SJC-12964

COMMONWEALTH vs. NICK N., a juvenile.

Norfolk. November 4, 2020. - January 26, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, & Kafker, JJ.

Delinquent Child. Juvenile Court, Delinquent child, Jurisdiction. Jurisdiction, Delinquent child, Juvenile Court, Juvenile delinquency proceeding. Evidence, Evidence at preliminary hearing, Hearsay. Practice, Criminal, Waiver, Hearsay, Discovery.

Complaint received and sworn to in the Norfolk County Division of the Juvenile Court Department on July 18, 2019.

Questions of law were reported by Linda G. Sable, J., to the Appeals Court.

The Supreme Judicial Court granted an application for direct appellate review.

Peter A. Hahn for the juvenile.
Laura A. McLaughlin, Assistant District Attorney, for the Commonwealth.
Dennis M. Toomey, for Committee for Public Counsel Services & another, amici curiae, submitted a brief.

KAFKER, J. This case involves the appropriate application of the rules of evidence and discovery procedures to Wallace W.

hearings, as well as further clarification of when a Wallace W. hearing must be used to prove that a juvenile has committed a first offense of a six months or less misdemeanor under G. L. c. 119, § 52. See Wallace W. v. Commonwealth, 482 Mass. 789, 800-801 (2019). In this case, the juvenile is alleged to have committed a major misdemeanor of assault and battery against another minor, followed by a minor misdemeanor[1] of accosting and annoying the same victim in a separate, later incident. The Commonwealth moved for a Wallace W. hearing to prove the greater offense, and the Juvenile Court judge reported three questions of law regarding waiver, evidentiary rules, and discovery procedures for Wallace W. hearings to the Appeals Court. We thereafter allowed the juvenile's application for direct appellate review.

We conclude that (1) the Commonwealth may proceed directly to trial on the greater offense that preceded the first offense of a minor misdemeanor, but the Commonwealth may not arraign on the minor misdemeanor until it proves the greater offense; (2) the failure of a juvenile to move for a prearraignment Wallace W. hearing on a first offense of a minor misdemeanor

[1] For purposes of this opinion, we will refer to all misdemeanors "for which the punishment is a fine, imprisonment in a jail or house of correction for not more than [six] months or both such fine and imprisonment" as minor misdemeanors, and all other misdemeanors as major misdemeanors. G. L. c. 119, § 52.

does not provide subject matter jurisdiction over the first offense, as subject matter jurisdiction cannot be conferred by waiver and can be raised by either party or the court at any time; (3) the evidentiary rules laid out in Commonwealth v. Durling, 407 Mass. 108, 114-119 (1990), apply to Wallace W. hearings; (4) notice of the alleged violation and some exchange of discovery are required prior to Wallace W. proceedings, and the Juvenile Court Department should promulgate appropriate rules surrounding discovery procedures to provide clarity and consistency going forward.[2]

1. Facts and procedural history.[3] On April 23, 2019, a fourteen year old student, Tina,[4] reported to Detective Christopher M. Jones, a school resource officer, that a fifteen year old male student, the juvenile, had been making inappropriate comments and gestures toward her and that she was uncomfortable attending class with him. At a subsequent meeting in the presence of her mother on May 4, 2019, Tina elaborated on some of these incidents. Starting a few months prior to the

[2] We acknowledge the amicus brief submitted by the youth advocacy division of the Committee for Public Counsel Services and Citizens for Juvenile Justice.

[3] The facts regarding the juvenile's behavior towards the victim are alleged in the police report and application for complaint.

[4] A pseudonym.

meeting, the juvenile had touched her on her arm and her back without permission. About two months prior to the meeting, he punched her arm, causing it to bruise. She shouted, catching the attention of the dean of students, who suspended the juvenile. On another occasion, the juvenile made explicit sexual comments and gestures to the alleged victim in the school cafeteria. In a separate encounter, he told her "you're my property," in response to her refusal to answer his question about where she had been.

On July 18, 2019, a delinquency complaint issued against the juvenile, charging him with accosting or annoying another person (G. L. c. 272, § 53) and assault and battery (G. L. c. 265, § 13A).[5] The former is a misdemeanor punishable by six months in a jail or house of correction; the latter is a misdemeanor punishable by not more than two and one-half years in a house of correction. The juvenile has no prior record.

