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The Naked Truth: An In-Depth Look into the Question of Hearsay Admissibility at Probation Violation Hearings in Massachusetts, the Application of Rule 6, and What It All Means for the Future of the Massachusetts Probation System

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THE NAKED TRUTH: AN IN-DEPTH LOOK INTO THE QUESTION OF HEARSAY ADMISSIBILITY AT PROBATION VIOLATION HEARINGS IN MASSACHUSETTS, THE APPLICATION OF RULE 6, AND WHAT IT ALL MEANS FOR THE FUTURE OF THE MASSACHUSETTS PROBATION SYSTEM

The Emperor's New Suit

An Emperor of a prosperous city who cares more about clothes than military pursuits or entertainment hires two swindlers who promise him the finest suit of clothes from the most beautiful cloth. This cloth, they tell him, is invisible to anyone who was either stupid or unfit for his position. The Emperor cannot see the (non-existent) cloth, but pretends that he can for fear of appearing stupid; his ministers do the same. When the swindlers report that the suit is finished, they dress him in mime. The Emperor then goes on a procession through the capital showing off his new "clothes." During the course of the procession, a small child cries out, "the emperor is naked!" The crowd realizes the child is telling the truth. The Emperor, however, holds his head high and continues the procession.
—Hans Christian Andersen 1837

I. INTRODUCTION

The Fifth Amendment to the United States Constitution prohibits the federal government from denying "life, liberty, or property" from any person without due process of law.¹ In a criminal prosecution, the line is clear: the protections provided by the Constitution for a criminal defendant are absolute.² However, after the adjudication of a defendant's case, the court's disposition has significant repercussions on the accused's liberty.³

¹ U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV (prohibiting states from depriving life, liberty, or property without due process of law).

² *See Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) (noting difference between criminal prosecution and revocation of parole). In a criminal prosecution, a citizen's liberty is at stake, thus that citizen is entitled to the absolute protections of the Constitution. *See id.*

³ A defendant found guilty is subject to the "sentence" imposed by the court. BLACK'S LAW DICTIONARY 1485 (9th ed. 2006). The extent of a defendant's loss of liberty varies greatly depending on the sentence imposed, from the total loss of liberty, to the "conditional liberty"

Although statutorily dependent, many states—including Massachusetts—grant judges the discretion to order probation in a criminal case after a finding of guilty or after a continuance without a finding.⁴ While on probation, a probationer has “conditional liberty.”⁵ As such, once it is determined a probationer has violated one or more of the contingencies upon which his liberty rests, his probation can be revoked and his liberty forfeited.⁶ A probation violation hearing illuminates this conditional liberty status because the same system that granted probation now has the discretion to take it away.⁷ Unlike the bright line set out by the United States Constitution for a criminal defendant on trial, the line defining which constitutional protections are afforded to a probationer during a probation violation hearing is less well-defined.⁸ Likewise, the evidentiary standards used to enforce those constitutional protections afforded to probationers are more relaxed compared to the evidentiary standards governing criminal trials.⁹

restrictions of a probationer. See *Commonwealth v. Durling*, 551 N.E.2d 1193, 1197 (Mass. 1990).

⁴ See generally MASS. GEN. LAWS ch. 276, § 87 (2004) (authorizing court to place person in care of probation officer); MASS. GEN. LAWS ch. 279, § 1 (1998) (outlining procedure for utilizing probation as suspended sentence).

⁵ See *Durling*, 551 N.E.2d at 1197 (providing probationer’s liberty may be taken away if he violates conditions imposed upon him).

⁶ See *id.* at 1197-98 (concluding due process requirements sufficient to determine whether probation revocation proper); see also MASS. DIST. CT. R. PROB. VIOLATION PROCEEDINGS 5(b) cmt. (acknowledging probation violation does not compel order of revocation).

⁷ See MASS. DIST. CT. R. PROB. VIOLATION PROCEEDINGS 1 cmt. (describing scope and purpose of probation violation proceedings). The commentary acknowledges that even though most of the relevant case law refers to the proceedings as “probation revocation hearings,” the rules actually govern “probation violation proceedings.” *Id.* This distinction is important because the decision to revoke a probationer’s probation, or order any other disposition, can only proceed if a probation violation is found. *Id.*; see also MASS. DIST. CT. R. PROB. VIOLATION PROCEEDINGS 5(b) (identifying adjudication and determining “disposition of the matter” as “two distinct steps” in revocation process).

⁸ See, e.g., *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.4 (1973) (noting probationers may not be denied due process because probation is an “act of grace”); *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) (providing parolee’s constitutional rights limited because parole revocations not part of criminal prosecution); *Mempa v. Rhay*, 389 U.S. 128, 133-34 (1967) (holding probationer entitled to representation by counsel at combined revocation and sentencing hearing); *Durling*, 551 N.E.2d at 1197 (“[A] probationer’s liberty interest is conditional. It was given to him as a matter of grace when the State had the right to imprison him.”); *Commonwealth v. Brown*, 504 N.E.2d 668, 671 (Mass. App. Ct. 1987) (noting “less formal and less stringent” due process protections required at probation hearings).

⁹ See *Morrissey*, 408 U.S. at 488 (noting Supreme Court decides minimum requirements of due process, but States write procedure); see also MASS. DIST. CT. R. PROB. VIOLATION PROCEEDINGS 1 (articulating fundamental differences between probationer and defendant protections); MASS. DIST. CT. R. PROB. VIOLATION PROCEEDINGS 6 (prescribing requirements of

