CRIMINAL LAW — SENTENCING — MASSACHUSETTS SUPREME JUDICIAL COURT HOLDS DRUG-FREE PROBATION REQUIREMENT ENFORCEABLE FOR DEFENDANT WITH SUBSTANCE USE DISORDER. — *Commonwealth v. Eldred*, 101 N.E.3d 911 (Mass. 2018).

State trial court judges sit at the heart of the opioid crisis.[1] With almost unlimited discretion in sentencing, judges presiding over cases that involve a defendant's addiction must increasingly grapple with the developing science of addiction and its implications for legal culpability. Recently, in *Commonwealth v. Eldred*,[2] the Massachusetts Supreme Judicial Court (SJC) held that requiring a probationer to remain drug-free was a valid probation condition that a judge had full discretion to impose — even on an individual with opioid use disorder,[3] "[a] disorder characterized by loss of control of opioid use."[4] The court also reaffirmed judges' authority to impose any and all probation requirements and sanctions, including imprisonment, as long as those measures were "reasonably related to the goals of . . . probation."[5] Despite the breadth of this holding, the SJC failed to answer the primary question presented by the case: whether in some circumstances, addiction might render abstention from drugs volitionally impossible, making punishment for such drug use unconstitutional. The court virtually ignored evidence and precedent suggesting that some drug use is not willful, and thus implicitly endorsed an extremely narrow interpretation of U.S. Supreme Court Eighth Amendment precedent. By advancing this interpretation, the SJC also declined the opportunity to extend its own line of precedent on involuntary probation violations to cases of addiction. In doing so, the court neglected to consider addiction science's implications for criminal responsibility in some drug-related offenses, to the detriment of Julie Eldred and similarly positioned defendants.

In 2016, Eldred stole over $250 of jewelry to support her heroin addiction.[6] A few months later, she "admitted to sufficient facts" to find

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[1] *See, e.g.*, *Opioids and the Courts*, NAT'L CTR. FOR ST. CTS., https://www.ncsc.org/opioidsandcourts [https://perma.cc/AQG3-AUS6]; Loretta Rush, *How State Courts Are Fighting Our National Opioid Epidemic*, LAW360 (Dec. 2, 2018, 8:02 PM), https://www.law360.com/articles/1106424/how-state-courts-are-fighting-our-national-opioid-epidemic [https://perma.cc/JF7F-4PLL]; Michelle White & Tara Kunkel, *Trends in State Courts: Opioid Epidemic and the Courts*, NAT'L CTR. FOR ST. CTS., https://www.ncsc.org/sitecore/content/microsites/trends/home/Monthly-Trends-Articles/2017/Opioid-Epidemic-and-the-Courts.aspx [https://perma.cc/C63B-5WM9].

[2] 101 N.E.3d 911 (Mass. 2018).

[3] *See id.* at 920.

[4] U.S. DEP'T OF HEALTH & HUMAN SERVS., FACING ADDICTION IN AMERICA: THE SURGEON GENERAL'S SPOTLIGHT ON OPIOIDS 5 (2018), https://addiction.surgeongeneral.gov/sites/default/files/OC_SpotlightOnOpioids.pdf [https://perma.cc/W4NP-TFTA].

[5] *Eldred*, 101 N.E.3d at 919 (internal quotation marks omitted) (quoting Commonwealth v. Obi, 58 N.E.3d 1014, 1020 (Mass. 2016)).

[6] *Id.* at 915–16.

her guilty of larceny, and a district court judge sentenced her to one year of probation, where she was required "to remain drug free [and] submit to random drug screens."[7] On September 2, Eldred tested positive for fentanyl (a synthetic opioid) during a random screening.[8] Her probation officer notified the court, and a detention hearing was held that same day.[9] At the hearing, the judge found probable cause to believe Eldred had violated her probation, and he ordered her to inpatient treatment pending her final violation hearing.[10] However, her defense counsel was unable to find immediate placement at a treatment facility, so Eldred spent ten days in state prison, undergoing withdrawal from fentanyl without treatment.[11]

Eldred filed an Opposition to Probation Violation,[12] arguing that she had not willfully violated probation because she suffered from substance use disorder (SUD),[13] "which rendered her incapable of remaining drug free."[14] The Massachusetts Medical Society submitted an amicus brief in support of Eldred describing the neuroscience of addiction.[15] It cited in turn the 2016 Surgeon General report on addiction,[16] which concluded that drug use impacts the structure and function of the brain to create an "overwhelming drive for substance seeking that can be unrelenting";[17] indeed, all people who suffer from SUD are "subject to relapse."[18] Eldred also

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[7] *Id.* at 916; *see also* Motion to Report Question of Law and Proposed Findings of Fact at 3–4, app. at 10, 16, Commonwealth v. Eldred, No. 1647CR901 (Mass. Dist. Ct. Dec. 2, 2016) [hereinafter Motion to Report Question of Law].