[5] The complaint alleges that both crimes occurred on May 29, 2019, but the police report stated that the incidents occurred in a different timeline. The Commonwealth has indicated that upon remand it will move to amend the complaint to correct the dates of the offenses. We have stated the facts according to the timeline provided in the police report. Given the inconsistency between the complaint and the alleged facts, it is unclear which behavior gave rise to which charge. We assume, for purposes of our analysis, that the assault and battery charge arose from either the juvenile's touching of Tina without her permission or his punching of her, both of which are alleged to have occurred prior to his explicit comments to her, which we will assume to have given rise to the accosting and annoying charge.

Defense counsel filed a motion for diversion on August 13, 2019. In that motion, the juvenile also raised the issue of the Juvenile Court's jurisdiction over the accosting and annoying charge based on our decision in Wallace W., arguing that the charge must be dismissed as a first offense under § 52 for lack of jurisdiction.[6] On August 20, 2019, the Commonwealth moved for and the judge granted a prearraignment evidentiary hearing pursuant to Wallace W. to prove beyond a reasonable doubt that the juvenile committed the assault and battery offense such that the Juvenile Court could exercise jurisdiction over the accosting or annoying offense and arraign the juvenile on that charge. In preparation, the Commonwealth filed a motion for the juvenile's school records, which was granted. The juvenile filed a motion in limine to exclude hearsay testimony regarding Tina's allegations.

At the scheduled Wallace W. hearing, the Commonwealth was ready to proceed with three witnesses, intending to elicit hearsay statements of the alleged victim. The parties disagreed as to whether hearsay should be admitted in evidence at the hearing. The judge indicated she would report a question of law regarding whether the rules of evidence apply at a Wallace W.

[6] Wallace W. was released on August 9, 2019, and so was not contemplated by the judge or parties prior to the juvenile's motion for diversion.

hearing, and did not hold the hearing or arraignment. The juvenile filed a motion to report a question of law on October 7, 2019. The Juvenile Court judge reported three questions to the Appeals Court:

> 1. "Where the juvenile does not move for a pre-arraignment Wallace W. hearing, can the issue be waived?"
>
> 2. "Do the rules of evidence apply when the court conducts a pre-arraignment Wallace W. [h]earing? Specifically, is hearsay permitted?"
>
> 3. "Should there be an exchange of discovery prior to the court hearing a pre-arraignment evidentiary hearing pursuant to Wallace W.?"

We granted the juvenile's application for direct appellate review.

2. Discussion. a. Appropriateness of a Wallace W. hearing in this case. In Wallace W., 482 Mass. 789, we interpreted the meaning of first offense of a minor misdemeanor in G. L. c. 119, § 52. This statute excludes from the definition of "[d]elinquent child," and therefore from the jurisdiction of the Juvenile Court, any child between the ages of twelve and eighteen years old who commits "a first offense of a misdemeanor for which the punishment is a fine, imprisonment in a jail or house of correction for not more than [six] months or both such fine and imprisonment." We held that the Legislature could not have intended to create a "Catch-22" in which, in the absence of a record of an adjudication of

delinquency for someone whose first offense was dismissed, "every subsequent commission of a six months or less misdemeanor would seemingly have to be dismissed as a 'first offense.'" Wallace W., supra at 790-791. We therefore defined "the means by which a first offense, even one that did not result in a prior delinquency adjudication, may be proved and recorded such that the Juvenile Court may exercise jurisdiction over subsequent [minor misdemeanor] offenses," a process that has come to be known as a Wallace W. hearing. Id. at 791.

In this case, the Commonwealth first moved for a Wallace W. hearing in the Juvenile Court, and then argued in its brief to this court that the juvenile is not entitled to a Wallace W. hearing because he is charged with a greater offense alongside his minor misdemeanor. The juvenile argues that the greater offense must be proved before the Juvenile Court has jurisdiction over his minor misdemeanor.

As we explain in Commonwealth v. Manolo M., 486 Mass. , (2021), also released today, the Legislature's use of "first offense of a [minor] misdemeanor" in § 52 excludes the first episode of minor misdemeanor misconduct from the Juvenile Court's jurisdiction where there has been no prior adjudication of delinquency. In the case before us, however, the alleged facts indicate that the juvenile committed a greater offense (assault and battery) in a separate episode, prior to

the minor misdemeanor behavior (accosting and annoying). The Commonwealth may therefore proceed to arraign and try to prove the greater offense without a Wallace W. hearing, as the § 52 exclusion does not apply to greater offenses. The Commonwealth need not, in this case, hold a Wallace W. hearing, as the greater offense can be proved at trial without a prior Wallace W. hearing. There is no need for duplicative proceedings to arraign on major misdemeanors or felonies.[7]