Accordingly, states across the country developed their own state and local district court rules outlining probation violation procedures.¹⁰ This Note addresses the current discrepancies in Massachusetts law surrounding the admissibility of hearsay evidence at probation violation proceedings.¹¹ Specifically, this Note shows how the Supreme Judicial Court's ("SJC") decision in *Commonwealth v. Negron*¹² is inconsistent with the language, application, and intent of Rule 6 of the District Court Rules for Probation Violation Proceedings ("Rule 6").¹³ Part II discusses the history and purpose of probation in Massachusetts and chronicles the relevant case law giving rise to the current state of the law.¹⁴ Part III explains the existing disparity in Massachusetts law.¹⁵ Part IV highlights the incorrect application of Rule 6 in *Negron* and its progeny by examining the Massachusetts courts' reasoning with respect to the admissibility of hearsay evidence at probation violation hearings both before and after Rule 6's enactment.¹⁶ Additionally, Part IV explores the immediate and long-term consequences of safeguarding probationers' constitutional rights, addressing Massachusetts' history of shying away from awarding constitutional protections to probationers;¹⁷ Rule 6's consistency with probation's purpose;¹⁸ and, whether awarding constitutional protections to

admissibility of hearsay evidence at probation violation proceedings); *Commonwealth v. Durling*, 551 N.E.2d 1193, 1197 (Mass. 1990) (stating hearsay evidence at probation violation hearings not per se prohibited by due process clause). See generally *Commonwealth v. Wilcox*, 841 N.E.2d 1240, 1248 (Mass. 2006) (concluding Article XII confrontation right does not apply at probation violation hearings); *Commonwealth v. Delaney*, 629 N.E.2d 1007, 1009 (Mass. App. Ct. 1994) (acknowledging ordinary hearsay prohibition non-applicable in probation revocation hearings with good cause).

¹⁰ See generally Marjorie A. Shields, Annotation, *Sufficiency of Hearsay Evidence in Probation Revocation Hearings*, 21 A.L.R. 771 (2007) [hereinafter Shields, *Sufficiency of Hearsay*] (outlining hearsay sufficiency requirements at probation revocation hearings by state); Annotation, *Admissibility of Hearsay Evidence in Probation Revocation Hearings*, 11 A.L.R. 999 (1982) [hereinafter *Admissibility of Hearsay*] (outlining admissibility of hearsay evidence at probation revocation hearings by state).

¹¹ See *infra* Parts II-V (discussing admissibility of hearsay evidence at probation violation hearings).

¹² 808 N.E.2d 294 (Mass. 2004).

¹³ See *infra* Part IV.A (analyzing court's application of Rule 6 in *Negron* decision).

¹⁴ See *infra* Part II.

¹⁵ See *infra* Part III.

¹⁶ See *infra* Part IV.A (analyzing admissibility of hearsay evidence at probation violation hearings in Massachusetts state courts).

¹⁷ See *infra* Part IV.B (highlighting conundrum of the *Negron* decision).

¹⁸ See *infra* Part IV.C (discussing effects of expanding constitutional protections on concept of conditional liberty).

probationers compromises the purpose of probation.¹⁹ Lastly, Part V calls for legislative and judicial action to reconcile the present incongruity in the law.²⁰ This Note suggests that the language of Rule 6 is consistent with the original rehabilitation goals of probation.²¹

II. HISTORY

A. Probation in Massachusetts

The concept of probation is deeply rooted in the Commonwealth of Massachusetts.²² Probation's original purpose was rehabilitation.²³ A revolutionary concept of its time, the probation system not only restored power to the judiciary, but shifted the focus of corrections to the individual.²⁴ Massachusetts' system was deemed a success and the concept

¹⁹ See *infra* Part IV.C (analyzing effects of expanding constitutional protections on purpose of probation).

²⁰ See *infra* Part V.

²¹ See *infra* Part V. (concluding Rule 6's language is consistent with larger rehabilitative purpose of probation).

²² See Charles L. Chute, *The Development of Probation in the United States*, in PROBATION AND CRIMINAL JUSTICE 225, 227-28 (Sheldon Glueck ed., Arno Press 1974) (1933). Probation originated in Massachusetts in 1878. *Id.* at 227. "Bailing on probation" served as the earliest method of placing a person on probation: prior to sentencing, but after adjudication, the defendant may be released for a sum of money ("bail" or "bond") provided the probation officer brings the probationer back to court on a specific date. *Id.* at 227-28. This method is still used today, although in the vernacular, the word "probation" implies the specific alternative sanction imposed by the court. See generally BLACK'S LAW DICTIONARY 1322 (9th ed. 2009) ("[Probation:] A court-imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of sending the criminal to jail or prison."); LOUIS P. CARNEY, PROBATION AND PAROLE: LEGAL AND SOCIAL DIMENSIONS 83-84 (Susan H. Munger & Myrna W. Breskin eds., 1977) (defining probation).

²³ See *Commonwealth v. Wilcox*, 841 N.E.2d 1240, 1245 (Mass. 2006) ("The purpose of probation . . . 'is to enable the [convicted] person to get on his feet, to become law abiding and to lead a useful and upright life under the fostering influence of the probation officer.'" (alteration in original) (quoting *Mariano v. Hibbard*, 137 N.E.2d 369, 370 (Mass. 1922))). See generally 24 C.J.S. *Criminal Law* § 2145 (2010) (characterizing purpose of probation as rehabilitating offenders without confinement and protecting public); CARNEY, *supra* note 22, at 85 (condemning brutal and lengthy imprisonments for breeding hostility and reinforcing criminal tendencies). Several theoretical justifications are used to rationalize probation, including: (1) maximizing community-based influences in the correctional processes; (2) eliminating physical and psychological degradation of prisoners; (3) humanizing the rehabilitation process; and (4) heeding the mass of evidence supporting diversion, as opposed to incarceration, is the more effective correctional device. CARNEY, *supra* note 22, at 86.

²⁴ See Thorsten Sellin, *The Trial Judge's Dilemma: A Criminologist's View*, in PROBATION AND CRIMINAL JUSTICE 99, 100-01 (Sheldon Glueck ed., Arno Press 1974) (1933). Probation commenced the individualization of penal treatment, focusing on the criminal's character rather

of probation quickly spread throughout the country.²⁵ As a result, probation, and its underlying purpose of rehabilitation, spawned a modern trend towards community-based corrections.²⁶

Under current Massachusetts law, any state court with criminal jurisdiction has authority to place an individual on probation.²⁷ Chapter 276, section 87A of the Massachusetts General Laws bestows virtually boundless discretion upon the judiciary with respect to the contingencies it is authorized to impose as conditions of probation.²⁸ Similar to the broad latitude afforded to the judiciary in sentencing probation, there is also ample discretion in the type of conduct that warrants revocation.²⁹

B. Probation Violations Hearings and Hearsay Evidence in Massachusetts

Massachusetts has developed, adopted, and modified a set of rules tailored specifically for probation violation hearings.³⁰ Consequently, the

than the nature of the offense. *Id.* at 101-02. Notably, probation provided the judiciary with vast discretion over a host of sentencing issues including but not limited to: whether a convict should serve a definitive, general or a limited indeterminate length sentence; whether a convict served his sentence in a penal institution; whether to order a suspended sentence with or without probation, and whether to sentence a convict to probation alone or to a combination of probation, costs and restitution. *Id.* at 102-03.

