground.<sup>447</sup> Instead, it has noted that the appellate division of the superior court is vested with the authority to review an otherwise lawful sentence and alter it if justice has not been done.<sup>448</sup>

The United States Supreme Court has upheld a sentence of life imprisonment for three nonviolent felonies over a nine-year period where the defendant was eligible for parole after serving twelve years,<sup>449</sup> but it overturned a life sentence for uttering checks where there was no possibility for parole and the defendant did not have a record of prior violence.<sup>450</sup> The court has noted, however, that outside of the death penalty, “successful challenges to the proportionality of sentences have been extremely rare.”<sup>451</sup>

### § 39.11B. MANDATORY SENTENCES

A “mandatory sentence” is a sentence of incarceration which must be imposed if the defendant is found guilty of the crime charged.<sup>452</sup> A mandatory sentencing statute specifically prohibits the imposition of a suspended sentence, a filing of the case, or a continuance without a finding.<sup>453</sup> The court has limited discretion in this

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<sup>447</sup> A sentence of 40–50 years possession of a machine gun was upheld, despite the fact that no other jurisdiction imposed a penalty of greater than 30 years because this “gangster-type weapon” was associated with violent crimes and mass killing. *Cepulonis v. Commonwealth*, 384 Mass. 495 (1981). The physical injury and psychological harm to two boys who were raped by a man, including the stigma in their community, warranted consecutive life sentences despite their exceeding the superior court sentencing guidelines. *Commonwealth v. Sanchez*, 405 Mass. 369, 380 (1989). Other instances of lengthy sentences being affirmed include life without the possibility of parole for first-degree murder (*Commonwealth v. Diatchenko*, 387 Mass. 718, 721–27 (1982)), a sentence of 40–60 for rape and robbery where defendant acquitted of murder in notorious crime, *Commonwealth v. Barnes*, 40 Mass. App. Ct. 666, 677 (1996), a term of 30–40 years for an armed robbery committed when the defendant was a juvenile (*Commonwealth v. Morrow*, 363 Mass. 601 (1973)), and 18 months in the House of Correction for an assault and battery (*Commonwealth v. Bianco*, 390 Mass. 254, 260–64 (1983)). *See also* *Commonwealth v. Ghee*, 414 Mass. 313, 320–21 (1993) (consecutive sentences of life imprisonment and 18–20 years for murder committed with sawed-off shotgun were not cruel or unusual); *Commonwealth v. Tart*, 408 Mass. 249, 267 (1990) (incarceration for fishing without permit not cruel or unusual; defendant not entitled to one “free” violation of statute). The Court also rejected a challenge to a sentence of life imprisonment for first-degree murder on the ground of disparate treatment between the 17-year-old defendant and his 16-year-old codefendant, who was treated as a juvenile. *Commonwealth v. Jones*, 400 Mass. 544, 549 (1987).

<sup>448</sup> *Commonwealth v. Sanchez*, 405 Mass. 369, 379 n.7 (1989); *Commonwealth v. Grimshaw*, 412 Mass. 505, 512–13 (1992), S.C. 31 Mass. App. Ct. 917 (1991) (sentence of 15–20 years for manslaughter in battered-woman case would not be reviewed despite alleged disparity with comparable cases; review had been obtained at appellate division of the superior court). *See infra* § 45.7 (appellate division of the superior court).

<sup>449</sup> *Rummel v. Estelle*, 445 U.S. 263 (1980) (defendant obtained \$80 worth of goods by fraudulent use of a credit card, \$28.86 through a forged check and \$120.75 by false pretenses).

<sup>450</sup> *Solem v. Helm*, 463 U.S. 277 (1983) (sentence in this circumstance was “grossly disproportionate” to the crime).

<sup>451</sup> *Rummel v. Estelle*, 445 U.S. 263, 272 (1980).

<sup>452</sup> STANDARDS OF JUD. PRACTICE: SENTENCING AND OTHER DISPOSITIONS, Standard 7:10, Mandatory Sentencing, (District Court Administrative Office, 1984).

<sup>453</sup> It is important to check the precise limitations on sentencing imposed by the particular statute under which the defendant is charged.

sentencing scenario as it must impose at least the minimum mandatory sentence set forth in the statute.

Mandatory sentencing provisions are found in the statutes setting the penalties for firearm offenses;<sup>454</sup> motor vehicle fraud;<sup>455</sup> motor vehicle theft;<sup>456</sup> operating under the influence of intoxicating liquor or drugs and related operation offenses;<sup>457</sup> and a variety of other offenses which may or may not be within the final jurisdiction of the district court.<sup>458</sup> Other statutes call for mandatory sentencing if the defendant is a recidivist, or repeat offender.