If the greater offense is proved, the Commonwealth may then arraign the minor misdemeanor charges, because the minor misdemeanor is alleged to have occurred later in time and therefore would not be a first offense. Until it is proved that the minor misdemeanor is not a first offense, the Juvenile Court does not have jurisdiction over it, even though it is charged

[7] Although the Commonwealth need not prove the greater offense at a Wallace W. hearing in order to arraign on the greater charge, it is within its discretion to do so -- for example, if it would like to arraign on the minor misdemeanor charge and address the greater and lesser offenses at the same trial or plea discussion. Because the minor misdemeanor charge is alleged to arise from a separate, later episode of misconduct, proof of the earlier occurrence of the greater charge at a Wallace W. hearing or trial would provide the Juvenile Court with jurisdiction over the minor misdemeanor, as it would not be a "first offense" under § 52. See Wallace W., 482 Mass. at 796 ("The exclusion from jurisdiction under § 52 applies only to six months or less misdemeanors that constitute the juvenile's 'first offense'").

simultaneously with a greater offense.[8] Manolo M., 486 Mass. at ("First episodes of minor misdemeanor level conduct must be dismissed as a first offense, even if they are accompanied by more serious charges").

b. Waiver. The first of the reported questions, albeit unclearly phrased, appears to ask whether jurisdiction over the minor misdemeanor may be conferred by waiver when the juvenile does not request a Wallace W. hearing regarding the minor misdemeanor. In this case, the waiver argument is particularly muddled. The Commonwealth requested a Wallace W. hearing on the assault and battery charge, which preceded the accosting and annoying minor misdemeanor, rendering any request by the juvenile unnecessary. On appeal, the Commonwealth relies primarily on its argument that no Wallace W. hearing is required when it brings multiple charges, an argument we rejected above. Nonetheless, to avoid unnecessary confusion about waiver, we answer the first reported question as follows: the issue of a first offense of a minor misdemeanor is one of subject matter jurisdiction; thus, it cannot be waived and can be raised by either party or the court at any time.

[8] If the greater charge proceeded to trial and was not proved, the minor misdemeanor charge would be a first offense, subject to dismissal under G. L. c. 119, § 52.

As we explained in Wallace W., the definition of "[d]elinquent child" in § 52 determines the Juvenile Court's subject matter jurisdiction over a child's minor misdemeanor where that charge may or may not be the child's "first offense of a [minor] misdemeanor." G. L. c. 119, § 52. See G. L. c. 218, § 60 (Juvenile Court shall have and exercise jurisdiction over cases of delinquent children); Lazlo L. v. Commonwealth, 482 Mass. 325, 335 (2019) (statute amending § 52 one of "jurisdictional nature"). Wallace W. hearings were, in turn, created as a mechanism to determine whether there is jurisdiction. Wallace W., 482 Mass. at 791.[9]

A question of subject matter jurisdiction "'may be raised at any time' . . . and [is] not waived even when not argued." Commonwealth v. DeJesus, 440 Mass. 147, 151 (2003), quoting Commonwealth v. Cantres, 405 Mass. 238, 240 (1989). Nothing in Wallace W. should be read to the contrary. Although we used permissive language to state that "the juvenile may move to dismiss the complaint" (emphasis added), this language does not confine to the juvenile the responsibility of attentiveness to proper jurisdiction. Wallace W., 482 Mass. at 800-801. Subject matter jurisdiction may be raised by either party or the court

[9] Jurisdiction over a minor misdemeanor charge can, of course, also be proved with a prior adjudication of delinquency, a continuance without a finding following a trial, or a plea of delinquency. Wallace W., 482 Mass. at 799-800 & n.4.

at any time and cannot be conferred by waiver. See United States v. Cotton, 535 U.S. 625, 630 (2002) ("defects in subject-matter jurisdiction require correction"); Lazlo L., 482 Mass. at 335 (discussing § 52, "jurisdiction is a threshold requirement"); DeJesus, supra. Indeed, the court is obligated to raise the issue of a potential defect in jurisdiction even if it is not argued by the parties. DeJesus, supra, quoting Commonwealth v. Andler, 247 Mass. 580, 582 (1924) ("'duty of the court to consider' lack of jurisdiction even when not raised by the parties"). See G. L. c. 277, § 47A (in criminal case, "defense or objection based upon a failure to show jurisdiction in the court . . . shall be noticed by the court at any time").

c. Evidentiary standard for Wallace W. hearings. The second reported question asks: "Do the rules of evidence apply when the court conducts a pre-arraignment Wallace W. [h]earing? Specifically, is hearsay permitted?" We conclude that reliable hearsay is permitted as provided for in Durling.