[8] *Eldred*, 101 N.E.3d at 916; *see also* Motion to Report Question of Law, *supra* note 7, at 4, app. at 11.

[9] *Eldred*, 101 N.E.3d at 916.

[10] *Id.*

[11] *Id.*; *see also* Motion to Report Question of Law, *supra* note 7, app. at 18–19 (affidavit of Julie Eldred).

[12] Motion to Report Question of Law, *supra* note 7, app. at 14.

[13] Substance use disorder is "[a] medical illness caused by repeated misuse of a substance or substances. . . . [S]evere substance use disorder is commonly called an addiction." U.S. DEP'T OF HEALTH & HUMAN SERVS., FACING ADDICTION IN AMERICA: THE SURGEON GENERAL'S REPORT ON ALCOHOL, DRUGS, AND HEALTH 1-6 to -7 (2016), https://addiction.surgeongeneral.gov/sites/default/files/surgeon-generals-report.pdf [https://perma.cc/GC3F-VHQX] [hereinafter 2016 SURGEON GENERAL'S REPORT].

[14] *Eldred*, 101 N.E.3d at 916. Eldred was diagnosed specifically with opioid use disorder, a type of SUD. Motion to Report Question of Law, *supra* note 7, app. at 59. However, she framed her arguments using the language of SUD more broadly.

[15] Brief on Behalf of the Massachusetts Medical Society et al. as Amici Curiae at 22–30, *Eldred*, 101 N.E.3d 911 (No. SJC-12279) [hereinafter Brief of Massachusetts Medical Society].

[16] *Id.*

[17] 2016 SURGEON GENERAL'S REPORT, *supra* note 13, at 2-18.

[18] *Id.* at 2-1; *see also id.* at 2-2 ("Well-supported scientific evidence shows that disruptions in three areas of the brain are particularly important in . . . substance use disorders: the basal ganglia, the extended amygdala, and the prefrontal cortex. These disruptions: (1) . . . increase incentive salience [to use drugs] . . . ; (2) reduce sensitivity of brain systems involved in the experience of pleasure or reward . . . and (3) reduce functioning of brain executive control systems, which are involved in the ability to make decisions and regulate one's actions, emotions, and impulses.").

submitted a medical affidavit affirming that people with SUD are "unable to exert control over the impulse to use [drugs] despite negative consequences . . . including incarceration."[19] While there is opposition to the brain-disease model of addiction,[20] Eldred and her amici's position reflects the consensus in the scientific community on SUD.[21]

Eldred used this evidence to ground her constitutional claims.[22] Relying on the holding in *Robinson v. California*[23] that criminalizing addiction is unconstitutional because an addict has no power to change his or her status,[24] Eldred contended that the medical consensus that "[r]elapse is a feature of SUD"[25] made punishment for relapse tantamount to punishment for simply having the disorder.[26] Despite these arguments, Eldred was found in violation of her probation.[27] The judge not only declined to vacate the drug-free provision, but also modified the conditions of her probation to add an inpatient treatment requirement.[28] However, she allowed Eldred's motion to report a question of law for direct appellate review: namely, whether a "probationer [may] permissibly be required to 'remain drug free' as a condition of her probation, and [whether she may] permissibly be punished for violating that condition, where [she] suffers from substance use disorder, and where her continued use of substances despite negative consequences is a symptom of that disorder."[29]

The SJC affirmed. Writing for a unanimous court, Justice Lowy first noted that the SJC was invoking its "general superintendence power"[30] to answer three questions of law: whether a defendant addicted to drugs may be required to remain drug-free during probation; whether that probation may be revoked for violating such a condition; and, when there is probable cause to believe such a violation occurred, whether a

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[19] Motion to Report Question of Law, *supra* note 7, app. at 22 (affidavit of Sarah Wakeman, M.D.).

[20] *See, e.g.*, Sally Satel & Scott O. Lilienfeld, *Addiction and the Brain-Disease Fallacy*, 4 FRONTIERS PSYCHIATRY, Mar. 2014, at 1, 1.