Mandatory sentences have been upheld for carrying a firearm (an 18-month sentence),<sup>459</sup> trafficking in drugs with a street value of more than \$25,000 (twenty-five years),<sup>460</sup> distribution of heroin, second offense (five years),<sup>461</sup> trafficking in over 200 grams of cocaine (ten years),<sup>462</sup> motor vehicle homicide (one year),<sup>463</sup> being an habitual criminal (maximum penalty of underlying offense)<sup>464</sup> and armed home invasion (twenty years).<sup>465</sup> In these instances, the court also concluded that the penalty was not disproportionate to the crime even if no other state had a similar mandatory provision

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<sup>454</sup> MASS. GEN. LAWS ch. 269, §§ 10 (unlawful carrying of dangerous weapon), 10E (unlawful sale of quantity of firearms), 10F (illegal sale of large capacity weapons).

<sup>455</sup> MASS. GEN. LAWS ch. 266, § 27A.

<sup>456</sup> MASS. GEN. LAWS ch. 266, § 28(a).

<sup>457</sup> MASS. GEN. LAWS ch. 90, §§ 24 (operating vehicle while under influence of liquor or drugs), 24G (causing homicide by driving while under influence of liquor or drugs), 24L (causing serious bodily injury by driving while under influence of liquor or drugs); MASS. GEN. LAWS ch. 90B, §§ 8 (operating vessel while under influence of liquor or drugs), 8A (causing serious bodily injury by operating vessel while under influence of liquor or drugs), 8B (causing homicide by operating vessel while under influence of liquor or drugs).

<sup>458</sup> Other mandatory minimum statutes for district court: See MASS. GEN. LAWS ch. 6, § 178H (failure to register as sex offender); MASS. GEN. LAWS ch. 90, § 23 (operating vehicle after suspension or revocation of license), MASS. GEN. LAWS ch. 94C, §§ 32-32D (distribution or possession with intent to distribute), 32J (drug violation near a school or park); MASS. GEN. LAWS ch. 265, §§ 13B (indecent assault and battery on child under fourteen years), 43(b) (stalking in violation of a restraining order); MASS. GEN. LAWS ch. 268, § 39 (false statements alleging theft of motor vehicle); MASS. GEN. LAWS ch. 272, §§ 4A (promoting child prostitution), 6 (maintaining house of prostitution), 7 (deriving support from prostitution).

<sup>459</sup> *Commonwealth v. Jackson*, 369 Mass. 904 (1976). A judge may not sentence a defendant to a lesser term than the mandatory minimum (unless the Legislature permits it if and when it enacts the proposed sentencing guidelines) (*Commonwealth v. Russo*, 421 Mass. 317 (1995)), or to house arrest on a conviction that carries a mandatory minimum sentence. *Commonwealth v. Cowan*, 422 Mass. 546, 548–50 (1996).

<sup>460</sup> Opinion of the Justices, 378 Mass. 822 (1979). This statute, however, was not enacted by the Legislature.

<sup>461</sup> *Commonwealth v. Marcus*, 16 Mass. App. Ct. 698 (1983).

<sup>462</sup> *Commonwealth v. Silva*, 21 Mass. App. Ct. 536, 541–45 (1986).

<sup>463</sup> *Commonwealth v. Therriault*, 401 Mass. 237 (1987).

<sup>464</sup> *Commonwealth v. Tuitt*, 393 Mass. 801, 812–14 (1985), *aff'd sub nom. Tuitt v. Fair*, 822 F.2d 116 (1st Cir. 1987). *See supra* § 39.10A.

<sup>465</sup> *Commonwealth v. Brown*, 431 Mass. 772 (2000), S.C., 47 Mass. App. Ct. 616, 46 Mass. App. Ct. 279 (1999) (minimum term is twenty years); *Commonwealth v. Dunn*, 43 Mass. App. Ct. 451 (1997).

and more serious crimes of violence in Massachusetts did not require that a certain minimum sentence be imposed.<sup>466</sup>

Massachusetts courts have rejected challenges to mandatory sentencing provisions that argued that the inability of the sentencing judge to consider mitigating factors rendered the punishment cruel or unusual.<sup>467</sup>

The Supreme Judicial Court has declined to accept the theory of “sentence entrapment” in which an undercover police officer induces the defendant to provide a greater amount of drugs than he had planned to offer, so that the defendant faces a greater mandatory minimum penalty.<sup>468</sup>

### § 39.11C. TYPE OF PUNISHMENT

The prison conditions of inmates in the Essex County jail, where open buckets in the cells constituted the toilet facilities, were held to be cruel or unusual conditions of punishment and thereby in violation of the Massachusetts Constitution Declaration of Rights.<sup>469</sup> A similar result was reached under the Eighth Amendment when the sentence imposed was fifteen years of “painful labor.”<sup>470</sup> Deliberate indifference to a prisoner’s medical needs constitutes cruel and unusual punishment.<sup>471</sup> Finally, the Supreme Court has termed a punishment unconstitutionally excessive that deprived a deserter of his citizenship following his court-martial and dishonorable discharge.<sup>472</sup>