We begin by recognizing that this question is not resolved by the statute. As explained above, the Legislature did not explain how a first offense should be proved, nor define the evidentiary standards for such proceedings. See G. L. c. 119, § 52. The Legislature also has declined our invitation in Wallace W. to fill in any gaps.

Nor has our decision in Wallace W. resolved this issue. In Wallace W., we concluded that a first offense of a minor misdemeanor must be proved beyond a reasonable doubt, but we were not asked or required to determine whether the rules of evidence applied in whole or part to Wallace W. hearings. More particularly, we were not asked or required to determine whether hearsay was admissible in such proceedings. We did note, however, potential problems in proving first offenses, including "track[ing] down" witnesses and evidence from "months, or even years, prior." Wallace W., 482 Mass. at 803 n.10. We recognized that this might also require coordination with different police departments and district attorney's offices. Id. Finally, we noted the difficulty of securing the participation of witnesses or victims of prior minor misdemeanors to prove first offenses "with no other legal effect than to establish that a first offense has occurred." Id. Nonetheless, we left these issues to be decided in subsequent cases.

The juvenile argues that, in determining whether the rules of evidence apply and whether hearsay is excluded at Wallace W. hearings, we should treat a Wallace W. hearing essentially as a substitute for trial. As a trial requires proof beyond a reasonable doubt and the application of the rules of evidence, so should a Wallace W. hearing. The juvenile further contends

that those hearings allowing relaxed evidentiary rules, including certain hearsay, all have lower burdens of proof. See, e.g., G. L. c. 276, § 58A (3), (4) (dangerousness hearing requires clear and convincing evidence, and rules of evidence do not apply); Juvenile Court Standing Order 1-17(VI)(c), (VII)(a) (2018) (hearsay admissible to meet preponderance of evidence at probation violation hearing, held pursuant to G. L. c. 119, § 59).

The Commonwealth's argument focuses on the different consequences of a decision in these different proceedings. A prearraignment evidentiary hearing pursuant to Wallace W. would not result in any detention of the juvenile, but only in a ruling that the Juvenile Court has jurisdiction over the subsequent six months or less misdemeanor. Reliable hearsay is permitted at many types of hearings that, unlike Wallace W. hearings, do result in the detention of a juvenile or defendant. See, e.g., Matter of a Minor, 484 Mass. 295, 308 & n.8 (2020) (commitment for substance abuse treatment); Commonwealth v. Hartfield, 474 Mass. 474, 484 (2016) (probation revocation); Abbott A. v. Commonwealth, 458 Mass. 24, 36 (2010) (dangerousness). Essentially, the Commonwealth contends that the rules of evidence have been relaxed and reliable hearsay has been allowed in proceedings with much greater consequences for

juveniles and criminal defendants, and therefore reliable hearsay should be admissible here.

We recognize that the interests protected by § 52 and the proceedings devised by Wallace W. are unique. To provide the second chance mandated by the Legislature, we concluded in Wallace W. that an adjudication of a first offense was required, and thus the appropriate standard of proof was therefore beyond a reasonable doubt. Although the proof beyond a reasonable doubt requirement requires substantial reliable evidence in order for a party to successfully meet the burden, it does not mandate that the rules of evidence apply per se, or that hearsay be precluded. Indeed, the Legislature has allowed express exceptions to the rules of evidence for the determination of sexual dangerousness, which requires proof "beyond a reasonable doubt." G. L. c. 123A, § 14 (certain hearsay admissible at trial to determine if person is sexually dangerous beyond reasonable doubt). We upheld this "very radical departure from ordinary evidentiary rules" in the context of confinement of a sexually dangerous person because the hearsay permitted had a "powerful independent indicator of the reliability" (quotation and citation omitted). Commonwealth v. Given, 441 Mass. 741, 744, 747-748, cert. denied, 543 U.S. 948 (2004).

Unlike sexually dangerous person proceedings, probation revocation proceedings, or dangerousness hearings, there is no

direct loss of liberty resulting from a Wallace W. proceeding. As a result, we are confronted with a higher burden of proof, but a diminished liberty interest. We are also confronted with the logistical and other difficulties discussed above in proving first offenses, including tracking down and securing the cooperation of witnesses months or years later for proceedings that would not directly affect them. To decide whether the rules of evidence should apply and, if not, whether hearsay is admissible, we therefore turn to our procedural due process decisions for more guidance. We do so not because they establish a minimum constitutional standard, but because "[i]n determining what process is due this court must balance the interests of the individual affected, the risk of erroneous deprivation of those interests and the government's interest in the efficient and economic administration of its affairs" (quotation, citation, and alteration omitted). Querubin v. Commonwealth, 440 Mass. 108, 117 (2003). See Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (due process generally requires consideration of private interest that will be affected by official action; risk of erroneous deprivation of such interest through procedures used, and probable value of additional or substitute procedural safeguards; and government's interest).