²⁵ See Chute, *supra* note 22, at 229-32 (chronicling spread of probation).

²⁶ See generally CARNEY, *supra* note 22, at 84-86 (discussing arguments supporting probation system).

²⁷ See MASS. GEN. LAWS ch. 276, § 87 (2004). The statute provides in pertinent part:

The superior court, any district court and any juvenile court may place on probation in the care of its probation officer any person before it charged with an offense or a crime for such time and upon such conditions as it deems proper, with the defendant's consent, before trial and before a plea of guilty, or in any case after a finding of verdict of guilty

Id.

²⁸ MASS. GEN. LAWS ch. 276, § 87A (2004). "The conditions of probation imposed by a court upon a person . . . may include, but shall not be limited to, participation by said person in specified rehabilitative programs or performance by said person of specified community service work for a stated period of time." *Id.*

²⁹ See generally CARNEY, *supra* note 22, at 118-20 (detailing historic criteria for probation revocation). The probation system's individualized nature allows for a level of flexibility in its operation and framework. *Id.* at 119. As such, there remains no fixed formula as to what specific conduct warrants revocation, and states developed their own procedures defining how and why probation may be revoked. See MASS. DIST. CT. R. PROB. VIOLATION PROCEEDINGS 1 cmt. (identifying "all or nothing" misconception that *revocation* must follow violation finding). *But see* *McHoul v. Commonwealth*, 312 N.E.2d 539, 543 (Mass. 1974) (recognizing probation disposition is a matter of court discretion and cannot be revoked arbitrarily).

³⁰ See MASS. DIST. CT. R. PROB. VIOLATION PROCEEDINGS 1-9 (outlining rules of probation

unique problem of apportioning constitutional rights to probationers was born.³¹ The admissibility of hearsay evidence at a probation violation hearing varies greatly from state to state and creates issues surrounding a probationer's constitutional rights to due process and confrontation.³²

Following the landmark probation violation hearing decision in *Commonwealth v. Durling*,³³ the Massachusetts Legislature enacted Rule 6.³⁴ Pursuant to Rule 6(a), hearsay evidence is admissible at probation

violation hearings); *see also* *Commonwealth v. Wilcox*, 841 N.E.2d 1240, 1248 (Mass. 2006) (noting evidence admissible at revocation proceedings not otherwise admissible in adversary criminal trial) (citing *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)).

³¹ *See supra* notes 8-9 and accompanying text (referencing various absolute and conditional constitutional rights of probationers); *see also* Mary T. Casey, Note, *Due Process in Probation Revocation v. Self Incrimination: A Comparative Perspective for the Massachusetts Probationer*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 181, 187-97 (1991) (discussing due process protections for probationers in Massachusetts). Notably, a probationer does not have the right of confrontation in a probation or parole violation hearing because the Sixth Amendment of the U.S. Constitution does not apply, as such hearings are not considered "criminal prosecutions." *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."). The Massachusetts Declaration of Rights expands the confrontation right:

No subject shall be held to answer for any *crimes or offence*, until the same is fully and plainly, substantially and formally, described to him . . . And every subject shall have a right . . . to meet the witnesses against him face to face . . . And no subject shall be arrested . . . put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

MASS. CONST. art. XII (emphasis added). *But see Wilcox*, 841 N.E.2d at 1249-50 (concluding probationer has no absolute right to confrontation in Massachusetts).

³² *See Commonwealth v. Durling*, 551 N.E.2d 1193, 1197 (Mass. 1990) (observing probationer has liberty interest at stake in violation proceedings); *see also Commonwealth v. Maggio*, 605 N.E.2d 1247, 1250 (Mass. 1993) (providing existence of reliable hearsay establishes "good cause" to deny probationer right of confrontation). *See generally* Casey, *supra* note 31, at 187-97 (discussing Massachusetts' interpretation of due process protections for probationers pre-1991); *Admissibility of Hearsay*, *supra* note 10, at § 3(a)-(b) (outlining admissibility of hearsay evidence at probation revocation hearing by each state). Unlike Massachusetts, which allows for the general admission of hearsay evidence pursuant to Rule 6(a), other states have expressly taken the position that the admission of hearsay evidence is either *dependent* upon compliance with minimum due process standards or inadmissible altogether. *See State v. Verdolini*, 819 A.2d 901, 905 (Conn. App. Ct. 2000) ("It is well settled that probation proceedings are informal and that strict rules of evidence do not apply to them. (citation omitted). Hearsay evidence may be admitted in a probation revocation hearing if it is relevant, reliable and probative."); *Barnett v. State*, 392 S.E.2d 322, 323 (Ga. Ct. App. 1990) (stating hearsay inadmissible at probation revocation proceedings); *State v. DeRoche*, 389 A.2d 1229, 1234 (R.I. 1978) (noting determination of "good cause" condition precedent to admission of hearsay).

³³ 551 N.E.2d 1193 (Mass. 1990).