[21] *See, e.g.*, AM. SOC'Y OF ADDICTION MED., TREATING OPIOID ADDICTION AS A CHRONIC DISEASE (2014), https://www.asam.org/docs/default-source/advocacy/cmm-fact-sheet---11-07-14.pdf [https://perma.cc/Q4XX-ZRYM]; Thomas R. Kosten & Tony P. George, *The Neurobiology of Opioid Dependence: Implications for Treatment*, 1 SCI. & PRAC. PERSP. 13, 13–18 (2002); Nora D. Volkow et al., *Neurobiologic Advances from the Brain Disease Model of Addiction*, 374 NEW ENG. J. MED. 363, 368 (2016).

[22] Motion to Report Question of Law, *supra* note 7, app. at 86–88.

[23] 370 U.S. 660 (1962).

[24] *See id.* at 667.

[25] Brief of Massachusetts Medical Society, *supra* note 15, at 20.

[26] Motion to Report Question of Law, *supra* note 7, app. at 88. Eldred also claimed that punishment for drug use violated SJC precedent on probation violations. *See id.* app. at 88–90.

[27] *Eldred*, 101 N.E.3d at 917.

[28] *Id.*

[29] Motion to Report Question of Law, *supra* note 7, at 1; *see also Eldred*, 101 N.E.3d at 917–18.

[30] *Eldred*, 101 N.E.3d at 917.

defendant may be held in custody pending a final hearing.[31] The SJC answered each question in the affirmative. It began its analysis with the foundational rule that "[e]ven where a condition of probation affects a constitutional right, it is valid if it is 'reasonably related' to the goals of sentencing and probation, in light of the defendant's underlying crime and her particular circumstances."[32] The court first confirmed judges' authority to require that probationers remain drug-free, even and especially in circumstances such as Eldred's,[33] and held that her abstention and treatment conditions were permissible because they "furthered the rehabilitative goal" of compelling recovery.[34] Second, the court held that Eldred could be subject to revocation proceedings after violating the drug-free condition.[35] Finally, the court held that the trial court judge did not abuse her discretion in detaining Eldred: as with probation requirements, any sanctions for actual or suspected violations were appropriate if they advanced the goals of probation, and Eldred's ten-day detention "further[ed] the overarching goal of preserving the safety of the public and welfare of the defendant."[36]

The SJC determined that the Eighth Amendment posed no obstacle to its holdings, quickly disposing of Eldred's constitutional claim. First, the court rejected the contention that Eldred was being punished for relapsing: sanctions for a probation violation did not punish the violation itself, but the underlying offense.[37] Second, even if Eldred's drug use was being punished, *Robinson* was "inapposite . . . because this case represent[ed] an appropriate exercise of judicial power at each stage of the probation proceedings, not the criminalization of the defendant's status."[38] The merits of Eldred's SUD defense were similarly dismissed: after stating that the "record . . . [was] inadequate to determine whether SUD affects the brain in such a way that certain individuals cannot control their drug use," the court held that the judge "did not abuse her discretion" in finding a violation because she was not "require[d] . . . to

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[31] *See id.* at 917–18.

[32] *Id.* at 919. The court determined that Eldred's state constitutional claims did not require an analysis distinct from that of her federal constitutional claims. *See id.*

[33] *See id.* at 918–19; *see also id.* at 919 ("[O]nce [a] judge has concluded that a party's substance abuse is a factor in the case . . . the judge should *specifically and unambiguously prohibit the party from all use of alcohol an[d] illicit drugs*." (quoting SUPREME JUDICIAL COURT STANDING COMM. ON SUBSTANCE ABUSE, STANDARDS ON SUBSTANCE ABUSE 27 (1998) (first two alterations in original))).

[34] *Id.* at 920.

[35] *Id.* at 919, 923.

[36] *Id.* at 922. In so concluding, the court did "not agree" that "the judge's decision to detain [Eldred] constituted a punishment for her relapse." *Id.*

[37] *Id.* at 920 ("[Eldred] argues that . . . requiring her to remain drug free sets her up for unconstitutional cruel and unusual punishment when the inevitable relapse occurs. . . . [R]evoking or modifying conditions of probation is not a punishment for drug use but for the underlying crime.").

