

SJC10669

DAR-18513

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK COUNTY

SUPREME JUDICIAL COURT  
NO.

APPEALS COURT  
NO. 2009-P-1166

COMMONWEALTH

V.

JOHN W. CANADYAN, JR.

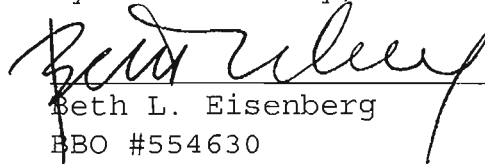
APPLICATION FOR DIRECT APPELLATE REVIEW

Pursuant to Mass. R. App. P. 11, defendant John W. Canadyan, Jr. moves for direct appellate review in the above-entitled case.

Respectfully submitted,

JOHN W. CANADYAN

By his attorney,



Beth L. Eisenberg

BBO #554630

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Dated: February 8, 2010

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK COUNTY

SUPREME JUDICIAL COURT  
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COMMONWEALTH

V.

JOHN W. CANADYAN, JR.

MEMORANDUM IN SUPPORT OF  
APPLICATION FOR DIRECT APPELLATE REVIEW

This application is filed today along with an Application for Direct Appellate Review in the matter of Commonwealth v. Eric S. Poirier, 2009-P-1785, as both Canadyan and Poirier present pressing issues of first impression concerning the scope of the Commissioner of Probation's mandate to "administer" the global positioning system (GPS) monitoring of convicted probationers pursuant to G.L. c.265, § 47. Both Poirier and Canadyan were deprived of their liberty by orders of the respective municipal district courts, and of their constitutional guarantees to due process of law, because the Commissioner of Probation failed to provide them with GPS monitoring apparatus;

in each case, the sole allegation was that in failing to wear a GPS device, the probationer violated his probation, despite the fact that as to each probationer, the Commissioner had failed to provide an adequate device to the probationer. No other claim of noncompliance with probation was alleged in either case.

These cases reflect the fact that the inferior courts view the Commissioner of Probation as blameless for (a) the technical incompatibility of the current GPS devices "administered" by the Commissioner, with the circumstances of homelessness (Canadyan), and (b) the unavailability of GPS devices and installation personnel to affix the apparatus to the probationer upon his release from incarceration (Poirier). Rather, the courts hold probationers responsible for these problems.

Society shares with these petitioners an interest in avoiding wrongful punishment. Given the cost of GPS monitoring, the public ought to be justified in entrusting the Commissioner of Probation with the

fulfillment of his statutory duties. The questions presented by the cases of Canadyan and Poirier are of such public interest that justice requires a final determination by the full Supreme Judicial Court.

Accordingly, Petitioner Canadyan respectfully seeks direct appellate review of his claims by this Court, for the reasons set forth below.

CONSOLIDATED STATEMENT OF PRIOR PROCEEDINGS AND FACTS

The probationer, a fifty-four year old man with no previous criminal record (Sent.Tr. 3, 8, 12),<sup>1/</sup> was charged by criminal complaint on July 30, 2007 in the Chelsea District Court, docket number 0714CR002626, with two counts of indecent assault and battery on a child under the age of fourteen, G.L. c. 265, § 13B (R.1). On October 15, 2007, the probationer tendered

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<sup>1/</sup>The three volumes of transcript of the probation surrender hearing will be signaled by volume and page thus "(Tr.vol./page)", and cited as follows: February 23, 2009, volume 1; March 9, 2009, volume 2; March 24, 2009, volume 3. The one-volume transcript of the October 15, 2007 sentencing hearing will be cited by page as "(Sent.Tr. page)". The Record Appendix will be cited as "(R. )". The Addendum will be cited as "(Add. )." In accordance with MRAP 11(b), appended hereto is the complete docket sheet (R.2-5), and the trial court's preliminary and final probation violation findings & dispositions (R.37,41).

a plea of guilty to both counts of the complaint, and was sentenced (Singer, J.) as follows: on count one, eighteen months to be served in the house of correction, with thirty-one days of that sentence deemed served (R.3). As to count two, a concurrent sentence of five years of straight probation, i.e., until October 15, 2012, with various terms and conditions imposed by the court in connection therewith (R.3,6).

The sole probationary condition relevant to the instant appeal was the imposition of global positioning system (GPS) monitoring, made mandatory upon the probationer by G.L. c.265, § 47<sup>2/</sup> (R.8, Add.57). The probationer, homeless and indigent (Tr.

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<sup>2/</sup>G.L. c.265, § 47 provides, in relevant part, as follows:

Any person who is placed on probation for any offense listed within the definition of "sex offense", a "sex offense involving a child" or a "sexually violent offense", as defined in section 178C of chapter 6, shall, as a requirement of any term of probation, wear a global positioning system device, or any comparable device, administered by the commissioner of probation, at all times for the length of his probation for any such offense. . . . (Add. 57-58) (emphasis added).

2/11, R.4, 30), was otherwise in compliance with both the general and special conditions of probation (Tr.2/15-18), which included sex offender evaluation and treatment; providing a DNA sample and registering as a sex offender; and "stay[ing] away from all children under 18 years old" (R.9).

The apparatus used by the Commissioner of Probation for GPS monitoring of most probationers consists of three components: the non-removable ankle shackle, the GPS cellular phone, and a so-called "docking port", into which the GPS cellphone is placed overnight, or at some comparable interval, to recharge the battery of the GPS cellphone (R.12). For homeless probationers, the Department of Probation distributes the ankle shackle and the GPS cellphone, along with a charger for the GPS cellphone (Id.). For a homeless individual to successfully use these devices, however, there must be regular, reliable overnight or comparable temporal access to an electrical outlet (Id.).