### § 39.11D. PENALIZING THE STATUS OF THE DEFENDANT

The U.S. Supreme Court has extended the proscription against cruel and unusual punishment to a statute that penalized a defendant for the fact that he was addicted to drugs, and held that this represented the criminalization of a person’s status rather than his conduct in contravention of the Eight Amendment.<sup>473</sup>

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<sup>466</sup> Challenges to mandatory sentences based on due process and separation of powers between the legislature and the judiciary also have been unavailing to defendants. *See, e.g.*, *Commonwealth v. Pennellatore*, 392 Mass. 382, 391 (1984); *Commonwealth v. Jackson*, 369 Mass. 904 (1976). In addition, the addition of a mandatory consecutive sentence for distribution of drugs within a school zone does not violate due process or the double jeopardy provision against multiple punishments. *Commonwealth v. Alvarez*, 413 Mass. 224 (1992).

<sup>467</sup> *See, e.g.*, *Commonwealth v. Diatchenko*, 387 Mass. 718 (1982) (life imprisonment for first-degree murder).

<sup>468</sup> *Commonwealth v. Garcia*, 421 Mass. 686 (1996) (court notes that this may be an issue for the Sentencing Commission to consider).

<sup>469</sup> *Michaud v. Sheriff of Essex County*, 390 Mass. 523 (1983); *contrast Libby v. Commissioner*, 385 Mass. 421 (1982) (solid steel doors in segregation unit at Walpole State Prison not cruel or unusual); *Sabree v. Conley*, 62 Mass.App.Ct. 901, 903-904 (2004) (“inoperable” and “bacteria-laden” cell facilities do not constitute cruel and unusual punishment).

<sup>470</sup> *Weems v. United States*, 217 U.S. 349 (1910).

<sup>471</sup> *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Johnson v. Summers*, 411 Mass. 82, 86 (1991).

<sup>472</sup> *Trop v. Dulles*, 356 U.S. 86 (1958).

<sup>473</sup> *Robinson v. California*, 370 U.S. 660 (1962).

## § 39.12 COLLATERAL CONSEQUENCES

A criminal conviction may have serious civil and economic collateral consequences in addition to the statutory punishment for the crime. The following is a list of potential collateral consequences that *defendants must be aware of in the course of trial preparation*.

### § 39.12A. CIVIL RIGHTS

There are several civil rights which, under certain circumstances, are denied to those convicted of felonies. With respect to jury service, a felony conviction within seven years of a summons for jury duty will disqualify a person from such service.<sup>474</sup> Likewise, incarceration in a correctional institution will disqualify an individual from jury duty,<sup>475</sup> and a person convicted of a felony or any other offense punishable by imprisonment for more than one year may be stricken by the court from the jury list.<sup>476</sup> It should be noted that a person's right to serve on a jury is automatically restored seven years after the completion of the imposed sentence.<sup>477</sup>

The right to vote is denied a citizen "incarcerated in a correctional facility due to a felony conviction."<sup>478</sup>

The right to legally carry a firearm, predicated on obtaining a license to carry such firearm, is curtailed by certain convictions, defined as "a finding or verdict of guilt or a plea of guilty, whether or not final sentence is imposed."<sup>479</sup> Massachusetts law<sup>480</sup> precludes issuance of a license to carry a firearm to any person convicted of: (1) a felony; (2) a misdemeanor punishable by imprisonment for more than two years; (3) a violent crime as defined in Massachusetts General Laws chapter 140, section 121; (4) "a violation of any law regulating the use, possession, ownership, transfer, purchase, sale, lease, rental, receipt or transportation of weapons or ammunition for which a term of imprisonment may be imposed"<sup>481</sup>; or (5) a violation of most controlled substance laws, including use, possession, or sale of a controlled substance.<sup>482</sup> However, a person may apply for a firearm identification card, which permits a person to possess, but not carry a firearm, five years after conviction or release from confinement, whichever is later.<sup>483</sup> The licensing authority retains discretion to deny the application only on the grounds of mental illness, drug addiction or habitual drunkenness, age, alien status, existing restraining order or outstanding arrest warrant.<sup>484</sup>

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<sup>474</sup> MASS. GEN. LAWS ch. 234A, § 4(7).

<sup>475</sup> *Id.*

<sup>476</sup> MASS GEN. Laws ch. 234, § 8.

<sup>477</sup> MASS. GEN. LAWS ch. 234A, § 4(7).

<sup>478</sup> MASS. GEN. Laws ch. 51, § 1.

<sup>479</sup> MASS. GEN. LAWS ch. 140, § 121.

<sup>480</sup> MASS. GEN. LAWS ch. 140, § 131.

<sup>481</sup> MASS. GEN. LAWS ch. 140, § 129B(1)(i).

<sup>482</sup> MASS. GEN. LAWS ch. 140, § 129B(1)(i).

<sup>483</sup> MASS. GEN. LAWS ch. 140, § 129B(1)(i).