[38] *Id.* at 922 n.7.

accept [Eldred's] argument."[39] The court closed its opinion by "conclud[ing] that the actions of the District Court judges and the probation department . . . were exemplary."[40]

Massachusetts's highest court has particular reason for concern over defendants with SUD. In 2017, the state saw over 2000 opioid overdose deaths and over 20,000 emergency doses of Narcan administered to prevent further fatalities.[41] The SJC itself has readily acknowledged that "[t]rial court judges . . . stand on the front lines of the opioid epidemic."[42] Yet when confronted with legal and scientific arguments against drug-free mandates for defendants with addiction, the court declined to move the front lines of its doctrine forward. While the SJC was technically correct in holding that the trial court judge did not abuse her discretion, the court advanced an extremely narrow interpretation of Eighth Amendment law, closing the door on a drug-dependence defense despite the opportune moment for such a doctrinal development in state courts. This rigid adherence to the status quo is all the more concerning in light of medical research concluding that some people with SUD lack the volitional capacity to control their drug use, posing urgent questions about criminal culpability for such defendants. In failing to acknowledge, much less answer, these questions, the SJC's decision may expose future defendants with SUD to significant legal and physical harm at the hands of the courts.

The SJC's treatment, or lack thereof, of Supreme Court precedent foreclosed the availability of a drug-dependence defense for defendants with SUD, despite that defense's long history and new validity. Two closely linked cases set the limits of Eighth Amendment protection against the criminalization of addiction. In *Robinson v. California*, the Supreme Court held that it was cruel and unusual punishment to criminalize the very status of being an addict.[43] To convict for an illness one could not control, the Court reasoned, was analogous to criminalizing the common cold, and even a day of incarceration for such an offense was disproportionate punishment.[44] Several years later, a plurality of the Supreme Court narrowed *Robinson* in *Powell v. Texas*,[45] holding that criminalizing public intoxication was constitutional because unlike the status of addiction, public intoxication required distinct

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[39] *Id.* at 924–25; *see also id.* at 917 n.6 (noting that the "issue [of SUD] was not subject to adversarial scrutiny, let alone resolved" and that "the Commonwealth advances a [model of addiction] which postulates that SUD . . . does not render [an] individual without the free will to use substances").

[40] *Id.* at 925.

[41] OFFICE OF ATT'Y GEN. MAURA HEALY, *Fighting the Opioid Crisis*, MASS.GOV, https://www.mass.gov/fighting-the-opioid-crisis [https://perma.cc/PT67-979F].

[42] *Eldred*, 101 N.E.3d at 921.

[43] *See* Robinson v. California, 370 U.S. 660, 666–67 (1962).

[44] *Id.* While the Court held that the law "inflict[ed] a cruel and unusual punishment in violation of the Fourteenth Amendment," it cast that holding in the light of the Eighth Amendment. *Id.* at 667.

[45] 392 U.S. 514 (1968).

acts that were not obviously beyond the offender's willful control.[46] Justice White's concurrence illuminated the logical quandary lurking in this interpretation: if addiction manifests through compulsive drinking, then punishing an alcoholic for that behavior merely "convicts for addiction under a different name."[47] While it may be argued that the SJC in *Eldred* was implicitly following *Powell*'s narrow view of *Robinson*'s status-act dichotomy,[48] the SJC did not attempt to frame its reasoning as such: in rejecting Eldred's reliance on *Robinson*, the court did not emphasize the volitional nature of Eldred's act, but instead reaffirmed the general validity of probation-related sanctions.[49]

Robinson and *Powell* were emblematic of the controversy emerging among courts in the 1960s and 1970s over a possible "drug dependence defense."[50] Advocates for the defense argued for "a complete defense for possession, purchase, and use crimes" where "at the time of the offense, the defendant, as a result of his repeated use of narcotics, lacked substantial capacity to conform his conduct to the requirements of the law."[51] Variations of this defense proliferated through circuit courts with varying success.[52] Nearly fifty years later, Eldred's SUD defense is the modern incarnation of the drug-dependence defense, and advances in neuroscience[53] require reconsideration of its validity — reconsideration that the SJC denied by treating the defense as a new phenomenon. Indeed, the SJC's treatment of the defense arguably represents a step backward. While the record in *Powell* failed to produce evidence of "an irresistible

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[46] *See id.* at 535 (plurality opinion).

[47] *Id.* at 548 (White, J., concurring in the result). *Powell*'s dissent proposed an alternative rule barring punishment "if [a criminal act] is part of the pattern of [the defendant's] disease and is occasioned by a compulsion symptomatic of the disease." *Id.* at 569 (Fortas, J., dissenting).