Upon discharge from incarceration, the probationer took up residence in the New England Center for

Homeless Veterans (hereafter, "the NECHV Shelter" or "the Homeless Shelter"), where he lived continuously following his release from custody (Tr. 1/4, 6, 14, 17, R.30). His probation officer informed him that the technical requirements of the GPS monitoring devices to which he would be subject required an available telephonic land-line, exclusively dedicated to the use of the GPS cellular phone (Tr. 1/4-5, 2/46-47, R.12-14).

According to the long-time director of the Shelter, the use of a telephonic land-line was not available at the NECHV Shelter (Tr.2/47). No other shelters in the Commonwealth of Massachusetts offer both housing to homeless sex offenders and "facilitate the use of the GPS device" (Tr.2/49). Likewise, Frederick I. Smith ("Smith"), who appeared as a witness for the probationer, testified that there were no homeless shelters in Massachusetts that provide housing compatible with use of the GPS device for homeless sex offenders (Tr.1/13-14). Smith, who works at the St. Francis House, a day shelter in Boston, has been working there with the homeless sex offender

population for fourteen years (Tr.1/12). Smith asserted that the probationer's predicament of homelessness was evidence of a growing problem among convicted sex offenders generally (Tr.1/12).

Vito Aluia, Chief Probation Officer of the Chelsea District Court ("Aluia" or "P.O. Aluia") contacted the NECHV Shelter to inquire whether the probationer could use the shelter's telephone line or utilities to charge a GPS cellular phone, and was told "no" (Tr.1/27, 2/10-15). Aluia asked for help from the Office of Probation's Electronic Monitoring (ELMO) unit (Tr.2/12), but was unsuccessful. Aluia next sought assistance from Deputy Commissioner of Probation Paul Lucci, who came up empty (Tr.2/12-13, 95). In sum, Aluia testified, "there is no alternative [device available to probationers to the one currently in use]. I do not know of any alternative. Whether one exists or not, I do not know. I believe I would have been told by the Commissioner's office if there was an alternative" (Tr.2/21-22).

On February 19, 2009, still unable to be set up

for GPS monitoring, the probationer was served with a Notice of Probation Violation and Hearing which alleged, as the exclusive cause for surrender, that the probationer was out of compliance because he had "failed to be set up for the GPS monitoring system" (R.8). No other basis for surrender was alleged, and indeed, P.O. Aluia acknowledged on the record that in all other respects, the probationer was in compliance with his probation (Tr.2/15-18).

At the preliminary surrender hearing on February 23, 2009, the probationer offered evidence that in mitigation of his present homelessness, he had begun looking for employment after release from the house of correction in December of 2008, but he still remained unemployed (Tr.1/12-13, 15). Prior to his incarceration, the probationer had been employed by United Parcel Service, but was rejected for re-employment because of his conviction (Tr.1/21). The probationer used a variety of job search techniques, including the public library's online resources for employment opportunities, and the premises of an organization called JobNet, which permitted the probationer access

to its computers for job searches (Tr.1/19). His efforts had included "knock[ing] on" at least twenty doors, but this only secured him two interviews (Tr.1/20).

Frederick Smith testified that "[t]he stigma" of being a convicted sex offender was "a big factor" impeding the probationer's ability to secure work and housing (Tr.1/22). "The amount of jobs available to ex-offenders, sex offenders, has dried up tremendously in the last five years" (Tr.1/22). With respect to housing, Smith testified that the probationer was currently on a waiting list for St. Francis House's "housing and rehabilitation program", and he estimated that by August or September of 2009, "and quite possibl[y] ... before then" if the probationer found employment, either a single room occupancy unit at the St. Francis House or a room in a rooming house could become available for occupancy (Tr.1/13, 15-18). Such an arrangement would be compatible with the use of GPS monitoring devices currently administered by the Commissioner of Probation (Tr.1/4-5, 2/12-13).

The probationer had filed pleadings (Tr.1/5)

premised upon Federal and State constitutional claims, in which he requested a temporary stay of GPS conditions until such time as he could secure housing, or alternatively, to order the Probation Department to provide the probationer with an alternative GPS monitoring device that was compatible with the circumstances of his homelessness, until he could find a home (R.11). He was heard on these arguments (Tr.1/27-30). Following receipt of the parties' evidence at the preliminary hearing, the judge seized upon the probationer's *unemployment*, although it was not a probationary condition (R.6), nor raised at sentencing. She opined that the probationer held a "defeatist attitude" and was "not making the effort" to find a job (Tr.1/25). Allowing that a convicted sex offender, classified as a level 3 offender by the Sex Offender Registry, would have a "much harder" time finding work "in this economy, perhaps in the winter when it's harder to get around," (*id.*), this simply meant that with the goal of obtaining GPS-compatible housing, the probationer should have been pursuing employment "as a *full-time proposition*" (*id.*)

(emphasis added). The judge continued:

[T]he Defendant didn't know he'd be without a job [following his plea of guilty] [?] What was he thinking? He didn't know he would be homeless. What was he thinking? I told him that he wasn't going to be living with his daughter because I said he couldn't live with any children.

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When I place a person on probation *with a requirement that they have full-time employment*<sup>3/</sup> and I say or document that you have a job search in which you went to no less than two places a job (*sic*) looking for employment, that's an ordinary situation. [This probationer is faced with] ... a *more desperate need to get employment than some other people*. And he doesn't seem to feel desperate about it.

(Tr.1/30,32) (emphases added). On the heels of these observations, the judge added that "the burden is on the probationer to comply with his probation. *It is not up to the Probation Department to do any of the things that would enable him to achieve compliance*. Obviously, they have to do their job in the sense of referring people to programs and making the necessary connections. ... [T]he onus is on the defendant to comply" (Tr.1/39) (emphasis added).

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<sup>3/</sup>There was no such probationary condition in this case (R.9).