We begin with the interests at stake. As we have explained, § 52 protects the juvenile's right to a second chance by assuring that his or her first offense of a minor misdemeanor does not result in an arraignment, an adjudication of delinquency, a CARI record, and the stigma and collateral consequences that flow therefrom. See Commonwealth v. Magnus M., 461 Mass. 459, 467 (2012).

The Commonwealth's interest in a Wallace W. proceeding is somewhat different, but similarly unusual. Until the first offense of a minor misdemeanor is proved, the Commonwealth cannot proceed on subsequent minor misdemeanor offenses. As repeat minor misdemeanor offenses are intended to be prosecuted for both the protection of the public and the rehabilitation of the juvenile, it is important that such proceedings be able to occur in a timely and efficient manner. Wallace W., 482 Mass. at 794-795.

Wallace W. hearings are designed to protect both sets of interests identified in § 52. They do so by assuring an accurate determination whether a first offense has occurred. As we have emphasized, the "requirements of the due process clause have, at their base, the goal of providing an accurate determination." Durling, 407 Mass. at 116.

We therefore focus our inquiry on the risk of an erroneous deprivation of the juvenile's interest in a second chance

through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards. Mathews, 424 U.S. at 335. To be more specific, we consider the risk of an erroneous decision at a Wallace W. hearing based on the allowance of hearsay evidence.

We conclude that the best guidance in this regard is provided by our decision in Durling. In that case, this court considered the different interests at stake and the risk posed by hearsay evidence to a reliable, accurate determination in a probation revocation proceeding. Although the burden of proof is lower in a probation revocation proceeding, the court struggled with many of the issues before us, reasoning: "Normally, the best source of information for such a determination is the testimony of one or more persons who have personal knowledge of the facts which the Commonwealth alleges constitute a violation. Such testimony can be tested by cross-examination." Durling, 407 Mass. at 116-117. Recognizing that was the best practice, the court stated, however, that "presenting a witness with personal knowledge is not always possible. Indeed, it is often unrealistic." Id. at 117. The court then discussed the logistical difficulties posed by requiring such testimony, and determined:

> "Unsubstantiated and unreliable hearsay cannot, consistent with due process, be the entire basis of a probation revocation. When hearsay evidence is reliable, however,

> then it can be the basis of a revocation. In our view, a showing that the proffered evidence bears substantial indicia of reliability and is substantially trustworthy is a showing of good cause obviating the need for confrontation."

Id. at 118. Since Durling was issued, we have extended its evidentiary standards to juveniles in other contexts, including those imposing higher burdens of proof. See Matter of a Minor, 484 Mass. at 296, 308 n.8 (commitment of juvenile for substance abuse treatment, requiring clear and convincing evidence); Abbott A., 458 Mass. at 34-36 (pretrial detention of juvenile based on dangerousness, requiring clear and convincing evidence).

We reach the same conclusion here, allowing the admission of reliable hearsay as defined by the Durling case and its successors. We conclude that application of the Durling evidentiary standard in this context appropriately addresses the interests at stake and guards against the risk of erroneous deprivation of the juvenile's interests. The high standard of proof for a Wallace W. hearing, beyond a reasonable doubt, is itself a protection against a risk of erroneous deprivation. The better and more reliable the evidence proffered, the greater the Commonwealth's ability to meet that burden. Although Durling allows for the admission of hearsay, "the due process touchstone of an accurate and reliable determination still remains." Durling, 407 Mass. at 117. In some circumstances

there will be "simply no adequate alternative to live testimony." Id. at 119, quoting Gagnon v. Scarpelli, 411 U.S. 778, 782 n.5 (1973). In others, however, hearsay may be unavoidable. As we recognized in Wallace W., securing direct testimony to prove first offenses of minor misdemeanors may be particularly difficult, especially where the result of such proceedings has no direct effect on the victims or other witnesses. Nonetheless, as in Durling, if hearsay is admitted at Wallace W. proceedings, it must be reliable, and "the indicia of reliability must be substantial" when hearsay is the only evidence offered. Durling, supra at 118. See Commonwealth v. Patton, 458 Mass. 119, 132–133 (2010) (discussing criteria for reliability of hearsay). In allowing reliable hearsay to be considered, we have also taken into account that Wallace W. proceedings are before a judge, not a jury, therefore all evidence, including reliable hearsay, would be presented to and evaluated by a judge with experience in assessing evidence and its appropriate weight, further protecting a juvenile's interests.[10] Cf. Given, 441 Mass. at 747-748 (hearsay admissible at jury trial pursuant to G. L. c. 123A, § 14).[11]