[48] Irene A. Sullivan, Comment, *Criminal Responsibility and the Drug Dependence Defense — A Need for Judicial Clarification*, 42 FORDHAM L. REV. 361, 369 n.47 (1973) (describing the status-act dichotomy).

[49] *See Eldred*, 101 N.E.3d at 922 n.7.

[50] Sullivan, *supra* note 48, at 361–63 & nn.4–5.

[51] *Id.* at 363 n.8 (internal quotation marks omitted) (quoting United States v. Moore, 486 F.2d 1139, 1258 (D.C. Cir. 1973) (en banc) (Wright, J., dissenting)). Unsurprisingly, courts largely rejected the argument that a drug-dependence defense could combat possession charges, *see, e.g.*, *Moore*, 486 F.2d at 1142, 1144, and scholars fiercely opposed it, *see, e.g.*, Herbert Fingarette, *Addiction and Criminal Responsibility*, 84 YALE L.J. 413 (1975). Even today, some argue that the prevailing "choice model of addictive behavior" in the law is "defensible" and that the "brain disease model . . . unjustifiably assumes that addicts have essentially no choice about use." Stephen Morse, *Addiction, Choice and Criminal Law* 33–34 (Univ. of Pa. Law Sch., Faculty Scholarship, Paper No. 1608, 2017), https://scholarship.law.upenn.edu/faculty_scholarship/1608 [https://perma.cc/RGX6-56NV].

[52] *See* Sullivan, *supra* note 48, at 370–78; *see also* Claudia R. Sarro, Note, *Determinism and the Drug Addiction Defense to Criminal Prosecution*, 8 N.Y.U. REV. L. & SOC. CHANGE 361, 361, 370–77 (1978).

[53] *See* Motion to Report Question of Law, *supra* note 7, app. at 20–28 (affidavit of Sarah Wakeman, M.D.); *see also* Volkow et al., *supra* note 21, at 368.

compulsion" sufficient to negate criminal responsibility for the defendant's alcohol use,[54] that conclusion was made after a good-faith factual inquiry.[55] No such effort was made in *Eldred*.[56] Decades after *Powell* and *Robinson*, "[t]he criminal law has avoided expanding a defense based on addiction"[57] — but at a critical moment in Eighth Amendment scrutiny,[58] the SJC had, and lost, the opportunity to reopen the door to such a defense.

The SJC's narrow take on precedent is especially concerning in light of the emerging addiction science suggesting that some relapses are not willful, but rather comparable to unchangeable status as understood in *Robinson*. As the Commonwealth argued and as the court acknowledged, the science on SUD remains contested and was not fully scrutinized below.[59] However, given the strength of the evidence that Eldred presented, the SJC could have erred in favor of protecting her rights, rather than potentially violating them while waiting for the science to come back with 100% certainty. In fact, SJC precedent contains the doctrinal foundation on which to rest a ruling for Eldred: a recent trilogy of cases, *Commonwealth v. Canadyan*,[60] *Commonwealth v. Henry*,[61] and *Commonwealth v. Poirier*,[62] held that probation violations may not be sanctioned if they are inextricably tied to an involuntary condition to the point of being symptomatic of that condition and thus involuntary themselves.[63] In other words, the SJC's own jurisprudence has established that defendants cannot be culpable, in the context of probation, for the consequences of a condition they cannot control — reasoning nearly identical to the Supreme Court's conception of addiction in *Robinson*.

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[54] Powell v. Texas, 392 U.S. 514, 526, 535 (1968) (plurality opinion).

[55] *See id.* at 521–26.

[56] Indeed, the SJC never cited *Powell*, despite its primary role in Eldred's arguments before the SJC. *See* Brief for the Probationer on a Reported Question and on Appeal from a Finding of Probation Violation from the Concord Division of the District Court Department at 28–30, *Eldred*, 101 N.E.3d 911 (No. SJC-12279) [hereinafter Brief for Probationer].

[57] Morse, *supra* note 51, at 21; *see also* Brief for Probationer, *supra* note 56, at 29–32 & nn.15–18.

[58] *Powell* and its status-act dichotomy have recently been challenged on the grounds of neurological developments regarding alcoholism's effect on the brain. *See, e.g.*, Maria Slater, Note, *Is* Powell *Still Valid? The Supreme Court's Changing Stance on Cruel and Unusual Punishment*, 104 VA. L. REV. 547, 549–50 (2018). Even more on point, the denial of medication-assisted treatment to prisoners with SUD has been challenged as an Eighth Amendment violation. *See* Michael Linden et al., *Prisoners as Patients: The Opioid Epidemic, Medication-Assisted Treatment, and the Eighth Amendment*, 46 J.L. MED. & ETHICS 252, 253 (2018).