<sup>484</sup> MASS. GEN. LAWS ch. 140, § 129B (1) (iii-ix).

### § 39.12B. IMMIGRATION CONSEQUENCES<sup>485</sup>

A district court disposition has the potential to create serious immigration consequences for a non-United States citizen. Such consequences include deportation or removal, exclusion upon re-entry, or denial of naturalization. Massachusetts law acknowledges the severity of these immigration consequences by mandating that each defendant who tenders a plea or admits to sufficient facts must be advised of the possible consequences for a non-citizen.<sup>486</sup>

The following is a brief summary of some common considerations in cases where the client is a non-citizen. This is by no means a complete discussion of the subject, and counsel is advised to consult with an immigration practitioner about sentencing strategies in a specific case.<sup>487</sup>

Criminal grounds of removal from the United States typically are premised upon a conviction. The Immigration and Nationality Act<sup>488</sup> defines “conviction” as:

... a formal judgment of guilt of the alien entered by a court or, if adjudication of guilty has been withheld, where

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.<sup>489</sup>

This definition<sup>490</sup> appears to treat a Massachusetts district court disposition of “continuance without a finding” as a conviction since a CWOFF is imposed after an admission of sufficient facts and almost always includes probation (supervised or unsupervised) or other conditions, which are considered “restraint[s] on liberty.”<sup>491</sup>

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<sup>485</sup> For a thorough discussion of the immigration consequences of conviction, refer to BLUMENSON, FISHER, KANSTROOM, eds. MASSACHUSETTS CRIMINAL PRACTICE, ch. 42, “Immigration Consequences of Criminal Proceedings (LEXIS 2003); National Immigration Project of the National Lawyers Guild, <http://www.nationalimmigrationproject.org>.

<sup>486</sup> MASS. GEN. LAWS ch. 278, § 29D reads: “The court shall not accept a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts...unless the court advises such defendant...’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.’ “

<sup>487</sup> See *supra* n. 485; Dan Kesselbrenner and Lory D. Rosenberg, National Lawyers Guild, Immigration Law and Crimes (1984).

<sup>488</sup> 8 U.S.C. § 1101-1537.

<sup>489</sup> 8 U.S.C. § 1101(a)(48)(A).

<sup>490</sup> Pub. L. No. 104-208, § 322(a)(1) (1996) (codified at 8 U.S.C. § 1101(a)(48)(A)).

<sup>491</sup> MASS. GEN. LAWS ch. 278, § 18.

However, pre-trial dispositions such as pre-trial probation and dismissal based on an accord and satisfaction, would **not** be considered a conviction.<sup>492</sup>

Certain categories of criminal offenses will trigger removal proceedings. Among those categories are: crimes of moral turpitude;<sup>493</sup> controlled substance offenses;<sup>494</sup> aggravated felonies;<sup>495</sup> firearm offenses;<sup>496</sup> and crimes of domestic violence.<sup>497</sup>

In addition to deportation or removal, a non-United States citizen may be denied re-entry, if he has been "...convicted of, or...admits having committed, or... admits committing acts which constitute the essential elements of...a crime involving moral turpitude."<sup>498</sup> Denial of re-entry may be based on an admission without a conviction, although the statute provides for exceptions: (1) to those who committed only one crime before age 18 and the offense was more than five years before the date of application to enter the United States;<sup>499</sup> and (2) crimes for which the maximum

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<sup>492</sup> *Griffiths v. INS*, 243 F.3d 45 (1<sup>st</sup> Cir. 2001), held that a Massachusetts disposition of "guilty-filed" was not deemed a conviction for immigration purposes as long as no punishment or restraint on the individual's liberty was imposed. But *see Commonwealth v. Simmons*, 448 Mass. 687 (2007).

<sup>493</sup> 8 U.S.C. § 1227(a)(2)(A)(i) states that "Any alien who (I) is convicted of a crime involving moral turpitude committed within five years...after the date of admission, and (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable." Examples of crimes involving moral turpitude have been found to include: serious crimes against the person (e.g. murder; voluntary manslaughter; accessory to murder; kidnapping; attempted murder; assault with intent to murder; assault with intent to rob; assault and battery with a dangerous weapon; indecent assault and battery); sex offenses (e.g. rape, prostitution); certain crimes against property (e.g. arson, robbery, destruction of property); crimes where theft or fraud is an element (e.g. larceny; credit card fraud). A cautionary note: check the Board of Immigration Appeals (BIA) administrative decisions regarding specific offenses since the administrative decisions are subject to Federal review and this is a much-litigated area.

<sup>494</sup> See 8 U.S.C. § 1227(a)(2)(B). Note that the statute exempts "a single offense involving possession for one's own use of thirty grams or less of marijuana."