[10] Nothing in § 52 or our Wallace W. decision provides for a jury in Wallace W. proceedings to prove a first offense.

[11] The Commonwealth in Manolo M., 486 Mass. at , suggested that we could instead adopt the less rigorous standards applicable to pretrial probation revocation hearings

d. Application of Durling. While the precise application of Durling to this case should be decided by the Juvenile Court judge on remand, the parties raise two specific issues that we clarify.

First, contrary to the contention of the juvenile, "papers alone" could theoretically be sufficient to prove a prior offense beyond a reasonable doubt, although clearing such a high burden with such evidence may be difficult. In proving a case on "papers alone," the indicia of reliability of such hearsay evidence must be "substantial," which might, in some cases, prove a difficult burden for the Commonwealth to meet. Durling, 407 Mass. at 118. Here, in any case, the Commonwealth did not intend to rely solely on papers -- the school records[12] -- as it

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in Commonwealth v. Preston P., 483 Mass. 759, 771 (2020), in which we recently held that pretrial probation revocation can be assessed without regard to the "full procedural requirements set forth in Durling." Pretrial probation revocation proceedings, however, are readily distinguishable. First, pretrial probation is purely a "matter of grace," but Wallace W. hearings are not, as they establish jurisdiction; second, the pretrial probation burden of proof, probable cause, is lower than the beyond a reasonable doubt standard in Wallace W.; and finally, the liberty interest, being returned to the trial list, is less consequential than an adjudication of first offense. See id.; Durling, 407 Mass. at 115.

[12] "Evidence which would be admissible under standard evidentiary rules is presumptively reliable." Durling, 407 Mass. at 118. On this basis, the Commonwealth contends that the school records it wishes to offer as evidence should be admissible under the business records exception. However, "evidence based on a chain of statements is admissible only if each out-of-court assertion falls within an exception to the hearsay rule." Commonwealth v. McDonough, 400 Mass. 639, 643

was prepared to present the testimony of three witnesses. We leave to the Juvenile Court judge the assessment whether the testimony of these witnesses -- to the extent that it includes hearsay evidence -- is sufficiently reliable.

Second, the Commonwealth requests that we clarify whether a judge may rule that a victim need not testify at a Wallace W. hearing. In response, the juvenile asserts that the court may not bar him from calling witnesses. We have recognized the due process right to present a defense in probation revocation proceedings as distinct from the right to confront adverse witnesses. See, e.g., Hartfield, 474 Mass. at 479 (right to present defense is distinct from right to confront adverse witnesses, and two should not be conflated); Commonwealth v. Kelsey, 464 Mass. 315, 323 (2013) (right to present defense at probation revocation hearing). In Wallace W. hearings, as in probation revocation proceedings, the accused has a "presumptive due process right to call witnesses in his or her defense, but . . . the presumption may be overcome by countervailing

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n.8 (1987). To the extent that portions of these records contain double hearsay, they are not presumptively admissible even if the judge rules that they qualify under the business records exception. See Commonwealth v. Siny Van Tran, 460 Mass. 535, 549 (2011) (admissibility under business records exception depends on whether evidence is "sufficiently reliable either because there was a corresponding duty [on the supplier of information] to give accurate information, or for some other recognized reason").

interests, generally that the proposed testimony is unnecessary to a fair adjudication of the alleged violation or unduly burdensome to the witness or the resources of the court." Hartfield, supra at 481. The "flexible" nature of due process requires that we balance this presumptive right with countervailing interests in the case. Durling, 407 Mass. at 113.