Concluding that there was probable cause to believe that the probationer had violated his probation "for [his] failure to have a GPS monitoring device set up as required, both by [his] plea and the statute, Chapter 265, § 47," the judge ordered the probationer held pending his final hearing (R.37). He was taken into custody and held until the next hearing date of March 9, 2009 (R.37).

At the final hearing, the probationer presented additional witnesses with whom he had been working assiduously (until he was held pending the final hearing) to find employment and a home (Tr.2/25-27,29,32,63-68,79). The probationer's JobNet record, admitted at the hearing as Exhibit 3 (R.38), reflected that he had used the resource room to conduct forty-four employment searches between January 23 and February 18, 2009 (Id.).

Upon the close of the evidence, the judge found that the probationer was wilfully noncompliant because his efforts to secure adequate housing were "[un]reasonable", "[in]adequate", and "bordering on pathetic" (Tr.2/100). She reasoned that as a result,

the probationer had failed to secure employment and "thus housing that would allow him to get GPS hook up" (R.41). The probation officer requested that the court revoke probation and impose a two-year sentence (Tr.2/104). Without waiving the probationer's defense of inability to comply, defense counsel proposed alternatives to incarceration (Tr.2/107, 110-113). The matter was continued for disposition to March 24, 2009 (Tr.2/119-121). In the interim, the probationer was released from custody (Tr.2/119-121).

On March 24, 2009, P.O. Aluia reported to Judge Singer that the Probation Department had solved the GPS monitoring problem by implementing an arrangement "[a]s of this past weekend", whereby the probationer had been provided by the Probation Department with a GPS monitor that had a battery life of twenty-four hours, and which the probationer was obligated to recharge daily at 7:00 a.m., seven days per week, at Probation's "ELMO office" (Tr.3/2-3). The finding of violation was not withdrawn, however; rather, it established the basis for newly-imposed, additional special conditions as a consequence of re-probation,

which required the probationer to attend "New Directions for Men", a treatment program (R.42), to be geographically excluded from the City of Revere (id.), and to make "reasonable efforts to obtain employment", viz., "two employment efforts per day" (id.).

The probationer's notice of appeal from the final order finding him in violation of probation was timely filed (R.43), and the case docketed in that Court on June 10, 2009. The probationer's brief was timely filed on November 17, 2009, and the Commonwealth's brief was timely filed on January 29, 2010.

ISSUES OF LAW RAISED BY THIS APPEAL

The following issues were raised and properly preserved in the lower court:

Whether the probationer was deprived of due process of law under the Fourteenth Amendment to the United States Constitution and article 12 of the Declaration of Rights, where (a) the judge's retrospective, invalid construction of the homeless probationer's condition of mandatory GPS monitoring to include his fulfillment of conditions of employment and housing, was both unforeseeable and devoid of

record support; and where (b) the judge's conclusion that the homeless probationer was exclusively responsible for his inability to comply with GPS monitoring, and that the Probation Department bore no responsibility, was baseless as a matter of fact and law.

ARGUMENT

THE PROBATIONER WAS DEPRIVED OF DUE PROCESS OF LAW, WHERE (1) THE JUDGE'S RETROACTIVE, INVALID CONSTRUCTION OF THE HOMELESS PROBATIONER'S MANDATORY GPS MONITORING CONDITION TO INCLUDE HIS FULFILLMENT OF CONDITIONS OF EMPLOYMENT AND HOUSING WAS BOTH UNFORESEEABLE AND DEVOID OF RECORD SUPPORT, AND (2) THE JUDGE'S CONCLUSION THAT THE HOMELESS PROBATIONER WAS EXCLUSIVELY RESPONSIBLE FOR HIS INABILITY TO COMPLY WITH GPS MONITORING, AND THAT THE PROBATION DEPARTMENT BORE NO RESPONSIBILITY, WAS BASELESS AS A MATTER OF FACT AND LAW.

A. The judge's reasoning was legally and factually erroneous.

In rejecting the probationer's homelessness and unemployment as brute facts to explain his inability to comply with GPS monitoring, the court adjudged these circumstances as actual proxies for, i.e., *equivalents to*, a violation of the GPS monitoring condition, reasoning in writing that having a home (and intrinsically, the income to afford one) were independently integral to compliance with GPS monitoring (R.41). Thus, she held him responsible for fulfilling these conditions, too.

The judge openly expressed the view that the probationer - and only the probationer - was accountable for his inability to comply, since he

should have reasonably anticipated the consequences of unemployment and homelessness when he pleaded guilty (Tr.1/30,32), even if he had not known he would need a home in order to be GPS-compliant (Tr.2/101-102). As she put it, "[h]e is responsible for the consequences of his actions. Not the economy, not Probation, not the Court" (Tr.2/102). Compare State v. Oyler, 92 Idaho 43, 46 (1968) ("[h]arshly unrealistic would be a rule that by acceptance a probationer waives his standing to object to a probationary condition on grounds of its impossibility").

Where noncompliance with a probationary condition is demonstrably attributable to indigence, and "the probationer has made all reasonable efforts to [meet the condition], and yet cannot do so through no fault of his own," Bearden v. Georgia, 461 U.S. 660, 665 (1983), it is fundamentally unfair to attribute wilfulness to the probationer's noncompliance, and to condemn him as a violator. Id. at 669 (indigent probationer's inability to pay fine despite "reasonable efforts" constituted "lack of fault" that rendered revocation "fundamentally unfair").

Instead, Judge Singer held the probationer to a ludicrously high standard of demonstrating extraordinary efforts to find housing and employment, even though neither housing nor employment was a condition of his probation. Having absolved the Probation Department of any responsibility for this problem, the judge rejected the probationer's evidence of reasonable efforts to comply, despite marginal circumstances in an indisputably abysmal economy (Tr.2/100-101). Indeed, the probationer ought to be "pounding the pavement eight, ten hours a day" looking for work, the judge said, and that given the serious economic recession, "*even reasonable efforts*" were likely to be useless (Tr.2/101) (emphasis added). This construction of the probationer's probation contract, and what was expected of him pursuant to its terms, violated the probationer's due process right to be given a reasonable opportunity to know what the probation order actually required of him, so that he might act accordingly. Commonwealth v. Ruiz, 453 Mass. 474, 478 (2009), citing Commonwealth v. Delaney, 425 Mass. 587, 592 (1997), cert. denied, 522 U.S. 1058 (1998).