[59] *Eldred*, 101 N.E.3d at 917 n.6, 924–25.

[60] 944 N.E.2d 93, 96–97 (Mass. 2010) (holding that punishing probationer for failing to wear an electronic GPS tracker because he lived in a shelter that could not provide a reliable outlet would be "akin to punishing the defendant for being homeless," *id.* at 96).

[61] 55 N.E.3d 943, 950 (Mass. 2016) (holding that "the failure to make a restitution payment that the probationer is unable to pay is not a willful violation of probation" and that not taking ability to pay into account would "simply doom[] [a] defendant to noncompliance").

[62] 935 N.E.2d 1273, 1276 (Mass. 2010) (holding that probationer did not violate condition that he wear a GPS tracker when the tracker was unavailable through no fault of the probationer).

[63] *See* Brief for Probationer, *supra* note 56, at 33–36.

In *Eldred*, the SJC cited *Canadyan*, *Henry*, and *Poirier* for the proposition that only willful probation violations may be punished[64] — but then found Eldred's violation willful without distinguishing her case, forsaking the opportunity to develop its progressive doctrine. At the very least, by expressing concern that Eldred's rights *may* have been violated and that a more developed record *may* have changed the outcome, the SJC could have retained its holding while signaling that opioid-related sanctions are constitutionally suspect. Instead, it encouraged unprincipled intervention by praising the lower court's actions, despite the physical harm those actions wrought on Eldred.[65] As *Eldred* exemplifies, probationers are particularly vulnerable to such harms thanks to probation's dearth of procedural safeguards[66] and overt reliance on judicial discretion.[67] That discretion can allow a judge to rule, as in *Eldred*, contrary to best practices promulgated by drug-court professionals.[68] Indeed, because most people with SUD relapse five to seven times before sobriety,[69] incarceration after one relapse stops recovery in its tracks, contrary to the rehabilitative goals professed by the SJC.

Though the SJC attempted to avoid the difficult questions posed in *Eldred*, lower courts are already treating those questions as answered. Just a few months after *Eldred* was issued, a lower court cited it for the proposition that requiring a probationer with SUD to remain drug-free is a valid probation condition insofar as it "facilitat[es] treatment"[70] — an interpretation that accepts the validity of the strict abstinence method of addiction treatment. In declining to incorporate new science into the treatment of defendants with SUD, the SJC endorsed a broad grant of deference that may impede, rather than advance, the "evolving standards of decency"[71] the Eighth Amendment is meant to enshrine.

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[64] *See Eldred*, 101 N.E.3d at 924.

[65] The trial court's ruling not only forced Eldred into withdrawal in jail, but also compelled her to hide a relapse that she experienced following her probation modification, for fear of further incarceration. Telephone Conversation with Lisa Newman-Polk, Attorney, Law Office of Lisa Newman-Polk (Nov. 27, 2018). Lisa Newman-Polk represented Eldred in the trial court and before the SJC.

[66] *See* Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 348 (2016); *see also* Gagnon v. Scarpelli, 411 U.S. 778, 782, 789 (1973) (holding that probation proceedings are not entitled to criminal due process protections).

[67] The SJC in *Eldred* made a point to embrace the virtues of that discretion in probation. *See Eldred*, 101 N.E.3d at 918.

[68] 1 NAT'L ASS'N OF DRUG COURT PROF'LS, ADULT DRUG COURT BEST PRACTICE STANDARDS 32–33 (rev. 2018) (2013), https://www.nadcp.org/wp-content/uploads/2018/12/Adult-Drug-Court-Best-Practice-Standards-Volume-I-Text-Revision-December-2018.pdf [https://perma.cc/U65E-XC68] ("[J]ail sanctions produce diminishing returns after approximately three to five days . . . . Drug Courts that had a policy of applying jail sanctions of longer than one week were associated with increased recidivism . . . ." *Id.* at 32.).

[69] Motion to Report Question of Law, *supra* note 7, app. at 27.

[70] Commonwealth v. Desmond, No. 17-P-1285, 2018 WL 6186244, at *3 n.5 (Mass. App. Ct. Nov. 28, 2018).

[71] Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).