³⁴ *See* MASS. DIST. CT. R. PROB. VIOLATION PROCEEDINGS 6 & cmt. (acknowledging rule based "almost exclusively" on *Durling*). In *Durling*, the SJC noted that "[t]his court has always allowed the use of hearsay at probation revocation hearings." 551 N.E.2d at 1197. Thus, the

violation hearings.³⁵ When an alleged probation violation is based solely on hearsay evidence, Rule 6(b) provides guidelines establishing the sufficiency of hearsay evidence.³⁶

Prior to Rule 6's enactment, hearsay evidence was consistently admitted at probation violation hearings.³⁷ Notably, the majority of cases

issue before the court was not whether hearsay was admissible, but rather, to what extent a court may rely on hearsay evidence in revoking probation. *Id.* In resolving this issue, the court stated that, "[u]nsubstantiated and unreliable hearsay cannot, consistent with due process, be the entire basis of a probation revocation." *Id.* at 1199. Reliable hearsay, however, can be the basis of a revocation: "In situations where the Commonwealth seeks to rely on evidence not subject to cross-examination, the due process touchstone of an accurate and reliable determination still remains." *Id.* at 1198-99. Although standard evidentiary rules do not apply to probation revocation hearings, the *Durling* court concluded that the first step "is to determine whether the evidence would be admissible under those rules" because "[e]vidence which would be admissible under standard evidentiary rules is presumptively reliable." *Id.* Importantly, this statement does not impute an admissibility requirement, only a guideline for evaluating the reliability of admitted hearsay evidence. *Id.* at 1198-99. *But cf.* Casey, *supra* note 31, at 194 (suggesting *Durling* provided new standard of hearsay admissibility in probation hearings). The *Durling* court opined that the confrontation issue would more appropriately be resolved on a case-by-case basis and will depend on the totality of the circumstances. *Durling*, 551 N.E.2d at 1199. Specifically, the SJC held, "[i]f the Commonwealth has 'good cause' for not using a witness with personal knowledge, and instead offers reliable hearsay or other evidence, then the requirements of due process are satisfied." *Id.* (emphasis added).

³⁵ MASS. DIST. CT. R. PROB. VIOLATION PROCEEDINGS 6(a). Due to the informal nature of probation violation hearings, as well as the fact that the case against the probationer is brought by a probation officer instead of a trained criminal prosecutor, the court is responsible for determining the reliability of hearsay evidence. *See* MASS. DIST. CT. R. PROB. VIOLATION PROCEEDINGS 6(a) cmt.

³⁶ *See* MASS. DIST. CT. R. PROB. VIOLATION PROCEEDINGS 6(b). Rule 6(b) provides:

Where the *sole* evidence submitted to prove a violation of probation is hearsay, that evidence shall be sufficient only if the court finds in writing (1) that such evidence is substantially trustworthy and demonstrably reliable and (2), if the alleged violation is charged or uncharged criminal behavior, that the probation officer has good cause for proceeding without a witness with personal knowledge of the evidence presented.

Id. (emphasis added). As such, Rule 6(b) applies *only* when hearsay evidence is the sole evidence of the probationer's alleged violation and does not deal with the issue of admissibility, but rather addresses the issue of legal sufficiency. *See id.* at cmt. Conversely, where unreliable hearsay evidence is presented at a probation violation hearing along with reliable hearsay or other evidence, due process is satisfied. *See Durling*, 551 N.E.2d at 1199 (noting unreliable hearsay must be accompanied with other evidence to satisfy due process). Nothing in Rule 6(b) or the *Durling* decision precludes the admission of unreliable hearsay, only that unreliable hearsay cannot serve as the entire basis of a probation violation. *See* MASS. DIST. CT. R. PROB. VIOLATION PROCEEDINGS 6(b) cmt.; *Durling*, 551 N.E.2d at 1199.

³⁷ *See Durling*, 551 N.E.2d at 1197 ("This court has always allowed the use of hearsay at probation revocation hearings."); *see, e.g., Commonwealth v. Vincente*, 540 N.E.2d 669, 671 (Mass. 1989) (emphasizing importance of admitting all reliable evidence relating to probationer's conduct); *In re Brown*, 480 N.E.2d 301, 302 (Mass. 1985) (admitting hearsay evidence that was insufficient but properly admitted); *Commonwealth v. Calvo*, 668 N.E.2d 846, 848 (Mass. App.

where a probationer was found to have violated probation and had his probation revoked and the revocation was reversed on appeal, turn on the issue of whether the evidence offered to prove the violation was *sufficient*, not *inadmissible*.³⁸ Following Rule 6's enactment, between the years 2000 and 2004, hearsay evidence continued to be regularly admitted into evidence at probation violation hearings.³⁹ The SJC shifted the focus of Rule 6's application from sufficiency to admissibility in 2004, through the *Negron* decision.⁴⁰ As a result, the decisions following *Negron* provide contradictory applications of Rule 6 resulting in inconsistent case law.⁴¹

Ct. 1996) (concluding police report containing sworn witness statements was admissible at probation violation hearing); *Commonwealth v. Joubert*, 647 N.E.2d 1238, 1241 (Mass. App. Ct. 1995) (permitting hearsay inadmissible under "standard evidentiary rules" as evidence of probation violations). But see *Commonwealth v. Delaney*, 629 N.E.2d 1007, 1008-09 (Mass. App. Ct. 1994) (holding violation finding erroneous because based on inadmissible hearsay despite additional non-hearsay evidence).

³⁸ See, e.g., *Commonwealth v. Maggio*, 605 N.E.2d 1247, 1250-51 (Mass. 1993) (finding evidence at probation violation hearing was insufficient); *In re Brown*, 480 N.E.2d 301, 302 (Mass. 1985) (determining bulk of hearsay introduced was unreliable); *Commonwealth v. Wilson*, 716 N.E.2d 649, 651 (Mass. App. Ct. 1999) (concluding police report lacked sufficient reliability).

³⁹ See *Commonwealth v. Cates*, 786 N.E.2d 411, 413-14 (Mass. App. Ct. 2003) (finding good cause and substantial trustworthiness to admit hearsay); *Commonwealth v. Ivers*, 778 N.E.2d 942, 944-46 (Mass. App. Ct. 2002) (acknowledging pragmatic necessity of hearsay evidence).

⁴⁰ See *Commonwealth v. Negron*, 808 N.E.2d 294, 299 (Mass. 2004) ("The proper inquiry [in determining whether hearsay statements are admissible at probation revocation hearings] is whether the hearsay evidence itself had substantial indicia of reliability establishing good cause for overcoming the need for confrontation.").