Probationers are entitled to clear guidance as to "when their actions or omissions will constitute a violation of their probation." Commonwealth v. Lally, 55 Mass. App. Ct. 601, 603 (2002). As the constitutional rule against vague statutory enactments applies to probation conditions, Commonwealth v. Power, 420 Mass. 410, 421 (1995), cert. denied, 516 U.S. 1042 (1996) "a defendant sentenced to probation [must] receive fair warning of conduct that may result in the revocation of probation." Ruiz, 453 Mass. at 479. There is no record evidence that this probationer was warned that he must have a home, or find a home, in order to be tracked by GPS monitoring.

Accordingly, the judge's determination that the homeless probationer violated his GPS-monitoring condition by failing to find a home and a job was factually and legally erroneous, and violated the Due Process Clause of the Fourteenth Amendment and article 12 of the Declaration of Rights. Douglas v. Buder, 412 U.S. 430, 432 (1973) (per curiam).

B. The probationer's noncompliance was excusable.

The judge also erred in finding the probationer's noncompliance inexcusable, where the quantum of credible evidence more than satisfied the showing required by the Supreme Court that the indigent probationer had made bona fide, reasonable efforts to comply.

"It is generally agreed that a probationer cannot be held responsible for not performing a condition of probation that is impossible to perform." 2 N.P. Cohen, *The Law of Probation and Parole* § 22:33, at 22-46 (2d ed. 1999). See Bearden v. Georgia, 461 U.S. at 669 n.10 (where indigence drives noncompliance, Court cites "[n]umerous decisions by state and federal courts" recognizing that "basic fairness forbids the revocation of probation when the probationer is without fault in his failure to pay the fine[,] and approving instances where courts distinguish between improper revocation of probation "where the defendant did not have the resources to pay restitution and had no way to acquire them ... from [legitimately] revoking probation where the defendant had the

resources to pay or had negligently or deliberately allowed them to be dissipated in a manner that resulted in his inability to pay").

While there are no reported appellate cases in Massachusetts that assess the defense of impossibility as justification for noncompliance with a probationary condition, numerous courts around the country have recognized that failure to comply ought not be actionable where it was the result of extenuating circumstances through no fault of the probationer, and reflecting factors beyond his control. See People v. Bowman, 423 N.Y.S.2d 242 (1980), ("unseemly to stigmatize" probationer as violator where she acted in good faith in an attempt to carry out conditions of imposed probation, in trying circumstances over which she had no control); State v. Bleasdale, 69 Ohio App.3d 68 (1990) ("no willful or intentional violation of the conditions of appellant's probation[,] " where probationer was cooperating with probation, and his termination from participation in program "was due to the program's inability to properly minister to his case"); Humphrey v. State, 290 Md. 164, 169 (1981)

(reversing revocation, where probationer was noncompliant despite repeated efforts to comply, and because of factors beyond his control).<sup>4/</sup>

It defied fundamental notions of substantive due

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<sup>4/</sup>For additional authorities recognizing impossibility of compliance, see Commonwealth v. Ammons, 1998 Mass.Super.LEXIS 426, \*10-\*11 (Volterra, J.) (failure to conform to the terms of the DNA collection statute); United States v. Boswell, 605 F.2d 171, 173-75 (5th Cir. 1979) (failure to make restitution); Johnson v. State, 62 Md.App. 548 (1985) (failure to appear in court cannot provide basis for revocation if offender was in jail when absent from court); People v. Romero, 192 Colo. 106, 107-08 (1976) (failure to make payment for attorney's fees); People v. Silcott, 177 Colo. 451, 452-54 (1972) (failure to make child support payments); Thomas v. State, 672 So.2d 587, 589 (Ct. App. Fla. 4th Cir. 1996) (failure to attend scheduled meeting because car broke down); Donneil v. State, 377 So. 2d 805, 805 (Fla. App. 1979) (failure to complete drug rehabilitation program); State v. Nakamura, 59 Haw. 378, 380-83 (1978) (failure to be accepted in residential drug treatment program); State v. Jacobsen, 238 Neb. 511 (1991) (failure to complete inpatient treatment program where hospital denied him admission); State v. Oyler, 92 Idaho at 44-47 (failure to "refrain from the use of alcoholic beverages"); State v. Moretti, 50 N.J. Super. 223, 228-29, 238-50 (1958) (failure to obtain gainful employment); Butler v. State, 486 S.W.2d 331, 332-34 (Tex. 1972) (failure to "work faithfully at suitable employment"); State v. Pleasant, 508 So.2d 113, 114 (Ct. App. La. 4th Cir. 1987) (failure on account of illiteracy to obtain employment so as to pay court costs). Also see Herold v. State, 52 Md.App. 295 (1982) (probation revocation should not be ordered if violation results from factors beyond offender's control and not involving offender's fault).

process of law for the judge to reach beyond the evidence of impossibility and to castigate the probationer for his failure to be clairvoyant at sentencing about his future homelessness and unemployment ("[t]he Defendant didn't know he'd be without a job[?] What was he thinking? He didn't know he would be homeless. What was he thinking?") (Tr.1/30). See Carradine v. United States, 420 A.2d 1385, 1389-1390, and cases listed at nn.11-14 (D.C.Cir. 1980) (citing numerous authorities for principle that in order to deem a condition "implied", it must be "so clearly implied that a probationer, in fairness, can be said to have notice of it").