<sup>495</sup> 8. U.S.C. § 1227(a)(2)(A)(iii) states that "...any alien who is convicted of an aggravated felony at any time after admission is deportable." An aggravated felony conviction causes severe consequences. A noncitizen with an aggravated felony conviction is automatically deportable with virtually no relief available; she will be held in mandatory detention and is barred from returning to the U.S. for life. The definition of an aggravated felony is at 8 U.S.C. § 1101(a)(43). It contains many broad categories of offenses, some of which require only a conviction and others which require a conviction AND a sentence of one year or more [a "sentence" is any period of incarceration either ordered imposed or suspended, 8 U.S.C. § 1101(a)(48)(B)]. Many relatively minor Massachusetts criminal offenses are considered aggravated felonies, including many misdemeanors (e.g. simple assault and battery).

<sup>496</sup> 8 U.S.C. § 1227(a)(2)(C) dictates deportation for violation of "any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device..."

<sup>497</sup> 8 U.S.C. § 1227(a)(2)(E)'s description of domestic violence offenses is broad, and includes "...crimes of violence, stalking, child abuse, child neglect, child abandonment, and certain violations of protective orders"

<sup>498</sup> 8 U.S.C. § 1182(a)(2)(A)(i)(II).

<sup>499</sup> 8 U.S.C. § 1182(a)(2)(A)(ii)(I).

penalty does not exceed one year, and the person was not sentenced to more than six months of imprisonment.<sup>500</sup>

A person may be denied admission to the United States due to controlled substance violations<sup>501</sup> as well as conviction of two or more offenses where the aggregate sentences of confinement actually imposed were five or more years.<sup>502</sup> Additionally, a non-United States citizen who has “engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status” is precluded from admission to the United States.<sup>503</sup> Lastly, exclusion from the United States may be based on a broadly-defined area related to “security and related grounds,”<sup>504</sup> and “terrorist activities.”<sup>505</sup>

District court dispositions may also affect a non-United States citizen’s application for naturalization, which is dependent upon a finding that the applicant is of “good moral character.”<sup>506</sup> Ordinarily, the government looks to the five years preceding the citizenship application to determine good moral character.<sup>507</sup> The Immigration and Nationality Act denies a finding of “good moral character” to certain status and criminal offenders.<sup>508</sup>

### § 39.12C. DNA REGISTRY

The Massachusetts legislature determined in 1997 that a statewide DNA database was necessary to assist law enforcement agencies in “(1) deterring and discovering crimes and recidivistic criminal activity; (2) identifying individuals for, and excluding individuals from, criminal investigation or prosecution; and (3) searching for missing persons.”<sup>509</sup> This legislation authorized the collection of biological samples from an individual convicted of any one of 33 specific crimes. In 2003, the legislature expanded the scope of the statute to include biological sample collection from any person “convicted of an offense that is punishable by imprisonment in the state prison.”<sup>510</sup> The statutory language has been interpreted to mean that a defendant convicted in district court of a concurrent felony (one carrying the potential of state imprisonment) is required to submit a DNA sample to the state database.<sup>511</sup> District court defense counsel should determine whether or not a lesser included

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<sup>500</sup> 8 U.S.C. § 1182(a)(2)(A)(ii)(II). However, a suspended sentence is deemed a term of imprisonment, according to 8 U.S.C. § 1101(a)(48)(B).

<sup>501</sup> 8 U.S.C. § 1182(a)(2)(A)(i)(II).

<sup>502</sup> 8 U.S.C. § 1182(a)(2)(B).

<sup>503</sup> 8 U.S.C. § 1182(a)(2)(D)(i)-(iii).

<sup>504</sup> 8 U.S.C. § 1182(a)(3).

<sup>505</sup> 8 U.S.C. § 1182(a)(3)(B). 8 U.S.C. § 1182(a)(3)(b)(iii-vi) provides definitions of terrorist activity, what it means to engage in terrorist activity, and what constitutes a terrorist organization.

<sup>506</sup> 8 U.S.C. § 1101(f).

<sup>507</sup> See, generally, 8 U.S.C. §§ 1421 et seq.

<sup>508</sup> See 8 U.S.C. § 1101(f) (e.g., habitual drunkard, gambling, conviction for aggravated felony); 8 U.S.C. § 1182(a) (crimes involving moral turpitude, violation of any law relating to a controlled substance, prostitution).

<sup>509</sup> St. 1997, c. 107, An Act Relative to the Enhancement of Forensic Technology.

<sup>510</sup> St. 2003, c. 107, § 1, An Act Relative to the State DNA Database.