⁴¹ Compare *Commonwealth v. Nunez*, 841 N.E.2d 1250, 1254 n.6 (Mass. 2006) (assuming judicial determination of reliability when hearsay objection overruled at probation violation hearing), *Commonwealth v. Wilcox*, 841 N.E.2d 1240, 1250 (Mass. 2006) (concluding due process not offended when "substantially reliable" hearsay admitted at probation violation hearing), and *Commonwealth v. Durling*, 551 N.E.2d 1193, 1199 (Mass. 1990) ("If the proffered evidence is not admissible under standard evidentiary rules, then a court must independently look to the reliability of that evidence. Unsubstantiated and unreliable hearsay cannot, consistent with due process, be the entire basis of a probation revocation."), with *Commonwealth v. King*, 886 N.E.2d 727, 730 (Mass. App. Ct. 2008) (holding police report insufficient despite "good cause" because of unreliable and untrustworthy hearsay). On September 30, 2009, the SJC granted further appellate review on the issue presented in *Thissell*. *Commonwealth v. Thissell*, 914 N.E.2d 330, 330 (Mass. 2009). The issue on appeal was whether the hearsay evidence admitted into evidence, which served as the basis of the violation finding, and which was used to revoke Thissell's probation, violated his due process rights according to *Durling*. *Commonwealth v. Thissell*, 928 N.E.2d 932, 933 (Mass. 2010). The trial court revoked Thissell's probation in part based on GPS maps and logs which documented his alleged probation violation. *Commonwealth v. Thissell*, 910 N.E.2d 943, 946 (Mass. App. Ct. 2009), *aff'd*, 928 N.E.2d 932 (Mass. 2010). In upholding the trial judge's decision to admit the documents, the Massachusetts Appeals Court reasoned that the maps and logs generated by the GPS were not hearsay and therefore admissible. *Id.* On July 1, 2010, the SJC affirmed the Massachusetts Appeals Court's decision in *Thissell*.

III. THE *NEGRON* DECISION

In *Negron*, the Commonwealth petitioned a single justice of the SJC seeking relief from the district court's evidentiary ruling at a probation violation hearing.⁴² The trial court's ruling excluded the statements made by the probationer's wife to the testifying officer, finding the wife's statements were "inadmissible hearsay of questionable reliability."⁴³ On appeal, the SJC rejected the trial court's determination that the wife's invocation of her marital privilege was indicative of the statements' unreliability, and instead, held that "[t]he proper inquiry [in determining admissibility] is whether the hearsay evidence itself had substantial indicia of reliability establishing good cause for overcoming the need for confrontation."⁴⁴ In addition to the newly announced reliability prerequisite, in a footnote at the very end of its decision, the SJC alluded to an *additional* factor preceding admissibility, noting, "[a]dmission of the hearsay also includes, of course, an additional implicit determination that the witness who is reporting the hearsay . . . is doing so accurately."⁴⁵

Thissell, 928 N.E.2d at 933.

⁴² 808 N.E.2d at 298 (challenging district court's decision excluding wife's testimony). In *Negron*, the probationer was alleged to have violated his probation pursuant to the issuance of a criminal complaint charging him "with assault on his wife, malicious damage to a motor vehicle, malicious destruction of property exceeding \$250 (two counts), leaving the scene of property damage, and arson of a dwelling house." *Id.* at 298. Prior to the trial court determining whether the probationer violated the terms of his probation, the SJC stayed the violation proceedings to allow the Commonwealth to pursue its application for relief. *Id.* at 296 n.1.

⁴³ *Negron*, 808 N.E.2d at 298. The trial court improperly found the probationer's wife was available as a witness, despite her valid claim of spousal privilege. *Id.* at 299. As a matter of law, a person is unavailable if he or she refuses to testify pursuant to a valid claim of marital privilege. *Id.* Moreover, the SJC noted the wife's assertion of her marital privilege had no bearing on whether or not her statements to the officers at the scene were otherwise reliable. *Id.* In addition, notwithstanding the fact the testifying officer was also the officer who responded to the incident, the trial court also rejected the Commonwealth's argument that the wife's statements qualified for admission under the spontaneous utterance exception because the officer testified the wife did not appear upset when she spoke with him. *Id.* at 298. However, the court permitted the testifying officer to testify to his personal observations. *Id.* The officer testified that when the police entered the apartment "it was engulfed in a smoky haze due to the fact that the stove's four electric burners had been turned on with 'the covers on them,' and the covers had all been 'charred.'" *Id.* Additionally, the officer testified that the apartment was in "a state of disarray," with "items broken and furniture overturned," and that there was an automobile outside with front end damage and scrapes on the back. *Id.*

⁴⁴ *Negron*, 808 N.E.2d at 299.

⁴⁵ *Id.* at 300 n.8. In footnote 8, the SJC departed from a well-established evidentiary concept and suggested that the court must evaluate a witness' credibility prior to admission. In doing so, the SJC departed from the well-established principle that the fact finder, not the court, judges the witness's credibility. See *Commonwealth v. Rodriguez*, 383 N.E.2d 851, 856 (Mass. App. Ct. 1978) (articulating long-standing principle that fact finder has ultimate appraisal of testimony's

IV. ANALYSIS

A. Anarchy. The Inconsistent Manner in Which Hearsay Evidence is Admitted at Probation Violation Hearings.

There is a significant difference between the decision to admit evidence and the question of what to do with evidence once it has been admitted.⁴⁶ As a result of *Negron*, the admissibility of hearsay evidence at probation violation hearings remains unclear.⁴⁷ Rule 6 codified the SJC's *Durling* decision.⁴⁸ Rule 6(a) expressly states that hearsay evidence is admissible at a probation violation hearing.⁴⁹ Moreover, Rule 6(b) provides for a "sufficiency check" when the only evidence submitted to prove a probation violation is hearsay.⁵⁰ In *Negron*, the SJC entertained the Commonwealth's appeal which challenged the district court's ruling that hearsay evidence was inadmissible, *before* it found the probationer violated his probation.⁵¹ In remedying the error, the SJC effectively redefined Rule 6,⁵² despite determining that the lower court erred in its evidentiary ruling.⁵³

credibility).

⁴⁶ See *supra* notes 35-36 and accompanying text (distinguishing two unique and independent subsections of Rule 6). When hearsay is admitted into evidence pursuant to Rule 6(a), it does not mean that a judge will refuse to evaluate the sufficiency of the evidence prior to finding a probationer has violated his probation as provided for in Rule 6(b). See MASS. DIST. CT. R. PROB. VIOLATION PROCEEDINGS 6(b) cmt. (stressing court must balance interests of probationer and Commonwealth by looking at "totality of the circumstances").