C. The judge relieved the Probation Department of its statutory responsibility to "administer" GPS monitoring.

The judge deprived the probationer of his rights to due process under the Fourteenth Amendment to the United States Constitution and article 12 of the Massachusetts Declaration of Rights, by excusing the Probation Department from meeting its statutory obligations, and thus from proving the probationer was in violation, because he *could have, but would not*

comply. Compare People v. Williams, 229 Ill.App.3d 677, 678-679 (1992) (where court did not require State to prove its case by a preponderance of evidence, nor even to present any evidence, telling defendant "that it was 'up to him' to prove he was in compliance," was "erroneous, since by doing this the court improperly shifted the burden of proof to the defendant"). In addition to her comments at the preliminary hearing, the judge stated at the close of the evidence that she was *affronted* by the probationer's suggestion that Probation bore any responsibility in this calculus:

I reject, and on behalf of Probation, resent the implication that these failures to comply are somehow the responsibility of Probation. If the State has a GPS system, they're not obligated to have numerous kinds of systems. ... if there are devices that would satisfy the purposes of the [GPS] Statute that they don't use, it's the [probationer's] obligation to find them, not [P]robation's.

(Tr.2/100). This is clear error. Where G.L. c.265, § 47 specifically obliges the Commissioner of Probation to "administer" the probationer's GPS device "or any comparable device" as a prerequisite condition to the GPS monitoring of a qualified probationer,

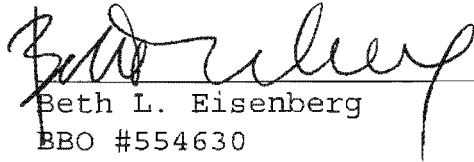
then it is, indeed, up to the Commissioner of Probation to enable the probationer to achieve compliance, so that his indigence and homelessness place him at no greater peril of revocation than any other probationer. See Massachusetts Coalition for Homeless v. Secretary of Human Services, 400 Mass. 806, 819 (1987) (if funds are insufficient to allow agency to comply with statutory mandate, agency has "an obligation to bring its inability to comply ... to the attention of the Legislature and to ask that it appropriate an adequate sum or that it provide some other solution to the dilemma"). To paraphrase this Court observations in Commissioner of Ins. v. First Nat'l Bank, 352 Mass. 74, 79-80 (1967), "the Commissioner's obligations of administration ... entail a duty to exercise a broad surveillance over the operations of [probation services] with a view to instituting procedures and recommending changes which might prevent or reduce the likelihood" of such difficulties as were suffered by this probationer.

CONCLUSION

Based upon the foregoing points and authorities, and in light of the importance of these and similar issues presented by the petition for direct appellate review filed today by Eric S. Poirier (A.C. 2009-P-1785), the Defendant requests that this Honorable Court grant his petition for direct appellate review.

Respectfully submitted,

JOHN W. CANADYAN, JR.  
By his attorney,



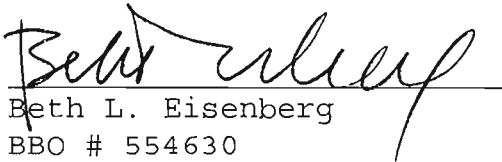
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Dated: February 8, 2010

CERTIFICATE OF SERVICE

I, Beth L. Eisenberg, hereby certify that on this 8th day of February, 2010, I caused a true and complete copy of the within Application for Direct Appellate Review, with Supporting Memorandum of Law in the matter of Commonwealth v. John W. Canadyan, Jr., A.C. No. 2009-P-1166 to be served by first class mail, postage prepaid, on A.D.A. Bernard Aidan Flanagan, Office of the Suffolk County District Attorney, One Bulfinch Place, Boston, MA 02114.

As a courtesy to A.D.A. Flanagan, I have also served him on this date by first class mail, postage prepaid, with a true and complete copy of the companion petition in the matter of Commonwealth v. Eric S. Poirier, A.C. No. 2009-P-1785.