<sup>511</sup> Commonwealth v. Smith, 444 Mass. 497 (2005).

offense exists for a charged offense. If so, that lesser included offense might avoid triggering the DNA registry requirement.<sup>512</sup>

### § 39.12D. SEX OFFENDER REGISTRY

Massachusetts enacted the Sex Offender Registry and Notification Act in 1996.<sup>513</sup> Following a number of successful constitutional challenges to the original act,<sup>514</sup> this legislation was replaced in 1999.<sup>515</sup>

The act defines a “sex offender” as “a person who resides, has secondary addresses, works, or attends an institution of higher learning in the commonwealth and who has been convicted of a sex offense...”<sup>516</sup> The statute enumerates what crimes constitute “sex offense(s).”<sup>517</sup> A defendant convicted of a sex offense is obligated to register with the sex offender registry board (“SORB”)<sup>518</sup> and a knowing failure to register is a separate crime<sup>519</sup> as well as a likely ground for probation or parole revocation. According to the statute, a sex offender must register annually with the SORB for a period of 20 years, unless he can demonstrate, upon clear and convincing evidence, that he has not committed a sex offense within 10 years following the conviction or release from custody or supervision, and is not likely to be a safety concern to the community.<sup>520</sup>

A defendant convicted of a sex offense must be informed not only of his responsibility to register with the SORB, but also that he will be assigned a classification level<sup>521</sup> that will dictate the amount of public disclosure allowed under the statute.<sup>522</sup> A defendant is entitled to a hearing with respect to the SORB’s recommended classification level.<sup>523</sup> Failure to register is punishable by two-and-a-half years in the house of corrections or a fine of one thousand dollars.<sup>524</sup>

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<sup>512</sup> E.g. indecent exposure, a misdemeanor, (MASS. GEN. LAWS ch. 272, § 53) is a lesser included offense of open and gross lewdness, a felony that would trigger the DNA registry requirement (MASS. GEN. LAWS ch. 272, § 16).

<sup>513</sup> St. 1996, c. 239. *See generally*, Daniel A. Less, *The Evolution of the Massachusetts Sex Offender Registry System*, 91 Mass. L. Rev. 67 (2008).

<sup>514</sup> *Doe v. Attorney Gen.*, 426 Mass. 136 (1997); *Doe v. Sex Offender Registry Bd.*, 428 Mass. 90 (1998); *Doe v. Attorney Gen.*, 430 Mass. 155 (1999).

<sup>515</sup> St. 1999, c. 74, An Act Improving the Sex Offender Registry and Establishing Civil Commitment and Community Parole Supervision for Life for Sex Offenders. *See* MASS. GEN. LAWS ch. 6, §§ 178C-178P. *See* Daniel A. Less, *The Evolution of the Massachusetts Sex Offender Registry System*, 91 Mass. L. Rev. 67 (2008).

<sup>516</sup> MASS. GEN. LAWS ch. 6, § 178C.

<sup>517</sup> *Id.*

<sup>518</sup> MASS. GEN. LAWS ch. 6, § 178D.

<sup>519</sup> MASS. GEN. LAWS ch. 6, § 178H.

<sup>520</sup> MASS. GEN. LAWS ch. 6, § 178G.

<sup>521</sup> MASS. GEN. LAWS ch. 6, § 178K.

<sup>522</sup> MASS. GEN. LAWS ch. 6, §§ 178I-J.

<sup>523</sup> MASS. GEN. LAWS ch. 6, §178L. Regulations governing the SORB hearings may be found at 803 C.M.R. §§ 1.01-1.41.

<sup>524</sup> .G.L. c. 6, § 178(H).

### § 39.12E. REGISTRY OF MOTOR VEHICLES

With respect to certain offenses, the registry of motor vehicles will either suspend or revoke a driving license.<sup>525</sup> The general categories of offenses that can jeopardize an individual’s right to drive are: moving motor vehicle violations; drug offenses; and violations of out-of-state license suspensions or revocations.

The most common type of criminal motor vehicle moving violation is the operating under the influence law, discussed in Part IA. Defendants must be made aware that a conviction or continuance without a finding under the “operating under” statute carries with it mandatory license suspension and revocation provisions. Other criminal moving violations usually carry a mandatory period of suspension or revocation, and some are mandated by statute.<sup>526</sup>

A district court drug conviction will trigger a motor vehicle license suspension.<sup>527</sup> The period of suspension is governed by registry regulations, and it is important to note that early reinstatement hearings are available once an individual has completed 50% of the suspension period.<sup>528</sup>

The Registry of Motor Vehicles will suspend or revoke a Massachusetts driver’s license if that driver has received a suspension or revocation in another state.<sup>529</sup>

### § 39.12F. FUTURE EMPLOYMENT AND LICENSING OPPORTUNITIES

A prospective employer may inquire about certain misdemeanor convictions within the five years prior to an application for employment, and may inquire about second or subsequent convictions for other misdemeanors during this time period.<sup>530</sup> The criminal history systems board is empowered by separate statute<sup>531</sup> to allow access to an individual’s criminal offender record information (“CORI”) under certain circumstances.

Massachusetts General Laws chapter 6, section 172, provides for dissemination of information “only to (a) criminal justice agencies; (b) such other agencies and individuals required to have access to such information by statute...and (c) any other agencies and individuals where it has been determined that the public interest in disseminating such information to these parties clearly outweighs the interest in

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<sup>525</sup> General authority to suspend or revoke a license is found in MASS. GEN. LAWS ch. 90, § 22.