⁴⁷ Compare *supra* text accompanying note 44 (prescribing substantial indicia of reliability as proper inquiry for admitting hearsay evidence), with *supra* notes 35-36 and accompanying text (providing hearsay evidence automatically admissible at probation violation hearing pursuant to Rule 6).

⁴⁸ See *supra* note 34 and accompanying text (explaining origin and commentary of Rule 6).

⁴⁹ See *supra* note 35 and accompanying text (explaining Rule 6(a)). In accordance with Rule 6(a), unreliable hearsay, although not worthy of the court's consideration, does not render it inadmissible but rather insufficient to justify a violation on its own. See MASS. DIST. CT. R. PROB. VIOLATION PROCEEDINGS 6(a) cmt.

⁵⁰ See *supra* note 36 and accompanying text (outlining language and scope of Rule 6(b)). The application of Rule 6(b) rests on the underlying presumption that the hearsay evidence was admitted into evidence. See *supra* note 37 (explaining limits on probationer's confrontation right). However, there is no preliminary evidentiary hearing prior to the probation violation hearing. MASS. DIST. CT. R. PROB. VIOLATIONS PROCEEDINGS 1-9.

⁵¹ See *supra* note 42 (stating interlocutory appeal allowed prior to district court determining probation violated).

⁵² See *supra* note 44 and accompanying text (remanding case to determine issue of reliability as prerequisite to admission).

⁵³ See *supra* notes 43-44 and accompanying text (noting invocation of spousal privilege does not render spouse available and therefore hearsay statements are unreliable).

By announcing a new standard for admissibility of hearsay evidence at probation violation hearings, *Negron* serves as the black sheep in a long line of precedential case law.⁵⁴ However, prior to the 2004 *Negron* decision, courts admitted hearsay into evidence inconsistently at probation violation hearings.⁵⁵ Rather than clarifying the issue, *Negron* and its progeny only add to the calamitous state surrounding the substantive law that governs probation violation proceedings.⁵⁶

⁵⁴ Compare *supra* text accompanying note 44 (announcing proper determination of admissibility is reliability), with *supra* notes 37-39 and accompanying text (outlining precedential case law from 1985 through *Negron*).

⁵⁵ See *supra* notes 37-39 and accompanying text (outlining Massachusetts case law historically regarding admission of hearsay evidence at probation violation hearings).

⁵⁶ See *supra* notes 7-8 and accompanying text (discussing inconsistencies in substantive law of probation violation proceedings); see also *supra* note 41 and accompanying text (discussing Massachusetts case law post-*Negron*). Since the *Negron* decision, courts have continued to admit and exclude hearsay evidence inconsistently at probation violation hearings, relying on their own interpretation of the muddled-hybrid rules articulated since *Durling*. See *Commonwealth v. Nunez*, 841 N.E.2d 1250, 1254 (Mass. 2006) (“‘[I]f reliable hearsay is presented, the good cause requirement is satisfied,’ and a probationer may be denied the right to confront and cross-examine witnesses at a probation revocation hearing.” (alteration in original) (quoting *Commonwealth v. Negron*, 808 N.E.2d 294, 300 (Mass. 2004))); *Commonwealth v. King*, 886 N.E.2d 727, 740 (Mass. App. Ct. 2008) (“Where hearsay is the only evidence of a violation, ‘the indicia of reliability must be substantial’ to overcome the defendant’s ‘interest in cross-examining the actual source.’” (quoting *Commonwealth v. Durling*, 551 N.E.2d 1193, 1199 (Mass. 1990))). In *Nunez*, the lower court judge found that the probationer violated his probation. 841 N.E.2d at 1252. In making his decision, the judge relied on the testimony of the victim, the arresting officer, and the probation officer. *Id.* at 1253. On appeal, the probationer argued that his right to cross-examine witnesses—under the Fourteenth Amendment to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights—was violated by the admission of hearsay without a finding of good cause, and where the hearsay was unreliable. *Id.* at 1252. In rebutting the probationer’s argument, the SJC not only misguidedly relied on the rule set out in *Negron*, but also failed to make reference to the evidentiary rule at issue, namely Rule 6. 808 N.E.2d at 296-300. The court in *Nunez* noted, “[a]lthough the judge did not explicitly state that he found the hearsay reliable, that conclusion is implicit in the fact that he made findings based on the hearsay evidence.” 841 N.E.2d at 1254. In upholding the probation violation, the court in *Nunez* presumed a finding of reliability based on the hearing judge’s response to the probationer’s objection to the admission of hearsay evidence; specifically, that the hearing judge stated “This is a probation surrender hearing; your objection is overruled.” *Id.* at 1254 n.6. The SJC’s assumption in *Nunez* relies on its misstated rule in *Negron*, and thus completely disregards the possibility that the objection was overruled because hearsay evidence is admissible at a probation violation hearing, as provided by Rule 6. See *id.* In *King*, the court misapplied the admissibility analysis set forth in *Negron*, noting the “significant observations by the officers [in *Negron*] bolstered the reliability of the victim’s hearsay statements as reported by the officer.” *King*, 886 N.E.2d at 731 n.8. Despite this mistake, the court in *King* correctly distinguished the lower court’s reliance on unreliable and untrustworthy hearsay, from the lower court’s decision in *Negron*, which prematurely excluded reliable hearsay. *Id.* at 731 & n.8. Furthermore, in *King*, the court’s decision to reverse the probation violation finding was consistent with the language of Rule 6(b) because hearsay evidence was the sole evidence of a violation provided at the hearing. See *id.* at 731 & n.6. Where the court’s analysis in *King* is consistent with Rule 6, the court’s

B. The Black Sheep. Negrón Decision Pulls Away from Massachusetts' Historic Resistance to Expanding the Breadth of Constitutional Protections for Probationers.

Notwithstanding the general due process exception, there has been strong resistance by Massachusetts courts to expand constitutional protections to probationers.⁵⁷ In refusing to extend these constitutional safeguards, courts have reasoned that excluding certain evidence not only hides a probationer's non-compliance with the terms and conditions of his probation, but, more importantly, ignores the reality that he has not been rehabilitated and continues to pose a threat to the public.⁵⁸ Courts continue to waver regarding how far they are willing to stretch the "rehabilitative cause" as a justification for making constitutional protections conditional.⁵⁹ Despite this history of resistance, the *Negrón* decision shifts the focus away from the concept of conditional liberty in favor of stricter constitutional safeguards for probationers.⁶⁰

C. Through the Looking Glass. Why a Strict Interpretation of Rule 6 is More Consistent with the Purpose of Probation and the Concept of Conditional Liberty.