  
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<b>CRIMINAL DOCKET</b>		DOCKET NUMBER <b>0714CR002626</b>	NO. OF COUNTS <b>2</b>	<b>Trial Court of Massachusetts District Court Department</b>	
DEFENDANT NAME AND ADDRESS John W Canadyan Jr. 256 Bradstreet Street Revere, MA 02151		DOB 06/16/1953	GENDER Male	COURT NAME & ADDRESS Chelsea District Court 120 Broadway Chelsea, MA 02150	
		DATE COMPLAINT ISSUED 07/30/2007	PRECOMPLAINT ARREST DATE 07/30/2007		INTERPRETER REQUIRED
FIRST FIVE OFFENSE COUNTS					
COUNT	CODE	OFFENSE DESCRIPTION	AMOUNT	DATE	OFFENSE DATE
1	265/13B/A	INDECENT A&B ON CHILD UNDER 14 c265 §13B	2000.00	07/31/07	07/11/2007
2	265/13B/A	INDECENT A&B ON CHILD UNDER 14 c265 §13B			07/11/2007
DEFENSE ATTORNEY <i>Casey (Paul only)</i>		OFFENSE CITY/TOWN Revere	POLICE DEPARTMENT Revere PD		
DATE & JUDGE	DOCKET ENTRY		DATE & JUDGE	FEES IMPOSED	
<i>Hamette 7-30-07</i>	<input type="checkbox"/> Attorney appointed (SJC R. 3:10) <input type="checkbox"/> Atty denied & Deft. Advised per 211 D §2A <input type="checkbox"/> Waiver of Counsel found after colloquy			Counsel Fee (211D § 2A(2))	<input type="checkbox"/> WAIVED
	Terms of release set: <input type="checkbox"/> PR <input checked="" type="checkbox"/> Bail <i>2000.00 Cash</i> <input checked="" type="checkbox"/> See Docket for special condition <input type="checkbox"/> Held (276 §58A)			Counsel Contribution (211D § 2)	<input type="checkbox"/> WAIVED
	Arraigned and advised: <input checked="" type="checkbox"/> Potential of bail revocation (276 §58) <input checked="" type="checkbox"/> Right to bail to review (276 §58) <input type="checkbox"/> Right to drug exam (111E § 10)			Default Warrant Fee (276 § 30(1))	<input type="checkbox"/> WAIVED
	Advised of right to jury trial <input type="checkbox"/> Waiver of jury found after colloquy <input type="checkbox"/> Does not waive			Default Warrant Arrest Fee (276 § 30 (2))	<input type="checkbox"/> WAIVED
	Advised of trial rights as pro se (Dist. Ct. Supp.R.4)			Probation Supervision Fee (276 § 87A)	<input type="checkbox"/> WAIVED
	Advised of right of appeal to Appeals Ct. (M.R. Crim P.R. 28)			Bail Order Forfeited	
SCHEDULING HISTORY					
NO.	SCHEDULED DATE	EVENT	RESULT	JUDGE	TAPE START/ STOP
1	07/30/2007	Arraignment	<input type="checkbox"/> Held <input type="checkbox"/> Cont'd		
2	8-20-07	PT (1)	<input type="checkbox"/> Held <input type="checkbox"/> Cont'd	<i>&lt; DFTA &gt;</i>	<i>Hamette</i>
3	10-15-07	PTH (1)	<input type="checkbox"/> Held <input type="checkbox"/> Cont'd		<i>SWITCH COPY ATTEST</i>
4	10-15-12	P	<input type="checkbox"/> Held <input type="checkbox"/> Cont'd		<i>Singer</i>
5	12-23-07	RF	<input type="checkbox"/> Held <input type="checkbox"/> Cont'd		
6	12-24-07	JRE (1)	<input type="checkbox"/> Held <input type="checkbox"/> Cont'd		
7	1-9-09	SRE (4)	<input type="checkbox"/> Held <input type="checkbox"/> Cont'd		
8	10-15-12	P	<input type="checkbox"/> Held <input type="checkbox"/> Cont'd		
9	3-9-09	M (4)	<input checked="" type="checkbox"/> Held <input type="checkbox"/> Cont'd		<i>Singer ct 5</i>
10	3-24-09	Sen	<input type="checkbox"/> Held <input type="checkbox"/> Cont'd		<i>Amey 10-30-09</i>
APPROVED ABBREVIATIONS					
ARR = Arraignment PTH = Pretrial hearing DCE = Discovery compliance & jury selection BTR = Bench trial JTR = Jury trial PCH = Probable cause hearing MOT = Motion hearing SRE = Status review SRR = Status review of payments FAT = First appearance in jury session SEN = Sentencing CWF = Continuance without finding scheduled to terminate PRO = Probation scheduled to terminate DFTA = Defendant failed to appear & was defaulted WAR = Warrant issued WARD = Default warrant issued WVR = Warrant or default warrant received PVH = Probation revocation hearing					
TRUE COPY ATTEST	CLERK-MAGISTRATE / ASST CLERK			TOTAL NO. OF PAGES	ON (DATE)
X					

<b>CRIMINAL DOCKET - OFFENSES</b>	DEFENDANT NAME <b>John W Canadyan Jr.</b>	DOCKET NUMBER <b>0714CR002626</b>
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COUNT / OFFENSE <b>1 INDECENT A&amp;B ON CHILD UNDER 14 c265 §13B</b>	DISPOSITION DATE AND JUDGE <b>10-15-07 Singer</b>
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DISPOSITION METHOD <input checked="" type="checkbox"/> Guilty Plea or <input type="checkbox"/> Admission to Sufficient Facts accepted after colloquy and 278 §29D warning <input type="checkbox"/> Bench Trial <input type="checkbox"/> Jury Trial <input type="checkbox"/> Dismissed upon: <input type="checkbox"/> Request of Commonwealth <input type="checkbox"/> Request of Victim <input type="checkbox"/> Request of Defendant <input type="checkbox"/> Failure to prosecute <input type="checkbox"/> Other: <input type="checkbox"/> Filed with Defendant's consent <input type="checkbox"/> Nolle Prosequi <input type="checkbox"/> Decriminalized (277 §70 C)	FINE/ASSESSMENT HEAD INJURY ASMT RESTITUTION	SURFINE RESTITUTION	COSTS VW ASSESSMENT <b>40</b>	OUI §24D FEE BATTERER'S FEE	OUI VICTIMS ASMT OTHER
SENTENCE OR OTHER DISPOSITION <input type="checkbox"/> Sufficient facts found but continued without a finding until: <input type="checkbox"/> Defendant placed on probation until: <input type="checkbox"/> Risk/Need or OUI <input type="checkbox"/> Administrative Supervision <input type="checkbox"/> Defendant placed on pretrial probation (276 §87) until: <input type="checkbox"/> To be dismissed if court costs / restitution paid by: <b>3286C000004/13/09VWAF</b>					
<b>18 months HOC Committed</b>  <b>31 days Credit</b>					