<sup>526</sup> *E.g.*, MASS. GEN. LAWS ch. 90, §§ 22B, 22F, 23, 24, 24½, 24B, 24D; MASS. GEN. LAWS ch. 266, § 28 (larceny of a motor vehicle).

<sup>527</sup> Mass. Gen. Laws ch. 90, § 22F.

<sup>528</sup> MASS. REGS. CODE, title 540 § 20.03(3) (2008).

<sup>529</sup> MASS. GEN. LAWS ch. 90, § 22(c).

<sup>530</sup> MASS. GEN. LAWS ch. 151B, § 4 (9), states that employers may not inquire as to “... (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred five or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within five years immediately preceding the date of such application for employment or such request for information.”

<sup>531</sup> Mass. Gen. Laws ch. 6, § 172.

security and privacy.”<sup>532</sup> Other legislation provides authority to government agencies,<sup>533</sup> some private agencies,<sup>534</sup> crime victims, witnesses, or family members of homicide victims,<sup>535</sup> to obtain CORI information. With so many opportunities for the dissemination of CORI information,<sup>536</sup> a defendant needs to be aware that prospective employers may review his criminal record.

In addition to having an impact on future employment, a criminal conviction may have repercussions on a person’s ability to obtain or maintain a professional license. The division of professional licensure, an agency under the jurisdiction of the office of consumer affairs and business regulation,<sup>537</sup> is mandated to “protect the public health, safety and welfare by licensing qualified individuals who provide services to consumers...”<sup>538</sup> Most of the licensing boards<sup>539</sup> require an applicant to demonstrate “good moral character,” and the existence of a criminal record may preclude the granting of the particular license. *Practice tip:* Defense attorneys should be mindful of their clients’ professional background or interest when considering dispositional alternatives.

### § 39.12G. HOUSING

A criminal conviction has consequences for an individual attempting to access or maintain public housing. State legislation gives local public housing authorities, and other agencies that oversee subsidized housing programs, approval to obtain CORI information about housing applicants.<sup>540</sup> Federal legislation gives similar authority to federal public housing agencies.<sup>541</sup> The purpose of the state and federal legislation is to ensure the safety, security and health of tenants on the premises.<sup>542</sup> A criminal conviction may be a cause for eviction from state or federal public housing. Federally funded housing programs, and federally-subsidized housing assistance programs

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<sup>532</sup> MASS. GEN. LAWS ch. 6, § 172(a)-(c).

<sup>533</sup> E.g., housing authorities (MASS. GEN. LAWS ch. 6, § 168, ¶ 3).

<sup>534</sup> E.g., nursing homes (MASS. GEN. LAWS ch. 6, § 172E); schools, camps and other organizations serving children (MASS. GEN. LAWS ch. 6, § 172G).

<sup>535</sup> MASS. GEN. LAWS ch. 6, § 178A.

<sup>536</sup> According to the Massachusetts Law Reform Institute’s “The CORI Reader” by Ernest Winsor, last updated 7/14/06 p.5, there are estimates of approximately 10,000 organizations certified for access to CORI.

<sup>537</sup> MASS. GEN. LAWS ch. 13, §§ 8 *et seq.*

<sup>538</sup> Division of Professional Licensure, Mission statement, available at <http://www.mass.gov/?pageID=ocaagencylanding&L=4&L0=Home&L1=Government&L2=Our+Agencies+and+Divisions&L3=Division+of+Professional+Licensure&sid=Eoca>.

<sup>539</sup> Some licensing boards include: allied health (MASS. GEN. LAWS ch. 13, § 11A), allied mental health (MASS. GEN. LAWS ch. 13, § 88), architects (MASS. GEN. LAWS ch. 13, § 44A), barbers (MASS. GEN. LAWS ch. 13, § 39), electricians (MASS. GEN. LAWS ch. 13, § 32), hairdressers (MASS. GEN. LAWS ch. 13, § 42), nursing (MASS. GEN. LAWS ch. 13, § 13), and real estate appraisers (MASS. GEN. LAWS ch. 13, § 92). For overall legislative reference to all of the boards under the bureau, *see* MASS. GEN. LAWS ch. 13, § 9.

<sup>540</sup> MASS. GEN. LAWS ch. 6, § 168, ¶ 3.

<sup>541</sup> 42 U.S.C. § 1437d(q); 24 C.F.R. § 5.903.