The question of hearsay evidence's admissibility at probation violation hearings presents a host of issues that threaten the core purpose of

analysis in *Negrón* is misplaced because hearsay evidence was not the sole evidence presented at the hearing. *See id.* at 731 n.8; *see also supra* note 43 and accompanying text (discussing evidence presented and admitted at probation violation hearing in *Negrón*).

⁵⁷ *See Casey, supra* note 31, at 195-97 (discussing Massachusetts' decision to not apply exclusionary rule at probation violation hearings); *see also* *Commonwealth v. Wilcox*, 841 N.E.2d 1240, 1249 (Mass. 2006) (holding probationer has no absolute and inflexible right to confrontation). Massachusetts has enacted a set of independent rules governing probation violation hearings. *See generally supra* notes 7, 30 and accompanying text (identifying Massachusetts Rules of District Court for Probation Violation Proceedings).

⁵⁸ *See Commonwealth v. Vincente*, 540 N.E.2d 669, 670-71 (Mass. 1989) (holding statements made in violation of *Miranda v. Arizona* admissible at probation violation hearing); *see also Casey, supra* note 31, at 195-96 (explaining rationale behind decision not to extend exclusionary rule to probationers). *See generally supra* note 22 and accompanying text (explaining rehabilitative purpose of probation).

⁵⁹ *Compare Casey, supra* note 31, at 196-97 (discussing Massachusetts' decisions against warrantless searches where probationer's diminished expectation of privacy was sole "cause"), *with Casey, supra* note 31 at 205-06 (discussing Massachusetts' refusal to postpone probation revocation hearings despite adverse effect on right against self-incrimination).

⁶⁰ *See infra* Part IV.C (explaining how *Negrón* increases evidentiary burden undermining rehabilitative concept of conditional liberty).

probation.⁶¹ The application of Rule 6 in *Negron* is inconsistent with probation's broader objective of rehabilitation because it sets forth an additional hurdle for the admissibility of hearsay evidence.⁶² The court in *Negron* prescribed a determination of reliability as a prerequisite for admission of hearsay evidence at probation violation hearings.⁶³ The *Negron* decision is not only a snub to the purpose of probation, but the imposition of a preliminary evidentiary ruling on reliability presents two additional problems.⁶⁴ First, imposing a preliminary evidentiary ruling effectively undermines a court's discretion to determine reliability as identified in the commentary of Rule 6(a).⁶⁵ Second, the evidentiary prerequisite places probation officers at an unfair disadvantage because it requires them to engage in a legal evidentiary argument against defense counsel.⁶⁶ Applying the new rule set out in *Negron* places a heightened evidentiary obstacle for the probation department to overcome in order to satisfy the burden of proof at a probation violation hearing.⁶⁷ The court is essentially placing the core concept of conditional liberty under direct attack because the additional constitutional protections effectively elevate a

⁶¹ See *infra* Part IV.C (discussing *Negron* decision as threat to probation's purpose).

⁶² Compare MASS. DIST. CT. R. PROB. VIOLATION PROCEEDINGS 1 (identifying purpose and scope of Massachusetts' probation violation proceeding rules), and *supra* note 23 and accompanying text (discussing rehabilitative aim of probation), with cases cited *supra* note 44 and accompanying text (articulating holding of *Negron*). Requiring an additional evidentiary obstacle does not advance the purpose of probation because "[t]he success of probation as a correctional tool is in large part tied to the flexibility within which it is permitted to operate." *Buckley v. Quincy Div. of the Dist. Court Dep't*, 482 N.E.2d 511, 512 (Mass. 1985) (quoting ABA STANDARDS RELATING TO PROBATION § 3.3 cmt. (1970)); see sources cited *supra* note 58 and accompanying text (suggesting reinforcing "bad behavior" flies in the face of rehabilitation).

⁶³ See *supra* text accompanying note 44 (stating holding of *Negron*).

⁶⁴ See *Commonwealth v. Negron*, 808 N.E.2d 294, 299 (Mass. 2004) (introducing new rule); see also *infra* text accompanying notes 65-66 (outlining two additional problems presented by *Negron* decision).

⁶⁵ See *supra* note 35 and accompanying text (reasoning its court's responsibility to determine reliability). A judge's discretion to determinate reliability in the context of other evidence presented is effectively negated by *Negron*, which requires the judge to make an evidentiary ruling on reliability prior to its admission. See *Negron*, 808 N.E.2d at 299.

⁶⁶ See *supra* note 35 and accompanying text (highlighting inherent disadvantage because Probation Officer not required to have law degree).

⁶⁷ See MASS. DIST. CT. R. PROB. VIOLATION PROCEEDINGS 6(b) cmt. ("'[G]ood cause' for denying the probationer the right to confront witnesses . . . defined in terms of 'difficulty and expense of procuring witnesses in combination with 'demonstrably reliable' or 'clearly reliable' evidence.'" (quoting *Commonwealth v. Durling*, 551 N.E.2d 1193, 1200 (Mass. 1990))); see also *Durling*, 551 N.E.2d at 1198 (denoting travel burden and loss of police services on local community justifies trumping cross-examination right); *supra* note 29 and accompanying text (explaining procedural flexibility justified because probationer abused opportunity to avoid incarceration).

probationer back to the same liberty status as a free citizen.⁶⁸

The debate over which constitutional protections can and should be afforded to probationers is a controversial issue with expansive repercussions for the probation system, but this ongoing dispute is simply evidence of a larger problem: failure of the state's probation system.⁶⁹ A combination of factors are reported to be contributing to the failure of the probation system, including but not limited to: insufficient government supervision, a disconnect between the court and probation department, inadequate training of probation department staff, and the enduring crusade by defense attorneys for greater constitutional protections for probationers.⁷⁰ Nevertheless, neither casting blame nor dwelling on the problem's origin will serendipitously fix the probation system. Instead, the first step is acknowledging that the current probation system is not only in administrative crisis, but it is also failing to foster its rehabilitative goals, creating a revolving door into the probation department.⁷¹ Under the current system, it is not uncommon for a probationer who violates his or her probation to be re-sentenced to a second or concurrent sentence of probation.⁷² Not surprisingly, where probation is an available option, it has become the preferred disposition for most criminal defendants.