FINDING <input checked="" type="checkbox"/> Guilty <input type="checkbox"/> Not Guilty <input checked="" type="checkbox"/> Responsible <input type="checkbox"/> Not Responsible <input type="checkbox"/> Probable Cause <input type="checkbox"/> No Probable Cause	FINAL DISPOSITION <input type="checkbox"/> Dismissed on recommendation of Probation Dept. <input type="checkbox"/> Probation terminated: defendant discharged <input type="checkbox"/> Sentence or disposition revoked (see cont'd page)
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COUNT / OFFENSE <b>2 INDECENT A&amp;B ON CHILD UNDER 14 c265 §13B</b>	DISPOSITION DATE AND JUDGE <b>10-15-07 Singer</b>
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DISPOSITION METHOD <input type="checkbox"/> Guilty Plea or <input type="checkbox"/> Admission to Sufficient Facts accepted after colloquy and 278 §29D warning <input type="checkbox"/> Bench Trial <input type="checkbox"/> Jury Trial <input type="checkbox"/> Dismissed upon: <input type="checkbox"/> Request of Commonwealth <input type="checkbox"/> Request of Victim <input type="checkbox"/> Request of Defendant <input type="checkbox"/> Failure to prosecute <input type="checkbox"/> Other: <input type="checkbox"/> Filed with Defendant's consent <input type="checkbox"/> Nolle Prosequi <input type="checkbox"/> Decriminalized (277 §70 C)	FINE/ASSESSMENT HEAD INJURY ASMT RESTITUTION	SURFINE RESTITUTION	COSTS VW ASSESSMENT	OUI §24D FEE BATTERER'S FEE	OUI VICTIMS ASMT OTHER
SENTENCE OR OTHER DISPOSITION <input type="checkbox"/> Sufficient facts found but continued without a finding until: <input type="checkbox"/> Defendant placed on probation until: <input type="checkbox"/> Risk/Need or OUI <input type="checkbox"/> Administrative Supervision <input type="checkbox"/> Defendant placed on pretrial probation (276 §87) until: <input type="checkbox"/> To be dismissed if court costs / restitution paid by: <b>Waived</b>					
<b>10-15-12</b> <b>5 yrs Prob</b> <b>Stayaway all children under 18</b> <b>Provide DNR</b> <b>Subject treat. deemed nec.</b>					

FINDING <input checked="" type="checkbox"/> Guilty <input type="checkbox"/> Not Guilty <input type="checkbox"/> Responsible <input type="checkbox"/> Not Responsible <input type="checkbox"/> Probable Cause <input type="checkbox"/> No Probable Cause	FINAL DISPOSITION <input type="checkbox"/> Dismissed on recommendation of Probation Dept. <input type="checkbox"/> Probation terminated: defendant discharged <input type="checkbox"/> Sentence or disposition revoked (see cont'd page)
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COUNT / OFFENSE	DISPOSITION DATE AND JUDGE
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DISPOSITION METHOD <input type="checkbox"/> Guilty Plea or <input type="checkbox"/> Admission to Sufficient Facts accepted after colloquy and 278 §29D warning <input type="checkbox"/> Bench Trial <input type="checkbox"/> Jury Trial <input type="checkbox"/> Dismissed upon: <input type="checkbox"/> Request of Commonwealth <input type="checkbox"/> Request of Victim <input type="checkbox"/> Request of Defendant <input type="checkbox"/> Failure to prosecute <input type="checkbox"/> Other: <input type="checkbox"/> Filed with Defendant's consent <input type="checkbox"/> Nolle Prosequi <input type="checkbox"/> Decriminalized (277 §70 C)	FINE/ASSESSMENT HEAD INJURY ASMT RESTITUTION	SURFINE RESTITUTION	COSTS VW ASSESSMENT	OUI §24D FEE BATTERER'S FEE	OUI VICTIMS ASMT OTHER
SENTENCE OR OTHER DISPOSITION <input type="checkbox"/> Sufficient facts found but continued without a finding until: <input type="checkbox"/> Defendant placed on probation until: <input type="checkbox"/> Risk/Need or OUI <input type="checkbox"/> Administrative Supervision <input type="checkbox"/> Defendant placed on pretrial probation (276 §87) until: <input type="checkbox"/> To be dismissed if court costs / restitution paid by:					

FINDING <input type="checkbox"/> Guilty <input type="checkbox"/> Not Guilty <input type="checkbox"/> Responsible <input type="checkbox"/> Not Responsible <input type="checkbox"/> Probable Cause <input type="checkbox"/> No Probable Cause	FINAL DISPOSITION <input type="checkbox"/> Dismissed on recommendation of Probation Dept. <input type="checkbox"/> Probation terminated: defendant discharged <input type="checkbox"/> Sentence or disposition revoked (see cont'd page)
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CRIMINAL DOCKET DOCKET ENTRIES		DEFENDANT NAME John W Canadyan Jr.	DOCKET NUMBER 0714CR002626
DATE	DOCKET ENTRIES		
7-30-07	Stay away from named victim + victims family		
AUG 20 2007	DFTA, BAIL FORFEITED (Singer, J)		
8/21/07	WITNESS		
9/14/07	WITNESS		
"	D to survey FD of possi Bail		
	New Ba. 500,000 - total 500,000 Ba.!		
9/14/07	ATTY GLOFFI for Δ (E)		
12/24/08	Def is not required to comply with bracelet program temporarily, due to his presence in a shelter which precludes it. This order is to be reviewed 1/7/09. (Hailley, J)		
1/7/09	Bail Forfeited to John L... (Hailley, J)		
2/23/09	PFA (1) - The parties appeared - apparently, the matter has been repeatedly addressed - the issue is whether a GPS monitor should be required - After hearing, the Court finds that there is no present ability for the Δ to enter any program and sat. of the requirements of setting up a GPS system. The ST Forfeited		
2/23/09	Atty Sharon Pollock / CPC-S APPROVE COPY ATTEST for VOP. (W...)		
"	P/C for VOP Δ to be Detained w/o Bail Pending final sum. (Singer)		
"	3-9-09 P/H (4)		
MAR 05 2009	Δ'S MOTION TO ACCESS PROBATION A/c + Allowed in P/RO (Lancaster, J)		
3-9-09	Att- Def is found to be in VOP and hearing is scheduled		

APPROVED ABBREVIATIONS

ARR = Arrangement PTH = Pretrial hearing DCE = Discovery compliance & jury selection BTR = Bench trial JTR = Jury trial PCH = Probable cause hearing MOT = Motion hearing SRE = Status review  
SRP = Status review of payments FAT = First appearance in jury session SEN = Sentencing CWF = Continuance without finding scheduled to terminate PRO = Probation scheduled to terminate  
DFTA = Defendant failed to appear & was defaulted WAR = Warrant issued WARD = Default warrant issued WR = Warrant or default warrant recalled PVI = probation revocation hearing

CLERK MAGISTRATE

for Tues 3-24-09 in Natuck PC 9:00am for Dispa  
3/24/09 New contract of probation ordered. (Singer, J)  
Singer JRC  
10:20am  
22



<b>PROBATION DETENTION FINDING &amp; ORDER</b>	DOCKET NO.(S), IN WHICH PROBATION WAS ORDERED	Trial Court of Massachusetts District Court Department
PROBATIONER'S NAME		COURT NAME
		PCF NO.