<sup>542</sup> The Massachusetts law allows such use of CORI records “to further the protection and well-being of tenants of such housing authorities.” MASS. GEN. LAWS ch. 6, § 168, ¶ 3.

disqualify applicants due to drug use,<sup>543</sup> alcohol abuse,<sup>544</sup> certain sex offender registration requirements,<sup>545</sup> drug-related or violent crime activity.<sup>546</sup>

### § 39.12H. EDUCATION

Massachusetts law provides for the suspension or expulsion of any adult student (defined as being over 17 years of age at the time of the offense) convicted of certain offenses. Massachusetts General Laws chapter 71, section 37H1/2 allows a principal or school headmaster to initiate a suspension process when a criminal complaint charges a student with a felony.<sup>547</sup> Upon conviction of a felony, the same statute gives a principal or school headmaster the discretion to initiate expulsion proceedings.<sup>548</sup>

The Massachusetts Fair Educational Practices Act<sup>549</sup> precludes in-state colleges and universities from inquiring about an applicant’s criminal history regarding (i) an arrest which did not result in a conviction; (ii) first convictions for specified misdemeanors, namely “drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace”; or (iii) “any conviction of a misdemeanor where such conviction occurred more than five years prior to the date of such application for admission, unless the applicant was sentenced to imprisonment upon conviction of such misdemeanor, or such individual has been convicted of any offense within the five years’ period.”<sup>550</sup>

Federal law may preclude a person with a drug conviction from receiving federal financial aid.<sup>551</sup> It appears that a first offense for drug possession bars a student from receiving financial aid for one year; a second offense conviction disqualifies financial aid for two years; and a third conviction results in an indefinite disqualification. A first offense drug sale conviction results in a two-year financial aid ineligibility and a second such offense results in an indefinite ineligibility.<sup>552</sup>

### § 39.12I. CIVIL FORFEITURE

Civil forfeiture of certain properties is a potential collateral consequence of drug prosecutions, pursuant to General Laws chapter 94C, section 47.<sup>553</sup> According to the statute, “all conveyances, including aircraft, vehicles or vessels,”<sup>554</sup> as well as “all real property...used to commit or to facilitate”<sup>555</sup> certain enumerated offenses, are

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<sup>543</sup> 24 C.F.R. § 960.204(a)(2).

<sup>544</sup> 24 C.F.R. § 960.204(b).

<sup>545</sup> 24 C.F.R. § 960.204(a)(4).

<sup>546</sup> 42 U.S.C. § 13661(c).

<sup>547</sup> MASS. GEN. LAWS ch. 71, § 37H1/2 (1).

<sup>548</sup> MASS. GEN. LAWS ch. 71, § 37H1/2 (2).

<sup>549</sup> MASS. GEN. LAWS ch. 151C, §§ 1-5.

<sup>550</sup> MASS. GEN. LAWS ch. 151C, § 2(f).

<sup>551</sup> Higher Education Act of 1965, 20 U.S.C. § 1091(r).

<sup>552</sup> *Id.*

<sup>553</sup> MASS. GEN. LAWS ch. 94C, § 47.

<sup>554</sup> MASS. GEN. LAWS ch. 94C, § 47 (a) (3).

<sup>555</sup> MASS. GEN. LAWS ch. 94C, § 47 (a) (7).

subject to civil forfeiture. The enumerated offenses include: the manufacture, distribution, dispensing or possession with intent to manufacture, dispense, or distribute, a Class A, Class B, Class C, Class D or Class E controlled substance;<sup>556</sup> trafficking in marihuana, cocaine, heroin, morphine, opium, etc.; unlawful manufacture, distribution, dispensing or possession with intent to manufacture, distribute or dispense Classes A-C controlled substances to minors;<sup>557</sup> unlawful creation, distribution, dispensing or possession with intent to distribute or dispense counterfeit substances;<sup>558</sup> sale, possession or manufacture with intent to sell drug paraphernalia;<sup>559</sup> controlled substances violations in, on, or near school property;<sup>560</sup> and conspiracy to violate controlled substance laws.<sup>561</sup> Additionally, any defendant who was assigned to an alcohol or controlled substance education, treatment or rehabilitation program or who was convicted of operating under the influence of intoxicating liquor at least three times, is subject to forfeiture of “a motor vehicle or vessel”;<sup>562</sup>

### § 39.12J. CIVIL TORT LIABILITY FOR SHOPLIFTING

Massachusetts General Laws chapter 231, section 85R 1/2 allows store merchants to initiate a civil action of recovery for damages to property as a result of a larceny or attempted larceny of that property. In addition to any actual damage caused to the property, a merchant, in this tort action, may request damages between \$50 and \$500.

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<sup>556</sup> MASS. GEN. LAWS ch. 94C, §§ 32, 32A-D.

<sup>557</sup> MASS. GEN. LAWS ch. 94C, § 32F.

<sup>558</sup> MASS. GEN. LAWS ch. 94C, § 32G.

<sup>559</sup> MASS. GEN. LAWS ch. 94C, § 32I.

<sup>560</sup> MASS. GEN. LAWS ch. 94C, § 32J.

<sup>561</sup> MASS. GEN. LAWS ch. 94C, § 40.

<sup>562</sup> MASS. GEN. LAWS ch. 90, § 24W.