Our decision in Hartfield lays out a totality of the circumstances test for determining whether countervailing interests overcome the presumption, which may also be applied to Wallace W. proceedings. Hartfield, 474 Mass. at 481. See Commonwealth v. Molina, 476 Mass. 388, 407-408 (2017) (applying same analysis to restitution hearing). The third factor in the Hartfield test ("whether, based on an individualized assessment of the witness, there is an unacceptable risk that the witness's physical, psychological, or emotional health would be significantly jeopardized if the witness were required to testify") is particularly pertinent to the case before us and other cases where the alleged victim is a minor. Hartfield, supra. However, just as in Hartfield we rejected a general rule prohibiting an accused from calling an alleged sexual assault victim to testify, so here we reject a general rule prohibiting a minor from being called to testify. Id. The "individualized and evidence-based" assessment of the witness must appropriately

account for the witness's age and the type of delinquent conduct alleged against a victim witness in considering potential negative effects of testifying.[13] Id.

e. Discovery procedures for Wallace W. hearings. Section 52 does not address what discovery procedures, if any, are applicable to Wallace W. hearings, and we have not addressed this question in Wallace W. or our previous decisions regarding § 52.

The juvenile argues that procedural due process requires, at a minimum, that the Commonwealth disclose a list of exhibits and witnesses prior to the hearing and that, as in probation violation proceedings, the Commonwealth must provide notice and disclose all relevant evidence at least seven days prior to a Wallace W. hearing.[14] See Juvenile Court Standing Order 1-

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[13] In balancing the need for an accurate and reliable determination at a Wallace W. hearing with the potential trauma of a necessary child witness, a Juvenile Court judge may make reasonable accommodations to avoid trauma to the child. See Commonwealth v. Brusgulis, 398 Mass. 325, 332 (1986) ("Judges have considerable latitude in devising procedures and modifying the usual rules of trial to accommodate child and other witnesses with special needs, so long as the defendant's . . . rights are not violated"); Adoption of Olivette, 79 Mass. App. Ct. 141, 152–155 (2011); Adoption of Daisy, 77 Mass. App. Ct. 768, 780 (2010), S.C., 460 Mass. 72 (2011). These accommodations must be fashioned in light of the individualized and evidence-based assessment that Hartfield demands, keeping in mind the general preference for live testimony. Hartfield, 474 Mass. at 481.

[14] Although the timing of notice and disclosures is not raised explicitly in the reported question, we address the

17(IV)(d). The Commonwealth argues that we need not resolve this question, since Juvenile Court judges have broad discretion to rule on discovery issues. See G. L. c. 119, § 55A.

The Juvenile Court Department is authorized to promulgate specific notice and discovery rules regarding Wallace W. proceedings, see G. L. c. 218, § 60, and we direct it to do so here. The need for clarity and consistency in Wallace W. hearings requires that some standard procedure be created, rather than an expectation that individual judges fashion an entire procedure every time they oversee a Wallace W. hearing, as the Commonwealth suggests. However, as with the evidentiary standard, it is appropriate for us to address the minimum requirements of due process in a Wallace W. hearing. We now conclude that at a minimum -- consistent with the due process principles elucidated in Durling and its progeny -- juveniles should be given notice of the charges and the evidence to be presented against them so that they can effectively defend themselves. However, the precise timing of such notice and the scope of discovery are left to the discretion of Juvenile Court judges, and may be governed by the specific rules that the Juvenile Court Department should promulgate consistent with this opinion. G. L. c. 218, § 60.

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question because it is directly related to the due process analysis.

As we explained above, we find the due process analysis in Durling to be instructive to Wallace W. hearings. In Durling, we recognized that due process requires, among other things, "written notice of the claimed violations" and "disclosure to the [probationer] of the evidence against him [or her]" (citation omitted).[15] Durling, 407 Mass. at 113. We conclude that notice and some disclosure are also required in the Wallace W. context, in order to protect the juvenile's interests in a fair and accurate proceeding and in avoiding improper prosecution. See id. at 116. Given the flexible nature of such proceedings and our recognition that Wallace W. hearings may "require[] multiple procedures to identify and prove first offenses that have no legal effect other than to establish that a first offense has occurred," we leave the exact parameters of the timing of notice to the Juvenile Court Department.[16] Wallace

[15] Note that unlike in the evidentiary context, where the relevant due process issue is the "right to confront adverse witnesses," the relevant issue in the discovery context is the right to prepare an adequate defense. See Kelsey, 464 Mass. at 327 n.12.

[16] The Juvenile, District, Boston Municipal, and Superior Court Departments have promulgated rules or guidelines requiring seven days' notice prior to probation hearings. See, e.g., Juvenile Court Standing Order 1-17(III)(b)(iii); Rules 3(b)(iii) and 4(d) of the District/Municipal Court Rules for Probation Violation Proceedings (2015); Guidelines for Probation Violation Proceedings in the Superior Court § 6(A) (effective Feb. 1, 2016). These rules requiring seven days' notice of court proceedings satisfy due process, but we note that we have never stated that due process requires a minimum of seven days'

W., 482 Mass. at 803. See Commonwealth v. Preston P., 483 Mass. 759, 770 (2020) (describing greater temporal interest in pretrial probation context, where delay could lead to prosecution of stale case).