V. CONCLUSION

Probation is a privilege, not a right. Probation's purpose is to rehabilitate offenders so they can lead a law-abiding life. In theory, probation is a win-win for everyone involved: the probationer maintains his liberty, albeit conditionally; the correctional institutions are less burdened;

⁶⁸ See *supra* notes 57-59 and accompanying text (discussing Massachusetts' resistance to expanding constitutional protections to probationers).

⁶⁹ See Thomas Farragher & Scott Allen, *Patrick Aims to Take Over Probation Department*, BOS. GLOBE, Jan. 24, 2010, available at www.boston.com/news/local/massachusetts/articles/2010/01/24/patrick_aims_to_take_over_probation_department (discussing significant problems with current probation department); see also Chief Justice Margaret H. Marshall & Chief Justice for Administration and Management Robert Mulligan, *Joint Statement in Response to Governor Patrick's FY11 Budget*, THE MASSACHUSETTS COURT SYSTEM, Jan. 28, 2010, <http://www.mass.gov/courts/jointstatement-budget012810.html> (acknowledging needed changes in probation department, but disagreeing with Governor's proposal for judicial branch removal).

⁷⁰ See Marshall & Mulligan, *supra* note 69 (identifying Governor Deval Patrick's common criticisms of rising budget, patronage and insularity).

⁷¹ See *infra* note 72 and accompanying text (illustrating one of many cases where probationers found violating probation and resentenced to probation).

⁷² See *Commonwealth v. Thacker*, No. 09-P-528, 2010 WL 743505, at *1 (Mass. App. Ct. Mar. 5, 2010) (outlining Thacker's eight-year cycle of probation, violation and resentencing to probation).

and society prospers from the benefit of a rehabilitated citizen. However, in recent years, the probation system has faced growing criticism for its lack of supervision over probationers, exorbitant budget, and insular bureaucracy. Some critics have suggested that the state should transfer control of the failing probation system from the judicial branch to the executive branch, but it is unclear whether this “quick-fix” would remedy the problem.

Notwithstanding the many contributing factors to the failing probation system, ignoring the reality of the current state of the probation system is undoubtedly compromising the integrity of the court. By chipping away at the core concept of probation, i.e. conditional liberty, the court is exacerbating, rather than fixing, the problem. The courts are contributing to the failing probation system by creating precedent that directly and indirectly increases the evidentiary burdens at probation violation hearings. By making it more difficult to show that a probation violation occurred, the court has effectively made it easier for the probationer to violate probation without consequence. The ability to escape a probation violation because of an evidentiary technicality undermines the central rehabilitative goal of probation and negates the concept of conditional liberty.

Despite Rule 6’s express authorization for admission of hearsay evidence, in *Negron* the SJC strayed from precedent disfavoring the expansion of a probationer’s conditional liberty under the guise of constitutional rights. The law’s current disparity must be reconciled. On September 30, 2009, the SJC granted further appellate review in the case of *Commonwealth v. Thissell* to determine whether the hearsay evidence used to revoke Thissell’s probation, violated his due process rights according to *Durling*.⁷³ *Thissell* presented a prime opportunity for the SJC to expound upon its holding in *Negron*, illuminate the principles of Rule 6, and directly address the rule’s constitutionality. Notably, the Commonwealth’s appellate brief in *Thissell* curiously failed to cite Rule 6 as authority to support its argument that “[t]he Judge correctly relied on GPS reports when finding the Defendant in violation of probation because they were admissible as business records and were ‘substantially trustworthy and demonstrably [sic] reliable.’”⁷⁴ The SJC could have squarely addressed the issue of *admissibility*, as well as the application and constitutionality of Rule 6 because *Thissell*’s facts presented a situation where a probationer

⁷³ *Commonwealth v. Thissell*, 928 N.E.2d 932, 933 (Mass. 2010).

⁷⁴ Brief for the Commonwealth at 17-26, *Commonwealth v. Thissell*, 910 N.E.2d 943 (Mass. App. Ct. 2009) (No. 08-P-1206), 2008 WL 5011192.

was found to have violated his probation based solely on hearsay evidence. This was an opportunity to both clarify and distinguish the application of Rule 6 and each of its two subparts. However, the SJC did not mention Rule 6 at any point in the opinion.⁷⁵

It would have proved paramount for the SJC to directly address the application and constitutionality of both provisions (a) and (b) of Rule 6 as they apply to probation violation hearings. The current disharmony in the law is the result of a series of decisions confounded by improper terminology. The most common misuses include referring to the probationer as “the defendant” and use of the phrase “probation revocation hearing” as a synonym for what procedurally is properly termed a “probation violation hearing.” Additionally, besides addressing the existence, application, and constitutionality of Rule 6, a primary objective of this decision should have been to clarify a long line of disjointed case law.⁷⁶

Confronting the *Negron* decision is an important step forward in safeguarding the integrity of the rule of law. Reconciling the *Negron* decision and Rule 6 will provide the necessary guidance to the criminal justice system by defining the concept of conditional liberty and safeguarding against the further decline of the probation system. Turning a blind eye to the naked Emperor is not a solution.

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⁷⁵ See *Thissell*, 928 N.E.2d at 937. On July 1, 2010, the SJC affirmed the *Thissell* decision without addressing the existence, application or constitutionality of Rule 6 with respect to the admissibility of hearsay evidence at a probation violation hearing. *Id.*

⁷⁶ See *Commonwealth v. Foster*, 932 N.E.2d 287, 292 (Mass. App. Ct. 2010) (noting defendant’s hearsay objection perpetuates common misunderstanding between admissibility and sufficiency). In *Foster*, the Massachusetts Court of Appeals recently highlighted the need for clarification. *Id.* Notwithstanding the court’s discussion, the *Foster* case is uniquely situated because the appeal stemmed from a Boston Municipal Court probation proceeding, and therefore the District Court Rules of Probation Violation Proceedings, including Rule 6 only has advisory impact. *Id.* at 293 n.6.