**I. FINDING**

The Probation Department having requested that the probationer named above be held in custody until the conclusion of a full probation violation hearing, and based upon the evidence presented at a hearing on whether there is probable cause to believe that alleged violation(s) of probation has (have) occurred, the Court FINDS as follows:

- There is **NO PROBABLE CAUSE** to believe that an alleged violation of probation has occurred
- There is **PROBABLE CAUSE** to believe that the following alleged violation(s) of probation has (have) occurred:

*failure to set up GPS monitoring device as required by plea & statute C. 265, § 47*

- For purposes of this detention hearing only, the defendant **STIPULATES THAT THERE IS PROBABLE CAUSE** to believe that the alleged violation(s) of probation has (have) occurred.

**II. ORDER** (to be completed only upon a finding of probable cause)

Upon the finding of probable cause indicated above, the Court **ORDERS** that the probationer named above:

- SHALL NOT BE HELD IN CUSTODY** pending a full probation violation hearing.
- SHALL BE HELD IN CUSTODY** pending completion of a full probation violation hearing, or waiver thereof.

*March 6, 2009*

DATE <i>2/23/09</i>	SIGNATURE OF JUDGE OR MAGISTRATE <i>X [Signature]</i>
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"The court's decision whether to release the probationer pending the conduct and completion of the final probation violation hearing, notwithstanding a finding of probable cause on an alleged violation, shall include, but not necessarily be limited to: (i) the probationer's criminal record; (ii) the nature of the offense for which the probationer is on probation; (iii) the nature of the offense or offenses with which the probationer is newly charged, if any; (iv) the nature of any other pending alleged probation violations; (v) the likelihood of probationer's appearance at the final probation violation hearing if not held in custody; and (vi) the likelihood of incarceration if a violation is found following the final probation violation hearing." Dist. Ct. R. Prob. Viol. Proc. 8(c).

The full probation violation hearing must be scheduled at least 7 days after written notice is given the probationer unless the probationer waives that notice period. Except in extraordinary circumstances, the hearing must be scheduled within 30 days if the defendant objects to a longer delay. Dist. Ct. R. Prob. Viol. Proc. 3(o)(iii), 3(c)(iii), and 4(d).

PROBATIONER'S NAME	DOCKET NO.(s), IN WHICH PROBATION ORDERED	Trial Court of Massachusetts District Court Department
		COURT NAME
		PCF NO.

I. FINDING ON ALLEGED VIOLATION

In the case(s) captioned above, the Court FINDS as follows:

NO VIOLATION OF PROBATION FOUND.

VIOLATION OF PROBATION FOUND. The probationer named above is found to have committed the following violation(s) of probation:

- Violated CRIMINAL LAW(s), namely: Δ has not made reasonable or adequate efforts to secure employment, thus
- Failed to attend or complete the following PROGRAM as ordered: housing that would allow
- Failed to comply with the following TESTING REQUIREMENT(s) as ordered: him to get GPS
- Failed to make the following PAYMENT(s): hook up
- Failed to REPORT as required by the probation officer as follows: \_\_\_\_\_
- Failed to comply with OTHER PROVISION(s) of the Order of Probation Conditions, namely: Have GPS as required by C. 265 § 47 CPO vito Alvia

This finding is based on  PROBATIONER'S ADMISSION, or  A HEARING and the preponderance of the credible evidence presented, specifically, the following TESTIMONIAL OR DOCUMENTARY EVIDENCE:

Brian Mooney, Robert Hanafin, Fred Smith, Emily Racine, Jose Gonzalez

HEARSAY EVIDENCE. In making this finding, the Court relied SOLELY ON HEARSAY EVIDENCE and finds that such evidence was substantially trustworthy and demonstrably reliable and, if a violation of criminal law(s) was found, that there existed good cause for the absence of a person(s) with personal knowledge of such evidence.

- Its detail suggests personal knowledge by the source.  The source was disinterested.
- The source was under oath or subject to prosecution or disciplinary action for false statements.
- The information was corroborated by the probationer.
- The source could not appear personally because of  distance.  costs.  scheduling difficulties.

II. DISPOSITION (to be completed only upon a finding of violation)

The Order of Probation Conditions is hereby vacated and probation is TERMINATED.

The current conditions of probation are to be CONTINUED; probationer admonished.

The Order of Probation Conditions previously issued is hereby MODIFIED as follows: (The probationer must sign a new Order.)

Cont for disposition at Natuck Dist Ct 3/24/09

PROBATION REVOKED. The Order of Probation Conditions is hereby REVOKED for the following reason(s):

- The safety of the public and/or an individual person or persons.  The recommendation of the District Attorney.
- The seriousness of the new offense that has been proved by a preponderance of the evidence.
- The unlikelihood that the rehabilitative purpose of probation will be achieved.
- The probationer's record of previous violations.  The recommendation of the probation department.
- The seriousness of the offense for which probation was ordered.
- Other: \_\_\_\_\_

SENTENCE IMPOSED AFTER PROBATION REVOCATION:

DATE 3.9.09

SIGNATURE OF JUDGE  
X Sarah B. Genger