Some exchange of discovery is necessary to protect the juvenile's interests by providing the juvenile with an opportunity to mount an effective defense. See Durling, 407 Mass. at 113. Regarding the scope of disclosures and discovery, we have held in the probation context that a probationer must be aware of the "specifics of his [or her] allegedly wrongful conduct" and the "evidence against him [or her]." Commonwealth v. Maggio, 414 Mass. 193, 197 (1993). See Juvenile Court Standing Order 1-17(III)(b)(ii); Rule 3(b)(ii) of the District/Municipal Court Rules for Probation Violation Proceedings (2015); Guidelines for Probation Violation Proceedings in the Superior Court § 3(A) (effective Feb. 1, 2016). We recognized that "some cases . . . will require disclosure to the probationer of information crucial to his [or

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notice. See Commonwealth v. Faulkner, 418 Mass. 352, 360 (1994) ("Notice must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded"). Compare id. at 364-366 (violation of probationer's right to due process where he received notice on day of hearing and judge denied his motion for continuance), with Commonwealth v. Morse, 50 Mass. App. Ct. 582, 586-588 (2000) (no per se due process violation where probationer received only four days' notice and counsel was appointed on day of hearing).

her] ability to prepare a defense," but we also noted that the Commonwealth has "significant interests in informality, flexibility, and economy" (citation omitted). Kelsey, 464 Mass. at 322, 327-328 (describing totality of circumstances test to determine whether Commonwealth was required to reveal identity of its informant at probation violation hearing "to effectuate the defendant's right to present a defense"). In the probation context, the balancing of a probationer's right to present a defense with the benefits of a flexible proceeding has taken many forms. See Commonwealth v. Bain, 93 Mass. App. Ct. 724, 727 (2018) (sufficient notice provided to probationer where notice did not state date of alleged incident, but probationer was aware of alleged violation, was readily prepared, and could have requested continuance); Commonwealth v. Simon, 57 Mass. App. Ct. 80, 84–86 (2003) (sufficient notice provided to probationer for conduct not included in written notice where such conduct was described in attached police report). The wide range of disclosure processes that satisfy due process in the probation context is instructive for the context of Wallace W. hearings, which must balance similar interests in accuracy, efficiency, fairness, and flexibility. Thus, Juvenile Court judges may order disclosures and grant discovery in their discretion for a Wallace W. hearing, where it is necessary for

juveniles to adequately prepare themselves. See G. L. c. 119, § 55A.

This opinion is intended to provide preliminary guidance to Juvenile Court judges on the minimum requirements of due process. For greater clarity and predictability going forward, the Juvenile Court Department should use its authority to promulgate more specific notice and discovery rules consistent with this opinion. G. L. c. 218, § 60.

3. Conclusion. We conclude that a Wallace W. hearing is not necessary in this case, as the Commonwealth may proceed directly to arraignment on the major misdemeanor of assault and battery. It may not, however, arraign on the minor misdemeanor until it proves the major misdemeanor at trial or, if it so chooses, at a Wallace W. hearing.

We answer the reported questions as follows:

1. Where the juvenile does not move for a prearraignment Wallace W. hearing, can the issue be waived? No: the failure of a juvenile to move for a prearraignment Wallace W. hearing on a first offense of a minor misdemeanor does not provide subject matter jurisdiction over the first offense, as subject matter jurisdiction cannot be conferred by waiver and can be raised by either party or the court at any time.

2. Do the rules of evidence apply when the court conducts a prearraignment Wallace W. hearing? Specifically, is hearsay

permitted? The Durling evidentiary standards are applicable to Wallace W. hearings. Hearsay is only permitted if it is reliable, and the indicia of reliability must be substantial if the hearsay is the only evidence offered to meet the Commonwealth's burden.

3. Should there be an exchange of discovery prior to a prearraignment evidentiary hearing pursuant to Wallace W.? Due process requires that a juvenile receive notice of the alleged violation and some disclosure of the evidence against him or her prior to a Wallace W. hearing. The exact nature and scope of notice and discovery procedures should be determined by rules promulgated by the Juvenile Court Department or, until such rules are promulgated, individual Juvenile Court judges.

So ordered.